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## *How Strong Is Armstrong? What To Make Of Montana's Ambiguous Autonomy Rights In A Post-Roe World*

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## HOW STRONG IS *ARMSTRONG*? WHAT TO MAKE OF MONTANA'S AMBIGUOUS AUTONOMY RIGHTS IN A POST-*ROE* WORLD

Ben McKee\*

### I. INTRODUCTION

Since 1973, courts in the United States had recognized that the federal constitution protected the right of persons to obtain an abortion.<sup>1</sup> In recent years, the strength of this right came into question.<sup>2</sup> With the perceived shift in the ideological balance of the United States Supreme Court, beginning with the retirement of Justice Anthony Kennedy in 2018,<sup>3</sup> state legislatures across the country passed numerous statutes restricting or banning abortion.<sup>4</sup> In 2021, the Texas Legislature passed Senate Bill 8, which banned abortions at the point when cardiac activity can be detected in the fetus,<sup>5</sup> effectively outlawing abortions past six weeks.<sup>6</sup> The law was unique in that its exclusive enforcement mechanism was through private civil action,<sup>7</sup> empowering private citizens to bring lawsuits against any person who violates the law, and providing for an award of \$10,000 if successful in court.<sup>8</sup> On emergency application from abortion providers for injunctive relief,<sup>9</sup> the United States Supreme Court ruled five to four not to block the law's enforcement.<sup>10</sup> In her dissent, Justice Sonia Sotomayor noted: "Presented with an application to enjoin a flagrantly unconstitutional law engineered to pro-

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\* J.D. Candidate, Alexander Blewett III School of Law at the University of Montana, Class of 2023. I would like to thank Professor Anthony Johnstone for his kindness and mentorship, and for consistently challenging me at each stage in the writing process. And because I cannot express my gratitude often enough, I would like to thank my wife, Celina, for her love, friendship, and many sacrifices.

1. *See* *Roe v. Wade*, 410 U.S. 113, 153 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. \_\_\_, 2022 U.S. LEXIS 3057 (June 24, 2022) (No. 19-1392); *see also* *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2132 (2020), *abrogated by* *Dobbs*, 597 U.S. \_\_\_; *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 607 (2016), *abrogated by* *Dobbs*, 597 U.S. \_\_\_; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (plurality), *overruled by* *Dobbs*, 597 U.S. \_\_\_.

2. Melanie Kalmanson & Riley Erin Fredrick, *The Viability of Change: Finding Abortion in Equality After Obergefell*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 647, 650 (2020).

3. *Id.*

4. *Id.* at 667–68.

5. TEX. HEALTH & SAFETY CODE § 171.204 (2021).

6. Peter N. Salib, *Ban Them All; Let the Courts Sort Them Out. Saving Clauses, the Texas Abortion Ban, and the Structure of Constitutional Rights*, 100 TEX. L. REV. ONLINE 13, 15 (2021).

7. TEX. HEALTH & SAFETY CODE § 171.207.

8. *Id.* § 171.208(b).

9. Emergency Application to Justice Alito for Writ of Injunction at 14, *Whole Woman's Health v. Jackson*, <https://perma.cc/VMB7-TSHJ> (Aug. 19, 2021) (No. 21-463).

10. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2494–95 (2021).

hibit women from exercising their constitutional rights and evade judicial scrutiny, a majority of Justices have opted to bury their heads in the sand.”<sup>11</sup>

While challenges to the Texas law continued to make their way through the courts, of greater concern to abortion rights advocates was the United States Supreme Court’s agreement to hear arguments regarding a Mississippi law banning the procedure after 15 weeks,<sup>12</sup> where the petitioners had explicitly asked the Court to overturn decades of abortion rights jurisprudence.<sup>13</sup> The Court heard arguments on December 1, 2021,<sup>14</sup> in which remarks by the Justices included Justice Brett Kavanaugh questioning whether the Court should overrule precedent and “return to the position of neutrality” on the question of abortion;<sup>15</sup> Justice Amy Coney Barrett suggesting—with regard to “the consequences of parenting and the obligations of motherhood that flow from pregnancy”—that “safe haven laws take care of that problem”;<sup>16</sup> and Justice Samuel Alito questioning if “the fetus has an interest in having a life, and that doesn’t change . . . from the point before viability to the point after viability.”<sup>17</sup>

On June 24, 2022, the Court issued its highly anticipated decision in *Dobbs v. Jackson Women’s Health Organization*, in which the Court held—by a vote of five to four—that its prior opinions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* “must be overruled,” reasoning that “[t]he Constitution makes no reference to abortion,” and contrary to the Court’s prior jurisprudence, “no such right is implicitly protected by any constitutional provision.”<sup>18</sup> Laws restricting abortion will now be upheld under the federal constitution “if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.”<sup>19</sup>

With the fate of federal abortion rights apparently settled, it begets the question of what effect this will have on the legal protections of abortion in

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11. *Id.* at 2498 (Sotomayor, J., with Breyer and Kagan, JJ., dissenting).

12. See MISS. CODE ANN. § 41-41-191(4)(b) (2018) (“Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform, induce, or attempt to perform or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.”).

13. Petition for Writ of Certiorari at 15, *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. \_\_\_, 2022 U.S. LEXIS 3057 (June 24, 2022) (No. 19-1392), available at <https://perma.cc/DE3J-GD6B>.

14. Oral Argument Transcript at 1, *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. \_\_\_, 2022 U.S. LEXIS 3057 (June 24, 2022) (No. 19-1392), available at <https://perma.cc/9XCN-XJ7Z>.

15. *Id.* at 80.

16. *Id.* at 56.

17. *Id.* at 65–66.

18. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. \_\_\_, 2022 U.S. LEXIS 3057, at \*21 (June 24, 2022) (No. 19-1392).

19. *Id.* at \*108 (citing *Heller v. Doe*, 509 U. S. 312, 319 (1993)).

Montana. Part II of this Comment reviews early abortion laws in Montana, leading up to the 1972 Montana Constitutional Convention and the conversations concerning the right to privacy generally—and abortion specifically—during the drafting and ratification of the Constitution; Part II then discusses the subsequent federal and state cases shaping those rights, beginning with United States Supreme Court’s 1973 decision in *Roe v. Wade*, and culminating with the Montana Supreme Court’s 1999 decision in *Armstrong v. State*.<sup>20</sup> Part III examines the unanswered questions regarding the scope of the Court’s holding in *Armstrong* and, after a comparative analysis of abortion rights in other states, offers a revised test for the Court to adopt in a future case. Part IV demonstrates the effectiveness of this test by applying it to four laws restricting abortion enacted by the Montana Legislature in 2021. Part V concludes this paper.

## II. BACKGROUND

On December 13, 1971, the United States Supreme Court heard oral arguments in *Roe*, a case challenging Texas’s criminal abortion statutes.<sup>21</sup> While the parties in *Roe* awaited the Court’s decision, the Montana Constitutional Convention convened on January 17, 1972.<sup>22</sup> The proposed Constitution was approved by the Convention’s delegates two months later on March 24, 1972,<sup>23</sup> and was ratified by the voters on June 6.<sup>24</sup> The Supreme Court called the parties in *Roe* for re-arguments on October 11.<sup>25</sup> Then, on January 22, 1973—ten months after the close of the Convention, and seven months after the Constitution’s ratification—the Court announced its opinion in *Roe*, holding that the Due Process Clause of the Fourteenth Amendment protected a person’s right to decide whether or not to terminate her pregnancy.<sup>26</sup>

### A. Early Abortion Laws in Montana

The status of abortion during Montana’s territorial years and early statehood as a serious offense under the law is evident from some of its

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20. 989 P.2d 364 (Mont. 1999).

21. 410 U.S. at 116.

22. 3 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 109 (1981), available at <https://perma.cc/6L4D-467J>.

23. 7 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 3046 (1981), available at <https://perma.cc/2BAD-2YJJ>.

24. Charles S. Johnson, *Constitution Passes*, BILLINGS GAZETTE, June 8, 1972, at \*1, available at <https://perma.cc/5WW9-LT3G>.

25. *Roe*, 410 U.S. at 113.

26. *Id.* at 153. This Comment uses gender-specific language when reflecting that used by the cited court.

earliest criminal cases and statutes,<sup>27</sup> including Montana's territorial penal code, which established the performance or procurement of abortions as a felony:

Every person who shall administer or cause to be administered or taken or furnish to another to be taken, any medical substance, or shall use or cause to be used, any instrument whatever with intent to procure the miscarriage of any woman then being with child (unless the same shall be done to save the life of such woman), and shall be convicted thereof, shall be punished by imprisonment in the territorial prison for a term of not less than two years, nor more than five years.<sup>28</sup>

The criminal status of abortion continued into early statehood, entailing felony offenses for both the provider and the patient:

Every person who provides, supplies or administers to any pregnant woman, or procures any such woman to take any medicine, drug or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years. . . . Every woman who solicits of any person any medicine, drug or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than one nor more than five years.<sup>29</sup>

The Montana Legislature copied the above language from the 1907 statutes verbatim into the 1947 criminal code, which were the statutes in effect at the time of the 1972 Constitutional Convention and subsequent ratification.<sup>30</sup>

27. See, e.g., Brief for Respondent, *Territory v. Corbett*, 3 Mont. 50, 52, 1877 WL 3574 (Mont. 1877) ("Consultation with physicians about procuring abortions are not privileged communications under our statute."); *State ex rel. Baldwin v. Kellogg*, 36 P. 957, 961 (Mont. 1894) ("[Dr. Kellogg's conduct] is entirely consistent with the fact of his having committed a criminal abortion, and attempting to conceal the same."); *State v. Hollowell*, 256 P. 380, 382 (Mont. 1927) ("And as a principal in the abortion he was guilty of a felony.").

