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Verna L. Williams

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# GUNS, SEX, AND RACE: THE SECOND AMENDMENT THROUGH A FEMINIST LENS

VERNA L. WILLIAMS*



## INTRODUCTION

As courts and commentators puzzle over the implications of the Supreme Court's decisions in *District of Columbia v. Heller*[1] and

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* Judge Joseph P. Kinneary Professor of Law, University of Cincinnati College of Law. I am deeply indebted to the following for helping me shepherd this project to completion: Deborah Brake, Joanna Grossman, Emily Houh, Kristin Kalsem, Darrell A.H. Miller, and Sandra Sperino. I also would like to thank participants in workshops at the University of Cincinnati and the Ninth Annual Lutie Lytle Conference at Vanderbilt University Law School where I presented versions of this paper. Research assistance from David Lopez-Kurtz, Kelsi Steele, and Candice Thomas was indispensable. Any errors or omissions are my own.

1. 554 U.S. 570, 635 (2008).

*McDonald v. Chicago*,[2] which held that the Second Amendment protects an individual right to keep and bear arms,[3] mass and public shootings continue to rise.[4] In 2015 alone they erupted in such diverse locations as a state health department,[5] community college,[6] movie theater,[7] and a church.[8] Yet, as the public discourse about gun rights escalates in urgency and tone, surprisingly few feminist legal scholars have intervened.[9] Why not?

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2. 561 U.S. 742, 750 (2010) (holding that the Second Amendment applies to the states).

3. In *Heller*, the Court observed that the right is not subject to a "freestanding, interest-balancing approach," but "longstanding prohibitions on the possession of firearms" nonetheless may apply. 554 U.S. at 626, 634 (referring to existing proscriptions against owning or possessing guns).

4. Mark Follman, *Yes, Mass Shootings are Occurring More Often*, MOTHER JONES (Oct. 21, 2014), http://www.motherjones.com/politics/2014/10/mass-shootings-rising-harvard; *see also* DEPT. OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, A STUDY OF ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES BETWEEN 2000 AND 2013 8 (Sept. 16, 2013), (https://www.fbi.gov/file-repository/active-shooter-study-2000-2013-1.pdf) (finding that in the first half of the years studied, the average annual number of incidents was 6.4, which increased in the second half of the study to 16.4 or, on average, more than one incident per month).

5. Marina Koren, *The Potential Terrorism Behind the San Bernardino Shooting*, THE ATLANTIC (Dec. 5, 2015), http://www.theatlantic.com/national/archive/2015/12 /san-bernardino-shooting-fbi-isis/419001/ (reporting on the mass shooting at the Inland Regional Center, where the state public health department held its holiday party).

6. Joseph Hoyt, Mark Berman & Jerry Markon, *Nine Victims and Gunman Dead in Mass Shooting at Ore. Community College*, WASH. POST (Oct. 2, 2015), https://www.washingtonpost.com/national/multiple-fatalities-reported-in-shooting-at-oregon-community-college/2015/10/01/b9e9cc4c-686c-11e5-9ef3-fde182507eac_story.html.

7. Ashley Cusick, Sarah Kaplan & Elahe Izadi, *'Slow and methodical': Officials Describe Deadly La. Theater Shooting*, WASH. POST (July 24, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/07/23/gunman-opens-fire-on-la-movie-theater-injuring-several-before-killing-himself/?tid=a_inl.

8. Eleanor Randolph, *The Murders at Mother Emanuel Church in Charleston*, NY TIMES:TAKING NOTE (June 18, 2015, 2:49 PM), http://takingnote.blogs.nytimes.com/ 2015/06/18/the-murders-at-mother-emanuel-church-in-charleston/.

9. *See, e.g.*, Lindsay K. Charles, *Feminists and Firearms: Why are So Many Women Anti-Choice?*, 17 CARDOZO J.L. & GENDER 297 (2011); Allana Bassin, *Why Packing a Pistol Perpetuates Patriarchy*, 8 HASTINGS WOMEN'S L.J. 351 (1997); Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97 (1997); Inge Anna Larish, *Why Annie Can't Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 U. ILL. L. F. 467 (1996); Sayoko Blodgett-Ford, *Do Battered Women Have a Right to Bear Arms?*, 11 YALE L.

After all, violence is a particular concern for women, as polling data indicate.[10] Too many women confront firearms at the hands of batterers.[11] Their children are at risk of dramatically shortened lifespans due to accidental and intentional shootings.[12] Moreover, gun ownership in this nation is highly gendered—according to the Pew Research Center, men are three times more likely to own a firearm than are women.[13] Gun ownership also is highly racialized; the same survey reported that 82% of gun owners were white males.[14] According to the Department of Justice, deaths by firearms are racialized and gendered: the rate of homicide by firearms for blacks in 2010 was 14.6 per 100,000, compared to 1.9 for whites; for men, the rate was 6.2 per 100,000, versus 1.1 for women.[15] Recently, the African American Policy Forum—of which critical race feminist scholar Kimberlé Crenshaw is the Executive Director—publicly urged feminists to speak out against racist violence in the wake of the Charleston massacre in which nine churchgoers were gunned

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& POL'Y REV. 509 (1993); Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 494–503 (1992).

10. *See, e.g.*, MS. FOUNDATION FOR WOMEN, A FRESH LOOK AT THE PUBLIC'S VIEW TOWARD EQUALITY, COMMUNITY ISSUES, AND SOLUTIONS 12–13 (2015), http://forwomen.org/wp-content/uploads/2015/10/Ms-National-Survey-Executive-Summary.pdf.

11. *See, e.g.*, Vanessa Farr, Henry Myrttinen & Albrecht Schnabel, *Sexing the Pistol: The Gendered Impacts of Prolific Small Arms, in* SEXED PISTOLS: THE GENDERED IMPACTS OF SMALL ARMS AND LIGHT WEAPONS 4 (Vanessa Farr, Henri Myrttinen & Albrecht Schnabel, eds. 2009) (observing the absence of gender in discourse about firearms, in addition to the lack of data and research on the gendered aspects of gun use and abuse).

12. John M. Leventhal, Julie Gaither & Robert Sege, *Hospitalizations Due to Firearm Injuries in Children and Adolescents*, 133 PEDIATRICS 219 (Feb. 4, 2004).

13 *Why Own a Gun? Protection is Now Top Reason*, PEW RESEARCH CENTER, 16 (Mar. 12, 2013), http://www.people-press.org/files/legacy-pdf/03-12-13%20Gun%20Owner ship%20Release.pdf (reporting that men 37% of men surveyed owned guns, compared to 12% of women).

14. *Id.* at 17.

15. Michael Planty & Jennifer L. Truman, *Firearm Violence, 1993-2011*, BUREAU OF JUSTICE STATISTICS (May 2013), http://www.bjs.gov/content/pub/pdf/fv9311.pdf.

down.[16] In the popular press, Dani McClain, a writer for *The Nation*, has urged that gun violence is a matter of reproductive justice.[17]

If any subject were ripe for a feminist analysis, it is the Second Amendment. Martha Chamallas has explained that feminism is suspicious of the status quo and questions what lurks beneath current conditions to uncover oppression.[18] In addition, because feminist legal methods are intentionally contextual and intersectional, as explained below, they help "smoke out" gender in ostensibly neutral places.

This article accepts Crenshaw and McClain's invitation and uses a recent move on the part of feminist legal advocates—social justice feminism ("SJF")—to explore the contours of the Second Amendment. As discussed more fully below, SJF resulted from practitioners' frustration with the failure of the modern women's movement to address fully the concerns of women at the margins of privilege—*e.g.*, women of color, low-income women—and its lack of traction in a negative political environment.[19] Building upon the various women's movements that came before, SJF illuminates structural barriers to equality that may not appear at first blush to implicate gender.[20]

Because SJF analyzes legal issues in context by examining their history, the interconnection of oppressions, as well as their impact on marginalized people, viewing the Second Amendment through its lens highlights the gendered and racialized aspects of the right to keep and bear arms. The historical analysis that SJF provides demonstrates the role the Second Amendment has played in constructing race and gender from the time of the founding. The framers drafted the Amendment against a legal backdrop that construed the term "citizen" as male and white. By the

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16. *The Charleston Imperative: Why Feminism & Antiracism Must Be Linked*, AFRICAN AMERICAN POLICY FORUM (July 7, 2015), http://www.aapf.org/recent/2015/7/charleston. As a matter of full disclosure, I am one of the signatories to that letter.

17. Dani McClain, *The Murder of Black Youth Is a Reproductive Justice Issue*, THE NATION (Aug. 13, 2014), http://www.thenation.com/article/murder-black-youth-reproductive-justice-issue/.

18. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 3 (3d ed. 2013).

19. *Id.* at 133-34.

20. Articulating methods highlights what is occurring in order to enhance it going forward. *Id.* at 175, (citing Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 836 (1990) (observing that such methods seek to "reveal features of a legal issue that more traditional methods tend to overlook or suppress")).

Reconstruction era, congressional enactments expanded that term to include Black[21] men, but white Southerners responded violently, seeking to restore that status to its antebellum meaning and the white patriarchal order it augured. In this connection, feminist legal theory, specifically SJF, reveals that the Second Amendment and attendant societal understandings of the right to keep and bear arms played a role in establishing and reproducing white male dominance. Understood in this way, the Court's decisions in *Heller* and *McDonald* reinforce structural oppression under the guise of promoting individual rights.

To make that case, this article proceeds in four parts. Part I briefly addresses the question of why a feminist lens is useful in this context, with a focus on SJF to set the stage for the analysis that follows. Because SJF examines the historical underpinnings of practices to determine whether and how they contribute to subordinating structures, this article follows in the footsteps of *Heller* and *McDonald* by focusing on the history of the Second Amendment, identifying aspects of history that the Court elided. In this connection, Part II reviews the Ratification Era, while Part III explores Reconstruction, broadly speaking. The Second Amendment's past suggests that, rather than providing for merely a collective or individual right to bear arms, as the majority and dissenting Justices in *Heller* debated, the Amendment also served structural purposes. More specifically, the framers drafted the Amendment to allay fears of tyranny emanating from a strong centralized government and, in so doing, constructed the notion of "citizen" as white and male. Some ninety years later, framers of the Reconstruction Amendments had similar ends in mind. However, the target was tyranny at the hands of the states. The framers thus sought to fold newly freed slaves into the definition of "citizen," as well as to protect the radical new social order represented and supported by fledgling Republican state governments. In this context, state militias, which the Amendment protects, highlighted the significance of masculinity in defining "citizen," as well as the primacy of race in defining manhood. Part IV then concludes by suggesting the implications for this expanded understanding of the Second Amendment, looking specifically at Stand Your Ground laws.

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21. "Black" and "African American" suggest a "specific culture group, and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation, and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

## I. WHY A FEMINIST LENS?

Feminist legal theory ("FLT") is a powerful tool for examining the Second Amendment because of its innate skepticism about the status quo, its emphasis on context, and its recognition that intersecting oppressions are especially relevant in analyzing a given policy or practice. In brief, FLT examines "how gender has mattered to the development of the law and how different groups of men and women are differentially affected by the power of law."[22] In so doing, FLT critiques legal doctrines to uncover hidden biases, identify how male supremacy is reproduced, and give voice to those who experience oppression at the intersections of sex, race, and class, among other things.[23] FLT is oriented toward making change; it leans toward inclusivity and collective solutions. Additionally, FLT questions the existence of a formal public/private divide and is open to state involvement to address societal wrongs.[24] Given the frequency and scope of gun violence in women's lives, the hostile resistance in many corners to any type of gun regulation, and the growing insistence on firearm ownership as a means of public safety, a feminist analysis of the Second Amendment right is essential to comprehending what is at stake in this highly charged debate.

