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Why reason-based abortion bans are not a remedy against eugenics: an empirical study

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ABSTRACT

In *Box v Planned Parenthood*, Justice Thomas wrote an impassioned concurrence describing abortions based on sex, disability or race as a form of 'modern-day eugenics'. He defended the challenged Indiana reason-based abortion (RBA) ban as a necessary antidote to these practices. Inspired by this concurrence, legislatures have increasingly enacted similar bills and statutes allegedly as a prophylactic to 'eugenics', its underlying discrimination, and the racial disparities eugenics caused. This article tests my hypothesis that this legislative focus on eugenics is largely performative, rather than evidence of true concern about the discrimination and disparities underlying eugenics. My research examined state laws in several areas that fall within narrow and broad understandings of eugenics to determine whether states with RBA bans have implemented policies to counteract eugenics more broadly. My analysis shows that they generally have not. Instead, the apparent motivation is to commandeer concerns about eugenics to restrict reproductive rights. This legislative mission is hypocritical, and it harms the very groups impacted by the eugenics movements—minorities, women, people with disabilities, the LGBTQ+ community, and immigrants. Ultimately, it has led us to *Dobbs*, which makes everyone vulnerable to the eugenics policies Thomas condemns by undercutting previous constitutional protections against eugenics.

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I. INTRODUCTION

The eugenics movement is a scourge upon American history. It represents an era when the government abused its power by controlling the reproductive lives of the disenfranchised—the disabled, the mentally impaired, and others deemed to be deficient based on class or race. It was also manifested in stringent immigration restrictions rooted in racism, prejudice, and stereotypes. Persuaded by the veneer of scientific validity, progressives, educated individuals, and social reformers supported eugenic policies as vital to the national welfare.[1] Justice Oliver Wendell Holmes, Jr fully embraced the now debunked eugenics theories in his infamous majority opinion in *Buck v Bell*. In a mere five paragraphs, Holmes effortlessly determined there was no constitutional violation in Virginia's involuntary sterilization of Carrie Buck, who, along with her mother and daughter, was diagnosed as an 'imbecile'. Shockingly, Holmes easily concluded in one of the most problematic Supreme Court lines that 'three generations of imbeciles is enough'.[2] The litigation over Virginia's mandatory involuntary sterilization law was a test case for the growing number of such laws.[3] The Supreme Court's endorsement of this eugenic sterilization law inspired even more legislators to follow suit, resulting in eugenic sterilization laws in 28 states by 1931.[4]

While that history seems unimaginable to many today,[5] *Buck v Bell* has not actually been overturned. Indeed, *Roe v Wade*, which itself was just overturned, cited *Buck v Bell* as authority for the proposition that constitutional rights are not absolute.[6] Nevertheless, there is near unanimity that the eugenics chapter was a horror to avoid repeating at all costs. Eugenics, once a symbol of progressive social reform, is now a term of derision, evoking contempt for highly discriminatory state policies.[7]

Nearly, 100 years after *Buck v Bell* was decided, another Supreme Court opinion regarding eugenics—Justice Thomas's concurrence in *Box v Planned Parenthood of Indiana and Kentucky*[8]—once again heavily influenced legislation. But instead of promoting eugenics as Holmes did, Thomas drew upon our disgraceful history to condemn abortion as a potential 'tool of modern-day eugenics'. Thomas's concurrence focused on an Indiana law that prohibits abortions based on sex, race, or disability,[9]

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1 See Sonia M. Suter, *A Brave New World of Designer Babies?,* 22 Berkeley Tech. L. J. 897 (2007).

2 274 U.S. 200, 207 (1927).

3 Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y. U. L. Rev. 30, 36–45 (1985).

4 Phillip R. Reilly, *Eugenics, Ethics, Sterilization Laws, in* 1 Encyclopedia of Ethical, Legal and Policy Issues in Biotechnology 208 (Thomas H. Murray & Maxwell J. Mehlman eds., 2000).

5 Unfortunately, coerced sterilizations occurred in the l970s. See Elizabeth Raterman, *Tracing the History of Forced Sterilization Within the United States*, Health Law & Policy Brief—Washington College of Law, Mar. 29, 2019, http://www.healthlawpolicy.org/tracing-the-history-of-forced-sterilization-within-the-united-states/ (last accessed Sept. 9, 2022). And in 2020, there were allegations of forced hysterectomies of ICE detainees by ICE authorities. Nicole Narea, *The Outcry over ICE and Hysterectomies, Explained*, Vox, Sept. 18, 2020, https://www.vox.com/policy-and-politics/2020/9/15/21437805/whistleblower-hysterectomies-nurse-irwin-ice (last accessed Sept. 9, 2022).

6 410 U.S. 113, 154 (1973).

7 Karey Harwood, *Which 'New Eugenics'? Expanding Access to ART, Respecting Procreative Liberty, and Protecting the Moral Equality of All Person in an Era of Neoliberal Choice,* 13 Int'l J. Feminist Approaches Bioethics 148. 148 (2020); Suter, *supra* note 1, at 899.

8 139 S. Ct. 1789 (2019) (per curiam).

9 Ind. Cod. § 16–34–4-1 *et. seq.* (excluding lethal fetal anomalies).

which the Seventh Circuit had enjoined as unconstitutional.[10] Although Thomas concurred with the Court's denial of Indiana's petition for certiorari regarding the ban,[11] his 20-page opinion was a full-throated condemnation of 'reason-based' abortions as vestiges of the eugenics era. Relying on a decidedly biased and incomplete account of eugenics, his thesis was that reason-based abortion (RBA) bans are appropriate antidotes to 'modern-day eugenics'. The not so subtle subtext throughout, however, is that abortions themselves are eugenic, a point that Professor Murray demonstrates so powerfully in *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade.[12]

Just as *Buck v Bell* inspired more states to enact mandatory sterilization laws, Thomas's concurrence encouraged more legislatures to propose or enact RBA bans. Indeed, many of the recent bills and some enacted statutes quote Thomas's concurrence. While supporters of these bans are primarily conservative legislators, the argument that terminating pregnancies based on race, sex, or disability is a form of eugenics transcends conservative politics. In fact, there are many liberal critiques of prenatal testing that describe it as eugenic.[13] Thus, this perspective potentially reaches across the aisle.

This article argues, however, that Thomas's view of eugenics, particularly his vision of the appropriate *anti*-eugenic remedy, is at best very narrow, and at worst problematic. In response to the growth of RBA bans as prophylactics to 'eugenics', which explicitly or implicitly embrace this narrow conception of anti-eugenics, I explored whether their policies are consistent with the expressed concerns underlying these allegedly anti-eugenic measures, or whether the enactment of RBA bans is merely a pretextual nod to concerns about eugenics. In other words, do RBA-ban states allow or impose policies that are eugenic in other ways, or have these states enacted more expansive anti-eugenic measures, demonstrating they are truly concerned about eugenics?

My hypothesis in approaching this project was that states with RBA bans would not tend to have more expansive anti-eugenic measures. Instead, I hypothesized that the focus on eugenics is performative and intended to engender support for yet another abortion restriction, rather than a reflection of true concern about the underlying discrimination that promoted eugenics and the disparities that resulted. To test my hypothesis, I investigated what states with RBA bans have done (or have not done) to address eugenics in other areas. My research found that, accepting Thomas's concerns about eugenics on his own terms, states with RBA bans are generally not anti-eugenic across various measures.

I should add that this research began well before the seismic shift in the reproductive rights landscape rendered by *Dobbs. v Jackson Women's Health Organization.*[14] That decision, which unceremoniously overturned the nearly 50-year-old constitutional

10 Planned Parenthood of Ind. & Ky, Inc. v. Box, 888 F.3d 300 (7th Cir. 2018), reinstated by Planned Parenthood of. v. Box, 917 F.3d 532 (7th Cir., en banc, 2018).

11 The Court did grant certiorari regarding provisions of the law that controlled the disposition of fetal remains and reversed the Seventh Circuit's invalidation of that portion of the law. 139 S. Ct. at 1789.

12 Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 Harv. L. Rev. 2026, 2033 (2021).

13 See infra text accompanying note 141.

14 142 S.Ct. 2228, 597 U. S. _____ (2022).

Table 1. Current Abortion Bans

	Number of RBA-Ban States with Bans	States Where Ban Is in Effect	States Where Ban Is Temporarily or Permanently Enjoined or Found Unconstitutional
Complete Ban	14	Alabama, Arkansas,† Idaho,† Kentucky,† Louisiana,† Mississippi,† Missouri,† Oklahoma,† South Dakota,† Tennessee,† Texas, and West Virginia†	Arizona,† Indiana,† North Dakota,† Michigan, Montana, South Carolina, Utah,† and Wyoming
6-week LMP	1	Georgia	Iowa, Ohio†

†RBA-ban state

right to abortion established in *Roe v Wade*[15] and reaffirmed in *Planned Parenthood of Southeastern Pa. v Casey*,[16] has given the green light to states eager to ban abortion, generally. If my thesis is correct that the focus on eugenics has more to do with a desire to end abortion than true concerns about eugenics, one would expect RBA-ban states to respond quickly to the *Dobbs'* invitation to restrict abortion rights. And, indeed, they have. Just five months after *Roe* was overturned, 14 of the 17 states with RBA bans had enacted or already had trigger laws with complete bans (four of which have been blocked) and one had enacted a 6-week ban (which has also been blocked) (see Table 1). This means that 14 (82.3.5 per cent) of RBA-ban states have sought to ban abortions at six weeks or earlier.

That leaves three RBA-ban states. North Carolina has a gestational ban at 20 weeks. Pennsylvania allows abortion with several restrictions. After the 2022 elections, it appears that Pennsylvania will have a divided legislature with a democratic governor, suggesting that, for the near future, Pennsylvania will not impose more stringent regulations. Finally, although Kansas allows abortions until 22 weeks and Kansans voted in August to reject a ballot measure that would have amended the State Constitution to deny a right to an abortion, Kansas still places several restrictions on abortions.[17] In addition, because the Kansas legislature retained its republican supermajority, it could impose even more stringent and veto-proof restrictions. In other words, not a single RBA-ban state is unequivocally abortion friendly, and a strong majority make abortion all but inaccessible.

One of the goals of this piece is to demonstrate empirically what most people would suspect—states with RBA bans are more interested in restricting abortion than preventing eugenics. A prior empirical study considered a narrower version of that issue. In 2015, Professor Kalantry examined whether sex-selective abortion bans are

15 410 U. S. 113 (1973).

16 505 U. S. 833 (1992).

17 *Tracking the States Where Abortion is Now Banned,* N.Y. Times, Oct. 13, 2022, https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html (last accessed Oct. 22, 2022).

anti-immigrant or anti-abortion. Her findings demonstrated that states with a higher growth of Asian immigrants were more likely to pass bans on sex-selective abortions. But she also found that states with sex-selective abortions were more likely to have other kinds of anti-abortion legislation.[18] My study indirectly confirms the connection between RBA-bans generally (not just sex-selective abortions) and abortion restrictions by demonstrating the many ways RBA-ban states are not, in fact, concerned with eugenics or discrimination, either on the terms described by Justice Thomas or by other definitions.

Another (forthcoming) piece challenges the coopting of disability rights rhetoric to justify genetic-selective abortion bans.[19] Not only does the article show that genetic-selective RBA bans 'cannot be justified solely on the basis of disability rights'—particularly when such bans have not been 'proposed as part of a broader disability rights policy agenda',[20] but it also demonstrates that these particular RBA bans do not advance disability rights.[21] Instead, the disability rights rhetoric used to justify these laws politicize and hinder the possibility of coalition building on behalf of the disability community, even as the bans restrict reproductive rights.[22] My study, like this one, challenges the defense of RBA bans on their own terms to show that the alleged motivation is ineffective, at best, and disingenuous, at worst.

Part I begins by setting up the judicial landscape that led to Thomas's passionate condemnation of eugenics and defense of RBA bans. It then demonstrates how Thomas uses a partially distorted narrative of the eugenics movement to justify his concerns about 'modern-day eugenics' and support for RBA bans as anti-eugenic.

Part II describes how this conception of eugenics has influenced growing efforts to enact RBA bans. These laws have been proliferating since 2010, especially in the last few years. In addition, legislators have increasingly used explicit and implicit references to 'eugenics'. Indeed, some legislation quotes directly from Thomas's concurrence in *Box*.[23]

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18 Sital Kalantry, *Sex-Selective Abortion Bans: Anti-Immigrant or Anti-Abortion?*, Georgetown J. Int'l Affairs 140, Winter/Spr. 2015.

19 Nina Roesner et al., *Reason-Based Abortion Bans, Disability Rights, and the Future of Prenatal Genetic Testing*, __ Am. J. L. & Med. __ (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4106851 (last accessed Sept. 8, 2022).

20 *Id.* at 8–11 (asserting that the laws 'presuppose[] a universal right to be born'; that they 'erroneously conflate[]' these bans with the eugenics movement, when abortions based on genetic anomalies are not part of any 'centralized campaign to reduce or eradicate the incidence of disability in the population'; that the logic of these bans could justify further restrictions on access to reproductive care like contraception and preimplantation genetic testing; that the focus on Down syndrome 'obscure[s] meaningful differences among disabilities and genetic anomalies,'; and that the focus on heritability is 'much narrower than the broader disability rights concerns').

21 *Id.* at 11–13 (The laws are not designed to be enforceable; they discourage important dialogue between provider and patient, reducing patients access to 'comprehensive and reliable information' to inform decisions about whether to continue pregnancies after receiving a prenatal diagnosis; they exacerbate expressivist concerns by oversimplifying the issue as being a choice 'for or against a disability,' rather than furthering a broader discussion about how to support children with disabilities and their families.

22 *Id.* at 14–17.

23 See, eg Life Equality Act of 2020 (MS 1295); State of Tennessee—Public Chapter No. 764 (HB 2263 2020); Life Nondiscrimination Act—SC HB 3872 (2021); Unborn Child with Down Syndrome Protection and Education Act—WV SB 468.

Part III then discusses different conceptions of eugenics and anti-eugenics remedies. It points out that in one sense Thomas's version of eugenics is quite narrow in focusing solely on reproductive decisions. But in another sense, he hints at a broader conception of eugenics by focusing on racial disparities in abortion rates and abortions based on sex. Despite adopting this broader understanding of eugenics, Thomas advocates an anti-eugenic remedy—RBA bans—that is quite narrow.

Part III argues that if we are to take seriously a broad conception of eugenics that examines how state policies lead to racial (or other) disparities, anti-eugenic remedies should address the disproportionately negative impacts on the populations who were harmed by the eugenics movement: people of color, low-income individuals, members of the LGBTQ+ community, females, people with disabilities, and immigrants. It is worth noting also that Thomas's description of eugenics bleeds into concerns about discrimination and inequality, which are not precisely the same thing as eugenics per se. But they are at the heart of eugenics policies. In many ways, Thomas uses the term eugenics as a bludgeon to critique inequality and discrimination—but only in the abortion context. Indeed, it is striking how little he is concerned about racial, gender, or social class equality in other contexts.[24]

Part IV provides empirical analysis of various state laws and policies that potentially have eugenic (or anti-eugenic) impacts, or, in some sections, discriminatory (or anti-discriminatory) impacts. Section A begins by focusing on policies tied to a narrow conception of eugenics—laws related to reproduction. An examination of laws related to sterilization, conjugal visits, incest, assisted reproductive technologies, and substance use during pregnancy support my theory that RBA-ban states often do not impose anti-eugenic remedies beyond RBA bans. However, as this section shows, prenatal information laws and bans on wrongful birth/life claims correlate positively with states that have enacted RBA bans. This outcome is not surprising because these laws are tied directly to preventing reason-based abortions and are therefore consistent with the alleged anti-eugenic goals of RBA bans.

Section B then explores state laws that have eugenic (or anti-eugenic) impacts in a slightly broader sense. The eugenics movement included deeply discriminatory efforts to 'purify' the American population by encouraging the presence of favored groups and discouraging that of 'dysgenic' groups. As a result, state laws that discourage the groups discriminated against in the eugenics era could also be viewed as eugenic. Thus, this section examines laws that impact (illegal) immigrants, incarceration rates as an indirect measure of state policies related to imprisonment, and death penalty statutes. As expected, it finds that RBA-ban states generally are not anti-eugenic in these areas.

Section C turns to an even broader understanding of eugenics—policies that discourage the thriving and integration of the groups at risk during the eugenics era. Infant

24 For example, in *Texas Department of Housing & Community Affairs v The Inclusive Communities Project, Inc.* 576 U.S 519, 547 (2015), Thomas wrote a dissent critiquing the majority opinion for recognizing disparate impact as a category of racial discrimination under the Fair Housing Act ('FHA'). He described 'the foundation on which the Court builds its latest disparate-impact regime' as 'made of sand,' in part because of criticism of the statutory analysis. But even beyond that, he criticized 'disparate-impact proponents' for 'doggedly assum[ing] that a given racial disparity at an institution is a product of that institution rather than a reflection of disparities that exist outside of it.' *Id.* at 553. As he wrote, '[w]e should not automatically presume that any institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination until proved innocent.' *Id.* at 554.

mortality rates, for example, are indicators as to whether states promote (or fail to promote) the wellbeing of various groups, including minorities. And pay gaps between women and men are indicators as to whether the state protects equality between the sexes. This Section shows a general, albeit not perfect, trend: states with RBA bans are less likely to have legislation or policies that are anti-eugenic or anti-discriminatory in this broader sense.

I conclude the article by discussing how my findings show that legislators commandeered the term 'eugenics' to justify further restrictions of reproductive rights before *Dobbs*. I argue that this characterization of abortions as eugenic—a feature everyone abhors—has always been an attempt to garner support across the aisle for greater abortion restrictions. It also has been deceptive in suggesting that RBA bans remedy broader concerns surrounding eugenics, when in fact they do little to address or reduce the underlying discrimination and disparities that resulted from eugenics. In fact, they only enhance those disparities.

Even though the *Dobbs* decision has fulfilled Thomas's goal of allowing states to ban all abortions, including RBAs, my examination of the way RBA-ban states address (or don't address) eugenics and discrimination in other areas remains important. While *Dobbs* resolved the question as to whether RBA bans are unconstitutional,[25] my research shows how the use of eugenics to defend these bans distorts both what is horrific about the eugenics movement (by focusing only on abortion) and the abortion debate itself. In misusing the term 'eugenics' in service of condemning certain types of, and ultimately most, abortions, this approach confuses the nature of interests at stake. While the distinction between reason-based abortions and all abortions is irrelevant after *Dobbs* in the most abortion-restrictive states, the eugenics argument on which Thomas et al. rely can influence and oversimply popular discussions about prenatal testing and its purpose[26]; it can even potentially lead to RBA bans in more abortion-moderate states.

Worse, although *Dobbs* represents the result of Thomas's mission to end the right to abortion, the decision exposes everyone, especially the most vulnerable among us, to the threats of eugenics. The constitutional analysis of *Roe*, as understood until recently, offered a constitutional interpretation that protected against involuntary sterilization. But that reasoning no longer stands. Thomas and his brethren have instead left us utterly powerless under the Constitution against state-imposed eugenic policies, even as he and others rail against eugenics. Irony is an understatement for what this misuse of the term eugenics has wrought.

25 *Compare* Planned Parenthood of Ind. & Ky, Inc. v. Box, 888 F.3d 300 (7th Cir. 2018), *reinstated by* 917 F.3d 532 (7th Cir. 2018) (en banc) (invalidating an RBA ban) *with* Preterm-Cleveland v. McCloud, 994 F.3d 512 (6th Cir. 2021) (en banc). Interestingly, a three-court panel of the same Circuit recently found that a Tennessee law prohibiting abortions based on sex, race, or diagnosis of Down syndrome was unconstitutional. Memphis Ctr. for Reprod. Health v. Slatery, 14 F.4th 409 (6th Cir.), *reh'g en banc granted, opinion vacated*, 18 F.4th 550 (6th Cir. 2021).

26 See Roesner et al, *supra* note 19.

II. THE THOMAS CONCEPTION OF EUGENICS AND ANTI-EUGENICS

II.A. Prelude to the Thomas Concurrence

Justice Thomas was not the first judge to associate certain types of pregnancy terminations with eugenics. Some courts have used the term descriptively and neutrally to contrast abortions intended 'to prevent the birth of a defective child' ('eugenic' abortions) from those intended to protect the mother's health or life ('therapeutic' abortions) or 'performed to limit the size of the family for economic reasons' ('socioeconomic' abortions).[27] Others, however, have used the term to critique wrongful birth or life claims—ie lawsuits brought by parents or the child, respectively, alleging that a provider's negligence deprived expectant parents of the opportunity to terminate a pregnancy based on fetal anomalies.[28]

For example, in holding that parents could not recover for a wrongful birth claim for a physician's alleged failure to inform them that their child would be born with birth defects, the New Jersey Supreme Court in 1967 concluded that a 'child need not be perfect to have a worthwhile life'.[29] The court reasoned:

> We are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle. It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of the single human life to support a remedy in tort.[30]

Similarly, in *Taylor v Kurapti,* a Michigan appellate court held that a claim for wrongful birth could not be brought. The court criticized the phrase 'wrongful birth' because it suggests that

> the birth of the disabled child was wrong and should have been prevented. If one accepts the premise that the birth of one 'defective' child should have been prevented, then it is but a short step to accepting the premise that the births of classes of 'defective' children should be similarly prevented, not just for the benefit of the parents but also for the benefit of society as a whole through the protection of the 'public welfare'. This is the operating principle of eugenics.[31]

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27 Speck v. Finegold, 408 A.2d 496 (Pa. Super. 1979). See also Jacobs v. Theimer, 519 S.W.2d 846 (TX 1975) (referring to 'eugenic abortions' as those intended 'to prevent the birth of a defective child'); Hummel v. Reiss, 589 A.2d 1041 (N.J. Super. 1991) (referring to 'eugenic abortions,' which are 'directed solely to eliminate a potentially defective fetus'), aff'd Hummel v. Reiss, 608 A.2d 1341 (NJ 1992) (using same reference to eugenic abortions); Gallagher v. Duke University, 638 F. Supp. 979, 982 (U.S. District Court, M.D. North Carolina, Durham Division. 1986) ('Post-conception genetic counseling is employed so that a mother may make an informed decision on whether to have a eugenic abortion of a deformed or otherwise genetically defective fetus.').

28 See Cailin *Harris, Statutory Prohibitions on Wrongful Birth Claims & Their Dangerous Effects on Parents,* 34 B.C. J.L. & Soc. Just. 365, 368–372 (2014).

29 Gleitman v. Cosgrove, 227 A.2d 689 (NJ 1967) (noting there are '[e]xamples of famous persons who have had great achievement despite physical defects').

30 *Id.* at 693.

31 Taylor v. Kurapti, 600 N.W.2d 670, 688 (Mich. App. 1999) (quoting and citing to scholars' definitions of eugenics as espousing 'the reproduction of the "fit" over the "unfit" (positive eugenics) and discourage[ing] the birth of the "unfit" (negative eugenics)' and 'the idea that the human race can be gradually improved and social ills simultaneously eliminated through a program of selective procreation').

Foreshadowing Thomas's concurrence, the court then recited the history of eugenics,[32] criticizing Justice Holmes for 'one of the most callous and elitist statements in Supreme Court history':

> [I]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.[33]

The Michigan court reasoned that even if, today, 'this talk of the "unfit" and of "defectives" has a decidedly jarring ring', we may not be 'above such lethal nonsense', given the potential of genetics advances to identify genes for various medical conditions. Specifically, it worried that allowing wrongful birth claims for the lost opportunity to obtain a 'eugenic abortion' is 'but another short half step from . . . proposing, for the benefit of the child's overburdened parents and of the society as a whole, that the existence of the child should not be allowed to continue'.[34]

II.B. RBA Bans and the Thomas Concurrence

Judge Frank Easterbrook, joined by then-Judge Amy Coney Barrett, was the first to discuss reason-based abortion bans in terms of eugenics. Dissenting from the Seventh Circuit's denial of a rehearing en banc concerning a different part of an Indiana abortion statute,[35] Easterbrook's opinion challenged the en banc panel's view that Indiana's 'Sex Selective and Disability Abortion Ban', which prohibits abortions when the provider knows the abortion is sought 'solely' based on race, sex, Down syndrome diagnosis or related characteristics,[36] was unconstitutional. According to Easterbrook, the Court's abortion decisions never considered the 'validity of an *anti-eugenics* law', and none of

32 *Id.* at 689 (noting that eugenicists' 'presumption that most, if not all, human traits are transmitted genetically,' led them to encourage 'educated, resourceful, and self-sufficient citizens to mate and produce "wellborn" eugenic children' and to discourage 'the dysgenic . . . from reproducing,' who included 'the feebleminded, the insane, the criminalistic, the epileptic, the inebriated or the drug addicted, the diseased—regardless of etiology, the blind, the deaf, the deformed, and dependents (an extraordinarily expansive term that embraced orphans, 'ne'er-do-wells," tramps, the homeless and paupers).')

33 *Id.* (citing Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927)). The court also noted the influence of 'the Third Reich's experiments with sterilization . . . on the American eugenics movement.' *Id.* at 689–90 (describing an expert witness in the *Buck* trial as expressing 'his admiration for Hitler's campaign,' which 'in six years ha[d] sterilized about 80,000 of her unfit while the United States with approximately twice the population ha[d] sterilized about 27,869 . . . in the [prior] 20 years').

34 *Id.* at 690. The concurring opinion in Grubbs v. Barbourville Family Health Center, P.S.C., 120 S.W.3d 682, 691 (KY 2003) (concurring J., Wintersheimer), which held that parents and children may not bring, respectfully, wrongful birth and life claims against physicians who fail to diagnose a fetal medical condition in time for an abortion, relied heavily on *Kurapti*'s critique of eugenics to argue against such claims. It argued that the 'quality of life' ethic underlying wrongful birth/life claims, which 'favors the life of the healthy over the infirm, the able-bodied over the disabled and the intelligent over the mentally challenged . . . could produce a culture that condones the extermination of the weak by the strong or the more powerful,' reminiscent of the Nazi regime and *Buck v Bell*, and that 'could lead to a eugenic culture where the "unfit" are made disposable').

