# Protecting Abortion with State Health Care Freedom of Choice

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**Abstract**: This essay examines the right of health care freedom of choice contained in some state constitutions. It explores how courts have, and could, use this constitutional health care right as a basis for recognizing or reinforcing a fundamental right to choose an abortion.

With the Supreme Court overturning the fifty-year federal constitutional right to abortion recognized in *Roe v. Wade* and reaffirmed in *Planned Parenthood v. Casey*, the question returns to state courts and legislatures. One potential avenue for future protection lies in state constitutional provisions. These issues are being litigated in court, and activists in several states have successfully put express constitutional amendments for abortion on the ballot.[1] Concurrently with the previously-recognized federal right, fourteen states had recognized a right to abortion under state constitutional guarantees of equal protection, liberty, autonomy, and/or privacy.[2] Post-*Dobbs*, there is renewed interest in utilizing these potential foundations for the abortion right under state-specific guarantees.[3]

One possible avenue for recognizing a state constitutional right to choose an abortion may be found in rights to health care. Four states have express constitutional guarantees of freedom of choice in health care, and three states have recently proposed such amendments.[4] Four other states have statutory provisions of health care freedom expressing policy that could be used to interpret constitutional rights of liberty to protect abortion.[5] Courts in Ohio, Wyoming, and Montana have applied their health care freedom amendments to protect the liberty interest in choosing an abortion.[6] These cases offer an example of how to protect abortion as a health care right.

## The Origins of Health Care Freedom

Many of these "Health Care Freedom Acts" originated as grassroots initiatives protesting the federal Patient Protection and Affordable Care Act ("ACA") and its insurance mandate.[7] These were intended mainly as symbolic libertarian protests of federalized health care, as state laws would be preempted by federal law.[8]

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Eighteen states passed laws to prohibit restrictions on the choice of insurance or payment for health care.[9] The language varies, but the core provision is the same: "no governmental entity shall coerce, directly or indirectly, any individual to participate in a healthcare system, nor interfere with an individual's freedom to directly purchase lawful medical services."[10]

The health care freedom acts and amendments emanated from the larger grassroots movement for "health freedom." Health freedom has historically meant safe harbor laws for practitioners and an individual right of patients to choose alternative healers who are not part of the conventional medical community, for example, choosing vitamin based treatments rather than chemotherapy for cancer.[11] More philosophically, health freedom has meant "the expectation of individuals to have the right of self-determination, that is, to have a say in what they experience with their bodies" and "the fundamental and inalienable right to make their own health care decisions."[12]

This broader meaning of the right to health care freedom was adopted by Montana in interpreting its constitution to protect abortion. In 1972, Montana adopted a health care freedom amendment guaranteeing the right to seek "safety, health and happiness."[13] In 1999, the Montana Supreme Court applied the amendment to abortion, defining this health freedom in *Armstrong v. State* as "the right to seek and obtain medical care from a chosen health care provider and to make personal judgments affecting one's own health and bodily integrity without government interference."[14] The court emphasized: "Unless fundamental constitutional rights—procreative autonomy being the present example—are grounded in something more substantial than the prevailing political winds, Huxley's *Brave New World* or Orwell's *1984* will always be as close as the next election."[15] "Fortunately," the court held, "the roots of Montana's constitutional right of procreative autonomy go much deeper and are firmly embedded in the right of individual privacy."[16] While the Montana Legislature has proposed a new law to exempt abortion from the constitutional definition of privacy, the state's longstanding constitutional right of health freedom, reaffirmed for abortion post-*Dobbs*, should block this partisan attempt and provide a model for other states to protect abortion as health care freedom.[17]

## State Incubators of Health Freedom for Abortion

Post-*Dobbs*, two state courts, Ohio and Wyoming, have protected access to abortion under health care freedom. Ohio's Health Care Freedom Amendment (HCFA) is particularly broad, expressly protecting the choice of health care separate from insurance.[18] Passed by a wide margin of 67% of the vote, the popular initiative of libertarian groups was enacted as a constitutional amendment for "Freedom of Choice in Health Care" to "preserve the liberty and dignity" of state citizens.[19] Only a few cases have been brought under the HCFA, including challenges to COVID mandates and an order requiring Amish parents to treat their child with chemotherapy.[20]

Pro-choice groups employed the Ohio HCFA to challenge Ohio's six-week abortion ban within hours of the Supreme Court's decision in *Dobbs*. The Ohio Heartbeat Act passed in 2019 bans abortion after a "fetal heartbeat" is identified at about six weeks, with exceptions to prevent the death of the pregnant woman or for "serious risk of substantial and irreversible impairment of bodily function of the mother."[21] It had been stayed indefinitely by a federal court as an unconstitutional undue burden in violation of U.S. Supreme Court precedent.[22] When that precedent was overruled in *Dobbs*, the injunction was lifted.[23]

In a subsequent state case, *Preterm-Cleveland v. Yost*, the trial court granted a temporary and then preliminary injunction on grounds that the Ohio Constitution's Substantive Due Process Clause and the HCFA expressly guaranteed the fundamental right to abortion.[24] The court found it "obvious" that the "Ohio Constitution is a document of independent force," and "Ohio courts interpret the constitution more broadly than its federal counterpart."[25] It added: "In light of the broad scope of 'liberty' as used in the Ohio Constitution, it would seem almost axiomatic that the right of a woman to choose whether to bear a child is a liberty within the constitutional protection. This necessarily includes the right of a woman to choose to have an abortion."[26] "No great stretch," the court held, "is required to find that Ohio law recognizes a fundamental right to privacy, procreation, bodily integrity and freedom of choice in health care decision making."[27] In granting a temporary injunction, the court relied heavily on the express health care amendment to reinforce constitutional meanings of liberty. The court found that the HCFA was "simple and clear" and represented "an express constitutional acknowledgement of the fundamental nature of the right to freedom and privacy in health care decision making."[28] The court dismissed arguments by the government that the HCFA was intended only to undermine the federal insurance mandate, finding "[t]his misses the point" as to the import of a constitutional amendment of a fundamental right.[29]



