

# When it Happens Here: Reproductive Autonomy, Fascism, and Dobbs V. Jackson Women's Health Organization

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# WHEN IT HAPPENS HERE: REPRODUCTIVE AUTONOMY, FASCISM, AND *DOBBS V. JACKSON* WOMEN'S HEALTH ORGANIZATION

Robin Maril\*

*Within six months after the U.S. Supreme Court's decision in Dobbs v. Jackson Women's Health Organization, nineteen states passed laws prohibiting abortion within the first trimester. The most restrictive laws banned abortion entirely, except to save the life of the person giving birth. The Court's eager abdication of its role in protecting individual liberty under the 14th amendment marks a grim chapter in the life cycle of American democracy. The Dobbs decision, along with the political environment that demanded the repeal of Roe v. Wade, promises to severely limit the role of women in public life. The specter of forced pregnancy threatens women's full citizenship and the sustained stability of American democracy.*

*This article argues that the threat to women's bodily autonomy is not simply a feminist problem, but rather a democracy problem. The speed and consistency with which state legislatures have moved to restrict the rights and lives of women have placed America on the cusp of a democratic crisis. We need to be willing to name this crisis and adopt a clear-eyed, united response founded in a framework of democratic self-defense. The second half of the 20th century offered our country a profound "glimpse of freedom" that the Founders could not have envisioned. However, this freedom is the result of the liberatory democratic structure they designed. History teaches us that robbing women of their autonomy will move us further away from a fully functioning and effective democracy. History also guarantees us that it will not be the last step.*

*This article proceeds in three parts. Part I outlines the characteristics of fascist regimes and the social and political environments that contribute to their growth. Part II situates the Dobbs decision within a broader historical understanding of the use of patriarchy and gender*

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\*Assistant Professor of Law, Willamette University College of Law. I would like to thank Laura Appleman and Nancy Knauer for their comments on earlier drafts, as well as Edwina Gantzer Barajas for her outstanding research and editing assistance. See generally SINCLAIR LEWIS, *IT CAN'T HAPPEN HERE* (1935) (The title of this article is a reference to the 1935 political novel *It Can't Happen Here*, which is a cautionary tale about the potential threat of fascism in the United States).

*subordination by fascistic regimes, with a special emphasis on the current American socio-political reality. Part III concludes that the present democratic crisis demands a robust democratic self-defense, specifically the deployment of an integrated model that is rooted in decreasing social, political, and economic inequality while fostering education and engagement.*

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## INTRODUCTION

In the first six months after the United States Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*,<sup>1</sup> nineteen states passed laws prohibiting abortion within the first trimester.<sup>2</sup> The most restrictive laws banned abortion entirely except to save the life of the person giving birth.<sup>3</sup> Beyond the weight of the individual

1. *See generally* *Dobbs v. Jackson Women’s Health Org.* 142 S. Ct. 2228 (2022).

2. As of August 15, 2023, fourteen states have enforceable laws prohibiting abortion in its entirety. *See After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state/> (last visited Aug. 17, 2023). The enforceability of another seven states’ total and first-trimester bans are currently pending litigation. *See id.*; *see also Abortion Regulations by State*, BALLOTPEDIA, [https://ballotpedia.org/Abortion\\_regulations\\_by\\_state](https://ballotpedia.org/Abortion_regulations_by_state) (last visited Aug. 17, 2023) (Containing a timeline of state legislative and judicial action regarding abortion post-Roe).

3. For the harshest abortion laws being enforced as of January 30, 2023, with no exceptions for serious health complications or pregnancy as a result of rape or incest,

physical and emotional cost of forced pregnancy, the Court's eager abdication of its role in protecting individual liberty under the Fourteenth Amendment marks a grim chapter in the life cycle of American democracy.<sup>4</sup>

The technological advances in reproductive healthcare that began in the 1960s profoundly impacted the American democratic infrastructure. This “reproductive technology shock” propelled the advancement of women across public life.<sup>5</sup> It contributed to the expansion of gender roles, transforming the social and economic lives of both men and women.<sup>6</sup> The changes brought about by this reproductive technology shock share significant parallels to the impact of the industrial revolution on class roles at the turn of the last century.<sup>7</sup> Both of these historic moments of social and political change—expanding egalitarianism, equality, and mobility—were marked by technological advancements that opened the door for new roles and

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see, for example, ARK. CODE ANN. § 5-61-304 (2022) (“except to save the life of a pregnant woman in a medical emergency”); S.D. CODIFIED LAWS § 22-17-5.1 (2022) (“unless there is appropriate and reasonable medical judgment that performance of an abortion is necessary to preserve the life of the pregnant female”); OKLA STAT. tit. 63, §1-731.4 (2022) (“except to save the life of a pregnant woman in a medical emergency”). For current abortion bans in effect and those blocked by legal challenges, see *Tracking Abortion Bans Across the Country*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> (last updated Aug. 2, 2023, 11:00 A.M.).

4. See David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 8 (1999) (acknowledging how the Court stepped into the role of protecting individual rights post-World War II).

5. George A. Akerlof & Janet L. Yellen, Commentary, *New Mothers, Not Married: Technology Shock, the Demise of Shotgun Marriage, and the Increase in Out-of-Wedlock Births*, BROOKINGS INST. (Sept. 1, 1996), <https://www.brookings.edu/articles/new-mothers-not-married-technology-shock-the-demise-of-shotgun-marriage-and-the-increase-in-out-of-wedlock-births/?eType=EmailBlastContent&eld=97aa70fa-df19-4955-bc5e-455e49b18852>. But see Ashley McGuire, *Janet Yellen's Surprisingly Traditional Views About Family Breakdown*, INST. FOR FAM. STUD. (Dec. 8, 2020), <https://ifstudies.org/blog/janet-yellens-surprisingly-traditional-views-about-family-breakdown> (critiquing Yellen's views as conservative and traditional).

6. See ANNA BERNSTEIN & KELLY M. JONES, INST. FOR WOMEN'S POL'Y RSCH., *THE ECONOMIC EFFECTS OF CONTRACEPTIVE ACCESS: A REVIEW OF EVIDENCE 5* (2019); ADAM SONFIELD ET AL., GUTTMACHER INST., *THE SOCIAL AND ECONOMIC BENEFITS OF WOMEN'S ABILITY TO DETERMINE WHETHER AND WHEN TO HAVE CHILDREN 10, 18–20* (Haley Ball ed., 2013).

7. See Yellen & Akerlof, *supra* note 5; Eric Niiler, *How the Second Industrial Revolution Changed Americans' Lives*, HIST. (Jan. 25, 2019), <https://www.history.com/news/second-industrial-revolution-advances>.

the abolition of stifling, ancient social hierarchies.<sup>8</sup> Both also were met with protests or “revolutions against the revolution.”<sup>9</sup>

The politicization of patriarchal retrenchment in response to expanding gender equality is a classic autocratic tool honed by fascists for more than a century.<sup>10</sup> It has also defined the American right’s response to the reproductive technology shock that was concretized by affirming Supreme Court rulings, such as *Griswold v. Connecticut*<sup>11</sup> and *Roe v. Wade*.<sup>12</sup> The *Dobbs* decision, along with the political environment that demanded the repeal of *Roe*, promises to severely limit the role of women in public life both socially and politically. The specter of forced pregnancy threatens women’s full citizenship and the sustained stability of American democracy. The *Dobbs* decision and the values it represents invites exploitation by ideological authoritarians at every level of government to explore similarly undemocratic solutions to complex social and political problems.<sup>13</sup>

This article proceeds in three parts. Part I outlines the characteristics of fascistic regimes and the social and political environments that contribute to their organic growth both historically and today. Part II situates the *Dobbs* decision within a broader historical understanding of the use of patriarchy and gender subordination by fascistic regimes, with a special emphasis on the current American sociopolitical reality. Part III concludes that the present democratic crisis demands the exercise of democratic self-defense, specifically the deployment of an integrated model that is rooted in decreasing social,

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8. See Philip Hannaford & Toni Belfield, *The Contraceptive Revolution: Some Excellent Progress But Work Still to be Done*, 59 BRIT. J. GEN. PRAC. 4, 5 (2009); Niiler, *supra* note 7.

9. See, e.g., Daniel K. Williams, *From Anti-Contraceptive Campaigns to Fetal Rights: The Pro-Life Movement’s Attempt to Separate Itself from the Politics of Birth Control*, 34 U.S. CATH. HISTORIAN 77, 77–78, 90–92 (2016) (describing religious movements and changing messages against birth control and abortion); Unsung History, *The Rise of the Labor Movement & Employer Resistance in the Late 19th Century* (Dec. 5, 2022), <https://www.unsunghistorypodcast.com/labor-movement/#transcript>.

10. See Erica Chenoweth & Zoe Marks, *Revenge of the Patriarchs: Why Autocrats Fear Women*, 101 FOREIGN AFFS. 103, 103 (2022).

11. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965).

12. See generally *Roe v. Wade*, 510 U.S. 113 (1973).

13. For a discussion of current Bills being proposed in 2023 legislation sessions targeting the ability for transgender people to access health care, see Hannah Schoenbaum, *Republican States Aim to Restrict Transgender Health Care in First Bills of 2023*, PBS (Jan. 7, 2023, 2:36 PM), <https://www.pbs.org/newshour/politics/republican-states-aim-to-restrict-transgender-health-care-in-first-bills-of-2023> (citing researcher Erin Reed’s insight that adult medical transition bans were a “hypothetical escalation” until recently).

political, and economic inequality and fostering education and engagement.

### I. FASCISM 2023: EVERYTHING OLD IS NEW AGAIN

In a nighttime speech in September 2022, President Joe Biden strode to the podium, framed by the lights of Philadelphia's Independence Hall.<sup>14</sup> With less than two months before the midterm elections, the nation was emerging from a summer colored by the Supreme Court decision overturning *Roe v. Wade*,<sup>15</sup> rising inflation and gas prices,<sup>16</sup> and a new COVID variant driving up infection rates.<sup>17</sup> Looking past the sea of reporters and straight into the camera President Biden explicitly recognized the growing political and cultural divides stating:

[A]s I stand here tonight, equality and democracy are under assault. We do ourselves no favor to pretend otherwise . . . . MAGA Republicans do not respect the Constitution. They do not believe in the rule of law. They do not recognize the will of the people . . . . They promote authoritarian leaders, and they fan the flames of political violence that are a threat to our personal rights, to the pursuit of justice, to the rule of law, to the very soul of this country.<sup>18</sup>

This speech came just five days after the President had described the MAGA philosophy behind the movement as "semi-fascist."<sup>19</sup>

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14. For the significance of the selection of Independence Hall for President Biden's speech, see Gillian Brockwell, *A Brief History of Independence Hall, Site of Biden Speech*, THE WASH. POST (Sept. 1, 2022), <https://www.washingtonpost.com/history/2022/09/01/independence-hall-biden-history/>.

