

# The Attack on Legal Protection for the Unborn Moves to State Courts

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## KEY TAKEAWAYS

With *Roe v. Wade* overruled, legal attacks on pro-life laws will shift to state courts under state constitutions.

Six state constitutions reject abortion, 11 have been interpreted to protect it, and three explicitly do so.

Voters can change their state constitutions and—in many states—decide who sits on their state supreme courts.

In *Roe v. Wade*,<sup>1</sup> the U.S. Supreme Court in 1973 created a constitutional right to abortion and issued rules for implementing it that invalidated the pro-life laws of all 50 states. As a result, abortion advocates went to federal court to challenge laws protecting the unborn that legislatures continued to enact. Less than 20 years after *Roe*, however, liberal scholar Kimberly Chaput argued that the Court was already departing from “the spirit of the original *Roe* decision” and that “[c]onservative appointees to the Court have recently expressed willingness to reconsider and, possibly, overrule *Roe*.”<sup>2</sup> As a result, she predicted, “the continued availability of abortion will depend on state courts.”<sup>3</sup>

That prediction came true in 2022 when the Supreme Court overruled *Roe v. Wade* and *Planned Parenthood v. Casey*,<sup>4</sup> holding that “the Constitution does not confer a right to abortion.”<sup>5</sup> Abortion

This paper, in its entirety, can be found at <http://report.heritage.org/lm322>

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advocates, therefore, are moving to state courts and arguing that pro-life laws violate state constitutions. This *Legal Memorandum* examines this shift in the context of the historical trend favoring legal protection for the unborn and litigation attacking those legal protections before *Roe v. Wade*.

## An “Unbroken Tradition of Prohibiting Abortion”

In *Roe*, the Supreme Court created what it neutrally called “the history of abortion”<sup>6</sup> in America, a narrative that extensive scholarship has since exposed as a “radically revisionist history.”<sup>7</sup> Historians trying to perpetuate this fiction in subsequent abortion cases have admitted that their *amicus curiae* briefs were “constructed to make an argumentative point rather than tell the truth.”<sup>8</sup> Telling the truth about abortion history reveals that, for more than 700 years—first by English common law and later by American statute—the law protected human beings before birth by increasingly restricting abortion. In this “unbroken tradition of prohibiting abortion,”<sup>9</sup> English common law made abortion unlawful since at least the beginning of the 13th century,<sup>10</sup> and English municipal ordinances began in the early 16th century to prohibit midwives from performing or procuring abortions.<sup>11</sup> England’s first abortion statute, Lord Ellenborough’s Act in 1803, made abortion a capital crime when a woman was “quick with child,” the legal standard at the time for proving the existence of a living child in the womb.<sup>12</sup>

In America, New York City replicated England’s midwife ordinance in 1716, and “[m]anuals for justices of the peace printed in the Colonies in the 18th century typically restated the common-law rules on abortion.”<sup>13</sup> The American Medical Association launched a national campaign against abortion at its 1859 convention, endorsing a report that rejected the “mistaken and exploded dogma” that the unborn child has no “independent and actual existence...as a living being.”<sup>14</sup> Courts followed the physicians’ lead in similarly abandoning outdated concepts such as quickening, with the Maryland Court of Appeals in 1887 noting its rejection of the idea that “the life of an infant was not supposed to begin until it stirred in the mother’s womb.”<sup>15</sup> As a result, during the 19th century, “the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy.”<sup>16</sup>

## Attacking Pro-Life Laws Before *Roe v. Wade*

**Rhetoric.** By the 1950s, “statutes in all but four States and the District of Columbia prohibited abortion ‘however and whenever performed, unless done to save or preserve the life of the mother.’”<sup>17</sup> Abortion advocates first

sought to undermine these pro-life laws with claims about the number of illegal abortions and women who died from them, as well as warnings about population growth.

*Illegal Abortions.* Abortion advocates' rhetorical strategy claimed high numbers of both illegal abortions and abortion deaths, even though reliable evidence either did not exist or actually contradicted the claims. The most common claim about illegal abortions originated in a report following the first national conference on abortion in April 1955. Led by Dr. Mary Calderone, the Planned Parenthood Federation's longtime medical director, the report stated that a "plausible estimate of the frequency of induced abortion...could be as low as 200,000 and as high as 1,200,000 per year," but "there is no objective basis for the selection of a particular figure between these two estimates."<sup>18</sup> That did not stop abortion advocates from turning this wide indeterminate numerical range into a firm statistical claim. In congressional testimony, for example, Calderone asserted that "1 million illegal abortions" were occurring every year.<sup>19</sup>

*Deaths from Illegal Abortions.* Claims about women dying from illegal abortions were on even shakier ground. In September 1967, for example, the *New York Times* referred to "the widely publicized estimate that 10,000 American women die annually of the effects of criminal abortions."<sup>20</sup> The following year, Professor Roy Lucas made the same assertion in the opening sentence of an article arguing that laws restricting abortion violate the Constitution.<sup>21</sup>

Ironically, Calderone herself had already debunked this wildly false claim. Writing in the *American Journal of Public Health*, for example, she noted that in 1957 there had been "only 260 deaths in the whole country attributed to abortions of any kind."<sup>22</sup> Data from the National Center for Health Statistics show that this total was cut in half within a decade<sup>23</sup> and dropped to just 36 in 1973,<sup>24</sup> the year *Roe v. Wade* was decided.

Undeterred, abortion advocates perpetuate these false claims as they continue to attack pro-life laws.<sup>25</sup> In May 2019, the *Washington Post's* Fact Checker column investigated this claim, concluding that "there is no evidence" that "thousands of women of women died every year in the United States from illegal abortions."<sup>26</sup> The figures used by abortion advocates, wrote Glenn Kessler, "were debunked in 1969...[and t]here's no reason to use them today." The Fact Checker not only gave Planned Parenthood its worst "Four Pinocchios" rating (reserved for claims that are just plain "whoppers"<sup>27</sup>), but also included this claim in its 2019 "roundup of the biggest Pinocchios of the year."<sup>28</sup>

*Warnings About Population Growth.* Abortion was a prominent topic during 1965 congressional hearings on the “population crisis.”<sup>29</sup> A *Congressional Quarterly* report issued later that year noted that “[a]nxiety over the effects of rapid population growth also plays a part in directing attention to the abortion problem.”<sup>30</sup> In March 1970, at President Richard Nixon’s request, Congress authorized the Commission on Population Growth and the American Future to conduct research and make recommendations “regarding a broad range of problems associated with population growth and their implications for America’s future.”<sup>31</sup> Nixon named Population Council founder John D. Rockefeller III as the commission’s chairman and appointed 20 of its 24 members, including then-Population Council president Bernard Berelson.

Since its founding in 1952, the Population Council has “worked to expand access to and protect sexual and reproductive health and rights around the world.”<sup>32</sup> Rockefeller initiated what became the Declaration on Population, first released in December 1966 with 12 heads of state as signatories<sup>33</sup> and again a year later with 18 more,<sup>34</sup> including President Lyndon Johnson. It declared that “the opportunity to decide the number and spacing of children is a basic human right.”<sup>35</sup>

The Rockefeller Commission report, released in March 1972, also connected abortion to population growth. The report asserted that “prohibitions against abortion throughout the United States stand as obstacles to the exercise of individual freedom” and “violate social justice.”<sup>36</sup> The “majority of the Commission believes that...states should be encouraged to enact affirmative statutes creating a clear and positive framework for the practice of abortion on request.”

