Note

Say It Ain't *Roe*: *Dobbs* and Reason Bans Are Trojan Horses for the Down Syndrome Community

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INTRODUCTION

The aftershock from the Supreme Court's seismic decision in *Dobbs* continues to reverberate throughout the legal discipline and American society as a whole.[1] In eliminating federal protection for abortion procedures, *Dobbs* unequivocally overturned *Roe* and *Casey*, and rendered the unprecedented decision to revoke a right deemed "fundamental" for almost half a century.[2] Although *Roe* and *Casey* were divisive and frequently challenged through state legislation, it was ultimately the creation of a Supreme Court conservative supermajority that provided the decisive impetus to crumble the foundational pillars governing abortion jurisprudence since the early 1970s.[3] Many legal scholars viewed *Dobbs* as inevitable, as the contemporary right-leaning Court had consistently demonstrated a veiled hostility towards

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1. Dobbs v. Jackson Women's Health Org., No. 19-1392 (June 24, 2022).

2. *Id.* at 4–5, 12; *see* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992). The only other instance in which the Court rescinded a fundamental right was in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which eliminated the fundamental right to contract previously recognized in *Lochner v. New York*, 198 U.S. 45 (1905).

3. *See* Joan Biskupic, *The Supreme Court Hasn't Been This Conservative Since the 1930s*, CNN (Sept. 26, 2020), https://www.cnn.com/2020/09/26/politics/supreme-court-conservative/index.html [https://perma.cc/DJ9J-73T7] (foreshadowing the effect that Justice Barrett's appointment and the resulting 6-3 conservative majority could have on *Roe*'s tenure).

Roe and *Casey* in its early abortion cases.[4] These prior decisions caused many legal meteorologists to forecast the Court's impending effort to divorce itself from the legal frameworks that had guided abortion jurisprudence over the last fifty years.[5]

Along with denoting the end of federally protected abortion rights, *Dobbs* dismantled the levies holding back the floods of state legislation restricting abortion. In the interim between *Roe*/*Casey* and *Dobbs*, many states made concerted efforts to diminish abortion rights through regulations toeing the line for compliance with *Roe* and *Casey*.[6] These legislative efforts

4. For example, the Court's decision in *Cameron v. EMW Women's Surgical Ctr.*, 142 S. Ct. 1002 (2022), undermined *Roe*'s procedural safeguards by allowing the Kentucky Attorney General to intervene on behalf of a restrictive abortion bill years after the initial litigation had been resolved. Although Health Secretary Eric Friedlander, the man initially tasked with defending Kentucky's bill, had declined to appeal a district court injunction preventing the bill's enforcement, the Court allowed Kentucky Attorney General Daniel Cameron to take up the challenge years later. This essentially allowed anti-abortion advocates a second bite at the apple whenever they disagreed with litigation decisions made by their predecessors. *See* Jaclyn Belczyk, *U.S. Supreme Court Allows Kentucky AG to Defend Abortion Law*, JURIST (Mar. 4, 2022), https://www.jurist.org/news/2022/03/us-supreme-court-allows-kentucky-ag-to-defend-abortion-law [https://perma.cc/5368-CTFD]. Additionally, the Court's failure to preemptively block Texas's fetal heartbeat statute, which restricted abortions as early as six weeks gestation, provided a strong signal that the Court was moving away from *Roe* and *Casey*. *See* Amy Howe, *Court Won't Block Texas Abortion Ban but Fast-Tracks Cases for Argument on Nov. 1*, SCOTUSBLOG (Oct. 22, 2021), https://www.scotusblog.com/2021/10/court-wont-block-texas-abortion-ban-but-fast-tracks-cases-for-argument-on-nov-1 [https://perma.cc/Q5UJ-ZECL] (outlining the procedural disposition surrounding the litigation of S.B. 8).

5. Many scholars viewed the Court's tolerance of S.B. 8 as the beginning of the end for *Roe* and *Casey*. *See, e.g.*, Nina Totenberg, *Supreme Court Refuses to Block Texas Abortion Law as Legal Fights Move Forward*, NPR (Dec. 10, 2021), https://www.npr.org/2021/12/10/1053628779/supreme-court-refuse-to-block-texas-abortion-law-as-legal-fights-move-forward [https://perma.cc/EMA9-VUPE] (quoting Florida State professor Mary Ziegler: "If you read the win for abortion providers here as some kind of positive sign in the *Dobbs* case, I think you're deluding yourself . . . . Essentially what you see is the most conservative justices saying 'it's not Texas's job to overrule *Roe v. Wade*. That's our job and we're going to do that job.'").

6. *See, e.g.*, Planned Parenthood of Wis., Inc. v. Schimel, 806 F. 3d 908 (7th Cir. 2015) (providing a permanent injunction against a law requiring care providers to have admitting privileges at hospitals within thirty miles in order to perform abortions); Debbie Elliott & Laurel Wamsley, *Alabama Governor Signs Abortion Ban into Law*, NPR (May 14, 2019), https://www.npr.org/2019/05/14/723312937/alabama-lawmakers-passes-abortion-ban [https://perma.cc/BP4V-G4UH] (detailing Alabama's effort to impose the strictest abortion ban in the

attempted to curtail abortion rights by limiting various aspects of abortion procedure, frequently resulting in constitutional challenges from abortion rights advocates and leaving the federal court system to strike the balance between an individual's constitutional rights and the interests conferred to states through the enacted regulations.[7] With *Dobbs* abolishing federal abortion protections, demarcating the prospective boundaries for permissible government control over abortion will be left solely in the province of the individual states.

In the lead up to *Dobbs*, possibly the most in vogue means of restricting abortion was through regulatory statutes colloquially referred to as "reason bans."[8] The moniker stems from the statutory language prohibiting medical professionals from providing abortion services to individuals seeking an abortion solely because of the sex, race, or potential genetic abnormality of the fetus.[9] Although the ramifications associated with each protected fetal class has been extensively debated among legal

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country in a direct challenge to *Roe*). The disparity in abortion regulations across jurisdictions has recently led to states attempting to pass statutes preventing residents from crossing state lines to seek abortions under more favorable statutes. *See, e.g.*, Caroline Kitchener, *Missouri Lawmaker Seeks to Stop Residents From Obtaining Abortions Out of State*, WASH. POST (Mar. 8, 2022), https://www.washingtonpost.com/politics/2022/03/08/missouri-abortion-ban-texas-supreme-court [https://perma.cc/ZE3P-6D2Y] (describing how such statutes reflect a "new strategy" for the anti-abortion movement).

7. *See, e.g.*, Colautti v. Franklin, 439 U.S. 379, 386 (1979) (holding that state interests only become compelling upon fetal viability); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (holding that a state's legitimate interests last throughout pregnancy but only become compelling upon fetal viability). *But see* Webster v. Reprod. Health Servs., 492 U.S. 490 (1987) (finding that a state's interests don't begin just at the point of viability).

8. *See* Jonathan Mattise, *Appeals Court Blocks Tennessee Down Syndrome Abortion Ban*, ASSOCIATED PRESS (Sept. 10, 2021), https://apnews.com/article/health-courts-tennessee-down-syndrome-8c3650a20fdaf4397ff9995a4c2cb3d4 [https://perma.cc/6BPK-55YQ].

9. *Id.* While many reason ban statutes include specific Down Syndrome Provisions, other statutes encompass any non-lethal genetic condition. *Compare* ARIZ. REV. STAT. ANN. §§ 13-3603.02(A)(2), 13-3603.02(G)(2)(a)–(b) (2022) (referring to genetic abnormalities), *and* N.D. CENT. CODE § 14-02.1-04.1 (2021) (same), *with* IND. CODE ANN. § 16-34-4-6 (West 2022) (referring specifically to Down syndrome). The most common affliction covered by the broader provisions is cystic fibrosis. *See* Steve Gorman, *Arizona Governor Signs Ban on Abortions Based on Genetic Abnormalities*, REUTERS (Apr. 28, 2021), https://www.reuters.com/world/us/arizona-governor-signs-ban-on-abortions-based-on-genetic-abnormalities-2021-04-28 [https://perma.cc/M7WS-YLM9].

scholars,[10] this Note focuses on the contentious discussions surrounding reason bans' genetic abnormality prong. These debates are being pursued with a renewed fervor due to modern advancements in predictive genetic screening, allowing for enhanced identification of the genetic markers determinative of certain abnormalities in the developing fetus.[11] Contemporary screening practices additionally permit fetal characteristics to be identified far earlier in the gestational timeline than what was possible using prior genetic testing methods.[12] Policymakers have expressed concerns that increased availability of genetic tests will induce a greater number of abortions based on positive screening results.[13] Such concerns are often discussed in the

10. Although this Note focuses on the genetic abnormality component of reason bans, the race and sex prongs raise equally important and contentious issues. For a sample of the discourse surrounding sex-based abortions, compare Steven W. Mosher, *President's Page: Let Us Ban Sex-Selective Abortions*, POPULATION RSCH. INST. (Mar. 1, 2007), https://www.pop.org/presidents-page-let-us-ban-sex-selective-abortions [https://perma.cc/74EJ-UU9X] (attempting to undermine abortions generally through the argument that Asian immigrants are bringing problematic sex-selective abortion practices to the United States), with Shivana Jorawar & Miriam W. Yeung, *Wolves in Sheep's Clothing: The Impact of Sex-Selective Abortion Bans on Asian American and Pacific Islander Women*, ASIAN AM. POL'Y REV. (June 3, 2014), https://aapr.hkspublications.org/2014/06/03/wolves-in-sheeps-clothing-the-impact-of-sex-selective-abortion-bans-on-asian-american-and-pacific-islander-women [https://perma.cc/8LEB-Y6ZD] (explaining how sex-selective abortion bans negatively impact the Asian American and Pacific Islander community by restricting health care accessibility and perpetuating damaging stereotypes). For an overview of the history and policy concerns behind race-selective abortion bans, see Jennifer M. Dunbow, *Abortion as Genocide: Race, Agency, and Nation in Prenatal Nondiscrimination Bans*, 41 SIGNS: J. WOMEN IN CULTURE & SOC'Y 603, 604 (2016) (detailing how one of the concerns motivating race-selective abortion bans was the idea that Planned Parenthood was targeting communities of color, a claim which finds little empirical support).

11. *See* Rachel Rebouché & Karen Rothenberg, *Mixed Messages: The Intersection of Prenatal Genetic Testing and Abortion*, 55 HOW. L.J. 983, 989 (2012) (outlining the gestational timeline for when genetic tests can be performed); Jaime S. King, *Not This Child: Constitutional Questions in Regulating Noninvasive Prenatal Genetic Diagnosis and Selective Abortion*, 60 UCLA L. REV. 2, 6 (2012) (describing how developments in genetic testing are creating a growing state interest with respect to certain abortion regulations).

12. *See How Do Health Care Providers Diagnose Down Syndrome?*, NAT'L INSTS. OF HEALTH, https://www.nichd.nih.gov/health/topics/down/conditioninfo/diagnosis [https://perma.cc/K99G-CC95].

13. David A. Prentice, *Testimony in Support of Indiana Senate Bill 334, A Bill to Prohibit Prenatal Discrimination by Prohibiting Abortion Based on Sex Selection or Genetic Abnormality*, 32 ISSUES L. & MED. 105, 109 (2017) (arguing

context of Down syndrome, America's most common chromosomal disorder and a hereditary condition screened for by most prenatal genetic tests.[14] Reason ban proponents claim that the imposed limitations are necessary to avoid the "eugenic" nature of selective abortions against Down syndrome.[15] Fears that modernized in utero[16] genetic tests will result in a spike in the number of abortions sought has caused several states to proscribe abortions sought solely due to a positive genetic test for Down syndrome.[17] These reason ban statutes have been subjected to numerous challenges from both healthcare providers and individuals seeking abortions, who claim that the restrictions infringe upon their constitutional rights.[18]

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that the increased availability of genetic tests also allows for increased opportunities for selecting against individuals with genetic abnormalities); David Crary & Iris Samuels, *Down Syndrome Abortion Bans Gain Traction After Court Ruling*, ABC NEWS, (May 19, 2021), https://abcnews.go.com/Health/wireStory/syndrome-abortion-bans-gain-traction-court-ruling-77781218 [https://perma.cc/K6NK-HFPR] (quoting Katherine Beck Johnson of the Family Research Council: "It's important for a state to show they're not supporting eugenics; they want to remove the stigma of people who have Down Syndrome."). Many reason ban advocates rely on statistical studies suggesting a nearly one-to-one correlation between positive screenings for Down syndrome and number of abortions sought. *See, e.g.*, Amy Harmon, *Prenatal Test Puts Down Syndrome in Hard Focus*, N.Y. TIMES (May 9, 2007), https://www.nytimes.com/2007/05/09/us/09down.html [https://perma.cc/V4AC-RGW8] (asserting that 90% of mothers who learn of a Down syndrome diagnosis choose to have an abortion). These studies are plagued by methodological flaws and have since been supplanted by more reliable studies indicating a much lower figure, discussed *infra* Part III.C.2.

14. *See* Brandon Colby, *Genetic Testing for Down Syndrome*, SEQUENCING, https://sequencing.com/education-center/genetic-testing-baby/genetic-testing-down-syndrome [https://perma.cc/GN3P-T27K].

15. *See supra* note 13 and accompanying text.

16. In utero genetic tests occur during the period in which a fetus is in the uterus of a pregnant female. *In Utero*, MILLER-KEANE ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED HEALTH 957 (Marie T. O'Toole ed., 7th ed. 2003).

17. *See* ARIZ. REV. STAT. ANN. § 13-3603.02(A)(2) (2022); N.D. CENT. CODE § 14-02.1-04.1 (2021); Melissa Jeltsen, *Court Rules Tennessee Can Enforce Abortion Ban Based on Down Syndrome Diagnosis*, HUFFPOST (Nov. 23, 2020), https://www.huffpost.com/entry/court-rules-tennessee-can-enforce-ban-on-abortion-based-on-down-syndrome-diagnosis_n_5fbbdfdec5b68ca87f7d9e89 [https://perma.cc/836N-L433] (noting how over a dozen states have passed similar reason bans to Tennessee's law).

18. *See*, *e.g.*, Supplemental Brief of Plaintiff-Appellees Preterm-Cleveland, et al. on Rehearing En Banc at 8–9, Preterm-Cleveland v. McCloud, 994 F.3d

Facial challenges to enacted reason bans divide the federal circuit courts. The Seventh Circuit has imposed a permanent injunction on reason ban regulations, while the Sixth Circuit recently upheld an Ohio reason ban statute.[19] The Eighth Circuit had also imposed a permanent injunction on reason ban regulations, but has since vacated its decision while awaiting a rehearing en banc.[20] As of October 2022, there has been no en banc decision released, and it is possible that the Eighth Circuit will allow the decision from June 2021 to stand as good law. These conflicting decisions reflect dissension as to whether reason bans more severely implicate individual rights or rights held by regulating states. The exponentially increasing reliability and popularity of genetic screening[21] means that a given state's stance on reason bans carries major ramifications for that jurisdiction's expectant parents, regardless of whether they are currently seeking an abortion or not. This Note seeks to expound the many issues inherent with reason bans to contend, not only that reason bans are unconstitutional under most current state policies, but also that they are a Trojan Horse for Down syndrome interests. The purported considerations justifying reason bans are heavily outweighed by the constitutional interests subverted by such legislation. Therefore, even without the backstop of federal protection for abortion, state courts should recognize the unsalvageable deficiencies in reason bans and follow the initial decisions from the Seventh and Eighth Circuits to void reason ban legislation.

