

# ABORTION RIGHTS UNDER STATE CONSTITUTIONS: A FIFTY-STATE SURVEY

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*The U.S. Supreme Court appears poised to overturn Roe v. Wade and its progeny, removing any federal law protection of the right to an abortion. However, numerous state supreme courts have interpreted their state constitutions to independently recognize such a right, finding their state's equal protection, due process, and privacy rights more expansive than those at the federal level. This Essay surveys all fifty states to ascertain how much protection each state currently affords to women's right to an abortion. Most state supreme courts have not made a determinative ruling on the issue, and a significant majority of state constitutions do not contain a provision explicitly protecting or denying the right, so state courts are likely to be the venues for many of the contentious fights over abortion rights in the years to come.*

## INTRODUCTION

On May 2, 2022, *Politico* leaked a draft of Justice Samuel Alito's forthcoming majority opinion in *Dobbs v. Jackson Women's Health Organization*.<sup>1</sup> The draft indicated that the U.S. Supreme Court is poised to overrule the 1973 landmark case *Roe v. Wade*,<sup>2</sup> which established that women have a fundamental right under the U.S. Constitution to receive an abortion prior to the viability of a fetus,<sup>3</sup> and the 1992 case *Planned*

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1. See Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022, 8:32 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/3J28-GVJ6>].

2. 410 U.S. 113 (1973).

3. See *id.* at 153 (“[The] right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty . . . or . . . in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

*Parenthood v. Casey*,<sup>4</sup> which confirmed the right's existence but reduced its constitutional protection.<sup>5</sup>

If Justice Alito's draft opinion in *Dobbs* becomes the law of the land, roughly half of state governments can be expected to attempt to ban or heavily restrict women's ability to receive an abortion.<sup>6</sup> Together, the Supreme Court opinion and the state regulations it makes possible will mark a tectonic shift in U.S. law—both for massively restraining women's bodily autonomy and for threatening other rights based in substantive due process.<sup>7</sup>

Justice Alito wrote, “[i]t is time to heed the Constitution and return the issue of abortion to the people's elected representatives.”<sup>8</sup> However, there are fifty other constitutions in this country that also must be heeded and will be totally unaffected by the *Dobbs* ruling: the state constitutions.<sup>9</sup> If a state's high court found that the state's constitution protects a right to abortion equal to or greater than the extent articulated in *Roe* and *Casey*, that state's elected representatives will have no greater power to regulate the reproductive health of pregnant people than they had before *Dobbs*.<sup>10</sup> If state constitutions independently and adequately provide a right, it is irrelevant whether a parallel federal right exists when state courts consider the constitutionality of a law or state action.<sup>11</sup> The Supreme Court has no authority to overrule a state's supreme court interpreting its own state constitution or statutes, as long as the federal government's powers are not implicated.<sup>12</sup> For the

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4. 505 U.S. 833 (1992).

5. *See id.* at 874 (“Only where state regulation imposes an undue burden on a woman's ability to make this decision [to receive an abortion] does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”).

6. *See* Allison McCann & Taylor Johnston, *Where Abortion Could Be Banned Without Roe v. Wade*, N.Y. TIMES (May 3, 2022), <https://www.nytimes.com/interactive/2022/us/abortion-bans-restrictions-roe-v-wade.html> [<https://perma.cc/XJJ9-QXA7>].

7. *See* Andrew Chung, *Gay Marriage, Other Rights at Risk After U.S. Supreme Court Abortion Move*, REUTERS, May 4, 2022, <https://www.reuters.com/world/us/gay-marriage-other-rights-risk-after-us-supreme-court-abortion-move-2022-05-04/> [<https://perma.cc/5THY-NGFJ>]. Substantive due process “forbids the government from infringing upon certain fundamental liberty interests, no matter what process is afforded unless infringement is narrowly tailored to serve a compelling state interest.” 16C CORPUS JURIS SECUNDUM, Constitutional Law § 1821 (footnotes omitted).

8. Gerstein & Ward, *supra* note 1 (quoting the eighth page of the draft opinion).

9. *See* Mark J. Stern, *A Post-Roe Road Map*, SLATE (July 9, 2018, 5:55 AM), <https://slate.com/news-and-politics/2018/07/in-planned-parenthood-v-reynolds-the-iowa-supreme-court-gives-states-a-post-roe-road-map.html> [<https://perma.cc/7G8Q-WP43>].

10. *See id.*

11. *See generally* Cynthia L. Fountaine, *Article III and the Adequate and Independent State Grounds Doctrine*, 48 AM. U. L. REV. 1053 (1999). *See also, e.g.*, *Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. 1992) (“Regardless of what may be required under the federal standard, however, our view is that the prosecutorial misconduct in this case implicates the double jeopardy clause of the Pennsylvania Constitution.”).

12. *See* *Murdock v. City of Memphis*, 87 U.S. (1 Wall.) 590, 638 (1874) (holding that “[w]hether decided well or otherwise by the State court, [the U.S. Supreme Court has] no authority to inquire” when a state court decision rests on state grounds). However, if Congress passes nationwide abortion regulations, federal powers would be implicated and state constitutional protections would pose no obstacle to enforcement. *See* Deepa Shivram, *White House: Serious Risk of Nationwide Abortion Ban After McConnell Floats the Idea*, NAT'L

people's elected representatives to enforce any laws restricting women's bodily autonomy, those laws must be able to survive state constitutional scrutiny. For this reason, the focus of the legal fight over the right to an abortion is likely to shift to state court venues like never before.<sup>13</sup>

This Essay surveys all fifty states for whether each state's highest court has determined that a *state* constitutional right to an abortion exists, and if so, why. The purpose of this Essay is to serve as a springboard for those turning their attention to state constitutions for the first time, both to illustrate the general landscape of state-level abortion rights and to point to leading cases and constitutional provisions for each state. It is intended to be a starting point—not an end point—and does not analyze any one state's constitutional protection of abortion or lack thereof at complete depth. Of the fifteen state supreme courts that have ruled on whether their respective states' constitutions contain a right to an abortion, all but one have found such a right exists.<sup>14</sup> Those states are discussed in Part I. Part II.A looks at the six states whose constitutions explicitly lack an abortion right, or whose state supreme courts have ruled that no implicit right exists. Part II.B discusses the remaining states, broken down by geographic region, that have yet to rule conclusively either way and can be expected to become legal battlegrounds in the coming years.

## I. STATES WITH CONFIRMED RIGHTS TO ABORTION

The thirteen states whose supreme courts have confirmed that women currently have a right to an abortion under their state constitutions are Alaska, California, Florida, Iowa, Kansas, Massachusetts, Minnesota, Mississippi (to a lesser extent), Montana, New Jersey, New York, Vermont, and Washington. The impending *Dobbs* decision will not alter the legal protection of abortions in these states, barring overrulings and constitutional amendments.

### A. Alaska

In the 1997 case *Valley Hospital Association, Inc. v. Mat-Su Coalition for Choice*,<sup>15</sup> the Alaska Supreme Court interpreted Article I, Section 22 of the

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PUB. RADIO (May 9, 2022, 7:14 PM), <https://www.npr.org/2022/05/09/1097614463/white-house-responds-to-protests-over-leaked-supreme-court-draft-opinion-on-roe> [https://perma.cc/VP72-L69H] (discussing the implications of a potential nationwide abortion ban, with both President Joseph Biden and Senate Minority Leader Mitch McConnell agreeing that such legislation is possible to pass and would be enforceable).

13. See Stern, *supra* note 9.

14. See *infra* Part I. The one state supreme court that failed to find a right to an abortion was North Dakota's, which did so with a court that was split 2-2-1. See *infra* Part II (discussing *MKB Mgmt. Corp. v. Burdick*, 855 N.W.2d 31 (N.D. 2014)). The Tennessee Supreme Court found that its constitution contained an abortion right, but a subsequent amendment preempted the ruling. See *id.* (discussing *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000)).

15. 948 P.2d 963 (Alaska 1997).

