

# The Case Against Reason-Based Abortion Bans

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## I. INTRODUCTION

Nearly half a century ago, the landmark decision of *Roe v. Wade*<sup>1</sup> came down from the highest court in the land, declaring a constitutional right to abortion. The political fallout has been an inexorable battle between state legislatures and civil rights groups over the extent to which abortions are protected. Abortion litigation always seems to make headlines. As of this Comment, most of the conversation was dominated by an infamous Texas law that deputizes private citizens to enforce an abortion ban through civil actions.<sup>2</sup> Its notoriety resulted in its concomitant litigation getting fast-tracked for oral argument in front of the Supreme Court.<sup>3</sup> The Court's docket was laden with abortion-related lawsuits, and a more conservative makeup of the Court had many believing that abortion rights were living on borrowed time.<sup>4</sup> Absent from the docket, and flying under the public's radar, was another, different form of abortion restriction: the reason-based abortion ban.

*Roe* created a qualified constitutional right to abortion rooted in the Fourteenth Amendment privacy interest.<sup>5</sup> The Court applied a rigid trimester framework—the State could only regulate after the end of the

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<sup>1</sup> 410 U.S. 113 (1973) *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

<sup>2</sup> TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2021).

<sup>3</sup> Brent Kendall, *Supreme Court Agrees to Quick Consideration of Texas Abortion Case*, WALL ST. J. (Oct. 22, 2021), [https://www.wsj.com/articles/supreme-court-agrees-to-quick-consideration-of-texas-abortion-case-leaves-state-law-in-place-for-now-11634921299?mod=hp\\_lead\\_pos1](https://www.wsj.com/articles/supreme-court-agrees-to-quick-consideration-of-texas-abortion-case-leaves-state-law-in-place-for-now-11634921299?mod=hp_lead_pos1) [<https://perma.cc/98GM-2HFM>].

<sup>4</sup> Nina Totenberg, *The Supreme Court's Conservatives Cook Up a Stew of Abortion, Guns, Religion, and More*, NPR (Oct. 4, 2021), <https://www.npr.org/2021/10/04/1041713663/the-supreme-courts-conservatives-cook-up-a-stew-of-abortion-guns-religion-and-mo> [<https://perma.cc/9L22-ZU2L>]. They were right.

<sup>5</sup> *Roe*, 410 U.S. at 153 (acknowledging potential roots elsewhere in the Bill of Rights).

first trimester and when its interest in life became compelling.<sup>6</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>7</sup> reaffirmed *Roe*'s central holding while slightly lengthening the reach of the State into the privacy right. After *Casey*, states could regulate abortions before viability so long as they did not impose an undue burden on a woman's ability to terminate her pregnancy.<sup>8</sup>

Reason-based abortion bans, on the other hand, are complete prohibitions on that ability when the abortion decision is made based on the sex, race, or genetic makeup of the fetus.<sup>9</sup> Nowadays, blood draws can provide information on genetic markers that code for, as an example, Down syndrome as early as ten weeks into pregnancy.<sup>10</sup> These laws represented yet another attempt to peel back *Roe*, this time by creating in the unborn a right against discrimination and a duty in the states to guarantee that right.<sup>11</sup> While it is hard to imagine that a blanket prohibition on pre-viability abortion would have survived a constitutional challenge under recent jurisprudence, reason-based bans are the subject of a circuit split.<sup>12</sup>

This Comment will focus on the possible constitutional justifications for these laws and subsequently undermine them. Part II will map out the path abortion jurisprudence has taken thus far, culminating in the circuit split. The circuit split mainly centers on the discussion of burdens on the abortion decision, but Part III will first claim that reason-based bans are simply unconstitutional on their face, regardless of how they are applied. Then, Part III will argue for a heavier evidentiary burden to be placed on the State, as well as identify a few helpful factors for courts to use when gauging the actual burden of a reason-based ban.

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<sup>6</sup> See *id.* at 163.

<sup>7</sup> 505 U.S. 833, 869–70 (1992), *overruled by* *Dobbs v. Jackson*, 142 S. Ct. 2228 (2022).

<sup>8</sup> See *id.* at 876–77.

<sup>9</sup> See, e.g., ARK. CODE ANN. § 20-16-2103(a)(1)–(3) (West 2019) (proscribing a physician from performing an abortion when the physician knows the woman is seeking said abortion because of a prenatal Down Syndrome diagnosis).

<sup>10</sup> 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, 297 (2013).

<sup>11</sup> See generally Tori Gooder, *Selective Abortion Bans: The Birth of a New State Compelling Interest*, 87 U. CIN. L. REV. 545 (2018).

<sup>12</sup> Compare *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 529 (6th Cir. 2021) (finding no substantial obstacle on the ability to obtain an abortion), with *Little Rock Fam. Planning Servs. v. Rutledge*, 984 F.3d 682, 692 (8th Cir. 2021) (finding these laws to pose undisputed substantial obstacles), and *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 310 (7th Cir. 2018), *rev'd in part on other grounds* (same).

## II. THE HISTORY OF ABORTION JURISPRUDENCE

## A. The Right to Privacy

In *Griswold v. Connecticut*,<sup>13</sup> and later in *Eisenstadt v. Baird*,<sup>14</sup> the Supreme Court decided that the Bill of Rights not only enumerated certain guaranteed liberties but also cast shadows over those liberties missing from the Constitution yet nevertheless held sacred and protected from governmental intrusion: the penumbral zones of privacy.<sup>15</sup> Indeed, most justices concurring in the *Griswold* judgment felt the “Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.”<sup>16</sup> The Court was explicit: there are some freedoms, while not explicitly provided for in the Constitution, so ancient, intimate, and revered so as to be sacrosanct.<sup>17</sup> This is the right to privacy.<sup>18</sup>

*Griswold* held that a ban on contraceptive use and prescription by married persons was an unconstitutional intrusion on the marital privacy protected by the Due Process Clause of the Fourteenth Amendment.<sup>19</sup> The Court was aghast at the idea of the government rummaging around in familial precincts.<sup>20</sup> Less than a decade later, *Eisenstadt*<sup>21</sup> expanded the right to privacy. If states could not ban the distribution of contraceptives to married persons, said the Court, then they certainly could not ban distribution to the unmarried.<sup>22</sup> This meant that the right to privacy did not inhere in the marital relationship itself; rather, “it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>23</sup>

B. *Roe v. Wade*

In the mid-to-late 19th century, while not the case beforehand, the vast majority of American states made it incredibly difficult for women

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<sup>13</sup> 381 U.S. 479 (1965).

<sup>14</sup> 405 U.S. 438 (1972).

<sup>15</sup> See *Griswold*, 410 U.S. at 484.

<sup>16</sup> *Id.* at 490 (Goldberg, J., concurring).

<sup>17</sup> *Id.* at 485–86.

<sup>18</sup> *Id.*

<sup>19</sup> See *id.* at 486.

<sup>20</sup> See *id.* at 485–86.

<sup>21</sup> 405 U.S. 438 (1972).