35 That part of the statute dealt with disposition of fetal remains.

36 Ind. Cod. § 16–34–4-1 *et. seq.* (excluding lethal fetal anomalies).

those 'decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children'.[37]

Justice Thomas's *Box* concurrence builds on Easterbrook's characterization of the Indiana law as anti-eugenic, albeit it shines a much brighter spotlight on the horrors of the eugenics movement than any prior opinion. Thomas does so, however, with a pointed and inaccurate twist long embraced by some aspects of the anti-choice movement. After devoting only a paragraph to agree with the majority's decision to overturn the injunction regarding statutory requirements for the disposition of fetal remains, Thomas presents his thesis that Indiana's RBA ban is anti-eugenic:

> Each of the immutable characteristics protected by this law can be known relatively early in a pregnancy, and the law prevents them from becoming the sole criterion for deciding whether the child will live or die. Put differently, . . . [the RBA ban] promote[s] a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics.[38]

Thomas relies on the history of the eugenics movement to argue that 'the use of abortion to achieve eugenic goals is not merely hypothetical', but a current threat because the 'foundations for legalization of abortion in America were laid during the early 20th-century birth-control movement'.[39] To make this claim, Thomas focuses to a disproportionate extent on two key figures associated with reproductive freedom: Margaret Sanger, who founded Planned Parenthood and was a leader in the birth control movement, and Alan Guttmacher, future Planned Parenthood President. To be sure, both supported the eugenics movement, but they were not the principal figures behind that movement. According to Thomas's tale of eugenics, Sanger, whose name he invokes 28 times (not including citations), was a primary force behind the movement, rather than one of many influential figures who supported it. He unabashedly ties Planned Parenthood, the symbol of reproductive rights, to eugenics to argue that reason-based (and perhaps all) abortions are eugenic.

Thomas does offer strands of the more typical and historically accurate narrative. He identifies Francis Galton as the man who coined the term 'eugenics' and who promoted efforts to encourage people with 'desirable qualities' to reproduce and to discourage the 'unfit' from reproducing. And he observes that Galton's goal was to improve 'society by "do[ing] providently, quickly, and kindly" "[w]hat Nature does blindly, slowly, and ruthlessly."'[40] In addition, Thomas accurately points out how 'well embraced' eugenics theories were, 'particularly among progressives, professionals, and intellectual elites'.[41]

His history also correctly underscores the movement's underlying racism, where anecdotes and statistics were used to categorize racial and ethnic groups in eugenics terms. Although he focuses heavily on eugenic conclusions about African

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

38 139 S. Ct. at 1783.

39 *Id.* at 1783.

40 *Id.* at 1785 (quoting F. Galton, Eugenics: Its Definition, Scope and Aims in Essays in Eugenics 42 (1909)).

41 *Id.*

Americans,[42] he rightly observes that eugenicists did not just deem certain racial groups to be "unfit." The "unfit" also included the "'feeble-minded', insane', 'criminalistic', 'deformed', 'crippled', 'epileptic', 'inebriate', 'diseased', 'blind', 'deaf' and 'dependent' (including orphans and paupers)."[43]

Thomas's account also includes the shameful legislative strategies to reduce 'dysgenic' traits in America: The Immigration Act of 1924, which severely restricted immigration by those who were not from Western and Northern Europe; anti-miscegenation laws;[44] laws prohibiting marriage between the 'unfit'; and mandatory eugenic sterilization laws. He rightly condemns *Buck v Bell*, as well as Holmes's eugenic rhetoric[45] and 'full-throated defense of forced sterilization'. As he notes, Holmes's decision legitimized and contributed to the momentum of the eugenics movement and the involuntary sterilization of as many as 70,000 people in the United States.[46]

But Thomas's narrative takes a turn from standard accounts of eugenics in a few ways. First, after correctly noting that support for eugenics 'waned considerably' once Americans became aware of eugenic policies in Nazi Germany and scientific understandings demonstrated how problematic the assumptions underlying eugenics were, he claims, with nary a citation, that 'support for the goal of reducing undesirable populations through selective reproduction has by no means vanished'.[47] His primary goal is to suggest that reason-based abortions are a form of such modern-day eugenics.

To make the case that 'abortion is an act rife with the potential for eugenic manipulation',[48] Thomas flanks his discussion of the main features of the eugenics movement with a diatribe against Margaret Sanger and to a lesser extent Alan Guttmacher. He twice quotes Sanger's statement that '"Birth Control . . . is really the greatest and most truly eugenic method" of "human generations."'[49] Indeed, he argues, she saw it as more effective than sterilization.[50] He also points to her initiation of the 'Negro Project', which was intended to 'promote birth control in poor, Southern

42 *Id.* (Eugenicists claimed that '"the Negro . . . is in the large eugenic *inferior* to the white"' and worried about the '"prodigious birth-rate" of nonwhite races . . . bring the world to a racial tipping point'.) (quoting P. Popenoe & R. Johnson, Applied Eugenics 285 (1920) and L. Stoddard, The Rising Tide of Color Against White World-Supremacy 8–9 (1920)).

43 *Id.* at 1786.

44 *Id.*

45 *Id.* (quoting Holmes for the propositions that, if "'the public welfare may call upon the best citizens for their lives,'" it "would be strange if it could not call upon those who already sap the strength of the State for those lesser sacrifices . . . in order to prevent our being swamped with incompetence'," and "'[t]hree generations of imbeciles are enough'") (quoting 274 U.S. at 205, 207).

46 *Id.* Some cite the number of involuntarily sterilized people as 70,000. See *The Supreme Court Ruling that Led to 70,000 Forced Sterilizations*, Fresh Air, NPR, Mar. 7, 2016, https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations#:~:text=All%20told%2C%20as%20many%20as,were%20deaf%2C%20blind%20and%20diseased (last accessed Oct. 22 2022). Others cite a number as high as 80,000. See *supra* note 33.

47 139 S. Ct. at 1786–87.

48 *Id.* at 1787.

49 *Id.* at 1784, 1788 (also quoting her claim that birth control is '"the most constructive and necessary of the means to racial health"') (citing M. Sanger, Pivot of Civilization 189 (1922)).

50 *Id.* at 1787–88 (Sanger stated that sterilization did 'not go to the bottom of the matter' because it did not 'touc[h] the great problem of unlimited reproduction' of 'those great masses, who through economic pressure populate the slums and there produce in their helplessness other helpless, disease and incompetent masses, who overwhelm all that eugenics can do among those whose economic condition is better.') (quoting Sanger, Pivot of Civilization).

[B]lack communities', and which Sanger described as "'"the most direct, constructive aid that can be given them to improve their immediate situation."'"[51]

Thomas does offer some half-hearted disclaimers, including that W.E.B. DuBois and other Black leaders supported the Negro Project. He also twice concedes that Sanger 'distinguished between birth control and abortion', even quoting her as describing contraception as the only thing that 'can put an end to the horrors of abortion and infanticide'. And finally, he notes that Sanger's supporters argue her writings 'should not be read to imply a racial bias', although it is clear he thinks otherwise.[52]

Despite these disclaimers, Thomas sees a clear through line between Sanger's support of birth control and his view that (reason-based) abortions are a form of modern-day eugenics. Even if Sanger 'was not referring to abortion . . . , at least not *directly*',[53] he reasons, her eugenics arguments for birth control 'apply with even greater force to abortion'.[54] If 'birth control could prevent "unfit" people from reproducing', 'abortion can prevent them from being born in the first place'.[55] To underscore this assertion, Thomas twice suggests that eugenicists were big proponents of abortion[56] and three times references Alan Guttmacher as one such proponent.[57] Even if the end of World War II led to a 'public aversion to eugenics' and reluctance to use the term, Thomas argues, eugenic desires remain. He points to support for birth control and abortion in the latter half of the 20th century as a means 'to achieve "population control" and to improve the "quality" of the population'.[58] Thus, abortion has the 'potential . . . to become a tool of eugenic manipulation'.[59]

Finally, Thomas devotes the last part of his concurrence to linking contemporary 'eugenic' attitudes to abortion and discrimination against Black people, people with disabilities, and females. He argues that the racism of the eugenics movement underlies contemporary support for birth control,[60] and that abortion carries those same 'eugenic' overtones. His support? The 'considerable racial disparity' in who has

51 *Id.* at 1788 (quoting *Birth Control or Race Control? Sanger and the Negro Project, Margaret Sanger Papers Project Newsletter* # 28 (2001).

52 *Id.* at 1789 (quoting WOMEN AND THE NEW RACE at 25); *Id.* at 1784 (noting that she 'recognized a moral difference between' the contraception and abortion).

53 *Id.* at 1784 (emphasis added).

54 *Id.* at 1787, 1790.

55 *Id.* at 1784.

56 *Id.* at 1789 (stating one can find support for abortion 'throughout the literature on eugenics'); *id.* at 1784 ('Many eugenicists . . . supported legalizing abortion, and abortion advocates . . . endorsed the use of abortion for eugenic reasons'.).

57 *Id.* at 1784, 1787 ('Even after World War II, future Planned Parenthood President Alan Guttmacher and other abortion advocates endorsed abortion for eugenic reasons and promoted it as a means of controlling the population and improving its quality'.); *id.* at 1789 ('In 1959, . . . Guttmacher explicitly endorsed eugenic reasons for abortion. . . . He explained that "the quality of the parents must be taken into account," including "[f]eeble-mindedness," and believed that "it should be permissible to abort any pregnancy ... in which there is a strong probability of an abnormal or malformed infant."') (citing A. GUTTMACHER, BABIES BY CHOICE OR BY CHANCE 186–188, 198 (1959)). He also points to eugenicists who believed that abortion 'should be legal for the very *purpose* of promoting eugenics'. *Id.*

58 *Id.* at 1790 (quoting Guttmacher's exultation over '"fantastic . . . progress" in expanding abortion' to focus more on '"quality of population than the quantity"') (citing to *Abortion Reforms Termed 'Fantastic', Harford Courant*, Mar. 21, 1970, at 16).

59 *Id.* at 1784.

60 He points out that some Black groups saw family planning as '"a euphemism for race genocide,"' directed especially toward keeping '"the Negro birth rate as low as possible."' *Id.* at 1790 (quoting Kaplan, *Abortion and Sterilization Win Support of Planned Parenthood*, N.Y. TIMES, Nov. 15, 1968, L50 at 1).

abortions. Black women, he observes, have abortions at 3.5 times the rate of white women, and Black children in some parts of New York City are 'eight times more likely to be aborted than white children'.[61] Thomas offers no causal explanation for these disparities, no evidence that it is part of a grand plan of modern-day 'eugenicists', and indeed, no evidence that people terminate pregnancies on the basis of race. He simply states that *'[w]hatever the reasons* for these disparities', abortion is a method of family planning of which '[B]lack people do indeed "tak[e] the brunt."'[62]

With respect to disability, Thomas argues that abortion has become 'a disturbingly effective tool for implementing the discriminatory preferences that undergird eugenics'.[63] Here, he points to the high abortion rates in Europe and the United States for pregnancies in which Down syndrome has been identified.[64] And finally, with respect to sex, he describes 'widespread sex-selective abortions' in Asia and asserts they are 'common among certain populations in the United States'.[65]

Surprisingly, Thomas concurs in the Court's decision not to grant certiorari with respect to Indiana's RBA ban. Nevertheless, his concurrence unabashedly lays the groundwork for the Court to uphold those laws (or all abortion bans), eventually. Thomas claims that the Court 'has been zealous in vindicating the rights of people even potentially subjected to race, sex, and disability discrimination', and therefore the Court cannot 'forever' avoid such issues in the context of abortion.[66] Thus, he concludes that '[e]nshrining a constitutional right to an abortion based solely on race, sex, or disability of an unborn child . . . would constitutionalize the views of the 20th-century eugenics movement'.[67] In short, he sees the Indiana ban on reason-based abortions as vindicating such constitutional rights.[68]

Notably, the majority opinion in *Dobbs* references Thomas's views in a footnote, citing to his *Box* concurrence for the proposition that some supporters of 'liberal access to abortion . . . have been motivated by a desire to suppress the size of the

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61 *Id.* at 1790.

62 *Id.* at 1791 (citing Dempsey, *Dr Guttmacher Is the Evangelist of Birth Control*, N.Y. Times Mag., Feb. 9, 1969, at 82) (emphasis added). He suggests that modern eugenics-like arguments play out today, with studies making findings to show that '"*Roe v Wade* helped trigger, a generation later, the greatest crime drop in recorded history."') (quoting Stephen Levitt & S. Dubner, Freakonomics 6 (2005)).

63 *Id.* at 1790. Indeed, he argues that that the 'individualized nature of abortion gives it even more eugenic potential than birth control, which simply reduces the chance of conceiving *any* child'. *Id.*

64 *Id.* at 1790–91 (citing rates of '98% in Denmark, 90% in the United Kingdom, 77% in France, and 67% in the United States').

65 *Id.* at 1791.

66 *Id.* at 1792.

67 *Id.* Thomas agreed with Easterbrook that abortion precedent (at the time *Box* was decided) had not resolved 'whether the Constitution requires States to allow eugenic abortions'. *Id.* (noting that Pennsylvania's ban on sex-selective abortions was not challenged in *Casey*).

68 Thomas points out that on the 100th anniversary of Indiana's mandatory sterilization law, the first in the country, the Indiana legislature adopted a resolution expressing 'regret over Indiana's role in the eugenics movement' and recognizing that eugenic laws '"targeted the most vulnerable . . . , including the poor and racial minorities, . . . for the claimed purpose of public health and the good of the people."' *Id.* at 1792 (quoting S. Res. 91 at 2, 115th Gen. Assemb., 1st Sess. (2007)). The implication is that the reason-based abortion ban is consistent with this resolution.

African-American population'.[69] Indeed, the footnote implicitly endorses these views in stating that 'it is beyond dispute that *Roe* has had that demographic effect' because a 'highly disproportionate percentage of aborted fetuses are Black'.[70] Although the majority claims not to 'question the motives of either those who have supported or those who have opposed laws restricting abortions', in citing Thomas's concurrence and presenting those statistics, it hints that a majority of the Court, not just Thomas, endorses a view that abortions themselves are eugenic.

II.C. Historical Inaccuracies

Historians and other scholars have taken serious issue with many of Thomas's claims, even while noting where his account of eugenics is accurate.[71] They have condemned his opinion as a distortion of 'history in the service of ideology',[72] '"historically incoherent,"'[73] 'selective, and incomplete',[74] '"really bad history,"' reliant on '"a gross misuse of historical facts,"' and guilty of the '"amateur historical mistake to project early 21st-century right wing views" onto the early 20th century'.[75]

As Adam Cohen, one of the historians whose work Thomas cites, asserts, 'Thomas used the history of eugenics misleadingly' and as 'a new weapon in the arsenal of the anti-abortion movement'. Cohen notes that.

> Thomas relied on a kind of historical guilt-by-association. 'The foundations for legalizing abortion in American were laid during the early 20th century birth-control movement', he wrote. The birth-control movement, in turn, 'developed alongside the American eugenics movement'. Therefore, he suggested abortion is inseparable from America's history of eugenics.[76]

Michael Dorf compares this aspect of Thomas's reasoning to the syllogism in *Love and Death,* which leads to the conclusion that 'all men are Socrates'.[77]

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69 142 S. Ct. 2228, 2256 n.41 (citing Brief for African-American Organization et al. as Amici Curiae 14–21 and *Box v Planned Parenthood of Ind. and Ky., Inc.*, 587 U. S. ____, ____–____ (2019) (THOMAS, J., concurring) (slip op., at 1–4).

70 *Id.*

71 *Box,* 139 S. Ct. at 1792 (citing as examples his description of Sanger's support of eugenics and the 'lamentable role in eugenics' that *Buck v Bell* played).

72 Eli Rosenberg, *Clarence Thomas Tried to Link Abortion to Eugenics. Seven Historians Told the Post He's Wrong*, WASH. POST, May 30, 2019.

73 *Id.* (quoting historians Phillipa Levine, Thomas C. Leonard, Paul A. Lombardo, and Daniel Kevles).

74 Murray, *supra* note 12, at 2033.

75 Rosenberg, *supra* note 72 (quoting historians Phillipa Levine, Thomas C. Leonard, Paul A. Lombardo, and Daniel Kevles).

76 Adam Cohen, *Clarence Thomas Knows Nothing of My Work*, ATLANTIC, May 29, 2019. He notes that this represents a common form of argument when a practice is condemned by falsely analogizing it to 'a universally acknowledged historical atrocity'. *Id.*

77 Michael C. Dorf, *Clarence Thomas's Misplaced Anti-Eugenic Concurrence in the Indiana Abortion Case*, DORF ON LAW, May 28, 2019, http://www.dorfonlaw.org/2019/05/clarence-thomass-misplaced-anti.html (last accessed Dec. 6, 2022) (The argument goes as follows: 'Sanger favored birth control on grounds of eugenics; she also opposed abortion; but the eugenics-based arguments she used in favor of birth control apply "with even greater force to abortion"; therefore, abortion is a form of eugenics'.). But see Ed Whelan, *Contra Michael Dorf on Justice Thomas's* Box *Concurrence—Part 1,* NAT'L REV., May 30, 2019 https://www.nationalreview.com/bench-memos/contra-michael-dorf-on-justice-thomass-box-concurrence-part-1/ (last accessed Dec. 6, 2022).

Although Sanger did support eugenics, many scholars reproach Thomas for suggesting her goal in opening a birth-control clinic in Harlem was to discourage reproduction in the Black community. As Professor Melissa Murray points out in *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade,[78] Margaret Sanger's promotion of birth control was much more nuanced and complex. Sanger initially tried to promote family planning by emphasizing feminist goals such as voluntary motherhood and support of women's sexuality. Unfortunately, these goals did not align with feminism in the early twentieth century, whose call for equality was rooted in 'the moral superiority of motherhood' and 'emphasis on maternal value, chastity, and temperance'.[79] Only when it became clear that her efforts to promote birth control did not have the support of the women's movement did Sanger reframe the argument for contraception in eugenics terms. By tying family planning to eugenics—with its wide appeal, purported scientific validity, and focus on the well-being of the country—Sanger hoped to garner broader support for contraception.[80]

Scholars also critique Thomas's suggestion that Sanger was imposing something on the Black community against their will. Historian Daniel Kevles stresses that Sanger's 'concern with lower income and immigrant women was to give them control over their lives; and these women were extremely grateful for it'.[81] Similarly, Professor Dorothy Roberts writes in *Killing the Black Body* that 'Black women were interested in spacing their children and Black leaders understood the importance of family planning services to the health of the Black community', which then as now faces high rates of maternal and infant mortality.[82] Author Harriet Washington describes how Black women embraced birth control because of the career options it provided, including allowing women to enter professional jobs by delaying motherhood until they were ready.[83] Finally, Ayah Hurridin, who is writing her Ph.D. thesis on eugenics and the African American community, observes:

> History shows that a lot of African Americans thought Margaret Sanger had the right idea. That birth control is not only a way to control reproduction and family size, but also a lot saw it as vindication of black womanhood, coming out of a long history where, during slavery, a lot of black women didn't have control over their reproduction due to all kinds of horrific sexual violence.[84]

Many historians also critique Thomas's insinuation that eugenicists were big supporters of birth control and abortion. According to Kevles, the opinion was "'ignorant and prejudiced when it comes to birth control'." For example, prominent eugenicists like Charles Davenport opposed birth control. Many eugenicists feared that "'the women who would use it were the type of women they would want to encourage to reproduce, so-called 'better' women—upper-middle-class women'."[85] Kevles also finds Thomas's

78 Murray, *supra* note 12, at 2033 (2021).

79 *Id.* at 2038.

80 *Id.* at 2038–39.

81 Rosenberg, *supra* note 72.

82 Dorothy Roberts, Killing the Black Body 82–84 (2d ed. 2017).

83 Harriet A. Washington, Medical Apartheid 200–01 (2006).

84 Rosenberg, *supra* note 72.

85 *Id.* (quoting Kevles).

claims "'wholly inappropriate when it comes to abortion vis-à-vis eugenics'"[86] because the leaders of the movement, including Davenport and Harry Laughlin, "were largely opposed to abortion and birth control."[87] As Professor Paul Lombardo puts it, "'I've been studying this stuff for 40 years, and I've never been able to find a leader of the eugenics movement that came out and said they supported abortion'."[88] And of course, as even Thomas conceded, Sanger opposed abortion.[89]

Finally, Professor Murray faults Justice Thomas for overlooking and obscuring 'the significant history of racialized sterilization abuse in the United States', which continued long after public support for the eugenics movement waned. Whereas the sterilization efforts during the eugenics movement century were primarily directed at poor white people to protect the public fisc and purify the white race,[90] in the second half of the 20th century, states began to repurpose 'their state sterilization programs to limit reproduction among those who were unduly dependent. . . on the public fisc', and who were disproportionately women of color. By equating 'state-sponsored reproductive abuses' primarily with individual decisions regarding abortion and contraception,[91] and overlooking this history, Thomas fails to emphasize 'the strong correlation between race and socioeconomic status and vulnerability to reproductive control'.[92]

Not all criticize Thomas's concurrence, however. Some argue that he 'was plainly *not* making the "guilt by association" argument . . . . Instead, he was showing that eugenics thinking has indeed played a significant role in the thinking of some leading advocates of abortion'.[93] Others praise Thomas for exposing many Americans to a needed lesson on eugenics, with which the anti-abortion movement has long been familiar.[94] Professor Paulsen contends that Thomas's account is 'mostly right', and that he 'stopped short of claiming that legal abortion is a racist plot to reduce the African American population'.[95] Under his view, even if 'abortion is not a eugenic *conspiracy*', Thomas highlighted the 'undeniable fact that the aborted are disproportionately racial minorities, female, and those with disabilities', and that 'abortions are sometimes had, today, for eugenics reasons—fairly often, even for sex selection and disability-elimination'. Thus, he sees Thomas as correct in showing that abortion is '*capable of being used as* "a disturbingly effective tool for implement the discriminatory preferences that undergird eugenics'.[96]

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86 *Id.*

87 *Id.*

88 *Id.*

89 See *supra* text accompanying note 52.

90 Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights,* 63 Wm. & Mary L. Rev. 1599, 1613–18 (2022) [hereinafter Murray, *Sterilization*].

91 *Id.* at 1608.

92 *Id.* at 1609.

93 Whelan, *supra* note 77.

94 Joe Carter, *Justice Clarence Thomas Gives America a Lesson on Eugenics and Abortion,* TGC, June 1, 2019, https://www.thegospelcoalition.org/article/justice-clarence-thomas-gives-america-a-lesson-on-eugenics-and-abortion/ (last accessed Sept. 9, 2022).

95 Michael Stokes Paulsen, *Abortion as an Instrument of Eugenics,* 134 Harv. L. Rev. 415, 422 (2021). Paulsen further claims that Thomas was 'careful to disclaim any' argument that 'the disparate racial incidence of abortion proves a racially discriminatory purpose behind the abortion-rights position', thereby 'maintaining consistency with his disparate-impact-does not-establish-discriminatory-intent position in other discrimination law contexts'. *Id.* at 423.

96 *Id.* at 419.

Justice Thomas's arguments linking abortion to eugenics are not new.[97] As one historian observes, 'the discursive use of eugenics to smear anything remotely associated with it, or could be associated with it, has been going on a long time'.[98] Indeed, these themes can be found in propaganda from various pro-life groups linking abortion to racial genocide, including the 2009 documentary, *Maafa 21: Black Genocide in the 21st Century America.*[99] Similarly, the Issues4Life Foundation, a faith-based organization that aims to achieve the goal of 'zero African-American lives lost to abortion or biotechnology', blames Planned Parenthood Federation of America for the 'Da[r]fur of America', ie the high abortion rates in the African-American community.[100] Similar propaganda has appeared on billboards in minority neighborhoods with such messages as 'Black children are an endangered species' and 'The Most Dangerous Place for an African American is in the Womb'.[101] And, more recently, the use of the slogan 'Unborn Black Lives Matter' in response to 'Black Lives Matter' furthers this propaganda.[102] While most of these messages have come from predominantly white anti-abortion groups, some Black anti-abortion groups share these views, pointing, as Thomas does, to the disproportionate numbers of abortions among Black women.[103] Nevertheless, it is important to emphasize that these views are not, and have not been, widely held within the Black community.[104]

All of this is to say that Thomas's history of eugenics and purported links to abortion based on race, sex, or disability does not capture the nuances of the eugenics era or attitudes toward family planning. As Murray persuasively demonstrates, 'through-

97 Melissa Murray notes that some Black nationalist groups were resistant to family planning, condemning it as '"race suicide"' and interference with '"the course of Nature and with the purpose of the God in whom we believe."' Murray, *supra* note 12, at 2040 (quoting *Convention of Negro Peoples Meet at Edelweiss Park*, Daily Gleaner (Kingston), Aug. 31, 1934, *reprinted in* 7 The Marcus Garvey and Universal Negro Improvement Association Papers 602, 603 (Robert A. Hill ed., 1990)). Under this view, the Black community should resist contraception and encourage its women '"to breed us the men and women who will really inherit the earth"'. *Id.* at 2041, at 2039–40 (citing Roberts, *supra* note 82, at 84 (quoting Philip Francis, *Guest Editorial, Birth Control and the Negro*, N.Y. Amsterdam News, Aug. 17, 1940, at 8)). And as late as the 1960s and 70s, some local affiliates of the National Association for the Advancement of Colored People (NAACP) 'questioned the proliferation of government-subsidized Planned Parenthood birth control clinics in predominantly Black neighborhoods'. *Id.* at 2041–42.

98 Rosenberg, *supra* note 72 (quoting Stern who noted that 'women were largely absent from Thomas's opinion') Stern goes on to say that you 'don't have to go that much further in his argument to criticize Darwin and theories of evolution, and therefore eugenics, and sterilization, therefore Nazism, and therefore birth control'. *Id.*

99 Murray, *supra* note 12, at 2057–58.

100 Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, Guttmacher Pol'y Rev., Aug. 6, 2008, https://www.guttmacher.org/gpr/2008/08/abortion-and-women-color-bigger-picture (last accessed Oct. 22, 2022).

101 Murray, *supra* note 12, at 2057–58.

102 *Id.*

103 *Id.* at 2058.

104 Several civil rights groups argued that sterilization, not abortion and birth control, was the real threat to the Black community. And many female leaders in the Black community rejected the claim that abortion and contraception were tools of racial genocide. *Id.* at 2044 (attributing these views to Congresswoman Shirley Chisholm, Professor Angela Davis, Toni Cade, Florynce Kennedy). One study in 1973 found '"considerable evidence that black women . . . are even more positively inclined toward family planning than white men."' Simone M. Caron, *Birth Control and the Black Community in the 1960s: Genocide or Power Politics?*, 31 J. Soc. Hist. 545, 548 (1998) (quoting Castellano Turner & William A. Darity, *Fears of Genocide Among Black Americans as Related to Age, Sex, and Religion*, 63 Am. J. Pub. Health 1029, 1033 (1973)).

out the nineteenth and early twentieth centuries, racialized arguments appeared on all sides of the debate of whether and how to regulate abortion, birth control, and reproduction'.[105] But Thomas's narrow understanding of eugenics,[106] which focuses on (reason-based) abortions, is gaining popularity and shaping legislative efforts across the country.

