THE CASE FOR TRAIT-SPECIFIC ABORTIONS IN A POST-*DOBBS* WORLD

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Abortions are difficult both mentally and physically on women; abortions may be even more difficult when a woman decides to terminate a pregnancy because she knows her baby will have a specific trait causing the baby to die shortly after birth. Trait-specific abortions occur, though not without controversy. In the states that still legally allow abortions, trait-specific abortions are not always permitted. Prior to Dobbs, *a circuit split existed regarding the legality of trait-specific abortions. Some states permitted trait-specific abortions, while others did not. Since* Dobbs, *the circuit split no longer exists, though the opinions may still influence future state action regarding the legality of trait-specific abortions. The central issue—whether trait-specific abortions are immoral and should be prohibited—remains prevalent in society.*

This Note argues that at its core, trait-specific abortions are merely just a type of abortion; thus, if the state permits abortions generally, trait-specific abortions should be treated no differently. While this Note acknowledges Dobbs *and its impact, it also analyzes the previous circuit split with a pre-*Dobbs *framework. Ultimately, this Note seeks to demonstrate that the issues regarding the ethics and legal considerations of trait-specific abortions are not necessarily black and white.*

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I. INTRODUCTION

If a woman elects to have an abortion for a trait-specific reason, such as finding out her child will likely not live past the age of five, should she be allowed to get an abortion? What if the woman is three months pregnant? Seven months pregnant? How does one distinguish between traits that "justify" having an abortion versus traits that do not? Even those who consider themselves to be pro-choice may have a difficult time justifying abortion when asked whether they would support a woman's choice to have an abortion based on her preferences alone—for example, if she finds out her child is going to be a boy. Although the terms "pro-life" and "pro-choice" are often perceived as being wholly in opposition of one another, the topic of abortion is not nearly as black and white when individuals consider the various reasons women choose to have abortions.[1]

Due to ever-improving technological and medical advancements, these seemingly improbable situations—having an abortion because of the fetus's genetic abnormality—are not as rare as they may appear.[2] As a result, the topic of trait-specific abortions is becoming increasingly prevalent within society; yet there is no law denotating if, when, and which trait-specific abortions are permissible.[3]

Prior to *Dobbs v. Jackson Women's Health Organization*, circuit courts struggled with coming to a cohesive answer regarding the legality of trait-

1. *See* Jessica L. Dozier et al., *Abortion Attitudes, Religious and Moral Beliefs, and Pastoral Care Among Protestant Religious Leaders in Georgia*, PLOS ONE 1, 6–7 (2020).

2. *See* David Stoller, *Prenatal Genetic Screening: The Enigma of Selective Abortion*, 12 J.L. & HEALTH 121, 128 (1997) ("Although many of the specific genetic sites that determine these features are not known, it is certain that the Human Genome Project will soon illuminate this information.").

3. Adam Liptak, *Supreme Court Sidesteps Abortion Question in Ruling on Indiana Law*, N.Y. TIMES (May 28, 2019), https://www.nytimes.com/2019/05/28/us/politics/supreme-court-abortion-indiana.html [https://perma.cc/VD9S-L9Y9].

specific abortions.[4] Whether "the U.S. Constitution creates a right to a 'trait-selective' abortion is an open question."[5] States disagreed as to whether trait-selective abortions should be permitted,[6] and when the Supreme Court was asked to rule on this issue, it declined to do so.[7]

This Note explores the constitutional, ethical, and moral issues involved in trait-specific abortions. Additionally, this Note argues that although *Dobbs* now permits states to ban abortions completely,[8] regardless of whether the abortion is pre- or post-viability, states should not ban trait-specific abortions. Instead, this Note asks that states uphold the underlying principles expressed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[9] specifically that trait-specific abortions are not banned pre-viability, as this would create an undue burden on women;[10] however, in post-viability situations, states should consider a variety of factors before banning all trait-specific abortions.

Part II introduces the reader to abortions generally, including a brief history of abortion laws with an emphasis on trait-specific abortions. The history will focus on three major cases decided by the Supreme Court regarding abortion laws, along with recent circuit court decisions discussing trait-specific abortions. Part III analyzes a circuit split that once existed between the Sixth, Seventh, and Eighth Circuits, in conjunction with the constitutional and ethical considerations and implications of trait-specific abortions, in an attempt to reconcile the disagreement amongst the circuits; this Part functions with respect for the *Dobbs* decision by acknowledging that the recent change in precedent eliminated this circuit split. Nonetheless, the previous circuit split still has relevance and may impact a state's decision on whether to protect a woman's ability to obtain an abortion, specifically concerning trait-specific abortions. Although *Casey* may no longer be precedent, Part IV takes a *Casey*-like approach, recommending that states permit abortions regardless of the reason in pre-viability situations; however, when the abortion is post-viability, a balancing test should be used to consider the mother's best interests, along with any competing interests, including, but not limited to, the unborn fetus, the father of the fetus, and the state.

4. Mary Anne Pazanowski, *Missouri's Down Syndrome Abortion Law Supported by 22 States*, BLOOMBERG L. (Aug. 10, 2021, 2:44 PM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/health-law-and-business/X78MPJ1K000000?bna_news_filter=health-law-and-business [https://perma.cc/N2VJ-TZAU].

5. *Id.*

6. *See* Preterm-Cleveland v. McCloud, 994 F.3d 512, 521–22 (6th Cir. 2021); Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 888 F.3d 300, 303 (7th Cir. 2018); Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson, 1 F.4th 552, 557–58 (8th Cir. 2021). The Sixth Circuit held regulating trait-specific abortions does not create an undue burden, whereas the Seventh and Eighth Circuits held this type of regulation creates an undue burden.

7. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1781 (2019).

8. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022).

9. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 883, 879 (1992).

10. *Id.* at 878.

II. BACKGROUND

A. Trait-Specific Abortions

Trait-specific abortions include abortions obtained for reasons regarding the characteristics of the fetus, such as the fetus's gender, race, or fetal abnormalities.[11] In general, trait-specific abortions include all traits that may be tied to genetics in some way.[12] There are three types of trait-specific abortions—fetal-abnormality abortions, sex-selective abortions, and genetic-selective abortions[13]—though the three types are often interrelated.[14] Thus, as the name "trait-specific abortion" implies, the decision to have an abortion stems from the woman's knowledge that the fetus has or will come to develop a specific trait.

As medical technology continues to advance, doctors are able to detect genetic traits that were previously undetectable when the fetus is still in the womb.[15] While determining the fetus's gender has been readily available for quite some time,[16] advancements such as noninvasive prenatal screening can help determine whether the baby will be born with chromosomal abnormalities.[17] Although the test is not absolutely precise in its determination, it can indicate whether the fetus is at a high risk of "common genetic conditions, such as Down syndrome."[18] If it is determined that a woman is at a higher risk for delivering a baby with certain chromosomal abnormalities, the woman may elect to have an invasive test, which is "more accurate but comes with risk of miscarriage."[19]

The timeline for these types of screenings varies.[20] Not every screening is available during the first trimester; some screenings become available only during the second trimester.[21] During the first trimester, screenings using ultrasound or maternal blood tests[22] may detect increased risks for Down syndrome or

11. *See generally* Bruce P. Blackshaw, *Genetic Selective Abortion: Still a Matter of Choice*, 23 ETHICAL THEORY & MORAL PRAC. 445, 446–47 (2020) (describing what trait-specific abortions are and what traits are often reasons for abortions).

12. *Id.* at 447 ("[I]n fact any traits attributable to some degree to a genetic component.").

13. *Id.* at 446–47.

14. *Id.* at 447 ("It is worth noting that FAA may well be a subset of GSA in many cases—for example, where Down's syndrome is diagnosed by genetic testing. SSA could similarly be considered a subset of GSA if sex is determined by this method.").

15. *Advances in Genetic Testing for Pregnant Women*, MY S. HEALTH (Jan. 22, 2020), https://www.mysouthernhealth.com/new-advances-in-genetic-testing-for-pregnant-women/ [https://perma.cc/4MF4-5TWB] [hereinafter *Advances in Genetic Testing*].

16. *See generally* Kate Marple, *When and How Can I Find Out My Baby's Sex?*, BABYCENTER (Sept. 10, 2020), https://www.babycenter.com/pregnancy/health-and-safety/when-and-how-can-i-find-out-my-babys-sex_20004784 [https://perma.cc/S3QQ-S728] (noting one can find out the baby's sex "as early as 11 weeks of pregnancy").

17. *Advances in Genetic Testing*, *supra* note 15.

18. *Id.*

19. *Advances in Care for Birth Defects*, NW. MED. (Dec. 2020), https://www.nm.org/healthbeat/medical-advances/advances-in-care-birth-defects [https://perma.cc/5CF6-FRYN].

20. *Prenatal Genetic Screening Tests*, AM. COLL. OBSTETRICIANS AND GYNECOLOGISTS (Dec. 2021), https://www.acog.org/womens-health/faqs/prenatal-genetic-screening-tests [https://perma.cc/GS3N-NQM4] [hereinafter *Screening Tests*].

21. *Id.*

22. Blackshaw, *supra* note 11, at 448.

"physical defects of the heart, abdominal wall, and skeleton."[23] These screening tests "rely on the presence of fragments of fetal DNA in maternal blood," and using this DNA, chromosomes "can be measured, indicating whether Down syndrome or other [extra or missing chromosomes] are likely in the fetus."[24] By the second trimester, screenings may detect other "major physical defects in the brain and spine, facial features, abdomen, heart, and limbs."[25] As previously stated, no screening can conclusively determine whether a baby will be born with physical or genetic abnormalities.[26]

In addition to the ability to detect genetic diseases, research has revealed which genes are correlated with specific traits, conditions, and behaviors—such as cancer or even intelligence.[27] These traits may be categorized as either therapeutic or nontherapeutic traits.[28] Therapeutic traits result in diseases, whereas nontherapeutic traits are typically unrelated to physical health.[29] For instance, a therapeutic trait includes one's predisposition to develop cancer. Certain mutations of specific genes "significantly increase the risk of developing breast cancer and ovarian cancer."[30] Additionally, research regarding "gene variants that predispose children to acute leukemia" is currently underway.[31] Although some of these traits—specifically nontherapeutic traits such as sexual orientation, athletic abilities, or cosmetic features—are not yet commonly included in genetic tests, it is highly possible that women will eventually have the opportunity to learn more about their unborn child.[32]

Not surprisingly, the conversation of trait-specific abortions is controversial, even amongst those who consider themselves pro-choice.[33] For instance, those who identify primarily as pro-choice may approve of certain trait-specific abortions and not others.[34] Broadly speaking, the divide amongst pro-choice individuals most commonly arises regarding sex-selective versus fetal-abnormality abortions, with sex-selective abortions being more controversial.[35] "While most pro-choice advocates seem comfortable with permitting selective abortion for disabilities . . . they are often reluctant to endorse sex selective abortion (SSA)."[36]

Regardless of whether one considers him or herself to be more pro-life or more pro-choice, it may be difficult for some individuals to understand a