28. COMPILED STATUTES OF MONTANA: ENACTED AT THE REGULAR SESSION OF THE FIFTEENTH LEGISLATIVE ASSEMBLY OF MONTANA, EMBRACING THE LAWS OF A GENERAL AND PERMANENT NATURE, IN FORCE AT THE EXPIRATION OF THE FIFTEENTH REGULAR SESSION OF THE LEGISLATIVE ASSEMBLY, ch. 4, § 42 (1888), available at <https://perma.cc/JG27-WTUA>.

29. 2 E.C. DAY, *THE REVISED CODES OF MONTANA OF 1907: CONTAINING ALL LAWS OF A PERMANENT & GENERAL NATURE IN FORCE AFTER THE ADJOURNMENT OF THE TENTH LEGISLATIVE ASSEMBLY* 590–91, §§ 8351–52 (1908), available at <https://perma.cc/6SHV-W4XU>.

30. See REV. CODES OF MONT. §§ 94-401 to 402 (1947), available at <https://perma.cc/8S6T-DLW3>; see also *Doe v. Woodahl*, 360 F. Supp. 20, 21 (D. Mont. 1973) (citing REV. CODES OF MONT. §§ 94-401 to 402).

*B. Privacy and Abortion in the Drafting and Ratification of the  
Montana Constitution*

Despite the Court hearing arguments in *Roe* in December 1971, the topic of abortion was not prevalent in the delegates' floor discussions during the Montana Constitutional Convention. The only explicit mention of abortion on the Convention floor took place on March 7, 1972, while the delegates debated the protection of inalienable rights under the proposed language for Article II, Section 3.<sup>31</sup> Delegate Robert Kelleher moved to substitute the word “born” with “conceived,” so that the language would read: “All persons are conceived free and have certain inalienable rights.”<sup>32</sup> Delegate Kelleher explained:

My purpose in this is, what's the use of having rights of the living if I don't have the right to be born? A most defenseless human being in the world is the human fetus, which is dependent upon its own mother for protection. And lastly, I would leave to the courts the meaning of when [a person] is conceived.<sup>33</sup>

Delegate Wade Dahood, chairman of the Bill of Rights Committee,<sup>34</sup> responded to Delegate Kelleher and objected to the motion:

What Delegate Kelleher is attempting to do at this time is, by constitutional command, prohibit abortion in the State of Montana. That issue was brought before the [Bill of Rights] committee. We decided that we should not deal with it within the Bill of Rights. It is a legislative matter insofar as we are concerned. The world of law has for centuries conducted a debate as to when a person becomes a person, at what particular state, at what particular time; and we submit that this particular question should not be decided by this delegation. It has no part at this time within the Bill of Rights of the Constitution of the State of Montana, and we oppose it for that reason.<sup>35</sup>

Following Delegate Dahood's comments, the Convention voted down Delegate Kelleher's motion to extend inalienable rights to the unborn by a vote of 71 to 15.<sup>36</sup> Delegate Dahood's reference to the Bill of Rights Committee's prior discussion of the issue appears to refer to a proposal by Dele-

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31. 5 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1640 (1981), available at <https://perma.cc/L68T-L6CW> [hereinafter CONVENTION TRANSCRIPT VOL. 5]; see also MONT. CONST. art. II, § 3 (“All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.”).

32. CONVENTION TRANSCRIPT VOL. 5, *supra* note 31, at 1640.

33. *Id.*

34. 1 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 22 (1979), available at <https://perma.cc/SW3G-37TW> [hereinafter CONVENTION TRANSCRIPT VOL. 1].

35. CONVENTION TRANSCRIPT VOL. 5, *supra* note 31, at 1640.

36. *Id.* at 1641–42.

gate Kelleher to include a section in the Constitution guaranteeing that “[a] human fetus has the right to be born.”<sup>37</sup>

One newspaper covering the March 7 exchange, and the failure of Delegate Kelleher’s motion, provided additional context to Delegate Dahood’s assertion that abortion was a legislative matter.<sup>38</sup> The Helena Independent Record noted that during the 1971 legislative session immediately preceding the Convention, Representative Dorothy Bradley, a Bozeman Democrat, had introduced a bill to legalize abortions which was defeated in committee.<sup>39</sup>

To the extent that the subject matter of privacy rights can be divided into, first, freedom from the disclosure of confidential information—that is, *information* privacy—and second, freedom from government interference in personal decision-making—*autonomy* privacy<sup>40</sup>—newspaper coverage and public commentary during the Convention, regarding a proposed privacy provision under Section 10 of the Article II Declaration of Rights, emphasized the significance of the information class of privacy. For example, Delegate George James wrote in a column in the Great Falls Tribune about a concern among the delegates “based on the growing fear of bureaucracy and the growing intrusion of government in our lives,” and that one of the proposals to address this included the right to privacy, which would “limit electronic surveillance or bugging.”<sup>41</sup>

A widely distributed<sup>42</sup> pamphlet created in part by Delegate Richard Roeder explained that “at a time when opportunities for invasion of privacy are increasing in number and sophistication, section 10 emphasizes that this right is essential for the preservation of a free society,” and described the right of privacy as intending “to protect the citizen from Government invasion of his privacy.”<sup>43</sup> The official Voter Information Pamphlet described Article II, Section 10 simply as a “[n]ew provision prohibiting any invasion of privacy unless the good of the state makes it necessary.”<sup>44</sup> Further, two

37. CONVENTION TRANSCRIPT VOL. 1, *supra* note 34, at 223.

38. *Abortion Issue Flares, Fails in Con Con*, HELENA INDEP. RECORD, Mar. 7, 1972, at \*148, available at <https://perma.cc/ZL5D-NPSA>.

39. *Id.*

40. See *State v. Nelson*, 941 P.2d 441, 448 (Mont. 1997) (citing *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 654–55 (Cal. 1994)).

41. George James, *Con-Con Comments by the Delegates from District 23*, GREAT FALLS TRIBUNE, Feb 5, 1972, at \*7, available at <https://perma.cc/ZL5D-NPSA>.

42. Tyler M. Stockton, *Originalism and the Montana Constitution*, 77 MONT. L. REV. 117, 122 (2016).

43. CONCERNED CITIZENS FOR CONSTITUTIONAL IMPROVEMENT, PROPOSED CONSTITUTION FOR THE STATE OF MONTANA 2, 11 (1972), available at <https://perma.cc/T4KT-P32J> [hereinafter ROEDER PAMPHLET].

44. PROPOSED 1972 CONSTITUTION OF THE STATE OF MONTANA: OFFICIAL TEXT WITH EXPLANATION 6 (1972), available at <https://perma.cc/M2Q7-Z4UZ>.

days after the delegates voted to approve the draft of the Constitution and send it to voters, the Great Falls Tribune opined in a glowing editorial that the delegates “avoided mistakes convention delegates in other states made by including emotional and controversial issues such as abortion and aid to parochial schools.”<sup>45</sup>

By scanning this sort of commentary, emphasizing only information privacy and ignoring protections related to personal autonomy, a straightforward and listless analysis might conclude “[t]hat the Convention’s discussion of the constitutional language did not include discussion of abortion . . . suggests the delegates did not believe the language covered abortion.”<sup>46</sup>

However, observers of the Convention were acutely aware of the possibility that the language in the new Constitution would be interpreted in the ongoing debates in Montana and the nation surrounding the legal status of abortion.<sup>47</sup> In 1969—four years before *Roe*—the California Supreme Court held that the unenumerated right to privacy in the federal constitution, as well as privacy rights in its state constitution, protected “[t]he fundamental right of the woman to choose whether to bear children.”<sup>48</sup> The court stated that such a conclusion followed from the United States Supreme Court’s 1965 decision in *Griswold v. Connecticut*,<sup>49</sup> where the Court held that the Due Process Clause of the Fourteenth Amendment protected the privacy of married couples in family planning and the use of contraceptives.<sup>50</sup>

This development did not go unnoticed in Montana. In the months leading up to 1972, the Great Falls Tribune reported in its coverage of the upcoming Convention that “[t]he right to privacy may be a key issue if the delegates decide to debat[e] abortion,” noting that “[t]he California Supreme Court ruled . . . that the right of privacy in the U.S. Constitution covers the right of a woman to an abortion.”<sup>51</sup>

As additional commentary, in his pamphlet distributed during the ratification period, Billings lawyer Gerald J. Neely<sup>52</sup> posed the question of whether another proposed provision in the Declaration of Rights, specifically, Section 15—“Rights of Persons Not Adults”—inadvertently created a

45. *Congratulations, Con Con delegates*, GREAT FALLS TRIBUNE, March 26, 1972, at \*34, available at <https://perma.cc/N7MU-JCDB>.

46. Andrew P. Morriss, *Opting for Change or Continuity? Thinking About ‘Reforming’ the Judicial Article of Montana’s Constitution*, 72 MONT. L. REV. 27, 45 n.85 (2011).

47. *See, e.g.*, Frank Adams, *Emotion-Packed Abortion Issue May Face Con Con Delegates*, GREAT FALLS TRIBUNE, Oct. 29, 1971, at 18, available at <https://perma.cc/FL99-JUH2>.

48. *California v. Belous*, 458 P.2d 194, 199 (Cal. 1969).

49. 381 U.S. 479 (1965).

50. *See id.* at 481–86.

