

EDITORIAL

Defying the will of the people: The US Supreme Court overturns right to abortion

RUTH MACKLIN

On June 24, 2022, the US Supreme Court issued its ruling in the landmark case *Dobbs v Jackson Women's Health Organization* that overturned the constitutional right to abortion with a decision that opposes the will of the majority of Americans. Two earlier Supreme Court decisions had established and upheld that constitutional right for almost 50 years. Now, however, a "super majority" of the Court (6 of its 9 members) has voted to leave laws regarding abortion to the individual states. As soon as the Court's final decision was announced, demonstrations began in front of the Supreme Court in Washington, DC and throughout many states and cities. At the same time, anti-abortion crowds celebrated their victory in the streets, an indication of how polarised the United States has become.

How could this have happened?

How could the current Supreme Court have overturned two previous Court rulings that established and upheld a right based on provisions in the US Constitution? The answer is simple: the Court has become highly politicised. While it is true that US Presidents have always proposed nominees to the Court from their own political parties, past Justices have largely worked together without acrimony. In the two cases in which the Court established a constitutional right to abortion, Justices appointed by Republican Presidents voted with Justices appointed by Democrats in favour of women's right to end their pregnancies. In *Roe v Wade*, the 1973 case, six of the nine Justices were appointed by Republican Presidents, but the vote was 7 to 2 in favour of the right to abortion. In *Planned Parenthood v Casey* (1992), the Court voted 5 to 4 to uphold the right established in *Roe*, with three Justices appointed by Republican Presidents voting in favour. In contrast, the most recent appointees to the Court are extremely religious. One of them, Amy Coney Barrett, is the third Justice nominated by Donald Trump during his one term as President. Like the five conservative men on the Court, she is a devout Catholic and voted to overturn the precedents that made abortion a constitutionally protected right. The sixth member of the "super majority" that reversed the two previous rulings on abortion is the Chief Justice, John Roberts. He is also a Republican but a moderate who believes in incremental changes to previous Court rulings. He is now outnumbered by the five Justices who are more extreme in their political views.

The Court's opinion was written by Justice Samuel Alito, one of the Court's most conservative members. In overturning the precedent that gave women the Constitutional right to abortion, Alito wrote: "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives" [1], referring to state legislatures. Although "the people's elected representatives" are supposed to represent the views of the population in their voting district, this is no longer the case regarding abortion today, in both Republican and Democratic majority states. A disconnect exists in many states between the people's view on the right to abortion and that of their elected representatives. Polls have consistently shown that a majority of people in the United States favour maintaining women's right to have an abortion. A poll conducted in 2022 reveals that 61% of U.S. adults say that abortion should be legal in all or most cases, while 37% claim that abortion should be illegal in all or most cases [2]. The latest survey by this group reveals that 80% of people who tend to vote Democratic favour the right to abortion, while only 38% of Republican voters uphold the right to abortion. This recent poll also shows a modest gender gap: 58% of men and 63% of women favour legal abortion, at least in most cases [2].

The gap between the view held by a majority of Americans and that of their elected representatives can be partially explained by the manipulation of voting districts, an unethical practice known as "gerrymandering". This phenomenon has enabled Republican legislators to manipulate voting districts in their states to favour Republican candidates for election. Evidence exists from past elections that clusters of residents who typically vote Democrat or Republican living in the boundaries of those areas

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have been redrawn to favour the desired party. Democratic officials have engaged in this manipulative redistricting as well as Republicans. The result is that many state legislatures no longer represent the will of the majority living in that state.

What are the options for women?

The consequences of the Court's decision are far reaching. It means that women in about half the states in the country no longer have the long-established right to abortion. Three basic options exist for women who seek to end an unwanted pregnancy:

