Reason-Specific Abortion Bans Under Current Abortion Jurisprudence

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Introduction

In 2021 alone, 108 restrictions on abortion were enacted in just nineteen states.[1] With the recent Supreme Court decision, *Dobbs v. Jackson Women's Health Organization*, that eliminated the federal constitutional right to obtain an abortion, abortion access is in a perilous position for millions of individuals.[2] Currently, ten states have found a right to abortion protected under their state constitutions;[3] yet in these states—and even more so in states without that right under their constitution—abortion access remains precariously situated as groups fight to expand, restrict, and foreclose abortion access.[4]

Decisions regarding pregnancy, particularly whether to carry a pregnancy to term, are deeply personal. The best person to make the decision as to whether to get an abortion is the pregnant individual themself; they best know their financial, physical, familial, and mental

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* This Article was initially written before the decision in Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). As a result, the discussion has a heavier focus on federal constitutional principles and a stronger focus on how reason-specific abortion bans interacted with federal abortion jurisprudence. That being said, this Article has been updated in an attempt to briefly highlight how similar, if not the same, constitutional principles may apply in the state context, granted with a greater degree of variability.

1. Elizabeth Nash, *State Policy Trends 2021: The Worst Year for Abortion Rights in Almost Half a Century*, GUTTMACHER INST., https://www.guttmacher.org/article/2021/12/state-policy-trends-2021-worst-year-abortion-rights-almost-half-century [https://perma.cc/H2PD-RYMG] (Jan. 5, 2022) (noting that this is the highest number of restrictions since 1973, when the right to abortion was affirmed in *Roe v. Wade*).

2. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973)); *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., [hereinafter *After Roe Fell*], https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/L7TG-CF9F] (providing an interactive map of abortion laws, restrictions, and protections in each United States state and territory); CTR. FOR REPROD. RTS., STATE CONSTITUTIONS AND ABORTION RIGHTS (July 2022) [hereinafter STATE CONSTITUTIONS] (discussing how various state courts have found abortion to be protected under the state's constitution); Quinn Yeargain, *What All State Constitutions Say About Abortion, and Why It Matters*, BOLTS (June 30, 2022), https://boltsmag.org/state-constitutions-and-abortion/ [https://perma.cc/Y99E-58T8] (providing analysis on the current state of abortion rights for each state).

3. STATE CONSTITUTIONS, *supra* note 2, at 2.

4. *See, e.g.*, *id.*

circumstances and capabilities.[5] Forcing individuals to carry a pregnancy to term takes away the power of an individual to determine the course of their life and can be highly detrimental to their physical and mental health and financial situations. These detriments are particularly salient for people of color due to the social and economic disparities associated with systematic racism and discrimination.[6]

Reason-specific abortion bans are often touted by anti-abortion lawmakers as being "anti-discrimination" or "anti-eugenics" laws claiming to protect traditionally marginalized communities; on the contrary, these laws function as a more general anti-abortion tactic used to completely restrict abortion access.[7] Furthermore, these bans are generally rooted in racist and xenophobic ideas which further stigmatize people of color—namely Asian and Black communities—and "send[s] the message that [people], and especially [people] of color, cannot be trusted to make their own medical decisions."[8] These types of bans further stigmatize abortion by imposing notions of what is and is not a valid reason to get an abortion—which should not be up for the State to decide.

This Article will discuss how sex-based, race-based, and anomaly-based abortion bans were incompatible with the legal framework of abortion rights in the United States prior to *Dobbs* primarily because they impose an undue burden on individuals seeking an abortion, especially members of marginalized groups. It will also briefly address the implications of such laws in a post-*Dobbs* United States. Part I lays out the current abortion jurisprudence and discusses the rhetoric and arguments behind such reason-specific prohibitions. Part II discusses recent caselaw regarding reason-specific abortion bans. Part III analyzes the

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5. *See Induced Abortion in the United States*, GUTTMACHER INST. (Sept. 2019), https://www.guttmacher.org/fact-sheet/induced-abortion-united-states [https://perma.cc/YT5R-MBPG] (providing statistics and demographics for abortion in the United States, including financial status, race, and insurance coverage).

6. *See* Emily Wagster Pettus & Leah Willingham, *Minority Women Most Affected if Abortion is Banned, Limited*, ABC NEWS (Feb. 1, 2022), https://abcnews.go.com/US/wire Story/minority-women-affected-abortion-banned-limited-82599673 [https://perma.cc/ T88N-UD2J].

7. *See, e.g.*, Strict Scrutiny, *At Liberty: This Fall's Fight Against Forced Pregnancy*, CROOKED MEDIA, at 19:26 (Nov. 2021) (accessed via Spotify) (discussing reason-specific abortion restrictions and how they fit within the general anti-abortion movement); Rachel Rebouché & Mindy Roseman, *What the Public Gets Wrong About "Reason-Based" Abortion Bans*, MS. MAG. (June 7, 2021), https://msmagazine.com/2021/06/07/roe-v-wade-pre-viability-abortion-dobbs-v-jackson-womens-health-organization-reason-based-abortion-bans-eugenics/ [https://perma.cc/EY2H-ATK4] (discussing the impact of reason-specific abortion bans and their place within the greater anti-abortion movement).

8. *Banning Abortions in Cases of Race or Sex Selection or Fetal Anomaly*, GUTTMACHER INST. (Jan. 22, 2020) [hereinafter *Banning Abortions*], https://www.guttmacher.org/ evidence-you-can-use/banning-abortions-cases-race-or-sex-selection-or-fetal-anomaly [https://perma.cc/V33Q-4PEV].

constitutional complications inherent in reason-specific abortion bans and how they present a serious threat to people of color, people who live in rural areas, and low-income individuals.

Background

A. Foundational Cases

Perhaps the most notable abortion rights case is the landmark case *Roe v. Wade*.[9] This 1973 case concerned Texas laws that criminalized procuring an abortion except for the purpose of "saving the mother's life."[10] Roe, unmarried and pregnant, was unable to get a legal abortion because her life was not threatened by the pregnancy, and she could not afford to travel to another jurisdiction to acquire a safe and legal abortion.[11] She claimed that the laws violated her right to privacy under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments, and that these laws were unconstitutionally vague.[12]

While the Court determined that abortion fell within the right to personal privacy and the right to personal liberty protected by the Due Process Clause, it held that such a right to an abortion is not absolute and must be considered alongside "important State interests" in regulating abortion.[13] However, the Court stated that such regulations should be narrow and aimed at promoting "only the legitimate state interests" in protecting health and potential life.[14] Such interests in maternal health become "compelling" at "approximately the end of the first trimester[,]"[15] and such interests in potential life become "compelling" at "viability,"

9. Roe v. Wade, 410 U.S. 113 (1973).

10. *Id.* at 113, 117–18.

11. *Id.* at 120.

12. *Id.*

13. *Id.* at 154. The Supreme Court disagreed with the notion that an individual's right to abortion is "absolute and that [they are] entitled to terminate [their] pregnancy at whatever time, in whatever way, and for whatever reason [they] alone choose[]." *Id.* at 153. The Court held that, at some point in a pregnancy, the State's interests—such as interests in health, medical standards, and protecting potential life—become "sufficiently compelling to sustain regulation of the factors that govern the abortion decision." *Id.* at 154.

14. *Id.* at 155 (citing Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Aptheker v. Sec'y of State, 378 U.S. 500, 508 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307–08 (1940)).

15. *Id.* at 163. The Court held that before the end of the first trimester, when "mortality in abortion may be less than mortality in normal childbirth[,]" an individual may get an abortion without State interference. *Id.* The precise language in the decision states that prior to the "'compelling' point, the attending physician, in consultation with [their] patient, is free to determine, without regulation by the State, that, in [their] medical judgement, the patient's pregnancy should be terminated. If that decision is reached, the judgement may be effectuated by an abortion free of interference by the State." *Id.* Note that this language centers the physician and their determinations rather than the individual seeking the abortion.

after which the State may prohibit abortion except when necessary to "preserve the life or health of the [pregnant individual]."[16]

Almost twenty years later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court—while upholding the essential holdings of *Roe*[17]—abandoned the trimester framework and instead applied an undue burden test to determine whether state regulations imposed "substantial obstacle[s]" on an individual seeking a pre-viability abortion.[18] The Pennsylvania statute at issue provided that, among other things, an individual seeking an abortion must give informed consent at least twenty-four-hours before the procedure and that, if married, they must notify their husband and obtain a signed statement indicating they gave such notification.[19]

The Court justified the adoption of the undue burden test by determining that *Roe*'s trimester framework was too restrictive or rigid when it came to prohibiting all pre-viability abortion regulation.[20] In other words, the undue burden test can be seen as an attempt to strike a clearer balance between the individual right to liberty and state interests in potential life by increasing a state's ability to regulate abortion. In defining the principles of the test, the Court stated that:

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16. *Id.* at 163–64. The Court determined this point because "the fetus then presumably has the capability of meaningful life outside the [pregnant individual's] womb." Importantly, the Court also held that a fetus is not, and has never been, recognized as a whole person under the law. *Id.* at 162. Note that states have enacted legislation creating "fetal personhood rights" by creating or extending homicide laws to cover fetal "deaths" and allowing for recovery for prenatal injuries. *See State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, NAT'L CONF. OF STATE LEGISLATURES (May 1, 2018), https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx [https://perma.cc/5UXN-TMG7] (citing state laws concerning fetal rights); *cf. What's Wrong with Fetal Rights*, ACLU, https://www.aclu.org/other/whats-wrong-fetal-rights [https://perma.cc/FNJ8-5T44] (discussing the various potential issues stemming from providing fetuses with legal personhood); We the People Podcast, *A Fetal Right to Life?: Abortion and the Constitution Part 2*, NAT'L CONST. CTR., at 18:43 (May 30, 2019), https://constitutioncenter.org/interactive-constitution/podcast/a-fetal-right-to-life-abortion-and-the-constitution-part-2 [https://perma.cc/P49G-GQGR] (discussing the constitutionality of fetal personhood legislation in relation to the right to abortion).

17. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (explaining the holdings of *Roe* as: an individual has a right to an abortion pre-viability without undue State interference and the State's interests are not strong enough to allow a prohibition of or substantial obstacle to abortion pre-viability; that the State can regulate abortion after viability—if exceptions for medical emergencies/life-threatening situations are provided; and the State has a legitimate interest throughout pregnancy to protect the life and health of the individual and the potential life of the fetus).

18. *Id.*

19. *Id.* at 844 (pinpointing the provisions at issue as §§ 3203, 3205(a), 3206(a), and 3209(c) of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989).

20. *Id.* at 873 (O'Connor, Kennedy & Souter, JJ.) (plurality opinion) ("The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant [individual]'s interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*.").

> Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the [individual's] exercise of the right to choose.[21]

The Court further clarified that this point meant that unless the individual's right to choose to have a pre-viability abortion is directly and substantially stifled, a state can even pass regulations "designed to persuade [the individual] to choose childbirth over abortion[,]" so long as the regulation is reasonably related to attaining such a goal.[22]

To apply the undue burden test, courts had to determine whether the law at issue 1) furthers a valid state interest; 2) confers benefits that outweigh the burdens; and 3) is based on credible evidence.[23] However, what specifically constituted an undue burden and/or a substantial obstacle to obtaining an abortion was constantly up for debate, as states attempted to pass more and more restrictions on the right to abortion.[24] The Court in *Casey* held that

> An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of [an individual] seeking an abortion before the fetus attains

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21. *Id.* at 877; *see id.* at 899–900 (addressing Pennsylvania's parental consent requirement).

22. *Id.* at 878; *see also* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (holding that the Texas law requiring that physicians who perform abortions have admitting privileges at a nearby hospital and that abortion clinics have similar facilities to an ambulatory surgical center violated the Fourteenth Amendment because the law imposed an undue burden on, and a substantial obstacle to, abortion access); June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020) (analyzing a Louisiana law nearly identical to the law at issue in *Whole Women's Health*).

23. *Whole Women's Health*, 136 S. Ct. at 2309–10.

24. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 886–87 (1992) ("We also disagree with the District Court's conclusion that the 'particularly burdensome' effects of the waiting period on some [individuals] require its invalidation. A particular burden is not of necessity a substantial obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the [individuals] in that group."). The Court is essentially stating that a provision that is a substantial burden for *only* lower-income and/or rural individuals is not a significant enough burden to cause the provision to not be upheld. *See also* Carrie N. Baker, *The History of Abortion Law in the United States*, OUR BODIES OURSELVES TODAY (Aug. 2022), https://www.ourbodiesourselves.org/book-excerpts/health-article/u-s-abortion-history/ [https://perma.cc/YB7T-ZQQE] (examining *An Overview of Abortion Laws*, GUTTMACHER INST. (Jan. 1, 2022), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws [https://perma.cc/P3VB-8R5Y]); Elizabeth Nash, Rachel Benson Gold, Gwendolyn Rathbun & Zohra Ansari-Thomas, *Laws Affecting Reproductive Health and Rights: 2015 State Policy Review*, GUTTMACHER INST. (Jan. 1, 2016), https://www.guttmacher.org/laws-affecting-reproductive-health-and-rights-2015-state-policy-review [https://perma.cc/255B-YH7B]; April Shaw, *How Race-Selective and Sex-Selective Bans on Abortion Expose the Color-Coded Dimensions of the Right to Abortion and Deficiencies in Constitutional Protections for Women of Color*, 40 N.Y.U. REV. L. & SOC. CHANGE 545, 545 (2016) (discussing how the undue burden test generally fails to take race into account, resulting in heavier burdens regarding abortion access being placed on individuals of color in comparison to white individuals).

> viability . . . .Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to [an individual] seeking an abortion impose an undue burden on the right.[25]

In *Whole Women's Health v. Hellerstedt*, the Court further emphasized that the burden would be unconstitutional when applied to a "large fraction" of the individuals for whom the provision would be relevant.[26] The Court continued to apply this standard; in *June Medical Services, L.L.C. v. Russo*, a case involving a law nearly identical to the one at issue in *Whole Women's Health*, the Court held that "a State's abortion-related law is unconstitutional on its face if 'it will operate as a substantial obstacle to a woman's choice to undergo an abortion' in 'a large fraction of the cases in which [it] is relevant.'"[27]

On June 24, 2022, the Supreme Court overturned *Roe* and *Casey* in *Dobbs v. Jackson Women's Health Organization* by holding that the Constitution does not confer—explicitly or implicitly—a right to obtain an abortion.[28] More specifically, the Court determined that such a right to obtain an abortion cannot be supported by the Due Process Clause of the Fourteenth Amendment because, in order for a particular right to fall under its protection, it must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[29] The Court found that abortion "does not fall within this category."[30] In overturning *Roe* and *Casey*, the Court elected to "return" the question of abortion—its permissibility and limitations on it—to "the people's elected representatives" to be "resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."[31] Thus, the federal constitutional right to obtain an abortion—which had existed for forty-nine years—was eliminated. The availability of abortion and the rights of individuals seeking an abortion and the physicians who

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25. *Casey*, 505 U.S. at 878.

26. *Whole Woman's Health*, 136 S. Ct. at 2320.

27. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2132 (2020) (citing *Casey*, 505 U.S. at 895 (plurality opinion)).

28. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

29. *Id.* at 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

30. *Id.*

31. *Id.* at 2243 (quoting *Casey*, 505 U.S. at 979 (Scalia, J., concurring in the judgement in part and dissenting in part)). While this Article will not address voter suppression in the United States, note that this is the Supreme Court that is actively assisting in states' efforts to restrict and suppress voters and voting rights, which makes its insistence that access to abortion be left up to state legislatures seem considerably more insidious. *See, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021); Shelby County v. Holder, 570 U.S. 529 (2013); Joan Biskupic, *The Supreme Court May Completely Hollow Out the Voting Rights Act by 2024*, CNN POL. (Feb. 8, 2022), https://www.cnn.com/2022/02/08/politics/supreme-court-voting-rights-act-2024-election/index.html [https://perma.cc/5LTE-SCZ6]; Strict Scrutiny, *Roe is Dead. Now What?*, CROOKED MEDIA, at 23:00 (June 25, 2022) (accessed via Spotify).

provide them now lie at the mercy of individual states—and the federal legislature.

B. Reason-Specific Abortion Prohibitions in the United States

i. Sex-Selection Restrictions

Currently, eleven states prohibit abortions based on the fetus' sex.[32] And while supporters of these kinds of bans claim they want to "protect"—generally female—fetuses, evidence indicates that such bans do not actually prevent sex-selection.[33] The Guttmacher Institute indicates that this is because sex-selection abortion bans do not address the underlying issue that is causing a preference for one sex or the other.[34] Additionally, such bans ignore the fact that there are methods other than abortion that allow individuals to control the sex of their fetus, including procedures such as "sperm sorting and preimplantation genetic diagnostics."[35] Supporters frame their position as "aimed at combating gender and racial discrimination," but in reality, many of them support outlawing abortion altogether and see such reason-specific bans as a step towards that goal.[36] This purpose is further exemplified by the fact that supporters of sex-selective abortion prohibitions conveniently gloss over the various other ways that individuals can, and do, "select" the sex of their fetus.[37]

Legislative attempts at both the state and federal levels to prohibit abortions on the basis of the sex and/or the race of the fetus (or the race of one of its parents) are tied up in racist and xenophobic rhetoric. Supporters of such laws often focus their arguments on the harmful stereotype that Asian-Americans significantly practice "sex-selection" via aborting female fetuses; however, there is little evidence to support such claims.[38] As a matter of fact, in countries like China or India—which are often cited to by supporters of sex-selective abortion bans—where sex

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32. *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, GUTTMACHER INST. (Nov. 1, 2022) [hereinafter *Abortion Bans*], https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly [https://perma.cc/X9FE-9SES].