51. Adams, *supra* note 47, at 18.

52. GERALD J. NEELY, *THE NEW MONTANA CONSTITUTION: A CRITICAL LOOK* \*3 (1972), available at <https://perma.cc/Q59W-EW5F>.



constitutional ban on abortion because of its interaction with existing statute:

An example of the potential problem areas that will face the legislature [because of the proposed Article II, Section 15] is this: under current Montana statute, an unborn child is deemed to be an existing person “so far as may be necessary for its interests in the event of its subsequent birth.” If unborn children are deemed to be existing persons, and all existing persons have the constitutional rights of all others, is it arguable that Montana, with passage of the rights of minors provision would have an anti-abortion statute already on the books?<sup>53</sup>

Finally, in a pivotal moment on the Convention floor and on the same day as Delegate Kelleher’s motion to include an anti-abortion provision in Article II, Section 3, Delegate Bob Campbell rose and expressed his support for the proposed Article II, Section 10, stating:

[T]oday we have observed an increasingly complex society and we know that our area of privacy has decreased, decreased, and decreased. The United States Supreme Court, in *Griswold versus Connecticut*, had to construe the right of privacy as an implied right and, in that case, held that the right of privacy extended into the marital privacy, that the state did not have a compelling state interest in going into the bedroom of a married couple to prevent contraception. And they ruled the Connecticut anticontraception law invalid as invading the right of privacy. Now, we don’t know how the interpretations will go from there, what the Supreme Court will do.<sup>54</sup>

By citing *Griswold*, Delegate Campbell asserted that Article II, Section 10, if approved by the delegates, would encompass the same autonomy privacy the United States Supreme Court determined protected married couples from state intrusion in family planning and the use of contraceptives<sup>55</sup>—procreative autonomy. In addition, Delegate Campbell acknowledged that the right to privacy, or at least the privacy protected under the Fourteenth Amendment,<sup>56</sup> had been and would continue to be subject to interpretation by the judiciary.<sup>57</sup>

The role of the courts up to this point in shaping the scope of these novel privacy rights was also understood outside the Convention. Following the close of the Convention and during the period when Montana voters

53. *Id.* at \*8 (citing MONT. CONST. art II, § 15 (“The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.”)). Although Neely uses quotation marks in quoting statutory language, he does not cite to any source. Neely appears to be quoting REV. CODE OF MONT. § 64-103 (1947), available at <https://perma.cc/4USM-PC3X> (“A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth.”).

54. CONVENTION TRANSCRIPT VOL. 5, *supra* note 31, at 1681.

55. See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

56. *Id.* at 481–86.

57. CONVENTION TRANSCRIPT VOL. 5, *supra* note 31, at 1681.

were gathering information and reflecting on whether to ratify or reject the new Constitution, a column in the Billings Gazette told readers that “[t]he Right of Privacy . . . section of the proposed Montana constitution to be voted on June 6, is another embarkation into new fields which would appear lofty and well meaning.”<sup>58</sup> The column included the input of a University of Montana School of Law student, tying Article II, Section 10 to the federal right of privacy which “has been suggested in some modern Supreme Court decisions.”<sup>59</sup>

Delegate Campbell later expanded on his prior comments regarding judicial interpretation of autonomy privacy when explaining his support for broad language in Section 10.<sup>60</sup> Delegate Campbell rose in response to a motion seeking to reinsert the phrase “without the showing of a compelling state interest,” which had been included by the Bill of Rights Committee’s proposal but had subsequently been removed by a vote on the floor of the Convention.<sup>61</sup> He predicted that the Montana Supreme Court “certainly are going to interpret the right of privacy. We had much discussion before our committee, and why not try to define the right, to put in specific examples.”<sup>62</sup> Delegate Campbell predicted that there would be “other areas in the future which may be developed by the court,” which he did not want to preclude by defining the right of privacy with too great of specificity.<sup>63</sup> After Delegate Ask indicated that the purpose of his motion was to add clarification that the right to privacy was not absolute, but rather must be interpreted within the constraints of what was “reasonable” and “justifiable,”<sup>64</sup> the Convention voted to reinsert the phrase “without the showing of a compelling state interest,”<sup>65</sup> so that the final language included in the Declaration of Rights—approved by the Convention and later ratified by Montana’s voters—read: “The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”<sup>66</sup>

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58. *A New Threat to Freedoms*, BILLINGS GAZETTE, May 5, 1972, at \*19, available at <https://perma.cc/A82A-ZMWG>.

59. *Id.* at \*19 (quoting Emilie Loring).

60. 6 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1851 (1981), available at <https://perma.cc/CPQ6-UK85> [hereinafter CONVENTION TRANSCRIPT VOL. 6].

61. *Id.* at 1850.

62. *Id.* at 1851.

63. *Id.*

64. *Id.* at 1852.

65. *Id.* at 1852–53.

66. MONT. CONST. art. II, § 10.

### C. Cases Shaping Montana's Right to Autonomy Privacy

#### 1. Beginning with Roe

On January 22, 1973, the United States Supreme Court expanded the right of privacy it had previously recognized in *Griswold* to include a person's right to decide whether to obtain an abortion.<sup>67</sup>

At the time, abortion remained a serious criminal offense in Montana, permissible only when necessary to save the life of the patient.<sup>68</sup> The Texas statute invalidated in *Roe* similarly restricted legal abortions to those “for the purpose of saving the life of the mother.”<sup>69</sup> The Court in *Roe* held that such statutes were subject to strict scrutiny,<sup>70</sup> and failed for being overbroad, as they made “no distinction between abortions performed early in pregnancy and those performed later,”<sup>71</sup> and limited “the legal justification for the procedure”<sup>72</sup> to one reason only—“‘saving’ the mother’s life.”<sup>73</sup> The Court created a trimester framework for determining the constitutionality of laws regulating or prohibiting abortion, holding that states lack a compelling interest prior to the end of the first trimester, and even at that point may only regulate abortion “to the extent that the regulation reasonably relates to the preservation and protection of maternal health.”<sup>74</sup> Not until the point of viability, when the fetus “has the capability of meaningful life outside the mother’s womb,”<sup>75</sup> does the state have a compelling interest in “potential life” to justify proscribing abortions outright.<sup>76</sup> The Court estimated the point of viability as existing somewhere between 24 and 28 weeks—essentially, at the start of the third trimester.<sup>77</sup>

67. *Roe v. Wade*, 410 U.S. 113, 153 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. \_\_\_, 2022 U.S. LEXIS 3057 (June 24, 2022) (No. 19-1392) (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, 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.”).

68. *See* REV. CODES OF MONT. §§ 94-401 to 402; *see also* *Doe v. Woodahl*, 360 F. Supp. 20, 21 (D. Mont. 1973) (citing REV. CODES OF MONT. §§ 94-401 to 402).

69. *Roe*, 410 U.S. at 164 (quoting 2A TEX. PENAL CODE arts. 1191–94, 1196 (1961)).

70. *Id.* at 165–66 (“The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention.”).

71. *Id.* at 164.

72. *Id.*

73. *Id.* (quoting 2A TEX. PENAL CODE art. 1196).

74. *Id.* at 163.

75. *Id.*

76. *Id.* at 163–64.

77. *Id.* at 160.

Three months after the Court announced its decision in *Roe*, a Montana woman in the first trimester of pregnancy brought a suit in the United States District Court for the District of Montana seeking a declaratory judgment that Montana's criminal abortion statutes were unconstitutional.<sup>78</sup> She was represented by former Delegate Bob Campbell, whose comments on procreative autonomy—discussed above—had shaped the discussions of privacy rights during the 1972 Constitutional Convention.<sup>79</sup> In *Doe v. Woodahl*, the district court compared Montana's statutes criminalizing abortion to the Texas statutes struck down in *Roe*, and—although Montana Attorney General Robert Woodahl had issued an opinion in the immediate aftermath of *Roe* vaguely asserting that at least one of the Montana statutes “present[ed] a different legislative purpose and enactment which has not been ruled on by the United States Supreme Court”<sup>80</sup>—the district court found that the Montana statutes as a whole were “in substance no different from the laws of Texas” because they were not “tailored to accommodate the conflicting rights of pregnant women and the interests of the state.”<sup>81</sup> On May 29, 1973,<sup>82</sup> the district court held that, under the federal constitution, Montana's abortion statutes were “unconstitutional and void in their entirety.”<sup>83</sup>

In response to the United States Supreme Court's decision in *Roe* and its application by the federal district court in striking down the state's abortion statutes as violative of the Fourteenth Amendment, the Montana Legislature enacted the Abortion Control Act of 1974,<sup>84</sup> which created “statutory limitations upon the performance of abortions intended to correspond with the guidelines” set forth by the federal courts, “limit[ing] the performance of abortion after the first 3-month period of gestation,” and prohibiting abortions post-viability.<sup>85</sup>

If the history of post-1973 abortion legislation in Montana can be conceptualized as appearing in four waves over time, the Legislature's enactment of the Abortion Control Act—filling the void left behind by the invalidation of the prior statutes—represented the first phase in this saga.

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78. Joan Uda, *Abortion: Roe v. Wade and the Montana Dilemma*, 35 MONT. L. REV. 103, 110 (1974).

79. *Doe v. Woodahl*, 360 F. Supp. 20, 21 (D. Mont. 1973).

80. Mont. Att'y Gen. Op. 35-9, at 18 (Feb. 22, 1973), available at <https://perma.cc/Y2ZE-Z8MG>.

81. *Doe*, 360 F. Supp. at 21–22.

82. *Id.* at 20.

83. *Id.* at 22.

