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### Cover Page Footnote

The author thanks Blake Koemans and members of the *Montana Law Review* for inviting her to participate in the 2022 Browning Symposium on *Montana's Constitution: The Next 50 Years*

## NOW WHAT? THE RIGHT TO PRIVACY IN MONTANA AFTER *DOBBS*

Caitlin E. Borgmann\*

### I. INTRODUCTION

Montana is one of just eleven states to include an explicit right to privacy in its constitution.<sup>1</sup> The Montana constitutional right to privacy, according to the Montana Supreme Court, encompasses the right to make fundamental, intimate, personal decisions, including whether to have an abortion.<sup>2</sup> The current status of Montana's right to privacy and its future are of intense interest to both supporters and opponents of the right to privacy, following the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.<sup>3</sup> *Dobbs* not only overruled *Roe v. Wade*<sup>4</sup> and held that there is no federal constitutional right to abortion, but its language also implied that the broader right to decisional autonomy is at risk at the federal level.<sup>5</sup> This raises the stakes for the right to privacy in Montana, which since the 1990s has been interpreted to provide stronger protections than the federal constitution.<sup>6</sup>

In this essay, I discuss the right to privacy today—what it means, why it is in peril, and specifically the stakes in Montana, including for the right to abortion. The battle over the right to privacy—and its diminished and fragile status under the U.S. Constitution—highlights the importance of the Montana Constitution as an independent source of protected rights. It also underscores the vital role of an independent, non-political Montana Supreme Court in protecting fundamental rights—including the right to privacy—in Montana. Even as the Montana Constitution and an independent, non-partisan Montana Supreme Court are more important than ever, opponents of a constitutional right to fundamental decisional autonomy are stepping up their attacks on both institutions, hoping Montana will follow the

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1. Kate Zernike, *A Volatile Tool Emerges in the Abortion Battle: State Constitutions*, N.Y. TIMES (Jan. 31, 2023), <https://perma.cc/239G-86S6>.

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

3. 142 S. Ct. 2228 (2022).

4. 410 U.S. 113 (1973), overruled by *Dobbs*, 142 S. Ct. 2228.

5. See *infra* Part II.A.2. ("*Roe*'s Undoing").

6. See *infra* Part II.B. ("The Right to Privacy Under the Montana Constitution").

example set in *Dobbs*.<sup>7</sup> It will be up to Montana voters to reject these attempts if Montana is to remain a beacon of protection for the right to privacy.

Part II of this essay reviews the evolution of the constitutional right to privacy under the federal and Montana constitutions. Given that *Roe* has been overturned, Part II next highlights the now-critical role of state courts in protecting the right to privacy. Part III argues that an independent judiciary is a crucial bulwark in safeguarding fundamental rights such as the right to privacy, and that the voting public cannot be relied upon to protect these rights. Part IV discusses how fundamental rights should be defined and takes issue with the test applied in *Dobbs* for identifying such rights (which, in *Dobbs*, yielded an impoverished interpretation of the right to privacy that, at a minimum, excludes the right to abortion). Part V describes current threats to Montana's independent judiciary and constitutional right to privacy. Part VI concludes that to retain the precious rights granted in Montana's unique constitution, Montanans must prevent politicization of the Court and diminishment of its role as a protector of constitutional rights.

## II. THE CONSTITUTIONAL RIGHT TO PRIVACY

### A. *The Right to Privacy Under the United States Constitution*

#### 1. *The Path to Roe v. Wade*

The right to privacy in constitutional law has two basic strands: the right to privacy of information about oneself and the right to make important, personal decisions.<sup>8</sup> This second strand of the right to privacy is sometimes referred to as “liberty.”<sup>9</sup> The United States Supreme Court relied

7. See Mara Silvers, *Montana Supreme Court says abortion laws will remain blocked while case proceeds*, MONT. FREE PRESS (Aug. 9, 2022), <https://perma.cc/G5D9-MH23>.

8. See *Whalen v. Roe*, 429 U.S. 589, 596 (1977) (“The cases sometimes characterized as protecting ‘privacy’ have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.”); *Armstrong v. State*, 989 P.2d 364, 373 (Mont. 1999) (“[T]he delegates intended this right of privacy to be expansive—that it should encompass more than traditional search and seizure. The right of privacy should also . . . protect citizens . . . from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private.”); *State v. Nelson*, 941 P.2d 441, 448 (Mont. 1997) (“‘Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information (‘informational privacy’); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference (‘autonomy privacy’).” (quoting *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 654 (Cal. 1994))). See generally Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PENN. L. REV. 477 (2006) (offering a taxonomy of privacy that further teases out these two strands).

9. Some have argued that the Court has shifted from reliance on “privacy” to “liberty” as the source of the right that protects important personal decision-making. See generally Jamal Greene, *The*

upon this strand of privacy when it reaffirmed the right to abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>10</sup> In *Casey*, the controlling opinion used the word “liberty” to describe the freedom to make “intimate and personal choices” that are “central to personal dignity and autonomy.”<sup>11</sup> The Court further explained, “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>12</sup>

In the United States Constitution, the right to privacy has been held to be implied in the Fourteenth Amendment’s Due Process Clause.<sup>13</sup> Although the path to locating the right in the Due Process Clause has not been linear, the core idea that fundamental personal decisions should be safe from governmental intrusion has endured, until now.<sup>14</sup> The word “privacy” itself is not mentioned in the U.S. Constitution, a frequent point of contention with constitutional textualists,<sup>15</sup> although the word “liberty” is.<sup>16</sup> Whether referred to as “liberty” or “privacy,” at the federal level the constitutional right to make intimate and personal choices is nearly 100 years old. Over the last century, the Supreme Court has found that the right to privacy protects from governmental interference individuals’ rights to make decisions about child-rearing,<sup>17</sup> marriage,<sup>18</sup> and procreation.<sup>19</sup>

Two of the earliest decisions that invoked the right to personal decisional autonomy were *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.<sup>20</sup> Both involved parents’ right to make decisions about how to raise their

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*So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715 (2010) (arguing that the Court has definitively moved from grounding the “right to make fundamental life decisions” in “privacy” to grounding it in “liberty” or “equality”); *see also Dobbs*, 142 S. Ct. at 2271 (“When *Casey* revisited *Roe* . . . [t]he Court abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendment’s Due Process Clause.”). I have argued that,

[T]he right to abortion would benefit from renewed attention to the more familiar sense of privacy—not just privacy as an awkward and unsuitable synonym for equality, liberty, or autonomy in a minimally decisional sense, but privacy as a protected space within which a person can make these kinds of important moral decisions without interference from the state.

Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women’s Privacy*, 16 WM. & MARY J. WOMEN & L. 291, 325 (2010). For purposes of this essay, it does not matter which word is used. Both versions have protected the same types of decision-making. In the Montana Constitution, the word “privacy” is expressly used, so that is the term I use here.

10. 505 U.S. 833, 846 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

11. *Casey*, 505 U.S. at 851.

12. *Id.*

13. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973).

14. *See infra* Part II.A.2. (“*Roe*’s Undoing”).

15. *See Dobbs*, 142 S. Ct. at 2245; Greene, *supra* note 9, at 717 (citing multiple examples of conservative jurists referring to the “so-called right to privacy”).

16. U.S. CONST. amend. XIV.

17. *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

18. *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015).

19. *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972).

20. 268 U.S. 510 (1925).

