

CHECKING THE *BOX-ES*: ATTEMPTING TO SUBVERT *ROE*

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ABSTRACT

This Article analyzes the issue of a woman's right to legalized abortion and state attempts to circumvent the precedential U.S. Supreme Court decisions recognizing a woman's right to bodily autonomy, using the state of Indiana as a persistent example of such attempts. A woman's right to legal abortion is a public health concern. Protection of legal abortion is found through the right to privacy, a right inferred from several amendments to the United States Bill of Rights. The Supreme Court's inaction in the Indiana litigation and more recently, in the Texas case, leaves many women who seek abortions with no recourse.

I. INTRODUCTION

Ever since the Trump administration began the appointment of Supreme Court Justices with reputations for conservative views, both legal and social commentators began predicting the High Court's imminent repudiation of *Roe v. Wade*.¹ The tragic death of Justice Ruth Bader Ginsburg intensified the speculation. However, the attempts to overturn *Roe* were in the works decades earlier, with over twenty state legislatures passing laws or putting laws on the books that restricted pre- and post-viability abortions, chipping away bit by bit at *Roe* in subtle and not-so-subtle ways under the guise of "safeguarding women's health."² The women who stood to be affected by these restrictions included adults, both married and single, as well as school-aged minors whose educations would, in many cases, be terminated by pregnancy.

One of the more vigorous and persistent anti-*Roe* campaigns was waged by the state legislature of Indiana. This commentary will examine the three latest attempts by Indiana to force the Court to abandon both *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.³ Part I will describe and analyze two different litigation forays recently mounted by Indiana which were vacated and remanded by the High Court in light of *June Medical Services v. Russo*,⁴ as well as how one court responded to the remand. Part II will examine perhaps the most dangerous anti-*Roe* arguments of the Indiana legislature, the

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1. See *Roe v. Wade*, 410 U.S. 113 (1973).

2. *Abortion Policy in the Absence of Roe*, GUTTMACHER INST., <https://www.gutmacher.org/state-policy/explore/abortion-policy-absence-roe> [<https://perma.cc/A5QC-BQQE>] (last updated Jan. 13, 2022).

3. See *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992).

4. See *June Med. Services LLC. v. Russo* (*June Med. 1*), 140 S. Ct. 2103 (2020).

revised statute for disposal of aborted fetal remains and the ban on voluntary selective abortions. Part III will examine the possible relevance of the ban on voluntary selective abortions to the eugenics movement and the High Court's limited reaction to the ban. Part IV will analyze whether Indiana's attempts to restrict abortions pose a true challenge to *Roe* and its progeny and attempt to dust off the proverbial crystal ball.

II. INDIANA'S EFFORTS TO RESTRICT WOMEN'S ACCESS TO ABORTIONS AND *JUNE MEDICAL*

A. *The Eighteen-Hour Waiting Time*

Since 1995, according to the Seventh Circuit Court of Appeals,⁵ the state of Indiana law required that, at least eighteen hours before a woman had an abortion, the state would provide the woman information about the abortion procedure, fetal life and development, and alternatives to abortion. The state legislature freely admitted that it provided this information in an attempt to convince the woman to forego the abortion and, by doing so, advance the state's interest in preserving fetal life. At that time, in addition to providing the information, the state also required that a woman submit to an ultrasound of her fetus and hear the fetal heartbeat, but she could decline either or both, and 75% of women did in fact decline. At this time, the ultrasound was usually performed just before the abortion procedure.

However, in July 2016, the Indiana House Enrolled Act 1337 ("HEA 1337") amended the law and added a "timing" mandate, that a woman seeking an abortion have an ultrasound performed at least eighteen hours before the actual abortion procedure, with no opt-out opportunity.⁶ Virtually all abortions in Indiana in 2016 occurred at four of the seventeen Planned Parenthood of Indiana and Kentucky ("PPINK") health centers, and these centers also had ultrasound facilities. The woman could refuse to view the ultrasound image but had to affirmatively decline to do so on an official state form.⁷

The PPINK centers with ultrasound capability were not open for abortions every day, some only one or three days per week. The eighteen-hour requirement between ultrasound and abortion procedure meant that two visits to one of the centers were necessary, and many women had to travel significant distances, often 100 miles or more, to get to the center, and stay at least overnight in accommodations near the facility.⁸ Most of the women seeking abortions at

5. *Planned Parenthood of Ind. and Ky., Inc. v. Comm'r, Ind. State Dep't of Health, et al. (Planned Parenthood of Ind. & Ky., Inc. 1)*, 896 F.3d 809, 812 (7th Cir. 2018), *reh'g and reh'g en banc denied*, Oct. 5, 2018.

6. IND. CODE § 16-34-2-1.1 (2021).

7. *Planned Parenthood of Ind. & Ky., Inc. 1*, 896 F.3d at 812.

8. *Id.* at 815. The Seventh Circuit reported, "For example, women in the second largest city in Indiana, Fort Wayne, must now travel approximately 400 miles over two days to obtain an abortion, as the closest ultrasound machine is 87 miles away in Mishawaka (174 miles round trip)

PPINK centers were poor, with approximately over half of the women with incomes at or below 200% of the Federal Poverty Line.⁹

The district court had concluded that the burdens on women seeking abortions were clearly undue when compared to the state's goals of promoting fetal life and women's health, and granted PPINK's request for a preliminary injunction.¹⁰ The Seventh Circuit agreed, citing *Casey*¹¹ and *Whole Woman's Health*,¹² and stated that the eighteen-hour ultrasound requirement before the abortion procedure created an impediment to the women's access to abortion services, and the lengthy travel necessitated by the time requirement was itself the origin of the burden. The eighteen-hour requirement was, therefore, unconstitutional.¹³

The Seventh Circuit then formulated a balancing test where the relevant comparators were the burdens and benefits deriving from the eighteen-hour time required between ultrasound and abortion services in HEA 1337. The appellate court listed the burdens involved in the newly enforced waiting period, particularly for poor women seeking abortions, as added travel expenses, childcare costs, loss of wages, risk of job loss, and potential danger from an abusive partner.¹⁴ The corresponding benefits, the potential of a woman's having and/or viewing an ultrasound and reflecting on her decision to proceed with abortion, according to the Seventh Circuit majority, were "very small."¹⁵ The court concluded that the state presented almost no evidence that the eighteen-hour time requirement produced any discernable effect on advancing the state's asserted goal of promoting the life of the fetus.¹⁶

The Commissioner subsequently petitioned for rehearing and rehearing en banc, both of which were denied on October 5, 2018. A petition for certiorari followed on February 4, 2019.¹⁷ Approximately two months later, on April 23, the case was scheduled for conference on May 9, 2019, but was rescheduled six times before the Supreme Court granted certiorari. On July 2, 2020, the High Court simply vacated the Seventh Circuit's decision and remanded the case to the

and the nearest abortion providing health center is 115 miles away in Lafayette (230 miles round trip)." *Id.* at 819.

9. *Id.* at 815.

10. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health (Planned Parenthood of Ind. & Ky., Inc. 2)*, 273 F. Supp. 3d 1013, 1043 (S.D. Ind. 2017).

11. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 846 (1992) (the Seventh Circuit noted at 817-18 that *Casey* defined undue burden as "placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus," citing *Casey*, 505 U.S. at 876-77).

12. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2324 (2016) (citing *Casey*, 505 U.S. at 877).

13. *Planned Parenthood of Ind. & Ky., Inc. 1*, 896 F.3d at 819, 827.

14. *Id.* at 827.

15. *Id.*

16. *Id.* at 830.

17. *See* Brief for Petitioner, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 2019 WL 446533 (U.S. 2019) (No. 18-1019).

Seventh Circuit for further consideration in light of the High Court's decision in *June Medical*.¹⁸

On September 30, 2020, the parties jointly requested the case be remanded to the district court.¹⁹

B. The Relevance of June Medical Services, LLC v. Russo

On June 29, 2020, the Supreme Court decided *June Medical Services, LLC v. Russo*, in which the members of the Court considered a Louisiana statute, Louisiana Act 620, providing that doctors who performed abortions at clinics in Louisiana must have active admitting privileges at hospitals within thirty miles of their abortion facilities. This requirement was the mirror image of the Texas requirement in *Whole Woman's Health*, previously declared unconstitutional by the High Court in 2016. Five abortion clinics and four abortion providers mounted a pre-enforcement facial challenge to *June Medical*, asking for a temporary restraining order ("TRO") and preliminary injunction ("PI") to block enforcement of the statute. They argued that, under the *Casey* standard of undue burden, the Louisiana statute was also unconstitutional.²⁰

Before the district court, the state urged the court to move forward, agreeing that the plaintiffs had standing, even for a pre-enforcement facial challenge.²¹ The district court examined the similarity of the Louisiana and Texas statutes and ruled that Act 620 was unconstitutional and enjoined its enforcement. The district court later granted a permanent injunction because the law provided no significant health benefits for women.²²

A divided court of appeals reversed the district court ruling, stating that the Louisiana statute would have "dramatically less impact than the Texas statute" previously declared unconstitutional.²³ A similarly divided court of appeals then denied a rehearing en banc,²⁴ but left intact the district court's injunction²⁵ while both parties petitioned for certiorari, which the Supreme Court granted.²⁶

Justice Breyer wrote the Supreme Court decision, joined by Justices

18. See *June Med. 1*, 140 S. Ct. 2103 (2020).

19. See Joint Request to Remand, *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. Dep't of Health*, 823 Fed. Appx. 440 (7th Cir. 2020) (Mem) (No. 17-1883) (remanded).

20. *June Med. 1*, 140 S. Ct. at 2112.

21. *Id.* at 2114 (where the state asserted that "there was 'no question that the plaintiffs had standing to contest the law'").

22. *Id.* at 2115.

23. *Id.* at 2116 (citing *June Med. Services, LLC v. Gee*, 905 F.3d 787 (5th Cir. 2018)). Rebekah Gee was Secretary of the Louisiana Department of Health and Hospitals. Stephen Russo, Interim Secretary of the Louisiana Department of Health and Hospitals, was substituted for Gee as Defendant.

24. See *June Med. Services, LLC v. Gee (June Med. 2)*, 913 F.3d 573 (5th Cir. 2019) (per curiam).

25. *June Med. 1*, 140 S. Ct. at 2117.

26. *June Med. Services, LLC v. Gee (June Med. 3)*, 139 S. Ct. 663 (2019).

Ginsburg, Kagan, and Sotomayor. The standing issue arose again in the state's arguments, but the Court noted that the state had waived that argument five years prior in the district court, and did not countenance the issue.²⁷ The plurality of the High Court members looked to the factual findings of the district court, and found those findings "not clearly erroneous," and therefore, controlling.²⁸ The plurality concluded that, "in light of the record, that the District Court's significant findings, both as to burdens and benefits, have ample evidentiary support."²⁹ Therefore, the Supreme Court found Louisiana Act 360 to be unconstitutional.³⁰

Chief Justice Roberts wrote a concurrence that for many commentators and legal scholars confused the issue of whether the decision should be called a plurality or a majority opinion.³¹ Roberts agreed that *Whole Woman's Health* was controlling precedent,³² and, therefore, Louisiana's Act 620 must be unconstitutional, but disagreed that any part of *Casey* required the balancing of benefits and burdens of a statute seeking to restrict abortions. The High Court interpreted Roberts' concurrence as rejecting the premise that *Casey* and *Whole Women's Health* applied the same standard in deciding whether a law restricting access to abortion was constitutional.³³

However, Roberts' concurrence did state:

Stare decisis instructs us to treat like cases alike. The result in this case is controlled by our decision four years ago invalidating a nearly identical Texas law. The Louisiana law burdens women seeking previability abortions to the same extent as the Texas law, according to factual findings that are not clearly erroneous. For that reason, I concur with the judgment of the Court that the Louisiana law is unconstitutional.³⁴

This statement in Roberts' concurrence served as the basis of the plurality's claim to a 5-4 decision in the *June Medical* case.

Justices Alito, Gorsuch, Kavanaugh, and Thomas filed dissenting opinions, with several Justices signing on in agreement with dissenting colleagues. In his lengthy dissent, Justice Alito argued that *Whole Woman's Health* was a post-

27. *June Med. 1*, 140 S. Ct. at 2118.

28. *Id.* at 2120.

29. *Id.* at 2131.

30. *Id.*

31. See, e.g., Rachel Rebouche, *Abortion Restrictions After June Medical Services*, REGUL. REV. (Aug. 4, 2020), <https://www.theregreview.org/2020/08/04/rebouche-abortion-restrictions-june-medical/> [<https://perma.cc/HS8N-YXDN>]. See also Benjamin M. Parks, *Burdens, Benefits, or Both? The Impact of Chief Justice Roberts's June Medical Concurrence on Courts' Analyses of Abortion Regulations*, LA. L. REV., <https://lawreview.law.lsu.edu/2021/03/12/burdens-benefits-or-both-the-impact-of-chief-justice-robertss-june-medical-concurrence-on-courts-analyses-of-abortion-regulations/> [<https://perma.cc/R76H-6P9S>] (last visited Mar. 12, 2021).

32. *June Med. 1*, 140 S. Ct. at 2142.

33. *Id.* at 2180-81.

34. *Id.* at 2142.

enforcement decision, whereas *June Medical* is a pre-enforcement decision.³⁵ He repeated the charge of lack of standing for Planned Parenthood, accused the district court of portraying faulty facts, and contended that the plaintiff doctors in the suit sought to secure admitting privilege in bad faith.³⁶ Alito concluded by stating that the plurality “twists the law.”³⁷

Justice Gorsuch, on the other hand, pointed to a “catalog of horrors,” examples of numerous instances of safety and ethical violations in the Planned Parenthood abortion facilities.³⁸ He dubbed the balancing of benefits and burdens analysis “little more than the judicial version of a hunter’s stew.”³⁹ Gorsuch accused the court of taking a static view of the current market,⁴⁰ and concluded that additional fact-finding was necessary to evaluate the Louisiana law.⁴¹

Justice Kavanaugh’s relatively short dissent agreed with Gorsuch’s analysis and emphasized the possibility that the plaintiff doctors might still obtain admitting privileges and clinics may not have to close.⁴²

Justice Thomas began his dissent with a succinct summary of his position, stating, “a majority of the Court perpetuates its ill-founded abortion jurisprudence by enjoining a perfectly legitimate state law and doing so without jurisdiction.”⁴³ He challenged the plurality’s decision to waive the state’s argument that the plaintiff doctors did not have Article III standing, and argued that, indeed, all of the abortion precedents were created “without a shred of support from the Constitution’s text.”⁴⁴

Despite the dissents’ panoply of contradictions to the plurality’s decision, Chief Justice Roberts’ concurrence allowed the High Court to claim a majority decision in *June Medical*.

