

A JURISPRUDENCE OF DOUBT: DISABILITY-BASED ABORTIONS, EUGENICS, AND THE UNDUE BURDEN TEST POST-*DOBBS*

Abstract: In 1973, in *Roe v. Wade*, the Supreme Court found, and immediately limited, a right to abortion. Since this landmark decision, state statutes have repeatedly challenged its scope. After the 1992 *Planned Parenthood of Southeastern Pennsylvania v. Casey* decision and until the 2022 *Dobbs v. Jackson Women's Health Organization* decision, the accepted standard for evaluating such statutes has been the undue burden test, which requires that courts assess whether state laws place a substantial obstacle in the path of women seeking abortion. But reason-based abortions, or abortions sought on the basis of race, sex, and disability, did not fit neatly within the undue burden test and the Court in *Dobbs* failed to provide an alternative solution. Since 2013, eleven states have enacted restrictions limiting reason-based abortions. In April 2021, prior to the Court's ruling in *Dobbs*, the U.S. Court of Appeals for the Sixth Circuit created a circuit split when it held in *Preterm-Cleveland v. McCloud* that disability-based abortion restrictions are constitutional as a measure of preventing eugenics. Perhaps even more surprising was the *Preterm-Cleveland* concurrence, which suggested not only that such restrictions are permissible, but that reason-based abortions themselves are a form of eugenics and thus impermissibly discriminatory under the Fourteenth Amendment. This Note examines the argument posited by the *Preterm-Cleveland* concurrence and reviews the pattern of inconsistent decisions under the undue burden framework prior to *Dobbs* to demonstrate the test's inability to settle the debate over disability-based abortion restrictions. The Note then argues that courts should begin their analysis of disability-based abortions with the Equal Protection Clause because such abortions represent a return to the discriminatory practices of early eugenics movements.

INTRODUCTION

In 1927, in the notorious case *Buck v. Bell*, the United States Supreme Court upheld the forced sterilization of Carrie Buck, a mentally disabled woman, when eight out of nine justices agreed that “[t]hree generations of imbeciles are enough.”¹ Nearly a century later, the eugenics movement pervading the

¹ *Buck v. Bell*, 274 U.S. 200, 205, 207 (1927) (finding that compulsory sterilization of Carrie Buck, a “feeble-minded” woman whose mother and daughter were also “feeble[.]minded,” did not violate her rights under the Fourteenth Amendment). See generally *Regulating Eugenics*, 121 HARV. L. REV. 1578, 1580 (2008) (describing *Buck v. Bell* as infamous and reviewing the facts of the case). Thought to have been raped as a teenager, Carrie Buck was committed to the State Colony for Epileptics and Feeble

country at the time of *Buck* has subsided, but the Court has never overturned its decision.² In April 2021, in *Preterm-Cleveland v. McCloud*, the U.S. Court of Appeals for the Sixth Circuit suggested that the eugenics movement was never eradicated, but simply renamed, and that today, reason-based abortions perpetuate the same discriminatory ideologies saturating the *Buck* opinion.³

Though few today would overtly favor eugenics, reason-based abortions remain a flashpoint of debate.⁴ One line of thinking, voiced perhaps most vociferously by Justice Clarence Thomas, decries reason-based abortions as a surreptitious effort to achieve eugenic goals by decreasing the populations of certain sexes, races, and capabilities.⁵ At the other end of the spectrum, how-

Minded—a mental institution in Virginia—by her foster parents after she became pregnant. John Kang, *The Soldier and the Imbecile: How Holmes's Manliness Fated Carrie Buck*, 47 AKRON L. REV. 1055, 1056 (2015). Virginia's Eugenical Sterilization Act allowed the state to sterilize people committed to the mental institution, justifying the procedure on the belief that "feeble[]minded[ness]" and similar conditions were hereditary. *Regulating Eugenics*, *supra*, at 1580–81, 1581 n.21 (reviewing the state statute); *Buck*, 274 U.S. at 205–06. Of the nine justices deciding the case, only Justice Butler dissented. *Buck*, 274 U.S. at 208 (Butler, J., dissenting). The Fourteenth Amendment forbids states from infringing on citizens' rights to life, liberty, and property, as well as from preventing citizens from enjoying equal treatment under the law. U.S. CONST. amend. XIV. Later, in the Supreme Court's decision in *Roe v. Wade*, Justice Blackmun relied on *Buck* to caution that the right to abortion defined in *Roe* was limited. *See Roe v. Wade*, 410 U.S. 113, 154 (1973) (noting that *Buck* supports the idea that there is no unlimited right to bodily autonomy), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); Jeannie Suk Gersen, *How Fetal Personhood Emerged as the Next Stage of the Abortion Wars*, NEW YORKER (June 5, 2019), <https://www.newyorker.com/news/our-columnists/how-fetal-personhood-emerged-as-the-next-stage-of-the-abortion-wars> [<https://perma.cc/VS9W-8W72>] (explaining how *Buck* was used to limit abortion post-*Roe*).

² *See* Gersen, *supra* note 1 (noting that *Buck* remains good law in that it has not been overturned); *Regulating Eugenics*, *supra* note 1, at 1582 (stating that the early eugenics movement is no longer popular). Although the eugenics movement that likely influenced the Court's decision in *Buck* has few, if any, supporters today, a new wave of eugenics has been introduced in recent years. *Regulating Eugenics*, *supra* note 1, at 1582. One form of modern eugenics is "liberal eugenics," which seeks to genetically engineer certain desirable characteristics in the unborn. *Id.* at 1582–83.

³ *See Preterm-Cleveland v. McCloud*, 994 F.3d 512, 536 (6th Cir. 2021) (Sutton, J., concurring) (discussing a state's interest in preventing discrimination against the unborn on the basis of disability, and noting that restrictions on reason-based abortions may be deemed anti-eugenics), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *id.* at 538, 540 (Griffin, J., concurring) (reviewing the history of the eugenics movement and criticizing reason-based abortions as a form of modern eugenics).

⁴ *See Regulating Eugenics*, *supra* note 1, at 1582 (labeling the early eugenics movement as immoral and arguing that although a modern form of eugenics has surfaced as potentially morally permissible, the early movement has few if any supporters). *But see id.* (noting that a modern form of eugenics, known as "liberal eugenics," supports some degree of genetic engineering by parents as a means of avoiding illnesses and physical traits that are deemed less desirable); Juliana Jiménez J., *California Compensates Victims of Forced Sterilizations, Many of Them Latinas*, NBC (July 23, 2021), <https://www.nbcnews.com/news/latino/california-compensates-victims-forced-sterilizations-many-latinas-rcna1471> [<https://perma.cc/25BV-ZBT8>] (reviewing California's history of forced sterilizations as a eugenic tool to eradicate minority groups, including the disabled, and explaining that forced sterilizations continued in California prisons until as late as 2010).

⁵ *See* *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1789–90, 1792 (2019) (Thomas, J., concurring) (explaining that the Supreme Court's decision not to overturn the U.S. Court

ever, is an equally adamant argument against restricting reason-based abortions, not as a form of eugenics, but rather as a preservation of women's equality.⁶ This moral quandary intensified in 2021, when the Sixth Circuit upheld Ohio's restriction on reason-based abortions, resulting in a circuit split that the Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization* left unresolved.⁷

of Appeals for the Seventh Circuit's holding invalidating Indiana's restriction on reason-based abortions did not constitute the Supreme Court's agreement with the Seventh Circuit, but rather its desire to allow other federal circuits to first weigh in on the issue, and arguing that reason-based abortions may in the near future be deemed a form of eugenics); Ariane de Vogue, *Why Clarence Thomas Wrote Over a Dozen Pages on Eugenics*, CNN, <https://www.cnn.com/2019/05/28/politics/clarence-thomas-eugenics-abortion/index.html> (May 28, 2019) [<https://perma.cc/X6ZC-XPJH>] (reviewing Justice Thomas's concurrence in *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, and discussing the implications of labeling reason-based abortions as eugenics). In his *Box* concurrence, Justice Thomas provided an extensive history of the foundation of Planned Parenthood, an American nonprofit health center that provides abortions internationally and performs the highest number of abortions in the United States. See 139 S. Ct. at 1783–84 (Thomas, J., concurring) (describing Margaret Sanger and Planned Parenthood in the early twentieth century); Stephen A. McCurdy, *Abortion and Public Health: Time for Another Look*, 83 LINCOLN Q. 20, 21 (2016) (arguing that Planned Parenthood founder Margaret Sanger brought racist ideologies to the organization and used eugenics to actualize her beliefs). But see *Who We Are*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/about-us/who-we-are> [<https://perma.cc/4VDM-H8AV>] (containing Planned Parenthood's explanation of how the organization operates and to whom it provides services). Started by Margaret Sanger to cleanse society of people whom she believed "never should have been born at all," Planned Parenthood's early years were marked by racist, ableist, and eugenic ideologies. See *Box*, 139 S. Ct. at 1784 (Thomas, J., concurring) (noting Margaret Sanger's belief that birth control and abortion prevented the "ever increasing, unceasingly spawning class of human beings who never should have been born at all" (quoting MARGARET SANGER, *THE PIVOT OF CIVILIZATION* 187 (1922))); *Regulating Eugenics*, *supra* note 1, at 1580 (providing further support that Sanger was a proponent of eugenics). Justice Thomas warned in his *Box* concurrence that the day will soon come when the Supreme Court will recognize reason-based abortions as tools of eugenics, and will be forced to determine whether eugenics can coexist with the Constitution. 139 S. Ct. at 1784 (Thomas, J., concurring).

⁶ 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, 878–80 (2020) (arguing that banning or restricting abortions sought on the basis of a fetal Down syndrome diagnosis is unconstitutional because it prevents women from enjoying robust, informed, and consensual medical care); Sital Kalantry, *Do Reason-Based Abortion Bans Prevent Eugenics?*, 107 CORNELL L. REV. 1, 4, 14, 19 (2021) (reviewing arguments for and against reason-based abortions, and concluding that reason-based abortion restrictions do not limit eugenics, but do limit women's reproductive rights); Marc Spindelman, *Embracing Casey: June Medical Services L.L.C. v. Russo and the Constitutionality of Reason-Based Abortion Bans*, 109 GEO. L.J. ONLINE 115, 115–16 (2020), <https://www.law.georgetown.edu/georgetown-law-journal/glj-online/109-online/embracing-casey/> [<https://perma.cc/TTG5-HPF2>] (arguing that the Supreme Court's interpretation of the undue burden test in *June Medical Services L.L.C. v. Russo* renders reason-based abortion bans unconstitutional, and contending that the Court will likely soon be called upon to hold as much).

⁷ Compare *Preterm-Cleveland*, 994 F.3d at 516 (reversing the district court's holding and finding Ohio's restriction on abortions sought on the basis of a fetal Down syndrome diagnosis unconstitutional because it satisfied the undue burden test), with *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 687, 689 (8th Cir. 2021) (finding reason-based abortion restrictions unconstitutional under the undue burden test), *vacated*, 142 S. Ct. 2894 (2022), and *Planned Parenthood of Ind. & Ky., Inc. (PPINK) v. Comm'r of the Ind. State Dep't of Health*, 888 F.3d 300, 302 (7th Cir. 2018) (holding that

Ohio's House Bill 214 prohibits physicians from participating in an abortion when they know the mother has sought the abortion due to a fetal Down syndrome diagnosis.⁸ Although the bill does not penalize the mother, it exposes a physician to hefty consequences, including imprisonment, loss of medical license, and money damages.⁹ A group of medical providers sued the state of Ohio shortly after the restriction went into effect, arguing that it violated a woman's right to an abortion under the Supreme Court's 1973 holding in *Roe v. Wade*.¹⁰ The district court agreed and ordered a preliminary injunction against the statute, which a Sixth Circuit panel affirmed.¹¹ After an en banc rehearing,

restricting sex-selective and disability-based abortions is unconstitutional under the undue burden test), *rev'd in part*, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019). The Sixth Circuit is the first to permit reason-based abortion restrictions, but similar statutes in several other states that have been enjoined are also awaiting judicial review. *See* Kalantray, *supra* note 6, at 1 n.2 (reviewing statutes in eleven states prohibiting or limiting reason-based abortions); MISS. CODE ANN. § 41-41-407 (West 2022) (outlining Mississippi's statute regarding abortion sought on the basis of predicted fetal disability); MO. REV. STAT. § 188.038(2) (West 2022) (outlining Missouri's statute regarding abortion sought on the basis of predicted fetal disability); N.D. CENT. CODE § 14-02.1-04.1 (West 2022) (outlining North Dakota's statute regarding abortion sought on the basis of predicted fetal disability); TENN. CODE ANN. § 39-15-217(2)(d) (West 2022) (outlining Tennessee's statute regarding abortion sought on the basis of predicted fetal disability).

⁸ OHIO REV. CODE ANN. § 2919.10(B) (West 2022). Beside Ohio, ten other states—Arizona, Arkansas, Kansas, Mississippi, Missouri, North Carolina, North Dakota, Pennsylvania, South Dakota, and Tennessee—have enacted similar laws restricting reason-based abortions on the basis of sex, race, or disability. *See* Kalantray, *supra* note 6, at 1 n.2; *see, e.g.*, ARIZ. REV. STAT. § 13-3603.02(A)(1)–(2) (2022) (making it a felony to perform an abortion while knowing the woman has sought the abortion on the basis of sex, race, or disability); ARK. CODE ANN. § 20-16-1904(b)(1)(A)–(B) (West 2022) (restricting sex-based abortions); MISS. CODE ANN. § 41-41-407(1) (restricting sex- and race-based abortions); TENN. CODE ANN. § 39-15-217(4)(b)–(d) (restricting abortions on the basis of sex, race, or a Down syndrome diagnosis).

⁹ OHIO REV. CODE ANN. §§ 2919.10(C)–(F), 2929.14(A)(4); *see Preterm-Cleveland*, 994 F.3d at 517 (explaining the punitive measure baked into the Ohio statute restricting reason-based abortions).

¹⁰ *See Preterm-Cleveland*, 994 F.3d at 516; *Roe v. Wade*, 410 U.S. 113, 153 (1973) (finding that both the Ninth and Fourteenth Amendments indicate a right to privacy, which in turn requires a woman's right to choose whether to have an abortion), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Five plaintiffs sued Ohio for unconstitutionally restricting abortion access; the plaintiffs comprised two Ohio-based Planned Parenthood organizations, two other health centers that provided abortions, and one physician who performed abortions. *Preterm-Cleveland*, 994 F.3d at 516 n.1.

¹¹ *See Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746, 749 (S.D. Ohio 2018) (enjoining Ohio's statute limiting reason-based abortions when a physician knows the mother has sought the abortion on the basis of a fetal disability diagnosis), *rev'd*, *Preterm-Cleveland v. McCloud*, 994 F.3d 512 (6th Cir. 2021), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *Preterm-Cleveland v. Himes*, 940 F.3d 318, 318 (6th Cir. 2019) (affirming the district court's decision to enjoin Ohio's statute), *vacated*, *Preterm-Cleveland v. McCloud*, 994 F.3d 512 (6th Cir. 2021), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). An injunction allows a court to enjoin, or bar, a party from committing or completing a certain action. *Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019). A preliminary injunction occurs when a court issues an injunction prior to hearing all the facts of the case and making a ruling. *Id.* A court issues a preliminary injunction with the goal of avoiding what would otherwise be an irreparable harm to the party seeking the injunction if the offending action were permitted to continue throughout the duration of trial. *Id.*

however, the Sixth Circuit reversed, holding that House Bill 214 was constitutional because the right to abortion is not unlimited.¹² Applying the framework outlined by *Roe*'s successor, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the court found that the disability-based abortion restriction did not impose an undue burden on a woman's right to choose.¹³ Moreover, the court recognized as a legitimate state interest the protection of those prenatally diagnosed with Down syndrome from discrimination.¹⁴

The Sixth Circuit's acknowledgement that reason-based abortions may represent discrimination against those with disabilities is groundbreaking for two reasons.¹⁵ First, it represents a departure from the majority of circuit courts,

¹² See *Preterm-Cleveland*, 994 F.3d at 516 (vacating the district court's preliminary injunction and holding that Ohio's statute was constitutional under the undue burden test outlined by *Planned Parenthood of Southeastern Pennsylvania v. Casey*); *Roe*, 410 U.S. at 154 (legalizing abortion, but holding that the right to abortion was limited, rather than absolute, due in part to the Supreme Court's decision in *Buck* that a state could constitutionally mandate sterilization which, the Court noted, resulted in a limited right to bodily autonomy). Circuit courts hear cases on appeal from a district court, and generally decide cases via a panel comprised of three circuit judges. Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 *FORDHAM L. REV.* 2001, 2001 (2014). When a circuit court holds an en banc hearing, however, all judges in the circuit, rather than just a panel, hear the case. *Id.*; *En Banc*, BLACK'S LAW DICTIONARY, *supra* note 11. Thus, an en banc rehearing, such as the Sixth Circuit's rehearing of *Preterm-Cleveland*, offers a circuit court a second chance to hear a particular case and overturn its own previous decision. See Sadinsky, *supra*, at 2001 (explaining that a federal court of appeal hearing a case en banc may overrule a decision made by one of its panels).

¹³ See *Preterm-Cleveland*, 994 F.3d at 527 (holding that Ohio's restriction did not constitute an undue burden because (1) it only limited, rather than entirely banned, reason-based abortions; (2) it was unlikely to adversely affect a large percentage of women who obtain abortions in Ohio; and (3) it advanced legitimate state interests); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878–79 (1992) (affirming *Roe*'s right to abortion, but creating a new framework, now known as the undue burden test, through which to evaluate states' abortion laws), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). As defined in *Casey*, a state's abortion law constitutes an impermissible undue burden when it substantially obstructs a woman seeking abortion pre-viability. See 505 U.S. at 877–79 (indicating that statutes deemed to be an undue burden are unconstitutional under *Roe*).

¹⁴ See *Preterm-Cleveland*, 994 F.3d at 517, 518, 527 (identifying three legitimate state interests justifying Ohio's reason-based abortion restriction, including preventing discrimination against those with Down syndrome). *Roe* established that states may have an interest in respecting and protecting the unborn as potential life, and thus a state's interests may at some point outweigh a woman's interest in seeking an abortion. 410 U.S. at 162. *Casey* reiterated this notion, but sharpened the analysis by holding that a state's interests in protecting unborn life can only supersede a woman's right to choose when the state achieves its interests in a way that does not cause the woman an undue burden. 505 U.S. at 877. In *Preterm-Cleveland*, the Sixth Circuit found that preventing discrimination against the Down syndrome community by means of limiting abortions sought solely due to a fetal Down syndrome diagnosis constituted a genuine state interest, and was narrowly tailored enough to achieve that goal alone, such that the statute did not create an undue burden. See 994 F.3d at 527–28 (upholding Ohio's statute under *Roe* and *Casey*).