SJF, a recently articulated strand of feminist legal theory, is particularly apt in this context because it reaffirms feminist ideals of focusing on under-served communities. The term "social justice feminism" emerged from feminist legal advocates in response to calls from women of color and other marginalized women seeking greater progress on issues affecting them, particularly violence.[25] SJF builds

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22. CHAMALLAS, *supra* note 18, at xxi.

23. *Id.* at 6-13.

24. NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY 8-12 (2006).

25. Kristen Kalsem & Verna L. Williams, *Social Justice Feminism*, 18 UCLA WOMEN'S L.J. 131, 133, 187 (2010). At a series of meetings designed to revitalize the movement, particularly for marginalized women, attendee Linda Burnham observed that the "feminist project, while not completely stalled, does not have the kind of political traction it needs to effectively influence public policy and improve the lives of women." *Id.* at 134. In addition, research by the National Association for the Advancement of Women found that women of color were more likely to consider themselves feminists than their white counterparts. These women expressed a desire for a women's movement that addressed issues mainstream feminism had neglected. Primary among those issues was violence. To move this conversation forward, Astrea Lesbian Foundation, the Ford Foundation, and the Ms. Foundation for Women funded meetings of feminist activists from a variety of settings to consider where and how the feminist movement could be more inclusive and effective in addressing

upon the various waves of feminism, reinforcing its original mission and expanding its reach. Specifically, SJF "strives to uncover and dismantle [social and political structures that support patriarchy],[26] while "recognizing and addressing multiple oppressions."[27] Martha Chamallas has suggested that SJF is "a new take on intersectionality theory and intersectional feminism."[28] Given its genesis among practitioners, SJF embodies three core methodologies that "attempt to reveal features of a legal issue that more traditional methods tend to overlook or suppress:"[29]

> One method, looking to history to understand subordinating structures, seeks to acquire more knowledge with which to understand and then dismantle the bases of societal institutions that perpetuate hierarchies and inequities. Another method, examining the inter-relationships between interlocking oppressions, asks how issues of gender, race, class, and other categories of identity and experiences work together to create social injustice. A third method, ensuring that principles of dismantling interlocking oppressions inform solutions, keeps the focus on bottom-up strategies in fashioning remedies.[30]

Accordingly, SJF focuses on historical context, structural inequities, intersecting oppressions, and underserved populations. In so doing, SJF methods reveal issues that liberal feminism might fail to recognize as having significant gender implications.[31]

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needs of under-served women. Social justice feminism is what the attendees determined was their calling, with one participant remarking, "I don't want to do feminism any more unless it's social justice feminism." *Id.* at 132.

26. *Id.* at 157.

27. *Id.* at 158.

28. Martha Chamallas, *Social Justice Feminism: A New Take on Intersectionality*, 2014 FREEDOM CENTER J. 13 (2014); *see also* CHAMALLAS, *supra* note 18, at 107-11 (identifying social justice feminism as a "promising variation" on intersectional feminism).

29. Kalsem & Williams, *supra* note 25, at 175 (quoting Bartlett, *supra* note 20, at 836).

30. *Id.*

31. *See id.* at 139. For example, we applied SJF to the Supreme Court's unanimous decision in *Long Island Care at Home v. Coke*, 551 U.S. 158 (2007), which upheld Department of Labor regulations exempting home health care workers from overtime or minimum wage requirements of the Fair Labor Standards Act ("FLSA"). SJF methods revealed that this apparently straightforward administrative law case "raised powerful issues of race, gender, and class hierarchies." In drafting the FLSA,

SJF's historical method emphasizes examining the past in order to "understand subordinating structures" to identify the roots of structural inequalities in order to dismantle them.[32] In this regard, SJF follows in the footsteps of feminist and critical race theory in seeking to "uncover[] lost histor[y] . . . [and] re-examin[e] how history has been told and understood."[33] Recognizing that history is constructed, typically by those in power, SJF seeks to elevate the experiences of those left on the margins to uncover how traditional historical narratives mask and perpetuate subordination.[34] Such a perspective is especially necessary in this context given the highly contested nature of the historical accounts articulated in *Heller* and *McDonald*,[35] upon which the Court heavily relied. Accordingly, the

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Congress purposefully excluded domestic and agricultural workers from protection because doing so would benefit African Americans and therefore erode support from Southern lawmakers for the Act. *Id.* at 187. This history had major implications for the present day because, in practice, the FLSA reinforced interlocking oppressions. Specifically, women of color are overrepresented in the field of home health care, physically and emotionally strenuous work that pays poorly. Thus, while the Court's reading of the FLSA implementing regulations may have been consistent with administrative law precedent, it unwittingly fortified Congress's discriminatory intent by sanctioning "a pay structure that assure[d]that this job category [would] remain the preserve of poor women of color, and thus, be perpetually underpaid." *Id.* at 190. Finally, in seeking solutions informed by a "bottom-up" approach, we argued that feminist legal advocates should add the *Coke* case to their agendas and organize home health care workers to identify goals and strategies to correct the Court's ruling. *Id.* at 191-92.

32. *Id.* at 175.

33. *Id.* at 175-76. We further explain that SJF "continues the work of uncovering stories and experiences that have not been told or included in accounts of history and examining how they alter ways of seeing." *Id.* at 177.

34. *Id.*

35. In *McDonald*, Justice Stevens disputed the history upon which the majority relied, as well as the conclusions to which the Justices came based on it. *McDonald*, 561 U.S. at 899 (Stevens, J., dissenting) (observing that the historic and plentiful instances of violence against African Americans in the past "do not suggest that every American must be allowed to own whatever type of firearm he or she desires—just that no group of American should be systematically and discriminatorily disarmed and left to the mercy of racial terrorists."). Justice Breyer noted that, since the Court decided *Heller*, "historians, scholars, and judges have continued to express the view that the Court's historical account was flawed." *Id.* at 914. Justice Alito responded that while "there is certainly room for disagreement about *Heller's* analysis of the history of the right to keep and bear arms, nothing written since *Heller* persuades us to reopen the question." *Id.* at 788. Historian Saul Cornell derided *Heller*, calling it "little more than a lawyer's version of a magician's parlor trick—admittedly clever, but without any intellectual heft." Saul Cornell,

parts that follow examine the Second Amendment's history with an eye toward exposing the context within which it emerged, a setting that established the foundation for a race- and gender-based social hierarchy.

## II. THE RATIFICATION PERIOD: DEFINING "NATION"

In *Heller*, the Court dissected the text of the Second Amendment, examining portions of what it called the "prefatory" and "operative" clauses to determine how the framers understood the terms therein at that time.[36] Justice Scalia turned to pre- and post-ratification era sources to conclude that the operative clause was meant to guarantee the individual right to possess and carry weapons for self-defense purposes.[37] The Court next determined that the prefatory clause, which references militias, was consistent with the operative clause because "history showed that the way tyrants had eliminated a militia . . . was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents."[38] When viewed through an SJF lens, the Court's examination of history is incomplete.

SJF reveals that the ratification history of the Second Amendment included a debate about the structure of the new nation. As the next sections will demonstrate, the framers intended the Second Amendment to amplify checks and balances on governmental overreach and to establish the metes and bounds of "nation" and "citizenship," terms limited to white men.[39] In this way, SJF reveals that the Second Amendment defended white patriarchy, helping establish a system that would subordinate those who fell outside the privileged category of citizen.

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*Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 690 OHIO ST. L.J. 625, 626 (2008).

36. *See Heller*, 554 U.S. at 578.

37. *Id.* at 592.

38. *Id.* at 598.

39. *See, e.g.*, IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 27-34 (2006) (discussing racialized and gendered aspects of citizenship under the Bill of Rights); Gretchen Ritter, *Women's Civic Inclusion and the Bill of Rights, in* GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP 60-82 (Linda C. McClain & Joanna L. Grossman, eds. 2009) (arguing that the Bill of Rights preserved a gender social order).

### *A. "A Well-Regulated Militia": Structural Protection against Tyranny*

Our Constitution arose from the ashes of the Articles of Confederation. The Articles established a loose alliance of sovereign states that essentially acted in their own interests: failing to pay into a common treasury, disregarding treaties, and erecting discriminatory and retaliatory trade barriers toward each other, to name a few transgressions.[40] These difficulties, in addition to the absence of a legislative body empowered to raise revenue and the difficulty of making changes when needed because of the text's unanimity requirement, propelled colonists to amend the document. However, when the delegates assembled for that task, they immediately set about creating a new charter that divided power between the state and federal governments and among three branches of centralized government.

Provisions addressing military power and militias, including the Second Amendment, reflect the framers' concerns regarding tyranny and power sharing. For example, Article I authorizes Congress to "raise and support Armies,"[41] but limits its ability to appropriate funds for such purposes to two years,[42] a period that coincides with the terms of the House of Representatives.[43] In addition, as legal scholars Richard Uviller and William Merkel observed, "since all funding measures were to originate in the lower House, the question of the army's longevity was never far removed from popular control,"[44] further confining the growth of the military.

The Second Amendment, part of the Bill of Rights agreed to in exchange for unanimous ratification by the states, addressed what long had been a key concern: colonists' distaste for a standing army. Uviller and Merkel have explained that Americans shared their English forbearers anxieties over a professional military:

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40. *See, e.g.*, Robert N. Clinton, *A Brief History of the Adoption of the Constitution*, 75 IOWA L. REV. 891 (1990); AKIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 28 (2005) (observing that "[b]y 1787, the Confederation was in shambles").

41. U.S. CONST. art. I, § 8, cl.12.

42. *Id.*

43. U.S. CONST. art. I, § 2; *see also*, H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR HOW THE SECOND AMENDMENT FELL SILENT 77 (2002).

44. UVILLER & MERKEL, *supra* note 43, at 77.

> [that] public virtue was both the source and goal of any legitimate exercise of public authority. Public virtue implied a common purpose, a dedication that transcended individual interest. Its antithesis was corruption, both individual and constitutional. . . . The vilest engine of constitutional corruption was the standing army . . . . Military power in the hands of a professional band of soldiers–whose loyalty to the government was unleavened by personal commitment to the community, the people, or the concerns of local security–was anathema to the ideals of civic virtue.[45]

Colonists thus feared that a standing army would consist of men sullied either by self-interest or dedication to a distant and detached sovereign. They preferred a militia populated by citizen-soldiers, men connected to their communities upon whom they could depend to be loyal.

In a similar vein, the framers believed that a standing army threatened state sovereignty. During ratification debates, Virginia's George Mason[46] argued that "Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them."[47] Delegates to that state's ratifying convention therefore proposed the following:

> That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.[48]

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45. *Id.* at 42.

46. Saul Cornell explains that Mason's reasoning is especially salient because he "was a leading patriot and took a major role in the creation of [Virginia's] militia . . . . Mason's emphasis on the need for the militia composed of property holders reflected a view common among members of Virginia's gentry elite that it was dangerous to arm the 'rabble.'" Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1700 (2012).

