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The hard path forward.

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 [Robert B. Hubbell](#)  96
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Chief Justice Roberts confirmed on Tuesday that the draft opinion overruling *Roe v. Wade* and *Casey v. Planned Parenthood* is authentic. For the first time in his career as Chief Justice, Roberts managed to summon indignation for an obvious ethical lapse by one of the justices or their staff—anger that was notably absent regarding other recent egregious ethical lapses by the justices. (More on that in a bit.) Roberts [said](#) that the leak of the draft was a “*singular and egregious*” breach of trust that the Court will investigate.

The leak of a draft opinion is a significant development worthy of discussion, but it is a footnote in history compared to the seismic shift in constitutional jurisprudence heralded by the opinion. For the first and only time in the Court’s checkered past, the Court is *eliminating* an *existing* constitutional right. It is doing so by denying women agency over their bodies and reproductive choices. The Court is retracting constitutional protections by diminishing the autonomy of women as humans entitled to control their lives. In so doing, the forthcoming opinion will stand beside *Dred Scott* and *Plessy v. Ferguson* as cases predicated on the notion that a class of human beings is “*subordinate to*” the control of white male legislators.

The opinion is grotesquely disingenuous, pretending that the Court is merely “correcting” a wrongly decided case. Not so. The Court knows its ruling will result in the immediate revocation of an existing constitutional right in more than two dozen states. Moreover, Alito’s logic is perverse and cruel. He claims that an implied right cannot exist unless it is “*deeply rooted in the nation’s history and tradition*,” but he ignores the fact that for the first 129 years of our nation’s history, women were denied the right to vote—and thus denied any realistic opportunity to create a “*deeply rooted tradition*” permitting contraception and abortion. Under Alito’s backward logic, a right plainly implied in the Constitution cannot exist because white male legislators successfully suppressed that right for more than a century.

An example of Alito’s circular and self-fulfilling denial of a right based on the successful suppression of the right is his citation to English jurist Sir Matthew Hale. Alito cites Hale for the proposition that abortion was considered murder in England but fails to note that Hale ordered two women [to be hanged](#) for being “witches” and wrote influential [commentary](#) upholding the right of a husband to rape his wife. See [tweet](#) by [Emily Bell](#), Professor of Digital Journalism, Columbia Journalism School.

So, if you rely on an English judge who believed women were witches and wives were chattel, it is easy to conclude that there is no “*deeply rooted tradition*” in which women are allowed to control their reproductive choices and bodies. Indeed, if the antiquated worldview of white landed gentry is the “tradition” that determines modern liberties, then the only liberties safe from the reactionary majority are the handful of rights expressly mentioned in the Constitution as interpreted by white landowners.

Alito seemed to go out of his way to ensure that anti-abortion forces can pursue a nationwide ban. See Mark Joseph Stern in *Slate*, [Alito’s leaked opinion overturning Roe opens the door for a nationwide abortion ban](#). As Stern explains, prior opinions by the anti-abortion wing of the Court focused on returning control of the question to state legislatures. But Alito repeatedly says he is returning the abortion debate “*to the people and their elected representatives*.” As Stern writes,

But which representatives? State legislators, or members of Congress? Alito does not tell us. He is, in fact, careful to avoid specifying how “the people” can respond to his decision, largely circumventing any wording that suggests abortion rights should be decided state-by-state.

And for those who naively believe Alito’s claim that the decision will not reach other implied rights recently recognized by the Court, I recommend [Martin London’s Blog](#), in which he discusses Alito’s increasing bitterness and stridency in attacking all things that do not fit his conservative Christian worldview. As London notes, “*Alito has railed against a court decision that sustained a law requiring pharmacies to carry ‘morning after’ pills. He argued they were ‘abortifacients’.*” In a wildly inappropriate speech to The Federalist Society, Alito said,

You can’t say [anymore] that marriage is a union between one man and one woman. Until very recently that’s what the vast majority of Americans thought. Now it’s considered bigotry.

See *NYTimes*, [In Unusually Political Speech, Alito Says Liberals Pose Threat to Liberties](#).

Justice Alito and his reactionary colleagues are coming for your rights; don’t let him or anyone else tell you otherwise. We have received fair warning. The only question is, “*What are we going to do about it?*”

The leak of the draft opinion and the Court’s legitimacy.

There are two aspects to the leak: Who is the leaker and what damage the leak has done (if any) to the Court’s legitimacy. On the first question, cogent theories would support a leak from a liberal clerk or justice, from a conservative clerk or justice, or from Chief Justice Roberts himself. See *Slate*, [Supreme Court leaker: four theories of what actually happened with the Roe opinion](#). In my opinion, the most likely scenario involves a leak by one of the five reactionary justices seeking to shore up support from one member of the majority who may be having second thoughts. But at this point, identifying the leaker is a parlor game, little more.

The real question is whether the leak will damage the legitimacy of the Court. That begs the question of whether the Court had significant legitimacy to damage. Recall that two weeks ago, we learned that Justice Thomas participated in a ruling in a case that involved his wife as a material witness to (or participant in) an attempted coup. Justice Roberts did not issue an outraged press release promising an investigation to determine if a member of the Court sought to conceal his wife’s involvement in a coup. Not a peep.