84. REV. CODES OF MONT. §§ 94-5-613 to 94-5-624.

85. Gerald J. Navratil, *Recent Developments—Legislation: The Abortion Control Act*, 36 MONT. L. REV. 155, 159 (1975).

## 2. *Continuing with Casey*

Nearly two decades after its decision in *Roe*, the Court revisited its prior abortion jurisprudence in its landmark decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>86</sup> In a plurality opinion authored by three of the Justices, the Court upheld the “essential holding” of *Roe*, which the plurality synthesized as having three parts:

First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure. Second is a confirmation of the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.<sup>87</sup>

The plurality thus replaced *Roe*’s trimester framework and strict scrutiny analysis with a new “undue burden” test, in which states could regulate abortion prior to viability so long as such a regulation did not have “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.”<sup>88</sup> The plurality clarified that “[o]nly where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”<sup>89</sup> Consistent with the Court’s holding in *Roe*,<sup>90</sup> the *Casey* plurality affirmed a state’s power to proscribe abortions after the point of viability.<sup>91</sup> However, the plurality recognized that medical advances since *Roe* had allowed for the possibility of fetal viability at 23 to 24 weeks, and thus the 28-week figure cited in *Roe* was medically outdated.<sup>92</sup>

*Casey* led to a second phase of post-1973 abortion legislation in Montana, in which, beginning in 1995, the Legislature enacted a series of amendments to the Abortion Control Act of 1974, such as the Woman’s Right to Know Act,<sup>93</sup> the purpose of which included to “ensure that every woman who is considering an abortion receive complete information on

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86. See generally *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. \_\_\_, 2022 U.S. LEXIS 3057 (June 24, 2022) (No. 19-1392).

87. *Casey*, 505 U.S. at 846 (plurality).

88. *Id.* at 877.

89. *Id.* at 874.

90. *Roe v. Wade*, 410 U.S. 113, 163–64 (1973), *overruled by Dobbs*, 597 U.S. \_\_\_.

91. *Casey*, 505 U.S. at 846.

92. *Id.* at 860.

93. See MONT. CODE ANN. §§ 50-20-301 to 50-20-308 (1995).

alternatives.”<sup>94</sup> This wave of legislation continued in 1997 with a bill banning “partial-birth” abortions,<sup>95</sup> although the law was later invalidated in Montana district court on the grounds of unconstitutional vagueness and violating the right to privacy under Article II, Section 10.<sup>96</sup>

The 1995 legislative session also saw the passage of the Parental Notice of Abortion Act,<sup>97</sup> which required minors to notify a parent prior to obtaining an abortion.<sup>98</sup> The law offered a narrow judicial bypass whereby a court could grant a waiver if it found that the parental notification would not be in the minor’s best interests.<sup>99</sup> Following a challenge in federal district court, the law was eventually upheld by the United States Supreme Court.<sup>100</sup> Aided by predictions among legal commentators that the Parental Notice of Abortion Act, “irrespective of its constitutionality under the federal constitution, impermissibly abridges a pregnant minor’s inalienable right to privacy under the Montana Constitution,”<sup>101</sup> the challengers then brought suit in Montana district court.<sup>102</sup> There, the district court held the law unconstitutionally infringed on the right to privacy protected by Article II, Section 10.<sup>103</sup>

### 3. *Culminating with Armstrong*

The 1995 amendments to the Abortion Control Act also included a new prohibition on physician assistants performing abortions.<sup>104</sup> Susan Cahill, the only physician assistant licensed to perform abortions in Montana at that time, brought suit in the United States District Court for the District of Montana alongside a group of licensed physicians, including her employer, Dr. James Armstrong, arguing the law created the kind of unconstitutional undue burden prohibited by *Casey*.<sup>105</sup> The federal district court denied the plaintiffs’ motion for a preliminary injunction because it found they had not established any likelihood of prevailing on such a claim under *Casey*.<sup>106</sup> However, the United States Court of Appeals for the Ninth Cir-

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94. *Id.* § 50-20-302(2)(a).

95. MONT. CODE ANN. § 50-20-401 (1997).

96. *Intermnt. Planned Parenthood v. State*, 1998 Mont. Dist. LEXIS 782, at \*23 (June 29, 1998) (No. BDV 97-477).

97. MONT. CODE ANN. §§ 50-20-201 to 50-20-215 (1995) (repealed 2011).

98. *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997).

99. *Id.* at 293.

100. *Id.* at 299.

101. Matthew B. Hayhurst, *Parental Notification of Abortion and Minors’ Rights under the Montana Constitution*, 58 MONT. L. REV. 565, 597 (1997).

102. *Wicklund v. State*, No. ADV 97-671, 1999 Mont. Dist. LEXIS 1116, at \*1 (Feb. 11, 1999).

103. *Id.* at \*11, \*23.

104. MONT. CODE ANN. § 50-20-109 (1995).

105. *Mazurek v. Armstrong*, 520 U.S. 968, 969–71 (1997).

106. *Id.* at 971.

cuit vacated the district court's order denying the preliminary injunction, in part because the district court had failed to appropriately account for the hardships that the law placed on Cahill, the other plaintiffs, and their patients.<sup>107</sup>

The State of Montana petitioned the United States Supreme Court for certiorari, and on June 16, 1997,<sup>108</sup> the Court issued an opinion reversing the court of appeals.<sup>109</sup> The Court found that the law did not create an undue burden, relying in part on pre-*Casey* precedent that “to ensure the safety of the abortion procedure, the States may mandate that only physicians perform abortions,”<sup>110</sup> and that such legislation “infringe[s] upon no realm of personal privacy secured by the Constitution against state interference.”<sup>111</sup> The Court also noted a lack of “evidence suggesting an unlawful motive on the part of the Montana Legislature.”<sup>112</sup>

On October 1, 1997, Cahill and the other plaintiffs brought suit in Montana district court, seeking an injunction on several grounds, including that the law violated the right of individual privacy guaranteed under Article II, Section 10 of the Montana Constitution.<sup>113</sup> Two years prior, the Montana Supreme Court had issued a landmark opinion on the Montana Constitution's protections of autonomy privacy, in *Gryczan v. State*.<sup>114</sup> There, the Court determined the two-prong test suggested by Justice John Marshall Harlan in his concurrence in *Katz v. United States*<sup>115</sup>—for determining the scope of rights protected by the Fourth Amendment<sup>116</sup>—was the appropriate test for determining the scope of autonomy privacy under Article II, Section 10.<sup>117</sup> This test required first, that the person asserting the right have had an actual, subjective expectation of privacy, and second, that this expectation of privacy be one that society would recognize as reasonable.<sup>118</sup> Because the right to privacy was one explicitly protected in the Declaration of Rights—and was therefore a fundamental right—any legislation regulating an activity within the scope of autonomy privacy—as deter-

107. *Armstrong v. Mazurek*, 94 F.3d 566, 568 (9th Cir. 1996).

108. *Mazurek*, 520 U.S. at 968.

109. *Id.* at 976.

110. *Id.* at 974–75 (quoting *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 447 (1983)).

111. *Id.* at 974 (quoting *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975)).

112. *Id.* at 976.

113. *Armstrong v. State*, 989 P.2d 364, 367, 372 (Mont. 1999).

114. 942 P.2d 112 (Mont. 1997).

115. 389 U.S. 347 (1967).

116. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

117. *Gryczan*, 942 P.2d at 122.

118. *Id.* at 121 (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

mined by the *Katz* test—must be subject to strict scrutiny.<sup>119</sup> In applying the *Katz* test to a statute criminalizing consensual sex between adults of the same gender, the Montana Supreme Court found that such conduct fell within the scope of Article II, Section 10,<sup>120</sup> and determined that the statute failed constitutional muster under strict scrutiny because the state lacked any compelling interests.<sup>121</sup> In its opinion, the Court emphasized that Article II, Section 10 “affords citizens broader protection of their right to privacy than does the federal constitution.”<sup>122</sup>

On November 25, 1997, the district court granted a preliminary injunction in favor of Cahill, enjoining the state from enforcing the 1995 amendments—prohibiting physician assistants from performing abortions—against her and Dr. Armstrong.<sup>123</sup> The district court granted its order based in part on the merits of the plaintiffs’ Article II, Section 10 claims.<sup>124</sup> The state then appealed to the Montana Supreme Court.<sup>125</sup>

The Court issued its decision on October 26, 1999.<sup>126</sup> In opening its discussion of the right to privacy, the Court provided a general rule for its scope in the context of personal autonomy: “Article II, Section 10 of the Montana Constitution broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from government interference.”<sup>127</sup>

The Court then went on to state a more specific rule regarding the Montana Constitution’s protections of reproductive rights: “More narrowly, we conclude that Article II, Section 10, protects a woman’s right of procreative autonomy—i.e., here, the right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice.”<sup>128</sup>

The Court looked to some of the same remarks from the Constitutional Convention discussed above,<sup>129</sup> and concluded:

[G]iven the Constitutional Convention’s unmistakable intent to textualize this tradition [of individual privacy] by explicitly protecting citizens from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private;

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119. *Id.* at 122.

120. *Id.*

121. *Id.* at 126.

122. *Id.* at 121.

123. *Armstrong v. State*, 1997 Mont. Dist. LEXIS 810, at \*19 (Nov. 25, 1997) (No. BDV 97-627).

124. *Id.* at \*12–13.

125. *Armstrong v. State*, 989 P.2d 364, 372 (Mont. 1999).

126. *Id.* at 364.

127. *Id.* at 370.

