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## Denouncing the Revival of Pre-Roe v. Wade Abortion Bans in A Post-Dobbs World Through the Void Ab Initio and Presumption of Validity Doctrines

Nora Greene

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# DENOUNCING THE REVIVAL OF PRE-ROE V. WADE ABORTION BANS IN A POST-DOBBS WORLD THROUGH THE VOID *AB INITIO* AND PRESUMPTION OF VALIDITY DOCTRINES

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I. INTRODUCTION

The United States Supreme Court voted to overturn *Roe v. Wade* in a leaked draft of *Dobbs v. Jackson Women’s Health Organization*.<sup>1</sup> Written by Justice Alito and joined by four of the other conservative justices, the decision describes *Roe* as “egregiously wrong from the start” and blatantly overrules the landmark holding and its prodigy, *Planned Parenthood v. Casey*.<sup>2</sup> In their state codes, nine states—Alabama, Arizona, Arkansas,

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1. See Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 02:14 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> (stating in the draft opinion, “[w]e hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . .”).

2. See Gerstein, *supra* note 1 (noting that Justice Clarence Thomas, Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett joined the draft opinion); See also *Roe v. Wade*, 410 U.S. 113, 153, 160, 164–65 (1973), *holding modified by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 917–18 (1992) (finding that the right to privacy encompasses a woman’s decision on whether or not to terminate her pregnancy and

Michigan, Mississippi, Oklahoma, Texas, West Virginia, and Wisconsin—have unrepealed criminal abortion bans enacted before *Roe*.<sup>3</sup> These bans prohibit abortion at any point in pregnancy unless to preserve the life of the pregnant person<sup>4</sup> and apply criminal penalties to any person that induces or attempts to induce an abortion.<sup>5</sup> These criminal penalties range from as lenient as a \$100 fine to as severe as ten years in prison.<sup>6</sup>

As numerous media outlets are now reporting, overruling *Roe* could revive these nearly-century-old abortion bans and disrupt the bodily autonomy of millions of Americans.<sup>7</sup> Even some legal scholars contend that if *Roe* were overturned, pre-*Roe* bans could be enforced without subsequent legislative enactment or “automatically rev[ived].”<sup>8</sup> However, these arguments fail to consider case law regarding the void *ab initio* and the presumption of validity

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holding that states may not prohibit abortions before viability—typically around twenty-eight weeks).

3. See generally Elizabeth Nash & Lauren Cross, *26 States Are Certain or Likely to Ban Abortion Without Roe: Here’s Which Ones and Why*, GUTTMACHER INST. (Apr. 19, 2022), <https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why> (listing which states have pre-*Roe* bans).

4. Note: To recognize that nonbinary people and trans men can become pregnant or have abortions, I will use nonbinary pronouns throughout this Comment.

5. See, e.g., OKLA. STAT. ANN. tit. 21, § 861 (1910) (providing that “[e]very person who administers to any woman, or who prescribes for any woman, or advises or procures any woman to take any medicine . . . or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life shall be guilty of a felony punishable by imprisonment” for two to five years in prison).

6. Compare ALA. CODE § 13A-13-7 (1852) (“[perpetrators] shall on conviction be fined not less than \$100.00 nor more than \$1,000.00”), with W. VA. CODE ANN. § 61-2-8 (1848) (“[perpetrators] upon conviction, shall be confined in the penitentiary not less than three nor more than ten years.”).

7. See, e.g., Kate Wells, *A Michigan Law From 1931 Would Make Abortion a Felony if Roe Falls*, NPR (May 7, 2022, 5:00 AM), <https://www.npr.org/sections/health-shots/2022/05/07/1097205107/a-michigan-law-from-1931-would-make-abortion-a-felony-if-roe-falls> (discussing how Michigan’s pre-*Roe* ban could be revived if *Roe* falls).

8. See 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, 359, 368-69 (1991) (conceding that the current legal system presumes statutes on the books are legitimate and enforceable until formally repealed); William M. Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of “Unconstitutional” Statutes*, 93 COLUM. L. REV. 1902, 1910-15 (1993) (illustrating courts’ preferences for automatically reviving statutes).

doctrines.<sup>9</sup> These legal doctrines define the point at which a statute held to be unconstitutional ceases to be enforceable, i.e., from the date of legal enactment (void *ab initio*) or from the judicial decision which invalidated the law (presumption of validity).<sup>10</sup>

This Comment argues that pre-*Roe* abortion bans cannot be automatically enforced if the Supreme Court ultimately overturns *Roe* by analyzing these bans under the void *ab initio* and presumption of validity doctrines.<sup>11</sup> This Comment will imagine a world where a state wishes to enforce its pre-*Roe* abortion ban as it exists by arguing *Dobbs* “revived” the statute.<sup>12</sup> Note that this Comment does not consider the constitutionality or validity of “trigger bans,” which are statutes designed to automatically ban abortion if *Roe* is overturned.<sup>13</sup>

Part II of this Comment introduces the presumption of validity and void *ab initio* doctrines.<sup>14</sup> Part III analyzes pre-*Roe* bans under these doctrines and argues that reliance on *Roe v. Wade*, criminalizing abortion, and the separation of powers between the legislative and judicial branches show pre-*Roe* prohibitions cannot be enforced without subsequent legislative action.<sup>15</sup> Part IV recommends preventing pre-*Roe* bans from being enforced at all by expressly repealing the bans.<sup>16</sup> Finally, Part V concludes that pre-*Roe* bans

9. See generally Erica Frohman Plave, *The Phenomenon of Antique Laws: Can a State Revive Old Abortion Laws in a New Era?*, 58 GEO. WASH. L. REV. 111, 114–15, 118–19 (1989) (describing the void *ab initio* and presumption of validity doctrines and attributing the doctrines to Oliver P. Field’s *Effect of an Unconstitutional Statute*, written in 1926).

10. See *id.* at 114–16, 118–21 (defining the void *ab initio* and presumption of validity doctrines in detail).

11. See *infra* Part III (arguing that both doctrines weigh against reviving pre-*Roe* bans).

12. See *Weeks v. Connick*, 733 F. Supp. 1036, 1037 (E.D. La. 1990) (exemplifying a state attempting to revive a pre-*Roe* ban after the Supreme Court’s holding in *Webster v. Reproductive Health Services*. The plaintiffs argued to dissolve the injunction against Louisiana’s criminal abortion ban because *Webster* had substantially changed “the decisional law upon which [the] court based its injunction”).

13. See generally Heidi S. Alexander, *The Theoretic and Democratic Implications of Anti-Abortion Trigger Laws*, 61 RUTGERS L. REV. 381, 383–84 (2008–2009) (describing constitutional arguments against state trigger bans).

14. See *infra* Part II(B) (introducing the presumption of validity doctrine and void *ab initio* doctrines).

15. See *infra* Part III (arguing that under either doctrine pre-*Roe* bans cannot be automatically revived).

16. See *infra* Part IV (recommending pre-*Roe* bans be expressly repealed and

cannot be enforced without reenactment by the state legislature.<sup>17</sup>

## II. BACKGROUND

### A. Summarizing Pre-Roe Bans and Attempts at Revival

Most states have expressly repealed their pre-*Roe* bans.<sup>18</sup> The nine pre-*Roe* bans that remain are antiquated—some are over one hundred years old—and do not reflect the significant social, political, and technological changes that have occurred in the decades since *Roe*.<sup>19</sup> Some states with pre-*Roe* bans have successfully enacted pre-viability abortion bans that have very narrow health exceptions for the pregnant person, illustrating that some of these states will prohibit abortion as early in pregnancy as possible.<sup>20</sup>

States have previously attempted to revive pre-*Roe* bans.<sup>21</sup> In 1989, in *Weeks v. Connick*, the District Attorney (“D.A.”) of New Orleans moved to enforce Louisiana’s pre-*Roe* abortion ban by trying to dissolve the injunction against it.<sup>22</sup> D.A. Connick argued the Supreme Court’s decision in *Webster v. Reproductive Health Services* changed the legal basis for the injunction against the criminal abortion bans.<sup>23</sup> He argued the injunction should be

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declared unenforceable by state Attorney Generals via precedent in *Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. 1952)).

17. See *infra* Part V (concluding both doctrines weigh against automatic revival, thus pre-*Roe* bans cannot be enforced without subsequent legislative action after *Dobbs*).

18. See Nash & Cross, *supra* note 3 (listing that only nine states have pre-*Roe* bans still on the books).

19. See, e.g., OKLA. STAT. ANN. tit. 21, § 861 (West 1910) (enacting Oklahoma’s pre-*Roe* ban in 1910); ALA. CODE § 13A-13-7 (1852) (enacting Alabama’s pre-*Roe* ban in 1852); WIS. STAT. § 940.04 (1849) (enacting Wisconsin’s pre-*Roe* ban in 1849); W. VA. CODE ANN. § 61-2-8 (1848) (enacting West Virginia’s pre-*Roe* ban in 1848).

20. See generally *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (May 3, 2022), <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions> (illustrating that Alabama, Arkansas, Oklahoma, West Virginia, and Wisconsin have enacted twenty-two weeks bans; Texas’s six-weeks ban is still in effect; Arizona’s twenty-weeks ban is permanently enjoined).

21. See *Weeks v. Connick*, 733 F. Supp. 1036, 1037 (E.D. La. 1990) (rejecting plaintiffs’ attempt to revive Louisiana’s criminal abortion statutes); see also *Zimmerman v. City of Austin*, 620 S.W.3d 473, 476 (Tex. Ct. App. 2021) (rejecting plaintiff’s argument that Texas’s unconstitutional pre-*Roe* abortion ban should prevent the City of Austin from creating an abortion access fund).

22. See *Weeks*, 733 F. Supp. 1036, 1037 (rejecting plaintiffs’ attempt to revive Louisiana’s criminal abortion statutes).

