ABORTION AND STATE CONSTITUTIONAL GUARANTEES: THE NEXT BATTLEGROUND

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I. INTRODUCTION

Commentators have long predicted that *Roe v. Wade*[1] would be overruled.[2] That prediction has been borne out by *Dobbs v. Jackson Women's Health Organization*,[3] which leaves abortion regulation up to the states.[4] Now, restrictive abortion regulations will likely be challenged in light of state constitutional guarantees.[5]

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1. 410 U.S. 113 (1973).

2. Matthew J. Clark, *Go Big or Go Home*: *The Case for Boldness in Pro-Life Advocacy After* June Medical Services v. Russo, 33 REGENT U. L. REV. 239, 273 (2021) ("[S]ix justices appear to believe that *Roe* and *Casey* were wrongly decided and that stare decisis does not preclude overruling those decisions."); Jeffrey M. Shaman, *The Rise of State Constitutional Law: Equality and Liberty*, 72 RUTGERS U. L. REV. 1247, 1254 (2020) ("[C]oncern grows that the United States Supreme Court may overrule *Roe v. Wade*."); Seema Mohapatra, *Law in the Time of Zika: Disability Rights and Reproductive Justice Collide*, 84 BROOK. L. REV. 325, 337 (2019) (discussing "the fear that *Roe v. Wade* may be overruled by the conservative majority in the Supreme Court"); Jessica Knouse, *Reproductive Indeterminacy and Rights Discourse in Frozen Embryo Disputes*, 42 COLUM. J. GENDER & L., no. 1, 2021, at 112, 170 ("When *Planned Parenthood v. Casey* reached the Supreme Court in 1992, many expected *Roe v. Wade* to be overruled."). Others have offered different predictions. *See* Mark A. Graber, *Overruling* McCulloch*?*, 72 ARK. L. REV. 79, 125–26 (2019) ("Americans in the near future might experience a conservative regime in which *Roe v. Wade* is never overruled, but judicial decisions permit states to regulate abortion in ways that make terminating a pregnancy as difficult as was the case before 1973."); Anthony Dutra, *Men Come and Go, but Roe Abides: Why* Roe v. Wade *Will Not Be Overruled*, 90 B.U. L. REV. 1261, 1262 (2010) ("Rather than arguing that *Roe* should or should not be overruled, I argue instead that it will not be overruled.").

3. 142 S. Ct. 2228 (2022).

4. *See id.* at 2277 ("Our decision returns the issue of abortion to those legislative bodies . . . . ").

5. *See, e.g.*, Anthony Izaguirre, *Florida Abortion Restriction Law Challenged with Lawsuit*, PBS (June 1, 2022, 5:27 PM), https://www.pbs.org/newshour/politics/florida-abortion-restriction-law-challenged-with-lawsuit [https://perma.cc/4H8W-VC9G] ("The filing in state court in Tallahassee from Planned Parenthood and other health centers alleges that the law violates a provision in the state constitution guaranteeing a person's right to privacy, 'including the right to abortion.'").

Some state courts have already offered constructions of their respective state constitutions' abortion protections in cases where plaintiffs sought to establish that the state constitutional guarantees were more robust than federal guarantees.[6] But the breadth of the state constitutional protections was often not explored because of the floor provided by the U.S. Constitution.[7] Now that the floor of federal protection has been removed,[8] state courts will likely be asked to analyze the protections afforded by a wide range of state constitutional provisions.[9] In addition, some state constitutions have been, and others likely will be, amended in light of the shifting federal constitutional landscape,[10] which may make interpreting existing state constitutional guarantees all the more challenging.

Part II of this Article addresses some recent state constitutional amendments specifically addressing abortion.[11] While these amendments might seem to bar all or almost all abortions, courts may well interpret them to be less restrictive than might first be thought. Part III considers some of the state case law analyzing the degree to which state constitutional protections of abortion exceed what was provided under

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6. *See, e.g.*, Preterm Cleveland v. Voinovich, 627 N.E.2d 570, 575 (Ohio App. 1993) ("In light of the broad scope of 'liberty' as used in the Ohio Constitution, it would seem almost axiomatic that the right of a woman to choose whether to bear a child is a liberty within the constitutional protection. This necessarily includes the right of a woman to choose to have an abortion so long as there is no valid and constitutional statute restricting or limiting that right.").

7. *Id.* at 574 ("[T]here has been little occasion for the Ohio courts to apply Ohio constitutional provisions, rather than parallel federal constitutional provisions, since in most instances the federal constitution has been construed to impose either the same restrictions or greater restrictions upon state action than does the Ohio Constitution.").

8. *Cf.* Darin E. Tweedt, *The Validity of Legislative Restrictions on Abortion Under the Oregon Constitution*, 65 TEMP. L. REV. 1349, 1350 (1992) (noting that "the Federal Constitution is merely a floor below which states may not fall").

9. *Id.* ("[E]ven if the Court overrules *Roe*, the abortion question will not have been settled. Instead, the battle over abortion rights will shift to state courts as litigators look to state constitutions for protection from restrictions on abortion.").

10. *See* Paul Benjamin Linton, *The Pro-Life Movement at (Almost) Fifty: Where Do We Go from Here?*, 18 AVE MARIA L. REV. 15, 31 (2020) ("In November 2018, Alabama and West Virginia approved state constitutional amendments (the West Virginia amendment overturned an abortion funding decision and neutralized the state constitution as an independent source of abortion rights)."); *see also* Shannon Young, *New York's Abortion Amendment Clears First Major Hurdle*, POLITICO (July 1, 2022, 8:28pm), https://www.politico.com/news/2022/07/01/new-york-abortion-amendement-00043736 [https://perma.cc/S9GR-RP9U] ("New York legislators on Friday approved a long-stalled proposal to enshrine abortion rights in the state constitution, making New York the latest state to pursue long-term protections in wake of the U.S. Supreme Court's *Roe v. Wade* reversal.").

11. *See infra* Part II; Linton, *supra* note 10, at 31; *see also* Young, *supra* note 10 (describing New York State's recent constitutional amendment).

the *Roe* line of cases.[12] Several state constitutions have been interpreted to provide abortion protections above and beyond those provided by the Federal Constitution, which may well mean that various state legislatures will have a much harder time prohibiting abortion than they seem to appreciate.[13] This Article concludes that *Dobbs* almost guarantees protracted and contentious litigation with the only certainty being that healthcare will suffer.[14]

II. ABORTION-SPECIFIC PROVISIONS

Anticipating that *Roe* and its progeny might be overruled, some state legislatures enacted more restrictive abortion laws.[15] In addition, some states amended their constitutions,[16] specifically addressing abortion.[17] Those statutes and amendments require interpretation, especially when considered in light of a number of factors including intent, other provisions within the state constitution, other interpretations of similar provisions in other state constitutions, et cetera.[18] Both the

12. *See infra* notes 109-78 and accompanying text.

13. Shannon Russell, Comment, *The Burden Is Undue: Whole Woman's Health and the Evolution, Clarification, and Application of the Undue Burden Standard*, 24 GEO. MASON L. REV. 1271, 1292 (2017) (explaining that fifteen state constitutions currently offer additional protections for abortion rights beyond the federal constitution); *see also* Linton, *supra* note 10, at 31 (describing the difficulty states will be met with in trying to prohibit abortion due to the current state case law); *see infra* Part III.

14. *See infra* Part IV; *see also* Ronald Brownstein, *'A Recipe For a Lot of Suffering': How Abortion Bans May Strain the Red States*, CNN (July 5, 2022, 10:27 AM), https://www.cnn.com/2022/07/05/politics/red-states-roe-v-wade-social-safety-net/index.html [https://perma.cc/S8R9-55LM].

15. *Cf.* Brittney A. Sizemore, *Under Kemp's Eye: Analyzing the Constitutionality of the Heartbeat Restriction in Georgia's Life Act and Its Potential Impact on Abortion Law*, 71 MERCER L. REV. 417, 417 (2019) ("[O]ver the last decade, the attempts by state legislatures to restrict or completely take away women's right to abortion have exponentially increased."); Jaclyn Alston, *The Future of* Roe v. Wade *with a Conservative Super Majority Supreme Court*, 22 RUTGERS J.L. & RELIGION 446, 448 (2022) ("Between 2011 and 2019, states have enacted 483 new abortion restrictions which accounts for 40 percent of all abortion restrictions enacted by states since *Roe*.").

16. Alston, *supra* note 15, at 457 ("Conservative states have also been amending their constitutions to ensure it explicitly does not protect the right to an abortion.").

17. *See* TENN. CONST. art. I, § 36; W. VA. CONST. art. VI, § 57; ALA. CONST. art. I, § 36.06.

18. *Cf.* Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 875 (2011).

> There is much more to state constitutional interpretation than what I have covered—canons of construction, presumptions of constitutionality, the use of historical materials evidencing the intentions or understandings of voters, the relevance of the interpretation of state constitutional provisions from other states (particularly of provisions borrowed from other states), the weight to be given contemporaneous legislative construction of state constitutional provisions, and the special challenges associated with resolving

number of such factors and the differing possible weights assigned to them might well mean that there will be continuing, and possibly contentious, abortion litigation for a long time to come.

A. Alabama

The Alabama Constitution was amended in 2018[19] to include a few abortion-specific provisions. That state constitution now provides:

> (a) This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life.
> (b) This state further acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate.
> (c) Nothing in this constitution secures or protects a right to abortion or requires the funding of an abortion.[20]

There is little case law interpreting these provisions.[21] Facially, they seem to preclude any challenges to restrictive abortion laws based on state constitutional guarantees.[22] However, given the multiplicity of considerations that might play a role in the analysis of those guarantees,[23] such a reading may prove inaccurate.

Consider subsection (a), which announces the state's public policy with respect to the unborn including that the unborn have a right to life. A recognition of the sanctity of unborn life and the rights of unborn children does not establish that the state constitution fails to offer protection for abortion, even if it is only because of the sanctity of the

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> inconsistencies in frequently amended state constitutions are just a few of the many issues that easily come to mind.

Id.

19. *See* Linton, *supra* note 10, at 31-32.

20. ALA. CONST. art 1, § 36.06; *see also* W. VA. CONST. art. VI, § 57 ("Nothing in this Constitution secures or protects a right to abortion or requires the funding of abortion."); TENN. CONST. art. I, § 36 ("Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion."); LA. CONST. ANN. art. I, § 20.1 ("[N]othing in this constitution shall be construed to secure or protect a right to abortion or require the funding of abortion.").

21. The amendment is mentioned in a footnote of a majority opinion. *See* Magers v. Alabama Women's Ctr. Reprod. Alts., LLC, 325 So. 3d 788, 789 n.1 (Ala. 2020) (noting in a footnote the amendment to the Alabama State Constitution); *see also Ex parte* Z.W.E., 335 So. 3d 650, 662 n.4 (Ala. Mar. 26, 2021) (Shaw, J., dissenting) (noting in a footnote in the dissent that the Alaska Constitution Art. I, § 36.06 specifically protects the rights of the unborn).

22. Alston, *supra* note 15, at 458 ("[T]his amendment was passed with the intention to ensure that the Alabama Constitution does not support the right to an abortion.").

23. *See supra* note 17 and accompanying text.

life of the pregnant woman, who also has the right to life[24]—it is simply unclear what the Alabama Constitution requires, permits, or prohibits when those rights come into conflict.[25] Suppose, for example, that continuation of a particular pregnancy would be life-threatening for the pregnant woman. A state constitutional provision supporting the sanctity of life would require further explication[26] before one could establish that the state constitution would not afford protection to the life of the pregnant woman over the life of a not-yet-viable fetus.[27]

Even if abortion is protected when the life of the pregnant woman would be at risk were she to continue the pregnancy to term, that exception might only be thought to apply to a very small percentage of abortions.[28] Yet, in other contexts, the right to defend oneself is not limited to instances in which one's life is threatened but might also include threats of serious but non-life-threatening bodily harm,[29] so one might expect that some states recognizing the sanctity of fetal life would nonetheless permit abortions when pregnancy continuation might cause serious but non-life-threatening harm.[30]

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24. *Cf.* Moody v. Bibb, 50 Ala. 245, 250 (1874) ("[T]he right to life, liberty, and property is sacred."); Padgett v. Gulfport Fertilizer Co., 66 So. 866, 868 (Ala. Ct. App. 1914) (discussing "the most sacred of human rights with which it deals—life, liberty, and property"); Payne v. State, 60 Ala. 80, 87 (1877) (discussing "a thing so sacred as human life"); Langham v. State, 68 So. 504, 508 (Ala. Ct. App. 1915) (applying "the principle that regards human life sacred").

25. Some commentators fail to appreciate this point. *See* Lawrence J. Nelson, *Of Persons and Prenatal Humans: Why the Constitution Is Not Silent on Abortion*, 13 LEWIS & CLARK L. REV. 155, 170 (2009) ("If prenatal humans are constitutional persons, [then] . . . [the Constitution] would require the State to ban all abortions.").

