

NOTE

HER FUNDAMENTAL RIGHT TO PROCREATE: THE UNCONSTITUTIONALITY OF ABORTION BANS

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INTRODUCTION

As she was wheeled into surgery, Amber Thurman said to her mother, “Promise me you’ll take care of my son.”¹ She was suffering a rare complication from the abortion pill that she was legally prescribed at nine weeks of pregnancy.² Not all of the fetal tissue had been expelled, and, as a result, she needed a dilation and curettage procedure routinely used in miscarriages and nonviable pregnancies to remove the remaining tissue.³

But when she arrived at Piedmont Henry Hospital in Stockbridge, Georgia, physicians refused to perform the abortion. Instead, they spent the next nineteen hours worrying about their criminal liability in performing such a procedure after the state’s abortion ban took effect, which only allowed abortions after six weeks of pregnancy in situations where the mother’s health or life necessitated one.⁴

Messiah, Amber’s son, was only six years old at the time. But one day, he will be older. He will grow up, and he will learn what ensued in the hours leading up to his mother finally receiving the surgery she so desperately needed. He will learn that his mother arrived at the hospital after experiencing vaginal bleeding, vomiting blood, and falling unconscious. He will learn that rather than perform the necessary abortion procedure, doctors merely gave her antibiotics. He will learn that even when his mother developed acute severe sepsis, her doctors would not operate. Instead, they let the hours tick by steadily, while his own mother’s breathing labored so unsteadily. He will learn that after those long nineteen hours, doctors finally began to operate and remove not only the remaining fetal tissue, but her uterus as well. He would never have any siblings—not because his mother had been forcefully

¹ Kavitha Surana, *Abortion Bans Have Delayed Emergency Medical Care. In Georgia, Experts Say This Mother’s Death Was Preventable.*, PROPUBLICA (Sept. 16, 2024), <https://www.propublica.org/article/georgia-abortion-ban-amber-thurman-death> [<https://perma.cc/RYH4-DY98>].

² The Food and Drug Administration reports that the abortion pill mifepristone has been associated with only thirty-six deaths from 2000 to 2024. U.S. FOOD & DRUG ADMIN., MIFEPRISTONE U.S. POST-MARKETING ADVERSE EVENTS SUMMARY THROUGH 12/31/2024 (2024).

³ See Surana, *supra* note 1.

⁴ See *Policy Tracker: Exceptions to State Abortion Bans and Early Gestational Limits*, KFF (Jan. 6, 2025) [hereinafter *Policy Tracker*], <https://www.kff.org/womens-health-policy/dashboard/exceptions-in-state-abortion-bans-and-early-gestational-limits/> [<https://perma.cc/Y65L-6Q6L>].

sterilized due to receiving delayed treatment, but because her heart stopped during the operation.⁵

In 2022, the Supreme Court in *Dobbs v. Jackson Women's Health Organization* overruled *Roe v. Wade* and held that there is no longer a constitutional right to abortion.⁶ As a result, states immediately began signing into law draconian abortion bans, greatly restricting women's access to medical treatment. Amber Thurman's death was the first deemed preventable under these modern-day abortion bans.⁷ A second Trump presidency threatens reproductive rights and maternal health care in ways that may reverberate for decades to come.⁸ It is thus more important now than ever to understand how practitioners may challenge the legality of state abortion bans even in the aftermath of *Dobbs*. The following analysis aims to identify an overlooked legal strategy for reproductive justice and the dismantling of state abortion bans that threaten the fertility and lives of women across the United States.

This Note argues that state abortion bans with exceptions only for circumstances when the mother's life or health is at risk violate the substantive due process right to procreate, as articulated in *Skinner v. Oklahoma ex rel. Williamson*.⁹ These stringent abortion bans chill physicians from acting for fear of facing criminal liability.¹⁰ As a result, physicians delay performing necessary abortions, leading women to receive care too late and suffer impaired fertility, sterilization, or even death.¹¹

In Part I, this Note will examine the evolving law of forced sterilization. In *Buck v. Bell*, the Supreme Court allowed for the sterilization of a woman who was deemed to be "feeble minded."¹² *Buck* serves as a reminder of the United States' history of eugenics-based sterilizations and just how recently

⁵ See Surana, *supra* note 1.

⁶ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022).

⁷ See Surana, *supra* note 1.

⁸ See Alison Durkee, *Here's How Trump's Win—And a GOP Senate—Could Impact the Supreme Court*, FORBES (Nov. 6, 2024), <https://www.forbes.com/sites/alisondurkee/2024/11/06/heres-how-trumps-win-and-a-gop-senate-could-impact-the-supreme-court/> [<https://perma.cc/FMD5-KQAN>] (describing the impact a second Trump presidency may have on the political landscape of the Supreme Court).

⁹ 316 U.S. 535, 536 (1942); see also *Dobbs*, 142 S. Ct. at 2257.

¹⁰ See Stacy Weiner, *Emergency Doctors Grapple with Abortion Bans*, AAMC (Oct. 22, 2024), <https://www.aamc.org/news/emergency-doctors-grapple-abortion-bans> [<https://perma.cc/UFF5-F7YV>].

¹¹ See *infra* subpart I.E.

¹² 274 U.S. 200, 205, 207 (1927).

the Court endorsed forced sterilization of those women deemed unworthy. Years later, however, the dangers of eugenics played out on the world stage in Nazi Germany,¹³ leading the Court to strike down a criminal, forced-sterilization law and constitutionally enshrine the right to procreate in *Skinner*.¹⁴

Next, this Note will discuss different types of abortion bans, using the following terminology for clarity. Life-exception abortion bans allow for an abortion only when one is necessary to save the life of the mother. Health-exception abortion bans allow for abortion only when one is necessary to either save the life of the mother or to preserve the health of the mother. The terminology used throughout this Note does not account for other exceptions that state abortion bans may or may not have. For example, states with life-exception or health-exception abortion bans may have other exceptions as well, including for instances of rape, incest, and/or fatal fetal anomalies.¹⁵ Then, this Note will present evidence of forced sterilizations under these modern-day abortion bans, particularly discussing how the threat of criminal liability leads physicians to delay medically necessary abortions. This delay results in complications that harm a woman's reproductive organs, requiring removal of part or all of her fallopian tubes, ovaries, and/or uterus—indelibly compromising her ability to procreate.¹⁶

Part II will explain how the substantive due process right to procreate as upheld in *Skinner* may now serve as the legal sword to be wielded against modern-day abortion bans. This fundamental right to procreate is incidentally burdened by these abortion bans and triggers strict scrutiny as the method of judicial review.¹⁷ In order to be constitutional, the state must prove that (1) there is a compelling governmental interest in an abortion ban and (2) the ban is narrowly tailored to serve that compelling governmental interest.¹⁸ While the government may be able to prove that there is a compelling governmental

¹³ See Daniel Frost, *Protection Against Eugenics: A Comparison of Two Jurisprudences*, 42 J. SUP. CT. HIST. 275, 292 (2017).

¹⁴ 316 U.S. at 541.

¹⁵ Those non-life and non-health exceptions must be examined on a state-by-state basis and may present other legal avenues of challenging abortion bans.

¹⁶ See *infra* subpart I.E.

¹⁷ See *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). See generally Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996) (discussing the method of judicial review when fundamental rights are incidentally burdened).

¹⁸ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (“The Fourteenth Amendment ‘forbids the government to infringe . . . ‘fundamental’

interest,¹⁹ the government will likely fail to show that a life-exception or health-exception abortion ban is narrowly tailored. As a result, the Court should strike down all life-exception and health-exception abortion bans as unconstitutional.

I

HOW DID WE GET HERE?

