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Abortion-Eugenics Discourse in *Dobbs*: A Social Movement History

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References to eugenics in recent abortion opinions—including *Dobbs v. Jackson Women's Health Organization*[1]—have only begun to attract scholarly attention as a distinctive form of constitutional discourse. In the early twentieth century, the term "eugenic" appeared frequently in legal, scientific, and other books, as a policy objective or subject of scientific study concerned with "improving" the quality of the nation's "racial stock."[2] After peaking in the 1910s, use of the term steadily declined in the World War II era as Western democracies came to repudiate the politics of Jim Crow and the Holocaust.[3] Usage spiked again at the turn of the century, a period when historians began critically

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[1] 597 U.S. 215 (2022).

[2] "*Eugenic*," GOOGLE BOOKS NGRAM VIEWER [https://perma.cc/N5GL-YKWV].

[3] *Id.*

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to examine the eugenics movement in Europe and the United States.[4] As condemnation of eugenics has grown, the term "eugenic" has become a term of opprobrium—a way to shame or discredit.

It is in this register that eugenic talk about abortion has spread in the last half century. Amongst Black Americans, there have been intergenerational debates about whether birth control and abortion pose threats to community or might play a role in community uplift. In this Essay, we show how antiabortion advocates have responded to these debates by depicting abortion as eugenic. For decades antiabortion advocates have spread race-equality arguments for the criminalization of abortion that explain racially disparate abortion rates as caused by intentional discrimination—often by a shadowy figure named Margaret Sanger—rather than by structural racism. We follow this abortion-is-eugenics argument from the streets to the pages of the United States Reports, where it appears in the much-studied 2019 decision of *Box v. Planned Parenthood of Indiana and Kentucky*[5] and in *Dobbs v. Jackson Women's Health Organization*,[6] the Court's decision overturning *Roe v. Wade*.[7] The abortion-is-eugenics argument offers a justification for criminalizing abortion designed to appeal to those

[4] *Id.* The literature on eugenic history is too rich to cover comprehensively here. A few seminal works include DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY (1985); JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW (2018); WENDY KLINE, BUILDING A BETTER RACE: GENDER, SEXUALITY, AND EUGENICS FROM THE TURN OF THE CENTURY TO THE BABY BOOM (1997); THOMAS C. LEONARD, ILLIBERAL REFORMERS: RACE, EUGENICS, AND AMERICAN EUGENICS IN THE PROGRESSIVE ERA (2017); ALEXANDRA MINNA STERN, EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA (2016); REBECCA KLUCHIN, FIT TO BE TIED: STERILIZATION AND REPRODUCTIVE RIGHTS IN AMERICA, 1950-1990 (2009); JOHANNA SCHOEN, CHOICE AND COERCION: BIRTH CONTROL, STERILIZATION, AND ABORTION IN MODERN AMERICA (2005).

[5] 139 S. Ct. 1780 (2019) (per curiam).

[6] This short Essay considers how talk of eugenics in the abortion debate functions as a constitutional discourse enabling open and veiled discussion of race and gender in case law—but there is an equally complex, intersectional, and long-running discourse focused on the relationship of abortion and disability. For an analysis of *Dobbs* in this framework, see Robyn M. Powell, *Forced to Bear, Denied to Rear: The Cruelty of* Dobbs *for Disabled People*, 112 GEO. L.J. (forthcoming 2024), https://ssrn.com/abstract=4558129 [https://perma.cc/EDA4-MELW]. For a sample of work on reproductive justice and disability in debates over *Box*, see Khiara Bridges, *The Dysgenic State: Environmental Injustice and Disability-Selective Abortion Bans*, 110 CALIF. L. REV. 297, 339-60 (2020) [*hereinafter* Bridges, *The Dysgenic State*]; and Samuel R. Bagenstos, *Disability and Reproductive Justice*, 14 HARV. L. & POL'Y REV. 273, 279-86 (2020).

[7] 410 U.S. 113 (1973).

unconvinced by fetal-protective arguments, suggesting that criminalizing abortion is necessary to achieving racial justice.

Movements seek to persuade. Over time, the antiabortion movement has developed new forms of argument in an effort to reach Americans whom its initial fetal-focused arguments did not persuade. To win over new supporters and counter equality arguments of the abortion-rights movement, the antiabortion movement began to stress that legal abortion facilitated discrimination not just against the unborn but also against women and people of color.[8] Antiabortion advocates drew on feminist frames to claim that abortion harms women as well as the unborn.[9] And, antiabortion advocates have drawn on antiracist frames to argue that abortion harms communities of color as well as the children they might bear, as the decades passed, making civil-rights frames more central to the case against abortion.[10] Eugenics enters here.

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[8] Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1649-51 (2008) (analyzing the dynamics of movement-countermovement struggles that shape constitutional argument); *see also* MARY ZIEGLER, *ROE*: THE HISTORY OF A NATIONAL OBSESSION 124-146 (2023) (chronicling how movement-countermovement dynamics shaped discussion of antiracism and *Roe*) [hereinafter ZIEGLER, *ROE*]; JENNIFER HOLLAND, TINY YOU: A WESTERN HISTORY OF THE ANTI-ABORTION MOVEMENT 3-22 (2020) (studying movement-countermovement dynamics in the development of antiabortion civil rights rhetoric). *See generally* Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 U.C.L.A. L. REV. 1728 (2017) (exploring movement-countermovement conflict in struggles over same-sex marriage); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323-1419 (2006) (documenting movement conflict's influence in constitutional-equality discourse).

[9] Siegel, *The Right's Reasons*, *supra* note 8, at 1669 ("As a political discourse designed to rebut feminist, pro-choice claims, [woman-protective antiabortion argument] came to internalize elements of the arguments it sought to counter—[incorporating] language of the late twentieth-century feminist and abortion-rights movement."); *see also* ZIEGLER, *ROE*, *supra* note 8, at 79-98 (exploring how in the 1990s, antiabortion constitutionalists sought to argue that legal abortion "had not made women equal but had only damaged their psyches and bodies"); Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on June Medical*, 2020 SUP. CT. REV. 277, 296-309 (2021) (tracing the spread of woman-protective antiabortion arguments into legislation and case law); PAUL SAURETTE & KELLY GORDON, THE CHANGING VOICE OF THE ANTI-ABORTION MOVEMENT: THE RISE OF "PRO-WOMAN" RHETORIC IN CANADA AND THE UNITED STATES (2015) (tracking the use of pro-woman rhetoric in the Canadian and American antiabortion movements).

[10] The fight over abortion rights began in the civil-rights era, and appeals to the equal treatment of minorities were commonplace in antiabortion argument long before claims about eugenics played a significant role in the antiabortion movement's argument. *See* BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S

Melissa Murray offered the first historical account of eugenics arguments in the Court's abortion cases, showing how these arguments tap the memories of slavery and sterilization in communities of color, and have prompted new rounds of gendered debates about whether birth control and abortion threaten the Black community.[11] Khiara Bridges has shown how the conservative Justices employ the memory of Margaret Sanger and this discourse about abortion and eugenics as a constitutional discourse, recognizing forms of racial injury under the Due Process Clause that the Court would not recognize under the Equal Protection Clause—in such a way as to legitimate reproductive coercion.[12]

This short Essay focuses attention on the antiabortion movement's multi-decade effort to advance eugenic allegations about abortion—often, it would appear, for the purpose of triggering these racial memories in communities of color and countering the resistance of Black women. The Essay examines the role of antiabortion activists in seeding the claim that abortion is eugenic—in particular the claim that Margaret Sanger, the founder of Planned Parenthood, was a eugenicist—and in helping to mobilize new actors to express this understanding in politics and in law. As is so often the case, the claims we are now seeing in the federal courts started decades ago in movement conflict about the Constitution outside the courts.[13]

RULING 86, 87 (Reva B. Siegel & Linda Greenhouse eds., 2d ed. 2012) (quoting Professor Robert Byrn arguing in 1966 that "[l]ike a person whose skin pigment is other than white, the unborn child is recognizable as a human being. . . . His status must be governed by this fact and not by the irrelevancies of size, shape, and color. . . . "); HOLLAND, *supra* note 8 at 7-11, 22-24, 31 (documenting civil-rights rhetoric in the early antiabortion movement); MARY ZIEGLER, PERSONHOOD: THE NEXT AMERICAN WAR OVER REPRODUCTION 32-56 (forthcoming, Yale University Press, 2025) (studying the early equality claims advanced in the struggle for fetal personhood).

[11] Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2027-2101 (2021) [hereinafter Murray, *Race-ing* Roe].

[12] Khiara M. Bridges, *The Supreme Court, 2021 Term—Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 24-66 (2022) [hereinafter Bridges, *Race in the Roberts Court*]; *id.* at 59-61 (analyzing Justice Thomas's account of Margaret Sanger); *id*. at 64 ("The Court embraces and elevates this injury narrative solely because it legitimates the Court's favored policy intervention—the reversal of *Roe*."). Michele Goodwin offers a powerful reading of Bridges's critique. Michele Goodwin, *Complicit Bias and the Supreme Court*, 136 HARV. L. REV. 119, 149-151 (2022).

