

# RACE-SELECTIVE ABORTION BANS: A NEW WAY TO PREVENT ELIMINATION OF MINORITY GROUPS IN THE UNITED STATES

*Tysharah Jones Gardner*

## INTRODUCTION

“Abortion has swept through the Black community like a scythe, cutting down every fourth member.”<sup>1</sup>

The Supreme Court should find that states have a compelling interest in preventing the use of abortion as a modern-day eugenics tool because Black people, especially women, have been the target of hidden eugenicists’ agendas for years.<sup>2</sup> This Article addresses whether race-selective abortion bans infringe on a women’s right to obtain an abortion when the state has a compelling interest in protecting against the elimination of a race through modern day eugenics. Section I discusses how abortion jurisprudence has developed over time. Section II discusses race-selective abortion bans. Section III examines and analyzes selective abortion bans, specifically race-selective abortion bans. Section IV presents numerous solutions for addressing the high abortion rate in different community settings and the prevention of abortion being used as a form of modern-day eugenics. The objective of this Article is to educate on the current status of race-selective abortion laws in the United States, and to place that knowledge in the context of the history of the eugenics movement.

Race-selective abortion bans are a fairly new concept.<sup>3</sup> Exploring and analyzing the different views on race-selective abortion bans is most instructive. This Article shows that state-enacted selective abortion bans are constitutional because the state has a compelling interest to prevent the advancement of eugenicists’ goals through the use of abortion.<sup>4</sup> It will also argue that a state’s goal in preventing abortions based on race is essential to the survival and expansion of minority groups, specifically the

---

<sup>1</sup> Michael Novak, BLACK GENOCIDE.ORG (2012), <http://www.blackgenocide.org/black.html>.

<sup>2</sup> See CTR. FOR URB. RENEWAL & EDUC., THE EFFECTS OF ABORTION ON THE BLACK COMMUNITY, 3 (June 2015) <https://docs.house.gov/meetings/JU/JU10/20171101/106562/HHRG-115-JU10-Wstate-ParkerS-20171101-SD01.pdf>.

<sup>3</sup> *Infra* note 58.

<sup>4</sup> See *infra* Section III.

Black community, in the United States. Even if the Supreme Court finds race-selective abortion bans to be unconstitutional, minority groups should be educated on the fact that there is an overwhelming amount of Black women having abortions and our communities need to work to eradicate the problems that cause women to have abortions. This Article sets forth the legal issues surrounding whether race-selective abortions are constitutional while also addressing the pivotal peripheral cultural and human issues American civilization must face before moving forward.

## I. ABORTION IN THE UNITED STATES

To determine whether race-selective abortion bans are constitutional, it is instructive to look at the history of the practice of abortion and the development of abortion laws over the years. Women have been terminating their unwanted pregnancies for centuries.<sup>5</sup> Until the nineteenth century, abortion was a fairly common and uncontroversial issue.<sup>6</sup> In fact, women in the eighteenth and early-nineteenth centuries often took drugs to end their unwanted pregnancies.<sup>7</sup> The drugs they took were often homemade remedies and accordingly caused lots of concern among doctors and slave owners.<sup>8</sup> Slave owners were particularly concerned with the use of these drugs by slave women, who terminated or prevented their pregnancies, because the slave owners would not be able to reap a profit from the slave women bearing children.<sup>9</sup>

Pursuant to the concerns, the concept of abortion became increasingly illegal in many states during the mid-to-late nineteenth century.<sup>10</sup> In fact, all but one state criminalized abortion, except when necessary, by 1910.<sup>11</sup>

---

<sup>5</sup> *Roe v. Wade is Decided*, HISTORY (Jan. 22, 2020), <https://www.history.com/this-day-in-history/roe-v-wade> [hereinafter History].

<sup>6</sup> Sarah Handley-Cousins, *Abortion in the 19th Century*, NAT'L MUSEUM CIV. WAR MED. (Feb. 9, 2016), <http://www.civilwarmed.org/abortion1/>. Today, abortion is a topic that people are still battling over. In 2017, approximately half of Americans believed that having an abortion was morally wrong. See Michael Lipka & John Gramlich, *5 Facts About the Abortion Debate in America*, PEW RSCH. CTR. (Aug. 30, 2019), <https://www.pewresearch.org/fact-tank/2019/08/30/facts-about-abortion-debate-in-america/>; see also LYNN D. WARDLE, MARK P. STRASSER, LYNNE MARIE KOHM & TANYA M. WASHINGTON, *FAMILY LAW FROM MULTIPLE PERSPECTIVES* 313 (West Academic Publishing 2d 2019).

<sup>7</sup> History, *supra* note 5.

<sup>8</sup> Handley-Cousins, *supra* note 6.

<sup>9</sup> *Id.*; see also Loretta J. Ross, *African-American Women and Abortion: A Neglected History*, 3 J. HEALTH CARE FOR POOR & UNDERSERVED, 274, 276 (1992). Ross argues that African-American women have always attempted to control their fertility. She points out that slave owners would often use African-American fertility for financial means and that the African-American women would often take contraceptives to resist slavery.

<sup>10</sup> Handley-Cousins, *supra* note 6.

<sup>11</sup> *History of Abortion*, NAT'L ABORTION FED'N, <https://prochoice.org/education-and-advocacy/about-abortion/history-of-abortion/> (last visited Sept. 14, 2020).

This criminalization of abortion did not survive for very long in all of the states.<sup>12</sup> Even though most states liberalized or repealed their criminal abortion laws, there was still a lot of concern as to how abortion should be regulated.<sup>13</sup> Even today, in the twenty-first century, there is still a constant debate on how abortion should be regulated in the United States.<sup>14</sup>

### A. *Right to Privacy and Abortion*

Although the right to privacy is not explicitly mentioned in the Constitution, the Supreme Court has recognized this right in varying context since 1891.<sup>15</sup> In 1965, the Supreme Court found “that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance” and that those guarantees create “zones of privacy.”<sup>16</sup> In *Griswold*, the Court held that a statute prohibiting the use of contraceptives by married persons violated the right to marital privacy.<sup>17</sup> This privacy right was soon expanded to include nonmarital persons.<sup>18</sup>

It did not take long for this right to privacy to cross over to the issue of abortion; the Supreme Court addressed the right to privacy in the context of obtaining an abortion in 1973.<sup>19</sup> The Court ruled that the right to privacy protected a woman’s right to obtain an abortion.<sup>20</sup> According to the Court, this right to have an abortion fell under the Due Process Clause of the Fifth and Fourteenth Amendments.<sup>21</sup> Although *Roe v. Wade* gave women the right to obtain an abortion, the Court made it clear that the right was not absolute.<sup>22</sup> In fact, the Court held that the right to obtain an abortion “is not unqualified and must be considered against important

---

<sup>12</sup> *Id.* “Between 1967 and 1973 one-third of the states liberalized or repealed their criminal abortion laws.”

<sup>13</sup> *See id.*

<sup>14</sup> *See* Scottie Andrew & Caroline Kelly, *Dissatisfaction with Abortion Laws Rises on Both Sides of the Debate*, CNN POLITICS (Jan. 23, 2020), <https://www.cnn.com/2020/01/23/politics/abortion-attitude-poll-roe-v-wade-anniversary-trnd/index.html>.

<sup>15</sup> *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

<sup>16</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>17</sup> *Id.* at 485–86.

<sup>18</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>19</sup> *Roe*, 410 U.S. at 153.

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

<sup>21</sup> *Id.* at 157, 164.