47. UVILLER & MERKEL, *supra* note 43, at 85.

48. *Id.* at 86.

As a result, in language very similar to that ultimately adopted by the framers, Virginia linked the right to bear arms to militias in order to preempt overreaching by the central government. While the wording of the ratified Amendment departed somewhat from this draft, it nonetheless indicates a purpose on the part of the framers that the Second Amendment would be among the panoply of Constitutional provisions designed to maintain a balance of powers among the three federal branches of government and between the state and national sovereigns. As a structural matter, the Amendment shores up the "two-tiered division of military control between the executive and legislative federal branches, and between the national and state authorities."[49] In addition to performing as a bulwark against federal overreaching, the Amendment's history sheds light on how the Framers contemplated "the people" whose rights it protects, which the next section considers.

### *B. "The Right of the People": Constructing Nation and Citizen*

The historical context leading up to and including ratification indicates that the phrase "the people" also served structural ends—namely, identifying those who were part of the new nation's citizenry. Building on pre-existing regulation of firearms and consistent with other parts of the Constitution,[50] the Second Amendment contemplated "people" who were white and male.[51]

Regulation of guns long served the function of reinforcing social and economic status. Alexander DeConde has explained that early colonists transported the English tradition of limiting firearms to men from the upper class, noting, for example, that "[i]n the first company of 105 English settlers who established Jamestown,

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49. *Id.* at 76. Richard Epstein also has argued that the Amendment, when read in concert with other constitutional provisions regarding militias, reflects federalism concerns and reinforces checks and balances on the centralized government, as well as among the branches of government. Richard Epstein, *A Structural Interpretation of the Second Amendment: Why Heller is (Probably) Wrong on Originalist Grounds*, 59 SYRACUSE L. REV. 171, 175-76 (2008) (comparing the Second Amendment to provisions in Articles I and II).

50. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 3 (counting enslaved persons as three-fifths of a person and excluding Native peoples for purposes of apportioning Representatives and direct taxes); U.S. CONST. art. IV, § 2, cl. 3 (requiring the return of runaway slaves).

51. *See* Becker, *supra* note 9, at 494. *But see* Epstein, *supra* note 49, at 178 (stating without support that the Second Amendment "extends to everyone, including women, whether or not they are or ever will be members of the militia").

Virginia, in 1607, only the gentlemen among them had the privilege of carrying firearms."[52] As the colonists dispersed across the continent, so, too, did the understanding that only the "right" people should have guns.

However, in the New World, race became the most salient characteristic. Kathleen Brown has argued that state regulations helped construct racial and gender norms, particularly establishing patriarchy as the sole province of white men.[53] Such rules contributed to establishing the social meaning of race and gender in this country. For example, in seventeenth century Virginia, selling or trading firearms to Indians could result in forfeiting one's estate.[54] In some places, the penalty for doing so could be death,[55] demonstrating how great a threat to communities the early settlers considered Native people. Other communities required white men to arm themselves in church "because of the establishment's anxiety that slaves would rebel during the gathering for prayer."[56] Brown further observed that although "legislators had been reluctant to include African laborers among those required to carry arms at church, [they] stopped short of prohibiting slaves from owning weapons,"[57] in part because of concerns about rebellions or attacks by Native Americans.[58] However, Brown noted that colonial Virginia's race and gender lines became more pronounced as time progressed; by 1723, the legislature passed laws explicitly prohibiting Black and Native men from being armed. [59] One such

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52. ALEXANDER DECONDE, GUN VIOLENCE IN AMERICA: THE STRUGGLE FOR CONTROL 17 (2001).

53. KATHLEEN M. BROWN, GOOD WIVES, NASTY WENCHES, AND ANXIOUS PATRIARCHS 181 (1996). Brown defines patriarchy as "the historically specific authority of the father over his household, rooted in his control over labor and property, his sexual access to his wife and dependent female laborers, his control over other men's sexual access to the women of his household, and his right to punish family members and laborers." *Id.* at 4.

54. "[W]hat person or persons soever [sic] shall barter or sell with any Indian or Indians for peice [sic], powder, or shott [sic], and being thereof lawfully convicted, shall forfeite [sic] his whole estate." WILLIAM WALLER HENNING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, VOL. I 441 (1823).

55. DECONDE, *supra* note 52, at 18. However, despite the overt bans, colonists would provide arms to tribes with whom they had joined forces against other Native peoples or encroaching settlers. *Id.* at 19.

56. *Id.* at 21.

57. BROWN, *supra* note 53, at 182.

58. DECONDE, *supra* note 52, at 19.

59. BROWN, *supra* note 53, at 182.

measure, "An Act for the settling and better regulation of the Militia," provided that

> free Negros, Mulattos, or Indians . . . may be listed and emploied [sic] as drummers or trumpeters: And that upon any invasion, insurrection, or rebellion, all free Negros, Mulattos, or Indians, shall be obliged to attend and march with the militia, and to do the duty of pioneers, or such other servile labour as they shall be directed to perform.[60]

The same year, lawmakers passed "[a]n Act . . . for the better government of Negros, Mulattos, and Indians, bond or free."[61] This law prohibited Blacks and Native people from "keep[ing], or carry[ing] any gun, powder, or any club, or other weapon whatsoever, offensive or defensive,"[62] unless they were free and "a house-keeper,"[63] which, according to a dictionary of that time period meant "householder; master of a family."[64]

Through such measures, lawmakers constructed a social hierarchy in which enslaved people, as well as Native Americans, occupied the lower rungs.[65] These statutes did not contemplate slaves and Indians as being suitable men for defending the state. Unlike white men, they needed an additional marker of masculinity—owning property and heading a household—in order to own a weapon.[66] The regulations surrounding militia service thus mirrored the social strata, as Brown observes:

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60. WILLIAM WALLER HENNING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, VOL. IV 119 (1820). In addition, Blacks or Native men who sought to appear in a muster could be fined 100 pounds of tobacco; failure to pay meant such men would be "tied neck and heels [to] remain for any time not exceeding twenty minutes." *Id.* at 120.

61. *Id.* at 126.

62. *Id.* at 134.

63. *Id.*

64. SAMUEL L. JOHNSON, ET AL., A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785).

65. The "Act . . . for the better government of Negros, Mulattos, and Indians" included many provisions that both indicated the low status of this group and guaranteed they would remain subordinate. Among them, measures that: prohibited slaves from meeting without their masters' consent; authorized slaveowners to dismember "incorrigible runaways and other slaves" without facing prosecution or punishment if such treatment resulted in slaves dying; and forbade Blacks and Native men from voting in any election. HENNING, *supra* note 60, at 129, 132-34.

66. Even then, the law limited such men to owning one firearm; any surplus weapon would have to be sold. *Id.* at 131. However, there was an exception for Blacks

> A wealthy planter . . . would normally serve as commander in chief over the militia of the county. At the governor's order, the commander would muster the militia in a field for parades or in response to an alarm. Men of substance received commissions as officers; other propertied planters would form a troop of horses. Less well-to-do men would comprise a 'company of foot.' Finally, black men would appear unarmed and be required to play the bugle or drums.[67]

By prohibiting Black and Native men from owning weapons and serving in the militia (unless they were servants or musicians), such laws participated in an overarching racial and gendered project that cast these men as "other."[68] Such laws distinguished Black and Native men from white men, even those lacking property and other markers of status, and placed them in another category devoid of masculinity and its attendant privileges. As Brown notes, this legal regime "relegated [such men] to a status equivalent to that of other dependents:" namely, women and children.[69] Indeed, a Norfolk, Virginia, court relieved a slave from having to pay a penalty for having shot a white man's horse because he was "under couvert," a term ordinarily applied to married women,[70] meaning "under the wing" of a head of household. This regime ensured that the proper realm for African American men in particular was the private sphere, where they lacked autonomy because they answered to the patriarch of the estate, a white man.

As Virginia's example suggests,[71] colonial lawmakers established a legal regime that excluded Black and Indian men from accessing

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and Native Americans living on "frontier plantations," provided they secured a license." *Id.* Thus, weapons were permissible for the purpose of fighting off Indians.

67. BROWN, *supra* note 53, at 279.

68. *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 125 (3d ed. 2015) (defining racial projects as "attempts both to shape the ways in which social structures are racially signified and the ways that racial meanings are embedded in social structures"); *see also* HANEY LÓPEZ, *supra* note 39, at 116 (observing that racial categories are "relational and hierarchical." Thus, white identity depends upon the law's construction of non-whites to exist).

69. BROWN, *supra* note 53, at 183.

70. *Id.* at 183.

71. It should be noted that Virginia was among the most powerful of the colonies; proponents of the Constitution saw its approval as essential to ensuring

the privileges flowing from masculinity, such as owning arms and serving in the militia.In so doing, the law contructed these men as dangerous and, by removing the perceived threat they posed, rendered them dependent at law and in society. Accordingly, regulation of firearms and militias helped establish and reinforce an alternative and inferior formulation of manhood—one that did not participate in public life and by definition was not a citizen.[72]

Sixty-five years later, the Supreme Court proclaimed that the framers had such a purpose in *Dred Scott v. Sandford*.[73] At issue in that case was whether traveling to the Missouri Territory rendered Mr. Scott a free man. The Court framed the question before it as follows:

> "Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution . . . and as such become entitled to all the rights, and privileges, and immunities, guarantied [sic] by that instrument to the citizen?"[74]

Relying upon the text of the Constitution and statutes of the various states at the time of the founding, the Court found that Mr. Scott, as a Black man, was not so entitled. According to the Court, the framers never

> intended to secure to [Blacks] rights, and privileges, and rank, in the new political body throughout the Union . . . . More especially, it cannot be believed that the large slaveholding States regarded them as included in the word citizens, or would have consented to a Constitution which

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that the document ultimately would be ratified. *See, e.g.*, PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787-88, 274 (2010).

72. DeConde also explains that similar exclusions also applied to new immigrants, observing that "as [the] population grew and became more diverse, old-line white Protestants came to dislike the idea of arming strange, immigrant males, such as Irish Catholic youths, in draft militias and training them to shoot." DECONDE, *supra* note 52, at 48. As a result, they collaborated with advocates for defunding militias, thus "disuguis[ing] their desire for selective gun regulation." *Id.*

73. 60 U.S. 393 (1856).

74. *Id.* at 403. It should be noted that, with respect to Native Americans, the Court observed that they had "always been treated as foreigners not living under our Government;" however, they could become citizens of the States, as well as the nation, by being naturalized by Congress. *Id.* at 404.

> might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens . . . . It would give to persons of the negro race . . . . the right to . . . keep and carry arms wherever they went . . . . and inevitably produc[e] discontent and insubordination among them, and endangering the peace and safety of the State.[75]

According to the Court, Black citizenship was not just contrary to the letter and spirit of the Constitution, it was antithetical to peace and national security.

As the foregoing suggests, when examined from the vantage point of SJF, the historical context which produced the Second Amendment was one that never contemplated Blacks as part of the nation's citizenry. Indeed, firearm regulation helped establish racial and gender categories that justified oppressions such as slavery, dispossessing Native people, and relegating women to the domestic arena. In this connection, key parts of the Amendment's text—"the people" and "militia"—carried gendered and racialized meanings of which the framers doubtless were aware, as these word choices were consistent with their notions of who best would move the fledgling democratic republic forward. This vision of the Constitution would remain unchallenged until after the Civil War.

