IMMUNIZING *ROE*: HOW COURT TREATMENT OF COVID-19 VACCINE MANDATES SUPPORTS REPRODUCTIVE FREEDOM

ALYSSA CURCIO*

INTRODUCTION

Discussions regarding bodily autonomy in the United States have always been contentious. Ideas about agency, religion, and privacy have fueled impassioned responses to court decisions and legislation regulating the body.[1] The COVID-19 pandemic and the ensuing effort to vaccinate Americans added a new dimension to the bodily autonomy debate.

COVID-19 vaccine mandates have become commonplace in the United States—as of February 2022, twenty states have imposed vaccine requirements in some form.[2] These mandates have ranged from merely requiring healthcare workers at long-term care facilities to be vaccinated against COVID-19[3] to broadly requiring vaccination to enter private businesses and public spaces.[4]

* J.D. Candidate 2023, Columbia Law School. With thanks to Professors Carol Sanger and Jessica Bulman-Pozen for their invaluable guidance. Thanks also to Katja Botchkareva and the entire staff of the Columbia Journal of Gender and Law for their exceptional editorial work, and to the many friends who helped me wrestle with these ideas.

[1] Carrie Blazina et al., *Key Facts About the Abortion Debate in America*, PEW RESEARCH CENTER (June 17, 2021), https://www.pewresearch.org/fact-tank/2021/06/17/key-facts-about-the-abortion-debate-in-america/ [https://perma.cc/6X2A-RXYL].

[2] KAISER FAMILY FOUNDATION, STATE COVID-19 DATA AND POLICY ACTIONS (2022), https://www.kff.org/report-section/state-covid-19-data-and-policy-actions-policy-actions/ [https://perma.cc/C732-HYWS].

[3] Conn. Exec. Order No. 13B (Aug. 6, 2021).

[4] N.Y. City Emergency Exec. Order No. 250 § 2 (Sept. 24, 2021).

While vaccine mandates are nothing new in the United States,[5] the unusually strong response against the COVID-19 mandates is a novelty. Since the widespread implementation of COVID-19 vaccine mandates began, people have taken to the courts,[6] the streets,[7] and the legislatures[8] to push back against requiring COVID-19 vaccination. In fourteen states, governors and state legislatures have implemented a ban on vaccine mandates.[9]

Resistance to COVID-19 vaccination has led to renewed interest in the abortion debate, as opponents of the new mandates have asserted that the legal arguments behind requiring vaccines are inconsistent with those protecting abortion.[10] Some figures have even gone so far as to commandeer the "my body, my choice slogan" created by the reproductive freedom movement as a rallying call to end vaccine mandates.[11] These arguments have been extended to the courtroom, where parties across the United States are arguing that vaccine mandates cannot be squared with the constitutional protection of abortion access.[12] Even the Supreme Court has hinted at this argument of inconsistency:

---

[5] Drew Desilver, *States Have Mandated Vaccinations Since Long Before COVID-19*, PEW RESEARCH CENTER (Oct. 8, 2021), https://www.pewresearch.org/fact-tank/2021/10/08/states-have-mandated-vaccinations-since-long-before-covid-19/ [https://perma.cc/V5VU-JW6N].

[6] *See, e.g.*, Beckerich v. St. Elizabeth Med. Ctr., 563 F.3d 633, 638 (E.D. Ky. 2021); Bridges v. Houston Methodist Hosp., 543 F.3d 525, 526 (S.D. Tex. 2021).

[7] *See, e.g.*, Cory James, *Hundreds Protest COVID-19 Vaccine Mandates Outside New York City Hall*, CBS NEW YORK (Aug. 25, 2021), https://newyork.cbslocal.com/2021/08/25/nyc-covid-vaccine-mandate-protest/ [https://perma.cc/M92X-EDES].

[8] *See, e.g.*, Ga. Exec. Order No. 05.25.21.01.

[9] *Supra* note 2.

[10] Jeffrey Lord, *Mandatory Vaccinations Undermine* Roe v. Wade *and Choice*, THE TENNESSEE STAR (Aug. 7, 2021), https://tennesseestar.com/2021/08/07/commentary-mandatory-vaccinations-undermine-roe-v-wade-and-choice/ [https://perma.cc/Z5TS-Y53B].

[11] Ted Cruz (@tedcruz), TWITTER (Sept. 29, 2021, 1:41 PM), https://twitter.com/tedcruz/status/1443269646006767622?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1443269646006767622%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.dailydot.com%2Fdebug%2Fted-cruz-your-body-your-choice-tweet-nba%2F [https://perma.cc/69Y7-7C29].

[12] *See, e.g.*, Brief of Plaintiff at 50G, Goe v. Zucker, 520 F. Supp. 3d 217 (2d Cir. 2021) (No. 21-0537-cv) (arguing that since medical exception requests are examined under the fundamental right framework in the abortion context, vaccine mandate exception requests should be too); Brief of Plaintiffs-Appellants at 35–37, We the Patriots USA, Inc. v. Hochul 17 F.4th 266 (2d Cir. 2021) (No. 21-2179) (arguing that *Roe v. Wade* and its progeny effectually overturned *Jacobson* due to the divergent approach taken by the Court); Complaint at 17, Valentino v. DLA Piper LLP U.S., (Cal. Super. Ct., San Diego Cty. Jan. 20, 2022) (No. 202200002424) (arguing that California's

while hearing arguments in *Dobbs v. Jackson Women's Health*,[13] a case concerning Mississippi's pre-viability ban on elective abortion, Justice Barrett noted a link between abortion and vaccination by asserting "there is, without question, an infringement on bodily autonomy, you know, which we have in other contexts, like vaccines."[14] While most of the cases utilizing this argument of inconsistency aim at striking down vaccine mandates, the same reasoning could easily be turned around to challenge abortion protections in the courtroom, particularly if a judge affords the anti-vaccine mandate arguments any credibility. Accordingly, it is essential to thoroughly understand and have a strong response to any such arguments. Additionally, given the rapidly changing landscape of abortion protections in the United States, analogy to the Court's vaccine mandate jurisprudence can be utilized as a defense against laws that restrict abortion access.

This Note seeks to challenge these inconsistency arguments, and to instead posit that vaccine mandates and abortion protections represent opposite ends of one cohesive bodily autonomy spectrum, where the state's interest in protecting against public harm is at one end of the scale and the individual's constitutional protections are at the other. In doing so, this Note will argue that when the Court addresses bodily autonomy claims, it always balances the individual's right against the state's interest, and that the divergent outcomes seen across bodily autonomy jurisprudence can be logically explained by how heavily each of those interests weigh in a particular issue.

Part I will provide an overview of the bodily autonomy jurisprudence in the United States, treating the historic practices of vaccinations and abortions individually while also providing background on other areas of the law that implicate bodily autonomy. Part II will explore both the argument urging that abortion protections and vaccine mandates are similar, and the argument that they are entirely different, in an effort to answer the question of how to characterize the relationship between the two bodies of cases. Lastly, Part III will argue that vaccine mandates are entirely consistent with the right to abortion, as they represent the opposite end of the Court's bodily autonomy spectrum, and are a useful tool in supporting the legality of reproductive freedom. By examining vaccine mandates and abortion protections under each other's respective legal frameworks, it becomes clear that the two jurisprudences can cohesively exist. Moreover, by examining abortion

---

permissiveness with abortion requires that the same medical autonomy be given in the vaccine mandate situation).

[13] Transcript of Oral Argument at 56–57, Dobbs v. Jackson Women's Health Org., 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022) (No. 19-1392).

[14] *Id.* at 56; Dobbs v. Jackson Women's Health Org., 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022).

protections under vaccine mandates' legal analysis, the necessity of the Court's protection of abortion rights is even further demonstrated.

I. The Bodily Autonomy Legal Landscape

Part I of this Note begins by reviewing the general landscape of bodily autonomy jurisprudence in the United States before turning to examine the Supreme Court's abortion and vaccination jurisprudences in-depth.

A. Survey of Bodily Autonomy Jurisprudence

"Every human being of adult years and sound mind has a right to determine what shall be done with [their] own body."[15] This oft-quoted line from Justice Cardozo in *Schloendorff v. Society of New York Hospital* represents a strong, idealized conception of bodily autonomy in the United States.[16] However, as described below, there are some well-established instances in which an interest of the state eclipses personal liberty.