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512 (2021) (No. 18-3329) ("[T]he Supreme Court recognized that the Fourteenth Amendment protects the decision to have an abortion.").

19. *See* Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health, 888 F.3d 300 (7th Cir. 2018), *rev'd in part on other grounds sub nom.*, Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780 (2019); Preterm-Cleveland v. McCloud, 994 F.3d 512 (6th Cir. 2021).

20. Reprod. Health Servs. of Planned Parenthood of the St. Louis Region v. Parson, 1 F.4th 552 (8th Cir. 2021), *vacated* July 13, 2021, *reh'g granted en banc*.

21. *See* Kathryn A. Phillips, Patricia A. Deverka, Gillian W. Hooker & Michael P. Douglas, *Genetic Test Availability and Spending: Where Are We Now? Where Are We Going?*, 37 HEALTH AFFS. 710, 712–14 (2018) (noting the rapidly expanding market of genetic tests, increased market spending on prenatal tests, and the decreased production costs associated with the creation of tests). *See generally* Catherine M. DeUgarte, Man Li, Mark Surrey, Hal Danzer, David Hill & Alan H. DeCherney, *Accuracy of FISH Analysis in Predicting Chromosomal Status in Patients Undergoing Preimplantation Genetic Diagnosis*, 90 FERTILITY & STERILITY, 1049, 1049–54 (2008) (discussing the accuracy of specific in utero testing options with respect to chromosomal abnormalities).

Part I of this Note retraces the history surrounding abortion's constitutional status, highlighting the important takeaways from the landmark *Roe* and *Casey* decisions and the legal standards they established for evaluating abortion regulations before addressing *Dobbs*'s rationale for eliminating the federal abortion right. Part II analyzes three cases comprising the circuit split on reason bans prior to *Dobbs*, discussing how the disparate appellate views regarding the constitutional implications for reason bans remains an important influence on state courts reviewing similar legislation in the near future. Part III applies the principles from the appellate split to argue that the categorical prohibitions created through reason bans should fail to survive judicial scrutiny, even in states recognizing only limited abortion rights. Part III also highlights the numerous constitutional issues emanating from reason bans and describes how these defects invidiously erode individual rights and sabotage the interests of the Down syndrome community. Finally, Part III argues that reason bans serve no legitimate state interests and are plagued with deficiencies that should cause state courts to follow the Seventh Circuit in setting aside reason bans as unconstitutional.

I. THE TUMULTUOUS RISE AND FALL OF *ROE* AND *CASEY*

Until recently, the popular conception of abortion rights was inextricable from the Supreme Court's decision in *Roe v. Wade*.[22] The seminal case established a constitutional right to abortion by extending the Fourteenth Amendment's privacy protections to cover abortion decisions, thus effectuating one of the most well-known and divisive rulings in the Supreme Court's history.[23] However, although *Roe* undoubtedly established the foundation for the Supreme Court's abortion jurisprudence, the subsequent *Casey* decision nuanced *Roe* by articulating a more

22. *See* Laura Santhanam, *How Has Public Opinion About Abortion Changed Since* Roe v. Wade*?*, PBS (July 20, 2018), https://www.pbs.org/newshour/health/how-has-public-opinion-about-abortion-changed-since-roe-v-wade [https://perma.cc/W8LH-SQLW] (framing contemporary public debates over abortion rights and overturning *Roe*).

23. *See* Linda L. Schlueter, *40th Anniversary of* Roe v. Wade*: Reflections Past, Present, and Future*, 40 OHIO N. U. L. REV. 105, 108 (2013) (detailing how *Roe* has become the touchstone for debates about the role of the Supreme Court in modern society and has given rise to major political movements).

relaxed judicial review standard for evaluating state regulations.[24] Thus, federal courts evaluated state legislation under the modified legal standards established in *Casey*, rather than invoking *Roe* directly.[25] And although *Dobbs* precludes abortion rights under the federal constitution, *Roe* and *Casey* still represent the trunk to which branching analytical frameworks in modern abortion decisions are firmly attached.[26] Thus, a brief look into the evolution of abortion jurisprudence and the resulting legal standards provides useful context for determining how state courts will prospectively evaluate abortion regulations such as reason bans.

A. FUNDAMENTALLY SOUND: *ROE*'S ABORTION-PRIVACY NEXUS

In 1970, an unmarried Texas woman named Norma McCorvey was pregnant with her third child.[27] McCorvey considered seeking an abortion, as she did not believe her job as a ticket salesperson for the traveling carnival show was conducive to supporting a third child.[28] Aggravating McCorvey's circumstance was Texas's categorical abortion prohibition, leaving McCorvey with no option other than carrying to term.[29] Texas's unforgiving regulation mirrored statutes that existed in a majority of the states during the time period.[30] After initially being advised by friends to lie about being raped in order to terminate the pregnancy (an act that would have been futile given that Texas's law did not create an exemption for incestuous or rape related abortions), McCorvey was eventually solicited to act as a

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24. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (replacing *Roe*'s trimester framework with the undue burden standard).

25. *See, e.g.*, Mary Ziegler, *Liberty and the Politics of Balance: The Undue Burden Test After* Casey/Hellerstedt, 52 HARV. C.R.-C.L. L. REV. 421, 423 (2017) (describing how the monumental *Hellerstedt* decision was decided under the delicate balance created in *Casey*).

26. *See Casey*, 505 U.S. at 846 (upholding the constitutional holdings in *Roe* before moving on to abandon the analytical framework *Roe* implemented to analyze those constitutional rulings).

27. *See* Matt Brennan, *Timeline: Key Events in the Life of Norma McCorvey, aka Jane Roe*, L.A. TIMES (May 22, 2020), https://www.latimes.com/entertainment-arts/tv/story/2020-05-22/norma-mccorvey-aka-jane-roe-timeline-fx-hulu-doc [https://perma.cc/T3BA-RWFW].

28. *Id.*

29. Roe v. Wade, 410 U.S. 113, 117–18 (1973). The only exception in Texas's law was if an abortion was deemed necessary to save the expectant mother's life. *Id.*

30. *Id.* at 118.

signatory plaintiff for a constitutional challenge to Texas's restrictive abortion laws.[31] McCorvey signed the lawsuit under the alias Jane Roe, initiating the now-famous *Roe v. Wade*.[32]

McCorvey's legal claim was that Texas's statute violated her right to privacy under the substantive arm of the Fourteenth Amendment's Due Process Clause.[33] Prevailing on a substantive due process claim required that McCorvey demonstrate unconstitutional interference with a "fundamental" right.[34] Fundamental rights are those that are either explicitly protected through the Constitution or "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[35] While neither the Fourteenth Amendment nor any other part of the Constitution guarantees a right to privacy, the Supreme Court has long recognized that certain privacy rights are entrenched in the Constitution.[36] Although Supreme Court jurisprudence had established privacy as a fundamental right, McCorvey's challenge was contingent upon the Supreme Court holding that abortion was sufficiently fundamental or "implicit in the concept of ordered liberty" to be protected under the recognized right to privacy.[37] The Court obliged.

Citing the "distressful life and future" women face through forced maternity, the Court found that abortion was within the scope of protected privacy rights.[38] Upon finding abortion was

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31. *Id.*; *see also* NORMA MCCORVEY WITH ANDY MEISLER, I AM ROE: MY LIFE, *ROE V. WADE*, AND FREEDOM OF CHOICE (1994).

32. *Roe*, 410 U.S. at 120.

33. *Id.* The Due Process Clause contemplates two related but separate categories of rights. Procedural due process serves to counter actions depriving individuals of life, liberty, or property. *See, e.g.,* Mathews v. Eldridge, 424 U.S. 319, 332 (1976). Substantive due process "provides heightened protection against government interference with certain fundamental rights and liberty interests." Troxel v. Granville, 530 U.S. 57, 65 (2000) (citation omitted).

34. *See, e.g.*, *Granville*, 530 U.S. at 65 (recognizing parents' fundamental right to rear their children); Wash. v. Glucksberg, 521 U.S. 702, 720 (1997) (holding that there is no fundamental right to physician-assisted suicide).

35. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

36. *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969) (holding that the right to privacy is covered under the First Amendment); Terry v. Ohio, 392 U.S. 1, 8–9 (1968) (finding that privacy is guaranteed through the Fourth Amendment); Katz v. United States, 389 U.S. 347, 350 (1967) (holding privacy is covered by the Fifth Amendment).

37. *Roe*, 410 U.S. at 152 (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

38. *Id.* at 153 ("Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned,

"fundamental," the Court in *Roe* proceeded to analyze the Texas statute under strict scrutiny, an exacting review standard invoked whenever a regulation purports to infringe upon a fundamental right.[39] Under strict scrutiny, statutes regulating a fundamental right are only justifiable if they protect a compelling state interest and are narrowly drafted to serve only those compelling interests.[40] A seven justice majority determined Texas's law lacked the constitutional muster to withstand strict scrutiny.[41]

The Court in *Roe* initially noted that although the state had a compelling interest in preserving fetal life, that interest alone did not justify Texas's stringent regulations.[42] *Roe*'s central holding asserted that with respect to abortion regulations, state interests in protecting fetal life did not become compelling until fetal viability.[43] The Court justified this inflection point on both logical and biological grounds, as a state could not truly have a

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associated with the unwanted child, and there is the problem of bringing a child into a family unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.").

39. *See* Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627 (1969) (evaluating whether the state interests at issue justified a New York statute limiting certain voting rights); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (reviewing whether sufficient state interests existed to justify a restriction of the fundamental right to travel); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (determining whether a law prohibiting the exercise of certain religious liberties was constitutionally valid in light of the state interests motivating the legislation); Tandon v. Newsom, 141 S. Ct. 1294, 1297–98 (2021) (applying the standard to COVID-19 regulations and their potential infringement on religious liberties).

40. *See* Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 225–26 (1989) (articulating the compelling state interest standard in the context of the First Amendment right to free speech); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (discussing the standard as it relates to the right of privacy). Strict scrutiny is an unforgiving standard under which few statutes can survive. *See, e.g.*, Wash. Post v. McManus, 944 F.3d 506, 520 (4th Cir. 2019) ("But strict scrutiny, in practice, is virtually impossible to satisfy . . . .").

41. *Roe*, 410 U.S. at 113.

42. *Id.* at 163.

43. Fetal viability is the point at which the fetus would have "the capability of meaningful life" if the mother were to give birth at the time an abortion is considered. *Id.* ("This is so because of the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth."). In addition to the interest in protecting fetal life, Texas had claimed interests in protecting the health and safety of the mother, as well as patient safety concerns associated with "abortion mills." *Id.* at 150, 170.

compelling interest in protecting fetal life that was not yet medically feasible.[44] In an effort to clarify the interplay between the fetal viability standard and the gestational timeline, *Roe* established a "trimester framework."[45] Under this test, the choice to have an abortion during the first trimester of pregnancy was protected from any state interference; the second trimester allowed states to "regulate the abortion procedure," but not to outlaw it entirely; after the second trimester, the fetus reached viability and states were permitted to ban abortions performed for purposes other than preserving the health or well-being of the mother.[46] *Roe* ultimately had the twofold impact of recognizing a constitutionally protected right to have an abortion and creating distinct temporal boundaries during a pregnancy denoting when state interests become sufficiently compelling to undertake certain regulatory actions.

B. REFINING *ROE*: *CASEY* AND THE UNDUE BURDEN STANDARD

The Supreme Court's decision in *Roe* sent shockwaves throughout the nation, as the fetal viability standard forced forty-six states to abandon their previous abortion laws.[47] In the chaotic aftermath, states opposing abortion attempted to limit *Roe*'s impact by imposing stringent regulations on abortion procedures, which in turn led to constitutional challenges by regulated parties in the federal court system.[48] The most famous of

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44. *Id.* at 163.

45. *Id.* at 164–65. Each trimester encompassed a fourteen-week gestational period. *Id.*

46. *Id.* Whether an abortion is for the "life or health" of the mother is an often amorphous distinction, with little definitive guidance. As an example, a Massachusetts court noted that abortions pre-*Roe* were permissible "to prevent serious impairment of [the mother's] health, mental or physical." Commonwealth v. Brunelle, 171 N.E.2d 850, 852 (Mass. 1961). In New Jersey, this same standard was applied, but the assessment was often left to a "good faith" determination of treating physicians and hospitals. Gleitman v. Cosgrove, 227 A.2d 689, 705 (N.J. 1967).

47. David Rosen, *Roe: 47 Years and Counting*, COUNTERPUNCH (Jan. 24, 2019), https://www.counterpunch.org/2019/01/24/roe-47-years-and-counting [https://perma.cc/9BFV-AEP5].

48. *See* M. David Bryant, Jr., *State Legislation on Abortion After* Roe v. Wade*: Selected Constitutional Issues*, 2 AM. J.L. & MED. 101, 102–03 (1976) (describing how states tried to fill the vacuum created by *Roe* by enacting legislation to conform with, and sometimes challenge, the Court's holding). The statutory reconstruction efforts of conservative states indicated hostility towards *Roe*, or at least a desire to find the outermost boundaries of *Roe*'s protections. This is evidenced by examining state statutes that could be reenacted if *Roe*

these cases came twenty years after *Roe* when the Supreme Court reconsidered *Roe*'s central holdings in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[49]

1. Tectonic Shifts: The Unstable Judicial Landscape Giving Birth to a Seminal Decision

Like Texas, Pennsylvania had employed a comprehensive abortion ban that was voided by the *Roe* decision.[50] Following *Roe*, Pennsylvania enlisted staunch Republican Stephen Freind to draft legislation that would maintain stringent abortion regulations, while simultaneously bringing Pennsylvania into minimal compliance with *Roe*.[51] Freind's efforts resulted in the Pennsylvania Abortion Control Act of 1982, a statute imposing numerous restrictive measures, including an informed consent provision,[52] a spousal notice provision,[53] a parental consent

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were reversed. *See Abortion Policy in the Absence of* Roe, GUTTMACHER INST. (Aug. 1, 2022) https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe [https://perma.cc/BX6A-9JSZ] (noting that seven states have retained their pre-*Roe* abortion bans and thirteen states have unconstitutional post-*Roe* restrictions that could take effect after *Dobbs*).

49. 505 U.S. 833 (1992).

50. *See After* Roe *Fell: Abortion Laws by State: Pennsylvania*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/state/pennsylvania [https://perma.cc/3YWP-6Z83] (describing Pennsylvania's abortion law after *Roe* and *Dobbs*); Commonwealth v. Page, 303 A.2d 215, 217 (Pa. 1973) (voiding the prior law); Commonwealth v. Jackson, 312 A.2d 13, 13 (Pa. 1973) (reaffirming *Page*).

51. *See* Anne McGraw, *Pennsylvania House Approves Abortion Controls*, AP NEWS (Oct. 24, 1989), https://apnews.com/article/6034d2acc826412ccf976dc570c41430 [https://perma.cc/H4YP-LWZJ] (quoting Freind's description of the bill as "a moderate, common sense approach to this issue"). Freind could have perhaps benefitted from a moderate, common sense approach to his state Senate campaign, in which he was heavily defeated by the much more centrally oriented Arlen Specter. During the campaign, Freind frequently accused Specter of having more in common with Democrats than Republicans, and Freind resorted to what some contemporaneous writers dubbed "bullying tactics." *See* Tom Bowman, *Arlen Specter Campaigns as an Insider Pa. Senator Takes Pride in Incumbency*, BALT. SUN (Apr. 20, 1992), https://www.baltimoresun.com/news/bs-xpm-1992-04-21-1992112067-story.html [https://perma.cc/WME3-AQ26] (referencing an incident where Freind repeatedly banged on the door outside a room where Specter was being interviewed).

