

DIGNITY AND ABORTION RIGHTS UNDER STATE CONSTITUTIONAL LAW

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ABSTRACT

In the wake of *Dobbs v. Jackson Women's Health Organization*, litigation over abortion rights has moved to the state constitutional level. Several states have adopted constitutional provisions recognizing abortion rights. Advocates for reproductive autonomy rely on state constitutional privacy, due process, and equal protection provisions to advance their arguments. This essay addresses a further state constitutional hook for these advocates: dignity provisions. These

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provisions—including a dignity right explicitly tied to abortion rights in Vermont, standalone dignity protections in Montana and Puerto Rico, and mentions of dignity rights in a host of other constitutions—present opportunities for abortion rights advocates. Through holistic interpretation and constitutional amendment, state constitutional dignity protections may enhance rights to abortion and reproductive autonomy.

INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*, the United States Supreme Court overruled longstanding precedent and concluded that the United States Constitution does not protect a right to abortion.¹ As a result, multiple states' "trigger laws" resulted in immediate or near-immediate statutory restrictions on abortion rights.² States have become "The New Abortion Battleground."³

This includes state constitutions. Recent years have seen a wave of litigation challenging abortion restrictions on state constitutional grounds.⁴ State constitutions have also become the sites of change, with four states constitutionalizing the right to abortion following the *Dobbs* decision.⁵ Ten other states are considering similar amendments to their own constitutions as of September 2024.⁶ Discussions of state level abortion rights address a wealth of constitutional provisions, including abortion-specific protections, due process rights, equal protection provisions, rights to privacy, and healthcare freedom rights.⁷

This essay addresses an additional avenue for state constitutional protection of abortion access and reproductive freedom: state constitutional rights to dignity. While the United States Supreme Court

1. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022).

2. See Sarah McCammon, *Two Months After the Dobbs Ruling, New Abortion Bans Are Taking Hold*, NPR (Aug. 23, 2022, 2:42 PM), <https://www.npr.org/2022/08/23/1118846811/two-months-after-the-dobbs-ruling-new-abortion-bans-are-taking-hold>.

3. David S. Cohen, Greer Donley, & Rachel Rebourché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 1 (2023).

4. See Jonathan L. Marshfield, *State Constitutional Rights, State Courts, and the Future of Substantive Due Process Protections*, 76 SMU L. REV. 519, 528 (2023).

5. See CAL. CONST. art. I, § 1.1; MICH. CONST. art. I, § 28; OHIO CONST. art. I, § 22; VT. CONST. Ch. I, art. XXII.

6. See *Ballot Tracker: Status of Abortion-Related State Constitutional Amendment Measures for the 2024 Election*, KFF (Nov. 6, 2024), <https://www.kff.org/womens-health-policy/dashboard/ballot-tracker-status-of-abortion-related-state-constitutional-amendment-measures/> [hereinafter *Ballot Tracker*].

7. See Marshfield, *supra* note 4, at 528–29.

refers to dignity throughout its jurisprudence—including its pre-*Dobbs* abortion cases—the United States Constitution does not contain a right to dignity.⁸ This is not always the case at the state level. Vermont’s constitution recognizes that reproductive autonomy is necessary for human dignity, which involves the ability to choose the course of one’s life.⁹ The constitutions of Montana and Puerto Rico recognize the right to individual dignity,¹⁰ while the constitutions of Illinois and Louisiana at least indirectly recognize the same right.¹¹ Many other state constitutions recognize the individual dignity of crime victims.¹²

State constitutional dignity provisions provide support for abortion rights and reproductive autonomy both directly, and by reinforcing protections provided elsewhere in state constitutional privacy and due process provisions. The vast majority of state courts interpret their constitutions holistically—requiring that the constitution be read as a whole when interpreting its provisions.¹³ This holistic interpretation gives form to otherwise abstract dignity provisions, which states like Montana have used to bolster rulings supporting robust protections for abortion rights. Other states with constitutional dignity provisions may also find support in such protections. And those hoping for increased protections in other states may do well to support the addition of dignity protections in their own state constitutions as the Supreme Court seems increasingly willing to deemphasize dignity at the federal level.

Part I provides a brief background on dignity and its treatment in legal contexts—particularly in the United States Supreme Court. Part II surveys mentions of dignity in state constitutions, demonstrating how multiple states directly or indirectly recognize individuals’ dignity rights. Part III addresses how state constitutional dignity protections have been employed to protect abortion rights, and Part IV discusses how dignity may play a role in enhancing reproductive autonomy through holistic interpretation and state constitutional amendment. While dignity provisions are not without their risk, their promise likely outweighs the dangers that the provisions themselves might pose.

8. See, *infra*, Section II.B.

9. See VT. CONST. ch. I, art. XXII.

10. See, *infra*, Section II.B.

11. See, *infra*, Section II.C.

12. See, *infra*, Section II.D.

13. See Michael L. Smith, *Constitutional Interpretation and Zombie Provisions*, 40 GA. ST. U. L. REV. 603, 643–49 (2023)

I. DIGNITY: BACKGROUND AND U.S. CONSTITUTIONAL LAW

A. Dignity: A (Very) Brief Background

Dignity appears in many contexts, including philosophical debates, religious discourse, and the texts of international agreements and constitutions around the world.¹⁴ Michael Rosen provides a walkthrough of some of these contexts, starting with Cicero's conception of dignity as a form of importance or respect "that human beings have solely because they are human, not animals."¹⁵ He then surveys St. Thomas Aquinas's view of dignity as "something's intrinsic value . . . that it has by occupying its appropriate place within God's creation, as revealed by Scripture and by natural law."¹⁶ Then there's Immanuel Kant's vision of dignity that emphasizes dignity's "connection with autonomy."¹⁷ The notion of dignity as autonomy over the direction of one's life is particularly relevant to legal questions of rights and freedoms, including those of reproductive autonomy.¹⁸ These philosophical foundations persist, and continue to inform references to dignity in legal contexts.¹⁹

Religions frequently refer to dignity in their teachings and doctrine. Jürgen Moltmann suggests that Christian conceptions of dignity tend to converge on the notion that human dignity lies in "being an image of God" and corresponding to that image.²⁰ This view of dignity finds support in sources dating back to medieval thinkers.²¹ In the Islamic context, Andrea Pin writes that the "concept and . . . role" of dignity, or "karāma," has been "debated for centuries," and while traditional Islamic law refers to the term as denoting miracles or the capacity to "perform miracles" or "marvel[s]," or as referring to the miracles or marvels themselves, its modern usage includes novel

14. See MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 1–3 (2012).

15. *Id.* at 11–12.

16. *Id.* at 16–17.

17. *Id.* at 24–25.

18. See RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 166–67 (1994).

19. See Victoria Baranetsky, *Aborting Dignity: The Abortion Doctrine After Gonzales v. Carhart*, 36 HARV. J.L. & GENDER 123, 150–51 (2013).

