



STATEWIDE BALLOT PROPOSAL 22-3: REPRODUCTIVE FREEDOM FOR ALL

In a Nutshell

For over 50 years, a right to abortion in the earlier stages of pregnancy was protected by the U.S. Constitution. Recently, the United States Supreme Court revoked those protections, leaving the status of abortion access in flux across the country. States are now responsible for reviving, enacting, or amending their own legislative provisions regarding abortion. In Michigan, a law originally enacted in 1846 that prohibits most abortions has remained unenforceable due to federal protection but could become active once again unless a right to abortion is found or created in the Michigan Constitution. In lieu of such a ruling, Proposal 3 is proposed as an amendment to the Michigan Constitution to establish an explicit right to “reproductive freedom,” including all matters related to pregnancy.

If Proposal 3 is Adopted, the right to reproductive health care, including access to abortion prior to the stage of viability, would be guaranteed to all individuals by the Michigan Constitution. Once established, this right would be protected from most legislative efforts to modify it.

If Proposal 3 is Rejected, decisions regarding access to abortion will revert to the state courts and legislature. Currently, Michigan law prohibits most abortions, but Michigan courts are currently addressing whether the statute violates the state constitution.

Major Issues to Consider: Proposal 3 would not only preserve the right to abortion that had been federally protected by the U.S. Constitution since 1973 – it could potentially expand access to abortion to later stages of pregnancy, lift certain restrictions that have previously been in place, and establish additional rights to a wider range of reproductive health services. While abortion legalization has been shown to have positive effects on women and society at large, the impact of this expansive of a constitutional right is unknown. The proposal’s language is broad and largely undefined, making it vulnerable to a host of legal challenges. If the proposal fails, the Michigan Supreme Court may still find a constitutional right to abortion, but that right is likely to be narrower than what the proposal offers. Without any constitutional protections, Michigan regulations on abortion would be left to the legislative process. Current Michigan abortion laws are among the strictest in the country, but its enforcement by local county prosecutors could vary widely across the state.

Introduction

Reproductive freedom can encompass a broad scope of rights that aim to foster individual autonomy regarding the decision to have a baby. While some aspects of reproductive freedom may conflict with various legal rights (e.g., freedom of religion), access to abortion continues to spark the most pas-

sionate discourse and debate. The controversy has historically centered around the competing interests of personal rights to autonomy, privacy, and bodily integrity with states’ interests in protecting potential or perceived human life. Because the issue involves a balancing of competing interests, the right to abortion

can take many forms and can follow several different regulatory pathways.

On November 8, 2022, Michigan electors will be presented with a petition initiated proposed constitutional amendment. Proposal 3 would add Section 28 to Article I of the 1963 Michigan Constitution to establish reproductive treatments or procedures related to pregnancy as fundamental rights. The ballot initiative is referred to as Reproductive Freedom For All.

Proposal 3 offers a legal framework not just for abortion, but a wide range of reproductive rights. It would establish an explicit right to abortion along with many reproductive health services that could not be restrict-

ed by statute or administrative rule. The proposed language is broad and inclusive, leaving much of the decision-making to the discretion of health professionals and the individuals seeking health care. Proponents of Proposal 3 argue that the breadth of the language is its strength – the encompassing nature of the provisions protects more people, procedures, and choices from legislative interference and allows the complexity of these decisions to be dictated by the particular facts of a given situation. Opponents stress that most, if not all, abortions should be illegal, arguing that the amendment language goes beyond the previous status quo regarding abortion, and that voters may not fully understand the potential consequences of implementing this right in this manner.

Background

Prior to the 1973 U.S. Supreme Court’s decision in *Roe v. Wade*, the seminal case establishing a federal constitutional right to abortion, most states, including Michigan, had laws that prohibited abortion to some degree. Michigan first passed a law regarding abortions in 1846 that penalized an individual that takes certain actions to procure a miscarriage, with an exception for when it is necessary to preserve the life of the woman.¹ A separate law protected the killing of an “unborn quick child.”² “Quickening” was generally defined as the first fetal movement³, demonstrating that the distinction between stages of pregnancy existed when the original statute was enacted. Because Michigan had two statutes to prohibit abortion before and after quickening, essentially all abortions in Michigan were illegal. Both statutes were recodified in 1931 and remain on the books.

