



Protect Abortion Care

Create a Constitutional Amendment

"Abortion is health care. Abortion is freedom. Abortion is bodily autonomy. A country without this human right is not a free country." - H.R. Bellicosa

Overview

The right to bodily autonomy was protected by the case of *Roe v. Wade* in 1973 but has recently been seriously curtailed by the United States Supreme Court. This leaves people who can get pregnant in a vulnerable state where they do not have access to the health care service of abortion. It is imperative for the state of Delaware to establish a constitutional amendment to protect abortion care within the state. Acts such as Senate Bill 343 of the 151st General Assembly would protect the right to personal reproductive liberty which would fortify the right to abortion. Having the right to make decisions about one's own body is a right that should not be taken away by anyone or any governing system. Through policy action, the right to bodily autonomy can be secured by amending the state's constitution.

Problem

On June 24, 2022, the United States Supreme Court overturned *Roe v. Wade*. Prior to that decision, access to an abortion was a federal right in the United States. The decision to overturn this precedent dismantled years of legal protection over bodily autonomy and now gives way for individual states to determine their own laws and regulations regarding abortions. In response to this Supreme Court decision several states have enacted trigger laws. As of May 2, 2023 abortion is illegal in Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, South Dakota, Oklahoma, Tennessee, Texas, Wisconsin, and West Virginia¹. Pregnant people in these states have had their bodily autonomy taken away, and would now

¹ "Where is Abortion Illegal? | Abortion Limits by State." Planned Parenthood Action Fund, <https://www.plannedparenthoodaction.org/abortion-access-tool/US>. Accessed 9 May 2023.

have to leave the state to receive health care.² Nearly one in four women in the United States will have an abortion by age 25.³ Therefore, this change will lead to unsafe abortions and forced birth in restricted states. Despite *Roe v. Wade* being codified in Delaware, it is not enough to rely on for the protection of bodily autonomy. Thus, it is imperative that the state of Delaware enacts an amendment in the state's constitution to protect abortion care.

Policy Solutions

- Upholding the Preamble and § 21 of the Delaware Constitution.
§ 21 of the Delaware Constitution states that “Equality of rights under the law shall not be denied or abridged on account of race, color, national origin, or sex.”⁴ The Preamble of the Delaware Constitution states: “Through Divine goodness, all people have by nature the rights of worshiping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and in general of obtaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for due exercise thereof, power is inherent in them; and therefore all just authority in the institutions of political society is derived from the people, and established with their consent, to advance their happiness; and they may for this end, as circumstances require, from time to time.” Accordingly, these sections of the Constitution imply that reproductive liberty should be a protected right and have benefits bestowed by the government. Upholding this right in the Constitution is critical to vindicate equal protection and treatment under the law. In order to enact the first leg of the amendment to Delaware's Constitution, there will need to be an affirmative majority of $\frac{2}{3}$ of the members who have been elected to each house of the General Assembly.
- The state of Massachusetts has recognized the right to abortion under their Constitution. Section 12 of the Massachusetts General Law was amended by St.2020, c.263, and became effective on December 29,2020. This amendment states “A physician, physician assistant, nurse practitioner or nurse midwife may perform an abortion consistent with the scope of their practice and license if, in their best medical judgment, the pregnancy has existed for less than 24 weeks.”⁵ In addition, c.112 § 12N was added, which allows for an abortion to be performed after 24 weeks under certain circumstances.⁶
- Oregon Law ORS 569.880 provides statutory protection for abortion.⁷ In addition, on November 8, 2022 Article I of the Oregon Constitution was amended by adding section 46 which states “Equality of rights under the law shall not be denied or abridged by the

² Yakupitiyage, Tharanga. “Abortion “Trigger Bans” Take Effect in Three States Tomorrow.” *Center for Reproductive Rights*, 24 August 2022, <https://reproductiverights.org/abortion-trigger-bans-take-effect-in-three-states-tomorrow/>. Accessed 21 March 2023.

