THE UNDESIRABLES: THE TRANSFORMATION OF AMERICAN EUGENICS FROM STERILIZATION TO ABORTION

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INTRODUCTION

> "For you formed my inward parts, you knitted me together in my mother's womb. I praise you, for I am wondrously made." - Psalm 139:13–14

In 2019, the United States Supreme Court upheld the constitutionality of an Indiana law prohibiting aborted children from being treated like "infectious waste."[1] Surprisingly, what drew most attention to the case was not the question answered by the Court, but rather, the question left unanswered. Justice Clarence Thomas, in a concurring opinion, took time "separately to address the other aspect of Indiana law at issue,"[2] which restricted selective abortions on the basis of race, sex, disability, or related characteristics.[3] In his concurrence, Justice Thomas sought to highlight the eugenic ethos behind the selective abortions prohibited by the challenged Indiana law.[4] It did not take long for Justice Thomas to receive criticism for connecting abortion to eugenics.[5] The principle criticism opposing his opinion is that the link between eugenics and abortion is severed due to the apparent incongruity of

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[†] Candidate for Juris Doctor, Ave Maria School of Law, 2022. To my dear wife and children: Thank you for everything. This Note is dedicated to all preborn children. O Mary, conceived without sin, pray for us who have recourse to thee.

1. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring).

2. *Id.*

3. IND. CODE §§ 16–34–4–1 to –9 (2016).

4. *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring) (arguing that "[t]he use of abortion to achieve eugenic goals is not merely hypothetical," but rather, that the historical developments of abortion practice in America "developed alongside the American eugenics movement.").

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

equating a *state* action (eugenics) with a *private* action (abortion).[6] The American eugenics movement, indeed, climaxed as a state-sponsored compulsory sterilization initiative imposed on men and women.[7] However, when exploring the motives of eugenics alongside the practice of selective abortions on the basis of race, sex, or disability, the soundness of Thomas's argument rests on the discovery that the end goal of eugenics has not died away, but the means have merely transformed.[8]

Part I of this Note will briefly survey the history of the American eugenics movement, while specifically highlighting the Supreme Court case that propelled eugenics. Part II will examine *Box v. Planned Parenthood of Indiana & Kentucky*, where Justice Thomas addressed Indiana's Sex Selective and Disability Abortion Ban. Part III will highlight the current *undue burden* standard applied to abortion restrictions that originated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. Part IV will assess whether the *Casey* standard should apply to anti-eugenic abortion laws by looking at two lower court opinions[9] issued in 2021 that dealt with state laws designed to prevent eugenics by outlawing selective abortions on the basis of a diagnosis of Down syndrome.

As one scholar suggests, the intellectual and medical ethics that advanced American eugenics have persisted,[10] and that there exists "laissez-faire eugenics"[11] to this day. Soon, prospective parents may be overtly urged "to bow to social attitudes by aborting their genetically inferior children."[12] This Note will emphasize, supported by lower court commentary, that the sociological and legal premises that render eugenics intolerable, are the same

6. *Id.* (stating that "Thomas's argument falls apart," because "[b]etween eugenic sterilization and abortion lie two crucial differences: who is making the decision, and why they are making it.").

7. *See* WESLEY J. SMITH, CULTURE OF DEATH: THE ASSAULT ON MEDICAL ETHICS IN AMERICA 34–36 (2000).

8. *See Box*, 139 S. Ct. at 1783–84 (Thomas, J., concurring); *See also* SMITH, *supra* note 7, at 34; Sonia M. Suter, *A Brave New World of Designer Babies?*, 22 BERKELEY TECH. L.J. 897, 916 (2007) ("While most argue that the classic eugenics movement met its demise in the mid-1930s and '40s or later, some suggest that eugenics never died, but merely transformed itself.").

9. Preterm-Cleveland v. McCloud, 994 F.3d 512 (6th Cir. 2021); Little Rock Fam. Plan. Servs. v. Rutledge, 984 F.3d 682 (8th Cir. 2021).

10. *See* SMITH, *supra* note 7, at 34.

11. *Id.* at 227.

12. *Id.* ("If infanticide ever becomes respectable, . . . 'post-birth abortions' might also become commonplace, as indeed they already are in the Netherlands.").

premises that ought to render selective abortions intolerable.[13] As may be discovered, "[t]here is an inherent connection between things foul."[14]

I. THE EUGENICS MOVEMENT

A. *Eugenics Overview*

Eugenics has been defined as the study of how to arrange reproduction within a human population to increase the occurrence of heritable characteristics regarded as desirable.[15] In *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck*, author Adam Cohen explains that the American eugenics movement is largely forgotten.[16] Perhaps a natural "repugnance"[17] in the public conscience to a "cruel procedure"[18] makes it more comforting to forget eugenics than to remember it at all.

"Eugenics" was a term "coined in 1883 by Francis Galton, a British statistician and half-cousin of Charles Darwin."[19] Galton used the term "eugenics" to describe his theories of genetic engineering through intentional breeding.[20] Galton seemingly adapted "Darwin's theories of natural selection" into a systematic program to fashion man as Galton—and other eugenicists—preferred.[21] Eugenicists believed they could fashion the human race as they saw fit without objective standards to direct them.[22] As revealed over the following decades, under the guise of social, medical, and genetic "progress,"

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13. Congregation for the Doctrine of the Faith, *Dignitas Personae*, ¶ 22 (2008) (quoting Pope John Paul II, *Evangelium Vitae*, [*Encyclical Letter on the Value and Inviolability of Human Life*] ¶ 58 (1995)) ("[A] *eugenic mentality* that 'accepts selective abortion in order to prevent the birth of children affected by various types of anomalies . . . is shameful and utterly reprehensible, since it presumes to measure the value of a human life only within the parameters of "normality" and physical well-being, thus opening the way to legitimizing infanticide and euthanasia as well.'").

14. D. BRIAN SCARNECCHIA, BIOETHICS, LAW, AND HUMAN LIFE ISSUES: A CATHOLIC PERSPECTIVE ON MARRIAGE, FAMILY, CONTRACEPTION, ABORTION, REPRODUCTIVE TECHNOLOGY, AND DEATH AND DYING 275 (2010).

15. *Introduction to Eugenics*, GENETICS GENERATION, https://knowgenetics.org/history-of-eugenics (last visited Oct. 10, 2021).

16. ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 11 (2016).

17. Leon R. Kass, *Wisdom of Repugnance: Why We Should Ban the Cloning of Humans*, 32 VAL. U. L. REV. 679, 687 (1998).

18. COHEN, *supra* note 16, at 13.

19. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1784 (2019) (Thomas, J., concurring).

20. SMITH, *supra* note 7, at 34.

21. *Id.*

22. *Id.*

eugenics and genetic engineering grew into a campaign waged against individuals essentially classified as *undesirable*, perpetrated by those who happened to be in positions of power.[23] As C.S. Lewis presciently penned in reference to the evolving European and American eugenics:

> [W]hat we call Man's power over Nature turns out to be a power exercised by some men over other men with Nature as its instrument.[24] . . . The final stage is come when Man by eugenics, by pre-natal conditioning, and by an education and propaganda based on a perfect applied psychology, has obtained full control over himself. *Human* nature will be the last part of Nature to surrender to Man.[25] . . . For the power of Man to make himself what he pleases means, as we have seen, the power of some men to make other men what *they* please.[26] . . . Man's final conquest has proved to be the abolition of Man.[27]

The pervasive capability of eugenics as an ideology is evidenced by its widespread dissemination and popularity in the early 20th century. It appears difficult to overstate the level of interdisciplinary and cultural prevalence the eugenics ethos achieved in the early 1900s.[28] Eugenics received considerable fuel from academia and the media of the day, which helped move eugenic ideology from minds of the "elites" to the minds of the common man.[29] By the 1920s, with eugenics at peak popularity, "[c]ourses in eugenics were taught in more than 350 American universities and colleges, leading to the widespread popular acceptance of its tenets."[30] Moreover, eugenics "was

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23. *See, e.g.*, ELIZABETH CATTE, PURE AMERICA 38 (2021) ("Eugenicists built an intentional glitch in the matrix . . . you couldn't tell if someone was feebleminded simply by looking at them, speaking to them, or watching them work. To the untrained eye, they were indistinguishable from people perceived as 'normal.' . . . The fear of invisible contamination was a potent tool eugenicists used to build power around their set of beliefs, but it also gave them a way to bend reality around the fact that they were, in fact, often targeting people on the basis of presumed character flaws.").

24. C.S. LEWIS, THE ABOLITION OF MAN 55 (HarperCollins Paperback Ed. 2001) (1944).

25. *Id.* at 59.

26. *Id.*

27. *Id.* at 64.

28. Suter, *supra* note 8, at 909 ("The 1920s saw a stronger and more powerful eugenics movement. Prominent eugenicists were members of prestigious intellectual institutions, wealthy donors founded more eugenics organizations, and local eugenics organizations proliferated.").