Alaska Constitution<sup>16</sup> as protecting a fundamental right to abortions in a manner equal to *Roe v. Wade* and declined to adopt the lessened protections of *Casey*.<sup>17</sup> Article I, Section 22 is an explicit privacy provision that reads in relevant part: “The right of the people to privacy is recognized and shall not be infringed.”<sup>18</sup> The court found that the right to privacy is “fundamental,” and “few things are more personal than a woman’s control of her body, including the choice of whether and when to have children,” so “reproductive rights are fundamental.”<sup>19</sup> The court held that the strict scrutiny test the U.S. Supreme Court called for in *Roe* would be the law of the land in Alaska: “These rights may be legally constrained only when the constraints are justified by a compelling state interest, and no less restrictive means could advance that interest. These fundamental reproductive rights include the right to an abortion.”<sup>20</sup>

### B. California

Article I, Section 1 of the California Constitution reads: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, . . . and pursuing and obtaining safety, happiness, and privacy.”<sup>21</sup> In the pre-*Roe* 1969 case *People v. Belous*,<sup>22</sup> the California Supreme Court found that this provision recognized and protected a “fundamental right of the woman to choose whether to bear children[.]”<sup>23</sup> The court found that California’s 1850 abortion laws were constitutional *at the time they were passed* because abortions were so much more dangerous then: “[I]n the light of the then existing medical and surgical science, the great and direct interference with a woman’s constitutional rights was warranted by considerations of the woman’s health.”<sup>24</sup> But once medicine advanced and abortions became safe procedures, *outlawing* abortions made women much less safe because it drove them to seek dangerous, unprofessional abortions, and such illegal abortions were “the most common single cause of maternal deaths in California” at the time.<sup>25</sup> Thus, the California Constitution permitted outlawing abortion under the circumstances of the nineteenth century, but not the twentieth century.

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16. ALASKA CONST. art. I, § 22.

17. See *Valley Hosp. Ass’n, Inc.*, 948 P.2d at 969 (“The scope of the fundamental right to an abortion that we conclude is encompassed within article I, section 22, is similar to that expressed in *Roe v. Wade*. We do not, however, adopt as Alaska constitutional law the narrower definition of that right promulgated in the plurality opinion in *Casey*.”).

18. ALASKA CONST. art. I, § 22.

19. *Valley Hosp. Ass’n, Inc.*, 948 P.2d at 968–69 (quoting *Breese v. Smith*, 501 P.2d 159, 169 (Alaska 1972)).

20. *Id.* at 969.

21. CAL. CONST. art. I, § 1.

22. 458 P.2d 194 (Cal. 1969).

23. *Id.* at 199.

24. *Id.* at 200.

25. *Id.* at 200–01 (adding, “[i]t is now safer for a woman to have a hospital therapeutic abortion during the first trimester than to bear a child”).

The court revisited the issue in the 1997 case *American Academy of Pediatrics v. Lungren*,<sup>26</sup> which involved a minor's right to receive an abortion without parental consent. The court affirmed that "the interest in autonomy privacy protected by the California constitutional privacy clause includes a pregnant woman's right to choose whether or not to continue her pregnancy."<sup>27</sup> The court continued:

[T]he right to choose whether to continue or to terminate a pregnancy implicates a woman's fundamental interest in the preservation of her personal health (and in some instances the preservation of her life), her interest in retaining personal control over the integrity of her own body, and her interest in deciding for herself whether to parent a child.<sup>28</sup>

Since the right is fundamental, the court required that restrictions meet *Roe*'s "compelling interest" standard,<sup>29</sup> which is higher than *Casey*'s "undue burden" standard.<sup>30</sup>

### C. Florida

The Florida Supreme Court struck down a law that created a twenty-four-hour waiting period before a woman could receive an abortion in the 2017 case *Gainesville Woman Care, LLC v. State*.<sup>31</sup> Article I, Section 23 of the Florida Constitution states that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life[.]"<sup>32</sup> The court found that the privacy clause "encompasses a woman's right to choose to end her pregnancy. This right would have little substance if it did not also include the woman's right to effectuate her decision to end her pregnancy."<sup>33</sup> Since that right is fundamental, the court found that "the burden falls on the State to prove both the existence of a compelling state interest and that the law serves that compelling state interest through the least restrictive means,"<sup>34</sup> which is again higher than the *Casey* undue burden standard.

This was not the first Florida Supreme Court case to find a right to an abortion under the privacy clause. The first instance came in the 1989 case *In re T.W.*,<sup>35</sup> in which the court stated: "We can conceive of few more personal or private decisions concerning one's body that one can make in the course of a lifetime [than an abortion], except perhaps the decision of the

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26. 940 P.2d 797 (Cal. 1997).

27. *Id.* at 813.

28. *Id.* (citations omitted).

29. *Id.* at 819.

30. *See also* *Comm. to Defend Reprod. Rts. v. Myers*, 625 P.2d 779, 799 (Cal. 1981) (finding that the state must fund abortion care for indigent persons at the same level as other care because "when the state finances the cost of childbirth, but will not finance the termination of pregnancy, it realistically forces an indigent pregnant woman to choose childbirth even though she has the constitutional right to refuse to do so").

31. 210 So. 3d 1243 (Fla. 2017).

32. FLA. CONST. art. I, § 23.

33. *Gainesville Woman Care*, 210 So. 3d at 1254.

34. *Id.* at 1256.

35. 551 So. 2d 1186 (Fla. 1989).

terminally ill in their choice of whether to discontinue necessary medical treatment.”<sup>36</sup>

#### D. Iowa

“Heartbeat bans” prohibit abortions once a fetal heartbeat is detectable on an ultrasound.<sup>37</sup> The Iowa Supreme Court found one such heartbeat ban unconstitutional in the 2018 case *Planned Parenthood of the Heartland v. Reynolds*.<sup>38</sup> Unlike the three cases above, the Iowa Supreme Court did not strike down the law as a violation of Iowa women’s privacy rights, but rather as a violation of the state constitution’s equal protection clause.<sup>39</sup> In doing so, the court explicitly adopted Justice Ruth Bader Ginsberg’s argument for why the right to an abortion is a fundamental right and applied it to the Iowa Constitution<sup>40</sup>

The court provided the following justification for viewing abortion as an equal protection issue:

Autonomy is the great equalizer. Laws that diminish women’s control over their reproductive futures can have profound consequences for women . . . . Without the opportunity to control their reproductive lives, women may need to place their educations on hold, pause or abandon their careers, and never fully assume a position in society equal to men, who face no such similar constraints for comparable sexual activity. Societal advancements in occupational opportunities are meaningless if women cannot access them . . . . Equality and liberty in this instance, as in so many others, are irretrievably connected.<sup>41</sup>

The Iowa Supreme Court concluded by also adopting the *Roe*-level standard for evaluating restrictions on abortion, requiring the state “to demonstrate the action is narrowly tailored to serve a compelling government interest,”<sup>42</sup> rather than the lower *Casey* standard.

#### E. Kansas

The Kansas Constitution begins with a sentence partially borrowed from the Declaration of Independence: “All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of

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36. *Id.* at 1192.

37. See B. Jessie Hill, *The Geography of Abortion Rights*, 109 GEO. L.J. 1081, 1124 n.239 (2021).

38. 915 N.W.2d 206 (Iowa 2018).

39. See *id.* at 245–46 (citing IOWA CONST. art. I, § 6 (“All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.”)).

40. See *Planned Parenthood of the Heartland*, 915 N.W.2d at 245 (“[I]n the balance is a woman’s autonomous charge of her life’s full course . . . , her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen.” (quoting Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 383 (1985))).

41. *Id.*

42. *Id.* at 245–46.

happiness.”<sup>43</sup> In the 2019 case *Hodes & Nauser, MDs, P.A. v. Schmidt*,<sup>44</sup> the Kansas Supreme Court found that those words constitute “more than an idealized aspiration,” laying the foundation for substantive rights.<sup>45</sup> Those substantive rights “include a woman’s right to make decisions about her body, including the decision whether to continue her pregnancy[.]”<sup>46</sup>

The Kansas court applied an originalist rationale, stating, “the state’s founders acknowledged that the people had rights that preexisted the formation of the Kansas government . . . . Included in that limited category is the right of personal autonomy, which includes the ability to control one’s own body, to assert bodily integrity, and to exercise self-determination.”<sup>47</sup> The court pointed out that this is *not* a due process right—being substantive in character rather than procedural—which “remove[d] from [the court’s] calculus one of the criticisms of *Roe* and other decisions of the United States Supreme Court relying on substantive due process rights under the Fourteenth Amendment.”<sup>48</sup> Rather, the court found it to be a fundamental liberty interest that predates the state constitution and “allows a woman to make her own decisions regarding her body, health, family formation, and family life—decisions that can include whether to continue a pregnancy.”<sup>49</sup> Accordingly, the court adopted the *Roe* standard in finding regulation of abortion unconstitutional “unless it is [done] to further a compelling government interest and in a way that is narrowly tailored to that interest.”<sup>50</sup>

#### F. Massachusetts

In the 1981 case *Moe v. Secretary of Administration and Finance*,<sup>51</sup> the Massachusetts Supreme Judicial Court found a right to an abortion implicit in the state constitution’s due process clause.<sup>52</sup> The court looked to a series of cases involving private marriage and parenting matters in which the state could not meddle, and it determined that the cases recognized “the existence of a private realm of family life which the state cannot enter.”<sup>53</sup> The court added that this recognition “is a cardinal precept of [the Massachusetts Supreme Judicial Court’s] jurisprudence.”<sup>54</sup> The court found “a woman’s right to make the abortion decision privately” to be “but one aspect of a far broader constitutional guarantee of privacy.”<sup>55</sup>

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43. KAN. CONST. Bill of Rts., § 1.

