
ARE VOTERS ALLOWED TO PROTECT ABORTION?[†]

LAURA PORTUONDO*

When the Supreme Court eliminated the federal right to abortion in *Dobbs v. Jackson Women's Health Organization*,¹ it claimed that it was giving power over abortion policy back to the voters.² No longer, the Court declared, would it allow its “own ardent views about . . . liberty” to govern the abortion question.³ Instead, it would ensure that voters, including “women on both sides of the abortion issue,” would be empowered “to seek to affect the legislative process.”⁴ The power to regulate abortion, supposedly, now rests with the people. The November 2024 election will put this claim to the test. If voters choose to protect abortion rights, will courts respect that decision? Professors Reva Siegel and Mary Ziegler's Article, *Comstockery*, provides reason to worry they may not.⁵ This symposium piece argues that, if courts override voters in this manner, they will contradict *Dobbs*'s rhetoric by substituting judicial policy preferences for the will of the people. Voters can and should resist such a judicial power grab.

In November, many voters will have an unprecedented opportunity to express their views on abortion. In eleven states, voters will decide on ballot measures that would enshrine abortion rights in their state constitution.⁶ Voters, moreover, will choose between Kamala Harris, a presidential

[†] An invited response to Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It*, 134 YALE L.J. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4761751.

* Assistant Professor, University of Houston Law Center. For their helpful comments and encouragement, I thank Leah Fowler and Anthony Sampson.

¹ 597 U.S. 215, 232 (2022).

² *Id.* at 232 (“It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.”).

³ *Id.* at 239.

⁴ *Id.* at 289.

⁵ Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It*, 134 YALE L.J. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4761751.

⁶ *Ballot Tracker: Status of Abortion-Related State Constitutional Amendment Measures for the 2024 Election*, KFF, <https://www.kff.org/womens-health-policy/dashboard/ballot-tracker-status-of-abortion-related-state-constitutional-amendment-measures/> [<https://perma.cc/WW6H-QARB>] (last updated Aug. 23, 2024).

candidate who has campaigned on expanding abortion rights,⁷ and Donald Trump, a candidate who is likely to restrict those rights.⁸ Voters will also decide whether to elect politicians down the ballot who support or who oppose abortion access. No doubt, many voters will be unable to express their views on abortion due to active voter suppression efforts.⁹ Among these are efforts by conservative politicians to ensure that abortion-protective measures never make it to the ballot at all.¹⁰ Where these efforts fail, however, voters will have many opportunities to express their views on how

⁷ Kamala “Harris supports legislation that would protect the right to abortion nationally, as *Roe v. Wade* did before it was overturned in 2022, in *Dobbs v. Jackson Women’s Health Organization*.” Maggie Astor, *Where Kamala Harris Stands on the Issues: Abortion, Immigration and More*, N.Y. TIMES, <https://www.nytimes.com/2024/07/21/us/politics/kamala-harris-abortion-immigration-economy-israel.html> (last updated Sept. 13, 2024).

⁸ Donald Trump has repeatedly obfuscated his views on abortion, variously claiming credit for overturning *Roe*, refusing to state whether he would sign a federal abortion ban, and urging that his administration would be “great for women and their reproductive rights.” Sareen Habeshian, *Trump Praises Overturning Roe v. Wade*, AXIOS (Sept. 10, 2024), <https://axios.com/2024/09/11/trump-abortion-harris-debate-roe-v-wade> (noting during presidential debate, Donald Trump both took credit for overturning *Roe* and also equivocated on whether he would sign or veto federal abortion ban); Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (Aug. 23, 2024, 11:39 AM), <https://truthsocial.com/@realDonaldTrump/posts/113012083325505976> (“My Administration will be great for women and their reproductive rights.”). Donald Trump, however, has a proven track record of limiting abortion rights and his administration would almost certainly restrict abortion access. Andrew Seger & Phil Mattingly, *Trump Walks Fine Line on Abortion, But Allies and Activists Have Big Plans for a Second Term*, CNN (June 14, 2024, 5:00 AM), <https://www.cnn.com/2024/06/14/politics/abortion-agenda-donald-trump/index.html> [<https://perma.cc/5V3S-XJN7>] (highlighting evidence that Donald Trump will continue to enact policy preferences of antiabortion groups).

⁹ See *Voting Laws Roundup: May 2024*, BRENNAN CTR. FOR JUST. (May 17, 2024), <https://brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2024> [<https://perma.cc/2VD2-67PR>] (“Voters in almost half the country will face new voting restrictions in the upcoming general election.”).