15. See Elena Schneider & Holly Otterbein, *'The Central Issue': How the Fall of Roe v. Wade Shook the 2022 Election*, POLITICO (Dec. 19, 2022, 4:30 A.M.), <https://www.politico.com/news/2022/12/19/dobbs-2022-election-abortion-00074426>.

16. See Scott Horsley, *No Retreat in the Summer Heat. Inflation Blistering at 9.1% in June*, NPR, (July 13, 2022, 8:39 AM), <https://www.npr.org/2022/07/13/1111070073/no-retreat-in-the-summer-heat-prices-likely-topped-40-year-high-last-month>.

17. See Rob Garver, *As COVID-19 Cases Rise, New Variant Poses Major Challenge*, VOA NEWS (July 8, 2022, 2:51 A.M.), <https://www.voanews.com/a/as-covid-19-cases-rise-new-variant-poses-major-challenge-/6650129.html>.

18. President Joseph Biden, Remarks by President Biden on the Continued Battle for the Soul of the Nation (Sept. 1, 2022) (transcript available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/01/remarks-by-president-biden-on-the-continued-battle-for-the-soul-of-the-nation/>).

19. See President Joseph Biden, Remarks by President Biden at a Reception for the Democratic National Committee (Aug. 25, 2022) (transcript available at

Prefacing his statement with “semi” did little to blunt the shockwaves of the President’s characterization of the far right’s approach to governance as potentially fascistic. However, for many Americans who have borne the brunt of the Right’s heightened demand for restrictive and exclusionary social norms and policies there was a sense of recognition, albeit horrifying, in its naming. Far right factions have successfully mainstreamed a radical, exclusionary agenda, transforming standard partisan conflicts into ideological warfare. In a post-January sixth political reality, the prevalence of armed citizens groups raiding public libraries and gay bars also belies new threats of a willingness to use force or violence.<sup>20</sup> Aside from the predictable partisan responses to Biden’s Independence Hall speech, the public and the media demanded a deeper understanding of fascism—semi or not—and how accurately it describes the growing “MAGA philosophy.”<sup>21</sup>

This section explores the effort to define fascism as a governmental phenomenon and the historical social, cultural, and political factors contributing to its rise in the twentieth century. This section endeavors not only to identify the role of fascism as a component of dictatorial regimes, but also to identify the characteristics of fascistic tools of governance. This section explores the risks associated with the willingness by some American leaders to embrace similar tools and the long-term impact on the health of American democracy.

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<https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/08/26/remarks-by-president-biden-at-a-reception-for-the-democratic-national-committee-3/>).

20. See, e.g., Steven Monacelli, *Texan Parents Face Down Proud Boys at Library Pride Event*, THE REAL NEWS NETWORK (June 29, 2022), <https://therealnews.com/texan-parents-face-down-proud-boys-at-library-pride-event> (noting similar armed protester entering a library in Sparks, Nevada); Brandon Tensley, *Proud Boys Crashed Drag Queen Story Hour at a Local Library. It was Part of a Wider Movement*, CNN (July 21, 2022), <https://www.cnn.com/2022/07/21/us/drag-lgbtq-rights-race-deconstructed-newsletter-reaaj/index.html>; Matt Lavietes, *2021 was Supposed to be the ‘Worst Year’ for LGBTQ Rights - Then Came 2022*, NBC (Dec. 29, 2022, 12:37 PM), <https://www.nbcnews.com/nbc-out/out-news/2021-was-supposed-worst-year-lgbtq-rights-came-2022-rcna63334>.

21. Compare Tom Mockaitis, *Biden was Right: MAGA Ideology is Fascism*, THE HILL (Sept. 2, 2022, 12:14 P.M.), <https://thehill.com/opinion/white-house/3625814-biden-was-right-maga-ideology-is-fascism/>, with Henry Olsen, *No, MAGA Republicans do not Support “Semi-Fascism”*, THE WASHINGTON POST (Aug. 26, 2022, 4:45 P.M.), <https://www.washingtonpost.com/opinions/2022/08/26/semi-fascism-biden-maga-gop/>.

### A. The Challenge of Definition

The academic exercise of defining modern fascism has occupied scholars and political activists for well over a century.<sup>22</sup> The linguistic distillation of the inherently visceral nature of fascism is undoubtedly an evolving challenge. Despite the inherent limitations of concrete definitions,<sup>23</sup> establishing recognizable, yet fluid, parameters within which to understand fascism is essential. It is impossible to craft a meaningful and effective response without a shared understanding of the scope of the problem on its most elemental level.<sup>24</sup>

As the depth of the depravity and human destruction of World War II became clear, the global community struggled to understand what led modern society to accept the war's mechanization of death.<sup>25</sup> The work of political science and legal scholars after the war reflect the incredulous horror of the period, as well as an academic need to

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22. See ROGER GRIFFIN, *FASCISM: AN INTRODUCTION TO COMPARATIVE FASCIST STUDIES* 27 (2018); PAUL MASON, *HOW TO STOP FASCISM: HISTORY, IDEOLOGY, RESISTANCE* 130 (2022) (“The first people who tried to make sense of fascism were its victims: the Italian socialists whose offices Mussolini’s squads were trashing.”).

23. See MASON, *supra* note 22, at 171 (“[D]efinitions are not explanations. And checklists cannot capture cause and effect.”)

24. See generally LEON TROTSKY, *FASCISM: WHAT IT IS AND HOW TO FIGHT IT* (Pathfinder Press, Inc. 1969) (describing the character and origins of fascist movements); Catherine Lutz, *Madeleine Albright on How to Fight Fascism*, ASPEN INST. (Aug. 13, 2018), <https://www.aspeninstitute.org/blog-posts/madeleine-albright-how-to-fight-fascism/> (“It’s important to understand the historical context of what gave rise to those leaders, nearly all of whom came to power legally . . . .”); Zoltán Ádám et al, *How to Keep the Lights On in Democracies: An Open Letter of Concern by Scholars of Authoritarianism*, THE NEW FASCISM SYLLABUS (Oct. 31, 2020), <http://newfascismsyllabus.com/news-and-announcements/an-open-letter-of-concern-by-scholars-of-authoritarianism/> (“We study the conditions that have historically accompanied the rise of authoritarian and fascist regimes. In nearly every case, we have observed how profound social, political, and economic disruptions, including the ravages of military conflicts, depressions, and the enormous pressures caused by globalization, deeply shook people’s confidence in democracy’s ability to adequately respond to their plights, or even provide basic forms of long-term security.”); Jenn Chávez, *What Protectors of Democracy can Learn from the History of Italian Fascism*, OPB (Nov. 12, 2020, 9:30 AM), <https://www.opb.org/article/2020/11/12/what-protectors-of-democracy-can-learn-from-the-history-of-italian-fascism/> (“Over 200 international scholars of authoritarianism signed an open letter of concern about the global state of democracy, before and after the 2020 U.S. presidential election.”).

25. See Neil Halloran, *The Fallen of World War II*, VIMEO (May 20, 2015), <https://vimeo.com/128373915>; Margaret MacMillan, *Rebuilding the World After the Second World War*, THE GUARDIAN (Sept. 11, 2009, 7:05 AM), <https://www.theguardian.com/world/2009/sep/11/second-world-war-rebuilding>.



categorize the irrational and make sense of the senseless.<sup>26</sup> Many writers positioned the war's horrors, including the rise of the authoritarian regimes, as a historic anomaly.<sup>27</sup> Their urge to isolate this political, legal landscape unfortunately reflected the wishful thinking of a war-scarred generation. Even today, scholars consistently resist the invitation to declare individual leaders "fascists," instead focusing study and attention on the use of fascistic tools and violence to undermine democracies.<sup>28</sup>

As scholars sought to confine fascists to a particular historical period, Left-leaning activists and pundits, on the other hand, seemed to see fascists everywhere. By the middle of the twentieth century, the term "fascist" had been adopted by the Left as a "political swearword" designed to malign conservative policies and their Right-leaning advocates.<sup>29</sup> British cultural theorist Stuart Hall characterized the willingness to embrace the rhetoric as a matter of convenience, concluding that "[t]here is a sense in which the appearance of organized Fascism on the political stage seems to solve everything for the Left. It confirms our best-worst suspicions, awakening familiar ghosts and spectres."<sup>30</sup> Increasingly, the Right has also labeled its opponents and their policies as "fascist." This haphazard, partisan, and pejorative use of the term dilutes its genuine power. It also paradoxically allows counter-villainization of anti-fascist movements by the Right and the media.<sup>31</sup> The characterization of fascism as a policy stance or partisan

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26. For example, historian Yehuda Bauer grappled with how to teach and explain the Holocaust and avoid its mystification stating that the "event is of such a tremendous magnitude that an ordinary person's mind is incapable of absorbing it." Yehuda Bauer, *THE HOLOCAUST IN HISTORICAL PERSPECTIVE* 30, 47 (1978) ("[T]he Holocaust was an actual occurrence in our century. It was not the product of an inexplicable fate or of a supernatural intervention, but one logical, possible outcome of European history.").

27. See Victoria de Grazia, *What We Don't Understand About Fascism*, ZOCALO PUB. SQUARE (Aug. 13, 2020), <https://www.zocalopublicsquare.org/2020/08/13/understand-fascism-american-history-mussolini-hitler-20th-century/ideas/essay/>.

28. See, e.g., Dylan Matthews, *Is Trump a Fascist? 8 Experts Weigh in*, VOX (Oct. 23, 2020, 12:00 PM), <https://www.vox.com/policy-and-politics/21521958/what-is-fascism-signs-donald-trump>.

29. See George Lavan Weissman, *Introduction to LEON TROTSKY, FASCISM: WHAT IT IS AND HOW TO FIGHT IT 3* (Pathfinder Press, Inc., 1969) ("They fling it around as an epithet or political swearword against right-wing figures whom they particularly despise, or against reactionaries in general."); see also de Grazia, *supra* note 27; Matthews, *supra* note 28.

30. Stuart Hall, *The Great Moving Right Show*, MARXISM TODAY 14, 15 (1979).

31. See, e.g., Bob Heleringer, Opinion, *The Term Fascist Should Have Been Buried with the Evil Movement's Leaders*, COURIER J. (Dec. 5, 2019, 6:15 AM), <https://www.courier-journal.com/story/opinion/2019/12/05/term-fascist->

affectation within the greater marketplace of ideas also ignores the real and present danger that fascism poses to democratic governance and individual freedoms. In contrast to partisan policy planks, fascism is concerned with power and control rather than influencing a substantive debate.<sup>32</sup>

## B. A Functional Approach

In the 1930s, anti-Nazi writers endeavored to sound the alarm bell and warn Germans of the potential danger by drawing on lessons from the Italian experience.<sup>33</sup> The rapid and seemingly frictionless rise of the National Socialist Party in Germany was facilitated by the dismissive attitude of mainstream German politics and the willful ignorance of its opponents.<sup>34</sup> Nearly a hundred years later, ultra-nationalist far right movements are rising world-wide, presenting a similar educational moment for a clear-eyed evaluation of our political and cultural realities.<sup>35</sup> This evaluation should include recognizing our current national vulnerability to accept easy, fascistic solutions to complex crises.<sup>36</sup> American exceptionalism does not provide immunity from the acceptance of potentially authoritarian regimes, as belied by the American flirtation with fascism in the 1930s.<sup>37</sup> We only need

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should-have-been-buried-hitler-mussolini/2602275001/; Eric Tucker, Associated Press, *What is ANTIFA? A Look at the Movement Trump is Blaming for Violence at Protests*, PBS (June 1, 2020, 7:15 PM), <https://www.pbs.org/newshour/nation/what-is-antifa-a-look-at-the-movement-trump-is-blaming-for-violence-at-protests>.