44. 440 P.3d 461 (Kan. 2019).

45. *Id.* at 466.

46. *Id.*

47. *Id.*

48. *Id.* at 473.

49. *Id.* at 466.

50. *Id.*

51. 417 N.E.2d 387 (Mass. 1981).

52. *See id.* at 399; *see also* MASS. CONST. Pt. 1, art. X.

53. *Moe*, 417 N.E.2d at 398–99 (quoting *Custody of Minor*, 389 N.E.2d 68, 72 (Mass. 1979) and collecting cases).

54. *Id.*

55. *Id.* at 398.

Although the language of Massachusetts and federal due process clauses do not differ in any substantive way,<sup>56</sup> the *Moe* court found the Massachusetts Constitution more protective than the U.S. Supreme Court found the U.S. Constitution to be in the similar case of *Harris v. McRae*.<sup>57</sup> The Massachusetts Supreme Judicial Court found that since the right to an abortion is an aspect of the “fundamental right of privacy,” restrictions of it must pass a high level of scrutiny.<sup>58</sup> However, as Massachusetts had developed its own idiosyncratic balancing test for encroachments upon fundamental rights, it did not directly apply the *Roe* compelling interest test.<sup>59</sup> The court balanced “the State interest . . . in the preservation of life, albeit potential life” against the interest of a pregnant woman in choosing to get an abortion and found the balance “to be decisively in favor of the individual right [of the woman] involved.”<sup>60</sup>

### G. Minnesota

The Minnesota Supreme Court struck down a law limiting state funding for abortions as violative of women’s right to privacy in the 1995 case *Doe v. Gomez*.<sup>61</sup> The court found a right to privacy preserved in the penumbra of Sections 2, 7, and 10 of Article I of the Minnesota Constitution.<sup>62</sup> The court analogized the right to an abortion to the right “to be free from intrusive medical treatment”<sup>63</sup> and stated, “[the] right [of privacy] begins with protecting the integrity of one’s own body and includes the right not to have it altered or invaded without consent.”<sup>64</sup> The court then likened the case to the forced-sterilization case *Skinner v. Oklahoma*,<sup>65</sup> writing: “The right of procreation without state interference has long been recognized as ‘one of the basic civil rights of man . . . fundamental to the very existence and survival of the race.’”<sup>66</sup>

The court “conclude[d] that the right of privacy under the Minnesota Constitution encompasses a woman’s right to decide to terminate her pregnancy” because the court could “think of few decisions more intimate,

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56. See *Planned Parenthood League of Mass., Inc. v. Att’y Gen.*, 677 N.E.2d 101, 103 (Mass. 1997) (summarizing *Moe*).

57. See *Moe*, 417 N.E.2d at 400 (citing *Harris v. McRae*, 448 U.S. 297 (1980) (involving the state funding of abortions under Medicaid)).

58. *Id.* at 400–01.

59. See *id.* at 403 (“[The compelling interest test], if accepted, would prove fatal to the challenged restriction. Rather than mechanically accepting this result, however, we prefer to test these enactments by the balancing principles which we have developed in our own recent decisions.”).

60. *Id.* at 404. Note that this case specifically involved “medically necessary” abortions. See *id.* at 391.

61. 542 N.W.2d 17 (Minn. 1995).

62. See *id.* at 19 (citing MINN. CONST. art. I, §§ 2 (ensuring due process), 7 (same), and 10 (prohibiting unreasonable searches and seizures)).

63. *Id.* at 27.

64. *Id.* (second alteration in original) (quoting *Jarvis v. Levine*, 418 N.W.2d 139, 148 (Minn. 1988)).

65. 316 U.S. 535 (1942).

66. *Gomez*, 542 N.W.2d at 27 (quoting *Skinner*, 316 U.S. at 541).

personal, and profound than a woman’s decision between childbirth and abortion.”<sup>67</sup> Any state restriction of this fundamental right must survive strict scrutiny under the *Roe* compelling state interest standard.<sup>68</sup> The court also noted that there *may* be a separate equal protection foundation for the right to an abortion, but it analyzed this case purely as a matter of privacy.<sup>69</sup>

#### H. Mississippi

In the 1998 case *Pro-Choice Mississippi v. Fordice*,<sup>70</sup> the Mississippi Supreme Court found that women have a right to receive an abortion under the privacy protections inherent in Article III, Section 32 of the Mississippi Constitution,<sup>71</sup> the state’s analog to the U.S. Constitution’s Ninth Amendment.<sup>72</sup> The court found that within that privacy right is the right to bodily integrity, and “[p]rotected within the right of autonomous bodily integrity is an implicit right to have an abortion.”<sup>73</sup> Although the court—like all the supreme courts above—usually applies strict scrutiny to state restrictions of such privacy rights, it found that “[t]he abortion issue is much more complex than most cases involving privacy rights” and placed the court “in the precarious position of both protecting a woman’s right to terminate her pregnancy before viability and protecting unborn life.”<sup>74</sup> The court broke from its previous privacy jurisprudence by adopting the *Casey* undue burden standard rather than the *Roe* compelling interest standard, although it emphasized that future privacy rights in other matters are not excluded from strict scrutiny protection.<sup>75</sup> There is only one abortion clinic open in Mississippi today,<sup>76</sup> emblematic of the possible state of affairs under this reduced but non-zero level of constitutional protection.

#### I. Montana

The Montana Supreme Court performed an originalist analysis of its state constitution in the 1999 case *Armstrong v. State*<sup>77</sup> and found that a fundamental right to an abortion was very firmly situated within “Montana’s historical commitment to the right of privacy and . . . core right to be let alone[.]”<sup>78</sup> In what reads like a direct rebuke to Justice Alito’s leaked

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67. *Id.*

68. *See id.* at 31.

69. *See id.* at 19.

70. 716 So. 2d 645 (Miss. 1998).

71. MISS. CONST. art. III, § 32 (“The enumeration of rights in this constitution shall not be construed to deny and impair others retained by, and inherent in, the people.”).

72. U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

73. *Pro-Choice Miss.*, 716 So. 2d at 653.

74. *Id.* at 655.

75. *See id.*

76. *See* Rick Rojas, *Inside the Last Abortion Clinic in Mississippi*, N.Y. TIMES (Dec. 1, 2021), <https://www.nytimes.com/2021/11/30/us/mississippi-abortion-clinic-supreme-court.html> [<https://perma.cc/2SST-HVWV>].

77. 989 P.2d 364 (Mont. 1999).

78. *Id.* at 377.

statement that abortion must be returned to the “people’s elected representatives,”<sup>79</sup> the Montana Supreme Court cautioned: “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.”<sup>80</sup>

The court rattled off various independent sources of this right within the Montana Constitution. Article II, Section 3 provides broad protection for unenumerated “inalienable rights,”<sup>81</sup> guarantees “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.”<sup>82</sup> Montana’s equal protection clause<sup>83</sup> also preserves that right because it “requires that people have an equal right to form and to follow their own values in profoundly spiritual matters.”<sup>84</sup> The state’s establishment<sup>85</sup> and free exercise<sup>86</sup> clauses protect “the freedom to accept or reject any religious doctrine, including those about abortion, and the right to express one’s opinion in all lawful ways and forums.”<sup>87</sup> The privacy clause<sup>88</sup> “requires the government to leave us alone in all these most personal and private matters.”<sup>89</sup> Finally, the due process clause<sup>90</sup> “protects those rights—including rights of personal and procreative autonomy—inherent in the historical concept of ‘ordered liberty.’”<sup>91</sup> Not surprisingly, the court adopted the *Roe* compelling interest standard to require strict scrutiny of state limitations on the right to choose.<sup>92</sup>

#### J. New Jersey

In the 1982 case *Right to Choose v. Byrne*,<sup>93</sup> the New Jersey Supreme Court found that women had a fundamental right to an abortion under the state’s equal protection clause,<sup>94</sup> in a case involving state funding of abortions necessary to save mothers’ lives.<sup>95</sup> The court found that the right

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79. Gerstein & Ward, *supra* note 1 (quoting the eighth page of the draft opinion).