C. Parental Notification Requirement for Minors Seeking Abortion

On July 2, 2020, the Supreme Court also remanded a second PPINK lawsuit in order to examine the Court’s decision in *June Medical Services*.⁴⁵ That lawsuit challenged Indiana’s amended requirement for parental notification of minors seeking an abortion.⁴⁶

35. *Id.* at 2158.

36. *Id.* at 2160.

37. *Id.* at 2170.

38. *Id.* at 2173.

39. *Id.* at 2179-80.

40. *Id.* at 2177.

41. *Id.* at 2182.

42. *Id.*

43. *Id.* at 2142.

44. *Id.*

45. *See* Box, Comm’r, Ind. State Dep’t of Health v. Planned Parenthood of Ind. & Ky., Inc. (*Planned Parenthood of Ind. & Ky., Inc.* 3), 141 S. Ct. 187 (2020). Kristina M. Box was Commissioner of the Indiana State Department of Health from October 16, 2017 to the present day.

46. *See* Planned Parenthood of Ind. & Ky., Inc. v. Adams, Comm’r, Ind. State Dep’t of

The majority in the Seventh Circuit began by explaining that Indiana statutes had long provided a speedy and confidential bypass procedure to allow that small fraction of pregnant, unemancipated minors seeking an abortion to obtain such without the consent or notification of parents, guardians, or custodians.⁴⁷ However, in 2017 the Indiana General Assembly passed Senate Enrolled Act 404 (“SEA 404”)⁴⁸ which added a parental notification requirement to the judicial bypass.⁴⁹ PPINK sued to enjoin enforcement of the new provision, and the district court granted a preliminary injunction.⁵⁰

Appeal to the Seventh Circuit followed, challenging the provision of the new law that required that, even if a judge concludes that the parents need not consent to the abortion because either (1) the unemancipated minor is mature enough to make her own decision about abortion, or (2) the abortion is in the minor’s best interest, parents must still be given prior notice of the planned abortion unless the judge finds the notification is *not* in the minor’s best interest.⁵¹ Therefore, under the amended law, the judicial bypass of *consent* may be based on either the minor’s maturity or best interests, but the judicial bypass of *notification* must be based solely on “best interests.” However, the parental notification is triggered only if the judge authorizes the abortion.⁵²

In addition to the significant change in language about judicial bypass of notification, the Seventh Circuit further noted the delay in obtaining the abortion because of the statute’s provision that the minor’s attorney shall serve the notice to the parents by certified mail or personal service prior to the abortion.⁵³

The new law also required that the physician who would perform the abortion must not only obtain written parental consent, but require government-issued evidence of the parent’s, legal guardian’s, or custodian’s identity, and execute an affidavit of that reliable evidence of identity. Criminal penalties were also provided in the new statute, for both physicians and Planned Parenthood health centers.⁵⁴

The Seventh Circuit majority noted that the district court had enjoined the new law because the notice requirement was likely to cause an “undue burden for the large fraction of mature, abortion-seeking minors in Indiana.”⁵⁵ The state

Health (*Planned Parenthood of Ind. & Ky., Inc. 4*), 937 F.3d 973 (7th Cir. 2019), *reh’g and reh’g en banc denied* Oct. 30, 2019. Jerome M. Adams was Commissioner of the Indiana State Department of Health from October 14, 2014 to September 1, 2017, the time period during which this appellate decision originated in the Southern District of Indiana.

47. *Id.* at 974.

48. S.E.A. 404, 120th Gen. Assemb., First Reg. Sess. (2017).

49. *Planned Parenthood of Ind. & Ky., Inc. 4*, 937 F.3d at 975.

50. *See* *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r, Ind. State Dep’t of Health (Planned Parenthood of Ind. & Ky., Inc. 5)*, 258 F. Supp. 3d 929 (S.D. Ind. 2017).

51. *Planned Parenthood of Ind. & Ky., Inc. 4*, 937 F.3d at 975-76.

52. *Id.*

53. *Id.* at 976-77.

54. *Id.*

55. *Id.* at 978.

argued unsuccessfully that a pre-enforcement facial challenge to the new law was contrary to Seventh Circuit precedent, but the appellate court instead relied on the High Court's decision in *Whole Women's Health*, also a pre-enforcement challenge, which confirmed the *Casey* undue burden standard.⁵⁶

In explaining the undue burden imposed by SEA 404, the majority noted that between October 2011 and September 2017, approximately sixty minors, mostly seventeen-year-olds, sought judicial bypasses.⁵⁷ The young women had not told their parents they were pregnant because they feared being “kicked out of their homes . . . being abused or punished,” or that their parents would try to block an abortion.⁵⁸

Examining the standards for a preliminary injunction, the Seventh Circuit concluded that PPINK demonstrated a likelihood of success on the merits because (1) the new Indiana statute “creates a substantial risk of a practical veto over a mature minor’s right to an abortion, and “[u]nder *Casey*, a statute that will have the practical effect of giving someone else a veto over a woman’s abortion decision is an undue burden,”⁵⁹ (2) factual evidence showed that most judicial bypasses for minors’ abortions were granted on the basis of the minor’s maturity,⁶⁰ (3) balancing the benefits and the burdens of the new statute demonstrates that the burdens for minors seeking abortions outweigh the state’s interest in helping parents care for their daughters,⁶¹ and (4) a notice requirement can operate as a consent requirement because of a minor’s fear of abuse, parental obstruction, triggering dangerous self-help abortions, or foregoing abortion altogether.⁶² The Seventh Circuit concluded that the district court did not abuse its discretion in issuing the preliminary injunction, and affirmed the district court decision.⁶³

Circuit Judge Kanne issued a lengthy dissent, arguing that precedent in other circuit courts, including the *Casey* decision, confirmed that both parental consent and notification laws were constitutional.⁶⁴ Kanne noted that the state “possesses ‘important’ and ‘reasonable’ interests in requiring parental consultation before a minor makes such an irrevocable and profoundly consequential decision.”⁶⁵

The State of Indiana appealed from the district court decision, requesting a rehearing and a rehearing en banc.⁶⁶ Both were denied by a divided en banc court, and Indiana petitioned for certiorari to the Supreme Court. In a per curiam

56. *Id.* at 979-80.

57. *Id.* at 977.

58. *Id.*

59. *Id.* at 981.

60. *Id.* at 982.

61. *Id.* at 983-84.

62. *Id.* at 986-87.

63. *Id.* at 990-91.

