

# NOTES

## Armed with Privilege: The “Right to Keep and Bear Arms” as a Tool for Reinforcing Exclusionary Conceptions of Citizenship

CHAYCE GLIENKE\*

### ABSTRACT

*The “right to keep and bear arms” is often touted as a fundamental right that affords protections to all Americans. However, as this note argues, the “right to keep and bear arms” does not now provide—nor has it ever provided—the same presumptions of lawfulness to Black Americans as it does to White Americans. Part I of this note explores the origins of the “right to keep and bear arms,” beginning with the founding of the United States and continuing through the Reconstruction era. Part II analyzes Black disarmament through gun laws as a mechanism of constructing exclusionary conceptions of citizenship that prioritize whiteness. Part III imports this lens of citizenship to the modern context, arguing that high profile examples of racially disparate responses to firearm use demonstrate that vestiges of earlier, more explicit restrictions on gun ownership still function to reinforce racially exclusionary conceptions of citizenship.*

### TABLE OF CONTENTS

INTRODUCTION . . . . .	232
I. ORIGINS OF THE “RIGHT TO KEEP AND BEAR ARMS” AND ITS HISTORICAL APPLICATIONS . . . . .	233
A. Gun Regulations and Firearm Ownership in Colonial America. . .	233
B. Evolution of the Second Amendment as a Tool of Racial Control. .	236
II. GUN OWNERSHIP AS A MEANS OF EXCLUSION THROUGH CONSTRUCTIONS OF CITIZENSHIP. . . . .	238
III. THE MODERN ANALOGUE OF JIM CROW GUN RESTRICTIONS: RACIAL DISPARITIES IN THE APPLICATION OF THE “RIGHT TO KEEP AND BEAR ARMS” . . . . .	242
A. Whiteness as a Proxy for Presumptive Lawfulness: The Story of Mark and Patricia McCloskey . . . . .	242

---

\* © 2022, Chayce Glienke.

B. *Blackness and the Presumption of Illegality: The Story of Kenneth Walker, III* . . . . . 245

CONCLUSION . . . . . 248

INTRODUCTION

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.”<sup>1</sup> The Second Amendment protects the right of the American people “to keep and bear arms.”<sup>2</sup> Modern Supreme Court jurisprudence has strengthened the Second Amendment, expanding rights related to gun ownership. In *District of Columbia v. Heller*, the Court held that the Second Amendment affords an “individual right” of gun ownership to each and every American.<sup>3</sup> However, more honest analysis reveals that the Second Amendment affords protection to only certain Americans: namely, Americans who are white.

When referring to the “right to keep and bear arms,” I mean to encompass more than the bare legal rights enshrined in the text of the Second Amendment and the Court’s interpretations of it. Rather, in analyzing the “right to keep and bear arms,” I intend to also capture the public perception of gun ownership and the presumptions associated with the Second Amendment.<sup>4</sup> Such a characterization of “the right to keep and bear arms” includes how the Justices on the Court conceptualize Black Americans who seek to exercise this “right,” how police respond to Black firearm owners, and even how Black Americans are situated within the polity with respect to their firearm ownership. This note will argue that America’s history of Black subjugation and disarmament is part and parcel of a still-existing system of oppression. That is, America’s history of conceptualizing Black people within its borders as dangerous non-citizens still informs the way that the “right to keep and bear arms” is understood and applied in the modern context. Contemporary frames for understanding the “right to keep and bear arms” are merely persisting relics of America’s longstanding history of oppression of People of Color.

This note will demonstrate that the privileges and presumptions of legal gun ownership afforded by the “right to keep and bear arms” are applied in a racially

---

1. U.S. CONST. amend. II.

2. *Id.*

3. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008); see also ROXANNE DUNBAR-ORTIZ, *LOADED: A DISARMING HISTORY OF THE SECOND AMENDMENT* 199 (2018) (citing a 2008 Gallup poll finding that, when asked, “Do you believe the Second Amendment to the U.S. Constitution guarantees the rights of Americans to own guns, or do you believe it only guarantees members of state militias such as the National Guard units the right to own guns?” 73% of respondents agreed with the Court that it was an individual right, while only 20% of respondents believed the former).

