# The Constitutionality of Laws Banning Down Syndrome Abortions

*Richard S. Myers*[*]

ABSTRACT: Laws banning abortions that are sought because the unborn child is thought to have Down syndrome are increasingly common. The constitutionality of these bans on so-called trait-selection abortions has been challenged in the courts, and the courts have reached conflicting results. This paper explores these constitutional issues. Under the existing constitutional framework set forth by *Roe v. Wade* and *Planned Parenthood v.* , these bans are likely unconstitutional. This conclusion further reveals the constitutional and moral deficiencies in the Supreme Court's current approach. These bans on what are called eugenic abortions are, however, serving a useful purpose. They highlight the reality that abortion takes the life of a human being, and they do so in the context of abortions that are difficult for abortion rights advocates to defend. These bans, which reveal how extreme the Court's current approach is, are helping to prompt a rethinking of *Roe* and *Casey*.

---

[*] *Richard S. Myers* is Professor of Law at Ave Maria School of Law. He is a graduate of Kenyon College and Notre Dame Law School. He taught at Case Western Reserve University School of Law and the University of Detroit Mercy School of Law before moving to Ann Arbor, Michigan, to help start Ave Maria School of Law. He has also taught as a visitor at Notre Dame Law School. His courses have included Constitutional Law and First Amendment, in addition to Civil Procedure and Conflict of Laws. He has published extensively on constitutional law in the law reviews of Catholic University, Case Western Reserve University, Notre Dame University, and Washington and Lee University. Professor Myers is the co-editor of *St. Thomas Aquinas and the Natural Law Tradition: Contemporary Perspectives* (2004). He is also the co-editor of the *Encyclopedia of Catholic Social Thought, Social Science, and Social Policy* (original two volumes, 2007; 3rd volume 2012). He was the President of University Faculty for Life (2004-2011) and is now its Vice President. He is the Executive Secretary of the Society of Catholic Social Scientists. Professor Myers is married to Mollie Murphy, who is also on the Ave Maria faculty. They are the proud parents of six children: Michael, Patrick, Clare, Kathleen, Matthew, and Andrew.

*1. Introduction*

IN THE YEARS after *Roe v. Wade*[1] and *Planned Parenthood v. Casey*,[2] states have continued to pass laws restricting the right to abortion that the Supreme Court discovered in *Roe* and *Casey*. Some of these state laws have involved relatively modest regulations such as waiting periods and parental notice laws.[3] Others have involved more direct challenges to the right to abortion.

One direct challenge is Mississippi's law banning abortion after fifteen weeks. That law was passed in 2018 as a candid effort to challenge the scope of the right to abortion protected by *Roe* and *Casey*. The Mississippi law was predictably invalidated by lower federal courts.[4] On May 17, 2021,[5] the U.S. Supreme Court agreed to hear the case, which is captioned *Dobbs v. Jackson Women's Health Organization*[6].That decision has elicited

---

[1] 410 U. S. 113 (1973). For commentary on *Roe*, see Richard S. Myers, "Re-Reading *Roe v. Wade*," 71 *Washington & Lee Law Review* 1025 (2014).

[2] 505 U. S. 833 (1992). For commentary on *Casey*, see Michael Stokes Paulsen, "The Worst Constitutional Decision of All Time," 78 *Notre Dame Law Review* 995 (2003); Richard S. Myers, "Reflections on the Twentieth Anniversary of *Planned Parenthood v. Casey*" in *Life & Learning XXII: The Proceedings of the Twenty-Second University Faculty for Life Conference*, ed. Joseph W. Koterski (Bronx NY: UFL, 2018), pp. 53-67.

[3] See, e.g., *Planned Parenthood of Indiana and Kentucky, Inc. v. Box*, 991 F. 3d 740 (7th Cir. 2021) (parental notice), petition for cert. filed (March 29, 2021), https://www.scotusblog.com/case-files/cases/box-v-planned-parenthood-of-indiana-and-kentucky-inc-4/ ; *Bristol Regional Women's Center, P.C. v Slatery*, 988 F. 3d 329 (6th Cir.), vacated, 994 F. 3d 774 (6th Cir.2021) (waiting period).

[4] 349 F. Supp. 3d 536 (S. D. Miss. 2018), aff'd, 945 F. 3d 265 (5th Cir. 2019), cert. granted, 2021 U.S. Lexis 2556 (May 17, 2021). Judge Ho's concurring opinion indicated his disapproval of the Supreme Court's case law on abortion. Judge Ho stated: "Nothing in the text or original understanding of the Constitution establishes a right to an abortion." Id. at 277 (Ho. J., concurring in the judgment). For discussion of the phenomenon of lower court judges criticizing *Roe* and *Casey*, see Richard S. Myers, "Lower Court 'Dissent' from *Roe* and *Casey*," 18 *Ave Maria Law Review* 1 (2020).

[5] https://www.scotusblog.com/2021/05/court-to-weigh-in-on-mississippi-abortion-ban-intended-to-challenge-roe-v-wade/.

[6] https://www.scotusblog.com/2021/05/court-to-weigh-in-on-mississippi-abortion-ban-intended-to-challenge-roe-v-wade/.

widespread speculation that the Court may reverse *Roe* and *Casey* when the Court entertains *Dobbs* in its current term.[7]

Other increasingly common restrictions on abortion have been state laws banning abortions that are sought when there is a diagnosis that the unborn child has Down syndrome.[8] These laws have been met with a mixed reception in the federal courts.

Indiana's law was struck down by the Seventh Circuit in 2018, and the Supreme Court denied cert in May of 2019.[9] More recently, the Eighth Circuit has struck down the Arkansas and Missouri statutes.[10] In a surprising development, the full Eighth Circuit, in a *sua sponte* order, granted rehearing en banc.[11] In contrast, in April 2021, the en banc Sixth Circuit upheld Ohio's statute.[12]

In *Rutledge v. Little Rock Family Planning Services*, the state of Arkansas has sought Supreme Court review of the following issue: whether the Fourteenth Amendment bars States from prohibiting abortions that are sought solely because of a prenatal diagnosis of Down syndrome. The state's petition was filed on April 9, 2021.[13] The Court will likely not rule

---

[7] See http://www.uffl.org/blog/2021/06/30/michael-stokes-paulsen-on-the-dobbs-case/. See also Robert P. George, "*Roe* Must Go," *First Things* (July 1, 2021), https://www.firstthings.com/web-exclusives/2021/07/roe-must-go?fbclid=IwAR1aZ7oJXGWmtubpk9c25ELh4vZfzCkfowXxsURNs2NDoPYqUkQG51PoYno.