[13] We are interested in the ways that movement conflict over abortion shaped the forms of reasoning that are now appearing in the Court's cases. *See, e.g*., sources cited, *supra* note 8. There are of course other movement histories that do not focus on conflicts in politics and courts. *See,*

When we reconstruct different pathways of argument about reproductive coercion—showing the roots of some conversations deep in the Black community and others in white antiabortion activism—we can see that there are complex raced and gendered dynamics at work in the abortion-is-eugenics discourse yet to be examined. As early as the 1930s, Marcus Garvey and other leaders of the pan-African movement denounced birth control for threatening to weaken the race.[14] In the 1960s and 1970s, as prominent spokesmen for the Black community opposed contraception and abortion, there was intense debate about whether birth control and abortion threatened Black genocide. Some maintained that the community needed to grow in numbers to overcome the effects of racism and slavery,[15] and others argued that politicians had offered contraception and abortion instead of addressing structural racism. As Jesse Jackson wrote in 1977, "[p]oliticians argue for abortion largely because they do not want to spend the necessary money to feed, clothe and educate more people."[16] Black women often rejected the Black genocide argument, insisting that racial uplift required access to contraception and abortion.[17]

As this Essay shows, antiabortion activists sought to discredit Black women's claims for reproductive autonomy by focusing Black nationalist grievances on abortion.[18] To demonstrate that abortion was responsible for racial subordination, antiabortion advocates told stories about a shadowy figure named

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e.g., Shyrissa Dobbins-Harris, *The Myth of Abortion as Black Genocide: Reclaiming Our Reproductive Choice*, 26 NAT'L BLACK L.J. 85 (2016-17) (offering a gender- and race-critical history of the gender dynamics in the Black antiabortion movement).

[14] Murray, *Race-ing* Roe, *supra* note 11, at 2040; DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 84 (1998) [hereinafter ROBERTS, KILLING THE BLACK BODY].

[15] *See* Murray, *Race-ing* Roe, *supra* note 11, at 2040-2041; *see also* Ralph Zallow, *"Family Planning:" "Black Genocide" or Equal Rights?*, GAZETTE & DAILY, May 3, 1969, at 13 (reporting that Dr. Charles Greenlee, a Black activist, argued that "black bodies equal black votes equals Black power" while worrying that family-planning clinics "would decimate the black population in America in a generation").

[16] Jesse Jackson, *How We Respect Life Is the Overriding Moral Issue*, NAT'L RIGHT TO LIFE NEWS, Jan. 1977, at 8. At this point in his career, Jackson also made religious and fetal-protective arguments against abortion, *see id.*, but other Black men made similar structural explanations for Black genocide. *See* Myra McPherson, *Figure in ' 62 Abortion Case Now Mother of 5*, FORT WORTH STAR TELEGRAM, Jan. 2, 1969, at 2B (Dr. John Clark of Howard University arguing, "[T]his country can do for everybody but the Black poor. . . . Abortion is not the solution.").

[17] *See* Murray, *Race-ing* Roe, *supra* note 11, at 2040-49; *see also* SHERIE RANDOLPH, FLORYNCE "FLO" KENNEDY: THE LIFE OF A BLACK FEMINIST RADICAL (2015).

[18] *See infra*, Part I.

"Margaret Sanger," the founder of Planned Parenthood, who, they argued, represented the interests of white elitists seeking to decimate the Black community by locating Planned Parenthood clinics in Black neighborhoods.[19] Their stories presented Black women—who, for many reasons rooted in structural inequalities, make the decision to end pregnancies more frequently than others[20]—as a threat to their community and as manipulated by the white woman named "Sanger."[21] Abortion, they argued, is eugenic.

These abortion-is-eugenics stories about "Sanger" iterated over time tend to (1) depict the wrongs of abortion in racial-demographic terms (instead of focusing on the movement's longstanding fetal-protective arguments); (2) present eugenics as a problem manifest in racially disparate abortion rates rather than as a practice of government coercion; (3) present Black women's decisions about abortion as coerced by partners, parents, or clinics; and (4) present the criminalization of abortion as a sufficient repair of racial injustice—no other redress for structural racism is necessary. Criminalization of abortion, it is claimed, frees women who are coerced and empowers the community suffering racial injustice.

Abortion-is-eugenics is a mode of reasoning, not a single story, one that has evolved as eugenic allegations about abortion have traveled from the movement to the streets to churches and then to the courts. We invite readers to consider how the logic of the abortion-is-eugenics claim varies when advanced by differently raced and gendered speakers across different contexts, whether as a guide to personal reproductive decision-making, a community exhortation expressed from the pulpit or a billboard, or as a court's justification for laws that would criminalize reproductive choices. The Essay traces the movement dynamics that led to the creation of this mode of talking about abortion and then follows abortion-is-eugenics from billboards to the pages of the United States Reports, where abortion-is-eugenics appears as a *new* race-conscious constitutional justification for laws coercing a person to carry a pregnancy to term, infusing traditional life-protective justifications with concerns about racial equality.

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[19] *See id.*

[20] *See* Bridges, *Race in the Roberts Court*, *supra* note 12, at 42-44 (explaining the social roots of Black women's disproportionate reliance on abortion care in racial distribution of wealth, healthcare, effective contraception, resources for childcare, and of differential exposure to sexual violence and reproductive coercion).

[21] *See infra*, Part I.

We begin in Part I by reconstructing the role of the antiabortion movement in seeding abortion-is-eugenics narratives in and beyond communities of color, and then in Part II examine the underappreciated role these arguments played in *Dobbs*, where the argument was twice invoked—by Judge James Ho and by Justice Samuel Alito—as a threat countering any suggestion that race might play a role in the conditions of abortion's criminalization. Part III considers Margaret Sanger's vilification in *Box v. Planned Parenthood of Indiana & Kentucky* and the abortion-is-eugenic narrative. In *Box*, the Court allowed Indiana to regulate the disposal of fetal remains, while declining to decide whether states could ban abortions for reasons of race, sex, or disability selection. In concurrence, Justice Thomas argued that such "reasons" bans were constitutional—and that abortion was a tool of eugenicists. Central to Thomas's account was a story about Margaret Sanger. This Essay does not undertake to evaluate Sanger's life—historians have examined that question.[22] Rather, we demonstrate the specific ends for which movement actors constructed the constitutional memory of "Margaret Sanger," and the different kinds of persuasion the constitutional memory of "Sanger" performs in politics and in law.[23]

In closing, we show how the racism of the wicked "Margaret Sanger" deflects attention from racial reasoning that pervades American society past and present and, thus, from the structural roots of racial disparities in abortion rates today—conditions for which laws criminalizing abortion provide no relief.[24] Paradoxically, in the very act of alleging racism, abortion-is-eugenics discourse

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[22] *See infra* note 124 and accompanying text.

[23] On the workings of constitutional memory, see *infra* note 110 and accompanying text.

[24] *See supra* note 12 and accompanying text (discussing commentary of Khiara Bridges and Michele Goodwin); *see also* Bridges, *The Dysgenic State*, *supra* note 6, at 360 (explaining that Thomas offered a blueprint for ignoring "the fact that *structural racism*—in the form of laws and policies that result in black people's coming to bear disproportionate burdens of poverty, as well as laws and policies that deny impoverished people access to basic healthcare, including contraception—provides a better explanation of black peoples' disproportionate reliance on abortion care"). Woman-protective antiabortion argument has many of the same features. Conservatives assert that women are coerced by parents or partners into unwanted abortions and offer the criminalization of abortion to protect women's freedom and health; but the criminal remedy they offer provides no relief for the many pressures that may lead women to end a wanted pregnancy, as the best of bad choices. *See* Siegel, *The Right's Reasons*, *supra* note 9; Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE. L.J. 1694, 1793-95 (2008) [hereinafter Siegel, *Dignity and the Politics of Protection*] ("Like the old gender paternalism, the new gender paternalism points to social sources of harm to women—abuse, poverty, or work/family conflict—and offers control of women as the answer. Women in need deserve better." (citation omitted)).

can naturalize the raced and gendered institutions shaping reproductive decision-making and legitimize reproductive coercion. That is its aim.

I. THE INVENTION OF EUGENICS ARGUMENTS AGAINST ABORTION

Box would have been a minor per curiam decision but for Justice Clarence Thomas's bombshell concurrence.[25] Thomas's opinion featured a lengthy account of abortion as eugenics—allegations that to many seemed to explode out of nowhere.[26] Yet Justice Thomas was expressing views about abortion that arose out of conversations that had been ongoing for some time, with disparate racial roots.

In *Race-ing* Roe[27] and subsequent work, Melissa Murray responded to Justice Thomas, situating his arguments in twentieth-century debates within the Black community. Centuries of reproductive coercion in slavery, as well as racialized sterilization abuse, have shaped Black nationalist opposition to birth control; yet, Murray showed, across the twentieth century these arguments were countered by Black women and men who supported birth control, for reasons of freedom and uplift.[28] The abortion-is-eugenics allegations could drown out the memory of these voices, particularly the advocacy of Black women. Murray correctly predicted that Justice Thomas's *Box* concurrence

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[25] *Box v. Planned Parenthood of Ind. & Ky.*, 139 S. Ct. 1780, 1782-1793 (2019) (per curiam) (Thomas, J., concurring).