A. Eugenics in the Early Twentieth Century

At the beginning of the twentieth century, eugenics-based laws proliferated across United States jurisdictions. Francis Galton, the cousin of Charles Darwin, first coined the term “eugenics” and referred to the theory as a method of selective breeding that had the potential to improve the human race.²⁰ Eugenics became widely popular, with proponents including Theodore Roosevelt, Winston Churchill, and Alexander Graham Bell.²¹ Sterilization laws in particular targeted those who the state thought would produce undesirable offspring and whose physical or mental health conditions would not improve.²²

Virginia was one of such states with a sterilization statute allowing for the sterilization of those institutionalized patients with “hereditary forms” of certain enumerated illnesses, including “feeble-mindedness.”²³ Carrie Buck was subject to sterilization under this law, as she was institutionalized at seventeen when she became pregnant while in foster care and was deemed to be feeble-minded.²⁴ When Buck’s case reached the

liberty interests *at all* . . . unless the infringement is narrowly tailored to serve a compelling state interest.”).

¹⁹ Given the Court’s concern, as expressed in *Dobbs*, with drawing an arbitrary line at which point protecting the fetus becomes a compelling governmental interest, this Note assumes the current Court will hold that state abortion bans advance a compelling governmental interest. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2268 (2022) (“If, as *Roe* held, a State’s interest in protecting prenatal life is compelling ‘after viability,’ why isn’t that interest ‘equally compelling before viability?’) (citation omitted).

²⁰ See Daniel J. Kevles, *The History of Eugenics*, 32 ISSUES SCI. & TECH. 45, 45 (2016).

²¹ See Ana Romero-Bosch, *Lessons in Legal History—Eugenics & Genetics*, 11 MICH. ST. U. J. MED. & L. 89, 98 (2007); Brian H. Greenwald, *The Real “Toll” of A.G. Bell: Lessons About Eugenics*, 9 SIGN LANGUAGE STUD. 258, 259 (2009).

²² See Frances Oswald, *Eugenical Sterilization in the United States*, 36 AM. J. SOCIO. 65, 68 (1930).

²³ Virginia Eugenical Sterilization Act of 1924, ch. 394, § 1, 1924 Va. Acts 569, 569 (repealed 1979).

²⁴ See PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL 103 (updated ed. 2022).

Supreme Court, the Justices provided her with no relief. The Court upheld the sterilization law in an opinion marked by its misogynistic and ableist rhetoric. Finding that both Buck's biological mother and daughter were also "feeble minded," Justice Holmes, writing for the Court, stated that "instead of waiting to execute degenerate offspring for crime," it would be better to "prevent those who are manifestly unfit from continuing their kind."²⁵ Holmes closed by noting that in the case of Buck's family, "[t]hree generations of imbeciles are enough."²⁶

B. Background on Substantive Due Process

During the early twentieth century, the Court was also navigating whether certain fundamental rights should be constitutionally protected and, if so, what the constitutional basis for such rights should be. In order to understand what later would become the fundamental right to procreate, it is necessary to understand the development of the constitutional legal theory that the right is rooted in—substantive due process.

In *Lochner v. New York*, the Court struck down a state statute that prescribed the maximum number of hours an employee of a bakery could work.²⁷ In doing so, the Court held that the Due Process Clause of the Fourteenth Amendment protected an individual's right to contract.²⁸ This great display of judicial activism would echo decades past this fateful decision and manifest in a distrust of the Court's power. So infamous is this case that *Lochnerism* has become a pejorative used to describe judicial overreach by striking legislation and supplanting the legislature's policy choices with the Court's own preferences.²⁹

Lochnerism met its end with the birth of the New Deal during the Great Depression. President Franklin Delano Roosevelt, looking to implement his New Deal policies, needed the Court to restrain itself and end its practices of striking down economic regulations as unconstitutional violations of the Due Process Clause.³⁰ As a way of achieving this, Roosevelt threatened to pack the Court with additional Justices during

²⁵ *Buck v. Bell*, 274 U.S. 200, 205, 207 (1927).

²⁶ *Id.* at 207.

²⁷ 198 U.S. 45, 68–69 (1905) (Harlan, J., dissenting).

²⁸ *See id.* at 53 (majority opinion).

²⁹ *See* HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 4 (1993).

³⁰ *See* William R. Musgrove, *Substantive Due Process: A History of Liberty in the Due Process Clause*, 2 U. ST. THOMAS J.L. & PUB. POL'Y 125, 129 n.32 (2008).

his famous Fireside Chats.³¹ In response to these public and political pressures,³² the Court's decision in *West Coast Hotel Co. v. Parrish* furloughed the use of substantive due process as a means of striking down democratically enacted legislation and rejected its counter-majoritarian, Lochnerist past.³³ But this furlough was just that, a temporary hold on using substantive due process. Fundamental rights were still upheld in the interim, as is best illustrated by *Skinner v. Oklahoma ex rel. Williamson*.

C. The Fundamental Right to Procreate

In 1942, fifteen years after *Buck v. Bell*, Jack Skinner came before the Supreme Court after having been convicted under Oklahoma's Habitual Criminal Sterilization Act, which allowed for the forced sterilization of habitual criminals who had committed two or more felonies of "moral turpitude."³⁴ The sterilization was rooted in eugenics, as it was a means of preventing the proliferation of "socially undesirable offspring."³⁵ By this time, the nation was at war with Nazi Germany, and the evils of eugenics had become apparent.³⁶ So, the Court was faced with a conundrum: constitutionally bless a eugenics-based law once again or uphold an unwritten, substantive due process right to procreate at the risk of being labeled Lochnerist.

The Court found a third way. Under the law at issue, a person convicted of embezzlement three times would not be subject to forced sterilization, while a person convicted of

³¹ See Radio Address of the President (Mar. 9, 1937) (transcript on file with the Franklin D. Roosevelt Presidential Library and Museum). President Roosevelt explained the two main purposes of this court-packing scheme: increasing the efficiency of the administration of justice and allowing a younger generation of Justices to make social and economic decisions, which would prevent the "hardening of judicial arteries." See *id.* This hardening can be interpreted as the judiciary's obstinance in upholding New Deal legislation.

³² See Davie E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 *Geo. L.J.* 1, 51 (2003).

³³ 300 U.S. 379, 391–93 (1937); see Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 *FORDHAM L. REV.* 459, 463 (2001); see also Cass R. Sunstein, *Lochner's Legacy*, 87 *COLUM. L. REV.* 873, 880 (1987).

³⁴ See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 536–37 (1942).

³⁵ *Id.* at 538.

³⁶ See Frost, *supra* note 13, at 292. Jack Skinner's attorneys explicitly characterized the Oklahoma statute as a punishment made "under the specious guise of eugenics" and argued for the Court to strike down such a law rooted in debunked criminologist theory. See Brief of Petitioner at 29, *Skinner*, 316 U.S. 535 (No. 782).

larceny of the same monetary value three times was subject to forced sterilization, as was true for Skinner.³⁷ Finding that this treatment was unequal, the Court invalidated the statute as a violation of the right to procreate under the Equal Protection Clause, and the statute was held unconstitutional while entirely avoiding substantive due process as the legal rationale.³⁸ In other words, the right to procreate could not be interfered with in a discriminatory way. In reaching this decision, Justice Douglas emphasized the insidiousness of forced sterilizations, stating that “[t]he power to sterilize, if exercised, may have subtle, far-reaching and devastating effects.”³⁹ However, the right to procreate has since been regarded by the Court as a fundamental right under substantive due process and will be understood as such throughout this Note.⁴⁰

The Court’s decision in *Skinner* presents the question—has *Buck v. Bell* been overruled? The *Skinner* Court distinguished *Buck*.⁴¹ Justice Jackson stated that Buck’s forced sterilization was permissible because of the generational depth of imbecility and inheritability of her undesirable characteristic, whereas the sterilization of Skinner was based on a eugenics scheme that only “vaguely identified” his undesirable characteristic and which was not yet known to be inheritable.⁴² Petitioner’s attorneys in *Skinner* too stated that the statute in *Buck* “provided for an intelligent and scientific inquiry to determine whether or not the defendant could in fact transmit to offspring mental or physical characteristics imposing unnecessary burdens upon society.”⁴³

While some legal scholars have contended that *Buck* was effectively overruled by *Skinner*,⁴⁴ this is simply not the case. As recent as 2001, *Buck* was cited as a valid authority by the Eighth Circuit for the proposition that “involuntary sterilization is not always unconstitutional.”⁴⁵ Therefore, when presented

³⁷ See *Skinner*, 316 U.S. at 538–39.

