

THE SUPREME COURT AS DEATH PANEL: THE NECROPOLITICS OF *BRUEN* AND *DOBBS*

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Two decisions in 2022, issued only a day apart, represent a dramatic and deadly escalation of the Supreme Court’s politicized jurisprudence. In New York State Rifle & Pistol Association, Inc. v. Bruen, the Court declared that the Constitution has always protected a right to armed self-defense in public as well as in the home. In Dobbs v. Jackson Women’s Health Organization, it decreed that the Constitution has never protected a right against forced childbirth. What unites the two cases, beyond the radical political extremism displayed by the conservative Supreme Court majority, the indefensibly selective and incoherent use of history, and the broad rejection of longstanding precedent, is the full transformation of American constitutional law into what Achille Mbembe calls “necropolitics.” At the heart of the Bruen and Dobbs decisions is nothing less than life and death, and specifically the question of who gets to decide who lives and who dies. Expanding the right to guns means expanding white men’s use of deadly force against women and racial minorities. Eliminating the right to abortion means leaving women at the mercy of the death, injury, and other suffering inflicted by forced childbirth. Taken together, the two cases demonstrate that the Supreme Court has embraced the use of the Constitution as a tool of racial patriarchy.

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INTRODUCTION

On June 23, 2022, the Supreme Court declared that the Constitution has always protected a right to armed self-defense in public as well as

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in the home.¹ One day later, it decreed that the Constitution has never protected a right against forced childbirth.² While the connection between the two cases may not be immediately apparent—*New York State Rifle & Pistol Association, Inc. v. Bruen* is ostensibly about gun rights,³ whereas *Dobbs v. Jackson Women’s Health Organization* is ostensibly about abortion rights⁴—their full implications become clear when read together. What unites the two cases, beyond the radical political extremism displayed by the conservative Supreme Court majority,⁵ the indefensibly selective and incoherent use of history,⁶ and the broad rejection of longstanding precedent,⁷ is the full transformation of American constitutional law into necropolitics. At the heart of the *Bruen* and *Dobbs* decisions is nothing less than life and death, and specifically the question of who gets to decide who lives and who dies.

The philosopher Achille Mbembe describes necropolitics as “the capacity to define who matters and who does not, who is *disposable* and who is not.”⁸ A necropolitical society is one divided into two categories: sovereigns and “others.”⁹ Those who are designated as sovereigns are entitled to defend themselves and their interests against any others that they perceive as threats.¹⁰ Those others, as non-sovereigns, are denied

¹ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2135 (2022) (“[T]he Second Amendment guarantees an ‘individual right to possess and carry weapons in case of confrontation,’ and confrontation can surely take place outside the home.” (quoting *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008))).

² *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (“The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . .”). While the right the Court denies is most commonly phrased as the “right to abortion,” it is most straightforwardly expressed as the right to not endure a forced pregnancy.

³ *Bruen*, 142 S. Ct. at 2111.

⁴ *Bruen*, 142 S. Ct. at 2228.

⁵ See Paul Gordan, *They’ve Only Just Begun: How the Far-Right Justices Reshaped Our Country in the 2021–22 Term*, PEOPLE FOR THE AM. WAY (July 1, 2022), <https://www.pfaw.org/report/theyve-only-just-begun-how-the-far-right-justices-reshaped-our-country-in-the-2021-22-term> [<https://perma.cc/H9E5-SNZ3>].

⁶ See Steven Lubet, *The Supreme Court’s Selective History*, THE HILL (July 27, 2022, 8:00 AM), <https://thehill.com/opinion/judiciary/3575292-the-supreme-courts-selective-history> [<https://perma.cc/WRJ8-B3T9>] (describing the history relied on by conservative judges as selective, incoherent, and “plucked . . . from partisan briefs”).

⁷ See David Cole, *Egregiously Wrong: The Supreme Court’s Unprecedented Turn*, N.Y. REVIEW OF BOOKS (Aug. 18, 2022), <https://www.nybooks.com/articles/2022/08/18/egregiously-wrong-the-supreme-courts-unprecedented-turn-david-cole> [<https://perma.cc/8XX6-BMYF>] (describing the basis for overturning *Dobbs* and other longstanding precedents as “transparently thin”).

⁸ Achille Mbembe, *Necropolitics*, in 15(1) PUBLIC CULTURE 11, 27 (Libby Meintjes trans.) (2003).

⁹ *Id.* at 17.

¹⁰ *Id.* at 17–18 (noting that the Nazi state was an example of this, stating, “[t]he perception of the existence of the Other as an attempt on my life, as a mortal threat or absolute danger whose biophysical elimination would strengthen my potential to life and security . . .”).

the right to defend themselves even against unambiguous, unlawful, and imminent attack. The sovereign thus holds the power of life and death over others, rendering their existence fundamentally precarious and contingent upon the whims of the sovereign. As Mbembe writes, “in our contemporary world, weapons are deployed in the interest of maximum destruction of persons and the creation of *death-worlds*, new and unique forms of social existence in which vast populations are subjected to conditions of life conferring upon them the status of *living dead*.”¹¹

In the Supreme Court’s tortured Second Amendment jurisprudence, the right to bear arms has alchemized into the right to self-defense, presented as universal, natural, and unimpeachable.¹² As such, it was easy for the Court in *Bruen* to vigorously condemn any requirement that an individual demonstrate a “special need” to the government before exercising it.¹³ But demonstrating a special need—indeed a necessary and proportional one—to use deadly force prior to resorting to it is precisely what the law demands of self-defense.¹⁴ The right of self-defense, which is in the first instance not reducible to or synonymous with the right to use weapons, is not a license for a person to use deadly force whenever they wish, or even whenever they perceive a threat.¹⁵ What *Heller* established, and *Bruen* expanded, is not a constitutional right to self-defense, but a constitutional right to kill¹⁶—more specifically, an absolute right to bear arms in anticipation of killing. This right by definition cannot be that of justifiable self-defense, because justifiable self-defense is a legal determination that can only be made after the fact and by someone other than the person claiming it.¹⁷ What *Bruen* instead established is the sovereign right of the gunbearer to decide who lives and who dies, not just inside the home but everywhere.

¹¹ *Id.* at 40.

¹² See generally *District of Columbia v. Heller*, 554 U.S. 570, 628 (2009) (“[T]he inherent right of self-defense has been central to the Second Amendment right.”).

¹³ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2122 (2022).

¹⁴ See Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63, 82 (2020) (observing the well-established principle that “[s]elf-defense is only lawful when necessary and proportional”).

¹⁵ See MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* 79–80 (2019) (reviewing restrictions on the right to self-defense).

¹⁶ See Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 728 (2011) (“[T]he Second Amendment right to bear arms, first articulated during the end of the Bush era in *District of Columbia v. Heller* and then underscored at the beginning of Obama’s presidency in *McDonald v. Chicago*—quite directly empowers individuals to kill.”).

¹⁷ See Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205, 1235 (2009) (spelling out the requirements for asserting self-defense).

And yet, it is abortion, the Supreme Court claimed in *Dobbs*, that uniquely “destroys . . . ‘potential life.’”¹⁸ Where *Bruen* grants the gun-bearer sovereignty over anyone he may perceive as a threat, *Dobbs* denies the pregnant woman sovereignty even over her own body. According to the Court, the government cannot demand that an individual demonstrate a special need to carry an object exclusively designed for killing,¹⁹ but the government can demand that a woman demonstrate a special need for terminating one of her own bodily processes.²⁰ More significantly, the Court declared that the government is free to reject as insufficient *any* need the pregnant woman demonstrates, including the need to save her own life.²¹ Even healthy pregnancies inflict dramatic and often irreparable physical injury on pregnant women’s bodies, which means that pregnancy inherently poses a risk of grave bodily injury or death to women and girls.²² The risk is particularly acute for Black women, whose maternal mortality rate is more than three times that of white women.²³ Abortion is both a necessary and proportionate response to the physical threat posed by unwanted pregnancy, a fact that does not change even if one assumes for the sake of argument that the embryo or fetus is a person.²⁴ *Bruen* refashions the right to kill as

¹⁸ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2236 (2022) (quoting *Roe v. Wade*, 410 U.S. 113 (1973)).