## III. RECONSTRUCTION ERA: THE STRUGGLE FOR REDEFINITION

Just as in *Heller*, the Court turned to history in *McDonald* to conclude that the Fourteenth Amendment applied the Second Amendment to the states.[76] Revisiting *Heller*'s historical narrative, the *McDonald* Court reiterated that the framers considered the right to keep and bear arms to be a fundamental one.[77] The Court then examined the right in the context of the Civil War and Reconstruction eras. Justice Alito noted that abolitionists of those times supported the right and that newly freed slaves combated systemic attempts by former Confederate soldiers to disarm them.[78] Justice Alito also found that the Freedmen's Bureau Act of 1866 mentioned the right to bear arms.[79] Therefore, according to the

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75. *Id.* at 416-17.
76. *McDonald*, 561 U.S. at 791.
77. *Id.* at 769.
78. *Id.* at 770-71.
79. *Id.* at 773.

Court, arming the formerly enslaved was essential for their self-defense against the Ku Klux Klan and similar groups, a reading of history that supported the individual right first found in *Heller*. However, viewing this history through the prism of SJF demonstrates that the Court's narrative was superficial and incomplete.

The framers of the Reconstruction Amendments sought to expand the antebellum notion of "citizen," in part by granting freedmen rights long denied to them as outliers and perceived threats to the social order. In this regard, the Reconstruction narrative revolves around much more than an individual right to self-defense. Rather, in the postbellum years, the framers recognized the right to bear arms as essential to integrating Black men into the nation as citizens, voters, and soldiers to whom communities could turn for protection.

Reconstruction and the legislative provisions born during this period upended the antebellum social order, enraging Southern whites who vehemently opposed these changes and resolved to strip Black men of any rights connected to citizenship. SJF's emphasis on identifying the historical roots of subordinating structures therefore reveals that during the Reconstruction era, the right to keep and bear arms could have been a tool for Black liberation and entwining with the national fabric; instead, whites resisted the threat posed by Blacks assuming the mantles of citizenship and manhood through the right to bear arms and the interrelated right to vote. These changes fueled violent opposition that ultimately thwarted Reconstruction's transformative potential and cemented intransigent white patriarchal norms.

As discussed below, losing the Civil War sparked much of this hostility. For many southern white men, defeat signaled a diminution of their masculinity and a racial abomination in part, because any advance by Blacks—men in particular—represented a concomitant setback for whites—again, specifically men.[80] Put differently, the societal transformation Reconstruction portended signified an end to white men's "natural" place at the top of the racial and gender social order. As a result, former Confederate legislatures enacted laws that sought to return African Americans to slavery in all but name. When Congress overrode such measures with federal legislation, white men's sense of worth further

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80. *Cf.* Anne Sarah Rubin, A SHATTERED NATION: THE RISE AND FALL OF THE CONFEDERACY, 1861-1868 103 (2005) ("From the Confederate perspective, any attempt to grant manhood to blacks was a threat to the Confederacy.").

plummeted as emancipated slaves gained rights their masters formerly monopolized. Without the framework and approbation slavery provided to assert their masculinity, these men violently sought to repudiate Reconstruction and reinforce the message that manhood belonged to whites alone, in the process targeting markers of Black masculinity: the rights to vote and to keep and bear arms, which frequently were considered in tandem.[81] In order to stem the rise of "negro supremacy" under the amended Constitution, protect white womanhood, and in so doing, reestablish white patriarchy, emergent hate groups such as the Ku Klux Klan[82] embarked on a racialized and gendered terror campaign to dismantle Reconstruction and restore white men to the top of the social hierarchy. It is in this context that the antebellum right to bear and keep arms was simultaneously rejected and defended, along with its attendant construct of "citizen."

### *A. Post-Civil War: Seismic Change to the Social Order*

The Civil War brought the end of slavery and promised a reordering of society that repelled southern whites. With freedom, Blacks could be paid employees and regulate their own families. Black men could engage in civic life by voting or holding public office. By affording the formerly enslaved agency over their lives, emancipation disrupted a regime that constructed African Americans as perpetually dependent. Moreover, by making the public sphere accessible to Black men through the franchise and the

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81. *Cf.* Becker, *supra* note 9, at 500 (observing that "ultimate political power lies with those who control the means of force") (quotation omitted).

82. The Ku Klux Klan was the "first and most notorious of the Reconstruction-era" hate groups; but by no means the only such group. According to Lisa Cardyn, the Reconstruction era saw the burgeoning of "white supremacist groups—notably the Pale Faces, the '76 Association, the White Brotherhood, and the Knights of the White Camelia," which shared the Klan's objectives and methods, such that they were "substantially indistinguishable from the real KKK." In this regard, the Klan should be "understood as a kind of umbrella organization embodying the array of white supremacist groups that grew up in the postwar years." Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 680-89 (2002) (citations omitted). W.E.B. DuBois was among the first scholars to document the history of such organizations, noting that, generally speaking, they were "determined to drive out the new Northern capitalist, and reduce the Negroes to slavery." W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA: 1860-1880 679 (The Free Press 1998) (1935). For purposes of this article, I will refer generally to the Klan because it exemplifies organized terroristic opposition to Reconstruction.

workplace, former enslaved men could stake a claim to hegemonic masculinity that had been denied them. The postbellum years and Reconstruction presaged a new nation that would require whites to share citizenship status with former slaves, an opprobrious notion for many.

Before the war, white southern men—wealthy planters and working class whites alike—relied on race and slavery to reinforce their positions in society. Slave status for African Americans meant perpetual subservience to a master and consignment to the private realm, where they were regulated by others and lacked ownership over their work or any products resulting from it.[83] In this regard, the institution of slavery—de jure or de facto—necessarily imposed upon Black men and women norms that, in white society, applied only to women and children. Those norms formed the basis of race- and gender-based classifications that elevated whiteness and masculinity. Under this paradigm, African American males were not considered to be "true" men, not even when compared to white laboring men who lacked property or means.[84] Similarly, Black women would not be considered "ladies."[85]

After the Civil War, white southerners sought to preserve to this state of affairs. To whites in the defeated Confederacy, the changes imposed by and resulting from Reconstruction were antithetical to their vision of the United States. Reconstruction removed white men from their rightful place atop the social hierarchy. Making Black men citizens amounted to a seismic shift for southern whites who "jealously guarded the traditional emblems of citizenship . . . . They evidenced a corresponding defensiveness with respect to the less formal signifiers of the masculine citizen[], most notably the ability to order one's familial life from the position of household head."[86] Lisa Cardyn observed that

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83. *See generally* LAURA F. EDWARDS, GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION 68-80 (1997) (explaining that as the concept of free labor emerged, race was a factor in understanding the degree of independence workers had, with Blacks being completely dependent and at the lowest rung of that hierarchy).

84. *Id.* at 72 (noting that "white working men used feminine dependence to naturalize masculine independence").

85. *See* Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 45-47 (discussing how slave status meant that Black women could not become "true" women).

86. Cardyn, *supra* note 82, at 816.

> Southern men in general and klansmen in particular were inclined to apprehend their struggle with the former slaves as a zero sum game: whatever was granted to freedmen was necessarily relinquished by whites. Indeed, one commentator hyperbolized that the rise of the freedmen from a position of abject slavery had reduced southern whites to a "naked and defenceless condition."[87]

Maryland Governor Thomas Swann voiced a similar concern in objecting to granting the franchise to Black men:

> The white man can never be educated to believe that the negro is his equal, nor can he be persuaded, unless warped in his heretofore fixed impressions, that the two races can be brought together in political or social fraternization upon terms of equality without degradation to his own. . . . This Government was never intended by its founders to be shared by the African race . . . . It was a white man's Government exclusively.[88]

Such sentiments undergird opposition to federal policies to facilitate freed slaves' entry into the polity. For example, the Democratic Party, in setting forth its platform for the 1868 elections, decried federal occupation of the South and the Freedmen's Bureau as "political instrumentalities designed to secure negro supremacy."[89]

This sentiment reflected the South's legislative strategy to resuscitate slavery by enacting black codes. Such laws had the overt purpose of ensuring that African Americans would be productive members of society, but their true design was maintaining white supremacy. For example, Mississippi Governor Benjamin Humphreys claimed that "sudden emancipation" had resulted in the "the evils . . . [of] vagrancy and pauperism, and their inevitable concomitant crime and misery, [which hung] like a dark pall over a once prosperous and happy, but now desolated land."[90] To counter

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87. *Id.* at 818-19.

88. *Maryland: Message of Gov. Swann—The State Militia—Negro Suffrage and Negro Equality*, N.Y. TIMES, Jan. 6, 1868, at 2.

89. *The Democratic Convention: A New Platform Reported and Adopted*, N.Y. TIMES, July 8, 1868, at 1 (hereinafter *Convention*).

90. *Mississippi: Message of Gov. Humphreys to the Legislature on Negro Troops*, N.Y. TIMES, Dec. 3, 1865, at 3 (hereinafter *Humphreys' Message*).

these purported deficiencies of the formerly enslaved, the Texas legislature, for example, enacted a measure imposing a one dollar fine upon Blacks for "failing to obey reasonable orders, neglect of duty, leaving home without permission, impudence, [and] swearing [at] or [using] indecent language to an employer."[91]

In addition, consistent with their rejection of Black citizenship *per se*,[92] legislators also passed laws proscribing African Americans from purchasing, owning, or using firearms, and prohibiting whites from selling guns to Blacks.[93] For instance, Mississippi state law did "not recognize the Negro as having any right to carry arms."[94] States broadly prohibited Black men from serving in state militias.[95]

Regulating the keeping and bearing of arms was about more than limiting Black efforts at self-defense: it was part of a larger legislative scheme to distinguish and disadvantage African American men, keeping citizenship beyond their reach.[96] Cognizant of such attempts to re-enslave African Americans, Congress enacted measures to realize the Thirteenth Amendment's promise of liberty, which, while essential to integrating Blacks into society, further inflamed white hostility to the new nation it heralded.

### *B. Reconstruction and its Discontents: Guns, Militias, and a Reordered Society*

In the face of Southern intransigence to emancipation, Congress enacted the Reconstruction Amendments and implementing legislation to vitiate the black codes, including statutes targeting state militias.[97] Taking the latter step was necessary because citizen-soldiers in the former Confederate states violently opposed the grant of freedom to Blacks. Historian Otis Singletary observed that militia:

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91. DOUGLAS R. EGERTON, THE WARS OF RECONSTRUCTION: THE BRIEF, VIOLENT HISTORY OF AMERICA'S MOST PROGRESSIVE ERA 178 (2014) (quoting Barry Crouch, "*'All the Vile Passions': The Texas Back Code of 1866*," 97 S.W. HIST. Q. 21, 24 (1993)).

92. *Convention*, *supra* note 89, at 1 (noting that the "negro is free, whether we like it or not. . . . To be free, however, does not make him a citizen, or entitle him to political or social equality with the white man").

93. SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 168-69 (2006).

94. OTIS A. SINGLETARY, NEGRO MILITIA AND RECONSTRUCTION 5 (1957).

95. CORNELL, *supra* note 93, at 169.

96. *Cf. Humphreys' Message*, *supra* note 90.