³⁸ See *id.* at 538; Lash *supra* note 33, at 498–99.

³⁹ *Skinner*, 316 U.S. at 541.

⁴⁰ See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 664–65 (2015); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2257 (2022).

⁴¹ See *Skinner*, 316 U.S. at 544 (Stone, C.J., concurring) (citing *Buck v. Bell*, 274 U.S. 200 (1927)); *id.* at 542 (majority opinion).

⁴² *Id.* at 546 (Jackson, J., concurring) (citing *Buck*, 274 U.S. 200).

⁴³ Brief of Petitioner, *supra* note 36, at 14.

⁴⁴ Cf. G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 407 (1993) (“Over the years the notoriety of *Buck v. Bell* has increased, as the Supreme Court has distinguished the case out of existence . . .”).

⁴⁵ *Vaughn v. Ruoff*, 253 F.3d 1124, 1129 (8th Cir. 2001).

with the opportunity, the Supreme Court should explicitly overrule *Buck* in order to set the precedent that forced sterilizations are unconstitutional and inconsonant with the fundamental right to procreate as upheld in *Skinner*.

D. Current Abortion Law

Since *Skinner*, the Court has used substantive due process as the constitutional hook on which to hang many unenumerated rights.⁴⁶ In 2022, the Court decided in *Dobbs v. Jackson Women’s Health Organization* to overrule the fundamental right to abortion that was established through *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Roe v. Wade*.⁴⁷ But *Dobbs* only unravels the right to an abortion and leaves other fundamental rights under substantive due process constitutionally enshrined.⁴⁸ In other words, the fundamental right to procreate survives the scythe of *Dobbs*.⁴⁹ Certain members of the current Court have expressed skepticism, or outright denial, of substantive due process.⁵⁰ However, this Note assumes that the fundamental right to procreate will remain good law under substantive due process, as is in line with the current Court’s jurisprudence.⁵¹

1. Life-Exception Abortion Bans

To reiterate, life-exception abortion bans only have exceptions to allow for abortion when the life of the mother is at risk. Currently, six states have such laws.⁵² Life exceptions are articulated in various ways. For example, the Arkansas criminal statute states that physicians are prohibited from performing abortions “except to save the life of a pregnant woman.”⁵³

⁴⁶ See, e.g., *Roe v. Wade*, 410 U.S. 113, 164 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015).

⁴⁷ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

⁴⁸ See *id.*; see also *id.* at 2309 (Kavanaugh, J., concurring).

⁴⁹ See *id.* at 2257, 2268 (majority opinion).

⁵⁰ See, e.g., *id.* at 2301 (Thomas, J., concurring).

⁵¹ See *id.* at 2268 (majority opinion) (citing fundamental rights under substantive due process). For more on the justifications for substantive due process, see *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965).

⁵² ARK. CODE ANN. § 5-61-304 (2024); IDAHO CODE § 18-622 (2024); MISS. CODE ANN. § 41-41-45 (2024); OKLA. STAT. tit. 21, § 861 (2024); S.D. CODIFIED LAWS § 22-17-5.1 (2024); TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West, Westlaw through legislation effective July 1, 2025).

⁵³ § 5-61-304.

However, Texas's criminal statute proscribes abortion except when necessary due to "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function."⁵⁴ Despite this language alluding to an exception when the mother's health is at risk, namely when she faces substantial impairment of a major bodily function, this criminal statute is generally understood to be a life-exception abortion ban.⁵⁵ The Texas Supreme Court has also foreclosed the possibility of the statute being a health-exception abortion ban.⁵⁶ Facially these life-exception abortion bans do not describe in detail what circumstances qualify as falling within the exception and just how close a woman must come to death's door before a physician may lawfully act.

2. Health-Exception Abortion Bans

Meanwhile, as of June 2024, fourteen states have health-exception abortion bans.⁵⁷ This Note will focus on health exceptions as classified by the Kaiser Family Foundation.⁵⁸ Classification A will refer to health exceptions defined as when the woman faces "serious risk of substantial and irreversible

⁵⁴ HEALTH & SAFETY § 170A.002(b)(2).

⁵⁵ See *Policy Tracker*, *supra* note 4. However, other sources classify the Texas criminal statute as having a life-exception and a "severely compromised" health exception. See *State Facts About Abortion: Texas*, GUTTMACHER INST. (2022), <https://www.guttmacher.org/sites/default/files/factsheet/sfaa-tx.pdf> [<https://perma.cc/3JCA-UQ6C>].

⁵⁶ In *State v. Zurawski*, the Texas Supreme Court explained that in order for a patient to have a qualifying life-threatening physical condition, "the life-threatening physical condition must 'place[] the female at risk of death or pose[] a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced.'" 690 S.W.3d 644, 664 (Tex. 2024) (alterations in original) (quoting HEALTH & SAFETY § 170A.002(b)(2)). Any risk of substantial impairment of a major bodily function is therefore only assessed once the physician has already determined that the patient faces a life-threatening condition. Therefore, Texas has a life-exception abortion ban.

⁵⁷ See Mabel Felix, Laurie Sobel & Alina Salganicoff, *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services*, KFF (June 6, 2024), <https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services/> [<https://perma.cc/Q8DW-NY77>].

⁵⁸ *Id.* Though not comprehensive of the language used in every state's health-exception abortion ban, these classifications provide a broad perspective on how statutory language may differ. Practitioners should use these classifications as a roadmap in interpreting their own state's health exceptions and the degree to which it is narrowly tailored.

impairment of a major bodily function.”⁵⁹ Classification B will refer to health exceptions defined as when the woman faces “serious *physical* risk of substantial impairment of a major bodily function.”⁶⁰ Classification C will refer to health exceptions defined as situations in which a mother requires an abortion “to *prevent* substantial and *irreversible physical* impairment of a major bodily function.”⁶¹ Classification D will refer to health exceptions defined as situations in which a mother requires an abortion “to prevent serious, permanent impairment of a life-sustaining organ.”⁶² Finally, Classification E will refer to health exceptions defined more broadly as “to prevent any serious health risk.”⁶³

E. Forced Sterilizations Under Abortion Bans

Sterilization is the process by which a person is made unable to reproduce.⁶⁴ This process is considered permanent, though this is partially dependent on the procedure used.⁶⁵ Fertility is a closely related concept that is defined by one’s ability to conceive children,⁶⁶ or, in other words, one’s ability to procreate. Because quantitative evidence of sterilization due to abortion bans does not yet exist, individual testimony provides great insight into how abortion bans have harmed women.

Women’s testimonies substantiate the assertion that life-exception abortion bans directly lead to harmed fertility and, in some cases, sterilization. Take, for instance, the case of Amanda Zurawski. Residing in Texas, Zurawski was eighteen weeks pregnant when she was diagnosed with preterm prelabor rupture of membranes,⁶⁷ also known as

⁵⁹ *Id.*

⁶⁰ *Id.* (emphasis added).

⁶¹ *Id.* (emphasis added).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Sterilization*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sterilization> [<https://perma.cc/Q7PR-MUYL>] (last visited Aug. 22, 2025).

⁶⁵ Vasectomy and tubal ligation are sometimes reversible. See *Sterilization*, MAYO CLINIC (Feb. 9, 2023), <https://www.mayoclinic.org/healthy-lifestyle/birth-control/basics/sterilization/hlv-20049454> [<https://perma.cc/C2NB-RTBY>].

⁶⁶ See *Fertility and Reproductive Health*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/conditions-and-diseases/fertility-and-reproductive-health> [<https://perma.cc/EHQ2-XEGD>].

