

HOW RACE-SELECTIVE AND SEX-SELECTIVE BANS
ON ABORTION EXPOSE THE COLOR-CODED
DIMENSIONS OF THE RIGHT TO ABORTION AND
DEFICIENCIES IN CONSTITUTIONAL PROTECTIONS
FOR WOMEN OF COLOR

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ABSTRACT

The Supreme Court’s analysis of the fundamental right to abortion as articulated in *Planned Parenthood v. Casey* fails to take into account how race operates to restrict women of color’s ability to exercise their right to an abortion. This article argues that Casey’s undue burden test imposes a conceptual blind spot on the connection between race and access to abortion. Even though states are using race to burden women’s access to abortion, most recently in the form of sex and race-selective bans on abortion, the undue burden test does not take race into account, and, therefore, allows for a regulatory system that burdens women of color more heavily than it burdens white women.

Thus, the current legal framework obscures the impact of race and almost inevitably perpetuates racial stereotypes, disproportionate burdens, and racial inequalities so as to systematically ensure that the fundamental right to abortion is less secure for women of color.

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I.

INTRODUCTION

In 2013 alone, twenty-two states curbed access to abortion through seventy separate legislative acts.¹ Between 2000 and 2011 the number of states considered hostile to abortion rights, meaning that they enacted at least four major abortion restrictions, doubled from thirteen to twenty-six.² This upward trend raises the question of whether abortion laws are more hostile to some women than others—a question that I argue can be answered affirmatively for women of color.

This article demonstrates how the increased hostility to women of color's right to abortion is directly linked to a Supreme Court jurisprudence that is insensitive to how differences among women are relevant to the constitutional protection of women's right to abortion. Because the Court's jurisprudence has constructed a legal baseline that treats women as a homogenous group, it both obscures and allows for a system in which women of color are less secure in their ability to exercise their reproductive rights.

The consequence is a legal system that enables states to use race to regulate women's access to abortion in ways that reproduce historically oppressive, racially charged narratives about women of color. This is demonstrated by the fact that the rise in states' hostility to abortions rights has been accompanied by a rise in the overt use of race to prohibit abortion through the implementation of sex- and race-selective abortion bans, which, respectively, prohibit abortions performed on the basis of the sex or the race of the fetus. In combination, the Supreme Court's abortion jurisprudence and sex- and race-selective abortion bans work to produce a legal system in which some women's access to abortion is

1. Julie Rovner, *22 States Curb Access to Abortion*, NPR (Jan. 4, 2014, 7:15 AM), <http://www.npr.org/blogs/health/2014/01/03/259445809/22-states-curbed-access-to-abortion-in-2013>.

2. Rachel Benson Gold & Elizabeth Nash, *Troubling Trend: More States Hostile to Abortion Rights as Middle Ground Shrinks*, 15 GUTTMACHER POL'Y REV. 14, 15 (2012).

more severely restricted because of their race. This occurs even as states misleadingly position themselves as both anti-racist and pro-woman.

Part II of this article contextualizes the above argument by explaining why race matters to securing women's abortion rights. As later discussed, race is a social construct that places individuals into seemingly "natural" racial categories, which primarily function to enforce a system of racial hierarchy. The Supreme Court, however, treats race as primarily a natural category, not a social category. An examination of the history of women's reproductive rights illustrates how the concept of "race" has undermined women's secure access to these rights, and thus demonstrates why it is essential to reject the Supreme Court's formulation of race and instead adopt an approach that is sensitive to differences among women.

Part III lays out the Supreme Court's jurisprudence on abortion in order to show how it produces a racial bias by conceptually erasing the specific burdens placed on women of color. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a plurality of the Court held that the right to abortion is violated if a regulation imposes an undue burden—that is, whether "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion"³; a regulation that poses an undue burden is unconstitutional.⁴

I argue *Casey's* analysis of the burdens experienced by poor women exposes the Court's general rejection of intersectionality: a rejection revealed by a persistent disregard for the constitutional significance of a regulatory system that continues to disproportionately burden poor women and women of color. Intersectionality is the theory that assessments of discrimination and oppression should consider the ways in which multiple features of individuals' identities intersect and create unique sites of oppression.⁵ For instance, as Kimberlé Crenshaw has

3. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion).

4. *Id.* at 876-77.

5. Intersectionality theory has transformed thinking about gender, race, and other categories of oppression by illustrating how such factors come together to create unique points of oppression. See BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 6 (3d ed. 2015) ("It was a mark of race and class privilege, as well as the expression of freedom from the many constraints sexism places on working-class women, that middle-class white women were able to make their interests the primary focus of feminist movement and employ a rhetoric of commonality that made their condition synonymous with 'oppression.'"); Patricia Hill Collins, *It's All In the Family: Intersections of Gender, Race, and Nation*, 13 *HYPATIA* 62, 62, 77 (1998) (arguing that "the traditional family ideal functions as a privileged exemplar of intersectionality in the United States" that "provides a rich site for understanding intersectional inequalities" since the "family ideal" corresponds to inequalities in the U.S. shaped around ideas about rights, obligations, gender, race, place, reproduction, and kinship); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 *U. CHI. LEGAL F.* 139, 149 (using the analogy of a traffic accident to illustrate that just as a car at an intersection can be hit from multiple directions, black women's experience of discrimination can be multifaceted—a reality that is erased when the Court just looks at single categories like race or gender); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241 (1991) (showing through an analysis of domestic violence and rape how the use of "either/or paradigms" that construct feminist and

powerfully illustrated, focusing exclusively on “gender” discrimination obscures the multiple ways in which black women are marginalized as *black women* and not just as “women.”⁶ At its core, intersectionality refuses to treat women as if they are a monolithic group, and thus challenges frameworks in which white privileged women “quietly become the norm, or pure, essential woman.”⁷ The problem that I identify is that even though the right to an abortion is a fundamental right,⁸ the undue burden test sets up a “color-blind” legal standard by downplaying the legal relevance of differences among women. Thus, the undue burden test inevitably ignores how abortion laws more harshly regulate women of color.

Part IV situates sex-selective and race-selective abortion bans, which prohibit abortions performed on the basis of the sex or race of the fetus, within the broader racial discourses in which they occur. As later discussed, sex-selective laws have been justified by a racial narrative that ties an alleged rise of “gendercide” in the United States to the transmission of so-called “Asian” values purportedly resulting from an increase in migration and multiculturalism.⁹ Similarly, the driving force behind criminalizing race-selective abortions in Arizona, the first state to prohibit race-selective abortions, was a statistic showing that black women were having abortions at higher rates than other women. Supporters of the law claimed that this discrepancy was the result of a desire to reduce the population of black people—a claim that implicates both the women receiving

anti-racist identity politics operates to ignore intragroup differences and instead calling attention to the role of structural intersectionality (how the intersection of race and gender shapes women of color’s experiences), political intersectionality (how these experiences are marginalized by feminist and anti-racist politics), and representational intersectionality (the cultural construction of women of color)). Intersectionality theory has also been influential on an international level. *See, e.g.,* Comm. on the Elimination of Discrimination Against Women, Gen. Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, ¶ 18, U.N. Doc CEDAW/C/GC/28 (2010), <https://www1.umn.edu/humanrts/gencomm/CEDAW%20Gen%20rec%2028.pdf> (recommending an intersectional approach to addressing discrimination against women).

6. Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 5, at 141–46. To illustrate, Crenshaw criticizes the Ninth Circuit in *Moore v. Hughes Helicopters, Inc.* for upholding the District Court’s refusal to certify a black woman plaintiff as a class representative for a sex discrimination claim since the plaintiff had claimed she was discriminated against “only as a Black Female.” *Id.* at 144 (quoting *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983)). Crenshaw points out that the absence of any reference to race, in the case of white females, makes white women the standard for sex discrimination claims even though a white woman is not necessarily in a better position to represent “all” women in sex discrimination suits. *Id.* Such doctrinal approaches further marginalize black women by erasing their experiences. *Id.* at 146.

7. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 595 (1990). bell hooks points out how the assumption of commonality (using a rhetoric of common oppression) was the starting point for early feminists’ concept of “Sisterhood” and “was a false and corrupt platform disguising and mystifying the true nature of women’s varied and complex social reality. Women are divided by sexist attitudes, racism, class privilege, and a host of other prejudices.” HOOKS, *supra* note 5, at 43–44.

8. *Casey*, 505 U.S. at 869; *Roe v. Wade*, 410 U.S. 113, 153 (1973).

9. *See infra* notes 84–86 and accompanying text.

the abortions and the abortion providers who were accused of “targeting” black women for abortions.¹⁰

Part V considers how race- and sex-selective laws would hold up under the Supreme Court’s undue burden analysis. I demonstrate how the undue burden test would inevitably fail to capture the variety of ways in which women of color’s access to abortion is uniquely impeded by these laws.

Part VI first examines the potential of equal protection law to provide an alternative means of legal protection for women of color, and concludes that it cannot; like the undue burden test, there is a racial bias built into the Supreme Court’s equal protection jurisprudence. Second, this Part assesses a “motive” based approach to such bans, which sees a legal path for invalidating such laws on the grounds that they unconstitutionally target women’s motives pre-visibility.¹¹ I argue that this and other “motive” approaches not only miss the point, which is that race is central to women’s ability to exercise their right to an abortion, but also reinforce racial stereotypes about the so-called “motives” of women of color. In sum, both strategies are unlikely to adequately protect women of color’s abortion rights.

Part VII concludes with some suggestions on how to move forward in order to secure women’s abortion rights. Specifically, women’s rights advocates must make race central to their advocacy of abortion rights or otherwise contribute to a legal system built upon a racial hierarchy that provides weaker protections for women of color.

II.

WHY RACE MATTERS TO ABORTION LAW

This Part contextualizes why a consideration of race should be central to the legal analysis of women’s right to abortion. Specifically, as discussed below, race is a social construct that places individuals in different socio-political positions with respect to their legal rights. Although theorists disagree as to whether race was constructed as a post-hoc justification of slavery or the construction of race itself was what made slavery seem morally acceptable, they widely agree on two issues.¹²

The first is that the concept of race is inherently about organizing individuals along a racial hierarchy. Race has been used to justify slavery, genocide, segregation, forced sterilization, colonization, and has empowered our legal institutions to turn a blind eye to “private violence” like rape and lynching. Second, the concept of race does not denote any “natural categories,” such as “essences,” or

10. Brief for Petitioner-Appellant at 8–10, *NAACP v. Home*, 626 F. App’x 200 (9th Cir. 2015) (No. 13-17247), 2014 WL 1153838.

11. Justin Gillette, *Pregnant and Prejudiced: The Constitutionality of Sex- and Race-Selective Abortion Restrictions*, 88 WASH. L. REV. 645, 671–81 (2013).

12. See Bernard Boxill, *Introduction*, in *RACE AND RACISM* 1–2 (Bernard Boxill ed., 2003).

shared biological traits—instead the real work that race is doing is social.¹³ Thus, as Joe R. Feagin and Clairece Booher Feagin state, “[f]rom the social-definition perspective, characteristics such as skin color have no self-evident meaning; rather, they have *social* meaning.”¹⁴

Despite widespread acknowledgement by theorists and scientists that race is a social construct,¹⁵ race is often construed as a self-evident reality that shapes people’s “common sense” ways of organizing the world.¹⁶ It is treated as a natural and objective way of carving up the world despite the fact that there is nothing natural about the use of race as a way of classifying human beings. It is this seeming “natural” dimension to racial categorization that operates to normalize racial inequality by masking the fact that the primary function of race is to attribute to people certain moral and intellectual qualities in order to distribute (or deny) legal, social, and political goods.

