

ESSAY

DO REASON-BASED ABORTION BANS PREVENT EUGENICS?

Sital Kalantry†

INTRODUCTION.....	1
I. WHAT IS EUGENICS?.....	5
II. WHY DO SOME JUDGES ARGUE THAT REASON-BASED BANS PREVENT EUGENICS?	6
III. ARE RACE, DISABILITY, AND SEX-SELECTIVE ABORTIONS EUGENICS OR WILL THEY LEAD TO EUGENICS-LIKE CONSEQUENCES?	8
A. Sex-selective Abortion Bans	8
B. Race-selective Abortion Bans	11
C. Disability Selective Abortion Bans	14
CONCLUSION	17

INTRODUCTION

Two judges of the U.S. Supreme Court, Amy Coney Barrett and Clarence Thomas, as well as several other U.S. Federal Court of Appeals judges have argued that reason-based abortion bans are designed to prevent eugenics.¹ Eleven states currently prohibit doctors from performing an abortion if they know that the reason the patient is seeking one is because of the predicted gender, race, and/or disability of the fetus.²

† Associate Professor of Law, Seattle University School of Law.

¹ See *Box v. Planned Parenthood of Ind. & Ky.*, 139 S. Ct. 1780, 1782 (2019). Justice Coney Barrett, when she was a judge on the U.S. Court of Appeals for the Seventh Circuit, dissented from the denial of *en banc* review. *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of the Ind. State Dep’t of Health*, 917 F.3d 532, 536 (7th Cir. 2018). Several judges on the U.S. Federal Court of Appeals have also argued that prohibitions on reason-based abortions prevent the elimination of certain groups of people. See *Planned Parenthood of Ind. & Ky., Inc.*, 917 F.3d at 536 (Judge Easterbrook dissented from the denial of *en banc* review); *Little Rock Family Planning Services v. Rutledge*, 984 F.3d 682, 694 (8th Cir. 2021) (Judges Erickson and Shepherd framed the reason-based bans as anti-eugenics states); *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 536, 547, 549–50 (6th Cir. 2021) (*en banc*) (Judges Sutton, Griffin, and Bush arguing the prohibition on termination of pregnancies on the basis of Down Syndrome is an anti-eugenics statute and further a compelling state interest).

² *Sex-selective abortion bans*. Arizona, Arkansas, Kansas, Mississippi,

These prohibitions apply from the moment the biological sex and genetic defects of the fetus can be identified, which is well before viability.

Many are closely watching to see whether the new composition of the Court will impact its abortion jurisprudence. The Court's refusal to prevent the Texas law that allows private actors to enforce a pre-viability prohibition on abortion has recently gained national attention.³ Another case that is being closely watched is *Dobbs v. Jackson Women's Health Organization*, which could permit states to enact prohibitions on pre-viability abortions.⁴ This Essay discusses a lesser-known case through which *Roe v. Wade* could be gutted—by declaring reason-based bans constitutional. If the Court finds that one reason-based abortion ban is constitutionally permissible, it will open the door for states to destroy the fundamental right to abortion by enacting many more reasons for why abortion is impermissible.⁵

Missouri, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, and Tennessee prohibit sex-selective abortion. Ariz. Rev. Stat. § 13-3603.02 (2020); Ark. Code Ann. § 20-16-1904 (2020); Kan. Stat. Ann. § 65-6726 (2020); Miss. Code Ann. § 41-41-407 (2020); Mo. Rev. Stat. § 188.038 (2020); N.C. Gen. Stat. § 90-21.121 (2020); N.D. Cent. Code § 14-02.1-04.1 (2019); Okla. Stat. tit. 63, § 1-731.2 (2020); 18 Pa. Cons. Stat. Ann. § 3204 (2020); S.D. Codified Laws § 34-23A-64 (2020); Tenn. Code Ann. § 39-15-217 (2020). Race-selective abortion bans. In Arizona, Mississippi, Missouri, and Tennessee, the same statute forbids race-selection. Ariz. Rev. Stat. § 13-3603.02 (2020); Miss. Code Ann. § 41-41-407 (2020); Mo. Rev. Stat. § 188.038 (2020); Tenn. Code Ann. § 39-15-217 (2020). Disability-selective abortion bans. Mississippi, Missouri, North Dakota, and Tennessee, all have also banned abortion on the basis of fetal anomaly, often specified as Down syndrome. Miss. Code Ann. § 41-41-407 (2020); Mo. Rev. Stat. § 188.038 (2020); N.D. Cent. Code § 14-02.1-04.1 (2019); Tenn. Code Ann. § 39-15-217 (2020). But note that Arkansas, Indiana, Illinois, Kentucky, Louisiana, Ohio, and Utah, have all passed additional motive-based abortion bans, but their statutes are currently permanently or temporarily enjoined by the courts (or, in Utah's case, awaiting *Roe v. Wade* to be overturned). See *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, GUTTMACHER INST. (last updated Jan. 2, 2021), <https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly#> [<https://perma.cc/YX4V-87DT>].

³ See, e.g., Adam Liptak, J. David Goodman and Sabrina Tavernise, *Supreme Court, Breaking Silence, Won't Block Texas Abortion Law*, N.Y. TIMES (last updated Sept. 23, 2021), <https://www.nytimes.com/2021/09/01/us/supreme-court-texas-abortion.html> [<https://perma.cc/T36Y-VN7H>].

⁴ See No. 19-1392: *Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health, et al., Petitioners v. Jackson Women's Health Organization, et al.*, SUPREME COURT OF THE UNITED STATES (updated Sept. 24, 2021), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1392.html> [<https://perma.cc/C8C7-RLN7>].

⁵ In finding reason-based abortion bans constitutional, the Court would not only open the window for other intention-based bans, but more importantly expand the scope of constitutional abortion restrictions far beyond the viability standards established in *Planned Parenthood of Southeastern Pennsylvania v.*

This has become an even more urgent issue now as the Court is considering a petition for certiorari on a case where the U.S. Court of Appeals for the Eighth Circuit upheld a preliminary injunction against the enforcement of a prohibition on termination of pregnancies on the basis of Down syndrome.⁶ Similarly, the U.S. Court of Appeals for the Seventh Circuit found prohibitions on abortions based on race, sex, or disability of the fetus to be unconstitutional restrictions on abortion rights.⁷ On the other hand, the U.S. Federal Court of Appeals for the Sixth Circuit overturned an injunction against enforcement of a ban based on Down syndrome.⁸ When this issue previously came to the Court, it denied review, but in an unusual move issued an order that explained its denial—the lack of a circuit split on the question.⁹ It may now have the circuit split it needs to decide whether or not pre-viability reason-based bans are constitutional.