20. See JÜRGEN MOLTSMANN, ON HUMAN DIGNITY: POLITICAL THEOLOGY AND ETHICS 10–12 (M. Douglass Meeks trans., 1984); see also Susan J. Stabile, *Catholic Legal Theory*, 44 J. CATH. LEGAL STUD. 421, 422–23 (2005).

21. See Frederick Mark Gedicks, *Christian Dignity and the Overlapping Consensus*, 46 BYU L. REV. 1245, 1249–50 (2021).

connotations of universality and “encapsulat[ing] the whole span of human rights and duties”²²

Erin Daly surveys early examples of dignity in the constitutions of various nations. Surveying Latvia’s 1922 constitution, Mexico’s 1917 constitution, Ecuador’s 1929 constitution, and Germany’s 1919 constitution, Daly emphasizes the “range of understandings of dignity” that make up modern understandings of the term, including dignity as prohibiting “degrading treatment,” protecting “personal and social relationships,” and allowing a baseline level of “quality of life”²³ Daly credits the Universal Declaration of Human Rights for inspiring modern drafters to incorporate dignity and its protection into modern constitutions.²⁴ The Declaration’s preamble recognizes the “inherent dignity . . . of all members of the human family,” and the first article of the Declaration proclaims that “All human beings are born free and equal in dignity and rights.”²⁵

Many nations’ constitutions now include references to dignity.²⁶ As of 2012, 162 countries’ constitutions contained references to dignity, compared with five countries’ constitutions that did so prior to 1945.²⁷ Dignity “is also recognized as a protected value, although not explicitly mentioned, in other constitutions and international human rights documents.”²⁸

B. Dignity in Federal Constitutional Law

While dignity is mentioned in numerous countries’ constitutions, the term is absent from the United States Constitution. Despite this, the United States Supreme Court frequently invokes the concept of dignity.²⁹ In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a majority of Justices recognized the role dignity played in the

22. Andrea Pin, *Arab Constitutionalism and Human Dignity*, 50 GEO. WASH. INT’L. L. REV. 1, 15–18 (2017).

23. ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON 12–13 (2021).

24. See *id.* at 13; see also ROSEN, *supra* note 14, at 2.

25. G.A. Res. 217 (III) A, UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. 1 (Dec. 10, 1948).

26. See DALY, *supra* note 23, at 16.

27. See Doron Shulztiner & Guy E. Carmi, *Human Dignity in National Constitutions: Functions, Promises and Dangers*, 62 AM. J. COMP. L. 461, 461 (2014).

28. Ariel L. Bendor & Michael Tamir, *Human Dignity as a Chameleon*, 5 CARDOZO INT’L. & COMP. L. REV. 739, 740–41 (2022).

29. See generally Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011) (describing examples of how the U.S. Supreme Court refers to dignity in its opinions on various constitutional issues).

abortion context—stating that “matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”³⁰ The Court’s citations in *Casey* indicate that it considers the ability to obtain contraceptives as central to personal dignity as well.³¹

The Court has recognized a right to dignity in other contexts. In *Obergefell v. Hodges*, the Court recognized a right to same-sex marriage and argued that the right to marry was a “personal choice[] central to individual dignity and autonomy”³² In *Trop v. Dulles*, a plurality of Justices ruled that “denationalization as a punishment is barred by the Eighth Amendment,” stating that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”³³

But times are changing. In *Dobbs v. Jackson Women’s Health Organization*, the Court ruled that the Constitution does not protect the right to abortion.³⁴ Pushing back against the *Casey* Court’s recognition of dignity as autonomy, the *Dobbs* Court acknowledged that while people “are certainly free to think and to say what they wish about ‘existence,’ ‘meaning,’ the ‘universe,’ and ‘the mystery of human life,’ they are not always free to act in accordance with those thoughts.”³⁵ The Court argued that granting constitutional protection to such an abstract level of autonomy “could license fundamental rights to illicit drug use, prostitution, and the like,” which were not “deeply rooted in history.”³⁶

While dignity may have played a role in the Supreme Court’s past jurisprudence, its recent cases suggest a turn away from the concept.

30. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion); (*Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 215 (2022)). Justices Stevens and Blackmun joined in the portion of the opinion recognizing this view of dignity, with Justice Stevens writing separately to recognize that the “authority to make such traumatic and yet empowering decisions [such as abortion] is an element of basic human dignity.” *Id.* at 916 (Stevens, J. concurring in part); *id.* at 922 (Blackmun, J. concurring in part).

31. See *id.* at 853 (citing *Carey v. Pop. Servs. Int’l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

32. *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015) (citing *Eisenstadt*, 405 U.S. at 453; *Griswold*, 381 U.S. at 484–86).

33. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958); see also *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring) (adopting this language).

34. See *Dobbs*, 597 U.S. at 240.

35. *Id.* at 255–56 (emphasis in the original).

36. *Id.* at 257 (citing *Compassion in Dying v. Washington*, 85 F.3d 1440, 1444 (9th Cir. 1996)).

³⁷ This turn has already come at the expense of federal constitutional abortion rights. Despite this development, dignity may still have a role to play in litigation over abortion rights and other issues of reproductive autonomy—at least at the state constitutional level.

II. DIGNITY IN STATE CONSTITUTIONS

A. *Vermont: Reproductive Autonomy and Dignity*

Chapter One, Article 22 of Vermont’s constitution provides:

That an individual’s right to personal reproductive autonomy is central to the liberty and dignity to determine one’s own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means.³⁸

Vermont enacted this provision in November 2022, months after the Supreme Court’s *Dobbs* ruling.³⁹ While Vermont was the first state to constitutionalize a right to abortion, the relatively recent nature of this provision, coupled with the state legislature’s inclination against restricting abortion, has left the provision uninterpreted by state appellate courts thus far.⁴⁰

Vermont’s constitutional provision exemplifies how state courts may draw a connection between human dignity and the right to reproductive healthcare access, including abortion. The text of the provision characterizes dignity as the ability “to determine one’s own life

37. See also, e.g., 303 Creative LLC v. Elenis, 600 U.S. 570, 599–602 (2023) (acknowledging the dignity interests at stake in requiring equal access to businesses, but ruling that a business’s speech interests trumped those dignity considerations).

38. VT. CONST. ch. I, art. XXII.

39. See Mikaela Lefrak, *Vermont Votes to Protect Abortion Rights in State Constitution*, NPR (Nov. 9, 2022, 12:23 AM), <https://www.npr.org/2022/11/09/1134832172/vermont-votes-abortion-constitution-midterms-results>.

