THE ORIGINALIST CASE FOR WHY THE FLORIDA CONSTITUTION'S RIGHT OF PRIVACY PROTECTS THE RIGHT TO AN ABORTION

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I. INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*,[1] the Supreme Court of the United States overruled the landmark decision in *Roe v. Wade*, where the Court had found a federal constitutional right to an abortion as part of an implicit right to privacy.[2] The *Dobbs* Court stated that "[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision."[3] Overruling *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[4] the Court stated that "[t]he Constitution does not prohibit the citizens of each [s]tate from regulating or prohibiting abortion"; the Court "return[ed] that authority [that *Roe* and *Casey* had arrogated] to the people and their elected representatives."[5]

So, the question for Floridians is: What is the status of the right to abortion in Florida? At first blush, the answer is easy. The Constitution of the State of Florida contains an express right of privacy, something the federal Constitution lacks. Approved by Florida voters in 1980, Section 23 of Article I of the Florida Constitution provides:

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1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
2. Roe v. Wade, 410 U.S. 113, 153 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.
3. *Dobbs*, 142 S. Ct. at 2242.
4. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.
5. *Dobbs*, 142 S. Ct. at 2284.

> 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.[6]

In 1989, the Supreme Court of Florida held in *In re T.W.* that Section 23 protects the right to an abortion, and the court has reaffirmed that holding in the decades since.[7] But those precedents are now being tested. In 2022, Governor Ron DeSantis of Florida signed into law House Bill 5, which bans most abortions after the fifteenth week of gestation.[8] There is a legal challenge to the law that is now in the Florida Supreme Court.[9]

In the case of *Planned Parenthood of Southwest and Central Florida v. State*, the State claims the precedents are wrong. Invoking originalism, conservatives' preferred mode of constitutional interpretation, the State argues the precedents are inconsistent with the meaning of Section 23 when voters approved it in 1980.[10] So the Supreme Court of Florida faces this question: How would a reasonable Floridian in the 1980s have understood the text of Section 23 at the time of its adoption?[11] And that was the question that dominated the oral argument held on September 8, 2023.[12]

The State and others contend that Section 23, as originally understood, protected only the right to informational privacy, i.e., the right to control personal information, and not the right to decisional privacy, i.e., the right to make certain important

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6. FLA. CONST. art. I, § 23.

7. *In re* T.W., 551 So. 2d 1186, 1192 (Fla. 1989); N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 639 (Fla. 2003), *superseded by amendment*, FLA. CONST. art. X, § 22; Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1254 (Fla. 2017).

8. H.B. 5, 2d Reg. Sess. (Fla. 2022).

9. State v. Planned Parenthood of Sw. & Cent. Fla., 344 So. 3d 637 (Fla. 1st Dist. Ct. App. 2022), *cert. granted sub nom.* Planned Parenthood of Sw. & Cent. Fla. v. State, No. SC22-1050 (Fla. Jan. 23, 2023).

10. State Defendants' Answer Brief on the Merits at 45–51, Planned Parenthood of Sw. & Cent. Fla. v. State, Nos. SC22-1050 & SC22-1127 (Fla. argued Sept. 8, 2023) [hereinafter State Answer Brief].

11. I left that question open in another piece but seek to answer it here. Adam Richardson, *The State Constitution of Florida—Yes, Florida—Protects the Right to Abortion*, SLATE (June 28, 2022, 4:05 PM), https://slate.com/news-and-politics/2022/06/florida-15-week-abortion-ban-state-constitution-privacy-rights.html.

12. Oral Argument, Planned Parenthood of Sw. & Cent. Fla. v. State, Nos. SC22-1050 & SC22-1127 (Fla. argued Sept. 8, 2023), https://thefloridachannel.org/videos/9-8-23-florida-supreme-court-oral-arguments-planned-parenthood-of-southwest-and-central-florida-v-state-of-florida-sc2022-1050/.

decisions, which includes abortion.[13] As one leading Florida pro-life activist confidently states, "[i]t was clear to everyone [in 1980] that [Section 23's] purpose was for informational privacy."[14] In a law review article in the *Cumberland Law Review*, that activist, John Stemberger, and coauthor Jacob Phillips elaborate: "Based on the totality of the evidence presented in this article, clearly the original and plain public meaning of the amendment's language as understood by voters in Florida on Tuesday, November 8, 1980, was related to informational privacy, not abortion."[15] But this conclusion is not accurate.

In Part II of this Article, I briefly explain originalism and the analysis it requires. Part III engages in a careful, phrase-by-phrase analysis of Section 23. The result of that analysis should not be surprising: Section 23 created a very broad right of privacy. There is no textual hint that it is limited to the right to informational privacy, to the exclusion of the right to decisional privacy. In Part IV, I examine the history of Section 23, and in Part V, I assess the historical evidence. Briefly, Section 23 was originally proposed in 1978 in a package of proposed revisions, and the voters rejected the package. The amendment was placed on the ballot again in 1980, and voters approved it. I survey the general background, the legislative history in both 1978 and 1980, the public debates in those years, and relevant post-approval history. The historical evidence I gathered reveals a robust public debate over the amendment that contained extensive discussions of decisional privacy. Although abortion was mentioned directly or indirectly only a few times in the public debate in 1980, a reasonable person in 1980 would have understood the right of privacy to include the right to decisional privacy, including the right to an abortion. A complementary law review article in the *Rutgers University Law Review* by Stetson University law professor James Fox reaches the same conclusion via a different

13. *E.g.*, *id.*; John Stemberger & Jacob Phillips, *Watergate, Wiretapping, and Wire Transfers: The True Origin of Florida's Privacy Right*, 53 CUMBERLAND L. REV. 1, 4 (2023); John Stemberger, Opinion, *The True Origin of Florida's Privacy Right—Not Abortion*, TALLAHASSEE DEMOCRAT (June 26, 2022, 6:00 AM), https://www.tallahassee.com/story/opinion/2022/06/26/true-origin-floridas-privacy-right-not-abortion-opinion/7719260001/; Mike Beltran, Opinion, *Florida's Abortion Caselaw Was Born with* Roe *and Must Die with It as Well*, FLA. POL. (June 4, 2022), https://floridapolitics.com/archives/529849-mike-beltran-floridas-abortion-caselaw-was-born-with-roe-and-must-die-with-it-as-well/.

14. Stemberger, *supra* note 13.

15. Stemberger & Phillips, *supra* note 13, at 40.

route focusing more on preexisting legal meanings and developments.[16]

In a nutshell, faithfully applying the principles of originalism, the answer to the question the Supreme Court of Florida will face is that the original meaning of the privacy right was that it would protect the right to informational privacy *and* the right to decisional privacy, including the decision to have an abortion—and that is the controlling original public meaning of Section 23. So, while the U.S. Supreme Court "return[ed] [the] authority [to regulate or prohibit abortion] to the people and their elected representatives,"[17] we will see that the people of Florida have already exercised their authority to provide for the right to an abortion.

II. ORIGINALISM AND ORIGINAL PUBLIC MEANING

Originalism is the idea that the meaning of the Constitution at the time of its adoption is controlling. When originalism first got off the ground in the 1980s as an articulated mode of constitutional interpretation, its focus was on the original, subjective intent of the Framers.[18] This "old originalism" declined in influence by the early 1990s, to be replaced by "new originalism."[19] New originalism—often referred to as public meaning originalism—is the dominant version of originalism today.[20] As noted below, the Supreme Court of Florida has already applied public meaning originalism, but it did not say that is what the court was doing or elaborate on the idea. It is necessary, then, to do so here.

A. The Basics of Originalism

Professor Keith Whittington, an early, leading proponent of new originalism, offers the following basic description: "[O]riginalism argues that the discoverable public meaning of the Constitution at the time of its initial adoption should be regarded

16. James W. Fox Jr., *A Historical and Originalist Defense of Abortion in Florida*, 75 RUTGERS U. L. REV. 393, 410 (2023).

17. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

18. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 603 (2004).

19. *Id.*

20. However, new originalists disagree on some significant points. *See generally* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009). This Article glosses over these disagreements, and also will not discuss criticisms of originalism.

as authoritative for purposes of later constitutional interpretation."[21] This version focuses not on drafters' intentions, but on the public meaning of the text.[22] Or in Justice Scalia's words: "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."[23] Originalists view this as an objective inquiry[24] "centered on constitutional text and history."[25]

To determine the public meaning of the text, originalists often turn first to founding-era dictionaries and other sources that elucidate contemporary usage; the founding era's legal background, such as English common law as explained by Blackstone; and the historical background. This is what the U.S. Supreme Court did in its rigorous Second Amendment decision in *District of Columbia v. Heller*, with Justice Scalia writing for the Court.[26]

In addition, originalists rely on what was said at the time of the adoption of the text—the drafting and ratification process—as shown by the majority's *Heller* opinion and other opinions,[27] because it "provides the context for understanding the language used in the historical document."[28] However, "originalism is not seeking to look 'behind the text' but is seeking the necessary evidence to make sense of the text itself."[29] When evaluating such evidence, there are distinctions between the drafters of the text (the Philadelphia Convention or Congress), the ratifiers (the state

21. Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 377 (2013).

22. *Id.* at 380–81; Whittington, *New Originalism*, *supra* note 18, at 609.

23. Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 38 (Amy Gutmann ed., 2018).

24. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 93–95 (2004, rev. 2014).

25. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2128–29 (2022).

26. District of Columbia v. Heller, 554 U.S. 570, 581–603 (2008); *see also* United States v. Lopez, 514 U.S. 549, 585–87, 590–93 (1995) (Thomas, J., concurring); Kelo v. City of New London, 545 U.S. 469, 508–11 (2005) (Thomas, J., dissenting); McDonald v. City of Chicago, 561 U.S. 742, 813–19 (2010) (Thomas, J., concurring in part and concurring in the judgment); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 621 (1999).

27. *Heller*, 554 U.S. at 598–99; *Lopez*, 514 U.S. at 586–87 (Thomas, J., concurring); Gonzales v. Raich, 545 U.S. 1, 58–59 (2005) (Thomas, J., dissenting); *McDonald*, 561 U.S. at 828–33 (Thomas, J., concurring in part and concurring in the judgment).

28. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 108 (1999).

29. *Id.* at 109.

ratifying conventions or legislatures), and the public.[30] As Whittington says, "[i]n ratifying the document, the people appropriated it, giving its text the meaning that was publicly understood."[31] So priority is given to "direct evidence of the intent of the ratifiers," with "additional information from the drafting convention, the popular debates surrounding ratification, and contemporary commentary" as allowable "indicators of ratifying intent."[32] Whittington says that "the history of the drafting process is [not] irrelevant—it may provide important clues as to how the text was understood at the time and the meaningful choices that particular textual language embodies—but it is not uniquely important to the recovery of the original meaning of the Constitution."[33] Again, "[w]hat is at issue in interpreting the Constitution is the textual meaning of the document, not the private subjective intentions, motivations[,] or expectations of its authors."[34] Whittington explains:

> The goal of originalism is not to reimagine the fleeting thoughts in the mind of some private individual at the time of the founding. It is rather to examine the articulated elaborations of textual meaning with which the Constitution was defended and upon which the ratifiers relied in reaching their judgment as to the desirability of the document.[35]

In short, as Justice Thomas has written: "When interpreting a constitutional provision, 'the goal is to discern the most likely public understanding of [that] provision at the time it was adopted.'"[36]

The Florida Supreme Court has already applied public meaning originalism as a method for interpreting the Florida

30. *Id.* at 35–36.

31. *Id.* at 60.

32. *Id.* at 36; *see also* Scalia, *supra* note 23, at 38.

33. Whittington, *New Originalism*, *supra* note 17, at 610; *see also* McDonald v. City of Chicago, 561 U.S. 742, 828–29 (2010) (Thomas, J., concurring in part and concurring in judgment); Whittington, *Originalism*, *supra* note 21, at 382; Scalia, *supra* note 23, at 38.

34. Whittington, *New Originalism*, *supra* note 22, at 610; *see also* Whittington, *Originalism*, *supra* note 21, at 382.

35. WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 28, at 162; *see also id.* at 163 ("[O]riginalism refers to the intentions of the various individuals who composed the ratifying convention.").

36. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 822 (2011) (Thomas, J., dissenting) (alteration in original) (quoting *McDonald*, 561 U.S. at 828 (Thomas, J., concurring in part and concurring in judgment)).

Constitution. In 2020, the court stated: "The goal of constitutional interpretation is to arrive at the fair meaning of the constitutional text. We ask how a reasonable member of the public would have understood the text at the time of its enactment."[37]

B. The Popular-Sovereignty Justification for Originalism

Several justifications for originalism have been offered over the years. The most common and influential one is popular sovereignty.[38]

Professor Thomas Colby summarized this justification in his article *Originalism and the Ratification of the Fourteenth Amendment*.[39] According to the justification, the American people are sovereign, and the ratification of the Constitution was an act of the sovereign American people.[40] The Constitution "owes its status as *higher* law—capable of trumping ordinary laws—to the fact that, in enacting it, a supermajority of the American people chose—through an extraordinary, more deeply democratic process—to bind future, ordinary, representative, majoritarian lawmaking within its confines."[41] The Constitution can be amended only through a similarly supermajoritarian process.[42] Colby writes:

> Since the Constitution owes its status as higher law to the fact that its precepts earned the assent of the American people, and since the Constitution can only be changed through the supermajoritarian ratification process, it necessarily follows, originalists claim, that contemporary judges must give the

37. Thompson v. DeSantis, 301 So. 3d 180, 187 (Fla. 2020); *see also* Advisory Op. to the Governor Re: Implementation of Amend. 4, the Voting Restoration Amend., 288 So. 3d 1070, 1078 (Fla. 2020) ("Indeed, our opinion is based not on the Sponsor's subjective intent or campaign statements, but rather on the objective meaning of the constitutional text. The language at issue, read in context, has an unambiguous 'ordinary meaning' that the voters 'would most likely understand' [citation omitted] to encompass obligations including [legal financial obligations]. The Sponsor's expressed intent and campaign statements simply are consistent with that ordinary meaning that would have been understood by the voters.").

38. Expounded upon at length in WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 28, at ch. 5.

39. *See generally* Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L REV. 1627 (2013).

40. *Id.* at 1631–32.

41. *Id.* at 1632 (emphasis in original).

42. *Id.* at 1633.

> Constitution the same meaning that it had at the time of ratification.
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> The Constitution meant something when it was ratified, and it was that something that the people agreed would bind them. If a judge interprets the Constitution to have some meaning other than its original meaning—to dictate some rule other than the only one by which the people agreed to be bound—then she acts illegitimately, as there is no democratic warrant for allowing a judge-made rule to trump majoritarian law. A statute enacted by an elected legislature has a far greater claim to democratic legitimacy than does a rule adopted by a small handful of unelected judges. But its claim is weaker than that of the supermajoritarian rules originally understood to be embodied in the Constitution.[43]

There are other justifications, some of which, like judicial restraint, have fallen out of favor, but again, popular sovereignty is the leading justification.[44]

C. Does the Standard Applied in *Dobbs* Apply Here?

Before turning to a textual analysis of Section 23, I will clarify what standard applies to determine whether the Florida Constitution protects the right to abortion. In *Dobbs*, the U.S. Supreme Court said:

> The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."

The right to abortion does not fall within this category.[45]

That standard is peculiar to substantive due process under the federal Fourteenth Amendment.[46] It does not apply to the question

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43. *Id.* at 1633–34 (footnotes omitted).
44. Whittington, *Originalism*, *supra* note 21, at 391–94.
45. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (cleaned up).
46. *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("Our established method of substantive-due-process analysis has two primary features: . . . .").

this Article attempts to answer because Florida has an explicit privacy right, and we need not rely on Florida's Due-Process Clause.[47]

The Florida Supreme Court made a statement in a 1987 case, *Rasmussen v. South Florida Blood Service*, that could be read to point in the opposite direction: "In recent cases, the [U.S. Supreme] Court has discussed the privacy right as one of those fundamental rights that are "'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [they] were sacrificed.'"[48] The court quoted a U.S. Supreme Court decision involving substantive due process under the Fourteenth Amendment, which in turn quoted another U.S. Supreme Court decision involving substantive due process. The Florida Supreme Court then wrote that Section 23 "provid[ed] an explicit textual foundation for those privacy interests inherent in the concept of liberty which may not otherwise be protected by specific constitutional provisions."[49] This statement should not be read as imposing the federal substantive-due-process standard on Section 23. It is merely a recognition that Section 23 protects at least those rights protected by the federal right of privacy at the time of adoption. The court held early on that Section 23 provides broader protections than the federal right, a holding supported by the provision's original meaning.[50]

III. A TEXTUAL ANALYSIS OF SECTION 23

In this Part, I will rely on dictionary definitions, saving a discussion of the general legal and historical background for Part III on the history of Section 23 except when warranted. At the time I posted a draft of this article to SSRN, it appeared that no one had adequately performed a careful textual analysis of Section 23

47. FLA. CONST. art. I, § 9. Before Section 23, the Florida Supreme Court held that the State's due-process clause did not provide a right of informational privacy. Shevin v. Byron, Harless, Schaffer, Reid & Assocs., 379 So. 2d 633, 639 (Fla. 1980).

48. Rasmussen v. S. Fla. Blood Servs., Inc., 500 So. 2d 533, 535 (Fla. 1987) (quoting Bowers v. Hardwick, 478 U.S. 186, 191–92 (1986)).

49. *Id.* at 536; *see also In re* T.W., 551 So. 2d 1186, 1192 (Fla. 1989) (same); *id.* at 1202 (Grimes, J., concurring in part and dissenting in part) ("In 1980, the Florida Constitution was amended to specifically guarantee persons the right to privacy. As a consequence, it was thereafter unnecessary to read a right of privacy into the due process provision of Florida's equivalent to the fourteenth amendment.").

50. Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regul., 477 So. 2d 544 (Fla. 1985).

before.[51] Since then, the State in its answer brief has offered such an analysis, and the Stemberger and Phillips article lightly touches upon the subject.[52]

A. "Every natural person"

The meaning of "Every natural person" is not controversial. A reasonable person in 1980 would have understood the language to mean that the holder of the right in Section 23 is a human being, not a corporation. Moreover, the right is an individual right.

B. "has the right to be let alone and free from governmental intrusion into the person's private life"

This language defines the substance of the right. I will call it "the right-defining language." Yet as critical as the right-defining language is, past commentators had not paid adequate attention to its structure, leading to its misinterpretation.[53] My concern, however, is with the interpretation currently being advanced by the State and its fellow travelers: that "to be let alone" is a term of art that means only informational privacy. They base this on the right of privacy, the "right to be let alone," as conceived by Samuel D. Warren and future justice Louis D. Brandeis in their famous article, *The Right to Privacy*.[54]

Let us first consider the text's structure. How the *Heller* Court interpreted the Second Amendment to the U.S. Constitution is instructive, specifically the part of the operative clause defining: "the right of the people to keep and bear Arms." In *Heller*, the majority broke this up into "the phrases 'keep arms' and 'bear

51. *Cf., e.g.*, Gerald B. Cope Jr., *To Be Let Alone: Florida's Proposed Privacy Right*, 6 FLA. ST. U. L. REV. 671, 742–44 (1978) [hereinafter *To Be Let Alone*]; Gerald B. Cope Jr., *A Quick Look at Florida's New Right of Privacy*, 55 FLA. BAR J. 12, 12–13 (1981) [hereinafter *Quick Look*]; Joseph S. Jackson, *Interpreting Florida's New Constitutional Right of Privacy*, 33 FLA. L. REV. 565, 572 (1981); Scott Denson, *Florida's Constitutional Shield: An Express Right to Be Let Alone by Government and the Private Sector*, 20 FLA. ST. U. L. REV. 907, 915–22 (1993); Ben F. Overton & Katherine E. Giddings, *The Right of Privacy in Florida in the Age of Technology and the Twenty-First Century: A Need for Protection from Private and Commercial Intrusion*, 25 FLA. ST. U. L. REV. 25, 35–37 (1997).

52. State Answer Brief, *supra* note 10, at 12–26; Stemberger & Phillips, *supra* note 13, at 36, 39.

53. *See* Cope, *Quick Look*, *supra* note 51, at 12–13; Cope, *To Be Let Alone*, *supra* note 51, at 731–32 n.343, 742–43; Overton & Giddings, *supra* note 51, at 35–36.

54. Samuel Warren & Louis Brandies, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

arms.'"[55] Later in the discussion, the majority responded to Justice Stevens' objection to this split:

> Justice STEVENS suggests that "keep and bear Arms" was some sort of term of art, presumably akin to "hue and cry" or "cease and desist." . . . Justice STEVENS believes that the unitary meaning of "keep and bear Arms" is established by the Second Amendment's calling it a "right" (singular) rather than "rights" (plural). There is nothing to this. State constitutions of the founding period routinely grouped multiple (related) guarantees under a singular "right," and the First Amendment protects the "right [singular] of the people peaceably to assemble, and to petition the Government for a redress of grievances."[56]

In a footnote to this passage, the Court continued, in part:

> Faced with this clear historical usage, Justice STEVENS resorts to the bizarre argument that because the word "to" is not included before "bear" (whereas it is included before "petition" in the First Amendment), the unitary meaning of "to keep and bear" is established. We have never heard of the proposition that omitting repetition of the "to" causes two verbs with different meanings to become one.[57]

The structure of the right-defining language of Section 23 parallels the structure of the language the *Heller* court was interpreting:

Second Amendment	"the right of the people"	"to"	"keep"	"and"	"bear"	"Arms"
Section 23	"the right"	"to"	"be let alone"	"and"	"be … free"	"from governmental intrusion into the person's private life"

55. District of Columbia v. Heller, 554 U.S. 570, 582 (2008).
56. *Id.* at 591 (citations and footnote omitted).
57. *Id.* at 591 n.14 (citation omitted).

Just as Justice Stevens tried to ascribe a unitary meaning to "the right . . . to keep and bear Arms," the State attempts to ascribe a unitary meaning to Section 23's right-defining language.[58] The attempt fails for the same reason as Justice Stevens' in *Heller*. The proper interpretation of the right-defining language is that it "group[s] multiple (related) guarantees under a singular 'right.'"[59] In rejecting this interpretation, the State says that "these phrases are synonyms that work in tandem."[60] Beyond ignoring the *Heller* textualist analysis, it ignores the surplusage canon of interpretation: "If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."[61] Read properly, the right-defining language groups two rights.[62]

1. "be let alone . . . from"

The first is the right to be "let alone." "Let alone" has a long history: "*Let alone* 'abstain from interfering with' is in Old English. . . ."[63] The phrase had the same meaning in the beginning, and for the entire twentieth century, as it did when voters approved Section 23.

The 1930 reprint of the 1909 *Webster's New International Dictionary*: "To withdraw from; to refrain from interfering with."[64]

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58. State Answer Brief, *supra* note 10, at 13–14.

59. *Heller*, 554 U.S. at 591.

60. State Answer Brief, *supra* note 10, at 13–14, n.14 (in the footnote, citing an earlier draft of my Article).

61. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012) (footnote omitted).

62. As far as I can tell, only one commentator has understood that the first sentence of Section 23 contains two, grouped rights, even if he did not reach the correct interpretation of those rights. Denson, *supra* note 51, at 918 ("[A] 'normal' reading of the language would allow the provision to assert the right to be let alone in one's private life against all comers while simultaneously protecting against intrusion into private data by government . . . . [T]he Commission appears to have effectively drafted a provision recognizing a right to be let alone by all others, a right which included protection from governmental intrusion into private affairs."). Denson was criticizing the interpretations of Cope, *To Be Let Alone*, *supra* note 51, and Jackson, *supra* note 51.

63. *Let*, ETYMONLINE.COM, https://www.etymonline.com/word/let#etymonline_v_6705 (last visited Sept. 9, 2023).