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children. In *Meyer*, the Supreme Court struck down a Nebraska law that prohibited teaching elementary school children any language other than English.<sup>21</sup> The Court found that “[the teacher’s] right thus to teach [a foreign language] and the right of parents to engage him so to instruct their children . . . are within the liberty of the [Fourteenth] Amendment.”<sup>22</sup> In *Pierce*, the Court held that Oregon’s compulsory education law unconstitutionally “interfere[d] with the liberty of parents . . . to direct the upbringing and education of [their] children.”<sup>23</sup>

Far from being outliers, *Meyer* and *Pierce* sowed a string of cases in the following decades that reaffirmed the right to make fundamental personal decisions. In *Skinner v. Oklahoma*,<sup>24</sup> the Court invalidated a law that allowed the State of Oklahoma to sterilize persons convicted two or more times for “felonies involving moral turpitude.”<sup>25</sup> Although the Court decided the case under the Equal Protection Clause, it emphasized that procreation is “a basic liberty” and “one of the basic civil rights of man.”<sup>26</sup> And in *Loving v. Virginia*,<sup>27</sup> the Court held that Virginia’s law prohibiting interracial marriages involving white persons “deprived the Lovings of liberty” under the Due Process Clause and that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>28</sup>

The Court soon made clear in two decisions that the right to procreate also entails the right to choose not to procreate. The first decision applied specifically to married couples: In *Griswold v. Connecticut*,<sup>29</sup> the Court ruled that married couples have a right to use contraception.<sup>30</sup> In striking down Connecticut’s ban on contraceptive use, the Court contrasted the private sphere of decision-making involved when married couples decide whether to procreate with “laws that touch economic problems, business affairs, or social conditions,” where the Court was more willing to defer to legislative judgment.<sup>31</sup> The Court noted the contraceptive ban, unlike those laws, “operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation.”<sup>32</sup> The Court compared this sphere of private decision-making with the “zones” or “penumbras” of

21. *Meyer*, 262 U.S. at 397, 403.

22. *Id.* at 399–400.

23. *Pierce*, 268 U.S. at 530–31, 535.

24. 316 U.S. 535 (1942).

25. *Id.* at 541 (internal quotation marks omitted).

26. *Id.*

27. 388 U.S. 1 (1967).

28. *Id.* at 2, 12.

29. 381 U.S. 479 (1965).

30. *Id.* at 485–86.

31. *Id.* at 482.

32. *Id.*

privacy surrounding numerous provisions in the Bill of Rights.<sup>33</sup> While the majority opinion by Justice Douglas did not declare with certitude which amendment protected the marital right to private decision-making, it and the concurrence by Justice Goldberg landed solidly on privacy as the basis for striking down the statute.<sup>34</sup>

Before deciding the second case recognizing the right not to procreate, the Court ruled in the First Amendment case of *Stanley v. Georgia*<sup>35</sup> that the state could not prohibit the possession of “obscene matter” in the privacy of one’s home.<sup>36</sup> The Court’s reasoning in *Stanley* notably blended both the spatial notion of the inviolate home, emphasized in *Griswold*, while also focusing on the more abstract notion of privacy in one’s thoughts:

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.<sup>37</sup>

In *Eisenstadt v. Baird*, the Court extended the right to contraception to unmarried couples.<sup>38</sup> The decision was based on equal protection, but the Court grounded the underlying right to contraception firmly in the right to privacy.<sup>39</sup> However, it shifted the focus completely from the “sacred precincts of the marital bedroom”<sup>40</sup> to the private nature of the decision at stake.<sup>41</sup> Justice Brennan’s majority opinion observed that a marriage is made up of individuals.<sup>42</sup> He then added, “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.”<sup>43</sup> This sense of privacy is one, not of a protected physical space, but rather of a protected sphere of decision-making into which the government may not intrude

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33. *Id.* at 484–86.

34. *Id.* 485–87.

35. 394 U.S. 557 (1969).

36. *Id.* at 559.

37. *Id.* at 565.

38. *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972).

39. *Id.* at 453–55.

40. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

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

42. *Id.*

43. *Id.* The inclusion of the word “bear” was likely deliberate in light of the upcoming arguments in *Roe*. See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF Roe v. Wade* 542 (1994) (describing Supreme Court clerks’ awareness of the statement’s import); see also Nan D. Hunter, *Justice Blackmun, Abortion, and the Myth of Medical Independence*, 72 *BROOK. L. REV.* 147, 167 (2006) (“Justice Brennan used the opportunity . . . in *Eisenstadt* to build a doctrinal bridge between” the contraception cases and the abortion cases.).

without a compelling reason.<sup>44</sup> As one commentator has put it, “[W]hen we speak of ‘private’ decision making, we may mean not only that it is physically cached but that it is closed to external influence or input.”<sup>45</sup>

*Roe v. Wade* followed logically from the reasoning of *Eisenstadt*, one year after that decision. The Court explicitly found that abortion was protected under the right to privacy, and that it fell within the protected sphere of decision-making that *Eisenstadt* had recognized.<sup>46</sup> “[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution,” the majority opinion stated, and “[t]his right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>47</sup> While cast as a controversial decision by its opponents, it is important to note that the vote in *Roe* was 7–2.<sup>48</sup> The majority opinion was written by Justice Blackmun, a Nixon appointee, and was joined by Chief Justice Burger and Justice Powell, also Nixon appointees.<sup>49</sup> In contrast, only five justices joined Justice Alito’s opinion overturning *Roe*.<sup>50</sup> Moreover, *Roe* maintained consistent popular support over its nearly fifty years of existence.<sup>51</sup> And the Supreme Court continued to uphold *Roe* for decades, even as it changed and weakened the test it applied to assess abortion restrictions, from strict scrutiny to the undue burden standard.<sup>52</sup>

Since *Roe*, the Court has moved away from invoking “privacy” as the basis for constitutional protection of intimate decision-making and has tended to use the term “liberty.”<sup>53</sup> The line of cases upholding the constitu-

44. *Griswold*, 381 U.S. at 497–98.

45. Greene, *supra* note 9, at 723–24.

46. *Roe v. Wade*, 410 U.S. 113, 152–154 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

47. *Roe*, 410 U.S. at 152–53.

48. *Id.* at 116 (majority opinion), 168 (Stewart, J., concurring), 171 (Rehnquist, J., dissenting).

49. *Id.* at 116 (majority opinion); *Supreme Court Nominations (1789–Present)*, U.S. SENATE, <https://perma.cc/CND3-9CDH> (last visited Feb. 18, 2023). Two others (Justices Brennan and Stewart) were Eisenhower appointees; one was appointed by Franklin Roosevelt (Justice Douglas) and the other by Lyndon Johnson (Justice Marshall).

50. *Dobbs*, 142 S. Ct. at 2240 (majority opinion), 2300 (Thomas, J., concurring), 2304 (Kavanaugh, J., concurring), 2310 (Roberts, C.J., concurring), 2317 (Breyer, Sotomayor & Kagan, JJ., dissenting). While Chief Justice Roberts concurred in the judgment, he notably did not join the majority in overturning *Roe* entirely. *See id.* at 2313 (Roberts, C.J., concurring) (“None of this, however, requires that we also take the dramatic step of altogether eliminating the abortion right first recognized in *Roe*.”).

51. Laura Santhanam, *How has public opinion about abortion changed since Roe v. Wade?*, PBS (July 20, 2018), <https://perma.cc/P7W4-TFYN>.

52. *See, e.g.,* *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582 (2016), *abrogated by Dobbs*, 142 S. Ct. 2228; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228. *See generally* Borgmann, *supra* note 9, at 291 (arguing that even as *Casey* reinforced the strand of constitutional privacy grounded in autonomy over important personal decisions, the “undue burden” test has fostered extensive encroachments on women’s personal privacy).

