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State Constitutional Law: The Future of Abortion Rights?

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State Constitutional Law: The Future of Abortion Rights?

Gabriella Wittbrod†

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INTRODUCTION

The landmark Supreme Court Case, *Roe v. Wade*, established a woman's[1] federal right to have an abortion.[2] However, on June 24, 2022, *Dobbs v. Jackson Women's Health Organization* stole this right from women in the U.S.[3] Now, because of *Dobbs,* women can no longer rely on consistent access to safe abortions, and instead may opt for underground, unregulated procedures including the ingestion of harmful toxins or breakage of the amniotic sac via foreign objects that put their lives at serious risk.[4] Annually, these unsafe practices cause approximately 68,000 deaths worldwide.[5] To protect abortion rights for all Americans in our post-*Roe* landscape, advocates should call upon another source of law to aid in the fight against reproductive oppression. Promising evidence from case law and legal literature suggests that state constitutions may provide the necessary support.[6] Most

1. For simplicity, this note uses the term "women" to describe those people who can become pregnant and subsequently have abortions. In reality, people of all genders have this ability. *See generally*, Heidi Moseson, et al., *Abortion Experiences and Preferences of Transgender, Nonbinary, and Gender-Expansive People in the United States,* 224 AM. J. OBSTETRICS AND GYNECOLOGY 376 (2021).

2. Roe v. Wade, 410 U.S. 113, 153 (1973).

3. Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228 (2022).

4. *Roe v. Wade Overturned: How the Supreme Court Let Politicians Outlaw Abortion,* PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/abortion/roe-v-wade [https://perma.cc/8CB2-NJNT] (last visited Feb. 13, 2023). The FDA has also recently authorized abortion pills to be distributed nationwide via mail. While this is a step in the right direction, these pills are only authorized for pregnancies up to 10 weeks' gestation. *See* Pam Belluck, *F.D.A. Will Permanently Allow Abortion Pills by Mail,* NY TIMES (Dec. 16, 2021), https://www.nytimes.com/2021/12/16/health/abortion-pills-fda.html [https://perma.cc/JME7-G85Y]; Lisa B. Haddad & Nawal M. Nour, *Unsafe Abortion: Unnecessary Maternal Mortality,* 2 R. OBSTETRICS & GYNECOLOGY 122 (2009).

5. Haddad & Nour, *supra* note 4, at 122.

6. *See generally* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 811 (Oxford Univ. Press, 1st ed. 2020); Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights*

state constitutions include due process clauses or equal protection clauses that can be used for future abortion litigation, just as *Roe* used the Fourteenth Amendment on a federal level.[7]

This Note discusses how advocates can use state constitutions to protect abortion rights in the absence of federal protections. By analyzing state constitutions and observing precedents set in past case law, this note will form a better picture of how abortion rights can be protected at the state level.

Part I will provide an overview of *Roe* and *Casey* to demonstrate where abortion rights began and how they progressed in the U.S prior to *Dobbs*. Part II will then detail the current state of federal abortion rights, including *Dobbs* and the larger political context behind its decision. Part III will outline the current case law that has protected abortion rights through state constitutions. This section argues that the equal protection and due process clauses are the main avenues through which states can protect abortion rights. Alternatively, states may turn to the privacy and right-to-liberty provisions. Lastly, this section will discuss unsuccessful attempts to protect abortion rights through state constitutions and consider how advocates can improve moving forward.

Finally, Part IV will ask: (1) what reproductive rights look like without *Roe* and (2) how attorneys can utilize pertinent clauses embedded in state constitutions to fight for abortion rights. These clauses may be useful to circumvent federal restrictions on abortions because states are able to offer more protections than the federal government.[8] The federal government, in this way, acts as a "floor of rights"[9] or "baseline"[10] from which the states can build further civil protections. Part IV will also discuss the limited lockstep method, which is a type of constitutional interpretation used by state judges to defer to federal interpretation of a state constitutional provision when

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Through State Constitutions, 15 Wm. & Mary J. Women & L. 469 (2009).

7. Sutton, *supra* note 6, at 92; Roe v. Wade, 410 U.S. 113, 153 (1973).

8. Sutton, *supra* note 6, at 187.

9. *Id.*

10. *Id.* at 205.

that provision matches a federal constitutional provision.[11] Part IV will explain why limited lockstep can be harmful to the state judicial system by stripping power from state courts and how the elimination of limited lockstep can benefit reproductive rights in the rapidly-shifting legal landscape. Lastly, Part IV will detail ongoing litigation to analyze the arguments that are succeeding in state courts.

I. ABORTION RIGHTS: AN OVERVIEW OF PAST SUPREME COURT LITIGATION[12]

To discuss abortion in the context of state constitutional law, it is important to first detail the federal cases that paved the way for abortion rights in the United States before *Dobbs*. The quintessential landmark cases— *Roe* and *Casey*— will be detailed here to exemplify how the Supreme Court viewed abortion rights from 1973 up until *Dobbs* in 2022.

Roe v. Wade was the Supreme Court case that effectually legalized abortion.[13] This case challenged a Texas law that banned all abortions other than those that were lifesaving to the mother.[14]

The U.S. Constitution does not explicitly grant a right to privacy. Despite this, the *Roe v. Wade* Court discussed how this right is founded in the Fourteenth Amendment's Due Process Clause, as privacy is intertwined with the concept of liberty.[15] Accordingly, the Court held that a law that prohibits abortion "without regard to pregnancy stage and without recognition of the other interests involved" violates the Due Process Clause.[16] Further, the *Roe* Court used strict scrutiny to assess whether the statute in question furthered the compelling state interest of

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11. Timothy P. O'Neill, *Escape from Freedom: Why "Limited Lockstep" Betrays Our System of Federalism*, 48 JOHN MARSHALL L. REV. 325, 326 (2014).

12. *See generally Timeline of Important Reproductive Freedom Cases Decided by the Supreme Court,* ACLU, https://www.aclu.org/other/timeline-important-reproductive-freedom-cases-decided-supreme-court [https://perma.cc/3YDD-VJHG] (last visited Oct. 25, 2021).

13. *Id.*; Roe v. Wade, 410 U.S. 113 (1973).

14. *Id.* at 113.

15. *Id.* at 727.

16. *Id.* at 732.

protecting a potential life and whether the statute was narrowly tailored to achieve that interest.[17] In using this strict scrutiny test, the highest standard of review, the Supreme Court set a precedent for the protection of abortion rights at the federal level.

Additionally, the *Roe* Court developed the trimester approach, which split up rules for regulating abortion by trimester.[18] In the first trimester, no state may regulate abortion.[19] In the second trimester, states may implement regulations that promote the health interests of the mother.[20] Lastly, in the third trimester, when the fetus is viable, states can regulate or outlaw abortions in the interest of the life of the fetus unless the mother's life is in jeopardy.[21] This trimester approach sets an important framework for analyzing future abortion cases.