29. SMITH, *supra* note 7, at 35.

30. *Id.*

endorsed in more than 90 percent of high school biology textbooks."[31] Eugenics even hit the silver screen.[32]

While the eugenic ethos was increasing in force throughout the culture, at least within the United States, it was unsettled how exactly the eugenicists would stop reproduction of the *undesirables*.[33] With elusive end goals, several tactics were tried and proved unsuccessful, including forced castration, marriage prohibitions, as well as institutional separation.[34] Castration, understandably so, was deemed too "barbaric."[35] Marriage prohibitions were ineffective, because paper laws would not prevent childbirth among the people the eugenicists despised.[36] Institutional segregation was too inefficient.[37] These failed tactics left the eugenicists without a clear path forward, until they received corporate funding.[38] Not long after, as one author notes, "[e]ugenics was taught in some of the world's most prestigious universities, and most eugenics societies 'were dominated by professionals such as professors, social workers, lawyers, doctors, teachers, and ministers.'"[39] Eventually, genetic engineers settled on sterilization—"their favored solution."[40] Sterilization, as it was viewed, "was completely effective, and it could be carried out on a mass scale."[41]

B. *The American Eugenics Movement*

Eugenics and the notion of sterilizing the undesirables on a mass scale gained momentum in America in the early 20th century.[42] America's eugenic history is largely forgotten, and the medical and sociological ideology that sprung eugenics into being seemingly went dormant. However, it would be a mistake to hide the reality of the eugenics movement in the public

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31. *Id.*
32. COHEN, *supra* note 16, at 61–62.
33. *Id.* at 62.
34. *Id.* at 62–64.
35. *Id.* at 62.
36. *Id.* at 63.
37. *Id.* at 64.
38. SMITH, *supra* note 7, at 35.
39. *Id.* (quoting DIANE B. PAUL, CONTROLLING HUMAN HEREDITY, 1895 TO THE PRESENT 11 (1995)).
40. COHEN, *supra* note 16, at 5.
41. *Id.*
42. *See* Teryn Bouche & Laura Rivard, *America's Hidden History: The Eugenics Movement*, NATURE EDUC.: SCITABLE (Sept. 18, 2014), https://www.nature.com/scitable/forums/genetics-generation/america-s-hidden-history-the-eugenics-movement-123919444.

conscience.[43] For example, if it remains possible that a eugenic ethos persists today, it seems unwise to conceal the fact that "as many as 70,000 Americans were forcibly sterilized during the 20th century . . . [as] victims of state-mandated sterilization" laws. [44]

A new eugenics momentum is arguably metastasizing under the mask of *allegedly* victimless reproductive choice.[45] As Professor D. Brian Scarnecchia explains: "All rhetoric about individual liberty aside, the real beneficiaries of reproductive technology are . . . a technologically elite sect: social engineers, medical professionals together with accommodating bioethicists, and jurists who aim at a society better planned by them."[46] If true, the connection between eugenics of old and today's bioethics is closer than one may initially think.[47] The repulsive atrocities perpetrated by Nazi Germany during the Second World War exposed to the world what happens when a eugenics movement is left unchecked and allowed to advance to its predictable end. Nevertheless, was the eugenics ethos—whereby elites seek to make man in their preferred image with *unnatural* selection—ever extinguished?[48] While open support of state-sponsored sterilization waned after World War II, have eugenicists merely altered the means to achieve their desired ends under the guise of "reproductive choice"?[49]

Author Wesley J. Smith states that an investigation into the ideology of eugenics "and the horrors that flowed from its acceptance . . . is highly relevant to an exploration of modern bioethic[al]" issues.[50] From a sociological, legal, medical, and moral perspective, Smith advanced three

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43. COHEN, *supra* note 16, at 11.

44. *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.

45. SMITH, *supra* note 7, at 34.

46. SCARNECCHIA, *supra* note 14, at 144.

47. SMITH, *supra* note 7, at 35.

48. Shenan J. Boquet, *Modern-Day Eugenics: Who Lives and Who Dies*?, HUM. LIFE INT'L (Nov. 30, 2020), https://www.hli.org/2020/11/modern-day-eugenics-who-lives-and-who-dies ("[P]eople often speak of eugenics as a thing of the past—a failed experiment. This is wrong. Not only has eugenics not failed, but it is also a more potent force than ever before. . . . [F]orms of eugenics are dressed up in the respectability of white lab coats, and presented in the language of modern marketing and 'choice.'").

49. *See* Preterm-Cleveland v. McCloud, 994 F.3d 512, 538, 540 (6th Cir. 2021) (Griffin, J., concurring) ("Many think that eugenics ended with the horrors of the Holocaust. Unfortunately, it did not. The philosophy and the pure evil that motivated Hitler and Nazi Germany to murder millions of innocent lives continues today. Eugenics was the root of the Holocaust and is a motivation for many of the selective abortions that occur today," as "the selective abortion of unborn babies who are deemed 'unfit' or 'undesirable' is becoming increasingly common.").

50. SMITH, *supra* note 7, at 34.

significant reasons to study the history of eugenics that are relevant for our discussion of selective abortions on the basis of sex, race, disability, or related characteristics. Smith's reasons to understand eugenics include:

> *First*, its history shows the inhuman consequences that invariably follow when the equality of human life is disregarded in science, medicine, law, and society at large. *Second*, striking and disturbing parallels exist between the manner in which eugenic theories were developed and put into practice, and the way in which bioethics ideology is coming to dominate the ethics of medicine. *Third*, modern bioethics, like eugenics before it, creates hierarchies of human worth intended to justify medical discrimination. Now, after decades of quiescence, eugenics itself is making something of a comeback under the cover of new genetic technologies.[51]

When the medical profession is relied on as the sole vehicle to engineer an improved human life, history has shown us that it can quickly lead to human harm.[52] As recounted by Smith, German physician Christoph Wilhelm Hufeland stated in 1806: "It is not up to [the doctor] whether . . . life is happy or unhappy, worthwhile or not, and should he incorporate these perspectives into his trade . . . the doctor could well become the most dangerous person in the state."[53] Are those words hyperbolic? After all, the medical profession, with the support of statutory law in America, ultimately deprived thousands of people of the right to bear children during an ugly chapter in the country's history. The "fundamental precepts"[54] of the American eugenics movement, and the Supreme Court's permission that propelled it, rather than ushering in the eugenic fantasy when "humans [took] control of their own evolution by using selective breeding techniques,"[55] actually revealed "a power exercised by some men over other men with Nature as its instrument."[56]

The tsunami of cultural, medical, and legal support paired with sophisticated wordplay allowed eugenics to flower under the guise of science and innovation.[57] The eugenics attitude swept across the culture during the early 20th Century through the amplification of mass media, and advanced in

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51. *Id.* (emphasis added).

52. Jonathan Broder, *Auschwitz Survivors Recall Horror of Nazi Experiments*, CHI. TRIB., (Feb. 7, 1985) https://www.chicagotribune.com/news/ct-xpm-1985-02-07-8501080137-story.html.

53. SMITH, *supra* note 7, at 37.

54. *Id.* at 34.

55. *Id.*

56. LEWIS, *supra* note 24, at 55.

57. Arguably like the cultural, medical, and legal support paired with sophisticated wordplay that has allowed legalized abortion to perpetuate.

popularity in the lead-up to *Buck v. Bell* in 1927.[58] But, as C.S. Lewis cautioned: "There is a difference between a real moral advance and a mere innovation."[59]

C. *Buck v. Bell*

Buck v. Bell should be recognized, as Cohen states, among the "worst decisions" in the history of the Supreme Court.[60] Justice Oliver Wendell Holmes Jr., renowned for his "mastery of the judicial opinion as a literary genre,"[61] sealed the fate for Carrie Buck, and, "[o]ver the next generation[,] some seventy thousand persons in the United States [who] were sterilized by state order."[62] *Buck v. Bell*,[63] with its disturbing reasoning, had the effect of giving institutional and legal support to eugenics,[64] and gave eugenics considerable momentum.[65] So, what happened in 1927, and how did the Supreme Court give its approval on forced sterilization?

The Virginia Sterilization Act of 1924, in pertinent part, authorized five state medical facilities in the Commonwealth of Virginia to conduct compulsory sterilizations.[66] The Sterilization Act stated:

> [W]henever the [medical] superintendent . . . shall be of opinion that it is for the best interests of the patients and of society that any inmate of the institution under his care should be sexually sterilized, such superintendent is hereby authorized to [sterilize] . . . any such patient . . . with hereditary

58. COHEN, *supra* note 16, at 59.

59. LEWIS, *supra* note 24, at 45–46.

60. COHEN, *supra* note 16, at 10.

61. Robert A. Ferguson, *Holmes and the Judicial Figure*, 55 U. CHI. L. REV. 506, 506 (1989).

62. WILLIAM LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 15 (1995).

63. Buck v. Bell, 274 U.S. 200 (1927).

64. *See id.* at 207 ("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 [e.g. sterilization] . . . 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. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.").

65. COHEN, *supra* note 16, at 299 (explaining that after *Buck v. Bell*, proponents of eugenic sterilization were "emboldened.").

