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Banning Abortions Based on a Prenatal Diagnosis of Down Syndrome: The Future of Abortion Regulation

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BANNING ABORTIONS BASED ON A PRENATAL DIAGNOSIS OF DOWN SYNDROME: THE FUTURE OF ABORTION REGULATION

Alexandra Russo[*]

"[A woman's right to an abortion] is something central to a woman's life, to her dignity . . . It's a decision that she must make for herself. And when Government controls that decision for her, she's being treated as less than a fully adult human responsible for her own choices."[1]

—Justice Ruth Bader Ginsburg

ABSTRACT

Since the infamous Supreme Court decision, *Roe v. Wade*, the United States has remained divided, each side unyielding to the other regarding the legal and moral issues surrounding abortion. The issues surrounding abortion have become progressively more politicized, thus threatening a woman's right to a safe and healthy termination of her pregnancy. Restrictions on a woman's ability to terminate a child with a genetic disorder, such as Down syndrome, highlight this concern. State restrictions on abortion that prohibit abortions based on a diagnosis of Down syndrome seek to prevent the stigmatization of the Down syndrome community. Regulations, such as these, that prevent a woman from electing a medically sound procedure based solely on her reason for doing so are unconstitutional.

This Note explains the history of abortion jurisprudence and genetic abnormalities generally. Further, it discusses abortion law as it pertains to the exceedingly political regulation of abortions that

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[1] *The Supreme Court; Excerpts from Senate Hearing on the Ginsburg Nomination*, N.Y. TIMES, (July 22, 1993), https://timesmachine.nytimes.com/timesmachine/1993/07/22/390393.html?pageNumber=20.

follow a Down Syndrome diagnosis. Lastly, this Note addresses the released early draft opinion, written by Justice Samuel Alito that expressed the Court's intention to overturn *Roe v. Wade*.

I. INTRODUCTION

In 1973, the Supreme Court declared that women have a constitutional right to an abortion under the Fourteenth Amendment.[2] A woman may exercise her constitutional right to an abortion after receiving a positive prenatal diagnosis of Down syndrome in her unborn child. A woman may choose to have an abortion following a positive prenatal diagnosis of Down syndrome for a plethora of reasons, including: therapy and other medical expenses, and an underlying fear that her child will be stigmatized because of a disability. Recently, proposed and enacted legislation prohibiting the practice of Down syndrome discrimination abortions have jeopardized this constitutional right.[3] These bills seek to protect potential life and stigmatized communities.[4] However, these state abortion restrictions place an undue burden on a woman's right to choose. Forcing women to carry out pregnancies can lead to domestic violence, unsafe abortion methods, and economic hardships for families that may not be financially capable of having children. A woman may want to terminate her pregnancy because she is already in an abusive relationship or because she is unable to financially care for the child. When there is a positive genetic abnormality diagnosis, such as Down syndrome, these hardships become exacerbated. This Note discusses the laws that ban abortions motivated by a prenatal diagnosis of Down syndrome and how they place an undue burden on a woman's right to terminate her pregnancy. This Note proposes that diagnoses of genetic abnormalities should be included as an exception to the undue burden standard regarding abortions after fetal viability.

Section II lays the foundation for abortion jurisprudence through over forty-nine years of precedent. The section also discusses the undue burden standard and provides a basis of understanding the

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[2] Roe v. Wade, 410 U.S. 113 (1973); U.S. CONST. amend. XIV, § 1.

[3] Louise Melling, *For Justice Ginsburg, Abortion Was About Equality*, ACLU (Sept. 23, 2020), https://www.aclu.org/news/reproductive-freedom/for-justice-ginsburg-abortion-was-about-equality; AMANDA STIRONE MANSFIELD, OVERVIEW OF LEGISLATION AND LITIGATION INVOLVING PROTECTIONS AGAINST DOWN SYNDROME DISCRIMINATION ABORTION 2 (2019).

[4] MANSFIELD, *supra* note 3 (explaining that the North Dakota statute enacted in 2016 seeks to prohibit attempted or actual abortions if the mother is seeking an abortion solely because the unborn child has been diagnosed with Down syndrome. Additionally, the Kentucky statute prohibits abortions on the basis of gender, race, and diagnosis or potential diagnosis of Down syndrome).

distinctions between bans and regulations. In addition to explaining genetic abnormalities, Section III describes modern prenatal testing. This section also highlights the long and short-term effects of genetic abnormalities as they relate to family dynamics and the reasons why women may choose to terminate their pregnancy when they become aware of these disabilities. Section IV analyzes the legal and social discourse surrounding abortions based on a prenatal diagnosis of Down syndrome. This section also discusses the current circuit split regarding issues of constitutionality of Down syndrome-motivated abortion bans, specific state regulations, as well as the arguments supporting and opposing these abortion bans. Lastly, Section V explores the damaging results of disability-motivated abortion prohibitions and proposes a solution to this issue.

II. FOUNDATIONAL ABORTION CASES

A. Abortion Jurisprudence

The Constitution does not expressly guarantee a right to privacy.[5] The "inventors" of privacy law were two young lawyers named Samuel Warren and Louis Brandeis who wrote a law review article that later became one of the most influential law journal pieces ever written.[6] Within their article, *The Right to Privacy*, Louis Brandeis and Samuel Warrant discuss the "right to be let alone."[7] The right to privacy protects personal decision-making from government intrusion.[8] The right to privacy "continues to develop through judicial decision-making."[9] Zones of privacy are also referred to as penumbras of privacy because these zones emanate from the Fourteenth Amendment concept of liberty and Fourth Amendment protection

[5] Alison M. Jean, *Personal Health and Medical Information: The Need for More Stringent Constitutional Privacy Protection*, 37 SUFFOLK UNIV. L. REV. 1151, 1157 (2004).
[6] Irwin Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. UNIV. L. REV. 703, 703 (1990).
[7] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).
[8] *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); Larry Peterman et al., *Defending Family Privacy*, 5 J.L. & FAM. STUD. 71, 73 (2003).
[9] Peterman, *supra* note 8.

against unreasonable searches and seizures.[10] The right to privacy was introduced in *Griswold v. Connecticut*,[11] where the Supreme Court held that a zone of privacy exists in the marital bedroom.[12] The parties in *Griswold* were arrested and fined for violating a Connecticut law that criminalized the use of birth control devices and prohibited doctors from advising anyone of their uses.[13] The Court ruled that the intimate relationship between a married couple falls within a zone of privacy of which the government cannot intrude.[14] Writing for the majority, Justice William Douglas held that the law was unconstitutional because it violated fundamental principles of liberty and justice and the state failed to meet its burden that the Connecticut law is "compelling" and "absolutely necessary."[15] The standard typically applied when reviewing fundamental rights is a strict scrutiny standard.[16] Under a strict scrutiny test, an interest is "compelling" when it is essential and necessary "rather than a matter of choice, preference or discretion."[17] Therefore, the right to use and prescribe contraceptives is fundamental in the interest of liberty and justice. *Griswold* commenced the era of change for sexual and reproductive rights in the United States.[18] This landmark case provided the framework for establishing the right to choose to carry out a pregnancy as fundamental in *Roe v. Wade*.[19]

The Supreme Court held in *Roe* that "a State may regulate abortion procedures to the extent that the regulation reasonably relates

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[10] Jean, *supra* note 5, at 1158.
[11] 381 U.S. 479 (1965).
[12] *See id.* at 485-86; Lauren Paulk, *What is an "Undue Burden"? The Casey Standard as Applied to Informed Consent Provisions*, 20 UCLA WOMEN'S L.J. 71, 73 (2013).
[13] John R. Vile, *Griswold v. Connecticut (1965)*, THE FIRST AMENDMENT ENCYC. (2009) https://www.mtsu.edu/first-amendment/article/579/griswold-v-connecticut; *Griswold*, 381 U.S. at 480.
[14] *Griswold*, 381 U.S. at 485.
[15] Alex McBride, *Landmark Cases, Griswold v. Connecticut (1965)*, THIRTEEN.ORG (Dec. 2006), https://www.thirteen.org/wnet/supremecourt/rights/landmark_griswold.html.
[16] Ronald Steiner, *Compelling State Interest*, THE FIRST AMENDMENT ENCYC. (2009), https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest.
[17] *Id*.
[18] *Griswold v. Connecticut*, PLANNED PARENTHOOD, PLANNED PARENTHOOD ACTION FUND (2022), https://www.plannedparenthoodaction.org/issues/birth-control/griswold-v-connecticut.
[19] 410 U.S. 113 (1973).

to the preservation of maternal health."[20] The protection and preservation of maternal health are important factors when analyzing the constitutionality of many early abortion statutes because the state has an important interest in protecting the life of the mother.[21] The Court reasoned that a woman's right to privacy is no longer absolute once she becomes pregnant because the fact that she is carrying a fetus makes a state's interest more compelling than it would be, for example, in the marital bedroom.[22] *Roe* established that a state's interest in potential life and maternal health are distinct from one another and decided to create a standard addressing this distinction, rather than focusing on the difficult question of when life begins.[23] Justice Blackmun wrote in the *Roe* opinion,

> With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge is at approximately the end of the first trimester. 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. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.[24]

This "established medical fact" was ultimately deemed unreliable due to the lack of medical data to support the assertion.[25] *Roe* continues to be a critical decision in furthering women's reproductive rights.[26]

Recently, unprecedent circumstances have led to an unauthorized release of a draft opinion by Justice Samuel Alito indicating the Court's intention to overturn *Roe v. Wade*.[27] The opinion

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[20] *Id.* at 163.
[21] *Id.*
[22] *Id.* at 159.
[23] *Id.* at 162.
[24] *Id.* at 163.
[25] *See* Clark D. Forsythe et al., *A Roadmap Through the Supreme Court's Back Alley*, 33 ISSUES IN L. & MED. 175, 181 (2018).
[26] Roe v. Wade, 410 U.S. 113, 154 (1973).
[27] Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022, 8:32 PM),

was not expected to be released until June of 2022. Justice Alito wrote that "*Roe* was egregiously wrong from the start."[28] Alito opined that *Roe* must be overturned because the right to an abortion was never mentioned in the Constitution and not "deeply rooted in the Nation's history and tradition."[29] This draft opinion disregards the importance of substantive due process. Justice Alito's analysis in deciding whether an unenumerated fundamental right is deeply rooted in our Nation's history and tradition is at odds with several recent Supreme Court decisions, including rulings in support of gay rights.[30] This decision jeopardizes other rights grounded in privacy, such as the right to contraception, the right to engage in private consensual activity, and the right to marriage, despite statements to the contrary in the draft opinion.[31] Overturning *Roe* will permit conservative state legislatures to enact laws that severely restrict a woman's ability to obtain a medically sound and healthy termination of her pregnancy. Although this draft opinion has not yet undergone the voting and amending procedures, the highly conservative majority of the Court increases the likelihood that *Roe* and all Supreme Court decisions affirming *Roe* will be overturned.[32]

The Texas statute at issue in *Roe*[33] made it a crime to procure or attempt an abortion at any time during the gestational period "except with respect to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."[34] Jane Roe, a single woman living in Texas, wished to terminate her pregnancy by an abortion to be performed by a licensed physician under safe conditions.[35] However, Texas's statute prevented her from doing so

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https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id. But see* Akhil Reed Amar, *The End of Roe v. Wade*, THE WALL STREET J. (May 14, 2022, 12:01 AM), https://www.wsj.com/articles/the-end-of-roe-v-wade-11652453609.