26. *Cf.* Rachel Suppé, *Pregnancy on Trial: The Alabama Supreme Court's Erroneous Application of Alabama's Chemical Endangerment Law in* Ex Parte Ankrom, 7 HEALTH L. & POL'Y BRIEF 49, 62 (2014) ("While Alabama has stated its policy of protecting unborn life, it has also, on multiple occasions, stated its policy of protecting women, women's health, and pregnant women.").

27. *Cf.* Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1825 (2007) ("[T]he abortion-as-self-defense right is largely uncontroversial, at least when threats to the mother's life . . . are involved.").

28. *Cf.* Sidney Buchanan, *The Abortion Issue: An Agonizing Clash of Values*, 38 HOUS. L. REV. 1481, 1482 (2002) (suggesting that only a tiny percentage of pregnancies are life-threatening).

29. *See* Sanders v. State, 61 So. 336, 339 (Ala. 1913) (holding that the right to self-defense includes the right to act to avoid serious bodily harm).

30. *See* FLA. STAT. ANN. § 390.0111(a) (permitting an abortion where "the termination of the pregnancy is necessary to save the pregnant woman's life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman"). *See also* Women of State of Minn. by Doe v. Gomez, 542 N.W.2d 17, 25 (Minn. 1995).

> [A]bortion may be necessary to preserve the health of the mother even though it is not clear to the physician that the mother would die without the abortion . . . . [S]everal medical conditions aggravated or caused by pregnancy, including premature ruptured membrane, preeclampsia, hypertension and poorly controlled diabetes, . . . might require an immediate abortion, even though they would fall outside the statutory exception for an abortion that is "necessary to prevent the woman's death." If an abortion is not

Suppose that a state only permits abortion where continuation of the pregnancy is life-threatening.[31] Doctors will be forced to wait to perform abortions until foreseeably dangerous complications pose an actual threat, even though the delay might put the lives and health of pregnant women at greater risk.[32] While it is fair to suggest that in some instances the potentially life-threatening conditions might not turn out to be life-threatening for a particular woman,[33] requiring physicians to wait would foreseeably result in many more women losing their lives or

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> performed in these situations, the woman is exposed to increased health risks such as shock, the need for a blood transfusion, infection, pain and discomfort.

Gomez, 542 N.W.2d at 25; Simat Corp. v. Arizona Health Care Cost Containment Sys., 56 P.3d 28, 34 (Ariz. 2002) ("Surely, a woman's right to choose preservation and protection of her health, and therefore, in many cases, her life, is at least as compelling as the state's interest in promoting childbirth."); *cf.* United States v. Vuitch, 402 U.S. 62, 67-68 (1971); D. D.C. CODE ANN. § 22—201. That Act provides in part:

> Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than [one] year or not more than [ten] years.

D.D.C. CODE ANN. § 22—201.

31. *See infra* notes 48-56 and accompanying text (discussing Arkansas law that only permits abortion where continuation of the pregnancy would be life-threatening).

32. *See* Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 393-94 (Mass. 1981).

> Because the risks associated with these conditions typically increase as a pregnancy becomes more advanced, Dr. Stubblefield suggests that physicians treating Medicaid-eligible pregnant women under the constraints of the challenged restriction face a dilemma: They may be forced to refuse treatment involving abortion early in a woman's pregnancy, only to undertake a more complicated and dangerous operation at some later stage when the situation has become life-threatening. He further cites a number of conditions in which termination of pregnancy is the preferred treatment, although not necessary to avert death.

Moe, 417 N.E.2d at 393-94; *but see* Fischer v. Dep't of Pub. Welfare, 502 A.2d 114, 122-23 (Pa. 1985).

> In addition to the obvious importance of the Commonwealth's interest in preserving potential life, we think that the challenged provision meets the other criterion of the intermediate scrutiny test. Firstly, the governmental classification here is between abortions necessary to save the life of the mother, and all other abortions. The stated purpose of the Act is the preservation of life. In furtherance thereof, the Commonwealth has made a decision to encourage the birth of a child in all situations except where another life would have to be sacrificed. We think such a classification is specifically related to the ends sought, in that it accomplishes the preservation of the maximum amount of lives: i.e., those unaborted new babies, and those mothers who will survive though their fetus be aborted.

Fischer, 502 A.2d at 122-23.

33. *See* Sylvia A. Law, *Childbirth: An Opportunity for Choice That Should Be Supported*, 32 N.Y.U. REV. L. & SOC. CHANGE 345, 375 (2008) ("[P]otentially life-threatening conditions can be identified early in pregnancy, but . . . it is not possible to know, early in pregnancy, which women will face a life-threatening condition at term.").

suffering long-term, adverse health consequences compared to the probable health outcomes that would have occurred had abortion been permissible earlier.[34] It will be up to the Alabama courts to determine whether the state constitution requires that pregnant women whose lives or health would be threatened by pregnancy-continuation must be permitted to obtain abortions.[35]

Subsection (b) must also be construed. While this subsection requires the lawful and appropriate protection of the unborn, courts might have very different views about what constitutes appropriate treatment if, for example, the refusal to permit an abortion would result in significant harm to the pregnant woman, whether physical[36] or nonphysical.[37] Further, a separate question is whether it is "lawful" to require protection of a not-yet-viable fetus when affording that protection would result in significant harm to the woman carrying the fetus. The degree to which subsection (b) affords or requires protection above what is already provided in subsection (a) is by no means obvious.

Even if subsections (a) and (b) do not preclude the state constitution from affording abortion protection, subsection (c) might be thought to make clear that the state constitution does not protect abortion rights. Yet even subsection (c) is open to differing interpretations. For example, subsection (c) might be understood to be clarifying that the state constitution does not protect abortion rights as a general matter.[38]

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34. *Cf.* Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229, 1240-41 (2020) ("[T]hat seven hundred women die in the United States of pregnancy-related causes annually is significant because researchers estimate that more than half of these deaths are preventable."). As abortion becomes less accessible, one might expect that there would be even more women dying during pregnancy. *See* Rachel Suppé, *A Right in Theory but Not in Practice: Voter Discrimination and Trap Laws As Barriers to Exercising a Constitutional Right*, 23 AM. U.J. GENDER SOC. POL'Y & L. 107, 121 n.95 (2014) (suggesting that women who do not have access to safe and legal abortion face a greater risk of death or poor health outcomes).

35. *Cf.* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2318 (2022) (Breyer, J., dissenting) ("States may even argue that a prohibition on abortion need make no provision for protecting a woman from risk of death or physical harm.").

36. *See* Women of Minn. by Doe v. Gomez, 542 N.W.2d 17, 25 (Minn. 1995) (discussing several medical conditions that might be caused or aggravated by pregnancy).

37. *See* Doe v. Dep't of Soc. Servs., 487 N.W.2d 166, 169 (Mich. 1992) ("[B]oth Jane Doe and her mother believed that an abortion would reduce the emotional trauma associated with the pregnancy."); *see also* United States v. Vuitch, 402 U.S. 62, 72 (1971) (construing a statute authorizing abortion to protect health as including psychological as well as physical health); *cf.* B. Jessie Hill, *Essentially Elective: The Law and Ideology of Restricting Abortion During the COVID-19 Pandemic*, 106 VA. L. REV. ONLINE 99, 122 (2020) ("A robust understanding of abortion as medically necessary could be useful . . . by bolstering the authority of individual patients and physicians to make decisions about which abortions are 'medically necessary,' without second-guessing from the state.").

38. *See supra* note 20 and accompanying text.

According to this interpretation, while the state constitution does not guarantee abortion access whenever that procedure is sought, the constitution might nonetheless protect abortion access under certain circumstances, e.g., where the abortion was needed to avoid or mitigate a serious medical complication.[39]

Suppose that a state permits an abortion where: (1) the pregnant woman's life is endangered; or (2) the pregnancy is health-threatening and is a result of rape or incest, but otherwise prohibits abortion.[40] The state constitution's protections might require that abortions be permitted in cases where the pregnancy is health-threatening even in cases where the pregnancy did not result from rape or incest.[41] Such a holding would not suggest that the state constitution protects abortion as a general matter[42] but might nonetheless suggest that the state constitution requires state law to permit more abortions than the state statute, as written, permits.[43] By the same token, a state constitution might not be interpreted to protect abortion as a general matter but might nonetheless require that therapeutic abortions be permitted, just as other kinds of health-protecting treatments and procedures are permitted.[44] While the constitutional guarantees would not be interpreted to privilege or protect abortion, they might nonetheless be interpreted to preclude the procedure from being singled out for unfavorable treatment in cases where that procedure was medically advisable for the pregnant woman.

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39. *See supra* notes 34-37 and accompanying text (discussing how other courts have analyzed some of these issues).

40. *Cf.* Simat Corp. v. Ariz. Health Care Cost Containment Sys., 56 P.3d 28, 29 (Ariz. 2002) (deciding "whether the state constitution permits the state . . . to refuse to fund medically necessary abortion procedures for pregnant women suffering from serious illness while, at the same time, funding such procedures for victims of rape or incest or when the abortion is necessary to save the woman's life").

41. *Id.* ("[I]nsofar as the state scheme permits funding of abortions for one class of pregnant women, the state constitution will not permit it to deny funding for others for whom abortions are medically necessary to save the mother's health.").

42. *Id.* ("It is not about whether the Arizona Constitution provides a more expansive abortion choice than the federal constitution—that issue is not presented.").

43. *Id.* at 33 ("While the state certainly has a legitimate interest in protecting the fetus and promoting childbirth, we cannot see how that is any more compelling than the state's interest in protecting the health of pregnant women afflicted with serious disease by treating health problems before they become terminal."); Right to Choose v. Byrne, 450 A.2d 925, 928 (N.J. 1982) ("[U]nder the New Jersey Constitution the State may not restrict funds to those abortions to preserve a woman's life, but not her health.").

44. *See* Moe v. Sec'y Admin. & Fin., 417 N.E.2d 387, 402 (Mass. 1981) (striking down limitation on the use of state funds by the indigent for medically necessary abortion services when there was no similar restriction on other kinds of medically necessary services); *Simat Corp.*, 56 P.3d at 33 (striking down limitation on funding medically necessary, non-life-threatening abortions).

A court interpreting the Alabama constitutional guarantees would not be compelled to adopt an interpretation prohibiting a distinction between abortion and other medical procedures.[45] On the contrary, a court might interpret the state constitution as focused on reducing or eliminating abortion, and thus might reject that abortion must be treated in the same way that other health-protecting treatments and procedures are treated.[46] The point here is merely that the language in the Alabama Constitution need not be interpreted that way and might instead be interpreted not to nullify state constitutional protections in the face of severe abortion restrictions. Thus, the abortion amendments in the Alabama Constitution might, but need not, be understood to preclude a court striking down restrictive abortion statutes on state constitutional grounds.

B. Arkansas

Sometimes, state statutes and constitutional provisions directly addressing abortion send confusing, if not contradictory, messages.[47] One provision of the Arkansas Constitution states: "[t]he policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution."[48] Such a provision would seem to indicate that the state must do everything it can to protect fetal life within the parameters set by federal law.[49] Further, Arkansas law is rather unforgiving with respect to abortion. For

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45. *See* Bell v. Low Income Women of Texas, 95 S.W.3d 253, 258 (Tex. 2002) ("The classification here is not so much directed at women as a class as it is abortion as a medical treatment, which, because it involves a potential life, has no parallel as a treatment method.").

46. *Cf.* Harris v. McRae, 448 U.S. 297, 325 (1980) ("Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."); *Bell*, 95 S.W.3d at 258 (suggesting that "abortion as a medical treatment . . . because it involves a potential life, has no parallel as a treatment method") (citing *Harris*, 448 U.S. at 325).

47. *See supra* notes 21-25.

48. ARK. CONST. amend. LXVIII, § 2.

49. *See* Linton, *supra* note 10, at 21-22 (discussing pending challenges to *Roe* and suggesting abortion may be illegal in Arkansas if *Roe* were overruled). However, current federal law protects abortion in some circumstances. *See also Reinforcement of EMTALA Obligations Specific to Patients who are Pregnant or are Experiencing Pregnancy Loss (UPDATED July 2022)*, CMS.GOV (July 11, 2022), https://www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfopolicy-and-memos-states-and/reinforcement-emtala-obligations-specific-patients-who-are-pregnant-or-are-experiencing-pregnancy-0 [https://perma.cc/V4QX-2G6E] ("The EMTALA statute requires that all patients receive an appropriate medical screening examination, stabilizing treatment, and transfer, if necessary, irrespective of any state laws or mandates that apply to specific procedures.").

example, one law, sometimes interpreted as a blanket abortion ban,[50] reads:

> It is unlawful for any person to administer or prescribe any medicine or drug to any woman with child with the intent to produce an abortion or premature delivery of any fetus before or after the period of quickening or to produce or attempt to produce the abortion by any other means.[51]

While not permitting prosecution of the woman obtaining an abortion,[52] this law seems to permit prosecution of anyone else seeking to produce an abortion.[53]

A different Arkansas law prohibits performing abortions unless to save the life of the pregnant woman,[54] although the law was enjoined in light of then-existing federal constitutional guarantees.[55] In addition to permitting abortions where continuation of the pregnancy would be life-threatening, this law provides doctors an affirmative defense to cover cases where the doctor accidentally or unintentionally causes fetal injury or death when providing a pregnant woman medical care.[56] Now that the basis for enjoining this law has been removed,[57] the law is likely

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50. *See* Linton, *supra* note 10, at 21-23 (discussing Arkansas "heartbeat" bans).

