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Florida's Privacy Paradox

EMILY GRADY*

*For almost half a century, Floridians have enjoyed a right to privacy specially guaranteed to them by the Florida constitution. This broad right to privacy, pre-*Dobbs*, guaranteed several specific rights like the right to have an abortion, the right to be left alone in one's own home, and the right to be able to direct the upbringing of one's children, amongst other rights. Despite the fact that these specific rights were nestled in the same broad right to privacy, their treatment has been far from similar in recent years in Florida.*

This Note examines the evolution of Florida's treatment of two of these specific rights—the right to have an abortion and the right to have a say in one's child's upbringing—and argues that recent trends in Florida's laws showcase a narrowing of the former and an expansion of the latter. This Note further argues that this contrasting treatment is not because of some deeply rooted tradition and history. Rather, the disparate treatment is nothing more than a political move by those in power.

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INTRODUCTION

The right to privacy has been the center of many Supreme Court decisions and academic critiques.[1] Despite the criticism,[2] the right

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[1] *See* Jason S. Marks, Note, *Beyond Penumbras and Emanations: Fundamental Rights, the Spirit of the Revolution, and the Ninth Amendment*, 5 SETON HALL CONST. L.J. 435, 437–38 (1995) (commenting that the "right of privacy . . . has become perhaps the most prominent topic of contemporary jurisprudence."); James W. Ely, Jr., *Economic Due Process Revisited*, 44 VAND. L. REV. 213, 213 (1991) (book review) (stating that the period involving the economic due process issues is one similar to a "Victorian melodrama"). *See generally* KAREN J. LEWIS & JON O. SHIMABUKURO, ABORTION LAW DEVELOPMENT: A BRIEF OVERVIEW (2001) (cataloging the many major Supreme Court decisions and the history of abortion laws, evidencing a continuing judicial interest in the right to privacy).

[2] Although the right to privacy is an important constitutional right, there has been disagreement over its origin and breadth. *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 737 (1989). Even the Court in *Roe v. Wade* had some hesitation in pinpointing the exact derivation of the right by stating that, in varying judicial contexts, the right had been discovered in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments, and even the "penumbras of the bill of

to privacy had been somewhat settled[3] in the Court's jurisprudence after its initial recognition.[4] But, the debate over what exactly the right to privacy entails was reignited when the Supreme Court handed down the infamous *Dobbs v. Jackson Women's Health Organization* decision.[5] This case untethered the right to have an abortion from the fundamental right to privacy[6] and held that state legislatures, not the Constitution, are the appropriate body to determine whether citizens deserve to have the right to have an abortion.[7]

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rights." Roe v. Wade, 410 U.S. 113, 152–53 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[3] The Court began to acknowledge the Fourteenth Amendment most prominently during the *Lochner* Era, but before then, the Court did recognize the Fourteenth Amendment as a potential source of protection against state laws. *See* Mugler v. Kansas, 123 U.S. 623, 664 (1887). This ideology can be seen in the 1887 *Mugler* decision, where the Court considered whether a Kansas law that prohibited liquor manufacturing was unconstitutional under the Fourteenth Amendment's Due Process Clause. *See id*. Although the Court did not find the law in violation of the Due Process Clause, it still recognized the Fourteenth Amendment as a substantive source of rights; since then, the Fourteenth Amendment has served as a basis for many unenumerated rights. *See* Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV 943, 947 (1927).

[4] Some cases have recognized the right to privacy as being amongst the oldest rights recognized in our society. *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

[5] Although the Court attempted to assure the public that only the right to have an abortion was being severed from the privacy precedent established by the Court for nearly fifty years, many of these rights are more intertwined than the court lets on, so such a clean-cut separation is dubious. *See Dobbs*, 597 U.S. at 290 ("Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."); *id.* at 346 (Kavanaugh, J., concurring) ("I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of those precedents and does *not* threaten or cast doubt on those precedents."); *see* Darren Lenard Hutchinson, *Thinly Rooted:* Dobbs*, Tradition, and Reproductive Justice,* 65 ARIZ. L. REV. 385, 408–09 (2023) (explaining how the court's "arbitrary distinctions among liberty interests" and "narrow traditionalism" puts other rights under the substantive due process clause on the chopping block and may allow for rights, such as marriage equality and sexual privacy rights, to be invalidated on similar grounds).

[6] Before the *Dobbs* decision, the right to have an abortion was recognized as part and parcel of the right to privacy. *Dobbs*, 597 U.S. at 235, 240.

[7] *Id.* at 289 (stating that the Court's decision "returns the issue of abortion to those legislative bodies").

Armed with this newfound authority and a changed legal landscape, states all over the country have begun to take drastically different approaches in their treatment of this right.[8] However, even prior to this Supreme Court decision, Floridians had already voted to secure the right to privacy to themselves.[9] Yet, despite the constitutionally explicit guarantee, those in power in Florida have endeavored to strip away some of the rights within the right to privacy from their citizens.[10] This Note argues that the treatment of the right to have an abortion and the right of parents to have a say in their child's

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[8] Some states have enacted more restrictive abortion bans. *See* Brittney A. Sizemore, Comment, *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, Note, *The Future of* Roe v. Wade *with a Conservative Super Majority Supreme Court*, 22 RUTGERS J.L. & RELIGION 446, 448 (2021) ("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."). Some states have amended their constitutions to explicitly remove abortion from any kind of state constitutional protection. *See id.* at 457 ("Conservative states have also been amending their constitutions to ensure it explicitly does not protect the right to an abortion."). Other states also have the right to have an abortion in their state constitution. *See* CTR. FOR REPROD. RTS., STATE CONSTITUTIONS AND ABORTION RIGHTS 1, 2 (2022) (finding that Alaska, Arizona, California, Florida, Kansas, Massachusetts, Minnesota, Montana, New Jersey, and New Mexico all have some sort of state constitutional protection).

[9] FLA. CONST. art I, § 23.

[10] The Florida Supreme Court previously had a case pending before it, *Planned Parenthood of Southwest & Central Florida v. State*, where the State argued that the court should uphold the then-current fifteen-week abortion ban because the 1980 privacy amendment actually never encapsulated the right to have an abortion. *See* Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So. 3d 67, 74 n.7 (Fla. 2024). The 2023 statute stated that if the court were to uphold this fifteen-week ban, there was a six-week abortion ban waiting in the wings. FLA. STAT. § 390.0111 n.1 (2023) (explaining that should the above-mentioned case come out in the State's favor, then the current subsection (1) will be replaced by "TERMINATION AFTER GESTATIONAL AGE OF 6 WEEKS; WHEN ALLOWED" within 30 days); *cf.* FLA. STAT. § 390.0111 (2024) (banning abortions beyond a gestational age of six weeks except under limited circumstances). The court heard oral arguments in September 2023. *See* Press Release, Planned Parenthood, Florida Supreme Court Hears Oral Argument in Abortion Ban Challenge (Sept. 8, 2023), https://www.plannedparenthood.org/about-us/newsroom/press-releases/florida-supreme-court-hears-oral-argument-in-abortion-ban-challenge.

upbringing,[11] when juxtaposed against one another, reveals a blatant contradiction that is not the result of any legal history or tradition, but is the result of the political motivations of those in power.

In Section I.A, this Note examines the Court's early Fourteenth Amendment jurisprudence, specifically looking at how the right to direct one's child's upbringing began and has continued to be protected federally. An examination of the early cases reveals that the Supreme Court has consistently recognized this right as falling under the Fourteenth Amendment's protection and implicit in the Due Process Clause's liberty language. Section I.B examines the early Supreme Court cases instrumental to the development of another one of the Fourteenth Amendment's formerly implicit protections—the right to have an abortion. Although the right to have an abortion is no longer a federally protected right, this section details the protection that was once extended to this intimate decision.

In Part II, this Note examines the parallel development of both of these rights in the state of Florida, looking at both the statutory and common law development of these rights. Section II.A explores the right of parents to have a say in their child's upbringing, with a specific focus on parental rights in the K-12 education context because this is where the most change to parental rights has occurred in Florida. An analysis of this history reveals that parental rights have only recently undergone a reformation to broaden them to their current state. In Section II.B, this Note undertakes a similar analysis of the changes the right to have an abortion has experienced in Florida, and this history exposes a comparable overall trend: The right to have an abortion in Florida experienced relative stability until recently, when a contraction, rather than an expansion, of the right began.

Section III.A juxtaposes the most recent statutory changes to these rights in Florida and highlights the disparate treatment these rights have experienced. Section III.B showcases the lack of legal backing or public support for this contradictory treatment and argues that the real motivation for such treatment is a broader political agenda, not any absence of state constitutional support for these rights. This Note further argues that the expansion of parental rights

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[11] The right to have a say in one's child's upbringing, the right to parent, and the right to direct one's child's upbringing all refer to the same right.

in Florida has not actually been enacted to advance the rights of parents or the interests of their children but rather to push a specific viewpoint that the State could not further under its own powers.

I. THE FEDERAL FLOOR

Although this Note seeks to demonstrate how Florida's differential treatment of the right to have an abortion and the parental right to influence one's child's upbringing is legally baseless, it is important to first address what the federal floor once guaranteed for the right to have an abortion and what it still does guarantee for the right to parent. It is important because the federal floor establishes the basis of what states must guarantee, explains what states are free to expand upon,[12] and provides the context needed to understand what Floridians intended to enshrine in their state constitution in 1980.[13]

Fundamental rights and the substantive due process analysis began with the *Lochner* Era.[14] During this infamous period, the Su-

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[12] *See* Jeffrey M. Shaman, *The Right of Privacy in State Constitutional Law*, 37 RUTGERS L.J. 971, 987–88 (2006) ("Clearly, a state is free as a matter of its own law to grant more expansive rights than is afforded by federal law.").

[13] *See* Joanna Gardner, Comment, *Refusing to Hew to the Federal Floor—Florida Supreme Court Finds Mandatory Waiting Period Prior to Abortion Unconstitutional.* Gainesville Woman Care, LLC v. State, *210 So. 3d 1243 (Fla. 2017)*, 71 RUTGERS U.L. REV. 1277, 1279 (2019) (explaining how the federal right to have an abortion analysis provides a useful contextual starting point to understand the basis for which a state right may have grown out of); Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIA. L. REV. 101, 109, 125, 131, 133 (2002) (linking the then-fundamental right of abortion to the fundamental rights of parents, demonstrating the common origin and baseline of these two rights).

[14] The term "*Lochner* Era" describes the Supreme Court period beginning with the decision of *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), and ending with *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937). David N. Mayer, *The Myth of Laissez-Faire Constitutionalism: Liberty of Contract During the* Lochner *Era*, 36 HASTINGS CONST. L.Q. 217, 217 nn.1–2 (2009). This era has now been termed the "era of laissez-faire constitutionalism," insinuating that the decisions that came out of this era implemented the judge's own economic views. *Id.* at 217; *see, e.g.*, Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court*, *1888-1921*, 5 LAW & HIST. REV. 249, 250 (1987) ("*Lochner v. New York* . . . is still shorthand in constitutional law for the worst sins of subjective judicial activism.").

preme Court established the now broadly condemned economic substantive due process rights.[15] According to the Court at the time, these economic rights protected an employee's liberty to contract, and the Court therefore struck down several state laws that supposedly interfered with this fundamental right.[16] Despite the fact that economic due process has now largely been discredited,[17] the Supreme Court's recognition of the Fourteenth Amendment's broad prohibition of state intrusion into "life, liberty, or property without due process of law"[18] remains good law and functions as the starting point for the analysis of more widely accepted fundamental rights.[19]

A. *The Right of Parents to Have a Say in Their Child's Upbringing*

Before diving into the Supreme Court jurisprudence that shaped the ideology underlying the parental right at issue in this Note, it is worth noting that the logic beneath modern parental rights predates its formal recognition within the Fourteenth Amendment's substantive Due Process Clause.[20] As unusual as it sounds, these parental rights were originally grounded in the idea that children were property.[21] Although this outdated ideology has given way to more mod-

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[15] *Lochner v. New York* held that the Fourteenth Amendment protects the individual right to contract. Lochner v. New York, 198 U.S. 45, 56, 58 (1905) (striking down a state regulation that sought to limit the number of hours a baker could work in a bakery as "an unreasonable, unnecessary, and arbitrary interference" with the right of the individual to contract in relation to labor, and, as such, it was in conflict with, and void under, the Federal Constitution).

