BUCK AS (ANTI)CANON: THE MISUSE OF EUGENICS RHETORIC IN SELECTIVE-ABORTION JURISPRUDENCE AND THE DANGERS FOR TORT LAW

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America's notorious eugenics case Buck v. Bell *is being resurrected as anticanon in abortion jurisprudence.* Buck *became one of the Court's worst decisions by upholding eugenic practices, but these recent anticanonical citations also prove harmful by misidentifying eugenics. This Article joins critics of this misuse of "eugenics" labeling and warns that the rhetorical use of* Buck *in abortion cases has dangerous implications for reproductive medicine. It draws on* Buck *as the leading precedent for eugenics under the law and demonstrates that selective-abortion cases are distinguishable because of two failures of the Buck Court: the failure to recognize state interference with reproductive choices and a failure to engage with the underlying science. When judges misidentify eugenics today, they do so by recreating these same mistakes in their decisions. If these mistakes are ignored, the only remaining meaning of eugenics will be that some element of selection occurs after fertilization but before birth.*

Defining eugenics as selection goes too far and implicates a host of other factual settings well-engrained in society and reproductive medicine. These medical procedures are already being met with mixed reception in tort law—despite having secured reception in medicine and society—and a eugenics label would feed courts' rejection of these claims. Moreover, the reasoning underlying those courts' rejection reflects the same two failures underlying Buck *and the misapplication of the eugenics label in selective-abortion cases. Therefore, a better*

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analysis of these two factors in each context, selective-abortions and torts, can lead to better resolutions in both cases.

This Article does not purport to take a normative stance on abortion, but it instead aims to relocate the debate surrounding selective abortions away from eugenics and into conversation with medical negligence through the courts' own inclination to draw on Buck v. Bell. *It concludes by looking to* Dobbs *and the opportunity that decision provides for judges to either reevaluate the rhetoric employed in reproduction law or continue the mistakes of the past.*

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INTRODUCTION

When judges invoke *Buck v. Bell*,[1] they know the weight of their words. The notorious case upheld a eugenics law calling for the plaintiff's forced sterilization, and it endorsed an era of eugenic practices in the United States. Today, judges cite *Buck* as they do other cases in the anticanon. Like the names of *Dred Scott*[2] and *Korematsu*,[3] *Buck* etches into the page the sins of America's past, a warning for our future, and a plea to recognize potential dangers in the path ahead. It is a stark message that the opposition is being reckless with American morality and an appeal to the readers' better angels. Yet, recent invocations of *Buck* in selective-abortion[4] jurisprudence have muddled its history. While these invocations aim to warn us against repeating our past transgressions, they have made some of the same mistakes as the *Buck* court, turning the notorious story of taking away a woman's reproductive choices in 1927 into an argument for taking away individuals' reproductive choices in the twenty-first century. The recent decision in *Dobbs v. Jackson Women's Health Organization*[5] presents courts with an opportunity to correct their reasoning in a new era of abortion and reproduction jurisprudence.

Justice Thomas recently referenced the infamous eugenics case in his 2019 concurrence to *Box v. Planned Parenthood of Indiana & Kentucky*,[6] which lower courts would soon follow.[7] In *Box*, the Court denied certiorari on a selective-abortion ban.[8] Thomas concurred to expound on why states should ban race-, sex-, and disability-selective abortions.[9] He likened these selective abortions to eugenic practices, analyzing the issue through his account of the history of eugenics in

1. 274 U.S. 200 (1927).
2. Dred Scott v. Sandford, 60 U.S. 393 (1856).
3. Korematsu v. United States, 323 U.S. 214 (1944).
4. Scholarship refers to sex-, race-, and disability-based abortions as both "selective-abortions" and "reason-based abortions." This Article uses the term selective abortion to reflect the overlap among selective abortions, genetic selection, and gamete donor selection. *See* discussion *infra* Sections II.C, II.D, & III.B.
5. 142 S. Ct. 2228 (2022).
6. 139 S. Ct. 1780 (2019) (per curiam).
7. *See infra* note 17.
8. *Box*, 139 S. Ct. at 1782.
9. *Id.* at 1792 (Thomas, J., concurring).

America—a historical account scholars have almost universally disavowed.[10]

This Article joins that criticism but through a new lens: it warns that the rhetorical use of *Buck v. Bell* in abortion cases has dangerous implications for reproductive medicine in other areas of law. The critique is based on two misunderstandings of the late-nineteenth- and twentieth-century eugenics movement, which, when correctly understood, distinguish *Buck* from selective-abortion cases. First, Thomas's concurrence and similar opinions fail to recognize the importance of personal choice and control over one's own reproduction. While this argument recently failed to sway the Court in *Dobbs* as related to abortion generally, it remains a distinguishing feature in understanding *eugenics*, distinct from abortion. Eugenic ideologies were empowered by state intervention that stripped individuals of their ability and right to reproduce; indeed, this was *Buck*'s grim legacy for the Supreme Court—giving eugenics the force of law.

Second, eugenics distorted the science of heritability[11] to accommodate social values for the perceived improvement of the species. Judges citing "eugenics" today, however, miss modern reproductive medicine's focus on a deeper understanding of genetics and its ability to empower individuals' reproductive choices about their children.[12] Furthermore, the way in which these judges discuss the

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10. *See infra* Part I (discussing Thomas's concurrence and the scholarly reaction); *see, e.g.*, Sonia M. Suter, *Why Reason-based Abortion Bans Are Not a Remedy Against Eugenics: An Empirical Study*, 10 J.L. & BIOSCIENCES 1, 3 (2023), https://doi.org/10.1093/jlb/lsac033 [https://perma.cc/XG4M-XXJE] [hereinafter Suter, *Reason-based Abortion Bans*] (describing Thomas's concurrence as "[r]elying on a decidedly biased and incomplete account of eugenics"); Mary Ziegler, *Bad Effects: The Misuses of History in* Box v. Planned Parenthood, CORNELL L. REV. ONLINE 196–200 (2020). This is not to say that his position does not have support, but that even supporters have recognized inaccuracies in his description of eugenics. *Cf.* Joanna L. Grossman & Lawrence M. Friedman, *Junk Science, Junk Law: Eugenics and the Struggle over Abortion Rights*, JUSTICIA (June 25, 2019), https://verdict.justia.com/2019/06/25/junk-science-junk-law-eugenics-and-the-struggle-over-abortion-rights [https://perma.cc/KX4E-VSUS] ("Justice Thomas's warped reading of history is not useful or should not be useful to those who oppose abortion rights. It is curiously twisted.").

11. Heritability refers to the relationship between genetic traits passed down from parent to offspring and the variation of observable phenotypic traits.

12. Borrowing from bioethical literature, this difference can be generally understood as the difference between eugenics and (the misleadingly titled) "liberal

nature of the selection occurring in reproductive medicine indicates a misunderstanding of science similar to that of the *Buck* court.

These distinctions do not make the selective abortions at issue in *Box* uncontroversial, but they do meaningfully change the points and scale of controversy. These cases denounce eugenics and assert a state interest in eliminating eugenic behavior. The policy values underlying those interests can extend—and have already extended—to other reproduction-based legal claims. Invoking eugenics as a rhetorical tool to limit abortions therefore also invites limitations on other reproductive practices, even those far less controversial than abortion. These practices have been litigated in tort law as negligence cases[13] involving a wider array of reproductive actions that include but extend

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eugenics." *See generally* NICHOLAS AGAR, LIBERAL EUGENICS: IN DEFENCE OF HUMAN ENHANCEMENT (2004) (coining the term "liberal eugenics" and arguing in favor of parental choices in human enhancement with a limited role for the liberal state in banning genetic choices harmful to the child's well-being); *see also* MICHAEL BESS, MAKE WAY FOR THE SUPERHUMANS 60 (2016); SIDDHARTHA MUKHERJEE, THE GENE 272–73 (2016) (detailing the creation of "newgenics" or "neogenics" as a "benevolent avatar" of more traditional eugenics theory); Samantha C. Smith, *Editing in Superpowers: How Approaches to Medicine, Eugenic Policies, and Global Power Dynamics Will Determine Whether the U.S. or China Acts on Genetic Bioenhancement* 1, 4–7 (working paper, 2021) (providing an overview of bioenhancement history and its relationship to liberal eugenics or "newgenics"). This Article does not adopt the "liberal eugenics" terminology, as it is used to refer to not only the current practices described here but also future genetic enhancements, which is beyond the scope of what courts currently face. *See generally* discussion *infra* Section II.C (detailing the uncertainty about and attempts of using genetic enhancement technology to modify a fetus's traits in utero).

13. A precise title for these cases might be "negligent provision of reproductive services," which is akin to Dov Fox's frequent use of the term "professional negligence." DOV FOX, BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW (2019) [hereinafter FOX, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY]; *see* discussion *infra* Section III.A (discussing his work). Fox's suggested tort reform and naming convention for the subcategories of procreation imposed, procreation deprived, and procreation confounded of these torts well capture the needed change, but I do not adopt his use of "procreation" for the overarching category of tort claims. His subcategorizes are intended to describe the different injuries sustained in different circumstances; my categorization is aimed at identifying the collection of the claims in a more neutral form than the current titles. Mark Strasser categorizes them as "birth-related" torts and also recognizes that some jurisdictions discuss them with the same language as medical malpractice. *See* Mark Strasser, *Yes, Virginia, There Can Be Wrongful Life: On Consistency, Public Policy, and the Birth-Related Torts*, 4 GEO. J. GENDER & L. 821, 821, nn.1–2 (2003). It is worth evaluating whether a new term should be introduced in the literature to put the onus on the negligent provider and cut against the insinuation that mothers or parents are somehow responsible or do not want a child, as is implied by the "wrongful" tort claims.

beyond selective abortions. These cases encompass a similarly variable set of interrelated, controversial negligence claims, including wrongful birth, wrongful life, wrongful sterilization, wrongful pregnancy, and wrongful conception. These claims typically take the form that, but for the actor's negligence, the plaintiff would not have had a child, been born, been sterilized, become pregnant, or conceived.[14]

When the policy of "reducing eugenic behavior," as described in selective-abortion cases, is extended to these tort actions, it risks identifying the underlying accepted practices of reproductive medicine as eugenics and effectively eliminating them. For courts that reject these tort claims categorically, their reasoning generally suffers the same misunderstandings of reproductive medicine as other courts' misapplication of eugenics in selective-abortion cases. Thus, by correctly identifying eugenic practices in selective-abortion cases, courts can both avoid a potential future of adopting this eugenics rhetoric in tort law and recognize flaws in how reproductive medicine is analyzed under both areas of law.

This Article ultimately suggests that, rather than identifying reproductive medicine's practices as eugenic and deepening moral stigma on these legal issues, politically polarized judges might find common ground through a more accurate understanding of *Buck*'s application to these modern cases. This Article does not purport to take a normative stance on abortion but instead aims to relocate the debate surrounding selective abortions away from eugenics and into conversation with reproduction-based negligence cases through the courts' own inclination to draw on *Buck v. Bell*.

The *Dobbs v. Jackson Women's Health Organization* decision provides an opening for courts to acknowledge the dangerous rhetoric that has infected abortion jurisprudence and to see eugenics labeling as a way to ban legalized abortion during the *Roe* era. The eugenics language does not adequately grapple with similarities and differences of the eugenics era of the past, showing either that the rhetoric is using horrors of the past as a political, rhetorical tool or does not respect its depth to grapple with it head-on. This Article does not try to say or analyze why that rhetoric is used but warns against its use. Rather than continuing these mistakes, courts can now use the post-*Roe* environment and *Dobbs*' focus on fitting abortion into the standard

14. *See infra* notes 126–28 (identifying these negligence claims).

three tiers of scrutiny[15] as an opportunity to reevaluate the merits of previous litigation strategies and avoid adopting their downfalls in the new *Dobbs* era.

Part I begins by explaining Justice Thomas's invocation of *Buck* in his *Box* concurrence and reviewing the scholarly critique of his opinion. Part II will detail how eugenics should be understood as a legal policy in light of *Buck* and will distinguish eugenics from the reproductive actions to which it is currently being applied. Part III will evaluate how the courts' misidentification of eugenics would apply in reproduction-based negligence cases. It will suggest that the misapplication of the eugenics label is harmful to practices in modern reproductive medicine that are secured by bipartisan and cross-cultural support. Part IV will consider where this leaves the law for both advocates and critics of abortion in the *Dobbs* era, suggesting that limiting eugenics rhetoric can beneficially create common ground in the controversial field of reproduction law. The Article concludes with a reminder that "eugenics" has rhetorical value because the social movement caused real harm to real people, and lawyers invoking historical atrocities should engage in a careful analysis of whether the use reduces or instead perpetuates those historic harms.

I. CRITIQUING THE MODERN INVOCATION OF *BUCK V. BELL*

When citing to *Buck v. Bell*, courts are not focused on analyzing the case but on identifying a current practice as eugenic. *Buck* is cited to indicate the Supreme Court's previous role in upholding the American eugenics movement and the horrific consequences attributable to that ruling. In doing so, the invoking judge offers to rectify the profession's past failings, correct course, and expose current practices that are or could become eugenic—an undeniable goal that morally stigmatizes opposing voices. Recent citations to *Buck* thus apply the case like anticanon, utilizing the rhetorical value and stigma of "eugenics." This Part will review Justice Thomas's *Box* concurrence in light of *Buck*, eugenics, and eugenics' path through American history. This analysis will draw out two distinguishing factors of eugenic practices in *Buck* (namely, the relationship to state actors and scientific discovery) that Thomas and other judges citing the notorious case have overlooked when ascribing a eugenics label to modern contexts.

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15. *Dobbs* eliminated *Casey*'s "undue burden" standard and put abortion under rational basis review. 142 S. Ct. 2228, 2284 (2022).

A. Introducing Buck as Anticanon with Justice Thomas's Concurrence in Box v. Planned Parenthood of Indiana & Kentucky

Box revolved around challenges to two provisions of an Indiana law: one that determined the method of disposing of fetal remains and a second that barred providing abortions when the abortion was based on sex, race, or disability.[16] In a per curiam opinion,[17] the Court granted a writ of certiorari and issued an opinion on the first provision,[18] but it denied certiorari on the second because, at the time,[19] the Seventh Circuit was the only circuit to have addressed the issue.[20]

Justice Thomas concurred in the judgment but wrote separately on the second issue. Filling twenty pages, he acknowledged that the selective-abortion ban was rightfully not before the court, but he noted that "[g]iven the potential for abortion to become a tool of eugenic manipulation, the Court will soon need to confront the constitutionality of laws like Indiana's."[21] The concurrence discussed how abortion (and birth control) has always been and continues to be a tool of

16. 139 S. Ct. 1780, 1781 (2019) (per curiam).

17. Justice Sotomayor would have denied the petition for both questions. *Id.* at 1782. Justice Thomas concurred, as discussed in this Article. *Id.* Justice Ginsburg, like Sotomayor, wrote separately to dissent from the first issue but concurred with the disposition of the second provision discussed here. *Id.* at 1793.

18. *Id.* at 1782 (holding that the regulation of aborted fetal remains is rationally related to the state's legitimate interest in the proper disposal of the remains).

19. The issue has since been heard in two other circuit courts, but both decisions were before *Dobbs*. *See* Preterm-Cleveland v. McCloud, 994 F.3d 512, 535 (6th Cir. 2021) (upholding an Ohio abortion ban for abortions on the basis of a Down Syndrome diagnosis); Reprod. Health Servs. of Planned Parenthood v. Parson, 1 F.4th 552, 570 (8th Cir. 2021) (affirming an injunction on a Missouri ban on abortions on the basis of Down Syndrome); Isaacson v. Brnovich, Nos. 21-16645, 21-16711, 2021 U.S. App. LEXIS 35096, at *4 (9th Cir. Nov. 26, 2021) (asking the court to lift a stay on an Arizona ban on abortions for genetic abnormalities while on appeal).

The *Isaacson* case was remanded in light of *Dobbs*, and a preliminary injunction was granted due to the uncertainty of the post-*Dobbs* landscape. 610 F. Supp. 3d 1243, 1248, 1257 (D. Ariz. 2022). This case dealt with the Arizona "Interpretation Policy" which has been viewed as a form of fetal personhood legislation. *See* STATES' ABORTION LAWS: POTENTIAL IMPLICATIONS FOR REPRODUCTIVE MEDICINE, ASRM CTR. FOR POL'Y & LEADERSHIP 4 (2022) (citing A.R.S. § 1-219); *Isaacson*, 610 F. Supp. 3d at 1243; Memphis Ctr. for Reprod. Health v. Slatery, 14 F.4th 409 (6th Cir. 2021), *vacated and remanded* in light of *Dobbs*, Memphis Ctr. for Reprod. Health v. Slatery, No. 20-5969, 2022 U.S. App. LEXIS 17882, at *4 (6th Cir. Jun. 28, 2022).

