NOTES

THE THINGS WE BEAR: ON GUNS, ABORTION, AND SUBSTANTIVE DUE PROCESS

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ABSTRACT

As the Supreme Court sits ready to curtail both abortion rights and gun control laws in its current term, this Note seeks to retheorize the nexus between the constitutional claims to abortion and individual gun ownership. It departs from existing theories, which largely frame the legal arguments or bases of the two rights as parallel, by proposing a framework of constitutional interpretation that both expands access to abortion and restricts individual access to firearms. This framework, building on the recent work of Douglas NeJaime and Reva Siegel, understands substantive due process—the constitutional hook through which both rights have passed during their development—as an equality-focused doctrine concerned with removing group-based subordination as a barrier to full democratic participation. In this capacity, the Due Process Clause requires that abortion and firearm restrictions' constitutionality are evaluated with reference to their implications for social inequality. To illustrate this theory, this Note analyzes abortion restrictions—specifically, the fetal homicide laws sometimes used to prosecute self-managed abortions—and permissive firearms policies that are each justified in part by appeals to women's empowerment and protection. This Note establishes that, to the contrary, the laws in question have an inverse relationship to women's protection. The potential regime of crippled abortion access and expanded gun access is a regime under which women are criminalized and more vulnerable to gender-based violence. As such, regulating firearms and deregulating abortion is not only doctrinally consistent but in fact doctrinally compelled.

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INTRODUCTION

During oral arguments for *Whole Woman's Health v. Jackson*[1]—the lawsuit in which petitioners sought to invalidate Texas's radical attempt to ban abortion after six weeks[2]—Justice Kavanaugh asked essentially: What about gun rights?[3] Citing an amicus brief filed by the Firearms Policy Coalition in the petitioners' favor, Justice Kavanaugh anticipated that Texas's innovative end-run around the Constitution could be replicated and weaponized by gun-control proponents against the Second Amendment right to bear arms.[4] In fact, the two issues are rhetorically contiguous—cultural controversy and highly contested legal lineages have positioned abortion and gun rights as two sides of a politically charged coin.[5] Because advocates of one right are typically hostile to the other,[6] the two

1. Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021).

2. Maggie Astor, *Here's What the Texas Abortion Law Says*, N.Y. TIMES (Sep. 9, 2021), https://www.nytimes.com/article/abortion-law-texas.html. On December 10, 2021, the Supreme Court settled the major procedural questions the law raised by allowing abortion providers to proceed with their lawsuit against state licensing officials but not state court judges or clerks. Ian Millhiser, *Don't Be Fooled: The Supreme Court's Texas Abortion Decision Is a Big Defeat for* Roe v. Wade, VOX (Dec. 10, 2021), https://www.vox.com/2021/12/10/22827899/supreme-court-texas-abortion-law-sb8-decision-whole-womens-health.

3. Transcript of Oral Argument at 72, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021) (No. 21–463) ("Can I ask you about the implications of your position for other constitutional rights, the amicus brief of the Firearms Policy Coalition says 'this will easily become the model for suppression of other constitutional rights with Second Amendment rights being the most likely targets.'")

4. Transcript of Oral Argument at 73, Dobbs v. Jackson Women's Health Org., (2021) (No. 19-1392). On December 11, 2021, Gavin Newsom, Governor of California, called for a law deputizing California citizens to file lawsuits against purveyors of restricted "ghost guns and assault weapons." *See* Shawn Hubler, *Newsom Calls for Gun Legislation Modeled on the Texas Abortion Law*, N.Y. TIMES (Dec. 12, 2021), https://www.nytimes.com/2021/12/12/us/politics/newsom-texas-abortion-law-guns.html.

5. Among the more popular slogans on Women's March protest signs in 2021: "If my uterus shot bullets, it would be less regulated." Alexa Lisitza, *Women's March 2021 Abortion Signs*, BUZZFEED (Oct. 4, 2021), https://www.buzzfeed.com/alexalisitza/womens-march-2021-abortion-signs.

6. The coalition between the Firearms Policy Coalition and Whole Women's Health, an abortion provider, is an anomaly. *See More Support for Gun Rights, Gay Marriage than in 2008 or 2004*, PEW

rights have emerged as twin juridical objectives caught in an intractable lockstep—expanding one risks the entrenchment of the other.

The Supreme Court's current term has highlighted the proximity between gun and abortion rights. The same week that the Supreme Court heard arguments for *Whole Woman's Health*, it also heard oral arguments for *New York State Rifle and Pistol Association v. Bruen*,[7] a gun rights case that will clarify and likely curtail the permissible scope of gun control.[8] Concurrently, a leaked draft of the Court's potential holding in *Dobbs v. Jackson Women's Health Organization*[9] indicates a strong possibility that the Court will overrule *Roe v. Wade* by the end of its 2021-2022 term.[10] At the same time, the implicit game of checkmate that binds the two rights is breaking down.[11] Though judges once recognized the symmetry between the individual interests in abortion access and gun ownership,[12] the Supreme Court seems poised to drastically retrench the former and expand the latter in the same term. Most major works of scholarship focused on the intersection of the two liberties observe that doctrinal consistency implies that the rights must rise and fall together.[13] This idea is ripe for revisiting.

This Note seeks to retheorize the nexus between the constitutional claims to abortion and individual gun ownership. It departs from existing theories, which

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RSCH. CTR. (Apr. 25, 2012), https://www.pewresearch.org/politics/2012/04/25/more-support-for-gun-rights-gay-marriage-than-in-2008-or-2004/.

7. N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (argued Nov. 3, 2021).

8. Amy Howe, *Majority of Court Appears Dubious of New York Gun-Control Law, but Justices Mull Narrow Ruling*, SCOTUSBLOG (Nov. 3, 2021), https://www.scotusblog.com/2021/11/majority-of-court-appears-dubious-of-new-york-gun-control-law-but-justices-mull-narrow-ruling/.

9. Dobbs v. Jackson Women's Health Org., No. 19-1392 (argued Dec. 1, 2021). Jackson Women's Health Organization drew an explicit parallel between abortion and gun rights in its brief to the Court. In imploring the Court to heed stare decisis despite Mississippi's attempt to malign the *Roe* decision, Jackson Women's Health argued that the seminal Supreme Court decisions protecting abortion and gun rights are similarly contested and criticized as recognizing new rights on inadequate historical foundations. Brief for Respondent at 3-4, 20, *Dobbs* (No. 19-1392).

10. *See, e.g.*, Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473; Amy Davidson Sorkin, *The Supreme Court Looks Ready to Overturn Roe*, NEW YORKER (Dec. 2, 2021), https://www.newyorker.com/news/daily-comment/the-supreme-court-looks-ready-to-overturn-roe; Ian Millhiser, *It Sure Sounds Like* Roe v. Wade *is Doomed,* VOX (Dec. 1, 2021), https://www.vox.com/2021/12/1/22811837/supreme-court-roe-wade-abortion-doomed-jackson-womens-health-dobbs-barrett-kavanaugh-roberts; Amy Howe, *Majority of Court Appears Poised to Roll Back Abortion Rights*, SCOTUSBLOG (Dec. 1, 2021), https://www.scotusblog.com/2021/12/majority-of-court-appears-poised-to-uphold-mississippis-ban-on-most-abortions-after-15-weeks/.

11. *See* Linda Greenhouse, *Do Gun Rights Depend on Abortion Rights? That's Now Up to the Supreme Court*, N.Y. TIMES, (Nov. 4, 2021), https://www.nytimes.com/2021/11/04/opinion/abortion-guns-supreme-court.html.

12. *See, e.g.*, Planned Parenthood Se., Inc. v. Strange, 33 F. Supp. 3d 1330, 1379 (M.D. Ala. 2014) (striking down a state law requiring doctors who perform abortions to have admitting privileges in local hospitals because, *inter alia*, the court was "struck by a parallel in some respects between the right of women to decide to terminate a pregnancy and the right of the individual to keep and bear firearms, including handguns, in her home for the purposes of self-defense" and reasoned that a similarly severe restriction on firearm vendors would be constitutionally impermissible).

13. *See* discussion *infra* Part I.

largely frame the legal arguments or bases of the two rights as parallel, by proposing a framework of constitutional interpretation that both expands access to abortion and restricts individual access to firearms. This framework, building on the recent work of Douglas NeJaime and Reva Siegel,[14] understands substantive due process—the constitutional hook through which both rights have passed during their development[15]—as an equality-focused doctrine concerned with removing group-based subordination as a barrier to full democratic participation. In this capacity, the Due Process Clause requires that abortion and firearm restrictions' constitutionality are evaluated with reference to their implications for social inequality.

Applying this theory, this Note focuses on abortion restrictions and permissive firearms policies that are justified in part by appeals to women's empowerment and protection. This Note establishes that, to the contrary, the laws in question have an inverse relationship to women's protection. The potential regime of crippled abortion access and expanded gun access is a regime under which women are criminalized and more vulnerable to gender-based violence. If the Due Process Clause is a mandate for anti-subordination, as theorized in this Note, the gendered implications of abortion restrictions and gun control move from the periphery to the heart of their constitutionality. As such, regulating firearms and deregulating abortion is not only doctrinally consistent but in fact doctrinally compelled.

The objective of this Note is twofold: First, to dispel the rhetorical mythology of women's protection, which obscures the reality that abortion restrictions and permissive firearm measures contribute to the subordination of women. And second, to use this analysis of the laws' gendered dimensions to propose a theory of substantive due process that views limited abortion access and unfettered gun ownership as obstacles to women's full democratic citizenship.[16]

This Note proceeds in four parts. Part I surveys the existing literature theorizing the intersection of the constitutional rights to abortion and individual gun ownership. These articles predominately submit that the rights must rise and fall together, in contrast to the polarization that characterizes positions on the two

14. *See* discussion *infra* Part II.A. Douglas NeJaime & Reva B. Siegel, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1909 (2021), https://www.nyulawreview.org/wp-content/uploads/2021/12/NeJaimeSiegel-ONLINE.pdf.

15. *See* discussion *infra* Part II. While the Second Amendment is the primary constitutional basis for the individual right to bear arms, the Court incorporated this holding against the states through the Fourteenth Amendment's Due Process Clause in *McDonald v. City of Chicago*. *See* District of Columbia v. Heller, 554 U.S. 570, 595 (2008); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

16. This Note focuses on women as a discrete social category primarily because it directly responds to anti-abortion and pro-gun rhetoric that weaponizes the social status of women as such. Moreover, the subject matter of abortion and gender-based violence are each conceived of in the public imaginary as "women's" issues and are thus constitutive of womanhood as a social category that creates and sustains social marginalization. That is not to say that this Note's analysis cannot be extended to redress the legal subordination of other marginalized genders or social classes—in fact, this Note aims to serve as a vista for such analysis. *See* discussion *infra* Part II.B.

individual rights in popular discourse. Part II proposes an alternative theory that the Due Process Clause compels the invalidation of abortion restrictions and the approval of gun control laws, drawing on NeJaime and Siegel's argument that substantive due process is a doctrine of anti-subordination. Parts III and IV substantiate the theory proposed in Part II by demonstrating that certain abortion restrictions and gun rights laws facilitate women's subordination. Part III analyzes state-level fetal protection laws, which receive little public attention and purportedly stem from lawmakers' desire to protect pregnant victims of gender-based violence. This Part documents that prosecutors use these laws to criminalize women who self-manage abortions. Part IV focuses on the gendered dimensions of gun ownership that underlie appeals to women's empowerment through armed self-defense. Specifically, it introduces empirical data that firearms exacerbate violence against women and documents the pervasive failure of self-defense claims made by women under Stand Your Ground laws, analyzing each through the lens of gun violence as a historically white, male prerogative. This Note concludes by contextualizing its proposed theory about the constitutional nexus between abortion and gun rights in the current political and judicial climate, offering, if not a roadmap for imminent legal victory, a refocused vision of what women's freedom is and must become.[17]

I. EXISTING THEORIES OF THE RIGHTS TO ABORTION AND GUNS

Abortion and gun rights are both hot button issues, so it is surprising that scholarship on their rhetorical and doctrinal nexus is sparse. Instead, the two issues are often written about in isolation, and some scholars make cursory mention of one right while expounding on the other.[18] This Part summarizes the arguments of three notable works that directly examine the relationship between the nature of the abortion right and the right to bear arms, and, where applicable, the arguments of their critics.