33. *Banning Abortions*, *supra* note 8 (noting that female fetuses are generally the focus of these discussions because supporters of these prohibitions focus their claims on cultures and countries that, historically, have/had a strong bias favoring males).

34. *Id.*

35. *Id.* (noting that other methods of sex-selection remain legal and that there is a general international consensus that "the most effective way to combat sex selection is to implement policies that promote gender equity").

36. *Id.*

37. *Id.*

38. *See id.*; UNIV. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, REPLACING MYTHS WITH FACTS: SEX-SELECTIVE ABORTION LAWS IN THE UNITED STATES 6–7, 12–20 (2014).

ratios are of concern, the government tries to limit such abortions by prohibiting disclosure of the fetus' sex to parents.[39] Additionally, supporting these bans with such xenophobic and racist rhetoric places higher stressors on abortion providers and individuals seeking abortions because providers are then required to question an individual's motive; Asian-Americans seeking abortion will have to bear the brunt of heightened stigmatization and scrutiny regarding their reasons for seeking an abortion.[40]

ii. Race-Selection Restrictions

Race-selection restrictions on abortion seem to be in close company with sex-selection bans. Fewer states prohibit abortions for reasons of the fetus' race or the race of one of the fetus' parents—currently, four states prohibit these abortions.[41] Like sex-selection abortion bans, race-selection bans are championed as "anti-discrimination" laws.[42] Proponents of these laws rely on claims that communities of people of color are targeted and coerced into abortions and/or are "complicit in a 'genocide' against their own community[,]" partially due to the elevated number of abortions amongst these communities and faulty claims that abortion clinics are highly prominent in these communities.[43] As a matter of fact, it can be said that supporters of these race-selection restrictions—arguably willfully—misinterpret the statistics that show that individuals of color have elevated abortion rates. For instance, these communities generally have to deal with lower access to "health care services, including . . . contraceptives and other reproductive health care" due to systematic racism and sexism;[44] couple this with the fact that "[individuals] of color face higher rates of unintended pregnanc[y]," and it is easy to see how and why these communities have higher abortion rates.[45]

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39. UNIV. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, *supra* note 38, at 10.

40. *Abortion Bans*, *supra* note 32; *Banning Abortions*, *supra* note 8.

41. *Abortion Bans*, *supra* note 32.

42. *See, e.g.*, *Hearing on H.R. 3451 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 112th Cong. 1–2 (2011) (statement of Rep. Trent Franks, Chairman, Subcomm. on the Const.) ("[B]etween 40 and 50 percent of all African American babies, virtually one in two, are killed before they are born, which is a greater cause of death for African Americans than heart disease, cancer, diabetes, AIDS, and violence combined.").

43. *Banning Abortions*, *supra* note 8 (noting that there is little to no evidence to support the statement that people of color seek abortions based on the fetus' race, or that such a ban would reduce the number of abortions that happen in these communities; only 22% of abortion clinics were in "minority" neighborhoods, while 60% were in primarily white neighborhoods according to a 2011 study).

44. *Id.*

45. *Abortion Bans*, *supra* note 32.

Similar to sex-selection abortion restrictions, the rhetoric behind race-selection restrictions places a heavier burden on individuals of color, particularly Black individuals.[46] In combination with the issues of healthcare access—namely reproductive healthcare access—these race-selection prohibitions will make accessing abortion and healthcare even more difficult for these communities.[47] Research from the Guttmacher Institute also indicates that such prohibitions further perpetuate negative stereotypes about people of color; increase distrust of healthcare providers among people of color, leading to underutilization of available healthcare resources; cause healthcare providers to second-guess their patients; and discourage honest conversations between providers and patients.[48]

iii. Restrictions Regarding Prenatal Diagnosis of Genetic Disease, Anomaly, and Developmental Issues

As prenatal testing becomes more advanced, anti-abortionists began to include fetal diagnosis or anomaly in their arsenal to combat abortion. North Dakota became the first state to prohibit abortion due to fetal anomaly in 2013.[49] Currently, six states prohibit abortions when the fetus has, or may have, an anomaly.[50] Again, like sex- and race-selection abortion prohibitions, prohibitions regarding fetal anomaly are generally presented as laws to prevent discrimination and eugenics.[51] Furthermore, Down syndrome is often one of the conditions at the main focus of these fetal anomaly abortion prohibitions with several states having statues that specifically refer to Down syndrome.[52] Though that is not to say that Down syndrome is the only or primary focus of fetal

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46. *See Banning Abortions*, *supra* note 8 (noting in the context of bans on race-selective abortions that Black pregnant people are substantially overrepresented among abortion patients, and the Black community in particular faces a wide range of health disparities due to "racism, abuse, and ongoing implicit bias in the medical profession").

47. *Id.*

48. *Id.*

49. *Id.* (discussing how the North Dakota prohibition also included instances where the anomaly would cause the fetus to die before birth or shortly after).

50. *Id.* (noting that North Dakota is the only state with such a law actually in effect); *Abortion Bans*, *supra* note 32 (noting that three states require perinatal hospice counseling if the fetal diagnosis is a fatal one).

51. *See* Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r of Ind. State Dep't of Health (*PPINK*), 888 F.3d 300 (7th Cir.) (describing a reason-based Indiana anti-abortion law as a "non-discrimination" law), *rev'd in part sub nom.*, Box v. Planned Parenthood of Indiana & Kentucky, Inc., 139 S. Ct. 1780 (2019); *see Box*, 139 S. Ct. at 1783–92 (Thomas, J., concurring) (equating reason-specific abortion with state-sponsored eugenics).

52. *See* Christine Scherer, *A Woman's Choice? The Constitutionality of Down Syndrome Abortion Bans and the Breakdown of the Doctor-Patient Relationship*, 71 CASE W. RES. L. REV. 847, 864 (2020) (detailing the twelve states that have passed Down syndrome abortion bans); *Abortion Bans*, *supra* note 32 (providing a breakdown of which state reason-based abortion prohibitions are in effect).

anomaly abortion bans in general. For instance, a North Dakota law defines genetic anomalies in a broad sense including "scoliosis, dwarfism, Down syndrome, albinism, Amelia, or any other type of physical or mental disability, abnormality, or disease[;]"[53] and an Indiana law covers "any [physical or mental] disease, defect, or disorder that is genetically inherited[.]"[54]

The argument that reason-specific abortion provisions promote eugenics is particularly prevalent when it comes to abortion because of fetal anomaly. Proponents of these laws often cite to the high rates of abortion for fetuses with Down syndrome diagnoses in countries like Denmark and Iceland—where nearly 95% and 100%, respectively, of fetuses with Down syndrome diagnoses are aborted—as an example of what, in their opinion, will happen in the United States if such abortions are not prohibited.[55] However, this is an extremely broad claim to make given the differences in cultures and healthcare systems between these countries and the U.S. and the prevalence of "pro-life" individuals in the United States who would, presumably, not abort their fetus upon learning that it has, or will likely have, an anomaly.[56]

iv. Equating Reason-Specific Abortions with Eugenics

The claims that these anti-abortion laws are eugenics by supporters of these laws, including Supreme Court Justice Clarence Thomas,[57] need to be addressed.[58] Eugenics as a "science" and practice flourished in the United States in the late nineteenth and the twentieth centuries.[59] During

53. *See, e.g.*, Sital Kalantry, *Do Reason-Based Abortion Bans Prevent Eugenics?*, 107 CORNELL L. REV. ONLINE 1, 14 (2021), https://cornelllawreview.org/wp-content/uploads/2021/10/Kalantry-107.1-reformatted.pdf [https://perma.cc/Y2CH-DGPW] (citing N.D. CENT. CODE § 14-02.1-02 (2019)).

54. *PPINK*, 888 F.3d at 303 (citing IND. CODE § 16-34-4-1 (2016)).

55. Kalantry, *supra* note 53, at 16 (citing Julian Quinones & Arijeta Lajika, *"What Kind of Society Do You Want to Live In?": Inside the Country Where Down Syndrome Is Disappearing*, CBS NEWS (Aug. 15, 2017), https://www.cbsnews.com/news/down-syndrome-iceland/ [https://perma.cc/M24C-H5ZG]); Press Release, Facts About Down's Syndrome & Pre-natal Screening in Iceland, Embassy of Iceland in the U.K. (Mar. 26, 2018), https://www.government.is/diplomatic-missions/embassy-article/2018/03/26/Facts-about-Downs-syndrome-and-pre-natal-screening-in-Iceland/ [https://perma.cc/MN2W-9K3J]; *'Pro-Choice' or 'Pro-Life,' 2018–2021 Demographic Table*, GALLUP, https://news.gallup.com/poll/244709/pro-choice-pro-life-2018-demographic-tables.aspx [https://perma.cc/P3W2-XDT6].

56. *See* sources cited *supra* note 55.