[16] Alex McBride, *Landmark Cases:* Lochner v. New York *(1905)*, THIRTEEN PBS (Dec. 2006), https://www.thirteen.org/wnet/supremecourt/capitalism/landmark_lochner.html ("Time and time again, the Supreme Court struck down laws regulating labor conditions, construing them as repugnant to the Fourteenth Amendment.").

[17] *See id.*

[18] U.S. CONST. amend. XIV.

[19] Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. REV. 1055, 1087 (explaining that "the right to parent originates" from the Due Process Clause of the Fourteenth Amendment).

[20] *See* Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1044–45 (1992).

[21] At early Roman law, the Romans treated their children as chattels, which seemingly translated into early English law treating children as possessions. *See*

ern ideals of the child's well-being necessarily being reliant on parental choices while they are dependents,[22] perhaps these ancient origins highlight the need for such rights to be construed narrowly rather than expansively.

Within the good law that remains from the *Lochner* Era jurisprudence lies cases that serve as the foundation of the parental rights at the heart of this Note. The first of these cases is *Meyer v. Nebraska.*[23] This case involved a Nebraska state law that prohibited the teaching of any language besides English to school-age children in an attempt to ensure that children of foreigners took English on as their "mother tongue."[24] Although the Supreme Court conceded that the passing of such a law was within the purview of the state's police powers, the Court also found that this law created an issue with the Fourteenth Amendment.[25] As the Court's previous jurisprudence explained, the Fourteenth Amendment's protection of "life, liberty, or property"[26] extended to much more than just protection from bodily harm and included other freedoms such as the right to marry, the right to educate oneself, and the right to "establish a home and bring up children."[27] With these competing rights in mind, the Court held that this law was unconstitutional because it violated not just the right of the parents to control the upbringing of their children, but also the right of the teacher to teach as instructed by the parents.[28]

The next case that expanded what *Meyer* began in relation to the right to parent is *Pierce v. Society of Sisters.*[29] This case struck down

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id. This dynamic can be seen through the "patriarchal theories" that men ruled over their families as kings ruled over their sovereigns. *Id.* at 1044. This view eventually evolved into a modern conception with a less obvious notion of children as property. *Id.* In this conception, the children nevertheless seem to have no rights of their own, and instead, parents speak for them. *Id.* at 1113–14; *see* Anne C. Dailey, *In Loco Reipublicae*, 133 YALE L.J. 419, 438 (2023).

22 Dailey, *supra* note 21, at 440.

23 Meyer v. Nebraska, 262 U.S. 390 (1923).

24 *Id.* at 396, 398.

25 *Id.* at 398–99.

26 *Id.* at 399.

27 *Id.*

28 *Id.* at 400 (stating that "it is the natural duty of the parent to give his children education suitable to their station in life" and that "it is [the teacher's] right thus to teach and the right of parents to engage him so to instruct their children . . . [under] the liberty of the Fourteenth [A]mendment.").

29 Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

Oregon's Compulsory Education Act of 1922, which was a state law that required children to be educated in public schools as opposed to parochial or private schools.[30] Based on the doctrine set out in *Meyer*, the Court found that this law was unconstitutional because it "unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control."[31]

Wisconsin v. Yoder was the third major case to elaborate upon this parental right doctrine and once again addressed the constitutionality of a state education-based law.[32] At issue in this case was Wisconsin's compulsory school-attendance law, which required all children to attend public schools until the age of sixteen, and Amish parents' desire to raise their children according to their own religious beliefs.[33] The Amish parents involved here declined to send their children to school past the eighth grade, claiming that the compulsory-attendance law violated their First and Fourteenth Amendment rights.[34] The parents reasoned that according to Amish religious beliefs, it was important for Amish children to receive vocational training and learn the Amish way of life, which "require[d] members of the community to make their living by farming or closely related activities."[35] Thus, the parents' objection to formal education was entrenched in their religious tenants.[36] The Court, drawing on expert testimony,[37] noted this dichotomy between for-

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[30] *Id.* at 530.

[31] *Id.* at 534–35. The opinion also stated that the child is not the sole responsibility of the state when it recognized that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

[32] Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

[33] *Id.*

[34] *See id.* at 210–11, 234.

[35] *Id.* at 210.

[36] *Id.* at 210–11 ("[The Amish] object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to 'worldly' influences in conflict with their beliefs.").

[37] The parents in this case utilized experts on the Amish community and the Amish method of education. *See id.* at 212–13. These experts testified about how

mal education and the preferred Amish education, and acknowledged that discarding this preference would be destructive to the Amish way of life.[38] Relying on the *Meyer* and *Pierce* precedents, the Court found that a state's interest in passing such an education law, although legitimate, "is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to their religious upbringing of their children."[39]

Of course, this decision once again reaffirmed the Fourteenth Amendment's guarantee of a parent's right to parent their children,[40] but this decision also relied on the religious rights of parents and children alike.[41] Similarly, the Court's decision in *Meyer* rested on the right of the teacher to teach, in addition to the Fourteenth Amendment's right to privacy.[42] Therefore, these Supreme Court decisions suggest that the right to parent may not be as strong or as broad as recent trends in Florida's legislation seem to imply because the right to parent was being bolstered by other fundamental rights in these decisions.[43]

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normal American education would negatively impact the survival of Amish communities, and how Amish children, despite a lack of formal education, still become functioning members of society. *Id.*

[38] *Yoder*, 406 U.S. at 210–12.

[39] *Id.* at 214.

[40] *See id.*

[41] *Id.* at 233 (commenting that "the interests of parenthood are combined with a free exercise claim of the nature revealed by this record . . . ."). The Court also took the view that the children's interests were not at odds with those of the parents in this case by alluding to the fact that the Court's current holding would not apply to a proceeding where it was alleged that "Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary." *Id.* at 231.

[42] Meyer v. Nebraska, 262 U.S. 390, 401 (1923).

[43] *See* Hamilton, *supra* note 19, at 1086 (2010) (explaining that the right of parents to have a say in their children's upbringing is "weaker than the court's rhetoric suggests" because the only time the right has prevailed in modern times was in *Wisconsin v. Yoder*, where the right was combined with a First Amendment claim).

B. *The Right to Have an Abortion*

Like the right of parents to have a say in their child's upbringing, the right to have an abortion flows from the same *Lochner* Era substantive due process rights.[44] The doctrine at the heart of the once-fundamental right to have an abortion began with *Griswold v. Connecticut*, where the Supreme Court struck down a Connecticut law that fined or imprisoned anyone who "use[d] any drug, medicinal article or instrument for the purpose of preventing conception"[45] and those who aided or abetted in the above medical treatments.[46] In this case, the executive director and lead physician of the Connecticut Planned Parenthood were prosecuted under this Connecticut law for giving medical advice to married persons who wanted to prevent conception.[47] Despite rejecting the invitation to use *Lochner* as the guide to its decision,[48] the Court did in fact rely on *Pierce* and *Meyer* to reach its decision in this case.[49] The Court reasoned that although the right to educate one's child is not directly mentioned in the Constitution, the right was protected because "without the peripheral rights [acknowledged in *Pierce* and *Meyer*,] the specific rights would be less secure."[50] Reasoning by analogy, the Court found that the association of people, specifically "the intimate relation of [a] husband and wife,"[51] although not explicitly mentioned in the Constitution, was protected through the penumbras of the Constitution because the marital relationship is one that "l[ies] within the zone of privacy created by several fundamental constitutional guarantees."[52]

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[44] *See* Wolf, *supra* note 13, at 108–10, 112 (explaining that the *Lochner* Era cases that created the fundamental rights doctrine laid the foundation for the "fundamental rights revolution," which took hold as the "buzzword" for cases like *Griswold v. Connecticut*, *Loving v. Virginia*, and *Roe v. Wade*).

[45] Griswold v. Connecticut, 381 U.S. 479, 480 (1965).

[46] *Id.*

[47] *Id.*

[48] *Id.* at 481–82.

[49] Although the Court did not rely on the *Lochner* case itself, it relied on cases from the *Lochner* Era, which had the same ideological underpinnings and views on substantive due process. *See id.*

[50] *Id.* at 482–83.

[51] *Griswold,* 381 U.S. at 482.

[52] *Id.* at 485.

Thus, with this case, the Court reformulated the foundation of these due process rights.[53] Now, the right of parents to have a say in their child's upbringing, divorced from its *Lochner* terminology, was seen as a right that was peripheral to the First Amendment because the laws at issue in *Meyer* and *Pierce* attempted to "contract the spectrum of available knowledge,"[54] which is a corollary of the right to free speech.

Based on this reworked ideology, the Supreme Court went on to decide *Roe v. Wade* on right to privacy grounds as well.[55] Despite not deciding exactly which amendment the right to have an abortion was a penumbra of,[56] the Court nevertheless held that the right to privacy "is broad enough to encompass a woman's decision [as to] whether or not to terminate her pregnancy."[57] After deciding that the right to have an abortion was a federally protected right, the Court went on to establish a trimester-based framework, which outlined the timing and degree to which a state could intrude into this zone

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[53] The term "reformulate" is used because, as mentioned above, although the Court rejected an invitation to directly rely on *Lochner*, by relying on *Meyer* and *Pierce*, which are *Lochner* Era cases, the Court did in fact indirectly rely on *Lochner*. *See id.* at 481–82. The reformulation was still based on the recognition of unenumerated rights. *Id.* at 482 ("The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights."). By tying this parental right to another constitutional right (the First Amendment) it adds strength to the argument that these parental rights, on their own, are not as strong as some suggest. *See* Hamilton, *supra* note 19, at 1086.

[54] *Griswold*, 381 U.S. at 482–83.

[55] Roe v. Wade, 410 U.S. 113, 152–53 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) ("[These decisions] also make it clear that the right [to privacy] has some extension to activities relating to marriage, *Loving v. Virginia*, . . . contraception, *Eisenstadt v. Baird*, . . . and child rearing and education, *Pierce v. Society of Sisters*, . . . *Meyer v. Nebraska* . . . .").

[56] The plaintiff herself argued that there was a violation of her Fourth, Fifth, Ninth, and Fourteenth Amendment rights, and the Court ultimately stated that "whether [the right to privacy] be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, [the right] is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 120, 153.

[57] *Id.* at 153.

of privacy.[58] Because the Texas abortion law at issue did not respect these standards, it was deemed unconstitutional for its violation of the Due Process Clause of the Fourteenth Amendment.[59]

Twenty years later, the right to have an abortion took its first big hit in *Planned Parenthood v. Casey*, where the Supreme Court replaced the trimester framework with an undue burden test.[60] Despite reaffirming *Roe*'s "essential holding" that the right to have an abortion is a fundamental constitutional right,[61] the Court scrapped *Roe*'s trimester framework.[62] By deconstructing the trimester framework and replacing it with the undue burden test,[63] the Court implicitly created a stronger foothold for the state's "legitimate interests in the health of the woman and in protecting the potential life within her."[64] This stronger foothold can be seen in the Court's application of the undue burden test, where out of the several provisions being

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[58] The trimester framework was as follows:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgement of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life may, it if chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgement, for the preservation of the life or health of the mother.