⁶⁷ See Eleanor Klibanoff, *Texas Supreme Court Rejects Challenge to Abortion Laws*, TEX. TRIB. (May 31, 2024), <https://www.texastribune.org/2024/05/31/texas-supreme-court-zurawski-abortion/> [<https://perma.cc/3KES-TPFF>].

preterm “PROM.”⁶⁸ Her fetus was no longer viable, yet she was denied an abortion under the Texas life-exception abortion ban due to the detection of fetal cardiac activity.⁶⁹ Zurawski was forced to wait until she was “ill ‘enough’” for an abortion.⁷⁰ Three days later, she became septic and was finally allowed an emergency abortion.⁷¹ But by this point, the delay in medical treatment had caused her infection to spread and one of her fallopian tubes to permanently close, impairing her fertility and ability to procreate naturally in the future.⁷²

But Zurawski isn’t the only victim in Texas. Kyleigh Thurman faced similar obstacles to obtaining an abortion for her ectopic pregnancy, a life-threatening condition in which the fertilized egg implants outside the main cavity of the uterus and is not viable.⁷³ Thurman was denied medical treatment by physicians claiming she did not fall within the abortion ban’s exception, and she was told to let “nature take its course,” despite her active bleeding.⁷⁴ Only once her obstetrician-gynecologist traveled to the hospital and begged medical staff to perform the abortion was Thurman finally treated.⁷⁵ This delay led her to nearly bleed to death.⁷⁶ Though her life was saved, she was forced to have an emergency removal of one of her fallopian tubes, impairing her ability to have children forever.⁷⁷

Unfortunately, these situations aren’t isolated to those states with the strictest abortion bans. Women in states with

⁶⁸ See *Water Breaking: Understand this Sign of Labor*, MAYO CLINIC (Mar. 27, 2024), <https://www.mayoclinic.org/healthy-lifestyle/labor-and-delivery/in-depth/water-breaking/art-20044142> [<https://perma.cc/XNJ8-3Z7X>].

⁶⁹ See Klibanoff, *supra* note 67.

⁷⁰ *Id.*

⁷¹ See *The Plaintiffs and Their Stories: Zurawski v. State of Texas*, CTR. FOR REPROD. RTS. (Nov. 14, 2023) [hereinafter *The Plaintiffs*], <https://reproductiverights.org/zurawski-v-texas-plaintiffs-stories-remarks/> [<https://perma.cc/GFM9-HKCR>].

⁷² See *id.*

⁷³ See *Ectopic Pregnancy*, MAYO CLINIC (Mar. 12, 2022), <https://www.mayoclinic.org/diseases-conditions/ectopic-pregnancy/symptoms-causes/syc-20372088> [<https://perma.cc/YEV9-C4N7>].

⁷⁴ Amanda Seitz, *Dozens of Pregnant Women, Some Bleeding or in Labor, Are Turned Away from ERs Despite Federal Law*, ASSOCIATED PRESS NEWS (Aug. 14, 2024), <https://apnews.com/article/pregnant-women-emergency-room-ectopic-er-edd66276d2f6c412c988051b618fb8f9> [<https://perma.cc/L7PS-KCBQ>].

⁷⁵ See Mary Tuma, *Texas Women Denied Abortions for Ectopic Pregnancies Demand Federal Investigation*, THE GUARDIAN (Aug. 13, 2024), <https://www.theguardian.com/world/article/2024/aug/13/texas-abortion-ectopic-pregnancy-investigation> [<https://perma.cc/ZL3S-P3RZ>].

⁷⁶ *Id.*

⁷⁷ *Id.*

health-exception abortion bans face similarly devastating consequences of delayed access to abortion. Amber Thurman, as described previously, is one of these women who tragically died while waiting for her physician to be willing to perform an abortion.⁷⁸ Black maternal mortality rates are already far higher than white maternal mortality rates, and the racial disparity of sterilizations due to the chilling effect of abortion bans requires further research.⁷⁹

Mayron Hollis was living under the health-exception abortion ban in Tennessee when she was diagnosed with a cesarean scar pregnancy, a life-threatening condition.⁸⁰ After deciding that the risk to her life was too high, Hollis and her husband chose to terminate the pregnancy. However, her physician failed to explain to her the impending trigger ban that would prohibit almost all abortions in the state and later refused to perform an abortion. At twenty-five weeks pregnant, Hollis presented to the hospital bleeding profusely. At this point, her condition had progressed so far that she required an emergency hysterectomy. After being told to write a will and decide whether to save her life or the baby's life in the case that both could not survive, physicians finally performed the hysterectomy. Against all odds and after losing approximately two liters of blood, her baby was born. However, Hollis was left sterilized and unable to have any more biological children.⁸¹

Post-*Dobbs*, women are facing the consequences of abortion bans in more ways than impaired fertility and sterilization. Studies show that states where abortion is banned or restricted have higher rates of maternal and infant deaths,

⁷⁸ See *supra* Introduction.

⁷⁹ The United States has the highest maternal mortality rate of any industrialized nation. Roni Caryn Rabin, *Global Declines in Maternal Mortality Have Stalled*, N.Y. TIMES (Feb. 22, 2023), <https://www.nytimes.com/2023/02/22/health/pregnancy-complications-death-who.html> [https://perma.cc/W5KS-PWGWL]. In 2021, just before the Court handed down *Dobbs*, the Black maternal mortality rate was over two and a half times the white maternal mortality rate. See Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2021*, CDC (Mar. 16, 2023), <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2021/maternal-mortality-rates-2021.htm> [https://perma.cc/CTT8-SZBQ].

⁸⁰ See Nadine El-Bawab, *Tennessee Woman Gets Emergency Hysterectomy After Doctors Deny Early Abortion Care*, ABC NEWS (May 31, 2023), <https://abcnews.go.com/US/tennessee-woman-gets-emergency-hysterectomy-after-doctors-deny/story?id=99457461> [https://perma.cc/GJ86-TPA4]; Patricia Santiago-Munoz, *Cesarean Scar Ectopic Pregnancy: Facts and Treatment Options*, UT SW. MED. CTR. (Aug. 23, 2022), <https://utswmed.org/medblog/cesarean-scar-ectopic-pregnancy/> [https://perma.cc/7CRU-AFWM].

⁸¹ See Nadine El-Bawab, *supra* note 80.

fewer maternity care providers, and more maternal care deserts.⁸² The “pro-life” sentiment of legislators stands in stark contrast to this reality of death.⁸³

II

THE VIOLATION OF THE FUNDAMENTAL RIGHT TO PROCREATE

A. Applying Strict Scrutiny to Abortion Bans

In light of these harrowing conditions, women whose fertility is impaired or destroyed due to the chilling effect of abortion bans have a legally cognizable harm. Standing is the right of a litigant to have a court review and decide the legal issue they face.⁸⁴ Constitutional and prudential limitations serve as boundaries for determining when a litigant has standing.⁸⁵ The Court in *Dobbs* cast doubt upon standing as it relates to abortion providers bringing claims on behalf of their patients.⁸⁶ However, this analysis assumes that women affected by the abortion bans and whose right to procreate is infringed upon bring the lawsuit themselves. Therefore, standing will be assumed to not serve as an obstacle for these women obtaining judicial review of their harm.⁸⁷

Abortion bans under *Dobbs* are subject to rational basis review,⁸⁸ but only insofar as they implicate the right to an abortion. Other fundamental rights, including the right to procreate, remain good law post-*Dobbs* and still trigger strict scrutiny.⁸⁹ Abortion bans are not sterilization laws on their face,

⁸² Maternal care deserts are geographic locations that have limited or no access to maternity health care services. Eugene Declercq, Ruby Barnard-Mayers, Laurie C. Zephyrin & Kay Johnson, *The U.S. Maternal Health Divide: The Limited Maternal Health Services and Worse Outcomes of States Proposing New Abortion Restrictions*, THE COMMONWEALTH FUND (Dec. 14, 2022), <https://www.commonwealthfund.org/publications/issue-briefs/2022/dec/us-maternal-health-divide-limited-services-worse-outcomes> [<https://perma.cc/HZ2X-YWB4>].

⁸³ See Kelly Baden, *Anti-Abortion Politicians Never Intended to Support Women and Children*, THE HILL (June 8, 2023), <https://thehill.com/opinion/healthcare/4038665-anti-abortion-politicians-never-intended-to-support-women-and-children/> [<https://perma.cc/Q4M9-WPTY>].

⁸⁴ See *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

⁸⁵ See *id.*

⁸⁶ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275 (2022).

⁸⁷ Generally, procedural challenges that litigants might face in challenging the constitutionality of abortion bans are beyond the scope of this Note, which focuses on the substantive argument underlying the challenge. However, such procedural challenges are important, perhaps even as important as understanding the substantive legal argument, and deserve further elaboration to which practitioners may refer.