¹⁵ See Spindelman, *supra* note 6, at 115–16 (predicting that the Sixth Circuit sitting en banc would uphold the district court's injunction of Ohio's statute limiting reason-based abortions, but arguing that regardless of the outcome of the case, it was likely to spark further debate and perhaps prompt the Supreme Court to rule decisively on the constitutionality of reason-based abortions).

which found similar restrictions on reason-based abortions, prior to the Court's *Dobbs* decision, unconstitutional under *Casey*.¹⁶ Second, by characterizing reason-based abortions as discriminatory and eugenic, the court paved the path to a more credible argument against *any* form of reason-based abortion under the Equal Protection Clause of the Fourteenth Amendment.¹⁷ The controversy surrounding reason-based abortions now extends beyond whether restrictions on such abortions are constitutional: it may instead begin with a query as to whether reason-based abortions themselves violate the Equal Protection Clause.¹⁸

Part I of this Note outlines the history of eugenics and discrimination against people with disabilities, provides an overview of the legalization and subsequent restriction of abortion in the United States, and reviews Fourteenth Amendment jurisprudence.¹⁹ Part II then compares the efficacy of applying *Casey*'s undue burden test to disability-based abortion restrictions with that of the Equal Protection Clause.²⁰ Finally, Part III argues that the unborn fetus is a

¹⁶ Compare *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021) (finding that Arkansas's Act 619, which banned abortions based solely on a fetal Down syndrome diagnosis, was unconstitutional under the undue burden framework), *vacated*, 142 S. Ct. 2894 (2022), and *Planned Parenthood of Ind. & Ky., Inc. (PPINK) v. Comm'r of the Ind. State Dep't of Health*, 888 F.3d 300, 302 (7th Cir. 2018) (holding that an Indiana law limiting sex-selective and disability-based abortions failed the undue burden test), *rev'd in part*, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019), with *Preterm-Cleveland*, 994 F.3d at 528 (finding that Ohio's law preventing doctors from performing abortions they knew were sought solely due to a fetal Down syndrome diagnosis satisfied the undue burden test).

¹⁷ See *Preterm-Cleveland*, 994 F.3d at 531–32 (holding that abortions sought because of a Down syndrome diagnosis perpetuate the stigma surrounding disability and discrimination against the Down syndrome community); *id.* at 538, 539 (Griffin, J., concurring) (arguing that reason-based abortions, such as Down-syndrome-selective abortions, are a modern-day tool of eugenics). The Equal Protection Clause of the Fourteenth Amendment protects citizens from discrimination on the basis of any number of characteristics, including, but not limited to, race, sex, and disability. U.S. CONST. amend. XIV. Prior to the Sixth Circuit's holding in *Preterm-Cleveland*, opponents of abortion argued that the Equal Protection Clause guarantees the unborn a right to life that abortion impermissibly infringes upon. See, e.g., Charles I. Lugosi, *Beyond Personhood: Abortion, Child Abuse, and Equal Protection*, 30 OKLA. CITY U. L. REV. 271, 271–72 (2005) (assuming for the sake of argument that an unborn fetus is a person, and arguing that, as such, the Equal Protection Clause forbids the abortion of an unborn fetus). As discussed below, the efficacy of this argument hinges primarily on the legal definition of personhood; nevertheless, the Sixth Circuit's suggestion that reason-based abortions are a form of eugenics that impermissibly discriminate against the disabled bolsters anti-abortion arguments made from the vantage point of the Equal Protection Clause. *Preterm-Cleveland*, 994 F.3d at 539 (Griffin, J., concurring) (suggesting that reason-based abortions may implicate concerns with respect to the Equal Protection Clause just as Buck's involuntary sterilization does); *infra* notes 181–198. But see *Preterm-Cleveland*, 994 F.3d at 559 (Moore, J., dissenting) (criticizing the concurrence's invocation of the Due Process and Equal Protection Clauses as untenable and inaccurate).

¹⁸ See *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1792–93 (2019) (Thomas, J., concurring) (warning that the Supreme Court will likely soon be asked to determine the constitutionality of reason-based abortions); Spindelman, *supra* note 6, at 141 (envisioning future arguments against reason-based abortions as impermissible).

¹⁹ See *infra* notes 22–108.

²⁰ See *infra* notes 109–198.

legal person and that the Equal Protection Clause analysis should thus replace the undue burden test to account for the legacy of eugenics inherent in disability-based abortions.²¹

I. DISABILITY DISCRIMINATION: OVERVIEW OF THE EUGENICS MOVEMENT, REASON-BASED ABORTIONS, AND THE FOURTEENTH AMENDMENT

The ongoing circuit split regarding the constitutionality of disability-based abortion restrictions implicates concerns over the law's historic treatment of those with disabilities.²² Section A of this Part examines a pattern of discrimination against the physically and mentally disabled, highlighting as particularly egregious the twentieth-century eugenics movement which sought, among other things, to exterminate the disabled population.²³ Section B begins with an overview of the Supreme Court's holding in *Roe v. Wade* in 1973, then analyzes the post-*Roe* restrictions on abortion, and concludes with an explanation of the undue burden test and the impact of *Dobbs v. Jackson Women's Health Organization* on contemporary abortion laws.²⁴ Finally, Section C introduces Due Process and Equal Protection Clause jurisprudence.²⁵

A. The Early Eugenics Movement and Its Effect on the Disabled

Efforts to thin the population of disabled persons have pervaded society's treatment of the disabled since the early Greek and Roman empires.²⁶ Believing disability to be a sign of the gods' dissatisfaction, these ancient civilizations practiced infanticide by killing newborns who presented any evidence of

²¹ See *infra* notes 199–274.

²² See *Preterm-Cleveland*, 994 F.3d at 547 (Griffin, J., concurring) (lamenting past eugenics movements and discrimination against those with disabilities).

²³ See *infra* notes 26–48.

²⁴ See *infra* notes 49–84.

²⁵ See *infra* notes 85–108.

²⁶ See Walter D. Penrose, Jr., *The Discourse of Disability in Ancient Greece*, 108 CLASSICAL WORLD 499, 509, 510 (2015) (reviewing ancient forms of discrimination against those with disabilities); David J. Galton, *Greek Theories on Eugenics*, 24 J. MED. ETHICS 263, 263–64 (1998) (explaining that eugenics, which linguistically derives from Greek vocabulary, may have first appeared in Greek philosopher Plato's *Republic*, and suggesting that efforts to “purify” society via eugenicist mechanisms have abounded since the earliest human civilizations); David Mitchell & Sharon Snyder, “*Jesus Thrown Everything Off Balance*”: *Disability and Redemption in Biblical Literature* (discussing the Greek and Roman practice of committing infanticide against children born with visible disabilities and noting that ancient Rome enacted statutes designed to discriminate against the disabled), in THIS ABLED BODY: RETHINKING DISABILITIES IN BIBLICAL STUDIES 173, 175 (Hector Avalos, Sarah J. Melcher & Jeremy Schipper eds., 2007). See generally Nicole Kelley, *Deformity and Disability in Greece and Rome* (delving into Greek and Roman notions of disability), in THIS ABLED BODY: RETHINKING DISABILITIES IN BIBLICAL STUDIES, *supra*, at 31, 34.

physical or mental impairment.²⁷ Similarly discriminatory practices soon developed throughout Europe and later established themselves within the first American colonies.²⁸ Termed “ugly laws,” colonial legislation forbade the outwardly disabled from being seen in public, thereby effectively preventing their participation in society.²⁹ By the mid-nineteenth century, the “ugly laws” resulted in the commitment of most disabled persons to state-run institutions where abuse was rampant and services unregulated.³⁰ Such discrimination

²⁷ See Penrose, *supra* note 26, at 509–10 (describing Athenian and Spartan infanticide practices and noting that such civilizations often believed that disabled infants were displeasing to the gods); Debby Sneed, *Disability and Infanticide in Ancient Greece*, 90 *HESPERIA* 747, 749 (2021) (reviewing ancient Greek literature for evidence of infanticide of infants born with disabilities, including a passage by Plutarch suggesting that disabled infants were subject to exposure, a practice in which a special council ordered an infant to be left in a pit at the base of a mountain). Some scholars have gone so far as to conclude that ancient civilizations mandated immediate infanticide of disabled infants. See Sneed, *supra*, at 749 (noting scholars’ arguments regarding mandatory infanticide based on Greek literature). *But see id.* at 748 (arguing that infanticide was not necessarily common in Greece and that the ancient Greeks instead attempted to treat infants born with disabilities); Penrose, *supra* note 26, at n.69 (countering that although infanticide was a common practice for infants born with disabilities, there were some exceptions in which infants were permitted to live). Infanticide generally refers to the killing of a human infant following live birth, though different ages and cultures have struggled with distinguishing infanticide from manslaughter. See Jeffrey A. Meldman, *Legal Concepts of Human Life: The Infanticide Doctrines*, 52 *MARQ. L. REV.* 105, 107–08 (1968) (reviewing European and American definitions of infanticide, which ranged from the killing of a viable infant to the killing of a child just under one year old).

²⁸ See Rhonda Neuhaus, Cindy Smith & Molly Burgdorf, *Equality for People with Disabilities, Then and Now*, GPSOLO, Nov./Dec. 2014, at 46, 46 (outlining early European practices toward people with disabilities, discussing the adoption of such practices by the American colonies, and demonstrating that it was not until the mid-to-late twentieth century that the United States began to implement legislation designed to protect disability rights).

²⁹ See Neuhaus et al., *supra* note 28, at 46 (describing the so-called “ugly laws,” including a seventeenth-century Massachusetts statute requiring different treatment of “[c]hildren, [i]diots, [and] [d]istracted [p]ersons”). Indeed, “ugly laws” continued well into the twentieth century. See generally Susan Schweik, *Kicked to the Curb: Ugly Law Then and Now*, 46 *HARV. C.R.-C.L. L. REV.* 1 (2011) (describing the evolution of legislation discriminating against people with disabilities and attempting to remove them from the public eye). In 1917, for example, Oregon enacted legislation prohibiting “crippled, maimed, or deformed” people from being seen in public, punishable by a fine of up to one hundred dollars. See *id.* at 1–2 (quoting Portland, Oregon, Charter of the City of Portland, as Amended Together with the General Ordinances by the Order of the Common Council, No. 2959, § 23 (1881)) (reporting the story of “Mother Hastings,” a woman with deformed hands whom Portland police forced to leave the city permanently because she was “too terrible a sight” (quoting *Love Blooms on Sidewalk*, *L.A. TIMES*, Jan. 14, 1917, at II2)). In 1974, Nebraska arrested a disabled man who violated an ugly law by appearing in public; the same year, Chicago repealed legislation prohibiting disabled persons, described by the law as “unsightly or disgusting,” from appearing in public places. See *id.* at 2 (describing the arrest of a disabled man on April 21, 1974, when he violated Omaha’s version of the “ugly law[s]”); Neuhaus et al., *supra* note 28, at 46 (discussing Chicago’s act to repeal such legislation).

³⁰ See Neuhaus et al., *supra* note 28, at 46 (discussing almshouses, which were state-run institutions where the majority of disabled persons were sent to live). Activist and advocate for the institutionalized, Dorothea Dix investigated the conditions of several almshouses located throughout New England in the early nineteenth century. Albert Deutsch, *Dorothea Lynde Dix: Apostle of the Insane*, 36 *AM. J. NURSING* 987, 987 (1936). She reported to the Massachusetts legislature her horrifying

against the disabled only intensified with the alarming success of the eugenics movement in Europe.³¹

In 1883, English scientist Francis Galton became the “father of eugenics” when he coined the now controversial term, defining it as a scientific endeavor to purify and improve the genetic pool.³² Galton’s published theories regarding the possibility of weeding out “undesirable” traits from society were taken up by others shortly after his death.³³ At the core of the resulting eugenics movement was the troubling belief that society needed a scapegoat for its shortcomings.³⁴ Eugenics quickly assigned this blame to the mentally and physically disabled, and the solution to social ills became the eradication of the disabled.³⁵ The eugenics movement promised, for example, to prevent the birth of “unfit” children through involuntary sterilization, limitations on immigration and marriage, and forced institutionalization.³⁶ Nearly four hundred American universities taught eugenics throughout the early and mid-twentieth century, and several prominent political and social figures—including President Theodore Roosevelt and philanthropist John D. Rockefeller—funded the movement.³⁷ The horrors of the Holocaust, spurred by Adolf Hitler’s subscription to

findings, including that the disabled and mentally ill were frequently caged, chained, or confined to stalls. *See id.* at 991 (describing Dix’s initial two-year investigation and subsequent campaign to improve conditions for those confined to almshouses and state-run hospitals). When the eugenics movement was introduced in America, proponents began to call for efforts to sterilize disabled persons institutionalized in almshouses. *See Neuhaus et al., supra* note 28, at 46–48 (commenting on the effect of the eugenics movement on the disabled community).

³¹ *See Neuhaus et al., supra* note 28, at 46 (discussing European eugenicists’ efforts to sterilize the disabled against their will); *Regulating Eugenics, supra* note 1, at 1580 (reviewing compulsory sterilization statistics and statutes, and noting that American eugenicists achieved involuntary sterilization of over 60,000 people deemed genetically undesirable during the twentieth century).

³² *See Regulating Eugenics, supra* note 1, at 1579–80 (explaining Galton’s work with eugenics, including his definition of eugenics as a primarily scientific endeavor). *See generally* FRANCIS GALTON, *INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT* (2d ed. 1907) (containing Galton’s definition of eugenics and his beliefs regarding the practice as a scientific method for improving the human race).

³³ *See* James A. Field, *The Progress of Eugenics*, 26 Q.J. ECON. 1, 22 (1911) (stating that it was Galton’s desire to make eugenics a “new religion” so as to secure its place as a morally acceptable practice (quoting Francis Galton, *Eugenics: Its Definition, Scope, and Aims*, 10 AM. J. SOCIO. 1, 5 (1904))); *The Origins of Eugenics*, *FACING HIST. & OURSELVES*, <https://www.facinghistory.org/resource-library/origins-eugenics> [<https://perma.cc/X4J2-E8N2>] (Aug. 4, 2015) (noting that Galton was unable to accomplish his mission of entrenching eugenics).

³⁴ *See Neuhaus et al., supra* note 28, at 46–48 (explaining that the eugenics movement appealed to those looking for someone to blame for systemic issues such as poverty).

³⁵ *See id.*

³⁶ *Id.*; *see also Regulating Eugenics, supra* note 1, at 1580, 1581 (reviewing eugenicist efforts to enhance the genetic makeup of society, such as by hosting contests and giving awards to families deemed to have desirable genetic traits, encouraging the passage of the Immigration Act of 1924 to discourage immigration by those the movement deemed unfit to reproduce, and lobbying for sterilization statutes).

³⁷ *See Preterm-Cleveland v. McCloud*, 994 F.3d 512, 539 (6th Cir. 2021) (Griffin, J., concurring) (providing statistics regarding the teaching and funding of eugenics in America), *abrogated by Dobbs v.*

racist, classist, and elitist ideologies, brought an end to the popularity of Galton's eugenics.³⁸ But discrimination against the disabled did not disappear, and though the early eugenics movement is today widely condemned, a modern movement known as "liberal eugenics" has begun to gain popularity.³⁹

Unlike the Galtonian eugenics practiced in Nazi Germany, liberal eugenics relies on voluntary measures, typically undertaken by parents, to genetically modify society by engineering certain traits in unborn children.⁴⁰ Such measures include genetically screening a fetus for various disabilities, including Down syndrome.⁴¹ In utero screenings include both nondiagnostic tests, which merely measure the chance that a fetus will develop a certain disability, as well as diagnostic tests, which actually confirm whether a disability or other condition is present.⁴² As technology advances, diagnostic tests have become

Jackson Women's Health Org., 142 S. Ct. 2228 (2022); William A. Schambra, *Philanthropy's Original Sin*, NEW ATLANTIS (Summer 2013), <https://www.thenewatlantis.com/publications/philanthropys-original-sin> [<https://perma.cc/R9SL-9LCC>] (analyzing Rockefeller's political and monetary support of the early eugenics movement, including his contributions to Nazi eugenics efforts, and explaining that Rockefeller believed it would prove to be a beneficial social program that would ultimately promote the growth and progress of society).

³⁸ *Regulating Eugenics*, *supra* note 1, at 1582 (rejecting the early eugenics movement, and linking its premises to the actions carried out by the Nazis); *Preterm-Cleveland*, 944 F.3d at 540 (Griffin, J., concurring) (explaining that early supporters of eugenics quickly became disenchanted by the movement following the Holocaust). One of the first eugenicist measures instituted by the Nazi regime was the forced sterilization of the disabled, which encompassed the mentally ill, epileptic, blind, and alcoholic, followed within a few years by the mass killing of 300,000 disabled persons. See *People with Disabilities*, U.S. HOLOCAUST MEM'L MUSEUM, <https://www.ushmm.org/collections/bibliography/people-with-disabilities> [<https://perma.cc/HP2M-P2HZ>] (examining Nazi eugenics against the disabled). See generally SUZANNE E. EVANS, *FORGOTTEN CRIMES: THE HOLOCAUST AND PEOPLE WITH DISABILITIES* (2004) (outlining the various Nazi programs intended to identify, isolate, and exterminate disabled persons).

³⁹ See Neuhaus et al., *supra* note 28, at 48–49 (reviewing continued discrimination against the disabled throughout the mid- to late-twentieth century); *Regulating Eugenics*, *supra* note 1, at 1582 (introducing the concept of "liberal eugenics" as a modern form of eugenics distinct from that of the early twentieth century). See generally Nicholas Agar, *Liberal Eugenics*, 12 PUB. AFFS. Q. 137 (1998) (discussing a form of liberal eugenics that would allow parents to pre-select their children's physical traits, and noting that concerns regarding illness and quality of life have given liberal eugenics more credence); Felipe E. Vizcarrondo, *Human Enhancement: The New Eugenics*, 81 LINACRE Q. 239 (2014) (defining liberal eugenics, noting that it has more basis in scientific evidence than older versions of eugenics, and reviewing the various justifications for liberal eugenics, but ultimately rejecting the modern form of eugenics because it results in the eradication of "inferior" persons).

⁴⁰ Agar, *supra* note 39; see *Regulating Eugenics*, *supra* note 1, at 1582 (defining liberal eugenics and distinguishing it from practices advocated for by Galton or Hitler).

⁴¹ See *Regulating Eugenics*, *supra* note 1, at 1582 (describing the array of voluntary options available to parents interested in liberal eugenics, including genetic screening followed by treatment of any predicted disorders). Prenatal genetic screening is a voluntary diagnostic test that informs parents of the likelihood that a fetus will develop a number of genetic abnormalities. *FAQs: Prenatal Genetic Screening Tests*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/womens-health/faqs/prenatal-genetic-screening-tests> [<https://perma.cc/QM4Q-CAWX>] (Oct. 2020).

⁴² See generally Gareth M. Thomas & Barbara Katz Rothman, *Keeping the Backdoor to Eugenics Ajar?: Disability and the Future of Prenatal Screening*, 18 AM. MED. ASS'N J. ETHICS 406 (2016)

more sophisticated, though they still fall short of one hundred percent accuracy.⁴³ The results of these screenings can be used to treat the disability in utero.⁴⁴ As such, supporters differentiate liberal eugenics from Galton's by arguing that its techniques can only be used to enhance, rather than harm.⁴⁵ When screening reveals an untreatable condition, however, a parent may instead consider abortion.⁴⁶ Indeed, prenatal screening in several countries has greatly decreased the number of children born with Down syndrome in recent years.⁴⁷ Notably, Iceland presents an almost one hundred percent abortion rate for fetuses diagnosed with Down syndrome during genetic screening.⁴⁸

B. The Development of Abortion Laws in the United States

Abortion has long been controversial.⁴⁹ Since at least the very early nineteenth century, abortion laws in the United States have waffled from prohibito-

(contrasting nondiagnostic and diagnostic prenatal genetic screening and exploring the ethical implications of such tests). Down syndrome is not the only condition examined in prenatal testing; rather, such tests can predict other genetic syndromes as well as sex chromosome complications. *Id.* at 406–07.

⁴³ *Id.*

⁴⁴ See *Regulating Eugenics*, *supra* note 1, at 1582 (explaining that genetic screening may be used to help parents and physicians treat various defects and disabilities, as well as to enhance a fetus's natural abilities by altering or inserting a gene).

⁴⁵ See *id.* at 1582 n.31 (emphasizing that liberal eugenicists seek to employ measures that can only enhance a child's abilities and increase a child's autonomy).