¹⁹ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2122 (2022) (“Because the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense, we conclude that the State’s licensing regime violates the Constitution.”).

²⁰ See generally *Dobbs*, 142 S. Ct. at 2283–84 (giving abortion laws a “strong presumption of validity” (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993))).

²¹ See *id.* at 2318 (Breyer, Sotomayor & Kagan, JJ., dissenting) (“States may even argue that a prohibition on abortion need make no provision for protecting a woman from risk of death or physical harm.”).

²² See *id.* at 2338 (“Even an uncomplicated pregnancy imposes significant strain on the body, unavoidably involving significant physiological change and excruciating pain. For some women, pregnancy and childbirth can mean life-altering physical ailments or even death. Today . . . the risks of carrying a pregnancy to term dwarf those of having an abortion.”); Laura Santhanam, *It’s Time to Recognize the Damage of Childbirth, Doctors and Mothers Say*, PBS (May 7, 2021, 5:50 PM), <https://www.pbs.org/newshour/health/broken-tired-and-ashamed-how-health-care-fails-new-moms> [<https://perma.cc/SKW3-WRR3>] (“The United States has some of the highest maternal mortality rates among developed countries and those statistics have worsened in recent years, particularly for women of color.”).

²³ See Marian F. MacDorman, Marie Thoma, Eugene Declercq & Elizabeth A. Howell, *Racial and Ethnic Disparities in Maternal Mortality in the United States Using Enhanced Vital Records, 2016–17*, 111 AM. J. PUB. HEALTH 1673 (2021) (finding that disparities in maternal mortality between white and non-Hispanic Black women have been recorded since the 1930s, finding that the mortality rate for Black mothers has always been averaged higher than that of white mothers).

²⁴ As many scholars have noted, however, there is no compelling historical, legal, or policy justification to make such an assumption. See, e.g., Cynthia Soohoo, *An Embryo Is Not a Person: Rejecting Prenatal Personhood for a More Complex View of Prenatal Life*, 14 CONLAWNOW 81, 114 (2023) (noting that “the law has never recognized zygotes, embryos,

a legitimate right to self-defense; *Dobbs* refashions the right to self-defense as an illegitimate right to kill.

When the Court states that abortion destroys potential life, it declares that even an abstract hypothetical life is worth more than a pregnant woman's actual life. By the same token, when the Court fails to even acknowledge that the use of deadly weapons is destructive of life, it is a declaration that the gunbearer's life is worth more than the lives of those he feels entitled to take. That includes the lives of domestic violence victims, including pregnant women and the supposed "potential life" that they carry: homicide, principally committed by men with firearms, is the leading cause of death of pregnant women.²⁵ It also disproportionately includes the lives of Black Americans, who are ten times as likely to be killed by guns than white Americans.²⁶

Expanding the right to guns and eliminating the right to an abortion directly impacts who lives and who dies in America. The right to guns primarily protects white men at the expense of women and minorities.²⁷ The majority of gun owners in the United States are white and male. Men use guns to kill and terrorize women far more than the reverse.²⁸ Stand Your Ground laws across the country have protected white men who kill Black teenagers but not women who defend themselves against domestic abusers.²⁹ White Americans can stroll freely through public streets with assault rifles slung on their backs while Black Americans

and fetuses as legal persons and suddenly recognizing them as such will create confusion and instability in the law.").

²⁵ *Homicide Leading Cause of Death for Pregnant Women in U.S.*, HARV. T.H. CHAN SCH. OF PUB. HEALTH (Oct. 21, 2022), <https://www.hsph.harvard.edu/news/hsph-in-the-news/homicide-leading-cause-of-death-for-pregnant-women-in-u-s> [<https://perma.cc/8T7N-QNPA>].

²⁶ *WISQARS Fatal and Nonfatal Injury Reports*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://wisqars.cdc.gov/reports> [<https://perma.cc/S4AV-4XYE>] (select filters "fatal," "2001–2020 by Bridged Race," and "Firearm"; compare crude rates under "race" filter).

²⁷ See generally Brief for The NAACP Legal Def. & Educ. Fund, Inc. and The Nat'l Urb. League as Amici Curiae Supporting Respondents at 16–18, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) (discussing the disproportionate impact of gun violence on Black Americans relative to white Americans); Brief for Senator Charles E. Schumer et al. as Amici Curiae Supporting Respondents at 9–10, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022) (discussing how gun laws have only recently began protecting domestic violence victims).

²⁸ See Brief for The National Coalition Against Domestic Violence et al. as Amici Curiae Supporting Respondents at 9–13, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

²⁹ 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, 1103 (2014) (contrasting the treatment of George Zimmerman with Marissa Alexander, a domestic abuse victim who was immediately arrested and later sentenced to twenty years in prison for firing what she described as a warning shot at her abuser).

are shot dead if they hold anything that even vaguely resembles a weapon.³⁰ The right to an abortion is a matter of life and death for women and girls who may suffer and die from forced childbirth, botched illegal abortions, or the violence of family members triggered by pregnancy. In *Bruen* and *Dobbs*, the Supreme Court deliberately enlisted the Constitution to advance a necropolitical agenda, one that serves the interests of racial patriarchy.

I

THE WORLD AS A WHITE MAN'S CASTLE

A. *Heller: A Man's Home is His Castle. Why Didn't She Leave?*

The Second Amendment contains no reference to self-defense, individual rights, or the home.³¹ Despite this, and the sweeping historical and scholarly consensus that the Second Amendment protects a collective right to form militias,³² the Supreme Court in *District of Columbia v. Heller* (2008)³³ invented an individual right to keep and use weapons in the home for self-defense.³⁴

In doing so, the Court effectively provided constitutional endorsement of the castle doctrine, which allows for a more expansive use of deadly force in self-defense in the home than in other places.³⁵ Broadly speaking, for the use of deadly force to be justified as self-defense, it must be a necessary, proportionate, and reasonable response to an imminent and unlawful threat of bodily injury or death.³⁶ The assessment

³⁰ See FRANKS, *supra* note 15, at 91 (describing Black men killed for being thought to carry guns in states where carrying guns is legal).

³¹ See Gabriella Kamran, Note, *The Things We Bear: On Guns, Abortion, and Substantive Due Process*, 23 GEO. J. GENDER & L. 479, 509 (2022) (“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.’” (quoting *District of Columbia v. Heller*, 554 U.S. 570, 628 (2009))).

³² See Josh Jones, *The “Weaponization” of Corpus Linguistics: Testing Heller’s Linguistic Claims*, 34 BYU J. PUB. L. 135, 137 (2020) (“Prior to *Heller*, the collective rights theory had the support of the Supreme Court (three times over), as well as the scholarly consensus before the late 1980s.”).

³³ 554 U.S. 570 (2008) (holding that the Second Amendment protects an individual right to possess a firearm for the purpose of self-defense within the home).

³⁴ See FRANKS, *supra* note 15, at 70–74; see also Ruben, *supra* note 14, at 69–73.