Id. at 164–65.

[59] *Id.* at 165–66.

[60] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[61] *Id.* at 846, 873 ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment.").

[62] *Id.* at 873.

[63] *Id.* at 877 ("[The] undue burden [test] is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."). The Court considers an undue burden an "unconstitutional burden." *Id.*

[64] *Id.* at 871.

challenged, the Court only struck down a spousal notification requirement.[65] Conversely, under the newly fashioned undue burden test, the Court upheld the medical emergency provision,[66] the twenty-four-hour waiting period provision,[67] the informed consent provision,[68] and the minor parental consent provision.[69]

Another twenty years after *Casey*, the Supreme Court in *Whole Woman's Health v. Hellerstedt* struck down two provisions of a Texas abortion law under the undue burden test.[70] The first provision at issue in this case was dubbed the "admitting privileges requirement,"[71] and required that a doctor performing an abortion have admitting privileges at a hospital within thirty miles from where the abortion was being performed.[72] The second provision at

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[65] *Id.* at 898. The Supreme Court agreed with the lower court's findings, backed by medical research, that because many women may not have healthy marriages, but rather may be in marriages plagued by domestic assault, where they fear for their own safety, "[t]he spousal notification requirement is [] likely to prevent a significant number of women from obtaining an abortion." *Id.* at 892–94.

[66] *Casey*, 505 U.S. at 879. The petitioners argued that the medical emergency definition used in the Pennsylvania statute was too narrowly defined and would exclude "the possibility of an immediate abortion despite some significant health risks," but the Court deferred to the interpretation given to the statute by the lower court. *Id.* at 880.

[67] *Id.* at 885. Despite the fact that the lower court found that the twenty-four hour wait provision would pose serious hardships to women who had to travel far distances, would create increased exposure to harassment, and ultimately would be "particularly burdensome" to those "who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others," the Supreme Court found that while the findings were "troubling in some respects, [] they do not demonstrate that the waiting period constitutes an undue burden." *Id.* at 885–86.

[68] *Id.* at 883 ("[R]equiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion.").

[69] *Id.* at 899 ("Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure.").

[70] Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 627 (2016), *abrogated by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[71] *Id.* at 590.

[72] *Id.*

issue was the "surgical-center requirement,"[73] which required that abortion centers employed baseline standards that were "equivalent to the minimum standards adopted . . . for ambulatory surgical centers."[74] The Court found that the first provision did not further any "legitimate interest in protecting women's health,"[75] it did create an undue burden for women in their attempt to seek an abortion,[76] and it did not make abortion in Texas any safer than it already was.[77] As to the second provision, the Court held that the law "provide[d] few, if any, health benefits for women, pose[d] a substantial obstacle to women seeking abortions, and constitute[d] an 'undue burden' on their constitutional right to do so."[78] Even though the undue burden test still protected the fundamental right to have an abortion, and, as evidenced by this case, was applied by the Court to find some provisions unconstitutional, any standard less than strict scrutiny was seen as a step in the wrong direction by pro-choice supporters.[79]

Although the constitutional test applied to scrutinizing state abortion laws may have changed from *Roe* to *Casey*, for nearly fifty years the Court nevertheless recognized abortion as a fundamental right guaranteed to all United States citizens and those within the country's borders.[80] Then, in one fell swoop, the Supreme Court undid a half of a century worth of abortion precedent[81] and returned the issue of abortion to state legislatures.[82] The Court came to this

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[73] *Id.* at 591.

[74] *Id.*

[75] *Id.* at 611.

[76] *Hellerstedt*, 579 U.S. at 612.

[77] *Id.* at 610.

[78] *Id.* at 624.

[79] Mary Ziegler, *Liberty and the Politics of Balance: The Undue-Burden Test After* Casey/Hellerstedt, 52 HARV. C.R.-C.L. L. REV. 421, 437 (2017).

[80] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) ("We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment.").

[81] *Id.* ("That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.' The right to abortion does not fall within this category.") (citations omitted).

[82] The Court asserts that it has drawn a sharp distinction between the right to have an abortion and other rights protected by the right to privacy by stating that

decision through its own historical analysis of the right to have an abortion[83] and a disavowal of any *stare decisis* rationale that may have counseled against overturning *Roe*.[84] Although the historical analysis employed by the Court has been widely criticized[85] as

"the abortion right is [] critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of 'liberty.'" *Id.* at 231–32. According to the Court, this "critical[] difference" arises from the supposed moral question involved. *Id.* at 231. This somewhat capricious distinction may pose issues for other privacy rights. *See* Hutchinson, *supra* note 5, at 408–09.

[83] *Dobbs*, 597 U.S. at 241–55. The Court has sometimes accepted a historical analysis as support for or against the continuance of a particular right, but "relying on tradition often legitimizes and perpetuates prior discrimination" and "contravenes the purposes of the Fourteenth Amendment." Wolf, *supra* note 13, at 102–03. Additionally, the substantive due process analysis has never required the Court to find a completely uncontradicted legal history in order to support the legality or illegality of a right—in fact, "the Court currently recognizes several fundamental rights that historically were heavily regulated, criminalized, or unavailable to large demographic groups," such as parental rights, the right to contraceptives, and interracial and same-sex marriage, amongst others. Hutchinson, *supra* note 5, at 399–401.

[84] *Dobbs*, 597 U.S. at 231 ("*Stare decisis*, the doctrine on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority.").

[85] *See, e.g.*, Women of WIT, *An Historian's Reaction to* Dobbs v. Jackson Women's Health Organization, WOMEN IN THEOLOGY (July 18, 2022), https://womenintheology.org/2022/07/18/an-historians-reaction-to-dobbs-v-jackson-womens-health-organization/ ("To my eye, as a piece of historical analysis *Dobbs* is weak. Its reasoning is circular and lacks contextualization, and its chronology is poor. That's not to say it doesn't make some defensible points, but its historical arguments are not among them.").

weak[86] and overly stringent, as a Supreme Court decision, it remains the law of the land.[87]

II. THE BEGINNING OF FLORIDA'S RIGHT TO PRIVACY

As the previous section demonstrated, the Federal Constitution secured both the right to have an abortion and the right to have a say in one's child's upbringing until recently.[88] And as the Supreme Court in *Griswold* recognized, the right to privacy is "older than the Bill of Rights—older than our political parties, [and] older than our school system."[89] With this federal minimum in mind, states like

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[86] Another interesting point about the historical analysis performed by the Court in *Dobbs* is that clearly history had not changed from *Roe* to *Dobbs*; yet, the Court still came to a different conclusion based on the same history. Roe v. Wade, 410 U.S. 113, 130–151 (1973), *overruled by Dobbs*, 597 U.S. at 250. Further, the historical analysis done in "*Roe* involved the most extensive analysis of tradition of any fundamental rights opinion—and possibly the most exhaustive historical analysis in American jurisprudence." Wolf, *supra* note 13, at 131. Moreover, the Court in *Dobbs* borrowed the deeply rooted historical analysis from *Washington v. Glucksberg*, 521 U.S. 702, 705–06 (1997), where the right at issue was assisted suicide. In comparison to assisted suicide, abortion has a much more complicated history because assisted suicide had been completely banned by the states until it was legalized in 1994 in Oregon, meaning there truly was an uninterrupted history of criminalization of assisted suicide. *See id.* at 706–07, 717. Comparatively, abortion was only partially illegal and experienced periods of liberalization. *See* Hutchinson, *supra* note 5, at 393–94.

[87] *See History, the Supreme Court, and* Dobbs v. Jackson*: Joint Statement from the AHA and the OHA*, AM. HIST. ASS'N. (July 6, 2002), https://www.historians.org/news/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah/ ("[T]he court adopted a flawed interpretation of abortion criminalization that has been pressed by anti-abortion advocates for more than 30 years" and "inadequately represents the history of the common law, the significance of quickening in state law and practice in the United States, and the 19th-century forces that turned early abortion into a crime."); *see also* Hutchinson, *supra* note 5, at 392 ("Many scholars have argued that *Glucksberg* represents a more conservative application of precedent . . . .").

[88] *See* discussion *supra* Sections I.A, I.B.

[89] Griswold v. Connecticut, 381 U.S. 479, 486 (1965). This fact bolsters the required finding that the specific rights within the broader right to privacy are rooted in our nation's tradition and history, and it supports the conclusion that the right to privacy should be protected as a fundamental right. *Id.* at 493 (Goldberg, J., concurring) ("In determining which rights are fundamental, judges . . . must look to 'the traditions and [collective] conscience of our people' to determine

Florida sought to provide a steadier foundation for the right to privacy for their citizens by amending its state constitution to include a textual basis for these rights.[90] Florida's privacy amendment states: "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."[91]

Although the specific rights within the "right to be let alone and free from governmental intrusion" were not expressly enumerated,[92] the particular language used in this amendment clearly draws on the language that the Supreme Court relied on in its articulation of what the right to privacy entails for United States citizens.[93] Beyond looking at this seemingly obvious contextual clue as to what this language could have meant, it is also common practice to look to what the public thought these terms meant at the time of ratification[94]—*i.e.*, what voters believed they were voting for when ratifying this constitutional amendment.[95] Because this amendment came only a few short years after *Roe*, "when there was widespread awareness"

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whether a principle is 'so rooted [there] as to be ranked as fundamental.'") (alterations in original) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))).

[90] FLA. CONST. art I, § 23.

[91] *Id.*

[92] *Id.*

[93] As early as *Eisenstadt v. Baird*, the Court recognized "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to beget a child." Eisenstadt v. Baird, 405 U.S. 438, 452 (1972). In Justice Stewart's concurrence in *Roe*, he added that right to be let alone "necessarily includes the right of a woman to decide whether or not to terminate her pregnancy." Roe v. Wade, 410 U.S. 113, 169–70 (1973) (Stewart, J., concurring). Additionally, based on common practice, when terms with "pre-existing legal meaning" were adopted elsewhere, it was understood to bring with it its specific meaning. James W. Fox, Jr., *A Historical and Originalist Defense of Abortion in Florida*, 75 RUTGERS L. REV. 393, 395 (2023).

[94] For both originalists and non-originalists, one tool to aid in interpretation is "to study how the language was or would have been understood by the public responsible for adopting the language." Fox, *supra* note 93, at 402. Additionally, the Supreme Court has also endorsed this method of interpretation. *See* District of Columbia v. Heller*,* 554 U.S. 570, 634–35 (2008) ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.").

[95] *Heller*, 554 U.S. at 634–35.

of the right to privacy encompassing the right to have an abortion,[96] it is reasonable to believe that this baseline understanding of what the right to privacy entailed was what Florida voters sought to secure for themselves.[97] In the same vein, because the right to direct one's child's upbringing was also a well-recognized right federally in 1980, Florida voters desired explicitly to secure this right for themselves as well.[98] The following sections will look more closely at both the common law and statutory treatment of both of these rights as they developed in Florida.