[32] *See generally id.*

[33] *Roe*, 410 U.S. at 119 ("Texas first enacted a criminal abortion statute in 1854 . . . This was soon modified into language that has remained substantially unchanged to the present time.").

[34] *Id.* at 118; Tex. Crim. Stat. 1191-1194 (explaining the articles of the Texas Penal Code that are at issue).

[35] *Roe*, 410 U.S. at 120.

because her life was not threatened by the continuation of the pregnancy.[36]

The Court held that the right to personal privacy exists under the Fourteenth Amendment of the United States Constitution and that abortion is included in that list of fundamental rights.[37] Various standards of scrutiny are utilized in reviewing issues regarding free speech, equal protection, and due process.[38] The three levels of scrutiny — strict, intermediate, and rational basis — are used to analyze a goal that the law purports to achieve and the means by which the law uses to accomplish it.[39] Under a strict scrutiny standard, the "government has the burden of proving that the challenged law's classifications are 'narrowly tailored measures that further compelling governmental interest.'"[40] Courts typically apply strict scrutiny to government actions that infringe on fundamental rights, as the Supreme Court did in *Griswold*.[41] Under intermediate scrutiny, government restrictions will pass the scrutiny test if they are substantially related to a legitimate state interest.[42] Lastly, under a rational basis standard of review, the government act must be rationally related to a legitimate government purpose.[43] Because the right to an abortion is fundamental, the strict scrutiny standard of review should apply.[44]

The *Roe* decision created the trimester framework and held that the state interest does not become compelling until after the first trimester.[45] Therefore, abortion regulations are unconstitutional during the first trimester. The trimester framework recognized two state interests, "preserving maternal health and protecting fetal life."[46] After the first trimester, the decision to terminate must be left to the

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[36] *Id.*
[37] *Id.* at 152-53.
[38] Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchal Judiciary*, 14 GEO. J.L & PUB. POL'Y 475, 475 (2016).
[39] Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 50 NAT'L AFFAIRS 72, 72-73 (Fall 2019).
[40] Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579, 1584 (2017).
[41] *Id.*; *see generally Griswold*, 381 U.S. 479 (1965).
[42] Leslie, *supra* note 40.
[43] *Id.* at 1585.
[44] Leslie, *supra* note 40.
[45] *Roe*, 410 U.S. at 164.
[46] Randy Beck, *Self-Conscious Dicta: The Origins of Roe v. Wade's Trimester Framework*, 51 AM. J.L. HIST. 505, 505 (2011).

medical judgment of the pregnant woman's attending physician.[47] However, during the second trimester, the State may impose regulations that are reasonably related to maternal health.[48] Lastly, during the third trimester, after fetal viability has been reached,[49] a state's interest in potential life of the unborn fetus is compelling enough to support prohibitions on abortions.[50] Justice Blackmun explained fetal viability in the *Roe* decision as,

> With respect to the State's important and legitimate interest in potential life, the 'compelling point' is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.[51]

After the *Roe* decision, challengers to restrictive abortion legislation criticized the trimester framework for being too rigid to determine the point when a state has a compelling interest. The Court described the trimester framework as a "web of legal rules" rather than a "constitutional doctrine because of the inconsistencies in using viability as a rigid line where a state's interest becomes compelling."[52]

In an effort to amend the trimester framework, the Court adopted the undue burden standard. The undue burden standard was introduced in legislation concerning the funding of abortion.[53] In

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[47] *Id.*; *Roe*, 410 U.S. at 164.
[48] Beck, *supra* note 46.
[49] Ariana Eunjung Cha & Rachel Roubein, *Fetal Viability is at the Center of Mississippi Abortion Case. Hear's Why.,* WASH. POST (Dec. 1, 2021, 3:27 PM), https://www.washingtonpost.com/health/2021/12/01/what-is-viability. From a medical standpoint, fetal viability is the point at which the fetus can survive outside of the womb. *Id.* It is generally considered to be twenty-three to twenty-four weeks. *Id.*
[50] Beck, *supra* note 46.
[51] *Roe*, 410 U.S. at 163.
[52] David Masci et al., *A History of Key Abortion Rulings,* PEW RSCH. CTR. (Jan. 16, 2013), https://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/#post.
[53] *See generally* Maher v. Roe, 432 U.S. 464, 464 (1977).

Maher v. Roe,[54] the Connecticut Welfare Department limited Medicaid benefits for first trimester abortions to those that were medically necessary.[55] In order to obtain this authorization, the hospital or clinic where the abortion is to be performed must also submit a certificate from the patient's attending physician declaring that the abortion is "medically necessary."[56] Two indigent women were unable to obtain the certificate declaring that the abortion they were seeking was medically necessary, so they challenged the constitutionality of the regulation, stating that it was inconsistent with the requirements of Title XIX of the Social Security Act.[57] The Court reasoned that it is the duty of the legislature to guard the "liberties and welfare" of the people and the Court will not strike down state laws because they may be "unwise" or "out of harmony with a particular school of thought."[58] The appropriate forum for public funding of nontherapeutic abortions is the state legislature and it is their job to decide how the benefits are distributed.[59] The Court found that it was not unreasonable for a State to insist on a prior showing of medical necessity to ensure that its money is being spent for an authorized purpose.[60] The Court's refusal to extend *Roe* to require states to pay for abortions for indigent women opens the door to equal protection issues because medical funds are available to indigent individuals, including other pregnancy related expenses.[61] The Court rejected arguments that the equal protection issue triggered a strict scrutiny analysis because the barrier on obtaining an abortion was not exacerbated by the government itself.[62]

In 1982, Pennsylvania passed the Abortion Control Act,[63] which imposed restrictions including that: (a) a minor must obtain parental consent in order to have an abortion; (b) there must be a twenty-four hour waiting period between the initial consultation and the abortion procedure; and (c) married women must notify their

[54] *Id.* at 464.
[55] *Id.* at 466.
[56] *Id.*
[57] *Id.* at 467.
[58] *Id.* at 479.
[59] *Id.*
[60] *Id.* at 480.
[61] U.S. Const. Ann., *Right to An Abortion*, CORNELL LAW SCH., LEGAL INFO. INST.; https://www.law.cornell.edu/constitution-conan/amendment-5/right-to-an-abortion.
[62] *Id.*
[63] Tit. 18 PA. CONS. STAT., § 3201 (1982).

husbands prior to obtaining the abortion.[64] Another piece of notable abortion legislation was enacted in 1989 when Missouri amended its existing state law stating that "the life of each human being begins at conception" and that unborn children have interests in life, health, and well-being.[65] This Act requires that,

> [P]rior to performing an abortion on any woman whom a physician has reason to believe is 20 or more weeks pregnant, the physician ascertain whether the fetus is viable by performing 'such medical examinations and tests as are necessary to make a finding of gestational age, weight, and lung maturity of the unborn child.'[66]

Justice Rehnquist, writing for the majority in *Webster v. Reproductive Health Services,* found that the "viability" testing provision of the Missouri Act[67] was concerned with promoting a state's interest in potential life.[68] The Court also held that prohibiting the use of government workers and facilities to perform abortions is acceptable because *Roe* did not include the right to government assistance in obtaining one.[69] Justice Sandra Day O'Connor concurred in *Webster* that it was clear that testing and examination requirements to determine "whether the fetus is viable, when viability is possible, and when it would not be medically imprudent to do so, does not impose an undue burden on a woman's abortion decision."[70] Justice O'Connor reasoned that "constitutional adjudication itself, which is often highly fact specific" requires determinations as to "whether state laws are 'unduly burdensome' or 'reasonable' or bear a 'rational' or 'necessary' relation to asserted state interests."[71] A requisite amount of testing allows the physician to make determinations of the unborn child's health, thereby offering valuable medical advice to the patient.

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[64] Jessica Glenza, *A 'Fundamental' Right: A Timeline of US Abortion Rights Since Roe v. Wade,* THE GUARDIAN (Dec. 1, 2021, 2:00 PM), https://www.theguardian.com/world/2021/nov/30/abortion-rulings-history-roe-v-wade.
[65] Webster v. Reproductive Health Serv., 492 U.S. 490, 500-01 (1989).
[66] *Id.* at 501.
[67] H.B. 1596 § 217.760 & § 577.023.
[68] *Webster*, 492 U.S. at 515.
[69] *Id.* at 491; PEW RSCH. CTR., *supra* note 52.
[70] *See generally Webster*, 492 U.S. 490 (O'Connor J., concurring).
[71] *Id.* at 550.

Three years after the Supreme Court upheld the Missouri Abortion Act, the Court held in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[72] that restrictions on a woman's right to an abortion are permissible, so long as they do not impose a "substantial obstacle" to the right to an abortion.[73] The undue burden standard only applies to pre-viability abortions because the Court found in *Casey* that before viability, a state's interest is not compelling enough to restrict a woman from terminating her pregnancy.[74] The Court in *Casey* abandoned the majority of the trimester framework, leaving only the rule that a state cannot prohibit abortions before viability.[75] The Court reasoned that the "trimester framework does not fulfill *Roe*'s own promise that the state has an interest in protecting fetal life or potential life."[76] In order to distinguish the different legal standards for pre-viability abortion bans and regulations, viability is defined as the ability of a developing fetus to survive independent of a pregnant woman's womb.[77] In other words, "viability is reached when, in the judgment of an attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside of the womb, with or without artificial support."[78] The Court held in *Casey* that "a provision of law is constitutionally invalid if the purpose or effect of the provision is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[79] By abandoning the trimester framework, the Court created the undue burden standard, which only applies to regulations on abortion, not bans.[80] "Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden."[81]

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[72] 505 U.S. 833 (1992).
[73] *Id.* at 877.
[74] *Id.* at 873.
[75] *Id.* at 873.
[76] *Id.* at 876.
[77] Elizabeth Chloe Romanis, *Is 'Viability' Viable? Abortion, Conceptual Confusion and the Law in England and Wales and the United States*, 7 J.L. BIOSCI. 1, 2 (2020).
[78] Colautti v. Franklin 439 U.S. 379, 388 (1979).
[79] Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2299 (2016).
[80] *Id.* at 2303.
[81] *Casey*, 505 U.S. at 878.