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At the preliminary injunction phase, the trial court relied less directly on the health care amendment, using it synergistically to find that the HCFA "bolsters" and "reinforces" the due process rights of liberty and bodily autonomy.[30] Finding abortion to be a fundamental right, the court applied strict scrutiny and held that there is no compelling interest in potential life at six weeks nor in an absolute interest in the fetus to the exclusion of the pregnant person.[31] It found many other less restrictive alternatives including comprehensive sex education and expanding access to contraception.[32] The State's appeal of the preliminary injunction was denied by the appellate court as premature, but the Ohio Supreme Court agreed to hear the appeal as to the procedural issue of whether the injunction could be appealed.[33] A constitutional amendment protecting choice is on the November 2023 ballot. However, the state legislature added a special election for August to amend the constitution to change the threshold from passing initiatives for amendments from fifty to a supermajority of sixty percent—which failed—and then the secretary of state rewrote the proposed amendment language for the ballot, which was upheld by the Ohio Supreme Court.[34]

Similarly post-*Dobbs*, a Wyoming trial court in *Johnson v. Wyoming* dismissed arguments that the state's health freedom applied only to insurance, and agreed that it protected the right to abortion.[35] Like Ohio, Wyoming adopted its HCFA by referendum in response to the ACA.[36] Wyoming enacted a trigger law in anticipation of the overturning of *Roe* to completely ban all abortions except for risk of death or serious permanent impairment of the woman.[37] The Wyoming Constitution expressly provides that "[e]ach competent person shall have the right to make his or her own health care decisions," with a separate more specific section focused on insurance.[38] Defendants argued that the right of health care access was "really just an amendment conferring Wyoming residents with the right to purchase and pay for health care services," and was "only adopted to push back on the Affordable Care Act."[39] The court rejected this interpretation and found that the plain language of the constitution clearly protects the fundamental right to abortion, finding that it "unambiguously is a health care decision."[40]

That right, however, is not absolute as "reasonable and necessary" restrictions are permitted. The Wyoming court evaluated the state's reasons under both strict scrutiny and rational basis. It found there was a compelling interest in potential life.[41] However, that interest was not served by the least restrictive means nor was it rational to deny abortions in cases like genetic defects or other risks to the fetus.[42] The trial court subsequently enjoined a new abortion ban passed by the Wyoming legislature in contravention of the decision recognizing a fundamental right to abortion.[43]

Laws enacted to ensure the right to choose health care can be used to assert a right to abortion whether expressly or to reinforce claims to liberty and bodily autonomy. These arguments could be of use, for example, in states like Oklahoma, where a court could rely on its state constitutional guarantee of freedom of health care to bolster claims to fundamental rights of bodily integrity under due process. In this way, state laws to protect health freedom and medical autonomy can be extended to abortion.

## Abortion as Health Care

These courts have assumed a straightforward textual application of the term "health care" to include abortion. The Ohio court noted that abortion, "whether procedural or medication, clearly constitutes health care within the ordinary meaning of that term," as confirmed by the testimony of medical experts in the case.[44] The Wyoming court agreed, based on an "unambiguous" reading of the classic definition of health care from Black's Law Dictionary and multiple state legislative statutory definitions.[45] "Reasonable persons could consistently and predictably agree that an abortion is a procedure, usually provided by a medical professional, that impacts a woman's physical, mental, or emotional well-being."[46]

This interpretation is well grounded in the medical and legal meanings of health care. Abortion involves medicines, medical procedures, physical bodily interventions, and doctors and nurses in the delivery of services—all quintessentially health care. Among medical



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professionals, "[t]he overwhelming consensus is that abortion absolutely is health care."[47] The U.S. Supreme Court too has previously conceptualized abortion and treatment for pregnancy as health care, including in *Roe v. Wade* itself.[48]

However, this definition of abortion as health care is politically contested and enmeshed in party politics coding.[49] Progressives and pro-choice groups in recent years have shifted their messaging from "choice" to "abortion is health care."[50] Conservatives and anti-abortion groups decry this health care messaging as a misleading euphemism. They say that the definition of health care is the treatment of diseases or problems, but that pregnancy is not a disease, and that moral issues like abortion and euthanasia cannot be labeled "health care." They also contend that choosing abortion for economic or social reasons cannot be health care, as the Wyoming attorney general argued in defending recent abortion laws.[51] Pro-choice advocates were suspicious of the health care characterization because it substituted physician oversight for individual autonomy.[52] And the medical classification had been co-opted by anti-abortion activists to justify increasingly onerous physician and clinic provider restrictions.[53] Proponents, however, now understand abortion as health care as part of the broader movement of health justice and reproductive justice.[54] Global norms reinforce this understanding, as the World Health Organization defines "health" as a "state of complete physical, mental and social well-being and not merely the absence of disease or infirmity" and includes a wide range of socio-economic factors.[55] This broad meaning of health was applied by the Ohio court in *Yost* to support its recognition of a fundamental right to abortion.[56]

## Conclusion

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### Note

The author has no conflicts of interest to disclose.

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