2017

Disarming State Action; Discharging State Responsibility

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The duty of a government to afford protection is limited always by the power it possesses for that purpose.

—United States v. Cruikshank (1876)[1]

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INTRODUCTION

Violence is a commodity in the global, national, and local political economy. Violence is used to establish and maintain nation-states, to support profit-making enterprises,[2] and to bring intrinsic value: providing pleasure and satisfaction to perpetrators[3] while enabling them to assert power.[4] One traditional government function is calculated management of the use of violence in society. The corresponding vision of this management is government monopoly over the legitimate means of violence.[5] But because early

* Professor, University of Miami School of Law. A.B., Princeton University; J.D., Harvard Law School. I thank Miguel Fernandez for his research assistance. For advancing the realization of this Essay, I appreciate the hard work of the *C.R.-C.L.* editors. For her selfless research in furthering the formation of my ideas, I appreciate the work of my former student and friend, Shekida Smith. Most especially, I express gratitude to Martha Minow for her friendship and enduring support for my career and scholarly efforts.

[1] United States v. Cruishank, 92 U.S. 542, 549 (1876).

[2] *See, e.g.*, CORPORATE VIOLENCE: INJURY AND DEATH FOR PROFIT 1–58 (Stuart L. Hills ed., 1987); MARY KALDOR, NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA 94–118 (2013); E.Wayne Nafziger & Juha Auvinen, *Economic Development, Inequality, War, and State Violence*, 30 World Development 153, 153–63 (2002).

[3] *See* ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD 27–38, 45–59, 124–39 (Oxford: Oxford University Press, 1985); *see also* Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457, 472–74, 488, 492–508, 512–17 (1997).

[4] *See* SCARRY, *supra* note 3; Farley, *supra* note 3, at 467–76.

[5] *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 650 (1989) (citing MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 156 (T. Parsons ed., 1947)).

American ideals of a republican government[6] included the ability to take up arms as an essential check on tyranny,[7] the vision of complete government control over the means for violence, either state or federal, is ideologically problematic. Thus, private actors retain significant control over the legitimate uses of violence in the United States.[8] Still, to the extent government asserts any control over the means of violence in society, its goal ought to be managing and reducing a "war of every man against every man."[9] The government should make efforts to avoid a majority-dictated despotism under democracy.[10]

Modern state and federal governmental bodies intentionally privatize functions directly related to the security of individuals by delegating them to private sector actors, including functions like law enforcement[11] and prison management.[12] More informal forms of privatization occur where private entities or individuals perceive gaps in available government services, signaled by their use of private security or, in more extreme examples, partici-

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[6] *See id.* ("[An] American political tradition that is fundamentally mistrustful of state power and vigilant about maintaining ultimate power, including the power of arms, in the populace [is linked] to conceptions of republican political order.")

[7] *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 314 (1991) (citations omitted) (". . . the framers of the Second Amendment [protected] the right to bear arms . . . to ensure an armed citizenry in order to prevent potential tyranny by a government empowered and perhaps emboldened by a monopoly of force."). *See also* JOHN LOCKE, TWO TREATIES OF GOVERNMENT, SECOND TREATISE § 239, 424–26 (Peter Laslett ed., 1988) (1690); JEAN-JACQUES ROUSEAU, OF THE SOCIAL CONTRACT PRINCIPLES OF POLITICAL RIGHT & DISCOURSES ON POLITICAL ECONOMY, book 1, chapter 3, 184–85 (1972) (translated from the French by Charles M. Sherover, 1984).

[8] When control over the manner of violence in society is not in the hands of government, its recognition as legitimate is subjective and dependent on perception. Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 381–91 (1996); Joan H. Krause, *Distorted Reflections of Battered Women Who Kill: A Response to Professor Dressler*, 4 OHIO ST. J. CRIM. L. 555, 564–67 (2007); *see also infra* notes 53 and 54. Unfortunately, questions of legitimacy might also be raised when the means for violence are in the hands of the government. *See* SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 1–38 (Cambridge University Press. 1999); LAWRENCE W. SHERMAN, SCANDAL AND REFORM: CONTROLLING POLICE CORRUPTION xxii–xli, 187–202 (1978); Roger Bowles & Nuno Garoupa, *Casual Police Corruption and the Economics of Crime*, 17.1 INT'L REV. L. ECON. 75, 84–85 (1997).

[9] THOMAS HOBBES, OF MAN, BEING THE FIRST PART OF LEVIATHAN, CH. XIII (Oxford University Press, 1909).

[10] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA vol. 2, 307–09, 424–26 (1840).

[11] *See generally*, MARK BUTTON, PRIVATE POLICING (2011); LES JOHNSTON, THE REBIRTH OF PRIVATE POLICING (2005).

[12] Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998), http://www.colorlines.com/articles/masked-racism-reflections-prison-industrial-complex, *archived at* https://perma.cc/KX5N-GWZK. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 230–31 (2010); Stormy Ogden, *The Prison-Industrial Complex in indigenous California in* JULIA SUDBURY, GLOBAL LOCKDOWN: RACE, GENDER, AND THE PRISON-INDUSTRIAL COMPLEX 57–65 (2005); Linda Evans, *Playing Global Cop: U.S. Militarism ad the Prison-Industrial Complex in* SUDBURY 215, 221–25.

pation in mercenary forces[13] or vigilantism.[14] Sometimes these gaps in services exist because the government chooses not to act or does not fulfill existing services. In these instances, the best option for individuals needing protection often is the use of force through private action, notwithstanding greater potential consequences.[15] When the government does not act it is not accountable.[16] One might posit that when the government chooses not to act in fulfilling services offered, it ought to be obligated to follow through.[17] However, *Town of Castle Rock v. Gonzales*[18] — although not a case in which a public function is delegated outright — permits the state to discharge its public responsibility through inaction. This essay critiques the Court's doctrinal maneuvers that allow government to escape its traditional functions, specifically those protecting individuals from violence.

In *Town of Castle Rock,* Jessica Gonzalez sought enforcement of a protective order after her husband unlawfully took the couple's three children while their divorce was pending.[19] At 3 a.m. the next morning, the husband brought the children to the police department, but also provoked a shoot-out with the police concluding in his own death.[20] Prior to his arrival at the police station, he shot all three of his children in the head.[21] Over the course of the twelve hours that Gonzales sought enforcement, the police made no effort to find the children.[22] By denying Gonzales' claims, the Court held

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[13] *See, e.g.,* Thomas K. Adams, *The New Mercenaries and the Privatization Of Conflict*, 29 PARAMETERS 103 (1999); Jurgen Brauer, *An Economic Perspective on Mercenaries, Military Companies, and the Privatization Of Force*, 13 CAMBRIDGE REV. OF INT'L AFF. 130 (1999).

[14] Kelly D. Hine, *Vigilantism Revisited: An Economic Analysis of The Law Of Extra-Judicial Self-Help Or Why Can't Dick Shoot Henry for Stealing Jane's Truck.* 47 AM. U. L REV. 1221, 1242–43; *See generally* Ewa Szymanska, *Retaliation Versus Vigilantism: Why Do We Choose to Punish?* (Jan. 1, 2011) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with Penn Libraries, University of Pennsylvania).

[15] The mere presence of guns in the home increases the risk of firearm homicide or suicide, regardless of storage practice, type of gun, or number of guns in the home. Linda L. Dahlberg, et al., *Guns in the Home and Risk of a Violent Death in the Home: Findings From a National Study*, 160 AM. J. EPIDEMIOLOGY 929, 929, 935 (2004). Twice as many people were injured by firearms than were killed with them. CENTER FOR DISEASE CONTROL AND PREVENTION, NON-FATAL INJURY REPORTS, INJURY PREVENTION & CONTROL: DATA & STATISTICS (WISQARS), http://1.usa.gov/1qo12RL, *archived at* https://perma.cc/R2J5-QBTB.

[16] *See* Flagg Bros. Inc. v. Brooks, 436 U. S.149, 163–64 (1978) (finding that the Fourteenth Amendment only applies to state entities and actors). This case raises doubts as to whether the government can delegate public functions to private actors. *Id.* at 157–63 (citing Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); and distinguishing Marsh v. Alabama, 326 U.S. 501 (1946)).

[17] Joseph H. Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 637 (1920).

[18] Town of Castle Rock v. Gonzales, 545 U.S. 748, 760, 766 (2005).

[19] *Id.* at 753.

[20] *Id.* at 754.

[21] *See* Zanita E. Fenton, *Town of Castle Rock v. Gonzales: A Tale of State Enabled Violence in Women and the Law Stories*, Foundation Press 379, 380 (Elizabeth Schneider and Stephanie Wildman, eds., 2011).

[22] *Town of Castle Rock*, 545 U.S. at 753.

she did not have a "legitimate claim of entitlement"[23] in her enforceable protective order.[24] The Court's ruling allows a state to avoid enforcing its own orders of protection.[25] In so holding, *Town of Castle Rock* leaves little alternative to those seeking protection but to resort to private action.

Supporters of privatization argue that the shift of services from public to private management boosts the efficiency and quality of government services; reduces taxes; and shrinks the size of government.[26] But the effects of privatization are not purely financial: there are also social consequences when privatization eliminates the restraints and responsibilities emanating from the public trust.[27] A few years after *Town of Castle Rock*, the Court decided the cases of *District of Columbia v. Heller*[28] and *McDonald v. Chicago*,[29] which identified a right to self-defense rooted in the Second Amendment "right of the people to keep and bear arms."[30] Specifically, *Heller* states that guns are a type of weapon "overwhelmingly chosen by American society for that lawful purpose [of self-defense]" and it "extend[s], moreover, to the home, where the need for defense of self, family, and property is most acute."[31] This line of cases implies that self-help with firearms is wise and, in instances where assistance from the state is not forthcoming, possibly the only rational measure citizens can take to ensure their own safety.[32] Indeed, government inaction implicitly encourages self-help, including by violent means, and possibly promotes societal breakdown.[33] Citizens'

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[23] *Id.* at 757, 760–61.