57. *See, e.g.*, Strict Scrutiny, *supra* note 7; *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2256 n.41 (2022) (citing *Box*, 139 S. Ct. at 1782–84 (Thomas, J., concurring)).

58. Abortion, race, sex/gender, and disability issues are deeply sensitive and personal subjects, and therefore I want to attempt to address the eugenics arguments and outline why equating reason-specific abortions to eugenics is a faulty and dangerous comparison as respectfully as I can.

59. *See, e.g.*, *The Supreme Court Ruling that Led to 70,000 Forced Sterilizations*, NPR

this time period, countless individuals were denied immigration into the U.S. and forcibly sterilized in the name of improving the country's "human stock."[60] These laws and practices targeted individuals considered "mentally deficient," those with physical disabilities, poor people, sexually "promiscuous" women, and racial and ethnic minorities.[61] For instance, in the midst of the eugenics movement in the U.S., Carrie Buck challenged the law under which she was going to be forcibly sterilized; the case made its way to the Supreme Court, which—in an egregious opinion—determined that the State does have a right to forcibly sterilize individuals it deems unfit.[62]

When it comes to defining eugenics, scholars emphasize that it is based around the ideology of "wanting to improve the human stock or elimination of certain characteristics from society,"[63] and associate it with state-sponsored/condoned actions to attain this goal of improving the human stock. Given the deeply personal and complex reasons an individual may have for deciding to get an abortion, the decision to have an abortion based on the fetus' sex, race, and/or diagnosis of an anomaly arguably has to do more with the individual's own circumstances, rather than a desire to improve the gene pool.[64] The assumption that eugenics is the motivating factor for every individual who seeks an abortion inherently discredits and disregards the individual's unique circumstances and the decisions they make under those circumstances.[65] In other words, the distinction can perhaps be seen as the difference

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(Mar. 7, 2016), https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations [https://perma.cc/CZD8-V8X9] (discussing the eugenics movement in the United States). *See generally* ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK (2016) (considering the Supreme Court case Buck v. Bell, 274 U.S. 200 (1927), in which the Court condoned government-sponsored sterilization of the "feebleminded" and others with "undesirable" traits).

60. *The Supreme Court Ruling that Led to 70,000 Forced Sterilizations*, *supra* note 59.

61. *Id.*

62. *Id.*; *see* Buck v. Bell, 274 U.S. 200 (1927). The majority of *Buck v. Bell* has since been repudiated. *See, e.g.*, Fieger v. Thomas, 74 F.3d 740, 750 (6th Cir. 1996).

63. Kalantry, *supra* note 53, at 6 (citing Adam Cohen, *Clarence Thomas Knows Nothing of My Work*, ATLANTIC (May 29, 2019), https://www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455/ [https://perma.cc/4YA3-ZM49]); *see also* Eli Rosenberg, *Clarence Thomas Tried to Link Abortion to Eugenics. Seven Historians Told the Post He's Wrong.*, WASH. POST (May 30, 2019), https://www.washingtonpost.com/history/2019/05/31/clarence-thomas-tried-link-abortion-eugenics-seven-historians-told-post-hes-wrong/ [https://perma.cc/7GEV-VNQZ].

64. *See* Kalantry, *supra* note 53, at 8.

65. *See, e.g.*, Emily Jackson, *Abortion, Autonomy, and Prenatal Diagnosis*, 9 SOC. & LEGAL STUD. 467 (2000) (discussing how reason-specific abortion laws chip away at an individual's autonomy and discredit an individual's medical decisions, and the paternalistic nature of such laws).

between "I do not want a child that is X, Y, or Z," for whatever reason, and "I do not think X, Y, or Z people/communities should exist, and I am consciously acting to limit their presence in society and improve the quality of the population by getting this abortion."

*C. The Pre-*Dobbs *Fractured Circuit*

1. The Seventh and Eighth Circuits Found Reason-Specific Bans Are Unconstitutional

In *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of Indiana State Department of Health* (*PPINK*), the Seventh Circuit upheld a permanent injunction preventing the enforcement of an Indiana law which prohibited abortions for certain reasons.[66] In relevant part, the provisions challenged in *PPINK* prohibited someone from performing an abortion if they knew the individual seeking the abortion was seeking it "solely" for one of the listed reasons, including: the fetus' sex;[67] because the fetus has been "diagnosed with Down syndrome or has a potential diagnosis of Down syndrome" or "any other disability[;]"[68] or because of the fetus' "race, color, national origin, or ancestry[.]"[69] These provisions are referred to as the "non-discrimination provisions."[70] The state enacted these non-discrimination provisions because of technological advances that allowed for non-invasive genetic testing for disabilities, such as Down syndrome, at earlier stages of pregnancy.[71]

The Seventh Circuit found that the non-discrimination provisions violated established Supreme Court precedent that upholds an individual's right to terminate pregnancy prior to viability and the state's inability to prohibit the exercise of that right.[72] In doing so, the court considered the right established by *Casey* to be unconditional—an individual cannot be prohibited from making the "ultimate decision" to terminate their pregnancy before it is viable.[73]

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66. *See PPINK*, 888 F.3d 300 (7th Cir.), *rev'd in part sub nom.*, Box v. Planned Parenthood of Indiana & Kentucky, Inc., 139 S. Ct. 1780 (2019);

67. *Id.* (citing IND. CODE §§ 16-34-4-4 to -5 (2016)).

68. *Id.* (citing IND. CODE §§ 16-34-4-6 to -7 (2016)). "[A]ny other disability" was defined as "any disease, defect, or disorder that is genetically inherited," and included both physical and mental disabilities. IND. CODE § 16-34-4-1 (2016). "[P]otential Diagnosis" was defined as "the presence of some risk factors that indicate that a health problem may occur[.]" *Id.* § 16-34-4-3.

69. *Id.* (citing IND. CODE § 16-34-4-8 (2016)).

70. *Id.*

71. *Id.* (mentioning specifically "cell-free DNA testing," which can screen for different genetic disabilities as early as ten weeks into pregnancy).

72. *Id.* at 302.

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

A few years later, the Eighth Circuit faced a similar situation in *Reproductive Health Services of Planned Parenthood of the St. Louis Region v. Parson*, which in part concerned a Down syndrome provision in a Missouri anti-abortion law.[74] Here, the court followed the Seventh Circuit and found the provisions unconstitutional under the right affirmed in *Casey*.[75] While Missouri contended that the Down syndrome provision was a "regulation" on pre-viability abortions, the court—like the *PPINK* court—found that because an individual who wants an abortion (pre-viability) "solely because of a prenatal diagnosis, test, or screening indicating Down [s]yndrome or the potential of Down [s]yndrome" would be completely prohibited from getting an abortion, the provision constituted a complete ban.[76]

In a second case, the Eighth Circuit came to the same conclusion regarding an Arkansas Down syndrome prohibition.[77] The court determined that such a ban was incompatible with the individual's right to privacy; the court stated that "it is 'inconsistent to hold that [an individual]'s right of privacy to terminate a pregnancy exists if . . . the State can eliminate this privacy right if [they want] to terminate [their] pregnancy for a particular purpose.'"[78]

ii. Uncertainty in the Sixth Circuit

On the other hand, the Sixth Circuit has come to contradictory conclusions regarding reason-specific abortion bans. The Sixth Circuit has both overturned a preliminary injunction blocking an Ohio reason-specific anti-abortion law and upheld a preliminary injunction blocking a similar Tennessee anti-abortion law.[79] In *Preterm-Cleveland v. McCloud*,

74. Reprod. Health Servs. of Planned Parenthood of the St. Louis Region v. Parson, 1 F.4th 552 (8th Cir. 2021) (discussing a gestational age provision; both provisions were part of Missouri House Bill 126 which was scheduled to go into effect in August 2019); *see* MO. REV. STAT. §§ 188.056–.058, 188.375 (2019) (providing the gestational age provision that "no abortion shall be performed or induced . . . at eight weeks gestational age or later, except in cases of medical emergency[,]" and including similar provisions for abortions at or after fourteen, eighteen, and twenty weeks); *id.* § 188.038 (2019) (including the Down syndrome provision, which, similar to the law at issue in *PPINK*, prohibits abortions if the provider "knows that [the individual] is seeking the abortion solely because of a prenatal diagnosis, test, or screening indicating Down Syndrome or the potential for Down Syndrome . . . .").

75. *Parson*, 1 F.4th at 559–60.

76. *Id.* at 557 (citing MO. REV. STAT. § 188.038.2 (2019)).

77. *See* Little Rock Fam. Plan. Servs. v. Rutledge, 984 F.3d 682 (8th Cir. 2021), *vacated*, 142 S. Ct. 2894 (2022).

78. *Id.* at 690 (quoting *PPINK*, 888 F.3d 300, 303 (7th Cir.), *rev'd in part sub nom.*, Box v. Planned Parenthood of Indiana & Kentucky, Inc., 139 S. Ct. 1780 (2019)).