³⁵ See Benjamin Levin, Note, *A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 HARV. J. ON LEGIS. 523, 530 (2010) (“Rooted in the conviction that ‘a man’s home is his castle,’ the common law rule allowing deadly force against intruders became known as the castle doctrine.”).

³⁶ See Franks, *supra* note 29, at 1125 (noting that “according to common law, a person can use deadly force in self-defense only when it is necessary, proportionate, and the danger is imminent”).

of necessity typically includes consideration of whether the person threatened could safely retreat from the situation without resorting to deadly force, commonly known as the duty to retreat.³⁷

The castle doctrine is an exception to this duty to retreat, premised on the view that, as the saying goes, “a man’s home is his castle.”³⁸ That is, the home is considered a special place deserving of special protections: it is a place of refuge and privacy and ownership, a place where one is sovereign. Accordingly, the castle doctrine allows for the justifiable use of deadly force even if one could safely retreat from his home to avoid the threat. In many jurisdictions, the use of deadly force against intruders inside the home is furthermore presumed to be reasonable, largely eliminating the need to demonstrate that the use of force was reasonable, proportional, and necessary.³⁹

On its face, the castle doctrine makes intuitive and legal sense. All else being equal, the right of a lawful inhabitant to be in his own home should trump the rights of those who are not lawful inhabitants, and a person’s right to self-defense should be at its height in the place where he has the right to exclude others. That is, the castle doctrine can be described as a justifiable, limited, non-arbitrary designation of sovereignty: in a private dwelling, the rights of lawful inhabitants trump those of non-lawful inhabitants.

Complications arise, however, when the rights of one lawful inhabitant in the home clash with another’s, for example, in domestic violence. When a female domestic violence victim uses deadly force against an abusive male co-habitant, the gendered nature of the castle doctrine becomes starkly clear: far from being praised for not running away and for fighting back, the victim is frequently asked why she didn’t leave.⁴⁰ The expectation that a domestic violence victim should leave her home when threatened with violence directly contradicts the central point of the castle doctrine, namely that lawful inhabitants should not have to leave their own home to avoid violence. This expectation reveals that the cliché “a man’s home is his castle” is often understood literally—it is specifically men who are considered the lords of their castles, and that

³⁷ See C.D. Christensen, *The “True Man” and His Gun: On the Masculine Mystique of Second Amendment Jurisprudence*, 23 WM. & MARY J. WOMEN & L. 477, 489–90 (2017) (“By integrating seamlessly both [necessity and proportionality], the Castle Doctrine thus carves out an exception for the use of deadly force in pursuit of a right to either body or property, conceptually and practically obscuring the distinction between the two.”).

³⁸ Levin, *supra* note 35, at 530.

³⁹ See *id.* at 534 (writing how under several state statutes the burden shifts to the state to prove that the deadly conduct was unreasonable).

⁴⁰ See Franks, *supra* note 29, at 1111 (pointing out that women who use deadly force in their homes against abusive co-habitants are frequently asked why they didn’t leave, as opposed to being praised for protecting their “castle”).

as such they have the right to use violence against both external and internal threats to their rule.⁴¹ In this view, a woman can be a lawful cohabitant, but not a sovereign one: if she is abused, she is not entitled to defend herself or her castle, and she must instead retreat even from her own home to escape unlawful threats of injury or death. This is an assumption with serious legal consequences; women who kill their abusers are frequently denied self-defense instructions and given lengthy prison sentences.⁴²

When the Court in *Heller* interpreted the Second Amendment as protecting the right of armed self-defense in the home, it essentially imported the castle doctrine, with its troubled gendered history and application, and tethered it to the use of firearms.⁴³ In doing so, it created a right that is both narrower and broader than the common law understanding of self-defense in the home: narrower in the sense that it focuses solely on deadly force perpetrated with guns, and broader in the sense that it protects the *possession* as well as the use of guns in the home for self-defense.

What is the significance of this? This interpretation highlights how the right to self-defense the Court reads into the Second Amendment is anticipatory in nature: one is not only entitled to use deadly force if the situation arises, but to prepare in advance for the possibility of such situations by purchasing and possessing certain tools to use in its execution. On its face, this may seem like a logical and even necessary corollary of the right to self-defense; if one has the right to use deadly force, then one has the right to prepare to use it, including by purchasing implements capable of delivering it.

But the presumption that the purchase and possession of weapons is “for the purpose of” self-defense is not self-evident. In the first instance, it is unclear what it means to prepare to use deadly force in self-defense before any threat has materialized, given that the legal determination of whether the use of deadly force is justified can ultimately be made only after the fact and by someone other than the person using it.⁴⁴ People keep firearms in their home for many purposes other

⁴¹ See *id.* at 1112 (highlighting how women are not given the benefit of the castle doctrine when defending themselves in their homes the way men typically are).

⁴² Cf. Kamran, *supra* note 31, at 507 (“[A]n 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.”).

⁴³ Christensen, *supra* note 37, at 487 (“[I]nasmuch as *Heller* purports that the Second Amendment ‘codified a pre-existing right,’ scholars have located it in the common law understanding of the Castle Doctrine.” (citation omitted)).

⁴⁴ See Eric Ruben, *Self-Defense Exceptionalism and the Immunization of Private Violence*, 96 S. CAL. L. REV. 509, 552 (2023) (“[S]elf-defense immunity laws [are] not rooted in history,

than self-defense, including for the purpose of unlawfully intimidating, threatening, or harming another person in the home.⁴⁵ People may also purchase and keep a weapon in the home with the full intention of using it “for” self-defense, but find themselves using it for other purposes. And people might purchase and keep a weapon in the home believing that they will use it “for” justifiable self-defense but have an incorrect understanding of what justifiable self-defense actually is.

The *Heller* court enshrined constitutional protection for the possession and use of a weapon in the home for the purpose of self-defense without interrogating how such purpose could or should be demonstrated.⁴⁶ Such a presumption might have been understandable had the Court not been presented with myriad examples of the other purposes for which guns can and have been used in the home, in particular by domestic abusers to terrorize, intimidate, injure, and kill members of their household.⁴⁷ As Susan Liebell writes, “[t]reating the home as uncontested, private, and ‘safe’ is historically inaccurate [and] leaves contemporary women without a clear constitutional ruling on armed self-defense *within the home* against the people who historically and statistically threaten them the most: husbands, lovers, and acquaintances.”⁴⁸ Gun violence in the home is a deeply gendered phenomenon: men are two times more likely than women to own guns;⁴⁹ in many gun-owning households, only the male members of the household are even aware of the existence of the gun;⁵⁰ and men are exponentially more likely to use

tradition, or longstanding priorities of criminal law and procedure. Self-defense has always been an affirmative defense, embedded in a system of defenses and vindicated through the same criminal justice process as other defenses.”).

⁴⁵ See David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey*, 15 VIOLENCE & VICTIMS 257, 271 (2000) (using survey data to conclude that guns are “used far more often to intimidate and threaten than they are used to thwart crimes”).

⁴⁶ District of Columbia v. *Heller*, 554 U.S. 570, 629 (2008) (“[H]andguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”).

⁴⁷ See generally Brief for National Network to End Domestic Violence et al. as Amici Curiae Supporting Petitioners at 23–24, District of Columbia v. *Heller*, 554 U.S. 570 (2008) (No. 07-290) (noting that “female murder victims were more than 12 times as likely to have been killed by a man they knew than by a male stranger” and that “[o]f murder victims who knew their offenders, 62% were killed by their husband or intimate acquaintance”).

⁴⁸ Susan P. Liebell, *Sensitive Places?: How Gender Unmasks the Myth of Originalism in District of Columbia v. Heller*, 53 POLITY 207, 210 (2021).

