Guns, Sex, and Race: The Second Amendment through a Feminist Lens

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ABSTRACT: Surprisingly few feminists have analyzed the Second Amendment, even though violence is a critical concern for women. This article applies social justice feminism (SJF) to the Supreme Court's decisions in *District of Columbia v. Heller* and *McDonald v. Chicago*. SJF methods, which include examining history to understand interlocking oppressions, reveal that the Second Amendment has structural purposes beyond an individual's right to self-defense. Specifically, at ratification, the Amendment helped construct concepts of citizen, race, and gender by reinforcing regulations limiting gun ownership and militia service to white men. The Reconstruction era challenged those notions through additions to the U.S. Constitution and passage of implementing legislation, which enabled Black men to participate in civic life through the rights to vote and keep and bear arms. These rights, which were viewed in tandem, removed Black men from the domestic sphere, to which antebellum norms and laws had relegated them, and placed them in the center of public life. Because this seismic shift destabilized the pre-existing social order, white Southerners resisted mightily, engaging in terroristic acts to reaffirm the primacy of white patriarchy. Thus, as SJF methods reveal, the history of the Second

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Amendment is one that includes systemized race- and gender based subjugation. By eliding the structural, subordinating aspects of the right to keep and bear arms, *Heller* and *McDonald* may be understood as reinforcing oppression by facilitating access to firearms for self-defense purposes. Specifically, an SJF lens reveals that the Amendment continues its subjugating ends, most recently through such state laws as Stand Your Ground, which have resulted in racial and gender disparities in prosecution.

Introduction

In *District of Columbia v. Heller*, the Supreme Court asserted that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[1] Characterizing that statement as "overwrought and novel," Justice Stevens challenged his colleagues' interpretation of the Constitution's text, and decried their departure from precedent and the rule of law[2] in holding that the Amendment protected an individual right to own firearms. While the Court ultimately conceded that this right was not absolute, it nonetheless rejected a "free-standing interest-balancing approach" to determine its scope[3] because

> the very enumeration . . . takes out of the hands of government—even the Third Branch of Government--even the power to decide on a case-by–case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.[4]

During the 2014 term, Justice Thomas highlighted this "elevated right" understanding of the Second Amendment, in his

[1] *District of Columbia v. Heller*, 554 U.S. 670, 635 (2008).
[2] *Id*. at 652, 639.
[3] *Id.* at 634.
[4] *Id.* at 634 (emphasis in original).

dissent to the Court's denial of certiorari in *Jackson v. San Francisco*.[5] In that case, the Ninth Circuit Court of Appeals upheld a city requirement that firearm owners store their weapons "in a locked container or disabled with a trigger lock,"[6] a regulation similar to the one struck down in *Heller*. Justice Thomas stated that the Ninth Circuit's ruling not only conflicted with the Court's precedent, it was "questionable"[7] and that "something was seriously amiss"[8] with the decision, given *Heller*. However, cases such as *Jackson* may reflect the confusion[9] wrought by the Court's decisions, which, on the one hand apparently privilege the right to bear arms, but nonetheless provide safe harbor for "longstanding prohibitions on the possession of firearms,"[10] without explanation or analysis.

As lower courts and commentators puzzle over which regulations comply with the Second Amendment and which ones tread too much on the right, gun violence continues to make headlines. Recent research indicates that mass and public shootings are on the rise.[11] Such harrowing assaults occurred frequently in

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[5] 746 F.3d 953 (9th Cir. 2014), *cert denied*, 135 S.Ct. 2799 (2015).
[6] 135 S. Ct. at 2800.
[7] *Id.* at 2802.
[8] *Id*. at 2801.
[9] *See, e.g., Friedman v. Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015), *cert. denied*, 577 U.S. ___ (2015). That case upheld a city ordinance banning possession of assault weapons or large capacity magazines. Observing that *Heller* and *McDonald* only establish limits on firearm regulation, the court explained that

> the best way to evaluate the relation among assault weapons, crime, and self-defense is through the political process and scholarly debate, not by parsing ambiguous passages in the Supreme Court's opinions. The central role of representative democracy is no less part of the Constitution than is the Second Amendment: when there is no definitive constitutional rule, matters are left to the legislative process.

Id.
[10] *Heller*, 554 U.S. at 627.
[11] Mark Follman, *Yes, Mass Shootings are Occurring More Often*, 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) (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

2015, erupting in diverse locations, from a state health department,[12] a community college,[13] and movie theater,[14] to a church.[15] As the discourse about gun rights escalates in urgency and tone, surprisingly few feminist legal scholars have intervened.[16] Why not?

Violence is a particular concern for women, as polling data indicate.[17] Too many women confront firearms at the hands of

average, more than one incident per month) https://www.fbi.gov/news/stories/2014/september/fbi-releases-study-on-active-shooter-incidents/pdfs/a-study-of-active-shooter-incidents-in-the-u.s.-between-2000-and-2013.

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

[13] 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.

[14] 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

[15] Eleanor Randolph, *The Murders at Mother Emanuel Church in Charleston*, NY TIMES, June 18, 2015, http://takingnote.blogs.nytimes.com/2015/06/18/the-murders-at-mother-emanuel-church-in-charleston/.

[16] *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. LAW F. 467 (1996); Sayoko Blodgett-Ford, *Do Battered Women Have a Right to Bear Arms?*, 11 YALE L. & POL'Y REV. 509 (1993); Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights"*: A Bicentennial Perspective, 59 U. CHICAGO L. REV. 453 (1992).

[17] *See, e.g.*, MS. FOUNDATION FOR WOMEN, A FRESH LOOK AT THE PUBLIC'S VIEW TOWARD EQUALITY, COMMUNITY ISSUES, AND SOLUTIONS 7 (Aug. 2015), forwomen.org/wp-content/uploads/2015/10/Ms-National-Survey-Executive-Sumary.pdf.

batterers.[18] Their children are at risk of dramatically shortened lifespans due to accidental and intentional shootings.[19] Gun ownership in this nation is highly gendered: according to the Pew Research Centers, men are three times more likely to own a firearm than are women.[20] Gun ownership also is highly raced: the same survey reported that 82% of gun owners were white males.[21] 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 anti-racist violence, in the wake of the Charleston massacre in which nine churchgoers were gunned down.[22] In the popular press, NATION writer Dani McClain has urged that gun violence is a matter of reproductive justice.[23] It is time for a feminist take on the Second Amendment.