128. *Id.*

129. *Id.* at 373–77.



given the Convention's reliance on *Griswold*; and given jurisprudential recognition, following the close of the Constitutional Convention, of a woman's right to seek and obtain a pre-viability abortion, it is clear that the procreative autonomy component of personal autonomy is protected by Montana's constitutional right of individual privacy found at Article II, Section 10.<sup>130</sup>

The Court further emphasized the importance of the Constitutional Convention's reliance on *Griswold* as an inspiration for Article II, Section 10, as *Griswold* had recognized the right to procreative autonomy—that decisions affecting reproduction are so personal that people must be permitted to make such decisions without state interference.<sup>131</sup> The Court went on:

Implicit in this right of procreative autonomy is a woman's moral right and moral responsibility to decide, up to the point of fetal viability, what her pregnancy demands of her in the context of her individual values, her beliefs as to the sanctity of life, and her personal situation. Moreover, the State has no more compelling interest or constitutional justification for interfering with the exercise of this right if the woman chooses to terminate her pre-viability pregnancy than it would if she chose to carry the fetus to term.<sup>132</sup>

Here, the Court expressed its concern that granting the government dominion over a person's reproductive decisions could lead to the government mandating abortion for certain groups or instituting eugenics programs.<sup>133</sup> The Court pointed to the United States Supreme Court's decision in *Buck v. Bell*,<sup>134</sup> upholding Virginia's use of forced sterilization<sup>135</sup> on the "manifestly unfit" to prevent them "from continuing their kind."<sup>136</sup> In summing up these concerns, the Court reiterated:

Unless fundamental constitutional rights—procreative autonomy being the present example—are grounded in something more substantial than the prevailing political winds, Huxley's *Brave New World* or Orwell's *1984* will always be as close as the next election. Fortunately, as demonstrated above, the roots of Montana's constitutional right of procreative autonomy go much deeper and are firmly embedded in the right of individual privacy guaranteed under Article II, Section 10 of the Montana Constitution.<sup>137</sup>

The Court then applied its analysis to Cahill and the other plaintiffs' claims that the 1995 amendments to the Abortion Control Act were unconstitutional:

The reality of this case is that, while the legislature could not make pre-viability abortions facially unlawful, it . . . attempt[ed] to make it as diffi-

130. *Id.* at 377.

131. *Id.* (citing RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 106 (First Vintage Books ed. 1994)).

132. *Id.*

133. *Id.* at 377–78.

134. 274 U.S. 200 (1927).

135. *See* *Buck v. Bell*, 274 U.S. 200, 205, 208 (1927).

136. *Armstrong*, 989 P.2d at 377–78 (quoting *Buck*, 274 U.S. at 207).

137. *Id.* at 378.

cult, as inconvenient and as costly as possible for women to exercise their right to obtain, from the health care provider of their choice, a specific medical procedure protected by the Due Process Clause of the federal constitution and, *independently of the Fourteenth Amendment*, protected by their greater right of individual privacy under Article II, Section 10 of the Montana Constitution.<sup>138</sup>

Here, the Court distinguished the Montana Constitution's autonomy privacy protections from those in the federal constitution, because the former required more than just "that the State simply *not* impose an undue burden,"<sup>139</sup> but rather, that it must *affirmatively* "demonstrate a compelling state interest for infringing this right."<sup>140</sup> However, the Court did not rule out that such interests may exist and would be within the power of the Legislature to address:

Certainly, this right of choice in making personal health care decisions and in exercising personal autonomy is not without limits. In narrowly defined instances the state, by clear and convincing evidence, may demonstrate a compelling interest in and obligation to legislate or regulate to preserve the safety, health and welfare of a particular class of patients or the general public from a medically-acknowledged, *bonafide* health risk.<sup>141</sup>

The Court clarified that outside such narrow circumstances, the Legislature has no role in or authority over the relationship between a patient and their health care provider, as that relationship was protected from state infringement under Article II, Section 10.<sup>142</sup> In applying a strict scrutiny analysis to the 1995 amendments to the Abortion Control Act, the Court found "there was no predicate compelling state interest justifying the amendments."<sup>143</sup> The Court declined to determine whether the legislation would have otherwise been narrowly tailored.<sup>144</sup>

In addition to finding that procreative autonomy was protected within the right of individual privacy under Article II, Section 10, the Court made quick mention that other rights under the Montana Constitution were implicated as well, including the inalienable rights of safety, health, and happiness protected by Article II, Section 3,<sup>145</sup> the rights to dignity and equal protection under Article II, Section 4,<sup>146</sup> and the right to reject religious

138. *Id.* at 381–82 (emphasis added).

139. *Id.* at 375 (emphasis added).

140. *Id.* (citing *Gryczan v. State*, 942 P.2d 112, 122 (Mont. 1997)) (internal quotation marks omitted).

141. *Armstrong*, 989 P.2d at 380 (italics in original).

142. *Id.*

143. *Id.* at 382.

144. *Id.*

145. *Id.* at 383 (citing MONT. CONST. art II, § 3 ("All persons are born free and have certain inalienable rights. They include . . . seeking their safety, health and happiness in all lawful ways.")).

146. *Id.* (citing MONT. CONST. art II, § 4 ("The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws.")).

doctrine under Article II, Sections 5<sup>147</sup> and 7.<sup>148</sup> The Court also applied a brief substantive due process analysis, similar to those used by the United States Supreme Court, finding that “[t]he right to due process of law, Article II, Section 17,<sup>149</sup> protects those rights—including rights of personal and procreative autonomy—inherent in the historical concept of ‘ordered liberty.’”<sup>150</sup>

In holding that a person’s procreative autonomy was protected by Article II, Section 10 of the Montana Constitution, the Court was unanimous—seven to zero.<sup>151</sup>

Following the Court’s decision in *Armstrong*, Montana saw a relative lull in abortion legislation. In 2005, in a rare exception to the inactivity that defined this period, the Legislature at last responded to the *Armstrong* decision by expanding which practitioners could perform abortions—although narrowly restricting the practice to only licensed physicians and physician assistants.<sup>152</sup> This lull in legislation continued until 2011, when, in a third wave of post-1973 legislation, the Legislature passed a new incarnation of the Parental Notice of Abortion Act,<sup>153</sup> which the Legislature then repealed and replaced in 2013 with the Parental Consent for Abortion Act.<sup>154</sup>

In 2018, a certified nurse practitioner operating out of a Whitefish clinic she co-owned with Susan Cahill, the prevailing plaintiff in *Armstrong*, brought suit alongside a certified nurse-midwife challenging the Legislature’s revised practitioner limits.<sup>155</sup> The district court issued a declaratory judgment that the statute violated the right of privacy under Article II, Section 10, and granted the plaintiffs a preliminary injunction.<sup>156</sup> In *Weems v. State*, the Montana Supreme Court affirmed its prior holding in *Armstrong* that “a statute preventing a woman from obtaining a lawful medical procedure—a pre-viability abortion—from a health care provider of her choosing unconstitutionally infringe[s] her right to individual privacy under

147. *Id.* (citing MONT. CONST. art. II, § 5 (“The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”)).

148. *Id.* (citing MONT. CONST. art. II, § 7 (“No law shall be passed impairing the freedom of speech or expression.”)).

149. *Id.* (citing MONT. CONST. art. II § 17 (“No person shall be deprived of life, liberty, or property without due process of law.”)).

150. *Id.* Although the Court uses quotation marks around the words “ordered liberty,” it does not cite to any source. The Court appears to be quoting *Palko v. Connecticut*, “[I]mmunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.” 302 U.S. 319, 324–25 (1937).

151. *Armstrong*, 989 P.2d at 384.

152. See MONT. CODE ANN. § 50-20-109 (2005).

153. See *id.* §§ 50-20-201 to 50-20-235 (2011) (repealed 2013).

154. See *id.* §§ 50-20-501 to 50-20-511 (2013).

155. *Weems v. State*, 440 P.3d 4, 6–7 (Mont. 2019).

156. *Id.* at 4.

Montana’s Constitution,”<sup>157</sup> and affirmed the district court’s order of injunctive relief.<sup>158</sup>

However, in contrast to the unanimous decision in *Armstrong*, three Justices dissented from the Court’s opinion.<sup>159</sup> In his dissent, Justice Rice, joined by Justices McKinnon and Shea, quoted from the Court’s 2006 decision in *Wiser v. State*<sup>160</sup>—discussed below—which employed narrow, isolated language from *Armstrong* to emphasize the “lawful” characteristic of medical procedures protected by Article II, Section 10, as well as the licensure status and competence of the provider.<sup>161</sup> As this paper will discuss, the lack of clarity surrounding *Armstrong*’s holding—what it is and what it is not—has created issues for the Court which will surely escalate if not resolved, given the federal dismantling of *Casey* and *Roe*.

### III. ANALYSIS OF AUTONOMY RIGHTS AFTER *Armstrong*

Here, this paper will look to the unanswered questions regarding the scope of the Montana Supreme Court’s holding in *Armstrong* and the issues this ambiguity has caused—and will continue to cause—in subsequent cases. This paper will then conduct a comparative analysis of abortion rights in states with similar privacy protections in their state constitutions. Finally, Part III will culminate in the unveiling of a simplified test for the Court to apply in future cases.

#### A. *Problems with the Scope of Procreative Autonomy Under Armstrong*

Although the Court’s opinion in *Armstrong* was in some ways unequivocal regarding the strength of the Montana Constitution’s protection of reproductive rights from “the prevailing political winds,”<sup>162</sup> the Court seemed to also rely in its judgment on the legal status of abortion, referencing the termination of pregnancies “at a time the law allows”<sup>163</sup> and repeatedly referring to pre-viability abortions as a “lawful medical procedure.”<sup>164</sup>

157. *Id.* at 6.

158. *Id.* at 14.

159. *Id.* at 17 (Rice, J., with McKinnon and Shea, JJ., dissenting).

160. 129 P.3d 133 (Mont. 2006).

161. *Weems*, 440 P.3d at 14 (Rice, J., with McKinnon and Shea, JJ., dissenting) (quoting *Wiser*, 129 P.3d at 137).