It is not clear what legal test the Court will use to evaluate whether or not reason-based bans are constitutional. In *June Med. Servs. L. L. C. v. Russo*, Justice Roberts appears to be moving away from the “cost/benefit” analysis test articulated in *Whole Woman’s Health v. Hellerstedt* in favor of the “undue burden” test in *Casey*.¹⁰ Regardless of what legal test the Supreme Court uses, the question of whether or not the bans truly prevent eugenics or have eugenics-like consequences will loom large on the question of whether the bans serve a legitimate state interest.¹¹

Casey.

⁶ *Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 686 (8th Cir. 2021) (upholding a preliminary injunction against an abortion prohibition on the basis of Down syndrome).

⁷ Judge Easterbrook and Justice Coney Barrett, when she was a judge on the U.S. Court of Appeals for the Seventh Circuit, dissented from the denial of *en banc* review. *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of the Ind. State Dep’t of Health*, 917 F.3d 532, 536 (7th Cir. 2018).

⁸ *Preterm-Cleveland v. McCloud*, 994 F.3d 512,516 (2021).

⁹ *Box v. Planned Parenthood of Ind. & Ky.*, 139 S. Ct. 1780, 1782 (2019).

¹⁰ *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2139 (2020) (Roberts, C.J., concurring) (“Under principles of *stare decisis*, I agree with the plurality that the determination in *Whole Woman’s Health* that Texas’s law imposed a substantial obstacle requires the same determination about Louisiana’s law. Under those same principles, I would adhere to the holding of *Casey*, requiring a substantial obstacle before striking down an abortion regulation.”) (citing *Whole Woman’s Health v. Hellerstedt*, 136 S.Ct. 2292 (2016); and *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992)).

¹¹ Under the *Casey* “undue burden test,” a state law may not present an undue burden on women seeking abortion without a compelling state interest at stake. If the statutes are thought to prevent eugenics, then perhaps a court might consider that the burden is not undue. Under *Whole Women’s Health*, the Court engages in a cost benefit analysis, determining whether the cost of the law to

Many authors have pointed out that a practice should be considered eugenics only if it is state-sponsored.¹² They have further correctly argued that none of the practices that the reason-based statutes intend to address are coerced or forced by the state.¹³ If a woman terminates her pregnancy because the fetus was predicted to be a girl, it is not because the state or a powerful private organization is forcing her to do so. A personal decision to terminate a pregnancy is not eugenics. This Essay further considers whether the practices the bans intend to curb would actually eliminate or significantly reduce certain groups of people in the United States as Justice Thomas and several other judges have argued.

Many judicial opinions addressing reason-based bans do not analyze each of the three laws separately and also neglect to discuss the actual incidences of reason-based abortions.¹⁴ By disaggregating reason-based bans, we can better see why the behaviors purported to be regulated by the bans will not lead to eugenic-like consequences. Lacking data to conclude that sex-selection, race-selection, and disability-selection is leading to the elimination of certain groups of people in the United States, many judges instead point to data from other countries. Given the differences between the societal context and governmental policies of the United States and the countries the judges point to, the same consequences that have been witnessed in foreign countries are not likely to occur in the United States.

In Part I, I provide background on the eugenics movement and demonstrate that it was closely associated with

abortion seekers outweighs the derived benefits thereof. If a court believes that the prohibitions prevent eugenics, then they might find that the benefit of the bans outweigh the costs. Under either test, the court should consider whether the reasons-based bans serve the legitimate purposes of the state—and preventing eugenics would likely be a legitimate purpose. See SITAL KALANTRY, *Transnational Legal Feminist Approach to Sex Selective Abortion Bans*, in WOMEN'S HUMAN RIGHTS AND MIGRATION 170–75 (2017) (discussing the possible legal roads the Court might take in adjudicating the constitutionality of reason-based bans).

¹² See, e.g., Mindy Roseman, *Restricting Women's Autonomy in the Name of "Eugenics"*, LPE PROJECT (Nov. 11, 2019), https://lpeproject.org/blog/restricting-womens-autonomy-in-the-name-of-eugenics/?fbclid=IwAR26U0o9rvvpP11BDzVgcO3_PttzR7bnNTrO4zlljdN4RnEG_p35cBDE8BQ [<https://perma.cc/Z9C8-7FJS>]; Adam Cohen, *Clarence Thomas Knows Nothing of My Work*, THE ATLANTIC (May 20, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455/> [<https://perma.cc/M679-JRVK>].

¹³ See *id.*; See also McCloud, 994 F.3d at 568–69 (Gibbons, J., dissenting) (arguing that a decision to abort a fetus with Down syndrome is not eugenics).

¹⁴ See e.g., *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018).

governmental policies and also advanced by influential private organizations—it was never associated with individual decisions of women. Part II explains the arguments made by judges who believe that reason-based bans are designed to prevent eugenics. In Part III, I examine whether each type of practice that the reason-based bans purport to restrict is motivated by eugenic policies, the incidence of abortions based on race, sex, and disability, and the extent to which they actually occur.

I

WHAT IS EUGENICS?

Eugenics is a view that advances the idea that society should consist only of certain types of people, deemed desirable by societal standards.¹⁵ Popularized among Victorian scientists as an off-shoot of Darwin’s theory of evolution, eugenics became public policy by the early 1900s, and remained so through the end of World War II.¹⁶ Although eugenics is most closely associated with Nazi Germany and its use of eugenic practices to craft and purify a “master” race, it was actually a global phenomenon.¹⁷ United States Jim Crow and immigration legislation itself was the inspiration for large parts of Nazi eugenic policy.¹⁸

In the United States, eugenic policies were implemented by governments and sponsored by private organizations, such as universities and hospitals.¹⁹ For example, in the United States from 1907-1937, 32 states, as well as Puerto Rico, passed laws mandating the sterilization of any individual deemed defective, squashing individual reproductive autonomy in order to “improve” public health and the genetic quality of citizens.²⁰ Forced sterilization was one aspect of the government-enforced eugenics, which by and large restricted reproductive freedom among the communities deemed to be undesirable through

¹⁵ Edwin Black, *Eugenics and the Nazis—the California Connection*, SFGATE (last updated Nov. 9, 2003), <https://www.sfgate.com/opinion/article/Eugenics-and-the-Nazis-the-California-2549771.php> [<https://perma.cc/8ACZ-H4TF>].