64. *Id.* at 991.

65. *Id.* at 992 (quoting *Bellotti v. Baird*, 443 U.S. 622, 640-41 (1979)).

66. *See Planned Parenthood of Ind. & Ky., Inc. v. Box, Comm’r, Ind. State Dep’t Health (Planned Parenthood of Ind. & Ky., Inc. 6)*, 949 F.3d 997 (7th Cir. 2019).

opinion, the High Court granted the petition for certiorari and on July 2, 2020 vacated the judgment below and remanded the case to the Seventh Circuit for reconsideration in light of *June Medical*.⁶⁷

On March 12, 2021, the Seventh Circuit responded at length to the High Court's remand.⁶⁸ Applying the doctrine of the "narrowest ground" rule⁶⁹ to interpret the fractured decision in *June Medical*, the Seventh Circuit reaffirmed its earlier preliminary injunction. The appellate court noted that Chief Justice Roberts, in his concurrence, agreed that *Whole Woman's Health* was applicable as stare decisis in *June Medical*, even as he disagreed with portions of the plurality opinion, stating "[t]he opinions in *June Medical* show that constitutional standards for state regulations affecting a woman's right to choose to terminate a pregnancy are not stable, but they have not been changed, at least not yet, in any way that would change the outcome here."⁷⁰

The Court noted that the Louisiana law in *June Medical* "tracked nearly word-for-word" the Texas law struck down in *Whole Woman's Health*.⁷¹ In his concurrence, Roberts' emphasis on downplaying the value of balancing benefits and burdens prompted the High Court to question whether a true majority opinion could be cobbled together in *June Medical*. The High Court questioned whether Roberts' concurrence fit more squarely with the opinions of the other dissenters, Justices Alito, Gorsuch, and Thomas. However, under the *Marks* rationale, dissents are excepted from consideration in plurality opinions. That rationale settled the decision for the Seventh Circuit.⁷²

The State of Indiana filed a second petition for certiorari on March 29, 2021, and a decision on that petition is pending. On June 8, 2021, the Court scheduled a June 24 conference to consider a grant of certiorari. The High Court had yet to announce a decision at the end of the 2020 Term.⁷³

67. See *Box, Comm'r, Ind. State Dep't of Health v. Planned Parenthood of Ind. & Ky., Inc.* (*Planned Parenthood of Ind. & Ky., Inc.* 7), 141 S. Ct. 187 (2020) (Mem.).

68. *Planned Parenthood of Ind. & Ky., Inc. v. Box, Comm'r, Ind. State Dep't of Health* (*Planned Parenthood of Ind. & Ky., Inc.* 8), 991 F.3d 740 (7th Cir. 2021).

69. The "narrowest ground" rule from *Marks v. United States*, states that when assessing which precedential decisions apply in plurality decisions, the court must look for the common ground expressed by the plurality and the concurrence(s). 430 U.S. 188, 193 (1977). *King v. Palmer* states that the narrowest ground rule means that "when, for example, 'the concurrence posits a narrow test to which the plurality must necessarily agree as a logical consequence of its own broader position,' the plurality can claim to be a majority opinion which then has precedential value. *Planned Parenthood of Ind. & Ky., Inc.* 8, 991 F.3d at 745-46 (quoting 950 F.2d 771, 782 (D.C. Cir. 1991) (en banc)).

70. *Planned Parenthood of Ind. & Ky., Inc.* 8, 991 F.3d at 741.

71. *Id.* at 742.

72. *Id.* at 745.

73. *Box v. Planned Parenthood of Indiana and Kentucky*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/box-v-planned-parenthood-of-indiana-and-kentucky-inc-4/> [https://perma.cc/2WF4-E2MF] (last visited Jan. 15, 2022).

III. INDIANA'S ATTEMPT TO REVISE DISPOSAL OF FETAL REMAINS AND BAN SELECTIVE ABORTIONS

Indiana's General Assembly attempted to delay a pregnant woman's attempt to proceed with an abortion by mandating an eighteen-hour waiting period. They also tried to place a parental notification requirement to restrict a minor's access to abortion. Next, they attempted to revise the process for the disposal of fetal remains. Finally, they tried to ban all voluntary selective abortions based on discernible fetal characteristics. The Supreme Court ultimately weighed in on the litigation. However, it was only in a partial and unsatisfactory way for Justice Sotomayor.⁷⁴

The Governor of Indiana signed House Enrolled Act 1337 ("HEA 1337") into law on March 24, 2016.⁷⁵ The Act included three challenged provisions, the first being the "Sex Selective and Disability Abortion Ban," prohibiting a person from performing a pre-fetal viability abortion if the person knows the woman is seeking an abortion solely for reasons of: (1) the sex of the fetus, (2) fetal diagnosis of Down's syndrome or "any other disability," genetically inherited, either physical or mental, or (3) because of the race, color, national origin, or ancestry of the fetus.⁷⁶ Violating this provision of law would be a felony under Indiana's existing statutes, and the abortionist would be subject to disciplinary sanctions and civil liability for wrongful death.⁷⁷

The second provision would have required the abortion provider to advise the woman of the new prohibition on discriminatory abortion.⁷⁸ The third prohibition concerned the disposal of fetal remains after abortion. While preserving the right of a woman to dispose of the fetal remains herself, HEA 1337 provided that fetal remains be disposed of in the same way as Indiana law requires for a dead human body, interred or cremated after receipt of a "burial transmit permit."⁷⁹ Aborted fetuses could no longer be incinerated with other surgical byproducts, infectious or pathological waste.⁸⁰

A. The Seventh Circuit Decisions

Shortly after the enactment of HEA 1337, PPINK filed an action in Indiana district court seeking a preliminary injunction barring the state from enforcing the new provisions.⁸¹ The district court granted the preliminary injunction and, upon

74. See Box, *Comm'r Ind. Dep't Pub. Health v. Planned Parenthood of Ind. & Ky., Inc.* (*Planned Parenthood of Ind. & Ky., Inc.* 9), 139 S. Ct. 1780 (2019).

75. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r Ind. State Dep't Health* (*Planned Parenthood of Ind. & Ky., Inc.* 10), 888 F.3d 300, 302 (7th Cir. 2018).

76. *Id.* at 302-03.

77. *Id.* at 303.

78. *Id.*

79. *Id.* at 304. Indiana law requires a "burial transmit permit" for transport and disposition of a dead human body.