A. *The Right to Have a Say in One's Child's Upbringing Before Parental Privileging*

The right to have a say in one's child's upbringing has received little focus in terms of case law in Florida, and until recently, was not the center of much statutory attention either.[99] Thus, the historical analysis of parental rights in this section will concentrate mostly on the statutory development of this right. Specifically, there will be an emphasis on the right of a parent to have a say in their child's education because this area is where Florida has deployed parental rights most heavily to effect substantive change.[100]

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[96] Fox, *supra* note 93, at 395 ("The express protection of the general right to privacy in section 23, coming as it did when there was a widespread awareness that the right was the basis for *Roe* and *Griswold v. Connecticut*, can only reasonably be read to encompass abortion rights.").

[97] *See* Shaman, *supra* note 12, at 987–88.

[98] *See id.*

[99] The first modern iteration of a parental right law in Florida came in 1970 with Sections 232.031 and 233.067 of the Florida Statutes, which were statutes that allowed parents to exempt their children from medical or physical examinations upon request and certain teachings based on religious conflicts. FLA. STAT. § 232.031(2) (1970); FLA. STAT § 232.067(6) (1970).

[100] Najahe Sherman, *Parental Rights Bill Has Brought Change, Fear to South Florida's Classrooms, Some Educators Say*, CBS NEWS (Aug. 24, 2023, 6:28 AM), https://www.cbsnews.com/miami/news/parental-rights-bill-has-brought-change-fear-to-south-florida-classrooms-some-educators-say/ ("Florida teachers are faced with new standards when it comes to what they are allowed to say and teach under the Parental Rights in Education bill, which is viewed by many educators as the catalyst for many of classroom changes.").

Fifty years ago, Florida did not recognize the sweeping parental rights it touts today.[101] From 1970–1976, a few provisions relating to the rights of parents were codified in the law.[102] The provisions that were codified included exempting one's child from immunizations[103] or certain teachings,[104] obtaining one's child's school records,[105] and purchasing one's child's instructional material.[106] Beginning in 1977, Florida reorganized and expanded some of its education provisions, yet still nothing much more substantive was added to the rights of parents.[107] In fact, up until 2001, all that parents were entitled to, beyond exempting their children from immunizations or certain learning lessons, was the right to look at their child's school records.[108] In 2002, the education chapter was transferred to Chapters 1000–1013, but parental rights regarding their child's education were still mostly limited to rights relating to exemptions and access to records.[109]

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[101] *See* FLA. STAT. § 232.031(2) (1970); FLA. STAT. § 233.067(6) (1970) (both codifying only minimal rights for parents to be able to exempt children from immunizations or certain lessons).

[102] *See, e.g.*, FLA. STAT. § 232.031(2) (1970); FLA. STAT. § 233.067(6) (1970).

[103] FLA. STAT. § 232.032(3)(a) (1971) ("The parent or guardian of the child [may] object[] in writing that the administration of immunizing agents conflicts with his religious tenets or practices . . . .").

[104] FLA. STAT. § 233.061 (1975) ("That any child whose parent shall present to the school principal a signed statement that the teaching of disease, its symptoms, development, and treatment . . . conflict with the religious teachings of their church, shall be exempt from such instruction . . . .").

[105] FLA. STAT. § 232.23(1) (1973) ("The cumulative record shall be open to inspection only by the school board, the superintendent, the professional staff of the school, the parent or guardian of the pupil, a court of competent jurisdiction, and to such other persons as the parent, guardian, or principal may authorize in writing.").

[106] FLA. STAT. § 233.21 (1973) ("Nothing in this chapter shall be construed to prohibit parents, guardians, or other persons from purchasing from the publishers textbooks adopted by the state under the provisions of the school code.").

[107] FLA. STAT. § 228.093(3)(a)(2) (1977) ("Such parent . . . shall have the right, upon request, to be shown any record or report relating to such pupil or student maintained by any public educational institution.").

[108] The same Section 228.093 of the Florida Statutes remained in force through 2001. *See* FLA. STAT. § 228.0933(a)(1)–(2) (2001).

[109] FLA. STAT. § 1002.22(1) (2002) ("The intent of the Legislature is that students and their parents shall have rights of access, rights of challenge, and rights of privacy with respect to such records and reports, and that rules shall be available for the exercise of these rights.").

Most importantly, prior to 2014, public school boards had no obligation to create any sort of procedure for notice or opportunity for parental objection to the instructional materials a school planned on offering.[110] In 2014, though, parental rights in Florida experienced a substantive expansion when Section 1006.28(1)(a)(2) of the Florida Statutes required district school boards to "adopt a policy regarding a parent's objection to his or her child's use of a specific instructional material."[111] Additionally, public school boards were obligated to "establish a process by which the parent of a public school student may contest the district school board's adoption of a specific instructional material" under this section.[112]

In 2017, the Florida legislature modified this instructional material provision further.[113] This new alteration extended the right to object to the adoption of material beyond parents of current school-aged children to residents of the county.[114] This change, of course, did not directly enlarge the right of parents to direct their child's upbringing, but this adjustment, coupled with the other gradual changes these parental rights experienced since the mid-1900's, signaled the direction in which the legislature was going with these rights.

B. *Abortion Pre-Dobbs*

In 1989, just a few years after the right to privacy was added to the Florida Constitution, the Florida Supreme Court was tasked with interpreting the newly minted amendment in *In re T.W.*, where a minor child sought an abortion via Florida's judicial bypass procedure.[115] While analyzing this constitutional amendment, the Florida

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[110] The only obligation the school board had was to provide "adequate instructional materials" to their students—an obligation to their students, not to the parents. *See* FLA. STAT. § 1006.28(1) (2013).

[111] FLA. STAT. § 1006.28(1)(a)(2) (2014).

[112] FLA. STAT. § 1006.28(1)(a)(3) (2014). This language is broader than subsection (1)(a)(2) because it extends beyond what one's child has access to and only refers to the general adoption of instructional material. *See id.*

[113] FLA. STAT. § 1006.28(2)(a)(2) (2017).

[114] *Id.*

[115] *In re* T.W., 551 So. 2d 1186, 1188–89 (Fla. 1989) ("Prior to undergoing an abortion, a minor must obtain parental consent or, alternatively, must convince a court that she is sufficiently mature to make the decision herself or that, if she is

Supreme Court noted that Florida citizens "opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution."[116] More importantly, though, the court recognized the following:

> Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.[117]

The Florida Supreme Court also expressly held that Florida's privacy amendment encompassed a woman's decision to get an abortion.[118] As such, the court struck down the parental consent law at issue as an unconstitutional violation of a woman's privacy interests because the court could "conceive of few more personal or private decisions concerning one's body that one can make in the course of a lifetime, except perhaps the decision of the terminally ill in their choice of whether to discontinue necessary medical treatment."[119] In reaching this decision, the court applied the compelling state interest standard to the parental consent provision that was at odds with the right to have an abortion.[120]

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immature, the abortion nevertheless is in her best interests."), *receded from by* Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So. 3d 67, 88 (Fla. 2024).

[116] *Id.* at 1191 (quoting Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985)).

[117] *Id.* at 1191–92 (quoting *Winfield*, 477 So. 2d at 548).

[118] *Id.* at 1192 ("Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy.").

[119] *Id.* The court also found that the challenged statute was unconstitutional under Florida law because it not only "intrude[d] upon the privacy of the pregnant minor from conception to birth," but it also was not "the least intrusive means of furthering the state interest." *Id.* at 1194–96.

[120] The compelling interest standard, also known as the strict scrutiny test, places the burden of proof on the state to demonstrate that the "challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *Id.* at 1192 (quoting *Winfield*, 477 So. 2d at 544). In applying the compelling interest test, the court recognized the right to privacy as a fundamental right, and, in applying it to the decision to have an abortion, the

The next major Florida Supreme Court case to deal with the right to have an abortion was *North Florida Women's Health & Counseling Services, Inc. v. State*.[121] This case confronted a parental notification provision similar to the one at issue in *In re T.W.*, and here, too, the court remained steadfast in its view on the right to have an abortion despite the State's request for the court to overrule *In re T.W.*[122] Instead, the court reaffirmed *In re T.W.* in its entirety and once again used a strict scrutiny test to protect the fundamental right to have an abortion.[123]

In 2017, the Florida Supreme Court again upheld the analysis and holding of *In re T.W.* in *Gainesville Woman Care, LLC v. State*, where the court was faced with a Florida law that imposed a twenty-four-hour wait time on women who sought an abortion.[124] Because this mandatory delay provision squarely implicated Florida's constitutional right to privacy,[125] and because the State failed to present evidence to demonstrate how the law furthered a compelling gov-

court deemed the right to have an abortion just as fundamental as any other privacy right that would fall within the purview of Florida's constitutional amendment. *See id.*

[121] N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612 (Fla. 2003), *receded from by* Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So. 3d 67, 88 (Fla. 2024).

[122] *Id.* at 615–16 ("The State, on the other hand, contends that this case is not controlled by *T.W.*, or alternatively, that this Court should recede from *T.W.*").

[123] Before reaching its final determination, the Florida Supreme Court noted that although cases like these may involve moral questions, the court cannot be swayed to decide cases like these on emotional grounds; rather, the only legal question for the court to decide was whether the trial court erred in its application of the precedent set forth in *In re T.W*. *Id.* at 639–40. Based on that question alone, the court upheld the trial court's decision based on its application of the Florida right to privacy clause. *Id.*

[124] Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1245 (Fla. 2017), *receded from by Planned Parenthood of Sw. & Cent. Fla.*, 384 So. 3d at 88.

[125] *Id.* ("In Florida, any law that implicates the fundamental right of privacy, regardless of the activity, is subject to strict scrutiny and, therefore, presumptively unconstitutional.").

ernmental interest, the court deemed the provision unconstitutional.[126] The court also went on to "make clear,"[127] for the third time now, that any law that challenged the right to have an abortion, just like any other right that is protected under Florida's constitutional right to privacy, must pass a strict scrutiny standard because the right to have an abortion is a fundamental right in Florida.[128]

While the Florida Supreme Court consistently upheld the right to have an abortion as a fundamental right pre-*Dobbs*,[129] the Florida legislature took a somewhat different path.[130] In 1868, Florida enacted its first homicide law that directly addressed abortion,[131] which remained in place for nearly 100 years.[132] As early as 1949, Florida also had a separate statutory provision for punishments related to performing an abortion.[133] Later, in 1972, both abortion-related statutes were repealed.[134] For the next several years, only the advertisement and distribution of drugs for abortion or any fatal injury to an unborn child via injury to a mother were criminalized under Section 797.02[135] and Section 782.09 of the Florida Statutes, respectively.[136]

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[126] *Id.* at 1265 ("In this case, the State failed to present any evidence that the Mandatory Delay Law serves any compelling State interest, much less through the least restrictive means, and, therefore, the trial court correctly concluded that there is a substantial likelihood that the Mandatory Delay Law is unconstitutional.").

[127] *Id.*

[128] *Id.*

[129] *See, e.g.*, *id.*

[130] *See* discussion *infra* Section II.B.

[131] *See* C. Ken. Bishop, *The Florida Abortion Law—Reform or Regression in 1972?*, 24 FLA. L. REV. 346, 346 (1972) (citations omitted).

[132] *See id.*

[133] FLA. STAT. § 797.01 (1949) ("Whoever with intent to procure miscarriage of any woman unlawfully administers to her, or advises or prescribes for her, any poison, drug, medicine . . . shall . . . be punished by imprisonment in the state prison not exceeding seven years, or by fine not exceeding one thousand dollars.").

[134] FLA. STAT. §§ 782.10, 797.01 (1972) ("Repealed by § 9, ch. 72-196.").

[135] FLA. STAT. § 797.02 (1973).