State regulation of what citizens do with their bodies is more common than most realize. The federal government has authority under the Commerce Clause to regulate consumption of controlled substances, since the distribution, sale, and manufacture of such substances have a notable effect on interstate commerce.[17] Under the state's police power to take measures to protect the public health, safety, and welfare of its citizens,[18] states are given wide latitude to determine their respective policies concerning enforcement and sentencing of drug laws.[19] Under this same power, the state may also regulate what someone wears on their body in public,[20] may require someone to wear a seatbelt on their

---

[15] Schloendorff v. Soc'y of New York Hosp., 211 N.Y. 125, 129–30 (1914); this case concerned issues of bodily autonomy and capacity. While this is a crucial area of personal liberty, such a discussion is outside the scope of this Note. For an illuminating and thoughtful discussion on bodily autonomy and institutionalized individuals, please see Jessica Litman, *A Common Law Remedy Forced Medication of the Institutionalized Mentally Ill*, 82 COLUM. L. REV. 1790 (1982).

[16] *Id.*

[17] Gonzales v. Raich, 545 U.S. 1, 25 (2005) ("the activities regulated by the CSA are quintessentially economic").

[18] Wendy E. Parmet, *From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health*, 40 AM. J. LEGAL HIST. 476, 478 (1996).

[19] Corinne Snow, *Cooperative Federalism and Substance Regulation: Lessons Learned from the End of Prohibition,* CENTER FOR ALCOHOL POLICY 2 (2015), https://www.centerforalcoholpolicy.org/wp-content/uploads/2015/03/Corrine_Snow_Essay.pdf [https://perma.cc/SWC3-NRGM] [https://perma.cc/6V7E-YNQL].

[20] *See, e.g.*, N.Y. PENAL LAW § 245.01 (LexisNexis 1984).

body while driving,[21] and may control at what age someone is permitted to consume alcohol.[22] The state thus has some control over what its citizens may do with their bodies, and these regulations are generally regarded as acceptable by the public.

The government's ability to regulate one's use of her body also manifests itself in more substantial ways. While the common law historically recognized a right to refuse medical treatment,[23] this liberty has been curtailed by the Supreme Court.[24] In *Cruzan v. Director, Missouri Department of Health,* Nancy Cruzan was in a severe car accident that rendered her incompetent with little to no chance of recovery.[25] She had previously told her housemate that in the event of an accident, she wished to be taken off of life support.[26] "Balancing [respondent's] liberty interests against the relevant state interests," the Supreme Court ruled that Missouri had a higher stake in the case due to the finality of death and that its interest in being sure that a citizen wanted to refuse medical treatment "by clear and convincing evidence" was a constitutional exercise of its police power.[27] The Court later directly addressed the question of whether a citizen has a right to physician-assisted suicide in *Washington v. Glucksburg.*[28] In *Glucksburg*, the Court emphatically ruled that while individuals have a right to self-determination in their life and bodies, this must give way to Washington State's interests in preserving human life, protecting vulnerable groups, and preserving the integrity of the medical profession.[29] Explaining its holding, the majority wrote that the fact that "many of the rights protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected."[30]

---

[21] *See, e.g.*, N.Y. VEH. & TRAF. LAW § 1229-c (LexisNexis 1985) (amended 2020).

[22] *See, e.g.*, N.Y. ALCO. BEV. CONT. LAW § 65-c.

[23] *See* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250 (1891); *Schloendorff*, 211 N.Y. at 93.

[24] *See* Cruzan v. Dir., Miss. Dep't of Health, 497 U.S. 261 (1990).

[25] *Id.* at 265.

[26] *Id.* at 268.

[27] *Id.* at 279–81.

[28] 521 U.S. 702, 728 (1997).

[29] *Id.* at 727–32.

[30] *Id.* at 727.

The state therefore has a fairly prominent role in regulating the body in both discrete and substantial ways. In upholding such regulations, the Court has expressly qualified the right to personal and bodily autonomy and has repeatedly framed inquiries concerning bodily autonomy through a balancing test weighing the interests of the individual against the interest of the state.

B. Reproductive Freedom Through the Historical Lens

1. Early Framework: Privacy and Penumbras

The Fourteenth Amendment's substantive due process guarantee has informed much of the modern conception of personal liberty, with applications spanning from the right to practice one's profession[31] to the right to marry.[32] However, the Court's recognition of violations of substantive due process as valid rights of action is relatively new. Historically, the Court was reticent to ground unenumerated rights in the Fourteenth Amendment's somewhat ambiguous language.[33] Apart from the now-void concept of economic substantive due process,[34] the Court's first utilization of substantive due process was grounded in parents' right to control the upbringing of their children,[35] which later evolved into the right of care, custody, and control of one's children.[36] These initial steps towards substantive due process paved the way for a recognized right to obtain an abortion.

The path toward abortion protections continued with *Griswold v. Connecticut*.[37] The Court—still hesitant to return to the then-disfavored

---

[31] Williamson v. Lee Optical, 348 U.S. 483, 491 (1955).

[32] Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

[33] Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1521–22 (1999).

[34] Under economic substantive due process, businesses had a right to be free from government intervention in their affairs, particularly in regards to their ability to contract. This right was crystallized in *Lochner v. New York* and was utilized for decades to strike down hundreds of economic regulations. 198 U.S. 45 (1905); Chemerinsky, *supra* note 33, at 1503. However, this right was voided in *West Coast Hotel v. Parrish* and has not been used since. 300 U.S. 379 (1937); Chemerinsky, *supra* note 33, at 1503–04.

[35] Meyer v. Nebraska, 262 U.S. 390 (1923).

[36] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[37] Griswold v. Connecticut, 381 U.S. 479, 480 (1965). This case was essentially the sequel to *Poe v. Ullman* where the Supreme Court upheld the same Connecticut statute because it was purportedly never enforced and thus the issue was not ripe. 367 U.S. 497 (1961).

language of substantive due process[38]—overturned a Connecticut statute outlawing the prescription of contraceptives by finding that, though privacy was not a concrete right protected under the Fourteenth Amendment, other "specific guarantees in the Bill of Rights have penumbras, formed by the emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."[39] Thus, while the Court did not read the language of the Fourteenth Amendment to specifically protect a right to privacy, it nestled a couple's right to privacy in the marital bed in the shadows of other enumerated rights.[40]

With an established bedrock of privacy in order, the Court in *Roe v. Wade*[41] made the final leap and expressly recognized the substantive due process right of privacy.[42] In *Roe*, the Court examined a Texas statute that criminalized procuring or attempting an abortion, unless strictly necessary to save the pregnant person's life and carried out by a medical professional.[43] The Court analyzed the constitutionality of this statute by balancing the interests at hand. The harm enacted by this law was "apparent": an unwanted pregnancy could result in harm to the pregnant person, distress on their mental state and future, psychological effects on the unwanted child, and the stigma of unwanted parenthood.[44] Moreover, the Court found that an individual has a personal liberty interest to make the best decision for themselves in light of these harms.[45] On the other hand, the state had an interest in prenatal life and in minimizing hazardous medical procedures—although the Court noted that the latter interest was mitigated by medical advances increasing the safety of abortions.[46]

---

[38] *Griswold*, 381 U.S. at 481–82 ("Overtones of some arguments suggest that *Lochner v. State of New York* . . . should be our guide. But we decline that invitation as we did in [other cases].").

[39] *Id.* at 484.

[40] *Id.* (referencing the Fourth and Fifth amendments and how they were enacted to protect the right to be left alone).

[41] Roe v. Wade, 410 U.S. 113 (1973).

[42] Chemerinsky, *supra* note 33, at 1508.

[43] *Roe*, 410 U.S. at 117–18.

[44] *Id.* at 153.

[45] *Id.* at 153.

[46] *Id.* at 149–50.

The Court went on to find that a statute "that excepts from criminality only a life-saving procedure on behalf of the mother without regard to her pregnancy stage and without recognition of the other interests involved, is violative of the Due Process clause of the Fourteenth Amendment."[47] The text of the opinion grounds the right to an abortion in a substantive due process right to privacy. However, this right was curtailed by the stage of the pregnancy—in the first trimester, the state cannot impede the ability to obtain an abortion. In the second trimester, the state may regulate abortion by imposing limitations such as qualifications of the administrator, the permissible facilities, the licensing of physicians and facilities, and requiring hospital-like clinics.[48] This tripartite framework relied on "viability"—or the ability of the fetus to live outside the womb—as the turning point where the interests at play weighed more heavily in favor of the state than in favor of the parent.[49] Thus, the legality of obtaining an abortion was expressly dependent on how high the state's interests were, as informed by how far along the pregnancy was. While later cases differed as to the appropriate test to apply to restrictions on abortion,[50] an understanding of how *Roe* relied on the idea of substantive due process is crucial to later discussions about reproductive freedom.

2. Modern Framework: Burdens or Balancing?

The next major progression in reproductive freedom jurisprudence came in 1992 with *Planned Parenthood v. Casey*.[51] A Pennsylvania act implemented multiple restrictions on a person's ability to obtain an abortion.[52] Though emphasizing the importance of stare decisis and adhering to precedent,[53] the Court in *Casey* significantly rolled back *Roe*'s protections[54] by replacing the tripartite structure with an "undue burden" analysis that asks whether the restrictions placed on the mother *pre-viability* have the substantial purpose and

---

[47] *Id.* at 164.