80. *Id.*

81. *Id.*

PPINK's subsequent motion for summary judgment, granted a permanent injunction.⁸²

The Seventh Circuit referenced the continuing viability of the *Roe* decision and *Casey's* reaffirmation of *Roe's* "essential holding" that a woman may "choose to have an abortion before viability and to obtain it without undue interference from the state."⁸³ The court characterized the woman's right as "categorical," reiterating that "a State *may not prohibit* any woman from making the ultimate decision to terminate her pregnancy *before viability*" [emphasis in the original].⁸⁴ Acknowledging that both *Roe* and *Casey* provided that not all regulations are unwarranted, because the state has a substantial interest in potential life, the court nevertheless ruled that the ban on discriminatory abortions violated "well-established Supreme Court precedent[s]" and was, therefore, unconstitutional.⁸⁵

The Seventh Circuit, on the other hand, noted, "[s]imply put, the law does not recognize an aborted fetus as a person."⁸⁶ In addition, the court recognized that, under the new fetal disposal provisions, (1) the woman retained the right to dispose of the aborted fetus, and (2) aborted fetuses could be cremated together without prior authorization, which is not the same treatment reserved for human remains.⁸⁷ Therefore, under rational basis review, the court found no rational basis for the state's interest in disposing of "human remains" humanely and with dignity.⁸⁸ The court declared the fetal remains provision of HEA 1337 to be unconstitutional.⁸⁹

Circuit Judge Manion concurred in the decision about the unconstitutionality of the ban on selective abortions but disagreed with the court's decision about the disposal of fetal remains. His partial concurrence, however, was critical of the court's reliance on *Roe* as some kind of "super-precedent."⁹⁰ Manion went on to state, "[t]hat today's outcome is compelled begs for the Supreme Court to reconsider *Roe* and *Casey*."⁹¹

Manion also argued for recognizing the dignity of an aborted fetus. Stating that if "[s]tates may value the dignity of an unborn child," states may still recognize the inherent dignity and humanity of the aborted child.⁹² He proposed

82. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r Ind. State Dep't of Health (Planned Parenthood of Ind. & Ky., Inc. 11)*, 265 F. Supp. 3d 859, 861 (S.D. Ind. 2017).

83. *Planned Parenthood of Ind. & Ky., Inc. 10*, 888 F.3d at 305.

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

85. *Id.* at 306. This reliance on precedent to establish unconstitutionality, challenged in the dissent, may be significant for future developments.

86. *Id.* at 308.

87. *Id.* at 309.

88. *Id.* at 309-10.

89. *Id.* at 310.

90. *Id.* at 311-12 (quoting Senate Judiciary Committee member Dianne Feinstein's characterization of *Roe v. Wade*).

91. *Id.* at 313.

92. *Id.* at 319.

that the fetal remains provision was within the police power of Indiana.⁹³

PPINK motioned for, and was initially granted, rehearing en banc on the district court decision on the fetal remains provision, and the decision of the Seventh Circuit was vacated.⁹⁴ However, one of the judges who voted for the rehearing subsequently recused himself, and the rehearing en banc was reversed, and the prior order vacated.⁹⁵ Chief Judge Wood, joined by Judges Rovner and Hamilton, concurred, in order to explain, first, why the request for a rehearing concentrated only on the fetal remains issue. Wood explained that, because of the Seventh Circuit's dependence on the precedent of *Casey* in its decision, PPINK recognized that a rehearing on the issue of the selective abortion ban would have been futile: only the Supreme Court would have had the power to overturn *Casey*.⁹⁶

Wood explained, however, that rehearing en banc on the fetal remains decision would have been “distorted” by the Seventh Circuit's incorrect reliance on the rational basis standard of review of the fetal remains part of the statute. Wood explained that the Seventh Circuit had not presented any evidence that the fetal remains provision could or could not present an undue burden to the woman who desired to abort, either pre- or post-abortion, either raising the cost of fetal disposal or creating psychological trauma that would make a woman forego an abortion.⁹⁷ Wood, therefore, stated that it would have been useless for the court to rehear the decision on the fetal remains provision if all the en banc court were able to say was that the incorrect standard of review was binding on them, but that things could have been different if the standard from *Casey* and *Whole Woman's Health* had been applied.⁹⁸

Judge Easterbrook, joined by Sykes, Barrett, and Brennan, dissented from the denial of rehearing en banc.⁹⁹ Although PPINK did not request rehearing for the selective abortion provision of the Indiana statute, Easterbrook peremptorily characterized that provision of the law as the “eugenics statute.”¹⁰⁰ He stated that *Casey* did not consider an anti-eugenics law. Although irrelevant to the question presented, Easterbrook continued, stating that “[u]sing abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statutes.”¹⁰¹

Easterbrook finally turned to the provision of the statute at hand, stating that because “X” is not a person, does not mean that “X” is beyond regulatory

93. *Id.* at 321.

94. *See* *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r Ind. State Dep't Health (Planned Parenthood of Ind. & Ky., Inc. 12)*, 727 Fed. Appx. 208 (7th Cir. 2018) (Mem.).

95. *See* *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r Ind. State Dep't Health (Planned Parenthood of Ind. & Ky., Inc. 13)*, 917 F.3d 532 (7th Cir. 2018).

96. *Id.* at 535.

97. *Id.* at 535-36.

98. *Id.* at 536.

99. *Id.*

100. *Id.*

101. *Id.*

authority, and gave examples of animal welfare statutory authority, specifically mentioning laws for humane treatment of dogs, cats, and gerbils.¹⁰² He supported the Seventh Circuit panel’s application of rational basis review to support their decision on the disposal of fetal remains. In the end, he accused the majority of the en banc court of “[k]icking the can down the road” when “we have reached the road’s end.”¹⁰³

Kristina Box, then Commissioner of the Indiana Department of Health, filed a petition for certiorari to the Supreme Court on October 12, 2018. The petition was originally scheduled for conference on December 19, 2018, but was rescheduled fourteen times until the petition was granted on May 28, 2019, but only for the provision of the Indiana law on disposal of fetal remains.¹⁰⁴

B. The Supreme Court Decision

The Supreme Court bifurcated the petition for certiorari and ruled only on the second question in the petition: whether the Seventh Circuit decision on disposal of fetal remains was invalid, even under the deferential standard of rational basis review.¹⁰⁵

The High Court reviewed the Seventh Circuit’s rationale in deciding to declare the fetal remains provision in HEA 1337 unconstitutional. However, the Court noted that prior decisions of the Court had acknowledged that the state has a legitimate interest in regulating disposal of aborted fetuses,¹⁰⁶ and therefore upheld the disposal of fetal remains provision in the Indiana law. The Court also noted that the Seventh Circuit never held that the disposal regulations posed an undue burden on a woman seeking an abortion.¹⁰⁷

The brief opinion of the Court noted that the Court expressed no opinion on the merits of the selective abortion question because the Seventh Circuit was the first circuit court to address this issue. The “ordinary practice” of the High Court, the majority noted, was to defer judgment until additional courts of appeal consider the same question.¹⁰⁸

Justice Sotomayor expressed her opinion that she would have denied the petition for certiorari as to both questions in the initial petition but provided no

102. *Id.* at 537-38.

103. *Id.* at 538. These kinds of comments by Judge Easterbrook are of the kind that caused Pamela Karlan to call Easterbrook a “loose cannon” in her oral arguments in the *Bostock* case. *See* Transcript of Oral Arguments, *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020) (No. 17-1618, No. 17-1623).

104. *Box v. Planned Parenthood of Indiana and Kentucky Inc.*, SCOTUSblog, <https://www.scotusblog.com/case-files/cases/box-v-planned-parenthood-of-indiana-and-kentucky-inc/> [https://perma.cc/8T2H-WAYB] (last visited Jan. 13, 2022).

105. *Planned Parenthood of Ind. & Ky., Inc. 9*, 139 S. Ct. 1780, 1780 (2019).