A public health movement to legalize abortions emerged across the country in the 20th century, as illegal abortions created serious health complications for many women and disparate access to safe abor-

tions led to significant racial and class inequalities.⁴ Leading up to *Roe*, several states were enacting laws to legalize abortion. In 1972, a year before *Roe*, a petition-initiated statute in Michigan regarding the legalization of abortion up to 20 weeks into the pregnancy made the ballot but was not enacted into law.

In 1973, *Roe v. Wade* added to the growing constitutional framework of substantive due process, which instituted the concept of fundamental rights. The Court ruled in *Roe* that the right to privacy – an established fundamental right that was found to be “deeply rooted” in the nation’s history – encompassed the right to abortion in the first trimester, making state bans on abortion procedures in the first trimester (like Michigan’s) unconstitutional. Under *Roe*, abortions in the second trimester could be restricted if “reasonably related to maternal health,” and abortions in the third trimester could be restricted if the law allowed an exception for the life or health of the mother. States’ interest in protecting the fetus in the first trimester was not, according to the Court, a com-

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elling interest sufficient to uphold a ban.⁵ Following *Roe*, the Michigan Supreme Court found that the 1931 law criminalizing abortion was unenforceable for abortions in the first trimester of a pregnancy.⁶ The trimester framework was later replaced by the viability line, which divided the standards for abortion restrictions by fetal viability.⁷

Since the establishment of the federal constitutional right to abortion, there has been a significant effort to limit the scope of the right and, ultimately, overturn the precedent-setting decision. As part of that effort, state legislatures have tried to push back and test

the boundaries of the constitutional protections by regulating various aspects of the abortion process. In Michigan, several laws were enacted to restrict access to abortion, including laws related to informed consent, reporting and licensing restrictions, protection from coercion, parental consent, and the use of public funds. Support for these types of regulations grew as medical advancements allowed for earlier detection of pregnancy and increased likelihood of viability. In addition, the “religious right” movement, which had gained significant momentum following the passage of *Roe*, made abortion a centerpiece of its political and public policy platforms.

Definitions

Due Process Clause – Clauses in the 5th and 14th amendments of the U.S. Constitution that guarantee that no individual shall be “deprived of life, liberty, or property, without due process of the law.”

Substantive Due Process – A legal principle founded in the Due Process clauses of the 5th and 14th amendments that protects substantive rights along with procedural rights.

Fundamental (Substantive) Right – A right that has been designated as significant enough to individuals that it can only be infringed upon by the government for very limited reasons.

Strict Scrutiny – The legal standard for determining when the government can restrict a fundamental right. The standard requires that the government prove that the restriction on the fundamental right is necessary to achieve a compelling state interest, is narrowly tailored, and is the least restrictive means for accomplishing that interest.

Compelling State Interest – A state interest or objective that a court determines is important, necessary, or foundational enough to justify a restriction on an individual’s fundamental right.

Viability – The stage of pregnancy where the fetus has developed enough to survive outside of its mother’s womb.^a

^a Viability has been defined by trimesters or weeks of pregnancy, depending on the historical context. For the purposes of this report, we use the term “stages” to encompass all the ways in which pregnancy can be divided.

Proposal 3: Reproductive Freedom for All

The recent U.S. Supreme Court decision in *Dobbs v. Jackson Women’s Health Organization* upended the existing legal framework on reproductive rights. While previous courts found that the right to abortion was subsumed under the right to privacy, the *Dobbs* Court held that the right to privacy did not include the specific right to abortion.⁸ As a result, *Roe* and subsequent cases that had affirmed its conclusions were overturned and the federal constitutional right to pre-viability abortion was eliminated. Without the status of a fundamental right, states no longer need to provide a compelling state interest to prohibit or regulate abortion. A concurring opinion to the *Dobbs* decision suggested that other rights judicially established under the right to privacy pretense, such as access to contraception, may have been wrongly established.⁷

Proponents of abortion access in Michigan were prepared for the potential that *Roe* would be overturned and that the 1931 law could be reanimated. Following *Dobbs*, a legal challenge was filed asking the courts to take up the question of whether the Michigan Constitution implicitly establishes a right to abortion. As these cases are being litigated, courts have temporarily prohibited the enforcement of the 1931 law.

