AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Personal Freedom and Public Morality: Abortion

**Box v. Planned Parenthood of Indiana and Kentucky, Inc.,** \_\_\_ U.S. \_\_\_ (2019)

*Planned Parenthood of Indiana and Kentucky provides abortion services in Indiana. In 2016 that state passed a series of anti-abortion laws. One measure forbade persons from performing abortions when a woman chose to terminate a pregnancy on the basis of the gender, race or disability. A second measure required special rules for the disposal of fetal remains. Planned Parenthood sought an injunction against Kristina Box, the Commissioner of the Indiana Department of Health, forbidding her from enforcing these laws. The selective abortion ban, Planned Parenthood claimed, unduly burdened the abortion right protected by the due process clause of the Fourteenth Amendment. The fetal disposal law, in their view, was unconstitutionally irrational. A lower federal court declared the Indiana measures unconstitutional and that decision was sustained by the Court of Appeals for the Seventh Circuit. Indiana appealed to the Supreme Court of the United States.*

*The Supreme Court by a 7-2 vote reversed the federal appellate court on the fetal disposal issue and unanimously denied certiorari on the selective abortion issue. The per curiam opinion noted that the fetal disposal law met a relatively toothless rational standard. Justice Ruth Bader Ginsburg would have denied certiorari on the ground that had Planned Parenthood insisted on the correct undue burden standard, the law would have been unconstitutional? Should the court have bothered making a decision if the lawyers had argued the wrong standard? Does the per curiam imply that the result would have been the same even if Planned Parenthood argued undue burden? Justice Clarence Thomas’s opinion attempted to link abortion rights with the eugenics movement at the turn of the twentieth century? Did he effectively do so? Does the contested relationship between birth control and eugenics suggest Justice Thomas opposed birth control rights and well as abortion rights? Does he provide any evidence that the prominent feminist groups who support abortion favor eugenics? Why did Ginsburg ignore the Thomas opinion?*

Per Curiam.

. . . .

Respondents have never argued that Indiana’s law creates an undue burden on a woman’s right to obtain an abortion. Respondents have instead litigated this case on the assumption that the law does not implicate a fundamental right and is therefore subject only to ordinary rational basis review. To survive under that standard, a state law need only be “rationally related to legitimate government interests.”. . .

. . . .

This Court has already acknowledged that a State has a “legitimate interest in proper disposal of fetal remains.” The Seventh Circuit clearly erred in failing to recognize that interest as a permissible basis for Indiana’s disposition law. The only remaining question, then, is whether Indiana’s law is rationally related to the State’s interest in proper disposal of fetal remains. We conclude that it is, even if it is not perfectly tailored to that end. (the State need not have drawn “the perfect line,” as long as “the line actually drawn [is] a rational” one). We therefore uphold Indiana’s law under rational basis review.

. . . . Our opinion likewise expresses no view on the merits of the second question presented, *i.e.*, whether Indiana may prohibit the knowing provision of sex-, race-, and disability-selective abortions by abortion providers. Only the Seventh Circuit has thus far addressed this kind of law. We follow our ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals. . . .

Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=If57c731c813e11e9bc5d825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If57c731c813e11e9bc5d825c4b9add2e) would deny the petition for a writ of certiorari as to both questions presented.

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=If57c731c813e11e9bc5d825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If57c731c813e11e9bc5d825c4b9add2e), concurring.

. . . .

[T]his law and other laws like it promote a State’s compelling interest in preventing abortion from becoming a tool of modern-day eugenics.

The use of abortion to achieve eugenic goals is not merely hypothetical. The foundations for legalizing abortion in America were laid during the early 20th-century birth-control movement. That movement developed alongside the American eugenics movement. And significantly, Planned Parenthood founder Margaret Sanger recognized the eugenic potential of her cause. She emphasized and embraced the notion that birth control “opens the way to the eugenist.” . . . It is true that Sanger was not referring to abortion when she made these statements, at least not directly. She recognized a moral difference between “contraceptives” and other, more “extreme” ways for “women to limit their families,” such as “the horrors of abortion and infanticide.” But Sanger’s arguments about the eugenic value of birth control in securing “the elimination of the unfit,” apply with even greater force to abortion, making it significantly more effective as a tool of eugenics. Whereas Sanger believed that birth control could prevent “unfit” people from reproducing, abortion can prevent them from being born in the first place. Many eugenicists therefore supported legalizing abortion, and abortion advocates—including future Planned Parenthood President Alan Guttmacher—endorsed the use of abortion for eugenic reasons. Technological advances have only heightened the eugenic potential for abortion, as abortion can now be used to eliminate children with unwanted characteristics, such as a particular sex or disability.

