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A HISTORICAL AND ORIGINALIST DEFENSE OF ABORTION IN FLORIDA

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"You have to have some objective measure to go by, . . . [i]t can't just be fly-by-the-seat-of-your-pants philosophizing and imposing whatever idiosyncratic views you have on society under the guise of constitutional interpretation. Originalism provides a mechanism to (restrain) judicial discretion, which I think is very, very important." –Governor Ron DeSantis, speaking to the Federalist Society, November 14, 2019.[1]

"The right of privacy provision, adopted by the people of this state in 1980, effectively codified within the Florida Constitution the principles of Roe v. Wade . . . as it existed in 1980." –Justice Benjamin Overton, one of the drafters of the right of privacy provision in 1978, writing in In re T.W. in 1989.[2]

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* Professor of Law, Stetson University College of Law. This Article benefited from the thoughtful comments and criticisms of Evan Bernick, Michael Morley, and Royal Gardner.

1. Lawrence Mower, *DeSantis Is Reshaping Florida's Courts—with the Federalist Society's Help*, TAMPA BAY TIMES (Nov. 29, 2019), https://www.tampabay.com/florida-politics/buzz/2019/11/29/desantis-is-reshaping-floridas-courts-with-the-federalist-societys-help/ (statement of Ron DeSantis).

2. *In re* T.W., 551 So. 2d 1186, 1201 (1989) (Overton, J., concurring in part and dissenting in part). Overton served as a commissioner on the Constitution Revision Commission of 1977–78 that drafted the right of privacy provision that was later adopted in 1980. Ben F. Overton & Katherine E. Giddings, *The Right of Privacy in Florida in the Age of Technology and the Twenty-First Century: A Need for Protection from Private and Commercial Intrusion*, 25 FLA. ST. U. L. REV. 25, 25 (1997).

INTRODUCTION

Recent challenges to Florida's new law criminalizing the provision of abortion services performed after fifteen weeks of gestation force upon the Florida Supreme Court a fundamental conflict between conservative values: adhere to originalist methods of constitutional interpretation and overturn the law, or uphold the pro-life law by either rejecting or ignoring evidence usually considered persuasive or dispositive by originalists.[3] As this Article will show, protection of abortion as set forth in *Roe v. Wade*[4] was a pre-existing baseline understanding of the right to privacy in 1980 when Florida's constitutional right of privacy provision in article I, section 23,[5] was adopted. Seven years after the Supreme Court decision, *Roe* was widely recognized, in both law and public discourse in Florida, as a leading case establishing and giving meaning to the doctrine of a right of privacy. This context is critically important to interpreting the state constitution's right to privacy provision regardless of which

3. At least two cases have been filed challenging the constitutionality of the law based on the right to privacy provision of the Florida Constitution. *See, e.g.*, Planned Parenthood of Sw. & Cent. Fla. v. State, No. 2022-CA-912 (Fla. Cir. Ct. filed June 1, 2022); Generation to Generation v. State, No. 2022-CA-980 (Fla. Cir. Ct. filed June 10, 2022). In the *Planned Parenthood* case, the circuit court enjoined the law. *See* Order Granting Plaintiff's Motion for an Emergency Temporary Injunction, Planned Parenthood of Sw. & Cent. Fla. v. State, No. 2022-CA-912 (Fla. Cir. Ct. July 5, 2022). Under Florida law, an appeal automatically stayed the injunction. *See* FLA. R. APP. P. 9.310(b)(2). The court of appeals refused to vacate the stay. State v. Planned Parenthood of Sw. & Cent. Fla., 342 So. 3d 863, 869 (Fla. Dist. Ct. App. 2022), *review granted*, No. SC22-1050, 2023 WL 356196 (Fla. Jan. 23, 2023). The court of appeals subsequently overturned the temporary injunction. State v. Planned Parenthood of Sw. & Cent. Fla., 344 So. 3d 637 (Fla. Dist. Ct. App. 2022). Planned Parenthood has appealed these related decisions, which are currently before the Florida Supreme Court. *See State Court Abortion Litigation Tracker*, BRENNEN CTR. FOR JUST., (Jan. 6, 2023), https://www.brennancenter.org/our-work/research-reports/state-court-abortion-litigation-tracker#florida; *see also Florida Supreme Court Docket*, FLA. SUP. CT., http://onlinedocketssc.flcourts.org/DocketResults/CaseDocket?Searchtype=Case+Number&CaseTypeSelected=All&CaseYear=2022&CaseNumber=1050 (last visited Feb. 15, 2023).

4. 410 U.S. 113 (1973).

5. FLA. CONST. art I, § 23.

interpretive approach one takes. For originalism, however, which privileges the contemporaneous public understanding of constitutional terms at the time of adoption and which treats pre-existing legal meanings of constitutional texts as presumptively adopted with the text, this context should be dispositive. 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*,[6] can only reasonably be read to encompass abortion rights. Not surprisingly, this is precisely what the Florida Supreme Court held in the decade after adoption and has repeatedly confirmed in subsequent cases.[7] Contrary to the situation faced by Justices on the United States Supreme Court in *Dobbs v. Jackson Women's Health Organization*, where originalist arguments plausibly supported the overturning of abortion-rights precedents,[8] the Florida Supreme Court instead confronts a direct conflict between the two, a conflict that tests the mettle of a conservative judiciary[9] and will show whether originalism,

6. 381 U.S. 479 (1965).

7. *In re* T.W., 551 So. 2d 1186, 1192 (Fla. 1989); N. Fla. Women's Health & Counseling Servs. v. State, 866 So. 2d 612, 621 (Fla. 2003); Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1246 (Fla. 2017).

8. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235–36 (2022). Scholars debate whether Justice Alito's opinion in *Dobbs* in fact follows originalist methods. *Compare* J. Joel Alicea, *An Originalist Victory*, CITY J. (June 24, 2022), https://www.city-journal.org/dobbs-abortion-ruling-is-a-triumph-for-originalists (praising *Dobbs* for being originalist), *and* David Cole, *The Supreme Court Embraces Originalism—and All Its Flaws*, WASH. POST (June 30, 2022), https://www.washingtonpost.com/opinions/2022/06/30/supreme-court-originalism-constitution/ (critiquing *Dobbs* for being originalist), *with* Cass R. Sunstein, *The Alito Draft* (May 23, 2022), https://ssrn.com/abstract=4117446 (arguing that *Dobbs* is based on due process traditionalism, not originalism). This debate, however, is irrelevant to this Article, which focuses on the interpretation of the Florida Constitution. On the conventionally pluralistic nature of Alito's jurisprudence, see Neil S. Siegel, *The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent*, 126 YALE L.J.F. 164, 167 (2016). On how *Dobbs* is best seen as an expression of modern conservative politics and a conservative living constitutionalism using history and tradition to smuggle personal values into constitutional law, see Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEXAS L. REV. (forthcoming 2023) [hereinafter Siegel, *Memory Games*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4179622).

9. All of the current justices of the Florida Supreme Court were appointed by governors who were at the time Republican. *See* Allison Ross, *Florida Voters Will Decide Whether to Retain 5 of 7 State Supreme Court Justices*, TAMPA BAY TIMES (Oct. 17, 2022), https://www.tampabay.com/news/florida-politics/elections/2022/10/17/florida-supreme-court-justices-retention-ballot-canady/. Three were appointed by Charlie Crist, who is now a Democrat. *Florida Supreme Court Justices*, FLA. SUP. CT., https://supremecourt.flcourts.gov/Justices (last visited Feb. 15, 2023);

as actually practiced by the judiciary, in fact operates as the constraining and democracy-enhancing theory that its advocates have long claimed[10] or is merely another blank canvas on which judges paint whatever version of history best matches their predisposed policy views.[11]

In April 2022, as the United States Supreme Court was in the throes of overturning *Roe v. Wade*,[12] Florida Governor Ron DeSantis signed House Bill 5 prohibiting physicians from performing abortions if the patient has been pregnant for more than fifteen weeks.[13] Although the Supreme Court's decision in *Dobbs* mooted any argument that the new Florida law violates the federal constitutional right to privacy,[14] the statute conflicts with the line of Florida Supreme Court precedents that protect abortion rights under article I, section 23 of the Florida Constitution. Since first construing article I, section 23 in 1985, the Florida Supreme Court has consistently stated that the provision was intended to be more protective of individual rights to privacy than is

Crist Appoints Polston to the Supreme Court, FLA. BAR (Oct. 16, 2008), https://www.floridabar.org/the-florida-bar-news/crist-appoints-polston-to-the-supreme-court/. At the time of making those appointments, Crist professed pro-life positions. Of the three Crist appointees, Justices Canady and Polston dissented in the most recent abortion case overturning a twenty-four-hour waiting period regulation. *See* Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1265 (Fla. 2017).

10. Adam Richardson recently wrote an excellent public meaning originalist analysis of section 23 and the right of privacy in Florida. *See* Adam Richardson, *The Originalist Case for Why the Florida Constitution's Right of Privacy Protects the Right to an Abortion*, STETSON L. REV. (forthcoming 2023), https://ssrn.com/abstract=4187311. Richardson persuasively argues that the original public meaning of the provision was that it covered broadly the rights of decisional privacy, including abortion rights. *Id.* at 62. Richardson focuses primarily on the broad general right of privacy and its coverage of a full range of decisional privacy, and how this broad view was part of the original meaning of section 23. *Id.* His study contrasts sharply with (and in my view overwhelms) recent arguments that section 23 only covers informational privacy. *Id.* at 3 (discussing restrictive arguments). This Article will delve more into the then-current understanding of the right to abortion more specifically. I do so to better grasp the public understanding of how the right to privacy and abortion rights were, in the 1970s, intimately intertwined. I focus on the role of pre-existing legal meanings and how such meanings affected the original public meaning of section 23, and why such pre-existing meanings are critical to originalist analysis. This analysis of pre-existing legal meanings and public understandings of those meanings supplements and reinforces Richardson's analysis.

11. On the use of originalism to impose the values of movement conservativism through constitutional law, see Siegel, *Memory Games*, *supra* note 8.

12. *See* Joan Biskupic, *The Inside Story of How John Roberts Failed to Save Abortion Rights*, CNN (July 26, 2022, 7:52 AM), https://www.cnn.com/2022/07/26/politics/supreme-court-john-roberts-abortion-dobbs/index.html.

13. H.B. 5, 2022 Leg. (Fla. 2022), https://www.flsenate.gov/Session/Bill/2022/5/BillText/er/PDF. The gestational age of the fetus is determined based on the time elapsed since the first day of the pregnant patient's last menstrual period. Fla. H.B. 5 § 3(7).

14. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2283–84 (upholding a similar Mississippi law).

federal constitutional law.[15] This expansiveness has meant that Florida constitutional law has been more protective of the right to terminate a pregnancy than has the United States Supreme Court.[16] As the court stated in *In re T.W.*, the first case to apply section 23's right of privacy to abortion regulations, "Unlike the federal Constitution which allows intrusion [into a minor's abortion rights] based on a 'significant' state interest, the Florida Constitution requires a 'compelling' state interest in all cases where the right to privacy is implicated."[17] And although there has been pointed disagreement among justices about the precise application of Florida's right to privacy to particular abortion regulations at issue in each case, no justice of the Florida Supreme Court has yet argued that section 23 does not protect a woman's right to terminate a pregnancy.[18]

Thus, as Florida constitutional law stood when the legislature passed and the governor signed House Bill 5, the statute violated *In re T.W.* and subsequent Florida case law. If the Florida Constitution prevents the

15. Winfield v. Div. of Pari-Mutual Wagering, 477 So. 2d 544, 548 (Fla. 1985). This decision, issued only five years after the adoption of article I, section 23, prominently cited *Roe v. Wade* as one of the leading cases on the right to privacy. Justice Overton, who had first called for a right to privacy amendment when, as a commissioner, he addressed the Constitution Revision Commission in its opening session in 1977, joined the opinion in *Winfield*. *See* Gerald B. Cope, Jr., *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 FLA. ST. U. L. REV. 671, 721–22 (1978) [hereinafter Cope, Jr., *To Be Let Alone*] (discussing Overton's role on the commission); Major B. Harding et al., *Right to Be Let Alone—Has the Adoption of Article I, Section 23 in the Florida Constitution, Which Explicitly Provides for a State Right of Privacy, Resulted in Greater Privacy Protection for Florida Citizens*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 945, 954 (2000) (discussing Florida's expansive right to privacy).

16. *In re* T.W., 551 So. 2d 1186, 1191–92 (Fla. 1989) (parental consent statute); N. Fla. Women's Health & Counseling Servs. v. State, 866 So. 2d 612, 634–35 (Fla. 2003) (parental notification statute); Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1246 (Fla. 2017) (twenty-four-hour mandatory delay after receiving medical information about abortions). The Florida Constitution was amended in 2004 to expressly except parental notification statutes from the state's right to privacy protections and thus overturned that aspect of the holding in *North Florida Women's Health*. *See* FLA. CONST. art. X, § 22.

17. *In re T.W.*, 551 So. 2d at 1195 (referring to the significant interest standard applied to regulations involving minors by the plurality in *Belloti v. Baird*, 443 U.S. 662, 638 (1979), and mentioned by the Court in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 427 n.10 (1983)). *See also N. Fla. Women's Health*, 866 So. 2d at 634–35 (noting that "any comparison between the federal and Florida rights of privacy is inapposite in light of the fact that *there is no express federal right of privacy clause*" and holding that the undue burden standard "has no basis in Florida's Right to Privacy Clause"); *Gainesville Woman Care*, 210 So. 3d at 1256.

18. The dissent in the most recent case, *Gainesville Woman Care*, would have applied a compelling interest test once the plaintiffs presented sufficient evidence that the law imposed a significant restriction on access to abortion. *See* 210 So. 3d at 1268–71 (Canady, J., dissenting).

State from imposing a twenty-four-hour waiting period on women seeking abortions before viability, which the Florida Supreme Court has held it likely does,[19] then it definitely prevents the State from criminalizing almost all abortions performed after fifteen weeks. And because these cases are rooted in the Florida Constitution's privacy provision and not in the federal Due Process Clause, the United States Supreme Court's overturning of *Roe* and de-constitutionalization of abortion rights in *Dobbs* should be irrelevant to the constitutionality of House Bill 5.

Constitutional law, however, is not always so straight-forward. As *Dobbs* itself shows, the influences of politics and the changes in composition of a court can have a defining effect on constitutional rights and powers, regardless of how well-established a particular doctrine may be. Indeed, if the principle of the right to privacy and its application to abortion in Florida were as dependent on judicial construction as is the case with federal constitutional law, the *Dobbs* Court's arguments against stare decisis could well be applied in parallel to upend Florida's abortion cases.[20] This is the hope on which the legislature and governor rested their actions in passing a law so plainly in violation of current state constitutional law.[21] The State has asserted in a recent brief to the

19. *Id.* at 1260–63 (majority opinion) (upholding temporary injunction and stating that the twenty-four-hour delay law was presumptively unconstitutional given the State's lack of evidence of a compelling state interest implemented with the least restrictive means). The circuit court that has jurisdiction over *Gainesville Woman Care* has recently ruled for the State and declared the twenty-four-hour waiting period constitutional, despite the Supreme Court's prior opinion *in the same case* (upholding an injunction issued by a different judge) that the waiting period was presumptively unconstitutional and requiring the State to satisfy strict scrutiny analysis. Jim Saunders, *After 7 Year Legal Battle, Leon County Judge Signs Off on Florida Abortion Waiting Period*, TALLAHASSEE DEMOCRAT (Apr. 12, 2022, 10:36 AM), https://www.tallahassee.com/story/news/2022/04/12/florida-abortion-judge-waiting-period-leon-county-tallahassee/7287912001/. This decision marked a particularly bold flouting of a higher court, in this case by a judge who the Florida Supreme Court had previously publicly reprimanded for ethical failures. Our Tallahassee, *VancoreJones & Judge Angela Dempsy Campaign Conduct Lands Dempsey in Front of Florida Supreme Court*, YOUTUBE (June 13, 2022), https://www.youtube.com/watch?v=tGh0-_Nd_7Q.

20. *See* Richardson, *supra* note 10, at 58 n.250 (discussing Florida Supreme Court's recent relaxation of stare decisis and arguing that, even under the new standard, the original public meaning of section 23 protects abortion rights because *In re T.W.* cannot be found "clearly erroneous").

21. Florida's legislature operated with similar optimism when it enacted a parental consent law in 2020. *See* FLA. STAT. § 390.01114 (2022). This law was passed despite clear supreme court precedent finding a prior parental consent law unconstitutional. *In re T.W.*, 551 So. 2d at 1194. Courts have yet to rule on the constitutionality of this new version. *See generally* Denise Cespedes, *Mother May I?: The Constitutionality of Florida's Revived Parental Consent Requirement for the Termination of an Unmarried Minor's Pregnancy*, 21 FLA. COASTAL L. REV. 1 (2021).

Florida Supreme Court that "this Court is likely" to overturn *In re T.W.* and other abortion precedents.[22] The court of appeals decision refusing to issue an injunction, despite clear and binding supreme court precedent, feeds such hopes.[23]

But, as the Florida Supreme Court in *In re T.W.* itself noted,

> The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, . . . an independent, freestanding constitutional provision which declares the fundamental right to privacy . . . [and] which . . . provides for a strong right of privacy not found in the United States Constitution.[24]

Unlike the federal right, the right of privacy *is* in the text of the Florida Constitution.[25] As future Justice Carlos Muñiz wrote in 2004, "one purpose of the privacy amendment clearly was to give the abortion right a textual foundation in our state constitution."[26] Any analysis of whether

22. *See* Response to Emergency Motion to Vacate Automatic Stay at 23, State v. Planned Parenthood of Sw. & Cent. Fla., No. 1D22-2034 (Fla. Dist. Ct. App. Sept. 6, 2022) [hereinafter Response to Emergency Motion], https://efactssc-public.flcourts.org/casedocuments/2022/1050/2022-1050_response_57992_response.pdf; *see also* Appellants' Initial Brief at 5, State v. Planned Parenthood of Sw. & Cent. Fla., No. 1D22-2034 (Fla. Dist. Ct. App. July 20, 2022), https://edca.1dca.org/DcaDocs/2022/2034/2022-2034_Brief_1068052_RC03202D20Initial20Brief20on20Merits.pdf. As this Article was going to print, the State filed its merits brief before the Florida Supreme Court, arguing that *In re T.W.* should be overturned. Answer Brief on the Merits at 1–2, Planned Parenthood of Sw. & Cent. Fla. v. State, Nos. SC22-1050 & SC22-1127 (Fla. Mar. 29, 2023) [hereinafter Answer Brief], https://acis-api.flcourts.gov/courts/68f021c4-6a44-4735-9a76-5360b2e8af13/cms/case/693c27ad-f040-4da1-9c9e-b52e62e960a2/docketentrydocuments/046c3fe0-2280-44d2-943c-634856868f27.