<sup>22</sup> *Id.* at 154.

state interests in regulation.”<sup>23</sup> Therefore, states can regulate abortion but cannot deny women the right to obtain an abortion altogether.<sup>24</sup>

The *Roe* Court agreed with lower courts that “at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant.”<sup>25</sup> Also, the *Roe* Court examined the word “person” in the Constitution and concluded that the application of “person” did not apply to the unborn.<sup>26</sup> However, the states at some point still have an interest in regulating abortion.<sup>27</sup> The Court attempted to strike a balance between a woman’s right and the state’s interest by setting a trimester framework.<sup>28</sup> According to the Court, the point at which the state gains a compelling interest is at the end of the first trimester.<sup>29</sup>

The Trimester framework set up in *Roe v. Wade* was re-examined by the Supreme Court less than 20 years later.<sup>30</sup> In *Planned Parenthood v. Casey*, the Court found that the trimester framework was unnecessary to ensure a woman’s right to obtain an abortion against a state’s compelling interest.<sup>31</sup> In this case there were five provisions that the court considered — 1) requirement that women give informed consent and that women be giving information 24 hours prior to the abortion being performed; 2) requirement that a parent give informed consent for a minor to obtain an abortion; 3) requirement that a married woman provide an affidavit stating that she has informed her husband of her decision to have an abortion; 4) medical emergency exception that excused these requirements; and 5) requirements on facilities providing abortion services.<sup>32</sup> The Court struck down the provision requiring a woman to inform her husband of her decision to have an abortion but upheld all the other provisions.<sup>33</sup> The Court reasoned that as long as the state’s

---

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

<sup>24</sup> *Id.* at 153.

<sup>25</sup> *Id.* at 155.

<sup>26</sup> *Id.* at 158.

<sup>27</sup> *Id.* at 129, 150, 154–58.

<sup>28</sup> *Id.* at 162–63.

<sup>29</sup> *Id.* at 163–64. (“[T]he period of pregnancy prior to this ‘compelling’ point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State. . . . With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.”).

<sup>30</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 858, 872 (1992).

<sup>31</sup> *Id.* at 875–76.

<sup>32</sup> *Id.* at 844.

<sup>33</sup> *Id.* at 895, 901.

regulations are not an undue burden on the woman, the state could impose some burden on the woman trying to have an abortion.<sup>34</sup> Thus, states may regulate abortions as long as there is no undue burden placed on the woman's right to have an abortion.<sup>35</sup> An undue burden exists when the purpose or effect of the law "is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."<sup>36</sup>

After *Casey*, it was clear that only three principles from *Roe* survived: 1) a woman has the right to choose to have an abortion; 2) states may restrict abortion after fetal viability; and 3) states have a legitimate interest to protect the health of the mother and life of the fetus.<sup>37</sup> It is important to note and reiterate that *Casey* did not do away with *Roe*'s essential holding that states may not prohibit a woman from having an abortion prior to viability but only required that states may not impose an undue burden on the right to obtain an abortion at any point during the pregnancy.<sup>38</sup>

The Supreme Court has not heard many abortion related cases since *Casey*.<sup>39</sup> Because of this, states are constantly challenged with determining what laws to implement so that they are not placing an undue burden on a woman's rights to obtain an abortion.<sup>40</sup> The Supreme Court has added a small list of things, such as requirements that doctors have admitting privileges within thirty miles from where the abortion was performed and requirements that abortion facilities maintain minimum standards for ambulatory surgical centers,<sup>41</sup> to the undue burden list.<sup>42</sup>

The Court has also considered whether partial birth abortion bans place an undue burden on a woman's right to have an abortion.<sup>43</sup> In 2000, the Court in *Stenberg v. Carhart* found a Nebraska statute that prohibited partial-birth abortions to be unconstitutional.<sup>44</sup> The Court reasoned that the statute was unconstitutional because it failed to include an exception for the preservation of the health of the mother and because it imposed an undue burden on a woman's right to choose to have a Dilation and

---

<sup>34</sup> *Id.* at 878.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See Tori Gooder, *Selective Abortion Bans: The Birth of a New State Compelling Interest*, 87 U. CIN. L. REV. 545, 550 (2018); see also *Casey*, 505 U.S. at 874–76, 879.

<sup>38</sup> *Casey*, 505 U.S. at 870, 879.

<sup>39</sup> Gooder, *supra* note 37, at 550.

<sup>40</sup> *Id.* at 550–52.

<sup>41</sup> *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310–11, 2314–16, 2318 (2016).

<sup>42</sup> *Id.* at 2318.

<sup>43</sup> See *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000).

<sup>44</sup> *Id.* at 929, 930.

Extraction procedure (D&E) as a means to get an abortion.<sup>45</sup> The Court reconsidered partial birth abortion bans just seven years later.<sup>46</sup> This time, however, the Court found the statute to be constitutional because, unlike the statute in *Stenberg*, the statute in this case was more specific and precise as to when the partial birth abortion bans applied.<sup>47</sup> In *Gonzalez v. Carhart*, the Court noted that the government has an interest in protecting the medical profession and can therefore

[U]se its voice and its regulatory authority to show its profound respect for life within a woman. . . . Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.<sup>48</sup>

It is important to note that both of the statutes from *Stenberg* and *Gonzalez* addressed partial birth abortions in the later stages of pregnancy.<sup>49</sup> The Court provided extra insight on what constitutes an undue burden with these two cases by adding broad partial birth abortion bans that lack preservation of health exceptions to the undue burden list but ruling partial birth abortion bans that are specific and precise constitutional and not an undue burden on a woman's right to obtain an abortion.<sup>50</sup>

Further, some states have put bans on selective abortions<sup>51</sup> and the Supreme Court has yet to decide whether these bans are an undue burden on the women trying to procure an abortion.<sup>52</sup> Although the Court recently denied certiorari, Justice Thomas wrote a long concurrence about the selective bans that Indiana enacted.<sup>53</sup> His concurrence forced people to think about how the Court will rule on the issue of abortion — particularly

---

<sup>45</sup> *Id.* at 930. (*Roe* and *Casey* made it clear that states may regulate abortion, but states cannot regulate abortion “where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”)

<sup>46</sup> *Gonzales v. Carhart*, 550 U.S. 124, 132 (2007).

<sup>47</sup> *Id.* at 133.

<sup>48</sup> *Id.* at 157–58.

<sup>49</sup> *See id.* at 132–33.

<sup>50</sup> *Id.* at 147, 150, 156; *see Stenberg*, 530 U.S. at 930.

<sup>51</sup> *See Gooder, supra* note 37, at 553.

<sup>52</sup> *See Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019).

<sup>53</sup> *Id.* at 1782–83 (Thomas, J., concurring).

selective abortion — in the future.<sup>54</sup> One thing is very clear from these lines of cases: abortion jurisprudence today is very different than when *Roe* was decided.<sup>55</sup>

## II. SELECTIVE ABORTION BANS

Every state in the United States has dealt with the issue of abortion in some way.<sup>56</sup> Many women decide to get abortions for many different reasons — such as resource limitations and lack of partner support.<sup>57</sup> Although there are many different reasons that women decide to get abortions, states do not place bans on abortions for all of these reasons. In fact, only a few states have enacted some form of law to prohibit or limit abortion based on sex, race, or genetic anomaly.<sup>58</sup> Currently, ten states have banned abortion for reasons of sex-selection.<sup>59</sup> Sex-selective abortions are abortions that are performed due to the sex of the unborn child.<sup>60</sup> Three states banned abortion for reasons of race, and three states banned abortion for reasons of genetic anomaly.<sup>61</sup> The Supreme Court has yet to rule on whether sex-, race-, or disability-selective abortion bans are unconstitutional.<sup>62</sup>

### A. *Race-Selective Abortion Bans*

Only three states tried to use their regulatory power to prohibit abortions based on race.<sup>63</sup> Arizona was the first state to enact legislation prohibiting abortion providers from performing abortions when they know that the reason for getting an abortion is based on the sex or race of the unborn child.<sup>64</sup> The statute states “A person who knowingly does any of the following is guilty of a class 3 felony: 1. Performs an abortion knowing

<sup>54</sup> See *id.* at 1790–93.

<sup>55</sup> Gooder, *supra* note 37, at 552.

<sup>56</sup> See *An Overview of Abortion Laws*, GUTTMACHER INST. (Nov. 1, 2020), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws>.

<sup>57</sup> Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPROD. HEALTH 110, 112–17 (2005).

<sup>58</sup> *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, GUTTMACHER INST. (Nov. 1, 2020), <https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly> [hereinafter *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*].

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

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

<sup>61</sup> *Id.*

<sup>62</sup> *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019).

<sup>63</sup> *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, *supra* note 58.