¹⁶ PHILIPPA LEVINE, *EUGENICS: A VERY SHORT INTRODUCTION* 2–3 (2017).

¹⁷ *Id.* at 7–8 (noting that, although the specific eugenic practice differed for each country, eugenic governmental policies were installed in Europe, Latin America, Iran, Egypt, Hong Kong, and India).

¹⁸ For a thorough examination of the American roots of Nazi Germany’s eugenic laws, see generally JAMES Q. WHITMAN, *HITLER’S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* (2017).

¹⁹ See Black, *supra* note 15.

²⁰ 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> [<https://perma.cc/AF6Z-UJ2G>].

forced abortions, isolation and confinement in asylums or prisons, and even forms of euthanasia.²¹ In a dark moment in its history, the Supreme Court of the United States upheld a state statute permitting forced sterilization of the intellectually-disabled in *Buck v. Bell*.²²

Eugenics was and is a discriminatory and problematic philosophy. Imbued with a view that certain groups of people are superior to others, it called for the elimination of inferior groups and was advanced by the government or powerful private organizations.²³ The term eugenics should be “reserved for restrictions on reproduction imposed upon individuals by the state.”²⁴ Indeed, individual and private decisions of women to have an abortion without any coercion cannot be seen as a policy of eugenics. Individuals who engage in abortion do so for deeply personal reasons and they do not consider the impact of the human race by their actions.²⁵

II

WHY DO SOME JUDGES ARGUE THAT REASON-BASED BANS PREVENT EUGENICS?

In *Box v. Planned Parenthood*, the Supreme Court denied certification on a case from the Seventh Circuit that found race, gender, and disability-selection reason-based bans unconstitutional.²⁶ While denying certification, Justice Thomas stated that when a woman aborts a fetus due to its

²¹ See LEVINE, *supra* note 16, at 59–65.

²² See *Buck v. Bell*, 247 U.S. 200 (1927); See also Paul A. Lombardo, Taking Eugenics Seriously: Three Generations of—Are Enough, 30 FLA. ST. U. L. REV. 191 (2003), systemically disproving *Buck v. Bell*'s starting premise that the woman in question to be sterilized was an “imbecile.” However, Lombardo also warns that “a moralistic, backward judgment about eugenics is not only naively ahistorical, it can be dangerous. To impute only corrupted motives to supporters of the eugenic agenda because of our disgust at the worst of those who claimed the label means to miss the myriad ways other motives guided their efforts, as well as the many ways our current practices and motives parallel them. It also may imply that had Holmes’ commentary been accurate, and if Carrie Buck actually was likely to pass on a genetically diagnosed disabling condition, we would endorse the Holmes conclusion and the type of law it affirmed as well.” *Id.* at 217.

²³ See Lombardo, *supra* note 22, at 216; See also LEVINE, *supra* note 16, at 57 (describing how Margaret Sanger’s earliest efforts to provide birth control to communities, in 1916, were shut down by the government).

²⁴ Carole J. Petersen, *Reproductive Autonomy and Laws Prohibiting “Discriminatory” Abortions: Constitutional and Ethical Challenges*, 96 U. DET. MERCY L. REV. 605, 609–10 (2019).

²⁵ See *id.*

²⁶ *Box v. Planned Parenthood of Ind. & Ky.*, 139 S. Ct. 1780, 1781–82 (2019).

predicted gender, disability or race, she engages in eugenics.²⁷ Justice Thomas argued that these bans “promote a [s]tate’s compelling interest in preventing an abortion from becoming a tool of modern-day eugenics.”²⁸ In order to set up the eugenics framework, he drew a line from Margaret Sanger’s and Planned Parenthood’s connection with the eugenicists of the early 1900s to modern day abortion.²⁹

Justice Thomas cited three key data points in concluding that states have a legitimate interest in enacting the reason-based bans—a high rate of aborted fetuses diagnosed with Down syndrome in Denmark, the selective abortions of female fetuses in certain Asian countries, and higher rates of abortion among Blacks and Latinas as compared to Caucasians in the United States.³⁰ In his opinion, these trends illustrate the “eugenic effects” of abortion.³¹ Justice Thomas then argued that the decision in *Casey*, which found a “categorical” right to a women’s right to an abortion prior to viability, did not require the state to allow “eugenic abortions.”³²

Similarly, in an opinion from the U.S. Federal Court of Appeals for the Seventh Circuit, then-Judge Coney Barrett and Judge Easterbrook dissented from a denial of a rehearing *en banc*, arguing that reason-based abortion bans are designed to prevent eugenics, and therefore might not be within the scope of abortion protected by *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.³³ Taking their cue from

²⁷ See Box, 139 S. Ct. at 1792 (Thomas, J., concurring) (*cert. denied*). Justice Thomas’ wide ranging cert denial misquoted a number of authors. See *Sital Kalantry, By Misciting My Work, Justice Thomas Proves My Point*, PENN PRESS (June 12, 2019), <https://pennpress.typepad.com/pennpresslog/2019/06/by-misciting-my-work-justice-thomas-proves-my-point.html> [<https://perma.cc/Q873-V2K3>]; 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/> [<https://perma.cc/M679-JRVK>].

²⁸ Box, 139 S. Ct. at 1783 (Thomas, J., concurring) (*cert. denied*).

²⁹ *Id.* at 1787–90. While Sanger certainly had eugenic views, there is a clear distinction between the “positive” forms of eugenics she supported, including maternal health and birth control, and abortion. *Id.* Justice Thomas deals with this quandary by arguing that “the eugenic arguments that she made in support of birth control apply with even greater force to abortion.” *Id.* at 1789.

³⁰ *Id.* at 1790–91.

³¹ *Id.* at 1791.

³² *Id.* at 1792–93.

³³ The majority opinion determined that *en banc* review was not required to determine the constitutionality of Indiana’s Sex Selective and Disability Abortion Ban—and Indiana itself never asked it to. *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm’r of Indiana State Dep’t of Health*, 917 F.3d 532, 533

Justice Thomas, several U.S. Court of Appeals opinions have also joined the chorus in framing individual decisions of women as the new eugenics.³⁴

III

ARE RACE, DISABILITY, AND SEX-SELECTIVE ABORTIONS EUGENICS OR WILL THEY LEAD TO EUGENICS-LIKE CONSEQUENCES?

Scholars have pointed out that reason-based bans are not eugenics because to the extent a woman terminates her pregnancy due to a fetal anomaly or other reason, it is a personal decision she is making because of her own circumstances and has nothing to do with wanting to improve the human stock or elimination of certain characteristics from society.³⁵ Moreover, there is no evidence of force or coercion by the government or private organizations in the pregnant persons' decisions in question.³⁶ Below I explain why it is wrong to believe that there will be eugenic-like consequences in the United States unless states enact sex-selective, race-selective, and disability-selective abortion bans.