162. *Armstrong v. State*, 989 P.2d 364, 378 (Mont. 1999).

163. *Id.* at 383.

164. *See Armstrong*, 989 P.2d at 368 (“[T]he statutory amendments at issue prevent a woman from obtaining a lawful medical procedure—a pre-viability abortion . . . .”); *id.* at 370 (“Article II, Section 10, protects . . . the right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion . . . .”); *id.* at 380 (“[T]he legislature has no interest . . . to justify its interference with an individual’s fundamental privacy right to obtain a particular lawful medical procedure . . . .”); *id.* at 381 (“[T]he government failed utterly to demonstrate . . . that the State had a compelling interest for effectively

The Court also placed weight on the fact that the state Board of Medical Examiners had determined Cahill's competence to perform abortions, implying that the Board's professional judgment should not be questioned by the Legislature<sup>165</sup>—while overlooking the fact that the Board was composed of political appointees subject to confirmation by the Legislature's upper house, and included only 5 medical doctors among its 11 members.<sup>166</sup>

This emphasis on the legality of the medical procedure in question has led to greater confusion since *Armstrong*. In a later case in which a group of denturists brought an *Armstrong*-based Article II, Section 10 challenge<sup>167</sup> to Montana's requirement that denturists refer partial denture patients to dentists,<sup>168</sup> the Court in *Wiser v. State* selectively quoted language from *Armstrong* to narrow the scope of its holding:

[W]hile recognizing that the right to privacy was implicated in health care choices, *Armstrong* nonetheless specifically defined the right as guaranteeing access to a chosen health care provider who has been determined "competent" by the medical community and "licensed" to perform the procedure desired. *Armstrong* did not hold that there is a right to see a health care provider who is not licensed to provide the services desired.<sup>169</sup>

As discussed above, the dissenting Justices in the Court's 2018 decision in *Weems* quoted *Wiser*'s narrow and specific language as the correct rule from *Armstrong* regarding the Montana Constitution's protections of procreative autonomy.<sup>170</sup>

In a subsequent challenge to Montana's restrictions on medical marijuana,<sup>171</sup> the district court relied on *Armstrong* in determining that such restrictions violated the plaintiffs' rights under Article II, Section 10.<sup>172</sup> However, on appeal, the Court disagreed:

In *Armstrong*, the statute at issue prevented individuals from receiving a lawful, constitutionally protected medical procedure, abortion. Both the U.S. Supreme Court and this Court recognized that prohibiting a woman from obtaining an abortion violates her personal autonomy, and therefore, her

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infringing the right of procreative autonomy of women to obtain a pre-viability abortion and their right of personal autonomy to choose P.A. Cahill, under the supervision of Dr. Armstrong, to perform this lawful medical procedure."); *id.* at 384 ("[W]e hold that Article II, Section 10, protects a woman's right of procreative autonomy—here, the right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion . . .").

165. *Id.* at 381.

166. See MONT. CODE ANN. § 2-15-1841(2), (3) (1999).

167. *Wiser v. State*, 129 P.3d 133, 137 (Mont. 2006).

168. *Id.* at 136.

169. *Id.* at 137 (quoting *Armstrong*, 989 P.2d at 380) (internal citation omitted).

170. *Weems v. State*, 440 P.3d 4, 14 (Mont. 2019) (Rice, J., with McKinnon and Shea, JJ., dissenting) (quoting *Wiser*, 129 P.3d at 137).

171. *Mont. Cannabis Indus. Ass'n v. State*, 286 P.3d 1161, 1163 (Mont. 2012).

172. *Id.* at 1167.

right to privacy. . . . Unlike *Roe* and *Armstrong*, Plaintiffs' alleged affirmative right to access a particular drug has not been constitutionally protected under the right to privacy.<sup>173</sup>

The Court utilized circular reasoning here, suggesting that the threshold condition for a medical procedure being constitutionally protected was its existing status of constitutional protection.

Curiously, at no point in its opinion in *Armstrong* did the Court employ or even acknowledge the *Katz* test—which it had relied on in *Gryczan* only two years prior—in its determination that obtaining an abortion fell within the scope of the privacy protected by Article II, Section 10. In an unrelated case from earlier that same year, which the Montana Supreme Court never heard, a Montana district court applied the *Katz* test for this very purpose:

The first prong questions whether individuals have an expectation of privacy in the involved activity. What could be more private than an individual's decision as to whether to conceive and/or carry a child? As is the case in almost any medical procedure, a woman's decision to consider abortion certainly carries with it an expectation of privacy. The second prong considers whether society is willing to recognize as reasonable, an expectation of privacy as to a woman's decision on whether or not to have [an] abortion. While many Montanans do not approve of abortion, this Court cannot say that society is unwilling to recognize as reasonable, a woman's expectation of privacy in her very personal decision as to whether she should carry a pre-viable fetus. This Court concludes that a woman's decision to choose a pre-viability abortion is covered by Montana's right to privacy.<sup>174</sup>

Perhaps most troubling in the Court's limited abortion jurisprudence is that, although the Court has been clear that the express protections of individual privacy in the Montana Constitution are independent of and broader than the privacy rights implicit in the Due Process Clause of the Fourteenth Amendment,<sup>175</sup> the Court never quite provides any assurance that its protections of abortion specifically are built on a foundation separate from *Roe*, or whether, after one pulls back the curtain on *Armstrong*'s careful references to lawful medical procedures, the Court is really just marching in lockstep with the federal judiciary. There is a non-frivolous argument to be made that *Armstrong* and the cases that cite it rest on a fragile three-part premise: The Montana Constitution protects at least as much privacy as the Fourteenth Amendment; and the United States Supreme Court has held that abortion rights are included in those privacy protections; therefore, abortion rights—as they are discussed in *Roe*—are included in the privacy protected by the Montana Constitution.

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173. *Id.* (citing *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Armstrong*, 989 P.2d at 384).

174. *Planned Parenthood v. State*, 1999 Mont. Dist. LEXIS 1117, at \*7–8 (Mar. 12, 1999) (No. BDV 95-722).

175. *Armstrong*, 989 P.2d at 375 (citing *Gryczan v. State*, 942 P.2d 112, 121 (Mont. 1997)).

The obvious question then becomes: When five Justices on the United States Supreme Court decide that abortion rights are *not* protected by the Fourteenth Amendment, do the Montana Constitution's protections come tumbling down?

### B. *Abortion as Privacy in Other States*

Montana is one of 14 states whose supreme courts have recognized a state constitutional right to abortion, independent of the federal constitutional right first recognized in *Roe*.<sup>176</sup> The courts of ten of those states have based their abortion rights decisions—at least in part—on a theory of privacy.<sup>177</sup> The remaining four have grounded such rights in due process or equal protection clauses, a broad protection of liberty, or some otherwise ambiguous rationales.<sup>178</sup> Of the nine states that Montana joins in recognizing abortion rights under the right of privacy, six of those states provide helpful analyses for comparing to the prior jurisprudence in Montana.

California expressly protects privacy in its constitution as an inalienable right,<sup>179</sup> which the California Supreme Court held as early as 1969—three years before the inclusion of that right in the Montana Constitution—includes “[t]he fundamental right of the woman to choose whether to bear children.”<sup>180</sup> In a later case, the court clarified that this right under its state constitution is “at least as broad as that described in *Roe v. Wade*.”<sup>181</sup> Restrictions on abortion in California are subject to strict scrutiny,<sup>182</sup> and for the purposes of that test, the “protection of a nonviable fetus is not a compelling state interest.”<sup>183</sup>

In another state with an express right to privacy in its constitution,<sup>184</sup> the Alaska Supreme Court held that this right to privacy protects “fundamental reproductive rights [which] include the right to an abortion,” the scope of which is “similar to that expressed in *Roe v. Wade*.”<sup>185</sup> Interestingly, the court has deliberately declined to march in lockstep with federal abortion jurisprudence, explicitly rejecting “the narrower definition of that

176. PAUL BENJAMIN LINTON, *ABORTION UNDER STATE CONSTITUTIONS: A STATE-BY-STATE ANALYSIS* 497 (3d ed. 2020).

177. *Id.*

178. *Id.*

179. CAL. CONST. art. I, § 1 (“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”).

180. *California v. Belous*, 458 P.2d 194, 199 (Cal. 1969).

181. *Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 796 (Cal. 1981).

182. *Myers*, 625 P.2d at 793.

183. *Id.* at 796.

184. ALASKA CONST. art. I, § 22 (“The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.”).

185. *Valley Hosp. Ass’n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 969 (Alaska 1997).

right promulgated in the plurality opinion in *Casey*.<sup>186</sup> Legal constraints to reproductive rights are subject to strict scrutiny.<sup>187</sup>

Florida's constitution also has an express guarantee of the right to privacy,<sup>188</sup> and the Supreme Court of Florida has held that this right includes the fundamental right of a woman to decide “whether to end her pregnancy.”<sup>189</sup> In the first trimester, abortion “may not be significantly restricted by the state.”<sup>190</sup> After the first trimester, state restrictions are still subject to strict scrutiny, and prior to viability, “maternal health” may be a compelling state interest, but not until the point of viability may the “potentiality of life” be asserted as such an interest.<sup>191</sup>

In the absence of an express provision, the Supreme Court of Minnesota has recognized a right to privacy implied in three separate sections of its constitution,<sup>192</sup> and held that this right protects both the obtaining of an abortion and the decision-making process that precedes it.<sup>193</sup> Restrictions on abortion are subject to strict scrutiny, and the state cannot assert a compelling interest in “potential life” prior to viability.<sup>194</sup> However, the court primarily relied on *Roe*—not the privacy protections in its state constitution—in drawing the viability line with regards to that interest.<sup>195</sup>

The Supreme Court of Mississippi has also recognized an implied right to privacy in the state's common law and as an unenumerated right protected by the state constitution,<sup>196</sup> and held that this right includes “autonomous bodily integrity,” which in turn includes the “right to have an abortion.”<sup>197</sup> The court adopted *Casey*'s undue burden test for state regulation of pre-viability abortions.<sup>198</sup>

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186. *Id.*

187. *Id.*

188. FLA. CONST. art. I, § 23 (“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.”).

189. *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989) (quoting *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986)).