97. CORNELL, *supra* note 93. at 175-76; SINGLETARY, *supra* note 94, at 6.

> [m]embership was restricted exclusively to whites and was composed primarily of former rebel soldiers, who persisted in wearing their Confederate gray. Their activities were frankly terroristic and aimed directly at Negroes who displayed a tendency to assert their newly granted independence. Disarming the freedmen was apparently considered a primary duty and one that was fulfilled with relish.[98]

Union leaders of the Freedmen's Bureau in various Southern states informed Congress about militia violence targeting the former enslaved in hearings. For example, General Thomas testified that in Mississippi, the militia was "abusive" and that it:

> assisted to paralyze labor, and add to the combination of difficulties under which the State has labored. . . . [T]wo companies of the militia had sworn that in their counties no negro who did not work for his old master, and no Yankee could live; that they would "drive out the thieving Yankees and shoot the niggers."[99]

In Georgia, the militia was "engaged in disarming the negroes," as well as burning schools and issuing death threats to teachers.[100] In Louisiana, an Army officer reported that "[n]ot a day or night passes but what many victims are murdered by the white confederate citizens. . . . All around in the country is one tale of abuse, woe, and misery, the master taking vengeance because his slaves are free."[101] Another general suggested that such harms were compounded by the fact that these militia organizations "give the color of law to their violent, unjust, and sometimes inhuman proceedings."[102] Based on such reports, Senator Henry Wilson concluded that the "rebel militia has been disastrous to peace and security of loyal men and freedmen. I trust Congress will see to it that armed rebels are not permitted to outrage the rights and endanger the lives of the people."[103]

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98. SINGLETARY, *supra* note 94, at 5.
99. CONG. GLOBE, 39th Cong., 1st Sess. 914 (1865) (statement of Sen. Wilson).
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*

Over constitutional objections, Congress passed a joint resolution temporarily disbanding the militias in former Confederate states in 1867.[104] Some members argued that this provision exceeded Congressional authority and violated the Second Amendment.[105] Like other supporters of the measure, Senator Wilson charged that the law was necessary to counteract what amounted to a continuation of the rebellion:

> [T]hese men were once disarmed when General Lee and General Johnston and the other rebel generals surrendered. They are the same men. . . . There is one unbroken chain of testimony from all people that are loyal to this country, that the greatest outrages are perpetrated by armed men who go up and down the country . . . disarming people. . . I believe this Congress has [the] power to disarm ruffians or traitors, or men who are committing outrages against law or the rights of men on our common humanity. I have no doubt of our right to prevent the organization in the rebel States of any militia force . . . .[106]

This law thus took its place alongside other statutes designed to "reconstruct" the states formerly in rebellion—such as requiring them to ratify new constitutions eliminating discrimination as a condition for re-admittance to the union.[107] President Andrew Johnson decried both as running afoul of the Constitution and

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104. The legislation provided as follows:

> [A]ll militia forces now organized or in service in either of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Louisiana, Mississippi, and Texas, be forthwith disarmed and disbanded, and that the further organization, arming, or calling into service of the said militia forces, or any party thereof, is hereby prohibited under any circumstances whatever until the same shall be authorized by Congress.

CONG. GLOBE, 39th Cong., 2d Sess. 1848 (1867). It was amended to delete "disarmed," to address the concern that the law "relate[d] to people" and not just to the States. *Id.* at 1849. During the debate, members reiterated the temporary nature of the measure, noting that "it prevents armed rebel organizations in any of these States until matters are settled." *Id.*

105. *Id.* West Virginia Senator Waitman Willey objected on those grounds, but ultimately supported the measure when its sponsor struck "disarmed" from it. *Id.*

106. CONG. GLOBE, 39th Cong., 2d Sess. 915 (1867).

107. CORNELL, *supra* note 93, at 176.

deserving of being "annulled."[108] These provisions departed sharply from antebellum understandings of the balance of power between the federal and state governments under the Constitution; however, lawmakers and other public figures justified federal intervention in this context as a proper exercise of Congress's War Powers. For example, Richard H. Dana, Jr., U.S. Attorney for Massachusetts at the time, noted that cessation of armed conflict did not guarantee that the South would uphold "public safety and public faith" for blacks and whites alike. [109] As a result, the federal government had to impose measures to ensure that the formerly enslaved were truly free: "[T]he public faith is pledged that every man, woman and child of them, and their posterity forever, shall have a complete and perfect freedom."[110] Dana also averred that, in addition to being constitutional, such actions were radical and necessary for the public good: "To introduce the free negroes to the voting franchise is a revolution."[111]

Indeed, congressional debate concerning the Reconstruction Amendments and legislation intended to realize their goals, reveals that others shared Dana's assessment. For example, when the Senate considered the Ku Klux Klan Act of 1870, Republicans addressed charges that they sought to "subvert the whole system of self-government and all the political institutions to which this country owes so many of its blessings."[112] Missouri Senator Carl Schurz responded as follows:

> Yes, sir, this Republic has passed through a revolutionary process of tremendous significance. Yes, the Constitution of the United States has been changed in some most essential points; that change does amount to a great revolution, and this bill is one of its legitimate children. . . . We all remember that the most powerful political interest in this country for a long period previous to the war was that of slavery. We remember also that the slave power, finding itself at war

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108. Gerhard Peters and John T. Wooley, *Andrew Johnson, Fourth Annual Message*, The American Presidency Project, http://www.presidency.ucsb.edu/ws/?pid=29509.

109. *Reconstruction: Speech of Hon. Richard H. Dana at the Meeting in Faneuil Hall, Boston*, N.Y. TIMES, June 24, 1865 at 2.

110. *Id.*

111. *Id.* at 3. He continued to note that "the poor, oppressed degraded black man, bearing patiently his oppression until he can endure it no longer, rising with arms for his rights—do you want to see that?" Again, the crowd responded "No." *Id.*

112. CONG. GLOBE, 41st Cong., 2d Sess. 3607 (1870) (statement of Sen. Schurz).

> with the conscience of mankind . . . sought safety behind the bulwark of what they euphoniously called local self-government, and intrenched [sic] itself in the doctrine of State sovereignty. To be sure, it made, from that defensive position, offensive sallies, encroaching on the rights of the non-slaveholding States, as for instance in the case of the notorious fugitive slave law . . . . And what did that revolution put in its place? It gave us three great amendments to the national Constitution. . . . It made the liberty and rights of every citizen in every State a matter of national concern. Out of a republic of arbitrary local organizations it made a republic of equal citizens . . . .[113]

Reconstruction proponents accepted and celebrated the fact that the new Amendments eradicated the status quo by erasing, to some extent, the line separating federal matters from state concerns. As Representative Schurz's speech suggests, state sovereignty had been a convenient artifice, wielded to facilitate oppression that was at odds with the nation's creed. According to Schurz, the "revolutionary" Reconstruction amendments rebuilt the nation in a manner that was true to its founding principles of liberty and equality.[114]

As a practical matter, however, this revolutionary phase placed the new Republican governments in a precarious situation, as hostile Democrats sought to unseat them by ballot, bullet, or both. For example, in South Carolina, the Klan embarked on an effort intended to "put an end to a situation that threatened to leave no part of South Carolina secure for white supremacy."[115] Arkansas Senator Benjamin Rice described the carnage leading up to the 1868 election:

> [T]here was a systematic course of assassination that resulted in the destruction of over two hundred Union men in that State. A member of Congress was killed, State senators were assassinated, members of the House of Representatives, registers, and leading Union men in various

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113. *Id.* at 3607-08.

114. *Id.* at 3607.

115. Herbert Shapiro, *The Ku Klux Klan During Reconstruction: The South Carolina Episode*, 49 J. NEGRO HIST. 34, 40 (1964).

> counties of the State were assassinated without any . . . opportunity of defense.[116]

In the face of such violence, and at the urging of state lawmakers, Congress repealed the militia ban to protect the new governments from resentful and dangerous members of the electorate.[117]

State governors then established new military units, which included African Americans. The "Negro militias," were a "political and military institution, providing a means of protecting and organizing freedmen,"[118] necessary to combat the Klan's avowed purpose of "'killing all these damned niggers that vote the radical ticket.'"[119] President Grant recognized that Klan violence was intended to strip African Americans of every vestige of their new status. In a message to the House of Representatives, he observed that the Klan's goals:

> were by force and terror to prevent all political action not in accord with the views of the members; to deprive colored citizens of the *right to bear arms and of the right to a free ballot*; to suppress schools in which colored children were taught, and to reduce the colored people to a condition closely akin to that of slavery.[120]

Grant's message suggested that he viewed armed militia service as tantamount to exercising the franchise: a right and responsibility related to to citizenship. It was this understanding of the right to bear arms during Reconstruction that particularly infuriated the Klan, which claimed to respect the Constitution, "but only . . . that version in effect before 1865.The Klan sought to nullify any concept of constitutional liberty that included the extension [of the vote] to Negroes . . . . [It] was particularly concerned with disarming the Negroes."[121] Disarmament in this context implicated more than self-defense. As mentioned above, former Confederates had turned to

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116. CONG. GLOBE, 40th Cong., 3d Sess. 83 (1868).

117. *Id.* at 86.

118. CORNELL, *supra* note 93, at 176.

119. 42nd Congress, 2nd Session, Report of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States, Vol. V 1719 (Feb. 19. 1872) https://archive.org/details/reportofjointsel05unit.

120. JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897 164 (1898) https://babel.hathitrust.org/cgi/pt?id=mdp.39015068011728;view=1up;seq=11 (emphasis added).

121. Shapiro, *supra* note 115, at 44.

violence to reject Reconstruction in form and substance, particularly the notion of Black men as fellow citizens.[122] Accordingly, the acts of terror in which they engaged were directed at the franchise and its armed protectors. The Black militia was a natural target.

Notwithstanding the name, some of these military forces were integrated; but, according to Singletary, "[a]s in heredity, so in the militia, a touch of Negro was sufficient to brand it as all Negro in the eyes of most Southern whites."[123] In this regard, many Southerners were hostile to the Negro militia not only because of race, but also because the federal government activated them to assist Republican state governments.[124] For white southerners, the social meaning of the militia had shifted from being a manifestation of nation and the embodiment of white American masculinity, to being an enemy and foreign force in the former Confederacy.

Reconstruction meant Black men no longer were dependent charges relegated to the domestic sphere. Black men were free to engage in the public affairs of their communities and the nation by voting.[125] Militia service cemented that posture as African American men took their place among the defenders of state security.[126] In practice, the rights to vote and bear and keep arms were mutually reinforcing, as the latter helped ensure the former.[127] Similarly, voting for Republican candidates typically meant that Black rights would remain protected, at least as a matter of law.[128] For example, in South Carolina, Republican gubernatorial candidate Robert K. Scott activated the Black militia to protect African American voters in the 1870 election, after two years of systemic violence targeting Black voters in county elections.[129] This muster had been essential two years earlier in countering Klan intimidation at the polls, and

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122. *See* Williams, *supra* note 85 and accompanying text.

123. SINGLETARY, *supra* note 94, at 15-16.

124. *Id.* at 29-30.