<sup>64</sup> Gooder, *supra* note 37, at 553; see also ARIZ. REV. STAT. ANN. § 13-3603.02(A)(1) (LexisNexis 2011).

that the abortion is sought based on the sex or race of the child or the race of a parent of that child.”<sup>65</sup> Some Arizona legislators enacted the legislation to protect minority groups, such as African-Americans and Hispanics, from being targeted by abortion providers.<sup>66</sup> In the summer of 2009, a documentary, *Maafa 21*, about racial targeting and population control was released.<sup>67</sup> This documentary argues, amongst other things, that the primary consideration used to decide where to put population control facilities was the percentage of Blacks in the area.<sup>68</sup> This information and many other studies, showing the same results, likely had a strong impact on Arizona’s legislators’ decision to enact legislation to ban race-selective abortions to actually protect minority groups. In 2015, the Ninth Circuit upheld the Arizona statute prohibiting abortion based on race.<sup>69</sup> The court found that the Plaintiff’s alleged injury — the stigmatizing effect of the statute on female members — lacked standing and was insufficient because they did not allege that they were personally denied equal treatment.<sup>70</sup> The results of this case would have been very different if someone who was personally affected by this statute came forward. It causes one to wonder whether no one came forward because women typically do not get abortions based on the race of their child. Research has not suggested that Black women, or women of any other ethnicity, obtain an abortion based on the race of their unborn children.<sup>71</sup>

The only other state to enact a law that banned abortion based on race was Indiana.<sup>72</sup> The statute states,

- (a) A person may not intentionally perform or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking the abortion solely because of the race, color, national origin, or ancestry of the fetus. (b) A person may not intentionally perform or attempt to perform an abortion after

---

<sup>65</sup> ARIZ. REV. STAT. § 13-3603.02(A)(1).

<sup>66</sup> Gooder, *supra* note 37, at 553.

<sup>67</sup> Mark Crutcher, Carole Novielli, & Renee Hobbs, *Racial Targeting and Population Control*, LIFE DYNAMICS INC. 1 (2011), <https://www.klannedparenthood.com/wp-content/themes/trellis/PDFs/Racial-Targeting-Population-Control.pdf>.

<sup>68</sup> *Id.*

<sup>69</sup> NAACP v. Horne, 626 F. App’x 200, 201 (9th Cir. 2015).

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

<sup>71</sup> See John Eligon, *When ‘Black Lives Matter’ is Invoked in the Abortion Debate*, N.Y. TIMES (July 6, 2019), <https://www.nytimes.com/2019/07/06/us/black-abortion-missouri.html>.

<sup>72</sup> See IND. CODE ANN. § 16-34-4-8 (LexisNexis 2016).



viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking the abortion solely because of the race, color, national origin, or ancestry of the fetus.<sup>73</sup>

The Indiana statute prevents people from performing abortions before or after viability when they know that the person is seeking an abortion solely because of race.<sup>74</sup> Indiana's legislature also placed bans on sex- and disability- selective abortions.<sup>75</sup> Planned Parenthood of Indiana and Kentucky quickly challenged these provisions by asserting that the provisions violated the Due Process Clause of the Fourteenth Amendment by placing a substantial obstacle in the way of obtaining an abortion before viability.<sup>76</sup> The Seventh Circuit found the bans to be unconstitutional.<sup>77</sup> It was not long before the Supreme Court received a petition to review that ruling.<sup>78</sup> The Supreme Court quickly denied the petition and stated that it would follow its ordinary practice of waiting for other Courts of Appeals to consider the legal issues surrounding selective abortion bans.<sup>79</sup> Justice Thomas recognized that the Court will soon need to address the constitutionality of selective abortion bans due to the potential of abortion being used as a tool for "modern day eugenics."<sup>80</sup>

Out of the two states that enacted bans on race-selective abortion, only Arizona's statute survived.<sup>81</sup> It seems unlikely that other states will enact race-selective abortion bans. Research suggests that states seem to focus more on sex-selective abortion bans than race-selective abortion bans.<sup>82</sup> The reason that states seem to be avoiding race-selective abortion bans are unknown. Maybe state legislators fear the backlash that they will receive from the Black community. They may even fear that the bill

---

<sup>73</sup> *Id.* § 16-34-4-8(a)(b).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* § 16-34-4-5; *Id.* § 16-34-4-7.

<sup>76</sup> *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 194 F. Supp. 3d (S.D. Ind. 2016).

<sup>77</sup> *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 888 F.3d 300, 302 (7th Cir. 2018).

<sup>78</sup> *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1781 (2019).

<sup>79</sup> *Id.* at 1782.

<sup>80</sup> *Id.* at 1783–84 (Thomas, J., concurring).

<sup>81</sup> ARIZ. REV. STAT. § 13-3603.02(A)(1) (LexisNexis 2011).

<sup>82</sup> By conducting a quick search on Google for "race-selective abortion bans", it is clear that sex-selective abortion laws or issues occur more often than race-selective abortion bans. See *Sex- or Race-Selective Bans Laws*, REWIRE NEWS GRP., <https://rewirenewsgroup.com/legislative-tracker/law-topic/sex-or-race-selective-bans/> (last visited Oct. 17, 2020).

will not pass due to similar bills failing in other states.<sup>83</sup> Whatever the reason, it is unlikely that the Supreme Court will decide on whether race-selective abortions are constitutional in the near future, unless it is considered with other sex- or disability- selective abortion bans.<sup>84</sup>

The topic of race-selective abortion bans is a very sensitive one, and there are multiple perspectives on the bans.<sup>85</sup> Some people in the Black community support legal access to abortion but often feel as though it is morally wrong.<sup>86</sup> These sentiments play a vital part in understanding why some Blacks, often Christians, are against race-selective abortion bans but believe that abortion itself is morally wrong.<sup>87</sup> In fact, Mr. Clinton Stancil, a pastor and civil rights activist, stated “As much as I believe with all my heart about the killing, the taking of innocent lives, I also believe that I will never support giving white legislators, who have no interest in our community, the ability to tell our women what they can do with their bodies.”<sup>88</sup> Stancil, like others in the Black community, believes that abortions are wrong but does not believe in allowing far-reaching restrictions, such as race-selective abortion bans, that would do away with abortion all together.<sup>89</sup> However, race-selective abortion bans will not do away with abortions altogether because they only infringe on a woman’s right to have an abortion based on racial reasons.<sup>90</sup> It is clear that a woman who decides to have an abortion for any other reason, that is not regulated by the state, would be able to obtain an abortion.<sup>91</sup>

Others argue that banning abortion based on sex, race, or genetic anomaly stigmatizes pregnant people of color by questioning their motivation behind getting an abortion.<sup>92</sup> They further argue that “race-selective abortion bans are based on the idea that women of color are coerced into abortions or are complicit in a ‘genocide’ against their own community.”<sup>93</sup> Women decide to get abortions for many different reasons

---

<sup>83</sup> *Banning Abortions in Cases of Race or Sex Selection or Fetal Anomaly*, GUTTMACHER INST. (Jan. 22, 2020), <https://www.gutmacher.org/evidence-you-can-use/banning-abortions-cases-race-or-sex-selection-or-fetal-anomaly> [hereinafter *Banning Abortions*].

<sup>84</sup> See *Box*, 139 S. Ct. at 1782.

<sup>85</sup> See Gooder, *supra* note 37, at 558–59, 568–69.

<sup>86</sup> Eligon, *supra* note 71; see also Emily Ward, *CDC: 36% of Abortions Abort Black Babies*, CNSNEWS (Nov. 28, 2018), <https://www.cnsnews.com/news/article/emily-ward/blacks-make-134-population-36-abortions>.

<sup>87</sup> Eligon, *supra* note 71; see also Ward, *supra* note 86.

<sup>88</sup> Eligon, *supra* note 71.

<sup>89</sup> *Id.*

<sup>90</sup> See *id.* (demonstrating that people acknowledge there are different purposes for abortion, and showing opinions to ban some abortions for some reasons compared with banning all abortions, thus acknowledging that banning abortion for one reason would not ban all abortions).