**Legislation.** The second step in the strategy to attack pro-life laws urged state legislatures to modify their abortion restrictions. Abortion advocates initially framed their goal modestly. Dr. Alan Guttmacher, who would later lead the Planned Parenthood Federation, American Society for the Study of Abortion, and American Eugenics Society, wrote in 1959 that he was “strongly opposed to modifying the law to permit abortion on demand. There must be important medical or sociological necessity.”<sup>37</sup>

Scholar Clarke D. Forsythe writes that 1967 was the “breakthrough year for abortion law reformers”<sup>38</sup> and that this legislative reform campaign “eventually reached all fifty states by 1971 or 1972.”<sup>39</sup> Colorado was the first state to modify its pro-life law, using the statutory language recommended by the American Law Institute (ALI) in its 1962 Model Penal Code.<sup>40</sup> North Carolina followed suit, requiring agreement by three physicians and also limiting abortions to state residents. In June 1967, then-California Governor

Ronald Reagan signed legislation into law that included the ALI's exception for the life or health of the mother, limiting abortions to the first 20 weeks of pregnancy, and requiring agreement of two physicians through 12 weeks and three physicians thereafter.<sup>41</sup>

A total of 17 states modified their pro-life laws, 13 of them allowing abortions in a few narrow circumstances and four states allowing abortions for any reason, but only during early pregnancy.<sup>42</sup> After only four years, however, this legislative campaign had run its course. No additional states modified their pro-life laws after 1970, and several states, through their legislatures or directly by the voters, rejected proposals to repeal those laws.<sup>43</sup>

**Litigation.** With further legislative change unlikely, abortion advocates turned to litigation challenging the constitutionality of laws protecting the unborn. These challenges argued that the laws were unconstitutionally vague and, building on arguments first developed by Professors Roy Lucas<sup>44</sup> and Cyril Means,<sup>45</sup> that they violated various unenumerated constitutional rights. By Forsythe's count, 12 decisions (seven federal, five state) struck down state pro-life laws, and 21 decisions (five federal, 16 state) upheld them. The list below, in chronological order, summarizes the most significant pre-*Roe* decisions.

These decisions are instructive. Several of them included holdings that would become part of the abortion regime imposed by the Supreme Court in *Roe*. In addition, the constitutional landscape before *Roe v. Wade* was similar to what it is after *Roe*'s demise—with no right to abortion under the U.S. Constitution. As such, these decisions demonstrate the kind of constitutional arguments that will likely be made against pro-life laws today in state court.

*People v. Belous*. In 1872, the California legislature prohibited abortion except when “necessary to preserve [the mother’s] life.”<sup>46</sup> A century later, the California Supreme Court agreed with Dr. Leon Belous, challenging his sentence for violating this law, that it was unconstitutionally vague. The court held that the phrase “necessary to preserve her life” was “not susceptible of a construction that...is sufficiently certain to satisfy due process requirements without improperly infringing on fundamental rights.”<sup>47</sup> Although not the basis for its decision, the court also referred to a constitutional right “to choose whether to bear children”<sup>48</sup> that “follows from the Supreme Court’s and this court’s repeated acknowledgement of a ‘right of privacy’ or ‘liberty’ in matters related to marriage, family, and sex.”<sup>49</sup> Only a few years later, the U.S. Supreme Court would take this approach in *Roe* to create a federal constitutional right to abortion.

*United States v. Vuitch*. A physician and a nurse's aide challenged a District of Columbia statute that prohibited abortion except when "necessary for the preservation of the mother's life or health."<sup>50</sup> They argued that the statute was unconstitutionally vague and asserted "a constitutional right of all women...to determine whether or not they shall bear a child."<sup>51</sup> Citing *Belous*, the court held that the statute failed to specify whether the exception included both physical and mental health<sup>52</sup> and, therefore, placed physicians in "a particularly unconscionable position."<sup>53</sup> And like *Belous*, the court made suggestions that the Supreme Court would adopt in *Roe*, speculating about a right to privacy that "may well include the right to remove an unwanted child at least in early stages of pregnancy"<sup>54</sup> and lead to "different [constitutional] standards at various phases of pregnancy."<sup>55</sup>

*Babbitz v. McCann*. A Wisconsin statute prohibited abortions except when performed by a physician and that are "necessary...to save the life of the mother."<sup>56</sup> The court disagreed with *Belous* "that such language is so vague that one must guess at its meaning."<sup>57</sup> Instead, the court held that, under the Ninth Amendment,<sup>58</sup> "a woman's right to refuse to carry an embryo during the early months of pregnancy" outweighs "the claimed 'right' of an embryo of four months or less."<sup>59</sup> In other words, "the mother's interests are superior to that of an unquickened embryo, whether the embryo is mere protoplasm, as the plaintiff contends, or a human being, as the Wisconsin statute declares."<sup>60</sup>

*Roe v. Wade*. This case, brought by a single woman and a physician, challenged Texas' 19th-century laws prohibiting abortion except when performed "by medical advice for the purpose of saving the life of the mother."<sup>61</sup> Citing *Babbitz*, the court held that the Texas statutes "deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children"<sup>62</sup> and that Texas failed to show that the abortion ban "is necessary to support a compelling state interest."<sup>63</sup> Citing *Belous* and *Vuitch*, the court also found the laws unconstitutionally vague, with "grave and manifold uncertainties" that deprived physicians of "proper notice of what acts in their daily practice and consultation will subject them to criminal liability."<sup>64</sup> On appeal, the U.S. Supreme Court did not address the vagueness issue,<sup>65</sup> but held that the "right of privacy, whether it be founded in the Fourteenth Amendment...as we feel it is, or, as the District Court determined, in the Ninth Amendment...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>66</sup>

*Doe v. Bolton*. While *Roe* challenged a 19th-century near-total ban on abortion, this case challenged a more recent Georgia law based on the ALI model.<sup>67</sup> The court paid lip service, as the Supreme Court would in *Roe*, to

the idea that the abortion decision “cannot be considered a purely private one affecting only husband and wife, man and woman.”<sup>68</sup> In *Roe*, Justice Harry Blackmun, writing for the majority, similarly stated that the “pregnant woman cannot be isolated in her privacy” because “[s]he carries an embryo and, later, a fetus.”<sup>69</sup>

The Georgia statute challenged in *Doe* allowed an abortion if the pregnancy would “seriously and permanently injure [the mother’s] health.” On appeal, issuing the decision together with *Roe*, the Supreme Court established a very broad definition of health. “[T]he medical judgment,” Blackmun wrote, may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. All these factors may relate to health.”<sup>70</sup>

*Rosen v. Louisiana State Board of Medical Examiners*. A Louisiana statute provided for suspension or revocation of the medical license of a doctor who has performed or aided in an abortion for reasons other than “the relief of a woman whose life appears in peril after due consultation with another licensed physician.”<sup>71</sup> A physician under investigation by the Louisiana State Board of Medical Examiners for violating this law challenged its constitutionality. The court held that the phrase “relief of a woman whose life appears in peril” was “neither vague nor indefinite.”<sup>72</sup> Even if, “as a general matter,” women have a fundamental right to determine whether to bear children “before they have become pregnant,”<sup>73</sup> the court said, this right does not include abortion “if a child for whatever reason is not wanted.”<sup>74</sup> In other words, a “decision whether to bear children made before conception...contemplates the creation of a new human organism” while the same decision made after conception “contemplates the destruction of such an organism already created.”<sup>75</sup>

*Steinberg v. Brown*. Several plaintiffs, each claiming to represent a different class, challenged an Ohio law prohibiting abortion except when “necessary to preserve [the woman’s] life.”<sup>76</sup> Citing the decisions in *Roe* and *Doe*, the court held that the plaintiffs had standing, and agreed with *Babbitz* that the statute was not unconstitutionally vague. And, following *Rosen*, the court observed that “the rights of individuals to determine without governmental interference whether or not to enter into the process of procreation cannot be extended to cover those situations wherein, voluntarily or involuntarily, the preliminaries have ended, and a new life has begun.”<sup>77</sup>

*Abele v. Markle*. A group of Connecticut residents challenged that state’s laws that prohibited abortion unless “necessary to preserve [a woman’s] life.”<sup>78</sup> The plaintiffs included women of child-bearing age; women physicians, nurses, and other medical personnel; and women who “counsel others

concerning abortion.”<sup>79</sup> The court held that, while not unconstitutionally vague,<sup>80</sup> the statutes violated the Ninth Amendment and the Fourteenth Amendment’s Due Process Clause.<sup>81</sup>

The district and appeals courts in this case each offered observations that appeared to influence the Supreme Court in *Roe*. The district court began its opinion with observations about the “extraordinary ramifications” of pregnancy for women,<sup>82</sup> similar to what the Supreme Court would call the “detriment” for women from prohibiting abortion.<sup>83</sup> The Second Circuit’s contribution was even more significant, originating the concept of viability that would become “the central principle of *Roe v. Wade*.”<sup>84</sup>