79. *See* Preterm-Cleveland v. McCloud, 994 F.3d 512 (6th Cir. 2021) (en banc) (finding the injunction erroneous), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Memphis Ctr. for Reprod. Health v. Slatery, 14 F.4th 409 (6th Cir. 2021) (upholding the injunction), *vacated*, *remanded*, No. 20-5969, 2022 WL 2570275 (6th Cir. June 28, 2022).

the court, in a 9-7 en banc decision, refused to block an Ohio Down syndrome abortion ban.[80] The Ohio law at issue, House Bill 214 (H.B. 214), states, in relevant part,

> No person shall purposely perform or induce or attempt to perform or induce an abortion on a pregnant [individual] if the person has knowledge that the pregnant [individual] is seeking the abortion, in whole or part, because of any 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 the unborn child has Down syndrome.[81]

The plaintiff in *Preterm-Cleveland* had argued that the right to a pre-viability abortion is absolute, so the Ohio law violates that right.[82] The court decided this argument was flawed on three grounds: 1) the right to a pre-viability abortion is not absolute; 2) "viability is not germane to this analysis or decision[;]" and 3) the "right" actually implicated in this case is not the individual's right "merely to obtain an abortion."[83] In determining that pre-viability abortion restrictions are not inherently unconstitutional, the court relied on the undue burden standard and the Supreme Court's contention that an individual's right to an abortion is not absolute.[84]

As to the second point, the court justified its determination that viability was irrelevant to the issue at bar because the strength of the State's interests[85] are "the same throughout pregnancy, from the first day to the last. Put another way, if these interests would support H.B. 214 after viability, then they support it equally before viability because none of them depends on a distinction between whether a fetus is a person or a nonperson."[86] However, this reasoning arguably completely disregards

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80. *See Preterm-Cleveland*, 994 F.3d at 512; Debra Cassens Weiss, *Full* Memphis Ctr. for Reprod. Health v. Slatery, 14 F.4th 409 (6th Cir. 2021) (upholding the injunction), *vacated*, *remanded*, No. 20-5969, 2022 WL 2570275 (6th Cir. June 28, 2022).*6th Circuit Upholds 'Don't Ask, Don't Tell' Law Punishing Docs Who Perform Down Syndrome Abortions*, A.B.A. J. (Apr. 13, 2021), https://www.abajournal.com/news/article/full-6th-circuit-upholds-dont-ask-dont-tell-law-punishing-docs-who-knowingly-perform-down-syndrome-abortions [https://perma.cc/86YS-7KM6].

81. *Preterm-Cleveland*, 994 F.3d at 517 (quoting OHIO REV. CODE ANN. § 2919.10(B) (West 2018)).

82. *Id.* at 520.

83. *Id.*

84. *See id.* at 520–21, 524–25.

85. *Id.* at 521 ("[Ohio's interests are:] 1) protecting the Down syndrome community from stigma it suffers from the practice of Down-syndrome-selective abortions; 2) protecting [individuals] whose fetuses have Down syndrome from coercion by doctors who espouse and advocate the abortion of all such fetuses; and 3) protecting the integrity and ethics of the medical profession by preventing doctors from enabling such targeted abortions.").

86. *Id.* at 521.

the holding in *Casey* that a State's interests, when unrelated to maternal health, do not become "compelling" until viability.[87]

Finally, the court found that it is not actually a ban on an individual's ability or right to get an abortion because the pregnant person could technically still get an abortion in the event of a fetal diagnosis of Down syndrome—the physician performing the abortion just cannot know that a Down syndrome diagnosis is a reason their patient is seeking an abortion.[88] Instead of impacting an individual's right to get a pre-viability abortion, the court stated that its understanding of H.B. 214 was that it merely denies an individual "the doctor of [their] choosing when, and only when, that doctor . . . is a doctor who knows that [their] reason for the abortion is because [they do not] want a child with Down syndrome[;]" which it found to not constitute a substantial or undue burden.[89] When the plaintiffs raised the contention that "knowledge" is too broadly defined, the court put the onus on the individual seeking the abortion to not cause their doctor to violate H.B. 214 by simply not stating that they want an abortion because the fetus has Down syndrome.[90]

A few months later, and in a tone completely different from the *Preterm-Cleveland* opinion, the Sixth Circuit affirmed a district court's finding that provisions of Tennessee House Bill 2263 (H.B. 2263)—which criminalized the performance of an abortion if the physician knows the reason for the abortion is because of the fetus' race, sex, or Down syndrome diagnosis—were constitutionally unsound.[91] The court applied the undue burden test to the statute; it relied on Chief Justice Roberts' concurrence in *June Medical Services, L.L.C. v. Russo*, which "emphasized that if a regulation creates a substantial obstacle to [an individual] seeking a pre-viability abortion, that finding constitutes a

87. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); *see also* Whole Women's Heath v. Hellerstedt, 136 S. Ct. 2292 (2016) (affirming the "viability" standard of *Casey*). In other words, the court in *Preterm-Cleveland* interprets *Roe* as being exclusively about the State's interest in the potential life of a fetus and determines that in this instance, the interest of "protecting potential fetal life" is not explicitly present in H.B. 214, so therefore the issue of viability is not relevant.

88. *Preterm-Cleveland*, 994 F.3d at 521.

89. *Id.* at 522.

90. *Id.* at 529 (citation omitted) ("'The plaintiffs are right that 'knowledge' is defined broadly. But Ohio's broad definition of knowledge does not alter the reality that the [individual] remains in control of who knows, and who does not know, the reason for [their] abortion.").

91. Memphis Ctr. for Reprod. Health v. Slatery, 14 F.4th 409, 416 (6th Cir. 2021) (noting while the statute provides an exception for medical emergencies, it expressly excludes "a claim or diagnosis related to the [individual's] mental health"), *vacated*, *remanded*, No. 20-5969, 2022 WL 2570275 (6th Cir. June 28, 2022); *see* TENN. CODE ANN. § 216(a)(4) (2020) (containing a mental health exclusion); *see, e.g.*, Marie Feyche, *Federal Appeals Court Blocks Tennessee Six-Week and 'Reason' Bans on Abortion*, JURIST (Sept. 11, 2021), https://www.jurist.org/news/2021/09/federal-appeals-court-blocks-tennessee-six-week-and-reason-bans-on-abortion/ [https://perma.cc/3D39-S2DY].

sufficient basis to invalidate the regulation."[92] Under this test, the court determined that the provisions at issue posed a substantial burden to an individual seeking an abortion.[93]

The Sixth Circuit distinguished the provisions at issue in this case with those at issue in *Preterm-Cleveland*. Here, the district court had found the law to be unconstitutionally vague and thus void, while the court in *Preterm-Cleveland* did not address this argument.[94] The court also noted other important distinguishing factors, including that the Tennessee law at issue also deals with fetal sex and race—while the Ohio law in *Preterm-Cleveland* did not—and that the language of the laws and the facts on record differ.[95] While the court declined to address the substantive due-process issue,[96] the court affirmed the district court's finding that the statute was unconstitutionally vague because the language left many unanswered questions.[97] For example, "physicians testified . . . that they are unclear whether 'knowing' that an abortion is sought 'because of' a banned reason means that the reason must 'be the only reason, the main reason, one of many reasons, or simply a factor that the individual considered.'"[98] Further,

> [I]t [was] also unclear to those physicians whether performing an abortion when the patient's file notes a Down syndrome diagnosis or after a patient makes an inquiry regarding the sex of the fetus will be deemed an abortion "because of" one of those reasons and would thus incur criminal liability.[99]

However, on December 1, 2021, after a majority of the judges voted to grant a petition for en banc review of this case, the opinion was vacated.[100] On February 2, 2022, the court granted the State's renewed motion for a partial stay of preliminary injunction pending the appeal.[101] In her dissent, Circuit Judge Moore—one of the three judges on the original panel—noted that not only did the court stay "the portion of the district court's order enjoining Tennessee's reason bans," but it also refused to hear the case until the Supreme Court made a decision in *Dobbs*

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92. *Memphis Ctr. for Reprod. Health*, 14 F.4th at 425 (citing June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103, 2139 (2020)).

93. *Id.*

94. *Id.* at 429.

95. *Id.* (noting that because of these reasons, even if the *Preterm-Cleveland* court addressed the void-for-vagueness argument, the court's analysis would differ).

96. *Id.* at 435 (citations omitted) (directing the district court to decide the issue by evaluating whether the State's purported interest in preventing discrimination is legitimate).

97. *Id.* at 430.

98. *Id.*

99. *Id.*

100. *See* Memphis Ctr. for Reprod. Health v. Slatery, 18 F.4th 550 (6th Cir. 2021) (mem.).