80. *Armstrong*, 989 P.2d at 378.

81. MONT. CONST. Art. II, § 3.

82. *Armstrong*, 989 P.2d at 383.

83. MONT. CONST. Art. II, § 4.

84. *Armstrong*, 989 P.2d at 383.

85. MONT. CONST. Art. II, § 5.

86. *Id.* § 7.

87. *Armstrong*, 989 P.2d at 383.

88. MONT. CONST. Art. II, § 10.

89. *Armstrong*, 989 P.2d at 383.

90. MONT. CONST. Art. II, § 17.

91. *Armstrong*, 989 P.2d at 383.

92. *See id.* at 384.

93. 450 A.2d 925 (N.J. 1982).

94. N.J. CONST. art. I, ¶ 1.

95. *See Right to Choose*, 450 A.2d at 941.

to privacy is implicit in the equal protection clause and had been since the 1844 iteration of the state's constitution.<sup>96</sup>

The later case *Greenberg v. Kimmelman*<sup>97</sup> clarified the level of scrutiny New Jersey courts use in evaluating infringements upon such rights in equal protection challenges, which is different from the federal approach: “[W]e . . . consider[] the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.”<sup>98</sup> The outcome of the test is usually the same as a traditional strict scrutiny, compelling state interest analysis.<sup>99</sup> In the 2000 case *Planned Parenthood of Central New Jersey v. Farmer*,<sup>100</sup> the court indicated its agreement with a 1967 dissent from its former Chief Justice Joseph Weintraub,<sup>101</sup> which contained the assertion: “[K]nowing nothing about the void before or after their earthly presence, . . . men cannot agree upon the stage at which an embryo or fetus has a claim to acquire life in human form strong enough to override a woman’s right to her own bodily integrity.”<sup>102</sup>

#### K. New York

In the 1994 case of *Hope v. Perales*,<sup>103</sup> New York’s highest court, the New York Court of Appeals, plainly announced that “the fundamental right of reproductive choice, inherent in the due process liberty right guaranteed by our State Constitution, is at least as extensive as the Federal constitutional right” under *Roe* and *Casey*.<sup>104</sup> As the defendant in the case, the state government did not dispute that interpretation.<sup>105</sup> The court found that while the facts of the case did not implicate that fundamental right under the state’s due process clause,<sup>106</sup> under New York law, state regulations limiting fundamental rights must “promote a compelling State interest and [be] narrowly tailored to achieve that purpose,”<sup>107</sup> as in *Roe*.

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96. *See id.* at 933. Note that New Jersey’s equal protection clause is broader than its federal analog, also including a protection of “natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.” N.J. CONST. art. I, ¶ 1.

97. 494 A.2d 294 (N.J. 1985).

98. *Id.* at 302.

99. *See id.* at 303.

100. 762 A.2d 620 (N.J. 2000).

101. *See id.* at 629 (citing *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967) (Weintraub, C.J., dissenting in part)).

102. *Gleitman*, 227 A.2d at 709 (Weintraub, C.J., dissenting in part).

103. 634 N.E.2d 183 (N.Y. 1994).

104. *Id.* at 186.

105. *See id.*

106. *See id.* at 188; N.Y. CONST. art. I, § 6.

107. *Golden v. Clark*, 564 N.E.2d 611, 614 (N.Y. 1990) (discussing fundamental equal protection rights).

*L. Vermont*

There is some disagreement about whether the pre-*Roe* 1972 Vermont Supreme Court case *Beecham v. Leahy*<sup>108</sup> established the presence of a state constitutional right to an abortion.<sup>109</sup> Future U.S. Senators Patrick Leahy and James Jeffords represented the state government and argued for the constitutionality of a statute that punished doctors who performed abortions.<sup>110</sup> The court admonished the legislature for its “hypocrisy.”<sup>111</sup> It reasoned that the legislature punished doctors but not mothers because of an “implicit recognition” of women’s right to an abortion.<sup>112</sup> By recognizing the right to an abortion but blocking doctors from performing them, the legislature indirectly prohibited women from exercising a guaranteed right that it knew it could not restrict outright.<sup>113</sup>

The court called abortion “an appropriate area for legislative action, provided such legislation does not . . . restrict to the point of unlawful prohibition.”<sup>114</sup> The court, however, did not identify the “point of unlawful prohibition” or the standard it would use to recognize that cutoff. With the citizens of Vermont voting on an amendment in November of 2022 that would put *Roe*’s compelling interest language explicitly into the Vermont Constitution,<sup>115</sup> debate over *Beecham* may soon become moot.

*M. Washington*

In the 1975 case *State v. Koome*,<sup>116</sup> the Washington State Supreme Court found that the Article I, Section 3 due process clause of the Washington Constitution recognized a privacy right analogous to the one the *Roe* Court found under the Fourteenth Amendment.<sup>117</sup> The case involved a statute that required minors to obtain parental consent before receiving an abortion—a

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108. 287 A.2d 836 (Vt. 1972).

109. See Cheryl Hanna, *Beechman v. Leahy and the Doctrine of Hypocrisy*, 32 VT. L. REV. 673, 679 (2008) (“I have sometimes heard folks suggest that *Beecham* holds that in Vermont there is a state constitutional right to abortion. Such an interpretation of *Beecham* is clearly wrong.”).

110. Senator Leahy later said that he never prosecuted a doctor under the statute as a state prosecutor, and he told the Supreme Court candidly that he felt it was unconstitutional. See Anne Galloway, *Senators Aim to Remove Vermont’s Abortion Provider Law from the Books*, BRATTLEBORO REFORMER (Feb. 10, 2014), [https://www.reformer.com/local-news/senators-aim-to-remove-vermonts-abortion-provider-law-from-the-books/article\\_6757752d-8b8a-56b4-84a6-fab1b7123b54.html](https://www.reformer.com/local-news/senators-aim-to-remove-vermonts-abortion-provider-law-from-the-books/article_6757752d-8b8a-56b4-84a6-fab1b7123b54.html) [<https://perma.cc/L5FB-RQ7G>]. He claimed he did the minimum required of his office in representing the state government. See *id.*

111. *Beecham*, 287 A.2d at 839.

112. *Id.*

113. See *id.* at 839–40.

114. *Id.* at 840.

115. Declaration of Rights; Right to Personal Reproductive Liberty, Prop. 5, 2021–2022 Sess. (Vt. 2022). The amendment, if approved, will read: “That an individual’s right to personal reproductive autonomy is central to the liberty and dignity to determine one’s own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means.” *Id.*

116. 530 P.2d 260 (Wash. 1975) (en banc).

117. See *id.* at 263 (citing WASH. CONST. art. I, § 3 (“No person shall be deprived of life, liberty, or property, without due process of law.”); U.S. CONST. amend. XIV).

requirement the court also found to be an equal protection violation under Article I, Section 12 of the Washington Constitution.<sup>118</sup> The court found three classifications in the statute that violated equal protection guarantees: “(1) between unmarried adult women seeking abortions and similarly situated minors; (2) between married and unmarried minors; and (3) between unmarried minors seeking abortions, and others seeking other types of medical care.”<sup>119</sup> Laws restricting either the due process or equal protection rights found in this case must serve a compelling state interest to be constitutional, as in *Roe*.<sup>120</sup>

## II. STATES DENYING OR SILENT ON THE RIGHT TO ABORTION

In a majority of states, state supreme courts have not authoritatively determined that the right to an abortion is cognizable under the respective states’ constitutions. Part II.A discusses the states that have outright rejected the existence of that right. Part II.B analyzes the status of the law in the states whose courts have not yet made a conclusive determination on the issue either way.

### A. Explicit Rejection

Six states have ratified constitutional provisions which explicitly state that no right to an abortion exists under their constitutions: Alabama,<sup>121</sup> Arkansas,<sup>122</sup> Louisiana,<sup>123</sup> Rhode Island,<sup>124</sup> Tennessee,<sup>125</sup> and West Virginia.<sup>126</sup> Tennessee amended its constitution to remove the right to an abortion after the Tennessee Supreme Court found that a fundamental right to an abortion existed within a constellation of seven separate provisions of the Tennessee Constitution<sup>127</sup> and, as in *Roe*, it required a compelling state

118. *See id.* at 266–67 (citing WASH. CONST. art. I, § 12).

119. *Id.* at 266.

120. *See id.* at 264.