[24] Fenton, *supra* note 21, at 381.

[25] Fenton, *supra* note 21, at 404–08.

[26] *See* John B. Goodman & Gary W. Loveman, *Does Privatization Serve the Public Interest?* 69 HARV. BUS. REV. 26, 26 (Nov. 1991).

[27] The public trust doctrine typically applies to land access and use, and natural resource law. *See* Illinois Central Railroad v. Illinois, 146 U.S. 387, 435 (1892); MOLLY SELVIN, THIS TENDER AND DELICATE BUSINESS: THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW AND ECONOMIC POLICY, 1789–1920 (1987). However, entrusting the public good to the government readily applies to government functions, such as matters of security. *See, e.g.*, JOHN LOCKE, TWO TREATIES OF GOVERNMENT, SECOND TREATISE § 149; JEAN-JACQUES ROUSSEAU, OF THE SOCIAL CONTRACT PRINCIPLES OF POLITICAL RIGHT & DISCOURSES ON POLITICAL ECONOMY (1818) (translated from the French by Charles M. Sherover, 1984). THOMAS HOBBES, OF MAN, BEING THE FIRST PART OF LEVIATHAN, CH. XIII, 96–98 (Oxford University Press, 1909) (government order is necessary to curtail man's natural state, "war of every man against every man").

[28] District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008).

[29] McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).

[30] U.S. CONST. amend. II.

[31] 554 U.S. at 628; *see also McDonald*, 561 U.S. at 767.

[32] *See, e.g.*, Jeannie Suk, *The True Woman: Scenes From the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 273–75 (2008) (connecting self-defense for domestic abuse victims to deterrence in national defense from terrorism); *see also* Brief for National Rifle Association at 33–34, District of Columbia v. Heller, 552 U.S. 1254 (2008) (No. 07-290), 2008 WL 695617.

[33] *See supra* notes 8–9, and accompanying text.

protections are reduced when government outsources its customary functions[34] and eliminated when the government chooses not to fulfill them.[35]

The combined effect of the Court's seemingly unrelated decisions in *Gonzales*, *Heller*, and *McDonald* is the valuation of rights of autonomy and individual action — specifically, gun ownership and gun usage — over rights to personal security — specifically, freedom from gun violence. This dissonance is reflected in several other binary tropes perpetuated by the Court in this context. For instance, in its unwitting promotion of privatizing certain aspects of government policing, it contributes to the blurring between public and private in a context where the Court insists on the special character of "home" and private space, while ignoring the violence perpetrated by cohabitants of the home[36] and the perpetration of or acquiescence to violence by those holding the public trust. In its own doctrine, the Court chooses not to acknowledge the interrelationship of act and omission in the fulfillment of government responsibilities. Finally, the Court is removed from the notion of the existence of tyranny being a matter of perception, especially those perceptions tied to historical and continuing incongruities. These convolutions are very much part of the blurred lines shaped by privatization.[37]

Part I presents the violence of the Reconstruction era, which is relied upon by the *McDonald* Court to identify the Second Amendment right to self-defense. This Part also highlights the doctrinal inconsistencies and the ways in which these inconsistencies were perpetuated during Reconstruction, setting the stage for the modern landscape discussed in Parts III through V. Part II continues the doctrinal histories of cases relied upon by the *McDonald* Court, particularly *The Slaughter-House Cases* and *Cruikshank*, both of great significance to the Court's evolving definitions of individual rights; the role of government in promoting personal security; and evolving interpretations of the Second Amendment. Part III analyzes how modern case law perpetuates a structure that accepts the abeyance of state responsibility for individual security in favor of the autonomy of individual gun ownership. Part IV provides modern examples of social space and its relationship to race and gender violence, and suggests the right to self-defense is less universal than the Court's decisions suggest. This part also discusses underenforcement and protection as one manner of tyranny. Part V discusses

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[34] In many instances, privatization makes government accountability nonexistent, with no recourse through the state action doctrine. *See* Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 164–65 (1978) (finding that the Fourteenth Amendment only applies to state entities and actors).

[35] *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 757, 760–61 (2005); *see also*, Fenton, *supra* note 21, at 404–08.

[36] *Compare* text accompanying *infra* note 121 (home is paradigmatic location for self-defense) *with supra* note 25 (protective orders need not be enforced) *and infra* note 143 (self-defense against a cohabitant is only effective where the defender has previously acquired an order of protection).

[37] *See* MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 1–34 (Beacon Press, 2002).

some additional forms of modern-day tyranny, connecting them to the examples from the past, such as those relied on by the *McDonald* Court. The final Part provides concluding thoughts on the right to self-defense.

I. Reconstructing The Second Amendment

Writing for the plurality in *McDonald*, Justice Alito asserts that "[s]elf-defense is a basic right" and notes that *Heller* situates self-defense at the core of the Second Amendment.[38] The constitutional right of self-defense arises, in part, from the nature of a republican form of government that contemplated private actors' access to arms as a check against tyranny.[39] In finding a due process right to bear arms, the *Heller* and *McDonald* Courts rely heavily on the history of Reconstruction, during which freed Blacks needed to protect themselves, especially from mob violence.[40] During the Reconstruction era, violence against Blacks, free and otherwise, was ubiquitous. Contemporaneously, state officials applied firearms laws differentially to prevent Blacks' access to arms,[41] while efforts to disarm Blacks were

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[38] *See McDonald*, 561 U.S. at 767–70; *Heller*, 554 U.S. at 598–600. *See also* Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 Ind. L.J. 939, 943–47 (2011); Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 Hastings L.J. 1205, 1207 (2009).

[39] "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them." McDonald, 561 U.S. at 769–70 (quoting 3 J. Story, *Commentaries on the Constitution of the United States § 1890*, p. 746 (1833)). *See also* Levinson, *supra* note 5.

[40] *McDonald*, 561 U.S. at 767 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)); Miller, *supra* note 38, at 968 ("[McDonald] acknowledges that the contours of the Second Amendment were delineated by the need to protect freedmen from terror — both official and unofficial."); Robert C. Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. Ill. L. Rev. 739, 743 ("Freedom of blacks was thus both the cause and the purpose of the Reconstruction amendments") (citing *The Slaughter-House Cases* at 71). *See also* The Slaughter-House Cases, 83 U.S. 36, 71 (1872) ("[T]he one pervading purpose found [in the Reconstruction Amendments was] . . . the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."); Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–77 at 258 (Henry Steele Commager and Richard B. Morris eds., 1st ed. 1988).

[41] *See* Cottrol & Diamond, *supra* note 7, at 355 (quoting Watson v. Stone, 4 So.2d 700, 703 (Fla. 1924) (Buford, J., concurring specially) ("The statute [making it unlawful to carry a firearm in an automobile] was never intended to be applied to the white population and in practice has never been so applied") and State v. Nieto, 130 N.E. 663, 669 (Ohio 1920) (Wannamaker, J., dissenting) ("the race issue there has extremely intensified a decisive purpose to entirely disarm the negro, and this policy is evident upon reading the opinions")). *See also* Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to Be Applied to the White Population": Firearms Regulation and Racial Disparity — The Redeemed South's Legacy to a National Jurisprudence*, 70 Chi.-Kent L. Rev. 1307, 1309 (1995).

ongoing.[42] Unequal access to arms was part of an overall agenda to deny Blacks access to all other rights — a straightforward form of tyranny. The remedy for this denial of rights, at least ideologically, may be regarded as one part of the purpose underlying a Second Amendment right to arms.[43] In fact, the *McDonald* Court's substantiation of a right to self-defense is steeped in this history of violence, derived from terrorist mobs and law enforcement alike.[44]

The period following the passage of the Fourteenth Amendment was marked by state legislation to disarm freedmen,[45] incidents of mob violence,[46] and a long history of lynching,[47] all often orchestrated or otherwise tacitly condoned by government actors.[48] In order to remedy police refusals to enforce state criminal law on behalf of newly-freed black slaves and in keeping with the original intent of the Due Process Clause of the Fourteenth Amendment,[49] Congress passed the Civil Rights Act of 1871.[50] This Act, the precursor to 42 U.S.C. § 1983, was known alternately as the Force Act of

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[42] *Heller*, 554 U.S. at 615–16; *McDonald* 561 U. S. at 772–73 (discussing parties of Southern state militias disarming blacks); *see also id.* at 806–07 (Thomas, J., concurring in part and concurring in the judgment) (discussing massacre of black militia members by white citizen militia).

[43] *Heller*, 554 U.S. at 598 ("[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny"); *McDonald*, 561 U.S. at 770 ("By the 1850's, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights — the fear that the National Government would disarm the universal militia — had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense") (citing MICHAEL DOUBLER, CIVILIAN IN PEACE, SOLDIER IN WAR 87–90 (2003). *See also* AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 258–59 (Yale University Press 1998).

[44] *McDonald*, 561 U.S. at 772 n. 20, 769–78; *see also id.* at 845–49 (Thomas, J., concurring in part and concurring in the result); Miller, *supra* note 38, at 959 ("As the *McDonald* Court observed, during the nineteenth century, freedmen and Union sympathizers had as much to fear from Southern law enforcement as they did from terrorist organizations like the Klan.").