B. The "Undue Burden" Standard Established

In *Casey*, a group of abortion clinics and physicians who provided abortions challenged the provisions at issue in the Pennsylvania Abortion Control Act of 1982.[82] These provisions included: (1) the informed consent requirement; (2) the twenty-four hour waiting period before the abortion; (3) the parental consent requirement for minors; and (4) a spousal notification requirement.[83] *Casey* clarified that, although a state may require the woman to obtain informed consent regarding her abortion, it is the mother's ultimate decision to terminate the pregnancy.[84] Abortion regulations have been struck down up until most recently because they posed a substantial obstacle to those seeking an abortion. For example, Georgia's ban on abortion after six weeks was declared unconstitutional.[85] Abortion rights activists sued the state because the state law, H.B. 481, was created to undermine *Roe*.[86] A district court judge struck down the law because it violated several stipulations set forth in *Roe.*[87] Although the ban had exceptions for rape and incest, the statute required the woman to file a police report in those circumstances, thereby adding another obstacle in the woman's path to obtaining an abortion.[88] The undue burden test was necessary because, under *Roe*, the state would have a substantial amount of power and a restrictive test would be needed to prevent unconstitutional regulations being set forth.[89]

The Fourteenth and Fifth Amendments of the Constitution state that liberty cannot be denied "without due process of law."[90] Each fundamental right is a liberty, and liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupancies of life, to acquire useful knowledge . . . and generally to enjoy those privileges long recognized

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[82] *Id.* at 844.
[83] *Id.*
[84] *Id.* at 879.
[85] Ivan Pereira, *Georgia's 6-Week Abortion Ban Officially Struck Down*, ABC NEWS (July 13, 2020, 5:10 PM), https://abcnews.go.com/Health/georgias-week-abortion-ban-officially-struck/story?id=71759054.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Casey*, 505 U.S. at 845.
[90] Dmytro Taranovsky, *Fundamental Rights*, MASS. INST. TECH. (May 7, 2003), http://web.mit.edu/dmytro/www/FundamentalRights.htm.

at common law as essential to the orderly pursuit of happiness by free men."[91] However, under the Due Process Clause of the Fourteenth Amendment, individual liberties may be infringed upon, as long as due process or law has been provided.[92] Fundamental rights are typically reviewed under a heightened scrutiny standard because they embody what individual liberties stand for and further encourage the government to avoid infringing on those individual liberties.[93] The undue burden standard is a unique standard of review because fundamental rights are typically accorded a strict scrutiny analysis.[94] *Casey* created this standard — specific to the abortion right — which gave state legislatures a greater deference in restricting abortion throughout pregnancy.[95] Under the undue burden standard established in *Casey*, the state's interests no longer have to be compelling, but rather they must not create an undue burden on a woman's right to terminate her pregnancy.[96] Using the undue burden standard, the Court found that parental consent for minors, informed consent, the twenty-four hour waiting period, and certain reporting requirements for medical facilities were all constitutionally permissible restrictions on an abortion.[97] However, the requirements that women must notify their husbands before getting an abortion were declared unconstitutional.[98]

The Court has been unclear in its definitions of a substantial obstacle and an undue burden thus making the undue burden standard difficult to apply. Since the *Roe* decision, there has been an influx of restrictive abortion legislation and the constitutionality of this legislation is in question.[99] The recent draft opinion by the Supreme Court has intensified the division between the states regarding this issue.[100] This Supreme Court decision will almost immediately lead to

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[91] *Id.*; Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
[92] Taranovsky, *supra* note 90.
[93] *Id.*
[94] *See generally* Taranovsky, *supra* note 90.
[95] Lauren Paulk, *What is an "Undue Burden"? The Casey Standard as Applied to Informed Consent Provisions*, 20 UCLA WOMEN'S L.J. 71, 74-75 (2013).
[96] *Id.* at 75-76.
[97] *Id.* at 77-78; *Casey*, 505 U.S. at 883.
[98] Paulk, *supra* note 95, at 78.
[99] June Med. Serv. LLC. v. Russo, 140 S. Ct. 2103, 2112 (2020); *see generally* Jackson Women's Health Organization v. Dobbs, 951 F.3d 246, 246 (5th Cir. 2020).
[100] Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022, 8:32 PM),

stricter limits on the access to abortion, especially in the South and the Midwest of the United States.[101] The uncertainty with the ruling of *Casey* has already left lower courts with inadequate guidance when deciding cases involving restrictive abortion laws and gives leeway to the states to "push the boundaries."[102] Overturning *Roe* and fifty years' worth of federal constitutional protections that came from it will ultimately cause more confusion and increase the politicized nature of the issue. For example, the state of Texas attempted to propose blatantly unconstitutional and unprecedented legislation in an effort to overturn *Roe*[103] by prohibiting an abortion after a doctor has detected a fetal heartbeat at six-to-seven weeks.[104]

In 2007, the Supreme Court applied the undue burden standard to specific bans on abortion procedures.[105] In *Gonzales v. Carhart*, doctors who performed intact dilation and extraction [hereinafter D&E] abortions challenged the Partial-Birth Abortion Ban Act, which prohibited intact D&E abortions.[106] Intact D&E abortions is a dilation and extraction which involves removing the fetus intact by dilating a woman's cervix, then pulling the entire body out of the birth canal.[107] Congress was concerned with the effects on the reputation of the medical community by practicing partial-birth abortions.[108] The Court held that the Partial-Birth Abortion Ban Act was constitutional because it did not place an undue burden on a woman's right to terminate her

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https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.

[101] *Id.*

[102] Paulk, *supra* note 95, at 77 (discussing the difficulty in determining what constitutes a substantial obstacle).

[103] Tex. S.B. 8 § 171. 204 ("A physician may not knowingly perform or induce an abortion on a pregnant woman if the physician has detected a fetal heartbeat for the unborn child.").

[104] J. David Goodman et al., *Confusion in Texas as 'Unprecedented' Abortion Law Takes Effect*, N.Y. TIMES (Sept. 2, 2021), https://www.nytimes.com/2021/09/02/us/supreme-court-texas-abortion-law.html; USA FACTS, *States Passed a Record Number of Restrictive Abortion Laws in 2021*, (Feb. 25, 2022, 11:24 AM), https://usafacts.org/articles/states-passed-a-record-number-of-restrictive-abortion-laws-in-2021.

[105] Gonzales v. Carhart, 550 U.S. 124, 158 (2007).

[106] *Gonzales*, 550 U.S. at 133.

[107] Julie Rovner, *'Partial-Birth Abortion': Separating Fact from Spin*, NPR (Feb. 21, 2006, 9:44 PM), https://www.npr.org/2006/02/21/5168163/partial-birth-abortion-separating-fact-from-spin.

[108] *See id.* at 157.

pregnancy.[109] The Court reasoned that this Act was not vague because the language of the Act specifically states that the doctor must "deliberately and intentionally deliver the fetus, with the purpose of performing an overt act that the doctor knows will kill it."[110] The Court also agreed that in order for the Act to apply, a delivery of a living fetus must occur.[111] The Act set forth clear guidelines as to the prohibited conduct and to determine whether a doctor has performed the prohibited procedure.[112] The Act only prohibited a specific and brutal type of D&E abortion, not all D&E abortions.[113] A doctor who intends to remove a fetus in parts from the outset does not have the requisite intent needed to incur criminal liability under the Partial-Birth Abortion Ban Act.[114] Congress determined that this method of abortion was disturbingly similar to killing a newborn infant.[115] A court's ruling against the prohibition of partial-birth abortion procedures would make it challenging to protect innocent and vulnerable life.[116] The Court concluded that the government has a legitimate interest in protecting the integrity and ethics of the medical community based on a finding that,

> Partial Birth abortion . . . confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child whom he or she has just delivered, all but the head, out of the womb in order to end that life.[117]

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[109] *Id.* at 156. Partial-birth abortions are defined as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." NEB. REV. STAT. § 28-328(1)(1998).
[110] Neb. Rev. Stat. § 28-328(1)(1998); *Gonzales* 550 U.S. at 148.
[111] *Gonzales*, 550 U.S. at 148.
[112] *Id.* at 149.
[113] *Id.* at 150; Megan K. Donovan, *D&E Abortion Bans: The Implications of Banning the Most Common Second-Trimester Procedure*, GUTTMACHER INST. (Feb. 21, 2017), https://www.guttmacher.org/gpr/2017/02/de-abortion-bans-implications-banning-most-common-second-trimester-procedure (explaining that D&E (dilation and evacuation) is a safe abortion procedure that accounts for majority of second-trimester abortions).
[114] *Gonzales*, 550 U.S. at 151.
[115] *Id.* at 158.
[116] *Id.* at 156-57.
[117] *Id.* at 157.

The majority opinion in *Gonzales* provided courts with some guidance for evaluating state and government interest. Lower courts were given deference to determine what does and does not constitute a "substantial obstacle." Some states, like Ohio and South Dakota, began imposing laws that restrict a woman's right to an abortion before viability.[118]

Numerous states have passed legislation throughout the past decade designed to undermine or block a woman's access to abortion care.[119] Under the undue burden standard, the Supreme Court held that states are permitted to prohibit abortions after viability as long as there are exceptions for life and health of the mother.[120] In 2021, a record number of abortion restrictions were passed in a single year.[121] In general, some states have passed laws restricting the insurance coverage of abortions.[122] Kansas and Kentucky have approved measures to amend their state constitutions to explicitly exclude the right to an abortion and prohibit the public funding of abortions.[123] Arkansas also enacted the Arkansas Unborn Child Protection Act in an effort to protect the lives of the unborn.[124] Other states, like Texas,[125] have passed trigger ban legislation.[126] Based on Supreme Court precedent, states may restrict or expand the access to an abortion without running into constitutional issues.[127] After fetal viability has been reached, states may impose a restriction on abortion that they see fit, excluding any restriction that prevents a pregnant woman from

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[118] Romanis, *Is 'Viability' Viable? Abortion, Conceptual Confusion and the Law in England and Wales and the United States*, 7 J.L. BIOSCI. 1, 7 (2020).