53. *See* Borgmann, *supra* note 9, at 325. *But see id.* at 299 (arguing that “there is no distinct and obvious line between liberty and privacy”).

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tional rights to sexual intimacy and marriage between persons of the same sex serves as a prominent example of this trend.<sup>54</sup> But even there, the Court has recognized that “liberty” is inextricably linked with privacy. In *Lawrence v. Texas*, for example, Justice Kennedy wrote for the majority,

In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.<sup>55</sup>

## 2. Roe’s *Undoing*

Roe v. Wade, of course, is no more. The Supreme Court overruled it in 2022, in *Dobbs v. Jackson Women’s Health Organization*.<sup>56</sup> *Dobbs* shifted the question of the constitutional right to abortion definitively to the states to decide, at least for the moment.<sup>57</sup> The majority in *Dobbs* explicitly rejected that any right to decisional privacy encompasses the right to abortion.<sup>58</sup>

More broadly, the majority opinion in *Dobbs* strongly signals that the decisional autonomy strand of the right to privacy itself is at risk of being severely curtailed or even overruled. To be sure, *Dobbs* did not rule that there is no constitutional right to decisional privacy—nor was that general question before the Court. The Court acknowledged the long line of cases that have upheld “the right to make and implement important personal decisions without governmental interference.”<sup>59</sup> But, the Court insisted, abortion is different from other intimate, private decisions because of the presence of an embryo or fetus:

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54. See *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (framing the challenge to a law criminalizing same-sex sexual intimacy as posing a question of “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution”); *Obergefell v. Hodges*, 576 U.S. 644, 651–52 (2015) (“The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex.”).

55. *Lawrence*, 539 U.S. at 562.

56. *Dobbs*, 142 S. Ct. at 2242 (“We hold that *Roe* and *Casey* must be overruled.”).

57. See *id.* at 2257 (“*Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed ‘potential life.’ But the people of the various States may evaluate those interests differently.” (internal citations omitted)). *Dobbs*’s focus was on the states, but if Congress should act in the future to ban abortion (currently unlikely given the results of the 2022 midterm elections), the Court will face the question of whether this is in Congress’s power to do. See Kevin Breuninger, *Sen. Lindsey Graham introduces bill to ban most abortions nationwide after 15 weeks*, CNBC (Sept. 13, 2022), <https://perma.cc/C4AV-ZVGN>.

58. *Dobbs*, 142 S. Ct. at 2258.

59. *Id.* at 2267–68.

What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call “potential life” and what the law at issue in this case regards as the life of an “unborn human being.”<sup>60</sup>

The Court may have tipped its hand, however, when it stated, “[*Roe*] held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, *which is also not mentioned*.”<sup>61</sup> It was wary of a liberty grounding as well, on the theory that—at least as articulated in *Casey*—such a liberty interest presents a worrisome slippery slope. “[*Casey*’s] attempts to justify abortion through appeals to a broader right to autonomy and to define one’s ‘concept of existence’ prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like.”<sup>62</sup> The Court indicated it would cabin any right to decisional autonomy by requiring that it be deeply rooted in the Nation’s history and traditions.<sup>63</sup> Thus, Justice Alito’s reassurance—that the other decisional autonomy cases are “inapposite”<sup>64</sup> and that “our conclusion that the Constitution does not confer such a right [to abortion] does not undermine them in any way”<sup>65</sup>—rings hollow. Even though Justice Alito’s opinion insists its reach is limited to abortion,<sup>66</sup> the opinion’s logic would apply to other important privacy or liberty rights, such as same-sex marriage and sexual intimacy.<sup>67</sup>

### B. *The Right to Privacy Under the Montana Constitution*

In Montana, the right to privacy is explicit in the state constitution. This right is found in the Declaration of Rights, which automatically means

60. *Id.* at 2236 (“None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite.”). While beyond the scope of this essay, it is important to note that this reasoning begs the question. Each of the decisional autonomy cases the Court distinguishes from *Roe* and *Casey* could be said to involve “moral questions.” Why does the specific moral question posed by abortion deserve different treatment? Simply answering, “because of embryonic or fetal life” describes factually what makes abortion different but does not answer the question. See generally Caitlin E. Borgmann, *The Meaning of “Life”: Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 556–557 (2009) (arguing that “conservatives and liberals must engage in a public conversation about abortion that seeks reflective equilibrium on the status of the embryo or fetus, one that satisfies the demands of public reason”).

61. *Dobbs*, 142 S. Ct. at 2245 (emphasis added); see also *id.* at 2247 (emphasizing that “the Court has long been ‘reluctant’ to recognize rights that are not mentioned in the Constitution”).

62. *Id.* at 2258 (citation omitted).

63. *Id.* at 2259–60.

64. *Id.* at 2257–58.

65. *Id.*

66. *Id.* at 2280–81.

67. See *infra* Part IV (“Defining Fundamental Rights”).

it is a fundamental right protected by strict scrutiny.<sup>68</sup> Moreover, the Montana Constitution expressly embeds the strict scrutiny test in the privacy clause: “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>69</sup>

The Montana Supreme Court has made clear that the state constitutional right to privacy includes not just the right to informational privacy but the right to autonomy over important personal decisions.<sup>70</sup> The case that first declared this, *Gryczan v. State*,<sup>71</sup> invalidated a Montana law that criminalized what it called “deviate sexual relations,” defined as “sexual contact or sexual intercourse between two persons of the same sex or any form of sexual intercourse with an animal.”<sup>72</sup> One of the questions presented was whether the law “infringe[d] on Respondents’ right to privacy under Article II, Section 10 of the Montana Constitution to the extent it prohibit[ed] consensual, private, same-gender sexual conduct between adults.”<sup>73</sup>

At the time *Gryczan* reached the Montana Supreme Court, the infamous U.S. Supreme Court decision in *Bowers v. Hardwick*<sup>74</sup> was still good law. *Bowers*, subsequently overruled in *Lawrence*,<sup>75</sup> had upheld a Georgia law criminalizing the act of “sodomy.”<sup>76</sup> Although the statute “prohibited the conduct whether or not the participants were of the same sex,”<sup>77</sup> the Court in *Bowers* framed the issue as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.”<sup>78</sup>

68. *Gryczan v. State*, 942 P.2d 112, 122 (Mont. 1997) (“Since the right to privacy is explicit in the Declaration of Rights in Montana’s Constitution, it is a fundamental right and any legislation regulating the exercise of a fundamental right must be reviewed under a strict-scrutiny analysis.”).

69. MONT. CONST. art. II, § 10 (emphasis added).

70. *Armstrong v. State*, 989 P.2d 364, 373 (Mont. 1999) (noting that “the delegates intended this right of privacy to be expansive [and] that it should . . . protect citizens from illegal private action and from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private”).

71. *See id.* at 374 (“[I]t was not until our decision in *Gryczan* that this Court directly addressed and judicially recognized this ‘personal autonomy’ component of Montanans’ fundamental constitutional right of individual privacy.”).

72. *Gryczan*, 942 P.2d at 116.

73. *Id.* at 115.

74. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

75. *Lawrence*, 539 U.S. at 578 (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

76. *Bowers*, 478 U.S. at 189.

77. *Lawrence*, 539 U.S. at 566.

78. *Bowers*, 478 U.S. at 190.

