

SIX WEEKS: THE TACTICS OF SAMMY ALITO'S ABORTION

Last night, Politico published a February 10 draft opinion in the Dobbs case, authored by Sam Alito, that overturns *Roe* and *Casey* entirely. I'll leave it to experts to analyze the opinion. For my purposes, it matters only that it is legally and historically shoddy (meaning, Alito didn't even care about making a convincing argument before taking away constitutional protections), and that it would also permit states to roll back protections for gay rights, contraception, and privacy generally.

I'd like to talk about tactics.

This leaked draft opinion, while not unprecedented, is almost that momentous. But the leak of the draft will *in no way* affect abortion access after June in any case. Since the oral argument, there was never a doubt that *Casey*, at least, was going to be effectively overturned. The only suspense, then, and now, concerned the scope of rights the Supreme Court eliminated and how John Roberts will vote.

The most hackish five justices support the Alito argument. And – in CNN reporting that is almost as important as the Politico leak – John Roberts would have voted to uphold Mississippi's sharp restrictions on abortion in any case.

CNN legal analyst and Supreme Court biographer Joan Biskupic reported late Monday that Chief Justice John Roberts did not want to completely overturn *Roe*, meaning he would have dissented from part of Alito's draft opinion, likely with the top bench's three liberals. That would still give the conservatives a 5-4 majority on the issue.

Roberts is willing, however, to uphold the Mississippi law that would ban

abortion at 15 weeks of pregnancy, CNN has learned. Under current law, government cannot interfere with a woman's choice to terminate a pregnancy before about 23 weeks, when a fetus could live outside the womb.

CNN's report suggests this leak more likely came from Roberts' chambers than the most likely other source, Stephen Breyer's. The most logical explanation for the leak is that Roberts is trying to get his colleagues to adopt a less radical opinion. And if that's the purpose, it might have the desired effect, both by making it clear what a shit-show the original Alito opinion will set off, but also by exposing the opinion itself to the ridicule and contempt it, as written, deserves.

But that doesn't change the fact that in one way or another, the national protection for access to abortion is gone by the end of the SCOTUS term next month.

So those who support equality for women (and LGBTQ rights, and privacy generally) should consider this leaked draft as an opportunity to use the next six weeks – assume the final opinion will be released in mid-June – to lay the groundwork for what comes next. Symbolically, those who support equality for women (and LGBTQ people) now have about as long as many states will permit abortions to do something to protect the right to abortion (and to marry who you love) going forward.

It's not clear how overturning abortion access or the early release of this opinion will affect politics going forward. I can certainly see it driving the plurality of Republicans who support such a radical stance. I can also see this decision being decisive in defeating some anti-choice Senate candidates and maybe, because this was released before the run-off, the remaining anti-choice Democrat, Henry Cuellar. Gavin Newsom has already talked about adding abortion to California's constitution, and California

might not be the only such state. Perhaps it is not too late to find a way to put reproductive rights on the ballot as a referendum (though I assume it is). Certainly, this is way to make abortion support a litmus test for state-wide elections.

Certainly, this decision raises the stakes of Brett Kavanaugh's lies in his confirmation and Clarence Thomas' implication in his wife's participation in a coup attempt.

Democrats are talking about abolishing the filibuster to pass abortion rights, but there's no indication they have 51 votes to pass it. Maybe this would change things?

But there are other ways to mobilize what is a solid majority (including most large corporations) in the United States to undercut this decision, and possibly to change the tenor of politics in this country. Americans believe that women and gays (at least) should be treated as equals. A radical minority disagrees.

Use the next six weeks to figure out how to isolate them as a radical minority.

Update: Noted that this opinion will just end national protections on abortion access.

Update: Roberts is ordering an investigation, suggesting he is not aware of the leaker's identity. Others have made persuasive arguments that this is from one of the radicals, attempting to keep the five vote majority.