In addition to the effort to establish an *implicit* state constitutional right to abortion, the Reproductive Freedom for All initiative began an effort to establish an *explicit* state constitutional right to a wider range of services. Proposal 3 would create a fundamental right to “reproductive freedom,” which would include all matters related to pregnancy. The proponents of this initiative argue that reproductive freedom is foundational to full personhood, and therefore should be enshrined in the constitution instead of being left to the politics of the legislature. Opponents argue that abortions are ethically and morally wrong and that if they are to be permitted, there are state interests that warrant regulation of the timing and types of procedures employed.

Defining Reproductive Freedom

Proposal 3 defines “reproductive freedom” as “the right to make and effectuate decisions about all

matters related to pregnancy.” It does not limit “matters related to pregnancy” to specific treatments or procedures. Instead, it highlights some examples of reproductive care, including prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.

Proposal 3 also outlines a strict scrutiny standard for infringing on this right to reproductive care. The language of the amendment mirrors the constitutional framework of substantive due process and establishes that reproductive care requires the same protections as other fundamental rights (the right to marry, freedom of speech, etc.) The government must provide a compelling state interest to infringe on the right, and the law, regulation, or action must be the “least restrictive means” for accomplishing that state interest. In other words, any restriction on reproductive care must be persuasively justified and cannot infringe on the right more than is absolutely necessary.

The strict scrutiny standard applies specifically to pregnancy before “fetal viability.” The state retains an explicit right to regulate reproductive care post-viability, with some exceptions. Post-viability abortions must not be prohibited by the state if necessary to protect the life or health of the mother, as indicated by a health care professional. “Health” includes both physical and mental health, and the language does not delineate the severity of the potential health threat that could justify an exception. Exceptions are limited only by the opinion of the health professional.

Non-Discrimination

The state would be prohibited from discriminatory protection and enforcement of this right. However, what qualifies as equal protection remains unclear. Different populations may encounter distinct barriers in obtaining access to reproductive care, and it is possible that, in the absence of clear language, any disparate impact on these groups could be argued as “discriminatory.” In addition, it is not clear if the nondiscriminatory protection will impact laws that treat abortion care differently than other medical care when it comes to funding, reporting, and licensing.

Protection Against Prosecution

The state would be prohibited from taking any criminal or adverse action against an individual based on their actual, potential, perceived, or alleged pregnancy outcomes (which includes, but is not limited to, stillbirth, miscarriage, and abortion). In addition, the state would be prohibited from taking any criminal or adverse action against someone aiding or assisting an individual who is voluntarily exercising their right to reproductive freedom. Essentially, Proposal 3 would explicitly prohibit the state from criminally prosecuting individuals who are exercising this right for themselves or in assistance of someone else.

Compelling State Interest

What can qualify as a “compelling” state interest would be restricted to one specific purpose – to protect the health of the person seeking care. In other words, an individual’s right to reproductive freedom can only be infringed upon when the restriction protects that same individual. This precludes the state from arguing that the “life of the unborn” is a compelling state interest, as it is not related to the protection of the person seeking care. In addition, the interest must also be consistent with accepted clinical standards of practice and evidence-based medicine and cannot infringe on the individual’s autonomous decision-making.

Impact

The status of the right to abortion and other reproductive care depends not only on the outcome of the ballot initiative, but also on continuing legal challenges regarding any pre-existing implicit constitutional right. There are three potential future pathways:

1. Proposal 3 is rejected by voters and the Michigan Supreme Court does not find an implicit right to abortion in the Michigan Constitution.
2. Proposal 3 is adopted by voters, creating an explicit right to abortion (pre-viability) in the Michigan Constitution.
3. Proposal 3 is rejected by voters, but the Michigan Supreme Court finds an implicit right to abortion in the Michigan Constitution.

