2022

The Problem with Dobbs and the Rule of Legality

William J. Aceves
California Western School of Law, wja@cwsl.edu

The Problem with *Dobbs* and the Rule of Legality

WILLIAM J. ACEVES*

In Dobbs v. Jackson Women's Health Organization*, the Supreme Court reversed decades of precedent to overrule* Roe v. Wade *and* Planned Parenthood v. Casey. *In anticipation of the Court's decision, several states adopted "trigger laws" restricting abortion. These laws were explicitly drafted to take effect if* Roe *and* Casey *were overturned. These laws joined pre-*Roe *"zombie laws" that restricted abortion and were never rescinded by state legislatures despite* Roe *and its progeny. Collectively, trigger laws and zombie laws are now being used in several states to impose restrictions on reproductive autonomy. This Essay challenges the validity of these laws. Despite their eponymous names, they are not laws. When the Supreme Court affirmed the right to abortion in* Roe *and reaffirmed that right in* Casey*, any inconsistent state laws were voided. When states adopted laws contrary to* Roe *and* Casey *in the hope of future reversal, these laws were void ab initio.* Dobbs *did not and could not resurrect these laws. Prosecution under trigger laws or zombie laws would violate the rule of legality—there is no crime in the absence of a duly enacted law. Until state legislatures adopt de novo restrictions on reproductive autonomy, courts should reject any effort to rely on outdated and void legislation.*

---

* Steven R. Smith Professor of Law, California Western School of Law. I am grateful to Jessica Fink, Erin Sheley, Glenn Smith, and Daniel Yeager for their comments. Chelsey Barkley, Maliat Chowdhury, Alexis Garcia, Brittney Kondrat, and Livia Stahle provided excellent research assistance. All errors are my own.

TABLE OF CONTENTS

I. INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*,[1] the Supreme Court reversed decades of precedent to overrule *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[2] Because the right to abortion does not appear in the Constitution, the Court indicated that it is an unenumerated right entitled to only rational basis review by the courts.[3] Applying this most deferential form of judicial review, the Court held that Mississippi was free to prohibit abortion because it had offered several legitimate state interests in justification of the law.[4] Written by Justice Samuel Alito, the opinion also made clear that *Roe* and *Casey* were wrongly decided and were now overruled.[5]

The impact of *Dobbs* on the health and well-being of women cannot be overstated.[6] States that oppose abortion are now empowered to regulate, restrict, and prohibit abortion well before viability, which was the time frame previously established by *Casey*.[7] As a result, many women will now be subjected to forced pregnancy and childbirth. They will suffer the physical and emotional trauma that results from an unplanned or unwanted pregnancy, including heightened risks of mental health issues and maternal morbidity and mortality.[8] Women will also suffer from the risk of complications associated with nonviable pregnancies and miscarriages.[9] In the absence of

---

[1] 142 S. Ct. 2228 (2022).
[2] 410 U.S. 113 (1973); 505 U.S. 833 (1992).
[3] *See Dobbs*, 142 S. Ct. at 2283.
[4] *See id*. at 2283–84.
[5] *See id*. at 2242.
[6] This Essay regularly refers to the impact of *Dobbs* on women. It does so for two reasons. First, most zombie laws and trigger laws specifically identify women as the subjects of abortion restrictions. Second, the case law consistently addresses the rights of women. However, *Dobbs* will also affect transgender men and nonbinary individuals. *See* Olivia McCormack, *Transgender Advocates Say the End of* Roe *Would Have Dire Consequences*, WASH. POST (May 6, 2022, 11:37 AM), https://www.washingtonpost.com/politics/2022/05/06/transgender-men-nonbinary-people-abortion-roe/. Accordingly, this Essay uses gender-neutral language when appropriate.
[7] *See* 505 U.S. at 846.
[8] *See* Press Release, Am. Psych. Assoc., Restricting Access to Abortion Likely to Lead to Mental Health Harms, APA Asserts (May 3, 2022), https://www.apa.org/news/press/releases/2022/05/restricting-abortion-mental-health-harms [https://perma.cc/JAU5-6LVS]; Mariana Lenharo, *Being Denied an Abortion Has Lasting Impacts on Health and Finances*, SCI. AM. (Dec. 22, 2021), https://www.scientificamerican.com/article/being-denied-an-abortion-has-lasting-impacts-on-health-and-finances/.
[9] *See* Frances Stead Sellers & Fenit Nirappil, *Confusion Post-*Roe *Spurs Delays, Denials for Some Lifesaving Pregnancy Care*, WASH. POST (July 16, 2022, 9:09 AM), https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-

statutory exceptions, victims of rape and incest may be forced to endure the devastating effects of their trauma for the rest of their lives.[10]

Pursuant to *Dobbs*, states could now require women to notify their spouses or partners before seeking an abortion.[11] Indeed, women seeking abortions could even be required to obtain consent, thereby delegating control of their health care decisions to others.[12] Young girls could be compelled to notify their parents or receive parental consent before accessing reproductive health services.[13] Victims of domestic violence could be forced to seek the consent of their abusers.[14] There are significant financial and professional consequences stemming from the *Dobbs* decision as well.[15] Although the fallout from *Dobbs* will affect all women seeking abortions, it will have a

---

pregnancy-care/; Sonia M. Suter, *All the Ways* Dobbs *Will Harm Pregnant Women, Whether or Not They Want an Abortion*, SLATE (June 29, 2022, 4:35 PM), https://slate.com/news-and-politics/2022/06/dobbs-pregnant-women-surveillance-ivf-bans-abortion.html.

[10] *See* Victoria Reyes, Opinion, *I Am the Product of Rape. Here's Why I Support Abortion Rights*, L.A. TIMES (June 12, 2022, 3:06 AM), https://www.latimes.com/opinion/story/2022-06-12/abortion-reproductive-justice-rights-roe-supreme-court-product-of-rape; Jan Hoffman, *The New Abortion Bans: Almost No Exceptions for Rape, Incest or Health*, N.Y. TIMES (June 9, 2022), https://www.nytimes.com/2022/06/09/health/abortion-bans-rape-incest.html; Elaine Godfrey, *The GOP's Strange Turn Against Rape Exceptions*, ATLANTIC (May 4, 2022), https://www.theatlantic.com/politics/archive/2022/05/supreme-court-overturn-roe-v-wade-no-rape-incest-exceptions/629747/; Jennifer Haberkorn, *Rape Exceptions to Abortion Bans Were Once Widely Accepted. No More*, L.A. TIMES (Apr. 8, 2022, 3:00 AM), https://www.latimes.com/politics/story/2022-04-08/red-states-eliminate-rape-exceptions-from-abortion-bans.

[11] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022). In *Casey*, the Supreme Court held that spousal notification laws were unconstitutional. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 893–95 (1992).

[12] In *Planned Parenthood of Central Missouri v. Danforth*, the Supreme Court held that spousal consent requirements during the first twelve weeks of pregnancy were unconstitutional. *See* 428 U.S. 52, 69 (1976).

[13] In *Bellotti v. Baird*, the Supreme Court held that parental consent requirements were unconstitutional in the absence of a judicial bypass option. *See* 443 U.S. 622, 643 (1979).

[14] In *Casey*, the Court recognized the profound consequences of a spousal notification requirement on women facing domestic violence. *See* 505 U.S. at 888–93.

[15] *See* Sheelah Kolhatkar, *The Devastating Economic Impacts of an Abortion Ban*, NEW YORKER (May 11, 2022), https://www.newyorker.com/business/currency/the-devastating-economic-impacts-of-an-abortion-ban; Caitlin Knowles Myers & Morgan Welch, *What Can Economic Research Tell Us About the Effect of Abortion Access on Women's Lives?*, BROOKINGS (Nov. 30, 2021), https://www.brookings.edu/research/what-can-economic-research-tell-us-about-the-effect-of-abortion-access-on-womens-lives/ [https://perma.cc/8N9Q-PSZM].

disproportionate impact on women of color and poor women, who often have fewer resources and less access to health care.[16]

Through *Dobbs*, the Supreme Court has triggered a mass criminalization event in the United States, where millions of people may now be prosecuted for acts that were once legal and constitutionally protected.[17] These laws apply to women, transgender men, and nonbinary individuals.[18] They create potential legal liability for families, friends, health care professionals, employers, and coworkers.[19] There are few historic parallels.[20]

Of course, the potential impact of *Dobbs* is not limited to reproductive autonomy. Having ended nearly fifty years of precedent and weakened the principle of stare decisis, the Court's reasoning could extend far beyond the abortion debate.[21] There are numerous unenumerated rights that have been

---

[16] *See* Khaleda Rahman, Roe v. Wade *Being Overturned Will Harm Black Women the Most*, NEWSWEEK (Nov. 29, 2021, 6:05 AM), https://www.newsweek.com/overturning-roe-harmblack-women-most-1653082; Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2093 (2021); Jamila K. Taylor, *Structural Racism and Maternal Health Among Black Women*, 48 J.L., MED. & ETHICS 506, 510–11 (2020).

[17] *See, e.g.*, Greg Sargent, Opinion, *In Louisiana, A Dark Turn in the Post*-Roe *Wars Signals Danger Ahead*, WASH. POST (July 5, 2022, 11:29 AM), https://www.washingtonpost.com/opinions/2022/07/05/louisiana-abortion-trigger-ban-supreme-court-roe-v-wade/; Erin Douglas & Eleanor Klibanoff, *Abortion Funds Languish in Legal Turmoil, Their Leaders Fearing Jail Time If They Help Texans*, TEX. TRIB. (June 29, 2022, 4:00 PM), https://www.texastribune.org/2022/06/29/texas-abortion-funds-legal/ [https://perma.cc/6SAX-JMG3].