<sup>22</sup> See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>23</sup> *Id.*

to procure an abortion.<sup>24</sup> The impetus for this proscriptive shift was found in the medical establishment of all places, not in the Church or other traditionally conservative loci of thought.<sup>25</sup> Abortion, practiced mostly at home by midwives, disrupted professionalized medicine, and practitioners sought to limit entry into the market.<sup>26</sup> This lobbying effort to criminalize abortion also brought with it troubling racial and misogynistic implications.<sup>27</sup>

In response, women in need of the procedure often traveled long distances to legally obtain an abortion in places like New York City.<sup>28</sup> The travel, delay, and lack of continuity in treatment increased the risks of complications and disproportionately affected women of marginalized groups.<sup>29</sup> The advent of the 1960s, and the decade's watershed civil rights and female liberation movements, led to a partial curtailment of punitive anti-abortion laws.<sup>30</sup>

Enter *Roe v. Wade*,<sup>31</sup> the first case in front of the Supreme Court to squarely address abortion rights. The Court invalidated a Texas law criminalizing all abortions not performed for the purpose of saving the life of the mother.<sup>32</sup> The *Roe* Court went even further with the right to privacy and determined that it was founded in the Fourteenth Amendment's concept of personal liberty, restricting state action as something more than a shadow of enumerated rights.<sup>33</sup> In this light, the Court concluded that "the right of personal privacy includes the abortion decision."<sup>34</sup>

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<sup>24</sup> Rachel Benson Gold, *Lessons Before Roe: Will Past Be Prologue?*, 6 GUTTMACHER POL'Y REV. 8, 9 (2003).

<sup>25</sup> Jessica Ravitz, *The Surprising History of Abortion in the United States*, CNN (June 27, 2016), <https://www.cnn.com/2016/06/23/health/abortion-history-in-united-states/index.html> [<https://perma.cc/EUT3-AKKA>].

<sup>26</sup> *Id.*

<sup>27</sup> *See id.*; see also Michele Goodwin, *The Racist History of Abortion and Midwifery Bans*, AM. C.L. UNION (July 1, 2020), <https://www.aclu.org/news/racial-justice/the-racist-history-of-abortion-and-midwifery-bans/> [<https://perma.cc/F7CN-FXKP>].

<sup>28</sup> Gold, *supra* note 24, at 11.

<sup>29</sup> *Id.* at 11.

<sup>30</sup> *Id.*

<sup>31</sup> 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

<sup>32</sup> *Roe*, 410 U.S. 113, 164 (1973).

<sup>33</sup> *See id.* at 153; see also U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."). The Court further explained that the unborn are not included in the Fourteenth Amendment's protected "person" category. *See Roe*, 410 U.S. at 158.

<sup>34</sup> *Roe*, 410 U.S. at 154.

However, as with other fundamental rights, the right to an abortion is far from absolute and must be balanced with competing and compelling state interests in regulation.<sup>35</sup> To do this, and attempting to incorporate modern medical understanding, *Roe* established a trimester framework for evaluating the constitutional validity of abortion restrictions.<sup>36</sup> Prior to the end of the first trimester, the woman and her attending physician had absolute domain to terminate a pregnancy without state interference.<sup>37</sup> The state's interest in regulating for the health of the mother was not "compelling" until after that trimester, given that maternal mortality rates for first trimester abortions may be lower than for actual childbirth.<sup>38</sup> Of course, the regulation must reasonably relate "to the preservation and protection of maternal health," like licensure of the physician, facility, and place of operation, to name a few.<sup>39</sup>

But the State had one last important and legitimate interest to protect: the potentiality of human life. Obviously, this interest stood in stark contrast to the woman seeking to exercise her Fourteenth Amendment liberty right. Nevertheless, the State's interest in potential life becomes compelling, and thus open for regulation, at viability.<sup>40</sup> At viability, the fetus is presumably able to sustain meaningful life outside of the woman, so the State's interest then overwhelms that of the physician and mother, so long as exceptions are made when necessary to preserve the mother's life.<sup>41</sup>

### C. The Rise of Undue Burden

Alas, the trimester framework did not last more than two decades. The central holding of *Roe*, though, survived *Casey*, in which the Court refused to repudiate the constitutional liberty underlying the ability to terminate a pregnancy.<sup>42</sup> The Court decided to abandon trimester analysis in favor of drawing the line at viability alone, as *Roe*'s rigidity too often precluded the State from advancing its interest in the unborn.<sup>43</sup>

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<sup>35</sup> *See id.*

<sup>36</sup> The incorporation of modern medicine into constitutional standards is not without consequence, though, potentially pushing the point of viability earlier in time. *See* Pam Belluck, *Viability Has Shifted Slightly as Medicine Has Advanced*, N.Y. TIMES (Dec. 1, 2021), <https://www.nytimes.com/2021/12/01/us/politics/viability-abortion.html> [<https://perma.cc/TY3B-23CE>].

<sup>37</sup> *Roe*, 410 U.S. at 163.

<sup>38</sup> *See id.*

<sup>39</sup> *Id.*

<sup>40</sup> *See id.*

<sup>41</sup> *See id.* at 163–64.

<sup>42</sup> *See* 505 U.S. 833, 871 (1992) (plurality opinion) ("The woman's right to terminate her pregnancy before viability . . . is a rule of law and a component of liberty we cannot renounce.").

<sup>43</sup> *See id.* at 872–73.

Furthermore, laws regulating abortion with incidental effects on procuring the operation only violate the substantive due process guarantee of the Fourteenth Amendment when those effects rise to “undue burdens.”<sup>44</sup> The inquiry, then, is whether those intrusions into that zone of privacy are warranted.<sup>45</sup>

The Court went on to define what exactly an undue burden is: it arises when “a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”<sup>46</sup> The average reader would be right to remain unsatisfied with this definition, but the Court recognized this and provided a few guideposts: neither regulations designed to foster the health of women desirous of an abortion, nor those which create a structural mechanism that merely expresses respect for unborn life, constitute undue burdens.<sup>47</sup> Short of outright prohibition, the State may persuade women to choose childbirth in whatever means reasonably related to that goal.<sup>48</sup> After viability, though, the State interest in the potential for human life becomes overwhelming, and it may go so far as to proscribe abortion except where necessary to protect the life and health of the mother.<sup>49</sup>

#### 1. Applying the undue burden standard

In 2000, the Court was called upon to apply *Casey*'s undue burden test when a Nebraska law blanketly prohibited “partial birth abortions.”<sup>50</sup> In effect, the regulation outlawed second trimester abortions because it banned a certain procedure called dilation and evacuation (D&E) which, as luck would have it, happened to account for virtually all abortions performed in the second trimester.<sup>51</sup> Moreover, the broad plain language of the statute incorporated another procedure—dilation and extraction (D&X)—into its proscription.<sup>52</sup> Regardless of whether the Nebraska Attorney General believed the statute to only prohibit the D&X method, the overinclusive language essentially rendered pre-viability second trimester abortions inaccessible, and the statute was therefore unconstitutional for the undue burden it imposed.<sup>53</sup>

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<sup>44</sup> See *id.* at 874.

<sup>45</sup> See *id.* at 875.

<sup>46</sup> *Id.* at 877.

<sup>47</sup> See *id.* at 877–78.

<sup>48</sup> See *id.*

<sup>49</sup> See *id.* at 879.

<sup>50</sup> See *Stenberg v. Carhart*, 530 U.S. 914, 922–23 (2000).

<sup>51</sup> See *id.* at 924.

<sup>52</sup> See *id.* at 938.

<sup>53</sup> See *id.* at 945–46.

Federal law got around *Stenberg v. Carhart*<sup>54</sup> by only prohibiting a subset of D&E abortions—the less common subset of “intact D&E,” in fact.<sup>55</sup> The Partial-Birth Abortion Ban Act of 2003<sup>56</sup> banned outright intact D&E but left untouched the general D&E method, “so it [did] not construct a substantial obstacle to the abortion right.”<sup>57</sup> The determinative factor, then, was the availability of alternative procedures.<sup>58</sup> This separated the congressional ban from other “unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions [pre-viability].”<sup>59</sup>

The federal law failed to provide for an exception, pre- or post-viability, to safeguard the woman’s health.<sup>60</sup> Usually, an unconstitutional, undue burden on the abortion right arises when, as discussed above, the barred procedure is not permitted even when necessary for the preservation of the woman’s health.<sup>61</sup> But the existence of medical uncertainty as to whether the proscription posed significant health risks led the Court to grant Congress critical deference in its conclusion that no medical risks were implicated.<sup>62</sup> In the end, the methodological, nationwide restriction on abortion passes muster because it is not categorical—leaving feasible alternatives to exercise the abortion right pre-viability—and furthers a genuine and important State interest.