51. ARK. CODE ANN. § 5-61-102(a).

52. ARK. CODE ANN § 5-61-102(e) ("Nothing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero.").

53. *See* infra notes 90-91 and accompanying text (discussing whether this statute should be interpreted to be aiming at all abortions or only medical abortions).

54. *See* ARK. CODE ANN § 5-61-404(a) ("A person shall not purposely perform or attempt to perform an abortion except to save the life of a pregnant woman in a medical emergency.").

55. *See* Little Rock Fam. Plan. Servs. v. Jegley, 549 F. Supp. 3d 922, 937 (E.D. Ark. 2021) ("This preliminary injunction remains in effect until further order from this Court.").

56. ARK. CODE ANN § 5-61-404(d) ("It is an affirmative defense to prosecution under this section if a licensed physician provides medical treatment to a pregnant woman which results in the accidental or unintentional physical injury or death to the unborn child.").

57. *See* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2279 (2022) ("We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives."); *see also* Alex Woodward, *Arkansas Governor Defends Abortion Ban that Makes No Exception for Rape or Incest*, INDEPENDENT (June 27, 2022), https://www.independent.co.uk/news/world/americas/us-politics/arkansas-abortion-ban-hutchinson-roe-v-wade-b2109705.html [https://perma.cc/4VG9-6S4Y] (discussing Arkansas abortion prohibition that has no exceptions except to save the life of the pregnant woman); *cf*. Howard Koplowitz, *Federal Judge Lifts Injunction on Alabama's 2019 Abortion Ban After* Roe v. Wade *Overturned*, AL.COM (June 24, 2022), https://www.al.com/politics/2022/06/federal-judge-lifts-injunction-on-alabamas-2019-abortion-ban-after-roe-v-wade-overturned.html [https://perma.cc/4VG9-6S4Y] ("A Montgomery federal judge on Friday lifted the injunction preventing Alabama's 2019 abortion ban from going into effect after the U.S. Supreme Court overturned *Roe v. Wade*, meaning abortions are now illegal in Alabama except in cases where the life of the mother is in danger."); 10TV Web Staff & Associated Press, *'Heartbeat' Law Now in*

to have both obvious and less obvious effects. First, because a physician performing an abortion when the pregnancy is not life-threatening may be fined up to $100,000 or imprisoned for up to ten years,[58] one would expect that the number of abortions performed in the state would be rather low. Second, because physicians would understand that the availability of an affirmative defense would not guarantee that the invocation of such a defense would ultimately be successful,[59] some physicians might be tempted to alter the treatments they recommend to their pregnant patients to mitigate the risk of harming the fetus, even if the now-recommended treatment poses a greater risk of complications for the patient (the pregnant woman), for instance because the now-recommended treatment is less likely to be successful or is more likely to cause unwanted side effects.[60]

The Arkansas Constitution precludes the use of public funds to pay for an abortion except where the abortion would save the pregnant woman's life.[61] Such a provision is compatible with a statute that only permits abortions where the life of the pregnant woman is at risk. Basically, the constitutional provision and statute together suggest that the state only permits abortions where the pregnancy is life-threatening,

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Effect After Federal Court Lifts Injunction, WTOL11 (June 24, 2022, 11:14 PM), https://www.wtol.com/article/news/local/ohios-heartbeat-bill-becomes-law-federal-court-lifts-injunction/530-ae0e7a91-9f20-47ec-94c6-cd4c6ede829a [https://perma.cc/74LB-N2SP] ("Enforcement of Ohio's 2019 'heartbeat' ban had been on hold for nearly three years under a federal court injunction. The state attorney general, Republican Dave Yost, asked for that to be dissolved because of the high court's ruling, and a federal judge agreed hours later.").

58. *See* ARK. CODE ANN. § 5-61-404(b) (2021) ("Performing or attempting to perform an abortion is an unclassified felony with a fine not to exceed one hundred thousand dollars ($100,000) or imprisonment not to exceed ten (10) years, or both.").

59. *Cf.* Butcher v. State, 454 S.W.3d 13, 20 (Tex. Crim. App. 2015) ("The jury rejected Appellant's mitigating affirmative defense. The court of appeals affirmed the legal sufficiency of that finding. We agree.").

60. *Cf.* Cheryl M. Plambeck, *Divided Loyalties: Legal and Bioethical Considerations of Physician-Pregnant Patient Confidentiality and Prenatal Drug Abuse*, 23 J. LEGAL MED. 1, 4-5 (2002) ("[T]he maternal-fetal conflict also generally encompasses the clash between the interests of pregnant women and the declared interests of law enforcement officials and medical professionals who step in on behalf of the fetus.").

61. ARK. CONST. amend. LXVIII, § 1 ("No public funds will be used to pay for any abortion, except to save the mother's life."); *see also* COLO. CONST. art. V, § 50.

> No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, either directly or indirectly, any person, agency or facility for the performance of any induced abortion, PROVIDED HOWEVER, that the General Assembly, by specific bill, may authorize and appropriate funds to be used for those medical services necessary to prevent the death of either a pregnant woman or her unborn child under circumstances where every reasonable effort is made to preserve the life of each.

COLO. CONST. art. V, § 50.

and the State is permitted in appropriate circumstances to use public funds to underwrite the costs of those abortions.

Yet, even if one solely focuses on abortions where continuation of the pregnancy would be life-threatening, the state constitution sends mixed messages. Assuming that no federal law requires Arkansas to pay for any abortions,[62] the provision permitting the state to pay for abortions where the pregnancy is life-threatening would seem to conflict with the provision specifying that the state will protect fetal life to the greatest extent possible. Refusing to fund any abortions at all seems more protective of the fetus than does funding some abortions. While refusing to pay for abortions where the pregnancy is life-threatening does not place much value on the life of the pregnant woman,[63] the provision regarding protection of fetal life does not even mention the life or health of the pregnant woman.[64]

The Arkansas Constitution contains a provision suggesting that the state must protect the fetus to the extent permitted by federal law.[65] But this provision as well as the provision precluding funding of non-life-threatening abortions create their own interpretive difficulties when one considers how Medicaid funding is structured.

Federal law requires that any state accepting Medicaid funding must not only fund abortions in cases involving life-threatening pregnancies but must also fund abortions in cases involving pregnancies resulting from rape or incest.[66] Arkansas accepts Medicaid funding, and

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62. *See infra* note 61 and accompanying text (discussing how the state might be required to pay for certain abortions if accepting certain federal funding).

63. Emily Blistein, *Revisiting Roe: The Language of Privacy and Isolation in U.S. and Vermont Case Law*, VT. BAR J., Summer 2008, at 42, 43 (discussing how the pro-life movement "pushes for legislation and regulations that establish fetal personhood, and values it over the life and health of women").

64. *Cf.* Susan Goldberg, *Of Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem for Fetuses and Embryos*, 66 WASH. L. REV. 503, 541 (1991) (discussing a policy that "assigns a higher value to the potential life and health of a fetus than to the rights of pregnant women").

65. *See* ARK. CONST. amend. LXVIII, § 2.

66. *See* Dalton v. Little Rock Fam. Plan. Servs., 516 U.S. 474, 475 (1996).

> Amendment 68 of the Arkansas Constitution, § 1 . . . prohibits the use of state funds to pay for any abortion "except to save the mother's life." . . . [T]his provision is inconsistent with a requirement in Title XIX of the Social Security Act, 79 Stat. 343, as amended, 42 U.S.C. § 1396 *et seq*., as affected by the 1994 version of the "Hyde Amendment," that States fund medically necessary abortions where the pregnancy resulted from an act of rape or incest.

Id.

the state constitutional prohibition of funding non-life-threatening abortions has been enjoined insofar as it conflicts with federal law.[67]

Once the federal requirement has been triggered, the Supremacy Clause precludes enforcement of a state law that conflicts with federal law.[68] However, a separate issue is whether the state constitution's prohibition on funding abortions where the pregnancy is not life-threatening precludes the state from accepting Federal Medicaid funding where acceptance of that funding would require the state to fund some abortions in non-life-threatening situations. This issue has been litigated, and the Arkansas Supreme Court upheld the state's ability to accept Federal Medicaid funding, even though the state was thereby obligated to assure that certain abortions were funded even when the life of the pregnant woman was not endangered.[69] Because a private trust fund had been set up to cover the costs of the abortions where the pregnancies were due to rape or incest, Arkansas was deemed to have met the federal requirement without having violated the state constitutional prohibition on using public funds for that purpose.[70]

Post-*Dobbs*, Congress might decide to remove the Medicaid requirement that states provide abortion funding for pregnancies due to rape or incest or, perhaps, might make an exception for those states whose constitutions or statutes preclude such funding.[71] Yet, Congress

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67. *Id.* at 478 ("[E]njoining the enforcement of Amendment 68 only to the extent that the amendment imposes obligations inconsistent with federal law.").

68. *See* U.S. CONST. art. VI, cl. 2.

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Id.

69. The Arkansas Supreme Court rejected that the state had to withdraw from the Medicaid program because of that state constitutional provision. *See* Hodges v. Huckabee, 995 S.W.2d 341, 343 (Ark. 1999) ("Because we find that the trial court did not err in its decision granting summary judgment and declining to order the removal of Arkansas from the Medicaid program, we affirm.").

70. It may be that the State is able to meet Medicaid requirements through a private trust that has been set up for that purpose. *See id.* at 347 ("The Arkansas Medicaid Saving Trust was initiated on August 19, 1996, by a private individual; its stated purpose is to pay for Medicaid abortions performed as a result of rape or incest.").

71. *Dalton*, 516 U.S. at 477.

> While the versions of the Hyde Amendment applicable to the 1994 and 1995 fiscal years authorized the use of federal funds to pay for an abortion after notice that "such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest," the version of the amendment applicable to prior years limited federal funding to those abortions necessary to save the life of the mother.

Id.

might decide not to change the current requirement. In that event, the courts will have to decide whether a state accepting Medicaid funding will be precluded from enforcing abortion prohibitions in cases in which the pregnancy is a result of rape or incest.[72]

The Arkansas Constitution reads:

> This enumeration of rights shall not be construed to deny or disparage others retained by the people; and to guard against any encroachments on the rights herein retained, or any transgression of any of the higher powers herein delegated, we declare that everything in this article is excepted out of the general powers of the government; and shall forever remain inviolate; and that all laws contrary thereto, or to the other provisions herein contained, shall be void.[73]

This provision requires interpretation because it does not spell out which rights are retained by the people. Other state courts have considered whether one of the rights retained by the people is the right to self-defense.[74] If indeed the Arkansas Constitution protects a right to self-defense, then there may be implications for the Arkansas constitutional provisions addressing abortion, because the right to self-defense is often interpreted as including the right to prevent bodily injury as well as the right to protect one's life.[75]

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72. A separate issue involves the constitutionality of Congress's conditioning the receipt of Medicaid funds on a state's willingness to fund abortions where the pregnancies resulting from rape or incest were not themselves life-threatening. On the one hand, there is a history of Congress's conditioning the receipt of Medicaid funding in this way. On the other hand, the Court might find that Congress's conditioning the receipt of Medicaid funds on a state's meeting this condition to be coercive. *Cf.* Nat'l Fed'n Indep. Bus. 567 U.S. 519 (2012) (striking down as coercive a provision requiring states to expand eligibility or face the loss of Medicaid funding).

73. ARK. CONST. art. II, § 29. *See also* IDAHO CONST. art. I, § 21 ("This enumeration of rights shall not be construed to impair or deny other rights retained by the people."); MINN. CONST. art. I, § 16 ("The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people."); 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."); UTAH CONST. art. I, § 25 ("This enumeration of rights shall not be construed to impair or deny others retained by the people.").

74. *See, e.g.*, *In re* Application of Atkinson, 291 N.W.2d 396, 398 (Minn. 1980). The Minnesota Supreme Court seemed to recognize that the right to self-defense was protected, but also suggested that the right "was not absolute." *See id.* at 398-99; *but see* State v. Storms, 308 A.2d 463, 464 (R.I. 1973) ("[T]he constitutional provision relied upon declares only that the enumeration of rights in the Declaration of Rights 'shall not be construed to impair or deny others retained by the people,' and manifestly this guarantee in no sense assures a right of self-defense."). A separate issue is the degree to which the Federal Constitution protects "the inherent right of self-defense." *Cf.* District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

75. *See supra* note 29 and accompanying text.

