
SYMPOSIUM:
FEATURED
ARTICLES

A COMPARATIVE VIEW OF GOVERNMENT INTRUSION INTO
BODILY AUTONOMY REGARDING VACCINE MANDATES
AND REPRODUCTIVE RIGHTS IN THE WAKE OF COVID-19
AND *DOBBS*

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I. INTRODUCTION

Currently (and throughout the past few years), it feels as though we are living through and making history every day. In the wake of the COVID-19 pandemic and the Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*,¹ significant questions about bodily autonomy have risen to the surface. This Article explores bodily autonomy's seemingly paradoxical existence regarding government intrusion, abortion rights, and vaccination mandates.

The overarching question this Article attempts to answer is, can both vaccination mandates and reproductive rights co-exist? Is there another explanation besides hypocrisy when someone supports intrusion into bodily autonomy for vaccine mandates but argues against government intrusion into bodily autonomy for the sake of reproductive rights? The answer is yes—both can exist.

Section II will discuss the role religion plays in public health. Section III will explore public health versus health care—explaining that the former is a matter of public health, whereas the latter is a private matter. Then, Section IV will explain state police powers in relation to enacting vaccination mandates and protecting reproductive rights—wherein a state could exercise its ability to promote the health and welfare of its citizens by enacting vaccination mandates, and by protecting reproductive rights.

Importantly, this Article discusses difficult topics: bodily autonomy, religion, vaccinations, and reproductive rights. These are all significant matters. People are absolutely entitled to their own views on these issues. Notably, there are a few things to be kept in mind. First, bodily autonomy is not a clear-cut issue. Everything this paper discusses can have more than one side. Second, religion is not an evil. The issue lies with the weaponization of a religion, not with the practitioners or the religion in and of itself. Third, a significant external factor not briefed is a distrust of the medical system. Some individuals may be opposed to vaccination mandates as they do not believe in western medicine,² or they have a distrust of the medical field in

¹ 142 S. Ct. 2228 (2022) (holding that a woman's right to an abortion is no longer protected by the Constitution).

² See Daniel Bennett, *The Tension Between Traditional and Western Medicine*, U.S. CAL.: EVIDENCE BASE (July 11, 2017), <https://healthpolicy.usc.edu/evidence-base/the-tension-between-traditional-and-western-medicine/>.

general.³ Fourth, reproductive rights, specifically the right to an abortion, are probably among the most argued over set of rights. The question of when a fetus becomes a life is nearly as profound as the question of what the meaning of life is. Truly, who knows? To some, life begins at viability. To others, life begins at conception. This topic is playing with extraordinarily difficult questions. However, when all is said and done, it is important to take a step back and find that no one is inherently a bad person for their view on any of these topics.

II. RELIGION AND PUBLIC HEALTH

First, we will explore religion. Does religion get a seat at the table when we are discussing vaccination mandates and reproductive rights? The gut reaction for many is that religion should have no bearing on either of these two issues. After all, Colonists dating all the way back to 1607 sought a haven from religious persecution in America.⁴ Today, jumping more than four hundred years into the future, this country has a vast religious landscape.⁵ Though our country is predominantly Christian,⁶ young adults are increasingly becoming less affiliated with any religion.⁷ Therefore, logistically speaking, there is just no way to seat religion at the table when having this discussion.

And yet, even though (1) our nation prides itself on *separation of church and state*,⁸ (2) people used to seek America as a haven from persecution,⁹ (3) there is no national religion,¹⁰ and (4) more

³ See Robert J. Blendon et al., *Public Trust in Physicians — U.S. Medicine in International Perspective*, 317 NEW ENG. J. MED. 1570 (2014). Data from a recent study showed the U.S. ranked 24th of 29 industrialized nations for public trust in doctors. *Id.* at 1570–71.

⁴ *Colonial America (1492-1763)*, AM.'S STORY FROM AM.'S LIBR., https://www.americas-library.gov/jb/colonial/jb_colonial_subj.html (last visited Dec. 22, 2022).

⁵ See *The 2020 Census of American Religion*, PUB. RELIGION RSCH. INST. (July 8, 2021), <https://www.ppri.org/research/2020-census-of-american-religion/>.

⁶ *Id.* (finding approximately 70% of Americans identify as Christians). For ease, all denominations are grouped into the 70% figure.

⁷ *Id.*

⁸ *Freedom of Religion*, HISTORY, <https://www.history.com/topics/united-states-constitution/freedom-of-religion> (last updated Aug. 21, 2018).

⁹ *Id.*

¹⁰ *Id.*

young people today are not identifying with any religion,¹¹ religious arguments consistently sneak into these discussions. The United States is not a Christian nation. Simply put, while the Bible can be revered, it is not the law of our land, nor should it have an iota of impact on the question of reproductive rights or vaccine mandates. However, we will discuss whether and to what extent religious exemptions should be allowed for vaccine mandates.

A. Vaccine Mandates

In broad terms, vaccines are issues of public health. The Supreme Court has answered tricky questions regarding the intersection of religion and public health. For example, the Court grappled with this issue in *Employment Division, Department of Human Resources v. Smith*,¹² where it was tasked to resolve whether a state law of Oregon could prohibit the use of peyote, even if the substance was being used for religious reasons, and whether the state could deny unemployment benefits to an individual who was terminated due to religious-inspired drug use.¹³ The Court ultimately found that the prohibition was constitutional.¹⁴ However, *Smith* was subsequently superseded by statute as explained in *Tanzin v. Tanvir*.¹⁵ In *Tanzin*, the Court explained that Congress passed the Religious Freedom Reformation Act ("RFRA") in response to *Smith*.¹⁶

RFRA is a statute that dictates that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)."¹⁷ In regard to this Article, we are interested in the exception found in section (b) of RFRA; it says the "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."¹⁸

¹¹ *The 2020 Census of American Religion*, *supra* note 5.

¹² 494 U.S. 872 (1990).

¹³ *Id.* at 874.

¹⁴ *Id.* at 890.

¹⁵ 141 S. Ct. 486, 489 (2020).

¹⁶ *Id.*

¹⁷ 42 U.S.C. § 2000bb-1(a).

¹⁸ *Id.* at (b)(1)–(2).

Because RFRA is dealing with religion, a right that finds protection in the First Amendment,¹⁹ it is no shock to see the language of "compelling" and "least restrictive means," both of which are generally benchmarks for strict scrutiny.²⁰

"An interest is compelling when it is *essential* or *necessary* rather than a matter of choice, preference, or discretion."²¹ The least restrictive means is a test, similar to compelling interest, that essentially asks if the government has used the least restrictive way possible to achieve its compelling government interest.²² While that logic, as applied by the courts, may seem circular, it follows in application. A prime example of when a government interest was found to violate RFRA because the Court found that there were less restrictive means to accomplish the government's goal is *Burwell v. Hobby Lobby*.²³

In *Burwell*, the Supreme Court grappled with the constitutionality of a regulation from the U.S. Department of Health and Human Services (HHS) that required corporations to provide health insurance coverage for methods of contraception.²⁴ The HHS mandate included four contraceptive methods that the companies bringing the suit believed were "abortifacients."²⁵ The companies argued that the regulation violated their sincerely held religious beliefs, as they had religious objections to abortion.²⁶ If the corporations opted to ignore the HHS mandate, they would face heavy fines.²⁷ For instance, Hobby Lobby would pay about \$475 million per year.²⁸ In arriving at its final holding, the Court made a few key determinations. First, the Court found that, though these were corporations and not individuals,

¹⁹ U.S. CONST. amend. I.