No one had mentioned viability during the lower court proceedings in *Roe* and, even before the Supreme Court, the parties “did not discuss viability in their briefs or urge the Justices to adopt viability as a standard. There was no mention of viability in the arguments.”<sup>85</sup> Forsythe writes that the “earliest reference to viability in the Justices’ records” is a memo by a Blackmun clerk dated August 11, 1972.<sup>86</sup> A month later, affirming the decision striking down the Connecticut pro-life law in *Abele*, U.S. Circuit Judge Jon Newman made the same suggestion. “[T]he state interest in protecting the life of a fetus capable of living outside the uterus,” he wrote, “could be shown to be more generally accepted and, therefore, of more weight in the constitutional sense than the interest in preventing the abortion of a fetus that is not viable.”<sup>87</sup> In *Casey*, the Court reaffirmed that the Constitution protects a woman’s right “to terminate her pregnancy before viability.”<sup>88</sup>

*Crossen v. Attorney General of Kentucky*. Plaintiffs challenged a Kentucky law prohibiting abortion “unless...necessary to preserve [the woman’s] life”<sup>89</sup> on vagueness and substantive constitutional grounds. The court held that, while “perhaps technically imprecise,” the language was not unconstitutionally vague.<sup>90</sup> The court also held that, even assuming the existence of a “right to privacy in certain matters of marriage, family and sex,” the state “has a compelling interest in the preservation of potential human life” that justifies “a statute of this rigidity.”<sup>91</sup>

*Cheaney v. State*. An Indiana plaintiff appealed her conviction for performing an illegal abortion. She challenged a state law that prohibited abortion “unless...necessary to preserve [the mother’s] life,” arguing that it was vague and violated a woman’s Ninth Amendment right to “decide whether to bear an unquickened fetus.”<sup>92</sup> The court held that assessing whether the state has a compelling interest in “protecting the life of the unborn child” required determining “whether the unborn child has an independent existence, and also whether this independent existence begins at conception or only at quickening.”<sup>93</sup>

The court examined “the legal recognition and the medical recognition of the fetus, both quickened and unquickened”<sup>94</sup> and noted how “advances in medical knowledge”<sup>95</sup> have made either quickening or viability unsuitable for answering these questions. Instead, “[w]e ought to be safe...in saying that legal separability should begin where there is biological separability... [W]hat we know makes it possible to demonstrate clearly that separability begins at conception.”<sup>96</sup> The court concluded that “a state interest in what is, at the very least, from the moment of conception a living being and potential human life, is both valid and compelling.”<sup>97</sup>

*State v. Munson*. A physician charged with performing an illegal abortion challenged a South Dakota law prohibiting abortion “unless the same is necessary to preserve [the mother’s] life.”<sup>98</sup> The South Dakota Supreme Court observed that the case “follows a pattern of attack made against similar abortion laws in other states.”<sup>99</sup>

Like those cases, this challenge asserted that the statute violated “the right of individual privacy including the right to obtain an abortion for an unwanted pregnancy” and that it was unconstitutionally “vague and indefinite.”<sup>100</sup> Citing *Steinberg*, the court rejected these arguments, similarly distinguished between deciding whether to become pregnant from “destroy[ing] the product of conception after it has taken place.”<sup>101</sup>

## Attacking Pro-Life Laws After *Roe v. Wade*

The Supreme Court’s claim in *Casey* that it was “resolv[ing]...[this] intensely divisive controversy”<sup>102</sup> over abortion was never more than judicial wishful thinking. Far from abating, pro-life legislative efforts have steadily expanded,<sup>103</sup> including laws prohibiting abortion, regulation of the abortion decision-making process, restrictions on how abortions are performed, and laws governing whether the government must subsidize abortion.<sup>104</sup> Despite decades of relentless propaganda from abortion advocates and the mainstream media, public opinion about the legal status of abortion has actually changed very little. For example:

- In 1970s Gallup polls and recent CNN polls, a majority thought abortion should be legal “only under certain circumstances” and defined “certain circumstances” narrowly.<sup>105</sup>
- In polls by *USA Today* and Gallup over two decades, support for abortion being “generally” legal plummeted from an average of 64 percent in the first trimester to less than 10 percent in the third.<sup>106</sup>

- Gallup polls show that the same percentage of Americans consider themselves “pro-choice” today as they did in 1995.<sup>107</sup>

In *Dobbs v. Jackson Women’s Health Organization*,<sup>108</sup> the Supreme Court overruled *Roe* and *Casey*, holding that “the Constitution does not confer a right to abortion.”<sup>109</sup> As a result, laws that restrict or prohibit abortion are “entitled to a ‘strong presumption of validity’”<sup>110</sup> under the U.S. Constitution and “must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.” These interests, Justice Samuel Alito wrote, include “respect for and preservation of prenatal life at all stages of development.”<sup>111</sup>

The United States, however, is a union of sovereign states that each has its own constitution and a supreme court with final authority to interpret that constitution’s meaning and determine its application. Abortion advocates, therefore, are turning from using a single “supreme law of the land”<sup>112</sup> in a single judicial system to using dozens of state constitutions in just as many judicial systems.

## State Constitutions and Individual Rights

The foundation for using state courts and constitutions as a source of enhanced protection for individual rights was being laid well before *Roe v. Wade*. Justice William Brennan, appointed to the Supreme Court in 1956, was an early advocate. He first broached this subject in the 1961 James Madison Lecture in Constitutional Law at New York University School of Law,<sup>113</sup> returning to it in the 1977 Meiklejohn Lecture at Harvard Law School.<sup>114</sup> There, he observed that “more and more state courts are construing state constitutional counterparts of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased.”<sup>115</sup>

Brennan speculated that state courts may be reacting to “a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being”<sup>116</sup> its previously more liberal construction of “constitutional provisions for the security of the person and property.”<sup>117</sup> Supreme Court decisions, Brennan emphasized, “are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.”<sup>118</sup> State courts, therefore, should “step into the breach.... With federal scrutiny diminished, state courts must respond by increasing their own.”<sup>119</sup>

Scholars have applied this approach to identify state constitutional grounds for abortion rights. Writing in 2009, for example, Professor Linda J. Wharton argued that *Roe v. Wade* had become “a shadow of its former self.”<sup>120</sup> Subsequent decisions, she claimed, had “seriously undermined Roe’s promise of full and meaningful federal constitutional protection for women’s access to abortion.”<sup>121</sup> Acknowledging that “no state constitution currently affirmatively protects a right to abortion,”<sup>122</sup> Wharton explained that they still “provide fertile ground for protecting reproductive rights.”<sup>123</sup> Like Chaput had done, Wharton examined explicit and implicit privacy guarantees and different kinds of constitutional provisions that “recognize individual equality.”<sup>124</sup> She also noted that “many state constitutions also contain equal rights amendments” and “twenty states have sex equality guarantees that could potentially be used to strengthen protection for abortion rights.”<sup>125</sup>

## Current State Constitutions and Abortion

Prior to 2022, no state constitution explicitly protected a right to abortion, and several state supreme courts held that their constitutions did not protect such a right.<sup>126</sup> Courts in other states declined to address whether their constitutions did so, deferring to the federal right to abortion in *Roe* and *Casey*.<sup>127</sup> In 12 states, however, the supreme court created a right to abortion by interpreting provisions related to privacy, due process, or equal protection.