A. NICHOLAS JOHNSON

The most significant existing scholarship on the rhetorical parallels between arguments for abortion and gun rights is Nicholas J. Johnson's treatise, *Principles and Passions: The Intersection of Abortion and Gun Rights*.[19] Written before

17. Justice Kennedy wrote for the Court in *Obergefell v. Hodges*: "The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. . . . This interrelation of the two principles furthers our understanding of what freedom is and must become." Obergefell v. Hodges, 576 U.S. 644, 672 (2015).

18. This Note acknowledges that the articles summarized in this Part are not the only academic works that address both the abortion right and the right to bear arms. However, the works not mentioned are largely in the nature of treatises on due process or constitutional interpretation generally, not theorizations of abortion and gun rights' relationship as a discrete matter.

19. *See* Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97 (1997) [hereinafter Johnson, *Principles and Passions*]. Johnson returned to this

District of Columbia v. Heller established an individual right to bear arms under the Second Amendment,[20] Johnson argues that many of the arguments advanced to support a constitutional right to abortion lend equally strong support for a constitutional right to possess firearms for individual self-defense.[21] Johnson's aim in documenting the congruencies between the two positions is to reconcile their respective advocates, lest those who favor one right eschew the other based solely on personal distaste.[22]

Johnson's comparison of the theoretical and philosophical justifications for the two rights-claims opens with a "core theme": both abortion and armed self-defense may arise as "crucial private choices" that function as "a vital option in a life-changing or life-threatening crisis."[23] The centerpiece of Johnson's analysis is the self-defense analogy, which frames abortion as the use of lethal force to avoid the threat of coerced pregnancy.[24] Viewed this way, abortion is on par with the use of deadly force to defend oneself against an imminent threat of death or serious bodily harm—a widely accepted legal defense to the use of deadly force that undergirds claims to the individual right to bear arms.[25] For Johnson, the self-defense argument supports an individual right to gun ownership even more strongly than abortion, especially insofar as armed self-defense contemplates resistance against a willful, malicious criminal attacker.[26]

Beyond explicit self-defense analogies, Johnson engages with abortion rights proponents' appeals to women's bodily autonomy and self-determination as a basis for grounding abortion rights in the Fourteenth Amendment's Due Process Clause.[27] A major argument advanced in support of abortion rights—ultimately

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intersection in a later piece arguing that the contemporary debate over banning assault weapons parallels the debate over late-term abortion, insofar as each contemplate a restriction at the outer margins of a controversial right. Johnson proposed that the Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), compels the recognition of a right to own assault weapons, as the Court's protection of a sometimes optimally effective but arguably less safe abortion method should extend to assault weapons that are more dangerous but have superior utility in some contexts. Nicholas J. Johnson, *Supply Restrictions at the Margins of* Heller *and the Abortion Analogue:* Stenberg *Principles, Assault Weapons, and the Attitudinalist Critique*, 60 HASTINGS L.J. 1285, 1287 (2008).

20. D.C. v. Heller, 554 U.S. 570, 595 (2008).

21. Johnson, *Principles and Passions*, *supra* note 19, at 99, 101–02.

22. *Id.* at 101.

23. *Id.* at 98.

24. *Id.* at 102. Cass Sunstein identifies the self-defense analogy as the strongest justification for the abortion right. *See* Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion and Surrogacy)*, 92 COLUM. L. REV. 1, 31 n.120 (1994).

25. MODEL PENAL CODE § 3.04.

26. Johnson, *Principles and Passions*, *supra* note 19, at 104, 168. Johnson contends that even in a scenario in which the armed individual "exceeds the bounds of self-defense"—that is, uses deadly force against someone who is legally undeserving—it is difficult to impute to the victim the same innocence as that of a fetus. *Id* at 168.

27. For a more comprehensive discussion of the constitutional bases for the abortion and gun rights *see infra* Part II. For further examples of pro-gun scholarship that connects gun rights to bodily integrity-based arguments for abortion, *see* Robert L. Barrow, *Women with Attitude: Self Protection, Policy, and the Law*, 21 T. JEFFERSON L. REV. 59, 73–74 (1999) and Lindsay K. Charles, *Feminists and Firearms:*

embraced by the Court in *Roe*[28] and *Casey*[29]—is that abortion fits within the rubric of autonomy in family matters that the Supreme Court has protected under the umbrella of the due process right to privacy in pre-*Roe* cases.[30] In response to the argument that abortion's potentially life-altering consequences make it a component of personal liberty,[31] Johnson contends that "*no* decision has more potential to alter the course of one's life than one's response to the threat of death or serious bodily injury."[32]

Johnson derives further support for the right to armed self-defense from the argument that abortion is necessary to women's social equality and should therefore be protected under the Equal Protection Clause.[33] Johnson posits that "a woman's autonomous charge of her full life's course"[34] and equality is predicated at least on her being alive, for which purpose her own armed self-defense may be necessary.[35] To underscore his point, Johnson cites arguments that the individual right of armed self-defense protects women from rape or domestic abuse; guns emerge in Johnson's calculus as an equally if not more important instrument for women's equality than abortion.[36] Ultimately, there is no legal or policy argument in favor of abortion rights in which Johnson does not find concomitant support for an individual right to bear arms.

B. JUDGE HARVIE WILKINSON, III

Where Johnson addresses abortion advocates who reject an individual right to bear arms, U.S. Fourth Circuit Judge Harvie Wilkinson III seeks to temper the excitement about *Heller* among conservative legal theorists who denigrate the

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Why Are So Many Women Anti-Choice?, 17 CARDOZO J.L. & GENDER 297, 297 (2011) ("I am ready and willing to defend my bodily integrity at the point of a gun, and I have the .357 Magnum to prove it.").

28. Roe v. Wade, 410 U.S. 113, 152 (1973).

29. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.").

30. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (protecting the right of married couples to use contraception); Meyer v. State of Nebraska, 262 U.S. 390 (1923) (protecting the right of a teacher to teach languages other than English to a student, comprising part of the right of parents to control the upbringing of their child as they see fit).

31. Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 127 (1989).

32. Johnson, *Principles and Passions*, *supra* note 19, at 123.

33. *See, e.g.*, *Casey*, 505 U.S. at 856 (recognizing that abortion has facilitated "[t]he ability of women to participate equally in the economic and social life of the Nation"); *see also* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

34. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 383 (1985).

35. Johnson, *Principles and Passions*, *supra* note 19, at 139. It is Johnson's position that guns are the most effective instruments of self-defense and are sometimes essential to this end. *See id.* at 108, 186.

36. *Id.* at 139, 187–88. The argument that gun ownership protects women from gender based violence is further explored and challenged *infra* Part IV.

Court's decision in *Roe*.[37] Wilkinson argues that *Roe* and *Heller* "share four major shortcomings: [1] an absence of a commitment to textualism; [2] a willingness to embark on a complex endeavor that will require fine-tuning over many years of litigation; [3] a failure to respect legislative judgments; and [4] a rejection of the principles of federalism."[38] In essence, Wilkinson criticizes the Court for failing in each case to defer to the democratic process about a contentious question with no straightforward answer in the text of the Constitution—thus violating the conservative legal principle of modesty and restraint in favor of judicial policymaking.[39]

Wilkinson's critique rests on his assessment that the Second Amendment is ambiguous regarding individual, as opposed to militia-bound, gun ownership, by which he means that both the majority and dissent in *Heller* marshal substantial support for their respective originalist interpretations of the Second Amendment.[40] As for *Roe*, Wilkinson adopts the well-worn criticism that the abortion right, let alone the trimester framework developed by the Court,[41] has at best an attenuated basis in the text of the Constitution.[42] In Wilkinson's view, when justices find no clear answer in the text that gives the Court legitimacy, it is incumbent on them to respect democracy, federalism, and public faith in the courts by deferring to the legislative process. The *Roe* and *Heller* Courts both failed in Wilkinson's measure, and their legitimacy as neutral arbiters of law, rather than unelected enactors of their policy preferences, has suffered as a result.

Wilkinson's critique of *Roe* and *Heller* prompted notable responses from his conservative colleagues, which take issue primarily with Wilkinson's lack of fidelity to originalism in interpreting both cases.[43] Wilkinson concedes that from an originalist perspective *Heller* has an edge over *Roe* insofar as "[t]here is a big difference between when the text says something . . . and when it says absolutely nothing;"[44] but Wilkinson's critics dispute the significance of this difference.

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37. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. REV. 253 (2009).

38. *Id*. at 254.

39. *Id*. at 266.

40. *Id*. at 271. Specifically, considering the textual interpretation of the amendment's prefatory and operative clauses, the tension between original public meaning and framer's intent theories of originalism, and the historical record amassed on each side of the case, Wilkinson concludes that *Heller* was a close enough call that its resolution was a matter of judicial discretion, not constitutional mandate. *Id*. at 272.

41. Roe v. Wade, 410 U.S. 113, 163 (1973).

42. Wilkinson, *supra* note 37, at 258 ("It is a long trek from the liberty protected by [the Fourteenth Amendment's Due Process Clause] to a general right of privacy; [and] a longer journey still from a general privacy right to a specific right to induce an abortion.").

43. This Note does not regard these responses to Wilkinson's article as major theorizations of the legal intersection between guns and abortion in their own right because they are merely critiques which respond to an initial, more widely circulated text.

44. Wilkinson, *supra* note 37, at 265.

Nelson Lund, David B. Kopel, and Alan Gura criticize Wilkinson's contention that *Heller* was inadequately committed to textualism.[45] Lund and Kopel argue that a "detailed and disinterested originalist analysis" of the Second Amendment reveals "far stronger" evidence supporting an individual rights reading of the amendment than it does for a right restricted to militia service.[46] In light of this unambiguous evidence, a constitutional right to gun ownership cannot be compared to the abortion right, which has no textual basis in the Constitution.[47] Thus, Lund and Kopel argue, a truly originalist analysis that "take[s] seriously the text of the Constitution or the historical evidence about the meaning of that text" suggests that the Constitution protects individual gun ownership but not abortion.[48] Based on this textual support, Wilkinson's qualms about the Court's inadequate deference to the legislative branch become moot.[49] This position aligns with that of more than one current Supreme Court justice, and might well become the position of the Court.[50]

C. ROBIN WEST

Robin West's theory of the individual right to armed self-defense and abortion aligns more closely with Johnson's characterization of both as "crucial private choices" than Wilkinson's rejection of both as fabricated from judicial activism. West's distinctive contribution to the abortion law canon is her Rawlsian account of the abortion right.[51] She posits that "[t]o whatever degree we fail to create the minimal conditions for a just society, we also have a right, individually and fundamentally, to be shielded from the most dire or simply the most damaging consequences of that failure."[52] Because we presently have an "unjust patriarchal

45. Nelson Lund & David B. Kopel, *Unraveling Judicial Restraint: Guns, Abortion, and the Faux Conservatism of J. Harvie Wilkinson III*, 25 J.L. & POL. 1, 7 (2009); Alan Gura, Heller *and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV. 1127, 1129 (2009).

46. Lund & Kopel, *supra* note 45, at 7. Lund and Kopel accuse Wilkinson of cavalierly dismissing the substance and weight of the evidence presented in Justice Scalia's *Heller* majority opinion, and extending undue credit to the arguments in Justice Stevens' dissenting opinion, which they argue does not "refute[], or even call[] into serious question," the majority's analysis. *Id*. at 2, 4.

47. *Id*. at 3.

48. *Id*. at 4.

49. Gura, *supra* note 45, at 1135.

50. *See* Timbs v. Indiana, 139 S. Ct. 682, 692 (2019) (Thomas, J., concurring) (calling substantive due process "meaningless" and placing *Roe* alongside *Dred Scott v. Sandford* as examples of "substantive due process precedents . . . [that] are some of the Court's most notoriously incorrect decisions"); *Barrett Confirmation Hearing, Day 3 Part 2*, C-SPAN (Oct. 14, 2020), https://www.c-span.org/video/?476317-2/barrett-confirmation-hearing-day-3-part-2 (in which Justice Barrett refuses to give her views on *Griswold*).