[8] Down syndrome bans gain traction after court ruling (May 19, 2021), https://apnews.com/article/us-supreme-court-donald-trump-down-syndrome-abortion-courts-ab09552bd57aa5306f0341189f70b1cb.

[9] 888 F. 3d 300 (7th Cir. 2018), rev'd in part, cert. denied in part *Box. v. Planned Parenthood of Indiana and Kentucky, Inc*. 139 S. Ct. 1780 (2019).

[10] *Little Rock Family Planning Services v. Rutledge*, 984 F. 3d 682 (8th Cir. 2021)(Arkansas); *Reproductive Health Services v. Parson*, 2021 U.S. App. Lexis 17099 (June 9, 2021)(Missouri).

[11] https://www.lifenews.com/2021/07/14/missouri-fights-in-court-to-uphold-ban-on-abortions-of-babies-with-down-syndrome/; the Eighth Circuit's order is available at this link, see https://www.bloomberglaw.com/public/desktop/document/ReproductiveHealthSvcsetalvParsonetalDocketNo19028828thCirSep0320.

[12] *Pre-Term Cleveland v. McCloud*, 994 F. 3d 512 (6th Cir. 2021)(en banc)

[13] https://www.scotusblog.com/case-files/cases/rutledge-v-little-rock-family-planning-services/.

on the state's petition until it decides the *Dobbs* case, which likely won't happen until the spring or summer of 2022.

This paper explores the constitutionality of these state laws banning Down syndrome abortions. The Court's decision in *Dobbs* will likely have an important impact on this issue. In this paper, I will largely limit my discussion to the fate of these laws under the existing constitutional framework set forth in *Roe* and *Casey*. In my view, states laws banning Down syndrome abortions are likely unconstitutional under the existing framework. This conclusion is another piece of evidence of the constitutional and moral deficiencies in the current law. Perhaps the Court's decision in *Dobbs* will bring about a change in the law and permit states to protect the unborn.

*2. The Supreme Court and Abortion*

In order to understand the constitutional issues presented by state bans on Down syndrome abortions, it is necessary to explore the Supreme Court's abortion decisions. I have discussed these decisions in detail in prior articles,[14] and so I will only provide a brief account here.

In *Roe v. Wade*, the Court set forth the trimester framework. The Court did acknowledge that the state has an important interest in the health of the pregnant woman and "another important and legitimate interest in protecting the potentiality of human life [,]"[15] and that at some point during pregnancy "each becomes 'compelling.'"[16] *Roe*'s trimester framework gave states the ability to regulate abortion after the first trimester "in ways that are reasonably related to maternal health."[17] Under *Roe*, the states had the ability to proscribe abortion after viability, but the Court added the proviso

---

[14] See, e.g. Richard S. Myers, "*Evangelium vitae* and Constitutional Law" in *Life & Learning XXX: The Proceedings of the Thirtieth Annual University Faculty for Life Conference*, ed. Joseph W. Koterski (Bronx NY: UFL, 2020), pp. 65-88; Richard S. Myers, "The Constitutionality of Laws Banning Sex-Selection Abortion" in *Life & Learning XXVIII: The Proceedings of the Twenty-Eighth Annual University Faculty for Life Conference*, ed. Joseph W. Koterski (Bronx NY: UFL, 2018), pp. 65-74; Myers, supra note 1.

[15] 410 U. S. at 162.

[16] 410 U.S. at 163.

[17] Id. at 164.

"except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[18]

*Roe* ushered in a regime of abortion on demand. Justice White's dissent explained that the Court had basically accepted the claim that "for any one or more of a variety of reasons—convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc..., or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure."[19] Even after viability, the mother's right to an abortion under the *Roe* framework is still quite broad.[20]

From 1973 through the mid-1980s, the Court aggressively protected the right to abortion against most state efforts to restrict the practice.[21] In 1992, in *Planned Parenthood v. Casey*,[22] the Court did abandon the trimester framework in favor of the undue burden approach. This approach explicitly acknowledged that prior decisions had not given sufficient weight to the state's "interest in protecting fetal life or potential life."[23] Under the undue burden approach, the Court accepted certain regulations, such as an informed consent provision and a 24-hour waiting provision, that it would have invalidated under its past decisions.[24]

But despite the claims that are sometimes made by those in favor of abortion rights, *Casey* did not dramatically restrict the right to abortion.[25] The joint opinion in *Casey* noted that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before

---

[18] Id. at 165.

[19] *Doe v. Bolton*, 410 U. S. 179, 221 (White, J., dissenting).

[20] See Richard S. Myers, "The Constitutionality of Laws Banning Sex-Selection Abortion" in *Life & Learning XXVIII: The Proceedings of the Twenty-Eighth Annual University Faculty for Life Conference*, ed. Joseph W. Koterski (Bronx NY: UFL, 2018), noting that the health exception is typically thought of as authorizing abortion on demand, p. 67 n16.

[21] See Myers, supra n20, at pp. 67-68.

[22] 505 U.S. 833 (1992).

[23] *Casey*, 505 U.S. at 876.

[24] Myers, supra n20 at p. 68.