Of particular relevance to securing women’s reproductive rights is that this “common sense” view of race as a natural category is the dominant view that informs the United States Supreme Court’s understanding of race. Specifically, when the Court deals directly with race, it tends to treat race like a fixed biological category, which, in turn, masks its social dimensions. This is most clearly demonstrated by the Court’s modern jurisprudence on equal protection, which treats race as inherently suspect precisely because the Court views it as an “immutable characteristic” people are born with.¹⁷

13. Naomi Zack, *Race and Philosophic Meaning*, in RACE AND RACISM 43, 43 (Bernard Boxill ed. 2003); see also Lucius Outlaw, *Toward a Critical Theory of Race*, in RACE AND RACISM 58, 70 (Bernard Boxill ed., 2003).

14. JOE R. FEAGIN & CLAIRECE BOOHER FEAGIN, RACIAL AND ETHNIC RELATIONS 6–9 (5th ed. 1996), reprinted in RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 73, 75 (Juan F. Perea, Richard Delgado, Angela P. Harris, Jean Stefancic & Stephanie M. Wildman eds., 2d ed. 2007).

15. See *id.* at 74.

16. Outlaw, *supra* note 13, at 65.

17. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (“[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth”); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 755 (3d ed. 2009); see also *Vieth v. Jubelirer*, 541 U.S. 267, 338 n.32 (2004) (Stevens, J., dissenting) (“Because race so seldom provides a rational basis for a governmental decision, racial classifications almost always fail to survive ‘rational basis’ scrutiny. But ‘[n]ot every decision influenced by race is equally objectionable’ When race is used as the basis for making predictive political judgments, it may be as reliable (or unreliable) as other group characteristics, such as political affiliation, economic status, or national origin. The fact that race is an immutable characteristic does not mean that there is anything immutable or certain about the political behavior of the members of any racial class Registered Republicans of all races sometimes vote for Democratic candidates, and vice versa.”) (internal citations omitted); *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J., concurring) (“Racial classifications must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision.”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978) (“Second, race, like gender and illegitimacy, . . . is an immutable characteristic which its possessors are powerless to escape or set aside.”). Additionally, recent cases involving affirmative action policies in higher education, have approvingly cited *Bakke* and reaffirmed that race classifications are subject to strict scrutiny. See

The Court's own history, however, demonstrates why this view is deeply flawed. For instance, in *Plessy v. Ferguson*, the Court upheld as constitutional a law that required separate railway carriages for whites and "colored races."¹⁸ Plessy was subjected to Jim Crow laws even though he was "seven eighths Caucasian and one eighth African Blood" and "the mixture of colored blood was not discernable in him."¹⁹ In upholding the Jim Crow law, the Court treated race as a legally valid and objectively reasonable way for states to classify people²⁰ The "one drop rule," validated in *Plessy*, was about who could be defined as "black" so as to legally deny those individuals full equality.²¹ What is illuminating about *Plessy* is that Plessy was not born "black"; Plessy was made "black" by social and legal norms seeking to maintain a racial hierarchy that placed "whites" at the top and "blacks" at the bottom.

Plessy demonstrates how race is in no sense an "immutable" characteristic," but a social category that has been constructed, in no small part, by our legal institutions. On the one hand, the Supreme Court has occasionally recognized the problematic nature of race classification, noting that "clear-cut [racial] classifications do not exist" and that scientists have concluded that "racial classifications are for the most part sociopolitical not biological in nature."²² On the other hand, by holding race out to be an immutable characteristic under its equal protection jurisprudence, the Court continues to perpetuate the idea that race is a self-evident, static, and natural category that one is simply born into.²³ Thus, the Supreme Court ignores its own participation in shaping racial classifications.²⁴

Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411, 2415 (2013) ("The Court concludes that the Court of Appeals did not hold the University to the demanding burden of strict scrutiny articulated in *Grutter* and *Regents of Univ. of Cal. v. Bakke* . . ."); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) ("We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny.").

18. *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896).

19. *Id.* at 538.

20. Justice Harlan's dissent, however, acknowledged the social and fluid nature of race. *Id.* at 552. ("It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States; some holding that any visible admixture of black blood stamps the person as belonging to the colored race; . . . others, that it depends upon the preponderance of blood But these are questions to be determined under the laws of each State, and are not properly put in issue in this case. Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.") (internal citations omitted).

21. *Id.* at 550–52.

22. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987).

23. *See supra* note 17.

24. Courts have been active participants in defining racial categories. *See United States v. Bhagat Singh Thind*, 261 U.S. 204, 210, 214–15 (1923) (denying naturalization benefits to a "high caste Hindu of full Indian blood" on the ground that the term "free white persons" should be interpreted according to common understanding to mean Caucasian); *Perkins v. Lake Cnty. Dep't of Utils.*, 860 F. Supp. 1262, 1265 (N.D. Ohio 1994) (deciding whether a plaintiff was an "American Indian" and thus, a member of a protected class under Title VII of the Civil Rights Act of 1964);

An examination of how race is historically linked to inequalities with respect to women's sexual and reproductive rights further underscores why race must be central to the legal analysis of women's right to abortion. The reproductive rights of women of color have been persistently embedded within a racialized framework that targets and undermines these rights. For instance, women of color have been subjected to forced sterilization and the conditioning of welfare benefits on a woman's "consent" to be sterilized.²⁵ Black women are disproportionately subjected to criminal penalties for drug-abuse during pregnancy.²⁶ Similarly, a study of mandatory state reporting requirements of substance abuse by pregnant women in one Florida county found that, despite very similar rates of substance abuse during pregnancy, black women were reported to health authorities at ten times the rate of white women.²⁷ And, Angela Harris also has highlighted that, throughout most of U.S. history, "as a legal matter the experience of rape did not even exist for black women" since, in being denied the "partial or at least formal protection white women had against sexual brutalization, black women had no legal protection whatsoever."²⁸ Thus, the law construed rape as something that could only happen to white women.

These examples illustrate how the absence of race as a conceptual tool raises serious questions about the law's ability to secure the reproductive rights of women of color given the long and continued history of race being used as a legal tool of oppression.

Both the social nature of race and its implications for women's equality demonstrate why intersectionality theory must be the starting point for assessing women's right to abortion. As Patricia Hill Collins explains, "[i]ntersectional paradigms remind us that oppression cannot be reduced to one fundamental type, and that oppressions work together in producing injustice."²⁹ As history shows,

Ex parte Shahid, 205 Fed. 812, 815 (E.D.S.C. 1913) (finding that "free white persons" means persons of European habitancy and descent for the purpose of obtaining naturalization benefits).

25. KATHERINE T. BARTLETT, DEBORAH L. RHODE, & JOANNA L. GROSSMAN, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 599, 686 (6th ed. 2013); *see also* ANGELA DAVIS, *WOMEN, RACE, AND CLASS* 202–21 (1982) (illustrating how the racist history of the birth control movement, as demonstrated by Margaret Sanger's racially informed advocacy of eugenics and state-sponsored forced sterilization, as well as a failure to address the concerns of working class women, created an ideological framework that helped to explain women of color's absence from the early birth control and abortion rights movements).

26. CTR. FOR REPRODUCTIVE RIGHTS, *PUNISHING WOMEN FOR THEIR BEHAVIOR DURING PREGNANCY: AN APPROACH THAT UNDERMINES WOMEN'S HEALTH AND CHILDREN'S INTERESTS* 2 (2000), http://www.reproductiverights.org/sites/default/files/documents/pub_bp_punishingwomen.pdf (finding that the majority of women prosecuted for alleged drug use or other actions during pregnancy are low-income women of color and that, although courts tend to reject such charges, in many cases women are pressured into pleading guilty or accepting plea bargains).

27. Ira J. Chasnoff, Harvey J. Landress & Mark E. Barrett, *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 *NEW ENG. MED.* 1202, 1204 (1990).

28. Harris, *supra* note 7, at 599.

29. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 21 (2d ed. 2009).

forced sterilization was not simply a “gender” problem, but a practice informed by race and class.³⁰ To ignore such realities, is, as Angela Harris states, to reduce differences among women to mere “nuances” in relation to a monolithic universal category of “women,” which is typically white and privileged.³¹ This is because failing to take differences among women seriously produces theories that can only really capture the experiences of women who are not significantly disadvantaged by race, class, or other factors. With this in mind, I now turn to the current state of abortion law in order to show how these problems arise within the context of *Casey*’s shaping of and application of the undue burden test.

III.

THE CURRENT LANDSCAPE OF THE RIGHT TO ABORTION

The right to abortion is a fundamental right protected under the due process clause of the Fourteenth Amendment.³² Although the Supreme Court has continued to uphold the right to abortion as a fundamental right, the Court has significantly shifted the constitutional landscape since *Roe* first recognized the right. To situate the current jurisprudence on the right to abortion, it is necessary to begin with *Roe* to demonstrate how constitutional protections for the right to abortion were reformulated and subsequently weakened.³³

In *Roe*, the Supreme Court found that the right to abortion is protected under the umbrella of privacy rights contained within the due process clause, which includes only those “personal rights that can be deemed fundamental or implicit in the concept of ordered liberty.”³⁴ *Roe* established two constitutional protections for the right to an abortion, which would later be rejected by the Court. First, *Roe* applied strict scrutiny, the highest level of review.³⁵ Second, *Roe* implemented the following trimester framework: abortion could not be banned prior to the first trimester; regulations to promote the states’ interest in the health of the mother were permitted after the first trimester; and regulations to promote the states’ interest in life were permitted after viability.³⁶

While *Roe* initially recognized the right to an abortion as a constitutionally protected right, *Casey* provides the current constitutional test for whether the right has been infringed. On the one hand, *Casey* affirmed what it deemed to be

30. DAVIS, *supra* note 25, at 215–21 (discussing the targeting of black, Puerto Rican, and Native American women and welfare recipients for forced sterilization); *see also* Bartlett, Rhode & Grossman, *supra* note 25, at 686.

31. Harris, *supra* note 7, at 595–96.

32. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

33. *See generally* Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women’s Privacy*, 16 WM. & MARY J. WOMEN & L. 291, 309–23 (2010) (discussing how *Casey*’s undue burden standard, especially as later interpreted by Justice Kennedy, justified greater intrusion into the privacy interest of a woman seeking an abortion).

34. *Roe*, 410 U.S. at 152 (internal citations omitted).

35. *Id.* at 154–55.

36. *Id.* at 164–65.

one aspect of *Roe*'s "essential" holding, which it understood to be that states cannot prohibit women from having an abortion prior to viability.³⁷ On the other hand, *Casey* significantly departed from *Roe* by replacing the strict scrutiny test with the undue burden test, a less rigorous standard of review, and by rejecting *Roe*'s trimester framework.³⁸

Casey's departure from *Roe* paved the way for more government intervention and regulation of abortion. The Court reasoned that *Roe*'s trimester framework "misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life."³⁹ By re-conceptualizing the various interests involved, *Casey* opened the door for greater state regulation throughout pregnancy to promote states' interest in life, what the Court calls "normal childbirth,"⁴⁰ in addition to promoting the health of the woman seeking the abortion.⁴¹ The Court's protection of the state's alleged interest in "normal childbirth," included regulations to ensure a woman's choice is "thoughtful and informed" by exposing her to philosophical and social arguments in favor of childbirth.⁴² Thus, *Casey* bolstered the government's ability to regulate for what it labeled as social, philosophical, and health reasons.⁴³ There can be no doubt that the increase in regulatory restrictions governing abortion is grounded in *Casey*.⁴⁴

37. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 879 (1992).