52. The informed consent provision required that a doctor provide certain information to the mother considering abortion at least twenty-four hours in advance of the procedure. 18 PA. STAT. AND CONS. STAT. § 3205 (West 2022).

53. Unless certain exceptions applied, a woman was required to sign a statement affirming that she had notified her husband prior to undergoing the procedure. 18 PA. STAT. AND CONS. STAT. § 3209 (West 2022).

provision,[54] and various reporting and record keeping mandates for abortion providers.[55] Abortion rights advocates quickly rallied to challenge Pennsylvania's new statute, and *Casey* arrived at the Supreme Court on appeal from the Third Circuit.[56] The district court had issued an injunction preventing the statute's enforcement, but the Third Circuit reversed, upholding all provisions, except for the spousal notification provision.[57] The petitioners contested that Pennsylvania's new statute violated *Roe*'s trimester framework by imposing unconstitutional restrictions during the first trimester of pregnancy.[58] Pennsylvania claimed the statutory provisions were consistent with *Roe* and alternatively argued for *Roe* to be overturned.[59]

2. Upholding *Roe*'s Constitutional Holdings

The *Casey* Court began its analysis by reaffirming the fundamental constitutional holdings in *Roe*: namely that a woman has a right to seek an abortion pre-fetal viability[60] "without undue [state] interference" and that states preserve the right to impose regulations following viability due to states' compelling interest in protecting the life of both the mother and the fetus.[61] The Court stood behind *Roe*'s holding that the Fourteenth Amendment guaranteed a right to privacy encompassing abortion decisions by asserting that the Due Process Clause extends not only to rights enumerated elsewhere in the constitution, but to "all substantial arbitrary impositions and purposeless restraints."[62] *Casey* found that a woman's substantive liberty with

54. Minors seeking an abortion were required to get the consent of a parent or guardian prior to receiving an abortion. 18 PA. STAT. AND CONS. STAT. § 3206 (West 2022).

55. 18 PA. STAT. AND CONS. STAT. § 3214 (West 2022).

56. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845 (1992).

57. *Id.*

58. *Id.*

59. *Id.* at 853.

60. The Court noted that in the time of *Roe*, fetal viability was determined to be around twenty-eight weeks into gestation, while viability at the time of *Casey* was judged to be around twenty-three to twenty-four weeks. *Id.* at 860. The Court acknowledged that although the exact timeline for fetal viability may change, fetal viability can continue to serve as "the critical fact" in similar analyses. *Id.*

61. *Id.* at 846 (discussing *Roe*'s three-part holding and noting that each part would be adhered to).

62. *Id.* at 848 (citing Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

respect to abortion is unique due to the mental and physical restraints she alone must bear during a pregnancy, giving rise to an "intimate and personal" suffering that precludes states from mandating their own vision of a woman's role without articulating additional interests beyond maintaining fetal life.[63] The Court found that the combination of these realities and the power of stare decisis was sufficient to uphold *Roe*'s central holdings.[64]

3. Replacing the Trimester Framework: *Casey*'s Undue Burden Standard

While stare decisis proved too powerful for the Court to overturn *Roe*'s constitutional holdings, the conservative Court threw a parting blow to abortion by rejecting *Roe*'s trimester framework for determining when state interests become sufficiently compelling to override individuals' Due Process Clause protections.[65] *Casey* asserted that the trimester framework misconceived the nature of the pregnant individual's interest and undervalued the state's compelling interest in protecting human life.[66] The plurality found the trimester framework too prohibitive on state action during the first trimester.[67] According to the Court, *Roe* granted the right "to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child."[68] The Court found that not all governmental interference is "unwarranted" due to the recognized interest in protecting life throughout pregnancy.[69] The Court reasoned that the trimester framework's inflexibility had resulted in courts striking down statutes that reflected justifiable governmental interference and did not truly bear on an individual's ultimate decision on whether to have an abortion.[70]

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63. *Id.* at 852 ("The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.").

64. *Id.* at 853 ("[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.").

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

66. *Id.* (noting the "basic flaws" in the trimester framework).

67. *Id.*

68. *Id.* at 875 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

69. *Id.*

70. *Id.* ("[T]he Court's experience applying the trimester framework has led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision.").

Upon discarding *Roe*'s trimester framework, the Court offered the now familiar "undue burden" standard to serve as the standard for judicial scrutiny of prospective regulations.[71] Prior to *Casey*, a faction of the Supreme Court spearheaded by Justice O'Connor advocated for an "undue burden" framework to evaluate abortion regulations, but the Court as a whole had failed to reach a consensus on the standard's practical implications prior to *Casey*.[72] Thus, the *Casey* court was tasked with reconciling prior inconsistent applications of the undue burden standard and articulating a coherent test for the evaluation of future abortion restrictions. Pursuant to that aim, the plurality in *Casey* opined that a finding of an undue burden is "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[73] The Court reached this definition by reasoning that "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it" and that a statute which "has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends."[74]

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71. *Id.* at 876 ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

72. *Compare* Hodgson v. Minnesota, 497 U.S. 417, 459–61 (1990) (O'Connor, J., concurring in part and concurring in the judgment in part) (interpreting the undue burden standard as a "rational relation" test, requiring that the obstacles imposed by a statute be reasonably related to state interests, and finding that a Minnesota statute requiring both parents to be notified of a minor's intent to seek an abortion as unduly burdensome under this standard), *with* Thornburgh v. Am. Coll. Obstetricians & Gynecologists, 476 U.S. 747, 828–29 (1986) (O'Connor, J., dissenting) (defining an undue burden as requiring "absolute obstacles" and rejecting the majority's classification as any regulation posing "an unacceptable danger of deterring the exercise of that right"). Justice O'Connor also noted in her dissent that prior decisions had reflected an inconsistent application of the undue burden standard. *Compare* Harris v. McRae, 448 U.S. 297, 314 (1980) (finding no undue burden where no state-imposed restriction on abortion was present), *with* City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 452–53 (1983) (O'Connor, J., dissenting) (arguing that undue burden should be applied throughout the pregnancy regardless of "stage").

73. *Casey*, 505 U.S. at 877.

74. *Id.*

The Supreme Court's switch to the undue burden standard provided states greater regulatory freedom prior to fetal viability, as the previously off-limits first trimester became open to certain abortion restrictions. The practical impact of the more permissive standard was felt immediately, as four of the five challenged provisions to the Pennsylvania Abortion Control Act were upheld, with only the spousal notification provision being set aside.[75] Despite *Casey* offering increased leeway for state legislatures pursuing abortion regulations, the Court unequivocally confirmed that abortion was a constitutionally protected right.

C. THE *DOBBS* DOUBLE REVERSE: SCOTUS'S INFAMOUS TRICK PLAY

Casey enjoyed relative stability as the Court's leading abortion case until Justice Barrett's 2020 appointment created a Supreme Court conservative supermajority.[76] The unbalanced Court quickly planted their flag on abortion, most notably by refusing to grant an injunction against Texas's fetal heartbeat statute (S.B. 8).[77] S.B. 8 prevented abortions as early as six weeks gestation, openly flouting *Casey*'s pre-viability standard.[78] Allowing S.B. 8 to take effect tipped the Court's hand on their intent to abandon the *Casey* framework. The Court's methodical subversion of *Roe* and *Casey* came to a head in *Dobbs v. Jackson Women's Health Organization*.[79] At issue in *Dobbs* was Mississippi's Gestational Age Act, which proscribed abortions after fifteen weeks gestation, a cutoff substantially predating fetal viability and thus posing a direct challenge to *Roe* and *Casey*.[80]

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75. With respect to the informed consent prong, the Court found that while the provision had problematic implications, these difficulties "do not demonstrate that the waiting period constitutes an undue burden." *Id.* at 886. In upholding the Abortion Control Act's parental consent provision, the Court stated "[t]he only argument made by petitioners . . . is the contention that the parental consent requirement is invalid because it requires informed parental consent. For the most part, petitioners' argument is a reprise of their argument with respect to the informed consent requirement in general, and we reject it . . . ." *Id.* at 899. Conversely, the Court held that the spousal notification provision was likely to create a substantial obstacle in light of the well documented physical and psychological abuse faced by pregnant individuals subjected to such a condition. *Id.* at 893–94.

76. *See supra* note 3 and accompanying text.

77. *See supra* note 4 and accompanying text.

78. *See id.*

79. Dobbs v. Jackson Women's Health Org., No. 19-1392 (June 24, 2022).

80. *Id.*; MISS. CODE ANN. § 41-41-191 (2021).

Instead of striking down Mississippi's law under the fetal viability standard that had guided the Court for five decades, the Supreme Court took drastic action by simultaneously overturning *Roe* and *Casey*, turning its back on half a century of jurisprudence and eviscerating federal protection for pre-viability abortions in the process.[81] This Section briefly examines the Court's tenuous rationale behind the controversial ruling in *Dobbs*.

1. The Due Process Retrograde

"[W]e must never forget, that it is a constitution we are expounding."[82] Chief Justice Marshall's famous line reflects a longstanding principle recognized since America's inception: constitutional rights cannot stagnate based on the limited issues contemplated by the framers in the 1700s, but must be interpreted in a way to accommodate the country's evolving needs.[83] Ever since the *Slaughter-House Cases* relegated the Privileges and Immunities Clause to vestigial status, the constitutional foothold for establishing contemporary rights has been the substantive arm of the Due Process Clause.[84] In light of these constitutional dynamics, *Dobbs*'s test for evaluating substantive due process rights frustrates the eminent purposes of the framers' constitutional design.

When considering whether a contemporary right is fundamental, courts ask whether the purported right is "deeply rooted in this nation's history and tradition."[85] Broadly speaking, there are two divergent schools of thought for making this determination. The first is the "common law plaintiff test," popularized by Justice Scalia, asking whether an individual would have succeeded in asserting the exact right at issue in a court of common

81. *Dobbs*, slip op. at 5.

82. McCulloch v. Maryland, 17 U.S. 316, 407 (1819) (emphasis omitted).

83. Laurence H. Tribe, *Foreword* to IT IS A CONSTITUTION WE ARE EXPOUNDING: COLLECTED WRITINGS ON INTERPRETING OUR FOUNDING DOCUMENT 7 (Am. Const. Soc'y ed., 2009) ("The framers conceived the Constitution of the United States as a basic charter, marking core principles and general outlines that would be elucidated over the years, enabling succeeding generations to meet the new, and largely unforeseeable challenges they would face.").

84. 83 U.S. 36 (1872); *see* Natalie M. Banta, *Substantive Due Process in Exile: The Supreme Court's Original Interpretation of the Due Process Clause of the Fourteenth Amendment*, 13 WYO. L. REV. 151, 152 (2013) ("The Due Process Clause, as the story goes, obtained a substantive interpretation only because the *Slaughter-House Cases* . . . foreclosed use of the Privileges or Immunities Clause to protect substantive rights . . . .").

85. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

law.[86] This formulation is utilized in many cases refusing to extend substantive due process, such as *Michael H.* and *Bowers*.[87] The second approach can be described as the "fundamental corollary" test, which asks if the purported right naturally emanates from broader constitutional principles, such as the recognized rights to privacy or individual autonomy. This interpretation prevailed in recent cases granting rights that had historically been withheld, such as *Lawrence*, *Griswold*, and *Obergefell*.[88]

Dobbs resoundingly chose to analyze abortion rights under the common law plaintiff test, analyzing abortion in a vacuum while painstakingly combing through ancient historical statutes and treatises to demonstrate that abortion was criminalized at common law, and therefore not deeply rooted in the nation's history and tradition.[89] The majority's due process analysis is troubling for many reasons. Initially, describing this common law plaintiff approach as a "test" is a misnomer because relying on this philosophical view alone disposes of the vast majority of substantive due process questions, as common law rights were severely curtailed compared to the rights contemplated by modern, developed societies.[90] The common law plaintiff method imposes

86. *See* Anthony C. Cicia, Note, *A Wolf in Sheep's Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process Formulation*, 64 FORDHAM L. REV. 2241, 2254, 2258 (1996) (noting that Justice Scalia's formulation defines the right at the most specific level and utilizes judicial restraint and traditional sources to resolve the question).

87. Michael H. v. Gerald D., 491 U.S. 110, 124–25 (1989) (finding that the common law principles of legitimacy precluded plaintiff from challenging for parental rights); Bowers v. Hardwick, 478 U.S. 186, 192–94 (1986) (noting that sodomy was criminalized at common law in rejecting petitioner's due process claim).

88. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (overturning *Bowers* by finding consensual adult sex between a same-sex couple was a corollary of the autonomy inherent in liberty); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding a right to birth control stemmed from the recognized right to privacy); Obergefell v. Hodges, 576 U.S. 644, 645–46 (2015) (asserting that principles of intimacy and marriage applied with equal force to same-sex couples).

89. The Court cited cases dating back to the thirteenth century. Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 17–20 (June 24, 2022).

90. This was especially true for women's rights. *See Development of Rights of Women*, LAWSHELF, https://lawshelf.com/coursewarecontentview/development-of-rights-of-women [https://perma.cc/6TY8-PCQK] (discussing the common law practice of women exchanging their individual rights in return for protection of their husbands under the "unity of person" theory).

a "1791 or bust" attitude towards substantive rights that comports poorly with the axiom that it is a constitution we are meant to be expounding.

Furthermore, while *Dobbs*'s stance on substantive due process is itself problematic, using the common law plaintiff approach would have been precedentially justified if the Court had used it to decide the abortion right in the first instance. The issue for the *Dobbs* majority is that *Roe* and *Casey* protected abortion using a fundamental corollary analysis, finding that abortion rights derived from the guaranteed right to privacy.[91] *Dobbs* could therefore not use medieval treatises as the primary basis to overturn *Roe* and *Casey* without rejecting the fundamental corollary theory entirely. But that ship had already sailed. The fundamental corollary theory has become ingrained in the Court's jurisprudence through cases such as *Griswold*, which extends due process rights to obtaining contraceptives, and *Obergefell*, which protects same-sex marriage.[92]

Thus, the majority was left to try and walk the tightrope of using the common law plaintiff method to overturn the right to abortion, while simultaneously offering idle assurances that the remaining fundamental corollary cases are not at risk—a self-contradicting position that the majority failed to reconcile. *Dobbs* attempts to distinguish abortion from other fundamental corollary cases on the basis that only abortion undertakes the decision to terminate potential life.[93] This offers a facile distinction given the remainder of the opinion. After all, was birth control protected in the 1300s? Were same-sex marriages well received in feudal England? Under the majority's analysis, it is difficult to conceive how *Dobbs* doesn't reflect the flicking of the first domino towards a cataclysmic substantive right regression. Indeed, this appears to be the policy that Justice Thomas's concurrence cannot reach quickly enough.[94]

2. ~~Standing by~~ Abandoning Things Decided . . . Twice

Having articulated a specious basis for distinguishing abortion from other fundamental corollary cases, *Dobbs* still needed to overcome the quintessential stare decisis doctrine to overturn *Roe*, a task complicated by the fact that *Roe*'s central holdings

91. *See supra* notes 38, 61 and accompanying text.

92. *See supra* note 88 and accompanying text.

93. *Dobbs*, slip op. at 49.

94. *Id.* at 3 (Thomas, J., concurring) (arguing for the wholesale abandonment of substantive due process).

had been fortified by *Casey* and thirty years of subsequent Supreme Court jurisprudence. Thus, a curious refrain permeating the *Dobbs* opinion is that the *Casey* Court somehow abdicated their responsibility to consider precedential workability by employing a "novel version" of the stare decisis doctrine to uphold *Roe*.[95] But it is *Casey* that is more congruent with the Court's stare decisis jurisprudence.

