

Opinion Overturning Roe would make America more democratic

By [Jason Willick](#)

Columnist | [+ Follow](#)

May 6, 2022 at 7:00 a.m. EDT

The partisan furies unleashed by the Supreme Court's leaked draft opinion that would overturn *Roe v. Wade* are, for the most part, higher-intensity retreads of decades of cultural warfare over abortion. The pro-choice side contends, as it always has, that the conservative justices are influenced by antique religious convictions and are hostile to women's health and equality; the pro-life side contends, as it always has, that abortion extinguishes a human life and that the right to it is found nowhere in the Constitution.

But one rhetorical weapon in the liberal arsenal is of more recent vintage. As The Post reports, Democrats are now making a concerted effort to cast the draft opinion, written by Justice Samuel A. Alito Jr., as “at odds with democracy,” and the media is following suit. A Los Angeles Times column called the leaked opinion an “emphatic, and damaging, expression of minority rule”; a New York Times podcast warned of the “frighteningly autocratic” implications of the decision; and a New Yorker essay cautioned that “the danger of permanent minority rule is looming ever larger.”

This point of view is ... puzzling, at least if we interpret “democracy” to mean something like “self-government through elections.” The court's contemplated ruling in *Dobbs v. Jackson Women's Health*, which concerned a Mississippi abortion regulation, would allow popular majorities to decide the scope of abortion rights for the first time in a half-century. Life-tenured, unelected federal judges would lose their authority over a contested part of American life, and the menu of policy options for voters to choose from would expand dramatically.

The surge of democratic inputs in abortion policy — in direct referendums, as well as elections for statehouses, judgeships, governorships and Congress — would be so sudden and profound that the results are impossible to predict.

Why would liberals characterize such a clear democracy-expanding devolution of power as, in effect, a minoritarian coup? The most common explanation is that the Republican Party's "structural advantage" in the Senate and electoral college (derived from its ability to win majorities distributed across a greater number of less-populous states) has contributed to the ideological composition of the Supreme Court. There is no doubt that the GOP played procedural hardball to achieve the conservative court majority.

Editorial Board

COUNTERPOINT
**Biden wants to codify
Roe v. Wade. A
bipartisan bill would
do just that.**

But if the court does in fact have a "structural" bias in favor of the GOP, that's all the more reason for policy to be decided at the state level as a matter of democratic fairness. State legislative districts have strictly equal population sizes (unlike the states represented in the U.S. Senate), and there's no electoral college in gubernatorial races. If *Roe* falls, alleged democratic shortcomings in the Supreme Court confirmation process are irrelevant; authority over abortion policy would lie primarily with state officials, who are more responsive to political majorities than justices appointed by presidents of either party.

Yes, polls show that a majority of Americans want *Roe* to stay. But dig deeper into what abortion regulations the public supports, and both sides can make a plausible claim to majority backing. As the Manhattan Institute's Charles Lehman points out, a recent poll found that nearly two-thirds of Americans think abortion should be banned after 15 weeks. In other words, the outline of the Mississippi legislation at issue in the *Dobbs* case appears to have majority support not only in Mississippi's legislature but also across American adults. How exactly would the justices have vindicated democracy by striking it down?

President Biden on Tuesday was more candid in his defense of *Roe*. "I'm not prepared to leave [abortion policy] to the whims of the public at the moment in local areas," he said. Bingo: The real problem for critics of Alito's draft opinion is that it prescribes too much democracy, not too little. Biden wants to make it easier for Americans to vote but also to limit their ability to influence abortion policy in elections.

Reintroducing abortion into the democratic process would heighten the stakes of state-level competitions for office. This won't necessarily be a gentle process: Periods of growing popular sovereignty (such as the Jacksonian era in the United States) are often accompanied by social upheaval. Institutions are transformed as new interests demand representation.

The promise of a post-*Roe* democratization of abortion policy is that the representative institutions of each state can identify policies consistent with the views of its residents. The peril is that the nationalized partisan dynamics could instead push red and blue states into extreme abortion policy blocs that are perpetually at one another's throats.

This week has shown that America's erosion of political norms is unlikely to stop any time soon. But as George Orwell observed, "to think clearly is a necessary first step toward political regeneration." Clear thinking tells us that democracy is not a utopian end-state; it's a process for temporarily settling differences of opinion. The court is poised to make the United States more democratic when it comes to abortion policy. By distorting the meaning of democracy — especially on the narrow issue of abortion — progressives risk draining the democratic ideal of its prestige and moral authority. That's one way to grease the skids for "minority rule."