⁴⁹ See Megan Brenan, *Stark Gender Gap in Gun Ownership, Views of Gun Laws in U.S.*, GALLUP (Dec. 2, 2022), <https://news.gallup.com/poll/406238/stark-gender-gap-gun-ownership-views-gun-laws.aspx> [<https://perma.cc/WY3A-AGV6>] (noting that, in the United States, gun ownership among men has consistently been at least double that of women).

⁵⁰ See Jens Ludwig, Philip J. Cook & Tom W. Smith, *The Gender Gap in Reporting Household Gun Ownership*, 88 AM. J. PUB. HEALTH 1715, 1717 (1998) (explaining that wives’

guns against women in a household than the reverse.⁵¹ When there are guns in a home, a woman's chance of being injured or killed increases exponentially: "Among homicides occurring at home, adults were seven times more likely to die by homicide with a firearm at the hand of a spouse or intimate partner who owned a gun, with most of those victims being women."⁵²

"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,'" Gabriella Kamran writes, "we must ask who, in the history of the United States, has held the keys to the home."⁵³ More than a decade before *Bruen*, the Court's modern Second Amendment jurisprudence was already an exercise in constitutional necropolitics: reinforcing the power of men to decide whether women live or die in their own homes. *Heller* ensured that homes are indeed a man's castle, where he alone is sovereign.

B. *Bruen: White Men at Home Everywhere*

Bruen subsequently declared that not only the home, but the entire world, is a man's castle. The *Bruen* majority expanded *Heller* to declare that the Second Amendment protects the right to use guns for self-defense in public as well as inside the home.⁵⁴ Among the many astonishing aspects of the *Bruen* opinion is how the Court treated the right to armed self-defense in public as though it followed logically and inevitably from the right to the same in one's home.⁵⁵ But the castle doctrine, as its name makes clear, sharply differentiates between the right

lack of knowledge can be a reason behind wives underreporting, which could stem from disagreement among spouses in which a woman opposes keeping a gun in the home).

⁵¹ See *When Men Murder Women: An Analysis of 2020 Homicide Data*, VIOLENCE POL'Y CTR., <https://vpc.org/when-men-murder-women-introduction> [<https://perma.cc/TZ2U-F5DG>] ("[W]omen are far more likely to be the victims of violent crimes committed by intimate partners than men, especially when a weapon is involved."); see also Susan B. Sorenson, *Guns in Intimate Partner Violence: Comparing Incidents by Type of Weapon*, 26 J. WOMEN'S HEALTH 249, 249 (2017) ("[W]omen in the United States are more than twice as likely to be shot and killed by their male intimate as they are to be fatally shot, stabbed, bludgeoned, strangled, or killed in any other way by a stranger.").

⁵² *Females At Increased Risk of At-Home Homicide by Gun Violence*, OPEN ACCESS GOV'T (Apr. 5, 2022), <https://www.openaccessgovernment.org/females-risk-homicide-gun-violence-gun-ownership-usa-government-death/133326> [<https://perma.cc/3QBK-2R39>].

⁵³ Kamran, *supra* note 31, at 509 (citation omitted).

⁵⁴ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2122 (2022) ("We too agree, and now hold consistent with *Heller* and *McDonald*, that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home.").

⁵⁵ *Id.* at 2135 ("[T]he Second Amendment guarantees an 'individual right to possess and carry weapons in case of confrontation,' and confrontation can surely take place outside the home." (quoting *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008))).

of self-defense in the home and the right outside of it. The entire justification for the castle doctrine is premised, as it were, on the premises: in a private residence, the rights of those who are lawful inhabitants of that residence are superior to those who are not.⁵⁶ Setting aside for the moment the troublingly gendered nature of the castle doctrine when it comes to confrontations between lawful cohabitants, the deference the doctrine grants to lawful inhabitants' subjective perception of what or who is a threat against which deadly force can be used can be justified by the doctrine's spatial limitations to one's own home.⁵⁷

Outside of one's own private residence, however, there is no compelling reason to privilege any one person's subjective perception of threat over another's. The *Bruen* court, like the *Heller* court before it, presumes that the person who claims or believes he is bearing weapons for the purpose of self-defense is both sincere and correct. The consequences of this presumption are even more grave in *Bruen* than in *Heller*, because there is a potentially limitless number of other individuals that the gunbearer can terrorize, intimidate, injure, or kill with the deadly weapons he carries into the public.⁵⁸

Once again, the Court had at its disposal a wealth of empirical evidence about the uneven distribution of these consequences. Beginning in 2005, a sweeping reform movement known as Stand Your Ground expanded the castle doctrine to areas outside the home in many states.⁵⁹ Stand Your Ground laws vary by state and often include multiple provisions, but the general effect of these laws is to remove a person's duty to retreat in any place where he has a lawful right to be.⁶⁰ These laws have often accompanied permitless carry legislation or other laws that make

⁵⁶ See Christensen, *supra* note 37, at 489 (discussing the castle doctrine in the context of "the view that one's home is one's castle" and that "the violation of [the home's] sacrosanctity is what affords the right to force in its defense").

⁵⁷ See *id.* at 491 ("[T]he pride of place granted to the privacy of the personal dwelling has long offered a similar privilege of non-retreat for the use of force in self-defense.").

⁵⁸ See generally Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 NW. U. L. REV. 139 (2021) (explaining that a right to carry in public, and not just for the purpose of defending in the home as recognized in *Heller*, has greater potential for harmful consequences in relation to safety and peace and order of the public).

⁵⁹ See generally Mary Anne Franks, *How Stand-Your-Ground Laws Hijacked Self-Defense*, in 3 GUNS AND CONTEMPORARY SOCIETY: THE PAST, PRESENT, AND FUTURE OF FIREARMS AND FIREARM POLICY (Glen H. Utter ed., 2016) (discussing the rapid passing of stand-your-ground laws in a majority of states and analyzing their impact of on the law of self-defense).

⁶⁰ See, e.g., Joseph Blocher, Samuel W. Buell, Jacob D. Charles & Darrell A.H. Miller, *Pointing Guns*, 99 TEX. L. REV. 1173, 1186 (2021) (noting Florida's law which "states that the actor asserting self-defense has no duty to retreat and 'has the right to stand his or her ground' and meet force with force if the actor is attacked in 'a place where he or she has a right to be'" (citation omitted)).

it easier for people to obtain and carry weapons in public.⁶¹ The effect of these laws is clear: Stand Your Ground laws and permissive public carry laws are correlated with significant increases in homicides and other violent crimes.⁶²

That result means an increased risk of death and injury to the public as a whole, a result directly in tension with the ostensible goal of protecting the right to self-defense. “If the Second Amendment protects a broad right to carry handguns virtually everywhere and at all times, and most Americans choose to exercise that right, conflicts would regularly present a threat of lethal violence, and lethal force would regularly be perceived as a reasonably proportional and necessary response.”⁶³ The benefits, such as they are, of expanding justifiable uses of deadly force are by no means equally distributed across society. A controlled study of Stand Your Ground outcomes in Florida found that women were twice as likely to be convicted as men in domestic cases.⁶⁴ No women were given the benefit of a Stand Your Ground ruling in Alabama between 2006 and 2010.⁶⁵ Multiple studies have found that Stand Your Ground laws exacerbate existing racial disparities in determining whether deadly force is justified.⁶⁶ Nationally, homicides involving white

⁶¹ See *Carrying Firearms in Public and Stand Your Ground Laws*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, <https://publichealth.jhu.edu/departments/health-policy-and-management/research-and-practice/center-for-gun-violence-solutions/solutions/public-carry-of-firearms> [<https://perma.cc/3PTU-RVUU>].

