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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)

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I. INTRODUCTION

In *Gainesville Woman Care, LLC v. State*, the Florida Supreme Court found that a state law requiring a 24-hour waiting period between when a woman receives required medical disclosures and when she has an abortion likely violated the explicit right to privacy contained in the Florida Constitution.[1] In doing so, it reaffirmed that the Florida Constitution guarantees a higher level of protection for

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1. 210 So. 3d 1243, 1247, 1249 (Fla. 2017).

abortion access than the Federal Constitution. While the Federal Constitution's implicit right to privacy is not offended by laws that require a waiting period prior to obtaining an abortion, in Florida, such laws amount to an impermissible infringement on the state's fundamental right of privacy.

The key difference between the Florida approach and the Federal Constitution is the standard of review that each applies to laws infringing on abortion access. The Federal Constitution's implicit right to privacy has been held to require an "undue burden" standard of review for laws regulating abortion,[2] while in *Gainesville Woman Care*, the Florida Supreme Court made clear that in Florida—a state with an explicit right to privacy codified in its constitution—the standard is strict scrutiny. In doing so, the Florida court rejected its prior rule requiring a preliminary finding that a regulation imposes a "significant" restriction on abortion access *before* strict scrutiny review applies—a standard that was more similar to the federal "undue burden" test than to the strict scrutiny approach Florida applies in other cases implicating the state's right to privacy.[3] The case illustrates the relative freedom available to states at both ends of the contentious abortion debate: while many states have capitalized on the low federal floor protecting abortion access to legislate restrictions on abortion, Florida shows that states have a corollary power through their state constitutions to strike down such legislation and raise the statewide abortion-privacy guarantee above the minimum floor mandated by the Federal Constitution.[4]

This Comment begins with a brief overview of federal abortion cases constituting the minimum requirements—the federal "floor"—for abortion access. Next it turns to an overview of Florida caselaw interpreting the state constitution's privacy clause as it relates to abortion and examines the ways the state has diverged from federal abortion precedent. Part III discusses the Florida Supreme Court's decision in *Gainesville Woman Care*, where the court upheld a trial court's preliminary injunction blocking the state's mandatory delay law and instituted a new, streamlined rule that applies strict scrutiny review to abortion-regulating statutes without requiring a preliminary finding that a regulation imposes a "significant" restriction. In doing so, it diverged from prior cases in Florida that seemed to require the

2. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 875–76 (1992).

3. *Gainesville Woman Care*, 210 So. 3d at 1265 ("Today we make clear, in Florida, any law that implicates the fundamental right of privacy, regardless of the activity, is subject to strict scrutiny and is presumptively unconstitutional.").

4. *See infra* Part V.

plaintiff to make a preliminary showing that restrictions on abortion were "significant" before strict scrutiny review would apply. Lastly, this Comment discusses how the Florida decision shows that although the abortion debate in the U.S. is often framed in terms of federal law, states are accorded a high level of deference, both to restrict abortion access and to provide a higher degree of protection for abortion-privacy through state constitutional law.

II. BACKGROUND

A. Federal Right to Privacy in the Abortion Context—A Brief Overview

Federal constitutional law sets "a minimum floor for reproductive rights that the states may not lower."[5] Above this floor, states are free to secure additional rights through their state constitutions, and they are in no way constrained in the interpretation of their constitutions by federal constitutional law.[6] Despite the relative freedom accorded to the states within the limits set by the Federal Constitution, states often choose to be guided by the Federal Constitution in their interpretations of parallel state constitutional provisions.[7] Therefore, a brief overview of the implicit federal right to privacy as it relates to abortion provides useful context for the interpretation of Florida's explicit constitutional right to privacy.

Mandatory delay laws have played a large role in the development of federal abortion precedent. A 24-hour delay provision was at the center of the case that marked the biggest sea change in abortion law since *Roe v. Wade*: *Planned Parenthood v. Casey*.[8] *Roe v. Wade* first established a federally-protected right to abortion by situating the decision to terminate a pregnancy within the private sphere of sexual autonomy that is protected by the Constitution's implicit right to

5. Ken Gormley & Rhonda G. Hartman, *Privacy and the States*, 65 TEMP. L. REV. 1279, 1291 (1992).

6. *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. State constitutional provisions, such as an express right to privacy guarantee, that have no parallel in the Federal Constitution of course may be interpreted by the states completely independently of federal law. But even state constitutional provisions, such as a due process clause, that do have a federal parallel, may be interpreted independently of federal law and more expansively than their federal counterparts." (footnotes omitted)).

7. *See* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 711 (2016).

8. 505 U.S. 833 (1992); *see* Jennifer Djavaherian et al., *Abortion*, 18 GEO. J. GENDER & L. 395, 399–400 (2017).

privacy.[9] In *Roe*, the Supreme Court treated the right to privacy as a fundamental constitutional right and therefore held that regulations infringing on abortion access would be subject to strict scrutiny review, upheld only in the presence of a "compelling state interest."[10] The Court established a trimester system where state interests became compelling at different stages of pregnancy. In the first trimester of pregnancy, states were prohibited from regulating abortion access; in the second trimester, they could do so only in furtherance of their interest in promoting maternal health; and in the third trimester—the point of viability outside the womb according to the *Roe* Court—states could regulate abortion access to promote their interest in the "potentiality of human life."[11]

Applying the strict scrutiny framework, the Court initially struck down mandatory delay laws passed by the states. In *City of Akron v. Akron Center for Reproductive Health, Inc.*, the Court found that no "legitimate state interest [was] furthered by an arbitrary and inflexible waiting period."[12] The Court reversed this course, however, in *Casey*, where it replaced *Roe*'s trimester system and strict scrutiny analysis with a single test that analyzes whether a regulation places an "undue burden" on a woman's ability to obtain an abortion.[13] The Court defined a state regulation that would present an "undue burden" as one that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[14] For post-viability (third trimester) abortion restrictions, the Court left the *Roe* rule intact: "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary . . . for the preservation of the life or health of the mother."[15] With these changes, the Court

9. Djavaherian et al., *supra* note 8, at 397 (citing Roe v. Wade, 410 U.S. 113, 153 (1973)); *see also* Gormley, *supra* note 5, at 1290–91 (discussing the development of the federal right to privacy from *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (forced sterilization unconstitutional under the right to privacy), to *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Carey v. Population Services International*, 431 U.S. 678 (1977) (striking down laws regulating the sale or use of contraception as violations of the Constitution's right to privacy)).

10. *Roe*, 410 U.S. at 155 (citing Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627 (1969)).

11. *Id.* at 164–65.

12. 462 U.S. 416, 449–50 (1983), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

13. *See* Linda J. Wharton, Roe *at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469, 471 (2009); *Casey*, 505 U.S. at 875–76.

14. *Casey*, 505 U.S. at 877.