[18] Committed spouses and partners—regardless of gender—will also be affected by *Dobbs*. They will no longer have the ability to make family planning decisions in the absence of state intervention. *See* Andréa Becker, Opinion, *Men Have a Lot to Lose When* Roe *Falls*, N.Y. TIMES (May 26, 2022), https://www.nytimes.com/2022/05/26/opinion/men-abortion.html; Amanda Jayne Miller, Opinion, *Unsuspecting Men Don't Yet Know That Overturning* Roe v. Wade *Will Also Change Their Lives*, USA TODAY (May 11, 2022, 4:00 AM), https://www.usatoday.com/story/opinion/columnists/2022/05/11/abortion-law-roe-supreme-court-men/9667205002/?gnt-cfr=1.

[19] *See, e.g.*, Sheryl Gay Stolberg & Ava Sasani, *Doctor Informed State of 10-Year-Old Girl's Abortion*, N.Y. TIMES (July 14, 2022), https://www.nytimes.com/2022/07/14/us/10-year-old-abortion-caitlin-bernard-indiana.html (discussing state laws criminalizing medical professionals instead of "actual criminals").

[20] The adoption of the Eighteenth Amendment to the U.S. Constitution, which prohibited the manufacture, sale, and transportation of "intoxicating liquors," is perhaps the most relevant example of criminalizing conduct that was previously legal. U.S. CONST. amend. XVIII, § 1. Significantly, the Amendment indicated it would not become effective until one year after ratification. *Id*.

[21] The majority opinion argues that its approach to abortion need not extend to other unenumerated rights. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2280–81 (2022). However, the opinion's own approach to "history and tradition" contradicts that assertion. *See, e.g.*, Melissa Murray, Opinion, *How the Right to Birth Control Could Be Undone*, N.Y. TIMES (May 23, 2022), https://www.nytimes.com/2022/05/23/opinion/birth-

protected by the Court through the Due Process Clause of the Fourteenth Amendment. These rights—the right to contraception, the right to marry, the right of families to live together, and the right of parents to control the upbringing of their children—are now at risk of losing their heightened constitutionally protected status.[22] On this point, Justice Thomas's concurring opinion in *Dobbs* could not have been clearer.[23]

In anticipation of the Court's decision in *Dobbs*, several states adopted "trigger laws" restricting abortion.[24] These laws were explicitly drafted to take effect if *Roe* and *Casey* were overturned. They joined pre-*Roe* "zombie laws" that restricted abortion and yet were never rescinded by state legislatures despite *Roe* and *Casey*.[25] Collectively, trigger laws and zombie laws are now being used in several states to impose immediate restrictions on reproductive autonomy.[26]

---

control-abortion-roe-v-wade.html. *But see* Akhil Reed Amar, *The End of* Roe v. Wade, WALL ST. J. (May 14, 2022, 12:01 AM), https://www.wsj.com/articles/the-end-of-roe-v-wade-11652453609 (arguing that the *Dobbs* opinion will not result in the restriction of other fundamental rights).

[22] *See* Obergefell v. Hodges, 576 U.S. 644, 645–46 (2015) (right of same-sex couples to marry); Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (right to consensual sexual activity by same-sex couples); Moore v. City of East Cleveland, 431 U.S. 494, 505–06 (1977) (right of families to live together); Loving v. Virginia, 388 U.S. 1, 12 (1967) (right of interracial couples to marry); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (right to contraception); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (right of parents to control the upbringing of their children).

[23] *See Dobbs*, 142 S. Ct. at 2304 (Thomas, J., concurring) ("[I]n future cases, we should 'follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away.' Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity." (citation omitted)).

[24] *See* Jennifer Calfas, *States Prepare to Quickly Implement Abortion 'Trigger' Laws*, WALL ST. J. (June 16, 2022, 9:10 AM), https://www.wsj.com/articles/states-prepare-to-quickly-implement-abortion-trigger-laws-11655385028; Jesus Jiménez, *What is a Trigger Law? And Which States Have Them?*, N.Y. TIMES (May 4, 2022), https://www.nytimes.com/2022/05/04/us/abortion-trigger-laws.html; Casey Parks & Amber Phillips, *What are 'Trigger' Laws, and Which States Have Them?*, WASH. POST (May 3, 2022, 12:26 PM), https://www.washingtonpost.com/dc-md-va/2021/12/07/what-is-an-abortion-trigger-law/.

[25] *See* Rose Wagner, *It's Not Halloween: Post-*Roe *America Could See Rise of 'Zombie' Abortion Bans*, COURTHOUSE NEWS SERV. (May 6, 2022), https://www.courthousenews.com/its-not-halloween-post-roe-america-could-see-rise-of-zombie-abortion-bans/ [https://perma.cc/6TRA-B32W]; Michael C. Dorf, *Would Overruling* Roe v. Wade *Retroactively Reanimate "Zombie" Abortion Laws?*, VERDICT (Sept. 13, 2021), https://verdict.justia.com/2021/09/13/would-overruling-roe-v-wade-retroactively-reanimate-zombie-abortion-laws [https://perma.cc/HN4B-SQMY].

[26] *See After* Roe *Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/QDY8-

This Essay argues that the use of zombie laws and trigger laws to prohibit and criminalize abortion violates the rule of legality—there is no crime in the absence of a duly enacted law.[27] In fact, zombie laws and trigger laws are not laws.[28] When the Supreme Court affirmed the right to abortion in *Roe* and reaffirmed that right in *Casey*, any inconsistent state laws were voided. When states adopted laws contrary to *Roe* and *Casey* in the hope of future reversal, these laws were *void ab initio* (void from inception). *Dobbs* ended the protections afforded by *Roe* and *Casey*, but it does not have the power to resuscitate or activate these state laws. In the absence of new state legislation adopted after *Dobbs*, any prosecution under zombie laws or trigger laws would violate the rule of legality and the corollary maxim of *nullum crimen sine lege*—there is no crime in the absence of law.

Part II of this Essay offers a brief summary of *Roe, Casey*, and now *Dobbs*. Part III then examines the current status of zombie laws and trigger laws in the United States. There are thirteen states with trigger laws regulating abortion.[29] Zombie laws exist in nine states.[30] Collectively, these laws will affect millions of women and countless other individuals.[31] In response, Part

---

MKDP] (last visited Nov. 7, 2022). This issue has received significant scholarly attention for over thirty years. *See, e.g.*, Paul Benjamin Linton, *The Legal Status of Abortion in the States if* Roe v. Wade *Is Overruled*, 27 ISSUES L. & MED. 181, 221 (2012); Matthew Berns, Note, *Trigger Laws*, 97 GEO. L.J. 1639, 1641–46 (2009); Heidi S. Alexander, Note, *The Theoretic and Democratic Implications of Anti-Abortion Trigger Laws*, 61 RUTGERS L. REV. 381, 384–88 (2009); Richard H. Fallon, Jr., *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World*, 51 ST. LOUIS U. L.J. 611, 616–21 (2007); Teresa L. Scott, Note, *Burying the Dead: The Case Against Revival of Pre-*Roe *and Pre-*Casey *Abortion Statutes in a Post-*Casey *World*, 19 N.Y.U. REV. L. & SOC. CHANGE 355, 363–65 (1991). Because of *Dobbs*, it is no longer a hypothetical issue.

[27] *See* H.L.A. Hart, *Philosophy of Law, Problems of*, *in* 5 THE ENCYCLOPEDIA OF PHILOSOPHY 264, 273–74 (Paul Edwards ed., 1967) ("The requirements that the law . . . should be general . . . ; should be free from contradictions, ambiguities, and obscurities; should be publicly promulgated and easily accessible; and should not be retrospective in operation are usually referred to as the principles of legality."); *see also* Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 10 (2008) (describing the similarities between the rule of law and the rule of legality); Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 1 (1997) (arguing that "the Rule of Law needs to be understood as a concept of multiple, complexly interwoven strands").

[28] This Essay uses the terms "zombie laws" and "trigger laws" because they are routinely used to describe these legislative acts. However, the use of the word "law" does not reflect their actual legal status.

[29] *See infra* Part III.B.

[30] *See infra* Part III.A.

[31] *Dobbs* will also have a significant effect on states that protect reproductive autonomy. *See, e.g.*, Melody Gutierrez, *Newsom Signs Bill Protecting California Abortion Providers from Civil Liability*, L.A. TIMES (June 24, 2022, 2:57 PM), https://www.latimes.com/politics/story/2022-06-24/newsom-signs-bill-protecting-

IV argues that these laws cannot be used to restrict or prohibit abortion because this would violate the rule of legality. Under the rule of legality, zombie laws are void, and trigger laws are *void ab initio*.[32] Thus, advocates of reproductive autonomy should not concede the applicability of these laws. There are compelling arguments to be made. Indeed, these arguments extend to any subject area where zombie laws remain "on the books" or trigger laws await activation.[33]

The rule of legality offers only temporary protection against abortion restrictions in states where these statutes exist. Pursuant to *Dobbs*, state legislatures may adopt de novo restrictions on reproductive autonomy.[34] Until such time, courts should reject any efforts to restrict access to abortion through outdated and void legislation.[35] Prosecutors should also consider

---

california-abortion-providers-from-civil-liability (referencing research that thousands of women will travel to California seeking abortion care); Fahima Haque, *Which States Are Reinforcing Abortion Rights?*, N.Y. TIMES (May 4, 2022), https://www.nytimes.com/2022/05/04/us/abortion-rights-protections.html (listing several bills that seek to protect the right to abortion care); Elaine Kamarck, *What Happens After* Roe v. Wade*?*, BROOKINGS (May 3, 2022), https://www.brookings.edu/blog/fixgov/2022/05/03/america-after-roe-v-wade/ [https://perma.cc/M5K7-DTYU] (describing how *Dobbs* will have implications beyond the borders of states that prohibit abortion).

[32] *See infra* Part IV.