⁴⁶ See *id.* at 1587 (suggesting that a woman who discovers via genetic screening that her fetus has developed a genetic abnormality may consequently seek an abortion).

⁴⁷ Compare *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 583 n.23 (6th Cir. 2021) (Donald, J., dissenting) (providing statistics on live Down syndrome births in the United States, and noting that the American College of Obstetricians and Gynecologists reported a recent increase in live births), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), with *id.* at 540 (Griffin, J., concurring) (providing international abortion statistics of fetuses with predicted Down syndrome, and noting that European countries report much higher rates of abortion than the United States), and Julian Quinones & Arijeta Lajka, "What Kind of Society Do You Want to Live In?": *Inside the Country Where Down Syndrome Is Disappearing*, CBS, <https://www.cbsnews.com/news/down-syndrome-iceland/> [<https://perma.cc/K56R-4QUC>] (Aug. 15, 2017) (reporting that whereas close to six thousand infants with Down syndrome are born in the United States per year, the number of infants born with Down syndrome per year in Iceland, where roughly 85% of pregnant women request genetic screening, can be counted on one hand).

⁴⁸ See *Preterm-Cleveland*, 994 F.3d at 540 (Griffin, J., concurring) (reporting Iceland's abortion rate of fetuses diagnosed with Down syndrome as being near 100%); Quinones et al., *supra* note 47 (providing Iceland's abortion statistics). The implications of Iceland's sharply diminished number of Down syndrome births remain heavily debated: proponents argue that Iceland's high abortion rate reflects the progress of medical technology in improving children's health, whereas opponents criticize the development as modern eugenics seeking to eradicate people with Down syndrome, rather than treat Down syndrome itself. Compare Quinones et al., *supra* note 46 (presenting one proponent's view), with Alexandra Desantis, *Iceland Eliminates People with Down Syndrome*, NAT'L REV. (Aug. 16, 2017), <https://www.nationalreview.com/2017/08/down-syndrome-iceland-cbs-news-disturbing-report/> [<https://perma.cc/2RZU-ZXVB>] (presenting the opposing view).

⁴⁹ See Scherer, *supra* note 6, at 851 (presenting the history of abortion in the United States as complicated, and reviewing various salient cases that have expanded or restricted abortion access

ry to permissive.⁵⁰ The early common law, for example, permitted abortions prior to the fetus's first movements, after which point abortion constituted homicide, manslaughter, or misdemeanor, depending on the jurisdiction.⁵¹ By the time the Supreme Court attempted to set a floor for abortion access in 1973, forty-nine states had classified abortion as a felony.⁵² Abortions nevertheless occurred in such states, sometimes by physicians willing to risk revocation of their medical licenses, or, other times, performed by a desperate mother herself.⁵³ The number of women who lost their lives during these procedures

since *Roe*); *Preterm-Cleveland*, 994 F.3d at 535 (Sutton, J., concurring) (commenting on the polarity of the abortion debate and positing that it is likely to last a while longer); *Roe v. Wade*, 410 U.S. 113, 130–41 (1973) (reviewing in detail the circuitous evolution of positions regarding the legality of abortion, beginning with ancient practices and concluding with American common law), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

⁵⁰ See *Roe*, 410 U.S. at 138–40 (presenting a timeline of abortion laws in the United States prior to 1973). Connecticut passed the first anti-abortion statute in 1821, criminalizing abortions performed prior to quickening—a fetus's first movements in the womb. See *id.* at 138. Eight other states followed suit, generally imposing lower penalties. *Id.* at 138–39. After the Civil War, legislation criminalizing abortion began to replace common law, introduced more stringent penalties, and abandoned the notion of quickening. *Id.* at 139. Over time, some states carved out exceptions, such as abortions deemed necessary to secure the mother's health or safety. *Id.*

⁵¹ See *id.* at 135 (explaining that although abortion was considered homicide or manslaughter in the thirteenth century, later American courts held it to be only a misdemeanor). The early common law established quickening, or the point at which the mother detects fetal movement, as the marker between permissible and impermissible abortions. See *id.* at 132–33, 135, 138, 160–61. In New York, for example, abortion before quickening constituted a misdemeanor whereas abortion after quickening rose to the level of second-degree manslaughter. See *id.* at 139 (comparing Connecticut and New York statutes criminalizing abortion in the nineteenth century but imposing generally lenient punishments). Prior to notions regarding quickening, several philosophers attempted to establish the point at which human life began. See *id.* at 134 nn.21 & 22 (summarizing views regarding the start of human life, including the beliefs of Aristotle, Hippocrates, St. Augustine, and Galen). Some early thinkers determined life to begin at or shortly after birth; others believed male life to begin within forty days of conception and female life to begin in roughly twice the amount of time. See *id.* (discussing the 40/80 day theory and offering an Aristotelian justification of the view). Eventually, quickening became the generally accepted post between potential and realized human life. *Id.* at 134.

⁵² See *id.* at 139 (reviewing abortion laws throughout the United States prior to *Roe*); *Timeline of Abortion Laws and Events*, CHI. TRIB. (Mar. 29, 2001), <https://www.chicagotribune.com/sns-abortion-timeline-story.html> [https://perma.cc/9KY6-US5R] (providing an overview of abortion statutes from 1821 to 1997, and noting that as of 1967—six years before *Roe*—forty-nine of the fifty states had established abortion as a felony). Crimes that are classified as felonies are considered more serious and generally result in heightened sentences. *Felony*, BLACK'S LAW DICTIONARY, *supra* note 11. The same year, however, President Kennedy, having formed the President's Commission on the Status of Women to review alleged discrimination against women, advocated against states' abortion laws. See *Timeline of Abortion Laws and Events*, *supra* (describing President Kennedy's support of repealing abortion laws).

⁵³ See Simone M. Caron, *We Won't Go Back: Abortion Before Roe v. Wade*, 9 WAKE FOREST J. L. & POL'Y 167, 168 (2019) (arguing that although some doctors during World War II performed illegal abortions at the risk of facing criminal and civil sanctions, roughly two-thirds of all abortions obtained illegally prior to *Roe* were performed by non-professionals or even pregnant women themselves); Sarah Pripas, *Coat Hangers and Knitting Needles: A Brief History of Self-Induced Abortion*, NURSING CLIO (Mar. 10, 2016), <https://nursingclio.org/2016/03/10/coat-hangers-and-knitting-needles-a-brief-history-of-self-induced-abortion/> [https://perma.cc/YRT8-6GHU] (suggesting evidence that

declined during the twentieth century, from as many as 2,700 deaths in 1930 to roughly thirty-nine in 1972.⁵⁴

Almost fifty years after the Supreme Court upheld the constitutionality of involuntary sterilization, the Court found a right to abortion in *Roe*, but held that *Buck v. Bell*'s decision in 1927 limited the right.⁵⁵ In finding for pseudonymous plaintiff Jane Roe, the Court simultaneously qualified *Roe*'s right to abortion via the trimester framework.⁵⁶ The Court held that the right to privacy permitted abortions without state interference during the first and second trimesters of a mother's pregnancy.⁵⁷ Once a woman reached the third trimester, however, a state's interests in protecting the life and health of both mother and

pre-*Roe*, pregnant women induced abortions of their unborn fetuses by various means, including using "crochet hook[s] [and] pencil[s]" or ingesting chemicals, such as arsenic). But see Andrew T. Looker, Jr., *Illegal Abortion: Truth vs. Fiction*, LIBERTY U. J. STATESMANSHIP & PUB. POL'Y, Feb. 2022, at 1, 2 (noting that Planned Parenthood medical director Mary Calderone estimated in 1960 that only 10% of illegal abortions were performed by pregnant women, and the remaining 90% were performed by doctors).

⁵⁴ Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?*, GUTTMACHER INST. (Mar. 1, 2003), <https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue> [<https://perma.cc/JVJ6-ZM93>] (arguing that as many as 1.2 million illegal abortions were performed annually pre-*Roe*, and that although the death rate gradually decreased throughout the mid-1900s due to the introduction of antibiotics, approximately 2,700 women died in 1930 from illegal abortion complications); Looker, *supra* note 53, at 2.

⁵⁵ See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (finding mandatory sterilization constitutional); *Roe*, 410 U.S. at 154 (explaining that because the Supreme Court permitted involuntary sterilization in *Buck*, there exists only a limited, rather than absolute, right to bodily autonomy, such that the right to abortion may be checked by the state). The Court also cited a decision handed down two decades before *Buck*, in which the Court found that the Constitution permits states to pass mandatory vaccination statutes, as further evidence that the Court has never recognized an absolute right to bodily autonomy. See *Roe*, 410 U.S. at 154 (referencing *Jacobson v. Massachusetts* and holding that the right to bodily autonomy must be limited); *Jacobson v. Massachusetts*, 197 U.S. 11, 22–25 (1905) (finding that a Massachusetts law requiring that citizens be vaccinated against the smallpox was constitutional).

⁵⁶ See *Roe*, 410 U.S. at 153, 154 (noting that because *Buck* and other cases limited the right to bodily autonomy, the right to abortion was also limited by a state's interest in protecting a viable fetus); Scherer, *supra* note 6, at 851 (outlining *Roe*'s trimester framework to limit the right to abortion found in the same case). The plaintiff in *Roe* used the pseudonym "Jane Roe" throughout the duration of the case, but was subsequently revealed to be a woman named Norma McCorvey. See 410 U.S. at 120 (describing plaintiff Jane Roe as a pregnant woman who sought an abortion in Texas but was unable to receive one because a Texas statute criminalized abortion unless deemed medically necessary to save the life of the mother, and *Roe*'s physician found an abortion was not medically necessary). See generally Margaret Talbot, *How the Real Jane Roe Shaped the Abortion Wars*, NEW YORKER (Sept. 13, 2021), <https://www.newyorker.com/magazine/2021/09/20/how-the-real-jane-roe-shaped-the-abortion-wars> [<https://perma.cc/4Z9M-446U>] (reviewing Norma McCorvey's life pre- and post-*Roe*).

⁵⁷ See *Roe*, 410 U.S. at 154, 160, 163 (holding that a state's interest in protecting an unborn fetus becomes sufficiently compelling to outweigh a woman's interest in choosing to terminate the pregnancy once the fetus has reached the point of viability, resulting in state-imposed limitations on abortion in the third trimester). The Court had previously identified a right to privacy within the "penumbras" of the Fourth Amendment in *Griswold v. Connecticut*. See 381 U.S. 479, 479, 484 (1965) (holding that a Connecticut statute banning all forms of contraceptives was unconstitutional because it violated a right to privacy implicit in the Bill of Rights).

child overshadowed a woman's choice.⁵⁸ To support the Court's holding that bodily autonomy is not unlimited, but instead subject to state regulation, Justice Blackmun cited *Buck's* approval of forced sterilization.⁵⁹

Not long after *Roe* asserted a constitutional right to abortion, several states crafted, and plaintiffs promptly challenged, limitations on abortion.⁶⁰ Many restrictions were invalidated, but it was not until 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, that the Supreme Court adopted a new framework for determining the constitutionality of states' abortion limitations.⁶¹ *Casey* first reiterated *Roe's* recognition of a state's interest in protecting life, health, and medical standards, but then departed from *Roe* by abandoning the trimester framework and replacing it with the undue burden test.⁶² Drafting a plurality opinion intended to bring consistency to abortion restrictions, Justice O'Connor established the undue burden test as a sliding scale measuring how substantially a state's restrictions hindered a woman's ability to obtain an abortion.⁶³ The more substantial the obstacle, the more likely the restriction is to create an undue burden on a woman seeking abortion, and thus the less likely to be constitutional under *Roe* and *Casey*.⁶⁴

⁵⁸ See *Roe*, 410 U.S. at 164 (delineating various state interests and holding that such interests only outweigh a woman's interest in deciding whether to have an abortion once the fetus has become viable outside the womb); Scherer, *supra* note 6, at 851 (explaining further *Roe's* trimester framework and noting that it permitted women to seek abortions without limitation until the third trimester).

⁵⁹ See *Roe*, 410 U.S. at 154 (referencing *Buck* in support of the premise that the right to abortion is not absolute); *Buck*, 274 U.S. at 207 (permitting Virginia to compel the involuntary sterilization of a disabled woman).

⁶⁰ See Scherer, *supra* note 6, at 852 (noting subsequent abortion law restrictions following *Roe*); *Bigelow v. Virginia*, 421 U.S. 809, 823 (1975) (overruling a Virginia law prohibiting the advertisement of abortion services as violating freedom of speech under the First Amendment); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 52 (1976) (invalidating a Missouri law requiring spousal consent and parental notification in order for a woman to obtain a legal abortion in the state); *Bellotti v. Baird*, 443 U.S. 622, 622 (1979) (finding that a Massachusetts law requiring minors seeking abortions to present evidence of parental consent was unconstitutional); *Colautti v. Franklin*, 439 U.S. 379, 379 (1979) (striking a provision of the Pennsylvania Abortion Control Act requiring physicians performing an abortion to attempt to preserve the life of the fetus if the fetus had reached the stage of viability), *abrogated by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

⁶¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877–84 (1992) (evaluating several portions of the Pennsylvania Abortion Control Act under the new undue burden test framework drafted by Justice O'Connor), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

⁶² See *id.* (discussing a state's legitimate interest in protecting unborn life, but replacing *Roe's* trimester framework, designed to further such state interests, with the undue burden test).

⁶³ See *id.* at 845 (cautioning that exercise of one's freedoms and rights is hindered by legal debates over the existence of such rights, and positing that the undue burden framework was designed to end those debates); *id.* at 944 (Rehnquist, C.J., dissenting) (characterizing abortion law in the United States as "confused," noting several cases that highlight the inconsistency with which the Court has addressed abortion statutes, and arguing that *Roe* was wrongly decided).

⁶⁴ See *id.* at 878 (majority opinion) (defining an undue burden as one that constitutes a "substantial obstacle" to a woman's right to choose whether to terminate a pregnancy).

Applying this framework for the first time in *Casey*, the Court struck down several Pennsylvania abortion restrictions as presenting undue burdens, including a provision requiring spousal notification prior to obtaining an abortion.⁶⁵ Because statistics indicated that a significant number of pregnant women seeking abortions also suffered from domestic violence, the Court found that the spousal notification requirement would substantially limit abortion access for a significant number of women seeking to keep the abortion secret from an abusive partner, and thus presented an undue burden.⁶⁶ Nevertheless, the Court permitted some restrictions to remain in effect.⁶⁷ For example, an informed consent mandate requiring physicians to inform women about alternatives to abortion was not an undue burden because states may permissibly require written and informed consent prior to medical procedures.⁶⁸

Just eight years after *Casey*, application of the undue burden test started to produce a series of inconsistent decisions.⁶⁹ Judicial confusion regarding the

⁶⁵ See *id.* at 893–94.

⁶⁶ See *id.* (striking the spousal notification provision of the Pennsylvania Abortion Control Act). The Court noted that although past decisions had upheld parental notification requirements for minors seeking to obtain an abortion, the invalidation of a spousal notification requirement differed because it restricted adult, rather than minor, women from exercising their right to abortion under *Roe*. *Id.* at 895; see *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 503 (1990) (permitting a parental notification requirement for minors seeking abortions).

⁶⁷ See *Casey*, 505 U.S. at 886 (upholding the remaining provisions of the Pennsylvania Abortion Control Act, including a mandatory waiting period); 18 PA. STAT. AND CONS. STAT. § 3205 (West 2023) (outlining the Pennsylvania Abortion Control Act's informed consent requirements, which *Casey* also upheld).

⁶⁸ See *Casey*, 505 U.S. at 885–86 (outlining the informed consent and twenty-four-hour waiting period provisions of the Pennsylvania Abortion Control Act).

⁶⁹ Compare *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000) (finding a partial-birth abortion ban unconstitutional under *Casey*), with *Gonzales v. Carhart*, 550 U.S. 124, 133 (2007) (finding a federal partial-birth abortion ban permissible under *Casey*). In 2000, in *Stenberg v. Carhart*, the Court applied *Casey* to prohibitions on partial birth abortions—a procedure in which a physician uses forceps to partially remove the fetus from the birth canal and snip the spinal cord, killing the fetus. 530 U.S. at 922–29, 984; see Scherer, *supra* note 6, at 853–54 (describing state and federal laws attempting to restrict partial birth abortions); *Gonzales*, 550 U.S. at 135–41 (explaining the process of dilation and extraction abortions, a particular form of partial birth abortions, and concluding that limitations on the procedure were constitutional); Janice Hopkins Tanne, *US Supreme Court Approves Ban on "Partial Birth Abortion,"* NAT'L CTR. FOR BIOTECHNOLOGY INFO. (Apr. 28, 2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1857800/> [<https://perma.cc/N7VE-H5RQ>] (explaining the manner in which a partial birth abortion procedure is performed). The Court found that prohibiting such abortions presented an undue burden due to the lack of a medical emergency exception, as well as the prohibition's secondary effect of disallowing another abortion procedure, known as dilation and extraction, commonly used in later pregnancies. See *Stenberg*, 530 U.S. at 930 (invalidating Nebraska's statute prohibiting partial birth abortions as creating an undue burden because the statute did not account for medical emergencies in which a partial birth abortion might be necessary and prevented women from having the autonomy to choose the particular form of abortion they desired and their physician recommended). In *Gonzales v. Carhart*, however, the Court applied the same undue burden test to the Partial Birth Abortion Act, finding that the federal restrictions did *not* impose an undue burden. See 550 U.S. at 141–42 (finding that the federal restrictions on partial birth abortions differed from the state restrictions in *Stenberg*, and were thus constitutional, because the Partial Birth Abortion Act included

scope of the undue burden test has only continued in recent years.⁷⁰ Indeed, in 2020, in *June Medical Services L.L.C. v. Russo*, several justices expressed concern with the efficacy of the undue burden test and the constitutionality of abortion itself.⁷¹ The inability of courts to analyze post-*Casey* abortion restrictions also affected the American public at large, sparking heated political debates and increasingly violent protests.⁷² Public debate intensified in May

certain exceptions such that the limitations did not substantially hinder women seeking abortions in the second trimester).

⁷⁰ Compare *Whole Woman's Health v. Hellerstedt*, 578 U.S. 582, 582, 584–86 (2016) (finding that an admitting privileges requirement violated *Casey*), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), with *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2103, 2133 (2020) (Roberts, C.J., concurring) (suggesting that *Whole Woman's Health v. Hellerstedt* was incorrectly decided), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). In *Hellerstedt*, the Court struck down Texas statutes that required physicians responsible for performing abortions to receive hospital admitting privileges within a thirty-mile radius of the place at which the abortion was to be carried out. See 578 U.S. at 584–86 (striking Texas's abortion restriction law); TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West 2023) (codifying Texas's statute requiring that physicians have admitting privileges). The Court found that the statutes presented an undue burden to women in Texas seeking an abortion because Texas failed to offer evidence that the admitting privileges requirement improved the care provided to women obtaining an abortion. *Hellerstedt*, 578 U.S. at 610–11. As such, the statute was not reasonably related to such permissible goals as protecting the health of the mother or upholding medical safety standards, but instead had the effect of creating a substantial obstacle to a woman's ability to obtain an abortion—a finding ostensibly bolstered by the fact that a number of abortion facilities in Texas closed after being unable to comply with the admitting privileges requirement. *Id.*

⁷¹ See 140 S. Ct. at 2133–34 (Roberts, C.J., concurring) (arguing that *Hellerstedt* was incorrect); *id.* at 2149 (Thomas, J., dissenting) (criticizing *Roe* and suggesting that no constitutional right to abortion exists); Scherer, *supra* note 6, at 856 (noting that although *June Medical Services* and *Hellerstedt* confronted nearly identical statutes, the Court's strong position in *Hellerstedt* began to waver in *June Medical Services*).