[25] Id. at 68-69.

viability."[26] And, even after viability, the *Roe* "exceptions" were explicitly retained. The joint opinion stated: "We also affirm *Roe*'s holding that 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[27] Under the undue burden standard, a state may regulate but never actually prohibit an abortion. As Justice Scalia's dissent maintained, "in the 'undue burden' standard as applied in the joint opinion, it appears that the State may not regulate abortion in such a way as to reduce significantly its incidence."[28] As Justice Scalia noted, "despite flowery rhetoric about the State's 'substantial" and 'profound' interest in 'potential human life,' and criticism of *Roe* for undervaluing that interest, the joint opinion permits the State to pursue that interest only so long as it is not too successful."[29]

More recent decisions have focused on the meaning of *Casey*'s undue burden test. In 2016, in *Whole Woman's Health v. Hellerstedt,*[30] the Court used the undue burden standard in striking down two provisions of a Texas law regulating abortion. The Court concluded that neither of the two provisions of the Texas law (the admitting privileges requirement or the surgical-center requirement) "offers medical benefits sufficient to justify the burdens upon access [to abortion] that each imposes. Each places a substantial obstacle in the path of a woman seeking a previability abortion, each constitutes an undue burden on abortion access, ...and each violates the Federal Constitution [as interpreted in *Casey*]."[31]

In 2020, in *June Medical Services v. Russo,*[32] the Court invalidated a Louisiana law requiring doctors who perform abortions to have admitting privileges at local hospitals. The law was similar to the Texas law at issue

---

[26] *Casey*, 505 U.S. at 874.

[27] *Casey*, 505 U.S. at 879 (quoting *Roe*, 410 U. S. at 164-165).

[28] Casey, 505 U.S. at 992 (Scalia, J., concurring in the judgment in part and dissenting in part).

[29] Id. at 992 (Scalia, J., concurring in the judgment in part and dissenting in part).

[30] 136 S. Ct. 2292 (2016).

[31] Id. at 2300.

[32] 140 U.S. 2103 (2020).

in *Whole Woman's Health*. A 5-4 Court agreed with the district court that the Louisiana law was unconstitutional. Chief Justice Roberts provided the crucial fifth vote to invalidate the Louisiana law.[33] Chief Justice Roberts noted that he had "joined the dissent in *Whole Woman's Health* and [that he] continue[s] to believe that the case was wrongly decided."[34] Nevertheless, the Chief Justice stated: "*Stare decisis* instructs us to treat like cases alike. The result in this case is controlled by our decision four years ago invalidating a nearly identical Texas law. The Louisiana law burdens one seeking previability abortions to the same extent as the Texas law, according to factual findings that are not clearly erroneous. For that reason, I concur in the judgment of the Court that the Louisiana law is unconstitutional."[35]

Importantly, Chief Justice Roberts expressed a different understanding of the meaning of the undue burden standard than was set forth by the other four Justices who voted to invalidate the Louisiana law. Justice Breyer's opinion focused on a cost-benefit analysis.[36] In contrast, the Chief Justice stated: "Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts.... *Casey* instead focuses on the existence of a substantial obstacle, the sort of inquiry familiar to judges across a variety of contexts."[37] Under Roberts's approach, state regulations of abortion would be more likely to be upheld. Since *June Medical*, lower courts have disagreed about the appropriate legal standard.[38]

---

[33] 140 S. Ct. at 2133-2142 (Roberts, C.J., concurring in the judgment).

[34] Id. at 2133 (Roberts, C.J., concurring in the judgment).

[35] Id. at 2141-2142 (Roberts, C.J., concurring in the judgment).

[36] Id. at 2120.

[37] Id. at 2136 (Roberts, C.J., concurring in the judgment).

[38] See Preterm-Cleveland v. McCloud, 994 F. 3d 512 (6th Cir. 2021)(en banc). The opinions in Preterm-Cleveland explore the differing interpretations of the governing legal standard. Judge Batchelder's opinion notes that the Sixth Circuit has used the June Medical concurrence as the governing law. Id. at 524-525. In contrast, the dissents in Preterm-Cleveland take the position that Justice Breyer's opinions in Whole Woman's Health and in June Medical set forth the controlling standard. Id. at 563-568 (Clay, J., dissenting).

*3. Down Syndrome Abortion Bans in the Courts*

State laws banning Down syndrome abortions have received varying treatment from the federal courts. Indiana's law was invalidated by the Seventh Circuit, and the Supreme Court denied cert.[39] Arkansas's law was invalidated by the Eighth Circuit.[40] The state's petition, as noted, is currently pending before the Supreme Court.[41] The Eighth Circuit also recently invalidated Missouri's law,[42] although that decision will be reheard en banc.[43] In contrast, Ohio's law was upheld by the Sixth Circuit.[44] This section of the paper discusses these decisions.

*A. Seventh and Eighth Circuit Rulings*

In *PPINK v. Commissioner*,[45] the Seventh Circuit affirmed a lower court ruling *invalidating* portions of Indiana's Sex Selective and Disability Abortion Ban. That law banned abortion when the person performing the abortion knows the woman is seeking an abortion on account of disability, sex, or race; the law also required that the remains of aborted babies be disposed of in a dignified manner.

The Seventh Circuit stated: "The non-discrimination provisions clearly violate well-established Supreme Court precedent holding that a woman may terminate her pregnancy prior to viability, and that the State may not prohibit a woman from exercising that right for any reason."[46]

Judge Manion wrote an opinion concurring in the judgment in part and dissenting in part. Judge Manion made it clear that he disagreed with the Court's decisions in *Roe* and *Casey*.[47] In so doing, Judge Manion joined a

---

[39] 888 F. 3d 300 (7th Cir. 2018), rev'd in part, cert. denied in part *Box. v. Planned Parenthood of Indiana and Kentucky, Inc*. 139 S. Ct. 1780 (2019).

[40] 984 F. 3d 682 (8th Cir. 2021).

[41] https://www.scotusblog.com/case-files/cases/rutledge-v-little-rock-family-planning-services/

[42] 2021 U.S. App. Lexis 17099 (June 9, 2021).

[43] See n11 supra.

[44] 994 F. 3d 512 (6th Cir. 2021).

[45] 888 F. 3d 300 (7th Cir. 2018).

[46] Id. at 302.