Finally, it is worth pointing out elements of the eugenics era that Thomas does not emphasize. For example, he mentions that eugenic policies focused on the criminalistic elements, but he does not underscore the role of eugenics in the origins of the carceral state. Segregating 'undesirables' through imprisonment or institutionalization helped achieve eugenic goals without sterilization. Indeed, scholars argue that, even today, the disproportionate incarceration of minorities functions as a form of 'new eugenics'.[107]

In addition, Thomas does not note that the earliest sterilization statutes focused on 'sex criminals' and those who were considered to be sexually deviant, ie those whose identities and sexual practices were unconventional. 'Many of the same eugenics-driven laws that propelled the forced sterilization of so-called "mental defectives" like Carrie Buck also authorized the sterilization, forced commitment, and criminal prosecution of LGBT people'.[108] As Nancy Ordover discusses, the eugenicist Albert Moll 'recognized that any characterization of homosexuality as acquired (and therefore something that could be restrained) could be used to justify legal and criminal penalties'. He, however, viewed 'the act [of homosexuality/bisexuality] not as criminal but morbid'.[109] Concerns among conservatives regarding gay marriage and same-sex couples parenting children today, like the carceral state, may also have their roots in those eugenic notions regarding 'sex criminals'.

As the next section describes, bills and statutes banning RBAs have proliferated in the last 10 years. After the Thomas concurrence, the anti-eugenic goals of these laws have only become more explicit.

III. THE PROLIFERATION OF RBA BANS

From 1975 to 2009, long before Thomas's concurrence in *Box*,[110] only 14 RBA bans were introduced, and only two became law: sex-selective abortion bans

105 Murray, *supra* note 12, at 2033.

106 See *infra* Part IV.

107 See, eg James Oleson, *The New Eugenics: Black Hyper Incarceration and Human Abatement*, 5 Soc. Sci. 1 (2016), https://doi.org/10.3390/socsci5040066 (last accessed Aug. 25, 2022).

108 Brief of *Amici Curiae* National Center For Lesbian Rights et al. at 18, Whole Women's Health v. Cole, No. 15–274 (5th Cir. Jan. 4, 2016).

109 Nancy Ordover, American Eugenics Race, Queer Anatomy and the Science of Nationalism 105 (2003). She goes on to point out that the goal in 'treating' same-sex behavior, 'was not . . . the promise of liberation of minorities that was so appealing, but liberation *from* minorities—as is the promise of all eugenic campaigns'. *Id.* at 118. She also notes that only six years after proposing the sterilization of prisoners in 1887, gay men were added to the list. *Id.* at 133.

110 This was part of the statute that was challenged in *Planned Parenthood of Southeastern Pa. v Casey*, 112 S. Ct. 2791(1992), although this provision was not challenged.

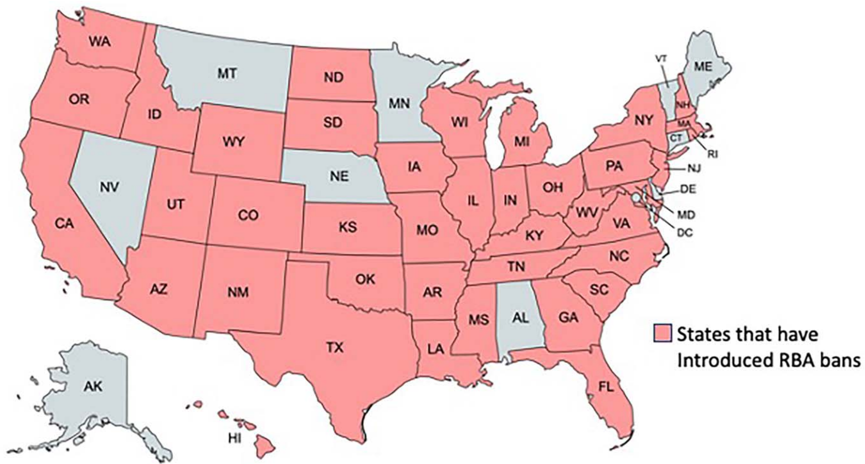

Figure 1. Map of States with Introduced Reason-Based Abortion Bans 2010–2022.

that passed in Pennsylvania[111] and Illinois. The Illinois law was repealed in 1993.[112]

2010, however, marked the beginning of a resurgence of interest in such laws. As Figure 1 shows, since 2010, bills have been introduced across the country in all but nine states and D.C. Table 2a indicates the number of bills (1990) that have been introduced each year between 2010 and 2022, as well as how many are pending, in effect, vetoed, or blocked/enjoined (fully or partially). Not surprisingly, in 2021, following the confirmation of Justice Amy Coney Barrett, the largest number (37) of RBA bans were proposed. Also unsurprising is the distinctly conservative bent in the sponsorship of such laws. Only 21.69 per cent (41) of the 189 bills introduced had democratic sponsors, and only 6.17 per cent (128) of the 2074 total sponsors were Democrats.

As of July 2022, 21 RBA bans have been enacted in 17 states (see Table 2b): Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, and West Virginia. Twenty of these laws are currently in effect, and one is partially enjoined.[113] Missouri, the only state left with a partial injunction on its 2019 law, instituted a near total ban on abortion, making this injunction irrelevant. Table 2c demonstrates the nature of the prohibited reasons for abortions by state.

There had been a circuit split as to whether these laws are constitutional, with the Sixth Circuit ruling en banc that Ohio's ban on abortions based on Down syndrome

111 18 Pa. Cons. Stat. Ann. § 3204 (1989). 'The advent of reason-based abortion bans largely tracks the history of prenatal testing'. Roesner, *supra* note 19, at 3.

112 Illinois Abortion Act of 1975, 720 Ill. Comp. Stat. 510 (repealed by P.A. 81–1078, § 2 (1979), P.A. 83–1128, § 2 (1984), P.A. 83–890, § 9 (1984), P.A. 101–13, § 905–15 (2019)).

113 See Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson,1 F.4th 552 (8th Cir. 2021) (enjoining Mo. Ann. Stat. §188.038.2, which bans abortions based on Down syndrome, but not enjoining Mo. Ann. Stat. §188.038.3, which bans abortions based on sex and race).

Table 2a. Summary of RBA Bans Introduced 2010–2022

Year	Pending	In Effect	Failed	Vetoed	Blocked/ Enjoined	Blocked/ Enjoined in Part	Total Bills Introduced	Enacted
2022	7	1	1	0	0	0	9	1
2021	17	1	16	2	0	1	37	2
2020	0	2	10	0	0	0	12	2
2019	0	2	9	2	1	1	15	4
2018	0	1	15	0	0	0	16	0
2017	0	3	10	0	0	0	13	3
2016	0	1	15	0	0	1	17	2
2015	0	0	13	0	0	0	13	0
2014	0	1	9	0	0	0	10	1
2013	0	3	23	0	0	0	26	3
2012	0	0	9	0	0	0	9	0
2011	0	1	5	0	0	0	6	1
2010	0	1	6	0	0	0	7	1
Totals	25	17	141	4	1	3	**190**	**20***

*The total number of states with enacted statutes is 21 counting Pennsylvania's law, which was enacted before this period.

Table 2b. Summary Table of RBA Bans in 2022

Bans In Effect (Cumulative)**	Partial Blocked/Enjoined	Total Enacted Bans to Date
17 AR, AZ, IN, KY, KS, LA, MO, MS, NC, ND, OH, OK, PA, SD, TN, UT, WV	1 MO	21 AR, AZ, IN, KY, KS, LA, MO, MS, NC, ND, OH, OK, PA, SD, TN, UT, WV

**Shows the number of states with enacted bans, some states have enacted multiple bans as indicated by the third column.

is constitutional,[114] and the Seventh Circuit ruling that the Indiana ban on abortions based on race, sex, and genetic anomaly, which was at issue in Thomas's concurrence, was unconstitutional.[115] Of course, after the *Dobbs* ruling, abortion bans based on reasons such as race, sex, and genetic anomaly can clearly stand under federal constitutional law if abortion can be banned for virtually any reason from the point of conception.[116]

114 Preterm-Cleveland v. McCloud, 994 F.3d 512 (6th Cir. 2021) (en banc). Interestingly, a three-court panel of the same Circuit found that a Tennessee law prohibiting abortions based on sex, race, or diagnosis of Down syndrome was unconstitutional. Memphis Ctr. for Reprod. Health v Slatery, No. 20–5969, 2021 U.S. App. LEXIS 27293 (6th Cir. Sep. 10, 2021).

115 Planned Parenthood of Ind. & Ky, Inc. v. Box, 888 F.3d 300 (7th Cir. 2018), reinstated by Planned Parenthood of. v. Box, 917 F.3d 532 (7th Cir., en banc, 2018).

116 A petition was filed for certiorari to resolve this conflict. The Court granted cert and vacated the judgment and remanded 'for further consideration in light of *Dobbs v Jackson Women's Health Organization*, 597 U. S. ___ (2022)'. Rutledge v. Little Rock Family Planning Servs., 2022 WL 2347570 (2022).

Table 2c. Nature of RBA Bans by State

State	Sex	Race	Down Syndrome (DS) or Genetic Anomaly (GA)
Arizona	X	X	X (GA)
Arkansas	X		X (DS)
Indiana	X	X	X (DS/GA)
Kansas	X		
Kentucky	X	X	X (DS/GA)
Louisiana			X (GA)
Mississippi	X	X	X (GA)
Missouri	X	X	X (DS)
North Carolina	X		
North Dakota	X		X (GA)
Ohio			X (GA)
Oklahoma	X		X (GA)
Pennsylvania	X		
South Dakota	X		X (DS)
Tennessee	X	X	X (DS)
Utah			X (GA)
West Virginia			X (DS/GA)
Totals	**13**	**6**	**14 (7, DS; 10, GA)**

Not only has the number of proposals for and enactment of RBA-bans grown in the last decade or so, but there has also been an increase in the use of explicit or implicit references to eugenics in the legislation. As Table 2d shows, of the 21 RBA bans, two have explicit references to eugenics, as do four of the 25 pending bills from 2021 and 2022. In addition, several proposed bills use eugenic-like language, focusing on concerns about discrimination based on race, sex, or disability.

For example, Mississippi's Life Equality Act of 2020, which prohibits abortions based on race, sex, and genetic anomaly,[117] relies heavily on Thomas's concurrence. Its legislative findings quote Thomas's description of the Supreme Court as '"zealous in vindicating the rights of people even potentially subjected to race, sex, and disability discrimination."'[118] They proclaim that '[n]otwithstanding' state and federal laws that protect 'the inherent right against discrimination on the basis of race, sex, or genetic abnormality', 'unborn human beings are often discriminated against and deprived of life'.[119] Finally, they assert that 'sex-selection abortions continue to occur in the United States', where the 'victims are overwhelmingly female', and that '[a]bortions predicated on the presence or presumed presence of genetic abnormalities continue to occur

117 Miss. Code Ann.§ 41–41-407(2) (prohibiting providers from intentionally or knowingly performing abortions, except in the case of medical emergencies 'if the abortion is being sought because of the actual or presumed race or sex of the unborn human being or because of the presence or presumed presence of a genetic abnormality').

118 Miss. Code Ann. § 41-41-403(1)(a) (quoting Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1780, 1792 (2019) (Thomas J., concurring)).

119 Miss. Code Ann. § 41-41-403(1)(b–c).

Table 2d. Summary of Reason-Based Bans

	Pending	In Effect	Passed and Scheduled to Take Effect	Failed	Vetoed	Blocked/ Enjoined	Blocked/ Enjoined in Part	Enacted
All Reason-Based Abortion Bans	24	20	0	141	4	0	1	21
Contains 'Eugenics' in Text	3	3	0	6	1	0	0	3
Contains Eugenics-Like Language in Text	0	1	0	5	0	0	1	2

despite the increasingly favorable post-natal outcomes for human beings perceived as handicapped or disabled . . . '[120]

While much of the language focuses on discrimination, the stated purpose of this legislation is explicitly anti-eugenic, with quotes from Thomas's concurrence:

> (d) As Supreme Court Justice Clarence Thomas has noted, 'Each of the immutable characteristics protected by this law can be known relatively early in a pregnancy, and this law prevents them from becoming the sole criterion for deciding whether the child will live or die'.
> (e) 'Abortion is an act rife with the potential for eugenic manipulation'.
> (f) The State of Mississippi maintains a 'compelling interest in preventing abortion from becoming a tool of modern-day eugenics'.[121]

Tennessee's ban on abortions based on race, sex, or a Down syndrome diagnosis,[122] also quotes Thomas's concurrence:

> As Justice Clarence Thomas wrote in his opinion concurring in the denial of certiorari in *Box v Planned Parenthood of Indiana and Kentucky, Inc.*, . . . 'the use of abortion to achieve eugenic goals is not merely hypothetical'. This historical practice of abortion was rooted not in equality but in discrimination based on age, sex, and disability.[123]

120 Miss. Code Ann. § 41-41-403(1)(g–i).
121 Miss. Code Ann. § 41-41-403(1)(d–f) (citations omitted) (quoting Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1780, 1783, 1787 (2019) (Thomas J., concurring)).
122 T. C. A. § 39-15-217 (b–d) (prohibiting providers from performing abortions if the provider knows that 'the woman is seeking the abortion because of the sex of the unborn child', 'because of the race of the unborn child', or 'because of a prenatal diagnosis, test, or screening indicating Down syndrome or the potential for Down syndrome in the unborn child').
123 T.C.A. § 39-15-214(a)(54).

The legislative findings devote three paragraphs to a history of the eugenics movement in the early 20th century, suggesting, much like Thomas's account, that the primary figures in the movement were Margaret Sanger, who promoted birth control to reduce '"the ever increasing, unceasingly spawning class of human beings who never should have been born at all,"' and Planned Parenthood President Alan Guttmacher, who endorsed 'abortion for eugenic purposes' and 'to prevent the birth of disabled children'.[124]

As of July 2022, legislatures in three states—Missouri, West Virginia, and Wyoming—introduced four pieces of legislation banning abortions based on fetal abnormalities. The bills in Missouri and West Virginia quote Thomas's description of reason-based abortions as 'rife with eugenic potential'.[125] West Virginia's bill went into effect in July 2022.[126]

Legislatures also drew upon the same language from Thomas's opinion in *Box* in several proposed bans in 2021. For example, bills introduced in Arkansas, North Carolina, South Carolina, and West Virginia, which would prohibit abortions based on race, sex, or genetic anomaly, also describe "abortion as rife with eugenic potential."[127] Louisiana's proposed bill also links abortions to "sterilizing people with disabilities and aborting their pregnancies without consent . . . based on flawed eugenic principles."[128] A proposed bill in Arizona, titled the Prenatal Nondiscrimination Act of 2021, which would prohibit abortions based on race and sex, expresses the view that "'sex control [using technology to choose a child's sex] might lead to . . . dehumanization and a new eugenics'."[129] Its legislative findings also proclaim that the "history of the American population control movement and its close affiliation with the American Eugenics Society reveals a history of targeting certain racial or ethnic groups for 'family planning'." Like Thomas, its findings suggest that this "history likely contributes to the current statistic that a Black baby is five times as likely to be aborted as a White baby, often in a federally subsidized clinic."[130]

Also notable is language in many enacted statutes and proposed legislation hinting at eugenic concerns without using the term explicitly. A 2019 Kentucky statute prohibiting abortions based on sex, race, or disability[131] describes such abortions as 'unfairly discriminatory'.[132] Comparing this ban to 'state, federal, and international law [that] supports the rights of all people to dignity, equality, and freedom from discrimination

124 T.C.A. § 39-15-214(a)(55)–(57). The findings, like Thomas's concurrence, also call out legal scholar Glanville Williams, 'whose book was cited in the majority opinion in *Roe v Wade*', and who argued that '"eugenic killing by a mother ... cannot confidently be pronounced immoral."' *Id.*

125 H.B. 1987 (Mo. 2022); S.B. 468 (W. Va. 2022); H.B. 4337 (W. Va. 2022).

126 W. Va. Code Ann. § 16-2Q-1.

127 S.B. 468, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); Human Life Nondiscrimination Act/No Eugenics, H.B. 453, 2021–22 Gen. Assemb. (N.C. 2021) (vetoed by Gov. Cooper); H. 3782, 124th Sess. 2021–22 (S.C. 2021); and S.B. 74, 2021 Reg. Sess. (W. Va. 2021).

128 H.R. 109, 2021 Reg. Sess. (La. 2021).

129 H.B. 2878 § K, 2021 Leg., Reg. Sess. (Ariz. 2021) (quoting a working paper from the President's Council on Bioethics).

130 *Id.* at § T.

131 EMW Women's Surgical Ctr., P.S.C. v. Beshear, 2019 WL 9047174 (W.D. Ky Mar. 20, 2019).

132 https://apps.legislature.ky.gov/recorddocuments/bill/19RS/hb5/orig_bill.pdf. This law was temporarily enjoined, but the injunction expired.

based on sex, race, color, national origin, or disability', the findings describe the statute as protecting 'the human rights of unborn children not to be discriminated against'.[133]

Similar language can be found in a 2019 partially enjoined Missouri statute prohibiting abortions based on a diagnosis of Down syndrome or the sex or race of the fetus.[134] The legislative findings allude to the history of eugenics when suggesting that the law is a prophylactic to the 'historical relationship of bias or discrimination by some family planning programs and policies towards poor and minority populations, including . . . the nonconsensual sterilization of mentally ill, poor, minority, and immigrant women and other coercive family planning programs and policies'.[135] Without ever using the word 'eugenics', the findings rely on many of Thomas's arguments in support of RBA bans. For example, they state that Black or African–American women in Missouri have abortions at roughly three and a half times the rate of white women. They also describe sex-selective abortions as 'repugnant to the values of equality of females and males'. Finally, the findings state that terminating pregnancies based on Down syndrome is a 'form of bias or disability discrimination and victimizes the disabled unborn child at his or her most vulnerable stage', sending 'a message of dwindling support for' the 'unique challenges' of those with disabilities, fostering 'a false sense that disability is something that could have been avoidable', and increasing 'the stigma associated with disability'.[136] While this statute does not use the term eugenics, it uses the same kinds of discrimination arguments that are explicitly tied to eugenics concerns in other RBA bans.

Thomas's reasoning has not only influenced legislation, but it also appears in judicial opinions in the federal courts. For example, the Sixth Circuit en banc opinion upholding Ohio's prohibition of abortions based on a diagnosis of Down syndrome hints at the anti-eugenic effects of the law. It claims the law protects the 'Down syndrome community from the stigma associated with the practice of Down-syndrome-selective abortions', noting that 'two thirds of the pregnancies with a fetal diagnosis of Down syndrome are aborted' in the United States and at higher rates in some other countries. It also asserts that targeting 'unborn children exhibiting a certain trait . . . for abortion . . . sends a message to people living with that trait that they are not as valuable as others'.[137]

All but one of the concurring judges explicitly references eugenics and makes anti-eugenics arguments for reversing the preliminary injunction of the Ohio law. For example, Judge Sutton queries in his pre-*Dobbs* concurrence:

> How did it happen that an anti-eugenics law is not the kind of law that reasonable people could compromise over in the context of broader debates about abortion policy? For my part, I do not find this case difficult as a matter of federal constitutional law. The United States Supreme Court has never considered an anti-eugenics statute before. Nothing in its

133 Ky. HB 5 (2019), https://apps.legislature.ky.gov/recorddocuments/bill/19RS/hb5/orig_bill.pdf.

134 Mo. Ann. Stat. §188.038.2 & 3. The statute was temporarily enjoined with respect to the Down syndrome provision. See Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson, 1 F.4th 552 (8th Cir. 2021).

135 Mo. Ann. Stat. §188.038.1 (2019).

136 Mo. Ann. Stat. §188.038.1(3)–(6).

137 Preterm-Cleveland v. McCloud, 994 F.3d 512, 531–32 (6th Cir. 2021).

> abortion decisions indicates that a State may not ban doctors from knowingly performing an abortion premised on the undesirability of the disability, sex, or race of the fetus. The question is not whether the ban counts as an undue burden. The question is whether the undue burden test applies at all. I see no reason that it does.

His concurrence goes on to argue that.

> The Ohio law . . . prevents the medical profession in particular and society in general from knowingly casting aspersions on individuals with Down syndrome—or, worst of all, celebrating the number of Down syndrome births averted. . . . Ohio does not have to be Iceland.[138]

Similarly, Judge Griffin writes 'separately to emphasize Ohio's compelling state interest in prohibiting its physicians from knowingly engaging in the practice of eugenics', invoking Justice Thomas' concurrence in *Box* and using the word 'eugenics' 17 times throughout his opinion (and in all but one paragraph).[139] Finally, Judge Bush makes 22 explicit references to eugenics and also follows Thomas's concurrence in detailing the history of the eugenics movement.[140]

IV. NARROW AND BROAD CONCEPTION OF EUGENICS AND ANTI-EUGENICS

As we have seen, legislators who proposed and enacted RBA bans, as well as some judges upholding those laws, embrace Thomas's view of eugenics. Thomas's account of eugenics is not only grounded in a misleading view of history, but in many ways it is also exceedingly narrow, focusing only on individual reproductive decisions concerning abortion. Even so, it taps into a common view across ideologies that many reprogenetic decisions today, particularly those where abortions are based on particular characteristics of the fetus (sex or genetic anomaly) are a form of individualized eugenics—what Thomas calls modern-day eugenics and others call the new eugenics, liberal eugenics, or neoeugenics.[141]

The term eugenics, however, can be understood more or less broadly. Literally, it means 'good birth' and is therefore often associated with certain reproductive practices. The quintessential examples are laws from the eugenics era that mandated involuntary sterilization of people with 'undesirable traits'. These laws were a form of negative eugenics in preventing the birth of children with unwanted and allegedly heritable traits. Anti-miscegenation laws and other laws discouraging marriage among those

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138 *Id.* at 536 (Sutton, J., concurring).

139 *Id.* at 538 (Griffin, J., concurring).

140 *Id.* at 540–550 (Bush, J., concurring).

141 See Nicholas Agar, Liberal Eugenics: In Defence of Human Enhancement (2004); Allen Buchanan et al., From Chance to Choice: Genetics and Justice (2000); Allen Buchanan, Beyond Humanity? (2011); John Harris, Enhancing Evolution: The Ethical Case for Making Better People (2010); Troy Duster, Backdoor to Eugenics (2003); Maxwell J. Mehlman, *Modern Eugenics and the Law, in* A Century of Eugenics: From the Indiana Experiment to the Human Genome Era (2010); Sonia M. Suter, *A Brave New World of Designer Babies?*, 22 Berkeley Tech. L. J. 897 (2007). *Cf.* Rachel Saady-Saxe, *An Analysis of State Interests in Regulating Germline Crispr Use*, 12 Ala. C.R. & C.L.L. Rev. 77 (2020); Tandice Ossareh, *Would You Like Blue Eyes with That? A Fundamental Right to Genetic Modification of Embryos*, 117 Colum. L. Rev. 729 (2017).

who were deemed genetically unfit also fall into this category because marriage is so closely tied to reproduction, and because these laws sought to prevent reproduction between individuals believed to present heritable risks to future generations. At the other extreme, efforts to encourage procreation among allegedly 'genetically superior' individuals also fall within this narrower description of eugenics, albeit these policies are a 'positive' form of eugenics in attempting to promote the birth of those with desirable traits.[142]

Eugenics policies were not all tied directly to reproduction, however. One goal of the eugenics movement was to reduce the number of people with 'dysgenic' traits. This led to the Immigration Restriction Act of 1924,[143] which limited the influx of 'biologically inferior' ethnic groups and privileged the entry of Northern Europeans.[144] The impetus for such legislation was rooted in stereotypes cloaked in scientific legitimacy. Legislators relied on the expertise of eugenics leaders who testified that certain ethnic groups, like Southern and Eastern Europeans, were genetically unfit. Indeed, one expert stated that '80–90 per cent of Italian, Russian, Hungarian, and Jewish immigrants were feeble-minded'.[145] While these laws, of course, influenced future births in America by determining who was allowed in and who would reproduce, they were eugenic simply in attempting to shape the nature of the American population. Thus, eugenics also includes policies that encourage or discourage certain groups from being part of a country's or locale's population.

Another way to understand eugenics is in terms of the presence or absence of state control. Some describe individual reproductive decisions aimed at improving the birth of one's child through genetic testing (pre- or post-conception) as a form of 'neoeugenics'. They distinguish neoeugenics from laws during the eugenics movement that involved state control over reproduction.[146] Thus, some see the 'new eugenics' as unproblematic because it is tied to 'a goal of improvement' based on free choice.[147]

Others take issue with assertions that 'eugenics cannot be an individual project'.[148] They argue that individual reproductive decisions, such as terminating pregnancies based on Down syndrome, can 'collectively have a eugenic impact' and that 'systemic

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142 Concerns that birth control would be used by 'so-called "better" women—upper-middle-class women",' ie the type of women eugenicists wanted to reproduce, see *supra* text accompanying note 85, is a form of positive eugenics.

143 43 Stat 155 (1924) (creating immigration quotas set at three percent of the total population of the foreign-born of each nationality in the United States as recorded in the 1910 census); see also 39 Stat 874 (1917) (barring people from 'any country not owned by the United States adjacent to the continent of Asia' from immigrating to the United States); 22 Stat 214 (1882) (excluding idiots, lunatics, convicts, and persons likely to become public charges).

144 Suter, *Brave New World*, *supra* note 1, at 905.

145 Robert G. Resta, *The Twisted Helix: An Essay on Genetic Counselors, Eugenics, and Social Responsibility*, 1 J. Genetic Counseling 227, 232 (1992).

146 See Suter, *Brave New World, supra* note 1, at 936, 957–58 ('When the state determines which lives are unacceptable . . . or desirable . . . , it raises acute concerns about society's devaluing (or privileging) certain groups. If individuals make such decisions, the concerns are somewhat lessened'.); Maxwell J. Mehlman, *supra* note 141, at 220; Roesner, *supra* note 19, at 9 (criticizing advocates of genetic-selective abortion bans for 'erroneously' conflating these bans with the eugenics movement because abortions based on genetic anomalies are not part of any 'centralized campaign to reduce or eradicate the incidence of disability in the population, instead they are the private decisions of individual women').