23. State v. Planned Parenthood of Sw. & Cent. Fla., 342 So. 3d 863, 869 (Fla. Dist. Ct. App. 2022). The court, over a dissent, said that there was no evidence of irreparable harm in a fifteen-week ban because the plaintiffs were providers, not the pregnant patients—despite a long history of provider standing and irreparable harm decisions in the Florida courts. *Id.* at 866, 868–69; *id.* at 869–70 (Kelsey, J., dissenting). Changing abortion-related third-party standing law was one avenue courts used before *Dobbs* to limit challenges to abortion. *See generally* Elika Nassirinia, *Third-Party Standing and Abortion Providers: The Hidden Dangers of* June Medical Services, 16 NW. J.L. & SOC. POL'Y 214 (2021). Other courts in the state have been even bolder, including simply ignoring the holding and reasoning of the Florida Supreme Court. *See generally id.* It is hard to see such blatant flouting of supreme court decisions as reflecting anything other than the hope that newly appointed justices will overturn long-standing precedents.

24. *In re T.W.*, 551 So. 2d at 1191–92 (quoting Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985)).

25. FLA. CONST. art. 1, § 23.

26. Carlos Muñiz, *Parental Notification of a Minor's Termination of Pregnancy*, 29 J. JAMES MADISON INST. 8, 9 (2004).

and how it covers abortion rights begins with interpretation of that text, not with analogies to and imitations of *Dobbs*.[27]

This Article presents an analysis of the public understanding of the relationship between abortion rights and the right to privacy at key moments in Florida's constitutional history. Because public meaning is critical to originalist theories of interpretation,[28] a developed understanding of the context in which the right of privacy was adopted should be essential for courts employing originalism (it is important for non-originalist methods as well).[29] Part I sets out some of the basic concepts of originalism that are most relevant to Florida's right of privacy provision, with a particular focus on pre-existing legal terms and their role in original meaning. Part II presents the most significant part of the Article: a study of the context underlying the original public meaning of the Florida Constitution's right of privacy provision. This Part presents research into the history of the drafting of the provision—both the initial drafting by the 1977–78 Constitution Revision Commission and the re-drafting in 1980 by the legislature. As this analysis shows, *Roe* and abortion rights were very much part of the background materials used by the drafters as they framed the broad statement of a general right for the constitution. This Section also analyzes the extensive discussions in the press in 1980 about abortion and the right to privacy, revealing just how well-known the connection between *Roe* and the right to privacy was in

27. In its brief, the State contends that the reasoning in *Dobbs* "obliterates the foundation of [the Florida Supreme Court's] abortion precedents, which heavily relied on . . . [*Roe*] and its progeny in establishing a right to abortion under the Florida [privacy clause]." *See* Response to Emergency Motion, *supra* note 22, at 1–2, 24. This fundamentally misstates the state constitutional analysis under section 23 and ignores critical historical evidence about the adoption of the text. As this Article makes clear, the connection between *Roe* and section 23's right of privacy protection existed *at the time of the adoption* of the text in 1980. The Florida Supreme Court in *In re T.W.* merely acknowledged that fact. The people of Florida constitutionalized the right of privacy based on federal right to privacy law as it existed in 1980. *See infra* Part II. The State is now asking the court to reject the reasonable understanding of the people who adopted the text in favor of its interpretation that has repeatedly lost in efforts to amend the constitution by popular vote.

28. Richardson, *supra* note 10, at 5–8.

29. Although I am a (sympathetic) critic of originalism as applied to the United States Constitution, I recognize that originalist arguments are favored by a growing number of state and federal judges and that originalism is therefore an important part of any legal argument being made to courts, especially to state and federal courts of last resort. Many originalist arguments can carry weight for other methods of interpretation as well since most approaches to constitutional interpretation consider text and its surrounding historical context important modes of analysis. It is my own view that the closer in time the text being applied was adopted, the weightier the originalist arguments are. But the thesis of this Article—that the Florida Supreme Court will need to choose between originalism and pro-life positions—is true regardless of one's own views of the merits and faults of originalism.

the public sphere. Part III considers and reject counterarguments, including the idea that the general text of the provision silently excluded this well-known right to an abortion and really only codified a right to informational privacy, as well as an argument that *Dobbs* compels a change in state law. Finally, Part IV argues that subsequent constitutional actions, including a second amendment in 2004 addressing abortion rights and two failed efforts in 2012 and 2017 to drastically limit Florida's right to privacy, all evidence a *continued and ongoing* public understanding of what the Florida Supreme Court first held in 1989: article I, section 23 protects the right to terminate a pregnancy as then articulated in *Roe v. Wade*.

I. SOME KEY PRINCIPLES OF ORIGINALISM AND STATE CONSTITUTIONS

The starting point for most constitutional analysis, whether originalist or non-originalist, is text. Article I, section 23 of the state constitution provides:

> Right of privacy.—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. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.[30]

This right, although more specific than the Federal Constitution's Due Process Clause, remains fairly general. The text provides no guidance on whether the right protects reproductive choices such as abortion and contraception, or, for that matter, other areas of privacy such as basic decisions about raising one's children, protection of bodily integrity in decisions about which medical procedures can be performed on oneself, or the protection of sensitive personal information from disclosure. As is common with important constitutional provisions, many of which are stated at similar levels of generality and are therefore operationally

30. FLA. CONST. art. I, § 23. The phrase "except as otherwise provided herein" was meant to ensure that the search and seizure provisions of article 1, section 12 and the public disclosure provisions of article II, section 8 (the "Sunshine Amendment") were not affected by the amendment. *See* Overton & Giddings, *supra* note 2, at 36 (describing search and seizure provisions); Audio Tape: Hearing of Subcommittee on Executive Reorganization, at 18:18–42:07 (Mar. 11, 1980) (on file with State Archives of Florida, at Box 296, tape 1 (S 414)) [hereinafter Audio Tape: Dore] (statement of Professor Patricia Dore) (discussing the Sunshine Amendment and search and seizure provisions); *see also* Richardson, supra note 10, at 11–20 (providing a detailed textual analysis of section 23).

vague, interpretive work is needed to apply the language to specific cases and categories of activity.

One of the most important moves of originalism comes at this point. For many originalists, the first step in interpretation of vague or ambiguous terms is to study how the language was or would have been understood by the public responsible for adopting the language.[31] While this move can also be part of the toolbox for many non-originalists,[32] originalism requires this step and, importantly, will end its analysis if the vague or ambiguous meaning can be determined. That is, if analysis of the original meaning reveals with a fair degree of confidence that a particular provision was understood a particular way, then that understanding fixes the provision's meaning and no further analysis is necessary. This Fixation Thesis is the heart of originalism. According to originalists, this fixed meaning binds courts, holding them to the democratically-adopted higher law and preventing the creation or rejection of new constitutional provisions by the judiciary.[33] Only if there remains ambiguity about whether the constitutional language was originally understood by the adopting public to have a particular meaning would a court be justified in considering other modes of interpretation, including judicial concepts of evolving societal values and ethics, interpretation of comparable language by courts in other jurisdictions, or other common modes of construction.[34]

31. *See* Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 453–56 (2018); *see also* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 7–8 (2015) [hereinafter Solum, *The Fixation Thesis*] (discussing how varieties of originalism all accept the fixation thesis). Solum observes that some originalists focus on the original intent of the drafters of the language rather than the public meaning of the words. *See also* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1921 (2017) (explaining the theory that interpretations are fixed by discoverable original public meaning); *see also* KEITH E. WITTINGTON, CONSTITUTIONAL INTERPRETATION 53–59 (1999) (explaining the historically-based theory supporting fixation thesis). The Supreme Court currently appears to direct lawyers to the public meaning or understanding approach. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2137–38 (2022) (applying public understanding method to the Second and Fourteenth Amendments). Original intent, however, remains evidence of public meaning.

32. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–14 (1991); *see also* Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1763 (1994).

33. Solum, *The Fixation Thesis*, *supra* note 31, at 7–9 (explaining that the idea that meanings fixed in this way should constrain courts and other interpreters is known as the Constraint Principle).

34. *Id.* at 8; *see also* KEITH E. WITTINGTON, CONSTITUTIONAL CONSTRUCTION 5–9 (1999) (discussing the distinction and relationship between interpretation and construction in the context of hard-to-fix terms); *see also* Randy E. Barnett & Evan Bernick, *The Letter and the*

Given that this Article's analysis of Florida's right of privacy will focus on abortion rights, it is also necessary to say a few words about how originalists address the relationship between original meaning and original expected applications. As mentioned above, since constitutional text is often phrased at a high level of generality, application of the text to specific instances will require more precise definitions of rights-claims. At the time of adoption, the framers or ratifying public may have in mind specific applications of a proposed constitutional term, even though the language of the proposal is stated more generally. Several originalists contend that the expected application of constitutional text at the time of adoption should not necessarily constrain future interpreters. The classic formulation of this idea is found in Jack Balkin's living originalist defense of abortion rights under the Fourteenth Amendment.[35] But in most versions of this distinction, the way in which drafters and the adopting public originally expected to apply the text remains important evidence of original meaning.[36] Moreover, many originalists criticize

Spirit: A Unified Theory of Originalism, 107 GEO. L.J. 1, 10–18 (2018). Academic originalists disagree about what modes of analysis courts should employ if constitutional meaning remains indeterminate or underdetermined after original intent and understanding evidence is considered, or even if any other mode of analysis is appropriate. Again, that debate is not relevant here given the strong evidence of original meaning.

35. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292–94 (2007). A similar point is made by Christopher Green in elucidating the difference between the sense. of a constitutional term and its referent (e.g., its application). *See generally* Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 555 (2006).

36. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 781 [hereinafter *The Abstract Meaning Fallacy*]. For important originalist articles that rely heavily on original application evidence to determine textual meanings, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953 (1995) (arguing that a majority of congressmen who supported the Fourteenth Amendment expected the amendment to bar legal segregation in public schools); David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L.Q. 213, 215–17 (2015) (using expected application evidence to argue that Republican supporters of the Fourteenth Amendment understood it to bar laws prohibiting interracial marriage). To some degree the labelling of an instance of a right's use as an "application" rather than a "meaning" is itself arbitrary. Does the right to privacy "mean" the right to an abortion? In some important sense the answer is yes, what the first phrase means to people who could become pregnant is the protection of abortion rights, not as an "application" but as a core meaning. That is, they would see themselves as not having a meaningful right to privacy if abortion access is prohibited. I suspect whether one sees reproductive rights as an application or a core meaning will differ quite a lot across gender, raising the problem that meanings themselves can be situated (a problem public meaning originalists do not address very well). One gets the sense that by labeling a use-instance an "application" and thus distinct from meaning, public meaning originalists can more easily evade hard criticisms about

Balkin and others for being too willing to jettison original applications as evidence of original meaning.[37] And judicial originalism—originalism as actually practiced—resorts to application evidence quite readily.[38] Original applications therefore have an important role in determining a fixed or bounded meaning, they just do not of themselves necessarily define the limits of meaning. Importantly, one way they may help fix meaning is by setting a baseline—the expected application of a right-granting provision establishes how the right most likely applies to actual disputes, although later interpretations could apply the right more broadly. The original expected application of the right may leave room for future development that is consistent with but unanticipated by the framing public's applied meaning. To the extent "public meaning originalism" sees original (or initial) applied meaning as evidence of overall meaning and as a baseline guide for future applications, the two approaches are consistent.

But sometimes public meaning originalists will argue that the meaning of the text actually contradicts the original application evidence—for example, that the Fourteenth Amendment in fact protects women's equal citizenship even if that was not expected to be the result in 1868 and was not the then-current law and practice.[39] The burden for

originalism. *See generally* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 720–21 (2011); Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 716–19 (2011). My own inclination is to see applications as themselves part (but only part) of the fuller meanings of the general terms, and to see language as more integrated in the relationship of meanings and uses, and therefore more confused and ambiguous, than some original public meaning theorist seems to assume. But my own professional focus is on historical uses and not on language theories.

37. *See, e.g.*, Nelson Lund, *Living Originalism: The Magical Mystery Tour*, 3 TEX. A&M L. REV. 31, 34–36 (2015).

38. One hardly need go further than *Dobbs* itself on this point. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2252–56 (2022) (discussing historical evidence of abortion regulation at the time of adoption of the Fourteenth Amendment); *id.* at 2285–300 (extended appendices summarizing historical abortion regulation laws). *Bruen* is even more direct. There, the Court mandated the use of analogies to historical gun regulations to determine the constitutionality of modern laws. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131–34 (2022). Requiring direct historical comparisons of detailed regulations basically makes expected applications analysis into constitutional doctrine. *See also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (employing expected application analysis to Eighth Amendment); Morse v. Frederick, 551 U.S. 393, 410–16 (2007) (Thomas, J., concurring) (discussing an extensive expected application history to reject claims of student free speech rights); McCreary County v. Am. Civ. Liberties Union of Ky., 545 U.S. 844, 896–97 (2005) (Scalia, J., dissenting) ("What is more probative of the meaning of the Establishment Clause than the actions of the very Congress that proposed it, and of the first President charged with observing it?").

39. *See, e.g.*, Barnett & Bernick, *supra* note 34, at 46 (discussing Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872)).

those arguing that the original meaning that courts should now apply actually *contradicts* the expected application of the adopting public—an argument that the original public was in some sense *wrong* about its own text—falls on those arguing for a different meaning.[40] To deviate from what the evidence shows was a well-known application of the text, the arguments should be strong. And if the expected application was part of the core meaning of the text, the arguments may be impossible from an originalist perspective.[41] Ultimately, the more space a public meaning originalist puts between the original expected application and their asserted original meaning, the more the theory looks like living constitutionalism in different garb.[42]

Another aspect of originalism that is relevant to Florida's right of privacy provision is the use in constitutional text of an established legal term or concept. When the drafters and adopters purposely use and approve language that has pre-existing legal meaning, originalists will usually give great weight to that meaning.[43] This makes sense: by placing

40. I am sympathetic to this style of interpretation as applied to older constitutional text, especially text adopted through largely undemocratic methods. But I think in those situations we are best using other modes of reasoning (e.g., pluralism, common law constitutionalism) that account for historical evidence of "deeper" meanings—principles, spirit, etc.—but acknowledge that what we are in fact doing is debating meaning over time, not finding historically fixed meaning.

41. The concept of "core" meanings as I use it here is somewhat similar to Rubenfeld's concept of paradigm cases or "foundational applications understanding." *See generally* JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 13–14 (2005); Jed Rubenfeld, *The Paradigm-Case Method*, 115 YALE L.J. 1977, 1981–83 (2006).

42. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 10–11 (2010); Smith, *supra* note 36, at 721; Colby*, supra* note 36, at 741. My own view is that the farther in time one is from the original text, the less constraining the expected applications should be and the more important other modes of analysis become (whether those modes be principles-based originalism or non-originalist). *See, e.g.*, Balkin, *supra* note 35, at 303 (observing that expected applications are less weighty as time passes). As I explore more in the text, I see the evidence that abortion rights were a core aspect of Florida's right to privacy as being an argument about baseline meaning that should both constrain how future courts apply the privacy right to abortion regulation and help guide development of the right to other areas. The relative recency of the text weighs heavily in favor of courts adhering to expected application analysis; ignoring or rejecting that expected meaning—outside the formal and relatively feasible constitutional amendment process—would pretty clearly be doing something other than originalism, however that term is understood.

43. *See* Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 968–71 (2009) [hereinafter Solum, Heller *and Originalism*]. For examples of originalist analysis that focuses on the pre-existing legal meaning of terms, see Ilan Wurman, *Reconstructing Reconstruction-Era Rights*, 109 VA. L. REV. (forthcoming); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 13–14, 45–47, 65–66 (2014); *see also* John O. McGinnis & Michael

a term or concept that has a known legal meaning into a constitution, the drafters, readers, and voters adopting it are presumed to have constitutionalized that background legal meaning.[44] Indeed, that was likely the point of going through the effort to adopt the constitutional language in the first place, especially if the term or concept appears in an individually adopted amendment that focuses the attention of the adopting public. As we will see, doing so allows the drafters and the public to focus debate on the possible extensions of meaning and direction of possible future court interpretations while still protecting the core meaning of the text. The pre-existing legal meaning helps form the baseline meaning of a text that may also be more generally applicable.

The United States Supreme Court has repeatedly employed this principle. In *District of Columbia v. Heller*[45] the Court emphasized that the Second Amendment (as well as the First and the Fourth) "codified a *pre-existing* right."[46] The Court analyzed in detail English common law and statutes as well as state law at the founding.[47] The fact that self-defense was already a right recognized in cognate and overlapping legal systems as being connected to the language "keep and bear arms" was, according to the Court, essential to understanding that the amendment protected self-defense rights even though self-defense was not expressly mentioned in the text.[48] The Court recently reaffirmed this pre-existing rights mode of analysis in *N.Y. State Rifle & Pistol Ass'n v. Bruen*.[49]

B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1326–32 (2018) (setting forth a strong theory of legal meanings and legal interpretative methods). This discussion usually focuses on legal "terms of art," but what is at issue is whether there are pre-existing legal meanings to the text used. Reliance on legal meaning is deeply problematic for periods when legal and political culture excluded large swaths of the polity, because the method can cloak non-democratic exclusions with a facially neutral test for meaning. But for more recent periods, a pre-existing legal meaning analysis could have greater force.

44. *The Abstract Meaning Fallacy*, *supra* note 36, at 750 ("The Constitution is a legal document, and when it employs words that have an existing legal meaning, this is strong evidence that the legal meaning is the correct meaning. Constitutional provisions are generally not created ex nihilo, but rather against the background of a complex and reticulated legal tradition which provides more information about their meaning than could be gleaned from a naïve reading of the text.").

45. 554 U.S. 570 (2008).

46. *Id.* at 592.

47. *Id.* at 592–95, 600–03.

48. *See id.* at 581–95.

49. 142 S. Ct. 2111, 2127 (2022). Justice Thomas has previously advocated the pre-existing rights approach to constitutional interpretation. *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 692 (2019) (Thomas, J., concurring) ("When the Fourteenth Amendment was ratified, 'the terms "privileges" and "immunities" had an established meaning as synonyms for "rights."'" (quoting McDonald v. City of Chicago, 561 U.S. 742, 813–26 (2010) (Thomas,

A pre-existing legal meaning can also interact with public meaning in ways that reinforce the legal meaning and give depth to the terms at issue. For instance, evidence from newspaper articles and public letters and speeches can reflect how the public likely understood the right being adopted.[50] Often such evidence can help show how well the public was aware of the scope of legal terms, either by discussing prominent cases or when legal analysis is explained in public forums. To the extent that the legal term and the public awareness of the term overlap, the meaning is reinforced. To the extent they diverge, original meaning becomes less secure, less fixed.[51]

State constitutional interpretation, including originalist interpretation, has an added dimension. Many state constitutions have been amended and even wholly re-written multiple times.[52] Thus, the context for the understood meanings of state constitutional text is much broader than that for the Federal Constitution. State constitutional texts may employ terms that are already part of constitutional law in other jurisdictions, whether in other states or in federal law.[53] The reference sources for state constitutional interpretation will therefore often include federal and state constitutional and sub-constitutional law. In this way, state constitutional meaning is often easier to "fix" or pin down, than are the general terms of the United States Constitution.[54] Courts

J., concurring) (analyzing pre-adoption usages in law of the terms privileges and immunities as being strong evidence of the amendment's ordinary meaning)).