66. Virginia Sterilization Act of 1924, ch. 394, § 1, 1924 Va. Acts 569 (repealed 1968).

> forms of insanity that are recurrent, idiocy, imbecility, feeble-mindedness or epilepsy.[67]

However, as Cohen explains, the state wanted its new authorization to sterilize the innocent "tested in the courts."[68]

Carrie Buck was born in Charlottesville, Virginia in 1906.[69] When Carrie was thirteen, her mother, Emma Buck, was taken into custody and held to be "feeble-minded" by a municipal judge in Virginia.[70] Subsequently, at seventeen years old, while living in foster care, Carrie testified to being raped.[71] She became pregnant and would eventually give birth to a baby girl.[72] As Cohen explains, Carrie was immediately placed in a difficult position, and experienced the awful "misfortune to be at the wrong place at the wrong time."[73] The eugenicists based much of their faulty science on the erroneous notion that "feeble-minded" individuals, as Carrie was classified, were vulnerable to the lack of moral restraint, specifically sexual restraint, and therefore were better off sterilized.[74] Consequently, Carrie would wind up being Virginia's first victim of state-approved sterilization, and was only twenty-one years old when the Supreme Court authorized doctors to remove her capacity to bear children.[75]

Holmes was well-known for his "stirring defenses of civil liberties and individual freedom."[76] Thus, as Carrie's appeal reached the Supreme Court, Holmes would have been seen as a likely advocate for Carrie,[77] because her appeal implicated equal protection, procedural due process, and substantive due process violations.[78] In 1897, while sitting on the Supreme Judicial Court of Massachusetts, Holmes stated in *The Path of the Law*, "I think that judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage."[79] In reference to judicial reasoning, Holmes declared, "[t]he language of judicial decision is mainly the language

67. *Id.*
68. COHEN, *supra* note 16, at 6.
69. *Id.* at 17.
70. *Id.* at 22.
71. *Id.* at 24.
72. *Id.* at 24, 28.
73. *Id.* at 6.
74. *Id.* at 25–26.
75. *Id.* at 283.
76. *Id.* at 212.
77. *Id.* at 213.
78. Buck v. Bell, 274 U.S. 200, 205 (1927).
79. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897).

of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind."[80] Holmes added, "But . . . [b]ehind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. *You can give any conclusion a logical form*."[81] Whether the Court intended to support eugenics outright, the decision had that effect. As another scholar notes, "[b]y recognizing eugenical sterilization" in *Buck v. Bell*, "the Supreme Court gave sterilization the tremendous legal, and in many instances emotional, backing of the Constitution."[82]

Carrie Buck's appeal to the Supreme Court rested on the grounds that by being forcibly sterilized she was being denied "due process of law and the equal protection of the laws."[83] Unfortunately for Carrie, the Court's opinion directly echoed eugenic ideology.[84] In *Buck*, the Court detestably declared, "[i]t 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."[85] While the individual case of Carrie Buck was a grave injustice in and of itself, as Cohen suggests, perhaps "[w]hat is most disturbing is the worldview the court revealed."[86] With the pronouncement that, "[t]hree generations of imbeciles are enough,"[87] the Court seemed to justify *any* logical form that would result in the sterilization of Carrie Buck.

Holmes understood that Carrie's appeal rested primarily "not upon the procedure but upon the substantive law" of the lower court's ruling.[88] Carrie's objection, principally, was on the fact that her right to bear children was being

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80. *Id.* at 465.

81. *Id.* at 465–66 (emphasis added).

82. Robert J. Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1454, 1457 (1981) (The justices "seemed to have dulled their critical faculties to the point where they were blind to the many improprieties and inconsistencies in the case before them. . . . [E]ven a superficial observation of the proceedings in *Buck v. Bell* reveals a conspicuous absence of the adversarial character on which our legal system relies to determine a certain legal 'truth.' For example, the essential eugenic assumptions about the nature of man which were at the heart of the sterilization program were never challenged by Carrie's lawyer during any of the legal proceedings.").

83. *Buck*, 274 U.S. at 205.

84. COHEN, *supra* note 16, at 2.

85. *Buck*, 274 U.S. at 207.

86. COHEN, *supra* note 16, at 13.

87. *Buck*, 274 U.S. at 207.

88. *Id.*

substantively violated by the Virginia Sterilization Act of 1924.[89] Again, whether intended or not, the Court appeared to sympathize with eugenics, as before Holmes even analyzed the legal issues in *Buck*, he explicitly accepted the premise that "Carrie Buck is a feeble-minded white woman."[90] It is one thing to apply the law to the facts in a legal case, it is quite another to accept a premise that some people are of less value, or less human, than others, and therefore subject to less respect. Has political and judicial sentiment changed?[91] Holmes's very brief recitation on the details of Carrie's situation, and her right to bear children, gave the impression of a "lack of interest" in such details.[92] Not to be overlooked, *Buck v. Bell* was an 8-1 decision, without a word from the one dissenting justice.

The Governor of Virginia, seventy-five years after the Court upheld Virginia's Sterilization law in *Buck*, formally apologized for Virginia's participation in eugenics, stating that "[t]he eugenics movement was a shameful effort in which state government never should have been involved."[93] While emotional and visceral argument will not suffice in the court of law, American author, medical ethicist, and physician, Leon Kass, posits that in certain situations, repugnance can be "the emotional expression of deep wisdom beyond reason's power to fully articulate it."[94] Despite the fact that *Buck v. Bell* was never officially overturned, perhaps the natural repugnance is why compulsory sterilizations faded away in America. A likely wake up call for many Americans was the realization of the global impact of *Buck v. Bell* and eugenics in general.[95] For example, the eugenic campaign in Nazi Germany "carried out 375,000 forced eugenic sterilizations."[96] Alarmingly, at Nuremburg, the Nazis even "cited *Buck v. Bell* in defense of their actions."[97] Kass's theory of an instructive gut reaction is not illusory

89. *Id.* ("The attack is not upon the [civil] procedure, but upon the substantive law . . . contend[ing] that in no circumstances could such an order [of sterilization] be justified.").

90. *Id.* at 205.

91. *See* Michael Stokes Paulsen, *Abortion as an Instrument of Eugenics*, 134 HARV. L. REV. F. 415, 433 (2021) ("The reality is that our current constitutional law allows abortion for any reason, including a eugenics reason. The result is that abortions can be obtained, and are obtained, on account of the race, sex, or disability of the child that otherwise would be born.").

92. COHEN, *supra* note 16, at 267.

93. *Id.* at 1 (quoting *Virginia Governor Apologizes for Eugenics Law*, USA TODAY (May 2, 2002), http://usatoday30.usatoday.com/news/nation/2002/05/02/virginia-eugenics.htm.).

94. Kass, *supra* note 17, at 687; *see also* LEWIS, *supra* note 24, at 19 ("[E]motional states can be in harmony with reason . . . . No emotion is, in itself, a judgement; in that sense all emotions and sentiments are alogical. But they can be reasonable . . . as they conform to Reason or fail to conform.").

95. COHEN, *supra* note 16, at 10.

96. *Id.* at 10–11.

97. *Id.* at 11.

when one learns of the "unspeakable atrocities" perpetrated against the Jews and other *undesirables* in Nazi Germany.[98]

While America's eugenicists faced another roadblock following World War II, did the means of reaching eugenic ends simply evolve from state sterilizations to something less obvious? In 2016, the Indiana legislature believed so, and passed by "wide margins"[99] an anti-eugenic abortion ban. The Indiana law was quickly challenged by Planned Parenthood, the country's largest abortion provider, and the case reached the Supreme Court in 2019.

II. *BOX V. PLANNED PARENTHOOD OF INDIANA & KENTUCKY, INC.*

In *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, the Supreme Court granted in part and reversed in part a decision by the Court of Appeals for the Seventh Circuit, and upheld an Indiana law that prohibited abortion providers, and all citizens, from "treating the bodies of aborted children as 'infectious waste' and incinerating [the aborted children] alongside used needles, laboratory-animal carcasses, and surgical byproducts."[100] Our interest here, however, surrounds the Indiana law that did not reach the Court. The Court declined to consider an anti-eugenic abortion ban that was struck down by the Seventh Circuit under the existing abortion precedent.[101] The "Sex Selective and Disability Abortion Ban"[102] passed by the Indiana State Legislature, made it unlawful "for an abortion provider to perform an abortion in Indiana when the provider knows that the mother is seeking the abortion solely because of the child's race, sex, diagnosis of Down syndrome, disability, or related characteristics."[103]

At the Seventh Circuit, the panel's majority found the restriction unconstitutional under the standard set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[104] In his dissent from the denial of a rehearing en banc, Judge Easterbrook called the Indiana law a "eugenics statute," and argued against the majority's premise that *Casey* provided the standard for the court's analysis.[105] Easterbrook defended his skepticism

98. *Eugenics*, HISTORY, https://www.history.com/topics/germany/eugenics (Jan. 13, 2021).

99. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1792 (Thomas, J., concurring).

100. *Id.* at 1782–83. *See* IND. CODE §§ 16–41–16–2, 16–41–16–4(d), 16–41–16–5 (2020).