²⁰ See Ronald Steiner, *Compelling State Interest*, FIRST AMEND. ENCYC., <https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest> (last visited Dec. 22, 2022).

²¹ *Id.* (emphasis added).

²² Scott Johnson, *Least Restrictive Means*, FIRST AMEND. ENCYC., <https://www.mtsu.edu/first-amendment/article/494/least-restrictive-means> (last updated June 2017).

²³ 573 U.S. 682, 690–92 (2014).

²⁴ See *id.* at 688–89.

²⁵ *Id.* at 691.

²⁶ See *id.*

²⁷ *Id.*

²⁸ *Id.* at 720.

RFRA still applied.²⁹ Next, upon that initial determination, the Court decided that the consequences of failing to comply with the HHS mandate were a substantial burden.³⁰ As a substantial burden, the HHS mandate must then serve a compelling interest and be the least restrictive means to achieve the compelling interest.³¹ Though there was a substantial burden on religious exercise, the Court assumed that the compelling government interest requirement was satisfied.³² However, when determining if the HHS mandate constituted the least restrictive means, the Court very succinctly said "the mandate plainly fails that test."³³ The Court believed that there were less restrictive "ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all [Food and Drug Administration] FDA-approved contraceptives."³⁴

Burwell serves as an interesting framework for the present question: could the HHS issue a COVID-19 vaccine mandate? First, based on the mission of the HHS, it would likely be the proper branch of government to issue such a mandate.³⁵ "The mission of . . . (HHS) is to enhance the health and well-being of all Americans, by providing for effective health and human services and by fostering sound, sustained advances in the sciences underlying medicine, public health, and social services."³⁶ Next, the mandate would have to survive strict scrutiny, which the HHS mandate in *Burwell* failed.³⁷ The HHS would bear the burden to show that the mandate not only served a compelling interest, but that the mandate was also the least restrictive means to achieve that interest.

The compelling interest in mandating the COVID-19 vaccine is saving lives.³⁸ I contend that any of us would be hard-pressed to

²⁹ *Id.* at 691.

³⁰ *Id.*

³¹ *Id.* at 691–92.

³² *Id.*

³³ *Id.* at 692.

³⁴ *Id.*

³⁵ *About HHS*, HHS, <https://www.hhs.gov/about/index.html> (last visited Dec. 22, 2022).

³⁶ *Id.*

³⁷ *See Burwell*, 573 U.S. at 691–92.

³⁸ *See Vaccination Saves Lives*, APIC, https://apic.org/monthly_alerts/vaccination-saves-lives/ (last visited Dec. 22, 2022); *see also Vaccination Saves Lives at Every Stage of Life*, SANOFI, <https://www.sanofi.com/en/your-health/vaccines/vaccination-saves-lives-at-every->

find a more compelling interest than the preservation of human life. As seen in *Burwell* though, the difficult part of surviving strict scrutiny is generally not going to be whether the government has fronted a compelling enough interest, but whether the government has ensured it is achieving that interest by the least restrictive means.³⁹

In the beginning of the pandemic, "flattening the curve" was our best way to combat COVID-19.⁴⁰ The plan (and hope) was that we would avoid large gatherings, engage in social distancing, and minimize outings, all in an effort to try to slow or stop the spread of the virus.⁴¹ Then, in December 2020, the COVID-19 vaccine became available, and, in August of 2021, the FDA formally approved the vaccine.⁴² Once the vaccines became available, the conversation switched to the public achieving herd immunity—social distancing and masks were no longer our *best* methods of protection (though they were still highly effective).⁴³ "Herd immunity occurs when a large portion of the community (the herd) becomes immune to a disease,"⁴⁴ therefore protecting the entire community, not just the portion of the community that is immune (either from natural antibodies or vaccines).⁴⁵

Often, a percentage of the population must be capable of getting a disease in order for it to spread. This is called a threshold proportion. If the proportion of the population that is immune to the disease is greater than this threshold, the spread of the disease will decline. This is known as the herd immunity threshold.⁴⁶

stage-of-life (last updated Sept. 2019); *Vaccines Save Lives*, UNICEF, <https://www.unicef.org/northmacedonia/vaccines-save-lives> (last visited Dec. 22, 2022); Walter A. Orenstein & Rafi Ahmed, *Simply Put: Vaccination Saves Lives*, 114 PROC. NAT'L ACAD. SCI. 4031 (2017).

³⁹ See *Burwell*, 573 U.S. at 691–92.

⁴⁰ Helen Branswell, *Why 'Flattening the Curve' May Be the World's Best Bet to Slow the Coronavirus*, STAT (Mar. 11, 2020), <https://www.statnews.com/2020/03/11/flattening-curve-coronavirus/>.

⁴¹ *Id.*

⁴² *FDA Approves First COVID-19 Vaccine*, FDA (Aug. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine>.

⁴³ *How to Protect Yourself & Others*, CDC (Feb. 25, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

⁴⁴ *Herd Immunity and COVID-19: What You Need to Know*, MAYO CLINIC (Apr. 20, 2022), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/herd-immunity-and-coronavirus/art-20486808>.

⁴⁵ *Id.*

⁴⁶ *Id.*

In the early stages of the pandemic, it was believed that the U.S. could reach herd immunity when 80-90% of the population achieved immunity, whether it be from getting COVID-19 or getting the vaccine.⁴⁷ However, to date, this percentage has proven to be ever so elusive. As of May 15, 2022, approximately 66% of the U.S. is fully vaccinated, and 78% of the population has received at least one dose of the COVID-19 vaccine.⁴⁸

Although, it should be noted that herd immunity has been misunderstood throughout the course of the pandemic.⁴⁹ Herd immunity was confused with *sterilizing immunity*.⁵⁰ The theory behind herd immunity was that if enough people got vaccinated (the threshold of herd immunity), then the transmission of COVID-19 would cease.⁵¹ However, that idea—that if enough people received the vaccination, we would see the virus eradicated—really came from the concept of *sterilizing immunity*.⁵² But, herd immunity and sterilizing immunity are not synonymous. "Sterilizing immunity means an individual can no longer be infected or infect others."⁵³ As we have seen with COVID-19, the virus has mutated numerous times, and people can be infected more than once.⁵⁴

Regardless, vaccines are still highly effective in reducing hospitalizations and saving lives.⁵⁵ Alison Galvani, founding director of the

⁴⁷ Damien McNamara, *How Much Herd Immunity is Enough?*, WEBMD (Feb. 12, 2021), <https://www.webmd.com/vaccines/covid-19-vaccine/news/20210212/at-current-vaccination-pace-when-is-herd-immunity-likely#:~:text=Although%20figures%20vary%2C%20scien-tists,to%20achieve%20herd%20immunity>.

⁴⁸ *USA Coronavirus Vaccine Tracker*, USAFACTS, <https://usafacts.org/visualizations/covid-vaccine-tracker-states/> (last updated May 15, 2022).

⁴⁹ See David Robertson, *How We Got Herd Immunity Wrong*, STAT (Mar. 25, 2022), <https://www.statnews.com/2022/03/25/how-we-got-herd-immunity-wrong/>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Mary Kekatos, *Experts Reveal How Likely Reinfection is from COVID with Spread of Omicron Subvariant BA.5*, ABC NEWS (July 14, 2022, 5:06 AM), <https://abcnews.go.com/Health/experts-reveal-reinfection-covid-spread-omicron-subvariant-ba5/story?id=86598514>. More than 1.6 million people in the United States (throughout 24 states) have contracted COVID-19 more than once. *Id.*

⁵⁵ Shanoor Seervai, *COVID Vaccines Save Lives, But We're Chasing a Moving Target*, COMMONWEALTH FUND (Nov. 19, 2021), <https://www.commonwealthfund.org/publications/podcast/2021/nov/covid-vaccines-save-lives-but-chasing-moving-target>.

