Roe’s Race: The Supreme Court, Population Control, and Reproductive Justice

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ABSTRACT: Questions of race and abortion have shaped current legal debates about defunding Planned Parenthood and banning race-selection abortion. In these discussions, abortion opponents draw a close connection between the eugenic or population-control movements of the twentieth century and the contemporary abortion-rights movement. In challenging legal restrictions on abortion, abortion-rights activists generally insist that their movement and its predecessors have primarily privileged reproductive choice.

Notwithstanding the centrality of race to abortion politics, there has been no meaningful history of the racial politics of abortion that produced or followed Roe v. Wade. This Article bridges this gap in the abortion discussion by focusing on the racial politics of abortion in the 1970s. In the 1970s, some population controllers did have ties to the eugenic legal reform movement or a particular interest in limiting the growth of poor, non-white populations. Those most closely involved with the abortion-rights movement, however, primarily focused on family planning for white, middle-class families, emphasizing the importance of environmental stewardship and sexual liberation. Arguments treating the abortion-rights, population-control, and eugenics movements as indistinguishable from one another are flawed.

At the same time, by reinterpreting Roe, feminists created new opportunities to reshape the racial politics of abortion. By defending their own understanding of the opinion against anti-abortion attack, feminists were able to redefine abortion as a right that belonged to women irrespective of its political consequences.

In telling the story of Roe’s racial politics, we can gain new insight into legislative battles on laws defunding Planned Parenthood or banning race-selection abortions. Legislators sponsoring these laws at times raise important questions about the disproportionally high number of African American women who have abortions. Racial disparities in access to reproductive health

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care are real and disturbing, but as the history offered here suggests, legislators cannot address those disparities by punishing clinics on the basis of the history of race, population control, and abortion.

The materials presented here also speak to upcoming juridical battles about defunding and race selection. The issue of legislative intent figures centrally in doctrinal disputes under the Bill of Attainder Clause, the undue-burden test, and the First and Fourteenth Amendments. The desire to address the present impact of past racism may be sincere, but legislation of this kind does not address a present danger of racial bias. As the history of the racial politics of abortion makes clear, contemporary legislative concerns about racism and abortion are overstated. A better understanding of the racial history of abortion should reinforce, rather than undermine, judicial concerns about the true purpose of laws said to address racism and abortion.

A little over three decades after the Supreme Court upheld the constitutionality of the Hyde Amendment, a ban on the Medicaid funding of abortion, the issue of abortion funding has once again taken center stage.\(^1\)\(^2\)

\(^1\) Harris v. McRae, 448 U.S. 297 (1980).

Beginning in the winter of 2011, abortion opponents in Congress and state legislatures mobilized to demand the defunding of abortion providers rather than the outlawing of abortion procedures, particularly targeting Planned Parenthood. Underlying the debate about defunding Planned Parenthood have been broader questions about the role of race and racism in abortion politics. Similar arguments have played a part in discussions of legislation banning race-selection abortions—abortions based on the race of a fetus—that has been passed in four states, considered in several others, and voted on in Congress.

Questions of race have preoccupied commentators on both sides of the abortion debate. In promoting new legal restrictions on abortion, abortion opponents have drawn on the history of the early movement for birth control to charge abortion-rights supporters with racism. The anti-abortion movement ties earlier proponents of family planning and legal abortion to what they characterize as a bigoted movement for population control or eugenics. Abortion-rights activists counter with an alternative history, tracing an emphasis on reproductive freedom back through the 1970s and beyond.

Jane Norman, States Ramp Up Drive to Defund Planned Parenthood, CONG. Q.: HEALTH BEAT (July 1, 2011), http://interest.healthcare.thomsonreuters.com/content/CQNewsletter20110708;


6. See supra note 4 and accompanying text. On the historical context for the early twentieth-century relationship between the birth-control and eugenics movements, see, for example, JEAN H. BAKER, MARGARET SANGER: A LIFE OF PASSION 147 (2011); and ELLEN CHESLER, WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA 216-17, 343-45 (1992).


But what was the role of Roe in the racial politics of abortion in the 1970s? Although there is an impressive body of work on the histories of the abortion-legalization and population movements, leading scholars have not adequately addressed this question. This Article works to close this gap in the abortion discussion. By drawing on extensive archival research, the Article offers the first comprehensive history of the racial politics leading up to and immediately following Roe.

Roe came down at a time when the abortion-rights movement was closely tied to the population-control cause. As a general matter, members of the population-control coalition lobbied for legal reforms or government funding designed to check domestic or international population growth. Because of the widespread popularity and political salience of population-control politics, abortion supporters often borrowed population-based claims in demanding the legalization of abortion. Moreover, some population controllers did have ties to the eugenic legal reform movement or a particular interest in limiting the growth of poor, non-white populations.


10. See supra note 9 and accompanying text.


12. See id. at 285-91.

13. For example, the Human Betterment Foundation, the forerunner of the Association for Voluntary Sterilization ("AVS") (an influential population-control organization), was founded in 1929 in order to study the psychological, physical, and sexual effects of compulsory eugenic sterilization. For discussion of the early work of Human Betterment, see, for example, HARRY BRUNIUS, BETTER FOR ALL THE WORLD: THE SECRET HISTORY OF FORCED STERILIZATION AND AMERICA'S QUEST FOR RACIAL PURITY 272-73 (2006); and WENDY KLINE, BUILDING A BETTER RACE: GENDER, SEXUALITY, AND EUGENICS FROM THE TURN OF THE CENTURY TO THE BABY BOOM 70-78 (2001). Other organizations, like the Population Council, focused on population growth among poor, often non-white persons, particularly in developing countries. See, e.g., CONNELLY, supra note 9, at 375. For examples of programs with this aim, see, for example, Jane E. Brody, Overpopulation War Escalated, N.Y. TIMES, Jan. 6, 1969, at 142; Jane E. Brody, Population Group Offers Care Plan, N.Y. TIMES, Apr. 20, 1971, at 36; ROY REED, BIRTH CONTROL GAINS IN THE RURAL SOUTH, N.Y. TIMES, Mar. 28, 1966, at I.
stewardship and sexual liberation. The abortion-rights movement itself differed considerably from the population-control movement in that many abortion-rights activists defined themselves by concerns about women’s rights or public health rather than population growth. It is wrong to treat the abortion-rights, population control, and eugenics movements as indistinguishable from or even similar to one another.

At the same time, current accounts of the impact of Roe on feminist activists tell only part of a more complex story. By reinterpreting Roe, feminists created new opportunities to reshape the racial politics of abortion. This Article argues that by defending their own understanding of the opinion against anti-abortion attacks, feminists were able to redefine abortion as a right that belonged to women irrespective of its political consequences.

The stakes of this history become clear when one recognizes how it has been invoked in debates about laws defunding Planned Parenthood or prohibiting race-selection abortions. For example, in sponsoring a defunding law, the majority leader of the North Carolina House of Representatives stressed “the connection of Margaret Sanger, the founder of Planned Parenthood, with the eugenics movement.” Concerns about race and abortion also helped to motivate the first law in the nation, passed in Arizona, to ban

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14. For discussion of groups of this kind, see, for example, Looking to the ZP Generation, TIME MAG., Feb. 28, 1977; and Judy Klemesrud, To Them, Two Children Are Fine, But Three Crowd the World, N.Y. TIMES, Jan. 12, 1971, at 30.

15. Ziegler, supra note 11, at 302-04.


race-selection abortions. Debate on that bill turned on whether or not there was evidence that abortion providers associated with or were themselves racists, and proponents of the bill stressed the supposed financial connections of Planned Parenthood to individuals seeking to reduce the size of minority populations.

The history of race, abortion, and population control may also play a role in upcoming battles about the constitutionality of the new laws. At the heart of many of these constitutional struggles are questions of legislative intent. In Planned Parenthood of Central North Carolina v. Cansler, for example, the district court addressed whether a defunding law constitutes an unconstitutional bill of attainder. To constitute a bill of attainder, a law must single out a particular actor and punish her without a judicial trial. Invoking legislative concerns about race, history, and abortion, Planned Parenthood argued that defunding laws reflect precisely such a punitive intent.

Providers also contend that defunding laws constitute impermissible viewpoint discrimination under the First or Fourteenth Amendments. According to providers, states have unconstitutionally punished Planned Parenthood for its advocacy of abortion rights. Legislators respond that they instead advance a legitimate, nondiscriminatory purpose. At the state and federal level, as we have seen, the past racial transgressions of the abortion-rights movement have served as one potential rationale for the laws proposed. Does mention of this history signal an intent to discriminate against abortion-rights activists, or do efforts to address racism represent a legitimate legislative purpose?

Finally, as race-selection laws come before the courts, legislative intent will likely play a part in constitutional decisionmaking. Under Planned Parenthood of Southeastern Pennsylvania v. Casey, a law creates an undue burden if it has the purpose or effect of creating a substantial obstacle to a woman’s right to choose abortion. Do race-selection laws reflect a sincere


21. Id. at 321.

22. Id. at 324-25.


25. See, e.g., Suehs, 692 F.3d at 348-50.


27. Id. at 877.
desire to address the legacy of population control in the abortion-rights movement, or do these laws instead serve only to narrow abortion rights?

In telling the story of Roe's racial politics, we can gain new insight into these legislative contests. Legislators sponsoring defunding or race-selection laws at times raise important questions about the disproportionately high number of African American women who have abortions.28 Racial disparities in access to reproductive health care are real and disturbing.29 But as the history offered here suggests, legislators cannot address those disparities by punishing clinics on the basis of the history of race, population control, and abortion. We cannot equate the often racist eugenic movement with the diverse population-control movement, particularly those members of it who endorsed legal abortion, environmentalism, sexual freedom, and responsible child-bearing for the white middle class. Nor can we draw any direct historical connection between the population-control movement of the 1970s and the contemporary abortion-rights movement, for the latter has changed dramatically since 1973. Lawmakers should use the law to address racial disparities in access to and provision of reproductive health care, but relying on a flawed historical account to penalize providers will do little to achieve this goal.

As we have seen, the issue of legislative intent also figures centrally in doctrinal disputes under the Bill of Attainder Clause, the undue-burden test, and the First and Fourteenth Amendments. In any of these doctrinal contexts, the desire to address the present impact of past racism may be sincere, but as the materials assembled here suggest, legislation of this kind sometimes addresses a problematic historical narrative rather than a present danger of racial bias. As the history of the racial politics of abortion makes clear, contemporary legislative concerns about racism and abortion are overstated. A better understanding of the racial history of abortion should reinforce, rather than undermine, judicial concerns about the true purpose of laws said to address racism and abortion.

The Article proceeds in eight parts. Part I examines the emergence of a racially charged dialogue about reproduction, crime, and juvenile delinquency in the 1950s and 1960s. In this period, some members of family-planning organizations like Planned Parenthood attributed a host of social ills to inadequate parenting and unwanted children in predominantly poor or minority communities. At the same time, civil rights organizations like the NAACP developed a competing explanation: crime and delinquency stemmed from racial discrimination and its social, economic, and political consequences rather than from the culture of poor, non-white communities. Over time, arguments

28. For examples of arguments of this kind, see supra note 16 and accompanying text.
29. See, e.g., KIARA BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION (2011) (illustrating how medical professionals socially construct race and establishing that this construction serves to marginalize women in broader conversations about Medicaid and infant mortality).
about the social costs of unwanted children increased anxieties about racism in the family-planning and abortion-rights movements.

Part II explores the identity and priorities of the population-control movement between 1965 and 1973, as activists concerned about sexual freedom and environmental stewardship joined a movement that already included those concerned about eugenics, Cold War politics, and international development. Part III examines the relationship between the movements for abortion rights and population control. Contrary to what some activists and legislators now suggest, this relationship did not necessarily reflect any racial bias on the part of abortion-rights supporters. Instead, some activists sympathized with calls for environmental preservation or sexual liberation. Abortion-rights-movement pragmatists highlighted the political benefits that might be available through an alliance with population controllers.

Part IV evaluates the interplay between population-control arguments, the abortion-rights struggle, and the politics of black power between 1965 and 1973. In particular, this Part traces the spread of a “black genocide” argument against the legalization of abortion: a claim that legal abortion had the purpose or effect of decimating the African American population.

Part V studies the use of race-based arguments in the litigation of Roe. For the most part, Roe made invisible politically powerful concerns about abortion, racism, population control, crime, and environmental decline. Roe presented a medical, rights-based framework as a way of avoiding the more explosive questions in abortion politics.

Part VI chronicles the decline of population-control arguments in the aftermath of Roe. This shift came in response to a number of developments. Outside of abortion politics, the population-control movement attracted controversy when leaders of developing countries, at a major UN conference, accused movement leaders of seeking to manipulate people of color served by population programs. An emerging awareness of the political costs of such claims came at a time when feminists managed to attain positions of leadership in the abortion-rights movement. Relying on a reinterpretation of Roe or on their own understandings of abortion rights, these feminists justified abortion because of its intrinsic importance to women rather than because of its beneficial impact on crime, welfare expenses, or the environment. Part VII puts this history in dialogue with contemporary legal and legislative battles about laws defunding Planned Parenthood or race-selection abortion, and Part VIII offers a brief conclusion.

The Article shows that, in the 1950s and 1960s, discussion of law, juvenile delinquency, eugenics, population control, and family planning had explosive racial undertones. In the late 1960s and early 1970s, by contrast, discussion of both population control and abortion changed substantially. Those population groups most interested in legalizing abortion focused on the reproductive
decisions of the white middle class, discussing the environment and the sexual revolution as much as the reduction of crime or welfare costs. Nonetheless, because of the tenor of the population-control debate in the 1950s and 1960s, some black-power and civil-rights leaders worried that legal abortion would decimate minority populations and advance a racist agenda. Anti-abortion arguments about race, eugenics, and population control are inaccurate and misleading, but such claims resonate with the public because of the racially charged discussion of family planning and even population control that has unfolded in previous decades.