23. *Screening Tests*, *supra* note 20.
24. Blackshaw, *supra* note 11, at 448.
25. *Screening Tests*, *supra* note 20.
26. *See generally id.* (describing the possibility of "false-positive results and false-negative results").
27. Blackshaw, *supra* note 11, at 448.
28. Stoller, *supra* note 2, at 128.
29. *Id.*
30. Blackshaw, *supra* note 11, at 448.
31. *Id.*
32. *Id.*; Stoller, *supra* note 2, at 128–29.
33. Blackshaw, *supra* note 11, at 446–47.
34. *See id.* at 446.
35. Emma Green, *Should Women Be Able to Abort a Fetus Just Because It's Female?*, ATLANTIC (May 16, 2016), https://www.theatlantic.com/politics/archive/2016/05/sex-disability-race-selective-abortion-indiana/482856/ [https://perma.cc/RP8C-TE86]; *see* Stoller, *supra* note 2, at 130.
36. Blackshaw, *supra* note 11, at 446–47.

woman's choice to have an abortion solely because of the fetus's sex.[37] This view is partially grounded in the belief that sex-selective abortions may be used to effectively prevent the existence of one gender, primarily females, thus setting back gender equality.[38] For instance, in certain cultures, there is a preference for sons based on the "necessity or utility of male offspring for manual labor, war, elder care, property inheritance, continuation of the family name or blood," etc.[39] In these cultures, women may choose to abort females, though not males.[40] Some argue that permitting sex-selective abortions will only perpetuate gender inequality and social discrimination and thus should not be allowed.[41] Others believe that abortions based on one's preference of the fetus's sex are trivial,[42] and sexism, rather than sex-selective abortions, is the real problem.[43]

As noted above, fetal-abnormality abortions are often more easily justified in comparison to sex-selective abortions.[44] These abortions generally occur in the second trimester of pregnancy,[45] though advancements in science and technology may allow earlier diagnosis for some genetic conditions that are associated with abnormal development.[46] While a woman's reasons for terminating a pregnancy vary depending on the woman's personal circumstances and the fetal abnormality diagnosis, some common reasons include the "emotional and financial cost of raising a disabled child; the effect on a woman's ability to care for her existing children; and the feeling that it is cruel to have a child that will need constant medical intervention and may live in pain."[47] Furthermore, some public-health officials favor fetal-abnormality abortions.[48] Nevertheless, fetal-abnormality abortions are not without controversy. Those who generally disapprove

37. *See* Jeremy Williams, *Sex-Selective Abortion: A Matter of Choice*, 31 LAW & PHIL. 125, 126–27 (2012) ("[A] great many people appear to believe that, whilst a woman is *of course* entitled to abort in response to prenatal testing that reveals that her child would be disabled, abortions performed on grounds that the fetus is of the 'wrong' sex are objectionable, and ought not to be allowed."); *id.* at 127 ("[S]ome disability rights advocates have advanced parallel claims: on their view, allowing selective abortion for disability is incompatible with the requirement that, in a community governed by justice, disabled and non-disabled individuals alike are to be treated and valued as equals, and able to regard themselves as such.").

38. *Id.* at 126–28.

39. Sunita Puri, Vincanne Adams, Susan Ivey & Robert D. Nachtigall, *"There Is Such a Thing as Too Many Daughters, but Not Too Many Sons": A Qualitative Study of Son Preference and Fetal Sex Selection Among Indian Immigrants in the United States*, 72, SOC. SCI. & MED. 1169, 1169 (2011).

40. *Id.*

41. Williams, *supra* note 37, at 126–28.

42. *Id.* at 134 ("Now, opposition to SSA often stems from the assumption that preferences with regards [to] the gender of one's child are merely self-indulgent or trivial.").

43. Green, *supra* note 35.

44. *See* Blackshaw, *supra* note 11, at 446–47.

45. *Termination of Pregnancy for Fetal Anomaly*, BPAS, https://www.bpas.org/get-involved/campaigns/briefings/fetal-anomaly/ (last visited July 4, 2022) [https://perma.cc/4SFU-VYLZ] [hereinafter *Fetal Anomaly*].

46. Tracy B. Grossman & Stephen T. Chasen, *Abortion for Fetal Genetic Abnormalities: Type of Abnormality and Gestational Age at Diagnosis*, 2020 AM. J. PERINATOLOGY REPS. 87, 88 (2020).

47. *Fetal Anomaly*, *supra* note 45.

48. Green, *supra* note 35.

of abortions, including disability rights advocates,[49] argue that children with disabilities can live happy lives.[50]

Finally, there are some individuals who wholly support a woman's right to have an abortion. This belief extends to trait-specific abortions as well.[51] If fetal-abnormality abortions are allowed, then the same logic should be applied to allow sex-selective abortions.[52] This group believes the right to bodily autonomy "overrides any concerns about possible harmful side effects, whether those harms are incurred by children, women or society."[53] Thus, it should not matter what a woman's reason for obtaining an abortion is.

B. History of Abortion Laws

The Supreme Court set the precedent for interpreting abortion cases beginning with *Roe v. Wade*,[54] following up with *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[55] and most recently, reversing its previous precedents in *Dobbs v. Jackson Women's Health Organization*.[56] Since the first two of these three decisions, numerous cases involving abortion rights have attempted to interpret the Court's rulings, though none did so without controversy and occasional confusion. Even *Dobbs* lent itself to some confusion.

1. Understanding the Supreme Court's Framework to Interpret Abortion Laws

The first landmark abortion case, *Roe v. Wade*, set the standards regarding abortion restrictions.[57] Thus, it is important to start with *Roe* to understand the Supreme Court's progression of its views.

The *Roe* case stemmed from a Texas statute making it a crime to obtain an abortion unless the woman's life was at risk.[58] Roe, the plaintiff, sought an abortion; however, because her life was not at risk if she continued her pregnancy, she was essentially forced to give birth under the Texas statute.[59] Roe argued this statute was unconstitutional.[60] Ultimately, the case ended up at the Supreme Court, where the Court delineated when abortions may be regulated or even prohibited.[61]

The regulations set forth by *Roe* focus on which trimester a woman is in when she seeks an abortion, in conjunction with whether the fetus would be

49. *Id.*
50. *Fetal Anomaly*, *supra* note 45.
51. *See* Blackshaw, *supra* note 11.
52. *See id.* at 446; Williams, *supra* note 37, at 128 (2012).
53. Blackshaw, *supra* note 11, at 446.
54. *See generally* Roe v. Wade, 410 U.S. 113 (1973).
55. *See generally* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).
56. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).
57. *See Roe*, 410 U.S. at 164–67.
58. *Id.* at 117–18.
59. *Id.* at 120.
60. *Id.*
61. *See id.* at 164–65.

viable outside the woman's womb.[62] According to *Roe*, the Court permits abortions throughout the entire first trimester at the discretion of the pregnant woman's doctor.[63] Thus, the Court held a state cannot intervene or regulate abortions during the first trimester.[64] After the first trimester, however, a state is allowed to intervene or regulate abortions, "promoting its interest in the health of the mother."[65] This includes regulating who is qualified to perform abortions, where abortions are performed, and similar considerations.[66] Finally, once the fetus is viable outside of the woman's body, a state can regulate abortion—even prohibiting abortion—so long as there is an exception for cases in which the woman's health or life is at risk.[67] The Court justified its framework by acknowledging a state's interest in protecting potential life, though only to the extent that the fetus would survive outside the womb; hence, as the pregnancy progresses, the states have an increasing amount of power to regulate abortions.[68] As a result, post-viability regulations may be harsh with regard to a woman's right to have an abortion.[69]

From a constitutional standpoint, this decision stemmed from the Court's interpretation of the Fourteenth Amendment, which includes the right to privacy.[70] Specifically, the Court held "the right of personal privacy includes the abortion decision," though the right is not absolute and still must be weighed against "important state interests in regulation."[71] Overall, *Roe* allowed for increasing state and governmental intervention as the woman's pregnancy progressed "so long as those restrictions [were] tailored to the recognized state interests."[72]

Not even twenty years later, in 1992, the Supreme Court heard *Planned Parenthood of Southeastern Pennsylvania v. Casey*, another landmark abortion case.[73] In *Casey*, the Court reexamined its previous decision regarding abortion

62. *Id.* at 164–65 ("For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician . . . . For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health . . . . For the stage 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.").

63. *Id.* at 164.

64. *See id.*

65. *Id.*

66. *See id.* at 163.

67. *Id.* at 164–65.

68. *See id.* at 165 ("The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests.").

69. *See id.* at 163–64 ("State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.").

70. *Id.* at 153–54; *see* Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) (holding the right to privacy may be implied).

71. *Roe*, 410 U.S. at 154.

72. *Id.* at 165.

73. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

restrictions and prohibitions.[74] In it, the Court generally upheld the essential principles of *Roe*.[75] A pregnant woman continued to have the right to have an abortion pre-viability without "undue interference from the State," and the state retained its power to regulate abortions post-viability, so long as there were "exceptions for pregnancies endangering a woman's life or health."[76] The state may not "prohibit any woman from making the ultimate decision to terminate her pregnancy *before* viability."[77]

But the Court also departed from *Roe* in some respects. For instance, the Court held that throughout the entire pregnancy, the state has an interest in protecting the health of the woman, fetus, and eventual child.[78] This embodies perhaps the greatest change in *Casey* from *Roe*.[79] Additionally, the Court adopted a new framework for determining when a state could regulate abortions, focusing solely on pre- and post-viability, as opposed to *Roe*'s trimester framework.[80] The Court argued that the trimester framework failed to place enough value on a state's interest in protecting potential life.[81] Therefore, by rejecting the trimester framework, the Court placed more emphasis on a state's interests.[82]

Nevertheless, while a state's interests were given more consideration and weight in comparison to the ruling in *Roe*, the Court argued that the increase in a state's interest does not detract from the woman's interests.[83] To illustrate this idea, the Court made it clear that simply because a regulation may make it more difficult to exercise a certain right—here, the right to have an abortion—it does not mean that a regulation is unconstitutional.[84] An abortion regulation is unconstitutional only when it places an "undue burden" on a woman's ability to decide and obtain an abortion; such a regulation would violate the Due Process Clause within the Fourteenth Amendment.[85] The Court defined an "undue burden" as a provision or regulation where "its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability."[86] Regulations should be aimed at informing a woman's choice, not oppressing it.[87] Yet a state may attempt to persuade a woman *not* to have an abortion via

74. *See id.* at 844.
75. *See id.* at 887.
76. *See id.* at 846.
77. *Id.* at 879 (emphasis added).
78. *See id.* at 846.
79. *Id.* at 872 ("The trimester framework no doubt was erected to ensure that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact. We do not agree, however, that the trimester approach is necessary to accomplish this objective. A framework of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State's permissible exercise of its powers.").
80. *Id.* at 870.
81. *Id.* at 873.
82. *Id.*
83. *See id.* at 879.
84. *Id.* at 873–74 ("The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.").
85. *Id.* at 874.
86. *Id.* at 878.
87. *Id.* at 877.

certain regulations so long as it does not create a substantial obstacle or undue burden.[88]

In general, *Casey* represented the Supreme Court's new framework for interpreting abortion laws and regulations. After *Casey*, states and courts needed to use the pre- and post-viability framework when enacting or ruling on the constitutionality of abortion regulations. To briefly summarize, since *Casey*, and prior to *Dobbs*, states could regulate abortions throughout the entire pregnancy, not merely after the first trimester.[89] Depending on whether the fetus is viable outside the woman's womb, abortion regulations were subject to additional guidelines, specifically the undue burden test.[90] Prior to viability, abortion regulations could not place an undue burden on the right of the woman to obtain an abortion.[91] Thus, if a fetus was not yet viable, a state could not enact regulations whose sole purpose was to prevent women from obtaining abortions; nonetheless, a state could enact regulations in an attempt to ensure "the woman's choice is informed . . . as long as [the State's] purpose is to persuade the woman to choose childbirth over abortion."[92] After a fetus was viable, there were fewer restrictions regarding a state's ability to enact abortion regulations.[93] States may "regulate, and even proscribe, abortion except where it is necessary, in the appropriate medical judgment, for the preservation of the life or health of the mother."[94] All of this changed with *Dobbs*.