51. In broad terms, philosopher John Rawls's theory of justice contends that each individual has an equal right to the most extensive basic liberty compatible with a similar liberty for others, and social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged. Brian Duignan, *John Rawls*, ENCYC. BRITANNICA (Feb. 17, 2022), https://www.britannica.com/biography/John-Rawls.

52. Robin L. West, *Nature of the Right to an Abortion: A Commentary on Professor Brownstein's Analysis of Casey*, 45 HASTINGS L.J. 961, 964–65 (1994).

world that visits unequal but unparalleled harms upon women with wanted and celebrated children, and even more serious harms upon women with unwanted pregnancies," it follows that the state must allow abortion to fill the lacuna created by its own failures.[53] The abortion right is thus defensive and second-best in nature; it is contingent upon a social order in which motherhood does not unduly burden participatory citizenship.[54] West's analysis of the gun rights doctrine spearheaded by *Heller* follows similar logic: because the state has abdicated its responsibility to protect citizens from private violence,[55] the state privatizes this policing function and grants what amounts to a right to armed, violent self-help.[56]

Proceeding from these definitions, West groups the rights to abortion and armed self-defense in a category that she calls, alternatively, "exit rights"[57] and "lethal rights."[58] Exit rights is West's term for individual liberties that allow citizens to opt out of some central public or civic project. Abortion is therefore a person's right to exit family obligations they cannot afford, offered in lieu of rights to health care, assistance with parenting obligations, or a livable family wage (West calls such positive rights "rights to enter").[59] The individual right to bear arms is a right to exit the exchange inherent to the liberal social contract, in which the citizen agrees to lay down his arms and entrust the state with his protection from private violence.[60] Lethal rights, on the other hand, are "defensive rights to kill."[61] According to West, killing an individual in self-defense is to the right to bear arms, as killing a fetus is to the abortion right.[62] In West's account, like those of Johnson and Wilkinson, "the rights created by the Court in *Heller* and *Roe* have more than a slight family resemblance."[63] Insofar as a just world requires both full participatory citizenship for mothers and state protection from private violence, West implies that progress toward a more just society would require both rights to be scaled back in lockstep.

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53. *Id*. at 965.

54. *Id*. at 966.

55. While critiques of the police as ineffective or inequitable guardians of public safety are beyond the scope of this Note, West is specifically referring here to the Court's declaration in *DeShaney v. Winnebago County Department of Social Services* that the state has no duty to provide a police force or otherwise guarantee "certain minimal levels of safety and security." *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989).

56. Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893, 899–900 (2014) [hereinafter West, *A Tale of Two Rights*].

57. *Id*. at 903.

58. Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1424 (2009) [hereinafter West, *From Choice to Reproductive Justice*].

59. West, *A Tale of Two Rights, supra* note 56, at 895, 903.

60. *Id*. at 898. Interestingly, West, who is generally supportive of gun control laws, echoes the woman-protective arguments raised by proponents of the right to bear arms, see discussion *infra* Part IV, when she invokes victims of domestic abuse, "who must be protected against intimate violence . . . if they are to enjoy equal and full citizenship," as a paradigmatic citizen whom the state fails to guarantee protection. *Id*. at 897, 909.

61. West, *From Choice to Reproductive Justice*, *supra* note 58, at 1424.

62. *Id*.

63. *Id*.

II. TOWARD A NEW THEORY

At the conclusion of *Principles and Passions*, Johnson asks his reader,

> Consider two problems: an unwanted fetus kicking in the womb and a criminal kicking through the back door. What set of principles makes the abortion response to the first problem a vital, fundamental right, but transforms armed response to the second into "grim madness?"[64]

This Part offers one possible answer derived from substantive due process. First, this Part situates both the abortion right and the right to bear arms in their constitutional footholds. Next, it articulates a new theory of the two rights under the framework of the due process clause as a mandate for anti-subordination. Finally, it maps the debate regarding whether abortion restrictions and gun control laws lead to social marginalization.

A. CONSTITUTIONAL BASIS OF EACH RIGHT

Roe v. Wade[65] established, and *Planned Parenthood v. Casey* subsequently reaffirmed, the right to obtain an abortion before fetal viability.[66] The Court located the right in the Fourteenth Amendment's Due Process Clause, building on a series of cases under the Clause protecting a right to privacy in personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.[67] This body of cases is known as substantive due process—that is, a doctrine that identifies in the Due Process Clause a substantive dimension of liberty distinct from procedural due process.[68] Substantive due process is also the constitutional home to post-*Casey* decisions legalizing same-sex sexual relationships and marriage.[69] When determining whether a right is protected by the Due Process Clause, the Court asks whether the right is "implicit in the concept of ordered liberty" and "deeply rooted in this Nation's history and tradition."[70]

The individual right to bear arms for the purpose of self-defense is a constitutional right of relatively recent vintage. Before *Heller*, the Second Amendment was interpreted to protect only the ownership of firearms "with some reasonable

64. Johnson, *Principles and Passions*, *supra* note 19, at 191.

65. Roe v. Wade, 410 U.S. 113, 164–65 (1973).

66. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

67. *Id.* at 851. Equal Protection Clause arguments for the abortion right were presented to the Court in its abortion cases, but the Court did not formally embrace them. *See* Jill Lepore, *To Have and to Hold*, NEW YORKER (May 25, 2015), https://www.newyorker.com/magazine/2015/05/25/to-have-and-to-hold ("Feminist legal scholars began trying to put the equality back into reproductive-rights cases, not least as a matter of historical analysis, pointing out that, in *Griswold* and *Roe*, amicus briefs submitted on behalf of the plaintiffs by organizations that included the A.C.L.U. and Planned Parenthood made equality arguments that the Court simply ignored, preferring to base its opinion in these cases on privacy.").

68. For sources on the evolution of the term's use, see NeJaime & Siegel, *supra* note 14, at 107 n. 29.

69. *See* Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015).

70. *E.g.*, Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

relationship to the preservation or efficiency of a well regulated militia."[71] Then in 2008, *Heller* held that an originalist interpretation of the Second Amendment protects an individual right to keep and bear arms unconnected to militia service, for the purpose of self-defense in the home.[72] *Heller* involved a challenge to a District of Columbia gun control statute, so the holding was limited to enforcement against the federal government. Two years later, *McDonald v. City of Chicago* presented the Court with an opportunity to incorporate its holding in *Heller* against the states through the Fourteenth Amendment's Due Process Clause.[73] The test the Court applied in *McDonald* to find that individual gun ownership is protected by the Due Process Clause is identical to the test used in the cases associated with the doctrine of substantive due process, such as *Roe*.[74]

Despite the abortion and gun rights' common passage through the Due Process Clause, pro-gun critics of the abortion right—such as Lund, Kopel, and Gura[75]—contend that their constitutional pedigrees are not comparable. These critics believe that *Roe* "manufactured a right from whole cloth," whereas *Heller* merely identified a right expressly protected in the Constitution's text.[76] This supposed disjunction between the two rights' constitutional foundations is perhaps the most salient argument raised by those who—unlike the scholars who have written about the abortion and gun rights' intersection as a discrete matter—would like to see the Court discard its abortion rights doctrine and preserve its cases that protect individual gun ownership.[77]

Despite pro-*Heller* scholars' protestations in support of individual gun rights, there exists a robust body of constitutional scholarship, both originalist and non-originalist, that disputes the *Heller* majority's conclusion that the Second Amendment must protect an individual right to bear arms unconnected to militia service.[78] That is, the position espoused by Lund, Kopel, and Gura that there is an unassailable basis in the Constitution for the individual right to bear arms does

71. United States v. Miller, 307 U.S. 174, 178 (1939) (reasoning that the Second Amendment protects the ownership of weapons that are "part of the ordinary military equipment" or the use of which "could contribute to the common defense").

72. D.C. v. Heller, 554 U.S. 570, 635 (2008) (holding that the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home").

73. McDonald v. City of Chicago, 561 U.S. 742, 758–59 (2010).

74. *Id*. at 767.

75. *See supra* notes 45–50 and accompanying text.

76. Gura, *supra* note 45, at 1136.

77. For a colloquy between Justice Sotomayor and Scott Stewart, Solicitor General of Mississippi, about *Roe* and *Casey*'s basis in the Constitution, see Transcript of Oral Argument at 21–24, Dobbs v. Jackson Women's Health Org., (2021) (No. 19-1392).

78. *See, e.g.*, Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187, 1191 (2015); Johnson, *Principles and Passions*, *supra* note 19, at 197, App'x 1.C; Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 35 (1989); Maynard H. Jackson, Jr., *Handgun Control: Constitutional and Critically Needed*, 8 N.C. CENT. L.J. 189, 190 (1977); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 1000–01 (1975); CARL BAKAL, THE RIGHT TO BEAR ARMS (1st ed. 1966).

not present an insurmountable barrier to an alternative theorization of the rights' constitutional bases. The alleged chasm between enumerated and unenumerated rights—which renowned constitutional philosopher Ronald Dworkin described as "bogus"[79]— also does not present an insurmountable barrier to legitimizing "unenumerated" abortion rights over "enumerated" gun rights. For every right that critics of *Roe* identify as "unenumerated" in the Constitution, there is another constitutional principle that those critics take as sacrosanct despite its lack of explicit delineation in the Constitution.[80] For instance, in his *Poe v. Ullman* dissent, widely regarded as the inception of substantive due process doctrine, Justice Harlan conflated the right to bear arms and other "enumerated" rights with more diffuse notions of liberty and privacy that some now deride as "unenumerated."[81]

In sum, the common arguments leveraged to relegate *Roe* but not *McDonald* outside of the Constitution's bounds do not preclude an alternative analysis that evaluates the two rights evenhandedly under the Due Process Clause alone. This Part now turns to a new constitutional theory that treats the abortion and gun rights neither as symmetrical rights that travel in lockstep, nor in the originalist cast of strict textualism.

B. SUBSTANTIVE DUE PROCESS AS A DOCTRINE OF ANTI-SUBORDINATION

In John Hart Ely's seminal book *Democracy and Distrust*, he articulates a now-canonical theory of judicial review that legitimates constitutional scrutiny only insofar as it reinforces democracy.[82] Ely's definition of what impermissibly impedes democracy is precise: restrictions on certain social groups' access to formal civic institutions such as voting rights and speech, as well as *de jure* discrimination of the kind in *Brown v. Board of Education* that the Court struck down under the Equal Protection Clause.[83] Ely derides the Supreme Court's substantive due process cases, most notably *Roe*, as illegitimate and anti-democratic

79. Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 389 (1992) ("It is sometimes said that the Constitution does not 'mention' a right of travel, or of association, or of privacy, as if that fact explained why these rights are usefully classified as unenumerated. But the Constitution does not 'mention' flag burning or gender discrimination either. The right to burn a flag and the right against gender-discrimination are supported by the best interpretation of a more general or abstract right that is 'mentioned.'").

80. Gura himself concedes this point. *See* Gura, *supra* note 45, at 1150 n.107 ("Just as *Roe*'s conservative opponents should recognize their argument is not with judicial review, so should they make peace with the concept of unenumerated rights even as they resist the notion that abortion is among those rights."); *see also* Transcript of Oral Argument at 22, Dobbs v. Jackson Women's Health Org., (2021) (No. 19-1392) (Justice Sotomayor stated, "Counsel, there's so much that's not in the Constitution, including the fact that we have the last word.").

81. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) ("[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on.").

82. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75–104 (HARVARD UNIV. PRESS 1980) [hereinafter ELY, DEMOCRACY AND DISTRUST].

83. NeJaime & Siegel, *supra* note 14, at 1906–07.

overreaching by an activist Court.[84] Ely famously referred to the concept of substantive due process as "a contradiction in terms—sort of like 'green pastel redness.'"[85] Ely's theory thus entails a strict clause-based dichotomy between due process and equal protection, suggesting that the content of each line of jurisprudence is distinct in its relationship to the project of reinforcing democratic participation.[86]

In their recent article, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy*, Douglas NeJaime and Reva Siegel challenge Ely's vision of the Fourteenth Amendment and its role in securing participation in the civic sphere as unduly narrow.[87] Ely's account of judicial review as democracy-reinforcing, and substantive due process as democracy-impeding, relies on the presumption that democracy is electoral and representational—that is, the Court's role in ensuring democracy is limited to rectifying blockages in certain social groups' access to the levers of political procedure.[88] This view of democracy as purely majoritarian elides the reality that "social marginalization and stigmatization are democratic problems"—problems that impede both formal civic participation and "the more diffuse social and cultural processes that inform, frame, and shape politics."[89] Under this definition of democracy, judicial review can be democracy-reinforcing when it intervenes in the political process in a counter-majoritarian manner—perhaps even more so, as it rectifies the majority's subordination of a stigmatized group.