[45] Even before the Civil War, some states amended their state constitutions in order to disarm free blacks. Tennessee, for example, amended its constitution to provide that the right to keep and bear arms, previously extended to all freemen, extended only to "free white m[e]n". *See* Glenn Harlan Reynolds, *The Right To Keep and Bear Arms Under the Tennessee Constitution: A Case Study In Civic Republican Thought*, 61 TENN. L. REV. 647, 654–62 (1994).

[46] The Colfax massacre, subject of the facts in *Cruikshank*, is one example. *See* United States v. Cruikshank, 92 U.S. 542 (1876); FONER *supra* note 40, at 530; REBECCA HALL AND ANGELA P. HARRIS, HIDDEN HISTORIES, RACIALIZED GENDER, AND THE LEGACY OF RECONSTRUCTION: THE STORY OF *United States v. Cruikshank* in Women and the Law Stories 21 (Elizabeth Schneider and Stephanie Wildman, eds., 2011). For details of some of the racial massacres and the forms of mob violence, *see* Cottrol and Diamond, *supra* note 7, at 339–42.

[47] *See generally* IDA B. WELLS-BARNETT, *Southern Horrors, in* ON LYNCHINGS 25 (Humanity Books 2002). In the first four years after Plessy v. Ferguson, 163 U.S. 560 (1896), white mobs lynched more than 400 black people. *See* ROBERT L. ZAGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909–1950 6 (Temple University Press 1980).

[48] *See, e.g.*, Cottrol and Diamond, *supra* note 7, at 349–58; Hall and Harris, *supra* note 46, at 21–25; FONER, *supra* note 40, at 425–44, 593–94.

[49] AMAR, *supra* note 43, at 383–85 (identifying the need to counter the Black codes as the primary rationale behind the Fourteenth Amendment's Due Process clause).

[50] CONG. GLOBE, 42nd Cong., 1st Sess. 322 (1871).

1871 and as the Ku Klux Klan Act of 1871.[51] The core purpose of the Force Act and its successors was to counteract the non-enforcement of state measures to prevent violence against individuals.[52]

Perspective dictates whether one identifies violence as a defense against tyranny or more accurately, the ability to *identify* with claims of defense against tyranny.[53] Post-Civil War, the KKK and law enforcement often colluded with one another,[54] both no doubt believing they were thwarting the "tyrannical" imposition of Reconstruction.[55] During Reconstruction, ideological debates regarding natural rights about liberty versus holding (human) property readily turned into talk about freedom from Klan violence, or separately, freedom from the vengeance of freedmen.[56] Reconstruction was a time of ideological and political conflict where the nature of law enforcement, as either protector or perpetrator, varied with location and with prevailing political sympathies.[57] The promise of Reconstruction was often

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[51] The Force Act was invalidated by *United States v. Harris*, 106 U.S. 629 (1883).

[52] *See The Slaughter-House Cases*, 83 U.S. at 71–72 (1872); Monroe v. Pape, 365 U.S. 167, 174–76 (1961). Even with its purpose, it was not until the 1961 case, *Monroe v. Pape*, that the Court held state officials responsible for their inaction, noting that what concerned Congress when they wrote the Reconstruction Amendments "was not the unavailability of state remedies, but the failure of certain States to enforce the laws *with an equal hand* . . . It was their *lack of enforcement* that was the nub of the difficulty." *Monroe*, 365 U.S. at 174–76 (1961) (emphasis added) (recognizing that on occasion, law enforcement was choosing not to enforce the law for the protection of minorities and instead encouraged violence against these communities). For municipal liability, see *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 658 (1978).

[53] *See, e.g.*, Cristina Jayme Montiel and Ashiq Ali Shah, *Effects of Political Framing and Perceiver's Social Position On Trait Attributions of a Terrorist/Freedom Fighter* 27 J. LANGUAGE AND SOC. PSYCH. 266, 266–75 (2008); Stuart Hall, *The West and the Rest: Discourse and Power, in* The Indigenous Experience: Global Perspectives 165–73 (Roger CA Maaka and Chris Andersen eds., 2006); JOANNE WRIGHT, TERRORIST PROPAGANDA: THE RED ARMY FACTION AND THE PROVISIONAL IRA, 1968–86 73–80 (1991). *But cf.*, Boaz Ganor, *Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?*, 3 POLICE PRACTICE AND RESEARCH 287–304 (2002).

[54] *See generally* Robin D. Barnes, *Blue by Day and White by (K)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079 (1995–1996); *see also* Cottrol and Diamond, *supra* note 7, at 349–58; FONER, *supra* note 40, at 425–44, 593–94.

[55] *See generally* WYN CRAIG WADE, THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA (1998). Concurrently, black activists such as Robert Williams chose to use self-defense, but only where the state, local, and federal governments did not or would not enforce the law or provide protection against conflicts with the KKK and other instigators of mob violence. ROBERT F. WILLIAMS, NEGROES WITH GUNS (photo reprint 1989) (1962). Cottrol and Diamond also describe multiple instances of mob violence used against black people and the formation of armed groups for self-defense, *supra* note 7, at 357–58 (quoting Hamilton Bims, *Deacons for Defense*, EBONY, Sept. 1965, at 25–26) ("Blacks in the South found the Deacons helpful because they were unable to rely upon police or other legal entities for racial justice. This provided a practical reason for a right to bear arms: In a world in which the legal system was not to be trusted, perhaps the ability of the system's victims to resist might convince the system to restrain itself.").

[56] *See* Miller, *supra* note 38, at 959–68 (citation omitted).

[57] Miller, *supra* note 38, at 960.

more illusory than real when it came to both practice and implementation.[58] Thus, it is naïve to draw conclusions, as the *McDonald* Court did, about the right to self-defense from the fractious history of Reconstruction. For this reason, imagining the right to bear arms as a solution for emancipated slaves and other free blacks is all but facetious.[59]

In the course of the *McDonald* plurality, the Court affirms the continuing viability of the post-Reconstruction *Slaughter-House Cases*.[60] By incorporating a Second Amendment right to self-defense against the states, *McDonald* and its predecessor *Heller* have reinvigorated scholarly discussions of the Privileges and Immunities Clause as well as the nature of incorporation.[61] The *Slaughter-House* decision was a form of prestidigitation, ensuring that the promise of rights formalized by Reconstruction would remain illusory. While *Slaughter-House* discusses state denial of rights to freed Blacks as the underlying rationale for adoption of the Reconstruction Amendments,[62] it also echoes *Dred Scott*[63] in its treatment of citizenship.[64] *Dred Scott* distinguished state from national citizenship, effectively accepting different treatment of individuals[65] based on the type of government actor; similarly, *Slaughter-House* distinguishes rights due to individual citi-

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[58] *Id.* ("[T]hose who extrapolate from Reconstruction an unqualified vindication of freedmen's inalienable right to self-defense obscure a far, far more nuanced and fractious history. . . To simplify this narrative into the unalloyed vindication of self-protection is shallow and tendentious."); *see generally* FONER, *supra* note 40; C. VAN WOODWARD, THE STRANGE CAREER OF JIM CROW 13–19 (1955). *Cf.* W.E.B. DU BOIS, BLACK RECONSTRUCTION in America 1860–1880 706–78 (1935).

[59] *See* Miller, *supra* note 38, at 960.

[60] McDonald v. City of Chicago, 561 U.S. 742, 758 (2010).

[61] In asserting that the right to keep and bear arms should not be enforceable against the States through the Due Process Clause, but instead should be applied to the States through the Fourteenth Amendment's Privileges or Immunities Clause, Justice Thomas points out that "the founding generation added the first eight Amendments to the Constitution in response to Anti-federalist concerns regarding the extent of federal — not state — power, and held that if 'the framers of these amendments [had] intended them to be limitations on the powers of the state governments . . . they would have declared this purpose in plain and intelligible language.'" *McDonald*, 561 U.S. at 806–07 (Thomas, J., concurring) (quoting Chief Justice Marshall in Barron ex rel. Tiernan v. Mayor of Baltimore, 7 Pet. 243, 250, 8 L.Ed. 672 (1833)); *see also id.* at 754 (Alito, J.); Brannon P. Denning & Glenn H. Reynold, *Five Takes on McDonald v. Chicago*, 26 J.L. & POL. 273, 289–90 (2011).

[62] *See The Slaughter-House Cases*, 83 U.S. at 69–75.

[63] Dred Scott v. Sandford, 60 U.S. 393, 411–12 (1857).

[64] Like the *Slaughter-House* Court's holding determining that Privileges and Immunities apply to *United States* citizens, but not to citizens of the various states, 83 U.S. at 74, *Dred Scott* defers to state law in its determination of the citizenship status and the rights held by blacks, even when that state's law was in conflict with the laws of other states or contrary to federal law. *See* Missouri Compromise 1820. While Justice Taney could acknowledge the possibility of *state* citizenship status of freed blacks, at 417–18 (and notwithstanding his characterization of the status of Native Americans, at 403–05) he nevertheless denied the possibility of *United States* citizenship status for descendants of Africans or the relevance of state citizenship where such status was contrary to a white slave-holder's due process interests in the status of those same individuals as property, at 408, 414–15, 450.