20. *Box v. Planned Parenthood of Ind. & Ky.*, 139 S. Ct. at 1782.

21. *Id.* at 1784 (Thomas, J., concurring).

eugenicists;[22] how other countries are experiencing the eugenic results of selective abortions;[23] and how, having created the right to abortion, the Court has a responsibility to limit its scope.[24]

Thomas began with his history of eugenics. He rightfully criticized *Buck* and the way in which the Supreme Court "threw its prestige behind the eugenics movement," before providing a history in which, "[f]rom the beginning, birth control and abortion were promoted as means of effectuating eugenics."[25]

Buck, however, was not a case about contraceptives and abortion, but about forced sterilization. On May 2, 1927, the Supreme Court of the United States decided the state of Virginia could forcibly sterilize Carrie Buck because, in the infamous words of Justice Oliver Wendell Holmes, "Three generations of imbeciles are enough."[26] Buck had been born out of wedlock to a mother who was a prostitute and, supposedly, cognitively disabled.[27] As a teenager, Buck was raped allegedly by her foster mother's nephew, was institutionalized to cover up the resulting pregnancy, and gave birth to a daughter of her own.[28] Having also given birth out of wedlock, Buck was alleged to be just like her mother: "feeble minded."[29] Despite being only months old, her

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22. *Id.* at 1787.

23. *Id.* at 1790–91.

24. *Id.* at 1793. Justice Thomas joined the majority in *Dobbs*, finding no constitutional right to an abortion. He penned an additional concurrence saying that there are no substantive due process rights. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2300 (2022) (Thomas, J., concurring).

25. *Box*, 139 S. Ct. at 1786–87 (Thomas J., concurring). Despite expressing concerns about birth control, Thomas focuses on abortion. He states that Sanger correctly "recogniz[ed] a moral difference between birth control and abortion" and "the eugenic arguments that she made in support of birth control apply with even greater force to abortion." *Id.* at 1788–89; *see infra* Part III (discussing generally accepted forms of reproductive medicine).

26. Buck v. Bell, 274 U.S. 200, 207 (1927). The Court's decision was an eight-justice majority. Justice Butler did not pen his dissent, but Justice Holmes and others have attributed it to his Catholic faith. *E.g.*, Edward J. Larson, *Putting* Buck v. Bell *in Scientific and Historical Context: A Response to Victoria Nourse*, 39 PEPP. L. REV. 119, 125 (2011); Corinna Barrett Lain, *Three Supreme Court "Failures" and A Story of Supreme Court Success*, 69 VAND. L. REV. 1019, 1044 (2016). Section III.C discusses the Catholic Church's views on current reproductive practices and how it should factor into the courts' decisions.

27. *See generally* PAUL LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* (2010) [hereinafter LOMBARDO, THREE GENERATIONS] (providing the authoritative account of the history behind *Buck v. Bell*).

28. *See generally id.*

29. *Buck*, 274 U.S. at 206–07.

daughter was determined to be the same, like her mother and grandmother before her.[30] Legitimizing the eugenics movement, the Court held that because the state was responsible for promoting "the welfare of society" and protecting society from "being swamped with incompetence," it could forcibly sterilize Carrie Buck and avoid the burden on society.[31] *Buck* succeeded as the eugenicists' test case, and over thirty states ended up with sterilization laws on their books based on the model law Virginia had adopted.[32] As a result, tens of thousands of Americans were forcibly sterilized.[33]

When the Court heard *Buck*, the eugenics wave had swept the country as a full-fledged social movement. The Supreme Court Justices who decided *Buck* were among those societal elites most influenced by these "progressive" ideas,[34] but they were not alone, with commonly

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30. *Id.* at 205. Her daughter later died at the age of eight after receiving high marks in school, discrediting any argument that she had a mental illness. LOMBARDO, THREE GENERATIONS, *supra* note 27, at 216. In addition to the tragedy of Carrie Buck's rape and resulting institutionalization, neither Carrie nor her daughter demonstrated mental illness. Additionally, Buck's appointed counsel, Irving Whitehead, was a founding member of the Virginia State Colony for Epileptics and Feebleminded, where Buck was institutionalized and a leading supporter of Albert Priddy, the superintendent of the Colony who led the sterilization movement there and was responsible for the passage of the state's sterilization law at issue in the case. When Priddy died before trial, he was replaced by Bell, who took on the representation despite having been a childhood friend to Whitehead and a writer of Virginia's sterilization law. During the trial, Whitehead did not offer a rebuttal or call opposing expert witnesses. *See also* Alessandra Suuberg, Buck v. Bell, *American Eugenics, and the Bad Man Test: Putting Limits on Newgenics in the 21st Century*, 38 L. & INEQ. 115, 120–22 (2020) (giving a background on the collusion between Whitehead, Bell, and Priddy). *See generally* LOMBARDO, THREE GENERATIONS, *supra* note 27 (discussing the history of *Buck* and the circumstances surrounding Carrie Buck's sterilization).

31. *Buck*, 274 U.S. at 205–07.

32. FOX, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 13.

33. *See id.* at 14 (citing at least 60,000 cases of sterilization since *Buck*); MUKHERJEE, *supra* note 12, at 80–81 ("What [Dr. Albert] Priddy needed was a blanket legal order that would authorize him to sterilize a woman on explicitly eugenic grounds; one such test case would set the standard for a thousand.").

34. Though inaccurate, the Justices had reason to believe the science was legitimate because of academic support for eugenics and the rise of genetics as a course of study at the time. Larson, *supra* note 26, at 122–25; Paul A. Lombardo, *The Power of Heredity and the Relevance of Eugenic History*, 20 GENETICS IN MED. 1305, 1307–08 (2018) [hereinafter Lombardo, *The Power of Heredity*] (giving context to the widespread academia of eugenics, starting with physicists and becoming engrained in most lobbying practices). Nevertheless, *Buck* does not provide any evidence of serious consideration of the science and its support, as discussed *infra* Part II.

cited supporters including the likes of inventor Alexander Graham Bell; activist Helen Keller (who favored eugenic remedies for severe disabilities); scientists and academics; political leaders including Presidents Theodore Roosevelt, William Howard Taft, Woodrow Wilson, and Calvin Coolidge; and Planned Parenthood founder Margaret Sanger.[35] To transition from *Buck* and draw the connection between abortion and eugenics, Thomas described Sanger's relationship to eugenics and suggested that, because she was a known eugenicist, her provision of abortions to communities of color was, therefore, a eugenic practice.[36]

He wrote, "abortion is an act rife with the potential for eugenic manipulation."[37] He described how that eugenic potential has already become a reality in regard to disability, citing a number of European countries and the United States.; to sex, primarily citing to China; and to race, based on racial disparities between Black and white women having abortions in the United States.[38] As such, he argued, "[e]nshrining a constitutional right to an abortion based solely on the race, sex, or disability of an unborn child . . . would constitutionalize the views of the 20th-century eugenics movement."[39] Thomas concluded by taking aim squarely at the right to an abortion itself,[40] an issue he finally won in *Dobbs v. Jackson Women's Health Organization*.[41]

His concurrence invited and has been followed by a circuit split.[42] Should this issue appear before the Supreme Court in the future, Thomas will not be the standalone Justice anymore, as now-Justice Barrett joined the similarly reasoned dissent in the lower court,[43] discussed further in Section II.C. Both of these decisions drew on *Buck*

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35. Larson, *supra* note 26, at 123.

36. Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1780, 1783–84 (2019) (Thomas, J., concurring).

37. *Id.* at 1787.

38. *Id.* at 1790–91.

39. *Id.* at 1792.

40. *Id.* at 1793 ("Although the Court declines to wade into these issues today, we cannot avoid them forever. Having created the constitutional right to an abortion, this Court is dutybound to address its scope. In that regard, it is easy to understand why the District Court and the Seventh Circuit looked to *Casey* to resolve a question it did not address. Where else could they turn? The Constitution itself is silent on abortion.").

41. 142 S. Ct. 2228 (2022).

42. *See supra* note 19 (providing background on the circuit split).

43. Planned Parenthood of Ind. & Ky. v. Comm'r of Ind. State Dep't of Health, 917 F.3d 532, 536 (7th Cir. 2018).

to correct the mistakes of the past but did so while misapplying the history of *Buck* and the American eugenics movement in favor of invoking the rhetorical value of eugenics and the anticanon.

Like the word "eugenics" itself, *Buck* is often cited to discredit arguments as moral failures—such as this citation in *Box*. In this way, it has become part of America's "anticanon," with such cases as *Dred Scott*,[44] *Lochner*,[45] *Plessy*,[46] and *Korematsu*:[47] a "narrower and less contested"[48] set of cases whose use, scholars suggest, is to provide "wrongly decided cases that help frame what the proper principles of constitutional interpretation should be,"[49] "examples of [the] judicial system gone wrong,"[50] and "anti-precedents."[51] Like these cases, *Buck* and its support for eugenics has been notorious for decades.

After World War II, America desired to distance itself from Nazi ideology, and eugenics lost popularity in the United States.[52] At the Nuremberg trials, Nazi officers raised *Buck* as a defense, citing Justice Holmes in support of the Nazi defendants accused of perpetuating the

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44. Dred Scott v. Sandford, 60 U.S. 393 (1857).

45. Plessy v. Ferguson, 163 U.S. 537 (1896).

46. Lochner v. New York, 198 U.S. 45 (1905).

47. Korematsu v. United States, 323 U.S. 214 (1944).

48. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 382 (2011).

49. *Id.* at 386–87 (quoting J.M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on "The Banjo Serenader" and "The Lying Crowd of Jews,"* 20 CARDOZO L. REV. 1513, 1553 (1999)).

50. *Id.* at 387 (quoting Gerard N. Magliocca, *Preemptive Opinions: The Secret History of* Worcester v. Georgia *and* Dred Scott, 63 U. PITT. L. REV. 487, 487 (2002)).

51. *Id.* (quoting Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1469 n.112 (2000)). Greene's article suggests that the anticanon should be defined by cases that are incompletely theorized; are wrongly decided with "irreconcilable disagreement, as to why," allowing it to be used "as a rhetorical trump" from different angles; "are, in some formalistic sense, correct" making them "susceptible to repetition by otherwise reasonable people"; and are symbolic of renounced ethical propositions. *Id.* at 384. At the time of Greene's writing and his identification of the set of cases that constituted the anticanon under his proposed definition, he did not consider *Buck* part of that set and quickly dismissed it. However, *Buck* shares many of the same traits relating to *Korematsu* in his article, and while, like other cases in the article, *Buck* may not be as firmly situated in the anticanon as, for example, *Dred Scott*, some scholars nevertheless identified it as such and have used it in comparable ways. *Id.* at 391–96, 462–63 n.554; *see also* FOX, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 13 (noting that *Buck* has been "banished" to the anticanon).

52. Larson, *supra* note 26, at 126; *see also* FOX, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 12–14.

eugenic atrocities of the Holocaust.[53] Faced with the reality that the Nazi defense was American hypocrisy, Americans distanced themselves from eugenics, and sterilization laws, like the one in *Buck*, were eventually repealed around the country.[54] Because these laws were repealed, *Buck* has never been overturned despite the universal condemnation of its eugenic ideologies that give it its anticanonical use. Nevertheless, *Buck* retains some good law value. It has long been cited—and even in *Roe v. Wade*[55] was cited beside *Jacobson v. Massachusetts*[56]—to support the proposition that individuals do not have a right to complete control over their bodies.[57] Though scholars may debate whether *Buck* resides squarely in the anticanon, it is used in a similar fashion when cited in discussions of allegedly eugenic behavior, as in *Box*.[58]

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53. *See* LOMBARDO, THREE GENERATIONS, *supra* note 27, at 239 (explaining that the defense of chief Nazi Medical officer Karl Brandt and other Nuremberg defendants cited *Buck* and Holmes).

54. Some state actions continue to be characterized as eugenic into the twenty-first century. FOX, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 14 (describing, for example, the sterilization of prisoners in the early 2000s).

55. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

56. 197 U.S. 11 (1905).

57. *Roe*, 410 U.S. at 154 ("In fact, it is not clear to us . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. Jacobson v. Massachusetts, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905) (vaccination); Buck v. Bell, 274 U.S. 200, 47 S. Ct. 584, 71 L.Ed. 1000 (1927) (sterilization). We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). *Buck* is based on the precedent *Jacobson* set.

58. *See* Derek Warden, *Ex Tenebris Lux:* Buck v. Bell *and the Americans with Disabilities Act*, 51 U. TOL. L. REV. 57, 57, 91 n.349 (2019) (noting that, though *Buck* is not commonly known—let alone part of the established anticanon like *Dred Scott*—"many people in the disability rights community look to *Buck* as the *Dred Scott* of disability rights cases"); text accompanying *supra* note 51 (describing the common characteristics of cases considered part of the anticanon).

B. Critical Reaction to Thomas's Concurrence

Thomas's concurrence was met with significant criticism by scholars and commentators.[59] Much of this critique focused on his distortion of history, though scholars debate whether his mistakes were made in error or "in the service of ideology."[60] These critiques can be categorized into two lines of approach: they criticize describing abortion as eugenic in nature, and they challenge Thomas's suggestion that abortions are eugenic in effect. While drawing on elements of both, this Article takes a third approach by distinguishing selective-abortion cases from *Buck* specifically.

First, most of the commentators have focused on how Thomas's misrepresentation of eugenics' history presents abortion as eugenic in nature.[61] His narrative intertwines the concurrent emergence of abortion and eugenics to delegitimize abortion as the eugenicist's tool. This retelling contradicts history. While they did emerge contemporaneously, abortions were not widely used by eugenicists, and many eugenicists opposed abortions and birth control.[62] They feared that upper-middle-class women would utilize these new technologies rather than reproduce for the perceived betterment of the species.[63] That is not to say forced abortions could not be used to the same effect as forced sterilization,[64] but, like sterilization, it is not

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59. *See, e.g.*, Eli Rosenberg, *Clarence Thomas Tried to Link Abortion to Eugenics. Seven Historians Told The Post He's Wrong.*, WASH. POST (May 30, 2019, 9:50 PM), https://www.washingtonpost.com/history/2019/05/31/clarence-thomas-tried-link-abortion-eugenics-seven-historians-told-post-hes-wrong [https://perma.cc/FL6T-VXE8] ("The Washington Post spoke to seven scholars of the eugenics movement; all of them said that Thomas's use of this history was deeply flawed."); Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2028 (2021) (criticizing Justice Thomas for relying upon a "selective and misleading invocation of the history of eugenics" to connect abortion with eugenics).

60. Rosenberg, *supra* note 59.

61. *See, e.g.*, *id.* ("Thomas's opinion seemed to mischaracterize the history of the eugenics movement . . . leading eugenicists and organizations of the day were largely opposed to abortion and birth control . . . .").

62. *See, e.g.*, *id.*

63. *E.g.*, *id.*

64. Indeed, forced abortions have occurred with eugenic goals throughout history. *See generally* Tessa Chelouche, *Doctors, Pregnancy, Childbirth and Abortion During the Third Reich*, 9 IMAJ 202 (2007) (discussing how forced abortions were used to further Nazi goals); *China Cuts Uighur Births with IUDs, Abortion, Sterilization*, ASSOCIATED PRESS (June 28, 2020, 12:04 AM), https://apnews.com/article/ap-top-news-international-news-weekend-reads-china-health-269b3de1af34e17c1941a514f78d764c

the procedure that is eugenic but the forced nature of the procedure and the intention behind it.

