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The link between voting rights and the abortion ruling

It's no coincidence that the court is making our democracy less democratic at the very moment it returns the issue of abortion to the political process

Perspective by Leah Litman, Melissa Murray and Kate Shaw

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The Supreme Court's opinion in *Dobbs v. Jackson Women's Health Organization* gives states the maximum amount of freedom to restrict abortion. The decision is so sweeping that, under its logic, states could ban abortion even in cases of rape or incest; they may even be able — as the dissent notes — to prohibit abortions in circumstances in which a doctor believes the procedure is necessary to preserve the life or health of the pregnant person.

Justice Samuel A. Alito Jr.'s opinion attempts to minimize these concerns by insisting that advocates for abortion rights can now register their support politically. The decision, he writes, “allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office.” He breezily concludes that “women are not without electoral or political power.”

Alito's assurances, however, ring hollow — in part because this conservative court has made several decisions that have hobbled the infrastructure of democracy. As a result, true democratic deliberation on the abortion question will be elusive. What the court has done is to turn the issue of abortion over to politicians who are increasingly removed from the voters' will, as well as increasingly extreme on issues of reproductive rights and women's self-determination.

One way the court has done this involves partisan gerrymandering. Partisan gerrymandering allows politicians to, in effect, select their voters — and ensure that a particular party and its politicians remain in power even when a majority of voters want them out. By drawing voting districts in ways that advantage their own, political parties ensure their continued primacy — and artificially restrict the will of the majority. Take Wisconsin, where, in 2018, the Republican candidate for governor (incumbent Scott Walker) lost the popular vote by roughly 1 percentage point. Nonetheless, state legislative districts had been drawn by Republicans in such a way that Walker's party was able to win 63 of the 99 seats in the state assembly. Partisan gerrymandering not only results in more extreme laws that severely restrict abortion and contraception, it also makes it harder to vote out the politicians who enact these measures.

The Supreme Court has cultivated conditions that allow partisan gerrymandering to flourish. In 2018, for example, it said federal courts could not strike down partisan gerrymanders because they present a “political question” better decided by state politicians and legislatures. The logic is painfully circular: The court gave the authority to correct partisan gerrymandering to the very people who are most invested in maintaining gerrymandered districts. It’s like asking a burglar to investigate a burglary. After the court took this hands-off position, some states drew maps that were even more aggressively gerrymandered than before. (State courts currently can remedy partisan gerrymandering, but the Supreme Court will decide in the next term whether they have the right to do so.)

This court has allowed politicians to insulate themselves from the will of the people in other ways, too — and, specifically, from the will of people of color. That is especially problematic in the context of abortion, because women of color will disproportionately suffer in states where abortion is made illegal. Black women, for instance, face almost three times the risk of maternal mortality as non-Hispanic White women; American Indian and Alaska Native women face double the risk.

These minority groups will have difficulties voicing their objections to abortion restrictions in electoral politics. Just last term, for instance, the court blessed two voting rules in Arizona that disproportionately limit the votes of members of minority groups. In another far-reaching opinion by Alito, the court allowed Arizona to disallow anyone but the voter from returning an absentee ballot and to throw out ballots mistakenly cast in the wrong precinct. A lower court — the U.S. Court of Appeals for the 9th Circuit — had found that both of these rules violated Section 2 of the Voting Rights Act (because Arizona changed the location of voting places more often in minority communities, creating confusion, and because Native voters were more likely to live farther from a polling location, making it more difficult to vote in person).

In 2013, the court had released several states with a history of voting discrimination from the requirement under the Voting Rights Act to get “pre-clearance” from judges or the U.S. attorney general before changing their voting rules. The 2021 ruling weakened the Voting Rights Act further, by decreeing that the discriminatory effect of laws was often not sufficient to establish a violation of what remained of the act — making it much harder to challenge all sorts of exclusionary voting measures by states.

Looking ahead, the court is also poised to make it easier for states to dilute the voting power of racial minorities. This year, it provisionally allowed an Alabama districting map to go into effect after a three-judge district court panel concluded that the map minimized the voting power of people of color. Alabama’s population is 27 percent Black, but under the new map, Black voters have the power to elect their preferred candidates in only one of the state’s seven congressional districts. The Supreme Court will formally hear the Alabama case next term. It’s likely to give its blessing to the scheme — which will invite other states to follow suit.

It is not a coincidence that the court is making our democracy less democratic at the very moment it is returning the issue of abortion to the political process (in the name of democracy).

After all, the Supreme Court that overruled *Roe* is itself the product of minority rule. Justices Neil M. Gorsuch, Brett M. Kavanaugh and Amy Coney Barrett were all confirmed by senators who collectively represented fewer people than the senators who voted against them. Those three justices, moreover, were appointed by a president who received fewer total votes than the opposing Democratic candidate.

Given that the court has been steadily undermining democracy for the past decade, its recent appeal to democracy rings hollow — especially in the context of a decision that allows states to treat women as less than full and equal citizens.