[33] *See generally* Howard M. Wasserman, *Zombie Laws*, 25 LEWIS & CLARK L. REV. 1047 (2022) (describing zombie laws that implicate abortion, social media regulation, and defamation); Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 WIS. L. REV. 1063 (2021) (describing zombie laws that implicate various legal issues); Jordan Carr Peterson, *The Walking Dead: How the Criminal Regulation of Sodomy Survived* Lawrence v. Texas, 86 MO. L. REV. 857 (2021) (describing zombie laws that implicate consensual sexual activity).

[34] The rule of legality does not prevent constitutional challenges or jurisprudential changes. When a state adopts legislation contrary to Supreme Court precedent, it would be challenged through litigation. Indeed, this is precisely what happened in *Dobbs*. The Supreme Court's authority to engage in judicial review is distinct from whether the outcome of such review should reanimate zombie laws or activate trigger laws.

[35] The battle in state courts has already begun. *See, e.g.*, Rachel Roubein & McKenzie Beard, *Abortion Providers Are Turning to State Courts to Halt Bans*, WASH. POST (June 28, 2022, 8:27 AM), https://www.washingtonpost.com/politics/2022/06/28/abortion-providers-are-turning-state-courts-halt-bans/ (addressing the complex legal issues raised in state litigation); Shawn Hubler & Mitch Smith, *Abortion Rights Groups Take Up the Fight in the States*, N.Y. TIMES (June 27, 2022), https://www.nytimes.com/2022/06/27/us/abortion-rights-states.html (referencing legal challenges to restrictive state abortion laws); Luke Vander Ploeg, *Michigan Judge Suspends an Abortion Ban from 1931*, N.Y. TIMES (May 17, 2022), https://www.nytimes.com/2022/05/17/us/michigan-abortion-ban.html.

whether bringing charges for violating these laws comports with the rule of legality.[36]

II. THE LAW OF *ROE* AND *CASEY*—AND NOW *DOBBS*

In *Roe v. Wade*, the Supreme Court confronted a challenge to a Texas statute that criminalized abortion except in cases where it was necessary to save the life of the mother.[37] Under the applicable federal jurisdictional statute at that time, the Court considered the case as a direct appeal from a special three-judge panel which held the Texas statute void.[38] The Court analyzed the constitutionality of the statute through the Due Process Clause of the Fourteenth Amendment. *Roe* was one of several cases where the Court would address this discrete yet profound constitutional issue.[39]

Writing for a 7-2 majority, Justice Blackmun acknowledged the "sensitive and emotional nature of the abortion controversy," as well as its complexity.[40] Informed by "the relative weights of the respective interests involved," "the lessons and examples of medical and legal history," "the lenity of the common law," and "the demands of the profound problems of the present day," the Court developed a trimester framework for assessing permissible

---

[36] *See* Steve Descano, Opinion, *My Governor Can Pass Bad Abortion Laws. But I Won't Enforce Them*, N.Y. TIMES (May 31, 2022), https://www.nytimes.com/2022/05/31/opinion/prosecutor-abortion-virginia.html (describing how prosecutors can use their inherent discretion to decline prosecution of abortion providers); Jonathan Shorman, *In Kansas City, Prosecution of Abortion Not Expected if Missouri Ban Triggered*, KAN. CITY STAR (May 18, 2022, 7:26 AM), https://www.kansascity.com/news/politics-government/article261520747.html (describing how prosecution of abortion providers "impede[s] medical care" and "alienat[es] communities").

[37] 410 U.S. 113, 164 (1973).

[38] *See id*. at 121–22; 28 U.S.C. § 2281 (1958). This jurisdictional statute was repealed in 1976. *See generally* Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413 (2019) (describing the mechanics of three-judge district courts); David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964) (describing the situations in which a three-judge court is required).

[39] In *United States v. Vuitch*, the Court held that a D.C. statute prohibiting abortion except in cases where the mother's life or health was at risk was not unconstitutionally vague. 402 U.S. 62, 70–72 (1971). However, the Court did not address whether the right to abortion itself was a substantive due process right entitled to heightened protection under the Due Process Clause.

[40] *Roe*, 410 U.S. at 116. Although moral standards and religious beliefs informed the abortion debate, the Court recognized other factors were also relevant, including concerns about "population growth, pollution, poverty, and ra[ce]." *See id*.

state regulation of abortion.[41] This framework sought to balance the competing and significant interests in the case.

According to the Court, the level of permissible state regulation of abortion increased with each trimester. The first trimester was defined as the period of time between conception and the end of the first three months of pregnancy, when a mother's risk of "mortality in abortion may be less than mortality in normal childbirth."[42] During the first trimester, a woman's right to choose whether to terminate her pregnancy was her own, informed by "the medical judgment" of her physician.[43] The second trimester was defined as the time period between three and six months of pregnancy, the end of which coincided with the potential viability of the fetus "outside the mother's womb."[44] During the second trimester, the state had a greater interest in overseeing the abortion decision and could "regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[45] In the third trimester, fetal viability became the deciding factor. At this point, the state could choose to "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[46] Applying this framework, the Court struck down the Texas statute because it failed to consider the stages of pregnancy or a woman's interests in the abortion decision.[47]

When *Roe* was decided by the Court, it affirmed the legal status of abortion in the United States. It was, however, subject to withering criticism.[48] Some states adopted legislation that pushed the boundaries of the

---

[41] *Id*. at 164–65.
[42] *Id*. at 163.
[43] *See id*. at 164.
[44] *Id*. at 163.
[45] *Id*.
[46] *Id*. at 165.
[47] *See id*. at 162–64.
[48] *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 937–43 (1973) (arguing that the Court could have used a different approach to overturn the Texas statute at issue in *Roe*). *See generally* Clarke D. Forsythe, *A Draft Opinion Overruling* Roe v. Wade, 16 GEO. J.L. & PUB. POL'Y 445 (2018) (proposing a draft opinion for overruling *Roe*); Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028 (2011) (arguing that reliance on "courts to vindicate rights is too often counter-productive"); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 377 (2007) (arguing how *Roe* "provoke[d] intense opposition" inspiring political mobilization "us[ing] every available political means to press . . . [the] courts" for judicial decisions "hostile to . . . equality of women and the separation of church and state").

trimester framework and the scope of permissible restrictions.[49] On several occasions, the Court revisited *Roe* to reconsider its position on the constitutional protections afforded to reproductive rights.[50]

Almost twenty years later, the Supreme Court affirmed *Roe*'s essential holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[51] In *Casey*, however, the Court replaced *Roe*'s trimester framework with a semester framework, using viability as the temporal divider.[52] Before viability, *Casey* established an "undue burden" standard that allowed women to make informed decisions about their reproductive rights but also allowed for some level of state regulation.[53] Such regulations were justified so long as they did not pose a "substantial obstacle" for women seeking an abortion.[54] After viability, the state interest was seen as sufficiently compelling so that it could prohibit abortion except where it was necessary to protect the life or health of the mother.[55]

Casey affirmed *Roe*'s essential holding of heightened constitutional protection for reproductive autonomy. However, it still did not end the abortion debate. States continued to push the boundaries of permissible regulation, forcing the Court to repeatedly revisit the undue burden standard.[56] These state efforts were emboldened by the Court's changing ideological composition, and the argument that reproductive rights were not entitled to heightened constitutional protection.[57] Although the Court

---

[49] *See generally* M. David Bryant, Jr., *State Legislation on Abortion after* Roe v. Wade*: Selected Constitutional Issues*, 2 AM. J.L. & MED. 101 (1976) (citing state laws passed after *Roe* which retained criminal penalties of the kind which might be impermissible under *Roe*).

[50] *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 513–21 (1989) (addressing several restrictions on abortion); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 759–60 (1986) (addressing twenty-four hour waiting period and informed consent requirements). *See generally* Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83 (1989) (arguing that *Webster* eviscerated *Roe* without overruling it).

[51] 505 U.S. 833, 846 (1992).

[52] *See id*. at 878–79.

[53] *See id*.

[54] *See id*.

[55] *See id*. at 879.

[56] *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 132 (2007) (addressing the constitutionality of the federal Partial-Birth Abortion Ban Act). *See generally* Steven G. Calabresi, *Substantive Due Process After* Gonzales v. Carhart, 106 MICH. L. REV. 1517 (2008) (discussing the *Gonzales* Court's approach to substantive due process).

[57] *See, e.g.*, *Gonzales*, 550 U.S. at 169 (Thomas, J., concurring) ("I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, has no basis in the Constitution." (citations omitted)); Hill v. Colorado, 530 U.S. 703, 741–42 (2000) (Scalia, J., dissenting) ("Having deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court

continued to uphold abortion rights in several cases, it became clear that the Court's ideological composition would determine whether reproductive autonomy would remain a privileged and protected right.[58]

In 2018, Mississippi adopted the Gestational Age Act, which prohibited most abortions after fifteen weeks.[59] In its legislative findings clause, the Act cited language from both *Roe* and *Casey* that acknowledged a state's interest in protecting the potential for human life.[60] However, the Act made no reference to the operative language from *Roe* or *Casey* protecting the right to abortion before viability. On the day the Act was signed into law, Jackson Women's Health Organization and one of its doctors filed a federal lawsuit challenging the Act and sought a temporary restraining order to enjoin its enforcement.[61] The district court granted the plaintiffs' request for injunctive relief and eventually held that the Act was unconstitutional.[62] The Fifth Circuit Court of Appeals affirmed, relying on *Roe* and *Casey*.[63] The Supreme Court then granted certiorari to address whether "all pre-viability prohibitions on elective abortions are unconstitutional."[64]

In *Dobbs v. Jackson Women's Health Organization*, the Court rejected almost fifty years of precedent to overturn both *Roe* and *Casey*.[65] Written by Justice Alito, the opinion framed its approach through both a textualist and originalist lens, finding that the Constitution contained no provisions protecting or even addressing the right to abortion.[66] Although unenumerated

---

today continues and expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong. Because, like the rest of our abortion jurisprudence, today's decision is in stark contradiction of the constitutional principles we apply in all other contexts, I dissent.").