And that force was the force of state action. These commentators emphasize state action as the more significant historical factor in the American eugenics movement that Thomas overlooked and one that is present in *Buck* in particular.[65] They suggest that the eugenics movement stripped away reproductive agency from women in a way that parallels abortion regulation, and they argue that eugenics was advanced by the state's role in forcibly limiting reproductive choices, not through an individual's use of abortion.[66]

An overlapping group of commentators criticizes Thomas's view of the eugenic purpose of abortion, especially his discussion of race.[67] His protective stance of, in particular, Black women assumes eugenic motives in instances of personal choices, where these choices may be based on a variety of non-discriminatory factors.[68] These commentators spotlight his suggestion that the higher rate of abortions in Black and minority communities is a demonstration of eugenic purposes.[69] Because he does not elaborate further, readers must speculate on his meaning: he seems to suggest that eugenicists are deceiving these women into having abortions that they otherwise would not have or, as some scholars have considered, he could be perpetuating a narrative that Black women are complicit in supporting eugenic behaviors—implicitly accusing Black women of racial genocide and choosing abortions to harm their race.[70] These commentators point to the

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[https://perma.cc/23KT-Z9GA] (discussing how the Chinese government has subjected Uighur (an ethnic minority) women to forced abortions).

65. Rosenberg, *supra* note 59.

66. *See, e.g.*, *id.* (noting the views of several commentators that "state-mandated reproductive control" is the common thread linking eugenics and the anti-abortion movement).

67. *E.g.*, *id.*

68. *See, e.g.*, *id.* (explaining that, for many African American women, birth control was seen as "a 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" (quoting Ayah Nuriddin)); Murray, *supra* note 59, at 2089–91 (noting a variety of considerations driving a decision to receive an abortion, including economic factors, educational opportunities, and access to health or childcare).

69. *E.g.*, Murray, *supra* note 59, at 2097.

70. *See id.* at 2090 ("On his telling, Black women who consider—or obtain—an abortion are coconspirators with eugenicists (here, Margaret Sanger, a white woman)

interaction between eugenics and reproductive agency, acknowledging how abortion promotes the choice of whether or not to have children, while eugenics took away the option altogether—a distinction missing in Thomas's opinion.[71] Although eugenicists were not opposed to reproductive choices per se, they were concerned with which women made which choices.[72] They, therefore, were interested in controlling reproductive choices in some ways.

Second, scholars suggest that even if abortion is organized around a eugenic agenda, it is an ineffective tool, lacking eugenic effect.[73] Though the idea that a selective abortion prevents a specific "type" of person from being born theoretically aligns with the notion of eugenics, it is missing an essential element. Eugenics purported to redefine the species, purging the species of perceived weaknesses.[74] In a response to *Box*, Sital Kalantry reviewed whether the actions targeted by selective-abortion bans had eugenic motives and consequences for sex, race, and disability.[75] She found no evidence of eugenic effects in the United States and that social and cultural differences between the

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in orchestrating the Black community's destruction."); *Dorothy Roberts Argues that Justice Clarence Thomas's* Box v. Planned Parenthood *Concurrence Distorts History*, PENN. L. (June 6, 2019), https://www.law.upenn.edu/live/news/9138-dorothy-roberts-argues-that-justice-clarence [https://perma.cc/9ZJQ-28VC] (characterizing Thomas's rhetoric in the context of national anti-abortion campaigns, which described abortions as "racial genocide" and "demonize[d] black women for their reproductive decisions while diverting attention from the structural causes of racial disparities in abortion rates"); Michael Stokes Paulsen, *Abortion as an Instrument of Eugenics*, 134 HARV. L. REV. 415, 419 (2021) (defending Thomas's position but stating, "[w]hile abortion is not a eugenics conspiracy—a deliberate plot to reduce the size of the African American, female, or disabled populations—it remains an undeniable fact that the aborted are disproportionately racial minorities, female, and those with disabilities").

71. *See, e.g.*, Murray, *supra* note 59, at 2089 (explaining that Justice Thomas' concurrence in *Box* disregards "both the structural dynamics that shape Black people's reproductive choices and the prospect of abortion as an act of individual autonomy").

72. *See* Rosenberg, *supra* note 59 (citing the author's interview with Professor Emeritus Daniel Kevles and explaining that eugenicists feared birth control would depress birth rates among upper-middle-class white women).

73. *See, e.g.*, Sital Kalantry, Essay, *Do Reason-Based Abortion Bans Prevent Eugenics?*, CORNELL L. REV. ONLINE 1, 8–17 (2021) (explaining that there is a lack of data to support the claim that certain groups of people are being eliminated via selective abortion in the United States).

74. *See, e.g.*, MUKHERJEE, *supra* note 12, at 64 (discussing how Galton "would mimic the mechanism of natural selection" and "imagined accelerating the process of refining humans via human intervention").

75. Kalantry, *supra* note 73, at 6–8.

United States and other countries indicate that eugenic-like effects abroad are unlikely to occur here.[76]

In sum, these critiques, scholars, and commentators have argued that Thomas misunderstands eugenics, misattributing eugenic purposes and effects to abortion and selective abortions, in particular. These lines of criticism support that eugenics and *Buck* are being used for their rhetorical flare more than their factual accuracy. This Article joins these critics but without taking a normative stance on abortion. Instead, it looks to *Buck* as the cited anti-authority and evaluates its applicability to the presented reasoning. With *Buck* serving as a precedent for eugenic ideologies under the law, cases assigning the same eugenics label ought to be comparable scenarios, or courts should explain how the differences serve the same eugenic ends. In doing so, this Article identifies two fundamental aspects of eugenics—as it is presented in *Buck*—that Thomas fails to recognize in his concurrence. First, *Buck* focuses on the role of the state in executing eugenics through state actions that limit individuals' reproductive autonomy. Second, *Buck* takes the scientific legitimacy of eugenics for granted, failing to recognize that its ideology was successful in large part because it was seen as a science, while it was, in fact, a pseudoscience based on discriminatory biases and inaccurate medical knowledge. The eugenics presented in *Buck* directed state action against the reproductive freedom of certain members of one generation with the false impression that it could apply discriminatory views scientifically to create its idealized next generation.

While there may be other iterations of eugenic ideology, *Buck* is cited as the Supreme Court's precedential authority on eugenic behavior and is the authority *Box* and similarly reasoned cases claim to correct.[77] As eugenics is the purported state interest in these cases,[78] it is essential to understand whether the word "eugenics" is an accurate descriptor or if it is instead rhetorical flare. To do so, Part II will compare eugenics as presented in *Buck* to its presentation in *Box*, drawing out

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76. *See* Kalantry, *supra* note 73, at 13, 16–17 (attributing, for example, the high percentage of aborted fetuses diagnosed with down syndrome in Nordic countries to cultural and other differences, including the availability of and government support for pre-natal testing). Relatedly, Sonia M. Suter recently argued that selective-abortion bans do not remedy "the discrimination and disparities underlying eugenics." *See* Suter, *Reason-based Abortion Bans*, *supra* note 10, at 1.

77. Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1780, 1786–87 (2019) (Thomas, J., concurring).

78. *Id.* at 1783, 1786–87.

distinguishing factors and identifying the common definition that remains.

II. THE COURT'S MEANING OF "EUGENICS"

In arguing *Buck*, Bell explicitly asserted eugenic goals and used Virginia's police power to affect them.[79] These goals were singularly discriminatory, relying on stereotypes and misunderstood science. A closer look at *Buck* reveals that eugenics—at least as previously addressed by the Court[80]—does not align with uses like Thomas's in *Box*. This Part will evaluate how selective abortions' personal (as opposed to state) action and scientific bases define the nature of selective abortions as something distinct from the "eugenics" label that Thomas attributed to it. Further, if Thomas's use of "eugenics" remains, it makes the label effectively synonymous with the notion of selection, so that selection itself is malicious. The effects of this definition will be taken up in Part III.

A. State Action over Personal Choice

Many scholars focus on Thomas's failure to recognize the state action at play in eugenics in order to emphasize the similarities to state regulation of abortion.[81] The problem with ignoring state action does not rely on its relationship to abortion regulation, though. *Buck* is itself based on a state action rather than a private action.

In *Buck*, the Court addressed, in appalling language, the state's ability to limit an individual's autonomy over her own body. The Court there described how "the public welfare may call upon the best citizens for their lives," and so when someone has already relied heavily on state resources (such as when they have been institutionalized), the State can ask "for these lesser sacrifices . . . in order to prevent our being swamped with incompetence."[82] The opinion described how it "is better for all the world" for the State to require this "sacrifice" since it avoids "degenerate offspring" and prevents the "manifestly unfit from

79. *See generally* Suuberg, *supra* note 30, at 122.

80. This is not to say that other types of eugenics are permissible. However, if there are other types of harmful eugenics separate from those seen in *Buck*, they must be addressed more distinctly in the law.

81. *See supra* discussion Section I.B (discussing the failure to acknowledge the role of state action as a common scholarly critique of Thomas's *Box* concurrence).

82. Buck v. Bell, 274 U.S. 200, 207 (1927).

continuing their kind."[83] The opinion centered on allowing the State to exchange someone's agency in the name of promoting the public good.

In *Box*, Thomas acknowledged instances in which eugenics has been implemented through state action without addressing state action as a characteristic of these eugenic policies. He mentioned forced sterilization laws, immigration laws, and marriage prohibition laws,[84] but he failed to place significance on the obvious—these are all laws. By conflating those state actions with abortions and birth control, he overlooked the distinction between a state taking away an individual's choice and an individual enacting their own choice. So, while eugenics would legislate that a family tree be cut off, selective abortions would allow parents to choose how and if their tree continues to branch based on their family's circumstances.

The state's ability to *legally enforce* its trait selection after *Buck* gave eugenics momentum and power.[85] Eugenics primarily operated through the power of state action, allowing society to dictate the reproductive actions of others. Any given individual in society could not force the reproductive actions necessary to have the species-

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83. *Id.* The Court also addressed the equal protection argument that the eugenics law applied only to the institutionalized and not all of society. This "last resort of constitutional arguments" was of no concern to the Court since "the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow" because "the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others," the Court found that the Constitutionally required equal treatment under the law "more nearly reached" over time. *Id.* at 208.

84. Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1780, 1785–86 (2019) (Thomas, J., concurring).

85. *See* Lombardo, *The Power of Heredity*, *supra* note 34, at 1606 ("The feature of eugenic history that draws general condemnation today is contained in the body of coercive laws that were adopted as an expression of eugenic ideology."); Paul A. Lombardo, *Disability, Eugenics, and the Culture Wars*, 2 SAINT LOUIS UNIV. J. HEALTH L. & POL'Y 57, 60 (2008) [hereinafter Lombardo, *Disability*]. Arguably, race-based marriage laws were also a form of eugenics aimed at racial purification. Eugenics, though used to racist ends like these, did not, at the time, require racism. *See* Larson, *supra* note 26, at 120. Additionally, racial purification was separate from the eugenic goals of eliminating traits from the population. While in the Holocaust, for example, these became one in the same as the Third Reich aimed to eliminate certain race and ethnic groups from the population, elsewhere racial purification meant limiting the mixing of races. Marriage laws in America were therefore eugenic in that they prevented a "type" of child, a mixed-race child, from being born, but it was also not eugenic (though racist) because all women could still have their own race's child.

altering change eugenicists desired. Said differently, an individual's own discriminatory and even eugenic-oriented ideologies did not have eugenic significance without the power of state action. This is, in part, why eugenicists pushed for sterilization laws and used *Buck* as a test case to maintain those laws.[86]

While state action may not be the only social mover, it is the only one that can legally force decisions on others. Arguably, other factors, like religion, could have a similarly sweeping effect in determining how people reproduce, as discussed in Section III.C. These choices, which still rely on private decision-making and personal self-expression, are not seen as malicious in the same way practices historically identified as eugenic have been because they lack the law's compulsory effects. Moreover, even if this historic foundation does not limit eugenics (but instead merely provides an origin story), it nevertheless indicates that *Buck* does not provide direct precedent and that a more precise evaluation of the choices being made today is necessary to reason from *Buck*. Because upholding abortion bans limits personal choices, courts should carefully consider these distinguishing factors to avoid limiting choices for the wrong reasons, like the *Buck* Court.

Selective-abortion practices empower members of society to make informed and self-controlled reproductive choices, and they reject government intervention in those choices. Thus, "it is not the project itself of improving human bodies and minds that is the problem," but "rather, it is a question of who decides, a question of freedom and choice."[87] By leaving it to the individual, their selection may or may not be eugenically motivated. Carrie Buck undergoing a sterilization procedure or not having children was not itself harmful; the harm was that she was forced to be sterilized and childless against her will (and the underlying motivation to eliminate certain types of people from the population, discussed below). Unlike during the eugenics

86. LOMBARDO, THREE GENERATIONS, *supra* note 27, at 195–96.

87. BESS, *supra* note 12, at 60 (emphasis omitted) ("This is the new incarnation of eugenic thought, which one scholar has aptly dubbed 'liberal eugenics.' To the extent that the human species will be deliberately reshaped over time, the liberal eugenicists believe, this will take place through the 'invisible hand' of myriad decisions made by private citizens acting on behalf of their own values, worldviews, and perceived interests."). Though this change has been identified as "liberal eugenics," this Article does not adopt the use of "liberal eugenics," and I have concerns about the use of such language because of the rhetorical, colloquial, and fearmongering use of the term "eugenics" described in the introduction.

movement, "[t]oday it's very different. We leave the decision to parents and medical professionals, and that makes all the difference."[88]

Of course, an individual's personal motivations could be eugenic.[89] But, because Thomas skips over discussing how the Court should understand the difference between state and private actors and their differing motivations, he seems to put more weight on eugenic effects than intentions, despite his lengthy discussion about abortion's eugenic motives.[90] As previously mentioned, though, there is no evidence of eugenic effects to rely upon in finding a state interest.[91]

In addition to minimizing the state action in *Buck*, Thomas also neglected to discuss eugenics' attempt to pass as a science.

B. Discrimination Masking as Science

The Court in *Buck* took the scientific legitimacy of eugenics for granted and did not engage in a conversation about the science of inheritance or the nature of how desirable or undesirable traits pass down from parents to offspring.[92] In doing so, it authorized illegitimate, discriminatory purposes to carry the weight of scientific legitimacy, allowing for discrimination to mask as a medical intervention.[93] Similarly, selective-abortion opinions like *Box* do not engage with the science of reproductive medicine and its interventions. By not acknowledging the capabilities and limits of science,[94] Thomas suggests that these medical practices' legitimate

88. Rosenberg, *supra* note 59 (quoting Thomas C. Leonard).

89. *See infra* text accompanying note 162 (mentioning the Article's limits in discussing private eugenics).

90. Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1780, 1784–86 (2019) (Thomas, J. concurring).

91. *See supra* text accompanying notes 67–70 (discussing scholarship that argues that abortions do not have a eugenic effects).

92. *See* Paul Enríquez, *Genome Editing and the Jurisprudence of Scientific Empiricism*, 19 VAND. J. ENT. & TECH. L. 603, 686 (2017)*; cf.* Larson, *supra* note 26, at 128 (arguing that the science of the day supported the court's decision).

93. Though inaccurate, the Justices had reason to believe the science was legitimate because of academic support for eugenics and the rise of genetics as a course of study at the time. *See* Larson, *supra* note 26, at 121–23; Lombardo, *The Power of Heredity*, *supra* note 34, at 1308. Nevertheless, the text of *Buck* does not provide any evidence of serious consideration of the science and its support.

94. Thomas generally does not discuss abortion in its scientific or medical context, but instead solely as related to eugenics. Easterbrook's Seventh Circuit dissent engaged with the science more, but incorrectly. His opinion and the ramifications of these scientific misunderstandings are drawn out in the following Section.

scientific bases are equally dangerous as the pseudoscience of eugenics. To the credit of this implication, it is right to fear repeating the history of eugenics by giving something the force of law just because it calls itself science; after all, the *Buck* court could take the science for granted because they believed in its legitimacy. Nevertheless, the following discussion will show that by not engaging with abortion as a medical practice or considering genetic inheritance as a scientific field, Thomas's opinion assumes the patient undergoing the abortion has an illegitimate, discriminatory purpose and allows that assumption to trump any legitimate purpose the patient might instead hold.

From the beginning, eugenics was on a path to be no more than pseudoscience. Started by Sir Francis Galton, eugenics' patriarch and the jealous cousin of Charles Darwin, eugenics was Galton's attempt to trump the success of his cousin's theory of natural selection by speeding up the multi-generational, evolutionary cycle.[95] Purporting to build off the early theories of inheritance that Mendel and Darwin developed,[96] Galton claimed to have found a solution to society's woes and termed his new idea "eugenics": rather than leave the important process of human evolution to fate, society could evolve into a more productive version of itself by eliminating bad traits from the reproductive pool.[97] As a state policy, eugenics was purported "as a genetic solution to social problems like unemployment, promiscuity, and 'feeblemindedness,' a catch-all for unexplained low achievement," and it explicitly targeted unpopular populations, like people experiencing poverty.[98]

Despite its claims to scientific rigor, the eugenics movement's foundation in genetics was misplaced. Eugenic selection for traits like intelligence and work ethic can, at best, be considered the selection of

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95. *See* MUKHERJEE, *supra* note 12, at 64–66.