**Alaska.** The Alaska Constitution provides that the “right of the people to privacy is recognized and shall not be infringed.”<sup>128</sup> The Alaska Supreme Court held in 1997 that this right to privacy protects “reproductive autonomy, including the right to abortion”<sup>129</sup> even more broadly than *Roe* and *Casey* interpreted the U.S. Constitution to do. The court also held that because “reproductive rights are fundamental,”<sup>130</sup> abortion restrictions must meet the strict scrutiny standard.<sup>131</sup> This standard requires that a law be a “narrowly tailored”<sup>132</sup> or “necessary”<sup>133</sup> means to achieve a “compelling” government purpose.<sup>134</sup>

**California.** The California Constitution provides: “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.”<sup>135</sup> The California Supreme Court held in 1997 that this “includes a pregnant woman’s right to choose whether or not to continue her pregnancy.”<sup>136</sup> The court held that this is a “fundamental” right and that abortion restrictions must meet *Roe*’s “compelling interest” standard.<sup>137</sup>

**Florida.** The Florida Constitution provides: “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.”<sup>138</sup> The Florida Supreme Court held in 1989 that this right encompassed the decision of “whether, when, and how one’s body is to become the vehicle for another human being’s creation.”<sup>139</sup>

**Illinois.** The Illinois Constitution’s privacy clause is phrased much like the U.S. Constitution’s Fourth Amendment: “The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means.”<sup>140</sup> In 2013, the Illinois Supreme Court held that while this language did not protect a right to abortion, “our state due process clause” provides “protections, with respect to abortion, equivalent to those provided by the federal due process clause” as interpreted in *Roe*.<sup>141</sup>

**Iowa.** In 2015, the Iowa Supreme Court applied the Supreme Court’s decision in *Casey* to strike down a ban on using telemedicine to obtain abortion drugs.<sup>142</sup> Three years later, the court went further, interpreting the Iowa Constitution’s due process clause to protect a right “to decide whether to continue or terminate a pregnancy” and requiring that abortion restrictions must meet *Roe*’s strict scrutiny standard.<sup>143</sup> But in 2022, the Iowa Supreme Court overruled its 2018 decision, “reject[ing] the proposition that there is a fundamental right to abortion in Iowa’s Constitution.”<sup>144</sup> It did not, however, decide “what constitutional standard should replace it.”<sup>145</sup>

**Kansas.** The Kansas Constitution guarantees “equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.”<sup>146</sup> In a 2019 *per curiam* opinion, the Kansas Supreme Court held that this provision provides a “foundation for substantive rights,” including “a woman’s right to make decisions about...whether to continue her pregnancy.”<sup>147</sup> The court mirrored *Roe*’s “revisionist history”<sup>148</sup> in attempting to justify this conclusion by citing influential jurists and legal philosophers such as John Locke, William Blackstone, and Edmund Burke.<sup>149</sup> But as they have done to *Roe*,<sup>150</sup> scholars have demonstrated that the court’s holding in this case went beyond what a fair reading of legal history allows.<sup>151</sup>

**Massachusetts.** The Massachusetts Supreme Judicial Court has “taken the view that the principles of due process of law in our State Constitution are embodied” in several provisions.<sup>152</sup> In *Framingham Clinic, Inc. v. Selectmen of Southborough*,<sup>153</sup> a case involving a challenge to a zoning law designed to exclude abortion clinics from a town, the court held that these due process principles prohibited the state from “interpos[ing] material

obstacles to the effectuation of a woman's counselled decision to terminate her pregnancy in the first trimester."<sup>154</sup> And in *Moe v. Secretary of Administration and Finance*,<sup>155</sup> the court struck down restrictions on Medicaid funding for abortion, holding that "a woman's right to make the abortion decision privately"<sup>156</sup> is within the "constitutional guarantee of privacy"<sup>157</sup> protected by the state constitution.

**Minnesota.** In *Doe v. Gomez*,<sup>158</sup> the Minnesota Supreme Court struck down state laws restricting the use of public funds to pay for abortions. It held that three provisions of the state constitution, including its due process clause, establish a "fundamental right to privacy"<sup>159</sup> that "encompasses a woman's right to decide to terminate her pregnancy."<sup>160</sup> Abortion restrictions, the court held, must meet the *Roe v. Wade* compelling interest standard.<sup>161</sup>

**Mississippi.** The Mississippi Constitution includes a provision that parallels the U.S. Constitution's Ninth Amendment: "The enumeration of rights in this constitution shall not be construed to deny or disparage others retained by, and inherent in, the people."<sup>162</sup> In 1998, the Mississippi Supreme Court held that this provision protects a right to privacy, including the right to bodily integrity and "an implicit right to have an abortion."<sup>163</sup> The court held, however, that abortion restrictions would be subject to the more lenient "undue burden" standard established in *Planned Parenthood v. Casey*, rather than strict scrutiny under *Roe v. Wade*.<sup>164</sup>

**Montana.** The Montana Constitution provides: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."<sup>165</sup> In 1999, the Montana Supreme Court held that this includes "a woman's right of procreative autonomy—i.e., 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."<sup>166</sup>

**New Jersey.** The New Jersey Constitution provides: "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."<sup>167</sup> The New Jersey Supreme Court has interpreted this provision to include "a guarantee of equal protection of the laws"<sup>168</sup> that, in turn, includes "the choice to terminate a pregnancy or bear a child."<sup>169</sup>

**New York.** The New York Court of Appeals, the state's highest court, has interpreted the state constitution's due process clause<sup>170</sup> to include "the fundamental right of reproductive choice."<sup>171</sup> The court had previously held that restrictions on fundamental rights must "promote a compelling State interest and [be] narrowly tailored to achieve that purpose."<sup>172</sup>

**Washington.** In 1975, the Washington Supreme Court held that “implicit”<sup>173</sup> in the Washington Constitution’s due process clause was a “right to privacy” that mirrored the right created in *Roe*.<sup>174</sup> A restriction on that right, the court held, must be “justified by some ‘compelling state interest’ which it furthers.”<sup>175</sup>

## State Equal Rights Amendments

Congress proposed the Equal Rights Amendment (ERA) in June 1972, sending it to the states for ratification. In November 1977, while the ERA was pending before state legislatures, the National Women’s Conference issued a National Plan of Action that called for both ratification of the ERA and “reproductive freedom.”<sup>176</sup> Less than one year later, President Jimmy Carter created the National Advisory Committee for Women to advise him regarding “initiatives needed to promote full equality for American women... including recommendations of the 1977 National Women’s Conference.”<sup>177</sup> At its first meeting in January 1979, commission co-chairs Representative Bella Abzug (D-NY) and Carmen Delgado Votaw asserted that the ERA was the “foundation on which all our proposals rest,” including fighting “the continued erosion of the Constitutional right to reproductive freedom.”<sup>178</sup> Since then, abortion advocates have repeatedly affirmed their view that the ERA would provide an alternative constitutional basis for abortion rights.<sup>179</sup>

Even though the campaign to add the ERA to the U.S. Constitution failed, 21 state constitutions contain a similar provision and six others have a more limited gender equality provision.<sup>180</sup> Abortion advocates have long insisted that both state and federal ERAs should be understood the same way.<sup>181</sup> In a January 2020 analysis, for example, the Center for American Progress cited court decisions interpreting and applying state ERAs to strike down abortion restrictions as support for concluding that the federal ERA “could further buttress...existing constitutional protections” for abortion rights.<sup>182</sup>

In fact, courts in several states have held that the equal rights amendments in their respective constitutions invalidate restrictions on public funding of abortion. For example:

- **Connecticut.** The Connecticut Constitution provides: “No person shall be denied the equal protection of the laws...because of...sex.”<sup>183</sup> In *Doe v. Maher*,<sup>184</sup> the Connecticut Superior Court applied strict scrutiny to conclude that using Medicaid funds for “medical expenses necessary to restore the male to health” but not for “therapeutic abortions that are not life-threatening”<sup>185</sup> violates the state ERA.

- **New Mexico.** The New Mexico Constitution provides: “Equality of rights under law shall not be denied on account of the sex of any person.”<sup>186</sup> In *New Mexico Right to Choose/NARAL v. Johnson*,<sup>187</sup> the New Mexico Supreme Court held that allowing Medicaid funds to pay for abortions only for specific reasons violated the state ERA.
- **Pennsylvania.** The Pennsylvania Constitution provides: “Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.”<sup>188</sup> Several abortion clinics filed suit, arguing that the Medicaid program’s restriction on funding for elective abortions violated the state ERA by denying coverage of a medical procedure that can be used only by women.<sup>189</sup> The Commonwealth Court of Pennsylvania dismissed the suit, holding that “we can ascertain no reason, and none is alleged, why women enrolled in [Medicaid] cannot assert the constitutional claims in the petition for review on their own behalf.”<sup>190</sup> The court also followed Pennsylvania Supreme Court precedent in rejecting the argument that restricting funding for non-therapeutic abortions, which only women can obtain, is a “legislative classification...related to sex.”<sup>191</sup>

## Changing State Constitutions

While arguing that state constitutions can be a source of abortion rights, Professor Wharton warned of “the possibility of backlash against favorable state court abortion rights decisions in the form of constitutional amendments.”<sup>192</sup> Voters have responded in different ways to state supreme court decisions interpreting their state constitutions regarding abortion rights.