101. *See* Memphis Ctr. for Reprod. Health v. Slatery, 24 F.4th 1069 (6th Cir. 2022) (mem.).

v. Jackson Women's Health Organization.[102] The court wanted to wait for *Dobbs* because the case could impact its decision on the pre-viability ban, though this is a completely separate part of the law.[103] Judge Moore argued that by waiting for the *Dobbs* decision—combined with the granting of the partial stay of the district court's preliminary injunction—the court's action "has the effect of reversing a thoughtful and thorough district court opinion indefinitely . . . ."[104] Furthermore, Judge Moore posited that this action—or rather, inaction—would be pointless if the Supreme Court were to uphold its precedent in *Dobbs*; if, on the other hand, the Supreme Court were to announce a new standard in *Dobbs*, the circuit court would have been the first to apply the new standard "without the benefit of district court factfinding tailored to that standard . . . [which] would manifest reckless overconfidence and unprincipled disregard for the normal judicial process."[105] Four days after the *Dobbs* decision, the Sixth Circuit vacated the preliminary injunction.[106] The case has now been remanded for further proceedings.[107]

Analysis

In the instance of the reason-specific anti-abortion laws discussed above, the State focuses the restrictions on the abortion provider rather than directly on the individual seeking an abortion.[108] The common argument made in defending such laws is something along the lines of the restriction being "easy" to bypass, because all the individual seeking the abortion must do is not tell their medical provider about why they want an abortion—or at the very least not disclose their illicit reason for wanting an abortion.[109] However, such an argument is disingenuous on the part of the states pushing these laws and the courts that support

102. *Id.* at 1071 (Moore, J., dissenting).

103. *Id.*

104. *Id.*

105. *Id.* at 1071–72. Justice Moore also cited United States v. Ramamoorthy, 949 F.3d 955, 963 (6th Cir. 2020), noting that "[c]ourts of appeal are not equipped to decide factual questions in the first instance." *Id.* at 1071.

106. Memphis Ctr. for Reprod. Health v. Slatery, No. 20-5969, 2022 WL 2570275, at *1 (6th Cir. June 28, 2022).

107. *Id.*

108. *See PPINK*, 888 F.3d 300 (7th Cir.), *rev'd in part sub nom.*, Box v. Planned Parenthood of Indiana & Kentucky, Inc., 139 S. Ct. 1780 (2019).

109. *See, e.g.*, Preterm-Cleveland v. McCloud, 994 F.3d 512, 521–22 (6th Cir. 2021) (en banc) ("Even under the full force of [House Bill] 214, [an individual] in Ohio who does not want a child with Down syndrome may lawfully obtain an abortion solely for that reason. [The law] does not prohibit [them] from choosing or obtaining an abortion for that, or any other, reason. It bars a doctor from aborting a pregnancy when that doctor knows the . . . specific reason and that [the] reason is: the . . . child will have Down syndrome and, because of that, [the individual] does not want it.").

them; particularly in light of the hostility that abortion providers and individuals seeking abortions face.[110] Plaintiffs—namely abortion providers on behalf of themselves and their patients—in all cases argue that such laws will result in a virtual prohibition of pre-viability abortions because, due to the lack of certainty of what constitutes "knowledge" of an individual's illicit reason for seeking an abortion, they will be forced to deny these patients an abortion out of fear of being found guilty of a felony.[111]

Pre-*Dobbs*, these laws have typically been assessed under their implications for the Fourteenth Amendment, since the right to abortion has been found to fall under the liberty and privacy rights granted by that Amendment.[112] While the Constitution does not expressly denote a right to privacy, the Supreme Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist . . . ."[113] Though this right is not absolute, Supreme Court precedent clearly established that state interests in the potential life of a fetus do not become compelling until the fetus has reached viability, and these reason-specific anti-abortion laws are typically written to apply at any point in an individual's pregnancy.[114] Therefore, these anti-abortion laws were inherently unconstitutional pre-*Dobbs*. Furthermore, given the deeply personal considerations that go into an individual's decision to get an

110. Seemingly in various instances any kind of pregnancy termination, either voluntary or involuntary, is met with suspicion, leading to the criminalization of individuals for the loss of a pregnancy. *See* Barbara Rodriguez, *Criminal Convictions for Abortion, Miscarriage? Texas Abortion Ban Previews Life Without* Roe v. Wade, 19TH NEWS (Sept. 2, 2021), https://19thnews.org/2021/09/criminal-convictions-abortion-miscarriage-texas-abortion-ban/ [https://perma.cc/B3MZ-JAQH].

111. *Preterm-Cleveland*, 994 F.3d at 524; *see also* Memphis Ctr. for Reprod. Health v. Slatery, 14 F.4th 409, 421 (6th Cir. 2021) (noting that the murkiness of the "knowledge" requirement would force physicians to "assume the patient had accounted for such a factor [such as diagnosis, sex, race] in making [their] decision, and would not be able to provide an abortion"), *vacated*, *remanded*, No. 20-5969, 2022 WL 2570275 (6th Cir. June 28, 2022); Reprod. Health Servs. of Planned Parenthood of the St. Louis Region v. Parson, 1 F.4th 552, 562 (8th Cir. 2021) (describing plaintiff's argument that the Down syndrome provision would put physicians at an "unjustifiable risk in providing abortion care to patients if [they] know that a patient has had a prenatal diagnosis, or potential diagnosis, of Down [s]yndrome and . . . [they would] be forced to turn [the patient] away and tell [them] they cannot get this care in Missouri").

112. Roe v. Wade, 410 U.S. 113, 153 (1973).

113. *Id.* at 152.

114. *See, e.g.*, *Memphis Ctr. for Reprod. Health*, 14 F.4th 409 (noting that Tennessee's anti-abortion bill, H.B. 2263, which included an "anti-discrimination" provision making it a felony for a physician to perform an abortion if they know that the pregnant person is seeking an abortion because of the fetus's sex, race, or potential for Down syndrome, was in part unconstitutional because it restricted access to pre-viability abortions; the anti-discrimination provision did not include any language restricting the provision's scope to "viable" pregnancies); *PPINK*, 888 F.3d 300, 302 (7th Cir.) (finding IND. CODE § 16-34-4-4 to be an unconstitutional pre-viability abortion ban), *rev'd in part sub nom.*, Box v. Planned Parenthood of Indiana & Kentucky, Inc., 139 S. Ct. 1780 (2019).

abortion, restricting that decision to reasons the State deems "valid" is inherently inconsistent with the notion of personal privacy as it was ascribed to the right to abortion, and personal privacy in general.[115]

A. Claiming Reason Specific Anti-Abortion Laws are "Anti-Discrimination" Laws Ascribes Legal Personhood to the Fetus at the Expense of the Pregnant Person's Constitutional Rights

Perhaps one of the most crucial problems of these particular reason-specific anti-abortion laws is that they are generally—and rather weakly or disingenuously—framed by supporters as being "anti-discrimination" laws.[116] This framing is especially problematic because states, in supporting and pushing for these laws, and the courts that uphold the laws are ascribing personhood to a fetus that does not (at least pre-viability) have any well-defined, constitutionally recognized personhood rights under the Fourteenth Amendment, at the expense of the pregnant individual's well-established constitutional rights.[117]

While states have the ability to pass, and have indeed passed, "fetal personhood" or "fetal rights" laws,[118] that does not necessarily mean that they could apply such personhood in the abortion context. As abortion rights jurisprudence stood pre-*Dobbs*, fetal rights/right-to-life laws were clearly unconstitutional under *Roe* and *Casey*, particularly where they

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115. Little Rock Fam. Planning Servs. v. Rutledge, 984 F.3d 682, 690 (8th Cir. 2021) (quoting *PPINK*, 888 F.3d at 307) ("[I]t is 'inconsistent to hold that [an individual]'s right to privacy to terminate a pregnancy exists if . . . the State can eliminate this privacy right if [they want] to terminate [their] pregnancy for a particular purpose.'"), *vacated*, *remanded*, 142 S. Ct. 2894 (2022) (mem.).

116. *See Preterm-Cleveland*, 994 F.3d at 551 (referring to H.B. 214 as "the anti-discrimination law"); *Memphis Ctr. for Reprod. Health*, 14 F.4th at 421 (discussing the State's argument that the law promotes its "purported interest in preventing discrimination"); *PPINK*, 888 F.3d at 302 (referring to relevant provisions as "the non-discrimination provisions").

117. *Preterm-Cleveland*, 994 F.3d at 521 (citing *Roe*, 410 U.S. at 158) ("The Court held that, because 'the word 'person,' as used in the Fourteenth Amendment, does not include the unborn' . . . the State had no interest in defending the life of a *non*person[.]"); *Roe*, 410 U.S. at 161–62 ("In areas other than criminal abortion, the law has been reluctant to endorse any theory that life . . . begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth . . . .In short, the unborn have never been recognized in the law as persons in the whole sense.").