38. *Id.* at 871–74.

39. *Id.* at 873. In place of *Roe*'s trimester framework, *Casey* draws the line at viability. Pre-viability, the state cannot ban abortion and regulation of abortion is measured under the undue burden test. Post-viability, the state can restrict abortion so long as there is an exception for the health and safety of the mother. Yet, even during the pre-viability stage, the Court found that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Id.* at 846. It is clear that the Court's determination that *Roe* gave too little weight to the states' interests largely drives its rejection of *Roe*'s trimester framework. *Id.* at 875 ("[T]he Court's experience applying the trimester framework has led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision. Those decisions went too far because the right recognized by *Roe* is a right 'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.' Not all governmental intrusion is of necessity unwarranted; and that brings us to the other basic flaw in the trimester framework: even in *Roe*'s terms, in practice it undervalues the State's interest in the potential life within the woman.") (citation omitted).

40. *Id.* at 872.

41. *Id.* at 871 (recognizing *Roe*'s allowance of state regulation for the health of a woman)

42. *Id.* at 872–73.

43. See, e.g., Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 264–65, 354–81 (1992) (analyzing how the regulation of abortion is impacted by more than just an interest in the health of the mother and the life of the fetus but also by normative judgments about women's sexuality and biases that see women's natural roles as mothers).

44. States have justified a variety of regulations under this framework, including mandatory counseling, ultrasounds, waiting periods, hospital admitting privileges. See *An Overview of Abortion Laws*, GUTTMACHER INST., http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf (last visited June 14, 2016).

Casey also changed the standard of review from strict scrutiny to the current test, the undue burden test, which requires a less rigorous standard of review.⁴⁵ Under this test, an undue burden occurs when “a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”⁴⁶ When a regulation creates an undue burden, states have unconstitutionally infringed on the right to abortion.⁴⁷ Under this new test, *Casey* upheld the following restrictions: informed consent accompanied by a twenty-four-hour waiting period;⁴⁸ requiring the consent of at least one minor’s parent (with an allowance for judicial bypass);⁴⁹ and a reporting requirement for abortion clinics.⁵⁰ As discussed in more detail below, the Court did strike down a spousal notification requirement that required a woman to notify her spouse that she was seeking an abortion,⁵¹ stating that it posed an undue burden because it would likely “prevent a significant number of women from obtaining an abortion.”⁵² Importantly, the Court was not referring to “a significant number of women” in terms of women as a whole, but rather to a significant

45. *Casey*, 505 U.S. at 876.

46. *Id.* at 877. In *Whole Woman’s Health v. Hellerstedt*, the court held that the undue burden test articulated in *Casey* requires courts to consider the burden conferred by a regulation along with its alleged benefits and the court also rejected the rational basis standard, which the Fifth Circuit adopted in its undue burden analysis. 136 S. Ct. 2292, 2309-10 (2016). Prior to this decision, lower courts have struggled with how to operationalize *Casey*’s undue burden test. The Fifth and Sixth Circuits have rejected any analysis of whether a regulation *actually furthers* the state’s interest, while the Ninth and Seventh Circuits have adopted the opposite approach. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 594 (5th Cir. 2014) (“Nothing in the Supreme Court’s abortion jurisprudence deviates from the essential attributes of the rational basis test, which affirms a vital principle of democratic self-government. It is not the courts’ duty to second guess legislative factfinding, ‘improve’ on, or ‘cleanse’ the legislative process by allowing relitigation of the facts that led to the passage of a law.”) (citations omitted); *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 514–18 (6th Cir. 2012). *Contra* *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 914 (9th Cir. 2014) (“The Fifth and Sixth Circuits’ approach fails to recognize that the undue burden test is context-specific, and that both the severity of a burden and the strength of the state’s justification can vary depending on the circumstances. We adhere to the approach . . . which requires us to weigh the extent of the burden against the strength of the state’s justification in the context of each individual statute or regulation.”) (citations omitted); *see also* *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013) (“The cases that deal with abortion-related statutes sought to be justified on medical grounds require not only evidence (here lacking as we have seen) that the medical grounds are legitimate but also that the statute not impose an ‘undue burden’ on women seeking abortions. The feebler the medical grounds, the likelier the burden, even if slight, to be ‘undue’ in the sense of disproportionate or gratuitous.”) (citations omitted). After laying out the correct application of the undue burden test, *Whole Woman’s Health* found Texas’s abortion restrictions in H.B. 2 had posed an undue burden. *See infra* notes 67-69 and accompanying text.

47. *Casey*, 505 U.S. at 877.

48. *Id.* at 885–87.

49. *Id.* at 899.

50. *Id.* at 900–01.

51. *Id.* at 893–95.

52. *Id.* at 893.

number of women who were married and threatened by spousal domestic violence.⁵³

A. The Undue Burden Test is Conceptually Insensitive to Differences Among Women

In reflecting on the legal history of rape laws, Catharine MacKinnon states that “[r]ape cases finding insufficient evidence of force reveal that acceptable sex, in the legal perspective, can entail a lot of force.”⁵⁴ In a similar fashion, under the undue burden test an acceptable level of burden is one in which a lot of burden is placed on only some groups of women. This is because *Casey*’s undue burden test is indifferent to differences among women, particularly those differences that are representative of socially marginalizing features of women’s identities, such as race. It is this conceptual blind spot built into the Court’s legal analysis that makes it easier for states to regulate abortion unevenly.

Even pre-*Casey*, the Court failed to grasp the legal importance of the fact that all women are not actually similarly situated. For example, as Pamela Bridgewater has stated, “when the issue of class reappeared [post-*Roe*] in the jurisprudential landscape of the modern reproductive rights doctrine, it did so in *Maher v. Roe*⁵⁵ and *Harris v. McRae*⁵⁶—two cases that limited public funding of abortions for women on public assistance.”⁵⁷ Given that women of color tend to rely more heavily on such assistance, the Court’s failure to take seriously the interests of poor women is necessarily interlinked with race.⁵⁸ As Jill Adams and Jessica Arons have argued, the Court’s failure to take an intersectional approach in assessing restrictive abortion laws that hit poor women of color at the intersection of race, class, and gender renders those women triply vulnerable.⁵⁹

Casey has only reinforced a lack of consideration for the legal relevance of intersectionality. For instance, *Casey* upheld the twenty-four hour waiting period even though the Court accepted that the waiting period would have the effect of

53. *Id.*

54. CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF STATE 173 (1989).

55. *Maher v. Roe*, 432 U.S. 464, 480 (1977) (upholding a state law that prohibited the use of Medicaid funds to pay for non-therapeutic abortions).

56. *Harris v. McRae*, 448 U.S. 297, 326 (1980) (upholding the Hyde Amendments, a federal law that prohibited the use of funds for medically necessary abortions except to save the life of the mother or in cases of promptly reported rape or incest).

57. Pamela Bridgewater, Gonzales v. Carhart: *Continuing the Class Critique of the Reproductive Rights Doctrine and Movement*, 59 S.C. L. REV. 827, 837 (2008).

58. Jessica Arons & Lindsay Rosenthal, *How the Hyde Amendment Discriminates Against Poor Women and Women of Color*, CTR. FOR AM. PROGRESS (May 10, 2013), <https://www.americanprogress.org/issues/women/news/2013/05/10/62875/how-the-hyde-amendment-discriminates-against-poor-women-and-women-of-color/>.

59. Jill E. Adams & Jessica Arons, *A Travesty of Justice: Revisiting Harris v. McRae*, 21 WM. & MARY J. WOMEN & L. 5, 50–53 (2014). Adams and Arons make this point in the context of raising an equal protection critique of *Harris v. McRae*. This same point is also relevant to the Court’s due process analysis pre- and post-*Casey*.

“increasing the cost and risk of delay of abortions,” and that in practice the delay is typically much longer than twenty-four hours.⁶⁰ Nor did the finding that the requirement would be more burdensome “for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulties explaining their whereabouts” convince the Court that the regulations would create an undue burden.⁶¹

Critics have raised objections to the disparate adverse impact that abortion laws have on poor women. For instance, waiting periods are particularly harsh for rural women who have greater difficulties in obtaining transportation.⁶² These women are also increasingly subjected to heightened burdens due to regulations that have caused clinics to close.⁶³ Such closures have resulted in travel times to other cities of up to four or five hours.⁶⁴ Combined with waiting periods, such regulations impose overlapping heavy burdens upon poor women.⁶⁵ As critics point out, an affluent professional woman is not similarly situated to a pregnant, single, 18-year-old woman who is still in school and living in the rural south.⁶⁶

Despite such real-world difficulties faced by poor women, the Court’s most recent decision on abortion rights, *Whole Woman’s Health v. Hellerstedt*, reflects how the undue burden test is constructed to specifically ignore such factors. There, the Court struck down two abortion laws that resulted in the closure of half of Texas’ abortion clinics, reasoning in part that such closures “meant fewer doctors, longer waiting times, and increased crowding,”⁶⁷ without any discussion of the greater burden that such factors place on poverty-stricken women.⁶⁸ This occurred even though the poverty impacts of these regulations were raised and discussed by the district court, when it concluded that the regulations uncon-

60. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885–86 (1992).

61. *Id.* at 886.

62. Lisa R. Pruitt, *Toward a Feminist Theory of the Rural*, 2 UTAH L. REV. 421, 470–73 (2007).

63. These include doctor admitting privileges requirements as well as requirements that clinics meet ambulatory surgical center standards. See *Petition for a Writ of Certiorari, Whole Woman’s Health v. Hellerstedt*, 2015 WL 5169200, at *4–5 (No. 15-274) (2015).

64. Manny Fernandez, *Abortion Law Pushes Texas Clinics to Close Doors*, N.Y. TIMES (Mar. 6, 2014), <http://www.nytimes.com/2014/03/07/us/citing-new-texas-rules-abortion-provider-is-shutting-last-clinics-in-2-regions.html>.

65. *Id.*

66. Walter Dellinger & Gene B. Spelling, *Abortion and the Supreme Court: The Retreat From Roe v. Wade*, 138 U. PA. L. REV. 83, 102 (1989). This problem has recently been exacerbated by the accelerating pace of abortion laws. For instance, abortion laws in Mississippi have left the state with only one abortion clinic, which is currently fighting to stay open because doctors performing abortions have been unable to satisfy newly mandated hospital admitting privileges requirements. Debbie Elliott, *Mississippi’s Lone Abortion Clinic Fights to Remain Open*, NPR (Apr. 28, 2014), <http://www.npr.org/2014/04/28/307487327/mississippi-lone-abortion-clinic-fights-for-its-survival>.

67. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2313 (2016).

68. See *id.* at 2309–18.

stitutionally imposed an undue burden on women.⁶⁹ Thus, the reasoning in *Whole Woman's Health* reflects the “logic” of *Casey*'s formulation of the undue burden test, which imagines that burdens can be assessed without consideration of the intersection of poverty and gender.