15. *Id.* at 879 (quoting *Roe*, 410 U.S. at 164–65).

sought to better effectuate states' "important and legitimate interest[s] in preserving and protecting the health of the pregnant woman [and] in protecting the potentiality of human life."[16]

Under the more lenient "undue burden" framework, the Court found that a 24-hour delay provision was constitutional because it did not place an undue burden on a woman's ability to access an abortion. Despite acknowledging that the law would cause some women "increased costs and potential delays," the Court did not consider these to be "substantial obstacles."[17]

The *Casey* rule opened the door to a flood of state legislation seeking to limit abortion access.[18] For several decades, the Court seemed unwilling to strike down such legislation under the *Casey* standard, with its broad deference to state interests.[19] However, in its recent decision in *Whole Woman's Health v. Hellerstedt*, decided twenty-four years after *Casey*, the Court struck down a Texas law that placed such stringent requirements on abortion providers that it would have had the effect of closing most abortion facilities in the state.[20] In doing so, the Court modified the *Casey* standard, holding that a regulation presents an undue burden if it places a "'substantial obstacle in the path of women seeking a previability abortion' without conferring 'medical benefits sufficient to justify the burdens.'"[21] "The impact of *Hellerstedt*" in curbing state regulations that limit abortion access "remains to be seen."[22]

16. *Id.* at 875–76 (alterations in original) (quoting *Roe*, 410 U.S. at 162) ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

17. *Id.* at 886–87 ("[U]nder the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest.").

18. *See* Djavaherian, *supra* note 8, at 401–02 ("[T]he Court's shift from a focus on a viability framework to an undue burden standard rendered abortion more susceptible to state restrictions [after *Casey*].").

19. *Casey*, 505 U.S. at 876.

20. 136 S. Ct. 2292 (2016); Djavaherian, *supra* note 8, at 402 (citing *Hellerstedt*, 136 S. Ct. at 2298). Such laws are often referred to as Targeted Regulation of Abortion Providers, or "TRAP," laws. *Id.* at 413.

21. Djavaherian, *supra* note 8, at 402 (quoting *Hellerstedt*, 136 S. Ct. at 2300).

22. *Id.* at 437. *See generally* Steven R. Morrison, *Personhood Amendments After* Whole Woman's Health v. Hellerstedt, 67 CASE W. RES. L. REV. 447 (2016) (discussing possible ramifications of the *Hellerstedt* decision on future strategies pursued by state legislators and activists who wish to limit abortion access).

B. The Right to Privacy as It Relates to Abortion in Florida

Florida has been dubbed "a leader in the development of state privacy rights."[23] It is one of eleven states with an explicit right to privacy in its state constitution,[24] and one of six states where that right is "both expressly enumerated . . . and, as a matter of structure, separated from related protections such as the prohibition of unreasonable searches and seizures."[25]

The privacy clause states in part: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life."[26] Since its adoption by Florida voters in 1980 as a free-standing clause in the state constitution, the provision has been held to protect abortion access.[27] This interpretation survived a 2012 attempt to limit the privacy clause's application to abortion when "Florida voters rejected a constitutional amendment . . . that would have interpreted Florida's explicit constitutional right of privacy as

23. JENNIFER FRIESEN, 1 STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 2.02, at 2-4 (4th ed. 2006).

24. These include Alaska (ALASKA CONST. art. I, § 22), Arizona (ARIZ. CONST. art. II, § 8), California (CAL. CONST. art. I, § 1), Florida (FLA. CONST. art. I, § 23), Hawaii (HAW. CONST. art. I, §§ 6–7), Illinois (ILL. CONST. art. I, § 6), Louisiana (LA. CONST. art. I, § 5); Montana (MONT. CONST. art. II, § 10), South Carolina (S.C. CONST. art. I, § 10), Washington (WASH. CONST. art. I, § 7), and, as of December 2018, New Hampshire (N.H. CONST. art. 2-b). *Privacy Protections in State Constitutions*, NAT'L CONF. ST. LEGISLATURES (Nov. 7, 2018), http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx; *see* Gormley, *supra* note 5, at 1282 ("Five states—California, Alaska, Montana, Hawaii, and Florida—added fundamental personal decision privacy language to their constitutions between the years of 1972 and 1980, directly in response to the national mood swing following *Griswold* [*v. Connecticut*] and *Roe* [*v. Wade*]." (footnotes omitted)); *see also* N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 619 & n.6 (Fla. 2003) (collecting cases where the right to privacy has been "implicated in a wide range of matters dealing with personal privacy").

25. *See* FRIESEN, *supra* note 23, § 2.02, 2-4. The other five states that join Florida in separating their right to privacy provision from other related privacy protections in the state constitution are California, Alaska, Montana, Hawaii, and, most recently, New Hampshire. *Id.*; N.H. CONST. art. 2-b.

26. FLA. CONST. art. I, § 23.

27. *In re* T.W., 551 So. 2d 1186, 1192 (Fla. 1989) ("Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy."); TALBOT D'ALEMBERTE, THE FLORIDA STATE CONSTITUTION 68 (2d ed. 2016). Other areas where the state constitutional right to privacy is invoked is in cases of refusal to undergo medical treatment, government access to personal information, and public disclosure of records. *Id.* at 69–70.

being no broader than the implicit federal constitutional right of privacy."[28]

Unlike the Federal Constitution, which applies an undue burden standard in reviewing laws that implicate abortion, the Florida Constitution's right to privacy is considered a fundamental right, and thus, laws that implicate abortion are subject to strict scrutiny review.[29] This standard was established by the seminal case *In re T.W.*, in which the Florida Supreme Court struck down a statute requiring minors to obtain parental consent prior to undergoing an abortion on the grounds that the law violated the state constitution's privacy clause.[30] The case was the first time the Florida Supreme Court had applied the right to privacy to abortion.[31] The court held that the same strict scrutiny standard used to evaluate whether regulations infringe on the right to privacy in other contexts also applied to abortion legislation: in order to pass state constitutional muster, the state must prove that a statute regulating abortion "furthers a compelling state interest through the least intrusive means."[32]

The case was decided pre-*Casey* and drew heavily from the Supreme Court's *Roe v. Wade* decision, adopting a strict scrutiny, trimester framework that tracked closely with the Supreme Court's test in *Roe*.[33] However, the court framed its rule in the context of the state constitutional right to privacy and made it clear that Florida's explicit constitutional right to privacy guaranteed privacy rights beyond those protected by the Federal Constitution.[34]

28. Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1253 & n.4 (Fla. 2017). "With respect to abortion, [the] proposed amendment [would have] overrule[d] court decisions which conclude that the right of privacy under Article I, Section 23 of the State Constitution is broader in scope than that of the United States Constitution." PROHIBITION ON PUBLIC FUNDING OF ABORTIONS; CONSTRUCTION OF ABORTION RIGHTS, FLA. DEP'T OF STATE, DIV. OF ELECTIONS, http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=82 (last visited Apr. 3, 2019); *see also* H.R.J. Res. 1179, 2011 Leg. (Fla. 2011).

29. *Gainesville Woman Care*, 210 So. 3d at 1254 ("[A]ny law that implicates Florida's right of privacy will be subject to strict scrutiny review."); *see also* Gormley, *supra* note 5, at 1293 ("The stringent test under the Florida Constitution—which stands in contrast to the Supreme Court's requirement of merely a 'significant' state interest to interfere with a [woman's] privacy in an abortion decision—requires that the statute further a compelling state interest through the least intrusive means.").

30. 551 So. 2d at 1188–89.