118. Such legislation includes fetal homicide laws which may either expand existing homicide law to cover fetuses as possible victims or create a standalone homicide law for fetuses. *See, e.g.*, *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, *supra* note 16. The Court in *Roe* also notes that recovery for prenatal injuries is generally permitted in most states and that some states allow for parents to pursue wrongful death actions because of prenatal injuries; yet such actions "would appear to . . . vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life." *Roe*, 410 U.S. at 162.

expressly applied at any stage of pregnancy.[119] So, while a state may "declare personhood" for fetuses (and embryos),[120] it could not do so and apply it in a way that restricted an individual's right to an abortion. In other words, states did not have the authority to "recognize fetal personhood" when it came to the rights secured by *Roe* and *Casey*, at the very least as far as pre-viability abortions went, since, prior to viability, a state did not have a compelling interest sufficient to warrant a prohibition on an individual's right to obtain an abortion.[121] Though, admittedly, the term "viability" itself is not a particularly specific term, given the high variability when any particular fetus actually becomes viable—meaning each pregnancy is different, and it varies as to when any particular fetus could survive outside the uterus.[122]

Ascribing legal personhood to a pre-viability fetus (or assuming this) is precarious because, anti-abortion lawmakers and the courts supporting them can be seen as either ignoring the legal personhood rights (i.e., constitutional rights) of the person carrying the fetus, or as deciding that their legal personhood is somehow lesser than that of the fetus. In this way, the constitutional rights of the fetus and the pregnant person (who wishes to have an abortion) are necessarily at odds. It follows that because a pre-viability fetus is not a person under the law, laws meant to prohibit discrimination cannot apply to it.[123] This conclusion is also congruent with the Supreme Court's holding in *Casey* that, "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to [an individual's] effective right to elect [to have an abortion]."[124]

Ultimately, in the context of abortion, ascribing legal personhood (and by extension constitutional rights) to a fetus—pre- or post-viability—could not co-exist with the maintenance of individuals'

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119. *See, e.g.*, *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, *supra* note 16.

120. *A Fetal Right to Life?*, *supra* note 16.

121. *Id.* (noting that *Roe* and *Casey* would have to be overturned for states to apply "fetal personhood" to abortion); *Roe*, 410 U.S. at 153; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

122. The nuances of fetal "viability" and the "viability" standard are outside the scope of this Article.

123. *Id.*; *see also* Jackson, *supra* note 65, at 481 ("[I]f one accepts that a fetus does not have legal personality, rules that prohibit discrimination cannot apply *in utero*." (citation omitted)). Even after *Dobbs*, a fetus is not a person as far as the Fourteenth Amendment is concerned. *See* Preterm-Cleveland v. McCloud, 994 F.3d 512, 521 (6th Cir. 2021) (en banc) (citing *Roe*, 410 U.S. at 158) ("'The Court held that, because 'the word 'person,' as used in the Fourteenth Amendment, does not include the unborn . . . the State had no interest in defending the life of a *non*person.").

124. Reprod. Health Servs. of Planned Parenthood of the St. Louis Region v. Parson, 1 F.4th 552, 555–60 (8th Cir. 2021) (quoting *Casey*, 505 U.S. at 846).

previous right to abortion. Such laws, without proper and adequate protections for abortion,[125] not only put pregnant individuals' constitutional rights at jeopardy, but they also have the potential of putting their lives and physical freedom at risk as well.[126] The Court in *Roe* stated, "by adopting one theory of life, [a state may not] override the rights of the pregnant [individual] that are at stake;"[127] this rings true when it comes to fetal rights legislation (and should still ring true despite the *Dobbs* decision). No interest that the state possibly could have in preserving the potential life of a fetus or any rights of that fetus declared by the state, especially prior to its viability, should take precedence over an individual's bodily autonomy and legal personhood.

Now that the federal right to abortion no longer exists, such constitutional analysis and valuing of rights will take place at the state level. State constitutions are generally morphologically similar to the federal constitution; so, while states cannot provide less protection than the federal constitution, states can, and often do, interpret their state constitutions more expansively than the federal constitution.[128] Furthermore, state courts have found protection for abortion in state constitutions in similar provisions to the federal constitution, such as due process and equal protection clauses, privacy rights, and gender equality protections—meaning logic similar to that used in *Roe* and *Casey* can be used to support finding a constitutional right to obtain an abortion at the state level.[129] That being said, absent any explicit constitutional amendments or legislative action at the state level, a right to abortion in any particular state is not guaranteed and previous state supreme court rulings remain vulnerable in abortion-hostile states.[130]

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125. *See What's Wrong with Fetal Rights*, *supra* note 16 (noting that fetal rights legislation must exempt abortion and should "explicitly cover: 1) abortions performed by health care workers . . . and 2) self-abortions" and arguing that without such protections such laws could make all abortions illegal if *Roe* gets overturned).

126. *Id.* (citing various cases where individuals faced criminal charges after attempting to abort their pregnancy themselves; and describing instances of "pregnancy policing" where individuals were charged for partaking in certain activities deemed "harmful" to the pregnancy or for making certain medical decisions).

127. 410 U.S. at 162.

128. *See, e.g.*, Women of State of Minn. *ex rel.* Doe v. Gomez, 542 N.W.2d 17, 30 (Minn. 1995) ("This court has long recognized that we may interpret the Minnesota Constitution to offer greater protection of individual rights than the U.S. Supreme Court has afforded under the federal constitution.").

129. *See, e.g.*, STATE CONSTITUTIONS, *supra* note 2 (discussing how various state courts have found abortion to be protected under the state's constitution); Yeargain, *supra* note 2 (providing analysis on how state courts have interpreted their constitutions regarding abortion, initiatives being taking to amend state constitutions, and discussion on the important role of judicial politics).

130. *See, e.g.*, Yeargain, *supra* note 2; STATE CONSTITUTIONS, *supra* note 2. Additionally, movement in some states to enshrine "fetal rights" (which tend to be necessarily in conflict with the rights of the pregnant individual) in state constitutions and laws adds another layer

B. The Complications of the First Amendment and Vagueness Doctrine for Reason-Specific Abortion Bans

Furthermore—and perhaps more importantly so given the *Dobbs* decision—reason-specific abortion laws have also raised questions about their constitutional implications under the vagueness doctrine and the First Amendment right to freedom of speech.[131] The very nature of these laws seem to raise issues of vagueness rather easily. As mentioned above, these laws require an abortion provider to "know" that an individual is seeking an abortion for some non-prohibited reason in order to perform the procedure (and it depends on the specific law as to whether the prohibited reason has to be the "sole" reason for seeking an abortion or whether it is sufficient that the reason simply be a factor in the decision).[132] Because of this uncertainty, and sometimes despite a court's "assurance" that "knowledge of the diagnosis is not knowledge of the reason,"[133] physicians still (rightfully) contend that they will be effectively forced to not perform an abortion when they know of a diagnosis of Down syndrome or that the patient had inquired about the sex of the fetus, out of fear that mere knowledge of such things could be used to show their knowledge of a patient's reason for seeking an abortion.[134] While such laws could be rewritten to reduce confusion about what situations would trigger a physician's knowledge, like an explicit patient statement about their reasoning behind an abortion, there would likely still remain a dangerous grey area where a physician's "knowledge" of a patient's prohibited reason for seeking an abortion could possibly be inferred. For example, if, immediately following a patient being told that their fetus is male or female, they request an abortion. Therefore, the "vagueness" hurdle may be one that is near impossible to clear.

There appears to be a strong argument for finding that these laws restrict an individual's freedom of speech rights under the First Amendment. Laws such as the ones discussed above technically do not prohibit an individual from getting an abortion for a specific reason, they rather penalize physicians when they know that their patient is seeking

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of complexity. *See, e.g.*, *What's Wrong with Fetal Rights*, *supra* note 16.

131. *Memphis Ctr. for Reprod. Health*, 14 F.4th at 434 (finding reason-specific anti-abortion law to be unconstitutionally vague/void); *Preterm-Cleveland*, 994 F.3d 512, 522 (6th Cir. 2021) (Cole, C.J., dissenting) (arguing in his dissent that the law prohibits an individual from exercising their right, protected by the First Amendment's Free Speech Clause, to tell their doctor about their "Down Syndrome-selective" reason for the abortion).

132. *See, e.g.*, MO. REV. STAT. § 188.038 (2019).

133. *Preterm-Cleveland*, 994 F.3d at 519.

134. *See Memphis Ctr. for Reprod. Health*, 14 F.4th at 418–19; Reprod. Health Servs. of Planned Parenthood of the St. Louis Region v. Parson, 1 F.4th 552 (8th Cir. 2021).

the procedure for a prohibited reason.[135] Therefore, it can be argued that while an individual's ability to obtain an abortion is untouched, the laws still likely violate their right to free speech. As a result, patients will essentially be prohibited from having candid conversations with their providers out of fear that whatever they ask or disclose could end up triggering the law's "knowledge" provisions and thus preventing them from obtaining an abortion from that specific provider (which, for some individuals, may be the only accessible provider).[136] Furthermore, under the First Amendment argument, it essentially does not matter if the law imposes an unconstitutional undue burden on an individual's right to obtain an abortion because regardless, such laws restrict the right to free speech.[137] And as Chief Judge Cole in *Preterm-Cleveland* noted in his dissent, "states cannot force citizens to trade one constitutional right for another," which is undoubtedly one of the major issues that such laws pose.[138]

C. The Uncertainty of an "Undue Burden" and the Implications Reason-Specific Abortion Bans Have for Marginalized Individuals

As discussed above, pre-*Dobbs*, an anti-abortion law was considered unconstitutional when it created a substantial obstacle to an individual's ability to access an abortion—before viability—in a "large fraction of the cases in which [the law] is relevant."[139] On its face, this standard appears broad enough to allow courts to deal with the unique situations of their

135. *See Preterm-Cleveland*, 994 F.3d at 540.