This article uses social justice feminist methods to explore the contours of the Second Amendment. As discussed more fully below, the term "social justice feminism" ("SJF") emerged from feminist legal advocates. Just as the earliest iterations of feminist theory, SJF seeks to remove gendered barriers, particularly for the

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[18] *See, e.g.*, Vanessa Farr, Henry Myrttinen, an 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, and 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).

[19] John M. Leventhal, Julie Gaither, and Robert Sege, 133 PEDIATRICS 219 (Feb. 4, 2004).

[20] Pew Research Group, Why Own a Gun? Protection is Now Top Reason, 16 (March 2013)(reporting that men 37% of men surveyed owned guns, compared to 12% of women).

[21] *Id*. at 17.

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

[23] 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/.

most marginalized;[24] however, because SJF resulted from practitioners' frustration with the failure of the modern women's 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,[25] SJF encompasses tools that shed light on issues confronting women, particularly structural barriers to inequality that may not appear at first blush to implicate gender.[26]

SJF methods require contextualizing legal issues by examining their history, considering their intersectional implications, as well as their impact on marginalized people. Applying this approach to the Second Amendment demonstrates how the right to keep and bear arms has assisted in constructing "citizen" as white and male from the time of the Founding. While congressional enactments during the Reconstruction expanded the construct of citizen to include Black[27] men, white Southerners fought back violently to preserve the antebellum social order in which white patriarchy reigned. In this regard, the Second Amendment has played a key role in establishing racial and gendered hierarchies. SJF reveals that the Court's decisions in *Heller* and *McDonald v. Chicago*[28] reinforce structural oppression under the guise of promoting individual rights.

To make that case, this article proceeds in several parts. Part I briefly explains SJF, setting the stage for the analysis that follows. Since SJF examines the historical underpinnings of practices to

[24] *See* Kristin Kalsem and Verna L. Williams, *Social Justice Feminism*, 18 U.C.L.A. WOMEN'S L. J. 131, 151-5 (2010) (discussing early social justice feminists).
[25] *Id*. at 133-4.
[26] 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").
[27] "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, 332 n.2 (1988).
[28] 561 U.S. 742 (2010) (holding that the Second Amendment applies to the states).

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. In this connection, Part II examines 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* argue, the Amendment also serves a structural purpose. More specifically, the framers drafted the Amendment to allay fears of tyranny emanating from a strong centralized government, in so doing, constructing 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 states; framers 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.

I. A Brief Primer on Social Justice Feminism

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.[29] SJF builds upon the various waves of

[29] Kalsem & Williams, *supra* note – at 133, 187. 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." 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

feminism, reinforcing its original mission and expanding its reach. Specifically, SJF "strives to uncover and dismantle [social and political structures that support patriarchy][30], while "recognizing and addressing multiple oppressions."[31] Martha Chamallas has explained that SJF can be understood as "a new take on intersectionality theory and intersectional feminism." [32] 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:"[33]

> One method, looking to history to understand subordinating structures, seeks to acquire more knowledge with which to understand and dismantle the bases of societal institutions that perpetuate hierarchies and inequities. Another method, examining the inter-relationship 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.[34]

SJF and its methodologies reveal issues that liberal feminism might fail to recognize as relevant to women.[35]

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 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."

[30] *Id*. at 157.

[31] *Id*. at 158.

[32] Martha Chamallas, *Social Justice Feminism: A New Take on Intersectionality*, 2014 FREEDOM CENTER J. 13 (2014); *see also* MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 107-11(3d ed. 2013) (identifying social justice feminism as a "promising variation" on intersectional feminism).

[33] Kalsem & Williams, *supra* note – at 175 (quoting Bartlett, 103 HARV. L. REV. at 836).

[34] Kalsem &Williams, *supra* note – at 175.

[35] 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

SJF requires examining history "to understand subordinating structures" to identify the roots of structural inequalities with the goal of dismantling them.[36] In so doing, it follows in the footsteps of feminist and critical race theory in seeking to "uncover[] lost history [and] re-examin[e]how history has been told and understood."[37] Accordingly, recognizing that history is constructed, typically by the in power, SJF seeks to elevate the experiences of those left on the margins to uncover how traditional historical narratives mask and perpetuate subordination.[38] Such a perspective is especially necessary in this context given the highly contested nature of the historical accounts articulated in *Heller* and *McDonald*.[39] The

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." *Id*. at 175. For example, in drafting the FLSA, 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 188. 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 191-2.

[36] *Id*. at 175.

[37] *Id.* at 175-6. We further explain that SJF "continues the work of uncovering stories and experience that have not been told or included in accounts of history and examining how they alter ways of seeing." *Id*. at 177.

[38] *Id*.

[39] 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. *See, e.g*., *McDonald* 561 U.S. at 899 (observing that the historic and plentiful instances of violence against African Americans "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

analysis that follows explores the context within which the Second Amendment emerged to understand its role in perpetuating subordination.

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 language at the time it was drafted.[40] 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.[41] The Court next determined that the prefatory clause, which references militias, is 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."[42] However, when viewed through an SJF lens, the Court's examination of history is incomplete. SJF reveals that the ratification history of the Second Amendment includes a debate about the structure of the new Nation. As the next sections will demonstrate, the framers intended the Second Amendment to amplify the checks and balances on governmental overreach and to establish the metes and bounds of "nation" and "citizenship," terms limited to white men.[43] In this way, SJF reveals that the Second Amendment defended white

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 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 open the question." *Id*. at 788.

[40] *See Heller*, 554 U.S. at 578.

[41] *Id.* at 591.

[42] *Id.* at 598.

[43] *See, e.g.*, Gretchen Ritter, *Women's Civic Inclusion and the Bill of Rights in* GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP 60 (Linda C. McClain and Joanna L, Grossman, eds.)(2009).

patriarchy, assisting in establishing a system that would subordinate those who fell outside the privileged category of citizen.