[48] *Id.* at 163.

[49] *Id.* at 163–64.

[50] *See infra* note 74.

[51] 505 U.S. 833 (1992).

[52] *Id.* at 844. The other measures imposed were a minor consent provision, a recording requirement, a waiting period, and a medical emergency provision.

[53] *Id.* at 854 ("the obligation to follow precedent begins with necessity").

[54] Carol Sanger, ABOUT ABORTION: TERMINATING PREGNANCY IN THE TWENTY-FIRST CENTURY 63–64 (2017).

effect of creating a significant obstacle to the individual's ability to obtain an abortion.[55] Applying this test to the facts of the Pennsylvania statute, the Court found that only one provision requiring spousal notice violated the Constitution because of the high rate of domestic violence against women, the markedly lower impact that pregnancy has on a father, and the separate legal status of a woman within the context of a heterosexual marriage.[56] Because the Court left the rest of the abortion-restrictive provisions in place, *Casey* emboldened an outpouring of state laws placing restrictions on abortions and on the professionals who perform them.[57]

From this wave of abortion regulations came two more Supreme Court cases,[58] effectively rounding out the Court's modern reproductive justice jurisprudence.[59] In *Whole Woman's Health*, the Court undertook a review of Texas legislation that required all abortion providers to have admitting privileges at a hospital within thirty miles of the clinic as well as have ambulatory facilities onsite—effectively the equivalent of an operating room.[60] Justice Breyer, writing for the Court, applied the undue burden analysis to the facts and said that the Texas law was unconstitutional because it caused the number of operative clinics to drop by fifty percent,[61] increased travel times exponentially,[62] and led to a crowding effect of the facilities that were still in

---

[55] *Casey*, 505 U.S at 873 ("We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*."); *see also* at 874–77.

[56] *Id.* at 891–98.

[57] Sanger, *supra* note 54, at 31. These restrictions are now colloquially referred to as "TRAP" laws, or targeted restrictions on abortion providers. *See* GUTTMACHER INST., TARGETED REGULATION OF ABORTION PROVIDERS (TRAP) LAWS (2020), https://www.guttmacher.org/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws [https://perma.cc/63N3-HQSG].

[58] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016); June Med. Servs. v. Russo, 140 S. Ct. 2103 (2020).

[59] While the Court has since made multiple rulings concerning abortion regulations during its October 2021 Term, this Note addresses only the abortion jurisprudence preceding these cases to orient the reader in the Court's historical understanding of abortion rights.

[60] *Whole Woman's Health*, 136 S. Ct. 2992, 2300.

[61] *Id.* at 2312 ("the number of facilities providing abortions dropped in half, from about 40 to about 20.").

[62] *Id.* at 2313 (noting that the number of women living more than 150 miles from a facility increased to 400,000 and the number of women living more than 200 miles from a facility increased to 290,000).

operation.[63] All of these factors together markedly decreased access to abortion, creating an undue burden on a person's reproductive freedom.[64]

The *Whole Woman's Health* decision caused another pending abortion case on appeal from the Fifth Circuit, *June Medical Services v. Russo*, to be remanded in accordance with the new ruling.[65] On remand, the Fifth Circuit once again upheld the Louisiana law as constitutional, despite its almost identical structure to the law struck down in *Whole Woman's Health*.[66] The case then made its way to the Supreme Court.[67] Relying on stare decisis, the Court struck down the law as unconstitutional, finding that it had reduced the number of operative clinics in the entire state to three, drastically minimizing abortion access for the ten thousand people who annually seek abortions in the state of Louisiana.[68] In arriving at this conclusion, the Court took into account the benefits conferred by this Louisiana law in order to conduct an ample examination of the state's interest[69]—an inquiry it also undertook in *Whole Woman's Health*.[70] Though the language of *Casey* specifically requires the Court to examine whether "a statute further[s] [a] valid state interest,"[71] Chief Justice Roberts took issue with what he deemed to be a novel balancing approach used by the plurality.[72] He instead argued that *Casey* requires a strict analysis of the burdens placed on the person's ability to obtain an abortion, not of the benefits conferred or denied to the state.[73] Since the Court's decision was

---

[63] *Id.* ("these closures meant fewer doctors, longer waiting times, and increased crowding.").

[64] *Id.* at 2318.

[65] Benjamin M. Parks, *Burdens, Benefits, or Both? The Impact of Chief Justice Roberts's* June Medical *Concurrence on Courts' Analyses of Abortion Regulations*, LA. L. REV. ONLINE (2020), https://lawreview.law.lsu.edu/2021/03/12/burdens-benefits-or-both-the-impact-of-chief-justice-robertss-june-medical-concurrence-on-courts-analyses-of-abortion-regulations/ [https://perma.cc/WAU9-KGL4].

[66] *June Med. Servs.*, 140 S. Ct. at 2112 ("In this case, we consider the constitutionality of a Louisiana statute, Act 620, that is almost word-for-word identical to Texas' admitting-privileges law.").

[67] Parks, *supra* note 65.

[68] *June Med. Servs.*, 140 S. Ct. at 2129.

[69] *Id.* at 2130.

[70] *Whole Woman's Health*, 136 S. Ct. at 2309.

[71] *Casey*, 505 U.S. at 877.

[72] *June Med. Servs.,* 140 S. Ct. at 2135, 2317 (Roberts, C.J., concurring).

[73] *Id.* at 2136.

a plurality, Chief Justice Roberts' concurrence means that the central holding of *June Medical Services* is limited to the conclusion the Louisiana statute imposed an undue burden on people's Fourteenth Amendment rights.[74] However, this conclusion has not been followed uniformly, with lower courts splitting on whether to additionally consider the benefits to the state in their analyses.[75]

The Court's abortion jurisprudence was further complicated in June of 2022 with the Court's issuance of its opinion in *Dobbs v. Jackson Women's Health Organization*.[76] *Dobbs* dealt with a Mississippi law banning all abortions after fifteen weeks, except in the cases of physical, medical emergencies or of severe fetal abnormality.[77] Under *Roe* and *Casey*'s frameworks, the law should have easily been struck down—at fifteen weeks, the fetus is still pre-viability, and so banning nearly all abortion access would almost certainly place an undue burden on the parent's ability to obtain abortion care.[78] Instead of following settled precedent, however, the Court overturned *Roe* and its progeny entirely, grounding its decision in the fact that the text of the Constitution does not provide for a right to obtain a lawful abortion.[79] This latest chapter in the Court's abortion jurisprudence makes a holistic understanding of its bodily autonomy jurisprudence even more crucial, as access to lifesaving and liberating healthcare is now left entirely to the whims of legislators.

C. Vaccination Jurisprudence

1. The Analysis: Public Harm Framework

Although COVID-19 has recently brought new interest to the legal issues surrounding vaccinations, vaccine mandates have been a part of American society for well over a century.[80] Many of the vaccines required today by

---

[74] Parks, *supra* note 65.

[75] *Id.*

[76] *Dobbs*, 597 U.S.

[77] Brief for Respondent at 3, Dobbs v. Jackson Women's Health Org., 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022), (No. 19-1392), 2021 WL 4197213, at *5.

[78] *Casey*, 505 U.S at 874–77.

[79] *Dobbs*, 597 U.S.

[80] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

schools and employers were created in the early 1900s.[81] Thus, most[82] of the COVID-19 vaccine mandates which have been and likely will continue to be before the courts will present issues that American courts have experience with. The landmark Supreme Court vaccination case, *Jacobson v. Massachusetts*, was decided in 1905 and is still cited today.[83]

In *Jacobson*, the city of Cambridge passed a regulation requiring that all residents receive inoculation against smallpox, or face a five dollar fine.[84] Similar to COVID-19 regulations, this law came on the heels of a devastating outbreak of smallpox in 1901 that took many lives.[85] Jacobson refused to receive the vaccine and sued, alleging that the law violated the liberty guaranteed to him under the Massachusetts and United States Constitutions.[86] The Court rejected his arguments. Referencing the state police power,[87] as well as the idea of a "social compact,"[88] the Court wrote that while there is a sphere of protected liberties guaranteed by the Constitution, the state has broad powers to push back against those liberties where "the safety of the general public may demand."[89] The Court then applied a public harm analysis, which asked whether there is a public harm at play which threatens the common good, so that the state's action in mandating the vaccines is not arbitrary.[90] This public harm analysis was heavily factual, emphasizing the empirical data around the

---

[81] Desilver, *supra* note 5.