[47] See Myers, supra n4 at p. 9 (discussing Judge Manion's critique of *Roe* and *Casey*).

significant number of lower court judges who have expressed their disagreement with the Court's abortion cases.[48] Judge Manion stated:

> Indiana made a noble attempt to protect the most vulnerable members of an already vulnerable group. That it must fail is not due to lack of effort by the legislators who drafted it or the Solicitor General who ably argued before us. The Supreme Court's abortion jurisprudence proved an insurmountable obstacle despite their best efforts. More than anything, this case illustrates the extent to which abortion has become the most favored right in American law. Without a significant recalibration, the States sadly cannot protect even unborn children targeted because of their race, sex, or diagnosis of Down syndrome. But this court is powerless to change that state of affairs. Only the Supreme Court or a constitutional amendment can do that.[49]

The Seventh Circuit denied a motion for rehearing en banc.[50] Judge Easterbrook (joined by three other judges including then-Judge Amy Coney Barrett) dissented from the denial of rehearing en banc. Judge Easterbrook noted that the Supreme Court has not addressed the validity of an anti-eugenics law. He stated:

> *Casey* and other decisions hold that, until a fetus is viable, a woman is entitled to decide whether to bear a child. But there is a difference between "I don't want a child" and "I want a child, but only a male" or "I want only children whose genes predict success in life." Using abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statute *Casey* considered. None of the Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children.... We ought not impute to the Justices decisions they have not made about problems they have not faced.[51]

---

[48] I have explored this topic in other writings. See Myers, supra n4. "These lower court 'dissents' serve to destabilize *Roe* and *Casey* to some degree and make it somewhat more likely that the Court will modify or overrule *Roe* and *Casey*." Id. at p. 8.

[49] 888 F. 3d at 320 (Manion,J., concurring in the judgment in part and dissenting in part).

[50] 917 F. 3d 532 (7th Cir. 2018).

[51] Id. at 536 (Easterbrook, J., dissenting from the denial of rehearing en banc). Judge Easterbrook also noted that "Indiana has not asked us to rehear this part of the panel's decision. Only the Supreme Court can determine the answer; we might

The state of Indiana sought Supreme Court review on the constitutionality of the fetal remains provision and of the disability provision. The Court reversed the Seventh Circuit's decision and upheld the constitutionality of the fetal remains provision.[52] The Court denied certiorari on the second question dealing with the constitutionality of the ban on discriminatory abortions.[53] The Court did not express a view on that issue, noting that it would prefer to wait until other courts have addressed the constitutional issues raised by such laws.[54] Now, two years later, other courts have weighed in on these issues,[55] as I will explore below.

Justice Thomas concurred in the Court's ruling to uphold the constitutionality of the fetal remains provision and to deny review on the constitutionality of the ban on discriminatory abortions. Justice Thomas wrote separately to explore the issues presented by laws that "promote a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics."[56] Justice Thomas made the point that the Court had not decided the issue presented by anti-eugenics laws such as Indiana's. Justice Thomas stated: "In light of the Court's denial of certiorari today, the constitutionality of other laws like Indiana's thus remains an open question."[57] He cautioned that "[e]nshrining a constitutional right to an abortion based on the race, sex, or disability of the unborn child, ...would constitutionalize the views of the 20th-century eugenics movement[,]"[58] which his opinion explored at length.[59]

---

guess, but the Justices can speak authoritatively. So although 18 states have filed an amicus brief asking us to rehear this part of the decision en banc, I am content to leave it to the Supreme Court." Id. at 537 (Easterbrook, J., dissenting from the denial of rehearing en banc).

[52] 139 S. Ct. 1780, 1780-81 (2019).

[53] Id. at 1782.

[54] Id. at 1782.

[55] Alexandra Desanctis, "The Supreme Court Must Settle the Selective Abortion Question" (June 14, 2021). https://eppc.org/publications/the-supreme-court-must-settle-the-selective-abortion-question/.

[56] 139 S. Ct. at 1783 (Thomas, J., concurring)(footnote omitted).

[57] Id at 1792 (Thomas, J., concurring).

[58] Id. at 1792 (Thomas, J., concurring).

[59] Id. at 1783-1791 (Thomas, J., concurring). Justice Thomas's focus on the use of abortion as a tool for eugenic manipulation stirred great controversy. For a

The Eighth Circuit has also addressed the constitutionality of bans on discriminatory abortions. The Eighth Circuit has affirmed lower court rulings enjoining laws in Arkansas and Missouri that prohibited a doctor from performing an abortion when the doctor knows that the reason for the abortion is that there has been a diagnosis that the baby has Down syndrome.

In *Little Rock Family Planning Services v. Rutledge*,[60] the Eighth Circuit affirmed an injunction prohibiting enforcement of two provisions of Arkansas law restricting abortion. One provision prohibits abortion after eighteen weeks and the other provision prohibits abortion after a Down syndrome diagnosis if the abortion is sought for that reason. The Eighth Circuit concluded that the eighteen-week ban was unconstitutional. The court read *Casey* as preventing states from enacting prohibitions on abortion prior to viability. The court stated: "As Defendants presented no generally accepted medical evidence that the attainment of viability has shifted to before eighteen weeks after gestation, we must affirm the district courts order preliminarily enjoining enforcement of ... [the statute], which effectively prohibits a substantial universe of pre-viability abortions."[61] The court also concluded that the Down syndrome abortion ban was unconstitutional. The court agreed with the Seventh Circuit that states have no power to enact purpose-based or reason-based bans on pre-viability abortions. The Eighth Circuit stated: "We agree with our sister circuits that it is 'inconsistent to hold that a woman's right of privacy to terminate a pregnancy exists if...the State can eliminate this privacy right if [she] wants to terminate her pregnancy for a particular purpose.'"[62]

Two judges (Judges Shepherd and Erickson) concurred but also wrote separately to indicate their dissatisfaction with the Supreme Court's viability standard.[63] These judges called for the Supreme Court to re-

---

recent exploration of these themes, see Michael Stokes Paulsen, "Abortion as an Instrument of Eugenics," 134 *Harvard Law Review* F. 415 (2021).

[60] 984 F. 3d 682 (8th Cir. 2021)

[61] 984 F. 3d at 688.

[62] Id. at 690 (quoting *PPINK*, 888 F. 3d 300, 307).