There is also a serious inconsistency in *Casey*'s application of the undue burden test with respect to its treatment of class (or poverty-specific) burdens. As Erwin Chemerinsky has pointed out, in striking down the spousal notification requirement, the Court reasoned that an undue burden analysis “does not end with one percent of women upon whom the statute operates; it begins there” and that the “proper focus on the constitutional inquiry is the group for whom the law restricts, not the group for whom the law is irrelevant.”⁷⁰ Chemerinsky concludes that it is thus inconsistent and “unclear why the Court felt that [the waiting period's particular burden on poor women] was not enough to meet the undue burden test.”⁷¹

The Court's willingness in *Casey* to strike down laws that disproportionately impact married women threatened by spousal domestic violence shows that the Court recognizes that women are not similarly situated with respect to the impact of abortion laws. But the Court is unwilling to apply this same type of analysis under the undue burden test to regulations that disproportionately affect traditionally marginalized groups of women, such as poor women. Instead, the Court treats such burdens as marginal:

The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.⁷²

The Court viewed such regulations as “regulations which in no real sense deprived women of the ultimate decision.”⁷³ But, it is only within a framework that treats women as a monolithic group that making abortion more expensive and increasing travel times needed to obtain an abortion can be regarded as “incidental” burdens that in “no real sense” deprive women of the right to an abortion. The Court's continual refusal to take seriously the intersection of gender and class necessarily implicates an accompanying racial blindness given women

69. *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 373, 383 (W.D. Tex. 2014) (“The act's two requirements erect a particularly high barrier for poor, rural, or disadvantaged women throughout Texas, regardless of the absolute distance they may have to travel to obtain an abortion.”); *see also* Brief for Petitioners at 49–50, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274), <http://www.scotusblog.com/wp-content/uploads/2016/01/15-274-ts-reprint.pdf> (noting the district court's discussion of same).

70. CHEMERINSKY, *supra* note 17, at 832 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992)).

71. *Id.*

72. *Id.* at 874.

73. *Casey*, 505 U.S. at 875.

of color's overrepresentation among the poor.⁷⁴ Thus, *Casey's* legal erasure of the salience of poverty is implicitly a legal erasure of the salience of race.

The poverty critiques show that the Court's jurisprudence on abortion tends to fall within the monolithic, or "nuance" framework. Given that the undue burden test is not sensitive to differences among women, especially those that operate as points of marginalization, it will continue to be "color-blind" and uphold a regulatory system that allows women of color to be legally subjected to disproportionate burden and stigma. An examination of laws prohibiting sex-selective and race-selective abortion shows how regulations that impose burdens on women of color may overlap with, but can also be distinct from, regulations that disproportionately impact poor women.

IV.

REGULATIONS PROHIBITING SEX AND RACE-SELECTIVE ABORTIONS

The problem with a color-blind lens is that it simply fails to capture subtle and not so subtle forms of color-coded inequalities. An examination of prohibitions on sex-selective and race-selective abortions reveals that abortion rights are increasingly organized along a color-coded racial hierarchy. That hierarchy is made both intelligible and invisible by racial stereotypes that draw upon a long history informed by demeaning portrayals of women of color as culturally inferior. In this way, race continues to operate as it has historically—as an institution that ensures the reproductive rights of women of color are less secure. This Part examines the framework in which advocacy for sex-selective bans on abortion have taken place and then examines Arizona's prohibition on race-selective abortion.

A. *Sex-Selective Bans on Abortion*

Currently, nine states ban sex-selective abortions.⁷⁵ Sex-selective abortions are abortions sought because of the sex of the fetus. Globally, sex-selective abortions have been criticized due to overuse of the practice with respect to female

74. See *NWLC Analysis of 2014 Census Poverty Data*, NAT'L WOMEN'S L. CTR., <http://www.nwlc.org/nwlc-analysis-2013-census-poverty-data> (last visited June 14, 2016).

75. Indiana is the most recent state to prohibit sex-selective abortions. Merrit Kennedy, *Indiana Governor Signs New Abortion Restrictions Into Law*, NPR (Mar. 25, 2016, 11:55 AM), <http://www.npr.org/sections/thetwo-way/2016/03/25/471842196/indiana-governor-signs-new-abortion-restrictions-into-law>. However, a district court has issued a preliminary injunction. Mitch Smith & Erik Eckholm, *Federal Judge Blocks Indiana Abortion Law*, N.Y. TIMES (June 30, 2016), <http://www.nytimes.com/2016/07/01/us/federal-judge-blocks-indiana-abortion-law.html>.

Other states include Illinois, Pennsylvania, Oklahoma, Arizona, North Dakota, Kansas, North Carolina, and South Dakota. GUTTMACHER INST., STATE POLICIES IN BRIEF: ABORTION BANS IN CASES OF SEX OR RACE SELECTION OR GENETIC ANOMALY (2016), http://www.guttmacher.org/statecenter/spibs/spib_SRSGAAB.pdf. Illinois' ban has been enjoined pre-viability, but is still in effect post-viability.

fetuses.⁷⁶ Such global issues have provided the backdrop for the recent rise in prohibitions on sex-selective abortions in the United States, with proponents of the bans typically pointing to the need to protect female fetuses from the same sort of global gender biases that devalue women relative to men.⁷⁷

Pointing to a general legislative trend in the formulation of these laws, the National Asian Pacific American Women's Forum ("NAPAWF") has identified three major overlapping features that are typical of sex-selective bans in the U.S.: (1) banning abortion in cases where the abortion provider knows that a woman is seeking an abortion on the basis of the sex of the fetus; (2) banning the use of threat or force to coerce a woman into obtaining a sex-selective abortion; and (3) banning the solicitation or acceptance of funds in order to finance sex-selective abortions.⁷⁸ While the number of states banning sex-selective abortions currently stands at eight, as many as fourteen other states have considered or attempted to pass similar legislation.⁷⁹

Laws against sex-selective abortion are facially race neutral, as they target abortions based on the sex of the fetus, but a closer look at legislative processes and popular discourses reveals that such laws are built upon a racial ideology that sees Asian women as culturally backwards and threatening to gender equality. To begin, pro-life advocates have justified the need for these laws as arising from the threat of Asian values through migration of Asian women to the United States. A typical claim made by one prominent pro-life advocate is that the practice of sex-selective abortions has "become more common with Indian, Chinese, Vietnamese, and Korean immigrants coming on shore."⁸⁰ Such claims have been

76. Evidence of global practices of sex-selective abortion is usually grounded in skewed female to male ratios, though these skewed ratios also reflect other practices, such as gender biased prenatal selection in favor of boys. See Sneha Barot, *A Problem-and-Solution Mismatch: Son Preference and Sex-Selective Abortion Bans*, 15 GUTTMACHER POL'Y REV. 18, 18 (2012); OHCHR, UNFPA, UNICEF, UN WOMEN & WHO, PREVENTING GENDER-BIASED SEX SELECTION: AN INTERAGENCY STATEMENT 1–2 (2011), http://whqlibdoc.who.int/publications/2011/9789241501460_eng.pdf.

77. NAT'L ASIAN PAC. AM. WOMEN'S FORUM, RACE AND SEX SELECTIVE ABORTION BANS: WOLVES IN SHEEP'S CLOTHING I (2013), https://napawf.org/wp-content/uploads/2009/10/PRENDA_IssueBrief_8.5_Final.pdf.

78. *Id.* at 3.

79. Including Oregon, California, Utah, Wisconsin, Florida, New York, Indiana, Iowa, Mississippi, Missouri, Virginia, West Virginia, Colorado. See *Legislative Tracker, Sex- or Race-Selective Bans*, REWIRE (Mar. 18, 2016), <https://rewire.news/legislative-tracker/law-topic/sex-or-race-selective-bans/>. Although Utah has yet to formally introduce legislation, at least one legislator has pushed for the introduction of such legislation. See Robin Marty, *Utah Legislator Pushes for Sex-Selective Abortion Ban*, REWIRE (June 14, 2012, 8:02 AM), <https://rewire.news/article/2012/06/14/utah-to-consider-gender-based-abortion-ban/>.

80. Dayna Lovelady, *At Least Nine States Considering Bills to Ban Sex Selective Abortions*, CHRISTIAN POST (Mar. 6, 2013), <http://www.christianpost.com/news/at-least-9-states-considering-bills-to-ban-sex-selective-abortions-91318/>.

continually reiterated in the popular media and during attempts to pass legislation at the federal level.⁸¹

Rather than distance themselves from such claims, legislators on the state and federal level have embraced them. NAPAWF has highlighted how in the most recent attempt to pass a federal ban on sex-selective abortions, the Prenatal Non Discrimination Act, legislators explicitly located the problem in China and India while simultaneously stating that “some Americans are exercising sex-selection abortion practices within the United States consistent with discriminatory practices common to their country of origin, or the country to which they trace their ancestry.”⁸²

At the state level, Arizona legislators also relied heavily on the problem of sex-selection in China and Asia, along with the alleged influx of such values through increased immigration to promote its law.⁸³ As one Arizona senator stated, “[w]e are a multicultural society now and cultures are bringing their traditions to America that really defy the values of America, including cultures that value males over females.”⁸⁴ In North Dakota, the legislative record reveals that the same logic was used to promote its bill: one anti-choice advocate stating that the “use of abortion as a means of sex selection is a major social problem in a number of Asian countries, including China and India,”⁸⁵ while another claimed that, “[b]ecause of Gendercide, there are now 37 million more males living in China than women.”⁸⁶ Sex-selective abortion was also labeled as a modern form of eugenics, with one supporter stating that sex-selective abortions are “only the beginning of the eugenic selection.”⁸⁷

South Dakota is the most recent state to ban sex-selective abortions.⁸⁸ Following the lead of other states like Arizona and North Dakota, one state repre-

81. See Jennifer Steinhauer, *House Rejects Bills to Ban Sex Selective Abortions*, N.Y. TIMES (May 31, 2012), <http://www.nytimes.com/2012/06/01/us/politics/house-rejects-bill-to-ban-sex-selective-abortions.html> (quoting a claim by a spokeswoman for Susan B. Anthony List that three studies had documented an increase in sex-selective abortion, largely among a small number of women from various immigrant groups); BRYAN CITRO, JEFF GILSON, SITAL KALANTRY & KELSEY STRICKER, *REPLACING MYTH WITH FACTS: SEX-SELECTIVE ABORTION LAWS IN THE UNITED STATES* 15–20 (2014), <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2536&context=facpub> (debunking studies cited by proponents of sex-selective abortion bans and presenting recent national data of sex ratios at birth of Chinese, Indian, and Korean immigrants, which show that these groups have *more* girls overall than white Americans).

82. CITRO, GILSON, KALANTRY & STRICKER, *supra* note 81, at 15.

83. Brief of the Petitioner-Appellant, *supra* note 10, at 6, 8–10.

84. *Id.* at 9 (citations omitted).

85. 2013 H. Standing Comm. Minutes: Hearing on H.B. 1305 Before the H. Human Servs. Comm., 63rd Legis. Assembly no. 5 (N.D. 2013) (statement of Paul Maloney, Director of North Dakota Right to Life).

86. *Id.* no. 6 (statement of Janne Myrdal, State Director for Concerned Women for America (CWA) of North Dakota).

87. *Id.* no. 2 (statement of William Schuh, father of child with Down Syndrome who claimed children like his were being “systematically exterminated before birth”).