The cases decided under substantive due process doctrine illustrate the Due Process Clause's role in redressing social marginalization. In each case closely associated with the doctrine, the plaintiffs were part of a group suffering the effects of structural inequality engendered by laws enacted through the democratic process. In *Griswold*, *Roe*, and *Casey*, women challenged laws that blocked access to the tools of reproductive choice and the social and economic participation it enables, and in *Bowers v. Hardwick*,[90] *Lawrence v. Texas*,[91] and *Obergefell v. Hodges*, LGB people sought redress for the criminalization or non-recognition of their intimate relationships.[92] The challenged laws "contributed to a wider system of inequality, animating and justifying exclusion across multiple domains,"

84. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 935–36 (1972). Scholars on both the right and left have echoed this criticism of *Roe* as counter-majoritarian and therefore undemocratic. *See, e.g.*, West, *From Choice to Reproductive Justice*, *supra* note 58, at 1431; Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), https://bostonreview.net/lawjustice/samuel-moyn-resisting-juristocracy (pointing to substantive due process, and specifically *Roe* and *Obergefell*, in arguing against liberals' use of "black-robed power to enact their preferences").

85. ELY, DEMOCRACY AND DISTRUST, *supra* note 82, at 18.

86. NeJaime & Siegel, *supra* note 14, at 1916 & n.57.

87. *Id.* at 1946.

88. *Id.* at 1907–08.

89. *Id.* at 1946 (citing Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 746–47 (2004)).

90. Bowers v. Hardwick, 478 U.S. 186 (1986).

91. Lawrence v. Texas, 539 U.S. 558 (2003).

92. *Id.* at 563.

thus necessitating a judicial corrective to the majoritarian process to enable true democratic participation for the plaintiffs' groups.[93] Substantive due process has from its very inception functioned as a doctrine of anti-subordination.

NeJaime and Siegel acknowledge that their theory might appear to reiterate the many existing arguments that the substantive due process cases are, should be, or could have been[94] understood as equal protection cases.[95] To the extent that Ely accepted the legitimacy of judicial review under the Equal Protection Clause, this would not be much of a critique of Ely's work. It would also be highly consequential to the scope of the applicability of their theory: the Court has interpreted the Equal Protection Clause to prohibit only intentional discrimination and not laws with a disparate impact on a protected class,[96] and the mechanics of structural inequality about which NeJaime and Siegel are concerned would fall largely in the latter category. NeJaime and Siegel affirm that they join a tradition of understanding the Due Process Clause and the Equal Protection Clause as "profoundly interlocked in a legal double-helix,"[97] a theory implicitly invoked in *Casey*[98] and *Lawrence*,[99] and expressly embraced in *Obergefell*.[100] However, they emphasize that the cases are no less about the Constitution's guarantee of liberty than its promise of equality.[101]

The Due Process Clause has its own formidable lineage that includes cases that do not pertain to the sexual dimensions of liberty—and curiously, critics of substantive due process seem ready to appreciate the clause's role in securing substantive liberty in those less controversial cases.[102] For instance, Wilkinson himself, in the course of inveighing against the Court for finding substantive liberties in ambiguous constitutional provisions, makes an unexplained caveat for "salutary substantive decisions" such as *Loving v. Virginia*—the case holding that bans on interracial marriage violate the fundamental right to marry—and some of the early due process cases recognizing a privacy right to direct the upbringing of one's children.[103] NeJaime and Siegel observe that it is common to

93. NeJaime & Siegel, *supra* note 14, at 1922–23.

94. *See, e.g.*, Wilkinson, *supra* note 37, at 294; Melissa Murray, *Overlooking Equality on the Road to* Griswold, 124 YALE L.J. F. 324, 325–27 (2015) (recounting the claim of Yale Law School student Louise Trubek in *Trubek v. Ullman* that access to contraception would allow her to coordinate her professional career and her marital life).

95. NeJaime & Siegel, *supra* note 14, at 1920.

96. *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

97. Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004).

98. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 835 (1992).

99. Lawrence v. Texas, 539 U.S. 558, 575 (2003).

100. Obergefell v. Hodges, 576 U.S. 644, 672 (2015).

101. NeJaime & Siegel, *supra* note 14, at 1940.

102. *Id.* at 1921.

103. Wilkinson, *supra* note 37, at 258–59 ("The difference between substantive and procedural due process is an important one in Fourteenth Amendment law. To be sure, the point should not be pushed to extremes, as salutary substantive decisions like *Loving v. Virginia*, *Pierce v. Society of Sisters*, and *Meyer v. Nebraska* make clear.").

see outsized angst directed at the substantive due process cases involving stigmatized sexual identities, but not at incorporation cases such as *McDonald*.[104] They speculate that criticism of the legitimacy of the clause as a doctrine of anti-subordination might be tainted by the very stigma against which the plaintiffs sought to vindicate their constitutional rights.[105]

Two principles emerge from NeJaime and Siegel's critique: First, that substantive due process doctrine is immanently a constitutional cornerstone of anti-subordination and the dismantling of structural inequality. Second, that the supposed disjunction between the stigmatized substantive due process cases, such as *Roe* and *Casey*, and the broadly uncontroversial uses of the Due Process Clause is largely a product of scholarly invention.

C. MAPPING THE DISCOURSE ON SOCIAL MARGINALIZATION

NeJaime and Siegel's account of substantive due process as a constitutional basis for undoing the legal infrastructure of state-sanctioned inequality provides a renewed premise for theorizing the rights to abortion and armed self-defense. It allows the matters of social inequity and stigma that are presently relegated to footnotes in decisions about the rights' scope to become integral to their constitutionality.[106] The question becomes, then, whether abortion restrictions and gun control laws lead to social marginalization.

This is highly contested terrain; those on either side of each debate claim their preferred outcome contributes to racial and gender empowerment. Pro-choice activists justly argue that allowing women to control their reproduction allows them to take control of their lives.[107] On the other hand, the anti-abortion contingent also claims the mantle of women's empowerment. It promotes a message of "Love Them Both"—that is, both the fetus and the pregnant woman.[108] The movement concocted a variety of claims, designed to counter and appropriate the pro-choice camp's feminist ethos and reproductive freedom language.[109] These

104. NeJaime & Siegel, *supra* note 14, at 1963 ("We observe that not every substantive due process case seems to bear the jurisprudential stigma that *Casey* and *Obergefell* do. Substantive due process is the ground on which the Bill of Rights has been incorporated against the states and has been applied to a number of problems outside and inside the family—ranging from fines and fees to punitive damages to parental rights. It is the cases that involve stigmatized sex that critics invoke when they equate substantive due process with judicial overreach. Critics struggle to imagine sexual autonomy claims as the kind of claims for which the Constitution was made and are quick to castigate judges as responding out of political 'preference' rather than principle.").

105. *Id*. at 1921–22, 1940.

106. This theory draws on the Black feminist tradition of theorizing from margin to center—that is, reasoning from the location of the socially disempowered to integrate their existence into the fabric of social justice. *See, e.g*., BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (S. End Press, 1st ed. 1984); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

107. *See* Melissa Murray, Katherine Shaw & Reva B. Siegel, *Introduction*, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 1st ed. 2019).

108. Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1717 (2008).

109. *Id*. at 1714–15.

claims advanced the notion that curtailing access to abortion empowers women.[110] An amicus brief invoking one such invention—"post-abortion syndrome," a term used by anti-abortion activists to describe the trauma some women experience after an abortion—even made its way into the Court's reasoning in the late-term abortion case *Gonzales v. Carhart*.[111]

Both abortion rights and the right to bear arms are deeply implicated in racial justice discourse as well. A formidable reproductive justice movement has emerged, largely under the leadership of Black women, to "highlight[] the intersecting relations of race, class, sexuality, and sex that shape the regulation of reproduction" by the state.[112] While the theory rejects a singular focus on abortion as the key to reproductive freedom, it is decidedly in favor of abortion access as a facet of bodily autonomy and a vital component of women's—particularly low-income women of color's—economic and life planning.[113] Additionally, proponents of an unfettered right to bear arms for self-defense co-opt the language of racial justice.[114] For instance, Justice Thomas and other supporters of the right to bear arms point to the reality that at various points in history, gun control was a tool of the white ruling class used to suppress Black resistance and deprive Black people of equal citizenship rights.[115] They extrapolate from this that a robust individual right to bear arms is essential to Black people's ability to resist white violence.[116] Others counter that doubling down on the right to bear arms—a right

110. *Id.* (Siegel refers to this strategy as "woman-protective antiabortion argument (WPAA), a political discourse that taps longstanding traditions of gender paternalism and is designed to persuade voters who ambivalently support abortion rights that they can help women by using law to restrict women's access to abortion.").

111. Gonzales v. Carhart, 550 U.S. 124, 159, 183 n.7 (2007) (citing Brief for Sandra Cano et al. as Amici Curiae in Support of Petitioner at 22–24, *Carhart*, 127 S. Ct. 1610 (No. 05-380)).

112. MURRAY, SHAW & SIEGEL, *supra* note 107. *See also* Dani McClain, *The Murder of Black Youth Is a Reproductive Justice Issue*, NATION (Aug. 13, 2014), https://www.thenation.com/article/archive/murder-black-youth-reproductive-justice-issue/.

113. *See* MURRAY, SHAW & SIEGEL, *supra* note 107 (explaining that reproductive justice is concerned with a broad range of issues that impact reproductive freedom, including sterilization, assisted reproductive technology, access to childcare, pregnancy discrimination, community safety, food and housing insecurity, the criminalization of pregnancy, and access to reproductive health care).

114. Melissa Murray has written about a similar emerging trend among anti-abortion advocates to co-opt the language of the reproductive justice movement in promoting restrictions on abortion access. *See* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2057–58 (2021). Along with Justice Thomas, their ally on the Court, these advocates argue that permissive abortion laws perpetuate racism, sexism, and ableism—both to the extent that they enable selective abortions of fetuses of a certain race, gender, or disability status, and to the extent that abortion laws are designed to perpetuate white supremacy by limiting Black reproduction. Murray offers a compelling repudiation of these claims as historically incomplete and misleading. *Id.* at 2053–62.

115. *See, e.g.*, Brief for National African American Guns Association, Inc. as Amicus Curiae Supporting Petitioners at 3–11, 27–30, N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (argued Nov. 3, 2021); Brief for Black Guns Matter, et al. as Amici Curiae Supporting Petitioners at 5–8, *Bruen*, (No. 20-843); *see also* Johnson, *Principles and Passions*, *supra* note 19, at 132–34.

116. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 808–09, 856–58 (2010) (Thomas, J., concurring in part and concurring in the judgment) (citing the Colfax Massacre of 1873, and the Hamburg Massacre of 1876—white supremacist mass murders of Black people—as support for his

derived from the mold of white, male supremacy—and allowing more and more people to bear guns is a recipe for more Black death.[117]

While the theory proposed in this Note seeks to move real-world, social considerations out of the periphery of constitutional analysis of these issues, arguments about social inequality do exist in the constitutional arenas of abortion and armed self-defense. In fact, the above-mentioned arguments about the racial and gender implications of abortion and gun control laws have crept into Court decisions by way of amicus briefs with some regularity[118]—and not just in Justice Thomas's concurrences and dissents. For example, Justices have sparred across various opinions in gun cases about the ramifications of gun control laws on women's vulnerability to violence.[119] The racialized and gendered dimension of gun control appeared in the majority's *McDonald* opinion, in which the Court explicitly invoked amici's arguments[120] that individual firearm ownership is

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conclusion that "[t]he use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence" and "the Framers of the Privileges or Immunities Clause and the ratifying-era public understood—just as the Framers of the Second Amendment did—that the right to keep and bear arms was essential to the preservation of liberty"); s*ee also* Nicholas Johnson, *A Flawed Case Against Black Self-Defense*, REASON (Dec. 19, 2021), https://reason.com/2021/12/19/a-flawed-case-against-black-self-defense/ ("[T]he history of the freedom movement spills over with black people using arms to fight off deadly threats and embracing arms as a crucial resource in the face of state failure, neglect, and overt hostility.").