Fetal Viability

Proposal 3 defines “fetal viability” as “the point in pregnancy, in the professional judgement of an attending health care professional and based on the particular facts of the case, when there is a significant likelihood of the fetus’s sustained survival outside of the uterus, without the application of extraordinary medical measures.” The amendment offers no further guidance on the parameters of viability. Unlike other historical regulatory measures regarding abortion, viability is not set at a certain number of weeks or by trimester. Instead, viability is determined by the judgment of the health care professional and may vary depending on the facts of a particular situation.

Execution of the Amendment

Proposal 3 includes a self-execution clause and a severability clause. The amendment shall be “self-executing,” which means that the entirety of the amendment can go into effect without any additional legislative action. In addition, if any subsection is found to be invalid, it can be removed or “severed” from the amendment without invalidating any other provision. This section adds a layer of protection from legislative and legal efforts to obstruct or overturn the amendment.

Each pathway will impact the future of reproductive care in distinct ways and have different public health, societal, and economic implications. No matter the pathway, a range of legal and policy questions will remain. This will likely open the door to a deluge of legal challenges and uncertainty.

Pathway One – No Constitutional Protections for Abortion

Under a framework in which no constitutional right to abortion or reproductive freedom is adopted or found in the Michigan Constitution, the legality of abortion in Michigan will be determined by the legislative process and enforcement will largely depend on the political makeup of local county prosecutors and the state attorney general. The previously invalidated

law banning abortions will once again hold legal weight. While the precise parameters and reach of the law are unclear at this time, access to elective abortions will be essentially eliminated in Michigan, and unequal enforcement of the law may lead to widening social and geographic health disparities within the state.

Legal Impact

As a result of the dismantling of *Roe*, disparate reproductive health regulations will be enacted throughout the country. Without a federal or state constitutional provision defining the right to abortion, state legislatures are responsible for regulating the legality of and access to abortion by enacting new legislation, amending and clarifying existing legislation, or reviving legislation that has been invalid for decades. Legislative action, however, requires political compromise – something that is difficult to achieve in the current hyper-partisan political environment and divided government. Furthermore, even if there is the prospect of unitary party control of the legislative and executive branches, laws can be undone as soon as the political winds shift, making long-lasting legislation on this topic unlikely.

In the absence of legislative action, Michigan's 1931 law banning abortion would no longer be nullified by *Roe*, and therefore, individuals who assist in abortion procedures could be vulnerable to prosecution and imprisonment. Because the law bans all elective abortions and allows for only a narrow life-of-the-mother exception, health care providers who currently offer abortions may become vulnerable to prosecution and imprisonment for continuing to provide their current services. It is likely this framework would lead to an end to virtually all elective abortions in the state performed by licensed health care professionals.

Proponents of Proposal 3 argue that the existing 1931 statute is among the strictest in the country, as it does not allow exceptions for cases of rape or incest. An abortion may only be performed under one circumstance – when “necessary to preserve the

life” of the woman. While many other state laws that restrict abortion allow exceptions for protecting the physical or general health of the woman, Michigan's law requires that the woman be close to death to justify the procedure. Providers may be protected by federal regulations, including the Emergency Medical Treatment & Labor Act (EMTALA), that allow providers to perform abortion procedures to stabilize “emergency medical conditions” as determined by the health professional. The Centers for Medicare & Medicaid Services issued guidance stating that any state law that draws a narrower exception for the use of abortion procedures is preempted by EMTALA.⁹ While this may serve as a potential legal defense, it will not necessarily prevent state action against providers.