[63] Other lower court judges have criticized the Court's use of "viability." See Myers, supra n4 at pp. 11-13 (discussing lower court opinions dealing with viability).

examine *Casey*.[64] Judge Shepherd stated: "Today's opinion is another stark reminder that the viability standard fails to adequately consider the substantial interest of the state in protecting the lives of unborn children as well as the state's 'compelling interest in preventing abortion from becoming a tool of modern-day eugenics.'"[65] Judge Erickson's concurring opinion elaborated at some length on the risks of what he termed the "neo-eugenics movement."[66] He noted the importance of valuing the life of every human being, even those thought of as "inferior."[67] He stated: "By focusing on viability alone, the Court fails to consider circumstances that strike at the core of humanity and pose such a significant threat the State of Arkansas might rightfully place that threat above the right of a woman to choose to terminate a pregnancy."[68]

In *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. v. Parson*,[69] the Eighth Circuit affirmed a district court decision enjoining Missouri's Down syndrome abortion law. The appellate court's decision was 2-1 with Judge Stras in dissent. The Missouri law prohibits abortions if the provider "knows that the woman is seeking the abortion solely because of a prenatal diagnosis, test, or screening indicating Down [s]yndrome or the potential of Down [s]yndrome in an unborn child."[70] The Missouri case largely followed the Eighth Circuit's earlier decision in *Little Rock Family Planning Services.*[71]

---

[64] 984 F. 3d at 692 (Shepherd, J. concurring); 984 F. 3d at 693 (Erickson, J., concurring).

[65] Id. at 693 (Shepherd, J., concurring)(quoting Box, 139 S. Ct. at 1783 (Thomas, J., concurring)).

[66] Id. at 694 (Erickson, J., concurring).

[67] Id. (Erickson, J., concurring).

[68] Id. at 694 (Erickson, J., concurring).

[69] 2021 U. S. App. LEXIS 17099 (8th Cir. June 9, 2021). The state of Missouri filed a petition for writ of certiorari with the Supreme Court, https://www.scotusblog.com/case-files/cases/schmitt-v-planned-parenthood-of-the-st-louis-region-inc/ but subsequently the Eighth Circuit sua sponte granted rehearing en banc. See n11 supra.

[70] 2021 U.S. App. LEXIS 17099, at *6.

[71] 984 F. 3d 682 (8th Cir. 2021).

Judge Stras's dissent explored themes that also featured prominently in the Sixth Circuit's treatment of bans on Down syndrome abortions.[72] Judge Stras explained that the Missouri law doesn't really restrict a woman's access to abortion. For the statute to apply, the abortion must be "solely" because of a diagnosis of Down syndrome and the doctor must know of that fact. Judge Stras noted: "Even when providers are aware of a positive Down syndrome diagnosis, ...nothing prevents them from performing an abortion if they know nothing more. Nor is there any restriction when providers know that the diagnosis is one reason for the abortion but remains in the dark about whether there are others."[73] In reality, as Judge Stras explained, the statute does not restrict access to an abortion, or at least there was no proof that the law had such an impact.[74] As noted above, the full Eighth Circuit has granted rehearing en banc.[75]

*B. Sixth Circuit Ruling*

In contrast to the Seventh and Eighth Circuit decisions, the Sixth Circuit has upheld Ohio's ban on Down syndrome abortions. The Ohio law "prohibits a doctor from performing an abortion if that doctor knows that the woman's reason for having the abortion is that she does not want a child with Down syndrome."[76] On October 11, 2019, the U.S. Court of Appeals for the Sixth Circuit affirmed a lower court decision that enjoined an Ohio law prohibiting abortion on account of the disability of the unborn child.[77] The decision was 2-1. The dissent, by Judge Alice M. Batchelder, echoed many of the themes expressed in Justice Clarence Thomas's opinion in *Box v. Planned Parenthood*. In that opinion, as noted above, Justice Thomas stated that states have "a compelling interest in preventing abortion from becoming a tool of modern-day eugenics."[78] The full Sixth Circuit agreed to rehear the case en banc. On April 13, 2021, in *Pre-Term Cleveland v.*

---

[72] See *Pre-Term Cleveland v. McCloud*, 994 F. 3d 512 (6Th Cir. 2021)(en banc).

[73] 2021 U. S. App. LEXIS 17099, at *24 (Stras, J., dissenting).

[74] Id. at *24-*32 (Stras, J., dissenting).

[75] See n11 supra.

[76] 994 F. 3d at 517.

[77] 940 F. 3d 318 (6th Cir. 2019).

[78] 139 S. Ct. at 1783 (Thomas, J., concurring).

*McCloud*,[79] the en banc Sixth Circuit reversed and upheld the constitutionality of the Ohio law.

The en banc Sixth Circuit divided 9-7. The lead opinion was written by Judge Batchelder, who had dissented from the original panel ruling. Judge Batchelder explained that, in her view, the law was not an actual prohibition on a woman's choice to obtain an abortion. Judge Batchelder explained that the law does not prohibit a woman from obtaining an abortion because she does not want a child with Down syndrome, and so does not create an undue burden on the right to abortion. The law is focused on the doctor and the court concluded that the law advanced legitimate state interests.[80] In the end, Judge Batchelder concluded: "We hold that the restrictions imposed, or burdens created, by...[the Ohio law] do not create a substantial obstacle to a woman's ability to choose or obtain an abortion. Moreover, those restrictions are reasonably related to, and further, Ohio's legitimate interests. Therefore, [the Ohio law] ... is valid in all conceivable cases and the plaintiffs cannot succeed on the merits of their claim."[81]

There were several concurring opinions of note. Judge Sutton expressed the view that the case "is Exhibit A in a proof that federal judicial authority over this issue has not been good for the federal courts or for increased stability over this difficult area."[82] Judge Griffin wrote separately to emphasize "Ohio's compelling interest in prohibiting its physicians from knowingly engaging in the practice of eugenics."[83] Griffin echoed many of the arguments that Justice Thomas made in the *Box* case. Griffin noted that "the selective abortion of unborn babies who are deemed 'unfit' or

---

[79] 994 F. 3d 512 (6th Cir. 2021)(en banc).

[80] Id. at 525. The court identified the following state interests: "[protecting] (1) the Down syndrome community from the practice of Down-syndrome-selective abortions and the stigma associated with it; (2) pregnant women and their families from coercion by doctors who advocate the abortion of Down-syndrome-afflicted fetuses; and (3) the integrity and ethics of the medical profession by preventing doctors from becoming witting participants in Down-syndrome-selective abortions." Id. at 521.

