

JURISPRUDENCE

What Can the Chief Justice Do Now?

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Chief Justice John Roberts at the Supreme Court on April 23, 2021. Erin Schaff/Pool/Getty Images

The shocking leak of a draft majority opinion in *Dobbs v. Jackson Women's Health Organization*, in which the state of Mississippi seeks to have the court approve its prohibition on abortion after 15 weeks' gestation, has thrown into bold relief the question of Chief Justice John Roberts' role in the abortion controversy. For now, let's set the identity of the leaker aside to focus on the impact the leak has on Roberts' efforts to emerge from this scandal and arrive at an ultimate decision in *Dobbs* without overturning *Roe* entirely.

The first sign of Roberts' split from the court's conservative bloc came in December during oral arguments in *Dobbs*. Mississippi officials asked the court to overrule *Roe v. Wade*, which upholds the constitutional right to abortion prior to fetal viability. Five justices—Samuel Alito, Amy Coney Barrett, Neil Gorsuch, Clarence Thomas, and Brett Kavanaugh—all signaled they were ready to uphold Mississippi's 15-week ban and completely overrule *Roe*. The three liberal justices indicated they would dissent, defending *Roe*'s long-standing prohibition on laws that outlaw abortion pre-viability. The chief justice stood alone. His questions suggested that he wanted to find a way to uphold the Mississippi law, shrinking the *Roe* rule from viability to 15 weeks' gestation as the earliest time for prohibition, while

limiting the damage to the constitutional right to terminate a pregnancy.

The great majority of abortions occur prior to 15 weeks, so Roberts might have thought that this was only an incremental inroad on the current regime, though perhaps a first step toward overruling.

The leak of the draft opinion, along with [Politico's reporting about who supported this draft](#), confirmed the previously intuited breakdown of the justices in deciding *Dobbs*. But it doesn't illuminate Roberts' position as the lone justice standing in the liminal space between concurrence and dissent. Writing a separate concurring opinion for himself would accomplish nothing. If Roberts wants to avoid the overruling firestorm—political, jurisprudential, and institutional—he must wrest one or more of those five justices away from the Alito draft.



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Roberts has several possible moves. Only one, however, ensures his desired outcome while minimizing further fallout. If he snared only one justice away from Alito, the court might divide 4–2–3. Without a majority opinion, the narrowest opinion in support of the 15-week ban would be controlling, making Roberts' opinion the source of the new norm. This outcome would limit the damage to *Roe* but would also create massive legal and political confusion in states with stricter limitations.

The best result for Roberts, by far, would be to find a way to get five justices in support of his approach. What if, for example, he could persuade Stephen Breyer and Elena Kagan to join him, on the condition that he could also get Barrett and Kavanaugh?

The result would be a “centrist” majority opinion of five, upholding the Mississippi law and somehow articulating a reason why 15 weeks is acceptable but a shorter period is unconstitutional. The logic of this position would be difficult to explain, but the result might seem salutary compared with full overruling of *Roe*.

This scenario is much less far-fetched than it may seem. Last term, in *Fulton v. City of Philadelphia*, Roberts pulled off a similar maneuver, successfully garnering a majority of six while leaving Alito, Gorsuch, and Thomas stranded with a more radical separate opinion, calling for the overruling of a controversial precedent. *Fulton* involved a free exercise clause challenge by Catholic Social Services to Philadelphia's policy of forbidding discrimination against same-sex married couples who wanted to take in foster children.

The court had agreed to decide whether to overrule its 1990 decision in *Employment Division v. Smith*, which eliminated constitutionally mandatory religious exemptions from general laws. Between oral arguments in November, as Barrett ascended to the bench, and the decision in mid-June 2021, Roberts had assembled a very surprising coalition of Barrett, Kavanaugh, and the three liberal justices, none of whom had seemed sympathetic to CSS at

oral argument. The Roberts opinion was relatively brief and superficial, but it had six votes.