[82] Certain mandates passed during 2021 do seem to be novel, particularly New York City's "Key to NYC" Executive Order. N.Y. City Emergency Exec. Order No. 250 § 2 (Sept. 24, 2021). However, the large majority of vaccine mandates do not follow this model and instead employ techniques used by schools, government, and employers for decades.

[83] *Jacobson*, 197 U.S. 11 (1905).

[84] *Id.* at 12–13.

[85] Wendy E. Parmet et al., *Individual Rights Versus the Public's Health—100 Years After* Jacobson v. Massachusetts, 352 NEW ENG. J. MED. 652, 653 (Feb. 2005).

[86] *Jacobson*, 197 U.S. at 12–13.

[87] *Id.* at 25 ("According to settled principles, the police power of the state must be held to embrace . . . such reasonable regulations . . . as will protect the public health and public safety.").

[88] Case Comment, *Toward a Twenty-First-Century* Jacobson v. Massachusetts, 121 HARV. L. REV. 1822 (2008).

[89] *Jacobson*, 197 U.S. at 29.

[90] *Supra* note 88, at 1823.

smallpox epidemic:[91] Justice Harlan wrote that the smallpox epidemic had taken many lives and necessitated action to protect the community from its deadly effects.[92] Additionally, he wrote that the means utilized by the statute had a "real and substantial relation" to the crucial ends of curtailing harm to the public.[93] As such, the legislation was a lawful exercise of the state's police power on the basis of the public harm—the epidemic—sought to be avoided.

Jacobson stands for a second proposition: the courts should give wide deference to a state legislature's public health decisions.[94] The Court established that "the mode or manner in which" safeguarding the public health shall be accomplished "is within the discretion of the State,"[95] and even posited that a failure to defer could "usurp the functions of another branch of government."[96] While the Court's decision preceded the tiers of scrutiny now used when examining a right under the Fourteenth Amendment, there is general agreement that the *Jacobson* analysis applied what would now be called rational basis review, requiring that the government's action be rationally related to a legitimate interest.[97]

Finally, though only in dicta, *Jacobson* set the stage for a discussion of vaccine exemptions.[98] The Cambridge regulation allowed a medical exemption to the vaccination requirement, but the plaintiff did not present any evidence that he was unfit to receive the inoculation.[99] The Court therefore ruled that he could not be exempt. But it did write, without much elaboration, that there may be circumstances where vaccine requirements should be waived for certain

---

[91] Wendy E. Parmet, *Rediscovering* Jacobson *in the Era of COVID-19*, 100 BOSTON L. R. 117, 125 (2020).

[92] *Jacobson*, 197 U.S. at 31–32.

[93] *Id.* at 32.

[94] Ben Horowitz, Note, *A Shot in the Arm: What a Modern Approach to* Jacobson v. Massachusetts *Means for Mandatory Vaccinations During a Public Health Emergency*, 60 AM. U. L. REV. 1715, 1720 (2011).

[95] *Jacobson*, 197 U.S. at 25.

[96] *Id.* at 28. For a comparison on how this deferential approach compares to the Court's approach to abortion, see Part II of this Note.

[97] Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring).

[98] Horowitz, *supra* note 94, at 1720.

[99] *Jacobson*, 197 U.S. at 36–37.

individuals.[100] Scholars, consequentially, relied upon this idea to support limitations of vaccine mandates.[101]

Seventeen years later, the Court reaffirmed *Jacobson*'s core holdings in *Zucht v. King*.[102] In that case, Rosalyn Zucht refused to comply with Texas's public school vaccination requirements.[103] In response, the school barred her from attending classes, and she filed suit, alleging that both the policy and the school's actions were unconstitutional.[104] Citing *Jacobson*, the Court wrote that it is well settled under the police power that states may provide for compulsory vaccination.[105] Such mandates are an exercise not of "arbitrary power, but only that broad discretion required for the protection of the public health."[106] In affirming the outcome of *Jacobson*, the Court in *Zucht* also affirmed its legal approach: when examining the constitutionality of a vaccine mandate, the Court must ask whether the state's action was reasonable in the face of the public harm that the underlying health crisis has created.[107] Embedded in this analysis is also the deference to the state legislature's decision-making process.

2. Modern Applications of the Traditional Doctrine

While some scholars argue that *Jacobson*'s doctrinal foundation has been eroded by the Court's subsequent substantive due process decisions,[108] recent

---

[100] *Id.* at 39 ("we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination").

[101] *See* B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 299 (2007); *See also* LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 67–69 (2000) (reading *Jacobson* as not only an explication of the state power, but also as an implied limitation to it through its discussion of exemptions).

[102] Zucht v. King, 260 U.S. 174 (1922).

[103] *Id.* at 175.

[104] *Id.*

[105] *Id.* at 176.

[106] *Id.* at 177.

[107] Horowitz, *supra* note 94, at 1721.

[108] *See* Scott Burris, *Rationality Review and the Politics of Public Health*, 34 VILL. L. REV. 933, 966, 937–38 (1989); *see also* George J. Annas, *Blinded by Bioterrorism: Public Health and Liberty in the 21st Century*, 13 HEALTH MATRIX 33, 56–57 (2003) (arguing that compromising civil liberties in the name of public health actually backfires and undermines the public trust, which is crucial to an effective public health agenda).

cases in federal courts have found *Jacobson*'s holding to be pertinent and applicable to COVID-19 vaccine mandate challenges, even those enacted by private, non-governmental actors. In June of 2021, the federal courts handled their first substantial challenge to a COVID-19 vaccine mandate, *Bridges v. Houston Methodist Hospital*.[109] Jennifer Bridges, an employee at the Houston Methodist Hospital, sued to block a vaccine mandate requiring all hospital workers to receive full vaccination against COVID-19 or otherwise be fired.[110] She alleged that the vaccine was unsafe, and forcing her to choose between inoculation or her job amounted to wrongful termination and an abridgement of public policy. Citing *Jacobson v. Massachusetts*, the Texas federal district court rejected Bridges's arguments in a short opinion, reaffirming that "[t]he Supreme Court has held that . . . state imposed requirements of mandatory vaccination do not violate due process."[111] A few months later, a Kentucky federal court again took up the issue of vaccine mandates, this time specifically analyzing how they apply when enacted by a private party.[112] In *Beckerich v. St. Elizabeth Medical Center*, Christy Beckerich and a group of hospital employees sued their employer for implementing a COVID-19 vaccination mandate that threatened termination if immunization was not met.[113] Though the mandate contained religious and medical exemptions, the plaintiffs alleged that the hospital had been denying all exemptions, and they asked the court to issue a preliminary injunction.[114] The court immediately rejected Beckerich's constitutional claims, citing the state action doctrine:[115] "without establishing that defendants are state actors, Plaintiffs' constitutional claims cannot stand . . ."[116] The court then proceeded to examine the four factors used in determining if a preliminary injunction is appropriate on the Plaintiffs' remaining claims. Factors three and four of this test, often referred to as "balancing the equities," place the interests

[109] Bridges v. Houston Methodist Hosp., 543 F. Supp. 3d 525 (S.D. Tex. 2021), aff'd sub nom. Bridges v. Methodist Hosp., No. 21-20311, 2022 WL 2116213 (5th Cir. June 13, 2022).

[110] *Id.* at 526.

[111] *Id.* at 527.

[112] Beckerich v. St. Elizabeth Med. Ctr., 563 F. Supp. 3d 633, 637 (E.D. Ky. 2021), *recons. denied*, No. CV 21-105-DLB-EBA, 2021 WL 4722915 (E.D. Ky. Sept. 30, 2021).

[113] *Id.*

[114] *Id.* at 638.

[115] The state action doctrine, as declared by the Supreme Court, dictates that provisions of the Constitution retraining impediments on rights are in force only against restrictions by the government, not by private actors. Hala Ayoub, *The State Action Doctrine in State and Federal Courts*, 11 FLA. STATE U. L. REV. 893 (1984).

[116] *Beckerich*, 563 F. Supp. 3d at 639.

of the private parties against the public equities—typically expressed as the "greater good."[117] Applying these factors to the facts, the court found that the plaintiffs have interest in seeking employment; consequently, they can exercise "another individual liberty, no less significant—the right to seek other employment."[118] The public equities, on the other hand, concern the potential for widespread illness and death, an interest that the court noted had been strong enough to uphold a state-imposed vaccine mandate in *Jacobson*. Here, in these "easier" cases that "deal with private, non-state actors," this interest in avoiding public harm outweighs the private liberty interest of the Plaintiffs to hold *this* specific job.[119] Thus, even in private action cases, courts not only engage in an analysis of public harm but also do so on the basis of the Supreme Court's holding in *Jacobson v. Massachusetts*, lending the conclusion that *Jacobson*'s doctrinal basis is still alive and well.[120]

Federal district courts are not the only institutions that have been asked to engage with COVID-19 vaccine mandates. The Supreme Court has now three times rejected specific requests for either a preliminary injunction or a writ of certiorari concerning the legality of vaccine mandates imposed by state actors.[121] In August of 2021, Justice Amy Coney Barrett was asked by students of Indiana University to block the school's vaccine mandate, which allowed religious and medical exemptions.[122] Without any explanation or referral to the full Court's review, she rejected the students' request.[123] In October 2021,

---

[117] *Id.* at 644–45 (quoting Ent. Prods., Inc. v. Shelby Cnty., 588 F.3d 372, 395 (6th Cir. 2009)).