The 1931 statute cannot be fully understood based on the text alone – the Michigan Supreme Court has weighed in on matters related to abortion at various times, both before and after the passage of *Roe*. For example, the statute as written requires the defendant to demonstrate that the abortion was medically necessary, but the Michigan Supreme Court found that this shift in burden was impermissible – the prosecution would have to show an absence of medical necessity.⁶ Also, the statutory language is potentially unclear

as to whether a woman can be charged herself for administering an abortion, but the Michigan Supreme Court has held that under the statute, women cannot be prosecuted for self-induced abortions.¹⁰ Lawyers and legal scholars will inevitably conduct full analyses of the judicial history surrounding the law to inform its potential application. Future legal actions challenging the statute, along with possible legislative actions that restrict or expand the law, will also work to shape the law's potential application and impact.

While the legislative and judicial processes define the scope of the law's potential, the real-world impact of criminal penalty depends on the degree to which the law is enforced. Making elective abortions illegal will only deter health care professionals from providing

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abortions if there is a real or perceived expectation that they will be criminally charged for doing so. Laws on the books do not always have teeth in real life, and it is up to the state Attorney General and county prosecutors to take the criminal action required by the law.

Prosecutors generally have some degree of discretion in enforcing laws, and the decisions regarding who to charge and with what offense can be largely influenced by the prosecutor’s preferences. This may lead to county-by-county variation in abortion access, and state support for criminalizing abortions could ebb and flow depending on the politics of the state Attorney General. Democratic Attorney General Dana Nessel has stated that her office will not take any action to defend the 1931 statute in a legal proceeding, but the next elected Attorney General may have a different approach and may prioritize enforcement of the law.

Importantly, the statute of limitations for the criminal offense is six years, which means that a commitment from a current prosecutor to not enforce the law would not necessarily be enough to encourage providers to continue to provide abortions because a future Attorney General or prosecutor could be elected and decide to file charges. The actual deterrence effect of the law, therefore, could vary widely across geographic regions and over time.

Societal Impact

Assuming the 1931 law is sufficiently enforced to impact abortion providers, the number of abortions in Michigan will be significantly reduced. Over 30,000 abortions were performed in Michigan in 2021, most of them for Michigan residents.¹¹ Approximately 89 percent of these were performed to end pregnancies in which the fetus’ gestational age was 12 weeks or less.¹² Assuming Michigan continues to follow similar trends, the enforcement of the 1931 law will result in considerably fewer abortions and may lead to a significant increase in the birth rate. While an increased birth rate could have both positive and negative outcomes for the state, abortion bans have been shown to have an adverse impact on the personal, social, and financial well-being of women.

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There is limited data on the positive impact of a drastic reduction in access to abortions. Opponents of abortion generally argue that in addition to the moral value in preserving human life, society can benefit from an abortion ban in various ways. For example, restricting abortions could help families who wish to adopt a child. It is estimated that one to two million families are currently waiting to adopt¹³, and more live births would expand the number of children available for adoption. In addition, restricting abortion access may help problems associated with the declining birth rate. Some demographers argue that low birth rates will lead to economic decline

– fertility rates are decreasing while life spans are increasing, creating a situation where there will not be enough young people to join the workforce and support older generations.¹⁴ Lastly, the experience of abortion comes with physical and emotional risks, including excessive bleeding, blood clots, infection, and various mental health issues, and opponents argue that easy access to abortion may trivialize the significance of these risks.

While the experience of abortion could have a negative impact on the physical and emotional health of women who receive them, these must be weighed against the costs of pregnancy. Even uncomplicated pregnancies can take an enormous toll on the body. Many pregnant women experience multiple symptoms that can range from minorly uncomfortable to outright debilitating, including nausea, headaches swelling, backpain, fatigue, and digestive issues, among others.¹⁵ During pregnancy, however, many women are expected to continue their social and work responsibilities like normal, with very few societal accommodations or financial resources. Access to prenatal care is essential not just for the fetus, but also to simply maintain the status quo of the woman’s health and functionality. Further, many pregnancies are far from uncomplicated. Serious and life-threatening risks come with any labor and delivery.