31. *Gainesville Woman Care*, 210 So. 3d at 1253.

32. *T.W.*, 551 So. 2d at 1193.

33. *Id.* at 1193–94.

34. *Id.* at 1190, 1192 ("[Florida's privacy] amendment embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution.").

The court recognized two potential state interests that could be implicated in abortion regulation, the same identified by the *Roe v. Wade* Court: "the health of the mother and the potentiality of life in the fetus."[35] It then articulated a rule for when these state interests become "compelling" for purposes of triggering strict scrutiny review. The court held that the state's interest in maternal health becomes compelling at the end of the first trimester and adopted the following rule:

> Under Florida law, prior to the end of the first trimester, the abortion decision must be left to the woman and may not be *significantly restricted* by the state. Following this point, the state may impose *significant* restrictions only in the least intrusive manner designed to safeguard the health of the mother. *Insignificant* burdens during either period must substantially further important state interests.[36]

One noteworthy departure from the *Roe* framework in the rule established by *T.W.* is the distinction drawn between "significant" and "insignificant" burdens, language that seems to foretell the federal "undue burden" standard later adopted in *Casey*.[37] The plain language of the *T.W.* court appears to have established a two-part test, requiring that regulations first be evaluated as either significant or insignificant in order to determine which standard of review applies.[38] This language is important to the court's reasoning and holding in *Gainesville Woman Care*. As argued below, the court in *Gainesville* eliminated this distinction and called for strict scrutiny review of any regulation infringing on abortion access, without requiring a threshold "significant/insignificant" determination.

Second, the *T.W.* court held that the state's interest in the potentiality of life "becomes compelling upon viability."[39] Following the point of viability, the state could regulate abortion in furtherance of this interest, "provided that the mother's health is not jeopardized."[40] The court defined viability as "that point in time when the fetus becomes

35. *Id.* at 1193.

36. *Id.* (emphasis added) (footnote omitted) (citing City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 430 (1983), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

37. *See supra* discussion accompanying notes 13–17.

38. *In re* T.W., 551 So. 2d 1186, 1193 (Fla. 1989).

39. *Id.*

40. *Id.* at 1194.

capable of meaningful life outside the womb through standard medical measures," and set that point as the end of the second trimester.[41]

After the court's decision in *T.W.*, the Florida Legislature passed a parental *notification* statute (as opposed to the parental *consent* statute struck down in *T.W.*) that required minors to inform a parent before undergoing an abortion. This statute was likewise held unconstitutional by the Florida Supreme Court in *North Florida Women's Health & Counseling Services, Inc. v. State*.[42] The court affirmed the reasoning of *T.W.* and specifically declined to abandon its strict scrutiny framework in light of the Supreme Court's intervening decision in *Casey* and its adoption of the undue burden test.[43] In rejecting the *Casey* standard, the court affirmed that under the Florida Constitution the right to privacy is a fundamental right that would continue to receive strict scrutiny analysis, with any legislation infringing on this right presumptively unconstitutional.[44] Like *T.W.*, the *North Florida Women's* court drew extensively from cases interpreting the state constitution's privacy clause in different contexts, emphasizing that the same strict scrutiny standard used in those cases applied to regulations targeting abortion.[45]

And yet, in its analysis, *North Florida Women's* did not apply a strict scrutiny analysis exactly equal to that applied in other contexts, because it implicitly adopted *T.W.*'s differentiated rule for "significant" and "insignificant" burdens. The court engaged in a two-part analysis, examining "(1) [whether] the Parental Notice Act impose[d] a *significant* restriction on a minor's right of privacy[.] And if so, (2) [whether] the Act further[ed] a compelling State interest through the least intrusive means[.]"[46] In answering the first inquiry, the supreme court deferred to the trial court's findings of fact in concluding that parental notification did impose a significant restriction on minors' right to obtain an abortion.[47] Only then did the court apply strict scrutiny review to the law, determining whether the restriction

41. *Id.* One of the *T.W.* justices dissented from this definition of viability, and so on this point the opinion does not represent a majority and is not binding precedent. *See* N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 636 (Fla. 2003) (citing *T.W.*, 551 So. 2d at 1197 (Ehrlich, C.J., concurring specially)).

42. 866 So. 2d at 615.

43. *Id.* at 634.

44. *Id.* at 635.

45. *See id.* at 635 & n.53 ("Florida courts consistently have applied the 'strict' scrutiny standard whenever the Right of Privacy Clause was implicated, regardless of the nature of the activity.").

46. *Id.* at 631 (emphasis added).

47. *Id.* at 631–32.

furthered a compelling state interest by the least intrusive means.[48] The court concluded that while "[t]he State's interests in protecting an immature minor and fostering the integrity of the family" might be compelling, they did "not justify restricting a minor's right to choose abortion where similar restrictions are not imposed on comparable choices or decisions."[49]

After the Florida Supreme Court had twice struck down statutes concerning parental involvement in abortion access by minors on the basis of the state constitution's privacy clause, the legislature achieved its goal by way of a constitutional amendment.[50] Florida voters adopted an amendment proposed by the legislature in 2004, which, while affirming a minor's right to privacy, authorized the legislature to pass statutes requiring parental notification of an abortion.[51]

T.W. and *North Florida Women's* are the primary cases in the development of Florida's privacy jurisprudence in the context of abortion. However, one other major case forms the backdrop to the *Gainesville Woman Care* decision: *State v. Presidential Women's Center*.[52] In *Presidential Women's Center*, the Florida Supreme Court held Florida's abortion-specific informed consent law, the Woman's Right to Know Act, constitutional under both the federal and state constitutions.[53]

Generally under Florida law, informed consent requires that healthcare providers comply "with an accepted standard of medical practice" and provide patients with information sufficient to ensure that they have a reasonable understanding of the procedure, the risks involved, and the available alternatives.[54] The Woman's Right to Know Act imposes substantial additional requirements for informed consent to an abortion. It requires that the woman be informed in person of

48. *Id.* at 632–34.

49. *Id.* at 633 (citing State v. N. Fla. Women's Health & Counseling Servs., Inc., 852 So. 2d 254, 260 n.1 (Fla. Dist. Ct. App. 2001), *quashed*, 866 So. 2d 612).

50. ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 504 (5th ed. 2015) (citing FLA. CONST. art. X, § 22).

51. *Id.* The amendment states in full:

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

FLA. CONST. art. X, § 22.

52. 937 So. 2d 114 (Fla. 2006).

53. *Id.* at 115, 121; *see* FLA. STAT. ANN. § 390.0111(3) (West 2019).

54. *Id.* at 117 n.2 (quoting § 766.103(3)(a)(1)–(2)).