## 2. The former uncertain state of the undue burden

*Whole Woman’s Health v. Hellerstedt*<sup>63</sup> may have added a crucial caveat to the undue burden standard. There, the Court began by reiterating the standard we have come to know: prior to viability, the State cannot effectively place a substantial obstacle in front of a woman procuring an abortion even when regulating for its legitimate interest in the potential for life.<sup>64</sup> However, the Court announced that *Casey* requires lower courts to “consider the burdens a law imposes on abortion access together with the benefits those laws confer.”<sup>65</sup> For example, the

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<sup>54</sup> 530 U.S. 914 (2000).

<sup>55</sup> See *Gonzales v. Carhart*, 550 U.S. 124, 151 (2007).

<sup>56</sup> 18 U.S.C. § 1531.

<sup>57</sup> *Gonzales*, 550 U.S. at 165.

<sup>58</sup> See *id.* at 164.

<sup>59</sup> *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 79 (1976).

<sup>60</sup> See *Gonzales*, 550 U.S. at 171 (Ginsburg, J., dissenting).

<sup>61</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992), *overruled by Dobbs v. Jackson*, 142 S. Ct. 2228 (2022).

<sup>62</sup> See *Gonzales*, 550 U.S. at 164.

<sup>63</sup> 136 S. Ct. 2292 (2016), *abrogated by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

<sup>64</sup> See *id.* at 2309.

<sup>65</sup> *Id.*

Court dissected a Texas law requiring the attending physician, on the day of the procedure, to have admitting privileges at a hospital within thirty miles of the operation.<sup>66</sup> The Court, evincing a standard of review stricter in its scrutiny than other cases under *Casey's* progeny,<sup>67</sup> looked beyond a state's purported interest, balancing only those benefits and burdens actually effectuated.<sup>68</sup> Plaintiffs still must satisfy a burden of production to establish a causal link between regulation and burden.<sup>69</sup> Under *Hellerstedt*, and in the absence of any real advancement of State interest, significant limitations on abortion become substantial obstacles and unconstitutionally undue burdens.<sup>70</sup>

In 2020, though, only a plurality of the Court followed *Hellerstedt* to a tee.<sup>71</sup> The Louisiana law in front of the Court in *June Medical Services v. Russo*<sup>72</sup> was "almost word-for-word identical" to the Texas law challenged in *Hellerstedt*.<sup>73</sup> The Court found the law to serve no relevant credentialing function, while the State provided no evidence that an admitting privileges requirement would enhance health outcomes for women, and thus no asserted benefits were accomplished.<sup>74</sup> On the burden side, the law would have dramatically slashed the supply of providers capable of performing abortions, leading to increased wait times, increased driving distances, fewer noninvasive options available, and increased chances of pregnancy complications.<sup>75</sup> The balance clearly weighed in favor of an undue burden finding. And the Court's preoccupation with the burden placed on abortion providers supplied a new source of potential burdens, aligning with the suggestions of legal commentators.<sup>76</sup>

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<sup>66</sup> *See id.* at 2310.

<sup>67</sup> *Id.* at 2309 ("[It is] wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review where, for example, economic legislation is at issue.").

<sup>68</sup> *Id.* at 2318 (finding the admitting privileges requirement to provide few, if any, health benefits in light of its burdens).

<sup>69</sup> *See id.* at 2313.

<sup>70</sup> *See id.* at 2311–12.

<sup>71</sup> *See June Med. Servs., LLC v. Russo*, 140 S. Ct. 2103 (2020), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

<sup>72</sup> 140 S. Ct. 2103 (2020).

<sup>73</sup> *Id.* at 2112.

<sup>74</sup> *See id.* at 2131–32.

<sup>75</sup> *See id.* at 2129–30.

<sup>76</sup> *See* Kate L. Fetrow, *Taking Abortion Rights Seriously: Toward a Holistic Undue Burden Jurisprudence*, 70 STAN. L. REV. 319, 348–49 (2018) (suggesting courts consider the entire landscape of regulations rather than analyzing each one on a piecemeal basis); Leah Shabshelowitz, *The Beast of Undue Burden: Evaluating the Burden on the Physician in Planned Parenthood of the Heartland v. Heineman*, 52 B.C. L. REV. E-SUPPLEMENT 229 (2011) (advocating for the burden on physicians to carry some weight in the analysis).



Chief Justice Roberts—the plurality’s crucial fifth vote—did not engage in this balancing act. He worried, as many do, that balancing costs and benefits facilitates judicial arbitrariness and destroys predictability.<sup>77</sup> The act of balancing, he said, is an impossible task of measuring imponderable values and a usurpation of legislative function.<sup>78</sup> Ever the purported servant of *stare decisis*, the Chief Justice would look simply to whether a state regulation imposes a substantial obstacle to receiving an abortion and no further—the Court struck down an identical law in *Hellerstedt* and that should be the end of the judicial exercise.<sup>79</sup> So, did the Robert’s concurrence in *June Medical* control, or did *Hellerstedt* entrench itself in abortion jurisprudence? Notably, the Supreme Court denied certiorari as to this question during the October Term of 2021.<sup>80</sup> The circuit split on reason-based abortion bans, elaborated upon below, sheds some light on the question. However, the certainty in abortion jurisprudence is that, as of this Comment’s inception, *Casey* controls.<sup>81</sup> Substantial obstacles to an abortion prior to viability are undue burdens and were therefore unconstitutional.

#### D. Reason-Based Abortion Bans and the Circuit Split

Traditionally, the State’s compelling interests under *Roe*, allowing for pre-viability regulation, have been the health of the mother and the potential for human life in the fetus.<sup>82</sup> Reason-based abortion bans seek to insert a new State interest into the undue burden calculus,<sup>83</sup> an interest that potentially reaches earlier into pregnancy than the other two. Now, the State is permitted, under some circumstances, to limit the abortion right pre-viability,<sup>84</sup> as its interest in “promoting respect for human life [exists] at all stages in the pregnancy.”<sup>85</sup> Indeed, the

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<sup>77</sup> See *June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring) (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989)); see also T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972 (1987).

<sup>78</sup> See *June Med. Servs.*, 140 S. Ct. at 2136 (Roberts, C.J., concurring).

<sup>79</sup> See *id.* at 2141–42.

<sup>80</sup> *October Term 2021 Cases for Argument*, SCOTUS, <https://www.supremecourt.gov/qp/19-01392qp.pdf> [<https://perma.cc/8FJ5-UXG3>] (last updated Sept. 30, 2021) (granting certiorari limited to only the question of “[w]hether all pre-viability prohibitions on elective abortions are unconstitutional”).

<sup>81</sup> See, e.g., *Planned Parenthood v. Noem*, 584 F. Supp. 3d 759 (D. S.D. 2022) (applying *Casey*’s undue burden standard).

<sup>82</sup> See *Roe v. Wade*, 410 U.S. 113, 159 (1973), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

<sup>83</sup> See Gooder, *supra* note 11, at 556–57 (discussing discrimination as a potential new compelling interest); Thomas J. Molony, *Roe, Casey, and Sex-Selection Abortion Bans*, 71 WASH. & LEE L. REV. 1089, 1118–30 (2014) (same).

<sup>84</sup> See *Gonzales v. Carhart*, 550 U.S. 124, 156 (2007). And especially after *Dobbs*.