The ambiguity of the 1931 law, specifically on the issue of life-saving treatment, may create a chilling effect on the willingness of health care professionals to perform abortions, even in life-threatening situa-

tions. Before a standard for medical necessity is established, individual providers will have to assess the severity of the person's condition to determine whether the situation justifies an abortion as an appropriate medical procedure. The potential threat of prosecution may cause health care providers to err on the side of caution and only perform abortions in the most severe and extreme circumstances, which may increase the risk of negative health outcomes for both the woman and the fetus. Further, physician unwillingness to perform abortions may lead desperate individuals to seek "back-alley" abortions performed by unlicensed or unskilled providers, creating an additional health risk.

The physical health risk is only part of the potential health threat that may arise from a pregnancy. The pregnancy alone creates a complete upheaval in a person's life and can reduce opportunities for women, both socially and professionally. Having children can affect career advancement for women. It is well documented that mothers face significant barriers in the workplace, as many employers do not provide paid parental leave and/or have inflexible sick time policies.^{16a} In addition, women may experience profound emotional trauma by being either forced into motherhood or forced into the decision of placing a child up for adoption. Pregnancy, and what follows, has the potential to impact not just a person's body, but every facet of their life.

The increase in birth rate, while potentially producing positive outcomes as discussed above, may create burdens on the state. Health insurance costs will increase from more pregnancies, and there may be a considerable demand on public services, including foster care, childcare, and education. Further, as the economic demands on the state increase, the economic potential of the state may suffer with a reduced workforce, as many women are forced out of their professions. A statewide abortion ban, therefore, has implications for virtually every resident of the state.

The variability in enforcement, along with population differences in health status and rates of unintended

^a Michigan adopted and amended a petition-initiated law regarding paid leave in 2018 (the Paid Medical Leave Act). Because the amendment significantly weakened the proposed law, the legislative action has been challenged in the courts and has not yet been settled.

pregnancy, will exacerbate the disparate impact of the abortion ban. Those with the means to travel to other states where abortion is legal or other counties with limited enforcement may be able to avoid the physical and personal risks of pregnancy, child birth, and unwanted parenthood. Furthermore, when the state struggles economically, those of lower socioeconomic status often bear the brunt of the burden. Tangential financial problems that result from the domino effect of the abortion ban are likely to disproportionately impact groups that are already vulnerable to societal inequity.

Prohibiting most, if not all, abortions in the state primarily serves the ethical and moral argument regarding human life. Those opposed to abortion argue that despite any evidence of the positive impact on women's lives, abortion is equivalent to murder, and there is no benefit to women great enough to justify its use. The question of when life begins is both scientific and philosophical, and pro-life advocates point to evidence of life, such as a fetal heartbeat, to demonstrate the issue in black and white. Those who support pro-choice policies generally argue that there is scientific uncertainty regarding what constitutes human life, and the decision requires a balancing of competing interests and values. Whether abortion is viewed as a moral dichotomy, therefore, largely dictates the relevancy of any scientific or academic research on the pros and cons of an abortion ban.

Pathway Two – Proposal 3 Creates an Explicit Constitutional Right to Abortion

In this scenario, the right to abortion, along with broader reproductive freedoms, will be made explicit in the Michigan Constitution. Amending the Constitution will protect the right to abortion from legislative override. Only another constitutional amendment could potentially eliminate or curtail this right. Pregnant individuals will retain the access to abortion they had before the *Dobbs* decision, with fewer legal hurdles, and may have increased access to abortion at later stages of pregnancy. In addition, Proposal 3 would create protections for a wider range of health care services and, therefore, has the potential to directly apply to significantly more people than the previous status quo.