⁸⁸ See *Dobbs*, 142 S. Ct. at 2284.

⁸⁹ See, e.g., *id.* at 2257, 2268.

as were those statutes subject to judicial review in *Buck* and *Skinner*.⁹⁰ So, do these abortion bans implicate a fundamental right at all such that strict scrutiny applies?

It is clear that direct burdens on a fundamental right trigger strict scrutiny. This was true in *Obergefell v. Hodges*, where the state laws in question directly burdened the litigant's fundamental right to marry by requiring a lawful marriage be between a man and a woman.⁹¹ In *Lawrence v. Texas*, the fundamental right to privacy or to consensual sex—depending on how the right is conceived—was directly burdened by the state law explicitly criminalizing sodomy.⁹²

Cases involving indirect or incidental burdens on fundamental rights are less clear, however. The Court has not clearly articulated when incidental burdens on a fundamental right rise to the level of triggering strict scrutiny. However, looking to the work of several legal scholars provides some clarity.⁹³ Professor Michael C. Dorf's survey of the Court's rulings and subsequent analysis serve as the foundation for how this Note will conceive of the proper level of judicial scrutiny for abortion bans and the right to procreate.

At times, incidental burdens on fundamental rights trigger a lower level of scrutiny than direct burdens on fundamental rights.⁹⁴ This application of a lower level of scrutiny is practical; if any law that incidentally burdened a fundamental right was subject to strict scrutiny, legislation would be regularly struck down as unconstitutional, thus allowing for extreme judicial activism.⁹⁵ However, some incidental burdens on fundamental rights should be subject to a more exacting scrutiny because otherwise the legislature may strategically write laws to burden fundamental rights while doing so indirectly and perhaps without enough evidence of such purposive discrimination, thus avoiding heightened scrutiny.

But the question remains—which incidental burdens should be subject to heightened scrutiny? Professor Dorf

⁹⁰ *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 536 (1942); *see Buck v. Bell*, 274 U.S. 200, 205 (1927).

⁹¹ *See Obergefell v. Hodges*, 576 U.S. 644, 653–55 (2015).

⁹² *See Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

⁹³ *See generally* Sherif Girgis, *Defining "Substantial Burdens" on Religion and Other Liberties*, 108 VA. L. REV. 1759 (2022); Dorf, *supra* note 17 (discussing the general trend of the Court's method of judicial review when fundamental rights are incidentally burdened).

⁹⁴ *See* Dorf, *supra* note 17, at 1178–79.

⁹⁵ *See id.* at 1180.

argues that the Court has reviewed laws that incidentally burden a fundamental right under a heightened level of scrutiny if that incidental burden is deemed “substantial.”⁹⁶

In *Vaughn v. Lawrenceburg Power Systems*, the Sixth Circuit defined “direct and substantial burdens” on the right to marriage as only occurring when “a large portion of those affected by the rule are absolutely or largely prevented from marrying, or where those affected by the rule are absolutely or largely prevented from marrying a large portion of the otherwise eligible population of spouses.”⁹⁷

While not binding on any court outside of the Sixth Circuit, if this standard were applied to abortion bans, there is a strong argument that these abortion bans do impose a substantial burden on the right to procreate. A large portion of pregnant women living under abortion bans are not prevented from procreating, as they do not encounter circumstances where they experience a medical emergency and receive delayed treatment that results in impairment of their reproductive systems. However, if even some women who are affected by the abortion bans are largely or absolutely prevented from exercising their right to procreate, then this constitutes a substantial burden under the *Vaughn* standard.⁹⁸ In fact, even if a single woman is sterilized under these abortion bans, that sterilization is a substantial burden on the right to procreate. This may be a tenuous argument, as it depends on reading the *Vaughn* standard as requiring *some*, not *all* or *nearly all*, of those affected by the abortion bans to be absolutely or largely prevented from exercising the right to procreate.⁹⁹ If all or nearly all women affected by abortion bans have to be absolutely or largely prevented from exercising the right to procreate, then there would not be a substantial burden to the right to procreate under the *Vaughn* standard.¹⁰⁰ However, this reading of *Vaughn* would simply be illogical.

Furthermore, Professor Sherif Girgis contends that an incidental burden substantially burdens a right if it “leaves no adequate alternative means of exercising that liberty.”¹⁰¹ The Court’s reasoning in *Casey* buttresses this argument and

⁹⁶ *Id.* (emphasis omitted).

⁹⁷ *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 710 (6th Cir. 2001).

⁹⁸ *See id.*

⁹⁹ *See id.*

¹⁰⁰ *See id.*

¹⁰¹ Girgis, *supra* note 93, at 1783 (emphasis omitted).

indicates how the Court treats incidental burdens, even if the right to an abortion was ultimately overturned.¹⁰² In the case of abortion bans incidentally burdening women's right to procreate, it is evident that once a woman has suffered reproductive harm due to delayed treatment that results under the abortion bans, they oftentimes have little to no adequate alternative to exercise that right to procreate.

However, Girgis' understanding of what constitutes substantially burdening a right is deeply flawed. Under this definition, if a woman is entirely sterilized due to delayed care under an abortion ban yet she has previously frozen her eggs and, post-sterilization, uses in vitro fertilization to procreate, then this would be an adequate alternative and thus her right to procreate would not be incidentally burdened. This simply cannot be the case—the existence of at least one adequate alternative to procreate cannot be the litmus test for when a woman's right to procreate has been incidentally burdened.

The Court has not set forth a clear standard to use in determining whether a right is substantially burdened.¹⁰³ However, when applying the plain meaning of “substantial,” life-exception and health-exception abortion bans substantially burden the right to procreate in the circumstances faced by women as described in Part I.¹⁰⁴ This determination may, however, depend on the degree to which a woman's fertility is impaired. Perhaps, a court will find that the closing of one fallopian tube is not a substantial burden on her right to procreate given that the other ovary can still fulfill this reproductive function.¹⁰⁵ Perhaps a court will find that her procreative abilities must be even more impaired, like in the case of an emergency hysterectomy, in order for there to be a substantial burden on her right to procreate. Given the lack of clarity on what constitutes a substantial burden, moving forward practitioners should look to any updates and clarifications on the law before employing the following strict scrutiny analysis.

This Note contends that, despite the lack of clarity in how to define a substantial burden, the substantial burden

¹⁰² See *id.* at 1786–87 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883, 877, 895, 897, 901 (1992)).

¹⁰³ See *id.* at 1768 (“The usual sources of legal authority offer little help in shaping a ‘substantial burden’ doctrine.”).

¹⁰⁴ *Contra id.* at 1771 (describing how dictionaries do not help define the word “substantial” due to its vagueness).

¹⁰⁵ See *The Plaintiffs*, *supra* note 71.

threshold requirement is met even when a woman is not left fully sterilized as a result of delayed treatment under the abortion ban. In other words, women who are not sterilized entirely but suffer impaired fertility as a result of being denied an abortion have had their right to procreate substantially burdened. Both sterilization and impaired fertility significantly impede one's right to procreate. Whether or not a fundamental right is substantially burdened does not seem to hinge on that burden manifesting in its most extreme form—in this case, sterilization. In other words, the substantiality requirement does not presuppose that an incidental burden manifests by burdening the right to the highest degree. Thus, it seems that incidental burdens on fundamental rights may manifest in varying degrees, still creating substantial burdens and thus triggering strict scrutiny.

What is clearer, however, is that once there is a substantial burden on an unenumerated right, strict scrutiny follows.¹⁰⁶ One might argue that incidental burdens should trigger a method of judicial review akin to intermediate scrutiny rather than strict scrutiny. This is true in free speech cases, where incidental burdens are subject to intermediate scrutiny.¹⁰⁷ However, this is inconsistent with the Court's precedent involving incidental burdens on unenumerated rights. In *Zablocki v. Redhail*, the Court held that "reasonable regulations that do not significantly interfere" with the fundamental right can be legitimately imposed by the government.¹⁰⁸ But if there is significant interference with the fundamental right, the governmental action "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."¹⁰⁹ In other words, significant,

¹⁰⁶ See *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

¹⁰⁷ *United States v. O'Brien*, 391 U.S. 367, 377 (1968) ("[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

¹⁰⁸ *Zablocki*, 434 U.S. at 386.