136. *See, e.g.*, *Memphis Ctr. for Reprod. Health*, 14 F.4th at 435 (noting plaintiffs assertion that "the majority of the patients . . . are economically disadvantaged persons of color . . . [and] faced substantial obstacles in obtaining abortion care even prior to the bans"); ANNA BERNSTEIN & KELLY M. JONES, INST. FOR WOMEN'S POL'Y RSCH., THE ECONOMIC EFFECTS OF ABORTION ACCESS: A REVIEW OF THE EVIDENCE 21 (2019) (noting that for individuals in states with highly restrictive anti-abortion policies, and particularly for individuals without the means to obtain abortions out-of-state, restrictive policies essentially eliminate their access to abortion); Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, 19 GUTTMACHER POL'Y REV. 46 (2016), https://www.guttmacher.org/sites/default/files/article_files/gpr1904616_0.pdf [https://perma.cc/T33Z-352K] (discussing the disproportionate impacts and restrictions on abortion access for disadvantaged individuals).

137. *Preterm-Cleveland*, 994 F.3d at 512 (Cole, C.J., dissenting) (noting that even laws targeting discriminatory speech are unconstitutional).

138. *Id.* at 551. This reasoning could be applicable under state constitutions as well, particularly in states where their supreme courts have found abortion to be a protected right under the state's constitution. *See, e.g.*, *After Roe Fell*, *supra* note 2 (providing a concise outline of abortion laws, restrictions, and protections in each U.S. state and territory); STATE CONSTITUTIONS, *supra* note 2 (providing legal analysis of case law in various states where abortion has been found to be protected under the state's constitution in some way).

139. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2132 (2020) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992)).

own jurisdictions in regards to abortion access, and to consider the implications that whatever law at issue might have for different groups of individuals. On the other hand, it is also broad enough to allow anti-abortion legislators to impose more restrictions on abortion access if they can convince the courts that any burdens their law may impose are not substantial to a "large fraction" of the relevant population.

There does not seem to be a set formula that courts have used to determine which burdens on which populations are sufficient to make a law unconstitutional. For instance, in *Casey*, the Court struck down a provision that would have required married individuals to notify their spouses that they were seeking an abortion.[140] The Court analyzed evidence about the prevalence of spousal domestic abuse and considering the very real harm that an individual could be subjected to if required to inform their spouse of their decision to get an abortion.[141] In *Casey*, the Court noted that spousal domestic abuse impacts individuals "of all class levels, educational backgrounds, and racial, ethnic and religious groups;" thus, considering the high statistics for domestic abuse, the Court determined that "a significant number" of individuals would be prevented from getting an abortion.[142]

Yet, the same Court, in the same case, upheld the provision that required a twenty-four-hour waiting period before an individual was able to receive an abortion.[143] The district court's findings indicated that "for those [people] who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period would be 'particularly burdensome[;]'" yet the Supreme Court determined that these burdens were not significant enough to hold the provision unconstitutional.[144] This determination is somewhat ironic, at least as far as the burden imposed on "those who [would] have difficulty explaining their whereabouts to *husbands*, employers, or others"[145] is concerned, because someone who has to come up with an excuse as to their whereabouts for their spouse is likely in a situation where there is, or there is a higher likelihood of, spousal domestic abuse—which the Court determined was a sufficient enough burden or risk to hold the spousal notification provision invalid.

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140. *Casey*, 505 U.S. at 833.

141. *Id.*

142. *Id.* at 889–93.

143. *Id.* at 881 (noting the provision, except in a medical emergency, "require[d] that at least 24 hours before performing an abortion a physician inform the [individual] of the nature of the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child'" and the individual had to give informed consent).

144. *Id.* at 885–86.

145. *Id.* (emphasis added).

Furthermore, the Supreme Court disagreed with the district court's determination "that the 'particularly burdensome' effects of the waiting period on some [individuals] require[d] its invalidation."[146] The Court backed this statement by concluding that "[a] particular burden is not of necessity a substantial obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the [individuals] of that group."[147] So, while the Court was willing to recognize the situation of married individuals in determining that the spousal notification requirement was an undue burden, it refused to extend that same consideration to individuals who reside in rural areas, and lower-income and poor individuals—all of whom may also be married and at risk of spousal domestic abuse.

In *Whole Women's Health* and *June Medical Services*, the Supreme Court struck down anti-abortion provisions that would have resulted in a significant reduction in abortion providers in-state.[148] The Court reasoned that, such a reduction would result in "longer waiting times, [and] increased crowding," which could lead to an increased risk of abortion complications and prevent an individual from being able to choose to have a "noninvasive medication abortion."[149] Furthermore, the Court also noted that, were an individual able to obtain an appointment at an abortion clinic, they would likely face significantly increased driving distances—which in the case of *June Medical Services* would be doubled due to Louisiana's twenty-four-hour waiting period requirement—placing a higher burden on lower-income and poor individuals.[150] Still, the lower-income, poor, and rural individuals—who would be most burdened by the law—were given barely more than a passing glance.[151]

Therefore, given the inconsistency with which the undue burden test has been applied, reason-specific abortion bans posed a serious threat to the already restricted access to abortion that traditionally marginalized groups faced pre-*Dobbs*. This is true even more so post-*Dobbs*; now, individuals—principally vulnerable individuals—in abortion-hostile states where abortion is not outright banned will likely have to weather increasing burdens to abortion access as groups increase efforts to ban abortion access.[152] While these reason-specific anti-

146. *Id.* at 886–87.

147. *Id.*

148. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016); June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020).

149. *June Med. Servs. L.L.C.*, 140 S. Ct. at 2130 (citing *Whole Women's Health*, 136 S. Ct. at 2294).

150. *Id.*

151. *Id.*

152. *See generally*, *After Roe Fell*, *supra* note 2 (providing a concise outline of abortion laws, restrictions, and protections in each U.S. state and territory).

abortion laws restrict abortion access in general, the restriction will be felt more acutely by these marginalized groups. Particularly in the instance of race-based and sex-based abortion prohibitions, Black and Asian-American individuals have to bear the extra burdens that result from the racist and xenophobic stigmas that these laws perpetuate.[153] Additionally, while the impact of anomaly-based abortion prohibitions can impact anyone, the impacts of such laws will likely be felt most by lower-income individuals who may lack (or feel they lack) sufficient recourses to comfortably raise a child with a particular disability. The impacts stemming from these kinds of anti-abortion laws are also further compounded by the systemic disparities these communities tend to face—and of course are exacerbated by other intersectional circumstances such as residing in a rural location.[154]

Conclusion

In all, reason-specific abortion bans are just another tool anti-abortionists use to try and chip away at abortion access; and now that there is no longer a federal constitutional right to abortion, that tool has become significantly more dangerous. Supporters' attempts to appeal to anti-discrimination and anti-eugenics via inflammatory language, misinterpreted history, and misconstrued research are at minimum disingenuous, and at maximum dangerous for those who need or want to obtain an abortion.

The reasons for deciding to get an abortion are multi-faceted, meaning it is most likely impossible to deduce the specific reason—if there even is just one—an individual has for getting an abortion from general abortion statistics and demographics.[155] If these legislators truly cared about discrimination, there are a multitude of other things they could do to combat racial, sex-based, and disability discrimination that would be significantly more effective than policing the reasons an individual may have for getting an abortion and forcing individuals to give birth.[156] In light of *Dobbs*, it is crucial that reason-specific abortion laws

153. *Banning Abortions*, *supra* note 8; *see supra* Sections B.i–ii.

154. *Id.*

155. *Id.* (addressing claims that people of color, particularly Black people, are coerced or complicit in committing "genocide" against their own community by seeking abortions, are completely unfounded; there is no evidence suggesting a significant number of people actually get an abortion solely for these reasons).

156. These efforts could include ensuring people have living wages; creating effective poverty-reduction programs; increasing access to affordable pregnancy, reproductive, and general healthcare; and providing better assistance for individuals with disabilities and families with children with disabilities, for example. They could also not endorse sex- and race-based abortion bans because the rhetoric behind them is grounded in racism and xenophobia. *See, e.g.*, *Banning Abortions*, *supra* note 8; *supra* Sections B.i–ii.

get repealed and/or prevented from becoming law in the first place. If these anti-abortion laws are allowed to stand, they would be yet another nail in the coffin of abortion access for many marginalized groups—particularly in abortion-hostile states—when compounded with the other disparities they face when trying to access abortion and reproductive healthcare.