**Tennessee.** In *Davis v. Davis*,<sup>193</sup> a custody dispute over frozen embryos, the Tennessee Supreme Court in 1992 looked to the U.S. Supreme Court’s privacy precedents, holding that the state constitution protects an unenumerated “right of procreational autonomy” or “the right to procreate and the right not to procreate.”<sup>194</sup> Eight years later, the court held that this right includes “a woman’s right to obtain a legal termination of her pregnancy.”<sup>195</sup> Voters responded by amending the state constitution to read: “Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion.”<sup>196</sup>

**Michigan.** In 1997, the Michigan Court of Appeals held that, while the courts had recognized a “generalized right to privacy” under the state constitution, that right did not include abortion.<sup>197</sup> A quarter-century later, in the November 2022 election, Michigan voters adopted Proposal 3 (Prop 3),

adding to their constitution a provision guaranteeing to “every individual” a “fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy.” In several ways, this new provision protects the right to abortion even more extensively than under *Roe* and *Casey*. Here are a few examples:

- The Supreme Court held that the presence of the unborn child makes abortion “inherently different”<sup>198</sup> from contraception. Prop 3 makes no distinction between preventing and terminating pregnancy.
- *Roe* and *Casey* held that the state’s interest in “protecting fetal life”<sup>199</sup> is “important” throughout pregnancy and “compelling” after viability.<sup>200</sup> Prop 3 acknowledges no state interest in protecting life before birth at all, restricting any “compelling” state interest to “the limited purpose of protecting the health of an individual seeking care.”
- The Supreme Court defined viability as the point after which the unborn child is “potentially able to live outside the mother’s womb, albeit with artificial aid.”<sup>201</sup> Prop 3 defines viability more narrowly as a “significant likelihood of the fetus’s sustained survival outside the uterus without the application of extraordinary medical measures.”
- *Casey* held that the state’s interest in the “life of the fetus” exists “from the outset of the pregnancy.”<sup>202</sup> Prop 3 does not recognize any interest in the child at any point in pregnancy.
- The Supreme Court held that, even after viability, the state must allow abortions that are “necessary” to preserve the mother’s life or health.<sup>203</sup> Prop 3 broadens that exception to anything the physician deems “medically indicated.”
- In several cases, the Supreme Court recognized that minors “often lack the ability to make fully informed choices”<sup>204</sup> and upheld laws requiring some level of parental involvement in minors’ abortion decision.<sup>205</sup> Prop 3 makes no distinction between minors and adults, giving every “individual” the same the right to “make and effectuate decisions about all matters relating to pregnancy.”

**California.** As noted above, the California Supreme Court in 1997 interpreted the state constitution to protect a “fundamental” right to abortion.

Nonetheless, in November 2022, voters approved Proposition 1, described by the Secretary of State as “expressly include existing rights to reproductive freedom—such as the right to choose whether or not to have an abortion and use contraceptives.” Even if the measure had failed, however, “existing rights to reproductive freedom...would continue to exist under other state law.”<sup>206</sup>

**Vermont.** In *Beecham v. Leahy*,<sup>207</sup> decided before *Roe v. Wade*, the Vermont Supreme Court suggested that the traditional application of abortion bans after “quickenings” implied that the legislature recognized a right to abortion before that point.<sup>208</sup> Abortion, the court observed, is “an appropriate area for legislative action, provided such legislation does not, as the present law does, restrict to the point of unlawful prohibition.”<sup>209</sup> The court did not, however, actually identify this “point of unlawful prohibition” or hold that the state constitution protects a right to abortion.

This left uncertain whether there existed a right to abortion under Vermont law. Vermont voters, however, addressed that issue in November 2022. By more than three-to-one, they voted to add the following new article to the state constitution: “That an individual’s right to personal reproductive autonomy is central to the liberty and dignity to determine one’s own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means.”<sup>210</sup>

These examples show that voters can change their state constitutions to provide or prevent protection for the unborn. They can do so in reaction to state supreme court decisions or independent from them. “State constitutions are much easier to amend than the U.S. Constitution”<sup>211</sup> and voters can participate in this process in different ways. While each legislature may propose constitutional amendments,<sup>212</sup> for example, voters in 26 of those states may use petitions to propose them.<sup>213</sup> The required signature threshold is typically defined in terms of a percentage of votes cast in the previous gubernatorial election, ranging from 5 percent in Colorado<sup>214</sup> to 15 percent in Arizona.<sup>215</sup> And in every state, constitutional amendments must be approved by the voters.

## Changing State Supreme Courts

In 32 states, voters have a role in determining who sits on their supreme court. According to the Brennan Center for Justice, 21 states use contested elections, 14 of them non-partisan and the other seven partisan, to select new members of the state supreme court.<sup>216</sup> In addition, following the governor’s appointment to a first term, voters in 11 states vote in an uncontested election whether to retain a justice for another term.<sup>217</sup>

- **Contested Non-partisan Elections:** Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Dakota, Oregon, Washington, West Virginia, and Wisconsin.
- **Contested Partisan Elections:** Alabama, Illinois, Louisiana, Michigan,<sup>218</sup> New Mexico, North Carolina, Ohio, Pennsylvania, and Texas.
- **Uncontested Retention Elections After Governor Appointment:** Alaska, Colorado, Illinois, Iowa, Maryland, Montana, Nebraska, New Mexico, Pennsylvania, Utah, and Wyoming.

## Conclusion

In the 1950s, abortion advocates began a campaign to stop what had been a centuries-long “unbroken tradition of prohibiting abortion.” That campaign utilized rhetorical claims aimed at shifting attention from the unborn child to the pregnant woman, political efforts to persuade states to liberalize their abortion laws, and litigation urging courts to declare pro-life laws unconstitutional. The litigation results, like the legislative effort, were mixed, but laid the legal groundwork by making arguments—and resulting in court decisions—that would be developed further in later cases.

The Supreme Court’s decision in *Roe v. Wade*, however, surpassed this campaign’s most optimistic goals by not only creating a right to abortion in the U.S. Constitution but imposing rules so restrictive that no abortion prohibition anywhere in America at the time survived. Litigation attacking pro-life laws proceeded in federal court, with *Roe* and, later, *Planned Parenthood v. Casey* as potent precedential weapons.

Now that the U.S. Supreme Court has overruled *Roe* and *Casey*, however, this litigation is shifting to state courts, where the legal landscape is much more diverse. In 14 states, by either amendment or judicial interpretation, the constitution protects abortion rights. Seven other states are among the 21 with equal rights amendments, which some courts have interpreted them to require that taxpayers subsidize abortion.

As this *Legal Memorandum* has outlined, *Roe v. Wade* did not stop legislatures from enacting pro-life laws—and overruling *Roe* will not stop abortion advocates from attacking those laws. Pro-life Americans, however, have several opportunities to defend the unborn. Voters elect the legislators and governor responsible for enacting their state’s laws. They also determine what their state’s constitution says and, in many states, who sits on the supreme court that is responsible for interpreting and applying it.

Finally, voters also elect state attorneys general, the officials primarily responsible for defending the constitutionality of those duly enacted laws before those courts.<sup>219</sup> While the U.S. Supreme Court’s distortion of the Constitution in *Roe v. Wade* and *Planned Parenthood v. Casey* stifled such pro-life opportunities, overruling those “egregiously wrong”<sup>220</sup> decisions has cleared the way to continue the tradition of protecting the unborn.