¹⁰⁹ *Id.* at 388. Despite the majority using the language of "sufficiently important state interests," courts have interpreted this to be equivalent to strict scrutiny. See, e.g., *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 143 (2d Cir. 2007).

incidental burdens on fundamental, unenumerated rights like the right to privacy trigger strict scrutiny.¹¹⁰

Strict scrutiny places a burden on the government to show (1) a compelling governmental interest and (2) that the regulation is narrowly tailored to serve that interest.¹¹¹ In fact, it has been famously described by Professor Gerald Gunther as being “‘strict’ in theory, and fatal in fact.”¹¹²

Given the current Court’s jurisprudence and decision in *Dobbs*, it is safe to say that when presented with the question of whether life-exception and health-exception abortion bans violate the fundamental right to procreate, the Court will likely find a compelling governmental interest in the “potential life” of the fetus.¹¹³ For the sake of this argument, it will be assumed that the government would meet its burden on this first prong of strict scrutiny.

B. Under Strict Scrutiny, Abortion Bans Fail to Be Narrowly Tailored to Serve the Compelling Governmental Interest

First, it must be established that this Note will only determine if each type of abortion ban is narrowly tailored based on the face of the statute. Certain states’ courts have interpreted abortion bans in ways that may have narrowed the statutory language.¹¹⁴ Practitioners should check the judicial history of their state’s abortion ban to ensure that judicial construction has not rendered the statute narrowly tailored. In some states, extrajudicial bodies like state administrative agencies have attempted to define or narrow the statutory language.¹¹⁵ This interpretation is of less concern than judicial construction, as extrajudicial interpretations only have minimal persuasive value because they occur outside the formal judiciary and thus likely cannot remedy or cure a narrow-tailoring flaw in a statute.¹¹⁶

¹¹⁰ See *Zablocki*, 434 U.S. at 388.

¹¹¹ See *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting).

¹¹² Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

¹¹³ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2268 (2022).

¹¹⁴ See generally *State v. Zurawski*, 690 S.W.3d 644 (Tex. 2024).

¹¹⁵ See 22 TEX. ADMIN. CODE § 165.8 (2024) (repealed 2025).

¹¹⁶ Cf. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (“[C]ourts need not . . . defer to an agency interpretation of the law simply because a statute is ambiguous.”).

Both life-exception and health-exception abortion bans are overinclusive and thus fail to be narrowly tailored. While the government has an interest in protecting viable life,¹¹⁷ it loses that interest once the fetus is no longer viable.¹¹⁸ Yet in many cases where women are denied abortions, the fetus or pregnancy is not viable.¹¹⁹ Women have been denied abortions even when the abortion ban has a statutory, or judicially constructed, exception for cases of nonviable fetuses.¹²⁰ This overinclusivity is a hallmark of a lack of narrow tailoring.¹²¹ Abortion bans can be thought of as a means to an end.¹²² These criminal statutes utilize the means of a regulation prohibiting abortion to achieve the end of preserving potential life. Yet the means of serving that governmental interest is still in effect when the end—preserving potential life—is entirely impossible. Thus, the means does not match the end and the ban is not narrowly tailored.

In order to more narrowly tailor both life-exception and health-exception abortion bans, one might think to add a specific intent requirement for physicians to be held criminally liable. Though it may make physicians more at ease to perform an abortion knowing they lack the requisite mental

¹¹⁷ See *Dobbs*, 142 S. Ct. at 2268.

¹¹⁸ The Court in *Dobbs* rejected the use of “viability” as a temporal benchmark in determining when abortions are permissible, arguing that such a benchmark is arbitrary. See *id.* at 2269. This is specifically within the context of the Court’s concern for those fetuses that are before the arbitrary cutoff of the viability line, but that may become viable if given more time to develop. See *id.* at 2269-70. However, this Note discusses viability in the context of pregnancies where the fetus will never become viable. In this context, there is no governmental interest because there is no potential for life to ever exist at any point.

¹¹⁹ While some state abortion bans have exceptions for abortion when the fetus or pregnancy is no longer viable, evidence clearly shows that this is not what is happening in practice. In reality, women are denied abortions even when there is no compelling governmental interest because their fetus is no longer viable. See *supra* subpart I.E.

¹²⁰ For an example of a woman being denied an abortion despite the fetus not being viable, see Meredith Clark, *Oklahoma Woman with Non-Viable Pregnancy Told to Wait in Parking Lot ‘Until You Bleed Out’ Due to Abortion Ban*, INDEPENDENT (May 5, 2023), <https://www.independent.co.uk/life-style/health-and-families/jaci-statton-oklahoma-abortion-ban-pregnancy-b2333380.html> [https://perma.cc/GYU8-BU4B]. See generally OKLA. STAT. tit. 63, § 1-732(b) (2024) (permitting an abortion of an unborn child that is no longer viable despite there being a presumption of viability after twenty-four weeks).

¹²¹ See *Republican Party of Minn. v. White*, 416 F.3d 738, 751 (8th Cir. 2005) (citing *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 226, 228-29 (1989)).

¹²² See Owen Fiss, *The Law of Narrow Tailoring*, 23 U. PA. J. CONST. L. 879, 879 (2021).

state to be prosecuted under the criminal statute, this specific intent would require more than recklessness in order to avoid the chilling effect that abortion bans in their current form create.

Take, for instance, a situation in which a physician believes that there is a substantial risk that a woman's health is *not* in danger.¹²³ If they still perform the abortion, because there was a substantial risk that the woman's health was not in fact in danger, they would have performed the abortion with the specific intent of recklessness. However, on the off chance that the physician is incorrect, the woman may face perilous health ramifications—including an emergency hysterectomy. In this situation, physicians must have the leeway to choose to perform an abortion if, in their medical judgment, they determine that they should disregard the substantial risk that her health is not in danger due to the degree of harm the woman may suffer if her health is in fact at risk. A court may, with hindsight, decide this is an unjustified risk. In this situation, a physician may be held criminally liable if the specific intent requirement is “recklessness,” the same chilling effect will result, and women will continue to be denied abortions and suffer harm to their fertility.

The same is true if this same situation were to present itself under a life-exception abortion ban. Physicians will not act, despite their better medical judgment, and women who fall within the unlikely, yet still possible, circumstance where their health or life is in fact at risk will pay the consequences. Therefore, if a specific intent requirement is to be added to these criminal abortion bans, it must be more than a standard of recklessness. Adding a specific intent requirement to those statutes that do not currently have one,¹²⁴ however, will not cure the narrow-tailoring problem of overinclusivity previously identified.

¹²³ This describes the standard for recklessness under the Model Penal Code. See MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1985).

¹²⁴ This chilling effect will not be ameliorated if abortion bans without specific intent requirements on the face of their statute are applied by courts as having a specific intent requirement. Physicians will not be on notice of this judicial construction, and the chilling effect will remain. For further information on the utility of a specific intent requirement, see Mary Claire Bartlett, Note, *Physician Mens Rea: Applying United States v. Ruan to State Abortion Statutes*, 123 COLUM. L. REV. 1699, 1702 (“The Note concludes by arguing that state courts interpreting statutes with emergency exceptions should adopt, as the *Ruan* Court did for the CSA, a subjective mens rea standard. Such a standard is critical for three reasons: . . . (3) it mitigates the constitutional vagueness concerns presented by the statutes.”).

1. *Life-Exception Abortion Bans Fail to Provide Physicians with Workable Standards and Are Thus Not Narrowly Tailored*

More specifically, life-exception abortion bans clearly illustrate a lack of narrow tailoring under strict scrutiny. First, life exceptions are so vague as to not provide physicians with a workable standard. In states with life-exception abortion bans, physicians are left wondering when they can and cannot perform an abortion due to confusion about how close the patient must come to dying before the exception is triggered, offering legal protection to act.¹²⁵ Second, life exceptions prioritize potential life entirely over a woman's right to procreate. Even when she is faced with an emergency hysterectomy, entirely decimating her fertility and leaving her without any ability to procreate, the law favors the potential life of the fetus. No consideration is given to competing interests, particularly an individual's fundamental right to procreate. Thus, life-exception abortion bans fail to be narrowly tailored.

