

## On the Constitutionality of Ohio’s “Down Syndrome Abortion Ban”

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\* Copyright © 2018, by Marc Spindelman. All rights reserved. Permissions regarding this Article should be sent to mspindelman@gmail.com. Isadore and Ida Topper Professor of Law, The Ohio State University Michael E. Moritz College of Law. Many thanks to Ohio State law students Alex Al-Doory, Gretchen Rutz, and Ethan Weber for various forms of editorial and research assistance, to Brookes Hammock for ever-incisive engagement with the text, to Susan Appleton, Cinnamon Carlarne, Martha Chamallas, Ruth Colker, Tucker Culbertson, Ned Foley, Stephanie Hoffer, Dana Howard, Jessie Hill, Andy Koppelman, Maya Manian, Alan Michaels, and Katy Rivlin for various sorts of collegial engagement as thinking and writing proceeded, and to Matt Cooper and especially to Susan Azyndar for swift-footed help locating a variety of sources. This Article emerges from interested party testimony on Senate Bill 164, S. 164, 132d Gen. Assemb., Reg. Sess. (Ohio 2017), that I offered to the Ohio Senate Health, Human Services and Medicaid Committee on November 14, 2017. In preparing the testimony and the subsequent work out of which it grows, work which was substantially complete before a lawsuit challenging H.B. 214 was filed in federal court, Verified Complaint for Declaratory and Injunctive Relief at 1, *Preterm-Cleveland v. Himes*, No. 1:18-cv-109 (S.D. Ohio Feb. 15, 2018), I have drawn on Marc Spindelman, *On the Constitutionality of Ohio’s Proposed “Heartbeat Bill,”* 74 OHIO ST. L.J. 149 (2013). Views expressed here are mine alone.

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## I. INTRODUCTION

Like many laws impacting the rights of women in relation to reproduction, House Bill 214 (H.B. 214),<sup>1</sup> Ohio's "Down syndrome abortion ban," raises profound personal, ethical, spiritual, and political questions<sup>2</sup>—questions that

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<sup>1</sup> OHIO REV. CODE ANN. §§ 2919.10, 2919.101, 3701.79 (West, Westlaw through File 51 of 132d Gen. Assemb. (2017–2018)). The measure, which has already been challenged in federal court, *see* Verified Complaint for Declaratory and Injunctive Relief at para. 1, *Preterm-Cleveland v. Himes*, No. 1:18-cv-109 (S.D. Ohio Feb. 15, 2018); *see also Preterm Cleveland*, No. 1:18-cv-109 (S.D. Ohio Mar. 14, 2018) (order granting preliminary injunction), was at times referred to as "the Down Syndrome Non-Discrimination Act." *See, e.g., Hearing on H.R. 214 Before the H. Health Comm.*, 132d Gen. Assemb., Reg. Sess. (Ohio 2017–2018) (statement of Rep. Derek Merrin at 1) [hereinafter *Merrin Testimony*]. H.B. 214, H.R. 214 132d Gen. Assemb., Reg. Sess. (Ohio 2017) (as passed by House, Nov. 1, 2017), is identical to Senate Bill 164, S. 164, 132d Gen. Assemb., Reg. Sess. (Ohio 2017) (as passed by Senate, Nov. 15, 2017). Email from Amy Archer, Research Assoc., Ohio Legislative Serv. Comm., to Tara Marasco, Sr. Legislative Aide, Ohio Senate (Dec. 7, 2017) (on file with *Ohio State Law Journal*) ("Per your request, I am writing to confirm that SB 164 (As Passed by the Senate) and HB 214 (As Passed by the House) are identical.").

<sup>2</sup> This expression echoes the spirit of similar remarks in *Roe v. Wade*, 410 U.S. 113, 116 (1973):

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

It also resonates with the observations of the authors of the joint opinion for the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992):

touch upon some of the most fundamental aspects of human existence and the human condition. These questions and their delicate nature deserve acknowledgement at the outset, both in themselves and as inquiries that deserve ventilation in the public sphere. What follows here, however, is something else. It is an engagement of an almost entirely different, though not wholly unrelated, sort: an effort that looks into how H.B. 214 conforms to the U.S. Constitution as that charter of government and civil and political rights now stands.<sup>3</sup>

The conclusion about H.B. 214's constitutionality, stated up front, amounts to this: H.B. 214 is inconsistent with the Federal Constitution's present demands. Discussion explaining why is organized into four parts. First is a brief summary of key aspects of what H.B. 214 does. Second is a basic overview of the relevant constitutional rules against which H.B. 214 must be considered. Third is an analysis of H.B. 214's constitutionality that considers both its previability and postviability applications. And fourth is a conclusion that summarizes the preceding analysis and ends with a note on a question of personal conscience that H.B. 214 raises.

## II. WHAT DOES H.B. 214 DO?

Succinctly, H.B. 214 prohibits anyone from “purposely perform[ing] or induc[ing] or attempt[ing] to perform or induce an abortion on a pregnant woman if the person has knowledge that the pregnant woman is seeking the abortion, in whole or in part, because of any”<sup>4</sup> one of three reasons: (1) “[a] test result indicating Down syndrome in”<sup>5</sup> the fetus she carries, referred to in the bill as “an unborn child;”<sup>6</sup> (2) because of “[a] prenatal diagnosis of Down syndrome

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Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision.

<sup>3</sup> The analysis in these pages focuses specifically on the constitutionality of H.B. 214 within the context of the U.S. Supreme Court's abortion rights jurisprudence. It does not purport to exhaust the full range of constitutional arguments about the measure, some of them gestured to below, *see, e.g., infra* notes 21, 197, and others not. Additionally, although the analysis in these pages focuses specifically on H.B. 214, the arguments offered about it apply in various ways to other Down syndrome abortion bans in other jurisdictions. Some of its lessons, including its methods of analysis, are also applicable to other decisional abortion bans, as well as to nondecisional abortion bans operating in the postviability setting, on which, in particular, see the analysis found *infra* in Part IV.B.

<sup>4</sup> OHIO REV. CODE ANN. § 2919.10(B) (West, Westlaw through File 51 of 132d Gen. Assemb. (2017–2018)).

<sup>5</sup> *Id.* § 2919.10(B)(1).

<sup>6</sup> *Id.* § 2919.10(B)(1)–(3). The Ohio Revised Code defines “unborn child” as “an individual organism of the species homo sapiens from fertilization until live birth.” *Id.* § 2919.16(L).

in<sup>7</sup> the fetus she carries; or (3) to quote the language of the bill, because of “[a]ny other reason [that the woman has or might have] to believe that an unborn child has Down syndrome.”<sup>8</sup> Anyone who performs or induces, or attempts to perform or induce an abortion under these circumstances commits a fourth-degree felony,<sup>9</sup> which carries a criminal penalty of six to eighteen months in prison and a fine of not more than \$5,000.00.<sup>10</sup> Although H.B. 214 expressly exempts individual pregnant women from the operation of its criminal liability rule,<sup>11</sup> physicians who violate its terms are additionally subject to professional sanction by the State Medical Board, which is required to “revoke a physician’s license to practice medicine in this state”<sup>12</sup> for any violation of H.B. 214’s terms.

In addition to these criminal and professional sanctions, H.B. 214 expressly authorizes civil liability for physicians for the same underlying conduct. According to H.B. 214:

Any physician who violates . . . [the prohibitions on Down-syndrome-abortions contained in the measure] is liable in a civil action for compensatory and exemplary damages and reasonable attorney’s fees to any person, or the representative of the estate of any person, who sustains injury, death, or loss to person or property as the result of the performance or inducement or the attempted performance or inducement of the abortion.<sup>13</sup>

Importantly, H.B. 214, beyond providing for economic liability, authorizes a court in an H.B. 214-related case to award “any injunctive or other equitable relief that the court considers appropriate.”<sup>14</sup> The scope of these “injunctive or other equitable relief”<sup>15</sup> powers, impossible to fully know in advance, is potentially sweeping.<sup>16</sup>

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<sup>7</sup> *Id.* § 2919.10(B)(2).

<sup>8</sup> *Id.* § 2919.10(B)(3).

<sup>9</sup> *Id.* § 2919.10(C).

<sup>10</sup> OHIO REV. CODE ANN. § 2929.14(A)(4) (West, Westlaw through File 51 of 132d Gen. Assemb. (2017–2018)) (term); *id.* § 2929.18(A)(3)(d) (fine).

<sup>11</sup> *Id.* § 2919.10(F).

<sup>12</sup> *Id.* § 2919.10(D).

<sup>13</sup> *Id.* § 2919.10(E).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> What might these powers under H.B. 214 mean, for example, for hospitals or other medical or surgical centers where abortions are provided? Do these powers effectively authorize courts to claim and exercise direct supervisory authority over intake and patient engagement procedures at a medical facility after an abortion in violation of H.B. 214 has been performed? A useful touchstone for approaching these questions is found in David J. Lanciotti & Robin C. Lerner, *Equity*, in 41 OHIO JURISPRUDENCE 3D 445, 448 (2017) (discussing “the fundamental principles of equity, including the nature and extent of equity jurisdiction, the scope and extent of equitable relief, and legal remedies as a limitation or bar on equity jurisdiction and relief”), and especially *id.* § 28 (“penalties and forfeitures in law and equity”). The relevant language of equity in H.B. 214, OHIO REV. CODE ANN.

Nor is that all. Leaving aside some provisions that, while important, are not especially germane to the present analysis,<sup>17</sup> H.B. 214 imposes certain reporting requirements on attending physicians.<sup>18</sup> It demands, among other things, that an attending physician “shall indicate”<sup>19</sup> in State-required reporting that she or he “does not have knowledge that the pregnant woman was seeking the abortion, in whole or in part”<sup>20</sup> because of any of the prohibited reasons for doing so.

Stepping back from the details of H.B. 214 and speaking generally, the regulatory terrain this law occupies is striking.<sup>21</sup> In sponsor testimony on H.B. 214 before the Ohio House Health Committee, Representative Derek Merrin referred to an earlier measure, House Bill 135 (H.B. 135),<sup>22</sup> which H.B. 214 “strengthened.”<sup>23</sup> Unlike H.B. 135, which prohibited abortion sought “solely because of a test result indicating Down syndrome in [a fetus] or a prenatal diagnosis of Down syndrome in [a fetus],”<sup>24</sup> H.B. 214 prohibits “purposely perform[ing] or induc[ing] or attempt[ing] to perform or induce an abortion”<sup>25</sup>

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§ 2919.10(E) (“In any action under this division, the court also may award any injunctive or other equitable relief that the court considers appropriate.”), is also found in *id.* § 2919.20(G) (“In any action under this division, the court also may award any injunctive or other equitable relief that the court considers appropriate.”) and *id.* § 2919.17(H) (same).

<sup>17</sup> *See, e.g.*, OHIO REV. CODE ANN. § 2919.10(G) (West, Westlaw through File 51 of 132d Gen. Assemb. (2017–2018)) (“[T]he provisions of this section and sections 2919.11 to 2919.193 of the Revised Code are severable as provided in section 1.50 of the Revised Code.”); *id.* § 2919.10(H) (“The general assembly may . . . intervene as a matter of right in any case in which the constitutionality of this section is challenged.”).

<sup>18</sup> *See id.* § 2919.101(A).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> The bar H.B. 214 imposes on pregnant women’s abortion decisions may practically burden the reproductive choices in particular of older women who may wish to become pregnant but have a higher risk of pregnancy affected by Down syndrome, who may, as a result, feel constrained to forego pregnancy altogether in light of H.B. 214. That being the case, H.B. 214 may implicate not only the right to abortion, as discussed here, but also the related and more general right to procreate. *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”). Thanks to my colleague Ruth Colker for spotlighting this point.

<sup>22</sup> H.R. 135, 131st Gen. Assemb., Reg. Sess. (Ohio 2015) (as reported by the H. Cmty. & Family Advancement Comm., June 17, 2015).

<sup>23</sup> *Merrin Testimony, supra* note 1, at 1 (“House Bill 135 has been strengthened from the last General Assembly.”); *accord Hearing on H. 214 Before the H. Health Comm.*, 132d Gen. Assemb., Reg. Sess. (Ohio 2017–2018) (statement of Rep. Sarah LaTourette at 1) [hereinafter *LaTourette H.R. 214 Testimony: H. Health Comm.*] (“I introduced similar legislation last General Assembly, but believe the language included in this bill to be even stronger and want to thank my joint sponsor for encouraging the changes included . . .”).

<sup>24</sup> Ohio H.R. 135, sec. 1, § 2919.20(B).

<sup>25</sup> OHIO REV. CODE ANN. § 2919.10(B) (West, Westlaw through File 51 of 132d Gen. Assemb. (2017–2018)).

when the pregnant woman's reasons for seeking the abortion have anything at all to do with the fact, expectation, or belief that the fetus she is carrying "has Down syndrome."<sup>26</sup>

No less striking is the regulatory terrain H.B. 214 does not claim. Almost remarkably, H.B. 214 contains no exception to its abortion prohibition or its other regulatory measures for circumstances in which a pregnant woman's life or health is imperiled by her pregnancy.<sup>27</sup> H.B. 214 thus blocks a pregnant woman from ending a pregnancy for the most burning reasons having to do with her own life or health if the fact, expectation, or belief that the fetus she is carrying "has Down syndrome"<sup>28</sup> plays any role in her decision. Should any of the prohibited reasons have any bearing at all on a pregnant woman's choice to terminate her pregnancy, it does not matter what other reasons she does or might have for wishing to end her pregnancy. A pregnant woman herself will suffer no direct criminal consequences for her choice, but the reasons H.B. 214 defines as illicit make her attending physician's conduct unlawful, and subject to criminal, professional, and civil liability, if the physician knows of the reasons for her choice.<sup>29</sup> A great deal—both for the pregnant woman and for her physician, and, of course, from a pro-life point of view, for her unborn child—thus hinges on what the legal meaning of "knowledge,"<sup>30</sup> as used in the legislation, is.

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<sup>26</sup> The quoted language appears in *id.* § 2919.10(B)(3). For the supporting language associated with what the text describes as "fact, expectation, or belief," see *id.* § 2919.10(B)(1)–(3).

<sup>27</sup> *Hearing on H.R. 214 Before the H. Health Comm.*, 132d Gen. Assemb., Reg. Sess. (Ohio 2017–2018) (statement of Jaime Miracle, Deputy Dir., NARAL Pro-Choice Ohio at 2) ("This bill has absolutely no protections for a doctor treating a woman in a life-threatening situation or a condition that threatens her long-term health.").

<sup>28</sup> See generally OHIO REV. CODE ANN. § 2919.10(B)(1)–(3) (West, Westlaw through File 51 of 132d Gen. Assemb. (2017–2018)). The quoted language is in *id.* § 2919.10(B)(3).

<sup>29</sup> *Id.* § 2919.10(B)–(F).

<sup>30</sup> *Id.* § 2919.10(B). With thanks to Jessie Hill for the cross-tabbing, the term is defined by *id.* § 2901.22(B):

A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

Read in light of this provision, H.B. 214's "knowledge" requirement is potentially very broad. It involves both actual knowledge and effective or constructive knowledge, at least in certain circumstances. Practically, the "knowledge" requirement might give rise to a felt sense, if not a legal obligation, that an attending physician must "make [an] inquiry" into a pregnant woman's reasons for wishing to terminate a pregnancy through abortion.

### III. A VERY BRIEF DESCRIPTION OF THE EXISTING CONSTITUTIONAL RULES TO BE USED TO ASSESS H.B. 214'S CONSTITUTIONALITY

Before assessing H.B. 214's constitutionality, a very brief description of some essential aspects of the existing constitutional rules governing women's reproductive rights in the abortion setting is in order.

Central to the substantive promise of liberty protected by the U.S. Constitution's Fourteenth Amendment is an autonomy-based right to which pregnant women are entitled, recognized consistently since *Roe v. Wade* was decided.<sup>31</sup> This constitutional right provides broad protections to the decision that a pregnant woman makes whether to continue or end a pregnancy before it reaches term. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>32</sup> the Supreme Court reaffirmed what it termed *Roe*'s "essential holding,"<sup>33</sup> including, perhaps most importantly, "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."<sup>34</sup> In saying this, *Casey* accepted *Roe*'s conviction that fetal viability is a crucial point during pregnancy and that this aspect of fetal development properly serves as a significant dividing line for constitutional purposes.<sup>35</sup> Before viability, *Casey* observed, the State's long-recognized interests in regulating a pregnant woman's abortion choice—interests in regulating medical standards and the medical profession,<sup>36</sup> in seeking to protect and preserve the pregnant

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<sup>31</sup> *Roe v. Wade*, 410 U.S. 113, 153–54 (1973).

<sup>32</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>33</sup> *Id.* at 846, 869, 880; *see also id.* at 870, 871, 873 (plurality opinion).

<sup>34</sup> *Id.* at 846 (majority opinion).

<sup>35</sup> *Roe*, 410 U.S. at 163 ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb.")

<sup>36</sup> *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (noting the State's "interest in protecting the integrity and ethics of the medical profession" (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997))); *id.* at 158 (discussing the State's "legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn"); *Roe*, 410 U.S. at 150 ("The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient."); *id.* at 154 (referring to the State's "important interests . . . in maintaining medical standards").

woman's life and health,<sup>37</sup> and in the (potential) life of the fetus<sup>38</sup>—“are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the [abortion] procedure.”<sup>39</sup>

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<sup>37</sup> See, e.g., *Casey*, 505 U.S. at 871 (plurality opinion) (“[T]he State has legitimate interests in the health of the woman . . .”); *id.* at 882 (“Those [earlier abortion] decisions . . . recognize a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth. It cannot be questioned that psychological well-being is a facet of health.” (citation omitted)); *id.* at 900 (concluding that the recordkeeping and reporting requirements of the statute relate to the State's interest in health); *Roe*, 410 U.S. at 150 (“[T]he State retains a definite interest in protecting the woman's own health and safety.”); *id.* at 154 (reiterating the State's “important interests in safeguarding health”); *id.* at 162 (“[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . .”).

<sup>38</sup> The Court has formulated this interest in various terms. See, e.g., *Gonzales*, 550 U.S. at 145 (discussing it as the State's “legitimate and substantial interest in preserving and promoting fetal life”); *id.* at 146 (referring to the “legitimate interest of the Government in protecting the life of the fetus”); *id.* at 158 (“[T]he State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child . . .”); *Casey*, 505 U.S. at 846 (“[T]he State has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child.”); *id.* at 853 (referring to the State's “legitimate interests in protecting prenatal life”); *id.* at 858 (discussing the “state interest in fetal protection”); *id.* at 870 (plurality opinion) (mentioning the State's “legitimate interest in promoting the life or potential life of the unborn”); *id.* at 871 (noting the same, but with the State's “legitimate interests in . . . protecting the potential life within her”); *id.* at 872 (noting the same, but with the “State's interest in promoting fetal life”); *id.* at 873 (“[T]he State has an interest in protecting the life of the unborn.”); *id.* at 875 (discussing the “State's interest in the potential life within the woman”); *id.* at 876 (“[T]he State has an interest in protecting fetal life or potential life.”); *Roe*, 410 U.S. at 150 (referring to “the State's interest—some phrase it in terms of duty—in protecting prenatal life”); *id.* at 154 (“[A] State may properly assert important interests . . . in protecting potential life.”); *id.* at 155 (“[A]t some point the state interests as to . . . prenatal life[] become[s] dominant.”); *id.* at 162 (indicating that the State “has still *another* important and legitimate interest in protecting the potentiality of human life”); *id.* at 163 (referring to the State's “interest in potential life”); *id.* (“[T]he State is interested in protecting fetal life after viability . . .”); see also *Casey*, 505 U.S. at 897–98 (holding that a spousal notification requirement justified by the “husband's interest in the life of the child his wife is carrying,” and coupled with the State's interest in potential life, does not outweigh “a wife's liberty”); *id.* at 949, 974 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (discussing the “potential life of the fetus”); *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting) (noting the same, but as the “life or potential life of the fetus”).

<sup>39</sup> *Casey*, 505 U.S. at 846; see also *Gonzales*, 550 U.S. at 146 (assuming that “[b]efore viability, a State ‘may not prohibit any woman from making the ultimate decision to terminate her pregnancy.’” (quoting *Casey*, 505 U.S., at 879)). These are not the only interests that have been recognized in the Court's abortion jurisprudence as it has developed over time, see, e.g., *Gonzales*, 550 U.S. at 158 (discussing the “additional ethical and moral concerns that justify a special prohibition,” in the form of the procedure banned by the federal law at issue in the case), and *Planned Parenthood Ass'n of Kan. City, Mo., Inc., v. Ashcroft*, 462 U.S. 476, 490–91 (1983) (Powell, J., writing for himself and joined by Burger, C.J.)



In order to safeguard the constitutional abortion right from State efforts that would either take it away entirely or otherwise unduly constrain it, the Supreme Court has declared previability abortion prohibitions are unconstitutional and has held that previability abortion regulations are to be subjected to what it called an “undue burden” test.<sup>40</sup> As *Casey* described the test:

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.<sup>41</sup>

The Supreme Court has recently clarified the operation of *Casey*’s undue burden test. In *Whole Woman’s Health v. Hellerstedt*,<sup>42</sup> the Court held that this test serves as a means for courts to subject laws regulating abortion to a constitutional balancing of relevant interests. According to *Whole Woman’s Health*, the undue burden test works to ensure that the benefits of a State’s previability abortion regulation outweigh its relative imposition of costs on the exercise by pregnant women of their protected abortion rights. In the Court’s words: “The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.”<sup>43</sup> Following this announcement, *Whole Woman’s Health* went on to strike down as unconstitutional State-imposed restrictions on the conditions under which abortions were to be provided. The particular measures at issue in the case failed to survive constitutional review because their benefits to women did not outweigh the burdens on abortion rights that they imposed.<sup>44</sup>

In contrast with the significant constitutional restrictions on the State’s ability to regulate abortions before fetal viability, the rule since *Roe* has consistently been that the State’s interest in protecting and preserving the

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(referring to the “State’s interest in protecting immature minors”), though they are the main ones.

<sup>40</sup> See, e.g., *Gonzales*, 550 U.S. at 146 (applying *Casey*’s “standard to the cases at bar”); *Casey*, 505 U.S. at 878 (plurality opinion); see also *Stenberg v. Carhart*, 530 U.S. 914, 921, 945–46 (2000) (applying the “undue burden” test to find state abortion statute unconstitutional).

<sup>41</sup> *Casey*, 505 U.S. at 877 (plurality opinion).

<sup>42</sup> *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

<sup>43</sup> *Id.* at 2309 (first citing *Casey*, 505 U.S. at 887–98; and then citing *id.* at 898–901 (plurality opinion)).