147 See Harwood, *supra* note 7, at 150 (citing those with that view).

148 Carter, *supra* note 94.

biases' can 'influence individual abortion decisions'.[149] Justice Thomas, for example, condemns certain individual reproductive decisions as an extension of the same attitudes that motivated the eugenics movement. Others cite concerns that some individual reproductive decisions can encourage a kind of perfectionism and challenge parents' ability to 'appreciate children as gifts [and] to accept them as they come, not as objects of our design or products of our will or instruments of our ambition'.[150] Others critique these decisions as commodifying reproduction[151] or promoting ableism and devaluing or discriminating against those with disabilities.[152] Indeed, some of the concerns about neoeugenics transcend ideology and are part of both liberal[153] and conservative critiques.[154]

A definition of eugenics that is limited to state action, however, does not capture all that was problematic in the eugenics movement, including the discriminatory views underlying some of the policies. Moreover, it suggests a distinction that is not as sharp as some suggest. Although state-mandated involuntary sterilization was one of the most abhorrent aspects of 20th century eugenics,[155] the movement also encouraged individual eugenic decisions.[156] Indeed, Francis Galton, the father of eugenics, saw eugenics' greatest promise exercised at the individual, as opposed to state, level, where informed individuals would make the 'right' procreative choices.[157] England, where eugenics originated,[158] focused far more on promoting eugenics through public education than compulsory measures.[159]

Eugenics therefore can include not only state action intended to control reproduction or population characteristics, but also disparate impacts of state policies on various populations. Although, in one sense, Justice Thomas adopts a narrow definition of eugenics by focusing solely on reason-based abortions, in another sense, his understanding of eugenics is quite broad in focusing on the disparate impacts of abortions, at least with respect to race. Whereas he points to concerns about individual decisions to terminate pregnancies based on sex or genetic anomalies, his concern about 'race-based' abortions does not focus on individual decisions to terminate pregnancies based on

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149 Whelan, *supra* note 77.

150 Michael Sandel, *The Case Against Perfection*, Atlantic Monthly, Apr. 2004, at 55; see also Jackie Scully et al., *Chance, Choice, and Control: Lay Debate on Prenatal Social Sex Selection*, 63 Soc. Sci. & Med. 21 (2006) (Children, unlike consumer goods, 'whose characteristics it is legitimate to select according to one's desires', are gifts that should be accepted and loved unconditionally).

151 See Stephen Wilkinson, Choosing Tomorrow's Children: The Ethics of Selective Reproduction (2010).

152 See Adriene Asch, *Disability Equality and Prenatal Testing: Contradictory of Compatible*, 230 Fla. St. Univ. L. Rev. 315 (2003); Suter, *Brave New World, supra* note 1, 955–56 (suggesting that prenatal selection may affect 'our social awareness of and sensitivity to the disabled community'); Jonathan Glover, Choosing Children: Genes, Disability, and Design (2006).

153 See *supra* note 141.

154 Samuel R. Bagenstos, *Disability, Life, Death, and Choice*, 29 Harv. J.L. & Gender 425, 437–38 (20160); Mary Ziegler, *The Disability Politics of Abortion*, 2017 Utah L. Rev. 587, 590, 595, 610 (2017).

155 Phillip Reilly, The Surgical Solution: A History of Involuntary Sterilization in the United States 2 (1991).

156 Suter, *Brave New World, supra* note 1, at 938.

157 See Buchanan et al., *supra* note 141, at 42 (noting that he 'wanted to secure voluntary acquiescence with eugenic guidelines by making eugenics a civil religion').

158 *Id.* at 27.

159 Suter, *Brave New World, supra* note 1, at 938.

race or ethnicity. Instead, he focuses on the disparate impact of abortions generally. In other words, his concern is that abortions themselves are disproportionately prevalent among people of color and are therefore, in his view, eugenic with respect to race. In noting that Black children are 'eight times more likely to be aborted than white children' in some parts of New York City,[160] he focuses not on policies aimed at increasing abortions among Black people, but on the disparate impacts that arise for *'[w]hatever . . . reason'*.[161] Thus, under Thomas's understanding of the term, eugenics can arise when a confluence of factors results in a disproportionate impact on a group harmed in the eugenics movement, even if no particular policy is geared toward encouraging that result. This viewpoint is quite a broad understanding of eugenics, indeed.

Although Thomas relies on both narrow and broad conceptions of eugenics, his vision of appropriate anti-eugenic remedies is quite narrow. He urges state control over reproductive choices regarding abortion to counter the 'modern-day eugenics' that he believes is inspired by the eugenics movement. There is, of course, tremendous irony in such a remedy, given that one of the horrors of the eugenics movement was state control over reproduction. The only difference between state control over reproduction advocated by Thomas's narrow vision of anti-eugenics and that of the eugenics era is that the latter prohibited reproduction and the former forces reproduction.

If we are to take Thomas's concerns about modern eugenics seriously, including worries about the disparate rates of abortions among minorities, a broader vision of anti-eugenic remedies is required. If the worry is that sex-selective abortions and abortions based on genetic anomalies are a form of eugenics and that a disproportionate rate of pregnancies among Black people will be terminated, prohibiting reason-based abortions will not remedy the problem. RBA bans will not change the underlying societal and systemic forces that lead to a disparate rate of abortions among people of color. Moreover, there is simply no evidence that people decide on the basis of race to terminate a pregnancy.

In fact, these anti-eugenic efforts blithely ignore the broader social circumstances that impact the very groups the laws claim to protect. For example, the fact that abortions are more prevalent among people of color and low-income people has to do with several factors, including 'the particular difficulties that many women in minority communities face in accessing high-quality contraceptive services and in using their chosen method of birth control consistently and effectively over long periods of time' and the 'significant racial and ethnic disparities' that have persisted within health care generally.[162] RBA bans do nothing to address those disparities or to decrease the proportion of abortions in minority communities.

The narrow 'anti-eugenic' efforts of RBA bans also do little to support disability rights or contemplate how state policies might impact a parent's ability to care for a child, let alone one with a disability. The bans discourage open communication between provider and patient, making it difficult for patients to obtain 'comprehensive and reliable information' critical to making an informed decision whether to continue a

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160 139 S. Ct. at 1790.

161 *Id.* at 1791 (citing Dempsey, *Dr Guttmacher Is the Evangelist of Birth Control*, N.Y. Times Mag., Feb. 9, 1969, at 82).

162 Cohen, *supra* note 100.

pregnancy when a disability has been diagnosed.[163] The bans do not promote the births of children with disabilities by offering support that would make those choices viable or more palatable.[164] Nor do the bans consider how they might disproportionately impact lower-income people—many of whom are people of color—who face disproportionate obstacles in raising a child with a disability. Finally, bans on sex-selective abortion do not address societal attitudes that counteract concerns about the inequality that allegedly motivates them.

Limiting control over reproduction simply does not remedy many of the eugenics concerns Thomas raises. In fact, it exacerbates them. Being denied access to an abortion by law, whatever the reason for seeking an abortion, will disproportionately harm low-income and minority communities. Unlike people with means, their ability to travel to locales where abortions are legal is limited. Nor will they be as likely to have the resources to care for the child they are forced to bear. As a result, they face increased health risks, stress, and economic instability. Moreover, the wellbeing of the children they already have is endangered. Indeed, these laws can impact infant mortality rates,[165] which are disproportionately high among minorities. Surely, concerns about infant mortality should be at least as serious as concerns about abortion rates in minority communities. In short, RBA bans do little to help, and they even harm, the very groups they claim to support.

In contrast, a broader conception of eugenics (and anti-eugenics) considers whether state policies promote (or disrupt) the capacity of different populations to live healthy lives, to reproduce, and to care for their children. Under this vision, anti-eugenic remedies would address the kinds of discrimination and disparities that Thomas and others believe justify RBA bans. The narrow conception of eugenics focuses on abortions and tries to counter eugenics with RBA bans. In contrast, the broader conception focuses on remedying systemic forces that can result in disparities and discrimination regarding the populations targeted in the eugenics movement: minorities, low-income individuals, women, the LGBTQ+ community, people with disabilities, and immigrants. Indeed, one could argue that policies focused on reproductive and health justice are perhaps the best antidote to eugenics under this broad conception hinted at by Thomas.

This broader conception of eugenics is consistent with the idea that the government's role in eugenics ranges from mandatory sterilization of 'undesirable' groups at one extreme to government policies that have disparate impacts on the well-being and populations of the same kinds of groups that were targeted in the eugenics movement at the other extreme. In between is the willingness of states to

163 Roesner et al., *supra* note 19, at 12–13. 'In fact, access to professional counseling, particularly by specialists, has been associated with lower rates of termination'. *Id.* at 13.

164 *Id.* at 18 (noting that these bans are not part of broader efforts to promote disability rights and that they undercut efforts to build coalitions to support policies that would address the needs of people with disabilities and make it 'more attractive and more feasible for families' to raise children with disabilities).

165 One factor associated with lower infant mortality rates is 'increased state funding for family planning, and abortion services, . . . especially for low-income women of color'. In contrast, 'restrictions on abortion services have been associated with increased infant and maternal mortality risk'. R. Pabayo et al., *Laws Restricting Access to Abortion Services and Infant Mortality Risk in the United States,* 17 Int'l J. Environmental Research & Pub. Health 3773 (2020), https://doi.org/10.3390/ijerph17113773 (last accessed Oct. 22, 2022).

allow certain individual 'eugenic' practices. One might conceptualize these different kinds of eugenics policies in ever-broadening circles.

At the center are policies that promote or discourage the reproduction or birth of certain types of people. Mandatory sterilization laws fall in this circle as a form of negative eugenics. So too do prohibitions of conjugal visits because they preclude procreation by certain classes of people—prisoners—who are disproportionately minorities and low-income individuals.[166] As noted earlier, incarceration has played a central role in achieving eugenic goals.[167] Incest prohibitions similarly fall in this category because they are based in part on concerns that genetically related individuals have a heightened risk of having children with birth defects.[168]

In that same circle are also policies that affect access to assisted reproductive technologies (ART). Dean Judith Daar argues that policies that make it harder for certain groups to access, or that do not assist them in accessing, reproductive technologies are a form of eugenics. As she writes, the 'true eugenic effect of ART is not in its use but in its deprivation'.[169] If laws prohibit certain forms of ART generally or for particular groups, they can have eugenic and discriminatory impacts. For example, certain states prohibit people who are unmarried from accessing some forms of ART (sometimes focusing only on heterosexual marriage), which has a disproportionate impact on access to this technology by low-income individuals, people of color, for whom marriage is less common, and gay people. Similarly, a state's failure to provide affirmative assistance for ART can be eugenic. Given the high costs of some forms of ART, like in vitro fertilization (IVF), and the disproportionate rate of infertility among people of color,[170] ART services are least likely to be accessible to people of color and lower socio-economic groups. States that do not mandate insurance coverage of fertility treatments discourage reproduction among the infertile with the least means, whereas states that provide such mandates are anti-eugenic in broadening the scope of individuals who can reproduce. Similarly, laws that restrict access to surrogacy services or that make it difficult to guarantee legal parentage in using surrogacy may be eugenic in making it more difficult for same-sex couples and single individuals to reproduce. Laws that allow for child abuse charges based on substance abuse also fall within this narrower definition of eugenics because they make reproduction and parentage disproportionately harder for some groups.

Expanding the circle of eugenic (or anti-eugenic) policies a bit more broadly includes those that impact the nature of a jurisdiction's population. In the eugenics era, immigration policies influenced the ethnic composition of America, which of course also affected who would reproduce.[171] Like the Immigration Act of 1924, these restrictions can be explicit in prohibiting certain groups from entering a country. But they can also be more indirect, through state laws that encourage or discourage immigrants from becoming residents by being, respectively, more or less supportive

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166 See *infra* text accompanying note 263.

167 See *supra* text accompanying note 107.

168 See *infra* text accompanying notes 192–194.

169 Judith Daar, I. Glenn Cohen, Seema Mohapatra, & Sonia M. Suter, Reproductive Technologies, and the Law 191 (3d ed. 2022).

170 See *infra* text accompanying note 201.

171 Mehlman, *supra* note 141, at 229.

of immigrants. Incarceration can also have eugenic impacts in that it essentially deters reproduction by certain groups of individuals, a disproportionate percentage of whom are people of color.[172] So can the death penalty. While one might argue that this broader conception of eugenics really describes concerns about inequality and discrimination, the reality is that immigration policy and the carceral state were explicitly central to eugenics, even if also rooted in deeply discriminatory views. Thus, it is impossible to separate out eugenics from discrimination in this context.

An even broader circle of eugenics includes policies that have the effect of promoting (positive eugenics) or discouraging (negative eugenics) reproduction among certain groups. For example, the government can impose measures that discourage or encourage the birth of children in certain socioeconomic groups through tax breaks and welfare penalties,[173] or that encourage or discourage certain types of groups from reproducing based on the extent of state welfare benefits.[174] Rather than exploring those policies, I looked to infant mortality as the best indirect measure of state efforts to promote the wellbeing of children, generally, and minority children, specifically. If, as Thomas suggests, the disproportionate impact of abortions among people of color is eugenic, surely high infant mortality rates of minorities and disparate rates are similarly eugenic. These rates can therefore function as a measure of sorts as to whether states have anti-eugenic policies in the broader sense of the term. Again, one might argue that these measures reflect concerns about racial and social inequality, rather than eugenics per se. But as noted earlier, the analysis in this article is in direct response to Thomas's vehement assertions that abortions are eugenic given the disproportionately high rates of abortion in minority communities. Moreover, eugenic policies were explicitly directed at reducing the presence of certain ethnicities in the population; thus, my analysis considers infant mortality rates (IMRs) in all RBA-ban states, not just those with race-based abortion bans.

Finally, to the extent that reason-based abortions are eugenic in discriminating based on sex, policies that promote women's wellbeing and thriving can be viewed as anti-eugenic in this broader sense. For example, policies that support equal pay can impact discrimination based on gender. Pay disparities, therefore, offer some insight as to whether the state generally is addressing equality between men and women. Here again, one might argue that laws that ban sex-selection are less motivated by concerns about eugenics per se than by concerns about discrimination, despite Thomas's (and some states') description of them as eugenic. This critique is more powerful than the same critique with respect to race, given that eugenics policies did not seem to be directed at eliminating women. Thus, I compare pay gaps and laws related to these gaps in states with RBA bans generally as well as in those with bans against sex selection.

Using these different conceptions of eugenics (and anti-eugenic remedies), my research set out to test my hypothesis that states with RBA bans are not likely to impose broader anti-eugenic antidotes. To test that hypothesis, my research assistants and I examined various state laws and policies related to these different conceptions

172 *Id.* at 230.

173 *Id.* at 228–29.

174 *Id.* at 229 (describing how family caps under state welfare programs discourage low-income families from having larger families).

of eugenics and anti-eugenics. As the next section describes, we found trends that supported my hypothesis among most (but not all) measures.

V. ARE RBA-BANS STATES TRULY ANTI-EUGENIC?

The empirical analysis described below focuses on legislation and policies in a range of areas that can have eugenic-like or anti-eugenic effects with respect to the various conceptions of eugenics discussed in Part IV. Section A examines laws related to the narrowest conception of eugenics: laws that impact who reproduces and how. This section includes laws concerning sterilization, conjugal visits, incest, assisted reproductive technology, substance use during pregnancy, prenatal information laws, and bans on wrongful birth and life claims. Section B examines laws that fall within the slightly broader understanding of eugenics: those that influence who makes up the population, such as laws or policies that discourage the presence of immigrants; incarceration rates, which disproportionately impact minorities and generally prevent their ability to reproduce; and the death penalty, which influences who lives or dies. Finally, Section C explores the broadest circle of eugenics (or anti-eugenics) by examining infant mortality rates, an indirect measure of a state's promotion of the well-being of children and mothers, and pay gaps, which are indirect measure of efforts (or lack of efforts) to address gender equality.

I begin with several caveats. First, I do not claim that states without RBA bans are aggressively anti-eugenic. Indeed, I suspect that the concept of eugenics does not play a large role in the policies enacted in those states. Instead, my research is aimed at examining whether states that enact RBA bans, allegedly based on concerns about eugenics (or discrimination), demonstrate those concerns more broadly or only with respect to abortion. While in some areas I found that states without RBA bans have policies that are anti-eugenic (or anti-discriminatory), in some instances they also have arguably eugenic-like laws. That does not undermine my critique, which focuses on whether states *with* RBA bans are consistent in their expressed concerns about eugenics (or discrimination) in enacting those laws.

Second, I focused largely on legislative decisions because RBA bans are, of course, enacted by legislatures. Thus, I wanted to compare the presence or absence of different kinds of potentially anti-eugenic legislative efforts within these states. But the focus was not exclusively legislative. Third, given the small numbers (only 17 states have enacted RBA bans) and very different kinds of measures, I did not attempt to determine whether the differences were statistically significant. Fourth, in examining state legislation and policies in states with and without RBA bans, it was difficult to make meaningful year-by-year comparisons because the RBA-bans and other laws were sometimes enacted at different times. Thus, my focus is largely on legislative trends in the last 5–10 years, which is the period when the RBA bills and laws have proliferated. The goal of the research is not to offer a definitive statistical comparison, but instead to get a sense of general trends with respect to states with RBA bans.

As the following sections show, with respect to most measures, states with RBA bans do not tend to have legislation or policies that are anti-eugenic beyond abortion under both the narrow and broad conceptions of eugenics. In comparing states with and without RBA bans, I sometimes found a correlation in both directions. That is to say, the majority of states without anti-eugenic remedies in other areas are RBA-ban states,

and the majority of RBA-ban states do not have such remedies. In some areas, especially where most states do not have a particular anti-eugenic remedy, the correlation exists only in one direction: The majority of RBA-ban states lack those anti-eugenic remedies, but the majority of states without the remedy are not RBA-ban states. In states with RBA bans, allegedly motivated by eugenic concerns, it is noteworthy when they do not adopt anti-eugenic efforts more broadly. The one area where that did not occur was, unsurprisingly, with respect to prenatal information laws and bans on wrongful birth and life claims, ie laws that try to discourage reason-based abortions. Together, these data support my working hypothesis that the focus on eugenics to justify RBA bans is not motivated by genuine concern about the underlying discrimination and disparities that shaped the eugenics movement, but instead is aimed at crafting an argument that can potentially cut across political aisles to further restrict access to abortion.

V.A. Narrow Conceptions of Eugenics

The narrowest conception of eugenics focuses primarily on reproduction and barriers to reproduction for certain groups. My data examined policies for all RBA-ban states in response to Thomas's claim that all forms of reason-based abortions are eugenic. It also focused on states with bans based on genetic anomalies under the theory that such abortions are most reminiscent of eugenics polices aimed at reducing the birth of the 'unfit', often people with disabilities. Ultimately, the results did not differ significantly under either type of grouping—all RBA bans or just bans based on genetic anomalies.

V.A.1. Laws Concerning Sterilization

Perhaps the state action closest to that of the eugenics movement is legislation allowing forced sterilization of people with disabilities. Of the 70,000 individuals who were involuntarily sterilized during the eugenics movement, many were disabled.[175] While contemporary laws are less starkly eugenic than state-mandated sterilizations of people diagnosed as genetically 'inferior', state sanctioned sterilization of people with disabilities reflects the view that these individuals should not reproduce. Supporters of today's sterilization laws suggest they are different from 'the old eugenic laws' because the latter 'tried to stop more disabled children from being born', whereas the contemporary laws are aimed at helping disabled people.[176] The justifications for these laws are plentiful: (i) pregnancy and having children would be too difficult for people with disabilities, (ii) sterilization protects them from sexual assault, and (iii) people with disabilities might make irresponsible and poor decisions.[177]

These assumptions are questionable, however. The lives of disabled people are not necessarily made easier by not having children; nor does having a disability inherently preclude someone from being a good parent. In addition, sterilization does not prevent sexual assault on people with disabilities, and neither does an unintended

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175 National Women's Law Center, Forced Sterilization of Disabled People in the United States 12 (2021), https://nwlc.org/wp-content/uploads/2022/01/%C6%92.NWLC_SterilizationReport_2021.pdf (last accessed Sept. 9, 2022) [hereinafter, NWLC].

176 *Id.* at 15.

177 *Id.* Judges have made the argument that contemporary sterilization laws are distinct from eugenics laws because they help disabled people. See, eg *In re* Mary Moe, 385 Mass. 555, 559 (1982); *In re* Wirsing Michigan, 456 Mich. 467, 474–74 (Mich. 1998); *In re* Grady, 85 N.J. 235, 246–47 (1981).

pregnancy necessarily reflect a poor decision.[178] Furthermore, these are the very kind of justifications used to promote mandated sterilization during the eugenic era.[179] Justice Holmes, for example, suggested that sterilization procedures would not only prevent the execution of 'degenerate offspring for crime' or the starvation of those with 'imbecility', but it would also 'enable those who otherwise must be kept confined to be returned to the world'.[180] In other words, sterilization was deemed to be 'good' for the sterilized individual.

Allowing the state to determine whether to sterilize an individual who cannot give consent could therefore be viewed as a form of eugenics within the narrower definition of the term. As one report argues, using the law to 'take away disabled people's choices' is 'part of a long history of the government making forced sterilizations possible'.[181]

My research, summarized in Table 3, found that 31 states allow for forced sterilization of some individuals with disabilities. Seven (41 per cent) of the 17 states with RBA bans and five (36.7 per cent) of the 14 with genetic anomaly (GA) bans fall in this category.[182] Only one RBA-ban state, North Carolina (and no GA-ban state) explicitly bans forced sterilizations of individuals with disabilities.[183] Only three states prohibit forced sterilizations of minors, and none is an RBA-ban state. Of the 17 states that allow sterilization of disabled children, four are RBA-ban states with GA bans—Arkansas, Indiana, North Dakota, and Utah.[184] These four states make up 23.5 and 28.6 per cent of RBA-ban and GA-ban states, respectively. This means that 76.5 per cent (13) of RBA-ban states and 71.4 per cent (10) of GA-ban states are silent on this issue.

At first glance, the correlations between RBA (and GA) bans and policies regarding forced sterilization of minors are not strong. On the one hand, only one RBA-ban state (and not a single GA-ban state) prohibits forced sterilization of people with disabilities, while no state without RBA bans of any kind prohibits this forced sterilization. Further, only 41 per cent of the RBA-ban states and 36 per cent of the GA-ban states allow involuntary sterilization of disabled individuals. On the other hand, no RBA-ban state prohibits forced sterilization of minors, while three non-RBA ban states do. Despite the lack of a clear correlation either way, one could nevertheless argue that there is some inconsistency in the concern about eugenics in over 40 per cent of RBA-ban states and just over a third of GA-ban states. This divergence is particularly striking given that involuntary sterilization of people with disabilities is so reminiscent of the earlier eugenics policies that included involuntary sterilization of people with undesirable traits.

V.A.2. Conjugal Visits

Carceral policies can also have eugenic impacts. The mere fact of imprisonment prevents reproduction by prisoners unless the state has policies that allow for

178 NWLC, *supra* note 175, at 16.

179 Suter, *supra* note 1, at 907–08.

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

181 NWLC, *supra* note 175, at 16.

182 The seven states are Arkansas, Indiana, Kansas, Kentucky, North Dakota, Pennsylvania, and Utah, and the five states are Arkansas, Indiana, Kentucky, North Dakota, and Utah. *Id.* at 10, 29, note 28.

183 *Id.* at 10.

184 *Id.* at 28, note 27.

Table 3. Sterilization

RBA Ban States	States with DS/GA† Bans	Sterilization Policies			
		Allows Forced Sterilization of Some Individuals with Disabilities?	Allows Forced Sterilization of Disabled Children?	Prohibits Forced Sterilization of People with Disabilities?	Prohibits Forced Sterilization of Minors with Disabilities?
Arizona	X (GA)				
Arkansas	X(DS)	Yes*	Yes*		
Indiana	X(DS/GA)	Yes*	Yes*		
Kansas		Yes			
Kentucky	X(DS/GA)	Yes*			
Louisiana	X(GA)				
Mississippi	X(GA)				
Missouri	X(DS)				
North Carolina				Yes	
North Dakota	X(GA)	Yes*	Yes*		
Ohio	X(GA)				
Oklahoma	X(GA)				
Pennsylvania		Yes			
South Dakota	X(DS)				
Tennessee	X(DS)				
Utah	X(GA)	Yes*	Yes*		
West Virginia	X(DS/GA)				
Total RBA/ GA-Ban States	**17/14**	**7/5***	**4/4***	**1/0***	**0/0***
Percent of RBA States (#/17)	**82.4%**	**41.1%**	**23.5%**	**5.9%**	**0%**
Percent of GA-Ban States (#/14)	—	**35.7%**	**28.6%**	**0%**	**0%**
Total States with Relevant Law	—	**31**	**17**	**1**	**3**
Percent of RBA States out of Total States	—	**22.6%**	**23.5%**	**100%**	**0%**

† DS = Down syndrome; GA = genetic anomaly; For totals, 'GA-Ban States' references both GA- and DS-ban states.
* Specifically has a ban against abortions based on DS and/or GA.

conjugal visits or perhaps even some forms of ART.[185] Given the demographics of people imprisoned in America, this has the effect of discouraging reproduction by a disproportionate number of minorities and low-income individuals, the same populations subjected to eugenic sterilization. The vast majority of states, both RBA- and non-RBA-ban states, do not allow conjugal visits. Only New York, California, and Washington currently do, none of which has an RBA ban.[186] This means that 100 per cent of RBA-ban states (including those with GA bans) impose this eugenic-like policy and thus are inconsistent with respect to eugenics in this context.

Interestingly, Mississippi, one of the RBA-ban states, had allowed conjugal visits since 1918,[187] but it abolished them in 2014,[188] just 6 years before it passed its RBA ban with explicit references to eugenics. The impetus for allowing these visits initially, however, was not to promote reproduction among prisoners. Instead, it was steeped in insidious stereotypes about Black males having stronger sexual drives than white males and the belief that the promise of sex would motivate them to work harder.[189] While several factors were offered to explain the end of conjugal visits in Mississippi, including cost, an important motivation was the fear of children being born to single parents. As Mississippi Commissioner of Corrections Christopher Epps explained, 'even though we provide contraception, we have no idea how many women are getting pregnant only for the child to be raised by one parent'.[190] Not only is it questionable whether conjugal visits are in fact too costly,[191] but the concern about single parentage itself is also eugenic-like and implies that children should not be born to single parents. Moreover, the state is not considering just any single parents; this policy specifically targets those who are married to prisoners and are therefore more likely to be low-income and minorities. Thus, in addition to the eugenic impact of prohibiting conjugal visits, the stated rationale is also eugenic and entirely inconsistent with the alleged rationale for RBA-bans.