96. *See* FOX, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 12 (acknowledging eugenics as an outgrowth in the broader history of genetics and scientific understanding of inheritance); MUKHERJEE, *supra* note 12, at 64–66, 69, 73 (discussing significant events of Galton's life and career as he created his theory of eugenics to mimic Darwin's natural selection at a faster pace and to control outcomes in order to refine the species).

97. FOX, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 12 ("This ideal assumed that human differences in intelligence, character, and temperament owed largely to differences in heredity—and it argued that those differences were too important to leave to the clumsy workings of natural selection.").

98. *Id.* at 11.

specific phenotypes;[99] however, phenotypic attributes are not linked cleanly to genes but involve a range of factors, such as environment and diet.[100] Eugenics, therefore, oversimplified the complexity of these traits and how they are inherited, which even some contemporaries recognized.[101] This oversimplification meant it was selecting purely out of biases for certain observable characteristics, discriminating under the façade of a medical intervention.

Today, these failures have the potential to be corrected through a better understanding of the science. Whereas eugenics was a process that preached a false science to create a species designed around social prejudices, modern reproductive selection occurs through good science that enables personal choice. Now, scientists "no longer select[] phenotypes as surrogates for the underlying genetic determinations," but instead, geneticists "select *genes* directly."[102] Parents are then free to make medical choices based on genetic indicators rather than society determining the type of person fit to reproduce based on societal perception[103]—distinctions absent in *Box*.[104]

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99. Phenotypes refer to the observable presentation of a trait. For example, someone's phenotype may be brown-eyed, but their genotype or genetic characteristic might involve a brown-eye gene from their mother and a blue-eye gene from their father. Despite having two different genetic markers for eye color, their phenotype is not brown and blue eyes but brown eyes. Phenotypes are not only determined through the dominance of certain genes, as in this example, but also in how genes interact with the individual's environment. Smith, *supra* note 12, at 6 n.11.

100. *Id.* at 7.

101. *Id.* at 7 n.12 (citing MUKHERJEE, *supra* note 12, at 67–68, 73–74).

102. MUKHERJEE, *supra* note 12, at 272–73.

103. Arguably, this superficial determination is occurring in the selection of gamete donors. *See infra* Section III.B.

104. The Court's capacity for engaging with genetic science has yet to be fully determined, but there is some reason for concern. The following description of *Ass'n for Molecular Pathology v. Myriad Genetics*, 569 U.S. 576, 579–82 (2013) (regarding naturally-occurring and artificially-occurring gene sequences) is taken from Smith, *supra* note 12, at 14–16 (citing Gary E. Marchant, *The Use and Misuse of Genetic Data*, 10 ABA SCITECH L., no. 1, Fall 2013, at 8; Enríquez, *supra* note 91, at 609):

> Writing for the Court, Justice Thomas grounded the opinion in science, explaining the necessary genetic concepts with sufficient accuracy (despite some mistakes insignificant to the outcome). While the opinion's emphasis on science is reassuring about the court's ability to address highly technical fields, the scientific focus could be due in large part to the nature of patent law. On the other hand, Justice Scalia, the only Justice who did not join in the

The selection's improved precision at the genetic level does not alone resolve eugenic concerns. Nor does it deny the reality that a preference for a boy over a girl or a non-disabled child over a disabled child is entirely unrelated to how society shapes an individual's perception. What it does suggest is that the reproductive choices at issue in *Box* and similar cases are not necessarily instances of private eugenics.[105]

When Virginia passed its sterilization laws, every instance of forced sterilization was eugenic in nature because the state's eugenic interest applied equally to everyone sterilized under the law. For selective abortions, no single intention applies equally across the board. When someone acts on genetic selection, they do so for various personal reasons. An individual's reasons and decisions may remain controversial but not *necessarily* eugenic. Moral opposition to bringing a suffering child into the world, an individual's financial inability to provide healthcare for a disabled child, and other personal reasons for

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judgment, portrayed both a hesitancy toward and a rejection of genetics as a field of science. Justice Scalia's complete concurrence read as follows:

> I join the judgment of the Court, and all of its opinion except Part I–A and some portions of the rest of the opinion going into fine details of molecular biology. I am unable to affirm those details on my own knowledge or even my own belief. It suffices for me to affirm, having studied the opinions below and the expert briefs presented here, that the portion of DNA isolated from its natural state sought to be patented is identical to that portion of the DNA in its natural state; and that complementary DNA (cDNA) is a synthetic creation not normally present in nature.

Since "understanding the specifics of genetic testing was critical to delineate the appropriate bounds of patents for protecting genetic data in that case," Justice Scalia's choice to either not learn or not accept genetics sets a challenging tone for future cases that likewise rely on a coherent understanding of genetic theories and applications . . . . Indeed, while this was only a lone concurrence in an otherwise undivided decision, scholars and judges alike suggest this opinion is only a recent addition to a trend . . . . Should future courts choose not to engage with or to openly reject the science of genetics, American law could end up with more ungrounded decisions based on popular whims like *Buck v. Bell*.

Smith, *supra* note 12, 14–16 (citations omitted).

105. *See infra* text accompanying note 162 (mentioning the Article's limits in discussing private eugenics). Selective-abortion bans tend to punish physicians who provide abortions to individuals who want abortions for the reason of selection. This Article's discussion of choices refers to the patient's choices, not the physician's. The institutional role of physicians in these decisions and how that might, if at all, resemble the institutional nature of state action are beyond the scope of this Article.

these abortions do not align with the eugenic ideology in *Buck* of "prevent[ing] our being swamped with incompetence."[106] Even if parents did abort based on racism, sexism, and the other discriminatory factors that fed the eugenic view that certain types of people were a drain on society, such biases are not the medical basis for the selection, as discussed in the next Section.[107]

Today's arguments cannot be "divorce[d] from the past by charging our predecessors with 'pseudoscience'" alone; instead, it is the combination of these factors, state coercion, and bad science, that created the "toxic expression of ideas" that gave eugenics its legacy.[108] Courts edge towards a similar pattern when they limit reproductive choices without engaging in the science of reproductive medicine at work in the cases before them. The following Section draws out these mistakes by returning to *Box*.

C. Understanding the Difference in Box

The significance of state coercion and false science can be understood by revisiting the reasoning presented in *Box* with the assumption that the eugenics discussion there is more than the guilty-by-association attack on abortion that scholars have alleged. Having drawn out two distinctions from a critique of the historical reasoning in Justice Thomas's concurrence, this Section will turn to the circuit opinion from which Thomas drew the eugenics label.

Thomas's opinion quotes from and joins the voice of Judge Easterbrook as he dissented from the Seventh Circuit decision denying rehearing en banc.[109] Easterbrook, who termed the selective-abortion provision in *Box* "the eugenics statute,"[110] wrote that there was a difference between a woman's right to say "I don't want a child" under *Casey*[111] and instead saying "'I want a child, but only a male' or 'I want

106. Buck v. Bell, 274 U.S. 200, 207 (1927).

107. *See infra* Section II.C.

108. *See* Lombardo, *The Power of Heredity*, *supra* note 34, at 1308 (concluding that even if the science relied upon was sound, all of the actions would still be wrong).

109. Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1780, 1792 (2019) (Thomas, J. concurring) (citing Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting)).

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

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

only children whose genes predict success in life.'"[112] He stated that the latter statements "us[ed] abortion to promote eugenic goals," which "is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered."[113] Easterbrook explained the nature of this allegedly eugenic selection:

> It is becoming possible to control some aspects of embryos' genomes. See Clyde Haberman, *Scientists Can Design 'Better' Babies. Should They?*, NEW YORK TIMES, June 10, 2018. States may regulate that process when conception is by *in vitro* fertilization. Does the Constitution supply a right to evade regulation by choosing a child's genetic makeup after conception, aborting any fetus whose genes show a likelihood that the child will be short, or nearsighted, or intellectually average, or lack perfect pitch—or be the "wrong" sex or race? *Casey* did not address that question. We ought not impute to the Justices decisions they have not made about problems they have not faced.[114]

This description demonstrates how judges understand eugenics apart from its use in *Buck*.[115] First, by acknowledging that "a woman is entitled to decide whether to bear a child" and then discussing the limits on what a woman could choose, Easterbrook acknowledged that the choice rested with the woman.[116] The woman had reproductive agency that allowed her to make a choice for different reasons, in contrast to the eugenic policy in *Buck* that stripped Carrie Buck of her choice altogether. Indeed, his reference to in vitro fertilization (IVF) regulation is akin to his eugenic label when he suggests that the state can choose which children a woman must have.[117]

Moreover, as discussed, the *Buck* court took the science for granted, focusing their discussion on the societal impact. Here, Easterbrook demonstrates a similar misunderstanding of genetics in how he discussed inheritance, resulting in an assumption of discriminatory intent among those undergoing selective abortions. Like the *Buck* court, Easterbrook misunderstands the relationships between

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112. *Planned Parenthood of Ind. & Ky.*, 917 F.3d at 536 (Easterbrook, J., dissenting) (citing *Casey*, 505 U.S. at 833).

113. *Id.*

114. *Id.*

115. As before, this discussion reads the opinion in its own time, when *Roe* was still in effect.

116. *Planned Parenthood of Ind. & Ky.*, 917 F.3d at 536 (Easterbrook, J., dissenting).

117. *See id.*; *see also* Preterm-Cleveland v. McCloud, 994 F.3d 512, 588 (en banc) (Gibbons, J., dissenting) ("But the American eugenics movement does share a goal of the majority view in this case: both seek to control a woman's reproductive decisions.").

phenotypes and genetic inheritance. He suggests that individuals can select for perfect pitch or high intelligence in the genome;[118] however, science has not yet identified a gene or combination of genes that controls these traits.[119] While he begins by alluding to real advances in genetics, he quickly conflates them with this misunderstanding from the eugenics era. No scientist, doctor, or individual can point to a specific gene or set of genes that are predetermined to give one perfect pitch or predict their level of success. These are highly complicated, phenotypic traits (if they can even be described as "phenotypic traits" and not merely a normalized worldview) that are not linked to a specific gene and can be influenced by one's environment.[120] Easterbrook's misapprehension of the mechanisms and capacities of genetic medicine has several implications:

First, it indicates a misunderstanding of the facts of the case before him. Because Easterbrook fails to describe accurately the nature of the selection occurring, the reader cannot be certain that he meant to call the reality of the medical decisions being made eugenic. He could believe only that this mistaken version of the decision-making is eugenic. And, since the selection at issue in selective abortions is based on proven science rather than the pseudoscience in *Buck*, it is not necessarily based on malicious, discriminatory intentions like *Buck* was.

Second, his proposed scenario suggests that patients similarly misunderstand the medical intervention they are using. If one selects for perfect pitch, as Easterbrook suggests, then she misuses the technology since no such selection can occur at the genetic level. This, indeed, looks like the use of eugenics to influence inheritance without an understanding of how the mechanisms of inheritance work. However, the actor differs from the actors in *Buck*. In *Buck*, the physicians who performed the sterilization and the state actors who decided to sterilize Buck believed the false inheritance theory underlying eugenics. Here, it is the patient's belief, not that of another imposing actor. As such, this misunderstanding now becomes a failure of healthcare. A patient engaging in medical decision-making based

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118. *Planned Parenthood of Ind. & Ky.*, 917 F.3d at 536 (Easterbrook, J., dissenting).

119. *See, e.g.*, Jocelyn Kaiser, *Screening Embryos for IQ and Other Complex Traits is Premature, Study Concludes*, SCIENCE (Oct. 24, 2019), https://www.science.org/content/article/screening-embryos-iq-and-other-complex-traits-premature-study-concludes [https://perma.cc/GE3B-4WQ6].

120. Patrick Turley, Michelle N. Meyer, Nancy Wang, David Cesarini, Evelynn Hammonds & Alicia R. Martin et al., *Problems with Using Polygenic Scores to Select Embryos*, 385 NEW ENG. J. MED. 78, 78–80 (2021).

on false perceptions of what can be achieved is a failure of informed consent on the part of the doctor, who has inadequately described to the patient the medical procedure being undertaken.

Furthermore, Easterbrook implicitly determined that would-be parents undergoing selective abortions have necessarily adopted that discriminatory misunderstanding as their motive for the abortion.[121] That is, for these scenarios to be eugenic as he claims, his analysis requires that these patients believe that someone of a certain sex, minority, or disability is less likely to find success in life because of their very genes and rejects alternative reasons for selection beyond a bias against people with that given condition. He assumes that the decisions of individuals are based on stereotypes, not allowing for alternative scenarios that consider other reasons why individuals make their choices, such as reducing the chance of passing on a genetic disease or finding oneself unable to provide for a sick child.

Of course, when the bias is against a condition in which science has identified the genes at work, the genetic selection and the phenotype selection are synonymous (like Down Syndrome or sex). A physician correctly informing a patient about the limits of the selection may not make a difference beyond eliminating stereotypes and misconceptions about what living with Down Syndrome, as a particular sex, or with another comparable condition, might look like. If we ignore the remarks about perfect pitch and assume that Easterbrook is concerned with this specific subset of cases, then Easterbrook correctly identified instances of potentially discriminatory behavior.

Other than sex, though, Easterbrook's examples are not clearly linked to a gene in a way that allows him this benefit of the doubt. Again, this is not to say that a genetic link is determinative of a non-eugenic motive but instead suggests that Easterbrook is not reacting to either the gene-linked scenario or the one in *Buck*. By doing so and assuming eugenic intentions, he minimizes the real choices and deliberations parents undergo. This minimization of the choices patients face is further demonstrated by his citation to an article about genetic engineering, a process the same article reports as currently being out of reach.[122] Today's abortions are not about perfect pitch or

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121. *Cf. Planned Parenthood of Ind. & Ky.*, 917 F.3d at 536 (Easterbrook, J., dissenting).

122. *Compare id.* (suggesting modern genetic science can select genes for athletic ability after citing a New York Times article: *Scientists Can Design 'Better' Babies. Should*

genetic engineering, but they are often about highly debilitating conditions (another point made in the cited article but overlooked in the opinion).[123] Easterbrook says, "[w]e ought not impute to the Justices decisions they have not made about problems they have not faced," but so too, judges should not make decisions about problems beyond the facts of the case before them.[124] Basing his decision on genetic selection and editing processes currently (and potentially indefinitely) beyond the scope of science, Easterbrook assumes any instance of offspring selection is eugenic regardless of its true motivation or effect.[125]

D. Introducing the Slippery Slope of Eugenics Rhetoric

While Easterbrook and Thomas both misapplied the eugenics label, Easterbrook's invocation of IVF indicates the dangers of this misapplication. IVF involves fertilizing a woman's eggs in a lab, selecting the fertilized egg(s) to implant, and then artificially implanting the fertilized egg(s) in the uterus.[126] Although there are

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They?, by Clyde Haberman), *with* that article, Clyde Haberman, *Scientists Can Design 'Better' Babies. Should They?*, N.Y. TIMES (Jun. 10, 2018), https://www.nytimes.com/2018/06/10/us/11retro-baby-genetics.html [https://perma.cc/G23K-YRXS] ("[S]elect-ing genes to produce, say, a star basketball player is hardly a snap; height alone is *influenced* by *tens of thousands of genetic variations*.") (emphasis added).

123. Haberman, *supra* note 122; *cf.* Roberta M. Berry, *From Involuntary Sterilization to Genetic Enhancement: The Unsettled Legacy of Buck v. Bell*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 401, 447 (1998) (warning against the legacy of *Buck* in regard to genetic enhancement—though limiting the argument so as not to apply to genetic therapies that cure or prevent disease and disability—by explaining that "[a]lthough the line between genetic therapy and genetic enhancement may appear perilously difficult to define and enforce, it is a line that is real . . . [a] line between compassion and hubris, between respecting the autonomy and worth of other human beings and regarding others as suitable subjects for our evaluation and 'improvement'").

124. *Planned Parenthood of Ind. & Ky.*, 917 F.3d at 536 (Easterbrook, J., dissenting); *cf.* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2311 (2022) (Roberts, C.J., concurring) (counseling judicial restraint).

125. *See Planned Parenthood of Ind. & Ky.*, 917 F.3d at 536 (Easterbrook, J., dissenting).