88. HB 1162 was signed into law on March 31, 2014. S.D. CODIFIED LAWS § 34-23A-64 (2016).

sentative supporting the law stated, “[m]any of you know I spent 18 years in Asia. And sadly, I can tell you that the rest of the world does not value the lives of women as much as I value the lives of my daughters.”⁸⁹ Similarly, another state representative stated that “[t]here are cultures that look at sex-selection as being culturally okay. And I will suggest to you that we are embracing individuals from some of the cultures in this county, or in this state.”⁹⁰ During legislative hearings, the House heard similar testimony from pro-life advocates who argued that the changing demographics of South Dakota had made sex-selective abortions in South Dakota a problem.⁹¹ Despite the persistent pattern of singling out Asian women, one state representative claimed that, “the [South Dakota] bill has nothing to do with race.”⁹²

In reality, sex-selective laws are based on essentialist racial narratives that signal which women deserve greater scrutiny when attempting to access abortion services. The underlying logic of these laws is that Asian women are a threat to gender equality because of their inferior “cultural” values. The problem with such narratives is that they imagine the existence of a homogenous set of values placed into a unitary category of “Asian values,” generally defined by the devaluing of women and girls. This narrative is nothing new as it draws upon a history of colonialist representations in which non-whites and non-Westerners are perpetually lagging behind Western countries. As Maneesha Deckha has pointed out, with respect to the parallel Canadian discourse on pre-implantation sex-selection, labeling sex-selection as a third-world practice becomes shorthand for signaling an inherently misogynist culture.⁹³

The justificatory scheme behind banning sex-selective abortion in the U.S. relies on erasing difference by locating the problem squarely within the alleged backwards and anti-women cultures of India and China. That this is a continuation of old colonialist representations is underscored by the fact that “[m]ale-biased ratios can be found in many countries throughout the world, including those with predominantly white populations.”⁹⁴ Yet despite this fact, China and India, along with immigrants from these countries, continue to be singled out, thus perpetuating the myth that the problem of sex-selection is solely a problem

89. Molly Redden, *We Need to Ban Sex-Selective Abortions Because of Asian Immigrants*, MOTHER JONES (Feb. 25, 2014), <http://www.motherjones.com/politics/2014/02/south-dakota-state-nelson-ban-sex-based-abortions-because-asian-immigrants>.

90. *Id.* (citations omitted).

91. *Id.* (citations omitted).

92. Dave Andrusko, *Ban on Sex-Selection Abortion Passes Key South Dakota Senate Committee*, NAT'L RIGHT TO LIFE NEWS TODAY, (Mar. 5, 2014), <http://www.nationalrighttolifenews.org/news/2014/03/ban-on-sex-selection-abortion-passes-key-south-dakota-senate-committee/#.Uys7bVzWRuY>.

93. Maneesha Deckha, *(Not) Reproducing the Cultural, Racial and Embodied Other: A Feminist Response to Canada's Partial Ban on Sex-Selection*, 16 UCLA WOMEN'S L.J. 1, 23–24 (2007).

94. CITRO, GILSON, KALANTRY & STRICKER, *supra* note 81, at 8.

for non-whites.⁹⁵ Thus, whereas old colonialist representations called for the “saving of brown women from brown men,”⁹⁶ new colonialist representations as exemplified by advocates of sex-selective bans call for the saving of Asian girls from Asian women.

Such representations operate in a two-fold way. First, they set up a legal baseline in which the law operates to subject Asian women to more scrutiny than other women by stamping their reproductive choices with a perpetual mark of “outsider.” Second, such representations rely on a deeply flawed understanding of non-Western cultures as backwards and morally inferior. This is not something new. For instance, as Uma Narayan has pointed out, in the U.S., it is routine to exoticize domestic violence in India as “Third-World gender issues” by labeling incidences of Sati or dowry murders as “death by culture.”⁹⁷ Yet, there is a lack of any similar cultural identification when discussing incidents of domestic violence in the United States. Narayan points out that:

[T]he references to “culture” commonplace in these reports [on dowry murders] serves to “render intelligible” everything that might otherwise remain “puzzling” to the audience. Thus, while many Western readers might not know exactly what dowry is...[t]he references to “culture” in these reports can then combine with more “free-floating” ideas of “Third-World backwardness” and the tendency to think of Third-World contexts as realms of “very other Cultures” to make “foreign phenomena” seem comfortingly intelligible while preserving their “foreignness.”⁹⁸

Such one-sided uses of “culture” perpetuate cross-cultural misunderstandings that otherize the so-called “Third World.”⁹⁹ Similarly, when proponents of prohibiting sex-selective abortion point to “Asian values” they invoke racially biased stereotypes that presuppose the existence of an inherently backwards and anti-women value system located in an imagined homogenous group identity that can be reduced to “Asian culture.” Such narratives not only support a racial hierarchy, but they also rely on deeply flawed cultural essentialism to resolve the contradiction between the moral superiority of white Western values and the urgency of such bans in the United States. Thus, while white women and Asian women may both be subjected to states’ moral disapproval, only Asian women seeking abortion commit “death by culture.”

95. *Id.*

96. Deckha, *supra* note 93, at 9–10 (citations omitted) (pointing out that post-colonialist feminist have identified this project as being a central justification for the missionizing projects of the West).

97. Uma Narayan, *Cross-Cultural Connections, Border-Crossings, and “Death by Culture,”* in *DISLOCATING CULTURES: IDENTITIES, TRADITIONS, AND THIRD WORLD FEMINISM* 81, 83–85 (1997).

98. *Id.* at 103–04.

99. *Id.*

While proponents of laws prohibiting sex-selective abortion position themselves as pro-women, several factors show that they are out of sync with genuine advocacy for gender equality. First, cultural essentialism undermines gender equality. As Chandra Mohanty has argued, decontextualized universal representations of third-world women by Western feminists have not supported women's agency because under such discourses, the "average third world woman leads an essentially truncated life based on her feminine gender (read: sexually constrained) and her being 'third world' (read: ignorant, poor, uneducated, tradition-bound, domestic, family-oriented, victimized, etc.)."¹⁰⁰ Along the same lines, L. Amede Obiora has highlighted how Western discourses on female circumcision that ignore complex differences among cultures perpetuate a legacy of Western missionary exploits that assumes the West's claim to "virtual monopoly on good judgment"; these discourses are often experienced by non-Western women as "unduly ethnocentric."¹⁰¹ And, as Leti Volpp states, "[w]hen culture and feminism are believed to be opponents in a zero-sum game, women will be presumed to be emancipated when they have abandoned their cultures."¹⁰² This is a choice that is often unevenly applied to immigrant women.¹⁰³ Thus, feminists have steadily moved away from essentialism and culture blaming because such discourses obscure the root causes of women's oppression and marginalize the agency and complex lives of non-Western women and women of color.¹⁰⁴

Second, supporters of sex-selective bans in the United States often cite Amartya Sen's statement that 100 million girls and women are missing worldwide to justify the need to ban sex-selective abortion.¹⁰⁵ When Sen originally made this claim, he was concerned with the issue of sex bias in relative care of females – not with sex-selective abortion.¹⁰⁶ More than ten years later, Sen noted that de-

100. Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, in *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM*, 51, 56 (Chandra Talpade Mohanty, Ann Russo & Lourdes Torres eds., 1991).

101. L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 *CASE W. RES. L. REV.* 275, 329 (1997); see also Mohanty, *supra* note 100.

102. Leti Volpp, *Framing Cultural Difference: Immigrant Women and Discourses of Tradition*, 22 *DIFFERENCES* 90, 106 (2011).

103. *Id.*

104. See also SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 6–28 (2006); Harris, *supra* note 7, at 595; Alison Jaggar, "Saving Amina": *Global Justice for Women and Intercultural Dialogue*, in *REAL WORLD JUSTICE: GROUNDS, PRINCIPLES, HUMAN RIGHTS, AND SOCIAL INSTITUTIONS* 37 (Andreas Follesdal & Thomas Pogge eds., 2005).

105. See CITRO, GILSON, KALANTRY & STRICKER, *supra* note 81, at 18 (stating that legislative references to "missing women" are a reference to Sen's statement in the nineties that sex-ratios showed that more than 100 million women are missing worldwide).

106. Amartya Sen, *More Than 100 Million Women Are Missing*, *N.Y. REV. BOOKS*, Dec. 20, 1990.

spite improvements in female mortality rates, the problem of missing women was not improving because of the rise of sex-selective abortion.¹⁰⁷

The problem with using Sen's work to advocate for sex-selective prohibitions of abortion is that when Sen first identified the missing women problem as it related to gender inequality in care, he rejected simplistic cultural explanations that alleged that Eastern values are more sexist and devalue women in comparison to Western values.¹⁰⁸ Sen also points out that sex-selection is a relatively new practice in India that has created a stark divide across India; thus, for example, while female to male ratios in Northern and Western India were much lower than European female to male ratios, the female to male ratios in Southern and Eastern India were higher than European female to male ratios.¹⁰⁹ This illustrates that the problem of missing women as identified by Sen is complex and cannot be reduced to the simplistic cultural explanations that have been used by proponents of sex-selective bans in the United States.

In sum, legislators and other supporters of banning sex-selective abortion have co-opted the language of gender equality in problematic ways. Not only have they reproduced a form of cultural essentialism that has a long history in the legacy of racial conquest and construction of non-whites, but they have also revealed themselves to be out of touch with developments in movements for women's equality.

B. The Intersection of Race-Sensitive Laws & Abortion Laws Affecting All Women: How Race-Neutral Laws Become Race Conscious

Abortion laws that directly target women of color also interact with other seemingly "neutral" anti-abortion laws in ways that exacerbate racially discriminatory assumptions. Ultrasound requirements, for example, operate in exactly this way. Of the seven states that prohibit sex-selective abortion, six have ultrasound requirements that apply to women seeking abortions.¹¹⁰ Arizona, Kansas, and North Carolina each require that a woman receiving an abortion undergo an ultrasound and be provided with the opportunity to view the image;¹¹¹ Kansas, North Carolina, and Oklahoma require women to be given written information

107. Amartya Sen, *Missing Women—Revisited: Reduction in Female Mortality Has Been Counterbalanced by Sex Selective Abortions*, 327 BRIT. MED. J. 1297, 1297 (2003) [hereinafter Sen, *Missing Women—Revisited*].

108. Sen, *More Than 100*, *supra* note 106. In fact, in other contexts, such as dealing with population control, Sen rejects the use of coercive political measures to control reproductive choices in favor of empowering women through increased social services, which is positively correlated to lower birth rates. See Amartya Sen, *Population: Delusion and Reality* N.Y. REV. BOOKS, Sept. 22, 1994.

109. Sen, *Missing Women—Revisited*, *supra* note 107, at 1297.

110. GUTTMACHER INST., STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUNDS (2016), http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf (Arizona, Kansas, Oklahoma, North Carolina, North Dakota, and South Dakota each prohibit sex-selective abortions and regulate the provision of ultrasounds).

111. *Id.*

on accessing ultrasound services, with Oklahoma adding that a woman must be given verbal information as well;¹¹² and North Dakota and South Dakota mandate that an ultrasound must be offered by the provider to a woman seeking an abortion.¹¹³ In all, twenty-five states impose ultrasound requirements. Courts, however, have only enjoined the most extreme laws requiring the abortion provider to display the ultrasound image of the fetus to the woman seeking an abortion.¹¹⁴

In states that prohibit sex-selective abortions, mandatory ultrasounds place a unique burden on Asian women by placing them in what Marilyn Frye has called a double bind, which are “situations in which options are reduced to a very few, and all of them expose one to penalty, censure, or deprivation.”¹¹⁵ On the one hand, state legislatures invoke “culture” to allege that, for Asian women, knowledge of the sex of a fetus is dangerous, and obtaining such knowledge is therefore a legitimate legal basis for denying Asian women access to an abortion. At the same time, women cannot obtain an abortion without consenting to the ultrasound requirements. Thus, the state puts Asian women in a position that will routinely call into question whether Asian women can ever legitimately (or legally) choose to have an abortion after she is presented with the mandatory information that tells her that the fetus is a girl.¹¹⁶ As a result, seemingly neutral laws, like ultrasound requirements, have unique implications at the intersection of race, gender, and national origin.

