

On Abortion, John Roberts Stands Alone

Justice Kavanaugh makes clear in a concurring opinion that the court would like to avoid future litigation.

By David J. Garrow

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If the Supreme Court held an end-of-term awards ceremony, the Old College Try Prize for great effort with zero success would go to Chief Justice John Roberts for his plaintive concurring opinion in *Dobbs v. Jackson Women's Health Organization*.

Chief Justice Roberts attempted to find a middle ground on abortion, upholding the state of Mississippi's prohibition after 15 weeks, while declining to overturn *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992) in total. But he drew no support from anyone, including all-or-nothing pro-choice advocates and the U.S. Solicitor General, when *Dobbs* was argued on Dec. 1.

The chief argues that what should be preserved from *Roe* and *Casey* is “a reasonable opportunity to choose” an abortion for any woman who wants one. “*Roe* adopted two distinct rules of constitutional law,” he writes. “One, that a woman has the right to choose to terminate a pregnancy; two, that such a right may be overridden by the State's legitimate interests when the fetus is viable outside the womb. The latter is obviously distinct from the former,” he writes, stressing that “there is nothing inherent in the right to choose that requires it to extend to viability . . . so long as a real choice is provided.”

Opinion polls suggest that a hearty majority of Americans agree with that policy. But no advocates on either side, nor any of the eight associate justices, evinced any interest in the chief justice's lonely search for moderation when he first telegraphed his position with his questions in oral argument. This is a sad loss for the court and the country.

Instead, Justice Samuel Alito's five-justice majority opinion disdains any interest in identifying “what period of time is sufficient to provide such an opportunity,” as Chief Justice Roberts calls for. The opinion baselessly asserts—as did counsel for both sides—that *Roe* and *Casey*'s constitutional vision of a woman's right to choose can't be preserved absent the viability standard. Justice Alito mocks Chief Justice Roberts's effort by twice invoking the latter's prior words from *Citizens United v. FEC* (2010): “*Stare decisis* is ‘a doctrine of preservation, not transformation,’ ” he quotes. “We

cannot embrace a narrow ground of decision simply because it is narrow; it must also be right.”

The heart of the Alito majority is most visible in its assertion that Chief Justice Roberts’s “quest for a middle way would only put off the day when we would be forced to confront the question we now decide”—that the tsunami of state legislation challenging any partial preservation of the precedents would intensify, and “the turmoil wrought by *Roe* and *Casey* would be prolonged.”

The majority asserts that “the most profound change” over the 30 years since the Republican-appointed trio of Justices Sandra Day O’Connor, Anthony Kennedy and David Souter reaffirmed *Roe*’s essential holding in *Casey* “may be the failure of the *Casey* plurality’s call for ‘the contending sides’ in the controversy about abortion ‘to end their national division.’ That has not happened, and there is no reason to think that another decision sticking with *Roe* would achieve what *Casey* could not.”

The conservative justices’ desire to rid themselves of an endless future of abortion litigation is also clear in Justice Brett Kavanaugh’s concurrence. He pre-emptively states that “some of the other abortion-related legal questions raised by today’s decision are not especially difficult as a constitutional matter”—to wit, a state can’t bar residents from traveling out of state to obtain an abortion or penalize an abortion that occurred before the *Dobbs* ruling came down, and the Constitution is “neither pro-life nor pro-choice,” implying that due-process or equal-protection claims on behalf of the unborn will fail.

Justice Kavanaugh is undoubtedly the decisive member of *Dobbs*’s narrow majority, and his insistence on two distinct conclusions merits reflection. First, he writes that “*Roe* has caused significant negative jurisprudential and real-world consequences,” that it “gravely distorted the Nation’s understanding of this Court’s proper constitutional role” and “thereby damaged the Court as an institution.” In contrast with the chief justice’s view that a 5-4 reversal of two landmark precedents will deliver “a serious jolt” to the court’s reputation, Justice Kavanaugh concluded that *Roe*’s continued existence would damage the court more.

Second, Justice Kavanaugh forcefully concludes that “the *Casey* plurality’s good-faith effort to locate some middle ground or compromise that could resolve this controversy for America” has failed. “*Casey*’s *stare decisis* analysis rested in part on a predictive judgment about the future development of state laws and of the people’s views on the abortion issue,” Justice Kavanaugh writes. “But that predictive judgment has not borne out. . . . The experience over the last 30 years conflicts with *Casey*’s predictive judgment and therefore undermines *Casey*’s precedential force.”

In an important footnote, Justice Kavanaugh adds that “*Casey* adopted a special *stare decisis* principle with respect to *Roe* based on the idea of resolving the national controversy.” Thus, “the continued and significant opposition to *Roe*”—26 states asked for its overruling in *Dobbs*—“is relevant to assessing *Casey* on its own terms” and concluding that the *Casey* trio failed.

Justice Alito’s majority opinion was largely unchanged from the draft that leaked on May 2, save for two brief new sections addressing the chief justice and the three liberal dissenters. The majority insists any fears that *Dobbs* imperils other rights such as contraception and gay equality are “unfounded.” Justice Kavanaugh likewise declares that “overruling *Roe* does not mean the overruling of those precedents, and does not threaten or cast doubt on those precedents.” That assertion is certainly believable. Yet millions of American women whose lives would have been easier had Justice Kavanaugh sided with Chief Justice Roberts will find themselves living in Brett Kavanaugh’s America.

Mr. Garrow’s books include “Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade” and “Bearing the Cross.”