⁶² See *Fact Sheet: Weakening Requirements to Carry a Concealed Firearm Increases Violent Crime*, CTR. FOR AM. PROGRESS (Oct. 4, 2022), <https://www.americanprogress.org/article/fact-sheet-weakening-requirements-to-carry-a-concealed-firearm-increases-violent-crime> [<https://perma.cc/L97H-37FA>]; *Effects of Stand-Your-Ground Laws on Violent Crime*, RAND CORP. (Jan. 10, 2023), <https://www.rand.org/research/gun-policy/analysis/stand-your-ground/violent-crime> [<https://perma.cc/J683-MXTT>]; JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, *supra* note 61 (“The passage of ‘stand your ground’ laws was linked to an 8-11 percent increase in the monthly gun homicide rate, translating to an addition 700 gun deaths each year.”).

⁶³ Ruben, *supra* note 14, at 100.

⁶⁴ See Justin Murphy, *Are “Stand Your Ground” Laws Racist and Sexist? A Statistical Analysis of Cases in Florida, 2005–2013*, 99 Soc. Sci. Q. 439, 451 (2018) (“Conviction for a male defendant in a typical domestic case was found to be about 40%, but for a female defendant in an otherwise objectively equivalent case, the probability of conviction was found to be around 80%.”).

⁶⁵ Elizabeth Flock, *How Far Can Abused Women Go to Protect Themselves?*, NEW YORKER (Jan. 13, 2020), <https://www.newyorker.com/magazine/2020/01/20/how-far-can-abused-women-go-to-protect-themselves> [<https://perma.cc/LXG4-M5YC>] (explaining that in Alabama, starting in 2006, when Stand Your Ground law was implemented in the state, no women received justifiable-homicide rulings through 2010 when the state stopped reporting its data).

⁶⁶ See, e.g., Kami Chavis, *The Dangerous Expansion of Stand-Your-Ground Laws and its Racial Implications*, DUKE CTR. FOR FIREARMS L. (Jan. 18, 2022), <https://firearmslaw.duke.edu/2022/01/the-dangerous-expansion-of-stand-your-ground-laws-and-its-racial-implications> [<https://perma.cc/5L2Q-NWGF>] (“In Stand-Your-Ground states, ‘homicides in which white shooters kill Black victims are deemed justifiable five times for frequently than

defendants and Black victims are 281% more likely to be ruled justified than when both the defendant and the victim are white.⁶⁷ Homicides involving Black defendants and white victims are 49% less likely to be found justified than when both the defendant and victim are white.⁶⁸ These disparities are heightened in states with Stand Your Ground laws: the odds of white defendants who shoot Black victims being found justified increase by 7% in Stand Your Ground states, whereas the likelihood of Black defendants who shoot white victims being found justified does not increase in those states.⁶⁹

While Black individuals are much more likely to be victims of gun homicide than any other racial group,⁷⁰ their right to self-defense is constrained by racial bias in the general public, law enforcement, and the criminal justice system generally. Black men's attempts to exercise self-defense, especially in public, are often perceived as displays of unlawful force.⁷¹ The role of both explicit and implicit racial bias in the perception of threats contributes to the extraordinarily high rates of extrajudicial killings of Black men.⁷² While white open-carry activists can freely march through town squares and grocery stores with loaded rifles on their backs, Black men and boys with toy guns or cell phones have been gunned down by police officers and neighborhood watchmen.⁷³ As Joseph Blocher and Reva Siegel write, “[e]xperience suggests that expanded gun rights have tended to privilege white gun carriers—whether acting in public spaces or in self-defense.”⁷⁴

when the situation is reversed.” (citing *A License to Kill: Shoot First Laws, Also Known as Stand Your Ground*, EVERYTOWN FOR GUN SAFETY (Sept. 8, 2021), <https://everytownresearch.org/report/stand-your-ground-laws-are-a-license-to-kill> [<https://perma.cc/XX4C-W528>]).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Stand Your Ground Laws*, EDUC. FUND TO STOP GUN VIOLENCE, <https://efsgv.org/learn/policies/stand-your-ground-laws> [<https://perma.cc/7RTW-RQYH>].

⁷⁰ Marissa Edmund, *Gun Violence Disproportionately and Overwhelmingly Hurts Communities of Color*, CTR. FOR AM. PROGRESS (June 30, 2022), <https://www.americanprogress.org/article/gun-violence-disproportionately-and-overwhelmingly-hurts-communities-of-color> [<https://perma.cc/8FTP-9DUZ>] (noting that Black Americans made up 12.5% of the U.S. population but 61% of gun homicide victims in 2020).

⁷¹ See Victoria Bell, *The “White” to Bear Arms: How Immunity Provisions in Stand Your Ground Statutes Lead to an Unequal Application of the Law for Black Gun Owners*, 46 *FORDHAM URB. L.J.* 902, 924–27 (2019) (“While [Stand-Your-Ground] statutes provide a presumption of reasonable fear for shooters in self-defense altercations, in actuality, there is a presumption that black shooters are inherently unreasonable.”).

⁷² See Ruben, *supra* note 44, at 543 (“Data has consistently shown that Black people are more likely to be misperceived as a threat than white people.”).

⁷³ See Kamran, *supra* note 31, at 508 n.207 (“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.”).

⁷⁴ Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 *HARV. L. REV. F.* 449, 456 (2022).

Given these realities, when the Supreme Court declares that there is a constitutional right to armed self-defense in public, it openly embraces and promotes a culture that privileges white men's ability to terrorize and kill those they perceive as threats.⁷⁵ Of course, Stand Your Ground laws and permissive gun carry laws increase death and injury to white men as well,⁷⁶ because the carnage unleashed by a fundamentalist gun culture is ultimately uncontrollable. But the fact that white men suffer from optimism bias⁷⁷ when it comes to who will kill and who will be killed in any given confrontation does not change the commitments of the necropolitical Second Amendment project. The Supreme Court has given constitutional legitimacy to the division of Americans into sovereign gunbearers and others, allowing the sovereign white male's "perception of the existence of the Other as an attempt on my life, as a mortal threat or absolute danger whose biophysical elimination would strengthen my potential to life and security"⁷⁸ to structure society itself.⁷⁹

This racially- and gender-coded agenda explains the confidence exemplified repeatedly by Donald Trump when he famously stated that he could "stand in the middle of Fifth Avenue and shoot somebody" and not lose a single vote,⁸⁰ when he bragged about being able to commit sexual assault with impunity,⁸¹ when he explained his enthusiasm for guns being taken away from people in "Chicago,"⁸² or when he allegedly

⁷⁵ See Blocher & Siegel, *supra* note 58, at 158–59 ("Remarking on racial dynamics in the history of American vigilantism, Lindsay Livingston has observed, 'Brandishing a gun, as a performance of belonging, is an exceptionalism afforded to only a very specific subset of US Americans.'" (quoting Lindsay Livingston, *Brandishing Guns: Performing Race and Belonging in the American West*, 17 J. VISUAL CULTURE 343, 352 (2018))).

⁷⁶ Chandler B. McClellan & Erdal Tekin, *Stand Your Ground Laws, Homicides, and Injuries* (Nat'l Bureau of Econ. Rsch., Working Paper No. 18187, 2012), <https://www.nber.org/papers/w18187.pdf> [<https://perma.cc/AWJ2-S6QM>] (describing the effect stand your ground laws have on homicides of white males).

⁷⁷ See Joseph M. Pierre, *The Psychology of Guns: Risk, Fear, and Motivated Reasoning*, PALGRAVE COMM'NS 3 (2019), <https://doi.org/10.1057/s41599-019-0373-z> [<https://perma.cc/9TE6-3WXF>] (explaining optimism bias).

