COMMENTS

MEDINA V. PLANNED PARENTHOOD: THE SUPREME COURT'S MAKING OF THE NEW JANE CROW

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INTRODUCTION

If the Warren Court reflected nearly twenty years of jurisprudence dismantling ugly systems of oppression and institutional injustice that embedded invidious practices and policies into American law and society,[1] the Roberts Court may be remembered for its reversal, dismantlement, and derailment of those same basic civil liberties and civil rights across myriad areas affecting voting,[2] education,[3] the environment,[4] human rights,[5] women's equality,[6] and reproductive health.[7] If the Warren Court is remembered for serving as a beacon for civil rights, the Roberts Court may be remembered for flattening those gains. Sadly, the Court's decision in *Medina v. Planned Parenthood South Atlantic*[8] will anchor its unseemly and undeniably injudicious legacy. If Jim Crow echoes the past, the Court's present dog whistling on reproductive freedom enshrines a new Jane Crow.

Equally, one could make the case that today's Congress lacks a similar vision for civil rights and civil liberties as did the 88th Congress. In other words, the 88th United States Congress delivered the Civil Rights

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[1] *See generally, e.g.*, STATES' LAWS ON RACE AND COLOR (Pauli Murray ed., 1951) (documenting hundreds of racially discriminatory laws in the United States across a nearly 800-page law treatise).

[2] *See, e.g.*, Shelby County v. Holder, 570 U.S. 529, 557 (2013).

[3] *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2176 (2023); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007).

[4] *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024); Seven Cnty. Infrastructure Coal. v. Eagle County, 145 S. Ct. 1497, 1518 (2025); West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).

[5] *See, e.g.*, City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2226 (2024).

[6] *See, e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 642–43 (2007); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011).

[7] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022); Whole Woman's Health v. Jackson, 142 S. Ct. 522, 539 (2021); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736 (2014); Gonzales v. Carhart, 550 U.S. 124, 168 (2007).

[8] 145 S. Ct. 2219 (2025).

Act of 1964,[9] which extended protections to women[10] — followed by the 89th, which protected voting rights[11] — a matter critically important to the full and inclusive citizenship of Black women.[12] Such actions reflected Congress's carrying out the Constitution's promise of equality and voting rights. The current Congress has attempted to gut Title X and has dismantled other reproductive health funding, such as funding for international family planning and reproductive health programs.[13]

In *Medina*, the Supreme Court delivered a stinging blow to basic healthcare and civil rights. In a 6–3 decision, drawn along ideological lines, the Court upheld South Carolina's policy of prohibiting any clinic that provides abortion services from participating in the state's Medicaid program.[14] Specifically, through an executive order, Governor Henry McMaster directed South Carolina's Department of Health and Human Services (SCDHHS) "to deem abortion clinics . . . and any affiliated physicians or professional medical practices . . . that are enrolled in the Medicaid program as unqualified to provide family planning services."[15] The executive order requires that officials "immediately terminate" abortion providers from the Medicaid program and mandates that they be denied any future enrollment.[16]

Planned Parenthood and one of its patients brought a lawsuit against Eunice Medina in her capacity as the director of the SCDHHS under 42 U.S.C. § 1983,[17] which allows individuals to sue state officials for violating their rights under the Constitution or federal laws.[18] The patient, Julie Edwards, sued to enforce her right to select Planned Parenthood as the provider of her gynecological care.[19] She was not seeking an abortion, but instead wanted to utilize the broad spectrum of reproductive health services provided by the organization, which includes cancer screenings, physical exams, contraceptives, pregnancy

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9 Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6).

10 *See* 42 U.S.C. § 2000e-2(a).

11 Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

12 *See* Deborah Gray White, *The 1965 Voting Rights Act Made Voting a Reality for Black Women*, RUTGERS-NEW BRUNSWICK SCH. OF ARTS & SCIS., https://sas.rutgers.edu/about/news/faculty/faculty-news-detail/the-1965-voting-rights-act-made-voting-a-reality-for-black-women [https://perma.cc/W32H-H4S5].

13 *See Title X*, NAT'L FAM. PLANNING & REPROD. HEALTH ASS'N, https://www.nationalfamilyplanning.org/title-x_budget-appropriations [https://perma.cc/2PWH-CAR2]; Floriane Borel et al., *Six Months in: How the Trump Administration Is Undermining Sexual and Reproductive Health and Rights Globally*, GUTTMACHER (Aug. 1, 2025), https://www.guttmacher.org/2025/08/six-months-how-trump-administration-undermining-sexual-and-reproductive-health-and-rights [https://perma.cc/L3KT-KHB5].

14 *See Medina*, 145 S. Ct. at 2219, 2227, 2239.

15 S.C. Exec. Order No. 2018-21 (July 13, 2018).

16 *Id.*

17 42 U.S.C. § 1983.

18 *Medina*, 145 S. Ct. at 2227.

19 *Id.*; *see also* 42 U.S.C. § 1396a(a)(23)(A).

exams, health counseling, and other care.[20] The lawsuit alleged that the Governor's executive order violated a key provision of the Medicaid statute that allows individuals to choose their provider so long as they are qualified under the Act.[21] This provision is known as the "any-qualified-provider provision."[22]

Plaintiffs prevailed at both the district court and appellate court levels. When the case was first heard in the U.S. District Court for the District of South Carolina, the judge granted summary judgment to Planned Parenthood and the patient.[23] The court also granted a permanent injunction, barring the state from excluding Planned Parenthood from the Medicaid program.[24] On appeal, the U.S. Court of Appeals for the Fourth Circuit upheld the lower court order.[25]

The case, like other reproductive health decisions in recent terms,[26] was decided on thin procedural grounds, which masks the true stakes in the variety of litigation involving abortion or abortion providers. On its face, the Court queried whether § 1983 can be used to enforce the "any-qualified-provider" provision, also referred to as the "free choice of provider" provision,[27] of the Medicaid statute.[28] Or stated differently, whether Medicaid created a right of action under § 1983 to enforce the "free choice of provider" provision.

However, the case represents substantive landmines in civil rights and reproductive justice. First, by upholding Governor McMaster's executive order, the Court also let stand the denial of patient choice to low-income Medicaid patients in South Carolina, which is a civil rights and human dignity issue as discussed in this Comment.[29] Second, the true and explicit aim of the executive order, based on its text and statements by the Governor, is to further restrict abortion access and rights by driving clinics and providers out of business in South Carolina.[30] Third, South Carolina problematically presented an unconstitutional ultimatum to abortion providers: cease pregnancy terminations or be denied government funding for any other reproductive health or family

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[20] *See* Planned Parenthood S. Atl. v. Kerr, 95 F.4th 152, 156 (4th Cir. 2024).

[21] *Medina*, 145 S. Ct. at 2228; *see also* 42 U.S.C. § 1396a(a)(23)(A).

[22] *Medina*, 145 S. Ct. at 2227.

[23] *Id.* at 2228.

[24] *Id*.

[25] *Id*.

[26] *See, e.g.*, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021); FDA v. All. for Hippocratic Med., 144 S. Ct. 1540 (2022); Moyle v. United States, 144 S. Ct. 540 (2024).

[27] Devin Dwyer, *Justices Divided over Medicaid "Right" to Choose Planned Parenthood Clinics*, ABC NEWS (Apr. 2, 2025, at 05:08 ET), https://abcnews.go.com/Politics/supreme-court-takes-bid-defund-planned-parenthood/story?id=120381909 [https://perma.cc/VL4R-M83A].

[28] *Medina*, 145 S. Ct. at 2228–29.

[29] Governor McMaster's executive order is limited to providers that perform abortions. *See* S.C. Exec. Order No. 2018-21 (July 13, 2018). However, the precedent it establishes is worrisome.

[30] *See id.*

planning services.[31] This falls outside of the *Rust v. Sullivan*[32] framework, which affirmed the right of clinics that perform abortions to receive federal funds for other reproductive health services even while the funds could not be used for pregnancy terminations and referrals.[33] That is, government funds may not be conditioned on viewpoint or ceasing otherwise lawful activities. Fourth, perhaps the most critical landmine is that involving maternal health and safety, which includes pregnancy termination services. As acknowledged by the Court in *Whole Woman's Health v. Hellerstedt*,[34] a woman is fourteen times more likely to die during delivery than by having an abortion.[35] Because of this, driving clinics that have even minor abortion services fully out of business is predictably a death sentence for some women, particularly as the United States leads high-income countries in maternal mortality.[36]

As such, *Medina* signals a devastating turn in law and health policy. This Supreme Court decision, written by Justice Gorsuch,[37] held that the "any-qualified-provider" provision did not "use[] clear and unambiguous rights-creating language" and therefore did not "support[] a private suit under § 1983."[38] Meaning, the text and context of the statute do not make it clear enough that individuals have the right to sue state officials for the enforcement of the Medicaid provision.

The Court's ruling represents a significant departure from the historic origins of Medicaid. As such, both procedurally and substantively, the decision undermines fundamental principles embedded in the exercise of civil liberties and the expression of civil rights. Notably, Governor McMaster's executive order, which targets Planned Parenthood and organizations that provide reproductive healthcare to low-income women,[39] speaks to a troubling, and largely untold, dark history in the

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[31] *Cf.* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 210–11 (2013) (ruling in favor of international HIV/AIDS organizations facing ultimatum in provision of services over federal regulation).

[32] 500 U.S. 173 (1991).

[33] *See id.* at 198–99 ("Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program." *Id.* at 198. "This is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression." *Id.* at 199.).

[34] 579 U.S. 582 (2016).

[35] *Id.* at 618.

[36] Munira Z. Gunja et al., *Insights into the U.S. Maternal Mortality Crisis: An International Comparison*, COMMONWEALTH FUND (June 4, 2024), https://www.commonwealthfund.org/publications/issue-briefs/2024/jun/insights-us-maternal-mortality-crisis-international-comparison [https://perma.cc/4LS7-MTLL].

[37] *Medina*, 145 S. Ct. at 2225.

[38] *Id.* at 2236.

[39] For any who would question whether Governor McMaster intended to restrict funding from Planned Parenthood and abortion providers, consider his statements immediately following the

United States generally, and South Carolina specifically. The badges and incidents of slavery included the trauma of Jim Crow healthcare.[40]

This Comment proceeds by making the normative argument that the Supreme Court should have upheld the Fourth Circuit's decision that Medicaid beneficiaries may sue to enforce the "any-qualified-provider" provision of Medicaid. Doing otherwise runs counter to the consistently interpreted clear meaning of the law. If it had done so, the Supreme Court would have preserved Medicaid's full integrity, which, as discussed in this Comment, dates to the Medical Civil Rights Movement (MCRM). Medicaid's passage was in response to segregationist laws that inflicted harm on Black patients while at the same time denying them access to quality medical care, particularly in states like South Carolina.[41] Instead, Justice Gorsuch's majority opinion struck down the Fourth Circuit's decision, ruling that the "any-qualified-provider" provision does not confer a private right upon a Medicaid beneficiary.[42] At its core, the decision ignored both text and original understanding, exposing once again the outcome-determinative decisionmaking of the Court on matters that relate to women's reproductive health and civil liberties.

Stripping beneficiaries of their choice of provider must also be read as a substantive civil rights harm. The Medicaid provision historically aligned with the MCRM — activism and civil disobedience led by Black medical providers — that sprang from and coincided with the civil rights movement,[43] which resulted in the Civil Rights Act of 1964 and Voting Rights Act of 1965.[44] To expound on this legacy and bring clarity to the Supreme Court's perilous ruling, this Comment addresses

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Medina decision as well as the amicus brief he filed in the case. According to the Governor, "[t]he legality of my executive order prohibiting taxpayer dollars from being used to fund abortion providers like Planned Parenthood has been affirmed by the highest court in the land." Press Release, Henry McMaster, Governor, S.C., Gov. McMaster Issues Statement on U.S. Supreme Court Victory in *Medina v. Planned Parenthood South Atlantic* (June 26, 2025), https://governor.sc.gov/news/2025-06/gov-mcmaster-issues-statement-us-supreme-court-victory-medina-v-planned-parenthood [https://perma.cc/NXC9-JSA7]; *see also* Brief of Governor Henry Dargan McMaster as Amicus Curiae in Support of Petitioner at 1, *Medina*, 145 S. Ct. 2219 (No. 23-1275).

40 *See, e.g.*, Jason Silverstein, *Jim Crow Laws Are Gone but They're Still Making Black People Sick*, VICE (Apr. 26, 2018, at 14:46 ET), https://www.vice.com/en/article/health-effects-jim-crow-laws-cancer [https://perma.cc/GY2P-46XN].

41 Beth Duff-Brown, *Desegregating Hospitals: How Medicare's Architect Forced Hospitals to Admit Black People*, STAN. MED. MAG. (May 10, 2021), https://stanmed.stanford.edu/medicare-architect-forced-hospital-desegregation [https://perma.cc/G93E-WR3A].

42 *Medina*, 145 S. Ct. at 2236.

43 *See generally* Vanessa Burrows & Barbara Berney, *Creating Equal Health Opportunity: How the Medical Civil Rights Movement and the Johnson Administration Desegregated U.S. Hospitals*, 105 J. AM. HIST. 885 (2019) (documenting how Medicare addressed racial segregation in hospitals).

44 Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

the largely hidden or obscured American legacy of harms in healthcare for which Medicaid was a specific, federal grant of relief.[45]

This Comment forecasts that by granting its imprimatur to an odious executive order that limits choice of providers — a key feature of Medicaid dating back nearly sixty years — the Court further revives a system of oppression. That is, the ruling in *Medina* opens the door to additional dismantling of reproductive healthcare access that will exacerbate existing harms and disparities. Further, the executive and legislative hostility it invites will deepen inequality, disenfranchise the patients Medicaid was intended to serve, and ultimately harm the most vulnerable women in need of medical care. Finally, this Comment further highlights the sophistry embedded in the majority's claims of fidelity to original meaning and history as guides for its jurisprudence.

My thesis is that women who would otherwise receive services at Planned Parenthood as their preferred provider under Medicaid, but who are now restricted from doing so in South Carolina and soon other states, will suffer serious harms to both their dignity and health. As reproductive healthcare and rights diverge by state, a two-tiered society emerges. By targeting Planned Parenthood, Governor McMaster's executive order engages in stereotyping and stigmatization affecting not only the medical provider but also the clientele that would seek services from that provider.