32. See Sean Illing, *How Fascism Works: A Yale Philosopher on Fascism, Truth, and Donald Trump*, Vox, <https://www.vox.com/2018/9/19/17847110/how-fascism-works-donald-trump-jason-stanley> (updated Dec. 15, 2018, 11:06 AM) (explaining “fascism as a method of politics”).

33. See, e.g., LEON TROTSKY, *FOR A WORKERS' UNITED FRONT AGAINST FASCISM* (1931), <https://www.marxists.org/archive/trotsky/germany/1931/311208.htm>.

34. See generally LEON TROTSKY, *THE STRUGGLE AGAINST FASCISM IN GERMANY* (George Breitman & Merry Maisel eds., 1971) (discussing the rise of facism in Germany).

35. See generally CASSIE MILLER & RACHEL CARROLL RIVAS, S. POVERTY L. CTR., *THE YEAR IN HATE & EXTREMISM 2021* (2022), [https://www.splcenter.org/sites/default/files/splc-2021-year-in-hate-extremism-report.pdf?utm\\_source=web](https://www.splcenter.org/sites/default/files/splc-2021-year-in-hate-extremism-report.pdf?utm_source=web) (“The storming of the U.S. Capitol on Jan. 6 exposed an alarming reality: that extremist leaders can mobilize large groups of Americans to use force and intimidation to impose their political will.”).

36. See Ed Pilkington, *'The US Can Still Become a Fascist Country': Frances Fox Piven's Midterms Postmortem*, GUARDIAN (Nov. 24, 2022, 3:00 PM), <https://www.theguardian.com/us-news/2022/nov/24/frances-fox-piven-interview-midterms-trump-fascism>.

37. See Seva Gunitsky, *These are the Three Reasons Fascism Spread in 1930s America – and Might Spread Again Today*, WASH. POST (Aug. 12, 2017, 6:00 PM) <https://www.washingtonpost.com/news/monkey-cage/wp/2017>

to look to our historic acceptance of the force of law to promote racial discrimination<sup>38</sup> and enforce traditional, exclusionary gender roles<sup>39</sup> to expose the systemic fallibility of American democracy.<sup>40</sup>

This article uses the term fascism as a descriptor of a collection of political tools that disregard individual freedom in favor of ultranationalism to achieve power, including through morally rationalized extralegal violence. It distinguishes fascism as structurally and substantively unique from a corrupting ideology reserved for historical madmen and from the school yard name calling of short-sighted punditry.<sup>41</sup> This functional approach is informed by the analytical evolution of the understanding of fascism as a product within the context of modern political realities and focuses on the use of fascistic tools, as opposed to the narrower understanding as the rise of a single individual or dictatorial regime.<sup>42</sup> The goal is to produce an understanding of fascism that transcends its persistent reinvention. As Toni Morrison warned in her 1995 address at Howard University discussing the intersection of racism and fascism in America,

racism may wear a new dress, buy a new pair of boots, but neither it nor its succubus twin fascism is new or can make anything new. It can only reproduce the environment that supports its own health: fear, denial and an atmosphere in which its victims have lost the will to fight.<sup>43</sup>

The recurring human and political appeal of fascism can be traced to the creation and promotion of a shared national interest in reversing recent social progress or trends in favor of “traditional”

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/08/12/these-are-the-three-reasons-that-fascism-spread-in-1930s-america-and-might-spread-again-today/.

38. See Alex Ross, *How American Racism Influenced Hitler*, THE NEW YORKER (Apr. 23, 2018) <https://www.newyorker.com/magazine/2018/04/30/how-american-racism-influenced-hitler> (discussing American race, immigration, and Native American policies as an influence for Germany’s policies that effectuated the Holocaust and the “eastern expansion” into Poland).

39. See generally *Uncurrent Events: A History of Women’s Economic Rights*, FRASER (Mar. 21, 2018), <https://fraser.stlouisfed.org/blog/2018/03/a-history-of-womens-economic-rights/>.

40. See generally ANTHONY R. DiMAGGIO, *RIISING FASCISM IN AMERICA: IT CAN HAPPEN HERE* (2021) (exploring how rising fascism has infiltrated United States’ politics).

41. See Sheri Berman, *Three Faces of Fascism*, 21 WORLD POL’Y J., 95, 95, 99 (2004).

42. See Illing, *supra* note 32.

43. Toni Morrison, *Racism and Fascism*, 64 J. NEGRO EDUC. 384, 385 (1995).

values.<sup>44</sup> Achieving this goal then becomes embedded in national identity, with the adoption of regressive policies central to national welfare. As Robert Paxton has succinctly summarized:

Fascism may be defined as a form of political behavior marked by obsessive preoccupation with community decline, humiliation, or victimhood and by compensatory cults of unity, energy, and purity, in which a mass-based party of committed nationalist militants, working in an uneasy but effective collaboration with traditional elites, abandons democratic liberties and pursues with redemptive violence and without ethical or legal restraints[,] goals of internal cleansing and external expansion.<sup>45</sup>

### C. Creating a Culture of Fear

Fear is the primitive and inextinguishable core that feeds the acceptance and eventual embrace of fascistic regimes.<sup>46</sup> Universal expansion of personal freedom and individual dignity necessitates rejecting structures of oppression, such as white supremacy, misogyny, and homophobia, and in turn, reimagining human relationships across society. This movement demands a measure of societal and personal elasticity, which can spark feelings of insecurity and fear. Individuals who are thriving—or who perceive themselves to be thriving—within existing structures of oppression are inherently invested in retaining them.<sup>47</sup> This investment triggers a backlash or a ‘revolution against the revolution.’<sup>48</sup> Fascism itself is the fear-based response to witnessing new freedoms, or “the practical resistance to transcendence.”<sup>49</sup>

Right-leaning parties and factions have historically characterized increasing freedoms and individual dignity for previously

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44. See Robert Soucy, *Fascism: Social Bases of Fascist Movement*, BRITANNICA, <https://www.britannica.com/topic/fascism/Intellectual-origins> (last updated Aug. 25, 2023).

45. ROBERT O. PAXTON, *THE ANATOMY OF FASCISM* 218 (2004).

46. See JASON STANLEY, *HOW FASCISM WORKS: THE POLITICS OF US AND THEM* 55 (2018) (quoting 2018 Interview with Steve Bannon and 1925 Italian fascist article).

47. See *id.* at xxxi.

48. See PAUL MASON, *HOW TO STOP FASCISM: HISTORY, IDEOLOGY, RESISTANCE* 189 (2021).

49. *Id.* at 170 (quoting ERNST NOLTE, *THREE FACES OF FASCISM: ACTION FRANÇAISE, ITALIAN FASCISM, NATIONAL SOCIALISM* 23 (1966)).

marginalized people, including women,<sup>50</sup> people of color,<sup>51</sup> and LGBTQ people<sup>52</sup> as symptoms of dangerous societal disintegration.<sup>53</sup> Stoked by growing uncertainty, majority populations invested in the status quo become increasingly wary of the freedoms that are characterized as contributing to a threatened social disintegration. Even if individuals stand to personally benefit from expanding freedoms, the fear of a new society can be greater than the promise of increased individual dignity.<sup>54</sup>

#### D. Demonization of Modernity and the Great Mythic Past

The fear generated by this perceived disintegration can fuel a powerful quasi-religious conviction in regressive policies that are designed to both restrict the dangerous new freedoms and to restore an idealized vision of the past.<sup>55</sup> This misguided backward glance is intensified when the disintegration challenges the core of the “traditional” social order, for example when women can not only vote, but can file sexual harassment claims against employers, when children are not only prohibited from working long hours, but have a right to attend schools that are racially desegregated, when gay couples are not just decriminalized, but can marry.<sup>56</sup> The traditional social and democratic safeguards designed to foster peaceful coexistence across diverse communities not only begin to fray, but they are seen to be in direct conflict with the welfare of the nation.<sup>57</sup> Fascistic governance

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50. See S. Res. 82, 1935 Leg., 62nd Sess. (Wis. 1935) (describing the employment of women as the “calling card for disintegration of family life”). The Resolution also stated: “The large number of husbands and wives working for the state raises a serious moral question, as this committee feels that the practice of birth control is encouraged, and the selfishness that arises from the income of employment of husband and wife bids fair to break down civilization and a healthy atmosphere . . .” See *id.*

51. See, e.g., Robert L. Fleeger, *Theodore G. Bilbo and the Decline of Public Racism, 1938-1947*, 68 J. MISS. HIST. 1, 9 (2006) (“It is essential to the perpetuation of our Anglo-Saxon civilization . . . that white supremacy be maintained, and to maintain our civilization there is only one solution, and that is either by segregation within the United States, or by deportation of the entire Negro race . . .” (quoting 83 CONG. REC. S. 881 (1938) (statement of Gov. Theodore G. Bilbo))).

52. See generally *VoteYesonProp8, Yes on 8 TV Ad: It's Already Happened*, YOUTUBE (Oct. 8, 2008), <https://www.youtube.com/watch?v=0PgcgqFYP4>.

53. See JEAN HARDISTY, *MOBILIZING RESENTMENT: CONSERVATIVE RESURGENCE FROM THE JOHN BIRCH SOCIETY TO THE PROMISE KEEPERS 97-98* (2000).

54. See MASON, *supra* note 48, at 170.

55. See *id.*

56. See *id.*

57. See, e.g., Joan Marshall Wesley, *Foregrounding the “War on Women”: Right-Wing Conservatism and Progressive Policies*, 20 RACE, GENDER & CLASS 40, 40-41

relies on the dehumanization of entire populations in the context of a nationalized goal characterized by a drive to eviscerate the freedoms that have come to define those populations.<sup>58</sup>

This demonization of modernity results in a correlative veneration of a nonmodern ideal that has been described as the “great mythic past.”<sup>59</sup> This mythic past serves at least two purposes as a fascistic tool. It funnels blame for the nation’s problems away from the leadership failures of the powerful and towards newly developed freedom-based ideologies and their beneficiaries.<sup>60</sup> It also provides an accessible blueprint to respond to systemic problems facing governments, such as crime, inflation, and climate change.<sup>61</sup> A return to the social, legal, and political infrastructure in place during the mythic past promises to stop disintegration and make possible the development of a modern nation that embraces past traditions and hierarchies.