64. *Let*, WEBSTER'S NEW INTERNATIONAL DICTIONARY 1238 (rev. 1930), https://archive.org/details/webstersnewinter00webs/page/1238/mode/1up [hereinafter WEBSTER'S].

The example given is striking: "'*Let* me *alone* in choosing of my wife.' *Chaucer*."[65] The example is obviously one of decisional privacy. The reference to Geoffrey Chaucer's fourteenth century *The Canterbury Tales* does not indicate that, then or in the first half of the twentieth century, "let alone" was only about informational privacy. The 1969 *American Heritage Dictionary of the English Language*'s relevant definition of "leave" is "[t]o forgo moving, changing, or interfering with; let remain," with a usage note to this definition explaining: "*Leave* and *Let* are interchangeable only when they are followed by a noun or pronoun and *alone: Leave* (or *let*) *John alone*. The intended sense here is 'refrain from disturbing or interfering'. . . ."[66] The 1978 reprint of the 1933 *Oxford English Dictionary* definition of "let alone": "To abstain from interfering with or paying attention to (a person or thing), abstain from doing (an action). *To let well alone*: see WELL."[67] The meaning of "let alone" has not changed since 1980.[68] And this is the ordinary meaning of the word—not an "idiosyncratic expansion."[69]

The State and others would have an article from 1890 on a proposed common-law tort of invasion of privacy, albeit a famous article, override the broad, ordinary meaning of "let alone" to narrow the phrase as used in Section 23. This is improper. As the Florida Supreme Court wrote in 2020:

> [E]xtraneous considerations can result in the judicial imposition of meaning that the text cannot bear, either through expansion or contraction of the meaning carried by the text. We therefore adhere to the "supremacy-of-text principle": "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."[70]

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65. *Id.*

66. *Leave*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 745 (1969), https://archive.org/details/americanheritage0000unse_w2z8 [hereinafter AMERICAN HERITAGE].

67. *Let*, 6 OXFORD ENGLISH DICTIONARY 213 (reprt. 1978), https://archive.org/details/in.ernet.dli.2015.271836/page/n216/mode/1up [hereinafter OXFORD]. For "let alone," the *Oxford English Dictionary* collects historical usages from 897 to 1886.

68. *Let*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/let (last visited Sept. 9, 2023) ("[T]o leave undisturbed").

69. Stemberger & Phillips, *supra* note 13, at 35.

70. Advisory Op. to the Governor Re: Implementation of Amend. 4, the Voting Restoration Amend., 288 So. 3d 1070, 1078 (Fla. 2020) (quoting SCALIA & GARNER, *supra* note 61, at 56).

Scalia and Garner also tell us that "[t]he ordinary-meaning rule is the most fundamental semantic rule of interpretation."[71] Under this canon, "[w]ords are to be understood in their ordinary, everyday meaning—unless the context indicates that they bear a technical sense."[72] The Florida Supreme Court said in the same 2020 case:

> We also adhere to the view expressed long ago by Justice Joseph Story concerning the interpretation of constitutional texts (a view equally applicable to other texts): "[E]very word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it."[73]

In that case, the court also relied on an earlier decision where it had said:

> The words and terms of a Constitution are to be interpreted in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense. The presumption is in favor of the natural and popular meaning in which the words are usually understood by the people who have adopted them.
>
> It has been said that, as statutes are hastily and unskillfully drawn, they need construction to make them sensible, but Constitutions import the utmost discrimination in the use of language, that which the words declare is the meaning of the instrument. It must be very plain, nay absolutely certain, that the people did not intend what the language they had employed in its natural signification imports before a court should feel at liberty to depart from the plain meaning of a constitutional provision.[74]

The text of Section 23 does not furnish any context indicating that "let alone" as used in the section has something other than its ordinary meaning. (I discuss the second sentence below.) If the State and others believe that "let alone" in Section 23 is a

71. SCALIA & GARNER, *supra* note 61, at 69 (footnote omitted).

72. *Id.*

73. *Advisory Op.*, 288 So. 3d at 1079 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 157–58 (1833)).

74. Wilson v. Crews, 34 So. 2d 114, 118 (Fla. 1948) (quoting City of Jacksonville v. Glidden Co., 169 So. 216, 217 (Fla. 1936)).

Brandesian term of art, the burden is on it to establish that the term of art penetrated the public consciousness to the degree that it is more likely than not that voters in 1980 intended the language in Section 23 to reflect that term of art and not the broad, ordinary meaning. It has failed to carry that burden.

As I will discuss in Part IV(C)(2), the evidence documenting the public debate in 1980 proves that the reasonable voter would more likely than not have understood that Section 23 protected more than informational privacy. Moreover, the State and others' arguments for why Section 23 carries the technical meaning relies primarily on framers' statements—which is improper in this context, *see infra* Part V(A)—and legal authorities like the Warren and Brandeis article, the Restatement, and non-SCOTUS judicial decisions that, unlike *Roe v. Wade*, hardly would have been in the mind of the reasonable voter.[75] Stemberger and Phillips also concede that, "[i]n the 1960s, several cases began conceiving of the right to be let alone to apply not only to the discovery and/or dissemination of private information but . . . also to protect the decisional autonomy of citizens against proscriptions from the state."[76]

As used in Section 23, "let alone" means more than informational privacy. It means, simply, to not be interfered with. The Governor recently confirmed the ordinary meaning of "let alone." In 2021, he had the legislature recreate the state guard. At a press conference, he hung a sign on the lectern that said, "LET US ALONE" beneath "FLORIDA STATE GUARD" and an alligator.[77] The Governor took that language from an unofficial state flag from all the way back in 1845. Even Governor DeSantis recognizes that the phrase "let alone" carries a broad meaning, one that *predates*, and is more generally accepted than, the narrower Brandeisian meaning of the term.

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75. State Answer Brief, *supra* note 10, at 26–32; Stemberger & Phillips, *supra* note 13, at 31–35. Along these lines, later in its brief, the State makes the ludicrous claim that Section 23's framers and the voters would have understood Section 23 to incorporate John Stuart Mill's harm principle, set out in an 1859 essay, while the ordinary voter would not have understood that, in *Roe v. Wade*, the U.S. Supreme Court found the right to an abortion in the right of privacy. *Id.* at 45–47, 49–51.

76. Stemberger & Phillips, *supra* note 13, at 34.

77. Michael Moline, *DeSantis Wants to Reboot State Guard to Ease FL's Reliance on Biden Administration*, FLA. PHOENIX (Dec. 2, 2021, 4:18 PM), https://floridaphoenix.com/2021/12/02/desantis-wants-to-reboot-state-guard-to-ease-fls-reliance-on-biden-administration/.

2. "be . . . free from"

As for the second right, like "let alone," the meaning of "free," and in particular "free from," did not change over the course of the twentieth century.

Webster's New International Dictionary:

> Not subject to some particular authority or obligation; enjoying a special privilege, immunity, or the like; exempt from or released, as from a tax, jurisdiction, duty, etc.; hence, exempt or released from any onerous condition or obligation; as, *free* from pain or disease; to be duty *free*; to have one's time *free*.[78]

American Heritage Dictionary: "1. At liberty; not bound or constrained . . . 5. a. Not affected or restricted by a given condition or circumstance. Used with *from* or *of* . . . ."[79] The *Oxford English Dictionary* definition: "IV. Not burdened, not subject or liable, exempt; invested with special rights or privileges. 26. (With const. *from* or *of*): a. Released or exempt from, not liable to (e.g. a rule, penalty, payment)."[80] The meaning of the phrase has not changed since 1980.[81]

The existence of this second right in Section 23 has a significant implication for the argument that the Brandeisian meaning of "let alone" overrides the phrase's ordinary meaning. Assuming the argument is right, it affects only the meaning of "let alone," not that of "free from." If "let alone" protects informational privacy only, "free from" must protect something beyond that privacy—the surplusage canon again—and that, naturally, would be decisional privacy.

3. "governmental intrusion into"

What is protected against is action by the government, not private actors. However, as noted above, the State and pro-life activists read Section 23 as protecting against governmental snooping and information-gathering, which simply is not what the

78. *Free*, WEBSTER'S, *supra* note 64, at 864.
79. *Free*, AMERICAN HERITAGE, *supra* note 66, at 624.
80. *Free*, 4 OXFORD, *supra* note 67, at 522.
81. *Free*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/free (last visited Sept. 9, 2023) ("[R]elieved from or lacking something and especially something unpleasant or burdensome[;] *free* from pain[;] a speech free of political rhetoric . . . .").

text says. It uses "intrusion," a word carrying a broader meaning. As Fox observes, this language directly invokes a U.S. Supreme Court decisional-privacy contraceptives decision, *Eisenstadt v. Baird* (1972): "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."[82] As Fox also points out, Justice Stewart approvingly quoted this language in his concurring opinion in *Roe v. Wade*.[83]

4. "the person's private life"

The important phrase here is "private life." It seems like a phrase whose interpretation is common sense. Yet earlier in the case, the State appeared to read "private life" to be the converse of a "public life," again to limit the language in Section 23 to informational privacy. That is indeed one definition. One of the definitions of "private" in *Webster's New International Dictionary* is: "Not invested with, or engaged in, public office or employment; not public in character or nature; as, a *private* citizen; *private* life; *private* schools."[84] Even here, however, we see a definition that is broader than that suggested by the State ("not public in character or nature").

Another similar definition from *Webster's New International Dictionary*: "Not publicly known; not open; secret; as, a *private* negotiation; a *private* understanding."[85] The *Oxford English Dictionary* provides the following definition that, like the others, is the most natural given the context: "Kept or removed from public view or knowledge; not within the cognizance of people generally;

82. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (citing Stanley v. Georgia, 394 U.S. 557 (1969)).

83. Roe v. Wade, 410 U.S. 113, 169–70 (1973).

84. *Private*, WEBSTER'S, *supra* note 64, at 1708; *see also Private*, 8 OXFORD, *supra* note 67, at 1388 ("Of a person: Not holding public office or official."); *Private*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/private (last visited Sept. 9, 2023) ("(1): not related to one's official position.[;] *private* correspondence (2): not holding public office or employment[;] a *private* citizen").

85. *Private*, WEBSTER'S, *supra* note 64, at 1708.

concealed, secret."[86] *American Heritage Dictionary*: "Not public; intimate; secret."[87] "Private" carries the same definition today.[88]

The meaning of "life" also would seem to be common sense. Nonetheless: *Webster's New International Dictionary*: "The series of experiences, of body and mind, which make up the history of an animal from birth to death . . . the totality of actions and occurrences constituting an individual experience; as, his was a happy *life*. . . . Hence: . . . An individual human existence, or human existence personified; as, each day of one's *life*."[89] The *Oxford English Dictionary*: "III. Course, condition, or manner of living. 12. The series of actions and occurrence constituting the history of an individual (esp. a human being) from birth to death. In generalized sense, the course of human existence from birth to death."[90] *American Heritage Dictionary*: "Human activities, relationships, and interests collectively: *everyday life*."[91] "Life" means essentially the same thing today, though with more brevity: "human activities."[92]

C. Remaining Textual Elements

There are three other parts of Section 23 to complete the textual analysis. The first sentence of Section 23 concludes with a straightforward exception: "except as otherwise provided herein," "herein" meaning "the entire constitution."[93] Next, the second sentence—"This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."—features in the State and pro-life activists' interpretation. They say the second sentence confirms that the first means only informational privacy.[94] The argument is nonsense. Applying the

86. *Private*, 8 OXFORD, *supra* note 67, at 1388.

87. *Private*, AMERICAN HERITAGE, *supra* note 66, at 1042.

88. *Private*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/private ("not known or intended to be known publicly: SECRET") (last visited Sept. 9, 2023).

89. *Life*, WEBSTER'S, *supra* note 64, at 1246.

90. *Life*, 6 OXFORD, *supra* note 67, at 261.

91. *Life*, AMERICAN HERITAGE, *supra* note 66, at 754.

92. *Life*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/life (last visited Sept. 9, 2023).

93. FLA. CONST. art. X, § 12(a) ("'Herein' refers to the entire constitution.").

94. *See* State Answer Brief, *supra* note 10, at 16; Stemberger & Phillips, *supra* note 13, at 36, 39; Brief of Amicus Curiae Liberty Counsel Action in Support of Respondents at 3–4, Planned Parenthood of Sw. & Cent. Fla. v. State, Nos. SC22-1050 & SC22-1127 (Fla. argued Sept. 8, 2023) [hereinafter Liberty Counsel Brief]; Amicus Curiae Brief of Mississippi et al.

second sentence in the suggested manner would allow the second sentence to override the ordinary meaning of the right-defining language in the first sentence. The second sentence does place a qualification on the first, but only to the extent provided by the text of the second sentence. Finally, the section's title, "Right of privacy," cannot play a role in the construction of Section 23 because Florida's Constitution has a title-body clause.[95]

D. Conclusion

"Putting all of these textual elements together,"[96] Section 23 means that every natural person has the right to not be interfered with by and to not be subject to governmental intrusion into activities that the person keeps private, i.e., from the public.

This is an extraordinarily broad right. There is no hint in the text of Section 23, as it would have been understood by voters in 1980, that it is limited to government snooping and information-gathering. While the right does protect against those things, it is logical to conclude that it must also include protection against governmental intrusion into a person's decisional privacy, like the decision to have an abortion. The argument that Section 23 does not protect the right to an abortion because it does not mention abortion is not persuasive.[97] Section 23 does not mention any *specific* protections at all. The breadth of the language is clear evidence that there was no intent to restrict the right of privacy in the way the State and pro-life activists argue. They are trying to read Section 23 in an "overly technical," not "the natural and popular," way—that is, not in the way "the voters would understand the broad phrase."[98] By trying to contract the meaning carried by the text to informational privacy, the State and pro-life activists are imposing a meaning on the text that it cannot bear. And as the U.S. Supreme Court said in *Heller*, "Constitutional

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at 7, Planned Parenthood of Sw. & Cent. Fla. v. State, Nos. SC22-1050 & SC22-1127 (Fla. argued Sept. 8, 2023) [hereinafter Amicus Brief of States].

95. FLA. CONST. art. X, § 12(h) ("Titles and subtitles shall not be used in construction."); *see also* SCALIA & GARNER, *supra* note 61, at 221.

96. District of Columbia v. Heller, 554 U.S. 570, 592 (2008).

97. *Cf.* Stemberger & Phillips, *supra* note 13, at 39 ("The text of the amendment does not mention abortion—an odd omission if the goal were to codify *Roe*." (footnote omitted)); Amicus Brief of States, *supra* note 94, at 4 ("The Florida Constitution does not by its terms protect a right to abortion.").

98. Advisory Op. to the Governor Re: Implementation of Amend. 4, the Voting Restoration Amend., 288 So. 3d 1070, 1081–82 (Fla. 2020).

rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."[99]

Because of its breadth and generality, however, Section 23 requires further analysis. Professor Whittington explains:

> Originalism has . . . emphasized the value of fidelity to the constitutional text as its driving principle. The goal of constitutional interpretation is not to restrict the text to the most manageable, easily applied, or majority-favoring rules. The goal is to faithfully reproduce what the constitutional text requires. Textual rules need not be narrow. The breadth of the rule is determined by the embodied principle, not an a priori commitment to narrowness.
>
> It is entirely possible for constitutional drafters to establish general or abstract rules or to prefer broad standards over narrow rules. Although such broadly worded rules may provide less guidance to later interpreters than narrowly crafted rules, they are not therefore without content. . . .
>
> . . . .
>
> [I]t is at least conceptually possible to recognize that constitutional drafters might similarly empower judges through constitutional provisions that authorize them to exercise substantial discretion. With a primary commitment to constitutional fidelity (rather than, for example, the restraint of judicial discretion), originalists have at least accepted the possibility of textual provisions embodying broad standards. The breadth of any given constitutional commitment and the extent to which it delegates discretionary authority are ultimately empirical questions to be resolved through the examination of the text.[100]

We cannot take the easy way out by placing a narrow construction on Section 23's text. When confronted with a provision that expresses general principles, Whittington says:

> In order to determine the outer boundaries of [the provision's] scope, the originalist premise would lead to a stepwise progression from a narrow to a broader reading. Once a layer of

99. *Heller*, 554 U.S. at 2821.
100. Whittington, *Originalism*, *supra* note 21, at 386–87.

> protection is posited that can no longer be supported by the weight of historical evidence, judicial interpretation and application of that principle must stop, leaving any further protection to political construction.[101]

Among other sources, Whittington cites Robert Bork, who said: "[T]he problem of levels of generality is solved by choosing no level of generality higher than that which interpretation of the words, structure, and history of the Constitution fairly support."[102] So let us turn to the historical evidence.

IV. A HISTORY OF SECTION 23

My review of the historical evidence will proceed in this order: the general pre-1980 legal and historical background; the 1977–78 Constitution Revision Commission's ("CRC's") proposed right of privacy, its legislative history, and the public discussion; the legislature's proposal in 1980, its legislative history, and the public discussion; and relevant post-approval history. I assess the historical evidence in Part V.

Before proceeding further, an explanation of my research. For the proceedings in the 1977–78 Constitution Revision Commission and the legislature in 1980, I have relied on secondary sources recounting the history that themselves rely a great deal on, and in many cases quote from, the primary sources; the typewritten minutes of the meetings of the CRC's Ethics, Privacy, and Elections Committee from the State Library of Florida; that committee's memoranda from the State Archives of Florida; and transcripts of the three public hearings of the CRC where the privacy amendment was discussed from Special Collections and Area Studies at the University of Florida's George A. Smathers Libraries. I have also conducted research on Newspapers.com, ProQuest Historical Newspapers: U.S. Southeast Collection, Digital Collections at the Smathers Libraries,[103] and the Florida Digital Newspaper Library,[104] as well as obtained *Florida Times-*

101. WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 28, at 37 (footnote omitted).

102. Robert Bork, Address at the University of San Diego Law School (Nov. 18, 1985), *in* 23 SAN DIEGO L. REV. 823, 828 (1986).

103. Digital Collections Home Page, UNIV. OF FLA.: DIGITAL COLLECTIONS, https://ufdc.ufl.edu/ (last visited Sept. 9, 2023).

104. Digital Newspaper Library Home Page, UNIV. OF FLA.: FLA. DIGIT. NEWSPAPER LIBR., https://newspapers.uflib.ufl.edu/ (last visited Sept. 9, 2023).

Union (Jacksonville) articles from the Jacksonville Public Library and an appendix the State filed in the Supreme Court in *In re T.W.* After I posted this article to the Social Science Research Network (SSRN), the State and amicus former State Representative John Grant have filed appendices in the Supreme Court case containing various historical materials, including news articles and legislative materials.[105] And Professor Fox cites his own research in his article. While no one has reviewed the full universe of publicly available materials, we will see that the evidence we all have collected disproves the statement that "[i]t was clear to everyone [in 1980] that [the privacy amendment's] purpose was for informational privacy."[106]

A. General Legal and Historical Background

It appears that Florida first adopted laws regulating abortion in 1868:

> Every person who shall administer to any woman pregnant with a quick child any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.[107]

There were two other relevant laws. Immediately preceding the abortion statute, in the same chapter of the digest, the legislature criminalized the willful killing of an unborn quick child: "The wilful killing of an unborn quick child, by any injury to the mother

105. State Defendants' Appendix to Answer Brief on the Merits, Volumes 1 and 2, Planned Parenthood of Sw. & Cent. Fla. v. State, Nos. SC22-1050 & SC22-1127 (Fla. argued Sept. 8, 2023) [hereinafter State Appendix]; Appendix to Amicus Brief of Former Representative John Grant, Planned Parenthood of Sw. & Cent. Fla. v. State, Nos. SC22-1050 & SC22-1127 (Fla. argued Sept. 8, 2023) [hereinafter Grant Appendix].

106. Stemberger, *supra* note 13.

107. DIGEST OF STATUTE LAW OF FLORIDA, ch. XLIII, § 11, at 213 (Allen H. Bush ed. 1872) (reproducing ch. 1637, § 11, Laws of Fla. (1868)), https://www.google.com/books/edition/A_Digest_of_the_Stat-ute_Law_of_Florida_o/WGMSAAAAYAAJ?hl=en&gbpv=1&pg=PA213&printsec=frontcover.

of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree."[108] In another chapter, the legislature criminalized the administering of poison to produce a miscarriage:

> Whoever, with intent to procure miscarriage of any woman, unlawfully administers to her, or advises, or prescribes for her, or causes to be taken by her, any poison, drug, medicine, or other noxious thing, or unlawfully uses any instrument or other means whatever with the like intent, or with like intent aids or assists therein, shall, if the woman does not die in consequence thereof, be punished by imprisonment in the State penitentiary not exceeding seven years, nor less than one year, or by fine not exceeding one thousand dollars.[109]

These statutes remained virtually unchanged up until 1972.[110]

In 1972, in a criminal case, the Florida Supreme Court invalidated the first and third statutes as unconstitutionally vague—a violation of the due-process guarantees of the federal and state constitutions.[111] The defendants also had argued that these statutes were "an unreasonable invasion into a female's fundamental right to privacy, thereby violating substantive due process guaranteed by [the] United States Constitution, Fourteenth Amendment."[112] Based on the vagueness holding, the court declined to address the second argument.[113] As a result of the statutes' invalidation, the court noted, the law in Florida on abortion defaulted to the common law, under which "[i]t was a [common-law] crime . . . to operate upon a pregnant woman for the purpose of procuring an abortion if she were actually quick with child."[114] The court encouraged the legislature, then in session, to enact a compliant statute.[115] The legislature did so. The new law formally repealed the two statutes and banned abortion at any

108. *Id.*, ch. XLIII, § 10, at 213.
109. *Id.*, ch. XLVIII, § 9, at 247.
110. *See* 1971 Fla. Laws 839–40 (amending FLA. STAT. §§ 782.09 & 782.10), http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/1971/LOF1971V1Ch001-377.pdf (elevating the offenses to second=degree felonies); *id.* at 956 (amending FLA. STAT. § 797.01) (elevating the offense to a third-degree felony).
111. State v. Barquet, 262 So. 2d 431 (Fla. 1972).
112. *Id.* at 434.
113. *Id.* at 437.
114. *Id.* (citations omitted).
115. *Id.* at 438.

time during the pregnancy unless, as certified in writing by a physician, there was a threat to the life or health of the mother, there was a fetal abnormality, or the pregnancy was the result of rape or incest.[116] The law also required the woman's written request and spousal or parental consent, unless there was an emergency.[117] Moreover, the law also required the abortion to take place at an approved facility by a physician.[118]

Of course, the U.S. Supreme Court decided *Roe v. Wade* the next year.[119] In *Roe*, the Court acknowledged that the federal "Constitution does not explicitly mention any right of privacy."[120] However, citing decisions like *Griswold v. Connecticut*[121]—where the Court found an implicit right to privacy in the federal Constitution and invalidated a state ban on the use of contraceptives by married couples—the Court said it had "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[122] The *Roe* Court continued:

> These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage; procreation; contraception; family relationships; and child rearing and education.
>
> 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, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[123]

One of the cases the Court cited in this passage was *Eisenstadt v. Baird*,[124] where, a year before *Roe*, the Court applied *Griswold* to invalidate a contraceptive ban for unmarried couples. As Professor

116. *See* 1972 Fla. Laws 608–11, http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/1972/LOF1972V1Ch001-409.pdf.
117. *See id*. at 609.
118. *See id*. at 608.
119. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
120. *Id.* at 152.
121. Griswold v. Connecticut, 381 U.S. 479 (1965).
122. *Roe*, 410 U.S. at 152.
123. *Id*. at 152–53 (citations omitted).
124. Eisenstadt v. Baird, 405 U.S. 438 (1972).