40. See generally Lola Duffort, *Vermont Becomes the 1st State to Enshrine Abortion Rights in Its Constitution*, VTDIGGER (Nov. 8, 2022, 9:09 PM), <https://vtdigger.org/2022/11/08/measure-to-enshrine-abortion-rights-in-vermont-constitution-poised-to-pass/> (noting that Vermont was the first state to pass a state constitutional amendment protecting the right to abortion); *One Year of the Reproductive Liberty Amendment*, ACLU VT. (Nov. 8, 2023, 11:00 AM), <https://www.acluvt.org/en/news/one-year-reproductive-liberty-amendment> (describing Vermont’s constitutional protection of abortion and other measures by the state legislature to protect those seeking and providing abortions from litigation).

course,” which parallels philosophical conceptions of dignity,⁴¹ as well as the U.S. Supreme Court’s prior approach to the concept.⁴²

B. Montana and Puerto Rico: Inviolable Human Dignity

Two American constitutions contain explicit textual references calling for the protection of dignity: Montana and Puerto Rico. Article II, Section 4 of Montana’s constitution states:

The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.⁴³

This provision originates in Montana’s 1972 constitution.⁴⁴ The provision is likely informed by the Supreme Court’s then-recent treatment of dignity as protecting individual autonomy in medical care, as well as protecting individuals from “arbitrary treatment of government agents.”⁴⁵

Montana’s Supreme Court has invoked Montana’s constitutional right to dignity on several occasions, including in the context of abortion rights.⁴⁶ In *Walker v. State*, for example, the Montana Supreme Court read the dignity provision in conjunction with Montana’s state constitutional prohibition of cruel and unusual punishment and concluded that this combined reading prohibited degrading and demeaning treatment of incarcerated persons.⁴⁷

Puerto Rico’s constitution protects a right to individual dignity as well. Article II, Section 1 of the constitution states:

The dignity of the human being is inviolable. All men are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin

41. See ROSEN, *supra* note 14, at 1–3.

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

43. MONT. CONST. art. II, § 4.

44. See Vicki C. Jackson, *Constitutional Dialogue and Human Dignity States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 21–22 (2004).

45. Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution’s “Dignity” Clause with Possible Applications*, 61 MONT. L. REV. 301, 312–14 (2000) (citing *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970)).

46. Montana’s cases addressing abortion rights are discussed below in Part IV.

47. See *Walker v. State*, 68 P.3d 872, 883–85 (Mont. 2003).

or condition, or political or religious ideas. Both the laws and the system of public education shall embody these principles of essential human equality.⁴⁸

As it turns out, Montana's provision was inspired by and based upon Puerto Rico's.⁴⁹ Luis Aníbal Avilés Pagán argues that Puerto Rico's dignity provision was meant to be read "along with" the constitution's right of privacy to protect an individual right to develop one's personality.⁵⁰

The Supreme Court of Puerto Rico has relied on the dignity provision in several cases. In *Figueroa Ferrer v. E.L.A.*, the court recognized that Article II, Section 1 was self-executing, and applied it to overturn Puerto Rico statutes prohibiting divorce by agreement of both parties to the marriage.⁵¹ In *Arroyo v. Rattan Specialties, Inc.*, the Puerto Rico Supreme Court concluded that Puerto Rico's dignity provision—in conjunction with state constitutional provisions regarding the right to property, right to be free from attacks on one's honor and integrity, and the right of employees to be free of risks to health or their person—gave the plaintiff the right to enjoin his employer from requiring him to submit to a polygraph test.⁵²

C. Suggestions of Individual Dignity Rights

Article I, Section 20 Illinois Constitution, titled "Individual Dignity," references dignity, though it would be a stretch to refer to the provision as granting an individual right to dignity.⁵³ The provision states:

To promote individual dignity, communications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference

48. P.R. CONST. art. II, § 1.

49. See Clifford & Huff, *supra* note 45, at 321; see also Jorge M. Farinacci-Fernós, *Curious In-Laws: The Legal Connections Between Montana and Puerto Rico*, 79 MONT. L. REV. 187, 192–94 (2018).

50. Luis Aníbal Avilés Pagán, *Human Dignity, Privacy and Personality Rights in the Constitutional Jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico*, 67 REVISTA JURIDICA UNIVERSIDAD DE PUERTO RICO 343, 354, 369–70 (1998).

51. See generally *Morales Morales v. Commonwealth*, 7 P.R. Offic. Trans. 278, 281–87, 301–02 (P.R. 1978).

52. See *Arroyo v. Rattan Specialties, Inc.*, 107 P.R. Offic. Trans. 43, 49–51, 69–71, 75 (P.R. 1986).

53. See ILL. CONST. art. I, § 20.

to religious, racial, ethnic, national or regional affiliation are condemned.⁵⁴

The text of this provision does not purport to be a general protection of dignity—rather, it “condemn[s]” certain expressions that insult or vilify certain groups of people out of an interest in promoting dignity.⁵⁵ Vicki Jackson notes that the provision is of little effect, as it’s been “construed as ‘purely hortatory,’ and creating no private cause of action nor imposing a limitation on the powers of government.”⁵⁶

Article I, Section Three of Louisiana’s constitution is titled, “Right to Individual Dignity.”⁵⁷ The text of the provision, however, does not mention the term:

No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.⁵⁸

Louisiana’s right to dignity originates with the adoption of the 1974 Louisiana Constitution, which contained the provision.⁵⁹ The provision appears to have been inspired by Montana’s 1972 Constitution, which contained an individual dignity provision—though the Louisiana provision lacks a textual confirmation of dignity’s inviolability.⁶⁰ Michelle Freeman notes that the Louisiana Supreme Court reads the provision to require a distinct, state constitutional approach to equal protection questions that required inquiring into a “threshold question” of whether an appropriate government interest is suitably furthered by governmental actions, and completely repudiating

54. *Id.*

55. *Id.*

56. Jackson, *supra* note 44, at 21 n.21 (quoting *AIDA v. Time Warner Ent. Co.*, 772 N.E.2d 953, 957–61 (Ill. 2002)).

57. LA. CONST. art. I, § 3.

58. *Id.*

59. See Mary Anne Wolf, Comment, *Louisiana’s Equal Protection Guarantee: Questions About the Supreme Court Decision Prohibiting Affirmative Action*, 58 LA. L. REV. 1209, 1216 (1998).