[58] *See, e.g.*, June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103, 2133 (2020) (striking down restrictions on abortion providers); Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 591 (2016) (same).

[59] *See* MISS. CODE ANN. § 41-41-191(4)(b) (2018). The Act allowed for abortions in two limited circumstances: in a medical emergency or in the case of a severe fetal abnormality. *See id.*

[60] *See id*. § 41-41-191(2)(b)(7).

[61] *See* Richard Fausset, *Mississippi Bans Abortions After 15 Weeks; Opponents Swiftly Sue*, N.Y. TIMES (Mar. 20, 2018), https://www.nytimes.com/2018/03/19/us/mississippi-abortion-ban.html.

[62] *See* Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 545 (S.D. Miss. 2018).

[63] *See* Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 271, 277 (5th Cir. 2019).

[64] Petition for Writ of Certiorari at i, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

[65] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

[66] *See id*. Given his longstanding criticism of *Roe*, it is unsurprising that Justice Alito wrote the majority opinion. *See, e.g.*, Memorandum from Samuel A. Alito to the Solic. Gen. 9 (June 3, 1985), https://www.archives.gov/files/news/samuel-alito/accession-060-89-216/Thornburgh-v-ACOG-1985-box20-memoFriedtoAlito-June3.pdf.

rights were still subject to some constitutional protection, the Court indicated that heightened protection was only available for those rights that were "rooted in our Nation's history and tradition" and were considered "an essential component of . . . 'ordered liberty.'"[67] Despite the historical findings identified in both *Roe* and *Casey*, the Court found no such historical support for the right to abortion.[68]

The Court then addressed why stare decisis did not support upholding *Roe* and *Casey*. Although the Court recognized its value and significance, it did not view stare decisis as "an inexorable command."[69] According to Justice Alito, five factors counseled overruling *Roe* and *Casey*: "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[70] Collectively, these five factors justified ending *Roe* and *Casey* as legal precedent.[71]

The Court rejected several legal and policy concerns with its decision. It acknowledged that many Americans would disagree with its decision, yet it refused to defer to public opinion.[72] Moreover, the Court indicated that *Roe* and *Casey* had not resolved the abortion issue; they "inflamed" it and prolonged "a rancorous national controversy."[73] (Presumably, Justice Alito believes his own opinion will escape this fate.) Responding to concerns that the Court's decision could now be used to challenge other unenumerated rights, the Court attempted to portray its opinion in narrow terms, stating that its decision "concerns the constitutional right to abortion and no other right."[74] It also noted that abortion is a "unique act" and distinguishable from other rights because it implicates the termination of "potential life."[75]

Having established that abortion was not a fundamental right entitled to protection under strict scrutiny or even the undue burden standard, the Court determined that restrictions on this right were only entitled to rational basis review.[76] Under rational basis review, state action will be upheld "if there is

---

[67] *See Dobbs*, 142 S. Ct. at 2244.
[68] *See id*. at 2248–49. To bolster its historical analysis, the Court included two appendices. The first appendix listed all the state statutes criminalizing abortion that existed in 1868, which was the operative date of the Fourteenth Amendment. *See id*. at 2285–97. The second appendix listed all the statutes criminalizing abortion in the Territories that became states as well as in the District of Columbia. *See id*. at 2297–300.
[69] *See id*. at 2278.
[70] *Id*. at 2265.
[71] *See id*.
[72] *See id*. at 2278.
[73] *Id*. at 2279.
[74] *See id*. at 2277.
[75] *Id*. at 2258, 2277.
[76] *See id*. at 2283–84.

a rational basis on which the legislature could have thought that it would serve legitimate state interests."[77] The Court found several such legitimate interests, which were sufficient to justify Mississippi's legislation prohibiting abortions after fifteen weeks.[78]

In closing, the Court acknowledged that "[a]bortion presents a profound moral question."[79] Accordingly, it is a question that should be answered, not by the Constitution, but by "the people and their elected representatives."[80] The Court's decision to uphold the Mississippi statute was 6-3. Chief Justice Roberts concurred in this outcome, but he disagreed with the Court's broader decision to overturn *Roe* and *Casey*.[81] In a rare joint dissent, Justices Breyer, Kagan, and Sotomayor conveyed grave concerns with the Court's decision, its impact on women, and its potential extension to other constitutional rights.[82]

III. ZOMBIE LAWS AND TRIGGER LAWS

Roe and *Casey* reflected the "law of the land" for many years. However, the landscape of reproductive rights was far from clear. Some states never rescinded abortion laws that were contrary to the Court's explicit holdings.[83] Other states adopted laws in direct contravention of the Court's decisions.[84] Many of these laws included a juridical condition precedent—that they would go into effect only if the Court reversed *Roe* and *Casey*. Zombie laws and trigger laws share similar features. However, they are distinct.[85]

---

[77] *Id*. at 2284.

[78] These interests included: "respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability." *Id*. (citations omitted).

[79] *Id*.

[80] *Id*.

[81] *See id*. at 2310–11 (Roberts, C.J., concurring).

[82] *See id.* at 2317–19 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

[83] *See infra* text accompanying note 94.

[84] *See infra* text accompanying note 100.

[85] *See* Wasserman, *supra* note 33, at 1059–67 (describing three types of zombie laws); Berns, *supra* note 26, at 1647–50 (distinguishing trigger laws from other statutes); Alexander, *supra* note 26, at 388–93 (distinguishing revival laws and sunset laws).

A. ZOMBIE LAWS

When a law is first adopted by an authorized political body, it is placed in a designated section of the statutory code.[86] The term "zombie law" refers to legislation that has been found unconstitutional or otherwise contrary to extant law and yet still remains in the statutory code.[87] Although these laws are codified, they are unenforceable because of a judicial decision. Zombie laws exist in countless areas of law.[88]

Several legal commentators have argued that unconstitutional laws never die; they are merely dormant.[89] Because they remain codified and have not been formally rescinded by the legislature, they may become enforceable if the relevant jurisprudence changes. For example, Jonathan F. Mitchell argues that "federal courts have no authority to erase a duly enacted law from the statute books, and they have no power to veto or suspend a statute."[90] When a court finds a statute unconstitutional, he argues, this simply permits the court to decline enforcement and to enjoin officials from enforcing the statute.[91] These adverse rulings do not "str[ike] down," "nullif[y]," or

---

[86] *See* Mary Whisner, *The United States Code, Prima Facie Evidence, and Positive Law*, 101 LAW LIBR. J. 545, 545–46 (2009). *See generally* 1 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 28.2 (Norman J. Singer & J.D. Shambie Singer eds., 7th ed. 2010) ("The official record of legislative action is the enrolled bill deposited with the secretary of state. All other reproductions of the law must conform to it to claim authenticity.") [hereinafter SUTHERLAND].

[87] The term was first used in *Pool v. City of Houston*. 978 F.3d 307, 309 (5th Cir. 2020) (describing a city ordinance as a zombie law because it remained codified even though the U.S. Supreme Court had found a similar law to be unconstitutional). *See* Wasserman, *supra* note 33, at 1051. Zombie laws have also been referred to as "revival laws." *See* Alexander, *supra* note 26, at 389.

[88] *See, e.g.*, Josh Blackman, *The Irrepressible Myth of* Cooper v. Aaron, 107 GEO. L.J. 1135, 1199 (2019) (noting that the Texas statute criminalizing sodomy remains codified despite *Lawrence v. Texas*); Gabriel J. Chin, Roger Hartley, Kevin Bates, Rona Nichols, Ira Shiflett & Salmon Shomade, *Still on the Books: Jim Crow and Segregation Laws Fifty Years After* Brown v. Board of Education, 2006 MICH. ST. L. REV. 457, 457 (noting that many segregationist laws remain codified despite *Brown v. Board of Education*). *See generally* Philip K. Howard, *Obsolete Law—The Solutions*, ATLANTIC (Mar. 30, 2012), https://www.theatlantic.com/national/archive/2012/03/obsolete-law-0151-the-solutions/255141/ (proposing new structures to more efficiently clean out obsolete laws); John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. 1267 (1996) (discussing ways of correcting statutory mistakes).

[89] *See, e.g.*, Erica Frohman Plave, Note, *The Phenomenon of Antique Laws: Can a State Revive Old Abortion Laws in a New Era?*, 58 GEO. WASH. L. REV. 111, 113 (1989); Earl T. Crawford, *The Legislative Status of an Unconstitutional Statute*, 49 MICH. L. REV. 645, 651 (1951).

[90] Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936 (2018).

[91] *See id*.