"[t]he nature and risks of undergoing or not undergoing the proposed procedure," "[t]he probable gestational age of the fetus" as determined by an ultrasound, and "[t]he medical risks to the woman and fetus of carrying the pregnancy to term."[55] The statute also requires that the woman be offered the opportunity to view the ultrasound (which the statute specifies she has the right to refuse); that she be provided with printed materials that include the age of the fetus as well as information regarding alternatives to abortion and "the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care"; and that she acknowledge in writing that this information has been provided to her.[56]

In *Presidential Women's Center*, the Florida Supreme Court held that the Woman's Right to Know Act passed constitutional muster on both state and federal grounds. Although the plaintiffs in *Presidential Women's Center* alleged that the law violated the privacy right in the state constitution, the court did not reach a privacy analysis in its opinion. Instead it treated the statute purely as "an informed consent statute."[57] Because the State had conceded to a limiting interpretation of the statute permitting *medical* disclosures only and requiring that the scope of the disclosures be patient-driven, the court found "the informational requirements of [the statute] comparable to . . . other Florida informed consent statutes," and therefore held that the right to privacy was not implicated.[58] The court would address the privacy issue, however, more than ten years later when an amendment to the Woman's Right to Know Act mandating a waiting period of twenty-four hours between the Act's required disclosures and when a woman could obtain an abortion gave rise to *Gainesville Woman Care, LLC v. State*.

55. § 390.0111(3)(a)(1)(a), (1)(b), (1)(c).

56. *Id.* § 390.0111(3)(a)(1)(b)(II), (III), (a)(2), (a)(3).

57. *Presidential Women's Ctr.*, 937 So. 2d at 116, 118.

58. *Id.* at 118. The court's holding was conditioned on a limiting interpretation regarding two provisions of the statute. First, "reasonable patient" was to be construed as "specifically the patient who is presenting herself for the procedure, and, therefore, the doctor need only consider, address, and inform based on that patient's individualized circumstances in determining what information is material and to be provided as the 'informed consent.'" *Id.* at 119. Second, in informing a patient of the "risks of undergoing or not undergoing" the procedure, § 390.0111(3)(a)(1)(a)), the provider was limited to providing "information with regard to medical risks—not information with regard to social, economic, or any other risks." *Presidential Women's Ctr.*, 937 So. 2d at 119.

III. PROCEDURAL HISTORY

Gainesville Woman Care, LLC v. State arose as a state constitutional challenge to Florida's Mandatory Delay Law.[59] The law, signed on June 10, 2015,[60] amended the Woman's Right to Know Act to require that its disclosures take place "at least 24 hours before the procedure."[61] It provided an exception to this requirement for women who could provide documentation proving that they were seeking the abortion as a result of "rape, incest, domestic violence, or human trafficking."[62] The Woman's Right to Know Act also includes a general exception to its provisions in cases of "medical emergency."[63]

The day after the law was signed, plaintiffs, Gainesville Woman Care, LLC and Medical Students for Choice, filed a complaint challenging the law on state constitutional grounds and a motion for a temporary injunction.[64] The trial court granted the temporary injunction on July 1, 2015.[65] The trial court applied a strict scrutiny standard of review to the Florida law in light of the fundamental right to privacy in the Florida Constitution and, on this basis, found a substantial likelihood that the law was unconstitutional.[66] On February 26, 2016, the appellate court reversed. It found that the trial court's factual findings during a one-hour evidentiary hearing provided insufficient grounds to grant a temporary injunction or to support the court's legal analysis of the requirements for a temporary injunction.[67]

The Florida Supreme Court quashed the appellate court's decision on February 16, 2017, holding that the trial court was right to issue the temporary injunction "based on the evidence presented at the temporary injunction hearing."[68] It agreed with the trial court "that there [was] a substantial likelihood that the Mandatory Delay Law [was] unconstitutional as a violation of Florida's fundamental right of

59. 210 So. 3d 1243, 1247–49 (Fla. 2017).

60. *Id.* at 1259.

61. Patients—Informed Consent, 2015 Fla. Laws, ch. 2015-118, sec. 1, § 390.0111(3)(a)(1) (codified as amended at FLA. STAT. § 390.0111(3) (2015)), *construed in Gainesville Woman Care*, 210 So. 3d at 1248.

62. *Id.*

63. § 390.0111(3)(a).

64. Complaint at 17, Gainesville Woman Care, LLC v. State, 210 So. 3d 1243 (Fla. 2017) (No. 2015-CA-001323); *Gainesville Woman Care*, 210 So. 3d at 1249.

65. Gainesville Woman Care, LLC v. State, No. 2015-CA-1323, at 1, 11 (Fla. Cir. Ct. July 1, 2015) (order granting temporary injunction).

66. *Id.* at 10–11.

67. State v. Gainesville Woman Care, LLC, 187 So. 3d 279, 281–83 (Fla. Dist. Ct. App. 2016) (per curiam), *quashed*, 210 So. 3d 1243 (Fla. 2017).

68. *Gainesville Woman Care*, 210 So. 3d at 1262.

privacy," and remanded "with instructions that the temporary injunction . . . remain in effect pending a hearing on Petitioners' request for a permanent injunction."[69]

After the supreme court's ruling in *Gainesville Woman Care*, the trial court held a hearing on the merits and, on January 9, 2018, permanently enjoined the Mandatory Delay Law.[70] Relying on the supreme court's rule announced in *Gainesville Woman Care*, the trial court determined that the State had failed to meet its burden of showing a compelling interest sufficient to withstand strict scrutiny review and therefore held the Mandatory Delay Law "facially unconstitutional."[71] The State is appealing the decision.[72]

IV. THE COURT'S REASONING

A. Majority Opinion

In a four-justice majority opinion written by Justice Barbara Pariente, the Supreme Court of Florida held in *Gainesville Woman Care* that strict scrutiny is the across-the-board standard applied to laws that infringe on abortion access in Florida.[73] Applying this standard of review, the court found that the Petitioners had demonstrated a substantial likelihood of success on the merits of their state constitutional challenge. Because they had also satisfied the other three elements required for issuance of a preliminary injunction, the court held that the trial court's grant of the preliminary injunction was warranted.[74]

69. *Id.* at 1262, 1247, 1265.

70. Gainesville Woman Care, LLC v. State, No. 2015-CA-001323, 2018 WL 3090185, at *1–4 (Fla. Cir. Ct. Jan. 9, 2018).

71. *Id.* at *4.

72. The Florida First District Court of Appeals heard arguments in March 2019. *Florida First District Court of Appeal Docket, Case Number: 1D18-623*, FLA. ST. CTS., http://onlinedocketsdca.flcourts.org/DCAResults/LTCases?CaseNumber=623&CaseYear=2018&Court=1 (last visited Apr. 14, 2019).

73. *Gainesville Woman Care*, 210 So. 3d at 1245, 1247, 1265. There are seven justices on the Florida Supreme Court. *See Florida's Court System: The Supreme Court of Florida*, FLA. SUP. CT., https://www.floridasupremecourt.org/About-the-Court/Florida-s-Court-System#SupremeCourt (last visited Mar. 3, 2018). The seventh justice, Justice C. Alan Lawson, did not participate in the case. *Gainesville Woman Care*, 210 So. 3d at 1265.

74. *Gainesville Woman Care*, 210 So. 3d at 1247.

