

*RACE-ING ROE: REPRODUCTIVE JUSTICE, RACIAL JUSTICE, AND THE BATTLE FOR ROE V. WADE*

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*Abstract*

*Amidst a raft of major Supreme Court decisions, a relatively quiet concurrence has planted the seeds for what may precipitate a major transformation in American constitutional law. Writing for himself in *Box v. Planned Parenthood*, Justice Thomas chided the Court for declining to review an Indiana law that prohibited abortions undertaken “solely because of the child’s race, sex, diagnosis of Down’s syndrome, disability, or related characteristics.” Arguing that the challenged law was merely Indiana’s modest attempt to prevent “abortion from becoming a tool of modern-day eugenics,” Thomas proceeded to elaborate a misleading history in which he associated abortion with eugenics, racism, and a broader campaign to improve the human race by limiting Black reproduction.*

*While many decried his selective and inaccurate invocation of the history of eugenics, Justice Thomas’s ambitions for the concurrence likely went beyond the historical record. Indeed, in drafting the concurrence, Thomas may have been less concerned with history than with the future—and specifically the future of abortion rights and the jurisprudence of race. As this Article explains, the concurrence’s misleading association of abortion and eugenics may well serve two purposes. First, it justifies trait-selection laws, an increasingly popular type of abortion restriction, on the ground that such measures serve the state’s interest in eliminating various forms of discrimination. But more importantly, and less obviously, by associating abortion with eugenic racism, the concurrence lays a foundation for discrediting—and overruling—*Roe v. Wade* on the alleged ground that the abortion right is rooted in, and tainted by, an effort to selectively target Black reproduction.*

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*Under principles of stare decisis, a past decision, like Roe v. Wade, cannot be overruled simply because a majority of the current Court disagrees with it. Instead, a “special justification” is required. Justice Thomas’s association of abortion with eugenics begins to construct the case that racial injustice is the “special justification” that warrants overruling Roe. In this regard, the Box concurrence builds on past decisions, like Brown v. Board of Education, as well as more recent cases, like Ramos v. Louisiana, in which the Court overruled past precedents, in part, to correct racial wrongs.*

*If undertaken, the Box concurrence’s latent strategy will be devastating to abortion rights, but as this Article explains, its deleterious impact goes beyond eviscerating Roe v. Wade. Under the concurrence’s logic, race may serve dual purposes in shaping the Court’s jurisprudence. As an initial matter, race—and the prospect of redressing racial injustice—furnishes the Court with a potent justification for reconsidering settled precedent. But it also provides the Court with an opportunity to articulate new law that affirms and entrenches the Court’s preferred conception of race and racial harm. In this regard, the Box concurrence is not merely an invitation to recast abortion as an issue of racial injustice; it is an invitation to entirely reconceptualize the meaning of race, racial injury, and racism, as well.*

## INTRODUCTION

In May 2019, the Supreme Court issued a per curiam decision in *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*,<sup>1</sup> a challenge to two Indiana abortion restrictions—one that “makes it illegal for an abortion provider to perform an abortion in Indiana when the provider knows that the mother is seeking the abortion solely because of the child’s race, sex, diagnosis of Down syndrome, disability, or related characteristics,”<sup>2</sup> and one that prescribed particular protocols for the disposal of fetal remains.<sup>3</sup>

The Court’s disposition of the two challenges was not necessarily noteworthy. It granted certiorari in the challenge to the fetal disposal restriction, while denying certiorari as to the challenge to the trait-selection prohibition.<sup>4</sup> What was noteworthy, however, was that one member of the Court, Justice Thomas, wrote separately to share his views regarding the constitutionality of the Indiana trait-selection statute.<sup>5</sup> As Justice Thomas explained, the law, and others like it,<sup>6</sup> promoted the state’s “compelling interest in preventing abortion from becoming a tool of modern-day eugenics.”<sup>7</sup>

To this end, Justice Thomas proceeded to elaborate a misleading and incomplete history in which he associated abortion with eugenics and the rise of the modern birth control movement.<sup>8</sup> Thus, while he concurred in

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<sup>1</sup> 139 S. Ct. 1780 (2019) (per curiam). The Court reached a decision in *Box* without oral argument. As such, the case may be considered part of the Court’s “shadow docket.” The shadow docket refers to “emergency orders and summary decisions that are outside the high court’s main docket of argued cases and decisions.” Mark Walsh, *The Supreme Court’s ‘shadow docket’ is drawing increasing scrutiny*, ABA J. (Aug. 20, 2020, at 9:20 a.m. CDT), <https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny>. Recently, scholars have noted the challenges that dispositions from the shadow docket present in terms of transparency and predictability. See generally Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019) (discussing these challenges vis a vis the interaction between the Office of the Solicitor General and the Court); William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015) (arguing that the shadow docket presents difficulties in terms of transparency).

<sup>2</sup> *Id.* at 1783 (Thomas, J., concurring); Ind. Code § 16-34-2-1.1(a)(1)(K) (2019).

<sup>3</sup> Ind. Code § 16-41-16—7.6 (2019); 410 Ind. Admin. Code § 35-2-1(a) (2019).

<sup>4</sup> *Box*, 139 S. Ct. at 1781.

<sup>5</sup> *Id.* at 1783 (Thomas, J., concurring).

<sup>6</sup> As Justice Thomas detailed in his concurrence, a number of states have taken steps to enact similar prohibitions on race, sex, and disability selective abortions. See *id.* at 1783 n.2 (citing Ariz. Rev. Stat. Ann. § 13-3603.02 (2018) (sex and race); Ark. Code Ann. § 20-16-1904 (2018) (sex); Kan. Stat. Ann. § 65-6726 (2017) (sex); La. Rev. Stat. Ann. § 40:1061.1.2 (2019) (genetic abnormality); N.C. Gen. Stat. § 90-21.121 (2017) (sex); N.D. Cent. Code Ann. § 14-02.1-04.1 (2017) (sex and genetic abnormality); Ohio Rev. Code Ann. § 2919.10 (2018) (Down syndrome); Okla. Stat., tit. 63, § 1-731.2(B) (2016) (sex); 18 Pa. Cons. Stat. § 3204(c) (2015) (sex); S.D. Codified Laws § 34-23A-64 (2018) (sex)).

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., Eli Rosenberg, *Clarence Thomas Tried to Link Abortion to Eugenics. Seven Historians Told the Post He’s Wrong*, WASH. POST (May 30, 2019), <https://www.washingtonpost.com/history/2019/05/31/clarence-thomas-tried-link-abortion-eugenics-seven-historians-told-post-hes-wrong/>; Imani Gandy, *When It Comes to Birth Control and Eugenics, Clarence Thomas*

the Court’s judgment to deny certiorari, conceding that “further percolation”<sup>9</sup> may assist the Court’s future review of such laws, he nonetheless maintained that the day was coming when the Court would “need to confront the constitutionality of laws like Indiana’s.”<sup>10</sup>

To be sure, no other member of the Court joined Justice Thomas’s concurrence. And many commentators and scholars decried his selective and misleading invocation of the history of eugenics.<sup>11</sup> But in drafting his concurrence, it seems Justice Thomas was not concerned with setting straight the historical record. Instead, his ambitions for this concurrence likely were focused on issues closer to the Court’s present docket.

This Article contextualizes Justice Thomas’s *Box* concurrence, and in so doing, elaborates the way in which his opinion may, in tandem with other recent decisions, provide a roadmap for not only upholding trait-selection abortion restrictions, but for overruling *Roe v. Wade*<sup>12</sup> and reconceptualizing the Court’s understanding of racial injury. As the Article explains, the *Box*

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*Gets It All Wrong*, REWIRE (May 29, 2019), <https://rewire.news/ablc/2019/05/29/when-it-comes-to-birth-control-and-eugenics-clarence-thomas-gets-it-all-wrong/>; Lydia O’Connor, *What Justice Clarence Thomas Gets Wrong About Eugenics and Abortion*, HUFFINGTON POST (May 20, 2019), [https://www.huffpost.com/entry/clarence-thomas-eugenics-abortion\\_n\\_5ced6c87e4b0356205a07182](https://www.huffpost.com/entry/clarence-thomas-eugenics-abortion_n_5ced6c87e4b0356205a07182).

<sup>9</sup> *Box*, 139 S. Ct. at 1784 (Thomas, J., concurring).

<sup>10</sup> *Id.*

<sup>11</sup> See, e.g., Mary Ziegler, *Bad Effects: The Misuses of History in Box v. Planned Parenthood*, 105 CORNELL L. REV. ONLINE 165, 196 — 202 (2020) (critiquing the historical arguments in Justice Thomas’s *Box* concurrence and arguing that “it is wrong to equate the population-control and abortion-rights movement—or to argue that eugenicists dominated the movement for population control”); Samuel R. Bagenstos, *Disability and Reproductive Justice*, 14 HARV. L. & POL’Y REV. (forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3468736](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3468736) [perma] (“When Justice Thomas and others seek to weaponize disability rights against abortion, they distort or disregard the full history of eugenics.”); Adam Cohen, *Clarence Thomas Knows Nothing of My Work*, THE ATLANTIC (May 29, 2019), <https://theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455> (explaining that “Thomas used the history of eugenics misleadingly, and in ways that could dangerously distort the debate over abortion”); Rosenberg, *supra* note 8 (“The Washington Post spoke to seven scholars of the eugenics movement; all of them said that Thomas’s use of this history was deeply flawed.”); Joanna L. Grossman & Lawrence M. Friedman, *Junk Science, Junk Law: Eugenics and the Struggle Over Abortion Rights*, VERDICT (June 25, 2019), <https://verdict.justia.com/2019/06/25/junk-science-junk-law-eugenics-and-the-struggle-over-abortion-rights> (“But if eugenics rested on junk science, Thomas’ [sic] opinion—and the eugenics label—might be said to rest on junk history, and to end up in what might be called junk law.”); Dorothy Roberts *Argues that Justice Clarence Thomas’s Box v. Planned Parenthood Concurrence Distorts History*, PENN. LAW (June 6, 2019), <https://www.law.upenn.edu/live/news/9138-dorothy-roberts-argues-that-justice-clarence-michael-c.-dorf-clarence-thomas-s-misplaced-anti-eugenics-concurrence-in-the-indiana-abortion-case>, DORF ON LAW (May 28, 2019), <http://dorfonlaw.org/2019/05/clarence-thomass-misplaced-anti.html>; Alexandra Minna Stern, *Clarence Thomas’ Linking Abortion to Eugenics Is as Inaccurate as It Is Dangerous*, NEWSWEEK (May 31, 2019), <https://www.newsweek.com/clarence-thomas-abortion-eugenics-dangerous-opinion-1440717>; Imani Gandy, *When It Comes to Birth Control and Eugenics, Clarence Thomas Gets It All Wrong*, REWIRE (May 29, 2019), <https://rewire.news/ablc/2019/05/29/when-it-comes-to-birth-control-and-eugenics-clarence-thomas-gets-it-all-wrong/>; Lydia O’Connor, *What Justice Clarence Thomas Gets Wrong About Eugenics and Abortion*, HUFFINGTON POST (May 20, 2019), [https://www.huffpost.com/entry/clarence-thomas-eugenics-abortion\\_n\\_5ced6c87e4b0356205a07182](https://www.huffpost.com/entry/clarence-thomas-eugenics-abortion_n_5ced6c87e4b0356205a07182).

<sup>12</sup> 410 U.S. 113 (1973).

concurrency trades, perhaps ironically, on the success of the reproductive justice movement, which has surfaced the myriad ways in which race, class, and other forms of marginalization shape women's experiences with, and the state's efforts to regulate, reproduction. But rather than surfacing race as a means of promoting greater reproductive autonomy and access in service of *Roe v. Wade*, as the reproductive justice movement does, the *Box* concurrence integrates racial injustice into the history of abortion for the purpose of destabilizing abortion rights.

Although *Roe* has been widely critiqued over the years, it has never been formally overruled. The doctrine of stare decisis, which demands fidelity to past decisions on the same, or similar, issues, has been the chief impediment to overruling *Roe*.<sup>13</sup> Under the Supreme Court's stare decisis jurisprudence, a past decision cannot be overruled simply because a majority of the current Court disagrees with it.<sup>14</sup> Instead, a "special justification" is required to overrule.<sup>15</sup> Thus, in order to override the demands of precedent and dislodge *Roe*, which has been repeatedly reaffirmed by the Court,<sup>16</sup> some "special justification" must be proffered.<sup>17</sup> Under the logic of the *Box* concurrence, that special justification is race. In this way, Justice Thomas's *Box* concurrence constructs a narrative that associates abortion with eugenics and racial injustice, such that when the Court next confronts *Roe*, it may, as it famously did in *Brown v. Board of Education*,<sup>18</sup> circumvent the demands of stare decisis and overrule its most controversial precedent in the name of racial justice.

Accordingly, where other efforts to discredit *Roe* have failed, Justice Thomas's *Box* concurrence plants the seeds for a potentially more successful strategy. Rather than insisting that *Roe* is wrongly decided, those intent on overruling it need only argue that the *Roe* Court failed to fully appreciate the racial dynamics and underpinnings of abortion. In this regard, the *Box* concurrence provides a roadmap to lower courts and abortion opponents to challenge *Roe* on the grounds that the abortion right allegedly is rooted in racial injustice and results in disproportionate impacts on minority groups.

If this strategy is successful, it will have implications that reverberate

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<sup>13</sup> See Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 311 (2020).

<sup>14</sup> See *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (citing *Dickerson v. United States*, 530 U.S. 428, 443 (2000)).

<sup>15</sup> *Id.* (internal quotation marks omitted).

<sup>16</sup> See Murray, *supra* note 13, at 349.

<sup>17</sup> *Halliburton*, 134 S. Ct. at 2407.

<sup>18</sup> 347 U.S. 483 (1954).

beyond *Roe* and abortion rights. By the concurrence's logic, race may serve dual purposes in shaping the Court's jurisprudence. As an initial matter, race—and the prospect of redressing racial injustice—furnishes the Court with a potent justification for reconsidering contested precedents. But it also provides the Court with an opportunity to articulate new precedents that may affirm and entrench the Court's preferred conception of race and racial harm. This is particularly meaningful when one considers that the Court's race jurisprudence is replete with contested narratives about the nature of race and racial-based liability. In this regard, the *Box* concurrence is not merely an invitation to recast abortion as an issue of racial injustice; it is an invitation to entirely reconceptualize the meaning of race, racial injury, and racism, as well.

This Article proceeds in four parts. Part I lays a contextual foundation for a critique of the *Box* concurrence by providing a more complete account of the role that race has played on both sides of the abortion debate. As it explains, from slavery to the present, race has been inextricably intertwined in discussions of reproductive rights. With this in mind, this Part counters the thin historical account that Justice Thomas provides in the *Box* concurrence with a more robust and nuanced discussion of the history of abortion criminalization, the birth control movement, and the association of reproductive rights with Black genocide. In charting the intersection of race and reproductive rights, this Part considers the post-*Roe* emergence of the reproductive justice movement and the cooptation of reproductive justice themes by those opposed to abortion rights. It concludes by locating the *Box* concurrence and its racialized critique of abortion within this trajectory.

Part II focuses on the *Box* concurrence's immediate goal—providing a defense of trait-selection abortion restrictions. By characterizing abortion as a “tool of modern-day eugenics,”<sup>19</sup> the concurrence augments the existing defense of trait-selection laws as antidiscrimination measures that do not trigger the heightened constitutional scrutiny that generally attends restrictions on the abortion right, or more troublingly, fall outside of the scope of traditional abortion jurisprudence.

Parts III and IV pivot to the heart of the argument—that the aspirations for the *Box* concurrence are not limited to simply defending trait-selection laws. Instead, the racialized critique of abortion rights lays a foundation for discrediting—and eventually overruling—*Roe v. Wade*. As Part III explains, the effort to overrule *Roe v. Wade* and the abortion right has been

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<sup>19</sup> *Box v. Planned Parenthood*, 139 S. Ct. 1780, 1783 (Thomas, J., concurring).

stymied by the force of stare decisis.<sup>20</sup> However, in the Court’s history, the prospect of correcting racial wrongs has served as a predicate for reconsidering—and overruling—past precedents. To support this claim, this Part considers *Brown v. Board of Education* and *Loving v. Virginia*,<sup>21</sup> in which the Court overruled two earlier precedents in the interest of promoting racial equality. To underscore that the interest in overruling in order to correct racial wrongs is not confined to the Court’s past, this Part also discusses *Ramos v. Louisiana*,<sup>22</sup> a case from the most recent Supreme Court term, in which the Court overruled a 1972 precedent in part because the earlier decision was inattentive to the challenged policy’s “racist origins.”<sup>23</sup> Part IV considers the broader implications of this strategy for issues of reproductive justice and racial justice. The Article then briefly concludes.

### I. RACE AND REPRODUCTION BEFORE AND AFTER *ROE*

In May 2019, the Court issued its decision in *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*,<sup>24</sup> a challenge to two Indiana laws regulating abortion. The first law, Indiana’s Sex Selective and Disability Abortion Ban, prohibited abortions performed solely on the basis of the fetus’s gender, race, or disabilities,<sup>25</sup> while the second law required abortion providers to use funereal methods for disposing of fetal remains.<sup>26</sup> The Court denied certiorari as to the first law, while upholding the second without requiring full briefing and argument.<sup>27</sup>

Although he concurred in the Court’s judgment, Justice Clarence Thomas wrote separately to express his views of the issues presented.<sup>28</sup> There, Justice Thomas chided the Court for declining to review the Sex Selective and Disability Abortion Ban.<sup>29</sup> As he explained, the challenged trait-selection law was a modest attempt to prevent abortion “from becoming a tool of modern-day eugenics.”<sup>30</sup> In making this claim, Justice Thomas invoked a selective history of reproductive rights. As he explained, the

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<sup>20</sup> Murray, *supra* note 13, at XX.

<sup>21</sup> 388 U.S. 1 (1967).

<sup>22</sup> 140 S. Ct. 1390 (2020).

<sup>23</sup> *Id.* at 1405.

<sup>24</sup> 139 S. Ct. 1780.

<sup>25</sup> *Id.* at 1781 (per curiam). See also *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 888 F.3d 300, 303 (7th Cir. 2018) (citing Ind. Code § 16-34-4 (2016)), *vacated in part by* 727 Fed. App’x 208 (7th Cir. 2018), *reinstated by* 917 F.3d 532 (7th Cir. 2018).

<sup>26</sup> *Box*, 139 S. Ct. at 1781 (citing Ind. Code §§ 16-41-16, 16-41-34).

<sup>27</sup> *Id.* at 1782.

<sup>28</sup> *Id.* at 1782-93 (Thomas, J., concurring).

<sup>29</sup> *Id.* at 1792-93.

<sup>30</sup> See *id.* at 1783.

modern birth control movement “developed alongside the American eugenics movement,”<sup>31</sup> which was preoccupied with both “inhibiting reproduction of the unfit”<sup>32</sup> and preventing the white race from being “overtaken by inferior races.”<sup>33</sup> And although Justice Thomas eventually conceded that the movement to legalize contraception was distinct from the movement to legalize abortion, he nonetheless maintained that the arguments lodged in favor of birth control “apply with even greater force to abortion, making it significantly more effective as a tool of eugenics.”<sup>34</sup>

Throughout the opinion, Justice Thomas invoked Margaret Sanger, the founder of what is now known as Planned Parenthood and the modern birth control movement.<sup>35</sup> Sanger, Justice Thomas recounted, was an unrepentant eugenicist whose interest in eugenics tilted toward the elimination of the “unfit,”<sup>36</sup> a group that often included non-whites.<sup>37</sup> As an example, Justice Thomas cited Sanger’s campaign for birth control in communities of color, including Harlem, New York; her work in the “Negro Project,” which sought to popularize the use of birth control among Southern Blacks; and her co-authorship of a report titled “Birth Control and the Negro,” which identified Blacks as “the great problem of the South”—“the group with ‘the greatest economic, health, and social problems.’”<sup>38</sup>

This Part maintains that the history of race, eugenics, and reproductive rights upon which Justice Thomas relies is selective and incomplete.<sup>39</sup> As a corrective, this Part furnishes a more accurate and complete historical account of the intersection of race and reproduction. As section I.A explains, throughout the nineteenth and early twentieth centuries, racialized arguments appeared on all sides of the debate over whether and how to

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1784.

<sup>33</sup> *Id.* at 1785.

<sup>34</sup> *Id.* at 1784.

<sup>35</sup> *See id.* at 1783-89.

<sup>36</sup> *Id.* at 1787 (quoting Margaret Sanger, *Birth Control and Racial Betterment*, BIRTH CONTROL REV., Feb. 1919, at 11, 11).

<sup>37</sup> *Id.* at 1788.

<sup>38</sup> *Id.* (quoting Birth Control or Race Control? Sanger and the Negro Project, The Margaret Sanger Papers Project (Fall 2001), [https://www.nyu.edu/projects/sanger/articles/bc\\_or\\_race\\_control.php](https://www.nyu.edu/projects/sanger/articles/bc_or_race_control.php)).

<sup>39</sup> *See, e.g.,* Rosenberg, *supra* note 8 (“The Washington Post spoke to seven scholars of the eugenics movement; all of them said that Thomas’s use of this history was deeply flawed.”); Adam Cohen, *Clarence Thomas Knows Nothing of My Work*, THE ATLANTIC (May 29, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455/> (arguing that “Thomas used the history of eugenics misleadingly, and in ways that could dangerously distort the debate over abortion”); Dahlia Lithwick, *Why Clarence Thomas is Trying to Bring Eugenics into the Abortion Debate*, SLATE (June 17, 2019, 10:42 AM), <https://slate.com/news-and-politics/2019/06/clarence-thomas-eugenics-abortion-debate-roe-v-wade.html>; *Dorothy Roberts Argues That Justice Clarence Thomas’s Box v. Planned Parenthood Concurrence Distorts History*, <https://www.law.upenn.edu/live/news/9138-dorothy-roberts-argues-that-justice-clarence> (June 6, 2019).



regulate abortion, birth control, and reproduction. Section I.B pivots to consider the ways in which race figured in arguments for and against abortion before *Roe v. Wade*. Section I.C considers the post-*Roe* landscape, including the emergence of the reproductive justice movement. Section I.D focuses on the emergence of arguments sounding reproductive justice themes into advocacy on both sides of the abortion debate. Finally, Section I.E returns to *Box* and the role of race, in tandem with gender and disability, in legislative efforts to restrict abortion access.

*A. Race-ing Reproduction: From Slavery to the  
Birth Control Movement*

1. Slavery and Reproduction.

Any historical account of the intersection of race and reproduction in the United States must begin with the experience of enslavement. Article 1, section 9, clause 1 of the Constitution provides that “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight.”<sup>40</sup> Although the clause did not specifically invoke the term “slave,” it was understood to be a compromise between the Southern states, which depended on slavery for their economies, and those states that had abolished slavery or were considering abolition.<sup>41</sup> By its terms, the clause prohibited the federal government from limiting the importation of “persons”—understood to refer to enslaved persons—until twenty years after the Constitution’s ratification in 1788.<sup>42</sup> In anticipation of the 1808 deadline, Congress enacted in 1807, and President Jefferson signed into law, a statute prohibiting the importation of slaves as of January 1, 1808.<sup>43</sup>

I raise this constitutional history because of its impact on the institution of slavery, and by extension, reproduction. Prior to 1808, slaveholders could rely on the international slave trade as a means of expanding the enslaved labor force. After 1808, however, any expansion of the labor force would depend on the reproduction of those who were already enslaved.<sup>44</sup> As Professor Dorothy Roberts explains, “[t]he ban on importing slaves after 1808 and the steady inflation in their price made enslaved women’s

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<sup>40</sup> U.S. Const., art. I, § 9, cl. 1.

<sup>41</sup> Gordon Lloyd & Jenny S. Martinez, *The Slave Trade Clause*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/761>.

<sup>42</sup> *Id.*

<sup>43</sup> The Act of March 2, 1807, ch.22, 2 Stat. 426.

<sup>44</sup> DOROTHY ROBERTS, *KILLING THE BLACK BODY* 24 (2d ed. 2017).

childbearing even more valuable.”<sup>45</sup> This changed economic reality, coupled with the lived experience of enslaved persons, who had no expectation of, or legal entitlement to, family integrity, cultivated conflicting interests with regard to reproduction.<sup>46</sup>

Slave owners had economic interests in the reproduction of enslaved persons and the reproductive capacities of enslaved women. For enslaved persons, however, the absence of sexual autonomy, coupled with the knowledge that their children were not their own and could be sold away from them, frequently resulted in efforts to control reproduction. Although ascertaining the causes of infertility and miscarriage was often difficult, many slave owners suspected that their slaves deliberately tried to prevent or terminate pregnancies.<sup>47</sup> In an academic paper read before the Rutherford County Medical Society in 1860, Dr. John T. Morgan of Murfreesboro, Tennessee recounted the various techniques that enslaved women used “to effect an abortion or to derange menstruation.”<sup>48</sup> During this period, abortion was not legally proscribed if undertaken before quickening, the point at fetal movement could be perceived, “typically late in the fourth month or early in the fifth month of gestation.”<sup>49</sup> Nevertheless, because the use of contraception and abortion to control reproduction had profound implications for property interests, slave owners sought to deter and punish efforts to prevent or terminate pregnancies.

## 2. The Racial Politics of Abortion Criminalization.

Emancipation and the postbellum shift to a wage labor economy only exacerbated the interest in race and reproduction. As Professor Reva Siegel has documented, following the Civil War, “states began to enact legislative restrictions on abortion,”<sup>50</sup> the cumulative effect of which “was to prohibit abortion from conception.”<sup>51</sup> In addition to criminalizing abortion, states “also adopted legislation barring the distribution of abortifacients and contraceptives, as well as the circulation of advertisements or information about them.”<sup>52</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> *See id.* at 26 (noting that enslaved women could reduce the likelihood of being sold and separated from their families by having more children); *cf. id.* at 47 (noting evidence of abstinence, contraceptive use, and abortion among enslaved women to rebel against forced reproduction).

<sup>47</sup> Roberts, *supra* note 44, at 47.

<sup>48</sup> *Id.* at 47.

<sup>49</sup> Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 281-82 (1992).