Roberts’ inaction in the face of repeated scandals involving the Court has eroded its legitimacy beyond redemption. Roberts has insisted since 2011 that the Court does not need a code of ethics [because](#) “*every justice seeks to follow high ethical standards*.” Roberts maintained that fiction [even after](#) Justice Scalia died at an exclusive hunting lodge, where he was staying [for free](#)—as the guest of a business owner who had a case on the Supreme Court’s docket the prior year. You will not be shocked to learn that Scalia voted in favor of the company whose owner hosted Scalia on the free hunting trip. I could go on; there are dozens of similar instances, but you get the point.

Of course, we must add to the Court’s declining legitimacy that at least two members of the reactionary majority affirmatively misled Senators during their confirmation hearing. See *Axios*, [Collins says Kavanaugh and Gorsuch possibly broke promise on Roe v. Wade](#).

Finally, in evaluating the tattered remains of the Court's legitimacy, we must remember that it is possible to predict the outcome of virtually every 5-4 ruling on a social or political issue simply by lining up the "R" or "D" next to the name of the president who appointed the justices. See presentation by Senator Sheldon Whitehouse, [The Roberts Five: Advancing Right-Wing and Corporate Interests 92% of the Time](#).

So, is the leak of a draft opinion a big deal? Yes. But the substance of the opinion will do more damage to the diminishing legitimacy of the Court than the leak. And in this matter, the damage to the Court is subsidiary to the damage to tens of millions of women who looked to the Constitution to protect them—and who have been betrayed by the Court.

The [Editorial Board](#) of the *Washington Post* has summarized the damage to the legitimacy of the Court that Justice Alito is about to inflict:

The Court's legitimacy rests on the notion that it follows the law, not the personal or ideological preferences of the justices who happen to serve on it at any given time. . . . What brought the Court to its current precipice was not a fundamental shift in American values regarding abortion. It was the shameless legislative maneuvering of Senate GOP leader Mitch McConnell, who jammed two Trump-nominated justices onto the Court.

The reactionary majority is thus willing to administer the fatal blow to the Court's legitimacy in pursuit of a temporary victory that will be reversed in time. Democrats must now take the Court as they find it—and rebuild it from scratch with or without the assistance of the feckless Chief Justice.

Concluding Thoughts.

Comments and emails from readers have exhibited equal parts shock and resolve. People are still processing the sudden realization of a long-feared outcome. The next several months will be nothing like America has ever experienced. We presume to know the outcome of the ruling due in June, although the result may change in unexpected ways. Indeed, it is possible that public outcry may cause at least one justice to pull back from Alito's insult to American jurisprudence.

But we cannot count on a change in the result. We must live in a world where we assume that *Roe* and *Casey* have been overruled. The reactionary majority has signaled as much by allowing the unconstitutional Texas law to remain in effect pending the final opinion in *Dobbs v. Jackson's Women's Health*. We have no time to waste. We have lived too long in fear and anticipation of this moment. We must assume control of our fate.

The only path forward is the hard path—it is the one that the Constitution grants us: the ballot box. Even as the Court turns its back on the Constitution, we must embrace it ever more fiercely. The Constitution will endure, and its faithful servants will prevail.

Talk to you tomorrow!

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I appreciate your resolve, and I appreciate the response you left for me last time. I'd appreciate if you responded again.

Today my parents were watching a nature documentary narrated by Obama. They remarked how they miss having him as president and how Trump ruined this country with his judges.

I miss the way things used to be. Back when I didn't watch the news. Back when Obama was president and I could be proud of my country. Back when I woke up and did fun things with my friends without worrying about current events. Back when our rights as human beings were guaranteed and I didn't spend all day obsessively looking at the news to make sure my safety as a gay person is safe. If they overrule Lawrence V Texas, I could be sent to prison like the Jews were in Hitler's time. So I feel like I have to watch for any indication that I have to flee the country. I feel threatened, so I spend all day doomscrolling hoping for any sign of hope for the future. Every article feels like doom and gloom.

I feel trapped in what feels like a right wing country where regular people are powerless to the billionaires, Christians, and brainwashed masses. I feel like I'm developing depression and helplessness. The idea that I can never go back to the way life used to be and that I'm stuck watching the slow motion collapse of our country makes life feel like a chore to get through. I can't even take pleasure in the simple things, knowing that everything I value and principle is uncertain. I have been on the verge of tears all day thinking about how Republicans could make it impossible for Democrats to win and I'll spend the rest of my life hiding in fear.

I don't know how to cope with this all. I'm seeing another therapist next week. I can't take this despair anymore. I know other people are able to enjoy their lives despite their worries, but every time I try to enjoy life, I think about the dark future that is coming and I feel depressed. It feels like I have a terminal illness. I hope my therapist can help, and I hope that someday this country learns to be kind again.

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[Lynn](#)

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- The actual leak of the draft opinion is indeed not concerning as compared to the actual intentions of this SCOTUS in eroding a woman's rights- except for the fact that Chief Justice Roberts has called for an investigation of this, all the while refusing to investigate a sitting Justice's wife as she plotted to overthrow the government. We must stay fully engaged in this fight. We have a lot of work to do.

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