60. See *id.* at 1223 (noting that “Montana’s 1972 constitution was listed as a reference.”); see also LA. CONST. art. I, § 3; MONT. CONST. art. II, § 4.

classifications “on the basis of race or religious beliefs” rather than engaging in strict scrutiny analysis.⁶¹

D. Indirect References to Dignity

Beyond explicit protection of human dignity and references to the concept, there are a host of other references to dignity in state constitutions. The most common mention of dignity occurs in provisions that describe the rights of crime victims in connection with criminal proceedings.⁶² These “Victims’ Rights” provisions, also known as “Marsy’s Law,” consist of a group of provisions “that grant[] victims and their families the right to be notified of and participate in many aspects of criminal proceedings.”⁶³ Among these procedural protections and guarantees, a number of these provisions include protections for victims’ dignity rights throughout the criminal process.⁶⁴ In other provisions, victims’ dignity is recognized, but treated as a goal of the criminal process rather than given the status of a right.⁶⁵

These references to dignity—while aimed at individuals—are rarely expounded upon by the courts. Candace McCoy describes the origins of California’s constitutional provisions relating to victims’ rights, arguing that the provisions were motivated by “boogeyman” imagery of crime perpetuated by politicians and the media and were meant to react to procedural safeguards for criminal defendants.⁶⁶ Practically, the provisions’ effects gave a small minority of victims the ability to play a role in sentencing, but had a greater impact in speeding

61. Michelle Freeman, Note, *The Right to Dignity in the United States*, 68 HASTINGS L.J. 1135, 1157–58 (2017).

62. See *id.* at 1145 (noting that seventeen state constitutions “guarantee some kind of constitutional right to dignity for crime victims.”).

63. Douglas Keith, *Victims’ Rights Meet State Constitutions*, STATE CT. REP. (Sept. 28, 2023), <https://statecourtreport.org/our-work/analysis-opinion/victims-rights-meet-state-constitutions>.

64. See, e.g., MD. CONST., DECL. OF RTS., art. 47 (requiring that “victim[s] of crime[s]” be treated “with dignity, respect, and sensitivity during all phases of the criminal justice process” by “agents of the State”); see also FLA. CONST. art. I, § 16 (recognizing “[t]he right to due process and to be treated with fairness and respect for the victim’s dignity.”).

65. See, e.g., CAL. CONST. art. I, § 28 (recognizing a need for a “bill of rights for victims of crime” that ensures that victims are treated with dignity); see also OR. CONST. art. I, § 42 (including, among the purposes of the Oregon Constitution’s victims’ rights provisions, the goal “to accord crime victims due dignity and respect . . .”).

66. Candace McCoy, *Crime as a Boogeyman: Why Californians Changed Their Constitution to Include a “Victims’ Bill of Rights” (and What It Really Did)*, in CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 128, 128–33 (G. Alan Tarr ed. 1996).

up the resolution of criminal proceedings through plea bargaining.⁶⁷ Discussions of the right to dignity tend to be absent from surveys and retrospective accounts of state constitutional victims' rights provisions.⁶⁸

Even more far removed from individual dignity are state constitutional provisions that mention dignity in the context of governmental functions. The constitutions of Alabama and Massachusetts mention dignity in the context of qualifications for officials: Alabama acknowledges "the dignity of the office" of governor in setting forth grounds for the governor's removal,⁶⁹ and Massachusetts requires the governor to "maintain the dignity of the commonwealth in the character of its chief magistrate"⁷⁰ While these provisions refer to state officials, their references to "dignity" convey the solemnity of the office, rather than the notion of individual dignity.⁷¹ Similarly, several state constitutions contain "style of process" provisions governing the drafting of certain official forms and documents. Many of these provisions require that criminal indictments conclude with the language indicating that the behavior described in the document was carried out against the dignity of the state.⁷² As with the Alabama and Massachusetts provisions, these provisions refer to a notion of dignity-as-solemnity rather than a right to individual dignity.⁷³

III. STATE CONSTITUTIONAL DIGNITY RIGHTS AND ABORTION

A number of state constitutional dignity provisions play a role in disputes over abortion rights. Chapter One, Article 22 of the Vermont Constitution ties dignity to reproductive autonomy, recognizing that

67. See *id.* at 139–40.

68. See, e.g., Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 ARIZ. ST. L.J. 421 (2015) (surveying Arizona's experience with victims' rights provisions in various procedural contexts, with no mention of dignity rights); see also Mary Margaret Giannini, Note, *The Swinging Pendulum of Victims' Rights: The Enforceability of Indiana's Victims' Rights Laws*, 34 IND. L. REV. 1157 (2001) (mentioning dignity in quoting state constitutions, but focusing on the procedural protections and safeguards set forth in victims' rights provisions).

69. ALA. CONST. art. VII, § 173.

70. MASS. CONST. pt. 2, cl. 2, § 1, art. XIII.

71. Cf. Doris Schroeder, *Dignity: Two Riddles and Four Concepts*, 17 CAMBRIDGE Q. HEALTHCARE ETHICS 230, 233 (2008) (describing "aristocratic dignity" that associates the notion of dignity with certain revered political or religious offices).

72. See, e.g., MD. CONST. art. IV, § 13 (requiring that indictments conclude with "against the peace, government and dignity of the State.").

73. See Freeman, *supra* note 61, at 1150–51.

“an individual’s right to personal reproductive autonomy is central to the liberty and dignity to determine one’s own life course”⁷⁴ This provision was passed in reaction to the Supreme Court’s *Dobbs* decision, which struck down federal constitutional abortion protections.⁷⁵ Through its text and origins, Vermont’s reproductive autonomy protection is an example of how state constitutional dignity rights may be explicitly tied to abortion and reproductive healthcare access.

But state constitutional provisions that explicitly recognize a right to individual dignity without expressly mentioning abortion or reproductive autonomy can, and have, been employed to bolster challenges to abortion restrictions. As recently as August 2024, Montana’s Supreme Court took up, and rejected challenges to state abortion bans.⁷⁶

In *Armstrong v. State*, the Montana Supreme Court affirmed the issuance of an injunction against the enforcement of a Montana statute prohibiting abortions “after the first three months of pregnancy” outside of licensed hospitals, and further prohibited solicitation, advertising, or other communications “attracting any person” to go to facilities or physicians “to have an abortion or purchase abortifacients.”⁷⁷ The court recognized that Montana’s constitution contained an explicit right to privacy, that any legislative infringements on privacy were subjected to strict scrutiny,⁷⁸ and that Montana’s restriction on abortion implicated the right to privacy and failed to survive strict scrutiny.⁷⁹

The bulk of the court’s analysis focused on Montana’s constitutional right to privacy and its relationship to bodily autonomy, with extensive discussion of the Constitutional Convention debates that led to the adoption of the provision.⁸⁰ But the court urged against considering the right to privacy in isolation, warning that the Montana

74. VT. CONST. ch. 1, art. 22.

75. See Mikaela Lefrak, *Vermont Votes to Protect Abortion Rights in State Constitution*, NPR (Nov. 9, 2022, 12:23 AM), <https://www.npr.org/2022/11/09/1134832172/vermont-votes-abortion-constitution-midterms-results>.

76. See Blair Miller, *Montana Supreme Court Strikes Down Abortion Parental Consent Law*, DAILY MONTANAN (Aug. 14, 2024, 3:28 PM), <https://dailymontanan.com/2024/08/14/montana-supreme-court-strikes-down-abortion-parental-consent-law/>.