50. *See* Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 GEO. L.J. 1275, 1277–78 (2013) (discussing importance of newspapers as evidence of original meaning of the Fourteenth Amendment); Tyler M. Stockton, *Originalism and the Montana Constitution*, 77 MONT. L. REV. 117, 147 (2016) (discussing importance of newspapers as evidence of original meaning of Montana's constitutional changes in the 1970s).

51. If pre-existing legal meaning and public meaning conflict, some rule of priority would be needed, or one would need to admit that originalist methods are insufficient. *See* McGinnis & Rappaport, *supra* note 43, at 1344. (arguing conflicts between technical legal and ordinary meanings should be resolved by legal interpretive rules). It is not clear to me that appeals to legal interpretive methods is always appropriate. And I do not agree with McGinnis and Rappaport's conclusion that "the Constitution is best understood as written in the language of law, not ordinary language." *Id.* at 1411. However, that point is moot here since the legal and commonly known meaning of right to privacy in Florida were essentially the same. *See* discussion *infra* Part II.

52. *State Constitution*, BALLOTPEDIA, https://ballotpedia.org/State_constitution (last visited Feb. 15, 2023).

53. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 115–19 (2009) [hereinafter LAW OF AMERICAN STATE CONSTITUTIONS].

54. The theory of how originalism applies to state constitutions is underdeveloped. *See, e.g.*, Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411, 433–44 (2012);

interpreting these provisions also have the challenge of determining whether interpretations of state provisions should track federal court interpretations of parallel federal constitutional provisions or whether the state provisions merit a distinct analysis.[55]

Moreover, because of the relative frequency and facility in the ability to change the text itself, state constitutional law arguably presents a stronger case for the application of originalist methods. One of the concerns with originalism as applied to the Federal Constitution is that it renders functionally impossible any real adaptation of the Constitution.[56] When the amendment process is too cumbersome, as many argue is the case with the United States Constitution, it becomes essential that courts employ more open interpretive techniques to adapt the text over time.[57] For a constitution to retain the fidelity of its public it must to some degree reflect their general views of law and legitimacy.[58]

Troy L. Booher, *Utah Originalism*, 25 UTAH BAR J. 22, 24–25 (2012); Stockton, *supra* note 50, at 143–49.
(2016).

55. LAW OF AMERICAN STATE CONSTITUTIONS, *supra* note 53, at 193. This question is often referred to as "lockstep" versus primacy interpretation. *See generally id.* at 194–209 (discussing different types of lockstep approaches); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 788–93 (1992) (discussing lockstep approaches); Rachael A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 206–19 (1998) (discussing varieties of approaches, including lockstep and primacy). Most discussion of lockstep involves truly parallel state and federal constitutional text, such as search and seizure law. *See, e.g.*, Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1511–12 (2005) [hereinafter *State Courts Adopting Federal Constitutional Doctrine*] (discussing Ohio search and seizure cases). It is not clear that this question is properly raised when the state court is interpreting a textual provision that is not itself present in the Federal Constitution but has instead been implied by federal courts, as is the case with state constitutional right to privacy provisions. For a discussion of these issues in the Florida courts, see Rachel E. Fugate, *The Florida Constitution: Still Champion of Citizens' Rights*, 25 FLA. ST. U. L. REV. 87, 105–16 (1997).

56. *See* Sanford Levinson, *How I Lost My Constitutional Faith*, 71 MD. L. REV. 956, 967–69 (2012).

57. Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561, 1567–70 (1998). On the notoriousness of the difficulty of amending, see SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 167 (2006); Richard S. Kay, *Updating the Constitution: Amending, Tinkering, Interpreting*, 67 DRAKE L. REV. 887, 892–96 (2019).

58. *See* Chemerinsky, *supra* note 57, at 1567–70. *But see* Friedman, *supra* note 54, at 435–36 (arguing an easier amendment process counsels in favor of more free-ranging judicial interpretation precisely because the public can overturn decisions it deeply dislikes). According to this view originalism is less appropriate for state courts. *Id.* This seems to overlook the fundamental justification behind originalism: that the law should reflect democratic choices as much as reasonably possible. The easier it is for the public to amend its charter, the less need there is for a court to deviate from the text's initial public meaning.

This concern about amendability is especially important where the text was written and adopted through processes that excluded large segments of the governed population, groups who were later determined to be essential to the text's basic democratic legitimacy.[59] These legitimacy critiques of originalism are far weaker when considering constitutions and constitutional provisions that were drafted and adopted more recently. Thus, even if one considers it illegitimate to apply originalism to the Fourteenth Amendment when considering laws regulating women's reproduction freedom because women had no political voice or law-making power in 1868,[60] using originalist methods for texts such as the Florida right of privacy provision, adopted in 1980 through democratic processes arguable as inclusive as at any point in American history, has a much stronger legitimacy claim. One could certainly reject originalism in both circumstances in favor some version of living constitutionalism in all constitutional interpretations. But if one believes that originalism *is* legitimate as applied to federal constitutional text pre-dating the Fifteenth and Nineteenth Amendments, as do many of today's judges and elected officials, then it is *even more important* to apply those techniques with the same rigor and methods to recently enacted state constitutional text.

With some of these basic points in mind, I will now turn to considering the original meaning of Florida's right of privacy as applied to the right to terminate a pregnancy.

II. FLORIDA'S RIGHT OF PRIVACY, ABORTION, AND ORIGINAL MEANING

No analysis can legitimately deny that as of November 1980, the right to privacy as a legal concept encompassed the right to obtain an abortion. *Roe v. Wade* grounded abortion rights in the line of precedent building the right to privacy in federal constitutional law.[61] The Court repeatedly reaffirmed this position by citing and applying *Roe* throughout the 1970s.[62] Even in cases where the abortion rights position

59. *See* James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 685–86 (2016); Mark S. Stein, *Originalism and Original Exclusions*, 98 KY. L.J. 397, 398 (2010); Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517, 518–22 (2011). For an excellent analysis of how originalists might begin addressing the problem of historical exclusions, see Christina Mulligan, *Diverse Originalism*, 21 U. PENN. J. CONST. L. 379 (2018).

60. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2323–25 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

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

62. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52, 56, 65 (1976); Carey v. Population Serv. Int'l, 431 U.S. 678, 685–86 (1977).

lost before the Court, the Court continued to embrace *Roe* and its due process-based liberty and right to privacy rationale.[63] Federal courts throughout the country had been applying this legal principle in analyzing challenges to abortion restrictions.[64]

By the time the voters of Florida were considering the proposed right of privacy amendment, the legal concept of a right to privacy had a well-established, if not fully delimited, meaning. The right to privacy functioned as shorthand for the range of applications that courts had given it over time. In this way, the Florida Constitution's right of privacy functions much like the Federal Constitution's use of "*ex post facto*": the legal meaning of the term is well-established at the time of adoption and the adopting public knows quite well what it is doing in adopting that term.[65] This evidence of a pre-existing legal meaning would, on its own, usually be sufficient to ground the meaning of a constitutional term.[66]

Legal terms of art, however, could be criticized for being too obscure to necessarily reflect the public meaning of constitutional language, and they could even conflict with common understandings. Ideally one would want to be sure that the legal understanding of the term corresponds as well to more common understandings, perhaps by evidence that the term was also used in the same ways in the drafting process or was generally available to the public through news accounts that discussed the term. As it turns out, substantial evidence supports the claim that the legally established understanding of the right to privacy was readily available and known to the commission and legislators who proposed the amendment and to the public that adopted the text.

Before discussing the drafting and adoption history of section 23, however, we should also briefly consider the relationship between the title of the provision—"Right of Privacy"—and its text, which declares, "the right to be let alone and free from governmental intrusion into [the person's] private life."[67] As the legal analysts at the time noted in materials used by the drafting bodies, the phrases "right of privacy" and

63. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 471–75 (1977).

64. *See e.g.*, Margaret S. v. Edwards, 488 F. Supp. 181, 188–89 (E.D. La. 1980); Fla. Women's Med. Clinic, Inc. v. Smith, 478 F. Supp. 233, 235–36 (S.D. Fla. 1979).

65. U.S. CONST. art. I, §§ 9–10; *see also* Lawrence B. Solum, *Cooley's Constitutional Limitations and Constitutional Originalism*, 18 GEO. J.L. & PUB. POL'Y 49, 59–60 (2020) [hereinafter Solum, *Cooley's Constitutional Limitations*] (discussing Thomas Cooley's analysis of how ex post facto operated in public and legal meaning).

66. *See* Solum, Heller *and Originalism*, *supra* note 43, at 968; James C. Phillips et al., *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J.F. 21, 24 (2016).

67. FLA. CONST. art I, § 23.

"right to be let alone" were synonymous.[68] One of the leading Supreme Court cases on privacy of that period, *Katz v. United States*,[69] described these terms as identical.[70] Moreover, the drafters included additional language—"free from government intrusion"—which directly invoked the language from the contraceptives case, *Eisenstadt v. Baird*,[71] and which was highlighted approvingly in *Roe v. Wade*.[72] The official ballot used in 1980 referred to the right of privacy, clearly indicating to the voters that they were voting on this general legal concept.[73] There is no suggestion in either the drafting process or the public debates over adoption that the language of the amendment was seen as being about something other than "the right of privacy" or that the operative text somehow clipped off substantial elements of the pre-existing legal meaning of privacy rights. Given that the title and operative text were synonymous terms, "term-of-art" analysis operates the same for "right of privacy," the "right to be let alone," and the right to be "free from government intrusion."

A. 1977–78 Constitution Revision Commission

The Constitution Revision Commission of 1977–78 ("CRC") engaged in a monumental attempt to revise major portions of the state constitution of 1968. It proposed significant changes to the individual rights provisions, legislative representation, executive cabinet selections,

68. Cope, Jr., *To Be Let Alone, supra* note 15, at 741. Memorandum from the Comm. on Governmental Operations on the Proposed Constitutional Amendment Relating to a Right of Privacy (Feb. 7, 1980) (on file with State Archive of Florida, at Box 731, Florida House Committee on Governmental Operations (S 19)) [hereinafter 1980 Staff Memorandum].

69. 389 U.S. 347 (1967).

70. *Id.* at 350–51 ("[T]he protection of a person's general right of privacy—his right to be let alone by other people "). This quote from *Katz* was specifically used in the summary comments of the proposal produced by the 1980 Committee on Governmental Operations. 1980 Staff Memorandum, *supra* note 68. The accompanying staff memorandum similarly describes the "right to be let alone" as "the right of privacy." *Id.*; *see also* Cope, Jr., *To Be Let Alone*, *supra* note 15, at 741 (discussing Katz).

71. 405 U.S. 438, 453 (1972).

72. 410 U.S. 113, 169 (1973) ("[I]n [*Eisenstadt v. Baird*], we 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 bear or beget a child'" (quoting *Eisenstadt*, 405 U.S. at 453)); *see also* Griswold v. Connecticut, 381 U.S. 479, 483 (referring to protection from "government intrusion").

73. *Right of Privacy*, FLA. DIV. OF ELECTIONS (Nov. 4, 1980), https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=10. The official ballot stated that it proposed "the creation of Section 23 of Article I of the State Constitution establishing a constitutional right of privacy." *Id.*; *see also* Overton & Giddings, *supra* note 2, at 35 n.68 (citing FLA. H.R. JOUR. 387 (Reg. Sess. 1980)).

judicial selections, taxation powers, and other matters.[74] A true mess of a proposal appeared on voters' ballots in November 1978, with eight designated ballot measures, the first of which lumped together a number of separate changes, including the right to privacy amendment, into one unwieldly package.[75] All told, the ballot included eighty-seven changes to the constitution.[76] They were all rejected.[77] The right to privacy amendment, however, was rescued and re-proposed by the legislature in 1980.[78] Because the provision was initially drafted through the CRC process and was re-proposed in substantially the same form, the record of the CRC process remains relevant to the interpretation of the provision.[79]

As mentioned above, then-Chief Justice Overton specifically highlighted the right to privacy at the start of the revision process.[80] As Adam Richardson has noted in his recent study of the background of section 23, the CRC's public discussions about the right to privacy focused predominantly on informational privacy.[81] This was to be expected, given that the CRC was concerned about what new work the provision would do that was not covered by existing law, state or federal.[82] As it turns out, the CRC had received detailed legal analysis of the right to privacy as it then existed, and that analysis fully covered the decisional privacy cases on the right to contraception and abortion.[83]

While the CRC's files contain numerous background materials presenting legal analyses of the provisions they were considering, for their understanding of the individual rights proposals the CRC relied on the work of faculty and students at the law school at Florida State University. Gerald Cope, at the time the editor-in-chief of the *Florida State University Law Review*, wrote a major article on the history and

74. Proposed Revisions of the Florida Constitution as Proposed by the Florida Constitution Revision Commission of 1977–78, (Nov. 7, 1978) [hereinafter Proposed Revisions], http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/1978rev.html.

75. *See id.*

76. *See* Steven J. Uhlfelder & Robert A. McNeely, *The 1978 Constitution Revision Commission: Florida's Blueprint for Change*, 18 NOVA L. REV. 1489, 1491 (1994). The authors observe that, over time, forty percent of the proposed substantive changes were adopted into law, either as constitutional amendments or by statute. *Id.*

77. Steven J. Uhlfelder & Billy Buzzett, *Constitution Revision Commission: A Retrospective and Prospective Sketch*, 71 FLA. BAR J., Apr. 1997, at 22–24.

78. *Id.*

79. *Id.*

80. Overton & Giddings, *supra* note 2, at 34; Cope, Jr., *To Be Let Alone*, *supra* note 15, at 674.

81. Richardson, *supra* note 10, at 27–29.

82. *See id.*

83. *Id.* at 28.

current status of the right to privacy.[84] He also wrote a follow-up article exploring future implications of the right to privacy which was published while the ballot initiative was being considered in the fall of 1978.[85] Cope personally presented his research to the CRC,[86] and his work was cited in the minutes of the committee that drafted the proposed amendment.[87] Justice Overton specifically recommended Cope's first article to the commission at a public hearing.[88] That article, which was published in fall 1977, was listed in the CRC's bibliography of important background sources.[89] As such, Cope's articles represent the best evidence of the understanding the CRC had of the then-current legal definitions and coverage of the right to privacy.

In his comprehensive survey of the right to privacy, Cope identified *Griswold v. Connecticut*[90] as the fountainhead of modern right to privacy

84. Gerald B. Cope Jr., *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U. L. REV. 631 (1977) [hereinafter Cope, Jr., *Toward a Right of Privacy*]; *see also Judge Gerald B. Cope, Jr.*, FLA. THIRD DIST. CT. OF APPEAL, https://www.3dca.flcourts.org/Judges/All-Judges/Judge-Gerald-B.-Cope-Jr (last visited Feb. 15, 2023).

85. Cope, Jr., *To Be Let Alone*, *supra* note 15.

86. Patricia A. Dore, *Of Rights Lost and Gained*, 6 FLA. ST. U. L. REV. 609, 650 n.250 (1978).

87. Minutes of the Ethics, Privacy, and Elections Committee, Constitution Revision Commission, at 4 (Oct. 5, 1977) (on file at the State Archive of Florida, at Box 7, folder 133, Florida Constitution Revision Commission (S 265)). The minutes make clear that the CRC greatly valued Cope's article:

> A preliminary discussion of a right to privacy was invited by the Chairman. Mr. Gerald B. Cope, Jr., Editor-in-Chief of the Florida State University Law Review, appeared and discussed the proposal for a right to privacy that he had submitted to the Commission, August 25, 1977, at the public hearing in Gainesville, Florida.

Id.; *see also* Minutes of the Ethics, Privacy, and Elections Committee, Constitution Revision Commission, at 3 (Oct. 14, 1977) (on file at the State Archive of Florida, at Box 7, folder 136, Florida Constitution Revision Commission (S 265)) (listing Cope as offering further commentary on right to privacy issues at the October 14th meeting).

88. CTR. FOR GOV'T RESP., PUBLIC TESTIMONY BEFORE THE FLORIDA CONSTITUTION REVISION COMMISSION, SUMMARY OF HEARINGS, AUGUST 18, 1977–SEPTEMBER 26, 1977, at 76–79 (1977) ("Commissioner Overton made a general comment suggesting that the law review article by Mr. Cope be consulted for further treatment of this area, and that the law review article was an excellent source of information.").

89. Background Reference Materials for Florida Constitution Revision Commission (Jan. 4, 1978) (on file at the State Archive of Florida, at Box 1, folder 2, Florida Constitution Revision Commission (S 263)) (listing Cope's article, among others, under the heading "New Section"). The Background Reference Materials list the title of Cope's article as "The Right of Privacy As A Matter of State Constitutional Law," which is a slightly different title than the final published version. The most likely explanation for this difference is that the article was probably still in the publication process at the law review at the time. *See also* Cope, Jr., *Toward a Right of Privacy*, *supra* note 84, at 667.

90. 381 U.S. 479 (1965).

jurisprudence and discussed it thoroughly.[91] He then discussed the doctrinal line of cases extending the right,[92] including the 1973 abortion rights cases, *Roe v. Wade*[93] and *Doe v. Bolton*.[94] Cope noted that *Roe* clarified the constitutional basis for the right to privacy as grounded in the Fourteenth Amendment's concept of personal liberty, thus establishing a more focused foundation for the right under the Federal Constitution.[95] Cope continued this analysis by discussing two more abortion and contraception rights cases from the most recent terms of the Supreme Court,[96] *Planned Parenthood v. Danforth*[97] and *Carey v. Population Services International*.[98] Cope's presentation of the cases on rights to contraception and abortion filled ten pages of his article.[99] All told, the article on the right to privacy that served as the foundation for the drafters' understanding of that right mentioned *Roe v. Wade* ten times and abortion ten times.[100] Nobody reading Cope's article could have been unaware that the right to abortion was an important component of the right to privacy as it existed in 1977.

Cope's second article presented an analysis of the privacy amendment and other proposed amendments potentially related to privacy issues, with more of a focus on how the right might and might not be applied by courts if adopted.[101] Similar to his earlier article, Cope again explained how the right to abortion was a key aspect of federal law on the right to privacy as part of what he termed the "*Griswold* constellation" of cases on personal autonomy.[102] Not surprisingly, this second article focused more on the possible extensions of the right to privacy that might be expected in Florida, including how it might affect financial disclosures, open government laws, and news organizations.[103] Cope argued that the right to privacy amendment was specifically meant to create a general privacy right that extended beyond the more particularized and topic-limited rights developed by the United States Supreme Court.[104] The right was stated generally so that courts could

91. Cope, Jr., *Toward a Right of Privacy*, *supra* note 84, at 660–67.
92. *Id.*
93. 410 U.S. 113 (1973).
94. 410 U.S. 179 (1973).
95. Cope, Jr., *Toward a Right of Privacy*, *supra* note 84, at 667–68.
96. *Id.* at 668–69.
97. 428 U.S. 52 (1976) (abortion rights).
98. 431 U.S. 678 (1977) (contraception rights).
99. Cope, Jr., *Toward a Right of Privacy*, *supra* note 84, at 660–70.
100. *Id.*
101. Cope, Jr., *To Be Let Alone*, *supra* note 15, at 674.
102. *Id.* at 680, 708–09.
103. *Id.* at 721–40.
104. *Id.* at 740–41.

develop extensions of the right over time.[105] Cope also suggested that the CRC proposal would properly require a compelling interest test to be applied to governmental interferences with the right, which was stated in unqualified terms, a point for which he again cited *Roe*.[106] Significantly, at no point in either article did Cope suggest that the *Griswold-Roe* line of cases and the rights they had established were somehow excluded from the proposed amendment.