[65] Disgracefully, Justice Taney's opinion in *Dred Scott* did not accord the status of personhood to those enslaved as he ruled that doing so would infringe on the Due Process right to property. *Dred Scott*, 60 U.S. 393 at 450.

zens in accordance with the level of government actor. The mere echo of *Dred Scott* as part of the doctrinal choices made in *Slaughter-House* contributed to the effective evisceration of the original purpose of the Fourteenth Amendment's Privileges and Immunities Clause as well as extending repercussions for civil rights.[66]

II. *SLAUGHTER-HOUSE* – STRUCTURES FOR VIOLENCE

In reaffirming *Slaughter-House*,[67] the *McDonald* Court completed a historical incongruity. Rather than revitalize the Privileges and Immunities Clause, as Justice Thomas advocates in concurrence,[68] the Court chose to selectively incorporate[69] the last addressable individual right under the Due Process Clause: the right to bear arms.[70] The piecemeal approach through selective incorporation may have ultimately accomplished what a fair interpretation of the Privileges and Immunities Clause would have, were it afforded its intended purpose at its passage.[71] Alternatively, the incremental implementation of rights may have allowed for the differential application of rights, with priority given to some rights over others.[72]

The *Slaughter-House Cases* held that the Fourteenth Amendment does not deprive states of legal jurisdiction over the civil rights of its citizens and that states are the primary protectors of individual rights.[73] Not long after, the *Civil Rights Cases* determined that, notwithstanding the explicit language of Section 5, Congress could not prohibit private discrimination in public accommodations.[74] The *Slaughter-House* and *Civil Rights Cases* create a doctrinal structure by which the states have the primary responsibility

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[66] *See* DAVID CURIE, CONSTITUTION OF THE UNITED STATES OF AMERICA 965 (1953); AMAR, *supra* note 43, at 249–56.

[67] *McDonald*, 561 U.S. at 756–62.

[68] *McDonald*, 561 U.S. at 813 (Thomas, J., concurring).

[69] *McDonald*, 561 U.S. at 767.

[70] Protections not incorporated against the states include those in the Third Amendment, the Fifth Amendment Right to a civil jury, the Seventh Amendment right to grand jury indictment, and the Eighth Amendment protections against excessive fines or bail. *See* Akhil Reed Amar, *2000 Daniel J. Meador Lecture: Hugo Black and The Hall of Fame*, 53 ALA. L. REV. 1221, 1230 (2002). Arguably, these remaining rights are procedural in nature, making the right from the Second Amendment the final substantive right to be incorporated.

[71] *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 53–54 (Greenwood Press 1979) ; *See also* Happersett v. Minor, 88 U.S. 162, 174–75 (1875).

[72] *See generally* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

[73] *The Slaughter-House Cases*, 83 U.S. at 77 ("The entire domain of civil rights heretofore belong[s] exclusively to the States").

[74] On its face, §5 of the Fourteenth Amendment grants the power to legislate redress for racial discrimination to Congress. Nevertheless, the Court in *The Civil Rights Cases* restricted that power by focusing on the state action language of §1. *See* The Civil Rights Cases, 109 U.S. 3 (1883).

to guarantee the rights of their citizens,[75] and the federal government may protect those rights only if the states violate them.[76]

United States v. Cruikshank[77] is also significant in understanding the effects of *Slaughter-House* on individual rights, especially regarding the perpetration of violence. *Cruikshank* arose out of a massacre in Colfax, Louisiana, where political contest and contention led to the use of arms by white supremacists to attack black Republican freedmen.[78] The armed attack resulted in the deaths of 280 black people.[79] The massacre also involved several public rapes of black women as well as sexual degradation of some men as part of lynching murders.[80] While ninety-eight people were indicted for participating in the massacre, only nine went to trial.[81] Of those nine, six were acquitted of all charges; the remaining three were acquitted of murder, but convicted under the Enforcement Act of 1870 for conspiring to deprive the victims of their constitutional rights, including the rights to assembly and to bear arms.[82] The *Cruikshank* Court invalidated those convictions, following the reasoning of *Slaughter-House* and holding that the Fourteenth Amendment applies only to state action and that the Congressional Enforcement Act could not proscribe individual conduct.[83] The federal charges brought against the white rioters were invalidated as a violation of the First Amendment right to freely assemble and the Second Amendment right to keep and bear arms. In overturning the convictions of the white male defendants, the *Cruikshank* Court held that the Due Process and the Equal Protection Clauses of the Fourteenth Amendment only apply to state action, not to actions by individual citizens.[84] Writing in *McDonald*, Justice Thomas noted:

> *Cruikshank*'s holding that blacks could look only to state governments for protection of their right to keep and bear arms enabled private forces, often with the assistance of local governments, to subjugate the newly freed slaves and their descendants through a

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[75] *See* Bell v. Maryland, 378 U.S. 226, 310 n.30 (1964) (Goldberg, J., concurring) (quoting Justice Bradley's correspondence to Circuit Judge (later Justice) Wood regarding the Fourteenth Amendment).

[76] *See generally* The Civil Rights Cases, 109 U.S. 3 (1883).

[77] *See generally Cruikshank*, 92 U.S. 542 (1875) (finding unconstitutional a federal criminal conspiracy statute designed to prevent whites from inhibiting blacks' exercise of their constitutional rights). Justice Thomas pointed out that "the reason the Framers codified the right to bear arms in the Second Amendment — its nature as an inalienable right that pre-existed the Constitution's adoption — was the very reason citizens could not enforce it against States through the Fourteenth. That circular reasoning effectively has been the Court's last word on the Privileges or Immunities Clause." *McDonald*, 561 U.S. at 809.

[78] Hall and Harris, *supra* note 46, at 46.

[79] FONER, *supra* note 40, at 437.

[80] *Id.*

[81] Hall and Harris, *supra* note 46, at 48.

[82] Hall and Harris, *supra* note 46, at 49.

[83] 92 U.S. at 542.

[84] *Id.* at 554.

> wave of private violence designed to drive blacks from the voting booth and force them into peonage, an effective return to slavery. Without federal enforcement of the inalienable right to keep and bear arms, these militias and mobs were tragically successful in waging a campaign of terror against the very people the Fourteenth Amendment had just made citizens.[85]

What is most telling about the Colfax massacre,[86] described as the bloodiest in United States history,[87] is that the state did not attempt to protect the victims. Since the *Slaughter-House* doctrine left protection of civil rights to the states, the perpetrators of the Colfax massacre faced few legal consequences for their actions;[88] the *Cruikshank* decision ultimately "[in] the name of federalism . . . " gave a green light to acts of terror where local officials either could or would not enforce the law."[89] Indeed,

> [t]he [*Cruikshank*] Court reversed all of the convictions, including those relating to the deprivation of the victims' right to bear arms . . . The Court wrote that the right of bearing arms for a lawful purpose "is not a right granted by the Constitution" and is not "in any manner dependent upon that instrument for its existence" . . . "The second amendment," the Court continued, "declares that it shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress" . . . "Our later decisions in *Presser v. Illinois*, 116 U.S. 252, 265 (1886), and *Miller v. Texas*, 153 U.S. 535, 538 (1894), reaffirmed that the Second Amendment applies only to the Federal Government."[90]

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[85] *McDonald*, 561 U.S. at 855–56.

[86] The massacre that occurred in Colfax, Louisiana, on Easter Sunday, April 13, 1873, was the subject of the facts in *Cruikshank*. *See* Hall and Harris, *supra* note 46, at 48. *See also* 561 U.S. at 757; FONER, *supra* note 40, at 437.

[87] Hall and Harris, *supra* note 46, at 48 ("In all, at least seventy people were massacred, most shot in the back of the head, and their bodies left to decompose or be eaten by dogs. The massacre would later be called 'the bloodiest single act of carnage in all of Reconstruction.'") (citing FONER, *supra* note 40, at 437).

[88] Justice Alito describes the outcome of *Cruikshank* and the basis for its ruling consistent with *Slaughter-House*: "the Court reviewed convictions stemming from the infamous Colfax Massacre in Louisiana on Easter Sunday 1873. Dozens of blacks, many unarmed, were slaughtered by a rival band of armed white men. Cruikshank himself allegedly marched unarmed African–American prisoners through the streets and then had them summarily executed. Ninety-seven men were indicted for participating in the massacre, but only nine went to trial. Six of the nine were acquitted of all charges; the remaining three were acquitted of murder but convicted under the Enforcement Act of 1870, 16 Stat. 140, for banding and conspiring together to deprive their victims of various constitutional rights, including the right to bear arms." *McDonald*, 561 U.S. at 757.

[89] FONER, *supra*, note 40, at 531. *See also* Hall and Harris *supra* note 46, at 46.

[90] *McDonald*, 561 U.S. at 757–58 (citing *Cruikshank*, 92 U.S. at 559; *Heller*, 554 U.S. at 620, n. 23). *See Cruikshank*, 92 U.S. at 553 ("The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in *The City of New York v.*

The structure of the *Slaughter-House* and *Civil Rights Cases* purports to provide the greatest protections for individual rights but ignores situations where individuals are denied protection by the state and suffer from state inaction.

Historical research accomplished by Rebecca Hall and Angela Harris demonstrates that the:

> [p]erpetuation of rapes and lynchings of Black people in the Reconstruction period intended to preserve the order of men over women, but also White over Black. Racialized gender violence maintained White supremacy through fear, oppression, and denial of gender privilege, . . . leaving Black women no refuge in "womanhood" or any chivalric protection accorded White women.[91]

The facts of *Cruikshank* stem from an event of massive racial and gender violence[92] in which state actors were both present and complicit in the perpetuation of mob violence; these state actors actively assisted in the abridgement of citizens' rights through violent means.[93] Thus, the Court in the *Slaughter-House* line of cases[94] perpetuates the contradictions between ideology and reality that commenced with the Founding.[95]

At the beginning of United States constitutional history, different people experienced life and the law differentially;[96] notwithstanding our stated ideals,[97] these differences were supported by variant textual commitments.[98] In the United States, this commitment is foundational. The Declaration of Independence states, "We hold these truths to be self-evident, that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights, that among these are life, liberty, and the pursuit of hap-

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Miln, 11 Pet. 139, the 'powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police,' 'not surrendered or restrained' by the Constitution of the United States.").