V.A.3. Laws Regulating Incest

There are many cultural taboos surrounding incest in marriage or sexual relationships. Some of these taboos are rooted in the genetic risks of reproduction among people who are biologically related.[192] Consanguineous marriage, defined as marriage 'between

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185 See Gerber v. Hickman, 264 F.3d 882 (9th Cir. 2001).

186 N.Y. Comp. Codes R. & Regs. tit. 7 § 220.1 (1985); Ca. Admin. Code tit. 15 § 3177 (1985); Extended Family Visit, DOC 590.100, https://www.prisonlegalnews.org/media/publications/DOC%20Policy%20Document%20-%20Extended%20Family%20Visiting%2C%20WA%20DOC%2C%202001.pdf (last accessed Aug. 31, 2022).

187 Columbus B. Hopper, *The Evolution of Conjugal Visiting in Mississippi*, 69 Prison J. 103, 103 (1989).

188 David H. McElreath et al., *The End of the Mississippi Experiment with Conjugal Visitation*, 96 Prison J. 752, 752 (2016).

189 *Conjugal Visits: Costly And Perpetuate Single Parenting?*, NPR: Tell Me More, Jan. 12, 2014, https://www.npr.org/2014/01/27/267029376/conjugal-visits-costly-and-perpetuate-single-parenting (last accessed Aug. 31, 2022). See also McElreath et al., *supra* note 188, at 755 (quoting sociologist Columbus B. Hopper's explanation that conjugal visits were rooted in the belief that Black men would '"submit to authority as long as their sexual needs were being met"').

190 *Conjugal Visits: Costly And Perpetuate Single Parenting?*, *supra* note 189.

191 *Id.*

192 Dwight W. Reed, *Incest Taboos and Kinship: A Biological or a Cultural Story?*, 43 Rev. Anthropology 150 (2014).

two blood-related individuals who are second cousins or closer',[193] has been associated with an increased risk in genetic conditions. Studies suggest that the average increased risk for congenital anomalies—the majority of which are autosomal recessive disorders—in the offspring of first cousins is 1.7–2.8 per cent.[194]

As Table 4 shows, almost all states have legislation criminalizing incest. Forty-eight states void and criminalize incestuous marriage,[195] and 48 forbid and criminalize incestuous sexual acts.[196] While many such laws describe the crimes in moral terms—eg 'offenses against the family'[197]—they are nevertheless a form of negative eugenics because they decrease the risks of birth defects by prohibiting marriage or sexual acts between consanguineously related individuals. Only two states do not forbid 'incestuous' marriage, one (Ohio) of which is an RBA-ban state with a GA ban. Similarly, only two states do not criminalize incestuous sexual acts: New Jersey and Rhode Island,[198] neither of which is an RBA-ban state. While laws that criminalize incest exist in states with and without RBA-bans, 16 (94 per cent) of the RBA-ban states and 13 (93 per cent) of the GA-ban states are inconsistent in defending RBA-bans on eugenics grounds while not addressing this other form of eugenics.

V.A.4. Assisted Reproductive Technologies

Another area within the narrow circle of eugenics includes policies that discourage the use of assisted reproductive technologies (ART) for those who struggle with biological or social infertility. Laws can impact who uses these technologies by increasing or decreasing access to them through, respectively, mandates for insurance coverage of treatments or prohibitions of their use generally or for specific groups.

V.A.4.a. Insurance Coverage As noted earlier, insurance coverage of ART can affect access to infertility treatment given the significant cost barriers to infertility treatment, some forms of which can be incredibly expensive. In vitro fertilization (IVF), for example, can range in price from $12,000–17,000 per cycle.[199] Because achieving a

193 Saeed Anwar et al., *Genetic and Reproductive Consequences of Consanguineous Marriage in Bangladesh* PLOS One, March 19, 2020, https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0241610 (last accessed Oct. 22, 2022) (citing Alan H. Bittles, *The Role and Significance of Consanguinity as a Demographic Variable,* 20 Popul. & Dev. Rev. 561 (1994)).

194 Hanan Hamamy et al., *Consanguineous Marriages, Pearls And Perils: Geneva International Consanguinity Workshop Report*, 13 Genet Med 841, 845 (2011) ('An increased 2% risk that first cousin couples will bear a child with an autosomal recessive disorder indicates that approximately 8% of these couples have an increased risk of 25% or more, whereas 92% of first cousin couples will not be at increased risk of the birth of an affected child.').

195 These numbers are based largely on *Statutory Compilation Regarding Incest Statutes* (Mar. 2013), https://ndaa.org/wp-content/uploads/Incest-Statutes-2013.pdf (last accessed Oct. 22, 2022), with updates of a few statutes by my research assistants.

196 *Incest Laws by State 2022*, https://worldpopulationreview.com/state-rankings/incest-laws-by-state (last accessed Aug. 31, 2022).

197 See, eg Ind. Code Ann. § 35–46–1-3 (Chapter 1. 'Offenses Against the Family'); A.R.S. § 13–3608 (Chapter 36. 'Family Offenses'); A.C.A. § 5–26-202 (Chapter 26. 'Offenses Involving the Family').

198 See *Incest Laws by State 2022, supra* note 196 (both states criminalize incestuous behavior with minors 16 and under in New Jersey and under 16 in Rhode Island).

199 NCSL, *State Laws Related to Insurance Coverage for Infertility Treatment*, Mar. 3, 2021, https://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx (last accessed Aug. 31, 2022).

Table 4. Incest Law

RBA Ban States	States with GA/DS† Bans	Incest Laws	
		Criminalize Incestuous Marriage?	Criminalize Incestuous Acts?
Arizona	X (GA)	Yes*	Yes*
Arkansas	X(DS)	Yes*	Yes*
Indiana	X(DS/GA)	Yes*	Yes*
Kansas		Yes	Yes
Kentucky	X(DS/GA)	Yes*	Yes*
Louisiana	X(GA)	Yes*	Yes*
Mississippi	X(GA)	Yes*	Yes*
Missouri	X(DS)	Yes*	Yes*
North Carolina		Yes	Yes
North Dakota	X(GA)	Yes*	Yes*
Ohio	X(GA)	No	Yes*
Oklahoma	X(GA)	Yes*	Yes*
Pennsylvania		Yes	Yes
South Dakota	X(DS)	Yes*	Yes*
Tennessee	X(DS)	Yes*	Yes*
Utah	X(GA)	Yes*	Yes*
West Virginia	X(DS/GA)	Yes*	Yes*
Total RBA/GA-Ban States	**17/14**	**16/13***	**17/14***
Percent of RBA States (#/17)	**82.4%**	**94.1%**	**100%**
Percent of GA-Ban States (#/14)	—	**92.9%**	**100%**
Total States with Relevant Law	—	**48**	**48**
Percent of RBA States out of Total States	—	**33.3%**	**35.4%**

†DS = Down syndrome; GA = genetic anomaly; For totals, 'GA-Ban States' references both GA- and DS-ban states.
*Specifically has a ban against abortions based on DS and/or GA.

successful pregnancy often requires more than one cycle of IVF,[200] such treatment is out of reach for most people, especially low-income individuals. Despite the fact that infertility rates in Black and American Indian/Alaska Native (AI/AN) individuals, who are also more likely to be low income, are higher than that of white individuals,[201] a disproportionate share of white people can access infertility treatments.[202] Evidence suggests that health insurance coverage of IVF treatment results in a greater chance of giving birth.[203] Thus, the lack of an insurance mandate could be described as 'positive'

200 Daar, *supra* note 169, at 773.
201 *What Does It Cost to Cover Fertility Benefits*, KFF, https://www.kff.org/report-section/coverage-and-use-of-fertility-services-in-the-u-s-issue-brief/#endnote_link_483386-9 (last accessed Aug. 31, 2022).
202 *Id.*
203 Emily S. Jungheim, *In Vitro Fertilization Insurance Coverage and Chances of a Live Birth*, 317 JAMA 1273 (2017), https://jamanetwork.com/journals/jama/article-abstract/2613146 (last accessed Aug. 1, 2022).

eugenics (if one holds the racist views of the eugenics era) in making it disproportionately easier for white people to use ART to reproduce than people of color. State laws that make infertility treatment more accessible are therefore anti-eugenic.

As of July 2022, 19 states had enacted laws requiring insurers to cover or offer coverage of some form of infertility treatment,[204] although only 12 explicitly include some coverage for IVF.[205] Just five (29.4 per cent) of the 17 RBA-ban states, which also have GA bans (Arkansas, Louisiana, Ohio, Utah, and West Virginia), have insurance laws regarding infertility treatment. See Figure 2a and Table 5. And only two states (11.8 per cent)—Arkansas and Utah—with GA bans require insurance coverage for IVF. See Figure 2b and Table 5.

Four of the five RBA-ban states that provide some form of coverage for fertility treatment, however, are limited in how much they affirmatively promote access to ART. For example, Louisiana does not require coverage of fertility drugs, IVF, or reversals of any form of sterilization. It merely prohibits 'exclusion of coverage for diagnosis and treatment of correctable conditions on the grounds that they result in infertility'.[206] In short, the law does little to increase insurance coverage of and access to techniques that affirmatively assist reproduction. Ohio and West Virginia require coverage of 'basic health care services'. In Ohio, that includes infertility treatment when medically necessary, such as surgeries to treat diseases of reproductive organs. Its law, however, allows for, but does not require, coverage of IVF and some other forms of assisted reproduction.[207] In West Virginia, the law is extremely vague as to what services are included, and the statute states that 'services need not necessarily include all procedures or services offered by a service provider'.[208] Thus, while Ohio and West Virginia do not

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204 Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, New York, Ohio, Rhode Island, Texas, Utah, and West Virginia. Resolve, *Infertility Treatment by State*, https://resolve.org/what-are-my-options/insurance-coverage/infertility-coverage-state/ (last accessed July 25, 2022). California and Texas only require insurance companies to *offer* coverage for infertility treatment. NCSL, *State Laws Related to Insurance Coverage for Infertility Treatmen*t, Mar. 3, 2021, https://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx (last accessed July 25, 2022). A review of the statutes in July 2022, confirms that these findings remain current. Ark. Stat. Ann. §§ 23–79-510, 23–85-137, 23–86-118; Cal. Health & Safety Code §§ 1374.55, 1374.551; Cal. Insurance Code § 10119.6; Colo. Rev. Stat. Ann. § 10–16-104; Conn. Gen. Stat. §§ 38a-509, 38a-536; Del. Code Ann. tit. 18, §§ 3556, 3342; Haw. Rev. Stat. Ann. §§ 431:10A-116.5, 432:1–604 (West); 215 ILCS 5/356 m; La. Stat. Ann. § 22:1036; Md. Code Ann., Ins. § 15–810; Mass. Gen. Laws Ann. ch. 175, § 47H; Mass. Gen. Laws Ann. ch. 176A, § 8 K; Mass. Gen. Laws Ann. ch. 176B, § 4 J; 211 CMR 37.00; Mont. Code Ann. § 33–31–102 et seq.; N.H. Rev. Stat. Ann. § 417-G:3; N.J. Stat. Ann. § 17B:27–46.1x (West); N.Y. Ins. Law §§ 3216, 3221 (McKinney); Ohio Rev. Code Ann. § 1751.01(A)(7); R.I. Gen. Laws §§ 27–18-30, 27–19-23, 27–20-20, 27–41-33 (West); Tex. Ins. Code Ann. §§ 1366.005,1366.003 (West); Utah Code Ann. §§ 26–18-420, 49–20-418 (West); W. Va. Code Ann. § 33-25A-2 (West).

205 Arkansas, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, New York, Texas, and Utah. See ASRM, *Do Insurance Plans Cover Infertility Treatment?* https://www.reproductivefacts.org/faqs/frequently-asked-questions-about-infertility/q08-do-insurance-plans-cover-infertility-treatment/ (last accessed July 25, 2022). Medicaid coverage of infertility treatment is even more scarce. 'As of 2020, studies show that only one State, New York, had policies requiring Medicaid to pay for fertility treatment.' Timothy Silvia, *Does Medicaid Cover IVF?* - Overview, Grants For Medical https://www.grantsformedical.com/does-medicaid-cover-ivf.html (last accessed Oct. 22, 2022).

206 LSA-R.S. 22:1036 (2009).

207 Ohio Rev. Code Ann. §1751.01(A)(7).

208 W. Va. Code § 33-25A-2 (1995).

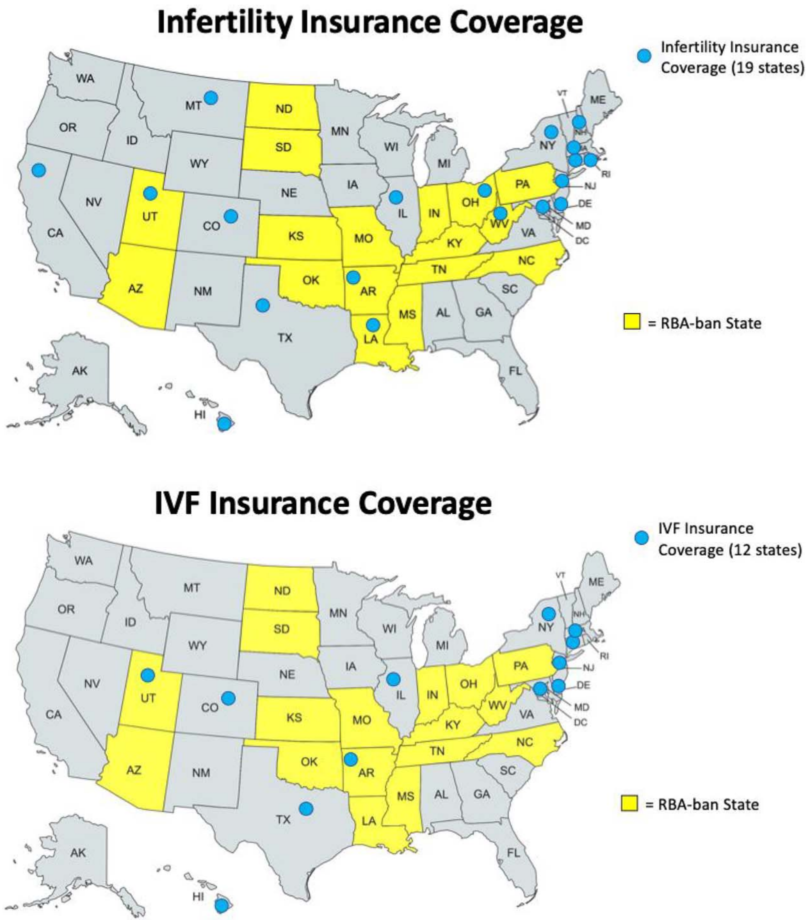

Figure 2. (a) Infertility Insurance Coverage. (b) IVF Insurance Coverage.

hinder access to infertility treatment, they do not proactively increase access to IVF for those who cannot afford it, which tends to be low-income people and people of color.

Arkansas does require coverage for IVF, but it has a lifetime limit of $15,000,[209] which means that at most it pays for one IVF cycle, which only somewhat increases the chances of achieving pregnancy. In addition, this requirement only applies to heterosexual married people.[210] Given that marriage rates of Black Americans are lower than those of other racial or ethnic groups for all ages, and that 'a far lower proportion of [B]lack women have married at least once by age 40',[211] this law will not help promote fertility treatment in Black Arkansians as much as white Arkansians. And with

209 https://talkbusiness.net/2017/04/arkansas-law-often-blocks-coverage-of-infertility-treatments-for-many-couples/ (last accessed July 25, 2022).

210 Ark. Admin. Code 054.00.1–5.

211 R. Kelly Raley, Megan M. Sweeney, & Danielle Wondra, *The Growing Racial and Ethnic Divide in U.S. Marriage Patterns*, 25 Future Child 89 (2015).

Table 5. Insurance Coverage Law for Infertility Treatment

RBA-Ban States	States with GA/DS† Bans	Requires Insurers to Offer Coverage of Some Form of Infertility Treatment?	Requires Insurance to Cover IVF?
Arizona	X (GA)		
Arkansas	X(DS)	Yes*	Yes*
Indiana	X(DS/GA)		
Kansas			
Kentucky	X(DS/GA)		
Louisiana	X(GA)	Yes*	
Mississippi	X(GA)		
Missouri	X(DS)		
North Carolina			
North Dakota	X(GA)		
Ohio	X(GA)	Yes*	
Oklahoma	X(GA)		
Pennsylvania			
South Dakota	X(DS)		
Tennessee	X(DS)		
Utah	X(GA)	Yes*	Yes*
West Virginia	X(DS/GA)	Yes*	
Total RBA/GA-Ban States	**17/14**	**5/5***	**2/2***
Percent of RBA States (#/17)	**82.4%**	**29.4%**	**11.8%**
Percent of GA-Ban States (#/14)	—	**35.7%**	**14.3%**
Total States with Relevant Law	—	**19**	**12**
Percent of RBA States out of Total States	—	**26.3%**	**16.7%**

†DS = Down syndrome; GA = genetic anomaly. For totals, 'GA-Ban States' references both GA- and DS-ban states.
*Specifically has a ban against abortions based on DS and/or GA.

its application only to heterosexual married couples, it does nothing to promote the fertility of same-sex couples.

Utah is the one RBA-ban state that affirmatively promotes infertility treatment. It requires that insurers who provide coverage for maternity benefits also provide an indemnity benefit for infertility treatments.[212] More importantly, it requires the Public Employees' Health Plan and the Medicaid program (if the waiver is approved) to provide coverage for IVF and genetic testing for individuals with genetic traits associated with certain heritable conditions who receive IVF services.[213] As a result, only one state—or to a lesser extent, two states (if one includes Arkansas)—with an RBA/GA ban affirmatively increases access to forms of ART that are disproportionately used by

212 Utah Code Ann. § 31A-22-610.1.
213 Utah Code Ann. §§ 26-18-420(3)(a)–(b), 49-20-420(2)(a)–(b).

higher income, white people. Thus, depending on how one measures this, 15 (88.2 per cent) or 16 (94.1 per cent) of the states with RBA bans and 12 (85.7 per cent) or 13 (92.8 per cent) of the states with GA bans are not anti-eugenic in this broader sense.

V.A.4.b. Surrogacy *i. Enforcing Surrogacy Contracts*. Surrogacy is another form of ART that can help individuals reproduce; in this case, when biological impediments or social circumstances require assistance with gestation. Laws regarding surrogacy vary widely and depend on the type of surrogacy. Gestational surrogacy, which involves implantation of an embryo created by the egg and sperm of the intended parents and/or gamete donors, is expressly permitted by statute or case law in 29 states.[214] It is not prohibited in another 15.[215] Five states—Arizona, Indiana, Louisiana, Michigan, and Nebraska—however, forbid all surrogacy contracts, certain surrogacy contracts, or declare them void or unenforceable. As Table 6 shows, three (or 60 per cent) of those states—Arizona, Indiana, and Louisiana—are RBA-ban states (with GA bans).[216] In Arizona, because such contracts are not enforceable, the gestational surrogate and her husband (if she has one) are deemed the legal parents of the resulting child.[217] The Indiana statute declares the enforcement of such contracts as 'against public policy'.[218] Although some Indiana courts will allow pre-birth parentage orders that establish the parental rights of the intended parents, the statutory prohibition of the enforceability of the surrogacy contracts means that parentage status is uncertain, which can act as a deterrent to the use of gestational surrogates. Finally, Louisiana forbids most gestational surrogacy contracts, with a narrow exception for heterosexual married couples who use their own gametes, as long as there is no compensation for the surrogate.[219]

State laws are even more restrictive regarding traditional or genetic surrogacy, ie when the surrogate is artificially inseminated with the sperm of an intended parent or donor. Twelve states explicitly allow such forms of surrogacy,[220] and 16 allow it by default in having no laws (or cases) that prohibit it.[221] Seven states, however, have extremely restrictive policies concerning traditional surrogacy,[222] and eight simply do not permit it.[223] As Table 6 shows, of the eight that ban such contracts, five (62.5 per cent)—Arizona, Kentucky, North Dakota, Louisiana, and Indiana—have RBA bans,

214 Arkansas, California, Colorado, Connecticut, Delaware, Florida, Illinois, Iowa, Maine, Mayland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *The Surrogacy Experience*, https://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html (last accessed July 25, 2022). [hereinafter *Surrogacy Experience*].

215 Alabama, Alaska, Georgia, Hawaii, Idaho, Kansas, Minnesota, Mississippi, Missouri, Montana, North Carolina, Pennsylvania, South Carolina, and South Dakota. *Id.*

216 *Id.*

217 Ariz. Rev. Stat. § 25–218.

218 Ind. Code § 31-20-1.

219 LSA-R.S. 9:2720; LSA-R.S. 9:2720.2; https://www.creativefamilyconnections.com/us-surrogacy-law-map/louisiana/ (last accessed Aug. 31, 2022).

220 Arkansas, Colorado, Florida, Iowa, Kansas, Maine, Missouri, New Hampshire, Texas, Virginia, Washington, and Wisconsin. *Surrogacy Experience*, *supra* note 214.

221 Alabama, Alaska, California, Connecticut, Georgia, Idaho, Illinois, Montana, Mississippi, Ohio, Oregon, Pennsylvania, South Dakota, Utah, Vermont, and West Virginia. *Id.*

222 Maryland, Massachusetts, New Jersey, New Mexico, Oklahoma, Rhode Island, South Carolina. *Id.*

223 Arizona, Kentucky, New York, North Dakota, Louisiana, Indiana, Nebraska, and Michigan. *Id.*

Table 6. Laws/Policies Re: Surrogacy

RBA-Ban States	States with GA/DS[†] Bans	Forbids All or Certain Gestational Surrogacy Contracts?	Has Restrictive Policies or Does Not Permit Traditional/Genetic Surrogacy?[††]
Arizona	X (GA)	Yes*	Yes* (P)
Arkansas	X(DS)		
Indiana	X(DS/GA)	Yes*	Yes* (P)
Kansas			
Kentucky	X(DS/GA)		Yes* (P)
Louisiana	X(GA)	Yes*	Yes* (P)
Mississippi	X(GA)		
Missouri	X(DS)		
North Carolina			
North Dakota	X(GA)		Yes* (P)
Ohio	X(GA)		
Oklahoma	X(GA)		Yes* (R)
Pennsylvania			
South Dakota	X(DS)		
Tennessee	X(DS)		
Utah	X(GA)		
West Virginia	X(DS/GA)		
Total RBA/ GA-Ban States	**17/14**	**3/3***	**5/5* (P)** **1/1* (R)** **6/6***
Percent of RBA States (#/17)	**82.4%**	**17.6%**	**29.4% (P)** **5.9% (R)** **35.3%**
Percent of GA-Ban States (#/14)	—	**21.4%**	**35.7% (P)** **7.1% (R)** **42.9%**
Total States with Relevant Law	—	**5**	**8 (P)** **7(R)** **15**
Percent of RBA States out of Total States	—	**60.0%**	**62.5% (P)** **14.3% (R)** **40%**

[†] DS = Down syndrome; GA = genetic anomaly. For totals, 'GA-Ban States' references both GA- and DS-ban states.
* Specifically has a ban against abortions based on DS and/or GA.
[††] (P) designates prohibits, (R) designates restricts.

including GA bans. Oklahoma, another RBA-ban state (with a GA ban), imposes a restriction that no compensation is allowed for such contracts.[224]

While only six (35.3 per cent) out of 17 RBA-ban states (and 42.9 per cent of the 14 GA-ban states) prohibit or significantly restrict gestational and/or genetic surrogacy, the fact that they make up the majority of states with those surrogacy restrictions shows some inconsistency with respect to anti-eugenic efforts.

ii. Parentage Pre-birth Orders. Also relevant to the accessibility of surrogacy are laws regarding declaration of parentage and pre-birth orders. Surrogacy contracts are not successful if the intended parents are not ultimately listed as the child's parents on the birth certificate. Restrictions on such determinations can thus act as a deterrent and barrier to this form of ART. Some states allow intended parents to receive pre-birth orders declaring them to be the child's legal parents, while other states require adoption proceedings following the birth of the child. Again, there is a great variation as to who is eligible to enter into such agreements as intended parents and who can be declared the child's parents after birth.

Some RBA-ban states make parentage determinations for the intended parents difficult. As Table 7 shows, one (Missouri) out of the nine states that prohibit pre-birth orders for gestational surrogates[225] and three (Louisiana, Oklahoma, and Tennessee) out of the four that impose limiting conditions are states with RBA bans (including GA bans). Louisiana appears to require the intended parents to be opposite-sex married couples[226] and residents of the state for at least six months[227]; Oklahoma requires validation of the gestational surrogacy agreement before the embryo transfer[228]; and Tennessee requires at least one of the intended parents to be genetically related to the child.[229] However, nine (52.9 per cent) of the RBA-ban states and seven (50 per cent) of the GA-ban states allow pre-birth orders regarding gestational surrogacy for

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224 *Id.*

225 Hawaii, Idaho, Illinois, Missouri, Nebraska, Virginia, and Wyoming. *Id.* Seven of the nine states declare that they prohibit prebirth orders and two say they *generally* prohibit them. Florida, for example, does not allow them, but it may allow 'an interim pre-birth order . . . that authorizes the Intended Parents to make medical decisions for the child.' Creative Family Connections, *Gestational Surrogacy in Florida*, https://www.creativefamilyconnections.com/us-surrogacy-law-map/florida/ (last accessed July 25, 2022). Michigan will only allow pre-birth orders when the surrogacy contracts do not involve financial compensation or even living expenses. Creative Family Connections, *Gestational Surrogacy in Michigan,* https://www.creativefamilyconnections.com/us-surrogacy-law-map/michigan/ (last accessed July 25, 2022). Missouri follows 'the old Uniform Parentage Act (UPA) on artificial insemination, which permits a petition to be filed before the birth but requires any court order to wait until after the birth.' Creative Family Connections, *Gestational Surrogacy in Missouri,* https://www.creativefamilyconnections.com/us-surrogacy-law-map/missouri/ (last accessed July 25, 2022). Because parties 'may request a preliminary hearing to resolve issues regarding parentage before the birth . . . , attorneys have been successful in establishing parentage of children born in Missouri by surrogacy.' This suggest that Missouri has a de facto, as opposed to express, ban on pre-birth orders.