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

Our Constitution arose from the flames of the Articles of Confederation, which established a loose alliance of sovereign states that essentially acted in their own interests: for example, failing to pay into a common treasury, disregarding treaties, and erecting discriminatory and retaliatory trade barriers toward each other, to name a few transgressions.[44] These difficulties, in addition to the absence of a legislative body empowered to raise revenue and the difficulty of making necessary changes because of the text's unanimity requirement, propelled colonists to amend the document. However, when the delegates assembled, 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, are no exception. For example, Article I grants Congress the power to "raise and support Armies,"[45] but limits the authority to appropriate for such purposes to two years,[46] which coincides with the terms of the House of Representatives.[47] In addition, as Richard Uviller and William Merkel have observed, "since all funding measures were to originate in the lower House, the

[44] *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").
[45] U.S. CONST., Art. I, § 8, cl.12.
[46] *Id*.
[47] 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).

questions of the army's longevity was never far removed from popular control,"[48] further constraining 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 with their English forbears the belief 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.[49]

Colonists feared that a standing army lacked the loyalty necessary to serve the public interest. They preferred a militia populated by citizen-soldiers, men who were connected to their communities and the nation.

Absent a tie to local communities, a standing army also threatened the state sovereignty. During ratification debates, Virginia's George Mason 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."[50] Delegates to that state's ratifying convention therefore proposed the following amendment:

> That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people

[48] UVILLER & MERKEL, *supra note* at 77.
[49] *Id.* at 42.
[50] *Id.* at 85.

> 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.[51]

In language very similar to that adopted by the framers, Virginia linked the right to bear arms to militias in service of preempting 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 those ratifying the document 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."[52] In addition to performing as a bulwark against federal overreaching, the Amendment 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

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[51] *Id.* at 86.

[52] *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 encompasses the structural 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, 176 (2008) (comparing the Second Amendment to provisions in Articles I and II).

consistent with other parts of the Constitution,[53] the Second Amendment contemplated "people" who were white and male.[54]

Regulation of guns long has 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, Virginia, in 1607, only the gentlemen among them had the privilege of carrying firearms."[55] As the colonists dispersed across the continent, so, too, did the understanding that only the "right" people should have guns. In seventeenth century Virginia, selling or trading firearms to Indians could result in forfeiting one's estate.[56] In some places, the penalty for doing so could be death,[57] demonstrating how great a threat to communities the early settlers considered Native people.

Kathleen Brown has argued that such regulations helped construct racial and gender norms, particularly establishing patriarchy as the sole province of white men.[58] Some communities

[53] *See, e.g.*, U.S. CONST., Art. I, § 2, cl. 3(counting enslaved persons as 3/5th 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).

[54] *See* Becker, *supra* note – at 494. But see Epstein, *supra* note – 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").

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

[56] "[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).

[57] DECONDE *supra* note -- 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.*

[58] 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

required white men to arm themselves in church "because of the establishment's anxiety that slaves would rebel during the gathering for prayer."[59] Brown further observes 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,"[60] in part because of concerns about rebellions or attacks by Native Americans.[61] However, Brown notes that as time progressed, race and gender lines became more pronounced in colonial Virginia; by 1723, the legislature passed laws explicitly prohibiting Black and Native men from being armed.[62] One such 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.[63]

The same year, lawmakers passed "An Act. . . for the better government of Negros, Mulattos, and Indians, bond or free."[64] The Act prohibited Blacks and Natives from "keep[ing], or carry[ing] any gun, powder, or any club, or other weapon whatsoever, offensive or defensive,"[65] unless they were free and "a house-keeper,"[66] which,

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over other men's sexual access to the women of his household, and his right to punish family members and laborers. *Id*. at 4.

[59] DECONDE, *supra* note -- at 21.

[60] BROWN, *supra* note – at 182.

[61] DECONDE, *supra note* -- at 19.

[62] BROWN, *supra* note -- at 182.

[63] WILLIAM WALLER HENNING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, VOL. IV 119(1969). The statute further penalized Blacks or Native men who sought to appear in a muster 100 pounds of tobacco; if they failed to pay, such men would be "tied neck and heels [to] remain for any time not exceeding twenty minutes." *Id*. (hereinafter HENNING IV)

[64] HENNING *supra* note – at 126.

[65] *Id.* at 134.

[66] HENNING at 134.

according to a dictionary of that time period meant "householder; master of a family." [67]

Through such measures, lawmakers constructed a social hierarchy in which enslaved people, as well as Native Americans, would occupy the lower rungs.[68] These statutes did not contemplate slaves and Indians as being suitable men for defending the state, generally speaking. Unlike white men, they needed an additional marker of masculinity—owning property and heading a household—in order to own a weapon.[69] This legal regime, particularly with regard to the militia, reflected the social hierarchy, as Brown observes:

> 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.[70]

By prohibiting Black and Native men from owning weapons and serving in the militia (unless they were servants or musicians), such

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[67] SAMUEL L. JOHNSON, ET AL., A DICTIONARY OF THE ENGLISH LANGUAGE (3rd ed. 1768).

[68] 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 IV, *supra* note – at 132-134.

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

[70] BROWN, *supra* note – at 279.

laws participated in an overarching racial and gendered project that cast these men as "other."[71] Such laws distinguished Black and Native men from white men, even those lacking in property and other 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.[72] Indeed, a Norfolk 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,[73]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, which meant they would lack autonomy, having to answer to the patriarch of the estate, a white man.

As Virginia's example suggests,[74] colonial lawmakers established a legal regime that constructed Black and Indian men as dangerous beings who were not truly men. By keeping the privileges attendant to masculinity, such as owning arms and serving in the militia, beyond their reach, lawmakers at once removed the perceived threat these men posed and further rendered them dependent at law and in society. In so doing, such legal frameworks helped establish and reinforce an alternative, and by definition, inferior construct of manhood—one that did not participate in public life and by definition was not a citizen.[75]

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[71] *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").

[72] BROWN, *supra* note – at 183.

[73] *Id.* at 183 (referring to *The matter concerning Sambo, a slave*).

[74] 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 that the document ultimately would be ratified. *See, e.g.*, PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787-1788, 274 (2010).