<sup>85</sup> *Id.* at 129.

Court in *Gonzales v. Carhart*<sup>86</sup> seemed to permit the State to advance a new compelling interest—the integrity and ethics of the medical profession.<sup>87</sup> Whether the Supreme Court would find reason-based abortion bans to constitute an undue burden, however, is an open question.<sup>88</sup>

### 1. The Seventh and Eighth Circuits

A swath of states across the country have either proposed or enacted measures prohibiting abortion on the basis of race, sex, or fetal anomaly.<sup>89</sup> For example, Arkansas banned physicians from performing abortions “with the knowledge that a pregnant woman is seeking an abortion solely on the basis of” a test result, prenatal diagnosis, or any other reason to believe that the unborn child has Down syndrome.<sup>90</sup> Similarly, Indiana prohibited physicians intentionally doing the same when they knew the woman to be seeking abortion solely on the basis of sex, disability, or race.<sup>91</sup> Neither law passed constitutional muster.

The Eighth and Seventh Circuits followed traditional analysis: categorical prohibitions on abortion before viability inherently pose substantial obstacles to the abortion right.<sup>92</sup> There is nothing remarkable about their analysis. In *Little Rock Family Planning Services v. Rutledge*,<sup>93</sup> the Eighth Circuit needed all of one sentence to conclude reason-based bans were indisputably substantial obstacles.<sup>94</sup> The Seventh Circuit was equally adamant in *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of Indiana State Department*:<sup>95</sup> “These [non-discrimination] provisions are far greater than a substantial obstacle; they are absolute prohibitions on abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State.”<sup>96</sup> The circuit courts were of one mind that it is “inconsistent to hold that a woman’s right of privacy to terminate a pregnancy exists

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<sup>86</sup> *Id.* at 124.

<sup>87</sup> *Id.* at 157.

<sup>88</sup> This Comment was drafted before the final *Dobbs* opinion was published. So, whether these regulations are undue burdens is practically irrelevant. However, the constitutionality of these bans is still uncertain.

<sup>89</sup> See *Banning Abortions in Cases of Race or Sex Selection or Fetal Anomaly*, GUTTMACHER INST. (Jan. 2020), <https://www.guttmacher.org/evidence-you-can-use/banning-abortions-cases-race-or-sex-selection-or-fetal-anomaly> [<https://perma.cc/S4M5-7QV3>].

<sup>90</sup> ARK. CODE ANN. § 20-16-2103(a)(1)-(3) (West 2019).

<sup>91</sup> IND. CODE ANN. § 16-34-4, -5, -6, -7, -8 (West 2016).

<sup>92</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

<sup>93</sup> 984 F.3d 682 (8th Cir. 2021).

<sup>94</sup> *Id.* at 690.

<sup>95</sup> 888 F.3d 300 (7th Cir. 2018), *rev’d on other grounds* [hereinafter *PPIK*].

<sup>96</sup> *Id.* at 306.

if . . . the State can eliminate this privacy right if [she] wants to terminate her pregnancy for a particular purpose.”<sup>97</sup>

## 2. The Sixth Circuit

One law of the same nature did not draw judicial ire. An Ohio law provides, in pertinent part, that no physician shall perform or induce an abortion if they have “knowledge that the pregnant woman is seeking an abortion, *in whole or in part*” because of any test, prenatal diagnosis, or other reason to believe the unborn child has Down syndrome.<sup>98</sup> The Sixth Circuit in *Preterm-Cleveland v. McCloud*,<sup>99</sup> in stark contrast to its sister courts, found no substantial obstacle placed on the pregnant woman.<sup>100</sup> In the court’s eyes, the Ohio law is not a prohibition on the woman receiving an abortion for whatever reason; rather, it only bars a physician from performing one when she knows the woman seeks one for a proscribed reason.<sup>101</sup>

So, the court performed an undue burden analysis. The court deemed the asserted burdens on the woman—the prevention of frank conversation with the attending physician and the shopping for a doctor ignorant of her reasons—to not constitute substantial obstacles.<sup>102</sup> After a quick approval of the putative state interests, the burden of proof was foisted on the plaintiffs who failed to show that the barriers to abortion would keep a significant number of women from receiving one.<sup>103</sup> Conspicuously absent from the majority opinion is any consideration of financial or downstream burdens the reason-based ban could feasibly impose.<sup>104</sup>

### III. THE CASE AGAINST REASON-BASED ABORTIONS

*Preterm-Cleveland* misconstrues *Roe* and *Casey*. Reason-based abortion bans rest on an interesting yet fatally flawed justification that misunderstands these seminal abortion cases. Section A of this Part argues that these laws find no footing in constitutional precedent. The logic providing for their support unravels when applied to other constitutional rights. Section B argues that, in the context of disability-based

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<sup>97</sup> *Id.* at 307.

<sup>98</sup> OHIO REV. CODE ANN. § 2919.10(B)(1)–(3) (emphasis added).

<sup>99</sup> 994 F.3d 512 (6th Cir. 2021).

<sup>100</sup> *See id.* at 535.

<sup>101</sup> *See id.* at 527.

<sup>102</sup> *Id.* The Sixth Circuit rejected the contention that the following constituted burdens: the incentives to misrepresent medical history, to misrepresent her true reason for having the abortion, and to forego counseling offered to women pregnant with Down syndrome fetuses. *Id.* at 525.

<sup>103</sup> *Id.* at 528.

<sup>104</sup> *See infra* Part III.B *infra* for a discussion of this topic.

abortion bans, something akin to *Hellerstedt* balancing is the ideal backstop to overreaching legislation. Along this vein, cost-benefit analysis allows for predictable and tangible balancing in this context if we are willing to use quantifiable, economic metrics. This balancing more closely resembles the stricter scrutiny review usually mandated when individual liberties are at stake but is lacking in reason-based abortion jurisprudence.

#### A. Neither *Roe* nor *Casey* Contemplates Exceptions

The supposed justification for reason-based abortion bans suggests that *Roe* and *Casey* carve out of the Constitution rather specific abortion interests. That is, a woman has a protected interest in not being pregnant, but a different, unprotected interest exists in not being pregnant with a specific child with certain attributes. In other words, *Roe* protects the choice to not beget a child *generally* but does not permit the child bearer to terminate a specific pregnancy for any possible reason.

This is essentially the argument put forth by the State in *Planned Parenthood of Indiana & Kentucky v. Indiana State Department [PPIK]*.<sup>105</sup> According to the court, under Indiana’s “binary choice” theory, a woman may decide to not bear a child generally, but no right exists to terminate the pregnancy if she makes the decision *after* conception for unacceptable reasons.<sup>106</sup> Of course, when such a decision is based on fetal attributes, it can only be made after conception. Thus, the State argued it may proscribe the termination of a pregnancy when the decision to terminate is made for certain disfavored reasons.<sup>107</sup> Notably, Ohio did not take this position in the case which upheld reason-based abortion bans on the basis that they did not constitute substantial obstacles.<sup>108</sup>

Although the Seventh Circuit in *PPIK* is right that the “binary choice” theory cannot be reconciled with a right to privacy under the Fourteenth Amendment,<sup>109</sup> the temporality of the pregnant woman’s decision making is not the relevant inquiry. This is unsurprising—prohibitions before viability simply do not survive *Casey*.<sup>110</sup> The court finds more compelling footing when it claims “[n]othing in the Fourteenth Amendment or Supreme Court precedent allows the State to invade this privacy realm to examine the underlying basis for a woman’s decision

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<sup>105</sup> See *PPIK*, 888 F.3d at 306–07 (7th Cir. 2018).

<sup>106</sup> See *id.* at 306.