<sup>50</sup> *Id.* at 282.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

This criminalization campaign was spearheaded largely by physicians, who associated contraception and abortion with the lay “folk medicine” of homeopaths and midwives, many of whom were Black and indigenous women.<sup>53</sup> Eager to professionalize medical practice and the nascent field of obstetrics and gynecology, the physicians sought to drive out these “irregular” practitioners who had traditionally handled the business of pregnancy and birth.<sup>54</sup> To be sure, physicians did not frame their appeal to criminalize abortion in the language of professional self-interest.<sup>55</sup> Instead, they maintained that abortion, and the midwives and homeopaths who practiced it, was dangerous and unsafe.<sup>56</sup> Further, abortion diverted women from their “natural” inclination toward wifedom and motherhood, posing physiological harm to women while also imperiling marriage and the family.<sup>57</sup>

In framing abortion as a vehicle of social disorder, the physicians did not limit themselves to the practice’s impact on motherhood and the family. Abortion, they argued, posed broader demographic concerns that would have a profound impact on American society.<sup>58</sup> As the physicians noted, in the period following the Civil War, the birthrate among white, Native-born women had fallen dramatically.<sup>59</sup> At the same time, the birthrate among the immigrant and non-white populations had risen, fueling concerns that the nation was on the precipice of a massive demographic reordering.<sup>60</sup>

Fearful that these demographic changes would radically alter the nation’s character (and reduce the political power of native-born whites), the predecessors of the pro-life movement pushed to criminalize abortion as a means of deterring native-born white women from terminating pregnancies and allowing the white birth rate to be overwhelmed by immigrant and non-

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<sup>53</sup> See Alicia D. Bonaparte, “*The Satisfactory Midwife Bag*”: *Midwifery Regulation in South Carolina, Past and Present Considerations*, 38 SOC. SCI. HISTORY 155, 157-59 (2014); Michele Goodwin, ACLU, *The Racist History of Abortion and Midwifery Bans* (July 1, 2020), <https://www.aclu.org/news/racial-justice/the-racist-history-of-abortion-and-midwifery-bans/>.

<sup>54</sup> Siegel, *supra* note 49, at 283.

<sup>55</sup> Nicola Beisel & Tamara Kay, *Abortion, Race, and Gender in Nineteenth-Century America*, 69 AM. SOC. REV. 498, 506 (2004)

<sup>56</sup> See Goodwin, *supra* note 53.

<sup>57</sup> Beisel & Kay, *supra* note 55, at 506.

<sup>58</sup> *Id.* at 504.

<sup>59</sup> *Id.* at 502 (“[T]he total fertility rate for whites fell dramatically, from seven children in 1800 to 3.6 in 1900.”). While many white European immigrants obtained citizenship as “free white persons” in eighteenth century, by the nineteenth century, they were increasingly looked down upon as inferior by native-born Anglo-Saxons. *Id.* at 501 (observing that the social and political categorization of “white” has varied throughout American history).

<sup>60</sup> See Siegel, *supra* note 49, at 285 & n.87, 297-300.

white births.<sup>61</sup> Professor Reva Siegel and Duncan Hosie have put it more succinctly: the interest in regulating, and indeed criminalizing, abortion was hand in glove with the effort to ensure that America remained a white nation.<sup>62</sup>

### 3. The Racial Politics of the Eugenics Movement.

The criminalization of abortion and concerns about demographic change coincided with the growing interest in eugenics throughout the United States.<sup>63</sup> The origins of the eugenics movement have been traced to Sir Francis Galton, an English scientist whose interest in the science of heredity was piqued by Charles Darwin's theory of natural selection, which posited that over time, the weakest species, unable to adapt and compete against hardier species, would become extinct.<sup>64</sup> Darwin's theories were not confined to the animal kingdom. Galton and his ilk argued that the theory of natural selection could be translated and applied to humankind as well. Noting that "[w]hat Nature does blindly, slowly, and ruthlessly, man may do providently, quickly, and kindly,"<sup>65</sup> Galton sought to replace the natural evolution of the species with "affirmative state intervention" aimed at promoting the very best of humankind.<sup>66</sup> Eugenics—taken from the Greek root meaning "good in stock"<sup>67</sup>—was "the science of improving stock" by giving "the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable than they otherwise would have had."<sup>68</sup> Because character and intelligence were believed to be heritable qualities, the eugenics movement argued that society should encourage the procreation of those of superior lineage, while discouraging procreation among—and public support for—those of inferior lineage.<sup>69</sup>

Unsurprisingly, Galton's eugenic theories were underwritten by a deep-seated belief in genetic distinctions between the races.<sup>70</sup> Eugenic theory posited that the human species was divided into different races, each with its own distinctive features and characteristics.<sup>71</sup> As Galton explained, "The

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<sup>61</sup> *Id.* at 297-300.

<sup>62</sup> Reva Siegel & Duncan Hosie, *Trump's Anti-Abortion and Anti-Immigration Policies May Share a Goal*, TIME (Dec. 13, 2019), <https://time.com/5748503/trump-abortion-immigration-replacement-theory/>.

<sup>63</sup> Roberts, *supra* note 44, at 58-59.

<sup>64</sup> *Id.* at 59.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> FRANCIS GALTON, INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT 24 n.1 (1883).

<sup>68</sup> Roberts, *supra* note 44, at 59.

<sup>69</sup> *Id.* at 59-60.

<sup>70</sup> *Id.* at 60.

<sup>71</sup> *Id.*; see also Sonia M. Suter, *A Brave New World of Designer Babies?*, 22 BERKELEY TECH. L.J. 897, 904 (2007) (noting that eugenicists of the 1920s "conflated national and racial identity and believed

Mongolians, Jews, Negroes, Gipsies [sic], and American Indians severally propagate their kinds; and each kind differs in character and intellect, as well as in colour and shape, from the other four.”<sup>72</sup> Notably, Blacks were distinctive in their “strong impulsive passions,” their “remarkabl[e] domestic[ity]” and were “endowed with such constitutional vigour, and is so prolific, that [their] race is irrepressible.”<sup>73</sup> At a time when white Americans were gripped by fears that immigrants and non-whites were reproducing faster than native-born whites, it is not surprising that eugenic theories, with all their implications for reproduction, took root and flourished in the United States.

By the early twentieth century, the American legal landscape was dotted with laws that reflected both anxiety about demographic change and an eugenic interest in regulating reproduction. A number of states enacted laws permitting the sterilization of the “feeble-minded”<sup>74</sup> and “habitual” criminals.<sup>75</sup> Others enacted laws criminalizing miscegenation and interracial marriage in order to prevent the “mongrelization” of the white race.<sup>76</sup> At the federal level, eugenics left an indelible imprint on the nation’s immigration laws and policies.<sup>77</sup> The interest in eugenic law-making reflected both a desire to prevent socially undesirable populations from procreating, as well as the desire to ensure the genetic selection of “fittest” of the race.<sup>78</sup>

#### 4. Race, Eugenics, and the Birth Control Movement.

As the eugenic movement gained force in the United States in the early twentieth century, another social movement was also ascendant. Early feminists had long raised calls for “voluntary motherhood”—that is, the ability, given the real dangers that childbirth posed, to allow women to better control when and how they became pregnant.<sup>79</sup> As noted above, white women’s efforts to limit childbirth gave rise, at least in part, to the

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that race determined behavior”).

<sup>72</sup> Roberts, *supra* note 44, at 60.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 69 - 70; *see also* Suter, *supra* note 71, at 906.

<sup>75</sup> Roberts, *supra* note 44, at 200.

<sup>76</sup> *Id.* at 268; *see also* Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860-1920*, 23 LAW & SOC. INQUIRY 541, 546 (1998).

<sup>77</sup> *See* Suter, *supra* note 71, at 907 (noting that eugenic principles were “central to the passage of the Immigration Restriction Act of 1924, which set quotas limiting the immigration of ‘biologically inferior’ ethnic groups into the United States and favored the entrance of Northern Europeans”); Robert J. Cynkar, *Buck v. Bell: “Felt Necessities” v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1432 (1981).

<sup>78</sup> Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 465-67 (2019).

<sup>79</sup> Beisel & Kay, *supra* note 55, at 510-11 (observing that “voluntary motherhood” arose as a response to marital rape, and a desire for early feminists to “guard rather than undermine the sanctity of motherhood”).

cultural climate that fueled the criminalization of abortion and contraception.<sup>80</sup> By the early twentieth century, however, some women reformers were redoubling their efforts to secure access to the means by which they could control reproduction and plan their families.<sup>81</sup>

Although a number of women were involved in the campaign to expand access to birth control, Margaret Sanger emerged as one of the most stalwart voices in the birth control movement.<sup>82</sup> In 1921, for the purpose of expanding access to contraception and family planning guidance to middle class women, she founded the American Birth Control League, which would become the Planned Parenthood Federation of America.<sup>83</sup> Sanger's early efforts to promote contraceptive access were rooted in feminist themes like voluntary motherhood, but they also included calls for contraception as a means of ensuring women's sexual gratification, which cost her crucial support among some quarters of the women's rights movement. Early twentieth century feminists often extolled the moral superiority of motherhood as the foundation of their claims for women's equality.<sup>84</sup> Sanger's call for contraception and sexual gratification was at odds with the women's movement's emphasis on maternal virtue, chastity, and temperance.<sup>85</sup>

Unable to secure the support of some sectors of the women's movement, Sanger sought to reframe the campaign for birth control to appeal to a wider audience.<sup>86</sup> In this regard, Sanger's efforts to link the birth control

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<sup>80</sup> *Id.* at 507 (noting that physicians advocating for antiabortion laws tried to generate widespread concern over abortion among native-born white women and the consequences of declining birthrates for "native-born" social and political power).

<sup>81</sup> *See id.* at 515 ("Despite physicians' successful efforts to get antiabortion statutes passed, the available historical evidence suggests that women did, indeed, continue to make decisions about reproduction. In spite of statutes banning use of abortion and contraception, the United States completed its first demographic transition in the early twentieth century." (citation omitted)).

<sup>82</sup> *See generally* ELLEN CHESLER, *WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA* (1992) (discussing Margaret Sanger's role in the birth control movement).

<sup>83</sup> JAMES RISEN & JUDY L. THOMAS, *WRATH OF ANGELS: THE AMERICAN ABORTION WAR 10* (1998).

<sup>84</sup> *See* Roberts, *supra* note 44, at 72.

<sup>85</sup> Hagar Kotef, *On Abstractness: First Wave Liberal Feminism and the Construction of the Abstract Women*, 35 *FEM. STUD.* 495, 499-500 (2009) ("Even the most liberal among First Wave feminists were concerned with domesticity, republican motherhood, religiosity, and moral virtues (often at the same time as they asserted full equality)."); *see also* Carole R. McCann, *supra* note XX, at 38 (explaining that suffragists told Sanger "to abandon birth control, or at least tone down her tactics").

<sup>86</sup> Alexander Sanger, *Eugenics, Race, and Margaret Sanger Revisited: Reproductive Freedom for All?*, 22 *HYPATIA* 210, 213 (explaining that Sanger "co-opted" eugenics to build support for birth control); Dorothy Roberts, *Margaret Sanger and the Racial Origins of the Birth Control Movement*, in *RACIALLY WRITING THE REPUBLIC: RACISTS, RACE REBELS, AND TRANSFORMATIONS IN AMERICAN IDENTITY* (Bruce Baum & Duchess Harris, eds. 2009) at 196-213, 200. *But see* Gerald V. O'Brien, *Margaret Sanger and the Nazis: How Many Degrees of Separation?*, 58 *SOC. WORK* 285, 285 (explaining that Margaret Sanger "sought, and largely failed, to co-opt the growing eugenics movement as a means of supporting her

movement to eugenics served a number of purposes. As an initial matter, it imbued the birth control movement with a successful national movement that carried with it the veneer of reputable scientific authority.<sup>87</sup> As importantly, eugenics offered the birth control movement another lens through which to articulate the interest in wider access to contraception. With eugenics as a frame, Sanger and the birth control movement could not only emphasize contraception as conducive to women's health and autonomy, but also as a means of promoting the national welfare.<sup>88</sup>

Contemporary scholars have been forthright about Sanger's ties to eugenics and its troubling racial implications.<sup>89</sup> But they have also made clear that Sanger's interests were focused on expanding access to contraception, rather than facilitating abortion, which she viewed as unsafe and dangerous.<sup>90</sup> As Sanger herself explained, among women, family planning "is being practised [sic]; it has long been practised [sic] and it will always be practised [sic]."<sup>91</sup> The more pressing question, in Sanger's view, was "whether [family planning] is to be attained by normal, scientific Birth Control methods or by the abnormal, often dangerous, surgical operation."<sup>92</sup>

As importantly, scholars have noted that increased access to birth control was not simply thrust upon the Black community in an unwelcome attempt to reduce the Black birthrate, as Justice Thomas's history suggests. As Professor Dorothy Roberts explains, "Black women were interested in spacing their children and Black leaders understood the importance of family-planning services to the health of the Black community," which was

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efforts to increase support for the birth control movement").

<sup>87</sup> Roberts, *supra* note 86, at 200; CAROLE R. MCCANN, BIRTH CONTROL POLITICS IN THE UNITED STATES, 1916-1945, at 100 (1994).

<sup>88</sup> Roberts, *supra* note 44, at 72.

<sup>89</sup> See, e.g., Roberts, *supra* note 44, at 79-81; CAROLE R. MCCANN, BIRTH CONTROL POLITICS IN THE UNITED STATES, 1915-1945, at 130-34 (1994).

<sup>90</sup> McCann, *supra* note 89, at 9 ("Confronted with death from illegal abortions, Sanger suddenly recognized that it was unconscionable for women to be forced to choose between avoiding sex altogether or risking their lives simply because the government prohibited them from having simple, safe, and effective contraceptives."); Imani Gandy, *How False Narratives of Margaret Sanger Are Being Used to Shame Black Women*, REWIRE (Aug. 20, 2015), <https://rewire.news/article/2015/08/20/false-narratives-margaret-sanger-used-shame-black-women/> [<https://perma.cc/3R6Q-2N5C>] ("Sanger opposed abortion. She believed it to be a barbaric practice."); Deborah L. Rhode, *Politics and Pregnancy: Adolescent Mothers and Public Policy*, 1 S. CAL. REV. L. & WOMEN'S STUD. 99, 107 (1992) ("Yet most leaders such as Margaret Sanger disavowed any support for abortion and presented their preventive approach as a sufficient alternative."); ROSALIND PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM 89-93 (1990) (noting that Sanger "disavowed" abortion on the view that access to contraception was a safer alternative for women seeking to limit their reproductive capacities).

<sup>91</sup> Margaret Sanger, *Birth Control or Abortion?* BIRTH CONTROL REV. 3, 3 (Dec. 1918), <https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=232534.xml> (discussing abortion).

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

plagued by high rates of maternal and infant mortality.<sup>93</sup> The Black press routinely provided frank information about birth control, including advertisements for contraceptive douches, pessaries, and suppositories. Indeed, in a 1932 article in *Birth Control Review*, George S. Schuyler wryly observed “If anyone should doubt the desire on the part of Negro women and men to limit their families, it is only necessary to note the large scale of ‘preventative devices’ sold in every drug store in the various Black Belts.”<sup>94</sup> Even W.E.B. DuBois publicly endorsed birth control as a means of vesting Black women with the ability to choose “motherhood at her own discretion.”<sup>95</sup>

## 5. Racial Opposition to the Birth Control Movement

Not everyone in the Black community understood access to contraception as a means of collective liberation and individual autonomy. Marcus Garvey, who led the Pan-African Movement of the 1930s, condemned contraception as “race suicide.”<sup>96</sup> In 1934, the Universal Negro Improvement Association, with which Garvey was associated, passed a resolution condemning birth control as an attempt “to interfere with the course of nature and with the purpose of the God in whom we believe.”<sup>97</sup> In a 1940 guest editorial in the *New York Amsterdam News*, Philip Francis insisted that “[t]he Negro needs more and better babies to overwhelm the white world, in war, in peace and in prosperity.”<sup>98</sup> With this in mind, Francis urged fellow members of the Black community to usher “our women back to the home” so that they might “breed us the men and women who will really inherit the earth.”<sup>99</sup>

### *B. Race and Abortion Before Roe v. Wade*

#### 1. Black Genocide and Reproductive Rights

<sup>93</sup> See Roberts, *supra* note 44, at 82-84.

<sup>94</sup> *Id.* at 83.

<sup>95</sup> W.E.B. DuBois, *Darkwater: Voices From Within the Veil*, in THE OXFORD W.E.B. DUBOIS READER 481, 565 (Eric J. Sundquist, Ed., 1996).

<sup>96</sup> See Dorothy Roberts, *Black Women and the Pill*, 32 FAM. PLAN. PERSPS. 92, 93 (2000); Roberts, *supra* note 44, at 84; see also Jill C. Morrison, *Resuscitating the Black Body: Reproductive Justice as Resistance to the State’s Property Interest in Black Women’s Reproductive Capacity*, 31 YALE J.L. & FEMINISM 35, 38 (2019); Beryl Satter, *Marcus Garvey, Father Divine and the Gender Politics of Race Difference and Race Neutrality*, 48 AM. Q. 43, 43 (1996).

<sup>97</sup> *Convention of Negro Peoples Meet at Edelweiss Park*, DAILY GLEANER, Aug. 31, 1934, in THE MARCUS GARVEY AND UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION PAPERS, Vol. 7 (ed. Robert A. Hill 1921).

<sup>98</sup> Roberts, *supra* note 44, at 84.

<sup>99</sup> *Id.*



A generation later, the strains of Black natalism that undergirded Garvey's Pan-African movement were reflected in the nascent Black Power movement and its opposition to contraception and abortion. During the 1960s, changing sexual mores, concerns about state intervention in private life, and anxiety about unchecked population growth fueled efforts to liberalize—or repeal entirely—criminal bans on contraception and abortion. Despite these dynamics, Black nationalist groups resisted efforts to expand birth control and abortion in the Black community, and their opposition sounded in the register of racial genocide. Both the Black Panthers and Nation of Islam opposed birth control and abortion, albeit for different reasons.<sup>100</sup> Like Marcus Garvey a generation earlier, the Panthers initially decried abortion and contraception as a form of deracination that deprived the community of a generation of potential soldiers in the crusade for Black freedom.<sup>101</sup> By contrast, the Nation of Islam's opposition to reproductive rights was rooted in religious principles and a notion of racial uplift that was linked to the patriarchal family.<sup>102</sup> For both groups, however, Black reproduction was necessary to not only erase the losses of slavery and Jim Crow, but to populate a strong Black community that could resist—and indeed, overwhelm and dominate—the white power structure.

Critically, the narrative of racial genocide gained traction—even outside of Black nationalist circles. In a 1972 article in the *American Journal of Public Health*, researchers William Darity and Castellano Turner reported that a significant number of Blacks were wary of family planning programs, particularly if they were administered and operated by non-Blacks.<sup>103</sup> Further, at least part of the skepticism of family planning programs was animated by an association between family planning and racial genocide.<sup>104</sup>

Even more traditional African American groups, like the National

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<sup>100</sup> See JENNIFER NELSON, WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT 96-97 (2003); Morrison, *supra* note 96, at 38 (Both the Black Panthers and Nation of Islam opposed birth control and abortion, but the genocide argument was much more common among the Panthers, who viewed Black children as potential soldiers in the fight for Black freedom. The Nation's opposition was rooted in religious principles and women's duty to raise children."); Robert G. Weisbord, *Birth Control and the Black American: A Matter of Genocide?*, 10 DEMOGRAPHY 571, 580 (1973); ROBERT G. WEISBORD, GENOCIDE?: BIRTH CONTROL AND THE BLACK AMERICAN 96-105 (1970); Simone M. Caron, *Birth Control and the Black Community in the 1960s: Genocide or Power Politics*, 31 J. SOC. HIST. 545, 547 (1998) (noting the differences between the Panthers's objections to birth control and those of the Nation of Islam).

<sup>101</sup> See Nelson, *supra* note 100, at 102.

<sup>102</sup> *Id.* at 96-98. That said, not all members of the Nation were implacably opposed to contraception and family planning. According to Robert Weisbord, in a 1962 interview with Black field consultants for Planned Parenthood, Malcolm X indicated that he favored family planning measures "for health and economic reasons." Weisbord, *supra* note 100, at 99.

<sup>103</sup> William A. Darity & Castellano B. Turner, *Family Planning, Race Consciousness and the Fear of Race Genocide*, 62 AM. J. PUB. HEALTH 1454, 1458 (1972).

<sup>104</sup> *Id.*

Association for the Advancement of Colored People (NAACP), began to reevaluate their positions on reproductive rights during this period.<sup>105</sup> In the 1920s and 1930s, the NAACP, under the leadership of W.E.B. DuBois, had supported birth control as a means of racial betterment.<sup>106</sup> By the 1960s and 1970s, however, the organization's stance on birth control was informed by the distrust of government and mainstream institutions that pervaded Black political discourse.<sup>107</sup> In particular, some local affiliates of the NAACP questioned the proliferation of government-subsidized Planned Parenthood birth control clinics in predominantly Black neighborhoods, noting that such clinics typically did not include Black community members among their administration and operating staffs and limited their services to the provision of contraception and abortion.<sup>108</sup> Black women's reproductive needs, these local NAACP affiliates argued, were not limited to contraception and abortion, but instead included a wider range of health and counseling services aimed at facilitating family planning.<sup>109</sup>

Although the Black Panthers rejected abortion and contraception as tools of Black genocide, other civil rights groups pointed to other developments in articulating their objections to, and skepticism of, state efforts to control Black reproduction. In a 1964 pamphlet entitled *Genocide in Mississippi*, the Student Nonviolent Coordinating Committee (SNCC) argued that forced sterilization of Black women throughout the South was a species of state-facilitated genocide that should be rooted out and condemned.<sup>110</sup> Critically, unlike the Panthers and the Nation, SNCC saw forced sterilization, as opposed to abortion and contraception, as the more pernicious threat to the Black community. Indeed, as the broader group condemned the forced sterilization of Black women as genocide, some members of SNCC also emphasized—and advocated for—Black women's freedom and autonomy to use birth control voluntarily.<sup>111</sup> As SNCC explained, the distinction between genocidal sterilization and autonomous contraceptive use hinged

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<sup>105</sup> See Roberts, *supra* note 44, at 99.

<sup>106</sup> See *supra* TAN 95.

<sup>107</sup> Roberts, *supra* note 44, at 99; Simone M. Caron, *Birth Control and the Black Community in the 1960s: Genocide or Power Politics?*, 31 J. SOC. HIST. 545, 546-47 (1998). *But see* Weisbord, *supra* note 100, at 585 (noting that the national leadership of the NAACP “believe[d] in family planning as a social value and reject[ed] the notion . . . that this is a form of genocide”).

<sup>108</sup> *Negroes Criticize Family Planners: Birth Curb Group is Accused by Pittsburgh N.A.A.C.P.*, N.Y. TIMES, Dec. 17, 1967, at 71; *Greenlee Holds Position on Birth Control Charge*, NEW PITTSBURGH COURIER, Dec 23, 1967 (available at <http://search.proquest.com/docview/202491643?accountid=14657>).

<sup>109</sup> Stephanie Flores, *Redefining Reproductive Rights in an Age of Cultural Revolution*, 2 ON OUR TERMS 1, 16-18 (2014).

<sup>110</sup> STUDENT NONVIOLENT COORDINATING COMMITTEE, GENOCIDE IN MISSISSIPPI 3-4 (1965).

<sup>111</sup> *Id.*; see also Frances Beal, *Double Jeopardy: To Be Black and Female*, in THE BLACK WOMAN, ed. Toni Cade (New York: Signet, 1970) (“The lack of availability of safe birth control methods, the forced sterilization practices, and the inability to obtain legal abortions are all symptoms of a decadent society that jeopardizes the health of black women . . .”).

on Black women's freedom to choose for themselves, rather than having the state's will imposed upon them.<sup>112</sup>

In a similar vein, other voices in the Black community explicitly countered Black nationalist opposition to reproductive rights. No less than Martin Luther King, Jr. registered his support of family planning measures aimed at the Black community. Having served on a committee for a Planned Parenthood study on contraception, King, who received Planned Parenthood's Margaret Sanger Award in Human Rights in 1966, maintained that "easy access to the means to develop a family related in size to [the] community environment and to the income potential [each individual] can command" could be a "profoundly important ingredient" for the Black community's economic security and stability.<sup>113</sup> Like King, other Black leaders saw a connection between family planning and the broader civil rights movement, lending support to efforts to expand access to family planning resources within the Black community.<sup>114</sup>

Black women were especially vociferous in their desire for, and defense of, broader access to contraception and abortion. A 1973 study found that, "despite obvious fears of genocide among young black men, there was 'considerable evidence that black women . . . are even more positively inclined toward family planning than white women.'"<sup>115</sup> To this end, the *Chicago Defender*, arguably the country's most prominent Black newspaper, featured a weekly column, "Letters to Leontyne," in which Leontyne Hunt, a Black woman, responded to family planning questions from Black women readers.<sup>116</sup> Many of the letters were explicit in their request for broader access to contraception and family planning resources within the Black community.<sup>117</sup>

Calls for broader access to family planning resources were often animated by the deleterious impact of abortion criminalization on Black women. Acknowledging "the experiences of several young women [she] knew,"

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<sup>112</sup> *Id.*; see also Nelson, *supra* note 100, at 91 ("Those black militants who stand up and tell women, 'Produce black babies!' are telling black women to be slaves.").

<sup>113</sup> Simone M. Caron, *Birth Control and the Black Community in the 1960s: Genocide or Power Politics?*, 31 J. SOC. HIST. 545, 550 (1998).

<sup>114</sup> *Id.* (discussing the work of Walter Chivers, Jerome Holland, and Bayard Rustin, among others, on behalf of family planning).

<sup>115</sup> *Id.* at 548.

<sup>116</sup> See, e.g., Leontyne Hunt, *Keep Your Family the Right Size*, CHI. DEFENDER, Oct. 22, 1966, at 11. Interestingly, there was no "Leontyne." The column was written by staff at the Planned Parenthood's Chicago South Side affiliate, who culled questions from their largely Black clientele and provided responses. Nicola Beisel & Bonnie Bright, *Letters to Leontyne: Black Women's Questions to Planned Parenthood, 1964-1970*, 1 (unpublished manuscript on file with author).