[81] Id. at 535.

[82] Id. at 536 (Sutton, J., concurring).

[83] Id. at 538 (Griffin, J., concurring).

'undesirable' is becoming increasingly common."[84] In this regard, Griffin particularly noted the increasing practice of sex-selection and Down syndrome abortions around the globe.[85] Judge Bush emphasized the Supreme Court's abortion cases have not considered "states' wholly separate interest in eliminating discrimination as a reason for an abortion."[86] Bush noted recent efforts to eliminate discrimination and stated: "A law passed to end the 'odious view that some lives are worth more than others' and ensure that people with Down syndrome are not eliminated in America, as they nearly have been in other countries, would fit squarely within that venerable tradition."[87] Bush also suggested that the Court's cases recognizing a right to abortion were wrongly decided.[88] Using an originalist approach, Bush concluded: "The Constitution says nothing about whether a state may enact legislation to protect unborn life with Down syndrome. It leaves to the People—through their elected representatives, not unelected judges—the freedom to provide that protection."[89]

*4. Constitutionality of Down Syndrome Abortion Statutes*

Under the existing framework, laws banning Down syndrome abortions are likely unconstitutional.[90] The Court has not directly addressed anti-eugenic statutes, and so the issue is "open," as Justice Thomas noted. The Court has, however, stated: "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[91] Prior to viability, the state interest in the life of the unborn is not considered strong enough to outweigh the mother's choice to have an abortion. This is true without regard to the reason for the mother's choice to have an

---

[84] Id. at 540 (Griffin, J., concurring).

[85] Id. at 540 (Griffin, J., concurring).

[86] Id. at 544 Bush, J., concurring).

[87] Id. at 545 (Bush, J., concurring)(quoting PPINK, 888 F. 3d at 315 (Manion, J., concurring in part and dissenting in part)).

[88] Id. at 546 (Bush, J., concurring).

[89] Id. at 550 (Bush, J., concurring).

[90] This discussion assumes that the law in question is a ban on Down syndrome abortions, which was the assumption of the Seventh and Eighth Circuits in the decisions discussed in section 3.A. supra.

[91] *Casey*, 505 U. S. at 879.

abortion.[92] Under *Casey*'s approach to substantive due process, the Constitution protects the woman's autonomy; under this approach, the Court is largely indifferent to the content of the choice.[93] It is not surprising, therefore, that most courts that have addressed the issue have found Down syndrome bans to be unconstitutional, even when the judges who so concluded expressed strong reservations about the legitimacy of *Roe* and *Casey*.[94]

Some have argued that the anti-discrimination reason for such laws offers the possibility that the Court might uphold such a statute. The problem with this argument is that under the Court's existing approach, these laws do not involve discrimination against persons. I have discussed this with regard to the constitutionality of laws banning sex-selection abortions.[95] The Court has recognized that the State has a compelling interest in preventing sex discrimination. But the Court would not likely extend this reasoning to sex discrimination against the unborn because such an approach would seem to rest on the view that the unborn are "persons" protected by the Constitution.[96]

Under this view, the Court cannot really consider abortions for a discriminatory reason as constituting sex discrimination (against a person).

---

[92] In PPINK, the Seventh Circuit stated: "The non-discrimination provisions clearly violate well-established Supreme Court precedent holding that a woman may terminate her pregnancy prior to viability, and that the State may not prohibit a woman from exercising that right for any reason." PPINK, 888 F. 3d at 303.

[93] See Richard S. Myers, "An Analysis of the Constitutionality of Laws Banning Assisted Suicide from the Perspective of Catholic Moral Teaching," 72 *University of Detroit Mercy Law Review* 771, 773 (1995).

[94] See Myers, supra n4 at p. 9 (discussing Judge Manion's critique of *Roe* and *Casey*); *Little Rock Family Planning Services*, 984 F. 3d at 692 (Shepherd, J., concurring); id. at 693 (Erickson, J., concurring).

[95] See Myers, supra n20.

[96] Id. at 72. See also Dov Fox, "Abortion, Eugenics, and Personhood in the Supreme Court" (January 25, 2020), https://www.fertstertdialog.com/posts/58704-fox-consider-this. In discussing Justice Thomas's concurrence in the Box case, Fox stated: "[Justice Thomas's] gesture toward personhood supposes that fetuses are protected against discrimination like people are. Yet not a single Supreme Court opinion—not even a concurring or dissenting one, let alone a majority opinion—has ever said that fetuses qualify as constitutional persons with equal rights against discriminatory treatment." Id.

Aborting unborn children because they are the "wrong" sex (often because they are girls) does not really involve sex discrimination, defenders of sex-selection abortion contend, because the victims are not really girls—they are "potential girls" with a "future sex."[97] These advocates contend that to view sex-selection abortion as sex discrimination would necessarily entail granting personhood to the unborn, which the Court of course rejected in *Roe*.[98] Under this view, unborn fetuses only become girls (and potential victims of sex discrimination) if they are born.

Even aside from the personhood issue, the Court doesn't view the state as having a compelling interest in the life of the unborn prior to viability. In *Roe*, the Court said that it would not answer the question of when life begins, although the Court did effectively decide the issue. In evaluating the state's interest, the Court necessarily rejected the state's view that fetal life (which the Court frequently describes as "potential life"[99]) deserved protection.[100] The Court in *Roe* explicitly stated that "we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."[101]

I think the same argument would apply to bans on Down syndrome abortions. There is, it is true, an interest in avoiding discriminatory

---

[97] See Myers, supra n20 at p. 72.

[98] See *Roe*, 410 U. S. at 158. For a different view on the personhood issue, see Michael Stokes Paulsen, "The Plausibility of Personhood," 74 Ohio State Law Journal 13 (2012); see also John Finnis, "Born and Unborn: Answering Objections to Constitutional Personhood," Public Discourse (April 9, 2021), https://www.firstthings.com/web-exclusives/2021/04/born-and-unborn-answering-objections-to-constitutional-personhood.

[99] See , e.g., *Casey*, 505 U. S. at 870.

[100] Myers, supra n20 at pp. 71-72.