[26] *See id.*

[27] Murray, *Race-ing* Roe, *supra* note 11, at 2090 (arguing that "[b]y charting a straight line between birth control, abortion, and eugenics, Justice Thomas echoes the claims of male Black nationalist figures, who viewed Black reproduction as Black women's specific contribution to the political project of the Black Power movement" and "crafts, whether consciously or not, a damning indictment of Black women who would terminate their pregnancies (or make use of contraception)"); *see also* Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, 63 WM. & MARY L. REV. 1599, 1607 (2022) [hereinafter Murray, *Abortion*] (explaining that Thomas's "narrative not only equates state-sponsored reproductive abuses with an individual' s decision to terminate or avoid pregnancy, but also overlooks—and indeed, further obscures—the significant history of racialized sterilization abuse in the United States").

[28] Murray, *Abortion*, *supra* note 27, at 1632-1649 (stressing that Thomas ignores the harms done by race-based eugenic sterilization and the resistance of Black women to it); Murray, *Race-ing* Roe, *supra* note 11, at 2041-49 (detailing the work of Black women who "countered the Black nationalist argument against abortion by arguing that Black women needed and desired access to safe and legal birth control"); *see also* JENNIFER NELSON, WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT (2003); ROBERTS, KILLING THE BLACK BODY, *supra* note 14, at 81-102 (describing the role played by eugenics in the experiences of Black women and the demands they made for access to birth control and abortion).

provided a roadmap for arguments that "the abortion right allegedly is rooted in racial injustice and results in disproportionate impacts on minority groups."[29]

Even if the discourse that appeared in Justice Thomas's *Box* opinion had roots in Marcus Garvey's pan-African movement or the Black nationalism of the late 1960s, this mode of reasoning could well have disappeared but for later efforts of the mostly white antiabortion movement to keep it alive. In the late 1960s and early 1970s, as Murray has shown, women like Florynce Kennedy and Shirley Chisholm rejected the claims of prominent Black nationalists like H. Rap Brown, Julius Lester, and Jesse Jackson, who denounced abortion and birth control as "Black genocide."[30] These Black feminists insisted that "Black women needed and desired access to safe and legal birth control."[31] Black feminists refused to cede leadership of the movement to Black men, and argued that Black women could more easily do so if they had the choice about when or whether to have children, or as Kennedy put it, whether to "travel light."[32] But as early as the 1970s, antiabortion groups sought to weaponize the claims of Black nationalists to discredit abortion-rights supporters and advocate for restrictions, including the Hyde Amendment.[33]

It was the white antiabortion activist Mark Crutcher who made abortion-is-eugenics arguments a part of popular discourse. In 1989, Crutcher published an editorial arguing that present-day abortion-rights supporters and abortion seekers carried on the legacy of Margaret Sanger.[34] "Margaret Sanger, the founder of Planned Parenthood," Crutcher proclaimed, "tried to sell the world on her belief on abortion for minorities by calling them 'human weeds.'"[35] Crutcher suggested that treating a fetus as a non-person carried on the same "vile" tradition.[36] Crutcher soon catapulted himself into a position of

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[29] Murray, *Race-ing* Roe, *supra* note 11, at 2031; *id.* at 2040-49; *see also* Bridges, *The Dysgenic State*, *supra* note 6, at 360.

[30] *See* Murray, *Race-ing* Roe, *supra* note 11, at 2041-49; NELSON, *supra* note 28, at 95-99; Loretta J. Ross, *African-American Women and Abortion*, *in* ABORTION WARS: A HALF-CENTURY OF STRUGGLE 180-185 (Rickie Solinger ed., 1998).

[31] Murray, *Race-ing* Roe, *supra* note 11, at 2045. They continued the tradition of an earlier generation of women of color. *See infra* note 134134.

[32] Murray, *Race-ing* Roe, *supra* note 11, at 2045; RANDOLPH, *supra* note 17, at 170-177.

[33] MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 187-190 (2015) [hereinafter ZIEGLER, AFTER *ROE*].

[34] Mark Crutcher, *Rights Are Relative, But None Outweighs the Right to Life*, FORT WORTH STAR TELEGRAM, May 11, 1989, at 21.

[35] *Id.*

[36] *Id.*

prominence in the antiabortion movement with *Firestorm*, a 1992 plan that, in the wake of *Planned Parenthood v. Casey*, detailed coldly instrumental strategies for ending abortion without waiting for the end of the nation's moral debate, by, for example, devising hard-ball tactics that would radically change how Americans saw, and could access, abortion.[37] Throughout the 1990s and early 2000s Crutcher employed a mixture of tort suits, stings, and media campaigns designed to depict abortion providers as profit-driven abusers of women and the unborn, who were, in his words, "Exploited By Choice."[38]

Crutcher's work helped inspire a strategy of "woman-protective" claims against abortion providers ("TRAP" laws and litigation),[39] offering a blueprint for a new generation of "guerrilla" attacks on Planned Parenthood led by Lila Rose, a white antiabortion college student who filmed viral videos that claimed to expose wrongdoing by the abortion provider.[40] In one video, the white antiabortion activist James O'Keefe posed as a Planned Parenthood donor convinced "the less Black kids out there, the better."[41]

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[37] MARK CRUTCHER, FIRESTORM: A GUERILLA STRATEGY FOR A PRO-LIFE AMERICA 36-38 (1992) (detailing a "guerilla campaign" of "harassment" and "sabotage" involving malpractice suits and arguing that "if we [the antiabortion movement] make abortion unavailable, it will then be a lot easier to make illegal").

[38] *See generally* MARK CRUTCHER, LIME 5: EXPLOITED BY CHOICE (1996) (detailing women's alleged exploitation by abortion providers and activists). For more on Crutcher's tactics, see Mark Crutcher, *We Help the Women Abortionists Butcher*, WALL ST. J., Dec. 9, 1994, at A17; *Anti-Abortion Tactic of Malpractice Lawsuit Proving Effective Even in Defeat*, SUN, Apr. 9, 1995, at 18A; Vivienne Walt, *Advice on Suing Doctors: Foes Out to Increase Malpractice Suit*, NEWSDAY, Sep. 6, 1993, at 6.

[39] Targeted Regulation of Abortion Providers (TRAP laws) single out abortion providers and impose on them different and more burdensome requirements than are imposed on other medical practitioners. Crutcher's initiative helped prompt a wave of clinic regulation of this kind, and movement litigation followed. *See State Policies in Brief: Targeted Regulation of Abortion Providers*, GUTTMACHER INST. 1 (Aug. 31, 2023), http://www.guttmacher.org/state-center/spibs/spib_TRAP.pdf [https://perma.cc/LZ7C-E3GM] ("Efforts to use clinic regulation to limit access to abortion, rather than to make its provision safer resurfaced in the 1990s and have gained steam since 2010."). For sources showing how this woman-protective and fetal-protective strategy led to major Supreme Court cases of the twenty-first century, see *supra* note 9 and accompanying text.

[40] On Lila Rose's viral videos and the inspiration Crutcher took from it, see Shaila Dewan, *To Court Blacks, Foes of Abortion Make Racial Case*, N.Y. TIMES (Feb. 26, 2010), https://www.nytimes.com/2010/02/27/us/27race.html [https://perma.cc/2LTQ-YXA2].

[41] *Id.*

In 2009 Crutcher built on the video with *Maafa 21: Black Genocide in the 21st Century America*,[42] a documentary in which Crutcher filmed spokespersons inside and outside of the Black community drawing connections between "slavery, Nazi-like eugenics, birth control, and abortion."[43] The film argued not just that Margaret Sanger spoke the language of eugenics but also insisted that she was the primary mouthpiece of wealthy eugenicists intent on destroying the Black community.[44] *Maafa 21* further argued that the eugenic aims of "Sanger," Planned Parenthood, and their wealthy eugenic backers were ultimately realized not in the legalization of contraception but instead in the disparate abortion rates of Black women.[45]

Maafa 21 argued that the eugenics programs it depicted did not reflect the will of "everyday" white Americans but rather the wishes of white elites, who set out to divide the country along racial lines and to find a spokesperson to carry out their wishes.[46] Margaret Sanger, the film argued, became the "frontman" for eugenicists, willing to carry out their racist policies in return for money for her fight for birth control.[47] Sanger's Planned Parenthood, *Maafa 21* further claimed, targeted people of color for extinction by locating birth control clinics in their communities.[48] Sanger's organization, Planned Parenthood, carried on her legacy more effectively by providing abortion services to Black

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[42] MAAFA 21: BLACK GENOCIDE IN 21ST CENTURY AMERICA, INTERNET MOVIE DATABASE, https://www.imdb.com/title/tt1500818 [https://perma.cc/HS87-7N5N]. The Internet Movie Database (IMDB) classifies *Maafa 21* as a "documentary" and explains that "*Maafa 21* traces eugenic thoughts and practices that have been set against African Americans from the time of slavery to the present." *Id.*

[43] *Id.*

[44] *See infra* notes 45-57 and accompanying text.

[45] After an hour on eugenics and contraception, *Maafa 21* shifts away from contraception to abortion rates in the present, depicting Planned Parenthood abortion clinics in Black communities as "the final solution," the realization of a goal that eugenicists "had been chasing for over 100 years." *See Maafa 21: Black Genocide in 21st Century America—Full Documentary*, YOUTUBE (Feb. 22, 2018), [https://perma.cc/DD6E-JSEM], at 57:54 (produced by Life Dynamics) [hereinafter *Maafa 21*]; *id.* at 59:27 (quoting Clenard Childress on racial disparities in abortion rates).