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## Endnotes

1. 410 U.S. 113 (1973).
2. Kimberly A. Chaput, *Abortion Rights Under State Constitutions: Fighting the Abortion War in the State Courts*, 70 OR. L. REV. 593, 593 (1991).
3. *Id.*
4. 505 U.S. 833 (1992).
5. *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2279 (2022).
6. *Roe*, 410 U.S. at 129.
7. Stephen G. Gilles, *Roe's Life-or-Health Exception: Self-Defense of Relative-Safety*, 85 NOTRE DAME L. REV. 525, 541 (2010).
8. Sylvia A. Law, *Conversations Between Historians and the Constitution*, 12 THE PUBLIC HISTORIAN 11, 16 (1990). See also Estelle B. Freedman, *Historical Interpretation and Legal Advocacy: Rethinking the Webster Amicus Brief*, 12 THE PUBLIC HISTORIAN 27, 32 (1990) (The "political strategy" of these briefs required "selective use of evidence, or lack of evidence.").
9. *Dobbs* at 2253.
10. *Id.* at 2249. See also CLARKE D. FORSYTHE, ABUSE OF DISCRETION: THE INSIDE STORY OF *Roe v. Wade* 84 (2013); JOSEPH DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 313 (2006).
11. See DENNIS J. HORAN & THOMAS J. MARZEN, ABORTION AND MIDWIFERY: A FOOTNOTE IN LEGAL HISTORY, in NEW PERSPECTIVES ON HUMAN ABORTION 200 (1981).
12. See *Dobbs*, 142 S.Ct. at 2251–52.
13. *Id.* at 2251.
14. *Report on Criminal Abortion*, 12 TRANSACTIONS OF THE AM. MED. ASS'N 75–78 (1859).
15. *Lamb v. State*, 10 A. 208, 208 (Md. 1887).
16. *Dobbs*, 142 S.Ct. at 2252. See also *id.* at 2254 ("by 1868 the vast majority of States criminalized abortion at all stages of pregnancy").
17. *Id.* at 2253, quoting *Roe*, 410 U.S. at 139.
18. See Eugene V. Rostow, *Fowler v. Harper*, *Review of Abortion in the U.S.*, 68 YALE L.J. 395, 397 (1958).
19. *Population Crisis, Hearings Before the Subcomm. on Foreign Aid Expenditures of the Comm. on Government Operations, 89th Cong.*, 1329 (1965). See also *id.* at 1417 (testimony of James V. Bennett, former director of the Bureau of Prisons).
20. Fred P. Graham, *Fetus Defects Pose Abortion Dilemma*, N. Y. TIMES, Sept. 7, 1967, at 38.
21. Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. REV. 730, 730 (1968).
22. Mary Steichen Calderone, *Illegal Abortion as a Public Health Problem*, 50 AM. J. PUB. H. 948, 949 (1960) (emphasis added). She was correct. See Division of Vital Statistics, *Vital Statistics of the United States*, 1957, Vol. I (1959), at C39.
23. Division of Vital Statistics, *Vital Statistics of the United States*, 1968, Vol. II, part A, at 1–51, [https://www.cdc.gov/nchs/data/vsus/mort68\\_2a.pdf](https://www.cdc.gov/nchs/data/vsus/mort68_2a.pdf).
24. Division of Vital Statistics, *Vital Statistics of the United States*, 1973, Vol. II, part A, at 1–72, [https://www.cdc.gov/nchs/data/vsus/mort73\\_2a.pdf](https://www.cdc.gov/nchs/data/vsus/mort73_2a.pdf).
25. Then-Planned Parenthood President Dr. Leana Wen, for example, tweeted in 2019 that "[b]efore *Roe v. Wade*, thousands of women died every year" from illegal abortions. @DrLenaWen, TWITTER (Apr. 19, 2019, 8:41 PM), <https://twitter.com/DrLeanaWen/status/1115686293206392832?s=20>.
26. Glenn Kessler, *Planned Parenthood's False Stat: "Thousands" of Women Died Every Year Before *Roe**, WASH. POST, May 29, 2019, <https://www.washingtonpost.com/politics/2019/05/29/planned-parenthoods-false-stat-thousands-women-died-every-year-before-roe/>.
27. Glenn Kessler, *About the Fact Checker*, WASH. POST, Jan. 1, 2017, <https://www.washingtonpost.com/politics/2019/01/07/about-fact-checker/>.
28. Glenn Kessler, *The Biggest Pinocchios of 2019*, WASH. POST, Dec. 13, 2019, <https://www.washingtonpost.com/politics/2019/12/13/biggest-pinocchios/>.
29. *Population Crisis*, *supra* note 19.
30. *Abortion in Law and Medicine*, CQ RESEARCHER (2002), Oct. 6, 1965, <https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1965100600>.
31. Establishment of the Commission on Population Growth and the American Future, Public Law 91–213, <https://www.govinfo.gov/content/pkg/STATUTE-84/pdf/STATUTE-84-Pg67.pdf#page=1>.
32. Population Council, *Statement on the US Supreme Court Decision to Overturn *Roe v. Wade**, June 24, 2022, <https://bit.ly/3slh29R>.
33. *Declaration on Population*, 1. STUD. IN FAM. PLAN. (Jan. 1976), at 1.
34. Turbay Ayala and Lord Caradon, *Declaration on Population: The World Leaders Statement*, 1 STUD. IN FAM. PLAN. 26 (Jan. 1968), at 1–3, <https://archive.org/details/1968-john-d-iii-gets-world-leaders-to-sign-family-planning-committment/mode/1up>.

35. Arguments that abortion should be legalized to help control population growth continued. See, e.g., S.D. Mumford and E. Kessel, *Role of Abortion in Control of Global Population Growth*, 13 CLINICAL OBSTETRICS AND GYNECOLOGY 19 (1986) (“No nation desirous of reducing its growth rate to 1% of less can expect to do without the widespread use of abortion.”).
36. Rockefeller Commission, *Population and the American Future: The Report of The Commission on Population Growth and the American Future*, July 18, 1969, ch. 11, [https://www.population-security.org/rockefeller/001\\_population\\_growth\\_and\\_the\\_american\\_future.htm](https://www.population-security.org/rockefeller/001_population_growth_and_the_american_future.htm).
37. Quoted in FORSYTHE, *supra* note 10, at 81.
38. *Id.*
39. *Id.* at 69. See also Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?* 6 GUTTMACHER POL’Y REV. 8, 9 (March 2003).
40. The National Conference of Commissioners on Uniform State Laws proposed a Uniform Abortion Act in 1971 that would allow abortions upon request up to 20 weeks of pregnancy and, thereafter, for rape, incest, fetal deformity, and the mental or physical health of the mother.
41. See Harvey L. Ziff, *Recent Abortion Law Reforms (Or Much Ado About Nothing)*, 60 J. CRIM. L. 3, 4–5 (1969).
42. Sarah Parshall Perry and Thomas Jipping, *Dobbs v. Jackson Women’s Health Organization: An Opportunity to Correct a Grave Error*, HERITAGE FOUND. LEGAL MEMORANDUM No. 293, Nov. 17, 2021, <https://www.heritage.org/sites/default/files/2021-11/LM293.pdf>, at 5.
43. FORSYTHE, *supra* note 10, at 86.
44. Lucas, *supra* note 21.
45. Cyril Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality*, 14 N.Y. L. FORUM 411 (1968).
46. *People v. Belous*, 71 Cal.2d 954, 959 (1969).
47. *Id.* at 961.
48. *Id.* at 963.
49. *Id.*
50. *United States v. Vuitch*, 305 F.Supp. 1032, 1033 (D. D.C. 1969).
51. *Id.*
52. *Id.* at 1034.
53. *Id.* On appeal, the U.S. Supreme Court agreed that the District statute was unconstitutionally vague, but the decision produced six different opinions. *United States v. Vuitch*, 402 U.S. 62 (1971).
54. *Vuitch*, 305 F.Supp. at 1035.
55. *Id.*
56. *Babbitz v. McCann*, 310 F.Supp. 293, 294 (E.D. Wis. 1970).
57. *Id.* at 298.
58. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” See Ryan Williams, *Rights Retained by the People*, HERITAGE GUIDE TO THE CONSTITUTION, <https://www.heritage.org/constitution/#!/amendments/9/essays/162/rights-retained-by-the-people>.
59. *Babbitz*, 310 F.Supp. at 301.
60. *Id.* The court noted that “[w]hile problems of over-population, ecology and pollution have been brought to our attention, we deem them secondary as decisional factors in a judicial resolution of the issues at hand.” *Id.* at 299.
61. *Roe*, 410 U.S. at 117 n.1.
62. *Roe v. Wade*, 314 F.Supp. 1217, 1221 (N.D. Texas 1970).
63. *Id.* at 1222.
64. *Id.* See also *Doe v. Scott*, 321 F.Supp. 1385 (N.D. Ill. 1971) (statute allowing abortions “necessary for the preservation of the woman’s life” is unconstitutionally vague and intrudes on “women’s rights...to control over their own bodies, and to freedom and privacy in matters relating to sex and procreation.”); *YWCA v. Kugler*, 342 F.Supp. 1048, 1066 (D. N.J. 1972) (statute prohibiting abortion “without lawful justification” provides “not a glimmer of notice to the reader of what he may and may not do” and agrees with *Babbitz* that statute violates woman’s “right to privacy” before quickening).
65. *Roe*, 410 U.S. at 164 (conclusion that law violates right to abortion “makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness.”).
66. *Id.* at 153.