⁷² See Jeremy W. Peters, *As Passions Flare in Abortion Debate, Many Americans Say 'It's Complicated'*, N.Y. TIMES (June 15, 2019), <https://www.nytimes.com/2019/06/15/us/politics/abortion-debate-pennsylvania.html> [https://perma.cc/J74Q-XKQD] (noting that abortion is not a black-and-white issue, as many Americans have developed complex views that are not fully captured by either of the major political parties). Abortion concerns have even crept into seemingly unrelated political debates, including tax policies. *Id.* Unfortunately, the ever-increasing polarization has too commonly erupted into violence. See *Hill v. Colorado*, 530 U.S. 703, 727 (2000) (finding that limiting protesters' ability to approach an abortion clinic did not violate the First Amendment, and reviewing a pattern of "aggressive" and "confrontational" conversations between protestors and the clinic's providers); Liam Stack, *A Brief History of Deadly Attacks on Abortion Providers*, N.Y. TIMES (Nov. 29, 2015), <https://www.nytimes.com/interactive/2015/11/29/us/30abortion-clinic-violence.html> [https://perma.cc/73ZN-MV96] (reviewing violent attacks on abortion clinics and physicians, including the targeted murders of abortion providers); Andrew Martinez, *Seven Arrested as March for Life Turns Violent*, BOS. HERALD, <https://www.bostonherald.com/2019/06/02/seven-arrested-as-march-for-life-turns-violent/> [https://perma.cc/K3BM-EXNU] (June 3, 2019) (discussing violent attacks on participants in a pro-life demonstration, including one instance of an opponent of the demonstration throwing urine on participants); *Disturbing Trend of Attacks on Pro-life Displays on College Campuses*, CBN NEWS (Nov. 16, 2017), <https://www1.cbn.com/cbnnews/us/2017/november/disturbing-trend-of-attacks-on-pro-life-displays-on-college-campuses> [https://perma.cc/X3BB-D2N4] (discussing increased violence on college campuses between abortion defenders and opponents, including acts of vandalism, theft, and physical aggression); Bruce Hausknecht, *Death and Bomb Threats Sent to Texas Pro-life Organiza-*

2022, when a leaked draft opinion signaled that the Supreme Court could be poised to reject the undue burden test.⁷³ Finally, in June 2022, in *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overruled both *Roe* and *Casey*.⁷⁴ In doing so, the Court held that the Constitution does not ensure a fundamental right to abortion, that the individual states may determine abortion access in their respective jurisdictions, and that subsequent constitutional challenges to laws limiting abortion access need not survive the undue burden test.⁷⁵

Despite significantly altering the legal landscape of abortion access, *Dobbs* failed to consider the constitutionality of reason-based abortions, including abortions chosen solely on account of the fetus's disability diagnosis.⁷⁶ Similarly, in creating the undue burden test, *Casey* also declined to address Pennsylvania's then-prohibition of a form of reason-based abortions: sex-selective abortions.⁷⁷ The Pennsylvania Abortion Control Act forbade a physician from performing an abortion sought because the child's predicted sex was undesirable to the mother.⁷⁸ Although *Casey* evaluated several of the Act's provisions under the undue burden framework, it never considered whether an outright ban on sex-selective abortions, or reason-based abortions in general, represented an undue burden, because the plaintiffs did not challenge that provision.⁷⁹ After the Supreme Court's reshaping of abortion jurisprudence in

tion Over Heartbeat Law, DAILY CITIZEN (Sept. 13, 2021), <https://dailycitizen.focusonthefamily.com/death-and-bomb-threats-sent-to-texas-pro-life-organization-over-heartbeat-law/> [<https://perma.cc/E27E-8NVM>] (noting the number of increasingly violent threats sent to the Texas Right to Life organization, including a "mysterious package" delivered to the organization and accompanied by a bomb warning).

⁷³ See, e.g., Press Release, Supreme Court of the United States, Statement of the Court Concerning the Leak Investigation (Jan. 19, 2023) (discussing the inconclusive results of an investigation into the leak of the Court's draft decision); Ellie Silverman, Justin Wm. Moyer & Joe Heim, *Crowds Protest at Supreme Court After Leak of Roe Opinion Draft*, WASH. POST, <https://www.washingtonpost.com/dc-md-va/2022/05/03/protests-roe-v-wade-supreme-court/> [<https://perma.cc/3YB3-7N9L>] (May 3, 2022) (discussing protests by abortion defenders outside the Supreme Court immediately following the leaked draft opinion, noting that some resulted in violent altercations between abortion opponents and proponents).

⁷⁴ See generally *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (finding that the Constitution does not guarantee a right to abortion and thereby overruling *Roe* and *Casey*).

⁷⁵ *Id.* at 2283–84.

⁷⁶ See generally *id.* (overruling *Roe* and *Casey*, but not addressing disability-based abortions).

⁷⁷ See 18 PA. STAT. AND CONS. STAT. § 3204(c) (West 2023) (prohibiting physicians from performing an abortion purely on the basis of the fetus's predicted sex); *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 536–37 (6th Cir. 2021) (noting that although the Pennsylvania Abortion Control Act contained a provision prohibiting sex-selective abortions—that is, a form of reason-based abortions—the provision went unchallenged in *Casey*, and thus the Supreme Court never addressed its constitutionality under the undue burden framework), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

⁷⁸ See § 3204(c) (banning sex-selective abortions in Pennsylvania); *Preterm-Cleveland*, 994 F.3d at 537 (discussing the unchallenged sex-selective abortion ban in *Casey*).

⁷⁹ See *Preterm-Cleveland*, 994 F.3d at 537 (explaining the Court's failure to rule on sex-selective or other reason-based abortions in *Casey*).

Dobbs, the constitutionality of restrictions on such reason-based abortions remains an open question.⁸⁰ No court post-*Dobbs* has addressed the issue, but several circuit courts pre-*Dobbs* relied on the undue burden test in attempting to decide the matter.⁸¹ The use of the undue burden test, however, led once again to a series of inconsistent cases.⁸² In the most recent pre-*Dobbs* case, the Sixth Circuit proposed not only that disability-selective abortion restrictions are not an undue burden, but also that the undue burden standard is not the proper place to begin the analysis.⁸³ Instead, the Sixth Circuit suggested in several concurrences that courts should rely on the Due Process and Equal Protection Clauses of the Fourteenth Amendment to evaluate disability-based abortion restrictions.⁸⁴

C. Fourteenth Amendment Jurisprudence

Ratified just a few years after the Civil War, the Fourteenth Amendment introduced several protections for all citizens—ostensibly regardless of race, sex, or disability.⁸⁵ The Amendment outlines the Due Process and Equal Protection Clauses, the first of which mandates that the state not infringe fundamental rights without providing individuals with substantive due process, and the second of which requires that the states afford equal legal protection to all persons.⁸⁶ What it did not do, however, is define “person,” thus opening the two clauses to future debate over what counts as a person, and as a result

⁸⁰ See Kalantry, *supra* note 6, at 1–2 (explaining that many are waiting for the Supreme Court to address the issue of reason-based abortions in the near future).

⁸¹ See, e.g., *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021) (invoking the undue burden test to analyze a law prohibiting abortions when sought solely because of the fetus’s Down syndrome diagnosis), *vacated*, 142 S. Ct. 2894 (2022).

⁸² Compare *Little Rock Fam. Plan. Servs.*, 984 F.3d at 690 (finding, pre-*Dobbs*, that an Arkansas law banning abortions based solely on a fetal Down syndrome diagnosis violated the undue burden framework), and *Planned Parenthood of Ind. & Ky., Inc. (PPINK) v. Comm’r of the Ind. State Dep’t of Health*, 888 F.3d 300, 302 (7th Cir. 2018) (holding that an Indiana law limiting sex-selective and disability-based abortions failed the undue burden test), *rev’d in part*, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019), with *Preterm-Cleveland*, 994 F.3d at 527 (finding that Ohio’s law preventing doctors from performing abortions they knew were sought solely due to a fetal Down syndrome diagnosis satisfied the undue burden test).

⁸³ See *Preterm-Cleveland*, 994 F.3d at 535 (finding that an Ohio law prohibiting disability-based abortions did not constitute an undue burden); *id.* at 539 (Griffin, J., concurring) (suggesting that the majority ought to have used the Equal Protection Clause, rather than the undue burden test, to find the Ohio law constitutional).

⁸⁴ See *id.* at 539 (Griffin, J., concurring) (discussing reason-based abortions as a modern tool of eugenics and suggesting that the Equal Protection Clause might be invoked to find that reason-based abortions themselves are unconstitutional).

⁸⁵ See U.S. CONST. amend. XIV (protecting all citizens from unequal treatment by the federal or a state government).

⁸⁶ *Id.*

whether they protect the unborn.⁸⁷ Moreover, exactly *how* the clauses protect individuals presented substantial difficulties to the judiciary.⁸⁸

The Due Process Clause protects individuals from unjustified infringement of their fundamental rights, but fails to delineate such fundamental rights.⁸⁹ Courts have interpreted fundamental rights to include, automatically, all rights enumerated in the Bill of Rights.⁹⁰ Additionally, fundamental rights may exist where the nation has a tradition of honoring and protecting such a right.⁹¹ Applying the Due Process Clause analysis to an enumerated right involves strict scrutiny, the courts' most aggressive review.⁹² The analysis of an unenumerated right, however, is less straightforward.⁹³ If there is no history of protecting the right, then a court will only review its infringement under permissive rational basis review.⁹⁴ If there is such a history, then the court will

⁸⁷ *Id.* (granting citizenship to "persons" who were born or naturalized in the country, but not defining personhood); Lugosi, *supra* note 17, at 271–72 (arguing that the Equal Protection Clause may apply to the unborn, but noting that much of the difficulty in making such an argument lies in the fact that the Fourteenth Amendment did not define "persons").

⁸⁸ See Martin A. Schwartz, *Due Process and Fundamental Rights*, 17 *TOURO L. REV.* 237, 237, 247–48 (2000) (arguing that the proper method for applying the due process analysis has remained controversial, and explaining lingering questions regarding the Equal Protection Clause analysis that have resulted in several circuit splits).

⁸⁹ See *id.* at 238–40 (reviewing various Supreme Court cases deciding what constitutes a fundamental right under the Fourteenth Amendment, including rights related to childrearing and abortion); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (1925) (finding that parents have a fundamental right to decide at which school to enroll their children); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (affirming a fundamental right of parents to raise their children as they see fit); *Troxel v. Granville*, 530 U.S. 57, 60 (2000) (holding that a parent's fundamental right to make decisions regarding childrearing includes the right to refuse visitors, including grandparents); *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) (invoking the fundamental right to abortion to permit partial-birth abortions).

⁹⁰ See *Glucksberg*, 521 U.S. at 720 (finding that due process protects all rights enumerated within the Bill of Rights); Viktor Mayer-Schönberger, *Substantive Due Process and Equal Protection in the Fundamental Rights Realm*, 33 *HOWARD L.J.* 287, 300 (1990) (explaining that the Bill of Rights contains explicit, rather than implicit, fundamental rights).

⁹¹ See *Glucksberg*, 521 U.S. at 720–21 (affirming the Court's method of protecting fundamental rights not contained within the Bill of Rights, but nevertheless fundamental, given the nation's history of protecting such rights); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (explaining that courts should determine whether unenumerated rights are fundamental by evaluating whether history demonstrates a "solid recognition" of the values the right implicates (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965))).

⁹² See *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (rejecting an interest-balancing approach to evaluating enumerated fundamental rights, and holding that enumerated rights receive the strictest scrutiny because the Constitution has identified such rights as beyond judicial assessment).

⁹³ See *Glucksberg*, 521 U.S. at 728 (explaining that the Court protects unenumerated rights as fundamental only if they satisfy the additional step of being deeply rooted in the nation's history and tradition).

⁹⁴ See *id.* (holding that because the Bill of Rights does not enumerate a right to physician-assisted suicide, and because there is no longstanding tradition of protecting such a right in the United States, the proper analysis was to apply rational basis review); *Williamson v. Lee Optical of Okla., Inc.*, 348

apply some variation of strict scrutiny.⁹⁵ Until *Dobbs*, the Supreme Court had carved out a separate analysis for abortion cases.⁹⁶ Having identified abortion as an unenumerated but fundamental right, the Court held that abortion restrictions are subject neither to strict scrutiny nor rational basis review, but rather to *Casey*'s undue burden test.⁹⁷ The Court later backtracked in *Dobbs*, finding that abortion is not a fundamental right under the Constitution, and thus subject only to rational basis review, but that states may nevertheless choose to recognize abortion rights.⁹⁸

As with the Due Process Clause's multistep analysis, the Court has established a framework known as the tiers of scrutiny for evaluating Equal Protection Clause claims.⁹⁹ This tiered analysis results in the Equal Protection Clause protecting certain classes of individuals—such as race, sex, or disability—unequally.¹⁰⁰ The Supreme Court reserves strict scrutiny under the Equal Protection Clause for those classes deemed “suspect” due to a history of systemic discrimination.¹⁰¹ Such suspect classes include race and national origin, meaning that a complaint alleging a state's violation of the Fourteenth Amendment on the basis of one's race or national origin will receive the Court's most searching form of scrutiny, with less deference given to a state's purported rea-

U.S. 483, 487–88 (1955) (finding that an unenumerated economic right triggered only rational basis review).

⁹⁵ See *Griswold*, 381 U.S. at 482, 484, 485–86 (finding that the right to privacy is not an enumerated right in the Bill of Rights, but is nevertheless fundamental given the nation's history of identifying privacy rights within the “penumbra” of various constitutional clauses, and applying strict scrutiny to the infringement of the right).

⁹⁶ See *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (finding that the unenumerated fundamental right to privacy includes a right to abortion), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878–79 (1992) (rejecting *Roe*'s trimester framework, a version of strict scrutiny, and replacing it with the undue burden test), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). *But see generally Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2283–84 (2022) (rejecting the separate analysis *Casey* devised for analyzing abortion restrictions).

⁹⁷ *Casey*, 505 U.S. at 878–79; see Schwartz, *supra* note 88, at 242–43 (explaining that *Casey* replaced *Roe*'s strict scrutiny with the undue burden test, and criticizing the test as unclear and unhelpful).

⁹⁸ *Dobbs*, 142 S. Ct. at 2283–84.

⁹⁹ See Mark Strasser, *Interpretations of Loving in Lawrence, Baker, and Goodridge: On Equal Protection and the Tiers of Scrutiny*, 13 WIDENER L.J. 859, 863 (2004) (explaining the Court's traditional tiers of scrutiny method of evaluating equal protection claims).

¹⁰⁰ See R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 J. CONST. L. 225, 230 (2002) (delineating the varying standards of review used by the Supreme Court in applying the Equal Protection Clause); Bruce Forrest Klein, Note, *Rational Basis? Strict Scrutiny? Intermediate Scrutiny? Judicial Review in the Abortion Cases*, 9 OKLA. CITY U. L. REV. 317, 321–22 (1984) (defining the levels of scrutiny in the context of abortion, and noting that strict scrutiny is usually reserved for a court's application of the Equal Protection Clause).

¹⁰¹ See Klein, *supra* note 100, at 322 (characterizing strict scrutiny as the most searching standard of review); Kelso, *supra* note 100, at 255 n.158 (explaining that strict scrutiny under the Equal Protection Clause is used to evaluate suspect classifications, such as on the basis of race or national origin).

soning.¹⁰² Discrimination on the basis of sex receives slightly less searching intermediate scrutiny, whereas non-suspect classes other than sex receive only rational basis review.¹⁰³ Although disability discrimination falls under rational basis review, the Court has often utilized a modified version of review—known as rational basis review with bite—when it suspects that animosity toward a disabled population motivated the legislation.¹⁰⁴

Notably, abortion defenders and opponents have both invoked the Equal Protection Clause in support of their arguments.¹⁰⁵ Defenders posit, for example, that the right to abortion is found not within a right to privacy—as *Roe* found and *Dobbs* rejected—but rather within the Equal Protection Clause’s requirement of equal protection regardless of sex.¹⁰⁶ Opponents, on the other hand, argue that the Equal Protection Clause protects the unborn as persons under the Fourteenth Amendment, and that abortion of an unborn fetus violates

¹⁰² See John H. Hasen, Note, *Sex Discrimination and Equal Protection: The Question of a Suspect Classification*, 5 N.Y.U. REV. L. & SOC. CHANGE 1, 7 (1975) (explaining that the suspect classes, which receive the Court’s most searching level of review in assessing whether government action has abridged Equal Protection Clause rights, include classifications on the basis of race, lineage, alienage, and national origin); see, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 184 (1964) (holding that discrimination on the basis of race required strict scrutiny because race was a suspect classification).

¹⁰³ See *Kelso*, *supra* note 100, at 227, 230 (explaining that intermediate scrutiny is less searching than strict scrutiny, but still more stringent than rational basis review, and noting that it requires state action to implicate a legitimate government interest in order to pass muster); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (finding that sex discrimination triggers intermediate scrutiny, which requires an “exceedingly persuasive justification” for the discrimination (first quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994); and then quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982))); Raphael Holoszye-Pimentel, *Reconciling Rational Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2070 (2015) (noting that rational basis review will often result in courts permitting the challenged legislation, as the standard of review generally defers to the legislature and searches only for a reasonable basis for the non-suspect classification, but introducing the concept of a slightly heightened standard of rational basis review known as rational basis with bite).

¹⁰⁴ See Holoszye-Pimentel, *supra* note 103, at 2087 (analyzing the slightly more searching form of rational basis review adopted by the courts when confronted with a classification that is non-suspect, but that nevertheless implicates concerns of animus against a particular group of people); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 432 (1985) (purporting to adopt rational basis review in examining a city’s refusal to grant a zoning permit that would allow the development of a group home for the mentally disabled, declining to identify the disabled as a quasi-suspect class, but nevertheless finding that the city’s refusal constituted impermissible discrimination under the Equal Protection Clause of the Fourteenth Amendment).

¹⁰⁵ See generally Ruth Bader Ginsburg, Essay, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985) (arguing that the right to abortion in *Roe* would have been less controversial had it been premised not on a right to privacy, but instead on notions of preventing sex discrimination under the Equal Protection Clause); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 352–53 (1992) (arguing that abortion restrictions are unconstitutional under the Equal Protection Clause); Lugosi, *supra* note 17, at 272 (arguing that the Equal Protection Clause, rather than securing a right to abortion, may defeat it by guaranteeing to the unborn fetus a right to life).

¹⁰⁶ See Siegel, *supra* note 105, at 262 (reviewing the increasing controversy of *Roe* and abortion, and arguing that the right to privacy was a shaky foundation on which to premise the right to abortion).

the fetus's right to life.¹⁰⁷ In *Preterm-Cleveland v. McCloud*, the concurrence suggested that reason-based abortions, particularly those sought on the basis of a predicted disability, violate the Equal Protection Clause's assurance to the disabled community of equal treatment under the law.¹⁰⁸

II. COMPARING THE UNDUE BURDEN TEST WITH THE EQUAL PROTECTION CLAUSE

Preterm-Cleveland v. McCloud, with its lengthy majority opinion followed by four concurrences and six dissents, exemplifies the judiciary's struggle to settle on an appropriate standard under which to evaluate reason-based abortions and their regulation.¹⁰⁹ Though the long-accepted standard before the Court's decision in *Dobbs v. Jackson Women's Health Organization* has been the undue burden test, *Preterm-Cleveland* represents the most notable move toward altering or perhaps even abandoning *Planned Parenthood of Southeastern Pennsylvania v. Casey*'s analysis when evaluating limitations on reason-based abortions.¹¹⁰ Section A of this Part examines various circuit courts' pre-

¹⁰⁷ See Lugosi, *supra* note 17, at 272 (arguing that abortion violates the Equal Protection Clause).