<sup>117</sup> Beisel & Bright, *supra* note 116, at 2.

who “had suffered permanent injuries at the hands of illegal abortionists,”<sup>118</sup> Congresswoman Shirley Chisholm, who served as the honorary president of the National Abortion Rights Action League (NARAL),<sup>119</sup> worked to increase the number of family planning clinics in Black neighborhoods, repudiating the Black genocide argument as “male rhetoric, for male ears” that “falls flat to female listeners and to thoughtful male ones.”<sup>120</sup>

Like Chisholm, other Black women directly challenged the Black Power movement’s account of contraception and abortion as instruments of genocide. Angela Davis acknowledged the rhetoric of Black genocide, but instead pointed to forced sterilization, as opposed to birth control and abortion, as the true threat to the Black community.<sup>121</sup> Toni Cade did not oppose the Black Power movement’s interest in birthing a new generation of revolutionaries.<sup>122</sup> That said, she disagreed vehemently with “the irresponsible, poorly thought-out call to . . . every Sister at large to abandon the pill that gives her certain decision power, a power that for a great many of us is all we know, given the setup in this country and in our culture.”<sup>123</sup> In debating whether family planning constituted Black genocide or female liberation, Cade made clear that the issue was not simply about the decision to have a child, but rather the broader social conditions in which Black children were raised. In her view, insisting on Black women’s reproduction without dealing with the social and material conditions—food insecurity, poverty, inadequate housing, and state violence—in which Black women often raised their children missed the mark.<sup>124</sup>

Florynce Kennedy, who was no stranger to the Black Power movement having cut her teeth as a litigator defending H. Rap Brown and the Black

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<sup>118</sup> Shirley Chisholm, *Facing the Abortion Question*, in BLACK WOMEN IN WHITE AMERICA 602, 603 (Gerda Lerner, ed., 1973).

<sup>119</sup> Mary Ziegler, *The Framing of A Right to Choose: Roe v. Wade and the Changing Debate on Abortion Law*, 27 LAW & HIST. REV. 281, 327 (2009).

<sup>120</sup> Loretta Ross, *African-American Women and Abortion: A Neglected History*, 3 J. HEALTH CARE FOR THE POOR AND UNDERSERVED 274, 282 (1992) (quoting SHIRLEY CHISHOLM, UNBOUGHT AND UNBOSSSED 114 (1970)). Critically, Chisholm initially had reservations about the efforts to liberalize New York’s abortion law. See SHIRLEY CHISHOLM, UNBOUGHT AND UNBOSSSED, 113. Careful reflection on the real-world circumstances of Black women’s reproduction prompted her to change her views. As she noted in her autobiography, “49 percent of the deaths of pregnant black women and 65 percent of those of Puerto Rican women. . . [are] due to criminal, amateur abortions.” *Id.* at 122. “Which,” she mused, “is more like genocide. . . the way things are, or the conditions I am fighting for in which the full range of family planning services is freely available to women of all classes and colors...” *Id.*

<sup>121</sup> Angela Davis, *The Historical Context: Racism, Birth Control and Reproductive Rights*, 4 WOMEN, RACE & CLASS 21, 21 (1993).

<sup>122</sup> Toni Cade, *The Pill: Genocide or Liberation?* in THE BLACK WOMAN: AN ANTHOLOGY 162, 164 (ed. Toni Cade 1970).

<sup>123</sup> *Id.* at 164.

<sup>124</sup> *Id.* at 167-68.

Panthers,<sup>125</sup> was outspoken in her defense of reproductive rights. A bridge between the Black Power and women's liberation movements, Kennedy repeatedly challenged the Black nationalist view that having a large family was both a revolutionary act and Black women's principal responsibility in the struggle for Black liberation.<sup>126</sup> Countering this masculinist vision, Kennedy argued that "if [B]lack women were to be truly 'revolutionary' and play varied and significant roles in the Black Freedom movement, 'some of us might want to travel light.'"<sup>127</sup> Indeed, in their book, *Abortion Rap*, Kennedy and her co-author Diane Schulder devoted an entire chapter to debunking the claim that legalizing abortion and contraception was a genocidal plot to deracinate Black people.<sup>128</sup> They countered the Black nationalist argument against abortion by arguing that Black women needed and desired access to safe and legal birth control.<sup>129</sup> Powerfully deploying examples of the Black women who died or suffered from botched abortions and unwanted pregnancies, Kennedy and Schulder argued that these deaths should be viewed—and condemned—as a form of genocide.<sup>130</sup>

## 2. Reproductive Rights and Race, Gender, and Class Equality

While others did not frame support for abortion legalization in terms that expressly countered claims of Black genocide, their arguments explicitly and implicitly centered the impact of abortion restrictions on marginalized groups, including communities of color. Echoing Kennedy and Schulder's invocation of the Black women who had suffered botched and illegal abortions, public health advocates argued that abortion criminalization posed health concerns, particularly in poor communities.<sup>131</sup> As they explained, regardless of criminalization, and with limited access to birth control, women would continue to seek abortions.<sup>132</sup> In this regard, the impact of laws that prohibited abortion except where necessary to save the mother's life fell disproportionately on poor women, many of whom were women of color.<sup>133</sup> Wealthy, well-connected women could circumvent the

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<sup>125</sup> Douglas Martin, *Flo Kennedy, Feminist, Civil Rights Advocate and Flamboyant Gadfly, Is Dead at 84*, N.Y. TIMES, Dec. 23, 2000, at B7.

<sup>126</sup> SHERIE M. RANDOLPH, FLORYNCE "FLO" KENNEDY: THE LIFE OF A BLACK FEMINIST RADICAL 179 (2015).

<sup>127</sup> *Id.* at 178.

<sup>128</sup> *Id.* at 177.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 170.

<sup>131</sup> See Mary Steichen Calderone, *Illegal Abortion as a Public Health Problem*, 50 AM. J. PUB. HEALTH 948, 951 (1960).

<sup>132</sup> *Id.* at 950.

<sup>133</sup> See *id.* at 951; see also LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973, at 205 (1997) (noting studies from the time period that show that most therapeutic abortions performed in hospitals were performed on white patients with private health insurance).

law by either leaving the country to seek legal abortion care, or by finding a psychiatrist who could attest to the woman’s likely suicide if leave for a “therapeutic” abortion was not granted.<sup>134</sup> Those without the financial wherewithal to do so were left with the prospect of continuing a pregnancy or risking their lives in a “back-alley” abortion. As one public health official noted, the difference between a lawful “therapeutic” abortion and an illegal abortion was merely “\$300 and knowing the right person.”<sup>135</sup>

In addition to concerns about public health, appeals for greater control of population growth were also marshaled in support of more liberal abortion policies. And these arguments also implicitly touched on issues of race. Unlike the eugenics-fueled interest in controlling the demographic growth of “the unfit,” 1960s population-based arguments in favor of abortion were more environmental and ecological, focusing instead on the universal threat that population growth posed to the planet and its inhabitants.<sup>136</sup> Founded in 1968, the organization Zero Population Growth argued that “no responsible family should have more than two children” and that “[a]ll methods of birth control, including legalized abortion, should be freely available.”<sup>137</sup> Likewise, the bestselling book *The Population Bomb* warned of the consequences of overpopulation to the developing world—and to the poor and marginalized living in more developed countries, like the United States.<sup>138</sup>

Broader concerns about sexual freedom, government intrusion into intimate life, and sex equality also framed the 1960s effort to repeal and liberalize criminal abortion laws—and in doing so, implicitly acknowledged the differential impact of morals legislation on marginalized communities.<sup>139</sup> The changing sexual mores of the 1960s called into question a range of moral offenses that criminalized the consensual, nonmarital sexual activity

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<sup>134</sup> Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2036 (2011).

<sup>135</sup> *Id.* In this regard, public health arguments in favor of abortion liberalization echoed earlier arguments in favor of repealing criminal bans on contraception: despite criminalization, those with means—and access to private physicians—were able to obtain contraception. Criminal prohibitions on contraception effectively limited the operation of public birth control clinics upon which the poor relied for family planning information and assistance. See Melissa Murray, *Sexual Liberty and Criminal Law Reform: The Story of Griswold v. Connecticut*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES 11, 12 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019); Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2, 22-24 (2018) (discussing contraceptive bans’ impact on public birth control clinics).

<sup>136</sup> Greenhouse & Siegel, *supra* note 134, at 2038.

<sup>137</sup> *Id.* (alteration in original) (quoting Zero Population Growth, Brochure, reprinted in LINDA GREENHOUSE & REVA B. SIEGEL, *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING* 55, 57 (2010)).

<sup>138</sup> PAUL R. EHRLICH, *THE POPULATION BOMB* 3 (rev. ed., 19th prtg. 1988).

<sup>139</sup> See Melissa Murray, Essay, *Griswold’s Criminal Law*, 47 CONN. L. REV. 1045, 1059 (2015) (discussing the concerns about selective enforcement of morals offenses).

of adults, as well as measures, like contraception and abortion, that might facilitate sex outside of marriage.<sup>140</sup> Many argued that the enforcement of morals offenses was necessarily selective, allowing the state to more actively police the intimate lives of minorities and other marginalized groups.<sup>141</sup> It also sanctioned state intervention into the most intimate aspects of private life, including the “marital bedroom.”<sup>142</sup> Indeed, concern about state intervention into the private recesses of intimate life underwrote the Court’s invalidation of laws criminalizing the use of contraception by married couples and single people.

Although the Court relied on the logic of privacy to strike down criminal restrictions on contraception,<sup>143</sup> privacy was not the only legal frame available to house constitutional protections for access to contraception. Early challenges to contraceptive bans noted that such laws placed heavier burdens on women than men,<sup>144</sup> while other challenges emphasized privacy as a necessary precondition for structuring intimate life along more gender egalitarian lines.<sup>145</sup> In the same vein, challenges to abortion restrictions also emphasized both freedom from unnecessary government regulation and sex equality. Although the women’s movement was not active in the earliest efforts to reform abortion laws, in time, feminists came to understand the interest in repealing and reforming abortion regulation as consistent with their aims to secure equal pay, equal access to higher education, opportunity in the workplace, and other policies, including access to childcare, that were necessary for women’s equal citizenship.<sup>146</sup>

As feminists integrated abortion into their public discourse around sex equality, calls for sex equality were central to feminist legal challenges to abortion bans. In contrast to early abortion challenges, which were framed in terms of the professional obligations and rights of physicians, feminist litigators challenging nineteenth century abortion bans in the 1970s explicitly framed their claims in terms of liberty, women’s equality, and

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<sup>140</sup> See *id.* at 1048, 1068.

<sup>141</sup> See *id.* at 1059.

<sup>142</sup> *Id.* at 1064 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)).

<sup>143</sup> See *Griswold*, 381 U.S. at 483; *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). Although *Eisenstadt* was technically decided on equal protection grounds, the Court nonetheless engaged in a discussion of the scope and breadth of constitutional privacy. *Id.* at 453-55.

<sup>144</sup> Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J.F. 349, 353 - 54 (2015) (discussing the way in which the law traded on well-worn gendered stereotypes about sex and parenting).

<sup>145</sup> See Complaint at 2, *Trubek v. Ullman*, 367 U.S. 907 (1961) (No. 847); see also Melissa Murray, *Overlooking Equality on the Road to Griswold*, 124 YALE L.J.F. 324, 326 (2015) (discussing sex equality claims in *Trubek v. Ullman*).

<sup>146</sup> Greenhouse & Siegel, *supra* note 134, at 2042.

sexual freedom.<sup>147</sup> Consider *Hall v. Lefkowitz*,<sup>148</sup> in which a team of feminist lawyers that included Florynce Kennedy challenged New York’s abortion ban as an affront to women’s rights. In so doing, these feminist lawyers explicitly rooted their objections to abortion bans in women’s lived experiences, salting their briefs and courtroom arguments with testimony from women who experienced illegal abortions, lack of contraceptive access, adoption, or forced motherhood.<sup>149</sup> In *Abele v. Markle*,<sup>150</sup> a challenge to Connecticut’s abortion ban, feminist lawyers led by Catherine Roraback emphasized both the gendered impact of the law, and its impact on poor women and women of color.<sup>151</sup> As they explained, women experienced motherhood differently based on their race and class, meaning that laws that criminalized abortion disadvantaged women but were doubly burdensome for those women who could not “afford to travel to London or Puerto Rico for abortions.”<sup>152</sup>

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This is all to say that, in the period before *Roe v. Wade* was decided, the discourse surrounding reproductive rights was diverse and multifaceted, reflecting concerns about the environment, the breadth of criminal regulation, sex equality, racial and class injustice, and intersectional claims that implicated both race and sex discrimination.

Not all of these frames, however, were reflected in the Court’s decision in *Roe v. Wade*, which was rooted in the right to privacy. In this regard, *Roe*’s embrace of privacy was as much a question of timing as it was a substantive choice. *Abramowicz v. Lefkowitz*, with its claims of sex and class equality, was mooted when the New York legislature repealed the challenged law.<sup>153</sup> Likewise, *Abele v. Markle* was pending before the Supreme Court when the Court issued its decision in *Roe*.<sup>154</sup>

Because *Roe* reached the Court first, the equality-based race, gender, and class claims that had infused other abortion challenges did not make their way into the Court’s understanding of abortion rights. And critically, unlike

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<sup>147</sup> See *id.* at 2044.

<sup>148</sup> 305 F. Supp. 1030 (S.D.N.Y. 1969).

<sup>149</sup> See *id.* at 1031.

<sup>150</sup> 342 F. Supp. 800 (D. Conn. 1972).

<sup>151</sup> Women vs. Connecticut Organizing Pamphlet (1970), reprinted in Greenhouse & Siegel, *supra* note 134, at 174.

<sup>152</sup> *Id.*

<sup>153</sup> Reva B. Siegel, *Roe’s Roots: The Women’s Rights Claims That Engendered Roe*, 90 B.U. L. REV. 1875, 1886 n.49 (2010) (explaining that the opinion dismissing *Abramowicz* and its companion suits as moot was issued on July 1, 1970, but it was not published in any official court reporter).

<sup>154</sup> *Id.* at 1894 (noting that the appeal of *Abele* “was intercepted by the *Roe* decision itself”).



the feminist lawyers who litigated *Abele* and *Lefkowitz*, the *Roe* lawyers, Linda Coffee and Sarah Weddington, did not frame their arguments in terms of sex equality or race and class inequality, choosing instead to root their claims in the privacy logic that had undergirded the Court's earlier contraception decisions.<sup>155</sup> As a consequence, the Court's decision in *Roe* reflected a narrower framing of the abortion debate, emphasizing the role of physicians, the scope of state police power, and, above all, privacy.<sup>156</sup>

### C. Race and Abortion After *Roe v. Wade*

The Court's decision in *Roe* rooted the abortion right in the logic of constitutional privacy, and in so doing, foreclosed the other doctrinal frames that had circulated in abortion litigation and discourse in the decade that preceded *Roe*. As importantly, this section explains, the Court's narrow framing shaped the response to, and defense of, the abortion right in the decades that followed.<sup>157</sup>

In announcing a woman's right to choose, in consultation with her physician, an abortion, *Roe* rested on a series of assumptions. First, it assumed a certain degree of affluence and access—women choosing an abortion ostensibly had access to medical care, and as such, made their decisions in consultation with medical professionals.<sup>158</sup> Relatedly, *Roe* framed abortion as the “choice” of whether or not to have a child, irrespective of the background conditions that might inform or shape such choices.<sup>159</sup> It offered no quarter to those women whose reproductive “choices” were shadowed by economic insecurity, the absence of safe and affordable childcare, and racial and gender injustice.<sup>160</sup> Nor did *Roe* venture beyond the issue of terminating a pregnancy to consider the conditions

<sup>155</sup> See *id.* at 1897.

<sup>156</sup> See *Roe v. Wade*, 410 U.S. 113, 153 (1973).

<sup>157</sup> *Id.* As scholars have argued, *Roe*'s framing of the abortion right was not the only available framing. Other challenges to abortion bans surfaced other constitutional lenses, including sex equality and class privilege, that, as much as privacy, could have provided doctrinal roots for the abortion right. See, e.g., Siegel, *supra* note 153, at 1886-94 (discussing the women's rights and equality claims put forth in *Abele v. Markle*); Linda Greenhouse & Reva Siegel, *The Unfinished Story of Roe v. Wade*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES, *supra* note 134, at 63 (discussing the sex equality and Eighth Amendment arguments advanced against abortion bans in *Abramowicz v. Lefkowitz*).

<sup>158</sup> *Roe*, 410 U.S. at 166 (calling abortion “primarily, a medical decision” such that “basic responsibility for it must rest with the physician”).

<sup>159</sup> *Id.* at 141, 153.

<sup>160</sup> See Rebecca L. Rausch, *Reframing Roe: Property Over Privacy*, 27 BERKELEY J. GENDER L. & JUST. 28, 31 (2012) (noting the right announced in *Roe* “might provide the right woman with reproductive choice . . . but for the wrong woman—one with limited resources—the so-called ‘choice’ becomes nonexistent”); Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and the State*, 127 YALE L.J. 1270, 1330 (2018) (reviewing KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017)) (discussing how *Roe* helped provide “a wide range of reproductive choices” to wealthy women but “little solace to . . . poor wom[e]n” seeking abortion access).

necessary to exercise the “choice” to bear and raise a child to adulthood.<sup>161</sup>

But it was not only that *Roe* framed the issue of reproductive freedom narrowly around abortion and avoiding a pregnancy; it also resolved the conflict by resorting to the constitutional discourse of negative rights.<sup>162</sup> *Roe* offered women the right to make the decision to have an abortion free from undue state interference and regulation.<sup>163</sup> But it did not offer, and later cases would emphatically reject,<sup>164</sup> positive constitutional entitlements that would facilitate women’s exercise of the abortion right.<sup>165</sup> Moreover, as scholars like Professor Robin West have argued, regardless of their content, “rights and rights rhetoric . . . tend to protect preexisting property entitlements . . . by discrediting precisely the democratic, popular, majoritarian, and political deliberation and reform it would take to upend them.”<sup>166</sup> To the extent that rights yield progressive gains, they should also be understood as “risking some degree of entrenchment of current distributions of power that favor a wealthy minority against majoritarian redistribution.”<sup>167</sup> As troublingly, “rights” center the work of courts, and in so doing, “feed[] a distrust of the machinations of public deliberation—including processes of government, of democracy, and collective action—the use of which is essential to any sort of genuinely progressive political movement against private injustice.”<sup>168</sup>

The legal challenges launched in *Roe*’s wake reflected these assumptions and privacy’s narrow logic. *Harris v. McRae*<sup>169</sup> is illustrative. In *Harris*, the Court considered a challenge to the Hyde Amendment, an appropriations rider that prohibited the use of federal funds, including Medicaid funding, for abortion services, except in cases of rape or where necessary to save the woman’s life.<sup>170</sup> As many recognized, the Hyde Amendment was legislated, in part, to blunt *Roe*’s impact by preventing women who relied on Medicaid

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<sup>161</sup> See Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 125 (1992) (discussing how reproductive choices for certain women are often burdened by “circumstance and constraint”).

<sup>162</sup> See Rausch, *supra* note 160, at 31 (noting “the right to privacy . . . is relegated to the land of negative rights”).

<sup>163</sup> *Roe*, 410 U.S. at 163.

<sup>164</sup> *Harris v. McRae*, 448 U.S. 297, 315 (1980); *Maher v. Roe*, 432 U.S. 464, 474 (1977).

<sup>165</sup> Rachel Rebouché, *The Limits of Reproductive Rights in Improving Women’s Health*, 63 ALA. L. REV. 1, 24 (2011) (“*Roe* has not been a ready platform for thinking about abortion in terms of women’s right to health care.”).

<sup>166</sup> Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1413 (2009).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 1414.

<sup>169</sup> 448 U.S. 297 (1980).

<sup>170</sup> *Id.* at 302.

and public assistance from accessing abortion.<sup>171</sup> Predictably, the Hyde Amendment's force was keenly felt by poor women and women of color. Indeed, drawing connections between economic oppression, reproductive control, and women's subordination, the Committee for Abortion Rights and Against Sterilization Abuse (CARASA) argued that the restriction was not simply aimed at preventing poor women and women of color from accessing abortion, but rather was part of an antinatalist effort to force poor women and women of color to submit instead to sterilization.<sup>172</sup>

Although groups like CARASA articulated the connections between race, class, and sex at issue in *Harris v. McRae*, the Court's disposition of the case was shaped by the negative rights framing that had prevailed in *Roe*. As the Court explained, "[t]he Hyde Amendment . . . places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest."<sup>173</sup> On this logic, although the Constitution recognized a right to abortion, the state was under no obligation to facilitate—or in this case, subsidize—an individual's exercise of the right.<sup>174</sup>

One member of the Court, however, recognized the race and class implications of the majority's decision. In a vehement dissent, Justice Thurgood Marshall, the first Black justice to sit on the Court, noted that "[t]he class burdened by the Hyde Amendment consists of indigent women, a substantial proportion of whom are members of minority races."<sup>175</sup> Further, because "nonwhite women obtain abortions at nearly double the rate of whites" and "the burden of the Hyde Amendment falls exclusively on financially destitute women,"<sup>176</sup> Justice Marshall believed the Court's review of the Hyde Amendment demanded "more searching judicial inquiry."<sup>177</sup>

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<sup>171</sup> See *id.* at 343 (Marshall, J., dissenting).

<sup>172</sup> See Brief Amici Curiae of the Association of Legal Aid Attorneys, et al., at 15, *Harris*, 448 U.S. 297 (No. 79-1268). CARASA was not alone in its association of the Hyde Amendment and sterilization abuse. Activist and scholar Angela Davis observed that Hyde "effectively divested" poor and minority women of "the right to legal abortions," "surgical sterilizations, funded by the Department of Health, Education and Welfare, remained free on demand," prompting "more and more poor women . . . to opt for permanent infertility." Angela Davis, *Racism, Birth Control and Reproductive Rights*, in *WOMEN, RACE, AND CLASS* (1983), at 356.

<sup>173</sup> *Harris*, 448 U.S. at 315.

<sup>174</sup> *Id.* at 316 ("[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.")

<sup>175</sup> *Id.* at 343 (Marshall, J., dissenting).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 343-44 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

Although a majority of the *Harris* Court was unwilling to draw connections between abortion and race, those opposed to abortion used the rhetoric of race and racial injustice as a weapon to beat back abortion rights. Abortion opponents underscored the view that *Roe* was improperly decided by analogizing abortion to slavery and *Roe* to *Dred Scott v. Sanford*.<sup>178</sup> J.C. Willke, a co-author of the pro-life *Handbook on Abortion*,<sup>179</sup> rooted the *Roe-Dred Scott* analogy in the concepts of personhood and sectional conflict.<sup>180</sup> As he explained, just as *Dred Scott* had concluded that African Americans were non-citizens—non-persons for constitutional purposes<sup>181</sup>—so too had *Roe* consigned the unborn to the constitutional status of non-persons.<sup>182</sup> Moreover, in its attempt to “finally settle a very vexing and controversial social issue,” *Roe*, like *Dred Scott* before it, had only fanned the flames of the conflict.<sup>183</sup> As backlash to *Roe v. Wade* mounted, a range of prominent leaders, including President Ronald Reagan and Justice Antonin Scalia, explicitly linked *Roe* and abortion to *Dred Scott* and the racialized rhetoric of slavery.<sup>184</sup>

The right’s efforts to deploy race in their arguments against abortion rights contrasted sharply with the tactics of the reproductive rights movement, which was roundly criticized for focusing its advocacy on defending *Roe*, while being inattentive to the scourge of forced sterilization and the impact of funding restrictions on poor women and women of color. Frustrated by *Roe v. Wade*’s limited framing of abortion and abortion rights,<sup>185</sup> and the reproductive rights movement’s tepid response to the Hyde Amendment and forced sterilization, feminists of color began to articulate a new, intersectional approach to reproductive rights that explicitly centered concerns about race, class, and discrimination.

Combining the terms “reproductive rights” and “social justice,” the

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<sup>178</sup> 60 U.S. 393 (1857); J.C. WILLKE, ABORTION AND SLAVERY: HISTORY REPEATS ix (1984) (“The abortion-slavery analogy is one that has been drawn by right-to-life leaders since the decision, granting mothers the right to abort, was handed down in 1973 by the U.S. Supreme Court in its *Roe vs. Wade* and *Doe vs. Bolton* rulings.”).

<sup>179</sup> DR. & MRS. J.C. WILLKE, HANDBOOK ON ABORTION (1971).

<sup>180</sup> See Willke, *supra* note 178, at 11-15.

<sup>181</sup> *Id.* at 163 - 64.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in part, dissenting in part) (comparing *Roe* to *Dred Scott*); Debora Threedy, *Slavery Rhetoric and the Abortion Debate*, 2 MICH. J. GENDER & L. 3, 7-8 (1994) (describing how Ronald Reagan compared *Roe* to *Dred Scott*).

<sup>185</sup> See Mary Ziegler, *The Price of Privacy, 1973 to the Present*, 37 HARV. J.L. & GENDER 285, 315-19 (2014) (tracing post-*Roe* feminist efforts to move toward a multi-issue reproductive agenda); Dorothy Roberts, *Reproductive Justice, Not Just Rights*, DISSENT (Fall 2015), <https://www.dissentmagazine.org/article/reproductive-justice-not-just-rights>.

reproductive justice movement emerged in the 1990s as a counterpoint to the reproductive rights framework that *Roe* and its progeny engendered.<sup>186</sup> Rooted in the work of groups like the Committee to End Sterilization Abuse (CESA), the Committee for Abortion Rights and Against Sterilization Abuse (CARASA), and the Combahee River Collective, the reproductive justice movement eschewed traditional feminism to take an explicitly intersectional approach, centering the experiences of women of color, the poor, queer communities, and the disabled.<sup>187</sup>

Moreover, it purposefully looked beyond abortion to condemn sterilization abuse and other forms of state-imposed reproductive control.<sup>188</sup> To this end, reproductive justice advocates continue today to emphasize a tripartite framework that focuses on: (1) reproductive health, by advocating for the provision of more robust health services to historically underserved communities; (2) reproductive rights, by emphasizing increased access to contraception and abortion; and (3) reproductive justice, by calling attention to the social, political, and economic systemic inequalities that impact women’s reproductive health and their ability to control their reproductive lives.<sup>189</sup>

In this regard, the contours of a reproductive justice framework are purposely broad, “encompassing the various ways law shapes the decision ‘whether to bear or beget a child’ and the conditions under which families are created and sustained.”<sup>190</sup> The reproductive justice framework “highlights the intersecting relations of race, class, sexuality, and sex that shape the regulation of reproduction.”<sup>191</sup> As such, it is attentive to “the many ways law shapes the choice to have, as well as to avoid having, children.”<sup>192</sup> In so doing, reproductive justice goes beyond “contraception and abortion—the traditional subject matter of ‘reproductive rights’”—to consider a broad range of issues that impact reproductive freedom, including sterilization, assisted reproductive technology, access to childcare, pregnancy discrimination, community safety, food and housing

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<sup>186</sup> See Mary Ziegler, *Roe’s Race: The Supreme Court, Population Control, and Reproductive Justice*, 25 *YALE J.L. & FEMINISM* 1, 38-40 (2013) [hereinafter *Roe’s Race*]; Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 *ANN. REV. L. & SOC. SCI.* 327, 334-35 (2013).