The Montana Supreme Court refused to apply *Bowers*'s reasoning to Montana's constitutional privacy provision. "Regardless of whether *Bowers* was correctly decided," the Court held, "we have long held that Montana's Constitution affords citizens broader protection of their right to privacy than does the federal constitution."<sup>79</sup> Instead of *Bowers*, the Court relied on the U.S. Supreme Court's decision in *Katz v. United States*.<sup>80</sup> The Court explained that the test applied in *Katz* asks (1) whether "a person ha[s] exhibited an actual (subjective) expectation of privacy," and (2) whether that "expectation be one that society is prepared to recognize as 'reasonable.'"<sup>81</sup> Applying this test to the Montana statute, the Court concluded,

It cannot seriously be argued that Respondents do not have a subjective or actual expectation of privacy in their sexual activities. . . . In fact, it is hard to imagine any activity that adults would consider more fundamental, more private and, thus, more deserving of protection from governmental interference than non-commercial, consensual adult sexual activity.<sup>82</sup>

Two years after *Gryczan*, in *Armstrong v. State*, the Montana Supreme Court held that the right to privacy includes the right to abortion.<sup>83</sup> In *Armstrong*, the Court decided that a law allowing only physicians to perform abortions was unconstitutional under Montana's right to privacy.<sup>84</sup> Just two years earlier, the United States Supreme Court had ruled that the Montana law at issue in *Armstrong* did not violate the United States Constitution.<sup>85</sup> Like in *Gryczan*, the Montana Supreme Court declined to follow federal precedent and instead carved its own path. The Court found that Montana's right to privacy "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."<sup>86</sup> The Court noted that, in *Gryczan*, it had not attempted to fully define or identify the scope of the decisional autonomy strand of the right to privacy.<sup>87</sup>

Setting out to fill this void, the Court in *Armstrong* conducted an in-depth analysis of "[m]odern legal notions of the right to privacy," including

79. *Gryczan v. State*, 942 P.2d 112, 121 (Mont. 1997).

80. *Id.* at 122. *Katz* addressed privacy in the context of the Fourth Amendment's protection against unreasonable searches and seizures. *Katz v. United States*, 389 U.S. 347, 349–51 (1967).

81. *Gryczan*, 942 P.2d at 121.

82. *Id.* at 122–23. The Court also noted that the law would be equally unconstitutional under a separate test articulated in *Palko v. Connecticut*, 302 U.S. 319 (1937). The *Palko* test asks whether a law violates those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Palko*, 302 U.S. at 328.

83. *Armstrong v. State*, 989 P.2d 364, 377 (Mont. 1999).

84. *Id.* at 370.

85. *Mazurek v. Armstrong*, 520 U.S. 968, 974–76 (1997) (per curiam).

86. *Armstrong*, 989 P.2d at 370.

87. *Id.* at 374.

the right to privacy's roots in John Locke's concept of "liberty."<sup>88</sup> The Court also reviewed records of the 1972 Montana Constitutional Convention, reflecting on the importance that the right to privacy held for the convention delegates.<sup>89</sup> The Court explained that the delegates intended the right to privacy to be "as broad as are the State's ever innovative attempts to dictate in matters of conscience, to define individual values, and to condemn those found to be socially repugnant or politically unpopular."<sup>90</sup>

The Court concluded that, "given the delegates' overriding concern that government not be allowed to interfere in matters generally considered private, and given the delegates' specific determination to adopt a broad and undefined right of individual privacy grounded in Montana's historical tradition of protecting personal autonomy and dignity," Montana's right to privacy encompasses "procreative autonomy," and more specifically the right to an abortion.<sup>91</sup>

### C. *The Right to Privacy Now Depends on State Courts*

The majority opinion in *Dobbs* invites reflection on what role the courts should play in protecting rights, and especially on the now critical, yet precarious, role of state courts in protecting the right to privacy. *Dobbs* places the abortion question squarely before the states to determine.<sup>92</sup> The United States Supreme Court emphasized that *states* must decide the issue that previously the Court had said is for an *individual* to decide.<sup>93</sup> The majority opinion's rationale is that the voting public must decide this issue, because it is a moral question upon which the voters in different states may have differing views.<sup>94</sup>

*Dobbs* is an alarming abdication of the U.S. Supreme Court's role as a protector of constitutional rights. As I explain below, the courts play a cru-

88. *Id.* at 372–73.

89. *Id.* at 373–74.

90. *Id.* at 374–75. It is important to note that, despite the Montana Constitution's explicit right to privacy and the Montana Supreme Court's expansive interpretation of it, in 2004, Montana voters approved a constitutional amendment banning same-sex marriages. See MONT. CONST. art. XIII, § 7. The ACLU of Montana won a federal lawsuit in 2014 against the State of Montana challenging the ban under the Fourteenth Amendment's Due Process Clause. Order at 1, *Rolando v. Fox*, <https://perma.cc/CGA3-A5A4> (9th Cir. Aug. 28, 2015) (No. 14-35987).

91. *Armstrong*, 989 P.2d at 376–77.

92. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2259 (2022) ("[S]upporters of *Roe* and *Casey* must show that this Court has the authority to . . . decide how abortion may be regulated in the States. They have failed to make that showing, and we thus return the power to weigh those arguments to the people and their elected representatives.").

93. *Id.* at 2257–59. It is important to note that the opinion is focused on "States" but does not preclude Congress from voting to make abortion illegal, as "the people's elected representatives." Illustrating this, less than three months after the *Dobbs* decision was issued, Senator Lindsay Graham introduced a ban on abortions after 15 weeks of pregnancy. See Breuninger, *supra* note 57.

94. *Dobbs*, 142 S. Ct. at 2228.

cial role in providing a check against majoritarian overreach.<sup>95</sup> Neither the political branches nor the voting public can be counted on to protect fundamental rights, especially “those found to be socially repugnant or politically unpopular.”<sup>96</sup>

Fortunately, the federal constitution sets the floor, not the ceiling, for the protection of rights.<sup>97</sup> States can protect rights more strongly,<sup>98</sup> as Montana has done for the right to privacy.<sup>99</sup> *Gryczan* and *Armstrong* are both quintessential examples of how state constitutions can be interpreted differently than the federal constitution to protect rights more robustly.<sup>100</sup>

The *Armstrong* decision has essentially been Montana’s *Roe v. Wade*, protecting the right to abortion and the right to make other intimate and personal decisions, as a fundamental right subject to strict scrutiny.<sup>101</sup> Indeed, the Montana Supreme Court explained in *Armstrong*, “Montana adheres to one of the most stringent protections of its citizens’ right to privacy in the United States.”<sup>102</sup> For now, this decision stands, pursuant to states’ power to protect rights more strongly than at the federal level. However, *Armstrong* is under attack by anti-abortion politicians. In a pending case, the Montana Attorney General has asked the Montana Supreme Court to overturn *Armstrong*.<sup>103</sup>

In Montana, the decisional autonomy strand of the right to privacy—in the near term—will only last as long as the *Armstrong* decision stands. And *Armstrong* will not stand if an independent judiciary’s role and its part in a system of checks and balances are not respected by the political branches and defended by the public. Thus far, the political branches in Montana have been doing the opposite.<sup>104</sup>

95. See *infra* Part III (“Courts as Protectors of Fundamental Rights”).

96. *Armstrong*, 989 P.2d at 375.

97. *Developments in the Law – The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1334–36 (1982).

98. *Id.* at 1334–35.

99. See MONT. CONST. art. II, § 10; see also *infra* Part II.B (“The Right to Privacy Under the Montana Constitution”).

100. See *infra* Part II.B (“The Right to Privacy Under the Montana Constitution”).

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

102. *Id.* at 373.