<sup>44</sup> *Whole Woman’s Health*, 136 S. Ct. at 2310–18. For the Court’s treatment of other arguments made in the case, see *id.* at 2318–20.

(potential) life of the fetus becomes sufficiently powerful in constitutional terms at the point of viability that, from and after that time, the State is generally permitted to regulate a pregnant women's abortion choice<sup>45</sup>—even to the point of prohibiting abortions altogether.<sup>46</sup> This permission—it must quickly be added—is subject to one very important and sizeable exception.<sup>47</sup> Even after viability, when the State's interests in regulating abortion reach their height, the State must, if it chooses to exercise its permitted regulatory powers,<sup>48</sup> make express exceptions in its rules for an abortion that is needed to protect or preserve a pregnant woman's life or her health.<sup>49</sup> This constitutionally required life and health exception is famously quite broad. The understanding of "health" that animates it includes both threats to a pregnant woman's physical health, as well as to her psychological well-being.<sup>50</sup> No abortion restriction that imperils

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<sup>45</sup> See, e.g., *Casey*, 505 U.S. at 846 (holding that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure," but that after viability, "the State's power to restrict abortions" rises to its highest constitutional heights).

<sup>46</sup> But see *infra* notes 47–49 and accompanying text; see also *Casey*, 505 U.S. at 846 (holding that the State may "restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health"); *id.* at 879 (plurality opinion) (quoting *Roe v. Wade*, 410 U.S. 113, 164–65 (1973)); *Roe*, 410 U.S. at 163–65 (same).

<sup>47</sup> *Casey*, 505 U.S. at 846 (holding that the State may "restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health"); *id.* at 879 (plurality opinion) (quoting *Roe*, 410 U.S. at 164–65); *Roe*, 410 U.S. at 163–65 (same).

<sup>48</sup> This is not a constitutional obligation, only a constitutional permission. See, e.g., *Roe*, 410 U.S. at 163–64 ("If the State is interested in protecting fetal life after viability, it *may* go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." (emphasis added)); *id.* at 163–65 (discussing the State's authority and holding that "[f]or the stage subsequent to viability, the State in promoting its interest in the potentiality of human life *may, if it chooses*, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" (emphasis added)). For further discussion of the contours of constitutional obligations and permissions, see generally Marc Spindelman, *Death, Dying, and Domination*, 106 MICH. L. REV. 1641 (2008) (engaging how these concepts play out in the constitutional right-to-die debates).

<sup>49</sup> *Casey*, 505 U.S. at 846; *Roe*, 410 U.S. at 163–65.

<sup>50</sup> See *Gonzales v. Carhart*, 550 U.S. 124, 170 (2007) (Ginsburg, J., dissenting) ("[T]he *Casey* Court stated with unmistakable clarity that state regulation of access to abortion procedures, even after viability, must protect 'the health of the woman.'" (quoting *Casey*, 505 U.S. at 846)); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 327–28 (2006) ("[O]ur precedents hold[] that a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for the preservation of the life or health of the [woman].'" (quoting *Casey*, 505 U.S. at 879 (plurality opinion))); *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) ("Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation." (first citing *Casey*, 505 U.S. at 880; and then citing *Harris v. McRae*, 448 U.S. 297, 316 (1980))); *Casey*, 505 U.S. at 882 (plurality opinion) ("Those [earlier abortion]

a woman's life or health, broadly understood in this way, may stand even when the State's authority to regulate abortions is at its constitutional apex.<sup>51</sup> Of course, one practical consequence of this state of affairs, recognized by the Supreme Court, is that no previability abortion regulation that fails to create a

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decisions . . . recognize a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth. It cannot be questioned that psychological well-being is a facet of health.” (citation omitted)); *see also* *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 768–69 (1986) (invalidating a postviability abortion regulation that “failed to require that [a pregnant woman’s] health be the physician’s paramount consideration”); *Roe*, 410 U.S. at 153 (“Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.”); *Doe v. Bolton*, 410 U.S. 179, 192 (1973) (“[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. All these factors may relate to health.”); *United States v. Vuitch*, 402 U.S. 62, 72 (1971) (“Indeed, whether a particular operation is necessary for a patient’s physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.”); *Women’s Med. Prof’l Corp. v. Voinovich*, 130 F.3d 187, 209–10 (6th Cir. 1997) (“[W]e emphasize that we are holding that a maternal health exception must encompass *severe* irreversible risks of mental and emotional harm. The State’s substantial interest in potential life must be reconciled with the woman’s constitutional right to protect her own life and health.”). The scope of the health exception has been a source of controversy in part on the ground that, as some commentators maintain, it makes the right to abortion throughout a pregnancy effectively a right to abortion on demand. *See, e.g.*, Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85, 97 (2005) (“[N]o objective reader of *Carhart* could fail to conclude that *Roe* and *Doe* legalized abortion-on-demand from conception to birth for virtually any reason.”); Jay Alan Sekulow & John Tuskey, Essay, *The “Center” Is in the Eye of the Beholder*, 40 N.Y.L. SCH. L. REV. 945, 955 & n.62 (1996) (observing that “[g]iven this infinitely expandable definition of ‘health,’ ‘the truth of the matter about *Roe* is that something very much like the abortion-on-demand mandated for the first two trimesters persists until birth,” and collecting some sources relevant to the point (quoting Gerard V. Bradley, Essay, *Life’s Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 335 (1993) (book review))).

<sup>51</sup> *Gonzales v. Carhart* may be taken to stand for a different position, as suggested by Justice Ginsburg’s dissent in the case, *Gonzales*, 550 U.S. at 170–71 (Ginsburg, J., dissenting) (describing the majority opinion as “alarming,” in part because “for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman’s health”), but the reasons for thinking so are easily overblown. Marc Spindelman, *On the Constitutionality of Ohio’s Proposed “Heartbeat Bill,”* 74 OHIO ST. L.J. 149, 179–84 (2013) (engaging the arguments for a robust pro-life reading of *Gonzales v. Carhart* while ultimately suggesting that such a reading of the case, based on its text and structure, should not be preferred to a more modest one).

safe harbor for abortions needed to protect or preserve a pregnant woman's life or health is constitutional either.<sup>52</sup>

#### IV. APPLYING THE CONSTITUTIONAL RULES TO H.B. 214

Given the continuing significance of the viability line in the Supreme Court's abortion doctrine, and the different constitutional rules that apply in the previability and postviability settings, analysis of the constitutionality of H.B. 214 is divided into two parts. First is a discussion of the constitutionality of H.B. 214 in its previability operations. And second is a discussion of the constitutionality of H.B. 214 as it functions postviability.

##### A. *The Previability Operation of H.B. 214*

Insofar as H.B. 214 bans a class of abortions outright prior to viability, it amounts to a previability abortion ban in flat contradiction of *Planned Parenthood v. Casey*'s understanding of the Fourteenth Amendment. So much must immediately be understood in view of *Casey*'s instruction that, previability, the State's interests in regulating abortion "are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the [abortion] procedure."<sup>53</sup> As a previability abortion ban, H.B. 214 is the sort of "prohibition of abortion" that *Casey* was talking about. The law strips a pregnant woman of the previability choice that, constitutionally speaking, is ultimately hers to make.<sup>54</sup>

In a recent case from Indiana, *Planned Parenthood of Indiana & Kentucky, Inc., v. Commissioner, Indiana State Department of Health*,<sup>55</sup> a federal district court reached this very conclusion in relation to an Indiana law, House Enrolled

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<sup>52</sup> *Stenberg*, 530 U.S. at 930 ("Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation." (citing *Casey*, 505 U.S. at 880)).

<sup>53</sup> *Casey*, 505 U.S. at 846; see also *Gonzales*, 550 U.S. at 146 (assuming that "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 879 (plurality opinion))).

<sup>54</sup> See *Gonzales*, 550 U.S. at 146 (assuming that "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 879 (plurality opinion))); accord *Hearing on H.R. 214 Before the H. Health Comm.*, 132d Gen. Assemb., Reg. Sess. (Ohio 2017–2018) (statement of B. Jessie Hill, Associate Dean for Academic Affairs, Judge Ben C. Green Professor of Law, Case Western Reserve University at 1) ("HB 214 is clearly unconstitutional, first, for the reason that it is a total ban on certain previability abortions. . . . In fact, no court has upheld a law that entirely bans previability abortions, whether for all women or some subcategory of women." (citations omitted)).

<sup>55</sup> *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 265 F. Supp. 3d 859 (S.D. Ind. 2017).

Act 1337 (H.E.A. 1337),<sup>56</sup> that (until it was struck down as unconstitutional) bore a family resemblance to H.B. 214.<sup>57</sup> In the course of ruling on Indiana’s abortion ban, the district court observed that:

The anti-discrimination provisions of HEA 1337 clearly . . . prevent women from obtaining abortions before fetal viability. The woman’s right to choose to terminate a pregnancy pre-viability[, however,] is categorical: “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.” . . .

. . . .  
 . . . The anti-discrimination provisions [of H.E.A. 1337] prohibit a woman from choosing to terminate a pregnancy pre-viability if the abortion is sought solely for one of the enumerated reasons. . . . [I]t is a woman’s right to *choose*

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<sup>56</sup> H.R. 1337, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016), *declared unconstitutional by Planned Parenthood of Ind. & Ky.*, 265 F. Supp. 3d at 869. According to the description of H.E.A. 1337 in *Planned Parenthood of Indiana & Kentucky*:

Specifically, HEA 1337 provides that “[a] person may not intentionally perform or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking” an abortion: (1) “solely because of the sex of the fetus,” §§ 16-34-4-4, 16-34-4-5; (2) “solely because the fetus has been diagnosed with, or has a potential diagnosis of, Down syndrome or any other disability,” §§ 16-34-4-6, 16-34-4-7; or (3) “solely because of the race, color, national origin, or ancestry of the fetus,” § 16-34-4-8. The phrase “potential diagnosis” is defined as “the presence of some risk factors that indicate that a health problem may occur.” Ind. Code § 16-34-4-3.

*Planned Parenthood of Ind. & Ky.*, 265 F. Supp. 3d at 862.

<sup>57</sup> Other laws with a family resemblance to H.B. 214 include a North Dakota law that bans physicians from “intentionally perform[ing] or attempt[ing] to perform an abortion . . . that the pregnant woman is seeking . . . solely . . . [o]n account of the sex of the unborn child; or . . . [b]ecause the unborn child has been diagnosed with either a genetic abnormality or a potential for a genetic abnormality,” Abortion Control Act, N.D. CENT. CODE § 14-02.1-04.1(1) (2017), and that defines “genetic abnormality” to include a range of conditions including Down syndrome. *Id.* § 14-02.1-02(4), (7) (broadly defining “genetic abnormality” as encompassing a range of conditions including Down syndrome). The category also includes a Louisiana law that prohibits abortions after twenty weeks “post-fertilization age . . . with knowledge that the pregnant woman is seeking the abortion solely because the unborn child has been diagnosed with either a genetic abnormality or a potential for a genetic abnormality,” Human Life Protection Act, LA. STAT. ANN. § 40:1061.1.2(B) (Supp. 2018), with Down syndrome being one of the conditions listed in the measure as a “genetic abnormality.” *Id.* § 40:1061.1.2(A)(3). Both these laws have been subject to challenge in federal court. *June Med. Servs., LLC v. Gee*, 280 F. Supp. 3d 849 (M.D. La. 2017) (challenging Louisiana measure); *MKB Mgmt. Corp. v. Burdick*, 954 F. Supp. 2d 900 (D.N.D. 2013) (dismissing without prejudice challenge to North Dakota ban on abortions involving sex selection and “genetic abnormalities”); *see also Legislative Tracker: Genetic Anomalies*, REWIRE.NEWS, <https://rewire.news/legislative-tracker/law-topic/genetic-anomalies-abortion-ban/> [<https://perma.cc/XUS7-K5HH>] (tracking “genetic anomaly” laws and legislation).

an abortion that is protected, which, of course, leaves no room for the State to examine, let alone prohibit, the basis or bases upon which a woman makes her choice.<sup>58</sup>

As might be expected, the view of H.B. 214 as an unconstitutional prohibition on previability abortions is fully in keeping with the conclusion about the measure that would be reached under *Casey*'s undue burden test, including as that test has been clarified by *Whole Woman's Health*.<sup>59</sup> This is the *Whole Woman's Health* Court speaking: "The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."<sup>60</sup> Seen in this light, H.B. 214, with its prohibition on abortion if the actual, expected, or believed Down-syndrome status of the fetus plays any part in a pregnant woman's decision to end her pregnancy and the abortion provider knows about it, is a 100% burden on her constitutionally protected choice. It obliterates it. And it

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<sup>58</sup> *Planned Parenthood of Ind. & Ky.*, 265 F. Supp. 3d at 866–67 (quoting *Casey*, 505 U.S. at 879 (plurality opinion)). As support for its position that the State has "no room . . . to examine, let alone prohibit, the basis or bases upon which a woman makes her choice," the opinion cites *Casey*, 505 U.S. at 846 (majority opinion), and *id.* at 879 (plurality opinion). *Planned Parenthood of Ind. & Ky.*, 265 F. Supp. 3d at 867. Mary Ziegler reaches the same conclusion about disability-based abortion bans, more generally, in Mary Ziegler, *The Disability Politics of Abortion*, 2017 UTAH L. REV. 587, 615–19 (2017) (engaging the constitutionality of disability-based abortion prohibitions).

<sup>59</sup> *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016). There is some debate in the lower courts about the meaning and scope of the Supreme Court's ruling in *Whole Woman's Health v. Hellerstedt*. How lower courts have been analyzing the decision is usefully traced in Leah M. Litman, *Unduly Burdening Women's Health: How Lower Courts Are Undermining Whole Woman's Health v. Hellerstedt*, 116 MICH. L. REV. ONLINE 50 (2017). While the approach here tracks the language of *Whole Woman's Health*, and sees its balancing inquiry as a general approach to applying *Casey*'s "undue burden" test, nothing for purposes of accounting for the unconstitutionality of H.B. 214's previability operation as an abortion ban turns on it. The same point could readily be made directly in terms of *Casey* and its own understanding and deployment of the "undue burden" test.

<sup>60</sup> *Whole Woman's Health*, 136 S. Ct. at 2309 (first citing *Casey*, 505 U.S. at 887–98; and then citing *id.* at 899–901 (plurality opinion)); accord Greer Donley, *Does the Constitution Protect Abortions Based on Fetal Anomaly?: Examining the Potential for Disability-Selective Abortion Bans in the Age of Prenatal Whole Genome Sequencing*, 20 MICH. J. GENDER & L. 291, 324 (2013) (discussing a North Dakota "disability-based abortion ban" and observing that, as a legal measure that "actually outlaws certain pre-viability abortions[,] [i]t is . . . an explicit rejection of the Court's holding in *Roe*, as interpreted by *Casey*, that the government cannot prevent women from obtaining a pre-viability abortion"); Jaime Staples King, *Not This Child: Constitutional Questions in Regulating Noninvasive Prenatal Genetic Diagnosis and Selective Abortion*, 60 UCLA L. REV. 2, 36 (2012) ("Because [reasons-based abortion prohibitions] proscribe providers from knowingly performing abortions sought for designated reasons, this alone could constitute an undue burden for all women seeking abortions for those reasons."). Thanks to Maya Manian for introducing me to Donley's and King's work.

does so while offering no offsetting benefits to a pregnant woman in relation to the exercise of her constitutionally protected choice. *Whole Woman's Health*,<sup>61</sup> reaffirming *Casey*'s rule in this respect,<sup>62</sup> instructs that abortion bans like H.B. 214, which offer all burdens and no benefits to pregnant women exercising their previability abortion rights, violate the Fourteenth Amendment's Due Process Clause.<sup>63</sup>

That said, it might be contended that H.B. 214 is not like other familiar abortion prohibitions that have been enacted to date, and that, as a result, a different and more nuanced constitutional analysis of it is in order. H.B. 214, like similar, recent measures in other jurisdictions, may be thought to have a novel-ish quality to it.<sup>64</sup> H.B. 214 is not a categorical bar on abortions that focuses on an abortion procedure, like the federal Partial-Birth Abortion Ban

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<sup>61</sup> See *Whole Woman's Health*, 136 S. Ct. at 2310–18.

<sup>62</sup> See, e.g., *id.* at 2321 (Ginsburg, J., concurring) (“So long as this Court adheres to *Roe v. Wade*, 410 U.S. 113 . . . (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 . . . (1992), Targeted Regulation of Abortion Providers laws like H.B. 2 that ‘do little or nothing for health, but rather strew impediments to abortion,’ *Planned Parenthood of Wis., Inc. v. Schimel*,] 806 F. 3d [908,] 921 [(7th Cir. 2015)], cannot survive judicial inspection.”).

<sup>63</sup> U.S. CONST. amend. XIV, § 1. The same conclusion would be reached even if *Whole Woman's Health* were to be understood as leaving open the prospect of a broader kind of balancing of interests that would include the State's interest in the (potential) life of the fetus and the State's interest in other considerations, like the equal dignity and worth of persons with Down syndrome (or persons with disabilities or vulnerable populations more generally, see *infra* Part IV.B.2). This is so because of H.B. 214's total burden on a pregnant woman's constitutionally protected previability choice. Thanks to Jessie Hill for the reminder of the possibility of the alternative understanding of *Whole Woman's Health*, and how it might play out in this setting.

<sup>64</sup> This is not to agree with the position that the State advanced in *Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner, Indiana State Department of Health*, “posit[ing] that HEA 1337 represents a ‘qualitatively new kind of [abortion] statute.’” 265 F. Supp. 3d 859, 865 (2017). Much less does it mean to affirm the argument made by the State of Ohio in the challenge to H.B. 214, to the effect that the law “falls outside the analysis of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).” Response in Opposition to Motion for Temporary Restraining Order and Preliminary Injunction at iii, *Preterm-Cleveland v. Himes*, No. 1:18-cv-109 (S.D. Ohio Mar. 3, 2018); see also *id.* at 18–30 (elaborating the argument). Earlier iterations of measures sufficiently like H.B. 214 so as to undermine claims about its novelty are noted in King, *supra* note 60, at 27 (“Before 2009, only two states, Pennsylvania and Illinois, had passed laws prohibiting physicians from providing abortion based on the mother's reason for wanting it.”), and are traced in Justin Gillette, Comment, *Pregnant and Prejudiced: The Constitutionality of Sex- and Race-Selective Abortion Restrictions*, 88 WASH. L. REV. 645, 650–55 (2013) (noting some of the history of “motive-based abortion restrictions”). Indeed, against the thought that there is something novel or novel-ish about H.B. 214, it may be said even more strongly that the measure is a non-novel continuation of an older and larger march toward barring abortion from conception on. See *infra* note 74.

Act of 2003<sup>65</sup> upheld in *Gonzales v. Carhart*.<sup>66</sup> Nor is H.B. 214 a categorical bar on abortion that focuses on fetal anatomical development, like Ohio's postviability ban,<sup>67</sup> its 6-to-8-week-on abortion ban called the "Heartbeat Bill,"<sup>68</sup> its 20-week-on abortion ban,<sup>69</sup> or other measures that would ban abortion from the point of conception on. By contrast, H.B. 214's abortion prohibition trains its sights on the workings of a pregnant woman's mind: her deliberative decisional processes. H.B. 214's legal block on abortions only arises when a pregnant woman seeks an abortion "in whole or in part, because of . . . [a] test result indicating Down syndrome in"<sup>70</sup> the fetus she carries, "[a] prenatal diagnosis of Down syndrome in"<sup>71</sup> the fetus, or "[a]ny other reason [that the woman has or might have] to believe" that the fetus "has Down syndrome,"<sup>72</sup> *and*—importantly—where the pregnant woman's reasons for wanting an abortion are also known by the person being asked to perform or induce or who seeks to perform or induce the abortion that the pregnant woman wants.<sup>73</sup> Should a pregnant woman's reasons for seeking an abortion change, then so might the abortion's legality.

Understood this way, H.B. 214 is an abortion prohibition that might be typed a "decisional prohibition" on abortion,<sup>74</sup> a characterization whose utility neither alters nor affects the constitutional conclusion about it under governing

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<sup>65</sup> 18 U.S.C. § 1531 (2012) (effective Nov. 6, 2003).

<sup>66</sup> *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007). Or similarly Ohio's "partial birth feticide" ban, OHIO REV. CODE ANN. § 2919.151 (West, Westlaw through File 51 of 132d Gen. Assemb. (2017–2018)) (effective Aug. 18, 2000), the constitutionality of which was affirmed by *Women's Medical Professional Corp. v. Taft*, 353 F.3d 436, 445 (6th Cir. 2003).

<sup>67</sup> OHIO REV. CODE ANN. § 2919.17(A) (barring postviability abortions).

<sup>68</sup> H.R. 258, 132d Gen. Assemb., Reg. Sess. (Ohio 2017) (as reported by the H. Health Comm., Dec. 13, 2017) (prohibiting "an abortion of an unborn human individual with a detectable heartbeat"). Discussion of the constitutionality of a predecessor measure is in Spindelman, *supra* note 51.

<sup>69</sup> OHIO REV. CODE ANN. § 2919.18 (prohibiting the "performance of an abortion on a pregnant woman when the probable post-fertilization age of the unborn child is twenty weeks or greater"); *see also infra* notes 121, 141 and accompanying text.

<sup>70</sup> *Id.* § 2919.10(B)(1).

<sup>71</sup> *Id.* § 2919.10(B)(2).

<sup>72</sup> *Id.* § 2919.10(B)(3).

<sup>73</sup> *Id.* § 2919.10(B).

<sup>74</sup> These measures have elsewhere been termed "reasons-based" abortion bans, King, *supra* note 60, at 5 ("I refer to these types of restrictions as reasons-based abortion prohibitions (RBAPs)."), and "motive-based restrictions," Gillette, *supra* note 64, at 646. Past these ways of characterizing these measures is a point of view that sees them as simple abortion bans. *See, e.g., Hearing on H.R. 135 Before the H. Cmty. & Family Advancement Comm.*, 131st Gen. Assemb., Reg. Sess. (Ohio 2015–2016) (statement of Jaime Miracle, Deputy Director, NARAL Pro-Choice Ohio at 1) [hereinafter *Miracle H.R. 135 Testimony: H. Cmty. & Family Advancement Comm.*] ("This bill is . . . an unconstitutional attempt to limit access to a health care procedure.").



case law.<sup>75</sup> This is because once a pregnant woman's reasons include a prohibited ground of decision in any way, and once another person who will help her carry out her choice to terminate the pregnancy knows of her illicit reason (or reasons) for seeking an abortion, no abortion may lawfully be provided to her. Instead, a physician will face a triple threat of sanctions—criminal, professional, and civil, all—for respecting a pregnant woman's choice. It is for these reasons that H.B. 214, despite whatever novel qualities it may have, is practically and doctrinally just like any other previability abortion prohibition that stands in the way of the right of a pregnant woman to make “the ultimate decision”<sup>76</sup> whether to terminate a pregnancy as a matter of constitutional right. That decision is to be made by her for herself, not for her by the State, as H.B. 214 would do, taking the right to choose away from her.