117. *See* Brief for NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Petitioners at 25, D.C. v. Heller, 554 U.S. 570 (2008) (No. 07-290) ("African-Americans, especially those who are young, are at a much greater risk of sustaining injuries or dying from gunshot wounds. The number of African-American children and teenagers killed by gunfire since 1979 is more than ten times the number of African-American citizens of all ages lynched throughout American history."); *see also* Verna L. Williams, *Guns, Sex, and Race: The Second Amendment through a Feminist Lens*, 83 TENN. L. REV. 983 (2016).

118. For a general discussion of the relevance of amicus briefs, see Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 752 (2000) and Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1777 (2014) ("Supreme Court Justices, like the rest of us, seem to be craving more factual information, and the amicus briefs are stepping in to fill the void.").

119. *See* Caetano v. Massachusetts, 577 U.S. 411, 413 (2016) (Alito, J., concurring) ("Caetano's abuser towered over her by nearly a foot and outweighed her by close to 100 pounds. But she didn't need physical strength to protect herself. She stood her ground, displayed the stun gun, and announced: 'I'm not gonna take this anymore. . . . I don't wanna have to [use the stun gun on] you, but if you don't leave me alone, I'm gonna have to.' The gambit worked. The ex-boyfriend got scared and he left [her] alone."); *McDonald*, 561 U.S. at 924 (Breyer, J., dissenting) (recognizing that the proliferation of guns might put women at greater risk of violence). In his *McDonald* dissent, Justice Breyer also hints at a version of the theory proposed in this Note, implying that the point of the Fourteenth Amendment was primarily to eradicate discrimination rather than to incorporate federal rights against the states. *See* Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 25–26 (2011).

120. Amici addressed the relationship between guns and violence against women in *Heller, McDonald*, and the currently pending *Bruen* case. *See, e.g.*, Brief for DC Project Foundation et al. as Amicus Curiae Supporting Petitioners at 9–11, N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843, 2021 WL 3128130, at *29–30 (relying on statistics about violence against women, including sexual assault and domestic violence, to underscore the urgency of striking down New York's restrictions on individual gun ownership); Brief for Independent Women's Law Center as Amicus Curiae Supporting Petitioners at 19–23, *Bruen,* 2021 WL 3821360, at *19–20 (relying on the same); Brief for National Network to End Domestic Violence et al. as Amicus Curiae Supporting Petitioners at 18, D.C. v. Heller,

"especially important for women and members of other groups that may be especially vulnerable to violent crime."[121] On abortion rights, Justice Ginsberg's opinions were replete with factual contentions about the detrimental impacts of abortion restrictions on women's lives and equal participation in society,[122] and *Casey* notably struck down a spousal consent law based on detailed empirical evidence of the risk it posed to victims of domestic violence.[123] Thus, while rhetoric about social stratification is not dispositive of existing constitutional questions in these cases, it is part of the legal fabric of the rights to individual gun ownership and abortion. This Note aims to move these ideas to the center of the conversation and take them seriously as a material part of the analysis of a right's constitutionality.

While a thorough exploration of the racialized and gendered arguments presented in this Part is beyond the scope of this Note, the arguments presented demonstrate the vast terrain upon which abortion and gun rights' implications for social subordination might be litigated. By way of example, the following Part explores abortion restrictions and permissive gun laws that are rhetorically associated with the protection and empowerment of women. The arguments pertinently overlap in their purported concern for women's safety in the face of pervasive gender-based violence, especially domestic abuse. The purpose of the Parts below is to challenge the myth that the laws in question are protective of women's safety or well-being, and to establish that the opposite is true—these laws result in women's criminalization and their heightened vulnerability to gender-based violence. These conclusions substantiate a constitutional analysis that the Due Process Clause, as a guarantee of an expansive form of democratic participation and a doctrine of anti-subordination, requires both unfettered access to abortion and restricted access to guns.

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554 U.S. 570, 595 (2008) (No. 07-290), 2008 WL 157199, at *28–29 (arguing that access to handguns exacerbates the problem of domestic violence and multiplies the chances that the abuse will become lethal, therefore important government interests underlie states' attempts to regulate gun ownership and preclude constitutional invalidation); Brief for 126 Women State Legislators and Academics as Amicus Curiae Supporting Respondent at 3, *Heller*, 2008 WL 383523, at *3 (arguing that D.C.'s handgun prohibition "allows gender-inspired violence free rein" by denying women the ability to equalize their physical inferiority compared to a male attacker); Brief for Women State Legislators and Academics as Amicus Curiae Supporting Petitioners at 3–4, 17, *McDonald*, 561 U.S. 742 (No. 08-1521) (proposing that the "privacy and personal autonomy jurisprudence protected by substantive due process" gives the Court a constitutional basis upon which to rest a right to handgun possession and that guns' efficacy in protecting women from physically superior men—including "stalkers and abusive boyfriends, spouses, or ex-spouses"—places the right to individual gun ownership on par with *Roe* and *Griswold*).

121. *McDonald*, 561 U.S. at 789–90 ("[P]etitioners and many others who live in high-crime areas dispute the proposition that the Second Amendment right does not protect minorities and those lacking political clout.").

122. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Ginsberg, J., dissenting).

123. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 888–94 (1992).

III. CRIMINALIZING SELF-MANAGED ABORTION SUBORDINATES WOMEN

An increasingly urgent threat to abortion access is the criminalization of pregnant people who self-manage their abortions, often using misoprostol and mifepristone—medications that are available on the internet.[124] Medication abortion is a safe and effective method of ending a pregnancy; administering the medication at home is virtually as safe as receiving the medication in a clinic under the supervision of a medical provider,[125] and significantly less expensive.[126] Nonetheless, individual prosecutors across the U.S. have criminalized women who self-manage their abortions, in some instances charging them with murder.[127] At least twenty-one women to date have been arrested for ending or attempting to end their own pregnancies,[128] but the number will almost certainly climb as states pass a record number of abortion restrictions[129]—and since the Supreme Court is, in all likelihood, going to hollow the protections of *Roe* and *Casey*.[130] As clinic capacity dwindles under onerous regulations, and waiting periods drive up the cost of clinic-supervised abortion,[131] the frequency of self-managed abortion will rise.[132] Further, the erosion of constitutional protections for abortion may embolden prosecutors to bring charges against people who end

124. *See generally* Irin Carmon, *Abortion After the Clinic*, CUT (Nov. 11, 2019), https://www.thecut.com/2019/11/future-abortion-access-america.html; Chloe Murtagh et al., *Exploring the Feasibility of Obtaining Mifepristone and Misoprostol from the Internet*, 97 CONTRACEPTION 287 (2018), https://www.sciencedirect.com/science/article/pii/S0010782417304754.

125. *See* Abigail Burman, *Abortion Sanctuary Cities: A Local Response to the Criminalization of Self-Managed Abortion*, 108 CALIF. L. REV. 2007, 2014–17 (2020); *see also* Thoai D. Ngo et al., *Comparative Effectiveness, Safety and Acceptability of Medical Abortion at Home and in a Clinic: A Systematic Review*, 89.5 BULL. WORLD HEALTH ORG. 360 (2011).

126. Murtagh et al., *supra* note 124.

127. *See* Burman, *supra* note 125, at 2022.

128. Julia Belluz, *Abortions by Mail: The FDA is Going After Online Pill Providers*, VOX (Mar. 12, 2019), https://www.vox.com/2019/3/12/18260699/misoprostol-mifepristone-medical-abortion; *see also* Emily Bazelon, *Purvi Patel Could Be Just the Beginning*, N.Y. TIMES (Apr. 1, 2015), https://www.nytimes.com/2015/04/01/magazine/purvi-patel-could-be-just-the-beginning.html.

129. Elizabeth Nash & Sophia Naide, *State Policy Trends at Midyear 2021: Already the Worst Legislative Year Ever for U.S. Abortion Rights*, GUTTMACHER INST. (July 21, 2021), https://www.guttmacher.org/article/2021/07/state-policy-trends-midyear-2021-already-worst-legislative-year-ever-us-abortion.

130. *See* sources cited *supra* note 10.

131. *See, e.g.*, Theodore J. Joyce et al., *The Impact of State Mandatory Counseling and Waiting Period Laws on Abortion: A Literature Review*, GUTTMACHER INST. (Apr. 2009), https://www.guttmacher.org/report/impact-state-mandatory-counseling-and-waiting-period-laws-abortion-literature-review.

132. *See, e.g.*, Abigail R.A. Aiken et al., *Motivations and Experiences of People Seeking Medication Abortion Online in the United States*, 50 PERSP. ON SEXUAL & REPROD. HEALTH 157, 161 (2018); Daniel Grossman et al., *Self-Induction of Abortion Among Women in the United States*, 18 REPROD. HEALTH MATTERS 136, 143–44 (2010); Abigail R.A. Aiken et al., *Demand for Self-Managed Medication Abortion Through an Online Telemedicine Service in the United States*, 110 AM. J. PUB. HEALTH 90, 92 (2020).

their own pregnancies,[133] and increase the likelihood that these charges will survive dismissal and appeal.[134]

While the statutory bases for the criminalization of self-managed abortion are varied, this Part focuses on one type of law under which these charges are brought: fetal homicide statutes, otherwise known as feticide laws. These laws impose criminal penalties on those who injure a fetus or terminate a person's pregnancy. Thirty-eight states have some version of a fetal homicide law, twenty-nine of which apply at any stage of a pregnancy, starting with fertilization.[135] Most feticide statutes include an explicit provision prohibiting the application of the law with regard to otherwise legal abortions,[136] but several are silent on this matter; in any case, explicit caveats for legal abortions do not stop zealous prosecutors from pursuing charges against women who self-manage abortions.[137] Thus, while feticide laws are not facially abortion restrictions, they function as such in the hands of some prosecutors.[138]

The legislative history of the passage of many fetal homicide laws reveals an apparent concern with punishing perpetrators of violence against women.[139] California passed a fetal homicide law after the state supreme court overturned

133. *See* Linda C. Fentiman, *In the Name of Fetal Protection: Why American Prosecutors Pursue Pregnant Drug Users (And Other Countries Don't)*, 18 COLUM. J. GENDER & L. 647, 668 (2009) ("[T]he withdrawal of many . . . courts from any meaningful review of such prosecutions serves as a virtual green light for these prosecutions to continue.").

134. Farah Diaz-Tello et al., *Roe's Unfinished Promise: Decriminalizing Abortion Once and For All*, SIA LEGAL TEAM (2018), https://www.semanticscholar.org/paper/Roe's-Unfinished-Promise%3A Decriminalizing-Abortion-Diaz-Tello-Mikesell/582c986f6be3d048621523c9f331e8ec81d60330 (documenting the appellate cases that have overturned convictions for self-managed abortions); *see also* Brief for If/When/How: Lawyering for Reproductive Justice et al. as Amici Curiae Supporting Petitioners at 26–28, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460) (listing various charges against women who self-managed abortions that were either dismissed or overturned on appeal after the woman served jail time).

135. *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, NAT'L CONF. OF STATE LEGIS. (May 1, 2018), http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx.

136. ACLU, *What's Wrong With Fetal Rights*, https://www.aclu.org/other/whats-wrong-fetal-rights [https://web.archive.org/web/20220505133625/https://www.aclu.org/other/whats-wrong-fetal-rights] (last visited April 4, 2022) ("An exemption specifying 'legal abortions' is not adequate, because a narrow interpretation of what constitutes a 'legal' abortion could restrict the performance of abortions to physicians only, and put mid-level health care practitioners, or women who self-abort, in jeopardy of being prosecuted for murder.").

137. Diaz-Tello et al., *supra* note 134, at 13–16. Kenlissia Jones was arrested for inducing a miscarriage using misoprostol despite the fact that Georgia's feticide statute explicitly does not apply to "[a]ny person for conduct relating to an abortion for which the consent of the pregnant woman . . . has been obtained" or "[a]ny woman with respect to her unborn child." Burman, *supra* note 125, at 2024 (internal citations omitted).