I. RACE, DELINQUENCY, AND FERTILITY CONTROL, 1950-1968

The first tensions between civil-rights supporters and the family-planning movement emerged in the 1950s, in the context of a panic about juvenile delinquency and the law. Earlier in the twentieth century, the eugenic legal reform movement had sponsored compulsory-sterilization laws that primarily applied to immigrants and residents in state institutions. After World War II, the remaining eugenic sterilization laws primarily impacted racial minorities.

Even outside the eugenic context, however, law, racial bias, and family planning became increasingly connected, especially during discussions of juvenile delinquency. The issue of delinquency became salient during World War II, when the media pointed to an increase in gang activity, homicides, and youth crime. Public concern about delinquency increased in the early 1950s. In the spring of 1952, the New York Times reported that, nationally, juvenile offenses had increased by 10% over a one-year period. By 1954, New York City, widely regarded as the epicenter of the delinquency epidemic, reported an 18.5% increase in youth offenses since 1947. Between 1947 and 1957, psychiatrists, politicians, sociologists, and even teenagers offered a wide variety of explanations for the perceived increase in delinquency, including the

32. See, e.g., DAVID B. WOLCOTT, COPS AND KIDS: POLICING JUVENILE DELINQUENCY IN AMERICA, 1890-1940, at 193-94 (2005); see also THOMAS BERNARD & MEGAN KURLYCHEK, THE CYCLE OF JUVENILE JUSTICE 12 (2010) (attributing a reported increase in juvenile crime in the 1940s to an increase in the number of young men).
34. See, e.g., Lucy Freeman, Youth Delinquency Growing Rapidly Over the Country, N.Y. TIMES, Apr. 20, 1952, at 1.
exposure of children to violent comic books, amoral television programs, and pornography.  

At the same time, a growing body of sociological scholarship attempted to trace the roots of the delinquency problem. These studies sometimes directly touched on the question of race. As Kenneth B. Clark, the author of the “doll studies” relied on by the Court in Brown v. Board of Education, put it, “The fact that there is a disproportionately higher rate of delinquency and crime among American Negroes is generally known and not in itself debatable.”

What led to rising delinquency rates? One group of scholars, led by William B. Miller of the University of Chicago, concluded that juvenile delinquency reflected a distinctive set of values held by the lower classes and by minorities. Miller and his sympathizers, including the pioneering sociologist Ruth Shonle Cavan, emphasized the importance of “broken homes” as a cause of delinquency. As Cavan explained in 1959, in poor African American communities, “families may be permanent relief clients.” Moreover, she stressed that African American youths suffered because of the values held by members of their communities: the prevalence of “illicit sex relations,” absent fathers, working mothers, and illegitimacy.

The lower-class-values theory gained currency in the late 1950s. In May 1957, a report produced by the Senate Subcommittee to Investigate Juvenile Delinquency primarily blamed “weak family life” for climbing delinquency rates. Similarly, in August 1957, the New York Times attributed New York’s juvenile delinquency rate to “economically underprivileged neighborhoods—areas that are poverty-ridden, filled with broken homes, alcoholics and working


41. Id. at 231.

42. Id.

parents who have little time for their children." The same year, New York Senator Jacob Javits, a great champion of programs to curb delinquency, called on Congress to spearhead the Family Fund Appeal, an effort to help broken families. An advertisement for the Appeal pleaded: "You Can Help Prevent the Greatest Tragedy of All: A Broken Home.

Since 1947, the Planned Parenthood Federation of America ("Planned Parenthood") had been an eager participant in the delinquency debate. At a 1947 conference held by the organization, several speakers suggested that unwanted children were a prime cause of delinquency. Equating unplanned with unwanted children, Planned Parenthood speakers concluded that unplanned pregnancies led to bad mothering, as overburdened women could not financially or psychologically provide adequate care for their children.

In 1952, in a letter to the editor of The New York Times, Planned Parenthood President William Vogt offered similar arguments in criticizing the delinquency reforms championed by then-New York State Attorney General Javits, highlighting the impact of unwanted children on youth crime rates. He wrote: "It is well known that unloved and ‘rejected’ children are prone to becoming neurotics. Much juvenile misbehavior shows a marked neurotic pattern." Vogt insisted, “[p]erhaps these poor youngsters should never have been born at all to parents who, because of their own deficiencies, are unable to provide children the emotional and spiritual environment indispensable to their health.”

For the rest of the decade, Planned Parenthood leaders worked to form alliances with the scholars tasked with identifying the causes of delinquency. As the decade went on, Planned Parenthood focused on gathering evidence for

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44. Youth Crime Laid to Neighborhood, N.Y. TIMES, Aug. 6, 1957, at 18.
46. Id.
47. On Planned Parenthood’s involvement in the delinquency debate in the 1940s, see, for example, LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 261, 276 (2002).
48. Id. at 261.
49. Id.
51. Id.
52. Id.
53. See, e.g., Letter from Doris L. Rutledge, Dir. Field Serv., to Mrs. Walter B. Cannon (June 3, 1955) (on file with Sophia Smith Collection, Smith College, The PPFA II Papers) (asking for an official statement on behalf of Harvard professors Eleanor and Sheldon Gluck supporting the theory that unwanted children tended to be delinquent); see also Letter from Mary Steichen Calderone, Med. Dir., to Dr. Seymour Rubenfeld, Nat’l Training School for Boys (Dec. 12, 1956) (on file with Sophia Smith Collection, Smith College, The PPFA II Papers) (asking for evidence of the same).
a causal relationship between delinquency and unplanned children, although refusing at times to draw such a connection publicly.\textsuperscript{54} Planned Parenthood used the juvenile delinquency scandal as a tool to build support for family planning. In doing so, however, the organization popularized claims that blamed crime on the birth of and culture surrounding unwanted children, a disproportionate number of whom likely came from poor, minority communities. Planned Parenthood’s argument directly blamed outmoded contraception laws for the problems of minority communities.\textsuperscript{55} At the same time, such arguments described unwanted children, their families, and their culture as the proximate cause of juvenile delinquency. Such claims would later help to fuel fears about racism within the movements for family planning, abortion, and population control.

One important development came with the emergence, in the late 1950s, of an alternative sociological explanation for delinquency. In 1955, in his book \textit{Delinquent Boys}, Albert K. Cohen argued that delinquency was not caused by distinctive “Negro” or “lower class” values but rather by the frustrations of poor children who could not achieve middle-class wealth or status.\textsuperscript{56} In 1960, sociologists Lloyd Ohlin and Richard Cloward highlighted the relevance of racial discrimination in creating such frustrations.\textsuperscript{57} Unfair obstacles to the advancement of African Americans, Ohlin and Cloward argued, heightened their “sense of discrimination and justifie[d] withdrawal of attributions of legitimacy from conventional rules of conduct.”\textsuperscript{58}

In the late 1950s, perhaps unsurprisingly, the debate about the causes of delinquency took on racial overtones.\textsuperscript{59} Opponents of school desegregation drew on race-based fears of juvenile violence to defend their views.\textsuperscript{60} Other segregationists suggested that delinquency was a “Negro problem” and attacked the NAACP for being soft on juvenile offenders.\textsuperscript{61} For its part, in a 1959 edition of its publication \textit{The Crisis}, the NAACP borrowed from discrimination-based arguments like those made by Ohlin and Cloward.\textsuperscript{62}


\textsuperscript{55} For discussion of the reasons for the later repeal of restrictions on contraception, see generally \textit{Peter Engel, A HISTORY OF BIRTH CONTROL IN AMERICA} (2011); and \textit{Gordon, supra} note 47.


\textsuperscript{57} LLOYD OHLIN & RICHARD CLOWARD, \textit{DELINQUENCY AND OPPORTUNITY} 113-17, 121 (1960).

\textsuperscript{58} \textit{Id.} at 121.


\textsuperscript{60} See, e.g., \textit{Flamm, supra} note 59, at 21.

\textsuperscript{61} See \textit{id.}

particular, *The Crisis* contended that “the motivation for some misdeeds is rooted in a background of social disabilities and economic inequities.”63

Some Planned Parenthood leaders sided with those who attributed delinquency to bad parents and the dysfunctional values held by the poor.64 In a 1962 letter to the editor of the *New York Times*, for example, Planned Parenthood leader Harriet Pilpel criticized a federal grant given to New Haven, Connecticut, a community known for its hostility to family planning.65 Pilpel asserted that two of the most important causes of delinquency were “overcrowded families and overburdened parents without sufficient means” and “unwanted children.”66 As we have seen, Planned Parenthood’s arguments could have troubling racial implications. The organization focused on unwanted children and pathological parenting in poor African American communities, suggesting that minority “culture” created the delinquency that the government sought to prevent.

Throughout the delinquency debate, members of Planned Parenthood tended to attribute juvenile crime to the births of unwanted children. Planned Parenthood blamed poor women for the problems in their communities, “removing from the spotlight the contributions of men, poverty, unemployment, and racism.”67 By blaming pathological parenting and unwanted children for juvenile delinquency, Planned Parenthood set the stage for later concerns about race genocide and legal abortion. Today, legislators and anti-abortion activists play on fears that the attitudes motivating Planned Parenthood’s juvenile-delinquency claims still animate the contemporary abortion-rights movement.

It was not until the late 1960s, however, that controversy about the racial politics of birth control and abortion became intense. There were several reasons for this shift. First, over the course of the 1950s and early 1960s, efforts to curb population growth enjoyed substantial popular support.68 In the same period, the movement for the legalization of abortion had picked up steam, attracting the official endorsement of Planned Parenthood in 1968.69 During this time, a militant streak within the civil-rights movement became more

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63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
visible and politically significant. Organizations like the Black Panthers contended that birth control and abortion were part of a plan to eliminate poor people of color. Finally, the anti-abortion movement began to organize, connecting the abortion-legalization movement to eugenics and racism. These were the events that made the racial politics of abortion in the early 1970s so combustible.

Part II begins to study these events by examining the evolution of the population-control movement between 1965 and 1973. In this period, the movement became less focused on the reproductive decisions of poor, non-white women. In the late 1960s, a new group of activists mobilized, focusing on the family-planning decisions of white middle-class Americans. These advocates joined a movement that still included some concerned about eugenics, Cold War politics, or international development. Contemporary abortion opponents describe the population-control movement of the pre-\textit{Roe} decade as being uniformly racist. Part II demonstrates that these claims are flawed.


Although the movements for legal abortion and population control differed in meaningful ways, an understanding of the abortion-rights movement should begin with an analysis of the relationship between them. As a general matter, members of the population-control coalition lobbied for legal reforms or government funding designed to check domestic or international population growth.

The abortion-rights movement did work with population controllers and borrow from their argumentative strategies. Some population controllers did have ties to the eugenic legal reform movement, and population programs at times focused on the fertility of poor, non-white individuals. Nonetheless, arguments conflating the movements for legal abortion, population control, and eugenics are misleading. Indeed, as we shall see, Zero Population Growth, Inc. (ZPG), the only major population-control organization to lobby for abortion reform before \textit{Roe}, tended to focus on population control within the white American middle class.


72. See, e.g., SIMONE CARON, \textit{WHO CHOOSES?: AMERICAN REPRODUCTIVE HISTORY SINCE 1850}, at 149-55, 160-63 (2008); supra note 9 and accompanying text.
Members of the abortion-reform movement did not always emphasize population rhetoric, often expressing concern about the deaths caused by dangerous illegal abortions. Additionally, many supporters of abortion did frame the procedure as a fundamental right for women.73 Members of the population movement, on the other hand, campaigned for a variety of measures unrelated to abortion, including voluntary-sterilization initiatives, maternal-health programs, and domestic or international contraception measures.74 Some population-control groups never endorsed abortion reform.75

Nonetheless, before Roe, claims about population control, like contentions about public health, became a prominent part of the abortion-rights arsenal. There were several reasons for this emphasis. Many of the older leaders of abortion-rights organizations had ties to the population-control movement.76 Leading figures in the movement, like Hugh Moore and John D. Rockefeller III, provided financial support to state-level campaigns to legalize abortion.77

Nor did abortion-legalization groups discount the political appeal of population arguments. Similar claims found favor with a broad spectrum of politicians, judges, and members of the public, and influential members in the population-control movement endorsed the repeal of abortion bans.78

The population-control movement took shape after the end of World War II, when those concerned with overpopulation came to exercise considerable influence over the family planning movement.79 By the late 1960s, the federal government had become deeply involved in population politics, providing funding for family planning under the federal Social Security Act, offering international population-control funding as part of the United States Aid for International Development program, and creating a National Center for Population and Family Planning in the Department of Health, Education, and Welfare (HEW).80 In June of 1969, when President Nixon was considering a bill that proposed the creation of the National Center for Population and Family Planning within HEW, the population movement was influential as well as

73. See Ziegler, supra note 11, at 302-04.
74. See id.
75. Id.
76. See IAN DOWBIGGIN, THE STERILIZATION MOVEMENT AND GLOBAL FERTILITY IN THE TWENTIETH CENTURY 151 (2008). Alan Guttmacher, the long-time leader of Planned Parenthood, maintained a relationship with AVS and the American Eugenics Society (AES). For a sample of Guttmacher's correspondence with the AES in the period, see Letter from Frederick Osborn, AES, to Alan Guttmacher (Mar. 9, 1964), (on file with Sophia Smith Collection, Smith College, The PPFA II Papers) (inviting Guttmacher to make suggestions for the AES's future activities). Similarly, Larry Lader, a NARAL leader, played a prominent part in the Population Crisis Committee, a major population-control organization. See CRITCHLOW, INTENDED CONSEQUENCES, supra note 9, at 151.
77. See, e.g., CRITCHLOW, INTENDED CONSEQUENCES, supra note 9, at 147, 193-97.
78. For example, a 1972 Gallup poll found that sixty-five percent of respondents believed population growth to be a serious problem. Ernest Ferguson, Zero Population Growth Isn't Zero, L.A. TIMES, Jan. 30, 1972, at 17.
79. See CRITCHLOW, INTENDED CONSEQUENCES, supra note 9, at 41-43.
80. Id. at 6, 73, 91.
diverse.81 Sponsored by 23 senators and 60 House members, the bill enjoyed strong bipartisan support.82 Political support for population reforms mirrored popular support. A 1972 poll found that 65% percent of respondents agreed that population growth was a serious problem, and more than half felt that population growth caused the nation to use up its natural resources too fast and produced social unrest and dissatisfaction.83

A variety of population-control organizations were active in the years immediately before Roe. Some groups, like the Population Council and the Population Crisis Committee (PCC), already had a significant track record by 1970.84 In the 1950s and 1960s, some of these organizations took up arguments about international instability, the Cold War, poverty, and famine.85 These organizations expressed concern about the fertility of poor, non-white individuals in the developing world. Hugh Moore, a leading activist and the founder of the PCC, was among those to publicize such claims.86 His widely circulated pamphlet in 1954, “The Population Bomb,” argued that “food shortages and population pressures are already contributing to the conditions that can lead to social unrest and war.”87

The Population Council, a research-oriented organization founded in 1952 by John D. Rockefeller III, also worked to reduce population pressures in the developing world.88 The organization pioneered contraceptive-access programs in the developing world, publicly stressing “the social and economic crisis confronting underdeveloped countries.”89 The Council also funded research on increasing contraceptive use among racial minorities in “the Black Belt” counties of Alabama.90 As these initiatives suggested, the Council prioritized programs that would reduce the rate of population growth among the poor.