[46] *Id.* at 12:46-13:23 (Crutcher explaining that in the early twentieth century, "the white elitists who made up the eugenics movement were no longer philosophers and academics; now, they were industrialists and billionaires").

[47] *Id.* at 13:23 (arguing that white elitist eugenicists "would hire crusaders to do the dirty work, and the primary one they settled upon was a woman named Margaret Sanger").

[48] *Id.* at 60:01.

Americans.[49] "To this day," the film stated, "Planned Parenthood has never disavowed Margaret Sanger or her plans for targeted population control."[50] Instead, abortion continued to be the leading killer of Black babies.[51] At its midpoint, *Maafa 21* featured Black pastor and antiabortion activist Clenard Childress Jr. on the racial disparity in abortion rates observing, "The abortion industry at this point kills as many African-American people every four days as the Klan killed in 150 years."[52]

On this telling, abortion is the new form of Black subordination, and Sanger was the architect of the plan. As Crutcher summarized, Sanger's story showed that the "driving force behind making abortion legal was to exterminate certain groups of people."[53]

Maafa 21 had turned the language of racial justice to antiabortion ends. The documentary is best understood as another phase of Crutcher's propaganda war on abortion, more concerned about stopping abortion than ending race inequality. (On Obama's election as president, Crutcher blogged that "from a purely racial perspective, that's a good thing," but then proceeded to call Obama "the most rabidly pro-abortion, morally defective and completely unqualified person to be given the keys to the Oval Office," denouncing him as "thoroughly evil."[54])

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[49] *Id.* at 60:04 (arguing that the biggest predictor of where Planned Parenthood abortion clinics were located was "not poverty but race").

[50] *Id.*

[51] *Id.* at 59:27, 60:48.

[52] *id.* at 59: 27. Pastor Childress, who organized an antiabortion march on Washington in 1999 to protest abortion as Black genocide, *see* Asjlyn Loder, *Eagler Facing Primary Fight*, RECORD, Apr. 12, 2005, at A1, was the creator of the antiabortion website Blackgenocide.org. and a prominent member in the 2000s of the Life Education and Resource Network (LEARN), a Black antiabortion group. *See* Ron Harris, *Racial Minorities Are Scarce in Prolife Group*, ST. LOUIS POST-DISPATCH, July 4, 2003, at 3.

[53] *Id.* at 120:02.

[54] Mark Crutcher, *Obamanistas Storm the Winter Palace*, MARK'S BLOG (Nov. 5, 2008), [https://perma.cc/33DQ-SWQX]; *see also* Mark Crutcher, *A Few Random Notes*, MARK'S BLOG (Oct. 5, 2009), [https://perma.cc/UM4D-JHDV] ("Today, anyone who says anything negative about The Grand Obama will instantly be labeled either a racist or an Uncle Tom–depending on the malefactor's skin color."); Mark Crutcher, *What's the Hurry?*, MARK'S BLOG (Dec. 1, 2009), [https://perma.cc/X8U6-CAGH] (arguing that Obama was trying to "implement a Marxist agenda" and insisting that "Obama represented a 'safe' vote because he was not perceived as some sort of "race-pimp" like a Jesse Jackson or an Al Sharpton"). Later, Crutcher also developed cards emblazoned with the words "All Black Lives Matter" that he recommended distributing at civil-rights events to advertise *Maafa 21* and the claim that

Maafa 21 was tremendously influential, with Crutcher running out of DVDs in two months.[55] The film was screened in thousands of churches, civic centers, and convention venues.[56] Crutcher, who argued that the "true motive" of abortion providers was not "women's rights and reproductive choice" but instead "racial genocide and ethnic cleansing," maintained that Black people who supported abortion were victims of "Stockholm syndrome."[57] Black women who advocated for abortion rights, by extension, were "no different than the original slaves, and they did not win in the long run."[58]

Crutcher had help getting his message to Black audiences. Catherine Davis, a Black antiabortion activist, worked with Georgia Right to Life, a predominantly white antiabortion organization, and the Radiance Foundation, a Christian antiabortion group co-founded by the Black antiabortion activist Ryan Bomberger, to publicize the arguments made in *Maafa 21*.[59] The groups paid for billboards around the Atlanta area proclaiming that because of abortion, Black children were an "endangered species."[60] The billboards further directed viewers to a website about the eugenic and racist beliefs of Margaret Sanger.[61] Davis had made similar arguments since 1987, when her minister convinced her that her own past abortion decisions had been a grave sin.[62]

With the mostly white, mainstream antiabortion movement behind arguments connecting abortion and eugenics, eugenic discourse took off.[63] Georgia Right to Life had made few inroads with Black residents until hiring Davis.[64]

"abortion plays a major role in a genocidal campaign aimed at minorities" and offering what Crutcher called "the facts on eugenics." Mark Crutcher, *The New All Black Lives Matter Card Debuts at NAACP Convention*, LIFE DYNAMICS (Aug. 3, 2016), [https://perma.cc/8G94-UV88].

[55] Karen Maroney, '*Maafa 21'—Ten Years Later*, AM. LIFE LEAGUE (Apr. 13, 2020), [https://perma.cc/PTD6-J5EY].

[56] For more on the impact of *Maafa 21*, see Anthea Butler, *African American Religious Conservatives in the New Millennium*, *in* FAITH IN THE NEW MILLENNIUM: THE FUTURE OF RELIGION AND AMERICAN POLITICS 65 (Darren Dochuk & Matthew Avery Sutton eds., 2016); ZIEGLER, *ROE*, *supra* note 8, at 112-115.

[57] Maroney, *supra* note 55.

[58] *Id.*

[59] Dewan, *supra* note 40; Robin Abcarian, *Antiabortion Ads Claim Conspiracy Against Blacks*, L.A. TIMES, Mar. 2, 2010, at A1.

[60] Dewan, *supra* note 40; Abcarian, *supra* note 59, at A1.

[61] Dewan, *supra* note 40; Abcarian, *supra* note 59, at A1.

[62] ZIEGLER, *ROE*, *supra* note 8, at 123-124.

[63] *Id.* at 131-142.

[64] Dewan, *supra* note 40.

Priests for Life, another major and mostly white antiabortion group, deployed a similar strategy, hiring Alveda King, another Black antiabortion activist and the daughter of Martin Luther King Jr., to do outreach in the Black community.[65] The billboards and website to which they directed viewers echoed Crutcher's story about Sanger as the primary spokesperson of racist and elitist white eugenicists.[66] The website, TooManyAborted.com, repeatedly referenced *Maafa 21* and argued that "American elites . . . championed and funded the racist beliefs of eugenics," identifying "Planned Parenthood's founder, Margaret Sanger" as a chief ally.[67] Sanger, the website said, launched an effort "to severely reduce or eliminate the reproduction of poorer blacks."[68] The website insisted that there was no difference between Sanger and the modern-day abortion-rights movement.[69] "The intent of Sanger's Negro Project is firmly intact," reasoned TooManyAborted.com.[70] "Nearly 40% of all black pregnancies end in induced abortion."[71]

The billboards prompted a backlash from many Black women. Loretta Ross, a pioneer in the struggle for reproductive justice and co-founder of SisterSong, then a coalition of 80 groups representing the reproductive health of minority communities, blasted the billboards for treating Black women as "monsters intent on destroying their own race or victims of whites."[72] Ross challenged the billboards for effacing the history of the Black community, the agency of its leaders, and of Black women. She insisted that Black leaders had encouraged the building of family-planning clinics in their own neighborhoods because "controlling . . . fertility was part of our uplift out of poverty strategy, and it still works."[73] Ross also condemned the billboards for shaming Black women who chose abortion instead of addressing the difficult conditions they faced,

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[65] *Id.* King, who featured prominently in *Maafa 21*, also served on the board of directors of Georgia Right to Life. Abcarian, *supra* note 59.

[66] TOOMANYABORTED.COM, [https://perma.cc/2WKY-K7CC?type=standard].

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Black & Unwanted*, TOOMANYABORTED.COM, [https://perma.cc/9GNV-AVAX].

[71] TOOMANYABORTED.COM, *supra* note 66.

[72] Dewan, *supra* note 40; Abcarian, *supra* note 59.

[73] Dewan, *supra* note 40.

including a lack of birth control access and education and a high rate of sexual violence.[74]

Despite anger among Black women, white antiabortion politicians leveraged eugenic discourse to introduce new abortion restrictions. Georgia Right to Life sponsored a bill banning abortions for reasons of race or sex selection and punishing physicians for "targeting" people of color, and other states passed bans citing similar reasons.[75] In 2010, three states stressed arguments about eugenics and abortion in seeking to defund Planned Parenthood.[76] Billboards about racism and abortion appeared in New York City, Chicago, and California.[77]

These arguments spread to the courts. In *Whole Woman's Health v. Hellerstedt* (2016),[78] Catherine Davis and the leader of other Black and Latinx antiabortion groups submitted an amicus brief arguing that "abortion has historically been used to target racial minorities."[79] In a brief representing 42 predominantly white antiabortion members of Congress in 2017, Jonathan Mitchell, the white former Texas solicitor general, argued that Texas had the right to treat Medicaid providers as unqualified if they associated with Planned Parenthood because "the 'Planned Parenthood' name is inextricably connected to its founder Margaret Sanger, who uttered many controversial statements on race and eugenics."[80]

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[74] *Id.* For more on the of thoughts of Ross and other Black advocates on the billboards and *Maafa 21*, see Diane Loupe, *Rev. Alveda King Reveals Tea Party's Stance on Parenthood*, MIAMI TIMES, Sep. 8, 2010, at 15B; Shaniqua Seth & Malika Raymond, *Billboards, Black Women, and Politics*, WOMAN HEALTH ACTIVIST, May/June 2012, at 1, 3.