Initially, it is worth noting that, unlike *Dobbs*, *Casey*'s decision to uphold *Roe* cannot be linked to political animus, as *Casey* featured an arguably more conservative makeup than the current court. In the interim between *Roe* and *Casey*, the Court underwent a conservative overhaul, with liberal justices William Brennan and Thurgood Marshall being supplanted by George H.W. Bush nominees David Souter and Clarence Thomas.[96] As a result, eight of the nine justices deciding *Casey* were Republican-appointed, with six being appointees of either Reagan or Bush, both of whom firmly opposed *Roe*.[97] The lone Democrat appointed justice in *Casey* was Byron White,[98] one of the two dissenters from the *Roe* opinion.[99] Rather than employing a "novel"[100] version of stare decisis, the loaded conservative Court acted contrary to their political leanings in upholding *Roe* under the established legal principles governing stare decisis analyses. *Casey* thoroughly analyzed *Roe*'s viability by examining concrete stare decisis factors, including *Roe*'s workability, *Roe*'s accordance with prior Supreme Court precedent, the question of

95. *Id.* at 56.

96. *See Members of the Supreme Court of the United States*, SUP. CT. U.S., https://www.supremecourt.gov/about/members.aspx [https://perma.cc/Q65P-9HMD].

97. *See* Sarah McCammon, *Looking Back on President George H.W. Bush's Legacy on Abortion*, NPR (Dec. 4, 2018), https://www.npr.org/2018/12/04/673398023/looking-back-on-president-george-h-w-bushs-legacy-on-abortion [https://perma.cc/X5B6-K55D] (noting how the Bush administration unsuccessfully petitioned the Supreme Court to overturn *Roe*); Francis P. Sempa, *Remembering Reagan's 'Abortion and the Conscience of the Nation*,' AM. SPECTATOR (Sept. 4, 2021), https://spectator.org/remembering-reagans-abortion-and-the-conscience-of-the-nation [https://perma.cc/KDW2-U5BF] (acknowledging that Reagan condemned the Supreme Court's ruling in *Roe*).

98. White was appointed to the Supreme Court by President Kennedy in 1962 and retired in 1993, the year after *Casey* was decided. *Byron White Biography*, FAMOUS PEOPLE, https://www.thefamouspeople.com/profiles/byron-white-8470.php [https://perma.cc/ZJM8-K8EP].

99. Doe v. Bolton, 410 U.S. 179, 221 & n.* (White, J., dissenting) ("This opinion applies also to . . . *Roe v. Wade* . . . .").

100. *Dobbs*, slip op. at 56.

whether changes in factual or legal underpinnings compelled *Roe* to be overturned, and reliance interests, finding that each of these considerations supported upholding *Roe*.[101]

The majority in *Dobbs* contends that *Casey* failed to consider that *Roe* was "egregiously wrong,"[102] and that prior Supreme Court jurisprudence supports overturning "clearly erroneous" decisions.[103] This empty bolstering language is necessitated by the weak underlying legal rationale. *Casey* did consider *Roe*'s merits, finding that *Roe*'s holdings were grounded in precedent such as *Griswold*.[104] *Dobbs*'s claim that *Roe*'s reasoning was exceptionally weak is based on the idea that the Constitution affords no right to privacy that could give rise to a right to obtain an abortion.[105] It is true that *Roe* applied the fundamental corollary theory of due process as opposed to the common law plaintiff philosophy, but that does not make it "egregiously wrong,"[106] as many other cases before and after *Roe* have done the same.[107] Furthermore, *Dobbs*'s efforts to analogize *Roe* with overturned fundamental corollary cases such as *Lochner* are unsound.[108]

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101. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855–61 (1992).

102. *Dobbs*, slip op. at 44.

103. *Id.* at 40–41, 41–43 n.48 (collecting cases in which the Supreme Court has overruled prior constitutional decisions).

104. *Casey*, 505 U.S. at 852–53 ("[I]n some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International* afford constitutional protection. We have no doubt as to the correctness of those decisions. They support the reasoning in *Roe* . . . . ").

105. *Dobbs*, slip op. at 25 ("But that argument flies in the face of the standard we have applied in determining whether an asserted right that is nowhere mentioned in the Constitution is nevertheless protected by the Fourteenth Amendment.").

106. *Id.* at 44.

107. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (striking down a law banning married couples' use of contraceptives as a violation of the right to privacy); Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972) (finding that unmarried couples are entitled to contraception under the Equal Protection Clause and the right to privacy); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (striking down a law criminalizing sexual conduct between members of the same sex as a violation of the right to privacy).

108. *Dobbs*, slip op. at 68; Lochner v. New York, 198 U.S. 45 (1905); *see* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overturning *Lochner*). *Lochner* held that the Fourteenth Amendment granted a fundamental right to contract as a corollary to one's right to individual autonomy. *Lochner*, 198 U.S. at 57–58 ("The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid

Lochner was not overturned due to a faulty substantive due process theory, but a faulty economic theory, as the Great Depression demonstrated that *Lochner*'s endorsement of laissez faire economics was untenable.[109] *Lochner* therefore presented a unique set of shifting factual circumstances and societal views that don't allow it to be painted with the same brush as *Roe*.[110] A careful analysis of Supreme Court precedent demonstrates that the truly "novel"[111] interpretation of stare decisis is the Court's most recent one.

After evaluating abortion under a substantive due process test that contravenes the fundamental goals of our nation's founding document, and concluding that *Roe*, *Casey*, and fifty years' worth of intervening Supreme Court decisions were "egregiously wrong"[112] for not doing the same, *Dobbs* revoked federal protection for abortion, leaving abortion regulations, such as reason bans, solely within the discretion of individual states.[113] Ju-

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which interferes with the general right of an individual to be free in his person . . . .").

109. *See* ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 85 (1941) ("The older world of *laissez faire* was recognized everywhere outside the Court to be dead.").

110. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992) ("Because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law . . . ."). Unlike the nearly nationwide condemnation of laissez faire economics leading up to *West Coast Hotel*, abortion has steadily garnered popularity in the court of public opinion. *See Public Opinion on Abortion*, PEW RSCH. CTR. (May 17, 2022), https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion [https://perma.cc/6U8A-ZAQZ] (showing that over 60% of Americans currently support a right to abortion, an increase of over 10% since 2010).

111. *Dobbs*, slip op. at 56.

112. *Id.* at 44.

113. Although some states will elect to ban abortion entirely, obviating the need for reason ban statutes, the majority of Americans favor a "middle ground" on abortion, and reason bans may be viewed as a possible compromise in many states looking to satisfy its moderate constituents. *See* Russell Heimlich, *Abortion Middle Ground*, PEW RSCH. CTR. (June 1, 2007), https://www.pewresearch.org/fact-tank/2007/06/01/abortion-middle-ground [https://perma.cc/AJ6T-AD8Z] (noting that two-thirds of Americans support a middle ground on abortion); *see also* Jonah Goldberg, *There's a Middle Ground on Abortion. Really*, L.A. TIMES (May 21, 2019), https://www.latimes.com/opinion/op-ed/la-oe-goldberg-abortion-roe-alabama-law-20190521-story.html [https://perma.cc/22DQ-4VAW] (noting that the majority of Americans desire an abortion middle ground).

diciaries in states choosing to codify reason ban statutes will inevitably be faced with litigation based on facial challenges by impacted parties. Part II discusses the existing reason ban litigation landscape created through the federal circuit split, and how state courts should extrapolate on the sound reasoning from the Seventh and Eighth Circuit decisions to set aside challenged reason bans.

II. GUIDING FROM BEYOND THE GRAVE: THE FEDERAL CIRCUIT SPLIT ON REASON BANS PROVIDES IMPORTANT INSTRUCTION FOR STATE COURTS

Prior to *Dobbs*, uncertainty surrounding reason bans resulted from divergent appellate treatment of Down syndrome provisions. Three federal circuits considered reason ban statutes, splitting on whether the restrictions imposed invidiously violated constitutional rights for those seeking an abortion. Both the Seventh and Eighth Circuits initially[114] voided challenged reason ban statutes while the Sixth Circuit upheld a reason ban enacted by the Ohio legislature.[115] Although the trio of federal decisions analyzed reason bans under *Roe* and *Casey*, that reliance in itself does not diminish the significance of the appellate decisions. While the litmus test for reason ban constitutionality will now be conducted under state law rather than the Fourteenth Amendment, and *Casey* will no longer guide judicial analyses, the circuit courts' discussion concerning the interplay between reason bans and fetal viability still carries implicit precedential impact for most states.

Twenty-four U.S. states currently protect the right to abortion, with some of those twenty-four offering expanded protections compared to those afforded under *Roe* and *Casey*.[116] In an additional eight states abortion remains legal, with many of their impending policies contingent on how pending abortion

114. The Eighth Circuit initially sided with the Seventh Circuit, though an en banc rehearing was heard in late 2021 and that decision has not yet been released. Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson, 1 F.4th 552, 552, 561 (8th Cir. 2021), *vacated* July 13, 2021, *reh'g granted en banc*; *see supra* note 20 and accompanying text.

115. *Id.*; Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health, 888 F.3d 300, 310 (7th Cir. 2018); Preterm-Cleveland v. McCloud, 994 F.3d 512, 535 (6th Cir. 2021).

116. *See Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES, https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [https://perma.cc/L3XB-49WL] (outlining state abortion laws in effect as of Oct. 13, 2022).

bans fare in state courts.[117] And though some of the remaining eighteen states impose categorical bans reminiscent of Texas's statute in *Roe*, others only modify *Casey*'s standard by moving the timeline for obtaining an abortion forward from fetal viability.[118] As Part III will discuss, even these expedited timelines fail to bring reason bans within the constitutional realm.[119] Thus, for states not banning abortion altogether, courts faced with reason ban legislation will be required, at least implicitly, to choose a side of the previously controlling circuit split. Because the existing federal appellate decisions continue to represent the proverbial fork in the road with respect to states' views on reason bans, careful analysis of the underlying rationales in the circuit court decisions is essential to understand why state courts should ultimately find reason ban statutes unconstitutional.

A. BANNING BANS: THE SEVENTH CIRCUIT'S REJECTION OF CATEGORICAL PROHIBITIONS PRIOR TO FETAL VIABILITY (OR YOUR STATE'S GESTATIONAL TIMELINE OF CHOICE)

The opportunity to trailblaze appellate jurisprudence on reason bans fell to the Seventh Circuit in *Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner of the Indiana State Department of Health*.[120] Allegedly in response to the "invidiously discriminatory practice" of "eliminat[ing] classes of human beings solely because of their disability, race, or gender,"[121] the Indiana legislature pushed through the "Sex Selective and Disability Abortion Ban"[122] in 2016. The self-labeled ban prohibited all abortions, including those occurring prior to fetal viability, sought "solely because the fetus has been diagnosed with Down Syndrome or has a potential diagnosis of Down Syndrome."[123] Planned Parenthood swiftly rallied to challenge Indiana's reason ban, winning a preliminary injunction at the district court

117. For example, a North Dakota judge temporarily blocked an abortion ban after it was challenged by an abortion provider. *Id.*

118. As an example, Florida's policy advances the timeline to fifteen weeks gestation. *Id.*

119. *See infra* Part III.B.

120. Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health, 888 F.3d 300 (7th Cir. 2018).

121. Brief for the State of Wisconsin et al. as Amici Curiae Supporting Appellants, *Planned Parenthood of Ind. & Ky.*, 888 F.3d 300 (No. 17-3163), 2017 WL 6210730, at *1–2.

122. IND. CODE ANN. § 16-34-4 (West 2016) (amended 2022).

123. *Planned Parenthood of Ind. & Ky.*, 888 F.3d at 303 (quoting IND. CODE ANN. § 16-34-4-6 (West 2016) (amended 2022)).

level.[124] On appeal, the Seventh Circuit decisively affirmed the lower court's decision, correctly ruling that Indiana's ban ran afoul of *Casey*.[125]

The court set aside Indiana's reason ban after engaging in a Fourteenth Amendment analysis, ultimately holding that the statute's non-discrimination provisions violated individuals' rights under the Due Process Clause.[126] In applying *Casey*'s undue burden standard, the court noted that the restrictive effect of Indiana's statutory text not only created a substantial obstacle to aborting a nonviable fetus, but (as even the title of the statute itself suggests) purported an absolute prohibition on certain classes of pre-viability abortions.[127] This conclusion led the court to justifiably hold that it was compelled to set aside Indiana's reason ban.[128] Thus, the Seventh Circuit reached its holding through an eloquent three step deductive process of (1) articulating the fetal viability threshold under *Casey*; (2) noting that Indiana's statute, even by its self-classification, purported an impermissible categorical ban; and (3) holding the statute therefore unconstitutionally violated the Due Process Clause of the Fourteenth Amendment. Following this pragmatic approach allowed the Seventh Circuit to reach a logical conclusion through a straightforward line of reasoning.

After walking through a seemingly elementary application of *Casey*, the Seventh Circuit next turned to Indiana's arguments justifying the enactment of the reason ban. The court portrayed Indiana's position as a contortionist act, performed in an effort to avoid an otherwise routine application of *Casey*'s binding precedent on pre-viability restrictions.[129] Indiana's legal gymnastics took the form of the novel "binary choice" theory, a premise advocating for the spurious distinction that *Casey* grants only the right to choose whether to have an abortion prior

124. *Id.* at 302.

125. *Id.*

126. *Id.* at 305–06 ("The non-discrimination provisions clearly violate this well-established Supreme Court precedent, and are therefore, unconstitutional.").

127. *Id.* at 306 ("These provisions are far greater than a substantial obstacle; they are absolute prohibitions on abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State.") (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992)).

128. *Id.* ("We are bound to follow that Supreme Court precedent.").

129. *Id.* (referring to Indiana's primary legal theory as a creative suggestion).

to fetal viability, but not to choose to abort a "particular child."[130] Indiana asserted that because a decision to abort based on a positive genetic screening for Down Syndrome would be a choice to abort a particular child rather than a general choice of whether or not to have an abortion, such abortions were not protected under *Casey*.[131]

While the binary choice argument may have demonstrated ingenuity, the theory's artificial distinction unsurprisingly failed to gain any traction with the Seventh Circuit. The court quickly dismissed the binary choice theory on the grounds that it lacked precedential support and was abjectly illogical.[132] The court continued its barrage on binary choice by highlighting the inconsistency in allowing a state to eliminate a guaranteed right to abortion if the abortion is performed for a particular purpose.[133] The court emphasized the complete absence of Fourteenth Amendment jurisprudence that would permit a state to invade the protected realm of privacy in order to examine the underlying basis for an abortion.[134] Upon comprehensively disposing of the binary choice theory, the court employed the natural and accepted reading of *Casey* to impose a permanent injunction against Indiana's reason ban.[135]

The Seventh Circuit's decision is instructive, irrespective of *Casey*, for how the opinion describes the nature of reason bans. Namely that reason bans have earned their colloquial moniker because the statutes purport absolute prohibitions without

130. *Id.* at 306. Indiana relied only on a strained reading of *Roe* and *Casey* to advance the binary choice theory. *See* Reply Brief of Appellants, *Planned Parenthood of Ind. & Ky.*, 888 F.3d 300 (No. 17-3163), 2018 WL 790953, at *1 ("A woman's right to choose abortion under *Roe* and *Casey* is not absolute. Instead, these cases protect only her binary choice whether to bear or beget a child, not her choice of which child to bear.").

131. *Planned Parenthood of Ind. & Ky.*, 888 F.3d. at 306 ("Under this theory, a woman . . . has no right to terminate the pregnancy if she determines *after* becoming pregnant that she does not want a particular child.").