³ Wind, Rebecca. “Abortion Is a Common Experience for U.S. Women, Despite Dramatic Declines in Rates.” *Guttmacher Institute*, 19 October 2017, <https://www.guttmacher.org/news-release/2017/abortion-common-experience-us-women-despite-dramatic-declines-rates>. Accessed 21 March 2023.

⁴ Delaware General Assembly. “Bill Detail - Delaware General Assembly.” *Bill Detail - Delaware General Assembly*, 29 June 2022, <https://legis.delaware.gov/BillDetail?LegislationId=129867>. Accessed 21 March 2023.

⁵ Commonwealth of Massachusetts. “Mass. General Laws c.112 § 12M.” *Mass.gov*, 31 December 2020, <https://www.mass.gov/info-details/mass-general-laws-c112-ss-12m>. Accessed 21 March 2023.

⁶ Commonwealth of Massachusetts. “Mass. General Laws c.112 § 12N.” *Mass.gov*, 29 July 2022, <https://www.mass.gov/info-details/mass-general-laws-c112-ss-12n>. Accessed 21 March 2023.

⁷ “ORS 659.880 - Prohibitions relating to termination of patient's pregnancy.” *OregonLaws*, https://oregon.public.law/statutes/ors_659.880. Accessed 21 March 2023.

State of Oregon or by any political subdivision in this state on account of sex, The Legislative Assembly shall have the power to enforce, by appropriate legislation, the provisions of this section. Nothing in this section shall diminish a right otherwise available to persons under section 20 of this Article or any other provision of this Constitution”.⁸ This amendment had been interpreted to keep abortion rights legal in the state, and to protect abortion care despite gestational age.

Potential Objections

Conscientious objection is the refusal to perform certain practices to patients based on reasons of morality or conscience.⁹ This right is protected under the right to freedom of thought, conscience, and religion contained in Article 18 of the International Covenant on Civil and Political Rights.¹⁰ This right has been used by health care professionals to refuse abortion services even in states where abortion health care is legal. Thus it can obstruct access, and in some contexts, seriously limit the availability of abortion services. Currently, the international human rights approach to this issue is to mandate these health care professionals to refer patients to a participating clinic. In states that permit conscientious objections, the UN treaty monitoring bodies require that they implement an effective framework that guarantees that the refusal of abortion health care will not hinder a birthing person's access to care.

Religious and political beliefs may play a role in the objection of establishing a constitutional amendment to protect abortion care. One's beliefs may influence their opinion on abortion access, as they may hold the expectations of their political party or religious affiliation. For example, as of 2022, 80% of Democrats believe abortion should be legal in all or most cases, whereas 60% of Republicans say abortions should be illegal in all or most cases.¹¹ Moreover, 84% of religiously unaffiliated Americans say abortion should be legal in all or most cases, but three quarters of White evangelical protestants believe abortion care should be illegal in all or most cases. As such, someone's beliefs and affiliations may affect their willingness to allow others to have autonomy over their own bodies which may make amending the Delaware Constitution to allow all people to have access to abortion care more difficult.

Resources for More Information

Additional Resources

- <https://legis.delaware.gov/BillDetail?LegislationId=129867>
- <https://www.guttmacher.org/news-release/2017/abortion-common-experience-us-women-despite-dramatic-declines-rates>
- <https://reproductiverights.org/maps/abortion-laws-by-state/>
- <https://www.abortionfinder.org/abortion-guides-by-state/abortion-in-delaware>

⁸ Oregon State Legislature. “Bills and Laws OrConst.” *Oregon State Legislature*, https://www.oregonlegislature.gov/bills_laws/Pages/OrConst.aspx. Accessed 21 March 2023.

⁹ Shanawani, Hasan. “The Challenges of Conscientious Objection in Health care.” *PubMed*, 2016, <https://pubmed.ncbi.nlm.nih.gov/26923838/>. Accessed 21 March 2023.