23. See *id.* (illustrating plaintiffs attempted to revive three Louisiana criminal

removed so the State's criminal abortion laws could be enforceable.<sup>24</sup> Though the court rejected these arguments, *Weeks* demonstrates the significance of existing pre-*Roe* bans and that state prosecutors will likely attempt to enforce pre-*Roe* bans after *Dobbs*.<sup>25</sup>

*B. The Doctrines Defining the Status of an Unconstitutional Statute*

To prevent confusion, it is worth restating the scenario at issue and defining the terms used in this Comment before introducing the presumption of validity and void *ab initio* doctrines. Erica Frohman Plave described the scenario in *The Phenomenon of Antique Laws: Can a State Revive Old Abortion Laws in a New Era?*:

State *A* and State *B* enact and enforce similar or identical statutes restricting abortion. The Supreme Court holds State *B*'s statute unconstitutional. State *A* and State *B* refrain from enforcing their statutes [but do not formally remove the statutes from their respective state codes]. Then the Supreme Court overrules its prior decision. State *A* and State *B* now wish to enforce their abortion statutes as they exist on their respective statute books.<sup>26</sup>

For clarity, hereinafter, this Comment will refer to the first judicial ruling as the “invalidating decision” (holding the State *B*'s statute unconstitutional) and the subsequent ruling as the “overruling decision” (overruling the decision that held State *B*'s statute unconstitutional).<sup>27</sup> This Comment will also refer to this scenario as the “revival scenario” because States *A* and *B* are attempting to “revive” or “resurrect” their state statutes.<sup>28</sup> Finally, note that this Comment includes cases that involve state constitutional

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abortion laws, including a blanket prohibition on abortions and a prohibition of the advertisement of abortion services).

24. See *id.* (arguing that *Webster*'s holding had “significantly changed the decisional law upon which this court based its injunction” on the Louisiana pre-*Roe* criminal abortion laws).

25. See *id.* at 1039–40 (finding “no significant change” which the court relied in issuing the injunction of Louisiana's pre-*Roe* ban and that subsequent abortion regulations had implicitly repealed Louisiana's pre-*Roe* ban); see also *Zimmerman*, 620 S.W.3d at 485–86 (affirming that *Roe* expressly held the Texas criminal abortion statute unconstitutional).

26. Plave, *supra* note 9, at 111 (laying out this structure and clarifying the scenario at issue).

27. See Treanor & Sperling, *supra* note 8, at 1903 (coining the phrases “invalidating” decision and “overruling” decision in this context).

28. See Plave, *supra* note 9, at 115 (using the term “revive” to describe a once-invalid statute that is enforceable after the decision invalidating the law is overturned).

amendments instead of statutes because the fact pattern is substantially similar.<sup>29</sup>

### 1. *Presumption of Validity: Void from the Invalidating Decision*

Under the presumption of validity doctrine, a statute found unconstitutional is inoperative from the decision that held it unconstitutional.<sup>30</sup> Guided by this theory, courts have absolved parties of liability that acted under the authority of a statute later deemed unconstitutional, such as an officer making a legal arrest based on a statute later found unconstitutional or holding municipal bond readjustments valid because the municipality's bond obligations were adjusted based on a statute that was valid at the time.<sup>31</sup> However, courts have come out differently in the revival scenario on whether a once-invalidated statute may be revived without subsequent legislative action after the invalidating decision is overruled.<sup>32</sup>

### 2. *Void ab Initio: Void from Enactment*

Under the void *ab initio* doctrine, a statute found unconstitutional is inoperative from its enactment.<sup>33</sup> Courts utilizing this doctrine have held parties liable for actions they took on a once-valid statute later found unconstitutional, such as repaying taxes collected under a statute valid at the

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29. See *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 624 (Miss. 1991) (involving the revival of a state constitutional amendment); *State v. Yothers*, 659 A.2d 514, 514 (N.J. Super. Ct. App. Div. 1995) (involving whether a newly enacted state constitutional amendment revived a capital punishment statute).

30. See *Plave*, *supra* note 9, at 118–19 (stating that “application of the presumption of validity theory means that an act declared unconstitutional is inoperative only from the time of the decision”).

31. See *Yekhtikian v. Blessing*, 157 A.2d 669, 670–71 (R.I. 1960) (absolving the police officer from liability for an arrest that was legal at the time of the arrest, although the statute which made the arrest legal was found unconstitutional after the arrest); *Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374–75 (1940) (holding petitioner's readjusted bond debt enforceable).

32. Compare *Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. 1952) (holding a D.C. minimum wage law was revived after the overruling decision), with *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 627 (Miss. 1991) (refusing to overturn the invalidating decision because doing so would revive the state constitutional amendment at issue).

33. See *Plave*, *supra* note 9, at 114, 117 (noting that the term is Latin for “void from the beginning”).



time of collection but later deemed unconstitutional.<sup>34</sup> In the revival scenario, the void *ab initio* doctrine does not allow a previously unconstitutional statute to be “revived” after the invalidating decision is overruled, and legislative reenactment is required for the statute to be enforceable.<sup>35</sup>

*C. Both Doctrines Consider Reliance on the Statute, Whether the Law is Criminal in Nature, and the Separation of Powers Between the Legislature and the Judiciary*

There is no definitive rule to determine which of these doctrines to use, and courts have generally applied the theories inconsistently.<sup>36</sup> Thus, analyzing the courts’ factors under each doctrine is imperative.<sup>37</sup> Under both doctrines, courts consider how parties have relied on the invalidating decision, whether the law is criminal or civil, and the separation of powers.<sup>38</sup>

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34. See *Dennison Mfg. Co. v. Wright*, 120 S.E. 120, 124 (Ga. 1923) (requiring the State Comptroller to pay back taxes collected against the plaintiff); see also *Smith v. Costello*, 290 P.2d 742, 743–44 (Idaho 1955) (holding a conservation officer liable for damages for shooting the plaintiffs’ dogs on-site under a law that allowed him to do so, but which was later declared unconstitutional).

35. See *State v. Yothers*, 659 A.2d 514, 520 (N.J. Super. Ct. App. Div. 1995) (refusing to ‘revive’ a statute that widened the offenses for capital punishment without amending or reenacting the statute); *State v. Hodge*, 941 N.E.2d 768, 775 (Ohio 2010) (refusing to revive sentencing statute).

36. See *Blankenship v. Minton Chevrolet, Inc.*, 266 S.E.2d 902, 904 (W. Va. 1979) (concluding that there is no rule determining the status of an unconstitutional statute and courts have applied both doctrines inconsistently); Plave, *supra* note 9, at 113 (concluding courts have not applied one particular theory).

37. See *Perkins v. Eskridge*, 366 A.2d 21, 27 (Md. 1976) (considering the void *ab initio* and presumption of validity doctrines as a prelude to the court’s analysis).

38. See generally *State v. Hodge*, 941 N.E.2d 768, 775–76 (Ohio 2010) (refusing to revive the statute at issue because it would disrupt thousands of people who had “justifiably relied” on the invalidating decision; there was no precedent to suggest to the Ohio legislature that “a statute that has been held unconstitutional” by the court and “that has never been repealed by that body may be automatically and suddenly revived through a later court decision”); *Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. 1952) (reviving a D.C. minimum wage law because separation of powers dictates that the judiciary cannot void a law completely after an overruling decision because otherwise the judiciary infringes on the power of the legislature).

### 1. *Reliance on the Invalidating Decision*

#### a. *Presumption of Validity*

In the revival scenario, in which the initial decision (the invalidating decision) that invalidated the law of State *B* is overruled (the overruling decision), courts using the presumption of validity doctrine have held inconsistently on whether the law at issue may be enforced without subsequent legislative reenactment.<sup>39</sup> These cases consider reliance on the invalidating decision and consider whether reviving the law of State *B* infringes on substantive rights.<sup>40</sup>

For example, in the Iowa Supreme Court decision *McCullum v. McConaughy*, the defendant solicited liquor across state lines.<sup>41</sup> The State argued that the solicitation law, which had been held unconstitutional, was “revived” by a U.S. Supreme Court decision that upheld a similar liquor solicitation law in another state.<sup>42</sup> The Iowa Supreme court agreed with the State and held that the defendant was not “affected by the decree, save the prevention of the soliciting or taking of such orders,” and no “vested right to property” had been infringed.<sup>43</sup> Thus, the defendant could not use reliance on the previous State court decision as a defense.<sup>44</sup> Compare this case with the Mississippi Supreme Court’s decision in *State ex rel. Moore v. Molpus*, where the plaintiffs challenged an old Mississippi Supreme Court decision

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39. Compare *McCullum v. McConaughy*, 119 N.W. 539, 541 (Iowa 1909) (holding an unconstitutional statute revived by the overruling decision), with *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 633 (Miss. 1991) (refusing to revive a state constitutional amendment because, among other reasons, the state legislature and citizens had relied on the precedent of the invalidating decision).

40. See *Molpus*, 578 So. 2d at 633 (analyzing both citizens’ and the legislature’s reliance on *Power v. Robertson*, the invalidating decision); *Jawish*, 86 A.2d at 97 (analyzing reliance on *Adkins v. Children’s Hospital*, the invalidating decision); *McCullum*, 119 N.W. at 541 (analyzing reliance on the liquor solicitation law invalidated in *State v. Hanaphy*).

41. See *McCullum*, 119 N.W. at 541 (overruling *State v. Hanaphy*, reviving the liquor solicitation statute, and holding the defendant liable for the charge).

42. See *id.* at 540 (arguing that the Supreme Court case *Delamater v. South Dakota*, 205 U.S. 93 (1907), had revived the liquor solicitation law invalidated in *State v. Hanaphy*, 90 N.W. 601 (Iowa 1902)).

43. See *id.* at 541 (overturning the court’s previous decision and affirming the charge against the defendant).

44. See *id.* (“It is plain, therefore, that defendant had acquired no right in reliance on our previous decisions in the nature of a vested right to property.”).

which invalidated a state constitutional amendment.<sup>45</sup> The court somewhat agreed with the plaintiff's argument to overturn the old decision but refused to overturn it because the constitutional amendment at issue would "without question" be "enforceable immediately."<sup>46</sup> The court reasoned that "weighty considerations of finality" of sixty-eight years of precedent outweighed reviving the constitutional amendment.<sup>47</sup> Thus, the court held reviving the amendment at issue was too consequential to justify revival.<sup>48</sup>

*b. Void ab Initio*

In the revival scenario, the void *ab initio* doctrine analyzes reliance on the invalidating decision as well, but courts using it have rejected the revival of the statute.<sup>49</sup> In *State v. Hodge*, the Ohio Supreme Court expressly rejected reviving the state's concurrent sentencing statute at issue.<sup>50</sup> The court refused to overrule the invalidating decision, *State v. Foster*, even after the U.S. Supreme Court repudiated *Foster's* reasoning in a subsequent case concerning a similar law in a different state.<sup>51</sup> The court reasoned that overturning its previous decision and reviving the sentencing statute invalidated in *Foster* would disrupt thousands of "defendants, prosecutors, judges, and victims of criminal activity" who had "justifiably relied" on the

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45. See *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 627–30 (Miss. 1991) (rejecting plaintiffs' attempt to overturn *Power v. Robertson*, who hoped to revive the Initiative and Referendum Amendment ("I & R") of the Mississippi Constitution so that citizens could vote on repealing the State's ban on lotteries).