"render[] 'void'" legislation.[92] Mitchell refers to this as the "writ-of-erasure fallacy."[93]

Although *Roe* limited state authority to restrict abortion, several states did not formally rescind laws that were contrary to the Supreme Court's decision. In fact, there are currently nine states with pre-*Roe* zombie laws: Alabama, Arizona, Arkansas, Michigan, Mississippi, Oklahoma, Texas, West Virginia, and Wisconsin.[94] The law of each state differs. However, they each purport to restrict or prohibit abortion altogether. If the writ-of-erasure fallacy is correct, the zombie laws of these nine states were revived by *Dobbs* and are now valid and enforceable.[95]

B. TRIGGER LAWS

The term "trigger law" refers to legislation that is adopted in anticipation of a future act. Until the condition precedent occurs, the law remains dormant. Most trigger laws explicitly include the condition precedent in the legislation.[96] Some trigger laws are immediately activated upon the occurrence of the condition precedent;[97] others are activated after a brief waiting period.[98]

As the Supreme Court began its inexorable journey to *Dobbs*, several states announced their intention to adopt trigger laws that would activate in the event *Roe* and *Casey* were overturned.[99] Upon activation by the juridical condition precedent, these laws would criminalize abortion in their jurisdictions. There are currently thirteen states with trigger laws: Arkansas,

---

[92] *Id*. at 942.
[93] *Id*. at 937.
[94] *Abortion Policy in the Absence of* Roe, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe (last visited Nov. 8, 2022) [https://perma.cc/GC3K-PRSV] [hereinafter GUTTMACHER INST.].
[95] *See, e.g.*, Paul Benjamin Linton, *Enforcement of State Abortion Statutes After* Roe*: A State-by-State Analysis*, 67 U. DET. L. REV. 157, 237 (1990).
[96] *See e.g.*, LA. STAT. ANN. § 40:1061 (2018); TENN. CODE ANN. § 39-15-213 (2019); TENN. CODE ANN. § 39-15-214 (2020); S.D. CODIFIED LAWS § 22-17-5.1 (2005); IDAHO CODE § 18-622 (2020); UTAH CODE ANN. § 76-7a-301 (2020); MO. REV. STAT. § 188.017 (2019).
[97] *See, e.g.*, S.D. CODIFIED LAWS § 22-17-5.1 (2005); UTAH CODE ANN. § 76-7a-301 (2020); MO. REV. STAT. § 188.017 (2019).
[98] *See, e.g.*, TENN. CODE ANN. § 39-15-213 (2019); TENN. CODE ANN. § 39-15-214 (2020) (activates in thirty days); IDAHO CODE § 18-622 (2020) (same).
[99] *See, e.g.*, Kate Zernike, Mitch Smith & Luke Vander Ploeg, *Oklahoma Legislature Passes Bill Banning Almost All Abortions*, N.Y. TIMES (June 25, 2022), https://www.nytimes.com/2022/05/19/us/oklahoma-ban-abortions.html; Summer Ballentine, *Missouri Governor Signs Bill Banning Abortions at 8 Weeks*, ASSOCIATED PRESS (May 24, 2019), https://apnews.com/article/80bfa84a31cb449cb5a60e1a24d7f8a7 [https://perma.cc/JAV6-C3XR].

Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming.[100]

In Louisiana, for example, the Human Life Protection Act (Act 467) was enacted in 2006 and provides:

> No person may knowingly administer to, prescribe for, or procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being. No person may knowingly use or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being.[101]

Because *Roe* and *Casey* prevented states from adopting absolute prohibitions on abortion, the Act did not take effect immediately. Instead, the Louisiana legislature indicated the Act would become effective upon the occurrence of either of the following two conditions:

> (1) Any decision of the United States Supreme Court which reverses, in whole or in part, *Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973)*, thereby, restoring to the state of Louisiana the authority to prohibit abortion.
>
> (2) Adoption of an amendment to the United States Constitution which, in whole or in part, restores to the state of Louisiana the authority to prohibit abortion.[102]

If trigger laws are viable and simply awaiting activation, *Dobbs* activated the Human Life Protection Act.

Collectively, zombie laws and trigger laws are poised to curtail reproductive rights for millions of women now that the Supreme Court has issued its opinion in *Dobbs*.[103] Although they represent distinct legal

---

[100] *See* GUTTMACHER INST., *supra* note 94.
[101] LA. STAT. ANN § 40:1299.30 (2006) (current version at LA. STAT. ANN § 40:1061(C)).
[102] *Id*. § 40:1061(A).
[103] The effective date of a Supreme Court opinion varies based on whether the case arises out of state or federal proceedings. *See* SUP. CT. R. 45. For example, a mandate shall be issued twenty-five days after entry of judgment in a case on review from a state court unless the Court shortens or extends the time. SUP. CT. R. 45(2). If the case is on review from a federal court, there is no formal mandate unless the Court requests that a mandate be issued. *See* SUP. CT. R. 45(3). Instead, the Supreme Court clerk will send a copy of the opinion and a certified copy of the judgment to the lower court. *See id. See generally* Josh Blackman, *When Does a Supreme Court Judgment Become Effective?*, VOLOKH CONSPIRACY (July 17, 2020, 5:35 PM), https://reason.com/volokh/2020/07/17/when-does-a-supreme-court-judgment-become-effective/ [https://perma.cc/3TP5-VUVE].

scenarios, zombie laws and trigger laws share several features. First, they purport to establish law based upon a future jurisprudential change—a juridical condition precedent. Second, they bind future polities with laws that have been found unconstitutional either before or after their adoption. Third, they generate criminal liability for an activity that was lawful prior to the jurisprudential change. Each of these features implicates the rule of legality.

IV. THE RULE OF LEGALITY: *NULLUM CRIMEN SINE LEGE*

The rule of legality is one of the oldest and most fundamental norms of due process and the rule of law.[104] It has been referred to as "the first principle of American criminal law jurisprudence."[105] To be valid and enforceable, a law must be duly enacted by the appropriate legislative body through established procedures.[106] When the government acts outside of its lawful and delegated authority, such acts are considered ultra vires.[107] A law that was enacted in such manner is *void ab initio*.[108] Laws that are subsequently found unconstitutional are void. The rule of legality is reflected in several principles, including the abolition of common law crimes, the prohibition of ex post facto laws, and the void-for-vagueness doctrine.[109] It can also be

---

[104] *See* Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 336 (2005); *see also* KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 14–15 (2009); Peter Westen, *Two Rules of Legality in Criminal Law*, 26 LAW & PHIL. 229, 229 (2007).

[105] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 39 (7th ed. 2015).

[106] *See* GALLANT, *supra* note 104, at 15 ("[L]egality is a requirement that the specific crimes, punishments, and courts be established legally – within the prevailing legal system.").

[107] *See* City of Arlington v. FCC, 569 U.S. 290, 297 (2013) ("Both [agencies'] power to act and how they are to act are authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires."). *See generally* Michael Sebring, Note, *Restoring the Essential Safeguard: Why the* Abbott *Test for Preclusion of Judicial Review of Agency Action Is an Inadequate Method for Protecting Separation of Powers*, 18 GEO. J.L. & PUB. POL'Y 181 (2020) (arguing that Congress may not prevent judicial review of agency actions, particularly when such actions may be ultra vires); James Barclay Smith, *Relief from Ultra Vires Governmental Action*, 42 MARQ. L. REV. 429 (1959) (discussing problematic ultra vires governmental action).

[108] *See* Gusman v. Marrero, 180 U.S. 81, 83 (1901) ("[The Act] goes far beyond the limits of legislative authority, is *ultra vires*, and absolutely null and void, and everything done under it equally null and void.").

[109] *See* Jonathan Simon, *Racing Abnormality, Normalizing Race: The Origins of America's Peculiar Carceral State and Its Prospects for Democratic Transformation Today*, 111 NW. U. L. REV. 1625, 1632 (2017); Robinson, *supra* note 104, at 337.

understood by reference to the maxim, *nullum crimen sine lege*—there is no crime in the absence of law.[110]

The rule of legality has a profound impact on zombie laws and trigger laws. Despite their eponymous names, zombie laws and trigger laws are not laws. And despite its compelling narrative, the writ-of-erasure fallacy is itself a fallacy.

A. SEPARATION OF POWERS

First, trigger laws violate the separation of powers by delegating legislative authority to the U.S. Supreme Court.[111] All legislation requires interpretation, which means all laws leave "some residuum of policymaking power" to the courts.[112] For this reason, judicial review is essential in any legal system. There is, however, a meaningful distinction between passive interpretation and active construction: "[A]t some point a line is crossed between a nuanced, interstitial job of interpreting reasonably definite statutes as applied to specific cases and a full bore assignment to the courts to create the crime in the first instance."[113]

Consider, for example, the trigger law adopted by Texas. The Human Life Protection Act (H.B. 1280) was adopted by the Texas legislature in 2021.[114] The law established criminal liability for any person who "perform[s], induce[s], or attempt[s] an abortion."[115] However, it did not take effect upon its adoption. Rather, the law provided that H.B. 1280 shall take effect on the thirtieth day after:

---

[110] *See* Beth Van Schaack, Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 121 (2008); Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 165 (1937). *See generally* Stefan Glaser, *Nullum Crimen Sine Lege*, 24 J. COMP. LEGIS. & INT'L L. 29 (1942) (discussing the origin and purpose of *nullum crimen sine lege*). The principle of *nulla poena sine lege* (there is no punishment in the absence of law) is a corollary to *nullum crimen sine lege*.

[111] SUTHERLAND, *supra* note 86, § 4:6 ("The doctrine of separation of powers does not permit a legislature to abdicate its function to the judiciary by passing statutes which operate at the discretion of the courts, or under which courts are allowed to determine conditions in which the statute will be enforced.").

[112] *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 428 (2008).

[113] Steven Wisotsky, *Can the Federal Courts Create Crimes?*, 50 CRIM. L. BULL. 1432, 1433 (2014).

[114] *See* TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (2021). Both its name and substantive provisions mimic the Louisiana abortion statute. *See supra* text accompanying notes 101–102.

[115] TEX. HEALTH & SAFETY CODE ANN. § 170A.002(a) (2021). The statute includes limited exceptions, such as situations where the abortion is necessary to protect the life of the mother or is necessary to prevent the substantial impairment of a major bodily function. *See id*. § 170A.002(b)(2).

> (1) the issuance of a United States Supreme Court judgment overruling, wholly or partly, *Roe v. Wade*, 410 U.S. 113 (1973), as modified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), thereby allowing the states of the United States to prohibit abortion;
>
> (2) the issuance of any other United States Supreme Court decision that recognizes, wholly or partly, the authority of the states to prohibit abortion; or
>
> (3) adoption of an amendment to the United States Constitution that, wholly or partly, restores to the states the authority to prohibit abortion.[116]

Essentially, Texas inserted a juridical condition precedent into the law and delegated adoption of the criminal provisions of the Act to the U.S. Supreme Court. Unlike legislation that requires a court to interpret and apply extant law, this statute empowers the Supreme Court to decide *if*, *when*, and even *how* these provisions would go into effect.[117] This represents an extraordinary degree of legislative delegation.