Yale Center for Infectious Disease Modeling and Analysis, noted that "the vaccination campaign that was implemented ha[d] already saved well over 200,000 lives and averted more than a million hospitalizations."⁵⁶ Galvani further opined that "it can be hard to appreciate the effectiveness of public health measures because successful measures lead to the absence of bad outcomes."⁵⁷

With the knowledge that sterilizing immunity will never be possible,⁵⁸ that begs the question of whether vaccination mandates are even worth it. As of July 8, 2022, approximately 1,045,035 people in the United States had passed from COVID-19.⁵⁹ Significantly, that number includes hundreds of thousands of people that passed away pre-vaccination.⁶⁰ However, of the total amount of people we have lost, an estimated 319,000 people (or 30.5%) of those deaths could have been avoided had people been vaccinated.⁶¹ If the statistics are put even further into context, they are jarring—"of the more than 641,000 people who died after vaccines were available, half of those deaths could have been averted—318,981—had every eligible adult gotten vaccinated."⁶²

It has been well-settled through past precedent that saving human life is a compelling interest.⁶³ Vaccination mandates are a formidable path to such a goal. Thus, vaccination mandates must survive the second half of the strict scrutiny test. Are mandates the least restrictive way? This question is truly a legal quandary. There are numerous ways to try and protect oneself from contracting and spreading COVID. The CDC has given the following recommendations: (1) get vaccinated and stay up to date on vaccines; (2) wear a mask; (3) stay six feet apart (affectionately known as "social distancing"); (4)

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See Robertson, *supra* note 49.

⁵⁹ *Coronavirus*, WORLDOMETER, <https://www.worldometers.info/coronavirus/country/us/> (last updated July 8, 2022).

⁶⁰ *Id.*

⁶¹ Selena Simmons-Duffin & Koko Nakajima, *This is How Many Lives Could Have Been Saved with COVID Vaccinations in Each State*, NPR (May 13, 2022, 5:01 AM), <https://www.npr.org/sections/health-shots/2022/05/13/1098071284/this-is-how-many-lives-could-have-been-saved-with-covid-vaccinations-in-each-sta>.

⁶² *Id.*

⁶³ *Lighthouse Fellowship Church v. Northam*, 458 F. Supp. 3d 418, 435 (E.D. Va. 2020) (citing *Roe v. Wade*, 410 U.S. 113, 162 (1973)).

avoid poorly ventilated places and crowds; (5) test yourself to prevent spreading it; (6) wash your hands; (7) cover your mouth when you cough or sneeze; (8) disinfect and clean; (9) monitor your daily health; (10) follow quarantine recommendations; (11) follow isolation recommendations; and (12) take precautions when traveling.⁶⁴ While the CDC provides an abundance of ways to help prevent the spread, the methods of protection are not equal. The most effective way to reduce the risk of symptoms, particularly of becoming critically ill, is getting vaccinated and boosted.⁶⁵ Other highly effective ways to combat COVID-19 are social distancing, wearing a mask, and avoiding crowds.⁶⁶

Of all the methods, it is unclear which would be the least restrictive and still achieve the compelling government interest. Any of the twelve recommendations may be insufficient on their own to combat COVID-19, may be underinclusive, or may not be narrowly tailored. For example, covering your mouth when you cough or sneeze is not narrowly tailored to prevent COVID-19—frankly, that is just common courtesy. The four most effective methods seem to be vaccinations, wearing a mask, avoiding crowds, and social distancing.⁶⁷ Taking each in turn, we can review how restrictive each measure would be. A vaccine does not restrict movement but does require an individual to relinquish some bodily autonomy to government intrusion.⁶⁸ Moreover, the scope of the mandate could be flexible where it only required the full vaccination and not boosters. The breadth of the mandate would impact how restrictive it is. Masks, likewise, do not restrict movement. The biggest question with masks that would likely impact how restrictive they are would be the duration of the mandate. At what point in time would mask mandates be lifted? Avoiding crowds and social distancing both limit movements and raise the same question as mask mandates—for how long would crowds

⁶⁴ *How to Protect Yourself & Others*, *supra* note 43.

⁶⁵ *Preventing the Spread of the Coronavirus*, HARV. HEALTH PUBL'G (Feb. 28, 2022), <https://www.health.harvard.edu/diseases-and-conditions/preventing-the-spread-of-the-coronavirus>.

⁶⁶ *Id.*

⁶⁷ *How to Protect Yourself & Others*, *supra* note 43.

⁶⁸ David Cole & Daniel Mach, *Civil Liberties and Vaccine Mandates: Here's Our Take*, ACLU (Sept. 2, 2021), <https://www.aclu.org/news/civil-liberties/civil-liberties-and-vaccine-mandates-heres-our-take>.

be restricted in size, and for how long would we have to social distance?

To be fair, it seems unlikely that anyone was complaining about the airlines not booking middle seats, but people definitely missed live entertainment, like concerts. All four of the above recommendations come with their own restrictions. I posit, based on the science and concrete timeline, that vaccines are the least restrictive way to achieve the compelling government interest—and the fact that it is the most effective way to minimize the risk of contracting/spreading COVID-19 is merely an added benefit.

However, as with all rules, there are often exceptions. This should go without saying, but, if someone is immunocompromised or has another medical issue that prevents them from getting the vaccine, they would be exempt from the mandate. But what about a religious exemption? While this country was founded on separation of church and state,⁶⁹ the First Amendment also protects freedom of religion.⁷⁰ The Supreme Court has held that it is not for judge nor jury to inquire into the truth or falsity of someone's religion—all that matters is that the beliefs are sincerely held.⁷¹

In Justice Stevens's opinion, "it is the objector who must shoulder the burden of demonstrating that there is a unique reason for allowing him a special exemption from a valid law of general applicability."⁷² RFRA, the federal law providing for religious exemptions from federal acts, now reflects this sentiment.⁷³ RFRA dictates that, to make a claim for a religious exemption, a plaintiff must first demonstrate a substantial burden on a sincerely held religious belief.⁷⁴ If the plaintiff meets their burden, the government must then pass strict scrutiny and demonstrate a compelling interest that is narrowly tailored.⁷⁵

⁶⁹ See *Freedom of Religion*, *supra* note 8.

⁷⁰ U.S. CONST. amend. I.

⁷¹ *United States v. Ballard*, 322 U.S. 78 (1944) (holding people are entitled to their own religious beliefs and, therefore, those beliefs cannot be subject to scrutiny by a court).

⁷² *United States v. Lee*, 455 U.S. 252, 262 (1982) (Stevens, J., concurring).

⁷³ See 42 U.S.C. § 2000bb-1.

⁷⁴ See 42 U.S.C. §§ 2000bb(b), 2000bb-1(c).

⁷⁵ 42 U.S.C. § 2000bb-1(b).

As noted above, the mandate likely meets a general strict scrutiny analysis based on the need to protect human life due to the highly contagious nature of COVID-19. However, RFRA demands a strict scrutiny analysis as the law is applied "to the person."⁷⁶ So, the government would have to demonstrate a compelling interest in denying an exemption to a particular plaintiff in each case challenging the mandate.⁷⁷ While RFRA provides the avenue for the challenge, it would be up to the courts to decide when to grant such an exemption.

B. Reproductive Rights

The next question is whether religion should have a role in the discussion of reproductive rights. Primarily, the answer is no. Religion on a large scale should have no bearing on the discussion regarding reproductive freedoms. But religion can have a place in a *personal* decision regarding reproductive rights and choices.