To reiterate: The State's choice of means for barring abortion—whether focused on an abortion procedure, a developmental landmark, or the constellation of a pregnant woman's decision-making—does not matter from a constitutional perspective. What matters is whether the State is prohibiting a pregnant woman from making her constitutionally protected choice. Prior to fetal viability, the State has no valid, constitutionally recognized reason for not finally allowing a pregnant woman to decide whether to terminate a pregnancy or to carry to term for reasons that are her own, unaccountable to the State.<sup>77</sup>

This conclusion can be explained by looking at H.B. 214 on a different and deeper level. H.B. 214 arrives on a field of constitutional law suffused with intuitions and rules about the boundaries of relations between and among the pregnant woman, her attending physician, and the State. For its part, H.B. 214 is written in a way that presupposes that the State has the constitutional authority to operationalize the reasons that a pregnant woman has for exercising her constitutional right to end her pregnancy as part of the State's own governance

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<sup>75</sup> King, *supra* note 60, at 32 (“The decision to have an abortion based on a genetic condition is no less intimate, challenging, or important than the decision to have it for any other reason.”).

<sup>76</sup> Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 875, 877, 879 (1992) (plurality opinion).

<sup>77</sup> Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016) (noting that laws imposing “substantial obstacle[s] in the path of [women]” who seek previability abortions are “undue burden[s] on abortion access” (quoting *Casey*, 505 U.S. at 878 (plurality opinion)); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (“*Casey*, in short, struck a balance [between a pregnant woman's right to “mak[e] the ultimate decision to terminate her pregnancy” and the State's interest in “express[ing] [its] profound respect for the life of the unborn”]. The balance was central to its holding.”); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (observing that “the Constitution offers basic protection to the woman's right to choose”); *Casey*, 505 U.S. at 870 (plurality opinion) (“We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy.”); *id.* at 879 (“[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”); *id.* at 872 (noting that before viability, “the woman has a right to choose to terminate or continue her pregnancy”).

apparatus. As the district court in *Planned Parenthood of Indiana & Kentucky, Inc.* observed, however, the constitutional protections afforded a pregnant woman's right to choose in the Supreme Court's abortion case law "leave[] no room for the State to examine, let alone prohibit, the basis or bases upon which a woman makes her choice."<sup>78</sup>

This idea is very important in this setting, and so it is worth looking at it in greater depth. When the Supreme Court reaffirmed the "essential holding"<sup>79</sup> of *Roe v. Wade* in *Planned Parenthood v. Casey*, the controlling opinion in *Casey* underscored how *Roe* and its protections for reproductive choice were situated "at an intersection of two lines of [Supreme Court] decisions."<sup>80</sup> The first line of decisions focused (then and now) on "the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child."<sup>81</sup> The second line of decisions involved (then and now) "cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection."<sup>82</sup>

Both of these lines of cases demonstrate great respect for "decisional autonomy," by which is meant here not merely freedom from State efforts that would block a final, constitutionally protected choice from being made, but also a certain freedom in and throughout the last processes of decision-making themselves.<sup>83</sup> To illustrate, consider the right to marry, protected as part of "the

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<sup>78</sup> *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health* 265 F. Supp. 3d 859, 867 (S.D. Ind. 2017).

<sup>79</sup> *Casey*, 505 U.S. at 846 (majority opinion). Other appearances of this language from *Casey* are collected in *supra* note 33.

<sup>80</sup> *Casey*, 505 U.S. at 857.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See Gillette, *supra* note 64, at 666–67, 671–74 (discussing decisional autonomy in the context of the Supreme Court's reproductive rights decisions, with an emphasis on *Casey*). In the course of sketching some of the scope of the pregnant woman's right to decisional autonomy, *Roe* focused on the impact of denying the pregnant woman a right to make the abortion decision in consultation with her physician:

This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

liberty relating to intimate relationships” and “the family.” In the right-to-marry setting, the State is obligated to recognize the decision to marry for those who are entitled to exercise the right. This obligation in no way authorizes the State to ask the parties to a would-be marriage to give the State an accounting of their reasons for marrying, such as by declaring how deeply or counting all the ways that they love one another. Nor could the State condition the right to marry on the reasons that an individual has for exercising the right.<sup>84</sup> People get to choose to marry someone whom the right to marry lets them choose to marry—or not—whether the State believes their actual reasons are good or bad or wrong or right. That is just what the freedom to marry that is constitutionally protected means.

Or take a related example from the same line of cases: In the realm of parental decision-making, where the State must let parents make certain choices about the welfare of their children,<sup>85</sup> the State cannot ordinarily put parents to the test of explaining their reasons for making a particular, constitutionally protected decision about their child’s or their children’s well-being.

The same point holds true in the other line of cases to which *Casey* noted the abortion right is related, which includes certain kinds of end-of-life decisions that individuals make.<sup>86</sup> The constitutional right to refuse unwanted medical treatment, with its common-law foundations,<sup>87</sup> is to be exercised for whatever reasons an individual might have for exercising it—whether altruistic or purely self-regarding or somewhere in between—even in those cases in which the choice to exercise the right might lead to the decision maker’s own death.<sup>88</sup> Because this is a constitutionally protected right, the State cannot condition its exercise on whether the State approves or disapproves of the reasons an individual has for making her or his or their constitutionally protected choice.

As in these various settings—settings in which the State may not condition the exercise of a constitutionally protected right on the basis of what it maintains

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Roe v. Wade, 410 U.S. 113, 153 (1973); see also Whalen v. Roe, 429 U.S. 589, 598–600 (1977) (discussing two different types of privacy interests: “the individual interest in avoiding disclosure of personal matters,” and “the interest in independence in making certain kinds of important decisions”).

<sup>84</sup>For an illustration, see *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”).

<sup>85</sup>See, for example, the classic decisions in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

<sup>86</sup>See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990) (“[F]or purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.”).

<sup>87</sup>*Id.* at 268–79 (discussing the common-law foundations of the right to refuse unwanted medical treatment).

<sup>88</sup>*Id.* at 279 (“But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.”).

are the right sorts of reasons—so, too, the idea is, in relation to the right to abortion.<sup>89</sup> The existence and recognition of this constitutional right means that the choice whether to exercise it—including the reasons why—ultimately belongs to the pregnant woman when the decision is hers to make. As Justice John Paul Stevens once observed, “[i]t is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties.”<sup>90</sup>

What has been said to this point has been said with some care in the articulation. This is because it turns out that the abortion right is not a right that, in recent years anyway, has been defined to its very core by freedom from State involvement in the processes of individual decision-making. Without question, *Casey* made plain that “[t]he woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*[.]”<sup>91</sup> and it called this right “a rule of law and a component of liberty”<sup>92</sup> that it emphatically refused to “renounce.”<sup>93</sup> But the governing opinion in *Casey* also went out of its way to note that it would be a mistake—or, more precisely, as the opinion put it, “an overstatement”—“to describe [the abortion right] as a right to decide whether to have an abortion ‘without interference from the State.’”<sup>94</sup> What the opinion meant by that was illuminated to an important degree when it turned to discuss the “guiding principles”<sup>95</sup> of the Supreme Court’s earlier abortion decisions to which it was largely recommitting itself. In that context, the lead opinion in *Casey* remarked that “[w]hat is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so.”<sup>96</sup> This is decisional autonomy, but within limits. Understanding this helps explain how *Casey* could countenance and affirm both the pregnant woman’s right to make the final abortion decision previability and also the State’s authority to enact measures “designed to persuade her to choose childbirth over abortion”<sup>97</sup> and how *Casey* could also approve previability regulations of abortion designed to ensure that a woman’s final choices—which were and remained hers—were meaningfully informed, knowing, voluntary, and deliberate.

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<sup>89</sup> See *Doe v. Bolton*, 410 U.S. 179, 215 (1973) (Douglas, J., concurring) (“Georgia’s enactment has a constitutional infirmity because, as stated by the District Court, it ‘limits the number of reasons for which an abortion may be sought.’” (citing *United States v. Vuitich*, 402 U.S. 62, 72 (1971))).

<sup>90</sup> *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring in the judgment).

<sup>91</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (plurality opinion).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 875 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 61 (1976)).

<sup>95</sup> *Id.* at 877–79.

<sup>96</sup> *Id.* at 877.

<sup>97</sup> *Casey*, 505 U.S. at 878 (plurality opinion).

But while *Casey* went this far, allowing some incursions on a pregnant woman's decisional autonomy designed to influence her decision whether to end or to continue her pregnancy, the controlling opinion in the case did not otherwise displace the situated sense in this area of doctrine,<sup>98</sup> with its two converging lines of cases, that the State may not hold a woman who exercises the abortion right to account by "examining"<sup>99</sup> her reasons for doing so. Stated differently, *Casey* recognizes and makes some room for the State's authority to attempt to influence a pregnant woman's abortion decision—by, for instance, requiring that she be given "truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus,"<sup>100</sup> and even by making her wait a short, reasonable amount of time to deliberate over this serious decision<sup>101</sup>—but it does so without suggesting that the State may additionally ask a pregnant woman to account for her reasons for exercising her right. Much less did *Casey* authorize the State to do what H.B. 214 does: make a pregnant woman's reasons for exercising her constitutional right to abortion the very condition for the right's legal exercise. Nothing in *Casey* embraces the proposition H.B. 214 crucially depends upon: that a pregnant woman has a constitutional right prior to viability to make the final abortion decision except when the State dislikes her reasons for exercising that right. This is so even if the State has what may be regarded as good reasons for its own preferences.

True enough, *Casey* did and does allow the State to "require a woman to give her written informed consent to an abortion."<sup>102</sup> To that extent, it might be thought that the State is constitutionally permitted to hold pregnant women and their reasons to account under law. But there is still an important difference to be found between: (1) an informed consent mechanism that acknowledges that a pregnant woman has received certain types of information reasonably deemed material by the State, and that acknowledges that a pregnant woman has made an informed, knowing, voluntary, and deliberate decision to end her pregnancy; and (2) a State law that conditions a pregnant woman's right to an abortion upon her reasons for exercising that right. If the legitimacy of an informed consent procedure seems—as, to some, it might—to be no different than a more

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<sup>98</sup> Karl Llewellyn's related concept of "situation sense" is productively discussed in, and critically engaged by, WILLIAM TWING, KARL LLEWELLYN AND THE REALIST MOVEMENT 216–27 (1973). "Situation sense" has profitably been tied to "Jerome Frank's use of 'gestalt' and Hutcheson's use of 'hunching[.]'" Samuel J.M. Donnelly, Book Reviews, 3 HOFSTRA L. REV. 899, 909 (1975) (first citing JEROME FRANK, COURTS ON TRIAL 165–85, 170–71, 175–79 (1950); and then citing Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929)).

<sup>99</sup> *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 265 F. Supp. 3d 859, 867 (S.D. Ind. 2017).

<sup>100</sup> *Casey*, 505 U.S. at 882 (plurality opinion).

<sup>101</sup> *See id.* at 881, 885–87.

<sup>102</sup> *Id.* at 881.

substantive inquiry into a pregnant woman's reasons for exercising her constitutional right, the practical difference between a procedural and substantive accounting may be to little avail. But whether the line is nonexistent or subtle from one angle of vision, it is very bold from another, seen in terms of its effects. To say a pregnant woman must give informed consent in the course of the exercise of her constitutional right to choose to end her pregnancy prior to viability leaves the final decision in her hands. To say the State can condition her exercise of her rights depending on her reasons, does not. In that case, the State makes the decision for her. It forces her to live by the State's reasons and under the State's rule.<sup>103</sup>

No constitutional analysis of H.B. 214 that is faithful to the relevant precedents and constitutional principles for which they stand could possibly miss this difference between a pregnant woman making the final choice about whether and why to exercise her constitutional right and the State making that decision for her. Nor should the major shift that would be required in the constitutional landscape for H.B. 214 to be upheld as a previability abortion ban be overlooked. To appreciate why the alteration of the landscape would be significant, it should be enough to recall that *Casey* reaffirmed that the pregnant woman's previability decision whether to continue or end her pregnancy is ultimately hers.<sup>104</sup> Uphold H.B. 214, and the consistent structure of the right to abortion since *Roe* and since *Casey*—which has preserved and safeguarded the pregnant woman's right to make the final previability abortion decision for herself and for her own reasons—ceases to be what it was. It is easy to imagine how a decision validating H.B. 214 could be the change that prefigures *Roe*'s fall.

That is not the end of the matter, however. There is another reason that upholding H.B. 214 as constitutional would work a major change in the existing constitutional abortion rights landscape. It is also, not incidentally, a second reason why H.B. 214 is unconstitutional in its previability operations.

As noted earlier, H.B. 214 contains no exception within it for abortions needed to protect or to preserve a pregnant woman's life or health. This is so despite the fact that throughout the course of pregnancy, the State is constitutionally required, and has long been constitutionally required, to allow a pregnant woman to terminate an unwanted pregnancy not only when the

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<sup>103</sup> B. Jessie Hill, *Regulating Reasons: Governmental Regulation of Private Deliberation in Reproductive Decision Making*, in *LAW, RELIGION, AND HEALTH IN THE UNITED STATES* 348, 352 (Holly Fernandez Lynch et al. eds., 2017) ("There is, therefore, a difference between deliberation-forcing mechanisms, such as reasonable informed consent requirements, and coercion, such as taking abortion off-limits altogether when it is sought for certain reasons."); *id.* at 355 ("Indeed, though the contours of the substantive due process right to privacy are unclear, the ability to deliberate and make decisions without coercive governmental judgments as to what are appropriate and inappropriate reasons is surely at the core of the right.").

<sup>104</sup> See *supra* notes 32–44 and accompanying text.

decision is on the general terrain of her conscientious choice, but also, more particularly, when the pregnancy would pose a danger to her life or to her health.<sup>105</sup> Under H.B. 214, a pregnant woman cannot have a legal abortion if a medical practitioner knows her reasons for wanting one are “in whole or in part,”<sup>106</sup> because of “[a] test result indicating Down syndrome in”<sup>107</sup> the fetus she carries, because of “[a] prenatal diagnosis of Down syndrome in”<sup>108</sup> the fetus she carries, or because of “[a]ny other reason [that the woman has or might have] to believe that” the fetus she carries “has Down syndrome.”<sup>109</sup> If any of these reasons plays any part in a pregnant woman’s abortion decision and the person performing the procedure knows it, the abortion is criminal. According to H.B. 214’s language, it does not matter that one of the illicit reasons it enumerates is a relatively minor calculation in the pregnant woman’s decision, even a miniscule one, and that the overwhelmingly major driver of the decision to end a pregnancy is the threat that the pregnancy poses to a pregnant woman’s life or her health. No abortion prohibition that forces a pregnant woman to meet these risks to her life or health and their possible materialization could be upheld consistent with existing constitutional rules.

And so it is that a ruling upholding a measure like H.B. 214 would necessarily be a big-footed step into a new era of abortion jurisprudence—an era in which the right to end an pregnancy belongs to a pregnant woman only insofar as she has what the State deems to be the right sorts of reasons for ending her pregnancy, even when her life or her health is at stake.<sup>110</sup> In that new era, it would no longer be true, as it consistently has been since *Roe* to the present day, that the right to end a previability abortion belongs to the pregnant woman and to her alone in ways that are finally, in terms of her deepest reasons, unaccountable to the State.

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<sup>105</sup> See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) (“Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation.” (citing *Casey*, 505 U.S. at 880)).

<sup>106</sup> OHIO REV. CODE ANN. § 2919.10(B) (West, Westlaw through File 51 of 132d Gen. Assemb. (2017–2018)).

<sup>107</sup> *Id.* § 2919.10(B)(1).

<sup>108</sup> *Id.* § 2919.10(B)(2).

<sup>109</sup> *Id.* § 2919.10(B)(3).

<sup>110</sup> See King, *supra* note 60, at 38. As King explains:

To date, the Court has never permitted a law to directly prohibit a woman from having a previability abortion once she has decided to do so. Under a liberty-based interpretation, the Court should stay on this path. Permitting the state to regulate access to abortion sought for certain reasons, but not others, invites states to pass numerous [reasons-based abortion prohibitions] to redefine the boundaries of the abortion right, thereby creating a significant amount of arguably arbitrary line-drawing work for the Court. More damning, this approach would allow direct governmental intervention into a woman’s reproductive decisionmaking process.

*Id.*

One final observation must be made at this point. It should give not only opponents of H.B. 214, but also at least some of its supporters, some very real cause for pause. Given how women's abortion rights are complexly woven into the fabric of constitutional law,<sup>111</sup> to hold that a pregnant woman as a right-holder may be held to account by the State for her reasons for exercising her constitutionally protected right to abortion might well prove to be, as a matter of principle, a highly volatile move. Once fixed in the abortion setting, there is no guarantee it would remain limited to it. Recognizing "[t]he tendency of a principle to expand itself to the limit of its logic,"<sup>112</sup> a decision that the right to abortion may be conditioned upon the reasons a pregnant woman has for exercising the right could readily lead to the principle's expansion beyond the abortion context. If so, would-be spouses, actual parents, and other individuals exercising constitutionally protected rights safeguarded by the Fourteenth Amendment's Due Process Clause, including rights affecting bodily autonomy and medical decision-making, could soon find themselves having the State superintending and second-guessing their reasons for exercising their erstwhile constitutional rights. In some instances, these individuals could find themselves having lost their ability to exercise their constitutional rights for their own reasons in the face of the State's contrary judgment that those reasons are not the right or good enough ones. In principle, the implications of a ruling upholding H.B. 214 might reach even further than those rights protected solely as a matter of substantive due process under the Fourteenth Amendment. A regime that, as a matter of constitutional principle, affirmed individual accountability to the State for one's reasons for exercising one's constitutional rights could easily become a regime in which the State might condition the exercise of, say, free speech or religious freedom claims under the First Amendment, or gun rights under the Second, or, come to think of it, any of the rights protected by the Bill of Rights made applicable to the States by virtue of the Fourteenth Amendment's Due Process Clause, on the sorts of reasons that the State deems acceptable for their use.

To be sure, a reply is readily in sight: The abortion right may be complexly woven into the fabric of constitutional law, and hence be complexly related to a range of other constitutionally protected rights, but it is also, as the lead opinion in *Casey* noted, a right that implicates a situation "unique to the human condition and so unique to the law."<sup>113</sup> Emphasizing this uniqueness, a decision upholding

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<sup>111</sup> See *supra* text accompanying notes 79–82 (discussing *Casey*'s affirmation of this point).

<sup>112</sup> BENJAMIN N. CARDOZO, *Lecture II. The Methods of History, Tradition and Sociology*, in *THE NATURE OF THE JUDICIAL PROCESS* 51, 51 (1921).

<sup>113</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) ("Abortion is a unique act. . . . [T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."); *id.* at 857 ("Finally, one could classify *Roe* as *sui generis*."). Focusing on this point in the Supreme Court's abortion jurisprudence may bring to mind the "real" or "natural" differences strain within the Supreme Court's sex-equality



H.B. 214 and its ban on abortions sought for what the State deems the wrong sorts of reasons need not be a precedent that begins to unravel the larger constitutional tradition of individual rights.

This might be right, but the idea that abortion is unique to the human condition and so to the law is an idea that imagines the right to abortion involves a special case of balanced interests: on the one hand, of course, there is the pregnant woman's autonomous choice, including choices that can involve her own life or health and death, and on the other hand, there is the State's interest in fetal life—life that is sometimes at stake depending partly on a pregnant woman's choice. But if the abortion right is thought to be unique because it implicates a tradeoff of life of different sorts, or, depending on one's view, lives of the same sort, the case for abortion's uniqueness dissipates. On closer inspection, a range of constitutional rights involve tradeoffs where nothing less than human life is at stake.<sup>114</sup> The easiest case in which to see this might be the Second Amendment,<sup>115</sup> but other rights, like aspects of the right to die that are already protected, do, too.<sup>116</sup> It is partly for this reason that a ruling upholding

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jurisprudence. In no way is it meant to endorse an uncritical view on it, on which, still see Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995) (describing as “jurisprudential error” the way that “sexual equality jurisprudence has uncritically accepted the validity of biological sexual differences” when they are, with respect to “almost every claim [about] sexual identity or sex discrimination[,] . . . grounded in normative gender rules and roles”).

<sup>114</sup>For a general discussion of what she calls “tragic rights,” see Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713 (2011).

<sup>115</sup>See *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (holding that the Second Amendment protects a right to own a handgun for purposes of self-defense in the home); *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (holding that *Heller's* rule applies to the States).

<sup>116</sup>See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990). This right to refuse unwanted medical treatment, including lifesaving artificial nutrition and hydration, which encompasses a right to passive euthanasia, has been subject to bids for expansion, so far not recognized by the U.S. Supreme Court, *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Vacco v. Quill*, 521 U.S. 793 (1997), partly on the grounds of the effects of the life tradeoffs that allowing active forms of euthanasia might take. See *Glucksberg*, 521 U.S. at 731–32 (discussing “the State . . . interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes,” and noting that this interest “goes beyond protecting the vulnerable from coercion,” to include “protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and ‘societal indifference,’” reasoning that the State's ban on assisted suicide “reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy” (citation omitted)). But, of course, those same life tradeoffs may arise in the context of the right to die achieved through passive means. Just so, *Cruzan* did not imagine that those prospects could justify limiting or conditioning the right that it recognized. *Cruzan*, 497 U.S. at 278–87. Similarly, the Ninth Circuit's en banc decision in *Compassion in Dying v. Washington*, written by Judge Stephen Reinhardt, vigorously rejected the equality claims against recognizing a constitutional right to active euthanasia in the course of announcing such a right. *Compassion in Dying v.*

H.B. 214 might well be the starting point for a larger reworking of the very tradition of individual rights from which the abortion right emerges and that has long been a point of tremendous national pride within our constitutional system, which has treated it as axiomatic that individual constitutional rights, to their very definition, imply a certain sphere, perhaps not wholly unlimited, of ultimate freedom from State inquiry and accountability in their exercise. Whether this tradition is a function of “the nature” of rights themselves or not, anyone who cares about any of the individual rights that our constitutional system protects might find themselves pausing to consider the potential for a precedent upholding H.B. 214 against constitutional challenge to pave the way to decision-based limitations on other constitutional rights. The patent inconsistency of this prospect with the constitutional rules governing previability abortion decisions is enough reason for the moment to think that H.B. 214 should be struck down.