[75] DeConde also explains that such exclusions also 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." As a result, they collaborated

The Supreme Court observed that the Framers had such a purpose in mind, albeit sixty-five years later, in *Dred Scott v. Sandford*.[76] 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?"[77] Relying upon the text of the Constitution and statutes of the various states at the time of the Founding, the Court found, of course, that Mr. Scott, as a Black man, was not so entitled. According to the Court, the Framers never

> [i]ntended 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 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.[78]

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

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with advocates for defunding militias, "disuguis[ing] their desire for selective gun regulation. DECONDE, *supra* note -- at 48.

[76] 60 U.S. 393 (1856).

[77] *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, upon being naturalized by Congress. *Id*. at 404.

[78] *Id*. at 416-417.

SJF's lens, which is trained on contextualizing and comprehending how subordinating structures become entrenched in society, and examining the interrelationship of interlocking oppressions, demonstrates that at ratification, the Framers never meant to include Blacks in "the people," the nation's citizenry, a point made more trenchant in *Dred Scott*. "The People" and "citizens" were gendered and raced, consistent with the Framers' notions of who best would move this fledgling democratic republic forward. This vision of the Constitution would remain unchallenged until after the Civil War.

III. Reconstruction Era: the Struggle for Redefinition

Building upon *Heller*, the Court in *McDonald* relied on history to conclude that the 14th Amendment applied the Second Amendment to the states.[79] Revisiting *Heller*'s historical narrative, the Court reiterated that the Framers considered the right to keep and bear arms fundamental. [80] The Court then examined the right in the context of the Civil War and Reconstruction eras. During those time periods respectively, Justice Alito noted, abolitionists supported the right; and newly freed slaves combated systemic attempts by former Confederate soldiers to disarm them.[81] Justice Alito also found that the Freedmen's Bureaus Act of 1866 also mentioned the right to bear arms.[82] According to the Court, arming the formerly enslaved was essential for their self-defense against the Ku Klux Klan and other groups. However, viewing this history through the prism of SJF demonstrates that the Court's narrative was superficial and incomplete. The Framers sought to expand the antebellum notion of "citizen," in part by granting freedmen rights long denied them as outliers and threats to the social order. In this regard, the Reconstruction narrative revolves around much more than individuals or even the individual right to self-defense. Rather, in the postbellum years, the Framers recognized the right to bear arms

[79] *McDonald*, 561 U.S. at 791.
[80] *Id*. at 769.
[81] *Id*. at 770.
[82] *Id*. at 773.

as essential to integrating Black men in to the nation as voters and soldiers to whom communities could turn for protection.

Reconstruction and the legislative provisions born during this period upended the antebellum social order and, in so doing, enraged Southern whites who opposed these changes with a vehemence calculated to making the rights and attendant promises of citizenship illusory for Black men. 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, white resistance to the threat posed by Blacks assuming the mantle of manhood through the right to bear arms and the interrelated right to vote, fueled violent opposition that ultimately cemented intransigent white patriarchal norms.

As discussed below, losing the Civil War sparked much of this hostility. For many southern white men, the defeat signaled a diminution of their masculinity since they no longer would serve as patriarch over their families and human chattel. 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, their sense of worth further plummeted as emancipated slaves gained rights formerly reserved for white men. 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, targeting symbols of Black citizenship: the rights to vote and keep and bear arms, which frequently were considered in tandem.[83] In order to stem the rise of "negro supremacy" under the amended Constitution and to protect white womanhood, and in so doing, reestablish white patriarchy, emergent hate groups such as the Ku Klux Klan[84] embarked on a raced and gendered terror campaign

[83] *Cf.* Becker, *supra* note – at 50. (observing that "ultimate political power lies with those who control the means of force") (quotation omitted).

[84] 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

to challenge the new social order 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, but did little to change southern white attachment to preexisting racial and gender hierarchies. With the War's end and ratification of the Thirteenth Amendment, states enacted measures designed to reinforce subordination of African Americans, specifically the "black codes."[85] With freedom, Blacks no longer were property subject to the dominion of a white patriarch. Emancipation freed Blacks to enter the public realm of the workplace as paid employees. They could be autonomous actors who formed their own families. And, they could engage in civic life by voting and even holding office. These shifts meant Blacks now had agency over their lives, which disrupted a regime that deemed Blacks as perpetually dependent. The post-bellum years and Reconstruction presaged a new nation that would require whites to share citizenship status with former slaves, which they resisted by any means necessary.

White southern men – wealthy planters and working class whites alike – relied on race and slavery to reinforce their position in society. Slave status for African Americans meant perpetual

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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, 681 – 689 (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 (1998 The Free Press, 1935 1962). For purposes of this article, I will refer generally to the Klan as exemplar of the organized terroristic opposition to Reconstruction.

[85] *See infra* notes --- and accompanying text.

subservience to a master and relegation to the private realm, where they were regulated by others and lacked agency over their work or any products resulting from it.[86] 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 to women and children. Departing from those norms meant that African American males were not considered to be "true" men, not even when compared to white laboring men, who lacked property or means.[87]

After Emancipation, white southerners sought to preserve to this state of affairs. To whites in the defeated Confederacy, the changes imposed by and attendant to 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 citizenship, most notably the ability to order one's familial life from the position of household head."[88] Lisa Cardyn observes that

> [s]outhern 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." [89]

[86] *See* 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).

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

[88] Cardyn, *supra* note – at 816.

[89] *Id*. at 818-819.

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.[90]

Such sentiments undergird opposition to federal policies designed to facilitate the 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 [sic] supremacy."[91]

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."[92] To counter 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

[90] *Maryland: Message of Gov. Swann—The State Militia—Negro Suffrage and Negro Equality*, NY TIMES, Jan. 6, 1868 at 2.
[91] *The Democratic Convention: A New Platform Reported and Adopted,* NY TIMES, July 8 1868 at 1.
[92] *Mississippi: Message of Gov. Humphreys to the Legislature on Negro Troops,* NY TIMES, Dec. 3, 1865 at 3.

duty, leaving home without permission, impudence, and swearing at or using indecent language to an employer."[93]

In addition, consistent with their rejection of Black citizenship per se,[94] legislators also passed laws proscribing African Americans from purchasing, owning, or using firearms, and prohibiting whites from selling guns to Blacks.[95] For instance, Mississippi state law did "not recognize the Negro as having any right to carry arms."[96] States broadly prohibited Black men from serving in state militias.[97] 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 Americans, keeping them outside the margins of citizenship. Cognizant of such attempts to re-enslave African Americans, Congress enacted measures to realize the 13th Amendment's promise of liberty, which, while essential to integrating Blacks into society, further inflamed white resistance to the new nation they augured.