A. Sex-selective Abortion Bans

Sex-selective abortion bans prohibit an abortion provider

(7th Cir. 2018) (“The state has not asked for rehearing *en banc* of the panel’s ruling on the Sex Selective and Disability Abortion Ban, and the reason why is obvious: only the U.S. Supreme Court has the power to decide whether to change the rule of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.”). Despite this, Judge Easterbrook dissented on the grounds that *Casey* did not address a situation in which abortion was undergone to engage in eugenics. *Id.* at 536–38 (Easterbrook, J., dissenting) (noting that he was “content” to leave the final determination on this issue to the Supreme Court).

³⁴ See e.g., *Little Rock Family Planning Services v. Rutledge*, 984 F.3d 682, 692–94 (8th Cir. Jan 5, 2021) (concurring opinions of Judges Shepherd and Erickson); *Preterm-Cleveland v. McCloud*, 994 F.3d 512 (6th Cir. 2021) (*en banc*) (concurring opinion of Judge Sutton calling reason-based bans “anti-eugenics” statutes.)

³⁵ See Adam Cohen, *Clarence Thomas Knows Nothing of My Work*, THE ATLANTIC (May 20, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455/> [<https://perma.cc/M679-JRVK>].

³⁶ See Mindy Roseman, *Restricting Women’s Autonomy in the Name of “Eugenics”*, LPE PROJECT (Nov. 11, 2019), https://lpeproject.org/blog/restricting-womens-autonomy-in-the-name-of-eugenics/?fbclid=IwAR26U0o9rvvpP1IBDzVgcO3_PttzR7bnNTrO4zIljdN4RnEG_p35cBDE8BQ [<https://perma.cc/Z9C8-7FJS>]; See also *McCloud*, 994 F.3d at 585. (“*Second*, in describing a Down-syndrome-selective abortion as eugenics, the concurrences and Ohio impute upon women a eugenicist mindset for which there is no evidentiary basis, much less a basis in common sense, thereby ignoring the difference between a woman today making an individual choice and a historical movement tightly fastened upon ‘improving stock.’”).

from performing abortions if she knows the abortion is being sought based on the sex of the fetus.³⁷ Proponents of sex-selective abortion bans argue that Asian Americans discriminate against the sex of their fetuses, causing a disproportionate number of abortions of female fetuses and a large number of “missing women” in the United States.³⁸ Supporters of sex-selective abortion bans further argue that the sexist beliefs of Asian American parents cause them to obtain abortions.³⁹

This rationale, though incorrect in and of itself, acknowledges that there is no governmental policy in the United States encouraging women to have sex-selective abortions. Because of the lack of governmental coercion, this practice should not be considered eugenics, even if it does occur (which it does not at any significant rates).⁴⁰ Indeed, in a study I co-authored, we found that the ratio of boys to girls born to Asian-Americans is similar to the ratio of boys to girls born to Caucasian-Americans. Both ratios are within the normal range indicating that there is little or no selection in favor of any gender.⁴¹ Moreover, it does not even make sense to characterize sex-selective abortion as eugenics, because no one thinks that it would enhance the human race to eliminate girls. Indeed, the elimination of women would eventually lead to the elimination of the entire human race.⁴²

The empirical reality is that there is no evidence that sex-selective abortions are occurring in the United States in such a way as to have any large-scale impact on society as they do in India.⁴³ Sex selection in the United States is not common;

³⁷ See, e.g., Ark. Code Ann. § 20-16-1904(a) (2020) (“A physician or other person shall not intentionally perform or attempt to perform an abortion with the knowledge that the pregnant woman is seeking the abortion solely on the basis of the sex of the unborn child.”)

³⁸ See Sital Kalantry, *Sex Selection in the United States and India: A Contextualized Feminist Approach*, 18 UCLA J. L. INT’L FOREIGN AFF. 61, 73 (2013).

³⁹ See Sital Kalantry, *Sex-Selective Abortion Bans: Anti-Immigration or Anti-Abortion*, 16 GEO. J. INT’L AFF. 140, 147–48 (2015).

⁴⁰ See, e.g., *Replacing Myths with Facts: Sex Selective Abortion Laws in the United States*, NAPAWF (June 1, 2014), available at <https://www.napawf.org/our-work/content/replacing-myths-with-facts> [<https://perma.cc/386X-J45P>]; See Kalantry, *supra* note 39.

⁴¹ See Kalantry, *supra* note 39.

⁴² While eugenics relied heavily on gender roles and notions of gendered respectability, there has never been a eugenic policy to wholesale eliminate a specific gender. See LEVINE, *supra* note 16, at 74–81.

⁴³ I have disproven this particular claim in numerous articles and books. See, e.g., *Replacing Myths with Facts: Sex Selective Abortion Laws in the United States*, NAPAWF (June 1, 2014), available at <https://www.napawf.org/our-work/content/replacing-myths-with-facts> [<https://perma.cc/386X-J45P>]; See

moreover, on the rare occasions that people *do* use technology to select for certain genders, they could be doing so equally in favor of boys and girls, with a goal of family balancing and using pre-implantation means such as sperm-sorting or in vitro fertilization to accomplish their goals.⁴⁴

In some countries, such as India and China, targeted abortion of fetuses identified as female are prevalent.⁴⁵ In those countries, governments are actively working to prevent gender-biased abortion. For example, the government in India passed a law in 1994, to curb the practice of sex-selection by banning the use of ultrasounds and other diagnostic tests to determine the sex of the fetus in utero.⁴⁶ Thus, while no government is known to actively encourage sex-selective abortions, some governments are working to prevent them where they are known to occur.

Sex-selection has not been found to have any impact on the larger population in the United States. The overall ratio of men to women is fairly constant. Lacking data that selecting in favor of boys is causing an elimination of girls in the United States, judicial opinions framing sex-selection as eugenics turn to data from other countries, particularly in India and China. For example, Justice Thomas' opinion is ripe with references to widespread sex-selection in India and China.⁴⁷

To sum, sex-selective abortions are not eugenic because there is no governmental policy in the United States in favor of targeted abortions based on sex nor are there any private organizations coercing or promoting abortions on the basis of sex. Moreover, no one could possibly suggest that elimination of girls will better the human race, because doing so would inevitably eliminate humanity. Finally, sex-selection has not impacted the overall number of girls born in the United States.