⁷⁸ Mbembe, *supra* note 8, at 18.

⁷⁹ See Kamran, *supra* note 31, at 508 ("These inequities developed throughout the history of gun ownership in the United States, where legal gun use is only associated with white, male citizenship. Gun ownership and white masculinity are mutually constitutive throughout U.S. history.")

⁸⁰ Colin Dwyer, *Donald Trump: 'I Could . . . Shoot Somebody, And I Wouldn't Lose Any Voters'*, NPR (Jan. 23, 2016), <https://www.npr.org/sections/thetwo-way/2016/01/23/464129029/donald-trump-i-could-shoot-somebody-and-i-wouldnt-lose-any-voters> [<https://perma.cc/L4VM-TWSK>].

⁸¹ *Transcript: Donald Trump's Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html> [<https://perma.cc/C3JB-QXAZ>].

⁸² Nolan D. McCaskill, *Trump Clarifies Stop-and-Frisk: I Only Meant Chicago*, POLITICO (Sept. 22, 2016), <https://www.politico.com/story/2016/09/trump-stop-and-frisk-only-chicago-228516> [<https://perma.cc/CR3D-7VB2>].

stated, as armed supporters arrived at the Capitol on January 6, 2020, “I don’t . . . care that they have weapons, . . . they’re not here to hurt me.”⁸³ That same barely-disguised gender and racial coding, along with an additional dose of classism, appears in the *Bruen* opinion, with Justice Thomas supporting his assertion that “[m]any Americans hazard greater danger outside the home than in it” with the following quote from a 2012 case: “[A] Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower.”⁸⁴ It is indeed probably true that a male Chicagoan able to afford a luxury condominium in Park Tower is unlikely to be attacked there; the same cannot be so confidently said of a female Chicagoan who might share that home. And if the Chicagoan carrying a gun in a “rough neighborhood” is Black, he will have to contend with the likelihood that being armed will be perceived as reasonable suspicion that he is committing a crime or presents a threat to the public, which could in turn result in being stopped and brutalized by law enforcement.⁸⁵

According to the conservative majority of the Supreme Court, the only constitutional firearms regulations are those “consistent with this Nation’s historical tradition of firearm regulation.”⁸⁶ The New York law at issue in *Bruen*, which established a proper cause requirement for the public carrying of firearms, dates back to 1905.⁸⁷ However, the Court warned, “not all history is created equal,” and “[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*.”⁸⁸ This could plausibly mean when the Second Amendment was enacted (1791); when the Fourteenth Amendment, creating constitutional obligations for the states, was enacted (1868); or when the Second Amendment was incorporated against the states (2010). In any event, the Court’s invalidation of a law that had been in effect for more than one hundred years indicates that a firearm regulation would have to be very long indeed to be considered part of the nation’s historical tradition.

⁸³ Jonathan Allen, ‘They’re Not Here to Hurt Me’: Former Aide Says Trump Knew Jan. 6 Crowd Was Armed, NBC NEWS (June 29, 2022), <https://www.nbcnews.com/politics/congress/jan-6-panel-looks-trump-white-house-cassidy-hutchinson-testimony-rcna35550> [https://perma.cc/P2MZ-G9NH].

⁸⁴ N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2135 (2022).

⁸⁵ See Kamran, *supra* note 31, at 495–96 (noting the view that “doubling down on the right to bear arms—a right derived from the mold of white, male supremacy—and allowing more and more people to bear guns is a recipe for more Black death”).

⁸⁶ *Bruen*, 142 S. Ct. at 2126.

⁸⁷ *Id.* at 2122.

⁸⁸ *Id.* at 2136 (emphasis added).

It would also, it seems, have to be a regulation that does not restrict the ability of domestic abusers to possess weapons. In *United States v. Rahimi*, the Fifth Circuit ruled that court orders prohibiting alleged domestic abusers from owning guns violate the Second Amendment.⁸⁹ The court reasoned that because such regulation did not exist in the eighteenth century, it could not be considered part of a historical tradition of firearms regulation.⁹⁰ It is true enough that domestic abusers were not punished in the eighteenth century—indeed, under the common law principle of coverture, men were legally entitled to give their wives “moderate correction.”⁹¹ It was not until fairly late in the twentieth century that domestic violence was broadly recognized as a crime,⁹² and later still before legal interventions such as prohibitions on gun ownership emerged.⁹³ The Fifth Circuit’s utter indifference to how its ruling will affect domestic violence victims is chilling. Eliminating the ability to disarm abusers means that more women will die, and even more will live in terror: “[A]n abuser’s access to guns makes it five times more likely that a woman will be killed. More than half of intimate partner homicides are committed with guns. An American woman is shot and killed by an intimate partner every 14 hours.”⁹⁴ Abusers also endanger the public as a whole: more than half of all mass shootings between 2014 and 2019 were connected to domestic abuse, and nearly two-thirds of mass shooters have a history of intimate partner violence.⁹⁵ As Mark Stern writes, “The 5th Circuit has arguably followed *Bruen* to its lethal, logical conclusion. If the Supreme Court truly meant what it said, then Americans today have no power to disarm those men who are most likely to murder their wives, girlfriends, and children.”⁹⁶

The impact of *Bruen* is to turn the entire world into a white man’s castle, where white men’s perceptions of threat determine who is allowed to live and who must die, and where women, nonwhite men, and

⁸⁹ *United States v. Rahimi*, No. 21-11001, *24 (5th Cir. Mar. 8, 2022) (holding that a regulation is invalid because it is inconsistent with the Nation’s historical tradition of firearm regulation).

⁹⁰ *Id.*

⁹¹ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 432 (1765).

⁹² See Richard Johnson, *Changing Attitudes About Domestic Violence*, L. & ORD., April 2002, at 60, 64 (describing how state legislatures began to criminalize domestic violence).

⁹³ See Stacie J. Osborn, *Preventing Intimate Partner Homicide: A Call for Cooperative Federalism for Common Sense Gun Safety Policies*, 66 LOY. L. REV. 235, 248 (2020) (explaining federal legislation prohibiting people convicted of domestic violence from owning guns).

⁹⁴ Mark Joseph Stern, *5th Circuit Rules That People Accused of Domestic Violence Have a Right to Keep Their Guns*, SLATE (Feb. 2, 2023), <https://slate.com/news-and-politics/2023/02/5th-circuit-court-domestic-violence-second-amendment-right.html> [https://perma.cc/P5LS-RYCV].

⁹⁵ *Id.*

⁹⁶ *Id.*

other vulnerable populations are held captive to the fear and rage of those at the top of the racial patriarchy.