Some commentators suggest that the right to a therapeutic abortion should be understood as included within the right to self-defense.[76] If indeed there is a right to self-defense[77] and that right includes the right to obtain a therapeutic abortion,[78] then state courts may be asked to construe and delimit apparently competing constitutional provisions, for example, a provision precluding abortion and a provision protecting the right to self-defense. State courts in other jurisdictions have interpreted their respective state constitutions to protect abortion where the pregnant woman's health was endangered even where her life was not at risk,[79] and Arkansas courts will have to determine whether the Arkansas Constitution protects the right to abortion in order to avert non-life-threatening injury.

The provision that precludes undermining retained rights from being denied or disparaged might be read as offering a rule of construction[80] with respect to the reach of the abortion-specific provisions—where a robust interpretation of the abortion prohibition would interfere with a woman's right to self-defense, the abortion provisions must be read more narrowly. Thus, a court might suggest that the provision specifying that fetal life must be protected from conception

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76. *See* Carla Graff, *The Religious Right to Therapeutic Abortions*, 85 GEO. WASH. L. REV. 954, 954 (2017).

77. *Cf.* ARK. CONST. art. II, § 2 ("All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty . . . and of pursuing their own happiness.").

78. *See* Eileen McDonagh, *The Next Step After Roe: Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-Level Abortion Legislation*, 56 EMORY L.J. 1173, 1201 (2007) ("[P]ossessing a basic right to life as a human being does not include any right to impose serious bodily injury upon another person or to intrude nonconsensually upon that person's basic liberties. That is what is made clear by self-defense legislation."); Anita Bernstein, *Common Law Fundamentals of the Right to Abortion*, 63 BUFF. L. REV. 1141, 1171 (2015).

> Self-defense goes especially far in support of abortion, however, because even if abortion is understood as the deliberate kind of homicide—more directly harmful than mere indifference or disinclination to sacrifice—this privilege still approves of it. Self-defense is also unique among the common law doctrines that underlie the legal right to terminate because it offers justification to furnishers of abortions as well as persons who take action to cease being pregnant themselves.

Bernstein, *supra*, at 1171; Mark Strasser, *The Next Battleground? Personhood, Privacy, and Assisted Reproductive Technologies*, 65 OKLA. L. REV. 177, 180 (2013) ("But if self-defense includes the right to protect one's health, then self-defense might be used to justify a woman obtaining an abortion both when continuing the pregnancy would endanger her life and under other circumstances.").

79. *See* Women of Minn. By Doe v. Gomez, 542 N.W.2d 17, 25 (Minn. 1995); Simat Corp. v. Arizona Health Care Cost Containment Sys., 56 P.3d 28, 34 (Ariz. 2022).

80. *See generally* Michael W. Mullane, *Statutory Interpretation in Arkansas: How Should A Statute Be Read? When Is It Subject to Interpretation? What Our Courts Say and What They Do*, 2004 ARK. L. NOTES 85 (2004) (offering a guide to construction of Arkansas law).

to birth[81] is qualified in that it must not be construed to curtail or interfere with a woman's right to self-defense. The provision specifying fetal protection might be interpreted to recognize the fetus's right to life or, perhaps, that the fetus is a "person."[82] But the retained rights provision suggests that "the enumeration of rights" contained in the Arkansas Constitution "shall not be construed to deny or disparage others retained by the people,"[83] which means that the rights accorded to the fetus should not be understood to undermine the rights of the pregnant woman. Were the provision regarding rights retained by the people to be interpreted to include a right to bodily autonomy or integrity[84] and were that right to bodily autonomy and integrity interpreted to include the right to abortion,[85] then any interpretations of the rights accorded to the fetus[86] would not be permitted to undermine those autonomy or bodily integrity rights.

Suppose that the Arkansas constitutional provision protecting rights retained by the people is interpreted to have no bearing on abortion limitations. Arkansas courts will still have to provide a construction and an interpretation of some of the laws mentioned above. While one of the laws above has an exception where pregnancy is life-threatening[87] and provides an affirmative defense where a physician inadvertently brings about injury or death to the fetus while attempting to help the pregnant woman,[88] the other law does not contain any exception for

81. ARK. CONST. amend. LXVIII, § 2.

82. *See* Phillip Aka v. Jefferson Hosp. Ass'n, Inc., 42 S.W.3d 508, 517 (Ark. 2001) (suggesting that the amendment makes the fetus a person for certain purposes).

83. ARK. CONST. art. II, § 29 ("[E]verything in this article is excepted out of the general powers of the government; and shall forever remain inviolate; and that all laws contrary thereto, or to the other provisions herein contained, shall be void.").

84. *See* Hodes & Nauser, MDs, P.A. v. Schmidt, 440 P.3d 461, 484 (Kan. 2019) ("At the core of the natural rights of liberty and the pursuit of happiness 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.").

85. *Id.* at 466 ("This right 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.").

86. For example, Arkansas recognizes wrongful death damages for fetuses that have attained viability. *See* Aka v. Jefferson Hosp. Ass'n, Inc., 42 S.W.3d 508, 518 n.4 (Ark. 2001); s*ee also* McCoy v. Crumby, 106 S.W.3d 462, 464 (Ark. 2003) (discussing the addition of "'unborn child' to the definition of 'person' for purposes of the crime of homicide").

87. ARK. CODE ANN. § 5-61-404(a) ("A person shall not purposely perform or attempt to perform an abortion except to save the life of a pregnant woman in a medical emergency.").

88. ARK. CODE ANN. § 5-61-404(d) ("It is an affirmative defense to prosecution under this section if a licensed physician provides medical treatment to a pregnant woman which results in the accidental or unintentional physical injury or death to the unborn child.").

life-threatening pregnancies.[89] The latter statute is aimed at preventing medical abortions,[90] but it might be read more broadly because it also prohibits "produc[ing] or attempt[ing] to produce the abortion by any other means."[91] If "by any other means" includes surgical abortions, then those performing life-saving abortions will be subject to prosecution under this statute unless the exceptions included in the other statute are imported to provide a defense to prosecution under this statute.[92]

West Virginia, Tennessee, Louisiana, and Rhode Island have constitutional provisions suggesting either that the constitution as a whole does not protect the right to abortion[93] or that a particular provision of the state constitution should not be construed to protect a right to abortion.[94] The state courts will have to decide if these provisions are merely intended to forestall an interpretation that finds within the state constitution a right to abortion as a general matter and does not, for example, preclude finding a right to abortion where medically necessary or advisable.[95]

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89. *See* ARK. CODE ANN. § 5-61-102.

90. *Id.* § 5-61-102(a) ("It is unlawful for any person to administer or prescribe any medicine or drug to any woman with child with the intent to produce an abortion or premature delivery of any fetus before or after the period of quickening.").

91. *Id.*

92. In the alternative, a court might enjoin the enforcement of the laws until the state makes clear whether a physician performing an abortion to save the life of the pregnant woman is subject to prosecution. *Cf.* Blake Paterson, *Abortions to Resume in Louisiana, After Judge Issues Temporary Injunction Against State Ban*, NOLA (June 27, 2022, 6:04 PM), https://www.nola.com/news/courts/article_442aebd6-f662-11ec-b3bd-43e8f976309c.html [https://perma.cc/P9UM-QE4Q] ("Judge Robin Giarrusso, a Democrat first elected to the bench in 1988, issued a temporary restraining order, barring the state from enforcing its ban."); *see* also *id.*

> Under one part of the law, anyone found guilty of performing an abortion could face up to 10 years in prison. Those found guilty of performing late-term abortions, defined as taking place at 15 weeks of gestation or later, would face up to 15 years if convicted. But a portion of the 2006 law says that anyone performing abortions will be subject to a maximum of two years in prison.

Id.; In any event, if the statute is interpreted not to include an exception where the woman's life is endangered, that statute would likely be preempted by federal law. *See supra* note 49 (discussing EMTALA).

93. W. VA. CONST. art. VI, § 57 ("Nothing in this Constitution secures or protects a right to abortion or requires the funding of abortion."); TENN. CONST. art. I, § 36 ("Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion."); LA. CONST. ANN. 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.").

94. *See* 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."). The section included both due process and equal protection provisions. *See id.* ("No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws.").

95. *See supra* notes 40-44 and accompanying text.

The West Virginia Supreme Court and the Tennessee Supreme Court had each found that the state constitutions protected the right to secure an abortion.[96] The state constitutions were subsequently amended—the Tennessee constitutional provision becoming effective on November 4, 2014[97] and the West Virginia constitutional provision becoming effective on November 6, 2018.[98] There have been no subsequent reported state court decisions construing these amendments.

West Virginia, Tennessee, and Louisiana have laws severely limiting abortion.[99] Courts in those states will have to construe the

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96. *See* Planned Parenthood of Middle Tenn. V. Sundquist, 38 S.W.3d 1, 25 (Tenn. 2000) (superseded by constitutional amendment) ("In summary, we hold that a woman's right to terminate her pregnancy is a vital part of the right to privacy guaranteed by the Tennessee Constitution."); Women's Health Ctr. Of W. Virginia, Inc. v. Panepinto, 446 S.E.2d 658, 667 (W. Va. 1993) (superseded by constitutional amendment) ("Given West Virginia's enhanced constitutional protections, we cannot but conclude that the provisions of West Virginia Code § 9–2–11 constitute undue government interference with the exercise of the federally-protected right to terminate a pregnancy.").

97. *See* TENN. CONST. art. I, § 36 (effective Nov. 4, 2014).

98. *See* W. VA. CONST. art. VI, § 57 (effective Nov. 6, 2018).

99. TENN. CODE ANN. § 39-15-216I(2) (2020).

> A person shall not perform or induce, or attempt to perform or induce, an abortion upon a pregnant woman whose unborn child is six (6) weeks gestational age or older unless, prior to performing or inducing the abortion, or attempting to perform or induce the abortion, the physician affirmatively determines and records in the pregnant woman's medical record that, in the physician's good faith medical judgment, the unborn child does not have a fetal heartbeat at the time of the abortion.

Id.; TENN. CODE ANN. § 39-15-216(a)(4) (West) ("'Medical emergency' has the same meaning as defined in § 39-15-211."); TENN. CODE ANN. § 39-15-211(a)(3)(2017) ("'Medical emergency' means a condition that, in the physician's good faith medical judgment, based upon the facts known to the physician at the time, so complicates the woman's pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman that delay in the performance or inducement of the abortion would create."); W. VA. CODE ANN. § 61-2-8 (2022).

> Any person who shall administer to, or cause to be taken by, a woman, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than three nor more than ten years; and if such woman die by reason of such abortion performed upon her, such person shall be guilty of murder. No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child.

W. VA. CODE ANN. § 61-2-8; LA. STAT. ANN. § 40:1061(C) (2018).

> No person may knowingly administer to, prescribe for, or procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being. No person may knowingly use or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being.

constitutional amendments to determine whether their respective state constitution imposes any constraints on the state's power to severely limit the conditions under which abortions might be provided.[100]

III. ABORTION PROTECTIONS UNDER MORE GENERAL CONSTITUTIONAL PROVISIONS

Several state constitutions have been interpreted to provide abortion protections above and beyond those provided by the United States Constitution.[101] Sometimes, a particular clause common to many state constitutions is given a more robust interpretation by a particular state's courts.[102] At other times, the state constitutional provision interpreted to provide more protection is peculiar to that state constitution or, perhaps, to only a few state constitutions.[103] Either way, a state court

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LA. STAT. ANN. § 40:1061(C); LA. STAT. ANN. § 40:1061(F) (2018).

> It shall not be a violation of Subsection C of this Section for a licensed physician to perform a medical procedure necessary in reasonable medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman. However, the physician shall make reasonable medical efforts under the circumstances to preserve both the life of the mother and the life of her unborn child in a manner consistent with reasonable medical practice.

LA. STAT. ANN. § 40:1061(F); Rhode Island law is much more permissive. *See, e.g.*, 23 R.I. GEN. LAWS ANN. § 23-4.13-2(d) (2019) ("The termination of an individual's pregnancy after fetal viability is expressly prohibited except when necessary, in the medical judgment of the physician, to preserve the life or health of that individual.").

100. Some commentators have suggested that the courts have limited discretion with respect to how they interpret the amendment. *See, e.g.*, Colleen Reider, June Medical Services L.L.C v. Russo*: Analyzing the Negative Impact of Maintaining the Status Quo on Abortion*, 55 UIC L. REV. 120, 165 (2022) ("Additionally, in the 2020 election, Louisiana voters approved an amendment to the state's constitution which added language that offers no protection for a woman's right to an abortion and would prevent state courts from finding state abortion regulations unconstitutional should *Roe* be overturned.").

101. Shannon Russell, *The Burden Is Undue: Whole Woman's Health and the Evolution, Clarification, and Application of the Undue Burden Standard*, 24 GEO. MASON L. REV. 1271, 1292 (2017) ("Currently, fifteen states' constitutions—including Florida, Massachusetts, New Jersey, and Vermont—offer additional protections of the right to choose abortion not found in the national law of the land.").

102. *See, e.g.*, Hodes & Nauser, MDs, P.A. v. Schmidt, 440 P.3d 461, 471 (Kan. 2019) ("[S]ection 1 of the Kansas Constitution Bill of Rights acknowledges rights that are distinct from and broader than the United States Constitution and that our framers intended these rights to be judicially protected against governmental action that does not meet constitutional standards. Among the rights is the right of personal autonomy. This right 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.").