Elimination of the individuals, ideals, or freedoms that contributed to supposed disintegration is essential to implementing this plan.<sup>62</sup> The desired “historical reset” offers individuals and communities struggling to navigate an increasingly complex, expensive, and polarized world a comforting salve for their compounding fears.<sup>63</sup> Although nations cannot turn back the clock, the goal of fascistic regimes has always been to “recreate the past within the present, following the example of past communities.”<sup>64</sup> Lead Nazi propagandist Joseph

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(2013) (discussing how ideologies advance contested policies that undermine women’s rights).

58. See STANLEY, *supra* note 46, at xxix–xxx.

59. See *id.* at 3–23; see also Benito Mussolini, Speech in Naples (Oct. 24, 1922) (transcript available at <https://bibliotecafascista.blogspot.com/search?q=speech+in+naples>); BERNARD MEES, *THE SCIENCE OF THE SWASTIKA* 115 (2008) (describing German reliance on ancient Germanic myths).

60. See Annelien De Dijn, ‘Freedom’ Means Something Different to Liberals and Conservatives. Here’s How the Definition Split—And Why That Still Matters, *TIME* (Aug. 25, 2020 1:00 P.M.), <https://time.com/5882978/freedom-definition-history/>.

61. See *id.*

62. See JACK Z. BRATICH, *ON MICROFASCISM: GENDER, WAR, AND DEATH* 9 (2022) (“Eliminationism refers to a ‘politics and a culture that shuns dialogue and the democratic exchange of ideas in favor of the pursuit of outright elimination of the opposing side, either through suppression, exile, and ejection, or extermination.’ Fascist power defines its opposition as the embodiment of evil itself, unfit for participation in their vision of society and thus worthy of elimination.” (citing DAVID NEIWERT, *ALT-AMERICA: THE RISE OF THE RADICAL RIGHT IN THE AGE OF TRUMP* 11 (2017))).

63. See De Dijn, *supra* note 60.

64. Johann Chapoutot, *How the Nazis Viewed History: The Time of Nature and the Abolition of History*, 117 *VINGTIÈME SIÈCLE. REVUE D’HISTOIRE* 43, 45 (2013) (providing a robust analysis of the Nazi party’s interest in pre-1789 social and political structure).

Goebbels promised in 1933 that if his party's campaign was successful, they would reinvent the country based on ancient Germanic structures before the influence of Marxism, feminism, liberalism, and other markers of modern social progress.<sup>65</sup> He concluded that the Nazi's would, in effect, "erase 1789 [the year of the French Revolution] from history."<sup>66</sup>

### III. FASCISM, MALE SUPREMACY, AND REPRODUCTIVE AUTONOMY

The historical reset and rebirth of an ideal society are founded on a unifying acceptance of the primacy of a traditional, patriarchal family structure.<sup>67</sup> Authoritarian regimes invariably exploit pre-existing patriarchal power disparities as a foundational gateway towards expanding social control and narrowing acceptable expressions of individuality, dignity, and freedom.<sup>68</sup> Within fascistic or authoritarian regimes, this desired "return" to patriarchy and gender roles often imagines gender roles and family structures that are much more restrictive than the lived experiences of the past.<sup>69</sup> This "return" can lead to heightened male supremacy and resulting sexual and reproductive restrictions beyond actual historic levels.<sup>70</sup> Nontraditional family structures, gender roles, or sexual activities all become undesirable because they are framed as contributing to the disintegration of the social fabric.<sup>71</sup>

Indeed, the belief in—or at least acquiescence to—patriarchy can prime an individual's mind for fascism. Externally, patriarchy and its accompanying gender policing and sexual repression can foster a form of public control that is self-enforcing and compounding.<sup>72</sup> Empowering the public to enforce concrete patriarchal norms feeds an

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65. *See id.* at 44–45.

66. *See id.* at 44.

67. *See, e.g., id.* (The historical reset of Nazi Germany, for example, was founded on a return to more restrictive gender norms and patriarchal control over family.).

68. *See, e.g.,* CAROL GILLIGAN & DAVID A.J. RICHARDS, DARKNESS NOW VISIBLE (2018) (arguing that President Trump's election shows the power and pretense of patriarchy in American society); CAROL GILLIGAN & DAVID A.J. RICHARDS, THE DEEPENING DARKNESS: PATRIARCHY, RESISTANCE & DEMOCRACY'S FUTURE 19 (2008) ("Gender stereotypes play a pivotal role in supporting not only sexual inequality and homophobia but also extreme religious intolerance and racial discrimination."); Chapoutot, *supra* note 64, at 44; BRATICH, *supra* note 62, at 57–59.

69. *See, e.g.,* STANLEY, *supra* note 46, at 6–14.

70. *See id.*

71. *See id.*; MASON, *supra* note 48, at 189.

72. *See* MASON, *supra* note 48, at 189–90.

acceptance of a hierarchy of ideas and the people who represent them. The deputized, conforming majority is also conveniently distracted by fulfilling and enforcing these gender norms, which moves more complex, less tangible societal problems further to the periphery.<sup>73</sup>

Nitasha Kaul has identified the use of misogynistic rhetoric by authoritarian regimes as a political strategy designed to, “silence democratic dissent and also simultaneously enact legislations or policies that challenge sexism, thereby delegitimizing the critics of misogyny by accusing them of overreacting to someone who has enacted anti-sexist policy.”<sup>74</sup> Kaul writes that this use of misogyny precludes any public calling out of claims of sexist or violent behavior and grants a sense of immunity from other investigations regarding undemocratic behavior or abuse of power.<sup>75</sup> Kaul concludes that

[t]he properly political domain of a democracy is rendered hollow and effectively anti-democratic by such misogynist authoritarians who construct a political project of achieving power in a democracy by recruiting their supporters who are enrolled into an understanding of, and commitment toward, authoritarian domination of the feminine and the feminized Others as being in itself the democratic exercise of power.<sup>76</sup>

This section addresses the compounding intersection of patriarchal and male supremacist ideology with fascism. This section also provides historic examples of the use of patriarchal systems by authoritarian regimes as a “gateway” tool towards fascistic control of individuals and the nation more broadly. Specifically, this section explores the deprivation of women’s reproductive autonomy by fascistic governments as a driving characteristic of nationalist, unifying policies.

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73. See, e.g., MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME 1: AN INTRODUCTION* (Robert Hurley trans., 1990).

74. Nitasha Kaul, *The Misogyny of Authoritarians in Contemporary Democracies*, 23 INT’L STUD. REV. 1619, 1635 (2021).

75. See *id.*

76. *Id.*



### A. Fascistic Regimes and Restrictive Reproductive Rights

Fascism and patriarchy share a common root – the exercise of power through oppression.<sup>77</sup> Both systems are driven by the creation of hierarchies and the assignment of power and value within them.<sup>78</sup> Virginia Woolf addressed this connection explicitly in her 1938 anti-fascist pamphlet turned novella *Three Guineas*.<sup>79</sup> Woolf had expressed concern that Germany's regressive social policies regarding work, education, and family could easily transfer to Britain, unwinding the progress of the first decades of the century.<sup>80</sup> In one famous passage, Woolf reacts to a news story quoting a man arguing against women in the workforce. She warns that "There we have in embryo the creature, Dictator as we call him when he is Italian or German, who believes that he has the right, whether given by God, Nature, sex or race is immaterial, to dictate to other human beings how they live; what they shall do."<sup>81</sup> Woolf describes this patriarchal acolyte as "the voice[s] of Dictator[s]" evocative of Hitler and Mussolini.<sup>82</sup>

The increased weight of patriarchy and gender conformity also decreases the emphasis—or even the possibility for—individuality, which is sacrificed for the unifying well-being of the state. Once in place, regressive policies regarding women's employment and motherhood further cement and normalize male supremacy and bind women socially and physically to their prescribed gender roles.<sup>83</sup> Historically, authoritarian regimes mandate the surrender of reproductive autonomy – offering a tangible marker of women's abandonment of individual dignity and self-definition that the restoration of a great mythic past demands.<sup>84</sup> In some cases, such as Nazi Germany, this compulsory pregnancy and motherhood is fused with extreme entho-

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77. See Nancy Topping Bazin & Jane Hamovit Lauter, *Virginia Woolf's Keen Sensitivity to War*, in *VIRGINIA WOOLF AND WAR: FICTION, REALITY, AND MYTH* 14, 27 (Mark Hussey ed., 1991) (illustrating an interesting discussion of parallels between patriarchal repression of women's individual freedoms and the broader civilization's use of tyranny and violence).

78. See MASON, *supra* note 48, at 189–90.

79. See generally *VIRGINIA WOOLF, THREE GUINEAS* (1938).

80. See Bazin & Lauter, *supra* note 77, at 35–36.

81. WOOLF, *supra* note 79, at 50.

82. *Id.* at 51.

83. See *id.*

84. See Hanna Kozłowska, *Where Democracy Falters, So Do Reproductive Rights*, FOREIGN POL'Y (Mar. 16, 2022, 8:34 AM), <https://foreignpolicy.com/2022/03/16/where-democracy-falters-so-do-reproductive-rights/>.

nationalist policies.<sup>85</sup> Nazi policies promoting white, non-Jewish motherhood and domestic retrenchment were directly linked to eugenics and dominated by anti-semitic white supremacy.<sup>86</sup> Goebbels' promise of a return to ancient Germanic glory for the white non-Jewish population demanded complete governmental control of all women's reproductive lives, thereby limiting women's public life more broadly.<sup>87</sup> A director of a Nazi women's clinic declared "the nation's stock of the ovaries [is] a national resource and property of the German state."<sup>88</sup> Directly linking women's reproductive capacity with national health and welfare, these policies aggressively unwound the progress made towards women's economic and reproductive equality under the Weimar republic. The Nazis popularized a slogan first promoted by Kaiser Wilhelm in the late nineteenth century, "Kirche, Küche, Kinder" or church, kitchen, and family.<sup>89</sup> The "3 Ks of Germany" succinctly encapsulated the limiting Nazi vision for white, non-Jewish women's horizon.<sup>90</sup>

Beginning in the 1930s, the newly elected Nazi party adopted increasingly restrictive laws limiting access to abortion and contraception for white, non-Jewish Germans.<sup>91</sup> The Nazis reinstated pre-Weimar abortion penalties and created new and even more draconian restrictions.<sup>92</sup> By 1943, the German parliament amended paragraphs 218-220 of the Penal Code to include prison or penitentiary sentence for a woman who "kill[ed] her fetus or permits such a killing by another," as well as anyone providing an abortion.<sup>93</sup> The death penalty was imposed on re-offending abortion providers whom the law

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85. See *Women in The Third Reich*, HOLOCAUST ENCYCLOPEDIA, <https://encyclopedia.ushmm.org/content/en/article/women-in-the-third-reich> (last visited Aug. 21, 2023).