[101] *Roe*, 410 U. S. at 162. Michael Paulsen has noted: "[The] intuition [that it should not be legal to kill a fetus on the basis of such human qualities such as sex or disability] contrasts sharply with the implicit ideology underlying current abortion law: *Roe* treats the unborn human fetus as merely 'potential' human life. See *Roe*, 410 U.S. at 150. If the human fetus has no human moral status unless the pregnant woman chooses to give it one (the position assumed by current law), there is nothing at all wrong with sex-selection abortion or with race-based or disability-based abortion. The fetus is, on this view, not really 'a girl,' or 'Black,' at all. She is only a 'potential girl' or 'potentially Black.'" Paulsen, supra n59 at p. 418 n7.

attitudes, but it is hard to see that this more symbolic interest would be thought of as weightier than the life of the unborn. A court that rejected the state's interest in the life of the unborn would not likely view the interest in avoiding discrimination against the unborn as weighty enough to override the woman's right to an abortion. Under the Court's cases, unborn children have no rights that the mother is bound to respect.[102] The Court might take this opportunity to revise its approach, but a significant revision would likely be necessary.[103]

This conclusion shows the defects in the current law. The constitutional defects have been clear for quite some time, as even people who approve of the result concede.[104] As Michael Paulsen has stated: "*Roe*'s reasoning is utterly laughable, a running joke in constitutional law circles."[105] The Court essentially invented a constitutional right to abortion in the face of a long history restricting the choice to have an abortion. Moreover, the Court undervalued the state interest in the life of the unborn. And the Court's error in undervaluing the state's interest in unborn life has become more and more clear. As Justice Parker noted:

> A national survey of the laws of the states demonstrates that unborn children have numerous rights that all people enjoy.... "[T]he only major area in which unborn children are denied legal protection is abortion, and that denial is only because of the dictates of *Roe* [*v. Wade*]." In *Roe*, the United States Supreme Court, without historical or constitutional support, carved out an exception to the rights of unborn children and prohibited states from recognizing an unborn child's inalienable right to life when that right conflicts with a woman's "right" to abortion. The judicially created exception of *Roe* is an aberration to the natural law and the positive and common law of the states. Of the numerous rights recognized in unborn children, an unborn child's fundamental, inalienable, God-given right to life is the only right the states are prohibited from ensuring for the unborn child; the isolated *Roe* exception, which is increasingly in conflict with the numerous laws of the states recognizing the rights of unborn children, must be overruled. As states like

---

[102] See Myers, supra n1 at p. 1032

[103] See Paulsen, supra n59 at p. 430.

[104] For perhaps the most famous example of a critique of *Roe* by someone who supports abortion rights, see John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," 82 *Yale Law Journal* 920 (1973).

[105] See Paulsen, supra n2 at p. 1011.

> Alabama continue to provide greater and more consistent protection for the dignity of the lives of unborn children, the *Roe* exception is a stark legal and logical contrast that grows ever more alienated from and adverse to the legal fabric of America.[106]

The moral defects are also clear. In *Roe* and *Casey*, the Court has prevented states from enforcing the traditional sanctity of life ethic and its corollary—the prohibition against intentionally taking the life of an innocent human person.[107] This is done in the name of freedom, yet such an approach threatens the life of the most vulnerable. As then-Cardinal Ratzinger stated:

> One understands, then, how a state which arrogates to itself the prerogative of defining which human beings are or are not the subject of rights and which consequently grants to some the power to violate others' fundamental right to life, contradicts the democratic ideal to which it continues to appeal and undermines the very foundations on which it is built. By allowing the rights of the weakest to be violated, the state also allows the law of force to prevail over the force of law. One sees, then, that the idea of an absolute tolerance of freedom of choice for some destroys the very foundation of a just life for men together. The separation of politics from any natural content of right, which is its inalienable patrimony of everyone's moral conscience, deprives social life of its ethical substance and leaves it defenseless before the will of the strongest.[108]

It seems clear that bans on abortion for discriminatory reasons are unconstitutional under the Court's current framework. The bans are, however, arguably serving a useful purpose. These bans help to highlight

---

[106] *Ex Parte Phillips*, 287 So. 3d 1179, 1244 (Ala. 2018)(Parker, J., concurring specially)(alterations in original)(citations and footnote omitted).

[107] See Richard S. Myers, Book Review, 18 *Ave Maria Law Review* 35, 41-42 (2020)(reviewing John Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legalisation* (2018)); Richard S. Myers, "*Evangelium vitae* and Constitutional Law" in *Life & Learning XXX*: *The Proceedings of the Thirtieth Annual University Faculty for Life Conference*, ed. Joseph W. Koterski (Bronx NY: UFL, 2020), pp. 65-88.

[108] Joseph Cardinal Ratzinger, "The Problem of Threats to Human Life," at IV:1 (April 8,1991), https://www.catholicculture.org/culture/ library/view.cfm ?recnum=187.

the reality that abortion involves the taking of human life.[109] And underscoring this reality might well prompt a long overdue rethinking of the legitimacy of the *Roe*/*Casey* framework.

It is that prospect—a necessary rethinking of *Roe* and *Casey*—that explains the fierce resistance to Justice Thomas's anti-eugenics opinion in *Box*. Critiques of Justice Thomas's opinion in *Box* have been common in scholarly and popular commentary[110] and in court opinions. For example, one of the dissents in *Pre-Term Cleveland* critiqued Thomas's opinion by noting that eugenics often involves population control efforts by governments. According to this opinion, the eugenics label isn't appropriate in describing private decisions to have an abortion for reasons of sex or disability.[111]

But this critique is misplaced. The history of eugenics is, it is true, quite complex.[112] But most of these critiques miss the broader, theoretical point that gives the association with eugenics such force.

The eugenics label is entirely appropriate in discussions of discriminatory abortions.[113] The label has been used for many years. For

---

[109] As Michael Paulsen has stated: "And at a deeper level, trait-selection bans tend to undermine both the legal and moral assumptions underlying the judicially created constitutional right to abortion in a unique way: they refute the "it"-ness of the human fetus. The unborn human fetus has human traits, qualities, capacities—in short, a distinctive human identity. Trait-selection abortion bans force fair-minded people (including judges) to confront and wrestle with the assumed "it"-ness of the human fetus in light of its—his or her—undeniable human characteristics. And that wrestling tends to produce a moral intuition: that the unborn human fetus is part of our common humanity." Paulsen, supra n59 at p. 417.