101. *Box*, 139 S. Ct. at 1781–82 (per curiam).

102. IND. CODE §§ 16–34–4–1 to –9 (2016).

103. *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring).

104. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion).

105. Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting).

surrounding the decision by stating that "*Casey* did not consider the validity of an anti-eugenics law. Judicial opinions are not statutes; they resolve only the situations presented for decision."[106] Easterbrook continued, "[n]one of the Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children."[107] Arguing for the application of a different standard, Judge Easterbrook underscored the important distinction between anti-abortion laws and anti-eugenics laws, like the one enacted by the Indiana Legislature. Easterbrook explained:

> *Casey* and other decisions hold that, until a fetus is viable, a woman is entitled to decide whether to bear a child. But there is a difference between "I don't want a child" and "I want a child, but only a male" or "I want only children whose genes predict success in life." Using abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered.[108]

In *Box*, because "[o]nly the Seventh Circuit ha[d] thus far addressed this kind of law,"[109] the Supreme Court ultimately declined to grant certiorari on the question of the constitutionality of Indiana's anti-eugenic abortion ban. Justice Thomas, seeing "the potential for abortion to become a tool of eugenic manipulation,"[110] acknowledged that "further percolation may assist [the Court's] review of this issue of first impression."[111] However, Justice Thomas also asserted that "[a]lthough the Court declines to wade into these issues today, we cannot avoid them forever. Having created the constitutional right to an abortion, this Court is dutybound to address its scope."[112]

Those critical of the opinion that selective abortions share a common thread with the former eugenics movement argue that connecting state-sponsored eugenics with the private action of abortion is a stretch that goes

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106. *Id.*

107. *Id.*

108. *Id.*; *see also* Paulsen, *supra* note 91, at 429 (explaining that "[t]here is something deeply wrong when a right to abortion, championed in the name of female gender equality, produces a constitutional right to abort human embryos and fetuses for being female. Standard-issue feminist arguments for abortion rights, whatever their merit in general, simply do not work in this setting. To whatever extent *Roe* and *Casey* rest on sex-equality premises, those premises fail to supply a justification for eugenics-based abortions specifically.").

109. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1782 (2019) (per curium).

110. *Id.* at 1784 (Thomas, J., concurring).

111. *Id.*

112. *Id.* at 1793.

too far.[113] But does it? As Judge Bush from the Sixth Circuit explained, critics "argu[e] that eugenics requires a collective and concerted effort to change humanity's genetic composition."[114] But that line of argument misses the point, for "just as a private decision that is not motivated by animus is still labeled discriminatory if its effect falls more heavily on a protected class, a private choice that contributes to the elimination of a disfavored genetic trait can be fairly called eugenic because it accomplishes eugenic ends."[115] If we focus solely on the means employed, then yes, the argument breaks down; selective abortions are not eugenics. However, the "full-fledged intellectual craze"[116] of eugenics in the twentieth century was primarily concerned with an end, rather than a means. Looking back, the tragedy of *Buck v. Bell* consists not solely in the Court upholding a eugenics law that allowed the means of forced sterilization, as bad as that was; the tragedy was that Carrie Buck, and thousands like her—that is to say, the many unwanted by the ruling class—were actually sterilized . . . permanently. Even if the state is not compelling a procedure, does eugenic ideology continue to persist by devaluing certain lives? As discussed, sterilization was the chosen vehicle of *that* era of eugenics. Is selective abortion a new vehicle for *this* era of eugenics?

Justice Thomas stated plainly, "[t]he use of abortion to achieve eugenic goals is not merely hypothetical."[117] Thomas supplied the perceived missing link between sterilization and abortion: artificial contraception.[118] Justice

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113. *See* Preterm-Cleveland v. McCloud, 994 F.3d 512, 585 (6th Cir. 2021) (Donald, J., dissenting) (arguing that "describing a Down-syndrome-selective abortion as eugenics . . . impute[s] upon women a eugenicist mindset for which there is no evidentiary basis . . . thereby ignoring the difference between a woman today making an individual choice and a historical movement tightly fastened upon 'improving stock.'").

114. *Id.* at 544 n.5 (Bush, J., concurring).

115. *Id.*

116. COHEN, *supra* note 16, at 2.

117. *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring). However, some judges perceive a missing link between eugenics and selective abortion. *See, e.g.*, *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 561 (6th Cir. 2021) (Moore, J., dissenting) (calling the comparison "an overly simplified and grossly inaccurate depiction."); *id.* at 568 (Gibbons, J., dissenting) (referring to the link between eugenics and abortion as an "inapt comparison."); and *id.* at 583 (Donald, J., dissenting) ("This use of 'eugenics' fundamentally misunderstands that term.").

118. *Box*, 139 S. Ct. at 1783, 1787–89 (Thomas, J., concurring). In fact, the Court has already admitted the characteristic link between abortion and contraception in its prior abortion caselaw. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) (plurality opinion) ("Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the *failure of conventional birth control*. . . . [F]or two decades [since *Roe*] . . . people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion *in the event that contraception should fail*.") (emphases added); *see also* EDWARD ROBERTS

Thomas explained how "[t]he foundations for legalizing abortion in America were laid during the early 20th-century birth-control movement . . . [and] developed alongside the American eugenics movement."[119] Thomas explained that Margaret Sanger, the founder of the Plaintiff-Appellee in *Box*, Planned Parenthood, Inc., believed that "[i]f 'the masses' were given 'practical education in Birth Control'—for which there was 'almost universal demand'—then the 'Eugenic educator' could use 'Birth Control propaganda' to 'direct a thorough education in Eugenics' and influence the reproductive decisions of the unfit."[120] Thus, Sanger's plan for birth control was to saturate the culture with a social betterment theory, the same roadmap used by eugenicists in prior years.[121] Preventing reproduction under government compulsion via sterilization, and preventing reproduction through private contraception achieved the same end: less reproduction. If that link is forged between state eugenics and the birth control movement, the only remaining link is between birth control and abortion.

Sanger "emphasized and embraced the notion that birth control 'opens the way to the eugenicist.'"[122] Sanger wrote that "[b]irth control . . . is really the greatest and most truly eugenic method" of "human generation" and "most clear thinking and far seeing" eugenicists viewed birth control "as the most constructive and necessary of the means to racial health."[123] Justice Thomas explained that "[l]ike many elites of her day, Sanger . . . agreed with eugenicists that "the unbalance between the birth rate of the 'unfit' and the 'fit' "was 'the greatest present menace to civilization.'"[124] The eugenics ethos, when operating practically, is quite malleable to suit the preference of those in positions of political, judicial, or cultural authority. As G.K. Chesterton noted, "feeble-mindedness is a new phrase under which you might

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MOORE, THE CASE AGAINST BIRTH CONTROL 47 (1931) ("No discussion of contraception would be complete without at least passing reference to the two closely related subjects of abortion and sterilization.").

119. *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring).

120. *Id.* at 1788 (quoting Margaret Sanger, *The Eugenic Value of Birth Control Propaganda*, BIRTH CONTROL REV., Oct. 1921, at 5, 5).

121. *Id.*

122. *Id.* at 1783 (quoting Margaret Sanger, *Birth Control and Racial Betterment*, BIRTH CONTROL REV., Feb. 1919, at 11, 12).

123. *Id.* at 1784 (quoting MARGARET SANGER, PIVOT OF CIVILIZATION 187, 189 (1922)).

124. *Id.* at 1787.

segregate anybody" since *feeble-mindedness* "conveys nothing fixed," except that which is defined by the elite of the day.[125]

Justice Thomas was critical of the Supreme Court which "threw its prestige behind the eugenics movement in its 1927 decision . . . *Buck v. Bell*."[126] Thomas explained that, "[t]he Court's decision gave the eugenics movement added legitimacy and considerable momentum; by 1931, 28 of the Nation's 48 States had adopted eugenic sterilization laws."[127] While state sponsored sterilization has ceased in the United States, Justice Thomas claimed that "support for . . . reducing undesirable populations through selective reproduction has by no means vanished."[128] Why is this so? Eugenics, at its root, is ultimately the grasping at control of reproduction by one of many means, to achieve a desired end—a particular type of reproduction.[129] Therefore, "arguments about the eugenic potential for birth control apply with even greater force to abortion, which can be used to target specific children with unwanted characteristics."[130] Justice Thomas explained:

> [W]ith today's prenatal screening tests and other technologies, abortion can easily be used to eliminate children with unwanted characteristics. Indeed, the individualized nature of abortion gives it even more eugenic potential than birth control, which simply reduces the chance of conceiving *any* child. As petitioners and several *amicus curiae* briefs point out, moreover, abortion has proved to be a disturbingly effective tool for implementing the discriminatory preferences that undergird eugenics.[131]

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125. *Id.* at 1786 (quoting G.K. CHESTERTON, EUGENICS AND OTHER EVILS: AN ARGUMENT AGAINST THE SCIENTIFICALLY ORGANIZED SOCIETY 49 (Michael W. Perry ed., Inkling Books 2000) (1922)); *See also id.* at 63 (Chesterton stating further that "[l]aw has become lawless; that is, it cannot see where laws should stop.").