<sup>91</sup> *Banning Abortions*, *supra* note 83.

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

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

and evidence has not shown that modern-day Black women decide to get abortions simply because of the race of their unborn child.<sup>94</sup> On the opposite end, people argue that population control facilities are disproportionately placed in Black communities<sup>95</sup> and that race-selective abortion bans protect Blacks from the pressures of these organizations.<sup>96</sup> They even argue that Blacks and Hispanics have been targeted by programs and people with eugenicists' goals.<sup>97</sup>

Regardless of the different views on race-selective abortion bans, it is clear that women and babies of color would be impacted by race-selective abortion bans.<sup>98</sup> Black women make up less than fourteen percent<sup>99</sup> of the population in the United States, yet statistically Black women have some of the highest abortion rates.<sup>100</sup> According to the CDC, 36 percent of abortions abort Black babies.<sup>101</sup> Currently, 27.1 of every 1000 Black women have an abortion whereas only 10 of every 1000 white women get abortions.<sup>102</sup> Furthermore, other minority groups in the United States have extremely high abortion rates.<sup>103</sup> For example, in 2014, 18.1 of every 1000 Hispanic women received an abortion.<sup>104</sup> The chart below exhibits the fact that Blacks and Hispanics receive more abortions than other women in the United States.<sup>105</sup>

---

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

<sup>95</sup> Crutcher, Novielli, & Hobbs, *supra* note 67, at 1.

<sup>96</sup> Gooder, *supra* note 37, at 553; *See id.* at 22;

<sup>97</sup> Crutcher, Novielli, & Hobbs, *supra* note 67, at 1.

<sup>98</sup> *See* Eligon, *supra* note 71.

<sup>99</sup> *See Quick Facts United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219#> (last visited Nov. 6, 2020).

<sup>100</sup> *See* Eligon, *supra* note 71.

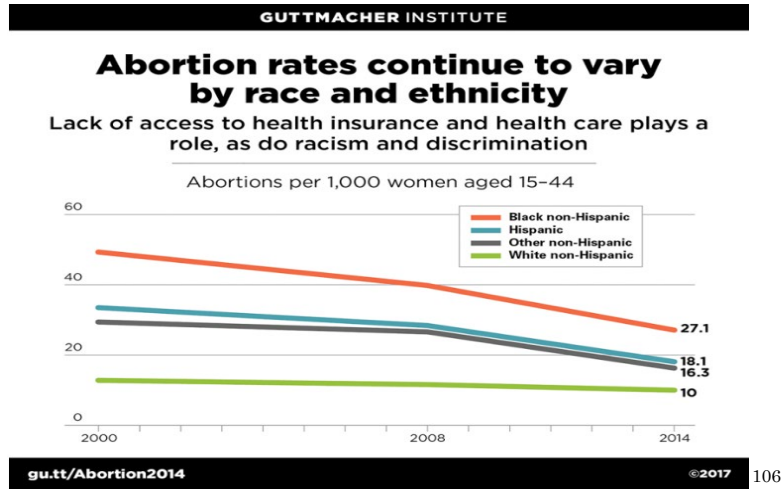
<sup>101</sup> Ward, *supra* note 86.

<sup>102</sup> Eligon, *supra* note 71.

<sup>103</sup> *See* Finer et al., *supra* note 57, at 112, 114–16.

<sup>104</sup> *Abortion Rates by Race and Ethnicity*, GUTTMACHER INST. (Oct. 19, 2017), <https://www.guttmacher.org/infographic/2017/abortion-rates-race-and-ethnicity>.

<sup>105</sup> *Id.* This chart was published by the Guttmacher Institute. Guttmacher Institute conducts research on sexual and reproductive health and rights.



Although there is an overall decline in the rate of abortions, it is clear that minority groups continue to have higher rates of abortions.<sup>107</sup> The reason that minority women groups have more abortions than white women vary.<sup>108</sup> However, research has shown that population control facilities are often placed in areas where there is a disproportionate number of Blacks and Hispanics.<sup>109</sup> It is likely that the deliberate locations of these facilities have a large influence on the decisions of minority women to get an abortion.<sup>110</sup> If it is found or even speculated that these facilities are targeting minority groups, then the implementation of race-selective abortion bans may provide extra protection against these tactics.

### III. ANALYSIS

Since *Planned Parenthood v. Casey*, the Supreme Court has considered the health of the mother, the potential life of the fetus, eradicating discrimination, and protecting the potential life from discrimination as compelling state interests.<sup>111</sup> Prior to Justice Thomas's concurrence in *Box v. Planned Parenthood*, Tori Gooder, former Human Rights Quarterly Senior Article Editor at the University of Cincinnati

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See Eligon, *supra* note 71.

<sup>109</sup> Crutcher, Novielli, & Hobbs, *supra* note 67, at 1, 22.

<sup>110</sup> *Id.* at 1; see also *Planned Parenthood Targets Minority Neighborhoods*, PROTECTING BLACK LIFE, [https://www.protectingblacklife.org/pp\\_targets/index.html](https://www.protectingblacklife.org/pp_targets/index.html) (last visited Nov. 6, 2020). This site offers an interactive map so that users may examine areas the relation between abortion clinics and minority communities.

<sup>111</sup> Gooder, *supra* note 37, at 556.

College of Law, argued that the prohibition of abortion as tool for eugenics may be a stronger compelling interest for states than even discrimination.<sup>112</sup> Gooder used the term “new compelling state interest” to describe a state’s interest in preventing abortion from being a tool for eugenicists’ agenda.<sup>113</sup> Justice Thomas focuses on this “new compelling state interest” in his concurrence in *Box v. Planned Parenthood*.<sup>114</sup> He argues that laws that ban selective abortions “promote a state’s compelling interest in preventing abortion from becoming a tool of modern-day eugenics.”<sup>115</sup> If states that have enacted race-selective abortion bans have done so to prevent abortion from being used as a tool for “modern day eugenics,” then the Court should rule that the bans are constitutional.

### A. *Eugenics Movement*

The United States has a fairly long and sometimes forgotten or untaught history with the eugenics movement.<sup>116</sup> Eugenics, a term coined by Francis Galton in 1883, means “the practice or advocacy of controlled selective breeding of human populations (as by sterilization) to improve the population’s genetic composition.”<sup>117</sup> The eugenics movement, led by Charles Davenport, a prominent biologist, and Harry Laughlin, a former teacher and principal interested in breeding, began in the United States in the 20th Century.<sup>118</sup> Eugenicians looked at the race of people as a relevant factor in distinguishing between the fit and unfit.<sup>119</sup> They believed that white men fixed many of the issues that often kept the colored populations from increasing out of control.<sup>120</sup> Known eugenicians went as far as to say that the number of colored people in the world continued to increase while the amount of subsistence dwindled, which would create a problem for the white world.<sup>121</sup> Lothrop Stoddard, American historian, expressed his concern for the growing amount of

---

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 561.

<sup>114</sup> See *Box v. Planned Parenthood of Ind. & Ky, Inc.*, 139 S. Ct. 1780, 1783–84 (2019) (Thomas, J., concurring).

<sup>115</sup> *Id.* at 1783.

<sup>116</sup> Teryn Bouche & Laura Rivard, *America’s Hidden History: The Eugenics Movement*, NATURE EDUC. (Sept. 18, 2014), <https://www.nature.com/scitable/forums/genetics-generation/america-s-hidden-history-the-eugenics-movement-123919444/>. (“[A]sk the average person about the ‘eugenics movement’ and you are likely to get blank stares.”).

<sup>117</sup> *Eugenics*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/eugenics> (last visited Sept. 12, 2020).

<sup>118</sup> Bouche & Rivard, *supra* note 116.

<sup>119</sup> *Box*, 139 S. Ct. at 1785 (Thomas, J., concurring).