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81. Nan Robinson, Nixon Considers Proposal for a Commission on Domestic Population Reforms, N.Y. TIMES, June 11, 1969, at 20. On the influence and diversity of the population-control movement, see, for example, Ziegler, supra note 11, at 283, 304-05.
82. Id.
83. Ferguson, supra note 78, at 17.
84. On the forming of the PCC, see CRITCHLOW, INTENDED CONSEQUENCES, supra note 9, at 66. For examples of the PCC’s activities, see, for example, Family Plan Aid Called Deficient, N.Y. TIMES, May 10, 1967, at 23; John Finney, Wide Starvation in Decade Is Seen, N.Y. TIMES, Dec. 2, 1965, at 20; and Warren Weaver, Keating to Head Birth Curb Drive, N.Y. TIMES, Apr. 20, 1965, at A1. For examples of the Council’s activities, see Ziegler, supra note 11, at 290-93.
85. On the connection drawn by some population controllers between population growth, instability, and communism, see, for example, John Sharpless, World Population Growth, Family Planning, and U.S. Population Policy, in THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE, supra note 9, at 72, 84-98.
86. For discussion of Moore’s career in the movement, see CRITCHLOW, INTENDED CONSEQUENCES, supra note 9, at 30.
87. Id.
88. See, e.g., infra notes 89-90 and accompanying text.
89. Seymour Topping, Taiwan Program Curbs Births, Contraceptive Loops Praised, N.Y. TIMES, June 13, 1965, at 10.
90. On the Council’s work in Alabama, see, for example, Reed, supra note 13.
Some members of the Population Council and the Association for Voluntary Sterilization (AVS), another major population-control organization, also had ties to the eugenic legal reform movement of the early twentieth century. The Human Betterment Foundation for Voluntary Sterilization, the forerunner of AVS, had itself taken the place of an openly eugenic organization, the Human Betterment Foundation. Eugenics, a term coined by the geneticist Francis Galton in 1883, had come to describe the use of law to prevent the births of persons with physical, mental, and "moral" defects. As late as 1962, Moore, who would soon become the AVS President, believed that the organization "favored legal sterilization of imbeciles and the like." Similarly, a preliminary draft of the Population Council Charter had set forth seemingly eugenic aims.

In the early-to-middle 1960s, however, organizations like the Population Council and AVS focused primarily on increasing access to and funding for contraception for the poor rather than on legalizing abortion. In the early 1960s, for example, AVS pioneered a voluntary sterilization program for the poor in rural Fauquier County, Virginia. Similarly, the Population Council sponsored research by Donald Bogue, a member of the University of Chicago’s Population Research and Training Center, designed to target "high fertility" groups, such as African Americans, Puerto Ricans, and Native Americans.

It is true that some older leaders of the population movement supported legal abortion. Moore had a close relationship with Larry Lader, a former member of the Population Crisis Committee, and provided substantial financial support to organizations like NARAL. Rockefeller made significant donations to NARAL, the Religious Coalition for Abortion Rights, and the ACLU Reproductive Rights Project. Generally, however, support for legal abortion

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91. For discussion of the activities of AVS in the period, see, for example, Judy Klemesrud, *Sterilization Is Answer For Many*, N.Y. TIMES, Jan. 18, 1971, at 24. For further analysis of the Human Betterment Foundation, see supra note 13 and accompanying text.


94. CRITCHLOW, INTENDED CONSEQUENCES, supra note 9, at 23.

95. Id. at 15-19.

96. On the Virginia sterilization law, see, for example, David Binder, *Clinic Defended on Sterilization*, N.Y. TIMES, Oct. 7, 1962, at 40; and David Binder, *Clinic Is Backed on Sterilization*, N.Y. TIMES, Sept. 12, 1962, at 31.

97. Ziegler, supra note 93, at 335 & n.126 (quoting Research Proposal, "Problems of Bearing and Rearing Children in High-Fertility, Low-Income, Low Education American Families" (1960) (on file with The Rockefeller Archive, Rockefeller University, The Population Council Papers)).

98. See e.g., DOWBIGGIN, supra note 76, at 151.

99. CRITCHLOW, INTENDED CONSEQUENCES, supra note 9, at 147.
defined a younger, more environmentalist wing of the population-control movement.

By the late 1960s, when some members of the movement endorsed legal abortion, a new generation of movement members linked population control to the sexual revolution, the women’s movement, and better environmental stewardship. Starting in 1968, some movement experts began to conclude that, as Joseph Swartland of the Family Planning Program at the University of Chicago put it, “[t]he population explosion is largely a white middle class phenomenon.”

New organizations formed to respond to calls for sexual and social responsibility among the white middle class. Founded in 1968 by Stanford Professor Paul Ehrlich, Connecticut attorney Richard M. Bowers, and Cornell Professor Thomas Eisner, Zero Population Growth became the only major population-control organization to campaign heavily for abortion before Roe. In contrast to those who worked with the Population Council or the PCC, ZPG members were young—in 1971, three out of five members were under thirty, and four out of five members were under forty.

Since 1968, ZPG leaders had described sexual liberation as a benefit of curbing population growth. In his seminal book, The Population Bomb, Ehrlich argued that curbing population growth would allow Americans to free themselves from “a sexually repressed and repressive society.” Thomas Eisner, another ZPG founder, justified widespread access to sterilization by praising it as “a lovely kind of solution that has given us a nice relaxed attitude toward making love.”

ZPG pamphlets and advertising materials also praised the sexual revolution while demanding personal responsibility. Slogans like “Worship Cupid, Don’t Be Stupid,” “Love Carefully,” and “Make Love, Not Babies” defined the organization’s public image, especially on college campuses. As ZPG framed it, abortion was an important tool that should be available to sexually active, middle-class people concerned about overpopulation. Indeed, when the Chicago Trib. asked a group of concerned college students what would be “the first and most feasible step” that could be taken to curb overpopulation, legalizing abortion was one of the most popular answers.


101. See, e.g., Critchlow, INTENDED CONSEQUENCES, supra note 9, at 156.


ZPG also justified population control in the context of the emerging environmentalist movement. As a leader of ZPG in New York explained, "[i]t doesn't make any difference whether the family can support all those children or not. . . . [T]he food and water supply [will diminish]. And I'd hate to think about all that pollution."\(^{107}\)

The mobilization of those who sympathized with ZPG helped to reshape the population-control movement in the lead-up to \textit{Roe}. Alongside those concerned about welfare costs, urban crime, or the births of defective children were activists worried about the environment and sexual freedom. The stories told by contemporary abortion opponents in state legislatures fail to capture the diversity or mutability of the population-control movement in the lead-up to \textit{Roe}.

Moreover, the groups and individuals within the population movement that were most directly involved in the abortion battle tended to come disproportionately from groups like ZPG. More established groups like the Population Council did not endorse legal abortion before \textit{Roe}.\(^{108}\) By contrast, organizations like ZPG tended to be more involved in the movement to legalize abortion. By April 1969, Richard Bowers began publicly arguing in favor of abortion-restriction repeal as a population-control measure and tied population control to the preservation of the environment.\(^{109}\) State-level ZPG affiliates also participated in pro-repeal rallies in Connecticut and Illinois and worked as part of the national pro-repeal effort.\(^{110}\)

The population-control movement was neither uniformly nor predominantly racist, and those most heavily involved in the campaign to legalize abortion tended to focus on controlling population growth among white, relatively well-to-do families. Moreover, as Part III shows, the relationship between the abortion-rights and population-control movements was far more complex than some contemporary anti-abortion activists and legislators suggest.

\section*{III. \textsc{The Population-Control and Abortion-Rights Movements: Agreement, Conflict, and Political Expediency, 1965-1973}}

For the abortion-rights movement, an alliance with population controllers had a number of practical advantages. Some members of the abortion-rights

\begin{itemize}
  \item[107.] Klemesrud, \textit{supra} note 14, at 30.
  \item[108.] See CRITCHLOW, INTENDED CONSEQUENCES, \textit{supra} note 9, at 177 (explaining that the Council took no position on abortion before \textit{Roe}).
  \item[109.] See Forum Set on Abortion Legislation, \textit{HARTFORD COURANT}, Apr. 9, 1969, at 10B.
movement likely sympathized with the priorities articulated by groups like ZPG. Protecting the environment appealed to some members of organizations like NARAL or NOW, as did calls to end sexual oppression or compulsory childbearing. The leadership of ZPG and NARAL sometimes overlapped. As importantly, population-control programs enjoyed bipartisan support and attracted the approval of established donors. If legalizing abortion fit within this broader program, the abortion-rights cause would appear more mainstream, less controversial, and more likely to succeed.

Abortion-rights groups often adopted population-control arguments as a more pragmatic alternative to those involving women’s rights. For movement pragmatists, women’s-rights claims likely seemed risky. In the early 1970s, the women’s movement remained poorly understood and, in some cases, unpopular. A 1970 Harris poll, for example, found that sympathy for the women’s movement did not top fifty percent in any of the age groups surveyed.

Just the same, overpopulation rhetoric made the politics of abortion more racially charged. The past ties of some members of the population movement to segregationists and to eugenic legal reformers generated concern for some civil-rights activists. So too did the focus on international overpopulation and domestic family-planning programs, many of which applied primarily to poor, non-white individuals. When New York repealed its abortion laws, a disproportionate number of African American women sought out the procedure, raising further concern in civil-rights organizations and black-power organizations like the Congress for Racial Equality and the Student Non-Violent Coordinating Committee. For this reason, conflict about population control claims impacted many pre-Roe abortion-rights organizations.

For example, in the late 1960s, when its members first considered an endorsement of legal abortion, Planned Parenthood was a part of the population-control movement. William Draper of the PCC had worked closely with Planned Parenthood in lobbying for an expansion of federal family

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111. On the overlapping membership and leadership of ZPG and NARAL, see, for example, STAGGENBORG, supra note 9, at 53.
112. On Lader’s involvement with the PCC, see, for example, CRITCHLOW, INTENDED CONSEQUENCES, supra note 9, at 150-51.
113. On popular views of the women’s movement in the period, see LOUIS HARRIS AND ASSOCIATES, INC., THE 1970 VIRGINIA SLIMS AMERICAN WOMEN’S OPINION POLL 4-7 (1971).
114. Id. at 4 (finding that forty-two percent of women “opposed to efforts made to change or strengthen women’s status in society,” and that fifty-one percent of women respondents concluded that these efforts were “not accomplishing their objectives”).
115. On the disproportionate rate of abortions in the African American community in New York following legalization, see, for example, Barbara Campbell, City Blacks Get Most Abortions, N.Y. TIMES, Dec. 6, 1973, at 94. For further discussion of the state’s abortion rate, see Philip Wechsler, State’s Abortion Rate Soaring, N.Y. TIMES, Nov. 25, 1973, at 97.
116. See, e.g., GORDON, supra note 47, at 281.
planning assistance and in promoting the cause of population control.Alan Guttmacher, the leader of Planned Parenthood until 1974, was a member of the American Eugenics Society as late as the mid-1960s and held a position in AVS.

Under Guttmacher’s influence, members of Planned Parenthood primarily justified abortion in consequentialist terms, invoking, among other things, the importance of population control. In a pamphlet on the benefits of legalizing abortion in New York, for example, Planned Parenthood stressed such arguments, arguing that legalization would result in lower rates of population growth and illegitimacy and decreased welfare expenses. Similar rhetoric appeared again in a 1969 interview with the New York Times, when Guttmacher argued that abortion reform was a problem closely related to the “population explosion” and contended that population-control efforts, including abortion, were intended to reduce poverty, not eliminate the poor. In 1970, in praising repeal acts in New York and Hawaii, Guttmacher also emphasized “the realization of the population problem.” “We’re now concerned more with the quality of population than the quantity,” he told the Associated Press, in commenting on efforts to reform abortion laws.

Other pro-legalization organizations formed alliances with population controllers and argued for abortion reform partly by making population-based claims. Consider the example of NARAL. Formed in 1969, the organization included a variety of pro-reform doctors, lawyers, members of the clergy, students, women’s liberation activists, and members of the American Public Health Association.