### *B. Postviability Application of H.B. 214*

This still leaves the constitutionality of H.B. 214’s postviability applications to consider.

To begin, recall the general idea of the law governing this area is that the State may, from and after the point of fetal viability, regulate and even prohibit abortions outright subject to the provision for express exceptions in individual cases in which an abortion is needed in order to protect or preserve a pregnant woman’s life or health.<sup>117</sup> When considering H.B. 214, and particularly its postviability applications, no one should forget that the State of Ohio already outlaws all postviability abortions precisely as such,<sup>118</sup> and that it additionally bars abortions from and after the earlier point in time “when the probable post-fertilization age of the [fetus] is twenty weeks or greater,”<sup>119</sup> technically, a previability and postviability abortion ban.<sup>120</sup> (Though it has not so far been

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Washington, 79 F.3d 790, 793–94, 825–27 (9th Cir. 1996) (en banc). Practically in this sense, both *Cruzan* and *Compassion in Dying* indicate that whatever life tradeoffs might result from recognizing that individuals have a constitutional right to end their lives with a doctor’s help are tradeoffs that the Constitution requires be made.

<sup>117</sup> See generally *supra* Part III (discussing aspects of governing constitutional doctrine).

<sup>118</sup> See OHIO REV. CODE ANN. § 2919.201(A) (West, Westlaw through File 51 of 132d Gen. Assemb. (2017–2018)). This rule requires that “[n]o person shall purposely perform or induce or attempt to perform or induce an abortion on a pregnant woman when the unborn child is viable.” *Id.* § 2919.17(A).

<sup>119</sup> *Id.* § 2919.18; see also *infra* notes 121, 141 and accompanying text.

<sup>120</sup> Ohio law also prohibits the procedure sometimes referred to as “dilation and extraction” or “D&X.” See generally *Gonzales v. Carhart*, 550 U.S. 124, 136 (2007) (“The abortion procedure that was the impetus for the numerous bans on ‘partial-birth abortion[.]’ . . . is a variation of this standard D&E [dilation and evacuation]. . . . The medical community has not reached unanimity on the appropriate name for this D&E variation. It has been referred to as ‘intact D&E,’ ‘dilation and extraction’ (D&X), and ‘intact D&X.’”

challenged in court, the previability functioning of the 20-week-on abortion ban is inconsistent with existing constitutional rules.<sup>121</sup>) This basic pattern of existing abortion law in Ohio, with its multi-layered, postviability abortion prohibitions will become relevant momentarily.

Taken on its own terms, H.B. 214's failure to provide any exception for abortions needed to protect or preserve maternal life and health is fatal to it in constitutional terms. This is true, as already discussed, in relation to H.B. 214's previability applications,<sup>122</sup> and it is equally true of H.B. 214's postviability operations. Even when the State's authority to regulate abortion is at its constitutional high point, as it is after fetal viability, the State may still not force a pregnant woman to carry a pregnancy to term in the interests of protecting and preserving the (potential) life of the fetus when doing so would imperil her own life or her health.<sup>123</sup> H.B. 214, by its own language, does and would require exactly that.

This is the most obvious, but not the only, constitutional flaw of H.B. 214's postviability applications. Another set of constitutional shortcomings of the legislation deserves mention and engagement.

The overarching concern at work here might have been quickly registered in the era in which *Roe v. Wade* governed abortion rights. At that time, a woman's abortion rights were protected as a function of the "fundamental" constitutional "right to privacy."<sup>124</sup> Standard doctrine at the time *Roe* was decided indicated that regulations, including prohibitions, on the exercise of fundamental constitutional rights like the right to privacy triggered the highest and most stringent form of judicial examination: strict scrutiny.<sup>125</sup>

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(citations omitted)). This ban, which appears as OHIO REV. CODE ANN. § 2919.151(A)–(D) (defining "partial birth feticide"), has both previability and postviability applications. For more on its legal status, see *supra* note 66.

<sup>121</sup> See, e.g., *Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013), *cert. denied* 134 S. Ct. 905 (2014) (mem.); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116–18 (10th Cir. 1996).

<sup>122</sup> See *supra* text accompanying notes 105–10.

<sup>123</sup> See *supra* notes 45–52 and accompanying text (discussing the life and health exceptions required for postviability State regulations, including bans, on abortion).

<sup>124</sup> *Roe v. Wade*, 410 U.S. 113, 169–70 (1973) (Stewart, J., concurring) ("[I]n *Eisenstadt v. Baird*, 405 U.S. 438, 453 [(1972)], we recognized 'the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.' That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.").

<sup>125</sup> Justice William O. Douglas's concurrence in *Doe v. Bolton* expressed an important aspect of this framing thus:

[W]here fundamental personal rights and liberties are involved, the corrective legislation must be 'narrowly drawn to prevent the supposed evil,' *Cantwell v. Connecticut*, 310 U.S. 296, 307, and not be dealt with in an 'unlimited and indiscriminate' manner. *Shelton v. Tucker*, 364 U.S. 479, 490. And see *Talley v. California*, 362 U.S. 60. Unless regulatory measures are so confined and are addressed

Conventionally, this aggressive mode of judicial review at the time of *Roe* provided (and still does) that a State-imposed limit on the exercise of a fundamental right must be supported by a “compelling” governmental interest.<sup>126</sup> It also required (and still does) that a State limitation on a fundamental right be drawn very carefully, as narrowly as possible, so as to ensure that the State’s reason for enacting a particular rights-constricting measure is precisely served by the measure that the State has finally enacted. Hence the well-known name for strict scrutiny’s precise “fit” requirement between legislative means and ends: “narrow tailoring.”<sup>127</sup>

In keeping with these conventional terms for analyzing State-imposed regulatory burdens on fundamental rights, *Roe* invoked the strict scrutiny test, including both its demand that the State come forward with a compelling justification when it infringes a fundamental right and the test’s demand for narrow tailoring.<sup>128</sup> But while *Roe* followed a strict scrutiny framework in important respects as to first-trimester abortions, where no regulations of abortion were allowed,<sup>129</sup> it also—in some notable ways—departed from it. Soft pedaling the point, *Roe* effectively announced that, at least in certain instances involving abortion and abortion regulations outside the first trimester of pregnancy, the strict scrutiny test’s “compelling governmental interest” requirement would remain fully in force, while its “narrow tailoring” requirement would be somewhat relaxed, replaced by a constitutional

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to the specific areas of compelling legislative concern, the police power would become the great leveler of constitutional rights and liberties.

*Doe v. Bolton*, 410 U.S. 179, 216 (1973) (Douglas, J., concurring) (first quoting *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940); then citing *Shelton v. Tucker*, 364 U.S. 479, 490 (1960); and then citing *Talley v. California*, 362 U.S. 60 (1960)). Having articulated this standard of review, the opinion proceeds to apply it. *Id.* at 216–21.

<sup>126</sup>*Roe*, 410 U.S. at 155–56 (“Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’ and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. . . . In the recent abortion cases, cited above, courts have recognized these principles.” (citations omitted)).

<sup>127</sup>*See id.*; *see also supra* note 125.

<sup>128</sup>*Roe*, 410 U.S. at 155–56 (“Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’ and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. . . . In the recent abortion cases, cited above, courts have recognized these principles.” (citations omitted)). For further discussion relevant to the point in *Roe*, *see id.* at 153–55, 162–64.

<sup>129</sup>*Id.* at 163 (observing that, prior to the end of the first trimester, “the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated,” and going on to add, “[i]f that decision is reached, the judgment may be effectuated by an abortion free of interference by the State”); *see also id.* at 164 (“For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.”).

assessment of whether the fit between the governmental interest and its regulatory end was a “reasonable” one.<sup>130</sup> To be sure, a “reasonable” fit is not necessarily a “narrow” one sufficient to comply with the standard demands of “narrow tailoring,” but from all indications the reasonable fit requirement that *Roe* deployed outside the first trimester functioned much the way as the more stringent narrow tailoring analytics ordinarily did and do. A reasonable fit requirement in this setting practically ensured that a State’s regulatory intrusion on a constitutionally protected choice would extend no further than the State’s reasons for it, carefully articulated and parsed, properly called for and justified. What is more, the reasonable fit requirement was also capable of serving a

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<sup>130</sup> *Id.* at 163 (holding that the State is permitted to regulate abortion after first trimester of pregnancy “to the extent that the regulation reasonably relates to the preservation and protection of maternal health”); *id.* at 164 (noting that after “approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.”); *see also Doe*, 410 U.S. at 194–95 (“This is not to say that Georgia may not . . . , from and after the end of the first trimester, adopt standards for licensing all facilities where abortions may be performed so long as those standards are legitimately related to the objective the State seeks to accomplish.”). While there is no similar language in *Roe*’s discussion of the third trimester and the State’s interest in protecting the potential life of the fetus, *see, e.g., Roe*, 410 U.S. at 164–65 (summarizing third-trimester rules without any discussion of a reasonable fit requirement), there is relevant discussion of tailoring that applies to the third trimester. *Id.* at 165 (“The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests.”); *cf. Planned Parenthood Ass’n of Kan. City, Mo., Inc., v. Ashcroft*, 462 U.S. 476, 499 (1983) (Blackmun, J., concurring in part and dissenting in part) (“But regulations governing postviability abortions, like those at any other stage of pregnancy, must be ‘tailored to the recognized state interests.’” (citing *Roe*, 410 U.S. at 165)). In any case, language similar to *Roe*’s treatment of the State’s interest in preserving and protecting maternal health and its engagement with a reasonable fit requirement is found in operation in *Planned Parenthood Ass’n of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. at 486 (1983) (Powell, J., writing for himself and joined by Burger, C.J.), where the lead opinion by Justice Powell, following *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 434 (1983), applies a “reasonable fit” requirement both with respect to second-trimester and third-trimester abortions. *Planned Parenthood Ass’n of Kan. City, Mo.*, 462 U.S. at 481–82 (majority opinion) (second-trimester abortion); *id.* at 486 (Powell, J., writing for himself and joined by Burger, C.J.) (holding second-physician requirement for third-trimester abortions “*reasonably furthers* the State’s compelling interest in protecting the lives of viable fetuses” (emphasis added)). Worth adding at this juncture is that the thought and intuition being offered and explored in the text are not meant as any kind of retrospective predictions about how the fundamental right to abortion recognized by *Roe* would have conditioned a Supreme Court analysis of a third-trimester abortion restriction such as the postviability operations of H.B. 214. Nor, for that matter, does the text seek to offer an analysis of H.B. 214 according to the rule of *Roe*. Rather, the thought and intuition being offered and explored in the text are invoking *Roe* and its approach to a “reasonable fit” analysis as a conceptual device that is designed to capture and illuminate an intuition about how H.B. 214, even postviability, does not, finally, square with the constitutional values at work in the abortion rights setting.

related function that the narrow tailoring requirement, for its part, can and does serve: as a device for determining whether the reasons that a State has proffered in support of a particular abortion regulation being challenged are the “real,” meaning constitutionally creditable, reasons for the State’s rule.

What does H.B. 214 look like within this sort of analytic framework? In defense of H.B. 214, the State could and almost certainly would claim that H.B. 214 restricts postviability abortions of fetuses actually or possibly with Down syndrome as a means of protecting and preserving fetal life. Since *Roe*, after viability, this State interest has been recognized as compelling in the relevant constitutional sense.<sup>131</sup> It is thus plainly capable of satisfying strict scrutiny’s powerful State interest requirement.<sup>132</sup> Considering H.B. 214, there is another State interest that may be thought to be in play, judging from arguments that sponsors and supporters of H.B. 214 and its twin measure in the State legislature, Senate Bill 164 (S.B. 164),<sup>133</sup> made during the course of legislative proceedings on the bills. Not itself yet recognized as part of the Supreme Court’s abortion jurisprudence, which has widely been thought to have defined all the possible State interests implicated by abortion rights, the State might well offer as a defense of H.B. 214 that it seeks to declare and vindicate an equality norm, perhaps, to give it, however provisionally, a more concrete mode of expression, something like the equal dignity and worth of people with Down syndrome.<sup>134</sup>

Although there is some important overlap between them and argument to be ventured against their independence of terms, each of the State’s interests will be considered separately in turn, starting with the question of their constitutional strengths, followed by a discussion of the reasonableness of the fit between these reasons for H.B. 214 and what the measure does.

### 1. *The State’s Interest in Protecting and Preserving Fetal Life*

The State’s interest in protecting and preserving fetal life is broad. It has repeatedly and consistently been understood by the Supreme Court to be a compelling State interest from and after the point of fetal viability, capable of justifying regulations of abortion, indeed, wholesale abortion bans, except where an abortion is needed to protect or preserve a pregnant woman’s life or health.<sup>135</sup> The doctrinal persistence of this State interest and the broad terms in

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<sup>131</sup> *Roe*, 410 U.S. at 163 (“With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability.”).

<sup>132</sup> *Id.*

<sup>133</sup> S. 164, 132d Gen. Assemb., Reg. Sess. (Ohio 2017) (as passed by the Senate, Nov. 15, 2017).

<sup>134</sup> For further discussion of some of the different ways this interest was discussed during the legislative deliberations on H.B. 214 and its Senate twin, S.B. 164, and how it might be characterized for purposes of a State-interest-and-fit analysis, see, for example, *infra* Part IV.B.2.

<sup>135</sup> See *supra* notes 45–52 and accompanying text (discussing the State’s interest in protecting and preserving fetal life and the life and health exceptions needed for postviability abortion regulations, including wholesale bans on the practice).

which the Supreme Court has discussed it since the time of *Roe* have led many who have studied the Supreme Court's abortion decisions, no matter where they stand on them (for, against, or somewhere else), to suppose that the State, after the point of fetal viability, is at liberty to regulate and prohibit abortions any way it might like, subject only to the required exception for individual cases involving a pregnant woman's life or health.

Surprising as this might sound, then, on closer consideration, the State's broad authority to regulate abortions postviability may actually rest on ground that is somewhat less solid than is ordinarily supposed. The importance and breadth of the State's interests in the (potential) life of the fetus postviability is beyond cavil, but that, as must now be clear, is not the only item of constitutional concern. Related to it is the matter of fit: how reasonably the State has gone about advancing its interest.

With respect to H.B. 214, the relevant inquiry is how reasonably does this law's Down syndrome abortion ban advance the State's interest, compelling after viability, in protecting and preserving fetal life?

This question cannot be settled by simple reference to hard science, nor can it be resolved by appeal to objective truth or legal, including logical, necessity to the strictest degree. "Reasonableness" here, as elsewhere in constitutional law, is a highly situated judgment. Ideally, it is rationally informed, if not mathematically governed, by the complex, competing considerations of constitutionally grounded values and interests found in an area of law governing an aspect of social and political life. In the abortion setting, the range of relevant values and interests are varied, profound, highly contentious, and regularly seen as conflicting, because, among other things, of the widely divergent worldviews reflected within the Supreme Court's abortion jurisprudence. The interpretations of the Constitution found in various abortion rights opinions span a remarkable range of understandings of how this basic charter of government and of rights is best understood to speak to the existence of a pregnant woman's abortion right and what sorts of State interests are sufficient to overcome and outweigh it and when, how, and why.

Given this complex matrix of values and interests and how they have been given constitutional grounding and expression, and in particular, how they have generally been worked out in relation to the State's authority to regulate abortion after the point of fetal viability, it is no great challenge to imagine that an engagement with the relevant abortion rights case law could lead to the conclusion that H.B. 214 reasonably advances the State's compelling interest in protecting and preserving fetal life. Here is one way to give that conclusion some rational exposition. Looking at the text of H.B. 214, the law plainly prohibits a class of abortions in a way that is designed to save fetuses with or that may have Down syndrome from abortion.<sup>136</sup> In this sense, it may be thought reasonably

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<sup>136</sup> See, e.g., OHIO REV. CODE § 2919.10(B) (West, Westlaw through File 51 of 132d Gen. Assemb. (2017–2018)).

to score an advance for what, postviability, is the compelling State end of protecting and preserving fetal life.

Recognizing the conceptual plausibility of this account, another perspective on H.B. 214's reasonableness as a means of protecting and preserving postviability fetal life presents itself. The strength of this alternative perspective in comparative terms is a variation on a traditional condition of theoretical preferability among ethical theories based on considerations of "complete[ness] and comprehensive[ness]."<sup>137</sup> Compared to the H.B. 214-favorable account holding that H.B. 214 reasonably advances the State's interest in protecting and preserving postviability fetal life, this version of reasonableness reflects and encompasses a larger array of contingent facts of the matter on the ground.<sup>138</sup> In this sense, it is the more reasonable reasonableness account.

The case for this view of H.B. 214 begins by noticing the pattern of existing positive law in Ohio as the legal fabric against which H.B. 214 was enacted and of which it is now a part. For some time before H.B. 214 was passed and signed into law, the State of Ohio had expressed its interest in protecting and preserving fetal life numerous times and in numerous ways over the course of numerous years.<sup>139</sup> Speaking of laws that occupy postviability abortion space, the State's

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<sup>137</sup>TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 339 (5th ed. 2001) ("A theory should be as complete and comprehensive as possible.").

<sup>138</sup>It might be noted that there is a certain family relationship between this approach and Carl Schneider's complaint that, in the Supreme Court's privacy cases, "the Court often looks at the challenged statute in isolation from its legal and social context and often looks at the challenged statute in isolation from other statutes and from other forms of social regulation." Carl E. Schneider, *State-Interest Analysis and the Channeling Function in Privacy Law*, in PUBLIC VALUES IN CONSTITUTIONAL LAW 97, 97 (Stephen E. Gottlieb ed., 1993) (quoting Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment 'Privacy' Law: An Essay on the Constitutionalization of Social Issues*, 51 LAW & CONTEMP. PROBS. 79, 97 (1988)). The approach in the text, like Schneider's but different in its orientation, does not regard this as an ineluctable fact.

<sup>139</sup>Some of these measures, broadly understood as implicating the State's interest in protecting and preserving fetal life, have reached and been decided by the Supreme Court. See, e.g., *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 518–20 (1990) (holding that parental notice requirement was constitutional where statute contained, *inter alia*, an emergency exception); *City of Akron v. Akron Ctr. for Reproductive Health (Akron I)*, 462 U.S. 416, 452 (1983) (invalidating sections of city's abortion regulation that required "parental consent, informed consent, a 24-hour waiting period, [a particular mode for] disposal of fetal remains[, and] that all second-trimester abortions be performed in a hospital"), *overruled in part by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882–83 (1992) (plurality opinion) (overruling *Akron I* with respect to informed consent requirements); see also *Voinovich v. Women's Med. Prof'l Corp.*, 523 U.S. 1036, 1037 (1998) (Thomas, J., dissenting from denial of certiorari). For some additional discussion, see Spindelman, *supra* note 51, at 184–85 (discussing David Forte's proud invocation of efforts in Ohio to restrict abortion as mechanisms to challenge and cut back on *Roe v. Wade*). The positive law rules in the cases that have reached the Supreme Court are hardly the only means by which the State has over the years since *Roe* sought to advance its interest in protecting and preserving fetal life.



expression of concern for prenatal but postviability life presently and prominently includes the law that expressly forbids all postviability abortions to the maximum extent allowed by the Federal Constitution.<sup>140</sup> Additionally, in the near-postviability and postviability spaces, Ohio law also currently bans any abortion “when the probable post-fertilization age of the unborn child is twenty weeks or greater,”<sup>141</sup> an abortion ban that, like the State’s basic postviability abortion prohibition, seeks to occupy the maximum extent allowed by federal constitutional law. These two wall-to-wall abortion prohibitions, which overlap in the postviability abortion domain, making all postviability abortions not singly but doubly prohibited, define important attributes of the legal backdrop against which H.B. 214 was enacted and against which its reasonableness as a

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<sup>140</sup> See OHIO REV. CODE ANN. § 2919.17(A) (West, Westlaw through File 51 of 132d Gen. Assemb. (2017–2018)). This rule requires that “[n]o person shall purposely perform or induce or attempt to perform or induce an abortion on a pregnant woman when the unborn child is viable.” *Id.* It contains an exception for abortions needed to protect and preserve a pregnant woman’s life and some aspects of a pregnant woman’s health. *Id.* § 2919.17(B)(1)(b) (making it an affirmative defense to the rule against postviability abortion to perform the abortion when “[t]he abortion was necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman”); see also *id.* § 2919.16(K) (“A medically diagnosed condition that constitutes a ‘serious risk of the substantial and irreversible impairment of a major bodily function’ . . . does not include a condition related to the woman’s mental health.”). Although this postviability abortion ban does not recognize the full scope of constitutional protections for a pregnant woman’s decision to end a pregnancy after viability where doing so is necessary to protect or preserve her own life or health, including psychological health, *id.*, the measure may be described as seeking to ban postviability abortions to the maximum extent allowed by existing constitutional doctrine. This anyway in light of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. at 879–80 (affirming the court of appeals’ interpretation of the State’s anti-abortion law at issue in the case, which contained, among other things, language that, on a plain reading of it, would have been an overly narrow, and hence an unconstitutional, exception for a pregnant woman’s life or health). Candidly, it is hard to see how a court could properly read Ohio’s postviability abortion ban’s maternal-life-and-health exception to conform with existing rules about the scope of that exception required by the Federal Constitution.

<sup>141</sup> OHIO REV. CODE ANN. § 2919.201(A). This ban creates an exception from its rule for abortions that are needed to protect and preserve a pregnant woman’s life or health, *id.* § 2919.201(B)(1)(a)–(b) (making it an affirmative defense to the rule against performing an abortion after “[t]he probable post-fertilization age of the unborn child [is twenty weeks or greater]” where “[t]he abortion was necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman”), but health, by text, is defined not to be “based on any reason related to the woman’s mental health.” *Id.* § 2919.201(B)(2). Although this abortion ban does not affirm the life-and-health exception that the Supreme Court’s case law requires to its fullest extent, it may anyway be read as seeking to assert the State’s maximum authority to regulate and prohibit abortions allowed by law. The additional caveats about the State’s postviability abortion ban mentioned in *supra* note 140, apply here, as does the earlier observation about this measure’s impermissibility in its previability operations under existing abortion precedent. See *supra* note 121 and accompanying text.

measure also aiming to vindicate the State's interest in protecting and preserving fetal life is to be considered.<sup>142</sup>

With this picture of postviability abortion space in view, the question about H.B. 214's reasonableness as a measure that aims to protect and preserve fetal life is whether there is any actual need for this law and the postviability abortion prohibition it entails. Given the State's multi-layered bans on postviability abortions, is there any reason to believe H.B. 214 is required? Is there any evidence that postviability fetuses with or that may have Down syndrome are being distinctively threatened in a way that State law, without H.B. 214, cannot adequately handle? Are fetuses with or that may have Down syndrome being aborted after viability notwithstanding the State's multi-layered prohibitory net, hence in ways that call out for H.B. 214's distinctive protections?