[119] Elyssa Spitzer & Nora Ellman, *State Abortion Legislation in 2021: A Review of Positive and Negative Actions*, (Sept. 21, 2021), https://www.americanprogress.org/issues/women/reports/2021/09/21/503999/state-abortion-legislation-2021.

[120] *State Abortion Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (Oct. 1, 2021), https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions.

[121] USA FACTS, *supra* note 104.

[122] *Id.*

[123] *Id.*

[124] *Id.;* Arkansas Unborn Child Protection Act, S.B. 6.

[125] H.B. 1280, Ch. 170A § 3. "This Act takes effect September 1, 2021, except section 2 takes effect, to the extent permitted, on the 30th day after the issuance of a certain judgement of the United States Supreme Court or the adoption of a certain amendment to the United States Constitution."

[126] USA FACTS, *supra* note 104 (explaining that trigger bans are legislative bans on abortion that are currently inactive but will triggered and illegalize abortion if the Supreme Court overturns *Roe v. Wade*).

[127] *Id.*

accessing an abortion when the pregnancy poses a serious risk to her health or the health of the fetus.[128] Restrictions that deny public funding to support abortion procedures are not technically unconstitutional, but they impose an undue burden on a woman's ability to obtain an abortion. The limited amount of time a woman has to decide to elect the procedure once she finds out she is pregnant, coupled with the lack of funding for abortions undoubtfully creates an obstacle. However, due to the varying social and political dynamics of each state, it is difficult to create a national standard.

In *Whole Women's Health v. Hellerstedt,*[129] the Court considered challenges to two provisions of the Texas House Bill 2.[130] The "admitting privileges requirement" of the Bill states that a doctor performing an abortion must on the date of the abortion, "have active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced."[131] The "surgical center requirement," provides that "minimum standards for abortion facilities must be equivalent to the minimum standards adopted under the Texas Health and Safety Code for ambulatory surgical centers."[132] According to the Court, the "rule announced in *Casey* . . . requires courts to consider the burdens that laws impose on abortion access all together with the benefits those laws confer."[133] In *Whole Women's Health*, the Court held that there were no legislative findings to suggest that the benefits of this specific provision would further the constitutionally acceptable objective of protecting women's health.[134] The admitting privileges requirement ensures that a woman has access to a hospital, closer in proximity to her, should she have any complications during the abortion procedure.[135] The Court agreed with the lower court's findings and held that these requirements place an undue obstacle in the path of a woman's right to an abortion because neither of the provisions confers medical benefits sufficient to justify these burdens.[136] The medical benefit justification is important because it provides a factor that courts

[128] Romanis, *supra* note 118, at 7.
[129] *See generally Whole Women's Health*, 136 S. Ct. 2292 (2016).
[130] *Whole Women's Health*, 136 S. Ct. at 2299.
[131] *Id.*
[132] *Id.*
[133] *Id.* at 2309.
[134] *Id.* at 2310.
[135] *Id.* at 2311.
[136] *Id.* at 2312.

can use to justify upholding or striking down an abortion regulation. If the purpose of the regulation provides a medical benefit, there is a stronger likelihood that a reviewing court would find that the regulation did not place an undue burden on the right to terminate a pregnancy.

Today, the majority of abortion regulations provide exceptions in cases of rape and incest. These exceptions are derived from advocates from the American Law Institute which pushed for exceptions that extend to threats to patient health, fetal anomalies, and rape and incest.[137] The extension of the exceptions to include rape and incest was a product of concern over the shame and anxiety that a woman experiences when she becomes pregnant against her own will.[138] Notably, many rape and incest cases go unreported despite the increase in sexual violence.[139] The Court noted in *Casey* that "in an average twelve-month period in this country, approximately two million women are victims of severe assault by their male partners and many of these assaults are sexual in nature."[140] Anti-abortion activists did not challenge the rape and incest exceptions outright due to their widespread support and the goal to gain trust from Republicans to push the anti-abortion movement further.[141] However, more recent abortion regulations fail to include such exceptions.[142] This is surprising because if these exceptions that were widely accepted do not serve as protection, how can a woman make conscious medical decisions when the circumstance is within her control?

There are many reasons why a woman would decide not to have children and those reasons have never been the basis of denying her the fundamental right to terminate her pregnancy under the current state of the law.[143] Therefore, the reasons for electing the abortion procedure should not legally prevent a woman from exercising her right to an abortion.

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[137] Michele Goodwin & Mary Ziegler, *Whatever Happened to the Exceptions for Rape and Incest?*, ATLANTIC (Nov. 29, 2021), https://www.theatlantic.com/ideas/archive/2021/11/abortion-law-exceptions-rape-and-incest/620812.
[138] *Id.*
[139] *Id.*
[140] *Casey*, 505 U.S. at 891.
[141] Goodwin, *supra* note 137.
[142] *Id.*
[143] *See generally Casey*, 505 U.S. 833 (1992).

III. A BACKGROUND ON PRENATAL TESTING AND GENETIC ABNORMALITIES

A. Prenatal Testing

New and advanced technology provides women with access to more information about her unborn fetus than ever before.[144] Prenatal testing allows for less invasive procedures that are able to test for hundreds of thousands of traits from a single blood sample, as opposed to the traditional tests that were more invasive and only detected the most serious disorders.[145] Women undergo prenatal testing to avoid future suffering that a child with a disability might experience.[146] Prenatal testing was further developed in the 1970s, and was predicated on economic cost-benefit analysis and the belief that women did not want to raise a child with a significant disability.[147] Accurate and effective prenatal testing provides women with more information about their fetus and allows them to make a well-informed decision of what she will be able to handle.

The most common chromosomal condition in the United States is Down syndrome which occurs when a child is born with an extra chromosome.[148] Chromosomes carry genetic material and every human being is supposed to have twenty-three pairs.[149] Down syndrome causes intellectual disabilities and individuals affected by this disease may encounter additional health issues such as heart

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[144] Greer Donley, *Does the Constitution Protect Abortions Based on Fetal Anomaly?: Examining the Potential For Disability-Selective Abortion Bans in the Age of Prenatal Whole Genome Sequencing*, 20 MICH. J. GENDER & L. 291, 292 (2013).

[145] *Id.* at 296-97; Sandhya Pruthi et al., *Amniocentesis*, MAYO CLINIC (Nov. 12, 2020), https://www.mayoclinic.org/tests-procedures/amniocentesis/about/pac-20392914 (more invasive testing includes amniocentesis which is a "procedure in which amniotic fluid is removed from the uterus for testing or treatment." It can provide valuable information about the unborn fetus's genetic makeup.).

[146] Robert Resta, *Prenatal Testing- What is it Good For? A Review and Critique*, 5 OBM GENETICS 1, 7 (Sept. 1, 2021).

[147] *Id.* at 4.

[148] *Facts About Down Syndrome*, Centers for Disease Control & Prevention, (Apr. 6, 2021) https://www.cdc.gov/ncbddd/birthdefects/downsyndrome.html [hereinafter "CENTERS FOR DISEASE CONTROL & PREVENTION"].

[149] Robyn Horsager-Boehrer, *Why Does a Woman's Age Impact the Risk of Down Syndrome in Her Baby?* UT S. MED. CTR (June 6, 2017) https://utswmed.org/medblog/age-matters-down-syndrome.

defects and hematopoietic disorders.[150] However, Down syndrome is the only autosomal trisomy[151] associated with significant rates of survival beyond early childhood.[152] Screening and diagnostic testing can detect Down syndrome.[153] Screening tests do not always provide an absolute diagnosis; however, they can provide answers as to whether the unborn fetus has a high or low chance of having Down syndrome.[154] Doctors will usually perform diagnostic tests after a positive screening test to make a more accurate determination.[155] However, "neither of these diagnostic tests can predict the full impact that Down syndrome will have on a baby" or on their families.[156] In practice, a "majority of women who undergo prenatal testing in most, but not all, western European countries, the U.S., Canada, and Australia choose to terminate a pregnancy in which an autosomal trisomy has been diagnosed."[157] The care needed for a child with Down syndrome can be extremely burdensome to families and it is near impossible to create preventative programs to outweigh this burden.[158] Down syndrome affects families very differently and it is unlikely that preventative programs are able to attend to all family situations. In 2012, abortions following a Down syndrome diagnosis in the United States were at a rate of 67% and research shows that most parents choose to undergo prenatal testing to avoid future suffering that a child with disabilities may experience.[159]

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[150] MOHAMMED KAZEMI, MANSOOR SALEHI, & MAJID KHEIROLLAHI, DOWN SYNDROME: CURRENT STATUS, CHALLENGES AND FUTURE PERSPECTIVES, page 1; MOUNT SINAI, *About Hematologic Disorders*, https://www.mountsinai.org/care/surgery/services/pediatric-surgery/conditions-we-treat/hematologic-disorders. Hematopoietic disorders involve the blood and include problems with red and white blood cells, platelets, bone marrow, lymph nodes, and spleen. *Id.* These disorders can cause abnormally formed blood cells, lymphatic conditions, and spleen problems. *Id.*

[151] "Autosomal trisomies, trisomy 21 (Down syndrome), trisomy 18, trisomy 13 are among the most common birth defects seen in live-born children." C.J. Curry, *Autosomal Trisomies*, SCI. DIRECT (2018), https://www.sciencedirect.com/topics/neuroscience/autosomal-trisomies.

[152] Resta, *supra* note 146, at 2.

[153] CENTERS FOR DISEASE CONTROL & PREVENTION, *supra* note 148.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] Resta, *supra* note 146, at 5.

[158] *Id.* at 4.

[159] *Id.* at 5.

During the 1970s and early 1980s, amniocentesis[160] was offered to a limited number of women who were deemed to be at a higher risk of having a child with a disability due to their maternal age.[161] On average, more women are waiting later to have their first child and as women wait well into their thirties to have their first child, they become more at risk to having a child with a chromosomal abnormality.[162] According to the National Down Syndrome Society, "maternal age is the only factor that has been linked to an increased chance of having a child with Down syndrome."[163] Statistically, a thirty-five year old woman has about a one in three hundred and fifty chance of conceiving a child with Down syndrome and that gradually increases to one in one hundred by age forty.[164] Therefore, the prevalence of Down syndrome is likely to increase as more women wait to have children until their mid-thirties. The high maternal age and risk for having a child with Down syndrome may be linked to the high termination rate of unborn children diagnosed with Down syndrome.