Fox points out, it is significant that, in *Eisenstadt*, the Court used the phrase "governmental intrusion" in the decisional-privacy context: "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."[125] After finding that the right to privacy included the right to abortion, the *Roe* Court recognized that the right was not absolute, however.[126] Therefore, the Court fashioned the trimester framework under which the state could place no restrictions on the right during the first trimester; it could regulate abortion in the second trimester in ways reasonably related to maternal health; and following fetal viability, it could regulate or even ban abortion unless necessary to preserve the life or health of the mother.[127]

The Court decided *Roe v. Wade* on January 22, 1973. Newspapers in Florida immediately communicated to the general public that the Court found the right to abortion in the right of privacy. Take the front page of the *Sentinel Star* (Orlando) that day. The Associated Press ("AP") article reporting *Roe v. Wade* said: "It was based predominantly on what Blackmun called a right of privacy. He said the right 'is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.'"[128] The AP article also ran in the *Bradenton Herald*, *Pensacola News*, *Tallahassee Democrat*, and *Tampa Times*.

As the majority in *Dobbs* noted, "*Roe* 'inflamed' a national issue that has remained bitterly divisive for the past half century."[129] The 1970s saw the rise of a national pro-life movement that grew in prominence and became politically influential as the

125. *Id*. at 453 (emphasis in original) (citations omitted); *see* Fox, *supra* note 16, at 441.

126. *Roe*, 410 U.S. at 153.

127. *Id*. at 164–65.

128. *Court Allows Operation In First 6 Months*, SENTINEL STAR (Orlando) (AP), Jan. 22, 1973, at 1-A, https://www.newspapers.com/image/303758376/; *see also Abortion Laws Limited*, FT. LAUDERDALE NEWS, Jan. 22, 1973, at 1A, https://www.newspapers.com/image/230666658 ("Only in about the last three months, when the unborn child is developed enough to live outside the mother, may the state interfere with this 'right of privacy,' said Justice Harry A. Blackmun.").

129. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 995 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part)).

decade wore on.[130] Professor Mary Ziegler chronicles the movement's efforts in her books *After* Roe*: The Lost History of the Abortion Debate* and *Abortion and the Law in America:* Roe v. Wade *to the Present*. After *Roe* was decided, "Pro-lifers prioritized a constitutional amendment and emphasized fetal rights. . . . But later in the decade, as the hope for a constitutional amendment gradually faded, the antiabortion movement focused more than ever before on limiting access," primarily by enacting funding bans and family-involvement requirements.[131] In this, the pro-life movement was successful in the state legislatures, and the U.S. Supreme Court upheld some of these restrictions (more on this below).[132] In 1976, Congress passed the Hyde Amendment, which barred the use of Medicaid funds for almost all abortions, a restriction the Court also upheld.[133] Even so, it is worth noting that public opinion polling in the 1970s saw consistently high support for abortion access.[134]

The pro-life movement's efforts, at the national and state levels, received press coverage in Florida papers. An Associated Press article that appeared in the *Miami Herald* on June 17, 1977, was headlined *Anti-Abortion Drive Picks Up Steam But Still Has Very Long Way to Go*.[135] The article described an attempt to have state legislatures across the country pass resolutions to call a constitutional convention that would propose a "Right to Life"

130. Deepa Shivaram, *The Movement Against Abortion Rights Is Nearing Its Apex. But It Began Way Before* Roe, NPR (May 4, 2022 5:00 AM), https://www.npr.org/2022/05/04/1096154028/the-movement-against-abortion-rights-is-nearing-its-apex-but-it-began-way-before; Randall Balmer, *The Real Origins of the Religious Right*, POLITICO MAG. (May 27, 2014), https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133/; Alex Ward, *The History of the Pro-Life Movement*, LIGHT, Summer 2021, at 40 (Ethics & Religious Liberty Comm'n of the S. Baptist Convention), https://erlc.com/wp-content/uploads/2021/06/ERL1019_LightHumanDignityProLife_Layout_063021_115dpi.pdf; Robert N. Karrer, *The Pro-Life Movement and Its First Years under "Roe"*, 122 No. 4 AM. CATHOLIC STUDIES 47 (2011).

131. MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT 23, 56–57 (2020); MARY ZIEGLER, AFTER *ROE:* THE LOST HISTORY OF THE ABORTION DEBATE 129 (2015) [hereinafter AFTER *ROE*].

132. ZIEGLER, AFTER *ROE*, *supra* note 131, at 129, 132.

133. *Id.* at 132.

134. *See generally* KARLYN BOWMAN & SAMANTHA GOLDSTEIN, ATTITUDES ABOUT ABORTION: A COMPREHENSIVE REVIEW OF POLLS FROM THE 1970S TO TODAY (Nov. 2021), https://www.aei.org/wp-content/uploads/2021/10/Attitudes-About-Abortion.pdf?x91208. See in particular the Gallup polling from April 1975 to July 1980 and the NORC polling from 1972 to 1980. *Id.* at 10, 21–23.

135. *Anti-Abortion Drive Picks Up Steam But Still Has Very Long Way to Go*, MIA. HERALD (AP), June 17, 1977, at 3-B, https://www.newspapers.com/image/626940367.

constitutional amendment banning abortions.[136] Articles also described attempts in Florida in the late 1970s to pass such a resolution through the legislature, though they were unsuccessful.[137] As Florida State Representative Mike Beltran recently wrote, between *Roe* and 1980, pro-life activists "were actively attempting to reinstate protections for the unborn."[138]

Regarding the political landscape, pro-life activists had allied with and become part of the right by 1980 as a result of political polarization of the abortion issue.[139] Abortion was a visible issue in the 1980 presidential election between Democrat Jimmy Carter, an evangelical Christian from the South, and pro-life Republican Ronald Reagan, who when governor of California in the late 1960s signed a law liberalizing abortion access[140] (even if the impact of the issue on the election is unclear[141]). While I do not believe it is wholly accurate to state, as Stemberger and Phillips do, that "in 1980, voters in the presidential election did not focus significantly on abortion," that statement still concedes that it was an issue.[142]

After *Roe v. Wade*, the U.S. Supreme Court issued several constitutional decisions involving abortion that, in Ziegler's words, signaled "the retreat of the Supreme Court from its protection of abortion rights."[143] In *Planned Parenthood v. Danforth* (1976), the Court struck down requirements for spousal and parental consent but upheld the requirement that the woman sign a consent form.[144]

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136. *Id.*

137. Mary Ann Lindley, *Panels Call for Abortion Convention*, PALM BEACH POST, Apr. 12, 1978, at A10, https://www.newspapers.com/image/134547063; *Call for Abortion Convention Rejected*, MIA. NEWS, May 25, 1978, at 6A, https://www.newspapers.com/image/302549244; Larry Lipman, *Anti-Abortion Win Scored in Committee Vote*, ORLANDO SENTINEL, Apr. 17, 1979, at 3-C, https://www.newspapers.com/image/225531320; Gregory Miller, *Anti-Abortion Amendment Move Killed a Second Time*, FT. MYERS NEWS-PRESS, May 2, 1979, at 10B, https://www.newspapers.com/image/214033826; *see also* Jeff Newell, *Anti-Abortion Resolution Offered Fort Walton Council*, PENSACOLA J., Feb. 14, 1980, at 1C, 2C, https://www.newspapers.com/image/266976719/. The State included some of the legislative materials in its appendix. State Appendix, *supra* note 105, at 229–33, 235, 239.

138. Beltran, *supra* note 13.

139. ZIEGLER, AFTER *ROE*, *supra* note 131, at 201–05.

140. *See, e.g.*, Balmer, *supra* note 130; T.R. Reid, *Reagan Is Favored by Anti-Abortionists*, WASH. POST (Apr. 12, 1980), https://www.washingtonpost.com/archive/politics/1980/04/12/reagan-is-favored-by-anti-abortionists/f89c94bf-4e00-4674-b91c-c1f10a6aea15/.

141. Donald Granberg & James Burlison, *The Abortion Issue in the 1980 Elections*, 15 FAM. PLAN. PERSPS. 231, 231–33 (1983).

142. Stemberger & Phillips, *supra* note 13, at 11–12.

143. ZIEGLER, AFTER *ROE*, *supra* note 131, at 152; *see also id.* at 12; ZIEGLER, ABORTION AND THE LAW IN AMERICA, *supra* note 131, at 45–46, 51, 60–61; Fox, *supra* note 16, at 416–17.

144. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 66–74 (1976).

Next, in *Maher v. Roe* (1977), the Court held that the federal Constitution did not require a state participating in Medicaid to pay for nontherapeutic abortions, despite the fact that Medicaid pays for childbirth.[145] In *Poelker v. Doe*, the Court followed *Maher* to uphold a city's policy prohibiting the performance of nontherapeutic abortions in city-owned hospitals.[146] In *Bellotti v. Baird* (1979), the Court invalidated a Massachusetts law that required a minor to obtain her parents' consent for an abortion and did not allow an alternative procedure (like judicial bypass) to obtain such consent.[147] Finally, in *Harris v. McRae* (1980), the Court upheld the federal Hyde Amendment.[148] Fox writes that "*Harris* [which was decided on June 30] received widespread coverage across the state, and many of the articles mentioned that abortion was protected under the right to privacy."[149]

Florida's abortion laws evolved during the 1970s and in 1980. There was the new law described above in 1972. In 1973, a three-judge federal district court applied *Roe v. Wade* to invalidate that statute's spousal- and parental-consent requirements.[150] The district court also invalidated the approved-facility requirement (which the State had not defended) because it was not limited to the second and third trimesters.[151] The federal appellate court affirmed the invalidation of the consent requirements and, citing *Danforth*, the U.S. Supreme Court in 1976 affirmed.[152] In 1977, the Florida Supreme Court also invalidated the approved-facility requirement but upheld the physician requirement,[153] which the U.S. Supreme Court had done in 1975 when faced with a Connecticut statute.[154] By the time of the Florida Supreme Court's decision, the legislature had enacted a law, taking effect in October 1976, that banned abortions during only the third trimester unless it was necessary to save the life or health of the mother, while also reenacting the approved-facility requirement; there were no

145. Maher v. Roe, 432 U.S. 464, 469–74 (1977).
146. Poelker v. Doe, 432 U.S. 519, 519–21 (1977).
147. Bellotti v. Baird, 443 U.S. 622, 643 (1979).
148. Harris v. McRae, 448 U.S. 297, 317–18 (1980).
149. Fox, *supra* note 16, at 428.
150. Coe v. Gerstein, 376 F. Supp. 695, 697 (S.D. Fla. 1973), *aff'd in part sub nom.* Poe v. Gerstein, 417 U.S. 281 (1974).
151. *Id.* at 696.
152. Poe v. Gerstein, 517 F.2d 787, 794 (5th Cir. 1975), *aff'd sub nom.* Gerstein v. Coe, 428 U.S. 901 (1976).
153. Wright v. State, 351 So. 2d 708, 711 (Fla. 1977).
154. State v. Menillo, 368 A.2d 136, 138, 140 (Conn. 1976).

spousal- or parental-consent requirements.[155] In 1977, the legislature enacted a law to go into effect July 1, 1979, the Medical Malpractice Act, that would repeal Florida Statutes Chapter 458, where the abortion laws were housed.[156] In 1978, the legislature enacted a law "relating to abortion clinics," creating Florida Statutes Chapter 390, imposing significant restrictions on their operation.[157] Chapter 390 gave the Department of Health and Rehabilitative Services the power to promulgate regulations while at the same time stating: "The rules shall not impose a legally significant burden on the woman's freedom to decide whether to terminate her pregnancy."[158] In 1979, a federal district court invalidated the department's rules allowing abortion clinics to perform only first-trimester abortions (hospitals also performed abortions, including abortions later in the first trimester).[159] However, the court upheld the statute because it did not "attempt to regulate first trimester pregnancy terminations with the exception of requiring facilities performing such procedures to be licensed."[160] In 1979, in response to the repeal decreed in 1977, the

155. 1976 Fla. Laws 530–31 (codified at FLA. STAT. § 458.225 (Supp. 1976)), http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/1976/1976V1Ch001-292.pdf.

156. 1977 Fla. Laws 1847, http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/1977/1977V1Pt2.pdf.

157. 1978 Fla. Laws 1054–58 (codified at FLA. STAT. ch. 390 (Supp. 1978)), http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/1978/1978V1Pt2.pdf.

158. Fla. Stat. § 390.012 (Supp. 1978), http://library.law.fsu.edu/Digital-Collections/FLStatutes/docs/1978/1978-Chap-390.pdf.

159. *See* Mike O'Hara, *Hospital OKs Abortion Policy*, FLA. TODAY, Sept. 19, 1974, at 2B, https://www.newspapers.com/image/124946443 ("According to the new regulations, any woman may have an abortion performed at [Cape Canaveral Hospital], for whatever reason, within the first three months of her pregnancy."); Susan Hemmingway, TAMPA TIMES, Feb. 25, 1978, at 4-D, https://www.newspapers.com/image/334599036 ("Not many local doctors are willing to perform late abortion, and only two hospitals—Tampa General and Women's Hospital—provide facilities for second trimester abortions. Other hospitals either perform no abortions or, as in the case of University Community Hospital, perform only early abortions."); *Abortion Unavailable to Many, Study Says*, MIA. HERALD (AP), Feb. 14, 1980, at 23-A, https://www.newspapers.com/image/628269100 (Nationally, "[t]wo out of three abortions are performed in clinics established for that purpose. Hospitals perform 30 percent of all abortions."); *see also* Johanna Schoen, *Living Through Some Giant Change: The Establishment of Abortion Services*, 103 AM. J. PUB. HEALTH 416, 418 (Mar. 2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3673524/ ("The proliferation of outpatient clinics which provided abortion services in a nonhospital location shaped the setting of abortion care for decades to come. If in 1973, 81% of abortion providers were tied to a hospital, by 1979 that number had dropped to 56%. In urban areas, almost three quarters of all women received their abortions in free-standing clinics." (footnote omitted)).

160. Fla. Women's Med. Clinic v. Smith (Fla. Women's I), 478 F. Supp. 233, 236 (S.D. Fla. 1979), *appeal dismissed*, 620 F.2d 297 (5th Cir. 1980) (table). It is very likely, as the district court insinuated, that the department exceeded the power the legislature delegated to it.

legislature reenacted the abortion statutes.[161] The 1979 law did not impose special restrictions on second-trimester abortions, even though *Roe v. Wade* authorized it.[162] Instead, it banned abortion in the third trimester, with two exceptions.[163] In addition to requiring the woman's written consent, the statute required parental consent (with a judicial-bypass alternative) and spousal notice.[164] The statute was added to Chapter 390. In 1980, the legislature enacted a law adding a subsection regarding the disposal of fetal remains but changing nothing else.[165] Also in 1980, the legislature revised the part of abortion statutes governing the regulation of abortion clinics, "grant[ing] even more sweeping authority to HRS than its predecessor,"[166] but left intact the "significant burden" language quoted above.[167] In the 1980 supplement to the Florida Statutes (1979), Chapter 390 still contained the subsection banning abortion only in the third trimester.[168]

So, the State's statement that "[t]he 1980 Legislature also had a recent history of *restricting* abortion" is not completely accurate.[169] While the legislature that approved placing Section 23 on the ballot had moved to more heavily regulate abortion services, it did not disturb the law banning only third-trimester abortions—that is the important part. Former State Representative John Grant's recounting of the history of Florida abortion laws in his amicus brief in *Planned Parenthood of Southwest and Central Florida v. State* does not appear to be accurate.[170] Grant also draws the wrong lesson from the 1980 legislature's actions:

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161. 1979 Fla. Laws 1613 (codified at Fla. Stat. §§ 390.001, 390.002 (1979)), http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/1979/1979V1Pt2Ch215-415.pdf.

162. 1979 Fla. Laws 1613–15, http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/1979/1979V1Pt2Ch215-415.pdf.

163. *Id.* at 1614.

164. *Id.* at 1614.

165. 1980 Fla. Laws 669, http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/1980/1980V1Pt1.pdf.

166. Fla. Women's Med. Clinic v. Smith (Fla Women's II), 536 F. Supp. 1048, 1051–52 (S.D. Fla. 1982).

167. 1980 Fla Laws 1734, http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/1980/1980V1Pt2.pdf. A federal district court held most of the statutes governing regulation of clinics, and the regulations promulgated thereunder, unconstitutional in 1982. *See Fla. Women's II*, 536 F. Supp. at 1057–58.

168. Fla. Stat. § 390.001 (supp. 1980), http://library.law.fsu.edu/Digital-Collections/FLStatutes/docs/1980/1980-Chap-390.pdf.

169. State Answer Brief, *supra* note 10, at 45 (emphasis added).

170. Amicus Brief of Former Representative John Grant at 25–28 nn.6–8, Planned Parenthood of Sw. & Cent. Fla. v. State, Nos. SC22-1050 & SC22-1127 (Fla. argued Sept. 8, 2023) [hereinafter Grant Brief].

> The most credible explanation for the [1980] Legislature's overwhelming passage of the Joint Resolution [to place Section 23 on the ballot] in light of the overwhelming vote in favor of the abortion clinic regulations passed during the same session is, again, that the language of the Privacy Amendment was understood as related, in the mind of the public and their elected representatives, to the issue of abortion.[171]

Aside from this being bald speculation, it would not have been inconsistent for the 1980 legislature to pass a law regulating abortion clinics while also approving for placement on the ballot a privacy amendment that would protect the right to abortion. First, the abortion-clinics law was not so significant a restriction on abortion that it seriously clashed with the right to an abortion—it did not ban abortion, for instance—even if a federal district court later struck the law and related regulations down as violating the right. Second, there is nothing surprising in a legislature passing some abortion restrictions but letting the general matter ultimately go to the voters for their judgment.

As Fox observes, the author of the *Griswold* opinion, William Douglas, died in January 1980, leading to press coverage in Florida of his legacy. Per Fox, "several of the news stories mentioned the abortion rights of *Roe v. Wade* as an outgrowth of Douglas's opinion in *Griswold*."[172] One article Fox cites linked informational privacy to the Court's decisional-privacy cases:

> Douglas spoke for the court in a landmark decision on the right of privacy in 1965, holding that the state could not regulate married couples' use of contraceptives.
>
> Later rulings in which he joined the majority expanded the privacy doctrine to cover other matters, including a woman's right to an abortion.
>
> Another time, Douglas warned, "We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from government."[173]

171. *Id.* at 27–28.

172. Fox, *supra* note 16, at 427–28.

173. *Court Liberal, Douglas, Dies*, TALLAHASSEE DEMOCRAT, Jan. 20, 1980, at 1A, 8A, https://www.newspapers.com/image/245929598.

Fox also points out that, in January 1980, the Court granted certiorari in *H.L. v. Matheson*,[174] which concerned required parental notification before a minor obtained an abortion, and that case was argued in October—just before the vote on Section 23. This case drew national attention, and press reports on the case in Florida connected abortion with the right to privacy.[175]

Florida newspapers in 1980 are filled with articles demonstrating the widespread understanding that *Roe v. Wade* was grounded on the right to privacy and generally framing abortion as part of that constitutional right.[176] Both sides understood this concept. In a *Tampa Tribune* article that ran September 20, 1980—shortly before the election—a pro-life activist was reported as saying: "The abortion law is based on the woman's right to privacy. It says, 'a woman's right to privacy supersedes the fetus's life.' And then, when it becomes legal, a lot of people feel it must be all right if it's law."[177] Closer to the election, on October 4,

174. H.L. v. Matheson, 450 U.S. 398, 405 (1981).

175. Fox, *supra* note 16, at 429.

176. *See, e.g.*, Editorial, *Abortions for the Poor*, STUART NEWS, Feb. 24, 1980, at A4, https://www.newspapers.com/image/885484271 ("Six years ago the high court ruled that government could not intrude in a woman's decision to end a pregnancy in its early stages. To do so would violate her constitutional rights to freedom and privacy."); *Federal Judge Kills Louisiana Abortion Statute*, ORLANDO SENTINEL, Mar. 4, 1980, at 4-A, https://www.newspapers.com/image/227305637 ("A federal judge on Monday ruled unconstitutional Louisiana's abortion law, saying it violates the woman's right to privacy. . . ."); *The Extraordinary Burden Borne by 9 Ordinary Men*, ST. PETERSBURG TIMES, Apr. 13, 1980, at 1D, https://www.newspapers.com/image/319404060 ("If the decisions of the past 10 years were to be rated in terms of public attention, for example, four would generally be put near the top: The abortion cases, holding that state laws restricting abortions during the early months of pregnancy were an unconstitutional invasion of a woman's privacy."); Elizabeth Olson, *Medicine Pushes the Courts for an Answer*, NEWS TRIB. (Ft. Pierce), June 12, 1980, at A10, https://www.newspapers.com/image/778725430 ("The three state supreme courts which have ruled on the euthanasia or 'death with dignity' question have based their opinions on the Constitution's right to privacy—the same right of a woman to seek an abortion."); *High Court Rules On Abortions*, PENSACOLA NEWS (AP), June 30, 1980, at 1A, https://www.newspapers.com/image/266408684 ("Today's decision had nothing to do with the legality of abortion itself. The Supreme Court legalized abortion in its landmark 1973 decision. In it, the court said a woman's right to privacy makes her decision to have an abortion a matter only for her and her doctor during the first three months of her pregnancy."); Richard Carelli, *High Court Upholds Medicaid Restrictions*, MIA. HERALD (AP), July 1, 1980, at 1A, https://www.newspapers.com/image/628709889 (running the same AP report).

177. Carol Jeffares, *Her Love Of Life Makes Her Stand, Fight For It*, TAMPA TRIB., Sept. 20, 1980, at 5, https://www.newspapers.com/image/335465400; *see also* George Will, *GOP Sees Chance to Mold Values*, TALLAHASSEE DEMOCRAT, July 17, 1980, at 4A, https://www.newspapers.com/image/246744078 (In a syndicated column that also ran in *Florida Today*, *Ft. Lauderdale News*, *News-Press* (Ft. Myers), *Sentinel Star* (Orlando), *Palm*

1980, the *Tampa Tribune* ran an Associated Press article that quoted the president of the Planned Parenthood Federation of America: "In recent years we have faced an increasingly vocal and at times violent minority which seeks to deny all of us our fundamental rights of privacy and individual decision-making."[178] Fox highlights an article that appeared on November 15, just after the election, which reported that the pro-life Charles Canady, now a Justice on the Supreme Court of Florida, "said the decision [*Roe v. Wade*] was based on a doctrine of an individual's right to privacy."[179] Fox also highlights an article that appeared in the *Florida Catholic* reporting a speech to the Catholic Health Assembly in Detroit in which law professor John Noonan said that "right to privacy" was a "code word[]" to mask the immorality of abortion.[180]

The above articles and additional ones cited in the footnotes establish why it is false to say, as former representative Grant does, that "era newspapers reported on privacy and abortion as

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Beach Post, *Pensacola News*, *St. Lucie News Tribune*, *St. Petersburg Times*, and *Stuart News*), Will wrote: "[T]he 1980 Republican platform did not put abortion on the nation's agenda of questions that shall be debated until a political consensus has been established. The Supreme Court did that, in 1973, by forging from a 'privacy right' a scythe to mow down state laws that expressed various community judgments about abortion."); L. Eggleton, Letter to the Editor, *Positive Step for Life*, POST (West Palm Beach), July 25, 1980, at A16, https://www.newspapers.com/image/134957931 (discussing abortion and the U.S. Supreme Court's Hyde Amendment case: "All because a woman decided she had the 'right to privacy' to do as she so desired with her own body. She fails to think of her baby's body. I challenge that right."); Hugh Pope, Letter to the Editor, TAMPA TRIB., Nov. 2, 1980, at 2-C, https://www.newspapers.com/image/335165254 ("There cannot be a more compelling reason for intelligent and patriotic Americans to vote Republican than to save lives! Stripped of all its sugarcoated slogans—'freedom of choice', 'woman's right to privacy', etc., etc., abortion is legalized murder.").