[136] FLA. STAT. § 782.09 (1973) ("Killing of unborn child by injury to mother.—The willful killing of an unborn quick child, by an injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed manslaughter, a felony of the second degree, punishable as provided . . . .").

Just before the Supreme Court decided *Roe*, the legislature reinstated an updated version of Chapter 797,[137] and added Chapter 390, "Termination of Pregnancies," to the Florida Statutes.[138] Although this abortion statute underwent minimal changes over the last fifty years,[139] the main prohibition of this statute—no termination of pregnancies in *the third trimester* except in limited circumstances—remained unchanged through 2021.[140]

Obviously, the most relevant change to Florida's legal landscape was the privacy amendment. On Tuesday, November 4, 1980, Florida voters had the opportunity to vote on this constitutional amendment.[141] At the time this constitutional amendment was voted into Florida's constitution, three other states had similar provisions, which has since expanded to eleven.[142] Now, and even in 1980 though, no other state employed as expansive language as Florida.[143]

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[137] This reinstated chapter defined several prohibited acts, such as making it unlawful for "any person to perform or assist in performing an abortion on a person, except in an emergency care situation, other than in a validly licensed hospital or abortion clinic or in a physician's office . . . [or] in the third trimester other than in a hospital." FLA. STAT. § 797.03(1), (3) (1979). It also made it unlawful for "any person or public body to establish, conduct, manage, or operate an abortion clinic without a valid current license." *Id.* The penalty for such violation was a second-degree misdemeanor. *Id.*

[138] FLA. STAT. § 390.001–.025 (1979).

[139] For example, in Section 390.001 of the Florida Statutes the language read: "termination in last trimester." FLA. STAT. § 390.001(2) (1987). Comparatively, the 2021 version of the same section of the Florida Statutes read: "termination in third trimester." FLA. STAT. § 390.0111(1) (2021).

[140] FLA. STAT. § 390.0111(1) (2021) ("No termination of pregnancy shall be performed on any human being in the third trimester of pregnancy unless one of the following conditions is met . . . .").

[141] *See, e.g.*, CITRUS CTY., FLA., SAMPLE BALLOT: OFFICIAL BALLOT GENERAL ELECTION (1980), https://www.votecitrus.gov/portals/citrus/documents/SampleBallots/1980/1980_general__114__sample_ballot.pdf.

[142] Kathryn Varn, *Florida Has A Unique Right Protecting Abortion. Its Framers Designed It That Way.*, TALLAHASSEE DEMOCRAT (June 8, 2022, 11:32 AM), https://www.tallahassee.com/story/news/local/state/2022/06/08/can-florida-privacy-law-protect-abortion-rights-roe-v-wade/7536003001/.

[143] *Id.*; *see* Adam Richardson, *The Originalist Case for Why the Florida Constitution's Right of Privacy Protects the Right to an Abortion*, 53 STET. L. REV. 101, 103 (2023) ("Section 23 created a very broad right of privacy."); Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 2003) ("The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution.").

This statutory history illustrates that Florida's abortion laws were nothing remarkable and faced only a few minor changes since their inception.[144] Of course, with the overturning of *Roe* with *Dobbs*, the Florida legislature has now driven Florida's abortion laws to the extreme,[145] despite the Florida Supreme Court's repeated recognition[146] of Florida's distinct right to privacy that emanates from its own constitution—separate from and broader than any federally recognized right.[147]

III. A CLOSER LOOK: FLORIDA'S CURRENT STATUTES AND A CLEAR CONTRADICTION TO PROMOTE THE STATE'S AGENDA

The right to direct one's child's upbringing and the right to have an abortion are simply two offshoots of the right to privacy.[148] These rights have the same origin federally,[149] and, up until recently, were protected under the same amendment in Florida as well.[150] Moreover, under Florida law, at least initially, nothing was out of the ordinary about how these respective rights were treated.[151] Now, however, Florida has been treating these rights disparately.[152]

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144 *See* discussion *supra* Sections II.A, II.B.

145 *See generally* FLA. STAT. § 390.0111 (2024).

146 The Florida Supreme Court's recent decision in *Planned Parenthood of Southwest & Central Florida* will be addressed later on in this Note because this case is part of the analysis of how the Republican political agenda has pervaded even the Florida Supreme Court and because this case was a post-*Dobbs* decision. *See* discussion *infra* Sections III.A, III.B. But this decision does not change the fact that, for several years and on several separate occasions, the Florida Supreme Court reaffirmed its recognition of the right to have an abortion within Florida's privacy amendment before *Dobbs* was decided. *See* discussion *supra* Section II.B.

147 Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1253 (Fla. 2017) ("Thus, while the Federal Constitution, at the very least, requires the recognition and protection of an implicit right of privacy, Florida voters have clearly opted for a broader, explicit protection of their right of privacy.").

148 *See* discussion *supra* Sections I.A, I.B.

149 *See* discussion *supra* Sections I.A, I.B.

150 *See* discussion *supra* Sections II.A, II.B; Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So. 3d 67, 71 (Fla. 2024).

151 *See* discussion *supra* Sections II.A, II.B.

152 *See* discussion *infra* Sections III.A, III.B.

A. *Florida's Current Path Forward: The Non-Existent Right to Have an Abortion and Florida's Parental Privileging Statutes*

Within the last three years, the Florida legislature has made significant changes to its abortion[153] and education statutes—changes that have not advanced these rights in the same direction.[154] On the one hand, the right to have an abortion in Florida went from being permitted up until the third trimester in 2021,[155] to being restricted beyond a gestational period of fifteen weeks in 2022,[156] to now being restricted beyond a gestational age of just six weeks[157] because

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[153] *See* FLA. STAT. § 390.0111 (2022).

[154] *See* Caroline Mala Corbin, *The Pledge of Allegiance and Compelled Speech Revisited: Requiring Parental Consent*, 97 IND. L. J. 967, 974 (2022) (explaining that Florida's parental permission laws advance the parent's rights to have a say in their child's upbringing); *cf*. FLA. STAT. §§ 1014.01–.06 (2021) (detailing Florida's parental bill of rights).

[155] FLA. STAT. § 390.0111 (2021) ("No termination of pregnancy shall be performed on any human being in the third trimester of pregnancy unless one of the following conditions is met . . . .").

[156] FLA. STAT. § 390.0111 (2022) ("A physician may not perform a termination of pregnancy if the physician determines the gestational age of the fetus is more than 15 weeks unless one of the following conditions is met . . . .").

[157] The statute at issue in *Planned Parenthood of Southwest & Central Florida* was the 2023 abortion statute, which provided that:

> [T]his act shall take effect 30 days after any of the following occurs: a decision by the Florida Supreme Court holding that the right to privacy enshrined in s. 23, Article I of the State Constitution does not include a right to abortion; a decision by the Florida Supreme Court in *Planned Parenthood v. St*ate, SC2022-1050, that allows the prohibition on abortions after 15 weeks in s. 390.0111(1), Florida Statutes, to remain in effect, including a decision approving, in whole or in part, the First District Court of Appeal's decision under review or a decision discharging jurisdiction; an amendment to the State Constitution clarifying that s. 23, Article I of the State Constitution does not include a right to abortion; or a decision from the Florida Supreme Court after March 7, 2023, receding, in whole or in part, from *In re T.W.,* 551 So. 2d 1186 (Fla. 1989), *North Fla. Women's Health v. State*, 866 So. 2d 612 (Fla. 2003), or *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243 (Fla. 2017).

FLA. STAT. § 390.0111 n.1 (2023). The 2024 abortion statute does indeed incorporate this change. FLA. STAT. § 390.0111(1) (2024).

of the recently decided Florida Supreme Court case that was resolved in the State's favor.[158] Considering that the right to privacy has been enshrined in the Florida Constitution for forty-four years now,[159] that the abortion precedent set by the Florida Supreme Court was consistently upheld from 1989–2024,[160] and that the abortion statute in Florida has remained relatively unchanged since around the same time,[161] there seems to be no legal grounds for Florida to suddenly take a different path forward. The only legal change that has taken place was *Dobbs*, but this decision did not declare abortions illegal.[162] Rather, this decision merely returned the decision over whether there should be a right to have an abortion to the states.[163] But even without this prompting, Floridians had already decided that its state constitution should recognize the right to have an abortion as a subset of the right to privacy.[164] That is, of course, up until the Florida Supreme Court, post-*Dobbs*, receded from this recognition and retroactively decided that Floridians did not intend to make such a decision.[165]

On the other hand, the right to direct one's child's upbringing has faced a substantive enlargement.[166] In 2021, Florida added Title XLIX, "Parental Rights," for the express purpose of further codifying the rights of parents to "direct the upbringing, education, and

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158 Marissa Parra et al., *Florida's 6-Week Abortion Ban Takes Effect, Cutting Off Access in Much of the South*, NBC NEWS (May 1, 2024, 4:30 AM), https://www.nbcnews.com/health/health-news/florida-ban-abortions-6-weeks-takes-effect-rcna150018.

159 FLA. CONST. art I, § 23.

160 *See In re* T.W., 551 So. 2d 1186, 1191–92 (Fla. 1989).

161 *See* FLA. STAT. § 797.03 (1979).

162 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022) ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.").

163 *See id.*

164 *See In re T.W.*, 551 So. 2d at 1192 ("Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy.").

165 Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So. 3d 67, 86 (Fla. 2024).

166 *See* FLA. STAT. § 1014.02(1) (2021).

care for their minor children."[167] In addition to adding this entire new chapter with a specific enumeration of what these parental rights consist of,[168] Chapter 1014, in its current state, also includes an express prohibition against infringing on these parental rights,[169] along with a provision supplementing a public school district's responsibility to parents.[170] Further, the corresponding district school board's duties section in Chapter 1006 was altered to give parents more authority over the materials used to teach their children.[171] Not only does this updated section provide a process for parents to object to the materials their children may have access to,[172] but the statute also allows parents to object to materials used in any manner

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[167] The legislature explains that the purpose of the statute is as follows:

> The Legislature finds that it is a fundamental right of parents to direct the upbringing, education, and care of their minor children. The Legislature further finds that important information relating to a minor child should not be withheld, either inadvertently or purposefully, from his or her parent, including information relating to the minor child's health, well-being, and education, while the minor child is in the custody of the school district. The Legislature further finds it is necessary to establish a consistent mechanism for parents to be notified of information relating to the health and well-being of their minor children.

Id.

[168] The enumerated rights of a parent under this section include, but are "not limited to . . . the right to direct the education and care of his or her minor child . . . [t]he right to direct the upbringing and the moral or religious training of his or her minor child," and the right to educate one's child in a variety of educational formats like private school or home school. FLA. STAT. § 1014.04(1)(a)–(j) (2024).

[169] FLA. STAT. § 1014.03 (2024) ("The state . . . may not infringe on the fundamental rights of a parent to direct the upbringing, education . . . of his or her minor child . . . .").

[170] Among the responsibilities that are listed in this section of the chapter are policies and procedures to allow parents to object to the implementation of instructional materials, to withdrawal their children from sex or health education, to learn about clubs and extracurricular activities, and to learn more about their parental rights. *See* FLA. STAT. § 1014.05(1)(a)–(b), (e) (2024).

[171] *See* FLA. STAT. § 1006.28(2)(a)(2) (2024).