[91] Hall and Harris, *supra* note 46, at 23.

[92] The *Cruikshank* story was not only about murder, but also about terrorization of individuals through sexual assault and torture. For a discussion of the complex nature of the gendered violence represented by the facts of *Cruikshank*, see Hall and Harris, *supra* note 46.

[93] *See* Cottrol and Diamond, *supra* note 7, at 318 ("That all too brief experiment in racial egalitarianism, Reconstruction, was ended by private violence and abetted by Supreme Court sanction." (citing *Harris*, 106 U.S. 629 (1883); *Cruikshank*, 92 U.S. 542 (1875))).

[94] The *Slaughter-House* line of cases includes *Cruikshank*, *Harris*, and now, *McDonald*.

[95] *See* Cottrol and Diamond, *supra* note 7, at 347 ("The *Cruikshank* decision, which dealt a serious blow to Congress' ability to enforce the Fourteenth Amendment, was part of a larger campaign of the Court to ignore the original purpose of the Fourteenth Amendment — to bring about a revolution in federalism, as well as race relations" (citation omitted)); Harry V. Jaffa, *Dred Scott Revisited*, 31 HARV. J.L. & PUB. POL'Y 197, 199 (2008) ("There could be no such thing as equal rights of slavery and freedom. Property in human beings could not be compared indifferently to property in non-human chattels. To make chattels of other human beings was a violation of the laws of nature, and this nation was founded upon 'the Laws of Nature and of Nature's God.'" (quoting THE DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776))).

[96] *See generally,* FONER, *supra* note 40; C. VAN WOODWARD, *supra* note 58.

[97] *See infra* note 99.

[98] *See infra* notes 100–04 and accompanying text.

piness."[99] While equality was a primary ideological basis for the Constitution as originally ratified, the Constitution nonetheless apportioned seats in the House of Representatives according to the "whole number of free Persons"[100] in each state while excluding "Indians not taxed" and adding "three fifths of all other persons," prohibited the "importation of such persons as any of the states, now existing, shall think proper to admit,"[101] and contained the Fugitive Slave clause, requiring states to "[deliver up any] person held to service or labor in one state, . . . escaping into another."[102] The early Congress also had the power to restrict the slave trade between the states under the Commerce Clause.[103] There is no mention of gender in the original Constitution, nor were women accorded the basic right of citizenship to vote until the ratification of the Nineteenth amendment.[104] These textual references account only for inconsistencies. The realities of differential treatment of people, especially inequality maintained through violent means, is well-documented in American history.

Cruikshank itself affirmed the right to use firearms over the right of citizens to be secure and the authority of the government to protect the people. At the time of *Cruikshank,* when federal law was designed to provide remedies for victims of violence, the Court would only apply the Second Amendment to actions of the federal government, in effect permitting violence without redress by the state.[105] Yet *McDonald* invalidated state-level legislation[106] designed to protect those citizens wishing to be free from gun violence[107] for infringing on the right of self-defense.[108] It seems then that the value protected is gun ownership, not a right in security. Nor is value accorded to structural distinctions between state and federal government. Further, an examination of the rights discourse presents the conundrum of determining which — or rather, whose — rights are protected. The Court's choices venerate the active rights of gun usage, while according little regard to passive rights of security or protection from gun violence. Ultimately, in

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[99] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[100] *See* U.S. CONST. art. I, § 2, cl. 3.

[101] *See* U.S. CONST. art. I, § 9, cl. 1.

[102] *See* U.S. CONST. art. IV, § 2, cl. 3.

[103] *See* U.S. CONST. art. I, § 8, cl. 3; Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 132–36 (discussing the intrastate nature of Congress' power to regulate commerce), 143 (citing the prohibition of slave imports after 1808, U.S. Const. Art. I, §9, c. 11); *see generally* Walter Berns, *The Constitution and the Migration of Slaves*, 78 Yale L.J. 198 (1968).

[104] *See* U.S. CONST. amend. XIX.

[105] FONER, *supra*, note 40, at 531.

[106] *See* Chicago, Ill., Municipal Code § 8-20-050(c) ("[n]o person shall [possess] any firearm unless such person is the holder of a valid registration certificate for such firearm"); Chicago, Ill., Municipal Code § 8-20-040(a) (2009); Oak Park, Ill., Village Code §§ 27-2-1 (2007), 27-1-1 (2009).

[107] The Chicago ban is designed to protect its residents "from the loss of property and injury or death from firearms." *See* Chicago, Ill., Journal of Proceedings of the City Council, p. 10049 (Mar. 19, 1982).

[108] *McDonald*, 561 U.S. at 750, 791.

the context of the Second Amendment, the *McDonald* Court's affirmation of *Slaughter-House* is also an affirmation of *Cruikshank*.

III. Defend Yourself

Contemporary state regulation of violence extends the doctrinal structures set out by *Slaughter-House* (along with *Cruikshank*) and the *Civil Rights Cases*. *United States v. Morrison*[109] denied Congress the authority to enact many provisions of the original Violence Against Women Act as impermissible under Section 5 of the Fourteenth Amendment[110] and determined that in passing the act, Congress exceeded its authority under the Commerce Clause.[111] Going further, *Town of Castle Rock v. Gonzales* held that even while states retain the primary authority to protect individual rights, states need neither adhere to their own legislated mandates nor enforce protective orders.[112]

When read in conjunction with *Heller* and *McDonald*, *Town of Castle Rock* also suggests that the Court values rights of action over rights of safety.[113] Through *McDonald*, one has the right to use (gun) violence; in *Town of Castle Rock*, the Court refuses to recognize the opposite right to be free from violence. Specifically, *Town of Castle Rock* does not recognize private citizens' expectation interest in basic security protected and enforced by the state.[114]

Slaughter-House, *Cruikshank*, and *McDonald*, along with the decisions in *United States v. Morrison* and *Town of Castle Rock v. Gonzales*, almost inevitably suggest that the most reasonable way citizens may defend themselves is with the private use of guns. However, the actor exercises this option at her peril.

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[109] United States v. Morrison, 529 U.S. 598 (2000). *Morrison* relied on the rationale of *The Civil Rights Cases* that Congress may not reach private conduct under Section 5 of the Fourteenth Amendment. *Id.* at 599. In support of the holding in *Morrison*, Justice Rehnquist invoked *Harris*, 106 U.S. 629 (1883), and *Cruikshank*, 92 U.S. 542 (1875), without full acknowledgment of the violent nature of the facts. *Id.* at 607, 622.

[110] 42 U.S.C. § 13925 (2006).

[111] The *Morrison* Court went further and rejected arguments for Congressional authority to restrict private conduct under the Commerce Clause. Ironically, in denying this authority, Morrison relied upon *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964), which forbade racial discrimination in accommodations and in restaurants, respectively, because such regulations burden interstate commerce. *Morrison*, 529 U.S. at 609–10, 619. *Heart of Atlanta Motel* and *Katzenbach*, two civil rights-era cases, were regarded as emblematic of a legitimate means for Congress to ensure individual rights in the face of state retrenchment.

[112] Town of Castle Rock v. Gonzales, 545 U.S. 748, 757, 760–61 (2005); *see also* Fenton, *supra* note 21, at 404–08.

[113] *See supra* note 108.

[114] *Town of Castle Rock*, 545 U.S. at 757, 760–61.

IV. Violent Space and the Tyranny of Under-Protection

Society tends to focus on violence in public spaces, delineating safe and unsafe spaces through un-nuanced racial associations with violence.[115] Society ignores or blames victims for the violence committed in private spaces.[116] When violence is in private spaces, individuals may decide it happens only to "others" or only happens to those bearing some shortcoming,[117] and in any case, when violence happens privately, society generally considers it a matter between the victim and perpetrator.[118] Social geography, including concepts of race, gender, and other individual characteristics, inform dominant social perceptions about who perpetrates violence[119] as well as who is entitled to self-defense.[120]

The Court in *McDonald* gives special consideration to the home as a location for the use of firearms in self-defense.[121] Even in dissent, Justice Stevens cites Blackstone's recognition of a "right of habitation," and his opinion that "every man's house is looked upon by the law to be his castle of defense and asylum."[122] But the Court's relevant citation to Blackstone is incomplete; it does not acknowledge the violence committed at home nor discuss Blackstone as the originator of coverture and chastisement. Under coverture, only husbands held rights; the personhood of the wife was subsumed by that of the husband.[123] Husbands were entitled to physically "cor-

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[115] *See* Hilda E. Kurtz, *Trayvon Martin and the Dystopian Turn in US Self-defense Doctrine*, 45 Antipode 248 (Mar. 2013) ("Pervasively linked in much of the collective (white) imagination with ghettoes and criminal behaviors, black boys and men can unwittingly and without warrant provoke fear and consternation when encountered in spaces in which they are viewed by others as not belonging.").

[116] The "private" conceptualization of wife-beating is influenced by conventional police responses. Male violence within the home was once excluded from police action. Information about such crimes only came from police reports (until the advent of crime and victimization surveys). Elizabeth A. Stanko, *Fear of Crime and the Myth of the Safe Home in Feminist Perspectives on Wife Abuse*, *in* Feminist Perspectives on Wife Abuse 75, 78–79 (Kersti Yllo & Michele Bograd eds., 1988).