Part I of this Comment performs the important task of unearthing the largely overlooked conditions that inspired the MCRM. The purpose is twofold. First, it renders visible the hidden and obscured patterns of overt and covert discrimination in healthcare, resulting in an odious healthcare Jim Crow that targeted Black Americans for unequal treatment. Second, by mining this important history, this Part brings the MCRM into view.

In Part II, grounded in sociolegal history, the Comment turns to the Medicare and Medicaid Act, also known as the Social Security Amendments of 1965.[46] As this Part argues, these key provisions should not be viewed in the abstract, disconnected from the contexts in which they were forged. Rather, the Medicare and Medicaid Act was part of a trilogy of legislation signed into law by President Lyndon Johnson to

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[45] *See, e.g.*, DAVID BARTON SMITH, THE POWER TO HEAL, at ix, 176 (2016); James Robinson, *Congress Feels Taxpayers About Ready to Yell "Stop*," COM. APPEAL (Memphis, Tenn.), Sep. 3, 1964, at 1; *Health Bill Is Given Senate OK*, SPRINGFIELD DAILY NEWS (Springfield, Mass.), July 10, 1965, at 1; Thomas J. Foley, *Johnson Signs Historic Medicare Bill into Law*, L.A. TIMES, July 31, 1965, at 1; *Johnson Signs Medicare Bill, Shares Honors with Truman*, THE PATRIOT (Harrisburg, Pa.), July 31, 1965, at 1; *Johnson Urges Medicare Unity*, THE OREGONIAN (Portland, Or.), July 1, 1966, at 1; *Help Make Medicare Work, Johnson Asks*, EVENING SUN (Balt., Md.), June 30, 1966, at 1.

[46] Pub. L. No. 89-97, 79 Stat. 286; *Medicare and Medicaid Act (1965)*, NAT'L ARCHIVES (Feb. 8, 2022), https://www.archives.gov/milestone-documents/medicare-and-medicaid-act [https://perma.cc/CG6N-MFF7].

combat invidious racial discrimination and strike down Jim Crow–era practices.

Part III makes the case that the *Medina* decision weaponizes poor women's poverty against them and in turn leaves clinics that wish to provide a full scope of healthcare unable to do so without a heavy financial or moral burden. Put simply, the risks are being barred from receiving federal and state dollars in providing care to low-income patients if abortion services are provided by the clinic — even if infrequently performed — or turn away patients that may need an abortion due to rape, incest, miscarriage, or other condition. In the wake of *Dobbs v. Jackson Women's Health Organization*,[47] and now *Medina*, given steep fines, criminal penalties, and risks to their licensure, doctors fear violating abortion bans and antiabortion laws. In South Carolina, lawmakers have called for the death penalty in such instances under the proposed Prenatal Equal Protection Act.[48] The moral dilemma is that most doctors recognize an ethical obligation to treat their patients and ease their suffering, but antiabortion laws purposefully discourage and prohibit doctors from acting on their ethical obligations.[49]

As such, at its core, *Medina* is a case about punishing providers — based not on the quality of services provided nor allegations of fraud, waste, abuse, or harm to patients. The case is not about failure to meet the conditions and terms of the Medicaid program. Rather, this case fits within a pattern of antiabortion lawmakers and governors seeking to weaponize their authority and overreach into constitutionally and federally protected spaces to truncate not only abortion rights but any type of reproductive healthcare that they themselves personally disagree with. In this case, the Governor's executive order to terminate Planned Parenthood and providers that perform abortions from the Medicaid program violated the free choice that patients were lawfully entitled to make under specific, decades-old Medicaid provisions.

I. JIM CROW AND INVIDIOUS HEALTHCARE DISCRIMINATION

Part I grounds this Comment. It addresses the invidious racial discrimination that plagued U.S. healthcare prior to President Johnson's signing the Medicare and Medicaid Act into effect. It exhumes this past to shine a light on the interests Congress sought to serve by enacting the

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[47] 142 S. Ct. 2228 (2022).

[48] H.B. 3549, 2023 Gen. Assemb., 125th Sess. (S.C. 2023); *SC Lawmakers Refile Proposed Bill to Make Abortions Punishable as Homicides*, FOX CAROLINA (Dec. 11, 2024, at 13:45 ET), https://www.foxcarolina.com/2024/12/11/sc-lawmakers-refile-proposed-bill-make-abortions-punishable-homicides [https://perma.cc/E63E-YK7W].

[49] *Cf.* Michelle Oberman & Lisa Soleymani Lehmann, *Doctors' Duty to Provide Abortion Information*, J.L. & BIOSCIENCES, Sep. 1, 2023, at 21 ("To be honest with you, I'm at the point in my career, I want somebody to fucking sue me for this. I want to be arrested for guiding a patient [on how] to get an abortion. . . . [F]or me to do my job, which is the right thing." (second alteration in original) (quoting a doctor)).

legislation. It provides an important backdrop for appreciating President Johnson's broader civil rights agenda and legacy, which importantly extended beyond the Civil Rights Act of 1964 and the Voting Rights Act of 1965 to address matters of health, as discussed in Part II.

A. Preservation Through Transformation

To underscore the history presented and the analysis offered in Part I, consider that in 1966, Dr. Martin Luther King Jr. expounded: "Of all the forms of inequality, injustice in health is the most shocking and the most inhuman . . . ."[50] Dr. King proclaimed this profound idea in Chicago on March 25, 1966, at the annual convention of the Medical Committee for Human Rights — months after President Johnson signed the pivotal legislation at issue in this case.[51] Dr. King was deeply aware of the horrors wrought by racially discriminatory healthcare systems and practices.[52] He understood how discrimination in healthcare was particularly pernicious in the lives of poor women,[53] especially Black women from the rural South.[54] He called for direct action and encouraged lawsuits "to force doctors and hospitals to comply with the Civil Rights Act."[55]

For example, in the same year, Dr. King made other bold and courageous statements about women's reproductive health. In a speech accepting Planned Parenthood's inaugural award recognizing excellence and leadership in furthering reproductive rights, Dr. King bemoaned that the United States "spen[t] paltry sums for population planning."[56] In a stunning critique, he wrote that if visitors from outer space came to observe lawmakers, "they would be stupefied at our conduct . . . spend[ing] billions to create engines and strategies for war" while women were tethered to unjust social and medical systems that both denied them family planning and provided virtually no economic, housing, or other relief to support the children they did not plan for and could not afford to feed.[57] While Dr. King highlighted the alarming incoherence

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[50] *King Berates Medical Care Given Negroes*, OSHKOSH DAILY NW., Mar. 26, 1966, at 3.

[51] *Id.*; *Johnson Signs Medicare Bill, Shares Honors With Truman*, *supra* note 45, at 1.

[52] *King Berates Medical Care Given Negroes*, *supra* note 50, at 3.

[53] Martin Luther King Jr., Family Planning — A Special and Urgent Concern by the Rev. Martin Luther King Jr. (May 5, 1966), *in Family Planning — A Special and Urgent Concern*, PLANNED PARENTHOOD GULF COAST, INC., https://perma.cc/7TV2-22L5.

[54] *See* Constance Baker Motley, *Desegregation: What It Means to the Medical Professions and the Responsibilities It Places on the Negro Professionals*, 55 J. NAT'L MED. ASS'N 441, 442 (1963); ANGELA Y. DAVIS, WOMEN, RACE & CLASS 220–21 (1981) (discussing the forced sterilization of poor Black women in the South).

[55] *King Berates Medical Care Given Negroes*, *supra* note 50, at 3.

[56] King, *supra* note 53.

[57] *See id.* ("In all respects Negroes were atomized, neglected and discriminated against. Yet, the worst omission was the absence of institutions to acclimate them to their new environment. . . . For the Negro, therefore, intelligent guides of family planning are a profoundly important ingredient in his quest for security and a decent life.").

in state and federal reproductive health policies, Black Americans faced the cruel irony of being denied access to family planning even as they were subjected to coercive sterilization.[58]

He surmised that the foreign visitors would bear witness to a strange and profound irony in legislative priorities that seemingly ranked funding and building weapons of war over erecting clinics and hospitals that served the needs and interests of vulnerable women.[59] In his speech, Dr. King concluded that these "visitors from outer space could be forgiven if they reported home that our planet is inhabited by a race of insane men whose future is bleak and uncertain."[60] Notably, the speech was delivered by Coretta Scott King, his wife, who declared that she was "proud to be a woman tonight" while recounting Dr. King's dedication to providing family planning resources to Black Americans.[61]

Jim Crow marked a devastating period of state-sanctioned racial discrimination against Black Americans. Despite the guarantees of freedom and equality embedded in the reconstructed Constitution and the implicit pledge to strike laws and practices that maintained the badges of slavery,[62] the instincts of that terrible institution endured even while it transformed into Jim Crow.[63] Transformation meant that the badges and incidents of slavery, such as the denial of various rights, public humiliations, and even state-sponsored terrorism, could be preserved while slavery appeared resolved and abolished. Jim Crow was not only an era but also a legal practice. During that period, state legislation enshrined invidious discrimination into law, imposing harsh conditions onto the lives of Black Americans.[64]

In a case involving statutory sterilization, Justice Douglas explained that invidious discrimination by the state occurs when the state singles out certain "groups or types of individuals in violation of the constitutional guaranty of just and equal laws."[65] Quoting *Yick Wo v.*

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[58] *See infra* notes 117–35 and accompanying text.

[59] King, *supra* note 53.

[60] *Id.*

[61] *Id.*

[62] *See* U.S. CONST. amends. XIII, XIV, XV.

[63] *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1146 (1997); *see also* Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORN. L. REV. 899, 934 (2019) (detailing how Jim Crow laws and Black Codes denied Black Americans equal rights); ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 31 (2020) (describing Jim Crow as a "legal caste system that grew out of enslavement . . . in which most everything that you could and could not do was based upon what you looked like").

[64] *See generally* STATES' LAWS ON RACE AND COLOR, *supra* note 1 (documenting racially discriminatory laws enacted during Jim Crow).

[65] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that state policies designed to prohibit or infringe individual authority to designate one's reproductive future "forever deprive[]" one "of a basic liberty"); *see also id.* at 536 ("This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race — the right to have offspring.").

Hopkins,[66] Justice Douglas expounded that "[t]he guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'"[67] Even then, it could not be ignored that American laws historically denied Black men and women this pledge of equality — both before the Civil War and after the ratification of the Reconstruction Amendments.[68]

In what remains a compelling depiction of Jim Crow in the United States and the preservation of the badges of slavery, Justice Douglas explained in another case that "[w]hile the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die."[69] For example:

> We have seen contrivances by States designed to thwart Negro voting. Negroes have been excluded over and again from juries solely on account of their race or have been forced to sit in segregated seats in courtrooms. They have been made to attend segregated and inferior schools or been denied entrance to colleges or graduate schools because of their color . . . [and] have been prosecuted for marrying whites.[70]

This searing condemnation implicated not only the laws that preserved the badges of slavery but also the lawmakers invested in maintaining a society in which Black Americans would be forever tethered to Chief Justice Taney's chilling vision in *Dred Scott v. Sandford*.[71] He wrote that the "fixed and universal" opinion among "the civilized portion of the white race" regarded Black people as "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."[72] He concluded that "the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it."[73]

In essence, Justice Douglas reminded the Court of the myriad laws, practices, and threats that subjugated Blacks to second-class citizenship.

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66 118 U.S. 356 (1886).

67 *Skinner*, 316 U.S. at 541 (quoting *Yick Wo*, 118 U.S. at 369).

68 *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 412, 427 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 613 (1842); The Civil Rights Cases, 109 U.S. 3, 11, 24 (1883); Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896).

69 Jones v. Alfred H. Mayer Co., 392 U.S. 409, 445 (1968) (Douglas, J., concurring).

70 *Id.* (citations omitted).

71 60 U.S. (19 How.) 393, 403 (1857) ("The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.").

72 *Id.* at 407.

73 *Id.*

As he reflected, Jim Crow solidified and normalized state-sanctioned practices designed to demean, humiliate, and segregate. He explained:

> They have been forced to live in segregated residential districts and residents of white neighborhoods have denied them entrance. Negroes have been forced to use segregated facilities in going about their daily lives, having been excluded from railway coaches; public parks; restaurants; public beaches; municipal golf courses; amusement parks; buses; public libraries. A state court judge in Alabama convicted a Negro woman of contempt of court because she refused to answer him when he addressed her as "Mary," although she had made the simple request to be called "Miss Hamilton."[74]

In other words, even while the Reconstruction Amendments legally abolished slavery and enshrined equality into law, slavery's roots did not wither and die. Tellingly, despite the scope and scale of Justice Douglas's thorough mining of the Jim Crow archive, the one important area missing is the horrific blight of healthcare discrimination. This Comment illuminates Jim Crow in healthcare.

Simply put, the conditions of slavery metastasized into all areas of life, including healthcare, during Jim Crow. As Constance Baker Motley — the first Black woman to serve as a federal judge and argue before the Supreme Court[75] — wrote in 1963:

> Racial discrimination in medical facilities and services is one of the prime reasons why Negro infant mortality is from two to five times greater than white infant mortality; why white women are five times less likely to die in childbirth than Negro women; and why Negro life expectancy is almost seven years less than white life expectancy.[76]

Black communities endured targeted medical and research exploitation, their bodies, whether alive or deceased, subjected to nonconsensual experimentation and dissection.[77] They were the subjects of grave robbing to supply cadavers to hospitals and medicals schools that barred Blacks.[78] Their bodies were mined for cells, tissues, and organs[79] and ultimately subjected to unequal and sometimes deadly treatment in the

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[74] *Jones*, 392 U.S. at 445–46 (Douglas, J., concurring) (citations omitted).

[75] *Constance Baker Motley: Judiciary's Unsung Rights Hero*, U.S. CTS. (Feb. 20, 2020), https://www.uscourts.gov/data-news/judiciary-news/2020/02/20/constance-baker-motley-judiciarys-unsung-rights-hero [https://perma.cc/4E7R-XU68].

[76] Motley, *supra* note 54, at 442.

[77] HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT 189–298 (2006) (documenting medical exploitation targeting Black Americans related to reproductive health, radiation experiments, incarcerated populations, and even children).

[78] Michele Bratcher Goodwin, *An "Amazon of Living Things"? The History & Horror of Commodifying Life*, 52 J.L. MED. & ETHICS 611, 615 (2024); Harriet A. Washington, *How Does Racial Segregation Taint Medical Pedagogy?*, 25 AMA J. ETHICS 72, 72 (2023).