[118] *Id.* at 647.

[119] *Id.* at 646–47 (The court also noted that Plaintiffs trade off many interests daily to work at the hospital—they are required to wear certain clothes, show up at a certain time, and even receive the influenza vaccine for the past five years. All of these are tradeoffs of individual liberty that Plaintiffs decide to do every day in order to work at this hospital.)

[120] *See generally* Robert Iafolla, *Vaccine Mandates Withstand Challenges as Suits Surge Across U.S.*, BLOOMBERG LAW (Oct. 14, 2021, 5:31 AM), https://news.bloomberglaw.com/daily-labor-report/vaccine-mandates-withstand-challenges-as-lawsuits-proliferate [https://perma.cc/B8NM-U4BM].

[121] Lawrence Hurley, *U.S. Supreme Court Rejects Religious Challenge to Maine's Vaccine Mandate*, REUTERS (Nov. 1, 2021, 10:56 AM.), https://www.reuters.com/world/us/us-supreme-court-rejects-religious-challenge-maine-vaccine-mandate-2021-10-29/ [https://perma.cc/5RMM-XT94].

[122] Andrew Chung, *Students Can't Block Indiana University Vaccine Mandate-U.S. Supreme Court's Barrett*, REUTERS (Aug. 12, 2021, 5:40 PM), https://www.reuters.com/world/us/supreme-courts-barrett-rejects-indiana-university-students-vaccine-mandate-2021-08-12/ [https://perma.cc/4SRK-VDSU].

[123] *Id.*

Justice Sonia Sotomayor received a request for an emergency injunction to stop New York City schools from requiring COVID-19 vaccinations for teachers who did not meet religious or medical exemption requirements.[124] The Justice rejected the request.[125] Finally, in October 2021, the Court denied an issue of certiorari to Maine plaintiffs who contended that the pre-existing Maine law, which denied religious exemptions for vaccinations, was a violation of their First Amendment rights.[126]

Vaccine mandates, both old and new, have seen significant success in the courtroom. However, that does not mean the state is unlimited in its capacity to require inoculation. As outlined in *Jacobson*, the state's action must be reasonable in light of the public harms at stake.[127] For this reason, vaccine mandates of less contagious diseases, particularly sexually transmitted illnesses, have had much less success when challenged in courts.[128] Additionally, as discussed above, *Jacobson* seemingly carved out a legally recognized place for vaccine exemptions.[129] Though the Supreme Court refused to review the Maine vaccination law that removed a religious exemption, three Justices dissented from this decision, showing potential interest on the High Court for a future requirement of religious exemptions.[130] Moreover, the Maine law maintains its medical exemption and thus is still in line with *Jacobson*'s exemption dicta.[131]

---

[124] Debra Cassens Weiss, *Sotomayor Refuses to Block Vaccine Mandate for New York City School Employees*, ABA JOURNAL (Oct. 4, 2021, 9:25 AM), https://www.abajournal.com/news/article/justice-sotomayor-refuses-to-block-vaccine-mandate-for-new-york-city-school-employees [https://perma.cc/FDB6-MZ25].

[125] *Id.*

[126] Hurley, *supra* note 121. The Court also recently partially struck down the federal test-or-vaccinate mandate promulgated by OSHA in *NFIB v. Dep't of Labor, Occupational Safety and Health Administration*. 142 S. Ct. 661 (2022) (per curiam). While this case did concern vaccine mandate jurisprudence, it focused on issues of administrative law, not of bodily autonomy.

[127] *Jacobson*, 197 U.S. at 82.

[128] *See, e.g.*, In re LePage, 18 P.3d 1177 (Wyo. 2001) (holding that the Wyoming Department of Health must accept all exemption requests it receives for the Hepatitis B vaccine); *see also supra* note 88, at 1834 (discussing the immense public and state legislature backlash to gubernatorial attempts to mandate the HPV vaccine).

[129] *Jacobson*, 197 U.S. at 36–37.

[130] Hurley, *supra* note 121 (discussing Justice Gorsuch's dissent to the denial of certiorari, which was joined by Justices Thomas and Alito).

[131] MAINE CHAPTER, AMERICAN ACADEMY OF PEDIATRICS, WHAT PARENTS NEED TO KNOW: MAINE'S 2021 VACCINE LAW, https://www.maineaap.org/assets/docs/What-Your-Child-Needs-For-Vaccines_May-2021.pdf [https://perma.cc/E48C-67AF].

II. My Body, My Choice? An Exploration of the Compatibility of Vaccine Mandates and Abortion Protections

Part II of this Note begins by discussing scholarship that argues that vaccine mandates and abortion protections are in conflict. It then moves to the pro-choice response to such arguments, which, in order to combat the notion that the two jurisprudences conflict, emphasizes the difference between the practices of abortion and vaccination. This builds the foundation for Part III, which will argue that both approaches are mischaracterizations.

A. Vaccine Mandates and Abortion: Bodily Autonomy in Conflict?

At first glance, the abortion cases' pro-individual liberty approach and the vaccine mandate cases' pro-state interest outcome may seem to be in conflict. Indeed, this argument has been made since long before COVID-19 was in anyone's vocabulary.[132] The pushback to the COVID-19 vaccine mandates has brought this argument back to center stage.[133]

One characterization of the Court's jurisprudence views this inconsistency as part of the Court's larger bifurcated approach to bodily autonomy.[134] This bifurcation can be traced through two lines of cases. The first line of cases, begotten by *Jacobson*, is the "public health" line in which the Court privileges the state's police power over individual rights. The second line of cases is the "autonomy" line, grounded in *Griswold v. Connecticut*[135] and emphasizing individual dignity and autonomy.[136] This two-line approach, while encompassing other applications of bodily autonomy, is emblematic of the purported conflict between abortion and vaccine mandates and, in fact, finds its inception in the cases that gave rise to abortion protections and the upholding of modern vaccine mandates. Thus, for the purposes of this Note, the public health

---

[132] Hill, *supra* note 101, at 278 (writing about the apparent inconsistency between the two doctrines in 2006).

[133] Chris Powell, *Inconsistency in 'My Body, My Choice' Mantra*, THE DAY (Aug. 20, 2021, 6:01 PM), https://www.theday.com/article/20210820/OP04/210829934 [https://perma.cc/8K92-S53Z].

[134] Mary Holland, *Compulsory Vaccination, the Constitution, and the Hepatitis B Mandate for Infants and Young Children*, 12 YALE J. OF HEALTH POL'Y, L., AND ETHICS 39, 66 (2012) ("The Supreme Court today has two distinct lines of cases that relate to vaccination mandates—one focused on public health and the limits of individual liberty and the other focused on the individual's fundamental claims to bodily integrity and autonomy.").

[135] 381 U.S. 479 (1965) (finding that the Constitution protects a right of marital privacy against state restrictions on contraceptives).

[136] Hill, *supra* note 101, at 282.

line of cases will be treated as representative of the vaccine jurisprudence and the autonomy line as representative of the abortion jurisprudence.

Critics argue that this bifurcation creates glaring doctrinal inconsistencies between the lines of precedent protecting abortion and those protecting the state's right to compel vaccination.[137] Though these two lines are "two sides of the same coin," the Court takes "sharply differing views of this right and of the individual asserting it."[138] Under this view, plaintiffs seeking vindication of their reproductive freedom are treated as individuals undertaking a very personal decision, one that is deeply intertwined with the rhetoric of bodily autonomy.[139] Individuals pushing back against vaccine mandates, however, are not treated as people exercising their personal autonomy rights but are rather viewed as "public health problems" and "threats to others that can and indeed must be controlled."[140]

Other approaches take an even more contrary understanding of Court's jurisprudence. One view posits that the Court's decision in *Roe* and its progeny implicitly overruled *Jacobson*.[141] Under this framework, *Roe*'s affirmation of privacy as a fundamental right which encompasses the right to obtain an abortion completely abandoned *Jacobson*'s deferential, rational basis approach.[142] By privileging the right to obtain an abortion as fundamental, proponents of this approach believe the Court replaced *Jacobson* with a general strict scrutiny approach to laws that obstruct one's privacy in making medical choices.[143] Another similar view asserts that *Jacobson* provided no footing whatsoever for *Roe* or *Casey*.[144] Rather, this view contends that a faithful application of *Jacobson* would support the constitutionality and upholding of the abortion regulations that were struck down in *Roe*.[145] Moreover, this view

---

[137] *Id.* at 283.