First, as mentioned above, separation of church and state is the bedrock of this country.⁷⁸ Justice Black explained the separation perfectly: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."⁷⁹ This idea of "separation of church and state" gets thrown around frequently, yet most of us probably do not fully understand what it means. "The establishment clause separates church from state, but not religion from politics or public life. *Individual citizens* are free to bring their religious convictions into the public arena. But the *government is prohibited* from favoring one religious view over another or even favoring religion over non-religion."⁸⁰

⁷⁶ *E.g.*, *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 430–31 (2006).

⁷⁷ *See id.*

⁷⁸ *See Separation of Church and State*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/separation_of_church_and_state (last updated Apr. 2021).

⁷⁹ *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

⁸⁰ *The First Amendment Says Nothing About "Separation of Church and State" or a "Wall of Separation Between Church and State." Where Did This Idea Come From? Is it Really Part of the Law?*, FREEDOM F. INST., <https://www.freedomforuminstitute.org/about/faq/the-first-amendment-says-nothing-about-separation-of-church-and-state-or-a-wall-of-separation-between-church-and-state-where-did-this-idea-come-from-is-it-really/> (last visited Dec. 22, 2022) [hereinafter *The First Amendment Says Nothing About "Separation of Church and State"*] (emphasis added).

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This distinction is so finite. For example, a person can run for a political office and bring their religious opinions into debates, campaigns, and perspectives.⁸¹ A voter can elect a candidate solely because the voter believes the candidate is a good Christian person. Religion isn't forbidden from ever entering the public arena.⁸² The distinction that follows is that the government cannot establish laws based on Christian tenets alone, as that would result in the government "favoring one religious view over another or even favoring religion over non-religion."⁸³

All religions do not view reproductive rights, particularly abortion, in the same light.⁸⁴ Abortion is so precarious a topic that, even within one religion, there are not unified stances from one denomination to the next.⁸⁵ So, what does that mean? When discussions about reproductive rights occur, the government should not, and cannot, discuss religion. The justification is simple—if one religion is considered when passing laws, the government has then favored one religion over another, thus breaching the wall that separates church and state.⁸⁶ To put this in context, each religion will be taken in turn.

To be clear, these are generalizations of religions and how they have been used (or weaponized) in the abortion discussion. Not every Christian, Jew, or Muslim will fit into these schools of thought. Further, this Article is not intended to paint any religion in a villainous light. Religions are largely impacted by how they are practiced. The below discussion is really intended to show how Christianity is being *weaponized* to push an anti-abortion agenda forward, even though it conflicts with other major world religions and is not a ubiquitously held belief within all of Christianity.

⁸¹ See Bonnie Kristian, *There's Nothing Wrong with Politicians Talking About Their Faith*, DAILY BEAST (Sept. 6, 2022, 9:43 AM), <https://www.thedailybeast.com/theres-nothing-wrong-with-politicians-talking-about-their-faith>.

⁸² *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring) ("But the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious.").

⁸³ See *The First Amendment Says Nothing About "Separation of Church and State"*, *supra* note 80.

⁸⁴ David Masci, *Where Major Religious Groups Stand on Abortion*, PEW RSCH. CTR. (June 21, 2016), <https://www.pewresearch.org/fact-tank/2016/06/21/where-major-religious-groups-stand-on-abortion/>.

⁸⁵ *Id.*

⁸⁶ See *The First Amendment Says Nothing About "Separation of Church and State"*, *supra* note 80.

Christianity, used as an umbrella term and to be understood in the way it is being utilized in the abortion debate, does not permit abortion.⁸⁷ However, many denominations of Christianity do permit abortion with varying levels of restrictions from one denomination to the next.⁸⁸ While the Bible does not *explicitly* say abortion is prohibited, the rule can be synthesized from a handful of proverbs: "Before I formed you in the womb I knew you;"⁸⁹ "For you created my inmost being; you knit me together in my mother's womb. I praise you because I am fearfully and wonderfully made;"⁹⁰ "If people are fighting and hit a pregnant woman and . . . there is serious injury, you are to take life for life."⁹¹ For some Christians (in certain denominations), abortion is murder, and, not only is it murder, it is the murder of a person made in the image of God.⁹²

Judaism takes a different approach. "The abortion question in talmudic law begins with an examination of the fetus' legal status. For this the Talmud has a phrase, *ubar yerekh imo*, a counterpart of the Latin *pars viscera matris*. The fetus is deemed a '*part of its mother*' rather than an independent entity."⁹³

The Committee on Jewish Law and Standards of the Rabbinical Assembly has affirmed the right of a pregnant person to choose an abortion in cases where 'continuation of a pregnancy might cause severe physical or psychological harm, or where the fetus is judged by competent medical opinion as severely defective.' This position is based on our members' understanding of relevant biblical and rabbinic sources as well as teshuvot – modern rabbinic responsa. Jewish tradition cherishes the sanctity of life, including the potential of life during pregnancy, but does not believe that personhood and human rights begin with conception, but rather with birth as indicated by Exodus 21:22–23.⁹⁴

⁸⁷ See *What Does the Bible Say About Abortions?*, GOT QUESTIONS, <https://www.gotquestions.org/abortion-Bible.html> (last visited Dec. 22, 2022).

⁸⁸ Masci, *supra* note 84.

⁸⁹ *Jeremiah* 1:5.

⁹⁰ *Psalms* 139:13–14.

⁹¹ *Exodus* 21:22–23.

⁹² See, e.g., Philip Pulella, *Pope Says Abortion is Murder but U.S. Bishops Should Not Be Political*, REUTERS (Sept. 15, 2021, 11:19 AM), <https://www.reuters.com/world/europe/pope-says-abortion-is-murder-us-bishops-should-not-be-political-2021-09-15/>.

⁹³ David M. Feldman, *Abortion: The Jewish View* (Adopted as opinion of Rabbinical Assembly Aug. 23, 1983), in *RESPONSA 1980-1990* 800, 800 (David J. Fine ed., 1983), www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19861990/feldman_abortion.pdf (emphasis added).

⁹⁴ *Conservative/Masorti Rabbis Denounce Leaked Supreme Court Decision to Overturn Abortion Rights*, RABBINICAL ASSEMBLY (May 3, 2022),

Thus, Judaism does not condemn abortion.⁹⁵ Judaism actually places the health of the mother over the health of the fetus.⁹⁶

Lastly, we will look at Islam. Islam, with many varying schools of thought, seems to say that "there is no clear prohibition of abortion in Islam, and . . . many [Muslim scholars and jurists] agree that a woman's life should be prioritized over an unborn fetus."⁹⁷ There are verses in the Quran that "indicate that a fetus is not a 'life' until the soul is breathed into it; that does not happen at conception, but at some time later."⁹⁸ The time at which the soul is breathed into the fetus is unclear, which is why "Fiqh (Islamic jurisprudence) scholars have given a range of time during which they said it is appropriate for a Muslim to have an abortion—from a few weeks to a few months."⁹⁹

Even though Islam seems to ask similar questions to Christianity about when a fetus becomes a life, there seems to be a stark difference. Islam permits abortion up to a certain point in general, to save the life of the mother, and if the fetus has an ailment.¹⁰⁰ Christianity (as a whole) believes the fetus is a baby at conception, and there is no reason to permit an abortion.¹⁰¹

Religions approach the issue of abortion differently—when a fetus becomes a person, if abortion is allowed, under what conditions abortions would be allowed, and up until what point they would be allowed. Perhaps most interesting is that Judaism and Christianity use

<https://www.rabbinicalassembly.org/story/conservativemasorti-rabbis-denounce-leaked-supreme-court-decision-overturn-abortion-rights>.