Not all forms of delegation are unconstitutional. Indeed, the Supreme Court has upheld many examples.[118] A key factor for assessing their legitimacy is to determine whether the delegation is accompanied by an "intelligible principle" to guide the exercise of legislative authority.[119] However, the Supreme Court has been skeptical of delegations that encroach on the separation of powers and the unique lawmaking authority of Congress.[120]

In *INS v. Chadha*, for example, the Court struck down a portion of the Immigration and Nationality Act because it granted one chamber of Congress

---

[116] Human Life Protection Act, H.B. 1280 § 3, 87th Leg., Reg. Sess. (Tex. 2021). This provision is codified in the preamble to Chapter 170A of the Texas Health & Safety Code.

[117] *Cf.* FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 879–80 (Tex. 2000) (acknowledging that legislative delegation had occurred because a statute gave private landowners authority to decide "whether, how, and to what extent" public duties applied to them).

[118] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–76 (2001); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 354–56 (6th ed. 2019).

[119] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[120] The nondelegation doctrine has historically been raised to challenge congressional delegation of legislative authority to the Executive Branch, including administrative agencies. *See, e.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 282–89 (2021); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 379 (2017); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1373–78 (2001); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000).

the authority to veto executive actions.[121] The opinion highlights the constitutional problems that arise through the transfer of clearly delineated legislative powers. Writing for the majority, Chief Justice Burger noted that efforts to bypass the fulsome features of the legislative process were inconsistent with the careful checks and balances crafted by the Framers.[122] To "preserve freedom" and "protect the people from the improvident exercise of power," legislation was meant to "be a step-by-step, deliberate and deliberative process."[123]

In *Clinton v. City of New York*, the Court considered a different form of delegation and struck down the federal Line Item Veto Act because it allowed the President to veto duly enacted laws in violation of the Presentment Clause of the Constitution.[124] Again, the Court highlighted the importance of respecting the established delineation of political authority. Citing *Chadha*, the Court noted that "the power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure.'"[125] As described by Justice Kennedy in his concurring opinion, "liberty demands limits on the ability of any one branch to influence basic political decisions."[126] Therefore, it was immaterial that Congress surrendered its own authority or that Congress could adopt a new law achieving the same outcome.[127]

Although these cases involved federal legislation and compliance with the federal constitution, the core principles conveyed in them regarding constitutional design, government structure, and the separation of powers apply with equal rigor to state laws.[128]

For example, the Texas Constitution establishes the separation of powers among the three branches of state government and prohibits the delegation of their respective powers.[129] Texas courts have indicated that the separation of powers "is well established in Texas," and its principles are informed by the

---

[121] *See* 462 U.S. 919, 928 (1983).
[122] *See id*. at 955–59.
[123] *See id*. at 957, 959.
[124] *See* 524 U.S. 417, 421 (1998).
[125] *Id*. at 439–40 (quoting *Chadha*, 462 U.S. at 951).
[126] *Id*. at 450–51 (Kennedy, J., concurring).
[127] *See id*. at 451–52.
[128] These principles have a lengthy history in both American and English political theory. *See, e.g.*, John Locke, *The Second Treatise of Government* § 141, *in* TWO TREATISES OF GOVERNMENT 408 (Peter Laslett ed., 1963) ("The *Legislative* [sic] *cannot transfer the Power of Making Laws* to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others." (emphasis in original)). In fact, many states have explicitly codified the prohibition against delegating authority between the coordinate branches of government. *See* Whittington & Iuliano, *supra* note 120, at 415.
[129] *See* TEX. CONST. art. 2, § 1.

U.S. Constitution.[130] As a result, Texas courts recognize that only the legislature may pass laws and that this "power cannot be delegated to some commission or other tribunal."[131] In fact, the Texas Legislative Council's Drafting Manual indicates that statutory references to laws that have not been enacted by the Texas Legislature "raise a question regarding whether the incorporation by reference is an unconstitutional delegation of legislative power."[132]

Like their federal counterparts, Texas courts have upheld some forms of delegation, subject to narrow constraints. Significantly, Texas courts have expressed concern with delegation to laws that did not exist at the time the delegating statute was enacted.[133] The legitimacy of legislative delegation to the judiciary is also disputed.[134] The Texas Legislative Council's Drafting Manual does not even address whether delegation through a juridical condition precedent is allowed. Although it acknowledges that incorporation by reference to statutory language may be permissible, it is silent on incorporation by reference to future judicial opinions.[135] These principles of constitutional design, government structure, and the separation of powers are not unique to Texas and can be found in other states.[136]

---

[130] *See Ex parte* Elliott, 973 S.W.2d 737, 740 (Tex. App. 1998); *see also* Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 465 (Tex. 1997).

[131] *See* Brown v. Humble Oil & Ref. Co., 83 S.W.2d 935, 941 (Tex. 1935); *see also Ex parte* Leslie, 223 S.W. 227, 227 (Tex. Crim. App. 1920) ("The power to make laws is placed by the people, through the Constitution, upon the Legislature.").

[132] TEXAS LEGISLATIVE COUNCIL, TEXAS LEGISLATIVE COUNCIL DRAFTING MANUAL 161 (2020), https://tlc.texas.gov/docs/legref/draftingmanual-87.pdf [https://perma.cc/PR9P-YR29].

[133] *See, e.g.*, *Ex parte Elliott*, 973 S.W.2d at 742 (accepting delegation but only to laws that were in existence at the time the referencing Texas statute was enacted); *see also* TEXAS LEGISLATIVE COUNCIL, *supra* note 132. *But see* BCCA Appeal Grp., Inc. v. City of Houston, 496 S.W.3d 1, 24 (Tex. 2016).

[134] *See, e.g.*, City of Houston v. Houston Pro. Fire Fighters' Ass'n, Local 341, 626 S.W.3d 1, 18 (Tex. Ct. App. 2021), *review granted* (May 27, 2022); City of Port Arthur v. Int'l Ass'n of Fire Fighters, Local 397, 807 S.W.2d 894, 898 (Tex. Ct. App. 1991); Int'l Ass'n of Firefighters, Local Union No. 2390 v. City of Kingsville, 568 S.W.2d 391, 394–95 (Tex. Ct. App. 1978).

[135] *See* TEXAS LEGISLATIVE COUNCIL, *supra* note 132, at 159–61; *see also id*. at 281 (memorandum from Mark Brown, Legal Division Director, Texas Legislative Council).

[136] *See, e.g.*, LA. CONST. art. II, § 1 ("The powers of government of the state are divided into three separate branches: legislative, executive, and judicial."); LA. CONST. art. II, § 2 ("Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others."); State v. Miller, 857 So.2d 423, 427 (La. 2003) ("Under the separation of powers doctrine, unless the constitution expressly grants an enumerated legislative power to the executive or the Legislature has enacted a statute expressly authorizing another branch to exercise its power, the executive does not have the power to perform a legislative function."); Mid-City Auto., L.L.C. v. Dep't of Pub. Safety & Corr., 267 So.3d 165, 175

Accordingly, state courts should be skeptical when legislatures delegate significant authority to other branches of government.[137] Delegation of legislative authority to the judiciary, such as through a juridical condition precedent, remains a rare occurrence and implicates separation of powers concerns.[138] These concerns are even more pronounced when they involve delegation to a different sovereign.[139] Both *Chadha* and *Clinton* involved delegation between coordinate branches of the federal government. In contrast, trigger laws involve delegation from state legislatures to the U.S. Supreme Court. There is no constraint to this delegation or "intelligible principle" to guide the Court in its legislative task.[140] In fact, constraints imposed by state legislatures would themselves give rise to separation of powers and federal supremacy challenges.[141] Finally, concerns about delegation are further heightened in the criminal law realm because "criminal conviction and sentence represent the ultimate intrusions on personal liberty

---

(La. Ct. App. 2018) ("Because of the constitutional separation of powers, delegation of legislative power, either to the people or to any other body of authority, is generally prohibited.").

[137] *See* Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1414 (2017) (discussing the applicability of nondelegation doctrine to the judiciary branch); Lemos, *supra* note 112, at 407–09; Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 46–52 (1982) (analyzing the incentives for legislators to delegate their responsibilities). *But see* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Delegation*, 69 U. CHI. L. REV. 1721, 1722, 1731 (2002) (arguing that the nondelegation doctrine is far more limited than it is perceived).

[138] Perhaps the most well-known example of legislative delegation to the judiciary involves the Rules Enabling Act. Passed by Congress in 1934, the Act authorizes the Supreme Court to make rules relating to practice and procedure in the federal courts. *See* 28 U.S.C. § 2072(a). However, it contains a significant limitation. Such rules cannot "abridge, enlarge or modify any substantive right." *Id*. § 2072(b). Notwithstanding this significant restriction, there are still colorable questions about its legitimacy. *See* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1307 (2006).

[139] In any federal system, there will inevitably be interactions between federal and state actors. However, such cross-sovereign interactions must be clearly established. *See, e.g.*, 28 U.S.C. § 1257 (authority of Supreme Court to review final judgments issued by state courts); 28 U.S.C. § 1332 (authority of federal courts to consider state claims); 28 U.S.C. § 1441(b) (removal of state actions to federal courts).

[140] *See* Mistretta v. United States, 488 U.S. 361, 372 (1989); *see also* Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 740–41 (Tex. 1995) (recognizing that delegation is permissible only if the legislature provides "reasonable standards to guide the entity to which the powers are delegated").

[141] *See generally* Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459 (2017) (addressing the value of judicial supremacy in the realm of constitutional interpretation); Hugh E. Willis, *The Doctrine of the Supremacy of the Supreme Court*, 6 IND. L.J. 224 (1931) (discussing the doctrine of judicial supremacy).

and carry with them the stigma of the community's collective condemnation."[142] In sum, state legislatures have no authority to cede their sovereign power through trigger laws. These efforts generate laws that are *void ab initio*.