[138] *Id.* at 294–95.

[139] *Id.* at 295.

[140] *Id.*

[141] Brief of the Plaintiffs-Appellants at 35, We the Patriots USA, Inc. v. Hochul, 17 F.4th 266 (2d. Cir. 2021) (No. 21-2179).

[142] *Id*.

[143] *Id.* at 39.

[144] Josh Blackman, *The Irrepressible Myth of* Jacobson v. Massachusetts, 70 BUFF. L. REV. 131, 214 (2022).

[145] *Id*. at 213.

posits that beyond just inconsistency with *Jacobson*, *Roe* actually extended the settings in which the 1905 ruling applied—*Jacobson* was decided during a time of crisis rooted in an outbreak of smallpox. *Roe*, on the other hand, was decided in ordinary times.[146]

These approaches find the two lines of vaccine and abortion jurisprudence to be irreconcilable and to represent a significant fracture in the Court's jurisprudence; arguments echoing this thinking are being made all across the country, from academia,[147] to the courtroom,[148] to the media.[149]

B. The Current Pro-Choice Response

How have proponents of abortion protections responded to these claims of ideological inconsistency? Rebuttals attempt to distinguish vaccination and abortion as entirely different practices with very different implications.

Responses aim to distinguish abortion and vaccine mandates on two main grounds.[150] First, abortion restrictions are gendered—their main impact is felt by the childbearing people who must carry unwanted fetuses to term.[151] Conversely, vaccine mandates apply evenhandedly to all citizens, regardless of gender or any other identifying factor. Second, the burdens placed on the individual are vastly different. Vaccines typically involve a fleeting pain followed by a day or so of illness.[152] Forced pregnancy, on the other hand, is an

---

[146] *Id.* at 214–15.

[147] *See, e.g.*, Blackman, *supra* note 144, at 214.

[148] *See, e.g.*, Brief of Plaintiff-Appellant, *supra* note 12, at 35.

[149] *See, e.g.*, Nicholas Tampio, *A Weakness in the Argument for Vaccine Mandates*, THE BOSTON GLOBE (Aug. 25, 2021, 11:36 AM), https://www.bostonglobe.com/2021/08/25/opinion/weak-constitutional-case-vaccine-mandates/ [https://perma.cc/AGX7-KZPW].

[150] Michael C. Dorf, *Mandatory Vaccination and the Future of Abortion Rights*, VERDICT (Nov. 24, 2020), https://verdict.justia.com/2020/11/24/mandatory-vaccination-and-the-future-of-abortion-rights [https://perma.cc/R4QK-N7Y7].

[151] This gendered aspect of abortion is precisely why the late Justice Ruth Bader Ginsburg argued that challenges to abortion restrictions should be viewed under the equal protection clause instead of the right to privacy. Dissenting from the majority in *Gonzales v. Carhart*, Justice Ginsburg wrote, "[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus, to enjoy equal citizenship stature." 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

[152] This argument may, however, overlook the difficulties posed by vaccines to those who have medical reasons to resist or have adverse vaccine reactions. However, the medical exemption in most vaccine mandates may resolve this argument.

immense, long-term physical and emotional burden, and a commitment of time, finances, and emotions that can span decades. Under the Court's jurisprudence, the scope of the burden imposed is material to the Court's analysis of the intrusion upon rights, and so the large measure of the burden posed by abortion calls for a different approach from the course the Court would take in cases of mandatory vaccination.[153] Thus, this approach posits that only by drawing upon and highlighting the differences between the two practices can one understand how they are able to coexist in American jurisprudence.[154]

Commentators have also drawn upon the practical differences between abortions and vaccine mandates to assert the cohesiveness of the two jurisprudences.[155] One such argument is that the government is trying to avoid public harm in imposing vaccine mandates. In the abortion context, legislators cannot point to any such widespread, concrete harms to justify the deprivation of rights.[156] A popular example of this response is the argument that legalizing abortion does not result in a contagion or pandemic of abortions; terminating a pregnancy is not communicable.[157] Another such argument is the private, personal nature of an abortion decision. The decision to terminate a pregnancy has almost no impact upon individuals not directly involved in the conception,[158] whereas the decision not to get vaccinated may end up having a widespread impact on the community. One writer, in pointing out some of the aforementioned distinctions, even calls the right to seek an abortion and vaccine mandates "fundamentally dissimilar."[159]

---

[153] *See* Dorf, *supra* note 150.

[154] *See also* Lindsay F. Wiley & Steve Vladeck, *Why Carefully Designed Public Vaccination Mandates Can—and Should—Withstand Constitutional Challenge*, LAWFARE (Aug. 12, 2021, 8:01 AM), https://www.lawfareblog.com/Designed-Public-Vaccination-Mandates [https://perma.cc/D7UF-WRR6] ("it isn't difficult to distinguish between a pregnant woman's right to pursue and abortion and an individual's right to refuse vaccination").

[155] Jessica Lynn, *Mandated Vaccines and Abortion Rights Are Not the Same Debate At All*, AN INJUSTICE! MAG (Jul. 6, 2021), https://aninjusticemag.com/mandated-vaccines-and-abortion-rights-are-not-the-same-debate-at-all-1772eeff468f [https://perma.cc/2QJM-ZKN4].

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] Paul Thornton, *No, the abortion debate isn't anything like the vaccine debate*, L.A. TIMES (Sept. 28, 2019), https://www.latimes.com/opinion/story/2019-09-27/opinion-no-the-abortion-debate-isnt-anything-like-the-vaccine-debate [https://perma.cc/BAF6-76RX].

Responses to arguments of inconsistency have thus focused mostly on the factual distinctions between abortion protections and vaccine mandates, possibly on the grounds that acknowledging their commonalities would also acknowledge that the Court's approach to the two doctrines is inconsistent. However, in Part III, this Note will argue that one need not keep the two practices ideologically distinct in order for them to coexist as discrete parts of a cohesive bodily autonomy jurisprudence.

III. Abortion and Vaccination as Opposite Ends of One Bodily Autonomy Spectrum

Part III of this Note argues that characterizing the practices of abortion and vaccination as fundamentally similar, as opponents of the vaccine mandates have, or as fundamentally dissimilar, as proponents of abortion protection have, both fall short as analytical frameworks. Rather, given the diversity of applications of the law in which questions of bodily autonomy arise either explicitly or implicitly, courts and scholars alike should view bodily autonomy as a sliding scale, with various body-implicating issues falling along different places on this scale. On each end of the scale are the individual's rights and the state's interest proffered in contravening those rights. Viewing both abortion protections and vaccination mandates in this light not only highlights their ability to coexist in American jurisprudence, but also more accurately colors the Court's bodily autonomy decisions.

A. Bodily Autonomy as a Sliding Scale, Not a Single, Amorphous Right

Approaching both frameworks critically, it becomes evident that neither of the above methods paint a complete picture of how the two jurisprudences of abortion protection and vaccine mandates interact. A quick survey of the implications of an abortion versus the implications of failing to get vaccinated undermines the argument that the practices are similar and should be treated identically by the Court.[160] As asserted above, unlike vaccination, there are no societal health effects from a person's choice to obtain an abortion.[161] The government's ability to mandate vaccinations stems from the legitimate threat to others that a fast-spreading disease or virus can present—it is this very public health aspect that gives governmental intervention with vaccines legitimacy.[162] By failing to get vaccinated, an individual increases the probability of spreading

[160] *See id.*

[161] *Id.*

[162] Lynn, *supra* note 155.

an illness, and such a probability is particularly dangerous in pandemic times where especially virulent illnesses have spread across the world.[163] Abortion does not present any such contagion. Rather, abortion may impact a small circle of individuals outside of the pregnant person, but it does not have the widespread effects that a highly communicable virus does. Obtaining an abortion and refusing to be vaccinated are therefore fundamentally different in the external risks they present.