[79] *See* MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS 177–79 (2006).

quest for healthcare.[80] These matters, although well documented and copiously detailed in the writings of legal scholars,[81] social scientists,[82] and journalists,[83] seem in modern times to have limited, if any, effect on reducing the impacts of implicit and explicit biases in healthcare.[84]

According to Professor David Barton Smith, author of *The Power to Heal: Civil Rights, Medicare, and the Struggle to Transform America's Health Care System*, at one point, during the period of Jim Crow, healthcare was "the nation's most racially and economically segregated institution[]."[85] The system was not only segregated but also fundamentally unequal.

B. Jim Crow Healthcare

Various case studies drawn from American life during Jim Crow illustrate this Comment's concerns and animate its thesis. The condensed set of examples provided offer insight, but are by no means intended to capture the full breadth of Jim Crow health practices. Rather, they point to legal and medical debasement and exploitation, and express moral outrage.

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[80] *See* David R. Williams, *Miles to Go Before We Sleep: Racial Inequities in Health*, 53 J. HEALTH & SOC. BEHAV. 279, 283–85 (2012); M. Gregg Bloche, *Race and Discretion in American Medicine*, 1 YALE J. HEALTH POL'Y L. & ETHICS 95, 121 (2001).

[81] *See, e.g.*, Patricia A. King, *Reflections on Race and Bioethics in the United States*, 14 HEALTH MATRIX 149, 149–153 (2004); DOROTHY ROBERTS, KILLING THE BLACK BODY 65–79 (1997); DAYNA BOWEN MATTHEW, JUST HEALTH: TREATING STRUCTURAL RACISM TO HEAL AMERICA 117–34 (2022); Ruqaiijah Yearby, *Structural Racism and Health Disparities: Reconfiguring the Social Determinants of Health Framework to Include the Root Cause*, 48 J.L. MED. & ETHICS 518, 518 (2020).

[82] *See, e.g.*, Troy Duster, *Race and Reification in Science*, 307 SCIENCE 1050, 1051 (2005) (explaining how misconceptions of race continue to embed stereotypes in science and medicine); Bryan L. Sykes & Alex R. Piquero, *Structuring and Re-Creating Inequality: Health Testing Policies, Race, and the Criminal Justice System*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 214, 214 (2009).

[83] *See, e.g.*, WASHINGTON, *supra* note 77, at 189–96; Austin Frakt, *Bad Medicine: The Harm that Comes from Racism*, N.Y. TIMES: THE UPSHOT (July 8, 2020), https://www.nytimes.com/2020/01/13/upshot/bad-medicine-the-harm-that-comes-from-racism.html [https://perma.cc/3SZ5-5EEK]; Roni Caryn Rabin, *Racial Inequities Persist in Health Care Despite Expanded Insurance*, N.Y. TIMES (Aug. 29, 2021), https://www.nytimes.com/2021/08/17/health/racial-disparities-healthcare.html [https://perma.cc/9H6V-2WEB]; Karen Zraick, *Racism Is Declared a Public Health Crisis in New York City*, N.Y. TIMES (Oct. 19, 2021), https://www.nytimes.com/2021/10/19/nyregion/nyc-racism-healthcare-system.html [https://perma.cc/SJP6-56NW].

[84] *See* David S. Jones, Evelynn Hammonds, Joseph P. Gone & David Williams, *Explaining Health Inequities — The Enduring Legacy of Historical Biases*, 390 NEJM 389, 389, 393 (2024) (providing an illustrative analysis of the "biases and injustice that the [*New England Journal of Medicine*] has historically helped to perpetuate," *id.* at 389, including more recently by "miss[ing] an opportunity to pass judgment . . . on a matter of great medical . . . importance" by publishing arguments in support of "race-based medicine," *id.* at 393). That article itself, however, exemplifies responsiveness, at least within scholarship, to recognize and correct for biases in the field of healthcare discrimination. *See id.* at 389, 394 (stating that the authors' goal in publishing article was to "learn from our mistakes and prevent new ones," *id.* at 389, and asserting an affirmative "commitment to health equity . . . by interrogating the racial assumptions and sociopolitical consequences of everything [the journal] publishes," *id.* at 394).

[85] SMITH, *supra* note 45, at 175.

1. Tucker's Administrator v. Lower. — In *Tucker's Administrator v. Lower*,[86] the estate of Bruce Tucker sued several doctors affiliated with the Medical College of Virginia Hospital for wrongful death and the nonconsensual extraction of Tucker's organs after a fall and head injury.[87] Less than twenty-four hours after Tucker's admission for medical care, the doctors removed his kidneys and "launch[ed] Virginia's first heart transplant."[88] Specifically, without the consent of his next of kin, doctors removed Tucker's heart for implantation in a white patient.[89] The case was significant for two reasons. First, this was Virginia's first heart transplant — as well as the ninth in the United States and sixteenth in the world.[90] Second, "the seven-member, all-white, male jury returned a verdict in favor of the [hospital] surgeons."[91]

2. Bonner v. Moran. — In the 1941 case *Bonner v. Moran*,[92] petitioner sought damages in tort for battery and assault.[93] According to the court, "[t]he facts [we]re these: Appellant, a colored boy . . . about to be . . . 15 years of age" had "a tube of flesh . . . cut and formed from his arm pit to his waist line."[94] The opinion detailed that the boy "lost a considerable amount of blood and himself required transfusions."[95] His hospital stay was nearly two months — all without clear consent from his mother.[96] While the case centered on the important question of first impression for the court — "whether the consent of a boy 15 years of age dispenses with the necessity of consent by his parents" for a medical operation[97] — the equally alarming matter was that the subject of potentially life-ending unauthorized tissue extraction was a person the court described as an "immature colored boy."[98]

3. United States Public Health Service Syphilis Study, Otherwise Known as the Tuskegee Syphilis Study. — For forty years, lasting from 1932 to 1972, the United States led a shocking syphilis study intended

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86 No. 2831 (Law & Eq. Ct. Richmond, Va. May 23, 1972).

87 *Id.* at 125–29.

88 *The Case of Bruce Tucker and the First Heart Transplant in Virginia*, OFF. OF THE SENIOR VICE PRESIDENT FOR HEALTH SCIS., OFF. OF HEALTH INITIATIVES, VA. COMMONWEALTH U., https://healthinitiatives.vcu.edu/history-and-health-program/the-case-of-the-first-heart-transplant-in-virginia [https://perma.cc/863K-K53L]; *see also* Harriet A. Washington, *When a Black Man's Heart Was Transplanted Without Consent*, N.Y. TIMES (Aug. 18, 2020) (book review), https://www.nytimes.com/2020/08/18/books/review/the-organ-thieves-chip-jones.html [https://perma.cc/Z8JV-6A2G].

89 *See Tucker*, No. 2831, at 127–28; Washington, *supra* note 88.

90 *The Case of Bruce Tucker and the First Heart Transplant in Virginia*, *supra* note 88.

91 *Id.*

92 126 F.2d 121 (D.C. Cir. 1941).

93 *Id.* at 121.

94 *Id.*

95 *Id.* at 122.

96 *Id.*

97 *Id.*

98 *Id.* at 123 (noting he "was subjected several times to treatment involving anesthesia, blood letting, and the removal of skin from his body, with at least some permanent marks of disfigurement").

to track how Black men died from the debilitating disease.[99] In his book, *The Tuskegee Syphilis Study*, Fred Gray, attorney for members of the study, wrote that the "Study was conceived, financed, executed, and administered by the federal government."[100] The study enlisted 600 Black men — 399 with syphilis and 201 who did not have syphilis[101] — who were "mostly poor and uneducated."[102] The medical subjects lacked full knowledge of the study's objectives.[103] The research subjects were "encouraged further with a special letter giving the time and place each man was to meet Nurse Rivers[:] . . . 'Remember, this is your last chance for special free treatment.'"[104] Many were in the rural South where they already had been refused care.[105] They were unaware that the intent was not to treat their disease nor save their lives but instead to watch them die from the effects of a treatable illness.[106] Researchers misinformed the subjects, who believed themselves to be patients receiving treatment for "bad blood."[107]

Rather than receiving medications that would treat their symptoms and cure them of syphilis, the men were provided placebos, iron tonic,

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[99] Jean Heller, *Syphilis Victims in U.S. Study Went Untreated for 40 Years*, N.Y. TIMES, July 26, 1972, at 1; Vanessa Northington Gamble, *Under the Shadow of Tuskegee: African Americans and Health Care*, 87 AM. J. PUB. HEALTH 1773, 1773 (1997); U.S. PUB. HEALTH SERV., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, FINAL REPORT OF THE TUSKEGEE SYPHILIS STUDY AD HOC ADVISORY PANEL 6–7 (1973), https://biotech.law.lsu.edu/cphl/history/reports/tuskegee/complete%20report.pdf [https://perma.cc/MSY9-JRVX].

[100] FRED D. GRAY, THE TUSKEGEE SYPHILIS STUDY 150–51 (1998).

[101] *The Untreated Syphilis Study at Tuskegee Timeline*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (Sep. 4, 2024), https://www.cdc.gov/tuskegee/about/timeline.html [https://perma.cc/E3U2-8NB8].

[102] Heller, *supra* note 99, at 1. According to Gray, the actual number of participants in the study was 623. *See* GRAY, *supra* note 100, at 17, 23, 106, 156 ("It's my understanding that actually they examined and interviewed several thousand individuals. We don't know the criteria these doctors used in selecting the 623 that they selected." *Id.* at 156.).

[103] *See* Amy L. Fairchild & Ronald Bayer, Essay, *Uses and Abuses of Tuskegee*, 284 SCIENCE 919, 919 (1999); *The Untreated Syphilis Study at Tuskegee Timeline*, *supra* note 101. Notably, the "[p]articipants' informed consent was not collected." *Id.*

[104] GRAY, *supra* note 100, at 53.

[105] *See id.* at 156 (quoting Mr. Shaw, Gray's client and a survivor of the Syphilis Study, explaining, "[t]hose of us who lived in the rural area, we could not get a doctor; couldn't get medicine or anything of that kind").

[106] *See* Heller, *supra* note 99, at 1; Fairchild & Bayer, *supra* note 103, at 919; GRAY, *supra* note 100, at 45, 47 ("In any event, by October 1932, the U.S. Public Health Service, with the cooperation of public health agencies in Alabama, and the apparent approval of the local, state, and national medical establishments for treatment of venereal disease, was ready to embark upon a program which would *not* treat syphilis in African American males, in order to *observe* the effects of untreated syphilis." *Id.* at 47.).

[107] *The Untreated Syphilis Study at Tuskegee Timeline, supra* note 101; *see also* GRAY, *supra* note 100, at 49–50 ("From the point of view of the men involved, the goal was to obtain free health care, of which the first step was to take a blood test. . . . Some of the participants were told they had 'bad blood,' however, they did not know what bad blood meant at that time. . . . None was ever told he had syphilis. Most knew nothing about syphilis. They were not told they were involved in a study. They never gave or were even asked to give written consent.").

or pink pain pills that were in fact aspirin[108] and given dubious annual certificates lauding their cooperation with public health officials.[109] According to Gray, "[m]aintaining the long-term cooperation of the participants was important, and over the years various inducements were used" purposefully and coercively.[110] The most egregious aspects of the study were twofold. First, doctors continued in their manipulation even after the Nuremberg doctors' trial and after a code of bioethics was established in response to the horrors of the Holocaust.[111] In fact, as explained in the *Final Report of the Tuskegee Syphilis Study Ad Hoc Advisory Panel* (published in 1973), the study persisted even after multiple bioethics codes were established after Nuremberg:

> The widely felt need to supplement and modify the provisions of the Nuremberg Code led to the proliferation of other "improved" codes of research ethics. The World Medical Association's Helsinki Declaration (1964), the American Medical Association's Ethical Guidelines for Clinical Investigation (1966) and the draft code of the American Psychological Association (1972) are three which have received the most attention.[112]

Second, the United States Public Health Service and researchers were directly responsible for the continued suffering and deaths of the men and their families by unflaggingly continuing the study even when medical treatment — penicillin — became available.[113] The men were not offered any care during the study.[114] The magnitude of cruelty involved in the study is exemplified by the disregard of human suffering and the denial of medical relief, described in a letter during the study:

> A new situation has arisen with reference to the untreated syphilis study patients. Some of the Control cases who have developed syphilis, are getting notices from the draft boards to take treatment. So far, we are keeping the known positive patients from getting treatment. . . . Shall we withhold treatment from a control case who has developed syphilis? Please let me

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[108] GRAY, *supra* note 100, at 59; *see also Tuskegee Syphilis Experiment*, EQUAL JUST. INITIATIVE (Oct. 31, 2020), https://eji.org/news/history-racial-injustice-tuskegee-syphilis-experiment [https://perma.cc/R267-LCK2] ("Researchers told participants they were receiving treatment for 'bad blood,' while administering only iron tonic and aspirin. For decades after penicillin was established as a cure for syphilis in 1947, researchers not only continued to experiment on the men but also barred them from treatment.").

[109] GRAY, *supra* note 100, at 58 ("In 1958, the participants were given another incentive in the form of an elaborately printed twenty-five year certificate of participation signed by the Surgeon General and accompanied by twenty-five dollars, one dollar for each year of the Study.").

[110] *Id.*

[111] *See* U.S. PUB. HEALTH SERV., *supra* note 99, at 25.

[112] *Id.* at 26 (footnotes omitted).

[113] Fairchild & Bayer, *supra* note 103, at 919 ("First, the study involved deceptions regarding the very existence and nature of the inquiry into which individuals were lured. As such, it deprived those seeking care of the right to choose whether or not to serve as research subjects. Second, it entailed an exploitation of social vulnerability to recruit and retain research subjects. Third, Tuskegee researchers made a willful effort to deprive subjects of access to appropriate and available medical care as a way of furthering the study's goals.").