¹⁰⁸ See *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 539 (6th Cir. 2021) (Griffin, J., concurring) (suggesting that the Equal Protection Clause invalidates reason-based abortions committed against fetuses diagnosed with a disability), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

¹⁰⁹ See *id.* at 536 (Sutton, J., concurring) (agreeing that Ohio's disability-based abortion restriction is constitutional, but arguing that the undue burden test does not cover reason-based abortion restrictions); *id.* at 540 (Griffin, J., concurring) (arguing that although preventing eugenics constitutes a compelling state interest under the undue burden test, *Casey* did not address whether reason-based abortions fall under its test); *id.* at 541 (Bush, J., concurring) (arguing that the traditional Due Process Clause analysis should replace the undue burden test, and concluding that Ohio's restrictions survive even strict scrutiny); *id.* at 550 (Kethledge, J., concurring) (writing separately to reject the U.S. Court of Appeals for the Seventh Circuit's holding that disability-based abortion restrictions constitute impermissible pre-viability bans); *id.* (Cole, J., dissenting) (arguing that even if Ohio's abortion restrictions survive the undue burden test, they violate the First Amendment by restricting a woman's freedom of speech to communicate with her physician); *id.* at 551 (Moore, J., dissenting) (arguing that the majority impermissibly relied on dicta in Justice Robert's *June Medical Services* concurrence, which is not precedential, to conclude that Ohio's restrictions did not constitute a pre-viability ban, and criticizing the concurrences for comparing disability-based abortions to eugenics); *id.* at 563 (Clay, J., dissenting) (criticizing the majority and concurrences for attempting to reject Supreme Court precedent); *id.* at 568 (Gibbons, J., dissenting) (arguing that disability-based abortions are not eugenic and that, instead, dictating a woman's decisions regarding reproductive health perpetuates eugenic mindsets); *id.* at 569 (White, J., dissenting) (disagreeing with the majority's characterization of disability-based abortions as eugenic); *id.* (Donald, J., dissenting) (arguing that Ohio's regulation is a pre-viability ban and thus immediately unconstitutional under *Casey*).

¹¹⁰ See Greer Donley & Jill Wieber Lens, *Second-Trimester Abortion Dangertalk*, 62 B.C. L. REV. 2145, 2146, 2157, 2165 (2021) (explaining, prior to *Dobbs*, that although the Supreme Court had begun shifting away from the undue burden test, *Casey*'s framework then remained the standard by which courts evaluate all abortion restrictions, including disability-based abortions); *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1784 (2019) (Thomas, J., concurring) (explaining that reason-based abortion restrictions might not fall under the undue burden test given their potential to implicate eugenic concerns); *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 687 (8th Cir.

Dobbs interpretation of the undue burden test in the context of disability-based abortion regulations, highlighting both the advantages and disadvantages of adopting this framework.¹¹¹ Section B presents the separate approach advocated by the *Preterm-Cleveland* concurrences—namely, structuring the Fourteenth Amendment to include the protection of disabled fetuses.¹¹²

A. Applying the Undue Burden Test to Disability-Based Abortion Regulations: The Sixth Circuit's Split from the Seventh and Eighth Circuits

Until the U.S. Court of Appeals for the Sixth Circuit's en banc rehearing in *Preterm-Cleveland*, no federal district or circuit court had held disability-based abortion regulations to be constitutional under *Casey*'s undue burden test.¹¹³ The main thrust of these decisions held that disability-based abortion regulations violated *Casey* by prohibiting at least some women from obtaining an abortion prior to fetal viability.¹¹⁴ Because the undue burden test weighs a state's interest in relation to fetal viability, an outright prohibition of abortion pre-viability fails *Casey* because the mother's interest pre-viability outweighs the state's.¹¹⁵ It is not until the fetus reaches viability that a state's legitimate interests may gain enough strength to support an abortion prohibition.¹¹⁶ Because most disabilities are diagnosed before the fetus has reached viability, the majority of circuit courts pre-*Dobbs* reasoned that limiting disability-based

2021) (concluding that disability-based abortion restrictions failed the undue burden test, but cautioning that the test itself is "obviously" subject to future rejection), *vacated*, 142 S. Ct. 2894 (2022); *Preterm-Cleveland*, 994 F.3d at 547 (Bush, J., concurring) (outlining a framework for reviewing disability-based abortion restrictions under the Due Process Clause's strict scrutiny).

¹¹¹ See *infra* notes 113–155.

¹¹² See *infra* notes 156–198.

¹¹³ See Donley & Lens, *supra* note 110, at 2165–66 (explaining that it was not until *Preterm-Cleveland* that a court found disability-based abortion restrictions constitutional under *Casey*, but noting that several preceding cases had questioned whether such restrictions survive the undue burden test); *Planned Parenthood of Ind. & Ky., Inc., (PPINK) v. Comm'r of the Ind. State Dep't of Health*, 888 F.3d 300, 302 (7th Cir. 2018) (finding disability-based abortion provisions unconstitutional under *Casey*), *rev'd in part*, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019); *Little Rock Fam. Plan. Servs.*, 984 F.3d at 690 (holding that a disability-based abortion restriction violated the undue burden test).

¹¹⁴ See *PPINK*, 888 F.3d at 302 (finding that Indiana's reason-based abortion restrictions interfered with women's right to obtain a pre-viability abortion by banning such abortions); *Little Rock Fam. Plan. Servs.*, 984 F.3d at 689–90 (classifying Arkansas's disability-based abortion restriction as a ban of certain pre-viability abortions).

¹¹⁵ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (holding that state abortion restrictions cannot amount to a prohibition of pre-viability abortions), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

¹¹⁶ *Id.*

abortion constitutes an impermissible prohibition of pre-viability abortions under the undue burden test.¹¹⁷

For example, in 2018, in *Planned Parenthood of Indiana and Kentucky, Inc. (PPINK) v. Commissioner of the Indiana State Department of Health*, the U.S. Court of Appeals for the Seventh Circuit found an Indiana statute regulating reason-based abortions unconstitutional under the *Casey* framework.¹¹⁸ The 2016 Indiana act, titled the “Sex Selective and Disability Abortion Ban,” imposed criminal sanctions on an abortion provider who performed an abortion with the knowledge that the woman’s sole reason for seeking the abortion was the fetus’s predicted sex, race, national origin, or disability status.¹¹⁹ The Sex Selective and Disability Abortion Ban applied to abortions performed at any stage of pregnancy—that is, both pre- and post-viability.¹²⁰ After a district court granted a permanent injunction blocking Indiana from enforcing the ban, the Seventh Circuit affirmed the holding, citing *Casey*.¹²¹ The Seventh Circuit reiterated *Casey*’s categorical rule: pre-viability, a state may not prohibit a woman from seeking abortion, and any pre-viability regulations that do not constitute an outright ban will only be constitutional if they do not place a substantial obstacle in the path of a woman seeking an abortion.¹²² Because Indiana’s statute applied across all stages of pregnancy, including pre-viability, the Seventh Circuit found that the statute could only survive if it constituted neither an abortion ban nor a substantial obstacle.¹²³ The Seventh Circuit found it unnecessary, however, to determine whether the statute presented a substantial obstacle because the Sex Selective and Disability Abortion Ban failed the first step of the analysis as an outright ban.¹²⁴ As such, the Seventh Circuit, in a

¹¹⁷ See Donley & Lens, *supra* note 110, at 2154 (explaining that although genetic screening is available during the first trimester, most diagnoses of fetal disability cannot be made until at least the second trimester); *PPINK*, 888 F.3d at 310 (Manion, J., concurring) (concluding that because Indiana’s disability-based abortion restrictions govern all stages of pregnancy—thereby necessarily including pre-viability—the restrictions violate *Casey*’s undue burden test).

¹¹⁸ *PPINK*, 888 F.3d at 306–07; IND. CODE § 16-34-2-1.1(K) (2021) (codifying Indiana’s Sex-Selective and Disability Abortion Ban as prohibiting abortion when chosen only because of the fetus’s “race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis” of Down syndrome).

¹¹⁹ See *PPINK*, 888 F.3d at 303 (explaining that Indiana’s disability-based abortion prohibition, when read in conjunction with a separate provision of the code, would result in such abortions constituting felonies).

¹²⁰ See IND. CODE § 16-34-2-1.1 (introducing reason-based abortion bans without differentiating between pre- and post-viability).

¹²¹ *PPINK*, 888 F.3d at 302, 305–06.

¹²² *Id.* at 305; see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (holding that prohibitions pre-viability are unconstitutional), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

¹²³ See *PPINK*, 888 F.3d at 302, 305–06 (explaining that *Casey* permits some regulations pre-viability, provided the regulations do not ban abortion and satisfy the undue burden’s substantial obstacle test).

¹²⁴ See *id.* at 306 (holding that Indiana’s statute prohibited pre-viability abortions).

unanimous decision, struck down Indiana's disability-based abortion statute as unconstitutional under *Casey*.¹²⁵

In 2019, however, in *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, the Supreme Court planted the seeds for a shift among the circuit courts when it denied certiorari to Indiana's appeal of the Seventh Circuit's *PPINK* holding.¹²⁶ In a per curiam opinion, the Court explicitly refrained from ruling as to whether the Seventh Circuit's holding was correct.¹²⁷ Rather, the Court denied certiorari on different grounds.¹²⁸ The Supreme Court traditionally does not intervene until multiple circuit courts have had the opportunity to consider a particular legal quandary; at the time of *Box*, only the Seventh Circuit had evaluated disability-based abortion regulations.¹²⁹ Thus, the Supreme Court delayed considering the merits of such reason-based abortion statutes.¹³⁰ In a lengthy concurrence reviewing the history of eugenics, Justice Thomas warned that the Court could not evade the issue of reason-based abortions much longer, and suggested that when the Court inevitably considers the matter, *Casey*'s undue burden test would not resolve the debate.¹³¹ Thus, although *Box* did not overrule *PPINK*, Justice Thomas's concurrence gave momentum to legislation targeting disability-based abortions.¹³²

This movement received a further boost in early 2021, via the U.S. Court of Appeals for the Eighth Circuit's *Little Rock Family Planning Services v.*

¹²⁵ *Id.* at 306, 310. *But see id.* at 311–13 (Manion, J., concurring) (agreeing that Indiana's regulations prohibited pre-viability abortions, in violation of *Casey*, but arguing that courts should not apply the undue burden test to reason-based abortions because it fails to consider the state's participation in eugenics).

¹²⁶ *See Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (declining to review the Seventh Circuit's *PPINK* holding, explaining that other circuit courts should first weigh in on the issue of disability-based abortions); Donley & Lens, *supra* note 110, at 2166 (arguing that *Box* represents a change in the Supreme Court's attitude toward disability-based abortions, evidenced particularly prominently in Justice Thomas's concurrence reviewing the history of eugenics).

¹²⁷ *Box*, 139 S. Ct. at 1782.

¹²⁸ *See id.* (holding that the Court denied certiorari simply because not enough circuit courts had debated the issue yet).

¹²⁹ *Id.*; SUP. CT. R. 10(a) (outlining circumstances in which the Court will grant certiorari, and explaining that the Court typically will not intervene until circuit courts are split on an issue).

¹³⁰ *See Box*, 139 S. Ct. at 1792–93 (Thomas, J., concurring) (agreeing that the Court does not yet have grounds to opine regarding the constitutionality of disability-based abortions, but cautioning that the Court is “dutybound” to address the issue eventually).

¹³¹ *See id.* (arguing that because *Casey* did not address reason-based abortions, the undue burden test does not govern the constitutionality of reason-based abortion restrictions).

¹³² *See id.* 1787–91 (reviewing the history of eugenics and Planned Parenthood founder Margaret Sanger's involvement with the movement); *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 689 (8th Cir. 2021) (explaining that Indiana sought to defend its statute by citing Justice Thomas's insinuation in *Box* that *Casey* does not control reason-based abortion restrictions), *vacated*, 142 S. Ct. 2894 (2022); *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 517–18 (6th Cir. 2021) (citing Justice Thomas's *Box* concurrence to support the proposition that disability-based abortions perpetuate discrimination against the disabled), *abrogated by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

Rutledge decision.¹³³ The Eighth Circuit applied the undue burden test to an Arkansas regulation limiting abortions sought solely on the basis of a fetal Down syndrome diagnosis, ultimately finding the regulation unconstitutional.¹³⁴ The Eighth Circuit began its analysis, however, by cautioning that while the undue burden test then-remained the only framework by which to evaluate such regulations, the standard may soon change.¹³⁵ Indeed, the court noted Justice Thomas's *Box* concurrence, which Arkansas cited in support of its proposition that *Casey* does not govern disability-based abortion regulations.¹³⁶ Nevertheless, in the absence of an alternative analysis, the Eighth Circuit reverted to the undue burden test, finding that the Arkansas statute effectively prohibited certain pre-viability abortions.¹³⁷

Finally, three months after *Little Rock*, the Sixth Circuit, sitting en banc, held for the first time that a disability-based abortion regulation not only did not constitute a pre-viability abortion prohibition, but moreover satisfied the undue burden test.¹³⁸ First, because Ohio's statute only prohibited physicians who had actual knowledge of a woman's disability-based reason for seeking an abortion from performing the abortion, the court found that the statute did not ban pre-viability abortions.¹³⁹ Rather, a woman seeking a pre-viability, disability-based abortion could still legally obtain one, provided she withheld her reason from her physician.¹⁴⁰

Having determined that the statute merely regulated, rather than banned, pre-viability abortions, the court next considered whether the regulation pre-

¹³³ See *Little Rock Fam. Plan. Servs.*, 984 F.3d at 687 (warning that the Court may replace the undue burden test in the near future); *id.* at 692 (Shepherd, J., concurring) (arguing that the Court needs to reexamine *Casey*'s viability standard as it proves unworkable in the context of disability-based abortion restrictions).

¹³⁴ *Id.* at 686, 690 (majority opinion); ARK. CODE ANN. § 20-16-2103 (West 2023) (prohibiting intentionally performed abortions when the physician knows the mother has sought the abortion solely due to a fetal Down syndrome diagnosis).

¹³⁵ *Little Rock Fam. Plan. Servs.*, 984 F.3d at 687.

¹³⁶ See *id.* at 692 (Shepherd, J., concurring) (reiterating Justice Thomas's statement that *Casey* may not govern disability-based abortions because it did not address whether eugenic abortions are constitutional).

¹³⁷ See *id.* at 689, 690 (majority opinion) (rejecting Justice Thomas's argument as a misunderstanding of both *Casey* and *Gonzales v. Carhart* and applying the undue burden test to find the restrictions unconstitutional, but concluding that the Supreme Court may yet revise *Casey* in the context of disability-based abortions).

¹³⁸ See *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 527, 535 (6th Cir. 2021) (finding that preventing disability-based discrimination is a legitimate state interest that Ohio's statute achieves without placing a substantial obstacle in the way of a woman seeking abortion in Ohio), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

¹³⁹ See *id.* at 518, 527 (holding that because doctors could still perform disability-based abortions if they were unaware of the woman's motives and women could still obtain such abortions if they did not share their motives, Ohio's restriction did not ban disability-based abortions pre-viability).

¹⁴⁰ *Id.* But see *id.* at 569–70 (Donald, J., dissenting) (arguing that the statute was a pre-viability ban because it prohibits specific types of abortions at any stage of pregnancy without exception).

sented a substantial obstacle to women seeking abortions in Ohio.¹⁴¹ In finding that the regulation satisfied the undue burden test, the court first evaluated whether Ohio demonstrated a legitimate state interest and, second, whether the statute imposed a substantial obstacle to abortion in a large fraction of cases.¹⁴² The Sixth Circuit recognized three legitimate state interests: first, protecting Ohio's Down syndrome community from discriminatory abortions; second, protecting pregnant women from coercion by physicians intent on performing reason-based abortions; and third, protecting the medical profession from affiliation with eugenics.¹⁴³ The court then found that the regulation was reasonably related to these three interests because it prohibited a physician from knowingly participating in a disability-based abortion.¹⁴⁴ Because the legitimate state interests sprung from concerns regarding a physician's knowing participation, the regulation's prohibition of such conduct, and only such conduct, achieved the state's legitimate goals.¹⁴⁵

Lastly, the Sixth Circuit considered whether the statute presented a substantial obstacle by identifying two burdens—first, that women may feel compelled to withhold information from their physicians and second, that women may engage in doctor-shopping to obtain an abortion without violating the disability-based abortion statute.¹⁴⁶ The court cited an expert's testimony that the

¹⁴¹ *Id.* at 527 (majority opinion); *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992) (holding that restrictions that do not ban pre-viability abortions nevertheless remain unconstitutional unless they do not constitute a substantial obstacle), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

¹⁴² *Preterm-Cleveland*, 994 F.3d at 527–28. The court reflected on the murkiness of the “large fraction test,” a component of *Casey*'s standard. *Id.* at 534. The court ultimately concluded that Ohio's statute would not impose a substantial obstacle to a large number of women in general seeking abortions in Ohio. *Id.* at 534–35. Moreover, analyzing specifically whether the statute adversely impacted a large fraction of women seeking disability-based abortions, the court similarly found it did not because women could still obtain such abortions provided they not share their motives with the physician. *Id.* at 527–28, 535.

¹⁴³ *Id.* at 531–32.

¹⁴⁴ *Id.* at 525, 527, 535.

¹⁴⁵ *Id.* at 525, 535; OHIO REV. CODE ANN. § 2919.10(B) (West 2022) (preventing physicians who perform abortions from doing so when they are aware that a woman has sought the abortion because of a fetal Down syndrome diagnosis).

¹⁴⁶ *See Preterm-Cleveland*, 994 F.3d at 525–26 (noting that the plaintiffs identified as many as five burdens, but concluding that the plaintiff's characterization of the burdens was redundant and essentially boiled down to the following: first, preventing women from communicating fully with their physicians and second, promoting doctor-shopping). *But see id.* at 558 n.5 (Moore, J., dissenting) (criticizing the way the majority characterized the burdens the plaintiffs asserted, and highlighting that plaintiffs presented several additional burdens, including financial obstacles and psychological distress). Compare Christine Vestal, *Some Abortion Bans Put Patients, Doctors at Risk in Emergencies*, PEW (Sept. 1, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/09/01/some-abortion-bans-put-patients-doctors-at-risk-in-emergencies> [<https://perma.cc/L9BG-FLCW>] (arguing that abortion restrictions place significant obstacles between physicians and patients seeking abortions, including, for example, the potential that a patient diagnosed with an ectopic pregnancy may delay treatment until the complications have become critical), with Emma Waters, *It's Time to Set*

reason a woman seeks an abortion is not medically relevant.¹⁴⁷ As such, the court found that Ohio's statute did not impose a substantial obstacle to women seeking pre-viability abortions because preventing women from sharing medically irrelevant information with their physicians is only an inconvenience akin to imposing additional delay, cost, or travel requirements on women seeking abortion—inconveniences which *Casey* and its successors explicitly allow.¹⁴⁸ Thus, because the statute was a pre-viability regulation, rather than a ban, and because it advanced legitimate state interests without imposing a substantial obstacle, the Sixth Circuit held that the statute survived the undue burden test.¹⁴⁹

Less than one month after the Sixth Circuit's break from the Seventh and Eighth Circuits, the Supreme Court granted certiorari in *Dobbs* to resolve the question of whether *all* pre-viability abortion prohibitions are unconstitutional.¹⁵⁰ The Court's subsequent decision to overrule *Roe v. Wade* and *Casey*, and to return the issue of abortion rights to the states, failed to resolve the disability-based abortion debate.¹⁵¹ Had the Court in *Dobbs* simply found that all pre-viability prohibitions were unconstitutional, then *PPINK* and *Little Rock* would have remained good law, and the circuit split regarding disability-based abortions would have remained unresolved.¹⁵² Alternatively, had the Court found

Record Straight on Ectopic Pregnancies and Abortion, HERITAGE FOUND. (July 29, 2022), <https://www.heritage.org/life/commentary/its-time-set-record-straight-ectopic-pregnancies-and-abortion> [<https://perma.cc/2TFB-HNTK>] (counterarguing that the treatment of an ectopic pregnancy does not constitute an abortion, and thus would not be impacted by abortion restrictions).