<sup>107</sup> *Id.*

<sup>108</sup> See *Preterm-Cleveland*, 994 F.3d at 535.

<sup>109</sup> See *PPIK*, 888 F.3d at 306–07.

<sup>110</sup> *Id.* at 307.

to terminate her pregnancy prior to viability.”<sup>111</sup> This holding should be taken a step further. That is, the Constitution vehemently denies the State the capability to enact reason-based abortion bans as an impermissible intrusion on the right to privacy and the First Amendment.

1. Births may be refused for the same reasons marriages are refused

*Loving v. Virginia*<sup>112</sup> provides a case in point. One would be hard pressed to argue that *Griswold*'s right to privacy,<sup>113</sup> whether penumbral to the Bill of Rights or itself derived from the Fourteenth Amendment liberty interest,<sup>114</sup> does not extend to the right to marry. Yes, the Constitution does not explicitly guarantee the right to marry, yet “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>115</sup> And although the privacy right is also subject to the State’s police power, the free choice to marry or not to marry cannot be restricted by classifications such as race.<sup>116</sup> Regardless of whether race is a determinative factor in the choice to marry, the individual is nonetheless free to make that determination for themselves without infringement by the state.<sup>117</sup>

Thus, to accept the “binary choice” theory advanced by the State in *PPIK* would be to upend *Loving*. A woman could make the choice not to marry based on a general desire to stay out of wedlock. However, if a woman wanted to marry an individual yet chose not to solely due to that individual’s race, the State would have license to thwart her desire and compel marriage. The same could be said if the woman’s decision was based on the sexual or genetic characteristics of a potential partner.

Logically, and thankfully, this reasoning does not reflect sound constitutional principles. A woman may absolutely be selective in the decision to marry. She may, for example, choose to marry or not to marry solely based on sex. No one before has rationally argued that a woman may refuse marriage to another woman on that basis. And under *Obergefell v. Hodges*,<sup>118</sup> the Fourteenth Amendment extends the right to

<sup>111</sup> *Id.*

<sup>112</sup> 388 U.S. 1 (1967).

<sup>113</sup> *See* *Griswold v. Conn.*, 381 U.S. 479, 484 (1965).

<sup>114</sup> *See* *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“The right of privacy [is] founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action.”), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

<sup>115</sup> *Loving*, 388 U.S. at 12.

<sup>116</sup> *See id.*

<sup>117</sup> *See id.*

<sup>118</sup> 576 U.S. 644 (2015).

marry to same-sex couples.<sup>119</sup> The right arises similarly out of those intimate choices central to individual autonomy, dignity, and identity.<sup>120</sup> Thus, the right to privacy expressly permits the woman, or whomever, to discriminate in the marriage decision. Under Indiana’s “binary choice” theory, the legalization of same-sex marriage would then bar a woman from refusing to marry another of the same sex if that refusal was solely due to sexual characteristics.

Again, however, the freedom to marry *or not to marry* a person of another race, sex, ability, or genetic anomaly rests with the individual and cannot be infringed by the State.<sup>121</sup> There is no distinction, as “binary choice” theory would have it, between the right to marriage generally and the right to an interracial or heterosexual marriage.<sup>122</sup> Each case on marriage, as is consistent with other fundamental rights, inquires “about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.”<sup>123</sup> The discretion of the individual in the abortion decision is similarly robust, and ability to make the “ultimate decision to terminate [a] pregnancy” may not be infringed by the State, regardless of the reason for making it.<sup>124</sup>

## 2. No tertiary, unlawful act attaches to abortion

One more sliver of constitutional justification undergirds these laws: sometimes, motivation is relevant to whether the exercise of constitutional rights is protected. The Constitution prohibits Congress—as well as the states through the Fourteenth Amendment—from abridging the freedom of speech.<sup>125</sup> Under today’s free speech doctrine, the State cannot prohibit or punish speech that it finds hateful or offensive unless it proves incitement, i.e., “the speaker both subjectively and objectively intended to incite immediate, unthinking lawless violence before a volatile crowd in a situation that makes this intention likely to be successful.”<sup>126</sup>

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<sup>119</sup> *Id.* at 680 (“The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.”).

<sup>120</sup> *Id.* at 663 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

<sup>121</sup> *Loving*, 388 U.S. at 12.

<sup>122</sup> *Obergefell*, 576 U.S. at 671.

<sup>123</sup> *See id.*

<sup>124</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

<sup>125</sup> U.S. CONST. amend. I.

<sup>126</sup> Ronald D. Rotunda, *The Right to Shout Fire in a Crowded Theatre: Hateful Speech and the First Amendment*, 22 CHAP. L. REV. 319, 349 (2019) (citing 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.15(d) (5th ed. 2012)).

So, while the Court allows the censorship of some speech, there is usually imminent or actual undesirable or criminal *conduct* that accompanies the speech to make it subject to State regulation.<sup>127</sup> As noted, the State can criminalize speech that actually and in fact incited lawless *action*.<sup>128</sup> Criminal syndicalism laws, then, can withstand constitutional scrutiny because the protected action (here, speech) is attached at the hip to conduct that is impermissible. Perjury and defamation provide another example. These forms of speech are driven by malintent and would usually be afforded constitutional protection but for their resultant legally cognizable harm, like the invasion of privacy or the costs of litigation.<sup>129</sup> The same can be said for a subset of commercial speech, where the government is free to regulate that which is deceptive or related to unlawful activity.<sup>130</sup> These generalizations of First Amendment jurisprudence convey the notion that, in many circumstances, the reason for the exercise of the speech right is irrelevant and immune to regulation, so long as the reason is not to cause some unlawful act or to cause some cognizable harm.

There is no illegal or otherwise harmful conduct that attaches to the of the privacy right. Motivation is only relevant in the First Amendment context when associated with actual, illegal conduct. The contemporary test allows prohibition of speech directed to incite or produce imminent lawless action.<sup>131</sup> The constitutional test focuses in on intent, yes, but that intent must be inextricably linked to unlawful action. The Ku Klux Klansmen in *Brandenburg v. Ohio*<sup>132</sup> clearly had morally reprehensible *reasons* for making their speech—it was littered with derogatory terms aimed at blacks and Jews, made by armed hooded figures standing around a burning cross.<sup>133</sup> And yet their exercise of speech did little else than call for political assembly, without intent to incite actual violence against these groups of people.<sup>134</sup> Speech which “may be made impermissible and subject to regulation” is that which is “brigaded with [lawless] action.”<sup>135</sup> “It is only his actions that government may examine and penalize,” not the conscience, beliefs or reasons underlying those

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<sup>127</sup> *Id.* at 321.

<sup>128</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>129</sup> See Rotunda, *supra* note 126, at 321 n. 10.

<sup>130</sup> *Cent. Hudson Gas & Elec. v. Pub. Sev. Comm'n.*, 447 U.S. 557, 563–64 (1980). Commercial speech, like speech made as a public employee or in broadcasting, is afforded less constitutional protection and is thus more amenable to regulation, under certain circumstances, even when not accompanied by some act or conduct. *Id.* at 563.

<sup>131</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>132</sup> 395 U.S. at 447 (1969).

<sup>133</sup> *Id.* at 445–46.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 456 (Douglas, J., concurring).

actions, as those are afforded the full protection of the First Amendment.<sup>136</sup>

The same must be true in the Fourteenth Amendment liberty context. The State presumably does not love when its citizens don white hoods and preach white supremacy, but it is nonetheless prohibited from interfering with those sermons without any illegal conduct, regardless of the discriminatory motivation of the speakers.<sup>137</sup> The State may not applaud the reasons its citizens choose to terminate pregnancies—after all, there is still the putative interest in potential life. However, as free speech doctrine shows, the State cannot block the exercise of constitutional rights purely because of the motivation driving that exercise.