[114] *Id.*

> have your wishes with reference to handling this type patient and I will carry them out as best as I can.[115]

So, despite the possibility of treatment, men died and suffered the traumatic conditions associated with untreated syphilis. Specifically, "128 participants died of syphilis or related complications, 40 wives were infected, and 19 children were born with congenital syphilis."[116]

4. Jane Crow: Relf v. Weinberger, Cox v. Stanton, and the Mississippi Appendectomy. — Perhaps the most malevolent of the healthcare indignities inflicted on African Americans were coerced sterilizations. The practice was often masked as "appendectomies" or other procedures by medical providers to camouflage its unlawful — though normalized — and unethical purpose.[117] Specifically, the so-called "Mississippi appendectomy" stripped the possibility of future parenthood from not only women but also children.[118] The practice, estimated to exploit between "100,000 to 150,000 poor people . . . each year under federally-funded programs,"[119] was largely brought to light by the civil rights activist Fannie Lou Hamer, who in 1961 became the medical subject of forced sterilization when she sought medical care for a uterine fibroid, but returned home after experiencing a nonconsensual hysterectomy.[120] Again, this was not incidental.[121]

As federal district court Judge Reeves wrote in the 2018 order granting injunctive relief against the Mississippi antiabortion law that later would overturn *Roe v. Wade*,[122] Hamer's reporting revealed a painful secret hidden in plain sight in Mississippi.[123] Namely, the state had "sterilized six out of ten black women in Sunflower County at the local hospital — against their will."[124] The "Mississippi Appendectomy" reached beyond Sunflower County to other cities, counties and states.

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115 GRAY, supra note 100, at 61 (quoting a letter sent on August 6, 1942, from Dr. Murray Smith to Dr. R.A. Vonderlehr about the problem of medications available to treat syphilis in the region and the concern that study participants might inadvertently receive treatment, *id.* at 60).

116 *Tuskegee Syphilis Experiment*, *supra* note 108.

117 WASHINGTON, *supra* note 77, at 204 ("In the South, rendering black women infertile without their knowledge during other surgery was so common that the procedure was called a 'Mississippi appendectomy.' . . . To accomplish the sterilizations, practitioners lied to patients, forged consent forms, or falsified medical records to reflect an 'appendectomy' or 'gallbladder removal,' so it is now impossible to know the exact number of African American women who were sterilized without their knowledge.").

118 *See* Brief of Amici Curiae Organizations Advancing Reproductive Rights, Health, and Justice in Support of Respondents at 15–16, *Medina*, 145 S. Ct. 2219 (No. 23-1275) [hereinafter Brief of Amici Curiae Organizations Advancing Reproductive Rights].

119 *Id.* at 15.

120 Sarah Averbach et al., Comment, *Failure to Progress: Structural Racism in Women's Healthcare*, ECLINICALMEDICINE, Mar. 2023, art. 101861, at 1.

121 *See* Brief of Amici Curiae Organizations Advancing Reproductive Rights, *supra* note 118, at 14.

122 410 U.S. 113 (1973).

123 *See* Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 541 n.22 (S.D. Miss. 2018).

124 *Id.*

In Alabama, the coerced sterilization of the Relf sisters brought to light the tragic extent of these chilling practices.[125] Minnie Lee, twelve years old, and Mary Alice, fourteen years old, were the unwitting subjects of a surprise surgery ordered by the Montgomery Community Action Committee.[126] Their mother unknowingly consented to the procedure when social workers asked that she draw an "X" in a document she could not read.[127] Later, when her daughters' experiences came to light, Mrs. Relf informed reporters that she was never informed of the medical document's contents.[128]

Cases brought in other states by Black women reveal similar experiences of forced sterilization in tragically similar circumstances. For example, eighteen-year-old Nial Ruth Cox brought suit against North Carolina officials who threatened that her family's welfare assistance would be terminated if she refused sterilization.[129] According to the court, "[t]he director of the Washington County Welfare Agency . . . allegedly petitioned the Eugenics Board to order Miss Cox's sterilization,"[130] and the surgeon, rather than performing a reversible tubal ligation, "performed an irreversible bilateral salpingectomy sterilization."[131]

Cox was not alone. Elaine Riddick, now an outspoken advocate on behalf of survivors of forced sterilization, suffered a similar tragedy at fourteen years old.[132] Riddick was "poor and black . . . in a segregated North Carolina town. And . . . pregnant after being raped by a man from her neighborhood."[133] "[S]ocial workers . . . referred her case to the state's Eugenics Board" where "[i]n an office building in Raleigh, five men met to consider her fate — among them the state health director and a lawyer from the attorney general's office."[134] Those men deemed her "doomed to promiscuity."[135] Riddick described her experience as being "butchered . . . like a hog."[136]

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125 DAVIS, *supra* note 54, at 215–16.

126 *Id.* at 216.

127 *Id.*

128 *Id.*

129 Cox v. Stanton, 529 F.2d 47, 49 (4th Cir. 1975) ("At the time of the sterilization Miss Cox was 18, unmarried, and the mother of a ten-week-old girl. She lived with her mother, who was a welfare recipient. According to the plaintiff's complaint, a social worker threatened to strike the family from the welfare rolls unless the mother consented to Miss Cox's temporary sterilization; 'consent' was obtained.").

130 *Id.*

131 *Id.*

132 David Zucchino, *Sterilized by North Carolina, She Felt Raped Once More*, L.A. TIMES (Jan. 25, 2012, at 00:00 PT), https://www.latimes.com/archives/la-xpm-2012-jan-25-la-na-forced-sterilization-20120126-story.html [https://perma.cc/WX7J-A5DM].

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

Medina brings this pre-Medicaid[137] trauma full circle. In the first instance, this history directly ties to and implicates South Carolina, the state that produced the law in *Medina*.[138] South Carolina has a chilling history of medical discrimination and assault based on sex and race. In recent years, the state's barbaric eugenic sterilization practices against poor Black women, dating to the 1930s, have come to light.[139] Over 250 people, disproportionately women and Black people, were sterilized in South Carolina at a time when civil rights leaders were protesting unequal and unfair treatment under law.[140]

This was not an anomaly. In neighboring North Carolina, the state "forcibly sterilized almost 7,600 people — many of whom were Black" — over the course of more than four decades.[141] Debra Blackmon was fourteen when she was coercively sterilized, remembering only her father crying and pleading with social workers and staff at the Charlotte Memorial Hospital not to hurt her.[142] Her niece's investigation into the circumstances surrounding the surgery revealed that "[t]hey were telling my grandparents that the surgery was going to be minimally invasive. They told them it would be a tubal ligation. And they [wound] up doing a full abdominal hysterectomy — on a 14-year-old."[143] This discriminatory treatment resulted in egregious wrongs committed against the most vulnerable women in that state. The tragic irony of this history cannot be unseen.

Furthermore, this backdrop is critical to understanding what was at stake in *Medina*. That is, the Court was considering another law that restricted women's reproductive health choices in the same state and region.[144] Sadly, the Supreme Court permitted South Carolina to gut

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137 *Compare id.* (Riddick was forcibly sterilized in 1968), *with* N.C. DIV. OF MED. ASSISTANCE, N.C. DEP'T OF HEALTH & HUM. SERVS., HISTORY OF NORTH CAROLINA MEDICAID PROGRAM 1 (2008), https://digital.ncdcr.gov/Documents/Detail/history-of-north-carolina-medicaid-program-state-fiscal-years-1970-to-2007/3692668 [https://perma.cc/8MZN-MH9L] (North Carolina's Medicaid program began in 1970).

138 *Medina*, 145 S. Ct. at 2227.

139 Lutz Kaelber, *South Carolina*, EUGENICS: COMPULSORY STERILIZATION IN 50 AMERICAN STATES, https://www.uvm.edu/~lkaelber/eugenics/SC/SCold.html [https://perma.cc/9G4S-6UNU]; *see also, e.g.*, Kathryn Winiarski, *At Least 259 Sterilized Under S.C.'s "Purging" Law State's First Forced Sterilization Was Done at Spartanburg School*, GOUPSTATE (Feb. 24, 2001, at 23:01 ET), https://www.goupstate.com/story/news/2001/02/25/least-sterilized-under-sc39s-39purging39-state39s-first-forced-sterilization-done-spartanburg-school/29631039007 [https://perma.cc/8J8Q-GF3Z].

140 *See* Kaelber, *supra* note 139.

141 Hayley Fowler, *"Act of Genocide." Eugenics Program Tried to "Breed Out" Black People in NC, Report Says*, NEWS & OBSERVER (Aug. 18, 2020, at 10:34 ET), https://www.newsobserver.com/news/state/north-carolina/article244411987.html [https://perma.cc/HSU4-V2XU]; *see also* Eric Mennel, *Payments Start for N.C. Eugenics Victims, But Many Won't Qualify*, NPR (Oct. 31, 2014, at 17:04 ET), https://www.npr.org/sections/health-shots/2014/10/31/360355784/payments-start-for-n-c-eugenics-victims-but-many-wont-qualify [https:// perma.cc/58RM-998Q].

142 Mennel, *supra* note 141.

143 *Id.* (second alteration in original).

144 Brief of Amici Curiae Organizations Advancing Reproductive Rights, *supra* note 118, at 3–4.

medical choice,[145] something that South Carolina implicitly and explicitly imposed upon women and girls decades before.

II. THE MCRM AND THE BIRTH OF MEDICAID AND MEDICARE

Part I unpacked how Jim Crow practices trapped African Americans in a legalized second-class citizenship, including in matters of health. It was a system dominant in the American South, but its bloodline circulated throughout the nation. The systems of health discrimination were unyielding, leading Dr. King to observe that of all the forms of Jim Crow harms and injuries, those impeding healthcare were the most cruel and inhumane, because they could lead to death as well as physical and mental trauma.[146] If treated at a white-serving hospital, Black patients were likely to experience discrimination not only in the form of segregation itself, but also through medical maltreatment that could lead to death.[147] On the other hand, being refused service at segregated hospitals could mean traveling many miles away for care, including to other cities or states.[148]

In Part II, the Comment turns to the Medicare and Medicaid Act of 1965, the MCRM, and the Hill-Burton Act.[149] This Part reframes and retells the story of the Medicare and Medicaid Act from a different point of view, centered on civil rights. Namely, it associates the Act with the Civil Rights Act of 1964 and the Voting Rights Act of 1965. It also underscores why medical choice became paramount in the structure of Medicaid. Because Black patients endured both segregation and unequal treatment, having a choice of provider was significant.

Given this history, Medicaid should not be viewed in isolation, but rather as part of the 1960s civil rights legislative agenda, which directly responded to the ways that American law and society subjected African Americans to unequal medical treatment.[150] In other words, provider choice is a civil rights issue. Medicaid was essential to achieving civil rights.[151] Provider choice was crucial to Medicaid being meaningful.[152]

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145 *See Medina*, 145 S. Ct. at 2239.

146 *King Berates Medical Care Given Negroes*, *supra* note 50, at 3.

147 SMITH, *supra* note 45, at 8.

148 *Id.* at 5–10, 45–47, 183–87 (The book provides an exhaustive account of medical segregation and horrific consequences, including detailing a story where a "young black man was shot in the abdomen by a gang of white youth intent on enforcing [segregation policies]. The two hospitals in Fort Lauderdale refused to admit him, and he died before he could be transported to one of the only black hospitals in South Florida . . . ." *Id.* at 6.).

149 Hospital Survey and Construction Act, ch. 958, 60 Stat. 1040 (1946) (codified as amended at 42 U.S.C. § 291).

150 SMITH, *supra* note 45, at 175; *see also Health Bill Is Given Senate OK*, *supra* note 45, at 1. For more on the passage of Medicaid and its role in the civil rights movement, see sources cited *supra* note 45.

151 *See* SMITH, *supra* note 45, at 175 (describing how, partially through Medicare, the civil rights movement "tore down most of the walls of a starkly separate and unequal system").

152 *See id.* at 181.

This Comment therefore excavates the buried, overlooked origins and priorities of the MCRM. It underscores that provider access and choice were crucial elements of the movement because Black Americans were denied essential healthcare,[153] stereotyped, stigmatized, demeaned, and subjected to medical segregation and discrimination.[154] The Comment argues that the MCRM movement recognized that the right to equitable, nondiscriminatory healthcare was as important as other civil rights such as accommodations, housing, education, and even voting.

Part II proceeds first by briefly turning to the MCRM. It next examines the birth of Medicaid.

A. The MCRM and The Hill-Burton Act

Four gaps in the teaching of constitutional law and health law are relevant to this Comment. The first of these gaps is the bifurcation of racial discrimination in medicine and healthcare from other forms of racial hostility and discrimination such that the former has been rendered invisible and unaddressed in the classroom. As demonstrated in Part I, explicit, cruel racial discrimination in health persisted alongside that in education, housing, employment, accommodation, and voting for nearly a century after the fall of Reconstruction and during Jim Crow.[155]

Second, in both constitutional and health law courses, relatively little if any attention is paid to the MCRM despite its centrality to the overall civil rights movement and the establishment of antidiscrimination laws in health and in the Medicare and Medicaid Act.[156]

Third, while the Medicare and Medicaid Act has been understood as addressing economic vulnerability in health, which is true, both the public understanding and teaching of the law are stripped of its context as a civil rights law.[157] Understanding the law as civil rights legislation — even while imperfect[158] — brings into view the signal achievement of President Johnson and Congress in essentially creating a second Reconstruction.

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153 *Id.* at 6–8; *see also Johnson Calls Medicare "Fifth Freedom," Proposes Extending It to Children*, THE ARGUS (Fremont-Newark, Cal.), Aug. 15, 1968, at 7 (quoting President Johnson as noting the "trag[ic]" lack of Black physicians and Medicare's "saving lives").

154 SMITH, *supra* note 45, at 6; DAVIS, *supra* note 54, at 215–18; Averbach et al., *supra* note 120, at 1.

155 *See* Ruqaiijah Yearby, Brietta Clark & José F. Figueroa, *Structural Racism in Historical and Modern US Health Care Policy*, 41 HEALTH AFFS. 187, 188 (2022) ("Since the Jim Crow era (1875–1968), racism has implicitly and explicitly been an integral part of the US government's structuring and financing of the health care system.").

156 *See, e.g.*, SMITH, *supra* note 45, at 29.

157 *Cf.* Sarah Somers & Jane Perkins, *The Ongoing Racial Paradox of the Medicaid Program*, 16 J. HEALTH & LIFE SCIS. L. 96, 98 (2022) (explaining that "Medicaid was born during an era of great civil rights struggle and advancement" and, "[o]n the one hand, . . . brought life-saving health coverage to millions of people of all races[, but, o]n the other hand, . . . perpetuated racial inequities in the health care system").