[117] *See* Leigh Goodmark, A Troubled Marriage: Domestic Violence and the Legal System 54–56 (2012); B. P. Yawn, R. A. Yawn, and D. L. Uden, *American Medical Association Diagnostic and Treatment Guidelines on Domestic Violence*, 39 Arch. Fam. Med. 1, 6 (1992).

[118] *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2150–74 (1996) (discussing the doctrine of family privacy).

[119] *See* Kurtz, *supra* note 115.

[120] *See* Lee, *supra* note 8, at 381–91; Krause, *supra* note 8, at 564–67.

[121] *McDonald*, 561 U.S. at 767–68; *see Heller*, 554 U.S. at 628–29.

[122] *McDonald*, 561 U.S. at 886 (Stevens, J., dissenting) (citing 4 William Blackstone, Commentaries *223, *288); *but see, id.* at 915–16 (Breyer, J. dissenting) (disagreeing with Justice Stevens' interpretation of Blackstone's Commentaries). *See also Heller* 554 U.S. at 628, 635 (observing that "the need for defense of self, family, and property is most acute" in one's abode, and celebrating "the right of law-abiding, responsible citizens to use arms in defense of hearth and home").

[123] *See* Siegel, *supra* note 118, at 2122; *see also* Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 Law & Soc. Inquiry 941, 965–67 (1995) (describing the marital rape exemption, still prevalent under state law through the early 1990's, as a vestige of coverture).

rect" wives, which permitted legal assault committed by husbands; wives had no similar right.[124] According to Blackstone, murder of a wife was regarded in the same manner as killing a stranger; conversely, husband-killing was considered treasonous.[125] Both the *McDonald* and *Heller* Courts neglect to address violent assaults within the home and the corresponding need for self-defense as protection against individuals within the same residence.[126]

It is possible that the Court gives priority to self-defense in one's home in recognition of the violence once imposed on newly freed black families at their homes.[127] The Court invokes the racial violence commonplace during Reconstruction as support for its conclusions regarding the propriety of a right to self-defense seated in the Second Amendment. The *McDonald* Court describes much of the public and racially selective non-enforcement of civil rights during the Reconstruction era. Yet unfortunately, the Court's reference to the self-protection needs of the emancipated does not acknowledge that for freed slaves, the possibility of self-protection in private spaces was inconceivable prior to, as well as during, Reconstruction.[128] Before emancipation, slave families were protected only at the whims of plantation

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[124] *See* 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 432 (R. Welsh & Co. ed. 1897).

[125] *See id.* at 418 n.103:

> Husband and wife, in the language of the law, are styled baron and feme. The word baron, or lord, attributes to the husband not a very courteous superiority. But we might be inclined to think this merely an unmeaning technical phrase, if we did not recollect that if the baron kills his feme it is the same as if he had killed a stranger, or any other person; but if the feme kills her baron, it is regarded by the laws as a much more atrocious crime, as she not only breaks through the restraints of humanity and conjugal affection, but throws off all subjection to the authority of her husband. And therefore the law denominates her crime a species of treason, and condemns her to the same punishment as if she had killed the king. And for every species of treason. the sentence of women was to be drawn and burnt alive.

See also, Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias In The Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 629, n.34 (1980).

[126] Over the last five years of available data, 55% of women killed by intimate partners were killed with guns. *See* FED. BUREAU OF INVESTIGATION, SUPPLEMENTARY HOMICIDE REPORTS, 2009–13, http://bit.ly/1yVxm4K, *archived at* https://perma.cc/QC6F-GLS5. Violence, sexual assault, and child endangerment are also forms of violence that primarily occur in private setting, particularly in the home. *See* U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES ADMINISTRATION FOR CHILDREN AND FAMILIES ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES CHILDREN'S BUREAU, CHILD MALTREATMENT 2014; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (DHHS) SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION FOR CHILDREN AND FAMILIES (ACF) CENTER FOR MENTAL HEALTH SERVICES OFFICE OF PLANNING, RESEARCH, AND EVALUATION (OPRE) (www.samhsa.gov) and the CHILDREN'S BUREAU, FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS–4), REPORT TO CONGRESS (2010).

[127] *McDonald*, 561 U.S. at 774–76 (citing 39TH CONG. GLOBE 1182).

[128] Since slave families had no rights in privacy, emancipated families only received the protections of privacy accorded to legal families, only to a minimally greater extent than during slavery. *See* Zanita E. Fenton, *Bastards! . . . And the Welfare Plantation*, 17 IOWA J. GENDER, RACE & JUSTICE 10–16 (2014) (discussing the unavailability of marriage for slave families, its use for social control during and after Reconstruction, and the effects of legitimacy law to maintain racial division).

owners,[129] and thus the slave's home could not be considered private.[130] The Court uses the example of emancipated slave families to demonstrate the need for a right to self-defense, yet fails when it neglects to examine the numerous occasions where freed people were prevented from exercising this right, subjected to violence in private spaces, without recourse or enforcement by the state.[131] By evoking the siege of manumitted slave families, the Court is successful only in furthering the illogic of the public/private distinction.[132]

As *McDonald* and *Heller* were being considered by the judicial branch, state legislators were busy extending the protections of "private" spaces to the public by means of Stand Your Ground legislation,[133] a modern variance on self-defense rules.[134] Stand Your Ground laws signify official permission to assault "the other," specifically men of color,[135] while discouraging vic-

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[129] *See id.*; *see also* Zanita E. Fenton, *An Essay on Slavery's Hidden Legacy: Social Hysteria and Structural Condemnation of Incest*, 55 HOWARD L.J. 319, 321–24 (2012).

[130] *Id.*; *cf.* Angela Browne and Shari S. Bassuk, *Intimate Violence in the Lives of Homeless and Poor Housed Women: Prevalence and Patterns in an Ethnically Diverse Sample*, 67 AM. J. OF ORTHOPSYCHIATRY 261 (1997) (modern-day homeless families receive little real privacy and also experience violence in multiple ways).

[131] Unfortunate examples include the rapes of freed women without formal legal redress. *See e.g.*, RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 162–82, 217 (2003); VICTORIA E. BYNUM, UNRULY WOMEN: THE POLITICS OF SOCIAL AND SEXUAL CONTROL IN THE OLD SOUTH 5, 109, 187 n.75 (1992). The Court further ignores the sometimes-myth of rapes of white women by black men as justification for lynching. *See* Coromae R. Mann and Lance H.& Selva, *The Sexualization of Racism: The Black as Rapist and White Justice*, 3 W.J. BLACK STUDIES 168 (1979); Amii Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology, 1892–1920*, 3 UCLA WOMEN'S L.J. 1 (1993). The uncatalogued rapings of black women, in slavery and then in their employers' kitchens, did not precipitate lynchings. *See* Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 117–23 (1983); BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 1–4 (South End Press 1st ed. (1984); IDA B. WELLS, SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES (1892) *reprinted in* Ida W. Arno, *On Lynchings* 11–12 (1969)); *see also* KENDALL THOMAS, STRANGE FRUIT, IN RACE-ING JUSTICE, ENGENDERING POWER 370 (Toni Morison, ed., 1992) ("In addition to suffering the rape and other forms of sexual terror, a number of black females lost their lives at the hands of lynch parties.").

[132] The blurring of lines that occurs with the privatization of public functions fits well within this paradox. *See supra* notes 13, 14, 34, and 37.

[133] Florida's Stand Your Ground Law provides *immunity* from prosecution to any person who reasonably perceives a deadly threat and uses deadly force in defense of self or of others. FLA. STAT. ANN. § 776.013 (2015) ("A person who uses force as permitted . . . is immune from criminal prosecution and civil action for the use of such force."). Stand Your Ground laws supersede any requirement to retreat. FLA. STAT. ANN. § 776.012(2), § 776.013(3), §776.031(1). *See* Tamara Rice Lave, *Shoot to Kill: A Critical Look at Stand Your Ground Laws*, 7 U. MIAMI L. REV. 827 (2013).

[134] *See* WAYNE R. LAFAVE, CRIMINAL LAW 491 (3d ed. 2000).

[135] *See* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1558–60 (2013) (using the example of the Trayvon Martin shooting to demonstrate racial bias in the application of Stand Your Ground laws); *see also* Kurtz, *supra* note 115, at 1 (connecting racial stereotype and urban geography).

tims of intimate abuse from fighting back.[136] Stand Your Ground laws extend the protections of "private" spaces to "public" spaces and "sanction addressing socio-spatial discomfort and perceived threat with deadly violence."[137] Stand Your Ground laws might also be understood as indirect state endorsement for violent maintenance of the social order not far removed from direct state sanction of violence during Reconstruction.[138] Violence endured without redress is commonplace and persistent in poor communities and in communities of color.[139] Randall Kennedy opines that, "[d]eliberately withholding protections against criminality (or conduct that should be deemed criminal) is one of the most destructive forms of oppression that has been visited upon African-Americans."[140]

Simultaneously, as Mary Anne Franks points out, Stand Your Ground "[reinforces] a quasi-duty for women to retreat from their own homes instead of fighting back."[141] In order to assert Stand Your Ground protection in its originating state of Florida,[142] violence against an intimate is only protected where the defender previously obtained a protective order.[143] Since *Town of Castle Rock* does not require the state to enforce these orders, it follows that a victim of abuse with the wherewithal to get a protective order also needs to be prepared to defend her or himself. Under *McDonald's* association of the right to self-defense with firearms, she is encouraged to use a gun to defend herself. Encouraging the use of firearms for self-defense by victims of domestic abuse carries the real risk of backfire. Where victims of intimate partner abuse have access to a firearm, there is "no clear evidence of protective effects,"[144] even within overall findings of substantial increase in lethality associated with gun ownership and greater likelihood of gun use

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[136] 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, 1110 (2014).