Alito was left fuming in a 77-page concurring opinion, calling for the overruling of *Smith* and complaining about how long it had taken to produce “a wisp of a decision that leaves religious liberty in a confused and vulnerable state.” As professor Robert Tuttle and I explain [elsewhere](#), the stretch of time, the relevant length of opinions, and the minimalist character of Roberts’ opinion suggest that Alito sought—and perhaps initially had within his grasp—five votes to overrule *Smith*, but somehow ended up with only three.

[\[Read: Roe Will Fall. But the Supreme Court’s Legitimacy Is Already Lost.\]](#)

Fast forward one year. In December, Alito seemed to have five votes in *Dobbs*. But Roberts is a master at the chess game of assembling unlikely majorities to avoid radical outcomes. He did so in *Fulton*, and he famously did so in the first [Affordable Care Act case](#), with different judicial personnel. And perhaps he is, or was, on the verge of doing it again in *Dobbs*.

It is not hard to see that Alito might be worried about losing his majority, and that Roberts and others might be eager to gain a majority in support of a narrower opinion in favor of Mississippi, permitting its law to remain on the books but blocking the avalanche of more restrictive abortion laws. In this light, Barrett and Kavanaugh stand out as potential defectors from Alito. In addition to *Fulton*, Barrett and Kavanaugh have elsewhere parted company from Alito, Gorsuch, and Thomas to align with Roberts. The same alliance appeared on Monday in [Shurtleff v. Boston](#), where Alito, Gorsuch, and Thomas argued for a much narrower doctrine than the other six justices to govern what speech is attributable to the government.

Moreover, others might see Breyer and Kagan as potential defectors from a Sotomayor dissent in *Dobbs*. Breyer and Kagan have made precisely such moves in important cases about [state funding of religious organizations](#), as well as in [American Legion v. American Humanist Association](#), in which the court upheld a government sponsored display of a Latin cross as a war memorial. For Breyer especially, leaving the court with a sense that he had saved much of *Roe* would be a triumph. And for Kagan, such a move would invite the notion that she would make a great chief someday.

Here is where the leak matters most. As Jeremy Stahl has written for Slate, there are a number of [potential suspects with different reasons](#) for leaking the draft to Politico. One suspect among them, Stahl wrote, is the chief justice himself who might have been compelled to disclose the draft in an attempt to force Kavanaugh and Barrett into an alliance. But as Stahl notes, this is an unlikely scenario. Roberts’ interest is in maintaining the court’s legitimacy, and this leak is a devastating blow. Besides, he does not need to go to extremes to achieve his desired outcome. The identity of the leaker may never be revealed, because the investigation by the Supreme Court marshal is likely to be unproductive, especially if a justice is the culprit.

What if any of the justices suspect Alito as the leaker, in service of an effort to deter defections? Perhaps they would be determined, albeit bitterly, not to let him get away with such an egregious breach of institutional norms. Whether a centrist five has the steely resolve, and the chief has the necessary magic, to thwart the overruling of *Roe* remains to be seen. The issue now for Roberts and the others is how to play the rest of the game after

this stunning and unprecedented breach.

Roberts seems very much to want a disposition in *Dobbs* that will roil the waters as little as possible. Will the leak make it more difficult for Barrett and Kavanaugh to defect from the Alito opinion? Perhaps, but with or without the leak, Barrett and Kavanaugh will be vilified by the right for any defection. Without doubt, Breyer and Kagan would be criticized by the left for defection from the dissent. But with the court's current makeup, and the revelation that the court is poised to gut *Roe*, it may be easier to accept that Roberts' approach to uphold the Mississippi law while drawing a line at 15 weeks may be the best we can possibly get.

Most importantly, however, Roberts' narrow avenue would cut off the possibility of a federal abortion ban at six weeks, as the anti-abortion movement has pushed Congress to enact in light of *Roe*'s impending demise. And it would knock out the many state laws, like the Texas vigilante scheme, that set the limit at eight weeks or even less. If Roberts succeeds, turning one vote in December into five by June would be quite the achievement. And even though this is Roberts' game, it would take the work of two other men and two women to make it happen. 🏳️‍🌈

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