103. *See, e.g.*, Armstrong v. State, 989 P.2d 364, 383-84 (Mont. 1999) (holding that Article II, Section 10 of the Montana Constitution, which guarantees the fundamental right of individual privacy, protects rights of "personal and procreative autonomy.").

interpretation of a state constitutional provision might be persuasive with respect to how other states' constitutional provisions should be interpreted, although such determinations will ultimately depend upon a variety of factors. Other state constitutions have not (yet) been amended,[104] which means that the extent to which those state constitutions protect abortion will have to be determined in light of other guarantees. In short, state courts will likely be asked to interpret a host of constitutional provisions to determine the degree to which the state constitution protects abortion rights.[105]

A. Due Process and Equal Protection

Many state constitutions have provisions protecting due process[106] or equal protection[107] guarantees. Those guarantees must be construed in

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104. C*f.* Linton, *supra* note 10, at 31 ("[A] state constitutional amendment would not be politically possible at this time in [several] of the . . . states with adverse state supreme court decisions.").

105. *See* Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469, 498-99 (2009) ("[S]tates offer a vast array of constitutional protection for individual rights of liberty and equality that provide fertile ground for protecting reproductive rights."); Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1091 (2003) ("The right of a woman to have an abortion, protected by the Due Process Clause of the Fourteenth Amendment of the Federal Constitution, may also be protected by due process clauses in state constitutions or by provisions in state constitutions that expressly protect the right of privacy.").

106. *See* ARIZ. CONST. art. II, § 4 ("No person shall be deprived of life, liberty, or property without due process of law."); ALASKA CONST. art. I, § 7 ("No person shall be deprived of life, liberty, or property, without due process of law."); CAL. CONST. art. I, § 7(a) ("A person may not be deprived of life, liberty, or property without due process of law."); COLO. CONST. art. II, § 25 ("No person shall be deprived of life, liberty or property, without due process of law."); CONN. CONST. art. I, § 8(a) ("No person shall be . . . deprived of life, liberty or property without due process of law."); FLA. CONST. art. I, § 9 ("No person shall be deprived of life, liberty or property without due process of law."); GA. CONST. art. I, § 1, ¶ I ("No person shall be deprived of life, liberty, or property except by due process of law."); ILL. CONST. art. I, § 2 ("No person shall be deprived of life, liberty or property without due process of law."); IOWA CONST. art. I, § 9 ("[N]o person shall be deprived of life, liberty, or property, without due process of law."); LA. CONST. ANN. art. I, § 2 ("No person shall be deprived of life, liberty, or property, except by due process of law."); ME. CONST. art. I, § 6-A ("No person shall be deprived of life, liberty or property without due process of law."); MICH. CONST. art. 1, § 17 (West) ("No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law."); MINN. CONST. art. I, § 7 ("No person shall be held to answer for a criminal offense without due process of law, and no person shall be put twice in jeopardy of punishment for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law."); MO. CONST. art. I, § 10 ("[N]o person shall be deprived of life, liberty or property without due process of law."); MONT. CONST. art. II, § 17 ("No person shall be deprived of life, liberty, or property without due process of law."); NEV. CONST. art. I, § 8(2) ("No person shall be deprived of life, liberty, or property, without due process of law."); N.M. CONST. art. II, § 18 ("No person shall be deprived of life, liberty or property without due process of

light of a number of factors and need not be interpreted in the same way that the federal guarantees are interpreted.[108]

In 2015, the Iowa Supreme Court interpreted the Iowa Constitution's abortion protections in *Planned Parenthood of the*

law"); OKLA. CONST. art. II, § 7 ("No person shall be deprived of life, liberty, or property, without due process of law."); R.I. CONST. art. I, § 2 ("No person shall be deprived of life, liberty or property without due process of law."); UTAH CONST. art. I, § 7 ("No person shall be deprived of life, liberty or property, without due process of law."); VA. CONST. art. I, § 11 ("[N]o person shall be deprived of his life, liberty, or property without due process of law."); W. VA. CONST. art. III, § 10 ("No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.").

107. ARIZ. CONST. art. II, § 13 ("No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."); ALASKA CONST. art. I, § 1 ("This constitution is dedicated to the principles that all persons have a natural right to life, liberty, 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.") CAL. CONST. art. I, § 7 (a) ("A person may not be . . . denied equal protection of the laws."); CONN. CONST. art. I, § 20 ("No person shall be denied the equal protection of the law."); ILL. CONST. art. I, § 18 ("The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts."); ILL. CONST. art. I, § 2 ("No person shall be . . . denied the equal protection of the laws."); LA. CONST. ANN. art. I, § 3 ("No person shall be denied the equal protection of the laws."); ME. CONST. art. I, § 6-A ("No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof."); MICH. CONST. art. 1, § 2 ("No person shall be denied the equal protection of the laws."); MO. CONST. art. I, § 2 ("That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law."); MONT. CONST. art. II, § 4 ("The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws."); N.M. CONST. art. II, § 18 ("[N]or shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person."); N.C. CONST. art. I, § 19 ("No person shall be denied the equal protection of the laws."); PA. CONST. art. I, § 28 ("Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."); R.I. CONST. art. I, § 2 ("[N]or shall any person be denied equal protection of the laws."); TEX. CONST. art. I, § 3a ("Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin."); VA. CONST. art. I, § 11 ("[T]he right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.").

108. *See* Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW & INEQ. 239, 254 (1999) ("[T]wenty-one of the forty-eight states that guarantee equal protection in their state constitutions explicitly held that their states' equal protection affords greater protections [than federal law]."); Mark Strasser, *Sex, Law, and the Sacred Precincts of the Marital Bedroom: On State and Federal Right to Privacy Jurisprudenc*e, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753, 753 (2000) (discussing substantive due process protections "in states with more robust right to privacy protections than are contained within the Federal Constitution").

Heartland, Inc. v. Iowa Board of Medicine ("PPH I").[109] At issue was a rule passed by the Iowa Board of Medicine that "would have the effect of prohibiting telemedicine abortions in Iowa."[110] Planned Parenthood sought to establish that the abortion protections afforded by the Iowa Constitution were more robust than those provided by the Federal Constitution.[111] The Iowa court saw no need to decide that question because the rule at issue violated federal guarantees.[112]

Yet, the Iowa court did not limit its analysis to federal guarantees but also addressed whether the Iowa Constitution also protected abortion access.[113] The court noted that "[m]any states considering this issue under their state constitutions have found their state constitutions provide such a right"[114] and explained that because "the Iowa Constitution protects a woman's right to terminate her pregnancy to the same extent as the United States Constitution, . . . the rule violates the Iowa Constitution."[115]

In 2018, the Iowa Supreme Court in *Planned Parenthood of the Heartland v. Reynolds ex rel. State* ("*PPH II*") again examined the state constitution's abortion protections.[116] At issue was a statute imposing a seventy-two-hour waiting period after consultation with a physician before an abortion could be obtained.[117]

First, the Iowa Supreme Court set about determining whether the right to abortion was protected under substantive due process guarantees

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109. 865 N.W.2d 252, 253 (Iowa 2015). For purposes of identification, this case will be referred to as "*PPH I*," following the practice adopted by the Iowa Supreme Court in *Planned Parenthood of the Heartland v. Reynolds ex rel. State (PPH III)*. *See* Planned Parenthood of the Heartland, Inc. v. Reynolds *ex rel.* State, 975 N.W.2d 710, 714 (Iowa 2022) ("In 2015, this court applied the federal *Casey* undue burden test under the Iowa Constitution. *See* Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med. (PPH I), 865 N.W.2d 252, 269 (Iowa 2015).").

110. *PPH I*, 865 N.W.2d at 253.

111. *See id.* at 254 ("Planned Parenthood argues the Iowa Constitution affords a broader right, and we should therefore apply a strict scrutiny analysis under the Iowa Constitution to the rule.").

112. *Id.* ("We need not resolve this question because we conclude, for the reasons stated herein, that the Board's rule violates the controlling 'undue burden' test announced by the United States Supreme Court as the federal constitutional test.").

113. *Id.*

114. *Id.* at 262.

115. *Id.* at 269.

116. 915 N.W.2d 206 (Iowa 2018), *overruled by* Planned Parenthood of the Heartland, Inc. v. Reynolds *ex rel.* State, 975 N.W.2d 710 (Iowa 2022).

117. *Id.* at 212 ("In this appeal, we must decide if the constitutional right of women to choose to terminate a pregnancy is unreasonably restricted by a statute that prohibits the exercise of the right for a period of seventy-two hours after going to a doctor.").

afforded by the Iowa Constitution.[118] The court began its analysis by explaining that history and traditions provide a guide to determine which rights are fundamental,[119] but noted that the Iowa "constitution recognizes the ever-evolving nature of society, and thus, [the court's] inquiry cannot be cabined within the limited vantage point of the past."[120] The court concluded that "the substantive due process protections embodied in article I, section 9 of the Iowa Constitution encompass the profoundly personal decisions Iowans make about family, procreation, and child rearing."[121]

The State had contended that "the Iowa Constitution does not expressly protect the right to an abortion, nor may it be found within any other provision."[122] But the Iowa court disagreed, explaining that "the State here fails to appreciate the extent of the liberty interest at stake when the government impermissibly invades a woman's ability to decide whether to terminate a pregnancy,"[123] and holding that "under the Iowa Constitution, that implicit in the concept of ordered liberty is the ability to decide whether to continue or terminate a pregnancy."[124] Ironically, the only mention of the previous decision involving the Board of Medicine's telemedicine prohibition was in the dissent, where the dissent emphasized that the court had applied the *Casey* undue burden test to determine that the prohibition at issue violated the Iowa Constitution.[125]

After finding that the right to abort implicated a fundamental right under the Iowa Constitution, the Iowa Supreme Court next sought to identify the level of scrutiny to employ when examining state statutes burdening that right.[126] Rejecting that the state should use the *Casey* undue burden test because that test seemed too subjective and

118. *Id.* at 233 ("PPH's due process claim rests not upon a procedural defect, but rather upon the existence of a substantively inadequate justification for burdening the ability to obtain an abortion.").

119. *Id.*

120. *Id.*

121. *See id.* at 234 (citing, inter alia, McQuistion v. City of Clinton, 872 N.W.2d 817 (Iowa 2015); *In re* Guardianship of Kennedy, 845 N.W.2d 707 (Iowa 2014); Callender v. Skiles, 591 N.W.2d 182 (Iowa 1999) and Olds v. Olds, 356 N.W.2d 571 (Iowa 1984)).

122. *PPH II*, 915 N.W.2d at 235.

123. *Id.* at 236.

124. *Id.* at 237.

125. *See id.* at 256 (Mansfield, J., dissenting) ("Applying the *Casey* standard under the Iowa Constitution, we found in favor of Planned Parenthood and struck down the rule.").

126. *Id.* at 237-38 ("Having identified the fundamental nature of the right at issue, we next proceed to the second step of the substantive due process inquiry. In the second step, we determine the 'appropriate level of scrutiny to apply' in examining the extent to which the right can be regulated.") (citing Hensler v. City of Davenport, 790 N.W.2d 569, 580 (Iowa 2010)).

malleable,[127] the Iowa Supreme Court held that statutes burdening abortion rights triggered strict scrutiny.[128] Under that level of scrutiny, the seventy-two-hour waiting period requirement could not pass muster.[129]

The court considered numerous factors when striking down the legislation. [130] For example, the Iowa court noted that many women do not even discover that they are pregnant until at least five weeks after their last menstrual period,[131] and that life circumstances might change during the pregnancy[132] including that some medical conditions might not be discovered until during the second trimester.[133] The court also noted that even after a family had decided to obtain an abortion, the procedure might have to be delayed while necessary funds were secured.[134] The state imposition of burdens requiring even more delay would have to be examined closely, because abortion, while a relatively safe procedure, becomes riskier later in the pregnancy.[135] The court worried that state barriers to abortion would be inversely correlated with good outcomes for women's health.[136] In addition, the court focused on

127. *Id.* at 240 ("We agree with the Tennessee Supreme Court that the undue burden standard 'offers . . . no real guidance and engenders no expectation among the citizenry that governmental regulation of abortion will be objective, evenhanded, or well-reasoned.'") (citing Planned Parenthood of Middle Tennessee v. Sundquist, 38 S.W.3d 1, 17 (Tenn. 2000)).

128. Planned Parenthood of the Heartland v. Reynolds *ex rel.* State, 915 N.W.2d 206, 241 (Iowa 2018).

129. *Id.* at 244.

130. *See id.* at 217-20 (explaining four factors that pose obstacles for women seeking an abortion).

131. *Id.* at 218 ("Most women are not aware of a pregnancy until at least five weeks since their last menstrual period.").

132. *Id.* ("Some patients' life circumstances change drastically between discovery and the decision to terminate. A patient may have lost her job, ended the relationship with her partner, or lost a support system.").

133. *Id.* ("Significantly, almost no fetal anomalies can be diagnosed until the second trimester when prenatal screening is conducted.").