Kalantry, *supra* note 39.

⁴⁴ See SITAL KALANTRY, *Sex Selection in the United States: From Gender-Biased Sex Selection to Family Balancing*, in WOMEN'S HUMAN RIGHTS AND MIGRATION 99-125 (2017) (describing that sex ratio research and qualitative interviews suggest that people are not attempting to have no girls at all, but are seeking at least one boy).

⁴⁵ See *Replacing Myths with Facts: Sex Selective Abortion Laws in the United States*, NAPAWF (June 1, 2014), available at <https://www.napawf.org/our-work/content/replacing-myths-with-facts> [<https://perma.cc/386X-J45P>].

⁴⁶ SITAL KALANTRY, *Transnational Legal Feminist Approach to Sex Selective Abortion Bans*, in WOMEN'S HUMAN RIGHTS AND MIGRATION 153 (2017).

⁴⁷ *Box v. Planned Parenthood of Indiana & Kentucky*, 139 S. Ct. 1780, 1791 (2019) (Thomas, J., concurring) (*cert. denied*).

B. Race-selective Abortion Bans

Race-selective abortion bans are statutes that prohibit an abortion provider from performing an abortion if she knows that the abortion is being sought because of the race of the fetus. The legislative histories of these laws show that supporters passed them in response to higher rates of abortion among Black women as compared to Caucasian women.⁴⁸ Supporters of the laws argue that these high rates of abortion are caused by the eugenic intent of abortion providers such as Planned Parenthood, claiming they open abortion centers in minority neighborhoods in order to decrease the size of those communities.⁴⁹ Justice Thomas reiterated this misinformation, arguing that organizations like Planned Parenthood target minority women for abortion, constituting evidence of eugenics for “elimination of the unfit.”⁵⁰ Thus, the rationale is that, because institutions like Planned Parenthood target minority women for abortion, a ban is necessary to prevent such coercion.

However, there is no evidence that abortion providers target minority women for abortions today.⁵¹ In the 1920s, Planned Parenthood established multiple centers in minority communities, in order to encourage access to safe birth control.⁵² More recently, in 2011 only 22 percent of the nation’s

⁴⁸ See, e.g., Rep. Steve Montenegro, Remarks at Arizona House of Representative Committee on Health and Human Services (Feb. 9, 2011) at 7, (transcript available at https://www.azleg.gov/legtext/50leg/1R/comm_min/House/020911%20HHS.PDF [<https://perma.cc/H6DQ-MGXXN>]) (“American abortion providers. . . are responsible for eliminating nearly 50 percent of African Americans conceived in the U.S. each year, as compared to 20 percent of white, unborn children.”); Mo. Rev. Stat. § 188.038 (2020) (“Among Missouri residents, the rate of black or African-American women who undergo abortions is significantly higher, about three and a half times higher, than the rate of white women who undergo abortions.”).

⁴⁹ See April Shaw, *How Race-Selective and Sex-Selective Bans on Abortion Expose the Color-Coded Dimensions of the Right to Abortion and Deficiencies in Constitutional Protections for Women of Color*, 40 N.Y.U. REV. L. & SOC. CHANGE 545, 567–68, 579 (2016).

⁵⁰ See *Box v. Planned Parenthood of Indiana & Kentucky*, 139 S. Ct. 1780, 1787–89, 1791 (2019) (Thomas, J., concurring) (*cert. denied*). See also Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. Harv. 2025, 2026–27 (critiquing Justice Thomas’ opinion in *Box v. Indiana*).

⁵¹ The purpose of Arizona’s Act states “[e]vidence shows that minorities are targeted for abortion.” The evidence mentioned in the purpose, however, is not elaborated on. Ariz. Rev. Stat. § 13-3603.02 (2020) (Editor’s Notes) (2011 Ariz. ALS 9, 2011 Ariz. Sess. Laws 9, 2011 Ariz. Ch. 9, 2011 Ariz. HB 2443. § 3).

⁵² See Amita Kelly, *Fact Check: Was Planned Parenthood Started To ‘Control’ The Black Population?*, NPR (Aug. 14, 2015, 12:59 PM Et),

abortion centers were located in neighborhoods where the majority of residents were Hispanic, Black, or of another race or ethnicity.⁵³ While there are higher rates of abortion among minority women, in particular Black and Latina women, in comparison to White women, the abortion rates are not due to the machination abortion providers.⁵⁴ The distinct lack of institutional coercion or targeting of Black and minority women to undergo abortion reveals that there is no eugenic push to eliminate minority communities through abortion practices.

Moreover, even if race-selective abortion bans are intended to prevent abortion providers from targeting minority communities as their advocates suggest, the text of the law does not actually do that. The statutes prohibit doctors from providing abortions if they know that the *patient* is seeking one on the basis of race of the fetus.⁵⁵ Race-selective statutes present offensive stereotypes of minority women as people who are seeking to abort their own fetuses due to their racial biases, leading to accusations against Black women of committing “Black genocide” when seeking abortions.⁵⁶ The reality is that women from minority communities do not have abortions because they view their own race as undesirable.⁵⁷ Black women seek abortions for multilateral reasons.⁵⁸ Moreover, the

<https://www.npr.org/sections/itsallpolitics/2015/08/14/432080520/fact-check-was-planned-parenthood-started-to-control-the-black-population> [<https://perma.cc/ZCN3-PJAB>].

⁵³ See *Banning Abortions in Cases of Race or Sex Selection or Fetal Anomaly*, THE GUTTMACHER INST. (Jan. 2020), <https://www.guttmacher.org/evidence-you-can-use/banning-abortions-cases-race-or-sex-selection-or-fetal-anomaly#> [<https://perma.cc/YX4V-87DT>].

⁵⁴ *Id.*

⁵⁵ See, e.g., Ariz. Rev. Stat. § 13-3603.02 (2020).

⁵⁶ For a thorough dismantling of this “Black genocide” framework and the misogyny and racism that undergirds it, see generally Shyrissa Dobbins-Harris, *The Myth of Abortion as Black Genocide: Reclaiming Our Reproductive Choice*, 26 NAT’L BLACK L.J. 85 (2017).

⁵⁷ Eugenic intent, on the part of Black women, is sometimes inferred due to proportionately higher rates of abortion among Black women. See Kathryn Joyce, *Abortion as Black Genocide?*, PUB. EYE (Apr. 29, 2010), <http://www.publiceye.org/magazine/v25n1/abortion-black-genocide.html> [<https://perma.cc/Y3JE-8DSV>]. However, there is no real evidence of such intent, and such inferences “obscure the root causes of the higher rates of abortion” and rely on long-standing social stereotypes. See April Shaw, *How Race-Selective and Sex-Selective Bans on Abortion Expose the Color-Coded Dimensions of the Right to Abortion and Deficiencies in Constitutional Protections for Women of Color*, 40 N.Y.U. REV. L. & SOC. CHANGE 545, 569–70 (2016).