138. *See generally* Alison Tsao, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights*, 25 HASTINGS CONST. L.Q. 457 (1998).

139. S*ee* Diaz-Tello, *supra* note 134, at 14 ("[Fetal homicide] laws have garnered widespread support, because they are usually passed in the name of protecting pregnant people and often arise in the wake of high-profile acts of violence against a pregnant person.").

the conviction[140] of a man charged with murder for beating his estranged wife and terminating her pregnancy in the process.[141] Wisconsin and Kentucky attached fetal homicide laws to domestic violence bills.[142] Kentucky's version was ultimately pushed through the legislature in the wake of a pregnant eighteen-year-old's murder by her ex-boyfriend; the bill's co-sponsor dedicated his vote for the bill to the murdered woman's parents, whom he called "a driving force in this state to bring this issue to the forefront."[143] State courts also perpetuate the connection of fetal homicide laws to domestic violence: a South Carolina appellate court recognized a cause of action for fetal homicide in a case in which a man stabbed his wife, who was nine months pregnant, in the neck, arms, and abdomen, causing the fetus to die in the womb.[144]

New York repealed its fetal homicide law in 2019; public reaction to the repeal revealed the rhetorical conflation of the laws with gender-based violence prevention.[145] A chorus of commentators derided the move as not only a failure to hold perpetrators of gender-based violence against pregnant women accountable,[146] but in fact as an explicit encouragement of such violence.[147] A spokesman for the

140. Keeler v. Superior Court, 2 Cal. 3d 619 (1970).

141. Alex Wigglesworth, *Her Baby Was Stillborn Because of Meth, Police Say. Now She's Charged with Murder*, L.A. TIMES (Nov. 8. 2019), https://www.latimes.com/california/story/2019-11-08/woman-charged-with-murder-after-delivering-stillborn-baby. Law professor Michele Goodwin stated that the California law was intended to protect domestic violence victims, and "there were feminist organizations and others that were assured by legislators that these laws would never be applied to pregnant women." *Id*.

142. Tsao, *supra* note 138, at 469 & n.108, 114; Richard Wilson, *Domestic-Violence Bill Approved in Senate with No Amendments*, COURIER-J. at A8 (Mar. 23, 1996) (noting the fetal homicide law amendment was not included in the final, adopted act; H.B. 108, 2004 Gen. Assemb., Reg. Sess. (Ky. 2004), https://apps.legislature.ky.gov/law/acts/04RS/documents/0001.pdf).

143. Chas J. Hartman, *Fetal Homicide Bill Clears House Hurdle*, NEWS-GRAPHIC (Feb. 1, 2004), https://www.news-graphic.com/fetal-homicide-bill-clears-house-hurdle/article_136d3d02-b5cd-5d20-8a3a-f34d9b5849bb.html.

144. State v. Horne, 282 S.C. 444 (1984).

145. The law decriminalizes abortion and places it in public health codes with other medical procedures, thus stripping prosecutors of authority to charge people with feticide. Bethany Bump, *Cuomo Signs Reproductive Health Act After Legislature Votes*, TIMES UNION (Jan. 22, 2019), https://www.timesunion.com/news/article/New-York-lawmakers-to-vote-on-abortion-rights-13551825.php.

146. Republican State Senator Catharine Young, who derided the repeal as a deprivation of justice for pregnant domestic violence victims, responded by introducing a bill—called the "'Liv Act' to protect pregnant victims of domestic violence"—that would restore felony charges for any violence against a pregnant woman. *See* Press Release, Catharine Young, *#LetJusticeLivOn: Pregnant DV Victim Who Lost Baby in Brutal NYC Attack Stands with Senate GOP & Unveils Legislation to Protect Pregnant DV Victims* (Jan. 22, 2019), https://www.nysenate.gov/newsroom/press-releases/catharine-young/letjusticelivon-pregnant-dv-victim-who-lost-baby-brutal-nyc.

147. Ashley Southall, *Prosecutor Drops Abortion Charge in Queens Murder Case, Stirring Debate*, N.Y. TIMES (Feb. 10, 2019), https://www.nytimes.com/2019/02/10/nyregion/abortion-murder-queens.html; Charles Camosy, *Did N.Y. Just Put Pregnant Women at Greater Risk? The Reproductive Health Act is a Dangerous Step Back*, DAILY NEWS (Jan. 28, 2019), https://www.nydailynews.com/opinion/ny-oped-ny-just-put-pregnant-women-at-greater-risk-20190128-story.html ("Tragically, New York women are less safe from violence now than they were before the passage of the Reproductive Health Act."); Feminists Choosing Life of New York, *Landmark Lawsuit Challenges New York's Reproductive Health Act*, PR NEWS WIRE (Jan. 15, 2021), https://www.prnewswire.com/news-releases/landmark-lawsuit-challenges-new-yorks-reproductive-health-act-301209373.html ("The RHA allows intimate partner and

New York State Catholic Conference, an anti-abortion organization, wrote that the repeal declared "open season on pregnant women in New York."[148] On January 12, 2021, victims of domestic and intimate partner violence, in partnership with an anti-abortion organization called Feminists Choosing Life of New York, filed a class action lawsuit against the state of New York that alleges the repeal unconstitutionally escalates the risk of violence against women.[149] A representative of Feminists Choosing Life of New York called the lawsuit "feminism in action."[150]

It is no accident that anti-abortion organizations are strong proponents of fetal homicide laws—nor that they are often the most steadfast in arguing that these laws protect women from violence.[151] The laws can give prosecutors the power to charge women who self-manage abortions, and they support the legal movement to establish fetal personhood under the Constitution.[152] In response, abortion advocates have urged lawmakers to explicate that fetal homicide laws protect only the pregnant person's interest in the potential life of their fetus, and does not impart independent legal status to a fetus.[153] Eight states have sentencing-enhancement statutes that regard harm to a fetus as a harm committed against the pregnant woman, not the fetus as a separate entity;[154] at least one state court has adopted such a reading of a fetal homicide law.[155] A recent high-profile case in

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domestic violence to run rampant in NY, by legalizing feticide. . . . The literature is replete with the understanding that criminal laws deter harmful conduct. . . . Domestic violence has increased against NY women since the passage of the RHA.").

148. Southall, *supra* note 147.

149. Feminists Choosing Life of New York, *supra* note 147.

150. *Id.*

151. ACLU, *supra* note 136 (noting the campaign by Americans United for Life to lobby legislatures across the nation to pass feticide laws).

152. *See* Editorial Board, *The Feticide Playbook, Explained*, N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-murder-charge.html ("Anti-abortion activists have patiently been working to pass fetal protection laws not only in hopes of establishing that a fetus is a person entitled to full rights, but also to create a vehicle for overturning *Roe v. Wade*.").

153. ACLU, *supra* note 136 ("Bills that cast the woman alone as the injured party are less likely to be read by the courts as vesting the fetus with rights independent of the woman or giving a born child rights to sue its mother."). Some have noted that such framing would actually enhance legal protection for women's reproductive freedom. *See* People v. Davis, 872 P.2d 591, 603 (Cal. 1994) (Kennard, J., concurring) ("The state has an interest in punishing violent conduct that deprives a pregnant woman of her procreative choice.").

154. Editorial Board, *supra* note 152; *see also* Sandra L. Smith, *Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application*, 41 WM. & MARY L. REV. 1845, 1865–67 (1999).

155. Whitner v. State, 328 S.C. 1, 12 (1997) (citing Commonwealth v. Pellegrini, No. 87970, at 11 (Mass. Super. Ct. Oct. 15, 1990)) (explaining that in Massachusetts law, a fetus has rights "only when the mother's or parents' interest in the potentiality of life, not the state's interest, are sought to be vindicated"). Courts in Florida and Georgia have also held, in the related context of wrongful death lawsuits, that one cannot bring such an action on behalf of an unborn fetus. *See* Young v. St. Vincent's Med. Ctr., Inc., 653 So. 2d 499 (Fla. Dist. Ct. App. 1995); Peters v. Hosp. Auth. of Elbert Cnty., 265 Ga. 487 (1995). Instead, any money damages should instead go to the prospective parent, who should be compensated for the loss of her child and the harm she suffered when her choice to continue a pregnancy to term was frustrated. *Id.*

California, an ostensibly abortion-friendly state, questioned whether the state legislature intended for its fetal homicide statute to apply only in the context of gender-based, third-party violence against pregnant people.[156] The California trial and appellate court all but rejected this reading, and left the door open for California prosecutors to bring fetal homicide charges against pregnant women who self-manage abortions.[157]

Dressing fetal homicide statutes in the language of protecting women from gender-based violence disguises the fact that such laws render women vulnerable to criminalization. Anti-abortion organizations and their allies within and outside of state legislatures co-opt the language of feminism and profit from public concern about violence against women. The social order that they are engineering is in reality one in which women are criminalized for making reproductive healthcare choices that are, at least for the time being, protected by the Constitution.[158] The marginalization and stigma these laws engender is vast—even if a pregnant person targeted under feticide laws is not ultimately incarcerated, the time, cost, and public scrutiny entailed by arrest and investigation can substantially disrupt her life.[159] Incarceration for healthcare decision-making directly infringes on women's full and free participatory citizenship. Much like the demeaning effect that criminalization of contraception and non-recognition of same-sex sex marriage[160] had on their targets prior to the laws' invalidation by the Court, self-managed abortion "remains a criminal offense with all that imports for the dignity of the persons charged."[161] Gender-based violence, in the meantime, rages on.

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156. The case involved a woman, Chelsea Becker, who was charged with feticide for delivering a stillborn fetus after consuming methamphetamine. Azi Paybarah, *Judge Dismisses Murder Charge Against California Mother After Stillbirth*, N.Y. TIMES (May 20, 2021), https://www.nytimes.com/2021/05/20/us/chelsea-becker-stillbirth-murder-charges-california.html. To support her position that the legislative intent behind the feticide statute was limited to protecting pregnant people from third parties—that is, protecting women from gender-based violence—the plaintiff offered the affidavit of the primary author of the fetal homicide bill, in which he stated that the sole purpose of the amendment was solely to "make punishable as murder a third party's willful assault on a pregnant woman resulting in the death of her fetus." Order Denying Writ at 4, Becker v. People, No. 19CM-5304 at 4 (Cal. Ct. App. Oct. 15, 2020) (Pena J., dissenting), https://www.aclunc.org/sites/default/files/2020.10.15_Order_Denying_Writ.pdf.

157. Paybarah, *supra* note 156.

158. Laws criminalizing women's conduct during the course of their pregnancies are inherently healthcare issues, as medical experts and policy advocates alike recognize that such laws deter pregnant people from seeking prenatal care and are ultimately a disservice to women's health. *See* CTR. FOR REPROD. RTS., PUNISHING WOMEN FOR THEIR BEHAVIOR DURING PREGNANCY (Sept. 2000), https://reproductiverights.org/sites/default/files/documents/pub_bp_punishingwomen.pdf.

159. Burman, *supra* note 125, at 2020.

160. Griswold v. Connecticut, 381 US 479, 485–86 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."); Obergefell v. Hodges, 576 U.S. 644, 670 (2015) ("It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.").

161. Lawrence v. Texas, 539 U.S. 558, 560 (2003).

IV. PERMISSIVE GUN LAWS SUBORDINATE WOMEN

At the Conservative Political Action Conference in 2013, NRA Executive Vice President Wayne LaPierre had a message for women in the audience: "The one thing a violent rapist deserves to face is a good woman with a gun."[162] Such arguments positioning gun ownership as instrumental to women's protection from gender-based violence have pervaded gun rights rhetoric since the late 1980s, when the gun industry targeted women as a new consumer market.[163] After Smith and Wesson produced the Lady Smith, a handgun designed for women, in 1989, a new spate of advertisements and news stories portrayed single women arming themselves against sexual predators.[164] In the early 2000s, Marion Hammer, the first woman president of the NRA, relied heavily on the trope of woman versus rapist in her lobbying for Florida's Stand Your Ground law.[165] Hammer testified before the Florida legislature that one "can't expect a victim to wait before taking action to protect herself and say: 'Excuse me, Mr. Criminal, did you drag me into this alley to rape and kill me or do you just want to beat me up and steal my purse?'"[166] Beyond the specter of stranger rape, some legal scholars use domestic violence as a justification for the right to armed self-defense,[167] which sometimes leads to legislation designed to expand gun access specifically

162. Jillian Rayfield, *At CPAC, Wayne LaPierre Tackles Rape*, SALON (March 15, 2013), https://www.salon.com/2013/03/15/at_cpac_wayne_lapierre_tackles_rape/.