¹⁰ Tongue, Zoe L. “On conscientious objection to abortion: Questioning mandatory referral as compromise in the international human rights framework.” *Medical Law International*, 2022, <https://journals.sagepub.com/doi/10.1177/09685332221119503>. Accessed 21 March 2023.

¹¹ Pew Research Center. “Public Opinion on Abortion.” *Pew Research Center*, 17 May 2022, <https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/>. Accessed 21 March 2023.

Potential Barriers and Unintended Consequences

Potential Barriers

Article XVI of the Delaware Constitution defines the path by which it can be amended. One path is through the Delaware General Assembly without the vote of the people.¹² Two-thirds of the elected members in each chamber can vote in favor of a proposed amendment. Next, the Delaware secretary of state must publish the proposed amendment three months prior to the next general election as well in at least three newspapers in each county. Moving forward, the subsequent General Assembly votes again on the proposed amendment, and if the amendment receives two-thirds majority approval of the members in each chamber, the amendment becomes part of the state Constitution.

On the other hand, the Constitution can be amended through a constitutional convention. On a statewide ballot if two-thirds of both chambers agree then the question "Shall there be a Convention to revise the Constitution and amend the same?" will be applied to the ballot.¹³ If a majority of those who vote answer yes, then there is a convention to amend the Constitution. Nonetheless, not allowing citizen initiative for initiated constitutional amendments may be a potential barrier for passing this legislation.

Delaware does not feature the power of citizen initiative for initiated constitutional amendments. Therefore, unlike any other state, the state legislature can amend the constitution without the public vote, which gives a few people enormous power to impact the public and their access to health care.

Unintended Consequences

Currently there are no federal laws that provide a right to paid family and medical leave. However, there have been proposals to ensure this right, and eleven states have passed paid family and medical leave laws.¹⁴ Nonetheless, this puts those who do not receive paid family and medical leave at a disadvantage during pregnancy and childcare. More conservative states that currently ban abortion also do not have legislation in place to provide financial support to those who are not given the option for an abortion. Henceforth, this injustice furthers the impact that banning abortion has on people who can get pregnant.

For those who are residents of states where abortion is illegal, those who seek abortion care and those who support them could be at risk for prosecution by going to legalized states to receive care. There is a risk that prosecutors will go after people involved in the process of having an abortion out of state. While there are currently no states that ban the attempt to prosecute women who cross state lines to seek an abortion, both Texas and Oklahoma recently passed abortion bans that allowed private citizens to sue those who perform abortion or

¹² Delaware General Assembly. "ARTICLE. XVI AMENDMENTS AND CONVENTIONS." *Delaware Code*, <https://delcode.delaware.gov/constitution/constitution-17.html>. Accessed 21 March 2023.

¹³ Ballotpedia. "Amending state constitutions." *Ballotpedia*, https://ballotpedia.org/Amending_state_constitutions. Accessed 21 March 2023.

¹⁴ Williamson, Molly. "The State of Paid Family and Medical Leave in the U.S. in 2023." Center for American Progress, 5 January 2023, <https://www.americanprogress.org/article/the-state-of-paid-family-and-medical-leave-in-the-u-s-in-2023/>. Accessed 22 March 2023.

otherwise assist someone in getting one.¹⁵ In addition, anti-abortion lawmakers have been working on legislation that would ban people from crossing state lines to receive abortions in legalized states. These bills could be proposed before state legislatures reconvene for their regular 2023 legislative sessions.¹⁶ Establishing bills such as these into law would harm all people in states where abortion has been banned.

¹⁵ Sasani, Ava. "Can Women Be Banned From Traveling to Other States to Get Abortion Access?" The New York Times, 27 June 2022, <https://www.nytimes.com/2022/06/24/us/abortion-travel-bans.html>. Accessed 22 March 2023.

¹⁶ Kitchener, Caroline, and Devlin Barrett. "Anti Abortion lawmakers want to block patients from crossing state lines." The Washington Post, 29 June 2022, <https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/>. Accessed 22 March 2023.