1. Strict Scrutiny Applies to the Mandatory Delay Law

The most significant part of the opinion is its holding related to the strict scrutiny standard applied in the abortion-privacy context in Florida. While the majority takes pains to argue that its holding is in line with earlier precedent, it actually established a new rule, eliminating the threshold requirement established by *T.W.* that plaintiffs show a restriction is "significant" before strict scrutiny review applies. The court began by discussing its prior decisions, *T.W.* and *North Florida Women's*, and concluded that the cases stand for the rule that: (1) "any law that implicates Florida's right of privacy will be subject to strict scrutiny review," and (2) "laws that place the State between a woman, or minor, and her choice to end her pregnancy clearly implicate the right of privacy."[75] As it had in these earlier cases, the court cited to privacy decisions outside of the abortion context to emphasize that laws infringing on the right to privacy are uniformly accorded strict scrutiny in Florida "without first requiring in-depth factual findings about the extent of the burden imposed by the law."[76]

The majority then proceeded to answer the key question before it: whether *T.W.* had actually imposed a different rule for privacy-infringing laws in the abortion context, requiring a threshold finding that a regulation imposed a "significant" restriction on abortion access before strict scrutiny would apply.[77] The majority's answer was an emphatic "no." Specifically, the court found that the strict scrutiny standard was intended to apply in the abortion context exactly as it did to laws implicating the right to privacy in other contexts:

> [T]he Court has not required an additional evidentiary prerequisite before strict scrutiny applies in other cases implicating the right of privacy, or any other context where strict scrutiny is appropriate. To single out the instance in which a woman chooses to end her pregnancy to apply this additional evidentiary burden would contradict our precedent

75. *Id.* at 1254.

76. *Id.* at 1255 (first citing T.M. v. State, 784 So. 2d 442, 443–44 (Fla. 2001) (involving a juvenile curfew ordinance); then citing Beagle v. Beagle, 678 So. 2d 1271, 1275 (Fla. 1996) (involving grandparental visitation rights); and then citing Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation, 477 So. 2d 544, 548 (Fla. 1985) (involving administrative subpoena of financial records)).

77. *Id.* at 1255.

> emphasizing the importance of Florida's fundamental right of privacy.[78]

The majority argued that the rule established by *T.W.*, with its language of "significant" versus "insignificant" burdens, had to be understood in "the appropriate context":

> To the extent the [*T.W.*] Court used the term "significant restriction," it was borrowing from the United States Supreme Court opinion in *City of Akron v. Akron Center for Reproductive Health, Inc.*, which provided that medical record-keeping and neutral informed consent laws would have "no significant impact" on a woman's right to choose. This Court was merely clarifying that prior to the end of the first trimester, the State was not permitted to restrict a woman's right to choose to terminate her pregnancy.[79]

This passage comprises the extent of the majority's effort to explain the language used in *T.W.* and its seeming differentiation between "significant" and "insignificant" restrictions. The relevant passage from *City of Akron* discusses that certain "insignificant" regulations on abortion may sometimes be permissible *even during the first trimester* of pregnancy, despite the strict bar on state interference in a woman's right to access abortion during the first trimester set out in *Roe v. Wade*.[80] However, the *T.W.* court used the "significant restrictions" language to refer to regulations of abortion *after* the first trimester, citing to *City of Akron* using a "*compare*" signal and an explanatory parenthetical. The relevant language in *T.W.* follows:

> Under Florida law, *prior to the end of the first trimester*, the abortion decision must be left to the woman and may not be

78. *Id.* at 1256.

79. *Id.* at 1255–56 (internal citations omitted) (quoting City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 430–31 (1983), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

80. The relevant passage from *City of Akron* is the following:

> This does not mean that a State *never* may enact a regulation touching on the woman's abortion right during the first weeks of pregnancy. Certain regulations that have no *significant impact* on the woman's exercise of her right may be permissible where justified by important state health objectives. . . . But even these minor regulations on the abortion procedure during the first trimester may not interfere with physician-patient consultation or with the woman's choice between abortion and childbirth.

462 U.S. at 430 (emphasis added).

> significantly restricted by the state. *Following this point*, the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother. Insignificant burdens *during either period* must substantially further important state interests. *Compare* [*City of Akron*, 462 U.S.] at 430 ("Certain regulations that have no significant impact on the woman's exercise of her right may be permissible where justified by important state health objectives.").[81]

Given this context, it is difficult to understand the majority's argument that *T.W.*'s use of this language was merely meant to emphasize that the State is barred from significantly interfering with abortion access in the first trimester. Instead, the plain language of *T.W.* seems to establish an intermediate scrutiny standard of review for *insignificant* restrictions on abortion access, both during and after the first trimester of pregnancy, which looks at whether they "substantially further important state interests" and draws on *City of Akron* as an example.[82] The language thus appears to require a threshold analysis of whether a burden is "significant" or "insignificant" in order to determine which standard of review applies.

Nevertheless, the *Gainesville Woman Care* court insisted that it was not creating a new rule, but rather was simply "clarifying" the rule that always existed: "To the extent there is any doubt or confusion regarding our precedent, we clarify that there is no threshold requirement that a petitioner must show by 'sufficient factual findings' that a law imposes a significant restriction on a woman's right of privacy before strict scrutiny applies."[83] To hold otherwise, the court found, would be to "equate the Florida constitutional inquiry in the termination of pregnancy context to the federal 'undue burden' test" articulated in *Casey*, which had already been rejected by the Florida Supreme Court in *North Florida Women's*.[84]

81. *In re* T.W., 551 So. 2d 1186, 1193 (Fla. 1989) (emphasis added) (footnote omitted); *see also supra* text accompanying notes 30–37.

82. *T.W.*, 551 So. 2d at 1193 (citing *City of Akron*, 462 U.S. at 430).

83. *Gainesville Woman Care*, 210 So. 3d at 1256 (citing Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation, 477 So. 2d 544, 547 (Fla. 1985)).

84. *Id.* (first citing *Casey*, 505 U.S. at 877; and then citing N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 634–35 (Fla. 2003)).

2. Four Elements of Preliminary Injunction Met

After establishing that strict scrutiny was the appropriate standard for reviewing the Mandatory Delay Law, the court turned to an evaluation of the four elements of a preliminary injunction.[85] To be granted a preliminary injunction in Florida, the plaintiff must show: "[1] a substantial likelihood of success on the merits; [2] lack of an adequate remedy at law; [3] irreparable harm absent the entry of an injunction; and [4] that injunctive relief will serve the public interest."[86] The court also highlighted that its standard of review for preliminary injunctions defers to the trial court on findings of fact.[87] It held that the trial court was correct in finding that plaintiffs had met all four requirements and therefore, the grant of a preliminary injunction was appropriate.[88]

The court found the first prong was met because strict scrutiny analysis carries a presumption of unconstitutionality that shifts the burden to the State to provide evidence of a compelling state interest.[89] It relied on two findings of fact by the trial court to support its conclusion: first, that the State had provided no evidence of a compelling interest, and second, that "Florida law does not require a parallel restriction on medical procedures of comparable risk."[90] Together, these facts were sufficient in the court's view to find a substantial likelihood that the law would fail to meet the strict scrutiny requirement that it "further[] a compelling state interest in the least restrictive way."[91]

The State conceded the second prong of the preliminary injunction test—lack of an adequate remedy if the law were to go into effect and later be found unconstitutional—and so the court proceeded to the final two prongs.[92] The court essentially combined these elements with the first two: it held that the statute's substantial likelihood of unconstitutionality, combined with the lack of an adequate remedy, led necessarily to the conclusion that the law would cause irreparable harm if enacted and that a temporary injunction would serve the public