126. *Box*, 139 S. Ct. at 1786 (Thomas, J., concurring).

127. *Id.* (citing COHEN, *supra* note 16, at 299–300).

128. *Id.* at 1787.

129. *Id.*; *see also* COHEN, *supra* note 16, at 62–64.

130. *Box*, 139 S. Ct. at 1787 (Thomas, J., concurring); *see also* SMITH, *supra* note 7, at 227 (Smith states, "[b]ased on current Western social and cultural attitudes, children at risk for termination might include not just those with Down's [sic] syndrome," but any other stigmatized feature. For example, an insurance company has already informed a mother "it would pay for an abortion when her unborn child tested positive for cystic fibrosis, but would not cover the infant under the family's medical policy if [the mother] chose to carry to term.").

131. *Box*, 139 S. Ct. at 1790 (citing Pet. for Cert. 22–26); Brief for State of Wisconsin et al. as Amici Curiae Supporting Petitioners at 19–25, *Box*, 139 S. Ct. 1780 (No. 18-483), 2018 WL 6042853; Brief Amici Curiae Ethics and Religious Liberty Commission of the Southern Baptist Convention et al. in support of the Petitioners at 9–10, *Box*, 139 S. Ct. 1780 (No. 18-483), 2018 WL 6082223.

Thomas highlighted that, "[i]t was against this background that Indiana's Legislature, on the 100th anniversary of its 1907 sterilization law, adopted a concurrent resolution formally 'express[ing] its regret over Indiana's role in the eugenics movement in this country and the injustices done under eugenic laws.'"[132]

Fast forward to 2016, and "the Indiana Legislature passed by wide margins the Sex-Selective and Disability Abortion Ban at issue"[133] in *Box*. Justice Thomas echoed Judge Easterbrook's dissent from the Seventh Circuit when he wrote, "[w]hatever else might be said about *Casey*, it did not decide whether the Constitution requires States to allow eugenic abortions."[134] Justice Thomas substantiated his point by directing attention to "the very first paragraph of the respondents' brief in *Casey*," which "made it clear to the Court that Pennsylvania's prohibition on sex-selective abortions was 'not [being] challenged[.]'"[135] Therefore, with the Court's denial of certiorari in *Box*, the constitutionality and applicable legal standard for state anti-eugenic abortion laws remain "an open question."[136] When the issue of anti-eugenic abortion laws finally reaches the Court, what standard will the Court apply?

III. THE UNWORKABLE STANDARD

On June 29, 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court issued the landmark decision that reaffirmed the practice of abortion in the United States.[137] In *Casey*, the Court refused to overturn the controversial decision in *Roe v. Wade*,[138] the decision that first produced a purported right to an abortion.[139] The three-justice plurality in

132. *Box*, 139 S. Ct. at 1791–92 (Thomas, J., concurring) (quoting S. Con. Res. 91, 115th Gen. Assemb., 1st Sess., § 1 (Ind. 2007)).

133. *Id.* at 1792.

134. *Id.*

135. *Id*. (quoting Brief for Respondents, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006423, at *4).

136. *Id.* As of this writing, the U.S. Supreme Court has not issued its decision in *Dobbs v. Jackson Women's Health Org.*, 945 F.3d 265 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 2619 (U. S. May 17, 2021) (No. 19-1392), where petitioners have asked to Court to overrule *Roe* and *Casey* and apply rational basis review for state abortion restrictions.

137. *Casey*, 505 U.S. 833 (1992) (plurality opinion).

138. Roe v. Wade, 410 U.S. 113 (1973).

139. The underlying premise behind the Court's abortion jurisprudence—whether the purported "right" to an abortion is supported at all by the Constitution—has not escaped judicial and academic scrutiny. *See e.g.*, *id.* at 221–22 (White, J., dissenting) ("The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action. . . .");

Casey replaced an outdated trimester framework for a pre- and post-viability framework, yet reaffirmed the "central holding of *Roe*."[140] A spousal notice requirement of a Pennsylvania abortion act was deemed unconstitutional under a new *undue burden* analysis.[141] Explaining the undue burden standard, the *Casey* plurality stated "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[142]

The *Casey* plurality sought to separate the Court from the contentious moral questions involved in abortion by instead leaving it up to the woman's "zone of conscience and belief,"[143] giving a nod to positivism's separation thesis, which divorces law and morality.[144] However, was the *Casey* plurality truly separating its constitutional analysis from its subjective view on

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Stenberg v. Carhart, 530 U.S. 914, 952 (2000) (Rehnquist, C.J., dissenting) ("I did not join the joint opinion in Planned Parenthood of Southeastern Pa. v. Casey . . . and continue to believe that case is wrongly decided.") (citation omitted); June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2142, 2149 (2020) (Thomas, J., dissenting) (*Roe* "created the right to abortion out of whole cloth, without a shred of support from the Constitution's text. Our abortion precedents are grievously wrong and should be overruled. . . . The Constitution does not constrain the States' ability to regulate or even prohibit abortion. This Court created the right to abortion based on an amorphous, unwritten right to privacy, which it grounded in the 'legal fiction' of substantive due process. . . . As the origins of this jurisprudence readily demonstrate, the putative right to abortion is a creation that should be undone." (citation omitted)); John Hart Ely, *The Wages of Crying Wolf*, 82 YALE L.J. 920, 947 (1973) (explaining that *Roe v. Wade* is "a very bad decision. Not because it will perceptibly weaken the Court—it won't; and not because it conflicts with either my idea of progress or what the evidence suggests is society's—it doesn't. It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."); Laurence H. Tribe, *Foreword: Toward A Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973) ("One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found."); DAVID A. KAPLAN, THE MOST DANGEROUS BRANCH: INSIDE THE SUPREME COURT'S ASSAULT ON THE CONSTITUTION 191–93 (2018) ("With a wave of the judicial wand, without more of an accounting of why, abortion was placed in the pantheon of sacred American freedoms, with such rights as expression, religion, jury trials, and unsegregated public schools. Those rights, and others, had a basis in constitutional text or structure or history. Abortion did not, so it had to be read into a constitutional 'concept of personal liberty.' . . . Even if one accepts some generalized constitutional foundation for a 'right to privacy'—penumbral or otherwise—just what is it exactly that puts abortion within its ambit? Saying the right 'was broad enough to encompass a woman's decision whether or not to terminate her pregnancy' didn't begin to constitute an argument.").

140. *Casey*, 505 U.S. at 853 (plurality opinion).

141. *Id.* at 893-95.

142. *Id.* at 878.

143. *Id.* at 852.

144. *See* Reginald Parker, *Legal Positivism*, 32 NOTRE DAME L. REV. 31, 42 (1956) (The positivist separates "law from ethics, religion and morality, the argument runs that the positivist is actually fostering amorality . . . . [H]e tolerantly believes that there does not exist, or is at any rate not within human cognition, a system of law that conforms to the absolute good.").

abortion?[145] Objectively speaking, the Court "can reconcile neither *Roe* nor its progeny with the text of our Constitution."[146] So, what was behind the holding in *Casey*?

Countering logic, the "purported right to have a pre-viability abortion is more ironclad than rights enumerated in the Bill of Rights,"[147] despite being a "judicially created"[148] right nearly fifty years ago. Justice Scalia, concurring in part and dissenting in part in *Casey*, stated plainly, "[c]onsciously or not, the joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is 'appropriate' abortion legislation."[149] Scalia further posited, "[i]t is not reasoned judgment that supports the Court's decision; only personal predilection."[150] In essence, Justice Scalia labeled the plurality opinion as precisely the type of legal realism that we already saw Justice Holmes advocate for at the turn of the twentieth century, when Holmes wrote "I think that judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage,"[151] and judges "can give any conclusion a logical form."[152] Was Holmesian realism at work in *Casey*?

In perhaps its most memorable assertion, the *Casey* plurality claimed, "[a]t the heart of liberty is the right to define one's own concept of existence, of

145. *See* Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 996–97 (2003) ("Merely to describe, in an unvarnished, direct manner, the freedom that Casey embraces and reaffirms is to suggest the stakes of the case viewed from the side of the opposing view. Just as Casey implicates the freedom of millions of women to have an abortion, it implicates the human existence of millions of lives a year. If the human embryo—which shortly later becomes a human fetus, and which not long after that, in the natural course of its development, is recognizably a human unborn child—is morally entitled to be treated as a human being, at any or all of these stages, then the regime created in Roe and dramatically reaffirmed in Casey creates an essentially unrestricted substantive legal right of some human beings to kill—murder, really, since the power is plenary and requires no serious justification for its exercise—other human beings, at a rate of approximately a million and a half a year.").

146. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2152–53 (2020) (Thomas, J., dissenting) (explaining further that "*Roe* is grievously wrong for many reasons, but the most fundamental is that its core holding—that the Constitution protects a woman's right to abort her unborn child—finds no support in the text of the Fourteenth Amendment.").

147. Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 888 F.3d 300, 310 (7th Cir. 2018), *rev'd in part, cert. denied in part sub nom.* Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1780 (2019) (Manion, J., concurring in the judgment in part and dissenting in part).