Abortion laws should be examined holistically in order to fully understand how they interact and reinforce the subjugation of women, especially women who are particularly vulnerable. Absent such an analysis, both courts and advocates will overlook important points at which obstacles are placed in front of some women of color and not other groups of women.

C. Race-Selective Bans on Abortion

Arizona was the first state to make race-selective abortion illegal, with one state recently following suit,¹¹⁷ in addition to attempts to enact similar legislation on the federal level.¹¹⁸ In Arizona, both race and sex-selective abortions are prohibited under the Susan B. Anthony and Frederick Douglas Pre-natal Non-

112. *Id.*

113. *Id.*

114. *Id.*

115. Marilyn Frye, *Oppression*, in *GENDER BASICS: FEMINIST PERSPECTIVES ON WOMEN AND MEN* 10, 11 (Anne Minas ed., 2000).

116. Ultrasounds can reveal the sex of the fetus pre-viability.

117. Indiana recently passed legislation banning race-selective abortion. See Emma Green, *Should Women Be Able to Abort a Fetus Just Because It's Female?*, *THE ATLANTIC* (May 16, 2016), <http://www.theatlantic.com/politics/archive/2016/05/sex-disability-race-selective-abortion-indiana/482856/>.

118. The Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011, H.R. 3541, 112th Cong. (2011).

Discrimination Act of 2011 (the “Act”). The Act states that a person who knowingly does any of the following is guilty of a class three felony:

1. Performs an abortion knowing that the abortion is sought based on the sex or race of the child or the race of a parent of that child.
2. Uses force or the threat of force to intentionally injure or intimidate any person for the purpose of coercing a sex-selection or race-selection abortion.
3. Solicits or accepts monies to finance a sex-selection or race-selection abortion.¹¹⁹

Additionally, the person performing the abortion must, before doing so, sign an affidavit stating that the abortion is not being performed or induced because of the “child’s sex or race” and that he or she has no knowledge that the abortion is being performed because of the “child’s sex or race.”¹²⁰

The Act was driven by the higher rate of abortions among black women as compared to white women.¹²¹ For instance, in the Arizona House, the Act’s sponsor, Steve Montenegro, defended the need for the Act, arguing:

American abortion providers . . . are responsible for eliminating nearly 50 percent of African Americans conceived in the U.S. each year, as compared to 20 percent of white, unborn children. In 2008, federally funded clinics were exposed as having agreed to accept funds from persons who expressly requested that the donation be used to reduce the African American population. There is currently no law to prohibit this in the U.S. or in Arizona, which needs to be addressed.¹²²

Similarly, in voting to pass the Act, the Arizona House heard testimony “that since 1973, illegal abortion has killed more African Americans than other medical or criminal causes combined.”¹²³ Arizona legislators also considered a letter from Trent Franks,¹²⁴ the U.S. Congressman who has made repeated attempts to pass the same legislation on the federal level.

The NAACP and NAPAWF attempted to bring a constitutional challenge to the Act.¹²⁵ Pointing to its racially charged legislative history, they argued, in

119. ARIZ. REV. STAT. ANN. § 13-3603.02(A) (2016).

120. ARIZ. REV. STAT. ANN. § 36-2157 (2016).

121. *See, e.g.*, Arizona House Committee Minutes February 2, 2011, at 10 (noting Act’s sponsor stated that “he does not anticipate lawsuits, but if that were to happen, the statistics are available”).

122. *See id.* at 9.

123. *Id.*

124. *Id.*

125. NAACP v. Horne, No. CV13-01079-PHX-DGC, 2013 WL 5519514, at *2 (D. Ariz. Oct. 3, 2013) (dismissed for lack of standing).

part, that the Act denies equal protection by perpetuating racially discriminatory stereotypes about black women and abortion, that demean, stigmatize, and discriminate against members of the NAACP.¹²⁶ For instance, as noted in their challenge, the “purpose” of the Act states that:

Evidence shows that minorities are targeted for abortion . . . The purpose of this legislation is to protect unborn children from prenatal discrimination in the form of being subjected to abortion based on the child’s sex or race by prohibiting sex-selection or race-selection abortions.¹²⁷

Thus, the legislative history of the Act demonstrates how Arizona’s ban on race-selective abortion is built upon racial stereotyping.

The legislative history of the Act also reveals a consistent theme between Arizona’s law and the failed federal law, to the extent that the higher rate of abortion among black women is similarly framed as black women committing “black genocide.”¹²⁸ For instance, Congressman Trent Frank’s letter in support of the Act criticized people for turning the other way while African American babies are killed because they are “the wrong race.”¹²⁹ In defense of the federal bill, he has similarly stated that “[f]ar more of the African American community is being devastated by the politics of today than were devastated by the policies of slavery.”¹³⁰ And in parallel fashion, Steve Montenegro testified in defense of the Arizona Act, stating, “some abortions are performed because a mother does not want a . . . minority baby.”¹³¹

What is significant, as the NAACP and NAPAWF pointed out, is that legislators failed to consider any other reasons that would explain the higher rates of abortion among black women.¹³² These include a long and persistent history of black women receiving low quality services in areas such as health care, family planning, and education, all of which have contributed to higher rates of unintended pregnancies.¹³³

What is also significant is that, by justifying and codifying a legal ban on race-selective abortion, on the basis of racially charged stereotyping about black women, Arizona has given legitimacy to extremist anti-abortion activists, by incorporating their racist ideologies into the state’s legal framework. Thus, Arizona’s scheme legitimizes a narrative that labels black women’s reproductive

126. *Id.* (including plaintiff NAPAWF who also challenged the sex-selective ban based upon racial stereotypes of Asian women).

127. *Id.* at 2 (citations omitted).

128. NAT’L ASIAN PAC. AM. WOMEN’S FORUM, *supra* note 77, at 2.

129. Brief of the Petitioner-Appellant, *supra* note 10, at 7 (citations omitted).

130. Kathryn Joyce, *Is Abortion Black Genocide?*, 25 PUB. EYE 3, 7 (2010).

131. *Id.* (citations omitted).

132. *Id.* at 7–8.

133. NAT’L ASIAN PAC. AM. WOMEN’S FORUM, *supra* note 77, at 3; *see also* Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POL’Y REV. 2, 2 (2008), https://www.guttmacher.org/sites/default/files/article_files/gpr110302.pdf.

choices as “womb lynchings,” as complicit with “Klan Parenthood,” and as acts that are comparable to the Rwanda genocide.¹³⁴

As with sex-selective abortion laws, this discourse shows that measuring whether women are subjected to an undue burden requires that the constitutional protection for women’s right to an abortion must be capable of capturing the racial dynamics occurring as laws increasingly single out women of color. While the law says that no “person” can perform a race-selective abortion, it is clear that by “person” Arizona meant to restrict black women’s access to abortion by imposing additional regulations on providers who perform abortions for black women.

The claim that black women are committing black genocide functions to obscure the root causes of the higher rate of abortion and instead provides a story that fits with a history of racist ideology targeted specifically against black women. The laws reflect what Patricia Hill Collins identifies as “controlling images,” which she defines as the ideological dimension of oppression that function to make racist and sexist ideologies appear natural and inevitable.¹³⁵ Collins states that controlling images based in negative stereotypes have been fundamental to black women’s oppression, which include images of black women as “mammies, jezebels, and breeder women of slavery...and ever-present welfare mothers of contemporary popular culture.” Arizona’s ban on race-selective abortion is consistent with these images to the extent that it fits a stereotypical discourse about black women being unfit mothers.

In today’s abortion discourse and legal landscape, black women are depicted as racist genocidal murderers who have devastated black communities with their Klan-like activities and their perpetual failure to conform to the norms of motherhood. Such failures are part of a long-standing narrative about black women. As Patricia Hill Collins points out, “[i]f good mothers are supposed to stay at home with their children, then why are U.S. Black women on public assistance forced to find jobs and leave their children in day care?”¹³⁶ Similarly, Lisa Ikemoto argues that a historical and legal analysis of the concept of motherhood demonstrates that the norm of the “Good Mother” is white and privileged and that black women, by “overcoming” their race (blackness), can, at most, become “Good *Black* Mothers”—a status that is inherently inferior to that of the “Good Mother.”¹³⁷ Thus, even though white women have the highest number of total abortions,¹³⁸ only black women, who have higher rates of abortion, relative to

134. Joyce, *supra* note 130, at 4.

135. See COLLINS, *supra* note 29, at 7.

136. *Id.* at 14.

137. Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 58 OHIO ST. L.J. 1205, 1305 (1992).

138. *Unintended Pregnancy in the United States*, GUTTMACHER INST., <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states> (last visited June 14, 2016).

their population, are identified as performing an act of racial genocide. Once again, social norms about race and motherhood are used against black women to relegate them to an inferior status.

V.

THE SUPREME COURT'S JURISPRUDENCE ON WOMEN'S RIGHT TO AN ABORTION REINFORCES A LEGAL SYSTEM OF RACIAL DIS-PRIVILEGE

The history of women's reproductive rights and the new wave of sex-selective and race-selective laws show that race has always been a factor that impacts women's ability to exercise their reproductive rights. While the recent rise of race-selective and sex-selective bans on abortion have made this more visible, it is clear that race-neutrality is an idealized fiction; sterilization, the legal sanctioning of increased economic burdens, and the use of racial discourses are all central aspects of the story of reproductive rights in the United States. And yet, although the undue burden test is supposed to measure whether a substantial obstacle has been imposed on a woman trying to access abortion,¹³⁹ it has instead created a legal lens in which the racialized dimensions that make women of color's reproductive rights less secure are legally erased. In the following section, I provide several reasons in support of the claim that the undue burden test reinforces a system of racial dis-privilege. The implication then is that, under the undue burden test, the racially conceived sex-selective and race-selective bans on abortion that target women of color will not be considered to pose any sort of serious burden on women.

One sign that the undue burden test cannot grapple with the intersection of race and reproductive rights is that it has, in fact, already failed to do so. This is demonstrated by how *Casey* dealt with poverty-based burdens, given that women of color tend to be overrepresented among the poor.¹⁴⁰

Second, as previously noted, the Court has only paid attention to intersectionality as it applies to married women who are subjected to physical and psychological abuse by their husband.¹⁴¹ Although unclear, it may be that the Supreme Court is more sympathetic to domestic violence because it is a problem that cuts across race, class, national origin, and other categories and threatens women across the globe.¹⁴² In contrast, poverty and racism, particularly the intersection of the two, tend to function as markers of disadvantage for only certain marginalized groups of women.

139. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992).

140. See NAT'L WOMEN'S L. CTR., *supra* note 74; WOMEN'S BUREAU, U.S. DEPARTMENT OF LABOR, THE ECONOMIC STATUS OF WOMEN OF COLOR: A SNAPSHOT 4 (2013), http://www.dol.gov/wb/media/reports/WB_WomenColorFactSheet.pdf.

141. *Casey*, 505 U.S. at 893-95.

142. See *Violence against Women Information*, AMNESTY INT'L, <http://www.amnestyusa.org/our-work/issues/women-s-rights/violence-against-women/violence-against-women-information> (last visited June 14, 2016).