The subject of population control came to the fore in NARAL when feminist Lucinda Cisler proposed a resolution redefining the organization’s mission. She explained the strategic importance of redefining abortion as a method of birth control, thereby framing legalization as something that


118. DOWBIGGIN, supra note 76, at 60. For a sample of Guttmacher’s correspondence with the AES in the period, see Letter from Frederick Osborn, AES, to Alan Guttmacher (Mar. 9, 1964) (on file with Sophia Smith Collection, Smith College, The PPFA II Papers).

119. See Facts and Figures on Abortion of Interest to All Americans (1973) (on file with Sophia Smith Collection, Smith College, The PPFA II Papers).

120. See David Dempsey, Dr. Guttmacher Is Evangelist of Birth Control, N.Y. TIMES, Feb. 9, 1969, at SM32.


122. Id.


"Planned Parenthood, the Association for Voluntary Sterilization, and Zero Population Growth could all support." Cisler insisted that NARAL should take a stand that would "appeal to groups concerned about population and conservation," groups she called "important potential allies." On September 1969, the NARAL Board of Directors approved Cisler’s resolution.

As Cisler’s memo indicated, some abortion-rights activists gravitated toward population-control claims not because they had any inherent concern about minority birth rates, crime, or welfare costs, but rather because an alliance with population controllers seemed politically valuable. Certainly, some movement members sympathized with the concerns about sexual liberation and the environment expressed by younger population controllers. At the same time, as Cisler apparently recognized, population-based claims were attractive because of the political benefits thought to flow from them. For example, the idea of an alliance with population controllers caught the attention of Larry Lader, who, as early as October 1969, began pushing for a ZPG-style resolution recommending that families have no more than two children. Just the same, not all abortion-rights activists were equally enthusiastic about the use of population-control claims.

By September of 1970, feminists expressed concern about the heavy emphasis put on arguments for population control. To counter this trend, Friedan proposed a resolution stating that "NARAL should support political groups working toward the basic purpose of the right of a woman to decide when to have or not to have children." At a meeting of the group’s Board of Directors, the motion died for lack of a second. In response, Lader again proposed his two-child resolution, which was tabled by a vote of twenty-six to eighteen. Greitzer led the charge against the resolution, arguing that too close a relationship with population controllers could “hurt [NARAL’s] position with legislators.”

Notwithstanding Greitzer’s concerns, partly for pragmatic reasons, NARAL increasingly defined its cause by reference to the movement for population control. Between 1971 and 1973, NARAL and ZPG collaborated on abortion reform efforts in Washington State and Colorado, and supported Senator Robert Packwood’s ultimately unsuccessful National Abortion Rights

125. Id.
126. Id.
127. NARAL Board of Directors, Meeting Minutes 1-3 (Sept. 28, 1969) (on file with Schlesinger Library, Harvard University, The NARAL Papers).
129. NARAL Board of Directors Meeting Minutes (Sept. 28, 1970) (on file with Schlesinger Library, Harvard University, The NARAL Papers).
130. Id.
131. Id.
132. Id.
Bill. That November, the NARAL Board published a resolution endorsing existing federal population-control legislation.\textsuperscript{134}

NARAL also framed abortion access partly by stressing concerns about population control. Along with arguments that abortion was a privacy right, the organization’s official debate handbook included a whole category of arguments related to overpopulation.\textsuperscript{135} When faced with arguments that Beethoven would not have been born if people used legal abortion for eugenic purposes, NARAL activists were advised to reply that “possibly Hitler wouldn’t have been born either.”\textsuperscript{136} Other proposed claims asserted that “[l]egal abortion will decrease the number of unwanted children . . . and possibly subsequent delinquency, drug addiction, and a host of social ills.”\textsuperscript{137} A final population control argument stated that “[s]ince contraception alone seems insufficient to reduce fertility to the point of no-growth, . . . we should permit all voluntary means of birth control (including abortion).”\textsuperscript{138}

Even the National Organization for Women (NOW), a major feminist group, worked closely with population controllers and, for tactical reasons, borrowed some of their ideas. In November 1970, Christopher Tietze of the Population Council asked NOW President Wilma Scott Heide for NOW volunteers to participate in a study on the health effects of abortion.\textsuperscript{139} In writing to NOW state affiliates, Heide recommended participating, suggesting that “[t]he request from the Population Council represents the fact that we are viewed as responsible and stable.”\textsuperscript{140} While some feminist proposals, like the Equal Rights Amendment, enjoyed substantial support in the early 1970s,\textsuperscript{141} population-control legislation, as we have seen, also enjoyed bipartisan support and popular approval. Heide’s wish to tie her organization to the population-control cause made strategic sense. Indeed, Heide also testified about population control in Congress, arguing that women’s rights and overpopulation were inextricably linked. She explained:

[\textsc{f}irst we must affirmatively change the [role of women]; then family size will change . . . On the question of overpopulation . . . , no matter

\begin{itemize}
  \item \textsuperscript{133.} See Ziegler, \textit{supra} note 11, at 313.
  \item \textsuperscript{134.} \textit{Id.} at 314.
  \item \textsuperscript{135.} National Abortion Rights League, Speaker’s and Debater’s Notebook Excerpt (c. 1972) (on file with Schlesinger Library, Harvard University, The NARAL Papers).
  \item \textsuperscript{136.} \textit{Id.}
  \item \textsuperscript{137.} \textit{Id.}
  \item \textsuperscript{138.} \textit{Id.}
  \item \textsuperscript{140.} Letter from Wilma Scott Heide to NOW Board of Directors et al. (Winter 1970-1971) (on file with Schlesinger Library, Harvard University, The Wilma Scott Heide Papers).
  \item \textsuperscript{141.} Congress passed the Equal Rights Amendment in 1972, and as many as thirty states ratified it the following year. The Amendment ultimately failed. See, e.g., \textsc{Suzanne Utarro Samuels}, \textsc{Fetal Rights, Women’s Rights: Gender Equality in the Workplace} 44 (1995).
how safe, effective, and universally available is any contraceptive method for women or men, women will continue to be producers of excess children . . . unless they have viable significant alternatives to motherhood.142

By 1973, NOW called its reproductive-rights task force the “Task Force for Reproduction and Population.”143 That February, the NOW Board considered participating in another population study, this time involving the Ford Foundation.144 In 1972, NOW also formed a close working relationship with ZPG in campaigning for abortion reform.145

In today’s battles about the defunding of Planned Parenthood or race-selection abortion, abortion opponents and some conservative legislators invoke the close relationship between the historical abortion-rights and population-control movements as evidence that contemporary providers and activists harbor racist intentions. However, the history of the relationship between the two movements in the 1970s shows that most abortion-rights activists adopted population-based claims for quite different reasons. Some activists were attracted to population-control claims because they shared concerns about preserving the environment or protecting individual sexual freedom. Other advocates adopted population-control claims for instrumental purposes, seeking to benefit from the influence and popularity of the movement for population control. And not all members of the abortion-rights movement were willing to stress population-control claims. We should reject historical arguments that identify the relationship between the movements for population control and abortion as evidence of racism. Nonetheless, as Part IV shows, the history of concerns within the family-planning movement about unwanted children, crime, and welfare expenses continued to shape the abortion debate in the 1970s.


The alliance between abortion reformers like those in NOW and population controllers emerged at a time when national racial politics were changing. Civil-rights organizations began adopting a more confrontational and at times

144. Ziegler, supra note 11, at 320.
145. Id.
separatist stance. In the same period, the anti-abortion movement drew on the history of the population-control movement, arguing that the abortion-rights movement was itself racist and indistinguishable from the eugenic legal reform movement. Together, these factors made population-based arguments for abortion racially explosive.

The radicalization of civil-rights politics began in the mid-1960s. On July 18, 1964, Police Lieutenant Thomas Gilligan shot and killed James Powell, a student at Robert F. Wagner Junior High. Powell’s killing touched off a riot in Harlem that ultimately led to 465 arrests and 118 injuries. In the wake of the Harlem riots, in August 1965, the Watts neighborhood of Los Angeles exploded in violence. The Watts riots resulted in 34 deaths, over 1,000 injuries, and over 400 arrests.

The Watts riots also galvanized change in some civil-rights organizations. The Student Non-Violent Coordinating Committee (SNCC) had been a bi-racial, student organization best known for its Freedom Summer efforts to register black voters in the Deep South. In May 1966, SNCC elected as Chairman Stokely Carmichael, a Trinidad-born, naturalized citizen thought of as a leading intellectual in the organization. Within a month, Carmichael had begun to popularize calls for “black power” rather than civil rights. As debate about the meaning and legitimacy of the subject grew, Martin Luther King, Jr. deemed the term “unfortunate.” However, Floyd McKissick, the leader of the Congress of Racial Equality (CORE) defended the term. He explained its meaning as follows: “The syndrome of the powerlessness of black Americans could only be ended by their own efforts; by harnessing the tremendous economic potential of the ghetto and by developing political movements that would fulfill the needs of its people.” CORE had been in operation since after World War II, attracting the most attention for its Freedom Rides, efforts to desegregate interstate bus travel. By 1966, like SNCC,

148. On the Watts riots, see, for example, Riots Unreal to Most in Los Angeles, CHI. TRIB., Aug. 15, 1965, at 3; and Seymour Korrman, Troops Fight LA Rioters, CHI. TRIB., Aug. 15, 1965, at 1.
149. STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 159 (1997).
150. On SNCC and Freedom Summer, see, for example, DOUG MCADAM, FREEDOM SUMMER 126 (1988); and Hollis Watkins et al., “In the Middle of the Iceberg”: Mississippi and the Mississippi Freedom Democratic Party, in A CIRCLE OF TRUST: REMEMBERING SNCC 61 (Cheryl Greenberg ed., 1998).
152. See id.
154. See, e.g., id.; see also McKissick Defines “Black Power,” CHI. DEFENDER, July 11, 1966, at 5.
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CORE had expelled white members, and McKissick called opponents of black power part of a “malevolent Southern tradition that seeks, even now, to divide black America into ‘good niggers’ and ‘bad niggers.’”\footnote{Mckissick Defines “Black Power,” supra note 154, at 5.}

Later in 1966, riots began in Chicago and San Francisco.\footnote{On the Chicago riots, see, for example, Donald Johnson, 4,000 Called Up, N.Y. TIMES, July 16, 1966, at 1; and Betty Washington, West Side Riots Parallel Earlier Outbreaks, CHI. DEFENDER, July 18, 1966, at 4. On the San Francisco riot, see, for example, The Backlash, N.Y. TIMES, Oct. 2, 1966, at 203.} By the end of that year, there were growing signs of a white backlash. In October 1966, the New York Times reported mounting “disaffection among white liberals for the Negro cause of equality.”\footnote{Polls taken in the fall of the same year showed white opposition to all civil rights demonstrations and black power. See Roberts, supra note 151, at 45.} Polls taken in the fall of the same year showed white opposition to all civil rights demonstrations and black power.\footnote{See Roberts, supra note 151, at 45.} As John Herbers of the New York Times reported in discussing one such poll, whites agreed “that Negroes were moving too fast on civil rights.”\footnote{Herbert Haines, BLACK RADICALS AND THE CIVIL RIGHTS MAINSTREAM, 1954-1970, at 62 (1995); see also The Black Panther Ten-Point Program, 253 N. AM. REV. 16-17 (1968); Charles Hamilton, An Advocate of Black Power Defines It, N.Y. TIMES, Apr. 14, 1968, at SM22.}

At the same time, members of the new black power movement often framed the riots as legitimate and even inevitable forms of resistance. The Black Panther Party (BPP), founded in 1966, emerged as a response to police violence in Oakland, California.\footnote{See Weisbord, supra note 71, at 577-81.} In April 1967, McKissick argued that the riots had occurred because African Americans “no longer believe in the white man’s promise.”\footnote{ATTACKS ON BIRTH CONTROL HAD TURNED TO ABORTION TENDENCY TO FEATURE IN MUCH LARGER} After Carmichael left SNCC for the BPP,\footnote{The Backlash, supra note 158, at 203.} his successor, H. “Rap” Brown, a Louisiana native and a member of the civil-rights movement since 1960, offered even more menacing rhetoric, suggesting that the unrest in the city would “look like a picnic” compared to the violence that would ensue if blacks organized to take on their oppressors.\footnote{See Roberts, supra note 151, at 45.} As he put it later in 1967: “[B]urn this town down if this town don’t turn around.”\footnote{See Roberts, supra note 151, at 45.}

The black-power movement had a far-reaching program, including demands for prison reform, economic self-sufficiency, and rights to employment and housing.\footnote{See e.g., Most Whites Found Opposed to Civil Rights Demonstrations, N.Y. TIMES, Aug. 16, 1966, at 24.} Between 1969 and 1973, in criticizing white racism, a number of movement members also began to attack legal abortion.\footnote{Herman, supra note 8, at 7.} Attacks on birth control and abortion tended to feature in much larger
narratives about efforts on the part of the United States to "herd [black people] into small, overcrowded areas called ghettos.169 or to "cut back on welfare."170 In 1969, Brown made the argument that birth control was "genocide."171 Dick Gregory, a leading black comedian, expressed concern about the issue in a much-debated article in *Ebony Magazine.*172 The Black Panther, the official publication of the BPP, criticized the legalization of abortion in New York in 1970, and equally scathing essays continued to appear throughout the early 1970s.173 Jesse Jackson of Operation Breadbasket also took a strong stand against legal abortion.174

Of course, these arguments were far from universally convincing to African Americans in the years leading up to *Roe.* Jerome Holland, an African American, served as Planned Parenthood chairman before *Roe* and asserted that legalized abortion would prevent the unnecessary deaths of black mothers and babies as a result of botched illegal abortions.175 An African American physician, Edward Keemer, worked with NARAL in a Michigan abortion test case pursued in 1971.176