[75] *See* Ernie Suggs, *Senate Oks No Coercion Abortion Bill*, ATL. J.-CONST., Mar. 27, 2010, at A10; *see also* ZIEGLER, *ROE*, *supra* note 8, at 134-35.

[76] ZIEGLER, *ROE*, *supra* note 8, at 134-35.

[77] Stacey Patton, *Soho Billboard: Womb Is 'Most Dangerous Place' for an African-American*, SUN REP., Mar. 3, 2011, at 5; Natasha Hemley, *Pro-Life Billboards Stir Controversy*, WINDY CITY TIMES, Apr. 6, 2011, at 10; Dawn Turner Trice, *Debate over Black Abortion Disparity*, CHICAGO TRIB., Apr. 20, 2011, at 1. For a report on a documentary tracing the spread of these arguments within communities of color, see P.R. Lockhart, *"Abortion as Black Genocide": Inside the Black Anti-Abortion Movement*, VOX (Jan. 19, 2018), [https://perma.cc/5SJF-SSQT] (interviewing filmmaker Yoruba Richen).

[78] 579 U.S. 582 (2016).

[79] Brief of Amicus Curiae African-American and Hispanic American Orgs. in Support of Respondents at 16, Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016) (No. 15-274).

[80] Brief of 42 Members of Congress in Support of Defendants-Appellants at 7, Planned Parenthood of Greater Texas Family Planning v. Smith, 981 F.3d 994 (5th Cir. 2020) (No. 17-50282).

Justice Thomas drew on three different antiabortion briefs in *Box* as he offered a history of what he called abortion as "a disturbingly effective tool for implementing the discriminatory preferences that undergird eugenics."[81] Thomas relied heavily on antiabortion amici in detailing his account,[82] first citing the Restoration Project's brief, which itself cited Crutcher's claims about race, eugenics, Sanger, and abortion.[83] Thomas also cited antiabortion briefs that expanded on Crutcher's claims. A group of conservative attorneys general denounced women for practicing selective eugenics and attempting to achieve "the elimination of classes of human beings."[84] A group of evangelical antiabortion groups, including the Southern Baptist Convention and Concerned Women for America, suggested that women of color themselves had advanced the goals of eugenics:[85] "The eugenics movement lost much of its steam after it had been practiced so efficiently by the Nazis in Europe," the brief explained.[86] "But it has come roaring back with abortion."[87]

II. EUGENIC TALK IN *DOBBS*

Eugenic talk was little noticed but present at every stage of the *Dobbs* litigation. When Jackson Women's Health Organization challenged the constitutionality of Mississippi's fifteen-week abortion ban in 2018, Judge Carlton Reeves issued an order granting the plaintiffs summary judgment and holding Mississippi's law unconstitutional.[88] The state justified restricting abortion on the grounds it would protect women's health and the life of the

[81] Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1780, 1782–1793 (2019) (per curiam).

[82] *Id.* at 1790 (citing Brief of State of Wisconsin et al. as Amici Curiae, Box, 139 S. Ct. 1780 (No. 17-3163); Brief Amici Curiae of the Ethics and Religious Liberty Commission of the Southern Baptist Convention et al., *Box*, 139 S. Ct. 1780 (No. 17-3163)); Box, 139 S. Ct. at 1791 (citing Brief for Restoration Project et al., *Box*, 139 S. Ct. 1780 (No. 17-3163)).

[83] Box, 139 S. Ct. at 1791 (citing Brief for Restoration Project et al., *supra* note 82 (citing MARK CRUTCHER, RACIAL TARGETING AND POPULATION CONTROL 7, 10 (2011))). Crutcher's book on "racial targeting" elaborated on the claims made in *Maafa 21*.

[84] Brief of State of Wisconsin et al. as Amici Curiae, *supra* note 82, at 7.

[85] Brief Amici Curiae of the Ethics and Religious Liberty Commission of the Southern Baptist Convention et al., *supra* note 82, at 9.

[86] *Id.*

[87] *Id.*

[88] Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536 (S.D. Miss. 2018).

unborn.[89] Reeves responded to that claim in a footnote where he observed that Mississippi's asserted interest in banning abortion was "pure gaslighting": "Its leaders are proud to challenge *Roe* but choose not to lift a finger to address the tragedies lurking on the other side of the delivery room: our alarming infant and maternal mortality rates."[90] The law, Judge Reeves argued, was a reflection of "the old Mississippi," one "bent on controlling women and minorities"—a place that was "the last state to ratify the Nineteenth Amendment."[91] Judge Reeves saw the coercion inherent in Mississippi's law as of a piece with a dark history in which Mississippi denied women the vote and "sterilized six out of ten black women in Sunflower County at the local hospital—against their will."[92]

Judge Reeves's insistence on analyzing the abortion ban in larger historical and policy context enraged Judge James Ho. On appeal, Ho voted with the Fifth Circuit to hold the Mississippi law unconstitutional—a step Ho said he no choice but to take under existing precedent[93]—but wrote separately to attack Judge Reeves for "disparaging the millions of Americans who believe in the sanctity of life."[94] Ho pointedly ignored Reeves's argument that the state's own policy choices called into question the state's claimed concern for its citizens' life and health.[95] Instead, Judge Ho chose to construe Reeves as attacking moral opposition to abortion (Reeves did not).[96]

Judge Ho asserted that Reeves's opinion "equates a belief in the sanctity of life with sexism" and "smears Mississippi legislators by linking House Bill 1510 to the state's tragic history of race relations, while ignoring abortion's own

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[89] Mississippi's law justified the 15-week ban with a legislative finding that "[a]bortion carries significant physical and psychological risks to the maternal patient, and these physical and psychological risks increase with gestational age" and that "[t]he State of Mississippi also has 'legitimate interests from the outset of pregnancy in protecting the health of women.'" H.B. 1510, 2018 Leg., Reg. Sess. (Miss. 2018) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992)).

[90] Currier, 349 F. Supp. 3d. at 540 n.22.

[91] *Id.*

[92] *Id.*

[93] Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 277-278 (5th Cir. 2019) (Ho, J., concurring), *rev'd & remanded*, 597 U.S. 215 (2022).

[94] *Id.* at 278.

[95] *Id.* at 278-84.

[96] *Id.*

checkered racial past."[97] To counter Judge Reeves and show that the state interests Mississippi invoked to justify banning abortion were legitimate, Judge Ho drew heavily on Justice Thomas's opinion in *Box* to suggest that at least some abortion-rights supporters sympathized with Margaret Sanger's efforts to "control the African-American population."[98] "Are *both* sides of the abortion debate racist?" Judge Ho taunted.[99] If Judge Reeves dared asked questions about the values animating the Mississippi abortion ban, Judge Ho would accuse abortion-rights supporters of carrying on the eugenic legacy of Margaret Sanger and suggest that abortion bans combatted racial eugenics.

On appeal Justice Alito offered his own version of race-whataboutism. In *Dobbs*, the Court overturned *Roe*, justifying that decision by appeal to the nation's history of banning abortion. But to justify the Court's decision on these grounds, Justice Alito had to contend with a brief of the American Historical Association and Organization of American Historians (AHA/OAH) which demonstrated that nineteenth-century abortion bans were enacted in significant part for constitutionally illegitimate reasons—not only to protect unborn life, but also to enforce women's roles as wives and mothers *and* to preserve the religious and ethnic character of the nation.[100] Marshalling evidence about the nativism, sexism, and demographic anxieties of reformers like the campaign's leader Horatio Storer, the brief suggested that the campaign advocated criminalizing abortion in part for demographic reasons, out of replacement anxiety: to ensure that Anglo-Saxon Protestant women would have more babies, especially compared to Catholic immigrants.[101]

Alito waved away the OAH/AHA argument as reflecting at most the views of "a few supporters of the new 19th-century abortion laws."[102] "Are we to believe," Justice Alito sneered, "that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and

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[97] *Id.* at 278; *see also id.* at 283 ("Consider, for example, the district court's claim that it is sexist to believe in the protection of the unborn."); *id.* at 284 ("What's more, the district court's claim that it is racist to believe in the sanctity of life is particularly noxious, considering the racial history of abortion advocacy as a tool of the eugenics movement.").

[98] *Id.* at 284-85 (citing Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1750, 1787-1788 (2019) (Thomas, J., concurring)).

[99] *Id.* at 285.

[100] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 250-53 (2022) (citing Brief for Amici Curiae American Historical Ass'n and Org. of American Historians, at 18-31, Dobbs, 597 U.S. 215 (2022) (No. 19-1392)).

[101] *Id.*

[102] Dobbs, 597 U.S. at 254.

women?" He answered, as if abortion laws are enacted for one reason only: "There is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being."[103]

Not confident that this retort settled the question, Justice Alito closed his rebuttal of the OAH/AHA brief by making a threat eerily like the threat Judge Ho made in response to Judge Reeves. Judge Ho had responded to Judge Reeves's questions about Mississippi's past and present policies with a long diatribe quoting Justice Thomas on abortion, Sanger, and eugenics, concluding, as we have seen, with a taunt: "Are *both* sides of the abortion debate racist?" So too did Justice Alito conclude his rebuttal of OAH/AHA brief with a footnote citing Justice Thomas's eugenics allegations about abortion in *Box*.[104] Far better, Alito reasoned, not to question "the motives of either those who have supported or those who have opposed laws restricting abortions."[105] Another case of race-whataboutism.