<sup>187</sup> See Ziegler, *Roe’s Race*, *supra* note 186, at 38-40; Luna & Luker, *supra* note 186, at 333-37; Human Rights Program at Justice Now, *Prisons as a Tool of Reproductive Oppression*, 5 *STAN. J.C.R. & C.L.* 309, 312 (2009).

<sup>188</sup> See Ziegler, *Roe’s Race*, *supra* note 186, at 39.

<sup>189</sup> See, e.g., Rachel Rebouché, *How Radical Is Reproductive Justice? Remarks for the FIU Law Review Symposium*, 12 *FIU L. REV.* 9, 16 - 19 (2016) [hereinafter Rebouché, *How Radical?*].

<sup>190</sup> See Melissa Murray, Katherine Shaw & Reva B. Siegel, *Introduction in REPRODUCTIVE RIGHTS AND JUSTICE STORIES*, 1, 1 (2019).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

insecurity, the criminalization of pregnancy, and access to reproductive health care.<sup>193</sup> Indeed, as one prominent reproductive justice group, Forward Together, puts it:

[R]eproductive justice is the complete physical, mental, spiritual, political, economic, and social well-being of women and girls, and will be achieved when women and girls have the economic, social and political power and resources to make healthy decisions about our bodies, sexuality and reproduction for ourselves, our families and our communities in all areas of our lives.<sup>194</sup>

By deliberately centering marginalized groups and expanding the lens to include a range of issues that impact reproductive freedom, the reproductive justice movement recuperated many of the themes that had framed pro-choice advocacy in the decade before *Roe v. Wade* and has become an important and influential presence in debates over reproductive rights and healthcare.<sup>195</sup> And indeed, although reproductive justice was explicitly contemplated as a counterweight to the reproductive rights movement's emphasis on abortion and contraception, and its association with traditional feminism, it has nonetheless been embraced by traditional abortion rights groups.<sup>196</sup> More intriguingly, as abortion rights groups have embraced reproductive justice, their antiabortion opponents, perhaps to capitalize on the growing interest in reproductive justice, have continued to marshal racialized arguments in their opposition to abortion rights.

#### D. Reproductive Justice and Racial Justice in the Abortion Debate

In the white paper *What is Reproductive Justice?*, Loretta Ross, a leader of SisterSong Women of Color Reproductive Health Collective and an architect of the reproductive justice movement, noted that “[o]ne of the key problems addressed by Reproductive Justice is the isolation of abortion from other social justice issues that concern communities of color.”<sup>197</sup> All

<sup>193</sup> See *id.*

<sup>194</sup> ASIAN CMTYS. FOR REPROD. JUST., A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE 1 (2005) (emphasis omitted), <https://forwardtogether.org/tools/a-new-vision/#:~:text=2005%20Forward%20Together%E2%80%99s%20%28then%20Asian%20Communities%20for%20Reproductive,finders%20as%20revelatory%20and%20pivotal%20to%20the%20field.>

<sup>195</sup> See Rebouché, *How Radical?*, *supra* note 189, at 18-19 (highlighting the “important role” reproductive justice has played in reproductive rights advocacy).

<sup>196</sup> See, e.g., *Big Victories for Reproductive Justice in 2011*, Planned Parenthood (June 8, 2011), <https://archive.vn/20130415204608/http://act.ppsne.org/connecticut/big-victories-reproductive-justice-2011.>

<sup>197</sup> Loretta Ross, *What is Reproductive Justice?*, in REPRODUCTIVE JUSTICE BRIEFING BOOK: A

too often, abortion rights were framed as issues of “choice,” without regard to the way in which, depending on one’s circumstances, the notion of “choice” could be severely constrained.<sup>198</sup> As she explained, it was essential to understand abortion rights in concert with other issues that impacted communities of color, including “issues of economic justice, the environment, immigrants’ rights, disability rights, discrimination based on race and sexual orientation, and a host of other community-centered concerns.”<sup>199</sup> All of these issues, whether individually or in concert, “directly affect an individual woman’s decision-making process.”<sup>200</sup>

The critique hit home. By the early 2000s, both Planned Parenthood and the National Abortion and Reproductive Rights Action League (NARAL) expanded their reform agendas beyond abortion to include broader access to contraception and health care.<sup>201</sup> By 2010, the changes were even more profound, as mainstream reproductive rights groups began to embrace the vernacular and logic of the reproductive justice movement in earnest.<sup>202</sup> In 2004, the National Organization of Women’s (NOW) national conference featured programming that explicitly focused on reproductive justice.<sup>203</sup> By 2016, NOW’s platform had a decidedly reproductive justice cast, as the organization “demand[ed] access not only to abortion but also ‘birth control, pre-natal care, maternity leave, child care and other crucial health and family services.’”<sup>204</sup>

In the same vein, Planned Parenthood also retooled its messaging. Recognizing that the term “pro-choice” failed to capture a range of issues that mattered to women of reproductive age, the venerable reproductive

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PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE 4, 4 (SisterSong ed., 2007).

<sup>198</sup> *See id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *See* Charles Babington, *Abortion-Rights Group Broadens Focus*, WASH. POST (Dec. 24, 1992), <https://www.washingtonpost.com/archive/politics/1992/12/24/abortion-rights-group-broadens-focus/2dd2cb7f-4933-4c8a-b355-8d5cdeb328e8> (discussing the shift in NARAL’s agenda); Shari Roan, *Moving ‘Beyond Abortion’: Planned Parenthood President Pamela J. Maraldo Says Her Mission Is to Re-Emphasize Health Care and Birth Control*, L.A. TIMES (Nov. 9, 1993), <https://www.latimes.com/archives/la-xpm-1993-11-09-vw-54964-story.html> (discussing the change in Planned Parenthood’s agenda).

<sup>202</sup> Mary Ziegler, *Reproducing Rights: Reconsidering the Costs of Constitutional Discourse*, 28 YALE J.L. & FEMINISM 103, 142 (2016) [hereinafter *Reproducing Rights*].

<sup>203</sup> *Id.* Some have argued that these changes were merely cosmetic and did not result in leadership changes and representation in the ranks of these traditional reproductive rights groups. *See* Ema O’Connor, *Employees Are Calling Out Major Reproductive Rights Organizations for Racism and Hypocrisy*, BUZZFEED NEWS (Aug. 21, 2020, 6:04 PM ET), <https://www.buzzfeednews.com/article/emaconnor/employees-calling-out-reproductive-rights-groups>.

<sup>204</sup> Ziegler, *Reproducing Rights*, *supra* note 202, at 142 (*quoting Reproductive Justice Is Every Woman’s Right*, Nat’l Org. for Women, <http://now.org/resource/reproductive-justice-is-every-womans-right>).

rights organization sidelined choice-focused messaging in favor of arguments that spoke to a broader range of issues, including pay equity, access to health care, and increased access to contraception.<sup>205</sup> As Professor Mary Ziegler notes, the rhetorical shift allowed “more in-depth discussion of reproductive justice.”<sup>206</sup>

Critically, the reproductive justice movement’s influence was not only felt in broadening the range of issues that traditional reproductive rights groups addressed. It was also evident in the discussion of a bread-and-butter concern for reproductive rights advocates: abortion rights themselves. Once criticized as inattentive to the threat the Hyde Amendment,<sup>207</sup> by the 2000s, traditional abortion rights groups had begun highlighting Hyde’s impact on marginalized communities.<sup>208</sup>

In their court-centered advocacy efforts, reproductive rights groups also began to deploy methods and messaging infused with reproductive justice themes. For example, in the Court’s most recent abortion case, *June Medical Services v. Russo*,<sup>209</sup> both the petitioner’s brief and related amicus briefs explicitly invoked reproductive justice themes,<sup>210</sup> highlighting the impact of the challenged abortion restriction on marginalized communities throughout Louisiana, as well as the state’s disinterest in securing women’s health beyond restricting abortion access.<sup>211</sup> In a nod to reproductive justice’s effort to center the narratives of those affected by reproductive policies, a brief filed in *Whole Woman’s Health v. Hellerstedt*,<sup>212</sup> a 2016

<sup>205</sup> See Jackie Calmes, *Advocates Shun ‘Pro-Choice’ to Expand Message*, N.Y. TIMES (July 28, 2014), <http://www.nytimes.com/2014/07/29/us/politics/advocates-shun-pro-choice-to-expand-message.html>; Dawn Laguens, *We’re Fighting for Access, Not Choice*, HUFFINGTON POST (Sept. 29, 2014), [http://www.huffingtonpost.com/dawn-laguens/were-fighting-for-access\\_b\\_5635999.html](http://www.huffingtonpost.com/dawn-laguens/were-fighting-for-access_b_5635999.html).

<sup>206</sup> Ziegler, *Reproducing Rights*, *supra* note 202, at 142.

<sup>207</sup> Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, §§ 506-07, 128 Stat. 5, 409 (2013).

<sup>208</sup> See, e.g., Hyde Amendment, Planned Parenthood, <https://www.plannedparenthoodaction.org/issues/abortion/hyde-amendment> (last visited Aug. 11, 2020).

<sup>209</sup> 140 S. Ct. 2103 (2020).

<sup>210</sup> See, e.g., Brief for Petitioners at 30, *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020) (No. 18-1323), 2019 WL 6341152, at \*30 (discussing the impact of the challenged abortion restriction on low-income women); Brief for National Health Law Program & National Network of Abortion Funds as Amici Curiae Supporting Petitioners at 2-4, *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020) (No. 18-1323), 2019 WL 6698205 (discussing the impact of the challenged abortion restriction on low-income people, people of color, LGBTQ-GNC people, and people experiencing intimate partner violence); Brief for Women with a Vision, et al. as Amici Curiae Supporting Petitioners at 7, *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020) (No. 18-1323), 2019 WL 6727087 (discussing the impact of the challenged abortion restriction on “people of color and other marginalized individuals and communities”).

<sup>211</sup> See generally, Brief for Women with a Vision, et al., *supra* note 210; Brief for Petitioners, *supra* note 210; see also Brief of African American Pro-Life Organizations as Amici Curiae Supporting Respondent, *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (Nos. 18-1323, 18-1460) (advocating women’s health solely through the lens of restrictions on abortion providers); Brief in Opposition, *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (Nos. 18-1323).

<sup>212</sup> 136 S. Ct. 2292 (2016).



challenge to a Texas abortion restriction, simply reproduced statements from women lawyers who maintained that their ability to obtain an abortion had shaped their careers and economic lives.<sup>213</sup>

But critically, as the traditional reproductive rights groups came to frame their defense of abortion rights in terms that drew on reproductive justice discourses, in time, their antiabortion opponents parried with their own vision of reproductive justice that traded heavily on tropes of racial equity and recalled earlier Black nationalist claims associating reproductive rights with genocide. Created by Life Dynamics, a predominantly white antiabortion activist group, the 2009 documentary *Maafa 21: Black Genocide in 21st Century America*<sup>214</sup> linked abortion to an elaborate (alleged) conspiracy to eliminate “surplus” Black labor after emancipation.<sup>215</sup> The Radiance Foundation, an antiabortion group, placed billboards in predominately Black neighborhoods asserting, “Black children are an endangered species.”<sup>216</sup> Life Always, another prominent pro-life group, also orchestrated a billboard campaign in minority neighborhoods, proclaiming “The Most Dangerous Place for an African American is in the Womb.”<sup>217</sup> And recent calls for Black Lives Matter have been met with claims from antiabortion groups that *unborn Black* lives matter.<sup>218</sup> Indeed, Reverend Clenard Childress, the creator of BlackGenocide.org and the president of Life Education and Resource Network (LEARN), a prominent Black antiabortion organization, has suggested that the Black Lives Matter movement cannot advocate in favor of Black uplift so long as it continues to

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<sup>213</sup> See generally Brief of Janice Macavoy, et al. as Amicus Curiae Supporting Petitioners, *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274); see also Brief for Michele Coleman Mayes, et al. as Amici Curiae Supporting Petitioners, *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020) (No. 18-1323, 18-1460), 2019 WL 6650222. This strategy echoed Florynce Kennedy’s story-centered strategy in *Hall v. Lefkowitz*. See *supra* TAN 148-149.

<sup>214</sup> Mark Crutcher, *MAAFA 21: BLACK GENOCIDE IN 21ST CENTURY AMERICA* (2009) <https://www.maafa21.com/watch>.

<sup>215</sup> *Id.* at 4:00-13:50.

<sup>216</sup> See Roberts, *supra* note 44, at xiv-xv; Morrison, *supra* note 96, at 41 (citing Radiance Foundation, *Black Children Are An Endangered Species* (Feb. 4, 2010), <http://toomanyaborted.com/black-children-are-an-endangered-species/>) (noting that the Radiance Foundation’s billboards were placed in predominately Black areas”).

<sup>217</sup> Roberts, *supra* note 44, at xiv; Morrison, *supra* note 96, at 41 (citing “*The Most Dangerous Place for an African-American is in the Womb*”: *Black Politician Criticises [sic] Anti-Abortion Billboard*, Daily Mail (Feb. 24, 2011), <https://www.dailymail.co.uk/news/article-1360125/The-dangerous-place-African-American-womb-Black-politician-criticises-anti-abortion-billboard.html>); see also Shyrisa Dobbins-Harris, *The Myth of Abortion as Black Genocide: Reclaiming Our Reproductive Choice*, 26 NAT’L BLACK L.J. 85, 117-20 (2017) (discussing billboard campaigns in Oakland, Atlanta, Missouri, Chicago, Memphis, and New York City).

<sup>218</sup> *Black Preborn Lives Matter*, Pro Life America (last visited Aug. 11, 2020), <https://prolifeamerica.org/preborn-black-lives-matter/>; see also *Planned Parenthood Claims “Black Lives Matter,” But Kills 247 Black Babies in Abortion Every Day*, LIFE NEWS (Jun. 4, 2020), <https://www.lifenews.com/2020/06/04/planned-parenthood-claims-black-lives-matter-but-kills-247-black-babies-in-abortion-every-day/> [hereinafter *Planned Parenthood*].

partner with abortion rights groups like Planned Parenthood.<sup>219</sup> As these advocacy groups explain, they are calling attention to the disproportionate rate of abortions among Black women, and countering the broader message of reproductive rights and reproductive justice groups that abortion rights serve Black women's autonomy and the interests of the Black community.<sup>220</sup>

This is all to say that, even as *Roe* and its progeny avoided explicit discussion of race and racial inequality in favor of privacy, questions of race and racial injustice continue to be surfaced in reproductive rights advocacy and messaging. In response to the reproductive justice movement's critiques of reproductive rights, and its call to center the claims and needs of marginalized communities, traditional reproductive rights groups have adjusted their rhetoric and methods to better integrate issues of race and class. But critically, the successful integration of reproductive justice themes into abortion advocacy has prompted a similar response from those opposed to abortion rights. Importantly, the antiabortion movement's use of racialized rhetoric and narratives reprises the themes of Black genocide that once undergirded Black nationalist thought. But it also reflects, to some degree, the reproductive justice movement's success in centering race and class in the public and legal discourse around abortion and reproductive rights.

### *E. Race, Disability, and Reproductive Justice*

Just as the reproductive justice movement successfully surfaced race and class as dynamics that shape state regulation of reproduction and reproductive decisionmaking, it has also highlighted disability's role in these discussions. To be sure, questions of disability, as much as race, are imprinted in America's experience with reproductive regulation. Indeed, as Justice Thomas noted in his concurrence in *Box*, one of the Court's most infamous decisions is 1927's *Buck v. Bell*,<sup>221</sup> in which Justice Oliver Wendell Holmes upheld the sterilization of "feeble minded" Carrie Buck on the ground that "[t]hree generations of imbeciles are enough."<sup>222</sup> Although

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<sup>219</sup> Rev. Clenard Childress, John Leaps Evangelization Livestream, [https://www.youtube.com/watch?v=hvforA4A\\_gM](https://www.youtube.com/watch?v=hvforA4A_gM) (June 26, 2020) (last visited Oct. 1, 2020).

<sup>220</sup> See, e.g., James L. Sherley, *Preborn Black Lives Matter, Too*, WASH. TIMES (Aug. 2, 2020), <https://www.washingtontimes.com/news/2020/aug/2/preborn-black-lives-matter-too>. To be sure, the messages espoused by these antiabortion groups have been countered by others in the Black community who have offered a more nuanced message. While some Black evangelicals reject abortion, they nonetheless recognize "a contradiction in the great concern some lawmakers and activists show toward the fetus versus the limited focus on policies that uplift black communities." John Eligon, *When 'Black Lives Matter' Is Invoked in the Abortion Debate*, N.Y. TIMES, July 6, 2019.

<sup>221</sup> 274 U.S. 200 (1927).

<sup>222</sup> *Id.* at 205, 207.

*Buck v. Bell* has been discredited, it has never been formally overruled.<sup>223</sup> Indeed, to this day, many states have maintained policies that limit and constrain the reproductive choices of individuals with disabilities.<sup>224</sup>

Although the reproductive justice movement has sought to highlight the role that disability has played in regulating and constraining reproductive decisionmaking, it is also worth noting how disability has worked in tandem with race to shape the reproductive landscape. Again, the country's experience with eugenics is illustrative. The eugenicist commitment to advancing the fittest of the human race focused on both maintaining racial purity and eliminating traits deemed undesirable, including mental and physical disabilities.

On this account, we might understand *Buck v. Bell* as not only a case about the state's antipathy for the cognitively disabled, but also about the state's investment in racial purity and betterment. As scholar Adam Cohen has argued, Virginia's sterilization of Carrie Buck was informed by the young woman's unfortunate economic and family circumstances as much as her alleged "feeble-mindedness."<sup>225</sup> As Cohen notes, at the time of her institutionalization, Carrie Buck was poor, unmarried, and pregnant—hardly representative of the best of the white race.<sup>226</sup> Given her circumstances, it was unsurprising that Dr. Albert Priddy, the director of the Colony where Buck was institutionalized, categorized her as part of "the shiftless, ignorant, and worthless class of antisocial whites of the South"<sup>227</sup> who posed, as much as people of color, a threat to the purity of the white race.<sup>228</sup>

Critically, race and disability are not just intertwined in the history of

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<sup>223</sup> See *Skinner v. Oklahoma*, 316 U.S. 535, 542 (1942); see also Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 24 (1996) ("Skinner qualified, but did not overrule *Buck*."); Robert L. Burgdorf, Jr. & Marcia Pearce Burgdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995, 1011 (1977) (noting that *Skinner* "does not . . . overrule" *Buck*).

<sup>224</sup> Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 807 (arguing against the traditional and paternalistic model of sterilization law as applied to the mentally disabled); Maura McIntyre, Note, *Buck v. Bell and Beyond: A Revised Standard to Evaluate the Best Interests of the Mentally Disabled in the Sterilization Context*, 2007 U. ILL. L. REV. 1303, 1303 (2007) (detailing the inconsistent and unjust sterilization approval procedures used throughout the United States and proposing a "revised best interest" standard).

<sup>225</sup> ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK* 58 (2016).

<sup>226</sup> *Id.*

<sup>227</sup> PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* 131-32, 134 (2010).

<sup>228</sup> Cohen, *supra* note 225, at 58 ("Southern eugenicists were particularly concerned with the lowest economic class, people often disparagingly referred to as 'poor white trash,' who were seen as repositories of the worst of the white race's germplasm.").

eugenics. They have become linked in contemporary discourses about abortion rights. As reproductive justice advocates have noted, in campaigning for greater reproductive choice, the reproductive rights movement has, perhaps inadvertently, taken a dim view of disability. Reproductive rights advocates have described “[d]isability in the context of a termination decision for a wanted pregnancy . . . as a ‘tragedy’ and a ‘defect’—using the language of pain, suffering, and devastation. The focus is on the potential suffering a child with a disability will allegedly experience and inevitably bring on parents and other siblings. The fetus with a disability that is survivable postpartum is often considered damaged.”<sup>229</sup>

By contrast, those opposed to abortion rights point to the empowering and affirming experience that many have had parenting a child with disabilities.<sup>230</sup> According to some abortion opponents, “abortion advocates . . . argue for the right to abort children who might grow up with a disability, as if disease or handicap somehow strips a person of their right to live and relegates them to a life of misery.”<sup>231</sup> The National Right to Life Committee makes the point more explicitly: “Aborting a child with a disability or illness is the height of prejudice.”<sup>232</sup>

To combat what they view as prejudice against the disabled unborn, antiabortion groups have yoked concerns with discrimination on the basis of disability to concerns about race and sex discrimination. Across the country, including at the federal level, legislation that prohibits abortion for the purpose of “trait selection” has proliferated.<sup>233</sup> These trait-selection laws prohibit the exercise of the abortion right if undertaken for the purpose of sex or race selection or to avoid bearing a child with a disability. In defending such laws, antiabortion groups have framed their claims explicitly in terms of discrimination and inequality. The Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011

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<sup>229</sup> Sujatha Jesudason & Julia Epstein, *The Paradox of Disability in Abortion Debates: Bringing the Pro-choice and Disability Rights Communities Together*, 84 *CONTRACEPTION* 541, 541 (2011).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* (quoting *Common Abortion Fallacies: Poverty, Rape, Disability, and “Unwantedness” Do Not Morally Justify Abortion*, Abort73 (last updated July 21, 2020), [https://www.abort73.com/abortion/common\\_objections/](https://www.abort73.com/abortion/common_objections/)).

<sup>232</sup> National Right to Life (@nrlc), Twitter (Sept. 27, 2019, 3:00 PM), <https://twitter.com/nrlc/status/1177659189344243715>.

<sup>233</sup> See, e.g., Prenatal Nondiscrimination Act (PRENDA) of 2016, H.R. 4924, 114th Cong. (2016); Morrison, *supra* note 96, at 46 n.69 (describing legislative efforts to ban abortion based on race); *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, Guttmacher Institute (Aug. 1, 2020), <https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly> (outlining state and federal abortion legislation in various cases).

(“PRENDA”),<sup>234</sup> a proposed federal trait-selection law is illustrative of this impulse. Not only was the federal bill named for Susan B. Anthony and Frederick Douglass, two towering figures in the struggle for gender and racial equality, according to its sponsors, its criminalization of race and sex selective abortions was intended to address race and gender discrimination within certain racial communities.<sup>235</sup> Specifically, PRENDA sought to address the disproportionately high rate of abortions among Black women, as well as the use of abortion for “son-selection” in certain Asian communities.<sup>236</sup>

Although PRENDA failed at the federal level, its logic lives on—and indeed, has thrived—in state-level trait-selection laws. Such laws prohibit abortion for race, sex, and disability selection and are framed as efforts to eliminate discrimination on the basis of race, sex, and disability. Specifically, those who propose and defend these trait-selection laws emphasize disproportionately high abortion rates among minority communities and the need to antidiscrimination protections to the unborn.<sup>237</sup>

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As the preceding sections make clear, the history of race and abortion is more nuanced and complicated than Justice Thomas’s thin account in the *Box* concurrence suggests. Race and racism have long shadowed efforts to both restrict and broaden reproductive freedom in the United States. Race and reproduction were inextricably intertwined in the political economy of slavery, and in the postbellum period, again intersected to inform, often in conflicting ways, the criminalization of abortion and contraception and the rise of the eugenics movement. Likewise, in the twentieth century, claims of racial justice and injustice have informed efforts to both expand and contract abortion rights. In this regard, the history that Justice Thomas relies on in the *Box* concurrence is at once incomplete and indeterminate.

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<sup>234</sup> H.R. 3541, the Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011 (“PRENDA”).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *E.g.*, Brief Amicus Curiae of Pro-Life Legal Defense Fund, et al., in Support of Petitioners at 5 - 16, *Box v. Planned Parenthood of Ind. and Ky., Inc.*, 139 S. Ct. 1780 (2019) (No. 18 - 483) (arguing *Box* provided an opportunity to reevaluate abortion rights grounded in eugenics); Brief Amici Curiae of Ethics and Religious Liberty Commission of the Southern Baptist Convention, et al. in Support of Petitioners at 7- 8 & n.8, *Box*, 139 S. Ct. 1780 (No. 18-483) (discussing racial discrimination in abortion and the rate of abortions among non-Hispanic black women); Brief of the Restoration Project, et al., in Support of Petitioners at 5-9, *Box*, 139 S. Ct. 1780 (No. 18 - 483) (arguing that “[m]inority babies in America are at far greater risk from abortion than white babies” and that “[i]n parts of this country, black babies are more likely to be aborted than they are to be born alive”).

But crafting a complete and accurate history of abortion regulation likely was not Justice Thomas’s goal in linking abortion, race, and eugenics. Indeed, in framing his skepticism of abortion in the register of eugenics and racial injustice, Justice Thomas perhaps had a more straightforward outcome in mind. By drawing a straight line between abortion and eugenics, Justice Thomas cast abortion as a potential tool for deracination, while firmly rooting abortion (and contraception) in a past tainted by the stain of racism. As the following Parts explain, in so doing, Justice Thomas’s racialized account of abortion rights underwrites both a short-term strategy to uphold trait-selection laws and a long-term strategy for challenging—and perhaps, overruling—*Roe v. Wade*.

## II. ABORTION, DISABILITY, AND ANTIDISCRIMINATION

It is worth remembering that Justice Thomas’s concurrence in *Box* was a response to the Court’s refusal to take up a challenge to Indiana’s trait-selection law. In this regard, we might understand the concurrence as expressing Justice Thomas’s views as to the constitutionality of trait-selection laws. On this point, Justice Thomas is incredibly transparent. His concurrence operates as both a defense of trait-selection laws, and as a roadmap for upholding these laws in the lower federal courts.

By suggesting that abortion could become a “tool of modern-day eugenics,”<sup>238</sup> the concurrence augments the existing defense of trait-selection laws as antidiscrimination measures that do not trigger the heightened constitutional scrutiny that generally attends restrictions on the abortion right. And importantly, when framed as antidiscrimination measures, rather than as efforts to promote maternal health or the potentiality of life, abortion laws may be more likely to be upheld as legitimate exercises of state authority.<sup>239</sup> Under the Court’s abortion jurisprudence—specifically, *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>240</sup>—to withstand constitutional scrutiny, an abortion restriction may not be an undue burden.<sup>241</sup> That is, it cannot have “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.”<sup>242</sup> Accordingly, if trait-selection abortion restrictions are framed as antidiscrimination measures, states need only show that the challenged

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<sup>238</sup> *Box v. Planned Parenthood*, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring).