158 *Id.*

Fourth, much of the hostility in advancing a medical civil rights agenda emerged from within the profession, led by well-organized white doctors — hostile to integration — who lobbied against its passage and continued to resist its implementation. This resistance resulted in compromise that continues to distinguish Medicare from Medicaid.[159] Wilbur Cohen, Secretary of Health, Education, and Welfare under the Johnson Administration,[160] wrote: "It is frequently overlooked that the American Medical Association (AMA) originally opposed early versions of even a limited Medicaid proposal."[161] In fact, as he noted, "[o]n April 24, 1956, the AMA informed Congress: 'The American Medical Association is vigorously and firmly opposed to this step'" and "'see[s] no need for the establishment of medical care as a fifth and separate category of Federal aid in public assistance programs.'"[162] By this time, the AMA had established itself as a white, male-only medical association, barring Black doctors from membership.[163]

Particularly noteworthy in the AMA's letter was the concern that facilitating healthcare access for economically vulnerable and Black individuals would "burden the community with regulations and restrictions inconsistent with local problems, local laws, or local customs."[164] This dog whistle echoed patterns of resistance to racial equality dating to Reconstruction — that is, that equality and civil rights for Black Americans would interfere with states' rights and local practices. In medicine, this included permissible racial segregation and discrimination.[165] In 2019, Dr. Adam Gaffney, then-president of the group Physicians for a National Health Program (PNHP), put it this

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159 Wilbur J. Cohen, *Reflections on the Enactment of Medicare and Medicaid*, 7 HEALTH CARE FIN. REV. (ANN. SUPPLEMENT) 3, 3–4, 6, 9–10 (1985); *see also* LaShyra T. Nolen, Adam L. Beckman & Emma Sandoe, *How Foundational Moments in Medicaid's History Reinforced Rather Than Eliminated Racial Health Disparities*, HEALTH AFFS.: FOREFRONT (Sep. 1, 2020), https://www.healthaffairs.org/content/forefront/foundational-moments-medicaid-s-history-reinforced-rather-than-eliminated-racial-health [https://perma.cc/F5PG-TQ9B]; Judith D. Moore & David G. Smith, *Legislating Medicaid: Considering Medicaid and Its Origins*, HEALTH CARE FIN. REV., Winter 2005–2006, at 45, 46; Jessica Greene, Jan Blustein & Beth C. Weitzman, *Race, Segregation, and Physicians' Participation in Medicaid*, 84 MILBANK Q. 239, 262–65 (2006); DAVID BARTON SMITH, HEALTH CARE DIVIDED 159–61 (1999) (notably, nursing homes became a central point of discrimination even after this important civil rights legislation was enacted).

160 Cohen, *supra* note 159, at 1.

161 *Id.* at 4.

162 *Id.* (quoting *Public Assistance Titles of the Social Security Act: Hearings on H.R. 9120, H.R. 9091, H.R. 10283, and H.R. 10284 Before the H. Comm. on Ways and Means*, 84th Cong. 331 (1956) (letter from Dr. George F. Lull, Sec'y-Gen. Manager, Am. Med. Ass'n, to Hon. Jere Cooper, Chairman, Comm. on Ways and Means, H.R. (Apr. 24, 1956))).

163 *See* James L. Madara, *Reckoning with Medicine's History of Racism*, AM. MED. ASS'N (Feb. 17, 2021), https://www.ama-assn.org/about/leadership/reckoning-medicine-s-history-racism [https://perma.cc/HAD2-ESV7].

164 Cohen, *supra* note 159, at 4 (quoting *Public Assistance Titles of the Social Security Act: Hearings on H.R. 9120, H.R. 9091, H.R. 10283, and H.R. 10284*, *supra* note 162, at 331 (letter from Dr. George F. Lull, *supra* note 162)).

165 *See* Motley, *supra* note 54, at 442 (describing how, in 1963, "[r]acial discrimination in all aspects of medical care exist[ed] throughout this nation").

way: "For decades, the AMA has been on the wrong side of history, fighting efforts to establish Medicare and Medicaid in the 1960s, and resisting movements to bring racial equality to the delivery and practice of health care."[166] As such, Medicaid's structure has been described as a paradox and "perpetuat[ing] racial inequities in the health care system."[167]

Yet, above and beyond the clear opposition of the AMA to ending systems of discrimination in health,[168] it was federal law that fundamentally instantiated discrimination within healthcare. At the very least, it was a powerful co-conspirator. If *Plessy v. Ferguson*[169] sanctioned separate but equal in day-to-day life,[170] the Hospital Survey and Construction Act of 1946, commonly referred to as the Hill-Burton Act,[171] embedded that ideology not only in the delivery of medicine but also in the law.[172] In *Simkins v. Moses H. Cone Memorial Hospital*,[173] the Fourth Circuit held that racially segregated "separate-but-equal" facilities funded by the Hill-Burton Act were unconstitutional.[174] The Fourth Circuit decision was appealed, but the Court denied cert.[175] Importantly, while the case holds precedential weight in the Fourth Circuit, the Hill-Burton Act was never struck down nationwide. The subsequent passage of the Civil Rights Act a year later largely rendered the question moot.[176] In short, for nearly twenty years until it was challenged in *Simkins* and followed by the passage of the Civil Rights Act, Hill-Burton explicitly enshrined racially discriminatory practice into healthcare delivery.[177] Its legacy permeates modern healthcare.

In response to a shortage of hospitals following World War II, Hill-Burton provided states with federal funds to construct hospitals.[178] However, it specifically codified a "separate-but-equal" provision within the law, permitting states to maintain and enforce separate services while still receiving federal funds.[179] Consequently, in the South, only

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166 Joyce Frieden, *AMA Drops Out of Group Opposing Medicare for All*, PNHP (Aug. 16, 2019), https://pnhp.org/news/ama-drops-out-of-group-opposing-medicare-for-all [https://perma.cc/6B6M-XW2V] (quoting Dr. Adam Gaffney).

167 Somers & Perkins, *supra* note 157, at 98.

168 Madara, *supra* note 163.

169 163 U.S. 537 (1896).

170 *Id.* at 544.

171 Joshua Herb, *Health Policy in Action — A Brief History of Hospital Desegregation in the United States*, ASS'N FOR ACAD. SURGERY (Feb. 27, 2025), https://www.aasurg.org/health-policy-in-action-a-brief-history-of-hospital-desegregation-in-the-united-states [https://perma.cc/XJR2-9UBW].

172 *Id.*

173 323 F.2d 959 (4th Cir. 1963).

174 *Id.* at 969.

175 Moses H. Cone Mem'l Hosp. v. Simkins, 376 U.S. 938, 938 (1964) (mem.) (denying cert.).

176 *See* Herb, *supra* note 171.

177 *Id.*

178 *Id.*; *Simkins*, 323 F.2d at 963.

179 *Simkins*, 323 F.2d at 965.

six percent of hospitals provided Black patients unrestricted services.[180] In thirty-one percent of Southern hospitals, Black patients were denied admission altogether, while in forty-seven percent Black patients were admitted to separate wards, usually on separate floors.[181]

Such conditions impacted physicians as well as patients. Black physicians encountered significant challenges to practicing medicine and delivering care to patients, let alone Black patients.[182] In the words of John Kenny Jr., who served as president of the National Medical Association (NMA) from 1962 to 1963, "[t]he colored doctor is . . . denied participation in hospital staff membership [and] . . . [t]he Negro patient is discriminated against both in seeking hospital admission, and once he gets in, in where he is placed in the hospital."[183]

In response to Hill-Burton and the denial of care to Black patients, Black doctors organized — founding and joining various groups such as the Medical Committee for Civil Rights, which provided care to patients in the Deep South — and pressured President Johnson.[184] The NMA had previously sprung into existence in 1895 given Black exclusion from the AMA.[185] This group protested the Hill-Burton Act and called for an end to all-white local AMA chapters.[186] The interracial Medical Committee for Civil Rights followed suit, picketing outside of the AMA and demanding an end to all segregation and discrimination in healthcare.[187] The MCRM became a crucial advocate for dignity and desegregation in American medical care.[188]

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[180] Herb, *supra* note 171.

[181] *Id.*

[182] *Id.*; *see also Chicago Physicians Sue for Admission to Hospital Staffs*, 53 J. NAT'L MED. ASS'N 198, 199 (1961); David Barton Smith, *The Politics of Racial Disparities: Desegregating the Hospitals in Jackson, Mississippi*, 83 MILBANK Q. 247, 248, 262 (2005).

[183] John A. Kenny, Jr., *Civil Rights in Medicine*, 35 AM. J. ORTHOPSYCHIATRY 26, 26–27 (1965).

[184] Beatrix Hoffman, *The Medical Civil Rights Movement and Access to Health Care*, NAT'L LIBR. MED.: CIRCULATING NOW (Jan. 14, 2016), https://circulatingnow.nlm.nih.gov/2016/01/14/the-medical-civil-rights-movement-and-access-to-health-care [https://perma.cc/643R-G3M4]; SMITH, *supra* note 45, at 83–88 (explaining how President Johnson invited Dr. W. Montague Cobb — a leading medical civil rights advocate who was principally involved in pressuring Johnson and medical leaders to desegregate hospitals — to the ceremony where he "signed the extension of the Hill-Burton Act, with the offending clause permitting the use of funds for the construction of separate but equal facilities deleted," *id.* at 83).

[185] *NMA History*, NAT'L MED. ASS'N, https://nmanet.org/nma-history [https://perma.cc/N4ZX-2TJW].

[186] Hoffman, *supra* note 184.

[187] *Id.*

[188] *Id.* Notably, even after the passage of the Medicare and Medicaid Act, patterns of inequality persisted and continue to manifest. In 1970, then-head of the NMA, Leonidas Berry, organized a group of health professionals from Chicago who chartered two planes to "mak[e] regular flights" from Chicago to Cairo, Illinois, to provide care to poor Black communities, coming to be known as the "Flying Black Medics." *Id.*; *see also* Julia Haskins, *Celebrating 10 African-American Medical Pioneers*, AAMC (Feb. 25, 2019), https://www.aamc.org/news/celebrating-10-african-american-medical-pioneers [https://perma.cc/SMS8-DUYM].

B. Medicaid, Medical Choice, and Title VI

President Johnson spearheaded the enactment of the Medicare and Medicaid Act[189] as well as the Civil Rights Act of 1964, of which Title VI was critically important.[190] These were not insignificant victories, and each was crucial to the whole. Simply put, long and enduring patterns of racial discrimination and economic exploitation in the United States (too frequently enforced by government)[191] explicitly barred Black Americans from meaningful pathways to equality,[192] essentially creating what Isabel Wilkerson describes as a caste system.[193] From education[194] to taxation,[195] institutionalized governmental policies handcuffed Black Americans to inequality. Sixty years later, with civil rights and civil liberties secured, it may be difficult to fully comprehend the American sociolegal landscape of inequality that preceded and precipitated the medical civil rights agenda. As such, these matters deserve brief review to situate both the past and this Comment's critique of *Medina*.

1. A Prologue: The Sociolegal Backdrop to the MCRM and Medicaid. — To place *Medina* within the appropriate legislative and therefore social context requires a brief, but necessary, prologue. Neither the legislation nor the political backdrop in which it was drafted occurred in a vacuum. Nor was the legislation passed in isolation of other civil rights legislation. The horrors that triggered the Civil Rights Act, Title

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189 Cohen, *supra* note 159, at 5.

190 Carole Bennett, *Healthcare Justice, Medicare, and the Racial Desegregation of Hospitals in the South*, ONLINE J. ISSUES NURSING (Sep. 27, 2023), https://ojin.nursingworld.org/table-of-contents/volume-28-2023/number-3-september-2023/articles-on-previously-published-topics/healthcare-justice-medicare [https://perma.cc/QT8N-AQCF].

191 *See, e.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW 17 (2017) ("The purposeful use of public housing by federal and local governments to herd African Americans into urban ghettos had as big an influence as any in the creation of our *de jure* system of segregation."); Patrick Rael, *The Distinction Between Slavery and Race in U.S. History*, BLACK PERSPS. (Nov. 27, 2016), https://www.aaihs.org/the-distinction-between-slavery-and-race-in-u-s-history [https://perma.cc/N2QJ-PW2P] ("At the time of the [nation's] founding, slavery was legal in every state in the Union.").

192 *See* CAROL ANDERSON, WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE 7 (2016) ("James Madison called it America's 'original sin.' Chattel slavery. Its horrors, Thomas Jefferson prophesied, would bring down a wrath of biblical proportions." (footnote omitted)). *See generally* STATES' LAWS ON RACE AND COLOR, *supra* note 1 (providing a detailed overview of laws that, inter alia, prevented Black Americans from receiving equal treatment and equal opportunities); CHARLES W. MILLS, THE RACIAL CONTRACT (1997) (observing that racial inequality has been purposefully instantiated within American law and arguing that the lineage of discrimination includes European colonialism, slavery, Jim Crow, and more contemporary patterns of racial discrimination).

193 WILKERSON, supra note 63, at 31.

194 Osamudia James, *White Injury and Innocence: On the Legal Future of Antiracism Education*, 108 VA. L. REV. 1689, 1751 (2022).

195 *See generally* DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS — AND HOW WE CAN FIX IT (2021) (exposing how racism in the American tax system promotes white wealth building at the expense of Black taxpayers).

VI, and the Voting Rights Act were part of the same forces that motivated the passage of the Medicare and Medicaid Act.

Ironically, this prologue is necessary because the breadth and ubiquity of race- and sex-based discrimination that proliferated in 1965 may be obscured today by the success of civil rights legislation, which is now under threat by executive orders such as that involved in *Medina*. The plague of American race- and sex-based injustice exists outside the South and has infected other parts of the United States.[196] Constant barriers to voting, including by threats of force and violence, have made certain that enduring systems of inequality or second-class citizenship will persist in law and society. Because Blacks — especially throughout the American South — encountered inordinate and violent barriers to voting, electing lawmakers who would represent their interests and vindicate their constitutional and legislative rights became more illusory than real after Reconstruction and throughout the Jim Crow era.[197] The effects of these barriers were particularly acute for Black women, who encountered sexism because of their gender and racism because of their color. Coercive sterilizations are but one example.

According to Armand Derfner, who argued seminal voting rights cases before the Supreme Court,[198] "[f]or years . . . the most simple-minded modes of discrimination — generally transparent devices to prevent blacks from even qualifying to vote — were almost totally effective."[199] Without meaningful voting rights, the ability to utilize the democratic process to address state-sponsored sterilizations, segregated hospitals, and rampant discrimination in healthcare, and advance individual and collective constitutional rights was essentially out of reach.