86. See *id.*

87. See *Joseph Goebbels on Women (1933)*, <https://alphahistory.com/nazigermany/joseph-goebbels-on-women/> (last visited Sept. 15, 2023).

88. Tessa Chelouche, *Doctors, Pregnancy, Childbirth and Abortion During the Third Reich*, 9 *ISR. MED. ASS'N J.* 202, 203 (2007).

89. See *Life in Nazi-Controlled Europe*, THE WEINER HOLOCAUST LIBR., <https://www.theholocaustexplained.org/life-in-nazi-occupied-europe/controlling-everyday-life/women/> (last visited Aug. 21, 2023).

90. See *id.*

91. See Jennifer Llewellyn et al., *Women in Nazi Germany*, ALPHA HIST. (Aug. 2, 2020), <https://alphahistory.com/nazigermany/women-in-nazi-germany/>; Charu Gupta, *Politics of Gender: Women in Nazi Germany*, 26 *ECON. & POL. WRLY.* 40, 41 (Apr. 27, 1991).

92. See Henry P. David et al., *Abortion and Eugenics in Nazi Germany*, 14 *POPULATION & DEV. REV.* 81, 90 (1988).

93. *Id.* at 97.

described as individuals who “continuously impair[] the vitality of the German Volk.”<sup>94</sup>

Although the Nazi’s seething ethno-nationalist family policies may have begun with the expansion of the non-Jewish German population through birth, these policies quickly adapted to the Nazi’s embrace of death to eliminate the Jewish and non-German populations. The Nazi government consistently used mandatory abortion as a genocidal tool throughout the Holocaust on both the individual and mass scale.<sup>95</sup> In the years immediately following Hitler’s election, Jews experienced social ostracization, economic boycotts, and legal abrogation.<sup>96</sup> German officials allowed Jewish women to continue accessing abortion and contraception that were otherwise restricted for German women.<sup>97</sup> The Nazi ideal German family and nation depended on fewer Jews, making access to abortion and contraception for Jewish and Slavic women a necessary response to the increasing “racial emergency.”<sup>98</sup> In the days after Kristallnacht in 1938, stripped of legal, social, and economic status Germany’s Jews were systematically deported to concentration camps. Within five years, mandated sterilization and abortions became a routine component of the Final Solution.<sup>99</sup>

In post-Armistice Day America, isolationist groups developed between the world wars, including Nazi apologist America First.<sup>100</sup> Other more established organizations, such as the Daughters of the

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94. *Id.*

95. Women in concentration camps considered fit for physical labor had abortions performed as opposed to being sent to immediate death. *See id.* at 100–01; *see also* Chelouche, *supra* note 88, at 204 (Several Jewish ghettos in 1942-1943 banned all births, resulting in “compulsory abortion.”).

96. *See When Did the Holocaust Begin? A Genesis of Genocide*, HAARETZ (Jan. 26, 2020), <https://www.haaretz.com/jewish/holocaust-remembrance-day/2020-01-26/ty-article/when-did-the-holocaust-begin/0000017f-f045-d8a1-a5ff-f0cf4c6d0000>.

97. *See* Chelouche, *supra* note 88, at 203.

98. Testimony from the Nuremberg trials that “they [those from Slavic countries] may use contraceptives or practice abortion, the more the better” reinforces the Nazi’s inconsistent approach to women’s rights. *See Women in The Third Reich*, *supra* note 85. In 1938 the German Supreme Court acquitted a Jewish couple, holding that paragraph 218 of the Penal Code did not apply to the protection of a fetus of Jewish parents. *See* Chelouche, *supra* note 88, at 204.

99. *See* David et al., *supra* note 92, at 91, 100–01.

100. *See* Susan Dunn, *Trump’s ‘America First’ Has Ugly Echoes from U.S. History*, CNN (Apr. 28, 2016, 8:02 AM), <https://www.cnn.com/2016/04/27/opinions/trump-america-first-ugly-echoes-dunn/index.html>.

American Revolution (DAR),<sup>101</sup> also adopted isolationist stances. These organizations became influential voices for a return to patriarchal family structures and limited roles for women at home and in public life. The DAR's particular devotion to genealogy and the primacy of white Anglo-Saxon ancestry coupled with its repulsion by the Russian Revolution made the group a willing messenger for the anti-liberal, patriarchal policies of an increasingly conservative American Right.<sup>102</sup> The DAR earned its moniker of the "Mothers of Fascism" through its staunch isolationist views, its racist and segregationist commitments, and its connection to Charles Lindbergh's America First.<sup>103</sup> For these groups and the wide swaths of Americans they represented, the threats of socialism and communism were compounded by other "un-American" beliefs and actions like pacifism, feminism, and modern sexual relationships.<sup>104</sup> America First, the DAR, and other conservative groups were committed to neutralizing the threats posed by modern, un-American ideas by returning women – and society – to a great American past.<sup>105</sup> Intensifying interwar anti-immigrant xenophobia fostered the elevation of childbirth and motherhood as the ultimate fulfillment of white, Christian women's American duty.<sup>106</sup> These efforts to ethno-nationalize women's reproductive lives intersected with an already robust American eugenics movement.

Throughout the first decades of the twentieth century, the American eugenics movement successfully promoted social categorization based on a brand of pseudo gene science with roots in xenophobia, white supremacy, and profound ableism. Championed by respected

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101. See *DAR History*, DAUGHTERS OF THE AM. REVOLUTION, <https://www.dar.org/national-society/about-dar/dar-history> (last visited Aug. 17, 2023) (stating that "National Society Daughters of the American Revolution was founded on October 11, 1890 . . .").

102. See Simon Wendt, *Defenders of Patriotism or Mothers of Fascism? The Daughters of the American Revolution, Antiradicalism, and Un-Americanism in the Interwar Period*, 47 J. AM. STUD. 943, 946–48, 959, 963 (2013).

103. See *McConnell Calls D.A.R. 'Mothers of Fascism'; Bishop Urges Women to Guard Liberties*, N.Y. TIMES, Mar. 16, 1939, at 8; Wendt, *supra* note 102, at 963.

104. See Wendt, *supra* note 102, at 949–50.

105. See *id.* at 953, 963; Laura McEnaney, *He-Men and Christian Mothers: The America First Movement and the Gendered Meanings of Patriotism and Isolationism*, 18 DIPLOMATIC HIST. 47, 53, 56 (1994).

106. See Wendt, *supra* note 102, at 951, 953.

doctors,<sup>107</sup> industry giants,<sup>108</sup> and Presidents,<sup>109</sup> this movement informed state policies sanctioning the involuntary sterilization of the nation's "undesirables."<sup>110</sup> These policies targeted people living with a disability or mental illness and those considered to be "feeble-minded."<sup>111</sup> The latter, broadly drawn category captured individuals who were not considered to have a physical disability or to be clinically mentally ill, but instead were deemed unfit because of "idiocy,"<sup>112</sup> "sexual promiscuity,"<sup>113</sup> "alcoholism,"<sup>114</sup> "pauperism," and "off-whiteness."<sup>115</sup> Black, indigenous, immigrant, and low-income women suffered disproportionately under these policies.<sup>116</sup>

After the bombing of Pearl Harbor, the political and social currency of the DAR and similar groups waned as isolationism became increasingly unpopular and impractical.<sup>117</sup> American interest and

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107. See Gervase Vernon, *Alexis Carrel: 'Father of Transplant Surgery' and Supporter of Eugenics*, 69 BRIT. J. GEN. PRAC. 352, 352 (2019).

108. See Nicholas Wu, *Trump Criticized for Praising 'Good Bloodlines' of Henry Ford, Who Promoted Anti-Semitism*, USA TODAY, <https://www.usatoday.com/story/news/politics/2020/05/22/trump-criticized-praising-bloodlines-henry-ford-anti-semite/5242361002/> (last updated May 22, 2020, 11:44 AM).

109. See Christopher Klein, *How Teddy Roosevelt's Belief in a Racial Hierarchy Shaped His Policies*, HIST. (Aug. 11, 2020), <https://www.history.com/news/teddy-roosevelt-race-imperialism-national-parks> (quoting Theodore Roosevelt: "Society has no business to permit degenerates to reproduce.").

110. See *Regulating Eugenics*, 121 HARV. L. REV. 1578, 1579 (citing FRANCIS GALTON, *INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT* 24 (1883)).

111. See *Buck v. Bell*, 274 U.S. 200, 205 (1927).

112. PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* 41 (2008).

113. See Walter L. Treadway, *The Feeble-Minded: Their Prevalence and Needs in the School Population of Arkansas*, 31 PUB. HEALTH REPS. 3231, 3234 (1916); Courtney Hutchison, *Sterilizing the Sick, Poor to Cut Welfare Costs: North Carolina's History of Eugenics*, ABC NEWS (July 17, 2011, 9:41 P.M.), <https://abcnews.go.com/Health/WomensHealth/sterilizing-sick-poor-cut-welfare-costs-north-carolinas/story?id=14093458>.

114. See Hutchison, *supra* note 113; INT'L EUGENICS CONG., *A DECADE OF PROGRESS IN EUGENICS: SCIENTIFIC PAPERS OF THE THIRD INTERNATIONAL CONGRESS OF EUGENICS* 501 (1934) (noting exhibit that demonstrated correlation between alcoholism and heredity).

115. See Anna Stubblefield, *"Beyond the Pale": Tainted Whiteness, Cognitive Disability, and Eugenic Sterilization*, 22 HYPATIA 162, 166, 169, 173-75 (2007).

116. See Hutchison, *supra* note 113; Lisa Ko, *Unwanted Sterilization and Eugenics Programs in the United States*, PBS (Jan. 29, 2016), <https://www.pbs.org/independentlens/blog/unwanted-sterilization-and-eugenics-programs-in-the-united-states/> (acknowledging that sterilizations without consent continued in larger numbers for immigrant and minority populations throughout the 1970's).

117. See Mark Loproto, *Pearl Harbor and the End of American Isolationism*, PEARL HARBOR (May 2, 2017), <https://pearlharbor.org/pearl-harbor-end-american->

broad acceptance of eugenics-informed policies also decreased as they became increasingly associated with the genocidal tools of Nazi Germany.<sup>118</sup> However, the regressive, patriarchal values and ethno-nationalization of reproductive autonomy continued to inform the platform of conservative political parties in the United States for decades.<sup>119</sup>

#### B. The “Reproductive Technology Shock” and the Appeal of Fascistic Tools

The historic authoritarian use of patriarchal, fear-based policy informs the strategic connection of anti-feminist politics to the regressive agenda marketed by far-Right demagogues in America today. The impact of America’s fractured economic system pushed to the breaking point by the Great Recession and marked by staggering income, credit, and opportunity inequality is coming home to roost.<sup>120</sup> In addition to economic disintegration, cable news provides daily reminders of the broader geopolitical “instability [of] the past decade.”<sup>121</sup> Within this powder keg, the global COVID-19 pandemic has entered its third year and the effects of climate change are increasingly harder to deny. The politicization of science in response to these intensifying public health crises has bred historic levels of distrust, polarization, and rampant acceptance of conspiracy theories.<sup>122</sup>

These are terrifying, complex realities that demand humble leadership, hard policy choices, and national soul searching. The far Right has offered an attractive time-worn alternative – braggadocious

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isolationism/ (quoting Theodore Roosevelt describing how isolationism was no longer an option after this day, “which will live in infamy”).