67. *Doe v. Bolton*, 319 F.Supp. 1048 (N.D. Georgia 1970). See also *Poe v. Menghini*, 339 F.Supp. 986 (D. Kan. 1972) (statute based on the Model Penal Code violates the “fundamental right to...privacy which includes in its scope the right to procure an abortion”).
68. *Doe*, 319 F.Supp. at 1055.
69. *Roe*, 410 U.S. at 159.
70. *Doe v. Bolton*, 410 U.S. 179, 192 (1973).
71. *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F.Supp. 1217, 1219 (E.D. Wis. 1970).
72. *Id.* at 1220.
73. *Id.* at 1222.
74. *Id.* at 1223.
75. *Id.* See also *Corkey v. Edwards*, 322 F.Supp. 1248 (W.D. N.C. 1971) (distinguishing between “the choice whether or not to bear children” made before or after conception, between “creation of a new human organism” and “destruction of such an organism already created”).
76. *Steinberg v. Brown*, 321 F.Supp. 741, 743 n.1 (N.D. Ohio 1970).
77. *Id.* at 746.
78. *Abele v. Markle*, 452 F.2d 1121, 1122 (2d Cir. 1971).
79. *Id.* at 1123. The U.S. District Court initially dismissed the case because the plaintiffs lacked standing. The U.S. Court of Appeals for the Second Circuit agreed with respect to non-pregnant women of child-bearing age, but reversed as to medical and counseling personal. *Id.* at 1124–25.
80. *Abele v. Markle*, 342 F.Supp. 800, 801 n. 4 (D. Conn. 1972).
81. *Id.* at 801.
82. *Id.* at 801–02.
83. *Roe*, 410 U.S. at 153.
84. *Casey*, 505 U.S. at 871.
85. FORSYTHE, *supra* note 10, at 127. See also *Dobbs*, 142 S.Ct. at 2266 (“[n]either party [n]or any *amicus* argue[d] that ‘viability’ should mark the point at which the scope of the abortion right and a State’s regulatory authority should be substantially transformed.”).
86. *Roe*, 410 U.S. at 128.
87. *Abele*, 351 F.Supp. at 232.
88. *Casey*, 505 U.S. at 879.
89. *Crossen v. Att’y General of Kansas*, 344 F.Supp. 587 (E.D. Ken. 1972).
90. *Id.*
91. *Id.* at 591.
92. *Cheaney v. State*, 285 N.E.2d 265, 266 (Ind. 1972).
93. *Id.* at 267.
94. *Id.*
95. *Id.* at 268.
96. *Id.* at 269, quoting *Kelly v. Gregory*, 125 N.Y.S.2d 696, 697 (1963).
97. *Cheaney*, 285 N.E.2d at 270.
98. *State v. Munson*, 201 N.W.2d 123, 124 (S.D. 1972).
99. *Id.*
100. *Id.*
101. *Id.* at 126.
102. *Casey*, 505 U.S. at 866.
103. See Elizabeth Nash, *For the First Time Ever U.S. States Enacted More Than 100 Abortion Restrictions in a Single Year*, GUTTMACHER INSTITUTE (Oct. 4, 2021), <https://www.guttmacher.org/article/2021/10/first-time-ever-us-states-enacted-more-100-abortion-restrictions-single-year>.
104. See Perry and Jipping, *supra* note 42, at 11.
105. *Id.* at 6.
106. *Id.* at 7.

107. Gallup, *Abortion*, <https://news.gallup.com/poll/1576/abortion.aspx>.
108. 142 S.Ct. 2228 (2022).
109. *Id.* at 2278.
110. *Id.* at 2284, quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993).
111. *Id.* These interests also include “the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.” *Id.* (internal citations omitted). See also *Washington v. Glucksberg*, 521 U.S. 702, 728–31 (1997) (identifying similar interests).
112. U.S. CONST., art. VI.
113. William Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 (1961). In its 75th anniversary retrospective, *New York University Law Review* included this as one of the “most influential articles” it had published. See *Seventy-Fifth Anniversary Retrospective: Most Influential Articles*, 75 N.Y.U. L. REV. 1517, 1517 (2000).
114. William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). In a 2012 compilation, this was the ninth-most cited law review “of all time.” Fred R. Shapiro, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012).
115. Brennan, *supra* note 114, at 495.
116. *Id.*
117. *Id.* at 494, citing *Boyd v. United States*, 116 U.S. 616, 635 (1886).
118. *Id.* at 502.
119. *Id.* at 503. As he marked 30 years on the Supreme Court in 1986, Brennan returned to NYU and delivered the 19th Madison Lecture, praising the “revival of state constitutions as guardians of individual rights.” William Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).
120. Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469, 471 (2009).
121. *Id.* See also Dawn Johnson, *State Court Protections of Reproductive Rights: The Past, the Perils, and the Promise*, 29 COLUM. J. GENDER & L. 41, 42 (2015) (describing the “heightened threat to availability of legal abortion services”).
122. Wharton, *supra* note 120, at 498.
123. *Id.*
124. *Id.* at 499.
125. *Id.* at 500. Feminist scholars had been arguing for years that the 14th Amendment’s Equal Protection Clause would have been a stronger constitutional foundation for abortion rights than the Due Process Clause that the Supreme Court chose in *Roe*. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992).
126. See Robert L. Bentleywski, *Abortion Rights Under State Constitutions: A Fifty-State Survey*, 90 FORD. L. REV. 201, 213–14 (2022). These states are Alabama, Arkansas, Louisiana, Rhode Island, Tennessee, and West Virginia.
127. See, e.g., *Hope Clinic for Women v. Flores*, 991 N.E.2d 745, 760 (Ill. 2013); *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 984 (Ind. 2005); *Reproductive Health Services of Planned Parenthood the St. Louis Region v. Nixon*, 185 S.W.3d 685, 692 (Mo. 2006); *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 584 (Ohio Ct. App. 1993); *Rosie J. v. Dep’t of Human Resources*, 491 S.E.2d 535, 536 (N.C. 1997); *Miller v. Johnson*, 343 S.E.2d 301, 304 (Va. 1986); *Wood v. University of Utah Medical Center*, 67 P.3d 436, 448 (Utah 2002).
128. ALA. CONST., art. I, § 22.
129. *Valley Hosp. Ass’n v. Mat-Su Coalition*, 948 P.2d 963 (1997).
130. *Id.* at 969.
131. *Id.*
132. *Police Dept. of City of Chicago v. Mosely*, 408 U.S. 92, 101 (1972).
133. *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 627 (1969).
134. See *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972).
135. CAL. CONST., art. I, § 1.
136. *American Academy of Pediatrics v. Lungren*, 940 P.2d 797, 813 (Cal. 1997).
137. *Id.* at 819.
138. FLA. CONST., art. I, § 23.