125. *See* EDWARDS, *supra* note 83, at 196-97 (observing the ways in which African American men demonstrated their masculinity through political engagement, among other things).

126. CORNELL, *supra* note 93, at 176. *Cf. also* Jane Dailey, *Deference and Violence in the Postbellum Urban South: Manners and Massacres in Danville, Virginia*, 63 J.S. HIST. 553, 569(1997) (discussing white "resent[ment] of African American police officers).

127. *Cf.* DECONDE, *supra* note 52, at 75 (stating that "African Americans viewed guns as symbols of freedom as well as instruments with which to defend it").

128. *See* EGERTON, *supra* note 91, at 241 (detailing Freedmen's Bureau's reports of violence against Blacks who had voiced their intention to vote).

129. Shapiro, *supra* note 115, at 39.

resulted in Republican victories in counties that previously had gone Democratic due to Klan disturbances.[130]

As Black voters exercised these rights, white supremacists redoubled their efforts to vindicate the notion that the United States was "a white man's country."[131] Race and gender combined not only to reinforce the antebellum notion of citizenship, but also to justify the existence of such groups. For example, Ku Klux Klan members pledged that "females, friends, widows, and their households, shall be the special object of [their] care and protection."[132] Against this backdrop, the Klan embarked on a campaign of terror to counteract the effects of Reconstruction and enforce the gendered and racial norms so essential to white supremacy.[133] This effort focused chiefly on overt signs of male privilege and citizenship, particularly the rights to vote and to keep and bear arms.

As a result, the Klan placed Black suffrage and Black militias in its crosshairs through campaigns to topple Republican leaders in the South, end Reconstruction, and reestablish the former white male planter class as the rightful leaders they believed themselves to be. President Grant stated as much in a message to the House of Representatives in 1872. Submitting a report on the wave of violence in South Carolina, the President stated that the Klan's purposes were:

> by force and terror to prevent all political action not in accord with the views of the members; to deprive colored citizens of the right to bear arms and of the right to a free ballot. . . these combinations were organized and armed, and had

130. *Id.* at 40.

131. Cardyn, *supra* note 82, at 781.

132. *Id.* at 695. *See also id.* at 815 (discussing the growing fear of the loss of masculinity).

133. *See, e.g.*, EDWARDS, *supra* note 83, at 199 (observing that white men took the law into their own hands, which "reinforced their place within this hierarchy, as those who embodied public power and controlled the rules to which others were subject"); *see also* Jane Dailey, *Deference and Violence in the Post-Bellum Urban South: Manners and Massacres in Danville, Virginia*, 63 J.S. HIST. 553, 573 (1997) (citing white discomfort with and rejection of African American "appropriation of Victorian gender roles"in part because "it reflected black men's new identities as patriarchs and citizens").

> rendered the local laws ineffectual to protect the classes whom they desired to oppress.[134]

For example, the day after South Carolina Governor Scott was reelected in 1870, whites organized to disarm the Black militia, starting in Laurens County, in the northwestern part of the state.[135] Violence spread to three neighboring counties, resulting in "approximately 500 outrages . . . committed [including] the murders of . . . the only Negro magistrate appointed in Spartanburg. . . . Supporters of the Radicals were attacked for a variety of reasons . . . . [such as being a Democratic supporter but] accept[ing] a Republican appointment."[136] Political outcomes not to the Klan's liking thus sparked deadly backlash.

Beyond election outcomes, however, the mere fact that Blacks were permitted to be armed and to vote was particularly outrageous to Klan members because these activities undermined the pre-existing racial and gender hierarchy. As Cardyn observed: "Not only were these enterprises seen as integral complements of manhood, but their rigid circumscription under the regime of racial slavery rendered them badges of whiteness as well . . . . [thus], 'the value of white skin dropped when black skin ceased to signify slave status.'"[137] As such, disarming the Black militia was essential to restoring the social meaning of whiteness, and in so doing, re-establishing the constructs of citizenship and masculinity as the preserves of white men.

Race and gender were not only at the roots of assaults upon freedmen and Reconstruction, they also were manifested in the punishment Klan members meted out. For example, the Klan whipped a North Carolina freedman for supporting radical (Republican) politicians and told him they "would show [him] how to be a man."[138] In another incident, Klan members warned a white

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134. Ulysses S. Grant, Letter to House of Representatives, (April 19, 1872) *in* MESSAGES AND PAPERS OF THE PRESIDENTS, VOL. VII, 164 (J.D. Richardson ed., 1898).

135. Shapiro, *supra* note 112, at 41.

136. *Id.*

137. Cardyn, *supra* note 82, at 817, (quoting Eva Saks, *Representing Miscegenation Law*, 8 RARITAN 39, 47 (1988)).

138. Cardyn, *supra* note 82, at 778 n.409 (quoting Trial of William W. Holden, Governor of North Carolina, Before the Senate of North Carolina, on Impeachment by the House of Representatives for High Crimes and Misdemeanors 1763 (Raleigh Sentinel 1871)).

woman that they would "slit her husband's throat if he didn't 'change his politics and be a white man.'"[139]

Black women risked retribution if they tried to politically influence their husbands or other men in their lives. For example, some Black women refused to sleep with husbands who were thinking of voting for a Democrat.[140] Others physically assaulted Black men who identified with the Democratic Party by jumping on them and tearing at their clothes.[141] Congressional hearings on Klan violence revealed that such actions came at a cost. For example, one witness testified that "women were whipped in every case, with the exception of one, [when] the man of the house voted for the republican ticket."[142] Similarly, a freedwoman testified that "[K]lansmen sought revenge not only on the men who voted Republican but also 'took the spite out on the women when they could get at them."[143] In this regard, Black women and their husbands were punished for transgressing gender norms. Seeking to sway their husbands' votes signified intrusion over the patriarchal privilege of voting and, therefore, venturing into the public realm-the male sphere. W. Scott Poole notes that in the public mind, "African American women became symbolic counterpoints to the purity of white southern womanhood," the antithesis of "southern lad[ies]."[144]

Klan punishments also had sexual dimensions designed to reinforce hegemonic masculinity and white supremacy. For example, the Klan whipped men and women alike, and ordered them to perform simulated sexual acts, or withstand assaults on their genitals.[145] Similarly, such penalties as requiring a pregnant woman

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139. *Id.* at 779 n.409.

140. W. Scott Poole, *Religion, Gender, and the Lost Cause in South Carolina's 1876 Governor's Race: "Hampton or Hell!,"* 68 J.S. HIST. 573, 594 (2002).

141. *Id.*

142. Cardyn, *supra* note 82, at 779 (quoting 2 JOINT SELECT COMM. ON CONDITIONS OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, 42D CONG., REPORT OF THE JOINT SELECT COMMITTEE TO INQUIRE INTO THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, NORTH CAROLINA, at 195-196 (Washington D.C., Government Printing Office 1872)).

143. *Id.* at n. 411 (quoting 3 JOINT SELECT COMM. ON CONDITIONS OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, 42D CONG., REPORT OF THE JOINT SELECT COMMITTEE TO INQUIRE INTO THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, SOUTH CAROLINA, pt. 1, at 586 (Washington, D.C., Government Printing Office 1872)).

144. Poole, *supra* note 140, at 594.

145. Cardyn, *supra* note 82, at 707-08.

to dance naked as her husband stood by powerless,[146] forcing husbands to witness their wives being raped,[147] or, at the most extreme level, castrating lynched freedmen,[148] brutally underscored that, in the eyes of the Klan, access to "true" masculinity resided with whites alone.

### *C. Bullets, Ballots, and Reconstruction's End: South Carolina's Example*

By 1876, Reconstruction was faltering for a variety of reasons, not the least of which was unremitting violent resistance from the Klan and its allies. Nationally, the country was experiencing an economic downturn.[149] Northerners had grown weary of reports of Southern political violence: "The whole public are tired out with these annual autumnal outbreaks in the South ... [and] are ready now to condemn any interference on the part of the Government."[150] In this environment, the President and lawmakers calculated that increased enforcement would come at great political expense to Republicans; as a result, the federal government deployed diminishing numbers of troops to the South.[151] This reduction was especially problematic given the fact that 1876 was a Presidential election year.[152] With federal support for enforcing the Reconstruction Amendments on the wane, opponents amplified their virulent opposition to Black national citizenship.[153]

The Hamburg Massacre, which began in South Carolina on the nation's centennial, July 4, 1876, illustrates militia service's deep interconnection with citizenship and masculinity and the lengths to which southern white men would go to restore the antebellum understanding of both. The fact that voters would choose the next governor and President heightened the urgency with which white men would pursue what they perceived as their lost primacy.

#### 1. Seeds of the Hamburg Massacre

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146. *Id.* at 706.

147. *Id.* at 722.

148. *Id.* at 752-54.

149. *See generally* ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 236-39 (1988).

150. *Id.* at 236.

151. *Id.* at 237.

152. *Id.*

153. *See generally, id.* at 236-39.

In celebration of Independence Day, Black militia soldiers paraded down a public street in their small, predominantly African American town, until they confronted white men who made a literal and figurative claim on the public space African Americans occupied.[154] Thomas Butler and Henry Getzen[155] used their buggy to block the soldiers' path, claiming that the road was private property because their wagon "had worn the ruts along"[156] it—Butler's father later admitted that the road was, indeed, public.[157] But the notion of Black men celebrating the July 4th holiday "generated intense anger among the whites," exacerbating existing resentment against the Black militia.[158] Butler's father stated that whites generally "'looked upon the [Black men] as nothing more than a parcel of men – not as militia' . . . they had 'no right to those guns.'"[159] Steven Kantrowitz suggests that their "hostility to the militia was based . . . in former slaveholders' expectations of personal and collective authority. They questioned the validity of [the militia], but their skepticism ran much deeper. A black militia, they implied, was an oxymoron."[160]

A few days later, long after the parade had dissipated, the conflict played out in court with General M.C. Butler, a former Confederate officer, representing the white men.[161] Butler, an attorney and unsuccessful candidate for Lieutenant Governor six years earlier,[162] was, according to Black residents, "one of the main

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154. *See* Stephen Kantrowitz, *One Man's Mob is Another Man's Militia: Violence, Manhood, and Authority in Reconstruction South Carolina, in* JUMPIN' JIM CROW: SOUTHERN POLITICS FROM CIVIL WAR TO CIVIL RIGHTS 67, 73 (Jane Dailey, Glenda Elizabeth Gilmore, & Bryant Simon, eds., 2000); *see also* Dailey, *supra* note 133, at 565-66 (examining escalating confrontations between whites and African Americans after the Civil War over public places, such as streets and sidewalks).

155. *See* Kantrowitz, *supra* note 141, at 73. A newspaper report of the time identified the men as Robert Butler and Mr. Gottson. *The Old Rebel Spirit: One Way of Reducing the Negro Vote in the South*, N.Y. TIMES, July 14, 1876, at 1 (hereinafter *Old Rebel Spirit*).

156. Kantrowitz, *supra* note 154, at 74. The road was "overgrown with weeds except in its wagon ruts." *Id.* at 73.

157. *Id.* at 74.

158. *Id.* at 73-74. Kantrowitz observed that "[s]uch men could hardly accept that the revolution honored by Independence Day offered any legitimate cause for black American celebration." *Id.*

159. *Id.* at 74 (citing U.S. Senate Misc. Doc. No. 48, 44th Cong. 2d Sess. I:1057).