The *Roe* decision was reconsidered by the U.S. Supreme Court's 1992 case, *Planned Parenthood of Southeastern Pennsylvania v. Casey,* where petitioners challenged five different provisions of the Pennsylvania Abortion Control Act of 1982, including a provision that mandated a 24-hour waiting period between a woman receiving information about her upcoming abortion and actually receiving that abortion.[22] This provision also mandated a minimum of two in-person clinic visits prior to receiving an abortion.[23] While the *Casey* Court upheld *Roe* and a woman's right to receive an abortion, it also adopted the "undue burden" test for evaluating restrictive abortion laws, a test that has been widely criticized within the context of abortion

17. *Id.* at 735.

18. *Id.*

19. *Id.*

20. *Id.* at 732.

21. *Id.*

22. Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791, 2796 (1992). Several other provisions of this Pennsylvania law were challenged here, including provisions requiring a woman to give informed consent prior to the procedure, requiring informed consent if one parent of the patient is a minor, and requiring married women to inform their husbands about their intent to abort prior to the procedure.

23. *Id.* at 2825.

litigation.[24] It noted that "in determining the burden imposed by the challenged regulation, the Court inquires whether the regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'"[25]

This case marked a change in the way federal courts approach abortion regulation by weakening the bar for constitutional review.[26] As long as a law does not pose a substantial obstacle for the woman seeking an abortion, that law is constitutional, regardless of whether it restricts access to abortion. The undue burden test places a qualifier on government interference, meaning that under *Casey*, the government can essentially interfere with a woman seeking an abortion so long as that interference is not deemed "substantial."[27] This allows for a diverse array of interpretations for what qualifies as a substantial obstacle, and it opens the door for conservative judges to conflate abortion restrictions with their own moral beliefs.[28] The *Casey* Court upheld all but one of the challenged provisions of the Pennsylvania Abortion Control Act of 1982, and some of the statute's requirements that had been previously struck down by the Supreme Court under strict scrutiny now stood with the undue burden test.[29]

24. *Id.* at 2845; Valerie J. Pacer, *Salvaging the Undue Burden Standard—Is it a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L. REV. 295 (1995).

25. *Id.*

26. ACLU, *Timeline of Important Reproductive Freedom Cases Decided by the Supreme Court, supra* note 12.

27. Pacer, *supra* note 24, at 309.

28. *Id.*

29. Planned Parenthood of Southeastern Pennsylvania, 112 S.Ct. at 2796. The Supreme Court upheld the provisions of the Pennsylvania law that required informed consent from patients by doctors, parental consent, 24-hour waiting period, and reporting from facilities offering abortions. The Supreme Court struck down the provision that required that married women give advance notice to their husbands before getting an abortion. The Court's reasoning in striking this provision down was that the provision places an undue burden on the woman seeking an abortion.

II. The Politics of the U.S. Supreme Court and Its Effect on Abortion Litigation

From the *Casey* decision in 1992 to now, perhaps the biggest changes in abortion litigation have been catalyzed by the ever-changing politics of the U.S. Supreme Court. The *Casey* Court leaned conservative, and the dissenters were the more conservative justices on the bench. Thus, it is no surprise that the underlying politics of the Court at that time had a major influence on the ultimate decision to switch from strict scrutiny to undue burden in *Casey*.[30]

Over the last two decades, the U.S. Supreme Court slowly began to accumulate more liberal justices. President Clinton nominated Justice Ginsburg and Justice Breyer in 1993 and 1994, respectively, and President Obama nominated Justice Sotomayor and Justice Kagan in 2009 and 2010, respectively.[31] In 2016, the Roberts liberal-leaning Court heard *Whole Woman's Health v. Hellerstedt*, wherein the Court struck down a statute that required abortion providers to hold admitting privileges at their local hospitals based on the opinion that the statute at issue posed an undue burden to women that outweighed the governmental interest of protecting unborn fetuses.[32]

The shift toward a more liberal court turned once again with the election of President Trump, the death of Justice Ginsburg, and the retirement of Justice Kennedy.[33] Additionally, with the vacancy left by the death of Justice Scalia, President Trump nominated three highly conservative justices: Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett.[34] This conservative shift is reflected in the 2020 decision of *June Medical Services, LLC v.*

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30. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Oyez, https://www.oyez.org/cases/1991/91-744 [https://perma.cc/G7MN-HW2C] (last visited Mar. 21, 2022).

31. *Supreme Court Nominations (1789-Present),* U.S. Senate, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm [https://perma.cc/G9DN-KBVQ] (last visited Mar. 21, 2022).

32. *See* Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 591 (2016).

33. U.S. Senate, *Supreme Court Nominations (1789-Present), supra* note 31.

34. *Id.*

Russo.[35] The *Russo* Court struck down a nearly-identical statute to the statute in *Hellerstedt,* and on its face, this appears to be a win for reproductive justice. However, *Russo* nevertheless reflects a conservative shift in the political leanings of the Supreme Court because of the actual language the Justices used in the *Russo* decision.[36] In his concurring opinion, Justice Roberts, who held the deciding vote in *Russo* due to his moderate political beliefs, stated that his hands were essentially tied because this case was so similar to *Hellerstedt.*[37] He also addressed the undue burden test, stating that "[n]either party has asked us to reassess the constitutional validity of that standard."[38] By this, Roberts invited a challenge to the undue burden standard in the future.

The U.S. Supreme Court heard its most recent challenge to *Roe* in 2022 with *Dobbs v. Jackson Women's Health Organization,* a case that challenged a Mississippi law prohibiting abortions after 15 weeks after conception.[39] In a shocking deviation from federal precedent, the U.S. Supreme Court overturned *Roe* and *Casey* on June 24, 2022.[40] The majority opinion, written by Justice Alito, examines three issues: (1) "whether the Fourteenth Amendment's reference to liberty protects a particular right;" (2) "whether the right [to have an abortion] . . . is rooted in our Nation's history and tradition and

35. *See* June Medical Services, LLC v. Russo, 140 S.Ct. 2103, 2113 (2020). It is important to note that this case was decided prior to Justice Barrett joining the Supreme Court. Justice Ginsburg was still on the Court at this time.

36. Gretchen Borchelt, *Symposium:* June Medical Services v. Russo: *When a "Win" is Not a Win*, SCOTUSBLOG (June 30, 2020), https://www.scotusblog.com/2020/06/symposium-june-medical-services-v-russo-when-a-win-is-not-a-win/ [https://perma.cc/VXR6-NN2Y].

37. *June Medical Services*, 140 S.Ct. at 2134.

38. *Id.* at 2135.

39. *See Dobbs*, 142 S.Ct. at 2243.