121. ALA. CONST. art. I, § 36.06(c) (“Nothing in this constitution secures or protects a right to abortion or requires the funding of an abortion.”).

122. ARK. CONST. amend. LXVIII, § 2 (“The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution.”).

123. LA. CONST. art. I, § 20.1 (“To protect human life, nothing in this constitution shall be construed to secure or protect a right to abortion or require the funding of abortion.”).

124. The Rhode Island Constitution’s relevant provision, however, only applies to the state’s equal protection rights. R.I. CONST. art. I, § 2 (“Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof.”). This does not preclude the possibility that a right to an abortion could be found elsewhere in the state constitution.

125. TENN. CONST. art. I, § 36 (“Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion.”).

126. W. VA. CONST. art. VI, § 57 (“Nothing in this Constitution secures or protects a right to abortion or requires the funding of abortion.”).

127. *See Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 13 (Tenn. 2000) (finding a relevant privacy right emerging from “from the express grants of rights in Article I, sections 3, 7, 19, and 27, and also from the grants of liberty in Article I, sections 1, 2, and 8”).

interest to overcome that right.<sup>128</sup> Similarly, West Virginia amended its constitution to ensure no right to an abortion could be found after its supreme court implied such a right exists.<sup>129</sup>

Only one state supreme court has definitively ruled that a right to an abortion does not exist under its due process and other state constitutional protections: North Dakota. In North Dakota, at least four of its five supreme court justices must sign onto a majority opinion in order to find a statute unconstitutional under the North Dakota Constitution.<sup>130</sup> In *MKB Management v. Burdick*,<sup>131</sup> two justices found that an independent state constitutional right to an abortion existed, two did not, and one only opined on the constitutionality of the statute in question under federal law.<sup>132</sup> The justices who found that no right existed utilized an originalist approach.<sup>133</sup> Despite acknowledging that the North Dakota Constitution provides protections “more expansive than the due process language in the federal constitution,”<sup>134</sup> the justices could “discern no basis for concluding the North Dakota Constitution imposes greater restrictions upon the State than the federal constitution.”<sup>135</sup>

### B. Silent

The remaining states have no clear statement in their state constitutions as to whether a right to an abortion exists, and their state supreme courts have not provided an authoritative answer to that question. Some state courts have avoided the issue by following an interstitial approach to constitutional analysis—analyzing cases under the U.S. Constitution first, and if the court finds no federal constitutional cause to strike down a statute, only then would the court look to the state constitution for greater protections.<sup>136</sup> This contrasts with the primacy approach, under which courts analyze cases as state constitutional matters first and federal matters second.<sup>137</sup> This section will discuss the present status of the remaining states by region.

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128. *See id.* at 15.

129. *See Women’s Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658, 667 (W. Va. 1993) (finding an abortion funding restriction unconstitutional under the federal standard and suggesting “West Virginia’s enhanced constitutional protections” would be even more protective than the federally-protected right).

130. N.D. CONST. art. VI, § 4.

131. 855 N.W.2d 31 (N.D. 2014).

132. *See id.* at 31–32.

133. *See id.* at 45 (“Our state constitution is silent about creating a state constitutional right to abortion, and the prevailing practice in the Dakota Territory and when the relevant constitutional provisions were adopted prohibited abortions except to preserve a woman’s life.”).

134. *Id.* at 35.

135. *Id.* at 45.

136. *See State v. Gomez*, 932 P.2d 1, 7 (N.M. 1997) (“Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined.”).

137. *See State v. Fleming*, 239 A.3d 648, 654 n.9 (Me. 2020) (“Under the primacy approach applied by this Court, we first look to the Maine Constitution, with federal precedent serving

## i. Midwest

*Illinois:* In *Hope Clinic for Women v. Flores*,<sup>138</sup> the Illinois Supreme Court performed an originalist analysis and found “no state grounds for deviating from the United States Supreme Court’s interpretation that the federal due process clause protects a woman’s right to an abortion.”<sup>139</sup> The court found it significant that the following language was removed from an early draft of the Illinois Constitution: “No penalty may be imposed by law upon any person in connection with an abortion performed by a licensed physician with the consent of the woman upon whom it is performed . . . .”<sup>140</sup> However, the court also noted that delegates to the Illinois Constitutional Convention considered and rejected anti-abortion language as well, which would have included the words “including the unborn” in the due process clause.<sup>141</sup> Now that the U.S. Supreme Court’s interpretation of the Due Process Clause<sup>142</sup> appears poised to change, it remains to be seen whether the Illinois Supreme Court will adapt its interpretation to remain in lockstep with the U.S. Supreme Court or maintains its interpretation as mirroring *Roe* and *Casey*.

*Indiana:* Like in Illinois, the Indiana courts have been mirroring the federal courts in their abortion jurisprudence. In *Clinic for Women, Inc. v. Brizzi*,<sup>143</sup> the Indiana Supreme Court stated that its “material burden test” is “the equivalent of *Casey*’s undue burden test, at least for purposes of assessing whether a state regulation violates any fundamental right of privacy that may include protection of a woman’s right to terminate her pregnancy that might exist under Article I, Section 1, of the Indiana Constitution.”<sup>144</sup>

*Michigan:* The Michigan Court of Appeals, the state’s intermediate appellate court, stated emphatically that no right to an abortion exists under the Michigan Constitution in *Mahaffey v. Attorney General*.<sup>145</sup> The court stated that “[i]t is the public policy of the state to proscribe abortion”<sup>146</sup> and that “there is no right to abortion under the Michigan Constitution.”<sup>147</sup> Article III, Section 8 of the Michigan Constitution<sup>148</sup> permits the Governor to seek advisory opinions from the Michigan Supreme Court, and Governor Gretchen Whitmer is exercising that power to get from the court a final word

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as potentially persuasive but not dispositive guidance with respect to constitutional provisions with similar goals.” (citation omitted)). Some state courts practice discretion in deciding on which constitution to begin its analysis. *See, e.g.*, *State v. Pals*, 805 N.W.2d 767, 772 (Iowa 2011) (“When, as here, a defendant raises both federal and state constitutional claims, the court has discretion to consider either claim first or consider the claims simultaneously.”).

138. 991 N.E.2d 745 (Ill. 2013).

139. *Id.* at 760.

140. *Id.* at 759 n.5.

141. *Id.* at 758–59.

142. U.S. CONST. amend. XIV, § 1.

143. 837 N.E.2d 973 (Ind. 2005).

144. *Id.* at 984.

145. 564 N.W.2d 104 (Mich. Ct. App. 1997), *appeal denied*, 616 N.W.2d 168 (Mich. 1998).

146. *Id.* at 110 (quoting *People v. Bricker*, 208 N.W.2d 172, 175 (Mich. 1973)).

147. *Id.*

148. MICH. CONST. art. 3, § 8.

on abortion rights under the state constitution.<sup>149</sup> The Michigan Supreme Court is likely to break its silence on abortion in response to the governor's request.

*Missouri:* In *Reproductive Health Services of Planned Parenthood the St. Louis Region v. Nixon*,<sup>150</sup> the Missouri Supreme Court adopted the *Casey* decision in interpreting the Missouri Constitution's due process and equal protection provisions.<sup>151</sup> The court found "no reason . . . to construe this language from the Missouri [C]onstitution more broadly than the language used in the United States [C]onstitution."<sup>152</sup> The court will likely soon need to decide whether to reduce its protection of this right in lockstep with the U.S. Supreme Court.

*Nebraska:* The Nebraska Supreme Court has not determined whether the right to an abortion exists in its state constitution. However, since the *Casey* decision, the court has suggested that there may be a state basis for such a right. The court stated in *Robotham v. State*<sup>153</sup> that the "constitutional right to privacy" includes matters relating to marriage, procreation, contraception, family relationships, child rearing, and education.<sup>154</sup> Although "[n]o Nebraska case recognizes a right to privacy, based on our Constitution, broader than the narrow federal constitutional right," the court did not preclude such a possibility.<sup>155</sup> The court also cited to *Roe*'s holding uncritically in *In re Petition of Anonymous I*.<sup>156</sup>

*Ohio:* The controlling state standard in Ohio was set by its intermediate appellate court, the Court of Appeals, in its opinion in *Preterm Cleveland v. Voinovich*.<sup>157</sup> The court "[found] no reason . . . to find that the Ohio Constitution confers upon a pregnant woman a greater right to choose whether to have an abortion or bear the child than is conferred by the United States Constitution, as explained in the plurality opinion of [*Casey*]."<sup>158</sup> Ohio courts will need to decide whether to maintain this interpretation of its constitution or to pull back from *Casey*'s standard in lockstep with the U.S. Supreme Court.