160. *Id.*

161. *See Old Rebel Spirit*, *supra* note 143, at 1.

162. *The Meaning of Hamburg: Negro Appeal for Protection*, NY TIMES, July 24, 1876, at 6.

pillars of the Kuklux fabric in South Carolina."[163] Butler sought to have Black militia Commander Doc Adams and other officers of the militia arrested for "obstructing the highway."[164] When Adams did not appear in court because he feared for his safety,[165] Butler and his men went to neighboring communities, across state lines to Georgia, and gathered men with the explicit purpose of disarming Adams and the Black militia.[166] In Edgefield, the closest town, whites already had stripped Black militia of their weapons.[167] Butler's mission was neither sponsored nor explicitly sanctioned by the state of South Carolina. Nonetheless, Butler later claimed that he and his men had the right to disarm the Black militia because they had "assembled riotously, [and] were in a state of armed resistance to the laws."[168] In the eyes of these white civilians, the Black militia's legal actions were transgressions ranging from trespassing to illegal possession of firearms and rioting, which, in turn authorized them to act in the interest of "self-preservation."[169] More likely, however, these whites saw armed Black men as affronts to their position at the top of the racial and gender hierarchy; in this sense, they embodied Justice Taney's charge in *Dred Scott* that African American citizenship in fomented "discontent" and was dangerous to the state's "peace and safety."[170] The Black militia troops, in defending themselves, were also asserting their status as male citizens of this nation.

### 2. The Massacre's Purpose: Dismantling Black Citizenship and Masculinity

As the posse grew, Doc Adams and the militia barricaded themselves in the armory which stored their firearms.[171] White town residents had fled Hamburg, having been alerted that an armed

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163. *Id.*

164. *Democratic Campaigning: The Hamburg Massacre,"* N.Y. TIMES, July 16, 1876, at 7.

165. *See* Kantrowitz, *supra* note 141, at 75.

166. *See Old Rebel Spirit*, *supra* note 155, at 1; *see also* Kantrowitz, *supra* note 154, at 75.

167. *See, The Meaning of Hamburg: Negro Appeal for Protection*, *supra* note 162, at 6.

168. *M.C. Butler Again: He Justifies His Course at Hamburg*, N.Y. TIMES, July 24, 1876, at 2.

169. *Id.*

170. 60 U.S. at 416-17.

171. *See Old Rebel Spirit*, *supra* note 155, at 1.

confrontation was imminent.[172] At seven in the evening, after militia members again refused to surrender their weapons, the battle began.[173] With the shower of bullets ringing through the air, the remaining African American residents also departed, leaving the town to its combatants.[174] When Butler's forces—members of rifle and sabre clubs—failed to breach the brick exterior of the armory, some men secured a cannon from Augusta, Georgia, which "tore the windows [of the armory] to pieces."[175] As the hostilities wore on, some militia members escaped unnoticed.[176] Others were able to flee after trading shots with Butler's men, and reached safety. Another soldier, Marshal James Cook, failed to escape: "[I]n an instant [he] fell dead, his head being literally honeycombed with bullets."[177] By one o'clock the next morning, Butler's men had captured twenty-nine militia members and several weapons. General Butler left for home, ordering his men to jail the prisoners. Instead, the white troops released the men, shooting them as they ran. Five Black men died.[178]

Subsequently, African Americans from Charleston, South Carolina, sought justice from the state for the Hamburg massacre.[179] Their letter to Governor Chamberlain, published in the New York Times, provided grisly details of the aftermath of the battle. They charged that Butler's men "plunder[ed] the homes of men whom they ha[d] just slain and chopped their flesh into mince-meat and exhibited it to the bystanders and taunting the children of the murdered with offers of their parents' flesh to eat. . . ."[180] Just as the Klan, Butler's men asserted their masculinity not only by disarming the Black militia men, but also by invading their households and terrorizing their children– demonstrating to those families and their communities who the "true" men were. The Charleston residents demanded that the Governor punish M.C. Butler, and that the federal government:

> see to it that the great principles of equal justice before the law and equal protection under this Government be maintained throughout this nation, so that safety to life and

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172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*; *see also* FONER, *supra* note 149, at 240.
179. *See, The Meaning of Hamburg*, *supra* note 162, at 6.
180. *Id.*

> property, and the right to vote as conscience shall dictate to every citizen, shall be forever secured to all throughout this broad land.[181]

Governor Chamberlain, in turn, solicited President Ulysses Grant for federal assistance.[182] While reluctant to ascribe a racial motive to the Butler's men,[183] the governor nonetheless concluded that their actions "indicate[d] a purpose to deprive the militia of their rights on account of their race or political opinions," because all those assaulted were Black and Republican.[184] Chamberlain noted that the result of the massacre was to "cause wide-spread terror and apprehension among the colored race and the Republicans of this State . . . [but] a feeling of triumph and political elation . . . in the minds of many of the white people and Democrats."[185] He further observed that because race and political leanings were so intertwined, whites, who were predominantly Democratic voters, tended to "overlook the naked brutality of the occurrence, and seek to find some excuse or explanation of conduct which ought to receive only unqualified abhorrence and condemnation, followed by speedy and adequate punishment."[186] According to Chamberlain, white indifference to this violence would only fuel additional acts of brutality and suppress the Black vote, which was no doubt a pointed reference to the fact that a Presidential race was approaching.[187] Federal intervention would be necessary to ensure that Black Republicans could get to the polls and elect Grant's successor. Chamberlain warned that Hamburg was "only the beginning of a series of similar race and party collisions in our State, the deliberate aim of which is . . . the political subjugation and control of this State."[188] Confronted with this threat to the republican form of government, Chamberlain sought assurances that the federal

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181. *Id.*

182. *The Hamburg Massacre: Gov. Chamberlain's Letter*, N.Y. TIMES, Aug. 7, 1876, at 5.

183. *Id.* The letter claimed that it was "manifestly impossible to determine with absolute certainty the motives of those who were engaged in perpetrating the massacre at Hamburg." *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

government would "exert itself vigorously to repress violence . . . during the present political campaign"[189] in South Carolina.

President Grant agreed that the federal government was obliged to act under these circumstances.[190] He observed first that Hamburg was not a unique experience, stating that, "as cruel, blood-thirsty, wanton, unprovoked, and uncalled for, as it was, [it] is only a repetition of the course which has been pursued in other Southern States within the last few years."[191] Pledging to take all actions within his authority under law and the Constitution, the President stated that:

> A government that cannot give protection to life, property, and all guaranteed civil rights (in this country the greatest is an untrammeled ballot) to the citizen is, in so far, a failure, and every energy of the oppressed should be exerted, always within the law and by constitutional means, to regain lost privileges and protections. [192]

Three months after the massacre, Governor Chamberlain disbanded the rifle clubs from whose ranks the Hamburg assailants came.[193] President Grant issued a proclamation supporting the governor's action. [194] However, neither M.C. Butler nor the men who attacked the Hamburg militia were ever punished.[195]

### 3. Significance of the Hamburg Massacre

From start to finish, the Hamburg Massacre illustrates the social meaning of the Second Amendment to the nation's racial and gender

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189. *Id.*

190. *See* Letter from Ulysses S. Grant to D.H. Chamberlain, Governor of South Carolina (July 26, 1876), *available at* teachingamericanhistory.org/library/letter-to-d-h-chamberlain-governor-of-south-carolina/.

191. *Id.* Grant pointed specifically to Louisiana and Mississippi, noting that the latter was "governed to-day by officials chosen through fraud and violence, such as would scarcely be accredited to savages, much less to a civilized and Christian people." *Id.*

192. *Id.*

193. Poole, *supra* note 140, at 588.

194. *Id.* at 593.

195. In fact, South Carolina lawmakers elected Butler to the U.S. Senate in 1877. Eric Foner has suggested the Hamburg Massacre demonstrated that even the South's elites endorsed violence as a way of reclaiming the antebellum status quo; indeed, after Hamburg, whites reportedly declared "This is the beginning of the redemption of the South." FONER, *supra* note 149, at 240.

hierarchy. Black militia soldiers celebrating Independence Day flouted white notions of citizenship, masculinity, as well as nation. By impeding the militia's parade, Butler and Getzen took a stand against this literal and figurative move into the public arena by claiming the street as "their" property. Instead of ceding ground to white men upon demand, the Black militia soldiers defended themselves, their arms, and, in doing so, their status as Americans. The Civil War and Reconstruction Amendments had made them free men, citizens, and voters, which in turn gave them access to the public sphere. However, their assailants sought to return them to slavery or something akin to it to reinstate white patriarchy. In this regard, disarming the Black militia was tantamount to putting African Americans in their proper place: subordinate, dependent, and outside the realm of citizenship. To justify these actions, Butler claimed that the armed Black militia *per se* contravened the law and undermined public safety.[196] However, in truth, the Black militia undermined the stratification upon which the South depended for its economy—*i.e.*, a system in which Blacks remained subservient and underpaid—by challenging white supremacy.

As Hamburg crystallizes, white attempts to disarm Blacks were about reifying white supremacy and patriarchy. The Klan and its sympathizers, as much as African Americans, recognized that the right to keep and bear arms was integral to reconstructing an inclusive and revolutionary understanding of citizen and nation. Hamburg is just one vivid example of how threatening that vision was for many white Southerners, such that they engaged in armed rebellions to return to the antebellum era. Sadly, by 1876, the frequency of such outrages, in addition to limited financial and military resources depleted by economic woes and constrained emotional resources after twenty-plus years of struggling with the South over slavery and issues of race, meant that Reconstruction was on its last legs.[197] In the razor thin election between Republican Rutherford Hayes and Democrat Samuel Tilden, the party of Lincoln agreed to a compromise that withdrew federal troops from the South to enable Hayes to take the White House.[198] With that deal, the M.C. Butlers of the South essentially prevailed.

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196. *Kantrowitz*, *supra* note 154, at 73-74 and accompanying text.

197. FONER, *supra* note 149, at 227, 233-34, 245.

198. *Id.* at 245.

## IV. WHAT SJF METHODS MEAN FOR THE SECOND AMENDMENT

As the foregoing demonstrates, SJF reveals that the Second Amendment has long played a role in establishing and supporting the interlocking oppressions of race and gender subordination. The Supreme Court's shallow historical analysis in *Heller* and *McDonald* completely ignores this aspect of the right to keep and bear arms, much as its textual analysis ignored the meanings of the "people" and "militia." At ratification, the right to keep and bear arms helped construct notions of citizenship, race, and gender. Reconstruction challenged those notions, but ultimately failed to dismantle them in the face of white terroristic resistance. Indeed, the hostilities sparked by Reconstruction illustrate that the right to keep and bear arms was integral to white hegemonic masculinity. Against this backdrop, the right to "self-defense" carries a meaning that extends beyond the individual right the Court found in *Heller* and *McDonald*.

SJF demonstrates that rather than encompassing merely the patriarchal norms of defending family, home, and hearth, the Second Amendment is a bulwark for the citizen-self, which as the foregoing suggests, also has racial implications. The right to keep and bear arms has served as both a gatekeeper to and symbol of securing that status. The Court's historical narrative turned a blind eye to this part of the Amendment's story. In doing so, the Court protected white patriarchal norms, and as a consequence, reinforced longstanding racialized and gendered subordination connected to gun ownership and use, as illustrated by Stand Your Ground legislation.