103. Appellant’s Opening Brief at 15–16, *Planned Parenthood of Mont. v. State*, <https://perma.cc/5PJ5-8UHZ> (Mont. Jan. 20, 2022) (No. DA 21-0521). (“This Court should overrule *Armstrong*.”). See also Opening Brief of Defendants-Appellants at 5 n.4, *Weems v. State*, <https://perma.cc/Q5CU-DWZH> (Mont. Aug. 5, 2022) (No. DA 22-0207) (questioning *Armstrong*’s validity); Keith Schubert, *Knudsen asks Montana Supreme Court to overturn abortion protection, correct ‘judicial activism’*, DAILY MONTANAN (Jan. 20, 2022), <https://perma.cc/6CHR-A4HH>.

104. See Shaylee Ragar, *Tensions between Montana’s judiciary and legislature continue in special committee final report*, MONT. PUB. RADIO (Dec. 23, 2022), <https://perma.cc/8DPQ-7LKL>.

## III. COURTS AS PROTECTORS OF FUNDAMENTAL RIGHTS

Politicizing the courts poses a grave threat to fundamental rights.<sup>105</sup> Rights protect us against the government, and, as in the case of Montana's right to privacy, fundamental rights are often enshrined in constitutions.<sup>106</sup> Legislatures can of course enact rights statutorily—the federal Civil Rights Act of 1964<sup>107</sup> and Voting Rights Act of 1965<sup>108</sup> are famous examples. But for the reasons I explain below, legislatures and the voting public are not reliable protectors of minority rights or the rights of those who lack political power for other reasons. In fact, as is currently happening in Montana and many other states, the government may actively try to undermine constitutional rights.<sup>109</sup> The courts are the best situated to act as a check on governments and voters attacking fundamental rights.<sup>110</sup>

A. *The Myth of Voice Through Democracy*

Justice Alito's majority opinion in *Dobbs* states that abortion is a "profound moral issue on which Americans hold sharply conflicting views."<sup>111</sup> He asserts it is time to "return the issue of abortion to the people's elected representatives," so that it can be "resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."<sup>112</sup> Justice Alito's view, commonly expressed by conservative judges and scholars,<sup>113</sup> conjures a naïve, romanticized view of

105. See David Lyle, *The Politicization of State Courts Threatens Fundamental Rights: The Empirical Case*, AM. BAR ASS'N (Jun. 1, 2017), <https://perma.cc/23NM-UC8R>.

106. *State v. Long*, 700 P.2d 153, 156 (Mont. 1985) ("Historically, constitutions have been means for people to address their government.").

107. Civil Rights Act of 1964, 42 U.S.C. § 2000e.

108. Voting Rights Act of 1965, 52 U.S.C. § 10101(a)(1).

109. See, e.g., Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 TEMP. L. REV. 123, 124–26 (2007); Michael Ollove, *Some States Already Are Targeting Birth Control*, PEW TRUSTS (May 19, 2022), <https://perma.cc/KGF7-H69T>; Mara Silvers, *Lawmakers, advocates prepare to fight legislative 'attacks' against LGBTQ people*, MONT. FREE PRESS (Jan. 25, 2023), <https://perma.cc/2A6G-Z6T4>; Mara Silvers, *12-week abortion ban and other restrictions surge through House committee*, MONT. FREE PRESS (Feb. 28, 2023), <https://perma.cc/N3DW-9ZFG>.

110. See Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 35–36 (2009) [hereinafter Borgmann, *Legislative Fact-Finding*]; Caitlin E. Borgmann, *Judicial Evasion and Disingenuous Legislative Appeals to Science in the Abortion Controversy*, 17 BROOK. J.L. & POL'Y 15, 21 (2008) [hereinafter Borgmann, *Judicial Evasion*].

111. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2240 (2022).

112. *Id.* at 2243 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in part and dissenting in part)).

113. *The 3 Big Differences Between Conservatives and Progressives*, HERITAGE FOUND., <https://perma.cc/N8YG-RJTD> (last visited Mar. 19, 2023) ("Whatever one may think about the wisdom of hiking the minimum wage, banning plastic straws, or removing controversial historical monuments, conservatives believe voters closest to the issues should be the ones making such decisions for their communities—not lawmakers in Washington or a panel of judges fives states away.").

American democracy that is utterly false. The constant references to “the people” suggest that everyone has a voice, through the ballot and ultimately through their elected representatives.<sup>114</sup> The idea of a robust public debate imagines a world where candidates still give speeches from stumps in small villages<sup>115</sup> or like Speakers’ Corner in London’s Hyde Park.<sup>116</sup> This view of democracy as a level playing field optimized for thorough airing of complex social issues is not only wrong but highly ironic; it comes most often from judges and justices who have eagerly upheld severe restrictions on the right to vote and other barriers to democratic participation or who have struck down measures designed to increase democratic participation.<sup>117</sup>

In a recent article in the *New Yorker*, Louis Menand dispels the idea of the United States as a “democracy” where everyone’s opinion is heard and people get to try to “persuade one another.”<sup>118</sup> Menand points out, “Strictly speaking, American government has never been a government ‘by the people.’”<sup>119</sup> He catalogs the countless structural ways in which our democracy is not failing to be democratic—because it was never designed to be democratic.<sup>120</sup> As Menand explains, “The fundamental problem is that, as the law stands, even when the system is working the way it’s designed to work and everyone who is eligible to vote does vote, the government we get does not reflect the popular will.”<sup>121</sup>

One manifestation of Menand’s thesis is that, even though a majority of Americans favor abortion rights,<sup>122</sup> this is not reflected in legislation in many states or federally through a codification of *Roe*. In the 2022 midterm

114. See, e.g., *Dobbs*, 142 S. Ct. at 2257, stating:

In some States, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an “unborn human being.” Our Nation’s historical understanding of ordered liberty does not prevent the people’s elected representatives from deciding how abortion should be regulated.

(emphases added; internal citations omitted). See also *id.* at 2259 (“[W]e thus return the power to weigh those arguments to the people and their elected representatives.” (emphasis added)).

115. See *Stump Speech*, WORDSENSE DICTIONARY, <https://perma.cc/S9RU-KVZ2> (last visited Jan. 23, 2023).

116. See *Speakers’ Corner*, THE ROYAL PARKS, <https://perma.cc/BJH2-YKKU> (last visited Jan. 23, 2023).

117. See, e.g., *Shelby Cty. v. Holder*, 570 U.S. 529, 556–57 (2013) (striking down Section 4 of the Voting Rights Act of 1965; Justices Alito and Thomas joining the majority opinion by Chief Justice Roberts).

118. Louis Menand, *American Democracy Was Never Designed To Be Democratic*, NEW YORKER (Aug. 15, 2022), <https://perma.cc/QBW6-BKFD> (quoting *Dobbs*, 142 S. Ct. at 2243).

119. *Id.*

120. *Id.*

121. *Id.* See also Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 74–75 (2008).

122. Hannah Hartig, *About six-in-ten Americans say abortion should be legal in all or most cases*, PEW RESEARCH CTR. (June 13, 2022), <https://perma.cc/U5C4-KSZN>.



elections, all ballot initiatives to expand or protect abortion rights passed (in California, Michigan, and Maine), and all ballot initiatives to ban or restrict abortion failed (in Kentucky, Kansas, and Montana). All of the anti-abortion initiatives were legislatively referred.<sup>123</sup> The outcome of the votes on these abortion bans or restrictions directly contradicted the views of the legislatures that placed them on the ballot.