[137] *Supra* note 115, at 250.

[138] *Compare* Lee, *supra* note 135 *with* FONER, *supra* note 40, at 530.

[139] *See* RANDALL KENNEDY, RACE CRIME AND THE LAW 136–67, 351–86 (1997).

[140] *See id.* at 29. Under-protection has been a constant reality in America from non-protection of slaves from violence during Reconstruction and the era of lynching, continued during the civil rights years to contemporary times for issues of intra-race, community victimizations. *Id.* at 29–75. This dynamic extends to conceptualizations of which victims are "valued" for purposes of capital punishment. *Id.* at 328–32 (discussing the Baldus study offered as evidence in *McKleskey v. Kemp*).

[141] Franks, *supra* note 136, at 1126 (citing Victoria Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1284–85 (2001)).

[142] *See* Lave, *supra* note 133, at 827–28.

[143] The presumption of self-defense does not apply if: "The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee, or titleholder," FLA. STAT. ANN. §776.013(2)(a) (2013), unless the defender has previously obtained "an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person," *id.*

[144] Jacqueline C. Campbell, Daniel Webster, & Jane Koziol-McLain, *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1092 (2003), http://1.usa.gov/1osjCet, *archived at* https://perma.cc/GLG9-EYQE.

by abusers during the gravest incidents of abuse.[145] Yet, should a victim kill her abuser, she faces an uphill battle given state courts' uneven application of battered women's syndrome doctrine[146] along with the imposition of new stricture under Stand Your Ground legislation.[147]

V. DEADLY FORCE

While we cannot equate the circumstances or severity of violence that occurred during Reconstruction to contemporary forms of urban violence, the patterns of disproportional violence in poor and minority communities, including by or with the acquiescence of police,[148] in addition to under-protection of those same communities,[149] make comparison germane. Similarities arise because modern policing in poor communities and communities of color over-target investigations of individuals in these communities[150] and simultaneously provide insufficient protection from crime for these neighborhoods.[151] Modern policing results in the convictions of innocents,[152] over-representation in prison,[153] and deaths of unarmed youths,[154] while also leaving a void when protection is needed.[155]

Public space continues to be a location where "others" are subjected to violence — sometimes in mob fashion,[156] sometimes by state actors,[157] and

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[145] *Id.*; *see* Jacquelyn C. Campbell et al., *Intimate Partner Homicide Review and Implications of Research and Policy*, 8 TRAUMA, VIOLENCE, & ABUSE 246–69 (2007) (rates of intimate partner homicide of females are approximately 4 to 5 times the rate for male victims); *see also* NAT'L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE NATIONAL STATISTICS (2015) (retrieved from www.ncadv.org); NAT'L INST. JUST., FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 25–30 (2000).

[146] *See, e.g.*, Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 77 (2008); Krause, *supra* note 8, at 563–66 (2007); Franks, *supra* note 136, at 1116–23.

[147] *Id.*

[148] *See, e.g.*, *supra* notes 8 (identifying police corruption as illegitimate and, on occasion, in support of extra-legal forms of violence), 54 (identifying collaborations between private organizations and state organizations in the perpetration of extra-legal violence), and 55 (describing the history of the KKK).

[149] *See id.*

[150] *See* Lee, *supra* note 8, at 402–15; KENNEDY, *supra* note 139, at 136–38.

[151] *See* KENNEDY, *supra* note 139, at 71.

[152] *See, e.g.*, Robert L. Young, *Guilty Until Proven Innocent: Conviction Orientation, Racial Attitudes, and Support for Capital Punishment*, 25 DEVIANT BEHAV. 151–67 (2004).

[153] *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2, 185 (2010).

[154] *See infra* note 157.

[155] *See supra* text accompanying notes 19–25; INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, GONZALES V. UNITED STATES (REPORT NO. 80/11, CASE 12.626) (July 21, 2011) (finding the United States in violation of human rights for not enforcing the laws in protection of women).

[156] *See, e.g.*, Kay Nolan and Niraj Chokshi, *Milwaukee Shaken by Eruption of Violence After Shooting by Police*, N.Y. TIMES, Aug. 14, 2016, http://www.nytimes.com/2016/08/15/us/milwaukee-shaken-by-eruption-of-violence-after-shooting-by-police.html?_r=0, *archived at* https://perma.cc/RX96-NK2J. *Cf., infra* notes 174–75 (pointing out violence as part of rebellion prior to Reconstruction).

sometimes by private individuals trying to fulfill state functions, as in the case of private security.[158] The *McDonald* Court seemed more concerned with race-based, turn-of-the-century mob violence than modern, urban violence.[159] Racially motivated mobs may no longer be a primary concern as during Reconstruction,[160] but state-sanctioned racial bias has shaped government under-protection in poor and racially segregated communities. Unfortunately, older Supreme Court decisions also neglect to address the threat of racially disproportionate outcomes.[161] While the Court in *McCleskey v. Kemp*[162] had an opportunity to integrate considerations of racial bias within its doctrinal remedies in capital cases, it declined to accord the evidence of racial disparities any constitutional significance.[163] The Court similarly failed to address racial implications in *Whren v. United States*,[164] which gives police officers authority to use pretextual evidence of traffic violations to profile and target suspects for search and seizure.[165] When police practice, such as the fatal use of chokeholds,[166] disproportionally results in the deaths

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[157] *See, e.g.*, Bonnie Kristian, *Chicago Police Release Fragmented Video of The Death of Unarmed Teen Paul O'Neal*, THE WEEK, Aug. 6, 2016, http://theweek.com/speedreads/641442/chicago-police-release-fragmented-video-death-unarmed-teen-paul-oneal, archived at https://perma.cc/PL35-TYEW; Associated Press, *White Police Officer Who Shot Unarmed Black Man to Death Found Guilty of Manslaughter in Virginia*, L. A. TIMES, Aug. 4, 2016, http://www.latimes.com/nation/nationnow/la-na-white-officer-manslaughter-20160804-snap-story.html, *archived at* https://perma.cc/LHP3-ME59 (shooting death of 18-year-old); Christopher Brennan, *Family of Unarmed Deaf Man Shot and Killed by State Trooper Says He Did Not Understand Commands*, NEW YORK DAILY NEWS, Aug. 23, 2016, http://www.nydailynews.com/news/national/family-deaf-man-shot-officer-answers-death-article-1.2762508, *archived at* https://perma.cc/M5DG-U376 (death of 29-year-old deaf man); Josh Hafner, *How Michael Brown's Death, Two Years Ago, Pushed #Blacklivesmatter into a Movement*, USA TODAY, Aug. 10, 2016, http://www.usatoday.com/story/news/nation-now/2016/08/08/how-michael-browns-death-two-years-ago-pushed-blacklivesmatter-into-movement/88424366/, *archived at* https://perma.cc/H4G5-GJ8K.

[158] George Zimmerman was acting as part of a neighborhood watch when he encountered, shot and killed Trayvon Martin. *See* Franks, *supra* note 136, at 1116.

[159] "Leading Causes of Injury Death," Injury Prevention & Control: Data & Statistics (WISQARS), accessed January 25, 2015, http://1.usa.gov/1S8hAO4, *archived at* https://perma.cc/H7EH-KNUB. ("Black men are 14 times more likely than non-hispanic white men to be murdered with guns. Black Americans make up 14 percent of the U.S. population but suffer more than half of all gun homicides.").

[160] *See, e.g.*, Criminal Justice Information Services Division, Race, Ethnicity, and Sex of Victim by Race, Ethnicity, and Sex of Offender 2014 Expanded Homicide Data Table 6 https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/expanded-homicide-data/expanded_homicide_data_table_6_murder_race_and_sex_of_vicitm_by_race_and_sex_of_offender_2014.xls, *archived at* https://perma.cc/S2WN-4367.

[161] For a case in the employment context, see *Washington v. Davis*, 426 U.S. 229 (1976).

[162] 481 U.S. 279 (1987).

[163] *See generally* David C. Baldus, George Woodworth & Catherine M. Grosso, *Race and Proportionality Since McCleskey v. Kemp (1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 COLUM. HUM. RTS. L. REV. 143 (2007).

[164] 571 U.S. 806.

[165] David A. Harris, *The Stories, the Statistics, and the Law: Why Driving While Black Matters*, 84 MINN. L. REV. 265 (1999).

[166] Chokeholds should be classified as deadly force. *See* James J. Fyfe, *Enforcement Workshop: The Los Angeles Chokehold Controversy*, 19 CRIM. L. BULL. 61–67 (1983).

of individuals in one community more than in others, the Supreme Court has repeatedly found such outcomes Constitutionally irrelevant.[167]

As Justice Thomas points out in his concurrence in *McDonald*, "[t]he use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence."[168] If tyranny is a justification for the use of arms, then it follows that such uses of arms would continue to be valid under a collective rights interpretation of the Second Amendment, so long as there is a principled way to define tyranny.[169] The *McDonald* Court does not give credence to the "collective rights" theory of the Second Amendment,[170] in which the right to keep and bear arms only guarantees a state's right to maintain and arm a militia free from complete federal control.[171] Deference to this theory would support a government monopoly over the legitimate uses of violence,[172] and may have facilitated manageable guidelines on the rights identified in the Second Amendment. Only where state militias or police force amount to unlawful mobs, or otherwise participate in mob violence, should the need for individuals to arm against state tyranny be constitutionally viable.[173]

The *McDonald* Court only discusses mob violence as part of history and as part of the justification for a right of self-defense. It does not examine the similarities between mobs and militias, nor that militias need not be state-sponsored. Thus once again, characterization of a body for security is dependent on perspective. *Cruikshank* was an especially extreme example of mob violence. Prior to Reconstruction, there were numerous lynch mobs using violence to maintain the social order. There were also rebellions, such as that led by Nat Turner[174] as well as John Brown's Raid in Harpers Ferry.[175] Post-Reconstruction, black communities occasionally formed militias for

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[167] City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

[168] *McDonald*, 561 U. S. at 857 (Thomas, J., concurring).

