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Opinion Think state supreme courts will save abortion rights? Think again.

By Neal Devins

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If the U.S. Supreme Court overturns *Roe v. Wade*, don't look to state supreme courts to step in to protect abortion rights.

State supreme courts have the power to interpret their own state constitutions to provide broader protections for individual liberty than the U.S. Supreme Court. But they rarely break from their state's dominant political culture. Unlike life-tenured federal court judges, justices in 38 states stand for election, and their decisions are subject to voter initiatives and other democratic checks. On abortion, they probably agree with their state's political establishment and, if not, they understand that any decision countermanding the state is subject to political override.

Witness a [decision](#) the Iowa Supreme Court handed down last week. Concluding that its 2018 ruling establishing a state constitutional right to abortion “insufficiently recognizes that future human lives are at stake,” the Iowa Supreme Court overruled that precedent. It also sent a message to other state supreme courts: Don't buck the dominant political party.

How did the Iowa Supreme Court come to overturn its own prior decision? Following the 2018 ruling, which invalidated a 72-hour waiting period for abortions, lawmakers changed the state's judicial selection process — a merit selection plan in which lawyers and the senior supreme court justice dominated the commission that nominates judicial candidates. Jettisoning that system in favor of one allowing the governor to appoint a majority of the commission enabled Iowa Gov. Kim Reynolds (R) to remake the court into a conservative body.

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Iowa is not alone. In Florida, Gov. Ron DeSantis (R) took aim at a 2017 state supreme court [decision](#) blocking a 24-hour waiting period law. By [replacing](#) three retiring Democrats on the Florida Supreme Court with “appointees who will interpret the law, be willing to reverse bad precedent and not legislate from the bench,” DeSantis transformed the court and ushered in a new era of conservative judicial decision-making. The Florida Supreme Court has already reversed a 2016 ruling requiring a unanimous jury recommendation for a death sentence; on abortion, it seems poised to [overturn precedent](#) and uphold the state's recently enacted 15-week ban.

Even in still-purple Kansas, a Democratic governor and supreme court dominated by Democratic appointments might not be enough to save state abortion rights. In 2019, the Kansas Supreme Court recognized a right to “control one's own body” when striking down a state law banning dilation and evacuation, the most commonly used procedure for second-trimester abortions. Republican lawmakers took aim, promoting an [initiative](#) to amend the state constitution to say that it does not confer a right to abortion. Kansans will vote on that initiative in August.

While this initiative might fail, Kansas is the exception that proves the rule. The antiabortion juggernaut will not be stopped in those very states where abortion rights are most in jeopardy. There, the risks of electoral defeat, voter override or other political attack are too great. More than that, red-state justices typically embrace red-state values. There is little doubt that recently appointed justices to the Iowa and Florida supreme courts disapproved of the rights-expanding precedents they overturned.

For similar reasons, there is little prospect that a majority of justices in any of the 13 states set to outlaw abortion immediately or very quickly if *Roe* is overturned will risk electoral defeat to set aside a U.S. Supreme Court decision they probably support. In contrast to national opinion polls backing abortion rights, voters in states that would eliminate or severely restrict abortion think that abortion should be fully or mostly illegal. Take Mississippi, the state whose abortion law is now before the U.S. Supreme Court. Almost 60 percent of adult Mississippians oppose abortion rights. In Idaho (where the state supreme court will hear arguments about a state constitutional right to abortion in August), Republicans are dominant, and two-thirds oppose abortion. There is little chance that either of these courts would find a state constitutional right to abortion.

None of this is to say that state supreme courts did not play a critical role in establishing and expanding individual rights protections. Defenders of state constitutionalism are correct when they extol state supreme courts for playing a leadership role on search and seizure, interracial marriage, same-sex marriage and more. They are also correct that there are some issues (property rights, for example) where broad bipartisan opposition to the U.S. Supreme Court creates a void that state courts can fill. In today's polarized world, however, those issues are few and far between. Red-state supreme courts back red-state values, and blue-state courts back blue-state values. Just as Mississippi and Idaho are unlikely to back abortion rights, state supreme courts in New York and California will not find a state constitutional right to bear arms.

Correspondingly, there is a hollow ring to claims such as the one made by Brett M. Kavanaugh at his confirmation hearing that people "affected" by and "upset" with the U.S. Supreme Court can seek relief by turning to "state constitutions and state constitutional law." That might have been true when there was no sharp Republican-Democrat divide on abortion, guns and other hot-button issues; it is not true today. State supreme courts are bellwethers of state politics, not rights-protecting pathbreakers.