2. *Health-Exception Abortion Bans Fail to Provide Physicians with Workable Standards and Are Thus Not Narrowly Tailored*

Strict scrutiny next requires health-exception abortion bans to be narrowly tailored to serve the compelling governmental interest in the potential life.¹²⁶ On this prong, health-exception abortion bans broadly fail and are thus likely to be unconstitutional. This analysis will proceed by first looking at health exceptions of Classification E, then Classifications A, B, and C, and finally Classification D. Each of the various subcategories of health-exception abortion bans as delineated in Part I are likely not narrowly tailored to serve the compelling governmental interest in the potential life of the fetus.

First, Classification E health exceptions that are defined as allowing abortion when there is a "serious health risk" are the clearest instances of health-exception abortion bans lacking narrow tailoring.¹²⁷ Other states have shown there is at least some way of more precisely defining "health," namely

¹²⁵ See Aria Bendix, *How Life-Threatening Must a Pregnancy Be to End It Legally?*, NBC NEWS (June 30, 2022), <https://www.nbcnews.com/health/health-news/abortion-ban-exceptions-life-threatening-pregnancy-rcna36026> [https://perma.cc/3ELM-PF4H].

¹²⁶ See *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting).

¹²⁷ Felix, Sobel & Salganicoff, *supra* note 57.

those with Classifications A, B, C, and D—even though those ultimately are likely to fail as well. The ambiguity in the term “health” raises the issue of vagueness, which is exemplified best by differentiating current health exceptions of Classification E with those that were litigated prior to *Roe*.

Before *Roe* upheld the right to abortion, the District of Columbia enacted an abortion ban that made a limited exception for when an abortion was “necessary for the preservation of the mother’s life or health.”¹²⁸ In *United States v. Vuitch*, the physician, Milan Vuitch, was charged under the criminal statute for performing an abortion and argued that his conviction should be overturned because the term “health” made the statute unconstitutionally vague.¹²⁹ Ultimately, the Court held that despite the fact that the statute did not define whether or not “health” included mental health, the term “health” was not unconstitutionally vague.¹³⁰ The Court reasoned that the District Court and Court of Appeals had defined “health” to include mental health, thus curing the statute of any vagueness.¹³¹

However, the present-day health exceptions in abortion bans are distinguishable from that in *Vuitch* and are indeed unconstitutionally vague. First, the Respondent’s vagueness argument in *Vuitch* was based in a due process theory of lack of adequate notice of the crime.¹³² Dissimilarly, this Note does not argue that Classification E health exceptions are unconstitutionally vague because of criminal law concerns of adequate notice of the crime, but rather for substantive due process concerns. Here, the Court would be deciding whether these health exceptions are vague due to how they limit medical access even when the woman falls within the exception and thus burden her right to procreate. The word “health” might not be too vague to adequately put physicians on notice of the crime, while still being too vague to provide adequate access to medical care to protect the fundamental right to procreate on substantive due process grounds.¹³³

Additionally, the women who are victims of modern-day abortion bans and whose fertility is harmed or who have tragically died would have fallen within the health exception in *Vuitch*

¹²⁸ *United States v. Vuitch*, 402 U.S. 62, 68 (1971).

¹²⁹ *See id.* at 63.

¹³⁰ *Id.* at 71.

¹³¹ *Id.* at 71–72.

¹³² *Id.* at 71.

¹³³ *See* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 72–73 (2023).

as the Court interpreted the term “health.” The Court relied on a textualist analysis to draw the conclusion that “health” is not vague, citing the Webster Dictionary definition of health which is the “[s]tate of being . . . sound in body [or] mind.”¹³⁴ It seems entirely unlikely that the Court would have found the medical conditions women are facing today to characterize a sound body. For example, sepsis and cesarean scar pregnancies seem to be the definition of a lack of soundness of body, as they are categorized as potentially life-threatening conditions.¹³⁵ And yet these women are denied access to medically necessary abortions because physicians hesitate to operate for fear that their conditions do not rise to the level of risking their “health” such that they fall within the health exception.¹³⁶ Thus, the Court would be unlikely to uphold a Classification E health exception today despite having upheld the health exception in *Vuitch*.

Furthermore, to show that “health” is a workable standard, the Court in *Vuitch* at least partly relies on the routine nature of physicians using their judgment to assess whether an operation is necessary for a patient’s physical and mental health.¹³⁷ However, such an inference stands at odds with present-day evidence of confusion among physicians regarding what situations fall within a health exception.¹³⁸ This confusion has led physicians to deny abortions necessary for the physical health of the woman out of fear of violating the law.¹³⁹

¹³⁴ *Vuitch*, 402 U.S. at 72 (alterations in original).

¹³⁵ See *supra* subpart I.E.

¹³⁶ See *supra* subpart I.E.

¹³⁷ *Vuitch*, 402 U.S. at 72.

¹³⁸ The University of California, San Francisco identifies fifty cases in which patients received standard care due to post-*Dobbs* abortion bans, particularly in states with life-exception and health-exception abortion bans. See DANIEL GROSSMAN ET AL., CARE POST-ROE: DOCUMENTING CASES OF POOR-QUALITY CARE SINCE THE DOBBS DECISION 6 (2023); see also BRITNI FREDERIKSEN, USHA RANJJI, IVETTE GOMEZ & ALINA SALGANICOFF, A NATIONAL SURVEY OF OBGYNs’ EXPERIENCES AFTER DOBBS 9 (2023) (showing that 19% of obstetrician-gynecologists surveyed in states where abortion is banned do not ever refer patients for abortions because there are too many regulations surrounding abortion services).

¹³⁹ Amber Thurman’s death being deemed preventable most clearly evidences this confusion physicians face. See *Comment on Death of Amber Thurman*, CTR. FOR REPROD. RTS. (Sept. 17, 2024), <https://reproductiverights.org/comment-death-amber-thurman/> [<https://perma.cc/ZLU2-PDJ4>]. More evidence will come to light as state maternal mortality committees begin to investigate the maternal deaths occurring post-*Dobbs*. See Surana, *supra* note 1. Dr. Nisha Verma describes how physicians presented with patients whose pregnancies compromise their health know what they must do medically, but they are unsure if such treatment is legal. See Ariana Eunjung Cha, *Physicians Face Confusion and Fear*

Even if the Court in *Vuitch* decided that health was not unconstitutionally vague in creating a lack of access to medical care to protect the fundamental right to procreate—which it did not—the realities of 1971 and 2024 are so drastically different that the decision reached in *Vuitch* would likely come out differently today. Prior to *Roe*, abortion bans led women to obtain illegal abortions, resulting in fatal conditions.¹⁴⁰ However, there is far less evidence, if any, that women living in a pre-*Roe* world were denied medically necessary abortions even when they did fall within legal exceptions to the governing abortion ban. So, presumably the Court in *Vuitch* did not consider a world in which abortion bans with health exceptions led women to become septic or bleed out in hospital bathrooms and parking lots, requiring emergency surgical removal of some or all of their reproductive organs.¹⁴¹ These new facts and circumstances further distinguish *Vuitch* from the conditions of present day and make evident the fact that health exceptions do not provide a workable standard to actually protect the health of the mother.¹⁴² The consistent chilling effect among physicians who do not act for fear of criminal liability for mistakenly performing an abortion on a woman who does not actually fall within the health exception corroborates the vagueness of the health exception such that it is unlikely that these bans are narrowly tailored.¹⁴³

Second, in addition to the narrow tailoring issue common to both life- and health-exception abortion bans, even those health exceptions that augment and build upon what defines “health” fail to be narrowly tailored because they are still too

in *Post-Roe World*, WASH. POST (June 28, 2022), <https://www.washingtonpost.com/health/2022/06/28/abortion-ban-roe-doctors-confusion/> [https://perma.cc/PUD4-HTY4].

