Roe v. Wade has fallen, has fallen!

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By Terry A. Hurlbut June 24, 2022

Today the Supreme Court released the Decision We Have All Been Waiting For. (Apologies to the estate of Bert Parks, long-time Master of Ceremonies for the *Miss America* Pageant, for borrowing that turn of phrase.) In *Dobbs v. Jackson Women's Health Organization* (19-1392), the Supreme Court took down the forty-nine-year-old precedent, *Roe v. Wade*. But pro-life advocates rightly recognize that they *have not* come to the end of their long, hard road. This decision is equivalent to the First Special Service Force capturing Monte La Difensa in southern Italy. Now many Anzios lie ahead, plus the Battle of Rome to end the war. Justice Samuel A. Alito would surely remind them of this, except that Justice Brett Kavanaugh did it for him.

Supreme Court Update

Today the Court released *two* opinions. The *other* case was a narrow, esoteric case arising out of a Medicare regulation. (Becerra v. Empire Health Foundation, for Valley Hospital Medical Center, 20-1312.)

That now leaves seven cases for the Court to decide, including these three of *almost* comparable import:

- *Kennedy v. Bremerton School District*. Coach Kennedy lost his job because he prayed with players after games. Naturally he wants his job back. In light of *Carson v. Makin* (see below), he just might get it.
- *Biden v. Texas*, concerning whether President Biden had the authority to rescind President Trump's "Remain in Mexico" policy.
- West Virginia v. Environmental Protection Agency, on whether or not the EPA may regulate carbon dioxide as a pollutant.

These cases come from this article in *Rolling Stone*, critical of a case the Court released earlier this week. (*Carson v. Makin*, 20-1088). Aside from *Kennedy*, we really don't know how the Court will rule. Brett Kavanaugh is a stickler for staying on one side only: that of the Constitution. He made that point abundantly clear in his concurring opinion.

The Court, late today, declared Monday June 27 as its next Opinion Issuance Day.

The *Roe* Draft survived intact

Here is the full text of the draft opinion by Samuel A. Alito in the *Dobbs* case. In it he explained why *Roe* had to go.

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And *here* is the full text of the final "slip opinion" in the *Dobbs* case:

Dobbs-v-Jackson-Womens-19-1392_6j37Download
A *slip opinion* is an electronic document containing one or all of these elements:

- A syllabus,
- The Opinion of the Court,
- Concurring opinion(s), and
- Dissenting opinion(s).

The slip opinion runs to 213 pages, including 108 pages for the Opinion of the Court. Justice Alito's leaked draft ran to 98 pages. Nevertheless, a careful page-by-page comparison will show that *Justice Alito's draft survived intact*, except for a few colorful phrases. For example:

> Until the latter part of the twentieth century, there was no support in American law for a constitutional right to obtain an abortion. Zero. None.

The words *zero* and *none* didn't make it into the final Opinion.

But as one might expect, Alito makes room in his opinion to address the:

1. Dissenting opinion of Justices Breyer, Kagan and Sotomayor, and the
2. Concurring opinion of Chief Justice Roberts.

Twelve pages suffice for him to address and rebut the dissent and the partial concurrence. But improved spacing, like removing hard page breaks before the Appendices, saves two pages.

All of which to show that *Justice Alito did not change his stance one iota* from his initial draft opinion.

How Alito trashed *Roe*

For the full particulars of how Justice Alito showed that *Roe v. Wade* had to fall, to restore the dignity and prestige of the Court, see this earlier article. These points that Alito made, bear repeating here.

First, the Constitution never mentions abortion, and certainly not in the explicit "enumeration of rights" in the first eight Amendments. Nor does a right to abortion have any roots in American history or tradition. Alito's Appendices, listing State and territorial laws against abortion, remain.

Furthermore, not until the second half of the twentieth century did any State *allow* abortion. States did use "quickening" as a threshold beyond which to outlaw abortion. But those were the days when quickening was the only way to tell whether a woman was pregnant. Once other methods became available, "quickening" as a threshold passed out of favor.

Nor is abortion central to any concept of ordered liberty. Alito further points out the big difference between *Roe v. Wade* and cases like Griswold v. Connecticut and *Loving v. Virginia*. That difference is: *abortion destroys life.* "Miscegenation" does not destroy life. Contraception might stop life from starting, but does not destroy life. Abortion does.

Stare decisis can't save a thoroughly bad decision

Alito spends a great deal of time on the concept *stare decisis*. That phrase, meaning "to stand as decided," says that precedent can be as important as Constitution or statute. But Alito listed many cases (especially *Brown v. Topeka Board of Education*) that reversed earlier precedents almost no one, and *certainly* no pro-abortion advocate or judge,would care to retain.

Alito sets five grounds for overruling a bad precedent:

- Nature of the error,
- Quality (or lack of quality) of the reasoning behind it,
- Workability of the original rule,
- Effect on other areas of law, and
- Interests of various parties that rely on continuing the error.