¹⁰ These efforts succeeded in Arkansas, where the state Supreme Court upheld the Secretary of State’s decision to use a highly dubious technicality to disqualify an otherwise valid citizen-initiated ballot measure. Emily Cochrane, *Arkansas Supreme Court Denies Bid to Get Abortion Measure on the Ballot*, N.Y. TIMES (Aug. 22, 2024), <https://www.nytimes.com/2024/08/22/us/politics/arkansas-abortion-amendment.html>. Other conservative lawmakers have engaged in similar antics throughout the country. See, e.g., Rachel Tucker, *DeSantis: Florida Abortion Rights Amendment “Built on Fraud,”* WFLA, <https://www.wfla.com/news/florida/desantis-florida-abortion-rights-amendment-built-on-fraud/> (describing the Florida governor’s ongoing and unsuccessful attempts to remove Florida’s abortion measure from the ballot and use government resources to campaign against it) (last updated Sept. 16, 2024, 2:54 PM).

abortion should be regulated. If public opinion polls are any measure, at least some of these voters will choose to expand abortion access.¹¹

If voters do protect abortion, *Dobbs*'s professed commitment to democracy will be put to the test. *Comstockery* illustrates how. In *Comstockery*, Professors Siegel and Ziegler trace how antiabortion activists have increasingly embraced a strategy to limit abortion access that disregards the views of the electorate.¹² Rather than attempt to enact abortion restrictions in the legislature, these activists have turned to courts to do their dirty work for them. They argue that judges should interpret the Comstock Act, an 1873 anti-vice statute, as a ready-made nationwide abortion ban.¹³ No matter that the anti-vice crusaders behind this law were more concerned with confiscating sex toys¹⁴ than with protecting potential life.¹⁵ No matter that a broad reading of the Comstock Act is inconsistent with history and precedent.¹⁶ These antiabortion activists hope that courts will take their side anyway. They hope, in short, that judges will decide that today's voters are not allowed to protect abortion because—surprise!—nineteenth-century voters already banned it.

If courts adopt this extreme interpretation of the Comstock Act, they will bulldoze the will of millions of voters. This vision of the Comstock Act would, as Professors Siegel and Ziegler emphasize, impose a nationwide abortion ban that the antiabortion movement “cannot persuade the nation to enact.”¹⁷ But the story is worse than this. Voters have not simply declined to enact a nationwide abortion ban. Millions of voters have affirmatively passed laws to protect abortion access. In the wake of *Dobbs*, voters in red and blue states alike have passed ballot measures enshrining rights to reproductive freedom in their constitutions.¹⁸ In the upcoming election, more will likely join them. Beyond these ballot measures, states throughout the country have

¹¹ Sixty-three percent of Americans say abortion should be legal in all or most cases. *Public Opinion on Abortion*, PEW RSCH. CTR. (May 13, 2024), <https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/> [<https://perma.cc/6K8M-DE2K>].

¹² Siegel & Ziegler, *supra* note 5.

¹³ *Id.* at 75-76.

¹⁴ *Id.* at 22 (“Comstock kept detailed lists of the items he confiscated, including ‘articles made of rubber for immoral purposes,’ such as dildos . . .”).

¹⁵ *Id.* at 16-17 (explaining that the anti-vice movement from which the Comstock Act emerged was more focused on “illicit sex” than “unborn life”).

¹⁶ *Id.* at 84-85.

¹⁷ *Id.* at 14.

¹⁸ Mabel Felix, Laurie Sobel, & Alina Salganicoff, *Addressing Abortion Access through State Ballot Initiatives*, KFF, <https://www.kff.org/womens-health-policy/issue-brief/addressing-abortion-access-through-state-ballot-initiatives/> [<https://perma.cc/4C72-BY8K>] (last updated Feb. 9, 2024).

enacted affirmative statutory protections for reproductive rights.¹⁹ The absolutist interpretation of the Comstock Act that antiabortion advocates propose would even wipe out the minimal—and unworkable—exceptions that the reddest states have included in their abortion bans.²⁰

Interpreting the Comstock Act to invalidate the will of the people in this manner would not, as courts might try to assert, be democratic. Yes, the Comstock Act is a statute that voters enacted 150 years ago. But there are two serious problems with the notion that using this statute to invalidate modern abortion-protective policies would reflect democratic will. First, the Comstock Act, enacted in 1873, suffers from serious democratic defects as compared to contemporary abortion-protective legislation. In 1873, unlike today, women were formally prohibited from voting, and men of color lacked meaningful access to the ballot.²¹ While contemporary democracy remains imperfect, abortion-protective legislation today far better reflects the will of the people than an anti-vice law from 1873. Setting these democratic defects aside, Professors Siegel and Ziegler identify a second problem with the idea that it would be democratic to apply the Comstock Act as an abortion ban. This problem is that the Comstock Act was not written as an abortion ban, was not intended to be an abortion ban, and was never interpreted as an abortion ban.²² Interpreting the Comstock Act to enact an abortion ban thus would not even reflect the will of the electorate of 1873. It would, instead, reflect the will of judges.