⁹⁵ *Id.*

⁹⁶ Tirzah Meacham (leBeit Yoreh) & Yoelit Lipinsky, *The Shalvi/Hyman Encyclopedia of Jewish Women*, JEWISH WOMEN'S ARCHIVE, <https://jwa.org/encyclopedia/article/abortion> (last updated July 27, 2022). "M. Ohalot 7:6[] states that if a woman is having difficulty giving birth, the midwife dismembers the fetus *in utero* in order to extract it to save the mother's life" *Id.*

⁹⁷ Dalia Hatuqa, *US Muslim Advocates Weigh in on Abortion Rights Battle*, AL JAZEERA (Jan. 26, 2022), <https://www.aljazeera.com/news/2022/1/26/us-muslim-advocates-weigh-in-on-abortion-rights-battle>.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Hatuqa, *supra* note 97; see also Abdulrahman Al-Matary & Jaffar Ali, *Controversies and Considerations Regarding the Termination of Pregnancy for Foetal Anomalies in Islam*, BMC (Feb. 5, 2014), <https://bmcmethics.biomedcentral.com/articles/10.1186/1472-6939-15-10>.

¹⁰¹ See *supra* text accompanying notes 87–92.

the same passage of the Old Testament yet come to vastly different outcomes as to what the religious rule is on abortions:

The chief biblical source referring to abortion is Exodus 21:22–25, concerning the man who inadvertently strikes a pregnant woman, causing her to lose the pregnancy. The attacker is not liable for homicide for the death of the fetus, but if the woman dies, the man is liable for her homicide. In either case, monetary compensation for the loss of the fetus is paid to the father. The infrequently used word *ason* (misfortune, accident), which according to most rabbinic texts refers to the death of the mother, was translated by the Septuagint [Greek Old Testament] as referring to the fetus and its stage of development. That is, if the fetus had reached a certain stage of development of identifiable human formation, the attacker was liable for its death. This difference reflects the two opposing schools of Greek philosophy: the Academy, represented by Plato/Aristotle, who held that human status obtained at fetal formation, and the Stoics, who held that the fetus is dependent on the mother. The Septuagint translation was the beginning of the separate approaches on the topic of abortion of Judaism and Christianity.¹⁰²

Data helps demonstrate the idea that Christianity is being weaponized and perverted by a minority, because, while this country is predominantly Christian, "[a] majority of Americans—54 percent—believe that abortion should be legal, according to estimates from a 2018 survey by the Public Religion Research Institute."¹⁰³ Further, "only 45 percent of all Christians think abortion should be illegal in all or most cases."¹⁰⁴

If the government supports the Christian view of abortion and enacts laws based on it, then they are ignoring the wall that separates church and state. It is abundantly clear that these three major world religions have conflicting opinions on abortion.¹⁰⁵ Islam and Judaism are similar to an extent, with Christianity as the outlier.¹⁰⁶ Thus, the government could not possibly predicate its support for the Christian view on anything but a preference for one religion over the other. If the government were to engage in such selection, it would be absolutely decimating the separation of church and state.

Section IV will discuss the Court's decision in *Dobbs*.¹⁰⁷ While it is *possible* that the Justices who voted to overturn *Roe* actually

¹⁰² Meacham & Lipinsky, *supra* note 96.

¹⁰³ Hatuqa, *supra* note 97.

¹⁰⁴ *Id.*

¹⁰⁵ See *supra* text accompanying notes 87–102.

¹⁰⁶ *Id.*

¹⁰⁷ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

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believed their actions were rooted in the law, there seems to be but one simple explanation for how the majority *actually* decided: religion. The religious make-up of the bench at the time of the decision (which closely preceded Justice Ketanji Brown Jackson's swearing-in) was six Catholics, one Protestant, and two Jews.¹⁰⁸ However, Justice Gorsuch was also raised Catholic but now attends an Episcopalian Church.¹⁰⁹

Justice	Religion	Nominated By	Vote in <i>Dobbs</i>
Alito	Catholic	Republican	Majority (author)
Thomas	Catholic	Republican	Majority
Gorsuch	Protestant*	Republican	Majority
Kavanaugh	Catholic	Republican	Majority
Barrett	Catholic	Republican	Majority
Roberts	Catholic	Republican	Concur
Kagan	Jewish	Democrat	Dissent
Sotomayor	Catholic	Democrat	Dissent
Breyer	Jewish	Democrat	Dissent

*Raised Catholic

Catholicism opposes abortion rights with few to no exceptions.¹¹⁰ The Episcopalian Church supports abortion rights with some limits.¹¹¹ Conservative and Reform Jews support abortion rights with few to no limits.¹¹² Looking at the religion of each Justice, the only Justice whose vote is incongruous with their religion is Justice Sotomayor. However, Justice Sotomayor was nominated to the bench by a

¹⁰⁸ Frank Newport, *The Religion of the Supreme Court Justices*, GALLUP (Apr. 8, 2022), <https://news.gallup.com/opinion/polling-matters/391649/religion-supreme-court-justices.aspx>.

¹⁰⁹ Daniel Burke, *What is Neil Gorsuch's Religion? It's Complicated*, CNN POL. (Mar. 27, 2017, 2:37 PM), <https://www.cnn.com/2017/03/18/politics/neil-gorsuch-religion/index.html>.

¹¹⁰ Masci, *supra* note 84.

¹¹¹ *Id.*

¹¹² *Id.*

Democratic President.¹¹³ So, the religious incongruity can be reconciled with Justice Sotomayor's social views (as understood by the political affiliation of the President who nominated her to the bench). Overall, the Justices appear to have voted down party lines and (frighteningly) along with their religion. We have arrived at a spine-chilling juncture in the Court's history where it seems that the Justices' own religious predilections have informed their decisions. Maybe there are other *possible* readings of the *Dobbs* decision to explain why the majority did what it did, but the most *prominent* reading is that it chose to apply religion to the law in whichever way best suited their own beliefs.

III. PUBLIC HEALTH AND HEALTH CARE

There are two competing issues that implicate bodily autonomy: reproductive rights and vaccine mandates. For individuals who vehemently support reproductive rights *and* vaccine mandates, those two goals seem juxtaposed. They require competing actions from the government. The former expects that there will be little to no government intrusion into bodily autonomy.¹¹⁴ The latter supports government intrusion into bodily autonomy.¹¹⁵ So, it seems that the idea of government intrusion into bodily autonomy is one that people would like to cherry-pick. We only want what we want when we want it—right? Not necessarily. While it may seem like hypocrisy can really be the only thing to account for this phenomenon, there is another explanation lurking in the background—*public health*. What is public health?

Public health is the science of protecting and improving the health of people and their communities. This work is achieved by promoting healthy lifestyles, researching disease and injury prevention, and detecting, preventing, and responding to infectious diseases. Overall, public health is concerned with protecting the health of entire populations. These

¹¹³ President Barack Obama nominated Justice Sotomayor in 2009. Deborah Tedford, *Obama Chooses Sotomayor for Supreme Court*, NPR (May 26, 2009, 8:30 AM), <https://www.npr.org/2009/05/26/104530389/obama-chooses-sotomayor-for-supreme-court>.

¹¹⁴ CENTER FOR REPRODUCTIVE RIGHTS, THE CONSTITUTIONAL RIGHT TO REPRODUCTIVE AUTONOMY: REALIZING THE PROMISE OF THE 14TH AMENDMENT 16–18 (2022), <https://reproductiverights.org/wp-content/uploads/2022/07/Final-14th-Amendment-Report-7.26.22.pdf>.