126. In the alternative of fertilization resulting naturally from sexual intercourse, the sperm typically fertilizes the egg in a woman's fallopian tube, and the fertilized egg travels down the fallopian tube into the uterus, where it implants in the lining of the uterus.

arguably many points of selection in IVF,[127] the comparable point to a selective abortion is the time before implantation when the fertilized egg[128] can be screened and selected. Screening occurs through a process known as preimplantation genetic testing (PGT) that allows parents to test for sex or a genetic disease (or gene-linked disability), and based on the results, parents can choose which embryos to implant.[129] Thus, the driving difference between selective abortions and the comparable use of IVF becomes whether or not the embryo is in the womb at the point of selection.[130] As Thomas and Easterbrook seem to consider any selection a eugenic action, it would be unreasonable to allow this selection through the IVF process but not through abortion.

When he suggested that selective-abortion bans prevent circumvention of IVF regulation, Easterbrook implied that states

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127. *See infra* text accompanying notes 160–72 (discussing the options of genetic testing prior to pregnancy, screening of embryos prior to implantation, and prenatal genetic testing after implantation).

128. This Article takes Easterbrook's use of "conception" to mean "fertilization" and will use the terms interchangeably.

129. There are important distinctions to note between sex, race, and disability selection. First, "disability selection" may be misleading in a way that "sex" selection is not. While certain gene-linked diseases legally qualify themselves as disabilities, such as Down Syndrome, others are not themselves disabilities but would most likely result in either legally recognized disabilities or one identifying as disabled outside of the scope of the legal definition. Comparatively, sex is linked to specific chromosomes; however, gender is a social construct. While parents may select for sex, they cannot for gender. Parents may hope that an xx child identifies as female, but they cannot select for that identity. Therefore, sex selection is more accurate to what is occurring.

Race selection is different. Like the physical elements of sex, there are phenotypical traits (e.g., skin color) and gene-linked diseases (e.g., sickle cell) that are attributed to specific races, yet one's racial identity is comprised of these factors in addition to the environmental and social elements of living with those traits. However, there is likely no expectation of race selection anyway, see Kalantry, *supra* note 73, at 12–13, presumably because the racial identity of the parents would be known beforehand (or could be known, as in the case of using a gamete donor).

130. Specific aspects of this difference could allow for more precision in defining the difference—temporal, spatial, reliance, etc. The strongest distinction between these subsets of differences is those relating to location in time and space and those related to the mother and the child's reliance on the mother for growth and support. However, because the Court's jurisprudence focuses on the unborn life's interest in survival more so than the mother's physiology, these are grouped collectively as a fetal stage in reproduction, the point of fertilization before or after implantation. This remains true after *Dobbs*, where the interest in "potential life" is repeatedly in focus. *See infra* Part IV.

regulate selection during IVF; however, states largely do not.[131] By not regulating this selection, states allow parents to legally select their children outside of the uterus. By Easterbrook's own implication, then, if selection for sex, race, or disability at the point of fertilization is eugenic in nature, then a state's interest in stopping eugenic practices should include these practices as well. However, Easterbrook does not suggest states *should* regulate IVF selection because it is eugenic, but that individuals cannot "evade regulation by choosing a child's genetic makeup after conception."[132] A patient could, though, undergo IVF to evade selective-abortion bans by, to borrow his language, "choosing a child's genetic makeup after conception,"[133] but before implantation. Easterbrook surely cannot want this instance of circumvention when he objects to the first. Said differently, he indicates that selection *could* be regulated during IVF in order to say that the states *can* regulate it during selective abortions; but, given that he identifies genetic selection at conception as eugenic, he should instead be warning against this selection altogether and suggesting the state *should*—not *could*—regulate it.

If the primary distinction between selection in IVF practices and abortion is whether selection occurs before or after the embryo implants in the woman's uterus, Easterbrook should find that either the abortion itself is the problem[134]—rather than the nature of the selection—or IVF selection is also eugenic. The next Part begins by assuming that those who, like Thomas and Easterbrook, would impose a eugenics label would find that of these options, IVF selection should likewise be banned because, at the time of these decisions, the rhetorical benefit of eugenics served to take selective-abortion bans out of the abortion debate.

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131. *E.g.* Madeline Verniero, *The Wild West of Fertility Clinics*, REGUL. REV. (Aug. 10, 2021), https://www.theregreview.org/2021/08/10/verniero-wild-west-fertility-clinics [https://perma.cc/AFS5-82ZL] (discussing how neither states nor the federal government have meaningfully regulated IVF).

132. Planned Parenthood of Ind. & Ky. V. Comm'r of Ind. State Dep't of Health, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting).

133. *Id.*

134. Like selective-abortion opinions, opinions about the use of IVF for screening have also been criticized for targeting abortion, and some statutory bars on wrongful life actions provide evidence supporting this criticism. Strasser, *supra* note 13, at 851–53.

III. THE EFFECTS OF THOMAS'S EUGENICS LABEL ON NEGLIGENCE CASES

Having addressed how the language of eugenics is being used in selective-abortion ban opinions and having understood that these opinions equate post-conception selection with eugenic selection, this Part now turns to the dangers of this conflation. The rhetorical flare of "eugenics" and anticanonical citations to *Buck* risk jeopardizing other aspects of reproductive medicine. This risk exists because selective abortions do not sit exclusively in the realm of abortion or constitutional law; they also appear in tort law in the context of negligence claims. Because courts could consider these same policy discussions when selective abortions appear in the tort context,[135] the eugenics label as it is currently being used could be integrated into these cases. These and other medical procedures are already being met with a mixed reception in tort law—despite having secured reception in medicine and society—and a eugenics label would feed the courts' rejection of these claims. As will be discussed, the policy decisions that lead courts to reject these claims reflect the same mistakes underlying the misunderstandings of the eugenics application discussed above: state interference with reproductive choices and a refusal to engage with the underlying science. Therefore, a better analysis of these factors in each context can lead to better resolutions in both cases.

This Part first describes the relevant tort claims and explores the parallel reasoning between courts that reject these claims and the eugenics rhetoric described above. While the courts who reject these claims do so for similar reasons, they do not invoke the language of eugenics. This Part will then suggest that, given the similar reasoning,

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135. This sharing of policy values between areas of law is well-established, including in the relationship between tort and constitutional law. *See e.g.*, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (placing a compelling interest in "ensuring that victims of crime are compensated by those who harm them" in tort law); Cristina Carmody Tilley, *Tort, Speech, and the Dubious Alchemy of State Action*, 17 J. CONST. L. 1117, 1119 (2015) (discussing the relationship between the policies for constitutional public or private speech and defamation and related torts in *New York Times v. Sullivan*); *id.* at 1168 n.218 ("Interest creep has been used to describe the incremental expansion of state interests such as national security or the protection of potential life that are proffered to justify legislation and the inverse contraction of judicial scrutiny when these state interests are invoked. In the context of dignitary injuries, however, the interest creep appears to have proceeded in the opposite direction, with courts invoking free speech interests in an increasingly sweeping fashion in order to avoid giving weight to the state interest in injury compensation for dignitary torts.").

these courts could logically adopt the eugenic rhetoric and apply it to their current case law; however, to do so would ascribe a "eugenics" label to most iterations of assisted reproductive medicine ("ART"). Doing so would suggest outlawing ART, indicating the danger of this use of eugenics since ART has become a staple in reproductive medicine, used by families across cultural and political ideologies.

A. A Brief Overview of Reproductive Negligence Claims

Negligence suits related to the negligent provision of reproductive medicine and related services involve a variety of tort claims, including wrongful birth,[136] wrongful life,[137] wrongful sterilization,[138] wrongful pregnancy,[139] and wrongful conception.[140] These claims can be best understood collectively through the three-branch framework suggested by Dov Fox in his recent book *Birth Rights and Wrongs: How*

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136. A claim brought by a parent that their child would not have been born but for another actor's negligence. Strasser, *supra* note 13, at 821. This claim is typically based on the negligent reading or conveyance of medical information about the health or condition of the child with which the plaintiff would have avoided or terminated the pregnancy. Jeffrey R. Botkin, *Prenatal Diagnosis and the Selection of Children*, 30 FLA. ST. U. L. REV. 265, 269–70 (2003); Strasser, *supra* note 13, at 827.

137. A child's claim that but for another actor's negligence, he would not have been born. Botkin, *supra* note 135. This claim raises uniquely difficult questions and is rejected by almost every state. For example, this claim asks that the court find one's own life to be a harm to himself (as opposed to the interference with parents' choices in the other "wrongful" claims). *See* Strasser, *supra* note 13, at 847–48. It can also be raised against parents, not just providers, for knowingly passing on genetic conditions. *See generally* Jaime King, *Duty to the Unborn: A Response to Smolensky*, 60 HASTINGS L.J. 377, 379 (2008). Future research should consider how this tort can be separated from the other reproduction-based negligence torts through how this negligence tort might act like strict liability for one's genes.

138. A claim that but for an actor's negligence, the plaintiff would not have become pregnant, typically involving a negligently performed sterilization procedure. *See infra* notes 140–45.

139. A claim that, but for an actor's negligence, the plaintiff would not have been sterilized. *See id.*

140. The use and meaning of reproductive terminology changes depending on the scholarship (e.g., between legal and medical scholars), jurisdiction, and context so that some uses would distinguish between wrongful pregnancy and wrongful conception, but most would not. This confusion demonstrates one of many challenges in analyzing these tort claims across the states. *See* Strasser, *supra* note 13, at 825–28 and accompanying notes (explaining the difficulty presented in various jurisdictions' different definitions of the same causes of action, providing the example of a negligently performed sterilization procedure being defined in some jurisdictions as a wrongful pregnancy tort and in others as wrongful birth).

Medicine and Technology Are Remaking Reproduction and the Law.[141] His work categorizes negligence cases into three forms: (1) procreation deprived, where a private actor's negligence prevents an individual from having a child; (2) procreation imposed, where a private actor's negligence prevents an individual from avoiding parenthood; and (3) procreation confounded, where a private actor's negligence interferes with an individual's plans about the nature of their parenthood and "the *type* of child that [they] would like to have."[142]

Examples of each category help demonstrate the nature of the factual scenarios involved in these claims. Procreation deprived would apply to the situation in which a cancer patient undergoes egg harvesting to protect her ability to have biological children before receiving chemotherapy, which sterilizes her, but the fertility clinic negligently destroys the frozen eggs.[143] Procreation imposed would include a negligently performed sterilization procedure that resulted in an unwanted pregnancy.[144] Procreation confounded would encompass the negligent performance of the previously discussed selective abortions or, for a new example, the negligent failure to diagnose a genetic anomaly that, if properly diagnosed, would have led a couple to adopt rather than try for a biological child, to not implant an embryo during IVF, or to abort.[145]

Fox rightly asserts that the courts that deny these claims have mischaracterized the harm occurring in these cases. While courts often

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141. FOX, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 6; Khiara M. Bridges, *Beyond Torts: Reproductive Wrongs and the State*, 121 COLUMB. L. REV. 1017, 1021 (2021) (reviewing DOV FOX, BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW (2019)) (describing in her book review the two goals of the book as (1) "to make the case that individuals who are victims of reproductive negligence suffer an injury that American law ought to recognize and compensate" and (2) "to provide a framework for determining the amount of compensation that victims of reproductive negligence should receive").

142. Bridges, *supra* note 141, at 1025. Fox's categorizations are for his suggested tort reform, but here, I use them only as categories to aid in understanding the variety of these claims.

143. *See* Fox, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 99–112 (Chapter 7 "Procreation Deprived").

144. *See id.* at 113–26 (Chapter 8 "Procreation Imposed").

145. *See id.* at 127–39 (Chapter 9 "Procreation Confounded").

agree that the duty, causation,[146] and breach elements of negligence have all been met, courts rejecting these claims generally reject them outright or on the element of damages, unable or unwilling to find or quantify a legal harm.[147] Though Fox's categories and their various factual iterations involve different factual harms, all of these harms underly what are fundamentally claims of interference in family planning and reproductive decision-making.[148]

While these negligence cases do not all involve claims to which Thomas's eugenics label can be affixed,[149] courts' rejection of these claims tends to rest on similar failures. Reproduction-based negligence cases often fail to recognize how private actors compromise an individual's reproductive choice, just as the distinction between state mandates and individual choices is overlooked in selective-abortion cases.[150] Similarly, these cases often demonstrate a rejection of the capability of reproductive medicine as a science, as judges find that

146. Causation is a more significant problem for some claims than others. Some courts find that when, for example, a now-infertile woman's frozen eggs are negligently destroyed, the negligence cannot be the cause of the harm (inability to have a biological child) since the woman could not have a biological child anyway. Fox discusses this in his calculation of damages, and he suggests that the loss-of-chance doctrine should be applied in these situations to ascribe the likelihood of causation to the damage award. *See* FOX, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 92–94.

147. *Id.* at 7 ("'[L]aw does not recognize disruption of family planning either as an independent cause of action or element of damages.'" (quoting Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235, 238–39, 271–72 (Tenn. 2015))); *id.* at 8 ("Most states are 'unwilling to say that life, even life with severe [impairments], may ever amount to a legal injury.'" (quoting Azzolino v. Dingfelder, 337 S.E.2d 528, 534 (N.C. 1985))); *see also* Dov Fox, *Birth Rights and Wrongs: Reply to Critics*, 100 B.U. L. REV. ONLINE 159, 159 (2020) [hereinafter Fox, *Birth Rights and Wrongs: Reply*] (highlighting how courts will often fail to hold medical professionals accountable for alleged reproductive harms).

148. *See* Fox, *Birth Rights and Wrongs: Reply*, *supra* note 147, at 160 (explaining that each category describes a "reproductive harm"); *see also* discussion at *supra* notes 129–35 (juxtaposing the reasons that parents and potential parents make family planning choices with the examples invoked by Judge Easterbrook's discussion).

149. For example, when negligent upkeep of a freezer leads to the destruction of frozen eggs or embryos, procreation is deprived. However, Thomas likely would find that no selection occurred that would move this into eugenics territory so long as the parents were using their own gametes. The reasoning of these courts, though, suggests there is a comparable element of selection when choosing a biological child since this interferes with the workings of fate.

150. *See generally* FOX, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 147–49 (describing why parents could meaningfully choose the sex of a child, desire a biological child, and other selective criteria).

parents cannot be harmed by the workings of fate (such as genetic disease or infertility), even if they had turned to proven science to avoid that fate and that scientific procedures had been negligently performed.[151]

Nevertheless, courts struggle to "define, confirm, and appraise" these reproductive losses and ultimately devalue them.[152] In the controversial "wrongful birth" context, for example, courts rejecting the claim reason that a ruling for the parents would send a message to their child that they are unwanted, which would be too harmful to the child for the court to allow.[153] Courts, afraid to say that the value of a, for example, life with a disability is less than no life at all, may reject these claims outright or might find that any calculable damages would be offset by the joy of parenthood, among other similar outcomes that deny a remedy to the plaintiffs.[154] Fox, however, redefines the message that the courts would be sending as one "that the wrongful defeat of procreative will mark[s] a tectonic shift in how [a woman] spends her days and thinks about who she is. Professional negligence has redirected the course of life plans for family and transformed her sense of self."[155]

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151. *Id.* at 46 (quoting a critic of the wrongful birth tort who claimed that parents putting themselves first would rather claim wrongful birth than "suffer[] an accident of fate"); *id.* at 162–63 (discussing that the policy arguments for "reproductive humility" over "playing God" are not found in law).

152. *Id.* at 54.

153. Throughout his book, Fox well attests to how these parents do want their children and do love those children. Their claim is not that they wish *this child* did not exist but that they wish their choice in parenthood was not taken from them.

154. *See, e.g.*, Grubbs ex rel. Grubbs v. Barbourville Fam. Health Ctr., P.S.C., 120 S.W.3d 682, 692 (Ky. 2003) (Wintersheimer, J., concurring) ("The reason for this is the same reason that a majority of jurisdictions have rejected wrongful life claims completely, namely, that measuring the value of an impaired life as compared to nonexistence is a task that is beyond mere mortals, whether judges or jurors."). *But see, e.g.*, Tillman v. Goodpasture, 485 P.3d 656, 659, 678 (Kan. 2021) (Rosen, J., dissenting) ("Justice Stegall ignores a core component of the injury in this case: the total affront to a patient's interest in self-determination and information concerning a course of medical treatment. He also disregards a very real and very tangible consequence of this affront: the life-long economic costs associated with providing the patient's child with the resources and support the child will need to function in a world that caters to the non-disabled.").