Applying the Comstock Act as a national abortion ban would, in sum, eliminate the popular control over abortion policy that *Dobbs* professed to give. It would, in turn, empower judges in the manner that *Dobbs* professed to condemn. This power shift from the people to unelected judges would not represent some coherent vision of judicial review. It would not, for example, correct for democratic process defects as Professors Siegel and Ziegler argue that courts did when they intervened to narrow the Comstock Act in the

¹⁹ In 2022, for example, Colorado enacted a statutory protection for abortion as a fundamental right. COLO. REV. STAT. §§ 25-6-401–406 (2024). And, in 2023, Colorado enacted a comprehensive shield law to protect abortion providers in the state from outside prosecution. *Id.* § 12-30-121. Other states have similarly passed statutes to protect abortion access since *Dobbs* and before it. *After Roe Fell: Abortion Laws by State*, CTR. FOR REPRODUCTIVE RTS., <https://reproductiverights.org/maps/abortion-laws-by-state/> [https://perma.cc/A856-ED37] (last visited Oct. 21, 2024) (listing abortion policies by state).

²⁰ Texas, for example, contains statutory exemptions for the life and health of the pregnant person, TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2023), and expressly allows abortions in the case of some conditions, including ectopic pregnancy, *Id.* § 245.002.

²¹ Siegel & Ziegler, *supra* note 5, at 93.

²² *See id.* at 14–59.

1930s.²³ Judicial enforcement of Comstock as a nationwide abortion ban would instead represent modern judges substituting their “own ardent views about the liberty that Americans should enjoy” for the will of the people.²⁴ This would reveal *Dobbs*’s purported commitment to democracy to be hollow: voters can control abortion policy, but only if they choose to restrict abortion. It would suggest, moreover, that *Dobbs* was not about democracy at all, but instead about imposing judicial value judgments about liberty and equality that a majority of Americans disagree with.²⁵

Voters are not powerless to combat this judicial power grab. Voters may, for example, choose to vote against politicians who would accelerate attempts to enforce the Comstock Act as a nationwide abortion ban. While Donald Trump has equivocated on this issue, a high-profile Republican presidential transition plan called Project 2025 calls for enforcing the Comstock Act as a nationwide abortion ban.²⁶ Vice Presidential candidate J.D. Vance, along with forty other Republican lawmakers, have publicly endorsed this plan.²⁷ Voters may similarly vote for candidates down the ballot who have voiced full-throated support for expanding protections for abortion rather than candidates who promise to limit abortion or vacillate on the matter because they understand their real views to be politically unpopular.

Voters, however, likely need to be more creative than simply opposing politicians who would revive and reinvent the Comstock Act to ban abortion. Antiabortion advocates favor banning abortion through the Comstock Act precisely because it allows them to ignore what citizens do in the voting booth. They hope that, when voters disagree with them, they can run to the courts to impose their policy preferences. In order to fight this looming threat, voters thus must turn their eyes to the courts themselves. Voters should consider the means at their disposal to limit the power of courts to displace their views on abortion and other issues that matter to them. This includes, among other things, supporting politicians who favor court reform and organizing for these reforms themselves.

²³ *Id.* at 65-67 (arguing that “when legislatures persist in acting in evidently counter-majoritarian ways, judges may prove more democratically responsive than the political branches,” and suggesting that Judge Hand’s refusal to convict two challengers of obscenity laws represented this phenomenon).

²⁴ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 216 (2022).

²⁵ See generally Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728 (2024) (arguing that *Dobbs* does not plausibly rest on principles of democracy and is instead better understood as part of broader political movement to limit abortion access notwithstanding views of the polity).

²⁶ PROJECT 2025, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 459, 562 (2023), https://static.project2025.org/2025_MandateForLeadership_FULL.pdf.

²⁷ Julianne McShane, *J.D. Vance Supported Using the Comstock Act to Criminalize “Mail-Order Abortions,”* MOTHER JONES (July 18, 2024), <https://www.motherjones.com/politics/2024/07/jd-vance-comstock-act-mail-abortion-mifepristone-ban/> [<https://perma.cc/4V67-D4AU>].

If courts rob voters of the power to protect abortion, voters can and should wrest that power back.