¹¹⁵ Cole & Mach, *supra* note 68.

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populations can be as small as a local neighborhood, or as big as an entire country or region of the world.¹¹⁶

In terms of public health, there is a chasm between vaccination mandates and reproductive rights. Vaccines are at the cornerstone of primary health care and unequivocally a human right.¹¹⁷ "Immunization is a global health and development success story, saving millions of lives every year."¹¹⁸

Unequivocally, reproductive rights are *health care*.¹¹⁹ However, health care and public health are not necessarily synonymous.¹²⁰ Health care is "efforts made to maintain or restore physical, mental, or emotional well-being especially by trained and licensed professionals—usually hyphenated when used attributively."¹²¹ Health care and public health can be analogized to the square and rectangle explanation in math. All squares are rectangles, but not all rectangles are squares. All public health reverts to some type of health care, *but* not all health care is a matter of public health.

Vaccines are both health care and a matter of public health. Reproductive rights, specifically abortions, are health care, but they are *private matters*.

Vaccines transcend private matters and become public health matters. The reason is simple. We do not live on an island alone. We encounter people every single day. We *expose* people to whatever we carry and vice versa—we are exposed to whatever they may carry. As explained above, nearly half the COVID-19 deaths that occurred after vaccinations were available could have been prevented.¹²² The

¹¹⁶ *What is Public Health?*, CDC FOUND., <https://www.cdcfoundation.org/what-public-health> (last visited Dec. 22, 2022).

¹¹⁷ *Vaccines and Immunizations*, WHO, https://www.who.int/health-topics/vaccines-and-immunization#tab=tab_1 (last visited Dec. 22, 2022).

¹¹⁸ *Id.*

¹¹⁹ *Facts are Important: Abortion is Healthcare*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare> (last visited Dec. 22, 2022).

¹²⁰ *Public Health vs. Population Health vs. Healthcare*, HELUNA HEALTH (Jan. 31, 2022), <https://www.helunahealth.org/news/public-health-vs-population-health/>. "Public health services focus on protecting and promoting the health of entire populations, while healthcare services focus on diagnosing and treating individual patients." *Id.*

¹²¹ *Health Care*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/health%20care> (last visited Dec. 22, 2022).

¹²² Simmons-Duffin & Nakajima, *supra* note 61.

decision of whether to get vaccinated or not affects more than just that individual.¹²³

Abortion is health care.¹²⁴ Pregnancy has enormous impacts on a pregnant individual's biological composition and health.¹²⁵ For example, one out of every thirteen individuals who become pregnant in the United States will develop high blood pressure, and of those who survive their pregnancy (7–8% don't), their risk of dying from heart disease at a young age is doubled.¹²⁶ And their risk of dying young from Alzheimer's disease is tripled.¹²⁷ One in seven pregnant people in the U.S. will develop gestational diabetes, and, of those, half will develop Type 2 diabetes within twenty years, which in turn shortens their life span by eight to nine years.¹²⁸ There is also a risk for severe bleeding at birth, which accounts for 11% of maternal deaths in the U.S.¹²⁹ Even more jarring is that in one in every twenty-five pregnancies, the pregnant individual will develop preeclampsia, which can be life-threatening (e.g., the elevated blood pressure and high levels of protein in the urine associated with preeclampsia can damage numerous organs).¹³⁰ Preeclampsia generally occurs after the 20-week point in pregnancy.¹³¹ When the embryo causes preeclampsia, the only cure is to deliver the fetus, either as soon as it is viable or, if the individual's life is in jeopardy, to abort the pregnancy.¹³² The fact is that there are grave physical risks that not only accompany pregnancy but last far longer than its nine months.¹³³ Conversely, abortion does not have the same long-term risks to mental and physical health.¹³⁴

¹²³ See *supra* text accompanying notes 117–22.

¹²⁴ Dakota E. McCoy & Madison B. Sharp, *Why Abortion is Health Care*, SLATE (May 9, 2022, 3:52 PM), <https://slate.com/technology/2022/05/abortion-access-health-care-pregnancy.html>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*; see also *Preeclampsia*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/diseases/17952-preeclampsia> (last visited Dec. 22, 2022).

¹³¹ *Preeclampsia*, *supra* note 130.

¹³² McCoy & Sharp, *supra* note 124.

¹³³ *Id.*

¹³⁴ *Id.*

Thus, in many instances, abortion is safer than childbirth for the pregnant individual.¹³⁵

That said, abortions are a private matter. If a pregnant individual chooses to get an abortion, that decision affects them. Such a personal choice has no bearing on the rest of society. If Shelby in California gets an abortion, how could it possibly impact Madison in New York? It doesn't. No reasonable causal connection can be conceived to connect these two individuals to make it that Madison feels the effect of Shelby's decision. As private matters, the decision of whether to carry or terminate a pregnancy should be one made by the individual, not the government. And circling back to the discussion on religion, if someone's religion precludes *them* from having an abortion, that is entirely that person's prerogative. But the individual decision of one person is of no consequence to the decision of another. Your own religion is your own belief that you are absolutely entitled to sincerely hold, but there is no entitlement to sincerely cast that religion (or its restrictions) on anyone else.

Uniquely, a driving factor behind the anti-abortion argument is that there is a need to protect the fetus—to protect the life of another. If protecting the life of another is so important, then there should be no issue with supporting vaccine mandates as vaccinations would also protect the lives of others. Surely, we cannot see a diminution in the value of life the moment it is no longer in the womb.

IV. STATE POLICE POWERS AND DOBBS

A. Dobbs v. Jackson Women's Health Organization

On June 24, 2022, the Supreme Court shocked the nation. In a 5-4 decision, it overturned a 49-year-old precedent.¹³⁶ In the case of *Dobbs v. Jackson Women's Health Organization*,¹³⁷ the Supreme Court seized its opportunity to overturn *Roe v. Wade*.¹³⁸ Not to be too

¹³⁵ *Id.*

¹³⁶ Josh Gerstein et al., *Supreme Court Gives States Green Light to Ban Abortion, Overturning Roe*, POLITICO (June 24, 2022, 1:24 PM), <https://www.politico.com/news/2022/06/24/supreme-court-overturms-roe-v-wade-00042244>.

¹³⁷ 142 S. Ct. 2228, 2242 (2022).

¹³⁸ 410 U.S. 113 (1973).

tongue-in-cheek, but Justices Alito, Thomas, Gorsuch, Kavanaugh, and Barrett exercised their choice and authority to abort *Roe*, all to fit their own personal predilection.

Roe acknowledged that "[t]he Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."¹³⁹ Further, the Court believed that this right was founded in the Fourteenth Amendment, as it "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."¹⁴⁰ What many people misunderstand is that *Roe* was not some free-for-all where pregnant individuals could terminate a pregnancy whenever they wanted.¹⁴¹ The Court specifically noted that the right to abortion "is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach."¹⁴²

The argument that a fetus is a person is not new—it was made by the appellee and some *amici* briefs in *Roe*.¹⁴³ In response, the Court reasoned that "[t]he Constitution does not define 'person' in so many words."¹⁴⁴ And "in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application."¹⁴⁵ The Court ultimately concluded that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."¹⁴⁶ The Court, in ensuring that the right was not limitless, opted for a trimester framework.¹⁴⁷ Essentially, in the first trimester, the state could not regulate abortions; in the second trimester, it could regulate abortions; and in the third trimester, it can regulate and potentially prescribe abortions.¹⁴⁸ Although the decision in *Dobbs* has been deemed

¹³⁹ *Id.* at 152.