226 La. Stat. Ann. § 9:2718.1 defines 'Intended parents' as 'a married couple who each exclusively contribute their own gametes to create their embryo and who enter into an enforceable gestational carrier contract, as defined in this Chapter, with a gestational carrier pursuant to which the intended parents will be the legal parents of the child resulting from an in utero embryo transfer.' The fact that the intended parents must each contribute their own gametes implies that the statute applies only to *heterosexual* married couples.

227 La. Stat. Ann. § 9:2720.3.

228 Okla. Stat. Ann. tit. 10, § 557.7.

229 Tenn. Code Ann. § 36-1-102.

intended parents with few limitations[230] and another four (three of which have GA bans) allow these on a case-by-case basis.[231] Therefore, the correlation between states with restrictions in this area and RBA-bans generally or GA bans specifically is weak.

One the other hand, the marriage conditions for pre-birth orders in this context do show some inverse correlations between RBA-ban states and restrictions based on marriage. As shown in Table 7, two (Louisiana and Utah) of the four states that do not allow single mothers to use their own eggs to obtain pre-birth orders as the intended parents are RBA-ban states (with GA bans).[232] Another ten states have unclear policies as to whether single mothers can use their eggs to be declared intended parents in pre-birth orders, half of which are RBA-ban states: Indiana, Kansas, North Dakota, Oklahoma, and Tennessee. Four of these states are GA-ban states.[233] Thus, seven (41.2 per cent) of the RBA-ban states and six (42.9 per cent) of the GA-ban states impose restrictions or have unclear policies as to the potential parentage status for single mothers. While such laws do not prohibit surrogacy for single mothers, they create uncertainty about parentage status, which can work as a deterrent for such women to use surrogates. As noted above, when policies make ART more difficult for unmarried individuals, they have a disproportionate impact on people of color[234] and members of the LGBTQ+ community (if the focus is on opposite-sex marriage). Thus, these laws are eugenic in reducing the options for reproduction by some of the same classes of people whose reproductive potential was restricted during the eugenics era.

With respect to traditional (or genetic) surrogacy, only seven states allow these pre-birth orders, but all with some limitations. Of those seven, only two (Missouri and West Virginia) are states with RBA-bans (including GA bans). Notably, Missouri is one of three states that only allow such orders for the biological father.[235] Another nine states are not clear as to whether pre-birth orders are allowed for genetic surrogacy, four of which are states that enacted an RBA-ban, and three of which have GA bans.[236] Finally, the remaining states do not allow such orders for this form of surrogacy. Thus, 11 (64.7 per cent) of the RBA-ban states and eight (53.3 per cent) of the GA-ban states affirmatively do not allow pre-birth orders in this context, and another four (23.5 per cent) of the RBA-ban states and three (21.4 per cent) of the GA-ban states are unclear. Only one (5.9 per cent of RBA-ban states and 7.1 per cent of GA-ban states) allows these orders, but only for the biological father. In sum, with respect to pre-birth orders, RBA-ban states and specifically GA-ban states impose strong deterrents to traditional surrogacy, which is inconsistent with the asserted anti-eugenic goals of RBA bans.

As we see in this section, therefore, there is some correlation between states with RBA bans (as well as states with GA bans) and laws that discourage some forms of assisted reproduction among unmarried people, low-income individuals, people of

230 Arkansas, Kansas, Kentucky, Mississippi, North Carolina, North Dakota, South Dakota, Utah, and West Virginia. *Id.* In total there are 27 such states. *Surrogacy Experience*, *supra* note 214.

231 Arizona, Indiana, Ohio, and Pennsylvania. *Id.*

232 The other two are Florida and Nebraska. *Id.*

233 The other five are Iowa, Minnesota, New Mexico, Texas, and Wisconsin. *Id.*

234 See *supra* note 211 and accompanying text.

235 The other two with this restriction are Georgia and Oregon. Florida and Washington allow these pre-birth orders, but the birth mother has 48 hours to revoke consent. Rhode Island also allows such orders, but only if the surrogate is a biological relative of one of the intended parents. *Surrogacy Experience*, *supra* note 214.

236 The nine states also include Alabama, Alaska, Delaware, Nevada, and West Virginia. *Id.*

Table 7. Laws/Policies Re: Pre-Birth Orders

RBA-Ban States	States with GA/DS† Bans†	Prohibits or Limits Pre-Birth Orders?††	Prohibits/Unclear Whether Single Mothers Can Use Their Own eggs for Pre-Birth Orders?*	Prohibits/Unclear Whether Pre-Birth Orders Allowed for Genetic Surrogacy?*
Arizona	X (GA)	No (CC)		Yes (P)*
Arkansas	X(DS)	No		Yes (P)*
Indiana	X(DS/GA)	No (CC)	Yes (U)*	Yes (P)*
Kansas		No	Yes (U)	Yes (P)
Kentucky	X(DS/GA)	No		Yes (P)*
Louisiana	X(GA)	Yes (L)*	Yes (P)*	Yes (P)*
Mississippi	X(GA)	No		Yes (U)*
Missouri	X(DS)	Yes (P)*		
N. Carolina		No		Yes (U)
North Dakota	X(GA)	No	Yes (U)*	Yes (P)*
Ohio	X(GA)	No (CC)		Yes (U)*
Oklahoma	X(GA)	Yes (L)*	Yes (U)*	Yes (P)*
Pennsylvania		No (CC)		Yes (P)
South Dakota	X(DS)	No		Yes (P)*
Tennessee	X(DS)	Yes (L)*	Yes (U)*	Yes (P)*
Utah	X(GA)	No	Yes (P)*	Yes (U)*
West Virginia	X(DS/GA)	No		
Total RBA/ GA-Ban States	**17/14**	**4/4***	**5/4* (U)** **2/2* (P)** **7/6***	**4/3* (U)** **11/8* (P)** **15/11***
Percent of RBA States (#/17)	**82.4%**	**23.5%**	**29.4% (U)** **11.8% (P)** **41.2%**	**23.5% (U)** **64.7% (P)** **88.2%**
Percent of GA-Ban States (#/14)	—	**28.6%**	**28.6% (U)** **14.3% (P)** **42.9%**	**21.4% (U)** **57.1% (P)** **78.6%**
Total States with Relevant Law	—	**13**	**14**	**34**
Percent of RBA States out of Total States	—	**30.8%**	**50.0%**	**44.1%**

† DS = Down syndrome; GA = genetic anomaly. For totals, 'GA-Ban States' references both GA- and DS-ban states.
* Specifically has a ban against abortions based on DS and/or GA
†† (CC) designates case-by-case, (L) designates limits, (P) designates prohibits, (U) designates unclear

color, and people who do not identify as heterosexual, supporting the hypothesis that the states' anti-eugenic remedies are often very narrow and inconsistent.

V.A.5. Substance Use During Pregnancy

Laws and policies regarding substance abuse during pregnancy are another area of potential eugenic impact under the narrower conception of eugenics. Not only do prosecutors use criminal laws to attack prenatal substance use, but states have also expanded their civil child-welfare requirements such that 'prenatal drug exposure can provide grounds for terminating parental rights because of child abuse or neglect'.[237] As some have pointed out, penalizing such behavior has eugenic-like impacts in reducing 'the spread of "bad" traits by preventing a certain class of women from reproducing'.[238] Women of color and low-income women are more likely to be screened for substance use during pregnancy, which can result in a disproportionate rate of their prosecution and being reported to child-welfare authorities after delivery.[239] Like the involuntary sterilization laws of the eugenics movement, these substance-use laws are a form of state control over the reproductive lives of low-income and minority communities in the name of protecting future generations. Worse, as scholars have demonstrated, these laws actually harm the children they claim to protect by subjecting primarily women of color to state control that punishes them and disrupts their families and communities.[240]

Thomas defends bans on abortions based on race because of his concern that they are eugenic, and because he worries about the 'considerable racial disparity' in abortion rates. Under that line of thinking, stringent substance-use laws should also be a serious concern because they particularly deter low-income women and women of color, who are most at risk of state action, from seeking prenatal care, which harms both fetal and maternal well-being.[241] Yet, in the oral arguments for *Dobbs,* Justice Thomas repeatedly asked whether the state could prosecute pregnant women for illegal drug

237 Guttmacher Institute, *Substance Use During Pregnancy*, Feb. 1, 2022, https://www.guttmacher.org/print/state-policy/explore/substance-use-during-pregnancy (last accessed Aug. 31, 2022).

238 See Stephanie Yu Lim, *Protecting the Unborn as Modern Day Eugenics*, 18 Health Matrix 127, 129 (2008). Michelle Goodwin describes how the tendency to focus on prosecution of street (illegal) drugs rather than addictive prescription drugs in the name of protecting fetal life disproportionately impacts women of color and lower socio-economic status, resulting in harm to both the women and their children. Michelle Goodwin, *Precarious Moorings: Tying Fetal Drug Law Policy to Social Profiling*, 42 Rutgers L.J. 659 (2011). While she does not use the term eugenics, the disparate harm to certain classes and races of children is tied to the kinds of eugenic concerns on which Thomas focuses

239 Kathi L H Harp & Amanda M Bunting, *The Racialized Nature of Child Welfare Policies and the Social Control of Black Bodies*, 27 Soc. Politics 258, 258 (2020).

240 *Id.*; Goodwin, *supra* note 238.

241 See Rebecca Stone, *Pregnant Women and Substance Use: Fear, Stigma, and Barriers to Care*, 3 Health Justice 1, 13 (2015); Sarah C.M. Roberts & Cheri Pies, *Complex Calculations: How Drug Use During Pregnancy Becomes a Barrier to Prenatal Care*, 15 Maternal & Child Health J. 333, 338 (2010); Emma S. Ketteringham, Sarah Cremer, & Caitlin Becker, *Healthy Mothers, Healthy Babies: A Reproductive Justice Response to the 'Womb-to-Foster-Care Pipeline'*, 20 CUNY L. Rev. 77, 103 (2016); Comm. On Health Care for Underserved Women, Am. Coll. Of Obstetricians & Gynecologists, *Committee Opinion No. 473, Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist* (2011), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2011/01/substance-abuse-reporting-and-pregnancy-the-role-of-the-obstetrician-gynecologist (last accessed Oct. 22, 2022) (opinion reaffirmed in 2022).

activity.[242] There is irony in his apparent support for such prosecutions, regardless of their disparate and eugenic-like impact.

Almost half (24) of the states and D.C. treat substance use during pregnancy as child abuse under civil child-welfare statutes. As Table 8 shows, eleven of these states[243] are RBA-ban states (all of which have GA bans). This means that nearly two-thirds (64.7 per cent) of RBA-ban states and over three-quarters (78.6 per cent) of GA-ban states have such laws. Under Missouri's child abuse law, a parent is considered unfit if they test positive for substances within 8 hours after delivery and have previously been convicted of child abuse or neglect or if they failed to complete a drug treatment program recommended by Child Protective Service. Further, South Dakota is one of three states that treat substance uses during pregnancy as grounds for commitment under civil child welfare statutes.

In addition, half of the states and D.C. require physicians to report suspected drug use, nine of which are RBA-ban states (all with GA bans).[244] Put differently, 52.9 per cent of RBA-ban states and 64.3 per cent of GA-ban states require such reporting (see Table 8). Further, eight states require health care providers to test for drug use. Four of those states—Kentucky, Louisiana, North Dakota, and South Dakota—have enacted RBA bans (including GA bans), which constitutes 23.5 per cent of RBA-ban and 28.6 per cent of GA-ban states.[245] The results from reporting or testing can be used as evidence in child-welfare proceedings, further heightening the threats to families and parental rights.

Some states do have policies intended to encourage treatment, which in itself seems anti-eugenic. Seventeen states and D.C. give pregnant people priority for substance use treatment, seven of which are RBA-ban states (all with GA bans).[246] This means that 41.2 per cent of RBA-ban and 50 per cent of GA-ban states have such laws. Even so, all but one of those seven states view substance use during pregnancy as child abuse, all but two require reporting of substance use, and one requires testing for substance use.[247] In addition, ten states protect pregnant people from discrimination based on drug treatment, three of which are RBA-ban states (all with GA bans), which is only 17.7 per cent of RBA-ban and 21.4 per cent of GA-ban states.[248] Moreover, all three

242 Transcript of Oral Argument at 53–54, Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021) (No. 19–1392), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/19-1392_4425.pdf, at 49, 51, 103 (last accessed Aug. 31, 2022).

243 Arizona, Arkansas, Indiana, Kentucky, Louisiana, Missouri, North Dakota, Ohio, Oklahoma, South Dakota, and Utah. The data are derived from Guttmacher Institute, *Substance Use During Pregnancy*, Feb. 1, 2022, https://www.guttmacher.org/print/state-policy/explore/substance-use-during-pregnancy, (last accessed Aug. 31, 2022) [hereinafter Guttmacher, *Substance Use*] and Leticia Miranda, Vince Dixon, & Cecilia Reyes, *How States Handle Drug Use During Pregnancy*, ProPublica, Sept. 30, 2015, https://projects.propublica.org/graphics/maternity-drug-policies-by-state (last accessed Aug 31, 2022). The two resources have different information for Oklahoma, which is included based on the latter resource.

244 Arizona, Arkansas, Kentucky, Louisiana, North Dakota, Ohio, Oklahoma, South Dakota, and Utah. *Guttmacher, Substance Use, supra* note *243*.

245 *Id.*

246 Arizona, Arkansas, Kentucky, Missouri, Ohio, Utah, and West Virginia. *Id.*

247 *Id.* Notably, West Virginia gives priority for pregnant women when her provider accepts Medicaid. *Id.*

248 Kentucky, Missouri, and North Dakota. *Id.*

Table 8. Laws Re: Substance Abuse During Pregnancy

RBA-Ban States	States with GA/DS† Bans	Treats Substance Use During Pregnancy as Child Abuse Under Civil Child Welfare Statutes?	Requires Physicians to Report Suspected Drug Use?	Requires Healthcare Providers to Test for Drug Use?	Has Policies Intended to Encourage Treatment?	Protects Against Discrimination Based on Drug Treatment During Pregnancy?
Arizona	X (GA)	Yes*	Yes*		Yes*	
Arkansas	X (DS)	Yes*	Yes*		Yes*	
Indiana	X (DS/GA)	Yes*				
Kansas						
Kentucky	X (DS/GA)	Yes*	Yes*	Yes*	Yes*	Yes*
Louisiana	X (GA)	Yes*	Yes*	Yes*		
Mississippi	X (GA)					
Missouri	X (DS)	Yes*			Yes*	Yes*
North Carolina						
North Dakota	X (GA)	Yes*	Yes*	Yes*		Yes*
Ohio	X (GA)	Yes*	Yes*		Yes*	
Oklahoma	X (GA)	Yes*	Yes*			
Pennsylvania						
South Dakota	X (DS)	Yes*	Yes*	Yes*		
Tennessee	X (DS)					
Utah	X (GA)	Yes*	Yes*		Yes*	
West Virginia	X (DS/GA)				Yes*	
Total RBA/ GA-Ban States	**17/14**	**11/11***	**9/9***	**4/4***	**7/7***	**3/3***
Percent of RBA States (#/17)	**82.4%**	**64.7%**	**52.9%**	**23.5%**	**41.2%**	**17.6%**
Percent of GA-Ban States (#/14)	—	**78.6%**	**64.3%**	**28.6%**	**50%**	**21.4%**
Total States with Relevant Law	—	**24**	**25**	**8**	**17**	**10**
Percent of RBA States out of Total States	—	**45.8%**	**36.0%**	**50.0%**	**41.2%**	**30%**

†DS = Down syndrome; GA = genetic anomaly. For totals, 'GA-Ban States' references both GA- and DS-ban states.
*Specifically has a ban against abortions based on DS and/or GA.

states consider substance use during pregnancy to be child abuse, while two require reporting of and one requires testing for substance use during pregnancy.[249]

The upshot is that, overall, a majority of RBA-ban states and even larger majorities of GA-ban states have laws regarding substance use that increase the risks for prosecution and termination of parental rights. Although such laws are ostensibly motivated by the goal of reducing harmful births, they are eugenic in penalizing behavior

249 *Id.*

during pregnancy, which subjects pregnant women with addiction to child abuse charges and potential loss of parental rights and harm to their children. Worse, these laws disproportionately impact low-income and minority women. Even RBA-ban (including GA-ban) states with laws intended to encourage treatment tend to have policies that will deter pregnant women from seeking treatment. When one considers that other behaviors that may impose fetal health risks (like some expensive infertility treatments) are primarily used by white women with means, the racially disparate and eugenic-like impacts are only intensified. In short, such policies prioritize reproduction and parenting of upper-middle-class and wealthy white women.[250]

V.A.6. Prenatal Information Laws

There are two areas where states with RBA bans and specifically GA bans have laws that are consistent with their stated anti-eugenic agenda: prenatal information laws and wrongful birth/life laws. With respect to the former, a growing number of states are passing 'Down Syndrome Information Acts', laws that require health-care providers to deliver information to expectant parents about Down syndrome after the condition has been diagnosed during pregnancy. Twenty-three states have passed such laws, 11 of which have enacted RBA bans[251] (see Table 9). This means that 64.7 per cent of all RBA-ban states and 78.6 per cent of the GA-ban states have such laws.[252] Because the goal is to encourage expectant parents to fully consider the implications of having a child with a genetic anomaly, presumably to discourage them from deciding to terminate on that basis, one would expect to find just such a correlation between enactment of these laws in RBA-ban states.

V.A.7. Wrongful Birth and Wrongful Life Claims

Another area where one would expect state policies to be consistent with the alleged anti-eugenics agenda of RBA bans are prohibitions of wrongful birth and life claims. An increasing number of states are enacting laws that proscribe wrongful birth claims, claims brought by parents alleging that a health care provider's negligence resulted in the failure to identify the risk of a birth defect in a child born with the condition. The root of such a claim is that, because of the provider's alleged negligence, the expectant parents failed to learn about the risk of a birth defect, depriving them of the opportunity to prevent the birth of the child who was born with the condition. When such a claim focuses on post-conception negligence, the alleged harm is the lost opportunity to

250 See Goodwin, *supra* note 238.

251 The 23 states are Delaware, Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, Ohio, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia. https://www.lettercase.org/issues/state-laws/ (last accessed July 25, 2022).

252 Nine of these 22 states also require disclosure of information about other prenatally diagnosed conditions or anomalies. Five of those states—Indiana, Kentucky, Kansas, Missouri, and Mississippi—are RBA-ban states, and four—Indiana, Kentucky, Missouri, and Mississippi—are states that ban abortions based on fetal anomalies. *Id.* Of these four, three (Indiana, Kentucky, and Mississippi) ban abortions based on genetic anomaly, not just Down syndrome. In other words, five (31.3%) of the RBA-ban states and four (30.7%) of the 13 states that enacted bans on abortions based on genetic anomalies require information about the condition.

Table 9. Laws Re: Prenatal Diagnosis Information

RBA-Ban States	States with GA/DS† Bans	Laws Requiring Health-Care Providers to Deliver Information after Diagnosis of Down Syndrome During Pregnancy?
Arizona	X (GA)	
Arkansas	X(DS)	
Indiana	X(DS/GA)	Yes*
Kansas		Yes
Kentucky	X(DS/GA)	Yes*
Louisiana	X(GA)	Yes*
Mississippi	X(GA)	Yes*
Missouri	X(DS)	Yes*
North Carolina		
North Dakota	X(GA)	
Ohio	X(GA)	Yes*
Oklahoma	X(GA)	
Pennsylvania		Yes
South Dakota	X(DS)	
Tennessee	X(DS)	Yes*
Utah	X(GA)	Yes*
West Virginia	X(DS/GA)	Yes*
Total RBA/GA-Ban States	**17/14**	**11/9***
Percent of RBA States (#/17)	**82.4%**	**64.7%**
Percent of GA-Ban States (#/14)	—	**78.6%**
Total States with Relevant Law	—	**23**
Percent of RBA States out of Total States	—	**47.8%**

† DS = Down syndrome; GA = genetic anomaly. For totals, 'GA-Ban States' references both GA- and DS-ban states.
* Specifically has a ban against abortions based on DS and/or GA.

terminate the pregnancy.[253] As of July 2022, 18 states prohibit wrongful birth claims. Two thirds (12) of those states are RBA-ban states, and half (9) have GA bans.[254] See Table 10. Thus, 70.6 per cent of RBA-ban states and 64.3 per cent of GA-ban states have such prohibitions. This shows a correlation in both directions, especially if the focus is on all RBA-ban states. States that prohibit wrongful birth claims tend to have RBA bans,

253 See Harris, *supra* note 28, at 366. It is important to note that claims about negligence in identifying risks to individuals before pregnancy are not necessarily tied to abortion because the birth can be avoided by not reproducing, using donor gametes, or preimplantation genetic testing. Of course, couples could also avoid the birth of an affected child in those cases by undergoing prenatal testing and pregnancy termination.

254 Center for Dignity in Healthcare for People with Disabilities, *Prenatal Laws: Wrongful Birth and Wrongful Life*, July 8, 2021, https://centerfordignity.com/wp-content/uploads/2021/07/Prenatal-Laws-Wrongful-Birth-Wrongful-Life-States-Territories.pdf (last accessed July 25, 2022).

Table 10. Wrongful Birth Claims

RBA-Ban States	States with GA/DS† Bans	Laws that Prohibit Wrongful Birth Claims?
Arizona	X (GA)	Yes*
Arkansas	X(DS)	Yes*
Indiana	X(DS/GA)	Yes*
Kansas		Yes
Kentucky	X(DS/GA)	Yes*
Louisiana	X(GA)	
Mississippi	X(GA)	
Missouri	X(DS)	Yes*
North Carolina		Yes
North Dakota	X(GA)	
Ohio	X(GA)	Yes*
Oklahoma	X(GA)	Yes*
Pennsylvania		Yes
South Dakota	X(DS)	
Tennessee	X(DS)	Yes*
Utah	X(GA)	Yes*
West Virginia	X(DS/GA)	
Total RBA/GA-Ban States	**17/14**	**12/9***
Percent of RBA States (#/17)	**82.4%**	**70.6%**
Percent of GA-Ban States (#/14)	—	**64.3%**
Total States with Relevant Law	—	**18**
Percent of RBA States out of Total States	—	**66.7%**

† DS = Down syndrome; GA = genetic anomaly. For totals, 'GA-Ban States' references both GA- and DS-ban states.
* Specifically has a ban against abortions based on DS and/or GA.

and states with RBA bans tend to prohibit wrongful birth claims. With respect to just GA bans, the correlation is more weighted toward GA-ban states prohibiting wrongful birth claims (nearly two-thirds), since only half of states that ban wrongful birth claims are GA-ban states.

An even stronger correlation exists with respect to wrongful life claims, but only in the latter direction: Most RBA-ban and GA-ban states have such laws. These claims are brought by a child seeking recovery for negligence in failing to identify risks of a birth defect that resulted in the birth of the child with the condition. Most (37) states have legislation prohibiting such claims. Of those states, all but one (Mississippi) RBA-ban and GA-ban states are included.[255] Thus, even though most non-RBA ban states also have such laws, as Table 11 shows, the vast majority of RBA-ban (94.1 per cent) and GA-ban (92.3 per cent) states impose such prohibitions.

Because wrongful life and wrongful birth claims are often linked to lost opportunities to terminate a pregnancy based on an identified disability, which is one type of

255 Only Mississippi has no legislation addressing such claims. *Id.*

Table 11. Wrongful Life Claims

RBA-Ban States	States with GA/DS† Bans†	Laws that Prohibit Wrongful Life Claims?
Arizona	X (GA)	Yes*
Arkansas	X(DS)	Yes*
Indiana	X(DS/GA)	Yes*
Kansas		Yes
Kentucky	X(DS/GA)	Yes*
Louisiana	X(GA)	Yes*
Mississippi	X(GA)	
Missouri	X(DS)	Yes*
North Carolina		Yes
North Dakota	X(GA)	Yes*
Ohio	X(GA)	Yes*
Oklahoma	X(GA)	Yes*
Pennsylvania		Yes
South Dakota	X(DS)	Yes*
Tennessee	X(DS)	Yes*
Utah	X(GA)	Yes*
West Virginia	X(DS/GA)	Yes*
Total RBA States/Total GA-Ban States	**17/14**	**16/13***
Percent of RBA States (#/17)	**82.4%**	**94.1%**
Percent of GA-Ban States (#/14)	—	**92.3%**
Total States with Relevant Law	—	**23**
Percent of RBA States out of Total States	—	**47.8%**

† DS = Down syndrome/GA = genetic anomaly. For totals, 'GA-Ban States' references both GA- and DS-ban states.
* State with ban against abortions based on DS or GA.

reason-based abortion, it is not surprising to see such large percentages of states with RBA bans and GA bans also proscribe these claims. Indeed, as noted in Section A of Part I, some judges characterize wrongful birth claims as eugenic. In short, RBA bans (or just GA bans) and wrongful birth and life bans are intricately connected by a very narrow vision of eugenics and anti-eugenic remedies that are tied to abortion restrictions.

V.B. Broader Conceptions of Eugenics

We turn now to policies that fall within the wider circle of eugenic (or anti-eugenic), policies: those that shape the nature of the population, such as immigration policies, incarceration rates (which are an indirect measures of many different policies), and death penalty statutes.

V.B.1. Immigration

As noted earlier, the Immigration Act of 1924 was a central part of the eugenics movement in trying to promote racial purity by limiting the immigration of 'biologically inferior' ethnic groups and privileging the immigration of Northern Europeans to America.[256] State action can also indirectly affect the nature of the immigrant population in a region. Although immigration law is federal, state policies can affect the immigrant population by being supportive of or discouraging to immigrants, particularly illegal immigrants, who are often people of color. A broader conception of eugenics would therefore include policies that are not welcoming to immigrants.

V.B.1.a. Method of Analysis My research assistants examined four areas where state policies could impact the well-being of immigrants: Medicaid/CHIP benefits, DMV benefits, systems that confirm the immigration status of employees, and access to in-state tuition by illegal immigrants.[257] We awarded negative points for anti-immigrant policies and positive points for immigrant-supportive policies and then totaled the score for each state. In addition, we explored whether states with RBA bans were sanctuary states, that is, jurisdictions with laws, regulations, policies, etc. that 'obstruct immigration enforcement' and shield illegal immigrants from ICE.[258] In other words, we considered sanctuary states to be supportive of immigrants generally and illegal immigrants in particular.

We first examined whether states offered Medicaid and/or CHIP benefits to immigrants because these policies are clearly relevant to the well-being of these groups. No state offers these benefits to illegal residents. Some states, however, provide health benefits to legal residents. Thus, we awarded one point for each benefit offered in each of two categories—to pregnant women and/or to children for Medicaid and for CHIP—and a negative point for each of those categories in which they did not offer any benefit. See Table 12.