Sponsor testimony on H.B. 214 offered by Representative Sarah LaTourette and sponsor testimony offered on H.B. 214's Senate twin, S.B. 164, by Senator Frank LaRose highlighted what they understood to be the percentage of abortions of fetuses after pregnant women are given a Down syndrome diagnosis. The benchmark figure that both Representative LaTourette and Senator LaRose cited was "nearly," "around," or "up to" "90%."<sup>143</sup> The underlying authority for this statistic, referred to by Senator LaRose's

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<sup>142</sup> Making the point this way in no way means to forget that Ohio law also prohibits the abortion procedure sometimes referred to as "dilation and extraction" or "D&X," on which see *supra* note 120, which appears as OHIO REV. CODE ANN. § 2919.151 (defining "partial birth feticide"). (More on its legal status is in *supra* note 66.) It is rather to be somewhat conservative about the argument being advanced at this point in the text.

<sup>143</sup> *LaTourette H.R. 214 Testimony: H. Health Comm.*, *supra* note 23, at 1 ("Upon receiving a potential diagnosis of Down syndrome for their unborn child, nearly 90% of women choose abortion. Substitute House Bill 552 from the 130th General Assembly sought to address this alarming statistic. The Down Syndrome Information Act requires medical professionals to distribute up-to-date, evidence-based information on Down syndrome to parents who receive the diagnosis, either prenatally or after birth."); *Hearing on S. 164 Before the S. Health, Human Servs. & Medicaid Comm.*, 132d Gen. Assemb., Reg. Sess. (Ohio 2017–2018) (statement of Sen. Frank LaRose at 1) [hereinafter *LaRose Testimony*] ("Currently around 90% of unborn babies in the U.S. that receive a pre-natal diagnosis of Down syndrome are aborted." (citing Amy Harmon, *Prenatal Testing Puts Down Syndrome in Hard Focus*, N.Y. TIMES (May 9, 2007), <http://www.nytimes.com/2007/05/09/us/09down.html>)); Ohio House of Representatives, 132d Gen. Assemb., Reg. Sess., *Floor Debate on H.R. 214: 11-1-2017*, OHIO CHANNEL, at 0:27:00 (Ohio 2017–2018), <http://www.ohiohouse.gov/session/session-video-library> (click on "House of Representatives–11-1-2017") [hereinafter *Floor Debate on H.R. 214: 11-1-2017*] (statement of Rep. Sarah LaTourette) ("I first decided to carry this legislation during the last General Assembly upon hearing the statistic that up to 90% of women choose abortion when receiving this potential diagnosis for their unborn child. 90%.").

testimony,<sup>144</sup> is a decade-old *New York Times* story,<sup>145</sup> which itself referred to a systematic literature review from 1999, the data of which have now been superseded by a more recent “systematic review of termination rates.”<sup>146</sup> That

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<sup>144</sup> *LaRose Testimony*, *supra* note 143, at 1 & n.1. Although Representative LaTourette’s written testimony mentions the same 90% figure that Senator LaRose’s does, neither her testimony on the bill before the House Health Committee, *LaTourette H.R. 214 Testimony: H. Health Comm.*, *supra* note 23, at 1 (claiming that “[u]pon receiving a potential diagnosis of Down syndrome for their unborn child, nearly 90% of women choose abortion,” but citing no authority for the “nearly 90%” figure), nor her testimony on the bill before the Senate Health, Human Services and Medicaid Committee, *Hearing on H.R. 214 Before the S. Health, Human Servs. & Medicaid Comm.*, 132d Gen. Assemb., Reg. Sess. 1 (Ohio 2017–2018) (statement of Rep. Sarah LaTourette) (claiming again that “[u]pon receiving a potential diagnosis of Down syndrome for their unborn child, nearly 90% of women choose abortion,” but citing no authority for the “nearly 90%” figure), nor her statement during the floor debate over H.B. 214 in the Ohio House of Representatives, *Floor Debate on H.R. 214: 11-1-2017*, *supra* note 143, at 0:27:00 (statement of Rep. Sarah LaTourette) (noting “I first decided to carry this legislation during the last General Assembly upon hearing the statistic that up to 90% of women choose abortion when receiving this potential diagnosis for their unborn child. 90%,” but again citing no authority for the “up to 90%” figure), offers any authority for the statistic. The same holds for Representative LaTourette’s testimony on H.B. 135. *Hearing on H.R. 135 Before the H. Cmty. & Family Advancement Comm.*, 131st Gen. Assemb., Reg. Sess. (Ohio 2015–2016) (statement of Rep. Sarah LaTourette at 1) [hereinafter *LaTourette H.R. 135 Testimony: H. Cmty. & Family Advancement Comm.*] (claiming that “[u]pon receiving a potential diagnosis of Down syndrome for their unborn child, up to 90% of women choose abortion,” but citing no authority for the “up to 90%” figure).

<sup>145</sup> Harmon, *supra* note 143.

<sup>146</sup> Jaime L. Natoli et al., *Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates (1995–2011)*, 32 *PRENATAL DIAGNOSIS* 142, 142 (2012)). Testimony offered by Dr. Dennis M. Sullivan to the Ohio House Health Committee on H.B. 214 cited to this more recent systematic review of termination rates. *Hearing on H.R. 214 Before the H. Health Comm.*, 132d Gen. Assemb., Reg. Sess. (Ohio 2017–2018) (statement of Dennis M. Sullivan, MD, MA (Ethics), FACS, Professor of Pharmacy Practice, Director, Center for Bioethics, Cedarville University at 4 & 6 n.2) [hereinafter *Sullivan Testimony*]. The results of this newer systematic review of termination rates, described as “the largest synthesis of United States data on termination rates following a prenatal diagnosis of Down syndrome,” Natoli et al., *supra*, at 142, were summarized by the review’s coauthors as follows:

Twenty-four studies were accepted. The weighted mean termination rate was 67% (range: 61%–93%) among seven population-based studies, 85% (range: 60%–90%) among nine hospital-based studies, and 50% (range: 0%–100%) among eight anomaly-based studies. Evidence suggests that termination rates have decreased in recent years. Termination rates also varied with maternal age, gestational age, and maternal race/ethnicity.

*Id.* As the systematic review notes, “[t]he estimated termination rates following a prenatal diagnosis of Down syndrome presented in this review are appreciably lower than the 92% termination rate determined by Mansfield *et al.*” *Id.* at 150; *see also id.* at 142 (“Evidence suggests that termination rates are lower than noted in a previous review that was based on less contemporary studies and had an international focus.”). The “Mansfield *et al.*” study

detail aside, nothing that Representative LaTourette or Senator LaRose said in support of their bills indicated with clarity that postviability fetuses with or that may have Down syndrome faced any kind of distinctive threat compared to other postviability fetuses.<sup>147</sup> More broadly, if also conservatively, a review of the public legislative deliberations over H.B. 214 and its twin, S.B. 164, including written testimony submitted to the relevant committees and the video of the floor debates on the measures, indicates that discussions about them did not focus in any meaningful way on the need for them as postviability abortion bans. Nowhere in the public legislative deliberations as just described was the case ever squarely and prominently made that the State's current postviability abortion prohibitions were inadequate to the task of safeguarding the lives of all postviability fetuses, including fetuses with or that might have Down syndrome. No argument highlighted the need for H.B. 214 as a measure that was required in excess of the current postviability abortion bans in order to protect and preserve the lives of postviability fetuses that have or might have Down syndrome.

So, is there any issue of Down-syndrome-selective abortions after fetal viability that the State might see a concrete need to contend with as through H.B. 214? Perhaps, but if there is, it seems less likely to be found in the general field of postviability abortions, which the State multiply disallows, than within

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referred to is Caroline Mansfield et al., *Termination Rates After Prenatal Diagnosis of Down Syndrome, Spina Bifida, Anencephaly, and Turner and Klinefelter Syndromes: A Systematic Literature Review*, 19 *PRENATAL DIAGNOSIS* 808, 809–10 (1999), the same study referred to by the *New York Times* article cited by Senator LaRose's S.B. 164 testimony. *LaRose Testimony*, *supra* note 143, at 1. As the authors of the more recent systematic review note, although the Mansfield et al. study "is frequently referenced, its applicability to the current US population is unclear." Natoli et al., *supra*, at 142. Natoli and her coauthors also discuss important limitations on their own systematic review in *id.* at 151–52.

<sup>147</sup> Nothing in the *New York Times* story nor the review of termination rates by Mansfield et al. prominently breaks them down by trimester. Indeed, only some of the underlying studies that the Mansfield et al. work surveyed were even from the United States. *See* Mansfield et al., *supra* note 146, at 809 (noting that of the "20 papers . . . [that] met the inclusion criteria . . . these papers included 37 data sets from 11 different countries"); Natoli et al., *supra* note 146, at 142 (noting that, of the studies cited in Mansfield et al., "three . . . were from the United States, [but] comprised only 77 of the 5035 patients (1.5%) in the analysis"). Although there is, by contrast, some disaggregation of termination rates by trimester in the work by Natoli et al., *see, e.g., id.* at 149 tbl.5, considerations of various sorts—including the reasons pregnant women had or might have had for having a third-trimester abortion, the medical status of the fetus that was aborted as a result of the pregnant woman's decision, and variations of State law—make it difficult to draw any portable and firm conclusions about rates of third-trimester Down-syndrome-selective abortions that would speak to the practical need in Ohio for a law like H.B. 214. In any case, the undisaggregated 90% figure, which was actually a little higher than that in the Mansfield et al. review reported by the *New York Times* and cited by Senator LaRose, seemed to be the gross, relevant number that informed the legislative deliberations of H.B. 214 and its Senate twin, S.B. 164.

the constitutional safe harbor for postviability abortions where the abortion choice is still protected when the procedure is needed by the pregnant woman to safeguard her life or health. Almost conveniently, H.B. 214, which contains no exceptions for abortions indicated to protect or preserve maternal life or health, may be read as reflecting an awareness that some abortions undertaken to save a pregnant woman's life or well-being may also be motivated to some degree by the actual or possible Down-syndrome status of the fetus. In this sense, H.B. 214's exceptionless abortion prohibition, which is, as described above,<sup>148</sup> unconstitutional for that reason, looks to be at least in part a bid that could occasion the rewriting of existing constitutional rules safeguarding maternal life and health throughout the course of pregnancy, including after fetal viability.

To the extent that H.B. 214 enters, and by its terms seeks to govern, the postviability constitutional safe harbor for abortion choice in the name of protecting and preserving the life of fetuses actually or possibly with Down syndrome, the measure technically may advance the State's interest in maintaining fetal life. But against the conclusion that this fit is both rational and reasonable is the unavoidable sense that the Supreme Court's existing abortion jurisprudence frames a measure like H.B. 214 as one that, in regulating abortions needed to protect and preserve maternal life and health, goes too far in constitutional terms. The State's interest in protecting and preserving fetal health, compelling as it is after viability, does not allow the State to regulate the safe harbor of postviability abortion choice. To the extent that H.B. 214 intrudes on a pregnant woman's decision to end a pregnancy as a decision she makes to protect or preserve her own life and or health, the law is an unreasonable means of advancing the State's interest in safeguarding fetal life postviability. "[T]he woman's life and health must always prevail over the fetus' life and health when they conflict."<sup>149</sup>

The same conclusion about reasonableness holds—albeit for a different set of reasons—in relation to H.B. 214's ban on Down-syndrome-motivated abortions after viability in cases where maternal life or health is not at stake. This is because the State of Ohio has already banned all postviability abortions in their entirety through not one but two different measures.<sup>150</sup> An additional

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<sup>148</sup> See *supra* notes 105–10, 123 and accompanying text.

<sup>149</sup> The quoted language is from *Colautti v. Franklin*, 439 U.S. 379, 400 (1979). In context, it is a characterization of a statutory interpretation claim made in the case and not the Court's own conclusion about it. Indeed, as the full sentence in which the quoted language appears explains: "The statute does not clearly specify, as appellants imply, that the woman's life and health must always prevail over the fetus' life and health when they conflict." *Id.*

<sup>150</sup> Once again, this is not to forget the State's ban on so-called "partial birth abortion" or "dilation and extraction." See *supra* notes 118–21 and accompanying text; see also *supra* notes 120, 142. It is once more to be somewhat conservative about the argument being made

postviability abortion ban like H.B. 214 is not, of course, categorically precluded simply because it is cumulative. Multiply criminalizing the same conduct is not, after all, an independent constitutional violation.<sup>151</sup> But the reasonableness of H.B. 214 as a means of furthering the State's end of protecting and preserving fetal life should be measured as a function of the concrete need for legislation doing what it does, substantiated, for instance, by an empirical demonstration that the State's existing postviability prohibitions are inadequate to the task of protecting and preserving all postviability fetal life equally.

Based on the testimony given in support of H.B. 214 and its Senate twin, S.B. 164, and hence the legislative record amassed in advance of floor debates on the bills, the Ohio legislature had no active reason to believe that the State's existing postviability abortion bans—banning all abortions after fetal viability—are not working as they are meant to and that they are thus leaving fetuses that actually or possibly have Down syndrome underprotected by law and subject to differential treatment compared with all other fetuses safeguarded by the State's existing abortion rules. Without such evidence, it might be true that H.B. 214 furthers the State's interest in protecting and preserving fetal life in a general sense, but it does not do so reasonably in relevant constitutional terms. There is no reasonable basis for the way that H.B. 214 singles out fetuses with or that may have Down syndrome for the distinctive protections it provides postviability.<sup>152</sup>

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in the text. If this measure were considered, too, it might make the need for H.B. 214 as a measure designed to protect and preserve postviability fetal life seem all the more attenuated.

<sup>151</sup> See *United States v. Dixon*, 509 U.S. 688, 746 (1993) (Souter, J., concurring in the judgment in part and dissenting in part) ("To give the government broad control over the number of punishments that may be meted out for a single act . . . is consistent with the general rule that the government may punish as it chooses, within the bounds contained in the Eighth and Fourteenth Amendments."); *Missouri v. Hunter*, 459 U.S. 359, 368–69 (1983) ("Where . . . a legislature specifically authorizes cumulative punishments under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." (citing *Blockburger v. United States*, 284 U.S. 299 (1932)); *id.* at 370 (Marshall, J., dissenting) ("A State has wide latitude to define crimes and to prescribe the punishment for a given crime. For example, a State is free to prescribe two different punishments (*e.g.*, a fine and a prison term) for a single offense."). Thanks to my colleague Alan Michaels for pointing me in the right direction here.

<sup>152</sup> This point might also be relevant to any consideration of whether courts should narrow the existing constitutional safe harbor for postviability abortions required to protect and preserve a pregnant woman's life or health undertaken in the context of Down-syndrome-selective abortions. Any court deciding whether to alter existing postviability abortion rules should want to know whether the postviability safe harbor for choice is actually being used as a "cover" for "traffic" in what H.B. 214 would deem to be acts of anti-Down-syndrome discrimination.

At this juncture, it seems important to note that the State—which carries a burden of constitutional justification in this setting<sup>153</sup>—has not so far taken the step of seeking to amass the kind of evidence that might speak to the concrete need for H.B. 214’s protections for fetuses with or that may have Down syndrome after fetal viability. If the State wished to, it presumably could, in conformity with existing constitutional abortion rules, try to collect data relevant to the question of whether fetuses that have or might have Down syndrome are being treated differently from all other postviability fetuses, both when maternal life and health are not at stake and also when they are. Speaking generally, the State presumably could constitutionally further its interest in protecting and preserving fetal life by requiring physicians asked to perform postviability abortions to inquire of their patients about their reasons for doing so as a data collection device. Depending on the results that obtained, some additional step—certainly an informed consent mechanism to provide pregnant women with truthful and nonmisleading information about Down syndrome and what it may be like to parent a child with Down syndrome—might, in keeping with the sorts of informed consent rules that are permitted prior to viability, be constitutionally allowed.<sup>154</sup> What the evidence about Down-syndrome-selective abortions might have to look like in order legitimately to curtail pregnant women’s postviability abortion decisions and what sorts of restrictions, if any, would reasonably advance the State’s interest in fetal life need not presently be sorted out in advance. Even now, this much generally seems clear: Lacking any indication that fetuses with or that may have Down syndrome are inadequately being protected under existing State law rules, there is reason to suppose that H.B. 214 will not protect fetuses that actually or possibly have Down syndrome when all postviability abortions are already prohibited. In its ordinary postviability operations, H.B. 214 presently appears a form of regulatory surfeit, not a measure reasonably adapted to achieving what are otherwise constitutionally powerful ends.

Just in case it is not clear enough, this analysis of the reasonableness—or, more exactly, the unreasonableness—of the fit between H.B. 214’s end of protecting and preserving fetal life and its means of doing so is highly contingent. It turns on the existence of the existing State bans on all postviability abortions and also on the absence of any case grounded in fact as they exist in

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<sup>153</sup> This is consistent with the nature and structure of the right to terminate an unwanted pregnancy as, if not a fundamental right per *Roe*, see *supra* note 124, then a constitutionally protected liberty per *Casey*. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992) (plurality opinion).

<sup>154</sup> This might entail an expansion of the operation of Substitute House Bill 552 (H.B. 552), the Down Syndrome Information Act. OHIO REV. CODE ANN. § 3701.69 (West, Westlaw through File 51 of 132d Gen. Assemb. (2017–2018)) (codifying H.R. 552, 130th Gen. Assemb., Reg. Sess. (Ohio 2014)). Compare the terms and scope of H.B. 552 with the terms and scope of another informed consent measure discussed in Ziegler, *supra* note 58, at 613 & n.185 (discussing an informed consent measure that “Texas legislators proposed,” and collecting sources describing the measure).

Ohio (or elsewhere) that speaks to the need for a measure like H.B. 214 and its distinctive postviability protections for fetuses that actually or possibly have Down syndrome. Were any of these factors to change in a material way, a different conclusion on the reasonableness of H.B. 214 and its postviability operations might follow. Certainly, the calculus of reasonableness would be different than it presently is.

## 2. *The State's Interest in Declaring and Vindicating the Equal Dignity and Worth of Persons with Down Syndrome*

What about the other State interest that H.B. 214 may be said to advance? Is the State's interest, once again to give it some initial expression, in declaring and vindicating the equal dignity and worth of persons with Down syndrome reasonably advanced by H.B. 214?

As a threshold matter, this State interest has, of course, not yet been recognized by and within the Supreme Court's abortion jurisprudence. And so it is worth flagging a constitutive feature of constitutional State interest analyses writ large. In the context of challenges to laws regulating individual constitutional rights, judicial analysis of relevant State interests *contra*—how these interests are articulated, their strength in constitutional terms, and how they are fitted to the State's means of advancing them—are preeminently matters of constitutional policy-making, no matter how constrained, hence law-like, the traditional standards of review through which they are processed are.<sup>155</sup> A State's interest that is advanced in any given case and recognized by a court as legitimate, important, highly persuasive, or compelling, may be grounded in constitutional text or constitutionally informed values, but either way, the process of recognizing and assessing the strength of an asserted State interest and how carefully a legal rule that has been enacted furthers it is thoroughly normative.

The initial question about the State's equality interest in relation to fetuses with or that may have Down syndrome, implicated by H.B. 214, is how, precisely, the interest should be characterized, a variant of the level of generality problem most often associated with the articulation of individual constitutional rights.<sup>156</sup>

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<sup>155</sup> One defense of this mode of constitutional policy-making points to its own structural constitutional underpinnings. See, e.g., Sandra Day O'Connor, *Testing Government Action: The Promise of Federalism*, in PUBLIC VALUES IN CONSTITUTIONAL LAW, *supra* note 138, at 35, 40 ("This grand [constitutional] design provides a reference point for examining constitutional conflicts. Above all, it highlights the importance of safeguarding personal liberties. . . . [T]he founders guarded against political excess by providing for inviolable individual rights. As the non-majoritarian branch, the judiciary ultimately must ensure that this bulwark, so carefully constructed, is maintained.").

<sup>156</sup> On that problem, see generally Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990). For some live



As public deliberations on H.B. 214 and its Senate twin, S.B. 164, proceeded, sponsors and supporters of the measures variously discussed them in ways that, perhaps unremarkably given their shared text, focused intently and specifically on the condition of Down syndrome itself: its biological and population-based realities, its basis as a predicate for abortions, and how, in Iceland, Down-syndrome-selective abortions are functioning (this is the claim anyway) as a means to eliminate Down syndrome and persons with Down syndrome from the population as a whole.<sup>157</sup> Testimony by sponsors and supporters of H.B. 214 and S.B. 164 also discussed abortion of fetuses with or that may have Down syndrome as a problem not exactly of anti-Down-syndrome discrimination as such,<sup>158</sup> but as a form of discrimination against

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examples, see *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–605 (2015); *Washington v. Glucksberg*, 521 U.S. 702, 721–24 (1997); and *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989).

<sup>157</sup> All these aspects of Down syndrome were discussed, for example, in the proponent testimony given by Dr. Dennis Sullivan on H.B. 214 to the Ohio Health Committee. *Sullivan Testimony*, *supra* note 146, at 3–4. Even in testimony favorable to H.B. 214 and S.B. 164 that could be regarded as making a case for the distinctiveness of Down syndrome, arguments favoring the measure at times collapsed into arguments holding Down syndrome protections are disability protections. See, e.g., *Hearing on H.R. 214 Before the S. Health, Human Servs. & Medicaid Comm.*, 132d Gen. Assemb., Reg. Sess. (Ohio 2017–2018) (statement of Michael Gonidakis, President, Ohio Right to Life at 1–2) [hereinafter *Gonidakis Testimony*] (noting that Down syndrome is “the most common chromosomal disorder,” and that it “is not considered a severe disability,” but then going on to discuss “the use of prenatal screenings and invasive testing to diagnose potential health problems in unborn children” in a way that did not differentiate between Down syndrome and other disabilities); *id.* at 2 (“Abortions resulting from tests like these, which identify Down syndrome among many other disabilities, are discriminatory toward those with disabilities. . . . How contradictory this seems to be, in a time where our culture so highly values diversity and works so hard to promote acceptance of the marginalized members of our communities.”); *id.* (“In many circumstances, the United States prohibits discrimination against persons with Down syndrome, and the Americans with Disabilities Act . . . creates certain protections for Americans with disabilities like Down syndrome.”); *id.* (“How is it that we are so willing to make such accommodation for and to celebrate with the disabled among us, yet we so easily accept the arguments to end their lives before they are born? It is the worst form of discrimination to violently rob them of their opportunity even to live.”); see also *LaTourette H.R. 214 Testimony: H. Health Comm.*, *supra* note 23, at 2–3 (discussing some of the distinctive features and realities of living with Down syndrome and then concluding with the observation that “this is not an issue about abortion—it is an issue of discrimination,” only finally to return focus back onto Down syndrome by saying that “[d]iscriminating against a person, not allowing them their God-given right to life, simply because they *might* have Down syndrome.”).