Such factors indicate that the Court's jurisprudence contains an underlying bias that privileges the experiences of white, affluent women. The Court's analysis of whether an undue burden exists fails to acknowledge the daily realities of women whose experience is shaped by identities that typically act as sites of oppression. Thus the undue burden test excludes consideration of the impact of regulations on the reproductive rights of some of society's most vulnerable women. As Maria C. Lugones and Elizabeth V. Spelman have argued, not all women are equally vulnerable with respect to certain features of their identities.¹⁴³ Treating diverse women's voices not as *women's* voices, but as, for example, "black" voices, produces imperialistic theories that do not capture the experiences of non-white women, or women who do not fit a certain privileged norm.¹⁴⁴

Recognizing this inherent bias in the Court's jurisprudence provides a certain rationality to the Court's willingness to recognize important differences among women when it was confronted with a regulation that touched on domestic violence. As previously noted, with regard to how spousal notification would affect victims of domestic violence, *Casey* finds that "[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there."¹⁴⁵ On the other hand, as Erwin Chemerinsky has pointed out, the Court fails to apply the same logic to poor women.¹⁴⁶ In fact, the Court appears hostile to applying such an analysis to poor women, stating that:

We also disagree with the District Court's conclusion that the "particularly burdensome" effects of the waiting period on some women requires its invalidation. A particular burden is not of necessity a substantial obstacle. *Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group.*¹⁴⁷

In a formalistic sense, the Court's reasoning may be accurate: a disproportionate burden on one group alone may be insufficient to render that burden substantial. What the Court ignores, however, is that when the disproportionate burden falls on some women, in ways that exacerbate vulnerabilities that have historically functioned in an oppressive way, then that disproportionality is no longer distinct from the substantial obstacle inquiry. For example, if the disproportionality repeatedly falls on poor black women, the fact that the regulations regulate them more harshly should be the central focus of whether there is an undue burden. It is only these women that realistically face any threat that would prevent them

143. Maria C. Lugones & Elizabeth V. Spelman, *Have We Got a Theory for You! Feminist Theory, Cultural Imperialism and the Demand for 'The Woman's Voice'*, 6 *WOMEN'S STUD. INT'L* F. 573, 574 (1983).

144. *Id.*

145. *Casey*, 505 U.S. at 894.

146. CHEMERINSKY, *supra* note 17, at 832.

147. *Casey*, 505 U.S. at 886–87 (emphasis added).

from accessing abortion services. Instead, the Court trivializes the interests of poor women, who have been traditionally marginalized, as a plea for “abortion on demand.”¹⁴⁸

Under such a monolithic approach to women’s burdens, the answer to whether sex-selective and race-selective abortion laws would prevent a substantial number of women from obtaining an abortion would be “no.” This is because the legislative narrative tells us that it is *only* black women (in the case of race-selection) and Asian women (in the case of sex-selection) who are obtaining abortions for these reasons. In failing to consider the intersection of race and sex, burden is solely measured against white women who are not targeted by these laws that arise within a system of racial privilege. In this way, the undue burden analysis conceals the experiences of women of color and measures burdens according to the experiences of women who are privileged with respect to race and class.

Third, the inconsistencies in the Court’s approach reflect a certain logical consistency when race is used as a conceptual lens of analysis. Critical theorists have argued that the law problematically and typically treats racism as an anomaly.¹⁴⁹ Treating racism as an anomaly requires erasing its significance from legal structures. Charles Mills has illustrated how the formal extension of rights has been crucial to upholding a system of white privilege (a Racial Contract) by creating certain epistemological norms in which one of the defining features is:¹⁵⁰

*[T]he failure to ask certain questions, taking for granted as a status quo and baseline the existing color-coded configuration of wealth, poverty, property, and opportunities, the pretence that formal, juridical equality is sufficient to remedy inequities created on a foundation of several hundred years of racial privilege, and that challenging that foundation is a transgression of the terms of the social contract.*¹⁵¹

Mills later goes on to argue that the Racial Contract produces an “epistemology of ignorance,” which is an agreement to misinterpret the world with respect to matters related to race.¹⁵² As Mills explains, “[w]hite misunderstanding, misrepresentation, evasion, and self-deception on matters related to race [are] prescribed by the terms of the Racial Contract, which requires a certain schedule of

148. *Id.* at 887.

149. Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389, 1393–94 (1991) (reviewing ROY L. BROOKS, *RETHINKING THE AMERICAN RACE PROBLEM* (1990)).

150. CHARLES W. MILLS, *THE RACIAL CONTRACT* 9–11 (1997). Charles Mills breaks down traditional social contract theory to argue that the real social contract is a Racial Contract, which is a meta-contract that is moral, political, and epistemological contract, the purpose of which is the privileging of whites as a group over non-whites and which operates as a contract that regulates all other contracts.

151. *Id.* at 73–74.

152. *Id.* at 18.

structural blindness and opacities in order to establish and maintain the white polity.”¹⁵³ Such misrepresentations were central to colonization and slavery and often took the form of gross caricatures about non-whites.¹⁵⁴

Mills’ conceptual framework helps to situate the Court’s undue burden test within a larger structure in which the rules of the game mandate ignoring questions of racial injustice, since racial inequalities are taken for granted. In similar fashion, the undue burden test ignores differences among women, which means ignoring how multiple laws create an interlocking web of burdens for women of color. The overrepresentation of women of color among the poor means that they are impacted by laws that create burdens based on poverty (by increasing cost and travel times); by laws that create burdens for all women regardless of their circumstances (such as restrictions on abortion after week twenty);¹⁵⁵ and by laws that create burdens that overtly target women of color (such as race-selective and sex-selective bans). Using race as a lens of analysis explains why even though the theoretical starting point for the undue burden analysis should be women who are the most burdened, in practice these women are on the margins of legal analysis. Mills’ point about misrepresentation and misunderstanding also bears relevance to the discourse on sex-selective and race-selective abortion.

Women’s right to an abortion is being played out in terms of a color coded racial hierarchy by which women of color, especially poor women of color, are more insecure in their ability to exercise their constitutionally protected right to an abortion. An epistemological starting point that takes for granted that certain questions need not—and maybe even cannot—be asked hides the racialized structure of women’s right to an abortion and codifies a racial hierarchy that has been central to the inability of women of color to secure equal reproductive rights, within the constitutional structure of protections. Understanding the legacy of structural blindness and misrepresentation with respect to race explains why even though the Supreme Court has found that, “[t]he proper focus of constitutional inquiry is the group for whom the laws is a restriction, not the group for whom the law is irrelevant,”¹⁵⁶ it has continued to direct its inquiry away from the relevant groups of women when it touches upon matters of their racial identity. The Court’s inconsistencies turn out to be quite consistent with a larger legacy of tacit acceptance and blindness to matters of racial inequality.

In conclusion, the Supreme Court’s undue burden test fails to be sensitive to how race and reproductive rights have typically interacted to produce a greater burden for women of color. This suggests that the undue burden test will not be sensitive to the racialized nature of sex- and race-selective abortion prohibitions.

153. *Id.* at 19.

154. *Id.* at 20–21.

155. An example of this would be a ban on abortion at twenty weeks, though such laws have been found to be unconstitutional by lower courts.

156. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992).

In this way, the Court has failed to produce constitutional protections that afford all women the equal ability to have equal fulfillment of their fundamental rights.

VI.

OBJECTIONS: CAN'T THE COURT PROTECT WOMEN'S RIGHT TO ABORTION (EVEN FOR WOMEN OF COLOR) ANYWAY?

This Part addresses two potential objections to the claim that there is a race bias built into the legal structure of constitutional protections for women's right to an abortion that renders the law ill-equipped to strike down prohibitions on sex-selective and race-selective abortions. The first possible objection looks to equal protection law to do the work of invalidating racially driven anti-abortion laws even if the undue burden test fails to do so. The second possible objection rests in a "motive" based argument, which claims that sex and race-selective laws unconstitutionally intrude on women's privacy interests by prohibiting certain motives.¹⁵⁷ Both possible objections suggest that the Court's failure to make race and intersectionality central to its lens of analysis under the undue burden test may be less important if sex-selective and race-selective laws are invalidated by other constitutional means.

Opponents of Arizona's sex and race-selective prohibition have brought legal challenges to the law on the grounds that it constitutes an equal protection violation.¹⁵⁸ If an equal protection violation can be established, then this may suggest that even if the Court fails to make race central in its undue burden analysis, women of color's right to abortion nonetheless remains adequately protected.

Equal protection law will not be able to undo the race bias built into the undue burden analysis for two reasons. First, the Supreme Court's equal protection jurisprudence is subject to many of the same criticisms raised against the undue burden framework because, generally, only facially race based laws trigger strict scrutiny.¹⁵⁹ Facially race "neutral" laws ordinarily get rational basis review, the weakest level of review, unless the plaintiff can prove both a discriminatory impact and a discriminatory intent, in which case strict scrutiny is triggered.¹⁶⁰ The

157. Justin Gillette, *supra* note 11, at 671–81.

158. NAACP v. *Horne*, No. CV13-01079-PHX-DGC, 2013 WL 5519514, at *2 (D. Ariz. Oct. 3, 2013).

159. *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny.").

160. *Washington v. Davis*, 426 U.S. 229, 245-48 (1977) (upholding a facially race neutral policy personnel test because plaintiffs failed to prove a discriminatory purpose); *Palmer v. Thompson*, 403 U.S. 217, 224-26 (1971). (finding no discriminatory impact where pools were closed to blacks and whites alike despite plaintiff's allegations that the closures were motivated by a desire to avoid integration requirements). But a facially race neutral law can be treated as a racial classification (thus triggering strict scrutiny) where evidence of discriminatory enforcement leads the Court to conclude that there was a discriminatory intent. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

problem is that this distinction is another means by which race and the experience of racism is legally marginalized. Barbara J. Flagg has argued that requiring that facially race-neutral laws reveal a discriminatory intent (in contrast to the unconscious use of race) to trigger strict scrutiny is “a curious strategy for implementing the principle that the use of race as a criterion of decision is what constitutes the constitutional harm, because the racial criterion is equally present in either case.”¹⁶¹ Flagg also argues that the assumption of race neutrality is more indicative of whites’ subjective experiences, yet this assumption is built into *Washington v. Davis*, which first established the requirement of discriminatory intent for facially race-neutral laws.¹⁶² In this way, the Supreme Court’s equal protection jurisprudence follows the same racially informed epistemological norms that Charles Mills identifies as foundational to maintaining a color-coded status quo by separating out certain questions of racial justice through the requirement of a discriminatory intent and a discriminatory impact.¹⁶³

Second, race-selective and sex-selective laws ostensibly are facially race neutral laws that prohibit discrimination.¹⁶⁴ As prohibitions against discrimination, it is difficult to see how the Supreme Court would regard such laws as race conscious discrimination in violation of the Constitution’s equal protection clause.¹⁶⁵ The problem is that establishing a discriminatory intent is unlikely because of the co-option of the language of “civil rights” and “gender equality” by advocates of these laws. Proving a discriminatory intent requires showing that a decision maker chose a particular course of action “at least in part ‘because of,’

161. Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 980 (1993).

162. *Id.* at 977, 980-85.

163. See *Palmer*, 403 U.S. at 239 (Douglas, J., dissenting) (“I conclude that though a State may discontinue any of its municipal services—such as schools, pools, athletic fields, and the like – it may not do so for the purpose or perpetuating or installing *apartheid* or because it finds life in a multiracial community difficult or unpleasant.”).

164. This is even true of Arizona’s race-selective anti-abortion law, which uses the term “race” but does not single out any racial groups for differential treatment. Arizona’s race-selective ban is fundamentally unlike the facial use of race for the purpose of imposing an unequal burden and segregation. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 487-88 (1954); *Korematsu v. United States*, 323 U.S. 214, 215-16 (1944).