106. *Id.* at 1782, (citing *Akron v. Akron Ctr. Reproductive Health*, 462 U.S. 416, 452 n. 45 (1983)).

107. *Id.*

108. *Id.*

explanation.¹⁰⁹ Justice Ginsburg concurred in part but dissented in part.¹¹⁰ Ginsburg disagreed with the basis for the Court's reversal, the rational basis standard of review of the fetal disposal provision, stating that a correct standard of review may have restored the appellate court's judgment. Ginsburg would have applied a heightened standard of review involving an undue burden analysis. Ginsburg reiterated the opinion of Chief Judge Woods in denying the rehearing en banc, agreeing with Wood that simply taking a case to say the court is bound by a former standard of review, but that "everything might be different" under a new standard would be futile.¹¹¹ In typical Scalia fashion, Ginsburg stated she would have denied Indiana's petition in its entirety.¹¹²

Only Justice Thomas, perhaps prompted by Easterbrook's comments in the petition for rehearing en banc, in his concurrence dealt at length with the part of the Indiana law that the majority ignored: the selective abortion issue.¹¹³ Thomas's concurrence has prompted such a great deal of commentary that his observations and comments are treated separately below.

The decision of the Supreme Court after grant of certiorari did not end the case for PPINK. PPINK, as prevailing party even if only in the most partial sense, returned to Indiana district court to request attorneys' fees and costs.¹¹⁴ After some discussion of reducing the grant of fees by 50% for the partial nature of PPINK's successful ruling, the court awarded "reasonable" attorneys' fees and costs as requested, \$182,499.73.

IV. RELEVANCE OF SELECTIVE ABORTIONS TO THE EUGENICS MOVEMENT

A. Justice Thomas's Concurrence

Beginning his concurrence, Justice Thomas lauded Indiana's ban on selective abortion as promoting the state's compelling interest in "preventing abortion from becoming a tool of modern-day eugenics."¹¹⁵ Thomas's narrative continued with what he presented as the origin story of the fight for legal abortion, the birth-control movement of the early twentieth century.¹¹⁶ In particular, he focused on the work of Planned Parenthood founder Margaret Sanger, whom, he asserted, recognized the eugenic potential of her cause and argued that, "birth control . . . is really the greatest and most truly eugenic method' of 'human generation.'"¹¹⁷

Thomas conceded that Sanger was not referring to abortion in her comments, "at least not directly," but stated that "Sanger's arguments about the eugenic

109. *Id.*

110. *Id.* at 1793.

111. *Id.*

112. *Id.*

113. *Id.* at 1783.

114. *Id.* at 1780.

115. *Id.*

116. *Id.*

117. *Id.* at 1783-84.

value of birth control . . . apply with even greater force to abortion.”¹¹⁸ Thomas, therefore, reasoned that the motives of those who still support legal abortions may lay in eugenics.¹¹⁹

Thomas’s conclusion, expressed early in his concurrence was that “given the potential for abortion to become a tool of eugenic manipulation, the Court will soon need to confront the constitutionality of laws like Indiana’s.”¹²⁰ He catalogued the rise of the eugenics movement in America. By the 1920s, according to Thomas, eugenics became an “intellectual craze,” and found support among progressive, professionals, and the intellectual elite, especially at prominent universities, notably Harvard.¹²¹

Eugenics, Thomas continued, rapidly coalesced with those who supported the theory of White intellectual superiority to that of the Negro race. That coalescence, he contended, helped to precipitate the Immigration Act of 1924, which reduced immigration from outside Western and northern Europe, and led to race consciousness in marriage and reproductive decisions, including anti-miscegenation laws.¹²²

Thomas also noted how the Court supported forced sterilization of misfits and the “feeble-minded,” as in the *Buck v. Bell* decision, where Oliver Wendell Holmes notoriously asserted that “[t]hree generations of imbeciles are enough.”¹²³ However, Thomas noted, the rise of Naziism in the 1940s somewhat lessened America’s craze with the eugenics movement, but Thomas, nevertheless, pressed his argument that abortion is an “act rife with the potential for eugenic manipulation.”¹²⁴

In fact, later in his concurrence, Thomas posited that with the rise and reliability of prenatal screening tests and other technologies, “the individualized nature of abortion gives it more eugenic potential than birth control.”¹²⁵ Abortions for fetuses identified with Down syndrome occur at very high rates, as do abortions of female children, and the abortion rate among Black women is 3.5 times that of White women.¹²⁶

Thomas says Easterbrook was correct in his urging for en banc review in opposition to the Seventh Circuit’s denial: “*Casey* did not decide whether the Constitution requires states to allow eugenic abortions.”¹²⁷ Thomas’s conclusion was that the Court’s denial of certiorari to the part of the Indiana law banning selective abortions leaves the issue an open question, but that the denial should

118. *Id.* at 1784.

119. *Id.* This logic, however, failed to recognize the complex context in which Sanger existed within the eugenics movement.

120. *Id.*

121. *Id.* at 1785-86.

122. *Id.*

123. *Id.* at 1786 (citing 274 U.S. 200, 208 (1927)).

124. *Id.* at 1786-87.

125. *Id.* at 1790.

126. *Id.* at 1790-91.

127. *Id.* at 1792.

not be interpreted as agreement with the decisions below.¹²⁸ Thomas concluded his concurrence with this assessment:

Although the Court declines to wade into these issues today, we cannot avoid them forever. Having created the constitutional right to an abortion, this Court is dutybound to address its scope. In that regard, it is easy to understand why the district court and the Seventh Circuit looked to *Casey* to resolve a question it did not address. Where else could they turn? The Constitution itself is silent on abortion. With these observations, I join the opinion of the Court.¹²⁹

B. Critiquing Thomas's Concurrence

Thomas's concurrence was met with severe and widespread criticism for what commentators charged was a distortion of history.¹³⁰ Disability rights advocates also linked Thomas's concurrence with Justice Kavanaugh's former comments on supporting abortions for people with intellectual disabilities.¹³¹

As previously noted, in the early 1920s, eugenic sterilization laws received great support. In contrast, Sanger's birth-control movement struggled for support. Therefore, championing eugenics "made sense for a movement lacking popularity, powerful political allies, or elite intellectual credentials."¹³² As seen through the support of eugenics by such powerful leaders as Teddy Roosevelt — he called on Anglo-Saxon women to stop "race suicide" by having more children — eugenics was a cause with widespread support at the time.¹³³ As such, Sanger's view merely reflected the time and to identify her support as anything more than strategic was an oversimplification on Thomas's part.

Thomas also attempted to connect the eugenics movement to the population control movement of the 1950s to 1970s, and thus, connect both back to the modern abortion rights movement. According to Mary Ziegler, Thomas argued that eugenics ". . . lost popularity because of opposition to the Nazi movement (which openly endorsed compulsory sterilization) and because of the obvious problems with the science underlying eugenicists work. Population-control

128. *Id.*

129. *Id.* at 1793.