<sup>158</sup> See Jim Siegel, *Down Syndrome Abortion Ban Headed to Kasich*, COLUMBUS DISPATCH (Dec. 13, 2017), <http://www.dispatch.com/news/20171213/down-syndrome-abortion-ban-headed-to-kasich> [<https://perma.cc/GB6M-U8VW>] (quoting Mike Gonidakis, “executive director of Ohio Right to Life,” as saying, after the passage of H.B. 214 by the Ohio legislature that “[w]e are one step closer to ensuring that Ohioans with Down syndrome are recognized as humans worthy of dignity, just as they are.”).

persons with disabilities, where Down syndrome defined the scope of the subset of the larger class.<sup>159</sup> More broadly still, testimony by sponsors and supporters of H.B. 214 and S.B. 164 variously described the measures, to quote Michael Gonidakis, the President of Ohio Right to Life, as seeking to advance, hence benefit, the interests of persons with Down syndrome as “marginalized members of our communities.”<sup>160</sup> In light of these different characterizations, the initial

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<sup>159</sup> See, e.g., *LaRose Testimony*, *supra* note 143, at 1 (“The life of a child with Down syndrome is not worth any less than the life [of] another child. This legislation will protect the lives of unborn children with disabilities and value them as equal members of society.”); see also, e.g., *Gonidakis Testimony*, *supra* note 157, at 1 (noting that Down syndrome “is not considered a severe disability”); *id.* at 2 (“Abortions resulting from tests like these, which identify Down syndrome among many other disabilities, are discriminatory toward those with disabilities.”); *id.* (“In many circumstances, the United States prohibits discrimination against persons with Down syndrome, and the Americans with Disabilities Act . . . creates certain protections for Americans with disabilities like Down syndrome.”); *id.* (“How is it that we are so willing to make such accommodation for and to celebrate with the disabled among us, yet we so easily accept the arguments to end their lives before they are born? It is the worst form of discrimination to violently rob them of their opportunity even to live.”); *id.* at 3 (“People with Down syndrome have the same fundamental rights as all other human beings. They are as valuable to our society as you or me. As you consider this legislation, consider our brothers and sisters with disabilities who live among us, and think of the message we send by standing by while others like them are devalued in our society through abortion.”); *Hearing on H.R. 214 Before the H. Health Comm.*, 132d Gen. Assemb., Reg. Sess. (Ohio 2017–2018) (statement of Jessica Koehler, Director of Legislative Affairs, Right to Life Ohio at 2) [hereinafter *Koehler Testimony*] (“In many circumstances, the United States prohibits discrimination against persons with Down syndrome, and the Americans with Disabilities Act . . . creates certain protections for Americans with disabilities like Down syndrome. . . . People with Down syndrome have the same fundamental rights as all other human beings. They are as valuable to our society as you or me. As you consider this legislation, consider our brothers and sisters with disabilities who live among us, and think of the message we send by standing by while others like them are devalued in our society through abortion.”); *supra* note 157; cf. Samuel R. Bagenstos, *Disability, Life, Death, and Choice*, 29 HARV. J.L. & GENDER 425, 437–41, 449–52 (2006) (discussing abortion and disability, including disability-selective abortion decisions). Thanks to Susan Appleton for reminding me about Bagenstos’s work.

<sup>160</sup> *Gonidakis Testimony*, *supra* note 157, at 2 (noting that “[a]bortions resulting from tests like these, which identify Down syndrome among many other disabilities, are discriminatory toward those with disabilities,” and observing “[h]ow contradictory this seems to be, in a time where our culture so highly values diversity and works so hard to promote acceptance of the marginalized members of our communities”); see also, e.g., *Merrin Testimony*, *supra* note 1, at 2 (“Our laws cannot reflect a societal bias or lack of understanding that dehumanize those having a medical condition or that do not meet personal, subjective standards of quality. Unborn children with Down syndrome are no exception—they must be protected.”); *Hearing on H.R. 214 Before the H. Health Comm.*, 132d Gen. Assemb., Reg. Sess. (Ohio 2017–2018) (statement of Josh Brown, Legal Counsel and Director of Policy, Citizens for Community Values at 1) [hereinafter *Brown Testimony*] (“We write today to indicate our *support* for House Bill 214[,] [t]he Down Syndrome Non-

question to be answered when analyzing the State's interest in relation to persons with Down syndrome that H.B. 214 may be said to advance is, How, precisely, should this State interest be described? Is this an interest in vindicating the equal dignity and worth of persons with Down syndrome simply? An interest in vindicating the equal dignity and worth of persons with Down syndrome as a function of the equal dignity and worth of persons with disabilities? Or is it an interest in vindicating the equal dignity and worth of persons with Down syndrome as a function of the State's broader interest in equality and first-rank citizenship status for persons who presently are and traditionally have been "marginalized members of our communities"?

Because the assessment of the reasonableness of H.B. 214's fit between its means and its ends depends on what the State's interest is taken to be, the various expressions of the State's interest in the equal dignity and worth of persons with Down syndrome will be taken up in turn.

a. *Expression One: H.B. 214 as a Means of Advancing the State's Interest in Vindicating the Equal Dignity and Worth of Persons with Down Syndrome*

Begin by considering H.B. 214 as a means of advancing the State's interest in vindicating the equal dignity and worth of persons with Down syndrome *simpliciter*.

i. *A Pro-Life Perspective*

From a pro-life perspective that understands life and personhood to begin at the moment of conception—a perspective that, of course, is reflected in H.B. 214's text, and was invoked by the bill's sponsors and a number of its supporters<sup>161</sup>—H.B. 214 advances the State's interest in vindicating the equal

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discrimination Act, because this bill will help Ohio protect the most vulnerable among us."); *infra* text accompanying notes 182–83.

<sup>161</sup> For some evidence of this perspective in the text of the measure, consider H.B. 214, OHIO REV. CODE ANN. § 2919.10(A)(2), (B)(1)–(3) (West, Westlaw through File 51 of 132d Gen. Assemb. (2017–2018)), which uses the term "unborn child," defined to have "the same meaning[] as in section 2919.16 of the Revised Code," which itself defines "unborn child" as "an individual organism of the species homo sapiens from fertilization until live birth." *Id.* § 2919.16(L). For evidence of this perspective in language from sponsors and supporters of H.B. 214, see, for example, *LaTourette H.R. 214 Testimony: H. Health Comm., supra* note 23, at 1 ("The Down Syndrome Non-Discrimination Act[, H.B. 214,] is priority legislation for Ohio Right to Life . . . [T]hese are not the stories of rape and unplanned pregnancies often used to explain away the practice of killing our unborn . . ."); *id.* at 2–3 ("I believe that life begins at conception and that abortion should never be considered an option. However, regardless of if you agree with me or not, I hope that you can see that this is not an issue about abortion—it is an issue of discrimination. Discriminating against a person, not allowing them their God-given right to life, simply because they *might* have Down

dignity and worth of persons with Down syndrome, and it does so, consistent with this point of view, in a direct, immediate, and powerful way. Acknowledging that discrimination against persons with Down syndrome exists and operates on a social level, partly through the widespread circulation of outmoded stereotypes about the capacities and talents of persons with Down syndrome, a pro-life view of H.B. 214 readily sees the Down-syndrome-selective abortions that the law outlaws as involving rank discrimination against persons—unborn persons—with or that may have Down syndrome that will end their lives and thwart their chances for any kind of life opportunities.<sup>162</sup> In many cases, this discrimination may seem to result from the decisions, motivations, and ideas that pregnant women have in mind when deciding to end a pregnancy because of the actual or potential Down-syndrome status of the child she carries.

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syndrome.”); *Merrin Testimony*, *supra* note 1, at 1 (“[O]ur legislation protects unborn children from discrimination . . . I applaud Representative LaTourette’s steadfast work to defend unborn children with Down syndrome . . . , and . . . have welcomed the opportunity to partner with her moving forward. . . I strongly believe life begins at conception and all unborn children deserve the right to life.”); *Hearing on H.R. 214 Before the H. Health Comm.*, 132d Gen. Assemb., Reg. Sess. (Ohio 2017–2018) (statement of Barry Sheets, Legislative Consultant, Right to Life Action Coalition of Ohio at 1) [hereinafter *Sheets Testimony*] (describing the “Right to Life Action Coalition of Ohio” as “a network of organizations who stand together to uphold protections for defenseless unborn life,” and detailing the network’s engagement with one of the cosponsors of the bill on its language, and suggesting that the result of that process “is HB 214”); *Hearing on H.R. 214 Before the H. Health Comm.*, 132d Gen. Assemb., Reg. Sess. (Ohio 2017–2018) (statement of Paula Westwood, Executive Director, Right to Life of Greater Cincinnati at 1) (“While every unborn child deserves protection from abortion death, House Bill 214 is helpful in protecting those targeted for destruction due to cultural bigotry against babies identified before birth as ‘abnormal’ or ‘imperfect’ due to a Down Syndrome prediction.”).

<sup>162</sup>Speaking about H.B. 214’s predecessor Down syndrome abortion ban, H.B. 135, H.R. 135, 131st Gen. Assemb., Reg. Sess. (Ohio 2015–2016), Representative LaTourette, apparently from a pro-life perspective, observed: “Choosing to end a person’s life simply because of this potential diagnosis [of Down syndrome] is discrimination. Period.” *LaTourette H.R. 135 Testimony: H. Cmty. & Family Advancement Comm.*, *supra* note 144, at 1; *accord Sullivan Testimony*, *supra* note 146, at 4 (“George F. Will, himself a father of a child with Down Syndrome,” has “describe[d] the recent increase in prenatal testing as a ‘Search and Destroy Mission’ against babies with this condition. . . . This is just eugenics, and it is blatant discrimination.” (footnote omitted)). Speaking somewhat more generally during the floor debate on H.B. 214 in the Ohio House of Representatives, Representative Derek Merrin outlined the “two general types of discrimination” that he understood to be at work in relation to Down syndrome selective abortions. *Floor Debate on H.R. 214: 11-1-2017*, *supra* note 143, at 00:33:56 (statement of Rep. Derek Merrin). “The first is where you believe an individual has fewer or less rights than you do. Meaning: that other people are not equal to you. . . . The second type of discrimination is where people refuse to even acknowledge an individual exists or has any rights all.” *Id.* at 00:33:59. In the context of Representative Merrin’s remarks, both these types of discrimination are in play in cases in which the “right to life” of “unborn children” is not recognized, “and those with Down Syndrome are no exception.” *Id.* at 00:35:18.

These women, the pro-life thought goes, may be influenced in a distorting sort of way by discriminatory ideas, including stereotypes, about Down syndrome, which are readily capable of hindering a parent from having and acting on a clear-eyed vision of the full range of realities of what kind of life a child with Down syndrome might have after birth and also what parenting a child with Down syndrome might be like.<sup>163</sup> The other possibility from this point of view is that an abortion because of the actual or potential Down-syndrome status of an unborn child might be discriminatory not because it is driven by discriminatory attitudes, but because of the decision's effects, judged either in individual cases or in the aggregate. On this line, it matters that it is a life of an unborn person with or who may have Down syndrome that is distinctively being ended by a Down-syndrome-selective abortion. And it matters that the sum total of these decisions may have population-based effects.

Taking up these two ways of understanding how anti-Down-syndrome discrimination may work in this setting consistent with a pro-life point of view, whether abortions of unborn persons with or who may have Down syndrome is discrimination against them because of a pregnant woman's decisional processes or because of the impact that those processes have, there is, as a conceptual matter, a close and direct fit between the proffered State interest in vindicating the equal dignity and worth of persons with Down syndrome and the abortion ban that H.B. 214 contains. The reason for emphasizing the conceptual aspects of these arguments boils down to this: If one understands Down-syndrome-selective abortions as discrimination against persons with or who may have Down syndrome, it may not matter that, in the postviability setting, the State has discovered no established record of this type of discrimination happening in the present (or even in the past) tense. Seen in this light, there is no need to wait to see how often this discrimination has previously come up in light of existing postviability abortion bans or how often it might happen without H.B. 214's Down-syndrome-selective abortion ban. The conceptually inflected understanding of the social meaning of the choice to abort an unborn child that has or may have Down syndrome and the meaning of this act for the unborn person whose life is thus being ended is, without more, a sufficient warrant to bar the eventuality from ever coming to pass. Indeed, one might well recognize the existence of the State's current postviability abortion bans and still take the position that H.B. 214 is reasonably adapted to what should be regarded as a highly persuasive and even compelling State interest, if it saves the life of any unborn person who has or may have Down syndrome,

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<sup>163</sup> Compare Mansfield et al., *supra* note 146, at 809–10 (“[H]igh [termination] rates might reflect thorough counselling and systematic decision-making before a diagnostic test is undergone, with all those not inclined to terminate a pregnancy affected by the condition being tested for, declining testing. Alternatively, they may reflect directive counselling from health professionals putting pressure on women to undergo a termination. Clearly the results of this review cannot address this.”), *with id.* at 810 (“The high rates for Down syndrome reflect the negative attitudes towards giving birth to a child with serious cognitive impairments.” (citation omitted)).

who would otherwise be discriminated against by being killed as a function of a pregnant woman's abortion choice. An incrementally additional deterrent effect that could save the life of an unborn person with or who may have Down syndrome is clearly enough. Understanding this pro-life way of thinking may go some distance toward explaining why the State legislature considering H.B. 214 and its Senate twin, S.B. 164, did not get hung up on the empirical need for a Down-syndrome-selective abortion ban in light of the State's already-existing abortion bans. While this may account for, it does not constitutionally excuse, that fact.

The pro-life position on the reasonableness of H.B. 214's means of advancing the posited State interest in declaring and vindicating the equal dignity and worth of persons with Down syndrome covers, but does not hide, a related question of means–end reasonableness that is distinctively apparent from within a pro-life point of view. If H.B. 214 asserts the State's interest in the project of declaring and vindicating the equal dignity and worth of persons with Down syndrome, the wonder is, Why does the law only protect some but not all persons with Down syndrome? The answer cannot be that already-born persons with Down syndrome cannot have their lives cut short by discrimination. No acrobatics are required to see in the medical setting the vulnerability of newborns with Down syndrome and of persons with Down syndrome later on in life, including close to life's end, whose care, hence survival, might be made a function of quality of life judgments that are parasitic on or that otherwise reinforce discriminatory norms. And so, if H.B. 214 means to declare and vindicate the equal dignity and worth of persons with Down syndrome by saving lives that may be imperiled by decision-making in the medical setting, an obvious question to ask is why the law does not give all persons with Down syndrome and their lives equal protections against being discriminatorily ended?<sup>164</sup> Why does H.B. 214 not safeguard all persons with Down syndrome from having their lives and life opportunities discriminatorily cut short?<sup>165</sup> The same type of question arises outside of the context of medical caregiving, where H.B. 214's protections might be useful, particularly as part of a larger antidiscrimination law that affords persons with Down syndrome a right to be free from the sorts of subtle and not-at-all subtle violence that anti-Down-syndrome discrimination can take.<sup>166</sup> From the range of needs of persons with

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<sup>164</sup> See *infra* note 166.

<sup>165</sup> There is also a noticeable degree of overinclusiveness at work here. To the extent that H.B. 214 is about vindicating the equal dignity and worth of persons with Down syndrome, even if that interest could properly have prenatal application, the measure would protect fetuses that do not actually have, but are only believed to possibly have, Down syndrome from a pregnant woman's decision, when her reasons are known by the person to perform or attempt to perform an abortion. OHIO REV. CODE ANN. § 2919.10(B)(3) (West, Westlaw through File 51 of 132d Gen. Assemb. (2017–2018)).

<sup>166</sup> These forms of violence amounting to discrimination might include negative as well as positive stereotyping about the talents and capacities of persons with Down syndrome that

Down syndrome to first-class citizenship status—needs that might also include forms of publicly funded care that, not incidentally, an amendment to H.B. 214 would have provided, but which were rejected by the Ohio House<sup>167</sup>—the limitation of H.B. 214 to the abortion setting looks to be highly underinclusive in view of the State’s ends. Seen in light of the full range of needs that persons with Down syndrome have and what it would take for the State to declare and vindicate the equal dignity and worth of persons with Down syndrome, it might reasonably appear, to some observers at least, that H.B. 214 is not actually about declaring and vindicating the equal dignity and worth of persons with Down syndrome so much as it is about using that idea, and hence persons with Down syndrome, as instruments, as pawns, as objects, in a larger pro-life campaign.<sup>168</sup>

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leaves them with a constricted range of opportunities for public and private life. *See* David M. Perry, *Don’t Label People with Down Syndrome*, CNN (Nov. 17, 2012), <https://www.cnn.com/2012/11/16/opinion/perry-down-syndrome/> [<https://perma.cc/R6LF-XYMP>] (“[W]hile good intentions count for a lot, ‘angel’ [as a description of children with Down syndrome] makes me no happier than ‘retard.’ . . . The words ‘retard’ and ‘angel’ represent images that dehumanize and disempower. Both words connote two-dimensional, simple or limited people. Neither angels nor retards can live in the world with the rest of us, except as pets, charity cases or abstract sources of inspiration.”). The forms of violence amounting to discrimination might also take the form of interpersonal violence against the bodies of persons with Down syndrome, some of it overt, *see, e.g.*, *People v. Davis*, 585 N.E.2d 214, 216 (Ill. App. Ct. 1992) (involving sexual assault and abuse against victim with Down syndrome), and some of it not, though no less consequential for that, *see* Ziegler, *supra* note 58, at 603–08, 605 n.119 (discussing “the so-called Baby Doe controversy,” described as involving a Down syndrome child who died after the child’s parents declined surgery for a condition “that physicians could often correct,” and then going on to elaborate some of the law reforms, including “the final version of the Baby Doe rules,” 45 C.F.R. § 84.55 (2017), that the case helped to spawn).

<sup>167</sup> The Ohio House of Representatives rejected several floor amendments to H.B. 214 during debate on the measure, including one offered by Representative Nickie Antonio, *Floor Debate on H.R. 214: 11-1-2017*, *supra* note 143, at 1:02:45 (statement of Rep. Nickie Antonio), ultimately tabled, *see id.* at 1:14:45, that would have redistributed economic resources to pregnant women carrying fetuses with Down syndrome and to children and later adults born with Down syndrome. *Id.* at 1:04:33 (discussing details of proposed amendment). For some, the tabling of this amendment frames a question about how seriously and deeply H.B. 214 reflects the State’s commitment to promote the equal dignity and worth of persons with Down syndrome tout court. *See Miracle H.R. 135 Testimony: H. Cmty. & Family Advancement Comm.*, *supra* note 74, at 2 (“[A]s we debate this bill [H.B. 135], the budget passed by this Ohio House slashes funding for programs that serve people with developmental disabilities, the House passed budget even significantly cuts Medicaid funding for this population. . . . Funding for special education programs also falls short of what is needed in this state. . . . Will this woman have access to maternity leave and/or paid sick leave to help her bond with her child and help her continue to earn a wage if she has to take time off to help take care of her child? Looking at the statistics, the answer is probably not.”).

<sup>168</sup> Writing about the issue, David Perry, who regularly writes about disability rights and who testified on H.B. 214, *Hearing on H.R. 214 Before the H. Health Comm.*, 132d Gen. Assemb., Reg. Sess. (Ohio 2017–2018) (statement of David Perry at 1) (“I am the father of

If this is right, the State's interest in declaring and vindicating the equal dignity and worth of persons with Down syndrome is not so much advanced by H.B. 214 as it is defeated by it. Whatever the intention, to reduce persons with Down syndrome to political things violates the very principle of treating persons with Down syndrome as being entitled to equal dignity and worth—and respect.

### ii. *A Non-Pro-Life Perspective*

Departing from a pro-life perspective, the reasonableness of the measure as a way of declaring and vindicating the equal dignity and worth of persons with Down syndrome takes on an even harder and more negative cast. From the vantage point of the Supreme Court's abortion jurisprudence, the neat, tight fit between the ostensibly egalitarian ends of the legislation and its means of achieving them must be reconfigured in a different and more complex light.

Since *Roe*, the right to abortion has been built in part upon the notion that the concept of "personhood" as used in the U.S. Constitution has only postnatal application.<sup>169</sup> This means that the State's interest in the equal dignity and worth of persons with Down syndrome cannot be credited, constitutionally, as being directly implicated by H.B. 214. There might well be thought to be a connection

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a boy with Down syndrome and am opposed to [H.B. 214]. This bill will not lower rates of abortion following a prenatal diagnosis nor will it help people with Down syndrome.”), and S.B. 164, *Hearing on S. 164 Before the S. Health, Human Servs. & Medicaid Comm.*, 132d Gen. Assemb., Reg. Sess. (Ohio 2017–2018) (statement of David Perry at 1), has made this point in different contexts. See David M. Perry, *How Ohio Is Using Down Syndrome To Criminalize Abortion*, PAC. STANDARD (Oct. 3, 2017), <https://psmag.com/social-justice/gop-using-down-syndrome-as-cynical-wedge> [<https://perma.cc/XE8N-6S2N>] (“Still, Down syndrome has emerged as a major front in the cultural divide around reproductive access, with similar attempts [in addition to Ohio] underway in North Dakota, Missouri, and Louisiana. The cynical use of my son’s disability as a wedge issue hasn’t made the world any better for him.”); David M. Perry, *Ohio Abortion Ban*, HOW DID WE GET INTO THIS MESS? (Nov. 16, 2017), <http://www.thismess.net/2017/11/ohio-abortion-ban.html> [<https://perma.cc/4KHH-C5HM>] (“It’s happening. Ohio is going to pass an anti-choice bill that criminalizes speech between a woman and her doctor. . . . This won’t help people with Down syndrome. It’s not intended to. It just keeps spreading stigma on the one hand, while serving as a vehicle to restrict reproductive rights on the other.”); David M. Perry, *Resources: Down Syndrome and the Abortion Wars*, HOW DID WE GET INTO THIS MESS? (Aug. 24, 2015), <http://www.thismess.net/2015/08/resources-down-syndrome-and-abortion.html> [<https://perma.cc/9YRM-BWZQ>] (“As a parent of a child with Down syndrome and a pro-choice man, I have this to say. 1) The Forced Birth movement does not actually care about disability rights. 2) The right-wing is very good at playing divide and conquer with disability rights. 3) We have a lot of actual work to do. This isn’t helping.”). Thanks to my colleague Ruth Colker for introducing me to Perry’s writing and work on this issue.