*South Dakota:* The South Dakota Supreme Court has not stated conclusively whether a right to an abortion exists in its state constitution. However, the following statement from a case interpreting the right to an abortion under the Fourteenth Amendment decided shortly before *Roe* makes the right's existence under the South Dakota Constitution unlikely:

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149. Gretchen Whitmer, Opinion, *I'm a Pro-Choice Governor, and I'm Not Going to Sit on My Hands Waiting for Congress*, N.Y. TIMES (May 9, 2022), <https://www.nytimes.com/2022/05/09/opinion/taking-the-fight-for-safe-legal-abortion-to-the-states.html> [https://perma.cc/K224-M69B].

150. 185 S.W.3d 685 (Mo. 2006).

151. See *id.* at 691–92 (interpreting MO. CONST. art. I, § 2).

152. *Id.* at 692.

153. 488 N.W.2d 533 (Neb. 1992).

154. *Id.* at 538–39 (collecting U.S. Supreme Court cases).

155. *Id.*

156. 558 N.W.2d 784, 789 (Neb. 1997).

157. 627 N.E.2d 570 (Ohio Ct. App. 1993).

158. *Id.* at 584.

[T]he question resolves itself into whether or not the state has a legitimate interest to legislate for the purpose of affording an embryonic or fetal organism an opportunity to survive. We think it has and on balance it is superior to the claimed right of a pregnant woman or anyone else to destroy the fetus except when necessary to preserve her own life.<sup>159</sup>

*Wisconsin:* Wisconsin courts have not taken a clear position. It is worth noting that the first sentence of the Wisconsin Constitution borrows language from the opening of the Declaration of Independence,<sup>160</sup> and the Kansas Supreme Court found those words to recognize a fundamental right to an abortion.<sup>161</sup>

## ii. Northeast

*Connecticut:* A trial court opinion from the Connecticut Superior Court is the clearest statement of the state courts' position on abortion as of this Essay's publication. In *Doe v. Maher*,<sup>162</sup> the court found a fundamental right to an abortion<sup>163</sup> in the state's due process clause,<sup>164</sup> equal protection clause,<sup>165</sup> and equal rights amendment.<sup>166</sup> The opinion requires that restrictions upon the right to an abortion survive strict scrutiny.<sup>167</sup> The Connecticut Supreme Court has not explicitly approved of this trial court opinion, but it has favorably cited to *Maher* for broader propositions.<sup>168</sup>

*Maine:* The Maine Supreme Court has no clear position on abortion rights. Because the court interprets the state's due process clause<sup>169</sup> to be coextensive with its federal counterpart, due process claims are analyzed under both constitutions concurrently.<sup>170</sup> The state legislature codified that it is the public policy of the state to protect a woman's right to an abortion prior to viability,<sup>171</sup> and Maine's Senator Susan Collins drafted a bill to

159. *State v. Munson*, 201 N.W.2d 123, 126 (S.D. 1972), *vacated sub nom.*, *Munson v. South Dakota*, 410 U.S. 950 (1973).

160. WIS. CONST. art. I, § 1 (“All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.”).

161. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019); *supra* notes 44–50.

162. 515 A.2d 134 (Conn. Super. Ct. 1986).

163. *Id.* at 135.

164. CONN. CONST. art. I, § 10.

165. *Id.* § 1.

166. *Id.* § 20.

167. *See Maher*, 515 A.2d at 157.

168. *See, e.g., Fair Cadillac-Oldsmobile Isuzu P'ship v. Bailey*, 640 A.2d 101, 105 (Conn. 1994) (citing *Maher* for its analysis of the “varying levels of judicial review . . . used depending on the nature of the right [that a] statute or regulation impinges upon”).

169. ME. CONST. art. I, § 6-A.

170. *See Green v. Comm'r of Mental Health & Mental Retardation*, 750 A.2d 1265, 1270 n.2 (Me. 2000).

171. *See ME. STAT. tit. 22, § 1598(1)* (2022) (“It is the public policy of the State that the State not restrict a woman's exercise of her private decision to terminate a pregnancy before viability . . . . After viability an abortion may be performed only when it is necessary to preserve the life or health of the mother.”).

maintain *Roe* and *Casey* as the law of the land,<sup>172</sup> so the sentiment in Maine seems to favor breaking from the federal law if *Roe* and *Casey* are overturned.

*New Hampshire*: Although the New Hampshire Supreme Court regularly uses the primacy approach when litigants put forth concurrent state and federal claims,<sup>173</sup> it has restricted its abortion jurisprudence to only analysis of federal law.<sup>174</sup> A pre-*Roe* case, *State v. Millette*,<sup>175</sup> discussed how abortion bans served a much clearer purpose in the nineteenth century—when “they had a solid basis in the inherent danger of abortions at that time”—but by 1972, bans served less of a purpose because scientific advancements like antibiotics, blood banks, and general medical progress made abortions much safer.<sup>176</sup> With a half-century of medical progress now added to the *Millette* court’s understanding, that consideration may be important in future cases.

*Pennsylvania*: In 1984, the Commonwealth Court—one of Pennsylvania’s two intermediate appellate courts—made a *Casey*-like determination that “[a] woman is protected from unduly burdensome interference with her freedom to terminate a pregnancy” under the Pennsylvania Constitution.<sup>177</sup> However, the Pennsylvania Supreme Court narrowed the ruling on appeal, not reaching the issue of whether a right to an abortion exists and clearly stating, “[t]his case does not concern the right to an abortion.”<sup>178</sup> The court has issued no clear statement since, but it did refer to the “right to procreate” as a “fundamental” right that can only be limited by laws withstanding strict scrutiny.<sup>179</sup>

### iii. South

*Delaware*: The Delaware Supreme Court has not analyzed abortion rights under the Delaware Constitution. Delaware’s courts do not interpret the Delaware Constitution’s due process clause as being identical to its federal counterpart,<sup>180</sup> so there is little available guidance as to how the state courts will rule in future abortion decisions.

*Georgia*: The Georgia Supreme Court has never determined whether the Georgia Constitution recognizes a right to an abortion. In the 2017 case

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172. See Reproductive Choice Act, S.3713, 117th Cong. (2022).

173. See *State v. Addison*, 87 A.3d 1, 41 (N.H. 2013) (“Where the defendant claims a violation of both the State and Federal Constitutions, we first address his claims under the State Constitution, and rely upon federal law only to aid our analysis.”).

174. See, e.g., *Smith v. Cote*, 513 A.2d 341, 346 (N.H. 1986) (“[W]e believe that *Roe* is controlling; we do not hold that our decision would be the same in its absence.”).

175. 299 A.2d 150 (N.H. 1972).

176. See *id.* at 154.

177. *Fischer v. Dep’t of Pub. Welfare*, 482 A.2d 1148, 1155 (Pa. Commw. Ct. 1984), *aff’d in part*, 502 A.2d 114 (Pa. 1985).

178. *Fischer*, 502 A.2d at 116.

179. *Nixon v. Commonwealth*, 839 A.2d 277, 287 (Pa. 2003).

180. *Moore v. Hall*, 62 A.3d 1203, 1208 (Del. 2013) (“[T]he textual differences between the United States Constitution and the Delaware Constitution have led to different interpretations of their respective due process provisions.”).

*Lathrop v. Deal*,<sup>181</sup> plaintiffs sought relief based exclusively on the right to an abortion under the Georgia Constitution, but the court did not conclude whether such a right exists. The court recognized that the U.S. Constitution established the “freedom of a woman to choose to abort her pregnancy,” but it proceeded by writing, “this Court never has held that the state constitution imposes similar limits upon the regulation of abortions.”<sup>182</sup> The court assumed that the right exists independently in the Georgia Constitution for the sake of its analysis,<sup>183</sup> but ultimately found that it could not entertain the lawsuit against the state due to sovereign immunity.<sup>184</sup>

*Kentucky*: The Kentucky Supreme Court has a long, robust tradition of libertarianism, relying heavily on the philosophy of John Stuart Mill to guide its privacy jurisprudence.<sup>185</sup> In *Commonwealth v. Smith*,<sup>186</sup> the court made the sweeping statement: “The power of a state to regulate and control the conduct of a private individual is confined to those cases where his conduct injuriously affects others. With his faults . . . which do not operate to the detriment of others, the state as such has no concern.”<sup>187</sup> In *Commonwealth v. Campbell*,<sup>188</sup> the court quoted from Mill’s *On Liberty* extensively, including that “[o]ver himself, over his own body and mind, the individual is sovereign,” and “[t]he only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute.”<sup>189</sup> Such a fervent emphasis on protecting the autonomy of individuals may incline the court to find a right to make the deeply personal decision of whether to get an abortion free from government interference, unless the court finds a fetus to be considered a separate individual.