130. Eli Rosenberg, *Clarence Thomas Tried to Link Abortion to Eugenics. Seven Historians Told the Post He's Wrong*, WASH. POST (May 30, 2019), <https://www.washingtonpost.com/history/2019/05/31/clarence-thomas-tried-link-abortion-eugenics-seven-historians-told-post-hes-wrong/> [<https://perma.cc/455B-7MQR>].

131. See Samuel R. Bagenstos, *Disability and Reproductive Justice*, 14 HARV. L. & POL'Y REV. 273 (2020). Bagenstos reported that during Kavanaugh's nomination for the Supreme Court, disability advocates drew attention to then-Judge Kavanaugh's support for government decisions requiring intellectually disabled individuals to have abortions. *Id.* at 275.

132. Mary Ziegler, *Bad Effects: The Misuses of History in Box v. Planned Parenthood*, 105 CORNELL L. REV. 165, 198 (2020).

133. *Id.* at 198.

arguments in his telling, simply replaced eugenic rhetoric that had become taboo.”¹³⁴

Like the origin of the eugenics movement, though, the motivations for the population control movement were far more nuanced. While some who joined the movement harbored eugenic intentions, such as Dixie Cup Company founder Hugh Moore,¹³⁵ others joined for a variety of reasons. For example, Representative George H.W. Bush of Texas viewed the movement as an extension of Cold War politics and concluded that population control would stop the growth of Communism.¹³⁶ Indeed, on college campuses, groups of Zero Population Growth Inc. formed which framed population control as a method for environmental advocacy or advancing women’s liberation.¹³⁷ Equating eugenics in the United States with such topics is an oversimplification.

In *Roe* the High Court’s narrative asserted women-protective health reasons to show that previous nineteenth-century abortion bans were no longer substantial.¹³⁸ The *Roe* court affirmed that physicians had previously led campaigns to criminalize abortion out of fear of the safety of the procedure.¹³⁹ Because of this, throughout the 1970s, medical organizations weakened or abandoned their abortion opposition. This included the American Medical Association and American Public Health Association.¹⁴⁰ However, Ziegler noted, Thomas argued that “motives darker than we believed” underlaid the Court’s decision on abortion.¹⁴¹

V. WHETHER INDIANA’S ABORTION RESTRICTIONS CHALLENGE *ROE* AND ITS PROGENY

Prenatal genetic screening makes it possible to diagnose many diseases in the earliest stages of pregnancy.¹⁴² Thousands of human diseases have genetic components which may be detected. Depending on the condition, this may range from a defect in a single gene to many genes. Receiving results that an unborn child has a condition can be a deeply personal and heartbreaking experience for a mother. Thomas’s argument oversimplified the idea of genetic testing to say that “with today’s prenatal screening tests and other technologies, abortion can easily be used to eliminate children with unwanted characteristics.”¹⁴³

134. *Id.*

135. *Id.*

136. *Id.* at 199.

137. *Id.*

138. *Roe v. Wade*, 410 U.S. 113, 150 (1973).

139. *Id.* at 146-49.

140. Ziegler, *supra* note 132, at 169.

141. *Id.* at 201.

142. *Prenatal Genetic Screening Tests: Frequently Asked Questions*, AM. C. OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/womens-health/faqs/prenatal-genetic-screening-tests> [https://perma.cc/74VN-NHVN] (last updated Oct. 2020).

143. *Planned Parenthood of Ind. & Ky., Inc.* 9, 139 S. Ct. 1780, 1790 (2019).

Abortion is intimately and inescapably tied to the concept of a woman's bodily privacy. Even the *Roe* decision itself mentioned the strict constructionist problem inherent in the concept of privacy, stating "[t]he Constitution does not explicitly mention any right of privacy. In a line of decisions, however, the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."¹⁴⁴

In *Eisenstadt v. Baird*, the Court decided that the right to privacy extended to procreative decision making by the married and unmarried.¹⁴⁵ In this case, William Baird gave a female student a contraceptive following a lecture on birth control.¹⁴⁶ Massachusetts charged Baird with a felony under a law which was designed to prevent premarital sex.¹⁴⁷ The law banned distribution of contraceptives to unmarried men and women; only married couples could obtain contraceptives and only from doctors or pharmacists.¹⁴⁸ The Court decided that the Fourteenth Amendment right to equal protection applied to both married and unmarried individuals' ability to access contraceptives.¹⁴⁹ As such, individuals have the constitutional right to privacy in decisions regarding their procreative choice and contraception.¹⁵⁰

The *Roe* majority asserted the right to privacy "under the Due Process Clause of the Fourteenth Amendment's concept of liberty," stating that such clause "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."¹⁵¹ The Seventh Circuit added that "[n]othing in the Fourteenth Amendment or Supreme Court precedent allows the State to invade this privacy realm to examine the underlying basis for a woman's decision to terminate her pregnancy prior to viability."¹⁵²

Eugenics strives to better the entire human race.¹⁵³ As John Harding wrote a generation ago, "[t]he promise of genetic science, particularly human genetic engineering, appeals to that in humans which strives for perfection – perfection in oneself, one's life, one's children¹⁵⁴. . . [w]ith each new discovery of genetic links to disease, however, the likelihood increases that more eugenic programs will be implemented."¹⁵⁵

Eugenics is a population concept. Thomas's concurrence discussing Indiana's selective abortion statute overlooks the fact that every state which permits race,

144. *Roe*, 410 U.S. at 152 (citations omitted).

145. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

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

152. *Planned Parenthood of Ind. & Ky., Inc. 10*, 888 F.3d 300, 307 (7th Cir. 2018).

153. *See John R. Harding, Jr., Beyond Abortion: Human Genetics and the New Eugenics*, 18 PEPP. L. REV. 471 (1991).

154. *Id.* at 471.

155. *Id.* at 485.

or disability selective abortion, also leaves prospective parent(s) with the ability to select offspring traits of their choice.¹⁵⁶ Individuals are free to discard embryos that test positive for disease or even to set aside sperm and egg donations of different ethnicity. If the selective abortion provision of the disputed Indiana law sought to “control the population and improve its quality,”¹⁵⁷ as Thomas implies, then genetic screening should not allow non-eugenic-related choices. Indeed, the ultimate ability of choice distinguishes genetic testing from any connection to eugenic acts.

The Supreme Court declined to grant certiorari to the major question in *Planned Parenthood v. Commissioner of the Indiana State Department of Health*, the selective abortion based on race, sex, and disability provision in HEA 1337.¹⁵⁸ The Court explained that at the time of their consideration of the provision, no other circuit courts had considered the issue.¹⁵⁹ While the Seventh Circuit permanently enjoined the ban on selective abortion, the fact that the Court did not decide on the constitutionality of the ban leaves opportunity for such a ban to reappear in other jurisdictions. And, indeed, it already has. According to the Charlotte Lozier Institute, at least fifteen states have enacted bans on performance of abortions based on the sex, race, and/or the presence of a genetic abnormality of the unborn child.¹⁶⁰

The Lozier Institute reported that since the Supreme Court declined to rule on the Indiana selective abortion ban, the Sixth Circuit has affirmed a lower court’s injunction of an Ohio ban on abortions of fetuses screened positive for Down syndrome. Further, an injunction against an Ohio law banning abortions based on sex, race, or Down syndrome is on appeal.¹⁶¹ Selective abortion bans have also been contested in the Eighth Circuit for bans enacted by Arkansas and Missouri.¹⁶²

Indiana case law points out the persistence of the factions that would diminish women’s rights to abortion and completely overturn *Roe*. And Indiana’s efforts are not exhausted. The grant of certiorari for considering Indiana’s law requiring the parental notification for minors seeking an abortion – the second petition, after remand – is still pending. The Court scheduled a conference for June 24, 2021 but announced no action after that date.