Arguably more important to the abortion-reform movement were African American women’s-rights activists who spoke out against the black genocide argument. One African American women’s-rights advocate, Congresswoman Shirley Chisholm, served as NARAL’s honorary president in the years immediately before *Roe* and frequently argued that abortion reform was in the best interest of African American women because, under present law, "the poor [and] the blacks . . . are denied a choice available to the rich."177 Subsequent studies supported Chisholm’s claim: as Mark Graber and Leslie Reagan have shown, pre-*Roe* abortion laws disproportionately affected poor women.178

African American women’s-rights activists outside of the abortion reform movement also publicly argued that legalized abortion would better protect women. For example, popular advice columns in the *Chicago Defender* advised African American women about how and why to seek contraception or support abortion reform.179 Nevertheless, African American women remained divided

on the question of abortion reform, at least insofar as it was framed as an issue of population control.\textsuperscript{180}

There were several reasons that the abortion issue generated a particular kind of racial politics. The spread of abortion-reform statutes in the American South exacerbated fears about race genocide. There might have been nothing inherently suspicious in these developments; in North Carolina and Georgia, for example, a small and unmobilized Catholic population, combined with a low amount of media attention, contributed to the easy passage of the abortion-reform laws.\textsuperscript{181} However, the American South had a troubling history of forcing women of color to undergo sterilization, either under eugenic statutes or through informal, involuntary “Mississippi appendectomies.”\textsuperscript{182} Efforts to introduce involuntary sterilization laws in the South continued in the mid-1960s, a phenomenon noted and condemned by SNCC.\textsuperscript{183}

This support for coerced sterilization seemed all the more troubling after there was news of involuntary sterilizations performed in the South.\textsuperscript{184} In June 1973, in Montgomery, Alabama, two African American girls, Minnie Lee Relf, aged twelve, and Mary Alice, aged fourteen, were sterilized without their own or their mother’s informed consent.\textsuperscript{185} Over eighty other minors were revealed to have been sterilized at federally-funded birth-control clinics in a fifteen-month period.\textsuperscript{186} Chicana and African American women responded by bringing lawsuits based on compulsory-sterilization claims.\textsuperscript{187} The sterilizations at issue were carried out without formal authorization, and by 1970, no population-control organization supported involuntary sterilization (although one group,

\begin{itemize}
\item \textsuperscript{180} For discussion of the divisions between Black women on the subject of black genocide, see, for example, \textit{Birth Control Views}, CHI. DAILY DEFENDER, Sept. 5, 1972, at 19; and Robert E. Johnson, \textit{Legal Abortion: Is It Genocide or Blessing in Disguise?}, JET, Mar. 22, 1973, at 12 (describing “Black women whose responses range from freedom from grief to fear of genocide”).

\item \textsuperscript{181} On the lack of organized Catholic opposition to the reforms in North Carolina and Georgia, see, for example, GENE BURNS, \textit{THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES} 181 (2005); and GARRY, \textit{supra} note 69, at 329, 348.

\item \textsuperscript{182} \textit{See, e.g., REBECCA KLUCIN, FIT TO BE TIED: STERILIZATION AND REPRODUCTIVE RIGHTS IN AMERICA, 1950-1980}, at 90-94 (2011).

\item \textsuperscript{183} \textit{See, e.g., NELSON, \textit{supra} note 9, at 68 (describing SNCC’s reaction to a compulsory sterilization law proposed in Mississippi).}

\item \textsuperscript{184} \textit{See infra} notes 186-187 and accompanying text.


\item \textsuperscript{186} \textit{See, e.g.,} Jack Slater, Sterilization: Newest Threat to the Poor, EBONY MAG., Oct. 1973, at 150.

\item \textsuperscript{187} \textit{See KLUCIN, \textit{supra} note 182, at 166 (describing a suit brought by ten Chicanas against the U.S.C. L.A. County Medical Center); NELSON, \textit{supra} note 9, at 72 (describing the lawsuit of Niall Cox Ramirez, an African American woman from North Carolina, following a compulsory sterilization procedure).}
AVS, had endorsed compulsory sterilization as late as 1960). Nonetheless, the sterilization abuse scandal once again raised the possibility that, if racism was a real part of the population movement, abortion reformers might have similar biases.

As importantly, before and after Roe, influential state anti-abortion organizations like Women for the Unborn in New York made claims about the supposed racism of abortion supporters. Members of Women for the Unborn belonged to the recently mobilized anti-abortion movement. Beginning in the late 1960s, a number of private citizens responded to changes in abortion laws by forming small organizations designed to stall the progress of the abortion-rights movement. While some members of the anti-abortion movement had been involved in civil-rights politics, the movement focused on protecting the rights of the fetus, the disabled, and the dying. For example, in 1971, Robert Byrn, a Fordham Law School professor and a leader of New York State Right to Life, brought suit as a guardian ad litem for unborn children scheduled to be aborted in New York hospitals. Byrn also used the media to publicize his understanding of the personhood and rights of the fetus, arguing that “[t]he eight-week fetus has a human baby face, arms, legs, fingers, toes, a strongly beating heart and a brain that emits recordable impulses.”

188. Indeed, as indicated by a 1973 study by the Department of Health, Education, and Welfare, the sterilization rate for poor women was twice as high as it was for women of any other income level. Childbearing Rights Information Project, To Bear or Not to Bear, in Making Sense of Women’s Lives: An Introduction to Women’s Studies 353 (Michele Plott & Lauri Umansky eds., 2000). On AVS’s previous support for involuntary sterilization and change of position, see, for example, Ziegler, supra note 11, at 285-90.

189. See, e.g., Brief for Women for the Unborn as Amicus Curiae at *16, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18).

190. See, e.g., Brief for Women for the Unborn as Amicus Curiae at *16, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18).


192. For examples of this involvement, see, for example, Munson, supra note 190, at 19; and Mary Krane Derr, Pro-Life Feminism, in Historical and Multicultural Encyclopedia of Female Reproductive Rights in the United States 172-73 (Judith A. Baer ed., 2002).

193. For example, the National Right to Life Committee, at the time the largest national anti-abortion organization, described its mission as follows: “Protecting the right to life of the unborn child is a central issue for the National Right to Life Committee.” Pennsylvanians for Human Life, National Right to Life Committee Statement of Purpose (c. 1972) (on file with Gerald Ford Memorial Library, University of Michigan, The American Citizens Concerned for Life Papers). On anti-abortion opposition to euthanasia and the right to die, see, for example, Ian Dowbiggin, A Merciful End: The Euthanasia Movement in Modern America 135, 147 (2003).

abortion opponents translated Byrn's claims into "a visual argument," depicting late-term abortions using "still photographs of fetuses and film strips."  

Nationally, anti-abortion organizations publicized similar claims, circulating slide shows explaining "the reality of abortion."  

In promoting fetal-rights claims, abortion opponents certainly oversimplified the relationship between population control, eugenics, and racism. At the same time, some abortion reformers, like Lader, argued that juvenile delinquency and crimes of all kinds would become less prevalent if abortion were legal. By contrast, as we have seen, some civil-rights leaders tended to interpret riots or crime as natural or even desirable responses to entrenched discrimination and police violence. Abortion opponents drew on the history of some population reformers and the uncomfortable implications of some population-based claims. Although the abortion-rights movement itself—including those population organizations involved with it—did not harbor obviously racist motives, some population controllers' past experience reinforced the concerns some minority activists had about population control and abortion.

Concern over race genocide played an important part in debates about abortion within the civil-rights community. The connection between the movements for population control and abortion rights served only to heighten these concerns. As Part V shows, Roe came down at a time when the racial politics of abortion were salient and highly divisive, but the Court's opinion obscured the relevance of race to the law and politics of abortion.

V. THE INVISIBLE QUESTION: RACE, POPULATION CONTROL, AND RIGHTS TALK IN THE ROE COURT

Amicus curiae briefs in Roe made questions of race, population control, and race genocide central to debate about the case. Initially, when the Court conferred the case in December 1971, Justices William O. Douglas and Thurgood Marshall raised concerns about whether existing abortion restrictions denied "equal protection by discriminating against the poor." By the time Justice Harry Blackmun drafted the final version of Roe, however, questions of race and population control had receded into the background of the opinion. Significantly, Blackmun described the framework of Roe—one based on

195. Shapiro, supra note 193, at SM10.
198. GARROW, supra note 69, at 530-31.
constitutional rights and the history of the medical profession—as a way of avoiding the more emotional questions surrounding race and abortion. As David Garrow has shown, the issues of race and poverty did come up during the Court's first conference of Roe v. Wade and Doe v. Bolton.\footnote{GARROW, supra note 69, at 530.} Roe involved a Texas statute that prohibited all abortions but those necessary to save the life of the mother.\footnote{Id.} By contrast, Doe involved a statute patterned on the American Legal Institute's ("ALI") model reform: the statute allowed abortions subject to particular restrictions, requiring, among other things, several diagnoses by licensed physicians.\footnote{See id. at 530-32.}

During the conference, the Justices generally favored striking down the Texas law but found the constitutionality of the Georgia statute to be a closer question. Warren Burger, who led off voting on the Georgia measure, stated that it was constitutional.\footnote{Id. at 530-32.} In discussing Doe, William Douglas, the next to vote, raised questions about the practical operation of the Georgia statute, asking: "Is it weighted on [the] side of only those who can afford this? What about the poor?"\footnote{Id. at 530-32.} Thurgood Marshall similarly expressed concern about the impact of the Georgia statute on women in rural areas where "there [were] no negro doctors."\footnote{Id. at 530-32.} Although there was some discussion of whether the Court ought to remand for lower court findings as to how the statute affected poor, non-white women, it ultimately did not.\footnote{See id. at 530-32.} Just the same, Douglas and Marshall's comments revealed a doctrinal path the Court could have followed in Roe or Doe if it had wanted to address the question of race, poverty, and abortion. Under the Equal Protection Clause, the Court could have asked whether facially neutral statutes, like the ALI model, had an impermissibly discriminatory impact on poor, non-white women. Assuming that there was some constitutional right or liberty interest protecting the abortion decision, unequal access to abortion services might have posed an equal-protection problem.\footnote{Eisenstadt v. Baird, 405 U.S. 438 (1972), took a similar approach. Although deciding that a contraception regulation had at best a "marginal relation to the proferred [legislative] objective[s]," Eisenstadt explained: "If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on the distribution to unmarried persons would be equally impermissible." Id. at 438. A similar argument could have been made if the abortion decision gained constitutional protection.}

Between December 1971 and October 1972, when the cases were reargued,\footnote{On the Justices' decision to have the cases reargued, see GARROW, supra note 69, at 552-56.} amicus briefs brought different but equally explosive racial
arguments to the fore. No prominent civil-rights or black-power organizations participated in amicus advocacy in *Roe*, but Planned Parenthood, NOW, and other abortion-rights organizations joined amicus briefs arguing that abortion bans had undesirable social consequences, leading to the births of antisocial, poor, and unwanted children who depended on government services. Planned Parenthood, for example, cited a study of children born to women who had unsuccessfully sought abortions in Sweden.208 The study showed that “many more of the unwanted children than control children . . . registered more often in psychiatric services, . . . were more often registered for antisocial and criminal behavior, . . . [and] got public assistance more often.”209

Relying on the same study, an amicus brief joined by several women’s organizations, including NOW, asserted that “[i]n addition to the effect of the unwanted pregnancy upon the mother and upon the unwanted children, those unwanted children who are economically or emotionally harmed transmit their psychosocial pathology to succeeding generations.”210 The brief stressed “concrete evidence of, the direct cost in alcoholism, drunkenness, crime, and welfare costs” of existing abortion laws.211

Abortion opponents responded to these contentions partly by playing up the concerns about race genocide expressed by some in the black power movement. For example, Women for the Unborn, a prominent New York anti-abortion group, argued:

The easy solution of abortion discourages more constructive solutions . . . Such a fear appears to lie behind the opposition to abortion on demand within the black community. Despite assurances by abortion advocates, many members of the black community seem to suspect that numerous abortion clinics in ghetto areas could end up as the white man’s solution to the problems of poverty and race.212

While not explicitly acknowledging these concerns, Planned Parenthood’s amicus brief did stress that abortion bans disproportionately harmed poor women, who lacked access to adequate contraceptive services and who might try self-abortion “or may turn to the quack abortionist, and serious injury or even death may result from either course.”213

209. Id.
211. Id. at *35.
212. Brief for Women for the Unborn as Amici Curiae, supra note 189, at *16.
The racial politics of Roe were complex and divisive. Some abortion-rights proponents invoked arguments, similar to those made in the juvenile delinquency debate, about the connection between unwanted children, poverty, crime, welfare costs, and social pathology. Abortion opponents stoked fears about race genocide. At the same time, abortion-rights briefs acknowledged that abortion bans disproportionately impacted the constitutional interests of poor, non-white women.