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

In the face of Southern intransigence, Congress enacted the Reconstruction Amendments and implementing legislation to vitiate the black codes, including statutes targeting state militias.[98] Taking the latter step was necessary because citizen-soldiers in the former

[93] 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 SOUTHWESTERN HISTORICAL QUARTERLY 21, 24 (1993)).

[94] *See id.* (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").

[95] SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 168-169 (2006).

[96] OTIS SINGLETARY, NEGRO MILITIA AND RECONSTRUCTION 5 (1957) (quoting HARPER'S WEEKLY, January 13, 1866).

[97] CORNELL, *supra* note -- at 169.

[98] *Id.* at 175-6; SINGLETARY, *supra* note – at 6.

Confederate states violently opposed the grant of freedom to Blacks and sought to make it illusory in practice. Historian Otis Singletary observed that militia

> [m]embership was restricted exclusively to whites and 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.[99]

Union leaders of the Freedmen's Bureau in various southern states informed Congress about militia violence targeting the former enslaved. For example, General Thomas reported 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…two companies of the militia had sworn in their counties no negro who did not work for his old master, and no Yankee could live: . . . they would drive out the thieving Yankees and shoot the niggers.[100]

In Georgia, the militia was "engaged in disarming the negroes," as well as burning schools, and issuing death threats to teachers.[101] 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 the country is one tale of abuse, woe, and misery, the master taking vengeance because his slaves are free."[102] Another general suggested that such harms were compounded by the fact that these militia organizations "give color of law to their

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[99] SINGLETARY, *supra* note -- at 5.
[100] 39th Congress, 1st Session 914 (Feb. 19, 1875) (statement of Sen. Henry Wilson).
[101] *Id*.
[102] *Id*.

violent, unjust, and sometimes inhuman proceedings."[103] 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."[104]

Over constitutional objections, Congress passed a joint resolution temporarily disbanding the militias in former Confederate states in 1867.[105] Some members argued that this provision exceeded Congress' authority and violated the Second Amendment.[106] Supporters charged that the law was necessary to counteract what amounted to a continuation of the rebellion. Senator Wilson stated that

> these 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

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[103] *Id*.

[104] *Id*.

[105] The legislation provided as follows:

> all 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.

39th Congress, 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*.

[106] West Virginia Senator Waitman Willey objected on those grounds, but ultimately supported the provision when its sponsor struck "disarmed." *Id*.

> men on our common humanity. I have no doubt of our right to prevent the organization in the rebel States of any militia force. . .[107]

This law thus took its place alongside other statutes designed to "reconstruct" the states formerly in rebellion—such as requiring these States to ratify new constitutions that eliminated discrimination before permitting them to re-enter the union.[108] President Andrew Jackson decried both as running afoul of the Constitution and deserving of being "annulled." [109]These provisions departed sharply from the balance of power between the federal and state government the Constitution contemplated; however, lawmakers and other public figures justified federal intervention in this context as a proper exercise of Congress's war powers. For example, U.S. Attorney for Massachusetts Richard H. Dana, Jr., noted that cessation of armed conflict did not guarantee that the South would uphold "public safety and public faith" for Blacks and whites alike. [110] As a result, the federal government had to impose measures to ensure that the formerly enslaved were truly free: "the public faith is pledged that every man, woman, and child of them, and their posterity forever, shall have a complete and perfect freedom."[111] Dana averred that, in addition to being constitutional, such actions also were radical and necessary for the public good: "Why, to introduce to the voting franchise four millions of slaves is a revolution."[112]

Indeed, congressional debate concerning the Reconstruction Amendments and legislation to realize their goals reveals that Dana's assessment was widespread. For example, when the Senate considered the Ku Klux Klan Act of 1870, Republicans addressed

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[107] *Id*. at 915.
[108] CORNELL, *supra* note -- at 176.
[109] Andrew Johnson, Fourth Annual Message, Dec. 9, 1868 (The American Presidency Project).
[110] *Reconstruction: Speech of Hon. Richard H. Dana at the Meeting in Faneuil Hall, Boston*, NY TIMES, June 24, 1865 at 8.
[111] *Id.*
[112] *Id*. 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*.

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."[113] 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 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 the revolution give us 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. . .[114]

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.

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[113] Cong. Globe Senate, 41st Congress, 2nd Session 3607 (May 1, 1870) (statement of Sen. Schurz).
[114] *Id*. at 3607-3608.

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 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 reported that in the period leading up to the 1868 election

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

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

States then established new military units, which included African Americans. The "Negro militias," were "political and military in nature, providing a means of protecting and organizing freedmen."[118] President Grant viewed armed militia service as tantamount to exercising the franchise: a right and responsibility attendant 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

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[115] Herbert Shapiro, *The Ku Klux Klan During Reconstruction: The South Carolina Episode*, 49 J. OF NEGRO HISTORY 34, 40 (Jan. 1964).
[116] 40th Cong. Globe, Senate, 40th Cong., 3d Sess. 83 (Dec. 15, 1868).
[117] *Id*. at 86.
[118] CORNELL, *supra* note -- at 176.

Negroes. . . [It] was particularly concerned with disarming the Negroes."[119] Disarmament in this context implicated more than self-defense. As mentioned above, former Confederates had turned to violence to reject Reconstruction in form and substance, particularly the notion of Black men as fellow citizens. 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."[120] 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. For them, 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.