### B. *The Problem with Deciding Rights by Majoritarian Vote*

Even assuming we could create a system in which democracy worked more or less the way Justice Alito describes, majoritarian vote would not be a good way to decide what rights should be protected. As the Montana Supreme Court pointed out in *Armstrong*, “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.”<sup>124</sup> Justice Scalia’s statement, which Justice Alito quoted in *Dobbs*, is worth revisiting. Justices Scalia and Alito asserted that the issue of abortion should be “‘resolved like *most important questions* in our democracy: by citizens trying to persuade one another and then voting.’”<sup>125</sup>

The “most” in Scalia’s quote is telling: it implies that some important questions should *not* be resolved by citizen vote. Which ones? Even if there were access to democracy for literally every person, there are certain rights that are too important to be left to majoritarian vote. This is because majorities rarely have the incentive to protect minority rights.<sup>126</sup> In contrast, courts are—or can be—structured to be more “insulated from political responsibility and un beholden to self-absorbed and excited majoritarianism.”<sup>127</sup> It is ironic that often the legislators who most want to politicize the courts implicitly reaffirm the courts’ role as apolitical arbiters when they refuse to take accountability to enact constitutionally permissible laws and instead parrot the refrain that constitutionality “is for the courts to decide.”<sup>128</sup>

123. 2022 abortion-related ballot measures, BALLOTPEDIA, <https://perma.cc/K2R4-N8HJ> (last visited Jan. 23, 2023).

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

125. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in part and dissenting in part)) (emphasis added).

126. See Borgmann, *Legislative Fact-Finding*, *supra* note 110, at 35–36; Borgmann, *Judicial Evasion*, *supra* note 110, at 21.

127. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 68 (1980).

128. See, e.g., Jim Goetz, Opinion: *The Attorney General’s criticism of the courts is sour grapes*, BILLINGS GAZETTE (Oct. 9, 2022), <https://perma.cc/R4DF-V8DT> (“A virtually identical legislative measure [to eliminate at-large elections for the state supreme court] was found by the Montana Supreme

A critical purpose of the courts is to protect the fundamental rights of minorities and others who lack political power from infringement by majoritarian legislatures.<sup>129</sup> The “scales of justice” symbol reflects our expectation that courts be fair and do what is just. And we expect them to uphold rights, because rights by their very nature are meant to act as a counterforce to majoritarian influence. As the U.S. Supreme Court has stated, “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”<sup>130</sup>

Legislators, unlike courts, do not—and are generally not expected to—act with the aim of promoting fairness or justice. Research has demonstrated that legislators’ primary goals are to satisfy constituents or be re-elected, to increase or maintain Washington influence, and to create sound public policy.<sup>131</sup> Factors that influence what is considered “sound public policy” include legislative ideology and preferences.<sup>132</sup>

Given these contrasting roles, it is interesting that Justice Alito asserts that the “profound” question of when personhood begins should be left to the democratic process. Why wouldn’t a question of primarily moral or religious significance be a question that individuals should decide for themselves, with the courts protecting their right to do so? Should the questions of whether there is a god or what religious practices are valid be left to the legislative process?

Conservative jurists like Chief Justice Roberts have perpetuated the cramped view of a court’s role as simply to “call balls and strikes”<sup>133</sup>—implying the courts should stay out of messy controversies like abortion. But this is a disingenuous sound bite that has no basis in the reality of how the Supreme Court works. An umpire calls balls and strikes. The U.S. Supreme Court is not an umpire—it determines the meaning of law, including

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Court to be unconstitutional in 2011 in the seminal Reichert case. The new bill [in 2021] was passed by a legislative majority which knew full well of its constitutional defects.”); Caitlin E. Borgmann, *Holding Legislatures Constitutionally Accountable Through Facial Challenges*, 36 HASTINGS CONST. L.Q. 563, 567 n.27 (2009); see also Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753, 753–757 (2006) (describing “power grabs” of state legislatures that knowingly enact unconstitutional laws while deliberately evading judicial review); Eugene Hickok, *Congress, the Court, and the Constitution: Has Congress Abdicated Its Constitutional Responsibilities?*, HERITAGE FOUNDATION (Nov. 29, 1990), <https://perma.cc/2DC3-ZBZG>.

129. See Michael Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 1–2 (1996).

130. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

131. Taled El-Sabawi, *What Motivates Legislators To Act: Problem Definition & The Opioid Epidemic, A Case Study*, 15 IND. HEALTH L. REV. 190, 202–03 (2018).

132. *Id.*

133. *Chief Justice Roberts Statement - Nomination Process*, U.S. COURTS, <https://perma.cc/V2MK-M3QG> (last visited Feb. 8, 2023).

constitutional rights.<sup>134</sup> The same is true of state supreme courts.<sup>135</sup> There is no way for them to escape this role. Inevitably, these courts determine the fate of rights one way or the other. This is exactly what happened in *Dobbs*.

#### IV. DEFINING FUNDAMENTAL RIGHTS

If we agree that a key role of courts is to protect fundamental rights, we must still determine which rights are fundamental. The U.S. Supreme Court has gone through various iterations of a test to answer this question.<sup>136</sup> In *Dobbs*, Justice Alito leaned heavily on the two-pronged test set forth in *Washington v. Glucksberg*.<sup>137</sup> In *Glucksberg*, the Court stated that, to be deemed a fundamental right, the right must be both “implicit in the concept of ordered liberty” and be “objectively, deeply rooted in this Nation’s history and tradition.”<sup>138</sup> The first of these prongs could make sense as a condition for a right to be fundamental since, at least as articulated in *Glucksberg* and *Palko v. Connecticut*, it means “that neither liberty nor justice would exist if they were sacrificed.”<sup>139</sup> *Dobbs* pounced on the second part of this test, however, which it said requires “a careful analysis of the history of the right at issue.”<sup>140</sup> The Court defined the “right” at stake narrowly, to mean simply abortion—as opposed to a broader right to decisional autonomy—and then devoted many pages to attempting to prove that abortion did not meet this prong.<sup>141</sup>

What *Dobbs* does not address, other than to raise the time-worn specter of a slippery slope, is *why* individuals should only enjoy fundamental rights that are deeply rooted in the Nation’s history and traditions. The problem with the tests articulated in *Glucksberg* and *Palko*, or even *Katz* (which *Armstrong* relied on), is that they circumscribe the boundaries of rights based on reference points that are deeply problematic. Whether a right is deemed fundamental, under these tests, is determined according to the views of a narrow, privileged minority. This Nation’s history was profoundly exclusionary of certain groups. Our country was founded on vio-

134. *The Court and Constitutional Interpretation*, SUPREME COURT OF THE U.S., <https://perma.cc/95JT-E9T7> (last visited Feb. 8, 2023).

135. See, e.g., *State v. Long*, 700 P.2d 153, 156–157 (Mont. 1985).

136. See, e.g., *supra* note 82 and accompanying text (describing *Palko* version); *Gryczan v. State*, 942 P.2d 112, 122 (Mont. 1997).

137. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

138. *Glucksberg*, 521 U.S. at 720–21 (internal quotation marks omitted).

139. *Id.* at 721 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)).

140. *Dobbs*, 142 S. Ct. at 2246.