The argument that reason-based bans on abortion are tethered to some conduct, and should thus be permitted, is easily dismissed. Yes, the reason-based regulations are all tethered to conduct that is unlawful. Abortion, on the other hand, is not only usually a lawful act prior to viability but one that garnered constitutional protection.<sup>138</sup> Second, the abortion *is* the conduct. As shown above, regulating the motive behind speech requires an amalgamation of three components: malintent, the constitutional exercise, and unlawful conduct. Reason-based abortion bans never reach the latter component. The State wishes to limit a constitutional exercise by way of regulating the undesirable motivating force behind it, but the State has no illegal act that it can tether the regulation to. Therefore, reason-based abortion bans find no supporting precedent where the State has criminalized, in some manner, the specific intent behind the exercise of constitutional rights.

*a. The tension between reason-based abortion and discrimination*

This is not to say that the State may never infringe upon individual constitutional rights in the name of preventing discrimination. Instances can and do arise where the interest in the latter trumps the former.<sup>139</sup> But, as elaborated upon below, the exercise of the abortion right for racial, sexual, or other physiological reasons is not the kind of discrimination that the State has an overriding interest in prohibiting.

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<sup>136</sup> *Speiser v. Randall*, 357 U.S. 513, 535–36 (1958) (Douglas, J., concurring).

<sup>137</sup> *Brandenburg*, 395 U.S. at 444–45.

<sup>138</sup> *See Roe v. Wade*, 410 U.S. 113, 153 (1973) (“This right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

<sup>139</sup> *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (“The government interest . . . in eradicating racial discrimination . . . substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.”).



A few hypotheticals will illustrate this proposition against the backdrop of the First Amendment.

Imagine a white bookstore owner. This individual may include or exclude books from her shelves regardless of the discriminatory intent behind that expressive conduct. She can toss the Toni Morrison and the James Baldwin books into the dustbin, premising her expressive choices entirely on a desire to remove black authors from her shelves. The exercise of her constitutional right includes the right to decide *why* she wants to exercise that right, regardless of its intentionally offensive<sup>140</sup> and outrageous nature.<sup>141</sup>

Suppose then that the bookstore owner hits the streets in protest, along with other similar “connoisseurs” of literature, over a proliferation of literature celebrating blackness in America. That same undesirable motivation in keeping such works off her shelves extends to the right to associate and, importantly, the right not to associate. When discriminatory exclusion is made for the purpose of expressing those discriminatory viewpoints, “the forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association.”<sup>142</sup>

Whether or not this is an ideal outcome, this constitutional right to exclude does not extend inside the doors of the owner’s shop. The compelling governmental interest in prohibiting discrimination becomes overwhelming when unrelated to expression, which keeps the doors of bookstores open to all, regardless of race.<sup>143</sup> The incidental effect on her ability to express discriminatory beliefs is not so great in this context given that the avowed purpose of the bookstore is commercial and not inherently expressive.<sup>144</sup>

The reason-based abortion ban operates like a law restricting our owner’s ability to stock her shelves according to her undesirable preferences rather than one keeping her doors open to the public. Kicking a group of people out of a store because of their skin color is no crucial

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<sup>140</sup> See *Dennis v. United States*, 341 U.S. 494, 583 (1951) (Douglas, J., dissenting) (“[T]o make freedom of speech turn not on what is said but on the intent with which it is said . . . [is to] enter territory dangerous to the liberties of every citizen.”).

<sup>141</sup> See *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (highlighting the importance of allowing the outrageous and the insulting to give adequate breathing space to constitutional freedoms).

<sup>142</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); see also *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 573–75 (1995).

<sup>143</sup> See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (submitting the rights of private business owners who service the public to exclude from the premises in order to prevent discrimination).

<sup>144</sup> *Id.* (advising the business owner to simply disclaim sponsorship of any messages expressed by the presence on unwanted individuals).

exercise of an associational right—the store need not and does not express any belief beyond a desire to sell books to the public.<sup>145</sup> The government should have no compunction in preventing discrimination when the implication of the constitutional right is so incidental.

The reasoned-based abortion is qualitatively different. But for a woman's intent to abort a pregnancy for specific reasons, she would carry to term. But for the bookstore owner's desire to speak in racist terms, she would not speak. The exercise of her constitutional right in both instances hangs entirely on her ability to act on the underlying reason for its exercise. You cannot separate the bookstore owner's expression from its racist underpinnings because they are one and the same. The discriminatory intent is the essence of the expression and is thus protected. The same must go for the abortion right. The exercise of that right cannot be extrapolated from the woman's reason to exercise it. If the right to abortion is to hold any constitutional water, it must and does include the right to decide *why* she wants that abortion. To hold otherwise would be logically indistinguishable from a compulsive affirmation of those values and beliefs sponsored by the State.<sup>146</sup>

#### B. The Downstream Financial Costs of Reason-Based Bans Are Undue Burdens

This Comment is certainly not the first to advocate for a more expansive lens when looking at the burdens imposed on women.<sup>147</sup> More holistic approaches to the undue burden standard would hopefully ground jurisprudence in more objective considerations.<sup>148</sup> But the first step is to incorporate *Hellerstedt's* balancing on top of *Casey's* undue burden standard. Laws get the strict scrutiny treatment and require a narrow tailoring to a compelling state interest “when [they] impinge on personal rights protected by the Constitution.”<sup>149</sup> Even this standard is lower than undue burden review, which requires courts to consider any and all burdens imposed on abortion access.<sup>150</sup>

There is no lack of criticism of Justice Breyer's opinion in *Hellerstedt* for his liberal insertion of a stricter balancing test into *Casey*.<sup>151</sup>

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<sup>145</sup> See *id.*

<sup>146</sup> See *Hurley*, 515 U.S. at 575 (“But *whatever the reason*, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.”) (emphasis added).

<sup>147</sup> See Fetrow, *supra* note 76, at 347–51; see also, Shabshelowitz, *supra* note 76, at 260.

<sup>148</sup> Fetrow, *supra* note 76, at 350.

<sup>149</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

<sup>150</sup> See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–10 (2016).

<sup>151</sup> See, e.g., Stephen Gilles, *Restoring Casey's Undue Burden Standard After Whole Woman's Health v. Hellerstedt*, 35 QUINNIPIAC L. REV. 701, 760–61 (2017) (arguing that *Casey* only intended to scrutinize abortion regulations to the extent they rationally related to their valid interests).

But there may be a need for this heightened scrutiny, simply given what has been occurring in the lower courts.<sup>152</sup> Look again at the Sixth Circuit's decision in *Preterm-Cleveland*, which upheld a reason-based ban on abortion. The court spends the entire opinion discussing the alleged burdens while spending three paragraphs on the state's alleged interests.<sup>153</sup> That is not scrutiny in any sense of the word. And nowhere in the opinion does the court demand any evidentiary production from the State, even though the State is the party reaching into the Fourteenth Amendment.<sup>154</sup>

1. The true cost of these bans is heavier than courts acknowledge

There is also ample room to incorporate hard metrics into the balancing act. Conspicuously absent from every court's calculus are the economic costs of being coerced into bringing a child to term, especially one diagnosed with Down syndrome. Parents with children who have Down syndrome pay over \$18,000 in additional out-of-pocket medical expenses for the first eighteen years of life compared to parents of children without Down syndrome.<sup>155</sup> That is no slight burden, especially since poorer communities usually bear the costs of limited abortion access.<sup>156</sup> The denial of an abortion further exacerbates the economic conditions of women seeking abortions, obviously creating financial turmoil for themselves and their newborn children, even in the absence of special needs.<sup>157</sup> Abortion denials specifically and significantly increase the seekers' past-due debt and negative public records like evictions or bankruptcies.<sup>158</sup>

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<sup>152</sup> See *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013) (finding that the medical justifications behind an abortion regulation were feeble in light of the great burden placed on the abortion decision); *Planned Parenthood of Ariz., Inc. v. Humble*, 753 F.3d 905, 914 (9th Cir. 2014) (discussing the need for medical grounds justifying the regulation to be legitimate and backed by evidence else the likelihood increases of a burden becoming undue).