134. *Id.* at 219 ("Financial hurdles can be extraordinary, and many women are delayed in obtaining the procedure simply due to the time it takes to tap their resources, determine how much money they can raise, arrange for time off work, and find childcare.").

135. *Id.* at 230 ("While abortion is a safe procedure and, in fact, safer than many office medical procedures, the risk of failed or incomplete medication abortion increases with advancing gestational age. The risks of surgical abortions also increase with gestational age, even week by week. A second trimester abortion is eight to ten times riskier than a first trimester abortion.").

136. *See* Michele Goodwin, *Challenging the Rhetorical Gag and Trap: Reproductive Capacities, Rights, and the Helms Amendmen*t, 112 NW. U.L. REV. 1417, 1423 (2018) ("[S]tates continue to erect serious barriers to women's reproductive autonomy by enacting targeted regulations of abortion providers (TRAP) laws that claim to protect and promote women's health. Empirically, however, such laws do not promote women's health.").

battered or abused women who were seeking an abortion. This group faces additional obstacles when seeking abortion access.[137]

The Iowa court's analysis is important to consider. Because the problems facing Iowa women seeking abortion are also faced by women in other states,[138] other state courts might well take into account some of the considerations and analyses offered by the Iowa court.[139]

After finding that the regulation could not pass muster in light of due process guarantees, the Iowa court then examined whether, in addition, the statute violated the equal protection guarantees contained in the Iowa Constitution.[140] The court explained that "[l]aws that diminish women's control over their reproductive futures can have profound consequences for women."[141]

The court understood that the Iowa law has vastly different implications for men and women.[142] "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."[143] This, too, was a violation of guarantees provided by the Iowa Constitution.[144] Thus, the Iowa Supreme Court concluded that the statute at issue violated both the due process and equal protection guarantees of the Iowa Constitution.[145]

Courts in other states considering whether the due process or equal protection guarantees of their state constitution protect abortion access may well find the Iowa court's analysis persuasive, although the Iowa decision may be important to consider for a very different reason. In *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*

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137. Planned Parenthood of the Heartland v. Reynolds *ex rel.* State, 915 N.W.2d 206, 219 (Iowa 2018) ("[V]ictims of domestic violence and sexual assault also face significant barriers to obtaining an abortion.").

138. Indeed, some of the studies referenced in the case did not involve Iowa women. *See id.* at 241-42.

139. *See, e.g.*, Hodes & Nauser, MDs, P.A. v. Schmidt, 440 P.3d 461, 485 (Kan. 2019) (discussing *PPH II* favorably).

140. *PPH II*, 915 N.W.2d at 244 ("While we conclude the Act is unconstitutional under the due process clause, we further consider the impact of the Act on our equal protection clause.").

141. *Id.* at 245.

142. *See id.*

143. *Id.*

144. *Id.* at 245-46 ("[W]e hold the 'seventy-two hour[]' waiting requirement of Division I of Senate File 471 violates the right to equal protection under the Iowa Constitution.").

145. *See id.* at 212 ("[T]he statute enacted by our legislature, while intended as a reasonable regulation, violates both the due process and equal protection clauses of the Iowa Constitution . . . . ").

("*PPH III*"),[146] decided a mere four years after the previous decision was handed down, the Iowa Supreme Court considered a case involving a challenge to the state's requirement that women wait twenty-four hours after consulting with a physician before obtaining an abortion.[147] Apparently, the composition of the court had changed in the intervening years.[148] The *PPH III* court took the opportunity to overrule the *PPH II* court's due process and equal protection analyses.[149]

The *PPH III* court recognized that other state courts had found abortion a fundamental right triggering strict scrutiny under their respective state constitutions.[150] But those state courts had linked the protections to "one or more substantive constitutional guarantees"[151] rather than the state's due process clause. Those courts recognizing abortion rights under the due process clause contained in the state constitution had not held that statutes targeting abortion triggered strict scrutiny.[152]

Regrettably, the *PPH III* decision is open to misinterpretation, both because of the context in which it was decided and the language included in the opinion.[153] The opinion was issued after a draft opinion of *Dobbs* had already been leaked.[154] The Iowa opinion quoted from a law review article written by Justice Amy Coney Barrett discussing why overruling past precedent may be justified.[155] The court stated that the

146. 975 N.W.2d 710 (2022).

147. *See id.* at 715 ("In 2020, in the waning hours of a legislative session that had been disrupted by COVID-19, the general assembly added a mandatory 24-hour waiting period for abortion.").

148. *But cf. id.* at 734 ("The professors urge that adhering to a precedent when the membership of a court changes 'refutes the cynical view that a supreme court is a political institution guided by the justices' personal values, rather than the law.").

149. *See id.* at 735-46.

150. *See id.* at 737.

151. *Id.*

152. *Id.* ("[S]tates that find a right to an abortion in a state constitutional due process clause have gone no further than the undue burden test."); *see also id.* at 738 ("[S]tate courts focusing specifically on the due process clause have overwhelmingly found that the right to an abortion in the state constitution is no broader than the federal right (if it exists at all).").

153. *See infra* notes 154-60 and accompanying text.

154. *See* Chloe Reichel, *The Leaked Dobbs Opinion, Explained*, BILL OF HEALTH (May 24, 2022) https://blog.petrieflom.law.harvard.edu/2022/05/24/the-leaked-dobbs-opinion-explained [https://perma.cc/BBW5-8PC5] ("On May 2, 2022, Politico published a leaked draft of the majority opinion in *Dobbs v. Jackson Women's Health Organization*, which showed the Supreme Court's intent to overturn the right to abortion as decided in *Roe v. Wade*."). The Iowa opinion was issued on June 17, 2022. *PPH III*, 975 N.W.2d.

155. *See PPH III*, 975 N.W.2d. at 29 (quoting from a law review article written when Justice Barrett was a professor).

PPH II position was without textual support in the Iowa Constitution,[156] and was not only "doctrinally inconsistent with prior Iowa jurisprudence,"[157] but was unworkable in practice.[158] With such strong criticism of the previous decision, one might have wrongly inferred that the *PPH III* court was rejecting the prior Iowa abortion jurisprudence "root and branch"[159] and was suggesting that abortion was not protected under the Iowa Constitution.[160]

While the *PPH III* court was clearly rejecting that statutes targeting abortion triggered strict scrutiny under the Iowa Constitution,[161] the court was not holding that statutes targeting abortion are subject to rational basis review—on the contrary, the court held that such statutes must be examined under the undue burden standard.[162] Under the Iowa Constitution, statutes burdening family rights trigger review comparable to the undue burden standard,[163] which means that abortion receives the same kind of protection under the Iowa Constitution that other fundamental rights receive.[164] While the constitutionality of the twenty-four-hour waiting period at issue in *PPH III* would likely be upheld under that standard,[165] other legislation that might be proposed in Iowa would likely be struck down under the *Casey* undue burden standard.[166]

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156. *Id.* at 740 ("Textually, there is no support for *PPH II*'s reading of the due process clause.").

157. *Id.* at 742.

158. *Id.* at 735 ("The issue is whether the doctrine set forth in *PPH II* is workable. Here we have doubts.").

159. *See* Green v. Cnty. Sch. Bd. of New Kent Cnty., 391 U.S. 430, 438-39 (1968) (explaining that state school systems which practiced discrimination were to be eliminated "root and branch").

160. *Cf.* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2243 (2022) ("*Roe* was egregiously wrong from the start . . . . It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.").

161. *See PPH III*, 975 N.W.2d at 738 (noting that other state courts holding that abortion was protected under the state constitution's due process clause employed the *Casey* undue burden test rather than strict scrutiny).

162. Planned Parenthood of the Heartland, Inc. v. Reynolds *ex rel*. State of Iowa, 975 N.W.2d 710, 716 (2022) ("[T]he Iowa Constitution is not the source of a fundamental right to an abortion necessitating a strict scrutiny standard of review for regulations affecting that right . . . . [T]he *Casey* undue burden test we applied in *PPH I* remains the governing standard."). That said, however, the court seemed open to reassessing that standard. *Id.* ("[T]he legal standard may also be litigated further.").

163. *Id.* at 739 ("In other words, what we followed pre-2018 with respect to rights to family, procreation and child-rearing was something like the undue burden test of *Casey*.").

164. *Id.*

165. *See id.* at 715 (noting that the United States Supreme Court had upheld a twenty-four hour waiting period under the *Casey* undue burden standard).

166. Stephen Gruber-Miller, Ian Richardson & Brianne Pfannenstiel, *Kim Reynolds Seeks to Revive Iowa's 6-Week 'Heartbeat' Abortion Ban After* Roe v. Wade *Overturn*, DES MOINES REG.

The Iowa Supreme Court also addressed the prior holding that abortion was protected as a matter of equal protection guarantees.[167] The Iowa court reasoned that because only women can become pregnant,[168] men and women were not similarly situated, and thus, the first part of the applicable test to establish an equal protection violation could not be met.[169]

In *Geduldig v. Aiello*, the United States Supreme Court examined whether California's refusal to cover certain pregnancy-related conditions under its disability insurance system violated constitutional guarantees.[170] The Court recognized that only women could become pregnant,[171] but rejected that therefore every pregnancy classification was gender-based.[172] *Geduldig* has been widely criticized for its equal protection analysis,[173] but the Iowa court went even further than

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(June 28, 2022, 5:39 PM), https://www.desmoinesregister.com/story/news/politics/2022/06/28/iowa-abortion-laws-gov-kim-reynolds-seeks-six-week-heartbeat-ban/7756862001 [https://perma.cc/TNE7-UCB9] ("Republican Gov. Kim Reynolds will ask a district court to reinstate Iowa's 'fetal heartbeat' law in her first action to limit abortion since the U.S. Supreme Court eliminated the constitutional right to the procedure.").

167. *PPH III*, 975 N.W.2d at 742-743 ("*PPH II* also found that the 72-hour waiting period violated the equal protection clause in article I, section 6.").

168. *Id.* at 743 ("Planned Parenthood's brief acknowledges as much, stating, 'Women and men are not similarly situated in terms of the biological capacity to be pregnant . . . . '").

169. *Cf. id.* ("Under our well-established equal protection precedent, before finding a violation, we first needed to find that women were similarly situated to men as it related to the purposes of the law.").

170. Geduldig v. Aiello, 417 U.S. 484, 486 (1974) ("The appellees brought this action to challenge the constitutionality of a provision of the California program that, in defining 'disability,' excludes from coverage certain disabilities resulting from pregnancy.").

171. *Id.* at 496 n.20 ("[I]t is true that only women can become pregnant.").

172. *Id.* ("[I]t does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . "); *see also* Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From Struck to Carhart*, 70 OHIO ST. L.J. 1095, 1112 (2009) ("[*G*]*eduldig* did not hold that discrimination on the basis of pregnancy is never discrimination on the basis of sex; rather, *Geduldig* held that discrimination on the basis of pregnancy is not *always* discrimination on the basis of sex.").

173. *See Geduldig*, 417 U.S. at 503 (Brennan, J., dissenting) ("[T]he Court appears willing to abandon that higher standard of review without satisfactorily explaining what differentiates the gender-based classification employed in this case from those found unconstitutional in *Reed* and *Frontiero*."); *see also* Mary Ziegler, *Choice at Work*: Young v. United Parcel Service*, Pregnancy Discrimination, and Reproductive Liberty*, 93 DENV. L. REV. 219, 225 (2015) ("*Geduldig* ratified sex stereotypes surrounding pregnancy and undermined any challenge to them."); Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U. REV. L. & SOC. CHANGE 381, 408 n.210 (2008) (describing *Geduldig*'s "contrived reasoning"); Young v. United Parcel Service, Inc.*: Brief of Law Professors and Women's Civil Rights Organizations as Amici Curiae in Support of Petitioner*, 36 WOMEN'S RTS. L. REP. 75, 85 (2014) (discussing *Geduldig's* "formalistic reasoning"); Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 599 n.171 (2010) ("[The *Geduldig*] opinion

Geduldig. By suggesting that equal protection guarantees could only be violated where men and women were similarly situated, the court not only followed *Geduldig* by rejecting that every pregnancy classification triggered equal protection guarantees but also seemed to preclude any pregnancy classification from triggering equal protection guarantees.[174]

Other state courts have analyzed their respective state constitutions' equal protection guarantees where the state refused to fund abortion even when funding other kinds of healthcare.[175] For example, the Alaska Supreme Court examined the constitutionality of the state denial of Medicaid funds to indigent women seeking abortions when the state provided funding for other kinds of medical services.[176] The court reasoned, "[t]he State, having established a health care program for the poor, may not selectively deny necessary care to eligible women merely because the threat to their health arises from pregnancy."[177] Other state courts have offered similar analyses.[178]

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has been rightly lampooned for its reasoning."); Wendy S. Strimling, Comment, *The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking* Geduldig *After Cal Fed*, 77 CAL. L. REV. 171, 188 (1989) (discussing "the flaws in the Court's reasoning in *Geduldig*").

174. *See Geduldig*, 417 U.S. at 496-97.