4. See Anders Walker, *Fundamental Frames: How Cultural Frames Inform the Fourteenth Amendment*, 62 ST. LOUIS U. L.J. 569, 576 (2018) (describing how National Rifle Association advocates sold a vision of the “right to keep and bear arms” that was broad, as it encompassed “not only was the right to bear arms [as] an individual constitutional right, but the right to bear arms in self-defense was an even greater, absolute right worthy of constitutional protection independent of the Second Amendment. . . derived from natural law itself, pre-dating the founding”).

discriminatory fashion. This, however, is not a flaw of the Second Amendment, but rather its very purpose—a purpose that was carefully crafted and has been intentionally employed across centuries of American history. Part I of this note will examine the racist history of the “right to keep and bear arms,” tracing its origins from colonial America through its development and application in the post-Reconstruction era. Part II will explore how the “right to keep and bear arms” has long been used as a tool for constructing American citizenship, a status which has remained largely unattainable for Black Americans. The note will argue that perceptions and applications of gun ownership are still being used as mechanisms for crafting belonging that are racially exclusionary. Part III will demonstrate the perpetuation of racial discrimination in the modern context through the “right to keep and bear arms,” arguing that recent news events are illusory of the time-honored practice of racializing gun ownership that is still being perpetuated today. This section will juxtapose the experiences of Patricia and Mark McCloskey, the white St. Louis couple whose flagrant display of firearms to ward off protesters in their lavish neighborhood garnered them widespread media attention, with the experiences of Kenneth Walker III, the Black boyfriend of Breonna Taylor who was charged with attempted murder of a Louisville police officer when he fired shots at people he believed to be intruders. This note will conclude that the “right to keep and bear arms” continues to generate racially discriminatory results despite no longer being enforced through explicit legal means; rather, it remains a tool of racial subjugation that enforces exclusionary constructions of citizenship, thus prioritizing whiteness through its cultural remnants. That is to say, the Second Amendment offers no protection to Black Americans, and, rather than serving as a remedy to this problem, the law and its tortuous history paved the road for this very result.

## I. ORIGINS OF THE “RIGHT TO KEEP AND BEAR ARMS” AND ITS HISTORICAL APPLICATIONS

### A. *Gun Regulations and Firearm Ownership in Colonial America*

A careful review of American history demonstrates that laws and regulations related to gun ownership have always glorified whiteness while disenfranchising Black Americans. Black Americans have been consistently denied access to firearms as a way of reinforcing racial stereotypes, restricting citizenship, and facilitating their subjugation.<sup>5</sup> From the founding of the United States, through the height of enslavement into the Reconstruction period, and even through the early twentieth century, laws were often explicitly used to prevent Black Americans from owning, possessing, and using firearms.<sup>6</sup>

From the moment Christopher Columbus first set foot on what would come to be known as the island of Hispaniola, he contemplated using firearms as a means of

---

5. J. Baxter Stegall, *The Curse of Ham: Disarmament through Discrimination — The Necessity of Applying Strict Scrutiny to Second Amendment Issues in Order to Prevent Racial Discrimination by States and Localities through Gun Control Laws*, 11 LIBERTY U. L. REV. 271, 275 (2016).

6. See DUNBAR-ORTIZ, *supra* note 1, at 29-40.

repelling, subjugating, and controlling People of Color. Columbus wrote the following in his travel log upon landing in the Western Hemisphere “[The natives] invite you to share anything that they possess, and show as much love as if their hearts went with it. . . They would make fine servants. With fifty [armed] men, we could subjugate them all and make them do whatever we want.”<sup>7</sup> Columbus’s prophecy came true three years later, when just 200 Spanish soldiers armed with 100 muskets successfully repelled more than 250,000 attacking Hispaniola natives.<sup>8</sup> Although it proved more cost-effective for later colonists to procure their forced laborers by purchasing Africans sold into the transatlantic slave trade rather than conquering Natives, Columbus was prescient in his recognition that firearms would play a significant role in America’s oppression and enslavement of People of Color.<sup>9</sup>

The use of explicit gun laws as a means of oppressing Black Americans was concomitant with the formation of the United States. The framers contemplated “People” as white and male when drafting both the Constitution and its subsequent Bill of Rights.<sup>10</sup> In describing the Second Amendment and its history, legal scholar Anders Walker writes, “The history of gun control in America [is one of] discrimination, disenfranchisement, and oppression of racial and ethnic minorities, immigrants, and other ‘undesirable’ groups.”<sup>11</sup> Feminist scholar Verna L. Williams reiterates that the Second Amendment was used to reinforce oppression through attention to intersecting identities of race and gender, writing, “The Second Amendment has long played a role in establishing and supporting the interlocking oppressions of race and gender subordination.”<sup>12</sup>

A review of history demonstrates that Black Americans have consistently been the targets of weapons denials as a means to perpetuate their subjugation.<sup>13</sup> In the American colonies, the regulation of firearms functioned to fortify the social and economic status of gun owners. For example, the early colonists adopted the English tradition of limiting firearm ownership to upper-class men.<sup>14</sup> Of the settlers that established Jamestown, Virginia, in 1607, only the men among them were granted the privilege of carrying firearms.<sup>15</sup> This notion that only a select group of the “right” people should be permitted to own firearms was an understanding that followed the colonists as they populated the continent.

Penalizing the possession of weapons by People of Color became a dominant mechanism for maintaining white control. As the number of Black people living in

7. Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365, 1368 (1993).

8. *See id.*

9. *See id.* at 1369.