178. *Planned Parenthood Waving The Flag*, TAMPA TRIB. (AP), Oct. 4, 1980, at 7-D, https://www.newspapers.com/image/335461165 (the AP story also ran in the *Bradenton Herald* and the *Sentinel Star* (Orlando)); *see also* Joyce Tarnow, Coordinator, Florida Abortion Rights Action League, Letter to the Editor, *Don't Re-elect Public Officials Who are Opposed to Legal Abortion*, Stuart News, Jan. 26, 1980, at A4, https://www.newspapers.com/image/885480257 ("The U.S. Constitution guarantees each of us the right of privacy, the right of religious freedom and the right to pursue happiness however we define it. Compulsory pregnancy is a denial of each of these rights."); M.M. Mandell, Chairman, Am. Civil Liberties Union of Fla., Letter to the Editor, *Our Crusade Too Narrow, Says ACLU*, BRADENTON HERALD, Sept. 29, 1980, at A-4, https://www.newspapers.com/image/718365914 ("The need for the right of privacy, such as government interference with the right of women who want to terminate their pregnancies.").

179. Fox, *supra* note 16, at 433–34 (quoting Shirley Town, *Anti-Abortionist Welcomes Changes In U.S. Leadership*, TAMPA TRIB., Nov. 15, 1980, at 2, https://www.newspapers.com/image/335446185).

180. *Id.* at 432 (quoting *'Abortion Party' Rules U.S., Scholar Charges*, FLA. CATH., June 27, 1980, at 6).

separate issues."[181] The one example Grant offers is weird: page 3D of the May 15, 1980, *Tallahassee Democrat*, where one article is headlined "State licensing of abortion clinics approved" and another "Privacy proposal to be on the ballot." This is creative, but it does not establish that "the public discussed and understood the Privacy Amendment as addressing a topic completely unrelated to the abortion regulation debate of the day," or more generally abortion.[182]

And it cannot be disputed that people indeed viewed abortion as a private matter. Classified ads for abortions in Florida newspapers in 1980 assured patients of confidentiality and privacy.[183] The State's assertion that the judicial equation of privacy with decisional autonomy, including abortion, "did not filter into the common lexicon" is obvious nonsense.[184]

By early 1977, the U.S. Supreme Court made it clear what the federal right of privacy entailed. In February of that year, the Court explained in *Whalen v. Roe*, a non-abortion case: "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. [1] One is the individual interest in avoiding disclosure of personal matters, *and* [2] another is the interest in independence in making certain kinds of important decisions."[185] In the footnote to the first part of the sentence, the Court cited Justice Brandeis's dissent in *Olmstead v. United States* and said that the Justice "characterized 'the right to be let alone' as 'the right most valued by civilized men'. . . ."[186] In the footnote to the second part, the Court cited cases like *Roe*, *Loving v. Virginia*, and *Griswold*, then cited another of its decisions where "the Court characterized these decisions as dealing with 'matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. . . .'"[187]

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181. Grant Brief, *supra* note 170, at 28–31.

182. *Id.* at 29–30.

183. *See, e.g.*, TAMPA TIMES, Jan. 4, 1980, at 9-C, https://www.newspapers.com/image/327255692; FLA. TODAY (Cocoa), Apr. 4, 1980, at 4D, 14, https://www.newspapers.com/image/125207460; TAMPA TRIB., May 30, 1980, at 8-C, 5, https://www.newspapers.com/image/335121449.

184. State Answer Brief, *supra* note 10, at 11.

185. Whalen v. Roe, 429 U.S. 589, 598–600 (1977) (emphasis added) (footnotes omitted).

186. *Id.* at 599 n.25 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347 (1967)).

187. *Id.* at 600 n.26 (quoting Paul v. Davis, 425 U.S. 693, 713 (1976)).

It is important to consider the context in which pro-lifers viewed abortion. In 1980, "[a] number of Catholic and evangelical Protestant antiabortion groups took up similar arguments [to those expressed in a January 1980 conference] against secular humanism, linking legal abortion to rising divorce rates, the emergence of a gay-rights campaign, and the visibility of the women's movement," as well as extramarital sex.[188] In this absolutist view, abortion was part of a broader effort to destroy the traditional family.[189]

Other context that is relevant is that the Florida Supreme Court refused to find in the Florida Constitution a general right to privacy in 1977 (private possession of marijuana in the home) and in 1980 (the papers of an outside consultant hired to conduct a nationwide search for a position at an electric utility).[190]

At the same time as the very public developments concerning the right to privacy, decisional autonomy, and abortion, there were of course events and developments like Watergate, wiretapping, electronic banking, and the beginnings of the personal computer and the internet.[191] Stemberger and Phillips are absolutely right that those things implicated privacy. But as we have seen above, it is a stretch to conclude, as they do, that "privacy rights relating specifically to personal information [were] the overarching legal and political theme of the decade of the 1970s and right up to the general election in 1980."[192] Far from it.

B. The 1977–78 Constitution Revision Commission's Proposal

A more specific part of the background informing the public's understanding of Section 23 is the proposal (and rejection) of a right of privacy in the 1978 election. While all of this concerns a legally distinct proposal, since it was not the one before the voters

188. ZIEGLER, AFTER *ROE*, *supra* note 131, at 82.

189. *Id.* at 82, 87, 181.

190. Cope, *To Be Let Alone*, *supra* note 51, at 696 (citing Laird v. State, 342 So. 2d 962 (Fla. 1977), and Shevin v. Byron, Harless, Schaffer, Reid & Assocs., 379 So. 2d 633 (Fla. 1980)).

191. Stemberger & Phillips, *supra* note 13, at 13–22. However, the authors concede that "[t]he widespread commercial and consumer development of the Internet did not flourish until the decades of the 1980s and 1990s when personal computers and LAN workstations were available," so it is not clear why the internet was on the ordinary 1980 person's mind. *Id.* at 19.

192. *Id.* at 12.

in 1980, it, and the public debate in particular, is still relevant as additional background.

1. Legislative History

Florida has an entity called the Constitution Revision Commission, an independent body that meets every twenty years to consider and propose constitutional amendments to the voters of the state. This body met in 1977 and 1978 to propose amendments for the 1978 election. Before the CRC got to its work, it held several meetings throughout the state at which the public expressed a strong desire for privacy rights.[193] The CRC then broke into committees focused on specific subjects. I will not fully recount the CRC's proceedings or the deliberations of its Ethics, Privacy, and Elections Committee that led to the proposed privacy right. They have been recounted in detail in other sources, and I want to focus on a couple events relevant to this Article.[194]

In general, it is true that the public statements of the commissioners are almost entirely concerned with informational privacy. For example, at the commission's organizational session on July 6, 1977, before the committees took up their work, Chief Justice Ben Overton, a CRC commissioner, said:

> The fact that this is an age where citizens are more aware of their legal rights is partly because our government now touches or controls many more citizens than ever before. Because government in its operation does affect more citizens, the task of this Commission to review our basic constitutional document

193. Susan DeFord, *Constitution Panel in Fort Myers Today*, FT. MYERS NEWS-PRESS, Aug. 30, 1977, at 1A, https://www.newspapers.com/image/213514148; *Committee OKs Privacy Rights*, FT. LAUDERDALE NEWS (AP), Oct. 15, 1977, at 7B, https://www.newspapers.com/image/232864728.

194. Cope, *To Be Let Alone*, *supra* note 51, at 721–40; Patricia A. Dore, *Of Rights Lost and Gained*, 6 FLA. ST. U. L. REV. 609, 650–57 (1978); Overton & Giddings, *supra* note 51, at 34–35; Fox, *supra* note 16, at 12–15; Stemberger & Phillips, *supra* note 13, at 22–24. Of the Dore article, Stemberger and Phillips write:

> In 1978, Dore wrote a detailed law review article cataloguing the history of the debate and discussion over the eight amendments proposed by the 1978 Constitutional Revision Commission. The extensive explanation of the Privacy Amendment's development never mentions abortion—the entire context is the right to informational privacy . . . .

Stemberger & Phillips, *supra* note 13, at 23–24. This is not fair; Dore expressly limited her discussion of the privacy right to other subjects. *See* Dore, *supra*, at 650.

> is even more critical to ensure constitutional protection of individual rights.
>
> Another factor that should be recognized is that changes in our way of life occur very rapidly. Thomas Jefferson said this country was "advancing rapidly to destinies beyond the reach of mortal eye." That quotation is very true in this day and time. Our technological advancements continue to surpass our imagination, but our political and economic problems also are increased with this advancement.
>
> . . . .
>
> And who, ten years ago, really understood that personal and financial data on a substantial part of our population could be collected by government or business and held for easy distribution by computer operated information systems? There is a public concern about how personal information concerning an individual citizen is used, whether it be collected by government or by business. The subject of individual privacy and privacy law is in a developing stage. [A number of] states have adopted some form of privacy legislation, and many appellate courts in this nation now have substantial right of privacy issues before them for consideration. It is a new problem that should be addressed.[195]

While the above and other discussions recounted in the sources show a predominant concern with informational privacy,[196] that is not to say that commissioners understood the proposed privacy right to implicate only the right to that privacy. In the course of introducing the proposal to the full CRC, Jon Moyle, chair of the Ethics, Privacy, and Elections Committee, said:

> In 1890 Louis Brandeis wrote a law review article, "The Right to Privacy," urging recognition of a cause of action for invasion of privacy. Today the invasion of privacy is a tort that is generally recognized all over the country. In 1965 the US Supreme Court held that the Federal constitution protected zones of privacy, specifically a person's decision about marriage

195. The quotation is a composite of the quotes in Cope, *To Be Let Alone*, *supra* note 51, at 721–22, and Overton & Giddings, *supra* note 51, at 35–36 n.66.

196. *See* Minutes, Ethics, Privacy, and Elections Committee, Oct. 5–Nov. 21, 1977 (on file with author). The memoranda to the committee that I have does not contain substantive comments on the privacy right.

> and procreation. Thus, the Court invalidated a Connecticut law prohibiting the use of contraceptives to married persons.[197]

The last two sentences were, of course, a reference to *Griswold*, a substantive-due-process decisional-privacy case.[198] The above passage shows that as conceived the proposal included both informational and decisional privacy. The State barely acknowledges these sentences, saying only: "To be sure, some framers made a few references to decisional autonomy throughout the three-year ratification process. . . . But those remarks were almost invariably about what federal and other state courts had held, not what Section 23 would do."[199] The State's use of "to be sure" is a dead giveaway that the State acknowledges the sentences directly contradict its argument. The State's dismissal of the sentences is not persuasive. The sentences were uttered by the chair of the CRC committee responsible for privacy when introducing the proposed amendment to the CRC for its consideration. As for Stemberger and Phillips, they do not cite the sentences. Instead, they state that "also missing [from the CRC records] are the words '*personal autonomy*,' 'termination of pregnancy,' '*substantive due process*,' 'Roe v. Wade,' or any hint of a right to abortion."[200] But obviously, Moyle alluded to the two italicized terms.

The CRC finalized the language of the proposal in March 1980 and placed it on the ballot in a package of other proposals called Revision No. 1: "Right of Privacy.—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein."[201] There were eight other CRC revision packages placed on the ballot.[202]

2. Public Discussion

There was a robust public discussion of the proposed right to privacy both during the CRC's proceedings and after the CRC

197. Transcript of Hearing Before the Fla. Const. Revision Comm'n at 3273 (Jan. 9, 1978)) (on file with author and in State Appendix, *supra* note 105, at 43).

198. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

199. State Answer Brief, *supra* note 10, at 36–37 (footnote omitted) (citing State Appendix, *supra* note 105, at 43).

200. Stemberger & Phillips, *supra* note 13, at 24 n.177 (emphasis added).

201. Cope, *To Be Let Alone*, *supra* note 51, at 740.

202. *Florida 1978 Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/Florida_1978_ballot_measures (last visited Sept. 9, 2023).

voted to place the proposal on the ballot. While many did focus on informational privacy,[203] what was communicated to the public was that this was a broad right that touched on far more than that. In other words, once the proposal entered the public domain, it took on a life of its own. Three features of the public discussion are relevant to this Article.

Relationship to the Federal Privacy Right: One feature of the public discussion was the relationship of the proposed state privacy right to the federal right. Both supporters and opponents recognized that the proposal would either meet or exceed the federal Constitution in its protections.

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203. *See, e.g.*, *Constitution Panel Approves Government Snooping Restrictions*, BRADENTON HERALD (AP), Jan. 10, 1978, at B-3, https://www.newspapers.com/image/717936047 ("The state Constitution Revision Commission has approved a proposal it says would give Floridians the right to be free from government or business snooping."); Bob Rothman, *Florida Assured Chance To Vote On Sex Bias Amendment*, TAMPA TRIB., Jan. 10, 1978, at 1, 4, https://www.newspapers.com/image/335367441; John Van Gieson, *Rebuilding Florida's Foundation*, MIA. HERALD, Feb. 19, 1978, at CW1, https://www.newspapers.com/image/627449756 (quoting Florida State University law professor Patricia Dore, who staffed the Ethics, Privacy, and Elections committee and worked on the proposal); Emmett Peter, *Constitution Revision: Three Cities Offered Final Chance to be Heard on Proposed Changes*, SENTINEL STAR (Orlando), Feb. 19, 1980, at 1-C & 3-C, https://www.newspapers.com/image/225964252 (quoting Jon Moyle, chair of the Ethics, Privacy, and Elections Committee); Talbot D'Alemberte, Advice & Dissent, *Florida's Constitution*, TALLAHASSEE DEMOCRAT, Mar. 5, 1978, at 2B, https://www.newspapers.com/image/245306346 ("The need for a right to privacy has occurred primarily because of the technological breakthroughs which have allowed information about citizens['] personal and financial data to be collected by computer[-]operated information systems."); Mary Ann Lindley, *A New Constitution Takes Shape*, PALM BEACH POST-TIMES, Apr. 9, 1978, at D1, https://www.newspapers.com/image/134569928 ("Prompted by a computer-age concern that credit agencies, insurance companies, banks and government itself sometimes snoop too much into people's private lives, the right of privacy would assure citizens the right to be let alone from governmental intrusion."); Gov. Reubin Askew, *A Letter From the Governor*, ST. PETERSBURG TIMES, Sept. 30, 1978, at 15A, *in* State Appendix, *supra* note 105, at 15 ("In this era of enemies lists, wiretapping, and computerized data banks, the need for constitutional acknowledgement of our privacy rights as individuals should be apparent."); Editorial, *One for the People*, ST. PETERSBURG TIMES, Oct. 30, 1978, at 12A, https://www.newspapers.com/image/319049962 ("[T]he privacy guarantee is aimed at reducing government collection of personal information . . . ."); *Constitution Changes Focus on Privacy*, NAPLES DAILY NEWS (AP), Nov. 1, 1978, at 10B, https://www.newspapers.com/image/798745978; Talbot D'Alemberte, *Revision 1: To Protect Privacy, Limit Time in Office*, ST. PETERSBURG TIMES, Nov. 4, 1978, at 19A, https://www.newspapers.com/image/319843577 ("The important reasons for approving this revision . . . lie in the protections given to individual liberties, protections designed to prevent our society from fulfilling the Orwellian prophecy for 1984."); John Van Gieson, *Omnibus Proposal Would Alter 71 Sections of 1968 Constitution*, MIA. HERALD, Nov. 5, 1978, at 4N, https://www.newspapers.com/image/628314152 ("SUPPORTERS SAY Revision 1 would keep state government from meddling in the private lives of citizens, a danger that has been heightened by technological advances.").

In March 1978, CRC Chairman Talbot D'Alemberte wrote in the *Tallahassee Democrat*: "The proposed Florida Constitution enlarges and enhances the basic rights contained in the U.S. Bill of Rights, and contains many significant provisions not found in the federal constitution."[204] One such right is the right to privacy.[205] A month earlier, in a critical editorial, the *Miami News* editorial board essentially agreed: "The first section of the proposal would guarantee Floridians the right to be free from governmental intrusion, in what lawyers call the bedroom-bathroom test. This right already has been recognized in part by the U.S. Supreme Court, and would seem unnecessary to repeat in any meaningful fashion in Florida's Constitution."[206] Closer to the election, an article in the *Tampa Tribune* noted: "With the U.S. Supreme Court still interpreting the extent of privacy rights, the state revision panel decided to extend a blanket protection, and then let the Legislature write specific exceptions."[207]

Breadth and vagueness: Throughout the public discussion, the proposal was consistently referred to by shorthand as either a "right to privacy" or "right of privacy," not a right to or of informational privacy.[208] And the proposed right was understood by both supporters and opponents to be very broad as well as vague.

After the CRC voted to propose the privacy right, the *Pensacola Journal* carried an Associated Press report stating that the proposal was for "a sweeping privacy guarantee for the Florida Constitution."[209] At the time, two of the commissioners who

204. D'Alemberte, *supra* note 203.

205. *Id.* In May, D'Alemberte said, "The federal and state constitutions do not have the right to privacy fully developed." Julie Farnsworth, *Sex Clause in Constitution May Help Push ERA*, ALLIGATOR (Gainesville), May 30, 1978, at 5, https://ufdc.ufl.edu/UF00028290/03337/images/4.

206. Opinion, *Privacy Measures Not Thought Out*, MIA. NEWS, Feb. 9, 1978, at 10A, https://www.newspapers.com/image/301983073/.

207. *Smorgasbord*, TAMPA TRIB., Oct. 29, 1978, at 12-A, https://www.newspapers.com/image/335372924.

208. *See, e.g.*, *Election*, ST. PETERSBURG TIMES, Nov. 5, 1978, at 24B, https://www.newspapers.com/image/319850853; Buddy Nevins, *Constitutional Revision*, FT. LAUDERDALE NEWS, Nov. 5, 1978, at 3E, https://www.newspapers.com/image/233257035 ("right of privacy"); Elizabeth Willson, *Once in a Great While*, ALLIGATOR (Gainesville), Nov. 6, 1978 at 4, https://ufdc.ufl.edu/UF00028290/03388/images/13 ("strong, independent right-of-privacy provision in its constitution").

209. *Revisionists Keep ERA Provision, Urge Sweeping Privacy Guarantee*, PENSACOLA JOURNAL (AP), Jan. 10, 1978, at 4B, https://www.newspapers.com/image/265281119; *see also Charter Panel Passes Sweeping Privacy Right*, FT. MYERS NEWS-PRESS (AP), Jan. 10, 1978, at 6B, https://www.newspapers.com/image/212164742.

strongly supported the proposal, Jon Moyle, the chair of the Ethics, Privacy, and Elections Committee, and Dexter Douglass, a state senator, "conceded that the ramifications of the privacy proposal are unclear."[210]

On February 2, 1978, the *Miami News* carried an article stating:

> The reasons for opposition [to the proposal] vary, but the common thread of concern among opponents and even among the less enthusiastic supporters is the lack of specificity. Nobody—advocate or detractor—can say with any certainty what the proposed right of privacy would accomplish if added to the state's basic charter.[211]

The article continued that it would "grant[] what the lawyers call a free-standing right of privacy, and leaves it to the courts to determine what was intended by the vague wording."[212]

The *Fort Lauderdale News* echoed this: "What does it mean? No one knows for sure and it will probably be up to the courts to decide."[213] As did the *Bradenton Herald*—the proposal "[m]akes it state policy that persons have a right to privacy from government intrusion. The meaning of this will be determined by the courts."[214] And just a couple days before the election, the *Miami Herald* wrote that opponents worried that "the proposal leaves too much up to the courts in interpreting what a right to privacy means; it could wipe out widely accepted laws that govern individual behavior,

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210. Robert Hooker, *Privacy Rights Strengthened in Revision Proposal*, ST. PETERSBURG TIMES, Jan. 10, 1978, at 12B, https://www.newspapers.com/image/318809675; *see also* Editorial, *A Poor Catch-All*, PALM BEACH POST, Apr. 20, 1978, https://www.newspapers.com/image/134552041 ("[T]he commission is proposing a one-sentence statement on the right of privacy which even its own members cannot define, and which could be interpreted in many mischievous ways.").

211. David Schultz, *Working to Give Us All the Right to be Left Alone*, MIA. NEWS, Feb. 2, 1978, at 15A, https://www.newspapers.com/image/301969904.

212. *Id.*

213. *Florida's Constitutional Questions*, FT. LAUDERDALE NEWS, Oct. 29, 1978, at 1E, https://www.newspapers.com/image/233148460.

214. *Constitutional Revisions*, BRADENTON HERALD, Oct. 29, 1978, at 24, https://www.newspapers.com/image/718119690; *see also Constitution Changes Focus on Privacy*, NAPLES DAILY NEWS (AP), Nov. 1, 1978, at 10B, https://www.newspapers.com/image/798745978 ("Guarantee every everyone [sic] the right simply to be let alone and free from governmental intrusion. Critics claim the provision is vague but supporters say the article was purposefully written in general terms so that courts can make precise definitions case-by-case. The provision is expected to offer new safeguards against inspection of bank depositor records.").

such as restrictions on homosexuals and pot smokers."[215] One editorial board described "the ambiguous declaration on privacy" as "downright dangerous."[216]

Extensive Discussion of Decisional Privacy: The public discussion about the proposed privacy right showed that it was understood to be about far more than informational privacy.

In October 1977, an article in the *Palm Beach Post* discussed the interest in a state right to privacy: "Courts have recognized a right of privacy in specific instances such as purchase and use of contraceptives, or the use of a person's name or endorsement by an advertiser without permission, but there has been no general delineation."[217] In February 1978, after the CRC approved putting the proposal on the ballot, the *Miami News* noted that, among "some intriguing questions" that "are certain to be debated in some depth when the issue goes to the voters" is whether "sexual conduct between consenting adults" would be permitted in the privacy of one's home, "conduct that remains illegal under recent U.S. Supreme Court cases."[218]

This discussion continued as the election approached. In September, describing the race for governor, an article in the *Fort Myers News-Press* said: "[Claude Kirk, a former governor and current candidate for governor,] claims the proposal would advance gay rights, lead to anarchy, and 'thwart the enforcement of basic laws by denying police the right to search suspected premises.'"[219] The next month, the *News-Press* observed: "There's more agreement that archaic laws and regulations, such as those that now prohibit sexual intercourse between unmarried persons and ban the wearing of beards by correctional employees, would be overturned."[220] The *Ft. Lauderdale News* noted the same: "The purpose of the change is to prevent governmental poking into the lives of private people, but it may be so sweeping that it would

215. Van Gieson, *Omnibus Proposal*, *supra* note 203, at 4N.

216. Editorial, *Too Many Minuses*, PALM BEACH POST, May 7, 1978, https://www.newspapers.com/image/134533817.

217. Martha Musgrove & Bud Newman, *Constitution: Bit by Bit, a Document Takes Shape*, PALM BEACH POST, Oct. 2, 1977, at D1, https://www.newspapers.com/image/133750378.

218. Schultz, *supra* note 211, at 15A.

219. John Hanchette, *Candidates Trade Political Insults*, FT. MYERS NEWS-PRESS, Sept. 8, 1978, at 12B, https://www.newspapers.com/image/222283127.