B. Short and Long-Term Effects of Genetic Abnormalities

Although it is likely that a child born with Down syndrome will not have severe or life-threatening symptoms, the costs of medical care, therapy, specialized schooling, and even bullying raise concerns for many families.[165] Children with Down syndrome require routine health maintenance because they are more likely to have thyroid disease, otitis media, congenital cardiac defects, leukemoid reactions,

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[160] MEDLINE PLUS, *Amniocentesis (Amniotic Fluid Test)*, NAT'L LIBRARY OF MED., https://medlineplus.gov/lab-tests/amniocentesis-amniotic-fluid-test. *Id.* Amniocentesis is a test for pregnant women that takes a sample of the amniotic fluid that surrounds a fetus. *Id.* The fluid contains cells that provide information about the unborn baby's health. *Id.* This test is a diagnostic test which will be able to determine if the baby has a specific health problem. *Id.*

[161] Resta, *supra* note 146, at 3.

[162] Horsager-Boehrer, *supra* note 149.

[163] *What is Down* Syndrome, NAT'L DOWN SYNDROME SOC'Y https://www.ndss.org/about-down-syndrome/down-syndrome (last visited Apr. 12, 2022).

[164] *Id.*

[165] *See* Hayley White, *A Critical Review of Ohio's Unconstitutional "Right to Life Down Syndrome Non-Discrimination" Bill*, 29 GEO. MASON U. CIV. RTS. L.J. 87, 90 (2018).

and feeding difficulties.[166] Parents of a Down syndrome child are often referred to family support and specialty resources in order to help care for these children and provide for their basic medical and social needs.[167] Caring for an infant or young child with Down syndrome can be complicated and may involve "a myriad of immediate and long-term medical problems and psychological issues."[168] Endocrine disorders create long-term social problems and thyroid stimulating hormone tests should be performed at least on a yearly basis.[169] Other issues common to young children with Down syndrome include gastrointestinal defects which may require surgical intervention in order to correct the defect and congenital heart defects.[170] Repairing heart defects early through surgical intervention is recommended to minimize the risks associated with heart disease and heart failure.[171] Although the management of congenital heart defects has contributed to an increased life expectancy in patients with Down syndrome, "pulmonary-artery hypertension[172] occurs in 1.2 to 5.2% of individuals with Down syndrome" and "infants who are initially unaffected by complications of pulmonary-artery hypertension may still become symptomatic in childhood or later."[173] In addition to these complications, thirteen percent of children with Down syndrome have asymptomatic atlantoaxial instability that should be monitored and

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[166] Rebecca B. Saenz, *Primary Care of Infants and Young Children With Down Syndrome*, AMERICAN FAMILY PHYSICIAN, (Jan. 15, 1999), https://www.aafp.org/afp/1999/0115/p381.html; JOHNS HOPKINS MED., *Ear Infection (Otitis Media)*, https://www.hopkinsmedicine.org/health/conditions-and-diseases/otitis-media (explaining that otitis media is inflammation or infections located in the middle ear); CENTERS FOR DISEASE CONTROL & PREVENTION, *Congenital Heart Defects (CHDs)*, https://www.cdc.gov/ncbddd/heartdefects/index.html (explaining that congenital cardiac defects are conditions present at birth that can affect the structure of a baby's heart and the way it functions); MEDLINE PLUS, *Leukemoid* Reactions, https://medlineplus.gov/ency/article/000575.htm (explaining that leukemoid reactions are increases in the white blood cell count that can mimic leukemia).

[167] Saenz, *supra* note 166.

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] Marilyn J. Bull, *Down Syndrome*, 382 NEW ENG. MED. J. 2344, 2347 (2020).

[172] MAYO CLINIC, *Pulmonary Hypertension*, https://www.mayoclinic.org/diseases-conditions/pulmonary-hypertension/symptoms-causes/syc-20350697 (explaining that pulmonary artery hypertension is when blood vessels in the lungs are narrowed, blocked, or destroyed).

[173] Bull, *supra* note 171.

would also preclude them from participating in contact sports.[174] Due to the abundance of known health-related issues, like muscular-skeletal problems and cardiac anomalies, research has shown that sports participation can exacerbate these problems.[175] Although doctors would usually not suggest that the child stay away from participating in sports, the child must still go through extensive screening and evaluation to determine the extent to which the child may participate in sports.[176]

Most parents are concerned with the long-term medical burdens and social development of their child when they receive a prenatal diagnosis of Down syndrome. A woman may choose to terminate her pregnancy when she is faced with the reality that her unborn child has Down syndrome because of the fear that the child would be unable to participate in activities that other children without disabilities can.[177] Access to sufficient and effective therapy for children with disabilities may become very expensive and place a financial burden on a woman who is ill-equipped to care for that child. "Children with Down syndrome benefit from behavioral analysis and therapy, however, schools and insurance plans often require a diagnosis of autism to access this intervention."[178] Other long-term effects that are problematic include employment, sources of healthcare, and community involvement.[179] For example, adults with Down syndrome experience "accelerated aging" that can be seen medically, physically, and functionally.[180] Additionally, adults with Down syndrome are at a higher risk of early-onset Alzheimer's disease.[181] These long-term effects contribute to depression, anxiety, and other psychiatric problems.[182] These long-term problems significantly affect an individual's ability to live a full life. Since the

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[174] Saenz, *supra* note 166.
[175] Osman N. Sanyer, *Down Syndrome and Sport Participation*, 5 CURRENT SPORTS MED. REPORT. 315, 316 (2007), [hereinafter "*Down Syndrome and Sport Participation*"].
[176] *Id.*
[177] *Id.*
[178] Bull, *supra* note 171, at 2350.
[179] *Id.* at 2351.
[180] Julie Moran et. al., *Aging and Down Syndrome: A Health and Well-Being Guidebook*, NAT'L DOWN SYNDROME SOC'Y, 4, https://www.ndss.org/wp-content/uploads/2017/11/Aging-and-Down-Syndrome.pdf.
[181] *Id.* at 11.
[182] *Id.* at 15.

life expectancy of persons with Down syndrome continues to increase, more clinical research and evidence-based guidelines for adults with Down syndrome are needed.[183] The short and long-term issues that come with caring for a child with Down syndrome are significant on an economic and social level, regardless of the fact that most Down syndrome cases are not life-threatening.

IV. DISCOURSE SURROUNDING ABORTIONS FOLLOWING A DIAGNOSIS OF A GENETIC ABNORMALITY

Access to substantial information about the fetus through prenatal testing provides more productive and informed family planning, but it opens the door to an influx of abortions.[184] As a result, there are abortion laws that are focused on anti-discrimination and destigmatization.[185] Restrictive abortion legislation prohibits a woman from obtaining an abortion and doctors from administering abortions where there is knowledge that the woman is obtaining an abortion because of a prenatal diagnosis of a genetic abnormality.[186] This legislation also imposes a criminal penalty on a physician who performs the disability-selective abortion.[187] The purpose of anti-discrimination abortion restrictions is to stop "targeting" babies born with Down syndrome and end the discriminatory practice of terminating a pregnancy on the basis of Down syndrome.[188]

A. State Specific Abortion Regulation

As previously introduced, twenty-two states, including Texas, South Dakota, and Missouri, have passed laws that regulate and restrict abortion.[189] The states indicated are the most restrictive and notable to the abortion discussion to date. Abortion laws vary from state to state, but these abortion restrictions specifically stand out as patently

[183]Bull, *supra* note 171, at 2344.
[184] Resta, *Prenatal Testing—What is it Good For?* 5 OBM Genetics at 10.
[185] White, *supra* note 165, at 97.
[186] *See generally* Preterm-Cleveland v. McCloud, 994 F.3d 512 (6th Cir. 2021).
[187] White, *supra* note 165, at 95; *see also* N.D. CENT. CODE, § 14-02.1-02 (2013); *see also* S.B. 1457 § 13-3603.02(A).
[188] White, *supra* note 165, at 97.
[189] USA FACTS, *States Passed a Record Number of Restrictive Abortion Laws in 2021*, (Dec. 14, 2021, 11:01 AM), https://usafacts.org/articles/states-passed-a-record-number-of-restrictive-abortion-laws-in-2021.

unconstitutional. Recent restrictive abortion legislation pursue "the ultimate goal of ending access to legal abortion care."[190] More specifically, there are states that have determined that their interest in preserving the life of the individual diagnosed with Down syndrome or another genetic abnormality outweighs the woman's right to choose.[191] Arizona prohibits all abortion procedures and funding for the abortion because of a genetic abnormality.[192] Missouri also established a similar law prohibiting doctors from performing an abortion if the provider "knows that the woman is seeking an abortion solely because of a prenatal diagnosis, test, or screening indicating Down syndrome or the potential of Down syndrome in an unborn child."[193] South Dakota also prohibits a person from performing or attempting to perform an abortion "with the knowledge that the pregnant woman is seeking the abortion because the unborn child either has been diagnosed with Down syndrome or has had a screening indicating that the unborn child may have Down syndrome."[194]

In addition to abortion legislation that prohibits abortions based on a Down syndrome diagnosis, there is legislation addressing the point in a pregnancy when abortions are prohibited. The Supreme Court has allowed the Texas Law, S.B. 8, to take effect after a ruling in December of 2021, in the case of *Whole Women's Health v. Jackson.*[195] The Texas law prohibits abortion after six-weeks and creates the right of private citizens to sue anyone who "assists" a person's access to abortion care.[196] Unlike standard abortion bans, this law allows private citizens to sue in civil court over the performance of an abortion or the aiding and abetting of an abortion.[197] The Court of Appeals for the Fifth Circuit has declined to issue an injunction,

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[190] Elyssa Spitzer & Nora Ellman, *State Abortion Legislation in 2021*, CTR. FOR AM. PROGRESS (Sept. 12, 2021), https://www.americanprogress.org/article/state-abortion-legislation-2021.

[191] Christine Scherer, *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, 850 (2020).

[192] USA FACTS, *supra* note 189.

[193] Jim Salter, *Down Syndrome Issue at Center of Missouri Abortion Law Case*, AP NEWS (Sept. 21, 2021), https://apnews.com/article/abortion-courts-health-laws-st-louis-8310eaa67debfe2f06bd331d918b2cd9.

[194] H.B 1110 § 2-34-23A-90.

[195] 142. S. Ct. 522 (2021) [hereinafter, "*Jackson"*].

[196] Spitzer, *supra* note 190.