By all such standards, *Roe* and *Casey* must fall. Alito's quarrel with *Roe* and *Casey* was that it took a question no Court could settle, out of the hands of legislatures and the people.

He also found the reasoning very weak, especially given the "viability" standard. *Viability* depends on best medical practice and research. It's gotten better all the time—in the hands of doctors having patients who desperately want to save young lives.

Which leads to his next objection. "Viability" and "undue burden" don't work. They don't work because *who's to say* whether an unborn child is viable or not, or whether a burden is due or undue?

He shows bad effects on other areas of law by citing case after case in which the Court has carved out exceptions to long-standing principles of jurisprudence.

Reliance interests

A court creates a reliance interest when people must plan an act and know far in advance whether that act will still be legal. In nearly *every single case* involving abortion, people do *not* plan for it ahead of time. Furthermore, even the *Casey* opinion conceded that

> Reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.

When might the Court upend someone's plans? Some women have said on social media that if *Roe* goes, "hookup culture" goes with it. Several have already said they will *no longer* have sex casually. When they express a fear of pregnancy, they concede that *no contraceptive method is foolproof.*

One woman said:

> Since about 75% of men only care about sex and money I hope they know that this roe v wade decision could destroy hook-up culture and leave them paying 18 years of child support.

Lay aside whether that statistic is accurate or not. To force *any* man to accept responsibility for the children he sires, in or out of wedlock, is entirely appropriate.

Must our society permit abortion to let women take equal part in American economic and social life? Alito defies any Court to answer that. CNAV answers: no. The question assumes that motherhood gives no value to society – obviously false. It also denies that men have any similar obligation to balance work and family life. And that is also false, for reasons beyond scope here.

The dissent – preborns on trial

Justices Stephen G. Breyer, Elena Kagan, and Sonia Sotomayor collaborated on a dissent. That dissent, like Breyer's dissent in the famous Gun Law Case, focuses on effects, not law. To read either dissent is to wonder whether Breyer and his colleagues have forgotten that they are *appellate* judges, not *trial* judges.

And to read *this* dissent is to realize at once that they care *nothing* for the baby. They speak of "liberty and equality of women" and "women's right to choose" in a manner both eloquent and overwrought. When they do that, they exaggerate the perils of childbearing generally and of every single hardship they can mention. This dissent is not a legal document at all, but an argument more suitable at trial.

And who is on trial before these three? Unborn (or preborn) children everywhere, in all circumstances. For they describe particular "hard cases" with not one statistic to support the notion that they are describing *typical* cases.

An attempt to show that protecting life is irrational

In answer to Alito's advocacy for rational-basis review, they write:

> An abortion restriction, the majority holds, is permissible whenever rational, the lowest level of scrutiny known to the law. And because, as the Court has often stated, protecting fetal life is rational, States will feel free to enact all manner of restrictions.

Then they describe all the hard cases. When they describe the rape or incest cases, they forget that the preborns involved *thanked their mothers for bearing them.* When they describe medical hard cases, they go off the deep end.

> [S]ome States may compel women to carry to term a fetus with severe physical anomalies—for example, one afflicted with Tay-Sachs disease, sure to die within a few years of birth.

How can they or anyone else be sure of that? And more to the point, *how does that matter, to the preborns involved or any other preborn?* If they were bringing this out at trial during examination of a witness, surely counsel for the preborns would shout:

> Objection, Your Honor! Incompetent, irrelevant and immaterial!

They make one argument that Justice Kavanaugh surely discussed with them before today. Namely that, aside from women who couldn't afford to play "abortion tourist," States might forbid travel for such a purpose. Kavanaugh, in his own concurrence, doubts this.

The extreme hypocrisy of their defense of *Roe*

Moreover, this dissent is one of the most hypocritical documents to come out of the Supreme Court. The dissenters talk a great deal about women's rights – as they prepare to welcome into their fellowship one who does not even know what a woman is! They speak of individual

freedom – while one of them railed against it in a medical context.

They treat the relevant history with a curious mixture of ignorance and disdain. When they do that, they repeat the errors for which Alito chided the respondents and their *amici curiae*. (*Amicus curiae* means any person, not a party to a case, who has information he thinks the judge should consider.)

They also make one distinction that should alarm anyone who believes in unity of the people.

> But, of course, "people" did not ratify the Fourteenth Amendment. Men did.

And what can that mean? Are men and women two different species, with *no* reason *ever* to work together?

They refuse, of course, to address the larger point Justice Alito made. If they want a "right" to kill a preborn, let them take their case before Congress or any legislature. That's how women won the right to vote. But today, most legislators, or jurists, who might be willing to give them the right to kill, have died. And they died at liberal women's hands. While liberal women destroyed their children, conservative women kept and raised theirs. Observe the results.

Roberts would try to keep *Roe*

Now we come to Chief Justice Roberts and his attempt to keep the *Roe* case in force, but not necessarily intact. He recognized at least one thing Justice Alito did. Namely, that the original *Roe* case didn't work because it used *viability* as the boundary. So now we know how Roberts would have preserved *Roe*, but set a limitation on it. No longer would States have to allow abortion until the preborn became viable. Instead, States could step in *after a woman has had a reasonable opportunity to end her pregnancy.* A State could then set a limit *earlier* than viability, if they had a rational basis for that.