¹⁴⁰ *Id.* at 153.

¹⁴¹ Rather, *Roe* established a trimester framework that permitted certain actions at different times throughout a pregnancy. *See id.* at 162–66.

¹⁴² *Id.* at 155.

¹⁴³ *Id.* at 156.

¹⁴⁴ *Id.* at 157.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 158.

¹⁴⁷ *Id.* at 164–65.

¹⁴⁸ *Id.*

as overturning *Roe*,¹⁴⁹ that is not entirely the case. *Roe* gave the right to an abortion, but its trimester framework was already no longer good law.¹⁵⁰

The Court opened its *Casey* opinion with the following: "Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, that definition of liberty is still being questioned."¹⁵¹ In *Casey*, the Court eliminated *Roe*'s trimester framework.¹⁵²

A logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life.¹⁵³

The Court generally opted for a viability benchmark, where there could be some regulation *even* pre-viability if it would not constitute an undue burden.¹⁵⁴ The Court determined that "[r]egulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden."¹⁵⁵

Since *Casey*, reproductive rights have been called into question numerous times.¹⁵⁶ Yet, somehow, like the apparent scrappy underdog that reproductive rights were, they always came out on top—until now.

We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth

¹⁴⁹ Mark Joseph Stern, *The Supreme Court Overrules Roe v. Wade*, SLATE (June 24, 2022, 10:19 AM), <https://slate.com/news-and-politics/2022/06/supreme-court-overturns-roe-v-wade-abortion-to-become-illegal-in-half-the-states.html>.

¹⁵⁰ *Roe*, 410 U.S. 113; *cf.* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

¹⁵¹ *Casey*, 505 U.S. at 843 (citation omitted).

¹⁵² *Id.* at 873 ("We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*.").

¹⁵³ *Id.*

¹⁵⁴ *Id.* ("[W]e abandon the trimester framework as a rigid prohibition on all pre-viability regulation aimed at the protection of fetal life.").

¹⁵⁵ *Id.* at 878.

¹⁵⁶ *See, e.g., Whole Woman's Health v. Hollered*, 579 U.S. 582 (2016); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U. S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997) (internal quotation marks omitted).¹⁵⁷

The alarm at the *Dobbs* decision has not been wrongly raised, but there is some confusion as to what the *Dobbs* decision really means. While abortion is no longer a constitutionally protected right, abortion in and of itself is not illegal.

The five Justices believed that the issue of abortion belonged with the states—to the people's elected representatives.¹⁵⁸ They contended that "[t]he permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."¹⁵⁹ There are a few issues with this. First, the matter of reproductive rights is so integral to uterus-bearing individuals that it deserves federal protection. Second, the notion that people's elected officials truly represent their interests is rife with faulty assumptions.¹⁶⁰ Liberals reside in conservative states, and conservatives reside in liberal states.¹⁶¹ Gerrymandering and voting restrictions have undermined the integrity of elections.¹⁶² Elected officials generally represent the interests of those who elected them, not the entire group.¹⁶³

As noted above, only five (really six) of the nine Justices voted to strip uterus-bearing individuals of rights essential to their very

¹⁵⁷ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

¹⁵⁸ *Id.* at 2243.

¹⁵⁹ *Id.* (quoting *Casey*, 505 U.S. at 979 (Scalia, J., concurring in judgment in part and dissenting in part)).

¹⁶⁰ See *infra* notes 162–64.

¹⁶¹ See *Political Ideology by State*, PEW RSCH. CTR., <https://www.pewresearch.org/religion/religious-landscape-study/compare/political-ideology/by/state/> (last visited Dec. 22, 2022).

¹⁶² Perry Grossman & Sam Issacharoff, *Op-Ed: Partisan Gerrymandering Undermines the Integrity of Elections, Violates Right to Cast a Meaningful Ballot*, NYCLU (Sept. 7, 2017), <https://www.nyclu.org/en/publications/op-ed-partisan-gerrymandering-undermines-integrity-elections-violates-right-cast>.

¹⁶³ See Douglas J. Amy, *Winner-Take-All Elections: A Formula for Unfair Representation*, SECOND-RATE DEMOCRACY, <https://secondratedemocracy.com/winner-take-all-elections/> (last visited Dec. 22, 2022).

being.¹⁶⁴ Chief Justice Roberts penned his own concurrence.¹⁶⁵ Justices Kagan, Breyer, and Sotomayor vehemently dissented.¹⁶⁶ "With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent."¹⁶⁷

Roe and *Casey* well understood the difficulty and divisiveness of the abortion issue. The Court knew that Americans hold profoundly different views about the "moral[ity]" of "terminating a pregnancy, even in its earliest stage." *Casey*, 505 U. S., at 850, 112 S. Ct. 2791, 120 L. Ed. 2d 674. And the Court recognized that "the State has legitimate interests from the outset of the pregnancy in protecting" the "life of the fetus that may become a child." *Id.*, at 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674. So, the Court struck a balance, as it often does when values and goals compete. It held that the State could prohibit abortions after fetal viability, so long as the ban contained exceptions to safeguard a woman's life or health. It held that even before viability, the State could regulate the abortion procedure in multiple and meaningful ways. But until the viability line was crossed, the Court held, a State could not impose a "substantial obstacle" on a woman's "right to elect the procedure" as she (not the government) thought proper, in light of all the circumstances and complexities of her own life. *Ibid.*¹⁶⁸

The more "liberal" voting bloc on the bench recognized the magnitude of the decision to have an abortion.¹⁶⁹ They acknowledged the balance the Court must find between competing values and interests.¹⁷⁰ For these three Justices, "respecting a [person] as an autonomous being, and granting [their] full equality, meant giving [them] substantial choice over this most personal and most consequential of all life decisions."¹⁷¹ And while I sincerely hope a new case returns to the Court when the bench is not skewed so far to the right (and

¹⁶⁴ Gerstein et al., *supra* note 136.

¹⁶⁵ Clive Crook, *The Supreme Court Agrees on the Need to Divide the Country*, BLOOMBERG (June 29, 2022, 9:00 AM), <https://www.bloomberg.com/opinion/articles/2022-06-29/dobbs-abortion-ruling-supreme-court-agrees-on-need-to-divide-us>.

¹⁶⁶ Bill Chappell & Nell Clark, *The Supreme Court's Majority and Dissent Opinions on Dobbs Reveal a Massive Schism*, NPR (June 24, 2022, 5:30 PM), <https://www.npr.org/2022/06/24/1107445443/supreme-court-majority-and-dissent-opinions-dobbs-reveal-schism>.

¹⁶⁷ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2350 (2022) (Breyer, J., Sotomayor, J., & Kagan, J., dissenting).

¹⁶⁸ *Id.* at 2317.

¹⁶⁹ *Id.*

¹⁷⁰ *See id.*

¹⁷¹ *Id.*

has Justices who prioritize individual rights over religious convictions), for now, we will have to play the cards we have been dealt.

B. State Police Powers Can Be Employed to Mandate Vaccines and Protect Reproductive Rights

With a precursory understanding of *Dobbs*, we now look to the COVID-19 pandemic. Vaccine mandates could potentially be issued at the federal level through the HHS.¹⁷² But, in turn with abortion rights, the option to enforce a vaccine mandate can also be left with the states. How can states issue vaccine mandates? Police powers.¹⁷³ In fact, states could utilize their police powers to regulate both abortion rights and vaccine mandates if they can find no refuge in federal law.¹⁷⁴

"According to settled principles, the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."¹⁷⁵ In *Jacobson*, the Court found that Massachusetts's statute mandating smallpox vaccinations was a matter of public health and was a reasonable and valid exercise of its police power.¹⁷⁶ The Court asserted, "The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone."¹⁷⁷ And taking it one step further, "[t]he possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases."¹⁷⁸

The Court doubled down on protecting vaccine mandates in the name of state police powers in *Zucht v. King*.¹⁷⁹ The issue of vaccination mandates has been asked, and the Court has answered that "it is within the police power of a State to provide for compulsory

¹⁷² See WEN W. SHEN, CONG. RSCH. SERV., R46745, STATE AND FEDERAL AUTHORITY TO MANDATE COVID-19 VACCINATION 13–14 (2022).