148. *Id.* at 312.

149. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 987 (1992) (Scalia, J., concurring in the judgment in part, dissenting in part).

150. *Id.* at 984.

151. Holmes, Jr., *supra* note 79, at 467.

152. *Id.* at 465–66.

meaning, of the universe, and of the mystery of human life."[153] The plurality continued:

> [The mother's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[154]

Oddly, during its monologue on the "right to define one's own concept of existence," the plurality makes no mention of the *rights* for the unborn child.[155] The silence by the Court on the *right to life* of the unborn, seems analogous to Holmes's silence on the *right to bear children* of those who would eventually be forcibly sterilized. When analyzing the legal philosophy employed by a jurist, sometimes silence can speak louder than words. The rationale employed by the plurality was that "[the Court] must not blind [itself] to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases."[156] The contradiction in that reasoning is that, in its assertion to "not blind" itself to the mother's safety and the safety of the mother's born children, the Court willfully blinds itself to the demonstrable lack of safety for the unborn children who lose their lives in the act of abortion.[157] In essence, "[t]he bottom-line

153. *Casey*, 505 U.S. at 851 (plurality opinion).

154. *Id.* at 852.

155. In 2004, twelve years after *Casey*, Congress passed the Unborn Victims of Violence Act, which created a separate federal offense for anyone who injures or kills a "child in utero" during the commission of one of the sixty-eight federal crimes enumerated in the Act. Recognizing a child in utero "at any stage of development" as a legal victim is in obvious contradiction to the Supreme Court's abortion precedent. 18 U.S.C. § 1841; *see also* Steven Andrew Jacobs, *The Future of Roe v. Wade: Do Abortion Rights End When A Human's Life Begins?*, 87 TENN. L. REV. 769, 866 (2020) ("Based on available evidence, the scientific literature and a consensus of biologists have established that a fetus is a human. A review of the history of the [Fourteenth] Amendment, which was confirmed by Supreme Court Justices, has established that all humans are persons. A fetus, by virtue of being a human, is a person deserving of rights and legal protection.").

156. *Casey*, 505 U.S. at 894 (plurality opinion).

157. In *Roe v. Wade*, the Court admitted that the case for abortion "collapses" if the unborn child is held to be a person under the law. Roe v. Wade, 410 U.S. 113, 156–57 ("If . . . personhood is established, the appellant's case, of course collapses, for the fetus' right to life would then be guaranteed specifically by the [Constitution].").

rationale of Casey is that 'reliance interests' in abortion—as a backup to failed contraception—justified retaining the rule of Roe."[158]

Ironically, the plurality began its opinion stating, "[l]iberty finds no refuge in a jurisprudence of doubt."[159] However, Scalia pointed out the emptiness of the plurality's rhetoric when he wrote, "[t]he ultimately standardless nature of the 'undue burden' inquiry is a reflection of the underlying fact that the concept has no principled or coherent legal basis. . . . [T]he three Justices show their willingness to place all constitutional rights at risk . . . ."[160] Scalia highlighted, in a subsequent decision, that "what I consider to be an 'undue burden' is different from what the majority considers to be an 'undue burden'—a conclusion that cannot be demonstrated true or false by factual inquiry or legal reasoning."[161] Scalia's prediction that *Casey* would be a vexing standard has proved accurate.[162] Scalia summarized the plurality's analysis as "a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls 'reasoned judgment,' . . . which turns out to be nothing but philosophical predilection and moral intuition."[163] Scalia said the three Justice plurality "rattl[ed] off a collection of adjectives that simply decorate a value judgment and conceal a political choice."[164]

Moreover, Scalia criticized the plurality's framing of the constitutional legal issue in *Casey*. "[T]he issue," as Justice Scalia explained, is

> not whether the power of a woman to abort her unborn child is a 'liberty' in the absolute sense; or even whether it is a liberty of great importance to many women. . . . The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not.[165]

Careful to clarify his point, Scalia stated that his reasoning was:

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158. Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of* Roe v. Wade*: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85, 108 (2005).

159. *Casey*, 505 U.S. at 844 (plurality opinion).

160. *Id.* at 987–88 (Scalia, J., concurring in the judgment in part, dissenting in part).

161. Stenberg v. Carhart, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting).

162. *See* Richard S. Myers, *Lower Court "Dissent" From Roe and Casey*, 18 AVE MARIA L. REV. 1 (2020) ("[I]n reality, *Roe* and *Casey* are not settled, as the frequent and varied opposition to these decisions reflects.").

163. *Casey*, 505 U.S. at 1000 (Scalia, J., concurring in the judgment in part, dissenting in part).

164. *Id.* at 983.

165. *Id.* at 980; *see also* Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, concurring) ("[T]he Court's abortion jurisprudence, including *Casey* and *Roe v. Wade* . . . has no basis in the Constitution.").

> [N]ot because of anything so exalted as my views concerning the "concept of existence, of meaning, of the universe, and of the mystery of human life." Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.[166]

Casey "[is an] extreme example[] of the Supreme Court's modern method of constitutional lawmaking."[167] As John Hart Ely wrote, when referring to malleable legal standards, "[b]alancing tests invariably become intertwined with the ideological predispositions of those doing the balancing."[168] Or as Scalia put it, "The Imperial Judiciary lives."[169] The undue burden standard as applied to abortion is no different. The ultimate effect of *Roe* and *Casey* is "foreclosing all democratic outlet for the deep passions [abortion] arouses, by banishing the issue from the political forum,"[170] and funneling the issue to unelected jurists. Scalia knew that the Court would be handicapped, because "[t]here is of course no way to determine [undue burden] as a legal matter; it is in fact a value judgment."[171] As seen in *Box*, the essence of the undue burden standard has thus far thwarted state legislatures from weighing in on their own view of the humanity of the unborn child, even the view that eugenic abortions are intolerable. Without subsequent Supreme Court jurisprudence addressing sex-selective or disability-selective abortion restrictions, lower courts are left

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166. *Casey*, 505 U.S. at 980 (Scalia, J., concurring in the judgment in part, dissenting in part). Expressly absent in Scalia's originalist argument are the inherent moral considerations concerning abortion. But, are moral considerations truly separable from legal conclusions? For example, "[t]his country was highly divided on the matter of slavery, or on civil rights in our own time, and that didn't seem to affect people with the sense that it was impossible, under those conditions, to offer a judgment on where justice really lay in these matters." Hadley Arkes, *A Natural Law Manifesto or an Appeal From the Old Jurisprudence to the New*, 87 NOTRE DAME L. REV. 1245, 1252, (2012); *see also* Josh Hammer, *Common Good Originalism*, 44 HARV. J.L. & PUB. POL'Y 917, 923 (2021) (citing Josh Hammer, *Common Good Originalism*, THE AMERICAN MIND (May 6, 2020), https://americanmind.org/features/waiting-for-charlemagne/common-good-originalism) ("[H]uman beings, as Aristotle discussed at length so long ago, are at their core moral creatures, and preemptively foreclosing legal actors the ability to make overtly moralistic argumentation is 'an attempt to deprive us of the very faculties that make us human in the first instance.'").

167. Forsythe & Presser, *supra* note 158, at 138.

168. John Hart Ely, *Flag Desecration*, 88 HARV. L. REV. 1482, 1501 (1975).

169. *Casey*, 505 U.S. at 996 (Scalia, J., concurring in the judgment in part, dissenting in part).

170. *Id.* at 1002.

171. *Id.* at 982; *see also* Stenberg v. Carhart, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting) ("The most that we can honestly say is that we disagree with the majority on their policy-judgment-couched-as-law. And those who believe that a 5–to–4 vote on a policy matter by unelected lawyers should not overcome the judgment of 30 state legislatures have a problem, not with the *application* of *Casey*, but with its *existence*. *Casey* must be overruled.").

without clear guidance on how to deal with anti-eugenic laws that involve the "right" the Court created in *Roe*. In fact, two federal circuits recently arrived at opposite conclusions as to the constitutionality of state laws restricting disability-selective abortions, despite the fact the laws were nearly identical.

IV. PREDICTABLY UNPREDICTABLE: DISAGREEMENT AMONG THE CIRCUITS

In *Box*, Justice Thomas explained, "it is easy to understand why the District Court and the Seventh Circuit looked to *Casey* to resolve a question [*Casey*] did not address. Where else could they turn? The Constitution itself is silent on abortion."[172] The Seventh Circuit, however, is not the only federal circuit left rudderless in the area of anti-eugenic abortion laws. The Sixth and Eighth Circuits recently addressed very similar laws restricting selective abortions on the basis of Down syndrome. The Sixth Circuit upheld the law,[173] while the Eighth Circuit found the law unconstitutional[174]—a predictable result considering the Court's vexing jurisprudence. As discussed above, *Casey* did not comment on anti-eugenic abortion restrictions. Therefore, it is critical the Court clarifies the issue.