77. *Armstrong v. State*, 989 P.2d 364, 367–68, 370–71 (Mont. 1999).

78. Meaning that the law “must be reviewed under a strict-scrutiny analysis—i.e., the legislation must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest.” *Id.* at 373–74 (citing *Gryczan v. State*, 942 P.2d 112, 122 (Mont. 1997)).

79. See *id.* at 375–77, 382.

80. See *id.* at 376–77.

Constitution's Declaration of Rights was "not simply a cook book of disconnected and discrete rules" and, instead, "encompasse[d] a cohesive set of principles, carefully drafted and committed to an abstract ideal of just government."⁸¹ One such principle was embodied in Article II, Section 4 of the constitution, which (as noted above) includes an expansive equal protection provision and states that "[t]he dignity of the human being is inviolable."⁸² The court recognized that both the dignity and equal protection portions of the provision embodied a "moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives" and to "form and follow their own values in profoundly spiritual matters," which provided further support to the court's invalidation of Montana's abortion restriction.⁸³

More recently, in *Planned Parenthood of Montana v. State*, the court took up another state constitutional privacy challenge to a statute prohibiting minors from seeking abortions without parental consent or a judicial waiver.⁸⁴ The Montana Supreme Court noted that Article II, Section 15 of Montana's constitution regarding "Rights of Persons Not Adults," states:

The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.⁸⁵

This provision guarantees minors "the same fundamental rights as adults under Article II, which may be infringed only when the state can clearly show a compelling state interest" that enhances the protection of minors.⁸⁶ The court ruled that "minors, like adults, have a fundamental right to privacy, which includes procreative autonomy" and that Montana's consent requirement infringed that right to privacy.⁸⁷

Applying strict scrutiny, the court struck down the law, finding that the State's claimed interest in protecting minors from the medical risks of abortion were unfounded and noting that the State failed to prove that the consent requirement was narrowly tailored to interests

81. *Id.* at 383.

82. *Armstrong*, 989 P.2d at 383; MONT. CONST. art. II, § 4.

83. *Armstrong*, 989 P.2d at 383.

84. *See Planned Parenthood of Mont. v. State*, 554 P.3d 153, 158 (Mont. 2024).

85. *Id.* at 163; MONT. CONST. art. II, § 15.

86. *Planned Parenthood of Mont.*, 554 P.3d at 164.

87. *See id.* at 165.

of preventing abuse and protecting minors' wellbeing.⁸⁸ Unlike its earlier opinion in *Armstrong*, the court's opinion in *Planned Parenthood of Montana* did not directly cite Montana's state constitutional right to dignity. But the court closed its opinion with language similar to its mention of dignity and other relevant constitutional provisions:

A minor's right to dignity, autonomy, and the right to choose are embedded in the liberties found in the Montana Constitution. Because a minor's right to control her reproductive decisions is among the most fundamental of the rights she possesses, and because the State has failed to demonstrate a real and significant relationship between the statutory classification and the ends asserted, we hold that the Consent Act violates the Constitution of the State of Montana.⁸⁹

Montana demonstrates how state constitutional dignity rights may be employed to support challenges to strict abortion restrictions in the aftermath of *Dobbs*. The right to make intimate decisions about one's medical care and the trajectory of one's life lends itself to the issue of abortion access and access to reproductive healthcare more generally—even without an explicit mention of abortion or reproductive autonomy in the constitutional provision.

IV. THE POTENTIAL OF STATE CONSTITUTIONAL DIGNITY RIGHTS

A. Holistic Analysis and Dignity Provisions

State constitutional dignity provisions may seem overly abstract and malleable.⁹⁰ The concept of dignity itself is often characterized as abstract and subject to different definitions and conceptions—posing challenges for those who would seek to employ the concept in a legal context.⁹¹ In the face of this difficulty, one may be concerned that judges considering dignity claims will resort to personal opinions and values to interpret dignity provisions.⁹²

88. See *id.* at 167, 173.

89. *Id.* at 173.

90. See Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 244 (2008) (critiquing the “truly open-ended nature” of dignity).

91. See Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 134 (2011) (noting that “one of the main criticisms regarding human dignity” is “that it is too difficult to define to make it of any use to a jurisprudential system.”).

92. See Taavi Annus, *Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments*, 14 DUKE J. COMP. & INT. L. 301, 321 (2004).

But courts have resources other than simply considering values and consequences when faced with broad or abstract constitutional language. The vast majority of state courts take a holistic approach to constitutional interpretation, requiring that courts read the constitution as a whole document and interpret provisions together.⁹³ This approach is distinct from most instances of federal constitutional interpretation, which is characterized by a “clause-bound” approach that interprets provisions in a more isolated manner.⁹⁴

A holistic approach to interpretation may give dignity provisions greater force in the context of abortion and reproductive autonomy. A constitutional right to dignity may not seem clear or applicable to abortion standing alone. But in context of other provisions—including state constitutional rights to privacy,⁹⁵ equal protection provisions that prohibit discrimination on the basis of sex,⁹⁶ and rights guaranteeing medical care⁹⁷—dignity may take on a definition that favors those seeking to protect reproductive autonomy. And this definition isn’t simply the product of advocates’ persuasion or judges’ preferences, since a holistic approach draws on the constitution’s text to inform the interpretation of dignity provisions.

Montana’s interpretation of its constitutional dignity provision—both in the abortion context and elsewhere—demonstrates a holistic approach to constitutional interpretation. In *Armstrong v. State*, the Montana Supreme Court emphasized the role of Montana’s constitutional protection of privacy in striking down abortion restrictions.⁹⁸ But the court also drew on other provisions of Montana’s constitution to reach its conclusion, noting that Montana’s constitutional right to dignity informed its reading of the scope of the right to privacy and

93. See Smith, *supra* note 13, at 643-49 (identifying forty states applying a holistic approach, and other states as taking a qualified holistic approach or at least urging harmonious interpretations); see also Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1891 (2023).

94. See Bulman-Pozen & Seifter, *supra* note 93, at 1882-83; see also Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 WISC. L. REV. 1001, 1001 (2021) (recognizing the interpretive technique of considering multiple provisions together and noting the absence of this technique from the literature on federal constitutional interpretation).

95. See MONT. CONST. art. 2, § 10; S.C. CONST. art. I, § 10 (prohibiting unreasonable searches and seizures, as well as “unreasonable invasions of privacy”); LA. CONST. art. 1, § 5 (same).

96. See MASS. CONST. pt. 1, art. 1; MONT. CONST. art. 2, § 4; N.M. CONST. art. 2, § 18; P.R. CONST. art. II, § 1.

97. See P.R. CONST. art. II, § 20.

98. See *Armstrong v. State*, 989 P.2d 364, 373-77 (Mont. 1999).

further supported a holding striking down abortion restrictions.⁹⁹ Similarly, in *Planned Parenthood of Montana v. State*, the court engaged in a holistic analysis by reading together constitutional provisions guaranteeing the rights of minors, equal protection, and privacy.¹⁰⁰ While the court did not expressly cite Montana's dignity provision, this opinion demonstrates how holistic analysis of other provisions may result in strengthened protections for abortion and reproductive rights under state constitutions.

