

# Black Friday Turns Back the Clock on American Women

By Don Sutherland

In their seminal essay, “How to Lose a Constitutional Democracy,” Aziz Huq and Tom Ginsburg described the phenomenon of “constitutional retrogression.” A “constitutional retrogression” is a “more subtle, incremental erosion to three institutional predicates of democracy occurring simultaneously: competitive elections; rights of political speech and association; and the administrative and adjudicative rule of law.”

On Black Friday, June 24, 2022, the U.S. Supreme Court took a hammer to rule of law in issuing a radical 5-4 opinion in *Dobbs v. Jackson Women’s Health*. The Dobbs decision delivered a body-blow to women’s Constitutional protections. It shattered notions that women are truly equal under the law.

Justice Samuel Alito who authored the devastating opinion and Justices Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett stripped tens of millions of American women of full equality under the law. In doing so, they undermined confidence in the American constitutional framework and the Supreme Court’s legitimacy in overseeing respect for that framework.

That decision had nothing to do with constitutional principle. It had nothing to do with original intent. It had nothing to do with advancing the pursuit of a “more perfect Union.” Instead, a runaway razor-thin ideological majority embarked on a political crusade turned back the legal clock to some distant past where women were anything but full citizens with full rights. They trampled longstanding precedent and the guiding principle of *Stare decisis* in their rush to impose an outcome that could never be realized through statute or at the ballot box. Rather than protecting the Constitution and the rights it safeguards for all citizens, a crusading majority turned judicial review into a weapon that it deployed against the Constitution.

The mentality behind the crusade that deprived women of full protection under the law is one that goes back to the 19<sup>th</sup> century and earlier. Back in 1835, a book entitled, *Woman: As She Is, And As She Should Be*, explained, “Few are to be found who do not amuse themselves with a toy of some kind during every stage of life, and woman... is the most common and most fondled toy of all.” In short, women are little more than semi-autonomous property of men. Indeed, Samuel Alito reached back to the 13<sup>th</sup> century in quoting Henry de Bracton who once explained, “Women differ from men in many respects, for their position is inferior to that of men” (G.E. Woodbine and Samuel E. Thorne, eds., *Bracton de legibus et consuetudinibus Angliae: Bracton on the laws and customs of England*).

This decision is a naked and purposeful attempt to subordinate American women to an inferior role in society. The pressing question is, to what end? What’s clear is that the end is illiberal. In their March/April 2022 *Foreign Affairs* article, Harvard University’s Erica Chenoweth and Zoe Marks observed:

*Established autocrats and right-wing nationalist leaders in contested democracies are united in their use of hierarchical gender relations to shore up nationalist, top-down, male-dominated*

*rule. Having long fought against social hierarchies that consolidate power in the hands of the few, feminist movements are a powerful weapon against authoritarianism. Those who wish to reverse the global democratic decline cannot afford to ignore them... One way that autocratic and illiberal leaders make a gender hierarchy palatable to women is by politicizing the "traditional family," which becomes a euphemism for tying women's value and worth to childbearing, parenting, and homemaking in a nuclear household--and rolling back their claims to public power. Female bodies become targets of social control for male lawmakers...*

Does this decision aim to drive women from the pursuit of higher education and careers into narrower roles of “childbearing, parenting, and homemaking in a nuclear household” to advance the opportunities for men who, for lack of a college degree or other skills, cannot compete effectively in the workforce or whose role in society has eroded? Does it aim to drive women from the political sphere to restore male domination over politics, policy, and law? Does it aim to prop up an intellectually bankrupt belief system in which women are seen as inferior to men overall?

To what end is the decision aimed? Where next will the Alito-led majority take the Court and where else will those behind the larger political crusade that is driving that majority seek to take the United States? Much about the desired dark destination remains unknown.

In the meantime, one can readily adapt Justice John M. Harlan’s dissenting language from the *Plessy* decision to describe the lesson of Black Friday, simply by substituting “gender” for “race.” On Friday, the Supreme Court’s spectacularly bad decision demonstrated unmistakably that there remains ‘a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of gender.’ No deflections to “states’ rights” or “restoring authority to the people” can alter this unequivocal and dismal reality.

For his tragic and grievously awful decision, historians will place Justice Samuel Alito alongside Roger Taney, author of the Dred Scott opinion, and Henry B. Brown, writer of the *Plessy v. Ferguson* opinion. That will be Samuel Alito’s forever and deserved legacy. None of his previous or future opinions can cleanse Alito’s legacy.

That all but certain historical judgment is of no comfort to American women who suffered an abrupt and needless loss of a basic right. The fight to restore equality must now start anew.