[169] *See supra* text accompanying notes 53–56 (exemplifying the ambiguity in the identification of tyranny).

[170] *Heller*, 554 U.S. at 591; *id.* at 636 (Stevens, J., dissenting); *id.* at 682 (Breyer, J., dissenting). *See also* Amar, *supra* note 43, at 257–68 (identifying a collective rights theory for the Second Amendment); Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago*, 26 J.L. & POL. 273, 278 (2011) ("the Court unanimously rejected the old 'collective' right interpretation of the Second Amendment"); *Heller*, 554 U.S. at 770.

[171] *See generally* Brannon P. Denning and Glenn H. Reynolds, *Five Takes on District of Columbia v. Heller*, 69 OHIO ST. L.J. 671 (2008); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989).

[172] *See supra* note 5 and accompanying text; *but cf.* Cottrol and Diamond, *supra* note 7, at 331 (citing 1 Stat. 271) ("One year after the ratification of the Second Amendment . . . [t]he Uniform Militia Act called for the enrollment of every free, able-bodied *white* male citizen between the ages of eighteen and forty-five into the militia. . . The 1792 statute restricting militia enrollment to white men was one of the earliest federal statutes to make a racial distinction.").

[173] *See supra* note 7.

[174] *See generally* Kenneth S. Greenberg, NAT TURNER: A SLAVE REBELLION IN HISTORY AND MEMORY (2003); NAT TURNER, THE CONFESSIONS OF NAT TURNER, THE LEADER OF THE LATE INSURRECTION IN SOUTHAMPTON, VA. (1999).

their own protection.[176] We have witnessed murderous mobs in the present day, too, as in the case of the death of Matthew Shepard.[177] We have also witnessed militias, like that in which Timothy McVeigh[178] participated prior to his attack on Oklahoma City, and in the actions of the Branch Davidians during the ATF/FBI siege of its compound in Waco, Texas.[179] Mass shootings join this list at ever-increasing rates.[180]

All of the above examples constitute groups of individuals using firearms and other forms of violence for some cause, though the nature of the cause and the public's perception of that cause may shift from incident to incident. The *McDonald* Court provides no principles by which to analyze and differentiate when the Constitutional right to self-defense exists, its parameters or scope, nor how to define tyranny.[181] It leaves current restrictions on guns in place without defining why such legislation is appropriate in the face of the newly identified right. Legislatures and lower courts will be left to apply the principle in an *ad hoc* manner, allowing for maximum bias in application. This result presumably contravenes the Court's intention in *McDonald* as indicated by its core references to Reconstruction-era wrongs faced by freedmen.[182]

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[175] *See, e.g.*, MERRILL D. PETERSON, JOHN BROWN: THE LEGEND REVISITED (2004); PAUL FINKELMAN, HIS SOUL GOES MARCHING ON: RESPONSES TO JOHN BROWN AND THE HARPERS FERRY RAID (University Press of Virginia 1995).

[176] *See* Cottrol and Diamond, *supra* note 7, at 339–42.

[177] *See* Monique Noelle, *The Ripple Effect of the Matthew Shepard Murder*, 46 AM. BEHAV. SCIENTIST 27 (2002).

[178] *See* Michael Barkun, *Religion, Militias and Oklahoma City: The Mind of Conspiratorialist* 8 TERRORISM AND POL. VIOLENCE 50–64 (1996).

[179] *See e.g.*, STUART A. WRIGHT, ARMAGEDDON IN WACO: CRITICAL PERSPECTIVES ON THE BRANCH DAVIDIAN CONFLICT (1995).

[180] *See* Kevin Quealy and Margot Sanger-Katz, *Compare These Gun Death Rates: The U.S. Is in a Different World*, N.Y. TIMES, June 13, 2016, http://www.nytimes.com/2016/06/14/upshot/compare-these-gun-death-rates-the-us-is-in-a-different-world.html, *archived at* https://perma.cc/T7BK-KXZ4. *See also* Dennis A. Henigan, "A Uniquely American Tragedy": The Staggering Myths About Gun Control, SALON, July 2, 2016, http://www.salon.com/2016/07/02/a_uniquely_american_tragedy_the_staggering_myths_about_gun_control/, *archived at* https://perma.cc/CF99-7LN6; Melissa Healy, *Why the U.S. is No. 1 in Mass Shootings*, L.A. TIMES, Aug. 24, 2015, http://www.latimes.com/science/sciencenow/la-sci-sn-united-states-mass-shooting-20150824-story.html, *archived at* https://perma.cc/GYK9-4CUA; Erin Grinshteyn and David Hemenway, *Violent Death Rates: The US Compared with Other High-income OECD Countries, 2010*, 129 AM. J. MED. 266 (Mar. 2016).

[181] *See* Denning and Reynolds, *supra* note 170, at 296. Regarding an absence of standards from *Heller*, *see generally* Brownstein, *supra* note 38; *see also* Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245 (2009); Glenn H. Reynolds & Brannon P. Denning, *Heller's Future in the Lower Courts*, 102 NW. U. L. REV. 2035 (2008).

[182] *See supra* note 38.

CONCLUSION

Town of Castle Rock v. Gonzales holds that an individual has no protectable claim of interest in a government-issued protective order.[183] Under *Castle Rock*, under-enforcement of law — in communities of color, in public spaces, which highlight vulnerable populations, or in private spaces where abusive relationships thrive — will continue. Further, by approving gun usage, even as a means of self-defense, the holding in *McDonald* has contributed to preserving current configurations of violence.[184] If history provides any lessons, a right to self-defense only protects those who are already able to assert power, to the detriment of those without, especially in an environment in which there is no public responsibility for equal enforcement of existing facially-neutral laws.

The *Heller* and *McDonald* Courts do not provide sufficient guidance regarding the parameters and scope of this newly identified right.[185] The Court provides no guidance to legislatures on what permissible gun-control looks like nor whether protection of the negative right to be free of the violence associated with firearms is a legitimate government interest. The Court neither provides direction regarding limits to the exercise of this right nor instruction handling conflicts by its assertion by multiple individuals against each other under the same set of facts.[186] Furthermore, the Court's dependence on the home as the quintessential location requiring self-defense ignores violence among a home's occupants and violence disproportionally faced by certain communities.

While accepting tyranny as one rationale underlying the right to defend self, the Court does not explicitly acknowledge the tyranny carried out by

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[183] *See* 545 U.S. at 757, 760–61.

[184] *See* Cathy Spatz Widom and Michael G. Maxfield, *An Update on the "Cycle Of Violence,"* U.S Dep't of Justice, OFFICE OF JUSTICE PROGRAMS, NAT'L. INST. OF JUSTICE (2001) (discussing the role of abuse and neglect, including permissive exposure to violence, in the perpetuation of violence).

[185] *See supra* note 181.

[186] *See, e.g.*, Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205, 1236 (2009) (citations omitted):

> If the Court is going to take seriously the right to use arms for self-defense purposes, it will have to determine just how much discretion legislatures, common law courts, and juries will be permitted in defining and applying this affirmative defense. That may require constitutional scrutiny of some of these auxiliary rules. For example, is the rule adopted by the majority of jurisdictions that there is no duty to retreat, and certainly no duty to retreat from one's own home, constitutionally mandated? Consider a hard case where both the defendant and the person injured in the act of self-defense live in the same house. Suppose a husband and wife argue bitterly in the house they share. The husband slaps the wife. She runs upstairs to obtain a handgun she keeps in a bedside bureau, yelling that she will kill her husband if he is still in the house when she comes back down. He can safely flee the house and drive away. If he waits until his wife returns to the living room, a pistol in her hand, is he justified in using deadly force to protect himself against her?

private actors. As privatization becomes more prevalent, it may not only be that the state action doctrine is in question, but, with the abeyance of government responsibility, the very preservation of government may also be at stake. To the extent the Court references the violence of Reconstruction in arriving at its holding, future decisions which may provide guidance about the parameters of the right of self-defense ought to take into account the lessons from this time regarding differential enforcement across communities. Under-protection is a major factor in the need for self-defense or privately-acquired protections, regardless of a public or private location for the violence.

Violence is perpetrated in both private and public spaces. In addition to daily individual gun homicides and suicides, mass shootings have become commonplace and, among advanced nations, described as the "unusual America[n] gun violence problem."[187] We ought to be at a point in our history and political development where government holds the bulk of the legitimate means for violence and where the need for self-protection is either considerably reduced or is unnecessary because of legitimate protections provided through the systems of justice for all citizens. The right to self-defense should be a given, and has so been considered, long before *Heller* and *McDonald*. It is unfortunate that this right is now accorded constitutional recognition in the context of firearms, as if guns are only for self-defense or as though the only means for self-defense is the use of deadly force.[188]

[187] *See* Quealy and Sanger-Katz, *supra* note 180.

[188] *See, e.g.*, Caetano v. Massachusetts, 577 U.S. 1027 (2016) (holding that the right to self-defense extends to the use of a stun-gun, a form of non-lethal force).