### *A. Constructing Citizen, Race, and Gender*

During the time periods upon which the Court focused in *Heller* and *McDonald*, the Amendment played a critical role in establishing citizenship, as well as constructing race and gender, as discussed above. At the Founding, the Amendment helped define "citizen" as white and male, in part by limiting guns and militia service to that class.[199] In doing so, it also helped formulate our understanding of race and gender.

Namely, the very inaccessibility of the right to keep and bear arms for Black and Native men distinguished them from their white counterparts. Instead of participating in public life through militia service, men of color were relegated to domestic service, as reflected

199. *Supra* Part II. B

in statutes constraining their militia activities to attending to or entertaining white men.[200] In this way, excluding men of color from the Second Amendment's orbit established Black and Native men's status as non-white and non-male. Pushed to the sidelines as incapable of defending the state, these men were consigned to the domestic sphere as dependents, in the same category as women and children.

Reconstruction both challenged and highlighted these conceptions of race and gender, particularly for Blacks. By lifting the barriers to citizenship formerly enshrined in the Constitution, the Reconstruction Amendments and their implementing legislation equalized Black men with their white counterparts on paper. Equipped with the rights to vote, keep and bear arms, and serve in the militia, Black men were authorized to participate in civic life. By law, they could be paid for their labor and oversee their own households. Autonomous and freed from the domestic sphere, Black men no longer were feminized. These changes upended the social order.

For white southern men, the liberty afforded to Black men undermined their primacy at home and in society. Reconstruction thus revealed masculinity and whiteness to be contingent and malleable, which added to the destabilizing effects of the legal framework dismantling the slavery regime. White southerners thus brutally repudiated Reconstruction in order to reestablish the racial and gender social order, placing themselves at the top.

### *B. Self-Defense as Identity Protection*

In this regard, SJF reveals that the Second Amendment right to self-defense plays a structural role in society. Here, the Reconstruction history is telling. For white Southerners, new laws welcoming Black men into citizenship threatened a nation whites had long believed was established by and for them. Black men as citizens *per se* jeopardized that notion, as well as the security it provided the white nation, which Justice Taney averred that the framers intended to create.[201] Thus, when confronted with Black militia men, white Southerners claimed self-defense to justify disarming them. In this sense, they defended the self implicit in the antebellum concept of nation, which by definition excluded Blacks. Similarly, freedmen resisted attacks by hate groups to protect the

200. HENNING, *supra* note 60 and accompanying text.

201. *Scott*, 60 U.S. at 416-17. *See also supra* note 75 and accompanying text.

newly enfranchised and legitimized citizen self. The Hamburg Massacre illustrated how deeply at odds these dueling visions of nation were, and the barbarous lengths to which white Southern men would go to restore the antebellum racial and gender hierarchy.

### *C.* Heller *and* McDonald*: Using History to Reinforce Subordination*

The Court used a selective historical narrative to ascertain the Second Amendment's meaning. The story it told, to quote historian Robert W. Gordon, "relegate[d] the bad parts of history, the parts we no longer want or need—the past of slavery and legalized subordination of women, for example—to a thoroughly dead past that is over and done with."[202] The Court's textual and historical analysis of the Amendment erred significantly in failing to consider what the terms "militia" or "people" meant for African Americans or women at the founding in its examination of the "prefatory" and "operative" clauses.[203] Doing so would have provided a more comprehensive understanding of the right. The Court ignored this history, presumably because it deemed such facts as irrelevant for ascertaining the present-day significance of the right, or perhaps because it did not support the "single authoritative meaning" it sought to articulate.[204] Whatever the reason, as the foregoing indicates, racial and gender norms were implicit in the Second Amendment at Ratification and Reconstruction, which means the framers knew whom the provision was meant to protect and whom it was meant to exclude. The Court's neglect of the subordinating structures embedded in the Amendment means its holding—particularly when considered in tandem with dicta "elevating"[205] the right—guarantee that the subjugating aspects of the right to keep and bear arms will continue, albeit in a different form in what Reva Siegel has identified as "preservation-through-transformation."[206]

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202. Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1028 (1997).

203. *See Heller*, 554 U.S. at 578. Gordon provides an illuminating example: "'[l]iberty' in the eighteenth century presupposed a world in which slaves or indentured or household servants and women would perform the menial tasks that freed gentleman for participation in politics or the pursuit of new economic opportunities; a liberty of the few premised on the subordination of the many." Gordon, *supra* note 202, at 1025.

204. *Id.*

205. *Heller*, 554 U.S. at 635.

206. Reva Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118-19 (1996).

Specifically, in elevating the right to self-defense above all other interests, the Court has reified the white patriarchal structure the Second Amendment long has supported, as current laws suggest. Consider so-called Stand Your Ground (SYG) measures. Thirty-three states have such laws, which allow a person to use deadly force in self-defense at home or in public (in Florida, for example, any place one has a right to be), with no duty to retreat.[207] Many of these jurisdictions also provide immunity to persons asserting SYG, which frees them from arrest or prosecution.[208] An American Bar Association (ABA) task force found that SYG laws have resulted in significant racial disparities; for example, nationally, "a white shooter who kills a black victim is 350 percent more likely to be found to be justified than if the same shooter killed a white victim."[209] It also found significant discrepancies in case outcomes, even when the facts were similar.[210]

The cases of George Zimmerman and Marissa Alexander, Florida residents who sought refuge from SYG laws in highly publicized incidents, are useful examples. George Zimmerman shot and killed Trayvon Martin, an unarmed Black teenager, in February of 2012.[211] Police failed to arrest Zimmerman at the scene because he told officers that he acted in self-defense; accordingly, by statute, the officers used their discretion to release him, uncharged.[212] In the wake of public outrage, police later arrested Zimmerman. A jury ultimately acquitted him of second degree murder because SYG "language was . . . used in the instructions to the jury."[213] In contrast, the same year a jury convicted Marissa Alexander, an African American woman, and sentenced her to 20 years for firing a warning shot in the air out of fear of imminent abuse from her partner, who walked away unharmed.[214] The court denied Ms.

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207. AMERICAN BAR ASSOCIATION, NATIONAL TASK FORCE ON STAND YOUR GROUND LAWS, FINAL REPORT AND RECOMMENDATIONS 2 (Sept. 2015). *See also* Catherine L. Carpenter, *Of the Enemy Within, The Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 663 (2003) (commenting on how SYG laws reflect the current state of the law respecting self-defense: most jurisdictions do not impose a duty to retreat).

208. ABA REPORT at 22.

209. *Id.* at 25.

210. *Id.* at 14.

211. Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege*, 68 U. MIAMI L. REV. 1099, 1116-17 (2014).

212. *Id.* at 1117.

213. *Id.*

214. *Id.* at 1118-19. Alexander's partner admitted to abusing women as a relationship strategy:

Alexander's attempt to assert SYG, which a court of appeals affirmed.[215] SYG, an extension of the so-called "castle doctrine,"[216] was unavailable to Ms. Alexander. This doctrine allows a person to use deadly force to protect herself against an intruder or even a guest who becomes violent. However, when a cohabitant is the aggressor, the law imposes a duty to retreat because both parties "ha[ve] an equal right to be in the castle."[217] Thus, because Ms. Alexander lived with her abuser, she had a limited right to stand her ground, even though she was in danger.

The different results in the Alexander and Zimmerman cases show that SYG and its close relative, the castle doctrine, protect a racialized and gendered self. Zimmerman successfully deployed SYG to excuse his shooting of a Black male teenager armed only with Skittles and bottled iced tea. Race and gender combined to construct Martin as threatening to Zimmerman, a common manifestation of implicit bias.[218] In the home, however, SYG and the castle doctrine protected the functional or titular head of household, even when he was abusive and posed an actual, demonstrated threat to his cohabitant. The patriarchal norm of family thus is a barrier to prosecution under the SYG regime. In this regard, rather than serving as a tool for autonomy as *Heller* and *McDonald* suggest and

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> 'I got five baby mammas and I put my hands on every last one of them except for one. . . . I physically abused them; physically, emotionally, you know. . . . Me, the way I was with women, they was like they had to walk on eggshells around me. You know they never knew what I was thinking, what I might say. . . . Or what I might do.' He also stated that he told Alexander that 'if she ever cheated on him, he would kill her.'

*Id.*

215. Alexander v. State, 121 So. 3d 1185, 1186 (Fla. Dist. Ct. App. 2013). The appeals court ordered a new trial. *Id.* The court reversed Alexander's conviction for aggravated battery on grounds that the trial court erred in instructing the jury on self-defense, but affirmed denial of immunity under the SYG statute. *Id.* at 1187. Ms. Alexander subsequently pled guilty to assault and has been released from jail. *See* Irin Carmon, *Marissa Alexander Released from Jail*, MSNBC (Jan. 27, 2015), http://www.msnbc.com/msnbc/marissa-alexander-may-be-released.

216. Franks, *supra* note 210, at 1110.

217. Carpenter, *supra* note 206, at 679.

218. ABA REPORT, *supra* note 217, at 24. The ABA heard evidence from experts as to the prevalence of implicit bias and its implications for SYG. For example, Dr. Jennifer Eberhart reported on research demonstrating that "people were quicker to shoot black men with guns than white men with guns, and if there existed any doubt, would shoot a black person with no gun over a white man with no gun." *Id.*

some gun rights advocates assert, SYG more precisely is about protecting the white patriarchal self.

## CONCLUSION

When viewed through a feminist lens, the Second Amendment is less an instrument for protecting individual rights than a component of a legislative, political, and social framework to protect and advance white patriarchy. The SJF methods applied above shed light on history lost to or ignored by the Court of the purposefulexclusion of persons from the category of citizen based on race and gender. Congress's actions during the Reconstruction period only amplify that understanding, as lawmakers passed measures to correct that past. Specifically, through Constitutional amendments and implementing legislation, the former enslaved at last were deemed citizens and part of the nation. Black men could vote and serve in militias as armed soldiers, which further afforded them the mantle of manhood that the antebellum regime denied. However, this seismic shift to the social order ignited violence in much of the South, as white males sought to retain their primacy in the social order.

The battles of this period underscored the great significance of keeping and bearing arms, as a matter of race and gender. For white men participating in the Klan's campaign of terror to re-enslave African Americans, arming themselves was essential to repudiate Black progress and the threat it presented to their vision of a white America. For Black men, firearm ownership signified their accession to masculinity and citizenship, and was essential to defend that new status. At stake then, was nothing less than the social meaning of nation. The Supreme Court's focus on individual rights to self-defense elided this critical aspect of the Amendment's past, resulting in a holding that reinforced systemic racial and gender subordination by privileging self-defense over other interests. In so doing, it affirmed the Amendment's oppressive ends, recasting them in the guise of individual rights.

This understanding of the racialized and gendered aspects of the Second Amendment provides new tools for analyzing gun regulations. At a minimum, it suggests that the right should be considered against state interests in eradicating systemic race and gender bias, which are evident in so-called Stand Your Ground laws, for example. It is my hope that this article invites additional feminist exploration of gun regulation. As the death toll continues to rise due to accidental and intentional shootings, the more thinking we can bring to bear on this issue, the better.