Given that the ability to drive and have a driver's license can affect access to health care, food, work, and other basic needs, we theorized that DMV policies that are supportive or unsupportive of immigrants reflect attitudes that are, respectively, more

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256 The Immigration Act of 1924 established quotas for immigrants of certain countries and completely excluded immigrants from Asia. See text accompanying notes 143–145 and note 143; see also Suter, *Brave New World, supra* note 1, at 907.

257 Data were collected from https://ballotpedia.org/Immigration_Policy sites tracking immigration policy including Medicaid, https://www.medicaid.gov/medicaid/enrollment-strategies/medicaid-and-chip-coverage-lawfully-residing-children-pregnant-women (last accessed Oct. 23, 2022); NCSL, *States Offering Driver's Licenses to Immigrants* https://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx (last accessed Oct. 23, 2022); NCSL, *Tuition Benefits for Immigrants*, https://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx#:~:text=This%20law%20prohibits%20denial%20of,people%2C%20regardless%20of%20immigration%20status (last accessed Oct. 23, 2022); and E-Verify, https://www.e-verify.gov/about-e-verify/history-and-milestones#y2021 (last accessed Oct. 23, 2022).

258 See https://cis.org/Map-Sanctuary-Cities-Counties-and-States (last accessed Mar. 3, 2022) [hereinafter *Sanctuary Cities*] (noting that such efforts include 'refusing to or prohibiting agencies from complying with ICE detainers, imposing unreasonable conditions on detainer acceptance, denying ICE access to interview incarcerated aliens, or otherwise impeding communication or information exchanges between their personnel and federal immigration officers').

Table 12. Law Impacting Immigrants

RBA-Ban State	Offers Medicaid or CHIP Benefits to Pregnant Women or Children?*	Allows Illegal Immigrants to Obtain Driver's Licenses?	Bans Employers from Using Federal E-Verify System?	Allows Illegal Residents to Access In-State Tuition?	Total
Arizona	−4	−1	−1	−1	−7
Arkansas	2	−1	0	0	1
Indiana	−4	−1	−1	−1	−7
Kansas	−4	−1	0	1	−4
Kentucky	0	−1	0	0	−1
Louisiana	0	−1	−1	0	−2
Mississippi	−4	−1	−1	0	−6
Missouri	−4	−1	−1	−1	−7
North Carolina	2	−1	−1	0	0
North Dakota	−4	−1	0	0	−5
Ohio	0	−1	0	0	−1
Oklahoma	−4	−1	−1	0	−6
Pennsylvania	2	−1	−1	0	0
South Dakota	−4	−1	0	0	−5
Tennessee	−4	−1	−1	0	−6
Utah	0	1	−1	1	1
West Virginia	4	−1	−1	0	2

*These results represent the total scores for this category. States could receive a maximum of 4 (CHIP and Medicaid to pregnant women as well as CHIP and Medicaid to children) and a minimum of −4 (no benefits in any category).

or less eugenic. We awarded a positive point for states that allow illegal immigrants to obtain a driver's license and a negative point for those that do not.

Also relevant to state support or discouragement of immigration is whether states require employers to use the federal E-Verify system to confirm the immigration status of employees. The theory here is that such requirements make it harder for illegal, or even legal, immigrants to obtain work, given fears of being discovered or even suspected of being in the United States illegally. Since employment is essential to one's wellbeing, this offers a measure of states' attitudes toward immigrants, particularly illegal immigrants, and an indirect measure of attitudes that are more or less consistent with the broader notion of eugenics. States that ban this verification system received a positive point, those that require it a negative point, and those with no policy, no point.

Finally, we examined whether states bar illegal residents from access to in-state tuition. The idea behind this analysis is that education is crucial to economic advancement and well-being. Thus, the harder states make it for immigrants to access education, the less supportive they are of immigrants. Again, this ties to the broader conception of eugenics. States that grant illegal aliens access to in-state tuition in any capacity earned a positive point, those that bar such access earned a negative point, and those that take no position received no point (see Table 12 for a summary of these findings).

V.B.1.b. Results We added up the points on all measures for each state; the mean total score was −0.88. Figure 3a provides a graph of all the states, with a green bar for states without RBA bans, and a salmon bar for states with RBA bans (which also have three asterisks next to their names). As Figure 3a shows, only three immigrant-friendly states (states with positive values)—Arkansas, Utah, and West Virginia—have an RBA ban. The other 14, which make up 82.4 per cent of RBA-ban states, are not immigrant friendly. Of the three that are immigrant friendly, they are only one or two points above zero. North Carolina and Pennsylvania were also outliers in being immigrant neutral. The remaining 12 states (70.6 per cent) with RBA bans were immigrant unfriendly.

Figure 3b represents our findings with respect to sanctuary states using the same graph as Figure 3a, but in this figure the states that have been designated as sanctuary states by the Center for Immigration studies are circled.[259] As shown in Figure 3b, none of the sanctuary states have enacted RBA bans. Not surprisingly, all of the sanctuary states were immigrant friendly under our measures. Thus, the trend overall in this category suggests that states with RBA bans tend not to be immigrant-friendly by both measures.

V.B.2. Incarceration Rates

As noted earlier, some scholars describe the carceral state as a form of eugenics because it segregates 'undesirables', effectively preventing them from reproducing without relying on sterilization.[260] The fact that the majority of prisoners are in their prime reproductive years[261] only underscores that point. Given the disproportionate incarceration of minorities, states that are allegedly concerned about eugenics should want to enact policies to limit incarceration, particularly if they adopt Thomas's view that the disproportionate rate of abortion among Black women is eugenic.

Numerous policies at all levels of government influence incarceration rates, including legislation, prosecutorial decisions, policies regarding arrest, etc. Thus, I looked to incarceration rates, rather than particular legislation, as an indirect measure of state efforts (or lack of efforts) to counter the eugenic impacts of incarceration. The Bureau of Justice Statistics indicates that incarceration rates—measured in numbers per 100,000 residents—have dropped nationally from 2010–2020.[262] Nevertheless, minority imprisonment rates remain stubbornly overrepresented.[263] The average incarceration rate in the US was 359 and 308 in 2019 and 2020, respectively. When states are ranked from highest to lowest by incarceration rates, states with RBA bans are over-represented in the top five in both 2019 and 2020. For both years, they make

259 *Id.*

260 See text accompanying note 107. The lack of conjugal visits in most states only heightens that effect. See *supra* Section V.A.2.

261 In 2020, only 14% 'of male prisoners and 9% of female prisoners were age 55 or older.' E. Ann Carson, *Prisoners in 2020—Statistical Tables*, US Dept. of Justice, Bureau of Justice Statistics, Dec. 2021, at 21, https://bjs.ojp.gov/content/pub/pdf/p20st.pdf (last accessed Aug. 30, 2022).

262 *Id.*

263 *Id.* at 2, Fig. 2. The numbers are especially striking for males. 'Black males were 5.7 times as likely to be imprisoned in 2020 as white males; black males ages 18 to 19 were 12.5 times as likely to be imprisoned as white males of the same age.' But the same disparities apply to women. 'Black females (65 per 100,000) and Hispanic females (48 per 100,000) were imprisoned at higher rates than white females (38 per 100,000) in 2020.' *Id.* at 23. Moreover, these disparities exist in every state. See The Sentencing Project, *State-by-State Data*, https://www.sentencingproject.org/the-facts/#rankings (last accessed Aug. 30, 2022), which relies on U.S. Bureau of Justice Statistics data for 2019.

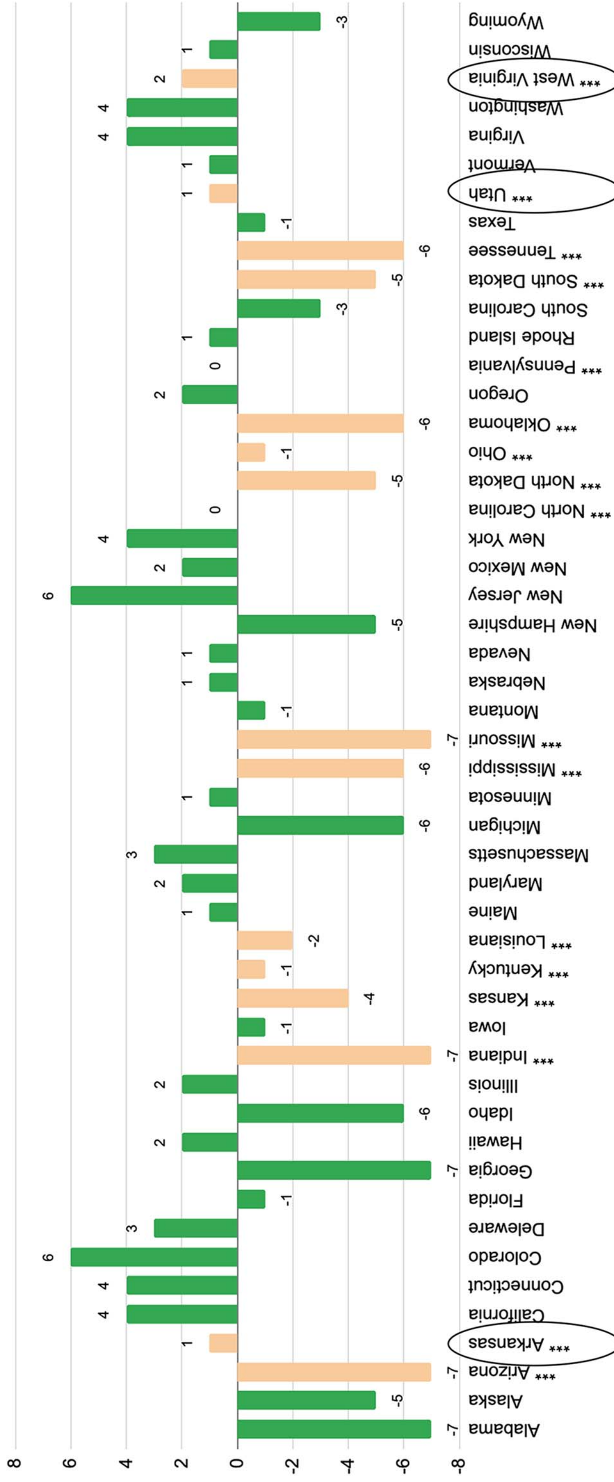

Figure 3a. Immigration Benefits Totals.

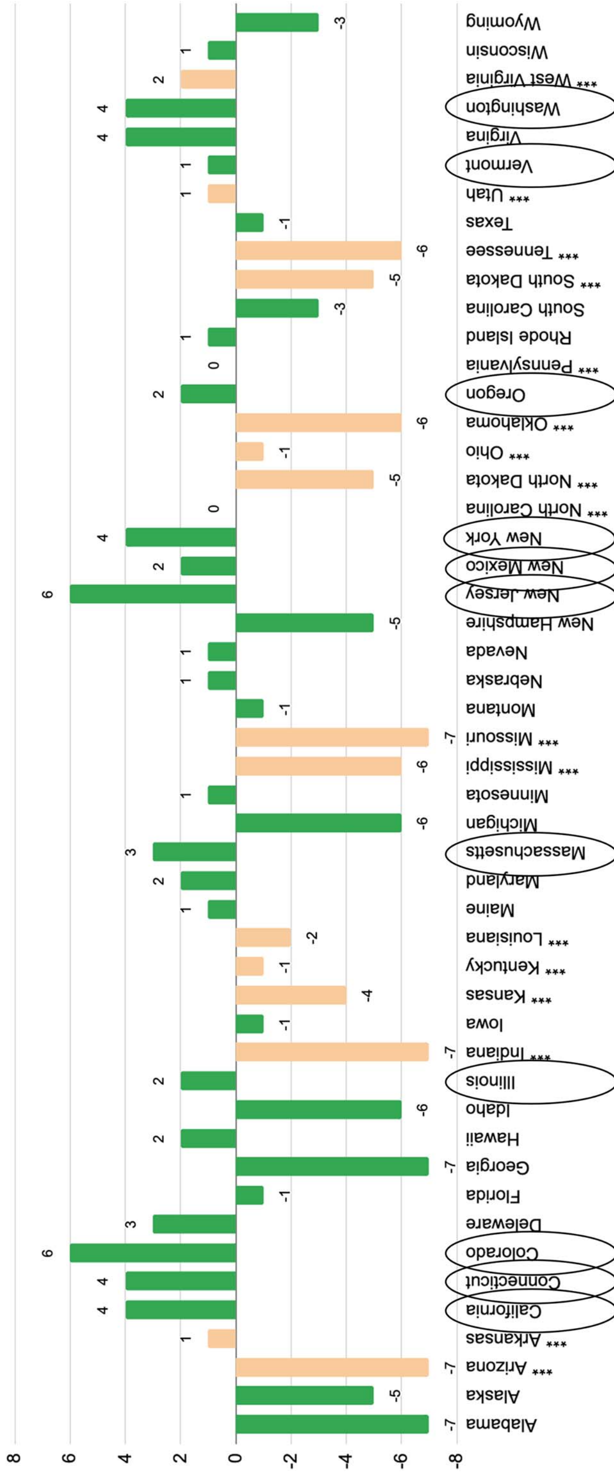

Figure 3b. Sanctuary States.

up 60 per cent of the ten states with the highest rates (see Table 13). Notably, in 2020, three states 'imprisoned more than 1 per cent of their male residents at year end'; all three are RBA-ban states: Louisiana, Mississippi, and Oklahoma.[264] In addition, in both 2019 and 2020, 12 (70.59 per cent) of the 17 RBA-ban states had rates above the national average.

These data show an inverse correlation in both directions with respect to RBA bans and incarceration rates. The majority of states with the highest incarceration states tend to be RBA-ban states and the majority of RBA-ban states have rates greater than the national average. In other words, there seems to be inconsistency in concerns about eugenics with respect to this measure in most RBA-ban states.

V.B.3. Death Penalty Statutes

A broader conception of eugenics also includes state acceptance of the death penalty. First, it involves state control over who lives and dies, and therefore to some extent who reproduces and is part of a jurisdiction's population. Second, it disproportionately impacts people of color and low-income groups.[265] Thus in the broader sense, it is a policy that results in state-sanctioned taking of lives that disproportionately impacts some of the groups targeted during the eugenics era. To explore legislative efforts in this regard, we examined which states retained or abolished the death penalty and whether there is any correlation between states that have retained the death penalty and those that have enacted RBA bans. The analysis suggests something of a correlation, albeit imperfect. As of 2021, 23 states and D.C. have abolished the death penalty. The remaining 27 states retain the death penalty on their books, although three—California, Oregon, and Pennsylvania—have a governor-imposed moratorium (see Figure 4).[266] Out of the 17 states that have enacted RBA bans, North Dakota and West Virginia are the only ones to have abolished the death penalty. The remaining 15 states (88.2 per cent) with RBA bans are among the 27 that retain the death penalty. (See Table 14).[267] These results suggest a very strong tendency of state legislatures that have enacted RBA bans not to employ the anti-eugenic measure of eliminating the death penalty.

V.C. Broadest Conceptions of Eugenics

Finally, we turn to policies that fall within the wider circle of eugenics. The first concerns infant mortality rates, which indirectly reflect how well or poorly states support infants and pregnant women. If abortion, as Justice Thomas suggests, is eugenic because of its disparate impact on minorities, then surely policies that do not support the thriving and wellbeing of infants and that do so disproportionately with respect to minority infants are also eugenic in this broader sense. Similarly, if states allow for big pay gaps between men and women, then they are either eugenic or at least discriminatory in ways that are inconsistent with the goals of RBA bans and, specifically, sex-based abortion bans.

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264 *Id.* at 15.

265 ACLU, *Race and the Death Penalty*, https://www.aclu.org/other/race-and-death-penalty (last accessed Aug. 3, 2022).

266 Data are from *Death Penalty Information Center*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last accessed Aug. 3, 2022).

267 Pennsylvania is the only state with a law enacted before 2010. While the death penalty has not been legislatively abolished, the governor has imposed a moratorium. *Id.*

Table 13. Incarceration Rates

Rank	State*	Incarceration Rates 2019	State	Incarceration Rates 2020
1	**Louisiana**	**680**	**Mississippi**	**584**
2	**Mississippi**	**639**	**Louisiana**	**581**
3	**Oklahoma**	**636**	**Oklahoma**	**559**
4	**Arkansas**	**586**	**Arkansas**	**529**
5	**Arizona**	**558**	**Arizona**	**495**
6	Texas	529	Texas	455
7	**Kentucky**	**516**	Georgia	433
8	Georgia	507	**Kentucky**	**414**
9	Idaho	475	Alabama	398
10	Florida	444	Idaho	398
11	Montana	440	**Ohio**	**385**
12	**Ohio**	**430**	**Missouri**	**374**
13	**South Dakota**	**428**	Florida	371
14	Wyoming	428	Virginia	370
15	**Missouri**	**424**	Montana	362
16	Virginia	422	**South Dakota**	**362**
17	Alabama	419	Nevada	361
18	Nevada	413	Wyoming	358
19	**Indiana**	**399**	**Indiana**	**351**
20	**Tennessee**	**384**	**West Virginia**	**340**
21	Michigan	382	Michigan	337
22	Delaware	381	**Tennessee**	**328**
23	**West Virginia**	**381**	Wisconsin	320
24	Wisconsin	378	Delaware/c	314
25	**Pennsylvania**	**355**	**Pennsylvania**	**308**
26	Oregon	353	South Carolina	304
27	South Carolina	353	Oregon	300
28	Colorado	342	**Kansas**	**298**
29	**Kansas**	**341**	Colorado	277
30	New Mexico	316	**North Carolina**	**271**
31	**North Carolina**	**313**	Nebraska	269
32	California	310	Iowa	262
33	Maryland	305	Maryland	258
34	Illinois	302	New Mexico	258
35	Iowa	293	California	247
36	Nebraska	289	Alaska	246
37	Washington	250	Illinois	237
38	Connecticut	245	Washington	203
39	Alaska	244	Hawaii	195

(*Continued*)

Table 13. Continued

Rank	State	Incarceration Rates 2019	State	Incarceration Rates 2020
40	**North Dakota**	**231**	**North Dakota**	**182**
41	New York	224	Connecticut	179
42	Hawaii	215	New York	177
43	New Jersey	210	New Hampshire	172
44	**Utah**	**209**	**Utah**	**166**
45	New Hampshire	197	Vermont	146
46	Vermont	182	Minnesota	145
47	Minnesota	176	New Jersey	145
48	Rhode Island	156	Rhode Island	131
49	Maine	146	Maine	120
50	Massachusetts	133	Massachusetts	103
	US Average	**359**	**4.63**	**308**

*States in bold font have enacted RBA bans.

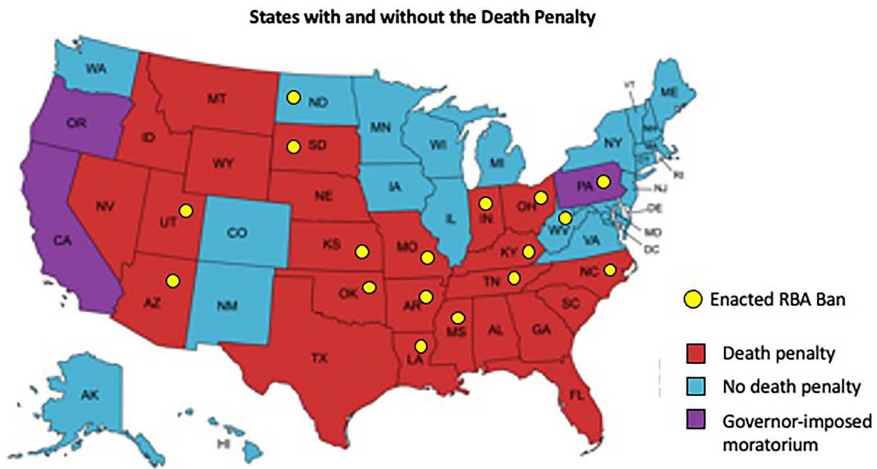

Figure 4. States with and without the Death Penalty.

V.C.1. Infant Mortality

The infant mortality rate (IMR) is a standardized measurement of deaths in the first year of life per thousand live births.[268] Not only is it generally considered one of the best predictors of the nation's life expectancy and an indicator of the population's health,[269] it is also an indirect measure of state efforts to promote the health of infants, particularly in populations that struggle economically. It is worth noting that infants of non-Hispanic Black mothers have more than twice the mortality rate compared

268 A. Ratnasiri et al., *Maternal and Infant Predictors of Infant Mortality in California*, 2007–2015, PLoS ONE, *15*(8), e0236877 (2020), https://doi.org/10.1371/journal.pone.0236877 (last accessed Mar. 3, 2022).

269 CDC, *Infant Mortality*, https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm (last accessed Mar. 3, 2022). See also Pabayo et al., *supra* note 165.

Table 14. Death Penalty

RBA-Ban State	Abolished Death Penalty?
Arizona	No
Arkansas	No
Indiana	No
Kansas	No
Kentucky	No
Louisiana	No
Mississippi	No
Missouri	No
North Carolina	Yes
North Dakota	No
Ohio	No
Oklahoma	No
Pennsylvania	No
South Dakota	No
Tennessee	No
Utah	No
West Virginia	Yes
Total RBA States	**2 (Yes)/15(No)**
Percent of RBA States (#/17)	**11.8% (Yes)/88.2% (No)**
Total States with Relevant Law	**23**
Percent of RBA States out of Total States with Law	**8.7%**

with infants of non-Hispanic white mothers.[270] Even with significant overall declines in IMRs in the United States, negative outcomes for African-American babies have remained stubbornly disproportionate.[271] For example, data from the US Department of Health and Human Services Office of Minority Health show that African Americans have 2.3 times the infant mortality rate as Caucasian (non-Hispanic) persons.[272] And in 2018, African American mothers were twice as likely to receive late or no prenatal care as compared to non-Hispanic white mothers, which impacts infant mortality.[273] Thus, given that infants of color are disproportionately negatively impacted by these rates, states with higher IMRs may have fewer anti-eugenic measures overall.

270 See DM Ely, *Infant Mortality in the United States, 2017: Data from the Period Linked Birth/Infant Death File*, 68 Natl Vital Stat Rep. 1 (2019).

271 See Joedrecka S. Brown Speights et al., *State-Level Progress in Reducing the Black-White Infant Mortality Gap, United States, 1999–2013*, 107 Am J Public Health 775 (2017).

272 DHHS, *Infant Mortality and African Americans*, https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=23 (last accessed Oct. 22, 2022).

273 Danielle M. Ely & Anne K. Driscoll, *Infant Mortality in the United States, 2018: Data from the Period Linked Birth/Infant Death File*, 69 Nat'l Vital Statistics Reps. 1 (2020), https://www.cdc.gov/nchs/data/nvsr/nvsr69/NVSR-69-7-508.pdf (last accessed Mar. 3, 2022).

If one adopts Justice Thomas's concern that abortions based on race are eugenic because of the disproportionate rate of abortions among people of color, then one should be equally, or perhaps even more, concerned about the disproportionately higher infant mortality rate among infants of color. Given my working hypothesis that states with RBA bans focus on anti-eugenics remedies very narrowly, I expected them to have fewer policies promoting infant welfare, particularly among the neediest, and to have higher infant mortality rates overall, especially with respect to infants of color. To test that hypothesis, I compared infant mortality rates generally and, for states with reliable data, IMRs with respect to Black and Hispanic infants. As described below, my findings suggest that the IMRs in these categories tended to be higher in RBA-ban states.

a. IMR Across Ethnic Groups My analysis of IMRs across ethnic groups relied on data from the CDC.[274] As Table 15a shows, in all years listed, a majority of the 15 states with the highest IMRs (T15) were states with RBA bans: In 2015, 2016, 2017, 2020, eleven (73.33 per cent) had RBA bans; in 2014 and 2019, ten (66.67 per cent) had such bans; and in 2018, nine (52.94 per cent) had such bans. Similarly, high numbers apply to the 10 states with the highest IMRs (T10), with 90 per cent of those states in 2020 with RBA-bans; 80 per cent in 2014 and 2017; 70 per cent in 2015, 2016, and 2018; and 60 per cent in 2019. In all years but 2015, RBA-ban states made up the majority of the top 5, ranging from 60 to 80 per cent.

The majority of states with RBA bans also had IMRs at or above the national average for each year from 2014–2020. In 2015, 15 (88.2 per cent) of the 17 states with RBA bans had IMRs above the national average; in 2017, 2018, and 2020, 14 (82.4 per cent) were above the national average; and in 2014, 2016, and 2019, 13 (76.5 per cent) were above the national average.[275]

b. IMR by Ethnicity Even more informative are data about infant mortality rates by race. The Kaiser Family Foundation, drawing from various sources, provides statistics on IMRs by race/ethnicity for 2018, but it does not have full information for 16 states, including five states that have enacted RBA bans (Kentucky, Mississippi, North Dakota, South Dakota, Utah, and West Virginia).[276]

Thirty-five states had reliable information about IMRs for Black or African American children. Four states with RBA bans (North Dakota, South Dakota, Utah, and West Virginia) were not among the 35. Four of the 13 RBA ban-states with reliable data on this measure (Ohio, Oklahoma, Arkansas, and Indiana) were among the ten states with the highest IMRs rates (T10). (See Table 15b). Four others (Kansas, North Carolina, Tennessee, and Louisiana) had rates above, and one (Mississippi) virtually equivalent

274 See CDC, *Infant Mortality Rates by State*, https://www.cdc.gov/nchs/pressroom/sosmap/infant_mortality_rates/infant_mortality.htm (last accessed Mar. 3, 2022).

275 Data were collected by analyzing the average for each year and ranking states from highest to lowest IMR using the CDC data. *Id.*

276 KFF, *State Health Facts, Infant Mortality Rate by Race/Ethnicity*, https://www.kff.org/other/state-indicator/infant-mortality-rate-by-race-ethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Black%20or%20African%20American%22,%22sort%22:%22desc%22%7D (last accessed Mar. 3, 2022) (noting that for some states 'data [were] not available due to suppression constraints', and for others, the data were '[n]ot sufficient').