¹⁴⁷ See *Preterm-Cleveland*, 994 F.3d at 519, 527 (explaining that a woman's reason for seeking an abortion does not implicate medical concerns such that a physician must be aware of it to provide adequate medical care).

¹⁴⁸ *Id.* at 527; see also *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2136–37 (holding that abortion restrictions affecting expenses, timeframes, and travel do not pose an undue burden and thus survive *Casey*), *abrogated by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). But see Scherer, *supra* note 6, at 870 (arguing that disability-based abortion restrictions impose an undue burden by unraveling the protections of the doctor-patient relationship, because to receive an abortion legally, a woman must not tell her physician why she is seeking it and thus cannot ask related questions about the procedure).

¹⁴⁹ See *Preterm-Cleveland*, 994 F.3d at 535 (holding Ohio's statute constitutional).

¹⁵⁰ See *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619, 2619–20 (2021) (approving certiorari); *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 268, 270, 274 (5th Cir. 2019) (holding that a Mississippi statute banning abortions after fifteen weeks of pregnancy, at which point the fetus is not viable, resulted in a pre-viability ban and was thus unconstitutional under *Casey*), *rev'd*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

¹⁵¹ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2274, 2284 (2022) (failing to address the constitutionality of reason-based abortions, noting only that the undue burden test led courts to disagree over laws limiting such abortions and stating that constitutional challenges to such laws will now receive rational basis review).

¹⁵² See Donley & Lens, *supra* note 110, at 2156, 2167 (arguing that the Court is likely to permit some pre-viability prohibitions in *Dobbs* with the result impacting, in particular, access to disability-based abortions); *Planned Parenthood of Ind. & Ky., Inc., (PPINK) v. Comm'r of the Ind. State Dep't of Health*, 888 F.3d 300, 302 (7th Cir. 2018) (invalidating Indiana's disability-based abortion restriction because it prohibited abortions pre-viability, which the court held violated *Casey*), *rev'd in part*, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019); *Little Rock Fam. Plan.*

some pre-viability prohibitions constitutionally permissible, then invalidating disability-based abortion statutes as a pre-viability ban would no longer have sufficed, and *Preterm-Cleveland*'s strategy may have prevailed.¹⁵³ The Court chose neither of these options.¹⁵⁴ Instead, the Court avoided the issue of disability-based abortions in its entirety, leaving state courts to decide whether to use rational basis review, offer more robust protection to abortion rights by engaging in the analyses showcased in either *PPINK* and *Little Rock* or *Preterm-Cleveland*, or to adopt an entirely different framework.¹⁵⁵

B. Applying a Two-Step Fourteenth Amendment Analysis: The Sixth Circuit Hints at Due Process and Equal Protection Clause Frameworks

If *Box* kindled a growing movement away from reliance on the undue burden test in the context of disability-based abortions, then the *Preterm-Cleveland* concurrences suggest that the Supreme Court's spark has become a circuit court blaze.¹⁵⁶ The crux of pre-*Dobbs* calls to abandon the undue burden test rested in the argument that disability-based abortions constitute discrimination at best, and modern-day eugenics at worst.¹⁵⁷ As such, some judges and scholars have begun

Servs. v. Rutledge, 984 F.3d 682, 690 (8th Cir. 2021) (striking Arkansas's disability-based abortion restriction as a pre-viability ban), *vacated*, 142 S. Ct. 2894 (2022).

¹⁵³ See Donley & Lens, *supra* note 110, at 2167 (explaining that if *Dobbs* permits pre-viability abortions, then disability-based abortion restrictions that prohibit abortions may nevertheless be constitutional).

¹⁵⁴ See generally *Dobbs*, 142 S. Ct. at 2228 (rejecting the undue burden test).

¹⁵⁵ See Donley & Lens, *supra* note 110, at 2156 (arguing that *Dobbs* may trigger a new analysis beside the undue burden test); *Dobbs*, 142 S. Ct. at 2274, 2284 (finding that because abortion is not a fundamental right under the U.S. Constitution, the proper constitutional analysis of abortion restrictions is rational basis review); Micah Schwartzbach, *A Note from Our Editors: Your State's Laws Might Offer More Protections*, NOLO, <https://www.nolo.com/legal-encyclopedia/your-states-laws-might-offer-more-protections.html> [<https://perma.cc/SGY4-RHUB>] (explaining the general principle that the U.S. Constitution sets the floor for the rights states must protect, but that states can choose to offer additional protections not afforded by the federal Constitution); *State Constitutions and Abortion Rights: Building Protections for Reproductive Autonomy*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/state-constitutions-abortion-rights/> [<https://perma.cc/SZ7M-V4XT>] (highlighting the significance of state constitutions and laws in securing abortion rights after the Supreme Court found that the federal Constitution does not guarantee a right to abortion).

¹⁵⁶ See *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1792 (2019) (Thomas, J., concurring) (suggesting that *Casey* does not control disability-based abortions); *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 536 (6th Cir. 2021) (Sutton, J., concurring) (questioning whether the undue burden test applies to disability-based abortions), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *id.* at 541 (Bush, J., concurring) (agreeing with Judge Sutton that the undue burden test does not govern disability-based abortions).

¹⁵⁷ See *Box*, 139 S. Ct. at 1792 (Thomas, J., concurring) (concluding that disability-based abortions are eugenic); *PPINK*, 917 F.3d at 320–21 (Easterbrook, J., dissenting) (arguing that because reason-based abortions are eugenic and thus implicate different ethical concerns than those evaluated in *Casey*, *Casey* is not equipped to answer debates regarding reason-based abortions); *Preterm-Cleveland*, 994 F.3d at 525 (citing a legitimate state interest in decreasing discriminatory stigma targeting the Down syndrome community).

to consider whether these abortions and their regulations ought to be examined under a different lens of the Fourteenth Amendment.¹⁵⁸ Subsection 1 explores *Preterm-Cleveland*'s suggestion that courts use the traditional Due Process Clause analysis, rather than the undue burden test carve-out, to evaluate disability-based abortion regulations.¹⁵⁹ This Subsection also compares reviewing disability-based abortion regulations under the Due Process Clause with invoking the Equal Protection Clause to compel states to adopt such regulations.¹⁶⁰ Subsection 2 introduces a major obstacle to applying the Equal Protection Clause to cases involving the unborn—the controversial question of personhood.¹⁶¹

1. A Revised Fourteenth Amendment Approach to Disability-Based Abortion Regulations

The *Preterm-Cleveland* concurrences identified how the Due Process Clause might be invoked to review Ohio's disability-based abortion statute under rational basis review or strict scrutiny, rather than the undue burden test.¹⁶² As with all Due Process Clause cases, the analysis begins with a determination of the right at issue: what is the right claimed, and is it enumerated or unenumerated?¹⁶³ In *Preterm-Cleveland*, the concurrences identified the claimed right not as the right to abortion, but rather as the right to eugenic abortion.¹⁶⁴ Thus, the right is unenumerated, and only fundamental if deeply rooted in the nation's history and tradition.¹⁶⁵ This second step prompted several of the concurrences to review the nation's history of eugenics—including its compulsory sterilization laws and dalliance with Galton's eugenics movement.¹⁶⁶ The concurrences concluded, however, that the right was not one so

¹⁵⁸ See *Preterm-Cleveland*, 994 F.3d at 539–40 (Griffin, J., concurring) (rejecting the undue burden test as inapplicable to reason-based abortions and explaining the possibility of bringing Fourteenth Amendment arguments instead); *id.* at 541 (Bush, J., concurring) (arguing that courts should examine disability-based abortion restrictions via the lens of the Fourteenth Amendment). See generally Lugosi, *supra* note 17, at 271 (arguing that the Equal Protection Clause encompasses the unborn and outweighs a right to abortion).

¹⁵⁹ See *infra* notes 162–180.

¹⁶⁰ See *infra* notes 162–180.

¹⁶¹ See *infra* notes 181–198.

¹⁶² See *Preterm-Cleveland*, 994 F.3d at 541, 545, 547 (Bush, J., concurring) (arguing that the undue burden test does not apply because the Due Process Clause does not bar regulations designed to protect the disabled unborn, and walking step-by-step through the resulting Due Process analysis).

¹⁶³ See *id.* at 547 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)) (explaining that the first step involves determining whether the right is enumerated or, if unenumerated, whether the nation has traditionally protected the right).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*; *Glucksberg*, 521 U.S. at 720–21 (holding that unenumerated rights, such as a right to physician-assisted suicide, are protected by the Due Process Clause if deeply rooted in the nation's tradition).

¹⁶⁶ See, e.g., *Preterm-Cleveland*, 994 F.3d at 539 (Griffin, J., concurring) (describing the history of eugenics both domestically and abroad).

deeply rooted in the nation's history as to require robust protection, first distinguishing sterilization laws from abortion, and second concluding that the country ultimately rejected the eugenics movement when it passed various anti-discrimination legislation.¹⁶⁷ As such, the right triggered only permissive rational basis review, under which lens Ohio's interest in preventing eugenics and disability discrimination was reasonably related to its statute limiting disability-based abortions.¹⁶⁸

The Due Process Clause, however, does not regulate governmental inaction.¹⁶⁹ It imposes no affirmative duty on the state to protect its citizens from harms, including physical violence and discrimination, perpetuated by private individuals.¹⁷⁰ Private individuals, not the state, perform abortions.¹⁷¹ As such, assuming *arguendo* that disability-based abortions deprive the unborn of the fundamental right to life without due process, the Due Process Clause nevertheless cannot compel a state to enact disability-based abortion regulations.¹⁷² The Due Process Clause is relevant, if at all, only as to whether a disability-

¹⁶⁷ See *id.* at 547 (Bush, J., concurring) (lamenting the nation's history of permitting eugenic tools, such as compulsory sterilization, but concluding that because states passed legislation overruling and attempting to rectify eugenics, there is no "deeply[-]rooted" tradition of protecting eugenic abortion).

¹⁶⁸ See *id.* (arguing that there is no fundamental right to eugenic abortion); *Glucksberg*, 521 U.S. at 720–21 (holding that unenumerated rights without a long history of protection receive only rational basis review). Despite finding no fundamental right to eugenic abortion, Judge Bush nevertheless reviewed Ohio's statute under strict scrutiny as well, ultimately concluding that the regulation survived. *Preterm-Cleveland*, 994 F.3d at 548 (Bush, J., concurring).

¹⁶⁹ See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 13, 23 (1948) (holding that the government does not have a duty to prevent private discrimination under the Due Process Clause, but instead is only in violation of the Due Process Clause if it causes or assists private individual discrimination); see also *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 191–92, 195 (1989) (holding that the government did not violate a child's due process rights when it returned the child to the custody of his physically abusive father because the Due Process Clause does not compel the government to protect individuals against private violence). See generally Lugosi, *supra* note 17, at 278, 280 (discussing the limitations of the Due Process Clause and contrasting due process with the broader scope of the Equal Protection Clause). But see *DeShaney*, 489 U.S. at 212 (Brennan, J., dissenting) (arguing that some forms of government inaction, such as that at issue in *DeShaney*, violate the Due Process Clause by causing abuses the Due Process Clause intended to prevent).

¹⁷⁰ See *DeShaney*, 489 U.S. at 195 ("[N]othing in the language of the Due Process Clause . . . requires the State to protect the life . . . of its citizens against invasion by private actors.").

¹⁷¹ See *Harris v. McRae*, 448 U.S. 297, 314 (1980) (finding that the Due Process Clause does not require Connecticut to provide funding for abortion services within the state because such services are provided by private, not state, actors).

¹⁷² See *DeShaney*, 489 U.S. at 195 (explaining that the Due Process Clause does not mandate the state to protect individuals from violence, physical harm, or even death caused by a private party); Lugosi, *supra* note 17, at 277 (explaining that the Due Process Clause does not necessarily protect the unborn).

based abortion regulation impermissibly impinges a right to eugenic abortion, *not* as to whether a state must enact such regulations.¹⁷³

The Equal Protection Clause, however, may compel state action related to disability-based abortions.¹⁷⁴ As with the Due Process Clause, the Equal Protection Clause does not govern the conduct of private individuals.¹⁷⁵ A reading of the Equal Protection Clause in conjunction with the Fourteenth Amendment's enforcement provision, however, suggests that government inaction to prevent discrimination may, in some contexts, violate the Fourteenth Amendment.¹⁷⁶ This is because the enforcement provision empowers Congress to prohibit conduct that interferes with the exercise of one's Fourteenth Amendment rights.¹⁷⁷ As such, if a state denies government protection to a marginalized individual that other, non-victimized persons enjoy, the state's failure to protect the marginalized class may constitute discrimination in violation of the Equal Protection Clause.¹⁷⁸ Thus, the Equal Protection Clause may require states to adopt legislation regulating disability-based abortions.¹⁷⁹ Once a state has adopted such legislation, *Preterm-Cleveland* suggests, the Due Process Clause reviews whether the statute passes constitutional muster.¹⁸⁰

¹⁷³ See *Preterm-Cleveland*, 994 F.3d at 547 (Bush, J., concurring) (evaluating disability-based abortion regulations under the lens of the Due Process Clause, having established the right at issue to be unenumerated and not deeply rooted in the nation's history).

¹⁷⁴ See Lugosi, *supra* note 17, at 274, 277, 282 (citing the Court's decision in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), which held that the Fourteenth Amendment applies to all persons, not just citizens of the United States, and arguing that as such, the Equal Protection Clause may apply when the state does not provide protection to some persons but does to others). Lugosi premises this argument on the Court's suggestion in *DeShaney* that although the Due Process Clause did not compel state protection against privately inflicted violence, the Equal Protection Clause can compel such protection when it is offered to some categories of persons, but not others. *Id.* at 282; see *DeShaney*, 489 U.S. at 197 n.3 ("The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.").

¹⁷⁵ See *Shelley v. Kraemer*, 334 U.S. 1, 8 (1948) (holding that the Fourteenth Amendment applies only to the government, not to private individuals).

¹⁷⁶ See Lugosi, *supra* note 17, at 282 (arguing that for the enforcement provision of the Fourteenth Amendment to have any teeth, it must require that the Equal Protection Clause be capable of preventing a state's failure to provide protections to some persons that it provides to others); U.S. CONST. amend. XIV (granting, in Section 5, Congress the power to adopt legislation barring conduct that violates the Fourteenth Amendment).

¹⁷⁷ U.S. CONST. amend. XIV.

¹⁷⁸ See *DeShaney*, 489 U.S. at 197 n.3 (noting that the government cannot cherry-pick who receives its protection); Lugosi, *supra* note 17, at 282 (arguing that the enforcement provision and *DeShaney* both indicate that a state that provides protective services to some persons has an Equal Protection Clause obligation to provide that service to all persons).

¹⁷⁹ Lugosi, *supra* note 17, at 282 (explaining that because states provide protection against homicide postnatally, states must provide the same protection to the unborn if the unborn qualify as legal persons).

¹⁸⁰ See *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 547 (6th Cir. 2021) (Bush, J., concurring) (arguing that the Due Process Clause's analysis should apply to disability-based abortion restrictions and that it does not entail the undue burden test), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

2. The Problem of Personhood

Perhaps the highest hurdle to invoking equal protection of the unborn arises from the Fourteenth Amendment's inclusion of, but failure to define, the word "person."¹⁸¹ The first Equal Protection Clause argument on behalf of the unborn arose within *Roe*, but was quickly quashed.¹⁸² Justice Blackmun, noting that the Constitution contains several references to but no definition of "person," concluded that precedent at the time prohibited an extension of the concept to the unborn.¹⁸³ Justice Blackmun cited, among other constitutional provisions, the Fugitive Slave Clause, explaining that the clause's language regarding personhood had no application to prenatal individuals.¹⁸⁴ As such, the Supreme Court held that the Equal Protection Clause did not cover the unborn at issue in *Roe* because they did not constitute "person[s]" under the Fourteenth Amendment.¹⁸⁵ It cautioned, however, that *Roe*'s right to abortion would collapse under the weight of the Fourteenth Amendment should fetal personhood be established.¹⁸⁶

The question of personhood remains an evolving and contested issue in both domestic and international law.¹⁸⁷ For example, in 2010, in *Citizens United v. Federal Election Commission*, the Supreme Court addressed corporate clamoring for First Amendment protection, affirming that corporations constitute legal persons for purposes of free speech cases.¹⁸⁸ Additionally, although

¹⁸¹ U.S. CONST. amend. XIV; see *Roe v. Wade*, 410 U.S. 113, 157 (1973) (noting that neither the Fourteenth Amendment, nor any of the Constitution, defines personhood), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); Gerard V. Bradley, Essay, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 338–40 (1993) (reviewing judicial attempts to define personhood in the context of the unborn).

¹⁸² See *Roe*, 410 U.S. at 157 (holding that personhood does not extend to the unborn, and thus that the Equal Protection Clause does not protect a fetus from abortion).

¹⁸³ See *id.* (reviewing constitutional clauses referencing personhood in order to conclude that no such mentions indicated an extension of the definition to the unborn).

¹⁸⁴ U.S. CONST. art. IV (forbidding the state from interfering in a slave owner's "right" to reclaim an enslaved person who had escaped). Congress has since repealed the Fugitive Slave Act. See generally H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 LAW & HIST. REV. 1133 (2012) (discussing the history of the Fugitive Slave Clause).

¹⁸⁵ *Roe*, 410 U.S. at 158.

¹⁸⁶ *Id.* at 156.

¹⁸⁷ See Bradley, *supra* note 181, at 342 (reviewing various constitutional interpretations of personhood). See generally Matthew Miller, *Environmental Personhood and Standing for Nature: Examining the Colorado River Case*, 17 U.N.H. L. REV. 355, 357 (2019) (explaining the theory of environmental personhood, or granting legal personhood to nature to secure more comprehensive protections of the environment, and noting that other countries, such as New Zealand and Ecuador, have already granted such rights to rivers).