⁵⁸ This lack of access is in itself a phenomenon known as “passive eugenics,” in which the state refuses to ensure and protect minority lives by denying access to health care, welfare, and other public goods. Passive eugenics permits the government to deny any responsibility in engaging in eugenic activities, or in this

race-selective abortion statutes erroneously assume that a fetus can be considered to be of a certain race—but race is a social construct, which is constructed only after a child is born.⁵⁹

The only conceivable situation in which a fetus is aborted on the basis of race is when a white woman seeks an abortion because the fetus was conceived with a person from a minority community.⁶⁰ However, no evidence of such a practice or any other form of race-selective abortion has been reported, and White women are not the target of these bans anyway.⁶¹ The reality is that there is no evidence that any minority or non-minority women are having abortions due to what they think will be the race of their fetus once it is born.⁶² Thus, race-selective abortion bans deny reproductive freedom to minority women on the false claim that they are seeking to eliminate their own race.⁶³ Abortions among Black and other minority women are not coerced by governments nor Planned Parenthood, nor do they have eugenic consequences leading to the elimination of their own race given that there is no evidence that minority women obtain abortions because of what they believe will be the race of their future child.

case, pass the implications off onto the victims of their policies. For more information, see James E. Bowman, *The Road to Eugenics*, 3 U. CHI. L. SCH. ROUNDTABLE 491, 493 (1996).

⁵⁹ See April Shaw, *How Race-Selective and Sex-Selective Bans on Abortion Expose the Color-Coded Dimensions of the Right to Abortion and Deficiencies in Constitutional Protections for Women of Color*, 40 N.Y.U. REV. L. & SOC. CHANGE 545, 550–51 (2016).

⁶⁰ See Jason C. Greaves, *Sex-Selective Abortion in the U.S.: Does Roe v. Wade Protect Arbitrary Gender Discrimination*, 23 GEO. MASON U. C.R. L.J. 333, 342 (2013) (“One could imagine scenarios where a young woman in a racist family would face ridicule and even disownment if she were to have a child of undesired race.”).

⁶¹ See *id.*

⁶² See Brief of Black Women’s Health Imperative as Amicus Curiae in Support of Plaintiffs-Appellants, *NAACP v. Horne*, No. 13-17247, (9th Cir., 2014), at 7 (available at <https://www.aclu.org/legal-document/naacp-et-al-v-tom-horne-et-al-amicus-brief-black-womens-health-imperative-support-pts> [<https://perma.cc/XFQ4-GAHF>]) (noting that the Arizona legislature could not identify any abortion believed to occur on the basis of race, either in Arizona or in the entire nation).

⁶³ See generally *id.* (describing how the bans stigmatize and stereotype Black women as too ignorant or immoral to engage in reproductive decisions, and align with historic eugenic practices limiting reproductive freedom); See also *Banning Abortions in Cases of Race or Sex Selection or Fetal Anomaly*, THE GUTTMACHER INST. (Jan. 2020), available at <https://www.guttmacher.org/evidence-you-can-use/banning-abortions-cases-race-or-sex-selection-or-fetal-anomaly> [<https://perma.cc/YX4V-87DT>] (describing how race-selective abortion bans compound the difficulties that women of color face in accessing reproductive health care).

C. Disability Selective Abortion Bans

Disability selective abortion statutes prohibit abortion providers from performing a procedure if it is sought solely or in part on the basis of genetic “abnormality.”⁶⁴ Some statutes define genetic abnormality broadly to include “any physical abnormality, scoliosis, dwarfism, Down [s]ndrome, albinism, Amelia, or any other type of physical or mental disability, abnormality, or disease.”⁶⁵ Such laws have the potential to ban abortion even in cases where the fetus is unlikely to survive long after childbirth.⁶⁶ Other statutes, such as North Dakota’s law, make no exceptions, even for cases where the patient’s health is at risk.⁶⁷ Yet other disability-selective abortion statutes focus only on Down syndrome, including the Arkansas law subject to the petition for certiorari to the U.S. Supreme Court.⁶⁸

Like other reason-based bans, disability selective abortions are not eugenic in the sense that they are part of a government sponsored policy encouraging them. Indeed, there is no Federal or state governmental policy that requires a pregnant woman to undergo prenatal screening for genetic information about their fetuses.⁶⁹ Data suggests that only 65%

⁶⁴ See, e.g., N.D. Cent. Code § 14-02.1-04.1 (2019). North Dakota’s law was the first to ban disability-selective abortion. Comparatively, Ohio’s statute, now enjoined, banned abortion when a diagnosis or even a suspected diagnosis of Down syndrome was the basis, either in whole or in part, for the woman’s choice. Ohio Rev. Code Ann. § 2919.10(B) (2018).

⁶⁵ N.D. Cent. Code § 14-02.1-02 (2019).

⁶⁶ See Carole J. Petersen, *Reproductive Justice, Public Policy, and Abortion on the Basis of Fetal Impairment: Lessons from International Human Rights Law and the Potential Impact of the Convention on the Rights of Persons with Disabilities*, 28 J. L. & HEALTH 121, 134 (2015); See also Greer Donley, *Does the Constitution Protect Abortions Based on Fetal Anomaly: Examining the Potential for Disability-Selective Abortion Bans in the Age of Prenatal Whole Genome Sequencing*, 20 MICH. J. GENDER & L. 291, 295 (2013).

⁶⁷ See Carole J. Petersen, *Reproductive Justice, Public Policy, and Abortion on the Basis of Fetal Impairment: Lessons from International Human Rights Law and the Potential Impact of the Convention on the Rights of Persons with Disabilities*, 28 J. L. & HEALTH 121, 134 (2015).

⁶⁸ Little Rock Family Planning Servs. v. Rutledge, 984 F.3d 682 (8th Cir. 2021), *petition for cert. filed*, (U.S. Apr. 9, 2021) (No. 19-2690) (available at https://www.supremecourt.gov/DocketPDF/20/20-1434/175342/20210409140329698_20-__PetitionForAWritOfCertiorari.pdf [<https://perma.cc/H89W-RZ8K>]).