165. A strong indicator that laws that are facially neutral and purport to disallow discrimination will not raise any constitutional red flags is that whether a benefit is conferred on people of color for the purposes of bringing different races together (*i.e.*, affirmative action) or whether a harm is inflicted for the purposes of keeping races apart (*i.e.*, segregation) both uses of race are treated as equally suspect. See, e.g., *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by Any Means Necessary*, 134 S. Ct. 1623, 1634–35 (2014) (“Government action that classifies individuals on the basis of race is inherently suspect and carries the danger of perpetuating the very racial divisions the polity seeks to transcend.”) (citations omitted); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (adopting strict scrutiny for affirmative action, reasoning that “the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”). This suggests that laws that are articulated in neutral terms that prohibit discrimination reflect the ideal “race-conscious” law under the Court’s equal protection jurisprudence.

not merely 'in spite of,' *its adverse effects* upon an identifiable group."¹⁶⁶ Legislative history is an important resource for proving a discriminatory purpose.¹⁶⁷ As noted above, opponents of these laws have appealed to the racially charged representations of Asian and black women to support their claim of an equal protection violation.¹⁶⁸ Yet, these stereotypes have been formulated as legal protections against "gendercide" and so-called "black genocide" in ways that rely upon widespread accepted norms about non-white women being culturally inferior. In the past, the Court has been all too willing to point to seemingly legitimate explanations, even when faced with stark evidence of a pattern of racial discrimination.¹⁶⁹ In this way, the distinction between facially race neutral laws and facially discriminatory laws has helped to perpetuate the racial status quo.¹⁷⁰ Given that the laws are framed as pro-woman and pro-racial justice and given the Court's continual marginalization of race, there is little to suggest a real possibility of establishing a discriminatory purpose.

A second possible objection is that race-selective and sex-selective laws will be held to be unconstitutional, even absent a race sensitive approach, because they are impermissibly directed at women's thoughts and motives. For instance, Justin Gillette has argued that sex and race-selective laws, which he refers to as "motive based" laws, are likely to be found unconstitutional because:

*The racist or sexist views of women covered by these motive-based abortion restrictions may be subject to mainstream society's disapproval, but it does not follow that the State can then limit the reproductive liberty of these individuals. These views, while offensive to many, are still included as one "variation" of the "intimate views" referenced in Casey.*¹⁷¹

His argument is that such "motives," or beliefs, are encompassed in the privacy interest that is embedded in women's liberty interest in reproductive autonomy.¹⁷² That is, the right to an abortion protects a woman's right to have an abor-

166. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 258 (1979) (emphasis added).

167. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977).

168. *See generally* Brief of the Petitioner-Appellant, *supra* note 10.

169. *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) (downplaying statistics that showed that the death penalty was being administered in a racially discriminatory fashion where black defendants were four times more likely be sentenced to death for killing white victims than when killing black victims by relying on the existence of a "legitimate" explanation for McCleskey's death sentence which was that "McCleskey committed an act for which the U.S. Constitution and Georgia laws permit the imposition of the death penalty").

170. *Id.* at 321 (Brennan, J., dissenting) (pointing to the history of race discrimination in Georgia's death penalty system and also stating that "[a]t some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury is likely to sentence him to die. A candid reply to his question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white").

171. Gillette, *supra* note 11, at 673 (emphasis added).

172. *Id.* at 672-74.

tion as well as her motives for having an abortion.¹⁷³ Gillette goes on to argue that not only do sex-selective and race-selective laws impermissibly target women's motives, but they also unconstitutionally do so by banning abortion pre-viability.¹⁷⁴

The problem with a motive-based argument like Gillette's is that appealing to constitutional protection for women's alleged racist and sexist beliefs reinforces rather than exposes the racial narratives that underlie these laws. As I have argued, race-selective and sex-selective bans are not about the actual motives of black and Asian women, but are part of a racial narrative that tells a much older story about Asian and black women being culturally and morally inferior. To challenge these laws as infringing on constitutional protection of women's motives legitimizes a discourse that has explicitly singled out women of color as being sexist and racist. That such framing of the issues necessarily buys into that narrative is evidenced by Gillette's imagined "mainstream society" (which is presumably white) that looks on disapprovingly on the backwards values of non-white women. As anti-racist critics have pointed out, black women are portrayed as either the perpetrators of black genocide or complete dupes who have been manipulated by anti-black abortion providers who are guilty of racial genocide.¹⁷⁵ Similarly, Asian women are saddled with a monolithic set of anti-women Asian values laden with cultural stereotypes. In either case, such motive-based arguments illustrate precisely why it is problematic to attempt to secure women's reproductive rights without using race as a lens of analysis and absent any serious consideration of intersectionality.

VII.

MOVING FORWARD: MAKING DIFFERENCES WORK IN SUPPORT OF WOMEN'S ABORTION RIGHTS

Women's rights advocates should be careful about how they engage in advocacy with the goal of securing women's right to abortion. States have increasingly constructed a racial ideology that operates to further restrict women's access to abortion services. The failure of women's advocacy groups to undermine these narratives will inevitably perpetuate racist stereotypes that continue to systematically undermine women of color's reproductive choices by portraying them as socially and culturally inferior.

One problem is that even among advocates of women's equality, race continues to be on the margins. For instance, recent purported feminist defenses of bans on sex-selective abortion revert to treating women as a monolithic group by claiming that sex-selective abortion undermines women's equality as a group.¹⁷⁶

173. *Id.*

174. *Id.* at 675.

175. Joyce, *supra* note 130, at 8–9.

176. See April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?*, 10 WIS. WOMEN'S L.J. 161, 166 (1995) ("My construction of a radical feminist

Such approaches inexplicably ignore the internal hierarchies among women, as well as how racism has shaped women's ability to exercise their reproductive rights.

Another problem is that even where advocates pay attention to the connection between race and abortion rights, there can be a tendency to treat race as a footnote—in the sense that the racialized nature of abortion regulation is treated as incidental (instead of central) to women's reproductive rights.¹⁷⁷ For example, the Guttmacher Institute's most recent overview of state-level abortion laws leaves out race and sex-selective laws.¹⁷⁸ These laws may not be implemented in as many states as other laws like physician and hospital requirements (38 states) or allowing physicians to refuse to participate in abortion (45 states), but they have special salience for women of color and should be highlighted along with other widely impactful restrictions.¹⁷⁹ Race-selective and sex-selective bans are also often categorized with bans that prohibit abortion based on genetic anomaly. This raises questions as to how such bans are being conceptualized and classified by those seeking to secure women's right to an abortion.¹⁸⁰

In addition to making race and the intersection of women's identities explicit in assessing abortion rights, it is also essential that advocates examine the intersection of burdens; even abortion laws that may seem to apply to all women equally may overlap in distinct ways to create unique obstacles for women of color. The current web of abortion regulations has an inherent racial dimension that specifically impacts women of color. Race-neutral restrictions, like ultrasound laws, can become race sensitive as they interact with other overt and cov-

analysis moves away from a view of the procedure as one of individual choice, and acknowledges sex-selection as an issue affecting women as a class.”); Sital Kalantry, *Sex Selection in the United States and India: A Contextualist Feminist Approach*, 18 UCLA J. INT'L & FOREIGN AFF. 61, 79 (2013) (“I propose an approach that allows for restrictions on sex-selection (which means limiting individual women's right to autonomy) only if that autonomy is being exercised in a way that threatens the equality of women and girls as a group.”). That political proponents of bans on sex-selective abortion use gender equality to further their attack on the abortion rights of women of color should dispel any notion that balancing abortion rights against an alleged impact on women's equality as a group actually furthers women's equality. Thus, feminists on both ends of the debate must take the differences among women seriously or else their advocacy efforts will reproduce historically familiar inequalities among women.

177. MILLS, *supra* note 150, at 56. Mills identifies the “footnote” approach as treating racism as a deviation from the ideal political structure. Instead, Mills argues the ideal itself incorporated racial norms about non-whites such that with racism “what is involved is compliance with a *norm* whose existence is now embarrassing to admit.” *Id.* Mills' point is particularly salient for advancing women's reproductive rights. Rather than viewing racism in the regulation of women's reproductive right as an anomalous or contingent occurrence, it should be conceptualized as a defining feature of how such rights are construed, protected, and channeled.

178. *State Policies in Brief: An Overview of Abortion Laws*, *supra* note 43 (the Guttmacher Institute is a leading policy and research organization whose work focuses on women's sexual reproductive rights and health).

179. *State Policies in Brief: An Overview of Abortion Laws*, *supra* note 43.

180. See *State Policies in Brief: Abortion Bans in Case of Sex or Race or Genetic Anomaly*, GUTTMACHER INST. (Dec. 1, 2015), http://www.guttmacher.org/statecenter/spibs/spib_SRSGAAB.pdf.

ert race conscious laws. Similarly, laws that disproportionately restrict poor women's ability to exercise their right to an abortion also tend to also disproportionately impact women of color. Even though the Supreme Court might render such forces invisible, advocates should highlight the racial dimensions of such burdens and bring attention to the ways in which women are not similarly situated in their ability to exercise their right to abortion.

This all demonstrates that state discourses about the reproductive choices of women of color must be situated within the larger historical and cultural contexts in which they occur. The fact that the groups that these legislators are aiming to "save" are opposed to these tactics should give pause to the legitimacy of the state's real intentions. During the Florida House debate on a sex and race-selective abortion ban, five black women lawmakers walked out in protest over the bill's supporter's representations of black people.¹⁸¹ Both the NAACP and NAPAWF are suing over Arizona's race and sex-selective laws because of its racial stereotyping. States are out of touch with communities of color, operating within a racial fantasy world in which one of the only major providers of services to poor women of color is equated with the Nazi Holocaust and the KKK.¹⁸² To charge black women with black genocide is to play upon old stereotypes about these women's alleged inferior status in the sexual and reproductive arena. Although black genocide is a completely incoherent conclusion to draw from the data that black women have abortions at higher rates than other women, it is given coherence by racial narratives that make illogical fictions seem rational. Similarly, cultural essentialism is offered up as a powerful explanatory tool for why Asian women's reproductive choices must be monitored more closely by the states. Situating such discourses within these contexts is essential for securing women's right to an abortion because it facilitates communication about underlying assumptions and the ways in which race continues to inform women's reproductive choices.

The Court's undue burden analysis is formulated according to norms that downplay differences among women, and thus exiles women who are particularly vulnerable to the margins of constitutional analysis. This approach recreates a common conceptual problem that treats race as incidental and women as a monolithic and undifferentiated group. In the hands of the states, the only differences among women that are identified are those in which race is used to mark out an inferior status. Women's advocates must challenge these narratives by exposing the ways in which such discourses have been historically used to keep non-whites socially and politically marginalized, in order to identify how such patterns are being reproduced through the modern and increasingly frequent enactment of abortion laws.

181. *Laura Bassett, Florida Abortion Bill Debate Causes Black Women Lawmakers To Walk Out*, HUFFINGTON POST (Apr. 19, 2013), http://www.huffingtonpost.com/2013/04/19/florida-abortion-bill_n_3118365.html.

182. *Id.* ("In America alone, without the Nazi Holocaust, without the Ku Klux Klan, Planned Parenthood and other abortionists have reduced our black population by more than 25 percent since 1973" and "[t]his is called discriminatory targeting") (quoting bill's sponsor).