[172] *Id.* ("Each district school board must adopt a policy regarding an objection by a parent or a resident of the county to the use of a specific material, which clearly describes a process to handle all objections and provides for resolution.").

throughout the school[173] on fairly broad grounds[174] and to have a special magistrate appointed to review a school board's determination should the parent disagree with the final outcome.[175]

B. *The Privacy Paradox*

The common law history and statutory development in Florida point to no clear indication as to why, rather suddenly, two offshoots of the same broader right are being treated completely differently and as if they were not derived from the same origin.[176] Legally, then, there is no justification that is "deeply rooted" in the State's history that would explain why parental rights have been expanded while abortion rights have been contracted.[177] Although it is true that directing one's child's upbringing has not been as hot of a topic as the right to have an abortion,[178] the right of a parent to have a say in

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[173] The materials parents are allowed to object to are "all instructional materials and any other materials used in a classroom, made available in a school or classroom library . . . ." FLA. STAT. § 1006.28(2)(a)(1) (2024).

[174] The statute allows parents to object on five different grounds:

> (1) "An instructional material . . . was not subject to the public notice, review, comment, and hearing procedures . . . ,"
> (2) "[i]s pornographic or prohibited under s. 847.012 . . . ,"
> (3) "[d]epicts or describes sexual conduct as defined in s. 847.001(19) . . . ,"
> (4) "[i]s not suited to student needs and their ability to comprehend the material presented," or
> (5) "[i]s inappropriate for the grade level and age group for which the material is used."

FLA. STAT. § 1006.28(2)(a)(2)(a)–(b) (2024).

[175] If a parent disagrees with the final determination, Section 1006.28(6) of the Florida Statutes provides that "a parent may request the Commissioner of Education to appoint a special magistrate who is a member of The Florida Bar in good standing and who has at least 5 years' experience in administrative law." FLA. STAT. § 1006.28(2)(a)(6) (2024). This special magistrate will then essentially review the record from the school district's determination and issue a "recommendation" to the State Board of Education. *Id.* Notice that there is no similar mechanism in this language for others to object to the determination of the school board if the issue did resolve in the objecting parent's favor, meaning another parent or child cannot use the same review standard to try to keep materials *on the shelves*. *Id.*

[176] *See* discussion *supra* Section III.A.

[177] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

[178] These rights have been consistently recognized since at least the early 1920s with *Meyer* and *Pierce*. *See* discussion *supra* Sections I.A, I.B. And by the

their child's upbringing has historically been only that—a right of parents over their own children—not a vehicle to have a say in the community's treatment of the children within.[179] For example, *Meyer*,[180] *Pierce*,[181] and *Yoder*[182] only furthered parents' interest in the way their own child was being educated and had never been treated as an unqualified right.[183] Yet, somehow, these rights have been broadened in Florida to the point that a parent of a student, and any individual in the community for that matter,[184] has the ability to control what other children may learn by challenging a school's instructional materials.[185]

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time *Yoder* was decided, it had been "established beyond debate as an enduring American tradition." Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

[179] *Yoder* expressly qualified the right of parents to have a say in their children's upbringing when such parental decisions would be adverse to the best interests of the child. *Yoder*, 406 U.S at 233 ("To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . .").

[180] *Meyer* recognized the right of a parent to be able to direct their child's upbringing by allowing their own child to learn a language other than English. Meyer v. Nebraska, 262 U.S. 390, 400 (1923). ("[T]he right of parents to engage him so to instruct *their* children . . . are within the liberty of the [Fourteenth] amendment.") (emphasis added).

[181] *Pierce* recognized the right of a parent to be able to send their children to private or parochial schools. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) ("[T]he liberty of parents and guardians to direct the upbringing and education of children under *their* control.") (emphasis added).

[182] *Yoder* recognized the right of a parent to be able to educate their children according to their religious beliefs. *Yoder*, 406 U.S. at 234 ("[T]he First and Fourteenth Amendments prevent the State from compelling respondents to cause *their* children to attend formal high school to age 16.") (emphasis added).

[183] *See id.* at 233; Corbin *supra* note 154, at 989; Elizabeth R. Kirk, *Parental Rights: In Search of Coherence*, 27 TEX. REV. L. & POL. 729, 735 (2023) ("Despite [*Dobbs*'s] description of parental authority as 'beyond debate' the Supreme Court has never undertaken such a comprehensive historical analysis of the origin and scope of parental rights.").

[184] FLA. STAT. § 1006.28(2)(a)(3) (2024) ("Each district school board must establish a process by which the parent of a public school student or a *resident of the county* may contest the district school board's adoption of a specific instructional material.") (emphasis added).

[185] Rachel Hatzipanagos, *After Florida Passes Bill, LGBTQ Parents Ask: Which Parents' Rights?*, WASH. POST (May 9, 2022, 6:00 AM), https://www.washingtonpost.com/nation/2022/05/09/lgbtq-parents-dont-say-gay/ (describing how, by privileging one set of parents' rights, the State completely ignores the rights of another group of parents).

In fact, the amalgamation of these new parental rights is what has led to the dramatic increase in book banning in Florida,[186] where books are being removed from school districts at an alarmingly high rate.[187] Further, while privileging parental rights expands the rights of parents, it simultaneously contracts the rights of their children.[188] Thus, by allowing parents and residents of the community to have such broad discretion over what children may learn, these expanded parental rights statutes minimize children's free speech rights.[189] This narrowing of the spectrum of information accessible to children not only hampers their ability to learn, but also impedes the development of a diverse range of ideas necessary for democracy.[190]

The right to have an abortion has similarly never been unqualified,[191] and certainly is a more politically charged topic,[192] but the restrictions that are currently being enforced in this State have historically never been as stringent as the Florida laws make them today.[193] While Florida is not the only state to enact stricter abortion laws,[194] Florida is unique in that it is one of the very few states to

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[186] *See* Martha M. McCarthy, *Challenged to and Restrictions on What is Taught in Schools: Changes Over Time and Implications of Recent Developments*, 413 ED. LAW REP. 521, 526–28 (2023).

[187] In the 2021–2022 school year alone, 565 books were banned in Florida. *See Florida Book Bans are No Hoax: Here Are the Facts*, PEN AMERICA (Mar. 10, 2023), https://pen.org/florida-book-bans-not-a-hoax/.

[188] Embedded in the American family law structure is the "parent-child-state triad." *See* Naomi Cahn, *The Political Language of Parental Rights: Abortion, Gender-Affirming Care, and Critical Race Theory*, 53 SETON HALL L. REV. 1443, 1445 (2023).

[189] Children's free speech rights can be legitimately curbed in the school setting, but only on a few grounds. *See* Corbin, *supra* note 154, at 976–79. Otherwise, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[190] *See* Jonathan David Shaub, Note, *Children's Freedom of Speech and Expressive Maturity*, 36 LAW & PSYCH. REV. 191, 197–203 (2012).

[191] *See* discussion *supra* Sections I.B, II.B.

[192] *See* Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1247 (Fla. 2017); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 233 (2022).

[193] *See* discussion *supra* Sections II.B, III.A.

[194] Several states including Indiana, West Virginia, and Alabama have enacted complete bans on abortion after conception. *See* Carter Sherman & Andrew Witherspoon, *Abortion Rights Across the US: We Track Where Laws Stand in Every*

have taken it upon itself to secure the right to privacy for its citizens in a manner that was more reliable than the prior federal counterpart,[195] which was only secured implicitly from the Fourteenth Amendment of the Constitution.[196]

Given the lack of legal foundation for the contrasting treatment of the right to have a say in one's child's upbringing and the right to have an abortion,[197] this disparity indicates that these Florida laws are being pushed for another reason altogether. The real motivation behind the Florida legislature's disparate treatment of these rights is a political agenda.[198] It is no secret that Florida has traditionally been a swing state with red-leaning tendencies and has had several Republican leaders.[199] But post-pandemic, or perhaps post-former

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State, GUARDIAN (Nov. 10, 2023, 3:55 PM), https://www.theguardian.com/us-news/ng-interactive/2023/nov/10/state-abortion-laws-us.

[195] *See* Mark Strasser, *Abortion and State Constitutional Guarantees: The Next Battleground*, 51 HOFSTRA L. REV. 231, 261 (2022) ("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.").

[196] Ironically enough, before *Dobbs* was decided, Florida seemed to be praised for its decision to amend its constitution to include a textual basis for the rights encapsulated in the then-understood right to privacy. *See* Gardner, *supra* note 13, at 1282 (explaining how "Florida has been dubbed 'a leader in the development of state privacy rights'" and how Florida's decision to secure abortion related privacy rights to its citizens via state constitutional law made it a part of minority of states to choose the method); Shaman, *supra* note 12, at 974–75 (describing Florida as one of five states who has provided a "fertile ground for the recognition of expansive privacy rights").

[197] *See* discussion *supra* Sections II A, II.B, III.A.

[198] *See* Benjamin Wallace-Wells, *The Political Strategy of Ron DeSantis's "Don't Say Gay" Bill*, NEW YORKER (June 28, 2022), https://www.newyorker-.com/news/the-political-scene/the-political-strategy-of- ron-desantiss-dont-say-gay-bill; Nicole Narea & Li Zhou, *A Guide to Ron DeSantis's Most Extreme Policies in Florida: DeSantis's Florida Bills Targeting LGBTQ People, Abortion Rights, and Teachings on Race Preview His Presidential Platform*, VOX (May 25, 2023, 6:00 AM EDT), https://www.vox.com/politics/2023/5/25/23736141/ron-desantis-2024-florida-legislature-policies.

[199] From Reconstruction to 1952, Florida voted mostly Democratic. *Florida*, 270TOWIN, https://www.270towin.com/states/Florida#:~:text=Very%20much%20a%20southern%20state,turning%20primarily%20Republican%20in%201952 (last visited Sept. 18, 2024). Of course, this voting pattern was when the then-Democratic party represented the ideals of the now-Republican party. *Id.* Since 1952, Florida has voted primarily Republican. *Id.*

President Trump,[200] Florida seems to have become the center of the reshaping of the Republican Party through its spearheading of several controversial conservative positions.[201] The epitome of the Florida legislature's true motivation is best captured by Governor Ron DeSantis's "Make America Florida" mantra.[202]

With this political landscape in mind, it becomes increasingly clear that these parental rights statutes are not really about giving parents more say over their children's upbringing, but rather, these statutes allow the State to do what it cannot do outright.[203] States cannot pass laws that, on their face, promote viewpoint discrimination by favoring one set of teachings over the other.[204] However, by creating such expansive parental rights statutes, like those currently enacted in Florida, the State has successfully employed "a Trojan horse" for preventing children from learning about topics like critical race theory, slavery, or LGBTQ+ views.[205] Thus, these parental

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[200] Not only has Florida become the "nerve center and idea laboratory for the Republican Party," but it also is home to both former President Trump and current Governor Ron DeSantis. *See* Arian Campo-Flores, et al., *How Florida Became America's GOP Hot Spot*, WALL ST. J. (Apr. 1, 2023, 12:01 AM), https://www.wsj.com/articles/florida-republican-state-trump-desantis-2b9b588. Florida has also experienced a "political shift" brought about in part by "demographic, ideological and economic changes that the Covid-19 pandemic catalyzed." *Id*.

[201] *See* Neil Vigdor, *What Bills Did DeSantis Sign as He Propelled Florida to the Right?*, N.Y. TIMES (May 24, 2023), https://www.nytimes.com/article/desantis-florida-bills.html; Geoffery Skelley & Mary Radcliffe, *Florida Started A Race To Reshape Conservatism. Now It Has Some Catching Up to Do*., FIVETHIRTYEIGHT (May 19, 2023, 3:22 PM), https://fivethirtyeight.com/features/desantis-florida-conservatism-2024/.