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[196] *See* Ronald R. Edmonds, *Simple Justice in the Cradle of Liberty: Desegregating the Boston Public Schools*, 31 VAND. L. REV. 887, 887 (1978); BERNADETTE ATUAHENE, PLUNDERED: HOW RACIST POLICIES UNDERMINE BLACK HOMEOWNERSHIP IN AMERICA 27, 41 (2025); *see also* Joe Bubar, *The Jim Crow North*, N.Y. TIMES UPFRONT (Mar. 9, 2020), https://upfront.scholastic.com/issues/2019-20/030920/the-jim-crow-north.html [https://perma.cc/DWM4-P9H3] (discussing segregation and racism in the North). For a historical treatment of the issue, see generally JAMES J. GIGANTINO II, THE RAGGED ROAD TO ABOLITION: SLAVERY AND FREEDOM IN NEW JERSEY, 1775–1865 (2015) (detailing the history and delayed dismantlement of slavery in the Northern state of New Jersey from the American Revolution to the Civil War); HENDRIK HARTOG, THE TROUBLE WITH MINNA: A CASE OF SLAVERY AND EMANCIPATION IN THE ANTEBELLUM NORTH (2018) (describing the "gradual emancipation" in New Jersey, *id.* at 7).

[197] *See* Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 523 (1973) ("Lawyers in voting discrimination cases are fond of quoting Justice Frankfurter's dictum that 'the [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination.' Unfortunately for historical accuracy and for the health of our society, this statement simply has been false for most of the century since the passage of that amendment." (alteration in original) (footnote omitted) (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939))).

[198] *Armand Derfner*, DERFNER & ALTMAN, https://www.derfneraltman.com/profiles.html [https://perma.cc/K44N-53TV].

[199] Derfner, *supra* note 197, at 524.

As such, the legal strategy to put an end to the foul effects of sex and race discrimination targeted federal legislation and legal cases.[200]

Collectively, the various bundles of racial discrimination copiously documented in Dr. Pauli Murray's treatise on race laws in America[201] created barriers to economic and social mobility, thickly entrenching poverty such that it would be difficult for future generations to extricate themselves from it.[202] Deadly attacks on thriving Black communities — largely without legal consequence — exacted a traumatizing toll.[203] Indeed, attempts to disturb the so-called color line through economic gains were met with extreme violence in some communities — violence that did not spare women or children.[204] Well-educated, successful Black Americans and their communities were not spared threats of violence when integrating schools, restaurants, department stores, neighborhoods, or places of accommodation and recreation.[205] The spectacle of lynchings and bombings of homes, businesses, and places of worship served as powerful tactics that reinforced the color line and

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[200] *See, e.g.*, *Thurgood Marshall as an Advocate*, SUP. CT. HIST. SOC'Y: BEYOND THE BENCH, https://civics.supremecourthistory.org/article/thurgood-marshall-as-an-advocate [https://perma.cc/83GC-UZF9]. But see Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256 (2005), for an argument that legal historians have focused too heavily on the courtroom side of civil rights lawyers' pre-*Brown* legal strategy, thereby overlooking other forms of advocacy that these lawyers undertook during the period. *Id.* at 263.

[201] STATES' LAWS ON RACE AND COLOR, *supra* note 1.

[202] ATUAHENE, *supra* note 196, at 77.

[203] *See, e.g.*, ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921 — RACE, REPARATIONS, AND RECONCILIATION, at ix (2002); Chris M. Messer & Patricia A. Bell, *Mass Media and Governmental Framing of Riots: The Case of Tulsa, 1921*, 40 J. BLACK STUD. 851, 853 (2010); Chris M. Messer, *The Tulsa Race Riot of 1921: Toward an Integrative Theory of Collective Violence*, 44 J. SOC. HIST. 1217, 1217–18 (2011); *1921 Tulsa Race Massacre*, MUSEUM OF TULSA HIST., https://www.tulsahistory.org/exhibit/1921-tulsa-race-massacre [https://perma.cc/F6B2-XVCY]; Maggie Astor, *What to Know About the Tulsa Greenwood Massacre*, N.Y. TIMES (May 28, 2021), https://www.nytimes.com/2020/06/20/us/tulsa-greenwood-massacre.html [https://perma.cc/68U5-WXK9]; Jessica Glenza, *Rosewood Massacre a Harrowing Tale of Racism and the Road Toward Reparations*, THE GUARDIAN (Jan. 3, 2016, at 08:00 ET), https://www.theguardian.com/us-news/2016/jan/03/rosewood-florida-massacre-racial-violence-reparations [https://perma.cc/NP7G-Q7WC]; Rosanna Xia, *Manhattan Beach Was Once Home to Black Beachgoers, But the City Ran Them Out. Now It Faces a Reckoning*, L.A. TIMES (Aug. 2, 2020, at 06:00 PT), https://www.latimes.com/california/story/2020-08-02/bruces-beach-manhattan-beach [https://perma.cc/RHE5-LJYH].

[204] *See, e.g.*, Joseph B. Cumming, *Lynching a Negro Woman for "Unwise" Remarks*, SAVANNAH TRIB., May 25, 1918, at 1; MARGARET VANDIVER, LETHAL PUNISHMENT: LYNCHINGS AND LEGAL EXECUTIONS IN THE SOUTH 29, 143 (2006); Glenn T. Eskew, *"Bombingham": Black Protest in Postwar Birmingham, Alabama*, 59 THE HISTORIAN 371, 371–72 (1997); Jeremy Gray, *Bombingham: Racist Bombings Captured in Chilling Photos*, AL.COM, (Feb. 19, 2020, at 19:23 ET), https://www.al.com/news/erry-2018/07/f39190a3553390/bombingham.html [https://perma.cc/QV28-VZZT]; *see also* Walter F. White, *The Work of a Mob*, 16 THE CRISIS 221, 222 (1918) (discussing incidents of lynching that targeted Black men and women in the United States); *Negro and Wife Lynched by Mob*, HARTFORD COURANT, May 20, 1918, at 1 (same); Leon F. Litwack, *Hellhounds*, *in* WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA 8, 10–11 (James Allen ed., 2000) (same).

[205] *See, e.g.*, MARGARET A. BURNHAM, BY HANDS NOW KNOWN: JIM CROW'S LEGAL EXECUTIONERS, at xii–xiv (2022).

terrorized Black Americans.[206] The notorious bombing of the Sixteenth Street Baptist Church, which killed four Black girls and maimed numerous others, speaks to the deadly, mostly unchecked barbarism of the era.[207]

In the South, well-documented patterns of discrimination thwarted the ability for even the most resilient, hardworking Black Americans to rise above and escape the reach of Jim Crow. Indeed, in his illuminating book *Trouble in Mind: Black Southerners in the Age of Jim Crow*, Professor Leon Litwack articulates how the "execution spectacle[]" of lynchings "witnessed by whites would be stamped on the character of the community in a variety of ways."[208] This sense of terror served as a bulwark and threat against self-advocacy, while also further empowering and emboldening racism.

Thus, for Black Americans, whose achievements in business, education, the arts, science, and medicine transcended the color line, these achievements occurred in spite of the steady, unceasing patterns of racial discrimination explicitly and implicitly fastened to law and social norms. This backdrop in part helps to demonstrate that economic opportunities were largely cut off, why poverty became widespread among some Black communities, how difficult it became to lift outside of it, and the importance of civil rights legislation, such as Medicaid, to address lack of access to healthcare.

2. Medicaid and Fomenting the Healthcare Civil Right. — Procedurally, *Medina* denied Medicaid beneficiaries the right to sue states in federal courts to enforce the "free choice of provider" provision "[u]nder section 1902(a)(23) of the Social Security Act."[209] The provision permits any Medicaid beneficiary the opportunity to seek and receive care from the provider of their choice so long as that provider meets necessary qualifications and participates in the program.[210] This bold move fomented healthcare for the poor as a civil right.

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[206] *See id.*

[207] *The Birmingham Church Bombing*, PBS NEWS (Apr. 18, 2002, at 10:19 ET), https://www.pbs.org/newshour/nation/media-jan-june02-birmingham_04-18 [https://perma.cc/9JUX-G23M].

[208] LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 288 (1998) ("Little separated mob lynchings from public executions, neither the rapidity of the 'justice' rendered nor the festive mood that often prevailed.").

[209] Letter from Vikki Wachino, Dir., Ctr. for Medicaid & CHIP Servs., Ctrs. for Medicare & Medicaid Servs., Dep't of Health and Hum. Servs., to State Medicaid Dir. (Apr. 19, 2016), https://www.medicaid.gov/federal-policy-guidance/downloads/smd16005.pdf [https://perma.cc/4357-BD99]; *see also* 42 U.S.C. § 1396a(a)(23).

[210] 42 U.S.C. § 1396a(a)(23); *see also id.* §§ 1396n, 1396u-2. "Because the 'free choice of provider' provision guarantees Medicaid beneficiaries the right to see any willing and 'qualified' provider of their choice, this provision limits a state's authority to establish qualification standards, or take certain actions against a provider, unless those standards or actions are related to the fitness of the provider to perform covered medical services — *i.e.*, its capability to perform the required services in a professionally competent, safe, legal, and ethical manner . . . ." Letter from Vikki Wachino, *supra* note 209.

Medicaid — born from federal legislation — provides healthcare to Americans of limited economic means. At the time of its inception, Medicaid served as a critical federal lifeline to counter persistent state-based discrimination in healthcare.[211] It provided care for people receiving government assistance and later expanded to include low-income families, individuals with disabilities, pregnant women, and people in need of long-term care.[212] The MCRM, which birthed Medicaid, also gave rise to Title VI of the Civil Rights Act,[213] both of which addressed two important impediments to equality and equity in healthcare. First, without Medicaid, low-income Americans, particularly Black Americans, would continue to be denied medical care due to income, which was deadly in some instances. Because of systemic patterns of racial discrimination — as discussed above — Black Americans would continue to be shut out of healthcare. Title VI — as discussed below — changed that.

Medicaid served as a salve to these problems, even while an imperfect compromise or what the distinguished emeritus health-law scholar Professor David Barton Smith described as part of a "patchwork of solutions" that are on one hand essential but on the other inefficient.[214] According to Smith, "health care in the United States at the end of World War II was markedly different than it is now . . . it was appalling."[215] For example, "[t]hose without insurance or the ability to pay were relegated to the charity wards and the indigent clinics of public hospitals and medical schools[, and] Blacks were at the bottom of this caste system of care."[216] And, "[i]n the South, blacks were either excluded altogether from community hospitals, or they were relegated to separate and typically inferior accommodations in basement wards or separate buildings."[217] Further:

> Many blacks had to rely on those white physicians who would accept them as patients, often in segregated waiting rooms where they would wait until all of the white patients had been seen. Similar discrimination took place in public hospital and medical school clinics. In northern cities, segregation of hospital and medical care was often almost as complete as in the South, only in the North, the segregation of hospitals and medical care was shaped by residential segregation and the informal practice patterns of physicians

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211 SMITH, *supra* note 45, at 29.

212 *Program History and Prior Initiatives*, MEDICAID.GOV, https://www.medicaid.gov/about-us/program-history [https://perma.cc/4HVA-PL3K].

213 *See* SMITH, *supra* note 45, at 76–84.

214 David Barton Smith, *The "Golden Rules" for Eliminating Disparities: Title VI, Medicare, and the Implementation of the Affordable Care Act*, 25 HEALTH MATRIX 33, 34 (2015) ("Race has contributed to making the United States the only remaining industrialized nation lacking some form of universal health insurance coverage for its citizens.").

215 *Id.* at 35.

216 *Id.*

217 *Id.* ("The result was a much higher rate of riskier home deliveries and a higher death rate from automobile accidents because of more restricted access to hospital emergency care.").

> and hospitals. For example, Chicago hospitals in 1960 came close to matching the segregation patterns of hospitals in the Deep South in spite of laws passed prohibiting hospital discrimination in admission practices.[218]

The passage of the Medicare and Medicaid Act in 1965 "altered the federal government's leverage" in addressing these issues.[219] By 1967, the first year of full operation, nearly one-third of "participating hospital revenues would flow from" these programs.[220] Shortly thereafter, this revenue share would grow to over fifty percent.[221] This profound shift meant that "private hospitals that once had been insulated from pressure to desegregate were now insulated from state and local political pressures opposed to desegregation."[222] These financial incentives created pressure for change in that "private boards [of hospitals] had a fiduciary responsibility for protecting their charitable assets" by accepting Medicare and Medicaid dollars.[223] Moreover, by leveraging medical choice, Black patients, particularly Black women, were able to select medical providers they believed were better suited and committed to their care, including Black physicians who had been shut out of medical privileges at segregated hospitals and clinics.[224]

3. Medicaid and the "Basic Freedom of Choice" Provision. — The key matter at stake in *Medina* was the concern related to eradicating the decades-old freedom of choice provision. Specifically, the lawsuit challenged Executive Order 2018-21, which was signed by Governor McMaster in 2018, directing the SCDHHS "to pursue all available methods and to take all necessary actions to exclude abortion clinics from receiving taxpayer funds for any purpose, including but not limited to seeking any and all requisite waivers from the Centers for Medicare and Medicaid Services."[225]

Even though Medicaid dollars could not be spent for abortion services prior to this executive order, this new mandate also required that "any affiliated physicians or professional medical practices . . . that are enrolled in the Medicaid program" thereby be deemed "unqualified to provide family planning services."[226] While much attention was placed on the exclusion of Planned Parenthood from being a recipient of tax dollars, the mandate is far broader in that it affected any clinic or physician providing pregnancy termination services. The Governor's

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[218] *Id.* at 35–36 (footnote omitted).
[219] *Id.* at 49.
[220] *Id.*
[221] *Id.*
[222] *Id.* at 50.
[223] *Id.*
[224] *Cf.* Brief of Amici Curiae Organizations Advancing Reproductive Rights, *supra* note 118, at 11–13 ("Given the lingering presence of bias in modern health care, individuals insured by Medicaid may be less likely to trust providers they have not been able to select freely, with negative consequences for their health." *Id.* at 12–13.).
[225] S.C. Exec. Order No. 2018-21 (July 13, 2018).
[226] *Id.*

order demanded that the SCDHHS "immediately terminate them upon due notice and deny any future such provider enrollment applications for the same."[227]

The problem with Governor McMaster's executive order was twofold. First, the long tradition of federalism creates a hierarchy among laws between the federal government and states. Namely, federal legislation and law preempt state laws.[228] Second, the free choice of provider provision of Medicaid states, "[A]ny individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . , who undertakes to provide him such services."[229]

Planned Parenthood and one of its patients brought a lawsuit against the director of the SCDHHS under a statute, § 1983, which allows individuals to sue state officials for violating their rights under the Constitution or federal laws.[230] The patient, Julie Edwards, sued because she preferred Planned Parenthood for gynecological care but needed the insurance Medicaid provides.[231] The lawsuit alleged that a state law that prohibits the use of public funds for abortion violates the provision of the Medicaid statute that allows individuals to choose their provider so long as the provider is qualified under the Act.[232]

The well-documented history of racial discrimination in healthcare contextualizes and situates the "free choice of providers"[233] provision in Medicaid. The legislation not only affirms free choice of providers, but also enshrines that beneficiaries enrolled in managed care organizations (MCOs) "may not be denied freedom of choice of qualified providers of family planning services."[234] The choice provision in the legislation was crucial in achieving the vision of equality that President Johnson sought.[235] Without choice, the legislation would have been more illusory or symbolic than real. Why would Black women patients who experienced coercive sterilization choose to be treated for any condition at a hospital or by a provider that harmed them? Or, for that matter, choose to be treated in a basement rather than the hospital wards where white patients were served?[236] And it would make little sense for families to tether themselves to care at a facility and with providers that had previously excluded them based on race.