<sup>120</sup> See *id.*

<sup>121</sup> LOTHROP STODDARD, *THE RISING TIDE OF COLOR AGAINST WHITE WORLD-SUPREMACY* 8–9 (1920).

colored people in the world and believed that “artificial barriers” were needed to prevent the white race from being overtaken by the increasing colored races.<sup>122</sup> Although he discussed many other colored people, Stobbard asserted that Black people were the “quickest of breeders” and “extremely susceptible to external influences.”<sup>123</sup> Eugenicists recognizing the “fact” that Blacks were the “quickest of breeders,” supported “artificial barriers” — such as forced sterilization, abortion, and birth control — to prevent the colored population from increasing.<sup>124</sup>

The reach of the eugenics movement goes far. So far in fact, that at one point in history, the Supreme Court and federal and state legislatures supported eugenics in their opinions.<sup>125</sup> The Supreme Court strengthened and supported eugenicists’ agenda in *Buck v. Bell*, 274 U.S. 200 (1927).<sup>126</sup> In *Buck*, the Supreme Court upheld a forced sterilization law.<sup>127</sup> The court stated that:

[S]he may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization. . . . We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.<sup>128</sup>

---

<sup>122</sup> *Id.* at 302.

<sup>123</sup> *Id.* at 90, 92.

<sup>124</sup> *Id.* at 90, 302; see also *Box*, 139 S. Ct. at 1784–86 (Thomas, J., concurring).

<sup>125</sup> Gooder, *supra* note 37, at 561.

<sup>126</sup> Brittany Raymer, *Pro-Abortion Group Leader Admits that Abortion is Eugenics*, DAILY CITIZEN (Dec. 4, 2019), <https://dailycitizen.focusonthefamily.com/pro-abortion-group-leader-admits-that-abortion-is-eugenics/>.

<sup>127</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927).

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

Throughout the 20th century, forced sterilization was used, in over 32 states, as a means of controlling an “undesirable” population.<sup>129</sup> This “undesirable” group consisted of “immigrants, people of color, poor people, unmarried mothers, the disabled, [and] the mentally ill.”<sup>130</sup> Many eugenicists supported forced sterilization to protect the society from the offspring of those whom they deemed “inferior or dangerous.”<sup>131</sup> The sad part is that Carrie Buck was not the only person to experience forced sterilization.<sup>132</sup> Since the Supreme Court’s ruling in 1927, there have been over 70,000 forced sterilizations in the United States.<sup>133</sup> Blacks were significantly impacted by the use of forced sterilization in America. In Virginia, African-Americans made up twenty-two percent of those sterilized.<sup>134</sup> Not only were older Black women forcibly sterilized but young African-American girls were sterilized against their will and the will of their parents.<sup>135</sup> Many states have apologized for its sterilization programs<sup>136</sup> but one fact remains — it has been almost a century later and *Buck v. Bell* has not been overturned.<sup>137</sup>

The reach of the eugenics movement can be seen in many other places as well. Eugenics was so popular that many colleges and universities educated students on the movement and its merits.<sup>138</sup> Simply educating young people of the movement is actually not a bad idea; however, when some of the most influential eugenics thinkers are teaching those classes with a proactive objective rather than an objective position, an issue

---

<sup>129</sup> Lisa Ko, *Unwanted Sterilization and Eugenics Programs in the United States*, PBS (Jan. 29, 2016), <http://www.pbs.org/independentlens/blog/unwanted-sterilization-and-eugenics-programs-in-the-united-states/>.

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

<sup>131</sup> *Id.*

<sup>132</sup> *See id.*

<sup>133</sup> *The Supreme Court Ruling That Led to 70,000 Forced Sterilizations*, NPR (Mar. 7, 2016), <https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations>.

<sup>134</sup> Lutz Kaelber, *Virginia*, UNIV. VT, <https://www.uvm.edu/~lkaelber/eugenics/VA/VA.html> (last visited Nov. 7, 2020).

<sup>135</sup> Ko, *supra* note 129. (Two poor mentally disabled black girls were sterilized after their illiterate mother signed paperwork that she believed authorized them to receive birth control shots.)

<sup>136</sup> Trevor Burrus, *How States Sterilized 60,000 Americans — And Got Away with It*, FOUND. FOR ECON. EDUC. (Jan. 28, 2016), <https://fee.org/articles/how-states-got-away-with-sterilizing-60-000-americans/>.

<sup>137</sup> Eric Metaxas, Commentary, *Eugenics Alive and Well in America: Sterilization Case Buck v. Bell Still Matters*, CNS NEWS (Nov. 17, 2017), <https://www.cnsnews.com/commentary/eric-metaxas/eugenics-alive-and-well-america-sterilization-case-buck-v-bell-still-matters>.

<sup>138</sup> *Box v. Planned Parenthood of Ind. & Ky. Inc.*, 139 S. Ct. 1780, 1784–85 (2019) (Thomas, J., concurring).

arises.<sup>139</sup> Some professors taught a racial version of eugenics and undoubtedly influenced students to think that Blacks were inferior to whites.<sup>140</sup> Some even went as far as to say that the Black race was incapable of producing offspring with high mental or moral capabilities.<sup>141</sup>

This particular thinking played a huge role in the treatment of Blacks throughout the twentieth century.<sup>142</sup> Since most of the legislators, judges, and other law makers attended, or knew someone who attended, these schools that taught eugenics, the movement undoubtedly spread to other aspects of life such as marriage and immigration.<sup>143</sup> Some eugenicists were huge proponents of preventing interracial marriages and laws were soon enacted to prevent whites from marrying other races of people.<sup>144</sup> Our country has a dark history with the eugenics movement, and it is truly strange that this movement touched one of the most sacred tenets known to humankind — marriage.<sup>145</sup>

Furthermore, the eugenics movement touched on reproductive rights.<sup>146</sup> Justice Thomas argues that birth control and abortion became a tool to advance eugenicists' goals.<sup>147</sup> Gooder quickly mentions abortion and infanticide as eugenicists' tools but fails to analyze why or even how these became eugenicists' tools.<sup>148</sup> Gooder only focuses on the use of eugenics for the disabled<sup>149</sup> but it is important to analyze the history of racial eugenics to understand how the movement has played a huge role

---

<sup>139</sup> See Adam S. Cohen, *Harvard's Eugenics Era: When Academics Embraced Scientific Racism, Immigration Restrictions, and the Suppression of "The Unfit"*, HARV. MAG., Mar.–Apr. 2016, <https://harvardmagazine.com/2016/03/harvards-eugenics-era>.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See *id.*

<sup>143</sup> Joanna L. Grossman & Lawrence M. Friedman, *Junk Science, Junk Law: Eugenics and the Struggle Over Abortion Rights*, JUSTIA VERDICT (June 25, 2019), <https://verdict.justia.com/2019/06/25/junk-science-junk-law-eugenics-and-the-struggle-over-abortion-rights>; see also Cohen, *supra* note 139 (“If Harvard’s embrace of eugenics had somehow remained within University confines—as merely an intellectual school of thought—the impact might have been contained. But members of the community took their ideas about genetic superiority and biological engineering to Congress, to the courts, and to the public at large—with considerable effect.”).

<sup>144</sup> Cohen, *supra* note 139.

<sup>145</sup> Todd S. Beall, *Seven Principles from Genesis for Marriage and Family*, ANSWERS IN GENESIS (Apr. 30, 2016), <https://answersingenesis.org/family/marriage/seven-principles-from-genesis/>. (Genesis 1 and 2 shows that marriage was created by God, not by men. Therefore, men should not have tried to regulate who married whom).

<sup>146</sup> Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL’Y, 1, 1–2 (1996).

<sup>147</sup> *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1787 (2019) (Thomas, J., concurring).

<sup>148</sup> See Gooder, *supra* note 37, at 562.