[202] DeSantis's presidential campaign pushed a "Florida blueprint[-based]" platform. Henry J. Gomez, *Ron DeSantis Is Learning That Not Every State Wants to be Florida*, NBC NEWS (May 22, 2023, 1:43 PM), https://www.nbcnews.com/politics/2024-election/ron-desantis-learning-not-every-state-wants-florida-rcna85138.

[203] Corbin, *supra* note 154, at 1002 (commenting that "the government is trying to accomplish indirectly what it is clearly prohibited from doing directly" when discussing Texas and Florida pledge laws, which require children to obtain parental permission to not pledge and are similarly related to parental rights).

[204] *See* Iancu v. Brunetti, 588 U.S. 388, 393 (2019); Matal v. Tam, 528 U.S. 218, 223 (2017).

[205] Cahn, *supra* note 188, at 1446; *see* McCarthy, *supra* note 186, at 526.

rights laws that clearly promote a single viewpoint are merely "pretext for imposing state orthodoxy."[206]

Moreover, surveys show that seventy-seven percent of parents are worried about book banning.[207] Although there is a majority opposition, a few parents or parent groups do support these parental rights statutes that empower parents to ban instructional material.[208] And these groups happen to be more outspoken, which creates a distorted view that more people do support these policies that align with the broader conservative Republican political movement.[209] Without the legal foundation or widespread public support for laws that authorize such conduct, it is apparent that these laws are only meant to further the State's own political agenda.

Besides furthering the State's own viewpoint as to what children should or should not be allowed to learn, this larger political agenda also involves enacting very stringent abortion laws.[210] Florida is certainly not the only state to have enacted stricter abortion laws in the

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[206] Corbin, *supra* note 154, at 1002; Mark Walsh, *What Do "Parents' Rights" Mean Legally for Schools, Anyway?*, EDUC. WK. (Oct. 20, 2022), https://www.edweek.org/policy-politics/what-do-parents-rights-mean-legally-for-schools-anyway/2022/10 ("The current movement in support of parental rights is motivated by various goals, including social, religious, and political ones that are tied up with conservatives' aims of limiting discussions of race, LGBTQ rights, or other controversial topics in schools.").

[207] Victoria Balara, *Fox News Poll: Parents Increasingly Concerned About Book Banning,* FOX NEWS (Apr. 5, 2023, 1:59 PM), https://www.foxnews.com/politics/fox-news-poll-parents-increasingly-concerned-book-banning ("Seventy-seven percent of parents are extremely or very concerned about book banning by local school boards.").

[208] Extremist groups like "Moms for Liberty" have been behind many book bans and at the center of efforts to elect officials to state legislatures and school boards who will advance this agenda. Ali Swenson, *Moms for Liberty's Focus on School Races Nationwide Sets Up Political Clash with Unions,* ASSOCIATED PRESS (July 2, 2023), https://apnews.com/article/moms-for-liberty-school-board-races-2024-5311cc11cd657a04e233216ac783d8f3/; Maddie Hanna, *Why Moms for Liberty Was Designated an Extremist Group by the Southern Poverty Law Center,* BRUNSWICK NEWS (June 28, 2023), https://thebrunswick-news.com/news/national_news/why-moms-for-liberty-was-designated-an-extremist-group-by-the-southern-poverty-law-center/article_7cdf3d1b-42d6-5674-94e0-8b58d169884a.html.

[209] *See* Swenson, *supra* note 208; Hanna, *supra* note 208.

[210] *See* Vigdor, *supra* note 201 ("Gov. Ron DeSantis of Florida this year has checked off many boxes on a far-right wish list of laws restricting abortion rights . . . .").

wake of the *Dobbs* decision,[211] but Florida's current six-week ban that has now been enacted goes further than several other Republican-leaning states.[212] Moreover, of the Republican-leaning states that have signed into law harsh abortion restrictions, Florida is the only state that also has a constitutional amendment protecting the right to privacy.[213] So, despite what the Florida Supreme Court held in *Planned Parenthood of Southwest & Central Florida*, the fact that Florida is the only state to have such an amendment *and* a restrictive abortion ban lends support to the argument that an explicit recognition of the right to privacy provides a legitimate basis for the protection of the right to have an abortion.[214]

Keeping in line with this tough-on-abortion agenda, as the text of the 2023 abortion statute indicated,[215] in the then-pending case of *Planned Parenthood of Southwest & Central Florida v. State of Florida*,[216] the State was hoping that the Florida Supreme Court

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[211] States like Texas, Oklahoma, Arkansas, and Louisiana have completely banned abortion. *See Tracking Abortion Bans Across the Country*, N.Y. TIMES (May 1, 2024, 4:40 PM), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html. A few other states have abortion restrictions in effect that range from fifteen to eighteen weeks, and states like Georgia and South Carolina currently have six-week restrictions in effect. *Id.*

[212] *See id.*; Narea & Zhou, *supra* note 198 ("Many of the Florida laws passed this session, which concluded earlier this month, go further even than other red states."). In the recent Newsome-DeSantis Debate, DeSantis's abortion views were described as "[s]o extreme . . . that even Donald Trump said [they were] was too extreme." Eric Bradner, *Takeaways from the DeSantis-Newsom Debate*, CNN (Dec. 1, 2023, 7:38 AM), https://www.cnn.com/2023/11/30/politics/desantis-newsom-debate-fox-hannity/index.html.

[213] Arizona has recognized the right to have an abortion via the equal privilege and immunities clause in its state's constitution, but the case that recognized the right addressed the issue of abortion on the narrower grounds of equal funding and access for those who are less financially secure. *See* CTR. FOR REPROD. RTS., *supra* note 8, at 23–24.

[214] *See* Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So. 3d 67, 94 (Fla. 2024) (Labarga, J., dissenting); Strasser, *supra* note 195, at 261 ("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.").

[215] FLA. STAT. § 390.0111 n.1 (2023).

[216] *Planned Parenthood of Sw. & Cent. Fla.*, 384 So. 3d at 94 (Labarga, J., dissenting).

would find that the right to privacy that is enshrined in the state constitution protects nothing more than informational privacy.[217] By pushing this interpretation of the amendment, the State argued that since the privacy amendment only protects informational privacy, decisional privacy rights like the right to have an abortion would be free to be regulated without any constitutional interference.[218]

The State based this informational privacy argument on the language of the amendment, claiming that the "right to be let alone" and "free from governmental intrusion" phrases are terms that are synonymous with informational privacy.[219] Thus, the State contended that the public, when voting on the amendment, only understood the amendment to protect their informational rights, not any decisional rights.[220] In the alternative, the State maintained that even if the public did think that the amendment protected decisional rights, the voters did not think that these decisional rights encompassed the right to have an abortion.[221]

Conversely, the petitioners argued the opposite—that this amendment does in fact protect the right to have an abortion,[222] and that the previous fifteen-week ban was unconstitutional.[223] Based on the historical analysis provided above,[224] it is clear that this is the correct interpretation of the constitutional amendment. It also becomes equally clear that this attempt by the State to get the Florida Supreme Court to support its understanding of the amendment is yet another move in its pursuit of its own political agenda.[225]

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[217] *See* FLA. STAT. § 390.0111 n.1 (2023); Richardson, *supra* note 143, at 102–03; State's Answer Brief on the Merits at 11, Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So. 3d 67 (Fla. 2024) (No. SC22-1050).

[218] State's Answer Brief on the Merits, *supra* note 217, at 11; *see* Richardson, *supra* note 143, at 112–13.

[219] *See* State's Answer Brief on the Merits, *supra* note 217, at 14–15.

[220] *Id.* at 11.

[221] *Id.* at 39.

[222] *See* Petitioners' Opening Brief at 2, Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So. 3d 67 (Fla. 2024) (No. SC2022-1050).

[223] *Id.* at 36 ("HB 5 plainly implicates the fundamental right to privacy by banning abortions prior to viability. Strict scrutiny therefore applies, as the State has conceded.") (citations omitted).

[224] *See* discussion *supra* Sections II.B, III.A.

[225] Florida, under DeSantis, has become the epitome "of a new right that embraces muscular use of state power to pursue a conservative agenda and reshape institutions." Campo-Flores, et al., *supra* note 200.

Unfortunately, but unsurprisingly,[226] the Florida Supreme Court handed down a decision in this case "reced[ing] from [its] prior decisions" and holding that the fifteen-week abortion ban was not unconstitutional because the right to abortion has "no basis under the Privacy Clause."[227] In reaching the decision, the court relied on its interpretation of the text and context of the statute,[228] as well as historical evidence[229] leading up to the adoption of the previous fifteen-week abortion ban.[230]

In performing this analysis, one of the court's main issues with its own prior precedent in *In re T.W.* was that the Florida Supreme Court relied too heavily on *Roe* and failed to consider in *In re T.W.* if *Roe* was "doctrinally coherent."[231] But as the dissent logically

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[226] Even though it is disappointing that the Florida Supreme Court receded from its prior decisions on abortion in the privacy context with an opinion that seems to jump through a lot of analytical hoops to reach a favorable decision for the State, it is worth noting that the court did not "take up the State's invitation [] to revisit the question of whether the Privacy Clause protects only 'informational privacy interests.'" *Planned Parenthood of Sw. & Cent. Fla.*, 384 So. 3d at 74 n.7. At least on this front, the court held firm and stated that "[its] jurisprudence before and after *T.W.* ha[d] understood the Privacy Clause to encompass certain decisional or autonomy rights," so in this case the court refused to "revisit [its] Precedents outside the abortion context." *Id.* Moreover, the Florida Supreme Court's decision still allowed for a more specific abortion amendment to be added to this upcoming election's ballot for Florida voters to again decide if the right to have an abortion should be a protected in Florida. Patricia Mazzei, *Florida Court Allows 6-Week Abortion Ban, But Voters Will Get to Weigh In*, N.Y. TIMES (Apr. 1, 2024), https://www.nytimes.com/2024/04/01/us/florida-abortion-law-supreme-court.html.

[227] *Planned Parenthood of Sw. & Cent. Fla*., 384 So. 3d at 71.

[228] Although the court here claims to be uninterested in the original intent of this amendment, the court cites to several commissioners and their claimed purposes for such constitutional proposals. *Id.* at 82–84.

[229] The Florida Supreme Court acknowledged that, prior to 2021, the abortion statute in Florida only restricted abortions in the third trimester. *Id.* at 72 n.2. The court also acknowledged that this was the same prohibition in place for the past fifty years, but the court seemingly glossed over this consistency. *Id.* at 80. Instead, the court focused on the fact that, from 1868 to 1972, when abortion was regulated in a different manner than it was for the past fifty years, no litigant challenged the abortion statutes under the right to be let alone. *Id.*

[230] *Id.* at 80.

[231] Ironically enough, though, the court cited to *Dobbs* for this proposition. *Id.* at 75. So, in denouncing its prior decision for relying too heavily on a previous Supreme Court case, the Florida Supreme Court relied on a different Supreme

points out, *Roe* was federal law even if it was a criticized decision, and, therefore, the Florida Supreme Court in *In re T.W.* was not required to offer the analysis now retroactively demanded by the current court.[232] Moreover, subsequent abortion cases in Florida reaffirmed *In re T.W.*'s precedent and tested that case's doctrinal coherence with each new attempt to challenge *In re T.W.*'s holding that the right to abortion was protected under Florida's privacy amendment.[233]

Like this Note has already pointed out,[234] an important consideration in the analysis of what rights are enshrined in Florida's privacy amendment involves examining what the public thought the constitutional amendment meant at the time they voted on it.[235] When examining this factor, the Florida Supreme Court conceded that there is a forceful argument that Florida voters, like all Americans, would have understood the "right to be let alone" language in this amendment to include the right to have an abortion because Florida's privacy amendment came off of the heels of *Roe*'s decision.[236] Despite this concession, the court went on to conclude that there was a "complete absence" of public discourse debating whether Florida's privacy amendment encapsulated the right to have an abortion.[237] Ironically, the court comes to this conclusion in the complete absence of any consideration of the choice of words used

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Court case's critique of *Roe*. *Id.* Moreover, the Florida Supreme Court seemed to adopt *Dobbs*'s reasoning for separating abortion rights from other decisional privacy rights by stating that "unlike other privacy matters, [abortion] directly implicated the interests of both developing human life and the pregnant woman." *Id.* at 76.