⁶⁹ See *Prenatal care and tests*, OFFICE ON WOMEN’S HEALTH, <https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/prenatal-care-and-tests> [<https://perma.cc/Y7KR-GRQL>] (last updated Jan. 30, 2019) (“[Y]our doctor *may* discuss many issues, such as healthy eating and physical activity, screening tests you might need. . . .”) (emphasis added). Even when the testing is offered freely, research indicates that women may prefer to opt out of prenatal testing. Allison Bruzek, *More Women Skip Some Prenatal*

of women undergo the traditional prenatal screening for genetic anomaly, including Down syndrome, and of those women only about 2% get more invasive diagnostic tests to confirm the diagnoses.⁷⁰ One-third of American women refuse to undergo any kind of prenatal test, regardless of the invasiveness of the procedure.⁷¹

On the other hand, of the 65% of women in the United States who do undergo prenatal testing, a subset of them following positive diagnoses of genetic anomalies terminate their pregnancies.⁷² In the United States, according to one study, roughly 67% of pregnancies where a diagnosis of Down syndrome is present are terminated.⁷³ Despite this there is no

Tests After Learning About Risks, NPR (Sept. 23, 2014, 4:08 PM ET), <https://www.npr.org/sections/health-shots/2014/09/23/350862102/more-women-skip-prenatal-tests-after-learning-about-risks> [https://perma.cc/8B84-FUQ3]; See also Amy Julia Becker, *Better Prenatal Testing Does Not Mean More Abortion*, THE ATLANTIC (Feb. 21, 2013), <https://www.theatlantic.com/health/archive/2013/02/better-prenatal-testing-does-not-mean-more-abortion/273053/> [https://perma.cc/N2HN-2AHJ]. Other studies suggest that the development of highly accurate prenatal screening technology does not impact the termination of fetuses with Down syndrome. See generally Melissa Hill, et al. *Has noninvasive prenatal testing impacted termination of pregnancy and live birth rates of infants with Down syndrome?*, 37 PRENATAL DIAGNOSIS 1281 (2017)(available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5767768/> [https://perma.cc/UA2H-WS5D]).

⁷⁰ This data is from a 1995 study, with serious divergences based on region. See Cynthia Powell, *The Current State of Prenatal Genetic Testing in the United States* in PRENATAL TESTING AND DISABILITY RIGHTS 44, 47–48 (Adrienne Asch & Erik Parens eds., 2000). Prenatal testing does not seem to be frequently opted for in the United States and advances in technology has not changed that. See Hill, *supra* note 69. That said, with the advent of technology, roughly 3 million women were projected to opt for prenatal screening. See Erika Check Hayden, *Fetal tests spur legal battle*, NATURE (June 27, 2012), <https://www.nature.com/news/fetal-tests-spur-legal-battle-1.10894> [https://perma.cc/3CGZ-H7B8].

⁷¹ Megan Allyse, Lauren C. Sayres, Taylor A. Goodspeed, and Mildred K. Cho, *Attitudes Towards Non-Invasive Prenatal Testing for Aneuploidy Among United States Adults of Reproductive Age*, 34 J. PERINATOLOGY 429, 429 (2014) (available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4399855/> [https://perma.cc/U6XB-KJA4]).

⁷² Women seek out abortions for multilateral reasons, not for one single reason. Only 13% of women with abortions seek them for health concerns related to the fetus, and in those particular cases the concern about fetal health overlay significantly with concerns about responsibility and economic stability. See *supra* note 70 and accompanying text. In short, on those infrequent occasions when genetic anomaly, such as Down syndrome, is revealed by prenatal screening, the choice to get an abortion is not due to a eugenic desire to rid the world of the anomaly, but interrelated reasons of responsibility and resource limitation. See Becker, *supra* note 68.

⁷³ See Jaime L. Natoli, Deborah L. Ackerman, Suzanne McDermott, and Janice G. Edwards, *Prenatal Diagnosis of Down Syndrome: a Systematic Review of Termination Rates (1995–2011)*, 32 PRENATAL DIAGNOSIS 142, 150 (2012).

evidence that the number of children born with Down syndrome is decreasing. On the contrary, Center for Disease Control notes that the number of children born with Down syndrome increased by 30% between 1979 and 2003.⁷⁴ The argument that people with Down syndrome are decreasing in society is of no avail.

Because there is a lack of evidence that the individual choices of women in the United States are eliminating a group of people, Justice Thomas, other judges, and pro-life advocates point to Denmark and other Nordic countries to support their arguments. In those countries, universal pre-natal testing is offered by the government and has led to very few births of children with Down syndrome.⁷⁵ Indeed, in Denmark almost 95% of the fetuses diagnosed with Down syndrome are aborted.⁷⁶ Similarly, in Iceland, nearly 100% of fetuses diagnosed with Down syndrome are aborted.⁷⁷ Pro-life advocates and judges claim that because there are few Down syndrome children born in those foreign countries, we will observe the same result in the United States without the reason-based ban.⁷⁸

However, the same patterns are not likely to occur in the United States. First, pre-natal testing is not offered to pregnant women and is not widely available in the United

⁷⁴ *Data and Statistics on Down Syndrome*, CDC (last updated Oct. 23, 2020), <https://www.cdc.gov/ncbddd/birthdefects/downsyndrome/data.html> [<https://perma.cc/2TCG-4L76>].

⁷⁵ *Box v. Planned Parenthood of Ind. and Ky.*, 139 S. Ct. 1780, 1790–91 (2018) (Thomas, J., concurring) (*cert. denied*); *See also* *Little Rock Family Planning Services v. Rutledge*, 984 F.3d 682, 694 (8th Cir. 2021) (Erickson, J., concurring) (citing data from Denmark).

⁷⁶ *See* Sarah Zhang, *The Last Children of Down Syndrome*, THE ATLANTIC (Dec. 15 2020), <https://www.theatlantic.com/magazine/archive/2020/12/the-last-children-of-down-syndrome/616928/> [<https://perma.cc/ZMV9-LLP7>].

⁷⁷ Julian Quinones & Arijeta Lajika, “*What kind of society do you want to live in?*”: *Inside the country where Down syndrome is disappearing*, CBS NEWS (last update Aug. 15, 2017, 2:17 AM EDT), <https://www.cbsnews.com/news/down-syndrome-iceland/> [<https://perma.cc/Q5RD-XXYC>]. This results in two to three children born with Down syndrome each year, out of a population of 330,000. *See* Press Release, Facts about Down’s syndrome and pre-natal screening in Iceland, Embassy of Iceland in the United Kingdom (March 26, 2018), <https://www.government.is/diplomatic-missions/embassy-article/2018/03/26/Facts-about-Downs-syndrome-and-pre-natal-screening-in-Iceland/> [<https://perma.cc/V5SY-BT2J>].