Thirty years later, the Supreme Court revisited the right to have an abortion for a third time in *Dobbs v. Jackson Women's Health Organization*. *Dobbs* involved Mississippi's Gestational Age Act (the "Act");[95] the Act effectively banned abortions after fifteen weeks.[96] This was still pre-viability.[97] Respondents alleged that the Act "violated [the Supreme] Court's precedents establishing a constitutional right to abortion."[98] The district court ruled in favor of the respondents, and the Fifth Circuit affirmed on the basis that outright bans on elective abortions are not permitted prior to viability.[99] The Supreme Court granted certiorari to determine "whether 'all pre-viability prohibitions on elective

88. *Id.* at 878.

89. *Compare id.* at 872 ("Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term . . . ."), *with* Roe v. Wade, 410 U.S. 113, 164 (1973) ("For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.").

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

91. *Id.*

92. *Id.* ("[M]easures designed to advance [the State's] interest [in potential life] will not be invalidated if their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.").

93. *Id.* at 879.

94. *Id.* at 879 (citing *Roe*, 410 U.S. at 164–165).

95. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022).

96. *Id.*

97. *Id.* at 2242–44.

98. *Id.* at 2244.

99. *Id.*

abortions are unconstitutional' . . . ."[100] Ultimately, the Court overruled both *Roe* and *Casey*.[101]

The Court's lengthy analysis began by addressing whether the Constitution recognizes a right to obtain an abortion; this included revisiting *Roe* and *Casey* in order to determine whether there was any Constitutional basis for their rulings.[102] *Roe* was decided under the right to privacy in the Fourteenth Amendment, though neither the right to privacy nor the right to obtain an abortion is mentioned within the Fourteenth Amendment.[103] According to the Court, *Casey* did not touch *Roe*'s analysis but "grounded its decision solely on the theory that the right to obtain an abortion is part of the 'liberty' protected by the Fourteenth Amendment's Due Process Clause."[104] In order for a right that is not mentioned in the Constitution to be protected under the Due Process Clause, the Court must look to whether the right is "deeply rooted in . . . history and tradition."[105] The Court concluded that history showed little support for "a constitutional right to obtain an abortion."[106] Further, "during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy."[107] Because the right to have an abortion was not deeply rooted in history, the Court found there was no fundamental right to obtain an abortion under the Fourteenth Amendment.[108]

Although the Court disagreed with *Roe* and *Casey*'s analysis, the Court acknowledged that disagreement with a prior decision by itself is not enough to overturn the Court's prior decision.[109] "Stare decisis plays an important role in our case law" while also protecting "the interests of those who have taken action in reliance on a past decision."[110] Nevertheless, the Court is allowed, and is even encouraged in some scenarios, to overrule decisions if they were wrongfully decided.[111] The Court discussed five factors used to determine when precedent should not be followed.[112] These five factors favored overruling *Roe* and *Casey*.[113] The five factors include: (1) "nature of their error," (2) "quality of their reasoning," (3) "'workability' of the rules they imposed on the country," (4) "disruptive effect on other areas of the law," and (5) "absence of concrete reliance."[114] To briefly summarize the Court's analysis of each factor, the Court argued that *Roe* was wrong when it was decided and *Casey* only "perpetuated its

100. *Id.*
101. *Id.* at 2242.
102. *Id.* at 2244–45.
103. *Id.* at 2245.
104. *Id.*
105. *Id.* at 2246.
106. *Id.* at 2248.
107. *Id.* at 2252.
108. *Id.* at 2253–54.
109. *Id.* at 2261–62.
110. *Id.*
111. *Id.* at 2262.
112. *Id.* at 2265.
113. *Id.*
114. *Id.*

errors;"[115] *Roe* failed to ground its decision in "text, history, or precedent;"[116] the undue burden test cannot be easily understood and applied;[117] *Roe* and *Casey* disrupted many traditional constitutional law principles;[118] and traditional, concrete reliance interests are not implicated.[119] Ultimately, the doctrine of stare decisis did not compel the Court to uphold *Roe*; rather, the Court found "*Roe* was egregiously wrong from the start[,] [i]ts reasoning was exceptionally weak, and the decision has had damaging consequences."[120]

Writing for the dissent, Justice Breyer, Justice Sotomayor, and Justice Kagan discussed why they felt the majority came to the wrong decision[121] and the implications *Dobbs* will have.[122] Now, states "can force [a woman] to bring a pregnancy to term, even at the steepest personal and familial costs."[123] Perhaps even more startling, states "have passed laws without any exceptions for when the woman is the victim of rape or incest. Under those laws, a woman will have to bear her rapist's child or a young girl her father's—no matter if doing so will destroy her life."[124]

Post-*Dobbs*, abortion regulations are left up to the states.[125] Since abortion is no longer recognized as a fundamental right, it is merely subject to rational-basis review.[126] Thus, states may regulate abortion for any legitimate reasons that serve the state's interests.[127] This includes concern for prenatal life, concern for the mother's health and safety, preventing "barbaric" medical procedures, and so on.[128] Given the recent nature of the *Dobbs* decision, the long-term effects of the decision are still unknown.

115. *Id.*
116. *Id.* at 2266.
117. *Id.* at 2272.
118. *Id.* at 2275–76.
119. *Id.* at 2276–77.
120. *Id.* at 2243.
121. *Id.* at 2317–19, 2338 ("*Roe* and *Casey* have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs. Women have relied on the availability of abortion both in structuring their relationships and in planning their lives.") ("In the end, the majority throws longstanding precedent to the winds without showing that anything significant has changed to justify its radical reshaping of the law.").
122. *Id.* at 2317, 2344 ("As *Casey* understood, people today rely on their ability to control and time pregnancies when making countless life decisions: where to live, whether and how to invest in education or careers, how to allocate financial resources, and how to approach intimate and family relationships. Women may count on abortion access for when contraception fails. They may count on abortion access for when contraception cannot be used, for example, if they were raped. They may count on abortion for when something changes in the midst of a pregnancy, whether it involves family or financial circumstances, unanticipated medical complications, or heartbreaking fetal diagnoses. Taking away the right to abortion, as the majority does today, destroys all those individual plans and expectations. In so doing, it diminishes women's opportunities to participate fully and equally in the Nation's political, social, and economic life.").
123. *Id.* at 2317.
124. *Id.* at 2318.
125. *See id.* at 2283–84.
126. *Id.* at 2283.
127. *Id.* at 2283–84.
128. *Id.* at 2284.

*2. Current Circuit Split: Pre-*Dobbs

Prior to *Dobbs*, decisions regarding trait-specific abortions led to a circuit split between the Sixth, Seventh, and Eighth Circuits.[129] Although the Supreme Court overturned *Casey*, making the pre- and post-viability framework obsolete, it is possible that a similar framework will be adopted once again in the future; if this occurs, this circuit split will become even more important. But even if a new framework is not adopted by the Court, analyzing this circuit split is still significant. States may look at other states' abortion regulations for guidance; whether to enact regulations regarding trait-specific abortions is an issue states will continue to encounter. Regardless of what unfolds in time, the following discussion of the cases creating the circuit split functions as though a *Casey*-like framework is still in place.

In 2018, the Indiana Governor enacted a nondiscrimination provision prohibiting abortions outright, including pre-viability abortions "if the abortion is sought for a particular purpose."[130] The "particular purpose" alluded to in the provision includes abortions "solely because of the sex of the fetus," "solely because the fetus has been diagnosed with Down syndrome" or "any other disability," or "solely because of the race, color, national origin, or ancestry of the fetus."[131] The provision made it a felony to "*knowingly* and intentionally" perform such an abortion.[132] Planned Parenthood of Indiana and Kentucky ("PPINK") filed a lawsuit, *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of Indiana State Department of Health*, arguing the Indiana provision was unconstitutional.[133] The Seventh Circuit held this provision violated Supreme Court precedent—referring to *Casey*—stating "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."[134] As previously noted in the discussion of *Casey*, if an abortion is sought pre-viability, the regulation must not impose an undue burden on the woman's ability to have an abortion.[135] A state may attempt to convince a woman not to have an abortion, but a state may not prohibit a woman from making this decision.[136] Because the nondiscrimination provision did not simply persuade a woman from having an abortion but prohibited a woman from the choice altogether, the Seventh Circuit found the provision was unconstitutional.[137]

129. The circuit split occurs between Preterm-Cleveland v. McCloud, 994 F.3d 512, 521–22 (6th Cir. 2021), Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 888 F.3d 300, 306 (7th Cir. 2018), and Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson, 1 F.4th 552, 561 (8th Cir. 2021). The Sixth Circuit held regulating trait-specific abortions does not create an undue burden, whereas the Seventh and Eighth Circuits held this type of regulation creates an undue burden.

130. *Planned Parenthood of Ind. & Ky.*, 888 F.3d at 303.

131. *Id.*

132. *Id.* (emphasis added).

133. *Id.* at 302.

134. *Id.*

135. *Id.* at 305–06 (discussing the holding in *Casey* and its implications).

136. *Id.* at 305 (discussing the holding in *Casey* and its implications).

137. *Id.* at 302.

Similarly, in Missouri, restrictive provisions were proposed to "prohibit abortion of all fetuses, viable and non-viable, where the pregnant woman's reason to abort is solely based on sex, race, or prospective Down syndrome of an expected infant."[138] Abortion providers sought preliminary injunctions to prohibit these restrictive provisions, instituting this case: *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Parson*.[139] Once again, the provisions in *Parson* were arguably in direct conflict with the Supreme Court's ruling in *Casey* because *Parson*'s provisions effectively prohibited certain pre-viability abortions.[140] Although the Supreme Court has yet to rule specifically on whether *trait-specific* abortions may be prohibited, its ruling in *Casey* held that pre-viability abortions may not be completely prohibited.[141] Consequently, in keeping with precedent, the state district court in Missouri held these restrictive provisions may not enforce "certain pre-viability bans on abortions."[142]

The defendants in *Parson* appealed the district court's decision to the Eighth Circuit, where the court reaffirmed the prior decision.[143] The State of Missouri did not dispute that absolute prohibitions on pre-viability abortions were unconstitutional.[144] Instead, Missouri argued the provisions in question were not prohibitions but merely regulations.[145] The Eighth Circuit disagreed.[146] Focusing on the Down syndrome provision, the court held that because the provision would prohibit women from obtaining an abortion prior to viability, the provision was effectively a ban, not a regulation.[147] Because both the Seventh and Eighth Circuit found each provision in question to be a ban rather than a regulation, there was no need to apply the undue burden test.[148] Ultimately, the Eighth Circuit, like the Seventh, held that Missouri's trait-specific, restrictive provision in question was unconstitutional.[149]

Finally, in one of the more recent cases involving trait-specific abortions, *Preterm-Cleveland v. McCloud*, an Ohio law prohibited abortions when the reason for the abortion was because the fetus had Down syndrome, even *pre-*

138. Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Parson, 389 F. Supp.3d 631, 633 (W.D. Mo. 2019).

