

What right does the Supreme Court have to rule?

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Women's March in Washington, D.C., Oct. 2.

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On Dec. 1, the U.S. Supreme Court heard the arguments from U.S. state attorneys supporting Mississippi's 15-week abortion ban.

A state law was passed in Mississippi in 2018 that would make most abortions illegal after the first 15 weeks of pregnancy — including those caused by rape. The Mississippi law hasn't yet been enforced due to a legal challenge by Mississippi's only abortion provider, the Jackson Women's Health Organization.

The Supreme Court is now considering the case.

The most conservative judges — including Donald Trump-appointed anti-woman bigot and serial abuser Brett Kavanaugh — pressed forward to raise the stakes to possibly overturning *Roe v. Wade*, the 1973 decision that established a constitutional right to abortion.

Another Trump appointee, Justice Amy Coney Barrett, [stated her position](#) during the hearing: Why was abortion necessary, when women who do not want to be mothers can simply give their babies up for adoption? Thereby, Barrett was arguing for cruel legislation that bans abortion for those who have been raped, whose health or the baby's health is at risk or a myriad of other legitimate issues, the most primary being control over one's own body.

As a member of the Indiana religious organization, [People of Praise](#), Barrett has served as a lay pastoral women's leader known as a "handmaid." Barrett is a millionaire — among the richest of rich justices, with a lush income from the Catholic Church's Notre Dame Law School—and this removes her from the concerns plaguing most peoples' lives.

One of three judges in the minority supporting women's constitutional rights, Justice Sonia Sotomayor asked whether the court would survive the stench of being considered a political institution, a point echoed by Justice Elena Kagan. Their attempt to defend a critical right to healthcare also implied support for the legitimacy of the Supreme Court.

What right does the Supreme Court have?

The U.S. Supreme Court was established 232 years ago by the U.S. Constitution with the passage of the Judiciary Act of 1789. At that time the U.S. Constitution did not extend equal rights to people kidnapped from Africa, the Indigenous population, oppressed genders or those without property — only white men with property.

The Court was set up as one of three branches of the emerging capitalist government, which included a president and a Congress made up of a House of Representatives and the Senate, reputed to be a balance of powers. However, during a dispute in 1805 it was determined that six appointed judges held supreme authority over the elected members of Congress and the president. (The U.S. Constitution grants Congress the power to determine how many “justices” sit on the Court. The Court started with six, but the number has been between 5 and 10. Since 1869 the number has been set at 9.)

Fifty years later, in 1853, the Court affirmed slavery with the Dred Scott decision. If there was any doubt as to where the real power was, it was right there in affirming the rights of the slave owners as against a majority of the people opposed to slavery.

In the years following the Civil War to end slavery, there was a gradual democratization of the political process. The right to vote had previously been denied to the Native people, to Black people, to women, to the youth. But these groups have won voting rights through years of struggle. (See Sam Marcy's "[A Marxist View of the Supreme Court.](https://www.struggle-la-lucha.org/2022/06/27/what-right-does-the-supreme-court-have-to-rule-2/)")

Supreme Court erodes rights

In the 2000 presidential election, the Supreme Court exercised its authority by selecting George W. Bush to be president. Bush appointed the conservative John Roberts who is currently Chief Justice.

Last June, the Court released a wave of decisions, as it does every year at the end of its session. Among them was a ruling giving the responsibility for decisions on partisan gerrymandering to state governments — a big attack on voting rights for Black and other oppressed peoples and all workers.

Along with reproductive rights other decisions currently on the courts docket include:

- **Gun control.** The political arguments surrounding this issue never take into account official U.S. policy of militarization or the violence of other armed wings of the state against Black people and other workers, employed and unemployed.
- **Religious freedom.** Under the guise of religious freedom the court is attacking public education by allocating funds to private institutions. This further infringes on the separation between church and state—an issue, we were taught, that laid the basis for the American Revolution.
- **State secrets.** This year, two lawsuits concern the kind of information the U.S. government can withhold in the interest of national security.

The first involves Guantanamo Bay detainee Abu Zubaydah, who is seeking information about U.S.-run interrogation torture sites and the Central Intelligence Agency contractors he is suing for allegedly torturing him.

The second is related to a suit from a group of Muslim men in California who allege the Federal Bureau of Investigation engaged in religious discrimination when it

monitored members of their community for possible terrorism connections.

An area of concern: the Shadow Docket

The court has increasingly relied on what's been called an emergency "shadow docket" — these are short, frequently unsigned, opinions issued without full briefing and argument — used to take significant steps in a conservative direction with less opportunity for scrutiny.

Three recent examples of the "shadow docket" trend involve Supreme Court action on (1) the extremely restrictive Texas abortion law, (2) a Trump-era policy requiring asylum-seekers to stay in Mexico and (3) throwing out a presidential-ordered temporary moratorium on home evictions.

While the court's traditional rulings take months of work — from legal briefs to oral arguments to a decision — and this term's big cases probably won't be announced until May or June of 2022 — the shadow docket can unfold quickly and move in unpredictable directions.

In an article titled, "[Texas lawmakers: Why you gotta be so cruel?](#)" Gloria Verdieu writes about the Texas abortion law that the Supreme Court supported through the shadow docket: "'The Heartbeat Law' bans abortion after five-and-a-half to six weeks of pregnancy, before most women are aware that they are pregnant. The law threatens any individual or entity who 'knowingly engages in conduct that aids or abets,' including paying for or reimbursing the costs of an abortion through insurance or otherwise, with a civil lawsuit. Any civilian who sues that person will be awarded \$10,000 plus court costs and attorney fees."

Invalidating the rights the people

A clear majority of people in the U.S. support upholding Roe v. Wade, guaranteeing a constitutional right to abortion. According to an [ABC News/Washington Post poll](#),

some 60% say Roe v. Wade should be upheld. Three out of four Americans say that the decision of whether or not a woman can have an abortion should be left to the woman and her doctor.

It's no accident that the power to make a legal decision on reproductive rights is ultimately exercised by the Supreme Court. It's the most reliably conservative, anti-democratic arm of the government, responsive only to those who have appointed them.

During the Depression the Roosevelt administration was forced to institute the National Recovery Act in order to save capitalism. It granted workers the right to organize — union rights — and established some forms of social insurance including social security and unemployment benefits, all under pressure from the working class actions countrywide.

As soon as it became clear that the capitalist recession was slowly ending, in one day the Supreme Court nullified this whole mass of legislation in the infamous Schechter case of 1935 and began to roll back the progressive legislation. To this day the Supreme Court has upheld the anti-labor strike-breaking policies of the National Association of Manufacturers, of the multinational corporations and of the banks. The plight of labor today, at least from the point of view of legality, can be shown to come from this — that in the last resort the ruling class relies on the Supreme Court, an instrumentality that is as undemocratic as it is reactionary.

Concerning the court 's decision in the 1989 to upheld a Missouri law prohibiting the use of public facilities to provide abortion services and to restrict physicians who provided abortions, [Sam Marcy wrote](#): "The abortion decision confirms that whenever the bourgeoisie is in a crisis, they will let nine people, unelected, appointed for life, decide the most critical issues concerning life in the United States."