<sup>239</sup> *Id.*

<sup>240</sup> 505 U.S. 833 (1992).

<sup>241</sup> *Id.* at 874.

<sup>242</sup> *Id.* at 877 (plurality opinion).

law’s antidiscrimination gains exceed the burdens on abortion access.<sup>243</sup>

Moreover, using the racialized critique of abortion to characterize trait-selection laws as antidiscrimination measures may be a means of sidelining *Casey*’s substantial-obstacle analysis entirely. The procedural history of *Box* provides a glimpse of this line of reasoning. An earlier three-judge panel of the Seventh Circuit invalidated the challenged Indiana trait-selection law on the ground that the law was an “absolute prohibition[] on abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State.”<sup>244</sup> However, in an opinion dissenting from the Seventh Circuit’s denial of a rehearing *en banc*, Judge Easterbrook was “skeptical” of this view “because *Casey* did not consider the validity of an *anti-eugenics* law.”<sup>245</sup> To illustrate his concerns, Judge Easterbrook offered an analogy: Traditionally, the common law permitted employers to terminate an employee “for any or no reason.”<sup>246</sup> However, “by the late twentieth century courts regularly created exceptions when the discharge was based on race, sex, or disability.”<sup>247</sup> On this account, *Casey* provided no guidance as to “whether a parallel ‘except’ clause is permissible for abortions.”<sup>248</sup>

Further, Judge Easterbrook noted, the legal challenge that resulted in the Court’s decision in *Casey* focused narrowly on a single question—whether “a woman is entitled to decide whether to bear a child.”<sup>249</sup> The Indiana trait-selection law encompassed an entirely different issue—as Judge Easterbrook maintained, “there is a difference between ‘I don’t want a child’ and ‘I want a child, but only a male.’”<sup>250</sup> The question of whether abortion may be used “to promote eugenic goals” was completely outside of the scope of “the statutes *Casey* considered.”<sup>251</sup> As such, it was an open question as to whether *Casey* was applicable to the challenged trait-selection law.

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<sup>243</sup> See *id.* at 878.

<sup>244</sup> *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm’r of Indiana State Dep’t of Health*, 888 F.3d 300, 306 (7th Cir. 2018), *reh’g en banc granted, judgment vacated*, 727 F. App’x 208 (7th Cir. 2018), *vacated*, 917 F.3d 532 (7th Cir. 2018), and *opinion reinstated*, 917 F.3d 532 (7th Cir. 2018), and *cert. granted in part, judgment rev’d in part sub nom.* *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780 (2019).

<sup>245</sup> *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm’r of Indiana State Dep’t of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting) (emphasis added).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

Viewed in tandem with Judge Easterbrook’s dissent, the *Box* concurrence’s potential becomes clearer. On the one hand, the association of abortion with eugenics may serve as a thumb on the scale, imbuing the state’s efforts to limit abortion access with the patina of anti-racism and anti-discrimination. On the other hand, the association may be proffered for the purpose of putting trait-selection laws beyond the scope of the Court’s extant abortion jurisprudence entirely. In either respect, casting abortion restrictions as efforts to combat racism and discrimination may blunt the force of *Roe* and *Casey* as limits on the state’s authority to regulate abortion.

Meaningfully, this short-term strategy has gained traction as a defense for trait-selection statutes in the lower federal courts. For example, in *Preterm-Cleveland v. Himes*,<sup>252</sup> a challenge to a law prohibiting abortion if undertaken because of a Down Syndrome diagnosis,<sup>253</sup> the State of Ohio defended the law by adverting to its “strong interest in preventing discrimination.”<sup>254</sup> As such, it continued, the constitutional balance of interests was different “from what they were in *Roe* and *Casey*,”<sup>255</sup> in which the state’s interests had been confined to maternal health and the potentiality of life.<sup>256</sup> Because “[t]he Supreme Court has never considered” whether a state’s interest in “prohibiting discrimination” could override a woman’s right to choose an abortion, it remained an open question whether the State’s interest in prohibiting trait discrimination might outweigh a woman’s right to terminate her pregnancy.<sup>257</sup>

The State’s arguments were ultimately unavailing with the district court and a three-judge panel of the Sixth Circuit, both of which enjoined the law on the ground that it constituted a pre-viability ban on abortion, in violation of *Roe* and *Casey*.<sup>258</sup> However, Judge Batchelder dissented from the Sixth Circuit majority, and in doing so, subscribed fully to the logic of the *Box* concurrence.<sup>259</sup> As she explained, the challenged Ohio law, like the Indiana

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<sup>252</sup> 940 F.3d 318 (6th Cir.), *reh’g en banc granted, opinion vacated*, 944 F.3d 630 (6th Cir. 2019).

<sup>253</sup> *Id.* at 320-21.

<sup>254</sup> Brief of Defendants-Appellants Lance Himes, Kim G. Rothermel & Bruce R. Saferin at 33, *Preterm-Cleveland*, 940 F.3d 318 (6th Cir. 2019) (No. 18-3329) [hereinafter Brief of Lance Himes].

<sup>255</sup> *Id.* at 43.

<sup>256</sup> *Id.* at 40-42.

<sup>257</sup> *Id.* at 43-44. On this point, the State also noted that “*Roe* . . . rejected both the notion that the ‘woman’s right [was] absolute’ and the notion that it gave her the option to obtain an abortion ‘for whatever reason she alone chooses.’” *Id.* at 43 (alteration in original) (emphasis omitted) (internal quotation marks omitted) (quoting *Roe v. Wade*, 410 U.S. 113, 153 (1973)).

<sup>258</sup> *Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746, 749 (S.D. Ohio 2018), *aff’d*, 940 F.3d 318 (6th Cir.), *reh’g en banc granted, opinion vacated*, 944 F.3d 630 (6th Cir. 2019); *see* 940 F.3d at 323-25 (analyzing the law under *Roe* and *Casey*).

<sup>259</sup> 940 F.3d 318, 325-28 (Batchelder, J., dissenting).



law at issue in *Box*, “promote[d] a State’s compelling interest in preventing abortion from becoming a tool of modern-day eugenics.”<sup>260</sup> Because the Court’s abortion jurisprudence “did not decide whether the Constitution requires States to allow eugenic abortions,”<sup>261</sup> the State’s interest in preventing discrimination against those with Down Syndrome required the court to “review laws like [the challenged law] under an undue-burden analysis, which is fact-intensive and must consider the State’s interests and the benefits of the law, not just the potential burden it places on women seeking an abortion.”<sup>262</sup> Because “[n]either the district court nor the majority . . . ma[de] a genuine attempt to meet that demand,” Judge Batchelder branded their decisions “insupportable and incorrect.”<sup>263</sup>

Similarly, in *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Parson*,<sup>264</sup> a district court wrestled with whether the State’s interest in prohibiting discrimination could override the abortion right.<sup>265</sup> The court concluded that the “anti-discrimination” provision seemed dangerously close to an impermissible pre-viability abortion ban.<sup>266</sup> Nevertheless, it noted that while “[t]he Supreme Court has not dealt with the merits of this question,” Justice Thomas has “demonstrated great interest in the ultimate question of a State’s authority . . . to prevent ‘abortion from becoming a tool of modern-day eugenics.’”<sup>267</sup>

The State of Arkansas also underscored the unresolved status of trait-selection laws in its briefs in *Little Rock Family Planning Services v. Rutledge*,<sup>268</sup> a challenge to a state statute banning abortions performed solely on the basis of a Down Syndrome diagnosis.<sup>269</sup> In its trial court brief, the State touted its interest in prohibiting discrimination on the basis of disability, and cited Justice Thomas’s *Box* concurrence to support the view that such trait-selective abortions were “eugenical.”<sup>270</sup> And in its appeal to the Eighth Circuit, Arkansas echoed Judge Easterbrook’s skepticism, again citing Justice Thomas in *Box* to support the view that the constitutionality of trait-selection laws “‘remains an open question’ because *Casey* ‘did not

<sup>260</sup> *Id.* at 325 (quoting *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1783 (Thomas, J., concurring)).

<sup>261</sup> *Id.* at 326 (quoting *Box*, 139 S. Ct. at 1792 (Thomas, J., concurring)).

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> 389 F. Supp. 3d 631 (W.D. Mo.), *modified*, 408 F. Supp. 3d 1049 (W.D. Mo. 2019).

<sup>265</sup> *See id.* at 634-35.

<sup>266</sup> *Id.* at 634; *see id.* at 634-36.

<sup>267</sup> *Id.* at 634 (quoting *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring)).

<sup>268</sup> 397 F. Supp. 3d 1213 (E.D. Ark. 2019).

<sup>269</sup> *Id.* at 1220.

<sup>270</sup> Response in Opposition to Plaintiffs’ Motion for a Preliminary Injunction or Temporary Restraining Order at 29-30, *Rutledge*, 397 F. Supp. 3d 1213 (E.D. Ark. 2019) (No. 4:19-cv-00449-KGB).

decide whether the Constitution requires States to allow eugenic abortions.”<sup>271</sup>

This is all to say that in a very short period of time, the *Box* concurrence has been repeatedly marshalled into service to defend the state’s interest in restricting abortion for the purpose of prohibiting discrimination.<sup>272</sup> And in so doing, as these cases make clear, the concurrence’s racialized critique of abortion has been highlighted to show that, in the context of banning a narrow group of abortions, antidiscrimination concerns may themselves serve as a compelling state interest that may well be sufficient to override—or severely limit—a woman’s constitutional right to an abortion. Alternatively, the fact that trait-selection laws are framed as antidiscrimination measures may place them beyond *Casey*’s purview. In this regard, in the short-term, the racialized critique of abortion as eugenical has underwritten a strategy to undermine the limits on state regulation that *Roe* and *Casey* impose.

But critically, in the cases discussed above, the challenged statutes differed from the trait-selection law challenged in *Box*. In *Box*, the Indiana law at issue prohibited abortion if undertaken for purposes of race and sex selection or because of a disability or fetal abnormality.<sup>273</sup> By contrast, the laws challenged in *Himes* and *Rutledge* were narrower, prohibiting abortion if undertaken because of a diagnosis of fetal abnormality (Down Syndrome, in particular).<sup>274</sup> And while the *Box* concurrence mentions the prospect of discrimination on the basis of disability, it is primarily preoccupied with the prospect of racially eugenic abortions.<sup>275</sup> What explains this disjunction?

As discussed above, concerns about race and disability have been imbricated in our history and in the state’s efforts to regulate reproduction. With this history in mind, it is perhaps unsurprising that contemporary pro-life discourse that frames abortion as an attempt to completely eliminate certain disabilities mirrors the contemporary pro-life discourse that associates abortion with efforts to regulate and limit Black reproduction. In

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<sup>271</sup> Brief of Defendants-Appellants at 29-30, *Little Rock Fam. Plan. Servs. v. Rutledge* (No. 19-2690) (8th Cir. Oct. 29, 2019) (quoting *Box*, 139 S. Ct. at 1782 (Thomas, J., concurring)).

<sup>272</sup> The fact that this racialized narrative has found such a receptive audience in the lower federal courts may speak to Justice Thomas’s broad influence. Not only is Justice Thomas regarded as the Court’s most stalwart conservative voice, but also many of his former clerks now populate the ranks of the federal district and circuit courts. See John Kruzel, *Trump’s Supreme Court List Reveals Influence of Clarence Thomas*, *The Hill* (Sept. 13, 2020, 6:00 AM) <https://thehill.com/regulation/court-battles/516109-trumps-supreme-court-list-reveals-influence-of-clarence-thomas>.

<sup>273</sup> *Box*, 139 S. Ct. at 1782 (per curiam).

<sup>274</sup> *Rutledge*, 397 F. Supp. 3d at 1220; *Preterm-Cleveland v. Himes*, 940 F.3d 318, 320 (6th Cir.), *reh’g en banc granted, opinion vacated*, 944 F.3d 630 (6th Cir. 2019).

<sup>275</sup> See *Box*, 139 S. Ct. at 1783-88 (Thomas, J., concurring).

both circumstances, the common thread is abortion's potential as a tool of genocide that reflects discriminatory animus against particular groups.<sup>276</sup> And just as the contemporary account of abortion as racial genocide builds on the reproductive justice movement's focus on the racialized impact of abortion restrictions, trait-selection laws draw on the reproductive justice movement's efforts to surface the ways in which disability functions as an axis of discrimination and oppression.

Cynically, one might argue that in framing its opposition to abortion in terms of race, sex, and disability discrimination, the pro-life movement is not only using antidiscrimination norms opportunistically, it is doing so in a way that divides the coalition of pro-choice advocates and activists. As Professors Sujatha Jesudason and Julia Epstein observe, "reproductive rights proponents can portray disability as a tragic state that justifies abortion—even for wanted pregnancies," while "anti-choice advocates proclaim their value for all life, including individuals with and without disabilities."<sup>277</sup> As Jesudason and Epstein note, this results in a paradox in which "disability rights advocates, generally a group that finds itself in the progressive political camp," are "on the same side as anti-choice advocates who are more usually associated with conservative political positions."<sup>278</sup>

A similar cognitive dissonance arises in the context of race- and sex-selection bans, which put the social justice community's predisposition toward abortion rights in conflict with laws that ostensibly prevent discrimination on the basis of race and sex. In this regard, in the same way that reproductive justice sought to build coalitions between various social justice communities in order to strengthen the demand for reproductive freedom, its methods and vernacular have been co-opted in ways that may actually divide this coalition.

Justice Thomas's association of abortion with eugenics doubles down on the effort to splinter the various constituents of the reproductive rights coalition. But critically, this is not the first time that Justice Thomas has deployed racialized narratives in ways that challenge or disrupt longstanding social justice alliances. His dissent in *Kelo v. City of New London*<sup>279</sup> and his concurrence in *McDonald v. City of Chicago*<sup>280</sup> are

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<sup>276</sup> See George F. Will, *The Real Down Syndrome Problem: Accepting Genocide*, WASH. POST (Mar. 14, 2018, 7:49 PM), [https://www.washingtonpost.com/opinions/whats-the-real-down-syndrome-problem-the-genocide/2018/03/14/3c4f8ab8-26ee-11e8-b79d-f3d931db7f68\\_story.html](https://www.washingtonpost.com/opinions/whats-the-real-down-syndrome-problem-the-genocide/2018/03/14/3c4f8ab8-26ee-11e8-b79d-f3d931db7f68_story.html).

<sup>277</sup> Jesudason & Epstein, *supra* note 229, at 541.

<sup>278</sup> *Id.*

<sup>279</sup> 545 U.S. 469 (2005).

<sup>280</sup> 561 U.S. 742 (2010).

instructive on this point. In *Kelo*, a narrow majority of the Court upheld a private redevelopment scheme as a permissible “public use” under the Takings Clause of the Fifth Amendment.<sup>281</sup> As the majority explained, the redevelopment scheme was a permissible public use because it served the citizens of New London, Connecticut by revitalizing a near-blighted neighborhood with new businesses, housing, and employment opportunities.<sup>282</sup> In a lone dissent, Justice Thomas offered a counterpoint to this rosy urban progress narrative in which he linked the Court’s public use jurisprudence to 1950s and 1960s urban renewal projects that “destroyed predominantly minority communities” and displaced Blacks and other marginalized groups.<sup>283</sup>

Similarly, in *McDonald v. City of Chicago*, Justice Thomas wrote separately to introduce a racialized account of the Second Amendment. The issue in *McDonald* was whether the Second Amendment right to bear arms was incorporated as to the states.<sup>284</sup> The Court held that it was<sup>285</sup> through the Due Process Clause of the Fourteenth Amendment.<sup>286</sup> Justice Thomas joined in the judgment, but he wrote separately to express his own view that the Privileges or Immunities Clause of the Fourteenth Amendment was the better doctrinal home for incorporation.<sup>287</sup> In so doing, he specifically repudiated the logic of *United States v. Cruikshank*,<sup>288</sup> an 1876 case in which the Supreme Court held that, despite the ratification of the Fourteenth Amendment, the Bill of Rights, including Second Amendment protections for the right to keep and bear arms, did not apply to private actors or to state governments.<sup>289</sup> Meaningfully, *Cruikshank* arose from the infamous Colfax Massacre of 1873, in which an armed mob of white militiamen slaughtered dozens of newly freed Blacks, many of whom were unarmed.<sup>290</sup>

In his *McDonald* concurrence, Justice Thomas drew a straight line connecting *Cruikshank* and its failure to protect the individual right to bear arms to the terror that Blacks experienced in the South during the waning

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<sup>281</sup> 545 U.S. at 472-73, 475, 485, 490.

<sup>282</sup> *Id.* at 472, 483.

<sup>283</sup> *Id.* at 522 (Thomas, J., dissenting).

<sup>284</sup> 561 U.S. at 750.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 758 (plurality opinion) (“For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause.”).

<sup>287</sup> *Id.* at 805-11 (Thomas, J., concurring in part and concurring in the judgment).

<sup>288</sup> 92 U.S. 542 (1876).

<sup>289</sup> *McDonald*, 561 U.S. at 808-09 (Thomas, J., concurring in part and concurring in the judgment); see *Cruikshank*, 92 U.S. at 552-53.

<sup>290</sup> *McDonald*, 561 U.S. at 757 (majority opinion).

days of Reconstruction and Redemption.<sup>291</sup> As Justice Thomas explained, *Cruikshank*, which made clear that the right to bear arms was not a privilege or immunity of national citizenship, “enabled private forces, often with the assistance of local governments, to subjugate the newly freed slaves and their descendants through a wave of private violence designed to drive blacks from the voting booth and force them into peonage, an effective return to slavery.”<sup>292</sup> Because “[t]he use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence,”<sup>293</sup> freedmen were uniquely vulnerable to this campaign of intimidation and terror in the postbellum era and well into the twentieth century.<sup>294</sup>

To further underscore *Cruikshank*’s brutal impact on freed Blacks, Justice Thomas’s concurrence detailed the violent lynchings and deaths of numerous Black men, including Emmett Till,<sup>295</sup> the boy whose brutal Mississippi lynching inspired civil rights activism in the 1950s.<sup>296</sup> The point was plain: Till, like other victims of lynching and other forms of racial violence, was unarmed. To the extent that some African Americans were able to stand up to white violence, doing so depended largely on their ability to bear arms. As Justice Thomas explains, “the use of firearms allowed targets of mob violence to survive.”<sup>297</sup>

Much has been made of Justice Thomas’s preoccupation with issues of race in these cases and others.<sup>298</sup> In referencing these cases, I do not wish to engage in the psychologizing that often attends discussions of Justice Thomas’s use of race.<sup>299</sup> Instead, I mean only to suggest that the racialized narratives that Justice Thomas offers in both *Kelo* and *McDonald* may hint at his aspirations for the racialized critique of abortion that he introduces in

<sup>291</sup> *McDonald*, 561 U.S. at 855-56 (Thomas, J., concurring in part and concurring in the judgment).

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 857.

<sup>294</sup> *See id.* at 856 - 57.

<sup>295</sup> *Id.* at 857 (“Emmit [sic] Till, for example, was killed in 1955 for allegedly whistling at a white woman.”).

<sup>296</sup> *See* Ronald Turner, Essay, *Remembering Emmett Till*, 38 HOW. L.J. 411, 420 — 21 (1995).

<sup>297</sup> *McDonald*, 561 U.S. at 858.

<sup>298</sup> *See, e.g.*, COREY ROBIN, THE ENIGMA OF CLARENCE THOMAS 19-61 (2019); Shaun Ossei-Owusu, *Racial Revisionism*, MICH. L. REV. (forthcoming 2020); Corey Robin, *Clarence Thomas’s Radical Vision of Race*, NEW YORKER (Sept. 10, 2019), <https://www.newyorker.com/culture/essay/clarence-thomass-radical-vision-of-race>; Angela Onwuachi-Willig, *Using the Master’s “Tool” to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113 (2005); Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931 (2005); Melissa Murray, *Foiling Clarence Thomas*, A HOUSE DIVIDED (Jan. 28, 2020), <https://ahousedividedapd.com/2020/01/28/foiling-clarence-thomas/>.

<sup>299</sup> *See, e.g.*, KEVIN MERIDA & MICHAEL A. FLETCHER, SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS (2007).

*Box*.

In *Kelo*, Justice Thomas complicates the view that economic redevelopment benefits the entire community by showing that marginalized groups within the community will likely bear the brunt of urban renewal. With a similar logic, his account of racial genocide in *Box* counters the stock reproductive rights narrative that expanding abortion rights is good for women and their families, including women of color. In a similar vein, in *McDonald*, Justice Thomas goes further, showing that the impact of judicial decision-making is borne disproportionately by certain groups while simultaneously countering the progressive view that gun control laws redound to the benefit of minority communities.

As importantly, taken together, Justice Thomas's concurrences in *McDonald* and *Box* lay the foundation for a crucial comparison between gun rights and abortion rights. His racialized account of the Second Amendment underscores that the Constitution's enumerated protections for gun rights is essential to the uplift and survival of the Black community. By contrast, his racialized account of abortion underscores that the unenumerated right to abortion may serve an entirely different purpose—to decimate and eliminate the Black community.

With this in mind, Justice Thomas's likely ambitions for his racialized critique of abortion rights comes into sharper focus. As the following Part argues, the most devastating aspect of the association of abortion with eugenics and racism is not in its short-term benefits for upholding trait-selection laws, but, perhaps less obviously, in its long-term implications for the abortion right writ large. In linking the abortion right to eugenics and racism, Justice Thomas's racialized critique of abortion provides a potent justification—race—for circumventing the demands of stare decisis and overruling *Roe*. On this logic, it is not *Roe*'s roots in an ephemeral notion of liberty or an unenumerated right to privacy that render it a constitutional apostasy.<sup>300</sup> Rather, it is *Roe*'s links to inequality—and more specifically, racial inequality—that ultimately furnish the necessary predicate for revisiting and, indeed, overruling it.

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<sup>300</sup> *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) (“I write separately to reiterate my view that the Court’s abortion jurisprudence, including *Casey* and *Roe v. Wade*, has no basis in the Constitution.”) (internal citations omitted); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 939 (1973) (critiquing *Roe* as unmoored from constitutional text and the Framers’ intent).

## III. RACE-ING ROE

This Part elaborates the argument sketched in Part II: namely, that in drawing on both reproductive justice and racial justice themes, Justice Thomas's *Box* concurrence lays a foundation for undermining, and eventually overruling, *Roe v. Wade*. This Part develops the claim in the following ways. First, section III.A explains the role that stare decisis has played in both entrenching *Roe* and simultaneously fueling the effort to overrule it. As section III.B explains, because of stare decisis, *Roe* cannot be overruled simply because some majority of the Court thinks it improper; instead, a special justification is required. By the *Box* concurrence's logic, in the case of *Roe*, that special justification may be race. With that in mind, this section explains that although the Court professes fidelity to precedent, it has on a number of occasions overruled past precedent for the purpose of redressing racial harm.

And, as section III.C asserts, not only is there a broader history of the Court overruling past precedents in order to remedy racial harms, there is a quite recent history of it doing so. In the most recent term, the Court, in *Ramos v. Louisiana*,<sup>301</sup> overruled a 1972 precedent in part because the earlier Court failed to appreciate the racialized context undergirding the challenged policy.<sup>302</sup> In tandem with the *Box* concurrence, this same logic may serve as a roadmap for challenging *Roe* on the ground that the *Roe* Court failed to properly appreciate the racial context of abortion.

## A. Stare Decisis and Abortion

In 1973, the Court, in *Roe v. Wade*,<sup>303</sup> recognized a constitutional right to choose an abortion. In the half-century since *Roe*, the Court repeatedly has confronted the question of whether or not *Roe* was properly decided<sup>304</sup> and whether it should be overruled.<sup>305</sup> In these disputes, the doctrine of stare decisis served to beat back assaults on *Roe* and the abortion right.

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<sup>301</sup> 140 S. Ct. 1390 (2020).

<sup>302</sup> *Id.* at 1394, 1408.

<sup>303</sup> 410 U.S. 113 (1973).

<sup>304</sup> *E.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 926-27 (1992) (Blackmun, J., concurring in part, concurring in the judgment, dissenting in part) (writing that the Court "correctly" applied principles of privacy rights in *Roe v. Wade*); *id.* at 944 (Rehnquist, C.J., concurring in part, dissenting in part) ("We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases." (citation omitted)); *id.* at 999 (Scalia, J., concurring in the judgment in part and dissenting in part) ("[T]he Justices should do what is legally right by asking two questions: (1) Was *Roe* correctly decided? (2) Has *Roe* succeeded in producing a settled body of law? If the answer to both questions is no, *Roe* should undoubtedly be overruled.").

<sup>305</sup> *E.g.*, *id.* at 944 (Rehnquist, C.J., concurring in the judgment in part, dissenting in part); *id.* at 999 (Scalia, J., concurring in the judgment in part and dissenting in part).

Latin for “let the decision stand,” *stare decisis* maintains that the Court cannot simply overrule past decisions because it believes they are wrong.<sup>306</sup> Doing so would compromise the predictability and order of the judicial system, while exposing the Court to claims of illegitimacy and partisanship.<sup>307</sup> In this regard, throughout the 1980s, the Court, citing *stare decisis*, rejected repeated invitations to overrule *Roe*.<sup>308</sup> Although some members of the Court insisted that *Roe* was wrongly decided and should be overruled,<sup>309</sup> a majority of the Court, nodding to *stare decisis*, declined to do so on the ground that it would undermine the predictability and legitimacy of the Court’s pronouncements.<sup>310</sup>

In 1992, the Court again faced a frontal challenge to *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>311</sup> Again, instead of overruling *Roe*, a plurality of the *Casey* Court, citing concerns for *stare decisis*, explicitly reaffirmed what it deemed to be *Roe*’s “essential holding,” recognizing a woman’s right to choose an abortion.<sup>312</sup> Meaningfully, however, *Casey* also affirmed the state’s interest in regulating abortion in order to promote women’s health and the “potentiality of life,”<sup>313</sup> and discarded the strict scrutiny standard of review prescribed in *Roe* in favor of the more permissive “undue burden”

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<sup>306</sup> See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”); see also Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1845 (2013) (noting the “overarching tension . . . between the law’s being ‘settled’ and its being ‘settled right’” (quoting *Burnet*, 285 U.S. at 406 (Brandeis, J., dissenting))).