<sup>169</sup> *Roe v. Wade*, 410 U.S. 113, 157–59 (1973) (discussing and concluding that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn”); see also *id.* at 162 (“In short, the unborn have never been recognized in the law as persons in the whole sense.”).



between H.B. 214's ban on Down-syndrome-selective abortions and the State's interest in declaring and vindicating the equal dignity and worth of people with Down syndrome, but that connection, if it is to be credited as a matter of constitutional law, can only be seen as operating indirectly, at some stage of causal remove.

Even so, the causal argument, or story, is familiar in its structure from any number of pro-equality discourses.<sup>170</sup> In one version, Down-syndrome-selective abortions, either in their motivations or in their effects, reflect and reinforce historical and contemporary sentiments about lives lived with Down syndrome—sentiments that hold these lives are not as valuable or as worth living as other lives are.<sup>171</sup> The normalization of Down-syndrome-selective abortions, to borrow a term found in the Supreme Court's opinion in *Gonzales v. Carhardt*, may thus “coarsen” the longstanding and still-existing discriminatory attitudes about people, meaning born persons, with Down syndrome, hindering the recognition and the lived experiences of their equal dignity and worth.<sup>172</sup> Seen in this light, although the lives of constitutional “persons” with Down syndrome are not directly and immediately implicated by H.B. 214, the law still advances the State's interest in the equal dignity and

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<sup>170</sup>In the abortion setting alone, cognate arguments may be run in relation to sex-selective abortions. For one analysis that articulates and engages these arguments, while tracking feminist views that both see the sex equality tradeoffs that sex-selective abortions involve and hold that it would be “politically imprudent, given the precarious nature of women's reproductive rights” to endorse a “legal prohibition of sex-selective abortion,” see April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?*, 10 WIS. WOMEN'S L.J. 161, 181–87, 219–22 (1995).

<sup>171</sup>The form of the point, put more generally, is on display in Ziegler, *supra* note 58. Reporting on a 1998 “strategy session” hosted by the National Abortion Rights Action League (NARAL), Ziegler writes that one “attendee [there] noted [that]: ‘Disability-rights people raised the question about whether aborting [a pregnancy] . . . demeans what it [means] to be a human being with a disability.’” *Id.* at 610–11 (third and fourth alterations in original). Continuing with this idea, it has elsewhere been observed that:

Selective abortion prevents disability not in an existing human being or in a fetus likely to come to term; instead, it prevents disability by preventing the fetus from becoming a person with a disability. It implies that it may be better for the child not to be born at all rather than to be born with a disability. Advocacy for this form of primary prevention, then, appears to disvalue and disrespect persons living with similar disabling conditions, sending them the message that they are mistakes that society would eliminate if it had the technological capacity. It connotes that if people do not meet a certain health standard, they should not be welcomed into the family or the world.

Adrienne Asch et al., *Respecting Persons with Disabilities and Preventing Disability: Is There a Conflict?*, in *THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES* 319, 326 (Stanley S. Herr et al. eds., 2003). Further elaboration is in *id.* at 327.

<sup>172</sup>*Gonzales v. Carhardt*, 550 U.S. 124, 157 (2007) (“Congress stated as follows: ‘Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life.’”).

worth of born persons with Down syndrome by preventing the further ossification of social and cultural attitudes already in circulation in ways that keeps persons with Down syndrome from achieving their rank as first-class persons. Connecting the dots, this is the conclusion: Banning abortions because of the actual or possible Down-syndrome status of a fetus furthers the State's interest in vindicating the equality and dignity of born persons with Down syndrome.<sup>173</sup>

The challenge of this line of reasoning for those who consider themselves as equality-minded liberals or progressives is that its form is such an elemental part of antidiscrimination discourses that, to reject it in this setting, may seem to risk having, in principle, to reconsider, if not reject it, elsewhere as a bid on how social and cultural life under law ought to be reformed. Recognizing the salutary effects of calls to reconsider well-worn lines of thought, in this case, it does seem as though part of H.B. 214's design is to generate just this sort of dilemma for liberals and progressives committed broadly to principles of social equality.

Whatever the politics or the pleasures of producing this dilemma, the challenge that the causal argument for H.B. 214 presents is not so ineluctable as at first glance appears.

To see why, notice where, in constitutional terms, the argument about H.B. 214 stands at this point. On the ordinary postviability terrain, Ohio law already multiply outlaws all abortions no matter why a pregnant woman might choose to have one if she could. This is why, as an additional layer of anti-abortion protection on top of the others already in force, where the initial layers of protection have not been shown inadequate to the task of protecting and preserving the lives of fetuses that have or may have Down syndrome, H.B. 214 is not a measure that reasonably advances the State's interest in protecting and preserving fetal life. For much the same reason, H.B. 214 does not reasonably further the State's interest in declaring and vindicating the equal dignity and worth of born persons with Down syndrome. If the State laws that already multiply bar all postviability abortions are working as intended, and if they are keeping all postviability abortions—including Down-syndrome-selective abortions—from taking place, then there is no practice of Down-syndrome-selective abortions that exists to reflect or reinforce discrimination against born

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<sup>173</sup> Speaking of H.B. 135, H.R. 135, 131st Gen. Assemb., Reg Sess. (Ohio 2015–2016) (as reported by the H. Cmty. & Family Advancement Comm., June 17, 2015), an earlier measure that would have banned Down-syndrome-selective abortions in a more limited range of circumstances than H.B. 214 does, Dr. Ashley Fernandes observed: "HB 135 will send a message to the citizens of Ohio that Down Syndrome children, whether born or unborn, are equal in dignity and value to the rest of us. Such a law will have a protective effect on already-born children and adults with Down Syndrome that transcends 'symbolism.'" *Hearing on H.R. 135 Before the H. Cmty. & Family Advancement Comm.*, 131st Gen. Assemb., Reg. Sess. (Ohio 2015–2016) (statement of Ashley K. Fernandes, Associate Director, Center for Bioethics and Medical Humanities, The Ohio State University College of Medicine; Board Member, Ohio Right to Life; Associate Professor of Pediatrics, Nationwide Children's Hospital at 10).

persons with Down syndrome. From aught that appears, H.B. 214 is not needed as a means of blocking the abortion practice that would perpetuate anti-Down-syndrome discrimination, which in turn means that H.B. 214 does not materially advance the State's interest in declaring and vindicating the equal worth of born persons with Down syndrome.

This leaves H.B. 214 to be justified, if at all, as a symbolic measure. While the law cannot at present be taken to make any material difference to postviability abortion practice, hence by extension, concretely to advance the equal dignity and worth of born persons with Down syndrome, the measure might still be thought to function as a way for the State to send out the message that it values and is committed to declaring and vindicating the equal dignity and worth of born persons with Down syndrome. This may in different ways be thought to be of real practical benefit to them. Appreciating that this line of thought hangs together well enough to be not just sensible, but reasonable, the judgment it reflects all too easily misses the way in which fetuses with or that may have Down syndrome are, in this symbolic accounting of H.B. 214, being themselves reduced to symbols, mere political objects, reflecting maneuvering inconsonant with dedication to the equal dignity and worth, including the full human value, of born persons with Down syndrome. There is something problematic to the point of being unreasonable about the paradox of reducing fetuses with or that may have Down syndrome to object-symbols in order to vindicate the lived equal dignity and worth of born persons with Down syndrome. This is particularly so when the multiple prohibitions against all postviability abortions formally treat all postviability fetuses equally, and hence advance the equality status of fetuses that have or may have Down syndrome—a state of affairs that itself may be taken as sending out a clear message that prenatal and postnatal life that is or may be lived with Down syndrome is as dignified and valuable and meaningful as any other kind of human life there is.

Where H.B. 214 might actually be able to materially advance the State's interest in vindicating the equal dignity and worth of born persons with Down syndrome is on the postviability terrain encompassed by the constitutional safe harbor for postviability choice, where an abortion may still be secured when needed to protect or preserve a pregnant woman's life or health. Within the boundaries of that safe harbor, however, the reasonableness of the State's means of achieving its end—its ban on any Down-syndrome-related abortion—comes at the direct expense of the choice that a pregnant woman would ordinarily make in consultation with her attending physician to end a pregnancy in order to protect her life or her health. Stated differently, within the constitutional safe harbor for postviability choice, the State's interest in the equal dignity and worth of persons with Down syndrome, as advanced by H.B. 214, concretely implicates the other State interest in play in that setting, long held to be constitutionally safeguarded: the State's interest in protecting and preserving the pregnant woman's life and health. This State interest and the important constitutional values of women's autonomy and equality that it reflects must be accounted for in any evaluation of the reasonableness of the State's effort

through H.B. 214 to vindicate the equal dignity and worth of persons with Down syndrome. When they are added to the mix, the reasons for regarding H.B. 214 as unreasonably adapted to the end of vindicating the equal dignity and worth of born persons with Down syndrome appear. Much like it is unreasonable for the State to deny the autonomy of pregnant women to make important life and health decisions for themselves in the interests of protecting and preserving the State's interest in protecting and preserving fetal life, the State does not act reasonably when it treats women's bodies as vessels for the understandable, important, and even generally compelling independent project of declaring and vindicating the equal dignity and worth of persons with Down syndrome. The State cannot strip individual pregnant women of their autonomy, cannot deny the autonomy of pregnant women as a class, by forcing them to run immediate risks to life and health in order to satisfy the State's concern, however otherwise vital, to vindicate the equal dignity and worth of persons with Down syndrome. The unreasonableness of this position may be most obvious in cases in which H.B. 214 would cost a woman her life in service of the State's project of vindicating the equal dignity and worth not of her fetus exactly but of born persons with Down syndrome. But it is still unreasonable in cases in which H.B. 214 would cost a pregnant woman her health, whether physical or psychological. As the Supreme Court's abortion case law has developed, women's psychological well-being has been of a piece with the other concerns for women's health postviability.<sup>174</sup> Consistent with the thrust of those decisions and their implicit configurations of reasonableness, it would be unreasonable for the State not to recognize that the immediate risks to health that H.B. 214 would force a pregnant woman to run outweighs the State's causal case for maintaining that all postviability Down-syndrome-selective abortions must be stopped in the interest of vindicating the equality dignity and worth status of born persons with Down syndrome.

To be clear, this is not to say that the State is powerless to advance the view that Down-syndrome-selective abortions postviability, as much as and perhaps, given their nearness to birth, more so than previability Down-syndrome-related abortions, should be understood as reflecting and reinforcing the inequality of born persons with Down syndrome. Consistent with the previability allowances made for informed consent measures that restrict but do not unduly burden the right to a previability abortion, the State presumably could publicize its opposition to discrimination against persons with Down syndrome in the postviability abortion setting by, say, seeking to ensure that pregnant women contemplating Down-syndrome-selective abortions receive truthful, nonmisleading, and up-to-date information about what life with Down syndrome is like and what it is like to parent a child with the condition.<sup>175</sup> Along

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<sup>174</sup> See *supra* note 50 (collecting a number of relevant sources).

<sup>175</sup> Along these lines, consider Substitute House Bill 552, the Down Syndrome Information Act, OHIO REV. CODE ANN. § 3701.69 (West, Westlaw through File 51 of 132d

similar lines, the State might likewise seek to ensure that pregnant women contemplating Down-syndrome-selective abortions hear and understand the State's view of how their abortion decisions may contribute to the social inequality of this traditionally subordinated group. Importantly, information-based mechanisms like these for advancing the State's interest in declaring and vindicating the equal dignity and worth of persons with Down syndrome do not take the additional step H.B. 214 does: denying women's autonomy in a way that also strikes at women's equality, by perpetuating old and discredited stereotypes about women that hold they are objects of their biological—read: reproductive—destinies.<sup>176</sup> There is something palpably unreasonable about the State furthering indirectly its interest in the equal dignity and worth of persons with Down syndrome by making pregnant woman pay for that achievement immediately or over the longer term with the coin of their own autonomy or equality, including their lives and health.

*b. Expression Two: H.B. 214 as a Means of Declaring and Vindicating the State's Interest in the Equal Dignity and Worth of Persons with Down Syndrome as an Expression of the State's Interest in the Equal Dignity and Worth of All Persons with Disabilities*

Next, consider H.B. 214 as a means of declaring and vindicating the State's interest in the equal dignity and worth of persons with Down syndrome as an expression of the State's broader interest in the equal dignity and worth of all persons with disabilities. Analysis of this way of expressing the State's interest in enacting H.B. 214, as with the last, implicates complex issues of causation, which vary depending on whether the measure is seen from a pro-life or a non-pro-life point of view. For the time being, analysis of those questions can productively be bracketed to highlight a relatively simpler concern.<sup>177</sup>

Recognizing that Down syndrome is a somatic condition with its own distinctive features, it is common enough, as during legislative deliberations on H.B. 214 and its Senate twin, S.B. 164, to think of anti-Down-syndrome

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Gen. Assemb. (2017–2018)) (codifying H.R. 552, 130th Gen. Assemb., Reg. Sess. (Ohio 2014)), which involves the collection, publication, and sharing of information about Down syndrome under a limited range of circumstances.

<sup>176</sup> See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141–42 (1873) (Bradley, J., concurring) (“The paramount destiny and mission of woman are to fulfil[] the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.”).

<sup>177</sup> This approach will also be taken in relation to the third way of expressing the State's interest in the equal dignity and worth of persons with Down syndrome—as a function of the State's interest in declaring and vindicating the equal dignity and worth of all the “marginalized members of our communities,” discussed *infra* Part IV.B.2.c.

discrimination as a type of disability discrimination,<sup>178</sup> and so to see H.B. 214's protections of the equal dignity and worth of persons with Down syndrome as an expression of the State's broader interest in declaring and vindicating the equal dignity and worth of all persons with disabilities.<sup>179</sup> Viewed this way, one understanding of the issue of the reasonableness of H.B. 214's means of achieving its end circles around whether Down syndrome is sufficiently distinct among the full range of disabilities so as to warrant in the abortion setting the distinctive status and protections offered by H.B. 214.

Whatever the case for believing that it is, no defense of H.B. 214 along these lines was mounted in any clear, prominent, and dedicated way during the course of public legislative proceedings on the bill or its Senate twin, S.B. 164.<sup>180</sup> This,

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<sup>178</sup>This class might be defined by genetic inheritance, *see, e.g.*, N.D. CENT. CODE § 14-02.1-02(7) (2017) (banning abortions on the basis of "any defect, disease, or disorder that is inherited genetically," and defining these conditions to include "any physical disfigurement, scoliosis, dwarfism, Down syndrome, albinism, amelia, or any other type of physical or mental disability, abnormality or disease"), or more broadly, as under the terms of the Americans with Disabilities Act, 42 U.S.C. § 12102 (2012). Dov Fox & Christopher L. Griffin, Jr., *Disability-Selective Abortion and the Americans with Disabilities Act*, 2009 UTAH L. REV. 845, 852 (2009) ("Down syndrome typically counts as a disability under the ADA." (citing 28 C.F.R. pt. 36, app. B (2007))). *But see id.* at n.40 (citing contrary authority). Indeed, testimony was offered on H.B. 214 urging that the legislation be "expand[ed]" to include "unborn children diagnosed with Trisomy-18 (Edward's Syndrome), another chromosomal anomaly, second most common to Downs'." *Sheets Testimony, supra* note 161, at 2; *see also Merrin Testimony, supra* note 1, at 1 ("Whether a child should live or die, should not be determined by their natural-born appearance, physical characteristics, or disability."); *Koehler Testimony, supra* note 159, at 2 ("Abortions resulting from tests like these, which identify Down syndrome among many other disabilities, are discriminatory toward those with disabilities. It is that simple.").

<sup>179</sup>This approach is not unique to H.B. 214. Ginny Engholm, *Prenatal Testing and Counseling: The New Front of the Abortion Wars?*, NURSING CLIO (July 29, 2014), <http://nursingclio.org/2014/07/29/prenatal-testing-and-counseling-the-new-front-of-the-abortion-wars/> [<https://perma.cc/T6S7-2L2Q>] (noting, while discussing Louisiana's passage of "a version of the Down Syndrome Information Act," that the measure "was not spearheaded by the Down syndrome community," but instead was "driven largely by the Bioethics Defense Fund," which "frames the change to the law as an issue of discrimination and argues that presenting termination as an acceptable option for women in the event of a prenatal diagnosis of Down syndrome constitutes state-sponsored discrimination that violates the Americans with Disabilities Act").

<sup>180</sup>*But see Hearing on H.R. 135 Before the H. Cmty. & Family Advancement Comm.*, 131st Gen. Assemb., Reg. Sess. (Ohio 2015–2016) (statement of Heather Bellagia-Ernest at 1) ("My initial thought was why should babies with Down syndrome have such a protection, but not others? All babies deserve to live. But then the word 'Extinction' hit me. With 9 out of 10 babies with Down syndrome being aborted, extinction is what we are really talking about."). Arguments in relation to the distinctiveness of Down syndrome might focus on its biological distinctiveness, including how common it is compared to other "chromosomal abnormalit[ies]." *Sullivan Testimony, supra* note 146, at 3 ("Down Syndrome is the most common chromosomal abnormality today . . ."). While these reasons might justify singling out Down syndrome among other disabilities in some settings, they were not pressed with

even though the argument was leveled against the measures that, in singling out Down syndrome from among other forms of disability, H.B. 214 created an unjustified “hierarchy of disabilities.”<sup>181</sup>

Against this complaint, the candid defense of H.B. 214 that at times surfaced was not that it was justified in taking only the single step that it does or that fetuses with Down syndrome were truly distinctive in a comparative disability sense. To the contrary, the idea was that H.B. 214 was a provisional measure, a step foreshadowing other similar decisional abortion bans yet to come.

One of the most notable articulations of this response—indeed, perhaps the most notable one—arrived during the floor debate on H.B. 214 in the Ohio House of Representatives. Representative Christina Hagan, a strong supporter of H.B. 214, took the floor in order to “applaud both of the sponsors for their courage, their conviction, and their drive to protect the most vulnerable populations in our communities.”<sup>182</sup> After speaking about the Icelandic experience with Down-syndrome-selective abortions, Representative Hagan, apparently turning to the domestic U.S. scene, observed that:

There is mass genocide that is occurring in this Nation. When we talk about eradicating entire walks of life, we should be embarrassed, we should be ashamed, and we should be shaken to the core to stand for these vulnerable populations. That’s exactly what these men and women are doing here today. And so if there is a motion to extend protection to other types of chromosomal deficiencies or abnormalities or anomalies, you better bet we’re going for them all. We’re going to protect every unborn baby. And it will take many different layers of legislation extending protection [to] unborn children, but we’re not

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any dedication in a comparative sense during public deliberations on H.B. 214 or its Senate twin, S.B. 164. One possible reason why is that supporters of the measures, or some of them anyway, wished to leverage legislative success on one or the other of them in the direction of barring other types of disability-selective abortions. *See infra* notes 182–85 and accompanying text.

<sup>181</sup> *Hearing on H.R. 214 Before the H. Health Comm.*, 132d Gen. Assemb., Reg. Sess. (Ohio 2017–2018) (statement of Jane Gerhardt, Policy Specialist, Leadership Education in Neurodevelopmental and Related Disabilities at 1) (“With this bill, the Ohio House tells us that individuals with Spina Bifida, Fragile X, achondroplasia, CF, OI, and every other genetically based disability, aren’t worthy of protection. This bill creates a hierarchy of disabilities, with Down syndrome at the top, receiving state sanctioned protection and stigmatizes every other disability, not deserving of that same protection.”). For a similar view from a different direction, see *infra* note 184 (quoting Senator Matt Dolan’s views).

<sup>182</sup> *Floor Debate on H.R. 214: 11-1-2017*, *supra* note 143, at 1:01:36 (statement of Rep. Christina Hagan). No less significant was sponsor testimony by Senator Frank LaRose on S.B. 164, which focused on how fetuses with Down syndrome are “unborn children with disabilities.” *LaRose Testimony*, *supra* note 143, at 1 (“The life of a child with Down syndrome is not worth any less than the life [of] another child. This legislation will protect the lives of unborn children with disabilities and value them as equal members of society.”).

forgetting these children today who are absolutely a target of an industry that wishes to eradicate them and erase them from the face of the earth.<sup>183</sup>

Representative Hagan's remarks affirm what might otherwise in part be read off the face of H.B. 214: If the measure is animated by a concern for the equal dignity and worth of people with Down syndrome and that concern is itself grounded in a concern for people with disabilities, more generally, a group defined in part by what Representative Hagan called "other types of chromosomal deficiencies or abnormalities or anomalies," then there is no good reason for H.B. 214 to single out fetuses with Down syndrome for distinctive protections.<sup>184</sup> To say that H.B. 214 is but a first step in the direction of "protect[ing] every unborn baby" or even all postviability fetuses might be constitutionally reasonable were that first step being taken on the terrain of ordinary social or economic legislation.<sup>185</sup> But where—as with H.B. 214—the question arises on the terrain of the constitutional abortion right and involves an inquiry into constitutional reasonableness, the measure looks seriously underinclusive in that it does not protect all fetuses with disabilities. H.B. 214's ban on only Down-syndrome-selective abortions does not go nearly far enough for the measure to be deemed to have a reasonable fit with a general pro-disability-equality end.

*c. Expression Three: H.B. 214 as a Means of Declaring and Vindicating the State's Interest in the Equal Dignity and Worth of All the "Marginalized Members of Our Communities"*

Finally, consider H.B. 214 as a means of declaring and vindicating the State's interest in the equal dignity and worth of all the "marginalized members

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<sup>183</sup> *Floor Debate on H.R. 214: 11-1-2017*, *supra* note 143, at 1:01:50 (statement of Rep. Christina Hagan); *see also* Harmon, *supra* note 143 ("A dwindling Down syndrome population, which now stands at about 350,000, could mean less institutional support and reduced funds for medical research. It could also mean a lonelier world for those who remain. . . . Many participants in the ad-hoc movement describe themselves as pro-choice. Yet some see themselves as society's first line of defense against a use of genetic technology that can border on eugenics.").

<sup>184</sup> As Senator Matt Dolan observed during the Ohio Senate floor debate on S.B. 164, "[w]hat concerns me about this bill is that it does not provide equal protection under the law. . . . [F]or very noble and heartwarming reasons, we are choosing one segment, one disease, to have rights greater than another, and I think courts will have trouble with that." Ohio Senate, 132d Gen. Assemb., Reg. Sess., *Floor Debate on S. 164: 11-15-2017*, OHIO CHANNEL, at 0:35:55 (Ohio 2017–2018), <http://www.ohiosenate.gov/session/session-video-library> (click on "11-15-2017") (statement of Sen. Matt Dolan).