II

NO HOME FOR WOMEN

A. “*These Lesser Sacrifices*”: *Buck v. Bell* and the Truth of *Roe*

In the wake of *Dobbs*, calls for Congress to “codify *Roe vs. Wade*” have become commonplace among pro-choice advocates.⁹⁷ While the sentiment is understandable, the demand is at best misleading and at worst misguided. To the extent that a federal statute would provide the same protection as *Roe* itself, it would almost certainly be struck down by the same Supreme Court majority that delivered *Dobbs*.⁹⁸ More fundamentally, *Roe* is a fundamentally flawed decision that, contrary to popular belief and despite the limited protections for abortion it provided, directly paved the way for *Dobbs*. *Roe* made the mistake of framing the right against forced birth as a right of privacy instead of a right to bodily integrity. *Roe* treated the right as a conditional one that necessarily becomes subject, at some point, to the countervailing interests of the government: “this right is not unqualified and must be considered against important state interests in regulation.”⁹⁹

In support of its assertion that “[t]he pregnant woman cannot be isolated in her privacy,”¹⁰⁰ the *Roe* majority cited two cases, *Jacobson v. Massachusetts* (1905) and *Buck v. Bell* (1927), though without elaborating on their details or directly explaining their significance to the right to abortion.¹⁰¹ In *Jacobson*, the Court ruled that it was constitutionally permissible for the government to mandate the smallpox vaccine, reasoning that “[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of

⁹⁷ See, e.g., Elie Mystal, *Democrats Should Use This Moment to Codify Roe v. Wade*, THE NATION (Nov. 15, 2022), <https://www.thenation.com/article/politics/codifying-roe-wade-challenges> [<https://perma.cc/K464-CGGZ>]; Joseph Choi, *Senators Reintroduce Bipartisan Bill to Codify Roe*, THE HILL, (Feb. 9, 2023), <https://thehill.com/homenews/3851564-senators-reintroduce-bipartisan-bill-to-codify-roe> [<https://perma.cc/3PM8-U3RM>] (highlighting legislators’ attempts to codify *Roe v. Wade*).

⁹⁸ Victoria Nourse, Opinion, *Why Codifying Roe Will Land Right Back at the Supreme Court*, CNN (June 30, 2022), <https://www.cnn.com/2022/06/30/opinions/codifying-roe-scotus-abortion-nourse/index.html> [<https://perma.cc/486K-VC5V>].

⁹⁹ *Roe v. Wade*, 410 U.S. 113, 154 (1973).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 154 (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) and *Buck v. Bell*, 274 U.S. 200, 47 (1927)).

the injury that may be done to others.”¹⁰² This is a well-expressed and powerful point, but its relevance to *Roe* is hardly clear. Terminating a pregnancy inflicts no injury on “others;” it is an act that is entirely contained within the pregnant woman’s own body. Even if the *Roe* majority regarded an unborn fetus as a person (which it claimed not to do),¹⁰³ the consideration of injury would surely go both ways: a fetus’s “liberty” must also be restricted in light of the injury it may do to the pregnant woman.

The reference to *Buck v. Bell*, on the other hand, is extremely illuminating. It is one of the most infamous Supreme Court decisions of all time,¹⁰⁴ and arguably the most infamous decision never to have been overruled. The Court found no constitutional issue with the forcible sterilization of a teenage girl who had been impregnated through rape and was deemed “mentally retarded” and “promiscuous.” Writing for the majority, Justice Oliver Wendell Holmes declared,

It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.¹⁰⁵

At first blush, it seems exceedingly odd that a decision establishing the right to choose abortion cites a decision praising forced sterilization. But that is because while *Roe* does establish a limited right to an abortion, it also establishes the right of the state to force women to give birth under certain circumstances.¹⁰⁶ The citation to *Buck* thus makes sense, because *Buck* establishes the right of the state to force women to be sterilized under certain circumstances. Forcing a woman to give birth against her will and sterilizing a woman against her will are two sides

¹⁰² *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

¹⁰³ *Roe*, 410 U.S. at 158 (“[T]hroughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”).

¹⁰⁴ See Corinna Barrett Lain, *Three Supreme Court “Failures” and a Story of Supreme Court Success*, 69 VAND. L. REV. 1019, 1032 (2016).

¹⁰⁵ *Buck v. Bell*, 274 U.S. 200, 207 (1927) (citation omitted).

¹⁰⁶ *Roe*, 410 U.S. at 150 (“In assessing the State’s interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.”).

of the same coin. Both are “lesser sacrifices” that women are obligated to make when the government decides it is in the women’s, or society’s, best interest.

If the test of a constitutional right is whether the government is allowed to demand a demonstration of a special need for its exercise, as *Bruen* implies, then the right against enforced pregnancy was at best always a “second-class right.” *Roe* and *Casey* granted the physician, not the pregnant woman herself, true authority over the abortion decision;¹⁰⁷ restrictions on minors’ access to abortion literally requires them to demonstrate special needs to parents or judges; and past the point of viability, *Roe* and *Casey* allowed the government to reject any special need short of a direct threat to the mother’s life.

The 1987 case of Angela Carder demonstrated how, long before *Dobbs* and with *Roe* in place, women were treated as though their lives were secondary to the “potential life” inside their bodies.¹⁰⁸ When Carder was intubated and sedated at 26 weeks pregnant due to her ongoing battle with cancer, the hospital treating her demanded the right to perform an emergency Cesarean over the objections of her parents.¹⁰⁹ The court ordered the surgery on the grounds that “the fetus should be given the opportunity to live.”¹¹⁰ Within two hours of the surgery, the baby had died, and within two days Carder died as well.¹¹¹ As reproductive rights scholar Dorothy Roberts succinctly described the lesson of Carder’s fate, “if you’re pregnant, they can kill you.”¹¹²

B. *Dobbs: Depriving Women of the Right to Life*

The Supreme Court in *Dobbs*, of course, stripped away even the paltry protections of *Roe* and *Casey*. In stark contrast to its expansive view of self-defense in *Bruen*, the conservative majority held that the Constitution provides women no right against forced pregnancy or childbirth, even if they will die from it.¹¹³ Eugene Volokh writes that

¹⁰⁷ *Id.* at 163 (“[F]or the period of pregnancy prior to this ‘compelling’ point, the attending physician, in consultation with his patient, is free to determine without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated.”).

¹⁰⁸ *In re A.C.*, 573 A.2d 1235, 1238 (D.C. 1990).

¹⁰⁹ Jodie Tillman, *A Dying Woman’s Forced C-Section Launched a Fight over Fetal Rights*, WASH. POST (Aug. 21, 2022), <https://www.washingtonpost.com/history/2022/08/21/angela-carder-fetal-rights-cancer> [<https://perma.cc/V9SM-N74Z>].

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Irin Carmon, *Dorothy Roberts Tried to Warn Us*, INTELLIGENCER (Sept. 6, 2022), <https://nymag.com/intelligencer/2022/09/dorothy-roberts-tried-to-warn-us.html> [<https://perma.cc/6C3Y-6VCU>].

¹¹³ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

“[l]ethal self-defense and abortion-as-self-defense share a moral core: the principle that people should generally be free to defend themselves against that which is threatening their lives,”¹¹⁴ which makes the Court’s extreme defense of one and denigration of the other seem at best hypocritical and at worst malicious. While it is possible, in Volokh’s view, to “support gun bans and yet oppose restrictions on self-defense that is far less dangerous to third parties, such as the use of lifesaving medical procedures,” it is much more difficult “to justify the opposite position, at which our legal system has arrived: that people should be free to own guns for lethal self-defense, but not free to engage in medical self-defense,” including abortion.¹¹⁵

Pregnancy by its very nature presents the threat of serious bodily injury and death to the pregnant woman.¹¹⁶ An unwanted pregnancy subjects a woman to the nonconsensual use of her body, a use that entails—even in healthy and wanted pregnancies—serious physical risk.¹¹⁷ As the dissent noted in *Dobbs*,

an American woman is 14 times more likely to die by carrying a pregnancy to term than by having an abortion Pregnancies continue to have enormous physical, social, and economic consequences. Even an uncomplicated pregnancy imposes significant strain on the body, unavoidably involving significant physiological change and excruciating pain. For some women, pregnancy and childbirth can mean life-altering physical ailments or even death.¹¹⁸

Women who have given birth are at increased risk of diabetes, stroke, heart disease, and hypertension.¹¹⁹ Even these statistics do not fully capture the threat that pregnancy poses to women, as they do not include the psychological and physical harms inflicted by abusive partners or family members in the wake of pregnancy, or the deadly means many women and girls turn to when safe, affordable, and legal abortion is not available.¹²⁰

¹¹⁴ Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1825–26 (2007).