What exactly was the eugenic allegation about abortion that Justice Alito advanced in *Dobbs*? Footnote 41 discussed antiabortion briefs alleging that some supporters of liberal access to abortion "have been motivated by a desire to suppress the size of the African-American population,"[106] and Justice Alito suggested that "it is beyond dispute that *Roe* has had that demographic effect. A highly disproportionate percentage of aborted fetuses are Black."[107] The implication was that abortion-rights supporters should stop discussing the racial motivations of the nineteenth-century campaign to criminalize abortion or Justice Alito would start talking about the eugenic plot responsible for the racial disparity in contemporary abortion rates.

Justice Alito's eugenic allegation amounted to a veiled suggestion about the agency of Black women, intimating, as Loretta Ross once objected to the eugenic allegations on the billboards, that Black women were "monsters intent on destroying their own race or victims of whites."[108] While Judge Reeves understood abortion laws in historical and policy context, Judge Ho and Justice Alito

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[103] *Id.* For discussion of the campaign's arguments and of these passages of the Court's opinion, *see* Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901 (2023).

[104] Dobbs, 597 U.S. at 255 n. 41 (citing Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1750, 1782-1784 (2019) (Thomas, J., concurring)).

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] Dewan, *supra* note 40; *see also* Melissa Murray, *Foiling Clarence Thomas*, HOUSE DIVIDED (Jan. 28, 2020), [https://perma.cc/575K-H64W].

refused to examine the safety-net policies to which Reeves pointed, and instead suggested that racial disparities in abortion rates were eugenic in origin.

It is to Justice Thomas's *Box* opinion that both Judge Ho and Justice Alito point when they suggest that racial disparities in abortion rates are eugenic in origin. There Justice Thomas presents Margaret Sanger, the founder of Planned Parenthood, at the root of the abortion-eugenics plot, a powerful white woman who appears to control the reproductive agency of women of color.

The figure of "Sanger" has played a unique role in abortion-is-eugenics talk. Sanger seems to have attracted attention in communities of color as a figure enabling race-conscious conversation about the concerns that high abortion rates raise. Yet as deployed by certain antiabortion activists and judges, "Sanger" provides a vehicle for cynical professions of concern about racism *in the advocacy of abortion rights* while papering over discussion of *racism outside that context*. Racism can be repaired, that story suggests, by punishing those who operate Planned Parenthood—and by criminalizing abortion.

We close in Part III by staging a reading of Sanger's character in *Box*, identifying a few key differences between Margaret Sanger, the complex woman who has received much attention from historians, and "Margaret Sanger," the one-dimensional figure that Thomas sketches. The divergence between Sanger the historical figure and Sanger the symbol makes clear that Thomas is drawing on a rich and decades-old series of movement narratives. Indeed, as far back as 1979, leaders of the antiabortion group Americans United for Life argued that Margaret Sanger's ties to eugenics "should be made a top research priority" for the antiabortion movement.[109] Today "Margaret Sanger" is part of the nation's constitutional memory and is beginning to play role in the Supreme Court's cases—her agency even more notable as women leaders scarcely ever play a role in the *United States Reports*.[110]

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[109] Letter from Dr. Joseph Stanton to Patrick Trueman (Jul. 12, 1979) (on file with the Joseph Stanton Papers, Schlesinger Library, Harvard University).

[110] *See, e.g.*, Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19, 25-26 (2022) (listing searches for names of 13 women leaders of the abolitionist, suffragist, antilynching movements and observing none are mentioned in *United States Reports*; observing that there is one incidental mention of Susan B. Anthony, and eight mentions of Anthony's name as part of the Susan B. Anthony List which fundraises for Republican candidates); *cf. id.* at 24 (discussing the difference between constitutional memory and constitutional history and observing that despite the fact that "women contested their lack of political authority in the constitutional order over two centuries, there is no trace of their arguments in constitutional law").

III. INVENTING "MARGARET SANGER"

In *Box*, Justice Thomas connected eugenics and abortion in the figure of Margaret Sanger:

> The foundations for legalizing abortion in America were laid during the early 20th-century birth-control movement. That movement developed alongside the American eugenics movement. And significantly, Planned Parenthood founder Margaret Sanger recognized the eugenic potential of her cause. She emphasized and embraced the notion that birth control "opens the way to the eugenicist." . . . Whereas Sanger believed that birth control could prevent "unfit" people from reproducing, abortion can prevent them from being born in the first place. Many eugenicists therefore supported legalizing abortion, and abortion advocates—including future Planned Parenthood President Alan Guttmacher—endorsed the use of abortion for eugenic reasons. Technological advances have only heightened the eugenic potential for abortion, as abortion can now be used to eliminate children with unwanted characteristics, such as a particular sex or disability.[111]

Justice Thomas recognized that many Americans subscribed to eugenics, over many generations. He located the beginning of the eugenic reform movement in the nineteenth century.[112] By the 1920s, he argued, interest in eugenics was widespread, especially among "progressives, professionals, and intellectual elites."[113] Echoing *Maafa 21*, Thomas reasoned that neither eugenics nor racism reflected a majority position so much as a project carried out by progressive elites who "believed that the distinction between the fit and unfit could be drawn along racial lines."[114]

Chief among these influential elite Americans, Thomas wrote, was Margaret Sanger, who provided Thomas's evidence that "birth control and abortion were promoted as means of effectuating eugenics."[115] Thomas stated that Sanger campaigned for birth control in the Black community and painted birth

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[111] Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1750, 1784 (2019) (Thomas, J., concurring).

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

control, as opposed to compulsory sterilization—which he scarcely discusses—as "the greatest and most truly eugenic method."[116]

While conceding that Sanger did not advocate for legal abortion, Thomas reasoned that the arguments "that she made in support of birth control apply with even greater force to abortion."[117] Lacking direct evidence tying abortion and eugenics, Thomas offered examples of later supporters of legal abortion who discussed abortion as a strategy for population control,[118] and he stressed the view of Black nationalists in the late 1960s and early 1970s that "'family planning' [was] a euphemism for race genocide."[119]

The eugenic potential of abortion had in no way changed in the subsequent decades, Thomas reasoned. Citing data on sex selection, the birth of children with Down syndrome, and racially disparate birth rates, Thomas insisted that "the individualized nature of abortion gives it even more eugenic potential than birth control."[120] The right to choose abortion, Thomas concluded, "proved to be a disturbingly effective tool for implementing the discriminatory preferences that undergird eugenics."[121]

Justice Thomas's opinion drew heavily on antiabortion briefs in depicting Margaret Sanger.[122] We identify several ways in which antiabortion memory—and history—diverge in Thomas's portrayal of "Margaret Sanger."[123]

First, Thomas's story pointed to "Margaret Sanger" to explain decision-making about abortion in communities of color—even though Sanger advocated the

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[116] *Id.* at 1785.

[117] *Id.* at 1787.

[118] By the 1970s, population control had a range of meanings, and the coalition espousing it included refugees from the eugenics movement, cold warriors, and college students attracted to environmentalism or feminism. ZIEGLER, AFTER *ROE*, *supra* note 33, at 164-175. In these emergent usages, the language of population control offered the public ways of talking about the goods of non-procreative sex.

[119] Box, 139 S. Ct. at 1787 (Thomas, J., concurring).

[120] *Id.*

[121] *Id.*

[122] *See id.* at 1791 (citing Brief for Restoration Project et al., *supra* note 82 (citing CRUTCHER, *supra* note 82, at 7, 10)); *id.* at 1790 (citing Brief of State of Wisconsin et al., *supra* note 82); Brief Amici Curiae of the Ethics and Religious Liberty Commission, *supra* note 82.

[123] For the distinction between constitutional memory, claims about the past that express value in constitutional argument, and history, *see* Siegel, *supra* note 110, at 21 (defining constitutional memory as a "form of collective memory forged through constitutional interpretation"); *id.* ("The Constitution's interpreters are continuously producing constitutional memory . . . as they tell stories about the nation's past experience to clarify the meaning of the nation's commitments, to guide practical reason, and to help express the nation's identity and values.").

decriminalization of contraception*, not abortion.* Margaret Sanger argued that access to contraception was a way of *avoiding* dangerous illegal abortion,[124] yet Thomas presented "Margaret Sanger," founder of Planned Parenthood, as responsible for abortion in the Black community decades later. The "Margaret Sanger" he invoked emerged through years of abortion-is-eugenics talk in response to concerns of "some black groups" about the potential of abortion for race genocide.[125] Justice Thomas's history of the movement for contraceptive access fixated on the eugenic agency of "Margaret Sanger," while omitting the voices of generations of women of color who supported access to birth control[126] and ignoring significant changes in the politics of reproductive liberty since the 1970s: the decline of population rhetoric among some white male supporters of legal abortion,[127] the mobilization of a reproductive-justice movement led by women of color,[128] and a concomitant shift in opinion within the Black community, which is now more supportive of legal abortion than white or Latinx communities.[129] Enlisting Sanger as a symbol of abortion as Black genocide allowed Thomas to relitigate earlier fights about race and abortion that postdate Sanger herself by decades.