*Maryland*: The Court of Appeals of Maryland—the state’s highest appellate court—has been silent on the question of abortion rights in the Maryland Constitution. The state’s intermediate appellate court—the Court of Special Appeals—recognized that there is a fundamental right to an abortion under the U.S. Constitution and further suggested that Article 24 of the Maryland Declaration of Rights<sup>190</sup> establishes a parallel right,<sup>191</sup> but little can be drawn from that. Maryland’s courts interpret their state constitutional due process right as so similar to its federal counterpart that “the decisions of the [U.S.] Supreme Court on the Fourteenth Amendment are practically direct authorities[.]”<sup>192</sup> However, the Court of Appeals of Maryland has

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181. 801 S.E.2d 867 (Ga. 2017).

182. *See id.* at 870 n.6.

183. *See id.*

184. *See id.* at 892.

185. *See Commonwealth v. Wasson*, 842 S.W.2d 487, 496–97 (Ky. 1992) (describing the Court’s libertarian history).

186. 173 S.W. 340 (Ky. 1915).

187. *Id.* at 343.

188. 117 S.W. 383 (Ky. 1909).

189. *Id.* at 386.

190. MD. CONST. DECL. OF RTS. art. 24.

191. *See Samuels v. Tschechtelin*, 763 A.2d 209, 238 (Md. Ct. Spec. App. 2000).

192. *Bureau of Mines v. George’s Creek Coal & Land Co.*, 321 A.2d 748, 755 (Md. 1974).

interpreted Article 24 as creating a broader due process right than the Fourteenth Amendment in limited circumstances where “fundamental fairness” required it.<sup>193</sup>

*North Carolina:* The North Carolina Supreme Court has treated abortion exclusively as a question of federal law, never interpreting its state constitution for this purpose.<sup>194</sup> A dissenting justice, however, has suggested that the state constitution’s equal protection clause<sup>195</sup> recognizes and protects a right to an abortion independent of the U.S. Constitution.<sup>196</sup> An intermediate appellate court has also found that a fetus is not a “person” under the North Carolina Constitution.<sup>197</sup>

*Oklahoma:* The Oklahoma Supreme Court considers abortion an “issue[] of federal law,” and “[b]ecause the United States Supreme Court has spoken, [the Oklahoma Supreme] Court is not free to impose its own view of the law as it pertains to the competing interests involved.”<sup>198</sup> The court has never concluded whether the Oklahoma Constitution establishes the right to an abortion,<sup>199</sup> but it is unlikely to depart from its approach of interpreting the Oklahoma Constitution in lockstep with the U.S. Constitution.<sup>200</sup>

*South Carolina:* The South Carolina Supreme Court has never taken a position on whether the South Carolina Constitution recognizes the right to an abortion. The state’s case law provides little guidance as to how the court would rule on the issue. In one instance, the court expressed that granting legal rights to fetuses would lead to absurd results, such as the estate of a fetus being able to sue its mother under tort law if the mother received an abortion.<sup>201</sup>

*Texas:* Before *Roe*, the Texas Court of Criminal Appeals—the highest appellate court in the state for *criminal* cases—found that the state government had a “compelling interest to protect fetal life.”<sup>202</sup> At that time, the court had not determined whether “any pregnant woman seeking an abortion operates within a constitutionally protected zone of privacy.”<sup>203</sup> However, the Supreme Court of Texas—the state’s highest court for *civil* appeals—cited to *Roe* when it recognized for the first time that a right to

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193. *Washington v. State*, 148 A.3d 341, 354 (Md. 2016) (collecting cases).

194. *See Rosie J. v. Dep’t of Hum. Res.*, 491 S.E.2d 535, 536 (N.C. 1997).

195. N.C. CONST. art. I, § 19.

196. *See Rosie J.*, 491 S.E.2d at 538 (Parker, J., dissenting).

197. *Stam v. State*, 267 S.E.2d 335, 340 (N.C. Ct. App. 1980), *rev’d on other grounds*, 275 S.E.2d 439 (N.C. 1981).

198. *Okla. Coal. for Reprod. Just. v. Cline*, 441 P.3d 1145, 1151 (Okla. 2019).

199. *See id.*

200. *See id.* at 1153 (“Due process protections encompassed within the Okla. Const. art. 2, § 7 are generally coextensive with those of its federal counterpart.”).

201. *See Crosby v. Glasscock Trucking Co.*, 532 S.E.2d 856, 857 (S.C. 2000) (holding that a mother negligently injured by the same act that results in the stillbirth of her fetus may seek recovery for her own injuries, but that she may not seek damages separately for damages to the fetus).

202. *Thompson v. State*, 493 S.W.2d 913, 918 (Tex. Crim. App. 1971), *vacated*, 410 U.S. 950 (1973).

203. *See id.*

privacy exists implicitly under various clauses of the Texas Constitution.<sup>204</sup> As recent abortion regulations work their way through the Texas state courts,<sup>205</sup> Texas's high courts may soon have an opportunity to rule definitively on the issue.

*Virginia:* The Virginia Supreme Court has relied on federal law to resolve questions related to abortion, without analyzing whether the Virginia Constitution recognizes an analogous right.<sup>206</sup> There is little indication of how the court will rule on the issue in the future.

#### iv. West

*Arizona:* The Arizona Supreme Court has not ruled definitively on whether a right to abortion exists in the Arizona Constitution. In *Simat Corp. v. Arizona Health Care Cost Containment System*,<sup>207</sup> the court struck down an abortion funding law that would only subsidize abortions necessary to save a woman's life, finding it unconstitutional under the state constitution's equal protection clause.<sup>208</sup> The court took "the right of choice announced in *Roe*" as a given in its analysis of the Arizona Constitution.<sup>209</sup> The case did not reach whether there was a fundamental right to an abortion in the state's privacy clause, but the court noted that Arizona's equal protection clause provides a "greater privacy right" than the U.S. Constitution.<sup>210</sup> The court had previously interpreted the privacy clause to mean that "[a]n individual's right to chart his or her own plan of medical treatment deserves as much, if not more, constitutionally-protected privacy than does an individual's home or automobile."<sup>211</sup>

*Colorado:* Although the Colorado Supreme Court has never ruled on the issue, the court's privacy and equal protection decisions suggest that it may be amenable to finding a right to an abortion under Sections 3 and 25 of

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204. See *Tex. State Emps. Union v. Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987).

205. See Madlin Mekelburg, *Texas Judge Rules Some Provisions of State's Restrictive Abortion Law Violate Texas Constitution*, AUSTIN AMERICAN-STATESMAN (Dec. 9, 2021), <https://www.statesman.com/story/news/politics/state/2021/12/09/texas-abortion-law-2021-judge-ruling-roe-v-wade-supreme-court/6453616001/> [https://perma.cc/CR6T-S2VS] (discussing how a state trial judge recently found a new law that allowed private attorneys general to enforce abortion restrictions did not provide due process).

206. See, e.g., *Miller v. Johnson*, 343 S.E.2d 301, 304 (Va. 1986) (citing *Roe* but no state authority for the proposition that "[w]ithin specified limits a woman is entitled to have an abortion if she so chooses"); *Simopoulos v. Commonwealth*, 277 S.E.2d 194, 201 (Va. 1981) ("In the definition of a woman's right to abort, the watershed case is *Roe v. Wade*.").

207. 56 P.3d 28 (Ariz. 2002).

208. See *id.* at 34 (citing ARIZ. CONST. art. II, § 13).

209. *Id.*

210. See *id.* (citing ARIZ. CONST. art. II, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.")).

211. *Rasmussen by Mitchell v. Fleming*, 741 P.2d 674, 682 (Ariz. 1987).