This holistic approach to interpretation demonstrates how state constitutional guarantees of the right to dignity may be applied in the context of abortion rights—even without an explicit mention of abortion or reproductive autonomy like that guaranteed by Vermont's constitution. Even indirect references to individual dignity rights might play a role in strengthening abortion protections, as their acknowledgment of the concept of dignity might, in turn, be applied to inform the meaning of other constitutional provisions.¹⁰¹

How might this play out? A state constitutional provision like Article One, Section Twenty of Illinois' constitution, which recognizes the existence of individual dignity and treats it as a worthy goal in the context of condemning abusive and hostile speech, might be employed to inform the meaning of other state constitutional protections.¹⁰² For example, Article One, Section One's protection of inalienable rights—which recognizes an open-ended group of “inherent and inalienable rights,” including “life, liberty and the pursuit of happiness,” may be read to include human dignity in light of recognition of the right elsewhere in the same document.¹⁰³ Similarly, Illinois' constitutional guarantee of equal protection on the basis of sex may also gain additional force from the constitution's recognition of individual dignity.¹⁰⁴

There are limits to this type of argument. While states like Illinois and Louisiana have constitutional provisions recognizing individual dignity, albeit in a less direct manner than Montana and Puerto Rico,

99. See *id.* at 383.

100. See *Planned Parenthood of Montana v. State*, 554 P.3d 153, 163–67 (Mont. 2024).

101. In addition to holistic interpretation, an “intratextualist” approach may lend force to these arguments. See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (arguing for an “intratextualist” approach in which the appearance of the same or similar term elsewhere in the Constitution may inform its meaning in other contexts in the document).

102. See ILL. CONST. art. I, § 20.

103. See ILL. CONST. art. I, § 1.

104. See ILL. CONST. art. I, § 18.

other constitutional provisions may not give rise to so strong a case. References to dignity in the context of official proceedings and the solemnity of government offices, for example, are unlikely to provide strong support for reading individual dignity into the scope of other rights provisions.¹⁰⁵ Victims' rights provisions might provide a slightly stronger textual hook, given their reference to individual dignity of victims. But because most of these references to dignity are in passing and cabined to victims of crimes, applying this recognition of dignity beyond these victims' rights provision may be a tall order.¹⁰⁶

B. Additional Dignity Provisions

One might object to this essay's focus on dignity by raising its seemingly limited scope. If only Montana and Puerto Rico have strong constitutional dignity protections, one might think that attention to dignity rights only matters for these jurisdictions. Good news for those places, but hardly a beacon of hope for the rest of the country!

While the use of holistic interpretation may give dignity force in constitutions beyond those that explicitly recognize the right to dignity, even indirect mentions of individual dignity are somewhat limited. But dignity provisions remain relevant to discussions of abortion and reproductive autonomy at the state constitutional level, as states may amend their constitutions to include these provisions.

Constitutional amendments may initially sound like a tall order, as amending the U.S. Constitution is notoriously difficult.¹⁰⁷ But things are different at the state level, where constitutions are routinely amended or replaced in their entirety.¹⁰⁸ A state constitutional amendment is not an outlandish proposal. Indeed, doing so may be preferable to the alternative of tasking courts with elaborating upon a small number of broadly worded, unchanging provisions.¹⁰⁹ And state

105. See *supra* Section II.D.

106. See, e.g., FLA. CONST. art. I, § 16 (distinguishing between the rights afforded to those accused of crimes in subsection (a), and the rights of victims in subsection (b), and mentioning dignity only in the context of victims' rights).

107. See Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 CAL. L. REV. 2005, 2007 (2022) (arguing that, under present conditions, the US Constitution is virtually impossible to amend).

108. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 23–24 (1998).

109. James D. Heiple & Craig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation*, 61 ALB. L. REV. 1507, 1515–16 (1998).

constitutional amendment may be more practical than legislative solutions, which face substantial anti-democratic barriers.¹¹⁰

This call for additional rights provisions in state constitutions aligns with historical calls for state-level protections. In 1977, Justice William Brennan, suspecting that the U.S. Supreme Court would turn away from the expansive approach to individual rights that characterized the Warren Court era, urged increased attention to individual rights at the state constitutional level.¹¹¹ As documents that are primarily meant to limit, rather than expound, the scope of state governmental power, state constitutions are a natural place for the addition and enhancement of individual rights.¹¹²

To be sure, one must not rush to treat state constitutional rights in the same way as federal constitutional rights. Jonathan Marshfield argues that rights provisions in state constitutions are better viewed as a tool for popular majorities to prevent the co-opting of government by political elites.¹¹³ This conception of state constitutional rights may give reason to pause when suggesting state constitutional rights as a mechanism to protect the rights of politically disfavored minority interests against the will of majorities.¹¹⁴

And yet, as Marshfield recognizes, state constitutions may be a proper forum for the development of abortion rights in light of the majoritarian nature of backlash to *Dobbs*.¹¹⁵ Vermont's constitutionalization of the right to abortion is one example.¹¹⁶ Other states have taken similar measures to add rights to abortion and reproductive autonomy to their constitutions, including California,¹¹⁷ Michigan,¹¹⁸ and

110. See Bulman-Pozen & Seifter, *supra* note 93, at 861 (arguing that state constitutions are far more in line with democratic values than the federal constitution); Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1735 (2021) (describing the democratic failures of state legislatures).

111. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

112. See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 249–50 (2009) (describing the plenary power of state legislatures).

113. See generally Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PENN. L. REV. 853 (2022).

114. See *id.* at 889–90.

115. See Marshfield, *supra* note 4, at 545–47.

116. See *supra* note 38, at Part III.A.

117. See CAL. CONST. art. I, § 1.1 (prohibiting state interference “with an individual’s reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives.”).

118. See MICH. CONST. art. I, § 28 (recognizing a “fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all

Ohio.¹¹⁹ Ten other states are voting on similar measures in 2024.¹²⁰ These new provisions appear to fit the mold of what Justice Brennan urged in the 1970s: state constitutional protection of rights that the U.S. Supreme Court refuses to acknowledge. They also align with the vision of state constitutional rights as a mechanism for popular majorities to push back against unpopular statutory restrictions imposed by skewed legislatures.¹²¹

Adding dignity provisions to state constitutions may be a part of this ongoing effort to amend state constitutions to better secure reproductive autonomy. Montana's experience acknowledging the role dignity plays in protecting abortion demonstrates the results that recognition of individual dignity alone may play in protecting abortion rights.¹²² While dignity provisions like those in Montana's and Puerto Rico's constitutions do not directly mention abortion or reproductive freedom, these rights are still relevant. Additionally, a push for general dignity provisions may generate coalitions with other groups interested in dignity-based arguments in their own causes, including those concerned with enhancing protections for those subject to criminal prosecution or punishment.¹²³

Those interested in reproductive autonomy may object to spending political capital on dignity provisions rather than more direct provisions that explicitly protect abortion rights. There's something to this objection. While Donald Trump ultimately won the 2024 presidential election, numerous states enacted constitutional amendments in that same election enhancing protections against abortion

matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.”).