220. *Revision 1 Covers 50 Constitutional Amendments*, FT. MYERS NEWS-PRESS, Oct. 28, 1978, at 8B, https://www.newspapers.com/image/214200803.

invalidate drug use laws, compulsory schooling and immunization of children and a wide range of other laws."[221]

Close to the election, gay-rights activists began to vocally support the Privacy Amendment. The *Miami Herald* reported:

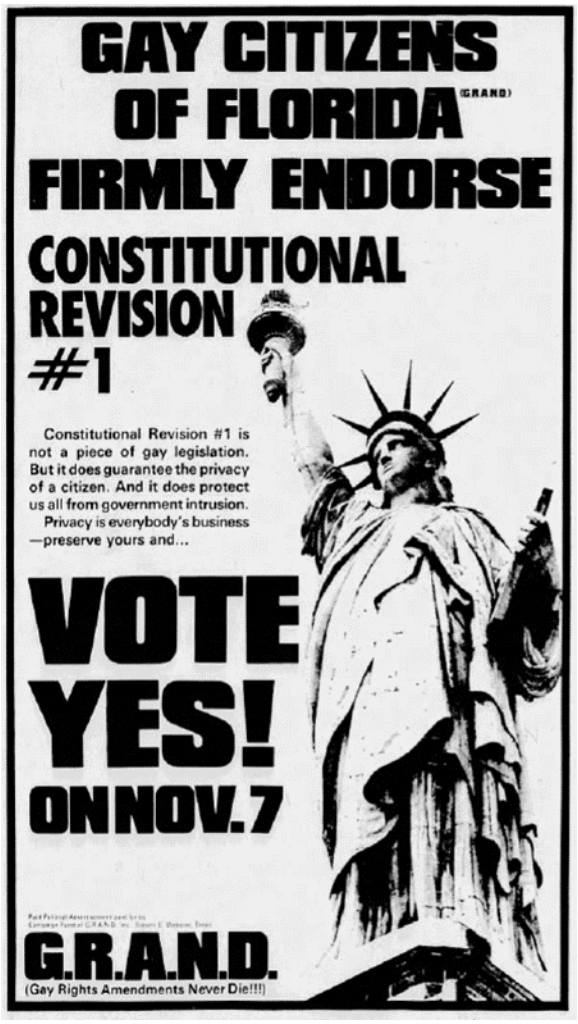
> A group that calls itself GRAND (short for Gay Rights Amendments Never Die) is urging Florida gays to vote for Constitutional Revision 1.
>
> Anthony Harris Hussey of Orlando, chairman of the recently formed gay rights organization, said the proposed right to privacy, one of dozens of provisions in Revision 1, will protect homosexuals.
>
> "We figure it will protect the jobs of gay public employees, including teachers," he said. "This isn't the solution to gay rights, but it's a step in the right direction."
>
> . . . .
>
> [Steve Uhlfelder, Executive Director] of the Constitution Revision Commission, said the group did not intend for the right to privacy to protect gays. He said he was confident it did not.
>
> "They're going to be misled if they think they're going to get relief from Revision 1," he said. "I just think they're barking up the wrong tree."[222]

Several days before the election, GRAND took out advertisements across the state supporting the amendment:[223]

221. Editorial, *Revision 1's Many 'Roaches' Should Cause Its Rejection*, FT. LAUDERDALE NEWS, Oct. 31, 1978, at 18A, https://www.newspapers.com/image/233153610.

222. *Constitution Revision . . . it's GRAND*, MIA. HERALD, Oct. 24, 1978, at 10-A, https://miamiherald.newspapers.com/image/628224289.

223. *See, e.g.*, MIA. HERALD, Nov. 1, 1978, at 3-F, https://www.newspapers.com/image/628279994; MIA. NEWS, Nov. 1, 1978, at 4A, https://www.newspapers.com/image/301936469/; ALLIGATOR (Gainesville), Nov. 1, 1978, at 7, https://ufdc.ufl.edu/UF00028290/03385/images/6.



The campaign provoked backlash. Uhlfelder, who was also an aide to Governor Reuben Askew, spoke with GRAND, telling the group he did not think the amendment would cover gay rights.[224] Moreover, "Uhlfelder also said that Florida Supreme Court Justice Ben Overton and Talbot (Sandy) D'Alemberte, Constitution Revision Commission chairman, say the privacy provision, because of its intent and wording, will not protect homosexuals from discrimination as GRAND claims."[225] Commissioner Dexter Douglass, a supporter of the proposal, suspected skullduggery—an

224. *Constitution . . . Gays for 1*, MIA. HERALD, Nov. 1, 1978, at 5-A, https://www.newspapers.com/image/628278052.

225. *Id.*

effort to tank it—although there was no evidence of such.[226] Gay-rights activists' support for the proposed privacy right was seen as "a setback" because the "belief" that the proposal would protect homosexuals "might turn many voters against the amendment."[227]

3. Ballot Summary and Election Result

As already noted, the privacy right was rolled into a package with a number of other proposals, called Revision No. 1. This is how Revision No. 1 was presented to voters on the ballot:

> Revision No. 1
> Basic Document
>
> Proposing a revision of the Florida Constitution, generally described as the Basic Document, embracing the subject matter of Articles I (Declaration of Rights), II (General Provisions), III (Legislature), IV (Executive), V (Judiciary), VI (Suffrage and Elections), VIII (Local Government), X (Miscellaneous), XI (Amendments) and XII (Schedule), except for other revisions separately submitted for a vote on this ballot.[228]

Voters rejected Revision No. 1 on November 7, 1978, and it was not close; seventy-one percent voted against.[229] When they did so, as they did all the CRC's proposals, backers, including D'Alemberte, blamed the support of the gay-rights activists.[230]

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226. Virginia Ellis, *Gays' Ad May Be Kiss of Death for Ballot Issue—or Dirty Trick*, ST. PETERSBURG TIMES, Nov. 2, 1978, at 1-B, https://www.newspapers.com/image/319814333.

227. *Rights*, TALLAHASSEE DEMOCRAT, Nov. 2, 1978, at 3, https://www.newspapers.com/image/245310396; *see also Askew Will Consult With Next Governor On PSC Appointees*, MIA. HERALD, Nov. 3, 1978, at 2D, https://www.newspapers.com/image/628302342 (Gov. Askew expressing similar statement); *No Debate On Constitution Revision*, TAMPA TRIB.-TIMES, Nov. 5, 1978, at 12-B, https://www.newspapers.com/image/335573084 ("Constitution Revision Commission leaders were embarrassed last week when an Orlando gay rights group endorsed the Revision 1 privacy provision. Gov. Reubin Askew says the gays are wrong, that the provision prohibits unreasonable government intrusion, but isn't a license for illegal acts.").

228. Fla. Dep't of State, Div. of Elections, *Basic Document*, https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=11&seqnum=11 (last visited Sept. 9, 2023).

229. *Id.*

230. Howard Wireback, *Entire Package of Revisions Seems Doomed*, TALLAHASSEE DEMOCRAT, Nov. 8, 1978, at 6A, https://www.newspapers.com/image/245310731 ("Revision 1 was not helped by the endorsement of a homosexual organization. . . . 'Those ads really hurt us,' D'Alemberte said.").

Despite Revision No. 1's failure, the public discussion surrounding the proposal established, as Professor Fox explains, that:

> in 1978 it was already clear that Section 23 was understood to incorporate then-existing federal rights to privacy as a baseline and to leave open the further development of privacy rights in Florida to areas not covered in federal law. This baseline-plus understanding of Section 23 would be a consistent aspect of the understanding of Section 23 throughout its adoption process.[231]

C. The Legislature's 1980 Proposal

Believing the privacy-right proposal did not get a fair shake, State Representative Jon Mills introduced a resolution in the House to put the proposed constitutional amendment back on the ballot.[232]

1. Legislative History

A memorandum prepared by or for (unclear which) the House Committee on Governmental Operations about the proposal surveyed the law on the federal right to privacy, noting that it comprised "decisional autonomy," citing *Roe* and *Griswold*, and the areas of governmental surveillance and collection of information.[233] The memorandum concluded, however, that the U.S. Supreme Court "has been careful in defining an overall right to privacy, leaving that responsibility to the individual states."[234] In the few states that had adopted a freestanding constitutional right of privacy, the memorandum stated that "[c]ourt decisions

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231. Fox, *supra* note 16, at 416.

232. Jon Mills, Opinion, *No Man's Life, Property Safe During Legislative Session*, ALLIGATOR (Gainesville), Feb. 18, 1980, at 7, https://ufdc.ufl.edu/UF00028290/03607/images/6.

233. Memorandum, H. Comm.on Governmental Operations, Fla. H.R. at 1–2 (Feb. 7, 1980) (1980 CS/HJR 387) (footnote omitted) (on file with author and in State Appendix, *supra* note 105, at 221) [hereinafter Memorandum]. Mills later wrote that he:

> introduced the privacy amendment with the intention of providing a basis for protecting both decisional and informational privacy rights. I used the background information prepared by Professor Pat Dore [who staffed the CRC's Ethics, Privacy, and Elections Committee] and staff analysis from the House Government Operations Committee to analyze the resolution.

Jon L. Mills, *Sex, Lies, and Genetic Testing: What are Your Rights to Privacy in Florida?*, 48 FLA. L. REV. 813, 825 n.42 (1996).

234. Memorandum, *supra* note 233, at 3.

resulting from these freestanding rights to privacy are varied although most, to date, are in keeping with privacy protection provided under the Federal Constitution."[235]

In the House, as Mills recounted over fifteen years later, "[t]he existence of *Roe v. Wade* muted debate on issues like abortion and gay rights. Proponents suggested the resolution had no effect on current law since the federal right was assured under the United States Supreme Court's decision."[236] According to Mills, the debate in the House concerned informational privacy.[237]

After the resolution passed the House, it went to the Senate. During the debate on the resolution on the Senate floor, an exchange occurred between Senator Gordon, the Senate sponsor, and Senator Ed Dunn, an opponent, on May 14, just before the Senate vote that Stemberger and Phillips quote:

> Senator Dunn: Senator, what do you think the effect of this amendment will be on the existing controversy involving right to life and abortion?
>
> Senator Gordon: I don't see that uhh—I don't see that it has any effect on that[,] Senator.
>
> Senator Dunn: Senator[,] you don't uh—you don't—you can't honestly say that this amendment addressing as you have contended the question of privacy will be the focal point of state litigation on the question of all laws dealing with, with the question of abortion or the taking of a uhh—of a—of a fetus under any condition?
>
> Senator Gordon: No, I don't see that at all. I don't know what that has to do with, with—I don't see what that has to do with intrusion in your—in—in—privacy in your home, I don't see that at all.[238]

While Senator Gordon attempted to carve out abortion from the protection afforded by the privacy right, he nevertheless indicated that the right would protect more than informational privacy. At

235. *Id.* at 4.
236. Mills, *Sex, Lies, and Genetic Information*, *supra* note 233, at 826.
237. *Id.* at 826–27.
238. Stemberger & Phillips, *supra* note 13, at 28–29 (quoting Tape Recording of Proceedings, Fla. S. (May 14, 1980) (on file with State Archives of Florida at Series S1238, Box 57)).

some other point in the debate, Gordon said something else that indicated the same thing. Senator Dunn had:

> warned that the amendment affected the state's taxing authority and lobbying disclosures, and would legalize the use of marijuana in the home and illicit sexual practices between consenting adults.
>
> That prompted the amendment's chief supporter, Sen. Jack Gordon, to thank Dunn for presenting reasons why he, Gordon, thought the measure should be passed.
>
> "Either you have the right of privacy or you don't," Gordon, D-Miami, declared. "You don't have a 'reasonable' right of privacy."[239]

Professor Fox has done much more research into the legislative history of Section 23, and I refer the reader to his account rather than repeat it here.[240] However, it needs to be mentioned that Fox obtained the audio recordings of the above debate and transcribes the *full* exchange. As Fox concludes, the full exchange shows that Gordon was seriously confused about federal constitutional law on the privacy right, casting serious doubt on its usefulness to our inquiry, but also that both Gordon and Dunn understood that Section 23 would protect more than informational privacy.[241]

I address what weight to give statements of legislators in section IV(A). The Senate passed the resolution, sending what is now Section 23 to the voters.[242]

2. Public Discussion

As reflected in newspaper articles, the public discussion about the proposal establishes that the story told by the State and others about 1980—that everyone understood the right to be about informational privacy only—is not accurate. As in 1978, many did

239. Larry Lipman, *Privacy Amendment Will Go to Voters*, SENTINEL STAR (Orlando), May 15, 1980, at 3-C, https://www.newspapers.com/image/226874007; *see also* Jim Walker, *Senators Clash Over Privacy Amendment*, TAMPA TRIB., May 15, 1980, at 6-A, *in* Grant Appendix, *supra* note 105, at A19.

240. Fox, *supra* note 16, at 411–22; *see also* Stemberger & Phillips, *supra* note 13, at 26–30.

241. Fox, *supra* note 16, at 421–23.

242. Mills, *Sex, Lies, and Genetic Testing*, *supra* note 233, at 827–28.

focus on informational privacy.[243] However, a review of the record the State, former State Representative Grant, and I have gathered demonstrates that what was generally communicated to the public about the amendment was that it covered far more than informational privacy. And remember, abortion (and *Roe*) had become a divisive issue that was prominent in the 1980 election. Further, remember that Justice Douglas died in January 1980, and "several of the news stories [in Florida] mentioned the abortion rights of *Roe v. Wade* as an outgrowth of Douglas's opinion in *Griswold*."[244]

Relationship to the Federal Privacy Right: As in 1978, there was discussion about the amendment's relationship to rights in the U.S. Constitution. Bob Kunst, a prominent Miami gay rights activist and leader of the gay rights group Congress United for Rights and Equality who stumped for the amendment around the state,[245] told the Palm Beach County Commission on September 30 that the amendment was "an avowal of human rights which

243. *See, e.g.*, Mills, *No Man's Life*, *supra* note 232 (framing the amendment the representative intended to propose in terms of informational privacy); Stephen Adler, *Privacy Amendment Pushed in House*, TALLAHASSEE DEMOCRAT, May 6, 1980, at 3B, https://www.newspapers.com/image/246042370 (quoting Rep. Mills and professor Dore); *House OKs Vote on Privacy*, FLA. TODAY (Cocoa), May 7, 1980, at 9B, https://www.newspapers.com/image/125170599; Editorial, *Special Ballot Issues Deserving of Approval*, PENSACOLA NEWS-J., Oct. 19, 1980, at 22A, https://www.newspapers.com/image/266957913; Editorial, *Pick and Choose Amendments to Pass*, TAMPA TIMES, Oct. 22, 1980, at 10A, https://www.newspapers.com/image/334555549; Editorial, *Amendment No. 2: Vote AGAINST privacy*, FT. LAUDERDALE NEWS, Oct. 24, 1980, at 10A, https://www.newspapers.com/image/235287385; Larry Lipman, *Conservatives, Gays Backing Privacy Rule*, SENTINEL STAR (Orlando), Oct. 27, 1980, at 1-C, 2-C, https://www.newspapers.com/image/224627129 (quoting Dore); Jim Walker, *Amendments Draw Vocal Opposition*, TAMPA TRIB., Oct. 29, 1980, at 5-B, https://www.newspapers.com/image/335160671 (quoting Rep. Mills); Patrick McMahon, *Huh? Amendment Wording Complicates Voting*, ST. PETERSBURG TIMES, Nov. 1, 1980, at 12B, https://www.newspapers.com/image/319443024 ("Although some opponents have contended that it might help legalize marijuana and promote homosexuality, Mills responds that the Supreme Court should be guided by the legislative history of the amendment and rule that it is aimed at 'informational privacy.'"); Brian E. Crowley, *The Amendments: A Simple Idea Has Taken Some Complex Turns*, PALM BEACH POST, Nov. 2, 1980, at 89, https://www.newspapers.com/image/135026164 (Rep. Mills "says the intent of the amendment is being distorted"). The Grant Appendix contains many other articles in the same vein.

244. Fox, *supra* note 16, at 427–28.

245. Mary Lavers, *Privacy Amendment Advocated by Kunst*, TAMPA TIMES, Oct. 23, 1980, at 10-A, https://www.newspapers.com/image/334558455 ("Bob Kunst, Dade County gay human rights activist, was in Tampa this morning on a whirlwind tour of Florida cities aimed at gathering support for a statewide constitutional amendment called the Privacy Rights Act.").

mirrors guarantees given to all citizens in the U.S. Constitution."[246]

An October 12 article by United Press International ("UPI") appearing in the *Miami Herald* said, "Another amendment on the Nov. 4 ballot establishes 'a right to privacy.' The measure could become controversial, but hasn't so far, with most people watching the amendment process, saying it merely clarifies a right already guaranteed in both the state and federal constitutions."[247]

Opponents thought the very same thing. Senator Don Childers, who opposed the proposal, complained that it was too broad and asked, "Why is it necessary? We have the right to privacy already guaranteed under state and federal law."[248] Similarly, an editorial in the *Tampa Tribune*, where the editorial board expressed its belief that the federal Constitution already "permit[ted] satisfactory and time-tested guarantees to privacy."[249] And an editorial in the *Naples Daily News*: "We think our privacy rights are adequately protected by constitutional law and we should leave matters as they stand."[250] A *Miami News* editorial in favor of the amendment stated:

> Critics of the amendment contend that it duplicates existing federal protection of privacy which, however, is insufficient and which is derived loosely from diverse sources. The U.S. Supreme Court, in fact, has encouraged the states to protect more thoroughly the privacy of citizens, and the amendment is an explicit attempt to do just that.[251]

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246. Mary Hladky, *Commissioners Table Vote on State Privacy Amendment*, FT. LAUDERDALE NEWS, Oct. 1, 1980, at 8B, https://www.newspapers.com/image/234894281; *see also* Tim Pallesen, *Panel Gives Gay Cold Shoulder*, MIA. HERALD, Oct. 1, 1980, at B1, https://www.newspapers.com/image/628971815.

247. *Constitution Revision Commission in Jeopardy*, MIA. HERALD (Palm Beach News), Oct. 12, 1980, at 16C, https://www.newspapers.com/image/629173096.

248. *Right of Privacy Amendment Stirs Battle in State*, PALM BEACH POST, Oct. 19, 1980, at B11, https://www.newspapers.com/image/135025160, *and in* Grant Appendix, *supra* note 105, at 39.

249. Editorial, *Two Amendments To Defeat, 3 To Pass*, TAMPA TRIB., Oct. 29, 1980, at 14-A, https://www.newspapers.com/image/335158713.

250. Editorial, *5 Amendments On The Ballot*, NAPLES DAILY NEWS, Nov. 2, 1980, *in* Grant Appendix, *supra* note 105, at 94.

251. Editorial, *Vote to Strengthen the Right of Privacy*, MIA. NEWS, Oct. 31, 1980, at 12A, https://www.newspapers.com/image/302444690; *see also* Editorial, *Proposed Amendments Deserve Voter Approval*, FLA. TODAY (Cocoa), Oct. 27, 1980, at 12A, https://www.newspapers.com/image/124902989 (although speaking mostly about

Breadth and Vagueness: After the House Governmental Operations Committee approved the resolution to put the amendment on the ballot, the *Tampa Times* wrote an article that demonstrates how broad the right could be.[252] In that article, one of the drafters of the 1978 CRC amendment who said the intent of the amendment was to protect informational privacy acknowledged that the amendment could do more:

> Florida State University law professor Patricia Dore testified on behalf of the measure, but after the vote she had a difficult time telling reporters exactly what the proposed amendment would do.
>
> There is no "parade of horribles" regarding invasions of privacy, she said, but the proposal speaks to widespread concerns about the "amount and kind of information government collects from all of us"—particularly in the modern computer age.
>
> . . . .
>
> Dore said it is impossible to know exactly how the right of privacy might be used in the courts. "What it does," she said, "is it gives you something to go to court on."
>
> . . . .
>
> Dore, who helped draft a similar proposal for the Constitution Revision Commission two years ago, speculated that a right of privacy could allow for test cases on matters such as a person's right to decide for himself when to die, what kind of information can be sought on job applications, or in government's ability to

informational privacy, framing the amendment as a "general right of privacy" that "merely fills a void in state law, and offers Floridians the same protection found in the national Constitution"); Jonathan Peterson, *Privacy Proposal Spawns Controversy*, TALLAHASSEE DEMOCRAT, Oct. 29, 1980, at 1B, https://www.newspapers.com/image/245921300 (after outlining the debate: "'There's no smoking gun that this provision is aimed at,' said Patricia Dore, an associate professor of law at Florida State University. 'Rather, it is an attempt to recognize constitutionally a right that people think they already have—but they don't have.'"); Claire M. Richert, Letter to the Editor, POST (West Palm Beach), Oct. 31, 1980, https://www.newspapers.com/image/135027056 ("Amendment No. 2 does not give Floridians any additional protection they don't already have under the federal and state constitutions.").

252. Jon Peck, *Privacy Measure Approved by Unanimous Panel Vote*, TAMPA TIMES, Apr. 17, 1980, at 8-A, https://www.newspapers.com/image/327673636.

> obtain information about an individual from someone other than that person.
>
> But, she pointed out, there are no absolutes in constitutional law; instead, the courts must balance conflicting rights.[253]

In June, a UPI report said: "A right-to-privacy provision in the basic law could do away with some of the ways that the state now regulates the private lives of individuals, but how and in what direction would be up to the courts to interpret."[254]

Much closer to the November 4 election, an article in the *Miami News* on November 1 said that "[w]hat exactly the privacy amendment would do is a bit of a mystery, but gay-rights activists are pushing for it, even though its authors did not have homosexual rights in mind."[255] On November 2, the *Florida Times-Union & Journal* published an article that said: "While proponents and opponents disagree as to the probable ramifications of this amendment, generally speaking a 'yes' vote would provide constitutional protection against certain types of information-gathering techniques of state and local governmental agencies."[256]

An article in the *Miami Herald* on November 2 said that the amendment's "language is short and seemingly simple, but its effects may be sweeping."[257] It reported that opponents, State Senators Ed Dunn and Don Childers, argued that "[t]he language is too broad and might lead to unforeseen and unwanted legal disputes."[258] At the same early-October Palm Beach County Commission meeting described above, Childers conceded that legislators did not really research the impact the amendment would have and said that "legislators didn't know what they were

253. *Id.* A majority of the Florida Supreme Court subsequently found that assisted suicide implicated Section 23. Krischer v. McIver, 697 So. 2d 97, 100 (Fla. 1997).

254. Barbara Frye, *Fall Ballot Will Include Proposed Amendments*, TALLAHASSEE DEMOCRAT, June 16, 1980, at 3B, *in* Grant Appendix, *supra* note 105, at 30.

255. Dary Matera, *Gays Want Privacy Law Passed*, MIA. NEWS, Nov. 1, 1980, at 11, https://www.newspapers.com/image/302624448.

256. R. Michael Anderson, *Here's What the Amendments Are All About*, FLA. TIMES-UNION & J., Nov. 2, 1980, at C8 (on file with author).

257. Craig Matsuda, *State Questions Are a Mix of Roads, Water, Privacy*, MIA. HERALD, Nov. 2, 1980, at 8E, https://miamiherald.newspapers.com/image/628974566.

258. *Id.* at C8.

doing when they approved placing the proposed amendment on the ballot."[259]

Several newspaper editorial boards opposed the amendment. The *Fort Lauderdale News* reluctantly did so because it was "too broad and will lead to widespread confusion over just what it does mean," pointing out the potential effects on law enforcement in particular.[260] The *Tallassee Democrat* said, "[t]he problem is, no one can tell just what the amendment does."[261] The *Tampa Tribune* editorial board wrote that it had "no idea what [the first sentence] really means" and agreed with Governor Bob Graham's objection that the amendment's goals were ambiguous and its methods imprecise.[262] The *Fort Myers News-Press* said that, while the legislative intent concerned informational privacy, "its language is too encompassing to become a part of the Florida Constitution."[263] The *Miami Herald* echoed these concerns.[264]

In contrast, the *Miami News* editorial board viewed the broad language as something of a positive when it recommended voting for the amendment:

> The amendment is broad, its exact application is vague, and so its interpretation would rest ultimately with the courts. But it is impossible for a basic Bill-of-Rights protection of this type to cover every potential application, and therefore its scope can be defined only by the courts. Like so many other cases in which conflicting rights are involved, the effectiveness of this proposal depends on a reasonable interpretation of privacy by the courts.