Article II of the Colorado Constitution.<sup>212</sup> In *Zavilla v. Masse*,<sup>213</sup> the court read the word “liberty” broadly in those sections, finding it “connotes far more than mere freedom from physical restraint; it is broad enough to protect one from governmental interference in . . . choice in countless matters of purely personal concern.”<sup>214</sup> The court also noted that the Colorado Framers’ failure to include a right by name—as they did with the rights to assembly, religion, and the like—does not mean they did not intend future Coloradans to have that right; it merely means they did not want those rights to “be left to the uncertainty of judicial construction of a general saving clause.”<sup>215</sup> When the law “restricts the freedom of the individual in matters of his purely personal concern,” the court will look for a strong government justification.<sup>216</sup>

In *Lujan v. Board of Education*,<sup>217</sup> the court included the right to an abortion under *Roe* in a long list of “fundamental rights” whose exercise is protected by the state’s equal protection provisions inherent in its due process clause.<sup>218</sup> It stated that those rights are the ones “which have been recognized as having a value essential to individual liberty in our society.”<sup>219</sup>

*Hawaii*: Although the Hawaii Supreme Court has never clearly stated that there is a fundamental right to an abortion under the Hawaii Constitution, it has left little doubt that there is. The court has looked to *Roe* for “guidance on the intended scope of the privacy protected by the Hawaii Constitution.”<sup>220</sup> The court also interprets the Hawaii Constitution’s privacy clause<sup>221</sup> to “afford[] much greater privacy rights than the federal right to privacy[.]”<sup>222</sup> The privacy clause explicitly requires that limitations on Hawaiians’ right to privacy serve a compelling state interest,<sup>223</sup> mirroring *Roe*. Further, the court has discussed the “fundamental privacy right to procreational autonomy” as if it were a given.<sup>224</sup> Taken together, it seems exceedingly likely that a fundamental right to an abortion exists under the Hawaii Constitution.

*Idaho*: The Idaho Supreme Court has been silent on abortion. In the 1980s, the court recognized that “the many problems associated with

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212. COLO. CONST. art. II, § 3 (mirroring the Declaration of Independence’s opening sentence: “All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties . . . and of seeking and obtaining their safety and happiness”); *id.* § 25 (“No person shall be deprived of life, liberty or property, without due process of law.”).

213. 147 P.2d 823 (Colo. 1944).

214. *Id.* at 827.

215. *Id.*

216. *Id.*

217. 649 P.2d 1005 (Colo. 1982).

218. *See id.* at 1015 n.7 and accompanying text.

219. *Id.*

220. *State v. Mueller*, 671 P.2d 1351, 1358 (Haw. 1983).

221. HAW. CONST. art. I, § 6.

222. *State v. Kam*, 748 P.2d 372, 377 (Haw. 1988).

223. HAW. CONST. art. I, § 6 (“The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.”).

224. *See Child Support Enf’t Agency v. Doe*, 125 P.3d 461, 468 (Haw. 2005).

illegitimate teenage pregnancy” made “the prevention of illegitimate teenage pregnancies . . . [an] important governmental objective” and that the “state has a strong interest in furthering” that objective.<sup>225</sup> It also observed that *Roe* “established that public policy now supports, rather than militates against, the proposition that a woman not be impermissibly denied a meaningful opportunity to make the decision whether to have an abortion.”<sup>226</sup>

*Nevada:* The Nevada Supreme Court has not interpreted whether the Nevada Constitution contains the right to an abortion, but the court has continued to point to *Roe* as the source of that right under the U.S. Constitution despite *Casey* restricting its breadth.<sup>227</sup>

*New Mexico:* In *New Mexico Right to Choose/NARAL v. Johnson*,<sup>228</sup> a case involving the funding of abortions, the New Mexico Supreme Court came short of finding that a fundamental right to an abortion exists but indicated its support of the right. New Mexico ratified the Equal Rights Amendment into its state constitution,<sup>229</sup> and the court in *New Mexico Right to Choose/NARAL* stated that the Amendment provides women with significantly more protection from discrimination than the equal protection clause of the U.S. Constitution provides.<sup>230</sup> Like the Iowa Supreme Court in *Planned Parenthood of the Heartland*,<sup>231</sup> the New Mexico court cited extensively to Justice Ginsberg’s writings on equal protection, and it found that gender-based discrimination must pass strict scrutiny, despite federal courts only applying intermediate scrutiny.<sup>232</sup> The court concluded: “[C]lassifications based on the unique ability of women to become pregnant and bear children are not exempt from a searching judicial inquiry under the Equal Rights Amendment to . . . the New Mexico Constitution.”<sup>233</sup>

*Oregon:* The Court of Appeals of Oregon—the state’s intermediate appellate court—heard a case challenging state restrictions on abortion funding and found that “the state’s interest in protecting potential human life before viability of the fetus . . . is of a limited nature and is not sufficient to outweigh the woman’s interest in her health.”<sup>234</sup> The court suggested that

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225. *State v. LaMere*, 655 P.2d 46, 50 (Idaho 1982).

226. *Blake v. Cruz*, 698 P.2d 315, 318 (Idaho 1984).

227. *See Greco v. United States*, 893 P.2d 345, 349 (Nev. 1995) (“Those who do not wish to undertake the many burdens associated with the birth and continued care of such a child have the legal right, under *Roe v. Wade* and codified by the voters of this state, to terminate their pregnancies.”).

228. 975 P.2d 841 (N.M. 1998).

229. N.M. CONST. art. II, § 18 (“Equality of rights under law shall not be denied on account of the sex of any person.”).

230. *See Right to Choose/NARAL*, 975 P.2d at 851 (“This lack of a federal counterpart to New Mexico’s Equal Rights Amendment renders the federal equal protection analysis inapposite in this case.”).

231. 915 N.W.2d 206 (Iowa 2018); *see also supra* notes 40–41 and accompanying text.

232. *See Right to Choose/NARAL*, 975 P.2d at 853–54.

233. *Id.* at 855.

234. *Planned Parenthood Ass’n v. Dep’t of Hum. Res.*, 663 P.2d 1247, 1260 (Or. App. 1983), *aff’d*, 687 P.2d 785 (Or. 1984).

Oregon's equal protection clause<sup>235</sup> may establish "an independent right to procreational choice" but declined to draw a conclusion on the matter.<sup>236</sup> On review, the Oregon Supreme Court found that the equal protection question was "premature" based on the facts of the case and struck down the funding restrictions on alternative, administrative law grounds.<sup>237</sup> The Oregon Supreme Court has not spoken on the question since.

*Utah:* The Utah Supreme Court has not analyzed abortion rights under the Utah Constitution. In *Wood v. University of Utah Medical Center*,<sup>238</sup> the court applied *Casey*'s undue burden standard to an abortion question and stated "[a]t this time we do not interpret the Utah Constitution to give any further protection to plaintiffs than does the federal constitution."<sup>239</sup> It remains to be seen whether the court will follow the U.S. Supreme Court once it restricts that protection.

*Wyoming:* The Wyoming Supreme Court has not determined whether an independent right to an abortion exists under the Wyoming Constitution, treating abortion as a question purely "within the federal domain."<sup>240</sup> In a case decided shortly after *Roe*, the Wyoming Supreme Court stated, "[t]he regulation of abortions in this State is beyond the power of the courts and is solely a matter for the legislature, which must, of course, give heed to the pronouncements of the United States Supreme Court[.]"<sup>241</sup>

#### CONCLUSION

If the U.S. Supreme Court overrules *Roe* and *Casey*, it will represent a historic recession in which women lose protection of what had been considered an inalienable right to choose to have an abortion. However, the effects of this overruling will vary widely between states depending on whether the states' constitutions recognize and protect a woman's right to an abortion independent of the federal law. In states with constitutions that are more protective of their citizens' privacy and bodily autonomy than the U.S. Constitution is, or afford greater due process, or more strictly require equal protection under the law, or more strenuously protect religious expression and resist the establishment of a state religion, the right to an abortion may be undisturbed by the federal regression.<sup>242</sup> State constitutions are much easier to amend than the U.S. Constitution,<sup>243</sup> so state-level abortion

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235. OR. CONST. art. I, § 20 ("No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.").

236. *Planned Parenthood Ass'n*, 663 P.2d at 1256–57.

237. *Planned Parenthood Ass'n*, 687 P.2d at 787, 792–93.

238. 67 P.3d 436 (Utah 2002).

239. *Id.* at 448.

240. *Wyo. Nat. Abortion Rts. Action League v. Karpan*, 881 P.2d 281, 288 (Wyo. 1994).

241. *Doe v. Burk*, 513 P.2d 643, 645 (Wyo. 1973).

242. See Stern, *supra* note 9.

243. See John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 ALB. L. REV. 2105, 2106 (2013) ("Although state constitutions vary in the difficulty of their amendment procedures, no constitution is more difficult to amend

protections can radically change with a single vote in any given year. This is the volatile domain to which the fight over abortion rights is likely to shift over the coming decades.

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than the U.S. Constitution . . . . All but a handful of states permit ratification of amendments by a bare popular majority.”).