

EDITORIAL

New tax
kicker
might get
the boot

In almost the same breath that state officials announced that an average Oregon taxpayer may get an \$850 kicker tax rebate, they were hinting at changing the kicker.

Oregonians are in for a record kicker rebate because nobody could very well predict the pandemic's economic impact. The kicker law requires very good guesses about revenues by state government or it kicks.

The kicker kicks "if actual state revenues exceed forecasted revenues by 2% or more over the two-year budget cycle. The excess, including the 2% trigger amount, is returned to taxpayers through a credit on their following year's tax return."

Oregon is the only state with this kind of law. It is one way, not the most artful way, of keeping a lid on government spending. And voters approved it.

It gets criticized because people who are wealthier tend to benefit more.

You get money kicked back to you based on the taxes you paid. Lower-income people may need a big kicker rebate more, but they get less.

That is an interesting argument because Oregon's income tax system is progressive. So people who earn more pay more in taxes.

So if Oregon were to change the kicker so lower-income people would benefit more, that would be a doubly progressive tax system? That may make sense to some.

There also have been proposals to channel kicker money instead to important matters Oregonians need, such as providing more child care or helping to create more affordable housing.

Those are great causes. But we'd rather see the money go directly into people's hands and let them decide how it is spent, instead of having the government decide for them.

Treasure your kicker, if you are fortunate enough to get one for the 2021 tax year. It may be the last of its kind.

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Is the Supreme Court ready to
overturn Roe? We don't know

By NOAH FELDMAN

A day after the Constitution-flouting Texas anti-abortion law went into effect, a divided Supreme Court ruled on Wednesday that it won't block the law before it can grapple with a concrete case that tests it in practice. The five most conservative justices agreed to an unsigned, one-and-a-half-page opinion that said the law might or might not be unconstitutional, but that given its unusual form, which delegates enforcement to private citizens instead of state authorities, it was too legally complicated to issue an emergency injunction blocking the law. In four separate dissents, the three liberals plus Chief Justice John Roberts said the law should have been blocked anyway.

Every nonlawyer on the planet — and no doubt a few lawyers, too — is likely to read this outcome as prefiguring a 5-to-4 vote to overturn Roe v. Wade, the 1973 precedent that made abortion a constitutional right. Later this year, the court will address a Mississippi anti-abortion law that lacks the cleverly diabolical enforcement mechanism of the Texas law but is equally unconstitutional. Indeed, the day after the law went into effect and before the Supreme Court ruled, many non-lawyers who were so unfamiliar with court procedures that they didn't know it would eventually issue a ruling on the Texas law had already concluded that they knew how the upcoming Mississippi case would come out.

That's a possible interpretation of the latest opinion, to be sure. But the opinion for the five conservatives explicitly denied it. "We stress," said the justices, "that we do not purport to resolve definitively any jurisdictional or substantive claim in the applicants' lawsuit." That's lawyer-speak for saying both that the law could still be unconstitutional and that there might still be some procedural way to block its operation. For good measure, the opinion said the challengers "have raised serious questions regarding the constitutionality of the Texas law."

These formulations indicate that at least some of the five conservatives who joined it wanted to take pains not to send the message that Roe v. Wade is sure to be overturned. What is less clear is whether anyone on the political battlefield wants to hear that message. The pro-choice camp will doubtless spend the months until the court term ends in June whipping up public sentiment, either in the hopes of changing the outcome or turning any decision overturning Roe into the impetus for packing the court or producing a heavy Democratic turnout in the 2022 midterm elections. The pro-life camp has an equal interest in making the overturning of Roe seem inevitable.

Consequently, neither side cares much for dispassionate analysis. But the fact remains that the majority in the Texas ruling did not address the underlying issues, so it would be premature to predict the outcome in the Mississippi case based on it.

Taken strictly on its own terms, the opinion made a point that is incorrect in my view, but that is legally plausible. That is that there's no clear precedent for courts to block in advance the operation of a law that creates a civil penalty — not a criminal violation — to be applied by the courts after private lawsuits by private parties. Ordinarily, when a criminal law is obviously unconstitutional, the courts issue an order to the state attorney general not to enforce it. Such an order would not have any effect in this case, since the Texas attorney general isn't empowered to enforce the law.