<sup>149</sup> See *id.* at 554 *passim*.



in the high rate of abortions amongst Black women. As Ben Carson, US Secretary of HUD and anti-abortion advocate, stated,

I know who Margaret Sanger is, and I know that she believed in eugenics, and that she was not particularly enamored with Black people. And one of the reasons that you find most of their clinics [Planned Parenthood] in Black neighborhoods is so that you can find way to control that population. And I think people should go back and read about Margaret Sanger, who founded this place.<sup>150</sup>

For this reason, it is extremely important to examine Margaret Sanger and Planned Parenthood's ties to the eugenics movement. Margaret Sanger, Planned Parenthood founder, openly endorsed the use of birth control for eugenics purposes.<sup>151</sup> She believed that birth control was needed to assist with many of the societal problems during her time.<sup>152</sup> Sanger targeted African-Americans in her campaign to provide birth control services to women.<sup>153</sup> She recognized that Black women wanted to control their fertility and took significant strides to ensure that Black women were provided birth control methods.<sup>154</sup> To some this may seem like a noble effort, but Sanger believed that birth control contained eugenic value.<sup>155</sup> She thought that people of her time would best serve the true interest of eugenics through birth control.<sup>156</sup> For this reason and many others, she was a huge proponent of educating the masses on birth control methods.<sup>157</sup> Although Sanger was a huge proponent of birth control, Sanger never endorsed the use of abortion, in fact she often distinguished between abortion and birth control.<sup>158</sup> However, Sanger's

---

<sup>150</sup> *Dr. Ben Carson the GOP's New 'Prom King' After First Debate?*, FOXNEWS.COM (Aug. 12, 2015), <https://www.foxnews.com/transcript/dr-ben-carson-the-gops-new-prom-king-after-first-debate>.

<sup>151</sup> *Box*, 139 S. Ct. at 1787 (Thomas, J., concurring).

<sup>152</sup> *Id.* at 1788.

<sup>153</sup> The Margaret Sanger Papers Project, *Birth Control or Race Control? Sanger and the Negro Project*, N.Y.U. (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>154</sup> *Id.*

<sup>155</sup> Margaret Sanger, *The Eugenic Value of Birth Control Propaganda*, BIRTH CONTROL R., (Oct. 1921), at 5, <https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=238946.xml>.

<sup>156</sup> *Id.*

<sup>157</sup> *See id.*

<sup>158</sup> Margaret Sanger, *The Birth Control of a Nation*, N.Y.U. (1937), <https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=101878.xml>.

arguments for birth control apply even more to abortion because babies with unwanted characteristics can easily be targeted through means of abortion and everchanging genetic technology.<sup>159</sup>

Even though Sanger did not support abortion, future Planned Parenthood presidents and abortion advocates supported abortion for eugenics reasons.<sup>160</sup> From its inception, Planned Parenthood has been actively involved with the eugenics movement.<sup>161</sup> The eugenics movement has touched almost every aspect of reproduction — marriage, birth control, etc. — and it is shocking that some still believe that abortion clinics do not carry a eugenics agenda — to control the population.<sup>162</sup>

The eugenics movement waned after being associated with the horrors of the Nazi regime in the 1940s.<sup>163</sup> That does not mean that eugenicist's agendas or ideas disappeared. Rather, while the term eugenics was tarnished by Hitler and his efforts, eugenicists still wanted to draw the distinction between the fit and the unfit.<sup>164</sup> So, they chose new words, such as genetics, to describe eugenics.<sup>165</sup> The main notion of limiting or eliminating the number of colored, disabled, and other “inferior” people is still alive today.<sup>166</sup> Although many others are undoubtedly negatively impacted by abortion, abortion poses a unique threat to Black families in America.<sup>167</sup> This threat is so unique because so many facilities are strategically placed in predominately Black neighborhoods.<sup>168</sup> It is no surprise that many family planning clinics, including Planned Parenthood, believed “that the most effective way they

---

<sup>159</sup> *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1787 (2019) (Thomas, J., concurring).

<sup>160</sup> *Id.*; see also Rebecca R. Messall, Opinion, *Margaret Sanger and the Eugenics Movement*, DENVER POST (June 2, 2010), <https://www.denverpost.com/2010/06/02/margaret-sanger-and-the-eugenics-movement/>.

<sup>161</sup> See *Box*, 139 S. Ct. at 1783.

<sup>162</sup> See *id.*; see also Amita Kelly, *Fact Check: Was Planned Parenthood Started to 'Control' the Black Population?*, NPR (Aug. 14, 2015), <https://www.npr.org/sections/itsallpolitics/2015/08/14/432080520/fact-check-was-planned-parenthood-started-to-control-the-black-population>.

<sup>163</sup> Bouche & Rivard, *supra* note 116.

<sup>164</sup> Messall, *supra* note 160.

<sup>165</sup> *Id.*

<sup>166</sup> Gary L. Welton, Commentary, *Eugenics is Alive and Well in America*, CNSNEWS.COM (Jan. 22, 2019), <https://www.cnsnews.com/commentary/gary-l-welton/eugenics-alive-and-well-america>; Messall, *supra* note 160, (“The control of reproduction remained the primary goal of eugenics in order to improve the human gene pool.”).

<sup>167</sup> P.R. Lockhart, “*Abortion as Black Genocide*”: *Inside the Black Anti-Abortion Movement*, VOX (Jan. 19, 2018), <https://www.vox.com/platform/amp/identities/2018/1/19/16906928/black-anti-abortion-movement-yoruba-richen-medical-racism>.

<sup>168</sup> Crutcher, Novielli, & Hobbs, *supra* note 67 at 22.

could advance their agenda would be to concentrate population control facilities within targeted communities.”<sup>169</sup>

On one hand, there are people like Justice Thomas who believe that the eugenicists used abortion and birth control as a means to advance their eugenics agenda.<sup>170</sup> On the other side, people argue that eugenicists never supported abortion as a way to control the population.<sup>171</sup> Regardless of the different perspectives on whether eugenicists supported abortion, it is clear that people of color are still being targeted by institutions with hidden eugenics agendas. In fact, “Planned Parenthood has been a key tool to reduce or eliminate births among Blacks, other minorities, and the disabled.”<sup>172</sup> Planned Parenthood and other family planning clinics are strategically placed in Black or minority communities for this very purpose.<sup>173</sup> Even if one does not believe that family planning clinics are placed in predominantly African-American communities for reasons of population control, there is no denying that the number of abortion clinics in Black communities is a major contributor to the high rate of Black women obtaining abortions.<sup>174</sup> The eugenics movement, with a new face and name, is clearly still alive and its goals of eliminating or reducing the “inferior” have been carried out through the use of abortion clinics that are strategically placed in certain communities.<sup>175</sup>

To determine whether race-selective abortion bans are constitutional, the Court will look at whether the state has a compelling interest that outweighs a woman’s right to an abortion.<sup>176</sup> A state’s interest in preventing abortion from being used as a modern-day eugenics tool is a compelling state interest and the Court should rule that race-selective abortion bans are constitutional. Statutes, such as Indiana’s race-selective abortion ban statute,<sup>177</sup> that regulate pre-viability abortions will likely face many arguments. In fact, *Casey* concluded that the line should be drawn at viability and any time before that a woman has the right to an abortion but it must be weighed against a state’s interest in protecting unborn life.<sup>178</sup>

---

<sup>169</sup> *The Effects Of Abortions on The Black Community*, *supra* note 2.

<sup>170</sup> *See* *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1783–84 (2019) (Thomas, J., concurring).

<sup>171</sup> Adam Cohen, *Clarence Thomas Knows Nothing of My Work*, ATLANTIC (May 29, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455/>.

<sup>172</sup> Messall, *supra* note 160.

<sup>173</sup> *See Planned Parenthood Targets Minority Neighborhoods*, *supra* note 110.

<sup>174</sup> *The Effects of Abortions in the Black Community*, *supra* note 2.

<sup>175</sup> *See id.*

<sup>176</sup> *See* *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992).

<sup>177</sup> *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring).

<sup>178</sup> *See Casey*, 505 U.S. at 870–71.