119. See OHIO CONST. art. I, § 22 (recognizing the right to “make and carry out one’s own reproductive decisions,” including decisions on abortion, contraception, and fertility treatment).

120. See *Ballot Tracker*, *supra* note 6.

121. See Marshfield, *supra* note 4, at 545–57.

122. See *supra* Section II.B.

123. See Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 WISC. L. REV. 1001, 1006 (2021) (recognizing how Montana’s dignity provision may be read to enhance state constitutional protections against cruel and unusual punishment); see also Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 515–16 (2004).

restrictions, including Arizona,¹²⁴ Colorado,¹²⁵ Maryland,¹²⁶ Missouri,¹²⁷ Montana,¹²⁸ Nevada,¹²⁹ and New York.¹³⁰ Constitutional provisions that directly address the right to abortion—rather than doing so indirectly through the recognition of dignity—may bolster abortion protections in the face of unwilling courts that might otherwise narrowly interpret dignity protections.

Despite this alternative, dignity provisions are still worth considering because of their versatility. Explicit protections for abortion rights are hard to get around, but there is a risk that they may not apply to other restrictions on reproductive freedom. Consider, for example, Colorado's new constitutional language recognizing the right to abortion: "The right to abortion is hereby recognized. Government shall not deny, impede, or discriminate against the exercise of that right, including prohibiting health insurance coverage for abortion."¹³¹ While this provision provides strong protections for abortion, it remains unclear if it applies to other forms of reproductive autonomy like contraception. A broader dignity protection is more likely to encompass these alternative restrictions, including restrictions that have

124. See Katherine Davis-Young, *Arizona Voters Pass Constitutional Amendment Guaranteeing Abortion Access*, NPR (Nov. 6, 2024, 4:20 AM), <https://www.npr.org/2024/11/06/g-s1-32937/arizona-abortion-amendment-results/>; ARIZ. CONST. art. II, § 8.1.

125. See Elaine Tassy, *Colorado Voters Approve Constitutional Amendment on Abortion Access*, COLO. PUBLIC RADIO (Nov. 5, 2024, 8:39 PM) <https://www.cpr.org/2024/11/05/amendment-79-right-to-an-abortion-results/>; COLO. CONST. art. II, § 32.

126. See Meredith Cohn, *Maryland Abortion Amendment Passes, Protecting Against Future Restrictions*, THE BALTIMORE BANNER (Nov. 5, 2024, 9:34 PM) <https://www.thebaltimorebanner.com/politics-power/state-government/abortion-reproductive-rights-constitution-4DB5HPDZANAQZLHSA2JFWSW6LM/>; MD. CONST. Declaration of Rts. art. 48 (West, Westlaw effective: Jan. 17, 2025).

127. See Anna Spoerre, *Missouri Voters Approve Amendment 3, Overturn State's Abortion Ban*, MO. INDEPENDENT (Nov. 5, 2024, 10:37 PM) <https://missouri-independent.com/2024/11/05/missouri-voters-overturn-states-near-total-abortion-ban/>; MO. CONST. art. I, § 36.

128. See Mara Silvers, *Voters Endorse Montana's Abortion Rights Measure*, MONT. FREE PRESS (Nov. 6, 2024) <https://montanafreepress.org/2024/11/06/montanas-abortion-rights-measure-surges-to-victory/>; MONT. CONST. art. II, § 36.

129. See Eric Neugeboren, *Nevadans Vote to Enshrine Abortion Rights in Constitution, but It Needs Approval in 2026*, THE NEV. INDEPENDENT (Nov. 5, 2024, 10:02 PM), <https://thenevadaindependent.com/article/nevadans-vote-to-enshrine-abortion-rights-in-constitution-but-it-needs-approval-in-2026/>; NEV. CONST. art. I, § 25.

130. See Ian Pickus, *New York Votes to Put Abortion Rights in the State Constitution*, NPR (Nov. 5, 2024, 10:29 PM), <https://www.npr.org/2024/11/05/g-s1-32751/new-york-abortion-election-results/>; N.Y. CONST. art. I, § 11.

131. COLO. CONST. art. II, § 32.

yet to be thought up. And beyond reproductive autonomy, dignity provisions may provide other protections, including the right to obtain gender-affirming healthcare.¹³²

C. Could Dignity Backfire? Considering Fetal Personhood and Religious Constitutionalism

One might object that a constitutional right to dignity may backfire and further limit abortion access should it be framed as protecting the right to dignity of fetuses or the unborn.¹³³ Abortion opponents who advance “fetal personhood” arguments assert that the Constitution actively prohibits infringing the rights of the unborn and thereby prohibits abortion.¹³⁴ These notions are finding their way into some state constitutions as well, with Nebraska amending its constitution in 2024 to state that “unborn children shall be protected from abortion in the second and third trimesters.”¹³⁵ This line of argument may gain further strength from dignity rights. If the fetus is granted the rights of a person and if these rights include dignity, then constitutional dignity rights could be used to further support restrictions on abortion access.¹³⁶

While the push for fetal personhood is a trend worthy of attention in ongoing legislation and litigation over abortion access, it is ultimately a separate issue from the usefulness and desirability of state

132. See Quinn Yeargain, *Litigating Trans Rights in the States*, 85 OHIO ST. L.J. 355, 400 (2024) (describing attempts by states to restrict access to gender-affirming healthcare, and encouraging further litigation against these restrictions on state constitutional grounds).

133. See Yuvraj Joshi, *The Respectable Dignity of Obergefell v. Hodges*, 6 CAL. L. REV. CIR. 117, 119 (2015).

134. See Meghan M. Boone & Benjamin J. McMichael, *Reproductive Objectification*, 108 MINN. L. REV. 2493, 2497–98 (2024) (describing fetal personhood arguments, particularly in the wake of *Dobbs*); see also Jill Wieber Lens, *Miscarriage, Stillbirth, & Reproductive Justice*, 98 WASH. U. L. REV. 1059, 1076–78 (2021) (describing fetal personhood arguments and their implications for issues beyond abortion, including miscarriage and stillbirth).