Cope's two articles represented the most detailed analysis of the right of privacy provided during the drafting and adoption process for the amendment. Two professors from Florida State University College of Law who advised the CRC and wrote articles in the same volume of the *Florida State Law Review* specifically cited Cope's work as a "comprehensive" explication of the right to privacy.[107] Cope's discussion of *Griswold* and *Roe* as foundations of the right to privacy as it was understood in 1977 was not challenged or opposed. Indeed, none of the materials used by the CRC suggests that abortion or any other decisional privacy right that had been established in federal law were not part of the general right to privacy as it was being developed in both federal and state law. The CRC proposed section 23 using the broad language of "right of privacy" and incorporating language ("free from governmental intrusion into the person's private life") used in *Griswold*, *Roe*, and *Eisenstadt* as part of the text of section 23.[108] Then, as Richardson notes, the public discussions of the provision in 1978 highlighted the parallels

105. *Id.* at 741.

106. *Id.* at 750 n.438.

107. Dore, *supra* note 86, at 650 n.250; *see also* Alaine S. Williams, *A Summary and Background Analysis of the Proposed 1978 Constitutional Revisions*, 6 FLA. ST. U. L. REV. 1115, 1117 (1978). John Stemberger has asserted that Dore's failure to mention the word abortion in her article suggests abortion was not understood to be covered under the right to privacy amendment. John Stemberger, *The True Origin of Florida's Privacy Right*, TALLAHASSEE DEMOCRAT (June 26, 2022, 6:00 AM), https://www.tallahassee.com/story/opinion/2022/06/26/true-origin-floridas-privacy-right-not-abortion-opinion/7719260001/. This seems a willful misdirection. Stemberger ignores the fact that Cope's article (which immediately followed Dore's in the volume) was the primary piece of scholarship on the right to privacy that was used by the CRC. He also fails to mention that Dore opened her discussion of the right to privacy in her article by deferring to Cope's two articles which addressed the right "comprehensively." Dore, *supra* note 86, at 650 n.250. As noted above, Cope discussed *Roe* and the right to abortion in both articles. Moreover, Dore specifically cited *Roe* twice in her own article—a point Stemberger also ignores. *Id.* at 615, 651.

108. Section 23's text closely tracks the language of *Eisenstadt*, describing a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child," and to *Stanley v. Georgia*, describing as fundamental the right "to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969). The Court in *Eisenstadt* also cited this quote from *Stanley*. *See Eisenstadt*, 405 U.S. at 453 n.10.

with the federal right, the greater breadth of section 23 compared to the federal constitutional right, and the importance of the decisional privacy component of the right.[109] Thus, in 1978 it was already clear that section 23 was understood to incorporate then-existing federal rights to privacy as a baseline and to leave open the further development of privacy rights in Florida to areas not covered in federal law. This baseline-plus understanding of section 23 would be a consistent aspect of the understanding of section 23 throughout its adoption process.

B. 1980 Legislative Proposal

In 1980 the Florida House and Senate chose to re-propose section 23 to the voters through the legislative option for constitutional amendment.[110] As was the case two years earlier, Gerald Cope's articles on the right to privacy were available to the house and senate committees and staff in 1980. In addition, however, the house committee that drafted the language of section 23 received a legal analysis of the right to privacy from both Professor Patricia Dore, and from its own staff.[111] The Staff Report to the House Committee on Government Operations emphasized the federal law origins of the right to privacy, quoted *Katz v. United States*'s description of the right to privacy as the right to be let alone, and pointed out that the Florida Supreme Court had refused to create a state law right to privacy on its own.[112] The accompanying legal memorandum explicating the law of the right to privacy referred to Cope's description of the area as the "*Griswold* Constellation" of cases.[113] According to this memorandum, "the right to be let alone" (which it described as being synonymous with the right of privacy) had "long been an area of concern

109. Richardson, *supra* note 10, at 29–33.

110. Jon Mills, *Sex, Lies, and Genetic Testing: What Are Your Rights to Privacy in Florida*, 48 FLA. L. REV. 813, 825 (1996).

111. Representative Jon Mills later stated that in preparing the draft provision for the house, he "used the background information prepared by Professor Pat Dore and staff analysis from the House Government Operations Committee to analyze the resolution." *Id.* at 825 n.42.

112. 1980 Staff Memorandum, *supra* note 68. The Executive Reorganization subcommittee of the Committee on Government Operations, to which this memorandum was directed, was chaired by Rep. Jon Mills and was responsible for introducing and drafting the proposed amendment in 1980. Mills, *supra* note 110, at 825.

113. Memorandum to the Comm. on Gov't Operations Providing an Overview of the Federal and State Right to Privacy, at 1 (n.d.) (on file with State Archive of Florida, at Box 731, Florida House Committee on Governmental Operations (S 19)) [hereinafter Privacy Memorandum]. This memorandum does not list an author. However, given Representative Mills's later statement that he relied on both a staff memorandum and "background information prepared by Professor Pat Dore," Professor Dore is the most likely author of the Privacy Memorandum. *See* Mills, *supra* note 110, at 825.

in both federal and state courts" and had expanded over time in both the federal and state court systems.[114] The memorandum then described the right to privacy as covering three areas: decisional privacy, governmental surveillance, and governmental collection of information.[115] The sub-category of decisional privacy, according to the memorandum, included the two prominent abortion cases, *Roe v. Wade* and *Doe v. Bolton*.[116] The memorandum then stated that the federal right to privacy was not a general right and thus it was not clear how far beyond the established cases the right might apply.[117] State versions of the right to privacy, the memorandum continued, largely mirrored federal law in terms of constitutional language and coverage and included "decisional autonomy in areas of family, marriage, contraception, abortion, and protection from unreasonable searches and seizures and surveillance."[118] In part as a response to the potential limitations of the federal right, states had been further developing the right to privacy and three states—Alaska, Montana, and California—had constitutionalized a general right to privacy and "expanded prospective constitutional privacy protection beyond its federally defined boundaries."[119] Notably, the memorandum emphasized that the then-recent efforts to use the right to privacy to protect personal information from governmental interference were seen as *expansions* of the right to areas not yet protected by federal law; the right to privacy provisions were not seen as a right separate from that developed at the federal level over the course of the twentieth century.[120] As the memorandum concluded, the general right to privacy developed in other states on which the Florida proposal was modelled "are in keeping with privacy protection provided under the Federal Constitution."[121]

On March 11, 1980, Florida State University constitutional law professor Patricia Dore testified before the subcommittee.[122] Professor Dore, who had served on the staff of the 1977–78 Constitution Revision Commission, was a recognized expert on constitutional individual

114. Privacy Memorandum, *supra* note 113, at 1.

115. *Id.*

116. *Id.* The memorandum cited *Roe* again later when discussing the parameters of the right to privacy. *Id.* at 3 n.17.

117. *Id.* at 2.

118. *Id.*

119. *Id.*

120. *Id.* at 2–3.

121. *Id.* at 4.

122. Letter from Jon Mills, House Representative, Governmental Operations Subcomm., to Patricia Dore, Prof. of L., Fla. State Univ. (Mar. 7, 1980) (on file with State Archive of Florida, at Box 731, Florida House Committee on Governmental Operations (S 19)) (requesting Professor Dore attend the March 11, 1980, meeting because her "expertise in [the] area would greatly enhance [the] discussion").

rights.[123] Like the written materials summarized above, Dore pointed out that one part of the right to privacy—"the right to intimate decision-making"—was "well-developed."[124] Dore specifically referred to *Griswold* as the font for this area of decisional privacy.[125] And, like the written materials, Dore stressed that the less-developed area under federal law involved disclosure rights.[126]

Dore also walked the subcommittee through a discussion of whether the right to privacy proposal should qualify the right by prohibiting only "unwarranted" intrusions.[127] Dore argued that such language was not advisable if the committee wanted to treat the right to privacy similar to the rights of free speech and press.[128] Courts would, she argued, inevitably establish some limitations on the right to privacy even if unqualified in the text in order to allow for important or compelling governmental interests, as courts had done in the area of First Amendment law.[129] But in anticipating a judicial balancing test, it was important that the right to privacy be stated as strongly as possible so that it could be considered a "preferred" right and one of the "most basic" rights.[130] As was the case in the 1977–78 proposal, the word "unwarranted" was rejected in the drafting of the 1980 proposal.[131] Notably, the parallel language from *Eisenstadt*, which had been cited in *Roe*,[132] did include the word "unwarranted,"[133] which suggests an intentional choice to make sure that the language of section 23 was indeed open to broader interpretations and more rights-protective than that set forth in *Eisenstadt* and *Roe*. The presentations and materials on this legal background of the right to privacy—a well-known legal term that had received extensive attention in law and public discussions by 1980—plainly described a right with a pre-existing baseline where

123. *Id.*
124. *See* Audio Tape: Dore, *supra* note 30, at 21:07—21:46.
125. *Id.*
126. *Id.* at 21:43–22:23.
127. *Id.* at 25:02–27:25.
128. *Id.* at 26:04–26:30.
129. *Id.* at 31:22–32:21.
130. *Id.* at 32:15—33:09.
131. Bill Action Record, H.J.R. 387, House Comm. on Governmental Operations, Subcomm. on Exec. Reorganization (Mar. 11, 1980) (on file with the State Archive of Florida, at Box 732, Florida House Committee on Governmental Operations (S 19)); *see also* Mills, *supra* note 110, at 826.
132. Roe v. Wade, 410 U.S. 113, 169–70 (1973).
133. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (describing a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); *see also* Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.").

reproductive rights were part of the core meaning. They also suggested that the more general statement of the right proposed would leave it open to broader interpretations over time.[134]

As the above discussion shows, all of the legal advice and analysis used by the legislature in drafting and proposing the right to privacy amendment in 1980 referred to the line of cases that included *Roe v. Wade*. Both the main law review article by Gerald Cope and the Privacy Memorandum specifically cited *Roe* and referred expressly to abortion.[135] Professor Dore reinforced this during her testimony by referring to the right of "intimate decision-making" and to the *Griswold* line of cases.[136] The legal terms "the right to privacy" and "right to be let alone" were well-known to the legislators who proposed the amendment.[137] At no point in any of these materials is there an indication that the portion of the right to privacy that covered what Dore described as intimate decision-making or its abortion right component was somehow excluded from the proposed amendment. The fact that much of the discussion about the right to privacy then proceeded to focus on areas that were as yet unprotected—areas such as informational or data privacy that the amendment would add on top of established law—reflected the quite logical point that the drafters wanted to understand better what new *extensions* of privacy would be created in Florida.

Other evidence confirms that the legislative bodies that proposed the amendment in 1980 were well aware that abortion rights were encompassed by the right to privacy. Simultaneous with the legislature's consideration and proposal of the right to privacy amendment in the spring and summer of 1980, it also was drafting a new statute for licensing abortion clinics. Florida had passed a clinic licensing statute in 1978.[138] A federal district court in South Florida considered whether the licensing law and its implementing regulations, which applied specifically to first-trimester abortions, were an "unconstitutional

134. The senate staff analysis suggested that the senate might consider expressly providing that the right could only be infringed upon a showing of a "compelling state interest." Senate Staff Analysis and Economic Impact Statement, Bill S.J.R. 935 (May 6, 1980) (on file with the State Archive of Florida, at Box 731, Florida House Committee on Governmental Operations (S 19)) [hereinafter Economic Impact Statement]. This suggestion gained no traction in the drafting process. The Florida Supreme Court did, however, adopt the compelling interest test in *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 547–48 (Fla. 1985).

135. Cope, Jr., *Toward a Right of Privacy*, *supra* note 84, at 635 n.12.; Privacy Memorandum, *supra* note 113.

136. Audio Tape: Dore, *supra* note 30, at 21:22–21:43.

137. *Id.*

138. FLA. STAT. §§ 390.011–.021 (1978), *invalidated by* Fla. Women's Medical Clinic v. Smith, 478 F. Supp. 233 (S.D. Fla. 1979).

infringement on the plaintiff's right of privacy."[139] The court found that they were and that under *Roe* the law and regulations "sweep too broadly" and did not meet the compelling interest test.[140] Then, in 1980, the legislature drafted a revised licensing law that attempted to meet the concerns expressed by the court.[141]

Quite obviously, the legislature was aware that the reason it was having to do all this work was that the right of privacy applied very directly to abortion laws, a point highlighted by the committee staff for the bill.[142] In their report to the Health Subcommittee of the House Committee on Health and Rehabilitative Services, the staff explained the court's decision and the problem presented for the legislature in trying to write abortion regulations.[143] The staff emphasized that the district court had applied *Roe*, that the licensing law implicated "an individual's right to privacy," and that the court held that the State had failed to advance a compelling state interest "necessary to justify an intrusion into a fundamental constitutional right such as an individual's right to privacy."[144] Notably, the staff memo used the same language—"intrusion" into an individual's right to privacy—that appeared in the draft of section 23 then currently before the house and senate.[145] The floor debates on the bill in the house and senate both reflected this understanding, with members of each body stressing that the federal court had said that the State needed to ensure protection of women's fundamental right of privacy when regulating clinics.[146]

139. *Fla. Women's Medical Clinic*, 478 F. Supp. at 235.

140. *Id.* at 236.

141. *See* Economic Impact Statement, *supra* note 134.

142. *Id.*

143. *Id.*

144. Staff Memorandum, H.B. 1240, Committee on Health and Rehabilitative Services (May 8, 1980) (on file with State Archive of Florida, at Box 882, Committee on Health and Rehabilitative Services (S 19)) (discussing implications of House Bill 1240). An identical copy of this memorandum is dated July 10, 1980, *see* Staff Memorandum, H.B. 1240, Committee on Health and Rehabilitative Services (July 10, 1980) (on file with State Archive of Florida, at Box 882, Committee on Health and Rehabilitative Services (S 19)) (discussing implications of House Bill 1240), most likely because it was also used when the two houses finally passed the bill in July.

145. *Id.*

146. Audio Tape: House Floor Debate, H.B. 1240, at 22:55–31:40 (June 5, 1980) (on file with State Archives of Florida, at Box 64, tape 2, side B (S 38)) (statement of Elaine Gordon) (discussing *Florida Women's Medical Clinic* and referring to "a person's fundamental right of privacy" that required the State to show a compelling interest in regulating access to abortion); Audio Tape: Senate Floor Debate, S.B. 1096, at 24:38–30:20 (June 6, 1980) (on file with State Archives of Florida, at Box 60, tape 3, side A (S 1238)) [hereinafter Audio Tape: Senate Floor Debate—Abortion Clinic Licensing] (statement of Jack Gordon) (quoting Fla. Women's Medical Clinic v. Smith, 478 F. Supp. 233, 236 (S.D. Fla. 1979); Roe v. Wade,

This exploration of the background on the right to privacy that was presented to the legislature in 1980 is essential for understanding an exchange in the senate during debate of the proposed amendment.[147] Senator Dunn, who eventually voted against the proposed amendment, moved to add "any unreasonable" before "government intrusion."[148] This was the same type of amendment that had been proposed and defeated in 1978 by the CRC and in the house subcommittee in 1980.[149] Dunn expressed concerns that without the qualifying term, the right of privacy protected by section 23 might preclude electronic surveillance and could even affect or legalize "possession of marijuana in one's home" and "sexual activities of any sort between consenting adults."[150] Notably, Dunn here was clearly expressing a reading of section 23 that included both informational and decisional privacy.[151]

After his amendment to add "unreasonable" was defeated,[152] Dunn then asked the senate sponsor, Jack Gordon, what "the effect of this amendment will be on the existing controversy involving right to life and

410 U.S. 113, 153 (1973) ("[T]he constitutional 'right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, . . . or . . . , in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.'")). Senator Gordon further emphasized that the State had to be careful when regulating as "fundamental a personal right as the right of privacy" and referred to the "people's privacy right" as being "the basis of the Supreme Court saying that first trimester abortions cannot be interfered with by the state," and that this privacy right "is guaranteed to all of us by the United States Constitution." Audio Tape: Senate Floor Debate—Abortion Clinic Licensing, *supra*, at tape 3, side A, 28:50–29:55.

147. The State relies heavily on a short excerpt from this exchange in arguing that abortion rights were not intended to be covered by section 23. As described below, the exchange is more ambiguous and confused than the State suggests, and it actually contradicts the State's argument that section 23 was meant to be limited to informational privacy. *See infra* Section II.B.

148. Audio Tape: Senate Floor Debate, S.J.R. 935/H.J.R. 387, at 44:30–5:10 (May 14, 1980) (on file with State Archives of Florida, at Box 57, tapes 1 & 2 (S 1238)) [hereinafter Audio Tape: Senate Floor Debate—Right of Privacy].

149. *See* discussion *supra* Section II.A.

150. Audio Tape: Senate Floor Debate—Right of Privacy, *supra* note 148, at tape 2, 6:00–8:18.

151. *Id.* at tape 2, 15:45–17:04. Dunn first warned that passing the amendment would invite litigation:

> [I]f this amendment passes in its absolute form, there will be a glut of cases every time government attempts to do anything vis-a-vis the private citizen in his home life whether it be proscribed conduct, sexual conduct, crimes, possession of marijuana, whatever. Every one of those cases will be challenged in the Florida Supreme Court on the basis that that is an intrusion into private life.

Id. at tape 2, 15:45–16:16. He then stated that without the qualification he proposed, the government would have no right to collect information on people. *Id.* at tape 2, 16:17–17:04.