¹¹⁵ *Id.* at 1823.

¹¹⁶ *Pregnancy Complications*, CTRES. FOR DISEASE CONTROL & PREVENTION (Feb. 8, 2023) [hereinafter CDC], <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-complications.html> [<https://perma.cc/X9NP-NN22>].

¹¹⁷ *Id.*

¹¹⁸ *Dobbs*, 142 S. Ct. at 2328.

¹¹⁹ CDC, *supra* note 116.

¹²⁰ See *Dobbs*, 142 S. Ct. at 2345 (“It is a history of women seeking illegal abortions in hotel rooms and home kitchens; of women trying to self-induce abortions by douching with bleach, injecting lye, and penetrating themselves with knitting needles, scissors, and coat hangers.”).

The risk of grave injury and death is especially acute for Black women, who “are now three to four times more likely to die during or after childbirth than white women, often from preventable causes.”¹²¹ In a revealing statement, Louisiana Senator Bill Cassidy suggested that his state’s abysmal maternal mortality rates look much better if one simply doesn’t count the deaths of Black women: “About a third of our population is African American; African Americans have a higher incidence of maternal mortality. So, if you correct our population for race, we’re not as much of an outlier as it’d otherwise appear.”¹²²

C. *Death-World*

A little more than two months into her much-wanted pregnancy, Texas resident Marlena Stell was given the heartbreaking news that she had suffered a miscarriage.¹²³ The fetus no longer had a heartbeat, and Stell asked her doctor to perform a dilation and curettage, or “D&C,” a standard procedure to remove fetal material from the uterus to avoid infection and other medical complications.¹²⁴ But because the procedure is also used during abortions, Stell’s doctor feared running afoul of Texas’s draconian abortion restrictions.¹²⁵ Stell was informed that she would have to provide additional evidence to show that her pregnancy was not viable before she could have the procedure.¹²⁶ Stell was forced to carry her dead fetus for two weeks.¹²⁷ “I felt like a walking coffin,” she said, fighting through tears.¹²⁸ “You’re just walking around knowing that you have something that you hoped was going to be a baby for you, and it’s gone. And you’re just walking around carrying it.”¹²⁹

Mbembe uses the term “death-worlds” to describe “new and unique forms of social existence in which vast populations are subjected to conditions of life conferring upon them the status of the *living dead*.”¹³⁰ The dissenters in *Dobbs* describe in detail how the majority decision means

¹²¹ *Id.* at 2339.

¹²² Sarah Owerhohle, *Why Louisiana’s Maternal Mortality Rates Are So High*, POLITICO (May 19, 2022), <https://www.politico.com/news/2022/05/19/why-louisianas-maternal-mortality-rates-are-so-high-00033832> [https://perma.cc/PW6R-UQAJ].

¹²³ Timothy Bella, *Woman Says She Carried Dead Fetus for 2 Weeks After Texas Abortion Ban*, WASH. POST (July 20, 2022), <https://www.washingtonpost.com/politics/2022/07/20/abortion-miscarriage-texas-fetus-stell> [https://perma.cc/BL7U-S8C6].

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Mbembe, *supra* note 8, at 40.

a death sentence for some women, and a hollowed-out existence for others, that echoes Mbembe's description of death-worlds:

As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare. Some women, especially women of means, will find ways around the State's assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all.¹³¹

The *Dobbs* decision will lead to deaths, not just of women and girls denied abortions, but of providers and supporters of abortion by extremists emboldened by the decision.¹³² It will also consign many women and girls to death-worlds of lives beyond their control, to an existence explicitly valued less than men's, to homes and workplaces and public spaces where they can never feel safe, valued, or seen. And it will be able to do all of this simply because six members of the Supreme Court have decided that true sovereignty belongs only to those who were considered sovereign by the drafters of the Constitution and of the Fourteenth Amendment. As the dissenters bluntly and sorrowfully note,

“people” did not ratify the Fourteenth Amendment. Men did. . . . Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase “We the People.” . . . Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that

¹³¹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2318–19 (2022).

¹³² See generally Jamie Gumbrecht, *Abortion Clinics Saw an Increase in Violence and Threats Since 2022, Report Says*, CNN (May 11, 2023), <https://www.cnn.com/2023/05/11/health/abortion-clinic-violence-report/index.html> [<https://perma.cc/EQC4-WAR6>]; see also Aaron Bolton, *Clinics Offering Abortions Face a Rise in Threats, Violence, and Legal Battles*, NPR (Apr. 7, 2023), <https://www.npr.org/sections/health-shots/2023/04/07/1168547810/clinics-offering-abortions-face-a-rise-in-threats-violence-and-legal-battles> [<https://perma.cc/VC44-SC68>].

we may also check it against the Dark Ages), it consigns women to second-class citizenship.¹³³

Far from consulting the Constitution as a charter for the protection of unalienable rights for all people, the conservative majority in *Dobbs* used the Constitution as a tool for forcibly returning the country to a state of brutal racial patriarchy.

CONCLUSION

In *Bruen*, the extremist right-wing majority of the Supreme Court expanded the right to protect oneself in the home as the right to kill anywhere one goes. Because of the racialized and gendered history of gun use, this is a right that will disproportionately empower white men to terrorize and execute others based on little more than subjective fears. That the Supreme Court announced that women have no constitutional right not to be injured or killed by an actual threat contained in their own bodies the very day after it waxed poetic about the constitutional right to engage in armed anticipatory self-defense against anyone, anywhere underscores Adam Serwer's observation that the cruelty of radical conservative extremism is, indeed, the point.¹³⁴ While the conservative majority may pay lip service in both decisions to protecting the rights of the vulnerable, those who are "[m]ost vulnerable in this new legal landscape will be people who have limited access to resources and services and inadequate protection against violence, especially those living in overburdened communities — primarily young, low-income women from historically marginalized racial or ethnic groups."¹³⁵ The questions that philosopher Judith Butler posed nearly two decades ago while grappling with the consequences of gendered dehumanization resonate here:

Certain humans are recognized as less than human, and that form of qualified recognition does not lead to a viable life. Certain humans are not recognized as human at all, and that leads to yet another order of unlivable life If I am a certain gender, will I still be regarded as part of the human? If I desire in certain ways, will I be able to live?

¹³³ *Dobbs*, 142 S. Ct. at 2324–25.

¹³⁴ Adam Serwer, *The Cruelty Is the Point*, ATLANTIC (Oct. 3, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104> [https://perma.cc/LHN8-BCCB] (arguing that cruelty plays a central role in the policies of Donald Trump and his allies).

¹³⁵ Elizabeth Tobin-Tyler, *A Grim New Reality—Intimate-Partner Violence after Dobbs and Bruen*, NEW ENG. J. MED. (Oct. 6, 2022), <https://www.nejm.org/doi/full/10.1056/NEJMp2209696> [https://perma.cc/8WFB-UCGD].

Will there be a place for my life, and will it be recognizable to the others upon whom I depend for social existence?¹³⁶

The dissenters in *Dobbs* aptly described the majority's decision as "its own loaded weapon." The *Bruen* and *Dobbs* decisions do not merely ignore Justice Robert Jackson's 1949 warning against converting the Bill of Rights into a suicide pact.¹³⁷ By simultaneously expanding white men's right to kill and constricting women's right not to die, this Court has turned the Constitution into a homicide pact as well.

¹³⁶ JUDITH BUTLER, UNDOING GENDER 2–3 (2004).

¹³⁷ *Terminiello v. Chicago* 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").