163. Tom Smith, *Armed and Dangerous Statistics: Media Coverage of Trends in Gun Ownership by Women*, PUB. PERSP., May/June 1990, at 5, 6, https://ropercenter.cornell.edu/sites/default/files/2018-07/14005.pdf; *see also* Letty Cottin Pogrebin, *Neither Pink Nor Cute: Pistols for the Women of America*, NATION (May 15, 1989).

164. For examples of such media, see Tom W. Smith & Robert J. Smith, *Changes in Firearms Ownership Among Women, 1980-1994,* 86 J. CRIM. L. & CRIMINOLOGY 133, 134 n.3 (1995); Joy Horowitz, *Arms and the Women*, BAZAAR 166 (Feb. 1994) (describing Smith & Wesson spokesperson Paxton Quigley's promotional sessions for the Lady Smith handgun, in which she identified armed self-defense as the "last frontier of feminism").

165. Michael Daly, *Marion Hammer Woman Behind Stand Your Ground*, DAILY BEAST (July 13, 2017), https://www.thedailybeast.com/marion-hammer-woman-behind-stand-your-ground. Stand Your Ground laws expand the boundaries of legal defense, most notably by eliminating the duty to retreat before resorting to lethal violence. Stand Your Ground laws enact automatic legal presumptions about the reasonableness of the use of deadly force and create immunity from arrest and prosecution for force that falls within the law's boundaries. *See* Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege*, 68 U. MIA L. REV. 1099, 1108 (2014); *see also* Jane K. Stoever, *Firearms and Domestic Violence Fatalities: Preventable Deaths*, 53 FAM. L.Q. 183, 191 (2019).

166. Daly, *supra* note 165.

167. *See, e.g.*, Jeannie C. Suk, *The True Woman: Scenes From the Law of Self-Defense*, 31 HARV. J. L. & GENDER 237, 240 (2008) (arguing that Stand Your Ground laws bear "the unmistakable traces of the subordinated woman, now an indelible presence in the self-defense terrain and in public understandings of crime. . . . [T]he modern Castle Doctrine leverages the subordinated woman into a general model of self-defense rooted in the imperative to protect the home and family from attack.); *see also* Sayoko Blodgett-Ford, *Do Battered Women Have a Right to Bear Arms?*, 11 YALE L. & POL'Y REV., 509–10 (1993); Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 390–91 (1993).

for domestic abuse victims.[168] Gun rights activists,[169] legislators, and political pundits[170] continue to use women's vulnerability to gender-based violence as a foundational justification for the individual right to bear arms.[171]

This Part will demonstrate that, contrary to the propaganda of pro-gun pundits, more guns in the street—and in the home—means more deadly violence against women. Simultaneously, the law is less permissive of women defending themselves with guns than it is of men doing so. As such, the Due Process Clause, a mandate to eliminate structural inequality and group-based subordination, requires that gun use be restricted.

A. THE POWDER KEG OF GENDER-BASED VIOLENCE

A wealth of empirical research supports the common-sense notion that access to firearms greatly exacerbates the fatality of gender-based violence.[172] Intimate partner homicides make up between one-third and half of all murders of women in the United States.[173] Between sixty and seventy percent of those murders are accomplished with guns—more than any other weapon combined.[174] An abuser's

168. For example, Indiana legislators passed a law allowing recipients of domestic violence protection orders to obtain a firearm without a license, background check, or training. The Indiana Coalition Against Domestic Violence opposed the bill. H.B. 1071, 120th Gen. Assemb., Reg. Sess. (Ind. 2017); Gregg Montgomery, *Indiana Domestic Violence Survivor Gun Law Goes into Effect*, WISH TV (July 7, 2017) https://www.wishtv.com/news/indiana-domestic-violence-survivor-gun-law-goes-into-effect/.

169. Claire Landsbaum, *NRA Ad Tells Women to Shoot Rapist Abusers*, CUT (July 13, 2016), https://www.thecut.com/2016/07/nra-ad-tells-women-to-shoot-rapists-abusers.html (describing an NRA ad from 2016 sending a message to "every rapist, domestic abuser, violent, criminal thug, and every other monster who preys upon women" that women are arming themselves).

170. Don Gaetz & Matt Gaetz, *Standing Up for "Stand Your Ground"*, SAINT PETERS BLOG (May 2, 2012), http://www.saintpetersblog.com/sen-don-gaetz-repmatt-gaetz-op-ed-standing-up-for-stand-your-ground (arguing that critics of Stand Your Ground laws, which expand lethal self-defense rights, are "anti-woman" and value "the safety of the rapist above a woman's own life"); *see also* Zerlina Maxwell, *Zerlina Maxwell on Hannity: Giving Every Woman a Gun Is Not Rape Prevention*, YOUTUBE (Mar. 6, 2013), https://www.youtube.com/watch?v=9FTVjKohaFE&t=26s&ab_channel=ZerlinaMaxwell (featuring a debate between Fox News commentator Sean Hannity and rape survivor Zerlina Maxwell, in which Hannity argues that women should be free to be armed to defend themselves against rape).

171. *See generally* Franks, *supra* note 165.

172. *See generally* BRADY, BEYOND BULLET WOUNDS: GUNS IN THE HANDS OF DOMESTIC ABUSERS (2021), https://brady-static.s3.amazonaws.com/Guns-Domestic-Violence.pdf; NAT'L COAL. AGAINST DOMESTIC VIOLENCE, GUNS & DOMESTIC VIOLENCE, https://assets.speakcdn.com/assets/2497/guns_and_dv0.pdf (last visited Apr. 10, 2022).

173. F. Stephen Bridges et al., *Domestic Violence Statutes and Rates of Intimate Partner and Family Homicide: A Research Note*, 19 CRIM. JUST. POL'Y REV. 19, 126 (2008) (placing the percentage at 33%); Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NAT'L. INST. OF JUST. J. 1, 18 (2003) [hereinafter Campbell et al., *Assessing Risk Factors*] (placing the percentage between 40–50%); Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014*, 66 MORBIDITY & MORTALITY WEEKLY REP. 741 (2017) (placing the percentage as high as 55.3%).

174. Emily F. Rothman et al., *Batterers' Use of Guns to Threaten Intimate Partners*, 60 J. AM. MED. WOMEN'S ASS'N. 62, 62 (2005); Neil Websdale, *The Domestic Violence Fatality Review Clearinghouse: Introduction to a New National Data System with a Focus on Firearms*, INJ. EPIDEMIOLOGY 6 (2019).

access to a gun is a strong predictor of femicide when the gun is stored in a home the woman shares with her abuser.[175] The impact of firearm access on an abused woman's chances of dying are direct and dramatic: having one or more guns in the home makes a woman six to 7.2 times more likely to be murdered by an intimate partner,[176] and the presence of a gun during a particular incident of domestic violence makes it twelve times more likely that the episode will culminate in the victim's death.[177] Even in the statistically improbable scenario of threatened sexual violence by a stranger,[178] individuals in possession of a gun are 4.46 times more likely to be shot in an assault than those not in possession.[179] Thus, owning a gun is likely to put women in more danger, not less.

Research on the correlation between state-level gun policy and domestic violence fatalities corroborate the premise that gun access makes gender-based violence more deadly. One recent study found that states with the highest firearm ownership had a sixty-five percent higher incidence rate of domestic firearm homicide compared to states with lower ownership rates.[180] A separate analysis of homicide data from sixteen states concluded that more restrictive state-level firearms legislation—including, but not limited to, legislation restricting firearms access for perpetrators of intimate partner violence—correlates with lower rates

175. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multistate Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1090 (2003). For research corroborating this finding on an international scale see MacKinnon, *supra* note 119, at 23 n.96.

176. James E. Bailey et al., *Risk Factors for Violent Death of Women in the Home*, 157 ARCHIVES INTERNAL MED. 777, 780 (1997); Campbell et al., *Assessing Risk Factors*, *supra* note 173, at 16 ("When a gun was in the house, an abused woman was 6 times more likely than other abused women to be killed.")

177. Shannon Frattaroli & Jon S. Vernick, *Separating Batterers and Guns*, 30 EVALUATION REV. 296, 297 (2006); *see also* Chelsea M. Spencer & Sandra M. Stith, *Risk Factors for Male Perpetration and Female Victimization of Intimate Partner Homicide: A Meta-Analysis*, 21 TRAUMA, VIOLENCE & ABUSE 527, 548 (2020) (finding that the presence of a gun makes femicide eleven times more likely).

178. Not only are the vast majority of rapes committed by someone known to the victim, but women are also more than twice as likely to be shot by a male intimate than killed by a stranger using any weapon. Susan Sorenson, *Firearm Use in Intimate Partner Violence: A Brief Overview*, 30 EVALUATION REV. 229, 232 (2006); *Perpetrators of Sexual Violence: Statistics,* RAINN, https://www.rainn.org/statistics/perpetrators-sexual-violence (stating that 80.5 percent of rapes are committed by someone who is not a stranger to the victim).

179. Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 AM. J. PUB. HEALTH 2034, 2037 (2009). Two studies from the Harvard Injury Control Research Center also concluded that firearms are used far more often to frighten and intimidate than they are used in self-defense, and victims of contact crimes who use a gun are no less likely to be injured than victims using other forms of protective action. *See* David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Use: Results of a National Survey*, 15 VIOLENCE & VICTIMS 257 (2000); David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007-2011*, 79 PREVENTIVE MED. 22 (2015).

180. Aaron J. Kivisto et al., *Firearm Ownership and Domestic Versus Nondomestic Homicide in the U.S.*, 57 AM. J. PREVENTIVE MED. 311, 312 (2019); *see also* Matthew Miller et al., *Firearm Availability and Unintentional Firearm Deaths, Suicide, and Homicide Among Women*, 79 J. OF URB. HEALTH 26, 26 (2002) (finding that women in states with greater firearm availability have elevated rates of unintentional gun deaths, suicides and homicides, particularly firearm suicides and firearm homicides).

of female intimate partner homicide.[181] The study's authors found that the incidence of female intimate partner homicide was fifty-six percent lower in states with greater than forty laws regulating firearm possession and access relative to states with zero to thirty-nine laws.[182] Some data suggest a similar relationship between gun policy and gender-based violence at the national level, as women in the U.S. are twenty-one times more likely to be killed with a gun than women in other high-income countries.[183]

Therefore, the archetype of a gun-toting woman who heroically wards off predators by brandishing her weapon is largely a product of the NRA's invention.[184] At best, it is a dangerously unrepresentative account of reality: women are much more likely to end up in front of a gun than behind it. As explicated below, dramatic renderings of the moment of armed combat are also temporally inadequate, as they elide the extensive challenges that women face after the fact in justifying their use of force in the criminal justice system.

B. WHO IS ALLOWED TO STAND THEIR GROUND? FORCE AS A WHITE MALE PREROGATIVE

Brittany Smith shot a man because he had her brother in a chokehold and was threatening to kill them both.[185] That man had strangled her unconscious and brutally raped her earlier that day and he was high on a combination of Xanax, amphetamines, alcohol, and meth.[186] Smith fired one shot, then two more when the man persisted.[187] A rape kit taken after the incident showed thirty-three injuries, including strangulation, bruises, and bite marks.[188] Smith lost her Stand Your Ground hearing, which would have immunized her from further prosecution for murder, because the judge doubted that Smith had reason to believe that the man was about to commit deadly physical force, assault, burglary, rape, or sodomy when she shot him.[189] In fact, the judge doubted that Smith had been raped at all.[190]

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181. Josie J. Sivaraman et al., *Association of State Firearm Legislation with Female Intimate Partner Homicide*, 56 AM. J. PREVENTIVE MED., 125, 128 (2019).

182. *Id.* at 131.