152. *Id.* at tape 2, 17:12–17:21.

abortion."[153] The ensuing discussion reflected both Dunn's awareness that the right to privacy was specifically the basis for *Roe v. Wade*—Dunn expressly mentioned *Roe*—and Gordon's confusion about the relationship between *Griswold* and *Roe* and his apparent belief that there was a distinction between privacy in "families" and privacy "in the home." The exchange is worth transcribing in full:

> Dunn: Senator, what do you think the effect of this amendment will be on the existing controversy involving right to life and abortion?
>
> Gordon: I don't see that uh—I don't see that it has any effect on that, Senator.
>
> Dunn: Senator, you don't uh—you don't—you can't honestly say that this amendment addressing, as you have contended, the question of privacy will be the focal point of state litigation on the question of all laws dealing with, with the question of abortion or the taking of a uh—of a—of a fetus under any condition?
>
> Gordon: No, I don't see that at all. I don't know what that has to do with, with—I don't see what that has to do with intrusion in your—in—in—privacy in your home, I don't see that at all.
>
> Dunn: Do you know the constitutional basis upon which the—uh—the *Roe*—uh—*Roe* case was decided?
>
> Gordon: Constitutional basis of *Roe*—uh—*versus Wade* had to do—had to do with the right of privacy asserted in the federal constitution.
>
> Dunn: And you think that has no compatibility with the same right [inaudible – senators talking over each other]?
>
> Gordon: Well, which said that the—that the—uh—relationship of—as far as the woman was concerned, was a matter of her choice and—uh—had nothing to do—really it arose out of cases having to do with the Connecticut case on contraception [referring to *Griswold*] saying that privacy rights within the family were protected under the—under—under the federal constitution, it was under—under—it was a question of what is preeminently a family situation, not a question of what—of

153. *Id.* at tape 2, 17:40–17:50.

> what—of what one does in one's home. And—uh—I—since we just defeated—uh—since we just defeated the other amendment [referring to Dunn's amendment] we've at least decided that—uh—there's no—uh—such thing as a reasonable intrusion into—uh—the privacy of one's sex life in one's home. I'm glad, Senator, that you didn't prevail on that.
>
> Dunn: Senator, if I understand your answer to that question, you think that the words "private life" cannot be made analogous to families, is that what you're saying?
>
> Gordon: It says, "Every natural person has the right to be let alone and free from government intrusion into his private life, except as otherwise provided herein."
>
> Dunn: Right.
>
> Gordon: And I don't see that that particular area of—of privacy—uh—relates to the other, but—uh—I—really—uh—it really doesn't bother me.[154]

To the extent we can make anything out of this exchange, it appears that Dunn believed that the right of privacy set forth in section 23 was consistent with *Roe*. He pressed Gordon to admit this. Gordon danced around the question, and in the process presented a mangled view of the federal right to privacy in which he imagined a distinction between privacy in one's home—including privacy in sexual relations, which he supported—and privacy about families. Of course, as the background materials available to all senators indicated, no such distinction existed. *Eisenstadt*, *Roe*, and *Stanley* all discussed government intrusions into both the home and intimate decisions about sex and reproduction.[155] And just how Gordon imagined there to be a zone of privacy around sexual activities that was sharply distinct from privacy about creation of families is simply beyond comprehension. But even given this level of confusion in Gordon's remarks, his conclusion indicated that while he did not see the connection, he also was not bothered by the possibility. And, most importantly, nothing in the text of section 23 supports Gordon's distinction between the privacy of families and privacy of other intimate decisions and activities in one's home or private life.[156] Gordon clearly *did* think—as did Dunn—that section 23 covered more than

154. *Id.* at tape 2, 17:50–20:22.
155. *See supra* note 72 and accompanying text.
156. FLA. CONST. art I, § 23.; *see* Richardson, *supra* note 10, at 16–19.

informational privacy because Gordon explicitly supported the view that private sexual activities would be protected from government intrusion. And when Dunn tried to pin Gordon down to say that the text of section 23 did not apply to families, Gordon merely quoted the text back to Dunn. Nothing in that text, of course, distinguishes between intimate decisions and acts in the home and decisions about reproduction and abortion.

If anything, this confused colloquy is a case in point about why originalists often shy away from divining "drafter intent" and instead focus on public meaning and pre-existing legal meanings. What exactly the other senators took out of this exchange we can never know. No equivalent exchange took place in the house, where the resolution was adopted without debate. We do know that all legislators were on solid notice that *Roe* was a right of privacy case, and that section 23 grew out of the same law as *Griswold* and *Roe*—what the Privacy Memorandum called the *Griswold* constellation. The language of section 23 tracked how those cases described the right. Gordon's statement, in its confusion about *Griswold* and *Roe*, is inconsistent with the drafters' sources and case where the text came from.

In the face of this counter-evidence about the connection of the right of privacy and abortion, an alternative reading of Gordon's statements makes more sense: he was not so much asserting that section 23 did not cover abortion rights at all as he was saying that the amendment did not *change* the legal framework on which that controversy was being argued—it did not affect the controversy, as Dunn put it, because that controversy was at the time handled under federal constitutional law. Federal law already protected abortion rights and section 23 did not change that fact. Gordon deflected to the Federal Constitution when asked about possible future state court litigation.[157] Thus, Gordon was either very confused about the nature of the right to privacy as a legal concept or he was intentionally deflecting the discussion to avoid letting Senator Dunn bog down the progress of section 23, which had already been approved by the house.[158] In any event, Gordon's statements

157. Audio Tape: Senate Floor Debate—Right of Privacy, *supra* note 148, at tape 2, 17:50–20:22. One month later, in debates over a bill to regulate abortion clinics, Senator Gordon spoke of the importance of the federal right of privacy and the State's need to protect it. *See* Audio Tape: Senate Floor Debate—Abortion Clinic Licensing, *supra* note 146, at tape 3, side A, 28:50–29:55. In that discussion, Senator Gordon gave no indication that what he called a "fundamental . . . people's privacy right" was limited to the privacy of "families" as distinct from privacy in the home. *Id.*

158. It is possible that Senator Gordon, who generally supported abortion rights, wanted to avoid turning the discussion of section 23 into a debate about abortion, even though he knew that Senator Dunn was right about the right to privacy being the basis for *Roe*. This

support nothing definite about original meaning beyond offering further support that section 23 was not limited to informational privacy.

Moreover, others involved in the drafting process read the text consistently with the other drafting evidence and differently from Gordon. The amendment was drafted and initially proposed by the house, not the senate.[159] The representative who led the drafting, Jon Mills, later wrote that the "existence of [*Roe v. Wade*] muted debate on issues like abortion and gay rights. Proponents suggested the resolution had no effect on current law since the federal right was assured under the United States Supreme Court's decision."[160] According to Mills, he introduced the amendment "with the intention of providing a basis for protecting both decisional and informational privacy rights" and he relied on "the background information prepared by Professor Pat Dore and staff analysis from the House Government Operations Committee."[161] Justice Overton, who was a member of the subcommittee of the CRC that initially drafted section 23,[162] later wrote in his partial concurrence in *In re T.W.* that section 23 "effectively codified within the Florida Constitution the principles of [*Roe v. Wade*] as it existed in 1980."[163] Similarly, former Assistant Attorney General Sharyn Smith, who was apparently responsible for suggesting the near-final version of the text when she advised the CRC committee in 1977, has also stated that there was not any controversy about the fact that section 23's right of privacy

would be one way to harmonize Gordon's statements regarding the right of privacy in May on the proposed amendment, and his statements in June on the clinic licensing bill. Essentially, one could argue that Senator Gordon was being insincere in his dodging of Senator Dunn's questions and that his insincerity somehow clouded the judgment of all senators on the issue and perhaps even the public at large.

The problem with this view is that, as shown, the connection between the right to privacy and abortion was abundantly clear in both the background documents prepared for the house and senate, and in press reports on abortion issues at the time. Senator Gordon's confused view of the then pre-existing meaning of the right of privacy was not part of the public discussion of either abortion or section 23, and there is no indication that Gordon's response to Dunn reflected the understanding of either the legislature or the voting public. Gordon's dance around *Roe* in the debates, whether done strategically or out of intellectual confusion, should not carry much weight in the public meaning analysis of section 23.

159. *See* Richardson, *supra* note 10, at 36–37.

160. Mills, *supra* note 110, at 825–26.

161. *Id.* at 825 n.42.

162. Cope, Jr., *To Be Let Alone*, *supra* note 15, at 723 n.305.

163. *In re* T.W., 551 So. 2d 1186, 1201 (Fla. 1989) (Overton, J., concurring in part and dissenting in part) (citation omitted). Justice Overton had also joined the earlier opinion in *Winfield v. Division of Pari-Mutual Wagering*, 477 So. 2d 544, 546–48 (Fla. 1985), where the court first applied section 23 and prominently cited Roe as a source for the right of privacy.

included abortion rights.[164] Although these statements came after the drafting process was complete, they still reflect understandings of significant participants in the process and, since they are more consistent with the text, the drafting process, and the pre-existing legal meanings, they are better evidence of drafters' understandings than is Gordon's response to Dunn.

C. The Press and Public Understandings

The fact that the members of the legislature who drafted and proposed the right of privacy provision were clearly aware of its relationship to *Roe v. Wade* and abortion rights is a significant factor in determining how the provision was originally understood and how it should be interpreted by the Florida courts. For many originalists, however, the understanding and intent of the people who draft constitutional language is not itself dispositive.[165] From that perspective, the original understanding of the public is the most probative evidence of original meaning.[166] So while the drafting evidence is an important source of evidence, the question remains whether a similar understanding was available to the voting public that the right to privacy was a term of art founded in the intimate decision-making rights of the *Griswold-Roe* line of cases.

There are at least two ways of exploring the public understanding of section 23 and its relationship to the right to obtain an abortion as of 1980. One can focus on the discussions about section 23 specifically to see how they implicated abortion rights, and one can also look at discussions of abortion and see how the right of privacy was seen as connected to and foundational for abortion rights. The focus in this Article is on the latter approach because it shows best how the public understood the relationship of the right of privacy and abortion as a pre-existing legal concept. But it is also worth pointing out, as Adam Richardson has, that the public discussions about section 23 reflected a broad right to privacy that encompassed decisional privacy concepts and not, as the State now claims, a limited right to informational privacy.[167] As explained above,

164. Cope, Jr., *To Be Let Alone*, *supra* note 15, at 727 (crediting Smith with the wording that gave section 23 its basic form as distinct from parallel provisions in other state constitutions); *see also* Kathryn Varn, *Florida Has a Unique Right Protecting Abortion. Its Framers Designed It That Way*, TALLAHASSEE DEMOCRAT (June 8, 2022, 6:00 AM), https://www.tallahassee.com/story/news/local/state/2022/06/08/can-florida-privacy-law-protect-abortion-rights-roe-v-wade/7536003001/.

165. *See supra* note 31 and accompanying text.

166. *Id.*

167. Richardson, *supra* note 10, at 38.

one would not expect the press and public to spend a lot of time discussing how section 23 covered the same ground as the pre-existing federal right, and in fact there was not much discussion of contraceptive rights, abortion rights, rights against forced sterilization, or other areas that were already protected by federal constitutional law. But, as Richardson says, *decisional* privacy rights—the category of privacy that included both contraception and abortion—were very much part of the discussions. Repeatedly the point was made that section 23 would at least secure the baseline of rights already protected by the federal right of privacy.[168] There was also a lively debate about whether the decisional privacy protections would *extend* to LGBTQ+ rights.[169] But because protection of abortion was already covered in federal law, the debates over section 23, including the debates about its decisional privacy component, focused on other issues.[170]

Does this mean that the public was unaware that abortion was an aspect of the right to privacy? Not at all. As it turns out, there is extensive evidence that in 1980 the public was quite aware that the right to privacy encompassed abortion rights and that the state and local press reflected this fact. First, in January, as the house was beginning its work on re-proposing the 1978 amendment, former Justice of the United States Supreme Court, William Douglas, died.[171] Press coverage of his death discussed his contributions to American jurisprudence.[172] Particular attention was given to the right to privacy, which Douglas had used to establish rights to contraception in *Griswold*, and several of the news stories mentioned the abortion rights of *Roe v. Wade* as an outgrowth of

168. *Id.* at 39 n.171 (citing sources).

169. *Id.* at 42–46. Unlike abortion rights, LGBTQ+ rights were not protected by the federal right of privacy and so were not part of the baseline meaning of the term in 1980. This, perhaps, is one reason why drafters of the amendment did not think LGBTQ+ rights were included. *Id.* at 38. Under the approach set forth here, LGBTQ+ rights would instead be part of the potential extensions of the right to privacy which could flow from the adoption of a general textual statement of the right and for which the baseline or core meaning might provide an analogical and conceptual foundation. The fact that LGBTQ+ rights were debated in public discussions and the amendment was then approved could provide evidence that the public understanding was different than the drafters' understandings on this point. Richardson rightly argues that the fact that LGBTQ+ rights were understood to be on the table at least shows that the public understanding was that decisional privacy, as a general concept, was part of the original public meaning. *Id.* at 56. Nonetheless, because LGBTQ+ rights were not, in 1980, part of the pre-existing legal understanding of the right to privacy, the analysis of protection of LGBTQ+ rights by section 23 would differ from the right to abortion on which this Article focuses.

170. *Id.* at 5.

171. Aaron Epstein, *William O. Douglas: Champion Underdogs, Unpopular Ideas*, MIA. HERALD, Jan. 27, 1980, at 5-E.

172. *Id.*

Douglas's opinion in *Griswold*.[173] The *Miami Herald*, for instance, ran a long piece on Douglas's impact. The story discussed how Douglas developed the idea of a right to privacy in dissent in the 1950s, then established it fully in his majority opinion in *Griswold*.[174] "From there," the story continued, "the court moved to rule, in 1973, that a woman in early pregnancy has a constitutional right to privacy to choose abortion without governmental interference."[175] The *Ft. Lauderdale News* declared that Douglas's establishment of the right to privacy in *Griswold* led to "the court eight years later appl[ying] Douglas's doctrine to a woman's right of privacy to legalize abortion."[176] The *Tallahassee Democrat* mentioned how the Court had expanded upon Douglas's privacy jurisprudence "to cover other matters, including a woman's right to an abortion."[177]

Later in 1980 the Supreme Court decided the much-anticipated abortion case, *Harris v. McRae*.[178] The Court upheld federal legislation (the Hyde Amendment) that barred the expenditure of federal Medicaid funds on almost all abortions. *Harris* received widespread coverage across the state, and many of the articles mentioned that abortion was protected under the right to privacy. The *Miami Herald* led with a front-page headline that declared "'Right-to-Lifers' Gain Major Victory."[179] The lead story pointed out, however, that *Harris*, while upholding the ban on governmental funding of abortions, "had nothing to do with the legality of abortion itself" and that in the landmark ruling of *Roe* in 1973, "the court said a woman's right to privacy makes her decision to have an abortion a matter only for her and her doctor during the first three months of her pregnancy."[180] The paper included in its coverage a box insert where it summarized prior abortion decisions and stated that in *Roe* the Court based "its ruling on a woman's right to privacy."[181] The *Pensacola News* ran the same wire story on the case, including the statement that in *Roe* "the [C]ourt said a woman's right to privacy makes

173. *Id.*
174. *Id.*
175. *Id.*
176. *Douglas Championed the Right of Privacy for Individuals,* FORT LAUDERDALE NEWS & SUN-SENTINEL, Jan. 20, 1980, at 13A.
177. *Court Liberal, Douglas, Dies*, TALLAHASSEE DEMOCRAT, Jan. 20, 1980, at 1A.
178. 448 U.S. 297 (1980). The *New York Times* declared earlier that year that "the most important event this year in regard to abortion will not be the election but the Supreme Court's ruling in *Harris v. McRae*." Helen Epstein, *Abortion: An Issue That Won't Go Away*, N.Y. TIMES, Mar. 30, 1980, at 44.
179. Richard Carelli, *High Court Upholds Medicaid Restrictions*, MIA. HERALD, July 1, 1980, at 1AW.
180. *Id.*
181. *Previous Abortion Decisions*, MIA. HERALD, July 1, 1980, at 8AW.

her decision to have an abortion a matter only for her and her doctor during the first three month of her pregnancy."[182] An editorial in the *Palm Beach Post* a few days later, criticizing *Harris* and the Hyde Amendment, similarly noted that the Court had not "reced[ed] from an earlier landmark decision that women—even poor women—have a constitutional right of privacy to decide for themselves whether to bear children."[183] For Florida voters concerned about abortion (both pro-choice and pro-life voters), discussions of how the established right to privacy was the legal basis for protection of abortion rights were literally front-and-center, coming as they did in these front page stories on *Harris*.

In addition to these two focal moments where the role of the right to privacy in protecting abortion rights was highlighted in the press, throughout 1980 there were stories in Florida's papers that made this connection for their readers. That year another case was working its way to the United States Supreme Court. *H. L. v. Matheson*[184] involved the question of required parental notification prior to a minor obtaining an abortion.[185] Although the case arose in Utah, it drew national attention in February 1980 when the Supreme Court granted certiorari.[186] In reports about the case both the *Tallahassee Democrat* and the *Miami Herald* noted that it presented a conflict between a minor's right to privacy and the parents' rights and duties.[187] The case was mentioned again shortly after oral argument in October, just one month prior to the Florida vote on the proposed right to privacy amendment, with the *Fort Lauderdale News* noting that the right to an abortion was protected as an aspect of the right to privacy.[188]

The connections between the right to privacy and abortion also arose in other stories. In March, when a federal judge in Louisiana found that

182. *See High Court Rules on Abortions*, PENSACOLA NEWS, June 30, 1980, at 1A; *see also* Richard Carelli, *High Court Backs Curb on Funding of Abortions*, FORT LAUDERDALE NEWS, June 30, 1980, at 1A.

183. Editorial, *Fanning the Flames*, PALM BEACH POST, July 3, 1980, at A18.

184. 450 U.S. 398 (1981).

185. *Id.* at 399.

186. H. L. v. Matheson, 445 U.S. 903 (1980).

187. Aaron Epstein, *Court Will Examine Parents' Notification for Minor's Abortion*, MIA. HERALD, Feb. 26, 1980, at 16-A ("Out of this conflict between a minor's right to privacy and her parents' obligation to care for her has emerged a constitutional issue that was accepted Monday for review by the U.S. Supreme Court."); *Court Takes Teen Case on Abortion*, TALLAHASSEE DEMOCRAT, Feb. 26, 1980, at 3A; *Court to Review Abortion Law That Restricts Surgery on Minors*, FORT LAUDERDALE NEWS, Feb. 25, 1980, at 4A (reporting that suit claimed that statute "constituted an invasion of privacy" and noting that the "Supreme Court held in its 1973 abortion ruling that a woman's right to privacy protects her choice of an abortion at least in the first trimester").