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259. Gayle Pallesen, *Commissioners Won't Take Up Sexual Privacy*, PALM BEACH POST, Oct. 1, 1980, at C3, https://www.newspapers.com/image/132685931; *see also* Paul J. O'Neill, *Privacy Act*, FT. MYERS NEWS-PRESS, Nov. 2, 1980, at 3F, https://www.newspapers.com/image/214037236. Childers also reportedly said: "It is my firm belief that we as elected officials should recognize that we made a very serious mistake in placing this amendment on the November ballot. I would urge that we advise our constituents through out the State of Florida to vote against this privacy act amendment." *Id.*

260. Editorial, *Amendment No. 2: Vote AGAINST Privacy*, FT. LAUDERDALE NEWS, Oct. 24, 1980, at 10A, https://www.newspapers.com/image/235287385.

261. Editorial, *No to Amendments 1, 2 and Yes on 3, 4, and 5*, TALLAHASSEE DEMOCRAT, Oct. 26, 1980, at 2B, https://www.newspapers.com/image/245917441.

262. Editorial, *Two Amendments to Defeat, 3 to Pass*, TAMPA TRIB., Oct. 29, 1980, at 14-A, https://www.newspapers.com/image/335158713. The editorial board also expressed its belief that the federal Constitution already "permit[ted] satisfactory and time-tested guarantees to privacy." *Id.*

263. Editorial, *Privacy, Abolition Propositions Should Be Rejected at the Polls*, FT. MYERS NEWS-PRESS, Nov. 1, 1980, at 6, https://www.newspapers.com/image/214017512.

264. Editorial, *Risks of Unknown Too High in New Proposal on Privacy*, MIA. HERALD, Oct. 29, 1980, at 6-A, *in* Grant Appendix, *supra* note 105, at 62.

> But the need to rely on reason for eventual guidelines does not justify rejection of the proposal itself.[265]

Extensive Discussion of Decisional Privacy: The very day after the Senate gave final approval to the proposal, putting the issue to the voters, the *News Tribune* (Fort Pierce) ran a UPI article about the proposed "right to privacy."[266] The May 15 article reported that Senator Dunn had warned before Senate approval that the right "might make marijuana legal and wiretapping by police illegal."[267] The article further reported, "The amendment probably would restrict or prohibit financial disclosure by public officials and disclosure by lobbyists, Dunn argued. It probably would make the possession and use of marijuana in one's home legal and strike down laws prohibiting homosexual conduct or marriage by 'gays.'"[268] This was before gay rights activists mobilized to support the proposal.

That happened later because, as in 1978, they believed it would protect gay rights—and more. In July, activist Kunst said:

> his group is mounting a campaign in support of a state constitutional amendment which he said will protect the right

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265. Editorial, *Vote to Strengthen the Right of Privacy*, MIA. NEWS, Oct. 31, 1980, at 12A, https://www.newspapers.com/image/302444690.

266. *Another Vote Due on 'Right to Privacy'*, NEWS TRIB., May 15, 1980, at A3, https://www.newspapers.com/image/778716705. The proposal was consistently referred to as the "right to privacy" or the "right of privacy." *See, e.g.*, Rich Pollack, *Watt Raps Homestead Amendment*, PALM BEACH POST, Sept. 19, 1980, at 2, https://www.newspapers.com/image/134975454 ("Others include a right to privacy amendment, which [Rep. Jim Watt] believes could cause legal problems in the future as a result of differing interpretations. . . ."); *Florida*, TAMPA TRIB., Nov. 4, 1980, at 3-A, https://www.newspapers.com/image/335168781 ("If approved by voters, the constitutional amendments would. . . . Provide a constitutional right of privacy.").

267. *Another Vote Due on 'Right to Privacy'*, *supra* note 266, at A3.

268. *Id.* A shortened version of the UPI article that included the block-quoted language also ran in the *Miami Herald*. *Privacy Rights Guarantee Will Be on Ballot Again*, MIA. HERALD, May 15, 1980, at 4-B, https://www.newspapers.com/image/628981674. *See also Privacy Amendment Passes*, PRESS J., May 15, 1980, at 1, *in* Grant Appendix, *supra* note 105, at 20 ("A proposed right-to-privacy amendment which would protect people from 'government intrusion' such as wiretapping has passed the House and Senate and will go on the November presidential election ballot. One senator said the amendment would make it tougher for government to arrest people for smoking marijuana and would legalize 'sexual activity of any sort' between consenting adults."); Susan Postlewaite, *Privacy Proposal to be on Ballot*, TALLAHASSEE DEMOCRAT (AP), May 15, 1980, at 3D, *in* Grant Appendix, *supra* note 105, at 21 ("The 34-2 vote came over the objections of Sen. Edgar Dunn, D-Daytona Beach, who said the amendment would make it tougher for the government to arrest people for smoking marijuana and would legalize 'sexual activity of any sort' between consenting adults."); Editorial, *Privacy Amendment Must Be Fully Aired*, PENSACOLA J., May 16, 1980, at 14A, *in* Grant Appendix, *supra* note 105, at 26 (reporting Dunn's remarks).

> of Floridians to "live and love" as they please in their own homes.
>
> "We want politicians to stay out of people's bedrooms. The way people live and love isn't their concern," said Kunst. . . .
>
> He said the privacy amendment would prohibit police from enforcing state laws against fornication and marijuana smoking in the privacy of one's home.[269]

On October 3, the *Fort Myers News-Press* ran an article titled *Psychologist Stumps for Amendment*.[270] The article recounted how Alan Rockway, a Miami clinical psychologist and gay-rights activist, came to Southwest Florida "to push for passage of a privacy amendment":

> At the Collier County Commission meeting, sheriff's Deputy Chief Ray Barnett warned the commissioners that the amendment could legalize homosexuality in Florida.
>
> Rockway, a co-author of the unsuccessful 1977 gay rights referendum in Dade County, said the amendment is needed to protect the privacy rights of heterosexuals.
>
> "Since a statute that made homosexuality a felony was thrown out by the state supreme court six years ago, the state has been silent on homosexuality," he said. "But it's still a misdemeanor for an unmarried man and woman to fornicate or cohabit (live together without legal sanction)."
>
> . . . .
>
> Rockway said half the states have legislation that says that two consenting adults may have any type of sexual relationship they want. He said the privacy amendment would decriminalize the presently forbidden activities, though not legalize them.
>
> In addition, Rockway said, the amendment could affect *the right of women to have abortions*, gay rights and the private use of small amounts of marijuana.

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269. *Gay Rights Leader Seeks Anita's Aid*, PALM BEACH POST, July 24, 1980, at C3, *in* Grant Appendix, *supra* note 105, at 32.

270. Julius Karash, *Psychologist Stumps for Amendment*, FT. MYERS NEWS-PRESS, Oct. 3, 1980, at B, https://www.newspapers.com/image/214034151.

> Rockway said the privacy amendment would counteract what he called the present "threat to American democracy" by the Moral Majority organization, a conservative Christian coalition lead nationally by television evangelist Jerry Falwell of Lynchburg, Va.
>
> Rockway accused the Moral Majority of "trying to use the state to enforce their own particular religious dogma. They're misusing religion as a political tool. They threaten American democracy because they threaten the separation of church and state—the fundamental basis of our whole government." [271]

The amendment became the most controversial of the five proposals because of the support of gay-rights activists, similar to 1978.[272] The *Tampa Tribune* reported that "[h]omosexual groups have endorsed the privacy amendment and thus chilled some of support from within the Legislature."[273]

On October 29, the *Tampa Tribune* quoted a statement Kunst made from the steps of Tampa's city hall, "A vote for the privacy rights act would create a new majority, incorporating all the alternative lifestyles. It would also give the people the opportunity to take back control over our own lives, *our own bodies* and minds, free of legislative directive or prohibition which is uninvited."[274] The same day, the *Bradenton Herald* ran an AP article describing an interview with Kunst, "Although legislative sponsors intended the measure only as a safeguard against government excesses, Kunst and other proponents and some legal experts believe it will result in the reversal of statutes outlawing homosexual and other

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271. *Id.* (emphasis added). This likely is one of the articles reporter Kathryn Varn showed Stemberger. *See* Stemberger, *supra* note 13; Kathryn Varn, *Florida Has a Unique Right Protecting Abortion. Its Framers Designed It That Way*, TALLAHASSEE DEMOCRAT, June 8, 2022, https://www.tallahassee.com/story/news/local/state/2022/06/08/can-florida-privacy-law-protect-abortion-rights-roe-v-wade/7536003001/.

272. *See* Craig Matsuda, *Privacy Amendment Gains Support in Early Returns*, MIA. HERALD, Nov. 5, 1980, at A19, https://www.newspapers.com/image/629177939; Rick Barry, *4 Of 5 Amendments Expected to Pass*, TAMPA TRIB., Nov. 5, 1980, at B30, https://www.newspapers.com/image/335171939; Larry Lipman, *Voters Give 4 of 5 Issues Thumbs Up*, ORLANDO SENTINEL, Nov. 5, 1980, at C2, https://www.newspapers.com/image/303995967.

273. Jim Walker, *Amendments Draw Vocal Opposition*, TAMPA TRIB., Oct. 29, 1980, at B1, https://www.newspapers.com/image/335158739.

274. Steve Piacente, *Gay Rights Activist Speaks for Privacy Act*, TAMPA TRIB., Oct. 24, 1980, at B2, https://www.newspapers.com/image/335151798 (emphasis added); *see also Gay Rights Activist Seeks Support for Amendment*, ST. PETERSBURG TIMES (AP), Oct. 24, 1980, at B5, https://www.newspapers.com/image/319650160.

sexual conduct between consenting adults. Kunst also contends *it would void anti-abortion laws*."[275]

In the days before the election, newspapers throughout Florida published articles observing that supporters *and* opponents of the amendment agreed that the language was broad and encompassed more than informational privacy. In an AP article run in the *Pensacola News-Journal* on October 26:

> A right to privacy measure, which seemed innocuous enough to its sponsors in the Legislature, is generating surprising controversy as the Nov. 4 general election nears.
>
> The proposed amendment to the Florida Constitution has drawn strong backing from South Florida's homosexual rights activists and opposition from some conservatives——for strikingly similar reasons.
>
> The homosexuals say judges would interpret it as legalizing their lifestyles, as well as those of co-habiting heterosexual couples.
>
> The conservatives agree—and they don't like it. . . .
>
> But the befuddled legislators who put the amendment on the ballot say that's not what they had in mind at all. The amendment, they say, came because they're worried about technological advances that could enable governments to compile extensive computer files on citizens.
>
> "I think the politicians don't want to take responsibility for dealing with such touchy issues, but they're setting it up in such a way for the courts to do it," Alan Rockaway [sic], a gay rights leader, says confidently.
>
> . . . .
>
> [T]he right to privacy amendment . . . has spurred rallies and press conferences.

275. *Amendments Under Attack As Vote Nears*, BRADENTON HERALD, Oct. 29, 1980, at B5 (emphasis added), https://www.newspapers.com/image/718471324. This likely is the other article Varn showed Stemberger. *See* Stemberger, *supra* note 13; Varn, *supra* note 271.

> "Generally, it's to prevent the 1984 George Orwell nightmare vision of Big Brother, of the TV set watching you back," Rockaway [sic] says. "It's based on the idea that the framers of the Constitution could have never imagined the technical advances of the last few years."
>
> The homosexuals also expect a "reordering of police priorities" on private marijuana use and prostitution if the amendment becomes part of the state constitution, Rockaway [sic] says.
>
> Mike Thompson, chairman of the Florida Conservative Union, calls the amendment "a legal can of worms."
>
> "If you look at the only active support, they (the gays) clearly believe passage of the privacy amendment would legitimize their lifestyle," he says. "I think they've made my point."
>
> He believes the amendment could undercut laws against sodomy, pornography, gambling, incest, drug use, sex between unmarried adults, truancy and even motorcycle helmet laws.
>
> "The people of Florida don't realize that's what these words mean," agrees lawyer Bob Brake.[276]

That same day, in the *Florida Times-Union*:

> Critics say it could be interpreted as sanctioning homosexual behavior, marijuana use in one's home and limiting police powers in criminal investigations.
>
> . . . .
>
> Gay rights organizations, as well as the American Civil Liberties Union, have banded together in support of the amendment, which has caused some opponents to say it could be interpreted as sanctioning all sorts of illicit sexual behavior.[277]

On October 28, in a letter to the editor in the *Naples Daily News*: "The chief proponents of Florida's 'right of privacy'

276. Anne S. Crowley, *Homosexuals, Conservatives Raise Privacy Amendment Controversy*, PENSACOLA NEWS-J. (AP), Oct. 26, 1980, at 6C, https://www.newspapers.com/image/266960541.

277. R. Michael Anderson, *Right-to-Privacy Amendment Debated*, FLA. TIMES-UNION, Oct. 26, 1980, at A11–12 (on file with author).

amendment are activists in Miami's homosexual community. These activists have been travelling around Florida to solicit support for the proposed amendment."[278]

In the *Tampa Tribune* on October 29:

> Bob Kunst, champion of gay rights in Dade County, calls the amendment a "spectacular bonanza" that would keep the state out of the bedroom.
>
> Sen. Don Childers, D-West Palm Beach, an earlier advocate of the amendment who swung around to urge its defeat, said he fears numerous state laws would be struck down, laws ranging from anti-fornication to prohibition on home-grown marijuana.[279]

On October 30, Kunst wrote a letter to the editor of the *Tampa Times* to respond to the editorial board's opposition to the amendment, explaining that the right would go far beyond informational privacy. The board appended a note to the letter saying in part: "*The Times* editorial position remains against the amendment, for some of the same reasons Mr. Kunst is for it."[280] In a letter to the editor of the *Post* (West Palm Beach) on October 31, a reader wrote:

> Floridians must be alerted to the fact that the proposed Constitutional Amendment No. 2, called a Right To Privacy, is actually a "gay rights" amendment.
>
> The primary supporters of Amendment No. 2 are members of a Miami homosexual organization, who are going around the state trying to drum up support for passage.
>
> Legislators who approved this mistake for the ballot are now red-faced, insisting they did not intend to establish homosexual rights, but that is the legal thrust of the proposal. Their motives may have been pure, but their work is careless and sloppy and they should be ashamed of themselves.

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278. Paul J. O'Neill, Letter to the Editor, *Right of Privacy Amendment Challenged*, NAPLES DAILY NEWS, Oct. 28, 1980, *in* Grant Appendix, *supra* note 105, at 54.

279. Jim Walker, *Amendments Draw Vocal Opposition*, TAMPA TRIB., Oct. 29, 1980, at 5-B, https://www.newspapers.com/image/335158739.

280. Bob Kunst, Letter to the Editor, TAMPA TIMES, Oct. 30, 1980, at 17A, https://www.newspapers.com/image/334571417.

> Amendment No. 2 does not give Floridians any additional legitimate protection they don't already have under the federal and state constitutions.[281]

A *Tampa Tribune* article on the day before the election stated:

> By far the most controversial of the six was number 2, the amendment guaranteeing the "right of privacy," backed by gay rights activists intent on "getting law enforcement out of adults' bedrooms."
>
> Opponents claimed the amendment was too vague, could be subject to judicial interpretation and might impede enforcement of drug and pornography laws and statutes forbidding certain types of sexual conduct.
>
> The homosexual activists supported it for the same reason, contending law enforcement priorities should be moved away from so-called "victimless crimes."[282]

In the *Miami Herald* on November 2:

> [The amendment] might handicap law-enforcement officers, legalize marijuana, condone sexual perversions and invalidate many other laws, [Senator] Dunn says.
>
> . . . .
>
> The Congress United for Rights and Equality, a gay-rights group, also is actively campaigning for the privacy provision, says leader Bob Kunst.
>
> "This would get the government out of people's bedrooms," Kunst says.[283]

The point, further supported by even more articles from newspapers across the state, is that it was communicated to the public—by not just gay activists but other supporters and even opponents—that the amendment was broad and would protect not

281. Richert, *supra* note 251.

282. Barry, *supra* note; *see also* Matsuda, *supra* note 272 (on the day after the election: "THE PRIVACY amendment would eliminate laws prohibiting sexual conduct between consenting adults, homosexual and heterosexual, contended gay rights activists who supported the privacy amendment.").

283. Matsuda, *supra* note 257, at E8.

just informational privacy but decisional privacy.[284] It is less than honest, therefore, when the State writes in its answer brief: "Some media reports on Section 23 did discuss decisional autonomy. But most merely quoted *opponents* stoking public fears about gay rights and legalized marijuana."[285]

This debate was not confined to the pages of newspapers either. It was very public. As noted above, Kunst stumped for the amendment across the state. Moreover, an article published a day before the election said: "Voters in Southwest Florida will be asked to vote on five statewide constitutional amendments in Tuesday's general election, one of which has spurred controversial rallies and press conferences."[286]

Immediately after voters approved the privacy right, Kunst claimed victory. He said that an organization he led, Floridians for Privacy, was already looking to file test cases: "We are not going to deal with just a gay test case. We will look at the use of marijuana, co-habitation, *abortion*, pornography, government surveillance,

284. *See, e.g.*, *Privacy Amendment Caught in Swirl of Controversy*, ORLANDO SENTINEL (AP), Oct. 24, 1980, at 2-C, *in* Grant Appendix, *supra* note 105, at 42; *Amendment Opposition By Graham Criticized*, PALM BEACH POST, Oct. 29, 1980, at A11, https://www.newspapers.com/image/135023435; *Confused Voters May Reject State Amendments*, PALM BEACH POST, Nov. 2, 1980, at B9, https://www.newspapers.com/image/135025795; *Privacy Measure Draws Critics*, PALM BEACH POST, Nov. 2, 1980, at 59, https://www.newspapers.com/image/135025795; Jonathan Susskind, *Graham Opposes Privacy Issue on Nov. 4 Ballot*, ST. PETERSBURG TIMES, Oct. 26, 1980, at 1-B, 13-B, https://www.newspapers.com/image/319663857; Patrick McMahon, *State Constitutional Amendments*, ST. PETERSBURG TIMES, Oct. 30, 1980, at 19, https://www.newspapers.com/image/319702509; Jonathan Peterson, *Privacy Proposal Spawns Controversy*, TALLAHASSEE DEMOCRAT, Oct. 29, 1980, at 1B, 2B, https://www.newspapers.com/image/245921300; Jon Peck, *Voters Facing Five Amendment Decisions*, TAMPA TIMES, Oct. 27, 1980, at 8-A, https://www.newspapers.com/image/334566904; *Amendments on Ballot Tuesday*, NEWS TRIB., Nov. 2, 1980, at A12, *in* Grant Appendix, *supra* note 105, at 89; Timothy Harper, *Tax Questions Set the Trend for Referenda*, MIA. HERALD, Nov. 2, 1980, at 14A, https://www.newspapers.com/image/629006575 ("Also in Florida, a state constitutional amendment would guarantee all citizens a right to privacy. The amendment was originally offered by a group concerned about government wiretapping but has been embraced by Miami gay rights activists."); Editorial, *Constitutional Amendments*, TAMPA TIMES, Nov. 3, 1980, at 23, https://www.newspapers.com/image/334510443 (recommending against the amendment, describing it as "establishing a 'right of privacy,' 'which could interfere with the public's right to know'—and also open up all kinds of other social cans of worms"); *Voters to Cast Ballots on 5 Constitutional Amendments*, NEWS-PRESS, Nov. 3, 1980, at B, https://www.newspapers.com/image/214056754 ("The controversial issue, a right to privacy measure, has drawn strong backing from South Florida's homosexual rights activists and opposition from some conservatives.").

285. State Answer Brief, *supra* note10, at 20 (emphasis added).

286. *Voters to Decide on Amendments*, FT. MYERS NEWS-PRESS, Nov. 3, 1980, at B1, https://www.newspapers.com/image/214054138.

adult movie houses, swingers clubs, nude dancing, adult bookstores. . . ."[287] Rockway said, "The amendment deals *with a lot of other things*, but we wanted people to see it as gay rights."[288] He also said, "This is a real vindication that when you bring the real issues to the public and are not afraid, the public will go for it. Voters are a lot more sophisticated than they were two or three years ago."[289] While also not mentioning abortion, opponent Senator Childers understood the privacy amendment would protect decisional privacy. He:

> warned that "it will certainly create chaos in our entire lifestyle in Florida.
>
> "I think that all the statutes dealing with victimless crimes will be abolished and the homosexual movement will certainly come out of the closet . . . flaunting their lifestyle upon the citizens."[290]

Another indication of the decisional-privacy dimension of the new amendment comes from a short article in the *Tampa Tribune* on November 21:

> Fifth District Moral Majority Chairman Lewis N. Turner will be the guest speaker Saturday at the 3 p.m. meeting of the Americans Against Communism.
>
> . . . .

287. Dary Matera, *Gay Forces Read Rights Legislation Their Way*, MIA. NEWS, Nov. 5, 1980, at 7A, https://www.newspapers.com/image/302628359 (emphasis added).

288. *Activists Try to Extend Impact of Amendment*, TAMPA TRIB. (AP), Nov. 7, 1980, at 36, *in* Grant Appendix, *supra* note 105, at 131.

289. *Id*.

290. Larry Lipman, *Issues Go Down for 4 Out of 5 Counts*, SENTINEL STAR, Nov. 5, 1980, at 2, *in* Grant Appendix, *supra* note 105, at 119; *see also* Editorial, *New 'Right' is Risky Business*, FT. LAUDERDALE NEWS & SUN-SENT., Nov. 9, 1980, at 4H, *in* Grant Appendix, *supra* note 105, at 137 ("This amendment could serve one useful purpose if it gets government out of people's bedrooms *and other aspects of their private lives* where it doesn't belong." (emphasis added)). *But see* Pat Lyles, Letter to the Editor, *Matter of Intrusion*, POST, Nov. 30, 1980, *in* Grant Appendix, *supra* note 105, at 142 ("There have been several news stories relating to the privacy amendment both before and after it was overwhelmingly passed by the voters. The stories that concern me are the ones dealing with Mr. Bob Kunst of Miami . . . [T]he privacy amendment passed (no thanks to this paper[']s[] opposition) not because it is a gay rights law (it is not), but because the people of this state are tired of unwanted intrusions into their private lives by the government. It is a good law and no less than all Floridians deserve.").

> Turner, pastor of Bible Baptist Church in New Port Richey, will discuss the Moral Majority program and the recently approved "right to privacy" amendment to the Florida Constitution.[291]

One would think a Moral Majority leader would not speak of the amendment unless it implicated decisional privacy.

3. Ballot Summary and Election Result

The ballot summary described the amendment in broad terms: "Proposing the creation of Section 23 of Article I of the State Constitution establishing a constitutional right of privacy ."[292]

After all the debate, voters passed the measure with 60.6 % voting yes (1,722,987) and the rest voting no (1,120,302).[293]

D. Post-1980 History[294]

Five years after voters approved Section 23, the Florida Supreme Court decided an informational-privacy case, *Winfield v. Division of Pari-Mutuel Wagering, Department of Business Regulation*.[295] It made the following unambiguously true statements, though with an unfortunate statement about the drafters' intent:

> The citizens of Florida opted for more protection from governmental intrusion when they approved [A]rticle I, [S]ection 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, [S]ection 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and

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291. *Moral Majority On Agenda*, TAMPA TRIB., Nov. 21, 1980, *in* Grant Appendix, *supra* note 105, at 141.