132. *Id.* at 306–07 ("Nothing in *Roe*, *Casey*, or any other case from the Supreme Court can be read to limit a woman's right in this way.").

133. *Id.* at 307 ("It is entirely inconsistent to hold that a woman's right of privacy to terminate a pregnancy exists if a woman decides before she becomes pregnant that she does not want to bear a child, but that the State can eliminate this privacy right if a woman later decides she wants to terminate her pregnancy for a particular purpose.").

134. *Id.* ("Nothing in the Fourteenth Amendment or Supreme Court precedent allows the State to invade this privacy realm to examine the underlying basis for a woman's decision to terminate her pregnancy prior to viability.").

135. *See id.*

concern for when the abortions occur on the gestational timeline. Additionally, the Seventh Circuit's opinion suggests that reason bans are not defensible on contrived "binary choice" or "particular child" theories, which are devoid of precedential support. Extrapolating the Seventh Circuit's ruling yields the conclusion that reason bans in states permitting abortion are only constitutional if they impact gestational periods after the state's inflection point demarcating when the government's regulatory interests become sufficiently compelling to permit categorical prohibitions.

B. SECOND VERSE, SAME AS THE FIRST: THE EIGHTH CIRCUIT'S RECENT CONFORMITY TO THE SEVENTH CIRCUIT'S VIEW OF ABORTION BAN LEGISLATION

The Eighth Circuit considered a similarly worded abortion ban in *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. v. Parson*.[136] With the support of Governor Michael Parson, Missouri enacted a statute containing a "Down Syndrome Provision," prohibiting any abortion in which the provider: "knows that the woman is seeking the abortion solely because of a prenatal[137] diagnosis, test, or screening indicating Down [s]yndrome or the potential of Down [s]yndrome in an unborn child."[138] Before turning to Missouri's arguments in support of the statutory provision, the Eighth Circuit established that under *Casey*, fetal viability provided the inflection point for when a state's interests in protecting fetal life were sufficiently compelling to permit categorical abortion bans.[139] In *Parson*, it was undisputed that Missouri's reason ban applied to pre-viability abortions.[140]

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136. 1 F.4th 552 (8th Cir. 2021).

137. "Prenatal" simply refers to any period proceeding birth. *Prenatal*, MILLER-KEANE ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED HEALTH (7th ed. 2003).

138. *Parson*, 1 F.4th at 557 (alterations in original) (quoting MO. ANN. STAT. § 188.038(6)(2) (West 2022)).

139. *Id.* at 559 ("Before viability, the State's interests are not strong enough to support a prohibition of abortion . . . .") (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992)).

140. *Id.* at 560 ("Missouri does not dispute that fetuses are considered nonviable at or before 20 weeks gestational age. Thus, the Gestational Age Provisions prohibiting abortions performed at or after 8, 14, 18, and 20 weeks gestational age apply to pre-viability abortions.") (footnote omitted).

Missouri implemented a different ploy than Indiana to defend its Down Syndrome Provision. Wisely abandoning the binary choice theory, Missouri instead contested that the restriction imposed by the bill was not a categorical ban or a "substantial obstacle" to pre-viability abortions.[141] Missouri's position was that the use of the word "solely" in the statute converted the provision from a ban to a regulation because pregnant individuals would still be permitted to get an abortion if a Down syndrome diagnosis served as only part of the motivation for seeking the abortion.[142] In other words, Missouri's sole defense for their statute was a preternatural reading of the word "solely." Predictably, Missouri's contrived interpretation of the Down Syndrome Provision met the same fate as Indiana's binary choice theory, failing to persuade the Eighth Circuit that "solely" was the magic word to bypass *Casey*'s fetal viability standard.[143] The court reiterated that while *Casey* allows states to impose certain pre-viability regulations on abortion, categorical bans are never permitted.[144] Because the Down Syndrome Provision completely prevented certain parents from obtaining a pre-viability abortion, the court concluded that the Missouri provision was a ban, and not a mere regulation.[145] Upon reaching this conclusion, the court proceeded to utilize a straightforward application of *Casey*'s fundamental holdings to affirm the district court's injunction.[146] Thus, *Parson* mirrored the deductive reasoning process employed by the Seventh Circuit and echoed the important conclusion that reason bans represent total prohibitions on certain classes of abortions.

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141. Brief of Appellants at 39, 44, *Parson*, 1 F.4th 552 (Nos. 19-2882, 19-3134).

142. *Parson*, 1 F.4th at 561 ("Missouri contends that the word 'solely' in the statute performs a regulatory function because it permits pre-viability abortions when the Down syndrome diagnosis is only part of the patient's motivation.").

143. *Id.* at 564.

144. *Id.* at 560 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992)).

145. *Id.* at 561 ("Here, the Down Syndrome Provision would prevent certain patients from getting a pre-viability abortion at all. That is a ban, not a regulation.").

146. *Id.* (finding "that [Appellees were] likely to succeed on the merits of [their] challenge to the Down Syndrome Provision").

C. STEPPING OUT OF LINE: THE SIXTH CIRCUIT'S SURPRISING SPLIT

Given the almost nonchalant manner in which initial circuit decisions set aside the reason ban statutes courts were confronted with, it seemed that the unconstitutionality of reason bans was well-settled at the appellate level. However, the Sixth Circuit's decision in *Preterm-Cleveland v. McCloud* offered a lifeline for the future viability of reason ban legislation.[147] Just as in the Seventh and Eighth Circuit cases, the Sixth Circuit decided *McCloud* following a district court order granting a preliminary injunction against the reason ban statute.[148] Undeterred by the Seventh and Eighth Circuit rulings, Ohio had pushed through an "Anti-Discrimination Law," which in part prevented healthcare providers from performing an abortion if they had knowledge that the abortion was sought: "[I]n whole or in part, because of any of the following: (1) A test indicating Down syndrome in an unborn child; (2) A prenatal diagnosis of Down syndrome in an unborn child; (3) Any other reason to believe that an unborn child has Down syndrome."[149] On its face, Ohio's statute was even more susceptible to a *Casey*-based facial challenge than the Missouri statute in *Parson*, as the "in whole or in part" phrasing suggested that Ohio could not even rely on Missouri's "solely" defense, which contended that the qualifier made the statute regulatory rather than prohibitive. Therefore, the Ohio legislature forced the Sixth Circuit to utilize its full Machiavellian capacity to articulate an anamorphic view of reason bans that would allow the statute to withstand judicial scrutiny.

The court began by acknowledging that *Casey* provided the controlling standard on purported abortion regulations and that while fetal viability is the temporal threshold for creating compelling state interests, regulations impacting earlier gestational periods are permissible if they do not create an undue burden or substantial obstacle for an individual to exercise their right to pre-viability abortions.[150] Where the Sixth Circuit deviated from the other appellate decisions was in classifying the effect that the reason ban has on parents seeking a pre-viability abortion. Neither the Seventh nor the Eighth Circuit conducted a thorough undue burden analysis because both courts reached the

147. 994 F.3d 512 (6th Cir. 2021).

148. *Id.* at 516.

149. *Id.* at 517 (quoting OHIO REV. CODE ANN. § 2919.10(B) (West 2022)).

150. *Id.* at 520.

natural conclusion that the effect of reason bans far surpassed a mere "substantial obstacle," but resulted in a categorical ban of certain pre-viability abortions.[151] However, despite the statutory text in Ohio's reason ban being unambiguously more prohibitive than the language in the voided Indiana and Missouri statutes, the Sixth Circuit held that Ohio's statute was a regulation and not a categorical ban, requiring the court to then examine whether the regulation rose to the level of an undue burden.[152]

In determining that the Ohio bill in question did not constitute a ban on pre-viability abortions, the Sixth Circuit relied on a convoluted interpretation of the statutory language's practical implications. The court reasoned that the statute did not ban abortions sought because of a Down syndrome diagnosis at all and that a woman could still seek an abortion for precisely that reason.[153] Instead, the court alleged that the effect of the bill was to prevent pregnant individuals in such cases from revealing to their healthcare providers that their intention was to abort their child because of the potential for the child to have Down syndrome.[154] Because the bill targeted the doctor's knowledge, rather than the ability of an individual to get an abortion, the court reasoned that Ohio's legislation did not impose a categorical ban of pre-viability abortions.[155] Thus, the Sixth Circuit took the novel position that the statute's purpose was to operate, not as a direct restriction on abortion, but as a type of conscience clause for medical providers.[156]

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151. *See supra* notes 127, 145.

152. *McCloud*, 994 F.3d at 527 ("But . . . as shown, H.B. 214 is not a ban. Even under the full force of H.B. 214, a woman in Ohio who does not want a child with Down syndrome may lawfully obtain an abortion.").

153. *Id.* ("H.B. 214 does not prohibit her from choosing or obtaining an abortion for [Down syndrome], or any other, reason.").

154. *Id.* ("[H.B. 214] prohibits a doctor from aborting a pregnancy when the doctor *knows* the woman's particular reason.").

155. *Id.* ("The district court erred by granting a preliminary injunction on the ground that H.B. 214 *eradicated* the woman's right to an abortion.").

156. "Conscience clause" refers to provisions that allow healthcare providers to refuse treatment for ethical, moral, religious, or professional reasons. Ohio has utilized similar clauses to pass restrictive healthcare measures under the guise of protecting the conscience of medical practitioners. *See* Ella Lubell, *Ohio Passes Controversial Conscience Clause for Doctors*, REASON (July 7, 2021), https://reason.com/2021/07/07/ohio-passes-controversial-conscience-clause-for-doctors [https://perma.cc/5RAS-6DZQ] (discussing the recent Ohio statute that allows for healthcare providers to refuse certain treatments that went against their beliefs).

Upon finding that Ohio's statute was a mere regulation, the court discussed whether the regulation rose to the level of an undue burden under the *Casey* standard. The plaintiffs in *McCloud* offered five potential burdens imposed by the reason ban, which the court consolidated into two categories for analysis.[157] The court enumerated the proposed burdens as: (1) the potential that a woman seeking an abortion will not be able to have an open and honest conversation with her doctor regarding her abortion, and (2) that a woman may be forced to "doctor-shop" to find a doctor who is unaware of her reason for seeking an abortion.[158]

In analyzing whether these burdens constitute an undue burden under *Casey*, the court asserted that because burdens that simply raise costs, create minor delays, or require dissemination of truthful information do not create an undue burden,[159] neither does the inability to disclose information that is not "medically relevant" to a healthcare provider.[160] The court stated that while "doctor shopping" may result in increased costs and delays, these inconveniences do not create an undue burden under the existing precedent.[161] Thus, because the Sixth Circuit found that Ohio's bill advanced cognizable state interests in protecting the Down syndrome community from stigma and selective abortions, and that the bill did not result in any undue burdens for pregnant individuals seeking a pre-viability abortion, the court concluded that the bill was constitutional and reversed the district court's injunction.[162]

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157. The five proffered burdens included: (1) preventing open and honest conversations with the caring physician; (2) the ban would cause the mother to misrepresent or adjust her reason for seeking the abortion; (3) the ban would cause the mother to conceal her medical history; (4) the restrictions would lead to "doctor shopping"; and (5) the ban would lead the mother to forego counseling and other education programs. *McCloud*, 994 F.3d at 525–26.

158. *Id.* at 527.

159. *Id.* ("[L]aws that merely increase costs, create potential delays, necessitate judicial bypass, or require the dissemination of truthful, non-misleading information are *not* substantial obstacles.").

160. *Id.* (stating that a law that prevents a patient from disclosing "not 'medically relevant'" information could not create an undue burden).

161. *Id.* at 528 ("[T]his could take some time, it would likely cost some additional money, and it might force her to travel farther than she would have had to otherwise. But, without something more, the Court has already determined that these types of burdens do not rise to the level of an objectively substantial obstacle.").

162. *Id.* at 531–32.

Evaluating the three circuit decisions holistically, the primary dispute is whether reason ban statutory language comprises a categorical ban on pre-viability abortions or a mere regulatory restriction. The majority position adopts a straightforward reading of reason bans, utilizing a deductive framework to reach the natural conclusion that the statutes are impermissible categorical bans.[163] Meanwhile, the Sixth Circuit labored to reach the aberrational finding that reason bans are not a categorical ban because pregnant individuals could still obtain an abortion for the statutorily prohibited reason, so long as they keep their doctor in the dark about their motivations.[164] Because the Sixth Circuit is the only appellate court to find that reason bans are a mere regulation, the *McCloud* case is the only decision to weigh in on whether the "regulations" that reason bans impose rise to the level of an undue burden. After a cursory analysis, the Sixth Circuit summarily rejected the notion that the proffered hardships reason bans impose reach the threshold of an undue burden. Part III highlights the deficiencies in the Sixth Circuit's rationale and argues that state courts should follow the sound reasoning from the Seventh and Eighth Circuit decisions when considering future reason ban challenges.

III. LOOKING A GIFT HORSE IN THE MOUTH: STATE COURTS SHOULD NOT BE FOOLED BY REASON BANS' ALTRUISTIC MASK

In states with a temporal boundary defining when the government's interests in abortion regulation transmute to 'compelling,' the courts will implicitly be forced to choose a side of the federal split.[165] Further, state courts will be forced to weigh in

163. *See supra* notes 127, 145 and accompanying text.

164. *See supra* notes 153–54 and accompanying text. It is also worth noting that the Sixth Circuit has a decidedly conservative tilt, with twenty of the twenty-six judges on its active and senior rosters being Republican nominees. *See* Robert Iafolla, *Sixth Circuit Wins Lottery to Weigh Biden's Shot-or-Test Rule*, BLOOMBERG L. (Nov. 16, 2021), https://news.bloomberglaw.com/daily-labor-report/sixth-circuit-wins-lottery-to-weigh-biden-shot-or-test-rule [https://perma.cc/Y3QJ-V6SE]. However, this is the case in both the Seventh and Eighth Circuits as well. *See Current Federal Judges by Appointing President and Circuit*, BALLOTPEDIA, https://ballotpedia.org/Current_federal_judges_by_appointing_president_and_circuit [https://perma.cc/UBS6-EWBD] (noting a seven-to-three Republican majority in the Seventh Circuit and a ten-to-one Republican majority in the Eighth Circuit, among active judges).

165. This assertion is based on the rapidly developing technology for genetic screenings, discussed *infra* Part III.B.

sooner rather than later in light of a significant number of reason ban statutes being recently enacted.[166] Given the impending wave of reason ban litigation across the country, resolving inconsistencies in the existing precedent is of paramount significance.

This Part discusses why state courts should adhere to the Seventh and Eighth Circuits' reading of reason bans as an impermissible categorical prohibition on pre-viability abortions, a position which reflects a more cohesive understanding of the interaction between the statutory language and state analogs to *Casey*'s fetal viability standard. Additionally, Part III advances the alternative argument that even if future courts deem that reason bans are mere regulations, reason bans should still be set aside, as the severe consequences emanating from reason bans far outweigh the purported additional state interests justifying such statutes. Although *Casey*'s undue burden standard is no longer controlling, state courts must still evaluate the practical implications resulting from reason bans when evaluating whether such statutes hold constitutional muster. Part III will therefore address how the Sixth Circuit mischaracterizes and underappreciates the burdens derived from reason ban statutes.