Mississippi's Gestational Age Act of 2018 set the limit at fifteen weeks. In the legislative findings, they made a judgment that abortions *after* fifteen weeks become:

1. More hazardous to the woman's health,
2. Demeaning to the abortionist and his or her staff, and
3. Downright gruesome.

Justice Alito addressed those very issues. So Roberts tried to persuade at least one Member of the Court to accept a compromise. *Roe* could stand, but instead of viability, use considerations like those three.

But, as we will see, Alito was having none of that.

How Alito addressed the dissents and the partial concurrence

Alito's address of the dissent alone accounts for two passages:

1. Four pages after the discussion of whether abortion is a part of ordered liberty (35-39 of the Opinion), and
2. Three pages following the treatment of *stare decisis* (pp. 69-71).

He also devotes five pages to rebutting the concurring opinion of Chief Justice Roberts (pp. 72-76).

Alito dismissed the dissent on two grounds. First, he notes that the dissenters *admit* they cannot show a right to abortion in the Constitution. For that matter, they bring forth no authority before *Roe* that gives women any such right. Without that, they cannot and do not show deep roots in American history or tradition for a right to abortion. That leaves them with "the long sweep of our history and from successive judicial precedents." Which means they ask the Court to continue its egregious behavior Thomas Jefferson decried: to treat the Constitution as

> a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.

Basta! (Enough!) cries Alito, and with good reason.

Alito shows only slightly more patience with Roberts' partial concurrence. Roberts says the State of Mississippi would have gone along with his recommendation. Alito disputes that, and says that in any case Jackson Women's and the U.S. Solicitor General refused to consider it. Nor did Roberts argue convincingly that *Roe* could survive without the viability standard.

Thomas objects to substantive due process

Justice Clarence Thomas addressed one salient point that Justice Alito did not. The entire thrust of the Respondents' argument, and presumably of the remarks by Breyer, Kagan and Sotomayor during oral argument, centered on a doctrine of *substantive due process.* Substantive due process forbids a court, or a legislature, to:

> infringe certain "fundamental" liberty interests *at all*, no matter what process is provided.

No, says Thomas. "Due process of law" guarantees a *process,* not a result. That *process* includes things like impartial judgment, a jury of one's peers, and rules of evidence, trial, and appeal. It does not extend to defining the *substance* of liberty.

Thomas went along with Alito and his colleagues because Alito found no right of pregnancy termination in "substantive due process." But, *unlike his colleagues,* he wants to re-examine all "substantive due process" precedents. These include many precedents Alito (and

Kavanaugh) would let stand, like those finding a *right* to contraception, and whether same-sex roommates could share more than roommates usually share, or give their rooming-in arrangement the privileges and immunities of married couples.

Thomas sees three dangers in substantive due process. First, it makes a philosopher-king out of a judge. Second, it "distorts other areas of constitutional law." Third, a judge or Justice might apply it in a disastrous manner. Thomas' example of that last: *Dred Scott v. Sandford*, that held that Congress may not free any slaves in "free" territories. That error, of course, took a War Between the States to correct.

Kavanaugh plumps for neutrality

Justice Brett Kavanaugh applauded Alito for returning the Supreme Court to a *neutral* position it abandoned with the *Roe* case. At the same time, he rejected those *amicus* briefs that asked the Court to find a right to life. The Court, in Kavanaugh's view, cannot justify one position or the other from the Constitution. It should therefore *stay out of the debate*. If anyone wants to legislate a federal right to abortion, or a federal right of a preborn to live, let them propose laws and Constitutional amendments to that or similar effect. But

> The Constitution does not grant the nine unelected Members of this Court the unilateral authority to rewrite the Constitution to create new rights and liberties based on our own moral or policy views.

From his concurrence, one can readily see why he *did not* join Chief Justice Roberts in his partial concurrence. Replacing the viability standard with a "reasonable opportunity" standard would not have solved the basic problem Kavanaugh identified. Which is: Justices of the Supreme Court are not philosopher-kings, and in *Roe* the Court acted like philosopher-kings.

Last – and possibly most important – Kavanaugh took pains to say that this decision does not *outlaw* abortion. It removes from it the Constitutional protection it enjoyed, but does not recognize a preborn's right to life. (That could be because no one argued that point before the Court.) Nor should this decision threaten other precedents the Left holds dear – though Thomas might argue with him about that.

In summary

As before, *Roe* is now dead. In recognition of that fact, at least two Attorneys General have already given formal opinions that their States' "trigger laws" now take force and effect. (Ken Paxton of Texas, for example, left this statement. Among other things, he declared a holiday for his staff to celebrate. Texas has a trigger law that takes effect in 30 days. It will then supersede the Texas Heartbeat Act.)

Politico (who carried the *Roe* Leak) offered this interactive page to show the status of pregnancy termination in each State.