Second, Thomas focused exclusively on "Sanger" while neglecting other leaders of the movement for access to contraception who joined Sanger in making arguments grounded in the right to voluntary motherhood without discussing eugenics. Sanger justified access to contraception in the language of voluntary motherhood, while Sanger's colleague, Mary Ware Dennett, advocated for the Voluntary

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[124] ELLEN CHESLER, WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT 62-65 (2007); JEAN H. BAKER, MARGARET SANGER: A LIFE OF PASSION 112-114 (2011).

[125] Box, 139 S. Ct. at 1790.

[126] Murray, *Race-ing* Roe, *supra* note 11, at 2041-49.

[127] ZIEGLER, AFTER *ROE*, *supra* note 33, at 199-208.

[128] *See* ZAKIYA LUNA, REPRODUCTIVE RIGHTS AS HUMAN RIGHTS: WOMEN OF COLOR AND THE FIGHT FOR REPRODUCTIVE JUSTICE (2020); LORETTA ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 9-58 (2017).

[129] Frank Newport, *Black Americans and Abortion*, GALLUP (Sep. 3, 2022), https://news.gallup.com/opinion/polling-matters/318932/black-americans-abortion.aspx [https://perma.cc/2PG2-KLH4]. A 2023 Pew Forum poll found that 73 percent of Black Americans say abortion should be legal in all or most cases, compared to only 59 percent of whites. *Nearly a Year After* Roe*'s Demise, Americans' Attitudes about Abortion Increasingly Vary According to Where They Live*, PEW RSCH. CTR. (Apr. 26, 2023), https://www.pewresearch.org/politics/2023/04/26/nearly-a-year-after-roes-demise-americans-views-of-abortion-access-increasingly-vary-by-where-they-live [https://perma.cc/AV86-QGY5].

Parenthood League.[130] As important for present purposes, Dennett and her organizations did not enlist then-prevalent eugenics arguments, even when provoked.[131] When white state legislators defended New York's contraceptive ban by arguing that that its repeal might lead to "race suicide," Dennett argued instead that "the present laws are absolutely inconsistent with the principle of freedom to know, to think and to do, on which this country is supposed to be founded."[132] Dennett, whose work was supported by the ACLU, was a pioneer in identifying the entwined freedoms of expression that constitutional democracy required: she worked to challenge the government's efforts to arrest draft resisters and to secure repeal of state and federal Comstock laws enforced against those who advocated for contraceptive access.[133] By making a stripped-down stick figure of "Sanger" a stand-in for all supporters of birth control—including Dennett and activists of color with whom Margaret Sanger in fact worked[134]—

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[130] In 1917, Sanger began publishing *The Birth Control Review*, announcing that if woman " must break the law to establish her right to voluntary motherhood," "then the law shall be broken." Margaret Sanger, *Shall We Break the Law?*, 1 BIRTH CONTROL REV. 4, 4 (1917); *see also* Appellants' Brief for Motion for Stay, at 8, People v. Sanger, 22 N.Y. 92 (N.Y. 1917) (explaining that "birth control means 'voluntary motherhood'"). For Dennett's advocacy organization, see *Work on Congress Begins*, 3 BIRTH CONTROL REV. 13 (1919), which reported the founding of the Voluntary Parenthood League, with a goal of persuading Congress to repeal the provisions of the Comstock Act criminalizing contraceptive information or articles in the mail by adopting a measure "providing for the removal of the words 'prevention of conception' from the Federal Penal Code". On voluntary motherhood in this era, see Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450, 466-72 (2020), which discusses Crystal Eastman advocating voluntary motherhood as one element of a broader feminist agenda in the era of the Nineteenth Amendment's ratification.

[131] See Lauren McIvor Thompson, *The Politics of Female Pain: Women's Citizenship, Twilight Sleep, and the Early Birth Control Movement*, 45 BRITISH MED. J. 67, 73 (2017) (Dennett framing "the issues of birth control and eugenics 'as almost entirely separate', not to be 'jumbled' as 'two quite different considerations'" and "far from synonymous").

[132] Mary Ware Dennett, *Legislators, Six-Hour Weeks and Birth Control*, 3 BIRTH CONTROL REV. 4, 4 (1919); *see also* Mary Ware Dennett, *A Poser for the "Purists,"* 3 BIRTH CONTROL REV. 20, 20 (1919); Mary Ware Dennett, *The Stupidity of Us Humans*, 3 BIRTH CONTROL REV. 5 (1920). For more on the racial politics of "race suicide" talk, *see infra* notes 137-138 and accompanying text.

[133] *See* LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S FREE SPEECH COMPROMISE 172-202 (2016); LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY 36-58 (2013); BRETT GARY, DIRTY WORKS: OBSCENITY ON TRIAL IN AMERICA'S FIRST SEXUAL REVOLUTION 56-57 (2021).

[134] *See* CAROLE MCCANN, WHAT PERSPECTIVES DID AFRICAN AMERICAN ADVOCATES BRING TO THE BIRTH CONTROL MOVEMENT AND HOW DID THOSE PERSPECTIVES SHAPE THE HISTORY OF THE HARLEM BRANCH BIRTH CONTROL CLINIC? (2006); *Women and Social*

Thomas demonized all supporters of legal abortion and birth control as engaged in a eugenic-racial project.

Third, Thomas constructed "Margaret Sanger" to promote abortion-is-eugenic, when Margaret Sanger in fact sought to decriminalize contraception, was incarcerated for advocating "voluntary motherhood," and could not persuade Congress to enact a law authorizing doctors to prescribe contraception at a time when her opponents *argued that providing women access to contraception would corrupt morals and promote race suicide.* As we have seen, in the 1840s and 1850s, nearly a century before the rise of compulsory eugenic sterilization laws, Horatio Storer and other doctors in the American Medical Association advanced moral and demographic arguments *for* banning abortion, emphasizing that elite Protestant women had fewer children than Catholic immigrants.[135] In the 1910s, similarly, when Sanger and Dennett were both advocating for voluntary motherhood,

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Movements in the United States, 1600-2000, ALEXANDER ST., [https://perma.cc/JW8H-9J9F] (collecting documents of Sanger's birth control clinic in Harlem between 1930-35). For other activists of color who advocated for contraceptive access, *see* ROSALYN TERBORG-PENN, AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850-1920, at 70-72 (1998) (discussing Angelina Weld Grimké and other African American suffragists who wrote for feminist journals on the eve of World War I); *see also* Jessie M. Rodrique, *The Black Community and the Birth Control Movement*, *in* PASSION AND POWER: SEXUALITY IN HISTORY 138, 145-50 (Kathy Peiss & Christina Simmons eds., 1989) (discussing race-conscious advocacy of birth control within African American communities beginning in the Progressive Era); ROBERTS, KILLING THE BLACK BODY, *supra* note 14, at 82-84. On the use of eugenic-adjacent arguments by Black activists, see Ayah Nuriddin, *Engineering Uplift: Black Eugenics as Black Uplift*, *in* NATURE REMADE: ENGINEERING LIFE, ENVISIONING WORLDS (Luis Campos et al. eds., 2021) [hereinafter Nuriddin, *Engineering Uplift*]; MITCHELL CHRESMAN, IMPROVE THE RACE: EUGENICS AS A STRATEGY FOR RACIAL UPLIFT (2013) (dissertation); BRIDGETTE ROBINSON, THE BATTLE FOR RESPECTABILITY: THE BLACK BOURGEOISIE'S USE OF EUGENIC RHETORIC IN RACIAL UPLIFT POLITICS, 1895-1940 (2018) (dissertation); SHANTELLA SHERMAN, IN SEARCH OF PURITY: POPULAR EUGENICS AND RACIAL UPLIFT AMONG NEW NEGROES 1915-1935 (2012) (dissertation); and AYAH NURIDDIN, RACE, SEXUALITY, AND THE "PROGRESSIVE PHYSICIAN:" AFRICAN-AMERICAN DOCTORS, EUGENICS, AND THE PUBLIC HEALTH, 1900-1940 (2014) (dissertation).

[135] HORATIO ROBINSON STORER, WHY NOT?: A BOOK FOR EVERY WOMAN 62-63 (1866) (connecting legal abortion with low "native" birthrates relative to those of Catholic women); *id.* at 64-65 (claiming that "abortions are infinitely more frequent among Protestant women than among Catholic [women]"); *see also, e.g.*, William McCollom, *Criminal Abortion*, *in* TRANSACTIONS OF THE VERMONT MEDICAL SOCIETY, FOR THE YEAR 1865, at 40, 42 (1865) ("Our own population seem to have a greater aversion to the rearing of families than . . . the French, the Irish and the Germans."); L.C. Butler, *The Decadence of the American Race, As Exhibited in the Registration Reports of Massachusetts, Vermont [and Rhode Island]; the Cause and the Remedy.*, 77 BOS. MED. & SURGICAL J. 89, 93-94 (1867) (stressing the reproductive rates of Protestants and Catholics).

opponents of birth control again insisted that contraceptives would undercut the work of eugenicists because the most genetically "fit" white women would be the most likely to limit childbearing. Anti-suffrage activist Grace Strachan insisted, for example, that "[r]ace suicide would follow the spreading of information on birth control."[136]

Eugenics arguments *against* birth control continued into the 1930s. Father Charles Coughlin, who would gain notoriety as one of the nation's most outspoken anti-Semites, warned Congress in 1934 that legalizing birth control would "exterminate the Anglo-Saxon race" because "the negroes are out-begetting the Anglo-Saxon and Celtic races in this country."[137] By omitting figures like Storer and Coughlin, Thomas painted racism as an unusual personal failing rather than a feature of American life.[138] In the process, Thomas framed racism as an individual failing of the evil "Sanger" rather than a structural issue, and repressed the role that racial "replacement" anxieties have played in arguments *for* criminalizing abortion and contraception.