Similarly, in the “no action” category, the failure of the Court to consider and rule on the selective abortion provision of HEA 1337 gives little information on

156. See *Planned Parenthood of Ind. & Ky., Inc.* 9, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring).

157. *Id.* at 1787.

158. See *Planned Parenthood of Ind. & Ky., Inc.* 10, 888 F.3d. 300 (7th Cir. 2018).

159. *Id.*

160. Mary E. Hamed, *Abortion Cases in the Higher Federal Courts*, CHARLOTTE LOZIER INST. 1, 4 (July 2019), https://s27589.pcdn.co/wp-content/uploads/2019/07/Abortion-Cases-in-the-Higher-Federal-Courts-On-Point-33_2.pdf [<https://perma.cc/9J3T-MYS3>].

161. *Id.* at 5-6.

162. *Id.* at 4-5.

the leaning of the Court.¹⁶³ However, whether the ban on selective and discriminatory abortions is, or is not, fatal for *Roe* and *Casey* is untested.

In his commentary, Michael Stokes Paulsen uses the example of workplace laws for hiring and firing.¹⁶⁴ Hiring and firing are both legal, but not for all reasons.¹⁶⁵ In a similar way, Paulsen argues, a ban on selective abortions is not a ban (or even an “undue burden” as in *Casey*) on all abortions, but only on abortions *for specific reasons*.¹⁶⁶ Therefore, *Roe* and *Casey* can survive the ban.

Another “save” for *Roe* and *Casey*, according to Paulsen, is to ban selective abortions for their social utility.¹⁶⁷ Selective abortions of females are hard to countenance when the purpose of making abortions legal is to further female gender equality.¹⁶⁸ The state has a compelling interest in eliminating sex bias in society by preventing the abortion of a fetus simply because the fetus is female; and likewise has a similar compelling interest in promoting racial equality.¹⁶⁹ These arguments, according to Paulsen, allow a ban on selective abortions to co-exist with the precedents of *Roe* and *Casey*.¹⁷⁰

However, an even greater challenge to the continued viability of the *Roe* and *Casey* decisions is the Fifth Circuit’s *Jackson Women’s Health Organization v. Dobbs*, decided by the Fifth Circuit,¹⁷¹ for which the Supreme High Court granted the petition for certiorari on May 17, 2021. The question presented in the Fifth Circuit was, “Is Mississippi’s law banning nearly all abortions after 15 weeks’ gestational age unconstitutional?”¹⁷² The question for certiorari was translated to, “Whether all pre-viability prohibitions on elective abortions are unconstitutional?”¹⁷³ Contrary to the Indiana statutory implications, this phrasing of the question for the Court is a frontal assault on *Roe* and its progeny.

While the frontal attack in *Dobbs* may be gaining the most attention, another controversy is even more insidious, and demonstrates the inaction of the Supreme Court most vividly.¹⁷⁴ On May 26, 2021, Texas adopted S.B. 8, and Governor

163. See *Planned Parenthood of Ind. & Ky., Inc. 10*, 888 F.3d. at 300.

164. Michael Stokes Paulsen, *Abortion as an Instrument of Eugenics*, 134 HARV. L. REV. 415, 428 (2021).

165. *Id.*

166. *Id.* at 428-29.

167. *Id.*

168. *Id.*

169. *Id.* at 429-30.

170. *Id.*

171. See *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019).

172. *Id.*

173. *Dobbs v. Jackson Women’s Health Organization*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/dobbs-v-jackson-womens-health-organization> [<https://perma.cc/DFK5-EK2F>] (last visited Jan. 16, 2022). The petition for certiorari was filed on June 15, 2020. The case was distributed for conference on September 2, 2020 but rescheduled for conference twenty-one times before grant of certiorari. *Id.*

174. Mary Ziegler, *Supreme Indifference: What the Texas Case Signals About the Court’s Treatment of Abortion*, SCOTUSBLOG (Sept. 1, 2021, 3:28 PM), <https://www.scotusblog.com/>

Greg Abbott signed the bill into law.¹⁷⁵ The law bans all abortions, even those due to rape, incest, or the mother's health, after a fetal heartbeat is detectable, usually at about the sixth week of pregnancy, a time at which many women might not even know they were pregnant. The new law criminalized abortion providers who violated the law but removed the responsibility of the state to enforce the law.¹⁷⁶ Private individuals were tasked with responsibility to sue the abortion providers, with the incentive of raking in at least \$10,000 for each conviction.¹⁷⁷

Texas abortion providers sought to block the law from taking effect by an emergency application to the Supreme Court to act. The Supreme Court allowed the emergency application to expire, and on the day following the expiration, September 1, 2021, the Court issued a brief order denying the application.¹⁷⁸ The Court, with one exception, reacted along party lines in a 5-4 decision, with Chief Justice Roberts joining Justices Breyer, Kagan, and Sotomayor in dissent. Roberts emphasized that the action of the Court did not mean that S.B. 8 was constitutional, but that reassurance was surely little relief in the immediate present.¹⁷⁹

What the High Court will rule in the Fifth Circuit's *Jackson Women's Health Organization v. Dobbs* case remains to be seen. However, issues of standing and other procedural concerns may be effective in S.B. 8 litigation, whatever the impact for or against the existing Supreme Court precedents. The nine individuals now sitting in the "High Chairs" of the Supreme Court must make some difficult decisions, and, hopefully, those decisions will be made not along party lines, but according to the Constitution and existing precedent.

2021/09/supreme-indifference-what-the-texas-case-signals-about-the-courts-treatment-of-abortion/ [https://perma.cc/5VHB-UWDY].

175. Letter from Gregory S. Davidson, Exec. Clerk Gov., Tex. Gov. Greg Abbot, to Hon. John B. Scott, Sec. State (Nov. 8, 2021), https://gov.texas.gov/uploads/files/press/TRANSMITTAL_2021-11-08_legislation_LETTER_IMAGE.pdf [https://perma.cc/Q2TW-3KHH].

176. Amy Howe, Supreme Court Leaves Texas Abortion Ban in Place, SCOTUSBLOG (Sept. 2, 2021, 2:26 AM), <https://www.scotusblog.com/2021/09/supreme-court-leaves-texas-abortion-ban-in-place/> [https://perma.cc/NF3G-24HH].

177. *Id.*

178. Katie Buehler, *Supreme Court Doesn't Stop Texas "Heartbeat" Abortion Bill*, LAW 360 (Sept. 1, 2021, 1:00 AM), <https://www.law360.com/articles/1417596/supreme-court-doesn-t-stop-texas-heartbeat-abortion-bill> [https://perma.cc/6MWT-B9J2].

179. *Id.*