292. Fla. Dep't of State, Div. of Elections, *Right of Privacy*, https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=10 (last visited Sept. 9, 2023).

293. *Id.*

294. This Part elaborates on the history outlined in Richardson, *supra* note 11.

295. Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regul., 477 So. 2d 544, 544 (Fla. 1985).

> succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.
>
> This is a case of first impression in the state of Florida; therefore, it is within the discretion of this Court to decide the limitations and latitude afforded [A]rticle I, [S]ection 23. We believe that the amendment should be interpreted in accordance with the intent of its drafters.[296]

Although the court said that federal "cases involving the autonomy zone of privacy are not directly applicable to the case at bar," it nonetheless described the right of privacy the U.S. Supreme Court "fashioned" that "protects the decision-making or autonomy zone of privacy interests of the individual."[297] These cases included informational-privacy cases and "decisions includ[ing] matters concerning marriage, procreation, contraception, family relationships and child rearing, and education," citing *Roe*.[298] In another informational-privacy case, in 1987, the court covered the same ground.[299]

The first abortion case to reach the court after Section 23's approval was *In re T.W.*, decided just nine years after the amendment's approval.[300] This is the primary case the State and pro-life activists will ask the Florida Supreme Court to overrule.[301] In *In re T.W.*, the court applied the privacy right to strike down a parental consent statute that required parents of minors seeking an abortion to consent to the procedure unless the minor was granted a waiver by a judge. After quoting *Winfield*, the court stated that "the amendment embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution."[302] Later in the opinion, the court

296. *Id.* at 548.
297. *Id.* at 546.
298. *Id.*
299. Rasmussen v. S. Fla. Blood Serv., 500 So. 2d 533, 535–36 (Fla. 1987).
300. *In re* T.W., 551 So. 2d 1186, 1188–89 (Fla. 1989).
301. State Answer Brief, *supra* note 10, at 1.
302. 551 So. 2d at 1192. Because the focus of this article is not on the continuing viability of the court's abortion precedents, it is not necessary to discuss in detail the argument that *In re T.W.* relied so heavily on *Roe* that *Roe*'s overruling has completely knocked the legs out from under *In re T.W. See* State Answer Brief, *supra* note 10, at 58–59; Beltran, *supra* note 13. Suffice to say that *In re T.W.* did not find that Florida law recognized a right to

held: "Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy."[303] This right also extended to minors. The court issued its decision after it received supplemental briefing on whether the statute conflicted with the state constitution; in those briefs (as well as post-decision filings), the parties and amici made detailed arguments about the original intent behind Section 23.[304]

Particularly relevant here are the justices' separate opinions. In a special concurrence, Chief Justice Ehrlich wrote:

> I wholeheartedly concur that Florida's express constitutional right of privacy, [A]rticle I, [S]ection 23, Florida Constitution, is implicated in this case. Specifically, I note that the privacy provision was added to the Florida Constitution by amendment in 1980, well after the decision of the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). It can therefore be presumed that the public was aware that the right to an abortion was included under the federal constitutional right of privacy and would therefore certainly be covered by the Florida privacy amendment. *See Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980) [("The constitutional amendment must be viewed in light of the

abortion solely because of *Roe*, or that the right was part of a right to privacy cobbled together from different state constitutional provisions. The court expressly said it was evaluating the statute under the state constitution and that, "[i]f it fails here [as it did], then no further analysis under federal law is required." *In re T.W.*, 551 So. 2d at 1190.

303. 551 So. 2d at 1192.

304. *Compare* Supplemental Brief of Appellant at 24–26, *In re* T.W., 551 So. 2d 1186 (Fla. 1989) (No. 74,143), https://efactssc-public.flcourts.org/casedocuments/1960/74143/1960-74143_brief_19947_br13.pdf, *and* Supplemental Brief of Intervenor State of Florida at 5–9, *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (No. 74,143), https://efactssc-public.flcourts.org/casedocuments/1960/74143/1960-74143_brief_19948_br13.pdf, *and* Supplemental Brief of Amici Bi-Partisan Group of Florida Legislators and Florida Right to Life, Inc. at 5–11, *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (No. 74,143), https://efactssc-public.flcourts.org/casedocuments/1960/74143/1960-74143_brief_19949_br08.pdf, *and* Motion for Rehearing or for Clarification of State of Florida at 7–8, *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (No. 74,143), https://efactssc-public.flcourts.org/casedocuments/1960/74143/1960-74143_motion_19017_m12.pdf, *with* Appellee's Supplemental Answer Brief at 8–12, 15, *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (No. 74,143), https://efactssc-public.flcourts.org/casedocuments/1960/74143/1960-74143_brief_19952_br14.pdf, *and* Supplemental Brief of Amici American Civil Liberties Union Foundation of Florida, Inc. et al. at 16–20, *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (No. 74,143), https://efactssc-public.flcourts.org/casedocuments/1960/74143/1960-74143_brief_19951_br08.pdf, *and* Reply of Appellee at 14–15, *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (No. 74,143), https://efactssc-public.flcourts.org/casedocuments/1960/74143/1960-74143_response_5259_b05.pdf.

> historical development of the decisional law extant at the time of its adoption and the intent of the framers and adopters.")].[305]

Next, Justice Overton, the CRC commissioner who expressed the need for a state right of privacy in terms of personal and financial data, said: "The right of privacy provision, adopted by the people of this state in 1980, effectively codified within the Florida Constitution the principles of *Roe v. Wade* . . . as it existed in 1980."[306] In his opinion concurring in part and dissenting in part, Justice Grimes wrote:

> In 1980, the Florida Constitution was amended to specifically guarantee persons the right to privacy. As a consequence, it was thereafter unnecessary to read a right of privacy into the due process provision of Florida's equivalent to the fourteenth amendment. However, this did not mean that Florida voters had elected to create more privacy rights concerning abortion than those already guaranteed by the United States Supreme Court. By 1980, abortion rights were well established under the federal Constitution, and I believe the privacy amendment had the practical effect of guaranteeing these same rights under the Florida Constitution. If the United States Supreme Court were to subsequently recede from *Roe v. Wade*, this would not diminish the abortion rights now provided by the privacy amendment of the Florida Constitution. Consequently, I agree with the analysis contained in parts I and II of the majority opinion, which I read as adopting, for purposes of the Florida Constitution, the qualified right to have an abortion established in *Roe v. Wade*.[307]

Finally, in his dissenting opinion, Justice McDonald said: "I have no problem in embracing the rationale of *Roe v. Wade*, particularly when this state has adopted a constitutional right of privacy."[308]

Since *In re T.W.*, the court has reaffirmed that the right to privacy protects the right to an abortion. In one significant 2003 case, *North Florida Women's Health Services v. State*,[309] the court struck down a parental-notice statute requiring physicians to notify the parents when a minor seeks an abortion. Responding to

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305. *In re T.W.*, 551 So. 2d at 1197 (Ehrlich, C.J., concurring specially).
306. *Id.* at 1201 (Overton, J., concurring in part and dissenting in part).
307. *Id.* at 1202 (Grimes, J., concurring in part and dissenting in part).
308. *Id.* at 1205 (McDonald, J., dissenting) (citation omitted).
309. N. Fla. Women's Health Servs. v. State, 866 So. 2d 612, 639–40 (Fla. 2003), *overruled by* FLA. CONST. art. X, § 22 (adopted in 2004).

the *North Florida Women*'s decision, the legislature placed a proposed constitutional amendment on the 2004 ballot that would authorize the legislature to enact a law requiring parental notification that would become Article X, Section 22:

> SECTION 22. Parental notice of termination of a minor's pregnancy.—The Legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.[310]

The electorate approved the amendment.[311] The next year, the legislature reenacted the parental-notice statute.[312]

In 2012, the legislature placed another proposed amendment, Amendment 6, on the ballot that would have added a section to Article I of the state constitution.[313] The relevant part of Amendment 6 stated: "[T]he State Constitution may not be interpreted to create broader rights to an abortion than those contained in the United States Constitution."[314] The amendment would have overruled an important aspect of the Florida Supreme Court's decisions protecting abortion, as the ballot summary given to voters in the voting booth explained:

> This proposed amendment provides that the State Constitution may not be interpreted to create broader rights to an abortion

310. FLA. CONST. art. X, § 22.

311. *Florida Amendment 1, Parental Notification of Abortion Measure (2004)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Amendment_1,_Parental_Notification_of_Abortion_Measure_(2004) (last visited Sept. 9, 2023).

312. FLA. STAT. § 390.01114. The legislature amended § 390.01114 in 2020 to reinstate the parental-consent requirement, in violation of *In re T.W.* To my knowledge, no one filed a lawsuit challenging the law.

313. *Florida Amendment 6, State Constitution Interpretation and Prohibit Public Funds for Abortions Amendment* (2012), BALLOTPEDIA, https://ballotpedia.org/Florida_Amendment_6,_State_Constitution_Interpretation_and_Prohibit_Public_Funds_for_Abortions_Amendment_(2012) (last visited Sept. 9, 2023) [hereinafter *Florida Amendment 6*].

314. *Id.*

> than those contained in the United States Constitution. With respect to abortion, this proposed amendment overrules court decisions which conclude that the right of privacy under Article I, Section 23 of the State Constitution is broader in scope than that of the United States Constitution.[315]

The proposal was the subject of robust public debate.[316] Although proponents argued that Amendment 6 was limited to overruling *In re T.W.*—an embarrassingly false claim—they conceded that, under their reading of the amendment, it would still protect an adult's right to abortion.[317] The language of the proposal was also forward-looking. It anticipated that, one day, the U.S. Supreme Court could overrule *Roe*, which would mean no more state constitutional right to an abortion. Ultimately, the electorate rejected Amendment 6, with fifty-five percent of the voters voting against it—a resounding defeat since it needed sixty percent to pass.[318]

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315. *Id.* When rejecting the legal significance of the failure of the 2012 proposed amendment, the State's amicus law professors contend that, in the text of the proposal, "[t]here was no reference to [A]rticle I, [S]ection 23, or any of its constituent language." Brief of Scholars on Original Meaning in State Constitutional Law as Amici Curiae in Support of Respondents at 8, Planned Parenthood of Sw. & Cent. Fla. v. State, Nos. SC22-1050 & SC22-1127 (Fla. Apr. 7, 2023) [hereinafter Scholars' Brief], https://acis-api.flcourts.gov/courts/68f021c4-6a44-4735-9a76-5360b2e8af13/cms/case/693c27ad-f040-4da1-9c9e-b52e62e960a2/docketentrydocuments/f801032f-9d34-4367-b1cf-cd51e6d7aca0. They ignore the ballot language.

316. *See* Lizette Alvarez, *Voters in Florida Are Set to Weigh In on Two Contentious Ballot Questions*, N.Y. TIMES (Oct. 6, 2012), https://www.nytimes.com/2012/10/07/us/floridians-face-initiatives-on-abortion-and-church-and-state.html; Sascha Cordner, *Both Sides of Abortion Amendment 6 Make Case To Florida Voters*, WFSU (Oct. 19, 2012, 7:12 PM), https://news.wfsu.org/elections/2012-10-19/both-sides-of-abortion-amendment-6-make-case-to-florida-voters; Tia Mitchell, *Privacy Clause Is at Center of Amendment 6 Debate*, TAMPA BAY TIMES (Oct. 23, 2012), https://www.tampabay.com/news/religion/privacy-clause-is-at-center-of-amendment-6-debate/1257921/.

317. Rufus S. Armstrong, Opinion, *Amendment 6 Protects Parental Rights*, GAINESVILLE SUN (Sept. 25, 2012, 3:27 PM), https://www.gainesville.com/story/opinion/columns/more-voices/2012/09/25/rufus-s-armstrong-amendment-6-protects-parental-rights/31694044007/; Carrie J. Eisnaugle, Opinion, *The Importance of Saying Yes on Amendment 6*, GAINESVILLE SUN (Oct. 10, 2012, 3:04 PM), https://www.gainesville.com/story/opinion/columns/more-voices/2012/10/10/carrie-j-eisnaugle-the-importance-of-saying-yes-on-amendment-6/31602814007/; *They Say . . . We Say*, YES ON AMEND. 6, https://web.archive.org/web/20121111211154/http:/www.sayyeson6.com/faq/they-say-we-say/ (last visited Sept. 9, 2023).

318. *Florida Amendment 6*, *supra* note 313.

V. ASSESSING THE HISTORICAL EVIDENCE

Having laid out the historical evidence, I will now apply the principles of public meaning originalism to assess it.

A. Whose Intent?

Whose intent should we be looking at? The State and others claim they are concerned with Section 23's original public meaning, but they place great, one might say conclusive, weight on what the drafters intended.[319] For example, in its brief, the State cites a U.S. Supreme Court case regarding statutory language, stating that it is the sponsor's statements that count.[320] And in his amicus brief, former State Representative Grant asserts that his "personal history in the 1980 legislature conclusively proves the original public meaning of privacy was unrelated to abortion."[321] As explained *supra* in Part I(A), what the drafters intended is not the proper focus of the inquiry under public meaning originalism, which places the greatest weight on how the public understood the text; [322] this is so even if we can resort to what the drafters said as circumstantial evidence of meaning.

We must recognize that the historical evidence described in Parts IV(C)(1) and (2) is susceptible to the conclusion that the drafters' intent diverged from what the public understood the text to mean. Viewed thusly, the drafters' intent supports the State and pro-life activists' position, and there is some scholarship suggesting that, with the federal Constitution, conflicts should be resolved in favor of original intent.[323] But that is not the correct

319. *See, e.g.*, State Answer Brief, *supra* note 10, at 18, 21–22, 40—44; Stemberger & Phillips, *supra* note 13, at 26–30; Grant Brief, *supra* note 170, at 19–20; Liberty Counsel Brief, *supra* note 94, at 3–6.

320. State Answer Brief, *supra* note 10, at 18, 21, 40.

321. Grant Brief, *supra* note 170, at 19–20.

322. *See also* Thompson v. DeSantis, 301 So. 3d 180, 187 (Fla. 2020) ("The goal of constitutional interpretation is to arrive at the fair meaning of the constitutional text. We ask how a reasonable member of the public would have understood the text at the time of its enactment.").

323. *See* Richard Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 714 (2009) ("We see, therefore, that even in those strange cases where we think that the apparent public meaning might yield a result different from the intended meaning, there are good reasons to refer to the original intentions. It is not surprising, then, that the practitioners of public meaning originalism tend to support particular interpretations with essentially the same kind of evidence we

answer here. Initially, the evidence does not show that the drafters necessarily agreed that Section 23 was limited to informational privacy.[324] Assuming they did, the conflict should be resolved in favor of what the public understood because of a critical difference between the federal and Florida Constitutions. Unlike the federal procedure where the enactors, and specifically the ratifiers, were not actually the public but representative bodies, amendments in Florida are approved by the voters directly. The Florida Supreme Court has implicitly recognized this significant difference.[325] How the voters understood the text should control if there is a divergence from what the drafters said. In other words, we are looking at what the public in 1980 understood not just because we are trying to determine the original public meaning, but because the voters were the actual ratifiers.

One may ask whether the drafters engaged in a bait and switch—intending one thing (a broad privacy right) and writing the proposal that way, but telling the public something else (it would be narrow)—and if so, whose understanding should prevail.[326] Possibly, the Florida Supreme Court would side with the drafters over the public as a result, likening the situation to an alleged bait and switch that appeared to trouble the court in the advisory opinion concerning the Voting Restoration Amendment.[327] However, there is no credible evidence of a bait and

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have always associated with the search for the original intentions: the debates and proceedings of the Philadelphia Convention, the ratifying conventions, and—for amendments—congressional speeches and committee reports; the drafting history of the provision in question; and the public statements and private correspondence of prominent enactors.").

324. *See* Memorandum, *supra* note 233; Peck, *supra* note 252; Lipman, *supra* note 239; Fox, *supra* note 16, at 412.

325. Advisory Op. to the Governor Re: Implementation of Amend. 4, the Voting Restoration Amend., 288 So. 3d 1070, 1078, 1081–82, 1084 (Fla. 2020) ("The language at issue, read in context, has an unambiguous 'ordinary meaning' that the voters 'would most likely understand' [citation omitted] to encompass obligations including LFOs. . . . [O]rdinary meaning that would have been understood by the voters. . . . [T]he voters who adopted Amendment 4 would have understood . . . the voters would understand the broad phrase . . . an ordinary meaning that the voters would have understood . . . .").

326. *See* Memorandum, *supra* note 233; Varn, *supra* note 271; State Answer Brief, *supra* note 10, at 21 n.27.

327. *See Advisory Opinion*, 288 So. 3d at 1078 ("Although the representations to this Court and to the public close the door on any credible suggestion that 'all terms of sentence' was *intended* by the Sponsor to refer only to durational periods, we need not address whether Amendment 4 involved a 'bait and switch' attempt to amend our State's constitution. Indeed, our opinion is based not on the Sponsor's subjective intent or campaign statements, but rather on the objective meaning of the constitutional text. . . . The Sponsor's

switch in the case of Section 23. Rather, it appears the drafters harbored a sincere, mistaken understanding of the broad language they put to voters.[328] When voters approved Section 23, they "appropriated it, giving its text the meaning that was publicly understood."[329] And resolving the conflict in favor of the drafters would void the decision of the People of the State of Florida, in whom "[a]ll political power is inherent."[330]

Accordingly, when interpreting Section 23, we look to what the public understood, not what the drafters said.

B. The Weight to Give the General Background

To determine what the public understood, how much weight do we place on the background? Originalists place great weight on it. In *Heller*, for example, the U.S. Supreme Court placed great weight on English common law when interpreting the Second Amendment—it was the background for the U.S. Constitution and the founding generation.[331] If sources on English common law like Blackstone, Coke, and Hale are probative of the meaning of the U.S. Constitution, then the U.S. Supreme Court's decisional-privacy cases—especially the landmark and divisive *Roe*, decided in 1973—are even more probative of the meaning of Section 23, approved several years later in 1980. This is not only the proper inquiry under public meaning originalism, but it is consistent with longstanding Florida case law: "The constitutional amendment must be viewed in light of the historical development of the decisional law extant at the time of its adoption and the intent of the framers and adopters."[332] Also probative is the Florida Supreme Court's refusal to find a general right to privacy in the state Constitution as it existed before 1980 that would have protected *more* than the limited federal right.

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expressed intent and campaign statements simply are consistent with that ordinary meaning that would have been understood by the voters.") (emphasis in original)).

328. *See supra* notes 235–38 and accompanying text.

329. WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 28, at 60.

330. FLA. CONST. art. I, § 1 ("All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.").

331. For example, the Court cited Blackstone several times. District of Columbia v. Heller, 554 U.S. 570, 582, 593–94, 594–95, 597 (2008); *see also* Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1957 (2017).

332. Jenkins v. State, 385 So. 2d 1356, 1357 (Fla. 1980).

Roe is particularly important, not just because it concerned abortion, but because of the firestorm it created—a fact the *Dobbs* majority acknowledged. Voters in 1980 knew about *Roe*. They also understood that, under federal law, the right to abortion was part of the right to privacy. On this point, Fox reaches a particularly important conclusion, which is the primary thesis of his article: By 1980, the "legal background of the right to privacy—a well-known legal term that had received extensive attention in law and public discussions . . . —[showed] a right with a pre-existing baseline where reproductive rights were part of the core meaning."[333] It is ludicrous to argue, as the State does, that "[e]ven if an ordinary voter in 1980 knew anything of *Roe*"—a bizarre enough statement—they nonetheless would not have appreciated that the right to an abortion was found in the right to privacy because "[it was] unlikely that the public, in ratifying Section 23, grasped the confounding legal alchemy that *Roe* used to concoct the federal abortion right."[334] Whether the reasonable voter in 1980 understood exactly how the *Roe* court arrived at its holding is not the same thing as whether they understood the holding itself—which they more than likely did. Voters also most likely knew about the pro-life movement's attempts in the 1970s to overturn the decision by constitutional amendment, or undermine the decision by restrictive laws, and the U.S. Supreme Court's decisions in the late 1970s limiting *Roe*.

Given this background, it is reasonable to conclude that Florida voters wanted to inscribe into their constitution not just a right to decisional privacy, but one that included the right to an abortion: a state-level constitutional protection against the pro-life movement's efforts. This is exactly what now Chief Justice Carlos Muñiz concluded in 2004:

> The people of Florida in 1980 amended the Constitution to add a right of privacy. At that time, seven years had passed since the U.S. Supreme Court established the abortion right in *Roe v. Wade*. Already there was widespread acknowledgment of the vulnerability of any right that lacked explicit support in the constitutional text. In this context, one purpose of the privacy

333. Fox, *supra* note 16, at 418–19.
334. State Answer Brief, *supra* note 10, at 49–51.

> amendment clearly was to give the abortion right a textual foundation in our state constitution.[335]

C. The Public Discussion

In the Florida context, public meaning originalism requires us to give the greatest weight to how the public understood Section 23. As we saw above, newspapers are a rich source for that inquiry, something Justice Thomas recognized in his opinion in *McDonald v. City of Chicago*, where he relied on newspaper coverage of proceedings in Congress when discussing the original understanding of the Fourteenth Amendment.[336] And Professor Ilya Somin has written:

> If elites are not always a reliable guide to understanding the public, why not look at information available in media directed at the ordinary voter? Newspapers and other publications intended to be read by the general public may provide a better guide to voters' understanding of the [federal] Constitution at the time of enactment than the statements of [allegedly] well-informed elites.[337]

Here, the newspapers reflect the public discussion in 1980 that Florida's privacy right was broadly worded and would extend beyond the protection of informational privacy to include decisional privacy. In the course of making their case for what they said would be a sweeping privacy right (something nearly everyone else understood too), gay-rights activists twice communicated to the public in the month before the election that the amendment would affect the right to an abortion, and once that it concerned

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335. Carlos Muñiz, *Parental Notification of a Minor's Termination of Pregnancy*, 29 J. JAMES MADISON INST., Fall 2004, at 8, 9, https://web.archive.org/web/20050222102548/http://jamesmadison.org/pdf/materials/273.pdf.

336. McDonald v. City of Chicago, 561 U.S. 742, 827–33 (2010) (Thomas, J., concurring in part and concurring in the judgment).

337. Ilya Somin, *Originalism and Political Ignorance*, 97 MINN. L. REV. 625, 656 (2012). In this article, Somin discussed "an important recent article" where the author "advocates precisely this strategy and uses extensive evidence from contemporary newspapers to shed interesting light on the perennial question of whether or not the Privileges or Immunities Clause of the Fourteenth Amendment was meant to incorporate the Bill of Rights against the states." *Id.* at 656–57 (discussing George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1?*, 18 J. CONTEMP. LEGAL ISSUES 323 (2009)); *see also* Thomas, *supra*, at 346–47; Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 27 (2011); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1493 n.13 (2005).

control of one's body, an obvious reference to abortion.[338] One of the abortion comments was made in an Associated Press report,[339] strongly suggesting it ran in other newspapers not included in the online databases I used.