<sup>153</sup> *Preterm-Cleveland*, 994 F.3d at 531–532.

<sup>154</sup> See Gilles, *supra* note 151, at 758 n. 265 (“Justice Breyer does not say who bears the burden of proof under his balancing version of the undue-burden standard.”).

<sup>155</sup> Andrew Kageleiry et al., *Out-of-Pocket Medical Costs and Third-Party Healthcare Costs for Children With Down Syndrome*, AM. J. MED. GENETICS 4 (Oct. 2016), [https://scholar.harvard.edu/files/campbell/files/american\\_journal\\_of\\_medical\\_genetics\\_part\\_campbell\\_john.pdf](https://scholar.harvard.edu/files/campbell/files/american_journal_of_medical_genetics_part_campbell_john.pdf) [<https://perma.cc/3BYX-R6MK>].

<sup>156</sup> Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2046 (2021).

<sup>157</sup> Chabeli Carrazana, *How Abortion Restrictions Like Texas' Push Pregnant People into Poverty*, THE 19TH (Sept. 7, 2021), <https://19thnews.org/2021/09/abortion-economy-poverty-texas-law/> [<https://perma.cc/9RLQ-Q4V5>].

<sup>158</sup> Sarah Miller et al., *The Economic Consequences of Being Denied an Abortion*, NAT'L BUREAU OF ECON. RSCH. 3 (Jan. 2020), [https://www.nber.org/system/files/working\\_papers/w26662/w26662.pdf](https://www.nber.org/system/files/working_papers/w26662/w26662.pdf) [<https://perma.cc/T4QK-BP8D>].

Moreover, the average household with a non-working, disabled member requires 28 percent more income to obtain the same standard of living as a similar household without such a member.<sup>159</sup> The family bears the cost of reduced income by staying home more often to care for the child or by taking lower paying jobs that provide the flexibility needed to be a caretaker.<sup>160</sup> Out-of-pocket costs of personal assistance services and healthcare for those with disabilities are double those imposed on the non-disabled.<sup>161</sup>

Specialized schooling also presents a plethora of administrative and financial challenges for parents. Equity is hard to find in the special education space. For those that can afford it, parents will often resolve their dissatisfaction with public schooling with expensive private school placement.<sup>162</sup> For most families that cannot so afford, racial and socio-economic disparities often lead to unequal outcomes for students.<sup>163</sup> In many states, students with disabilities have worse achievement, discipline, and attendance outcomes.<sup>164</sup> Those same students disproportionately belong to low-income families.<sup>165</sup> This is a troubling reality considering the procedural safeguards ensuring equality in education for special needs students can be immensely time consuming and costly for parents.<sup>166</sup>

The burdens do not just cease their oppression once the child exits the schoolhouse and enters adulthood, either. One single diagnosis spells a lifetime of concurrent living facility, healthcare, and equipment

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<sup>159</sup> Nanette Goodman et al., *The Extra Costs of Living with a Disability in the U.S.—Resetting the Policy Table*, NAT'L DISABILITY INST. 1 (Oct. 2020), <https://www.nationaldisabilityinstitute.org/wp-content/uploads/2020/10/extra-costs-living-with-disability-brief.pdf> [<https://perma.cc/85TY-GVZA>].

<sup>160</sup> *Id.* at 2.

<sup>161</sup> *Id.*

<sup>162</sup> See Tamar Lewin, *Court Affirms Reimbursement for Special Education*, N.Y. TIMES (June 22, 2009) <https://www.nytimes.com/2009/06/23/education/23special.html> [<https://perma.cc/4YSZ-KM4R>] (reporting that one residential school with special needs services costs \$5,200 a month in tuition).

<sup>163</sup> See Mike Elsen-Rooney, *Two Boys with the Same Disability Tried to Get Help. The Rich Student Got It Quickly. The Poor Student Did Not.*, USA TODAY (Feb. 9, 2020), <https://www.usatoday.com/in-depth/news/education/2020/02/09/disability-special-education-dyslexia-doe-nyc-sped-private-placement/4651419002/> [<https://perma.cc/5YJ4-WDZ7>]; see also Christina A. Samuels, *Special Education Is Broken*, EDUC. WEEK (Jan. 8, 2019), <https://www.edweek.org/teaching-learning/special-education-is-broken/2019/01> [<https://perma.cc/K4BR-WGKS>].

<sup>164</sup> See e.g., Gabriel Petek, *Overview of Special Education in California*, LEGIS. ANALYST'S OFF. 12–13 (Nov. 6, 2019), <https://lao.ca.gov/reports/2019/4110/overview-spec-ed-110619.pdf> [<https://perma.cc/27M7-JAPD>].

<sup>165</sup> *Id.* at 8.

<sup>166</sup> The Individuals with Disabilities Education Act (IDEA) assures the right of all children to a free appropriate public education, including special education services tailored to individualized needs. 20 U.S.C. §§ 1401, 1412. But if a parent is dissatisfied with the program crafted by their school, they must file complaints, participate in administrative due process hearings, or file lawsuits if still aggrieved. *Id.* § 1415. In short, they must litigate.

expenses, all of which require a complicated maneuvering of public and private insurance, and usually require drained retirement accounts and lots of penny pinching.<sup>167</sup> Discrimination against the differently abled does not start in the classroom, either. Children with autism or an intellectual disability are less likely to get adopted and more likely to find themselves in foster homes.<sup>168</sup> Couple that with the disproportionately high costs of bringing these pregnancies to term.<sup>169</sup> The burden on the woman's abortion right with reason-based bans thus runs at conception and does not alleviate itself until her own life expires.

## 2. A closer look

But if financial considerations are too meek in light of the existential questions that abortion presents, take a closer look at the state's interests. Ohio said its abortion ban was designed to remove stigma placed on the Down syndrome community.<sup>170</sup> One only needs to do cursory research to see that Ohio creates plenty of stigma on its own.<sup>171</sup> The state restrains and secludes its special needs students without necessity, fails to police itself when it does, and leaves students and parents out in the rain.<sup>172</sup> This is the same state that claims to wish to rid the world of stigma. Any modicum of actual scrutiny would see the economic burdens on the mothers and the lack of a genuine State interest and conclude that *Preterm-Cleveland* was wrong in its factual determinations.

For example, *Preterm-Cleveland* purported to identify five burdens in the plaintiffs' briefs, none of which articulated the financial burden imposed by the reason-based abortion ban.<sup>173</sup> As it stands, and especially as it pertains to reason-based bans, the law does very little to

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<sup>167</sup> Susan B. Garland, *When a Diagnosis Demands a Long-Term Money Strategy*, N.Y. TIMES (Jan. 17, 2022), <https://www.nytimes.com/2022/01/14/business/chronic-illness-financial-planning.html> [<https://perma.cc/9KVL-JDU8>].

<sup>168</sup> David Mandell, *Why Too Many Children with Autism End Up in Foster Care*, SPECTRUM (Jan. 9, 2018), <https://www.spectrumnews.org/opinion/viewpoint/many-children-autism-end-foster-care/> [<https://perma.cc/P5LW-XWUP>].