¹⁴⁰ See Sheila Flynn, *Doctors Share ‘Horror Show’ Stories from Before Roe v Wade – and Their Fears of What’s to Come*, INDEPENDENT (May 6, 2022), <https://www.independent.co.uk/news/world/americas/abortion-illegal-roe-v-wade-b2071775.html> [https://perma.cc/E8T7-9VSE] (describing the harrowing conditions under which women obtained dangerous, illegal abortions).

¹⁴¹ See *supra* subpart I.E; see also Selena Simmons-Duffin, *In Oklahoma, a Woman Was Told to Wait Until She’s ‘Crashing’ for Abortion Care*, NPR (Apr. 25, 2023), <https://www.npr.org/sections/health-shots/2023/04/25/1171851775/oklahoma-woman-abortion-ban-study-shows-confusion-at-hospitals> [https://perma.cc/Y468-U5XM].

¹⁴² See FREDERIKSEN, RANJ, GOMEZ & SALGANICOFF, *supra* note 137, at 12 (showing that 61% of obstetrician-gynecologists surveyed in states where abortion is banned were concerned about their legal risk when deciding whether an abortion was necessary for a patient).

¹⁴³ See *id.*

vague to create a workable standard.¹⁴⁴ Health exceptions of Classifications A, B, and C all specify that the exception applies only to those whose condition will lead to a substantial or irreversible impairment of a “major bodily function.”¹⁴⁵ What constitutes a “major bodily function” to some physicians may include a woman’s ability to reproduce, while others may not define the exception in such a way. To further complicate matters, what constitutes a “substantial impairment” is often entirely up to the discretion of the individual physician and leads to wide-ranging results in when women are or are not granted access to an abortion.¹⁴⁶ Thus, a woman’s fundamental right to procreate is burdened or not burdened based on the physician’s interpretation of a few unclarifying words. Luck of the physician one is assigned when they enter the emergency room should not influence, let alone be determinative, of whether an individual’s fundamental right to procreate is infringed upon.

Finally, health exceptions of Classification D are the least vague category of health exceptions and provide physicians with the most precise standard for determining when the exception is triggered; however, these exceptions still lack narrow tailoring because they do not create a workable standard. These types of health exceptions allow for an abortion when there is a “serious, permanent impairment of a life-sustaining organ.”¹⁴⁷ This standard is less vague than what defines a “major bodily function” in the previous subtypes of health exceptions, but there still may be disputes among physicians about what “life-sustaining” organs means—those organs necessary to keep a patient alive or those organs that are necessary for a reasonable quality of life. Furthermore, this standard also assumes that physicians can identify with precision and efficiency exactly which organs are affected by certain medical conditions, which is likely not feasible in reality.

Assuming that “life-sustaining organs” means those organs that are necessary to be alive, without regard to the quality of

¹⁴⁴ See Fiss, *supra* note 122, at 900 (using a hypothetical to illustrate how the government cannot use a means of achieving its compelling interest in a way that is “grossly offensive” to other rights).

¹⁴⁵ These health exception subtypes are grouped together because they are defined substantially the same way, although Classifications A and B specify that this risk must be of substantial or irreversible impairment while Classification D does not make this specification. See Felix, Sobel & Salganicoff, *supra* note 57.

¹⁴⁶ *Policy Tracker*, *supra* note 4 (showing that many states with abortion bans utilize a “reasonable medical judgment” standard for assessing whether a woman’s condition places her within the exception to the abortion ban).

¹⁴⁷ Felix, Sobel & Salganicoff, *supra* note 57.

life one might have, narrow tailoring still poses a problem. Now, these “health” exceptions read as life exceptions, in which case they are vulnerable to the same narrow tailoring flaws as life-exception abortion bans. Furthermore, because there could be an exception to save the mother’s reproductive organs—which are not necessarily “life-sustaining organs”—health exceptions of Classification D are clearly not the least restrictive means necessary to serve the governmental interest in the potential life of the fetus.

One might argue that legislators should simply define the health exceptions more precisely in order to avoid a narrow-tailoring problem. The more precisely the law defines when women fall within the health exception, the less vague the exception becomes, thus creating a more workable standard. Creating a more workable standard seems to ameliorate the narrow-tailoring flaw in the bans. However, the more precisely defined a health exception is, the more unable a physician is to use their medical judgment to provide individualized care, thus exacerbating the problem of women receiving substandard care.¹⁴⁸ So, legislators face a quandary: more precisely define the health exception but take away physicians’ ability to act within their reasonable medical judgment, causing substandard care, or leave the health exception vague and thus lacking narrow tailoring. This dilemma emphasizes the inherent problems with abortion bans highly regulating physician conduct and the physician-patient relationship.

But if legislators were to attempt to more precisely define health exceptions in order to make the exception less vague, they will still face yet another narrow-tailoring issue. Narrow tailoring requires, in part, that the law be the least restrictive means necessary to advance the government’s compelling interest in the potential life of the fetus.¹⁴⁹ Any abortion ban that does not outline an exception for situations in which the woman’s fertility will be impaired if they are not provided an abortion, with considerable deference to the physician to act within their reasonable medical judgment, is not the least restrictive means necessary for protecting the potential life of the

¹⁴⁸ See FREDERIKSEN, RANJI, GOMEZ & SALGANICOFF, *supra* note 137, at 13 (showing how 55% of physicians practicing in states where abortion is banned found that post-*Dobbs* their ability to practice within the standard of care worsened).

¹⁴⁹ See *Republican Party of Minn. v. White*, 416 F.3d 738, 751 (8th Cir. 2005) (citing *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990)) (holding that a law may fail to be narrowly tailored if it is not the least restrictive means necessary to advance the compelling governmental interest).

fetus. Health-exception abortion bans may still protect the life of the fetus while also protecting the fundamental right of the woman to procreate in the future, namely by explicitly writing in an exception when the mother's fertility is at risk.

One might argue that the health exceptions previously described do allow for an exception when the mother's fertility is at risk because they permit abortion when a "major bodily function" is at risk.¹⁵⁰ However, these health exceptions face the same vagueness issue as described above, and evidence of women not receiving abortions and suffering harm to their fertility confirms that health exceptions do not currently provide for any fertility-based exception. Thus, without an explicit exception for when the mother's fertility is at risk, health-exception abortion bans fail to be narrowly tailored. An explicit fertility-based exception has a better chance of being narrowly tailored, though there are still considerable concerns that physicians will continue to be chilled from acting due to the risk of criminal punishment.

This Note does not foreclose the possibility that a health exception may be written in such a way that renders it narrowly tailored and protective of the woman's right to procreate. However, the impediments to such a statutory construction are clear. Both life-exception and health-exception abortion bans face numerous narrow-tailoring flaws. These flaws pose what is arguably an insurmountable obstacle for these abortion bans to be held constitutional under the fundamental right to procreate.

CONCLUSION

Abortion bans in the United States cut at the most deeply intimate aspects of women's lives—their reproductive organs and ability to have children. When physicians are left wondering about their potential criminal liability while women bleed out on the hospital floor, these abortion bans have the power to derail entire family units. Mothers are left sterile, unable to have the children they desperately envisioned.¹⁵¹ Children are left without brothers and sisters. And in the worst cases, children are made orphans as their mothers die in operating rooms due to delayed treatment.¹⁵²

¹⁵⁰ Felix, Sobel & Salganicoff, *supra* note 57.

¹⁵¹ See El-Bawab, *supra* note 80.

¹⁵² See *Comment on Death of Amber Thurman*, *supra* note 139.

Given this nation's history, when presented with the opportunity, the Supreme Court should explicitly overrule *Buck v. Bell* and dispose of the legal proposition that forced sterilizations may be constitutional in certain circumstances. This unqualified denouncement of Justice Holmes' rhetoric will provide a modicum of justice to the Buck family and much greater justice for future generations of women.

Additionally, it is clear that there is a path forward. The fundamental right to procreate remains a powerful way of striking down these oppressive abortion bans and beginning to restore reproductive justice in a post-*Dobbs* world. Given the chance, the Supreme Court should hold that life-exception and health-exception abortion bans unconstitutionally infringe on a woman's right to procreate.