A. REASON "BANS" ARE, IN FACT, BANS

In all states affording some right to abortion, the threshold question to address in considering reason bans is whether such statutes truly "ban" certain classes of abortions prior to the threshold gestational period at which the government's interests become compelling, or whether they merely impose a permissible regulation on these earlier periods. Both the Seventh and Eighth Circuits interpreted Down syndrome provisions as unconstitutional bans on certain pre-viability abortions, while the Sixth Circuit in *McCloud* held that such statutes merely regulated selective abortions.[167] The Sixth Circuit reached its holding by reasoning that Ohio's reason ban still permitted abortions based on Down syndrome diagnoses, but the statute merely prohibited communicating such motivations to a healthcare provider.[168]

The better reading of reason ban statutes is that they impose an unconstitutional, categorical ban on pre-viability[169]

166. *See supra* note 17.

167. *See supra* notes 127, 145, 155.

168. *See supra* note 155.

169. Pre-viability is used to discuss the federal opinions, as that was the designated temporal boundary under *Casey*. The same arguments advanced in this part can be extrapolated to the applicable state timelines.

abortions. As an initial matter, it is telling that the Seventh Circuit, the Eighth Circuit, and the district court that first reviewed the reason ban statute in the Sixth Circuit all shared the view that reason bans clearly violated the Fourteenth Amendment while the Sixth Circuit itself was the first to offer the "conscience clause" justification.[170] Furthermore, the Indiana provision at issue in *Planned Parenthood of Indiana & Kentucky* was titled "Sex-Selective and Disability Abortion Ban."[171] This self-imposed designation reveals that the Indiana legislature contemplated a categorical prohibition on certain pre-viability abortions through the enactment of their reason ban. Given the close proximity between the passing of Indiana's law and other state reason bans, it is likely that the provisions were enacted to accomplish similar goals.[172] It is also evident from reason ban advocates' statements that their concern is not with medical ethics, but with prohibiting a practice that they themselves find objectionable, an insufficient basis for altering the judiciary's constitutional calculus.[173]

The reason the Sixth Circuit stood alone in its interpretation is simple: the majority view better comported with the Supreme Court's substantive due process jurisprudence. Fundamental rights "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[174] Additionally, nothing within the Fourteenth Amendment's substantive due process jurisprudence allows for states to investigate an individual's motives for exercising a fundamental right in any other context.[175] Although abortion is no longer a federally protected fundamental right, the fact that individuals are not required to justify exercising a recognized right holds equal force at the state level. The conscience clause rationale utilized by the Sixth Circuit to avoid the natural conclusion that reason bans impose categorical prohibitions is wholly unsupported by judicial precedent and should be cast

170. *See supra* notes 127, 145, 155, 156 and accompanying text; Preterm-Cleveland v. Himes, 294 F.Supp. 3d 746, 752 (S.D. Ohio 2018).

171. *See supra* note 121.

172. *See supra* note 17.

173. *See, e.g.*, *supra* note 13 and accompanying text.

174. Obergefell v. Hodges, 576 U.S. 644, 663 (2015) (citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

175. *See, e.g.*, Planned Parenthood of Ind. & Ky. v. Comm'r of Ind. State Dep't of Health, 888 F.3d 300, 307 (7th Cir. 2018) ("Nothing in the Fourteenth Amendment allows the State to invade this privacy realm to examine the underlying basis for a woman's decision.").

aside in favor of the more natural interpretation in the Seventh and Eighth Circuit decisions. Under this reading, reason ban statutes should be set aside in accordance with the voiding of similar categorical prohibitions in other contexts.[176]

B. SCIENTIFIC DEVELOPMENTS IN GENETIC TESTING MAKE REASON BANS OBSOLETE

Upon finding that reason bans are categorical prohibitions, the capabilities of modern genetic testing provide state courts the necessary ingredient to void reason bans through a straightforward deductive process. The *Dobbs* decision comes at a time when continuing strides in genetic technology are infusing new dimensions into discussions concerning reason bans' constitutionality. Genetic testing developments are increasing the efficacy and decreasing the costs associated with obtaining in utero genetic evaluations,[177] allowing certain testing methods, such as sequential integrated screenings, to become accessible to all pregnant individuals.[178] Increased test accuracy has additionally

176. *See, e.g.*, McCormack v. Herzog, 788 F.3d 1017, 1029 (9th Cir. 2015) (invalidating a pre-viability restriction on abortions where the fetus had reached twenty weeks in gestation); Edwards v. Beck, 786 F.3d 1113, 1117 (8th Cir. 2015) (setting aside a statute that prohibited pre-viability abortions after twelve weeks and a fetal heartbeat).

177. *See* Phillips et al., *supra* note 21, at 712–14 (noting that about 75,000 genetic tests were on the market, with ten new genetic tests entering the market daily; additionally, describing how modern technologies have led to decreased genome sequencing costs); Wynter K. Miller & Benjamin E. Berkman, *The Future of Physicians' First Amendment Freedom: Professional Speech in an Era of Radically Expanded Prenatal Genetic Testing*, 76 WASH. & LEE L. REV. 577, 589–604 (2019) (providing an in-depth discussion on the increased availability of non-invasive prenatal testing, as well as the capacity for modern tests to provide whole genome sequencing).

178. *See Prenatal Testing for Down Syndrome*, USCF HEALTH, https://www.ucsfhealth.org/education/prenatal-testing-for-down-syndrome [https://perma.cc/U7WH-6UJJ] (describing the process of sequential integrated screenings); *see also* Shubha R. Phadke, Ratna D. Puri, & Prajnya Ranganath, *Prenatal Screenings for Genetic Disorders: Suggested Guidelines for the Indian Scenario*, 146 INDIAN J. MED. RSCH. 689, 689–90 (2017) ("With advances in medical science, screening tests have become available for the prevention of common genetic disorders and are being offered to all pregnant women."). The effort to make in utero genetic testing widely available is supported by the American Congress of Obstetricians and Gynecologists, the governing body in the medical discipline. *See* Am. Coll. Of Obstetricians & Gynecologists, *Practice Bulletin No. 226: Screening for Fetal Chromosomal Abnormalities*, 136 CLINICAL MGMT. GUIDELINES OBSTETRICIANS & GYNECOLOGISTS e48, e54-e53 (2020); Laura M.

allowed for some in utero genetic tests to be recategorized from "diagnostic tests" to "screenings," greatly expanding the coverage for in utero genetic tests under insurance policies, as screenings are considered "preventative services," requiring little to no copayment from the insured.[179] This reclassification allows more prospective parents to gain insight into whether their fetus shows biological markers indicating a chromosomal abnormality, as such procedures are often no longer cost prohibitive.[180]

These advancements are significant with respect to reason bans because the evolution in genetic testing permits accurate screenings far earlier in the gestational timeline.[181] Prior to *Dobbs*, policymakers opposing abortions expressed concerns that the increased availability of pre-viability genetic screenings would lead to a corresponding rise in the number of abortions

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Carlson & Neeta L. Vora, *Prenatal Diagnosis*, 44 OBSTETRICIAN & GYNECOLOGIST CLINICS N. AM. 245, 246 (2017) (citing the ACOG bulletin and advocating for increased access to prenatal testing).

179. *See* USCF HEALTH, *supra* note 178 (differentiating diagnostic and screening tests with respect to fetal genetic abnormalities); *Screening and Diagnostic Tests*, HMSA, https://hmsa.com/help-center/screening-and-diagnostic-tests [https://perma.cc/GKV4-9VBG] (noting that diagnostic tests often have higher copayments than screenings and that because screening tests are considered preventative services, they are usually covered at 100% of the eligible charge).

180. *See* HMSA, *supra* note 179; *see also Genetic Testing*, MAYO CLINIC https://www.mayoclinic.org/tests-procedures/genetic-testing/about/pac-20384827 [https://perma.cc/7523-22CK] (discussing how genetic markers are used to identify potential abnormalities in a developing fetus). While Down syndrome is the most commonly screened condition, other genetic conditions flagged by genetic tests include: Cystic Fibrosis, Sickle-Cell Anemia, Tay-Sachs Disease, Edwards Syndrome (trisomy 18), Spina Bifida, and Anencephaly, among others. Alyssa Haag, *Genetic Screening: What It Is, What It Screens for, and More*, OSMOSIS, https://www.osmosis.org/answers/genetic-screening [https://perma.cc/ECW8-CXNE].

181. *See* Miller & Berkman, *supra* note 177, at 589; Hayley White, Comment, *A Critical Review of Ohio's Unconstitutional "Right to Life Down Syndrome Non-Discrimination" Bill*, 29 GEO. MASON. U. C.R.L.J. 87, 88 (2018) (discussing the availability of serum screenings for fetal abnormalities in the first and second trimester of pregnancy); *Prenatal Genetic Screening Tests*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, https://www.acog.org/womens-health/faqs/prenatal-genetic-screening-tests#:~:text=First%2Dtrimester%20screening%20includes%20a,the%20level%20of%20two%20substances [https://perma.cc/D4BP-ZD3P] (indicating that aneuploidy conditions such as Down syndrome can be tested for as early as ten weeks into gestation).

sought based on positive tests.[182] These fears catalyzed the recent augmentation of abortion ban legislation.[183] However, the wholesale banning of abortions based on positive genetic tests dictated by reason bans creates irreconcilable constitutional dissonance under most state laws. Currently, accurate Down syndrome screenings can be conducted as early as ten weeks gestation.[184] Following the Seventh and Eighth Circuit's reasoning, reason bans therefore place a categorical prohibition on certain classes of abortions at any time after ten weeks gestation. This unavoidable reality requires that reason bans be voided not only in states with enhanced abortion protections or states maintaining the fetal viability cutoff point, but also in states advancing the timeline from fetal viability, such as states utilizing a fifteen week statute mirroring *Dobbs*'s provision. Not only do accurate genetic tests now predate all but the harshest of state statutes, but the temporal implications resulting from reason bans are a moving target, as continuing developments in genetic screening technology will allow for confident diagnoses at earlier and earlier stages in the gestational timeline.[185] This reality mandates reason ban proponents in the majority of states to articulate additional interests in order to justify the otherwise impermissible absolute proscription created through reason bans.[186]

C. THE SKY IS NOT FALLING: THE CONTEMPTIBLE EFFORT TO LABEL SELECTIVE ABORTIONS AS MODERN-DAY EUGENICS

In an attempt to supplement the state's perpetual interest in protecting life, champions for reason bans often advance the

182. *See, e.g.*, Prentice, *supra* note 13. Selective abortion studies are discussed *infra* Part III.C.2.

183. *See supra* note 17.

184. *See supra* notes 11–12.

185. *See* Ignatia B. Van den Veyver, *Recent Advances in Prenatal Genetic Screening and Testing*, 5 F1000 RSCH. 2591, 2593 (2016) ("[T]he screening for and diagnosis of genetic abnormalities in the fetus is undergoing an unprecedented rapid evolution."). Van den Veyver also discusses how modern genetic testing methods such as chromosomal microarray analysis and next-generation sequencing are accelerating the discovery of the causes of intellectual disabilities and birth defects. *Id.*

186. Mark J. Stern, *Conservative Judges Are Manipulating the History of Eugenics to Overturn* Roe v. Wade, SLATE (Apr. 15, 2021), https://slate.com/news-and-politics/2021/04/sixth-circuit-clarence-thomas-abortion-eugenics.html [https://perma.cc/V79Y-DYN5] (arguing that comparing cases like *Buck v. Bell* to abortions based on genetic screenings is like comparing apples to oranges).

policy argument that selective abortions based on genetic test results are the modern equivalent of eugenic practices that took place both globally and in the United States during the last century.[187] When referencing past eugenic atrocities, reason ban proponents at least implicitly invoke the Supreme Court's decision in *Buck v. Bell*, which upheld a statute requiring the sterilization of certain mentally disabled individuals.[188] The *Buck* opinion is particularly infamous for Justice Holmes's assertion that "three generations of imbeciles is enough" to justify upholding a forced sterilization law.[189] A faction of legal scholars believe abortions motivated by genetic screenings are indistinguishable from the tarnishing eugenic practices in recent history, such as the sterilization statute upheld in *Buck*.[190]

1. The Debate Over Selective Abortions

Efforts to analogize selective abortions with cases such as *Buck* utilize Down syndrome as the star evidentiary exhibit, as Down syndrome is the United States's most common chromosomal abnormality and is frequently screened for during in utero genetic testing.[191] Those seeking to equate selective abortions to past eugenic practices rely heavily on outdated studies reflecting a high rate of abortions for mothers receiving a positive in utero screening for Down syndrome.[192] Advocates defending reason

187. *See* Prentice, *supra* note 13, at 106–08 (arguing that there are several examples of modern eugenic practices throughout the world); Alexandra Desanctis, *Is It Eugenics to Abort Unborn Babies with Down Syndrome?*, NAT'L REV. (Apr. 16, 2021), https://www.nationalreview.com/2021/04/is-it-eugenics-to-abort-unborn-babies-with-down-syndrome [https://perma.cc/939X-FYZ9] ("[S]everal of the concurrences referenced a 2019 concurrence by Justice Clarence Thomas in *Box v. Planned Parenthood* — in which he illustrated the link between the logic of selective abortion and the history of eugenics . . . ."). *But see* Sital Kalantry, *Do Reason-Based Abortion Bans Prevent Eugenics?*, 107 CORNELL L. REV. 1 (2021) (arguing that there is no state sponsorship of Down syndrome selective abortions and no empirical evidence suggests that Down syndrome fetuses are actively being selected against).

188. Buck v. Bell, 274 U.S. 200, 208 (1927).

189. *Id.* at 207.

190. *See* Michael J. Malinowski, *Choosing the Genetic Makeup of Children: Our Eugenics Past—Present, and Future?*, 36 CONN. L. REV. 125, 131–33 (2003) (imploring that we address the implications of selective abortions before repeating the eugenic mistakes made in our country's past).

191. *See supra* note 14.

192. *See* Prentice, *supra* note 13, at 108 ("In the U.S., a 1999 study found almost 87% of those diagnosed with Down syndrome in the womb were aborted."); Harmon, *supra* note 13 (suggesting that 90% of positive screening

bans contend that these statistical trends provide states with legitimate interests in addition to preserving fetal life, namely protecting certain groups from selective discrimination.[193] Their argument continues that while the interest of protecting human life alone is not compelling at early gestational stages, the additional interest in protecting at-risk subsets of the population against eugenic practices shifts the balancing test between an individual's right to an abortion and the state's legitimate interest back in favor of the state.[194] Opponents counter that the forgoing rationale is merely a covert attempt to subvert abortion rights, masquerading as a social justice campaign by manipulating the history of eugenics.[195]

2. Not Sponsored, Not Encouraged, Not Eugenics

Reason ban proponents assert that permitting selective abortions based on genetic screening results will lead to eugenic atrocities akin to the forced sterilization statute upheld in *Buck v. Bell*.[196] This argument does not hold. Modern genetic screening practices are entirely inapposite to forced sterilization statutes. *Buck* deprived fully grown adults, individuals recognized as "people" under the Constitution, of their fundamental right to procreate.[197] Conversely, genetic screenings protect the recognized rights of adult parents at the "expense" of pre-viability fetuses, who are not recognized as holding any constitutional rights.[198] Efforts to liken these two practices are attempting to fit a square peg into a round hole.

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results lead to an abortion); Darrin P. Dixon, *Informed Consent or Institutionalized Eugenics? How the Medical Profession Encourages the Abortion of Fetuses with Down Syndrome*, 24 ISSUES L. & MED. 3, 5–7 (noting that while the 90% figure introduced by Harmon may be too high, many other sources indicate the figure is well above 50%).

193. *See, e.g.*, Brief for the State of Wisconsin et al. as Amici Curiae Supporting Appellants, Planned Parenthood of Ind. & Ky. Inc. v. Comm'r of the Ind. State Dep't of Health, 888 F.3d 300 (7th Cir. 2018) (No. 17-3163) at *11 ("*Casey* did not consider, most importantly for this case, the State's interest in prohibiting the discriminatory elimination of classes of individuals . . . .").