139. *Id.*

140. *Compare id.* ("[P]rohibit[ing] abortions of all fetuses, viable and non-viable . . . ."), *with* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 879 (1992) ("[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.").

141. *See Casey*, 505 U.S. at 879.

142. *Parson*, 389 F. Supp.3d at 640.

143. Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson, 1 F.4th 552, 557 (8th Cir. 2021).

144. *Id.* at 560.

145. *Id.*

146. *Id.* at 562.

147. *Id.* at 563.

148. *See* Planned Parenthood of Southeastern Pennsylvania. v. Casey, 505 U.S. 833, 877 (1992) (stating if a regulation has the purpose of creating a substantial obstacle, or effectively bans abortions, the regulation is invalid).

149. *Parson*, 1 F.4th at 561.

viability.[150] According to the Ohio law, a trait-specific abortion was only prohibited when the doctor performing the abortion *knew* the reason for the abortion was because the woman "[did] not want a child with Down syndrome."[151] Thus, if the doctor did not know the reason for performing the abortion, no violation would occur.[152] The doctor's knowledge that a woman's child would likely have Down syndrome did not satisfy the knowledge requirement because "knowledge of the diagnosis is not knowledge of the reason."[153] While the district court held that women have the right to obtain an abortion prior to viability, as set forth in *Roe*[154] and *Casey*,[155] the Sixth Circuit reversed the district court's decision.[156] The Sixth Circuit held that "the right to an abortion, even before viability, is not absolute,"[157] and the district court erred in ruling so.[158] States may still regulate pre-viability.[159] If a woman does not inform the doctor who is performing the abortion why she is choosing to have an abortion, she can still obtain an abortion;[160] thus, according to the Sixth Circuit, the provision did not constitute an absolute ban.[161]

Similar to the Indiana law in *PPINK*, the Ohio law in *Preterm-Cleveland* only prohibits abortions if the doctor is aware of the woman's reason for obtaining the abortion.[162] Specifically, the Indiana law would have prohibited doctors from performing abortions only when the doctor knows the reason for the abortion is because the woman "does not want a child that she knows, from the fetal diagnosis, will be a certain gender, race, color, national origin, or ancestry, or will have Down syndrome or some other genetically inherited physical or mental disability."[163] Unlike the Seventh Circuit's decision in *PPINK*, however, the Sixth Circuit held there was no undue burden on a woman seeking an abortion in these circumstances.[164] The reason for the conflicting results, according to the Sixth Circuit, is because *PPINK* interpreted the provision as a prohibition to abortions, "regardless of whether the woman ever revealed or the doctor actually knew her reason."[165] The Sixth Circuit did not interpret the Ohio provision as a prohibition, but rather as a burden, and thus followed the undue burden test.[166] Applying the undue burden test to the provision under scrutiny, the court found

150. Preterm-Cleveland v. McCloud, 994 F.3d 512, 516 (6th Cir. 2021).
151. *Id.* at 518.
152. *Id.*
153. *Id.* at 519.
154. Roe v. Wade, 410 U.S. 113, 164 (1973).
155. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 879 (1992).
156. *Preterm-Cleveland*, 994 F.3d at 535.
157. *Id.* at 520.
158. *Id.* at 521.
159. *See id.* at 520.
160. *Id.* at 521–22.
161. *Id.* at 520.
162. *Id.* at 529–30 (describing the law in Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 888 F.3d 300, 303 (7th Cir. 2018)).
163. *Id.* (describing the law in *Planned Parenthood of Ind. & Ky.*, 888 F.3d at 303).
164. *Id.* at 521–22.
165. *Id.* at 530.
166. *Id.*

it was not an undue burden to prevent a woman "from having a full and open conversation with her doctor" or having to "force her to secure a different doctor who is unaware that that is her reason."[167]

Furthermore, the Sixth Circuit found that the Down syndrome provision furthered legitimate state interests, including protecting the Down syndrome community "from the stigma associated with the practice of Down-syndrome-selective abortions," "protecting pregnant women and their families from coercion by doctors who advocate abortion of Down-syndrome-afflicted fetuses," and "protecting the integrity and ethics of the medical profession by preventing doctors from becoming knowing participants in Down-syndrome-selective abortions."[168] For these reasons, the provision in question in *Preterm-Cleveland* was upheld by the Sixth Circuit.[169] The Sixth Circuit's decision led to the circuit split.

III. ANALYSIS

The law cannot reflect each person's individual ethics; what some consider ethical may be unethical to others. Not all laws are so divisive, but when it comes to controversial topics such as abortions, and arguably even more controversial, trait-specific abortions, there is a great divergence between what individuals believe to be ethical.[170] In highly controversial areas of law, the law inherently must decide what is more ethical, placing somewhat of a hierarchy on different ethical beliefs. Laws have the difficult task of balancing what is "more" ethical with upholding what the Supreme Court has set forth through precedent.

There is not necessarily a single right answer to the question of whether trait-specific abortions are ethical. In an attempt to answer the question, it is important to consider the Supreme Court's previous decisions along with the ethical considerations on both sides of the issue. What are the constitutional and ethical considerations involved with abortions, specifically those that arise in trait-specific abortions?[171] Given the Supreme Court's decision not to hear any issues regarding trait-specific abortions at this time,[172] the states are primarily left alone when it comes to enacting any abortion regulations. Future state legislation faces the difficult task of attempting to balance the law with ethics.

Part III functions as follows. Subsection III.A.1 analyzes how the circuit split should be decided pre-*Dobbs*. Subsection III.A.2 considers additional constitutional factors that may influence both the circuit split and future state legislation post-*Dobbs*. Section III.B moves away from any constitutional analysis to consider what ethical considerations may affect trait-specific abortions. Finally, Section III.C examines both the constitutional and ethical considerations together.

167. *Id.* at 531.

168. *Id.* at 531–32.

169. *Id.* at 535.

170. *See* Blackshaw, *supra* note 11, at 445.

171. *See id.* at 445–46 ("Selective abortion can be controversial depending on its target, even amongst those who generally hold a liberal pro-choice stance towards abortion . . . .").

172. Liptak, *supra* note 3.

A. Constitutional Considerations: Reconciling Trait-Specific Abortions Controversiality with the Supreme Court's Rulings

Before attempting to reconcile the differences between various circuit courts' recent decisions, it should be noted that had the Supreme Court wanted to ban trait-specific abortions, it had the opportunity to do so; it did not.[173] While it is impossible to infer how the Court would rule regarding the legality of trait-specific abortions given its silence on the matter, it is important to acknowledge the Court's decision *not* to reverse the judgement of the Seventh Circuit.[174] This could be interpreted to mean the Court agreed with the Seventh Circuit's decision to invalidate Indiana's ban on knowingly performed trait-specific abortions. Yet, it could also mean the Court simply did not want to express an opinion on the matter at this point, effectively allowing the states to make their own decisions.[175] Although a very different Court exists now, post-*Dobbs*, this is even more telling. In *Dobbs*, the Court did not hold that abortions should be illegal, but rather, the Court left it up to the states to decide what to do.[176] Thus, if a state wants to permit trait-specific abortions, the Court has given the states no reason not to do so.

*1. Pre-*Dobbs *Constitutional Analysis: Embracing a* Casey*-Like Framework*

As previously mentioned, this Section functions as though *Dobbs* had not been decided in order to address the circuit split as it once existed.

Given the Court's ruling in *Casey*, a woman has the right to obtain an abortion without any undue burden or interference from a state.[177] Although the decision in *Casey* should theoretically invalidate any laws that create substantial barriers to a woman's ability to obtain an abortion, there are cases in which states have tried, and even succeeded, in preventing women from having abortions.[178]

For instance, the Sixth Circuit, contrary to both the Seventh and Eighth Circuits' decisions, upheld an Ohio provision preventing certain abortions previability.[179] In *Preterm-Cleveland*, the Sixth Circuit found there were no undue burdens imposed as a result of Ohio's provision prohibiting a woman from having an abortion performed by a doctor who knows the woman is having an

173. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1781 (2019).

174. *Id.*

175. *Id.* at 1784 (Thomas, J., concurring) (declining to discuss the issue of trait-specific abortions now because further analysis, likely from other courts, may shed insight on the issue later).

176. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

177. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 834 (1992).

178. *See An Overview of Abortion Laws*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/overview-abortion-laws# (Oct. 1, 2021) [https://perma.cc/E8Q9-H4JC].; *see also* Nicole M. Baran, Gretchen Goldman & Jane Zelikova, *Abortion Bans Based on So-Called "Science" Are Fraudulent*, SCI. AM. (Aug. 21, 2019), https://blogs.scientificamerican.com/observations/abortion-bans-based-on-so-called-science-are-fraudulent/ [https://perma.cc/AD6L-J6LE] ("So-called heartbeat bills, which ban abortion as early as after six weeks of pregnancy, are not based on science. In fact, no heart yet exists in an embryo at six weeks. Yet six states and counting enacted such bills in 2019, in addition to Alabama's near-total ban.").

179. Preterm-Cleveland v. McCloud, 994 F.3d 512, 575–76 (6th Cir. 2021) (Donald, J., dissenting).

abortion because the fetus will have Down syndrome.[180] Yet, the plaintiffs in *Preterm-Cleveland* asserted multiple burdens women will have to face as a result of this law.[181] These burdens included preventing women from having honest conversations with their doctor, forcing women to withhold their reasons for having an abortion, concealing medical history if the history indicates the likelihood of Down syndrome, and even "doctor shopping"—finding a doctor who does not know a woman's reason for having an abortion.[182] Additionally, Ohio's provision could cause women to avoid seeking advice or counseling from doctors who are knowledgeable about pregnancies, delivering, and eventually raising a child with Down syndrome.[183] This is because by seeking advice or counseling, women may be concerned they will no longer be able to have an abortion should they choose to do so afterward.[184]

The Sixth Circuit was not convinced that any of these potential burdens were significant enough to find the provision unconstitutional.[185] In fact, the Court views the results of some of these burdens as the fundamental objective of the provision in question: encouraging a woman to reconsider having an abortion simply because the child will have Down syndrome.[186] Thus, although *Casey* clearly stated any provision or regulation that imposed substantial burdens on pre-viability abortions is unconstitutional,[187] the application of this statement is far less straightforward.[188]

The burdens argued by the plaintiffs in *Preterm-Cleveland* left the court unconvinced of the provision's unconstitutionality.[189] Yet a similar provision was found unconstitutional by the Seventh Circuit in *PPINK*.[190] The two provisions are almost identical; both provisions state a doctor may not perform an abortion if the doctor is aware the woman is obtaining the abortion for a trait-specific reason.[191] Though there are a few differences. While in *Preterm-Cleveland* the trait-specific reason focuses solely on Down syndrome,[192] in *PPINK*, the trait-specific reason encompasses sex, Down syndrome, genetic disabilities,

180. *Id.* at 525–26.