[197] S.B. 8 § 171.208(a).

thereby allowing the law to stay in effect.[198] The Texas state law directly undermined Supreme Court precedent by using loopholes to attack abortion rights.[199]

The Supreme Court granted certiorari to a Fifth Circuit case *Jackson Whole Women's Health Organization v. Dobbs.*[200] On March 19, 2018, Mississippi enacted the Gestational Act[201] which provides that,

> [Except] in a medical emergency or in the case of a severe fetal abnormality, a person shall not perform, induce, or attempt to perform or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.[202]

On the day that the Gestational Act was signed into law, Jackson Whole Women's Health Organization and one of its doctors filed a lawsuit challenging the Act and requested a restraining order to prevent the law from taking effect.[203] *Dobbs* raises concerns because of the recent trends in abortion legislation and the Supreme Court's 6-3 conservative majority.[204] Although the Supreme Court has heard many abortion cases involving state regulations, this is the first case that the Supreme Court has taken, where a state has directly asked the Court to overturn the constitutional right to an abortion.[205] This case could

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[198] *Jackson*, 142 S. Ct. at 539.

[199] *See generally* David G. Savage, *News Analysis: Supreme Court Signals Roe vs. Wade Will Fail After Allowing Texas to Ban Most Abortions*, L.A. TIMES (Sept. 2, 2021, 2:08 PM), https://www.latimes.com/politics/story/2021-09-02/the-supreme-court-signals-that-roe-vs-wade-will-fall-now-that-texas-may-ban-early-abortions.

[200] 945 F.3d 265 (5th Cir. 2019).

[201] "Gestational Act" H.B. 1510.

[202] *See id.*; *see also Jackson*, 945 F.3d at 269.

[203] *Jackson*, 945 F.3d at 269 (explaining that Jackson Women's Health Organization is the only licensed abortion facility in Mississippi).

[204] Spitzer, *supra* note 190; FLA. COMMITTEE ON HEALTH POL'Y, BILL ANALYSIS & FISCAL IMPACT STATEMENT, S. 146, 1st Sess. at 4 (Fl. 2022). https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=2022s00146.pre.hp.DOCX&DocumentType=Analysis&BillNumber=0146&Session=2022 (explaining that the Supreme Court held oral arguments on *Jackson Women's Health Org. v. Dobbs* on December 1, 2021, and is likely to rule on the case in the middle of 2022).

[205] Laurie Sobel et al., *Abortion at SCOTUS: Dobbs v. Jackson Women's Health*, KFF (Nov. 2, 2021) https://www.kff.org/womens-health-policy/issue-brief/abortion-at-scotus-dobbs-v-jackson-womens-health.

completely change the viability standard by allowing states to significantly limit or ban abortions pre-viability.[206]

In early March of 2022, Florida lawmakers proposed a bill that would ban abortion after fifteen weeks.[207] This legislation is modeled after the abortion law in Mississippi, which the Supreme Court is likely to uphold.[208] Florida's proposed bill is important to the discussion of an undue burden because pregnant women from other Southern states with more restrictive abortion laws traveled to Florida for abortion procedures.[209] In 2019, Arkansas enacted a statute regulating abortion that states "a physician shall not intentionally perform or attempt to perform an abortion with the knowledge that a pregnant woman is seeking an abortion solely on the basis of a test result indicating Down syndrome in an unborn child."[210] The statute's constitutionality has been called into doubt by the Eighth Circuit in *Little Rock Family Planning Services v. Rutledge*.[211] If the Supreme Court decides to allow the Mississippi law to stand, *Roe* and *Casey* will be effectively overturned and it is likely that more states will follow in passing new laws regulating abortion, limiting its access.[212]

However, there are states that have expanded access to abortion.[213] New Mexico repealed its trigger law that would ban abortion if *Roe* were overturned.[214] Hawaii also enacted a law that allows advanced practice nurses to provide abortions, which expands

[206] *Id.*
[207] S.B. 146; Patricia Mazzei & Alexandra Glorioso, *Florida Lawmakers Vote to Ban Abortions After 15 Weeks*, N.Y. TIMES (Mar. 3, 2022), https://www.nytimes.com/2022/03/03/us/florida-abortion-ban.html.
[208] Mazzei, *supra* note 207.
[209] *Id.*
[210] West Ark. Ann. Code § 20-16-2013(a)(1) (2019).
[211] *See generally* Little Rock Family Planning Servs. v. Rutledge, 984 F.3d 682 (8th Cir. 2021).
[212] Sobel, *supra* note 205.
[213] USA FACTS, *supra* note 189.
[214] *Id.*; S.B. 10 § 30-5-1 - § 30-5-3.

access to abortion.[215] Virginia,[216] Colorado,[217] and Washington[218] have acted to expand insurance coverage to cover the costs of abortion.[219] As abortion rights advocates prepare for post-*Roe* America, states like New York are making the necessary arrangements to serve as a sanctuary for out-of-state women seeking to terminate their pregnancies.[220] Following the release of the draft opinion overturning *Roe*, lawmakers have been working on expanding New York's abortion laws to prepare for the surge of out-of-state patients.[221] However, there is a need for proactive legislation to outweigh the burdens from the more restrictive abortion regulations and protect forty-nine years of Supreme Court precedent.

B. Argument Against Genetic Abortion-Motivated Bans

Women who seek an abortion pursuant to a positive fetal abnormality test will argue that the specific reasons for why a woman seeks an abortion are irrelevant.[222] Neither the decision in *Roe* nor in *Casey* provides that a woman's reasons for an abortion are factors to consider when determining if a woman can terminate her pregnancy.[223] A woman's liberty interest in "autonomous decision-making which protect her motives in seeking the medical procedure" is infringed

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[215] Elyssa Spitzer & Nora Ellman, *State Abortion Legislation in 2021*, CTR. FOR. AM. PROGRESS (Sept. 12, 2021), https://www.americanprogress.org/article/state-abortion-legislation-2021; H.B. 576 H.D.3 § 457 (2021).

[216] H.B. 1896 (explaining "removing prohibition on the provision of coverage for abortions in any qualified health insurance plan that is sold or offered for sale through health benefits exchange established or operating in Virginia.").

[217] *Health Care Access in Cases of Rape or Incest*, S.B. 21-142 (2021) (available at http://leg.colorado.gov/bills/sb21-142) ("concerning removing certain restrictions related to abortion services").

[218] H.B. 1009 (concerning student health plans).

[219] Spitzer, *supra* note 215.

[220] Ashley Wong & Lola Fadulu, *How New York is Planning for an Influx of Out-of-State Abortion Patients*, N.Y. TIMES (May 20, 2022), https://www.nytimes.com/2022/05/13/nyregion/abortion-safe-haven-ny.html.

[221] *Id.*

[222] Carole J. Petersen, *Reproductive Autonomy and Laws Prohibiting "Discriminatory" Abortions: Constitutional and Ethical Challenges,* 96 U. DET. MERCY L. REV. 605, 616 (2019).

[223] *Id.*

upon by[224] the severity of the symptoms that individuals with congenital or genetic disabilities experience.[225] There is a benefit to prenatal testing because some parents are better equipped to care for and raise a child with a cognitive disability than others. Using the results from a prenatal test gives more reassurance about generalized concerns of genetic and cognitive disabilities.[226] Additionally, there is no existential threat to the frequency of Down syndrome on a global level, even with prenatal testing increasing the number of genetic disability based abortions.[227] Therefore, limiting abortions for specific reasons and motivations, such as a Down syndrome diagnosis "further erodes abortion options for all women" and should never be questioned.[228] A woman may wish to terminate her pregnancy because it is not the right time for her to have a child or because she is in an abusive relationship. Reason bans "allow politicians to interfere with the health decisions that should be made between a pregnant person and their provider, while doing nothing to advance equity or justice."[229] In reality abortion restrictions that prohibit an abortion when a woman's decision to have the abortion is predicated on the fetus's sex, prenatal diagnosis, or race, are political strategies to stigmatize abortion decisions.[230]

C. Arguments Supporting Genetic Abnormality Abortion Bans- Concerns of Anti-Discrimination and Modern Eugenics

Anti-abortion legislatures are "knowledgeable in crafting laws to hinder a woman's choice and escape invalidation under the undue burden standard."[231] They argue that abortions, for the specific reason that her unborn child has a genetic abnormality, perpetuate eugenic

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[224] Justin Gillette, *Pregnant and Prejudice: The Constitutionality of Sex- And- Race-Selective Abortion Restrictions*, 88 WASH. L. REV. 645, 671 (2013).
[225] Resta, *supra* note 184, at 7.
[226] *Id.*
[227] *Id.* at 6.
[228] *Id.* at 7.
[229] Spitzer, *supra* note 215.
[230] *Id.*
[231] Lauren Paulk, *What is an "Undue Burden"? The Casey Standard as Applied to Informed Consent Provisions*, 20 UCLA WOMEN'S L. J. 71, 109 (2013).

ideas and practices.[232] Eugenics is the forced sterilization of the feebleminded and it has inspired the ideals of Nazi Germany where Nazi soldiers killed tens of thousands of people with disabilities, including children.[233] The Supreme Court held in *Buck v. Bell*,[234] that when an individual is a potential parent of socially inadequate offspring, she may be "sexually sterilized without a detriment to her general health and that of society will be promoted by her sterilization."[235] The *Buck* decision resulted in the sterilization of sixty to seventy thousand Americans.[236] This decision allowed for the sterilization of perfectly normal mental and physical individuals because they were deemed to be "imbeciles."[237] *Buck* was decidedly one of the worst Supreme Court decisions in the history of the United States and states that have laws that prohibited abortion for these reasons are fearful that allowing abortions pursuant to a Down syndrome diagnosis may resurface eugenic practices.[238] At the time *Buck* was decided, eugenicists argued that physical and mental qualities were passed down from generation to generation.[239] The drive for eugenic sterilization resulted from elites in medical establishments who endorsed the sterilization and supporters use this as fuel to prevent medical professionals from encouraging women to obtain abortions pursuant to a Down syndrome diagnosis.[240] Abortion providers are cautious and reluctant to link prenatal diagnosis of Down syndrome and other genetic diseases with the prevention of such diseases through abortion because of the heavy scrutiny and "contentious abortion debates."[241]

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[232] *See generally* Christine Scherer, *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 (2020).
[233] Sarah Zhang, *The Last Children of Down Syndrome*, THE ATLANTIC MAG. (Nov. 18, 2020), https://www.theatlantic.com/magazine/archive/2020/12/the-last-children-of-down-syndrome/616928.
[234] 274 U.S. 200 (1927).
[235] *Buck*, 274 U.S. at 205.
[236] ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK, 10 (Penguin Books, 2017).
[237] *Id.*
[238] *Id.*
[239] *Id.* at 51.
[240] *Id.* at 66.
[241] Resta, *supra* note 184, at 4.