155. FOX, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 47 (alteration added); *cf. id.* at 43 (explaining that the wrongful life tort is forbidden everywhere in the United States but California, Maine, New Jersey, and Washington because "nobody's existence can be an injury to himself").

In overlooking the harm to the patient's reproductive choice, courts reject how the patient's choice interacts with medical technology to enact their hopes for their specific child.[156] As indicated through the examples above, these cases involve reproductive medicine and its technologies, whether abortion, IVF, or gamete selection and preservation. As Fox describes,

> Today, developments in medicine and technology separate sex from conception; biology from brute luck; and genetics from gestation or childrearing. Birth control, surrogacy, sperm banking, egg freezing, and embryo selection don't just enhance control over whether, when, and how to reproduce. They reveal distinct interests in choosing *pregnancy* (gestating a fetus), *parenthood* (raising a child), and *particulars* (selecting offspring traits).[157]

By devaluing the use of medical science in reproductive decision-making out of concern of discriminatory motives, these courts make effectively the same judgments about reproductive choices and the limits that should be put on reproductive medicine as selective-abortion cases, but they have done so largely without invoking *Buck* or affixing the eugenics label.[158] However, if these cases did adopt the eugenics label used in *Box* to describe their factual circumstances, eugenics would snowball into an impact on reproductive medicine greater than what seems to be intended in the selective-abortion opinions.[159]

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156. *E.g.*, Cockrum v. Baumgartner, 447 N.E.2d 385 (Ill. 1983); Wilson v. Kuenzi, 751 S.W.2d 741 (Mo. 1988); *Grubbs*, 120 S.W.3d at 682.

157. FOX, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 16 (emphases in original).

158. *But see, e.g.*, Taylor v. Kurapati, 600 N.W.2d 670, 688–89 (Mich. Ct. App. 1999) (citing *Buck* as a reminder that "the courts were not above" eugenics rhetoric when rejecting a wrongful birth claim); *Grubbs*, 120 S.W.3d at 692–93 (Wintersheimer, J., concurring) (citing *Buck* as an example of shared eugenic ideologies between the Nazis and America when rejecting wrongful life claims because "it would definitely discriminate against disabled persons and could lead to a eugenic culture where the 'unfit' are made disposable"); *but cf. Tillman*, 485 P.3d at 678 (Rosen, J., dissenting) (describing a slippery slope to eugenics and the opportunity to overturn the state court's case that upheld eugenic practices).

159. Perhaps this extended impact was intended since Justice Thomas also discussed birth control in his opinion. However, as his opinion took care to categorize birth control and abortion differently, this Article assumes he did not intend to implicate other forms of reproductive medicine. *See* text accompanying *supra* note 25.

B. Identifying Reproductive Negligence Torts as Eugenic

While these torts often involve a failed abortion or lost opportunity to have an abortion, they need not be abortion-specific. Instead, reproductive negligence cases can involve the selection of gamete donors, embryo donors, or IVF embryos.[160] This Section will consider how the eugenics label, if used as it is in selective-abortion opinions like Thomas and Easterbrook's discussed above, would affect this wider set of factual circumstances.

As discussed in Section II.C, parents can select specific embryos in IVF, countering the logic that a selective abortion is a uniquely vile procedure because of the individual's active role in selection. As previously stated, because the difference between IVF screening and selective abortions is that embryos are selected after the point of fertilization and before viability, either abortion or selection itself is the problem.[161] If selection is the problem, selective abortions are not the only eugenic procedures, even though these types of selection may not act on social biases and may occur before and after the point of fertilization. For example, before IVF or natural pregnancy, parents could undergo genetic testing and choose not to have biological children because of a genetic trait. Or, if they choose to undergo IVF and screen the embryos prior to implantation, and if the embryo tests positive for the genetic trait, they may choose not to implant that embryo but instead implant another. But, if they become pregnant, and prenatal genetic testing indicates the genetic trait, they should not be able to abort under the selective-abortion opinion.

Like the selective-abortion context, the choices plaintiffs in these negligence cases make are deeply personal—and not necessarily focused on a discriminatory goal of improving society—even though they are selective.[162] Selection at the point of IVF, in particular, demonstrates the type of selection occurring and how parents determine what is best for their families. PGT is usually used preventatively by parents to screen out disease, but some parents

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160. *See supra* Section III.A.

161. This difference could also be based upon when "personhood" is ascribed. For a discussion on how the fetus has previously had no personhood status under the law until *Dobbs* opened the issue, prompting states to consider fetal personhood legislation, see *infra* Part IV.

162. The private eugenics aspects extend beyond the scope of this Article but are worthy of further discussion. *See infra* Section IV.B (discussing how antidiscrimination law addresses biases without invoking the rhetorical flare of eugenics at every instance).

instead select *for* disabilities and are also rejected by courts.[163] These parents usually hope that the new child will share the experience of having that disability with a parent or sibling.[164] As selective actions, Thomas would also consider these eugenic, even though they counter societal stereotypes like those at work in *Buck*. On the other hand, PGT can be used for nonmedical traits like sex or eye color, regardless of any associated health risk.[165] Others supposedly detect future intelligence[166] despite the fact that studies are not yet certain which genes control intelligence.[167] Screens like these that are based on unfounded science most closely resemble the pseudoscience of eugenics, yet it is how the industry has been allowed to progress unchecked.[168]

Given that selection occurs at these other points in the reproductive process, ascribing "eugenics" at the point of fertilization seems arbitrary.[169] Some courts have said that the fertilized embryo is given special value because of its potential for life,[170] so perhaps embryo

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163. King, *supra* note 136, at 378–79.

164. *Id.* at 379.

165. FOX, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 21.

166. *Id.*

167. *See* Kaiser, *supra* note 119 (reporting a study that found polygenic risk scores are poor predictors of complex traits).

168. Arguably, these tort cases themselves are checks to the industry; however, this type of check on an industry like healthcare that is prone to regulation gives the appearance of legislating from the bench. Additionally, the courts in these cases are not concerned about the industry, so much as the choices of the individual patient involved. Therefore, this Article does not consider this a meaningful check on the industry but instead a misguided response from the courts.

169. The difference in drawing this distinction, like many aspects of the abortion debate, is a problem of access. Whereas testing during pregnancy is routine, IVF and the involved comprehensive genetic testing is expensive, costing in the tens of thousands of dollars, and usually not covered by insurance. Thus, limiting selective abortions does not prevent selection, but it might prevent it among lower socioeconomic groups. This provides yet another irony in the eugenics debate: in addition to limiting reproductive choices through state action, the eugenics movement likewise focused on limiting the choices of people experiencing poverty. For a discussion on the problem of access to reproductive technologies like IVF, see generally Bridges, *supra* note 140.

170. Fox discusses how courts value the embryo. He includes in his conversation the Tennessee Supreme Court, which said embryos have a value "greater than that accorded to human tissues" because of their "potential to become a person." He also discusses different viewpoints on embryos as property. FOX, BIRTH RIGHTS AND

implantation matters as a step further toward developing into human life. *Dobbs* supports states' ability to protect "prenatal life,"[171] and the embryo is taking on new significance in some states post-*Dobbs*. In the wake of *Dobbs*, fetal personhood statutes, ascribing personhood status to embryos, are regaining momentum—a trend discussed below in Part IV. Even if the embryo is given greater value, that value is not based on a greater similarity to eugenics. After all, the eugenics movement sterilized potential parents to prevent reproduction *before* fertilization. Further, if the trouble is the selecting of what types of children should be born, why can parents choose gamete donors from a catalog?[172] Parents can select gametes for attributes that span from those far more similar to those of the eugenic movement to those established in genetics: life accomplishments, the highest level of education achieved, nationality, race, criminal record, eye color, skin tone, body type, genetic test results, and more.[173] This goes a step earlier in the process, before fertilization, but engages the same type of selection.

Perhaps this selection is more comfortable because it resembles, in some ways, the traditional family unit's development. An individual picks a spouse knowing who they are and the characteristics they could

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WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 49–51. *Dobbs* adopts the potential for life language without changing the personhood status of the fetus, but various "personhood bills" throughout the states would give the embryo legal status as a person. *See* discussion *infra* Part IV.

171. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022). Notably, in discussing the rational basis for abortion regulations, the court listed considerations that included discrimination. *Id.*; *see* discussion at *infra* note 238.

172. *See, e.g.*, *Sperm Donor Search*, XYTEX CORP., https://www.xytex.com/search-donors [https://perma.cc/TT2N-7FFV] (allowing for donor searches filtered by such features as advanced degrees, hair color, eye color, race, Jewish ancestry, religion, height, weight, a personality test, and about three hundred genetic indicators); *Donor Options*, XYTEX CORP., https://www.xytex.com/patient-information/donor-options [https://perma.cc/2RJD-9WC3] (describing tiers of donors as "highly selective," "superior selection," "[d]onors with the most comprehensive battery of genetic testing and available carrier condition results," and "[a]n exceptional pool of donors with strict limits regarding the number of allowed family units"); *cf.* Alan C. Milstein, *The Brave New World of Assisted Reproductive Technology*, 307 N.J. L. 42, 44 (2017), https://www.sskrplaw.com/files/brave-new-world-of-assisted-reproductive-technology.pdf [https://perma.cc/SH4H-9VYS] ("It is one thing to inquire about the health history of the donor, a history that can be absent of material information the future parent and subsequent child might need; it is quite another to choose the product based on what are perceived as desirable physical and social qualities.").

173. *See Sperm Donor Search*, *supra* note 172.

potentially pass down. By extension, consider the following two hypothetical couples:

The first couple is in love and engaged when they have genetic testing done for medical reasons and learn that their combined genes run a high risk of passing down a debilitating disease to their future child. They subscribe to a religion that does not condone the use of reproductive technologies or the use of abortion if the embryo tests positive for the disease. Rather than risk bringing a suffering child into the world, they adopt.

Another couple meets on a white supremacist social media page and decides to get married and have kids based purely on one another's light skin, blond hair, blue eyes, and a shared belief in creating the Aryan master race.

Are either of these couples eugenic? Are both? The first couple refuses to continue a genetic line out of a belief in diminishing the suffering of their future child; the second chooses to procreate with racist intentions. If these couples instead used a gamete donor to avoid the debilitating condition or to select for Aryan features, but their provider negligently interfered with their choices, courts that deny reproduction-based negligence claims would reject both parties' claims.

Presumably, the difficulty of these questions and the necessary line drawing has led to the quiet response of regulators who refuse to put safeguards around the American ART industry—even though that industry now runs so free that services are advertised and gamete donors and recipients matched in Facebook groups, while negative press reports the use of serial donors causing health problems for hundreds of children, among other adverse outcomes.[174] Perhaps because of the resemblance to spouse selection, as indicated in these hypotheticals, the selection in gamete donor cases indicates that the later point of fertilization is important, even if racism or other prejudices go into picking the genetic material prior to that point in time and even if *Buck* and the eugenics movement were based at this pre-fertilization point.

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174. *See, e.g.*, Nellie Bowles, *The Sperm Kings Have a Problem: Too Much Demand*, N.Y. TIMES (Jan. 8, 2021), https://www.nytimes.com/2021/01/08/business/sperm-donors-facebook-groups.html [https://perma.cc/22NM-XFWB] (last updated June 25, 2023) (reporting on the use of Facebook groups to find sperm donors); Jacqueline Mroz, *The Case of the Serial Sperm Donor*, N.Y. TIMES (Feb. 1, 2021), https://www.nytimes.com/2021/02/01/health/sperm-donor-fertility-meijer.html [https://perma.cc/U8X4-LCD4] (detailing how some private sperm donors are fathering hundreds of children).

On the other end of the reproductive cycle, children are the culmination of fertilization as that new life. Yet, when a child is put up for adoption, adoptive parents can choose to adopt children based on race, sex, and disability.[175] Of course, because the child is already born, the discriminatory selection cannot be eugenic because the genes have already been passed down to the next generation.[176]

But what about adoptive parents who match with a birth mother before the child's birth? The child has yet to be born, but the parents have already been able to consider such factors as the race of the mother. Therefore, the stage in the reproductive cycle again cannot cleanly separate eugenic and non-eugenic behaviors when eugenics is based purely on selection, as Thomas and Easterbrook suggest, and not on the surrounding context, purpose, and effect of the selection.

Easterbrook's opinion, when discussing IVF, suggests that the significance of the point of selection can be understood by looking at the relationship between personal choice and state regulation and whether those personal choices evade regulation.[177] However, IVF, as mentioned, is largely unregulated, and individuals instead rely on reproductive negligence claims to have a regulatory effect on the market.[178] By not recognizing these claims, courts impose their own standards, and parents' choices are limited not by regulation but by the court's regulatory effect on the parents' choices. By refusing to impose common law liability, a policy equivalent to regulation,[179] in the reproduction-based negligence cases, the courts are, to paraphrase

175. *See generally* Andrew Morrison, *Transracial Adoption: The Pros and Cons and the Parents' Perspective*, 20 HARV. BLACKLETTER L.J. 167 (2004) (detailing the pros and cons adopting parents weigh when considering whether to transracially adopt); *Do Adoptive Parents Choose the Child They Want to Adopt?*, AM. ADOPTION NEWS (Sept. 21, 2018), https://www.americanadoptions.com/blog/do-adoptive-parents-choose-the-child-they-want-to-adopt [https://perma.cc/P5JA-KBY7] (listing race as a question for adoptive parents to answer when choosing a child to adopt).

176. This is an issue for personhood legislation, as discussed in Part IV.

177. *See supra* Section II.C (describing Easterbrook's invocation of IVF as an example of the ability to regulate reproductive technologies).

178. *See id.* (noting that ART remains largely unregulated). *See generally* Fox, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, ch. 2 (discussing the lack of regulation, why it results, and its relationship to litigation based on reproductive claims).

179. *See* Susan Rose-Ackman, *Regulation and the Law of Torts*, AM. ECON. REV. 54, 54 (1991) ("Both tort and statutory law have regulatory effects.").

Thomas,[180] throwing their prestige behind private actors taking away those choices in a manner similar to how the state drove eugenic behavior in *Buck* by upholding limits on individuals' reproductive choices.

Ultimately, the current use of "eugenics" in selective-abortion cases is either aimed at abortions or at selection itself, the latter of which would encompass a much wider variety of reproductive actions. To identify all these instances as eugenic, though, would go too far in eliminating standard features of reproductive medicine.

C. Valuing the Assisted Reproductive Technologies Industry

Assisted reproductive technology (ART) is foundational to modern reproductive medicine and allows families to conceive children who would otherwise be unable or unwilling due to health risks. Its role in reproductive medicine indicates that courts should not reject it easily, especially considering the lack of legislative intervention. This Section will describe ART's place in society to show that courts should be hesitant to interfere with ART, given its cross-cultural and political acceptance as a facet of reproductive medicine, and that its acceptance is unlike the misguided practice of eugenics or the controversial but common practice of abortion.

1. Growth and frequency

The United States is home to over 100 sperm banks, 470 fertility centers, and 1,700 reproductive endocrinologists that one in eight couples rely on to reproduce.[181] In the past decade, ART's use has nearly doubled.[182] In the next decade, the global assisted reproductive technology market size is projected for remarkable growth, expanding from an over $2.3 billion industry in 2020 to over $12.2 trillion in 2030.[183] Predictions suggest the trend will continue, so by 2100, 3

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180. *Cf.* Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1780, 1786 (2019) (Thomas, J., concurring).

181. FOX, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 39, 105.

182. *ART Success Rates*, CDC (Apr. 20, 2021), https://www.cdc.gov/art/artdata/index.html [https://perma.cc/3VYY-4SWQ].

183. The growth is projected at a CAGR rate of 19.3% from 2021 to 2030. *See Assisted Reproductive Technology Market*, ALLIED MKT. RSCH. (2021), https://www.alliedmarketresearch.com/assisted-reproductive-technology-market-A13077 [https://perma.cc/V5

percent of the world population (400 million people) may have been born through the aid of assisted reproductive technologies.[184] IVF was debated at its inception in 1978,[185] but since then, it has grown to be a widely accepted practice across the globe, including in the United States, where it was introduced in 1981.[186] Today, the debate around IVF is not focused on its moral and ethical value as a practice of reproductive medicine but instead on access and payment—questions of how to *increase* the use of IVF, not limit it.[187]

This growth is not attributable specifically to the ability to select but instead is due in large part to factors like increasing incidences of infertility (ten to fifteen percent of couples experience infertility),[188] delayed childbearing, obesity, and sedentary lifestyles, and its effectiveness as a treatment for infertility conditions.[189] Nevertheless,

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85-9PTH] (summarizing the findings of Linu Dash & Onkar Sumant, *Assisted Reproductive Technology Market by Product (Instrument, Accessory & Disposable, and Reagent & Media), Technology (In Vitro-Fertilization, Artificial Insemination, and Others), and End User (Fertility Clinic, Hospital, Surgical Center, and Clinical Research Institute): Global Opportunity Analysis and Industry Forecast, 2021—2030*, ALLIED MKT. RSCH. (2021)).

