Voters Backed Abortion Rights but State Judges Have Final Say

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In November, Montana voters safeguarded the right to abortion in the state's constitution. They also elected a new chief justice to the Montana Supreme Court who was endorsed by anti-abortion advocates.

That seeming contradiction is slated to come to a head this year. People on polar sides of the abortion debate are preparing to fight over how far the protection for abortion extends, and the final say will likely come from the seven-person state Supreme Court. With the arrival of new Chief Justice Cory Swanson, who ran as a judicial conservative for the nonpartisan seat and was sworn in January 6, the court now leans more conservative than before the election.

A similar dynamic is at play elsewhere. Abortion rights supporters prevailed on ballot measures in seven of the 10 states where abortion was up for a vote in November. But even with new voter-approved constitutional protections, courts will have to untangle a web of existing state laws on abortion and square them with any new ones legislators approve. The new makeup of supreme courts in several states indicates that the results of the legal fights to come aren't clear-cut.

Activists have been working to reshape high courts, which in recent years have become the final arbiters of a patchwork of laws regulating abortions. That's because the 2022 U.S. Supreme Court's decision in Dobbs v. Jackson Women's Health Organization overturned federal abortion protections, leaving rulemaking to the states.

Since then, the politics of state supreme court elections have been "supercharged" as fights around abortion shifted to states' top courts, according to Douglas Keith, a senior counsel at the nonpartisan Brennan Center for Justice.

"Because we're human, you can't scrub these races of any political connotations at all," said former Montana Supreme Court Justice Jim Nelson. "But it's getting worse."

The wave of abortion litigation in state courts has spawned some of the most expensive state supreme court races in history, including more than $42 million spent on the nonpartisan 2023

Supreme Court race in Wisconsin, where abortion access was among the issues facing the court. Janet Protasiewicz won the seat, flipping the balance of the court to a liberal majority.

In many states, judicial elections are nonpartisan but political parties and ideological groups still lobby for candidates. In 2024, abortion surfaced as a top issue in these races.

In Michigan, spending by non-candidate groups alone topped $7.6 million for the two open seats on the state Supreme Court. The Michigan races are officially labeled as nonpartisan, although candidates are nominated by political parties.

An ad for the two candidates backed by Democrats cautioned that "the Michigan state Supreme Court can still take abortion rights away" even after voters added abortion protections to the state constitution in 2022. The ad continued, "Kyra Harris Bolden and Kimberly Thomas are the only Supreme Court candidates who will protect access to abortion." Both won their races.

Abortion opponent Kelsey Pritchard, director of state public affairs for Susan B. Anthony Pro-Life America, decried the influence of abortion politics on state court elections. "Pro-abortion activists know they cannot win through the legislatures, so they have turned to state courts to override state laws," Pritchard said.

Some abortion opponents now support changes to the way state supreme courts are selected.

In Missouri, where voters passed a constitutional amendment in November to protect abortion access, the new leader of the state Senate, Cindy O'Laughlin, a Republican, has proposed switching to nonpartisan elections from the state's current model, in which the governor appoints a judge from a list of three finalists selected by a nonpartisan commission.

Although Republicans have held the governor's mansion since 2017, she pointed to the Missouri Supreme Court's 4-3 ruling in September that allowed the abortion amendment to remain on the ballot and said courts "have undermined legislative efforts to protect life."

In a case widely expected to reach the Missouri Supreme Court, the state's Planned Parenthood clinics are trying to use the passage of the new amendment to strike down Missouri's abortion restrictions, including a near-total ban. O'Laughlin said her proposal, which would need approval from the legislature and voters, was unlikely to influence that current litigation but would affect future cases.

"A judiciary accountable to the people would provide a fairer venue for addressing legal challenges to pro-life laws," she said.

Nonpartisan judicial elections can buck broader electoral trends. In Michigan, for example, voters elected both Supreme Court candidates nominated by Democrats last year even as Donald Trump won the state and Republicans regained control of the state House.

In Kentucky's nonpartisan race, Judge Pamela Goodwine, who was endorsed by Democratic Gov.

Andy Beshear, outperformed her opponent even in counties that went for Trump, who won the state. She'll be serving on the bench as a woman's challenge to the state's two abortion bans makes its way through state courts.

Partisan judicial elections, however, tend to track with other partisan election results, according to Keith of the Brennan Center. So some state legislatures have sought to turn nonpartisan state supreme court elections into fully partisan affairs.

In Ohio, Republicans have won every state Supreme Court seat since lawmakers passed a bill in 2021 requiring party affiliation to appear on the ballot for those races. That includes three seats up for grabs in November that solidified the Republican majority on the court from 4-3 to 6-1.

"These justices who got elected in 2024 have been pretty open about being anti-abortion," said Jessie Hill, an attorney with the American Civil Liberties Union of Ohio, who has been litigating a challenge to Ohio's abortion restrictions since voters added protections to the state constitution in 2023.

Until the recent ballot measure vote in Montana, the only obstacle blocking Republican-passed abortion restrictions from taking effect had been a 25-year-old decision that determined Montana's right to privacy extends to abortion.

Nelson, the former justice who was the lead author of the decision, said the court has since gradually leaned more conservative. He noted the state's other incoming justice, Katherine Bidegaray, was backed by abortion rights advocates.

"The dynamic of the court is going to change," Nelson said after the election. "But the chief justice has one vote, just like everybody else."

Swanson, Montana's new chief justice, had said throughout his campaign that he'll make decisions case by case. He also rebuked his opponent, Jerry Lynch, for saying he'd respect the court's ruling that protected abortion. Swanson called such statements a signal to liberal groups.

At least eight cases are pending in Montana courts challenging state laws to restrict abortion access. Martha Fuller, president and CEO of Planned Parenthood Advocates of Montana, said that the new constitutional language, which takes effect in July, could further strengthen those cases but that the court's election outcome leaves room for uncertainty.

The state's two outgoing justices had past ties to the Democratic Party. Fuller said they also consistently supported abortion as a right to privacy. "One of those folks is replaced by somebody who we don't know will uphold that," she said. "There will be this period where we're trying to see where the different justices fall on these issues."

Those cases likely won't end the abortion debate in Montana.

As of the legislative session's start in early January, Republican lawmakers, who have for years called the state Supreme Court liberal, had already proposed eight bills regarding abortion and

dozens of others aimed at reshaping judicial power. Among them is a bill to make judicial elections partisan.

Montana Sen. Daniel Emrich, a Republican who requested a bill titled "Prohibit dismembering of person and provide definition of human," said it's too early to know which restrictions anti-abortion lawmakers will push hardest.

Ultimately, he said, any new proposed restrictions and the implications of the constitutional amendment will likely land in front of the state Supreme Court.

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