<sup>307</sup> See *Bush v. Vera*, 517 U.S. 952, 985 (1996) (“Our legitimacy requires, above all, that we adhere to *stare decisis*, especially in such sensitive political contexts as the present, where partisan controversy abounds.”)

<sup>308</sup> See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 521 (1989) (plurality opinion); *id.* at 559-60 (Blackmun, J., concurring in part and dissenting in part); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 779-81 (1986) (Stevens, J., concurring); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 419-20 (1983).

<sup>309</sup> See, e.g., *Webster*, 492 U.S. at 532 (Scalia, J., concurring in part and concurring in the judgment) (calling on the Court to “more explicitly” overrule *Roe*); *Thornburgh*, 476 U.S. at 788 (White, J., dissenting) (“In my view, the time has come to recognize that *Roe v. Wade* . . . ‘departs from a proper understanding’ of the Constitution and to overrule it.” (quoting *Garcia v. Metro. Transit Auth.*, 469 U.S. 528, 557 (1985))).

<sup>310</sup> *Webster*, 492 U.S. at 560 (Blackmun, J., concurring in part and dissenting in part) (“By refusing to explain or to justify its proposed revolutionary revision in the law of abortion, and by refusing to abide not only by our precedents, but also by our canons for reconsidering those precedents, the plurality invites charges of cowardice and illegitimacy to [the Court’s] door.”); *City of Akron*, 462 U.S. at 420 (“We respect [the principle of *stare decisis*] today, and reaffirm [*Roe*].”).

<sup>311</sup> 505 U.S. 833 (1992).

<sup>312</sup> *Id.* at 845-46 (“[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed.” *Id.* at 846.).

<sup>313</sup> *Id.* at 871 (plurality opinion) (quoting *Roe v. Wade*, 410 U.S. 113, 162 (1973) (alteration in original)).



standard.<sup>314</sup> As discussed earlier, this new, more permissive standard now governs judicial review of abortion restrictions.<sup>315</sup> For this reason, as many have argued, *Casey* was a Pyrrhic victory for abortion rights—one that left *Roe* standing, but gutted its substantive protections for abortion rights.<sup>316</sup> In truth, *Casey* was a boon to abortion opponents, providing a more permissive standard of review for abortion restrictions and granting states broad license to restrict and regulate abortion rights.<sup>317</sup> In this regard, *Casey* was both a formal victory for abortion rights (retaining *Roe*) and a practical victory for abortion opponents (restricting the abortion right).<sup>318</sup>

And critically, *Casey* was crucially important for the Court's jurisprudence about stare decisis and precedent itself. In rejecting the invitation to overrule *Roe*, the *Casey* plurality opinion made clear that the decision to overrule a prior decision is not one undertaken lightly.<sup>319</sup> Instead, when a court "reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."<sup>320</sup> Among the considerations specifically articulated in *Casey* are whether: (1) the precedent in question "has proven to be intolerable simply in defying practical workability;" (2) "the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation;" (3) "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine;" or (4) "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant

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<sup>314</sup> *Id.* at 876.

<sup>315</sup> *See* *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring in the judgment) (recognizing that the abortion restriction in question should be evaluated under *Casey*'s undue burden standard).

<sup>316</sup> Murray, *supra* note 13, at 314-16; Linda Greenhouse & Reva Siegel, *The Difference a Whole Woman Makes: Protection for The Abortion Right After Whole Woman's Health*, 126 YALE L.J.F. 149, 151 (2016); Serena Mayeri, *How Abortion Rights Will Die a Death by 1,000 Cuts*, N.Y. TIMES (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/opinion/brett-kavanaugh-abortion-rights-roe-casey.html>.

<sup>317</sup> *E.g.*, Dawn Johnsen, *The Outer Shell*, SLATE (Jan. 25, 2006, 5:01 PM), <https://slate.com/news-and-politics/2006/01/the-hollowing-out-of-roe-v-wade.html> (contending *Casey*'s "malleable undue-burden standard . . . almost certainly will continue to serve as the vehicle for an increasingly restrictive abortion regime").

<sup>318</sup> *E.g.*, Nina Martin, *The Supreme Court Decision That Made a Mess of Abortion Rights*, MOTHER JONES (Feb. 29, 2016), <https://www.motherjones.com/politics/2016/02/supreme-court-decision-mess-abortion-rights/> (calling *Casey* "a clouded victory for abortion rights," because "[e]ven as [*Casey*] upheld the right to abortion, the plurality opinion took [*Roe*] apart"); Linda J. Wharton & Kathryn Kolbert, *Preserving Roe v. Wade . . . When You Win Only Half the Loaf*, 24 STAN. L. & POL'Y REV. 143, 144-45 (characterizing *Casey* as a "partial victory" that "secured *Roe*'s formal status, but w[as] unable to forestall a plethora of burdensome abortion restrictions that increasingly threaten to make abortion services unavailable to America's most vulnerable women").

<sup>319</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992).

<sup>320</sup> *Id.*

application or justification.”<sup>321</sup> In recent years, the Court has adopted a kind of shorthand for these considerations, concluding that where one or more of these factors is present, a decision is “egregiously wrong” and may be overruled.<sup>322</sup>

In this way, even as *Casey* declined to overrule *Roe*, it nonetheless made clear why, for abortion opponents, merely stripping *Roe* of its substance was cold comfort, indeed. For the antiabortion movement, whatever gains *Casey* offered were overshadowed by the fact that *Roe* survived. And indeed, it survived in the face of a constitutional inquiry that refused to denounce its reasoning as erroneous, emphasizing instead its entrenchment as a right that many had come to rely upon.<sup>323</sup> In this regard, in reaffirming *Roe*, *Casey* further entrenched the view that the Constitution properly recognizes and protects a right to choose an abortion.<sup>324</sup> But even as *Casey* afforded states broader latitude to restrict abortion rights, it also engendered other difficulties. After all, stare decisis does more than demand respect for precedent as settled law: it lends “a veneer of respectability”<sup>325</sup> to the underlying precedent that suggests that the precedent is correct.<sup>326</sup> On this account, in the wake of *Casey*, “stare decisis is both the reason why *Roe* cannot be overturned and why it must be.”<sup>327</sup>

To be sure, abortion opponents have, despite the Court’s repeated reaffirmance of *Roe*, maintained the hope that the Court will, one day, cast aside stare decisis and formally discard *Roe*. Indeed, it is the prospect of cultivating the conditions under which the Court might overrule that inspires presidential candidates to vow to appoint only pro-life justices who will overrule *Roe v. Wade*.<sup>328</sup> But critically, as *Casey* makes clear,<sup>329</sup> even with the desired personnel changes on the Court, the pressure to observe the strictures of stare decisis are considerable—particularly in the hyper-politicized context of abortion rights.<sup>330</sup> On this account, to overrule *Roe*, it

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<sup>321</sup> *Id.* at 854-55 (internal citations omitted).

<sup>322</sup> *Ramos v. Louisiana*, 140 S. Ct. 1390, 1412, 1414-15 (2020) (Kavanaugh, J., concurring in part).

<sup>323</sup> *Casey*, 505 U.S. at 856.

<sup>324</sup> The statements of those in the antiabortion movement make clear these concerns that leaving *Roe* undisturbed as a formal matter lends credence to the view that abortion is a constitutionally protected right. The United States Conference of Catholic Bishops notes on its website that many Americans view *Roe* “as being immutable, permanent, ‘settled law’”—“elevated . . . to the stature of ‘freedom of speech,’ ‘trial by jury’ and other bedrock American principles.” Susan E. Wills, *Ten Legal Reasons to Reject Roe v. Wade*, United States Conference of Catholic Bishops, <http://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/ten-legal-reasons-to-reject-roe.cfm> (last visited July 8, 2020).

<sup>325</sup> *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring).

<sup>326</sup> *Murray*, *supra* note 13, at 316.

<sup>327</sup> *Murray*, *supra* note 13, at 310.

<sup>328</sup> *Murray*, *supra* note 13, at 308.

<sup>329</sup> *Casey*, 505 U.S. at 865-66.

<sup>330</sup> *Id.* at 310.

is not enough simply to cobble together a majority of five who believe *Roe* was wrongly decided. Stare decisis demands more than the conviction that an earlier Court got it wrong. As *Casey* and the other precedents on precedent make clear, more is required—indeed, a special justification is needed to circumvent stare decisis and trigger reconsideration of an earlier decision.

As the following section explains, one such special justification that may compel a break with precedent is an interest in correcting racial injustice. Indeed, the foundation for using race and concerns about racial justice as a predicate for reconsidering a past decision has already been laid in the Court’s jurisprudence.

### B. Race and Precedent

Critically, the *Box* concurrence was not Justice Thomas’s only notable separate writing in October Term 2018. In *Gamble v. United States*,<sup>331</sup> the Court declined to overrule the separate sovereigns exception to the Fifth Amendment’s prohibition against double jeopardy.<sup>332</sup> Justice Thomas wrote separately “to address the proper role of the doctrine of *stare decisis*.”<sup>333</sup> As Justice Thomas explained, the Court’s prioritization of settled over right in its consideration of precedent elevates and entrenches “demonstrably erroneous decisions.”<sup>334</sup> In a constitutional democracy where the judicial role is confined to interpreting the law, Justice Thomas wrote, slavish adherence to a precedent that is “demonstrably incorrect. . . is tantamount to *making* law, and adhering to it both disregards the supremacy of the Constitution and perpetuates a usurpation of the legislative power.”<sup>335</sup> According to Justice Thomas, “[w]hen faced with a demonstrably erroneous precedent,” federal courts are duty-bound to “not follow it.”<sup>336</sup>

It is no secret that the “muscular vision of stare decisis” that Justice Thomas articulates in *Gamble* takes aim at *Roe* and its progeny,<sup>337</sup> which Justice

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<sup>331</sup> 139 S. Ct. 1960.

<sup>332</sup> *Id.* at 1963-64.

<sup>333</sup> *Id.* at 1981 (Thomas, J., concurring).

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 1984.

<sup>336</sup> *Id.*

<sup>337</sup> Melissa Murray, *Party of Five?: Setting the Table for Roe v. Wade*, Scotusblog (July 24, 2019, 3:18 PM), <https://www.scotusblog.com/2019/07/symposium-party-of-five-setting-the-table-for-roe-v-wade/> (“[I]n offering this muscular vision of stare decisis and the judicial role, Thomas takes direct aim at *Casey*, the 1992 case that not only upheld the right to an abortion first recognized in *Roe*, but also identified a series of factors that courts must weigh in determining whether overruling an extant precedent is warranted.”); see Rebecca Falconer, *Justice Thomas: Supreme Court Shouldn’t Follow Erroneous Precedent*, AXIOS (June 18, 2019), <https://www.axios.com/justice-thomas-supreme-court-erroneous->

Thomas repeatedly has denounced as having “no basis in the Constitution.”<sup>338</sup> Still, he could not garner another supporter for his view—the *Gamble* majority remained faithful to traditional stare decisis principles, insisting that any “departure from precedent ‘demands special justification.’”<sup>339</sup>

So, what might constitute a “special justification” sufficient to warrant breaking with the past and overruling an earlier precedent—especially one like *Roe* that has been repeatedly reaffirmed?<sup>340</sup> If past is prologue, then an interest in remedying racial discrimination and racial harms might indeed suffice to justify a departure from stare decisis. The Court’s history bears this out.

Consider *Brown v. Board of Education*,<sup>341</sup> where the Court unanimously overruled *Plessy v. Ferguson*<sup>342</sup> and declared the principle of “separate but unequal” unconstitutional.<sup>343</sup> In overruling *Plessy*, which had been upheld in prior challenges,<sup>344</sup> the Court focused on factors that the *Plessy* Court had not—and indeed, could not—appreciate when it rendered its decision to bless de jure segregation. As the *Brown* Court explained, neither the *Plessy* Court nor the framers of the Fourteenth Amendment could have appreciated the importance of public education in a democratic society.<sup>345</sup> By 1954, however, public education had become “perhaps the most important function of state and local governments,” as it was “required in the performance of our most basic public responsibilities” and was regarded as “the very foundation of good citizenship.”<sup>346</sup> But more importantly, the

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precedent-d3754206-a7a5 - 4612 - 8932 - 762b3a78bf8c.html; Lawrence Hurley, *U.S. Supreme Court Declines to Expand ‘Double Jeopardy’ Protections*, REUTERS (June 17, 2019, 7:34 AM), <https://www.reuters.com/article/us-usa-court-doublejeopardy/u-s-supreme-court-declines-to-expand-double-jeopardy-protections-idUSKCN1T1ITC>.

<sup>338</sup> *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Thomas, J., concurring). Indeed, in his concurrence in *Gamble*, Justice Thomas specifically identified as “the most egregious example of [an] illegitimate use of stare decisis” the Court’s substantive due process jurisprudence, which includes (although it is not limited to) its abortion jurisprudence. *Gamble*, 139 S. Ct. at 1988 - 89.

<sup>339</sup> *Gamble*, 139 S. Ct. at 1969 (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

<sup>340</sup> *E.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 870 (1992) (describing the Court’s “unbroken commitment . . . to the essential holding of *Roe*,” *id.* at 870 (plurality opinion), and concluding this holding should be “reaffirmed,” *id.* at 846 (majority opinion)); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 556 n.11 (1989) (Blackmun, J., concurring in part and dissenting in part) (noting the Court’s “numerous cases reaffirming *Roe*”); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986) (“Again today, we reaffirm the general principles laid down in *Roe* . . . .”); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 420 (1983) (“We respect [stare decisis] today, and reaffirm [*Roe*].”)

<sup>341</sup> 347 U.S. 483 (1954).

<sup>342</sup> 163 U.S. 537 (1896).

<sup>343</sup> 347 U.S. at 494-95.

<sup>344</sup> *See id.* at 491-92 (collecting cases).

<sup>345</sup> *See id.* at 489-90.

<sup>346</sup> *Id.* at 493.

*Plessy* Court had not fully grappled with the way that state-sanctioned segregation “generate[d] a feeling of inferiority . . . that may affect [black children’s] hearts and minds in a way unlikely ever to be undone.”<sup>347</sup> While the deleterious impact of segregation was “amply supported by modern authority,”<sup>348</sup> such knowledge was likely unavailable “at the time of *Plessy v. Ferguson*.”<sup>349</sup> Put differently, the *Plessy* Court had deliberated in a blind, unconscious of the future import of public school and the psychological weight of segregation. In overruling *Plessy*, *Brown* was a means of considering—and indeed, remedying—the racial injuries that the *Plessy* Court had overlooked.

*Brown*’s overruling of *Plessy* is not the only instance of a later Court accounting for race and racism in ways that earlier Courts had not. *McLaughlin v. Florida*<sup>350</sup> and *Loving v. Virginia*<sup>351</sup> struck down criminal prohibitions on interracial relationships, and in the process, repudiated *Pace v. Alabama*,<sup>352</sup> an 1883 decision in which the Court declared Alabama’s antimiscegenation laws constitutional on the ground that they applied with equal force to blacks and whites alike.<sup>353</sup> When the *McLaughlin* Court took up the challenge to Florida’s ban on interracial cohabitation, it acknowledged that *Pace* and its “equal application”<sup>354</sup> theory was “controlling authority.”<sup>355</sup> Nevertheless, the *McLaughlin* Court struck down the challenged law, noting that *Pace*’s “narrow view of the Equal Protection Clause [had been] swept away”<sup>356</sup> in favor of a “strong policy [that] renders racial classifications ‘constitutionally suspect.’”<sup>357</sup>

Three years later, in *Loving*, the Court applied its concern with *Pace*’s flawed reasoning to the question of interracial marriage.<sup>358</sup> As Florida had done in *McLaughlin*, Virginia defended the challenged laws by reference to *Pace*, arguing that so long as the prohibition and penalties on interracial marriage applied equally to blacks and whites, they were constitutionally sound.<sup>359</sup> In rejecting this view, the *Loving* Court built upon *McLaughlin*,

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<sup>347</sup> *Id.* at 494.

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> 379 U.S. 184 (1964).

<sup>351</sup> 388 U.S. 1 (1967).

<sup>352</sup> 106 U.S. 583 (1883).

<sup>353</sup> *Id.* at 585.

<sup>354</sup> 379 U.S. at 191.

<sup>355</sup> *Id.* at 188.

<sup>356</sup> *Id.* at 190.

<sup>357</sup> *Id.* at 192 (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

<sup>358</sup> 388 U.S. at 10-11.

<sup>359</sup> *Id.* at 10 (“The State finds support for its ‘equal application’ theory in the decision of the Court in [*Pace*].”).

noting that because the Fourteenth Amendment’s “clear and central purpose . . . was to eliminate all official state sources of invidious racial discrimination,” the necessary question was not whether the prohibition applied equally to all races, but rather whether the interracial marriage ban constituted “arbitrary and invidious discrimination.”<sup>360</sup> The *Loving* Court underscored its break with *Pace* by noting that “[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”<sup>361</sup>

The Court’s repudiation of earlier decisions because of concerns about race and racism is not limited to the decisions of the Civil Rights Era. As recently as 2018, the Court famously discarded a precedent, not because the earlier Court did not appreciate the racial impact of its decision, but rather, because it did.<sup>362</sup> Issued in the heat of World War II, and after the bombing of Pearl Harbor, *Korematsu v. United States*<sup>363</sup> upheld an executive order requiring the internment of Japanese nationals and American citizens of Japanese descent.<sup>364</sup> There was no doubt that the *Korematsu* Court understood the racial impact of its decision. It explicitly acknowledged that the challenged executive order classified on the basis of race, triggering strict scrutiny,<sup>365</sup> and all three dissenters specifically identified the order’s obvious racism and xenophobia as the basis for their objections.<sup>366</sup>

Although its racism had been roundly criticized for years,<sup>367</sup> *Korematsu* remained good law<sup>368</sup>—until the Court’s disposition of *Trump v. Hawaii* in 2018.<sup>369</sup> There, the Court considered the constitutionality of the “Travel Ban,” an executive order limiting admission to the United States of nationals from certain Muslim-majority countries.<sup>370</sup> The Court upheld the executive order,<sup>371</sup> dismissing claims that the President’s statements in advance of the executive order evinced discriminatory animus toward

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<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at 12.

<sup>362</sup> *See Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

<sup>363</sup> 323 U.S. 214 (1944).

<sup>364</sup> *Id.* at 214-15.

<sup>365</sup> *See id.* at 216.

<sup>366</sup> *Id.* at 226 (Roberts, J., dissenting) (“[This] is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry . . . .”); *id.* at 242 (Murphy, J., dissenting) (“I dissent . . . from this legalization of racism.”); *id.* at 243 (Jackson, J., dissenting) (calling the majority’s decision “an attempt to make an otherwise innocent act a crime merely because this prisoner . . . belongs to a race from which there is no way to resign”).

<sup>367</sup> *See generally* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011); Jamal Greene, *Is Korematsu Good Law?*, 128 YALE L.J.F. 629 (2019).

<sup>368</sup> Greene, *The Anticanon*, *supra* note 367, at 399 (noting the *Korematsu* decision had not been formally overruled by the Supreme Court).

<sup>369</sup> 138 S. Ct. 2392, 2423 (2018).

<sup>370</sup> *See id.* at 2403-06.

<sup>371</sup> *Id.* at 2420-23.

Muslims.<sup>372</sup> However, amidst claims from dissenting Justice Sotomayor that the majority’s reasoning recalled “that of *Korematsu v. United States*,”<sup>373</sup> the majority took the unusual step of “express[ing] what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.”<sup>374</sup>

Taken together, these cases make clear that, modernly, an interest in correcting racial wrongs has shaped the Court’s thinking about stare decisis—and indeed, has on occasion provided the special justification necessary for the Court to depart from precedent. Of course, some might argue that these cases are exemplary because they involved facial racial classifications. But, as the section that follows makes clear, facial racial classifications are not necessary for race to form a basis for reconsidering—and overruling—an earlier precedent.

### C. *Ramos v. Louisiana*

As the previous section argues, some of the Court’s most celebrated departures from stare decisis have involved race and racism. More particularly, many of these departures were explicitly contemplated as efforts to remedy the impact of race and racism in judicial decisionmaking. Some might argue that the interest in overruling as a means of addressing racial injustices has been limited to certain cases—and certain periods—in the Court’s history, and that this phenomenon is unlikely to continue in the future. However, in its most recent term, the Court overruled an earlier decision in part because it had failed to properly consider racial harm in its disposition of the case.

*Ramos v. Louisiana*<sup>375</sup> involved a challenge to Louisiana’s policy of allowing criminal convictions to proceed from nonunanimous jury verdicts.<sup>376</sup> At issue in *Ramos* was whether the Fourteenth Amendment fully incorporates against the states the Sixth Amendment’s requirement for a unanimous jury verdict in order to convict.<sup>377</sup> Meaningfully, the Supreme Court had confronted the same question before in a set of earlier cases, *Apodaca v. Oregon*<sup>378</sup> and *Johnson v. Louisiana*,<sup>379</sup> decided in 1972.

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<sup>372</sup> See *id.* at 2421-22.

<sup>373</sup> *Id.* at 2447 (Sotomayor, J., dissenting).

<sup>374</sup> *Id.* at 2423 (majority opinion) (quoting *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

<sup>375</sup> 140 S. Ct. 1390 (2020).

<sup>376</sup> *Id.* at 1394.

<sup>377</sup> *Id.* at 1394-95.

<sup>378</sup> 406 U.S. 404 (1972).

Consolidated for review, the twin appeals produced “a tangle of seven separate opinions.”<sup>380</sup> Four justices agreed that the Sixth Amendment right to a jury trial, while incorporated against the states under the Fourteenth Amendment, did not require unanimous jury verdicts.<sup>381</sup> Justice Powell concurred with the judgments in both *Apodaca* and *Johnson*, writing separately to note that while the Sixth Amendment required unanimous juries in federal criminal cases, this feature of federal criminal practice was not incorporated as to the states.<sup>382</sup> Although Justice Powell agreed with the four dissenting Justices that “unanimous jury decisions . . . are constitutionally required in federal prosecutions,”<sup>383</sup> he alone on the *Apodaca* Court advanced a theory of dual-track incorporation under which “a single right can mean two different things depending on whether it is being invoked against the federal or a state government.”<sup>384</sup> Taken together, *Apodaca* and *Johnson* stood for the proposition that the Sixth Amendment guarantees a right to a unanimous jury, but that such a right does not extend to defendants in *state* trials.<sup>385</sup>

With this jurisprudential history in mind, it was not surprising that, at oral argument, the justices and the litigants were preoccupied with the question of stare decisis, and more particularly, the circumstances under which the Court might depart from a set of past decisions that were almost fifty years old and had been reaffirmed in subsequent challenges.<sup>386</sup> Indeed, when the Court announced its decision in *Ramos*, the question of stare decisis was center stage, with a majority of six justices overruling *Apodaca* (and, by extension, *Johnson*) on the ground that Louisiana’s rule permitting nonunanimous jury convictions was inconsistent with the logic and history of the Sixth Amendment.<sup>387</sup>

In so doing, the *Ramos* majority declared *Apodaca* “gravely mistaken”—so much so that “no Member of the Court today defends either [the plurality opinion or Justice Powell’s separate concurrence endorsing dual-track incorporation] as rightly decided.”<sup>388</sup> But meaningfully, the *Ramos* majority

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<sup>379</sup> 406 U.S. 356 (1972).

<sup>380</sup> Brief for Petitioner at 6-7, *Ramos*, 140 S. Ct. 1390 (No. 18-5924).

<sup>381</sup> See *Apodaca*, 406 U.S. at 406.

<sup>382</sup> *Johnson*, 406 U.S. at 373 (Powell, J., concurring in *Johnson* and concurring in the judgment in *Apodaca*).

<sup>383</sup> *Id.* at 383 (Douglas, J., dissenting); see *Apodaca*, 406 U.S. at 414-15 (Stewart, J., dissenting).

<sup>384</sup> *Ramos*, 140 S. Ct. at 1398.

<sup>385</sup> *Id.* at 1397-98.

<sup>386</sup> Indeed, at oral argument, Justice Alito observed, “last term, the majority was lectured pretty sternly in a couple of dissents about the importance of stare decisis and about the impropriety of overruling established rules.” Transcript of Oral Argument at 7-8, *Ramos*, 140 S. Ct. 1390 (No. 18-5924).

<sup>387</sup> 140 S. Ct. at 1391-92.

<sup>388</sup> *Id.* at 1405.



went beyond simply recasting *Apodaca* as an improperly reasoned Sixth Amendment “outlier.”<sup>389</sup> Race, the *Ramos* majority insisted, also shaped its consideration of *Apodaca*’s precedential value.

As the *Ramos* majority explained, the interest in permitting nonunanimous jury verdicts was inextricably intertwined with a desire to “establish the supremacy of the white race.”<sup>390</sup> When Louisiana drafted its postbellum constitution in 1898, an interest in maintaining white supremacy underlaid the proceedings, “and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements.”<sup>391</sup> The nonunanimous jury rule was of a piece with these efforts. Recognizing that any attempt to explicitly bar Blacks from jury service would draw “unwanted national attention”<sup>392</sup> and would be struck down under the Fourteenth Amendment,<sup>393</sup> Louisiana instead “sought to undermine African-American participation on juries” by “sculpt[ing] a ‘facially race-neutral’ rule” that would “ensure that African-American juror service would be meaningless.”<sup>394</sup> Adopted in the 1930s, the Oregon jury rule did not share the same Jim Crow provenance as Louisiana’s, but as the majority noted, its origins could be “similarly traced to the rise of the Ku Klux Klan and efforts to dilute ‘the influence of racial, ethnic, and religious minorities on Oregon juries.’”<sup>395</sup>

To be sure, the fact of “clear” racist origins of the non-unanimous jury rule, by itself, might have been insufficient to overrule *Apodaca*. However, taken in tandem with *Apodaca*’s status as a Sixth Amendment “outlier,” race tipped the balance. Writing for the *Ramos* majority, Justice Gorsuch explained that *Apodaca*’s precedential value was diminished by the “implacable fact that the plurality spent almost no time grappling with the historical meaning of the Sixth Amendment’s jury trial right, this Court’s long-repeated statements that it demands unanimity, or the racist origins of Louisiana’s and Oregon’s laws.”<sup>396</sup>

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<sup>389</sup> *Id.* at 1406.