232 *Id.* at 102–03 (Labarga, J., dissenting). The dissent, like this Note, emphasized that the whole point of Florida's constitutional amendment was to provide rights greater than what were offered federally. *See id.* at 102.

233 *See, e.g.*, N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 639–40 (Fla. 2003). The Florida Supreme Court in *Planned Parenthood of Southwest & Central Florida* instead viewed this as a mere "appli[cation] of T.W.'s flawed reasoning," without saying more. *Planned Parenthood of Sw. & Cent. Fla.*, 384 So. 3d at 88.

234 *See* discussion *supra* Section II.B.

235 *See Planned Parenthood of Sw. & Cent. Fla.*, 384 So. 3d at 76.

236 The court "agree[s] with this argument" and the abundance of "case law, newspaper articles, a news clip, and more" that the dissent cites for this "argument [that] has some force." *Id.* at 81.

237 *Id.* at 86.

in the Florida privacy amendment itself and how, comparatively, the words used in article I, section 23, of the Florida Constitution have consistently been recognized as being phrased to "make the privacy right as strong as possible."[238] Again, it seems paradoxical for the Florida Supreme Court to believe that the language of Florida's privacy amendment lends itself to being extremely strong and broad in one context but believe that the same language does not carry equal strength in the context of the right to have an abortion.

The court also looked to the dictionary definitions of the "let alone" and "free from governmental intrusion" language to ascertain the amendment's meaning to the Florida public.[239] Although the court relied on definitions that carried references to solitude and being "free from outside 'interfere[ence]' or 'attention,'" the court found that these definitions were not compatible with the accepted description of abortion—a decision that the court characterized as one that is often "made in solitude."[240] On this front, the court reasoned that because the decision to have an abortion is made with and in the presence of medical professionals, it is not without the "intrusion of others."[241]

Similar to the dissent's concerns with this distinction, this "intrusion of others"[242] reasoning seems to run contrary to the Supreme Court's established right to privacy jurisprudence from *Griswold v. Connecticut*—jurisprudence that the Supreme Court was careful to carve out of its decision in *Dobbs*.[243] In *Griswold*, recall that the

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238 Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 2003). Although this case was decided in a different privacy context, the Florida Supreme Court there explicitly recognized the strength of the language used and how Florida voters "exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution." *Id.* There, the court went on to state that based on this comparatively strong language, "it can only be concluded that the right is much broader in scope than that of the Federal Constitution." *Id.*

239 *See Planned Parenthood of Sw. & Cent. Fla*., 384 So. 3d at 77.

240 *Id.* at 78.

241 *Id.* The dissent cautioned that this "intrusion of others" line of reasoning can and most likely will be used beyond the abortion context to invalidate other decisional autonomy rights where another person may be involved. *Id.* at 95 (Labarga, J., dissenting).

242 *Id.*

243 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 262 (2022). It is worth noting here that *Dobbs* also distinguished abortion from other decisional

Court found that there was a right to privacy in a decision made within the "intimate relation of husband and wife and their physician's role in one aspect of that relation."[244] Of course, it is true that *Planned Parenthood of Southwest & Central Florida* was decided on state constitutional grounds where there is an enumerated right to privacy,[245] and *Griswold* was decided on federal constitutional grounds where there is no express "right to be let alone" language to analyze.[246] However, it is also true that *Griswold* remains good law that states are bound by.[247] Therefore, the dissent was correct to call out the majority for this rationale, as it undermines *Griswold* and the decisional rights protected in that case because, according to the majority's reasoning, the decisions protected in *Griswold* are just as susceptible to expulsion from the bundle of rights that are protected by the right to privacy.[248]

The Florida Supreme Court's decision in *Planned Parenthood of Southwest & Central Florida*, though not the exact outcome the

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privacy rights, like those in *Lawrence v. Texas*. *Id.* at 295. In *Lawrence*, the Court held that state statutes criminalizing consensual, private conduct between same-sex individuals were unconstitutional. Lawrence v. Texas, 539 U.S. 558, 577 (2003). Particularly relevant to the discussion of this Note is Justice Stevens' point that there must be a limit to the Court's use of history and tradition: "First, the fact that the governing majority in a State has traditionally viewed a particular practice as *immoral is not a sufficient reason for upholding a law prohibiting the practice*; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Id.* at 577–78 (Stevens J., dissenting) (emphasis added) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986), *overruled by* Lawrence, 539 U.S. at 577). As this language makes abundantly clear, morality and legality are two distinct concepts. *Id.* Today's Court, however, seems to no longer be as concerned as it once was about the limits that history and tradition should play in its analysis of these kinds of fundamental liberty interests. *Id.*

[244] Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

[245] *Planned Parenthood of Southwest & Central Fla*., 384 So. 3d at 71.

[246] *Griswold*, 381 U.S. at 484–85.

[247] *Dobbs*, 597 U.S. at 290 ("And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.").

[248] *Griswold*, 381 U.S. at 482.

State was hoping for,[249] still gave Governor DeSantis and the conservative Republicans the political victory they wanted.[250] By deciding that the fifteen-week ban was not unconstitutional under Florida's constitution, the Florida Supreme Court successfully set off one of the 2023 statute's triggers,[251] causing the even stricter six-week abortion ban to go into place for 2024.[252]

The fact that the Florida Supreme Court—a court composed of justices who were almost exclusively appointed by DeSantis—did hand down a decision in favor of the State is more fuel to the fire that Florida is transforming into an extremely right-leaning state.[253] This partisan composition is one that the Florida Supreme Court,

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[249] As previously mentioned, Floridians will vote on a proposed constitutional amendment targeted directly at whether Florida's constitution should protect the right to have an abortion. *See* Mazzei, *supra* note 226. The proposed "Amendment to Limit Government Interference with Abortion" reads: "Limiting government interference with abortion.— Except as provided in Article X, Section 22, no law shall prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient's health, as determined by the patient's healthcare provider." *Amendment to Limit Government Interference with Abortion 23-07*, FLA. DIV. OF ELECTIONS, https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=83927&seqnum=1 (last visited Sept. 18, 2024).

[250] Anthony Izaguirre, *Desantis Signs Florida GOP's 6-Week Abortion Ban Into Law*, ASSOCIATED PRESS (Apr. 14, 2023, 6:58 AM), https://apnews.com/article/florida-abortion-ban-approved-c9c53311a0b2426adc4b8d0b463edad1# ("The ban gives DeSantis a key political victory among Republican primary voters as he prepares to launch an expected presidential candidacy built on his national brand as a conservative standard bearer.").

[251] *See* FLA. STAT. § 390.0111 n.1 (2023) (explaining how the six-week abortion ban will go into place should the Florida Supreme Court decide this case in the manner that it did); Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So. 3d 67, 103 (Fla. 2024) (Labarga, J., dissenting) ("Today's decision implicates three of these four events, meaning that the Act's six-week ban will take effect in thirty days.").

[252] *See* FLA. STAT. § 390.0111(1) (2024) ("A physician may not knowingly perform or induce a termination of pregnancy if the physician determines the gestational age of the fetus is more than 6 weeks unless one of the following conditions is met . . . .").

[253] *The Florida Deciders: Who Is on Florida's Supreme Court*, NBC6 (Feb. 7, 2024, 8:31 PM), https://www.nbcmiami.com/news/local/who-are-the-justices-on-floridas-supreme-court-and/3226175/ (explaining how five out of the seven current justices were appointed by DeSantis, one was appointed by former Governor Jeb Bush, and the lone dissenter in this case was appointed by former Governor Charlie Crist).

when faced with a similar challenge to the right to have an abortion in *North Florida Woman's Health & Counseling Services Inc.*, cautioned against when it stated:

> A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.[254]

Thus, with the *Planned Parenthood of Southwest & Central Florida* decision on the books, the State has now successfully taken the extreme politicization of the right to direct Florida children's upbringing and the right to have an abortion to the legislative and judicial fronts, all in the name of its race to become *the* conservative state.[255] The outcome of the *Planned Parenthood of Southwest & Central Florida* case further supports the proposition that the State is willing to use several different avenues to pursue its political agenda at any cost.[256] Overall, then, the contradictory treatment of these rights can be attributed to the State's conformity with the conservative Republican political movement and not any legal rationale that the Florida Supreme Court or any other Florida politician now uses to justify their decisions with.

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[254] N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 638–39 (Fla. 2003) (quoting Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting)). The Court went on to state that it would "forswear any change in the controlling law in this area absent the most special and extraordinary circumstances." *Id.* at 639.

[255] *See* Skelley & Radcliffe, *supra* note 201.

[256] *See The Florida Deciders*, *supra* note 253.

CONCLUSION

Florida's decision to add a constitutional amendment securing the right to privacy for its citizens makes Florida distinct from many other states, as the amendment guarantees protection to a variety of privacy rights.[257] Despite the Florida Supreme Court's recent decision in *Planned Parenthood of Southwest & Central Florida*, the introduction of this amendment at a time when both the right to parent and the right to have an abortion were understood to be a part of the right to privacy, along with the development of Florida's statutory framework and common law history, indicate that Florida's privacy amendment protects both rights to the fullest extent.[258] As offshoots of the same right to privacy, and with no history or tradition of extreme expansion or contraction of the statutory treatment of these rights, it becomes apparent that there is no legal rhyme or reason[259] for the divergent treatment of the right to have an abortion and the right to direct one's child's upbringing.[260]

Without a legal foundation for the handling of these rights, the true motive underlying the dissimilar statutory manipulation in recent years is revealed as a move for political gain.[261] Furthermore, the parental privileging statutes are a mere pretext for state orthodoxy, lack widespread support, and can have detrimental effects on children's ability to become functioning members of society.[262] As such, a political agenda is not a valid justification for the disparate

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257 Only three other states secure the right to have an abortion via a state constitution-based right to privacy. *See* CTR. FOR REPROD. RTS., *supra* note 8, at 12.

258 *See* discussion *supra* Sections II.A, II.B.

259 Although it is beyond the scope of this Note, it is worth pointing out that the goal of this Note is not to single out a specific party or person for their treatment of the law. Rather, this Note is more like a case-study of a larger legal problem—courts and legislatures alike can manipulate or massage the law to make it fit their argument, perspective, or proposal. *See* Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 805, 809, 816 (2002); Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161, 163, 191 (1996).

260 *See* discussion *supra* Sections III.A, III.B.

261 *See* discussion *supra* Section III.B.

262 *See* discussion *supra* Section III.B.

treatment of these fundamental rights and is plainly unconstitutional.[263] The current statutory framework should be adjusted to reflect the strict scrutiny standard that must be employed when infringing upon rights to privacy, and any further attempt to restrict the right to have an abortion or expand parental rights statutes should be rejected.

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263 *See* discussion *supra* Sections III.A, III.B.