184. Marte Myhre Reigstad & Ritsa Storeng, *Development of In Vitro Fertilization, a Very Important Part of Human Reproductive Medicine, in the Last 40 Years*, 5 INT'L J. WOMEN'S HEALTH & WELLNESS 1, 1 (2019), doi.org/10.23937/2474-1353/1510089 [https://perma.cc/89KT-6HQH].

185. Even when IVF was introduced, IVF criticism was at its height, and accusations came from the religious community that individuals were "playing God," a 1978 Gallup poll indicated approval and acceptance. Heather Mason Kiefer, *Gallup Brain: The Birth of In Vitro Fertilization*, GALLUP (Aug. 5, 2003), https://news.gallup.com/poll/8983/gallup-brain-birth-vitro-fertilization.aspx [https://perma.cc/8ARL-7RK2]. The poll asked if Americans "opposed the procedure because it was 'not natural,' or whether they favored it because it would make having a child possible for couples who would be otherwise unable to have one." *Id.* The results are telling: sixty percent of Americans favored IVF and only twenty-eight percent were reported to oppose it. *Id.* Moreover, this extended beyond an arms-length acceptance as fifty-three percent of American said they would undergo IVF themselves if they otherwise could not have a child—just days after the first IVF birth. *Id.*

186. Ciara Nugent, *What It Was Like to Grow Up as the World's First 'Test-Tube Baby'*, TIME (July 25, 2018, 5:00 AM), https://time.com/5344145/louise-brown-test-tube-baby [https://perma.cc/C5P4-9GXC].

187. Lindsey Jacobson, Jessica Hopper, Anthony Castellano & Kelly Harold, *How IVF Has Redefined the Modern Family*, ABC NEWS (Apr. 25, 2019, 4:16 AM), https://www.goodmorningamerica.com/news/story/ivf-redefined-modern-family-61969890 [https://perma.cc/RQL9-X7C9] (discussing the high cost of fertility treatment for several featured families).

188. Reigstad & Storeng, *supra* note 184, at 2.

189. *See Assisted Reproductive Technology Market*, *supra* note 183; Reigstad & Storeng, *supra* note 184, at 1–2.

families who use IVF often also use the selective technologies available.[190] In Indiana, whose regulations were challenged in *Box*,[191] nine fertility clinics in the state in 2018 assisted with 599 births.[192] Most of these births (306) occurred at one clinic where the majority of patients transferred embryos after PGT.[193] This number is based on the number of births alone and not on the number of embryos screened and transferred, indicating the screening rate is likely higher since screening occurs before the transfer and the transfer may not successfully implant.[194] In 2016, five percent of IVF embryos were already being screened with preimplantation genetic diagnosis (PGD, a subset of PGT),[195] and some predict that in the next several decades, PGD will become a common aspect of reproduction in developed countries like the United States.[196] The routinization of embryo testing is a natural offshoot of what already occurs for regular pregnancies. Amniocentesis and prenatal testing have become an ordinary practice

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190. *See, e.g.*, Jamie Talan, *IVF Used by Some to Avoid Passing on Genetic Diseases to Offspring*, WASH. POST (Dec. 4, 2021, 9:00 AM), https://www.washingtonpost.com/health/preimplantation-genetic-testing/2021/12/03/3127e97e-1640-11ec-a5e5-ceecb895922f_story.html [https://perma.cc/EG9Z-UM5R].

191. Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1780, 1780-81 (2019).

192. *View ART Data: Indiana Clinics*, *Assisted Reproductive Technology (ART) Data*, CDC [hereinafter *View ART Data: Indiana Clinics*], https://nccd.cdc.gov/drh_art/rdPage.aspx?rdReport=DRH_ART.ClinicsList&SubTopic=&State=IN&Zip=&Distance=50 (last visited Dec. 17, 2021) (numbers totaled by the Author from individual pages). There were also nine facilities performing abortions (six of which were clinics) that performed 7,710 abortions. *State Facts About Abortion: Indiana*, GUTTMACHER INST. (2022), https://www.guttmacher.org/sites/default/files/factsheet/sfaa-in.pdf [https://perma. cc/78SS-5DYD].

193. *See View ART Data: Indiana Clinics*, *supra* note 192 (showing that the majority of births happened at Midwest Fertility Specialists). The instances of selection may be much higher than the number of births since not every transferred embryo results in a live birth. At this clinic, the rate of selection by age group varied from 56.3–72.8 percent. *Id.* The second largest number of births was 237, with an 11.7 percent rate of transfer after PGT. *Id.* Other clinics rates were lower, two to three percent, but with a lower number of births as well. *Id.* Many factors could explain this difference, including the demographics of the populations attending each clinic and how each clinic advertises.

194. *See id.*

195. FOX, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 21.

196. *Id.* It is worth considering that this discussion did not seem to consider the frequency of accidental pregnancies, which could dilute these claims about frequency while still maintaining the point that IVF will become increasingly used in coming years.

during pregnancy so that women are routinely offered testing.[197] While the reasons can vary from selective abortions to a desire to be able to plan appropriate accommodations for a child with a disability, this routinization indicates that parents and healthcare providers place a value on knowing this information and weighing options.[198]

2. Limited religious and political controversy

Just because something is used expansively does not make it uncontroversial, even if that use can indicate a social view on the matter. For example, the fact that thousands of abortions occur each year has not resolved the abortion debate. ART, though, is viewed differently than abortion. For example, the religious objections that underlie much of the abortion debate do not extend equivalently to ART. Many religious sects that do not approve of abortion approve of ART. For example, IVF is accepted in at least some forms by prominent religions like Protestantism, Anglicanism, Coptic, Judaism, Sunni Islam, Shi'a Islam, Hinduism, Buddhism, Japanese Buddhism and Shintoism, and Chinese Taoism and Buddhism, with the notable exception of the Catholic Church.[199] Officially, Catholics, Protestants, and Anglicans reject PGD, and these and several other religions reject surrogacy.[200] Gamete donation is likewise rejected or limited by gender in these religions.[201] However, unlike abortion, individuals are not as attached to these religious teachings, and related "laws and ethical guidelines in the United States disregard or even diverge from religious teachings."[202] A 2001 study indicated that while the Catholic Church rejects the use of IVF under any circumstances, 63.5 percent of Catholic responders would use IVF themselves, and 67.5 percent said others could use it.[203] Moreover, Fox's book is sprinkled with

197. Sonia Mateu Suter, *The Routinization of Prenatal Testing*, 28 AM. J.L. & MED. 233, 241 (2002).

198. *Id.*

199. HN Sallam & NH Sallam, *Religious Aspects of Assisted Reproduction*, 8 FACTS VIEWS VIS OBGYN 33, 33 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5096425/pdf/FVVinObGyn-8-33.pdf [https://perma.cc/K5AY-Y9RM].

200. *Id.* at 47. The fourth religion to reject surrogacy would be Sunni Islam, but as of 2016, when the study was completed, the issue was still being debated in that faith. *Id.*

201. *Id.* at 33, 38–39, 42–43, 46.

202. ALEXANDRA E. SIGILLO & MONICA K. MILLER, ASSISTED REPRODUCTION: CONCEPTIONS, CONTROVERSIES, AND COMMUNITY SENTIMENT 85 (2020).

203. *Id.* (stating thirty-six percent would not undergo the procedure, and eleven percent were uncertain).

examples of individuals, including Catholics, suing in tort because they turned to reproductive technologies like IVF and PGT just to have their choices frustrated by negligent providers.[204] Often these families desired to have a biological child, to reduce that child's chance of suffering,[205] and, being morally opposed to abortion, to avoid being put in a situation where one would consider a selective abortion.

Consider *Chevra Dor Yeshorim* (translates from Hebrew to "generation of the righteous"), a program designed to address the prevalence of Tay-Sachs disease in New York's Orthodox Judaism community.[206] Tay-Sachs, which is primarily found in individuals of Jewish ancestry, is an incurable genetic disorder that leads to death around the ages of four to six after the child's health progressively deteriorates, from loss of vision and motor control to severe mental impairments and seizures.[207] If two parents both carry the genetic variant, there is a one-in-four chance the child would be born with Tay-Sachs. In Orthodox Judaism tradition, birth control, prenatal testing, and abortions are limited or prohibited, so this program was created with the explicit aim "to eliminate Tay-Sachs from the Orthodox community."[208] The program allows couples to see if they are both carriers and risk having a child with the disease, and, as a now-integrated part of the Orthodox culture's matchmaking process, it discourages dating and marriage between two carriers of the variant.[209] The program has been widely successful in eliminating Tay-Sachs from the community, with one rabbi describing the program as an obligation for members of the faith.[210] The program was so successful that it spread across the country and internationally, and after thirty years, it has virtually eliminated

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204. *See, e.g.*, FOX, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 134 (describing a Jewish couple that was morally opposed to abortion and chose IVF to screen embryos for cystic fibrosis but whose provider negligently cleared embryos carrying the disease); *id.* at 103 (describing a Catholic couple who did not abort but gave over their child born from IVF when they learned another couple's embryo had been wrongly implanted).

205. Some individuals hold the reduction of suffering as a tenant of faith, leading them to turn to ART to have offspring that will not suffer.

206. Barbara Mahany & Tribune Staff Writer, *Tay-Sachs Test Eases the Fears of Orthodox Jews*, CHI. TRIB. (Feb. 7, 1994, 12:00 AM), https://www.chicagotribune.com/news/ct-xpm-1994-02-07-9402070003-story.html [https://perma.cc/TS93-YDFH].

207. Beverly Merz, *Matchmaking Scheme Solves Tay-Sachs Problem*, 258 J. AM. MED. ASSOC. 2636, 2636 (1987).

208. Mahany, *supra* note 206.

209. *Id.*

210. Merz, *supra* note 207, at 2639.

Tay-Sachs, reducing the incidence of the disease by over 95 percent (with the remaining cases occurring as genetic variants largely outside the Jewish community).[211]

Should this type of matchmaking be outlawed as eugenics? As discussed above, this type of pre-fertilization selection differs from the selective-abortion context primarily in whether the selection occurs before the point at which abortion is an option.[212] But again, that is precisely when selection occurred in *Buck*. Here, though, anyone can reproduce, but who they reproduce with is limited by their own choice to participate in genetic testing and act on the results. Ascribing a eugenics label without considering whether the actions are forced upon the participants and whether they occurred out of malicious discriminatory biases would make this action equally as "eugenic" in nature despite its desire to eliminate suffering and meet religious obligation.

Beyond religion, approval has also been captured in nonpartisan political action.[213] In 2021, nineteen states had imposed legislative requirements for insurers to provide or offer coverage of infertility treatments.[214] Of these, thirteen states (both blue and red) have insurance laws providing IVF coverage.[215] Even for states that do not promote IVF, the lack of IVF regulation itself demonstrates that ART differs politically from abortion.

The lack of regulation is attributable to how ART splits both conservative and liberal bases. Unlike abortion, ART, particularly IVF,

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211. Gina Kolata, *Using Genetic Tests, Ashkenazi Jews Vanquish a Disease*, N.Y. TIMES (Feb. 18, 2003), https://www.nytimes.com/2003/02/18/science/using-genetic-tests-ashkenazi-jews-vanquish-a-disease.html [https://perma.cc/KW4J-VWJS].

212. *See supra* Section II.C.

213. *E.g.*, Mariel Padilla, *IVF Would Be Covered for Federal Employees Under Proposed Bipartisan Bill*, 19TH NEWS (Apr. 25, 2023, 9:20 AM), https://19thnews.org/2023/04/ivf-treatment-coverage-federal-employees-proposed-bill [https://perma.cc/AF4J-W5DX] (providing an example of bipartisan IVF legislation).

214. The nineteen states were 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. Julia Cummings, *Closing the Reproductive Divide: Expanding Access to Fertility Services Beyond the White Nuclear Family*, 41 MINN. J.L. & INEQ. 254, 264 n.96 (2023) (citing *Insurance Coverage by State*, RESOLVE: NAT'L INFERTILITY ASS'N, https://resolve.org/what-are-my-options/insurance-coverage/infertility-coverage-state [https://perma.cc/8CMW-37KJ]).

215. Those that do not are California, Louisiana, Montana, Ohio, Texas, and West Virginia. *Id.* Ten of the states also have fertility preservation laws. *Id.*

is able to promote the traditional family unit many conservatives idealize. While some of the Republican, conservative, Christian base always promote natural fertilization and childbirth, others believe that the creation of the family unit and procreation itself are more important.[216] Conservatives who oppose the destruction of embryos do not limit IVF but instead promote legislation for embryo donations between couples.[217] They publicize that "personhood laws" will not affect IVF.[218] On the other hand, liberals are similarly ideologically split as they generally favor feminism and the woman's choice, but some are concerned about disability rights and the message selective reproduction at any stage sends to people living with disabilities.[219] Therefore, the social, religious, and political responses to ART indicate that these are not practices that courts want to eliminate in their selective-abortion ban reasoning or else risk overstepping the democratic process.

3. Distinguishing the eugenics era

While eugenics was also a "socially accepted" practice, social acceptance indicative of a national moral failing (like eugenics) is distinguishable from social acceptance as an indicator of a collective conscience recognizing beneficial developments. The two features of

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216. FOX, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 30.

217. *See generally* Margo Kaplan, *Fertility Clinics Destroy Embryos All the Time. Why Aren't Conservatives After Them?* WASH. POST (Aug. 14, 2015, 6:00 AM), https://www.washingtonpost.com/opinions/fertility-clinics-destroy-embryos-all-the-time-why-arent-conservatives-after-them/2015/08/13/be06e852-4128-11e5-8e7d-9c033e6745d8_story.html [https://perma.cc/FQK6-LU4T]; Jasmine Taylor-Coleman, *The Americans Who 'Adopt' Other People's Embryos*, BBC (July 18, 2016), https://www.bbc.com/news/magazine-36450328 [https://perma.cc/P65A-ENU3] (talking about a Christian pro-life couple who was involved in the embryo donation process). Some also advocate permanent storage rather than destruction of the embryos if they are not going to be donated.

218. Aria Bendix, *States Say Abortion Bans Don't Affect IVF. Providers and Lawyers are Worried Anyway*, NBC NEWS (June 29, 2022, 12:56 PM), https://www.nbcnews.com/health/health-news/states-say-abortion-bans-dont-affect-ivf-providers-lawyers-worry-rcna35556 [https://perma.cc/NQ48-WLA3] (stating that the attorney generals of Arkansas, Alabama, and Oklahoma said that their law defining personhood as starting at fertilization does not affect IVF); *see* Kaplan, *supra* note 217 (highlighting how conservative legislation often deemphasizes the impact of "personhood amendments" on IVF).

219. FOX, BIRTH RIGHTS AND WRONGS: MEDICINE AND TECHNOLOGY, *supra* note 13, at 30.

eugenics asserted in this Article that distinguish it from selective-abortion and negligence cases likewise make the distinction in social acceptance here. Unlike the social acceptance of eugenics, the medical procedures and genetic testing at use in ART involve science that is not only accepted but proven.[220] While eugenics rode the wave of social discrimination, outpacing and distorting the science of inheritance to match the public's discriminatory agenda of selecting for the un-selectable, here the science was established first, and ongoing advances in genetic technology build off of and reinforce current understandings. Moreover, the decision is personal to the patient and informed by her doctor, without interference from society in that choice.[221] Finally, eugenics was morally and ethically wrong but pushed by the majority; conversely, the cross-cultural approval of the ART industry indicates a universal moral prerogative.