Race-selective abortion bans before viability<sup>179</sup> should be held constitutional since abortion is being used as tool to annihilate and decrease the number of Black people in the United States. Race-selective abortion bans before viability should be upheld even more so than sex- or disability- selective abortion bans because a person generally knows the race of the child way before viability and can be targeted by abortion clinics during the early stages of pregnancy. Some have argued that there are many moral and ethical concerns with allowing individuals to decide which races are worth bringing to life.<sup>180</sup> Therefore, the Court can consider those moral and ethical concerns, as it did in *Gonzalez*, to conclude that the state has a compelling interest in preventing the use of abortion for modern day eugenics.<sup>181</sup>

Although a woman's right to abortion will be limited and some burdens will be imposed, there is no undue burden on the woman's right to obtain an abortion because the state has a compelling interest in protecting against racial discrimination. One thing is clear, colored people, specifically Blacks, have been targeted by eugenicists for years.<sup>182</sup> Some people do not agree with this notion and argue that eugenics thinking is long gone but, as Eric Metaxas stated, "Eugenics is a terrible idea that won't go away."<sup>183</sup> Black people have been subjected to hidden eugenics agendas for years and some truly believe that they are just exercising their constitutional rights to obtain an abortion.<sup>184</sup> Hopefully, the Court will recognize the prevention of abortion as a modern-day tool of eugenics as a compelling state interest and help expose the deeply hidden eugenicists' goals that many abortion clinics hold.

Even if the Court finds that race-selective abortion bans are constitutional, the high rate of women of color obtaining an abortion may remain. Even though legislators may be trying to protect against abortion being used as a tool for modern day eugenics, in practice the abortion bans will likely be ineffective. The statutes prohibit an abortion based on race but many women of color do not get an abortion based on the race of their child.<sup>185</sup> It is true that at one point in history, Black women prevented the birth of their children to prevent their babies from experiencing the horrors of slavery.<sup>186</sup> Today, women get abortions for so many different reasons, and it would be rather difficult for race-selective abortion bans to

---

<sup>179</sup> See Gooder, *supra* note 37, at 562.

<sup>180</sup> *Id.* at 563.

<sup>181</sup> *Id.*

<sup>182</sup> Kaelber, *supra* note 134 (explaining the extent of forced sterilization laws); see also *The Effects of Abortions in the Black Community*, *supra* note 2 (explaining the placement of abortion clinics in the black communities).

<sup>183</sup> Metaxas, *supra* note 137.

<sup>184</sup> *The Effects of Abortions in the Black Community*, *supra* note 2.

<sup>185</sup> *Banning Abortions*, *supra* note 83.

<sup>186</sup> Ross, *supra* note 9, at 276.

prevent abortions from being used as modern day eugenics.<sup>187</sup> Another question to consider is how will doctors determine if a woman is aborting her child simply due to race or for some other reason? Doctors may simply look at all women of color and assume that race may play a factor in their decision to get an abortion. That will lead to more discrimination and problems in the Black community.

While this Article has focused on the impact of race-selective abortion bans on Black women, I would argue that white women would be affected as well. White women, who get pregnant by a man of a different race, may choose to abort the child because of the race. So now the question becomes will this law apply to them as well? There seems to be issues if the state does not adopt race-selective abortion bans as well as if the state chooses to adopt these bans. If the state does not adopt the abortion bans, then Black women are more likely to unwittingly participate in aborting their babies. By adopting race-selective abortion bans, states will likely increase the conversation, amongst the Black community, about the use of abortion as a tool for modern day eugenics. If states do adopt race-selective abortion bans, then Black women will likely continue to participate in aborting their babies because women generally do not abort their children based on race.<sup>188</sup> By adopting race-selective abortion bans, states may encourage unintentional discrimination.

### B. Solutions

Whether the Court finds race-selective abortion bans constitutional or not, one issue remains — Black women have the highest abortion rates in the United States.<sup>189</sup> There are many solutions for addressing the high rates of abortion among Black women and minority groups, and for states to protect against eugenicists' agenda in the form of abortion. This Article proffers two different settings — legal and the Black community — and provides solutions for each.

#### 1. Legal

First, legislators should be very careful how they construct statutes that ban race-selective abortions. Statutes should be narrowly tailored and prohibit abortions based “solely” on race of the unborn child.<sup>190</sup> The Indiana statute does use the “solely because of the race” language whereas the Arizona statute does not.<sup>191</sup> The Court may find that the “solely”

---

<sup>187</sup> See *The Effects of Abortions in the Black Community*, *supra* note 2.

<sup>188</sup> *Banning Abortions*, *supra* note 83.

<sup>189</sup> *The Effects of Abortions in the Black Community*, *supra* note 2.

<sup>190</sup> Gooder, *supra* note 37, at 565.

<sup>191</sup> *Id.* at 553–54.

language is less of a burden on a woman's right to obtain an abortion because it allows other factors, such as lack of partner support, to be considered with the race factor. Another solution would be to focus on abortion facilities instead of imposing laws on a woman's right to obtain an abortion. States should work to limit the number of facilities in predominately Black and Hispanic communities by imposing laws that protect against racial targeting while still allowing women access to abortions. States may educate people in predominately Black and Hispanic communities on eugenics and the role it has played in abortion clinics.

In the end, the Supreme Court will play a very important role in constitutional interpretation of racial discrimination. The Supreme Court has avoided making a ruling on whether race-selective abortion bans are constitutional.<sup>192</sup> The Court is constitutionally required to protect against racial discrimination,<sup>193</sup> and it should address whether race-selective abortion bans are constitutional. If the Court were to take up the issue in the future, it should re-examine its rulings in *Roe v. Wade* and *Planned Parenthood v. Casey*. Many people are already speculating that the Court will overrule *Roe*.<sup>194</sup>

Some have argued that the Court should let states determine how it would like to regulate abortion instead of continuing to hold that abortion is a constitutional right.<sup>195</sup> The abortion laws that the Supreme Court has developed are not in the Constitution<sup>196</sup> and thus the Supreme Court should let states handle it. If *Roe* is overruled, State Legislatures should take steps to survey the community and develop laws that work well for their state. Even if the Court does not overrule *Roe* and *Casey*, the Court should consider giving more deference to state laws, such as race-selective abortion bans, because state legislators generally have a closer connection to the people than the Supreme Court.

## 2. The Black Community

Race-selective abortion bans may or may not affect the Black community. Black women generally get abortions for reasons outside of

---

<sup>192</sup> *Box v. Planned Parenthood of Ind. & Ky, Inc.*, 139 S. Ct. 1780, 1782 (2019).

<sup>193</sup> *See id.* at 1792.

<sup>194</sup> Scott Lemieux, *Supreme Court's New Abortion Case Shows Roe v. Wade's End Will Come Slowly. But It'll Come*, NBC NEWS (Oct. 7, 2019), <https://www.nbcnews.com/think/opinion/supreme-court-s-new-abortion-case-shows-roe-v-wade-ncna1063361>.

<sup>195</sup> Jessica Mason Pieklo, *The 'Let States Decide' Lie Conservatives Push on Abortion Rights*, REWIRE NEWS GRP. (Oct. 21, 2016), <https://rewire.news/article/2016/10/21/let-states-decide-lie-conservatives-push-abortion-rights/>.

<sup>196</sup> *Box*, 139 S. Ct. at 1793 (Thomas, J., concurring).

their race<sup>197</sup> and race-selective abortion bans will likely have a small impact because of that. Regardless of whether race-selective bans are enacted or upheld as constitutional, Black women continue to have the highest abortion rates and the community needs to come together to address this issue.<sup>198</sup> The right to obtain an abortion will eventually mean nothing if minority groups are eliminated through the use of abortion. Consider this:

What if the mothers of these individuals had believed the lies — Dr. Martin Luther King, Jr., Nelson Mandela, Shirley Chisholm, Ida B. Wells, Madame C. J. Walker, Harriet Tubman, Dr. Charles Drew, Dr. Ben Carson, Garrett A. Morgan, you and me? Imagine the greatness that would have been lost!<sup>199</sup>

Many Black women and men are actively involved in the abortion debate.<sup>200</sup> Many people in the Black community believe that race-selective abortion bans alone will not have a significant impact on the Black population because people need to understand the social forces that cause Black women to have abortions.<sup>201</sup> Addressing the social forces that cause Black women to obtain an abortion is extremely vital to limiting the number of Black women that get abortions each year. Black women obtain abortions for different reasons and they generally do not knowingly obtain an abortion based on the race of their child.<sup>202</sup> For that very reason, many race-selective abortion bans will not be effective. Some have proposed that the way to address abortion is to examine the quality of urban schools, the disproportionately high unemployment rates in the Black community, mass incarceration, and the racial disparities in health care.<sup>203</sup> A quality education would address many of the issues that affect the Black community.<sup>204</sup> However, many of the issues would need to be addressed in the home or through legislation.