183. Erin Grinshteyn & David Hemenway, *Violent Death Rates in the US Compared to Those of the Other High-Income Countries*, 2015, 123 PREVENTIVE MED. 20 (2019); *see also* David Hemenway et al., *Firearm Availability and Female Homicide Victimization Rates Across 25 Populous High-Income Countries*, 57 J. AM. MED. WOMEN'S ASS'N 100 (2002) ("Across developed nations, where guns are more available, there are more homicides of women.").

184. *See, e.g.*, Brief for Independent Women's Law Center, *supra* note 120, at 1–3.

185. Elizabeth Flock, *How Far Can Abused Women Go to Protect Themselves?*, NEW YORKER (Jan. 13, 2020) [hereinafter Flock, *How Far Can Abused Women Go*], https://www.newyorker.com/magazine/2020/01/20/how-far-can-abused-women-go-to-protect-themselves.

186. *Id.*

187. *Id.*

188. *Id.*

189. Elizabeth Flock, *Brittany Smith Loses Her Stand Your Ground Hearing*, NEW YORKER (Feb. 3, 2020), https://www.newyorker.com/news/news-desk/brittany-smith-loses-her-stand-your-ground-hearing.

190. *Id.*

Marissa Alexander fired a warning shot into her kitchen wall because her estranged husband—who had three domestic violence-related arrests on his record—was threatening to kill her in a jealous rage.[191] Alexander owned the gun because her father, a military man, had taught his daughters how to use guns in self-defense.[192] Alexander, a Black woman, lost her Stand Your Ground hearing and was charged with three counts of aggravated assault.[193]

Smith's and Alexander's experiences are typical of a criminal justice system that extends the self-defense justification for use of force along gendered and racialized lines.[194] A controlled analysis of cases where the Stand Your Ground defense is used in Florida documented a ninety percent conviction rate for white defendants versus 100% for Black defendants in cases involving white victims.[195] It also found a forty percent conviction rate for male defendants compared to eighty percent for women.[196] The racial discrepancy exists on either side of the barrel: an American Bar Association task force found that nationally, a white shooter who kills a Black victim is 350% more likely to succeed with a Stand Your Ground defense than if the same shooter killed a white victim.[197] Further, zero women received the benefit of Alabama's Stand Your Ground law from 2006 to 2010, when the state stopped reporting homicide data to the FBI.[198] These discrepancies did not originate with Stand Your Ground laws—an analysis of over forty years of FBI data demonstrated that male-on-female homicides are ten percent more likely to be deemed justifiable, or carried out without malicious or criminal intent, than female-on-male homicides.[199] In Alabama, where Smith was prosecuted, the disparity was twenty-five percent.[200]

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191. Franks, *supra* note 165, at 1118.

192. Jeannine Amber, *In Her Own Words: Marissa Alexander Tells Her Story*, ESSENCE (Oct. 27, 2020), https://www.essence.com/news/marissa-alexander-exclusive/.

193. *Id.* Alexander was ultimately sentenced to twenty years, of which she served three in prison and two on house arrest. *Id.* Alexander was deprived of the protection of Stand Your Ground in part because Florida's Stand Your Ground law extends a presumption of reasonable use of force only when "the person against whom the defensive force was used was in the process of unlawfully and forcefully entering." Because Alexander and her estranged husband shared title to the home where she fired the shot, her husband was not unlawfully entering. *Id.*; FLA. STAT. § 776.013(1)(a)–(b) (2013).

194. For a general exploration of courts' receptiveness to narratives of physical resistance to domestic violence among Black women and lesbians, *see generally* Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75 (2008).

195. Justin Murphy, *Are "Stand Your Ground" Laws Racist and Sexist? A Statistical Analysis of Cases in Florida, 2005–2013*, 99 SOC. SCI. Q. 439, 447–48 (2018). George Zimmerman's acquittal after he shot Trayvon Martin, while not ultimately determined by the existence of Florida's Stand Your Ground law, marked a seismic shift in public attention toward the lenience the legal system extends to white defendants who harm Black people. *See* Franks, *supra* note 165, at 1116–17, 1120.

196. Murphy, *supra* note 195, at 447–48.

197. AMERICAN BAR ASS'N, NATIONAL TASK FORCE ON STAND YOUR GROUND LAWS, FINAL REPORT AND RECOMMENDATIONS 13 (2015).

198. Flock, *How Far Can Abused Women Go*, *supra* note 185.

199. *Id.*

200. *Id.*

Other evidence of the gendered availability of self-defense claims is more diffuse. A Department of Justice survey of sixty women incarcerated in a maximum-security prison found that nearly half "committed assaults that might be characterized as defensive or retaliatory efforts to end abuse" that directly preceded their crime.[201] Mary Anne Franks observes that in place of self-defense claims, defense attorneys sometimes rely on Battered Women's Syndrome to demonstrate that the abuse rendered the woman so psychologically defective that she could not be expected to act reasonably in her use of force.[202] Whereas Stand Your Ground operates as a justification defense, exonerating the defendant because they did something right, Battered Women's Syndrome is generally an excuse defense, establishing that it's not the woman's fault she did something wrong.[203]

These inequities developed throughout the history of gun ownership in the United States, where legal gun use is only associated with white, male citizenship.[204] Gun ownership and white masculinity are mutually constitutive throughout U.S. history. Verna L. Williams writes that limiting the right to bear arms to white citizens allowed the antebellum federal government and the post-Civil War South to police the boundaries legal and social belonging in the United States.[205] She argues that Stand Your Ground laws can be traced back to the Reconstruction era, when white Southerners used the idea of "self-defense" to justify disarming Black militia men.[206] Then, as now, Second Amendment law functioned to "reinforce structural oppression under the guise of promoting individual rights."[207] Williams makes particular note of the role that the white man's identity as master of the household, vis-à-vis his wife, children, and slaves, played in the popular construction of the right to bear arms.[208] Today's archetypal

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201. DANA D. DEHART, PATHWAYS TO PRISON: IMPACT OF VICTIMIZATION IN THE LIVES OF INCARCERATED WOMEN vi (2005), https://www.ojp.gov/pdffiles1/nij/grants/208383.pdf; *see also* Suzanne C. Swan et al., *A Review of Research on Women's Use of Violence With Male Intimate Partners,* 23 VIOLENCE VICTIMS 2, 5–7 (2008) (finding that "the majority of domestically violent women also have experienced violence from their male partners" and "women's physical violence is more likely than men's violence to be motivated by self-defense and fear").

202. Franks, *supra* note 165, at 1122. Unlike a Stand Your Ground claim, which operates as a presumption, the Battered Women's Syndrome defense requires elaborate expert testimony and scrutiny of the woman's experience of abuse. *Id*. at 1123.

203. *Id*. at 1122.

204. Kyle Rittenhouse typifies the gun-owning, white male citizen. *See, e.g*., Noreer Nasin et al., *2 Trials, 1 Theme: White Men Taking Law Into Their Own Hands,* AP (Nov. 24, 2021), https://apnews.com/article/ahmaud-arbery-kyle-rittenhouse-race-and-ethnicity-racial-injustice-5a9b847506d388b7358b7de8b9079bb2.

205. Williams, *supra* note 117, at 1001, 1004.

206. *Id*. at 1022, 1025–26 ("[R]ather than serving as a tool for autonomy as *Heller* and *McDonald* suggest and some gun rights advocates assert, SYG more precisely is about protecting the white patriarchal self.").

207. *Id*. at 987. Today, even legal possession of a firearm can be a death sentence for a Black person confronted by the police, as the police shooting of Philando Castile demonstrates. *See* INDERPAL GREWAL, SAVING THE SECURITY STATE 193–94 (2017).

208. Williams, *supra* note 117, at 996, 1021.

shooter feels less secure in his privilege, so he becomes a vigilante upholding the boundaries of national identity and citizenship—a phenomenon facilitated, if not explicitly encouraged, by the courts' and legislatures' effective privatization of public safety.[209] Justice Scalia's word choice in *Heller* is therefore telling, and not accidental. The words "family" or "home" appear nowhere in the Second Amendment, but the Court chose to describe the right it protects as a right to individual gun ownership that "extends, moreover, to the home, where the need for defense of self, family, and property is most acute."[210] In response to the Court's holding that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home,"[211] we must ask who, in the history of the United States, has held the keys to the home.

In the face of this inequality, one might choose to advocate for the egalitarian application of self-defense justifications to non-white, non-male defendants.[212] So long as violence against women continues, women should not be punished for, or otherwise deterred from, resisting by any means necessary. This argument has logical appeal, but it confuses the sickness with the cure. Unfettering women's right to bear arms in self-defense against male violence would only further entrench the culture of guns in the United States and the legal edifice supporting it. Instead, the Due Process Clause requires a searching analysis of the rights called before the Court to eliminate the legal inscription of stigma and subordination. The reinscription of decades of white, male impunity for armed violence in the annals of the law, much like the legal reinforcement of paternalistic policing of women's reproductive choices, is a direct facilitation by the state of the kind of social marginalization that the Court's Due Process Clause doctrine should eradicate.

CONCLUSION

The use of fetal homicide laws to criminalize women who self-manage abortions and the failure of guns to protect women from gendered violence both illustrate that restrictive abortion laws and expanded gun rights harm women as a group. If the Due Process Clause is a mandate to the Court to eliminate structural inequality and group-based subordination, it requires that the Court increase access to abortions and restrict access to guns.

It may seem audacious to propose a legal argument for reinforcing access to abortion and scaling back the proliferation of guns, especially in the shadow of

209. The Court functionally privatized public safety when it held in *DeShaney* that the state has no duty to provide a police force or otherwise guarantee "certain minimal levels of safety and security." *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989).

210. D.C. v. Heller, 554 U.S. 570, 628 (2008).

211. *Id.* at 635.

212. *See, e.g.*, Blodgett-Ford, *supra* note 167, at 550 (proposing a special jury instruction affirming battered women's right to bear arms in self-defense in cases in which a battered woman is accused of murder or assault).

the Supreme Court's refusal to do either. At a time when the Court is unprecedentedly hostile towards anti-subordination readings even of the Equal Protection Clause, it might seem chimeric to propose a constitutional theory of substantive due process as a doctrine of anti-subordination.[213] Certainly such a constitutional argument to rescue abortion rights or slash gun rights cannot triumph before the Court at the eleventh hour, before *New York State Rifle & Pistol Association v. Bruen*[214] or *Dobbs v. Jackson Women's Health Organization*[215] are decided.

However, there is reason to seriously consider anti-subordination arguments. To begin, the federal constitution is not the only constitution in the United States. The importance of state-level organizing grows daily, and local organizing perhaps even more so.[216] The search for legal footholds from which to build more expansive definitions of liberty and democratic citizenship is ongoing, and the development of new legal theories of freedom "opens vistas rather than enclosing them."[217] To theorize is to begin to envision a way forward.[218] In crisis, we return to the drawing board, attuned to the task of envisioning what women's freedom is and must become.[219]

213. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Ricci v. DeStefano, 557 U.S. 557 (2009).

214. N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (argued Nov. 3, 2021).

215. Dobbs v. Jackson Women's Health Org., No. 19-1392 (argued Dec. 1, 2021). Jackson Women's Health Organization drew an explicit parallel between abortion and gun rights in its brief to the Court. In imploring the Court to heed stare decisis despite Mississippi's attempt to malign the *Roe* decision, Jackson Women's Health argued that the seminal Supreme Court decisions protecting abortion and gun rights are similarly contested and criticized as recognizing new rights on inadequate historical foundations. Brief for Respondent at 3–4, 20, *Dobbs* (No. 19-1392).

216. *See* Burman, *supra* note 125, at 2011 (proposing a local strategy for ensuring medication abortion access in the form of "abortion sanctuary cities" and noting that "cities are where abstract rights become concrete and accessible").

217. Tribe, *supra* note 97, at 1898.

218. bell hooks, *Theory as Liberatory Practice*, 4 YALE J.L. & FEMINISM 1, 8 (1991) ("Within revolutionary feminist movements, within revolutionary black liberation struggles, we must continually claim theory as necessary practice within a holistic framework of liberatory activism. . . . We must actively work to call attention to the importance of creating a theory that can advance renewed feminist movements, particularly highlighting that theory which seeks to further feminist opposition to sexism, and sexist oppression.").

219. *See* Obergefell v. Hodges, 576 U. S. 644, 672 (2015).