40. *Id.*; *see also* Mark Sherman, *Supreme Court Leak Probe: So Many Questions, So Few Answers,* AP (July 23, 2022), https://apnews.com/article/abortion-covid-us-supreme-court-health-john-roberts-7737a7e3a2fbbcac985549941b884a61 [https://perma.cc/9BS4-5LG3] (The *Dobbs* decision was leaked in May of 2022. This leak may suggest that political tumult exists within the walls of the Supreme Court, just as it does on the outside.).

whether it is an essential component of what we have described as "ordered liberty;" and (3) "whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents."[41]

As to the first issue, the majority held that the Fourteenth Amendment reference to liberty protects both the rights guaranteed in the Bill of Rights and "a select list of fundamental rights that are not mentioned anywhere in the Constitution."[42] These fundamental rights must be "deeply rooted in [our] history and tradition."[43] Thus, in the view of the *Dobbs* majority, for abortion to be protected by the Fourteenth Amendment as a fundamental liberty, the right to have an abortion must be deeply rooted in the history and tradition of the U.S. The Court continues: "we must guard against the natural human tendency to confuse what the [Fourteenth] Amendment protects with our own ardent views about the liberty that Americans should enjoy."[44] This warning sets the stage for the majority's opinion on their second issue of whether abortion rights are deeply rooted in the history and tradition of the U.S.

To argue that abortion rights were not deeply rooted, Justice Alito argued that prior to Roe, abortion was largely not considered a constitutional right, even at the state level, and often criminalized by states as well.[45] The majority cited many

41. *Dobbs*, 142 S.Ct. at 2244.

42. *Id.* at 2246.

43. *Id.* (quoting Timbs v. Indiana, 139 S.Ct. 682, 686 (2019)) (internal quotation marks omitted).

44. *Id.* at 2247. This argument introduces the paradox of whether or not the majority's views do exactly what they are trying to avoid: ardently placing their personal views about what liberties Americans should enjoy. While *Roe* gave positive rights to people by allowing abortion, the majority in *Dobbs* removes these rights, prohibiting people from enjoying a freedom that *Roe* originally permitted. While beyond the scope of this note, the question of whether or not this prohibition is based on ardent personal views remains.

45. *Id.* at 2248; *but see* Jessica Ravitz, *The Surprising History of Abortion in the United States*, CNN, https://www.cnn.com/2016/06/23/health/abortion-history-in-united-states/index.html [https://perma.cc/M36Q-6WLW] (last updated June 27, 2016, 10:52 AM). The author points out an alternative view of the history of abortion in the U.S. that largely contradicts the claims that the Dobbs majority asserts. In this article, Ravitz details the many

instances where this is true, and this "overwhelming consensus,"[46] for Justice Alito, was enough reason to hold that abortion rights are not deeply rooted in the history and tradition of the United States.[47]

Lastly, the Court addressed whether the right to have an abortion is part of a broader entrenched right in the U.S. Constitution or society at large.[48] Casey, as the majority quoted, describes this entrenched right as "the freedom to make intimate and personal choices that are central to personal dignity and autonomy."[49] The majority in Dobbs disagreed with the reasoning in Casey, and they ultimately held that abortion is not part of a broader entrenched right.[50]

The majority next addressed stare decisis, a legal concept that calls for prior decisions to be followed by the Court in most instances.[51] The Court chose to abandon stare decisis, arguing that abortion is a unique enough issue that non-abortion cases bear no weight, and *Roe* and *Casey* are not "principled and intelligible"[52] to follow.[53]

An apt summary of Justice Alito's holding can be found in the introduction of his opinion:

> *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national

dimensions of the history of abortion in the U.S., including the acceptance of the practice, the subsequent criminalization, and the staggering rates of dangerous illegal abortions performed in the pre-Roe era; *see also* Rachel Benson Gold, *Lessons from Before Roe: Will Past be Prologue?,* GUTTMACHER REP. PUB. POL'Y (Mar. 2003) https://www.guttmacher.org/sites/default/files/article_files/gr060108.pdf.

46. *Dobbs*, 142 S.Ct. at 2253.
47. *Id.* at 2248–54.
48. *Id.* at 2257.
49. *Id.* at 2236 (quoting Casey, 505 U.S. at 851) (internal quotation marks omitted).
50. *Id.*
51. *Id.* at 2261.
52. *Id.* at 2276 (quoting June Medical Services, LLC v. Russo, 140 S.Ct. 2103 (2020) (Thomas, J., dissenting)).
53. *Id.* at 2261–67.

> settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division. It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.[54]

This quote not only demonstrates the divergence from 49 years of Supreme Court precedent, but it also creates an alarming new precedent wherein the Supreme Court can easily pivot from previous opinions to support the majority's deeply political interests, regardless of the rights it will strip from its citizens. Yet, while the *Dobbs* decision is devastating, the United States is now in need of a backup plan to protect abortion rights and prevent backsliding from the progress that has been made in women's rights in the past century. This will likely come in the form of state constitutional law.

III. An Analysis of State Constitutional Precedents

Similar to the federal system, states have their own constitutions. In his book *51 Imperfect Solutions: States and the Making of American Constitutional Law,* Judge Jeffrey S. Sutton discusses how attorneys seeking to protect reproductive rights traditionally had two weapons in their arsenal: the U.S. Constitution and state constitutions.[55] Before *Dobbs*, litigators were far less likely to attack claims at the state level, partly due to the widely-known precedents set by cases including *Roe* and *Casey*.[56] In other words, attorneys did not feel the need to rely on state constitutions because of the federal protections. However, since *Dobbs* eliminated federal protections for abortion, federal litigation of abortion is essentially moot. Now, state litigation is more vital than ever to protect abortion rights, and attorneys will be forced to turn to state constitutions as their primary weapons in arguing for abortion rights.

Within state constitutional law, attorneys have several avenues to approach the issue of abortion, including equal protection, due process, rights to liberty, and individual privacy

54. *Id.* at 2243.

55. Sutton, *supra* note 6, at 8.

56. *Id.*

rights.[57] Almost all state constitutions contain some form of equal protection guarantees, due process guarantees, or both.[58] Further, all fifty states include a right to liberty, which usually accompanies rights to life and the pursuit of happiness.[59] The next few subsections will examine how attorneys have used equal protection, due process, rights to liberty, and individual privacy rights to argue for abortion protections in the past, both successfully and unsuccessfully.

A. Equal Protection and Due Process

As noted above, most attorneys have the ability to use their state's equal protection or due process clauses to argue for abortion rights because most states have either or both of these clauses. For example, in *Planned Parenthood of the Heartland v. Reynolds* ex rel. *State,* the Supreme Court of Iowa in 2018 struck down a statute that imposed a mandatory 72-hour wait after an initial abortion consultation to actually receive that abortion.[60] The court cited Iowa's Due Process Clause, which guarantees that "no person shall be deprived of life, liberty, or property, without due process of law."[61] The court also noted that while this clause is "nearly identical in scope, import and purpose" to the federal Due Process Clause, it has the right to interpret the state constitution independently from the U.S. Constitution.[62] This is important because it shows that state courts are not bound by federal interpretations of similar laws.—this opens the door for states to interpret laws in a manner that protects abortion rights.