Another solution to address the high rates of abortion in the Black community is to hold men more accountable. Less than 38.7 percent of

---

<sup>197</sup> See Eligon, *supra* note 71.

<sup>198</sup> *The Effects of Abortions in the Black Community*, *supra* note 2.

<sup>199</sup> *Black Women Targeted for Abortion*, CONCERNED WOMEN FOR AM. LEGIS. ACTION COMM. (Sept. 13, 2018), <https://concernedwomen.org/black-women-targeted-for-abortion/>.

<sup>200</sup> See Lockhart, *supra* note 167.

<sup>201</sup> Eligon, *supra* note 71.

<sup>202</sup> *Banning Abortions*, *supra* note 83

<sup>203</sup> Eligon, *supra* note 71.

<sup>204</sup> See *Banning Abortions*, *supra* note 83.

Black children live in a two-parent household.<sup>205</sup> More than one third of Black children living in a single parent household lives with an unmarried mother.<sup>206</sup> There are numerous reasons, such as incarceration, why children live with their unmarried mothers.<sup>207</sup> Fathers who willingly choose not to be involved in their child's life undoubtedly influence a woman's decision on whether to obtain an abortion.<sup>208</sup> The community should place a heavy emphasis on marriage and accountability when it comes to having a child. As Benjamin Watson, former NFL football player and pro-life advocate, stated, "Many women would not be seeking abortions if the men involved in their lives were doing what they were supposed to be doing . . . that's a challenge to men everywhere to step up."<sup>209</sup> If the community took this approach of challenging men to take accountability, then the high abortion rates amongst Black women would likely decrease. The church can play a huge role as well in holding men more accountable.<sup>210</sup> The church can teach young men that being a father is important and that they should take any means necessary to ensure a healthy life for their child. After all the Bible does tell us to "Train up a child in the way he should go, and when he is old he will not depart from it."<sup>211</sup> The Black community, including the church, should teach accountability at a young age so that when men are older they can be protectors, providers, and prevent Black women from obtaining abortions.<sup>212</sup> Another solution would be for the community to encourage fostering and adoption when women decide that they do not want to keep a child.

Black influencers, such as rappers and celebrities, should educate themselves on the history of abortion and the eugenics movement. They can use this knowledge to speak out about abortion. Today, many people do not read or watch the news but they educate themselves on what's happening in the world through social media outlets.<sup>213</sup> How amazing

---

<sup>205</sup> Zenitha Prince, *Census Bureau: Higher Percentage of Black Children Live with Single Mothers*, AFRO NEWS (Dec. 31, 2016), <https://www.afro.com/census-bureau-higher-percentage-black-children-live-single-mothers/>.

<sup>206</sup> *Id.*

<sup>207</sup> See Eligon, *supra* note 71.

<sup>208</sup> See My Abortion: 'I Don't Want to be Eternally Attached to Someone I Do Not Love', THE JOURNAL.IE (May 27, 2017), <https://www.thejournal.ie/readme/my-abortion-i-dont-want-to-be-eternally-attached-to-someone-i-do-not-love-3408331-May2017/>.

<sup>209</sup> Sarah Taylor, *Former NFL Star Says Men are Responsible to Step Up and Prevent Abortion: 'Men are Protectors. We are Providers.'*, BLAZE (Feb. 7, 2019), <https://www.theblaze.com/news/benjamin-watson-men-prevent-abortion>.

<sup>210</sup> Eligon, *supra* note 71.

<sup>211</sup> *Proverbs* 22:6 (King James).

<sup>212</sup> See Taylor, *supra* note 209.

<sup>213</sup> Media Insight Project, *How Millennials Get News: Inside the Habits of America's First Digital Generation*, AM. PRESS INST., (Mar. 16, 2015),



would it be if popular Black celebrities brought attention to the fact that a disproportionate number of Black babies are aborted every year and that abortion clinics have targeted Blacks for years? It would be monumental even if they were able to just get people involved in the abortion debate.

Some Black celebrities, such as Nick Cannon, Benjamin Watson, and Kanye West, are doing just that.<sup>214</sup> Nick Cannon has boldly spoken out against Planned Parenthood and its founder.<sup>215</sup> Cannon argues that Planned Parenthood is a population control facility and that it carries out modern day eugenics.<sup>216</sup> He has used his platform, whether on social media or through song, to educate people on the abortion issue. Benjamin Watson, a pro-life professional football player, is set to release a documentary about abortion.<sup>217</sup> He has often expressed his sentiments towards abortion in the Black community and urges other celebrities and public figures to speak out about abortion.<sup>218</sup> If more people are involved in the abortion debate, then the community can address the issues that affect it and possibly bring awareness to the hidden eugenicist's agenda of many abortion clinics.

#### CONCLUSION

In sum, "It's a true crisis ... that there are more African-American babies being aborted than born."<sup>219</sup> Abortion has become a tool for eugenicists to carry out their goal to control the population. The state's interest in preventing abortion from being used as a modern-day eugenics tool will outweigh a woman's right to abortion, even before viability. Although it will impose some burden on a woman's right to get an

---

<https://www.americanpressinstitute.org/publications/reports/survey-research/millennials-news/>.

<sup>214</sup> NICK CANNON, *CAN I LIVE* (Sony BMG Music Ent. 2005),

<https://www.discogs.com/Nick-Cannon-Featuring-Anthony-Hamilton-Can-I-Live-/release/5883019>; See e.g., Taylor *supra* note 209; Kanye West *Speaks Out Against Abortion: "Thou Shalt Not Kill"*, TEX. RT. TO LIFE (Dec. 28, 2019),

<https://www.texasrighttolife.com/kanye-west-speaks-out-against-abortion-thou-shalt-not-kill-2>.

<sup>215</sup> See Nick Cannon Lyrics "Can I Live", AZ LYRICS,

<https://www.azlyrics.com/lyrics/nickcannon/canilive.html> (last visited Nov. 3, 2020).

<sup>216</sup> Cavan Sieczkowski, *Nick Cannon Says Planned Parenthood's 'Population Control,' 'Eugenics'*, HUFFPOST (Nov. 28, 2016), [https://www.huffpost.com/entry/nick-cannon-planned-parenthood\\_n\\_583c41f5e4b000af95eed819](https://www.huffpost.com/entry/nick-cannon-planned-parenthood_n_583c41f5e4b000af95eed819).

<sup>217</sup> Mairead Mcardle, *Pro-Life New England Patriots Player Benjamin Watson to Release Abortion Documentary*, NAT'L REV. (Jan. 21, 2020), <https://www.nationalreview.com/news/pro-life-new-england-patriots-player-benjamin-watson-to-release-abortion-documentary/>.

<sup>218</sup> See *id.*

<sup>219</sup> Catholic Review, *Pro-Lifer Says Abortion is Leading Cause of Death in Black Community*, ARCHDIOCESE BALT. (Jan. 19, 2012), <https://www.archbalt.org/pro-lifer-says-abortion-is-leading-cause-of-death-in-black-community/>.

abortion, it will not impose an undue burden and thus race-selective abortion bans will be upheld. Race-selective abortion bans may help in some ways to address the high rate of abortion amongst minority groups, particularly African-Americans, who are being targeted by abortion clinics. However, race-selective abortion bans may not have an impact whatsoever because today's women of color do not generally obtain an abortion based on the race of their child. The idea to prevent abortion from being used as a tool for modern day eugenics is of utmost importance and states should enact some laws to protect against the use of abortion as a way to advance eugenicists' agendas.

This Article does not attempt to argue that Black women are participating in a genocide of their own babies but that some women have unwittingly been influenced by abortion clinics with hidden eugenics goals. Race-selective abortion bans and the high rate of abortions by colored women should be addressed both legally and within the community. Education and awareness are some of the major keys for the community. If more people become aware of the roots of birth control and abortion clinics, then hopefully they will realize that abortion clinics have targeted Black women for years. That needs to change now.