118. See generally VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS (2008) (discussing how the decline in eugenics occurred after realization of the large scale movement in Nazi Germany in the context of *Skinner v. Oklahoma*).

119. See, e.g., Kelly Lytle Hernández et al., *Introduction: Constructing the Carceral State*, 102 J. AM. HIST. 18, 22 (2015) (describing how “twentieth-century risk-assessment tools and sentencing guidelines” echo the eugenics movement).

120. See *Chart Book: Tracking the Recovery from the Pandemic Recession*, CTR. ON BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org/research/economy/tracking-the-recovery-from-the-pandemic-recession> (last updated Aug. 10, 2023).

121. Peter Turchin & Andrey Korotayev, *The 2010 Structural-Demographic Forecast for the 2010–2020 Decade: A Retrospective Assessment*, 15 PLoS ONE 1-14, 8-14 (2020).

122. See Robin Maril, *How Ron DeSantis is Emulating Vladimir Putin*, SLATE (Mar. 28, 2022, 6:48 P.M.), <https://slate.com/news-and-politics/2022/03/ron-desantis-vladimir-putin-dont-say-gay-bill.html>.

emperors with easy answers demanding reflexive regression.<sup>123</sup> The through line from modern male supremacist rhetoric and the co-occurring economic downturn to the retrenchment of restricted abortion and contraceptive access is as extreme as it is predictable. In 1996 Janet Yellen coined the term “reproductive technology shock” to describe the rapid development, acceptance, and legalization of contraception and abortion in the late 1960s and early 1970s.<sup>124</sup> Paul Mason links this reproductive technology shock, equal rights legislation, and the accompanying “reversal of male biological power” to an increased receptance of misogynistic rhetoric and policy solutions by men left unmoored by expanding gender roles.<sup>125</sup> For these men, Mason concludes that vitriolic anti-feminism became a “conduit for transmitting the theories and strategies of the alt-Right.”<sup>126</sup> Misogyny serves as a gateway to fascism.<sup>127</sup> After *Roe*, restricting access to these reproductive technological advances became an essential component in the American Right’s effort to return the country to an ideal mythic past defined by “traditional” family structures. As Mason concludes, “For Hitler and Mussolini, the return of women to their traditional childbearing role was a secondary objective. In our century, by contrast, hostility to women’s liberation has become as central to fascism as the narrative of ethnic supremacy.”<sup>128</sup>

Conservative America’s response to the reproductive technology shock and the expanding role of women in public life mirrors the conservative response to the French and industrial revolutions. In 1963 Ernst Nolte argued that these social and technological advancements – similar to Yellen’s reproductive technology shock – propelled human progress and made access to freedom and individual liberation a

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123. See, e.g., Zack Beauchamp, *How Hatred of Gay People Became a Key Plank in Hungary’s Authoritarian Turn*, Vox (June 28, 2021, 10:40 A.M.), <https://www.vox.com/22547228/hungary-orban-lgbt-law-pedophilia-authoritarian> (villainizing the LGBTQ community and Muslim refugees).

124. See Akerlof & Yellan, *supra* note 5 (“We have found that this sudden increase in the availability of both abortion and contraception—we call it a reproductive technology shock—is deeply implicated in the increase in out-of-wedlock births.”); George A. Akerlof et al., *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q.J. ECONOMICS 277, 279–81 (1996) (describing the use of abortion and contraception as a “technological shock”).

125. PAUL MASON, *CLEAR BRIGHT FUTURE: A RADICAL DEFENSE OF THE HUMAN BEING* 85 (2019).

126. *Id.*

127. See generally MASON, *supra* note 48 (explaining that racism is no longer the only gateway to modern fascism and violent misogyny serves as a co-equal gateway).

128. *Id.* at 223.

possibility for the first time.<sup>129</sup> Nolte argued that this “glimpse of freedom” served as a root cause of 20th century fascism as people within the former social hierarchy worked to recreate the “pre-revolutionary order of peasants, priests, and aristocrats.”<sup>130</sup> As Paul Mason summarizes Nolte’s foundational work *Fascism as Epoch*

[b]y the late nineteenth century . . . it looked like the reactionaries had lost . . . Those devoted to the ideals of absolute monarchy, eternal war and social hierarchy realized that if they didn’t stop human progress now, it would be too late. They began to mobilize and act . . . Fascism is resistance to social progress, and to the idea of liberation, by a group whose social position makes them scared of the prospect.<sup>131</sup>

Nolte’s articulation of the desperate mobilization of the anti-progressives of the late 19th century provides a chilling parallel to the repulsion of the American Right by women’s liberation in the second half of the 20th century. By separating individual women’s destinies from the irrationally haphazard dictates of biology, the reproductive technology shock revealed the democratic impact of women’s liberation for the first time in human history. This “glimpse of freedom” at women’s liberation accelerated societal progress including broader egalitarianism and greater equality.<sup>132</sup> But, as Laurie Penny has described, “[w]hen you’re accustomed to privilege, equality feels like oppression.”<sup>133</sup>

In the decades after *Roe*, conservative leaders successfully repackaged women’s equality as male oppression and the acceptance of women’s sexuality and expanding opportunities in public life as damaging to patriarchal family structures.<sup>134</sup> The Reagan Revolution of

129. See MASON, *supra* note 125, at 30 (2019) (discussing Janet Yellen).

130. MASON, *supra* note 48, at 169–70 (citing NOLTE, *supra* note 49).

131. *Id.* at 169–70. Note that Nolte became associated with Nazi apologist ideas later in their life, however, scholars still recognize the important contributions of this earlier work.

132. LAURIE PENNY, *SEXUAL REVOLUTION: MODERN FASCISM AND THE FEMINIST FIGHTBACK* xxi (2022).

133. *Id.* at 13 (quoting Franklin Leonard).

134. See Juliana Menasce Horowitz & Ruth Igielnik, *A Century After Women Gained the Right to Vote, Majority of Americans See Work to do on Gender Equality*, PEW RESEARCH CENTER (July 7, 2020), <https://www.pewresearch.org/social-trends/2020/07/07/a-century-after-women-gained-the-right-to-vote-majority-of-americans-see-work-to-do-on-gender-equality/> (“About three-in-ten men say women’s gains have come at the expense of men[.]”); see also LISA SUGIURA, *THE INCEL*



the 1980s ushered in the intentional incorporation of anti-feminist non-egalitarian governmental policies within the Republican party's platform as a response to a myriad of social and economic ills facing the country.<sup>135</sup> The Republican party's political agenda of the 1980s was directly informed by the economic and social transformation characterized by the sexual revolution and increased women's autonomy.<sup>136</sup> Efforts to bureaucratize "traditional" family values and gender roles permeated every level of the Reagan administration's policy agenda.<sup>137</sup> For example in an interdepartmental report published in 1986, the Reagan administration singled out social support programs, including welfare, childcare, food stamps, and subsidized school lunch, as threats to the "traditional" family.<sup>138</sup> The report also identified the "sexual revolution" and increased access to no-fault divorce as key contributors to the disintegration of the husband breadwinner/wife homemaker family ideal.<sup>139</sup> Four decades later, this relentless politicization of patriarchal rhetoric and male supremacy has done little to slow the advancement of women in the workforce or

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REBELLION: THE RISE OF THE MANOSPHERE AND THE VIRTUAL WAR AGAINST WOMEN 3, 23 (2021).

135. Responding to shrinking employment numbers, President Reagan countered in 1982 that "Part of unemployment is not as much the recession as it is the great increase of people going into the job market, and - ladies, I'm not picking on anyone but because of the increase of women who are working today and two-worker families and so forth." Question-and-Answer Session with President Ronald Reagan Following a White House Luncheon for Editors and Broadcasters from the Southeastern States (Apr. 16, 1982) (transcript available at <https://www.reaganlibrary.gov/archives/speech/question-and-answer-session-following-white-house-luncheon-editors-and-broadcasters>).

136. See generally Republican Nat'l Convention, *Republican Party Platform of 1980*, THE AM. PRESIDENCY PROJECT (July 15, 1980), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1980>.

137. Having run a "pro-family" campaign, which some commentators have characterized as blatantly anti-woman, President Reagan responded to the outcry for "protection" of the "traditional" family with the creation of the Office of Family Policy within the Department of Education. Its mission was to promote "pro-family" values—primarily respect for fathers and reinforcement of stereotypical gender roles within the home and in the marketplace. See SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR ON WOMEN* 74, 275 (1991) (describing the Office of Family Policy).

138. See WHITE HOUSE WORKING GRP. ON THE FAMILY, *THE FAMILY: PRESERVING AMERICA'S FUTURE: A REPORT TO THE PRESIDENT FROM THE WHITE HOUSE WORKING GROUP ON THE FAMILY* 15 (1986), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015028455072&view=1up&seq=5>.

139. See *id.* at 3 (illustrating which types of families are desirable pursuant to the "pro-family policy").

educational institutions.<sup>140</sup> However, its persistent incorporation within the Republican party platform and acceptance by mainstream media has normalized patriarchal retrenchment as a defensible tenor within partisan debate.<sup>141</sup>

These Reagan-era family policies also illustrate how centering traditional gender norms can be seen as essential to improving national welfare and forming the mythic ideal, both of which spur the demand for governmental policies that ensure uniform adoption of these norms. Conservative leaders united behind a discrete goal – restrict reproductive rights to reconstitute the traditional idea of the American family.<sup>142</sup> They out-organized and out-funded liberal, progressive supporters of women’s reproductive freedoms, strategically dismantling the ideological infrastructure of our nation’s federal court systems one district court judge and Presidential administration at a time.<sup>143</sup> This disarmingly bureaucratic,<sup>144</sup> quietly well-funded organizing culminated in the 2016 election of Donald Trump and the 2022 Supreme Court decision *Dobbs v. Jackson Women’s Health Organization*.<sup>145</sup>

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140. See generally A.W. Geiger & Kim Parker, *For Women’s History Month, a Look at Gender Gains – and Gaps – in the U.S.*, PEW RSCH. CTR. (Mar. 15, 2018), <https://www.pewresearch.org/fact-tank/2018/03/15/for-womens-history-month-a-look-at-gender-gains-and-gaps-in-the-u-s/> (offering findings about the gains and gaps of woman in the workforce).