46. See *id.* at 633, 638 (reasoning that the state legislature and citizens know how to amend their Constitution and could revive the I & R amendment according to current processes).

47. See *id.* at 633, 635, 638 (conceding that the invalidating decision may have been decided incorrectly but refusing to overturn it because resurrecting the I & R Amendment of the Mississippi Constitution would be too extreme).

48. See *id.* at 636 (emphasizing that there have been no adverse or harmful effects from the invalidating decision, thus there are no good reasons to overturn it even if the decision was incorrectly decided).

49. See *State v. Hodge*, 941 N.E.2d 768, 775–76 (Ohio 2010) (refusing to revive an Ohio criminal sentencing statute); *State v. Yothers*, 659 A.2d 514, 519–20 (N.J. Super. Ct. App. Div. 1995) (refusing to revive a statute that allowed capital punishment to be imposed for "purposely or knowingly causing serious bodily injury resulting in death.").

50. See *Hodge*, 941 N.E.2d at 775–76 (rejecting other jurisdictions' decisions to revive statutes because "those decisions are necessarily based on the factual contexts of the situations before them").

51. See *id.* at 768–70, 773 (admitting that the reasoning used in *Foster* was repudiated in *Oregon v. Ice* in which the U.S. Supreme Court upheld a similar criminal sentencing statute enacted in Oregon).

invalidating decision.<sup>52</sup> In *State v. Yothers*, the Superior Court of New Jersey rejected the State’s argument that a newly enacted state constitutional amendment “revived” New Jersey’s old capital punishment sentencing statute and should be imposed on the defendant.<sup>53</sup> The court held the amendment did not revive the statute because it would be “abhorrent” to sentence the defendant to capital punishment “merely to preserve strict legal principles of construction.”<sup>54</sup>

## 2. *Criminal Nature of the Statute*

### a. *Presumption of Validity*

Typically, when a criminal law is held unconstitutional, individuals prosecuted under that law are absolved of liability because prosecuting someone under a no longer valid law is unfair and may violate the Due Process Clause of the Fifth and Fourteenth Amendments.<sup>55</sup> Courts typically do not use the presumption of validity doctrine for criminal laws.<sup>56</sup> In almost all of the presumption of validity cases in which the law at issue was “revived” and enforceable without subsequent legislative action, the law was civil.<sup>57</sup>

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52. See *id.* at 776 (holding that potentially resentencing thousands of defendants and reliance on the invalidating decision by the criminal justice system outweighed revival).

53. See *Yothers*, 659 A.2d at 520 (rejecting the State’s argument that the newly ratified constitutional amendment could revive the State’s old criminal sentencing statute and holding the State could not impose the death penalty on the defendant).

54. See *id.* at 518 (holding the defendant could not be sentenced to death under the old sentencing statute, nor the State’s newly amended criminal sentencing statute since the defendant was convicted before the statute was enacted). *But see* *State v. Cooper*, 700 A.2d 306, 331 (N.J. 1997) (agreeing with the *Yothers* dissent that “no implementing legislation was required to effectuate the constitutional amendment”).

55. See U.S. CONST. amends. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law”); XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”).

56. See *cf.* *Blankenship v. Minton Chevrolet, Inc.*, 266 S.E.2d 902, 904 (W. Va. 1979) (explaining that “the reliance interest on the part of those adversely affected” is different between criminal and civil statutes). *But see* *People v. Holmes*, 90 N.E.3d 412, 421-22 (Ill. 2017) (holding that an invalidated criminal statute could not retroactively invalidate probable cause).

57. See *Jawish v. Morlet*, 86 A.2d 96, 96 (D.C. 1952) (minimum wage law); *Christopher v. Mungen*, 55 So. 273, 280 (Fla. 1911) (land inheritance); *McCollum v. McConaughy*, 119 N.W. 539, 540 (Iowa 1909) (solicitation of liquor); *Pierce v. Pierce*, 46 Ind. 86, 86-87 (1874) (inheritance).

*b. Void ab Initio*

The void *ab initio* doctrine rejects reviving criminal statutes or statutes involving criminal procedure because the doctrine voids the statute from enactment.<sup>58</sup> A state may not enforce the statute even if a judicial decision is overruled.<sup>59</sup> For instance, in *State v. Hodge*, the Ohio Supreme Court refused to revive a concurrent prison sentencing statute, and in *State v. Yothers*, the Superior Court of New Jersey declined to revive the State's capital punishment statute.<sup>60</sup> As the Illinois Supreme Court in *People v. Gersch* explained, the void *ab initio* doctrine "is especially appropriate . . . in the area of criminal prosecution" because prosecutors should not have the ability to convict a defendant under an invalid law.<sup>61</sup>

3. *The Doctrines Have Different Interpretations of the Separation of Powers Between the Legislature and Judiciary*

*a. Presumption of Validity*

The presumption of validity doctrine considers the separation of powers between the legislature and judiciary.<sup>62</sup> The doctrine maintains that a state may enforce a statute once the invalidating decision is overturned because

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58. See *State v. Hodge*, 941 N.E.2d 768, 776 (Ohio 2010) (rejecting revival of a criminal statute); *Yothers*, 659 A.2d at 520 (rejecting revival of a criminal statute); see also *Horsley v. State*, 160 So. 3d 393, 395 (Fla. 2015) (rejecting revival of a criminal statute); *Holmes*, 90 N.E.3d at 422 (Kilbride, J., dissenting) ("[W]hile we have occasionally permitted a somewhat more relaxed, equitable application of the void *ab initio* doctrine in civil cases, we have adhered to its strict application in criminal matters for decades.").

59. *People v. Gersch*, 553 N.E.2d 281, 288 (Ill. 1990) (remanding the defendant's conviction because he was sentenced under a statute found unconstitutional shortly after his conviction and declaring that there is a duty to "correct the wrongs" against the defendant and hold "such a legislative act void").

60. See *Hodge*, 941 N.E.2d at 776 (refusing to revive an Ohio criminal sentencing statute); *Yothers*, 659 A.2d at 520 (refusing to revive a statute that allowed capital punishment to be imposed for "purposely or knowingly caus[ing] . . . 'serious bodily injury resulting in death'").

61. *Gersch*, 553 N.E.2d at 288 ("[W]e believe the principle of treating similarly situated defendants alike comports with our rule that no one can be prosecuted under an unconstitutional statute, particularly after a court has declared that statute unconstitutional.") (citations omitted).

62. See *Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. 1952) (void *ab initio* doctrine is equivalent to the judiciary "repeal[ing]" laws); *Christopher v. Mungen*, 55 So. 273, 280 (Fla. 1911) (concluding the state legislature intended for the inheritance law at issue to be revived).

keeping the statute void is equivalent to repealing a law.<sup>63</sup> For instance, in *Jawish v. Morlet*, the D.C. Court of Appeals ruled that the U.S. Supreme Court decision, *West Coast Hotel Company v. Parrish*, revived the D.C. minimum wage law that the Supreme Court previously invalidated in *Adkins v. Children's Hospital*.<sup>64</sup> The court declared that since the minimum wage law remained on the books and “courts have no power to repeal or abolish a statute,” the law was enforceable without reenactment by Congress.<sup>65</sup>

*b. Void ab Initio*

The void *ab initio* doctrine also considers the separation of powers but interprets the judiciary's power differently than the presumption of validity doctrine.<sup>66</sup> In *People v. Gersch*, the Illinois Supreme Court reconciled the judiciary's ability to void laws with the legislature's power to repeal laws by reasoning a facially unconstitutional law deserves to be rendered void *ab initio*.<sup>67</sup> The court argued the void *ab initio* doctrine is an appropriate measure against a facially unconstitutional law that “suddenly cuts off” guaranteed rights of citizens.<sup>68</sup> The same court in *People v. Carrera* held that void *ab initio* doctrine prevents “a grace period” in which citizens are “subject to extraterritorial arrests without proper authorization.”<sup>69</sup> Similarly,

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63. See *Gersch*, 553 N.E.2d at 287 (summarizing the presumption of validity doctrine's concept that judges “discover” the law; they do not “create” it and that an unconstitutional statute remains a legislative act and is merely unenforceable rather than void or nonexistent).

64. See *Jawish*, 86 A.2d at 97 (concluding that *Adkins* “did not repeal or abolish the District of Columbia Minimum Wage law and when the effect of [*Adkins*] was removed by [*West Coast Hotel*], the law was effective without re-enactment by Congress”).

65. See *id.* at 96 (noting that the U.S. Attorney General issued an opinion following *West Coast Hotel* saying Congress did not need to reenact the law for it to be enforceable); see also *People v. Holmes*, 90 N.E.3d 412, 415, 422 (Ill. 2017) (stating the void *ab initio* doctrine is “tantamount to a repeal of the statute, which would violate separation of powers”); *Pierce v. Pierce*, 46 Ind. 86, 95 (1874) (arguing “this court has no power to repeal or ‘abolish’ statutes.”).

66. See *Gersch*, 553 N.E.2d at 287–88 (holding that a statute “violative of constitutional guarantees” should be declared void *ab initio* or void from enactment).

67. See *id.* at 287 (declaring that the judiciary should be able to void a “constitutionally repugnant” statute from enactment as a check against the legislature).

68. See *id.* at 287–88 (declaring that the court has “a duty not only to declare such a legislative act void, but also to correct the wrongs wrought through such an act by holding our decision retroactive”).