⁷⁸ *See, e.g.*, *Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682, 694 (8th Cir. 2021) (Erickson, J. concurring with whom Shepherd, J. joins) (“For example, since Denmark adopted universal prenatal screening for Down syndrome, the number of parents who chose to continue a pregnancy after a diagnosis of Down syndrome has ranged from 0–13. . . . The State of Arkansas could decide that this kind of eugenics is dangerous and poses a threat to its citizens.”)

States nor is it sponsored by the government. Second, women who are pro-life, of which there many in the United States,⁷⁹ are likely to refuse genetic testing. Even when they do obtain genetic information, they may still desire to carry the child to term even if the fetus was diagnosed with an anomaly.⁸⁰ Thus, much like in the case of reason-bans where advocates point to data in India and China, pro-life judges and other advocates are misguided in pointing to the situation in Demark to make predictions about the consequences of abortion in the United States.

CONCLUSION

The Supreme Court may soon decide whether or not states can prohibit women from terminating their pregnancies for certain reasons. A petition for certiorari from a decision from the U.S. Court of Appeals for the Eighth Circuit on the constitutionality of prohibitions on terminating pregnancies diagnosed with Down syndrome is currently pending.⁸¹ The U.S. Federal Court of Appeals have come to diverging opinions on whether to enjoin reason-based bans. When the Supreme Court previously considered this issue they agreed to kick the can down the road on adjudicating the constitutionality of reason-based bans, but that judicial compromise has likely come to an end with Justice Ginsburg's death.⁸² Should the Court find one reason-based abortion ban to be constitutional, it will open the door for states to destroy the fundamental right to abortion by enacting many more reasons for why abortion is impermissible and those prohibitions would apply pre-viability.⁸³

⁷⁹ According to one Gallup Poll, 49% of people surveyed identify as pro-life. "Pro-Choice" or "Pro-Life," 2018–2021 Demographic Tables, GALLUP, <https://news.gallup.com/poll/244709/pro-choice-pro-life-2018-demographic-tables.aspx> [<https://perma.cc/EP22-FEGN>].

⁸⁰ See Allyse, *supra* note 70, noting that anxieties about prenatal testing may serve as a proxy for religious or ethical opposition to termination; See also Lydia Saad, *Americians' Abortion Views Steady in Past Year*, GALLUP, (June 29, 2020), <https://news.gallup.com/poll/313094/americans-abortion-views-steady-past-year.aspx> [<https://perma.cc/EQ6V-52VN>] (noting that opposition to abortion has not fluctuated in the last twenty years).

⁸¹ Petition for Certiorari, *Leslie Rutledge v. Little Rock Planning Services*, 984 F.3d 682 (8th Cir. 2021) (No. 20-1434)

⁸² *Box v. Planned Parenthood of Ind. & Ky.*, 139 S. Ct. 1780, 1792–93 (2019) (Thomas, J., concurring) ("The Court's decision to allow further percolation should not be interpreted as agreement with the decisions below. Enshrining a constitutional right to an abortion based solely on the race, sex, or disability of an unborn child, as Planned Parenthood advocates, would constitutionalize the views of the 20th-century eugenics movement.")

⁸³ In finding reason-based abortion bans constitutional, the Court would not

This Essay does attempt to predict what legal test the Court will apply in determining the constitutionality of reason-based statutes. However, regardless of what legal test the Court uses, the question of whether or not reason-based prohibitions are anti-eugenic statutes will loom large in the discussion. Finding that they are designed to prevent eugenics allows judges to conclude that states have a legitimate interest in enacting reason-based bans.

Eugenics has only been associated with policies advanced by governments or powerful private organizations. The reason-based bans discussed in this Essay are aimed at limiting individual decisions of women that are not motivated by coercion or a deep-seated governmental policy. In addition, this Essay has pointed out that race-selective abortions do not occur and there are few, if any, sex-selective abortions in the United States. While some women (not all) in the United States seek prenatal testing for genetic issues, some (not all) of those might terminate their pregnancy. Despite this, the number of born with Down syndrome is actually increasing in the United States.

Lacking data to support their claims that certain groups of people are being eliminated or targeted in the United States, judges and pro-life advocates instead have looked to other countries where sex-selective abortion and disability-selective abortion occur.⁸⁴ However, the governmental policies and social biases in those countries cited by the judges are different than in the United States and the same consequences will not result here. Moreover, judges should not be deciding U.S. constitutional law on the basis of what societal trends they witness in other countries.

This Essay has shown that calling reason-based bans anti-eugenic is both wrong and dangerous. Framing the laws as preventing eugenics provides perfect cover to judges who are looking for ways to abandon long-held precedent on abortion and risks appealing to liberal judges and voters who do not carefully examine the issues.⁸⁵ Arguing that a state has

only open the window for other intention-based bans, but more importantly expand the scope of constitutional abortion restrictions far beyond the viability standards established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. See *id.*

⁸⁴ See e.g., *Petition*, *supra* note 68, at 20a (citing to the lack of Down Syndrome children born in Denmark and arguing that U.S. states have a legitimate interest in preventing that from happening in the United States even though they also point out that 6,000 children with Down Syndrome are born in the United States).

⁸⁵ See generally Sital Kalantry, *Harmful Anti-Sex-Selective Abortion Laws are*

a legitimate interest in enacting reason-based statutes because they prevent eugenics is just a ruse to further restrict reproductive rights.

Sweeping U.S. State Legislatures: Why Do Some Pro-Choice People Support Them?, in WHOSE CHOICE IS IT? ABORTION, LAW AND MEDICINE 357 (David F. Walbert & J. Douglas Butler eds., 7th ed. 2021). Many Americans believe that a woman's reasons for seeking an abortion matters—and by framing these statutes as preventing eugenics, these laws “touch on powerful emotions” and “seemingly square[] with calls to . . . dismantle systematic . . . injustice.” Rachel Rebouché & Mindy Roseman, “Eugenic Abortions” and the Problematic Popularity of Reason-Based Bans, MS. MAGAZINE (Jan. 27, 2021), <https://msmagazine.com/2021/01/27/eugenic-abortions-and-the-problematic-popularity-of-the-reason-based-ban/?fbclid=IwAR0aW0n8RnKdCi1mGBkuTKh6sS2jVhboZjtUfxjnaEfiSRxUKhWm-FWVhyc> [<https://perma.cc/93X7-EASU>].