57. *See, e.g.,* Planned Parenthood of Cent. New Jersey v. Farmer, 165 N.J. 609 (N.J. 2000); Armstrong v. State, 296 Mont. 361 (Mont. 1999); Hodes & Nauser, MDs, P.A. v. Schmidt, 309 P.3d 610 (Kan. 2019).

58. *See US Law, Case Law, Codes, Statutes & Regulations*, JUSTIA, https://law.justia.com/ [https://perma.cc/JLZ9-YXHY] (under "US State Law," see all state constitutions) (last visited Oct. 26, 2021) (All state constitutions were analyzed for equal protection clauses, and only two, Vermont and New Jersey, did not explicitly contain either).

59. *Id.*

60. Planned Parenthood of the Heartland v. Reynolds ex. rel. State, 915 N.W.2d 206, 212 (Iowa 2018).

61. *Id.* at 232 (citing IOWA CONST. art. I, § 9).

62. *Id.* at 233 (citing State v. Hernandez-Lopez, 639 N.W.2d 226, 237 (Iowa 2002)).

In an amicus brief to the Supreme Court of Iowa in this case, Bob Rush and B. Jessie Hill argued that the Iowa Supreme Court has a long tradition of interpreting the Iowa Constitution independently from the U.S. Constitution, and this tradition has proved influential in the U.S. Supreme Court's interpretations of analogous federal constitutional provisions.[63] The amicus brief argued that the Iowa Supreme Court's prior case law "clearly dictates that abortion is a fundamental right under the Iowa Constitution, and consequently, that infringements of that right should be subject to strict scrutiny."[64] The court in *Planned Parenthood of the Heartland* indeed applied strict scrutiny here, diverging from federal precedent set in *Casey*.[65] The court held:

> By applying the narrow tailoring framework . . . we fulfill our obligation to act as a check on the powers of the legislature and ensure state actions are targeted specifically and narrowly to achieve their compelling ends. The guarantee of substantive due process requires nothing less. Accordingly, we conclude strict scrutiny is the appropriate standard to apply.[66]

The Iowa Supreme Court did not follow the federal framework in this case because of the implications that the undue burden standard would place on the rights of women.[67] The court held that "adopting the undue burden standard would relegate the individual rights of Iowa women to something less than fundamental."[68] Thus, it chose to use strict scrutiny to hold that the 72-hour waiting requirement of the statute at issue violated the due process clause of the Iowa Constitution.[69]

While the Iowa Supreme Court in *Planned Parenthood of the Heartland* held that the 72-hour-wait statute violated due process, the court also examined the same issue under the equal protection

63. Brief Amici Curiae on Behalf of Iowa Professors of Law and of Women's Studies at 10, Planned Parenthood of the Heartland v. Reynolds ex. rel. State, 915 N.W.2d 206 (Iowa 2018) (No. 17-1579).

64. *Id.* at 14–15.

65. *Planned Parenthood of the Heartland*, 915 N.W.2d at 240.

66. *Id.* at 240–41.

67. *Id.* at 240.

68. *Id.*

69. *Id.* at 244.

lens.[70] The Iowa Constitution states that "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."[71] The court related the idea of autonomy to equal protection, holding that laws that diminish women's autonomy over their bodies and futures eliminate their ability to be equal participants in society.[72] Due to this fact, the 72-hour-wait law was unconstitutional because it violated Iowa's equal protection guarantee.[73] After *Planned Parenthood of the Heartland* was decided in 2018, there was another attempt to create a wait-time law, but this was blocked by a district court on grounds that it was unconstitutional in the face of the *Planned Parenthood of the Heartland* decision.[74]

Planned Parenthood of the Heartland v. Reynolds ex rel. *State* is a quintessential example of how a state can interpret its own equal protection and due process clauses to protect abortion rights. This phenomenon also appears in *Planned Parenthood of Central New Jersey v. Farmer,* where the Supreme Court of New Jersey struck down the Parental Notification for Abortion Act, which required minors to notify their parents of their pregnancy in order to receive an abortion.[75] Although New Jersey's constitution does not explicitly contain the phrases "equal protection" or "due process," the court in this case used article 1, paragraph 1 as an equal protection clause. It provides: "All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, or acquiring, possessing, and protecting property, and of pursuing and obtaining safety and

70. *Id.*

71. *Id.*

72. *Id.* at 245.

73. *Id.* at 246.

74. William Morris & Stephen Gruber-Miller, *Iowa Abortion Law Requiring 24-Hour Waiting Period Permanently Blocked by District Court*, DES MOINES REGISTER (June 22, 2021), https://www.desmoinesregister.com/story/news/crime-and-courts/2021/06/22/iowa-court-permanently-blocks-law-abortion-restriction-24-hour-waiting-period/5305613001/ [https://perma.cc/JVK3-YNJW].

75. Planned Parenthood of Central New Jersey v. Farmer, 762 A.2d 620, 620 (N.J. 2000).

happiness."[76] The court held that this section included a woman's right to make fundamental choices about her body and livelihood, and that it does not permit the government to impose "disparate and unjustifiable burdens" on young women when their fundamental rights are at stake."[77] Thus, the law was unconstitutional under New Jersey's equal protection principles.[78]

Another case that used a state equal protection argument to protect abortion rights was *DesJarlais v. State, Office of Lieutenant Governor,* where the Supreme Court of Alaska in 2013 ruled against an initiative filed by an Alaskan citizen that would prohibit abortion.[79] The court primarily cited *Roe* as the basis for why this law would be unconstitutional, but it also discussed the parallels between the ruling of *Roe* and Article I section 1 of the Alaska Constitution that provides that all persons are entitled to equal protection under the law.[80] Article I section 1 of the Alaska Constitution provides:

> This Constitution is dedicated to the principles that all persons have a natural right to life, liberty, and the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.[81]

The Supreme Court of Alaska struck down the law and held that because of this clause in the Alaska Constitution and the precedent set by the federal government in *Roe*, the court cannot "invalidate a recognized constitutional right."[82] Though the court in this case does not depart from federal law, this is still an example of a state court using their own constitution as the basis for their holding.

76. *Id.* at 631 (citing N.J. CONST. art. 1, § 1).

77. *Id.* at 638.

78. *Id.*

79. DesJarlais v. State, Office of Lieutenant Governor, 300 P.3d 900, 900 (Alaska 2013).

80. *Id.* at 905.

81. *Id.*

82. *Id.* at 906.

These three cases demonstrate how a state court can act independently from federal precedents. They also demonstrate how attorneys can achieve favorable results for abortion rights in state courts. By using the equal protection and due process clauses that are already set forth in state constitutions, attorneys can bypass federal shortcomings in order to protect reproductive rights.