181. *Id.*

182. *Id.* at 525.

183. *See id.*

184. *See id.* at 526.

185. *Id.* at 525–26.

186. *Id.* at 526.

187. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 877 (1992).

188. *See generally Preterm-Cleveland*, 994 F.3d at 525–28 (arguing that the provision in question does not constitute an undue burden).

189. *Id.*

190. Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 888 F.3d 300, 306 (7th Cir. 2018).

191. *See Preterm-Cleveland*, 994 F.3d at 517 ("In plain terms, H.B. 214 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."); *Planned Parenthood of Ind. & Ky.*, 888 F.3d at 303 ("Specifically, the non-discrimination provisions state that '[a] person may not intentionally perform or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking' an abortion: (1) 'solely because of the sex of the fetus . . . .'").

192. *Preterm-Cleveland*, 994 F.3d at 517 (describing what the provision encompasses).

race, color, national origin, or ancestry.[193] Evidently, the provision in *PPINK* is far more comprehensive, in terms of what it would prohibit, than the provision in *Preterm-Cleveland*.[194] If anything, the far-reaching nature of this provision should present even more of a potential issue. Yet, this illustrates the Seventh Circuit's belief that trait-specific abortions, including both sex-selective and fetal-abnormality abortions, should not be banned in pre-viability circumstances, regardless of their controversial nature.[195]

Another difference between the two cases is the way the Sixth and Seventh Circuit decided to analyze the provisions in question. The Sixth Circuit focused on the doctor's requisite knowledge; the Seventh Circuit did not.[196] The doctor's knowledge was the key to the Sixth Circuit's holding because any woman could overcome this obstacle by not disclosing her reason for having an abortion.[197] Thus, this provision did not amount to an undue burden.[198] In contrast, the Seventh Circuit held that regardless of whether a woman can easily circumvent the provision, the provision violates *Casey* because it is not merely an undue burden on women seeking abortions, it is an "absolute prohibition[] on abortions prior to viability . . . ."[199]

Similar to the provisions in both *PPINK* and *Preterm-Cleveland*, the provision in *Parson* prevented doctors from performing abortions on women if the doctor knew the woman was obtaining an abortion solely because the child may have Down syndrome or solely because of the sex or race.[200] The Eighth Circuit specifically analyzed the Down syndrome provision, concluding the provision was not merely a regulation but an absolute ban.[201] Regulations are permissible as long as they do not impose undue burdens.[202] Bans are not.[203] As a result, the provision was found unconstitutional.[204] This decision mirrors that of the Seventh Circuit; both circuits found the provisions to be bans rather than merely

193. *Planned Parenthood of Ind. & Ky.*, 888 F.3d at 303 (describing what the provision encompasses).

194. *See generally id.* (describing what the provision encompasses); *Preterm-Cleveland*, 994 F.3d at 517 (describing what the provision encompasses).

195. *Planned Parenthood of Ind. & Ky.*, 888 F.3d at 302.

196. *Compare Preterm-Cleveland*, 994 F.3d at 518 (focusing on the doctor's knowing and willingness to perform abortions on women obtaining abortions solely because the baby will have Down syndrome), *with Planned Parenthood of Ind. & Ky.*, 888 F.3d at 306 (arguing because the provision effectively prohibits women from obtaining abortions for certain reasons, the non-discrimination provision is unconstitutional).

197. *Preterm-Cleveland*, 994 F.3d at 527 ("H.B. 214 does not prohibit [a woman] from choosing or obtaining an abortion for that, or any other, reason. To the extent that H.B. 214 amounts to a prohibition, it prohibits a doctor from aborting a pregnancy when that doctor knows the woman's particular reason, and that the reason is that (a) she knows or has reason to know that the forthcoming child will have Down syndrome and (b), at least in part because of that, she does not want it.").

198. *Id.* at 521.

199. *Planned Parenthood of Ind. & Ky.*, 888 F.3d at 306.

200. MO. ANN. STAT. § 188.038 (West).

201. Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson, 1 F.4th 552, 561 (8th Cir. 2021).

202. *Id.*; *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 877 (1992).

203. *Parson*, 1 F.4th at 561.

204. *Id.*

regulations.[205] Not only did the Eighth Circuit find the provision to be a ban, but it also recognized that any other ruling would contrast with Supreme Court precedent.[206]

As previously stated, in theory, *Casey* should invalidate any provisions that ban or even impose an undue burden on pre-viability abortions.[207] Although the undue burden test is clearly articulated in *Casey*, the application of the test may yield different results when applied by lower courts.[208] Ultimately, the Sixth Circuit's decision directly conflicts with the Seventh and Eighth Circuit's decisions[209] and may conflict with *Casey*.

*2. Post-*Dobbs *Constitutional Analysis: The Doctrine of Stare Decisis*

While the previous Section looked at the circuit split pre-*Dobbs*, there is more to the constitutional analysis when considering how the country and law has changed post-*Dobbs* as well. The constitutional analysis of abortion laws changed drastically with the Court's decision in *Dobbs*. Though, *Dobbs* does not render all constitutional arguments invalid. It is still important to consider what it means to uphold precedent. Here, the circuit split cannot survive *Dobbs*. The doctrine of stare decisis did not save a woman's right to have an abortion; although, arguably, it should have.

In various Supreme Court cases within the past few years, the Justices have referenced the doctrine of stare decisis and its meaning. For instance, Justice Kagan wrote that "*stare decisis* requires 'a special justification,' over and above the belief 'that the precedent was wrongly decided' in order to reverse a decision."[210] Similarly, Justice Sotomayor wrote, "the Court is willing to overrule precedent without even acknowledging it is doing so, much less providing any special justification."[211] Justice Roberts explained the importance of stare decisis in an abortion case, stating it "has long been 'an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's

205. *Id.*; Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 888 F.3d 300, 306 (7th Cir. 2018).

206. Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Parson, 389 F.Supp.3d 631, 636 (W.D.Mo., 2019) ("I recognize that a Down Syndrome abortion is a very debatable subject, but it would likely be a legislative issue rather than a judicial issue if abortion jurisprudence, as established by the Supreme Court, permitted a legislative override of any aspect of a woman's right to abort a non-viable fetus. All judicial rulings so far preclude such a legislative override in this context. It is clear today that plaintiffs are likely to prevail in striking down the prohibited reasons law, insofar as it applies to non-viable fetuses.").

207. *Casey*, 505 U.S. at 877.

208. *See* Preterm-Cleveland v. McCloud, 994 F.3d 512, 518 (6th Cir. 2021); *Planned Parenthood of Ind. & Ky.*, 888 F.3d at 306; *Parson*, 1 F.4th at 561.

209. *Compare Preterm-Cleveland*, 994 F.3d at 535 ("[T]he restrictions imposed, or burdens created, by H.B. 214 do not create a substantial obstacle to a woman's ability to choose or obtain an abortion."), *with Planned Parenthood of Ind. & Ky.*, 888 F.3d at 306 ("The non-discrimination provisions clearly violate this well-established Supreme Court precedent, and are therefore, unconstitutional."), *and Parson*, 1 F.4th at 561 ("Here, the Down Syndrome Provision would prevent certain patients from getting a pre-viability abortion at all. That is a ban, not a regulation.").

210. William A. Waddell, Jr., *Stare Decisis*, 56 ARK. LAWYER 16, 17 (2021).

211. *Id.*

opinion.'"[212] The doctrine of stare decisis has not been ignored in case law, but rather the Justices seem to be aware of the role stare decisis plays in deciding cases and its importance in maintaining consistency within the Court's decisions.[213]

Not only does stare decisis promote the integrity of the Court by upholding previous decisions regardless of the Court's political makeup and personal opinions,[214] but it also enables the public to reasonably rely on the Court's decisions.[215] But, this is an idealistic view of stare decisis. In reality, stare decisis is not always followed.

The Court is not required to follow precedent; the Court has discretion to overrule wrongly decided precedent when it sees fit.[216] When determining whether a prior decision should be overruled, the Court may look to the constitutional legal reasoning.[217] Additional considerations, as mentioned in *Casey*, include "(1) the workability of a prior decision's rule, (2) whether the rule created substantial reliance, (3) whether subsequent legal developments undermined the rule, and (4) whether the factual circumstances supporting the decision have removed the rule's applicability or justification."[218] The second factor, whether the decision created reliance, is massively implicated in the Court's decision to overturn *Roe*.[219]

The public's reliance on precedent can be a large reason why the Court upholds stare decisis or ought to. "People make plans based on the law as they understand it, and abrupt changes in the law can upend their lives."[220] The reliance on *Roe* and *Casey* within the country was and continues to be tremendous.[221] The Court in *Casey* even went so far as to acknowledge this reliance, arguing that a woman's reliance on *Roe*, and subsequently *Casey*, allowed women to control their bodies and reproductive lives.[222] When the draft of the *Dobbs* decision was leaked, "American women who [thought] that they [got] to shape their own destinies, and have made commitments around that assumption . . . [got] some very bad news."[223]

212. *Id.* (quoting 1 W BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1765)).

213. Morgan Johnson, *Conservative Stare Decisis on the Roberts Court*: *A Jurisprudence of Doubt*, 55 UC DAVIS L. REV. 1953, 1956 (2022).

214. Waddell, *supra* note 210, at 18 ("Respect for precedent 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'").

215. *Id.* ("The Court accordingly considers additional factors before overruling a precedent, such as its administrability, its fit with subsequent factual and legal developments, and the reliance interests that the precedent has engendered.").

216. Johnson, *supra* note 213, at 1957.

217. *Id.* at 1959.

218. *Id.* at 1960–61.

219. *See id.*

220. Andrew Koppelman, *'Roe,' Precedent, and Reliance*, AM. PROSPECT (May 5, 2022), https://prospect.org/justice/roe-precedent-and-reliance/ [https://perma.cc/TNB4-WFPT].

221. *See id.*

222. *Id.*

223. *Id.*

Although stare decisis was not followed in *Dobbs*, it likely should have been, given the public's reliance on *Roe* and *Casey* and the Court's supposed respect for precedent. Looking forward, even though the circuit split no longer exists, a constitutional analysis still has weight in determining whether abortions, specifically trait-specific abortions, should be legal. States can look to the public's reliance on previous precedent—*Casey*—to determine whether to allow legal abortions within the state.

B. Ethical Considerations

In addition to the constitutional considerations regarding trait-specific abortions, the ethical considerations should not be ignored. Ethical concerns tend to vary depending on whether one identifies as either pro-choice, pro-life, or somewhere in between.[224] For instance, an individual who identifies as pro-life may place more emphasis on the idea that human life starts at conception, and thus, abortions are a form of ending human life.[225] In contrast, an individual who identifies as pro-choice may believe a woman's right to bodily autonomy is of the utmost importance.[226] The ethical considerations tend to center on whose or which rights should be given the most weight: the mother's, the fetus's, or the state's.[227] Yet, even amongst the two labels—pro-choice and pro-life—there are other attitudes that reflect a gray area: those who may identify as pro-choice in some instances and pro-life in others; this gray area is exacerbated when considering trait-specific abortions.[228]

Ethical concerns regarding trait-specific, pre-viability abortions affect both the woman and the fetus. Is it ethical to force a woman to continue her pregnancy when she does not want to? Is it ethical to allow a woman to abort her fetus because of specific traits, especially when those abortions have a "disparate impact along lines of race, sex, and disability[?]"[229] These questions are difficult to answer, specifically when examining the ethics surrounding trait-specific abortions given the relatively new introduction of these types of abortions; however, there is extensive research and data concerning individuals' moral perceptions of abortions more generally.[230] According to some, prohibiting women from having pre-viability abortions takes away women's constitutional rights and bodily autonomy.[231] Yet others object to pre-viability abortions when they are trait-

224. *See* Dozier et al., *supra* note 1, at 6–7.