But the two practices are also not completely dissimilar, as pro-choice responses to vaccine resistors have argued.[164] At bottom, abortion restrictions and vaccine mandates both implicate the government in instructing individuals as to what they can or must do with their bodies. While requiring an injection of antibodies may be a far smaller invasion than requiring one to carry a child to term, both issues strike a chord of bodily autonomy—the government is telling its citizens what to do with their bodies, sometimes in contravention of the individual's wishes.[165] Additionally, though abortion does not present the same public health *risks* as the failure to vaccinate, it is still a public health issue.[166] Justice Harry Blackmun, author of the *Roe v. Wade*[167] opinion, noted the public health implications of abortion restrictions in a memo to the other Justices: he suggested that the viability line has a biological justification, as there are many practical aspects to a person's decision to terminate a pregnancy that could have lasting effects on their life and health.[168]

Abortion and vaccination jurisprudences are thus not so similar but are also not completely distinct. So how do the two lines of jurisprudence relate to each other in a coherent, tenable way? Rather than trying to fit abortion protection and vaccine mandates into the binaries of "similar" or "different," the two jurisprudences should be viewed in tandem as different shades of the court's

---

[163] Priya Joi, *Five Reasons Why "My Body, My Choice" Doesn't Work for Vaccines*, GAVI (Oct. 18, 2021), https://www.gavi.org/vaccineswork/five-reasons-why-my-body-my-choice-doesnt-work-vaccines [https://perma.cc/TLT4-JRT2].

[164] Lynn, *supra* note 155.

[165] *Supra*, note 13 at 56–57.

[166] Tina Casey, *On Public Health, Employers Can Support Vaccine Mandates and Abortion Rights, Too*, TRIPLE PUNDIT (Dec. 8, 2021), https://www.triplepundit.com/story/2021/public-health-vaccines-mandates/732696 [https://perma.cc/2HKX-S6FL].

[167] *Roe*, 410 U.S. 113 (1973).

[168] Joan Biskupic, *How the Supreme Court Crafted its* Roe v. Wade *Decision and What It Means Today*, CNN (Sept. 23, 2021), https://www.cnn.com/2021/09/23/politics/roe-v-wade-history/index.html. [https://perma.cc/36UZ-QR9H].

larger bodily autonomy ideology. Though the Court's bodily autonomy jurisprudence may indeed seem disjointed at times,[169] it does reflect an overarching idea that when intrusions into the body by the state are involved, the state's need must be balanced against the individual's interests.[170] The Court's use of this balancing test is best understood as creating a spectrum of bodily autonomy, where the individual's constitutional rights are on one side and the state's interests lie on the other. Bodily autonomy presents extremely varied applications such as strip searches, imprisonment, property rights in the body, the right to die, abortion, and vaccination, among many others[171]— all of which implicate numerous provisions of the Constitution. It is therefore sensible that the Court's approach to bodily autonomy should have the flexibility and space for factual considerations built into it. To attempt to formulate a singular, copycat framework or test for all the various applications of bodily autonomy issues would disserve and even mischaracterize some of the rights implicated by a state's intrusion into the body. Instead, the Court's use of balancing techniques is well-suited to accommodate the many rights and interests that come into consideration when questions of bodily intrusions are brought before it.

To understand the bodily autonomy spectrum, each side of the balancing scale must be thoroughly comprehended. Beginning with the individual liberty side, the Court must examine the individual's rights implicated by the case.[172] This investigation often invokes the Fifth and Fourteenth Amendment Due Process clauses, with the Court finding that the state's actions contravened the individual's right to liberty or privacy.[173] However, the right to be free from bodily intrusions can be rooted in additional rights: in cases where a citizen is

---

[169] Caitlin E. Borgmann, *The Constitutionality of Government-Imposed Bodily Intrusions*, 2014 UNIV. OF ILL. L. REV. 1059 (2014) ("the Supreme Court's treatment of the right against government-imposed bodily intrusions is muddled and lacks an overarching theory.").

[170] *See* Riley v. California, 573 U.S. 373 (2014) (balancing the interests of privacy held by the owner of a cell phone against the government's interest in obtaining information on the phone without a warrant); Wilkinson v. Austin, 545 U.S. 209 (2005) (balancing the private interest infringed upon by state action, the risk of erroneous deprivation through the procedures used, and the burden that would be imposed on the government if additional protections were added in determining whether or not transferring a prisoner to a supermax prison was improper given his liberty interest); Washington v. Glucksberg, 521 U.S. 701 (1997) (balancing the individual's right to self-determination against the state's interest in preserving human life, protecting vulnerable groups, and preserving the integrity of the medical profession); Roe v. Wade, 410 U.S. 113 (1973) (balancing the state's interest in protecting life against the mother's interest in privacy).

[171] Borgmann, *supra* note 169, at 1076, 1091; Gowri Ramachandran, *Against the Right to Bodily Integrity: Of Cyborgs and Human Rights*, 87 DENVER UNIV. L. R. 1, 3, 17, 45–46 (2009).

[172] *Roe*, 410 U.S. at 152–53.

[173] Borgmann, *supra* note 169, at 1066.

alleging an unreasonable search, the Court must weigh the individual's Fourth Amendment right to be free from unreasonable searches and seizures; in cases where a defendant is alleging unduly harsh punishment by the government, the Court must weigh the individual's Eighth Amendment right to be free from excessive bail, fines, or cruel and unusual punishment.[174] Rarely, but sometimes, protections can even be grounded in the Fifth Amendment right against self-incrimination and the Sixth Amendment's Confrontation Clause.[175] The Court must examine the facts, find the corresponding right implicated, and decide how deeply the right is being contravened.

On the opposite side of the scale, the Court must weigh the relevant interests of the state. Historically, this has fallen into one of five categories: protecting public safety or health, often arising in the vaccination or quarantine context; protecting the individual's own safety or health, arising often in cases of medical treatment or administration of anti-psychotic drugs; determining guilt or innocence or searching for evidence of a crime, frequently arising in bodily searches; imposing discipline, often arising in cases of physical punishment or confinement; and protecting the integrity of the medical profession, arising historically in abortion cases but now mostly in right-to-die cases.[176] In order to be a permissible intrusion into the body, these interests must be strong enough to outweigh the rights of the individual.

Examining this balancing in the context of abortion protections and vaccine mandates, it becomes clear that the two practices fall on opposite sides of the spectrum. Abortion protections, iterated as they are by current Supreme Court jurisprudence, represent the end of the spectrum where the individual interest is the highest with little to no state interest implicated:[177] the Fourteenth Amendment right to privacy encompasses a person's right to decide whether or not to terminate their pregnancy.[178] Prior to viability, the state has almost no interest in protecting public health, protecting the pregnant person's safety, or protecting the sanctity of the medical profession.[179] Accordingly, abortion

---

[174] *Id.* at 1067–68.

[175] *Id.* at 1068.

[176] *Id.* at 1067.

[177] This analysis utilizes the Court's pre-*Dobbs* viability line as the point before which states cannot intrude on a person's right to terminate a pregnancy. While *Dobbs* overruled this metric, it remains useful as a method of analyzing how the Court as historically treated these claims. Before viability, the state's interest is very low in a being that cannot exist outside the womb.

[178] *Roe*, 410 U.S. at 153.

[179] The Court has discussed across its modern abortion jurisprudence how the life of the woman is no longer threatened nor the respect of the medical profession due to technological advancements.

protections fall on or near the very end of individual liberty side of the spectrum. Vaccination, on the other hand, falls along the state interest side of the spectrum. Vaccine mandates are typically implemented only in response to exceedingly contagious and dangerous illnesses.[180] Because of the threat of disease, the state typically has a high interest in protecting the public health.[181] Conversely, the individual's right to liberty is not heavily implicated because vaccinations are a non-invasive procedure and there is no constitutional right to hold a specific job or attend a specific school that may be requiring the vaccine against the individual's wishes.[182] Moreover, *Jacobson* retained a carveout for at least medical exemptions, so vaccination will not be required if it would result in known bodily harm to the individual.[183] Abortion and vaccination thus stand as foils to one another, representing the opposite balancing ends of the Court's bodily autonomy spectrum.

Other iterations of the Court's bodily autonomy jurisprudence fall accordingly along this spectrum, with their outcomes and placements corresponding to their varied levels of state interest and individual protections. In *Breithaupt v. Abram*, the Court upheld the taking of blood from an unconscious man who had been the driver in a fatal car accident.[184] Because the taking of blood was a relatively non-invasive procedure done by a skilled technician, and because the state had a very high interest in determining if the defendant was operating a vehicle while drunk when he killed the occupants of the other car, the Court upheld the invasion as a permissible intrusion.[185] In *Winston v. Lee*, the Court struck down the use of compelled surgery to find a bullet that was thought to be evidence in a criminal case.[186] The respondent, who had a bullet lodged in his chest, enjoyed the protection of the Fourth Amendment to be free from unreasonable searches, and the Court determined

---

Moreover, as stated earlier in this part, abortion does not present emanating public health effects like vaccination or transmissible diseases.

[180] *See supra* note 88, at 1832 (discussing the failure of the HPV vaccine due to its limited transmissibility).

[181] *Jacobson*, 197 U.S. at 39.