¹⁸⁸ See *Citizens United v. FEC*, 558 U.S. 310, 310 (2010) (expanding legal personhood to include and grant substantial rights to corporations); *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (affirming corporations' right to equal protection); see also Miller, *supra* note 187, at 361–62, 371 (delineating the progression of granting rights to corporations, culminating with a designation of corporations as legal persons).

no court has yet adopted this approach, there have been recent movements within the animal rights community to grant legal personhood status to non-human animals.¹⁸⁹ These arguments contend that depriving non-human animals of personhood constitutes discrimination, and premises its definition of personhood on the Court's tradition of treating personhood as a legal, rather than scientific, concept.¹⁹⁰ Finally, in construing a legal definition of personhood, other nations have extended the concept to include non-animated entities, such as rivers, mountains, trees, and even air.¹⁹¹ Domestically, Ohio—the first state to successfully pass disability-based abortion restrictions—grants legal rights to Lake Erie.¹⁹²

Accompanying the ever-expanding definition of personhood is the Court's tendency to restrict personhood status to specific contexts.¹⁹³ For example, though the Court conferred personhood on corporations, it has thus far limited such personhood to contexts involving the First and Fourteenth Amendments.¹⁹⁴ Similarly, *Roe* cited the U.S. Constitution's Extradition Clause, which addresses personhood in the context of crime, to support its conclusion that personhood does not encompass the unborn.¹⁹⁵ Personhood for

¹⁸⁹ Miller, *supra* note 187, at 366–68. See generally Richard L. Cupp, Jr., *Litigating Nonhuman Animal Legal Personhood*, 50 TEX. TECH L. REV. 573 (2018) (discussing the possibility of granting personhood status to nonhuman animals). Philosopher Peter Singer's argument that animals, such as chimpanzees, are persons has gained significant momentum. See, e.g., Peter Singer, *Chimpanzees Are People, Too*, N.Y. DAILY NEWS (Oct. 21, 2014), <https://www.nydailynews.com/opinion/peter-singer-chimpanzees-people-article-1.1982262> [<https://perma.cc/F94A-N8Z4>] (arguing that nonhuman animals are persons under both legal and philosophical perspectives). Singer rejects extending personhood to the unborn, however, and argues that postnatal babies are also not persons until capable of self-awareness, thus concluding that “the life of a newborn is of less value than the life of . . . a chimpanzee.” Nat Hentoff, *A Professor Who Argues for Infanticide*, WASH. POST (Sept. 11, 1999), <https://www.washingtonpost.com/archive/opinions/1999/09/11/a-professor-who-argues-for-infanticide/cce7dc81-3775-4ef6-bfea-74cd795fc43f/> [<https://perma.cc/NR7F-8K38>].

¹⁹⁰ See Miller, *supra* note 187, at 360 (asserting that the Court has long treated personhood as a contextual, legal matter subject to change given the circumstances in which it is invoked).

¹⁹¹ *Id.* at 357. See generally Ashley Westerman, *Should Rivers Have Same Legal Rights as Humans? A Growing Number of Voices Say Yes*, NPR (Aug. 3, 2019), <https://www.npr.org/2019/08/03/740604142/should-rivers-have-same-legal-rights-as-humans-a-growing-number-of-voices-say-ye> [<https://perma.cc/WS3M-TAU3>] (discussing recent movements toward recognizing environmental entities as legal persons).

¹⁹² Westerman, *supra* note 191.

¹⁹³ See Miller, *supra* note 187, at 360 (arguing that the Court continues to expand the definition of personhood by interpreting the context in which it is used); Bradley, *supra* note 181, at 342 (reviewing various situations in which the Court has held an entity to be a “person” in some contexts but not others).

¹⁹⁴ See Miller, *supra* note 187, at 361–62, 369, 371 (discussing the Court's recent definition of personhood as extending to corporations under the First Amendment and the Court's previous considerations of environmental and corporate personhood under the Fourteenth Amendment). See generally *Citizens United v. FEC*, 558 U.S. 310 (2010) (recognizing corporate personhood under the First Amendment).

¹⁹⁵ *Roe v. Wade*, 410 U.S. 113, 157 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); see U.S. CONST. art. IV, § 2, cl. 2 (commanding that criminals who

the purposes of the Extradition Clause certainly includes only the postnatal—but it is unlikely that the Extradition Clause intended to define personhood *generally* as limited to the postnatal criminal.¹⁹⁶ Additionally, some states have adopted laws finding that unborn fetuses attain the status of personhood in the context of homicide when the mother was also killed.¹⁹⁷ As such, there exists a plausible argument that constitutional personhood depends on the context in which it is used, and thus that personhood under the Equal Protection Clause is broad enough to include the disabled unborn.¹⁹⁸

III. THE EQUAL PROTECTION CLAUSE SHOULD REPLACE THE RECENTLY REJECTED UNDUE BURDEN TEST IN DISABILITY-BASED ABORTION CASES

Justice O'Connor's opening line in *Planned Parenthood of Southeastern Pennsylvania v. Casey* chastised courts for questioning *Roe v. Wade*'s right to abortion, remarking in a now-famous statement that a woman's freedom to choose continues to be undermined by a "jurisprudence of doubt."¹⁹⁹ To reaffirm *Roe*, and quash any lingering doubts as to the constitutionality of abortion, Justice O'Connor introduced the undue burden test.²⁰⁰ Ironically, the same test designed to demystify abortion jurisprudence has instead confounded and indeed divided courts ever since.²⁰¹ The undue burden test's unwieldiness is prominently displayed in the context of disability-based abortions.²⁰² Section A of this Part

were charged with a crime in one state and subsequently fled to another must, upon arrest, be returned to the state in which the crime was committed).

¹⁹⁶ See Bradley, *supra* note 181, at 342 (arguing that personhood under the Extradition Clause contemplates only postnatal personhood because only the postnatal can commit crimes).

¹⁹⁷ See, e.g., *Commonwealth v. Ronchi*, No. SJC-13043, at *1, 22 (Mass. Feb. 14, 2023) (finding that the defendant was liable for the deaths of both a mother and her unborn fetus when the defendant repeatedly stabbed the woman because the court adopted an expanded conception of personhood in the context of certain statutory crimes); *Commonwealth v. Cass*, 467 N.E.2d 1324, 1328–30 (Mass. 1984) (finding that the state of Massachusetts recognizes an unborn, but viable, fetus as a person in the context of vehicular homicide); see also *State Homicide Laws That Recognize Unborn Victims*, NAT'L RIGHT TO LIFE (Apr. 2, 2018), <https://www.nrlc.org/federal/unbornvictims/statehomicidelaws092302/> [<https://perma.cc/J7WU-F6LL>] (compiling states that either recognize an unborn fetus as a person or provide some protection to the unborn in the context of vehicular homicide).

¹⁹⁸ See generally Bradley, *supra* note 181 (suggesting that the legal definition of personhood is malleable enough to include the unborn).

¹⁹⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844–45 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

²⁰⁰ *Id.* at 875–77.

²⁰¹ See Schwartz, *supra* note 88, at 243 (critiquing the undue burden test as unworkable). Compare *Stenberg v. Carhart*, 530 U.S. 914, 914 (2000) (finding partial-birth abortion restrictions unconstitutional under *Casey*), with *Gonzales v. Carhart*, 550 U.S. 124, 136 (2007) (finding partial-birth abortion restrictions constitutional under *Casey*).

²⁰² See *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1792 (2019) (Thomas, J., concurring) (arguing that the undue burden test does not resolve the disability-based abortion debate). Compare *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021) (finding disa-

argues that the undue burden test, overruled by *Dobbs v. Jackson Women's Health Organization*, was incapable of resolving disability-based abortion regulations because it either ignored the question of discrimination, or flipped the regulation into a "don't ask, don't tell" law.²⁰³ Section B argues that the Equal Protection Clause more robustly and honestly addresses the uncomfortable concern that disability-based abortions promote eugenics, without compromising a woman's ability to communicate with her physician.²⁰⁴ Finally, Section C raises and resolves concerns with adopting the Equal Protection Clause analysis, especially the slippery slope argument that the framework will ultimately upend the Court's deference to the states in determining abortion access under *Dobbs*.²⁰⁵

A. The Undue Burden Test: A Jurisprudence of Doubt

Casey specifically analyzed regulations involving waiting periods, spousal notification, and parental consent under the undue burden test, but the Supreme Court has since been faced with a variety of other regulations not considered in *Casey*.²⁰⁶ Though *Dobbs* restructured the analysis of abortion laws, regulations limiting reason-based abortions have yet to reach the Supreme Court.²⁰⁷

Disability-based abortions specifically target a subset of unborn fetuses: those diagnosed with, or likely to develop, a mental or physical disability.²⁰⁸ Aborting a fetus on this basis perpetuates the mistaken and discriminatory belief that the disabled have an inferior right to life and, indeed, that it would be better to end a disabled life than live one.²⁰⁹ Taken one step further, disability-based abortions continue the early eugenics movement's efforts to erase the disabled community, beginning with its compulsory sterilization of "feeble-

bility-based abortion restrictions unconstitutional under *Casey*), *vacated*, 142 S. Ct. 2894 (2022), with *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 527 (6th Cir. 2021) (finding them constitutional under *Casey*), *abrogated by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

²⁰³ See *infra* notes 206–225.

²⁰⁴ See *infra* notes 226–251.

²⁰⁵ See *infra* notes 252–274.

²⁰⁶ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (evaluating the constitutionality of imposing waiting periods, spousal notifications, and parental consent under the undue burden test), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2112 (2020) (finding an admitting privileges requirement unconstitutional under *Casey*), *abrogated by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

²⁰⁷ See *Box*, 139 S. Ct. at 1782 (declining to address the constitutionality of reason-based abortion restrictions).

²⁰⁸ *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 518 (6th Cir. 2021), *abrogated by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

²⁰⁹ See *Box*, 139 S. Ct. at 1790 (Thomas, J., concurring) (explaining the eugenic backdrop against which abortion rights developed, and arguing that disability-based abortions accomplish eugenic goals of eradicating the disabled community); *Little Rock Fam. Plan. Servs. v. Russo*, 984 F.3d 682, 693–94 (8th Cir. 2021) (Erickson, J., concurring) (regretting that disability-based abortions prevent the disabled from enjoying recognition as equals in society), *vacated*, 142 S. Ct. 2894 (2022).

mind” mothers that states deemed likely to birth disabled children.²¹⁰ Eugenics designed to eradicate the disabled thus began with manipulation of the mother and, as society’s stance on eugenics shifted, adapted to target instead the child.²¹¹ Either way, the same goal is accomplished: a disabled child is not permitted to live.²¹²

The undue burden test failed to engage effectively with this troubling truth.²¹³ If, as the majority of circuits found *pre-Dobbs*, disability-based abortion regulations constituted pre-viability bans, then *Casey* immediately dismissed the regulation without a moment’s consideration of the concern that a state’s failure to enact such legislation promotes eugenic abortion of the disabled.²¹⁴ Even if disability-based abortion regulations were *not* impermissible bans under *Casey*—which only the Sixth Circuit concluded—the undue burden test forced judges to balance a woman’s autonomy against an interest in rejecting eugenics.²¹⁵ The result was a thinly-disguised “don’t ask, don’t tell” policy: women could keep their autonomy, provided they sacrifice their honesty.²¹⁶ It was thus almost inevitable that women would refrain from asking their physicians about the risks involved in an abortion where the fetus is disabled.²¹⁷ But, if this is true,

²¹⁰ See *Buck v. Bell*, 274 U.S. 200, 205 (1927) (characterizing Carrie Buck, who was forcibly sterilized, as “feeble[m]minded”); *Little Rock Fam. Plan. Servs.*, 984 F.3d at 694 (Erickson, J., concurring) (arguing that disability-based abortions represent a modern eugenics movement originally marked by efforts to compel sterilization).

²¹¹ See *id.* (noting the shift in eugenics from compelled sterilization to disability-based abortion); see also *Regulating Eugenics*, *supra* note 1, at 1580, 1581 (describing eugenic efforts to eradicate the disabled via forced sterilization of women deemed “unfit”).

²¹² See *Box*, 139 S. Ct. at 1790–91 (Thomas, J., concurring) (providing statistics regarding the high rate of abortion of fetuses diagnosed with Down syndrome internationally and domestically, and highlighting that 67% of fetuses with Down syndrome are aborted in the United States).

²¹³ See *Little Rock Fam. Plan. Servs.*, 984 F.3d at 693 (Shepherd, J., concurring) (arguing that the undue burden test’s reliance on viability renders it unworkable in the context of disability-based abortions because it prevents a reckoning with eugenic concerns).

²¹⁴ See *id.* (criticizing the majority for failing to consider whether reason-based abortions perpetuate eugenics); *Planned Parenthood of Ind. & Ky., Inc. (PPINK) v. Comm’r of the Ind. State Dep’t of Health*, 888 F.3d 300, 306 (7th Cir. 2018) (concluding the undue burden test analysis after characterizing disability-based abortion restrictions as pre-viability bans), *rev’d in part*, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019).

²¹⁵ See *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 527 (6th Cir. 2021) (holding that disability-based abortion restrictions do not constitute pre-viability bans because a woman can still obtain such an abortion if she does not share her motive with her physician), *abrogated by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); Donley & Lens, *supra* note 110, at 2167 (criticizing the U.S. Court of Appeals for the Sixth Circuit’s holding for reframing Ohio’s law as a “‘don’t ask, don’t tell’ policy” (quoting Debra Cassens Weiss, *Full 6th Circuit Upholds ‘Don’t Ask, Don’t Tell’ Law Punishing Docs Who Perform Down Syndrome Abortions*, ABA 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/54NH-9NBY>])).

²¹⁶ *Preterm-Cleveland*, 994 F.3d at 551 (Cole, J., dissenting).

²¹⁷ See Scherer, *supra* note 6, at 870–72 (arguing that post-*Preterm-Cleveland*, women will be hesitant to discuss the procedure with their physicians for fear of revealing their disability-based motive and thus rendering the abortion illegal).

then women may have then been unable to provide informed consent to the procedure.²¹⁸ Thus, in avoiding liability for performing a disability-based abortion, physicians may instead have exposed themselves to liability for performing a procedure without the patient's informed consent.²¹⁹ Judicial permission for abortions performed on women who have not consented to them begins to resemble far too closely the involuntary sterilization of Carrie Buck.²²⁰ Moreover, if disability-based abortions are eugenic, then Ohio's statute allowing women to continue obtaining such abortions, provided they withhold their reasoning, does not suffice.²²¹ The statute does not prevent discrimination against the disabled; it merely covers it up.²²² Conversely, if disability-based abortions are not eugenic, then Ohio's statute is an unnecessary restriction of *Roe*'s right to abortion that, pre-*Dobbs*, should not have survived *Casey*.²²³ In either situation, the undue burden test's failure to address uncomfortable concerns resulted in dissatisfactory and inconsistent holdings.²²⁴ *Dobbs*'s rejection of *Casey* does not solve the problem of disability-based abortions because courts simply cannot resolve these issues without sacrificing someone's protection—either the mother's or the child's—until they address the problem of eugenics.²²⁵

*B. Let's Be Honest: Adopting the Equal Protection Clause
Acknowledges the Nation's History with Eugenics*

Adopting the two-pronged Fourteenth Amendment approach via the Equal Protection and Due Process Clauses requires courts to confront eugenics head-on.²²⁶ First, the Equal Protection Clause, as understood in connection

²¹⁸ See *id.* (defining informed consent as requiring an appreciation of the risks involved and alternatives available, but arguing that this is impossible to achieve when a woman cannot discuss the risks or alternatives with her physician).

²¹⁹ *Id.*

²²⁰ See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (allowing the involuntary sterilization of a female patient who had not consented to the procedure).

²²¹ See *Preterm-Cleveland*, 994 F.3d at 527 (holding that Ohio's restriction is not likely to prevent disability-based abortions).

²²² See Mary Ziegler, *The Disability Politics of Abortion*, 2017 UTAH L. REV. 587, 619–20 (arguing that disability-based abortion restrictions such as *Preterm-Cleveland*'s do not actually limit or prevent such abortions from occurring).

²²³ See, e.g., *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021) (holding disability-based abortion restrictions unconstitutional), *vacated*, 142 S. Ct. 2894 (2022).

²²⁴ See, e.g., *id.*; see also *Preterm-Cleveland*, 994 F.3d at 551 (Cole, J., dissenting) (arguing that the majority created a “don’t ask, don’t tell” policy in order to uphold a disability-based abortion restriction).

²²⁵ See *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1790 (Thomas, J., concurring) (arguing that disability-based abortions discriminated against the disabled unborn); Donley & Lens, *supra* note 110, at 2167 (arguing that the Sixth Circuit’s interpretation of the undue burden test resulted in a harmful “‘don’t ask, don’t tell’ policy” (quoting Weiss, *supra* note 215)).

²²⁶ See *Preterm-Cleveland*, 994 F.3d at 547 (Bush, J., concurring) (discussing a Due Process Clause analysis of a right to disability-based abortions).

with the enforcement provision, would compel states that have not yet considered legislation to protect disabled fetuses to do so in order to avoid complicity in discrimination against the disabled.²²⁷ The Court's decision in *Dobbs* did not include an analysis of the Equal Protection Clause.²²⁸ Second, the Due Process Clause enters to evaluate legislation regulating disability-based abortions under the lens of rational basis review, which, incidentally, tracks with the rational basis review the Court adopted in *Dobbs*.²²⁹

The expansion of the definition of a legal person following *Roe* supports the conclusion that the Fourteenth Amendment "person" is broad enough to encompass the unborn.²³⁰ Indeed, legal personhood has nowhere else been evaluated under a one-size-fits-all definition, but rather on the basis of its context in nearly every other constitutional provision.²³¹ Examining the context of the Fourteenth Amendment reveals a governmental interest in promoting equality for all—especially those who traditionally have been denied the robust rights enjoyed by non-minorities.²³² The unborn, who are perhaps the most victimized and certainly the most powerless, fit within the classes the Fourteenth Amendment intended to protect.²³³ Moreover, the fact that the Court has recognized corporations as constituting persons under the Fourteenth Amendment further bolsters the argument that the Amendment also encom-

²²⁷ See Lugosi, *supra* note 17, at 282 (arguing that equal protection requires states that offer protective services to some categories of people to provide them to all persons).

²²⁸ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245–46 (2022) (finding that because abortion is not a fundamental right, the analysis of abortion restrictions should be grounded in rational basis review, and discussing equal protection for the limited purpose of holding that failure to protect abortion access does not constitute a sex-based violation of the Equal Protection Clause).

²²⁹ See *Preterm-Cleveland*, 994 F.3d at 547 n.9 (Bush, J., concurring) (discussing the tiers of scrutiny and the standard of review applicable to disability-based abortion restrictions); *Dobbs*, 142 S. Ct. at 2283–84 (requiring that the Court adopt rational basis review to determine constitutional challenges to abortion limitations).

²³⁰ See Miller, *supra* note 187, at 360 (reviewing the Court's interpretation of personhood); Bradley, *supra* note 181, at 342 (arguing that personhood includes the unborn for Fourteenth Amendment purposes).

²³¹ See Miller, *supra* note 187, at 360 (arguing that the Court has never adopted a singular definition of personhood); John Finnis, *Abortion Is Unconstitutional*, FIRST THINGS, Apr. 2021, at 29, 30, 31 (noting that the context of vocabulary in the Constitution is an essential consideration, reviewing various contexts in which the definition of personhood has been expanded and the law has recognized the unborn as deserving of legal protection, and arguing that the Fourteenth Amendment's Equal Protection Clause encompasses the unborn).

²³² See Lugosi, *supra* note 17, at 281 (the Fourteenth Amendment's "central purpose" was ensuring equality); Finnis, *supra* note 231, at 30 (noting that the Fourteenth Amendment was intended to offer "comprehensive" rights).

²³³ Lugosi, *supra* note 17, at 281–82; Finnis, *supra* note 231, at 30, 31 (explaining that the drafters of the Fourteenth Amendment stated their intent to match the protections offered by English law at the time, emphasizing that the unborn were "the very first persons" English law protected, and noting that although the unborn were not explicitly discussed by the drafters, corporations were also not directly contemplated by the drafters and yet nevertheless have been held to enjoy personhood status under the Amendment).

passes the unborn.²³⁴ The text of the Fourteenth Amendment articulates the following three uses of the term “person”: citizenship, due process of law, and equal protection of the laws.²³⁵ Only the first use, citizenship, requires that a person be “born or naturalized” within the United States.²³⁶ Neither the unborn nor corporations satisfy this definition, as neither is born or naturalized.²³⁷ Corporations nevertheless enjoy due process and equal protection under the Fourteenth Amendment, which, combined with a textualist interpretation of the Amendment, strongly suggests that the second and third uses of a “person” under the Amendment do not require that the entity be born or naturalized.²³⁸ Additionally, it would be a stretch to imagine that the term “person” is broad enough to include an “artificial person[]”, such as a corporation, and yet narrow enough to preclude unborn human beings, who are “natural persons.”²³⁹

²³⁴ See *Citizens United v. FEC*, 558 U.S. 310, 310 (2010) (finding that personhood under the Fourteenth Amendment includes corporations for purposes of due process and equal protection); Finniss, *supra* note 231, at 31–32 (comparing the similarities and differences between corporations and the unborn to conclude that the definition of “person” under the Fourteenth Amendment includes both).