Finally, making Sanger the primary symbol of eugenics minimizes the role of government coercion in eugenics. The nation's most prominent eugenicists wanted the state, not individuals, to make decisions about reproduction: As the historian and economist Thomas C. Leonard explained, eugenics was a program of "state

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[136] Lucy Huffaker, *Mrs. Arthur Dodge and Anthony Comstock to Combat Family Limitation*, N.Y. Trib., May 22, 1915, at 9; *see also Birth Control and Race Suicide*, OMAHA DAILY BEE, Feb. 5, 1917, at 4 (Dr. Robert J. Sharpe, an opponent of contraception, explaining that "[b]irth control among the poor is a problem, but race suicide among the middle classes is a racial menace which threatens by its influence to defeat the highest ideals of the nation"); *Letter to the Editor*, LEXINGTON HERALD, May 14, 1939, at 7 (explaining that through birth control, "the 'better families' are extinguishing themselves through race suicide"); *Cleric Brands Birth Control Diabolical and Race Suicide*, BUFFALO NEWS, Oct. 25, 1938, at 1 (Archbishop Joseph Rummel of New Orleans asserting that birth control was "what President Theodore Roosevelt called 'race suicide'").

[137] *Birth Control Would Extinguish Anglo-Saxons, Priest Tells House*, SALT LAKE TRIB., Jan. 19, 1934, at 9; *see also Birth Control "Race Suicide,"* ATLANTIC CITY PRESS, Dec. 19, 1935, at 2 (Archbishop Patrick Hayes of New York arguing that "use of birth control involves the risk of race suicide"); *Birth Control Trend Opposed*, ESCANABA DAILY PRESS, July 18, 1934, at 2 (the International Lions Association arguing that legal birth control poses "a serious menace to the white race"). On opposition to Sanger's efforts to decriminalize birth control in the 1930s, see PETER ENGELMAN, A HISTORY OF THE BIRTH CONTROL MOVEMENT IN AMERICA 163-64 (2011), which details the composition of the Depression-era anti-contraception movement.

[138] Indeed, populationist reasoning was so widespread and politically powerful that even people of color, themselves often victimized by eugenic policies, sometimes adopted rhetoric reminiscent of eugenics. *See supra* note 134 & accompanying text.

control of human breeding."[139] The abortion-is-eugenic narrative demonizes Sanger as if government coercion was of no significance in the most infamous episodes of eugenics. Justices Thomas and Alito and Judge Ho treat racially disparate abortion rates as evidence of eugenic coercion.[140] That the abortion rate is higher in communities of color is treated as evidence that women of color have been manipulated by the white woman "Sanger," who as head of Planned Parenthood, shoulders the blame for the myriad policy choices made by the government that help create the conditions in which sex, pregnancy, and family life unfold[141]—the very conditions that shape decisions about whether to carry a pregnancy to term, and which have made that choice so fraught, especially for women of color.[142]

In suggesting that a shadowy racial plot might explain racial disparities in abortion rates, those who point to "Sanger" elide the very possibility of structural racism and propose the criminalization of abortion and the expansion of coercive laws as the remedy for racial injustice. "Rather than link abortion rates to the policy choices that perpetuate poverty, opponents shift blame on to women who make decisions about abortion in a nation that provides scarcely any support for those who conceive, bear, and raise children."[143]

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[139] Eli Rosenberg, *Clarence Thomas Tried to Link Abortion to Eugenics. Seven Historians Told the* Post *He's Wrong*, WASH. POST (May 31, 2019, 9:50 P.M. EDT), [https://perma.cc/YD2J-WLTM]. For more on the importance of coercion in the eugenic program, see STERN, *supra* note 4 at 7-19; and LEONARD, *supra* note 4, at 110-161.

[140] Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1750, 1791 (2019) (Thomas, J., concurring) ("Eight decades after Sanger's "Negro Project," abortion in the United States is also marked by a considerable racial disparity."); *id.* at 1791 ("[I]nsofar as abortion is viewed as a method of 'family planning,' black people do indeed tak[e] the brunt of the 'planning.'" (citation omitted)); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 255 n. 41 (2022) (observing that "it is beyond dispute that *Roe* has had that demographic effect" since a "highly disproportionate percentage of aborted fetuses are Black"); Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 285-287 (5th Cir. 2019) (Ho, J., concurring) (citing Thomas's opinion in *Box* to suggest that the "abortion ratio . . . among black women is nearly 3.5 times the ratio for white women" (citation omitted)), *rev'd & remanded*, 597 U.S. 215 (2022).

[141] *See, e.g.*, *Jackson Women's Health Org.*, 945 F.3d at 285-87 (Ho, J., concurring).

[142] *See* Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobb's *Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99, 155-56, 158 (2023) (recounting unsuccessful efforts of Mississippi citizens in *Dobbs*'s wake to persuade state legislature to enact safety-net legislation protecting life and health of pregnant women and children they bear).

[143] Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondent at 33, Dobbs, 597 U.S. 215 (No. 19-1392).

CONCLUSION

Antiabortion eugenics discourse on abortion not only played a role in *Dobbs*, but in the Supreme Court case following it, *Alliance for Hippocratic Medicine v. U.S. Food and Drug Administration.*[144] As in *Dobbs*, argument began in the lower courts. When considering the claim that the Food and Drug Administration lacked the authority to approve the abortion pill mifepristone, for example, Judge Matthew Kacsmaryk invoked the history of eugenics in determining whether a preliminary injunction limiting access to mifepristone would serve the public interest. [145] The FDA had argued that denying access to abortion had negative effects on women and their families. In rejecting this claim, Kacsmaryk suggested that the FDA had indulged in eugenics by questioning how "unaborted children" would fare.[146] Kacsmaryk did not mention Sanger by name, but he proclaimed that the nation had moved beyond "the conflict, carnage, and casualties of the last century" tied to "Social Darwinism practiced by would-be Übermenschen."[147] Antiabortion briefs in *Alliance for Hippocratic Medicine* continue to stress constitutional claims about eugenics.

The eugenics reform movement was complex, broad, and fluid. The same is true of the movements to decriminalize abortion and contraception. All three, moreover, were distinct from one another. In these few pages, we cannot sketch a comprehensive history of any of these mobilizations, much less their relationship to one another.

But by recovering the movement origins of eugenic talk about abortion, we can raise questions about its function in constitutional law. The "tell" of this form of racial-justice talk is that it is hyper-focused on banning abortion, and

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[144] For briefs mentioning eugenics in the lower courts, see Brief Amici Curiae of the Frederick Douglass Foundation et al., at 4, Alliance for Hippocratic Med. v. U.S. Food & Drug Admin. at 4, __F.3d __, No. 23-10362, 2023 WL 2825871 (N.D. Tex. 2023) ("Chemical and other abortion advocacy rests on the eugenics movement, which is rooted in Social Darwinism and the elimination of undesirable populations"); Amici Curiae of the American Center for Law and Justice, at 9, Alliance for Hippocratic Med. v. U.S. Food and Drug Admin. at 4, (No. 23-10362(, 2023 WL 2825871 (N.D. Tex. 2023) ("Easy access to abortion pills facilitates do-it-yourself eugenics").

[145] Alliance for Hippocratic Med., 2023 WL 2825871 at *31.

[146] *Id.*

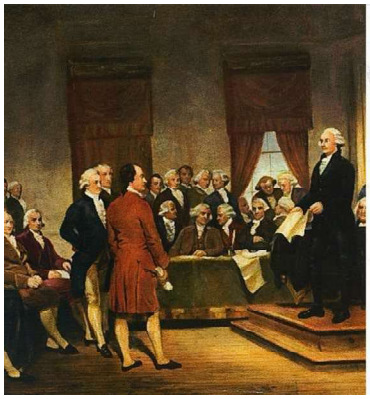
[147] *Id.*

within that universe, it modernizes constitutional justifications for reproductive coercion of women.[148]

If the Court were in fact concerned about racial bias, the majority in *Dobbs* would not have dismissed evidence of the white demographic anxieties fueling the nineteenth-century campaign to criminalize abortion. The *Dobbs* Court instead elevated that campaign as part of the nation's history and traditions to which twenty-first-century Americans owe constitutional fealty, whitewashing the demographic preoccupations of the nineteenth-century movement to ban abortion and addressing women's exercise of abortion rights as if it were a eugenic plot. If the Court were moved by the painful legacy of eugenics, Justices Alito and Thomas would recognize the harm the state inflicts when it compels reproductive decisions rather than underwriting new forms of state coercion.



[148] *Cf.* Murray, *Race-ing* Roe, *supra* note 11, at 2057. The antiabortion movement's efforts to restate traditional justifications for banning abortion in the languages of feminism and antiracism illustrate the dynamics of preservation through transformation.



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The Wages of Crying *Roe*: Some Realism About *Dobbs v. Jackson Women's Health Organization*

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