69. See *People v. Carrera*, 783 N.E.2d 15, 24 (Ill. 2002) (holding the statutory amendment void *ab initio* to prevent “a grace period” in which citizens would “have been subject to extraterritorial arrests without proper authorization”).

the dissent in *People v. Holmes* recognized the void *ab initio* doctrine as a “judicial repeal” that checks against unconstitutional legislation.<sup>70</sup> The dissent cautioned that weakening the void *ab initio* doctrine allows the legislative branch to abuse the criminal justice system by passing laws that are clearly unconstitutional but can be enforced until the judiciary invalidates them.<sup>71</sup>

Furthermore, cases using the void *ab initio* doctrine in the revival scenario have criticized automatic revival.<sup>72</sup> In *State v. Yothers*, the Superior Court of New Jersey refused to revive a capital punishment sentencing statute because doing so would be “abhorrent . . . merely to preserve strict legal principles of construction.”<sup>73</sup> In *State v. Hodge*, the Ohio Supreme Court did not restore the state’s concurrent prison sentencing statute because there was no precedent for the state legislature to believe that an unconstitutional statute never formally repealed “may be automatically and suddenly revived through a later court decision.”<sup>74</sup>

In sum, both doctrines consider how parties have relied on the invalidating decision and whether the law is criminal.<sup>75</sup> The doctrines have different

70. See *Holmes*, 90 N.E.3d at 423 (Kilbride, J., dissenting) (declaring that the majority opinion relies on a “faulty analogy” that “erroneously equates the ‘repeal’ of a statute with a judicial declaration that is void *ab initio*”).

71. See *id.* at 423 (failing to apply “the void *ab initio* doctrine to inactivate facially unconstitutional statutes . . . ‘effectively resurrect[s] the amendment and provide[s] a grace period during which . . . citizens would have been subject to’ unconstitutional legislative action” (quoting *Carrera*, 783 N.E.2d at 25)); see also *Jefferson v. Jefferson*, 153 So. 2d 368, 370 (La. 1963) (upholding the power of ‘judicial repeal,’ though not using that terminology, and declaring that if the invalidating decision was overturned, the law at issue could not be revived).

72. See *State v. Yothers*, 659 A.2d 514, 520 (N.J. Super. Ct. App. Div. 1995) (finding no legislative intent to revive the statute at issue); *State v. Hodge*, 941 N.E.2d 768, 775 (Ohio 2010) (reasoning that since there was no precedent of reviving an invalid statute after the previous judicial decision was overruled, the legislature could not intend for the statute’s revival); *Fornwalt v. Follmer*, 616 A.2d 1040, 1042 (Pa. Super. Ct. 1992) (holding the previous statute of limitations for paternity actions void *ab initio* because the legislature clearly intended the new statute of limitations to be retroactive).

73. See *Yothers*, 659 A.2d at 518 (rejecting the State’s argument that “the adoption of the constitutional amendment declaring imposition of the death penalty not [a] cruel and unusual punishment,” “immediately validated the death penalty statute,” “without the need for further legislation to implement the change”).

74. See *Hodge*, 941 N.E.2d at 775 (emphasizing the significance that the defendant had not “cited a single Ohio case that even remotely ponders . . . automatic revival”).

75. Compare *id.* at 776 (refusing to revive the statute at issue because it would

interpretations of the separation of powers, which is significant in the revival scenario because the presumption of validity doctrine's understanding of the separation of powers justifies revival of the statute at issue.<sup>76</sup> In contrast, the void *ab initio* doctrine categorically rejects revival.<sup>77</sup>

### III. ANALYSIS

#### *A. Substantial Reliance on Roe v. Wade, the Right to Abortion and Personal Liberties, and Severe Criminal Penalties Weigh Against the Automatic Revival of Pre-Roe Bans in a Post-Dobbs Scenario*

Anti-choice groups will likely attempt to enforce the unconstitutional criminal abortion bans in Alabama, Arizona, Arkansas, Michigan, Mississippi, Oklahoma, Texas, Wisconsin, or West Virginia after the Supreme Court's holding in *Dobbs v. Jackson Women's Health Organization*.<sup>78</sup> The legal issue will be whether these unrepealed statutes may be 'automatically revived' or enforceable without legislative reenactment.<sup>79</sup> States may not enforce pre-*Roe* bans without subsequent legislative reenactment because the reliance on *Roe v. Wade*, the personal liberties afforded by *Roe*, and the criminal penalties of pre-*Roe* bans outweigh philosophical interpretations of the separation of powers between

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disrupt thousands of people who had "justifiably relied" on the invalidating decision and rejecting revival of a criminal statute); *People v. Gersch*, 553 N.E.2d 281, 288 (Ill. 1990) (stating "in the area of criminal prosecution" the void *ab initio* doctrine "is especially appropriate"), with *McCullum v. McConaughy*, 119 N.W. 539, 541 (Iowa 1909) (holding an unconstitutional statute revived by the overruling decision in part because it did not infringe on a defendant's "vested right").

76. See, e.g., *Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. 1952) (holding that the invalidating decision, *Adkins*, did not repeal the statute at issue because doing so would be equivalent to the judiciary making laws).

77. Compare *Hodge*, 941 N.E.2d at 775 (refusing to revive the statute at issue), with *People v. Holmes*, 90 N.E.3d 412, 423, 425 (Ill. 2017) (Kilbride, J., dissenting) (declaring the void *ab initio* doctrine precludes the revival of the statute at issue).

78. See, e.g., *Weeks v. Connick*, 733 F. Supp. 1036, 1037 (E.D. La. 1990) (illustrating Louisiana's past attempt at reviving pre-*Roe* bans with intent to criminalize abortion).

79. See *Plave*, *supra* note 9, at 111 (stating, "[t]he legal issue arising out of this scenario is whether a state statute, once declared unconstitutional or construed as such due to the unconstitutionality of an identical or similar statute, may be validly enforced without legislative reenactment after a later decision overrules the prior holding of unconstitutionality").



the legislature and judiciary.<sup>80</sup>

*I. Generations of Americans' Reliance on Roe v. Wade, the Nature of Roe's Holding, and the Personal Liberties at Stake*

*Roe v. Wade* was a landmark decision that significantly bolstered American women's bodily autonomy and findings on if, when, and how to have children.<sup>81</sup> *Roe's* nearly fifty-year legacy means multiple generations of Americans have relied on abortion remaining accessible.<sup>82</sup> Reviving pre-*Roe* bans in these states will prohibit almost all abortions, which is significant considering one in four women will have an abortion in their lifetime.<sup>83</sup> Justice Sandra Day O'Connor recognized reliance on *Roe v. Wade* in *Planned Parenthood v. Casey*, which reaffirmed the principle that states cannot prohibit abortion before fetal viability:

The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.<sup>84</sup>

Reviving pre-*Roe* bans ignores significant social, political, and technological changes that have occurred in the decades since *Roe* because

80. *Compare Hodge*, 941 N.E.2d at 773, 775-76 (refusing to revive the statute at issue because it would disrupt thousands of people who had "justifiably relied" on the invalidating decision; there was no precedent to suggest to the Ohio legislature that "a statute that has been held unconstitutional by [the] court and that has never been repealed by that body may be automatically and suddenly revived through a later court decision"), *with Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. 1952) (reviving a D.C. minimum wage law because separation of powers dictates that the judiciary cannot void a law completely after an overruling decision because otherwise the judiciary infringes on the power of the legislature).

81. *See generally* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (describing the effects *Roe v. Wade* and the right to abortion had on women's bodily autonomy and their place in society).

82. *See id.* at 860 (stating that "[a]n entire generation has come of age free to assume *Roe's* concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions").

83. *See generally*, Margot Sanger-Katz, Claire Cain Miller & Quoctrung Bui, *Who Gets Abortions in America?*, N.Y. TIMES (Dec. 14, 2021), <https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortions-in-america.html> (describing the various statistics of who gets an abortion).

84. *Casey*, 505 U.S. at 856 (quoting the majority opinion written by Justices O'Connor, Kennedy, and Souter).

the bans reflect a legislature and American society much different than what it is today.<sup>85</sup> There are significantly more women in leadership roles, the workplace, and politics than in 1973.<sup>86</sup> Abortion technologies have changed drastically, making abortion safer than ever before.<sup>87</sup> Moreover, at least five of the nine unrepealed pre-*Roe* bans were enacted before women had the right to vote, failing to reflect the impact *Roe v. Wade* has had in allowing women to control their bodily autonomy and their lives.<sup>88</sup> The six-weeks ban in Texas further illustrates reliance on *Roe*.<sup>89</sup> Access to abortion practically ceased when the ban went into effect on September 1<sup>st</sup>, 2021.<sup>90</sup> Pregnant Texans now must travel for hours, sometimes hundreds of miles, to other states for abortion care and are creating backlogs of appointments in those states.<sup>91</sup> Citizens of other pre-*Roe* ban states will face similar consequences once *Roe* is overturned.<sup>92</sup>

Because *Roe* granted bodily autonomy and personal liberty to women and people who could become pregnant after it was decided, under either doctrine, pre-*Roe* bans should not be “revived” post-*Dobbs*.<sup>93</sup> In the revival

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85. See Scott, *supra* note 8, at 387 (illustrating that statutes passed before 1973 prohibiting abortion do not reflect current societal values or traditions, such as women’s increased participation in the workplace and roles as elected officials).

86. See Scott, *supra* note 8, at 388 (noting even trigger bans enacted after 1973 were adopted “without the requisite deliberation or consideration due a statute which would significantly infringe on personal liberties”).

87. See generally Angela Hill & Karen Rodriguez, *Abortion Pill Restricted by FDA for Decades Has Better Safety Record Than Penicillin and Viagra*, USA TODAY (July 10, 2020, 3:18 PM), <https://www.usatoday.com/story/news/2020/07/10/abortion-pill-restricted-fda-record-safer-than-penicillin-viagra/5412810002/> (stating that medication abortion, which is a method using pills to terminate pregnancy, was approved by the FDA in 2000 and “has a better safety record than penicillin and Viagra”).

88. See ALA. CODE § 13A-13-7 (1852); Ariz. Rev. Stat. Ann. § 13-3603 (formerly § 10-5-45 (1864)); OKLA. STAT. ANN. tit. 21, § 861 (West 1910); W. VA. CODE ANN. § 61-2-8 (1848); WIS. STAT. § 940.04 (1849).