Generally, however, the Court's decision obscured any question about race, population control, and abortion. Since Roe was the lead opinion, Doe offered little in the way of novel constitutional analysis, instead applying the trimester framework set forth in Roe.214 Significantly, Doe made no mention of the equal-protection concerns raised by Justices Douglas and Marshall during the conference of the case.215

Further, as Linda Greenhouse has shown, Justice Blackmun's extensive research at the Mayo Clinic over the summer of 1972 convinced him to rely on the history of medical attitudes toward abortion in drafting Roe.216 As importantly, the final draft of Roe relied not on the Equal Protection Clause but rather on a privacy right related to interests in procreation, marriage, and contraception already recognized by the Court.217

Blackmun seemed to believe that the framing of abortion as a medical matter and a privacy right would minimize the controversy that would greet the opinion. In January 1973, in order to achieve this goal, he drafted a proposed announcement of the decision, acknowledging the complexity of the issue while stressing that "abortion is essentially a medical decision."218 The final draft of Roe more explicitly used Blackmun's framing of the abortion right as a way of avoiding the controversy surrounding abortion in general and the racial politics of abortion in particular:

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

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215. See id.
218. GARROW, supra note 69, at 587.
racial overtones tend to complicate and not to simplify the problem. Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man’s attitudes toward the abortion procedure over the centuries.219

Roe acknowledged powerful arguments about race that had informed debate inside and outside of the Court, but the justices made no other reference to concerns about race, poverty, abortion access, or equal protection.220 Indeed, a few years later, in Maher v. Roe (1977)221 and Harris v. McRae (1981),222 the Court upheld laws denying public funding for abortion, rendering seemingly irrelevant any constitutional claim that abortion restrictions disproportionately impacted poor women.223

By describing abortion as a medical matter or a private decision belonging to the woman and her doctor, the Roe Court hoped to set itself above the political fray surrounding abortion and race.224 This choice proved to be consequential. On the one hand, by neglecting questions involving poor, non-white women’s lack of access to reproductive health care, Roe set the stage for later opinions that held that abortion funding bans did not violate the Constitution.225 Within a few years, Maher226 and Harris227 would translate

219. Roe, 410 U.S. at 116-17 (emphasis added).
220. See id.
223. Interestingly, the issue of race was largely absent from the litigation of Maher and Harris. Relying on the privacy rationale in Roe, abortion-rights advocates primarily argued that, if the Constitution protected the abortion right, the State violated the Equal Protection Clause by funding childbirth but not abortion—impermissibly discriminating against or burdening the abortion decision. See Brief for Appellees at *13-15, Maher v. Roe, 432 U.S. 464 (1977) (No. 75-1440). Abortion-rights attorneys also argued that the Hyde Amendment violated the Establishment Clause, imposing one religion’s beliefs on everyone else. See, e.g., Brief for Appellees at *66-92, Harris v. McRae, 448 U.S. 297 (1981) (No. 79-1268); Brief for the American Public Health Association et al. as Amici Curiae at *14, *29-30, Maher v. Roe, 432 U.S. 464 (1977) (Nos. 75-1440, 75-442). The absence of race in the Maher and Harris litigation testifies both to its invisibility in Roe and to the Court’s rejection of equal-protection claims based on racially disparate impacts rather than on racially discriminatory intent. See, e.g., Washington v. Davis, 426 U.S. 229 (1976).
224. See Roe, 410 U.S. at 116.
225. See, e.g., Rebecca Rauch, Reframing Roe: Property Over Privacy, 27 BERKELEY J. GENDER L. & JUST. 28, 63 (2012) ("[T]he right to privacy yields no positive rights to funding or access support from the government; it is relegated to the land of negative rights, which might provide the right woman with reproductive choice free from government intrusion, but for the wrong woman—one with limited resources—the so-called ‘choice’ becomes nonexistent"); Rachel Rebouché, The Limits of Reproductive Rights in Improving Women’s Health, 63 ALA. L. REV. 1, 24 (2011) ("[R]oe has not been a ready platform for thinking about abortion in terms of women’s right to health care"); Robin West, From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights, 118 YALE L.J. 1394, 1411 (2009) ("[T]he choice rhetoric of Roe undercuts the arguments for . . . the rights of caregivers, women and men both, to a level of public assistance for their caregiving work").
Roe’s silence on the questions of race and access to care into a conclusion that the abortion right protected women only from undue burdens on the ability to choose abortion rather than guaranteeing them access to the procedure.\textsuperscript{228}

At the same time, as Part VI argues, Roe’s relative silence on the issues of race and population control made the holding of the opinion an ideal symbol for feminists seeking to redefine the abortion right. Because Roe framed abortion as a right belonging at least partly to women, feminists reinterpreted the decision, arguing that it recognized that abortion mattered because of its intrinsic importance to women rather than because of any desirable impact legal abortion would have on the environment, population growth, welfare costs or crime.

VI. THE SEPARATION OF REPRODUCTIVE RIGHTS AND POPULATION CONTROL

Between 1973 and 1981, the abortion-rights movement gradually deemphasized claims about population control. There were a number of reasons for this shift. First, the very idea of population control became more divisive in the mid-1970s as a number of scandals emerged surrounding the very idea of population control. One such scandal broke in 1974, at the U.N. Conference on World Population in Bucharest, Hungary.\textsuperscript{229} At the Bucharest conference, leaders of developing countries characterized existing population programs as exploitative, and they demanded that excess population no longer be identified as the primary cause of poverty.\textsuperscript{230} The Bucharest Conference sent shock waves through the population-control movement, refocusing organizations like the PCC and the Population Council on international family planning and, in particular, on the importance of economic development.\textsuperscript{231} In 1976, another scandal broke when Dr. Karan Singh, the Indian Minister for Health and Family Planning, issued a statement that the door had been “left open” for compulsory sterilization programs in the Indian states.\textsuperscript{232} As population control

\textsuperscript{227} Harris, 448 U.S. 297 (1980).
\textsuperscript{228} Maher, 432 U.S. at 473-74 (“Roe did not declare an unqualified ‘constitutional right to an abortion’ . . . . Rather, the right protects women from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.”).
\textsuperscript{229} See Ziegler, supra note 11, at 300-01.
\textsuperscript{231} For contemporary analyses of the World Population Plan, the document produced at the Bucharest Conference, see Michael S. Teitelbaum, Population and Development: Is Consensus Possible?, 52 Foreign Affairs 742, 742-60 (1974). For further discussion of the Conference and its impact, see, for example, Critchlow, Intended Consequences, supra note 9, at 7.
\textsuperscript{232} See Kaval Gulhati, Compulsory Sterilization: The Change in India’s Population Policy, 195 Science 1300-05 (1977). For further discussion of compulsory-sterilization programs in India in the period, see, for example, Sterilization: No Choice in India, Off Our Backs, Jan.-Feb. 1976, at 10; and Henry Kamm, India State Is Leader in Forced Sterilization, N.Y. Times, Aug. 13, 1976, at 8.
became more controversial, the political benefits of population control claims no longer seemed as evident to the abortion-rights movement.

At the same time, anti-abortion organizations put more emphasis on concerns about racism in abortion clinics and within the abortion rights movement. For example, Dr. Joseph Stanton, a leading abortion opponent in Massachusetts and the leader of Americans United for Life (AUL), a major national group, widely distributed materials on the connection between population control and what he called the "abortion elitist apparatus." The National Right to Life Committee, the nation's largest anti-abortion organization, stressed claims about the supposed racism of Planned Parenthood's connection to the population-control movement of the 1970s. As anti-abortion activist Burke Balch stated in the early 1980s: "Does Planned Parenthood's championship of abortion really stem from a concern for women's rights and social justice and equality, or is its true basis their organizational commitment to population control, especially of the 'burdensome' poor?"

As activists became aware of the costs associated with population claims, an effort to stress new arguments began. Within Planned Parenthood, this process began in October 1973, at a strategy meeting in Denver, Colorado. In a confidential memorandum, Robin Elliott, one of the conference organizers, stated that abortion opponents had raised an important "question [about] Planned Parenthood's credibility in its reference to the population problem." Those present at the conference saw Planned Parenthood's support for population control as a vulnerability, because pro-life organizers had successfully "sought to exploit to their own advantages the fears of minorities." Elliott suggested that abortion-reform advocates adopt a new strategy involving rhetoric that echoed Roe, invoking "the reaffirmation of commitment to freedom of choice in parenthood."

Finally, as feminists gained positions of leadership in the abortion-rights movement, women activists began reinterpreting abortion rights, arguing that they reflected the constitutional significance of women's interests in autonomy and equality. As had been the case for Betty Friedan and Carol Greitzer before Roe, many feminists viewed abortion as being a women's-rights issue. With the

236. See Ziegler, supra note 11, at 308-10 (citing The Denver Conference Memorandum (November 2, 1973) (on file with Schlesinger Library, Harvard University, The NARAL Papers) [hereinafter Denver Conference Memorandum]).
237. Id. at 308 (citing Denver Conference Memorandum, supra note 236).
238. Id. at 309 (citing Denver Conference Memorandum, supra note 236).
239. Id.
controversy surrounding population control and the necessity of defending Roe, feminists saw a valuable opportunity to reframe abortion as an issue of rights for women.

By 1977, for example, the need to defend Roe prompted a change in strategy. Planned Parenthood led Abortion Rights Strategy ‘77, a conference and strategy session. Abortion Rights Strategy ‘77 reflected a conviction that “[t]he record of national pro-choice organizations over the last four years . . . [had] been decidedly mixed.” The invitation to the parley expressed particular concern about the Hyde Amendment, a ban on the Medicaid funding of abortion, which was labeled the “most devastating congressional defeat of the last four years.”

What could be done to overcome these obstacles? In 1978, the organization selected an African American feminist, Faye Wattleton, as its new president. Wattleton told The New York Times that she was likely chosen to head the organization “for being a woman and because [Planned Parenthood] needed to change [its] image.” That change in image involved a more “aggressive” campaign for “abortion rights” and increased emphasis on rights- and equality-based arguments. Explaining that preserving Roe was a priority for the organization, Wattleton told the press in the winter of 1978 that “[w]hat’s really important is that Black women have equal access to determine when and how they will have children.”

In defending Roe, NARAL also elevated new leaders and stressed arguments more responsive to the needs of women. In Congress, by drawing on Roe, Sarah Weddington, one of the attorneys who had argued Roe and a leading NARAL member, stressed arguments linking sex equality and abortion. After speaking to Democratic Senator Birch Bayh, a supporter of the Equal Rights Amendment, Weddington reported that she had persuaded him primarily by contending that “women cannot take advantage of opportunities guaranteed under [the] ERA if they cannot control their fertility.” In December 1975, Weddington became the president of the organization. As she had done previously, she emphasized that abortion was a matter of women’s rights to

241. Id.
242. Id.
244. Id.
245. Id.
246. Id.
247. See Minutes of the Executive Committee Meeting (Apr. 13, 1975) (on file with Schlesinger Library, Harvard University, The NARAL Papers).
248. Id.
privacy and equality. For example, when speaking to the press, Weddington insisted that abortion-reform advocates were women’s-rights supporters while anti-abortion activists “still [thought] that a woman’s place [was] in the home—barefoot and pregnant.” As we have seen, NARAL’s pre-Roe debating manual highlighted a number of population-control arguments. By contrast, at the end of the decade, NARAL’s debating manual included a denunciation of the very idea of population control:

Allegation: That abortion should not be used as a means of population control. [Response]: Agreed. The decision to have an abortion is and should be a private one, free from outside pressures or interference. . . . The term ‘population control’ implies the use of coercive policies and programs to limit population growth; the United States has no such policy.

As population-control arguments became a less central part of abortion-rights advocacy, a broader group of Black feminists also became actively involved in the abortion-rights movement. The emergence of a distinctive Black feminist movement for reproductive health came in the late 1960s, with the publication of works like Frances Beale’s *Double Jeopardy: To Be Black and Female* (1970) and Florynce Kennedy’s *Abortion Rap* (1971). Beale, a former member of the SNCC International Affairs Commission, formed a Black Women’s Liberation Caucus within the organization. After receiving little support from SNCC leaders, in 1969 Beale formed a stand-alone group, the Black Women’s Alliance. In turn, after forming working relationships with Chicana, Puerto Rican, and Native American women, the group renamed itself the Third World Women’s Alliance. Although some of these efforts involved reproductive rights, after *Roe*, Black feminists mobilized to an unprecedented extent.

Some efforts involved the founding of separate organizations committed to the reproductive rights of women of color. For example, in 1973, following a meeting on “Black Women and Their Relationship to the Women’s Movement,” activists formed the National Black Feminist Organization, whose

250. Id.
253. On the formation of the Women’s Caucus, see, for example, KIMBERLY SPRINGER, LIVING FOR THE REVOLUTION: BLACK FEMINIST ORGANIZATIONS 47 (2005).
254. Id. at 49.
members campaigned for reproductive justice, understood as a demand for legal abortion and a condemnation of sterilization abuse. In 1975, Barbara Smith formed the Combahee River Collective, a Boston-based reproductive justice organization that combined demands for legal abortion with criticism of sterilization abuse and calls for general improvements to the health care available to women of color.

On other occasions, women of color worked in multiracial organizations that focused on the rights of poor, often non-white women. One such organization was the Committee for Abortion Rights and Against Sterilization Abuse (CARASA), formed in 1977 by representatives of NOW, NARAL, and the Socialist Workers’ Party. CARASA emphasized the importance of abortion access and focused primarily on the needs of poor, non-white women. The group also argued that the struggle for abortion rights had to be part of a broader battle for reproductive justice, a program that included free universal daycare, welfare rights, decent health care, and opposition to population control. As a 1979 policy statement released by the organization asserted: “Reproductive freedom means the freedom to have as well as not to have children. Policies that restrict women’s right to have or raise children—through forced sterilization or the denial of adequate welfare benefits—are directly related to policies that compel women to have children.”

As African American feminists became more active in the abortion-rights movement, other members of the black community became more receptive to the idea of abortion rights. African Americans have remained more opposed to abortion than have members of other ethnic or racial groups. This likely reflects a variety of factors likely to influence a person’s views on abortion, including family income, years of education, region of residence, frequency of church attendance, and religious denomination.