175. *See, e.g.*, State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 908 (Alaska 2001); Humphreys v. Clinic for Women, Inc., 796 N.E.2d 247, 259-60 (Ind. 2003); New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841, 850-51 (N.M. 1998); Right to Choose v. Byrne, 450 A.2d 925, 937 (N.J. 1982).

176. *See* State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 905 (Alaska 2001) ("Alaska's Medicaid program funds virtually all necessary medical services for poor Alaskans . . . but it denies funding for medically necessary abortions.").

177. *Id.* at 908.

178. *See* Humphreys v. Clinic for Women, Inc., 796 N.E.2d 247, 258 (Ind. 2003).

> Article I, § 23, of our Constitution prohibits a statute from providing disparate treatment to different classes of persons if the disparate treatment is not reasonably related to inherent characteristics that distinguish the unequally treated classes. We believe that the characteristics that distinguish Medicaid-eligible pregnant women whose pregnancies create serious risk of substantial and irreversible impairment of a major bodily function to be virtually indistinguishable from the characteristics of women for whose abortions the State does pay. To the extent there is a distinction, it is too insubstantial to be sustained by the State's justifications.

Id. (citations omitted); New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841, 844 (N.M. 1999).

> Based on the independent grounds provided by the Equal Rights Amendment to Article II, Section 18 of our state constitution, we affirm the district court's order. New Mexico's Equal Rights Amendment requires a searching judicial inquiry to determine whether the Department's rule prohibiting state funding for certain medically necessary abortions denies Medicaid-eligible women equality of rights under law. We conclude from this inquiry that the Department's rule violates New Mexico's Equal Rights Amendment because it results in a program that does not apply the same standard of medical necessity to both men and women, and there is no compelling justification for

B. Privacy

Some state constitutions expressly protect the right to privacy.[179] There is no express counterpart in the Federal Constitution,[180] which at

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> treating men and women differently with respect to their medical needs in this instance. The district court did not exceed its authority in providing a remedy for this constitutional violation by enjoining the Department from enforcing its rule and requiring the Department to apply the standard of medical necessity in a nondiscriminatory manner in this case.

Johnson, 975 P.2d at 844; Right to Choose v. Byrne, 450 A.2d 925, 937 (N.J. 1982) ("[W]e hold that the State may not jeopardize the health and privacy of poor women by excluding medically necessary abortions from a system providing all other medically necessary care for the indigent."); *but see* Doe v. Dep't of Soc. Servs., 487 N.W.2d 166, 179 (Mich. 1992).

> Like the United States Supreme Court, we conclude that § 109a is rationally related to a legitimate governmental purpose. Contrary to the suggestion of the Court of Appeals, there is no constitutional obligation on the state to remain neutral regarding abortion any more than there is an obligation on the state to remain neutral regarding the exercise of other fundamental rights. The state has a legitimate interest in protecting potential life, and it has a legitimate interest in promoting childbirth. Equally important, the Legislature has a legitimate interest in allocating state benefits in a way that reflects its determination of the public policy of the state. Our constitution does not require that we have a government without values; it requires only that, in the pursuit of certain values, our government will not improperly interfere with the exercise of fundamental rights. Because no medical procedure besides abortion involves the deliberate termination of fetal life, and because of the high cost of childbirth and the relatively lower cost of abortion, it is rational for the state to pursue its legitimate interests by paying for childbirth, but not abortion.

Doe, 487 N.W.2d at 179; *cf.* Josh Wiedner, *The Hyde Amendment's Unconstitutional Commodification of the Right to Choose*, 30 ANNALS HEALTH L. ADVANCE DIRECTIVE 291, 302 (2021) ("Several states courts have ruled that bans on state Medicaid funding for abortion violate the state constitution. Massachusetts, Alaska, California, Connecticut, Minnesota, New Jersey, New Mexico, and West Virginia have all used framework under the neutrality principal to argue that a government's decision to fund one option of a protected choice while failing to fund the other is unconstitutional.").

179. ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed."); CAL. CONST. art. I, § 1 ("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, happiness, and privacy."); FLA. CONST. art. I, § 23 ("Every 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."); FLA. CONST. art. X, § 22.

> The Legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

FLA. CONST. art. X, § 22; 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. The legislature shall take affirmative steps to implement this right."); MONT. CONST. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without

least leaves open whether the express state constitutional right to privacy should be interpreted as more robust than the implied federal right to privacy.[181]

In *Gainesville Woman Care, LLC v. State*,[182] the Florida Supreme Court discussed whether the right to privacy contained in the Florida Constitution protects abortion rights.[183] The court found that the right to privacy includes the right to obtain an abortion,[184] and then had to determine the level of scrutiny to be employed when examining laws burdening abortion access.[185] At the time, the prevailing federal standard

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the showing of a compelling state interest."); Scott A. Moss & Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U.L. REV. 175, 197 (2008) ("The constitutions of four states - Alaska, California, Hawaii, and Montana - contain an express right to privacy.").

180. *See* Hope Clinic for Women, Ltd. v. Flores, 991 N.E.2d 745, 760 (Ill. 2013) ("[O]ur state constitution has an express privacy clause, which the federal constitution does not have."); Loder v. City of Glendale, 927 P.2d 1200, 1229-30 (Cal. 1997) ("[T]he California Constitution, which includes an *express* provision guaranteeing the right of privacy . . . [as compared to], the federal Constitution, in which the right of privacy is only *implied.*"); Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1254 (Fla. 2017) ("[A]ny comparison between the federal and Florida rights of privacy is inapposite in light of the fact that there is no express federal right of privacy clause.").

181. *See, e.g.*, *Gainesville Woman Care*, 210 So. 3d at 1254 (discussing "Florida's more encompassing, explicit constitutional right of privacy"); Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 808 (Cal. 1997) ("The federal Constitution contains no provision expressly setting forth or guaranteeing a constitutional right of 'privacy.' . . . The California Constitution, by contrast, contains in article I, section 1, an *explicit* guarantee of the right of 'privacy.'").

182. 210 So. 3d 1243 (Fla. 2017).

183. *Id.* at 1252, 1254.

184. *Id.* at 1254 ("Florida's constitutional right of privacy encompasses a woman's right to choose to end her pregnancy."); *see* Renee B. v. Fla. Agency for Health Care Admin., 790 So. 2d 1036, 1041 (Fla. 2001) ("The right of privacy in the Florida Constitution protects a woman's right to choose an abortion."); Planned Parenthood of The Great Nw. v. State, 375 P.3d 1122, 1135-38 (Alaska 2016).

> To determine whether the Notification Law discriminates between similarly situated classes, we first decide which classes must be compared. The parties agree that the relevant classes are pregnant minors seeking termination and pregnant minors seeking to carry to term. We next determine if the challenged law has a discriminatory purpose or is facially discriminatory—i.e., whether the classes are treated unequally . . . . Step one of our core equal protection analysis requires evaluating the importance of the personal right infringed upon to determine the State's burden in justifying its differential infringement. It has long been established that the Alaska Constitution's privacy clause guarantees the fundamental right to choose between pregnancy termination and carrying to term. And it has long been established that a law burdening the fundamental right of reproductive choice demands strict scrutiny.

Planned Parenthood of The Great Nw., 375 P.3d at 1135-38; Pro-Choice Miss. v. Fordice, 716 So. 2d 645, 653-54 (Miss. 1998) ("While we do not interpret our Constitution as recognizing an explicit right to an abortion, we believe that autonomous bodily integrity is protected under the right to privacy . . . . Protected within the right of autonomous bodily integrity is an implicit right to have an abortion.").

185. *Gainesville Woman Care*, 210 So. 3d at 1245-46, 1254, 1256.

was the *Casey* undue burden test,[186] which the Florida Supreme Court described as "'inherently ambiguous' and ha[ving] no basis in Florida's constitutional right of privacy."[187] Instead, the court employed a more demanding form of scrutiny, explaining that "any law that implicates the fundamental right of privacy, regardless of the activity, is subject to strict scrutiny and, therefore, presumptively unconstitutional."[188]

At issue was an injunction of a requirement that women seeking an abortion wait an additional twenty-four hours[189] after consultation with a doctor about the associated medical risks.[190] The court noted that the law required women to make two trips before obtaining an abortion—one trip to obtain the relevant information and another trip to have the procedure performed[191]—which increased costs and delayed the procedure.[192] The court acknowledged that other state courts and the United States Supreme Court had upheld such laws.[193] However, the Florida Constitution required that strict scrutiny be employed, and the Florida Supreme Court upheld the trial court finding that there was "a substantial likelihood that the Mandatory Delay Law [was] unconstitutional as a violation of Florida's fundamental right of privacy."[194]

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186. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 874 (1992) ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

187. *Gainesville Woman Care*, 210 So. 3d at 1254 (citing N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 635 (Fla. 2003)); *but see Fordice*, 716 So. 2d at 655 ("[W]e adopt the well[-]reasoned decision in *Casey*, applying the undue burden standard to analyze laws restricting abortion.").

188. *Gainesville Woman Care*, 210 So. 3d at 1245; *see* Armstrong v. State, 989 P.2d 364, 384 (Mont. 1999).

> [T]he core constitutional right infringed by the legislation at issue in the case at bar is the fundamental right of individual privacy guaranteed to every person under Article II, Section 10 of the Montana Constitution . . . . Article II, Section 10, protects a woman's right of procreative autonomy—here, the right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice.

Armstrong, 989 P.2d at 384.

189. *Gainesville Woman Care*, 210 So. 3d at 1247 ("[T]hrough the Mandatory Delay Law, the State . . . mandat[es] an additional twenty-four-hour waiting period before a woman may exercise her decision after receiving all of the information the state deems necessary to make an educated and informed decision.").

190. *Id.* at 1247 (explaining that the physician was to explain the risks associated with obtaining an abortion and also the risks of continuing the pregnancy).

191. *Id.* at 1261 (discussing the requirement that the woman make two trips to her healthcare provider).

192. *Id.* at 1246.

193. *See id.* at 1251 (discussing the trial court decision).

194. *Id.* at 1262.

Florida has amended its constitution to make clear that the state constitution does not prevent the legislature from passing a parental notification law.[195] However, the Florida Supreme Court characterized that amendment as extremely narrow in scope,[196] affecting a parent's right to learn of his or her child's desire to abort but not otherwise limiting the right to privacy.[197] Absent further amendment to the Florida Constitution, the Florida Legislature would seem precluded from passing very restrictive abortion laws even were the legislature so inclined.

C. Happiness / Safety

Some state constitutions protect the right to the pursuit of happiness or safety.[198] This language is from the Declaration of Independence rather than the Federal Constitution[199] and must be construed.

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195. *See* FLA. CONST. art. X, § 22.

196. *See Gainesville Woman Care*, 210 So. 3d at 1262 ("Article X, section 22, of the Florida Constitution is an extremely limited provision of the constitution, which deals solely with the issue of parental notification in the context of a minor choosing to terminate her pregnancy.").

197. *Id.* at 1262.

198. ALASKA CONST. art. I, § 1.

> This constitution is dedicated to the principles that all persons have a natural right to life, liberty, 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.

Id.; CAL. CONST. art. I, § 1 ("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, happiness, and privacy."); COLO. CONST. art. II, § 3 ("All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness."); IDAHO CONST. art. I, § 1 ("All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety."); IND. CONST. art. I, § 1 ("WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness."); IOWA CONST. art. I, § 1 ("All men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."); KAN. CONST. BILL OF RTS. § 1 ("All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."); KY. CONST. § 1.

> All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:
> First: The right of enjoying and defending their lives and liberties.
> Second: The right of worshipping Almighty God according to the dictates of their consciences.
> Third: The right of seeking and pursuing their safety and happiness.
> Fourth: The right of freely communicating their thoughts and opinions.

> Fifth: The right of acquiring and protecting property.
>
> Sixth: The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance.
>
> Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.

KY. CONST. § 1; ME. CONST. art. I, § 1 ("All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."); MASS. CONST. Pt. 1, art. I, *amended by* MASS. CONST. art. CVI.

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

MASS. CONST. Pt. 1, art. I; MO. CONST. art. I, § 2.

> That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

MO. CONST. art. I, § 2; N.J. CONST. art. I, ¶ 1 ("All persons are by nature free and independent, and have certain 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.C. CONST. art. I, § 1 ("We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."); OHIO CONST. art. I, § 1 ("All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."); OKLA. CONST. art. II, § 2 ("All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry."); PA. CONST. art. I, § 1 ("All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."); VA. CONST. art. I, § 1 ("That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."); W. VA. CONST. art. III, § 1.

> All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: The enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.

W. VA. CONST. art. III, § 1; 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."); *cf.* UTAH CONST. art. I, § 1 ("All persons have the inherent and inalienable right to enjoy and defend their lives and liberties.").