89. See Roni Caryn Rabin, *Texas Abortion Law Complicates Care for Risky Pregnancies*, N.Y. TIMES (Nov. 26, 2021), <https://www.nytimes.com/2021/11/26/health/texas-abortion-law-risky-pregnancy.html> (describing Texas’s six-weeks abortion ban, the most restrictive abortion law in the country).

90. See *id.* (detailing the background of the Texas law).

91. See *id.* (describing patients who needed to travel out of state for their abortions).

92. See *id.* (implying more states may pass statutes similar to S.B. 8 soon).

93. See generally Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860-61 (1992) (arguing that overturning *Roe* would have drastic consequences on the generation of women who have relied on its holding).

scenario, both doctrines consider reliance on the invalidating decision.<sup>94</sup> Courts using the presumption of validity doctrine have produced inconsistent holdings on whether a previously-invalid statute may be revived or enforced after the overruling decision<sup>95</sup> but generally consider whether reviving the law at issue infringes on a substantive right.<sup>96</sup> In contrast, the void *ab initio* doctrine has consistently ruled against reviving the statute.<sup>97</sup>

For example, unlike the revival of the statute in *McCullum v. McConaughy*, where reviving the statute at issue did not infringe on a “vested [property] right” of the defendant, the right to an abortion is a constitutionally protected liberty.<sup>98</sup> Reviving pre-*Roe* bans after *Dobbs* is similar to the Mississippi Supreme Court’s decision in *State ex rel. Moore v. Molpus*.<sup>99</sup> The court acknowledged that overruling *Power*, the invalidating decision, would revive the State’s constitutional amendment.<sup>100</sup> However, the court refused to do so because of “weighty considerations of finality” and

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94. See *Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. 1952) (analyzing the reliance on *Adkins v. Children’s Hospital*, the invalidating decision) (presumption of validity doctrine); *State v. Hodge*, 941 N.E.2d 768, 776 (Ohio 2010) (reasoning that reviving the statute at issue would disrupt thousands of people who had “justifiably relied” on the invalidating decision) (void *ab initio* doctrine).

95. Compare *McCullum v. McConaughy*, 119 N.W. 539, 541 (Iowa 1909) (holding an unconstitutional statute revived by the overruling decision), with *State ex rel. Moore v. Molpus*, 578 So. 2d at 624, 633 (Miss. 1991) (refusing to revive a state constitutional amendment because the state legislature and citizens had relied on the precedent of the invalidating decision).

96. See *McCullum*, 119 N.W. at 541 (affirming the charge against the defendant because the statute at issue was “revived” and it did not infringe on his “vested right to property”).

97. See *Hodge*, 941 N.E.2d at 776 (refusing to revive Ohio criminal sentencing statutes); *State v. Yothers*, 659 A.2d 514, 520 (N.J. Super. Ct. App. Div. 1995) (refusing to revive a statute that allowed capital punishment to be imposed where a defendant “purposely or knowingly caus[ed] serious bodily injury resulting in death”).

98. See *McCullum*, 119 N.W. at 540 (affirming the state’s argument that the Supreme Court case *Delamater v. South Dakota* had revived the liquor solicitation law at issue); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (establishing that the constitutional right to privacy encompasses abortion).

99. See *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 638 (Miss. 1991) (rejecting the plaintiffs’ attempt to revive the I & R Amendment of the Mississippi constitution).

100. See *id.* at 629 (introducing the Mississippi I & R Amendment’s background and noting that the validity of the Amendment was affirmed in *State ex rel. Howie v. Brantley*, but ultimately overruled *Brantley* in *Power v. Robertson* five years later).

“sixty-eight-year-old precedent.”<sup>101</sup> Similarly, *Roe* has protected the right of pregnant people to terminate their pregnancies before fetal viability for forty-nine years.<sup>102</sup> The Supreme Court reaffirmed that right in *Casey*.<sup>103</sup> Though some states have gestation bans that infringe on the viability timeframe, it is impossible to uphold the fifteen-week prohibition at issue in *Dobbs* without drastically upending *Roe*’s central holding.<sup>104</sup> Moreover, reviving pre-*Roe* bans will affect doctors, abortion providers, and people who can become pregnant.<sup>105</sup> These considerations alone should outweigh automatic revival.

Reviving pre-*Roe* bans after *Dobbs* is similar to the revival scenarios in *State v. Hodge* and *State v. Yothers*, in which the statutes at issue were not revived (or the invalidating decision was not overruled) because the ramifications of revival were too severe.<sup>106</sup> Thousands of people had relied on the invalidating decision, so automatically reviving the statutes in these cases would have drastic consequences on the states’ criminal justice systems.<sup>107</sup> In *Hodge*, the Ohio Supreme Court rejected revival because it

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101. See *id.* at 633 (stating that even if the court agreed with the plaintiffs’ argument to overturn the invalidating decision, the finality of sixty-eight years of precedent outweighed the plaintiffs’ challenge).

102. See *Roe*, 410 U.S. at 153 (holding that the right to privacy encompasses a woman’s decision to terminate her pregnancy).

103. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (reaffirming “the essential holding of *Roe*”).

104. See generally NARAL PRO-CHOICE AM., WHO DECIDES? THE STATUS OF REPRODUCTIVE RIGHTS IN THE UNITED STATES, 10–12 (30th Ed. Feb 2021), <http://www.prochoiceamerica.org/wp-content/uploads/2021/03/Who-Decides-2021-Digital-Edition.pdf> (demonstrating that some states have bans at twenty-two weeks of pregnancy, with limited exceptions).

105. See generally Tanya Lewis & Tulika Bose, *The Harmful Effects of Overturning Roe v. Wade*, SCIENTIFIC AM. (May 6, 2022), <https://www.scientificamerican.com/podcast/episode/the-harmful-effects-of-overturning-roe-v-wade/> (discussing the health risks of women who are unable to get an abortion, financial issues women who are forced to bear a pregnancy to term, and how prohibiting abortions will cause less abortion and miscarriage training to medical students and professionals in states with abortion bans).

106. See *State v. Hodge*, 941 N.E.2d 768, 776 (Ohio 2010) (holding that potentially resentencing thousands of defendants outweighed reviving the concurrent prison sentencing statute); *State v. Yothers*, 659 A.2d 514, 518–20 (N.J. Super. Ct. App. Div. 1995) (rejecting the state’s argument that the newly ratified constitutional amendment could revive the state’s old criminal sentencing statute and holding that the state could not impose the death penalty on the defendant).

107. See *Hodge*, 941 N.E.2d at 775–76 (noting that the invalidating decision at issue dealt with concurrent prison sentences); *Yothers*, 659 A.2d at 518–20 (stating that the invalidating decision at issue was about the death penalty).

did not want to disrupt the thousands of “defendants, prosecutors, judges, and victims of criminal activity” who had “justifiably relied” on the invalidating decision.<sup>108</sup> In *Yothers*, the Superior Court of New Jersey refused to ‘revive’ a death penalty sentencing statute.<sup>109</sup>

Like *Hodge* and *Yothers*, reviving pre-*Roe* bans would have drastic consequences. Explained further in the next section, the criminal justice system could be overwhelmed with vast numbers of people arrested for obtaining abortion care or, as some of the pre-*Roe* bans include, people aiding or attempting to aid in procuring an abortion.<sup>110</sup> Reviving pre-*Roe* bans would criminalize abortion at any point in pregnancy, punishable by prison and/or fines if violated, thereby drastically changing the abortion landscape of these nine states.<sup>111</sup> Though pre-*Roe* bans likely do not apply to the pregnant person, some state prosecutors will still use pre-*Roe* bans laws to prosecute pregnant people because some states allow for charges under “fetal protection laws.”<sup>112</sup>

## 2. *Creating Criminal Penalties for Doctors and Pregnant People, and Criminalizing Miscarriage*

Automatically reviving pre-*Roe* bans in these nine states has drastic consequences for doctors, clinic staff, and people who can become pregnant.<sup>113</sup> Each statute criminalizes the acts of willfully inducing an abortion and aiding or abetting in administering an abortion at any point in a

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108. See *Hodge*, 941 N.E.2d at 776 (rejecting other jurisdictions’ decisions to revive statutes because “those decisions are necessarily based on the factual contexts of the situations before them”).

109. See *Yothers*, 659 A.2d at 520 (refusing to revive a statute that allowed capital punishment to be imposed on a defendant who “purposely or knowingly caus[ed] serious bodily injury resulting in death”).

110. See Rabin, *supra* note 89 (describing Texas’s six-week abortion ban, the most restrictive abortion law in the country); see also Scott, *supra* note 8, at 374, n.135 (stating that about two-thirds of U.S. women will have an unintended pregnancy in their lifetime and about forty-five percent will have an abortion).

111. See, e.g., ALA. CODE § 13A-13-7 (1852) (providing prison for up to one year and fines between \$100 and \$1,000); OKLA. STAT. ANN. tit. 21, § 861 (1910) (providing two to five years in prison); W. VA. CODE ANN. § 61-2-8 (1848) (providing three to ten years in prison).

112. MICHELLE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* 28–45 (2020).

113. See Lewis & Bose, *supra* note 105 (discussing the implications banning abortion will have on the medical profession).

pregnancy.<sup>114</sup> Though each ban prohibits abortion at all stages of pregnancy, the bans vary slightly.<sup>115</sup> For example, Arkansas' pre-*Roe* ban, unlike the other pre-*Roe* bans, does not provide an exception if the pregnant person's life is in danger.<sup>116</sup> Mississippi's pre-*Roe* ban is the only one that provides an exception where the pregnancy resulted from rape.<sup>117</sup> The pre-*Roe* bans define felonies with punishments ranging from fines of \$100 to \$10,000, to sentences of one to ten years in prison.<sup>118</sup>

Though the nine pre-*Roe* bans apply to "any person" inducing or attempting to induce an abortion, the statutes likely do not apply to the pregnant person seeking an abortion.<sup>119</sup> Instead, the statutes aim at criminalizing a doctor's or physician's actions.<sup>120</sup> However, prosecutors will still prosecute pregnant people seeking abortions, considering that some states have prosecuted women for their pregnancy outcomes.<sup>121</sup> Pregnancy

114. See, e.g., § 13A-13-7 (punishing "[a]ny person who willfully administers to any pregnant woman any drug or substance or uses or employs any instrument or other means to induce an abortion, miscarriage or premature delivery or aids, abets or prescribes for the same, unless the same is necessary to preserve her life or health").