<sup>185</sup> A classic statement of the "one step at a time" idea involving ordinary social or economic legislation is in *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).



of our communities,”<sup>186</sup> a broad equality aim.<sup>187</sup> If the fit between H.B. 214’s end and its means of achieving it is attenuated, and hence unreasonable, when the measure is understood as being about the equal dignity and worth of persons with disabilities, the fit is even looser, and the attenuation is only more severe, when H.B. 214 is seen and defended as a measure that protects fetuses with or that may have Down syndrome as an expression of the State’s basic interest in safeguarding and promoting the equal dignity and worth of “marginalized members of our communities,”<sup>188</sup> or as Representative Hagan put it, “the most vulnerable populations in our communities.”<sup>189</sup>

Understood as being about the welfare of the socially marginalized, H.B. 214 is radically underinclusive in view of its failure to provide protections for fetuses that are or may be marked by other disabilities and, for that matter, for fetuses that are marked by other signs of social vulnerability, sometimes more than one vulnerability at once. H.B. 214 is also overinclusive in the nontechnical sense that it singles out fetuses that have or may have Down syndrome among all the indicators of vulnerability. The near-arbitrariness of this selection shifts attention away from fetuses and onto pregnant women themselves. They are treated by H.B. 214 in a way that practically overlooks their own status as belonging to a vulnerable population, indeed, a constitutionally recognized vulnerable population,<sup>190</sup> while reflecting and reinforcing discredited stereotypes about women not only as vessels for reproduction in society’s interests, but also stereotypes about women, and pregnant women, in particular, as “irresponsible decisionmakers”<sup>191</sup> who cannot be trusted and so are not

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<sup>186</sup> See, e.g., *Gonidakis Testimony*, *supra* note 157, at 2 (“How contradictory this seems to be, in a time where our culture so highly values diversity and works so hard to promote acceptance of the marginalized members of our communities.”).

<sup>187</sup> Analysis of this expression of the State’s interest involves complex questions of causation that are bracketed here, as in the last part, in order to focus on the concerns addressed in the text. See *supra* note 177 and accompanying text.

<sup>188</sup> See, e.g., *Gonidakis Testimony*, *supra* note 157, at 2 (“How contradictory this seems to be, in a time where our culture so highly values diversity and works so hard to promote acceptance of the marginalized members of our communities.”).

<sup>189</sup> *Floor Debate on H.R. 214: 11-1-2017*, *supra* note 143, at 1:01:40 (statement of Rep. Christina Hagan). For the larger quote from which this language is drawn, see *supra* text accompanying note 182. Along similar lines, see also, for example, *Brown Testimony*, *supra* note 160, at 1 (“House Bill 214 . . . will help Ohio protect the most vulnerable among us.”); *supra* text accompanying note 183.

<sup>190</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 519 (1996).

<sup>191</sup> Useful thinking in this direction is in Cherry, *supra* note 170, at 207 (noting how a certain type of feminist analysis might see “the social consequences of a legal prohibition of sex-selective abortion” as “the reinforcement of women’s subordinate status and the denigration of women as irresponsible decisionmakers, which would ‘nibble away at our hard won reproductive control’”); *id.* at 209 (“Prohibiting abortion denigrates women as decisionmakers, and it reinforces their role as sexual objects by undermining their ability to act as sexual agents. It further reduces the limited power that women are allowed to exercise over their bodies and their sexuality in our society.” (quoting Frances Olsen, Comment,

entitled to first-class rights as autonomous agents capable of shaping their own lives and destinies.

In point of fact, given the wildly differential fit between what H.B. 214 narrowly does and the deeper equality grounds that, on this line, the measure is said to advance, its fit problems extend past those of reasonableness and fully expose a perspective on the measure that has previously been glimpsed.<sup>192</sup> On close inspection, H.B. 214 appears not to be a law that is designed to further a basically egalitarian end, at least not as a constitutionally creditable aim. Rather, noting the poor job it does of advancing a general equality goal, H.B. 214 appears to be a measure that is singularly about the State's interest in protecting and preserving fetal life, animated certainly in some instances by the goal, as Representative Hagan stated it, of "protect[ing] every unborn baby," and, as part of that effort, of creating another "layer[] of legislation extending protection to unborn children" in order to stop the "mass genocide that is occurring in this Nation."<sup>193</sup>

If this is right, the State's interest in protecting and preserving fetal life is the only real constitutional basis that could justify H.B. 214, including as a postviability measure. And for the reasons previously discussed, it is not a reasonable means of achieving that end. To say this is not to take the position that abortions involving fetuses with or that may have Down syndrome cannot ever in any way be prohibited. Indeed, they can be, and in the way that they more or less already are under State law: under a postviability abortion rule of general applicability, subject to the constraint of allowing for abortions needed to protect or preserve maternal life and health. A general rule banning all abortions after fetal viability on equal terms, which, not incidentally, is the sort of measure that seems to have originally been contemplated by *Roe* and other cases within the Supreme Court's abortion jurisprudence, would be, and is, a constitutionally reasonable way for the State to advance its interest in protecting and preserving fetal life. H.B. 214—not that—is not.

### C. A "Reasonable Fit" Analysis in the Present Tense

These are the sorts of granular, context specific judgments about H.B. 214's constitutionality that can be worked up from the values discoverable in the Supreme Court's *Roe* and *Roe*-era jurisprudence. To take the position that H.B. 214 fails the test of the reasonableness of its fit between its underlying purposes

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*Unraveling Compromise*, 103 HARV. L. REV. 105, 121 (1989)). It is also found in April Shaw, *How Race-Selective and Sex-Selective Bans on Abortion Expose the Color-Coded Dimensions of the Right to Abortion and Deficiencies in Constitutional Protections for Women of Color*, 40 N.Y.U. REV. L. & SOC. CHANGE 545, 576–77 (2016) (noting problems of stereotyping that have tracked some critiques of decisional abortion bans).

<sup>192</sup> See *supra* note 168 and accompanying text.

<sup>193</sup> *Floor Debate on H.R. 214: 11-1-2017*, *supra* note 143, at 1:02:20 (statement of Rep. Christina Hagan). For the larger quote from which this language is drawn, see *supra* text accompanying note 183.

and its ultimate ends, and that it fails that test on multiple grounds, is a way of giving voice to a judgment that might have been accepted by courts in the *Roe*-era, which *Roe*'s own doctrinal apparatus might have helped to bring to light. The wonder in the present tense is, Has the Supreme Court's abortion jurisprudence since *Roe*, really, in and since *Casey*, overcome or displaced the foundations from which that judgment emerges? Does the Court's current abortion jurisprudence call for another judgment to be made? Or does the Court's present-day abortion jurisprudence have room within it for an assessment of the reasonableness of the fit between a State's reasons for a postviability abortion measure and its enacted means of advancing it?

There is no doubt that the current, *Casey*-era doctrinal apparatus governing postviability abortion regulations does not have as part of its moving pieces any "strict scrutiny" requirement, much less an operative "narrow tailoring" rule. Indeed, the current, *Casey*-era doctrinal apparatus governing postviability abortion regulations does not very visibly have a robust "fit" requirement to it at all. This alone might be thought to be enough to resolve the issue and to say that whatever intuitions about H.B. 214's reasonableness that might have obtained in the *Roe*-era have since been washed away, replaced by nothing more than a minimal and loose "rational fit" requirement.

Before too quickly accepting that conclusion it must be noted that there are some indications that the Court's abortion jurisprudence has not (or has not yet, anyway) eliminated the sense that some meaningful constitutional review of postviability abortion prohibitions for their reasonableness is still in order.

The essence of the explanation here focuses on the continued recognition of the constitutional abortion right and the way that that right is safeguarded after viability, where, in circumstances where an abortion is needed to protect or preserve a pregnant woman's life or health, the right to choose overcomes the State's countervailing interest in protecting and preserving fetal life. In those circumstances clearly, and, the idea is, even more generally, given that the pregnant woman's constitutional interests do not totally disappear postviability but are only ordinarily outweighed by the State's opposing interests, State restrictions on postviability abortions may properly be examined for their constitutional reasonableness precisely as a mechanism by which to weigh and accommodate, if not exactly to "balance,"<sup>194</sup> what the Court's abortion doctrine frames as the clash of values or interests that the abortion right involves.<sup>195</sup>

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<sup>194</sup>The quotation marks are meant as a gesture toward the problems of incommensurability that constitutional balancing analytics regularly involve.

<sup>195</sup>To be sure, this point might be limited to cases in which a pregnant woman's life or health, where health is broadly understood, is at stake. That said, the idea in the text is that the persistence of the abortion right postviability in cases where a pregnant woman's life or health is at risk can be regarded as a necessary and sufficient predicate for thinking that postviability abortion restrictions, including prohibitions, may be subject to a kind of constitutional reasonableness review.

If correct, then contrary to the widespread belief that any postviability abortion regulation or any postviability abortion ban is by definition constitutionally acceptable, it might actually be maintained that the State, at least where it departs from a postviability abortion regulation that applies generally to all pregnancies, should be put to the test of defending a distinctive anti-abortion measure of the sort entailed by H.B. 214.<sup>196</sup> On what grounds does the State single out fetuses that actually or possibly have Down syndrome among all others for a unique set of protections like those offered by H.B. 214? On what grounds is Down syndrome singled out and differentiated from other medical conditions defined as disabilities or other often-overlapping forms of social marginalization and inequality that pervade and define social and political life?<sup>197</sup>

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<sup>196</sup>The "greater-includes-the-lesser argument," which Michael Herz, following Peter Westen, among others, "particularly associate[s] with Justice Holmes," thus does not obtain here. Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 239 & nn.47-49 (1994) (citing Peter Westen, *The Rueful Rhetoric of "Rights,"* 33 UCLA L. REV. 977, 1011 n.87 (1986)). Herz notes the association of the argument with Holmes, whose dissenting opinion in *Western Union Telegraph Co. v. Kansas ex rel. Coleman* is quoted as offering "one of its purest expressions": "Even in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way." *Id.* at 239. (quoting *W. Union Tel. Co. v. Kansas ex rel. Coleman*, 216 U.S. 1, 53 (1910) (Holmes J., dissenting)). A few examples of judicial authority for the contrary point of view include and are found in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992) ("[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government."); *McLaughlin v. Florida*, 379 U.S. 184, 184-86, 194, 196 (1964) (striking down a Florida law that barred interracial, nonmarital cohabitation, without casting doubt on the State's general ability to regulate nonmarital intimacies, including cohabitation); *Cleveland Automobile Co. v. United States*, 70 F.2d 365, 368 (6th Cir. 1934) (noting that "the greater does not include the lesser"); and *Joseph Joseph & Bros. Co. v. United States*, 71 F.2d 389, 391 (6th Cir. 1934) (noting the same, and quoting *Cleveland Automobile Co. v. United States*). Borrowing from Herz, the situation at hand is one of those instances in which "the parts do not necessarily share the characteristics of the whole. . . . [T]he greater may not include the lesser because exercise of the 'lesser' power implicates constitutional considerations not present in the exercise of the 'greater' power." Herz, *supra*, at 243.

<sup>197</sup>The argument being framed in the text could, of course, also be framed directly in equal protection terms, as a question about the reasonable grounds of difference between fetuses with or possibly having Down syndrome and all others in the context of abortion rights. H.B. 214 would fail equal protection scrutiny if understood as a sex-based regulation and subject to the conditions described in *United States v. Virginia*, 518 U.S. 515, 519, 533 (1996), but even if not, the measure, as one that implicates substantive-due-process-based abortion rights, might prompt an equal protection inquiry along the following lines. On what basis are fetuses with or possibly having Down syndrome being selected out by the State from other fetuses with other disabilities or other markers of social hierarchy and inequality? As noted elsewhere, *see supra* notes 180-85 and accompanying text, this question received some airing as H.B. 214 worked its way through the Ohio legislature. In one of the more curious turns during legislative deliberations, testimony by Mike Gonidakis, President of Ohio Right to Life, speaking in favor of H.B. 214, raised, although it did not stop thoroughly

Needless to say, the pressures of justification that bear upon the State would not obtain if postviability abortion regulations were regulations of an ordinary matter of social or economic life, which might technically be how anti-abortion measures were understood if the entirety of the Supreme Court's abortion jurisprudence back to *Roe* were to be overturned. Under those circumstances, abortion prohibitions at any point during pregnancy or at any point of fetal development might be subject to no more than "ordinary" or "traditional" rational basis review, the tremendous deference of which would make it easy for the State to justify taking only the distinctive "first step" that H.B. 214 takes,

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to consider, the similar situatedness of fetuses with (or likely or only perhaps believed possibly to be with) Down syndrome and fetuses that "are" or "might be gay":

I'll leave with this. And, it's probably controversial, but, I'm going to say it nonetheless. A moment ago, I said that it's just a matter of time before we find the autism gene. And, I suspect, just being a lawyer, but I suspect at some point . . . [you] know, I have many gay friends and they all tell me it's not a lifestyle, it's not a choice or a decision they made when they were fifteen. They were born gay. So, at some point the gay gene is going to be found. And, there's going to be proof that yes, you're born gay or you're born straight. I suspect that's what will happen. . . . So what happens when Betty Buckeye and her husband, Billy Buckeye, go to the hospital or go to the doctor's office and the doctor walks in and says, "Congratulations, your child does not have Down's Syndrome. We tested. Your child does not have autism. We tested. Oh, but you know, hey, congratulations, by the way, your child has the gay gene and your son or daughter has a high propensity for being gay." What happens when Betty Buckeye says, "Well, I'm going to have an abortion because I don't want to have a gay child." Is that a hate crime? Is that offensive? I bring this out because as we continue to go down the line this is where we're going unless we draw a line in the sand now.

Ohio Senate, 132d Gen. Assemb., Reg. Sess., *Hearing on S. 154 Before the S. Health, Human Services and Medicaid Committee: 12-12-2017*, OHIO CHANNEL, at 00:51:38 (Ohio 2017–2018) (statement of Michael Gonidakis, President, Ohio Right to Life). (For some useful historical and conceptual context of this line of thinking as seen from a pro-gay point of view, consider Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 521–26 (1994) (offering thoughts about genetic arguments explaining homosexuality from a pro-gay "constructivist" perspective).) If the situation of sexual minorities is readily comparable to the situation of people with Down syndrome as in this defense of H.B. 214, why does the measure not also treat sexual orientation or identity as another prohibited grounds upon which a pregnant woman may not base her decision to end an unwanted pregnancy? The answer, viewed very strictly, cannot be because the so-called "gay gene" has not yet been "found," *id.*, and that it thus cannot be tested for. H.B. 214, after all, includes among its list of prohibited reasons the mere belief that a fetus may have Down syndrome. OHIO REV. CODE ANN. § 2919.10(B)(3) (West, Westlaw through File 51 of 132d Gen. Assemb. (2017–2018)) (prohibiting abortions for "[a]ny other reason [that the woman has or might have] to believe that an unborn child has Down syndrome."). Recognizing that there are different ways to capture the problematics of the Down syndrome abortion ban, those circling around matters of equality are, as the text seeks to note, legible from within—and can thus be addressed within—the Supreme Court's abortion rights jurisprudence and the range of values that it reflects.

with additional steps to protect other forms of prenatal life defined by disability or other sorts of inequality, to come later, if at all.<sup>198</sup>

No small aside here: The Supreme Court's abortion jurisprudence has already noted that previability abortion regulations that impose no undue burden are subject only to a minimal and deferential form of judicial review,<sup>199</sup> and this approach to abortion regulations could certainly as a matter of doctrine be extended to laws governing postviability abortion regulations. Practically, however, the only way for a court to conclude that conventional rational basis review, with all its deference to legislative judgments, is the singular standard for measuring all postviability abortion regulations is to take the position that a pregnant woman's constitutional right to abortion counts for naught after the fetus she is carrying becomes viable.

Doctrinally, that rule has not (yet) been announced. Nor could it readily be squared with the continuing right that pregnant women, even in and after *Casey*, possess after viability, which guarantees that the State may not stop her from getting an abortion needed to safeguard her life or health. That being the case, it stands to reason that in the *Casey*-era in which we still live, there must still be some meaningful room left for the constitutional examination of the State's justifications for outlawing abortion both before . . . and (here is the key point being made) after viability.<sup>200</sup> Minimally, with respect to H.B. 214, the State's reasons for protecting fetuses with or that may have Down syndrome must be reasonably related to the legislation's real ends. But, for the various reasons already elaborated, there are multiple paths to the singular conclusion that H.B. 214 is not a measure that is reasonably related to its prohibitory ends.<sup>201</sup>

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<sup>198</sup> See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955); cf. *supra* text accompanying note 185.

<sup>199</sup> See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) ("Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn."); *id.* (noting the legitimacy of ethics or morality as a basis for restricting abortion procedure that did not impose an "undue burden" on a pregnant woman's right to choose).

<sup>200</sup> Obviously, just how searching an examination for the reasonableness of means–end fit will be will vary depending on when it occurs during the course of pregnancy in light of fetal development. Postviability abortion prohibitions will certainly come in for less searching constitutional scrutiny, and, correspondingly, receive considerably more judicial deference than their previability counterparts, which are presently subject to the demands of the undue burden test with its balancing of interests. There is no neat algorithm to be found for how to calibrate these different types of "reasonableness" review.

<sup>201</sup> There is a way to read *Whole Woman's Health v. Hellerstedt* as affirming or reaffirming a kind of "reality principle" in the Court's current abortion rights jurisprudence. According to this reality principle, courts should look carefully not simply "at" but also "through" the proffered justifications for anti-abortion rules to see what their real, underlying purposes are. Those real purposes should then serve as the predicate for judicial analysis. In *Whole Woman's Health*, the Supreme Court used the benefits–burdens analysis to reach the conclusion that the measures involved in the case were not really about advancing pregnant

To see the various ways to this conclusion is already to understand a powerful asymmetry in our federal constitutional system. In our constitutional regime, the State must stand ready to give at least a meaningful and reasonable account of itself and the reasons for its governance rules where those rules implicate a constitutionally protected right like the right to terminate an unwanted pregnancy through abortion. By contrast, women who are pregnant and who have constitutionally protected interests in making reproductive decisions for themselves and their futures need not account to the State for their reasons for exercising the rights they are constitutionally guaranteed.<sup>202</sup>

This imbalance in accountability is not an ineluctable fact. It could change, and there are arguments, including some arguments behind some support for H.B. 214, suggesting that the situation should change. For now, though, this is a description of a feature of our constitutional system and its underlying values as they exist at this place and at this moment in time. It is a way of noticing a fact about our constitutional system that has existed for long enough to constitute an aspect of the traditions of our constitutional, rule-of-law regime.<sup>203</sup> At the same time, it marks some of the deeper structural stakes of a rule of constitutional law upholding H.B. 214.

## V. CONCLUSION

Having come this far, it is hopefully clear that and why H.B. 214 is inconsistent with the existing constitutional rules governing abortion rights both previability and postviability, and why a court reviewing the measure for its constitutionality could properly conclude it must be struck down.

But—if a point of personal privilege is in order—there is one final observation in relation to H.B. 214 to share.

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women's health. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016). In the case of H.B. 214, the reality principle, for reasons that have already been discussed in the text, might call the question on whether H.B. 214 is really, finally, about fetuses with Down syndrome or about something else, whether the protection or preservation of the life of the unborn, or, in more doctrine-focused terms, the continuing validity of *Roe v. Wade*. See *supra* notes 168, 193 and accompanying text (discussing, from different perspectives, what the actual purposes of H.B. 214 might look like in light of a reasonable means–end fit analysis).

<sup>202</sup> This locution takes account of the prospect that postviability abortion decisions in individual cases involving a pregnant woman's life or health might themselves be seen as decisional abortion permissions that are constitutionally allowed. Within the context of the right to choose that is constitutionally safeguarded both before and (to the extent it is safeguarded) after viability, the State may not itself impose a decisional abortion ban that further constricts a pregnant woman's choice.

<sup>203</sup> Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV.: BLOG (Nov. 24, 2017), <https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal/> [https://perma.cc/HZ4J-6T9X] (discussing big “C” Constitutionalism and its relation to little “c” constitutionalism in the context of a proposal for reforms to the federal judiciary).

To put it mildly, H.B. 214 is a contentious measure that has already engendered intense disagreement. As surely as some find H.B. 214 appealing as a righteous rule of law that furthers the protections that the State should offer to human life from the moment of conception on, others (including some in the first group) find it appealing because it seems to them to declare and vindicate the equal dignity and respect that those who live life or who might live life with Down syndrome are unquestionably entitled to. At the same time, as surely, H.B. 214 has been roundly condemned by many who see it not only as an aggressive but also an unlawful attempt to cut short the rights of women that additionally treats the lives and lived realities that those with Down syndrome experience as a political device to advance a project that is ultimately not about them and their equal dignity and worth or their actual needs for survival and flourishing. For many of its critics, H.B. 214 is a violation—not a validation—of commitments to equal dignity and respect for all the members of our shared political communities, including the most vulnerable among us.

There is a great deal to be said about these opposing perspectives, but past them is a different point of view. Leaving H.B. 214's constitutionality—or unconstitutionality—aside, along with whatever there is to be said about its truthful and pure or cynical and impure motivations, H.B. 214 offers a powerful reminder with social and political resonance and implications. Nobody who looks attentively and seriously across the current social and political landscape can possibly think that our communities and the State do enough for those who live lives affected by Down syndrome. Nor, for that matter, that our communities and the State do enough for those who live lives affected by other types of disabilities, much less that even larger group of individuals who live lives marked by other forms—often intersecting forms—of social inequality.

Speaking for myself, H.B. 214 has been a call, finally, not only or even primarily to come to terms with the questions it raises as a matter of federal constitutional law focusing on the Supreme Court's abortion jurisprudence. Perhaps owing something to the spirit that animates it, or perhaps it is something else, H.B. 214 is a text that has the capacity to prick a conscience.

Have I done as much as I might to work to understand the lives and the needs of those who live life defined in part by Down syndrome, by differing abilities, and by other, often intersecting, social inequalities? Have I done as much as I might to ensure that the abundant blessings available in our shared political communities are enjoyed equally, fairly, and justly, by all of them? What more is there that I might try to do to empower my friends and neighbors and fellow citizens in these groups as they travel on their own paths, and we all together on ours? Candidly, H.B. 214, obviously not intended for these purposes, has anyway reminded me of how I have yet to live up to my own ideals of and for our shared social and political life.

Considering that, I wonder: Is this strictly a personal truth?