188. Angel Castillo, *Taking Mom, Dad to Court*, FORT LAUDERDALE NEWS, Oct. 16, 1980, at 1C.

state's abortion law unconstitutional, the *Orlando Sentinel* noted that the judge held that the law "violates the woman's right to privacy."[189] In June, some papers ran an extended wire service series on how complex medical, moral, and legal issues of defining life arose with both pregnancy and end-of-life questions.[190] The stories discussed, in detail, the medical and moral supporting arguments about fetal life and death with dignity, and then, after discussing Justice Blackman's opinion in *Roe*, the articles noted that both death with dignity and abortion involve the legal doctrine of the right to privacy.[191] In October, shortly prior to the election, news stories covered how Planned Parenthood was responding to the recent success of pro-life groups in building political opposition to abortion, and they quoted the organization's president, Faye Wattleton, declaring that "[i]n recent years we have faced an increasingly vocal and at times violent minority which seeks to deny all of us our fundamental rights of privacy and individual decision-making."[192] And in August, the *St. Petersburg Times* coverage of the Democratic Convention noted that abortion was one of the most contentious issues for the party, with pro-choice supporters eventually outvoting the pro-life block with final platform language which opposed "government interference in the reproductive decisions of Americans" and "restrictions on funding for health services for the poor that deny poor women especially the right to exercise a constitutionally-guaranteed right to privacy."[193]

As this survey of Florida press coverage of abortion from 1980 makes clear, the connection between the right to privacy and abortion rights was well-known and widely seen as settled law. This final point—how the abortion-protecting right to privacy was seen by the public as settled law—is most dramatically revealed in the language pro-life supporters

189. *Federal Judge Kills Louisiana Abortion Statute*, SENTINEL STAR, Mar. 4, 1980, at 4-A; *see also Louisiana's Anti-Abortion Law Is Tossed Out by Federal Judge*, MIA. HERALD, Mar. 4, 1980, at 12-A ("[Judge] Collins said he reviewed the law in light of the U.S. Supreme Court rulings that the constitutional right of privacy is 'broad enough to encompass a woman's decision whether or not to terminate her pregnancy.'"). The case at issue was *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D. La. 1980).

190. Patricia McCormack, *When Do Life and Death Begin?*, FORT LAUDERDALE NEWS & SUN-SENTINEL, June 15, 1980, at 1H; Elizabeth Olson, *Medicine Pushes the Courts for an Answer*, NEWS TRIBUNE (Fort Pierce), June 12, 1980, at A10. The two stories fall under different bylines but appear to be based on the same original wire service text.

191. *See* McCormack, *supra* note 190, at 1H; Olson, *supra* note 190, at A10.

192. *Planned Parenthood Waving the Flag*, TAMPA TRIBUNE, Oct. 4, 1980, at 7-D. Wattleton's quote is set off in the text as a highlighted quote and her first name is misspelled as "Fay." *Id.*; *see also Planned Parenthood Turns to TV Ads on Family, Patriotism*, SENTINEL STAR, Oct. 4, 1980, at 7-A.

193. Charles Stafford, *Kennedy Stirs Democrats with Rousing Call to Arms*, ST. PETERSBURG TIMES, Aug. 13, 1980, at 1A.

used to talk about the legal status of abortion rights and what they identified as their best strategies for changing the law. In general, pro-life advocates in 1980 did not directly challenge the Supreme Court's holding that pregnant women's choices about abortion were part of a constitutionally protected right to privacy and instead focused their strategies on obtaining legal support for recognizing and protecting fetal life.[194] The main thrust of pro-life advocacy at the level of constitutional rights was to draft and support a national constitutional amendment protecting fetal life.[195]

Throughout 1980 one could see this dynamic in the Florida press. In February, anti-abortion advocates on the Fort Walton Beach city council drafted a resolution that would have declared that the fetus was a human life from conception through birth.[196] Yet even in making this strong pro-life statement, the drafting members also stated that their goal was to influence "the exercise by a pregnant woman of her constitutionally protected right of privacy with regard to abortion."[197] In September, the *Tampa Tribune* ran a story about a deeply committed pro-life Catholic woman and local organizer who described her pro-life group as working on the "human life amendment to the Constitution," a reference to the efforts of national pro-life groups to support a fetal life amendment.[198] Interestingly, she also said: "The abortion law is based on the woman's right to privacy. It says 'a woman's right to privacy supersedes the fetus's life.' And then, when it becomes legal, a lot of people feel it must be all right if it's law."[199] Her argument, it seems, was not that reproductive rights were not part of the right to privacy—she admitted that the law, as it then stood in the fall of 1980, protected abortion as part of this right of privacy.[200] Rather, she wanted the law to *change* so that a woman's right to privacy was properly balanced against a fetus's right to life.[201]

Concerns about the impact that the legal doctrine of the right to privacy had in supporting abortion was also raised in the state's Catholic

194. *See, e.g.*, MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 52, 83–84 (2015).

195. *See, e.g.*, *id.* (discussing the tension between the movement to propose a fetal life amendment and a push for more incremental change through the courts).

196. Jeff Newell, *Anti-Abortion Resolution Offered Fort Walton Council*, PENSACOLA J., Feb. 14, 1980, at C1.

197. *Id.*

198. Carol Jeffares, *Her Love of Life Makes Her Stand, Fight for It*, TAMPA TRIB., Sept. 20, 1980, at 5-Pasco. The Human Life Amendment drafted by National Right to Life would have declared the fetus a person under the Fifth and Fourteenth Amendments of the Constitution. *See* Epstein, *supra* note 178, at 50.

199. Jeffares, *supra* note 198, at 5-Pasco.

200. *Id.*

201. *Id.*

press. The *Florida Catholic*, published by the diocese of Orlando, ran a story in June summarizing a speech given by the prominent Catholic law professor (and later federal judge) John Noonan in which he held the right to privacy and the abortion precedents up to ridicule.[202] Noonan claimed there was an "abortion party" in the United States, but that it was not one of the political parties (at the time there were sizable pro-life and pro-choice members in both parties).[203] Rather, it was "a coalition of federal judiciary . . . together with lawyers," such as the ACLU, along with Planned Parenthood, doctors, and the media, all of whom had created the legal basis for protecting abortion.[204] These groups had created "code words" for abortion, he claimed, identifying the right to privacy as the worst offender: "The phrase, 'right to privacy,' is probably the best example of the use of code words and is 'a symbol for a great social, secular movement,' he said."[205] He went on, the paper reported, to declare that the right to privacy "was a legal phrase set up to protect the sacredness of marriage, but later became the battering ram used against the family and marriage."[206] He then briefly sketched the history of the modern right to privacy from *Griswold* to *Eisenstadt* (which he referred to only as a 1972 case written by Justice Brennan), and then to *Roe*, which Noonan described as the "most radical law on abortion in the world."[207] The right to privacy, he then continued, was being used after *Roe* to "exclude the father from having anything to say about the abortion decision of the mother, and finally to make parents powerless to prevent their daughter from having an abortion."[208]

This was a full-throated attack on the right to privacy as a legal term of art, given by one of the leading pro-life legal academics in the country. It was reported to Florida's Catholics in June as the Florida legislature was finalizing the proposed right to privacy amendment. When seen alongside the general press coverage of *Harris v. McRae* and other abortion issues, one can hardly claim that the public, including the pro-life segments of the public, would have been unaware that the right to privacy as a legal term of art was a key component for the right to abortion.[209]

202. *'Abortion Party' Rules U.S., Scholar Charges*, FLA. CATH., June 27, 1980, at 6.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. The right to privacy was also mentioned in other stories covering the election in the *Florida Catholic*. *See Delegates Rebuff Carter, Ask Abortion Funds*, FLA. CATH., Aug. 22,

One of the points that Noonan was making in his speech was that pro-life advocates needed to pay more attention to the role of the judiciary.[210] Unlike the local activist in the *Tampa Tribune* story, Noonan was not focused on the national right to life amendment as the primary instrument of constitutional change; instead, he argued for more attention on who was selected for the federal judiciary.[211] Legal historian Mary Ziegler has identified the period around the 1980 election as the time when an important shift in or multiplication of tactics was taking place for the pro-life movement.[212] While the pressure for a pro-life constitutional amendment continued, more advocates were pushing for an incremental strategy designed to "narrow the privacy right recognized in *Roe*."[213] Noonan's speech from the summer of 1980 seems to be an example of this shift. With the success of cases like *Harris v. McRae*, there was a growing feeling that *Roe* could be restricted and perhaps eventually overturned through the judiciary. Importantly, however, both the push for a pro-life amendment and Noonan's attack on the judiciary themselves *concede* that the then-current legal meaning of the right to privacy was one that encompassed the right to abortion. The former strategy sought to create a constitutional counterweight to that right by declaring the fetus a person, while the latter sought to get courts to curb the extension of the right and eventually to change the doctrinal analysis in future caselaw.[214] The key point for an originalist reading of the Florida right to privacy amendment, however, is that as of its adoption in 1980, it was widely acknowledged that the right to privacy *did* at the time protect the right to obtain an abortion.

This point was reflected in a *Tampa Tribune* story that ran shortly after the election.[215] The *Tribune* published a piece on Charles Canady, the future congressman and now justice of the Florida Supreme Court. The article explained Canady's pro-life views of the problems with *Roe* and the importance of Ronald Reagan's victory.[216] The *Tribune* wrote that "Canady, 26-year-old attorney with Holland & Knight law firm, said the decision [*Roe v. Wade*] was based on a doctrine of an individual's right to

1980, at 10 (reporting on Democratic party platform's support of abortion rights and quoting its reference to the right to privacy); *Elections '80: Parties' Positions Compared*, FLA. CATH., Oct. 3, 1980, at 6.

210. *See 'Abortion Party' Rules U.S., Scholar Charges*, *supra* note 202, at 6.

211. *Id.*

212. ZIEGLER, *supra* note 194, at 59.

213. *Id.* at 66 (discussing Americans United for Life); *see also id.* at 62–91 (discussing the tensions over strategy within the pro-life movement).

214. *Id.* at 52–53.

215. Shirley Town, *Anti-Abortionist Welcomes Change in U.S. Leadership*, TAMPA TRIB., Nov. 15, 1980, at 2-Polk.

216. *Id.*

privacy."[217] Canady particularly highlighted the constitutional amendment strategy as a response to *Roe*: "I feel with Reagan we will have a president who supports the enactment of a Human Life Amendment to the constitution."[218] Thus, as of the time of the adoption by the people of a right to privacy into the Florida Constitution, Canady recognized both that the legal concept of a right to privacy was the basis for abortion rights (precisely the point Senator Dunn had made in the senate debates in May) and that the best strategy for changing those rights was to seek a fetal life constitutional amendment at the federal level.[219]

D. Subsequent Case Law

As the United States Supreme Court stated in *District of Columbia v. Heller*,[220] evidence of how the constitutional text was interpreted in the period after its adoption "is a critical tool of constitutional interpretation" because it helps to "determine *the public understanding*" of the text.[221] In *Heller*, the Court analyzed interpretations for a period of a full century after adoption of the Second Amendment.[222] Fortunately, in the case of article I, section 23 of the Florida Constitution, such explorations of post-adoption interpretive history cover a shorter time.[223] But the basic principle of *Heller* surely applies to Florida's right of privacy provision as well: legal interpretations of a provision that occur in the period following its adoption are important evidence of the public understanding of the provision. This is especially true when those interpretations are consistent with pre-existing legal meanings of terms and phrases used in the text.

Within the first decade of adoption of section 23, the Florida Supreme Court held that the decisional privacy rights articulated in *Griswold* and *Roe* were similarly part of the coverage and meaning of section 23. In the first case interpreting the section, five years after adoption, the court

217. *Id.*

218. *Id.* Pro-life advocates had made similar points about the importance of the Human Life Amendment in late June when *Harris v. McRae* came down. *See, e.g.*, *Hyde: Victory for Countless Unborn Babies*, MIA. HERALD, July 1, 1980, at 8-AW (reporting Representative Hyde "guessed" that a constitutional amendment barring all elective abortions was possible within two more election cycles); *Ruling First Step, Abortion Foes Say*, MIA. HERALD, July 1, 1980, at 8-AW (stating pro-life advocates say a constitutional amendment needed to end abortion).

219. Town, *supra* note 215, at 2-Polk.

220. 554 U.S. 570 (2008).

221. *Id.* at 605.

222. *Id.* at 605–19.

223. FLA. CONST. art. I, § 23.

surveyed the general right of privacy, noting that decisional privacy was protected by *Roe*, and then adopted the compelling interest standard of *Roe* for evaluating claims of "unconstitutional governmental intrusion into one's privacy rights."[224] The court further held that because section 23 set out an "independent, freestanding" right of privacy and the drafters rejected the qualifying language ("unreasonable" or "unwarranted"), they made "the privacy right as strong as possible."[225] The right of privacy protected by this section, said the court, "is much broader in scope than that of the Federal Constitution."[226] The court reaffirmed this understanding two years later, again citing *Roe* and *Griswold*.[227] Justice Overton, who helped draft the first iteration of section 23, joined both decisions.[228]

Not surprisingly, in 1989 when the Florida Supreme Court eventually considered applying section 23 to abortion regulations in *In re T.W.*, it adopted the view that Florida's right to privacy provision constitutionalized abortion rights as set forth in *Roe*.[229] The court embraced *Roe*'s viability line and its compelling interest test, despite the fact that the U.S. Supreme Court was signaling its shifting path away from *Roe*.[230] Several justices specifically observed that this interpretation was consistent with the original meaning of the text. As Chief Justice Ehrlich wrote in his concurrence:

> [Section 23] was added to the Florida Constitution by amendment in 1980, well after the decision in *Roe v. Wade*. It can therefore be presumed that the public was aware that the right to an abortion was included under the federal constitutional right of privacy and would therefore certainly be covered by the Florida privacy amendment.[231]

As mentioned above, Justice Overton made the same point in his separate opinion, stating that Florida's right of privacy provision

224. Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 546–47 (Fla. 1985). The court found that state investigation of the Pari-Mutuel industry was a compelling interest and that the subpoenas of the financial records at issue were the least intrusive means to achieve that interest. *Id.* at 548.

225. *Id.*

226. *Id.*

227. Rasmussen v. S. Fla. Blood Serv., Inc., 500 So. 2d 533, 535–36 (Fla. 1987).

228. *Id.* at 538; *Winfield*, 477 So. 2d at 548.

229. *In re* T.W., 551 So. 2d 1186, 1192–93 (Fla. 1989).

230. *Id.* at 1193–94. The Florida Supreme Court specifically cited, approvingly, Justice Blackmun's opinion concurring in part and dissenting in part in *Webster v. Reproduction Health Services*, 492 U.S. 490, 537 (1989).

231. *In re T.W.*, 551 So. 2d at 1197 (Ehrlich, C.J., concurring) (citation omitted).

"effectively codified within the Florida Constitution the principles of *Roe v. Wade* . . . as it existed in 1980." [232] This was an especially telling statement coming from Overton, who, as Chief Justice of the Florida Supreme Court in 1977, had helped draft the provision as a member of the CRC.[233] Overton's ready acceptance of the idea that *Roe* was a core aspect of the Florida right to privacy provision, coming less than a decade after adoption of the text, is strong evidence of its original public meaning.[234]

Other justices agreed with this view. Justice Grimes, who, like Overton, partially concurred and partially dissented, also stated that section 23 constitutionalized *Roe v. Wade*. As he presciently wrote, "If the United States Supreme Court were to subsequently recede from *Roe v. Wade*, this would not diminish the abortion rights now provided by the privacy amendment of the Florida Constitution."[235] Even Justice McDonald, who fully dissented from the decision on the grounds that the right should be interpreted differently for minors than for adults, fully accepted the protection of a right to abortion under the state constitution: "I have no problem in embracing the rationale of *Roe v. Wade*, particularly when this state has adopted a constitutional right of privacy."[236]

The Florida Supreme Court has continued to follow this view of the meaning of section 23 in subsequent cases.[237] In *North Florida Women's Health & Counseling Services, Inc. v. State*,[238] the court upheld a

232. *Id.* at 1201 (Overton, J., concurring in part and dissenting in part). As this quote suggests, Overton concurred with the court's general holding that the right to an abortion was encompassed by the right to privacy provision. He differed with the court on the constitutionality of the statute at issue, which required a minor seeking an abortion to obtain parental consent. *Id.* Overton argued that the statute could be interpreted to enable a judicial bypass process for a minor that would also be consistent with federal constitutional law, and that the Florida right should permit this. *Id.*

233. Overton & Giddings, *supra* note 2, at 34; Cope, Jr., *To Be Let Alone*, *supra* note 15, at 674.

234. Overton had explicitly called for the CRC to consider adopting the right to privacy in his opening remarks to the commission in 1977 and can therefore be credited with being the initial force behind section 23. *See* Overton & Giddings, *supra* note 2, at 34 (citing CHIEF JUSTICE BEN F. OVERTON, REPORT TO THE CONSTITUTION REVISION COMMISSION 2–3 (1977)).

235. *In re T.W.*, 551 So. 2d at 1202 (Grimes, J., concurring in part and dissenting in part).

236. *Id.* at 1205 (McDonald, J., dissenting) (citation omitted).

237. *See, e.g.*, N. Fla. Women's Health v. State, 866 So. 2d 612, 619–22, 634–36 (Fla. 2003) (adhering to *In re T.W.* despite the U.S. Supreme Court's decision in *Planned Parenthood v. Casey*, and declaring that "any comparison between the federal and Florida rights of privacy is inapposite in light of the fact that *there is no express federal right of privacy clause*"); Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1252–54 (Fla. 2017) (reaffirming *In re T.W.* and discussing subsequent constitutional proposals).

238. 866 So. 2d 612 (Fla. 2003).

challenge to a Florida law requiring parental notification of abortions involving minor patients.[239] In that case, the court pointed out that the right to privacy under section 23 had by then been held to protect a wide array of decisional and bodily privacy rights, including parental rights and rights to refuse medical treatment.[240] The court reaffirmed this interpretation of section 23 in 2017.[241] At no point in any of these post-adoption analyses of section 23 has the court, or, indeed, any justice on the court, argued that decisional privacy was not encompassed in the original public meaning of section 23. For such a view to suddenly appear over forty years after adoption of the amendment would be, to say the least, novel, and its proponents would carry an enormous burden of proof to overcome extensive evidence of pre-existing meaning of the right to privacy, public understanding of that right, and near-contemporaneous judicial interpretations, including ones agreed to by one of the initial drafting commissioners.

III. COUNTERARGUMENTS AND THEIR FAILURES

As we can see, the connection of the legal term "right to privacy" with abortion rights was well established in 1980. It was unquestionably a true statement of federal law at the time. That legal position had been plainly articulated to both the 1977–78 Constitution Revision Commission that initially drafted the amendment and to the house committee that re-proposed the amendment in 1980. And the centrality of the right to privacy to abortion law and *Roe v. Wade* was repeatedly mentioned in the press throughout 1980, including in the Catholic press. Section 23 was consistently interpreted to include decisional privacy rights as articulated in *Roe* in the period immediately after adoption of section 23. All of this should be fairly dispositive for an originalist trying to determine if section 23 of the Florida Constitution should be understood to encompass the right to an abortion.

Such confidence would be misplaced. Governor DeSantis, who has appointed four of the current justices, signed a law banning abortions after fifteen weeks and Republican leaders have suggested that a near-total ban on abortions could be considered.[242] DeSantis did so despite

239. *Id.* at 619.

240. *Id.* at 619, 679 n.6. The court also repeated the point made by the court in *In re T.W.* and *Winfield* that by adopting a right to privacy provision, the voters in 1980 secured a right broader and more extensive than the federal right. *Id.*

241. *Gainesville Woman Care*, 210 So. 3d at 1254.