Because the selection that often goes into these practices is indistinguishable from that of selective abortion, courts would dangerously overstep by labeling selective abortions as eugenic or would be forced to contradict themselves in their reasoning of reproductive negligence cases. Moreover, for courts concerned about the messaging to children about their worth, upending the ART industry by labeling many of its accepted practices as eugenic could send a negative message to the over eight million[222] people born via IVF in its first forty years of use (1978 to 2018), the more than half a million people born each year from IVF and intracytoplasmic sperm

220. *See supra* text accompanying notes 122–25 (discussing how reproductive decisions made for reasons that do not reflect the current understanding of medicine and its capabilities is a failure of informed consent). Further, to the extent that any of the science gets disproven by future research, it would do so through legitimate research and scientific study, not simply changes in the social pulse.

221. *See* discussion *supra* Section II.B (describing the role of society on individual parental decision-making and distinguishing this from state policies based on stereotypes).

222. Eight million may be a gross underestimate because of the lack of reporting in other countries. Susan Scutti, *At Least 8 Million IVF Babies Born in 40 Years Since Historic First*, CNN (July 3, 2018, 6:04 AM), https://www.cnn.com/2018/07/03/health/worldwide-ivf-babies-born-study/index.html [https://perma.cc/2TXJ-VTXK].

injection,[223] and the roughly two percent of the American population born via IVF each year.[224]

IV. CORRECTLY DISTINGUISHING EUGENICS POST-*DOBBS*

The post-*Dobbs* era presents an opportunity to fix the eugenics language of the courts. It acknowledges a fraught abortion history and allows states to regulate abortion so long as they have a rational basis.[225] This Article's analysis suggests that "eugenics," defined as selection at the point of fertilization, is likely not even rational. As such, legislatures and courts can move forward with more precise language based on good law and avoid continuing to exacerbate the political tensions of reproductive law by deepening the use of faulty rhetoric.

The post-*Dobbs* environment was in constant flux and will likely continue to shift in the coming years.[226] Following *Dobbs*, the new frontier for the pro-life movement is arguably personhood legislation, which would establish a legal difference at the point of fertilization.[227] However, *Dobbs* focused on fitting abortion into the current Fourteenth Amendment jurisprudence that structures review of state action in terms of rational basis, intermediate scrutiny, and heightened scrutiny, rather than eliminating the categories altogether.[228] The tiers of scrutiny provide the basis for discrimination law and should be used when thinking about sex, race, and disability selection. Doing so forces

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223. *Id.* Intracytoplasmic sperm injection, like traditional IVF, involves fertilization outside the body. *Id.* ICSI injects the sperm directly into the egg rather than allowing the sperm to fertilize the egg in a Petri dish. *Id.* ICSI is often thought of as a step in the larger IVF process since the ICSI fertilized egg would still then be implanted in the uterus in the traditional IVF cycle. *See id.*

224. *ART Success Rates*, CDC (Apr. 20, 2021), https://www.cdc.gov/art/artdata/index.html [https://perma.cc/LFJ6-ENXU].

225. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–43 (2022).

226. *See* Nathaniel Weixel & Joseph Choi, *How the Supreme Court Changed America by Overturning* Roe v. Wade, HILL (Jun. 21, 2023, 6:00 AM), https://thehill.com/policy/healthcare/4058185-supreme-court-roe-dobbs-changed-america [https://perma.cc/SH7S-V48N]; *One Year After Dobbs, America's Pro-Life Movement is in Flux*, ECONOMIST (June 22, 2023), https://www.economist.com/united-states/2023/06/22/one-year-after-dobbs-americas-pro-life-movement-is-in-flux [https://perma.cc/LWQ2-2XQH].

227. *See* Wendy Davis, *The Next Big Battle in America's Abortion Fight Will be over Fetal Personhood*, NBC NEWS (Oct. 23, 2022, 7:00 AM), https://www.nbcnews.com/think/opinion/americas-abortion-law-fight-will-fetal-personhood-rcna53477 [https://perma.cc/SH8S-MVUT] (discussing how Republicans have focused on personhood legislation).

228. *See Dobbs*, 142 S. Ct. at 2242–43.

precision and allows meaningful debate while following the *Dobbs* decision.

A. Fetal Personhood

The new frontier for the pro-life movement seems to be fetal personhood, putting a new emphasis on the point of fertilization.[229] *Dobbs* upheld a ban on abortions fifteen weeks after fertilization,[230] and while pro-life groups will fight for fetal personhood, it is reasonable to expect that many will advocate that there is no "potential life" where an embryo has not been implanted since an embryo cannot develop into life outside and without the womb, much like an egg cannot develop into life without being fertilized by a sperm. With fetal personhood, though, the arbitrary point of fertilization is suddenly given significance as the defining point of what is a person.

Fetal personhood legislation has been introduced in a number of states,[231] though its meaning and scope are poorly defined. The Supreme Court recently denied to hear a case that would evaluate whether fetuses have equal protection and due process rights granted

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229. *See, e.g.*, *id.* at 2240, 2317 (Breyer, J., dissenting) (describing the majority opinion as "say[ing] that from the very moment of fertilization, a woman has no rights to speak of"); *see also supra* note 227 (highlighting newfound focus on recognizing fetal personhood in legislation).

230. *Dobbs*, 142 S. Ct. at 2242.

231. States that have successfully passed this legislation vary on whether their personhood laws are passed as state laws or state constitutional amendments and if they expressly provide for IVF. States with forms of fetal personhood legislation include Alabama, Arizona, Georgia, and Missouri. Davis, *supra* note 227. Voters have rejected ballot initiatives to grant fetal personhood through state constitutional amendments or personhood laws in Colorado in 2008, 2010, and 2014; South Dakota in 2006 and 2008; Mississippi in 2011; and North Dakota in 2014. Jeff Amy, *EXPLAINER: What's the Role of Personhood in Abortion Debate?*, ASSOCIATED PRESS (July 30, 2022), https://apnews.com/article/abortion-us-supreme-court-health-government-and-polit
ics-constitutions-93c27f3132ecc78e913120fe4d6c0977 [https://perma.cc/BUD3-4K
UH]; Kate Zernike, *Is a Fetus a Person? An Anti-Abortion Strategy Says Yes.*, N.Y. TIMES (Aug. 30, 2022), https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-pers
on.html [https://perma.cc/SCB5-T5SL]. At the conclusion of the writing of this Article, legislation has also been introduced in Arizona, Iowa, Ohio, Oklahoma, South Carolina, Vermont, and West Virginia. *State Legislation Tracker: Major Developments in Sexual & Reproductive Health*, GUTTMACHER INST., https://www.guttmacher.org/state-policy [https://perma.cc/Q2BV-XTHE] (providing statistics for abortion bans described as "Bans Abortion by Establishing Fetal Personhood" for 2022). Shortly before publication, the states that had introduced such bans in 2023 were Alabama, Missouri, New York, South Carolina, and Virginia. *Id.* (same for 2023).

under the Fourteenth Amendment, leaving open the question of whether states can define personhood.[232]

While a state-mandated definition of personhood could overcome this Article's argument that there is no meaningful difference to the point in time of selection between gamete donor and fertilization, it nevertheless fails to distinguish these stages from adoption. Additionally, the point only becomes nonarbitrary by taking the embryo out of the *Dobbs* definition of "prenatal life" and defining it as a person, making the alleged discrimination *less* comparable to eugenics and more suited to modern antidiscrimination law.

B. Use of Antidiscrimination Law

Moving away from eugenic language can help improve principled jurisprudence in the *Dobbs* era so that the new precedent in reproductive law is not based on rhetoric but on reason. This Article acknowledges that these medical treatments can still be used, at least theoretically, for discriminatory purposes, even if they are not eugenic in the same sense as *Buck*-era eugenics. But anti-abortion advocates would experience no honest loss in moving away from identifying the governmental interest as eugenics. Rational basis review, under *Dobbs*, requires a far less exacting interest,[233] so asserting eugenics as some stronger government interest is unnecessary from a pro-life perspective. Moreover, in states continuing to allow abortions, conservative judges could continue to oppose the narrower subset of selective abortions on discrimination grounds, which some liberals would also join.

The law regularly deals with balancing the interests of private actors against their allegedly discriminatory actions and the state's actions to eliminate that discrimination. Easterbrook himself indicated the

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232. Nate Raymond, *U.S. Supreme Court Rebuffs Fetal Personhood Appeal*, REUTERS (Oct. 12, 2022, 10:38 AM), https://www.reuters.com/legal/us-supreme-court-rebuffs-fetal-personhood-appeal-2022-10-11 [https://perma.cc/EP3X-Q62W]. Because the Fourteenth Amendment protections extend to "persons," it stands to reason that states cannot independently define personhood, or each state could independently limit Constitutional protections simply by rewriting the definition of personhood. U.S. citizens could then lose constitutional protections by crossing state lines.

233. *Dobbs*, 142 S. Ct. at 2277–88; *id.* at 2317–18 (J. Breyer, J. Sotomayor, & J. Kagan, dissenting).

court's ability to handle these questions, likening the limitations on selective abortions to employment discrimination.[234]

In doing so with selective reproductive medicine, the court will have to reidentify the state interest in these cases since it no longer rests on "preventing abortion from becoming a tool of modern-day eugenics,"[235] and it is not apparent how selection inherently falls under protecting potential life.[236] The *Dobbs* decision considered interests in:

> [R]espect for and preservation of prenatal life at all stages of development, *Gonzales*, 550 U.S. at 157–158, 127 S. Ct. 1610; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability. *See id.* at 156–157, 127 S. Ct. 1610; *Roe*, 410 U.S. at 150, 93 S. Ct. 705; *cf. Glucksberg*, 521 U.S. at 728–731, 117 S. Ct. 2258 (identifying similar interests).[237]

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234. Planned Parenthood of Ind. & Ky. v. Comm'r of Ind. Dep't of Health, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting). Similarly, legislatures have already recognized the room for genetic discrimination (admittedly with controversial success) with the Genetic Information Nondiscrimination Act (GINA). Sonia M. Suter, *GINA at 10 Years: The Battle over 'Genetic Information' Continues in Court*, 5 J.L. & BIOSCIENCE 495, 495–97, 499 (2018). GINA historically received support from the majority of both Democrats and Republicans, as evidenced by the 414–1 vote in 2008 by the House of Representatives. *Id.* at 496. As the goal of GINA was to prevent individuals from experiencing repercussions from genetic testing in order to further personalized medicine, further research should be done to determine how those goals interact with individuals receiving genetic information for their medical needs and subsequently making reproductive decisions off of those tests. *Id.* at 498.

235. Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring).

236. *Id.*

237. *Dobbs*, 142 S. Ct. at 2283. The Court has also discussed preventing discrimination on bases like race or sex in recent terms through the affirmative action case, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*. 600 U.S. 181, 230 (2023). Some have suggested that the same logic apply to employment cases. Jessica Guynn, *Supreme Court Just Reversed Affirmative Action. What that Means for Workplace Diversity*, USA TODAY (June 30, 2023, 1:14 PM), https://www.usatoday.com/story/money/2023/06/29/affirmative-action-supreme-court-ruling-workplace-diversity/70328166007 [https://perma.cc/WL5J-5BKK]. Notably, employment is the consideration that Easterbrook used to suggest selective abortions could be regulated on discrimination grounds. *Planned Parenthood of Ind. & Ky.*, 917 F.3d at 536 (Easterbrook, J., dissenting).

Notably, the language of "discrimination on the basis of race, sex, or disability" does not name eugenics as the state interest.[238] Given how *Dobbs* described abortion regulations as akin to "other health and welfare laws,"[239] perhaps the "principle that sustains compulsory vaccination is broad enough to cover" other statutory limits on reproductive choices.[240] Far from rejecting *Buck*, though, that instead asserts its remaining good law principle.

Though a full discussion and determination of the potential state interest in these cases is beyond the scope of this work, the purported state interest is poised to attract greater attention as conservative states before *Dobbs* had been passing laws to prohibit reproductive negligence torts, particularly wrongful birth torts, altogether, often clearly indicating that the goal was to prohibit abortion.[241] Should these laws be litigated, the state may have a hard time finding a state interest for which the means taken (the categorical ban on these tort claims) fits, especially now that the state can limit abortion to a greater degree. In that vein, even if states can maintain rational basis review, states have to provide a rational basis for banning these tort suits rather than regulating ART directly, a seemingly irrational decision given how heavily legislatures regulate healthcare.[242]

Ultimately, the distinction between labeling practices of reproductive medicine as eugenic or as controversial in other terms

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238. *Dobbs*, 142 S. Ct. at 2284.

239. *Id.* (citing Heller v. Doe, 509 U.S. 312, 319 (1993)).

240. Buck v. Bell, 274 U.S. 200, 207 (1927) ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes." (citing Jacobson v. Massachusetts, 197 U.S. 11, 25 (1904))).

241. *See, e.g.*, 2021 Tenn. Pub. Act 379 (SB 1370) (enacting tort reform to eliminate wrongful birth and wrongful life torts after the point of conception when in utero); John Hanna, *Top Kansas Court Upholds Law Barring 'Wrongful Birth' Suits*, AP NEWS (Apr. 30, 2021), https://apnews.com/article/kansas-laws-courts-business-health-3d7adc2e25261fdcd36585b4f32da9f6 [https://perma.cc/4LQZ-LPAA] (providing an example of courts barring wrongful birth suits); Madlin Mekelburg, *Bill to Prohibit 'Wrongful Birth' Lawsuits Unanimously Passes Texas Senate Panel*, DALLAS MORNING NEWS (Feb. 27, 2017, 8:30 AM), https://www.dallasnews.com/news/politics/2017/02/27/bill-to-prohibit-wrongful-birth-lawsuits-unanimously-passes-texas-senate-panel [https://perma.cc/6THJ-XJ8S] (providing an example of legislation that prohibits wrongful births).

242. States have successfully defended challenges to limits on damage awards in medical malpractice suits, but this does not prohibit the claim altogether. *See, e.g.*, Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, J.L. MED. & ETHICS 515, 517, 525 (2005) (providing examples of where states have been successful in challenging limits on damages for medical malpractice suits).

means that when selective abortions and other procedures are debated, they will be debated in good law rather than relying on *Buck* as anticanon to singularly dismiss their merits. Thus, as the subtleties of abortion, ART, and other reproductive technologies evolve in science, when they are wrestled with and debated in the law, and even when the genetic editing of Easterbrook's *New York Times* article becomes reality, they will be handled in a nuanced way, benefiting from the precedent of well-reasoned decisions rather than cases summarily decided on a misapplied, morally tinged label.

Selective-abortion bans are not cases by which to finally overturn *Buck*; *Buck* has been overturned in dicta, in scholarship, and in history. These cases deserve instead to be reasoned on their own merits. Removing the "eugenics" label from these reproductive decisions does not make the selection occurring in those cases uncontroversial, but it makes it differently controversial in a way the law is able and adept to handle. Rather than deciding selective abortion on *Buck* as anticanon, courts can look to good law tools to interpret and balance a state's ability to regulate a private actor's reproductive choices. And, of course, the state's ability to regulate what one chooses to do with one's own body is the remaining good law value of *Buck v. Bell*.

CONCLUSION

"Eugenics" is rightfully a word with power. Inflating that word beyond its meaning requires a misreading of history that dishonors those affected by the atrocities of the eugenics movement. Even considering that discrimination underwrote the eugenics movement, eugenics cannot be equated to discrimination, and calling something eugenic that misses fundamental elements of the eugenics movement eschews the application of the better developed area of antidiscrimination law. The reproductive choices currently before the courts cannot be fairly decided until the label of "eugenics" and the references to *Buck* are removed in favor of more valuable words: "Is this a discriminatory practice that the state can regulate?"

As eugenics and *Buck* scholar Paul Lombardo wrote, "[W]e should be careful that we are not distorting history merely to make debating points, or redefining eugenics as a bludgeon to be used in crushing the political opposition."[243] While *Buck* could be used to denounce eugenics and subsequently enflame the language of reproductive

243. Lombardo, *Disability*, *supra* note 85, at 78.

negligence torts, it can instead be used to draw accurate distinctions needed to understand these areas of conflict with the appropriate nuance. With the circuit split on selective abortions underway before *Dobbs*,[244] that question may come before the Court in the near future, or it may linger in the circuits as the full impact of *Dobbs* continues to play out. When it does come before the Court, at least two justices will have indicated a willingness to call selective abortions eugenic. But there is no need to complicate reproduction law further with decisions based on bad law, bad science, and bad reasoning when we have good law, good science, and good reasoning that will do the work. The justices will have to choose: will they use *Buck* as anticanon to decry eugenics, or will they use *Buck* as canon to assess government restrictions on bodily choices?

244. *See supra* note 19.