194. *See, e.g.*, *id.* at *10–12 (noting examples of auxiliary state interests that courts have held as compelling enough to uphold regulatory statutes).

195. *See, e.g.*, *supra* note 186 and accompanying text.

196. *See supra* note 190 and accompanying text.

197. *See generally* Buck v. Bell, 274 U.S. 200, 207 (1927) (holding state sterilization law is not unconstitutional).

198. *See* Lisa Needham, *A Brief Guide to Fetal Personhood, the Next Frontier in Anti-Choice Politics*, BALLS & STRIKES (May 25, 2022), https://ballsandstrikes

Even if one wished to abstain from engaging in the controversial subject of fetal personhood, there remains ample means to distinguish genetic screenings and *Buck*. A defining characteristic for "eugenic" practices is state sponsorship, or evidence that a government, through its policies, is moving against a subset of its population.[199] *Buck* fits this mold perfectly. Maryland's government enacted a statute actively targeting the mentally handicapped, seeking to ween the subgroup out of the population through an enforced policy.[200] On the other hand, no state has ever facilitated or advocated for abortions sought based on genetic screening results. Private, individual choices are never appropriately described as eugenics.

States insisting on the eugenic nature of genetic screenings suggest that pressure from genetic counselors and the medical community are causing Down syndrome fetuses to be selected against, necessitating intervention through reason bans.[201] The "medical field eugenics" argument is a complete nonstarter because neither doctors nor genetic counsellors are state actors. More importantly though, allegations of such a practice within the medical community are unsubstantiated. In fact, medical providers have helped drive an increasing nationwide trend to pass information statutes to give the power of knowledge to pregnant mothers and dissuade coercive counseling practices.[202] Nevertheless, reason ban proponents attempt to advance this theory

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.org/law-politics/fetal-personhood-explainer [https://perma.cc/HEL6-BL9C] (discussing how fetal personhood is not currently recognized).

199. *See* Kalantry, *supra* note 187, at 4 ("[A] practice should be considered eugenics only if it is state-sponsored."); *see also* Mindy Roseman, *Restricting Women's Autonomy in the Name of "Eugenics*,*"* LPE PROJECT (Nov. 11, 2019), https://lpeproject.org/blog/restricting-womens-autonomy-in-the-name-of-eugenics [https://perma.cc/C2VH-9X9S] (emphasizing that state action is needed for true eugenic concerns); Adam Cohen, *Clarence Thomas Knows Nothing of My Work*, ATLANTIC (May 29, 2019), https://www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455 [https://perma.cc/WZ75-XM4A] (stating that Thomas's eugenic argument that cited Cohen's book misunderstood the source material, and Thomas's analogy to *Buck v. Bell* was misguided).

200. *See generally Buck*, 274 U.S. at 206 (identifying Maryland's sterilization statute as specifically targeting hereditary forms of "insanity" and "imbecility").

201. *See, e.g.*, *supra* note 13 and accompanying text.

202. *See, e.g.*, Mark Leach, *Delaware and Maryland Join Massachusetts and Kentucky in Enacting Laws to Provide Information with a Down Syndrome Test Result*, DOWN SYNDROME PRENATAL TESTING (May 12, 2014), http://www.downsyndromeprenataltesting.com/delaware-and-maryland-join

by invoking outdated studies reflecting shockingly high correlations between abortions and positive genetic tests for Down syndrome.[203] However, contemporary studies suggest that reason ban proponents are hyperinflating the propensity for a positive genetic screening to lead to an abortion.[204] Reason ban advocates rely on methodologically flawed reports to contend that over 90% of fetuses screening positive for Down syndrome are aborted.[205] Studies implementing a more precise statistical analysis, however, reveal that elective terminations only reduce live Down syndrome births by about 30%.[206] Furthermore, total Down syndrome births increased 30% from 1979 to 2003.[207] If the underlying assumption regarding the "eugenic" nature of selective abortions is negated, the notion that genetic counselors or the medical community are somehow driving a non-existent trend is reduced to an absurdity. The combination of the tangible policy reform efforts promoting information over coercion,[208] as well as the lack of evidence of malfeasance in the medical community,

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-massachusetts-and-kentucky-in-enacting-laws-to-provide-information-with-a-down-syndrome-test-result [https://perma.cc/SWG5-CQ2Z] (describing the newly enacted laws implemented by several states to provide pregnant mothers with pertinent information regarding the ramifications of a prenatal diagnosis).

203. *See infra* note 205 and accompanying text.

204. *See, e.g.*, Gert de Graaf, Frank Buckley & Brian G. Skotko, *Estimates of the Live Births, Natural Losses, and Elective Terminations with Down Syndrome in the United States*, 167 AM. J. MED. GENETICS 756, 756 (2015) (suggesting that the actual rate of abortions following a positive diagnosis of Down syndrome is far lower than the often cited 90% range).

205. *See, e.g.*, *supra* note 199 and accompanying text. The inflated estimates are the result of relying on outdated European studies, limited data collection, and imprecise statistical analysis. *See, e.g.*, Mark Bradford, *New Study: Abortion After Prenatal Diagnosis of Down Syndrome Reduces Down Syndrome Community by Thirty Percent*, CHARLOTTE LOZIER INST. (Apr. 21, 2015), https://lozierinstitute.org/new-study-abortion-after-prenatal-diagnosis-of-down-syndrome-reduces-down-syndrome-community-by-thirty-percent [https://perma.cc/9T9C-5TLM] (describing how the exorbitant 90–92% estimates are the result of reliance on 1999 European studies, with little actual data collected in the United States).

206. *See, e.g.*, de Graaf et al., *supra* note 204, at 758 (utilizing advanced statistical models to analyze comprehensive datasets from multiple United States population-based birth defect surveillance programs to ultimately arrive at the 30% estimate); *see also* Bradford, *supra* note 205 (outlining the superior methodology in the de Graaf study).

207. *Data and Statistics on Down Syndrome*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/birthdefects/downsyndrome/data.html [https://perma.cc/CJ6R-D6YH].

208. *See supra* Part III.C.1.

refutes the idea that preventing healthcare providers from coercing abortions can serve as a cognizable additional interest that would allow reason bans to survive judicial scrutiny. Reason ban advocates' efforts to analogize *Buck* and genetic screenings are without merit.

D. DON'T ASK, DON'T TELL

While the additional state interests justifying reason bans are artificial, the additional burdens imposed beyond diminishing an individual's right to abortion are significant and serve to further undermine the viability of reason ban statutes. Although no longer controlling, *Casey* provides guidance suggesting that valid pre-viability[209] regulations "must be calculated to inform the women's free choice, not hinder it."[210] Even if the Sixth Circuit were correct about the Ohio legislature's intent for their reason ban to serve as a conscience clause, how could the restriction imposed possibly be classified as informative?[211] Indeed, even the Sixth Circuit conceded that reason bans serve to restrict the communication of certain information.[212] Reason bans have no informative utility and impose unconstitutional hinderances on otherwise permissible abortions.

In addition to lacking any informative capacity, reason bans prevent the open and honest communications necessary to form the doctor-patient relationship. The Sixth Circuit gave this issue a cursory acknowledgement in *McCloud* but found that the limitations were inconsequential after considering a straw man version of the burdens resulting from such information restrictions.[213] The court reasoned that if laws that merely require

209. Or whatever temporal line a state chooses to draw.

210. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

211. For further insight into what types of restrictions may qualify as informative regulations under *Casey*, compare Whole Woman's Health All. v. Rokita, 553 F. Supp. 3d 500, 580 (S.D. Ind. 2021) (holding that a regulation requiring a woman to review a mandatory disclosure statement related to mental health, where the statement was not anchored by scientific evidence, did not adhere to *Casey*), with Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health, 794 F. Supp. 2d 892, 916–19 (S.D. Ind. 2011) (permitting a regulation that required a woman to read a brochure containing the information that "human physical life begins when a human ovum is fertilized by a human sperm" because the statement only reflected biological fact).

212. *See supra* note 155 and accompanying text.

213. Preterm-Cleveland v. McCloud, 994 F.3d 512, 527 (6th Cir. 2021) (stating that a law that merely prevents a doctor from acting on a statement or opinion from a patient that is not "medically relevant" is not a "substantial obstacle"

the dissemination of truthful information are not serious burdens, then neither is a law that prevents a doctor from acting on a statement that is not "medically relevant."[214]

This knee-jerk dismissal fails to address the substantial detriments resulting from restricting communication between healthcare providers and those seeking treatment. Informed consent provides the essential foundation to an effective doctor-patient relationship.[215] The American Medical Association (AMA) defines informed consent as the process of communication between a patient and their physician that results in the patient's agreement to undergo an authorized medical intervention.[216] As part of the informed consent process, the AMA requires physicians to assess the patient's ability to understand the implications of treatment and possible alternatives, include information about the nature and purpose of recommended interventions, and inform the patient of the burden, risks, and benefits of all treatment options, including forgoing treatment.[217] The medical field's understanding of the doctor-patient relationship, as well as the AMA's description of the necessary components comprising informed consent suggest that an individual's specific reasons for obtaining an abortion are within the scope of essential information to establish informed consent.[218] Thus,

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to getting an abortion).

214. *Id.*

215. *See* Rebecca Roache, *Why Is Informed Consent Important?*, 40 J. MED. ETHICS 435, 435–36 (2014) (discussing the various theories regarding the importance of informed consent).

216. *See Informed Consent*, AMA CODE OF ETHICS, Op. 2.1.1 (2022) ("[I]nformed consent occurs when communication between a patient and physician results in the patient's . . . agreement to undergo a specific medical intervention."). This definition mirrors the informed consent requirements in the lawyer-client relationship. *See, e.g.*, MINN. RULES OF PRO. CONDUCT § 1.0(f) (2019) ("'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.").

217. *See Informed Consent*, *supra* note 216; *see also* Lois S. Snyder & Thomas A. Bledsoe, *American College of Physicians Ethics Manual*, 170 ANNALS INTERNAL MED. S1, S7 (2019) (requiring physicians to provide complete and accurate descriptions of medical conditions in order to "inform the patient about care options and alternatives," or "refer the patient for such information . . . .").

218. *See, e.g.*, Am. Coll. Of Obstetricians & Gynecologists, *ACOG Committee Opinion No. 439: Informed Consent*, 114 OBSTETRICS & GYNECOLOGY 401, 401 (2009) ("Informed consent should be looked on as a process rather than a signature on a form. This process includes a mutual sharing of information over time

statutes preventing communications pertaining to patient goals and rationales necessarily infringe on the foundational tenets comprising the doctor-patient relationship.

Reason bans do not merely undermine a patient's ability to provide informed consent, but additionally serve to actively destroy the utility of the physician-patient relationship.[219] As a result of reason ban restrictions, patients are incentivized to lie or mislead their medical providers about key information regarding their procedure.[220] In addition to encouraging dishonesty between patients and physicians, reason bans subvert physicians' ability to adhere to their duties of beneficence and nonmaleficence.[221] The principle of beneficence requires physicians to "promote the good" or act in the best interest of their patients, while nonmaleficence requires that physicians "do no harm" while providing care.[222] Abiding by these ethical requirements also requires that physicians demonstrate "due care" when providing treatment.[223] An essential element for exercising due care is that physicians conform with the generally accepted practices and ethical standards codified by the governing body of their various

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between the clinician and the patient to facilitate the patient's autonomy in the process of making ongoing choices.").

219. *See* Amici Curiae Brief of Biomedical Ethicists in Support of Plaintiffs-Appellees and Affirmance, Preterm-Cleveland v. McCloud, 994 F.3d 512 (6th Cir. 2021) (No. 18-3329), 2020 WL 980863, at *9–10 (arguing the Ohio reason ban would destroy the line of honest communication between patient and physician).

220. Christine Scherer, Note, *A Woman's Choice? The Constitutionality of Down Syndrome Abortion Bans and the Breakdown of the Doctor-Patient Relationship*, 71 CASE W. RSRV. L. REV. 847, 851 (2020) (discussing how reason bans will tarnish the doctor-patient relationship by creating liabilities for physicians).

221. Two central components of the Hippocratic Oath. *See Professional Moralities*, PRONOBIS HEALTH, https://www.pronobishealth.org/for-providers/medical-ethics-overview/professional-moralities [https://perma.cc/Y9CL-G53T] ("[T]he Oath directs the physician's tools to be used for benefit and not for harm, beneficence and nonmaleficence.").

222. *See* Liam B. Murphy, *The Demands of Beneficence*, 22 PHIL. & PUB. AFFS. 267, 267 (1993) (understanding that beneficence is a cooperative process where each physician aims to promote the general good together with others); Raanan Gillon, *"Primum Non Nocere" and the Principle of Non-Maleficence*, 291 BRIT. MED. J. 130, 130 (1985) ("Among the shibboleths of traditional medical ethics is the injunction 'Primum non nocere'—first (or above all) do no harm.").

223. *See* Gillon, *supra* note 222, at 131 (reminding doctors of the moral strand which states that in assuming care of a patient the doctor also assumes an obligation to exercise "due care").

professions or specialties.[224] Importantly in the context of reason bans, the guidelines set by the American College of Obstetricians and Gynecologists (ACOG) advise physicians to offer prenatal genetic screenings to all pregnant individuals.[225] According to the ACOG, prenatal screenings are critical for providing both the patient and their care provider with the necessary information to make fully informed decisions about pregnancy management.[226] With this in mind, reason bans raise ethical dilemmas for health care providers because the risk of liability may lead physicians to forego recommending prenatal screenings that could later be used as evidence in a criminal prosecution.[227] Meanwhile obstetricians and gynecologists choosing to forego recommending a prenatal screening would be failing to comply with their due care obligations considering the many health benefits associated with prenatal screenings acknowledged by the practice's governing body.[228] Thus, reason bans create a catch-22 where doctors either risk future criminal liability under state

224. *See* Frank A. Riddick, Jr., *The Code of Medical Ethics of the American Medical Association*, 5 OCHSNER J. 6, 8 (2003) ("These principles . . . are not laws but standards by which a physician may determine the propriety of his conduct in his relationship with patients, with colleagues, with members of allied professions, and with the public.").

225. Amici Curiae Brief of Biomedical Ethicists in Support of Plaintiffs-Appellees and Affirmance, Preterm-Cleveland v. McCloud, 994 F.3d 512 (6th Cir. 2021) (No. 18-3329), 2018 WL 4191266, at *17–18 (explaining ACOG recommends all pregnant women be offered prenatal assessment regardless of maternal age or other risk factors).

226. *See* Am. Coll. of Obstetricians & Gynecologists, *Practice Bulletin No. 162: Prenatal Diagnostic Testing for Genetic Disorders*, 127 OBSTETRICS & GYNECOLOGY e108, e108 (2016) ("The objective of prenatal genetic testing is to detect health problems . . . and provide the patient and her . . . obstetric care provider with enough information to allow a fully informed decision about pregnancy management.").

227. *See ACOG Statement on Abortion Reason Bans*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (Mar. 10, 2016), https://www.acog.org/news/news-releases/2016/03/acog-statement-on-abortion-reason-bans [https://perma.cc/AU4K-NYZV] (reporting that ACOG president Mark S. DeFrancesco released a statement stating that reason bans create a system in which both doctors and patients are encouraged to withhold information or outright lie in order to secure access to medical care).