242. *See* Arek Sarkissian, *Florida Republicans Open to Total Ban on Abortions*, POLITICO (May 24, 2022, 6:12 PM), https://www.politico.com/news/2022/05/24/florida-republicans-

repeatedly asserting that originalism is his guiding principle when choosing judges.[243] As the cases challenging Florida's recent law play out, questions about how to interpret Florida's right of privacy are sure to be raised. Given the strength of the originalist position in favor of abortion rights, what arguments could be made by those who support overturning *In re T.W.*?

The State of Florida has taken its first thrust at constructing an argument to overturn *In re T.W.* in its briefing in a case challenging the fifteen-week abortion ban.[244] The State's argument has three main components: first, the Supreme Court's overturning of *Roe* in *Dobbs* "obliterates the foundation of [the Florida Supreme Court's] abortion precedents"; second, section 23 encompasses only informational rights; and, third, Senator Gordon's statement on the senate floor during debate over the proposed amendment in 1980 reinforces that the clause does not protect an abortion right.[245] I will address these points in reverse order.

As discussed above, it is true that in his colloquy with Senator Dunn, Senator Gordon said that he did not see section 23 as affecting disputes about abortion because he did not "see what that has to do with intrusion in your—in—in—privacy in your home."[246] But reliance on this statement for evidence of original public meaning of section 23 is inappropriate. As stated earlier, Senator Gordon was deeply confused about the relationship between privacy in the home, which he supported (including as it related to private sexual activities), and what he termed privacy of "families."[247] This distinction is unsupported by the text of section 23, which protects against "governmental intrusion into [a] person's private life."[248] Such obvious confusion about the text itself renders Gordon's statement virtually irrelevant. It is even more telling that the very language Gordon stumbled over was language connected directly to *Roe*

total-abortion-ban-00034887; Issac Morgan, *'Heartbeat Bill Is the Most Likely Legislation' That Could Be Pushed by GOP in 2023*, FLA. PHOENIX (Jan. 31, 2023, 7:00 AM), https://floridaphoenix.com/2023/01/31/heartbeat-bill-is-the-most-likely-legislation-that-could-be-pushed-by-gop-in-2023-fl-legislature/.

243. *See supra* note 1 and accompanying text.

244. Response to Emergency Motion, *supra* note 22. Shortly before this Article was sent to print, the State set forth its arguments more fully in its merits brief to the Florida Supreme Court. *See* Answer Brief, *supra* note 22.

245. Response to Emergency Motion, *supra* note 22, at 23–27. The State argues, in the alternative, that the strict scrutiny applied in *In re T.W.* is inappropriate for many abortion regulations and that under a less demanding standard the Florida law should be upheld. *Id.* at 27–29.

246. *Id.* at 25–26 (quoting Audio Tape: Senate Floor Debate—Right of Privacy, *supra* note 148); *see also supra* text accompanying note 154 (transcribing colloquy between Senators Dunn and Gordon).

247. *See supra* text accompanying note 154.

248. FLA. CONST. art. I, § 23.

and the contraceptives case, *Eisenstadt*, which explicitly addressed "government intrusion" into matters of fundamental personal privacy and expressed no distinction at all between privacy in the home and privacy of the family or decisions about reproduction.[249] The actual drafters of section 23 (members of the CRC in 1978 and members of the house in 1980) were well informed about the language of those cases, and they chose to follow that case law. Indeed, as explained above, there is extensive evidence that that the drafters were well aware that *Roe* and abortion rights were central components of the right to privacy, including the Privacy Memorandum used by the house committee and the staff analysis of an abortion clinic licensing bill that was being considered at the same time.[250]

Moreover, in a portion of the colloquy that the State omits, Senator Dunn expressly linked *Roe* and the right of privacy.[251] All the senators present who voted for section 23 were made keenly aware that *Roe* was based on the right of privacy.[252] And the people who, unlike Gordon, were involved in the actual drafting of the provision—Representative Jon Mills and Justice Overton—later stated that *Roe* and abortion rights were components of the general right of privacy as they understood section 23 at the time.[253] Thus, even if one were to credit Gordon's statement with some weight as to drafters' understandings, it is outweighed by the other evidence of drafter understanding and the general awareness of the house and senate about the content of the pre- existing legal right of privacy.

The State also argues that the text of section 23 only covers informational privacy.[254] The problem, of course, is that section 23 does not say this. The right—as is often the case with constitutionally declared rights—is written in broad and general terms. As Adam Richardson has nicely explained in his detailed textual analysis of section 23, neither "right to be let alone" nor "free from governmental intrusion" contain any

249. *See supra* text accompanying notes 148–58.

250. In the debates over the abortion clinic licensing bill, Senator Gordon praised the importance of the right to privacy, which he described as "fundamental" and the "people's privacy right." Neither he nor anyone else suggested that abortion involved some limited set of "family" privacy rights in sharp distinction to rights of privacy in the home or "private life." *See supra* note 146 and accompanying text.

251. *See supra* note 154 and accompanying text. The State only included the first four statements from this exchange, ending its quote precisely at the point where *Roe v. Wade* is debated. *See* Response to Emergency Motion, *supra* note 22, at 25–26.

252. *See supra* notes 148–58 and accompanying text.

253. Overton & Giddings, *supra* note 2, at 34.

254. Response to Emergency Motion, *supra* note 22, at 3; Answer Brief, *supra* note 22, at 11–12.

language of limitation restricting them to informational privacy.[255] The State rests its argument primarily on the former phrase, citing the fact that Justice Brandeis's use of the phrase in 1928 in *Olmstead* involved a case of wiretapping.[256] This misrepresents both Brandeis's famous passage,[257] and, more importantly, the context of the phrase as of 1980. The Court had, in the 1967 case of *Katz. v. United States*,[258] connected the phrase directly with the "general right of privacy,"[259] as had Justice Goldberg in his concurrence in *Griswold*.[260] The CRC in 1977–78 decided to use this phrase rather than its synonym, "right of privacy," to indicate that the state right did not depend on constructions of the federal right but had independent force.[261] There is no indication from the drafting history that the phrase was used to *restrict* the right of privacy to informational privacy.[262] And there is no support for the State's claim

255. Richardson, *supra* note 10, at 13–16.

256. Response to Emergency Motion, *supra* note 22, at 3 n.1; Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

257. The State omits the full passage by Brandeis:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.

Olmstead, 277 U.S. at 478. It simply is not plausible to read this capacious text as limited to "informational" privacy—a concept only developed in the 1970s.

258. 389 U.S. 347 (1967).

259. *Id.* at 350–51.

260. Griswold v. Connecticut, 381 U.S. 479, 494 (1965) (Goldberg, J., concurring); *see also* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (recognizing that an "individual's right to be left alone" protects them in the "privacy of the home"); Doe v. Bolton, 410 U.S. 179, 213 (1973) (Douglas, J., concurring) ("'If the right of privacy means anything, it is 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 bear or beget a child.' This right of privacy was called by Mr. Justice Brandeis the right 'to be let alone.'" (citation omitted) (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972))).

261. Dore, *supra* note 86, at 652 n.268 (explaining the drafting choices made by Commissioners D'Alemberte and Douglass); *see also* Cope, Jr., *To Be Let Alone*, *supra* note 15, at 731–32 (explaining that the phrases "to be let alone" and "governmental intrusion" were used to make the right as strong as possible).

262. Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985). In 1977 the Court in *Whalen v. Roe* described two aspects of the right of privacy as follows: "One [component] is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599 (1977). Although the Court cited *Olmstead* and its phrase "right to be let alone" in connection with the first prong, it also cited *Griswold* and *Stanley*, cases that involved private conduct in the home and not "informational" matters. *Id.* at 599

that the phrase "to be let alone" was itself a well-established term of art referring only to informational privacy.

Moreover, the text of section 23 includes the second phrase, "free from governmental intrusion into the person's private life."[263] As explained above, this phrase echoes the language used in the *Griswold* line of decisional privacy precedents, including *Eisenstadt*, *Stanley*, and *Griswold* itself.[264] In *Eisenstadt*, the Court described "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 bear or beget a child."[265] In *Stanley*, the Court articulated a fundamental "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[266] And in *Griswold*, the Court talked about how the right to privacy was implicit in several provisions of the Constitution protecting against "governmental intrusion."[267] Intrusion into private, intimate decisions was the hallmark of the meaning of the right to privacy generally in the 1970s, and the legal language chosen by the drafters for section 23 reflected this fact.[268]

The argument that section 23 should be read as only protecting informational privacy, despite the lack of textual support for that view, has further been advanced in an essay in the *Tallahassee Democrat* by John Stemberger.[269] Stemberger has long supported pro-life legal

n.25, 608–09. To the extent meaning can be gleaned from these string cites, the Court appeared to recognize some overlap between the two prongs. It certainly did not define the phrase "right to be let alone" as a limited right of informational privacy.

263. FLA. CONST. art I, § 23.

264. *See supra* notes 258–62 and accompanying text.

265. *Eisenstadt*, 405 U.S. at 453.

266. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

267. Griswold v. Connecticut, 381 U.S. 479, 483–84 (1965).

268. As Adam Richardson observes, the CRC commissioner who introduced the draft language to the full commission discussed how it covered both the older, Brandeisian invasion of privacy concept, and the more modern decisional privacy idea from *Griswold*. *See* Richardson, *supra* note 10, at 28 (citing Jon Moyle's statement from January 9, 1978).

269. Stemberger, *supra* note 107. Stemberger was responding to an extended article on former Florida State University law professor Patricia Dore's extensive role in the initial drafting of the provision, and her own belief that the provision encompassed abortion rights. *See* Varn, *supra* note 164. As this Article was going to print, Stemberger and Jacob Phillips's forthcoming article further exploring these issues became available. *See* John Stemberger & Jacob Phillips, *Watergate, Wiretapping, and Wire Transfers: The True Origin of Florida's Privacy Right*, 53 CUMB. L. REV. 1 (forthcoming 2023), https://www.cumberlandlawreview.com/_files/ugd/3ec4ea_e25524760e6f4bcc9e9def949d528958.pdf. Stemberger and Phillips focus primarily on showing that article 23 covered informational privacy. *Id.* at 11–31. Nobody contests this point. But evidence that informational privacy was a dominant concern cannot logically operate to *exclude* other pre-

arguments. He helped write a brief supporting the abortion restriction law in *In re T.W.*, and, most recently, as a member of the 2017–18 Constitution Revision Commission, he proposed to limit the right to privacy provision to only informational privacy (thus removing abortion, contraception, and other decisional privacy matters from its scope).[270] That proposal did not make it out of the commission drafting process, but Stemberger apparently sees the current set of court challenges as a potential vehicle to have the Florida Supreme Court overturn *In re T.W.* and adopt the argument that section 23 only covers informational privacy.[271]

Stemberger relies heavily on the fact that the overwhelming concern discussed in 1980 regarding the proposed addition of the right to privacy to the constitution was how it would add protections to individual information gathered by the government.[272] He argues that the fact that abortion was not generally discussed indicates that it was not intended to be part of the amendment's scope.[273] He also suggests that the fact that pro-life advocates at the time did not themselves focus on the amendment indicates that "it was clear to everyone" that the amendment only secured informational privacy.[274]

There are several problems with this dog-that-didn't-bark argument.[275] To be correct, the argument from silence relies on the truth of an unspoken assumption. In Stemberger's case, the assumption is that abortion would have been openly debated had it been thought to have been covered by the amendment. This assumption is wrong. Abortion would only have been debated if its coverage within the right to privacy were in dispute or were not yet established in law. But as of 1980 the protection of abortion through the right to privacy *was the established law*. It would hardly make sense for debates about section 23 to invest time and effort re-arguing the reasoning of *Roe*, let alone arguing that the terms "right to privacy," "right to be let alone," and "free from

existing meanings about decisional privacy from the scope of the right of privacy. Their article largely defers to Stemberger's earlier essay on the history of the drafting of article 23. *Id*. at 4 n.21, 24 n.177.

270. Stemberger, *supra* note 107. On the 2017–18 CRC and the proposed changes to the right to privacy, see *infra* notes 310–12 and accompanying text.

271. Stemberger, *supra* note 107.

272. *Id.*

273. *Id.*

274. *Id.*

275. *See, e.g.*, Harrison v. PPG Indus., 446 U.S. 578, 591–92 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."); Chisom v. Roemer, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) ("[W]e have forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the past.").

governmental intrusion" would plainly mean what they already meant in federal law.[276] Rather, what the advocates for the amendment spent their time debating and analyzing was what *additional* protections section 23 would grant beyond the rights established in federal law.[277] They argued about extensions of the established baseline, just as one would expect when constitutionalizing (or, in the words of *Heller*, "codifying") a well-developed legal term.[278]

The dog-that-didn't-bark also proves too much: it would mean that any right traditionally encompassed within the right to privacy would fail to be part of the constitutional amendment unless it had been expressly debated throughout the process. Several important topics had been encompassed by the federal right to privacy in addition to abortion, including rights to access contraception, rights of parents to make important choices in the rearing and education of their children, and rights of bodily integrity and healthcare choices.[279] It hardly makes sense that the general statement of a right to privacy adopted by Florida voters in 1980 excluded all of these rights as well, simply because there was no ongoing debate about the obvious fact that they were already covered by the known content of the right to privacy as established in federal law up to that point.

Stemberger's dog-that-didn't-bark argument also relies on the fact that pro-life advocates at the time did not articulate opposition to section 23 based on its protection of abortion. Given the wealth of evidence that the right to privacy repeatedly was discussed in public discourse in the context of abortion, including in the Catholic press, it is not clear what mileage Stemberger expects to get from this argument.[280] Surely the right of abortion—plainly part of the accepted background meaning of

276. *See* FLA. CONST. art I, § 23.

277. Richardson, *supra* note 10.

278. *Id.*; *see also* District of Columbia v. Heller, 554 U.S. 570 (2008).

279. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (educating children); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation and bodily integrity). As of 1980, courts were wrestling with how the federal right to privacy applied to personal, major health care decisions. *See, e.g.*, Rutherford v. United States, 438 F. Supp. 1287, 1300 (1977) (holding that the FDA ban on the cancer drug "Laetrile" violated the right to privacy); People v. Privitera, 591 P.2d 919, 925–26 (Cal. 1979) ("We hold the asserted right to obtain drugs of unproven efficacy is *not* encompassed by the right of privacy embodied in either the federal or the state Constitutions."). It is worth noting that the limitation of the right of privacy to informational privacy would potentially undermine Florida's protection of the right to make choices about one's own medical treatment well beyond abortion. *See In re* Guardianship of Browning, 568 So. 2d 4, 9–11 (Fla. 1990) (relying on article I, section 23 as the source for "the constitutional right to choose or refuse medical treatment").

280. *See 'Abortion Party' Rules U.S., Scholar Charges*, *supra* note 202, at 6.

the right to privacy—cannot somehow be *lost* because opponents of the right did not speak up loudly enough. That would be a bizarre way of thinking about public meaning and democratic constitution-making. A far more plausible explanation for the relative silence of pro-life groups on the abortion issue and section 23 is, as set out above, the fact that they had ceded the question as to the right to privacy, and instead were focused on proposed ratification of a counterweight, the federal fetal life amendment. As the sources cited above make clear, that is actually what people such as Charles Canady said at the time.[281]

Even more broadly, Stemberger fails to account for—or even acknowledge—the wealth of evidence detailed above that the term "right to privacy" was well-known to the drafters and the public as encompassing abortion rights.[282] He implicitly suggests that we should ignore that evidence and instead substitute an unspoken *exclusion* of abortion from the original meaning of section 23. But, given the background knowledge of what the right to privacy meant in law as of 1980, it would be far more sensible to expect any restriction of that meaning to have been both fully discussed and supported by textual restrictions—restrictions perhaps like what Stemberger proposed in his failed 2017 amendment.[283] Once we understand how the right to privacy operated as a pre-existing legal term, we can better see how Stemberger has the presumptions exactly backwards.

281. The claim that pro-life advocates would certainly have opposed section 23 if they had thought *Roe* was implicated, is a form of presentism—attempting to impose the views common in the present on actors in the past without accounting for the differences in context, perspective, and mindset. It may seem today as if pro-life groups would certainly oppose such a right to privacy if it were being proposed now, but that does not mean that the same assumptions can be made about 1980. Where the historical record reveals a different dynamic, as argued above that it does, the historical record should be respected. Moreover, given how widely available the connection between the right to privacy and abortion was in 1980, the most that Stemberger can argue is that pro-life groups were not sufficiently attentive, not that the connection can be ignored. *See* Town, *supra* note 215, at 2-Polk.

282. Stemberger, *supra* note 107. Actually, Stemberger does not just ignore the evidence, he erroneously asserts that the evidence does not exist: "What does not appear in any of those archived records is the word 'abortion.' Not a single time. Also missing are the words 'personal autonomy,' 'termination of pregnancy,' 'substantive due process,' 'Roe vs. Wade,' or any hint of a right to abortion." *Id.* This is patently wrong, as the study above shows. *See* Cope, Jr., *Toward a Right of Privacy*, *supra* note 84, at 708; Privacy Memorandum, *supra* note 113; Audio Tape: Dore, *supra* note 30; Background Reference Materials for Florida Constitution Revision Commission, *supra* note 89. The Privacy Memorandum used by the house, and the leading law review article by Gerald Cope that was referred to by the 1978 commission and the 1980 subcommittee, both mention abortion and *Roe*. Stemberger also ignores that Senator Dunn specifically raised *Roe* and abortion in the senate debates in 1980. *See* Audio Tape: Senate Floor Debate—Right of Privacy, *supra* note 148.

283. *See* Stemberger, *supra* note 107.

One reason why most originalist analysis takes account of the current status in law of a pre-existing legal term or a term-of-art is that doing so allows drafters and adopters to rely on known legal meanings. It makes it possible for the drafters and the public to focus on the new potentials of the terms, not on re-hashing accepted meanings.[284] This point played out in Florida in 1980, where the two topics that generated public debate after the legislature submitted the proposal were the limits that might be placed on law enforcement and the question of whether the provision would protect intimate, same-sex relations. Both aspects of the right to privacy would have represented a change in law, and so both received extensive press attention.[285] The amendment was still approved, over and against the objections that it might *broaden* protections of individual rights, including rights of same sex couples. To somehow read that record as evidence that abortion was silently *erased* from the right to privacy in Florida in the course of the 1980 constitutional amendment process is fantastical, especially given the paucity of evidence that such erasure was known to the voters. Rather, what Stemberger appears to be doing is re-writing the historical record in a way that makes section 23 look like his failed proposed amendment from 2017. That is not a reasonable reading of the historical record.

The State's third point in favor of overturning established and near-contemporaneous interpretations of section 23 highlights the recent United States Supreme Court decision in *Dobbs v. Jackson Women's Health*.[286] Although the State wrongly characterizes *Roe*'s influence as extending only to the Florida Supreme Court's analysis in *In re T.W.*—thus ignoring the fact that *Roe* actually influenced the drafting and adoption of section 23 in the first place, a point the justices emphasized in *In re T.W.*—this argument can still be framed as applying to the original public meaning analysis of the adoption of section 23. If *Roe* was indeed wrong the day it was decided, as the Court in *Dobbs* declares,[287] then one could argue that a state law provision that was originally understood to implement *Roe* must itself be wrong as well. *Dobbs*

284. The idea here is similar to what Lawrence Solum describes as the "division of linguistic labor" achieved by legal terms of art. *See* Solum, *Cooley's Constitutional Limitations*, *supra* note 65, at 59–60. The drafters of section 23 were able to divide the labor over the public meaning of the right of privacy between the established legal meanings and the potentially broader, newer meanings, with the latter being the topic of debate and public discourse.