The better view is that the court should have been creative and found a way to block the law anyway. In his brief dissent, joined by Justices Stephen Breyer and Elena Kagan, Roberts said that he would have issued a preliminary injunction "to preserve the status quo ante" — without the law in force — and then allow the lower courts to address with more leisure the question of whether there is a legal way for the courts to block the operation of law like the Texas one. Roberts's dissent was written so that

one of the conservative justices might have been tempted to join it. Obviously, it did not work.

The other dissents each chose a slightly different emphasis. Breyer focused on the principle that under the 1803 Marbury v. Madison landmark ruling that established the court's power to rule on a law's constitutionality, there is supposed to be a remedy to defend every right — a point with which I wholeheartedly agree, having made it myself in a column on the topic in May. The idea is that it shouldn't matter who is enforcing the law; if the underlying law is unconstitutional and injures basic rights, the courts must have the power to block its operation.

Kagan said that the court was rewarding Texas for its scheme, and she criticized the way the court's so-called "shadow docket" — cases responding to requests for emergency action — was becoming increasingly important despite the opinions being issued quickly and without oral argument or time for consideration.

Justice Sonia Sotomayor, the only liberal who didn't join Roberts's opinion, went further. She denounced the law as a "breath-taking act of defiance" by Texas and made sure to be clear that the law itself is unconstitutional, which it surely is under the court's abortion precedents. Presumably she chose not to join the Roberts opinion because she did not like the implicit suggestion that the court should spend some time actually considering the question of constitutionality.

The upshot is that we know the three liberals plus Roberts will eventually vote to strike down the Texas law. But we still don't know how all the conservative justices will vote in the Mississippi case. And we won't know before the end of June 2022, when the decision will probably come down.

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OTHER VIEWS

Biden spins alternate reality on Afghanistan

Editorial from The Detroit News:

President Joe Biden continues to live in an alternate universe in regard to the disastrous withdrawal from Afghanistan. As someone put it on Twitter, his message is: "The mission was a complete success" and "it's all my predecessor's fault."

An angrier, more defensive Biden spoke publicly Tuesday to mark an end to the evacuation mission — and to the 20-year war in Afghanistan.

As he noted, the airlift was a tremendous feat, given the chaos surrounding the exit — a condition for which Biden bears much of the blame.

But boasting about the success of the mission was unseemly given at least 250 American citizens were

left behind to face an uncertain fate. Many more thousands of Afghans who assisted our mission were also abandoned, and are now being tracked down and killed by the country's new Taliban rulers.

Biden Tuesday continued to inflate the decision to leave Afghanistan, which was widely supported, with how he carried out the leaving.

Certainly, American support for the U.S. presence in Afghanistan had waned, though many experts say a small force was necessary to serve intelligence and counterterrorism purposes.

The issue Biden is skirting is the bungling of the withdrawal. He claimed Tuesday there was unanimous support for the plan among his military and security advisers, even though reports of vigorous

dissent continue to emerge from the Pentagon and intelligence community.

Biden spoke of those Americans remaining in Afghanistan as if they were volunteers, saying he would get them out "if they choose" to leave.

Most wanted out, but couldn't get to evacuation zones and are now in hiding. The president's faith in the Taliban to help collect them and get them safely back home is Pollyannish.

Nothing in Biden's remarks should assure the families of those Americans left behind that their loved ones will be safely returned. After all, Biden promised not to end the withdrawal until everyone of them was out, a vow he didn't keep.

While saying he accepts full responsibility, Biden disingenuously claimed his options were limited by the withdrawal deal made by former President Donald Trump. While the decision to leave was made by Trump, the execution belonged to Biden.

It was Biden's decision, not Trump's, to ask just 6,000 U.S. troops to carry out the evacuation while facing tens of thousands of hostile Taliban fighters. It was also his call to close the Bagram Air Base, which could have served as a second evacuation site, before the airlift began.

Biden said America's vital interest in Afghanistan is to assure it "can never again be used for an attack on our homeland."

How does he propose to guarantee that, with the Taliban in control

and now armed with the weapons we left behind, and without American eyes and ears in the country?

The departure from Afghanistan was a total failure, whether or not Biden accepts that reality, and sets up the Taliban for future attacks on American interests.

Accountability is demanded. Congress must investigate to determine exactly what went wrong, and who is responsible for the decisions.

Biden had help in making this mess. Top lieutenants such as Secretary of State Antony Blinken and Defense Secretary Lloyd Austin should be required to explain their roles as well.

This national humiliation should not be allowed to give way to the next crisis dominating the news cycle until it is fully answered for.