Legal Impact

If Proposal 3 is adopted, an explicit right to reproductive freedom will be created in the Michigan Constitution. However, the adoption of the language is only the first step – access to this right must be implemented and enforced in real world situations. As much of the language is broad, undefined, and situation-specific, the parameters of the right will be determined by potential legal challenges. Questions and uncertainty regarding various terms in the amendment’s text may arise. For example:

- “Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters related to pregnancy...”
 - Does “individual” include minors, extending full reproductive rights to people under 18?
 - What types of services are considered “related to pregnancy”?
- “...the state may regulate the provision of abortion care after fetal viability, provided that in no circumstance shall the state prohibit an abortion that, in the professional judgment of an attending health care professional, is medically indicated to protect the life or physical or mental health of the pregnant individual.”
 - Which physical and mental health conditions are severe enough to justify an exception?
- “The state shall not discriminate in the protection or enforcement of this fundamental right.”
 - Does the ban on public funding for abortions qualify as “discriminatory”?
- “The state shall not penalize, prosecute, or otherwise take adverse action against an individual based on their actual, potential, perceived, or alleged pregnancy outcomes...”
 - What constitutes an “adverse action”?
- “A state interest is ‘compelling’ only if it is for the limited purpose of protecting the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine, and does not infringe on that individual’s autonomous decision-making.”

- Do existing health and safety laws concerning abortion infringe upon an “individual’s autonomous decision-making”? What health and safety laws could be enacted in the future?
- “‘Fetal viability’ means: the point in pregnancy when, in the professional judgment of an attending health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus’ sustained survival outside the uterus without the application of extraordinary medical measures.”
 - What is considered an “extraordinary medical measure” needed to keep a fetus alive?

As these challenges arise in the courts, the answers to these questions will impact the validity of existing and future regulations on abortion.

Should Proposal 3 be adopted, it may or may not preempt existing state and federal laws. The Michigan Public Health Code has several provisions that address abortion, and many of these regulations restrict access to abortion procedures. This amendment should theoretically overrule any state legislation that runs counter to its intent. This may create a need to amend or nullify several state laws to comply with the constitutional amendment, including, but not limited to:

- Informed consent procedures under the Public Health Code¹⁷
- Ban on “partial-birth abortions” under the Public Health Code¹⁸
- Insurance opt-out for abortion procedures under the Abortion Insurance Opt-out Act¹⁹
- Immunity from civil or criminal liability for refusing to perform or participate in an abortion procedure under the Public Health Code²⁰
- Parental consent requirement for minors seeking abortions under The Parental Rights Restoration Act²¹
- Prohibition on the use of public funds to pay for abortions under the Social Welfare Act²²

Proposal 3 also potentially impacts various health and safety laws that currently regulate abortion. While many of these regulations are justified by the state interest in protecting the health of the mother, the language of the amendment would add an additional hurdle for health and safety laws – they cannot infringe on the individual’s autonomous decision-making. Opponents of the amendment argue that this will limit the state’s ability to protect individuals from unsafe abortion procedures, increasing the risk of potential injury or death.

While some existing legislation will be inevitably impacted, the precise reach of the amendment’s language is still largely unknown. Those opposed to the amendment argue that the legislative implications could extend even beyond abortion and pregnancy health care services – if “reproductive freedom” is construed as broadly as possible, it may impact other unintended legislation related to sex. Regardless of the exact reach of the amendment, the passage of this amendment would, at the very least, upend decades of legislation and would leave many questions for the courts to resolve.

Societal Impact

While researchers have documented the social, health, and economic outcomes resulting from abortion legalization, less is known about the impact of expanding access to abortions to this degree. Research on abortion legalization generally has shown that legalizing abortion in states has led to a decline in birth rates compared to the rest of the country, particularly for teens and women of color.²³ In addition, studies have found that abortion legalization increased women’s educational attainment, labor force participation, and earnings.¹³ Overall, expanded access to abortion has been shown to benefit women’s health and well-being and contribute to economic growth.²⁴ While the evidence is relatively clear on the general impact of laws that are more or less restrictive in the *Roe* context, the proposed amendment would offer some of the most expansive protections in the country and could potentially produce different outcomes.