- 1) To end their pregnancies safely, they will have to travel to other states — some far from their home — at considerable cost and inconvenience. That burden falls most heavily on poorer women. Some women cannot afford the cost of travel and a hotel stay. Many are single mothers with no one else to care for their children at home. It means that some women will be unable to make such trips and will undergo nine months of unwanted pregnancy, which for some will incur risks to their health. Although it may appear difficult to monitor the actions of women who seek abortions in pro-choice states, the legislatures in anti-abortion states are already looking for solutions that would prohibit this way of evading the law. The result is that poor women will be even worse off than they have been in the recent past.
- 2) Women could seek someone prepared to perform illegal abortions in their state. This practice was common before the US established a constitutional right to abortion in the country. But this is a dangerous option. Anti-abortion states can pass laws that penalise both the woman and the illegal abortion provider. At least two states recently passed laws that enable ordinary citizens to act as "vigilantes." They are authorised by law to sue providers of abortion as well as any person who assists a woman in obtaining abortion or who provides payment for the abortion. These laws provide large payments to such ordinary citizens if their lawsuits are successful [3].
- 3) The third option is for women to perform abortions at home using the medically safe pills available by prescription from doctors. More than half of recent abortions in the US were performed with anti-abortion pills [4]. They are available for purchase by mail. The consultation with an authorised provider can be accomplished by telephone, video, or even online. However, much uncertainty remains for the future. In all likelihood, the anti-abortion states will quickly pass new legislation to prohibit any or all of these methods of obtaining a medical abortion. And what if there are complications from a home abortion? The woman will have to rush to a hospital, where it will be immediately evident that she has broken the law. New laws will then be passed requiring hospitals to report women in these circumstances. This is not the United States of America most residents know. It harks back to a past that only very few ever experienced or remember.

One commentator on the Supreme Court's ruling wrote, "I'm struck that while the majority opinion repeatedly gives great weight to the importance of protecting fetal life, it fails to discuss the effect of its ruling on women's lives and health....The majority opinion brushes off [these consequences for women] by arguing that the state legislative process will protect women's interests, because they can vote or drop their babies on the doorsteps of fire stations" [5]. It does appear that foetal life trumps women's right to life and liberty as articulated in the US Constitution.

A misogynist Supreme Court

Even worse acts by the Supreme Court may be yet to come. One of the extreme right-wing Justices, Clarence Thomas, hinted in his concurring opinion that other rights could well be at risk: the rights to contraception, same-sex consensual relations, and same-sex marriage [6]. Although such reversals are by no means certain, the fact that a current Supreme Court Justice mentioned and promoted them in his concurring opinion is chilling. Any such development could place the United States in a movement back to the Middle Ages where women had to wear chastity belts. Thomas, who is Black, is extremely conservative. His views on abortion and other issues that come before the court are a threat to the well-being of the majority of Black Americans, many of whom are pro-choice and have a lower socioeconomic status than most white Americans. It is worth recalling the televised hearings back in 1991 when Thomas was a nominee for the Supreme Court. Anita Hill, a lawyer, educator, and author who had worked for Thomas as an aide, accused him of sexual harassment in those early years. She contended that he had made sexually offensive comments to her in what appeared to be an attempt to seduce her. He was narrowly confirmed by a divided US Senate [7].

Clarence Thomas wasn't the only Supreme Court Justice accused of sexual harassment. A more recently confirmed Justice, Brett Kavanaugh, also faced accusations of sexual misconduct that occurred during his early years. In his Supreme Court confirmation hearings, Kavanaugh was accused by Christine Blasey Ford of sexually assaulting her at a house party when they were teenagers. Two *New York Times* reporters (both women) did additional research about Kavanaugh's behaviour during his college years and found corroborating information.

Those occurrences of sexual harassment occurred years ago in the lives of Thomas and Kavanaugh. Although they should not

be swept under the rug, they do not indict current or recent behaviour by these two men. However, during the confirmation hearings for appointment to the Supreme Court, two recently appointed Justices gave statements that are politely called “misleading”, but are more simply known as lies. Two US Senators (one Democratic, the other Republican) accused Justices Neil Gorsuch and Brett Kavanaugh of lying about their views on abortion. Susan Collins, a Republican Senator who supports the right to abortion, said that Gorsuch and Kavanaugh had assured her that *Roe v Wade* was “settled as precedent”. Joe Manchin III, a Democratic Senator, says he is “pro-life” but makes exceptions for rape, incest, and where the woman’s life is in jeopardy. Manchin said he trusted both Gorsuch and Kavanaugh when they testified under oath that they believed *Roe v Wade* was settled legal precedent [8]. What these two Justices said under oath when they were questioned during their nominations to the Court was, simply put, a lie.

The future

Justice Sonia Sotomayor is one of the three liberal Justices who voted not to overturn the precedents that had made abortion a constitutionally protected right. When the challenge to those precedents was argued in the Court last December, Sotomayor asked: “Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts?” Nothing will change regarding this politicisation when the Court begins its next session. One of the three liberal Justices, Stephen Breyer, has retired and his replacement has already been chosen and confirmed. Ketanji Brown Jackson, a liberal Democrat appointed by President Biden, will join the other two liberal Justices, both women, who voted to retain the constitutional right to abortion. We can only hope that the fears raised by Justice Thomas’s remarks about revoking the rights to contraception and same-sex marriage will be laid to rest.

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