190. *Id.*

191. *Id.* at 1193–94.

192. *Women of the State v. Gomez*, 542 N.W.2d 17, 19 (Minn. 1995) (citing MINN. CONST. art. I, § 2 (law of the land); *id.* § 7 (due process); *id.* § 10 (search and seizure)).

193. *Id.* at 31.

194. *Id.* at 31–32.

195. *Id.* at 31–32.

196. *In re Brown*, 478 So. 2d 1033, 1039–40 (Miss. 1985) (citing MISS. CONST. art. III, § 32 (unenumerated rights)).

197. *Pro-Choice Miss. v. Fordice*, 716 So. 2d 645, 653 (Miss. 1998).

198. *Id.* at 655.



Finally, the Tennessee Supreme Court has recognized an implied right to privacy derived from various provisions of its constitution,<sup>199</sup> and held that this right includes a woman's fundamental right "to terminate her pregnancy."<sup>200</sup> Similar to the Alaska Supreme Court, the Tennessee court explicitly rejected the *Casey* test and asserted that strict scrutiny remained the appropriate standard of review for restrictions on this fundamental right.<sup>201</sup> The court recognized that the state "has a compelling interest in maternal health from the beginning of pregnancy,"<sup>202</sup> but held that the state's interest in "potential life" does not become compelling until viability.<sup>203</sup> However, in 2014, the court's holdings on abortion rights were effectively overruled by a voter-approved amendment to the state constitution stating that "[n]othing in this Constitution secures or protects a right to abortion."<sup>204</sup>

### C. *The Armstrong 2.0 Test*

This paper contends that the Montana Supreme Court should clarify its prior holding on the scope of abortion rights protected under the Montana Constitution as follows:

Article II, Section 10 protects the fundamental right of procreative autonomy, which includes the right to a pre-viability abortion.

For the purposes of discussing this test, this paper will refer to the above language as "*Armstrong 2.0*."

Because the Court in *Armstrong* did not rely on the *Katz* test to determine that procreative autonomy is within the scope of Article II, Section 10, there is no need to return to that question. Notably, none of the six state supreme courts discussed above utilized the *Katz* test to determine whether abortion was within the scope of the right to privacy protected in their state constitutions. Additionally, as demonstrated by the above analysis conducted by one Montana district court, a person's decision to obtain a pre-viability abortion clearly passes the *Katz* test.

Despite its reliance on *Roe*, the Court in *Armstrong* did not borrow its medically arbitrary<sup>205</sup> trimester framework, and there is no need for the

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199. *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 27 (Tenn. 2000) (citing *Davis v. Davis*, 842 S.W.2d 588, 600 (Tenn. 1992)).

200. *Id.* at 12.

201. *Id.* at 17.

202. *Id.*

203. *Id.*

204. TENN. CONST. art. I § 36.

205. Justice Harry Blackmun, author of the United States Supreme Court's opinion in *Roe v. Wade*, 410 U.S. 113 (1973), infamously wrote in a memorandum to his fellow Justices accompanying an early draft of the *Roe* opinion, "You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary." See Jonathan English, *Abortion Evolution: How Roe v. Wade Has Come to Support a Pro-*

Court to do so in a future case. Although the trimester lines provided straightforward boundaries for courts and legislatures to follow, *Roe* was always more fundamentally a test of viability, as this was the point that separated when a state could proscribe abortion, and when it could not. Thus, the Montana Supreme Court was not incoherent in its references to *Roe* while discussing its own viability framework in *Armstrong*, and the Court's utilization of the *Armstrong* 2.0 test in a future case would not constitute a departure from its prior holding.

Discussion of *Griswold* on the Convention floor made clear that the right to privacy protected in Article II, Section 10, includes procreative autonomy.<sup>206</sup> Because the language of Section 10 is explicit that this right—including its procreative autonomy component—"shall not be infringed without the showing of a compelling state interest,"<sup>207</sup> and because privacy is also a fundamental right listed in the Montana Constitution's Declaration of Rights, any restrictions on abortion should be subject to strict scrutiny.<sup>208</sup> A strict scrutiny analysis is also consistent with the standard of review applied by five of the six state supreme courts highlighted above.

Consistent with the determinations of several of those state courts, the Montana Supreme Court would likely find that some restrictions on abortion could be justified by a compelling state interest—as required by the text of Article II, Section 10—in the health and safety of the patient. However, in contrast to the undue burden test set out in *Casey*, these pre-viability regulations would be subject to strict scrutiny.

Similarly consistent with the application of strict scrutiny by the state supreme courts discussed above, the State of Montana could cite to a compelling interest in the potentiality of life in restricting abortions after the point of viability. Therefore, because this interest would allow the state to create restrictions that ban abortion outright post-viability, such late-term abortions lie outside the scope of the autonomy privacy guaranteed by Article II, Section 10, under an *Armstrong* 2.0 analysis.

#### IV. APPLICATION TO RECENT LEGISLATION IN MONTANA

The fourth and most recent wave of Montana's post-1973 abortion legislation occurred in the 2021 legislative session, when the Legislature passed four major bills restricting abortion in Montana: (1) The Pain-Capa-

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*Life & Pro-Choice Position*, 53 CREIGHTON L. REV. 157, 193–94 (citing Memorandum from Justice Blackmun to United States Supreme Court (Nov. 21, 1972) (on file with the Library of Congress)).

206. CONVENTION TRANSCRIPT VOL. 5, *supra* note 31, at 1681; *see also* *Armstrong v. State*, 989 P.2d 364, 377 (Mont. 1999).

207. MONT. CONST. art. II, § 10.

208. *See Armstrong*, 989 P.2d at 374.

ble Unborn Child Protection Act<sup>209</sup> which banned abortions at 20 weeks<sup>210</sup> and created criminal penalties for noncompliance;<sup>211</sup> (2) the Abortion-Inducing Drug Risk Protocol Act,<sup>212</sup> which placed restrictions on the distribution of medication abortions, including requirements that a medical practitioner “independently verify that a pregnancy exists,”<sup>213</sup> obtain informed consent at least 24 hours before the medication is provided,<sup>214</sup> and “inform the woman that the woman may see the remains of the unborn child in the process of completing the abortion,”<sup>215</sup> while creating criminal penalties for noncompliance;<sup>216</sup> (3) an amendment to the Abortion Control Act of 1974 requiring abortion providers to inform the patient of the opportunity to view an ultrasound of the fetus and listen to the fetal heart tone;<sup>217</sup> and (4) a bill prohibiting abortion coverage in insurance plans available through the Montana health insurance marketplace.<sup>218</sup>

In response to these four bills restricting access to abortion, on August 16, 2021,<sup>219</sup> Planned Parenthood of Montana and a Montana physician<sup>220</sup> brought suit against the state, seeking declaratory and injunctive relief from the laws.<sup>221</sup> In their complaint, the plaintiffs asserted that the four laws “violate the right to privacy of women seeking pre-viability abortions in Montana without being narrowly tailored to effectuate a compelling State interest, in violation of Article II, Section 10 of the Montana Constitution.”<sup>222</sup> The plaintiffs cited *Armstrong* throughout the complaint to support their arguments that the laws were unconstitutional.<sup>223</sup> The district court granted the plaintiffs’ motion for a preliminary injunction on the state enforcing the 20-week ban, the restrictions on medication abortions, and the law requiring that providers offer an ultrasound.<sup>224</sup>

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209. MONT. CODE ANN. §§ 50-20-601 to 50-20-606 (2021).

210. *Id.* § 50-20-603.

211. *Id.* § 50-20-604.

212. *Id.* §§ 50-20-701 to 50-20-714.

213. *Id.* § 50-20-705(1)(a).

214. *Id.* § 50-20-707(2).

215. *Id.* § 50-20-705(1)(c).

216. *Id.* § 50-20-711.

217. *Id.* § 50-20-113.

218. *Id.* § 33-22-116.

219. Complaint at cover page, *Planned Parenthood of Montana v. State*, <https://perma.cc/8CUE-ADB6> (Mont. Dist. Ct. Aug. 16, 2021) (No. 13-DV-21-0999).

220. *Id.* at 6.

221. *Id.* at 1.

222. *Id.* at 51.

223. *See, e.g., id.* at 2, 3, 7.

224. Order Granting Preliminary Injunction at 35, *Planned Parenthood of Montana v. State*, <https://perma.cc/9E2G-XFF4> (Mont. Dist. Ct. Oct. 7, 2021) (No. 13-DV-21-0999).