Opponents of the amendment generally argue that increased access to abortions can harm women in a variety of ways. They allege that increased access

to abortions may result in more reckless sexual behavior, leading to even more unwanted pregnancies and increasing the prevalence of sexually transmitted infections (STIs). While there is some evidence tying abortion access to an increase in STIs²⁵, the increase in unwanted pregnancies due to abortion legalization has not been demonstrated. Opponents also argue that riskier sexual activity among women could put them at higher risk of experiencing sexual violence. Research demonstrating these harms has been limited under the status quo of *Roe* access to abortion, so there is no direct evidence one way or the other as to whether expanding access to reproductive services broadly, as the amendment would do, could potentially lead to riskier sexual behavior and negative health outcomes.

Pathway Three – Michigan Supreme Court Finds an Implicit Constitutional Right to Abortion

The potential scope of a constitutional right to abortion established judicially is currently unknown. It is possible that the status quo under *Roe* is revived by the Michigan Supreme Court’s analysis of fundamental rights. However, the Court may also broaden or narrow this right. Without clear parameters of the legal framework, it is difficult to assess the potential impact. However, other state courts have weighed in on the issue of the constitutionality of abortions, and the legal analyses in those states may inform the outcome in Michigan.

Whether a right to abortion already exists implicitly in the Michigan Constitution depends on the outcome of ongoing lawsuits. Planned Parenthood of Michigan filed a lawsuit in the Michigan Court of Claims seeking to invalidate the 1931 law that prohibits abortions by declaring it in violation of the Michigan Constitution. The lawsuit argues that the 1931 law violates the constitutional right to bodily integrity, which was found to be a fundamental right in the state of Michigan in 2018.²⁶ The Court of Claims recently found in favor of the plaintiff.

Courts in other states have found that their state constitutions protect the right to abortion under various established fundamental rights, including privacy, equal treatment, and personal autonomy. For example, the Kansas Supreme Court found that

their state constitution protects “personal autonomy,” which encompasses bodily integrity.²⁷ The Democratic majority on the court found that decisions related to personal autonomy include decisions on whether to continue a pregnancy. Kansas voters recently rejected a ballot proposal that would have explicitly established that no constitutional right to abortion exists.

Unlike the right to reproductive freedom that would be found in Proposal 3, a right to abortion under the fundamental right to bodily integrity would be much narrower and less protected from legislative interference. While Proposal 3 offers explicit protections and broad freedoms, any right to abortion found by

the Michigan Supreme Court could be subject to a wider range of legislative regulations, and the law’s validity would be determined by applying the strict scrutiny balancing test used for fundamental rights.

It could take years of attempted and challenged legislation to fully flesh out the scope of this fundamental right, making it difficult to assess the potential impact at this time. Similarly, implied rights can be restricted and overturned by future courts, just as *Roe* was overturned by the U.S. Supreme Court in the *Dobbs* decision at the federal level. An explicit constitutional right would not be subject to the same type of headwinds, as it could only be repealed or refined by a vote of the people.

Conclusion

The reversal of *Roe* necessitates substantial policy and legal changes in Michigan concerning the right to abortion. Michigan voters are faced with a profound choice that has far-reaching implications. The three pathways presented cover a wide range of potential regulatory frameworks regarding access to abortion and other reproductive treatments. At one end of the spectrum, access to abortion will become extremely limited if no constitutional right is adopted by the voters or found by the Michigan Supreme Court, and even abortion in life-threatening situations may not

be guaranteed. At the other end of the spectrum, Proposal 3 would provide access to abortion beyond the regulations under *Roe*, and the Michigan Constitution would protect a host of other medical services that no state has ensured before. The Michigan Supreme Court could potentially offer a middle ground that re-establishes a right to abortion similar to the right under *Roe*, or the Court could create a general right that will later be narrowed or broadened by legislation and subsequent legal challenges.

Endnotes

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- 5 *Roe v. Wade*, 410 U.S. 113 (1973).
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- 11 Table A: Number, Ratio, and Rate of Reported Abortions Occurring in Michigan, 1982 – 2021. 2020 Michigan Resident Life Birth Files. Division for Vital Records & Health Statistics, Michigan Department of Health & Human Services. https://vitalstats.michigan.gov/osr/abortion/Tab_A.asp
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