<sup>390</sup> *Id.* at 1394 (citations omitted).

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> See *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880) (holding discrimination in jury selection on the basis of race violated the Equal Protection Clause).

<sup>394</sup> 140 S. Ct. at 1394 (quoting *State v. Maxie*, No. 13-CR-72522 (La. 11th Jud. Dist., Oct. 11, 2018)).

<sup>395</sup> *Id.* (quoting *State v. Williams*, No-15-CR-58698 (C. C. Ore., Dec. 15, 2016)).

<sup>396</sup> *Id.* at 1405 (emphasis added).

In their concurrences, Justices Sotomayor and Kavanaugh struck similar notes. Conceding that “overruling precedent must be rare,”<sup>397</sup> Justice Sotomayor nonetheless determined that overruling *Apodaca* was “not only warranted but compelled”<sup>398</sup> by the significant “interests at stake”<sup>399</sup> for the criminal defendants challenging their convictions and because *Apodaca*’s “functionalist”<sup>400</sup> logic was out of step with Sixth Amendment doctrine.<sup>401</sup>

But in addition to these practical and doctrinal concerns, Justice Sotomayor was adamant that “the racially biased origins of the Louisiana and Oregon laws uniquely matter here.”<sup>402</sup> To be sure, “many laws and policies in this country have had some history of racial animus,” but what set *Apodaca* and its entrenchment of the nonunanimous jury rule apart, in her view, was that “the States’ legislatures never truly grappled with the laws’ sordid history in reenacting them.”<sup>403</sup> The failure of the state legislatures—and the *Apodaca* Court—to do so meant that it fell to the *Ramos* Court to ensure that *Apodaca* was “fully—and rightly—relegated to the dustbin of history.”<sup>404</sup>

Justice Kavanaugh, concurring in part, also acknowledged the presumption in favor of affirming *Apodaca*. Still, he noted, “the doctrine of stare decisis does not dictate, and no one seriously maintains, that the Court should *never* overrule erroneous precedent.”<sup>405</sup> Indeed, Justice Kavanaugh identified a “lengthy and extraordinary list of landmark cases that overruled precedent,”<sup>406</sup> including *Brown v. Board of Education*, “the single most important and greatest decision in this Court’s history.”<sup>407</sup> But if “special justification” or “strong grounds” counseled in favor of overruling precedent, then what “constitute[d] a special justification or strong grounds” in the instant case?<sup>408</sup>

Like Justice Sotomayor, Justice Kavanaugh noted *Apodaca*’s disjunction with Sixth Amendment doctrine.<sup>409</sup> But as importantly, he emphasized the nonunanimous jury rule’s racialized origins. The rule, he argued, was “one

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<sup>397</sup> *Id.* at 1410 (Sotomayor, J., concurring in part).

<sup>398</sup> *Id.* at 1408.

<sup>399</sup> *Id.*

<sup>400</sup> *Id.* at 1409.

<sup>401</sup> *Id.* at 1410.

<sup>402</sup> *Id.* at 1408.

<sup>403</sup> *Id.* at 1410 (citing *United States v. Fordice*, 505 U.S. 717, 729 (1992)) (observing that “policies that are ‘traceable’ to a State’s de jure racial segregation and that still ‘have discriminatory effects’ offend the Equal Protection Clause”).

<sup>404</sup> *Id.*

<sup>405</sup> *Id.* at 1412 (Kavanaugh, J., concurring in part).

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> *Id.* at 1414.

<sup>409</sup> *Id.* at 1416.

pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service.”<sup>410</sup> This history, in tandem with the rule’s contemporary impact “as an engine of discrimination against black defendants, victims, and jurors,” “strongly support overruling *Apodaca*.”<sup>411</sup> On “the question whether to overrule,” Justice Kavanaugh’s views were clear: *Apodaca*’s failure to account for “the Jim Crow origins and racially discriminatory effects (and the perception thereof) of nonunanimous juries in Louisiana and Oregon should matter and should count heavily in favor of overruling.”<sup>412</sup>

#### D. Ramos, Box, and Roe

The connections between the Court’s disposition of *Ramos* and *Roe* are not obvious. After all, *Ramos* was a criminal procedure case that focused on the incorporation of the Bill of Rights’ guarantees against state governments. It is a world away from *Roe*, privacy, and the right to choose an abortion. But, as this section maintains, the *Box* concurrence provides the connective tissue that renders the relationship between these two disparate cases more legible. And in so doing, it explicates the *Box* concurrence’s roadmap for challenging, and even overruling, *Roe v. Wade*.

For years, those opposed to abortion have argued that *Roe* lacks a foundation in constitutional text,<sup>413</sup> was improperly reasoned,<sup>414</sup> and has proven unworkable over time.<sup>415</sup> Despite these efforts, *Roe* has survived.<sup>416</sup> But Justice Thomas’s racialized critique of abortion furnishes new justifications for reconsidering—and overruling—this embattled decision. Specifically, it provides new factual circumstances steeped in race and racial animus that may suffice to render *Roe* “a remnant of abandoned

<sup>410</sup> *Id.* at 1417.

<sup>411</sup> *Id.* at 1417-18.

<sup>412</sup> *Id.* at 1418.

<sup>413</sup> *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting) (suggesting that *Roe* “partakes more of judicial legislation than” of constitutional interpretation).

<sup>414</sup> *E.g.*, Mary Ziegler, *Roe v. Wade Was About More Than Abortion*, N.Y. TIMES (Jan. 21, 2018), <https://www.nytimes.com/2018/01/21/opinion/roe-v-wade-abortion.html#:~:text=Most%20scholars%20agreed%20that%20Roe%20was%20a%20poorly,privacy%20o%20ideas%20about%20individual%20identity%20and%20choice> (“Most scholars agreed that *Roe* was a poorly reasoned opinion.”).

<sup>415</sup> *E.g.*, Mark Joseph Stern, *The Trick That Could Bring Down Roe v. Wade*, SLATE (Jan. 3, 2020), <https://slate.com/news-and-politics/2020/01/roe-v-wade-scotus-brief-unworkable-trick.html> (noting abortion opponents’ claims that *Roe* has proven unworkable); Brief Amici Curiae of 207 Members of Congress in Support of Respondent and Cross-Petitioner at 29 - 34, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18-1323 & 18-1460) (arguing the Court should reconsider *Roe* and *Casey* because they are “unworkable” precedents, *id.* at 29).

<sup>416</sup> In the Court’s most recent abortion-related decision, it confirmed that *Casey* remained good law—and relied on “the most central principle of *Roe* . . . a woman’s right to terminate her pregnancy before viability.” *June Medical*, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring).

doctrine.”<sup>417</sup> Justice Thomas’s effort to graft the history of Margaret Sanger, the birth control movement, and eugenics to abortion may be selective and indeterminate, but it may prove incredibly effective.<sup>418</sup>

Justice Thomas’s racialized critique of abortion rights has already been incorporated into amicus briefs, and reproduced in judicial opinions, in the lower federal courts.<sup>419</sup> It is not difficult to see how this racialized narrative might make its way to the Supreme Court in the near future. Over the last fifty years, there has been a considerable uptick in the number of amicus filings before the Court.<sup>420</sup> And critically, the Court has been quite receptive to the prospect of amicus briefs that furnish additional factual grounds on which to base a decision.<sup>421</sup> But despite the proliferation of amicus briefs before the Court, there is no mechanism in place to verify the facts put forth by amici.<sup>422</sup> These concerns may be especially pronounced in circumstances, like those in *Box*, where the case proceeds to the Court as part of the shadow docket and is resolved without oral argument, eliminating an opportunity for questioning and discussion of new information.

Under these conditions, it is entirely likely that the racialized critique of abortion rights will be presented to the Court via amicus briefs, and when this happens, there will be no institutional apparatus to question or challenge its contested historical foundations. Indeed, the narrative is sure to find a hospitable ear with Justice Thomas—the Justice who may be best

<sup>417</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992).

<sup>418</sup> *See Box v. Planned Parenthood of Ind. & Ky. Inc.*, 139 S. Ct. 1780, 1783 - 89 (2019) (Thomas, J., concurring). Though Sanger’s involvement with eugenics has long been widely known, discussions about Sanger’s eugenics connection—and calls for reproductive-rights advocates to renounce Sanger entirely as a figure of the movement—have increased in recent years. *See* Kristan Hawkins, *Remove Statues of Margaret Sanger, Planned Parenthood Founder Tied to Eugenics and Racism*, USA TODAY (July 23, 2020, 4:00 AM), <https://www.usatoday.com/story/opinion/2020/07/23/racism-eugenics-margaret-sanger-deserves-no-honors-column/5480192002>; Melissa Jeltsen, *Reckoning with the Feminist, Eugenicist Founder of Planned Parenthood*, HUFFINGTON POST (July 30, 2020, 5:45 AM), [https://www.huffpost.com/entry/margaret-sanger-eugenics-birth-control-planned-parenthood\\_n\\_5f1f2a40c5b638cfec4893a8](https://www.huffpost.com/entry/margaret-sanger-eugenics-birth-control-planned-parenthood_n_5f1f2a40c5b638cfec4893a8); Amita Kelly, *Fact Check: Was Planned Parenthood Started to ‘Control’ the Black Population?*, NPR (Aug. 14, 2015, 12:59 PM), <https://www.npr.org/sections/itsallpolitics/2015/08/14/432080520/fact-check-was-planned-parenthood-started-to-control-the-black-population>.

<sup>419</sup> *See supra* at 252 - 272.

<sup>420</sup> Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1758 (2014); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 752 (2000).

<sup>421</sup> Larsen, *supra* note 420, at 1777 (“Supreme Court Justices, like the rest of us, seem to be craving more factual information, and the amicus briefs are stepping in to fill the void.”). The influence of amicus facts can be seen in *Gonzales v. Carhart*, 550 U.S. 134 (2007), a 2007 challenge to the federal Partial Birth Abortion Ban. In his opinion for the majority, Justice Kennedy cited an amicus brief to support the claim that some women later regret their abortions. *Id.* at 159.

<sup>422</sup> Larsen, *supra* note 420, at 1784-86 (discussing circumstances in which the Court’s use of brief-based assertions later proved to be contested).

positioned to command deference from his colleagues on issues of race and racism,<sup>423</sup> particularly in circumstances where the facts are disputed or indeterminate. In this regard, if the racialized narrative of abortion rights is left unchallenged, it will decisively frame abortion before the Court as part of a long-standing eugenical effort to eliminate marginalized groups, including racial minorities. As importantly, by highlighting the disproportionate abortion rates in minority communities, this narrative suggests that the racialized impact of abortion's alleged eugenicist origins continues to be felt to this day.

To be sure, the argument toward which this racialized narrative gestures is not that *Roe* is analogous to *Plessy* or *Korematsu*—cases that involved laws that were explicitly racist, both facially and in their application. Rather, the logic of the narrative is that what renders *Roe* “egregiously wrong” is the same neglect that the *Ramos* Court identified in the *Apodaca* Court's deliberations. By failing to “grapple[]” with the racist roots of the Louisiana and Oregon nonunanimous jury rules, the *Apodaca* Court allowed the residue of this past racism to seep into the present day.<sup>424</sup> Accordingly, in failing to appreciate both abortion's racially tainted origins and its current impact on racial minorities, *Roe* was—and is—egregiously wrong.

Critically, it is unclear whether concerns about race, by themselves, would be enough to render *Roe* ripe for overruling. On this point, *Ramos* again is instructive. There, concerns about racism were layered atop concerns about *Apodaca*'s incoherence with Sixth Amendment doctrine and the jury right more generally.<sup>425</sup> In this regard, race was not the reason for overruling *Apodaca*, but rather the tipping point militating in favor of overruling.<sup>426</sup> In the same way, race need not—and indeed, given the contested nature of Justice Thomas's narrative, cannot—be the reason for overruling *Roe*. But it can, in tandem with concerns about unenumerated rights and the workability of abortion doctrine, serve as the crucial element—the tipping point—that shifts the balance toward overruling.<sup>427</sup>

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<sup>423</sup> As the only Black member of the Court, and a conservative to boot, Justice Thomas's views may have particular weight with his colleagues on issues of race. As Professor Guy-Uriel Charles explains, as a Black man who has experienced racism, Justice Thomas “possesses epistemic authority and commands epistemic deference” from his colleagues. “He alone on the Court is positioned to explain, on the basis of what he knows to be true and what he has experienced as a person of color, the distinctive harm caused by [racism].” And because he is a conservative, his views are unlikely to be dismissed as “political correctness.” Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Critics?*, 93 GEO. L.J. 575, 611 (2005)

<sup>424</sup> See *Ramos*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring).

<sup>425</sup> *Id.* at 1394 - 95 (majority opinion).

<sup>426</sup> See *id.* at 1417 - 18 (Kavanaugh, J., concurring).

<sup>427</sup> Indeed, in *Gonzales v. Carhart*, a disputed narrative about abortion regret appeared to sway Justice Kennedy, who provided the crucial fifth vote to uphold the Partial Birth Abortion Ban. Reva B.

Recent legal challenges make clear that this existential threat to abortion rights is not hypothetical. In *June Medical Services*,<sup>428</sup> the Court’s most recent abortion challenge, in which it considered the constitutionality of a Louisiana admitting privileges law, this racialized critique of abortion and the association of abortion with eugenics surfaced in the briefs of several amici.<sup>429</sup> Critically, the law challenged in *June Medical Services* was wholly distinct from the Indiana trait-selection law challenged in *Box*; nevertheless, several amici referenced the *Box* concurrence to underscore the notion that abortion has—and has been deployed to exercise its—eugenic potential against marginalized groups. For example, in its brief supporting Louisiana, the Pro-Life Legal Defense Fund described *Roe v. Wade* as a “tragic ruling [that] has led directly to the death of over 60 million unborn babies—of which in one recent year, 36 percent would have been born to black women.”<sup>430</sup> On this account, *Roe* had “accomplish[ed] what the Eugenics Movement only could have dreamed of achieving about as it pushed for abortion rights.”<sup>431</sup> Likewise, an amicus brief submitted by African American Pro-Life Organizations adverted to statistics purporting to show “an enormous national racial disparity in abortion rates,” arguing that the “disproportionate abortion rate approaches what some civil rights leaders have called ‘race suicide.’”<sup>432</sup> More ominously, the Foundation for Moral Law explicitly connected abortion to race discrimination, noting that because “abortion in the United States arose from the eugenics movement,” the practice was an “inherent equal protection violation.”<sup>433</sup>

Of course, it is entirely possible that the Court will not rely on the racialized critique of abortion to overrule or discredit *Roe v. Wade*. Even if that is the case, the association between abortion and racism may nonetheless be taken for granted and accepted as part of the discourse of abortion rights. Consider, for example, *Gonzales v. Carhart*,<sup>434</sup> in which the Court upheld the Partial Birth Abortion Act.<sup>435</sup> Critically, in concluding that the

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Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1690-91 (2008).

<sup>428</sup> 140 S. Ct. 2103 (2020).

<sup>429</sup> *E.g.*, Brief Amicus Curiae of Pro-Life Legal Defense Fund at 32 n.9, *June Medical*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460); Brief of African American Pro-Life Organizations as Amici Curiae in Support of Rebekah Gee at 8, *June Medical*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460); Brief of Amicus Curiae Foundation for Moral Law in Support of Rebekah Gee at 21 n.9, *June Medical*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460).

<sup>430</sup> Brief of Pro-Life Legal Defense Fund, *supra* note 429, at 31.

<sup>431</sup> *Id.* at 31-32.

<sup>432</sup> Brief of African American Pro-Life Organizations, *supra* note 429, at 8-9.

<sup>433</sup> Brief of the Foundation for Moral Law, *supra* note 429, at 21 n.9.

<sup>434</sup> 550 U.S. 124 (2007).

<sup>435</sup> *Id.* at 147.

challenged law passed constitutional muster, Justice Kennedy credited an unsupported assertion that “some women come to regret their choice to abort the infant life they once created and sustained.”<sup>436</sup> Although the Court was criticized for “invok[ing] an antiabortion shibboleth for which it concededly has no reliable evidence,”<sup>437</sup> its uncritical acceptance of “post-abortion syndrome”<sup>438</sup> shaped the constitutional culture of abortion rights. In the wake of the Court’s decision in *Carhart*, woman-protective arguments proliferated—both in antiabortion discourse and in mainstream press coverage of the abortion debate.<sup>439</sup> In this regard, even if the racialized narrative of the *Box* concurrence is not taken up directly, it may nonetheless have a decisive impact on constitutional culture and meaning, cementing the association between abortion and race in our understanding of abortion rights.<sup>440</sup>

#### IV. RACE IN THE BALANCE

As the preceding Parts have made clear, Justice Thomas’s *Box* concurrence is not merely a call for the Court “to confront the constitutionality of [trait-selection] laws.”<sup>441</sup> It is also a roadmap for opportunistically using race—and an interest in racial justice—to circumvent the strictures of *stare decisis* and overrule *Roe v. Wade* once and for all. Obviously, this strategy would be devastating to abortion rights, but as this Part makes clear, its deleterious impact goes beyond eviscerating *Roe*. As section IV.A explains, Justice Thomas’s effort to inject race into the Court’s abortion jurisprudence is both instrumental and at odds with reproductive justice efforts to center communities of color and the systemic inequities that constrain reproductive decisionmaking. Section IV.B maintains that the *Box* concurrence’s negative impact is not solely limited to issues of reproductive rights and reproductive justice, but has broader implications for the Court’s race jurisprudence, as well.

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<sup>436</sup> *Id.* at 159.

<sup>437</sup> *Id.* at 183 (Ginsburg, J., dissenting).

<sup>438</sup> Emily Bazelon, *Is There a Post-Abortion Syndrome?*, N.Y. TIMES MAGAZINE (Jan. 27, 2007), <https://www.nytimes.com/2007/01/21/magazine/21abortion.t.html>.

<sup>439</sup> Siegel, *supra* note 427, at 1648-49.

<sup>440</sup> For a broader discussion of the feedback loop between the Court and nonjudicial actors in the creation of constitutional meaning, see Lani Guinier, *The Supreme Court—2007 Term, Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 60 (2008) (“Constitutional law . . . is not autonomous from the beliefs and values of nonjudicial actors and mobilized constituencies.”); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 928 (2006) (“[P]olitical contestation plays an important role in shaping understandings about the meaning and application of constitutional principles.”).

<sup>441</sup> *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1784 (Thomas, J., concurring).

*A. Undermining Reproductive Justice*

Although Justice Thomas never explicitly references the reproductive justice movement in the *Box* concurrence, we might understand his opinion as trading on the reproductive justice movement's successful effort to expand the terms of the abortion debate to focus more specifically on the needs of communities of color. Just as the reproductive justice movement extended the boundaries of the abortion debate beyond gender and feminism, thus transforming the central understanding of what reproductive rights are, Justice Thomas seeks to change the social—and constitutional—meaning of abortion, transforming it from an issue of privacy and sex equality to one of racial equality.

But in opportunistically co-opting the reproductive justice movement's interest in the intersection of race and abortion rights, the *Box* concurrence's racialized critique of abortion rights actually undermines the goals and interests of reproductive justice.<sup>442</sup> For example, a central pillar of the reproductive justice movement is the understanding that disability, class, race, sexual orientation, and gender identity shape the ability to exercise “choice.”<sup>443</sup> Although the association of eugenics and abortion injects a racial dynamic into the abortion debate, this racialized account of abortion is inattentive to both the structural dynamics that shape Black people's reproductive choices and the prospect of abortion as an act of individual autonomy.<sup>444</sup> Put simply, Justice Thomas invokes a particular historicized and disputed racial narrative while ignoring the functional ways that race has impacted—and continues to impact—reproductive autonomy.

As discussed earlier, in painting reproductive rights as tools of deracination, Justice Thomas invokes history selectively, overlooking the way in which the denial of reproductive rights—and, specifically, efforts to restrict abortion—were also used to bolster white supremacy and suppress communities of color.<sup>445</sup> But it is not just that Justice Thomas's critique occludes a more comprehensive history of abortion, it is that it promotes a masculinist vision of abortion, and in so doing, evinces a palpable distrust

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<sup>442</sup> To be sure, I do not mean to say that in discussing race, Justice Thomas has behaved opportunistically. As a Justice, he has evinced considerable interest in exploring racial inequities—perhaps more so than any other Justice in the Court's conservative wing. Rather, this Article surfaces the ways in which abortion opponents have begun to—and will likely continue to—co-opt principles of racial equity in the abortion debate, relying on arguments set forth in large part by Justice Thomas.

<sup>443</sup> Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 BERKELEY J. AFR.-AM. L. & POL'Y 71, 76 (2011).

<sup>444</sup> See Roberts, *supra* note 44, at xv (discussing the “structural causes of racial disparities in abortion rates—poverty, lack of access to contraception, and inadequate sex education”).

<sup>445</sup> Murray, *Foiling Clarence Thomas*, *supra* note 298.



of Black women and their reproductive choices. By charting a straight line between birth control, abortion, and eugenics, Justice Thomas echoes the claims of male Black nationalist figures, who viewed Black reproduction as Black women's specific contribution to the political project of the Black Power movement.<sup>446</sup> More troublingly, in resuscitating masculinist narratives of Black reproduction and genocide, Justice Thomas not only ignores the voices of the Black women who registered their objections to these claims, he crafts, whether consciously or not, a damning indictment of Black women who would terminate their pregnancies (or make use of contraception).<sup>447</sup> On his telling, Black women who consider—or obtain—an abortion are complicit with eugenicists (here, Margaret Sanger, a white woman) in orchestrating the Black community's destruction.<sup>448</sup> That is, in the name of individual rights and choice, Black women who avail themselves of abortion have blithely (and selfishly) invited the (white) eugenicist into the part of the Black community that is absolutely vital to its future: the womb.<sup>449</sup>

Of course, what is missing from this account of Black women as unwitting (or complicit) agents of deracination is an account of their own autonomy and attention to the structural impediments that communities of color face in reproductive decisionmaking—the kinds of concerns that animated the reproductive justice movement in the first place.<sup>450</sup> Though Justice Thomas cites disproportionate abortion rates within the Black community, his concurrence is utterly inattentive to the factors that may drive a decision to terminate a pregnancy.<sup>451</sup> As reproductive justice advocates make clear, for many people of color, the decision to terminate a pregnancy is shot through with concerns about economic and financial insecurity, limited employment options, diminution of educational opportunities, lack of access to health care, and lack of access to affordable quality childcare.<sup>452</sup> However, any

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<sup>446</sup> See *supra* TAN 100 - 109.

<sup>447</sup> *Id.* Critically, the way in which Justice Thomas dismisses—or ignores—the views of Black women challenging the Black nationalist account of racial genocide and paints Black women as accomplices in deracination recalls his 1991 confirmation hearings. There, in the face of Professor Anita Hill's sexual harassment claims, his supporters presented then-Judge Thomas as the embattled standard-bearer of the Black community, while depicting Professor Hill as a treacherous Black woman intent on tearing down a Black man, and with him, the Black community's hopes. For a more robust discussion of these dynamics, see Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1298 (1991).

<sup>448</sup> See *supra* TAN 100 - 109.

<sup>449</sup> *Id.*

<sup>450</sup> *Id.*

<sup>451</sup> *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1791 (Thomas, J., concurring).

<sup>452</sup> See Rausch, *supra* note 160, at 31 (noting that the right announced in *Roe* “might provide the right woman with reproductive choice . . . but for the wrong woman—one with limited resources -- the so-called ‘choice’ becomes nonexistent”); Chemerinsky & Goodwin, *supra* note 160, at 1330 (discussing how *Roe* helped provide “a wide range of reproductive choices” to wealthy women but “little solace to [] poor wom[en]” seeking abortion access).

mention of these considerations is utterly absent from Justice Thomas’s racialized critique of abortion rights. And in this absence is also a neglect of any account of Black women’s autonomy in seeking an abortion—the very voices once raised from within the Black community to counter the narrative of Black genocide.<sup>453</sup> Instead, on Justice Thomas’s telling Black women are reduced to being either the victims of eugenics or active participants in a eugenic conspiracy.

As importantly, the injection of race into the abortion narrative for the purposes of upholding trait-selection laws or providing a new justification for overruling *Roe* seems particularly opportunistic when juxtaposed against the Court’s inability to articulate in its jurisprudence the racialized dimensions of abortion rights. Recall the earlier discussion of *Harris v. McRae*,<sup>454</sup> in which the Court considered the constitutionality of the Hyde Amendment.<sup>455</sup> In upholding the Hyde Amendment, the *Harris* Court concluded that regardless of the right articulated in *Roe*, “it simply does not follow that a woman’s freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.”<sup>456</sup>

As many commentators, including those in the reproductive justice community, have noted, *Harris* had a profound impact on abortion access for women who are Medicaid recipients, a group that is disproportionately women of color.<sup>457</sup> Lacking the financial wherewithal to secure abortions, these women, it was argued, could be easily coerced into sterilization as a condition of receiving public assistance.<sup>458</sup> Indeed, in an amicus brief in *Harris*, New York City Legal Aid attorneys highlighted the incongruity of the federal government withholding financial support for abortion while

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<sup>453</sup> See *supra* TAN 116-152.

<sup>454</sup> 448 U.S. 297 (1980).

<sup>455</sup> At present, the Hyde Amendment continues to limit the use of Medicaid funds for abortion services. See *Hyde Amendment*, Planned Parenthood, <https://www.plannedparenthoodaction.org/issues/abortion/hydeamendment>. But importantly, its impact is felt even beyond the realm of public insurance. See Khiara M. Bridges, *Elision and Erasure: Race, Class, and Gender in Harris v. McRae*, in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES* (Murray, Shaw & Siegel, eds. 2019). Under the Affordable Care Act (ACA), “individuals with incomes that exceed Medicaid limits, but do not exceed 400 percent of the federal poverty level, receive federal subsidies that they can use to purchase private health insurance on health insurance exchanges.” *Id.* However, under the ACA, “these federal subsidies cannot be used to purchase insurance coverage for abortion services.” *Id.* In this regard, “the Hyde Amendment now reaches beyond the realm of public insurance, affecting more than just the poor.” *Id.*

<sup>456</sup> 448 U.S. at 316.

<sup>457</sup> See generally Jill E. Adams & Jessica Arons, *A Travesty of Justice: Revisiting Harris v. McRae*, 21 *WM. & MARY J. OF WOMEN & L.* 5 (2017) (discussing the impact of *Harris* on low-income women and the need to overrule the decision).