135. Aaron Sanderford, *Nebraska Passes Abortion-Restrictions Amendment, Bucking National Trend*, NEB. EXAMINER (Nov. 6, 2024, 2:32 AM), <https://nebraskalexaminer.com/2024/11/06/nebraska-passes-abortion-restrictions-amendment-bucking-national-trend/>; NEB. CONST. art. I, § 31 (West, Westlaw effective: December 12, 2024).

136. See Leah Litman, *Dignity and Civility, Reconsidered*, 70 HASTINGS L.J. 1225, 1237 (2019) (noting an increase in states’ reliance on “the dignity of fetuses” to justify “laws that would restrict abortion in the name of potential life and fetal personhood”); Mary Crossley, *Reproducing Dignity: Race, Disability, and Reproductive Controls*, 54 U.C. DAVIS L. REV. 195, 255–56 (2020) (describing how rhetoric regarding the dignity of human life is “pushed by religious conservatives seeking to establish fetal personhood”).

constitutional dignity provisions. The U.S. Constitution and state constitutions contain rights that would dramatically impact abortion laws if fetuses were to be granted those rights. Such outcomes have, for the most part, been avoided due to courts' general reticence to grant full personhood to the unborn—not because of the existence or lack of state constitutional dignity provisions.¹³⁷ If the fetal personhood argument succeeds, the issue of whether state constitutions contain dignity provisions will make little difference, as existing provisions regarding inalienable rights and due process protections will be enough of a foundation for constitutional arguments against permissive abortion policies.¹³⁸ Still, dignity provisions may be worth avoiding in states with constitutional provisions that might be employed alongside dignity provisions to push for fetal personhood, such as Arkansas.¹³⁹

As a related objection, one might also be concerned that the concept of dignity may come with conceptual baggage that is inherently inconsistent with abortion rights. Samuel Moyn argues that modern discussions of dignity in constitutional contexts originate in “religious constitutionalism” in Ireland in 1937.¹⁴⁰ Moyn is concerned over dignity’s religious origins, warning that enthusiasm for dignity may cause legal systems to veer in increasingly religion-oriented directions.¹⁴¹ Moyn’s concern has particular salience for those concerned with abortion rights. Should references to dignity in state constitution take on an inherent religious undertone, this may lead to the incorporation of

137. See Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 U.C. Davis L. Rev. 2149, 2224–25 (2024) (describing how the Supreme Court has, for now, avoided ruling in favor of fetal personhood). To be sure, this general reluctance is not universal. See *LePage v. Ctr. for Reprod. Med., P.C.*, No. SC-2022-0515, 2024 Ala. LEXIS 60, at *9–13 (Ala. Feb. 16, 2024) (ruling that unborn children fall under the definition of “child” under Alabama’s 1872 Wrongful Death of a Minor Act).

138. See Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 U.C. DAVIS L. REV. 2149, 2190 (2024) (noting pre-Roe arguments for fetal personhood arguing that abortions and “liberal abortion laws” violated fetal rights to due process); Carliss Chatman, *We Shouldn’t Need Roe*, 29 UCLA J. GENDER & L. 81, 83–84 (2022) (arguing that constitutional equal protection provisions will “prioritize the life of the fetus in all contexts” should fetal person be recognized).

139. See ARK. CONST. amend. 68, § 2 (“The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution.”).

140. Samuel Moyn, *The Secret History of Constitutional Dignity*, 17 YALE HUM. RTS. & DEV. L.J. 39, 40–41, 45–47 (2014).

141. See *id.* at 41; see also Justin Murray, *Exposing the Underground Establishment Clause in the Supreme Court’s Abortion Cases*, 23 REGENT L. REV. 1, 49–50 (2011) (describing how a variety of belief frameworks may support the conclusion that “fetuses should be protected as persons”).

religious doctrine that views abortion and other forms of reproductive healthcare as contrary to human dignity.¹⁴²

Varying interpretations of a term as malleable as “dignity” are a concern worth keeping in mind.¹⁴³ But there are reasons why such an outcome is unlikely. First, Moyn’s account of constitutional dignity’s religious origins may not account for non-religious “nationalistic, paternalistic and social democratic influences that may well have” informed what dignity was understood to mean in the Irish constitutional context.¹⁴⁴ Second, the origins of state constitutional dignity provisions—particularly those enacted in the future—will involve influences well beyond religion, as they will take place against a backdrop of recently overruled federal case law recognizing dignity’s role in protecting the right to abortion, and still-existing precedent recognizing dignity’s role in invalidating bans on sodomy and same-sex marriage.¹⁴⁵ Third, holistic interpretations of state constitutions counsel against a religiously oriented interpretation of dignity, as many state constitutions (and Puerto Rico’s constitution) contain provisions prohibiting the establishment of religion.¹⁴⁶ Reading dignity provisions in the context of textual bans on the establishment of religion discourage religious readings of these provisions.¹⁴⁷

142. See Susan J. Stabile, *An Effort to Articulate a Catholic Realist Approach to Abortion*, 7 U. ST. THOMAS L.J. 340, 341–42 (2010) (“[F]rom the Catholic perspective, abortion is an intrinsic evil—an abominable crime—that offends against the human person and against God the Creator and Father and that distorts the true nature and dignity of motherhood.”).

143. See RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 13 (2011) (“The concept of dignity has become debased by flabby overuse in political rhetoric.”).

144. Christopher McCrudden, *Where Did ‘Human Dignity’ Come From? Drafting the Preamble to the Irish Constitution*, 60 AM. J. LEGAL HIST. 485, 525–29 (2020).

145. See Adeno Addis, *Justice Kennedy on Dignity*, 60 HOUSTON L. REV. 519, 586–94 (2023) (describing Justice Kennedy’s repeated invocation of dignity in authoring opinions overturning bans on sodomy and same-sex marriage).

146. See, e.g., CAL. CONST. art. I, § 4 (“The Legislature shall make no law respecting an establishment of religion.”); LA. CONST. art. I, § 8 (“No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof.”); MONT. CONST. art. II, § 5, (“The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”); P.R. CONST. art. II, § 3 (“No law shall be made respecting an establishment of religion or prohibiting the free exercise thereof. There shall be complete separation of church and state.”); S.C. CONST. art. I, § 2 (“The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”).

147. See Ariel L. Bendor & Michael Tamir, *Human Dignity as a Chameleon*, 5 CARDOZO INT. & COMP. L. REV. 739, 742–43 (2022) (arguing that courts interpret explicit or implied constitutional rights to dignity “on the basis of the entirety of the provisions of the particular constitution”).

CONCLUSION

The Supreme Court has ruled that the federal Constitution does not protect a right to abortion. Abortion protections and restrictions are, instead, a matter to be left up to the states. To that end, state constitutions present an avenue for strengthened abortion protections. Dignity provisions themselves support individual autonomy and self-direction at the heart of reproductive autonomy rights. Read together with state constitutional privacy, due process, and equal protection provisions, state constitutional rights to dignity may enhance protections for reproductive autonomy in the face of restrictive legislation.