85. *Id.* at 1258.
86. *Id.* (quoting Reform Party of Fla. v. Black, 885 So. 2d 303, 305 (Fla. 2004)).
87. *Id.* (quoting Fla. High Sch. Athletic Ass'n v. Rosenberg, 117 So. 3d 825, 826 (Fla. Dist. Ct. App. 2013)).
88. *Id.* at 1265.
89. *Id.* at 1260.
90. *Id.*
91. *Id.*
92. *Id.* at 1262–63, 1262 n.5.

interest.[93] It pointed to United States Supreme Court, federal, and Florida appellate decisions for the proposition that courts often "presume[] irreparable harm when certain fundamental rights are violated."[94]

While the court found that the likelihood of unconstitutionality alone would be sufficient to satisfy the irreparable harm element, the court also noted the trial court's findings regarding the law's likely impact. The trial court had found, based on the plaintiffs' complaint and declarations, that enforcement of the Mandatory Delay Law would harm "women seeking to terminate their pregnancies in Florida" by requiring them "to make an additional, unnecessary trip to their health care provider [that] could impose additional harms by requiring a woman to delay the procedure or force her past the time limit for the procedure of her choice."[95] Considering this finding, the court held that "it would be specious to require . . . that the trial court make additional factual findings that enjoining the law would also be in the public interest."[96]

B. Justice Canady's Dissent

Justice Charles Canady's dissent, in which Justice Ricky Polston joined, raised two major points of contention with the majority opinion.[97] First, he argued that the trial court had an insufficient factual basis to establish the three contested requirements of a preliminary injunction. Second, he disagreed with the majority's constitutional analysis and its reframing of the *T.W.* rule.[98]

The dissent's first contention was that the trial court lacked sufficient evidence to grant a temporary injunction, which requires that each of the four elements be supported by "competent, substantial evidence."[99] The evidence before the trial court consisted of nothing more than the pleadings, a single affidavit from the plaintiffs, and a one-hour evidentiary hearing where no witnesses were called.[100] The dissent agreed with the appellate court that this evidence did not

93. *Id.* at 1264.
94. *Id.* at 1263; *e.g.*, Baker v. Buckeye Cellulose Corp., 856 F.2d 167 (11th Cir. 1988).
95. Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1264 (Fla. 2017).
96. *Id.*
97. *Id.* at 1265.
98. *Id.* at 1268–70 (Canady, J., dissenting).
99. *Id.* at 1266 (quoting *id.* at 1265 (majority opinion)).
100. *Id.* at 1267 & n.6 (Canady, J., dissenting); State v. Gainesville Woman Care LLC, 187 So. 3d 279, 281 (Fla. Dist. Ct. App. 2016) (per curiam), *quashed*, 210 So. 3d 1243 (Fla. 2017).

supply a sufficient factual basis to establish each of the three contested elements and grant a temporary injunction.

However, the dissent's first conclusion is dependent on its second: that the majority was wrong to hold that *T.W.* does not require a preliminary finding of a "significant" burden before strict scrutiny applies.[101] Both the dissent and the appellate court argued that the plaintiffs had failed to show a "substantial likelihood of success on the merits" because they had failed to demonstrate that the Mandatory Delay Law posed a "significant restriction" on abortion access before applying strict scrutiny.[102] But this is the very requirement the Supreme Court of Florida changed in the majority opinion.[103]

The dissent argues that the majority misinterpreted the plain language of *T.W.*, which, in Justice Canady's view, "ma[de] clear beyond any doubt that statutes imposing 'significant restrictions' on the right to abortion are subject to strict scrutiny while statutes imposing 'insignificant burdens' on the right to abortion are not."[104] Accordingly, the dissent rejected the majority's rule and would have required the plaintiffs to make a preliminary showing that a restriction is "significant" before strict scrutiny would apply "to challenges to statutes regulating the right to abortion."[105] This, Justice Canady argues, was the prior rule in Florida, and it comes from a recognition by the court "that the right of privacy is not boundless."[106]

V. AUTHOR'S ANALYSIS

The *Gainesville Woman Care* majority, while never explicitly stating an intent to depart from earlier precedent, essentially did just that by rejecting *T.W.*'s differentiated standard of review for significant and insignificant restrictions on abortion access and replacing it with an across-the-board strict scrutiny standard of review. The dissent correctly points out that this amounts to a departure from the prior rule, and the majority is not able to convincingly show otherwise. Further evidence that the prior rule was understood by Florida courts as imposing a threshold "substantial burden" analysis is that the

101. *Gainesville Woman Care*, 210 So. 3d at 1268 (Canady, J., dissenting).

102. *Id.* at 1267–69 (quoting *id.* at 1262, 1265 (majority opinion)); *Gainesville Woman Care*, 187 So. 3d at 282 ("The trial court's failure to make sufficient factually-supported findings about *whether the law imposes a significant restriction* . . . renders . . . the injunction deficient, and hampers meaningful appellate review." (emphasis added)).

103. *Gainesville Woman Care*, 210 So. 3d. at 1245 n.1.

104. *Id.* at 1269 (Canady, J., dissenting).

105. *Id.* at 1270.

106. *Id.*

appellate court's decision reversing the trial court's grant of a preliminary injunction was per curiam: a unanimous appellate court believed that the trial court was required "to make sufficient factually-supported findings about the existence of a *significant restriction* on a woman's right to seek an abortion" before applying strict scrutiny.[107]

Although disposing of the significant/insignificant restriction threshold analysis can easily be read as a departure from the prior rule in Florida, in another sense, the court's decision was consistent with prior precedent: the court's previous adamant rejection of the federal "undue burden" test established in *Casey*.[108] *North Florida Women's* had in fact presented an internal inconsistency: although it explicitly rejected the undue burden test, it still applied a two-part "significant restriction" analysis that bore a striking resemblance to the *Casey* standard.[109] By rejecting this threshold analysis of whether a restriction is "significant" before applying strict scrutiny to abortion restrictions, the supreme court reaffirmed its statement in *T.W.* that the Florida Constitution's privacy "amendment embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution."[110] The court reiterated, as it had in the prior cases, that abortion regulations implicate Florida's fundamental right to privacy, and thus, strict scrutiny review applies, just as it does in other privacy contexts.[111] So while the case can be read as an unexplained departure from the prior standard, it can also be read as finally bringing the Florida rule in line with what the court had always said the constitutional privacy right guaranteed. This may be what the court meant when it described its holding as intended to "clarify" its prior decisions.[112]

The case illustrates the ability of state courts to depart from federal precedent and guarantee a higher degree of protection for individual

107. State v. Gainesville Woman Care LLC, 187 So. 3d 279, 282 (Fla. Dist. Ct. App. 2016) (per curiam) (emphasis added), *quashed*, 210 So. 3d 1243 (Fla. 2017).

108. *See* N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 634 (Fla. 2003).

109. *See supra* notes 46–49 and accompanying text; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 875–77 (1992).