115. See, e.g., § 13A-13-7 (prohibiting abortion with no exceptions at any point in gestation).

116. See ARK. CODE ANN. § 5-61-102 (1969) (prohibiting abortions with no exceptions).

117. See MISS. CODE ANN. § 97-3-3(1)(a)-(b) (1952) (providing that a physician may provide an abortion to preserve the pregnant woman's life and/or if the pregnancy was a result of rape).

118. See, e.g., § 13A-13-7 (providing prison for up to one year and fines between \$100 and \$1,000); § 5-61-102 (sentencing perpetrators to a Class D felony, which includes fines up to \$10,000).

119. See, e.g., *People v. Nixon*, 201 N.W.2d 635, 641 (Mich. Ct. App. 1972) (affirming that a woman "could not be prosecuted under the present statute for either a self-induced abortion or as an aider and abettor in an abortion performed upon her"); *State v. Prude*, 24 So. 871, 871 (Miss. 1899) (same). *But see* *Steed v. State*, 170 So. 489, 489 (Ala. Ct. App. 1936) (holding that if the pregnant woman consents to an abortion, she "would be guilty of aiding or abetting, and indictable as a principal.").

120. See, e.g., WIS. STAT. § 940.04 (1849) (excluding the pregnant person from criminal liability); W. VA. CODE § 61-2-8 (1848) (same).

121. See Ashley Collman, *An Oklahoma Woman's Jail Sentence for Manslaughter After a Miscarriage Highlights an 'Extreme Acceleration' in Prosecuting Pregnancy Over the Last 16 Years*, INSIDER (Oct. 20, 2021, 5:54 PM), <https://www.insider.com/woman-jailed-for-miscarriage-shows-rise-in-prosecutions-of-pregnancy-2021-10> (explaining the rise in prosecution against women who use drugs during pregnancy); see also Ava B., *When Miscarriage is a Crime*, PLANNED PARENTHOOD ADVOCES. OF ARIZ., <https://www.plannedparenthoodaction.org/planned-parenthood-advocates-arizo>

Justice estimates that women were prosecuted in 413 cases from 1973 to 2005, a number that tripled between 2006 and 2020, for charges under fetal protection laws.<sup>122</sup> Fetal protection laws encompass an array of laws that are used to criminalize pregnant people by alleging actual or intended harm to fetuses, and include feticide laws (a form of homicide), drug policies, statutes authorizing the confinement of pregnant women to protect the health of fetuses, and child protection statutes that have been interpreted to apply to fetuses.<sup>123</sup> Included in the umbrella of fetal personhood laws are convictions against pregnant people for self-inducing their own abortion.<sup>124</sup> Famous cases include Purvi Patel, Jennie Linn McCormack, Anna Yocca, and many more, who were charged with explicit murder charges for causing the death of the fetus by self-induced abortion.<sup>125</sup>

This is particularly troubling because it is unclear whether pre-*Roe* bans would criminalize miscarriage itself.<sup>126</sup> Reviving pre-*Roe* bans will be incredibly confusing for doctors to implement because the statutes use abortion and miscarriage synonymously.<sup>127</sup> For example, Michigan's pre-

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na/blog/when-miscarriage-is-a-crime (last visited Feb. 26, 2022) (describing the ways feticide laws are used to prosecute pregnant people who have miscarriages).

122. Collman, *supra* note 121 (stating that the number of cases against people who miscarried has tripled to about 1,200 cases nationally).

123. See GOODWIN, *supra* note 112, at 28.

124. Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, GUTTMACHER INST. (Sept. 22, 2015), <https://www.guttmacher.org/gpr/2015/09/prosecuting-women-self-inducing-abortion-counterproductive-and-lacking-compassion>.

125. See Tess Barker, *The New Reality: Women Charged For Murder After Self-Inducing Abortions*, VICE (Jan. 24, 2016, 3:55 PM), <https://www.vice.com/en/article/ypa8z7/the-new-reality-women-charged-for-murder-after-self-inducing-abortions>.

126. Compare ALA. CODE § 13A-13-7 (1852) (stating “any person”), with MICH. COMP. LAWS § 750.14 (1931) (noting “any person”); and MISS. CODE ANN. § 97-3-3 (1952) (stating “any person”); and OKLA. STAT. ANN. tit. 21, § 861 (1910) (noting “every person”), with ARK. CODE ANN. § 5-61-102 (1969) (providing that “nothing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero”).

127. Compare ALA. CODE § 13A-13-7 (1852) (including “any person who willfully administers to any pregnant woman any drug or substance . . . to induce an abortion, miscarriage or premature delivery”), with tit. 21, § 861 (West 1910) (punishing “every person who administers to any woman . . . with intent thereby to procure the miscarriage of such woman”); and § 61-2-8 (1848), with ARK. CODE ANN. § 5-61-102 (1969) (providing that “[n]othing in this section shall be construed to allow the charging or conviction of a woman . . . in the death of her own unborn child”); and WIS. STAT. § 940.04 (1849) (expressly excluding punishment for a woman seeking an abortion).

*Roe* ban criminalizes any person who attempts or intends by any means “to procure a miscarriage of any such woman” and never uses the word abortion.<sup>128</sup> The language in these statutes will cause doctors to hesitate to care for or counsel pregnant patients who are experiencing miscarriages, have a life-threatening pregnancy-related condition, or carry nonviable pregnancies in which the fetus has no chance of survival.<sup>129</sup>

The six-week abortion ban in Texas illustrates doctors’ issues with complying with pre-viability abortion bans.<sup>130</sup> The Texas ban has an exception that allows doctors to perform abortions past six weeks if the patient faces a “medical emergency.”<sup>131</sup> However, due to the vagueness of this term, doctors and hospitals are afraid to counsel patients with medically risky pregnancies that could turn into life-threatening conditions for fear of being sued.<sup>132</sup> Subsequently, in the case where a prosecutor attempts to enforce a pre-*Roe* ban without reenactment or clarification from the state legislature, reviving pre-*Roe* bans will cause some doctors to turn away patients because the pre-*Roe* bans are unclear about the difference between abortion and miscarriage.

Unlike other instances of automatic revivals, such as *Jawish v. Morlet*, which effectively revived a minimum wage law, or *McCollum v. McConaughy*, which revived a liquor anti-solicitation law, pre-*Roe* bans carry criminal penalties.<sup>133</sup> Restoring pre-*Roe* bans means criminalizing a procedure that physicians have performed legally for almost fifty years.<sup>134</sup>

A foundational concept in the American legal system is fair notice about what behavior is prohibited based on the due process clauses of the United

128. See MICH. COMP. LAWS § 750.14 (1931) (using only ‘miscarriage’ throughout the statute).

129. See Rabin, *supra* note 89 (explaining how physicians and doctors are afraid to give patients information on abortion and treat some pregnancy-related conditions in fear of being prosecuted).

130. See *id.* (describing how the Texas law does not allow for people to terminate medically risky pregnancies).

131. See *id.* (describing how pregnant people in Texas cannot obtain an abortion even if the fetus will not be viable upon birth).

132. See *id.* (interviewing two doctors who did not feel comfortable discussing abortion for patients with pregnancies that could be dangerous or involve many medical complications).

133. See *Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. 1952) (reviving a minimum wage civil law); *McCollum v. McConaughy*, 119 N.W. 539, 540 (Iowa 1909) (reviving a solicitation liquor law).

134. *Cf. Roe v. Wade*, 410 U.S. 113, 164–66 (1973) (holding that states may not prohibit abortions before viability).



States Constitution's Fifth and Fourteenth Amendments.<sup>135</sup> Americans have extensively relied on *Roe*.<sup>136</sup> Hence, enforcing pre-*Roe* bans without subsequent legislative action is not an acceptable or practicable way to notify citizens of the law.<sup>137</sup> The consequences of reviving pre-*Roe* bans for physicians and pregnant people effectively illustrate why unconstitutional criminal laws are typically void *ab initio* rather than presumptively valid.<sup>138</sup>

For example, the Ohio Supreme Court in *State v. Hodge* refused to revive a concurrent prison sentencing statute, and in *State v. Yothers*, the Superior Court of New Jersey declined to revive the State's capital punishment statute.<sup>139</sup> Reviving pre-*Roe* bans goes against due process and fair legal principles by enacting a new and severe punishment.<sup>140</sup> Enforcing pre-*Roe* bans would affect thousands of people in these states, affecting citizens' bodily autonomy and disrupting doctor-patient relationships.<sup>141</sup> This factor alone should outweigh the revival of pre-*Roe* bans in a post-*Dobbs* world.

135. See U.S. CONST. amend. V (providing that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law”); XIV, § 1 (stating that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law”).

136. See, e.g., Scott, *supra* note 9, at 373–74 (describing the reliance interests established by *Roe*, including that abortion is a widespread practice throughout the United States).

137. See *id.* (arguing that reviving pre-*Roe* bans would cause confusion and may even allow prosecutors to determine what behavior constitutes a crime).

138. See *People v. Gersch*, 553 N.E.2d 281, 288 (Ill. 1990) (asserting that “[i]n the area of criminal prosecution, the void *ab initio* principle is especially appropriate”); see also *State v. Yothers*, 659 A.2d 514, 520 (N.J. Super. Ct. App. Div. 1995) (refusing to ‘revive’ a statute that widened the offenses for capital punishment without further legislative action).

139. See *Hodge*, 941 N.E.2d at 776 (refusing to revive an Ohio criminal sentencing statute); *State v. Yothers*, 659 A.2d 514, 520 (N.J. Super. Ct. App. Div. 1995) 520 (refusing to revive a statute that allowed capital punishment to be imposed for “purposely or knowingly caus[ing] . . . ‘serious bodily injury resulting in death’”).

140. See *Hodge*, 941 N.E.2d at 776 (rejecting other jurisdictions decisions to revive statutes because “those decisions are necessarily based on the factual contexts of the situations before them”); *Yothers*, 659 A.2d at 520 (denying revival of the state’s capital punishment statute); see also *Horsley v. State*, 160 So. 3d 393, 395 (Fla. 2015) (refusing to revive the state’s twenty-year-old criminal sentencing statute).