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227 *Id.*

228 *See* U.S. CONST. art. VI, cl. 2.

229 42 U.S.C. § 1396a(23)(A).

230 *See Medina*, 145 S. Ct. at 2227.

231 *Id.*

232 *Id.* at 2227–28.

233 42 C.F.R. § 431.51 (2024).

234 *Id.* § 431.51(a)(4).

235 *See, e.g.*, *Johnson Calls Medicare "Fifth Freedom," Proposes Extending It to Children*, *supra* note 153, at 7.

236 *See* Smith, *supra* note 214, at 35.

This critically important provision of the law was expressly intended to permit enrollees the opportunity to seek and receive care from providers of their choosing — so long as the providers meet the qualifications of the program and are willing to accept this insurance.[237]

Further, § 1983 is a crucial enforcement mechanism to protect this critical interest. Private enforcement mechanisms such as § 1983 are necessary avenues for populations that have been systematically excluded from our political and legal systems to vindicate their interests and seek redress for injuries.[238] Across multiple amicus briefs submitted to the Court and examined for this Comment, the Medicare and Medicaid Act's legislative history supports a reading that the "free choice of provider" provision is privately enforceable under § 1983.

The Supreme Court's departure in *Medina* from this very important free-choice principle by way of opining that Medicaid's free-choice provision does not create a right of enforcement under § 1983[239] strikes at the heart of civil liberties and civil rights in healthcare access and delivery and, as such, is deeply alarming. In its amicus brief, the American Cancer Society expressed the organization's concern thusly:

> That right is critical for individuals as a means of redress to hold state-administered programs, entities, or actors accountable when they seek to deprive Medicaid beneficiaries of their right to freely choose among qualified providers. Otherwise, these Medicaid beneficiaries, who include America's most vulnerable populations, would in many cases have no other means available to remedy violations of this right and have their day in court. This deprivation would inevitably reduce access to care among individuals with limited incomes and in rural areas.[240]

Indeed, fifteen amicus briefs were submitted to the Supreme Court in support of Planned Parenthood.[241] Almost all argued that the *Medina* decision would significantly impact these health outcomes by imposing more barriers to access, creating economic burdens for already vulnerable populations, reducing individuals' trust in their doctors, and eliminating personal autonomy over health decisions.[242] Such outcomes are now likely.

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[237] *See* SMITH, *supra* note 45, at 181.

[238] Khiara M. Bridges, *The Supreme Court, 2021 Term — Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 57 n.176 (2022) (stating that "Congress was moved to pass section 1983 in order to provide people . . . of color . . . with a tool to vindicate their federally protected rights").

[239] *Medina*, 145 S. Ct. at 2239.

[240] Amici Curiae Brief of the American Cancer Society Cancer Action Network et al. in Support of Respondents at 1–2, *Medina*, 145 S. Ct. 2219 (No. 23-1275).

[241] *See No. 23-1275*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-1275.html [https://perma.cc/69PV-5SHD].

[242] *See, e.g.*, Brief of American Public Health Association et al. as Amici Curiae in Support of Respondents' Supporting Affirmance at 3–4, *Medina*, 145 S. Ct. 2219 (No. 23-1275); Brief of Amici Curiae Organizations Advancing Reproductive Rights, *supra* note 118, at 1–2; Brief of Medicaid Beneficiaries C.M. et al. as Amici Curiae in Support of Respondents at 5–7, *Medina*, 145 S. Ct. 2219 (No. 23-1275); Brief of Massachusetts et al. as Amici Curiae in Support of Respondents at 2, *Medina*, 145 S. Ct. 2219 (No. 23-1275).

As a historical matter, President Johnson was acutely aware of the persistent patterns of racial discrimination targeted at Black Americans, including in matters of healthcare. According to Professor Merlin Chowkwanyun, "[a]nother turning point for hospitals came when the federal government rolled out the Medicare program in 1966 but threatened to withhold new funds from hospitals that weren't government-certified as compliant with the new civil rights laws."[243] As Chowkwanyun observes, "[t]he certification program had largely resulted from the work of Black physician-activists."[244]

Medicare and Medicaid were part of President Johnson's "Great Society" achievements, and the critical pieces of legislation discussed herein are tied to his civil rights legacy.[245] In an interview after Medicare and Medicaid's passage, President Johnson stated that he believed "[a] great burden [would] be lifted from the shoulders of all Americans"; news coverage at the time mentioned his hope that "the legislation [would] bring . . . a sense of justice to the nation."[246] Weeks later, he "signed Medicare into law . . . before a beaming Harry S. Truman and said: 'The hope he offered becomes a reality for millions of our fellow citizens.'"[247] He perceived the legislation as delivering on a promise neglected during Jim Crow[248] and stated that "[t]here are those, alone in suffering, who will now hear the sound of approaching help."[249]

Johnson recognized that eliminating racial discrimination in healthcare was a crucial matter for his Administration and the nation, but he also recognized the political risks it involved.[250] Both the Medicare and Medicaid Act and Title VI were part of a critically important medical and legal agenda. Medicare revolutionized healthcare by promising to cover one-third of all hospital revenue for medical providers that served previously uninsured elderly patients.[251] Medicaid provides insurance to individuals who are low income (over the years it has expanded to include health coverage for children[252]).[253] On the other hand, Title VI banned discrimination based on race, color, or national origin in "any

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243 Merlin Chowkwanyun, *Voices in the Civil Rights Era — New Horizons and Limits in Medical Publishing*, 390 NEJM 1541, 1542 (2024).

244 *Id.*

245 *Id.*

246 *Health Bill Is Given Senate OK*, *supra* note 45, at 1.

247 Foley, *supra* note 45, at 1.

248 *See Johnson Urges Medicare Unity*, *supra* note 45, at 1.

249 *Johnson Signs Medicare Bill, Shares Honors with Truman*, *supra* note 45, at 1.

250 Bennett, *supra* note 190, at 3; Ted Gittinger & Allen Fisher, *LBJ Champions the Civil Rights Act of 1964*, NAT'L ARCHIVES (2004), https://www.archives.gov/publications/prologue/2004/summer/civil-rights-act [https://perma.cc/Y9WQ-89AF].

251 Bennett, *supra* note 190, at 3

252 *Program History and Prior Initiatives*, *supra* note 212.

253 *Medicare and Medicaid Act (1965)*, *supra* note 46.

program or activity receiving Federal financial assistance."[254] In healthcare, this included both patient admission and employment.[255]

4. Title VI and Desegregation Compliance. — The passage of the Medicare and Medicaid Act gave power and purpose to Title VI. For example, "[d]iscrimination was not defined in the Civil Rights Act," leaving open questions such as: "Would the lack of a definition of discrimination liken the Civil Rights Act to the vague and meaningless 'assurances'" in other legislation?[256]

Two key aspects of Title VI advanced civil rights in healthcare. First, with the inclusion of Title VI in the 1964 Civil Rights Act, the government could essentially condition federal funds to hospitals on those institutions desegregating.[257] Second, hospitals had to be certified as civil rights compliant to receive Medicare funds.[258] Despite some resistance, tying federal funding to desegregation and equal treatment significantly induced compliance and made Title VI a highly important aspect of civil rights legislation.[259]

Title VI was a strategic part of the federal civil rights legislation advanced by President Johnson.[260] He spoke of Title VI as a landmark and significant achievement.[261] He was joined in advocating for its inclusion by Senator John Pastore, the former governor of Rhode Island.[262] Senator Pastore urged that one of the critical reasons for its enactment was that Southern hospitals were receiving federal money for construction while still discriminating against Black patients and medical staff.[263] He stated: "That is why we need title VI of the Civil Rights Act, H.R. 7152 — to prevent such discrimination where Federal funds are involved. . . . The title has a simple purpose — to eliminate discrimination in federally financed programs."[264]

Yet President Johnson understood the costs of attacking the vestiges of indignity tied to the enduring legacies of slavery and Jim Crow. According to a commentary republished in the National Archives, "Bill

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254 42 U.S.C. § 2000d.

255 Bennett, *supra* note 190, at 3.

256 Smith, *supra* note 214, at 50.

257 Bennett, *supra* note 190, at 3.

258 *Id.* at 3–4.

259 *Id.* at 3; *see also* David Barton Smith, Commentary, *Restorative Justice: The Life and Death of Jean Cowsert, MD*, 137 AM. J. MED. 479, 479–80 (2024) (discussing the death of physician Jean Cowsert, who reported Mobile Infirmary's refusal to desegregate to government inspectors, showing the heated tensions in hospitals following Title VI); Smith, *supra* note 182, at 263 (discussing how federal funding enticed state and nonstate officials to desegregate their hospital facilities).

260 *See* Bennett, *supra* note 190, at 3.

261 *See id.*

262 *Section II- Synopsis of Legislative History and Purpose of Title VI*, C.R. DIV., U.S. DEP'T OF JUST., https://www.justice.gov/crt/fcs/T6manual2 [https://perma.cc/F7TC-G8SC]; *PASTORE, John Orlando, 1907–2000*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguide.congress.gov/search/bio/P000100 [https://perma.cc/6YRR-8E2N].

263 *Section II- Synopsis of Legislative History and Purpose of Title VI*, *supra* note 262.

264 110 CONG. REC. 7054–55 (1964) (statement of Sen. John Pastore).

Moyers, a former aide to [President Johnson], recalled, in a statement during a 1990 symposium at the Johnson Library":

> The night that the Civil Rights Act of 1964 was passed, I found him in the bedroom, exceedingly depressed. The headline of the bulldog edition of the Washington Post said, "Johnson Signs Civil Rights Act." The airwaves were full of discussions about how unprecedented this was and historic, and yet he was depressed. I asked him why. He said, "I think we've just delivered the South to the Republican Party for the rest of my life, and yours."[265]

Nevertheless, President Johnson understood that gaps in equality needed closing. Not only was the Medicare and Medicaid Act necessary along with Title VI, but provisions including medical choice in Medicare and Medicaid were crucial as well. To this end, in a speech at the Convention of the Amalgamated Clothing Workers, President Johnson explicitly mentioned the relevance of choice, remarking on the value of utilizing "the doctor of your choice."[266]

III. *MEDINA V. PLANNED PARENTHOOD SOUTH ATLANTIC* AND THE NEW JANE CROW

Medina exposed the selective or opportunistic originalism of the Supreme Court and a precarious outcome determinism built upon an opportunistic logic. In *Medina*, the Court ignored both the text of the legislation and the history undergirding it. To better comprehend the Court's action is to understand two interconnecting forces on the Roberts Court.

First, *Medina* showcased the majority's judicial sympathy toward the antiabortion movement[267] and its antipathy toward women's rights and reproductive health more broadly — a disposition that manifests across multiple cases.[268]

Second, as observed by Professor Khiara Bridges, the Roberts Court is, at best, weak in its discernment of contemporary civil rights harms and violations.[269] This weakness impairs the Court in its ability to "see" civil rights harms and thus respond appropriately.[270] According to Bridges, the Court casts its vision on Jim Crow–type, overt racial

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[265] Gittinger & Fisher, *supra* note 250.

[266] Lyndon B. Johnson, Remarks in New York City Before the 50th Anniversary Convention of the Amalgamated Clothing Workers (May 9, 1964), https://www.presidency.ucsb.edu/documents/remarks-new-york-city-before-the-50th-anniversary-convention-the-amalgamated-clothing [https://perma.cc/TB94-9PKZ].

[267] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022); Gonzales v. Carhart, 550 U.S. 124, 156 (2007).

[268] *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 357 (2011); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 621, 632 (2007); *cf.* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013) (establishing a higher standard for workplace retaliation claims under Title VII).

[269] *See* Bridges, *supra* note 238, at 110.

[270] *See id.* at 131.

discrimination that one cannot unsee.[271] In civil rights contexts, this amounts to the chilling conduct of Bull Connor who ordered the punishment of Black civil rights advocates in the forms of billy clubs, unleashed canines, and the spraying of peaceful protesters under the powerful force of water hoses[272] or of Governor Orval Faubus who blocked the doors of the Little Rock Central High School in Arkansas to prevent the enrollment of Black students.[273] Overt racial discrimination of this level of callousness and calculation used to look like billy clubs and physically locked doors; now it looks like the Roberts Court's entrenchment of discrimination through law, and we should understand it as such.

This dual, intersecting hostility in the Roberts Court most recently manifested in *Dobbs*, which overturned[274] *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[275] and must be understood as a precursor to *Medina.* Further, *Medina* should be understood as a throughline to advance an agenda that not only dismantles abortion access but also makes vulnerable contraceptive healthcare and other services that aid women, girls, and LGBTQ populations. So what does *Medina* teach us about the Roberts Court? Sections III.A and III.B address this question.

A. Medina *Ignores Originalism: Gaslighting Women*

Medina is reflective of a trend in the Roberts Court's jurisprudence. In *Dobbs*, the Supreme Court's conservative majority claimed fidelity to history, tradition, and textualism.[276] In that decision, Justice Alito suggested the majority's reliance on "history and tradition" was principally guiding the Court's jurisprudence and analysis.[277] The case revived longstanding debates about the Court's so-claimed methodology of "originalism," which from the start, argue Professors Robert Post and Reva Siegel, seemed to be a set of political principles intended to reverse twenty years of Warren Court–era civil rights cases.[278]

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[271] *See id.* at 87.

