

# Robert Cavalier: We trust the 'democratic process,' but it can't secure the right to abortion

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In 1932, Supreme Court Justice Louis D. Brandeis famously referred to states as “laboratories for democracy.” In concurring with the Supreme Court’s Dobbs decision, Justice Brett Kavanaugh concludes that “The Court today properly heeds the constitutional principle of judicial neutrality and returns the issue of abortion to the people and their elected representatives in the democratic process.”

Were it so easy. Democracy in America today is not a simple topic outlining the structure of government and the process by which bills are made. In fact, there are severe challenges to our democracy that make the remedy of the Dobbs decision appear either naive or cynical.

The first is the rise of “alternative reality spheres” driven by a social media. These divide us into tribes communicating with like-minded people in social silos. Political campaign strategies stoke these divisions through 30-second ads serving to show us which side our tribe is on and how we should vote regardless of how much we actually know.

This kind of anger and outrage often drives a small percentage of voters to participate in a state’s primary system, selecting the candidates most in line with their beliefs, even if those beliefs represent extreme positions. Primary turnout is notoriously low, but these primaries determine the candidates for political office. Furthermore, these candidates are often running in districts that have been gerrymandered, mapped out to favor a certain party.

Republicans have been very adept at this and not by accident. Shortly after Barack Obama won the White House in 2008, a sustained and

coordinated effort to win state houses resulted in a wave of Republican state house seats. But they are not just sitting there in Harrisburg and other state capitols. They are crafting model legislation that expresses their political party's ideology.

Nothing wrong with promoting your political views, but over time the strategies employed here began to take on a life of their own. States became laboratories creating more and more extreme positions on issues relating to guns, public schools, unions and voting.

With abortion, the states were the wild west. Prior to Dobbs, all sorts of strategies sought to take advantage of the Casey caveat that the states had a role to play in regulating abortion. As states became more emboldened with the expected Supreme Court appointments that would create a majority to overturn the federal law on abortion, they began to chip away at Roe itself with fetal heartbeat and fetal pain laws restricting abortion.

After Dobbs, a whole host of laws and proposed amendments to state and federal constitutions began working their way through state legislatures. One must recognize the sincerely held beliefs of many Americans on both sides of the issue, but what has been occurring in our state houses over the past decade is not often recognized: many state houses do not in fact "represent the people," but only a minority of the politically active citizens who turn out in primaries. As a result, some state governments today are out of sync with the general population of their states.

Look at the shock that some Kansas politicians felt at the outcome of their state referendum. And look at the unforeseen consequences of a 10-year-old rape victim having to travel across state lines to get the medical care she needs. Politicians are getting tied up in a bunch now that the dog has caught the car. Brave statements that there will be "no exceptions" to the ban lead to absurd conclusions that a rape victim forced to bring her pregnancy to term is experiencing a "blessing."

The majority might have done better to heed the dissent in Dobbs: "The point of a right," Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan explained, "is to shield individual actions and decisions from the vicissitudes of political controversy, to place them beyond the reach of

majorities and officials and to establish them as legal principles to be applied by the courts. However divisive, a right is not at the people's mercy."

Yet here we are. What to do? It may be ironic that new democratic solutions to our democracy might actually make our democracy stronger. We should consider citizen juried referendum questions that provide transparency to the effort and vet the language for clarity. We should find more objective ways to draw district maps in a fair and equitable manner.

Rank choice voting of more than two candidates opens a pathway for more moderate candidates to win primary elections. And voter informed polling through citizen deliberation processes helps us see what the public thinks about an issue once they have become informed about it and discussed it amongst themselves in a civil and well-structured way.

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