141. See *id.* at 2248–54.

lence, genocide, enslavement, and displacement.<sup>142</sup> Justice Alito does not bother to explain why the views of white, Christian men from over two centuries ago should determine whether a right is fundamental. In fact, *Dobbs* literally goes back to the 13th century—or, as the dissent prefers, “the Dark Ages”—to justify its decision.<sup>143</sup>

For all *Casey*’s faults,<sup>144</sup> that opinion’s authors understood that what makes the right to decisional autonomy fundamental is that it is among those rights that are essential to self-actualization, to what it means to be a human, to live with dignity and autonomy.<sup>145</sup> *Casey* thus described abortion as embedded in “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>146</sup> The Montana Supreme Court has similarly articulated what makes a right fundamental. In *Gryczan*, the Court gave two examples to illustrate the contrast between rights that are fundamental and those that are not, explaining that a couple’s refusal to hook up to a city’s water system was a decision not sufficiently fundamental to merit constitutional privacy protection, whereas consensual, private sexual activity met the standard as clearly as anything could.<sup>147</sup> *Armstrong* went deeper to define the essence of fundamental rights, referencing John Locke and John Stuart Mill.<sup>148</sup> In sharp contrast to *Dobbs*, *Armstrong* acknowledged that fundamental rights must be allowed to change over time as humans become more enlightened.<sup>149</sup> But this is not a new concept. Chief Justice John Marshall recognized it, stating that the

142. See generally, e.g., NICOLE HANNAH-JONES, *THE 1619 PROJECT: A NEW ORIGIN STORY* (2021); ROXANNE DUNBAR-ORTIZ, *AN INDIGENOUS PEOPLES’ HISTORY OF THE UNITED STATES* (2014).

143. *Dobbs*, 142 S. Ct. at 2249 (“English cases dating all the way back to the 13th century corroborate the treatises’ statements that abortion was a crime.”); *id.* at 2325 (Breyer, Sotomayor & Kagan, JJ., dissenting) (“When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.”).

144. See Borgmann, *supra* note 9, at 325.

145. *Id.*

146. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

147. *Gryczan v. State*, 942 P.2d 112, 123 (Mont. 1997).

148. *Armstrong v. State*, 989 P.2d 364, 372–73 (Mont. 1999) (citing Jeffrey S. Koehlinger, *Substantive Due Process Analysis and the Lockean Liberal Tradition: Rethinking the Modern Privacy Cases*, 65 IND. L.J. 723 (1990) (drawing upon Lockean liberal tradition to provide benchmark for judging whether a particular decision is protected by the right to privacy)).

149. See *id.* at 375 (“Attempts to define this right notwithstanding, we conclude that, while it may not be absolute, no final boundaries can be drawn around the personal autonomy component of the right of individual privacy. It is, at one and the same time, as narrow as is necessary to protect against a specific unlawful infringement of individual dignity and personal autonomy by the government—as in *Gryczan*—and as broad as are the State’s ever innovative attempts to dictate in matters of conscience, to define individual values, and to condemn those found to be socially repugnant or politically unpopular.”).

Constitution is “intended to endure for ages to come,” including for a future we can only “see dimly.”<sup>150</sup>

The American Civil Liberties Union (ACLU) protects rights that are or should be deemed fundamental, including religion, speech, voting, informational privacy, and privacy in intimate, personal decision-making.<sup>151</sup> This latter right encompasses the right to decide whom to marry,<sup>152</sup> with whom to engage in sex,<sup>153</sup> to publicly assert one’s transgender or nonbinary identity,<sup>154</sup> whether and when to have children,<sup>155</sup> and what medical procedures to undergo.<sup>156</sup> These types of decisional rights are at risk after *Dobbs*, and no one should be fooled by the soothing language in the opinion attempting to distract from this. Justice Thomas, for his part, felt no need to hide the ball in his concurrence.<sup>157</sup>

150. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2325 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819)); *see also* *Obergefell v. Hodges*, 576 U.S. 644, 671–72 (2015) (“If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. . . . [R]ights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.”).

151. *Guardians of Freedom*, ACLU, <https://perma.cc/L6DP-KPLS> (last visited Feb. 7, 2023).

152. *See, e.g., Obergefell*, 576 U.S. at 675 (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

153. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 568 (2003) (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”).

154. *See, e.g., Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) (“Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”).

155. *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“Our cases recognize ‘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 v. Baird*, 405 U.S. 438, 453 (1972))).

156. *See, e.g., Armstrong v. State*, 989 P.2d 364, 378 (Mont. 1999) (“Similarly, in the broader context of one’s right to choose or refuse medical treatment, we must likewise conclude that these sorts of decisions are protected under the personal autonomy component of the individual privacy guarantees of Montana’s Constitution.”).

157. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2301–02 (2022) (Thomas, J., concurring) (arguing for overruling “these demonstrably erroneous decisions”).

## V. THREATS TO MONTANA'S INDEPENDENT JUDICIARY AND RIGHT TO PRIVACY

### A. *Efforts to Politicize the Courts*

It is clear that, in the current political climate in Montana, the courts are in great danger of losing their place as a backstop against legislative or executive disregard for fundamental rights. In the 2021 legislative session, multiple bills were passed that were designed to politicize the Montana Supreme Court, and more were introduced in 2023.<sup>158</sup> In 2021, for example, the Legislature passed bills to replace at-large elections for the Supreme Court with gerrymandered districts and to replace the non-partisan Judicial Nominations Commission with gubernatorial appointment of vacancies.<sup>159</sup>

Montana's Supreme Court race in 2022 was targeted by Republicans who sought to unseat incumbent Justice Ingrid Gustafson, whom they deemed too progressive.<sup>160</sup> Gustafson was originally appointed to a Montana district court by Governor Judy Martz, a Republican. Governor Steve Bullock, a Democrat, appointed her to the Montana Supreme Court. Gustafson's opponent was Republican utility regulator James Brown.<sup>161</sup> The race ended up being the most expensive Supreme Court race in Montana history.<sup>162</sup> It is safe to assume this intense focus on the Montana Supreme Court elections will only increase in the years to come. With a super-majority in the Legislature following the 2022 elections,<sup>163</sup> Republican politicians clearly see the Montana Supreme Court as an obstacle to achieving their policy goals.

158. See, e.g., Arren Kimbel-Sannit, *Tracking changes to the court system at the Legislature's midpoint*, MONT. FREE PRESS (Mar. 8, 2023), <https://perma.cc/S4E9-8W39> (“[L]awmakers haven’t shied away from attempts to reshape the court this session. Republicans say it’s a matter of asserting the Legislature’s role as a check on the other branches of government and opening up the internal processes of the judiciary to public (and partisan) scrutiny.”).

159. See *Capitol Tracker: HB 325: Elect supreme court justices by districts*, MONT. FREE PRESS (June 22, 2021), <https://perma.cc/FFM7-NY8Q>; *Capitol Tracker: SB 140: Revise laws relating to the judiciary*, MONT. FREE PRESS (June 22, 2021), <https://perma.cc/3MFU-25QN>.

160. Nicole Girtten, *Lawyers, judges back Gustafson as GOP push Brown in Montana Supreme Court Race*, GREAT FALLS TRIBUNE (Oct. 16, 2022), <https://perma.cc/BVH9-844S>.

161. *Election Guide '22: Ingrid Gustafson*, MONT. FREE PRESS, <https://perma.cc/7PXJ-Z5U5> (last visited Feb. 9, 2023); Shaylee Ragar, *Montana Supreme Court race brings unprecedented spending & lobbying*, YELLOWSTONE PUB. RADIO (Oct. 27, 2022), <https://perma.cc/HH74-URTA>.

162. Shaylee Ragar & Corin Cates-Carney, *Brown concedes to Gustafson in contentious Supreme Court race*, MONT. PUBLIC RADIO (Nov. 9, 2022), <https://perma.cc/VEY7-JHRN>.

163. *Party Control: Majority and Minority Party Numbers 1889 - Present*, MONT. LEGIS., <https://perma.cc/CUR6-53NE> (last visited Feb. 9, 2023).

*B. State Officials' Defiance of Court Rulings*

Beyond legislative attempts to change the structure of the Montana Supreme Court to make it more political, Montana's executive branch has challenged the judicial branch's authority by brazenly defying court rulings it disagrees with. Two such cases are being litigated by the ACLU of Montana.