Given the potential for abortion to become a tool of eugenic manipulation, the Court will soon need to confront the constitutionality of laws like Indiana’s. But because further percolation may assist our review of this issue of first impression, I join the Court in declining to take up the issue now.

. . . .

Eugenic arguments . . . helped precipitate the Immigration Act of 1924, which significantly reduced immigration from outside of Western and Northern Europe. The ****perceived superiority of the white race also led to calls for race consciousness in marital and reproductive decisions, including through antimiscegenation laws. . . . .

This Court threw its prestige behind the eugenics movement in its 1927 decision upholding the constitutionality of Virginia’s forced-sterilization law, *Buck v. Bell.* The plaintiff, Carrie Buck, had been found to be “a feeble minded white woman” who was “the daughter of a feeble minded mother ... and the mother of an illegitimate feeble minded child.” In an opinion written by Justice Oliver Wendell Holmes, Jr., and joined by seven other Justices, the Court offered a full-throated defense of forced sterilization.

. . . .

Support for eugenics waned considerably by the 1940s as Americans became familiar with the eugenics of the Nazis and scientific literature undermined the assumptions on which the eugenics movement was built. But even today, the Court continues to attribute legal significance to the same types of racial-disparity evidence that were used to justify race-based eugenics. ****And support for the goal of reducing undesirable populations through selective reproduction has by no means vanished.

This case highlights the fact that abortion is an act rife with the potential for eugenic manipulation. From the beginning, birth control and abortion were promoted as means of effectuating eugenics. Planned Parenthood founder Margaret Sanger was particularly open about the fact that birth control could be used for eugenic purposes. These arguments about the eugenic potential for birth control apply with even greater force to abortion, which can be used to target specific children with unwanted characteristics. Even after World War II, future Planned Parenthood President Alan Guttmacher and other abortion advocates endorsed abortion for eugenic reasons and promoted it as a means of controlling the population and improving its quality. . . .

. . . .

Sanger herself campaigned for birth control in black communities. In 1930, she opened a birth-control clinic in Harlem. . . . Then, in 1939, Sanger initiated the “Negro Project,” an effort to promote birth control in poor, Southern black communities. Noting that blacks were “ ‘notoriously underprivileged and handicapped to a large measure by a “caste” system,’ ” she argued in a fundraising letter that “ ‘birth control knowledge brought to this group, is the most direct, constructive aid that can be given them to improve their immediate situation.’ ” In a report titled “Birth Control and the Negro,” Sanger and her coauthors identified blacks as “ ‘the great problem of the South’ ”—“the group with ‘the greatest economic, health, and social problems’ ”—and developed a birth-control program geared toward this population. *Ibid.* She later emphasized that black ministers should be involved in the program, noting, “ ‘We do not want word to go out that we want to exterminate the Negro population, and the minister is the man who can straighten out that idea if it ever occurs to any of their more rebellious members.’ ”

Defenders of Sanger point out that W. E. B. DuBois and other black leaders supported the Negro Project and argue that her writings should not be read to imply a racial bias. But Sanger’s motives are immaterial to the point relevant here: that “Birth Control” has long been understood to “ope[n] the way to the eugenist.”

. . . .

Although Sanger was undoubtedly correct in recognizing a moral difference between birth control and abortion, the eugenic arguments that she made in support of birth control apply with even greater force to abortion. Others were well aware that abortion could be used as a “metho[d] of eugenics.” Indeed, some eugenicists believed that abortion should be legal for the very *purpose* of promoting eugenics. . . . Abortion advocates were sometimes candid about abortion’s eugenic possibilities. In 1959, for example, Guttmacher explicitly endorsed eugenic reasons for abortion. . . . But public aversion to eugenics after World War II also led many to avoid explicit references to that term. . . . Avoiding the word “eugenics” did not assuage everyone’s fears. Some black groups saw “ ‘family planning’ as a euphemism for race genocide” and believed that “black people [were] taking the brunt of the ‘planning’ ” under Planned Parenthood’s “ghetto approach” to distributing its services. . . .