199. *See* Hodes & Nauser, MDs, P.A. v. Schmidt, 440 P.3d 461, 466 (Kan. 2019) ("[T]he state's founders acknowledged that the people had rights that preexisted the formation of the Kansas

In *Hodes & Nauser, MDs, P.A. v. Schmidt*,[200] the Kansas Supreme Court addressed whether abortion rights were protected under its state's constitution. In particular, the court addressed whether the provision specifying that "[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness"[201] provides protection to abortion access. The court concluded that this provision protects the right to autonomy,[202] which itself includes abortion rights.[203]

Under the Kansas Constitution, statutes burdening the right of autonomy trigger strict scrutiny.[204] The court explained, "[a]t the core of the natural rights of liberty and the pursuit of happiness 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."[205] Like some of the other courts,[206] the Kansas Supreme Court criticized the *Casey* undue burden standard as being "difficult to understand and apply."[207]

Other states with similar constitutional provisions[208] might also interpret those provisions as incorporating protections for abortion. Of course, state constitutions are subject to amendment, and an amendment to the Kansas Constitution was placed on the August 2022 ballot.[209] That proposed amendment read:

> Because Kansans value both women and children, the constitution of the state of Kansas does not require government funding of abortion

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government. There they listed several of these natural, inalienable rights—deliberately choosing language of the Declaration of Independence.").

200. 440 P.3d 461 (Kan. 2019).

201. *Id.* at 466 (quoting KAN. CONST. Bill of Rts., § 1).

202. *Id.* ("Included . . . is the right of personal autonomy.").

203. *Id.* ("This right 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.").

204. *Id.* ("[T]his right is fundamental. Accordingly, the State is prohibited from restricting this right unless it is doing so to further a compelling government interest and in a way that is narrowly tailored to that interest.").

205. *Id.* at 484; *see also* Pro-Choice Miss. v. Fordice, 716 So. 2d 645, 653 (Miss. 1998) ("Protected within the right of autonomous bodily integrity is an implicit right to have an abortion.").

206. *See supra* notes 127 & 187 and accompanying text. Both the Iowa and the Florida Supreme Courts criticized the *Casey* approach.

207. *Schmidt*, 440 P.3d at 494.

208. Skylar Reese Croy & Alexander Lemke, *An Unnatural Reading: The Revisionist History of Abortion in* Hodes v. Schmidt, 32 UNIV. FLA. J.L. & PUB. POL'Y 71, 74–75 (2021) ("[C]lauses like Section 1 of the Kansas Bill of Rights, which are often called 'natural rights guarantees,' exist in thirty-three other state constitutions.").

209. KAN. CONST. amend. § 22 (proposed).

> and does not create or secure a right to abortion. To the extent permitted by the constitution of the United States, the people, through their elected state representatives and state senators, may pass laws regarding abortion, including, but not limited to, laws that account for circumstances of pregnancy resulting from rape or incest, or circumstances of necessity to save the life of the mother.[210]

The proposed constitutional amendment did not pass.[211] If the amendment were to pass sometime in the future, it would have to be interpreted. On its face, it suggests that the Kansas Constitution does not protect abortion as a general matter and that the Kansas Legislature is permitted but not required to pass legislation permitting abortion in cases where the pregnancy results from rape or incest, or where the pregnancy is life-threatening. At least one of the questions that Kansas courts would have to answer would be whether the Kansas Constitution, while not protecting abortion as a general matter, nonetheless does protect abortion under certain conditions, for instance where the life or health of the pregnant woman might be endangered by the pregnancy.[212]

D. State Constitutions Not Exceeding Roe's Protections

Some state courts have held that their respective state constitutions do not provide protection for abortion over and above what the Federal Constitution provided under *Roe*.[213] But that leaves open how the state constitution should be interpreted when the Federal Constitution no longer provides the floor that it was formerly thought to provide. The

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210. *Id.*

211. *See* Mitch Smith & Katie Glueck, *Kansas Votes to Preserve Abortion Rights Protections in Its Constitution*, N.Y. TIMES (Aug. 2, 2022), https://www.nytimes.com/2022/08/02/us/kansas-abortion-rights-vote.html [https://perma.cc/V7VU-KLM7] ("Kansas voters resoundingly decided against removing the right to abortion from the State Constitution, according to The Associated Press, a major victory for the abortion rights movement in one of America's reliably conservative states.").

212. *See* Moe v. Sec'y Admin. & Fin., 417 N.E.2d 387, 402 (Mass. 1981) (striking down a limitation on the use of state funds by the indigent for medically necessary abortion services when there was no similar restriction on other kinds of medically necessary services); *see also* Simat Corp. v. Arizona Health Care Cost Containment Sys., 56 P.3d, 28, 33 (Ariz. 2002) (striking down limitation on funding medically necessary, non-life-threatening abortions).

213. *See, e.g.*, Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon, 185 S.W.3d 685, 692 (Mo. banc 2006) (discussing the due process clauses in the Federal and Missouri Constitutions and then commenting: "There is no reason, within the context of this case, to construe this language from the Missouri constitution more broadly than the language used in the United States constitution").

Illinois Supreme Court discussed the linkage between the federal and state constitution in *Hope Clinic for Women, Ltd. v. Flores*.[214]

The plaintiffs had claimed that abortion was protected under the privacy clause of the Illinois Constitution,[215] citing an earlier Illinois Supreme Court decision.[216] The plaintiffs had argued in addition that because the right to privacy was expressly included in the Illinois Constitution, while only impliedly protected under federal guarantees, the right protected under the state constitution was more robust than the right protected under federal guarantees.[217]

The Illinois Supreme Court found that the state constitution's due process clause[218] rather than the privacy clause[219] protected the right to abortion, treating the statement in previous case law which suggested that the right was protected under the state constitution's right to privacy as mere dictum.[220] But that still meant that the court had to decide the degree to which the Illinois Constitution provided abortion protection in its own right.[221] The court suggested that the state constitution protected abortion rights,[222] but interpreted the state constitution's due process protections to be in "limited lockstep" with federal guarantees.[223]

Under the limited lockstep approach, state constitutional guarantees mirror federal guarantees "unless there is something in the language of [the Illinois] constitution, or in the debates and the committee reports of the constitutional convention, which would indicate that the . . . provision within [the] state constitution was intended to be

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214. 991 N.E.2d 745 (Ill. 2013).

215. *Id.* at 754 ("Plaintiffs . . . maintain that the fundamental right to make reproductive decisions for one's self . . . is a privacy right and that this right is secured for Illinois citizens, including minors, by our state constitution's privacy clause.").

216. Fam. Life League v. Dep't of Pub. Aid, 493 N.E.2d 1054, 1057 (Ill. 1986) ("That right of privacy guaranteed by the penumbra of the Bill of Rights of the United States Constitution was also secured by the drafters of the 1970 Constitution of the State of Illinois. Ill. Const. 1970, art. I, secs. 6, 12.").

217. Hope Clinic for Women, Ltd. v. Flores, 991 N.E.2d 745, 754 (Ill. 2013) ("Plaintiffs further maintain that because our state constitution contains an explicit right of privacy which the federal constitution does not have, the right to an abortion under our state constitution is broader than the right to an abortion under the federal constitution.").

218. *Id.* at 760 ("[A]t this time, we interpret our state due process clause to provide protections, with respect to abortion, equivalent to those provided by the federal due process clause.").

219. *Id.* at 757 ("[A]ny right to abortion in Illinois is clearly not grounded in the privacy clause of our state constitution.").

220. *Id.* at 755 ("In any event, to the extent that *Family Life League* might be interpreted as having made such findings, we find them to be dicta.").

221. *Id.* at 757.

222. *Id.* at 754 ("[T]he parties to this appeal do not dispute that a right to abortion exists under our state constitution. They disagree, however, on the origin and scope of that right.").

223. *Id.* at 758.

construed differently."[224] It will be up to the Illinois courts to determine whether the Illinois Constitution provides the same protections that were afforded under *Roe* and *Casey*[225] or whether the state constitution is interpreted not even to provide those protections now that the protections under federal constitutional guarantees have been reinterpreted.[226]

Sometimes, state courts interpret the state constitutional protections as corresponding to then-existing guarantees, but do not suggest that this is because the state and federal guarantees are in lockstep.[227] For example, the Mississippi Supreme Court adopted the *Casey* undue burden approach without suggesting that the Mississippi Constitution's protections were in some way in lockstep with federal guarantees.[228] Instead, the Mississippi court suggested that the *Casey* approach struck the correct balance when seeking to protect both "a woman's right to terminate her pregnancy before viability and protecting unborn life."[229] But if *Casey* reflected the proper balance that the Mississippi Constitution requires, then one would not expect that the retrenchment involving federal guarantees would affect the protections independently provided under the state constitution.[230]

IV. CONCLUSION

In *Dobbs*, the United States Supreme Court overruled almost fifty years of precedent and held that the right to abortion is not protected under federal constitutional guarantees.[231] Time will tell whether the Court will modify its position or Congress will step in to protect abortion rights. In the meantime, however, an important question will involve the extent to which state constitutions independently protect abortion rights.

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224. *Id.*

225. *See id.* at 755; *cf.* Preterm Cleveland v. Voinovich, 627 N.E.2d 570, 578 (Ohio Ct. App. 1993) ("We are unable to distinguish the Ohio statutes from the Pennsylvania statutes involved in *Planned Parenthood* and find no basis for determining Section 1, Article I, Ohio Constitution imposes greater restrictions upon the state than are imposed by the United States Constitution as construed by the plurality opinion in *Planned Parenthood*.").

226. *Cf.* People v. Caballes, 851 N.E.2d 26, 37 (Ill. 2006) ("[T]his court has, on occasion, departed from strict lockstep interpretation when circumstances warrant.").

227. *See, e.g.*, Pro-Choice Miss. v. Fordice, 716 So. 2d 645, 655 (Miss. 1998).

228. *Id.*

229. *Id.*

230. *See id.* ("To be held constitutional, the State's restrictions must be legitimate and not create an undue burden.").

231. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240-42 (2022).

Traditionally, state constitutions have sometimes provided protections even when the Federal Constitution did not.[232] Now that federal protections have been removed, state constitutions will become the focus of abortion litigation.

Various state constitutions have been interpreted to provide greater protection for abortion rights than those found in the Federal Constitution.[233] The clauses in those state constitutions providing the basis for abortion rights are sometimes found in other state constitutions, so courts in those other states may be asked to construe their respective state constitutional provision in a way that protects abortion access.

Yet, there are several reasons to believe that states will not rush to fill the gap created by *Dobbs*. First, as illustrated in West Virginia, Tennessee, and Louisiana, state constitutions affording abortion protection may be amended.[234] Even if they are not amended, justices on the state supreme courts may follow the *Dobbs* lead,[235] rejecting past precedent[236] and finding no state constitutional protection for abortion. Or, perhaps emboldened by the Kansas voters' rejection of the proposed amendment, justices on state supreme courts will feel more confident that protecting abortion rights is not the equivalent of political suicide.[237]

It seems likely that there will be much abortion litigation on the state level. But the uncertainty of the results of that litigation plus the possible severe civil and criminal penalties imposed under some of the statutes prohibiting abortion may, as a practical matter, severely restrict abortion services in many parts of the country. In addition, physicians may modify their treatment practices to reduce the risk that they might run afoul of the abortion prohibitions, even if those treatment practices increase the medical risks that pregnant women must face.[238] Clinics will close because of the severe abortion limitations,[239] making it more

232. Linda M. Vanzi, *Freedom at Home: State Constitutions and Medicaid Funding for Abortions*, 26 N.M. L. REV. 433, 433 (1996) ("Until the twentieth century, state constitutions were the primary guardians of individual rights.").

233. *See supra* Part III.

234. *See supra* notes 93-94 and accompanying text.

235. *See Dobbs*, 142 S. Ct. at 2279 ("We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.").

236. *Id.* at 2343 (Breyer, J., dissenting) ("For half a century, *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child.").

237. *See* Smith & Glueck, *supra* note 211.

238. *See supra* notes 58-60 and accompanying text.

239. *Cf.* Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 593 (2016) ("Prior to the enactment of H.B. 2, there were more than 40 licensed abortion facilities in Texas . . . . "); *id.* at 620

difficult for women to obtain abortions, even when permitted to do so under local law. While the ultimate effect of *Dobbs* in particular states will not be known for some time, it seems safe to assume both that there will be increased and contentious litigation, and that women and their families will suffer.[240]

("The parties stipulated that the requirement would further reduce the number of abortion facilities available to seven or eight facilities, located in Houston, Austin, San Antonio, and Dallas/Fort Worth.").

240. *See* Ronald Brownstein, *'A Recipe For a Lot of Suffering': How Abortion Bans May Strain the Red States*, CNN (July 5, 2022), https://www.cnn.com/2022/07/05/politics/red-states-roe-v-wade-social-safety-net/index.html [https://perma.cc/S8R9-55LM].

> New research shows that the states banning abortion could see up to hundreds of thousands of new births each year, most of them unplanned, and concentrated among lower-income families already facing the greatest financial and health care challenges. Social scientists have consistently found that those unplanned pregnancies tend to produce worse outcomes for kids and mothers – and, with abortion prohibited or severely limited, they now will be rising precisely in states, including most of the South, that traditionally have invested the least in health, education and other social supports for families.

Id.