B. Right to Liberty

Federally, the right to liberty is found in both the Fifth and Fourteenth Amendments, accompanying life and the pursuit of happiness as rights that shall not be denied to citizens without due process.[83] The right to liberty is also found in all 50 state constitutions.[84]

Liberty is an important concept when expanding upon the due process and equal protection arguments for defending abortion rights. It can also be used as a stand-alone argument, as seen in *Hodes & Nauser, MDs, P.A. v. Schmidt*.[85] Here, the Kansas Supreme Court granted a temporary injunction of a Kansas law that banned physicians from performing dilation and evacuation abortions, which is the type of abortion that covers 95% of second trimester abortions.[86] The plaintiffs, two doctors, argued that the law violated section 1 of the Kansas Constitution Bill of Rights that provides: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."[87] They maintained that this inalienable rights clause grants the right to personal autonomy, including the right to control one's body and the right to self-determination.[88] The Kansas Supreme Court held that these substantive rights do

83. *Liberty,* LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/liberty [https://perma.cc/TKV3-Q6YW] (last visited Oct. 27, 2021).

84. JUSTIA, *US Law, Case Law, Codes, Statutes & Regulations*, *supra* note 58.

85. Hodes & Nauser, MDs, P.A. v. Schmidt, 440 P.3d 461, 461 (Kan. 2019).

86. *Id.*

87. *Id.* at 466.

88. *Id.* at 471.

include "a woman's right to make decisions about her body, including the decision whether to continue her pregnancy."[89]

Further, the court addressed the reasoning behind not basing its holding on due process: the due process provision in the Kansas Constitution and the inalienable rights provision are found in completely different sections of the text.[90] The court emphasized the importance of inalienable rights as a stand-alone basis for argument, noting that these rights "did not function as simply vague, preambular language but were instead applied with varying degrees of judicial vigor to decide some of the most challenging and controversial issues of the day."[91] Thus, the inalienable right to liberty can be a convincing tool in abortion litigation as it relates to bodily integrity and self-determination.

C. Right to Privacy

The individual right to privacy is another basis reproductive rights advocates can use for protecting reproductive rights at the state level. The simple argument is that women have the right to bodily autonomy without government interference. In that way, women's bodies are kept private. For states that possess privacy clauses in their constitutions, individual privacy proves a strong argument for reproductive rights.

The right to individual privacy was relied upon in *Armstrong v. State*, where the Supreme Court of Montana considered a statute that required physicians to perform pre-viability abortions, as opposed to other health care providers like physician associates and nurse practitioners.[92] The court discussed the fundamental right of individual privacy that is set forth in Article II § 10 of Montana's Constitution,[93] which reads "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of compelling state

89. *Id.* at 466.

90. *Id.* at 473.

91. *Id.* at 476. (citing Calabresi & Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1440 (2015)).

92. Armstrong v. State, 989 P.2d 364, 364 (Mont. 1999).

93. *Id.* at 368.

interest."[94] The court ruled the Montana statute unconstitutional because it infringed upon a woman's right to individual privacy by limiting her ability to receive an abortion by the health care provider of her choosing.[95] The court also addressed the "compelling state interest" clause in the Montana Constitution by holding that "the government has failed to demonstrate a compelling state interest for infringing upon these rights of privacy."[96]

Gainesville Woman Care v. State is another example in which state court protected abortion rights through the state privacy clause. In *Gainesville Woman Care*, the Florida Supreme Court held that a statute that imposed a 24-hour waiting period between initial appointments and abortion procedures violated the privacy clause in Florida's constitution.[97] Article I § 23 of Florida's constitution provides "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."[98] The Florida Supreme Court held that "any law that implicates the fundamental right of privacy, regardless of the activity, is subject to strict scrutiny and is presumptively unconstitutional."[99] The court also noted that the statute in question did not serve a compelling state interest.[100]

Individual privacy clauses like those of Montana and Florida are only contained in 13 states' constitutions.[101] However, the right to privacy can be constructed in other ways. For example, in *Planned Parenthood of Central New Jersey*, the New Jersey Supreme Court interpreted Article I, Paragraph 1 of its Constitution as including privacy even though it does not

94. MONT. CONST. art. II, § 10.

95. *Armstrong*, 989 P.2d at 384.

96. *Id.* at 390.

97. Gainesville Woman Care v. State, 210 So.3d 1243, 1243 (Fla. 2017).

98. FLA. CONST., art. I, § 23 (noting that "this section shall not be construed to limit the public's right of access to public records and meetings as provided by law.").

99. *Gainesville Woman Care*, 210 So.3d at 1245.

100. *Id.*

101. JUSTIA, *US Law, Case Law, Codes, Statutes & Regulations*, *supra* note 58.

explicitly mention the term.[102] This provision of New Jersey's Constitution reads: "All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, and of pursuing and obtaining safety and happiness."[103] The New Jersey Supreme Court, citing a prior case, held that this constitutional provision includes the right of privacy, and "a woman's right to make certain fundamental choices" accompanies this privacy right.[104] Thus, even if the word "privacy" is not contained in a state's constitution, it can still be a compelling argument in abortion litigation.

D. Failed Abortion-Rights Litigation

So far, this note has discussed successes in state abortion litigation. However, not every case marks a win for reproductive rights. The good news is that these unsuccessful cases can be used as lessons for how to better advocate for abortion rights in the future.

An example of a failed case is *Hope Clinic for Women v. Flores,* where the Illinois Supreme Court upheld a statute that mandated notification of both parents before a minor can receive an abortion.[105] The plaintiffs in this case argued that the law violated Illinois constitution's privacy, due process, equal protection, and gender equality clauses.[106] The court denied that the privacy of minors seeking abortions was violated in this act because it promoted minors' "best interests."[107]

This case is factually similar to *Planned Parenthood of Central New Jersey v. Farmer,* discussed earlier, where an almost identical parental notification statute was successfully challenged

102. *Planned Parenthood of Central N.J.*, 762 A.2d at 629.

103. *Id.* (citing N.J. CONST., art. I, ¶ 1)

104. *Id.* (citing Right to Choose v. Byrne, 91 N.J. 287, 303 (N.J. 1982)).

105. Hope Clinic for Women v. Flores, 991 N.E.2d 745, 748-9 (Ill. 2013).

106. *Id.* at 748.

107. *Id.* at 763; The "parental notification" statute was repealed by Illinois' governor in 2021. *See* Sarah Burnett, *Illinois Governor Repeals Law Requiring Parental Notification of Abortion*, PBS (Dec. 17, 2021), https://www.pbs.org/newshour/politics/illinois-governor-repeals-parental-notification-of-abortion [https://perma.cc/2FC5-G2KQ].

on equal protection grounds.[108] The major difference between these two cases is how the courts viewed pregnant minors. In *Hope Clinic for Women*, the Illinois Supreme Court saw these minors as children, incapable of making informed decisions about their own bodies.[109] The court said that the compelling state interest here was to "ensure that a minor is sufficiently mature and well-informed to make the difficult decision whether to have an abortion."[110] Yet, as the New Jersey Supreme Court in *Planned Parenthood of Central New Jersey* noted, the reality of these kinds of statutes is that they apply "to many young women who are justified in not notifying a parent about their abortion decisions."[111] As the court explains, not every pregnant minor considers her parents caring, loving or supportive. In fact, many minors' homes "[fall] short of this ideal and may be a place of physical abuse and neglect and psychological mistreatment."[112] Viewing the outcomes of these two cases, abortion-rights litigators can tailor their argument toward the idea that pregnant minors are capable of making decisions about their own bodies and futures, as it is never certain whether or not a parent or guardian has the best interest of a minor in mind.