225. Matthew Scarfone, *If You're Pro-Life, You Might Already Be Pro-Choice*, CONVERSATION (Sept. 23, 2020, 1:56 PM), https://theconversation.com/if-youre-pro-life-you-might-already-be-pro-choice-146654 [https://perma.cc/2EBG-6B43].

226. *Id.*

227. *Id.*

228. Dozier et al., *supra* note 1, at 6–7.

229. Michael Stokes Paulsen, *Abortion as an Instrument of Eugenics*, 134 HARV. L. REV. 415, 419 (2021).

230. *See, e.g.*, Hannah Hartig, *About Six-in-Ten Americans Say Abortion Should Be Legal in All or Most Cases*, PEW RSCH. CTR. (June 13, 2021), https://www.pewresearch.org/fact-tank/2021/05/06/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases/ [https://perma.cc/LEX8-JGNX].

231. Blackshaw, *supra* note 11, at 446.

specific because they appear to discriminate against certain traits.[232] Even amongst individuals who generally consider themselves pro-choice, there is not a unanimous agreement that abortions should be allowed regardless of the trait in question.[233] Ultimately, it comes down to what an individual believes is ethical.

1. Pro-Choice Ethical Considerations

To begin with, some believe that pre-viability abortions should be allowed regardless of the reason for the abortion.[234] This is the broadest pro-choice position. Much of this argument stems from the belief that women should have complete bodily autonomy; regulations that take away a woman's ability to make her own decision about abortion also take away a woman's rights to control her body and privacy.[235] Ethically, how can a state impose regulations dictating what a woman can and cannot do with her own body? By denying women the ability to have an abortion pre-viability, abortions that were once constitutionally permissible, a state denies women the right to control their own bodies.[236] This broad pro-choice viewpoint covers all traits within trait-specific abortions, including, but not limited to, sex and disabilities.[237]

Although perhaps a controversial opinion, those who support all abortions believe abortions based on sex should not be treated differently than abortions based on disability.[238] As previously mentioned, the strongest of pro-choice beliefs are largely based on women's rights.[239] For instance, "in sexist cultures, the birth of a daughter can be seen as a serious burden to a family, comparable to the birth of a disabled child."[240] Thus, while it may be more understandable from an outsider's perspective when a woman chooses to have an abortion due to a serious medical deformity or disability, it should—and often is—comparable for women to have an abortion based on sex.[241] Each abortion stems from similar reasoning: the fetus is or would be a burden on the family if the woman chooses to continue her pregnancy.[242] Choosing to have a sex-specific abortion says more about cultural values and norms rather than what is universally ethical.[243]

One study further illustrates the differences in cultures amongst those in the United States.[244] In the study, a group of researchers interviewed "65 immigrant Indian women in the United States who had pursued fetal sex selection" to learn

232. *Id.*
233. *See* Williams, *supra* note 37, at 127; *see* Paulsen, *supra* note 229, at 417 n.6.
234. Blackshaw, *supra* note 11, at 446.
235. Paulsen, *supra* note 229, at 415–16.
236. *Id.* at 415.
237. *See* Williams, *supra* note 37, at 127 n.6.
238. *See id.* at 127–28.
239. *See* Paulsen, *supra* note 229, at 415–16.
240. *See* Williams, *supra* note 37, at 127–28.
241. *See id.*
242. *Id.*
243. *See id.* ("[T]he solution in this case is to eliminate the social discrimination, not to eliminate the victims of it. Sex selection merely affirms and perpetuates the pernicious social discrimination.").
244. Puri, Adams, Ivey & Nachtigall, *supra* note 39, at 1169.

more about why some cultures face pressures to have sons, how women deal with these pressures, and what women consider when deciding whether to abort a female.[245] Ultimately, the study found that "40% of the women interviewed had terminated prior pregnancies with female fetuses and that 89% of women carrying female fetuses in their current pregnancy pursued an abortion."[246] While no single factor fully explains these results, the women discussed beliefs that were engrained within them, such as the belief that if she did not have a son, she was less valuable, and the importance of having a son to provide support—physically, monetarily and emotionally—in the parents' old age.[247]

The women also expressed concern over raising daughters in America, versus sons, specifically in regards to sexual abuse, assault, and premarital sex.[248] Over half of the women recounted "verbal abuse from their female in-laws or husbands," and one-third shared experiences of "past physical abuse and neglect" when the woman did not produce a son.[249] Although this point of view is not entirely surprising, these women were still hesitant to share their opinions regarding their preference for sons over daughters.[250]

Other studies indicate Chinese and Korean Americans obtain sex-specific abortions for similar reasons as well.[251] The decision to have an abortion simply because the fetus is female, as indicated in the study, is not an easy decision to have to make; however, it is a decision based primarily on cultural beliefs and expectations imposed on the women.[252] It is prejudicial to say one culture's beliefs are wrong simply because they do not align with another culture's beliefs.[253] Thus, even the more controversial trait-specific abortions—sex-specific abortions—may be justifiable to some.

2. Pro-Life Ethical Considerations

On the other side of the debate are those who identify as pro-life; as the name implies, pro-life individuals tend to emphasize the importance of the life of the fetus.[254] The strongest stance from these individuals is that all abortions should be banned. This belief often stems from the idea that early on in a woman's pregnancy, as early as conception, a fetus is a human being with the right to live.[255] This idea is common in highly religious individuals;[256] it is "often

245. *Id.*
246. *Id.*
247. *Id.* at 1171.
248. *Id.*
249. *Id.* at 1173.
250. *Id.* at 1169.
251. Annie Moskovian, Note, *Bans on Sex-Selective Abortions: How Far is Too Far?*, 40 HASTINGS CONST. L.Q. 423, 423–424 (2013).
252. *Id.* at 425.
253. *Id.* ("To impose the beliefs of some members of society onto other members who have different notions of rights can create cultural superiority, which devalues the viewpoints of minorities.").
254. *See* Scarfone, *supra* note 225.
255. *Id.*; Dozier et al., *supra* note 1, at 9.
256. *See* Dozier et al., *supra* note 1, at 3.

the religious voices that oppose sexual and reproductive rights."[257] Ethically, pro-life individuals tend to believe the fetus's right to live is more important than a woman's right to bodily autonomy.[258]

Furthermore, in a study exploring Protestant religious leaders' attitudes toward abortion, participants with pro-life beliefs felt that those who support a woman's right to have an abortion choose to ignore the moral repercussions of aborting the "potential for life," viewing abortion only through a medical lens.[259] Again, this illustrates that for individuals who identify as pro-life, their ethical beliefs come from the idea that the fetus is a human life, and thus, it should be protected and given rights.[260] Some pro-life individuals equate abortion with murder;[261] if society accepts this belief as the truth, it is much easier to understand why some individuals are so morally against abortions.

In addition to the previous arguments, some pro-life individuals believe it is hypocritical to support equal rights for all genders, races, disabilities, etc., while also supporting trait-specific abortions that effectively discriminate against those same traits.[262] This poses an interesting question: how can individuals identifying as pro-choice justify their beliefs without contradicting themselves? Is it not hypocritical to support a woman's right to have an abortion but not also promote equal rights amongst all genders, races, disabilities, and so on?

In general, considering exclusively individuals who believe abortions should be banned in all circumstances, it is irrelevant whether the abortion is for a trait-specific abortion; these individuals do not care about the reason for the abortion because they believe all abortions are ethically wrong. The overarching opinion that abortions are unethical, and thus should be prohibited, stands starkly in opposition of those who believe abortions should be allowed regardless of the reason. On either side, whether one is wholly pro-choice or wholly pro-life, the ethical factors associated with trait-specific abortions are irrelevant; however, most individuals do not fall neatly into one category but instead fall into a "gray area."[263]

3. Gray Area Ethical Considerations

In contrast to wholly pro-choice or wholly pro-life individuals, there is an in-between category: those who believe abortions may be justified in certain circumstances and should be restricted in others.[264] This is the category the majority of individuals fall into.[265] The gray area does not focus solely on the constitutional concerns regarding taking away a woman's rights but instead also

257. *Id.*
258. Scarfone, *supra* note 225.
259. Dozier et al., *supra* note 1, at 7.
260. *Id.* at 6–7.
261. *Id.* at 7 tbl.2.
262. Green, *supra* note 35.
263. *See* Dozier et al., *supra* note 1, at 8.
264. *See id.*
265. *See Public Opinion on Abortion*, PEW RSCH. CTR. (May 6, 2021), https://www.pewforum.org/fact-sheet/public-opinion-on-abortion/ [https://perma.cc/Q5JZ-8T4J].

considers the ethical concerns regarding the fetus and possible issues of eugenics.[266] The concern regarding eugenics often materializes when an abortion is sought for reasons other than health or genetic concerns.[267] Typically, most pro-choice individuals support the bodily autonomy of women and abortions for reasons such as "diagnosis of fetal disability," but some may become skeptical when it comes to sex-selective abortions[268] or abortions involving other controversial characteristics, including race.[269] It is undeniable that the fetuses that are aborted "are disproportionately racial minorities, female, and those with disabilities."[270] This raises additional ethical considerations, specifically regarding the unborn fetus.

Additionally, the United States is made up of people with various backgrounds, whether they be cultural, religious, racial, etc.; opinions on abortions often stem from these backgrounds.[271] Given it is incredibly difficult for someone from one background to relate to or fully understand someone from a completely different background, it is nearly impossible to say that one background's ideals or opinions are correct or superior to another's.