Today, notwithstanding Sanger’s views on abortion, respondent Planned Parenthood promotes both birth control and abortion as “reproductive health services” that can be used for family planning. And with today’s prenatal screening tests and other technologies, abortion can easily be used to eliminate children with unwanted characteristics. Indeed, the individualized nature of abortion gives it even more eugenic potential than birth control, which simply reduces the chance of conceiving *any* child. As petitioners and several *amicus curiae* briefs point out, moreover, abortion has proved to be a disturbingly effective tool for implementing the discriminatory preferences that undergird eugenics. . . .

. . . .

Eight decades after Sanger’s “Negro Project,” abortion in the United States is also marked by a considerable racial disparity. The reported nationwide abortion ratio— the number of abortions per 1,000 live births—among black women is nearly 3.5 times the ratio for white women. . . . Some believe that the United States is already experiencing the eugenic effects of abortion. According to one economist, “ [*Roe v. Wade*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973126316&pubNum=0000780&originatingDoc=If57c731c813e11e9bc5d825c4b9add2e&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) help[ed] trigger, a generation later, the greatest crime drop in recorded history.” On this view, “it turns out that not all children are born equal” in terms of criminal propensity.*.* And legalized abortion meant that the children of “poor, unmarried, and teenage mothers” who were “much more likely than average to become criminals” “weren’t being born.” Whether accurate or not, these observations echo the views articulated by the eugenicists and by Sanger decades earlier: “Birth Control of itself ... will make a better race” and tend “toward the elimination of the unfit.”

It was against this background that Indiana’s Legislature, on the 100th anniversary of its 1907 sterilization law, adopted a concurrent resolution formally “express[ing] its regret over Indiana’s role in the eugenics movement in this country and the injustices done under eugenic laws.” Recognizing that laws implementing eugenic goals “targeted the most vulnerable among us, including the poor and racial minorities, ... for the claimed purpose of public health and the good of the people “urge[d] the citizens of Indiana to become familiar with the history of the eugenics movement” and “repudiate the many laws passed in the name of eugenics and reject any such laws in the future.”

. . . . Whatever else might be said about [*Casey*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992116314&pubNum=0000780&originatingDoc=If57c731c813e11e9bc5d825c4b9add2e&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), it did not decide whether the Constitution requires States to allow eugenic abortions. It addressed the constitutionality of only “five provisions of the Pennsylvania Abortion Control Act of 1982” that were said to burden the supposed constitutional right to an abortion. None of those provisions prohibited abortions based solely on race, sex, or disability. . . .

The Court’s decision to allow further percolation should not be interpreted as agreement with the decisions below. Enshrining a constitutional right to an abortion based solely on the race, sex, or disability of an unborn child, as Planned Parenthood advocates, would constitutionalize the views of the 20th-century eugenics movement. In other contexts, the Court has been zealous in vindicating the rights of people even potentially subjected to race, sex, and disability discrimination. . . .

Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=If57c731c813e11e9bc5d825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If57c731c813e11e9bc5d825c4b9add2e), concurring in part and dissenting in part.

I agree with the Court’s disposition of the second question presented. As to the first question, I would not summarily reverse a judgment when application of the proper standard would likely yield restoration of the judgment. In the District Court and on appeal to the Seventh Circuit, Planned Parenthood of Indiana and Kentucky urged that Indiana’s law on the disposition of fetal remains should not pass even rational-basis review. But as Chief Judge Wood observed, “rational basis” is not the proper review standard. This case implicates “the right of [a] woman to choose to have an abortion before viability and to obtain it without undue interference from the State,” so heightened review is in order.

It is “a waste of th[e] [C]ourt’s resources” to take up a case simply to say we are bound by a party’s “strategic litigation choice” to invoke rational-basis review alone, but “everything might be different” under the close review instructed by the Court’s precedent.