The Illinois Supreme Court in *Hope Clinic for Women* also used a concept known as "limited lockstep," which is a method of approaching constitutional law in which the state court may defer to the federal interpretation of a particular state constitutional clause when a similar clause exists in the U.S. Constitution.[113] The "limited" aspect of limited lockstep comes from the fact that the Illinois Supreme Court, or any state court, does not always follow in lockstep with the federal courts, but rather does it in limited situations.[114] The Court in *Hope Clinic for Women* used limited lockstep to interpret Illinois's equal protection and due process clauses just as the U.S. Supreme Court did, and it held

108. *Planned Parenthood of Central New Jersey*, 762 A.2d at 620.

109. *Hope Clinic for Women*, 991 N.E.2d at 763.

110. *Id.*

111. *Planned Parenthood of Central New Jersey*, 762 A.2d at 640.

112. *Id.*

113. O'Neill, *supra* note 11, at 326.

114. Roger Huebner & Jerry Zarley, *Legal Q&A: The "Lockstep" Doctrine*, ILL. MUN. LEAGUE (July 2006), http://legal.iml.org/file.cfm?key=353 [https://perma.cc/E9X6-7FZQ].

that the U.S. Supreme Court's reasonings regarding substantive due process and equal protection issues of parental notification were persuasive.[115]

Another failed abortion case is *Planned Parenthood Arizona v. American Association of Pro-Life Obstetricians and Gynecologists*, where the Arizona Court was asked to decide whether four provisions that regulated abortions violated the equal protection or privacy clauses of the Arizona Constitution.[116] The court discussed Arizona's Constitution's individual privacy clause, which reads: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."[117] The Arizona Court of Appeals noted that although the federal constitution does not contain a privacy clause, it will still defer to the federal standard on interpreting abortion rights, because the right to privacy has often been inferred in the penumbra of the U.S. Constitution.[118] Ultimately the Arizona Court of Appeals held that the four provisions that restricted abortion access did not impose an undue burden on the exercise of abortion rights.[119]

IV. WHAT DO ABORTION RIGHTS LOOK LIKE IN THE ABSENCE OF *ROE*?

With the *Dobbs* decision comes a pressing need to re-navigate what exactly the federal government protects with respect to

115. *Hope Clinic for Women,* 991 N.E.2d at 768 ("We are persuaded by the reasoning contained in the Supreme Court cases which have found parental notification statutes constitutional under federal substantive due process and equal protection law."). *See, e.g., Planned Parenthood of S.E. Pa.,* 112 S.Ct. at 2800.

116. Planned Parenthood Arizona v. American Association of Pro-Life Obstetricians and Gynecologists, 257 P.3d 181, 186 (Ariz.App. Div. 1 2011). The four provisions that the Arizona Supreme Court considered include: notarization of parental consent acquired prior to a minor receiving an abortion; in-person informed consent acquired by physician from the patient receiving an abortion; a ban on all non-physician healthcare providers performing abortions; and the right of health care providers to refuse to participate in the performance of abortions.

117. ARIZ. CONST., Art. I, § 8.

118. *Planned Parenthood Arizona*, 257 P.3d at 189.

119. *Id.* at 199.

abortion rights.[120] Because of *Dobbs*, abortion-rights advocates need to be prepared to use their own state constitutions to counteract the loss of rights at the federal level; they can start by using federal law as a baseline for abortion rights and abandoning limited lockstep.

A. Using Federal Law as a Baseline

When separating federal and state constitutional law, it becomes confusing when the same concept is interpreted in two disparate ways. Citizens wonder which standard to follow. They also wonder if their state can even depart from federal holdings. In *51 Imperfect Solutions*, Sutton notes that traditional federal doctrine is recognized as a "settled floor of rights."[121] He then recommends that state courts "acknowledge the dominance of federal law and focus directly on the gap-filling potential of state constitutions."[122] This is important because it shows that federal and state constitutional law do not have to be at war: state law can complement its federal counterpart by offering more protections.

Sutton also mentions that, in terms of law enforcement, federal and state guarantees are viewed as distinct, and people will have to follow "just one standard: the more protective of the two."[123] This is because states cannot take rights away that the federal government protects, they can only add more rights. Applied to reproductive rights law, this means that states can interpret their own constitutions to provide greater access to abortion. Because all state constitutions differ, at least slightly, from the U.S. Constitution, there is ample room for different interpretations.[124] For example, the U.S. Constitution does not

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120. *See generally Dobbs*, 142 S.Ct. at 2228.

121. SUTTON, *supra* note 6, at 187.

122. *Id.*

123. *Id.* at 186.

124. *See Constitutional Law and History Research Guide*, GEO. L., https://guides.ll.georgetown.edu/constitutionallaw/state-constitutions (last visited Feb. 5, 2023).

contain an individual privacy clause.[125] Therefore, the 13 states[126] that do have an individual privacy clause should put it to use.

B. Abandoning Limited Lockstep

Consistent with the federal baseline argument above, state courts should abandon the use of limited lockstep when evaluating individual rights. One study found that 78% of cases from a broad sampling relied on federal grounds to rule on self-incrimination cases.[127] This shows that state judges heavily favor a limited lockstep approach by using federal interpretations of analogous constitutional provisions instead of interpreting their own constitutions as they see fit. As seen in *Hope Clinic for Women,* the Illinois Supreme Court used limited lockstep to equate the U.S. Constitution's equal protection and due process clauses with Illinois's equal protection and due process clauses.[128] By equating these clauses, the Illinois court used federal holdings on equal protection and due process to justify why the state's parental notification statute was constitutional.[129] However, if the state court instead chose to forgo limited lockstep, it would have interpreted its own constitutional clauses how it saw fit.

Some argue that the limited lockstep approach is a departure from the U.S.'s federalist system because it contradicts traditional notions of the federal-state divide.[130] With limited lockstep, decisions come ready-made from the U.S. Supreme Court and require no further analysis from state court judges."[131] This can be harmful because each state has its own history and its own

125. *Is There a 'Right to Privacy' Amendment?,* FINDLAW, https://www.findlaw.com/injury/torts-and-personal-injuries/is-there-a-right-to-privacy-amendment.html#:~:text=The%20Fourth%20Amendment%20protects%20the,justifies%20protection%20of%20private%20information [https://perma.cc/F4DM-NGES] (last updated Jan. 25, 2023).