141. See generally Collman, *supra* note 121 (describing an increase in women being prosecuted for miscarriage and warning that overturning *Roe v. Wade* could accelerate prosecutions); Rabin, *supra* note 89 (describing doctors who did not feel comfortable discussing abortion for patients with pregnancies that could become dangerous or involve many medical complications).

### 3. *Different Interpretations of Separation of Powers*

The last factor both doctrines consider is the separation of powers between the legislative and judicial branches of government.<sup>142</sup> The presumption of validity doctrine generally holds that subsequent legislation is not needed in enforcing pre-Roe bans because the judiciary has no power to repeal laws.<sup>143</sup> The D.C. Court of Appeals in *Jawish v. Morlet* used this rhetoric to revive the D.C. minimum wage law after *West Coast Hotel Company v. Parrish*.<sup>144</sup> However, because separation of powers is just one factor the presumption of validity doctrine considers in its revival analysis, reliance on *Roe v. Wade* and criminalizing abortion should outweigh this element of the presumption of validity doctrine.<sup>145</sup> Like *State v. Yothers*, in which the New Jersey court amendment did not revive the statute because it would be “abhorrent” to sentence the defendant to capital punishment “merely to preserve strict legal principles of construction,” it would be cruel to prohibit abortion entirely and burden doctors with the confusion brought by reviving pre-Roe bans.<sup>146</sup>

This is especially egregious considering the void *ab initio* doctrine presents a logical, valid interpretation of the separation of powers.<sup>147</sup> The void *ab initio* doctrine maintains that the judiciary can void a statute from enactment because doing so is an appropriate response to the nature of

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142. Compare *People v. Gersch*, 553 N.E.2d 281, 287–88 (Ill. 1990) (holding that the void *ab initio* doctrine is an appropriate measure in the balance of separation of powers), with *Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. 1952) (expressing that the void *ab initio* doctrine is equivalent to the judiciary “repealing” laws).

143. See *Jawish*, 86 A.2d at 97 (D.C. 1952) (noting that the void *ab initio* doctrine is equivalent to the judiciary “repealing” laws); *People v. Holmes*, 90 N.E.3d 412, 415, 418 (Ill. 2017) (rejecting the defendant’s argument that probable cause for his arrest was void *ab initio* because that would be “tantamount to a repeal of the statute, which would violate separation of powers”); *Pierce v. Pierce*, 46 Ind. 86, 95 (1874) (stating that the “court has no power to repeal or ‘abolish’ statutes”).

144. See *Jawish*, 86 A.2d at 97 (holding that the D.C. minimum wage law was revived by *West Coast Hotel v. Parrish*).

145. See *infra* Part (III)(A)-(B) (demonstrating the consequences of reviving pre-Roe bans).

146. See *State v. Yothers*, 659 A.2d 514, 518, 520 (N.J. Super. Ct. App. Div. 1995) (refusing to revive a statute that allowed capital punishment to be imposed on a defendant who “purposely or knowingly caus[ed] serious bodily injury resulting in death”).

147. See *People v. Gersch*, 553 N.E.2d 281, 287–88 (Ill. 1990) (holding that a statute “violative of constitutional guarantees” should be declared void *ab initio* or void from enactment).

legislation that “suddenly cuts off rights” of citizens.<sup>148</sup> For example, the Illinois Supreme Court in *People v. Carrera* reasoned that the void *ab initio* doctrine prevents “a grace period” in which citizens are subject to extraterritorial arrests without proper authorization.<sup>149</sup> The dissent in *People v. Holmes* echoed this sentiment and recognized that the void *ab initio* doctrine is an implicit “judicial repeal” that checks against unconstitutional legislation.<sup>150</sup>

The void *ab initio* interpretation of separation of powers makes sense in a post-*Dobbs* world because reviving pre-*Roe* abortion bans would sever abortion rights dramatically and “cut off” an important right that was once constitutional.<sup>151</sup> In a post-*Dobbs* world, the judiciary should have the power to void criminal abortion bans from their enactment to prevent prosecutions against pregnant people or doctors during a period when the law is unclear, and to prevent the unfairness of enforcing a dormant law that is decades old, or in some states, over a century old.<sup>152</sup>

*B. Under Either Doctrine, Pre-Roe Bans Are Not Enforceable Without Subsequent Legislative Reenactment Because Reliance on Roe v. Wade and Criminal Consequences Outweigh Infringing on the Power of the Legislature*

If the Supreme Court overturns *Roe v. Wade* or dramatically broadens states’ rights to prohibit abortion prior to viability in *Dobbs v. Jackson Women’s Health Organization*, states could not revive or enforce their pre-*Roe* bans.<sup>153</sup> Both doctrines consider reliance on the invalidating decision,

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148. See *id.* at 287 (declaring that the judiciary should be able to void a “constitutionally repugnant” statute from enactment as a check against the legislature).

149. See *People v. Carrera*, 783 N.E.2d 15, 25 (Ill. 2002) (holding the statutory amendment void *ab initio* to prevent “a grace period” in which citizens would “have been subject to extraterritorial arrests without proper authorization”).

150. See *People v. Holmes*, 90 N.E.3d at 412, 425 (Ill. 2017) (Kilbride, J., dissenting) (declaring that the majority opinion relies on a “faulty analogy that erroneously equates the ‘repeal’ of a statute with a judicial declaration that is void *ab initio*”).

151. See *People v. Gersch*, 553 N.E.2d 281, 287–88 (Ill. 1990) (arguing that the void *ab initio* doctrine is an appropriate measure against a facially unconstitutional law that “suddenly cuts off” guaranteed rights of citizens).

152. See *Holmes*, 90 N.E.3d at 423, 425 (Kilbride, J., dissenting) (arguing that the void *ab initio* doctrine in the revival scenario is appropriate to prevent abuses of the legislature of enacting blatantly unconstitutional statutes that could exist for a period before being overturned).

153. See *cf.* *People v. Holmes*, 90 N.E.3d 412, 423, 425 (Ill. 2017) (Kilbride, J.,

the criminal nature of the statute at issue, and the separation of powers between the legislature and judiciary.<sup>154</sup> The two doctrines essentially weigh against revival, though the presumption of validity doctrine weighs in favor of revival under separation of powers.<sup>155</sup> However, substantial reliance on *Roe* and the consequences of reviving criminal abortion bans should outweigh any formalistic separation of powers argument.<sup>156</sup>

*Roe's* nearly fifty-year legacy means multiple generations of Americans have relied on abortion remaining accessible.<sup>157</sup> Because Americans have extensively relied on *Roe v. Wade's* central holding, as well as the personal liberties and increased bodily autonomy afforded after *Roe's* holding, reviving pre-*Roe* bans infringes on substantive rights.<sup>158</sup> Furthermore, unlike other cases involving the revival scenario that held the statutes at issue were

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dissenting) (arguing that the void *ab initio* doctrine is appropriate to combat legislative abuse of power); *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 635, 638 (Miss. 1991) (accepting the presumption of validity doctrine but refusing to overturn and revive the state Constitutional Amendment because resurrecting it would have extreme consequences); *State v. Yothers*, 659 A.2d 514, 518, 520 (N.J. Super. Ct. App. Div. 1995) (rejecting the revival of a criminal statute because separation of powers or “strict legal principles of construction” does not outweigh consequences of reviving death penalty statute against the defendant in the case).

154. *Compare State v. Hodge*, 941 N.E.2d 768, 775–77 (Ohio 2010) (refusing to revive the statute because it would disrupt thousands of people who had “justifiably relied” on the invalidating decision, and stating that there was no precedent to suggest to the Ohio legislature that “a statute that has been held unconstitutional” by the court and “that has never been repealed by that body may be automatically and suddenly revived through a later court decision”), *with Jawish v. Morlet*, 86 A.2d 96, 96–97 (D.C. 1952) (reviving a D.C. minimum wage law because separation of powers dictates that the judiciary cannot void a law completely after an overruling decision, because otherwise the judiciary infringes on the power of the legislature).

155. *See Jawish*, 86 A.2d at 96 (declaring that since “courts have no power to repeal or abolish a statute,” the law was enforceable without reenactment by Congress).

156. *See Yothers*, 659 A.2d at 518 (rejecting revival of a criminal statute because separation of powers or “strict legal principles of construction” do not outweigh consequence of reviving death penalty statute against the defendant in the case); *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 635, 638 (accepting the presumption of validity doctrine but refusing to overturn and revive the state constitutional amendment because resurrecting it would have extreme consequences).

157. *See generally Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992) (“An entire generation has come of age free to assume *Roe's* concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions.”).

158. *See Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (holding that states may not prohibit abortions before viability); *Casey*, 505 U.S. at 856 (describing the effects *Roe v. Wade* and the right to abortion had on women’s bodily autonomy and place in society).

revived, these cases did not involve a criminal statute.<sup>159</sup> In fact, courts typically reject automatic revival of criminal statutes because of potential due process violations and the extreme consequences of reviving a criminal law.<sup>160</sup> Reviving pre-*Roe* bans would ban abortion entirely and have drastic criminal implications for pregnant people and doctors.<sup>161</sup>

The presumption of validity doctrine and the void *ab initio* doctrine take opposing views on whether voiding a statute from its enactment versus the invalidating decision infringes on the legislature's power.<sup>162</sup> Even taking the presumption of validity's reasoning, that the judiciary cannot void a statute from enactment because that is equivalent to repealing a law,<sup>163</sup> the consequences of revival are so severe that they should outweigh the theoretical implications of the separation of powers. Even a conservative legislature that intends to ban abortion entirely will need to enact an abortion ban that conforms with *Dobbs*' holding instead of relying on the enforcement of decades-old pre-*Roe* abortion bans.<sup>164</sup>

#### IV. POLICY RECOMMENDATION

State legislatures should explicitly repeal their respective pre-*Roe* bans to prevent their enforcement at all. Enforcing pre-*Roe* bans will have devastating consequences for people who can become pregnant, their loved

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159. See *Jawish v. Morlet*, 86 A.2d 96, 96 (D.C. 1952) (regarding a minimum wage law); *Christopher v. Mungen*, 55 So. 273, 280 (Fla. 1911) (regarding land inheritance); *McCollum v. McConaughy*, 119 N.W. 539, 540 (Iowa 1909) (regarding the solicitation of liquor); *Pierce v. Pierce*, 46 Ind. 86, 87 (1874) (regarding inheritance).