Just the same, published studies on race and views on abortion suggest that the post- Roe changes to the debate might have had some impact on the views of

257. See id. at 184.
258. See id. at 185; see also Barbara Smith, Combahee River Collective: A Black Feminist Statement, in 9 OFF OUR BACKS 6, 8 (1979).
259. See NELSON, supra note 9, at 135.
260. See id. at 133.
261. See id. at 133-43.
262. Id. at 133.
264. See, e.g., Elaine J. Hall & Myra Marx Ferree, Race Differences in Abortion Attitudes, 50 PUB. OPINION Q. 193, 206 (1986) (identifying as a supposed explanation of differing racial attitude “the traditional values of [African American] subculture”); John Lynxwiler & David Gay, Reconsidering Race Differences in Abortion Attitudes, 75 SOC. SCI. Q. 67, 71-72 (explaining the importance of income, education, region of residence, community size, and church attendance); Clyde Wilcox, Race, Religion, Region and Abortion Attitudes, 53 SOC. RELIGION 97, 105 (1992) (finding that “the racial gap in abortion attitudes is closing over time” and suggesting that “[r]acial differences in religious orthodoxy and religiosity are an important source of racial differences in abortion attitudes”).
African Americans.\textsuperscript{265} Controlling for a variety of factors likely to determine a person’s views on abortion, one study found that the differences in racial attitudes toward abortion decreased substantially from 1972 to 1980.\textsuperscript{266} Although some difference in racial attitudes remained, race alone was a less significant predictor of attitudes for abortion between 1975 and 1980 than it had been between 1972 and 1974, particularly when researchers controlled for other relevant variables, such as religiosity.\textsuperscript{267}

By 1975, moreover, the Black Panthers had endorsed abortion rights.\textsuperscript{268} The organization first reversed positions when protesting the conviction of Dr. Kenneth Edelin, an African American obstetrician-gynecologist convicted for manslaughter in the death of a fetus during a late term abortion.\textsuperscript{269} In 1977, the Panthers ran a series of articles criticizing the Hyde Amendment and calling for access to abortion as part of a broader program of welfare rights.\textsuperscript{270}

This change in racial politics came as debate turned to the meaning of and justification for \textit{Roe}. Advocates defending \textit{Roe}, much like the decision itself, focused on claims involving constitutional rights. Fighting for \textit{Roe} meant downplaying arguments about population control and highlighting and developing the kinds of claims advanced by the Court. As population control claims and advocates became a smaller part of the abortion-legalization cause, as we have seen, the racial politics of abortion changed.

\section*{VII. Writing the History of Race and Abortion in the Legislatures and the Courts}

Laws defunding Planned Parenthood or banning race-selection abortion draw on an alternative narrative, forged by the anti-abortion movement, about the history of race, population control, and abortion. Researchers opposed to abortion, such as Angela Franks and Mary Meehan, began writing this history in the mid-2000s.\textsuperscript{271} For example, in reviewing Franks’s book on Margaret Sanger, \textit{The National Right to Life News} asserted that “the primary agenda driving Planned Parenthood and like-minded ‘family planning’ organizations/population control agencies has never been women’s health or their liberation, but control of their fertility for eugenic purposes.”\textsuperscript{272}

\textsuperscript{266} Id. at 516.
\textsuperscript{267} Id.
\textsuperscript{268} Id.
\textsuperscript{269} Id.
\textsuperscript{270} Id.
\textsuperscript{271} See Meehan, supra note 7; see also ANGELA FRANKS, MARGARET SANGER’S EUGENIC LEGACY: THE CONTROL OF FEMALE FERTILITY (2005).
\textsuperscript{272} O’Bannon, supra note 7, at 22.
This claim reflects many of the premises of anti-abortion arguments about eugenics and abortion. One treats the eugenics and population-control movements as being functionally identical to one another. For example, a 2010 edition of the Human Life Review suggested that eugenics was “[…later called … population control.”\(^{273}\) Similarly, Mary Meehan has claimed: “Thomas Malthus’s obsession with population numbers and Francis Galton’s ideas about breeding better babies through eugenics eventually led to a U.S. population-control movement that attained major power by the late 1960s.”\(^{274}\)

A second claim asserts that the abortion-rights movement is related to the population-control movement (and by extension, to the eugenics movement). Meehan contends, for example: “Anyone concerned about civil rights should be alarmed by abortion as lethal discrimination against poor people and ethnic minorities. . . . Eugenicists long have targeted both groups.”\(^{275}\) Legislators who form part of the movement to defund Planned Parenthood invoke this history in promoting a new legal agenda.\(^{276}\) For example, Senator Rick Santorum, a former presidential candidate, endorsed federal defunding legislation, explaining: “This [Planned Parenthood] is an organization that was founded on the eugenics movement, founded on racism . . . . Its origins are horrific. You can say well, it’s not that anymore. It’s not far from where it was in my opinion in its activities and in its motivations.”\(^{277}\)

In 2011, Herman Cain, another former presidential candidate, offered a similar criticism of Planned Parenthood.\(^{278}\) Cain emphasized that Margaret Sanger, the founder of Planned Parenthood, had worked to “prevent[] the increasing number of poor blacks in this country by preventing black babies from being born.”\(^{279}\) In Cain’s view, this history continues to shape Planned Parenthood’s work: a form of “planned genocide” that targets racial minorities and the poor.\(^{280}\)

Such arguments have also influenced some successful state legislative campaigns in Arizona and have contributed to votes in the United States House of Representatives favoring laws defunding Planned Parenthood or banning race-selection abortion. Since 2011, states including Texas, Kansas, Indiana, and Wisconsin have passed laws denying Medicaid or Title X funding to

\(^{273}\) Messall, supra note 7, at 98.

\(^{274}\) Meehan, supra note 7, at 15.

\(^{275}\) Id. at 24; see also Kathryn Jean Lopez & Anne Conlon, Combating Roe: One Word at a Time, HUMAN LIFE REV., Jan. 1, 2012, at 84.

\(^{276}\) See supra note 16 and accompanying text.

\(^{277}\) Terkel, supra note 16.


\(^{279}\) Id.

\(^{280}\) Id.
organizations that also provide abortion services.\footnote{281} Since the passage of the Hyde Amendment in 1976 and the introduction of a federal law banning the use of Title X monies for abortion, providers cannot use either Title X or Medicaid funds to pay for abortion services.\footnote{282} The new defunding laws, by contrast, deny Medicaid or Title X funds to organizations that provide or advocate for abortion even when the funds would exclusively cover non-abortion services, such as contraception or STI testing.\footnote{283} In 2011, by a vote of 240 to 185, the federal House of Representatives passed an amendment to a government funding bill that would have defunded Planned Parenthood; in the House, eleven Democrats voted for the amendment before it was subsequently defeated in the Senate.\footnote{284} A campaign for similar laws is already under way in Pennsylvania and Ohio.\footnote{285} At times, the history of race and abortion has played a part in justifying policy makers’ support for these bills. For example, North Carolina House Majority Leader John Stam argued that “Planned Parenthood in general, and Margaret Sanger in particular, its founders, were the driving force behind that [eugenics] effort.”\footnote{286} In explaining his support for a defunding bill, Stam argued: “[W]e should not be supporting the perpetrators of that program.”\footnote{287}

Similar concerns animate proposed race-selection abortion laws. Arizona’s race-selection abortion lawriminalizes any abortion “sought based on the sex or race of the child or the race of a parent of that child.”\footnote{288} While women choosing an abortion for any purpose may not be penalized, the law covers anyone supposedly performing or “accepting monies to finance” such an abortion, as well as anyone who uses “force or the threat of force to intentionally injure or intimidate any person for the purpose of coercing” such

\footnote{281. On the state of defunding laws, see, for example, Naomi Wolf, \textit{What Really Lies Behind the “War on Women.”}, \textit{Guardian} (May 24, 2012), http://www.guardian.co.uk/commentisfree/us/2012/may/24/what-lies-behind-war-on-women-naomi-wolf. In addition, Maine, Arizona, and Tennessee have either passed such a law or introduced a bill to do so. See \textit{id}. For further study of the defunding movement, see Mary Ziegler, \textit{Sexing Harris: The Law and Politics of the Movement to Defund Planned Parenthood}, 60 \textit{Buff. L. Rev.} 701 & n.1 (2012).


283. See, e.g., infra notes 321-323 and accompanying text.


287. \textit{id}.

an abortion. Violators of the Arizona statute may be found guilty of a felony, and the statute explicitly creates a civil-rights action on behalf of the father of the aborted child. The statute protects against the possibility of race- (or sex-) selection abortion by requiring providers to sign an affidavit stating that the provider “has no knowledge that the child to be aborted is being aborted because of the child’s sex or race.”

In promoting the bill, Representative Steve Montenegro, the chief sponsor of Arizona’s race-selection law, stressed evidence that “abortions were being performed disproportionately among minority populations” and that “some clinics ha[d] been exposed as receiving financial contributions from sources that stipulate the money be used to slow the growth of minority populations.” Relying exclusively on the fact that a disproportionate number of women of color chose abortion, Montenegro implied that racism influenced not only the views of past family-planning activists but also the work of contemporary abortion providers. Representative Albert Hale, a Native American, explained his support for the bill by reference to the history of race, abortion, and population control—in his words, the “decimation of . . . Native Americans.”

Since 2011, similar arguments played a part in an unsuccessful Georgia campaign to ban race- and sex-selection abortions. The campaign featured billboards and advertising suggesting that minority children were becoming “an endangered species” by virtue of abortion used as a tool for population control.

Similarly, at the federal level, in early 2012, Representative Trent Franks (R-AZ) proposed the Prenatal Nondiscrimination Act (PRENDA) and justified his bill in similar terms. PRENDA would ban sex- and race-selection abortions, or those “performed for purposes of eliminating an unborn child because the child or the parent of the child is of an undesired race.” Like the Arizona law, PRENDA would provide civil and criminal penalties for anyone funding, performing, coercing or transporting a woman across state lines for the purpose of abortion...

289. *Id.*
290. The statute provides a similar action for maternal grandparents in cases in which the woman seeking such an abortion is a minor. See *Id.* § 13-3603.02(C).
291. *Id.* § 36-2157.
of obtaining a race- or sex-selection abortion. Significantly, PRENDA would also create a reporting requirement to law enforcement for any "physician, physician's assistant, nurse, counselor, or other medical or mental health professional" who is aware of "known or suspected violations" of the statute.

The bill drew on fears about population control, race, and abortion, asserting that "race-selection abortions have the effect of diminishing the number of minorities in the American population." Representative Franks put the point more baldly, reasoning that "[f]ar more black children, far more of the African American community is being devastated by the [abortion] policies of today than were being devastated by the policies of slavery." After House Republicans invoked a rule allowing for non-binding votes that fell short of the required two-thirds majority, the House voted 246 to 168 for the bill, raising the possibility that Congress will later revisit the issue. As had been the case with a federal defunding law, PRENDA had some bipartisan support, as twenty Democrats joined 226 Republicans voting for the bill.

Moreover, PRENDA, like the Arizona statute, would have more than a symbolic impact. Both laws would require abortion providers to interrogate women about their reasons for choosing an abortion, making more traumatic what is, for many, an already stressful experience. PRENDA would go further, allowing any health-care worker to report and potentially interfere with suspect decisions and giving virtually no guidance as to what would constitute such a suspicion or make it reasonable. As abortion-rights activists have argued, the scrutiny and reporting required by PRENDA would likely have a significant chilling effect on abortion.

For lawmakers considering defunding or race-selection legislation, the racial history and politics of abortion continue to remain a central issue. Legislators like Representative Franks suggest that a legacy of racism in the movements for population control and abortion rights still shapes the work of Planned Parenthood and other supporters of legal abortion. Opponents of the bills suggest that PRENDA represents a thinly disguised attempt to undermine abortion rights: for example, Representative John Conyers (D-MI) called

297. Id. § 3(a).
298. id.
299. Id. § 2(a)(2)(E).
300. Mencimer, supra note 294.
PRENDA “just the latest in a series of measures intended to chip away” at abortion rights.\(^{306}\)

Legislators supporting measures defunding Planned Parenthood or banning race-selection abortion use the history of the racial politics of abortion in several ways. First, they point to the historical relationship between the movements for eugenics, population control, and abortion as evidence that racism still influences the contemporary abortion-rights movement. In the case of defunding Planned Parenthood, the supposed influence of racism on the contemporary movement serves to justify laws denying public monies to an organization that still supposedly caters to racist supporters. By contrast, in the context of race-selection laws, legislators invoke the relationship between the movements for population control, eugenics, and abortion rights in arguing that race-selective abortions are a real problem deserving legislative attention rather than a smokescreen for narrowing abortion rights.

Legislators have raised important questions about the disproportionate number of women of color who seek abortions. As Khiara Bridges has shown, racial disparities in reproductive health care are real and disturbing.\(^{307}\) As Bridges argues, race impacts not only women’s access to reproductive health care but also the attitudes of providers and the quality of care available.\(^{308}\) But punishing abortion providers for the past relationship between the movements for population control and abortion rights will do little to address these disparities. The contemporary abortion-rights movement bears little resemblance to past drives for eugenics or population control. Even population controllers involved in the campaign to legalize abortion in the 1970s had little to do with the racially charged demands of eugenic legal reformers. It is worth using the law to tackle racial disparities in reproductive health care, but to the extent that they draw on a flawed historical account, existing legislative strategies promise to achieve little change.

The materials presented here also contribute to discussion of how courts ought to adjudicate constitutional challenges to laws defunding Planned Parenthood or race-selection abortions. As race-selection and defunding legislation cases reach the courts, opposing attorneys have started to contest the history of race and abortion. Consider, for example, Cansler, a case involving a challenge to North Carolina’s ban on Title X funding for organizations that provide abortions directly or through affiliates.\(^{309}\) In the Cansler litigation, Planned Parenthood argued, among other things, that the defunding law

\(^{306}\) \textit{Id.}

\(^{307}\) \textit{See generally} BRIDGES, \textit{supra} note 29 (illustrating how medical professionals socially construct race and establishing that this construction serves to marginalize women in broader conversations about Medicaid and infant mortality).