The principle that laws found unconstitutional are *void ab initio* can be traced to *Marbury v. Madison*.[143] In his opinion setting forth the core features of judicial review, Chief Justice Marshall stated that "a law repugnant to the constitution is void."[144] This principle was affirmed by the Court in more forceful terms in *Norton v. Shelby County*.[145] Writing for the Court, Justice Field indicated that "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[146] This legal reasoning has also been used by state courts[147] and has been formally codified in several jurisdictions.[148]

Some commentators have argued that the *void ab initio* principle is mistaken and that courts have no authority to annul legislative pronouncements. Mitchell, for example, argues that a finding of unconstitutionality simply means that a court will "decline to enforce a statute" and that "it permits a court to enjoin executive officials" from enforcing the statute.[149] Otherwise, the statute remains in abeyance. To hold otherwise, Mitchell argues, promotes the writ-of-erasure fallacy.[150] Other scholars have made similar arguments about the limited impact of adverse rulings on a statute's existence.[151]

---

[142] *See* United States v. Nichols, 784 F.3d 666, 672–73 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of reh'g en banc), *rev'd*, 578 U.S. 104 (2016); *see also* Daniel Richman, *Defining Crime, Delegating Authority—How Different Are Administrative Crimes?*, 39 YALE J. REGUL. 304, 307 (2022).

[143] *See* 5 U.S. 137 (1803).

[144] *Id*. at 180; *see also* McCulloch v. Maryland, 17 U.S. 316, 423 (1819).

[145] *See* 118 U.S 425 (1886).

[146] *Id*. at 442.

[147] *See, e.g.*, People v. Tellez-Valencia, 188 Ill. 2d 523, 526 (Ill. 1999) (holding that a facially unconstitutional statute is deemed *void ab initio*). *But see* Charles v. Carey, 627 F.2d 772, 779 (7th Cir. 1980) (arguing that Illinois trigger provision did not express "an unlawful purpose"); Wynn v. Scott, 449 F. Supp. 1302, 1314, 1321 (N.D. Ill. 1978) (same).

[148] *See, e.g.*, GA. CONST., art. I, § II, ¶ 5(a) ("Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them."). *See also* Alexander *supra* note 26, at 400–02 (discussing how anti-abortion trigger laws conflict with nondelegation principles).

[149] Mitchell, *supra* note 90, at 936.

[150] *See id*. at 937.

[151] *See, e.g.*, Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339 (2000) ("A court has no power to remove a law from the statute books."); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759, 767 (1979) ("No matter what language is

These arguments assert that judicial decisions are temporary: "A court's constitutional pronouncements reflect only its *current* views of the Constitution and the judiciary's role in enforcing it."[152] A court may change its mind.[153] Yet, this critique proves too much.[154] If a court's constitutional pronouncements reflect only its current views, the same could be said about legislation: statutes only reflect the views of the legislatures that adopted them. If a court reverses an earlier decision interpreting a statute, there is no guarantee (or even likelihood) that its decision corresponds to the views of the *current* legislature. Rejecting the *void ab initio* principle would allow the reinstatement of laws that may not represent the will of the people and their elected representatives.[155] These concerns are multiplied in a federal system that includes fifty distinct legislatures. Instead, these renewed laws would only represent the views of the current judiciary.

Challenges to the *void ab initio* principle disregard the structural shortcomings of trigger laws. Not every legislative act is necessarily a law. Trigger laws were adopted *after* a finding of unconstitutionality and purport to impose future criminal liability through a juridical condition precedent. This methodology is antithetical to the separation of powers.[156] It is contrary to the purpose of codification, which seeks completeness in the statutory code and requires statutes to be fully formed when adopted by the designated

---

used in a judicial opinion, a federal court cannot repeal a duly enacted statute of any legislative authority."); *see also* Frohman Plave, *supra* note 89, at 116–18; Crawford, *supra* note 89, at 647–51.

[152] Mitchell, *supra* note 90, at 942 (emphasis in original).

[153] Courts are more likely to "change their mind" when there is a change in their composition. *See* Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 952 (2005).

[154] When a court's composition changes, this does not invalidate the court's prior decisions. Courts are neither required nor expected to reaffirm their prior decisions. In fact, the doctrine of stare decisis explicitly rejects such an approach. *See* Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 126; Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 789–92 (2012). *Cf.* Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 310 (2020) (describing the unique relationship between the Court's abortion jurisprudence and stare decisis).

[155] *See infra* Part IV(C).

[156] There is an intriguing connection between the separation of powers concerns implicated in the delegation of legislative authority and the vagueness doctrine. *See* Arjun Ogale, Note, *Vagueness and Nondelegation*, 108 VA. L. REV. 783, 785–86 (2022). In recent years, this connection has been highlighted by the Supreme Court. *See, e.g.*, United States v. Davis, 139 S. Ct. 2319, 2325 (2019) (The vagueness doctrine "rests on the twin constitutional pillars of due process and separation of powers."); Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018) (The vagueness "doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.").

legislative body.[157] In fact, this explains why some states explicitly require statutes to "set forth completely the provisions of the law enacted, amended, or revived."[158] Matthew Adler and Michael Dorf would argue that legislation which violates "existence conditions"—such as those that implicate the mechanisms of lawmaking—do not give rise to "laws."[159] As a result, such legislative acts would be *void ab initio*.

B. LEGISLATIVE AUTHORITY

Second, the delegation of legislative authority through trigger laws raises a related concern. Only designated government bodies are authorized to draft and adopt laws. Although the separation of powers may prevent a government body from delegating its authority, a distinct issue is whether the government body *receiving* this authority is empowered to act on it.

In Texas, for example, the Penal Code provides that "[c]onduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, order of a county commissioners court, or rule authorized by and lawfully adopted under a statute."[160] Texas courts have also indicated that the legislature alone is vested with the authority to define crimes and fix punishment for those crimes; only narrow exceptions have been recognized.[161] This highlights the flaws in the Texas Human Life Protection Act. It delegates the authority of defining the offense to the U.S. Supreme Court instead of one of the authorized government institutions identified in the Texas Penal Code. The Louisiana Criminal Code contains a similar provision, stating that "[a] crime is that conduct which is defined as criminal in this Code, or in other acts of the legislature, or in the constitution of this state."[162] Similarly, the Model Penal Code requires criminal offenses to be codified under the Code or a state statute.[163] It is conspicuously silent on other

---

[157] *See* Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 456–63 (2000).

[158] *See, e.g.*, LA. CONST. art. III, § 15(B).

[159] *See* Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1145–50 (2003). For example, the Presentment Clause of the U.S. Constitution constitutes an "existence condition," and its violation would render any ensuing law void. *Id*. at 1117–18. *Cf*. Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1941–43 (2011) (arguing that courts have the authority to strike down statutes adopted contrary to procedural lawmaking requirements).

[160] TEX. PENAL CODE ANN. § 1.03(a) (2003).

[161] *See supra* text accompanying notes 133–135.

[162] LA. STAT. ANN. tit. 14 § 7 (2006).

[163] *See* MODEL PENAL CODE § 1.05(1) (AM. L. INST. 1985) ("No conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State."); *see also* George P. Fletcher, *Dogmas of the Model Penal Code*, 2 BUFF. CRIM. L. REV. 3,

sources. In sum, courts are simply not authorized to engage in the legislative process, particularly in the criminal law realm.

In fact, trigger laws raise the specter of common law crimes, a system of law that was replaced long ago.[164] As described by Carissa Hessick, it is "incompatible with our system of divided government."[165] Indeed, "[t]he idea that courts could play a role, let alone a primary role, in deciding what conduct should be criminalized is seen as antithetical to the rule of law."[166] If common law crimes have been abolished, "it logically follows that the power of present courts to create new offenses ought to be similarly restricted."[167] This explains the motivating rationale behind the Model Penal Code—to prevent judicial lawmaking by defining offenses with sufficient scope and clarity.[168]

Trigger laws are incomplete when drafted, and they are not enforceable upon their adoption. Instead, they require the fulfillment of a juridical condition precedent to become fully formed and enforceable. This is categorically different from the classic paradigm of judicial review and statutory construction, where courts interpret extant legislation that is fully formed.[169] By delegating such extensive legislative authority to the U.S. Supreme Court, trigger laws empower the Court to create new crimes, albeit with state support. Such legislative efforts are *void ab initio*.

C. DEMOCRACY AND POLITICAL LEGITIMACY

Finally, both zombie laws and trigger laws raise broader concerns about democracy and the political process.[170] Even in abeyance, these laws have profound consequences.

Zombie laws and trigger laws chill constitutionally protected activity in several ways. They send an unmistakable message to affected individuals that

---

11 (1998) ("The Model Penal Code makes a strong commitment to the principle *nulla poena sine lege* in section 1.05(1)[.]").

[164] *See* Rogers v. Tennessee, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting) (arguing that "the notion of a common-law crime is utterly anathema today").

[165] Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 1013 (2019). To be fair, Professor Hessick argues that the shift from common law crimes to criminal statutes has its own significant shortcomings.

[166] *Id*. at 966.

[167] Robinson, *supra* note 104, at 341.

[168] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 331–32 (2007).

[169] *See* Richman, *supra* note 142, at 321; Lemos, *supra* note 112, at 421.