110. *In re* T.W., 551 So. 2d 1186, 1192 (Fla. 1989); *N. Fla. Women's*, 866 So. 2d at 634–35 ("While the United States Supreme Court has read into the federal constitution an *implicit* right of privacy, that particular right is a weak version of our *explicit* freestanding state right." (footnote omitted)).

111. *Gainesville Woman Care*, 210 So. 3d at 1245; *see N. Fla. Women's*, 866 So. 2d at 635; *T.W.*, 551 So. 2d at 1193.

112. *Gainesville Woman Care*, 210 So. 3d at 1256.

rights than that afforded by the Federal Constitution.[113] Forty-six years after *Roe v. Wade*, the national conversation around abortion often remains "dominated by federal law."[114] And yet, since the Supreme Court loosened the standard of review applied to state abortion regulations in *Casey*, states have played a prominent role in the day-to-day reality of abortion access. Legislative tactics to restrict abortion in the states include laws regulating abortion providers, limiting providers to licensed physicians, "mandat[ing] counseling designed to dissuade a woman from obtaining an abortion, requir[ing] waiting periods before an abortion, requir[ing] parental involvement before a minor obtains an abortion, or limit[ing] the use of state Medicaid funds to pay for medically necessary abortions."[115] These laws represent an effective, years-long strategy to limit the overall number of abortions by restricting abortion access, without overstepping the bounds set by the implicit right to privacy in the Federal Constitution as that right has been interpreted by the Supreme Court.[116] Such legislation finds its foothold in the state interest in protecting the "potentiality of human life," which was recognized as a legitimate state interest by *Roe v. Wade* and *Casey*.[117]

But federal deference to the states on abortion regulation can go both ways. States are free to guarantee a higher level of privacy protection than that protected at the federal level, and they may, like Florida, do so on state constitutional grounds.[118] Yet, advocacy using

113. *See generally* TALBOT D'ALEMBERTE, THE FLORIDA STATE CONSTITUTION 26–28 (2d ed. 2016) (discussing the relationship between federal and state constitutional law); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 489 (1977) (seminal article encouraging states to take a more active role in protecting individual rights through state constitutional law).

114. Ronda K. Kent, Case Survey, *Abortion and State Constitutions*, 21 RUTGERS L.J. 903, 914 (1989); John Gramlich, *Where the Public Stands on Key Issues That Could Come Before the Supreme Court*, PEW RES. CTR. (Aug. 30, 2018), http://www.pewresearch.org/fact-tank/2018/08/30/where-the-public-stands-on-key-issues-that-could-come-before-the-supreme-court/.

115. Djavaherian et al., *supra* note 8, at 396 (footnotes omitted); *see also* Marisa S. Cianciarulo, *For the Greater Good: The Subordination of Reproductive Freedom to State Interests in the United States and China*, 51 AKRON L. REV. 99, 114–15 & nn.82–87 (2017) (collecting state regulations); *State Laws and Policies: An Overview of Abortion Laws*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/overview-abortion-laws (last updated Apr. 1, 2019).

116. *See* Djavaherian et al., *supra* note 8, at 397.

117. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871 (1992) (quoting Roe v. Wade, 410 U.S. 113, 162 (1973)); *Roe*, 410 U.S. at 164–65.

118. Wharton, *supra* note 13, at 469, 477, 515 ("[S]tate constitutions are playing an important role in safeguarding abortion rights in individual states in an era of diminished federal constitutional protection and hold promise for influencing a return to expanded protection at the federal level.").

state constitutional law as an avenue for protecting abortion access has met with mixed results.[119] The status of mandatory delay laws in the various states illustrates this point.

Although ten states have an explicit right to privacy in the state constitution, and more have found an implied or penumbral right to privacy in various other sections of the state constitution, few states have been able to capitalize on these privacy guarantees to invalidate mandatory delay laws.[120] As of April 2019, the Guttmacher Institute reported that twenty-seven states required a mandatory waiting period between when a woman receives abortion counseling and when she undergoes the abortion.[121] After *Gainesville Woman Care*, Florida joins four other states—Delaware, Montana, Massachusetts and Iowa—that have had mandatory delay statutes permanently enjoined.[122] One other state, Louisiana, had its 72-hour delay law temporarily blocked pending ongoing litigation.[123] Tennessee had a two-day delay law struck down in state court on the basis of an implicit right to privacy in the state constitution,[124] but after the state passed a constitutional amendment

119. *Id.* at 526–27.

120. *See* FRIESEN, *supra* note 23, at 2-4 to 2-6.

121. *State Laws and Policies Counseling and Waiting Periods for Abortion*, GUTTMACHER INSTITUTE (last updated Apr. 1, 2019), https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion. The most common waiting period is 24 hours, but five states—Missouri, North Carolina, Oklahoma, South Dakota, and Utah—require a 72-hour waiting period. *Id.*

122. *Id.*; Planned Parenthood of the Heartland v. Reynolds *ex rel.* State, 915 N.W.2d 206, 246 (Iowa 2018) (granting a permanent injunction of Iowa's Mandatory Delay Law); Planned Parenthood of Del. v. Brady, 250 F. Supp. 2d 405, 410, 412 (D. Del. 2003) (granting temporary injunction on federal constitutional grounds), *aff'd*, No. Civ.A. 03-153-SLR, 2003 WL 21383721, at *2 (D. Del. June 9, 2003) (granting permanent injunction of Delaware's 24-hour delay law); Planned Parenthood of Missoula v. State, No. BDV-95-722, 1995 Mont. Dist. LEXIS 800, at *3, *19 (D. Mont. Nov. 28, 1995) (issuing temporary injunction on state constitutional grounds), *aff'd*, No. BDV-95-722, 1999 Mont. Dist. LEXIS 1117, at *22 (D. Mont. Mar. 12, 1999) (granting permanent injunction upon agreement of the parties); Planned Parenthood League of Mass., Inc. v. Bellotti, No. 80-1166-MA (D. Mass. Nov. 4, 1987) (granting permanent injunction of Massachusetts's 24-hour delay law).

123. In Louisiana, officials have agreed not to enforce a law extending the state's mandatory delay period from 24 to 72 hours while litigation challenging the law is pending in federal court. *See* Janet McConnaughey, *Judge Narrows Challenges to Some Louisiana Abortion Laws*, AP NEWS (Nov. 16, 2017), https://www.apnews.com/32bc9f3249574e339e74f4a807a6b1b8; *see also* LA. STAT. ANN. § 40:1061.17 (2018) (amending Louisiana's Woman's Right to Know statute in 2016; the pre-amendment version of this law, requiring only a 24-hour delay period, is currently in force).

124. *See* Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 4, 22, 25 (Tenn. 2000) ("[A] woman's right to terminate her pregnancy [was] a vital part of the right to privacy [implicitly] guaranteed by the Tennessee Constitution."). One commentator (in a piece predating the Florida Supreme Court's decision in *Gainesville Woman Care*) called

stating that the constitution was not to be construed to protect abortion rights,[125] a new 48-hour Mandatory Delay Law was passed in May 2015.[126] That law is currently being challenged in federal court.[127]

Of the four states where mandatory delay laws have thus far been successfully challenged, only Montana, Louisiana, and Florida have an explicit right to privacy in the state constitution, and only in Montana and Florida have the successful challenges been based on state constitutional grounds.[128] Louisiana, South Carolina,[129] and Arizona[130] all have an explicit right to privacy in their state constitutions and 24-hour delay laws on the books.[131] In Arizona, the state court of appeals has held that the explicit right to privacy in the state's constitution extends no further than the implicit right to privacy in the Federal Constitution.[132] This makes Florida one of just two states to have

the Tennessee decision "the strongest rejection of the *Casey* plurality's analysis by a state court." Wharton, *supra* note 13, at 520.