¹⁷³ JARED P. COLE & KATHLEEN S. SWENDIMAN, CONG. RSCH. SERV., RS21414, *Summary to MANDATORY VACCINES: PRECEDENT AND CURRENT LAWS* (2014).

¹⁷⁴ See U.S. CONST. amend X; see also *id.*

¹⁷⁵ *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

¹⁷⁶ *Id.* at 35.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See *Zucht v. King*, 260 U.S. 174 (1922).

vaccination.¹⁸⁰ In that case, the Court held that a Texas statute requiring students to be vaccinated did not confer "arbitrary power, but only that broad discretion required for the protection of public health."¹⁸¹

In *Zucht* and *Jacobson*, the Court has clearly earmarked the right to mandate vaccinations to the states vis-a-vis their police powers. Vaccination mandates are permissible through the police powers because vaccines, in accord with what police powers are intended to do—promote and protect the health and wellbeing of citizens.¹⁸² This can then be applied to states exercising police powers to protect abortion rights.

In Section III, it was established that the right to a safe abortion is health care.¹⁸³ The right to an abortion is critical to people's health and safety.¹⁸⁴ If abortion access is severely restricted or banned altogether, the consequences will be grave. Even now, taking *Dobbs* out of the equation and looking from a global perspective, "[g]lobal estimates from 2010–2014 demonstrate that 45% of all induced abortions are unsafe."¹⁸⁵ While 97% of unsafe abortions occur outside of the U.S.,¹⁸⁶ that does not diminish the significance of the issue. In fact, unsafe abortion is one of the leading causes of maternal deaths and morbidities.¹⁸⁷ The World Health Organization proclaimed "[l]ack of access to safe, timely, affordable, and respectful abortion care is a critical public health and human rights issue."¹⁸⁸

While access to safe abortions must exist, assuming *arguendo* that *Dobbs* was taken to the extreme and there was no abortion access, the results would be dire. First, pregnancy is a major life and health event. Pregnancy, as described earlier, is not without substantial risk.¹⁸⁹ However, the risk is exorbitantly higher for certain groups of

¹⁸⁰ *Id.* at 176.

¹⁸¹ *Id.* at 177.

¹⁸² See *supra* text accompanying notes 59–68, 175–78.

¹⁸³ See discussion *supra* Section III.

¹⁸⁴ See *supra* text accompanying notes 125–35.

¹⁸⁵ *Abortion*, WHO (Nov. 25, 2021), <https://www.who.int/news-room/fact-sheets/detail/abortion>.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ See *supra* text accompanying notes 125–33.

individuals.¹⁹⁰ "Pregnancy is even riskier for [people] who face racial disparities in treatment, cannot access good health care, or have other health conditions (including COVID-19)."¹⁹¹ Second, we cannot ignore the discrepancies in maternal morbidities across different groups:

Black and Indigenous mothers are two to four times more likely to die from pregnancy-related causes than white mothers. Women living in the South have a higher risk of death and poor maternal outcomes. Pregnant women diagnosed with COVID are more than three times more likely to die than nonpregnant women, and they have a significantly higher rate of miscarriage, stillbirth, and preterm deliveries. By banning abortions, we would enshrine in law serious discrepancies in risk based on race, region, and health.¹⁹²

The government would create a public health crisis by forcing people to remain pregnant and have children they could not support. The U.S. does not have the infrastructure to care for parents and children after pregnancy.¹⁹³ "Compared to 36 peer nations, the U.S. ranks 35th with regard to public spending on early childhood education and care."¹⁹⁴ The shortcomings of the U.S. childcare system result in the removal of hundreds of billions of dollars from the national economy annually, which can be explained in part by the fact that millions of women provide unpaid caregiving.¹⁹⁵ If a child is born with severe medical issues because abortion access was denied, though the government offers some assistance programs, the parent will face an immense financial burden.¹⁹⁶ "Tis not enough to help the feeble up, but to support them after."¹⁹⁷ Forcing a person to bear or beget a child they cannot support would only further fuel the public health crisis.

¹⁹⁰ McCoy & Sharp, *supra* note 124.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Carrie N. Baker, *Lack of Child Care Infrastructure Costs U.S. Billions of Dollars Each Year*, MS. (June 22, 2021), <https://msmagazine.com/2021/06/22/child-care-cost-economy-women-mother-workers-american-families-plan-biden/>.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* "In 2020, 65 million women provided unpaid caregiving." *Id.*

¹⁹⁶ See, e.g., *State Children's Health Insurance Program*, BENEFITS.GOV, <https://www.benefits.gov/benefit/607> (last visited Dec. 22, 2022). However, CHIP does have restrictions, such as only covering children to age 18. *Id.*

¹⁹⁷ WILLIAM SHAKESPEARE, *TIMONS OF ATHENS* act 1, sc. 1, l. 125–26.

Looking forward, in the wake of *Dobbs*, the states will have the power to make important decisions regarding abortion regulation.¹⁹⁸ The power that states have is basically a *carte blanche* sliding scale where the state can now place as many or as few restrictions on abortion as it so pleases.¹⁹⁹ And even though *Dobbs* cannot be reversed overnight, there is still hope for reproductive rights.

States can regulate and protect abortion rights through their state police powers. There is a dual explanation as to why police powers could be used to protect abortion rights. First, safety and welfare are both jeopardized when individuals are forced to seek *unsafe* abortions.²⁰⁰ Second, if the government were to force someone to have a child, the welfare of that child and mother could be severely impaired (e.g., there are financial barriers the government does not remove, and there are issues of disproportional mortality rates with delivery).²⁰¹ Therefore, the states would be well within their police powers to enforce reproductive rights.

V. CONCLUSION

We revisit the *Jacobson* Court's opinion that whether a belief is universal or not is of no moment.²⁰² There will never be a universal opinion on whether abortions are okay or whether we should have vaccination mandates. Religion, morals, and personal beliefs will guide opinions in different directions. The question posed at the beginning of this Article was whether vaccine mandates and abortion rights, both of which seem to have conflicting opinions regarding government intrusion into bodily autonomy, can simultaneously exist. The answer is unequivocally yes. Both can exist without being attributed to hypocrisy. The former is a matter of public health, whereas the latter is a matter of health care.

"Justices continue to think and change. I am ever hopeful that if the Court has a blind spot today, its eyes will be open tomorrow."²⁰³

¹⁹⁸ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

¹⁹⁹ *See id.* at 2284.

²⁰⁰ *See id.* at 2345 (Breyer, J., Sotomayor, J., & Kagan, J., dissenting).

²⁰¹ *Id.* at 2338–39.

²⁰² *Jacobson v. Massachusetts*, 197 U.S. 11, 35 (1905).

²⁰³ Sean Sullivan, *Justice Ruth Bader Ginsburg Says Male Justices Have a 'Blind Spot' on Women's Issues*, WASH. POST (July 31, 2014, 11:16 AM),

While the decision in *Dobbs* was painful, and the loss from COVID-19 was immense, we can hope that tomorrow we will see a better day.