126. Larry M. Thomas, *Legal Issues Concerning Transit Agency Use of Electronic Customer Data*, LEGAL RSCH. DIGEST 1, 38 (2017).

127. John Christopher Anderson, *The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois*, 44 LOYOLA U. CHICAGO L. J. 966, 968 (2013).

128. *Hope Clinic for Women*, 991 N.E.2d at 768.

129. *Id.*

130. O'Neill, *supra* note 11, at 326.

131. *Id.* at 326.

specific concerns.[132] It also contradicts Dobbs insofar as it leaves decisions to the federal governments rather than individual states.[133] Federal courts do not have to account for these nuances when they decide cases, and when state court judges use federal holdings, they will not have considered what is best for the citizens of their specific state. In other words, the federal-state divide affords state courts the freedom to formulate their own answers to issues that matter most to their states. With reproductive rights at risk at the federal level, it becomes even more important for state courts to abandon the use of limited lockstep in their rulings.

In *Hodes & Nauser, MDS, P.A. v. Schmidt*, discussed above, the Kansas Supreme Court chose to abandon limited lockstep and interpret its own constitution free from the federal courts.[134] In his concurring decision, Justice Biles notes that:

> [m]y colleagues all agree, as do I, that a Kansas standard based on section 1 [All men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness[135]] in the present context cannot be blindly bound to United States Supreme Court jurisprudence on abortion.[136]

He continues: "This is not an instance in which we simply go lockstep with federal caselaw."[137] Justice Biles' reasoning here is that the "analogous" section between the Kansas and federal constitutions are not actually analogous; they are not identical, and thus, the decision here cannot blindly mirror federal case law.[138] States should not willingly surrender their own autonomy to conform with the federal system. Moreover, in abortion cases, abandoning limited lockstep could give an entire state population the freedom to choose to have an abortion. It could also give

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132. *See Hodes*, 440 P.3d at 694.

133. *Id.* at 621.

134. *Id.*

135. KAN. CONST. BILL OF RIGHTS §1.

136. *Hodes,* 440 P.3d at 506–07.

137. *Id.*

138. *Id.* at 507.

women in neighboring states a safe-harbor to access abortion if needed.

There are many reasons a state might find different principles under its own constitution than under the federal Constitution. First, the texts could simply differ. This note demonstrated this above when it showed that individual privacy was used in several instances in state litigation despite being absent entirely from the federal Constitution. Moreover, every state constitution is slightly different, and these slight differences can amount to major differences in interpretation. Just because two states have privacy clauses does not mean that they are worded the same way or had the same meaning when they were drafted. For example, Louisiana's constitution includes the following privacy provision:

> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.[139]

This provision of Louisiana's constitution primarily applies to searches and seizures, but it does allow for some interpretation as far as granting "every person" security in "his person."[140] This provision, while explicitly granting the right to privacy in Louisiana, is significantly different from California's privacy clause, which states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety,

139. LA. CONST. art. I, § 5.

140. *Id.* It shall be noted that, while Louisiana does have a privacy clause in their constitution, and for this reason, it was used as an example in this context, the state also has an abortion clause that was added in 2020 that states that nothing in Louisiana's constitution should be construed to secure or protect a right to abortion. LA. CONST. art. I, § 20.1.

happiness, and privacy."[141] California's privacy clause is contained in its inalienable-rights provision, which differs significantly from Louisiana's. Further, these two states have vastly different histories, and thus, the context of these constitutions is also vastly different.

Next, the history of the state and its constitution could indicate a different meaning and purpose from the federal constitution. For example, in *Hodes & Nauser,* the Kansas Supreme Court discussed at length the implications of Kansas's specific history.[142] The court discusses the 1859 Wyandotte Constitutional Convention and how the delegates could not have considered the federal 14th Amendment because it had not been ratified yet.[143] However, the delegates still chose to include due process in their bill of rights, and the court held that this "does not function as simply vague, preambular language."[144] This is just one example of a state judiciary utilizing its own complex history to justify a holding that contradicts federal holdings on the matter. Indeed, it is important to remember that each of the 50 U.S. States has its own history, and this history should be used to inform judicial decisions.

Lastly, a state court could simply find the federal interpretation of the constitutional provision to be wrong or unpersuasive, and so long as a state is not depriving its citizens of rights guaranteed by the federal constitution, it is well within their power to interpret their own constitution how they see fit. For example, since the *Dobbs* opinion was released, it has faced immense criticism, with 57% of adults disproving of the opinion, and 43% of those adults *strongly* disapproving of *Dobbs.*[145] Further, 62% of adults feel that abortion should be legal in all or most instances.[146] With this overwhelming support of abortion rights, any state court would be well within its bounds to find the

141. CAL. CONST. art. 1, § 1.

142. *Hodes*, 440 P.3d at 473.

143. *Id.*

144. *Id.* at 476.

145. *Majority of Public Disapproves of Supreme Court's Decision to Overturn* Roe v. Wade, PEW RSCH. CTR. (July 6, 2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/ [https://perma.cc/8VRF-7SWY].

146. *Id.*

Dobbs decision wrong or unpersuasive, and thus abandon *Dobbs* altogether. In this way, the abandonment of the limited lockstep method can prove an essential tool for protecting reproductive rights.

C. Shortcomings of Deferring to the States on Abortion Matters

While there are some promising solutions to protect abortion rights after *Dobbs,* they do have some shortcomings. First, some states have more politically conservative leadership than other states, and politically conservative legislative and judicial leaders are more likely to hold anti-abortion stances.[147] Ultimately, if a majority of a state's supreme court justices leans conservative, their holdings on matters of abortion are likely to also lean conservative, even if justices are technically supposed to be unbiased. Moreover, if a state's legislature leans conservative, it will be more inclined to pass restrictive abortion legislation, especially in the absence of *Roe*. It is important to note that not all traditionally conservative states have conservative supreme court justices. For example, Montana's legislature is controlled by the Republican party in both houses.[148] However, its Supreme Court leans liberal.[149] This means that even if the Montana legislature passes a restrictive abortion law, the Montana Supreme Court will likely block it. The reality of abortion in the United States is that it is a highly politicized issue. Because the U.S. Supreme Court is now conservative-leaning, it is more important than ever to participate in state judicial elections in order to ensure that the ultimate authority on state law, state supreme courts, is either elected or nominated by Democrats.

147. *See* Thomas B. Edsall, *Abortion Has Never Been Just About Abortion*, N.Y. TIMES (Sept. 15, 2021), https://www.nytimes.com/2021/09/15/opinion/abortion-evangelicals-conservatives.html [https://perma.cc/N5YX-N23Z].

148. *Montana State Senate*, BALLOTPEDIA, https://ballotpedia.org/Montana_State_Senate [https://perma.cc/ZS8C-D3QT] (last accessed Feb. 5, 2023); *Montana House of Representatives*, BALLOTPEDIA, https://ballotpedia.org/Montana_House_of_Representatives [https://perma.cc/SC5X-PRWP] (last accessed Feb. 5, 2023).