[182] *Supra* note 88, at 1822–1823 (discussing the Court's conception in *Jacobson* of a social compact, in which citizens receive access to schools and businesses only in exchange for complying with the needs of public health).

[183] *Jacobson*, 197 U.S. at 36–37.

[184] 352 U.S. 432 (1957).

[185] Borgmann, *supra* note 169, at 1087–88.

[186] 470 U.S. 753 (1985).

that a compelled and very invasive chest cavity surgery failed to meet this standard when the circumstances of the case indicated that ample evidence could be found in less invasive ways.[187] In *Youngberg v. Romeo*, the Court held that physical restraints of mental health patients could violate the Due Process Clause in certain circumstances.[188] The Court wrote that the use of such restraints is only proper when the liberty of the patient is balanced against the demands of an organized society.[189] These examples, which significantly implicate both an individual's constitutional right as well as the state's interest, fall in between the two poles of the spectrum based on their facts, showing both the breadth of the bodily autonomy spectrum and the Court's affinity for utilizing a balancing approach in cases of bodily intrusions.

B. Demonstrating Jurisprudential Consistency by Swapping Abortion Laws' and Vaccine Mandates' Analytical Frameworks

Though the Court utilizes a similar macro-level balancing technique for all issues of bodily autonomy, the actual tests that it employs for each specific application of bodily autonomy differ: in cases of abortion restrictions, the Court asks whether the law places an undue burden on the person's ability to terminate their pregnancy.[190] For vaccine mandates, the Court asks whether there is public harm from a communicable illness, so that the state may take non-arbitrary measures to ensure the safety of its citizens.[191] In order to demonstrate the consistency of the outcomes in both abortion and vaccine mandate cases, it is useful to analyze each issue under the other's framework. Examining abortion regulations under the public harm framework and vaccine mandates under the undue burden standard helps tie together the bodily autonomy jurisprudence in a cohesive way—switching the tests from two ends of the spectrum produces the same results as to constitutionality and tends to prove that the recent vaccine mandates support the Court's protection of abortion, as opposed to undermining it.

As described in Part I, the public harm framework asks whether the measures taken by the state are a non-arbitrary, rational response to a real public harm.[192] This inquiry is steeped in factual considerations, as the Court must take

---

[187] *Id.* at 765.

[188] Youngberg v. Romeo, 457 U.S. 307, 319 (1982).

[189] *Id.* at 320.

[190] *Casey*, 505 U.S. at 874.

[191] *Supra* note 88, at 1823.

[192] *Jacobson*, 197 U.S. at 31–32.

into account the reality of the public health threat as well as whether the measures taken by the state are a proportional response to those harms.[193] Applying this framework to the Louisiana law in *June Medical Services v. Russo*,[194] as it is the Court's last decision striking down a punitive abortion ban, it was clear that pre-viability abortion restrictions remained unconstitutional under vaccination's public harm analysis. First, the public harm posed by pre-viability abortions is minimal—abortions affect only the pregnant person and a small circle of those around them and present no contagion that could spread to others against their will.[195] Second, Louisiana's law which required all abortion providers to have admitting privileges at a hospital within thirty miles of the clinic as well as have ambulatory facilities onsite is both arbitrary and disproportionate.[196] Requiring admitting privileges in a nearby hospital does not have a "real and substantial relation"[197] to the public harm posed by abortions, as all abortions, but particularly pre-viability abortions, are widely recognized as safe and low risk.[198] Similarly, given the infrequency of serious complications, the requirements of ambulatory facilities onsite are equally arbitrary and lack substantial relation to the minimal harm posed by legal abortion. Abortion restrictions that have been struck down by the Court under the undue burden standard, then, similarly fail the public harm framework.

The undue burden standard asks whether the restrictions placed on the pregnant person pre-viability have the substantial purpose and effect of creating a significant obstacle to the individual's ability to obtain an abortion.[199] Translating this to the vaccine mandate context, the question becomes whether the vaccine mandate is created with the substantial purpose and effect of impeding upon the individual's liberty to make medical decisions for themself and to choose what to put into their body. While vaccine mandates may have the effect of curtailing the individual's liberty to choose whether or not to be vaccinated, they fail to meet the purpose requirement of the test. Vaccine mandates indirectly impose restrictions on the individual's liberty; however,

---

[193] Parmet, *supra* note 91, at 125.

[194] *June Med. Servs.*, 140 S. Ct at 2103.

[195] Lynn, *supra* note 155.

[196] *June Med. Servs.*, 140 S. Ct at 2112.

[197] *Jacobson*, 197 U.S. at 31–32.

[198] *Landmark Report Concludes Abortion in U.S. Is Safe*, NPR (Mar. 16, 2018) https://www.npr.org/sections/health-shots/2018/03/16/593447727/landmark-report-concludes-abortion-is-safe [https://perma.cc/58UJ-5ZGW].

[199] *Casey*, 505 U.S at 876–77.

they do so with the aim of protecting public health and preventing the spread of contagious diseases.[200] The purpose is thus not to impede liberty, but rather to ensure the safety of all citizens. This is in line with *Jacobson*'s text, which recognizes that the individual's liberty in regard to public health is not inviolate—it must sometimes give way to the common good.[201] Vaccine mandates thus also pass constitutional muster under abortion's undue burden analysis.

The two above analyses validate the coherence of abortion protection and vaccine mandates in the Court's jurisprudence—even using the Court's tests from opposite ends of the bodily autonomy spectrum, the constitutionality of abortion regulations and vaccine mandates remain the same as under their respective tests. The analyses also serve as a strong response to the vaccine resistor argument that vaccine mandates undermine the Court's protection of abortion: examining abortion under the public harm framework reconciles the vaccine mandate jurisprudence and abortion by showing that the Court's test in *Jacobson* and its progeny would actually call for the Court's continued protection of abortion rights, not its destabilization. This analysis also paints the Court's recent decision in *Dobbs* as out of step with its general bodily autonomy methodology: protection of abortion is not an exceptional, extrajudicial process that should be left to the legislature, but is instead merely one more outcome of the Court's bodily autonomy methodology.

Applying this to the litigation context, parties can use the bodily autonomy spectrum characterization to rebut the argument that there are irreconcilable inconsistencies in the way the Court treats abortion and vaccine laws. Cases and complaints utilizing some form of an inconsistency argument to challenge vaccine mandates are proliferating in federal and state courts,[202] and it is not a far intellectual leap to turn these arguments around as ammunition against the protection of abortion, particularly in the current moment where a resurgence of legal and legislative anti-choice efforts is unfolding.[203] Having a strong and effective response to any argument of inconsistency between the two doctrines is therefore critical. By employing the bodily autonomy spectrum idea, parties to litigation as well as judges can defend against efforts to undermine either

---

[200] KEVIN M. MALONE & ALAN R. HINMAN, LAW IN PUBLIC HEALTH PRACTICE 262-63 (2d ed. 2007).

[201] *Jacobson*, 197 U.S. at 29.

[202] *See, e.g.*, *supra* note 12.

[203] *Abortion Rights are Under Attack*, ACLU OF NEW YORK, (Oct. 31, 2022 at 2:24 PM) https://www.nyclu.org/en/abortion-rights-are-under-attack [https://perma.cc/UA35-C5MH].

vaccine mandates or abortion protections. Moreover, given the insecurity of abortion access across the country in the wake of the Court's *Dobbs* decision, this idea of bodily autonomy as a spectrum can be used to mount challenges to the rising number of abortion bans at the state level. Distilling the Court's balancing methods into the idea of the spectrum, opponents of punitive abortion bans can argue that given the state's relatively low interest at stake in an abortion—particularly in the early weeks of gestation—and given the pregnant person's immense personal, financial, and emotional liberty at stake, that such bans cannot stand under the Court's cohesive bodily autonomy spectrum.

CONCLUSION

Abortion protection and mandated vaccines are two exceedingly relevant topics today, both inside and outside of the courtroom. Accordingly, a thorough understanding of the two jurisprudences in relation to each other is crucial. Abortion protection and vaccine mandates represent opposite ends of the Court's greater bodily autonomy spectrum, where the Court weighs the personal liberties at stake against the state's interest in contravening those liberties. Because pre-viability abortions represent an instance in which personal liberty is extremely high and state interest is relatively low, and vaccine mandates represent situations in which the state has a very high interest with minimal contravention of individual rights, the two practices coexist at opposite ends of the balancing spectrum. By recognizing this relationship between the two jurisprudences, it becomes clear that the Court's abortion rulings and lower federal courts' vaccine mandate rulings are not in conflict at all, but rather represent different outcomes of one greater balancing test used for questions of bodily intrusions. Moreover, by switching the specific tests that the Court has implemented for the two practices, parties as well as the courts can demonstrate that the Court's protection of abortion is both constitutional and necessary.