160. See *State v. Hodge*, 941 N.E.2d 768, 776 (Ohio 2010) (rejecting the revival of a criminal statute); see also *Yothers*, 659 A.2d at 520 (rejecting the revival of a criminal statute); *Horsley v. State*, 160 So. 3d 393, 395 (Fla. 2015) (rejecting the revival of a criminal statute).

161. See *infra* Part III(A)(1)–(3) (analyzing the effects reviving pre-*Roe* bans will have under the factors of the presumption of validity and void *ab initio* doctrines).

162. Compare *People v. Gersch*, 553 N.E.2d 281, 287–88 (Ill. 1990) (holding that the void *ab initio* doctrine is an appropriate measure against a facially unconstitutional law that “suddenly cuts off” guaranteed rights of citizens), with *Jawish*, 86 A.2d at 97 (finding that the void *ab initio* doctrine is equivalent to the judiciary repealing laws).

163. See *Jawish*, 86 A.2d at 97 (declaring the judiciary has no power to repeal laws); *Mungen*, 55 So. 280 (Fla. 1911) (concluding the state legislature intended for the inheritance law to be revived).

164. See *Hodge*, 941 N.E.2d 768, 775–76 (rejecting other jurisdictions decisions to revive statutes because “those decisions are necessarily based on the factual contexts of the situations before them”).

ones, and abortion providers.<sup>165</sup>

First, reviving pre-*Roe* bans will eliminate a long-standing fundamental right for women and people who can become pregnant because the bans eliminate the right to access abortion completely.<sup>166</sup> The right to choose whether to be pregnant is more than just a medical decision; it is also about dignity and autonomy—even if the Supreme Court holds it is no longer a liberty protected by the Fourteenth Amendment.<sup>167</sup> The U.S. Supreme Court has long recognized the significance abortion has had on the bodily autonomy of people who can become pregnant, and has consistently held that a state’s interest in protecting prenatal life does not outweigh prohibiting a pregnant person from having an abortion prior to fetal viability.<sup>168</sup> As the majority recognized in *Planned Parenthood v. Casey*, the decision to terminate a pregnancy is too “intimate and personal” for the state to impose its own decision on the pregnant person.<sup>169</sup> To revive such drastic bans is not an acceptable or practicable way to notify citizens of the law, and violates the due process clauses of the U.S. Constitution’s Fifth and Fourteenth Amendments.<sup>170</sup>

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165. See generally Ilana Panich-Linsman & Lauren Kelley, *Before Roe*, N.Y. TIMES: OPINION, <https://www.nytimes.com/interactive/2022/01/21/opinion/roe-v-wade-abortion-history.html> (last visited Mar. 25, 2022) (illuminating the consequences of overturning *Roe v. Wade*, illustrated by stories of women who had abortions before *Roe* was decided).

166. See *cf.* *What if Roe Fell?*, CTR. FOR REPROD. RTS., <https://reproductivereights.org/maps/what-if-roe-fell/> (last visited Mar. 25, 2022) (noting that abortion bans generally have an exception for the life of the mother and proposing that all abortion bans and restrictions be repealed).

167. See *Jackson Women’s Health Org. v. Currier*, 349 F. Supp. 3d 536, 544 (S.D. Miss. 2018) (referencing an amicus brief filed in *Whole Woman’s Health v. Hellerstedt* from a group of 110 women in the legal community); see Gerstein, *supra* note 2 (stating from the draft Supreme Court decision: “*Roe* expressed the ‘feel[ing]’ that the Fourteenth Amendment was the provision that did the work, but its message seemed to be that the abortion right could be found *somewhere* in the Constitution . . .”).

168. See Scott, *supra* note 8, at 360–61 (explaining the retreat from *Roe*’s holding by courts but emphasizing that *Roe*’s pre-viability holding remains and has been reaffirmed).

169. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992) (concluding the individual liberty or right to abortion established in *Roe* outweighed the state’s arguments to overturn *Roe*).

170. See U.S. CONST. amends. V (providing that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law”); XIV, § 1 (stating that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law”); see, e.g., Scott, *supra* note 8, at 37374 (describing the reliance interests established by

Second, the way pre-*Roe* bans are written may criminalize miscarriage, which has substantial consequences for people who miscarry, individuals attempting to become pregnant, and those individuals' loved ones.<sup>171</sup> As a result, pregnant people may not seek the medical care they need, thereby increasing infant and maternal mortality rates.<sup>172</sup> When abortion and miscarriage are used synonymously, pregnant people may be forced to carry to term an unviable pregnancy, which causes turmoil for the pregnant person and the partner or loved ones supporting them in the pregnancy.<sup>173</sup>

Finally, reviving pre-*Roe* bans will cause chaos for doctors and abortion providers because the bans are so vague that doctors and abortion providers will struggle to comply with the law.<sup>174</sup> Because pre-*Roe* bans use abortion and miscarriage synonymously and some of the bans prohibit "aiding" in an abortion, doctors and abortion providers will be caught in an unfortunate situation of how to do their jobs.<sup>175</sup> This consequence is exemplified in Texas's abortion ban, Senate Bill 8.<sup>176</sup> Doctors in Texas are struggling to understand and comply with the law.<sup>177</sup> Due to the vagueness of the statute's

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*Roe*, including that abortion is a widespread practice throughout the United States) (arguing that reviving pre-*Roe* bans would cause confusion and may even allow prosecutors to determine what behavior constitutes a crime).

171. Compare MICH. COMP. LAWS § 750.14 (1931) (prohibiting "miscarriage"), with ARK. CODE ANN. § 5-61-102(c) (1969) (stating that "[n]othing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero").

172. See Ava B., *supra* note 122 (speculating how the criminalization of pregnancy will cause people to forego medical care, which may result in increased maternal deaths).

173. See *cf.* Dan Solomon, *Texas Couple Says Texas's Laws Forced a Woman to Deliver a Stillborn Baby*, TEX. MONTHLY (Apr. 7, 2016), <https://www.texasmonthly.com/the-daily-post/texas-laws-forced-woman-deliver-stillborn-baby/> (illustrating the turmoil of a woman carrying a nonviable pregnancy to term and the trauma she and her family faced).

174. See *cf.* Rabin, *supra* note 89 (illustrating how after Senate Bill 8's enactment, Texas doctors are not sure how to comply with the law or recommend pregnancy-related care to their patients).

175. Compare ALA. CODE § 13A-13-7 (1852) (stating that "[a]ny person who . . . induce[s] an abortion, miscarriage or premature delivery or aids, abets or prescribes for the same . . . shall on conviction be [fined or imprisoned]"), with MICH. COMP. LAWS ANN. § 750.14 (1931) (differing by not including "aids and abets" in the abortion).

176. See Rabin, *supra* note 89 (examining how doctors in Texas are unsure what information they can tell their patients after S.B. 8's enactment).

177. See *id.* (interviewing two doctors who did not feel comfortable discussing abortion for patients with pregnancies that could be dangerous or involve many medical complications).

medical exception, doctors and hospitals are afraid to counsel patients with medically risky pregnancies for fear of being sued.<sup>178</sup> Subsequently, reviving pre-*Roe* bans will cause some doctors to turn away miscarrying patients because the pre-*Roe* bans are not clear about the difference between abortion and miscarriage.<sup>179</sup>

Most states have expressly repealed their pre-*Roe* bans.<sup>180</sup> In 2021, representatives in Michigan and Wisconsin proposed bills to repeal their corresponding pre-*Roe* bans.<sup>181</sup> The other states with pre-*Roe* bans on the books should follow suit and protect the right to abortion. The nine states with pre-*Roe* bans should expressly repeal their pre-*Roe* criminal abortion statutes to avoid these drastic consequences.

## V. CONCLUSION

Anti-choice parties will likely attempt to enforce the remaining pre-*Roe v. Wade* criminal abortion bans after the Supreme Court's holding in *Dobbs v. Jackson Women's Health Organization*.<sup>182</sup> The presumption of validity and void *ab initio* doctrines, which define the point at which an unconstitutional statute is enforceable, illustrate that states cannot automatically enforce pre-*Roe* bans without subsequent legislative reenactment.<sup>183</sup> Under both doctrines, courts consider how parties have relied on the invalidating decision, whether the law is criminal or civil, and separation of powers between the legislature and the judiciary.<sup>184</sup> Because *Roe* created a constitutional right to abortion and has been the precedent for nearly fifty years, any argument in favor of reviving pre-*Roe* bans should be outweighed

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178. See *id.* (examining the difficult position the law puts doctors in).

179. See *id.* (contextualizing the confusion created by laws such as S.B.8).

180. See Nash & Cross, *supra* note 3 (summarizing pre-*Roe* bans in each state).

181. See generally H.B. 5289, 101st Leg. Reg. Sess. (Mich. 2021) (proposing to repeal Michigan's pre-*Roe* ban in the State house); S.B., 101st Leg., Reg. Sess. (Mich. 2021) (proposing to repeal Michigan's pre-*Roe* ban in the State senate); A.B. 713, 105th Leg., Reg. Sess. (Wis. 2021) (proposing to repeal Wisconsin's pre-*Roe* in the State assembly/house); S.B. 675, 105th Leg. Reg. Sess. (Wis. 2021) (proposing to repeal Wisconsin's pre-*Roe* ban in the State senate).

182. See *infra* Part II(A) (describing the attempt to revive Louisiana's pre-*Roe* ban in 1989 in *Weeks v. Connick*, 733 F. Supp. 1036, 1037 (E.D. La. 1990)).

183. See *infra* Part III(A)–(B) (arguing that pre-*Roe* bans should not be revived since the consequences of revival weigh against theoretical interpretations of the separation of powers).

184. See *infra* Part II(C) (describing the factors that both doctrines apply when faced with whether a law may be revived after a court decision invalidating the law was overturned).



by the fact that reviving pre-*Roe* bans would have severe consequences for pregnant people and doctors.<sup>185</sup> Therefore, in a post-*Dobbs* world, states may not revive and automatically enforce their pre-*Roe v. Wade* criminal abortion bans.<sup>186</sup>

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185. See generally *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856, 860 (1992) (describing the effects of *Roe v. Wade* and the right to abortion had on women's bodily autonomy and place in society).

186. See *infra* Part III(A)–(B) (illustrating the consequences of reviving pre-*Roe* bans).