Table 15a. IMR Ranked from Highest to Lowest

	IMR Summary Table*						
Rank	2014	2015	2016	2017	2018	2019	2020
1	Alabama	**Mississippi**	Alabama	**Mississippi**	**Mississippi**	**Mississippi**	**Mississippi**
2	**Oklahoma**	Delaware	**Mississippi**	**Arkansas**	**Louisiana**	**Louisiana**	**Louisiana**
3	**Mississippi**	Alabama	**Arkansas**	**Oklahoma**	**Arkansas**	Alabama	**West Virginia**
4	Georgia	Georgia	**Louisiana**	**South Dakota**	South Carolina	**North Dakota**	**Arkansas**
5	**Louisiana**	**Louisiana**	Delaware	Alabama	**Oklahoma**	**Oklahoma**	Alabama
6	**Arkansas**	**Arkansas**	Georgia	**Tennessee**	Georgia	**Tennessee**	**South Dakota**
7	**North Carolina**	**North Carolina**	**Oklahoma**	**Indiana**	**West Virginia**	Wyoming	**North Carolina**
8	**Kentucky**	**Oklahoma**	**Ohio**	**Ohio**	Alabama	Georgia	**Kansas**
9	**Indiana**	**Indiana**	**Indiana**	Georgia	**Ohio**	**Ohio**	**Indiana**
10	**West Virginia**	**South Dakota**	**Tennessee**	**Louisiana**	**Tennessee**	South Carolina	**Ohio**
11	**Ohio**	**Ohio**	**North Carolina**	**North Carolina**	Hawaii	**Arkansas**	Michigan
12	**Tennessee**	**North Dakota**	**West Virginia**	**West Virginia**	**North Carolina**	**North Carolina**	South Carolina
13	Delaware	**West Virginia**	South Carolina	Michigan	**Indiana**	**South Dakota**	**Kentucky**
14	Alaska	**Tennessee**	**Kentucky**	**Kentucky**	Illinois	**Indiana**	**Tennessee**
15	Maine	South Carolina	**Missouri**	South Carolina	Vermont	Michigan	Georgia
% of T15 with Enacted RBA Bans	66.67%	73.33%	73.33%	73.33%	60.00%	66.67%	73.33%
% of T10 with Enacted RBA Bans	80.00%	70.00%	70.00%	80.00%	70.00%	60.00%	90%
% of T5 with Enacted RBA Bans	60.00%	40.00%	60.00%	80.00%	80.00%	80.00%	80%

*States in bold font have enacted RBA bans.

Table 15b. IMR Ranked by Black/African American

Rank	State*	Black/African American	White
1	Michigan	13.47	4.44
2	**Ohio**	**13.42**	**5.56**
3	Illinois	13.32	5.02
4	Nebraska	13.23	4.65
5	Wisconsin	12.68	4.8
6	**Oklahoma**	**12.57**	**6.08**
7	**Arkansas**	**12.35**	**6.31**
8	Iowa	12.24	4.3
9	**Indiana**	**11.91**	**5.9**
10	South Carolina	11.75	5.05
11	**Kansas**	**11.65**	**5.45**
12	**North Carolina**	**11.56**	**5.31**
13	Delaware	11.54	NSD
14	**Tennessee**	**11.37**	**5.58**
15	Georgia	11.18	4.85
16	**Louisiana**	**11.12**	**5.71**
17	Florida	10.96	4.81
18	**Mississippi**	**10.76**	**6.78**
19	**Missouri**	**10.58**	**5.48**
20	Alabama	10.57	5.3
21	**Kentucky**	**10.51**	**5.7**
22	Washington	10.45	4.16
23	Maryland	10.37	3.79
24	**Pennsylvania**	**10.29**	**4.67**
25	Texas	10.01	4.45
26	Virginia	9.06	4.91
27	Minnesota	9.02	3.91
28	New York	8.63	3.46
29	Nevada	8.55	5.99
30	California	8.49	3.01
31	New Jersey	8.43	2.48
32	Massachusetts	8.35	3.18
33	**Arizona**	**8.13**	**4.82**
34	Connecticut	6.78	2.76
35	Colorado	6.6	4.03
	United States Average	**10.75**	**4.63**

* States in bold font have enacted RBA bans. States not included because of insufficient data: Alaska, Hawaii, Idaho, Maine, Montana, New Hampshire, New Mexico, North Dakota, Oregon, Rhode Island, South Dakota, Utah, Vermont, West Virginia, Wyoming.

to, the nation's average of 10.75/1000 for Black/African American infants. Thus, eight (61.5 per cent) of the RBA-ban states with reliable data had IMRs above the national average. Only three (23 per cent)—Missouri, Pennsylvania, and Arizona—had rates below the national average.

Thirty-four states had reliable information about IMRs for Hispanic infants, but three states with RBA bans (Kentucky, Mississippi, and West Virginia) did not. Five out of the 14 RBA-ban states with reliable information (Kansas, Utah, Missouri, Tennessee, and Oklahoma) were among the ten states with the highest IMR for this group (see Table 15c). Another five (Arkansas, Pennsylvania, Indiana, Arizona, and Louisiana) had rates above the national average (4.86/1000 live births). Thus, nine (64 per cent) of RBA-ban states with such data had IMRs for Hispanic infants above the national average. Only two states (North Carolina and Ohio), or 14 per cent of the 14 RBA-ban states with reliable measures, had rates below average. Taken together, these measures indicate that in 2018, seven RBA-ban states had IMRs for Black/African American and Hispanic infants in the top 10 for one or both categories.

Together these measures suggest there is a trend, consistent with my working hypothesis, toward higher infant mortality rates in states that enacted RBA bans generally, but also with respect to Black/African American and/or Hispanic infants. These measures also show that the IMRs for minority infants are higher than for white infants in all states, demonstrating that the same kind of disparate impact that Thomas describes in the abortion context exists in every state in America, including 100 per cent of RBA-ban states. Thus, we see a deep inconsistency regarding the alleged anti-eugenic goals as defined by Thomas himself in all states with RBA bans. While we also see this disparity in non-RBA ban states, they are not enacting policies allegedly aimed at preventing eugenics.

V.C.2. Equal Pay

One of the arguments that prohibitions of sex-selective abortions are anti-eugenic is that they counteract discrimination. As the legislative findings in the Mississippi RBA ban (which explicitly reference eugenics concerns) put it, selective abortions are 'repugnant to the values of equality of females and males'.[277] To explore whether states with RBA bans were consistent in their efforts to promote equality with respect to gender, I explored how women fare relative to men with respect to pay in the workforce. Some argue that because eugenic policies never aimed to eradicate women, bans on abortions based on sex are not anti-eugenic per se, but instead anti-discriminatory. While the line between discrimination and eugenics can be blurry, as noted earlier, I nevertheless compared policies in both RBA-ban states and states with bans specifically directed toward abortions based on sex.

Table 16 lays out all of the 50 states, beginning with the state with the lowest wage gap between women and men and ending with the state with the highest wage gap. RBA-ban states are in bold font. As Table 17 shows, of the 17 states that have enacted RBA bans, 13 (76.4 per cent) are below the 50th percentile of states for equal pay among women and men, and eight (47.1 per cent) are below the 25th percentile.[278] Of the 13 states with bans on sex-based abortions, nine (69.2 per cent) are below the 50th

277 Mo. Ann. Stat. §188.038.1(3)–(6); *see also* text accompanying notes 136.

278 Arizona (11th, 83%), Arkansas (31st, 79%), Indiana (44th, 76%), Kansas (29th, 80%), Kentucky (28th, 80%), Louisiana (49th, 72%), Missouri (23rd, 80%), Mississippi (41st, 77%), North Carolina (7th, 86%), North Dakota (43rd, 76%), Ohio (33rd, 79%), Oklahoma (48th, 73%), Pennsylvania (32, 79%) South Dakota (46th, 75%), Tennessee (20th, 80%), Utah (50th, 70%). *Wage Gap Overall State Rankings*, Mar. 2021, https://nwlc.org/wp-content/uploads/2021/03/Overall-Wage-Gap-State-By-State-2021-v2.pdf (last accessed Mar. 3, 2022).

Table 15c. IMR Ranked by Hispanic

Rank	State*	Hispanic	White
1	**Kansas**	**8.2**	**5.45**
2	Hawaii	8.14	NSD
3	Wisconsin	7.7	4.8
4	Nebraska	7.7	4.65
5	**Utah**	**7.38**	**4.69**
6	Rhode Island	7.26	NSD
7	**Missouri**	**6.8**	**5.48**
8	**Tennessee**	**6.77**	**5.58**
9	**Oklahoma**	**6.76**	**6.08**
10	Minnesota	6.61	3.91
11	**Arkansas**	**6.34**	**6.31**
12	**Pennsylvania**	**6**	**4.67**
13	**Indiana**	**5.97**	**5.9**
14	Connecticut	5.82	2.76
15	Colorado	5.72	4.03
16	**Arizona**	**5.72**	**4.82**
17	Illinois	5.47	5.02
18	**Louisiana**	**5.3**	**5.71**
19	Massachusetts	5.29	3.18
20	New Mexico	5.16	5.43
21	Texas	5.12	4.45
22	South Carolina	4.95	5.05
23	Nevada	4.81	5.99
24	**North Carolina**	**4.79**	**5.31**
25	Michigan	4.76	4.44
26	**Ohio**	**4.71**	**5.56**
27	Georgia	4.59	4.85
28	Washington	4.29	4.16
29	California	4.29	3.01
30	Virginia	4.24	4.91
31	New Jersey	4.17	2.48
32	Oregon	4.13	3.79
33	Florida	4.06	4.81
34	Maryland	3.93	3.79
35	New York	3.88	3.46
	United States Average	**4.86**	**4.63**

*States with in bold font have enacted RBA bans. States not included because of insufficient data: Alabama, Alaska, Delaware, Idaho, Iowa, Kentucky, Maine, Mississippi, Montana, New Hampshire, North Dakota, South Dakota, Vermont, West Virginia, Wyoming.

percentile of states for equal pay among women and men, and five (38.5 per cent) are below the 25th percentile. Only two (Arizona and North Carolina, both of which ban

Table 16. Wage Gap by State

Rank	State*	Women's Earnings	Men's Earnings	Women's pay for Every Man's Dollar	Wage Gap
1	Vermont	$46,616	$51,212	$0.91	$0.09
2	Hawaii	$46,524	$52,033	$0.89	$0.11
3	Maryland	$56,545	$63,272	$0.89	$0.11
4	California	$50,220	$57,016	$0.88	$0.12
5	Nevada	$40,775	$46,706	$0.87	$0.13
6	New York	$51,927	$60,686	$0.86	$0.14
7	**North Carolina**	**$40,640**	**$47,524**	**$0.86**	**$0.14**
8	Rhode Island	$48,556	$57,278	$0.85	$0.15
9	Alaska	$50,832	$60,147	$0.85	$0.15
10	Connecticut	$55,636	$66,477	$0.84	$0.16
11	**Arizona**	**$41,496**	**$49,773**	**$0.83**	**$0.17**
12	Delaware	$46,907	$56,350	$0.83	$0.17
13	D.C.	$72,750	$87,603	$0.83	$0.17
14	Florida	$37,458	$45,136	$0.83	$0.17
15	New Hampshire	$49,291	$60,406	$0.82	$0.18
16	Minnesota	$49,242	$60,441	$0.81	$0.19
17	Massachusetts	$57,289	$70,483	$0.81	$0.19
18	Wisconsin	$42,360	$52,305	$0.81	$0.19
19	Georgia	$40,481	$50,346	$0.80	$0.20
20	**Tennessee**	**$38,284**	**$47,626**	**$0.80**	**$0.20**
21	New Jersey	$53,810	$67,007	$0.80	$0.20
22	Oregon	$44,634	$55,654	$0.80	$0.20
20	**Missouri**	**$40,496**	**$50,558**	**$0.80**	**$0.20**
24	Maine	$40,873	$51,029	$0.80	$0.20
25	Nebraska	$41,148	$51,412	$0.80	$0.20
26	Colorado	$48,258	$60,334	$0.80	$0.20
27	Virginia	$48,209	$60,285	$0.80	$0.20
28	**Kentucky**	**$38,763**	**$48,545**	**$0.80**	**$0.20**
29	**Kansas**	**$40,848**	**$51,291**	**$0.80**	**$0.20**
30	Texas	$40,670	$51,125	$0.80	$0.20
31	**Arkansas**	**$35,467**	**$44,631**	**$0.79**	**$0.21**
32	**Pennsylvania**	**$43,791**	**$55,221**	**$0.79**	**$0.21**
33	**Ohio**	**$41,184**	**$52,039**	**$0.79**	**$0.21**
34	Washington	$50,612	$63,988	$0.79	$0.21
35	Illinois	$45,967	$58,579	$0.78	$0.22
36	Iowa	$40,681	$52,070	$0.78	$0.22
37	Michigan	$41,475	$53,150	$0.78	$0.22

(*Continued*)

Table 16. Continued

Rank	State*	Women's Earnings	Men's Earnings	Women's pay for Every Man's Dollar	Wage Gap
38	New Mexico	$36,659	$46,982	$0.78	$0.22
39	Montana	$38,752	$49,778	$0.78	$0.22
40	South Carolina	$37,584	$48,541	$0.77	$0.23
41	**Mississippi**	**$33,140**	**$43,024**	**$0.77**	**$0.23**
42	**West Virginia**	**$35,748**	**$46,946**	**$0.76**	**$0.24**
43	**North Dakota**	**$41,718**	**$54,899**	**$0.76**	**$0.24**
44	**Indiana**	**$38,913**	**$51,322**	**$0.76**	**$0.24**
45	Idaho	$36,761	$48,861	$0.75	$0.25
46	**South Dakota**	**$37,765**	**$50,196**	**$0.75**	**$0.25**
47	Alabama	$37,161	$50,018	$0.74	$0.26
48	**Oklahoma**	**$36,494**	**$49,721**	**$0.73**	**$0.27**
49	**Louisiana**	**$37,075**	**$51,733**	**$0.72**	**$0.28**
50	**Utah**	**$39,784**	**$57,117**	**$0.70**	**$0.30**
51	Wyoming	$37,302	$57,339	$0.65	$0.35

*States in bold font have enacted RBA bans.

abortions based on sex) are in the top 25th percentile.[279] It is also noteworthy that in the American Community Survey's 2019 survey of state wage gaps, eight states that have enacted RBA bans and five that have sex-based bans are among the ten states with the highest wage gaps between men and women. These facts suggest an inverse correlation between states that have enacted RBA bans (and even sex-based abortion bans) and less equality in pay between men and women.

An exploration of equal-pay legislation tells a more complicated story, however. Only seven states—Mississippi, Iowa, North Carolina, South Carolina, Texas, Utah, and Wisconsin[280]—have not enacted such laws. Three of those seven states—Mississippi, North Carolina, and Utah—have enacted RBA bans and two (Mississippi and North Carolina) ban abortions based on sex. All of the seven states, except for Mississippi, have other anti-discrimination laws that generally prohibit compensation discrimination based on factors such as race, sex, pregnancy, religion, sexual orientation, etc.[281] Mississippi, a state with an RBA ban that includes sex-based abortions and uses 'eugenics' language, simply has no legislation prohibiting wage discrimination or enforcing equal pay. While legislators in Mississippi introduced six bills in 2021 to adopt equal pay legislation,[282] all of them died in various committees.

279 *Id.*

280 D.C. also does not have equal-pay legislation. However, as it is not yet a state, we did not include it in this sentence.

281 See, eg Iowa's Civil Rights Act, Iowa Code § 216.6A (prohibiting such discrimination by private employers); Texas Equal Pay Act, Tx. Govt. § 659.00 (applying such antidiscrimination laws to public employers, leaving private employers subject only to the federal Equal Pay Act if they engage in interstate commerce).

282 H.B. 1269, H.B. 1270, H.B. 1272, H.B. 1278, S.B. 2330, and S.B. 2101, 2021 Reg. Sess. (Miss. 2021).

Table 17. Equal Pay Law

RBA-Ban State	Sex-Ban States	Below 50th Percentile?	Below 25th Percentile?	Failed to Enact Equal Pay Legislation?
Arizona	X			
Arkansas	X	Yes*		
Indiana	X	Yes*	Yes*	
Kansas	X	Yes*		
Kentucky	X	Yes*		
Louisiana		Yes	Yes	
Mississippi	X	Yes*	Yes*	Yes*
Missouri	X			
N. Carolina	X			Yes*
North Dakota	X	Yes*	Yes*	
Ohio		Yes		
Oklahoma	X	Yes*	Yes*	
Pennsylvania	X	Yes*		
South Dakota	X	Yes*	Yes*	
Tennessee	X			
Utah		Yes	Yes	Yes
West Virginia		Yes	Yes	
Total	**17/13**	**13/9***	**8/5***	**3/2***
Percent of RBA States	**76.5%**	**76.5%**	**47.1%**	**17.6%**
Percent Sex Ban States with Law (#/13)	—	**69.2%**	**38.5%**	**15.4%**
Total with Relevant Measure	—	**25**	**13**	**7**
Percent RBA States out of States with Law	—	**52.0%**	**61.5%**	**42.9%**

*States with sex-ban.

There have been no recent attempts to establish or expand equal pay legislation in Alabama, Connecticut, Delaware, Georgia, Idaho, Kansas, Kentucky, New Jersey, New Mexico, South Dakota, or Texas. However, all other states have made attempts to amend their laws in various ways—including by expanding penalties,[283] strengthening reporting requirements,[284] and preventing inquiries into employees' or prospective

283 A.B. 212, 2017–18 Leg. (Wis. 2017), https://docs.legis.wisconsin.gov/2017/related/proposals/ab212.pdf (last accessed Mar. 3, 2022).

284 S.B. 973, 2019–20 Leg., Reg. Sess. (Cal. 2020), https://legiscan.com/CA/drafts/SB973/2019 (last accessed Mar. 3, 2022).

employees' wage histories.[285] Thus, it is hard to discern much of a clear pattern with respect to legislation regarding equal pay and RBA-ban states.

VI. CONCLUSION

This piece challenges the allegedly anti-eugenic promise of RBA bans by examining whether states with RBA bans are (or are not) anti-eugenic outside the context of abortion. As the data in Part V show, the evidence across many areas related to narrow and broad understandings of eugenics demonstrates that states with RBA bans do not tend to implement other kinds of anti-eugenic measures. The starkest, and expected, exception exists with respect to laws closely linked to efforts to prevent reason-based abortions—prenatal information laws and bans on wrongful birth and life claims.

One might argue that my findings are not surprising. After all, we should expect states that have taken a conservative stance on abortion, including through the enactment of RBA bans, to be less concerned about inequities in other areas. Even if the findings are not ultimately surprising, my goals are multifold in this project.

First, as I emphasize in Part III, I aim to show that RBA bans are ineffective with respect to the very eugenics concerns used to defend them. By exploring eugenics concerns in the terms offered to justify RBA bans, one sees how empty those stated concerns are when RBA-ban states largely fail to address them across several areas unrelated to abortion.[286] For example, if states are concerned that abortions are eugenic because they occur at a disproportionate rate for people of color, then states should also implement remedies that will counter racially disparate infant mortality rates or that place disparate burdens on reproduction for minorities, low-income individuals, and the LGBTQ+ community. Similarly, if states enact RBA bans because of concerns about the ways in which sex-selective abortions are potentially discriminatory, then they should implement policies to reduce pay gaps between men and women. Finally, if states ban abortions based on genetic anomalies because of concerns about the high rates of abortions due to a diagnosis of Down syndrome or disabilities, then they should institute policies that make it easier to have children generally, and especially to have children with a disability. RBA bans do not achieve those goals; instead, they burden those who can least manage to provide care for children with disabilities.

In showing how little these states do to address the putative concerns that motivate their 'anti-eugenic' RBA bans, my hope is to point out the hypocrisy regarding concerns about discrimination and inequality and to unveil the true purpose of such laws. That these states lack other anti-eugenic measures under both narrow and broad understandings of the term, despite alleged concerns about eugenics, belies the articulated motivation for these bans. As Professor Murray argues, these laws seem to be part of what has ultimately been a successful strategy to 'erace' *Roe*.[287]

I also strive to reach a broader audience, given that Thomas's view of eugenics is beginning to seep into mainstream culture. A 2021 Marist poll sponsored and funded

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285 H.B. 123 (MD), 2020 Reg. Sess. and SB 217, 2020 Reg. Sess. (Md. 2020), http://mgaleg.maryland.gov/2020RS/bills/hb/hb0123T.pdf (last accessed Mar. 3, 2022). S.P.422, 128th Maine Leg., Reg. Sess. (Me. 2017), https://legislature.maine.gov/legis/bills/getPDF.asp?paper=SP0422&item=1&snum=128 (last accessed Mar. 3, 2022).

286 *Cf.* Reva Siegel, *Why Restrict Abortion? Expanding the Frame on* June Medical, 2020 Sup. Ct. Rev. (2021).

287 Murray, *supra* note 12.

in partnership with the Knights of Columbus, for example, found that 70 per cent of those surveyed and 56 per cent of those who identify as pro-choice oppose or strongly oppose terminating a pregnancy because the fetus has been diagnosed with Down syndrome.[288] Similarly, a 2018 Gallup Poll found that 49 per cent of those surveyed thought that abortion should be legal in the first trimester when the child would be born with Down syndrome, while only 29 per cent thought it should be legal in the second trimester.[289] This suggests that a majority, 51 and 71 per cent, respectively, would support making abortion based on Down syndrome illegal in the first and second trimester, presumably because of concerns about eugenics, even though majorities in those polls identify as pro-choice or support abortion generally, especially in the first trimester.[290] Similarly, when I describe this project to people who tend to be supportive of reproductive rights, they often pause and wonder whether there isn't something to Thomas's eugenics worries. After I lay out the arguments in Part III as to why such bans are not ultimately anti-eugenic, they often view the problem differently. This anecdotal experience reveals the power of labeling something as eugenic and why it is such an effective strategy to limit reproductive rights. After all, concerns about eugenics cross ideologies and are not only held by the anti-choice movement. Defending these laws as antidotes to eugenics, therefore, runs the risk of leading to more RBA bans, even in states that are generally more moderate on the question of abortion.

Finally, my goal is to show that RBA bans are not anti-eugenic; they simply distract and change the subject. Moreover, these bans and the related goal of eliminating abortion altogether harm the groups they aim to help: Women, minorities, and people with disabilities who suffer when pregnant people are forced to bear children for whom they do not have the ability to care. In restricting choice during pregnancy, these 'anti-eugenic' measures actually have a great deal in common with the very eugenics laws Thomas critiques and uses to defend RBA bans.[291] Although he rails about the eugenics era and the disparate impact of abortions, his critique of the movement and his support for RBA bans provides no indication as to how the law or Constitution can protect people against the horrors of state-inflicted, involuntary sterilization. Indeed, in focusing on abortion and contraception as central to eugenics, his *Box* concurrence overlooks state-sterilization programs that were primarily directed at poor women of color in the second half of the 20th century.[292] Ultimately, he seems much more concerned about abortion than sterilization.

Today, however, those with the least power in society are even more vulnerable to state-mandated sterilization. The very decision that allows RBA (and all abortion) bans to stand—*Dobbs v Jackson Women's Health Organization*—has undercut constitutional protections against such eugenic laws. While *Buck v Bell* was never overturned, *Roe* had offered an understanding of constitutional law that recognized fundamental privacy

288 *American's Opinions on Abortion*, Jan. 2021, https://www.kofc.org/en/resources/news-room/polls/kofc-americans-opinions-on-abortion012021.pdf (last accessed Aug. 31, 2022).

289 Lydia Saad, *Trimesters Still Key to U.S. Abortion Views*, Gallup, June 13, 2018, https://news.gallup.com/poll/235469/trimesters-key-abortion-views.aspx (last accessed Aug. 31, 2022).

290 See *id* (60% think that abortion should 'generally be legal' in the first trimester); *American's Opinions, supra* note 288 (finding 53% identify as pro-choice).

291 Rosenberg, *supra* note 72.

292 See *supra* text accompanying notes 90–92.

interests over intimate matters like reproduction. As the *Dobbs* dissent noted, 'the Court's precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven—all part of the fabric of our constitutional law, and because that is so, of our lives'.[293] Were *Roe* still good law, its logic would provide strong support today for finding unconstitutional the laws that led to Carrie Buck's sterilization or that of poor Black women.

Instead, the majority opinion and Thomas's concurrence in *Dobbs* make abundantly clear that the substantive-due-process analysis of *Roe* is a thing of the past. Under *Dobbs*, there is no right to abortion because it is not mentioned in the Constitution, and because it allegedly was not a recognized right when the Fourteenth Amendment was ratified and therefore not part of our Nation's history and traditions. By that same logic, as the *Dobbs* dissent points out, there is no constitutional right to avoid involuntary sterilization—such an interest is not mentioned in the Constitution and the law did not recognize the right 'not to be sterilized without consent' at the time of the Fourteenth Amendment's ratification.[294] While the *Dobbs* majority claims to limit its reasoning only to abortion,[295] Thomas states in no uncertain terms that he condemns substantive due process in all areas.[296] Nothing in his opinion exempts constitutional protections against state-imposed sterilization.

Thus, today, RBA bans can stand, but the very eugenics world Thomas condemns has become a greater legal possibility for people with disabilities, for minorities, for low-income individuals, for the LGBTQ+ community (where the Texas GOP's platform recently called gay people 'abnormal' and rejected the identity of trans persons[297])—ie for the very people who suffered most during the eugenics era. Indeed, the *Dobbs* analysis potentially legitimizes the state-sterilization programs that were directed at women of color in the second half of the 20th century.[298] The only difference between the allegedly anti-eugenic RBA bans and the eugenics sterilization laws of the 20th century is that the former involves state control to force reproduction, whereas the latter involved state control to prevent reproduction. They are really two sides of the same coin, and *Dobbs* likely permits both. In short, the 'anti-eugenics' project of RBA bans has helped make eugenics more possible today than ever.

293 *Dobbs*, 142 S.Ct. at 2328 (Breyer, J., Sotomayor, J., Kagan, J., dissent).

294 *Id.* at 2242–43. See Meena Venkataramanan, *She Survived a Forced Sterilization: Activists Fear More Could Occur Post-*Roe, Wash. Post, July 24, 2022 (noting that 'some lawyers and activists worry that the use of forced sterilization could be expanded after the *Dobbs* decision').

295 142 S.Ct. at 2332 (Breyer, J., Sotomayor, J., Kagan, J., dissent).

296 *Id.* at 2300 (Thomas, J. concurrence).

297 Matt Lavietes, *Texas GOP's New Platform Calls Gay People 'Abnormal' and Rejects Trans Identities*, NBC News, June 21, 2022, https://www.nbcnews.com/nbc-out/out-politics-and-policy/texas-gops-new-platform-calls-gay-people-abnormal-rejects-trans-identi-rcna34530 (last accessed Aug. 31 ,2022).

298 See *supra* text accompanying notes 90–92.