Black men embraced the right to keep and bear arms, along with the newfound right to vote as symbols of attaining citizenship status and manhood. No longer 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. Militia service cemented that status as African American men took their place among the defenders of state security. [121] In practice, these rights to vote and bear and keep arms were mutually reinforcing, as the right of Blacks to keep and bear arms helped ensure that they would be able to exercise the franchise; similarly, voting for Republican candidates typically meant that Black rights would remain protected, at least as a matter of law.[122] For example, in South Carolina, after

[119] Shapiro, *supra* note -- at 44.
[120] SINGLETARY, *supra* note -- at 15-16.
[121] *See*, e.g., Jane Dailey, *Deference and Violence in the Postbellum Urban South: Manners and Massacres in Danville, Virginia*, 6 J. OF SOUTHERN HISTORY 55 (1997).
[122] *See*, EGERTON, *supra* note at 240 (detailing Freedmen's Bureau's reports of violence against Blacks who had voiced their intention to vote).

two years of systemic violence targeting Black voters in county elections, Republican gubernatorial candidate Robert K. Scott activated the Black militia to protect African American voters in the 1870 election.[123] This muster had been essential two years earlier in countering Klan intimidation at the polls, resulting in Republican victories in counties that previously had gone Democratic due to Klan disturbances.[124]

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." [125] Race and gender combined not only to reinforce the antebellum notion of citizenship, but also to justify the existence of such groups and make plain their goals. For example, Ku Klux Klan members pledged that "females, friends, widows, and their households, shall be the special object of [their] care and protection."[126] Against this backdrop, the Klan embarked on a campaign of terror to counteract the effects of Reconstruction and enforce the gendered and raced norms so essential to white identity, focusing much of their efforts on overt signs of male privilege and citizenship: particularly, the rights to vote and to keep and bear arms.

As a result the Klan made Black suffrage and Black militias prime targets in 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

[123] Shapiro, *supra* note – at 39 (1964).
[124] *Id*. at 40.
[125] Cardyn, *supra* note – at 781.
[126] *Id*. at 695, 815.

> combinations were organized and armed, and had rendered the local laws ineffectual to protect the classes whom they desired to oppress.[127]

For example, the day after South Carolina Governor Scott was reelected, whites organized to disarm the Black militia, starting in Laurens County, spreading to three neighboring counties, and 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."[128] Political outcomes not to the Klan's liking thus sparked deadly backlash.

Beyond outcomes, however, the mere fact that Blacks were permitted to be armed and to vote was particularly outrageous to Klan members, as these activities undermined Southern whites' perception of the social order. As Cardyn observes: "[n]ot 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."[129] As such, disarming the Black militia was a means of restoring a social order in which citizenship and masculinity itself were reserved for white men.

Race and gender not only were at the roots of assaults upon freedmen and Reconstruction, southern norms in this regard were manifest 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

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[127] J.D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, VOL. VII, 164 (1898).
[128] Shapiro, *supra* note -- at 41.
[129] Cardyn, *supra* note -- at 817, (quoting Eva Saks, *Representing Miscegenation Law*, 8 RARITAN 39, 47 (1988).

to be a man."[130] In another incident, Klan members warned a white woman that they would "slit her husband's throat if he didn't 'change his politics and be a white man.'"[131] Black women also stepped beyond the domestic sphere by seeking to influence husbands or other men in their lives politically. For example, some Black women refused to sleep with husbands who were thinking of voting Democratic.[132] Others physically assaulted Black men who identified with the Democratic Party by jumping on them and tearing at their clothes.[133] 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."[134] Similarly, a freedwoman testified that "Klansmen 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."[135] In this regard, Black women--and their husbands--were punished for transgressing gender roles. Seeking to sway their husbands' votes signified intrusion over the patriarchal privilege of voting and, in so doing, venturing into the public realm, the preserve of males. 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]." [136]

Klan punishments also had gendered dimensions. The klan whipped men and women alike for daring to defy their roles by forcing them to strip naked, perform simulated sexual acts, or

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[130] Cardyn, *supra* note – 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).

[131] *Id*.

[132] W. Scott Poole, *Religion, Gender, and the Lost Cause in South Carolina's 1876 Governor's Race*: *"Hampton or Hell!,"*68 J. OF SOUTHERN HISTORY 573, 594 (2002).

[133] *Id.* at 594.

[134] *Id*. (quoting 2 Joint Select Committee to Inquire into the condition of Affairs in the Late Insurrectionary States, North Carolina 530 (1872)).

[135] *Id*. at n. 411 (quoting 3 Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States, South Carolina 586 (1872)).

[136] *Id*. at 594.

withstand assaults on their genitals.[137] Similarly penalties such as requiring a pregnant woman to dance naked as her husband stood by powerless,[138] forcing husbands to witness their wives being raped,[139] or, at the most extreme level, castrating lynched freedmen[140] 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 sustained violent opposition from the Klan and its allies. Nationally, the country was experiencing an economic downturn.[141] Northerners had grown weary of reports of Southern political violence: "[t]he 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."[142] 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,[143] which was especially problematic given the fact that 1876 was a Presidential election year. With federal support for enforcing the Reconstruction Amendments on the wane, opponents amplified their violent opposition to Black national citizenship.

The Hamburg Massacre, which began in South Carolina on the nation's centennial, July 4, 1876, illustrates how interconnected militia service was with citizenship and masculinity, and the lengths to which white men would go to restore the antebellum

[137] Cardyn, *supra* note -- at 707-08.
[138] *Id*. at 706.
[139] *Id*. at 722.
[140] *Id*. at 752-754.
[141] ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 236 (1988).
[142] *Id.*
[143] *Id.* at 237.

understanding of both. The fact that voters would choose the next governor and President heightened the urgency with which white men would seek to regain what they perceived as their lost primacy.

1. Seeds of the Hamburg Massacre

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 sought to occupy. Thomas Butler and Henry Getzen[144]used their buggy to block the soldiers' path, claiming that the road was private property, as evidenced by the fact that their wagon "had worn the ruts along the road." [145] They later admitted that the road was, indeed, public;[146] however, their objection was twofold: that these Black men were celebrating July 4 "generated intense anger among the whites," which only exacerbated existing resentment against the Black militia.[147] With regard to the latter, 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."[148] Steven Kantrowitz suggested that their "hostility to the militia was based . . . in former slaveholders' expectations of personal and collective authority. They questioned the validity of [this militia], but their skepticism ran much deeper. A black militia, they implied, was an oxymoron."[149]

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[144] 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 73(Jane Dailey, Glenda Elizabeth Gilmore, Bryant Simon, eds. 2000). A news 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*, NY TIMES, July 14, 1876, at 1 (hereinafter *Old Rebel Spirit*).