[170] The rule of legality implicates numerous values, including promoting respect for human rights, supporting the legitimacy and structure of democratic governance, and affirming the purposes of criminalization. *See* GALLANT, *supra* note 104, at 19–20.

their rights are precariously positioned. These silent laws "convey[] meaning about the worth and value of the regulated person or conduct."[171] Such messages can cause damage through stigma and isolation.[172] They may also cause individuals to change their behavior because they cannot rely on the certainty of the law. This may seem puzzling because these laws are inactive and unenforceable. However, studies have documented statistically significant correlations between abortion restrictions and women's decisions to undergo even lawful abortion procedures.[173]

The adverse consequences of zombie laws and trigger laws extend to the political process. For example, William Michael Treanor and Gene B. Sperling argue that political actors may decline to pursue legislation because the courts have already acted.[174] Thus, the revival of unconstitutional statutes may raise legitimacy concerns because the "very act of judicial invalidation powerfully shapes *subsequent* legislative deliberations."[175] As a result, these laws "can produce a result contrary to what the political process would have produced in the absence of the initial judicial decision."[176]

Significantly, zombie laws and trigger laws may not reflect the support of a state's citizens at the time the juridical condition precedent is fulfilled.[177] This represents their most significant flaw.[178] The lag time between adoption and activation of these laws may be years or even decades. As this lag time grows, their electoral legitimacy becomes more tenuous. Moreover, intervening developments between adoption and activation may sever any meaningful connection between these distinct temporal moments.[179] When zombie laws and trigger laws have been considered in abeyance for decades,

---

[171] *See* Brady, *supra* note 33, at 1084.
[172] *See generally* Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 BROOK. L. REV. 1555 (2016) (examining the consequences of psychological harm in standing doctrine); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement* 148 U. PA. L. REV. 1503 (2000) (addressing the nature of expressive harm).
[173] *See* Brandice Canes-Wrone & Michael C. Dorf, *Measuring the Chilling Effect*, 90 N.Y.U. L. REV. 1095, 1108 (2015).
[174] *See* William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1906 (1993).
[175] *See id*. (emphasis in original).
[176] *See id*.
[177] *See* Berns, *supra* note 26, at 1688; Alexander, *supra* note 26, at 406.
[178] *See supra* text accompanying notes 152–155.
[179] *See, e.g.*, Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 854–56 (2014) (describing "intertemporal statutory interpretation," which considers "the context in which the statute was written").

the passage of time also implicates the doctrine of desuetude, which holds that antiquated laws are no longer valid because they are no longer in use.[180]

For these reasons, Treanor and Sperling would reject the writ-of-erasure fallacy, particularly when revival of the affected statute would constrain individual liberties.[181] In these cases, "statutes that implicate individual liberty interests should be enforced only if the current majority supports them."[182] Their position builds on the work of Alexander Bickel, who argued that current majoritarian support should govern the application of the law.[183] Treanor and Sperling suggest that the argument against enforcement "is strongest when the statute has long been unenforced because of a judicial decision that held the statute unconstitutional."[184]

Of course, every statute may be challenged upon adoption, and any statute may be found unconstitutional at some future date. The problem with zombie laws is that they have already been found unconstitutional. In these cases, the political process should reset to the status quo ante—to the time before the zombie law was adopted. This would provide legislatures the opportunity to reaffirm their belief in the value of the law, thereby incurring both the associated costs and benefits of political engagement.[185] Apart from their democratic illegitimacy, zombie laws generate other problems. If zombie laws can be reactivated, they impose a significant burden on legislatures. Every year, state legislatures would need to determine whether a statute had been found unconstitutional and then adopt legislation formalizing that outcome by excising the statute from the code.[186] Such a process is inefficient and certainly unnecessary.[187]

---

[180] *See* Alexander, *supra* note 26, at 395–99; Erik Encarnación, Note, *Desuetude-Based Severability: A New Approach to Old Morals Legislation*, 39 COLUM. J.L. & SOC. PROBS. 149, 149 (2005); Mark Peter Henriques, Note, *Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws*, 76 VA. L. REV. 1057, 1059 (1990). *But see* Linda Rodgers & William Rodgers, *Desuetude as a Defense*, 52 IOWA L. REV. 1, 1–2 (1966) (rejecting desuetude as a defense).

[181] *See* Treanor & Sperling, *supra* note 174, at 1955.

[182] *Id*.

[183] *See* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 60–62 (1961); *see also* Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 30 (2003) ("[A]t least in some circumstances, involving certain kinds of human interests, a criminal law cannot be enforced if it has lost public support.").

[184] *See* Treanor & Sperling, *supra* note 174, at 1951.

[185] *See* Brady, *supra* note 33, at 1083.

[186] *See* Crawford, *supra* note 89, at 665.

[187] *See* Wasserman, *supra* note 33, at 1074–75 (discussing legislative inertia); Treanor & Sperling, *supra* note 174, at 1930. Some states have rescinded their abortion trigger laws. *See* Pub. Act. 100-0538, 100th Gen. Assemb. (Ill. 2017) (overturning the 1975 Illinois trigger law); *see also Recent Legislation,* 131 HARV. L. REV. 1836, 1836 (2018).

Trigger laws are even more problematic because they are knowingly adopted in violation of extant constitutional law. Such action would seem counter to the oath of office that legislators take to "preserve, protect, and defend the Constitution and laws of the United States."[188] Moreover, accepting the legitimacy of trigger laws would incentivize legislatures to adopt unconstitutional laws in the hope that future courts would eventually activate them.[189] They would be aided by what Guido Calabresi called the "burden of inertia" in a country "choking on obsolete statutes."[190] Such "hyperlexis" has "toxic effects upon liberty," constraining both personal and economic liberty.[191] When the Supreme Court holds that a statute is unconstitutional, there is value in finality, even in a system that allows for change.[192]

In the absence of a duly enacted law, there can be no crime and no punishment. *Nullum crimen sine lege* is the consequence for violating the rule of legality. It offers a simple yet forceful defense to prosecution under zombie laws or trigger laws.

V. CONCLUSION

In *Dobbs*, the Supreme Court indicated that the authority to regulate or prohibit abortion should be returned "to the people and their elected

---

[188] *See* TEX. CONST. art. 16, § 1; LA. CONST. art. 10 § 30 (1974) ("Every official shall take the following oath or affirmation: 'I, ..., do solemnly swear (or affirm) that I will support the constitution and laws of the United States and the constitution and laws of this state . . . .'").

[189] Trigger laws reflect an albeit weakened form of legislative entrenchment, which is seen as contrary to democratic principles. *See generally* John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773 (2003) (arguing that legislative entrenchment poses significant challenges to democratic governance); Stewart E. Sterk, *Retrenchment on Entrenchment*, 71 GEO. WASH. L. REV. 231 (2003) (arguing against legislative entrenchment). *But see* Eric A. Posner & Adrian Vermeule, *Legislative Retrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002) (arguing that legislative entrenchment is both constitutionally permissible and appropriate).

[190] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 164, 169 (1982); *see also* Treanor & Sperling, *supra* note 174, at 1942.

[191] *Cf.* Mila Sohoni, *The Idea of "Too Much Law,"* 80 FORDHAM L. REV. 1585, 1626–27 (2012) (challenging the argument that there are too many laws). *See generally* Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977) (coining the term "hyperlexis" and arguing that there are too many laws in the United States).

[192] *See* Daniel A. Farber, *The Importance of Being Final*, 20 CONST. COMMENT. 359, 360 (2003) ("*Precedential supremacy* means that government officials should treat settled judicial doctrine as binding precedent even when their actions are not subject to judicial review." (emphasis in original)).

representatives."[193] In fact, the Court repeated this specific phrase throughout its opinion.[194] Yet, state use of zombie laws and trigger laws to prohibit and criminalize abortion is contrary to due process and the rule of law. Zombie laws are void. Trigger laws are *void ab initio*.

If there are any doubts about the legitimacy of zombie laws or trigger laws, states should be obligated to enact new legislation affirming the prohibition on abortion.[195] Given the profound consequences of these laws, such action would be consistent with the Court's stated desire to show deference "to the people and their elected representatives."[196]

And yet, there is a final irony in the Court's opinion. Returning the difficult decision of whether to terminate a pregnancy "to the people" should really mean returning it to the one person who is most directly affected by this decision—the pregnant person.

---

[193] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2259 (2022). Although deferring to the legislative and electoral process has credence in any democratic system, its call rings hollow when it is offered by a Court that has systemically undermined voting rights, particularly for people of color. *See* Sherrilyn Ifill, *Stealing the Crown Jewels*, N.Y. REV. BOOKS (May 12, 2022), https://www.nybooks.com/daily/2022/05/12/stealing-the-crown-jewels-ifill-roe/ [https://perma.cc/LAP6-VZP6].

[194] *See, e.g.*, *Dobbs*, 142 S. Ct. at 2259, 2279, 2284. The Court also referenced the need to return this issue to "the people's elected representatives" on three occasions. *Id*. at 2243, 2247, 2257. This would allow Congress to adopt federal restrictions on abortion rights. In fact, such laws have already been passed, and *Dobbs* may embolden politicians to adopt even more restrictive legislation. *See* Jessica Arons, *To See the Future of* Roe*, Look to the States*, ACLU (May 11, 2022), https://www.aclu.org/news/reproductive-freedom/to-see-the-future-of-roe-look-to-the-states [https://perma.cc/Q5TR-782P]; Caroline Kitchener, *The Next Frontier for the Antiabortion Movement: A Nationwide Ban*, WASH. POST (May 2, 2022, 10:54 PM), https://www.washingtonpost.com/nation/2022/05/02/abortion-ban-roe-supreme-court-mississippi/. Of course, the reverse is also true. Congress could adopt legislation protecting abortion rights.

[195] *See* Alexander, *supra* note 26, at 391; Treanor & Sperling, *supra* note 174, at 1917.

[196] *See Dobbs*, 142 S. Ct. at 2259. Yet, the meaning of "the people" is far from clear. *See generally* Mila Versteeg, *Unpopular Constitutionalism*, 89 IND. L.J. 1133 (2014) (discussing the weak link between a nation's constitutional choices and the values of its citizens); Neal Devins, *The D'Oh! Of Popular Constitutionalism*, 105 MICH. L. REV. 1333 (2007) (arguing that most U.S. citizens are uninterested in the Constitution).