\(^{308}\) \textit{Id.}

represented an unconstitutional bill of attainder.\textsuperscript{310} Generally, to constitute a
bill of attainder, a statute must target specific individuals and impose
punishment on them without a judicial trial.\textsuperscript{311} The issue in \textit{Cansler} was
whether the legislature had a legitimate, nonpunitive purpose for its action.\textsuperscript{312}
Planned Parenthood invoked the legislative history of the defunding law to
indicate the punitive intent behind it.\textsuperscript{313} This history, as Planned Parenthood
indicated, suggested a legislative intent to punish past and present
"perpetrators" of racist programs.\textsuperscript{314} If Planned Parenthood no longer carries
out a racist program, the argument goes, punishing the organization for a real
(or fictitious) past would be punitive. By contrast, if the organization still
targeted minority groups, Planned Parenthood's bill-of-attainder argument
would have less force—a defunding law would express disapproval of an
immoral and possibly illegal practice rather than a mere desire to punish.
Distinguishing between a punitive and non-punitive legislative intent may well
require courts to determine whether accusations of past and present racism
carry factual weight.

The legitimacy of historical justifications of this kind will likely play a part
in upcoming defunding litigation. These cases fall partly under the Supreme
Court's jurisprudence on unconstitutional conditions.\textsuperscript{315} Under this line of
cases, the state cannot penalize the exercise of particular rights or deny benefits
so as to "produce a result which [it] could not command directly."\textsuperscript{316} The
defunding laws tend to differ from the program upheld by the Supreme Court in
\textit{Rust v. Sullivan}.\textsuperscript{317} \textit{Rust} ultimately upheld regulations promulgated by the
Secretary of Health and Human Services prohibiting the use of Title X funds
for programs in which abortion counseling, referrals, or promotion were
included.\textsuperscript{318} Defunding laws differ from the one upheld in \textit{Rust}, since those
laws reach organizations that carry out abortion-related speech through
"separate and independent projects" rather than limiting, in a particular
program, the use of funds for abortion-related speech.\textsuperscript{319} \textit{Rust} specifically left

\textsuperscript{310} Id. at 322.
\textsuperscript{311} See, e.g., United States v. Lovett, 328 U.S. 303, 315 (1946) ("[L]egislative acts, no matter
what their form, that apply either to named individuals or to easily ascertainable members of a group in
such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited
by the Constitution.").
\textsuperscript{312} See \textit{Cansler}, 877 F. Supp. 2d at 324-25.
\textsuperscript{313} See \textit{id}.
\textsuperscript{314} See \textit{id}.
\textsuperscript{315} Scholars have argued that this body of law is conceptually incoherent. See, e.g., Richard A.
REV. 4, 103 (1988); Kathleen M. Sullivan, \textit{Unconstitutional Conditions}, 102 HARV. L. REV. 1413, 1496
(1989); Cass R. Sunstein, \textit{Why the Unconstitutional Conditions Doctrine Is an Anachronism (with
\textsuperscript{316} Perry v. Sinderman, 408 U.S. 593, 597 (1972) (quoting Speiser v. Randall, 357 U.S. 513, 526
(1958)).
\textsuperscript{317} 500 U.S. 173 (1990).
\textsuperscript{318} Id. at 177-80.
\textsuperscript{319} Id. at 196-97.
open the constitutionality of laws punishing organizations that carry out abortion-related services or speech through separate projects.\footnote{320}{See id.}

Defunding laws vary in the degree to which they explicitly target Planned Parenthood. Some laws, like the one introduced in North Carolina, explicitly prohibit the allocation of Title X funds to “Planned Parenthood, Inc. or its affiliates.”\footnote{321}{H.B. 200 § 10.19, 2011 Leg., Reg. Sess. (N.C. 2011), 2011 N.C. Sess. Laws 117.} Others, like those in place in Texas or Arizona, explicitly deny funding to entities or facilities that perform elective abortions.\footnote{322}{For the Texas law, see 2011 Tex. Gen. Laws §§ 300, 335, 4025, 4020; 1 TEX. ADMIN. CODE § 354.1363(a) (2012). For the Arizona law, see ARIZ. REV. STAT. ANN. § 35-196.05 (West 2012).} By contrast, for the purpose of Title X funding, the Kansas statute gives priority to “public entities (state, county, local health departments and health clinics)” and, secondarily, to “non-public entities which are hospitals or federally qualified health centers that provide comprehensive primary and preventative care in addition to family planning services.”\footnote{323}{Planned Parenthood of Kan. & Mid-Mo. v. Brownback, 799 F. Supp. 2d 1218, 1223-24 (D. Kan. 2011).} The effect and apparent purpose of the law was still to defund Planned Parenthood; affidavits, press releases, and media comments cited by the Brownback court highlighted the state legislature’s intent to target the organization.\footnote{324}{See id.}

In making out an unconstitutional-conditions claim, Planned Parenthood affiliates in different states have argued, under the First and Fourteenth Amendments, that such defunding laws punish providers for “participation in unrelated [speech and] conduct.”\footnote{325}{See id. at 1234.} Planned Parenthood first asserts that defunding laws impermissibly penalize the organization and other abortion providers for their speech rights and political advocacy in favor of abortion rights.\footnote{326}{For arguments of this kind, see, for example, Brownback, 799 F. Supp. 2d at 1234; Planned Parenthood of Cent. N.C. v. Cansler, 804 F. Supp. 2d 482, 494 (M.D.N.C. 2011); Planned Parenthood of Ark. & E. Okla. v. Cline, No. CIV-12-1245-F, 2012 WL 6700364, at *5 (W.D. Okla. Dec. 24, 2012); Planned Parenthood of Greater Memphis Region v. Dreyzehner, 853 F. Supp. 2d 724, 733 (M.D. Tenn. 2012); and Planned Parenthood Ass’n of Hidalgo Cnty. Tex. v. Suehs, 828 F. Supp. 2d 872, 881-86 (W.D. Tex. 2012).} Alternatively, Planned Parenthood argues that the defunding laws constitute an undue burden on women’s right to abortion under Planned Parenthood v. Casey by making providers less accessible or making it impossible for women to obtain abortions in a particular jurisdiction.\footnote{327}{See, e.g., Cline, 2012 WL at *5.}

In defending themselves against these claims, states have to identify legitimate purposes behind their laws.\footnote{328}{See, e.g., Planned Parenthood Ass’n of Hidalgo Cnty. Tex. v. Suehs, 692 F.3d 343, 350 (5th Cir. 2012); Brownback, 799 F. Supp. 2d at 1233-35.} Texas and Kansas have argued that their defunding laws express a purpose to promote childbirth over abortion.\footnote{329}{See, e.g., Planned Parenthood of Mid-Mo. & E. Kan. v. Dempsey, 167 F.3d 458, 463-64 (8th Cir. 1999).}

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\footnote{320}{See id.}
\footnote{322}{For the Texas law, see 2011 Tex. Gen. Laws §§ 300, 335, 4025, 4020; 1 TEX. ADMIN. CODE § 354.1363(a) (2012). For the Arizona law, see ARIZ. REV. STAT. ANN. § 35-196.05 (West 2012).}
\footnote{324}{See id.}
\footnote{325}{Id. at 1234.}
\footnote{327}{See, e.g., Cline, 2012 WL at *5.}
\footnote{328}{See, e.g., Planned Parenthood of Mid-Mo. & E. Kan. v. Dempsey, 167 F.3d 458, 463-64 (8th Cir. 1999).}
\footnote{329}{See, e.g., Planned Parenthood Ass’n of Hidalgo Cnty. Tex. v. Suehs, 692 F.3d 343, 350 (5th Cir. 2012); Brownback, 799 F. Supp. 2d at 1233-35.}
This argument seems problematic, however, since the record in defunding cases tends to indicate that Planned Parenthood did not use funds under the statute for abortions and required affiliates providing those services to be legally and financially separated from clinics offering non-abortion care.\(^{330}\) Another possible state interest, as suggested by *Cansler*, is a legislative concern about the past and present racial biases plaguing abortion-rights advocacy and reproductive health care.\(^{331}\) Like the *Cansler* court, other judges may have to determine whether such concerns are sincere and represent a legitimate governmental purpose.

Similar issues will likely arise with respect to the constitutionality of race-selection laws. Under *Casey*, a statute may constitute an undue burden on a woman’s right to choose abortion if that law has the purpose or effect of creating a substantial obstacle to the woman’s ability to exercise that choice.\(^{332}\) As we have seen, opponents of PRENDA and other race-selection laws argue that the statutes reflect only an impermissible desire to obstruct access to abortion. By contrast, supporters of laws like PRENDA stress that the legacy of past racism in the abortion-rights movement has tangible and disturbing effects. In determining whether a race-selection law is unconstitutional under *Casey*, courts may have to determine whether concern about past and present racism is a legitimate state interest or a mere pretext for narrowing abortion rights.

In a variety of doctrinal areas, the courts may well have to evaluate the legitimacy of historically based legislative concerns about racism and the abortion-rights movement. The history offered here does not necessarily suggest that legislators promoting defunding or race-selection laws are insincere, and examination of legislative history or intent certainly requires case-by-case analysis of legislative text, history, and other conventional sources of statutory interpretation. Indeed, the historical claims forged by anti-abortion activists and legislators have power because they have some factual basis. In the 1970s, some population controllers did have ties to the eugenic legal reform movement, and the abortion-rights movement did work with groups interested in curbing population growth. Some supporters of contraception and abortion did use eugenic rhetoric or focus on reducing the size of poor or minority populations.

Just the same, a more nuanced historical perspective should reinforce concerns on the part of courts that the purpose of defunding or race-selection laws is punitive or discriminatory. While some population activists did have ties to the eugenic legal reform movement, many population controllers had different aims, priorities, and arguments than did eugenic reformers. And while

\(^{330}\) See, e.g., Suehs, 828 F. Supp. 2d at 884-86.

\(^{331}\) Planned Parenthood of Cent. N.C. v. Cansler, 877 F. Supp. 2d 310, 322 (M.D.N.C. 2012) (discussing Planned Parenthood’s claim that state legislators “invoked the supposed wrongdoing that Planned Parenthood and its founder, Margaret Sanger, allegedly engaged in decades ago”).

\(^{332}\) 505 U.S. 833, 877 (1992) (plurality opinion).
some abortion-rights activists used population-based claims or joined the population movement, the movements for abortion and population control differed considerably from one another. Legislators invoking concerns about race, eugenics, population control, and abortion speak to past experiences that defined very little about the past or present organized movement for abortion rights. The historical claims underlying such laws should raise judicial suspicions about legislative intent.

Abortion-rights activists themselves also stand to learn something from this analysis. Proponents of legal abortion tend to deemphasize the ways in which the movements for legal abortion and contraception have changed over time. For example, in discussing Margaret Sanger, Planned Parenthood describes her views as mirroring almost exactly those articulated by the movement today. Activists suggest that Sanger “established the principle that a woman’s right to control her own body is the foundation of her individual human rights.”

When abortion-rights activists do acknowledge the past relevance of eugenics or population control, they tend to downplay their importance. For example, in replying to Herman Cain’s accusations, Planned Parenthood claimed that “Sanger worked for social and racial justice when segregation was the law of the land,” while only conceding that Sanger “made statements that were wrong then and are wrong now.”

The abortion-rights movement should acknowledge the ways in which the contemporary abortion-rights movement differs both from the efforts of previous decades and from earlier campaigns for family planning or population control. Failing to acknowledge the past fuels anti-abortion claims that proponents of Roe have something to hide. Ignoring the past also denies credit to the activists who worked so hard to reframe abortion as a right for women. It was not inevitable that the battle for abortion rights would focus on equality or autonomy for women. The terms of today’s debate directly reflect the work of earlier movement members who saw women’s experiences as central to the abortion question. Acknowledging the movement’s evolution does justice to those who reframed the abortion-rights cause.

VIII. Conclusion

A better understanding of Roe’s role in the racial politics of abortion provides important historical context for ongoing political debates about Planned Parenthood, health-care funding, abortion, and race. Too often, these debates have turned on historical claims that are incomplete, oversimplified, or unclear. This Article offers an important historical foundation for current debates.

333. See Sanger, supra note 8.
334. Williams, supra note 8, at 47.
By reconsidering these claims in proper historical context, the Article shows that current claims offered by anti-abortion legislators and activists about race and abortion are flawed. In the years immediately before and after Roe, some abortion-rights organizations did use population-based arguments for abortion or form alliances with population organizations. Some population controllers, moreover, did have ties to the eugenic legal reform movement or work primarily to reduce population growth among the poor. Activists involved in the abortion debate, however, tended to focus on population growth among white, middle class individuals, stressing the importance of sexual freedom and environmental preservation. Belonging to the population-control movement did not necessarily mean that an activist was racially biased.

As importantly, some within the abortion-rights movement of the 1970s resisted the population frame of the issue, arguing that women’s rights arguments were more principled and resonant. The movements for population control and abortion were diverse in the 1970s and evolved a good deal over time.

At times, social movements, legislators, and judges contest the history of race, population control, and abortion as part of current battles about laws defunding Planned Parenthood or banning race-selection abortions. Proponents of these laws suggest that the past abortion-rights movement worked to reduce the size of the minority population and continues to do so today. In court, opponents of the laws point to these claims as evidence of an impermissibly punitive legislative purpose.

These struggles have raised the salience of important issues involving the history of the abortion-rights movement and racial disparities in abortion and other reproductive health care. As the materials here suggest, however, legislators cannot successfully address those disparities by punishing clinics. The population-control movement of the 1970s, and particularly those involved in the effort to legalize abortion, were not predominantly racist, and even in the decade after Roe, the two movements differed substantially from one another. Over the course of the 1970s, moreover, the abortion-rights movement changed a great deal, as feminists redefined the priorities, identities, and arguments of their organizations. Today, the connections between race, population control, and abortion are tenuous at best. Legislation based on this connection will do little to address any racial disparities in reproductive health care.

As defunding and race-selection laws continue to come before the courts, judges will have to determine whether or not legislators’ historical concerns constitute a legitimate government purpose. It may well be that legislators are sincerely concerned about racism, population control, and abortion, but as the materials here indicate, any concerns of this kind are overstated, and courts should carefully scrutinize the intentions of legislators who invoke the history of race as a justification for punishing providers.