[145] Kantrowitz, *supra* note -- at 74. The road was "overgrown with weeds except in its wagon ruts." *Id*.

[146] *Id*.

[147] *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*.

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

[149] *Id*.

After the parade had long dissipated, and a few days later, the conflict played out in court, with General M.C. Butler, a former Confederate officer,[150] representing the white men. General Butler was an unsuccessful candidate for Lieutenant Governor six years earlier, an attorney,[151] and, according to Black residents, "one of the main pillars of the Kuklux fabric in South Carolina."[152] General Butler sought to have Black militia Commander Doc Adams and other officers of the militia arrested for "obstructing the highway."[153] When Adams did not appear in court because he feared for his safety,[154] Butler and his men went to neighboring communities, crossing state lines to Georgia and gathered men with the explicit purpose of disarming Adams and the Black militia. In Edgefield, the closest town, whites already had stripped Black militia of their weapons. It should be noted that this mission was neither sponsored by nor explicitly sanctioned by the state of South Carolina. General Butler later claimed that he and his men had the right to disarm the Black militia because they had "assembled riotously, were in a state of armed resistance to the laws."[155] In the eyes of the white civilians, the Black militia's transgression had transformed from merely trespassing into illegal possession of firearms and rioting, which, in turn authorized them to act in "self-preservation."[156] More likely, however, these whites saw armed Black men as affronts to their own security in occupying the top rungs of the social order; in this sense, they embodied Justice Taney's disregard of the notion of African American citizenship in *Dred Scott* as fomenting "discontent" and dangerous to the state's "peace and safety."[157] The Black militia

[150] *Old Rebel Spirit*, *supra* note --.
[151] *The Meaning of Hamburg: Negro Appeal for Protection*, NY TIMES, July 24, 1876, at .
[152] *Id*.
[153] *Democratic Campaigning: The Hamburg Massacre,"* NY TIMES, July 16, 1876, 7.
[154] Kantrowitz, *supra* note -- at 75.
[155] *M.C. Butler Again: He Justifies His Course at Hamburg*, NY TIMES, July 24, 1876, at 2.
[156] Id.
[157] *Dred Scott*, 60 U.S. at 416-17.

troops, in defending themselves also were assserting 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. White town residents had fled Hamburg, having been alerted that an armed confrontation was imminent. At seven in the evening, militia members still refused to surrender their weapons, so the battle began. With the shower of bullets ringing through the air, the remaining African Americans residents also departed, leaving the town to its combatants. 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." [158] As the hostilities wore on, some militia members escaped unnoticed. Others were able to flee after trading shots with Butler's men, and reached safety. Another soldier, Marshal James Cook, failed to escape because "in an instant [he] fell dead, his head being literally honeycombed with bullets."[159] 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.[160]

African Americans from Charleston, South Carolina, sought justice from the state for the Hamburg massacre. Their letter to Governor Chamberlain, published in the New York Times, provided grisly details of the aftermath of the battle. They stated 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

[158] *Old Rebel Spirit, supra* note -- .
[159] *Id*.
[160] ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 240 (1988).

their parents' flesh to eat…"[161] Just as the Klan, Butler's men vindicated their own 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 property, and the right to vote as conscience shall dictate to every citizen, shall be forever secured to all throughout this broad land.[162]

Governor Chamberlain, in turn, solicited President Ulysses Grant for federal assistance.[163] While reluctant to ascribe a racial motive to the Butler's men,[164] 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," since all the members of the assault were Black and Republican.[165] 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."[166] He further noted 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

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[161] *The Meaning of Hamburg*, *supra* note --.
[162] *Id*.
[163] *The Hamburg Massacre: Gov. Chamberlain's Letter*, NY TIMES, Aug. 7, 1876, at 5.
[164] 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*.
[165] *Id*.
[166] *Id*.

adequate punishment."[167] According to Chamberlain, white indifference to this violence would only fuel further acts of brutality and suppress the Black vote, which, no doubt was a pointed reference to the fact that a Presidental race was approaching. 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."[168] Confronted with this threat to the republican form of government, Chamberlain sought assurances that the federal government would "exert itself vigorously to repress violence. . . ruling the present political campaign"[169] in the State.

President Grant agreed that the federal government was obliged to act under these circumstances.[170] 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."[171]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. [172]

[167] *Id*.
[168] *Id*.
[169] *Id.*
[170] Letter to D.H. Chamberlain, Governor of South Carolina, July 26, 1876 (teachingamericanhistory.org/library/letter-to-d-h-chamberlain-governor-of-south-carolina/).
[171] *Id*. Grant pointed specifically to Louisiana and Mississippi, the latter which he stated 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*.
[172] *Id*.

Three months after the massacre, Governor Chamberlain disbanded the rifle clubs, from whose ranks the Hamburg assailants came. President Grant issued a proclamation supporting the governor's action. [173] However, neither M.C. Butler nor the men who attacked the Hamburg militia ever were punished.[174]

3. Significance of the Hamburg Massacre

From start to finish, the Hamburg Massacre illustrates the structural meanings of the Second Amendment and their significance to the social order. 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 marking the street as "their" property. Instead of ceding ground to white men upon demand, the Black militia men defended themselves, their arms, and, in so doing, their status. The Civil War and Reconstruction Amendments had made them free men, free voters, which, in turn, gave them access to the public sphere. However, their assailants sought to return them to slave status or something akin to it. In this regard, disarming the militia was about putting Blacks in their proper place: subordinate, dependent, and, outside the margins of citizenship. To justify their action, Butler claimed that the armed militia contravened the law and undermined public safety. 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 constructing nation and reifying white supremacy and

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[173] Poole, *supra* note -- at 588-589.

[174] In fact, South Carolina lawmakers elected Butler to the U.S. Senate in 1877. Eric Foner has suggested the Hamburg Massacre made clear 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 -- at 240.

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 status quo. Sadly, by 1876, the frequency of such outrages, in addition to limited financial and military resources depleted by economic woes and ongoing battles with Native Americans, 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. 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. With that deal, the M.C. Butlers of the South essentially prevailed.