Down syndrome stigmatization has been at the forefront of the arguments for prohibiting Down syndrome-related abortions.[242] About one in every seven-hundred babies are born with Down syndrome.[243] Approximately ninety percent of women who receive a prenatal diagnosis of Down syndrome choose to terminate that pregnancy.[244] If prenatal testing was not as frequent, it is likely that more children would be born with Down syndrome and as a result, the population would be more exposed to individuals with Down syndrome, thereby allowing families and others to be positive agents of change.[245]

Therefore, supporters of these bans argue that a prenatal diagnosis of Down syndrome is not a good enough reason for getting an abortion.

D. The Circuit Split

The circuit courts are currently split on this issue. For example, the Sixth Circuit holds that laws prohibiting abortions based on fetal anomalies do not place an undue burden on a woman's right to choose. Some circuits agree that protecting the life of the unborn outweighs the undue burden. On the other hand, the Seventh, Eighth, and Ninth hold that these laws not only create an undue burden, but also run afoul of Supreme Court precedent.

The Sixth Circuit held in *Preterm-Cleveland v. McCloud*, that an Ohio law prohibiting an abortion provider from providing an abortion to women seeking to abort pursuant to a Down syndrome diagnosis is not an undue burden.[246] H.B. 214[247] provides that:

> No person shall purposely perform or induce or attempt to perform or induce an abortion on a pregnant woman if the person has knowledge that the pregnant woman is seeking the abortion, in whole or in part, because of any

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[242] *Id.* at 7.
[243] *Data and Statistics on Down Syndrome*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Oct. 23, 2020), https://www.cdc.gov/ncbddd/birthdefects/downsyndrome/data.html.
[244] Louise Bryant, *What is So Complicated About Prenatal Testing for Down Syndrome? A Personal View*, HUMAN GENET. (May 17, 2021).
[245] *See generally* Preterm-Cleveland v. McCloud, 994 F.3d 512, 512 (6th Cir. 2021).
[246] *Id.* at 535.
[247] H.B. 214.

> of the following: (1) A test result 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.[248]

If a person violates this provision, the consequence is a fourth degree felony charge with up to eighteen months in prison and a revocation of their medical license.[249] Ohio asserted that doctors have encouraged the termination and emphasized challenges that arise from raising a child with Down syndrome.[250] The Court cited circumstances where countries have nearly eradicated Down syndrome populations through selective-abortions to prove that the state has a legitimate interest in protecting "the integrity and ethics of the medical profession."[251] According to the Court, this regulation does not pose any obstacle to a woman seeking an abortion because she still may have a "full, open, conversation with the doctor performing her abortion about anything else non-Down-syndrome-based."[252] The Court stressed that knowledge of the diagnosis is not enough to trigger this provision.[253] The doctor may perform the abortion so long as he does not know that Down syndrome specifically is the reason the woman wants to terminate.[254] The doctor may still perform the abortion, but they must not turn a blind eye to the woman's underlying reason. Although this provision is narrow on its face, it still burdens the woman because she cannot share her concerns with her medical provider concerning an aspect of her health and the health of her unborn child. The provision is consistent with the idea that state legislatures are creative with the statutory language to be able to make the provision narrow, but also achieving the bigger political goal.

Roe established abortion as a fundamental right under the Due Process Clause of the Fourteenth Amendment,[255] and the Sixth Circuit

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[248] *Preterm-Cleveland*, 994 F.3d at 517.
[249] *Id.*
[250] *Id.* at 518.
[251] *Id.*
[252] *Id.* at 535.
[253] *Id.* at 518.
[254] *Id.*
[255] U.S. CONST. amend. XIV, § 1.

decision in *Preterm-Cleveland* guts *Roe's* central meaning.[256] The Supreme Court held in *Roe*, and affirmed in *Casey*, that a state's compelling interest begins at "viability."[257] The Supreme Court further clarified in *Casey* that "before viability, state's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's right to elect the procedure."[258] The Sixth Circuit held that this right to an abortion before viability is not an absolute right and agreed with the Ohio state legislature that the Down syndrome provision did not create a substantial obstacle or undue burden.[259] The Sixth Circuit decision directly contradicts the viability standard established in *Casey* in that these abortions are prohibited if a woman divulges her reason, in part or in whole, being based on a positive Down syndrome prenatal test.

Contrary to the rulings in the Sixth Circuit, the Seventh, Eighth, and Ninth Circuits have upheld Supreme Court precedent and have refused to prohibit abortions that are based on a particular reason. In *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of the Indiana State Department of Health*,[260] the Seventh Circuit established that a nondiscrimination provision violated Supreme Court precedent.[261] In this case, the governor of Indiana signed into law new and amended provisions regulating abortion, the House Enrolled Act No. 1337 (HEA 1337),[262] which prohibited an abortion at any time, if the abortion is sought for a particular purpose.[263] HEA 1337 created the "Sex Selective and Disability Abortion Ban" which provided that:

> 'A person may not intentionally perform or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking' an abortion: (1) 'solely because of the sex of the fetus,' (2) 'solely because the fetus has been diagnosed with

[256] *See generally Preterm-Cleveland*, 994 F.3d 512 (6th Cir. 2021); *see also Casey*, 505 U.S. at 845.
[257] Paul Stark, *The Supreme Court's (Nonexistent) Argument for The Viability Standard*, MCCL (Jan. 4, 2017), https://www.mccl.org/post/2017/01/04/the-supreme-courts-nonexistent-argument-for-the-viability-standard.
[258] *Casey*, 505 U.S. at 846.
[259] *Preterm-Cleveland*, 994 F.3d at 520.
[260] 888 F.3d 300 (7th Cir. 2018).
[261] *Planned Parenthood of Indiana & Kentucky, Inc.*, 888 F.3d at 302.
[262] House Enrolled Act No. 1337.
[263] *Planned Parenthood of Indiana & Kentucky*, 888 F.3d at 303.

> Down syndrome or has a potential diagnosis of Down syndrome,' or has been diagnosed or has a potential diagnosis of 'any other disability,' or (3) 'solely because of the race, color, national origin, or ancestry of the fetus.'[264]

A potential diagnosis refers to the presence of some risk factors that indicate that a health problem may occur.[265] The Seventh Circuit stressed the importance of the precedent set forth in *Roe* and affirmed in *Casey* that a state's interests are not strong enough to support a prohibition of abortion or an imposition of a substantial obstacle to a woman's right to elect the procedure before fetal viability.[266] The regulations set prior to viability must be carefully calculated to inform a woman's free choice, not to hinder that choice.[267] The prohibition of abortions based solely on race, sex, or disability completely contradict the protections of a woman's right to abort her child.[268]

The State Department of Health argued that these provisions were constitutional because *Casey* only reaffirmed the woman's "binary choice" of whether to have a child or not pre-viability.[269] The Seventh Circuit provided a background of the "binary choice theory," asserting that a woman may terminate her pregnancy if she decides prior to becoming pregnant, that she does not want to have the child, but she has no right to decide to terminate after becoming pregnant.[270] The Seventh Circuit invalidated this argument holding that neither the Fourteenth Amendment nor Supreme Court precedent permits a state to invade this privacy right in examining an underlying basis for a

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[264] *Id.* (citations omitted); Indiana Code §§ 16-34-4-6; GUTTMACHER INST., *Abortion Bans in Cases of Sex or Race Selection or Genetic Abnormality*, https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly. Sex-selective abortions are abortions that are performed because of the predicted sex of the fetus. *Id.* These types of abortions typically occur in areas where there is a strong gender bias which manifests a preference for sons. *Id.*

[265] GUTTMACHER INSTITUTE, *supra* note 264.

[266] *See, e.g.*, *Casey*, 505 U.S. 833 (1992); *Roe*, 410 U.S. 113 (1973); *see also Planned Parenthood of Indiana & Kentucky*, 888 F. 3d at 305.

[267] *Planned Parenthood of Indiana & Kentucky*, 888 F.3d at 306.

[268] Box v. Planned Parenthood of Indiana & Kentucky, 139 S. Ct. 1780, 1792 (2019) (Thomas J., concurring).

[269] *Id.*

[270] *Id.*

woman's decision to terminate her pregnancy.[271] The provisions' purpose was to limit a woman's right to terminate her pregnancy based on her reasoning for doing so. The Seventh Circuit held that *Roe* and *Casey* have valued precedence and the provisions were absolute prohibitions on abortions prior to viability because they regulated a woman's choice where there was no legitimate state interest, and the choice was dependent on some other personal factor driving her decision.[272]

The Eighth Circuit struck down a Missouri Down syndrome provision prohibiting doctors from performing an abortion when the doctor has knowledge that the pregnant woman is seeking the abortion due to a test result indicating Down syndrome in the unborn child.[273] In *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. v. Parson*,[274] the Eighth Circuit reasoned that "the inability to obtain an abortion before fetal viability" is significant because these women would lose the constitutional right that they are entitled to.[275] The Eighth Circuit distinguished between abortion "bans" and abortion "regulations" by explaining that if it is a ban, the statute would be prohibited because the state may not legally stop a woman from obtaining an abortion pre-viability.[276] If the law serves as a regulation, it must be evaluated pursuant to the compelling state interest standard, asking whether the state's interest is compelling enough to outweigh the burden it places on the woman seeking an abortion.[277]

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[271] *Planned Parenthood of Indiana & Kentucky*, 888 F.3d at 306.
[272] *Id.* at 305.
[273] Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. v. Parson, 1 F.4th 552**,** 557 **(**8th Cir. 2021) [hereinafter, *Parson*].
[274] *Parson*, 1 F.4th 552 **(**8th Cir. 2021).
[275] *Id.* at 563.
[276] Mary Anne Pazanowski, *Ban or Regulation: Missouri Abortion Law Hinges on Contrast (1)*, BLOOMBERG LAW (Sept. 21, 2021, 3:37 PM), https://news.bloomberglaw.com/us-law-week/missouri-limits-on-abortion-based-on-womens-reasoning-debated.
[277] *Id.*

V. THE DAMAGING RESULTS OF REGULATIONS ON DISABILITY-BASED ABORTIONS - WHAT IS THE SOLUTION?

The doctor-patient privilege is arguably a freedom of speech protection.[278] Accordingly, the First Amendment provides that the government may not prohibit the expression of an idea or motivation of an idea simply because society finds the idea offensive.[279] Therefore, the doctor-patient privilege is at risk when a woman cannot completely express her concerns with her doctor regarding an abortion.[280] As the Supreme Court held in *Colautti v. Franklin,*[281] "the abortion decision in all aspects is inherently, and primarily a medical decision."[282] When a woman feels uncomfortable revealing her medical concerns to her medical provider, especially while contemplating the decision to terminate her pregnancy, her privacy privileges are now threatened.[283] From the pregnant woman's standpoint, these bans are unconstitutional under the First Amendment of the Constitution because a woman cannot freely have an open conversation with her medical provider. The purpose of the doctor-patient privilege is to allow patients to speak freely with their doctor who is treating them to ensure the best medical care available under the circumstances.[284] Doctor-patient privilege also instills an element of trust because a patient should feel comfortable to express their concerns without fear that the doctor will have to report the patient to authorities. Physicians and other medical professionals expressed concern that more restrictive abortion laws obstruct the doctor-patient relationship by preventing the doctor from providing proper and timely care.[285] Not only is the physician's reputation as a trusted medical

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[278] U.S. CONST. amend. I.