[272] *Connor, Theophilus Eugene "Bull,"* THE MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., STAN. UNIV., https://kinginstitute.stanford.edu/connor-theophilus-eugene-bull [https://perma.cc/HU47-65TR]; *On This Day — Apr 12, 1963: Bull Connor Orders Dr. Martin Luther King Jr. and Dozens More Civil Rights Marchers Violently Arrested in Birmingham*, EJI, https://calendar.eji.org/racial-injustice/apr/12 [https://perma.cc/H95V-RKPD].

[273] Arlene Sanders, Carrie Freshour & Sykina Butts, *Student Protest at Delta State College in March 1969*, MISS. HIST. NOW (Oct. 2022), https://mshistorynow.mdah.ms.gov/issue/delta-state-protest [https://perma.cc/8W5U-7BW8].

[274] 142 S. Ct. 2228, 2242 (2022).

[275] 505 U.S. 833 (1992).

[276] *See Dobbs*, 142 S. Ct. at 2242, 2244–45.

[277] *See id.* at 2248.

[278] *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 555 (2006).

However, *Dobbs* cast doubt on the Court's commitment to history and tradition with the majority's cherry-picked account of the past. By citing treatises written by English legal scholars[279] who played no part in either drafting or reconstructing the Constitution — indeed, these individuals were dead by both periods[280] — the Court showed itself to be uncommitted to historical accuracy. Thus, the lack of commitment to historical accuracy evinces either misguided naivete or, worse, bald strategic inconsistency. For example, the Court did not meaningfully engage with Reconstruction and its equality agenda, even as Justice Alito referenced the Fourteenth Amendment[281] — a pivotal Reconstruction Amendment that emphasizes equality, divorcing the Amendment from its original meaning and purpose.[282]

The Court did not survey history to highlight the interests of women and girls in being protected by the Thirteenth Amendment's promise to eliminate involuntary servitude while it cited scholars who were chief proponents of criminal exceptions to marital rape and physical abuse.[283] According to Sir Matthew Hale, a prominent English jurist and judge who died in 1676, a "husband cannot be guilty of a rape" because marriage provides unconditional consent, whereby a "wife hath given up herself in this kind unto her husband, which she cannot retract."[284] Arguably, rather than a method, the Court's so-called originalism jurisprudence represents a set of political choices, which inform matters of civil rights and civil liberties.[285]

Placed in that context, for example, rather than being intellectually rigorous, demanding, and discerning, the Court in *Dobbs* offered a disordered review of history. It falsely conflated abortion with eugenics and eugenics with the suppression of Black fertility and population.[286]

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279 *Dobbs*, 142 S. Ct. at 2249 (citing, inter alia, MATTHEW HALE, PLEAS OF THE CROWN 53 (P. Glazebrook ed., 1972); 1 WILLIAM BLACKSTONE, COMMENTARIES *129–30).

280 *Compare* David Eryl Corbet Yale, *Sir Matthew Hale*, BRITANNICA, https://www.britannica.com/biography/Matthew-Hale [https://perma.cc/C8WW-ADM7] (listing Hale's date of death as December 25, 1676), *and* The Eds. of Encyc. Britannica, *Sir William Blackstone*, BRITANNICA (Feb. 10, 2025), https://www.britannica.com/biography/William-Blackstone [https://perma.cc/E5KN-3AQS] (listing February 14, 1780, as his date of death), *with* The Eds. of Encyc. Britannica, *Constitution of the United States of America*, BRITANNICA (Sep. 15, 2025), https://www.britannica.com/topic/Constitution-of-the-United-States-of-America [https://perma.cc/RC29-UEFF] (explaining that the Constitution was written in 1787).

281 *Dobbs*, 142 S. Ct. at 2242–43.

282 *See* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism — And Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1135–36 (2023) ("Given the Court's dicta on equal protection, it seems not accidental that *Dobbs* justifies *Roe*'s overturning in maximal ways that not only threaten other fundamental rights but that seem designed to call into question women's equal standing in the polity." *Id.* at 1136.).

283 *Compare Dobbs*, 142 S. Ct. at 2249 (citing HALE, *supra* note 279, at 53) (describing abortion of a quick child as a "great crime"), *with* 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 629 (1736) (denying the possibility of husband raping his wife).

284 HALE, *supra* note 283, at 629.

285 *See* Post & Siegel, *supra* note 278, at 556.

286 *See Dobbs*, 142 S. Ct. at 2256 n.41.

As such the Court ignored its own record on eugenics anchored by *Buck v. Bell*.[287] Explicitly in that case, Justice Holmes identified Virginia's protagonist in its nightmarish-1920s sterilization scheme as "a feeble minded white woman."[288] It was decades later that Black women were coercively sterilized for distinctly different reasons.[289] The nuance matters when the Court claims to root its concerns and rulings in history.

My observation is intended not only to criticize, but also — and more importantly — to point out the Roberts Court's analytical and judicial favoritism toward a vision of women's subordination and oppression rather than liberation, freedom, and equality. It is within this category that *Medina* should be evaluated. It is another antiabortion case — like *Dobbs* — derived from another state formerly oriented and enmeshed in Jim Crow. In other words, on the Roberts Court, history as a methodology serves as an insincere and inconsistent proxy or cover for achieving a political vision and agenda that deny women equal governance in their lives, employment, and healthcare.

In *Medina*, the Court's insincerity manifests as disregard for both history and textualism. In their joint amicus brief, the American Public Health Association, the Robert Wood Johnson Foundation, the Network for Public Health Law, and others seemingly called the Court's bluff as they wrote, "[t]he text of the Medicaid statute, as further evidenced by its history, clearly confers a privately enforceable right to receive services from a beneficiary's qualified family planning provider of choice."[290] They explained, "[t]he existence of this right is essential in the context of family planning services, where patients require personal and intimate healthcare, and where the ability to select a trusted provider carries profound importance for maternal and child health."[291]

Moreover, as they reminded the Court, "[f]or more than a half century, family planning has been a mandatory Medicaid benefit."[292] The amici rightfully pointed out that "Congress has been unwavering in protecting the right of women to freely choose their family planning providers,"[293] and for good reason:

> For example, nearly 40 years ago, even as lawmakers expanded states' authority to require Medicaid beneficiaries to receive services from designated managed care provider networks, Congress amended the free choice of provider statute, 42 U.S.C. § 1396a(a)(23) (the "Free Choice of Provider Provision"), to specifically exempt family planning from these

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287 274 U.S. 200, 207 (1927).
288 *Id.* at 205.
289 *See* DAVIS, *supra* note 54, at 215–18.
290 Brief of American Public Health Association, *supra* note 242, at 2.
291 *Id.*
292 *Id.*
293 *Id.*

otherwise lawful access restrictions and explicitly preserve beneficiaries' right to obtain family planning services from their provider of choice.[294]

B. Medina *and Civil Rights*

Nor is *Medina* about preserving or protecting Medicaid's civil rights legacy, women's family planning, or the use of civil rights tools such as § 1983 to vindicate trampled civil rights. Instead, it is a throwback to the chilling time before. *Medina* is part of the ongoing attack on reproductive freedom that predates *Dobbs*. By adding family planning-protections to Medicaid, "Congress understood the importance" of women advancing their health.[295] As noted in the American Public Health Association's amicus brief, "[f]amily planning facilitates the detection and treatment of serious and life-threatening health conditions, such as cancer and sexually transmitted infections [(STIs)], and enables women to plan a safe and healthy pregnancy."[296] They further explained that "[t]he ability to plan a pregnancy reduces infant and maternal mortality by promoting early entry into prenatal care and facilitating comprehensive healthcare throughout pregnancy and childbirth."[297] For example, "[w]omen who depend on Medicaid lack financial resources and often live in areas with limited healthcare providers, and the importance of a planned pregnancy only grows as a result."[298]

Medina represents the repackaging of "targeted regulations of abortion providers — otherwise known as TRAP laws."[299] Prior to *Dobbs*, TRAP laws sought to undermine abortion rights indirectly by pressuring and requiring clinics to retrofit hallways, shelves, and operation rooms, and demanding that doctors obtain unnecessary medical-admission privileges at hospitals, among other tactics.[300] Even though the Court struck down some TRAP laws, others remain in place.[301] The intended effort was to drive up costs such that clinics would be forced to close.[302] *Medina* reflects antiabortion lawmakers' aims to "eliminate abortion through indirect means, [fashioning] financial ultimatums," creating moral dilemmas, and ultimately

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294 *Id.* at 2–3.
295 *Id.* at 3.
296 *Id.*
297 *Id.*
298 *Id.*
299 Michele Goodwin, *The Supreme Court Doesn't Really Care About Originalism. "*Medina v. Planned Parenthood" *Just Proved It.*, MS. (June 26, 2025), https://msmagazine.com/2025/06/26/supreme-court-originalism-medina-v-planned-parenthood-medicaid-civil-rights [https://perma.cc/G2PD-847K].
300 *See* Michele Goodwin, Commentary, Whole Woman's Health v. Hellerstedt*: The Empirical Case Against TRAP Laws*, 25 MED. L. REV. 340, 346–49 (2017).
301 *See, e.g.*, Whole Woman's Health v. Jackson, 142 S. Ct. 522, 530–31 (2021).
302 *See id.* at 543–44 (Roberts, C.J., concurring).

inflicting harms on women and girls.[303] For providers, it amounts to a choice either to stop providing abortion services and continue receiving funding to provide "breast cancer screenings, prenatal care, postnatal care, ovarian cancer screenings and pregnancy testing for poor women" or else forego critical funding and "leave poor women in a lurch."[304]

For women and girls, TRAP laws of the past as well as those on the horizon in the wake of *Medina* portend serious health tragedies and even death. *Medina* does not open the door to the New Jane Crow — *Dobbs* fully swung open a door with loosened hinges. However, *Medina* invites in new restrictions and TRAP laws that will bar medical providers from receiving tax dollars if they provide services offensive to a conservative religious agenda such as abortion, contraception, or transgender affirming care. However, driving those providers out of business will only exacerbate harm to patients, particularly as the states with the most restrictive abortion policies are also the deadliest to be pregnant in.[305]

Already the United States leads the industrialized world in maternal mortality and morbidity.[306] Without access to the types of prenatal-healthcare services provided by organizations like Planned Parenthood, women in both rural and urban communities will suffer.[307] Not only will women suffer, but teens likely will too.[308] Compared to peer nations, the United States has one of the highest rates of sexually transmitted diseases.[309]

> The United States has some of the highest STD rates in the developed world. The United States had a gonorrhea rate of 123 per 100,000 people in 2015 — the highest in the developed world at the time — which increased to 179 cases per 100,000 people in 2021. The U.S. also posted the

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303 *See* Goodwin, *supra* note 299.

304 *Id.*

305 *See, e.g.*, *Study Finds Higher Maternal Mortality Rates in States with More Abortion Restrictions*, CELIA SCOTT WEATHERHEAD SCH. OF PUB. HEALTH & TROPICAL MED., TULANE UNIV., https://sph.tulane.edu/study-finds-higher-maternal-mortality-rates-states-more-abortion-restrictions [https://perma.cc/GV7F-V9AC].

306 Roosa Tikkanen et al., *Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries*, THE COMMONWEALTH FUND (Nov. 18, 2020), https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries [https://perma.cc/4C8V-DN2F]; *see also* Eugene Declercq & Laurie C. Zephyrin, *Severe Maternal Morbidity in the United States: A Primer*, COMMONWEALTH FUND (Oct. 28, 2021), https://www.commonwealthfund.org/publications/issue-briefs/2021/octsevere-maternal-morbidity-united-states-primer [https://perma.cc/LAY2-EES4] (identifying that "maternal deaths in the United States number about 650 to 750 annually [and] severe maternal morbidity affects approximately 50,000 to 60,000 women each year").

307 *See* PLANNED PARENTHOOD, THE IRREPLACEABLE ROLE OF PLANNED PARENTHOOD HEALTH CENTERS 1 (2024).

308 *See For Teens*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/teens [https://perma.cc/96SD-S2TM].

309 THE NAT'L ACADS. OF SCIS., ENG'G & MED., SEXUALLY TRANSMITTED INFECTIONS: ADOPTING A SEXUAL HEALTH PARADIGM 54 (Stan H. Vermund, Amy B. Geller & Jeffrey S. Crowley eds., 2021).

> third-highest rate for chlamydia in the developed world with 475 per 100,000 people in 2015, which increased to 490 per 100,000 in 2021. STD rates increase in the United States for many reasons, including decreased condom use among vulnerable groups such as young people and men who partner sexually with other men. Additionally, state and local programs have experienced budget cuts, resulting in clinic closures, decreased screenings and care, and reduced patient follow-up.[310]

One key service provided by Planned Parenthood and other reproductive health organizations is STI screenings and treatments,[311] along with pregnancy examinations and prenatal and postnatal care.[312]

CONCLUSION

The Supreme Court should have upheld the Fourth Circuit's decision that Medicaid beneficiaries may sue to enforce the "free choice of provider" provision of Medicaid. This would have been consistent with the clear meaning of the law. If it had done so, the Roberts Court would have preserved the full integrity of the program, which, as discussed, emerged from the MCRM to strike down segregationist laws that both inflicted harm on Black patients while at the same time denied them access to quality medical care, particularly in states like South Carolina. Instead, the Court struck down the Fourth Circuit's decision, ruling that the "any qualified provider" provision does not confer a private right upon a Medicaid beneficiary. In *Medina*, the Court continued to set aflame civil rights achievements of the past. The Court's ruling must be read as part of a spectacle in which cinders land on the ashes of civil rights victories of the 1960s and '70s from voting rights to the decriminalization of abortion. By further displaying its selective adherence to text and history, the Court's opportunistic originalism cannot be ignored nor denied.

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310 *STD Rates by Country 2025*, WORLD POPULATION REV., https://worldpopulationreview.com/country-rankings/std-rates-by-country [https://perma.cc/H25G-HXVX].

311 *STD Testing and Treatment*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/get-care/our-services/std-testing-and-treatment [https://perma.cc/ZM6H-V2DH].

312 *Prenatal & Postpartum Services*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/get-care/our-services/prenatal-postpartum-services [https://perma.cc/7GEA-CNLF].