IV. What SJF Means for the Second Amendment

As the foregoing demonstrates, SJF reveals that the Second Amendment long has played a role in establishing and supporting interlocking oppressions. At ratification, the right to keep and bear arms helped construct notions of citizenship, race, and gender. Reconstruction challenged those notions to a degree, but ultimately failed to dismantle them. Indeed, the hostilities sparked by Reconstruction illustrate that the Amendment inscribed and reified 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. It 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 so doing, the Court protected white patriarchal norms and, as a consequence reinforced longstanding

raced and gendered subordination. Moreover, the Court's dicta "elevating" the right ensures that state legislatures will continue passing measures that harm already subordinated groups, 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. At the Founding, the Amendment helped define "citizen" as white and male, in part by limiting guns and militia service to that class. In so doing, 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, among other things, men of color were relegated to domestic service, as reflected in statutes constraining their militia activities to attending to white men or entertaining them. In this way, keeping and bearing arms was just one way that prevented Black and native men from achieving "true" masculinity. Pushed to the sidelines as incapable of defending state or nation, these men were relegated to the domestic sphere as dependents, in the same class as women and children, who, of course had no such rights.

Reconstruction both challenged and highlighted this construct of masculinity, 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. At law, they could be paid for their labor, oversee their own households. Autonomous and freed from the domestic sphere, Black men no longer were feminized. Those changes upended the social order. For white southern men, the liberty afforded Black men undermined

their primacy in the home and society. Reconstruction thus revealed masculinity to be contingent and malleable, which added to the destabilizing effects of the legal framework dismantling the slavery regime. White southerners' violently rejected Reconstruction in order to reestablish hegemonic masculinity, placing themselves at the top of the hierarchy.

B. Self-Defense as Identity Protection

In this regard, SJF reveals that the Second Amendment contemplates self-defense as a structural matter, as well as individual matter. Here, the Reconstruction history is telling. For white Southerners, new laws welcoming Black men into citizenship threatened a nation established by and for them. Black men as citizens *per se* jeopardized white security, and therefore, that of the nation. Thus, when confronted with Black militia men, white Southerners claimed "self-defense," to justify disarming them. In this sense, they defended the "self" attendant to the antebellum concept of nation, which excluded Blacks. Similarly, freedmen resisted attacks by hate groups to protect their 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 white patriarchal social order.

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

SJF identified historical moments that contributed to interlocking racial and gender oppressions, moments the Court ignored. The Court used its narrative of the Second Amendment's past, as Robert W. Gordon has explained, "to relegate 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."[175] In other words, the Court's historical analysis of the Amendment should have considered what

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

the terms "people" or "right" meant to African Americans or women at the Founding, rather than merely examining its "prefatory" and "operative" clauses.[176] Doing so would have provided a more comprehensive understanding of the right. The Court elided 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.[177] Whatever the cause, slavery and coverture influenced the meaning of the Second Amendment for its framers at Ratification and Reconstruction. They knew whom the provision was meant to protect and who was not. The Court's neglect of the subordinating structures embedded in the Amendment means, its holding—particularly when considered in tandem with dicta "elevating" 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."[178]

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.[179] Many of these jurisdictions also provide immunity to persons asserting SYG, which

[176] Gordon provides an illuminating example: "'Liberty' in the eighteenth century presupposed a world in which slaves or indentured or household servants and woman would perform the menial tasks that the freed gentleman for participation in politics or the pursuit of new economic opportunities; a liberty of the few premised on the subordination of many." *Id*. at 1025.

[177] *Id*.

[178] Reva Siegel, "*The Rule of Love": Wife Beating as Prerogative and Privacy,* 105 YALE L.J. 217, 2178-7 (1996).

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

frees them from arrest or prosecution. An ABA task force found that SYG laws have resulted in Blacks being prosecuted significantly more than whites: 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."[180] It also found significant disparities in case outcomes even when the facts were similar.[181]

The cases of George Zimmerman and Marissa Alexander, Florida residents who both sought refuge from SYG in highly publicized incidents are useful examples. George Zimmerman shot and killed Trayvon Martin, an unarmed Black teenager, in February of 2012.[182] Police failed to arrest Zimmerman at the scene because he told officers that he acted in self-defense; accordingly, by statute, they had the discretion to release him, uncharged.[183] 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."[184] 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.[185] The court denied Ms. Alexander's attempt to assert SYG, which a court of appeals affirmed.[186] SYG, as an extension of

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[180] ABA REPORT, *supra* note --- at 13.

[181] *Id*. at 14.

[182] 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, 1116-7 (2014).

[183] *Id*. at 1107.

[184] *Id*. at 1117.

[185] *Id*. at 1118-9. Alexander's partner admitted to abusing women as a relationship strategy:

> 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.

[186] *Id*. at 1119. The appeals court ordered a new trial; Ms. Alexander subsequently plead guilty to assault and has been released from jail. Irin Carmon, Marissa

the so-called "castle doctrine,"[187] 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."[188] Thus, because Ms. Alexander lived with her abuser, she had a limited right to self-defense, one that imposed a duty to protect his life even though she was in danger.

The disparities in the Alexander and Zimmerman cases show that SYG and its close relative, the castle doctrine, protect a raced 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.[189] In the home, however, SYG and the castle doctrine protect the functional or titular head of household, even when he is abusive and poses an actual, demonstrated threat to his cohabitant. The patriarchal norm of family thus is a barrier to self-defense. In this regard, rather than serving as a tool for autonomy as Heller and McDonald suggest and some gun rights advocates assert, SYG more precisely is about protecting the white patriarchal self. Slavery and coverture may be dead, but *Heller* and *McDonald* provide another avenue to perpetuate racial and gender hierarchy.

CONCLUSION

SJF reveals the raced and gendered dimensions of the Second Amendment, aspects that the Supreme Court ignored in *Heller* and

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Alexander Released from Jail, MSNBC, Jan. 27, 2015, http://www.msnbc.com/msnbc/marissa-alexander-may-be-released.

[187] Franks, *supra* note --- at 1110.

[188] Carpenter, *supra* note – at 679.

[189] 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." ABA Report, *supra* note – at 24.

McDonald. The Court's decisions reinforced subordination by privileging self-defense over other interests, affirming the Amendment's oppressive ends and recasting them in the guise of individual rights.