139. *In re T.W.*, 551 So.2d 1186 (Fla. 1989).
140. ILL. CONST., art. I, § 6.
141. *Hope Clinic for Women v. Flores*, 991 N.E.2d 745, 760 (Ill. 2013).
142. *Planned Parenthood of the Heartland, Inc. v. Iowa Board of Medicine*, 865 N.W.2d 252, 269 (Iowa 2015).
143. *Id.* at 237.
144. *Planned Parenthood of the Heartland v. Reynolds*, 975 N.W.2d 710, 715 (Iowa 2022).
145. *Id.*
146. KAN. CONST., Bill of Rights, § 1.
147. *Hodes & Nauser v. Schmidt*, 440 P.3d 461, 466 (Kan. 2019).
148. See Gilles, *supra* note 7.
149. *Hodes*, 440 P.3d at 480–81.
150. See Perry & Jipping, *supra* note 42, at 9–10.
151. See Skylar Reese Croy and Alexander Lemke, *An Unnatural Reading: The Revisionist History of Abortion in Hodes v. Schmidt*, 32 UNIV. FL. J. L. & PUB. POL'Y 71, 93–94 (2021) (“*Hodes* never acknowledged specific statements from many sources, instead letting general statements govern. In doing so, *Hodes* violated one of the basic tenants [sic] of reasoning: when there is an apparent conflict between a general rule and a specific rule, the specific rule controls.”).
152. *Moe v. Secretary of Adm. And Finance*, 417 N.E.2d 387, 390 n.4 (Mass. 1981).
153. 367 N.E.2d 606 (Mass. 1977).
154. *Id.* at 612.
155. 417 N.E.2d 387 (Mass. 1981).
156. *Id.* at 398.
157. *Id.*
158. 542 N.W.2d 17 (Minn. 1995).
159. *Id.* at 19.
160. *Id.* at 27.
161. *Id.* at 31.
162. MISS. CONST., art. I, § 32.
163. *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 653 (Miss. 1998).
164. *Id.* at 655.
165. MONT. CONST., art. II, § 10.
166. *Armstrong v. State*, 989 P.2d 364, 370 (Mont. 1999).
167. N.J. CONST., art. I, ¶ 1.
168. *Right to Choose v. Byrne*, 450 A.2d 925, 934 (N.J. 1982).
169. *Id.*
170. N.Y. CONST., art. I, § 6 (“No person shall be deprived of life, liberty or property without due process of law.”).
171. *Hope v. Perales*, 634 N.E.2d 183, 186 (N.Y. 1994).
172. *Golden v. Clark*, 564 N.E.2d 611, 614 (N.Y. 1990).
173. *State v. Koome*, 530 P.2d 260, 263 (Wash. 1975).
174. WASH. CONST., art. I, § 3 (“No person shall be deprived of life, liberty, or property, without due process of law.”).
175. *Koome*, 530 P.2d at 264.
176. NATIONAL WOMEN’S CONFERENCE, NATIONAL PLAN OF ACTION 25 (1977), <https://babel.hathitrust.org/cgi/pt?id=uc1.31822024249419&view=1up&seq=1>.
177. Exec. Order No. 12,050, 43 Fed. Reg. 14431 (Apr. 4, 1978).
178. Statement to President Jimmy Carter 2 (Jan. 12, 1979), [https://www.jimmycarterlibrary.gov/digital\\_library/sso/148878/103/SSO\\_148878\\_103\\_01.pdf](https://www.jimmycarterlibrary.gov/digital_library/sso/148878/103/SSO_148878_103_01.pdf).
179. See Thomas Jipping, *Not Your Grandmother’s ERA: Why Current Equal Rights Amendment Strategies Will Fail*, HERITAGE FOUND. LEGAL MEMORANDUM No. 291, Oct. 26, 2021, <https://www.heritage.org/civil-rights/report/not-your-grandmothers-era-why-current-equal-rights-amendment-strategies-will>, at 21–22.

180. See Brennan Center for Justice, *State-Level Equal Rights Amendments* (Aug. 26, 2022), <https://www.brennancenter.org/our-work/research-reports/state-level-equal-rights-amendments>.
181. See Jipping, *supra* note 179, at 22.
182. Robin Bleiweis, *The Equal Rights Amendment: What You Need to Know*, AM. PROGRESS, Jan. 29, 2020, <https://www.americanprogress.org/article/equal-rights-amendment-need-know/>.
183. CONN. CONST., art. 1, § 20.
184. 515 A.2d 134 (Conn. Super. Ct. 1986).
185. *Id.* at 159.
186. N.M. CONST., art. 2, § 18.
187. 975 P.2d 841 (N.M. 1998).
188. PA. CONST., art. I, § 28.
189. *Allegheny Reproductive Health Center et al. v. Pennsylvania Dep't of Human Services*, 249 A.3d 598, 603 (Common. Ct. Penn. 2021).
190. *Id.* at 607.
191. *Id.* at 610.
192. *Id.* at 533.
193. 842 S.W.2d 588 (Tenn. 1992).
194. *Id.* at 601.
195. *Planned Parenthood of Middle Tenn. V. Sundquist*, 38 S.W.3d 1, 11 (Tenn. 2000).
196. TENN. CONST., art. I, § 36.
197. *Mahaffey v. Attorney General*, 564 N.W.2d 104, 109 (Mich. Ct. App. 1997); *id.* at 110 (“[T]here is no right to abortion under the Michigan Constitution.”).
198. *Id.* at 159.
199. *Id.* at 163.
200. *Id.* at 163.
201. *Roe*, 410 U.S. at 160.
202. *Casey*, 505 U.S. at 846.
203. *Roe*, 410 U.S. at 165.
204. *Hodgson v. Minnesota*, 497 U.S. 417, 458 (1990) (O'Connor, J., concurring in part).
205. See, e.g., *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990).
206. Office of the California Secretary of State, *California General Election: Official Voter Information Guide*, <https://voterguide.sos.ca.gov/propositions/1/>.
207. 287 A.2d 836 (Vt. 1972).
208. *Id.* at 839.
209. *Id.* at 840.
210. See Mitch Smith and Ava Sasani, *Michigan, California, and Vermont Affirm Abortion Rights in Ballot Proposals*, N. Y. Times, Nov. 9, 2022, <https://www.nytimes.com/2022/11/09/us/abortion-rights-ballot-proposals.html>.
211. Bentlyewski, *supra* note 126, at 224.
212. Some states require two-thirds of the legislature. See, e.g., Ala. Const., art. XIII; Cali. Const., art. XVIII; Colo. Const., art. XIX; Ga. Const., art. X, § 1, ¶ 1; Kan. Const., art. 14; La. Const., art. XIII, § 1; Me. Const., art. X, § 4; Mich. Const., art. XII, § 1; Mont. Const., art. XIV, § 8; S.C. Const., art. XVI, 1; Tex. Const., art. XVII, § 1; Utah Const., art. XXIII, § 1. Other states require three-fifths of the legislature. See, e.g., Ala. Const., art. XVIII; N.C. Const., art. XIII, § 1. Other states require only a simple majority of the legislature. See, e.g., Ark. Const., art. 19; Minn. Const., art. IX, § 1; Mo. Const., art. XII, § 2(a); Nev. Const., art. 16, § 1; N.M. Const., art. XIX, § 1; Ohio Const., art. XVI, § 1; Okla. Const., art. 24, § 1; Or. Const., art. XVII, § 1; Penn. Const., art. XI, § 1; R.I. Const., art. XIV, § 1; S.D. Const., art. XXIII, § 1.
213. The following state constitutions do not provide for a popularly initiated amendment: Connecticut, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.
214. Colo. Const., art. XIX.
215. Ariz. Const., art. 21.

216. For an examination of this method of judicial selection, see Deborah O'Malley, *A Defense of the Elected Judiciary*, Heritage Found. Legal Memorandum No. 57, Sept. 9, 2010, <https://www.heritage.org/courts/report/defense-the-elected-judiciary>. The governor appoints state supreme court justices in 26 states, most of them choosing from among candidates chosen by a nominating commission. In South Carolina and Virginia, the legislature chooses supreme court justices.
217. Brennan Center for Justice, *Judicial Selection: Significant Figures*, Oct. 11, 2022, <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures>.
218. Michigan's non-partisan election follows a partisan primary.
219. See F. Andrew Hessick, *Defending the Constitutionality of Federal Statutes*, 98 N.C. L. Rev. 1185, 1185 (2020) ("Typically, so long as a reasonable argument can be made supporting a statute's constitutionality, the [Justice] Department will defend the statute.").
220. *Dobbs*, 142 S.Ct. at 2243.