The fact that abortion was referenced only a few times does not undermine the case for original public meaning. Rather, it highlights that it was communicated to the public that the Florida right of privacy would be a package of closely related rights. Newspapers and the ballot summaries actually given to voters referred to the right as, simply, the right of privacy. The public was told by both proponents and opponents, over and over again, that the privacy right was about far more than informational privacy; it entailed protection of the right to decisional privacy, and despite opponents' warnings, voters approved the amendment.[340] There is no indication that the public understood that they would be picking and choosing which components of the right of privacy would be included in Section 23. A voter would have understood that a

338. *See, e.g.*, Mary Barrineau, *Fetal Rights Urged*, PENSACOLA NEWS J., Aug. 27, 1974, at 4D, https://www.newspapers.com/image/264635919 ("Right-to-Lifers refute the oft-quoted maxims about a woman having the right to control her own body. 'When a woman is pregnant, it's not her own body, but also the body of another individual.' they say."); Ruth E. Laskowski, Editorial, *Flood of Misinformation on Abortion*, TAMPA TRIB., May 17, 1977, at 9-A, https://www.newspapers.com/image/334964017 ("Ms. Echelman protests hotly against anyone who would question the morality of abortion. She uses the familiar argument that such an action is right because 'a woman has a right to control her own body.' I protest."); William Raspberry, *'A Closet Right-to-Lifer, I Think'*, SENTINEL STAR (Orlando), July 2, 1977, at 11-A, https://www.newspapers.com/image/224844151 ("I have simply allowed my sophisticated friends to believe that I, like them, take abortion-on-demand to be as benign a procedure as, say, a cystectomy, a natural concomitant of a woman's right to control her own body."); Earl H. Ware Jr., President, Hillsborough Cnty. Chapter, Fla. Right to Life, Editorial, *Sanctity of Life vs. Convenience*, TAMPA TIMES, May 1, 1978, at 8-A, https://www.newspapers.com/image/333864723 ("Certainly a woman should be able to 'control her own body!' This is true enough, but the unborn child is not merely a piece of tissue . . . ."); Opinion, *Abortion Backslide*, MIA. NEWS, May 8, 1978, at 10A, https://www.newspapers.com/image/302185525 ("Maybe someday Florida legislators will accept the idea that the right to an abortion is a fundamental right of women to control their own bodies."); Marjorie Menzel, Opinion, *Abortion Rights Must be Protected*, TALLAHASSEE DEMOCRAT, Oct. 21, 1979, at 3B, https://www.newspapers.com/image/244412350 ("Oct. 22–29 is the nationwide Abortion Rights Action Week. It represents a belief in the inherent right of human beings to control their own bodies.").

339. *Planned Parenthood Waving the Flag, supra* note 178.

340. *Compare* United States v. Lopez, 514 U.S. 549, 586 (1995) (Thomas, J., concurring) (discussing the original understanding of the Commerce Clause: "In fact, when Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably." (citations omitted)), *with* George C. Thomas III, *supra* note 337, at 341 ("A news story that appears only in one, or a few Northeastern newspapers, does not offer much evidence that the country was put on notice of anything.").

constitutional right of privacy included the right to an abortion. As Fox observes, the public debate on decisional privacy, primarily over issues like fornication, cohabitation, and gay rights, was largely a litigation of unsettled issues: What else *in addition to* the rights already protected by federal law—the "baseline"—would be protected by Section 23?[341] Since it was already settled that the right to abortion was part of that baseline, it is not surprising that pro-life and pro-choice groups were silent on the issue.[342] Indeed, pro-life activists had become part of the political right by this point. Yet in the public debate over Section 23, while vocal about other aspects of decisional privacy, the right was silent about abortion, something the right had linked to other matters that they did publicly debate.[343] The explanation for this silence cannot be that pro-life activists, and the right more generally, simply did not think Section 23 implicated abortion, when clearly the right understood decisional privacy was at issue. The right to abortion was settled; it did not need to be discussed.

Based on all of this marshalled evidence, Stemberger and Phillips overstate their case when they conclude, "The historical record behind Amendment 2 compellingly indicates that the origin and purpose behind Florida's Privacy Law was informational privacy."[344] In fact, they reach this conclusion before they even discuss the public debate concerning the proposal, as they focus on the statements of the framers, which is improper but natural since

341. Fox, *supra* note 16, at 23 ("[O]ne would not expect the press and public to spend a lot of time discussing how [S]ection 23 covered the same ground as the pre-existing federal right, and in fact there was not much discussion of contraceptive rights, abortion rights, rights against forced sterilization, or other areas that were already protected by federal constitutional law. . . . But because protection of abortion was already covered in federal law, the debates over [S]ection 23, including the debates about its decisional privacy component, focused on other issues." (footnotes omitted)); *id.* at 44243 ("Abortion would only have been debated if its coverage within the right to privacy were in dispute or were not yet established in law. But as of 1980 the protection of abortion through the right to privacy *was the established law*. It would hardly make sense for debates about [S]ection 23 to invest time and effort re-arguing the reasoning of *Roe*, let alone arguing that the terms 'right to privacy,' 'right to be let alone,' and 'free from governmental intrusion' would plainly mean what they already meant in federal law. Rather, what the advocates for the amendment spent their time debating and analyzing was what *additional* protections [S]ection 23 would grant beyond the rights established in federal law. They argued about extensions of the established baseline, just as one would expect when constitutionalizing (or, in the words of *Heller*, 'codifying') a well-developed legal term.").

342. State Answer Brief, *supra* note 10, at 41–42; Stemberger & Phillips, *supra* note 13, at 27 & n.201.

343. State Answer Brief, *supra* note 10, at 41–42.

344. Stemberger & Phillips, *supra* note 13, at 29–30.

that history supports their conclusion. Their discussion of the debate comes in a critique of an earlier draft of my Article and—like the State in its answer brief—they make no serious attempt to create a counternarrative of the public debate.[345] And even their limited discussion is flawed:

> Tellingly, Mr. Richardson was unable to identify a single piece of evidence showing that abortion was contemplated to be within the "right to be let alone" granted by [S]ection 23. Instead, Mr. Richardson identifies a scattershot of newspaper articles focusing almost exclusively on gay rights, suggesting this shows [S]ection 23 covered both decisional and informational privacy, notwithstanding that, as he admits, this departed from the consensus view and "befuddled" lawmakers and CRC members. At most, Mr. Richardson demonstrated that over the course of a few years, there was, on the margins, some concern that the language was overbroad such that litigants might attempt to contort and stretch its meaning beyond recognition—and that extreme (at the time, at least) gay rights groups were happy to make such attempts. Indeed, the only mention of abortion identified by Mr. Richardson comes after [S]ection 23 passed, where a gay rights activist announced the intention to begin filing test cases on "marijuana, co-habitation, abortion, pornography, government surveillance, adult movie houses, swingers' clubs, nude dancing, [and] adult bookstores."
>
> A few articles mentioning gay rights and a single reference to abortion after the initiative had already passed does not outweigh or even seriously call into question the mountain of counterevidence showing that informational privacy was the concern that gave rise to [S]ection 23—nor indicate that sixty-one percent of Floridians were voting to prevent the government from "intruding upon" the right to nude dancing, swingers' clubs, pornography—or abortion.[346]

The criticism of my conclusion rests on mischaracterizations of my research. I identified three articles—now six after reviewing the State's and Grant's appendices—where it was stated or implied that the proposal would at least mirror the federal privacy right, which by 1980 most people knew included the right to abortion. I presented more than a "scattershot" of articles establishing the

345. *Id.* at 30–31 (critiquing an earlier draft of my article).
346. *Id.* (footnotes omitted).

prominence of decisional privacy, whether discussing gay rights or other matters. Those articles also show that the concern over the breadth of the amendment was not "on the margins," but a central point made by both opponents and proponents. And I identified two articles where activists mentioned abortion *before* Section 23 passed—the existence of which Stemberger and Phillips actually acknowledge earlier in their article but ignore here[347]—and an additional one where an activist spoke of control of one's own body, language that clearly implicates abortion. Importantly, Stemberger and Phillips do nothing to rebut the evidence of the extensive public discussion connecting decisional privacy to Section 23.

What I have said above about the Stemberger and Phillips article is true of Grant, whose conclusion was: "The historical record demonstrates beyond any reasonable doubt that the public understood 'the right to be let alone and free from governmental intrusion into the person's private life' to mean informational privacy and not the creation of a right to abort an unborn child."[348] This conclusion is hyperbolic, unsupported by the short discussion in his brief, and contrary to the actual historical record.[349]

As a final point, the historical record avoids the "political ignorance" problem identified by Professor Somin.[350] To start, as Somin notes, state constitutional referendum initiatives:

> increase[] the knowledge burden on voters. In many states, the range of issues covered by a referendum initiative is limited by the "single subject rule," which prevents a ballot question from addressing more than one issue at a time.[351] . . . [The rule] somewhat reduce[s] the amount of information voters need to understand any given initiative.[352]

On federal constitutional issues, Somin sketches out a solution that is helpful here:

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347. *Id.* at 24 n.177.
348. Grant Brief, *supra* note 170, at 31.
349. *See id.* at 28–31.
350. *See* Somin, *supra* note 337.
351. *See, e.g.*, FLA. CONST. art. XI, § 5 (1968).
352. Somin, *supra* note 337, at 661–62 (footnotes omitted). There appears to be a typo in the text. Rather than "increase[] the knowledge burden on voters," context suggests that Somin meant "decrease."

> [A]n interpretation of a constitutional provision that is supported by both elite statements and contemporary media accounts is more likely to be an accurate description of what the general public believed than a theory that is supported by only one of these two types of evidence. The theory becomes even stronger if it is also backed by evidence suggesting that voters became aware of it by using information shortcuts.[353]

As we have seen, the opinions of the elites (legislators and editorial boards) are entitled to far less weight than those of the ratifiers (voters); and the contemporary media accounts show that all agreed the proposal was very broad and could have sweeping effects, beyond just informational privacy. It is highly likely that voters were aware of this theory—and specifically that the proposal would include decisional privacy, including the right to abortion—by the information shortcut provided by the general background.

D. Post-Approval History

One might think that what happened after voters approved Section 23 is not relevant to a determination of its meaning. Indeed, the State and its amicus law professors make that argument.[354] Yet, originalists do turn to post-ratification history when interpreting the federal Constitution.[355] In *Heller*, Justice Scalia called "the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification" a "critical tool of constitutional interpretation."[356] In interpreting Section 23, I would not place *great* weight on post-approval history.[357] Still, the post-approval history supports the conclusion that Section 23 was understood to protect the right to an abortion.

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353. *Id.* at 664.

354. State Answer Brief, *supra* note 10, at 45 n.51; Scholars' Brief, *supra* note 315, at 7.

355. *See* Kelo v. City of New London, 545 U.S. 469, 511–14 (2005) (Thomas, J., dissenting); District of Columbia v. Heller, 554 U.S. 570, 605–19 (2008); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127–28 (2022); *see also* Ramsey, *supra* note 331, at 1957–62.

356. *Heller*, 554 U.S. at 605 (emphasis in original).

357. *Bruen*, 142 S. Ct. at 2136 ("[W]e must also guard against giving postenactment history more weight than it can rightly bear.").

In 1989, the Florida Supreme Court decided *In re T.W.*, which the State and pro-life activists will ask the court to overrule.[358] In that case, Justice Overton, who as a CRC commissioner framed the right to privacy in terms of informational privacy, nonetheless said that adoption of the privacy right "effectively codified within the Florida Constitution the principles of *Roe v. Wade* . . . as it existed in 1980."[359] Chief Justice Ehrlich concluded that voters intended to include the right to abortion within the protection of Section 23 because voters were presumed to have known about the 1973 *Roe* decision when they approved Section 23 in 1980.[360] Justice Grimes said "the privacy amendment had the practical effect of guaranteeing these same [federal abortion] rights under the Florida Constitution."[361] He also said that the U.S. Supreme Court's overruling of *Roe* "would not diminish the abortion rights now provided by the privacy amendment."[362] Dissenting, Justice McDonald also agreed that the adoption of the privacy right carried *Roe* with it.[363] These statements should be given at least some weight. They were nearly contemporaneous with the 1980 election and the public debate surrounding Section 23, which the justices themselves experienced. Additionally, the justices made the statements with the benefit of the parties' and amici's well-developed originalist arguments. If the current Supreme Court decides to reconsider *In re T.W.*, it should acknowledge that the

358. The focus of this article is not on litigation outcomes. Yet the interaction between public meaning originalism and Florida's law of *stare decisis* should be noted. Public meaning originalism concedes that it can be difficult and maybe impossible to determine the meaning of a constitutional text. *See, e.g.*, WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 28, at 194, 211. In State v. Poole, 297 So. 3d 487 (Fla. 2020), the Florida Supreme Court formally weakened *stare decisis* in Florida. Citing a U.S. Supreme Court decision—a reliance I find dubious because, unlike the federal Constitution, ours can be amended easily, *cf.* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63 (1996); Kimble v. Marvel Ent., 576 U.S. 446, 456 (2015)—the court concluded that it can recede from precedent if it believes the precedent "clearly conflicts with the law we are sworn to uphold" or if the precedent "is clearly erroneous." *Poole*, 297 So. 3d at 507. I believe Professor Fox and I have set out a compelling case for Section 23's original public meaning. To the degree we cannot satisfactorily determine that meaning, however, it should be hard to say that *In re T.W.* "clearly conflicts" with Section 23 or is "clearly erroneous." And as I say below, the justices in 1989 were in a better position to know what voters in 1980 intended than the current justices.

359. In re T.W., 551 So. 2d 1186, 1201 (Fla. 1989) (Overton, J., concurring in part and dissenting in part).

360. *Id.* at 1197 (Ehrlich, C.J., concurring specially).

361. *Id.* at 1202 (Grimes, J., concurring in part and dissenting in part).

362. *Id.*

363. *Id.* at 1205 (McDonald, J., dissenting).

justices in 1989 were in a better position to know Section 23's original public meaning than the justices now.

Next, there is the successful 2004 amendment authorizing the legislature to enact a parental-notification law. The relevant part of that amendment is the second sentence: "*Notwithstanding a minor's right of privacy provided in Section 23 of Article I*, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy."[364] This is an explicit recognition that Section 23 protects the right to an abortion. The State's amicus law professors contend, however, that the 2004 amendment is "consistent with a Warren-and-Brandeis reading of [S]ection 23," because "[n]otification to parents is about a minor's literal privacy, i.e., *information* about a minor's private life, not autonomy in decision-making."[365] This is not serious. The purpose of a parental-notification law is to involve a minor's parents in, and allow them to influence, her decision to exercise her right to have an abortion.[366]

Then there is the unsuccessful 2012 proposal the legislature placed on the ballot to tie interpretation of Florida's privacy right to interpretation of the federal Constitution, so that if the U.S. Supreme Court overruled *Roe* and *Casey*, the Florida Constitution's privacy right would no longer protect the right to an abortion. The ballot summary given to voters explicitly told them the amendment would "overrule[] court decisions which conclude that the right of privacy under Article I, Section 23 of the State Constitution is broader in scope than that of the United States Constitution."[367] The voters rejected the proposed amendment, confirming the original understanding in 1980 that the privacy right protected the right to an abortion.

Apart from illuminating the original understanding, this post-approval history implicates the concept of liquidation, something neither the State nor its amicus law professors acknowledge. Although the U.S. Supreme Court has not fully developed the

364. FLA. CONST. art. X, § 22 (emphasis added).

365. Scholars' Brief, *supra* note 315, at 18–19 (emphasis in original).

366. *See Parental Involvement and Consent for a Minor's Abortion*, AM. COLL. OF PEDIATRICIANS (May 2016), https://acpeds.org/position-statements/parental-involvement-and-consent-for-a-minor-s-abortion. The college is a pro-life medical organization, *see About*, AM. COLL. OF PEDIATRICIANS, https://acpeds.org/about (last visited Sept. 9, 2023), that has filed an amicus brief in the Florida Supreme Court in support of the State.

367. *Florida Amendment 6*, *supra* note 313.

principle or how it is applied, Justice Thomas summarized the idea in *New York State Rifle & Pistol Association v. Bruen*:

> [I]n other contexts, we have explained that "'a regular course of practice' can 'liquidate & settle the meaning of' disputed or indeterminate 'terms & phrases'" in the Constitution. *Chiafalo v. Washington*, 591 U.S. ___, ___ (2020) (slip op., at 13) (quoting Letter from J. Madison to S. Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908)); see also, *e.g.*, *Houston Community College System v. Wilson*, 595 U.S. ___, ___ (2022) (slip op., at 5) (same); The Federalist No. 37, p. 229 (C. Rossiter ed. 1961) (J. Madison); see generally C. Nelson, *Stare Decisis* and Demonstrably Erroneous Precedents, 87 Va. L. Rev. 1, 10–21 (2001); W. Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1 (2019). In other words, we recognize that "where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision." *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in judgment); see also *Myers v. United States*, 272 U.S. 52, 174 (1926); *Printz v. United States*, 521 U.S. 898, 905 (1997).
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> But to the extent later history contradicts what the text says, the text controls. "'[L]iquidating' indeterminacies in written laws is far removed from expanding or altering them." *Gamble v. United States*, 587 U.S. ___, ___ (2019) (THOMAS, J., concurring) (slip op., at 13); see also Letter from J. Madison to N. Trist (Dec. 1831), in 9 Writings of James Madison 477 (G. Hunt ed. 1910). Thus, "postratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text." *Heller*, 670 F.3d, at 1274, n.6 (Kavanaugh, J., dissenting); see also *Espinoza v. Montana Dept. of Revenue*, 591 U.S. ___, ___ (2020) (slip op., at 15).[368]

One of the articles Thomas cited was Professor William Baude's *Constitutional Liquidation*,[369] where Baude reconstructs James Madison's version of liquidation. The elements of Madison's liquidation are 1) indeterminacy (ambiguity or vagueness), 2) a

368. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2136–37 (2022).
369. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 1 (2019).

course of deliberate practice, and 3) settlement (acquiescence and public sanction).[370]

Section 23 is vague, satisfying the first element. The second element could be fairly modified here because, as Baude explains, the idea of precedent was different in the founding era. It required not a single act but several.[371] Now, modern *stare decisis*, as Baude notes, requires only one judicial decision to create a binding precedent.[372] Modern *stare decisis* was the doctrine relevant to interpretation of Section 23 at all relevant times. So it is fair to say that one act, if of enough force, should satisfy the second element. With respect to Section 23, the relevant act is not a judicial decision but the adoption of the 2004 amendment and the rejection of the 2012 amendment. Voters' decisions were "deliberate" in the Madisonian sense. Altering the second element to allow these two acts to equate to a course of deliberate practice accounts for modern *stare decisis* and the difference between the federal Constitution and the Florida Constitution's amendment process. In essence, the 2004 and 2012 votes were plebiscites, with voters in 2004 confirming the Florida Supreme Court's abortion precedents' main holdings and later, in 2012, declining to disturb them. This leads to the third element. One aspect of this element is acquiescence, the other public sanction. Baude explained that "[t]he key idea of acquiescence was that the losers in some sense gave up."[373] Pro-life activists never acquiesced to *In re T.W.* and progeny. However, the rejection of Amendment 6 should compensate for that. In Madison's view, per Baude:

> Interstitial interpretations or questions left unresolved by the text could be answered by any officer into whose jurisdiction they fell. But those answers would become binding constitutional law—that is, would become liquidated—only once *indirectly* endorsed by the people who had the authority to promulgate binding constitutional norms in the first place. And because the popular endorsement was *indirect* and *mediated*, it was logical to treat it as a mere construction of the document, rather than an amendment.[374]

370. *Id.* at 13–14, 18.
371. *Id.* at 37–39.
372. *Id.* at 39.
373. *Id.* at 18.
374. *Id.* at 20–21 (emphasis added) (footnote omitted).

The 2004 and 2012 votes were not indirect or mediated public sanctions—quite the opposite. As modified to reflect our state constitutional order, there could be no clearer examples of liquidation. The result is the same upon application of a similar, established Florida rule of interpretation.[375]

VI. CONCLUSION

Does Section 23 protect only the right to informational privacy, as the State and pro-life activists say? Or does Section 23's protection extend beyond that, to include the right to decisional privacy, including specifically, the right to abortion? An honest originalist analysis leads to the latter conclusion.

The text of Section 23's first sentence is extraordinarily broad: "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."[376] There is nothing in the text limiting the right to informational privacy. Instead, the plain and ordinary meaning of the words used in Section 23 was that the provision protects the activities that a person keeps private from governmental intrusion. No reasonable interpretation, in 1980 or at any other time, would exclude a woman's decision to have an abortion from the meaning of those words.

The weight of historical evidence supports a layer of protection afforded by Section 23's broad language that includes the right to

375. Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d 250, 264 (Fla. 2005) ("This determination is consistent with the principle that the Legislature 'is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed,' *Florida Dep't of Child. & Families v. F.L.*, 880 So. 2d 602, 609 (Fla. 2004), which is equally applicable on the constitutional level. *See generally Coastal Fla. Police Benev. Ass'n v. Williams*, 838 So. 2d 543, 548 (Fla. 2003) (stating that rules governing statutory construction are generally applicable to construction of constitutional provisions)."); Fla. Highway Patrol v. Jackson, 288 So. 3d 1179, 1182–83 (Fla. 2020) ("The prior construction canon teaches that, 'when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well.' *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85 (2006)). This canon is closely related to the interpretive principle that legal terms can take on an expected, ordinary meaning among the experienced audience to which such terms are addressed. '[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.' Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947); *see also Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (describing and relying on this 'longstanding interpretive principle').").

376. FLA. CONST. art. I § 23.

an abortion. What the proposal's drafters thought and said Section 23 meant means little in our public-meaning-originalist analysis as applied to a voter-approved constitutional amendment. In 1980, it was communicated to the voters that the privacy right, if approved, would be very broad and would reach decisional privacy. This public debate mirrored the debate in 1978, so this was not the first time the issue was brought before the public. At the time they approved Section 23 in 1980, most Florida voters certainly would have been aware of *Roe*. They would have known that, in *Roe*, the U.S. Supreme Court found a constitutional right of privacy that protected the right to an abortion; they also would have been aware of post-*Roe* developments, like the rise of the pro-life movement, its attempts to undermine *Roe*, and the U.S. Supreme Court's narrowing of *Roe*. With all of this in mind—and despite opponents' loud warnings about what Section 23 would do—voters approved it.

It simply is not true that "[i]t was clear to everyone [in 1980] that [the privacy amendment's] purpose was for informational privacy."[377] It is one thing to contend that informational privacy was an important issue in the 1970s, and that a reasonable Florida voter in 1980 would have understood that Section 23 would protect that kind of privacy. It is another to contend that informational privacy was so important in the 1970s, so dominant, that the reasonable voter would have understood Section 23 to protect only that kind of privacy—in other words, that it sucked all the oxygen out of the room. The State, its amici, and Stemberger and Phillips have certainly proven the first contention. They have fallen far short of proving the second.

Writing for himself, Justice Thomas has said: "When interpreting a constitutional provision, 'the goal is to discern the most likely public understanding of [that] provision at the time it was adopted.'"[378] In *Heller*, Justice Scalia wrote for the Court: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."[379] Considering the text of Section 23 and the relevant

377. Stemberger, *supra* note 13.

378. Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 822 (2011) (Thomas, J., dissenting) (quoting McDonald v. Chicago, 561 U.S. 742, 828 (2010) (Thomas, J., concurring in part and concurring in the judgment)).

379. District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008).

historical evidence, the most likely public understanding of the broadly worded Section 23, at the time it was adopted was that the right of privacy would protect the right to decisional privacy, including the right to an abortion.[380] Post-approval history confirms that. To interpret Section 23's broad language to protect only the right to informational privacy, to exclude the right to decisional privacy and the component right to an abortion, would "result in the . . . imposition of meaning that the text cannot bear."[381] The Supreme Court of Florida must avoid such an interpretation.

380. Even if the text and historical evidence left some doubt about the right to abortion specifically, it cannot be disputed, in any serious way, that the voters adopted a broad right of privacy. If there is a doubt, Section 23 should be read to be overinclusive rather than underinclusive to give full effect to voters' textually indicated intent and to honor the Florida Constitution's promise that "[a]ll natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, [and] to pursue happiness[.]" FLA. CONST. art. I, § 2.

381. Advisory Op. to the Governor Re: Implementation of Amend. 4, the Voting Restoration Amend., 288 So. 3d 1070, 1078 (Fla. 2020) (cleaned up).