<sup>458</sup> Elizabeth Jones, Note, *Looking Back to Move Forward: An Intersectional Perspective on Harris v. McRae*, 1 *GEO. J. L. & MOD. CRITICAL RACE PERSP.* 379, 379-80 (2009).

underwriting “sterilization abuse among Puerto Rican, Native American, Black, and Mexican American women and among welfare recipients.”<sup>459</sup> “The disparity of funding between abortion and sterilization,” they argued, “ha[d] the effect of compelling poor and minority women to be sterilized in violation of their constitutional rights.”<sup>460</sup>

Despite these efforts, the Court’s opinion in *Harris v. McRae* made no mention of race or the disproportionate impact of the Hyde Amendment on poor women of color.<sup>461</sup> Meaningfully, these views have also been absent in the Court’s most recent abortion decisions. In *Whole Woman’s Health v. Hellerstedt*<sup>462</sup> and *June Medical Services*,<sup>463</sup> advocates and amici underscored the view that the burdens of abortion restrictions are borne disproportionately by low-income women of color.<sup>464</sup> But even as the Court struck down the challenged laws in both cases and reaffirmed the abortion right, as in *Harris v. McRae*, it made no mention of the disproportionate impact of abortion regulations on these marginalized groups.<sup>465</sup>

As advocates and scholars have long noted, the impact of abortion regulations depends in large part on the social conditions in which women live.<sup>466</sup> For some women, laws that impose waiting periods and additional medical procedures or that limit access to a handful of providers may have little impact on the ability to obtain an abortion.<sup>467</sup> These women are equipped with the resources—health insurance, flexible work schedules, ready transportation, childcare—to be able to withstand the limitations that such restrictions impose.<sup>468</sup> For other women, however, the social conditions in which they live means that abortion restrictions will have a more profound impact on their lives.<sup>469</sup> In this way, abortion restrictions are

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<sup>459</sup> Brief of the Ass’n of Legal Aid Attorneys of New York et al. as Amici Curiae Supporting Respondents at 16, *Harris*, 448 U.S. 297 (1980) (No. 79-1268) [hereinafter Brief of Legal Aid Attorneys].

<sup>460</sup> Brief of Legal Aid Attorneys, *supra* note 459, at 17.

<sup>461</sup> 448 U.S. 297.

<sup>462</sup> 136 S. Ct. 2292 (2016).

<sup>463</sup> 140 S. Ct. 2103 (2020).

<sup>464</sup> Brief of Law Professor Melissa Murray, et al. as Amici Curiae Supporting Petitioners at 13, *Whole Women’s Health*, 136 S. Ct. 2292 (No. 15-274); Brief of National Women’s Law Center et al. as Amici Curiae Supporting Petitioners at 18, *Whole Women’s Health*, 136 S. Ct. 2292 (No. 15-274). This view was also reiterated by the Seventh Circuit in its disposition of *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015) (describing the strain that low-income women would face if required to travel to Chicago to obtain a late-term abortion).

<sup>465</sup> See generally *Whole Women’s Health*, 136 S. Ct. 2292; *June Medical Services*, 140 S. Ct. 2103.

<sup>466</sup> Loretta J. Ross & Rickie Solinger, REPRODUCTIVE JUSTICE: AN INTRODUCTION 123-24 (2017); Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POL’Y REV. 2, 6 (2008).

<sup>467</sup> Cohen, *supra* note 466, at 4.

<sup>468</sup> *Id.* at 4-5.

<sup>469</sup> *Id.*

often especially burdensome for poor women.<sup>470</sup> And because race and socioeconomic status are often positively correlated—particularly in those regions of the country where abortion restrictions are more extensive—the burden on poor women will also result in a burden on women of color, rendering abortion inaccessible to these groups.<sup>471</sup>

In focusing on the links between racism and abortion as a means of overturning *Roe*, while simultaneously overlooking the systemic and institutional constraints that shape abortion decision-making, the racialized critique of abortion rights surrenders an important opportunity to settle some of the conflict that abortion engenders. As Professor Robin West has argued, “[b]y putting legal abortion in its place—that is, putting it in the context of a reproductive justice agenda . . .—pro-choice advocates might find common cause with pro-life movements that responsibly seek greater justice for pregnant women who choose to carry their pregnancies to term, working families, and struggling mothers.”<sup>472</sup> Put differently, in laying a path toward overruling *Roe*, the injection of race that Justice Thomas proposes in *Box* only exacerbates contestation around abortion rights. By contrast, the use of race as a part of a broader reproductive justice framework might instead offer a way to bridge the distance between abortion rights advocates and abortion opponents.

This is all to say that Justice Thomas’s effort to introduce race into the Court’s discourse about abortion regulation and rights is incomplete, instrumental, and problematic. Although the *Box* concurrence, with its indeterminate historical record, attempts to surface the racial dynamics of abortion, it fails to account for the systemic inequities that shape Black women’s reproductive choices and paints Black women as either unwitting victims or as eager eugenicists who callously prioritize their own needs above those of the Black community. Further, the effort to account for race in abortion discourse seems opportunistic given the Court’s longstanding record of sequestering its discussions of abortion from discussions of race and inequality.

### *B. Undermining Racial Justice*

As the previous section explained, the *Box* concurrence’s use of race to lay a foundation for reconsidering *Roe* would not only be devastating to reproductive rights, it would undermine the reproductive justice

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<sup>470</sup> *Id.*

<sup>471</sup> *Id.*

<sup>472</sup> West, *supra* note 166, at 1427.

movement's effort to call attention to the racialized impacts of abortion regulation, as well. But critically, the concurrence's deleterious consequences extend beyond reproductive rights and reproductive justice. As this Section maintains, the *Box* concurrence's use of race also undermines the broader project of racial justice.

As an initial matter, Justice Thomas's invocation of race in *Box* is inconsistent with his views of race in other constitutional and statutory contexts. As some scholars have noted, Justice Thomas's views on race reflect his—and indeed, other Justices'—interest in “color-blind constitutionalism.”<sup>473</sup> Rooted in the first Justice Harlan's dissent in *Plessy v. Ferguson*,<sup>474</sup> “color-blind constitutionalism” maintains that race is almost never a legitimate ground for legal or political distinctions between groups.<sup>475</sup> On this view, any law that draws distinctions on the basis of race, whether for benign or nefarious purposes, is presumptively unconstitutional.<sup>476</sup> Accordingly, under a theory of color-blind constitutionalism, the race-based classifications that undergirded Jim Crow are unconstitutional, but so too are the race-based affirmative action measures designed to remedy past discrimination.<sup>477</sup>

The Court's affirmative action cases provide a helpful illustration. In a series of cases challenging the use of race-based affirmative action programs in employment and university admissions, the Court was repeatedly asked to consider whether “benign” race-conscious policies were constitutionally distinct from the race-based classifications that characterized Jim Crow and “separate but equal.”<sup>478</sup> As some argued,

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<sup>473</sup> See generally Jeffrey Rosen, Essay, *The Color-Blind Court*, 45 AM. U. L. REV. 791 (1996); Scott D. Gerber, *Justice Clarence Thomas and the Jurisprudence of Race*, 25 S.U. L. REV. 43 (1997); Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction and Affirmative Inaction*, 51 U. MIAMI L. REV. 191 (1997); Kendall Thomas, *Racial Justice: Moral or Political?*, 17 NAT'L BLACK L.J. 222, 224 (2002) (discussing Justice Thomas's and Justice Scalia's “commitment to color-blindness”); Rogers M. Smith, *Black and White After Brown: Constructions of Race in Modern Supreme Court Decisions*, 5 U. PA. J. CONST. L. 709, 715, 727-29 (2003) (noting that Justice Thomas's views on race have influenced other justices); Christopher W. Schmidt, Essay, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203 (2008) (discussing the impact of color-blind constitutionalism on cases post-Brown).

<sup>474</sup> 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

<sup>475</sup> Schmidt, *supra* note 473, at 203 - 04.

<sup>476</sup> *Id.*

<sup>477</sup> *Id.* at 204 n.8.

<sup>478</sup> *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 167-68 (1977) (concluding, in the context of a state's use of affirmative action principles to enhance minority voting representation in particular districts, that there was not unconstitutional discrimination); *Regents of the University of California v. Bakke*, 438 U.S. 265, 305-08 (1977) (considering the appropriate standard of review for race-conscious measures that are intended to ameliorate the effects of discrimination); *Fullilove v. Klutznick*, 448 U.S. 448, 472-73 (1980) (considering, in the context of a federal legislative program, the appropriate standard of review for race-conscious measures that are intended to remedy the effects of discrimination); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (concluding that strict

because affirmative action programs were intended to remedy past racial injustices in higher education and employment, they should not be subjected to strict scrutiny, as other racial classifications were.<sup>479</sup> Others, however, maintained that because it was difficult to discern whether a race-conscious measure was intended to help or harm, all racial classifications should be subjected to the same punishing standard: strict scrutiny.<sup>480</sup>

In *Regents of the University of California v. Bakke*,<sup>481</sup> Justice Powell cast the deciding vote to uphold the use of race in medical school admissions, but in so doing, he also made clear that strict scrutiny, as opposed to a less stringent standard, was the appropriate standard of review.<sup>482</sup> In *City of Richmond v. J.A. Croson Co.*,<sup>483</sup> the Court confirmed strict scrutiny as the appropriate standard of review for all race-based classifications—even those aimed at remedying past discrimination.<sup>484</sup> In this regard, the racial context and interests that undergird affirmative action programs are of no moment—as the Court has concluded, and Justice Thomas has agreed, the remedial motives behind affirmative action programs are irrelevant and indeed, “inherently unknowable.”<sup>485</sup> “Distrusting its ability to parse the state’s intentions” in order to distinguish between benign measures and those meant to further racial subordination, the Court has subjected all affirmative action programs to the most punishing standard of constitutional scrutiny.<sup>486</sup>

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scrutiny is the appropriate standard of review for race-conscious programs aimed at ameliorating past discrimination); *Adarand Constructors v. Peña*, 515 U.S. 200, 224 (1995) (concluding that strict scrutiny is the appropriate standard of review for race-conscious measures); *Johnson v. California*, 543 U.S. 499, 512 (2005) (holding that colorblind reasoning requires strict scrutiny of the practice of segregating prisoners).

<sup>479</sup> Schmidt, *supra* note 473, at 214.

<sup>480</sup> See, e.g., *Adarand Constructors*, 515 U.S. at 226; *J.A. Croson Co.*, 488 U.S. at 493 (“Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”); Jed Rubenfeld, Essay, *Affirmative Action*, 107 YALE L.J. 427, 428 (1997) (“One powerful function of strict scrutiny has always been that of ‘smoking out’ invidious purposes masquerading behind putatively legitimate public policy.”); see also Bryant S. Delgadillo, *Civil Rights—Do “Skepticism,” “Consistency,” and “Congruence” Foreshadow a Color-Blind Future?* *Adarand Constructors Inc. v. Peña*, 115 S. Ct. 2097 (1995), 69 TEMP. L. REV. 1521, 1527-31, 1534 (1996) (discussing cases in which the Court considered the appropriate level of scrutiny for remedial race-based classifications).

<sup>481</sup> 438 U.S. 265 (1978).

<sup>482</sup> Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1826 n.202 (2012) (“Though Powell cast the decisive vote upholding the challenged program, he did so only after holding that strict scrutiny should apply. Making this victory even more costly, Powell went on to hold that the government’s sole cognizable interest lay in increasing diversity in the classroom.”).

<sup>483</sup> 488 U.S. 469 (1989).

<sup>484</sup> See *id.* at 494 (plurality opinion); *id.* at 520 (Scalia, J., concurring in the judgment).

<sup>485</sup> See Haney-López, *supra* note 482, at 1783, 1832.

<sup>486</sup> *Id.* at 1783.

But if context and intent are meaningless in the context of affirmative action claims, then, perhaps perversely, they are all too meaningful in the context of disparate impact claims. For purposes of equal protection doctrine, the Court has concluded that where a facially neutral law disproportionately impacts a protected group, there is no constitutional injury unless discriminatory intent can be established.<sup>487</sup> But proving intent in the disparate impact context is a nearly impossible endeavor. As Professor Ian Haney-López explains, in its current incarnation, the disparate impact intent doctrine goes beyond simply demanding evidence of discriminatory intent—it requires “that plaintiffs prove a state of mind akin to malice on the part of an identified state actor.”<sup>488</sup> Such a requirement is “so exacting that, since this test was announced in 1979, it has never been met—not even once.”<sup>489</sup> On this account, if a facially neutral examination results in the elimination of minorities from the pool of those eligible to be considered for employment, in the absence of evidence that the exam was administered for the purpose of excluding minorities, there is no constitutional injury.<sup>490</sup>

Taken together, the Court’s disparate impact and affirmative action jurisprudence reflects broad skepticism of efforts to redress racial injustices. More importantly, it reflects an approach to racial liability that is utterly at odds with the spirit of the *Box* concurrence. In *Box*, much of Justice Thomas’s evidence of abortion’s “eugenic potential” flows from the disproportionate incidence of abortion within the Black community. Yet, in other contexts—capital punishment, employment—the disparate impact of race-neutral laws on racial minorities, by itself, is insufficient to establish an equal protection violation.<sup>491</sup> Justice Thomas underscored this point just four years prior to *Box* in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*<sup>492</sup> There, Justice Thomas maintained that “[a]lthough presently observed racial imbalance *might* result from past [discrimination], racial imbalance can also result from any number of innocent private decisions.”<sup>493</sup> And perhaps perversely, in a footnote in the *Box* concurrence, Justice Thomas reiterated this view,

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<sup>487</sup> *See id.*

<sup>488</sup> *Id.*

<sup>489</sup> *Id.*

<sup>490</sup> *Id.* at 1806.

<sup>491</sup> *See id.* at 1806, 1846.

<sup>492</sup> 135 S. Ct. 2507 (2015).

<sup>493</sup> *Id.* at 2530 (Thomas, J., dissenting) (quoting *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 750 (2007) (Thomas, J., concurring) (emphasis added)). As scholars have noted, Justice Thomas’s view of disparate impact liability are strongly informed by the work of Thomas Sowell. Corey Robin, *The Enigma of Clarence Thomas* (2019); Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 26 (2013) (discussing Sowell’s influence in the disparate impact context). As Sowell argues, “there are many reasons, besides genes and discrimination, why groups differ in their economic performance and rewards.” THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* 42 (1984).

staunchly asserting that “[b]oth eugenics and disparate-impact liability rely on the simplistic and often faulty assumption that ‘some one particular factor is the key or dominant factor behind differences in outcomes.’”<sup>494</sup>

But, curiously, even as he cautioned against “automatically presum[ing] that any institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination,”<sup>495</sup> Justice Thomas had no trouble associating disproportionately high rates of abortion in the Black community with eugenics and the desire to limit Black reproduction.<sup>496</sup> This type of cognitive dissonance highlights the flaws in Justice Thomas’s selective invocation of racial inequity: he rejects the notion that racism is to blame for racially-imbalanced outcomes even as he, in the context of abortion, defends it as the most likely cause of racial imbalance.

But it is not just that Justice Thomas’s interest in making eugenics part of the racial context of abortion is opportunistic and inconsistent; it is that the understanding of race that undergirds Justice Thomas’s *Box* concurrence reinforces a particular vision of racism and racial injury and liability that the Court, in recent years, has prioritized. Recall the earlier discussions of *Ramos v. Louisiana* and *Trump v. Hawaii*, where the Court abandoned two earlier decisions in part because of concerns about racism. Critically, in these two cases, it was not simply that the Court used race and racism as a justification for departing from precedent, but rather that in doing so the Court reaffirmed a particular understanding of the kinds of racial injuries that are constitutionally cognizable.

In *Trump v. Hawaii*, the Court consigned *Korematsu* to constitutional law’s anticanon;<sup>497</sup> however, in doing so, it also underscored color-blind constitutionalism’s view that only discrete acts of intentional discrimination constitute racial injuries redressable under the Constitution.<sup>498</sup> Specifically, *Trump v. Hawaii* repudiated *Korematsu*’s intentional discrimination against those of Japanese descent,<sup>499</sup> while simultaneously rejecting the notion that President Trump’s inflammatory statements about Muslims—statements made just months before the issuance of the challenged Travel Ban—could serve as evidence that the ensuing prohibitions on Muslims entering the country reflected discriminatory animus.<sup>500</sup> On this telling, the Court

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<sup>494</sup> *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1787 n.4 (2019) (Thomas, J., concurring).

<sup>495</sup> *Id.*

<sup>496</sup> *Id.* at 1791.

<sup>497</sup> *See Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

<sup>498</sup> *See id.*

<sup>499</sup> *Id.*

<sup>500</sup> *See id.* at 2417-18, 2420-23.



acknowledged that *Korematsu* reflected a clear intent to discriminate, but concluded that the challenged Travel Ban—the Administration’s third version of the prohibition<sup>501</sup>—was entirely disconnected, both temporally and in terms of purpose, from the President’s earlier statements and thus was “facially neutral.”<sup>502</sup>

In this way, in *Trump v. Hawaii*, race served as a “special justification” that warranted repudiating *Korematsu*. However, even as the Court disavowed *Korematsu*, it also articulated a new conception of racial injury—one in which a cognizable injury exists only upon a showing of racist intent that is clearly and closely connected to the challenged policy. In this regard, the invocation of race to reconsider an earlier decision also furnished the Court with an opportunity to lay down a new precedent—one that entrenched this crabbed understanding of racial injury and racial liability.

Likewise, in *Ramos*, race served as a vehicle for reconsidering and overruling *Apodaca*. But, unlike *Trump v. Hawaii*, where the Court determined that there was no nexus between the President’s anti-Muslim statements and the challenged executive order, the *Ramos* Court saw a clear connection between Louisiana’s postbellum interest in preserving white supremacy and the nonunanimous jury rule.<sup>503</sup> In this regard, *Ramos* echoed *Brown*’s rejection of *Plessy* and separate but equal. Put differently, the racialized harm to be remedied in *Ramos* was obvious, long-standing, and expressly stated in the legislative record. It was a clear-cut case of discriminatory intent that was obviously connected to the challenged policy. And in recognizing this history as problematic,<sup>504</sup> the *Ramos* Court reinforced the notion that the racial injuries are constitutionally cognizable when they rest on obvious expressions of discriminatory intent. In this way, in *Ramos*, as in *Trump v. Hawaii*, the effort to redress a racial injustice brings with it the opportunity to reiterate and embed an understanding of racial injury and liability that is limited to discrete acts of intentionally discriminatory conduct.

All of this is deeply concerning—for *Roe* and the future of abortion rights and for the Court’s prior precedents on race and racial discrimination. The *Box* concurrence makes clear that there is play in the joints as to what constitutes racial harm and racial liability. In this regard, the *Box* concurrence offers the Court different ways to use race to shape its

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<sup>501</sup> See *id.* at 2403-04.

<sup>502</sup> See *id.* at 2418.

<sup>503</sup> *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020).

<sup>504</sup> See *id.* at 1401.

jurisprudence. First, and most obviously, race can be used as a trigger for overriding *stare decisis* and reconsidering past precedents. Second, in serving as the trigger that prompts the reconsideration of past precedent, race can provide the Court with an opportunity to reconceptualize the nature of the injury at the heart of the case in question. On this telling, the invocation of race to reconsider *Roe* also will transform the social meaning of abortion from an exercise of individual autonomy to a collective racial injury. Finally, and perhaps most profoundly, by providing an opportunity to reconsider past precedent, race may also serve as the vehicle by which the Court may articulate new precedent—precedents that will guide and inform its understanding of race and racial injury going forward.

This last insight is especially important in understanding the *Box* concurrence's relevance not only to the future of the Court's reproductive rights jurisprudence, but to its race jurisprudence as well. *Roe v. Wade* is not the only contested precedent in the Court's jurisprudence. Indeed, across the Court's race jurisprudence, narratives about what race is and what constitutes a race-based injury are abundant—and more importantly, are continually contested, even across established precedents. For example, in *Shaw v. Reno*<sup>505</sup> the Court emphasized an understanding of race as fixed and biological.<sup>506</sup> By contrast, in *Hernandez v. Texas*,<sup>507</sup> it presented race as a social construction.<sup>508</sup> In *McCleskey v. Kemp*,<sup>509</sup> the majority and the dissents bitterly debated the scope and nature of judicial inquiry into racial discrimination.<sup>510</sup> Likewise in *Grutter v. Bollinger*<sup>511</sup> the majority posited a vision of society in which racial progress was in process and ongoing.<sup>512</sup> *Shelby County v. Holder*,<sup>513</sup> by contrast, depicted American society as one in which the project of racial progress was largely complete.<sup>514</sup>

As these examples suggest, throughout the Court's jurisprudence, the question of whether and how to think about race has been—and remains—bitterly contested.<sup>515</sup> This means that under the logic of the *Box*, the use of race as a justification for revisiting and overruling a prior decision may also

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<sup>505</sup> 509 U.S. 630 (1993).

<sup>506</sup> *See id.* at 647.

<sup>507</sup> 347 U.S. 475 (1954).

<sup>508</sup> *See id.* at 478.

<sup>509</sup> 481 U.S. 279 (1987).

<sup>510</sup> *See id.* at 291-300; *id.* at 321 - 22, 325-35 (Brennan, J., dissenting); *id.* at 349-61 (Blackmun, J., dissenting).

<sup>511</sup> 539 U.S. 306 (2003).

<sup>512</sup> *Id.* at 343.

<sup>513</sup> 570 U.S. 529 (2013).

<sup>514</sup> *Id.* at 547-48.

<sup>515</sup> *See, e.g.,* Justin Driver, Essay, *Recognizing Race*, 112 COLUM. L. REV. 404, 412-26 (2012) (discussing the judiciary's decisions as to when, and how, to recognize issues of race in its jurisprudence).

yield an opening for the Court to reinforce a particular conception of race and racism that is internal to—and contested within—the Court’s racial jurisprudence itself.

Critically, the *Box* concurrence’s racialized critique of abortion already evinces a particular conception of racism and racial harm. By its terms, it equates racism and racial injury with eugenics and genocide. It would be an understatement to say that there are few accounts of racism more egregious than the genocidal use of eugenics. Racialized eugenics underwrote the Holocaust, in which countless Jews were dispossessed of their property, imprisoned, and in many cases, killed.<sup>516</sup> If eugenics is the marker by which we measure constitutionally cognizable racial injuries, then the bar is very high indeed. On this account, using eugenics as an exemplar of racial injury moves the needle from Jim Crow and de jure segregation—already deeply problematic episodes of racism—toward something even more extreme.

Highlighting the fact of more egregious forms of racism and racial injury—beyond Jim Crow and segregation—is not, by itself, objectionable. We should recognize racialized eugenics as a constitutionally cognizable injury where and when it occurs. The difficulty, though, is a question of constitutional meaning. In ratcheting up what it means to experience racism and racial injury, we necessarily minimize the constitutional meaning and value we assign to other, less obviously egregious, forms of racism and racial harm. Again, the trajectory of constitutional colorblindness is instructive. Under the theory of constitutional colorblindness, evidence of disparate impact, absent a showing of discriminatory intent, is insufficient to trigger more searching equal protection review.<sup>517</sup> In a world where the exemplar of discriminatory intent is the racialized use of eugenics, claims of disparate impact may be pushed even further to the periphery. Put differently, in equating racism and racial injury with the horrors of eugenics and genocide, the *Box* concurrence’s racialized narrative underscores the view that the only kinds of racial injuries for which the Constitution offers redress are the exceptionally evil, intentional incidences of clear racial animus. Garden variety, “second-generation” discrimination slips beneath the surface—insufficiently egregious and thus constitutionally uncognizable.<sup>518</sup>

With this in mind, the *Box* concurrence’s association of race, abortion, and

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<sup>516</sup> See Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 830 n.375 (2020).

<sup>517</sup> See Haney-López, *supra* note 482, at 1784.

<sup>518</sup> Cf. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 767-68 (2011).

eugenics is incredibly consequential on a number of fronts. As the foregoing discussion makes clear, it is not merely an invitation to recast abortion as an issue of racial injustice; it is an invitation to entirely reconceptualize the meaning of race, racism, and racial injury as well.

### CONCLUSION

On July 21, 2020, Planned Parenthood of Greater New York (PPGNY) announced its plans to remove Margaret Sanger’s name from its Manhattan Health Center as part of its “public commitment to reckon with its founder’s harmful connections to the eugenics movement.”<sup>519</sup> The change, which grew out of a three-year reproductive justice-framed dialogue between the group and 300 community members, was “a necessary and overdue step to reckon with our legacy and acknowledge Planned Parenthood’s contributions to historical reproductive harm within communities of color.”<sup>520</sup>

Critically, PPGNY’s announcement came just a year after Justice Thomas’s *Box* concurrence interposed the issues of eugenics and racial selection into the abortion debate, and three weeks after the Court announced *June Medical Services v. Russo*, its most recent abortion decision, where it adverted to stare decisis to strike down a Louisiana admitting privileges law.<sup>521</sup>

The connections between PPGNY’s announcement, the *Box* concurrence, and *June Medical Services* are not immediately obvious. But, as this Article maintains, under the logic of the *Box* concurrence, one can draw a straight line from Margaret Sanger and eugenics to the “special justification” necessary to set aside stare decisis and reconsider a past precedent like *Roe v. Wade*. In this regard, the *Box* concurrence’s conflation of abortion, eugenics, and racial injury has harnessed the narrative and logic of reproductive justice and deployed it for its own ends.

But to be sure, the dismantling of abortion and reproductive rights are not the only likely casualties of the *Box* concurrence and its narrative of racial

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<sup>519</sup> Press Release, Planned Parenthood of Greater N.Y., *Planned Parenthood of Greater New York Announces Intent to Remove Margaret Sanger’s Name from NYC Health Center*, Planned Parenthood of Greater N.Y. (July 21, 2020), <https://www.plannedparenthood.org/planned-parenthood-greater-new-york/about/news/planned-parenthood-of-greater-new-york-announces-intent-to-remove-margaret-sangers-name-from-nychealth-center>.

<sup>520</sup> *Id.*

<sup>521</sup> *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2113 (2020).

injury. If race furnishes an opportunity for the Court to consider an earlier decision afresh, then it also furnishes an opportunity to generate new precedents that articulate and embed a specific conception of race and racial harm. In this regard, the *Box* concurrence contains not only the germ of a new campaign to topple *Roe v. Wade*, but the means by which the Court may harness the rhetoric of reproductive justice to continue sowing the seeds of a more parsimonious vision of racial justice.

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