228. *See* Am. Coll. of Obstetricians & Gynecologists, *supra* note 226 (enumerating the many benefits of prenatal genetic testing, including patient reassurance, providing knowledge of disorders for which prenatal treatment may be beneficial, and optimizing neonatal outcomes by ensuring appropriate timing and location for delivery).

law, or violate their ethical principles of beneficence and nonmaleficence. Along with the troubling incentivization for healthcare providers to withhold important information, reason bans problematically encourage pregnant individuals to avoid prenatal screenings altogether for fear of limiting their options in handling their current pregnancy.[229]

The Sixth Circuit's minimization of the consequences associated with reason bans fails to address the practical reality that such legislation imposes an unconstitutional ban on certain classes of people from exercising their right to obtain an abortion. Even if reason ban legislation could somehow avoid the designation of a categorical ban, such statutes significantly infringe on individual rights, while effectuating no cognizable state interests beyond protecting fetal life. State courts should therefore set aside reason bans even if the court deems that reason bans are merely a regulation on abortions prior to the state's analog to *Casey*'s pre-viability standard. The Sixth Circuit understates the implications of reason bans by insinuating that the only burdens imposed are minor delays, increased costs, or non-disclosure of irrelevant medical information.[230] The true impact of reason bans is far more consequential, inhibiting physicians from delivering medical care that satisfies the standards required by America's medical institutions through a direct assault on the foundational pillars of the doctor-patient relationship.

E. REASON BANS' LATENT CONSTITUTIONAL DIFFICULTY: PROSECUTING PHYSICIANS

Even for states with especially harsh abortion restrictions, or states that misread the scales for the interest balancing test

229. *See* Rebecca B. Reingold & Lawrence O. Gostin, *Banning Abortion in Cases of Down Syndrome: Important Lessons for Advances in Genetic Diagnosis*, 319 JAMA 2375, 2376 (2018) ("Coercive laws could also drive pregnant women away from prenatal health services . . . .").

230. *See supra* notes 160–61. Although the court was dismissive of the burdensome effect of incidental delays and increased costs, many scholars theorize that these consequences are, in some circumstances, sufficient to create an undue burden in and of themselves. *See, e.g.*, Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2045 (1994) ("[I]ncreased costs and delays, even if incidental, may prove to be undue burdens."); *see also* Charles Adside, III, *Undue Schizophrenia: Split Decisions, Confused Scholars, and Reversing Unworkable Abortion Precedent*, 54 WILLAMETTE L. REV. 219, 237 (2018) (discussing how courts have acknowledged that costs can impose an undue burden, but to this point that threshold has been left to the arbitrary decision of individual judges).

described above, reason bans are not necessarily out of the woods, as their uniquely unconstitutional statutory language is prone to an alternative line of attack. Suppose two states, A and B, are contemplating their prospective abortion policies following *Dobbs*. A is quite conservative, but not so far right as to outlaw abortion entirely. A elects to institute a fetal heartbeat statute, substantially similar to Texas's S.B. 8 provision. B adopts a more moderate position, mirroring *Dobbs*'s statute in advancing *Casey*'s pre-viability threshold to fifteen weeks gestation. Additionally, B's courts have a dark history with forced sterilization statutes, issuing many *Buck*-like opinions in the past. B's present-day courts are therefore hypersensitive to eugenic arguments and overvalue conscience clause justifications. Speaking purely in terms of general abortion jurisprudence, one might think each state is constitutionally amenable to a reason ban. A's statute allows the government to assert a compelling interest in protecting fetal life before an accurate genetic screening could be obtained. Meanwhile, though misguided, B could follow the Sixth Circuit's rationale to find that a reason ban is a permissible regulation prior to the compelling interest temporal threshold. However, there remains a fatal flaw precluding enactment in either state: reason bans are ambiguous criminal statutes.

Unclear criminal laws are susceptible to being set aside under the "void for vagueness" doctrine, which states that criminal statutes violate due process if individuals would have to guess the law's meaning or if the provision would be prone to disparate application.[231] Criminal laws can also be void for vagueness if the statute is "overbroad," in the sense that the proscribed conduct encompasses constitutionally protected activities.[232] There is no practicable means to consistently prosecute reason ban violations and the statutes fail to adequately put abortion providers on notice of what conduct is forbidden.[233] Reason bans therefore unconstitutionally infringe upon abortion providers' due process rights.

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231. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 629 (1984) (citing Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)) ("[A] statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the . . . due process of law.").

232. *See, e.g.*, W. MARK WARD, TENNESSEE CRIMINAL TRIAL PRACTICE § 14:11: *Motion to Dismiss–Void for Vagueness*, Westlaw (updated Oct. 2021) (explaining a statute may be void for vagueness if it defines behavior so broadly that it includes both undesirable and constitutionally protected conduct).

233. Void for vagueness challenges have been successful in setting aside

Reason bans are categorically different from most abortion regulations because their enforcement is dependent on evaluating doctors' mens rea with respect to the subjective determination of an abortion seeking individual's underlying *motivations*, rather than the objectively determinable age of the developing fetus. Thus, obtaining a conviction under this scheme essentially requires two layers of subjective mindreading, presenting glaring constitutional issues. For one, the scope of the prohibited conduct is unclear, as it would be nearly impossible to distinguish when a healthcare provider actually possesses "knowledge" that would bring them within the purview of reason ban legislation. What communications from an individual seeking an abortion impart "knowledge" as to holistically evaluate their motivations? Is there specific language that needs to be used to adequately convey an individual's underlying basis for an abortion? Or would the mere suggestion that genetic diagnoses may be part of the individual's rationale be enough to lead to criminal prosecution? And what are physicians to make of a genetic screening indicating Down syndrome? For example, consider an individual who obtains a genetic screening from a third-party clinic or from an online test. Even if the provider learns of the screening, the extent to which reason bans ask physicians to connect the dots between the outside test and an individual's prevailing motivations for seeking an abortion is left entirely in the domain of speculation. These issues are further aggravated when the reason ban at issue only holds a physician liable if they knew that an abortion was sought *solely* because of a genetic screening, such as Missouri's statute in *Parson*.[234] How could it ever be proved, beyond a reasonable doubt, that a physician "knew" that an abortion was sought solely because of a genetic screening, when there are always additional benefits inherent with terminating a pregnancy?[235] The amorphous conduct proscribed by reason bans is undoubtedly susceptible to disparate application and should not survive judicial scrutiny as a criminal statute.

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other abortion regulations, such as "partial-birth" restrictions. *See, e.g.*, Richmond Med. Ctr. for Women v. Gilmore, 55 F. Supp. 2d 441 (E.D. Va. 1999).

234. *See supra* Part II.B.

235. *See* Dawn Stacey, *Why Do People Have Abortions?*, VERYWELLHEALTH, https://www.verywellhealth.com/reasons-for-abortion-906589 [https://perma.cc/LQ56-9PDG] (July 16, 2022) (providing a percentage breakdown of the top reasons for seeking an abortion, including financial and health concerns).

In addition to their ambiguity, reason bans infringe upon constitutionally protected activities and are voidable as overbroad. Reason ban proponents acknowledge the deficiencies in the statutory enforcement and compliance mechanisms, conceding that reason bans can easily be circumvented.[236] Nevertheless, these advocates contend that reason bans are worth having in the state code as a symbolic stance on state policy.[237] Publishing an official statement disavowing a practice is one thing, but creating a statute imposing felony penalties based on subjective interpretations of a physician's knowledge is another prospect entirely. As previously discussed, the potential for criminal prosecution critically undermines the doctor-patient relationship by incentivizing both the doctor and the patient to engage in deceptive practices.[238] Reason bans purport an enforcement scheme rife with speculation and conjecture, creating a deterrent effect hindering physicians' ability to comply with the principles of informed consent.[239] Reason bans therefore extend not only to constitutionally protected activities, but to AMA-mandated actions according to the principles of due care. Thus, even states with policies analogous to the hypothetical states A and B should set aside reason bans under the void for vagueness doctrine.

F. REASON BANS ARE WOLVES IN SHEEP'S CLOTHING

Although reason bans' infringement on individual rights based on faux analogies and fearmongering is lamentable, perhaps the greatest tragedy associated with reason bans is that they frustrate the interests of groups they were supposedly designed to protect. Whether the motivations for enacting reason ban statutes truly relates to protecting the Down syndrome community is debatable, as many view such legislation as a covert effort to disguise general abortion animus.[240] However, even if one were to read in the purest intentions for reason bans, the purported interest of protecting vulnerable subgroups in society

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236. *See* Crary & Samuels, *supra* note 13 ("Katherine Beck Johnson, a lawyer with the conservative Family Research Council, acknowledged that the Down syndrome laws might be easy to circumvent. Doctors could tell women not to share their specific reasons for wanting an abortion.").

237. *See, e.g.*, *id.* ("'But even if it's hard to enforce, it's worth being passed,' [Katherine Beck Johnson] said, 'It's important for a state to show they're not supporting eugenics . . . .'").

238. *See supra* Part III.D.

239. *Id.*

240. *See supra* notes 186, 195, and accompanying text.

should not change the calculus regarding reason bans' constitutionality, as the practical effect of the statutes actually undermines the best interests of the Down syndrome community.

For example, prior to enacting their reason ban at issue in *McCloud*, Ohio utilized a more effective means to protect the interests of those with genetic disabilities in the form of their Down Syndrome Information Sheet statute ("Pro-Information Statute").[241] This law required health care providers to distribute an information sheet to any pregnant mother who received a genetic test indicating a Down syndrome diagnosis.[242] The information sheet was only permitted to contain information that was "current and based on medical evidence."[243] The Ohio Department of Health includes both the positive and negative aspects of parenting a child with Down syndrome, including citations to studies suggesting that the majority of people with Down syndrome are happy with their lives.[244]

The Pro-Information Statute served to encourage constructive discussions between a patient and a health care provider based on peer-reviewed information produced by medical professionals.[245] This information not only allowed prospective parents to make informed decisions, but also gave them time during pregnancy to prepare necessary arrangements and create a home environment that better accommodates the specialized needs for the incoming child impacted by Down syndrome. It is therefore not surprising that the National Down Syndrome Society, the leading Down syndrome human rights organization,

241. OHIO REV. CODE ANN. § 3701.69 (West 2015).

242. *Id.* § 3701.69(B).

243. *Id.* § 3701.69(A)(2).

244. *See Down Syndrome Fact Sheet for New and Expecting Parents*, OHIO DEP'T OF HEALTH (Oct. 20, 2020), https://odh.ohio.gov/wps/wcm/connect/gov/58a55d9a-50bd-4911-b949-8a762ae9dcb9/DownSyndromeFactSheet-12-09-2015.pdf?MOD=AJPERES [https://perma.cc/YA2T-NX6P]. The fact sheet cites published scholarship for the proposition that the majority of people with Down syndrome are happy with their lives. *See* Brian G. Skotko, Susan P. Levine & Richard Goldstein, *Self-Perceptions from People with Down Syndrome*, 155 AM. J. MED. GENETICS 2360, 2360 (2011) (finding 99% of people with Down syndrome surveyed from ages twelve to fifty-one reported they are happy with their life).

245. *See, e.g.*, Skotko et al., *supra* note 244; Emma J. Glasson, Rafat Hussain, Alan H. Bittles, Bev A. Petterson, Philip D. Montgomery & Sheena G. Sullivan, *The Changing Survival Profile of People with Down's Syndrome: Implications for Genetic Counseling*, 62 CLINICAL GENETICS 390 (2002).

supports pro-information statutes as an effective tool for serving Down syndrome interests.[246]

Conversely, reason bans lay their foundation on unsubstantiated allegations about the effect of genetic tests on the rate of abortions, as well as logical fallacies manifested through false analogy and slippery slope arguments attempting to analogize genetic screenings to eugenics.[247] In addition to many reason bans being based on a hyperbolic conflation of genetic screenings and *Buck v. Bell*, additionally aggravating is that reason bans and pro-information statutes are for all intents and purposes mutually exclusive, as it would be prohibitively difficult for a patient and a doctor to discuss an information sheet without risking violating the reason ban.[248] Thus, Ohio's reason ban effectively displaced the Pro-Information statute and transformed the doctor-patient relationship from one of honest and constructive disclosure, to a near adversarial transaction where each party is forced to walk on eggshells to protect their interests and avoid liability.

Requiring parents to blindly accept the challenge of raising a child with Down syndrome is irresponsible and detrimental for all parties involved, especially the child, as they are the ones forced to endure the consequences of parents who are uninformed, ill-prepared, and often financially incapable of shouldering the additional costs necessary to provide adequate care.[249]

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246. *Policy & Advocacy*, NAT'L DOWN SYNDROME SOC'Y, https://ndss.org/advocacy [https://perma.cc/N9H2-7Y44] ("NDSS supports state pro-information laws that ensure that health care providers provide quality information to anyone receiving a diagnosis of Down syndrome.").

247. Such arguments often liken genetic testing to the events that led up to *Buck v. Bell* and invoke a slippery slope argument towards a eugenic society. *See, e.g.*, *supra* notes 186, 195, and accompanying text; *see also Logical Fallacies*, UNIV. NEV. RENO, https://www.unr.edu/writing-speaking-center/student-resources/writing-speaking-resources/logical-fallacies [https://perma.cc/G2LD-3W49] (explaining how faulty analogies will make an argument fall apart if the things being compared are not substantially similar).

248. *See* Amici Curiae Brief of Disability Rights Organizations, Advocates and Academics on Rehearing En Banc, Preterm-Cleveland v. McCloud, 994 F.3d 512 (6th Cir. 2021) (No. 18-3329), 2020 WL 980678, at *4 ("Once a pregnant woman discloses to her abortion provider that she has received the Down syndrome sheet, the medical professional will have to . . . inform the pregnant woman that the health care facility can no longer perform the abortion procedure.").

249. Children with Down syndrome can accumulate medical expenses twelve to thirteen times higher than children without Down syndrome. Ted Oshman, *The Cost of Being a Parent to a Child with Birth Defects*, OSHMAN

Not only are reason bans themselves poorly conceived means to protect the interests of the Down syndrome community, but such legislation also takes effort and intention away from enacting legislation that could actually benefit those living with Down syndrome, such as educational and social reform programs.[250]

CONCLUSION

As the dust settles from the seismic *Dobbs* decision, state courts will be left to sift through the onslaught of impending abortion legislation, and the resulting litigation emanating from the new policies. State courts should adhere to the logical rationale articulated by the Seventh and Eighth Circuits to hold that reason bans have earned their colloquial designation as categorical prohibitions on certain classes of abortions in early gestational periods. This premature infringement on recognized individual rights is not justified by any of the additional interests purportedly conferred through such legislation, as efforts to analogize genetic screenings with past eugenic atrocities reflects a gross mischaracterization. Conversely, the additional burdens stemming from reason bans, including the deterioration of the physician-patient relationship and the potential for felony prosecution based on vague statutory language, are substantial and weigh heavily in favor of setting aside reason ban statutes. Finally, while anti-abortion advocates may celebrate *Dobbs* as the catalyst to enact reason bans, they will not be joined by those who truly care about the Down syndrome community, for Down syndrome interests are best effectuated by statutes that promote the sharing of information, rather than forcing physicians to hide the ball and compromise their ability to practice with due care.

FIRM (Apr. 7, 2017), https://www.oshmanlaw.com/news-center/cost-being-parent-to-child-with-birth-defects [https://perma.cc/CYY3-QKYR].

250. There has been longstanding litigation in Ohio regarding the disparate quality of and access to education for those with disabilities. *See, e.g.*, Doe v. Ohio, No. 2:91-cv-00464, 2020 WL 728276, at *5 (S.D. Ohio 2020) (detailing history of litigation beginning nearly two decades ago).