Other factors that may affect an individual's opinion regarding abortion include religion, political party affiliation, gender, race and ethnicity, age, and level of education.[272] According to a study conducted by the Pew Research Center, as of 2021, 59% of individuals "say abortion should be legal in all or most cases, while 39% say it should be illegal in all or most cases."[273] Breaking down these numbers even further, certain factors appear influential regarding whether an individual is likely to support or disapprove of abortions in general. For instance, 77% of "[w]hite evangelical Protestants [] think abortion should be illegal in all or most cases," whereas "82% of religiously unaffiliated Americans say abortion should be legal in all or most cases," along with "64% of Black Protestants, 63% of White Protestants who are not evangelical and 55% of Catholics."[274] The majority of Republicans believe abortion "should be illegal in all or most cases," while "80% of Democrats . . . say abortion should be legal in all or most cases."[275] The majority of both men and women support abortion.[276] Overall, the majority of adults "across racial and ethnic groups express support for legal abortion," though the percentages vary between groups.[277] The majority of adults support abortion rights, though the percentages decline as the adult's age

266. Williams, *supra* note 37, at 127.
267. *Id.*
268. *See id.* at 127–28.
269. *See* Paulsen, *supra* note 229, at 417.
270. *Id.* at 419.
271. *See Public Opinion on Abortion*, *supra* note 265.
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.* ("[T]hough women are somewhat more likely than men to hold this view (62% vs. 56%).").
277. *Id.* ("About two-thirds of Asian (68%) and Black adults (67%) say abortion should be legal in all or most cases, as do 58% of Hispanic adults and 57% of White adults.").

increases.[278] Finally, the majority of college graduates and those with some college education believe "abortion should be legal in all or most cases," though those with only a high school degree or less are fairly evenly split in their beliefs.[279]

Each of the factors mentioned in the statistics above evidently have some degree of influence on whether one tends to support or oppose abortion rights, given the differing percentages.[280] Examining each of the factors may shed light on the ethics of certain groups of people. For instance, the variation among racial and ethnic groups' support of abortion may be attributed to the values and morals shared amongst those groups.[281]

Furthermore, in one of the studies previously mentioned—discussing religious leaders' beliefs on abortion—each of the participants interviewed stated at least one situation where abortion "may be the best decision for a pregnant person."[282] While many of the participants identified more so with either pro-life or pro-choice beliefs, the majority made statements that indicated the divide was not nearly as black and white as it may seem.[283] The study called these attitudes the "gray area."[284] Within this group, the participants were neither 100% pro-choice nor 100% pro-life, but instead understood that women should have the ability to make decisions regarding abortions on their own, though still felt that "'all life is sacred' and should be protected."[285] Participants did not unanimously conclude when life begins;[286] this is a major factor in permitting or prohibiting abortions, especially amongst religious individuals. Depending on when life begins, some individuals have a harder time justifying abortions because of the relatively universal ethical belief that human life is important and should be protected.[287] Conflict amongst one's own morals is not uncommon; it can be difficult to reconcile two seemingly contradictory ideas, such as one's religious beliefs and legally recognized rights.[288]

This study is indicative that even amongst highly religious individuals, individuals that society typically assumes are exclusively pro-life, there are additional beliefs and opinions aside from the two ends—pro-life and pro-choice.[289]

278. *Id.* ("Among adults under age 30, 67% say abortion should be legal in all or most cases, as do 61% of adults in their 30s and 40s. Roughly half of those in their 50s and early 60s express support for legal abortion (53%); among those ages 65 and older 55% say the same.").

279. *Id.* ("About two-thirds of college graduates (68%) say abortion should be legal in all or most cases, as do 61% of those with some college education. Those with a high school degree or less education are more evenly divided on the question: 50% say abortion should be legal in all or most cases, while 47% say it should be illegal in all or most cases.").

280. *See generally id.*

281. *See* Christine Dehlendorf, Lisa H. Harris & Tracy A. Weitz, *Disparities in Abortion Rates: A Public Health Approach*, 103 AM. J. PUB. HEALTH 1772, 1773 (2013).

282. Dozier et al., *supra* note 1, at 6.

283. *Id.* at 6–7.

284. *Id.* at 7.

285. *Id.*

286. *Id.* at 6.

287. *Id.* at 9.

288. *Id.* at 7.

289. *Id.*

This is where the conflict regarding trait-specific abortions exists: the gray area. Entirely pro-life individuals do not care what the reason is for obtaining an abortion; they believe all abortions should be banned. By similar reasoning, entirely pro-choice individuals do not care what the reason is for obtaining an abortion; they believe all abortions should be permissible. Thus, the ethical factors previously discussed, specifically regarding trait-specific abortions, are only relevant when considering individuals within the gray area.

Ultimately, it is morally difficult to issue a blanket statement that trait-specific abortions are either wrong or right when either statement will directly contradict some beliefs shared amongst those living in the United States.[290] As indicated by the aforementioned statistics, while generally most Americans tend to support abortion rights, that is not necessarily true when looking at specific subgroups of Americans.[291] How can America as a society judge certain cultures that view abortion differently than others? How is one's point of view better, more informed, or more justified than another's? From a legal standpoint, states are given discretion on how to decide this issue. Yet from an ethical standpoint, restrictions on abortions based off the belief that abortions are wrong and, therefore, should be restricted are unreasonable; these restrictions adopt a hierarchy of personal ethics and morals.[292]

C. Who Wins?: Constitutional or Ethical Considerations

As previously stated, the law does not always reflect an individual's ethical beliefs, primarily because it is impossible to represent the ethics of all individuals accurately and fairly. Ultimately, the question of trait-specific abortions comes down to whether states will consider the reliance aspect of stare decisis or whether they will attempt to align with the "better" ethical beliefs.

Another factor to consider is the role religion plays in both the constitutional and ethical aspects of abortion law. Those who side more with pro-life arguments tend to base moral justifications off religion, arguing that life exists as early as conception[293] and certainly exists at the time the majority of abortions occur during a woman's pregnancy.[294] Yet, while the First Amendment protects religious freedom, it also ensures through the Establishment Clause and Free Exercise Clause that the government does not favor one religion over another.[295] By adopting the ethical justifications for prohibiting trait-specific abortions, justifications that stem largely from religion, courts would inherently be favoring

290. Moskovian, *supra* note 251, at 425.

291. *See generally Public Opinion on Abortion*, *supra* note 265.

292. Moskovian, *supra* note 251, at 425.

293. Dozier et al., *supra* note 1, at 9.

294. *See Abortion Surveillance—United States, 2019*, CDC (Nov. 26, 2021), https://www.cdc.gov/mmwr/volumes/70/ss/ss7009a1.htm [https://perma.cc/R5UC-XKSH] ("[In] 2019, 79.3% of abortions were performed at ≤9 weeks' gestation, and nearly all (92.7%) were performed at ≤13 weeks' gestation.").

295. *First Amendment and Religion*, U.S. CTS., https://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion (last visited July 4, 2023) [https://perma.cc/AT3W-L22K].

those who are religious; arguably, this could violate the First Amendment's two provisions.[296]

Furthermore, although it is a generally accepted view that protecting human life is important, science points to the fact that a fetus cannot survive outside the womb prior to viability.[297] While some religions may encourage the belief that life begins at conception, scientifically, life cannot exist pre-viability.[298] This reinforces the idea that when considering whether to prohibit pre-viability abortions, it is less of a concern to consider the fetus's life, given its inability to survive outside the womb; the woman's interests should outweigh the fetus.[299]

Nonetheless, not all justifications in support of banning abortions stem from religion; there are concerns regarding whether trait-specific abortions would be used to further discriminatory beliefs within the United States as well.[300] Most of these concerns, however, are unfounded.[301]

Further, it is important to consider the public's response to *Dobbs* to understand people's ethical beliefs further, rather than simply relying on the Court's perception of how the issue of abortion is and should be received by the country. Now that the decision is left up to the states on whether to permit abortions, some states have taken affirmative action in order to protect that right.[302] Some states have left it up to the people, proposing amendments to either add the right to abortion to the state's constitution or ban it.[303] For instance, in August 2022, Kansas citizens rejected "a ballot measure that would have amended the State Constitution to say it contains no right to an abortion."[304] In Nebraska, "[there were] not [enough] votes to pass a ban on abortion after 12 weeks of pregnancy."[305] Many states' governors, including those in Colorado, Rhode Island, Nevada, and Pennsylvania, "issued an executive order to shield those seeking or providing abortions . . . from laws in other states."[306] Evidently, many people

296. *See generally* U.S. CONST. amend. I.

297. Ariana Eunjung Cha & Rachel Roubein, *Fetal Viability Is at the Center of Mississippi Abortion Case. Here's Why.*, WASH. POST, https://www.washingtonpost.com/health/2021/12/01/what-is-viability/ (Dec. 1, 2021, 3:27 PM) [https://perma.cc/5MF8-7CUZ].

298. *Id.*

299. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 870 (1992).

300. *See Banning Abortions in Cases of Race or Sex Selection or Fetal Anomaly*, GUTTMACHER INST. (Jan. 22, 2020), https://www.guttmacher.org/evidence-you-can-use/banning-abortions-cases-race-or-sex-selection-or-fetal-anomaly [https://perma.cc/LJ6F-3GVV]; *see also* Chris McChesney, *Abortion, Eugenics and a Threat to Diversity*, 2 MOD. AM. 16, 18 (2006) ("Considering this country's history, it is not unreasonable to believe U.S. citizens would attempt to selectively remove a group of people from the population by practicing eugenics; in fact, it is not outrageous to assert that eugenics is alive and well as demonstrated by the abortion of the vast majority of fetuses with Down syndrome.").

301. *See Banning Abortions in Cases of Race or Sex Selection or Fetal Anomaly*, *supra* note 300.

302. *See Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES, https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html (Jan. 6, 2023, 10:30 AM) [https://perma.cc/42X4-25LQ].

303. *Id.*

304. *Id.*

305. Gabriella Borter, *Nebraska Republicans Lack Votes to Pass 12-Week Abortion Ban*, REUTERS (Aug. 8, 2022, 4:59 PM), https://www.reuters.com/world/us/nebraska-republicans-lack-votes-pass-12-week-abortion-ban-2022-08-08/ [https://perma.cc/VF7S-AF2Z].

306. *Tracking the States Where Abortion Is Now Banned*, *supra* note 302.

feel strongly about the right to have an abortion and have voted in conformity with this belief.[307]

Ultimately, when considering society post-*Dobbs*, the ethical and constitutional considerations begin to blur together. Prior to *Dobbs*, it was much easier to conclude that the constitutional factor weighed in favor of permitting trait-specific abortions because of *Casey*. The circuit split could likely have been resolved by relying on *Casey*. Now, the states need to look at people's opinions, ethical beliefs, reliance formed by *Casey*, and so on to determine whether trait-specific abortions should be permitted.

IV. RECOMMENDATION

Much of this recommendation stems from the Supreme Court's decision in *Casey*, and thus, is fairly straightforward.[308] What has yet to be examined, though, are the implications *Dobbs* will have on state regulations and what would result if women were forced to provide their reasons for obtaining an abortion. This recommendation addresses the following: (1) it proposes a solution to the previous circuit split involving trait-specific, pre-viability abortions; (2) it suggests states enact legislation to protect the privacy of women having abortions; and (3) it offers suggestions for state legislation regarding trait-specific abortions in a post-*Dobbs* society. Given the circuit split is merely hypothetical for now, most of the recommendation will focus on (2) and (3).

*A. Resolving the Pre-*Dobbs *Circuit Split*

The circuit split discussed in previous Sections only exists in light of *Casey*; for that reason, this Section functions as though *Casey*, or a *Casey*-like framework, still exists.

As previous Sections have illustrated, the law must balance both ethical and constitutional considerations. Often, ethical and constitutional factors do not align; it is nearly impossible for the law to reflect each person's morals, though the law should strive to represent society's ethics more generally. As noted by previous statistics,[309] however, abortions are generally a very divisive topic within the United States; trait-specific abortions are even more divisive. Those who oppose abortions generally believe that the fetus's life is more important than the woman's ability to control her own body.[310] This may be because these individuals believe life begins at conception, an idea that may be attributed to

307. *Id.*

308. *See generally* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 877 (1992) (holding pre-viability, women should have the right to obtain an abortion without substantial burden, and post-viability, a State may choose to restrict abortion access).

309. *See Public Opinion on Abortion*, *supra* note 265.