[110] See Melissa Murray, "Race-ing *Roe*: Reproductive Justice, Racial Justice, and the Battle for *Roe v. Wade*," 134 *Harvard Law Review* 2025, 2028 (2021)(collecting commentary).

[111] *Pre-Term Cleveland*, 994 F.3d at 584-590 (Donald, J., dissenting).

[112] For a good, accessible overview of eugenics, see John C. Berry, "Eugenics," in 3 *Encyclopedia of Catholic Social Thought, Social Science, and Social Policy: Supplement*, ed. Michael L. Coulter, Richard S. Myers & Joseph A. Varacalli (2012), defining the term eugenics and discussing its development, pp. 103-07.

[113] As Alexandra DeSanctis has noted: "it is entirely accurate to describe as 'eugenic' an individual choice to eliminate a child deemed 'unfit,' even in just one

example, in 1995 in *Evangelium Vitae*,[114] Saint Pope John Paul II criticized the use of prenatal diagnostic techniques to aid in abortion of unborn children with "possible anomalies." Pope John Paul II stated: "it not infrequently happens that these techniques are used with a eugenic intention which accepts selective abortion in order to prevent the birth of children affected by various types of anomalies. Such an attitude is shameful and utterly reprehensible, since it presumes to measure the value of a human life only within the parameters of 'normality' and physical well-being, thus opening the way to legitimizing infanticide and euthanasia as well."[115] Pope Francis has also made the same point.[116] The characterization of discriminatory abortions as eugenic captures an important point. As I noted some years ago, "there is a linkage between eugenics and those who favor abortion rights: both deny the idea of basic human equality."[117]

Supporters of discriminatory abortions are in reality defending the idea that human beings who are "weak" or "unfit" are not entitled to the same

---

instance." In responding to the state/private critique, DeSanctis explained: "there are important distinctions between a state -sponsored regime to target 'unfit' populations and a woman choosing abortion after receiving a prenatal Down-syndrome diagnosis. But…the core belief behind these situations is precisely the same: that some human lives are of lesser value and that as a result, other human beings must be given the power to exterminate them at will." Alexandra DeSanctis, "Is It 'Eugenics' to Abort Unborn Babies with Down Syndrome?"; https://eppc.org/publication/is-it-eugenics-to-abort-unborn-babies-with-down-syndrome/.

[114] Pope John Paul II, *Evangelium vitae* (March 25, 1995), http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/ hf_jp-ii_enc 25031995_evangelium vitae.html.

[115] Id. at 63.

[116] In a recent column discussing Pope Francis and the life issues, George Weigel stated: "So-called 'therapeutic' abortions that willfully destroy unborn children who suffer from some illness or deformity were, the pontiff insisted, a matter of 'inhuman eugenics.' He added that 'human life is sacred and inviolable and the use of prenatal diagnosis for selective [i.e., abortive] purposes should be discouraged with strength.'" George Weigel, "Pope Francis and the Life Issues," *First Things* (July 14, 2021), https://www.firstthings.com/web-exclusives /2021/07/pope-francis-and-the-life-issues.

[117] Myers, supra n1 at p. 1035 n55.

protection as the rest of us.[118] But supporters of the legitimacy of discriminatory abortions don't really confront that reality. As Michael Paulsen stated in an important response to an article by Professor Melissa Murray that critiqued Justice Thomas's concurring opinion in the *Box* case: "Trait-selection abortion bans thus pose hugely important, stark, and seemingly unavoidable legal and moral challenges to the constitutional legal regime of *Roe*. These are the fundamental questions posed in the *Box case* ... and that are discussed in Justice Clarence Thomas's important concurrence in denial of certiorari in that case—the opinion that is the topic of Murray's article. And yet these are the questions that Murray avoids entirely."[119]

Abortion supporters realize that they are on weak grounds in defending the constitutional and moral legitimacy of discriminatory abortions. They are concerned that a focus on these abortions and a connection with eugenics may lead to a fundamental rethinking of *Roe* and *Casey*. Laws banning discriminatory abortions are based on the idea that it is wrong to end the life of an unborn child based on an unwanted characteristic. As Alexandra DeSanctis has stated: "Supporters of abortion refuse to respond to this argument, because to do so would expose the logic of all abortion, which, regardless of disabilities, grants some human beings the power to declare the lives of others not worth living."[120]

As DeSanctis makes clear, *Roe* and *Casey* have largely been about power—the power to kill, even though the opinions have long sought to obscure the reality of what was at stake. This exercise of autonomy is inconsistent with the traditional sanctity of life norm, which is so important to protecting human rights, and with the increasing appreciation of the need

---

[118] See DeSanctis, supra n113.

[119] Paulsen, supra n59 at p. 418. Paulsen later noted: "This Response offers a straightforward but harsh critique of Murray's opus: it misses the point. For all of its analysis, Murray's article simply fails to address the central legal questions posed by trait-selection abortion bans: Are they constitutional or not? Does the Roe right really embrace the freedom to kill a fetus because it is Black, female, or disabled? And if trait-selection bans are constitutional, why—and doesn't the answer to that question deservedly undermine the legitimacy of *Roe* and *Casey*?" Id. at 419.

[120] DeSanctis, supra n113.

to protect victims of discrimination (such as the victims of sex discrimination or disability discrimination).

*5. Conclusion*

Discriminatory abortions, which have led to millions of missing girls and the increasing elimination of children with Down syndrome, are making the reality that abortion involves the taking of human life more apparent. The bans enacted in response are helping to reveal the constitutional and moral weaknesses of *Roe* and *Casey*. The constitutional illegitimacy of *Roe* and *Casey* has been clear for many years. The moral illegitimacy is also becoming more apparent. The anti-eugenics statutes particularly help with the latter argument. That is why they are so strongly resisted. Abortion rights supporters do not want the association with the eugenics movement, even when the association is earned. The theoretical linkages are clear. Perhaps this recognition, and a favorable ruling in the *Dobbs* case, may help to bring about an end to *Roe* and *Casey*.