141. See Alex DiBranco, *Before the Alt Right: Anita Hill and the Growth of Misogyny*, POL. RSCH. ASSOCS. (Aug. 13, 2018), <https://politicalresearch.org/2018/08/13/before-the-alt-right>; Kaul, *supra* note 74, at 1622–27.

142. See Donald Earl Collins, Opinion, *The Crooked Path from the ERA’s Failure to Roe’s End*, ALJAZZARA (Aug. 5, 2022), <https://www.aljazeera.com/opinions/2022/8/5/the-crooked-path-from-the-eras-failure-to-roes-end>.

143. See Stephanie Mencimer, *Anti-Abortion Activists Say Trump’s Court Picks Aren’t Extreme Enough*, MOTHER JONES (Jan. 13, 2017), <https://www.motherjones.com/politics/2017/01/anti-abortion-activists-reject-trump-high-court-picks/>.

144. For a detailed examination of the bureaucratic nature of reproductive rights repeal, see generally GLOB. JUST. CTR. & LEITNER CTR. FOR INT’L L. & JUST., *REPRODUCING PATRIARCHY: HOW THE TRUMP ADMINISTRATION HAS UNDERMINED WOMEN’S ACCESS TO REPRODUCTIVE HEALTH CARE* (2020), <https://www.leitner-center.org/news/New-Leitner-Center-Global-Justice-Center-Report-Reproducing-Patriarchy-How-the-Trump-Administration-has-Undermined-Women%E2%80%99s-Access-to-Reproductive-Health-Care/>.

145. See Mencimer, *supra* note 143.

C. *Dobbs v. Jackson Women's Health Organization*

*Dobbs v. Jackson Women's Health Center* overturned *Roe v. Wade* and nearly fifty years of constitutional jurisprudence that recognized and affirmed a right to abortion.<sup>146</sup> It also placed in question other precedents dealing with access to contraception and, some have conjectured that Justice Thomas's concurrence places a target on the Court's entire substantive due process jurisprudence.<sup>147</sup> In *Dobbs*, Mississippi's lone abortion provider, Jackson Women's Health Organization, challenged a 2018 state law that prohibited all abortions after fifteen weeks except "in a medical emergency or in the case of a severe fetal abnormality."<sup>148</sup> The clinic argued that the new law violated the constitutional right identified in *Roe* and later affirmed in *Casey v. Planned Parenthood*.<sup>149</sup> Throughout the litigation, the state of Mississippi never denied that the Mississippi law in question violated the rights preserved in *Roe* and *Casey*.<sup>150</sup> Rather, the state argued that *Roe* and *Casey* were incorrectly decided and were in violation of the state's right to restrict abortion.<sup>151</sup> Accordingly, the legitimacy of *Roe* and its progeny was squarely before the Court.

Writing for the majority, Justice Alito applied the analysis the Court used in the 1997 assisted suicide case *Washington v. Glucksberg*<sup>152</sup> to determine whether the right to abortion was protected as

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146. See *Dobbs v. Jackson Women's Health Center Organization: The Ruling*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/case/scotus-mississippi-abortion-ban/ruling-overturms-roe-v-wade/> (last visited Aug. 17, 2023) ("The ruling—issued June 24, 2022, abandons nearly 50 years of precedent and marks the first time in history that the Supreme Court has taken away a fundamental right.").

147. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2302–04 (2022) (Thomas, J., concurring).

148. Gestational Age Act, ch. 393, 2018 Miss. Laws 606, 609 (codified at Miss. CODE ANN. § 41–41–191 (2018)). At the time it was enacted, the Mississippi Gestation Age Act was the nation's most restrictive abortion law. See Jenny Gathright, *Mississippi Governor Signs Nation's Toughest Abortion Ban Into Law*, NPR (Mar. 19, 2018, 6:44 P.M.), <https://www.npr.org/sections/thetwo-way/2018/03/19/595045249/mississippi-governor-signs-nations-toughest-abortion-ban-into-law>.

149. See *Dobbs*, 142 U.S. at 2239 (2022).

150. See generally *id.*

151. From March 2018 to oral arguments in 2021 the Supreme Court experienced a tectonic political and ideological shift as the Senate confirmed a line of Trump-appointed Justices. Justices Kavanaugh and Barrett replaced Justices Kennedy and Ginsberg, both of whom expressed continued support for *Roe* and *Casey*. See *Current Members*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/biographies.aspx> (last visited Apr. 25, 2023).

152. See *Washington v. Glucksberg*, 521 U.S. 702 (1997).

an unenumerated fundamental right under the 14th amendment.<sup>153</sup> In *Glucksberg*, the Court introduced a standard limiting recognition of unenumerated fundamental rights to those that are “deeply rooted in our nation’s history and tradition” and “implicit in the concept of ordered liberty.”<sup>154</sup> Unsurprisingly, Justice Alito concluded that “[t]he right to abortion does not fall within this category.”<sup>155</sup> Driven by *Glucksberg*’s dependence on a narrow understanding of history and tradition, Justice Alito engaged in an extended analysis of abortion restrictions spanning multiple continents and eight centuries.<sup>156</sup> Alito’s sloggish characterization of this history as damning to the recognition of modern abortion rights was not only challenged by the dissenting Justices, but it sparked such a national guffaw that the cast of Saturday Night Live satirized the decision’s seeming reliance on practices from the fourteenth century after a draft version of the opinion was leaked in May 2022.<sup>157</sup>

Justice Alito further dismissed efforts by “defenders of *Roe* and *Casey*” to advocate for retention of Constitutional protections for abortion rights because of “changes in society.”<sup>158</sup> He concluded that the failure to produce “any new scientific learning” on the moral question of abortion is a fatal flaw undermining any arguments that “without the availability of abortion . . . people will be inhibited from exercising their freedom to choose the types of relationships they desire, and women will be unable to compete with men in the workplace and in other endeavors.”<sup>159</sup> He counters these compelling individual equality arguments by cataloging broader social changes prohibiting discrimination on the basis of pregnancy and the increasing adoption of “safe haven” laws.<sup>160</sup>

The majority’s refusal to recognize the continued national importance of the reproductive technology shock beyond the individual

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153. See *Dobbs*, 142 U.S. at 2242 (“The Due Process Clause of the Fourteenth Amendment . . . has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’” (quoting *Glucksberg*, 521 U.S. at 721)).

154. *Glucksberg*, 521 U.S. at 721.

155. See *Dobbs*, 142 U.S. at 2242.

156. See *id.* at 2247–54.

157. See *Roe v. Wade Cold Open – SNL*, YOUTUBE (May 7, 2022), <https://www.youtube.com/watch?v=mLMp-1NdzR8>.

158. See *Dobbs*, 142 U.S. at 2258.

159. *Id.*

160. See *id.* at 2259.

reflects the narrow thinking of the new conservative majority on the Court and may frustrate advocates for women's equal rights. However, Justice Alito's application of *stare decisis* to *Roe* and *Casey* presents a deeper democratic concern. Here, Justice Alito concludes that the decision to recognize a Constitutional right to an abortion was "egregiously wrong from the start" by "short-circuit[ing] the democratic process."<sup>161</sup> In sum, *Roe* and *Casey* were "egregiously wrong" because they prioritized the protection of women's individual Constitutional rights to reproductive autonomy over the rights of states to restrict it.<sup>162</sup> This dangerous reframing leads to the conclusion that if a court must weigh a risk of depriving individual Constitutional rights with a risk of interfering with the rights of the state, the Court must protect the rights of the state.

In his concurrence in *Casey*, Justice Blackmun warned against sacrificing women's reproductive autonomy to prioritize state interests concluding that:

By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course.<sup>163</sup>

The *Dobbs* decision does just that. Under the *Dobbs* standard, a recognition of the constitutional right to abortion and, in turn, the acceptance of women's nearly fifty year "glimpse of freedom"<sup>164</sup> is as impossible, yet necessary for the maintenance of modern democratic values.

#### IV. WHEN IT HAPPENS HERE: DEMOCRATIC SELF-DEFENSE AFTER *DOBBS*

The *Dobbs* decision and the movement that built it demand a critical analysis that looks beyond the minimizing framing of its

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161. *Id.* at 2243, 2265.

162. *Id.* at 2243.

163. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring).

164. See generally Alexis McGill Johnson, *Now Is the Time for Bold Imagination on Global Sexual and Reproductive Health Policy*, MEDIUM (Mar. 16, 2021), <https://ppfa.medium.com/now-is-the-time-for-bold-imagination-on-global-sexual-and-reproductive-health-policy-3f7e65cef54e> (referencing the freedom inspired by reproductive rights victories).

advocates. *Dobbs* and the future of abortion access is not simply a feminist problem. The preservation of women's bodily autonomy is a democracy problem. It's time that we treat it like one. The speed and consistency with which the U.S. Supreme Court and state legislatures are restricting the rights and lives of women place America at the cusp of a democratic crisis.<sup>165</sup> Unapologetically naming it as such allows for the adoption of a clear-eyed, united response founded in a framework of democratic self-defense. Democratic self-defense refers to the adoption of an intentional line of defense against anti-democratic factions.<sup>166</sup> This paper focuses on two primary forms of democratic self-defense. The first, militant democracy, was a response to the increasing chaos and destruction under the Nazi regime of the late 1930s.<sup>167</sup> Militant democracy continues to influence modern response to anti-democratic movements today. The second approach is of more recent vintage and is referred to as social or integrated democracy.<sup>168</sup>

This section begins with a description of the anti-abortion movement strategy to dismantle women's reproductive rights and its destabilizing impact on our democratic infrastructure. This section also engages the importance of democratic self-defense as a mechanism to counter these impacts and to steady the Constitutional health of our national infrastructure. Finally, this section concludes by recognizing barriers to developing an effective pro-democracy movement in response to the increasing deterioration of women's rights and public role. It urges organizations and academics to name anti-democratic actions as such and engage in intellectual and community organizing campaigns that are as inclusive as they are bold.

#### A. *Dobbs* Destabilizes our Democratic Infrastructure

For over four decades, the American Right has framed issues of women's equality including, reproductive autonomy, as markers

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165. See generally *After Roe Fell: Abortion Laws by State*, *supra* note 1; see GLOB. JUST. CTR. & LEITNER CTR. FOR INT'L L. & JUST., *supra* note 144; Shefali Luthra, *Here's How States Plan to Limit Abortion – Even Where it is Already Banned*, THE 19TH NEWS (Dec. 5, 2022, 8:31 AM), <https://19thnews.org/2022/12/states-plan-limit-abortion-statehouses>.

166. See Anthoula Malkopoulou & Ludvig Norman, *Three Models of Democratic Self-Defense: Militant Democracy and Its Alternatives*, 66 POL. STUD. 442, 442 (2018) (“Democratic self-defence refers to the idea that democracy cannot survive without a well-articulated line of defence against those who seek its demise.”).