In *Marquez v. State*,<sup>164</sup> the ACLU of Montana is defending the right of transgender people to correct the gender markers on their birth certificates.<sup>165</sup> In 2021, the Montana Legislature passed Senate Bill 280.<sup>166</sup> This bill requires a transgender person who wishes to amend the gender designation on their birth certificate to obtain a certified copy of an order from a court indicating that the person's sex has been changed by "surgical procedure."<sup>167</sup> They must then provide this court order to the Department of Public Health and Human Services (DPHHS).<sup>168</sup> Before the passage of SB 280, transgender Montanans needed only to provide an affidavit to DPHHS to change the gender marker on a birth certificate.<sup>169</sup> This process was efficient and easy and was administered without problem until the Legislature decided to act.<sup>170</sup>

The ACLU of Montana, along with the ACLU Foundation LGBTQ & HIV Project and Nixon Peabody LLC, challenged Senate Bill 280 in state court, arguing that it violates plaintiffs' state constitutional right to privacy, equal protection of the law, and due process.<sup>171</sup> For many transgender Montanans, surgical procedures are either unnecessary, medically contraindicated, or cost-prohibitive.<sup>172</sup> And even if a person has undergone gender-affirming surgery, it is an abhorrent invasion of a person's privacy to have to seek a court's certification that they have done so.<sup>173</sup>

On April 21, 2022, a Montana district court issued an injunction prohibiting enforcement of "any aspect of SB 280" pending resolution of the case.<sup>174</sup> Since the court's ruling, DPHHS has defied the ruling repeat-

164. See generally Complaint, *Marquez v. State*, <https://perma.cc/UT95-KY46> (Mont. Dist. Ct. Jul. 16, 2021) (No. DV21-00873).

165. *Id.* at 2.

166. S. 280, 2021–2023 Leg., 67th Reg. Sess. (Mont. 2021).

167. *Id.*

168. *Id.* at 1.

169. *Id.*

170. Complaint, *supra* note 164, at 8.

171. *Id.* at 2, 13, 17.

172. *Id.*

173. *Id.*

174. Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss and Granting Plaintiffs' Motion for a Preliminary Injunction at 35, *Marquez v. State*, <https://perma.cc/2XGA-YYRK> (Mont. Dist. Ct. Apr. 21, 2022) (No. DV21-00873).

edly.<sup>175</sup> First, it simply refused to comply with the ruling.<sup>176</sup> Then, on May 23, 2022, it issued a new temporary rule even harsher than its original rule implementing SB 280.<sup>177</sup> This temporary emergency rule blatantly disobeyed the court's order by denying any sex marker changes to birth certificates for transgender individuals.<sup>178</sup> Eventually, the ACLU of Montana was forced to seek clarification from the court. The court ordered a hearing for September 15, 2022 on the motion seeking clarification. Despite the pending motion, DPHHS made its new rule permanent on September 9, 2022.<sup>179</sup>

On September 15, the court held the hearing to clarify its ruling.<sup>180</sup> Judge Moses stated there was no question that state officials violated his earlier order by creating the new rule.<sup>181</sup> He explained that his order reinstates the previous rule that allowed people to update the gender on their birth certificate by filing an affidavit with the Department.<sup>182</sup> Judge Moses expressed dismay at the State's defiance, calling its actions "disastrous because they're simply thumbing their nose at orders."<sup>183</sup> Undeterred, in a media interview the same day, Charlie Brereton, director of DPHHS, said the agency was keeping the rule it issued in place, despite the judge's order and "scathing comments."<sup>184</sup> Brereton stated, "It's unfortunate that the judge's ruling today does not square with his vague April decision[.] The 2022 final rule the Department issued on September 9 remains in effect, and we are carefully considering next steps."<sup>185</sup> It was not until days after the September 15 hearing that the State finally agreed to comply with Judge Moses's orders and reinstate the rule that existed before SB 280 was enacted.<sup>186</sup>

175. See, e.g., Nicole Girtten, *DPHHS says rule on birth certificate gender markers in effect despite judge's order*, DAILY MONTANAN (Sep. 15, 2022), <https://perma.cc/2DEA-42N2>; Mara Silvers, *Health Department Defies Judges Transgender Birth Certificate Order*, MONT. FREE PRESS (Sept. 15, 2022), <https://perma.cc/E8DY-SA6M>.

176. Associated Press, *Montana Not Following Transgender Birth Certificate Ruling*, NBC NEWS (May 21, 2022), <https://perma.cc/ZZ3Y-K9PK>.

177. John Riley, *Montana Will Follow Judge's Order Regarding Sex Marker Change Process*, MISSOULA CURRENT (Sept. 20, 2022), <https://perma.cc/L3GR-XRRA>.

178. *Id.*

179. *Id.*

180. Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Plaintiffs' Motion Seeking Clarification of the Preliminary Injunction at 2, *Marquez v. State*, <https://perma.cc/5W6U-S87V> (Mont. Dist. Ct. Apr. 21, 2022) (No. DV21-00873).

181. Girtten, *supra* note 175.

182. Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Plaintiffs' Motion Seeking Clarification of the Preliminary Injunction, *supra* note 180, at 8–9.

183. Girtten, *supra* note 175; Silvers, *supra* note 175.

184. Girtten, *supra* note 175.

185. *Id.* (internal quotation marks omitted).

186. Riley, *supra* note 177.



The State similarly thumbed its nose at a court's ruling in *Western Native Voice v. Jacobson*,<sup>187</sup> a challenge the ACLU of Montana, along with the ACLU Voting Rights Project and the Native American Rights Fund, brought to two voting restrictions the Montana Legislature passed in 2021.<sup>188</sup> One of these restrictions was almost identical to one the ACLU had previously successfully challenged.<sup>189</sup> On September 30, 2022, a Montana district court permanently enjoined both laws.<sup>190</sup> In spite of the court's ruling, the secretary of state's office continued to publish inaccurate information on its website in the weeks leading up to the November 2022 election, which contradicted the Court's invalidation of the voting restrictions.<sup>191</sup>

## VI. CONCLUSION

Abortion should have remained protected under the U.S. Constitution, but the U.S. Supreme Court has deferred the question to the states. The broader right to privacy in intimate decision-making is at risk. Now it falls more heavily than ever on the Montana Constitution and the Montana Supreme Court to protect these rights within our state. The Montana judicial branch, with the Montana Supreme Court as the final word, is the branch to protect rights guaranteed in the Montana Declaration of Rights from infringement.

*Dobbs* makes it all the more important that the Montana Supreme Court continue to interpret the state constitution independently of the federal constitution, including the right to privacy. *Dobbs* expressly invites it to do so. Montanans will need to stand up to the political branches' attempts to politicize the Court and diminish its role as a protector of constitutional rights if we are to retain the precious rights granted in Montana's unique constitution.

187. See generally Complaint, *W. Native Voice v. Jacobsen*, <https://perma.cc/VB8V-YLPH> (Mont. Dist. Ct. May 17, 2021) (No. DV 21-0560).

188. *Id.* at 1, 2.

189. *Id.* at 2; Court Strikes Down Two Montana Laws That Restrict Native American Voting Rights, ACLU OF MONT. (Sept. 30, 2022), <https://perma.cc/CR6B-AQ6Q>.

190. ACLU Montana Newsletter Winter 2022 at 10, ACLU OF MONT. (Dec. 16, 2022), <https://perma.cc/S6ZV-UFPE>.

191. Shaylee Ragar, *Voter information pamphlet includes inaccurate information about voter registration*, MONT. PUB. RADIO (Oct. 19, 2022), <https://perma.cc/5WJL-WQ4C>.