A. Preterm-Cleveland v. McCloud

In *Preterm-Cleveland v. McCloud*, several abortion providers sued the Ohio state officials, seeking a preliminary injunction against the state on the claim that the Ohio law "is facially unconstitutional and, therefore, unenforceable in any respect."[175] In 2017, the State Legislature of Ohio passed a law ("H.B. 214") that "[i]n plain terms . . . prohibits a doctor from performing an abortion if that doctor knows that the woman's reason for having the abortion is that she does not want a child with Down syndrome."[176] The law stated in pertinent part:

> No person shall purposely perform or induce or attempt to perform or induce an abortion on a pregnant woman if the person has knowledge that the pregnant woman is seeking the abortion, in whole or in part, because of any

172. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1793 (2019) (Thomas, J., concurring).

173. Preterm-Cleveland v. McCloud, 994 F.3d 512, 535 (6th Cir. 2021).

174. Little Rock Fam. Plan. Servs. v. Rutledge, 984 F.3d 682, 692 (8th Cir. 2021).

175. *Preterm-Cleveland*, 994 F.3d at 516.

176. *Id.* at 517.

> of the following: (1) A test result indicating Down syndrome in an unborn child; (2) A prenatal diagnosis of Down syndrome in an unborn child; (3) Any other reason to believe that an unborn child has Down syndrome.[177]

The Sixth Circuit panel initially affirmed the district court's preliminary injunction.[178] However, the opinion was vacated and ultimately reversed after a rehearing en banc.[179] When appealing the district court's preliminary injunction, the state had asserted:

> H.B. 214 promotes three interrelated interests. First, it protects the Down syndrome community—both born and unborn—from what the State perceives as discriminatory abortions, namely Down-syndrome-selective abortions. . . . Second, the State asserts that H.B. 214 defends families from coercive healthcare practices that encourage Down-syndrome-selective abortions. . . . Third, the State asserts that H.B. 214 protects the integrity and ethics of the medical profession by preventing doctors from becoming witting participants in Down-syndrome-selective abortions.[180]

The Sixth Circuit, applying the *Casey* standard,[181] upheld the law, explaining that "the restrictions imposed, or burdens created, by H.B. 214 do not create a substantial obstacle to a woman's ability to choose or obtain an abortion."[182] The court explained that, "[n]either the intent, effect, validity, nor importance of any of these [state] interests turns on the viability of the fetus. The strength of these interests is the same throughout pregnancy, from the first day to the last."[183] The Sixth Circuit reasoned that a state's interest in protecting against selective abortion on the stated grounds were "legitimate interests."[184] In declaring the Ohio law constitutional, the Sixth Circuit decision in *Preterm-Cleveland* created a new circuit split with the Seventh and Eighth Circuits on the issue of anti-eugenic abortion restrictions.[185]

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177. OHIO REV. CODE ANN. § 2919.10 (West 2021).

178. Preterm-Cleveland v. Himes, 940 F.3d 318, 320 (6th Cir. 2019), *rev'd en banc*, 944 F.3d 630 (6th Cir. 2019).

179. *Preterm-Cleveland*, 994 F.3d at 515–16.

180. *Id.* at 517–18.

181. *Id.* at 520 ("The right to an abortion before viability is *not* absolute. . . . Even when we expressly characterized a regulation as a 'ban,' a 'total ban,' and an 'outright ban,' we still applied the undue-burden test.").

182. *Id.* at 535.

183. *Id.* at 521.

184. *Id.* at 525.

185. *See* Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 917 F.3d 532, 533 (7th Cir. 2018); Little Rock Fam. Plan. Servs. v. Rutledge, 984 F.3d 682 (8th Cir. 2021).

Judge Batchelder, who initially dissented from the panel's first decision,[186] wrote for the majority the second time around. Judge Batchelder explained that the Ohio law had been mischaracterized as an outright abortion ban.[187] Rather, the law regulates the doctors who perform abortions, not women seeking an abortion, by preventing the doctors from knowingly participating in selective abortions on the basis of Down syndrome.[188] With that said, Judge Batchelder noted, "[e]ven though H.B. 214 does not prohibit Down-syndrome-selective abortions . . . it sends a resounding message condemning the practice of selective abortions."[189] Concurring opinions in *Preterm-Cleveland* made more explicit the anti-eugenics interest in upholding the Ohio law.[190] Ultimately, the court found that Ohio's ani-eugenic interest echoed the Supreme Court's dicta in *Gonzales v. Carhart*, when the Court said that legislators may conclude that certain types of abortions "require[] specific regulation because [they] implicate[] additional ethical and moral concerns that justify a special prohibition."[191] The anti-eugenic state interest was present in *Preterm-Cleveland* because, "when unborn children exhibiting a

186. Preterm-Cleveland v. Himes, 940 F.3d 318, 320 (6th Cir. 2019), *rev'd en banc*, 944 F.3d 630 (6th Cir. 2019) (Batchelder, J., dissenting).

187. *Preterm-Cleveland*, 994 F.3d at 523 ("This case concerns a law directed at neither a woman's ability to obtain an abortion nor the method of abortion. Instead . . . it prohibits a doctor from aborting a pregnancy if the doctor knows that the woman's purpose is to preclude the birth of a child who will have Down syndrome.").

188. The law, therefore, can still be labeled anti-eugenic in the sense that it prevents a powerful class (e.g., doctors), from selectively eliminating a weaker class (e.g., unborn children diagnosed with Down syndrome) in specific cases of selective abortion. *See id.* at 536 (Sutton, J., concurring) ("For my part, I do not find this case difficult as a matter of federal constitutional law. The United States Supreme Court has never considered an anti-eugenics statute before. Nothing in its abortion decisions indicates that a State may not ban doctors from knowingly performing an abortion premised on the undesirability of the disability, sex, or race of the fetus.").

189. *Id.* at 532.

190. *Id.* at 536 (Sutton, J., concurring) (quoting Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1792 (2019) (Thomas, J., concurring)) ("The National Constitution permits States to convey their interest in the dignity of all human beings in all manner of ways. Most basic of all, a State may seek to avoid the stigma that comes with publicly acknowledged discrimination against the born and the unborn based on disability, sex, and race. The Pennsylvania law at issue in *Casey*, notably, included an anti-eugenics provision, one that banned abortions based on sex selection. . . . The sex selection provision in *Casey* went unchallenged . . . and thus remains unresolved. That's why the validity of a law like Ohio's "remains an open question."); *Preterm-Cleveland*, 994 F.3d at 538 (Griffin, J., concurring) ("Many think that eugenics ended with the horrors of the Holocaust. Unfortunately, it did not. The philosophy and the pure evil that motivated Hitler and Nazi Germany to murder millions of innocent lives continues today. Eugenics was the root of the Holocaust and is a motivation for many of the selective abortions that occur today," as "the selective abortion of unborn babies who are deemed 'unfit' or 'undesirable' is becoming increasingly common.").

191. Gonzales v. Carhart, 550 U.S. 124, 158 (2007) (upholding a federal law banning a method of partial-birth abortion—both before and after viability).

certain trait are targeted for abortion, that sends a message to people living with that trait that they are not as valuable as others."[192] Notably, the Supreme Court "has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned."[193] For example, "*Glucksberg* found reasonable the State's 'fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia.'"[194] The abortion of unborn children on the basis of selective traits, such as Down syndrome, certainly "implicates additional ethical and moral concerns,"[195] and therefore must be addressed by the Court.[196]

B. Little Rock Family Planning Services v. Rutledge

In *Little Rock Family Planning Services v. Rutledge*,[197] abortion providers challenged three Arkansas laws related to abortion. One such law, Act 619, was a Down syndrome abortion ban nearly identical to the law at issue in *Preterm-McCloud*.[198] In the district court, as in *Preterm-McCloud*, a preliminary injunction was awarded in favor of the abortion providers, prohibiting Arkansas from enforcing its new law.[199] On appeal at the Eighth Circuit, relying on Justice Thomas's opinion in *Box*, the State of Arkansas argued "that [the Down syndrome abortion ban] is not controlled by *Casey*,"[200] and the State claimed the law "is constitutional because it furthers the State's

192. *Preterm-Cleveland*, 994 F.3d at 532 (Moreover, Judge Batchelder explained, "[b]y involving the doctor in her personal decision to abort her pregnancy because the forthcoming child would be born with Down syndrome, the woman places the doctor in a position of conflicted medical, legal, and ethical duties. Ordinarily, under basic medical ethics, doctors are expected to respond to a diagnosis of Down syndrome with care and healing. In this situation, however, those doctors who would do so are instead being asked to act directly against the physical life of the fetus based solely on the fact that the forthcoming child would have Down syndrome.").

193. *Gonzales*, 550 U.S. at 158.

194. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 732–35, 733 n.23 (1997)).

195. *Gonzales*, 550 U.S. at 158.

196. *See* Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1793 (2019) (Thomas, J., concurring) ("Having created the constitutional right to an abortion, this Court is dutybound to address its scope.").

197. Little Rock Fam. Plan. Servs. v. Rutledge, 984 F.3d 682, 686 (8th Cir. 2021).

198. ARK. CODE ANN. § 20-16-2103(a) (West 2021) (prohibiting abortion by a physician "solely on the basis of: (1) A test result indicating Down Syndrome in an unborn child; (2) A prenatal diagnosis of Down Syndrome in an unborn child; or (3) Any other reason to believe that an unborn child has Down Syndrome").