[279] *Preterm-Cleveland*, 994 F.3d at 551 (Cole, J. dissenting). *See also* Texas v. Johnson, 491 U.S. 397, 414 (1989).

[280] *See generally* Jenny A. Higgins et al., *The Importance of Physician Concern and Expertise in Increasing Abortion Health Care Access in Local Context,* 111 AM. PUB. HEALTH ASSOC. 33, 34 (2021).

[281] 439 U.S. 379 (1979).

[282] *Id.* at 387.

[283] Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29, and 42 U.S.C.).

[284] *What is a Physician-Patient Privilege and Why is it Important?*, HG.ORG LEGAL RES., https://www.hg.org/legal-articles/what-is-physician-patient-privilege-and-why-is-it-important-31873.

[285] Higgins, *supra* note 280, at 34.

provider in jeopardy, but the physician, who performs the prohibited act, will fear criminal penalties. Therefore, the physician may be reluctant to inquire about the patient's concern, which would ultimately affect the medical care she will be provided. It is a critical moment for medical professionals to provide insight into the paramount topic of abortion restriction because the legislature should not be able to interfere with the doctor-patient relationship.[286]

Another reason why disability-based abortions should not be prohibited is the difficulty of finding an abortion provider or clinic to perform the abortion. The Court of Appeals for the Sixth Circuit stated that "causing any woman to forgo one specific doctor is not a substantial obstacle on her right to choose or obtain an abortion."[287] There are many states where there may be only one or two abortion providers in the entire state or other states where there is a clinic in every town. It should be noted that "in every southern state, except Florida, more than half of women of reproductive age, live in a county with no abortion clinic."[288] This statistic demonstrates that these restrictions place an undue burden on women who live in these areas by forcing them to have to travel far from their homes to reach an abortion clinic. On the other hand, in states such as New York or California, cities may have hundreds of abortion providers to choose from. This unquestionably creates an undue burden for women living in those southern states. It is unfair to make accommodations to travel to the nearest abortion clinic that may be hundreds of miles away.

Justice Blackmun, in the *Roe* decision, made an important point that is worth noting again in determining what qualifies as a substantial obstacle to a woman's right to obtain an abortion. In *Roe*, Jane Roe was unable to get a legal abortion in Texas because her life "did not *appear* to be threatened by the continuation of her pregnancy."[289] The central holding of *Roe* demonstrates that an appearance of how a woman's life may be affected by the continuation or discontinuation of pregnancy is not a good enough reason to deny the woman her right to privacy.[290] *Casey* also provided insight by declaring restrictions

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[286] *Id.* at 35.
[287] *Preterm-Cleveland*, 994 F.3d at 535.
[288] Jamille Fields Allsbrook et al., *A Proactive Abortion Agenda*, CTR. FOR AM. PROGRESS (Mar. 17, 2021), https://www.americanprogress.org/article/proactive-abortion-agenda.
[289] *Roe*, 410 U.S. at 120.
[290] *Id.*

unconstitutional if they place an undue burden on a woman's right to terminate a pregnancy and those restrictions provide no basis in protecting the health of the mother.[291] Therefore, the purpose of these restrictions is not to protect the health of the mother, but rather to unduly burden a woman's right to choose to terminate her pregnancy by placing a financial burden on those who cannot afford to care for a child with a disability.

As previously discussed, *Maher* established that the Supreme Court will not strike down a state law simply because it is "unwise."[292] The *Maher* case has not been overturned and allows states to deny funding for "nontherapeutic abortions" because under the rational basis standard, it is related to a constitutionally permissible purpose.[293] States and countries that pass legislation to place limits on abortion offer the least amount of social and medical services to lower-income families.[294] Referring back to the public funding issue of abortion procedures, if states are permitted to deny public funding for abortion procedures, then they should be providing more funding to support lower-income families who may not be able to support a child. This is ironic because legislation that prohibits doctors from performing abortions when the doctor knows that the woman is terminating the pregnancy solely for the reason that the child has Down syndrome will affect lower income families the most. It is also coincidental that since prenatal testing is more commonly utilized by upper income women, a disproportionate number of babies born with Down syndrome are born to poorer women who may not have the financial or medical resources to care for the child.[295] Children with Down syndrome require a higher degree of care than children without a disability. Regardless, a woman should not have to provide a specific reason as to why she does not want to have a child with a genetic disability.

Down syndrome is fascinating because it is now associated with significant survival rates that extend beyond early childhood.[296] Many people with Down syndrome live more fulfilling and economically productive lives than they have in past decades because

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[291] *Casey*, 505 U.S. at 879.
[292] *Maher*, 432 U.S at 479.
[293] *Id.* at 478.
[294] Robert Resta, *Prenatal Testing- What is it Good For? A Review and Critique,* 5 OBM GENETICS 1, 7 (Sept. 1, 2021).
[295] *Id.* at 3-4.
[296] *Id.* at 2.

of advocates for better education, medical care, and job opportunities.[297] Raising a child with Down syndrome can be very similar to raising a child without any genetic disabilities on an economic, emotional, and social level. The societal economic impact of destigmatizing the Down syndrome community is minor compared to the economic impact of having a child with Down syndrome on individual families.[298] Similarly, the emotional impact of having a child with Down syndrome is unpredictable depending on the family circumstance and dynamic. Therefore, legislatures should not insert themselves into the private lives of families making decisions that are best for their circumstance, as well as personal medical decisions.

Having a child coupled with the state government's lack of willingness to increase familial support will threaten a woman's economic security, if the right to an abortion were further limited.[299] The lack of support from state governments in the area of public funding poses a serious issue because people with Down syndrome tend to live longer lives than those with other genetic disorders that are more life-threatening. Family-friendly public policies have proven to have powerful effects on reducing demands for abortion services especially for economically vulnerable women, so that they will not feel that they have to abort their fetus to stay financially afloat.[300] Statistics have shown that "states with more generous grants to women, infants, and children under the age of five had a thirty-seven percent lower abortion rate."[301] Research has demonstrated a relationship between an increase in restrictions on abortions and worsening outcomes for women and children.[302] European countries have found lower abortion rates when they created stronger support systems.[303] By providing more support to lower income families and vulnerable women, it is likely that termination rates will decrease

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[297] *Id.* at 6.
[298] *Id.*
[299] Katelyn Beaty, *To End Abortion, Don't Ban it. Support Families Instead,* NAT'L CATH. REP., (Aug. 28, 2018), https://www.ncronline.org/news/opinion/end-abortion-dont-ban-it-support-families-instead.
[300] *Id.*
[301] *Id.*
[302] Anusha Ravi, *Limiting Abortion Access Contributes to Poor Maternal Health Outcomes,* CTR. FOR AM. PROGRESS (June 13, 2018), https://www.americanprogress.org/article/limiting-abortion-access-contributes-poor-maternal-health-outcomes.
[303] Beaty, *supra* note 299.

because lower income women are more likely choosing to have abortions because of their inability to care for the child physically or financially.[304]

VI. CONCLUSION

The abortion right is essential to reproductive autonomy and the way in which women can control their bodies, personal lives, and their futures. It is now clear that recent legislation and Supreme Court decisions restricting abortions have a negative effect on lower income individuals and disabled persons. "My body, my rights" is an all-encompassing phrase that has been at the forefront of the sexual reproductive rights movement.[305] On an international scale, women's reproductive rights are being heavily regulated by governments. The slogan "my body, my choice" is also being utilized in the discussion of body autonomy with respect to the COVID-19 mask and vaccination mandates following a global pandemic.[306] Mississippi is one of the twenty-two states that have imposed restrictive abortion legislation in 2021.[307] It is jarring that Mississippi, which defends the constitutional structure with respect to maintaining individual liberties and to make personal choices with respect to COVID-19 restrictions, is also defending unconstitutional abortion regulations where women are "stripped of self-determination the moment they get pregnant."[308] This selective application of the law suits one political agenda and not the other.

Restrictions that limit a woman's right to an abortion based on elected officials' motivations erode the precedent set forth in *Roe*. By allowing these abortion bans, a state would now be able to pick and choose the reasons or motivations behind a woman's decision to terminate her pregnancy. A state will then decide which reasons are

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[304] Dianne Green, *Effects of Carrying an Unwanted Pregnancy to Term on Women's Existing Children*, 205 J. PEDIATR. 183 (2018).

[305] *See generally My Body My Rights*, AMNESTY INT'L (2022) https://www.amnesty.org/en/get-involved/my-body-my-rights.

[306] Michelle Goldberg, *What 'My Body, My Choice' Means to the Right,* SEATTLE TIMES, (Dec. 2, 2021, 9:41 AM) https://www.seattletimes.com/opinion/what-my-body-my-choice-means-to-the-right.

[307] Elyssa Spitzer & Nora Ellman, *State Abortion Legislation in 2021*, CTR. FOR AM. PROGRESS (Sept. 12, 2021), https://www.americanprogress.org/article/state-abortion-legislation-2021.

[308] Goldberg, *supra* note 306.

valid enough to allow the woman to have the procedure. States like Missouri, Ohio, and Texas are disregarding the autonomy a woman has over her own body and the decisions she makes for her own family. The decision to terminate a pregnancy based on a prenatal diagnosis of Down syndrome is not an easy decision to make because Down syndrome affects the child and the child's family very differently. These bans clearly infringe on a woman's constitutional right to choose what to do with her baby and the right to speak freely and unabatedly with her doctor. Despite the societal morals today in protecting stigmatized groups, the infringement on the right to choose to terminate one's pregnancy is highly personal and emotional. Courts and legislatures should include the diagnosis of a fetal genetic abnormality as an exception to abortion regulation. In deciding whether to amend the undue burden standard or to overturn *Roe*, courts should never use a woman's personal reasons to deprive her of body autonomy and her ability to make healthcare decisions.