167. See discussion *infra* Section III.B.

168. See discussion *infra* Section III.C.

within a broader morality-based culture war.<sup>169</sup> The diminutive caveat “culture” softened the optics of the movement, enabling the Right to wage a war on women and modernity with few social checks.<sup>170</sup> Through this manufactured platform, *Roe*’s opponents engaged in a campaign against the constitutionality of women’s right to reproductive autonomy and bodily integrity. The consistent incorporation of anti-woman policies within the mainstream Republican political platform normalized patriarchal retrenchment.<sup>171</sup> By strategically connecting reproductive autonomy with broader conversations of religion, morality, and family values, conservative leaders marginalized and silenced mainstream Republican abortion rights supporters.<sup>172</sup> Our current legal and social realities are a direct product of this strategy. The *Dobbs* decision and the movement that built it demand a critical analysis that looks beyond the minimizing framing of its advocates.

The Court’s elimination of a constitutional right to abortion is an abdication of a longstanding federal responsibility to safeguard the rights of women.<sup>173</sup> The Court’s failure to acknowledge and accept the democratic importance of the reproductive technology shock in *Dobbs* does not reverse it. However, conservative leaders at every level of government will undoubtedly cite the decision to sanction and normalize policies that undermine equality for women, limiting women’s role in public life.<sup>174</sup> These persistent developments transform the

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169. See notes 9, 51 and accompanying text.

170. See Patrick Joseph Buchanan, Culture War Speech: Address to the Republican National Convention (Aug. 17, 1992) (transcript available at <https://voicesofdemocracy.umd.edu/buchanan-culture-war-speech-speech-text/>).

171. For example, the Republican Party removed support for the ERA in the 1980 platform and included traditional family language for the first time. See Republican Nat’l Convention, *supra* note 136.

172. For example, Barbara Bush supported Planned Parenthood. In 2001, Laura Bush voiced her opposition to overturning *Roe v. Wade* on national television, to the dismay of party members and leaders who called her comments “upsetting.” See GLORIA FELDT, THE WAR ON CHOICE: THE RIGHT-WING ATTACK ON WOMEN’S RIGHTS AND HOW TO FIGHT BACK 19–20 (2004) (listing Barbara Bush, Laura Bush, and Condoleezza Rice as Republicans with pro-choice views while the party platform was staunchly anti-abortion); *Laura Bush Speaks Out on Abortion*, ABC NEWS (Jan. 19, 2001), <https://abcnews.go.com/Politics/story?id=122008&page=1?id=122008&page=1> (detailing the initial reaction to the First Lady’s interview from Republican voters and party members).

173. See *e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

174. See generally Jessica Schneider & Devan Cole, *Activists Preparing for ‘An Absolutely Crazy Year’ in First Full Statehouse Session Since Supreme Court Overturned*

nature of equality and democracy by empowering would-be demagogues to exercise fascistic tools of governance designed to restrict individual liberties more broadly.<sup>175</sup> Further, the *Dobbs* decision contributes to the destabilization of our democratic infrastructure through the artificial recreation of biological hierarchies. This destabilization invites the continued maintenance of the mythologized American patriarchal past marketed by ideological demagogues committed to policy agendas that are rooted in a brand of magical thinking no longer restrained by the rule of law.

## B. Militant Democracy

In 1937 German Jewish refugee Karl Loewenstein first articulated the idea of democratic self-defense in the form of militant democracy.<sup>176</sup> Loewenstein's work and ideas for militant self-defense have grown in popularity over the past decade in response to rising fascist sentiments in America and Europe.<sup>177</sup> Militant democracy assumes that the popular electorate is inherently vulnerable to manipulation by propagandizing fascists and that structural safeguards must be put in place to separate the public from the government.<sup>178</sup>

Loewenstein's approach to militant democracy not only argued for the prohibition of anti-democratic political parties and the potential establishment of political police, but also concluded that some personal freedoms like speech and assembly may also have to be limited.<sup>179</sup> Scholars have challenged this approach as both elitist and a

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Roe, CNN, <https://www.cnn.com/2023/01/20/politics/abortion-state-laws-2023-roe-dobbs/index.html> (last updated Jan. 20, 2023, 6:04 A.M.) (reporting on the introduction of over two-hundred bills related to abortion in the last year). For some of the bills, see, for example, FLA. STAT. § 390.0111 (2023); OKLA. STAT. tit. 63, §1-731.4 (2022) (effective Aug. 26, 2022); TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (2023) (effective Aug. 25, 2022); S.D. CODIFIED LAWS § 22-17-5.1 (2023).

175. See Schneider & Cole, *supra* note 174; Maya Yang, *DeSantis Appoints Judge Who Denied Abortion to Girl Over School Grades*, THE GUARDIAN (Dec. 22, 2022, 1:07 PM), <https://www.theguardian.com/us-news/2022/dec/22/ron-desantis-appoints-judge-abortion-girl-school-grades>.

176. See generally Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 AM. POL. SCI. REV. 417 (1937) [hereinafter *Militant Democracy I*]; Karl Loewenstein, *Militant Democracy and Fundamental Rights, II*, 31 AM. POL. SCI. REV. 638 (1937) [hereinafter *Militant Democracy II*].

177. See Rune Møller Stahl & Benjamin Ask Popp-Madsen, *Defending Democracy: Militant and Popular Models of Democratic Self-Defense*, 29 CONSTELLATIONS 310, 310 (2022).

178. See *id.*

179. See *Militant Democracy I*, *supra* note 176, at 638.



threat to democracy itself. Anthoula Malkopoulou and Ludvig Norman conclude that militant democracy scholars “coalesce around the notion that safekeeping democratic institutions will often require militant measures, most of which are aimed towards curbing political participation of undesirable political actors.”<sup>180</sup> In sum, militant democracy concludes that democracy must sometimes be limited in order to be saved. Democracy is, in effect, its own worst enemy.

### C. Integrated Democracy

Social or integrated democratic self-defense takes a more comprehensive view of democracy and its vulnerability to extremist threats.<sup>181</sup> This approach centers social justice and equal access to political participation as essential components to “immunizing” democracies from extremism and fascism.<sup>182</sup> Integrated democratic self-defense characterizes increased public participation and investment in democratic governance by a liberated and educated electorate as essential tools to prevent the rise of extremism.<sup>183</sup> Social democratic self-defense is committed to addressing underlying societal factors, like inequality, that make extremism an attractive political alternative.<sup>184</sup>

Militant democracy characterizes adoption of fascism as an example of the electorate’s emotional, irrational foolishness that makes self-governance by the masses impossible.<sup>185</sup> Modern social democratic self-defense interprets a mass-turn towards fascism as a human response to unanswered questions regarding persistent individual suffering and entrenched inequality.<sup>186</sup> Social democratic self-defense asserts that rooting democracy in social justice will alleviate suffering and will allow democracy to more fully function without a popular extremist rise.<sup>187</sup> Through this lens, democracy is its own best, last hope.

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180. Malkopoulou & Norman, *supra* note 166, at 445.

181. *See id.* at 443.

182. *See id.* at 454.

183. *See id.*

184. *See id.*

185. *See id.* at 445

186. *See* SHANE BURLEY, *WHY WE FIGHT: ESSAYS ON FASCISM, RESISTANCE, AND SURVIVING THE APOCALYPSE* 54–55 (2021).

187. *See* Malkopoulou & Norman, *supra* note 166, at 455 (“The social model of democratic self-defence places the people at the forefront of any effort to safeguard democratic institutions, making democratic self-defence part of an ongoing *process* of realizing democracy.”).

#### D. Pro-Democracy Movements

The coming American election cycles present an opportunity to craft a strong, democratic response to the rising popularity of authoritarian demagogues and their well-worn tools of fear mongering, division, and mandatory conformity. At this juncture, all American pro-democracy movements must recognize their intertwined political destiny. Beyond recognition, however, organizations operating in defense of democratic values must develop and implement policy agendas that are radically inclusive and empathetic. As noted above, the advocates of militant democracy would have us believe that in a democracy the people are their own worst enemy whereas the proponents of social or integrated democracy argue that we are our own best hope.<sup>188</sup> We must recognize that we are, in fact, both.

In a 2022 article, Erica Chenoweth and Zoe Marks provided pro-democracy movements with clear prescriptions regarding the appropriate democratic response to patriarchal retrenchment.<sup>189</sup> They argue for mass mobilization of women within political campaigns and movements, noting that democratic movements must “prioritize issues that directly affect women’s ability to play an equal role in public life, such as reproductive autonomy, domestic violence, economic opportunity, and access to healthcare and childcare.”<sup>190</sup> Chenoweth and Marks conclude that incorporating these issues as democratic necessities will prove “central to the broader battle over the future of democracy in the United States.”<sup>191</sup>

Similarly, the mainstream women’s movement must turn meaningful focus to democratic bellwethers that are not explicitly feminist or women’s issues. For example, it is essential that the women’s movement recognize issues like voting restrictions, immigration and detention, and mass incarceration as democratic and therefore feminist concerns. Virginia Woolf describes this intentional coordination of women with other marginalized groups as the “[s]ociety of [o]utsiders.”<sup>192</sup> Nearly a century later, critics of mainstream feminist

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188. *See id.*

189. *See* Chenoweth & Marks, *supra* note 10, at 115–16; Nora Delaney, *Autocracy and Patriarchy Are Surging Worldwide—But Women are Pushing Back*, HARV. KENNEDY SCH. (Feb. 28, 2022), <https://www.hks.harvard.edu/faculty-research/policy-topics/gender-race-identity/autocracy-and-patriarchy-are-surging-worldwide> (interviewing Chenoweth and Marks).

190. Chenoweth & Marks, *supra* note 10, at 115.

191. *Id.*

192. WOOLF, *supra* note 79, at 100.

movements, including those who organized the Women's March in 2017, continue to see white women's failure to recognize themselves as outsiders as fatal to the success of the movement.<sup>193</sup> As a number of commentators concluded after the 2016 election, today's women's movement must fight not just for "feminism, but an unstoppable, all-inclusive resistance against fascism."<sup>194</sup>

Finally, commentators and academics have the unique responsibility and opportunity to document tomorrow's political and democratic history today. A democratic crisis demands boldness, restrained by measured intellectual honesty and respect. Anti-democratic and authoritarian and fascist tools should be named as such. The leaders that use them should be named as well. The second half of the 20th century offered our country a profound "glimpse of freedom" that our founders could not have envisioned. However, this freedom is the result of the liberatory democracy they designed. History teaches that robbing women of autonomy moves us further away from a fully functioning and effective democracy. History also guarantees us that it will not be the last step.

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193. See ANAND GIRIDHARADAS, *THE PERSUADERS* 17 (Jon Segal & Vrinda Condillac eds., 2022).

194. Jessica Ferri, *Virginia Woolf Teaches How to Fight Fascism*, DAILY BEAST, <https://www.thedailybeast.com/virginia-woolf-teaches-how-to-fight-fascism?ref=scroll> (last updated Apr. 10, 2017, 2:01 P.M.).