<sup>169</sup> Jordan C. Apfeld et al., *The Disproportionate Cost of Operation and Congenital Anomalies in Infancy*, 165 SURGERY 1234 (June 2019), [https://www.surgjournal.com/article/S0039-6060\(19\)30007-8/fulltext](https://www.surgjournal.com/article/S0039-6060(19)30007-8/fulltext) [<https://perma.cc/TB7J-DSYH>] (finding that the small minority of fetuses with congenital anomalies accounted for over 40 percent of all hospitalization costs in the first year of life).

<sup>170</sup> *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 517–18 (6th Cir. 2021).

<sup>171</sup> See Danielle Gray, *Restraint and Seclusion in Ohio Schools*, DISABILITY RTS. OHIO 5–8 (Feb. 2016), [https://www.disabilityrightsohio.org/assets/documents/dro\\_restraint\\_and\\_seclusion\\_report\\_2\\_feb2016.pdf](https://www.disabilityrightsohio.org/assets/documents/dro_restraint_and_seclusion_report_2_feb2016.pdf) [<https://perma.cc/V8WC-FXNG>].

<sup>172</sup> *Id.*

<sup>173</sup> 994 F.3d 512, 525 (6th Cir. 2021) (discussing the burdens on the ability to receive an abortion to only be “doctor shopping” for an ignorant physician, an incentive to conceal medical history, an incentive for a woman to misrepresent her reasoning for an abortion, an impediment to full and

assess burdens on the abortion right. Courts repeatedly reiterate that it is incumbent on the plaintiff to show that a state's abortion regulation constitutes an unconstitutional undue burden.<sup>174</sup> Thus, a plaintiff's failure to raise the financial impact of a regulation means its substantial burden proceeds without scrutiny. Furthermore, the State is never challenged in its assertions of its interests. As shown above, many states—including Ohio—do little to nothing in actuality to improve education or life outcomes for special needs children. The court in *Preterm-Cleveland* takes a cursory glance at the State's briefings, noting that State claims to be fighting stigma, but points to no empirics. Stigma is an amorphous term and potentially very costly, but the flippant treatment of actual and downstream burdens means that they are never accurately assessed nor properly weighed.<sup>175</sup>

This Comment may be erroneously construed as advocating for the termination of pregnancies involving fetuses prenatally diagnosed with some genetic anomaly, or even fetuses determined to be of a certain race or gender. Indeed, in *Box v. Planned Parenthood of Indiana & Kentucky*,<sup>176</sup> Justice Thomas argued that reason-based abortion bans push back against the supposed tradition of eugenics that underpins the history of abortion.<sup>177</sup> He is not alone in proposing such a notion.<sup>178</sup> A jurisprudential analysis weighing the financial costs of begetting a child against the benefits to stifling eugenics would never survive public scrutiny if the balance tipped in favor of the former. And rightly so. But even if these arguments were not mere appropriations to secure a broader base of support,<sup>179</sup> you are right back to policing the undesirable intent behind the exercise of constitutional rights.<sup>180</sup> These arguments also miss the larger point.

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frank conversation, and forgoing assistance programs for mothers of children with Down syndrome).

<sup>174</sup> See *June Med. Servs., LLC v. Russo*, 140 S. Ct. 2103, 2133 (2020).

<sup>175</sup> See *Preterm-Cleveland*, 994 F.3d at 532. The court concluded the “minor,” “incidental,” and “acceptable” burdens are overwhelmed by the balance of asserted benefits, even under *June Medical's* plurality balancing. *Id.*

<sup>176</sup> 239 S. Ct. 1780 (2019).

<sup>177</sup> *Id.* at 1783–93 (Thomas, J., concurring) (claiming, implicitly, that abortion is now and has always been meant as a tool to commit genocide on certain groups of people).

<sup>178</sup> See Michael Stokes Paulsen, *Abortion as an Instrument of Eugenics*, 134 HARV. L. REV. F. 415 (2021).

<sup>179</sup> See Shyriisa Dobbins-Harris, *The Myth of Abortion as Black Genocide: Reclaiming our Reproductive Choice*, 26 NAT'L BLACK L.J. 85, 97, 104 (2017) (arguing that conflating abortion with eugenics also necessitates birth giving be treated as a kind of ethnic jihad, and it likens black women seeking abortions to slaveowners when the act was historically one of agency and rebellion against slavery); see also Murray, *supra* note 156, at 2040 (documenting how family planning in black communities was not designed to reduce birthrates but rather to reduce maternal and infant mortality rates); Goodwin, *supra* note 27 (explaining how the lobby to criminalize abortion was an attempt to rid the medical profession of black women).

<sup>180</sup> See discussion *infra* Section III.A.1.

The point is that undue burden analysis mistakenly views the abortion decision as one moment in chronological time. The burden on the woman attempting to make that decision, though, inarguably includes downstream effects from reason-based bans that must be incorporated into a court's calculus. A state's purported interests should thus not be taken at face value because a zero-sum game is afoot. A wider social and educational safety net for children with disabilities—or even a society with more equity in outcome for children of any given race or gender—renders the burden on potential mothers barred from abortions much less onerous. But a State which fails to adequately provide for its most vulnerable of citizens, while simultaneously claiming an interest in protecting those citizens against stigma, creates an undue and impermissible burden on mothers and families rearing a child disadvantaged from the beginning. It is the failure of government, outside of the womb, to achieve equity for the mentally and physically handicapped that is “[t]he imposition of [a] disability [in and of itself and] serves to disrespect and subordinate them.”<sup>181</sup> It is the politicization of a class of people, the signaling that this class is lesser and in need of paternalistic, coercive intervention from the State, that actually “sends a message to people living with that trait that they are not as valuable as others.”<sup>182</sup> States like Ohio have simply not put their money where their mouths are.

#### IV. CONCLUSION

Abortion is and will continue to be a divisive subject. The advent of reason-based bans only adds another layer of moral complication. *Roe v. Wade* proclaimed the qualified constitutional right to abortion. *Casey* provided that the State could not impose an undue burden—a substantial obstacle—on a woman's ability to receive an abortion prior to viability. A categorical ban pre-viability used to constitute such a burden, but one circuit court held otherwise.

Reason-based abortions create somewhat of a new state interest—the protection of socially stigmatized fetuses—in addition to the traditional interest in bringing pre-natal life to term. It can hardly be said that these interests are outside of the State's scope of concern.

This Comment has argued that reason-based abortion bans cannot generally withstand constitutional scrutiny. The first reason is that the reason behind the exercise of affirmative constitutional rights to marriage and speech generally cannot be regulated. *Loving v. Virginia* and

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<sup>181</sup> *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

<sup>182</sup> *Preterm-Cleveland*, 994 F.3d at 532; see also *id.* at 582 (Donald, J., dissenting) (deriding a law that purports to protect children with Down Syndrome from stigma while perpetuating a sense of ‘otherness’ between those children and the rest of the disabled community).

*Obergefell v. Hodges* dictate that an individual must be able to decide to marry or not to marry another based on sex, race, or disability. Furthermore, unless under very specific circumstances, the reason for making speech cannot be regulated unless some imminent or actual unlawful act accompanies that reason. No such incidental, unlawful conduct is tethered to reason-based abortions.

Second, a more holistic and accurate depiction of the burden imposed by reason-based abortion bans yields a different conclusion than that reached in *Preterm-Cleveland*. The State's asserted interest is undermined by its own apathy towards the development of disabled children, and that apathy, especially in education and healthcare, lays the financial burden that much more heavily on the mother's shoulders. Indeed, the reason-based ban itself evidences an indifference to disability stigma that cannot be politically weaponized. The inclusion of downstream financial burdens into courts' calculus not only better characterizes the ultimate burden borne but also provides an incentive for the State to alleviate those burdens should it truly desire to regulate in favor of the unborn.