285. *E.g.*, Craig Matsuda, *Dull Amendments Cover Big Issues*, TALLAHASSEE DEMOCRAT, Nov. 3, 1980, at 1B; Mary Hladky, *Commissioners Table Vote on State Privacy Amendment*, FORT LAUDERDALE NEWS, Oct. 1, 1980, at 8B.

286. Response to Emergency Motion, *supra* note 22, at 1–2; Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

287. *Dobbs*, 142 S. Ct. at 2243.

analogized *Roe* to *Plessy v. Ferguson*, and surely one would not support a state constitutional provision implementing *Plessy* after *Brown v. Board of Education* declared *Plessy* wrong.[288] Thus, even if section 23 was originally understood to encompass *Roe*, it is appropriate for the Florida Supreme Court to "revise" that meaning to comport with United States Supreme Court holdings after the adoption of section 23.[289]

This is flawed for several reasons. First, it misconstrues the nature of the rights and powers issues in *Brown* and *Dobbs*. *Brown* affirmatively *prohibited* state laws segregating by race, based on its reading of federal equal protection law.[290] State laws mandating segregation themselves violated the Federal Constitution, as interpreted by the Supreme Court. *Dobbs*, on the other hand, *enables* state legislative and constitutional action by removing an individual's rights protected under *federal* law.[291] *Dobbs* does not hold that abortion is prohibited by the Federal Constitution, but only that it is not protected—states can protect *or* prohibit abortion as the people of each state best determine.[292] State laws protecting abortion rights are entirely unaffected by *Dobbs*. No law superior to the state's constitution exists that would require a court to overturn the will of the people of Florida as expressed in 1980, and, as we will see below, re-expressed several times thereafter.[293]

288. *See* Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

289. Such an argument is most likely to be made in the originalist context by arguing that the abortion rights are merely an application of the broader right to privacy, and that sometimes original expected applications are incorrect implementations of the general principle. *Dobbs*, the argument might proceed, held that abortion is not in fact part of the right to privacy and therefore the original expectation that abortion was part of the right to privacy in 1980 was wrong. For a discussion of the problems with this type of application versus meaning sleight of hand, see *supra* Part I.

290. *Brown*, 347 U.S. at 495.

291. *Dobbs*, 142 S. Ct. at 2284.

292. *Id.*

293. In one of its appellate briefs, the State opened its argument by asserting that the *Dobbs* Court's declaration that the "authority to regulate abortion" belongs "to the people and their elected representatives" means that the legislature is free to regulate abortion as it sees fit. Appellants' Initial Brief, *supra* note 22, at 1. This misreads both *Dobbs* and the Florida Constitution. *Dobbs* only held that the Federal Constitution does not restrict states. *Dobbs*, 142 S. Ct. at 2284.

But when the people of a state have themselves adopted a right of privacy (expressly, not implicitly, and not based on the Federal Due Process Clause) and have done so when the general meaning of privacy rights included abortion rights, then the people have acted in a manner superior to normal lawmaking through legislation. Indeed, the whole point of originalist analysis is to *preserve* this type of super-democratic lawmaking by the people from erosion and interference by more transient legislative authority. The people of Florida acted in 1980. They re-confirmed that action in 2004 and 2012. *See infra*

Second, the argument ignores key differences between the federal implied right of privacy and Florida's express textual right. *Dobbs* addressed whether the liberty prong of the Fourteenth Amendment's Due Process Clause encompassed a right to abortion; it did not address at all whether the right to privacy, *as understood in the 1970s*, included in its core meanings a right to abortion. The people of Florida did not adopt a nineteenth century text on due process. They adopted the twentieth century right of privacy. When they did so, *Roe* was a reference point for the Florida provision, but it was not a proxy. The Florida statement of the right of privacy is based on but *independent* of the federal right and *Roe*. It took *Roe* as its reference, but it created a new right of privacy in state law. Pointedly, the people of Florida in 2012 in fact rejected an attempt to change section 23 to have it expressly tied to the fate of *Roe* and *Casey*, as discussed below. The State would now have the court adopt the failed 2012 amendment by itself tying the Florida right of privacy to the fate of *Roe*.

Finally, this argument wrongly frames abortion rights as merely an application of a right of privacy rather than as one of its core components. Under this theory, judges would have the power to re-interpret "original meaning" to change and eliminate rights they disagree with. By whittling away at each right (abortion? contraception? anti-sterilization?) as a mere mistaken "application," one could be left with a right of privacy that means only the things the justices approve of, even when that interpretation conflicts directly with evidence of original meaning.[294] That is ultimately a rejection of originalism and democratic constitutionalism, not an implementation of them. If the Florida courts do end up going down that path to eliminate abortion rights, it should be clear that they are adopting the type of living constitutionalism that conservatives usually deplore.

IV. CONSTITUTIONAL EVENTS AFTER 1980

To repeat, the evidence of the abortion-rights meaning of the right to privacy as of 1980 is compelling and should, on its own, be persuasive for originalist interpreters of the constitution. But, remarkably, the evidence

Part IV. That they have acted in a manner contrary to how the current political leaders would prefer is not a basis for upholding a statute and reinterpreting the constitution to change its original public meaning.

294. To the extent the rejection of original applications makes sense for originalism, it is best understood as a way to expand rights by rejecting expected rights-limitations (such as the mid-nineteenth century limitation of citizenship rights and privileges to men) that conflict with other evidence of core meanings, not as a way to reduce rights by narrowing core meanings.

does not end there. Constitutions are living documents, even for originalists, because they are subject to ongoing amendments. This point is especially important for state constitutions, which generally are more easily amended and revised than is the Federal Constitution. And the history of the Florida Constitution after 1980 also supports an abortion-right reading of the constitution's right to privacy.

Article I, section 23 is not the only provision of the Florida Constitution that addresses abortion. In 2003, the Florida Supreme Court held in *North Florida Women's Health & Counseling Services v. State*[295] that the Parental Notice Act was unconstitutional as a violation of section 23's right to privacy.[296] The following year, the legislature proposed and the voters adopted a new constitutional amendment that enabled the legislature to pass parental notification laws.[297] Now located in article X, section 22 of the constitution, this amendment specifically recognizes that article I, section 23's right to privacy covers abortions. In fact, the phrasing of the 2004 amendment makes it clear that parental notification is an *exception* to an otherwise protected right under Florida's right to privacy: "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."[298] The first clause of this sentence only makes sense as a statement confirming that minors have rights to abortion under article I, section 23; the enabling of the legislative power to require parental notification is an exception ("notwithstanding") to that general right. Thus, even as the voters of Florida in 2004 rejected the Florida Supreme Court's extension of the right to privacy to parental notification laws in *North Florida*, they also recognized that the court's application of the right to privacy to abortion

295. 866 So. 2d 612 (Fla. 2003).

296. *Id.* at 639–40.

297. *Election Results: Florida*, CNN, https://www.cnn.com/ELECTION/2004/pages/results/states/FL/ (last visited Feb. 15, 2023); *see also*, Maya Bell, *Amendment 1 Stirs Passions About Abortion*, ORLANDO SENTINEL, Oct. 24, 2004, at A1 (describing the context of the proposed amendment).

298. FLA. CONST. art. X, § 22. The full provision reads:

> Parental notice of termination of a minor's pregnancy.—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.

Id.

laws in *In re T.W.* and other cases was the valid interpretation of the right to privacy provision in section 23.

Any argument that the voters in 1980 somehow did not understand the right to privacy provision to encompass abortions, as weak as it is, founders on the shoals of the later-in-time amendment that expressly recognized that meaning. Not only is the evidence of the public meaning in 1980 of the right to privacy well supported, the public meaning of the parental notification amendment in 2004 also encompassed an understanding that abortion was protected under the Florida right to privacy provision. The 2004 amendment was reported in the press as being an exception or limitation of the right to privacy. The *Tallahassee Democrat*, for instance, ran a front page story on the amendment one week before the election, declaring in the bold headline: "Abortion—privacy rights on the ballot."[299] The story described the proposal as follows: "Amendment 1, as it's listed on the ballot, would limit privacy rights in the state constitution that protect a young woman's right to terminate a pregnancy."[300] Reporting in other papers was to the same effect.[301] As future Justice Muñiz stated at the time in an article supporting the parental notification amendment, section 23 "clearly . . . [gave] the abortion right a textual foundation in our state constitution."[302] The voting public in 2004, much like the voters in 1980, were made very aware that the right to privacy protected the right to an abortion.

Moreover, Floridians in 2012 rejected a proposal to further limit the abortion-rights interpretation of article I, section 23.[303] In 2011, the legislature passed an amendment proposal that would have changed the right to privacy's protection of abortion rights by limiting abortion rights in Florida to only those protections required under the United States

299. Diane Hirth, *Abortion—Privacy Rights on the Ballot*, TALLAHASSEE DEMOCRAT, Oct. 26, 2004, at 1A.

300. *Id.*

301. *See, e.g.*, Bell, *supra* note 297, at A1 ("Amendment 1 would exempt a future parental-notification law from the privacy clause in Florida's constitution."); Antigone Barton, *Voters to Weigh Amendment Requiring Abortion Notification*, PALM BEACH POST, Oct. 7, 2004, at 8A ("[T]he amendment . . . would exclude girls seeking abortions from being covered by the state's constitutional right to privacy."); Mary Ellen Klas, *New Amendments Could Reshape Constitution*, MIA. HERALD, Oct. 24, 2004, at 1L ("This [amendment] says that a minor's constitutional right to privacy should not preclude parents from being informed when an underage girl seeks an abortion. Florida is one of 10 states that has a right to privacy in its state Constitution; the provision has long been a legal stumbling block for abortion opponents.").

302. Muñiz, *supra* note 26, at 9.

303. *Prohibition on Public Funding of Abortions; Construction of Abortion Rights*, FLA. DIV. OF ELECTIONS, [hereinafter Rejected Proposal], https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=82 (last visited Feb. 15, 2023).

Constitution.[304] The proposal read, in part: "This constitution may not be interpreted to create broader rights to an abortion than those contained in the United States Constitution."[305] The proposal thus attempted to mandate what is known as "lockstep" interpretation—tying state law to the parallel federal law—for how courts could apply article I, section 23 to abortion.[306] Notably, this proposal would have left intact all other applications of the right to privacy that were more expansive than the federal right, including applications to other fundamental rights of personal decision-making and bodily integrity. Abortion was simply being singled out for interpretive isolation. The proposal would also have tied Florida's right to privacy provision (as applied to abortion) to the vicissitudes of the United States Supreme Court's abortion jurisprudence. As it turns out, this amendment would have led to the de-constitutionalization of abortion rights under Florida law based solely upon the issuance of the United States Supreme Court's ruling in *Dobbs*, which of course did not involve Florida law at all. The proposal paralleled a provision of the state's constitution that ties interpretation of the Florida Constitution's prohibition on unreasonable searches and seizures to the United States Supreme Court's interpretation of the Federal Constitution's Fourth Amendment.[307] As the ballot measure explaining this amendment stated, it was meant to overturn prior cases (implicitly referring to *In re T.W.* and *North Florida*) that read Florida's right to privacy as more protective of abortion rights than the post-*Casey* United States Supreme Court had held under the federal right to privacy.[308]

304. *Id.*

305. H.R.J. Res. 1179, 2011 Leg. (Fla. 2011), https://dos.elections.myflorida.com/initiatives/fulltext/pdf/10-82.pdf. The amendment would also have prohibited public funding of abortion-related services except as required by federal law.

306. *See generally* LAW OF AMERICAN STATE CONSTITUTIONS, *supra* note 53, at 193–231 (discussing different types of lockstep approaches); *id.* at 129 (arguing against lockstep by constitutional amendment because it abdicates "a part of a state's sovereignty and judicial autonomy").

307. FLA. CONST. art. I, § 12 ("This right shall be construed in conformity with the [Fourth] Amendment to the United States Constitution, as interpreted by the United States Supreme Court."); *see also id.* § 17 (lockstepping the excessive punishment clause with the federal court interpretation of the Eighth Amendment). This constitutionally-forced lockstep overrides state court interpretations and methods. *See generally* Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. FLA. L. REV. 653 (1987); Thomas C. Marks, Jr., *Federalism and the Florida Constitution: The Self-Inflicted Wounds of Thrown-Away Independence from the Control of the U.S. Supreme Court*, 66 ALBANY. L. REV. 701 (2003).

308. *See* Fla. H.R.J. Res. 1179.

Florida voters overwhelmingly rejected this amendment in November 2012.[309]

While one must be cautious in reading rejected proposed amendments for the purpose of interpreting existing constitutional language, in this case the fact that the 2012 proposal directly asserted an interpretive position about existing text makes its rejection more probative of how the voting public understands the constitutional right at issue. Certainly, in the context of the right to privacy provision that has a history of protecting abortion rights and that was originally adopted in a context where the right to privacy was well-known as protecting abortion, the rejection of a contrary interpretive position in 2012 stands as yet another strike against arguments that *In re T.W.* and its progeny were wrong about section 23. It also indicates that the voters rejected "lockstep" interpretation principles to the right to privacy, thus signaling to the court that it would be wrong to use *Dobbs* or any other federal interpretation of the Fourteenth Amendment to likewise limit Florida's express privacy provision.

This point is further reinforced by the failure of other proposed amendments. Most recently, a proposal prepared by John Stemberger for the Constitution Revision Committee process in 2017 would have expressly restricted section 23 to informational privacy.[310] It died on the vine of the revision drafting process and prior to submission to the public.[311] A similar fate befell numerous pro-life proposals for changes to section 23's right of privacy in the 1997–98 process.[312] In light of this history of the Florida amendment process—a history that includes an amendment that confirmed the right to privacy's protection of abortion and several failed amendments that would have read such protections out of the constitution, any attempt to argue that section 23 was originally understood to be limited to informational privacy are revealed as merely end runs around the valid amending process, employing unsupported historical arguments to achieve what has failed to convince the voting public or the Revision Commission. Not only would that be bad

309. The proposed amendment required 60% "yes" votes to pass. FLA. CONST. art. XI, § 5(e). It was defeated 45% "yes" to 55% "no." *See* Rejected Proposal*, supra* note 303.

310. JOHN STEMBERGER, CONST. REVISION COMM'N 2017–2018, PROPOSAL 0022 (2017), library.law.fsu.edu/Digital-Collections/CRC/CRC-2018/Proposals/Commissioner/2017/0022.html.

311. The proposal was withdrawn from consideration on March 20, 2018. *Id.*

312. *See* Daniel R. Gordon, *Upside Down Intentions: Weakening the State Constitutional Right to Privacy, a Florida Story of Intrigue and a Lack of Historical Integrity*, 71 TEMP. L. REV. 579, 586–87, 605–06 (1998) (discussing the proposals). To access the final proposals for the 1998 commission, as well as the record of defeat of other proposals, see *Proposals*, FLA. CONST. REVISION COMM'N, http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/proposals/index.html (last visited Feb. 15, 2023).

originalism, it would be precisely the opposite of what originalists declare as one of their overriding principles: limitation of constitutional change to that expressed by the authorized will of the people.

CONCLUSION

This Article has not attempted a comprehensive analysis of the full range of constitutional arguments that will likely arise in the course of litigation over House Bill 5 and any subsequent, even more restrictive abortion laws. Courts may decide to apply any number of interpretive approaches to the right to privacy under the Florida Constitution. But if Florida's judges do take seriously originalism or the related modes of reasoning from text and history, this Article shows that there is no valid basis in either text or original public meaning of that text for overturning the Florida Supreme Court's prior holdings in *In re T.W.* and *Gainesville Woman Care*.

This Article also does not directly address the question of whether the Florida Supreme Court might have room within originalist analysis to lower the burden on state regulatory legislation while still retaining the basic holding of *In re T.W.* The text of section 23 does not itself refer to a standard of review and so leaves that work to the court. However, given what this article sets forth about the centrality of *Roe* to Florida's right to privacy, including some references to the compelling interest test, it would likely be just as great a departure from originalism to overturn that component of *In re T.W.* as to overturn the protection of abortion rights itself. Nothing in the original public meaning evidence suggests that abortion was somehow to be treated differently from other decisional privacy rights analysis, which is what the court would be doing if it switched to an undue burden or another lower standard.[313]

Finally, this Article does not explicitly address the role of fetal viability in understanding the weight of a pregnant person's privacy interest as balanced against the state interest in the fetus. Like the compelling interest test, however, viability was a core component of *Roe* and was known in 1980 to be so. Moreover, the later-in-time amendment in 2004, which, as argued, re-affirmed section 23's application to

313. It is possible to read the state of federal law at the time as somewhere between a compelling interest test from *Roe* and the undue burden test that the Court later adopted in *Casey*. In *Maher v. Roe*, for instance, the Court, while applying *Roe*, stated that the "right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." Maher v. Roe, 432 U.S. 464, 473–74 (1977). On the history of the push-and-pull development of the undue burden test, see Mary Ziegler, *Liberty and the Politics of Balance: The Undue-Burden Test After* Casey/Hellerstedt, 52 HARV. C.R.-C.L. L. REV. 421, 424–25, 437 (2017).

abortion, did not change either the viability line or the compelling interest test. Thus, for the court to go down the road of clipping the wings of abortion rights in Florida, while claiming to be upholding the right to privacy protections, would still be a rejection of originalism.

Of course, the court can do any of these things. But to reduce or eliminate protections for women to terminate their pregnancies would render claims about the importance of originalism and the need to restrain courts—claims like those made by Governor DeSantis in 2019 before the Federalist Society[314]—a charade.[315] Either a judicial commitment to original meaning should apply in the cases that do not align with one's political party, or we should stop pretending and misleading the public and just engage in the set of pluralistic arguments that courts have traditionally employed.[316]

314. *See* Mower, *supra* note 1 ("You have to have some objective measure to go by, . . . [i]t can't just be fly-by-the-seat-of-your-pants philosophizing and imposing whatever idiosyncratic views you have on society under the guise of constitutional interpretation. Originalism provides a mechanism to (restrain) judicial discretion, which I think is very, very important." (statement of Ron DeSantis)).

315. On how judicial and political originalism often engaged in this type of charade, see Siegel, *supra* note 8; Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008).

316. I also hope this Article will raise some questions among liberals about the potential value for some originalist-style arguments. My guess is most proponents of abortion rights would agree that the Florida courts should enforce what was pretty clearly the meaning of the right to privacy provision in 1980, and would find judicial arguments that allow courts to reconfigure that right based on judicial judgments about shifting cultural ethos and traditions to be anti-democratic. This Article suggests some ways one can separate the more democracy-enhancing originalism from that which enhances historic discriminations, but much more can be done on this point.