199. Little Rock Fam. Plan. Servs. v. Rutledge, 397 F. Supp. 3d 1213 (E.D. Ark. 2019), *appeal aff'd in part, dismissed in part, and remanded*, 984 F.3d 682 (8th Cir. 2021).

200. *Rutledge*, 984 F.3d at 689.

valid interest in preventing discrimination on the basis of Down syndrome."[201] The Eighth Circuit panel applied *Casey* nonetheless, and in so doing affirmed the district court's ruling in favor of the abortion providers.[202]

Of note, despite concurring on the outcome based on Supreme Court precedent, two of the Eighth Circuit judges on the panel expressed the limitations of the *Casey* standard as applied to anti-eugenic abortion bans. Judge Shephard explained, "[t]oday's opinion is another stark reminder that the [*Casey*] standard fails to adequately consider the substantial interest of the state in protecting the lives of unborn children as well as the state's 'compelling interest in preventing abortion from becoming a tool of modern-day eugenics.'"[203] Identifying the present handcuffs presented by Supreme Court precedent, Judge Shephard lamented:

> The viability standard does not and cannot contemplate abortions based on an unwanted immutable characteristic of the unborn child. However, because we must apply the ill-fitting and unworkable viability standard to an act aimed at preventing eugenics-based abortions unless and until the Supreme Court dictates otherwise, I concur in the Court's opinion holding Act 619 unconstitutional.[204]

Judge Erickson, aligned with Judge Shephard, professed "deep[] regret that precedent foreclose[d] a balancing of the state's actual interest against the woman's right to choose in enacting Act 619."[205] Judge Erickson, purportedly compelled by the *Casey* precedent to concur with the judgment, wrote "separately to emphasize [the] belief that there are important reasons for the Supreme Court to revisit its precedent in [*Casey*]."[206] Judge Erickson recognized that "[o]ne of the great curses of the 20th century was the rise of the eugenics movement. [Eugenics] gave a patina of acceptability to such horrors as genocide, forced sterilization, the development of a master race, and the death of millions of innocents."[207] With history as our guide, and with the American eugenics movement squarely in mind, "genetic manipulation" on marginalized classes of people could pose a substantial threat to a state's

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201. *Id.*

202. *Id.*

203. *Id.* at 693. (Shephard, J., concurring) (quoting Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring)).

204. *Id.*

205. *Id.* at 694 (Erickson, J., concurring).

206. *Id.* at 693.

207. *Id.* at 694.

interest in protecting its citizens.[208] Parents of babies with Down syndrome have "spoke[n] of how their doctors pushed them to abort, emphasized the negatives, treated their children as something to be sad about, and made diagnosis day one of the worst days of their lives."[209] Additionally, in a study conducted by the Down Syndrome Diagnosis Network, "just 11% of women say they were given their prenatal diagnosis of Down syndrome in a positive way."[210] With this campaign against babies with Down syndrome in mind, is it far-fetched to see the link between selective abortions on the basis of sex, race, or disability and the eugenics movement of old?[211] It seems the *undesirables*—this time inside the womb—continue to be treated less than human.

CONCLUSION

The appropriate legal standard to analyze anti-eugenic abortion bans has thus far escaped judicial scrutiny at the U.S. Supreme Court.[212] However, when the Court refused to address Indiana's anti-eugenic abortion ban in *Box*, Justice Thomas warned, "[e]nshrining a constitutional right to an abortion 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."[213] Unfortunately, for *undesired* unborn children "[t]he reality is that our current constitutional law allows abortion for any reason, including a eugenics reason. The result is that abortions can be obtained, and are obtained,

208. *Id.*

209. Cassy Fiano-Chesser, *Powerful Documentary Shows Doctors' Push to Abort Babies with Down Syndrome*, LIVEACTION (Oct. 31, 2018, 7:51 AM), https://www.liveaction.org/news/documentary-doctors-abortions-down-syndrome.

210. *Id.*

211. *Dignitas Personae*, *supra* note 13, ¶ 22 ("Dignity belongs equally to every single human being, irrespective of his parents' desires, his social condition, educational formation or level of physical development. If at other times in history, while the concept and requirements of human dignity were accepted in general, discrimination was practiced on the basis of race, religion or social condition, today there is a no less serious and unjust form of discrimination which leads to the non-recognition of the ethical and legal status of human beings suffering from serious diseases or disabilities. . . . Such discrimination is immoral and must therefore be considered legally unacceptable, just as there is a duty to eliminate cultural, economic and social barriers which undermine the full recognition and protection of disabled or ill people.").

212. *See* Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1793 (2019) (Thomas, J., concurring).

213. *Id.* at 1792. Emphasizing further the contradiction imposed on the unborn, as compared to those already born, Justice Thomas cited to several occasions when "the Court has been zealous in vindicating the rights of people *even potentially* subjected to race, sex, and disability discrimination." *Id.* at 1792–93 (emphasis added).

on account of the race, sex, or disability of the child that otherwise would be born."[214] Existing abortion jurisprudence, under *Casey*, allows for results incompatible with a just society that rejects eugenics. A just society, where "the rule of law . . . is best conceptualized not as an end unto itself, but rather as an instrumental means to achieve the historically understood substantive goals of any worthy politics: justice, human flourishing, and the common good."[215] As Professor Michael Paulsen explains, "In the end . . . what matters are not technical legal nuances or clever doctrinal moves," such as "whether trait-selection bans can be squeezed within current 'undue burden' analysis. . . . What matters are the realities and the results."[216]

"With the advent of genetic screening," the eugenic ethos of the early twentieth century has not disappeared, but has merely transformed, and the "discrimination has moved to abortion decisions made before birth."[217] The eugenic ethos applied to the unborn is in direct "contrast with the fundamental truth of the equality of all human beings which is expressed in the principle of justice, the violation of which, in the long run, would harm peaceful coexistence among individuals."[218] Moreover, by permitting selective abortions on the basis of sex, race, or some diagnosed disability, "one can recognize *an ideological element* in which man tries to take the place of his Creator."[219] Specifically in the case of Down syndrome, "'prenatal genetic screening programs offer no corrective intervention or earlier introduction of therapies to deal with a condition.' Instead, their overriding purpose is to enable abortion of Down syndrome children."[220] Does that comport with a just society? By tolerating abortions based on eugenic principles, the notion

214. Paulsen, *supra* note 91, at 433.

215. Hammer, *supra* note 166, at 923–24.

216. Paulsen, *supra* note 91, at 433; *see also* Arkes, *supra* note 166, at 1252, 1273 ("[W]e know that the judges have the modes of argument readily at hand in a case of that kind to identify grounds that are thoroughly arbitrary in making discriminations here between the human and the not-quite-human, between those with a claim to live and those whose lives may be taken without the need to render a justification.").

217. Brief of Amici Curiae State of Missouri and 16 Other States Supporting Defendants-Appellants and Reversal at 22–23, Little Rock Fam. Plan. Servs. v. Rutledge, 984 F.3d 682, 686 (8th Cir. 2021) (No. 19-2690) (internal citations omitted) [hereinafter Brief for State of Missouri].

218. *Dignitas Personae*, *supra* note 13, ¶ 27.

219. *Id.* ("[T]he ethical negativity of these kinds of interventions . . . imply *an unjust domination of man over man*.").

220. Brief for State of Missouri, *supra* note 217, at 23 (internal citations omitted).

that "some of us deserve greater care and concern than others of us,"[221] remains the message of the culture and, regrettably, the Supreme Court.

When the Court finally decides to address the question of anti-eugenic abortion bans, perhaps the Court will, at long last, be informed by Justice Scalia's simple solution to its unworkable abortion jurisprudence: "We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining."[222] If Justice Scalia is not persuasive, my hope is Judge Erikson will be:

> We are . . . remarkably variant in our talents, abilities, appearances, strengths, and weaknesses. The human person has . . . a capacity to love and be loved that is at the core of human existence. Each human being possesses a spirit of life that at our finest we have all recognized is the essence of humanity. And each human being is priceless beyond measure.[223]

221. SMITH, *supra* note 7, at 234; *See also* Brief of Indiana, Kentucky, and 16 Other States as Amicus Curiae in Support of Lance Himes at 8–11, Preterm-Cleveland v. McCloud, 994 F.3d 512 (6th Cir. 2021) (No. 18-3329) (quoting Washington v. Glucksberg, 521 U.S. 702, 731 (1997)) ("Promoting abortion on the basis of a Down syndrome diagnosis blurs 'the time-honored line between healing and harming,' . . . which distorts the purpose that the medical profession should serve. . . . Critically, laws banning Down syndrome abortions vindicate moral and ethical justifications not addressed in *Roe* and *Casey*.").

222. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in judgment in part, dissenting in part).

223. Little Rock Fam. Plan. Servs. v. Rutledge, 984 F.3d 682, 693 (8th Cir. 2021) (Erickson, J., concurring).