The state has since filed its notice of appeal with the Montana Supreme Court.<sup>225</sup> In its opening brief, the state explicitly argued that *Armstrong* should be overruled.<sup>226</sup> The brief's arguments summarily dismissed the protections of autonomy privacy in the Montana Constitution, describing Article II, Section 10 as a "provision meant to prevent government snooping."<sup>227</sup> The state additionally argued that the delegates to the 1972 Convention "chose to leave that abortion policy firmly in the hands of the Legislature,"<sup>228</sup> and as for a recognized right to pre-viability abortion, "Montana women don't need it."<sup>229</sup>

In an amicus curiae brief filed by Bob Campbell and other delegates to the 1972 Convention, the amici defended the Court's decision in *Armstrong*, emphasizing the "repeated references to *Griswold* in the drafting of Article II, Section 10 and in its presentation and debate on the Convention floor,"<sup>230</sup> as well as the delegates' "understanding that the courts would interpret the Declaration of Rights consistent with both the Delegates' original intent and the demands of an evolving society."<sup>231</sup>

This pending litigation challenging the Legislature's 2021 abortion bills presents an opportunity to apply the simplified *Armstrong* 2.0 test advocated for in this paper. As a threshold matter, the Court would not need to apply the *Katz* test to determine whether the activities regulated by these laws are within the scope of the right of privacy, as the Court in *Armstrong* settled this question regarding any laws infringing on procreative autonomy. Thus, because each of these laws implicates the right to privacy, the text of Article II, Section 10 requires the showing of a compelling state interest. For this reason and because the law implicates a fundamental right within the Montana Constitution's Declaration of Rights, under the *Armstrong* 2.0 test, the Court would apply strict scrutiny.

First, because the 20-week abortion ban applies to abortions well before the 23- to 24-week viability line,<sup>232</sup> the only interest the state could cite as compelling is the health and safety of the patient. The state cited this

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225. Defendant's Notice of Appeal at 1, *Planned Parenthood of Montana v. State*, <https://perma.cc/Q2HF-JGGS> (Mont. Oct. 19, 2021) (No. DA-21-0521).

226. Appellant's Opening Brief at 15, *Planned Parenthood of Montana v. State*, <https://perma.cc/7KSL-WQS6> (Mont. Jan. 20, 2022) (No. DA-21-0521).

227. *Id.* at 18.

228. *Id.* at 19.

229. *Id.* at 23.

230. Amicus Curiae Brief of Montana Constitutional Convention Delegates & Research Staff in Support of Plaintiffs/Appellees at 16, *Planned Parenthood of Montana v. State*, <https://perma.cc/GAA9-GRP7> (Mont. Mar. 24, 2022) (No. DA-21-0521).

231. *Id.* at 15.

232. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992) (plurality), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. \_\_\_, 2022 U.S. LEXIS 3057 (June 24, 2022) (No. 19-1392).

interest before the district court in the recent litigation, although it also asserted an interest in fetal life.<sup>233</sup> Because the latter is not a compelling state interest prior to viability, only the former would be considered under *Armstrong* 2.0. In continuing the analysis, because the statute itself ties the 20-week cutoff to the Legislature’s determination of when a fetus experiences pain,<sup>234</sup> this line has nothing to do with the health or safety of the patient. Although the state argued before the district court that the 20-week ban “protects women from risky late-term abortions,”<sup>235</sup> it pointed to no evidence indicating a 20-week pre-viability abortion is any more “risky” than, for example, a 19-week pre-viability abortion. In addition, the law does not merely add additional health and safety measures; it institutes an outright ban. Therefore, the Pain-Capable Unborn Child Protection Act—or at least the key component highlighted here—is not narrowly tailored to any compelling state interest and would fail strict scrutiny under *Armstrong* 2.0.

Second, regarding the restrictions on abortion pills in the Abortion-Inducing Drug Risk Protocol Act, such medication abortions are only medically recommended for very early pregnancies<sup>236</sup>—much earlier than the point of viability. Therefore, the only compelling interest for this law, as applied to pre-viability abortions, would be the state’s interests in patient health, which the state asserted as its purpose in district court—“protect[ing] patient safety.”<sup>237</sup> However, the state cites no evidence that the law’s provisions further such a purpose,<sup>238</sup> except with regard to informed consent requirements, whereby information provided by the doctor on “risks like hemorrhage or death” may result in the patient “avoiding” such outcomes.<sup>239</sup> Although such references reinforce the state’s stated interest in patient safety, the law in its entirety demonstrates a stunning lack of narrow tailoring. Provisions prohibiting medical practitioners from shipping medications to their patients by mail<sup>240</sup> or providing medications at any postsecondary facilities<sup>241</sup> may survive the Court’s rational basis review, but would undoubtedly fail the demands of strict scrutiny under *Armstrong* 2.0. Instead, by merely “usurping, through laws or regulations which dictate

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233. Defendants’ Brief in Opposition to Motion for Preliminary Injunction at 9, *Planned Parenthood of Montana v. State*, <https://perma.cc/XK5V-BGRQ> (Mont. Dist. Ct. Sept. 7, 2021) (No. 13-DV-21-0999).

234. MONT. CODE ANN. § 50-20-603(1)(b) (2021).

235. Defendants’ Brief in Opposition, *supra* note 233, at 9.

236. *Medical Abortion*, MAYO CLINIC, <https://perma.cc/VD6C-27ES> (last visited Dec. 9, 2021).

237. Defendants’ Brief in Opposition, *supra* note 233, at 7.

238. See MONT. CODE ANN. § 50-20-702 (legislative findings); Defendants’ Brief in Opposition, *supra* note 233, at 7–9.

239. Defendants’ Brief in Opposition, *supra* note 233, at 7–8; see also MONT. CODE ANN. § 50-20-707(5)(c).

240. MONT. CODE ANN. § 50-20-704.

241. *Id.* § 50-20-706.

how and by whom a specific medical procedure is to be performed, the patient's own informed health care decisions made in partnership with his or her chosen health care provider,"<sup>242</sup> the Abortion-Inducing Drug Risk Protocol Act violates the autonomy privacy protected by Article II, Section 10.

Third, regarding the amendment to the Abortion Control Act requiring providers to offer an ultrasound to the patient prior to performing an abortion, the state asserted that because the law does not require the patient to actually undergo an ultrasound, it does not infringe any of the patient's rights.<sup>243</sup> However, because the law nonetheless dictates the conversations a patient must have with her doctor and the decisions she must make prior to an abortion, it undoubtedly implicates the autonomy privacy protected by Article II, Section 10. Because the law applies to pre-viability abortions, the only compelling interest the state could assert is the health of the patient. However, the state does not even attempt to point to such an interest, instead insisting that the law's purpose is in "empower[ing] women to more fully understand the nature of the procedure."<sup>244</sup> Because this interest could not be justified as compelling for the state, the absence of this interest in infringing the right of privacy directly violates the text of Article II, Section 10.

Finally, regarding the 2021 bill prohibiting abortion coverage in insurance plans available through Montana's health insurance marketplace, because the law fails to except pre-viability abortions, its application to such abortions can be justified only by a compelling state interest in patient health. Although it is unclear whether the state will use such an argument in the pending litigation, what is clear is that this law serves no purpose other than to "place a substantial obstacle in the path of a woman seeking an abortion,"<sup>245</sup> by "mak[ing] it as difficult, as inconvenient and as costly as possible."<sup>246</sup>

A prior Montana district court case had challenged a similar administrative regulation that prohibited state Medicaid funding for abortions, except when—in addition to other requirements—"the recipient certifie[d] in writing that the pregnancy resulted from an act of rape or incest."<sup>247</sup> There, in answering the question of "whether the state, having enacted a general

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242. *Armstrong v. State*, 989 P.2d 364, 380 (Mont. 1999).

243. Defendant's Brief in Opposition, *supra* note 233, at 13.

244. *Id.*

245. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality) (discussing what constitutes an undue burden), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. \_\_\_, 2022 U.S. LEXIS 3057 (June 24, 2022) (No. 19-1392).

246. *Armstrong*, 989 P.2d at 381.

247. *Jeannette R. v. Ellery*, 1995 Mont. Dist. LEXIS 795, at \*1 (May 22, 1995) (No. BDV-94-811) (quoting MONT. ADMIN. R. 46.12.2002 (1)(f)(i) (repealed)).

program to provide medical services to the poor, may selectively withhold such benefits from otherwise qualified persons solely because such persons seek to exercise their constitutional right of procreative choice in a manner which the state does not favor and does not wish to support,”<sup>248</sup> the district court held that this withholding of benefits violated the right to privacy under Article II, Section 10.<sup>249</sup>

In looking to the court’s reasoning in the prior case, it becomes clear that although the 2021 law provides exceptions for when “the life of the mother is endangered by a physical disorder, physical illness, or physical injury, [or] . . . the pregnancy is the result of an act of rape or incest,” the law is remarkably overbroad in its withholding of insurance benefits for pre-viability abortions.<sup>250</sup> Therefore, it would not survive strict scrutiny under *Armstrong 2.0*.

## V. CONCLUSION

The above application of the *Armstrong 2.0* test to the four bills restricting access to abortion, passed by the Montana Legislature in 2021, leads to a relatively straightforward conclusion as to their unconstitutionality under Montana’s express right to individual privacy protected by Article II, Section 10.

However, in the absence of a clear and simplified test, one can imagine a divided Montana Supreme Court in a post-*Roe* world—and in the aftermath of a bill passed in the 2023 legislative session directing that “[e]very woman . . . who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, . . . is punishable by imprisonment in the state prison not less than one nor more than five years”<sup>251</sup>—debating whether the plaintiffs have shown that the right to a “lawful medical procedure”<sup>252</sup> is any longer even implicated.

To avoid such a future, the Montana Supreme Court should use the present opportunity, provided by the challenges to the 2021 laws, to affirm that Article II, Section 10 of the Montana Constitution protects the fundamental right of procreative autonomy, which includes the right to a pre-viability abortion.

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248. *Id.* at \*3 (quoting *Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 781 (Cal. 1981)).

249. *Id.* at \*29.

250. MONT. CODE ANN. § 33-22-116(2) (2021).

251. REV. CODES OF MONT. 1947 § 94-402.

252. *Armstrong v. State*, 989 P.2d 364, 384 (Mont. 1999).