²³⁵ U.S. CONST. amend. XIV; see Finniss, *supra* note 231, at 31–32 (noting that the first section of the Fourteenth Amendment includes three uses of the term “person”). Specifically, with respect to citizenship, the text of the Fourteenth Amendment states the following: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” U.S. CONST. amend. XIV. With respect to the second and third uses—namely, due process and equal protection—the Fourteenth Amendment states: “[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” *Id.*

²³⁶ U.S. CONST. amend. XIV; Finniss, *supra* note 231, at 31–32.

²³⁷ See Finniss, *supra* note 231, at 32 (conceding that neither corporations nor the unborn are capable of meeting the requirements of the first use of “person” under the Fourteenth Amendment).

²³⁸ See generally *Citizens United*, 558 U.S. at 310 (holding that corporations constitute persons for purposes of due process and equal protection under the Fourteenth Amendment); Finniss, *supra* note 231, at 32–33 (adopting a textualist reading of the second and third uses of “person” under the Fourteenth Amendment). Notably, the text of the Fourteenth Amendment does not require that “persons” for purposes of due process and equal protection be born or naturalized. U.S. CONST. amend. XIV; Finniss, *supra* note 231, at 32–33. Had the drafters intended the definition of “person” for the second and third use of the term to mirror the definition adopted in the first use, they likely would have included language to highlight this intent. See Finniss, *supra* note 231, at 32 (noting, for example, that the drafters could have used the phrase “such persons” to clarify the definition of “person” to be used in the context of due process and equal protection). Additionally, had the drafters intended the term “person” to be construed more narrowly, so as to preclude extending personhood to corporations or the unborn, they likely would have included similar clarifying language. *Id.* at 32 (suggesting that the drafters could have limited the term to “natural persons” or “any person wherever born” so as to prevent corporations or the unborn from attaining personhood). In the absence of such language, however, a textualist reading of the Amendment can conclude that the definition of a “person” for purposes of due process and equal protection is broader than the definition used in the context of citizenship. *Id.* at 32–33.

²³⁹ Finniss, *supra* note 231, at 32 (arguing that because the unborn are human beings, they more closely fit within the definition of persons than corporations do). See generally Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in*

Thus, at least for purposes of equal protection, the unborn ought to constitute legal persons.²⁴⁰

Having contemplated the Equal Protection Clause to include the unborn, the analysis progresses to a contemplation of a state's duty to ensure equal protection under its laws to the disabled unborn.²⁴¹ If the state offers postnatal protections against assault, bodily harm, or the like, then a failure to extend similar protections to the disabled unborn constitutes a violation of the Equal Protection Clause.²⁴² The analysis might be pushed even further: a failure to extend such protections to *any* unborn, regardless of disability status, violates the state's commitment to equal protection by failing to protect a particular category of persons.²⁴³

Addressing disability-based abortions by first invoking the Equal Protection Clause also avoids the harmful "don't ask, don't tell" solution created by *Preterm-Cleveland v. McCloud*.²⁴⁴ The Equal Protection Clause arguably compels states to enact legislation that protects the disabled unborn just as comprehensively as it protects persons postnatally.²⁴⁵ Because no states permit parents

Fourteenth Amendment Jurisprudence, 4 GEO. J.L. & PUB. POL'Y 361 (2006) (noting that scientific research has determined that unborn fetuses are human beings, and arguing that because every human being constitutes a person under the Fourteenth Amendment, unborn fetuses necessarily constitute persons as well).

²⁴⁰ See generally Finnis, *supra* note 231 (refuting each of *Roe*'s arguments against extending personhood to the unborn and arguing that the text of the Fourteenth Amendment, intent of the drafters, and subsequent court decisions broadening the definition of personhood permit the conclusion that the unborn constitute legal persons). See Bradley, *supra* note 181, at 342 (arguing that personhood need not extend to the unborn in all contexts, but applies at least for purposes of satisfying the Equal Protection Clause); Lugosi, *supra* note 239, at 361–62 (arguing that the unborn constitute persons under the Equal Protection Clause based on their status as human beings and because failure to extend personhood to the unborn discriminates against a sizable group of human beings).

²⁴¹ See Lugosi, *supra* note 17, at 282 (explaining that once a state reads the Equal Protection Clause to include the unborn, the state must then provide protection to the unborn comparable to the protections it affords postnatally).

²⁴² *Id.*

²⁴³ See *id.* (arguing that if the Equal Protection Clause encompasses the unborn, then abortion is not permissible in any circumstance).

²⁴⁴ See *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 551 (6th Cir. 2021) (Cole, J., dissenting) (arguing that the majority permitted a "don't ask, don't tell" policy), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

²⁴⁵ See Lugosi, *supra* note 17, at 282 (arguing that the enforcement provision fortifies the Equal Protection Clause such that states must provide the same protection to all categories of persons). Under Section 5 of the Fourteenth Amendment, Congress retains the power to prohibit actions that undermine the Fourteenth Amendment, as well as to draft legislation correcting such conduct. U.S. CONST. amend. XIV. Thus, if a court determines that a state has violated the Equal Protection Clause by failing to provide rights on the basis of disability, the enforcement provision permits Congress to intervene to compel the state to pass statutes offering the same rights to the disabled that are available to those who are not disabled. Lugosi, *supra* note 17, at 277, 282. In the context of a disabled fetus, assuming *arguendo* that the unborn constitute persons, the enforcement provision would permit Congress to compel states that fail to provide the same protection to a disabled fetus that they provide postnatally to enact laws offering just as comprehensive protection to the unborn disabled fetus as are

to request that a physician commit a tort or other bodily harm against their child postnatally if the physician does not know of the parents' disability-based motives, a statute such as Ohio's fails to satisfy the Equal Protection Clause.²⁴⁶ That is, states do not rely on convoluted "don't ask, don't tell" policies to protect postnatal individuals.²⁴⁷ Instead, they provide comprehensive protection postnatally via statutes prohibiting torts, such as battery and assault, as well as criminal acts, such as homicide.²⁴⁸ Thus, offering only a "don't ask, don't tell" policy as protection for the unborn, rather than providing the same comprehensive protection afforded postnatally, would provide inadequate protection under the Equal Protection Clause.²⁴⁹ As such, statutes purporting to protect the disabled unborn, while simultaneously restricting a woman's ability to communicate honestly and fully with her physician, would not survive.²⁵⁰ Rather, states would need to adopt legislation accomplishing anti-eugenic goals that mirrors its legis-

offered postnatally. U.S. CONST. amend. XIV; Lugosi, *supra* note 17, at 277, 282; see Bradley, *supra* note 181, at 341, 344–45 (arguing that states violate the Fourteenth Amendment when they protect against homicide postnatally but not prenatally, assuming the unborn are legal persons).

²⁴⁶ See Lugosi, *supra* note 17, at 282 (explaining that states must provide the unborn with the same degree of protection provided to persons postnatally).

²⁴⁷ See *Preterm Cleveland*, 994 F.3d at 551 (Cole, J., dissenting) (characterizing the majority's holding as enabling a "don't ask, don't tell" policy); e.g., *Homicide*, JUSTIA, <https://www.justia.com/criminal/offenses/homicide/> [<https://perma.cc/96Q5-G7VZ>] (defining criminal homicide and reviewing state laws specifically and directly prohibiting it).

²⁴⁸ *Id.*; *Assault and Battery*, JUSTIA, <https://www.justia.com/criminal/offenses/violent-crimes/assault-battery/> [<https://perma.cc/6958-ZYA4>] (defining the torts of assault and battery and reviewing state laws prohibiting each); Lugosi, *supra* note 17, at 282.

²⁴⁹ Lugosi, *supra* note 17, at 282; see also *Preterm Cleveland*, 994 F.3d at 551 (Cole, J., dissenting) (describing the majority's decision as allowing a "don't ask, don't tell" policy). Citing the Court's decision in *DeShaney*, Lugosi argues that although the Fourteenth Amendment's Due Process Clause does not compel state protection against private violence, the Equal Protection Clause does compel state action if the state offers protection to some categories of persons but not others. *Id.* at 282; see *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 n.3 (1989) ("The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."). Failure to provide protection to one particular class of persons when protection is offered to other classes violates the Equal Protection Clause. Lugosi, *supra* note 17, at 282. The enforcement provision and the Equal Protection Clause then work together to compel states to correct such violations of the Equal Protection Clause by enacting legislation covering the formerly unprotected class. *Id.*

²⁵⁰ See Lugosi, *supra* note 17, at 282 (arguing that the enforcement provision of the Fourteenth Amendment can compel states to provide protection when the failure to do so would violate the Equal Protection Clause). Thus, it would be insufficient for states to protect the disabled unborn from an abortion provider's torts or criminal conduct only when the provider knows the patient is seeking abortion on the basis of disability. *Id.* States postnatally protect against torts and criminal conduct regardless of whether the offender commits the acts with the knowledge that the victim is disabled. *Id.* Thus, assuming arguendo that the unborn constitute persons, states that offer such unqualified protection postnatally must offer the same protection to the disabled unborn in order to avoid violation of the Equal Protection Clause. *Id.*

lation protecting postnatal persons: an across-the-board prohibition of torts and criminal acts committed against a fetus on the basis of disability.²⁵¹

C. Confronting Complications Under the Equal Protection Clause

The undue burden test has proven ineffective in addressing disability-based abortions, but the Equal Protection Clause analysis presents its own shortcomings as well.²⁵² First, states might easily circumvent the requirement to protect a disabled fetus by invoking the theory of self-defense.²⁵³ Because most statutes banning physical attacks permit exceptions when necessary to protect oneself from bodily harm, a state might contemplate legislation that permits disability-based abortions as necessary to the mother's self-defense.²⁵⁴ Indeed, prominent philosophers, such as Judith Jarvis Thomson, have posited that all abortions may represent a form of self-defense, acknowledging the fetus as an innocent life, but permitting a woman to end that life in order to preserve her own physical or emotional wellbeing.²⁵⁵ When carrying a disabled fetus jeopardizes the mother's health, the mother might be said to act in self-defense when she chooses to abort the fetus.²⁵⁶ This argument leaves out an important consideration, however: most self-defense statutes require that the defender use the least force possible, and deadly force only if absolutely necessary.²⁵⁷ Because it is possible to preserve the life of the mother without intentionally ending the life of the fetus—such as by surgically removing the fetus and providing life-sustaining care to the prematurely born child—statutes that

²⁵¹ *Id.*; *supra* note 250 and accompanying text (discussing an interpretation of the enforcement provision of the Fourteenth Amendment that would compel states to provide protection prenatally that is equal to the protection available postnatally).

²⁵² See Bradley, *supra* note 181, at 345 (evaluating a self-defense counterargument to the Equal Protection Clause analysis); *Preterm-Cleveland*, 994 F.3d at 560 (Moore, J., dissenting) (criticizing the concurrences' approach as a surreptitious attack on *Roe* and an attempt to unravel reproductive rights), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

²⁵³ Bradley, *supra* note 181, at 345.

²⁵⁴ See Arthur Ripstein, *Self-Defense and Equal Protection*, 57 U. PITT. L. REV. 685, 686 (1996) (explaining that self-defense statutes are an exception to the general prohibition against murder); Lugosi, *supra* note 17, at 282 (arguing that state protection of the unborn must mirror that of the postnatal).

²⁵⁵ See generally Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFS. 47 (1971) (discussing the self-defense theory of abortion). *But see* John Finnis, *The Rights and Wrongs of Abortion: A Reply to Judith Thomson*, 2 PHIL. & PUB. AFFS. 117, 118, 131–32 (1973) (rebutting Thomson's self-defense argument).

²⁵⁶ See generally Thomson, *supra* note 255, at 61 (suggesting that self-defense can be invoked as a justification for abortion).

²⁵⁷ See Ripstein, *supra* note 254, at 687 (explaining that traditional self-defense laws permit the defender to take another's life only if she reasonably fears for her life or serious bodily injury and has no reasonable alternative available).

permit abortion as self-defense when such alternatives are available also fail to provide equal protection to the disabled unborn.²⁵⁸

The second snag under the Equal Protection Clause framework is the possibility that this analysis will effectively permit a backdoor attack on *Dobbs*'s holding that the individual states may determine abortion access.²⁵⁹ Extending personhood to the disabled fetus, and only the disabled fetus, is underinclusive.²⁶⁰ It would be far more honest to include all unborn, regardless of disability, within the definition of a legal person.²⁶¹ As soon as one concedes the personhood of the unborn, however, she must then grapple with the Fourteenth Amendment right to life of *every* fetus.²⁶² Thus, if personhood encompasses not only the disabled fetus, but rather all unborn, then the Equal Protection Clause analysis proposed above would scrutinize and potentially prohibit every abortion—not just disability-based abortions.²⁶³ The Equal Protection Clause analysis thus presents the opportunity to override a state's ability to permit abortions under *Dobbs*.²⁶⁴ This will be troubling to those protective of reproductive rights.²⁶⁵ But perhaps more troubling is the alternative: without an Equal Protection Clause approach to disability-based abortions, courts cannot effectively address the eugenic aspect of such abortions.²⁶⁶ As a result, the eugenics movement of the twentieth century that the nation correctly rejected has

²⁵⁸ See generally Committee on Obstetric Practice & Society for Maternal-Fetal Medicine, *Medically Indicated Late-Preterm and Early-Term Deliveries*, 138 AM. COLL. OBSTETRICIANS & GYNECOLOGISTS e35 (2021), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2021/07/medically-indicated-late-preterm-and-early-term-deliveries.pdf> [<https://perma.cc/RGF2-CM8C>] (explaining reasons to deliver a fetus early in order to preserve maternal health and discussing medical strategies to care for a prematurely delivered fetus).

²⁵⁹ See *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 560 (6th Cir. 2021) (Moore, J., dissenting) (rejecting the Due Process and Equal Protection Clause analyses as means of eviscerating *Roe*'s right to abortion), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); Lugosi, *supra* note 17, at 282 (outlining an Equal Protection Clause approach to overturning *Roe*).

²⁶⁰ See Bradley, *supra* note 181, at 342–43 (arguing that personhood includes the unborn, and extending such personhood to all fetuses, regardless of disability). See generally Lugosi, *supra* note 239 (arguing that unborn fetuses are human beings, that the Equal Protection Clause protects all human beings, and thus that the Clause protects all unborn fetuses).

²⁶¹ Bradley, *supra* note 181, at 342–43.

²⁶² *Id.*; see also Lugosi, *supra* note 17, at 282–83 (explaining that conferring personhood on the unborn requires considering the promises of the Fourteenth Amendment, and arguing that several states have already done so by enacting legislation criminalizing the killing of a fetus). See generally Lugosi, *supra* note 239 (arguing that the Equal Protection Clause protects all unborn fetuses).

²⁶³ Lugosi, *supra* note 17, at 282–83.

²⁶⁴ *Id.*

²⁶⁵ See *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 560 (6th Cir. 2021) (Moore, J., dissenting) (arguing that the majority's analysis will overthrow reproductive rights), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

²⁶⁶ See *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 693 (8th Cir. 2021) (Shepherd, J., concurring) (arguing that the undue burden test fails to consider eugenics), *vacated*, 142 S. Ct. 2894 (2022).

quietly, but forcefully, resurfaced.²⁶⁷ Indeed, recent years have witnessed a regrettable rise in discrimination of all forms.²⁶⁸ Neither pregnant women nor disabled persons have been spared from such discrimination, as is acutely evident in the context of disability-based abortions.²⁶⁹ As such, courts and society at large ought to be especially vigilant in weeding out practices that smack of the unbridled bigotry of the early twentieth century.²⁷⁰

Continuing to turn a blind eye to the eugenic effect of disability-based abortions allows prejudice against the disabled to take root, grow, and multiply until society's treatment of the disabled reverts to the same overtly biased behaviors that activists spent centuries undoing.²⁷¹ Concerns regarding the implications of the Equal Protection Clause analysis are well-founded, but courts are also well-equipped to address them.²⁷² It would be a grave failure of jurisprudence not to prevent known discriminatory practices—indeed, practices that evoke a morally indefensible return to the same legal failures that sanctioned Carrie Buck's forced sterilization—on the basis of slippery slope considerations about the implications of adopting a more inclusive reading of the Equal Protection Clause.²⁷³ Stamping out discrimination must begin in the womb if society is ever to eradicate it postnatally.²⁷⁴

CONCLUSION

The judicial system failed to protect Carrie Buck from disability-based discrimination when it permitted the state to sterilize her against her will. Though such eugenic measures fortunately faded in the mid-twentieth century, they have recently resurfaced in the legislative and judicial branches' unwillingness to prevent disability-based abortions. If courts continue to ignore the eugenic implications of disability-based abortions, the underlying discrimina-

²⁶⁷ See *id.* at 694 (Erickson, J., concurring) (arguing that there is a new wave of eugenics beginning to sweep the country, and that permitting disability-based abortions without at least considering their eugenic ramifications adds fuel to the modern-day eugenics movement).

²⁶⁸ See *id.* (lamenting various forms of modern-day discrimination that have been on the rise).

²⁶⁹ See *id.* (discussing how disability-based abortions perpetuate discrimination against the disabled); *Preterm-Cleveland*, 994 F.3d at 551 (Cole, J., dissenting) (criticizing the majority for permitting disability-based abortion restrictions at the expense of the mother, requiring her to forego discussing risks of the procedure with her physician).

²⁷⁰ See *Little Rock Fam. Plan. Servs.*, 984 F.3d at 694 (Erickson, J., concurring).

²⁷¹ See *id.* (comparing disability-based abortions with forced sterilization). See generally Deutsch, *supra* note 30, at 991 (describing the work of activist Dorothea Dix in bringing awareness to the plight of the disabled in the early nineteenth century).

²⁷² See *Preterm-Cleveland*, 994 F.3d at 559–60 (Moore, J., dissenting) (arguing that courts are more than capable of resolving nuances under the Fourteenth Amendment).

²⁷³ See *id.* at 540 (Griffin, J., concurring) (discussing the “now-enlightened” policy of protecting the disabled from discrimination and arguing that Ohio’s disability-based abortion statute is necessary to achieve such goals).

²⁷⁴ See *Little Rock Fam. Plan. Servs.*, 984 F.3d at 694 (Erickson, J., concurring) (discussing the recent rise in discrimination on the basis of disability as well as race, gender, and sexual orientation).

tion perpetuated against the disabled fetus will continue to be swept under the rug, replaced with such distractions as measuring viability and inquiring whether the physician knows the woman's reason for abortion. The Equal Protection Clause, however, does not engage in such smoke-and-mirror tactics. Rather, it acknowledges that disability-based abortions target only the disabled, and offers protection to this historically oppressed community without dictating what a woman tells her doctor. Unless and until the Supreme Court finds otherwise, courts confronted with disability-based abortion regulations should reject any analysis of such regulations that fails to consider the Equal Protection Clause. Doing so does not right the injustice committed against Carrie Buck, but it does represent a long-awaited judicial stance against eugenics. Abortion is a controversial subject; eugenics need not be.

ZOË R. HAGGERTY