149. *Montana Supreme Court,* BALLOTPEDIA, https://ballotpedia.org/Montana_Supreme_Court [https://perma.cc/PE6A-MC89] (last accessed Feb. 5, 2023).

A second shortcoming of the proposed solutions is the fact that state officials can amend their constitutions to withhold protections to the right to abortion. For example, in 2014, Tennessee passed a constitutional amendment that clarifies that abortion is not a constitutionally protected right.[150] The provision reads:

> Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion. The people retain the right through their elected state representatives and state senators to enact, amend, or repeal statutes regarding abortion, including, but not limited to, circumstances of pregnancy resulting from rape or incest or when necessary to save the life of the mother.[151]

This amendment and others like it are notable limitations on pro-abortion litigation.[152] In light of the overturn of *Roe* and *Casey*, other states could ratify amendments like this.

While the 2014 Tennessee constitutional amendment provided that their state constitution does not protect abortion rights, these kinds of state constitutional amendments can swing the other way as well. Shortly after the *Dobbs* decision was released, Kansas introduced a referendum wherein abortion protections would be removed from the Kansas constitution.[153] The vote failed by 18 percentage points, or 165,000 votes

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150. Anita Wadhwani, *Tennessee Amendment 1 Abortion Measure Passes*, TENNESSEAN, https://www.tennessean.com/story/news/politics/2014/11/04/amendment-takes-early-lead/18493787/ [https://perma.cc/M76T-852S] (last updated Nov. 6, 2014, 9:31 AM).

151. TENN. CONST. art. I § 36.

152. *See* Elizabeth Nash & Lauren Cross, *26 States Are Certain or Likely to Ban Abortion Without* Roe*: Here's Which Ones and Why,* GUTTMACHER INST. (Oct. 28, 2021), https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why [https://perma.cc/DS9S-NGZL] (showing that Alabama, Louisiana, Tennessee, and West Virginia all have similar constitutional amendments that bar constitutional abortion protections.).

153. Associated Press, *Kansas Recount Confirms Results in Favor of Abortion Rights,* POLITICO (Aug. 21, 2022, 8:58 PM), https://www.politico.com/news/2022/08/21/kansas-recount-favor-abortion-rights-00053046 [https://perma.cc/P3HE-GKBT].

statewide.[154] This signifies the idea that pro-abortion state constitutional arguments can stand, even in conservative states. Additionally, Michigan voted to add abortion rights into their state constitution during the 2022 midterm elections.[155] It is clear that there is ongoing and reignited support for abortion rights, and people are bringing these convictions to the polls.

D. Current Ongoing State Litigation: What Arguments are Currently Working?

At the time of this writing, there are several pending abortion-related lawsuits across the country. In Georgia, Plaintiffs SisterSong Women of Color Reproductive Justice Collective et al. sued the State of Georgia for its Living Infants Fairness and Equality ("LIFE") Act, arguing that certain provisions were unconstitutional.[156] This act criminalized abortions occurring after six weeks, or after a heartbeat is able to be detected.[157] The Plaintiffs in this case argued that parts of the LIFE Act are unconstitutional under the Georgia Constitution's due process and equal protection clauses.[158] The Superior Court of Fulton County never addressed Plaintiffs' arguments on their merit, and instead declared the key provisions of the LIFE Act unconstitutional for the reason that, at the time the Act was enacted in 2019, *Roe* was still controlling precedent, and "the general rule is that an unconstitutional statute is wholly void and of no force and effect from the date it was enacted."[159] Thus, while a victory for reproductive rights in Georgia as of now, the fight

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154. *Id.*

155. Alice Miranda Ollstein, *Michigan Votes to Put Abortion Rights into State Constitution*, Politico (Nov. 9, 2022, 3:43 AM), https://www.politico.com/news/2022/11/09/michigan-abortion-amendment-results-2022-00064778 [https://perma.cc/M6D6-53H6]. For the full text of the Amendment, *see* House Fiscal Agency, *Ballot Proposal 3 of 2022*, at 6 (Oct. 26, 2022), https://www.house.mi.gov/hfa/PDF/Alpha/Ballot_Proposal_3_of_2022.pdf [https://perma.cc/TY89-W8WC].

156. Sistersong Women of Color Reproductive Justice Collective v. Georgia, Order on Motion for Partial Judgment and Motion to Dismiss, 2022CV367796, at 1 (Ga. Super. Ct. Nov. 15, 2022).

157. *Id.* at 2.

158. *Id.* at 5.

159. *Id.* at 6 (citing Adams v. Adams, 249 Ga. 477, 478-79 (1982)) (internal quotation marks omitted).

is not over, and Georgia courts will surely face future statutes banning abortion and will ultimately need to rule based on the merits of the parties' arguments.

Similarly, in Ohio, plaintiffs Preterm-Cleveland et al. sued the State of Ohio for its Heartbeat Act, a statute that bans abortions after a fetal heartbeat is detected and criminalizes the abortion provider.[160] Plaintiffs argued that the Heartbeat Act was unconstitutional under the Ohio Constitution.[161] The trial court granted a preliminary injunction until the matter could be decided on its merits.[162] However, the Ohio First District Court of Appeals failed to rule on the case's merits, and instead found issue with whether they could exercise jurisdiction over the defendants' appeal of the preliminary injunction.[163] Ultimately, the Court of Appeals found that it did not have jurisdiction and dismissed the case.[164] The injunction on the Heartbeat Act will remain in effect until, as the trial court held, the case can be decided on its merits.[165] Like with the case in Georgia, we can expect other similar lawsuits and, eventually, they will be decided on their merits.

CONCLUSION

Federal abortion protections were effectively eliminated with *Dobbs*.[166] However, all 50 states have it within their power to provide state abortion protections in the absence of federal protections. By following caselaw examples seen in many states across the country, state courts can use federal law as a baseline of protections from which to build more abortion rights. Further, by eliminating limited lockstep from state courts' toolbox, they will be more willing and able to interpret their own constitutions in ways they see appropriate for their own citizens. Federal protections are certainly important to reproductive rights. As

160. Preterm-Cleveland v. Yost, 2022-Ohio-4540, at 2 (2022).

161. *Id.* at 5.

162. *Id.* at 28.

163. *Id.* at 8.

164. *Id.* at 29.

165. *Id.* at 1.

166. *Dobbs*, 142 S.Ct. at 2242.

Justices Breyer, Sotomayor, and Kagan wrote in their joint dissenting opinion of *Dobbs*:

> Some women, especially women of means, will find ways around the State's assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all.[167]

These words underscore how catastrophic the *Dobbs* decision really is, especially for women of lower socioeconomic status. However, federal protections are not the end-all-be-all; states have the ability to interpret their own constitutions in a way that furthers reproductive rights for the future.

167. *Dobbs,* 142 S.Ct. at 2318–19 (Breyer, Sotomayor, and Kagan, JJ., dissenting).