Women's Reproductive Rights – And More - Under Threat

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Heather Cox Richardson, September 3, 2021. (See below)

In a 5-to-4 vote on September 1, the Supreme Court allowed Texas to put into place the most restrictive abortion law in the nation. It bans abortions, with no exception for rape or incest, as early as the sixth week in a pregnancy based on the presence of a fetal heartbeat. **Furthermore, the law empowers citizens to sue those who perform an abortion or anyone who aids and abets the procedure**. If successful, the individual pursuing the lawsuit can receive $10,000. **Are not such vigilante tactics encouraging citizens to enforce the law a form of bounty hunting?**

There has been no shortage of analysis and protests ranging from journalists in leading newspapers such as Dan Balz writing on this topic in The Washington Post, September 3, 2021to political leaders, such as Maggie Hassan, Senator from New Hampshire, who has denounced the Texas legislation and the Supreme Court's decision.

The law will shut down access to legal abortions in Texas. Many have pointed out that what is happening in Texas is not an isolated event. Across the country, with South Dakota's Governor acting on the heels of the Supreme Court's decision, access to reproductive health care is being whittled away by Republican-led legislatures. According to Justice Sonia Sotomayor the Court has failed to enjoin "a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny. . . a majority of justices have opted to bury their heads in the sand."

No one is better able to help us understand this legislation and its implications for all Americans than Heather Cox Richardson, Professor of History and Boston College. In her September 3, 2021 "Letters from an American" she provides the historical framework for civil rights legislation in the post-World War II era. Her letter, seen below, places this Texas legislation and the assault on Roe V. Wade into the broad context of civil rights in this country over the past 75 years.

September 3, 2021

Heather Cox Richardson

The new anti-abortion law in Texas is not just about abortion; it is about undermining civil rights decisions made by the Supreme Court during the 1950s,1960s, and 1970s. The Supreme Court declined to stop a state law that violates a constitutional right.

Since World War II, the Supreme Court has defended civil rights from state laws that threaten them. During the Great Depression, Democrats under President Franklin Delano Roosevelt began to use the government to regulate business, provide a basic social safety net—this is when we got Social Security—and promote infrastructure. But racist Democrats from the South balked at racial equality under this new government.

After World War II, under Chief Justice Earl Warren, a Republican appointed by President Dwight Eisenhower, and Chief Justice Warren Burger, a Republican appointed by Richard Nixon, the Supreme Court set out to make all Americans equal before the law. They tried to end segregation through the 1954 Brown v. Board of Education of Topeka, Kansas, decision prohibiting racial segregation in public schools. They protected the right of married couples to use contraception in 1965. They legalized interracial marriage in 1967. In 1973, with the Roe v. Wade decision, they tried to give women control over their own reproduction by legalizing abortion.

They based their decisions on the due process and the equal protection clauses of the Fourteenth Amendment, passed by Congress in 1866 and ratified in 1868 in the wake of the Civil War. Congress developed this amendment after legislatures in former Confederate states passed "Black Codes" that severely limited the rights and protections for formerly enslaved people. Congress intended for the powers in the Fourteenth to enable the federal government to guarantee that African Americans had the

same rights as white Americans, even in states whose legislatures intended to keep them in a form of quasi-slavery.

Justices in the Warren and Burger courts argued that the Fourteenth Amendment required that the Bill of Rights apply to state governments as well as to the federal government. This is known as the "incorporation doctrine," but the name matters less than the concept: states cannot abridge an individual's rights, any more than the federal government can. This doctrine dramatically expanded civil rights.

From the beginning, there was a backlash against the New Deal government by businessmen who objected to the idea of federal regulation and the bureaucracy it would require. As early as 1937, they were demanding an end to the active government and a return to the world of the 1920s, where businessmen could do as they wished, families and churches managed social welfare, and private interests profited from infrastructure projects. They gained little traction. The vast majority of Americans liked the new system.

But the expansion of civil rights under the Warren Court was a whole new kettle of fish. Opponents of the new decisions insisted that the court was engaging in "judicial activism," taking away from voters the right to make their own decisions about how society should work. That said that justices were "legislating from the bench." They insisted that the Constitution is limited by the views of its framers and that the government can do nothing that is not explicitly written in that 1787 document.

This is the foundation for today's "originalists" on the court. They are trying to erase the era of legislation and legal decisions that constructed our modern nation. If the government is as limited as they say, it cannot regulate business. It cannot provide a social safety net or promote infrastructure, both things that cost tax dollars and, in the case of infrastructure, take lucrative opportunities from private businesses.

It cannot protect the rights of minorities or women.

Their doctrine would send authority for civil rights back to the states to wither or thrive as different legislatures see fit. But it has, in the past, run into the problem that Supreme Court precedent has led the court to overturn unconstitutional state laws that deprive people of their rights (although the recent conservative courts have chipped away at those precedents).

The new Texas law gets around this problem with a trick. It does not put state officers in charge of enforcing it. Instead, it turns enforcement over to individual citizens. So, when opponents sued to stop the measure from going into effect, state officials argued that they could not be stopped from enforcing the law because they don't enforce it in the first place. With this workaround, Texas lawmakers have, as Justice Stephen Breyer noted in his dissent, "delegate[d] to private individuals the power to prevent a woman from…[exercising]...a federal constitutional right."

Justice Sonia Sotomayor was more forceful, calling the measure "a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny." And yet, the Supreme Court permitted that state law to stand simply by refusing to do anything to stop it. As Sotomayor wrote in her dissent: "Last night, the Court silently acquiesced in a state's enactment of a law that flouts nearly 50 years of federal precedents."

A state has undermined the power of the federal government to protect civil rights. It has given individuals who disagree with one particular right the power to take it away from their neighbors. But make no mistake: there is no reason that this mechanism couldn't be used to undermine much of the civil rights legislation of the post–World War II years.

On September 4, 1957, three years after the Brown v. Board of Education decision, a crowd of angry white people barred nine Black students from entering Central High School in Little Rock, Arkansas. The white protesters chanted: "Two, four, six, eight, we ain't gonna integrate."

In 1957, Republican President Dwight Eisenhower used the federal government to protect the constitutional rights of the Little Rock Nine from the white vigilantes who wanted to keep them second-class citizens. In 2021, the Supreme Court has handed power back to the vigilantes.

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Notes:
https://www.supremecourt.gov/opinions/20pdf/21a24_8759.pdf

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