310. *See* Ross Douthat, *The Case Against Abortion*, N.Y. TIMES (Nov. 30, 2021), https://www.nytimes.com/2021/11/30/opinion/abortion-dobbs-supreme-court.html [https://perma.cc/BYE2-9T4D]; *see What's Wrong with Fetal Rights*, ACLU, https://www.aclu.org/other/whats-wrong-fetal-rights (last visited July 4, 2022) [https://perma.cc/N766-CP3D].

religious beliefs.[311] Yet this same group of individuals will often have abortions themselves.[312] It is a common misconception that those who are religious do not get abortions; however, "[a]lmost 1 in 4 women get an abortion by age forty-five. And most of them identify with a religion."[313]

On the other hand, those who support abortions generally believe that the woman's ability to control her own body is more important than the fetus's potential life.[314] This opinion likely does not see the fetus as a living human yet, and thus the woman's choice should come first.[315] Another common misconception is that this group does not care about babies or children,[316] yet more than "59% of women seeking abortions have already given birth to a child."[317] Neither opinion is necessarily right or wrong; both sides may not fully understand the other, though, perpetuating this divide.

Regardless of how courts rule when deciding whether to uphold future trait-specific abortion provisions and regulations, the ruling will be controversial. Although it is difficult to decide whose morals are "better," it is less difficult to decide on a ruling consistent with *Casey*.[318] While *Casey* does not specifically mention trait-specific abortions, it does permit pre-viability abortions.[319] Using this logic, so long as the trait-specific abortion occurs pre-viability, it appears this specific type of abortion is constitutional until the Supreme Court indicates otherwise.[320] Thus, in an effort to follow precedent and do what some believe to be ethically right, it is imperative courts allow trait-specific abortions in all pre-viability circumstances. If a *Casey*-like framework ever becomes good law again, this recommendation would solve the circuit split.

311. David Masci, *Where Major Religious Groups Stand on Abortion*, PEW RSCH. CTR. (June 21, 2016), https://www.pewresearch.org/fact-tank/2016/06/21/where-major-religious-groups-stand-on-abortion/ [https://perma.cc/642E-2892].

312. Holly Yan, *Debates Over Anti-Abortion Laws Have Raised Common Myths About Abortion. These Are the Facts*, CNN (May 18, 2019, 7:44 AM), https://www.cnn.com/2019/05/18/health/abortion-myths-and-facts/index.html [https://perma.cc/8MW2-K4SA].

313. *Id.*

314. *See generally What's Wrong with Fetal Rights*, *supra* note 310 ("[T]he ACLU brief argued that according independent legal rights to fetuses opens the door to causes of action against pregnant women in violation of their autonomy and privacy.").

315. *See, e.g.*, Douthat, *supra* note 310.

316. *See generally* Christina Zdanowicz, *Women Have Abortions for Many Reasons Aside from Rape and Incest. Here Are Some of Them*, CNN (May 22, 2019, 5:46 AM), https://www.cnn.com/2019/05/21/health/women-reasons-abortion-trnd/index.html [https://perma.cc/X2WF-W7AN] ("A mother to two children became pregnant and she and her husband decide they weren't in a place to have a third child.").

317. Yan, *supra* note 312.

318. *See generally* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992) (discussing the holding of the decision).

319. *Id.* at 879.

320. *See generally id.*

*B. The Issue of Privacy Post-*Dobbs

Another issue arises when considering if women are forced to share with their doctor their reason for having an abortion. Because a woman's right to have an abortion previously stemmed from the right to privacy,[321] an implied right within the Fourteenth Amendment, *Dobbs* has left the right to privacy vague—especially in the context of women's rights.[322] Under the provisions previously considered by Indiana[323] and Missouri,[324] and the provision enacted by Ohio,[325] none of the provisions required the woman to disclose her reason for obtaining an abortion.[326] In theory, so long as a woman need not disclose her reason prior to having an abortion, a woman *should always* be able to obtain an abortion in states that allow it—even under the Ohio provision prohibiting doctors from knowingly performing abortions on women who chose to have the abortion because of the fetus's likelihood of having Down syndrome.[327] Put simply, if a woman does not disclose why she wants an abortion, trait-specific provisions—like the ones proposed in Indiana, Missouri, and Ohio—should not impact her ability to have an abortion.[328]

Yet, the issue is not so simple. This is because the issue becomes not if, but when, women are required to disclose their reason for obtaining an abortion. There is no denying that abortion laws have continued to become more and more restrictive since the passing of *Roe* in 1973.[329] This issue was present pre-*Dobbs* but is even more pertinent post-*Dobbs*. Now, states may create provisions requiring women to state their reason for having an abortion. Given the right to privacy, specifically in abortion cases, was attacked in *Dobbs*,[330] it would not be shocking if states choose to do so moving forward. Even in *Roe*, the Supreme Court held

321. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

322. *See* Dobbs v. Jackson Women's Health Org., 142 U.S. 2228, 2257–58 (2022).

323. *See* Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 888 F.3d 300, 303 (7th Cir. 2018) ("Specifically, the non-discrimination provisions state that '[a] person may not intentionally perform or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking' an abortion: (1) 'solely because of the sex of the fetus . . . .'").

324. *See* MO. ANN. STAT. § 188.038 (West).

325. *See* Preterm-Cleveland v. McCloud, 994 F.3d 512, 517 (6th Cir. 2021) ("In plain terms, H.B. 214 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.").

326. *Id.* at 530 ("As with H.B. 214 in the present case, the Indiana law did not directly prohibit the woman from having an abortion for those reasons; it prohibited a doctor from aborting a pregnancy when that doctor *knows* the woman's reason and that reason is that she does not want the forthcoming child because it will have one of those genetic characteristics.").

327. *See, e.g.*, *id.*

328. *See id.* at 521 ("Even under the full force of H.B. 214, a woman in Ohio who does not want a child with Down syndrome may lawfully obtain an abortion solely for that reason.").

329. *See* Elyssa Spitzer & Nora Ellmann, *State Abortion Legislation in 2021*, CAP (Sept. 21, 2021), https://www.americanprogress.org/article/state-abortion-legislation-2021/ [https://perma.cc/NL57-AUWC] (discussing recent abortion restrictions amongst the states).

330. *See* Dobbs v. Jackson Women's Health Org., 142 U.S. 2228, 2257–58 (2022).

the right to privacy is not absolute;[331] this may be used in future cases to justify a requirement of disclosure prior to obtaining an abortion.

Consequently, laws prohibiting trait-specific abortions only when the doctor is aware of the woman's reason will become exceedingly restrictive if states begin to require women to disclose their reason for having an abortion. To resolve this inevitable problem, each state should enact legislation prohibiting doctors from requiring women to disclose their reason for obtaining an abortion. If a state attempted to enact any regulation requiring a woman's disclosure, the regulation should be struck down. This proposed legislation would not prohibit women from disclosing their reason so long as it is their choice to disclose this information. The purpose is simply to ensure that women will not lose their right to have an abortion if the abortion is due to a trait-specific reason.

It is unlikely that each state will enact the proposed legislation. Some states have already prohibited abortions.[332] Nonetheless, this recommendation should be considered, especially amongst states that currently permit abortions.

C. Pre- and Post-Viability Abortion Regulation

As *Dobbs* indicates, theoretically, states could prohibit abortions regardless of whether they are pre- or post-viability; though, this recommendation urges states to refrain from doing so.

Any future state legislation, post-*Dobbs*, should adopt a *Casey*-like framework when determining whether abortion regulations are permissible. This means that states should not ban abortions. Instead, states may regulate pre-viability abortions so long as the regulations do not impose any substantial or undue burdens.[333] Once the fetus reaches viability, the states may continue to employ restrictions regarding a woman's access to abortions,[334] though in certain circumstances, states are urged not to wholly ban post-viability abortions. When considering whether trait-specific abortions should be permitted, this same *Casey*-like framework should apply. Thus, if the trait-specific abortion is pre-viability, there should not be any undue burden on a woman's ability to have an abortion; if the trait-specific abortion is post-viability, the state may consider other factors when determining whether to regulate. For instance, the state may consider the voices of the people living in that state, reliance caused by *Casey* and stripped by *Dobbs*, and so on. Finally, regardless of when the abortion occurs—pre- or post-viability—and what kind of abortion it is—trait-specific or non-trait-specific—there should always be exceptions when a woman's life or health is at risk.[335]

331. *See* Roe v. Wade, 410 U.S. 113, 154 (1973) ("[T]he right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.").

332. *Tracking the States Where Abortion Is Now Banned*, *supra* note 302.

333. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).

334. *Id.*

335. *Id.*

States should not simply consider and weigh the interests of the mother versus any competing interests—the state's interest in protecting the unborn fetus, the father, etc.—but should instead look to circumstances surrounding the situation.[336] Although this is a nonexhaustive list, the state is encouraged to consider the medical concerns regarding the fetus, along with the woman's background, including her race, ethnicity, and religion.[337] These factors may all affect a woman's decision to continue with her pregnancy[338] and, in some situations, may materialize only after the fetus is viable.

This Note does not propose that all post-viability abortions be allowed, but rather that the restriction not be so narrowly construed that the woman's health and life must be in danger before allowing the abortion. For instance, if future medical advancements make it possible that severe fetal abnormalities are detectable only once the fetus is viable, the woman should still have the choice to have an abortion if she chooses, even if her health and life are not at risk. Another example includes instances where the woman becomes aware, post-viability, that the fetus will not survive birth; again, the woman should not be forced to deliver a stillborn baby.[339] Often, when the abortion is occurring post-viability, it was not the woman's first choice; post-viability abortions are often the result of traumatic news.[340] States should not judge these difficult decisions by banning post-viability abortions but should create circumstances specifically regarding the fetus's health where the woman is allowed to have an abortion. Though it is difficult to illustrate what situations or circumstances specifically give a woman the right to have an abortion post-viability, states should not use the lack of clarity as an opportunity to simply ban all abortions post-viability.

V. CONCLUSION

Although *Dobbs* changed the manner in which states may regulate abortions, it did not prevent states from permitting trait-specific abortions. This Note argues that trait-specific abortions should be permitted in all pre-viability situations; however, in post-viability situations, various factors should be considered before allowing or banning a woman's right to obtain an abortion. Additionally, legislation should be enacted to ensure women are not forced to disclose their reasons for having an abortion. The Supreme Court has declined to hear the issue regarding trait-specific abortions.[341] As the country seems to become more divided in terms of its opinions regarding abortions,[342] with seemingly more of the

336. *See* Lawrence B. Finer, Lori F. Frohwirth, Lindsay A. Dauphinee, Susheela Singh & Ann M. Moore, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPROD. HEALTH 110, 117 (2005).

337. *See id.* at 112–18.

338. *See id.*

339. *See generally* Zdanowicz, *supra* note 316.

340. *See generally id.* (discussing one woman's decision to end her pregnancy because the baby would be born brain dead and noting that there are often misunderstandings and misconceptions about why women have abortions).

341. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1781 (2019).

342. *See* Spitzer & Ellmann, *supra* note 329 (discussing recent abortion restrictions amongst the states).

country attempting to restrict a woman's access to abortions,[343] this topic is both relevant and important to a large percentage of the country. Until the Supreme Court decides to hear a case focusing on trait-specific abortions, states will be permitted, and are encouraged, to permit trait-specific abortions in all pre-viability abortions and some post-viability abortions.

343. *See id.*