125. A challenge to the repeal amendment's validity was recently upheld in the Sixth Circuit. George v. Hargett, 879 F.3d 711, 714, 730 (6th Cir. 2018).

126. *See* Jonathan Mattise, Tennessee Gov, Top GOP Lawmakers Back Heartbeat Abortion Ban, AP NEWS (Jan. 30, 2019), https://www.apnews.com/1724a05e393e456e8aac7dd214ebc5cd.

127. *See Adams & Boyle, P.C. v. Slatery (3:15-cv-00705)*, COURT LISTENER, https://www.courtlistener.com/docket/4383769/adams-boyle-pc-v-slatery/ (last updated Apr. 11, 2019); *Adams & Boyle, P.C. et al. v. Slatery, et al.*, CTR. FOR REPROD. RTS. (June 13, 2017), https://www.reproductiverights.org/case/adams-boyle-pc-et-al-v-slatery-et-al.

128. *See Planned Parenthood of Missoula*, 1995 Mont. Dist. LEXIS 800, at *18–19; Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1245 (Fla. 2017). Although Louisiana has an explicit right to privacy in its state constitution, the challenge to its 72-hour delay law was brought in federal court on federal constitutional grounds only. Complaint at 37, June Med. Servs. v. Gee, No. 3:16-cv-00444-BAJ-RLB (M.D. La. 2016), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/june-medical-services-v-gee-complaint-16-CV-444.pdf.

129. S.C. CODE ANN. § 44-41-330 (2013) (South Carolina's Woman's Right to Know Act, mandating a 24-hour delay period).

130. ARIZ. REV. STAT. ANN. § 36-2153 (2009) (Arizona's informed consent statute, mandating a 24-hour wait period between abortion counseling and performing the abortion).

131. *See supra* note 24 (listing the ten state constitutions that contain explicit protection of the right to privacy).

132. In a 2011 case challenging several provisions of Arizona's informed consent statute (although not specifically its 24-hour delay provision) on grounds that they violated the state constitution's right to privacy, the Arizona Court of Appeals held "that the statutes at issue would withstand federal constitutional scrutiny, and that the Arizona Constitution—to the extent it protects abortion rights at all—offers no greater protection than the federal constitution with respect to the regulations at issue in this case." Planned Parenthood Arizona, Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists, 257 P.3d 181, 186 (Ariz. Ct. App. 2011).

invalidated a mandatory delay law on state constitutional grounds.[133]

Even where state constitutions have been wielded to guarantee a higher level of privacy protection than that afforded by the Federal Constitution, this approach comes with its own pitfalls, notably the susceptibility of state constitutions to amendment.[134] The history of Florida's privacy amendment illustrates this point. After the Florida Supreme Court's decisions in *T.W.* and *North Florida Women's* striking down statutes that required minors to inform a parent before obtaining an abortion, Florida voters approved an amendment to allow for parental notification statutes.[135] More recently, in response to the Florida Supreme Court's decision in *Gainesville Woman Care* and the subsequent permanent injunction of the Mandatory Delay Law, lawmakers proposed an amendment to the Florida Constitution that would have prevented the privacy right from being interpreted to protect abortion access. The proposed amendment was intended in part to "[r]estrain[] the Florida Supreme Court's gross overreach by ignoring the original intent of the amendment and producing bad public policy."[136] It was defeated in a four to two vote by the Judicial Committee of the Constitution Revision Commission ("CRC") in February 2018.[137]

While state constitutional law thus provides an avenue for states like Florida to guarantee a heightened level of protection for abortion access, Florida is clearly in the minority when it comes to states' willingness to assert the state constitution as a means of providing abortion-privacy rights beyond those already guaranteed by the Federal Constitution.[138]

133. The outcome of the State's appeal of the permanent injunction will determine whether Florida maintains this status. *See supra* notes 69–71 and accompanying text.

134. *See* John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 ALB. L. REV. 2105, 2106 (2013) (discussing the amendment process for state constitutions, which, though varied, is universally less burdensome than the process for amending the Federal Constitution); Wharton, *supra* note 13, at 533.

135. *See supra* notes 50–51 and accompanying text.

136. *Committee Meeting Expanded Agenda*, CONST. REVISION COMMISSION, flcrc.gov/PublishedContent/Committees/2017-2018/JU/MeetingRecords/MeetingPacket_174.pdf (last visited Apr. 16, 2019).

137. *Id.* The amendment's sponsor still has the option of reviving the proposal at future meetings of the full CRC in hopes of getting the measure added to a state general election ballot. *See* Lloyd Dunkelberger, *CRC Panel Rejects Plan to Narrow Privacy Rights in Florida Constitution*, ORLANDO WKLY.: BLOGGYTOWN (Feb. 5, 2018, 10:22 AM), https://www.orlandoweekly.com/Blogs/archives/2018/02/05/crc-panel-rejects-plan-to-narrow-privacy-rights-in-florida-constitution.

138. *See supra* note 133 and accompanying text. It appears that many states are not "willing to engage in a truly independent analysis that leads to protection beyond that required by the Federal Constitution." Wharton, *supra* note 13, at 531.

VI. CONCLUSION

In *Gainesville Woman Care, LLC v. State*, the Florida Supreme Court reasserted that laws infringing on access to abortion implicate the state constitution's privacy right and will be held to a strict scrutiny standard of review.[139] Although the majority claimed that it was merely clarifying its earlier precedent, the court's holding in effect overruled the test established by *T.W.*, which had required a showing that an abortion restriction was "significant" before strict scrutiny analysis would apply.[140] Such a test was more akin to the current federal "undue burden" test established by *Casey*, even though that test had been explicitly rejected by the Florida Supreme Court in *North Florida Women's*.[141] In *Gainesville Woman Care*, the court reaffirmed that the state's constitution guarantees a higher level of privacy protection when it comes to abortion than what is provided by the Federal Constitution and thus rejected *T.W.*'s differentiated standard.[142] The case illustrates the corollary power available to states in shaping the day-to-day realities of abortion access for most Americans: on the one hand, the broad power to regulate abortion provided to the states by *Casey*; on the other, the inherent ability of states through their constitutions to guarantee protections beyond those mandated under current federal constitutional law. The divisive abortion issue, and the multiplicity of state legislative and constitutional approaches to it that have sprung up in the wake of *Casey*, exemplifies both the promise and pitfalls of federalism, for both sides.

139. Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1265 (Fla. 2017).

140. *Id.*; *In re* T.W., 551 So. 2d 1186, 1193 (Fla. 1989).

141. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 875–77 (1992); N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 634 (Fla. 2003).

142. *Gainesville Woman Care*, 210 So. 3d at 1256.