10. *See* Judy Scales-Trent, *Black Women and the Constitution: Finding our Place, Asserting our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 40 (1989).

11. Anders Walker, *From Ballots to Bullets*: District of Columbia v. Heller and the New Civil Rights, 69 LA. L. REV. 509, 519 (2009) [hereinafter *Ballots to Bullets*].

12. Verna L. Williams, *Guns, Sex, and Race: The Second Amendment through a Feminist Lens*, 83 TENN. L. REV. 983, 1021 (2016) [hereinafter *Second Amendment through a Feminist Lens*].

13. *See* Walker, *Ballots to Bullets*, *supra* note 9, at 525.

14. *See* Williams, *Second Amendment through a Feminist Lens*, *supra* note 12, at 995.

15. *See id.* at 994-95.

the colonies increased with the growth of the transatlantic slave trade, so too grew the fear of slave revolts. The imposition of gun laws presented opportunities for tempering concerns of Black violent resistance. Second Amendment scholar Carl Bogus describes the strategy of using guns to enforce white control as twofold: “to keep guns out of the hands of Blacks and Indians” while also “keeping white men well-armed.”<sup>16</sup>

Many of the colonies enacted analogous laws preventing even free Blacks from owning or possessing firearms. For example, in 1633, every white male in Plymouth colony was required by law to own a musket, two pounds of gunpowder, and ten pounds of bullets.<sup>17</sup> Conversely, Virginia enacted a statute in 1680 that “prohibited Negroes, slave or free, from carrying firearms.”<sup>18</sup> In 1712, South Carolina placed blanket restrictions on Black gun ownership “for the better ordering and governing of Negroes, not just slaves.”<sup>19</sup> Maryland passed similar legislation to that of South Carolina, pronouncing that “[n]o Negro [in Maryland] shall be permitted to carry any gun, or any other offensive weapon.”<sup>20</sup>

On top of laws and regulations explicitly disqualifying Blacks from being gun owners, states also began assembling militias, from which Blacks were excluded from membership. State militia groups were initially formed to protect whites against attacks by Natives. However, as the danger of confrontations with Natives diminished while fear of slave uprisings increased, colonial lawmakers shifted their attention to restricting weapon possession by Black Americans.<sup>21</sup> The development of the militias was tailored to a slaveholding society. To ensure the continued safety and perpetuation of the institution of slavery, white communities banded together to form these early militias, which functioned closely with slave patrols.<sup>22</sup> “In most states there was substantial connection between the patrol and the militia, either through control of one by the other or through identity of personnel.”<sup>23</sup>

Incidents of Black resistance only strengthened militias’ power and membership. Following the infamous Nat Turner revolt in Southampton County, Virginia, wherein a rebellion by Black slaves resulted in mass casualties of more than fifty-five white Americans and nearly 200 enslaved Black rebels, more than 100,000 men obtained membership in the Virginia state militia.<sup>24</sup> This number comprised a significant portion of the entire white adult male population in Virginia.<sup>25</sup>

16. Bogus, *supra* note 7, at 1370.

17. *See id.* at 1371.

18. *Id.* at 1370.

19. Walker, *Ballots to Bullets*, *supra* note 11, at 520.

20. *Id.*

21. *See* DANIEL J. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 352-57 (1958).

22. *See* Saul Cornell & Eric M. Ruben, *The Slave-State Origins of Modern Gun Rights*, ATLANTIC (Sept. 30, 2015), <https://www.theatlantic.com/politics/archive/2015/09/the-origins-of-public-carry-jurisprudence-in-the-slave-south/407809/>.

23. BOORSTIN, *supra* note 21, at 355.

24. *See* Bogus, *supra* note 7, at 1370.

25. *See id.*

Despite varying size and organizational structure, these militias shared a commonality: only white males were eligible for militia service. For example, the South Carolina militia was established in 1690 and was typical of other state militias at the time. In 1819, the South Carolina militia made all white men not only eligible, but actually liable for patrol duty at the age of majority, a requirement that was discharged at age forty-five.<sup>26</sup> This close association between militias and slave patrols grew increasingly problematic in later contexts, when the Court came to place great reliance on the “militia” verbiage when interpreting the rights granted by the Second Amendment.

### *B. Evolution of the Second Amendment as a Tool of Racial Control*

Even after the state-sanctioned practice of slavery ended, white fears of violent Black resistance continued. At the conclusion of the Civil War, southern states retooled the practice of “disenfranchisement qua disarmament” through the institution of Black Codes, which continued the suppression of newly-freed slaves.<sup>27</sup> Among these Codes were restrictions on basic civil rights, including the ability to travel freely, assemble publicly, vote, and bear arms.<sup>28</sup> Though *de jure* oppression lessened as Black Americans were integrated into the American polity in a post-slavery regime, *de facto* oppression increased as whites struggled to maintain their superior position in America’s racial hierarchy.

The Reconstruction period saw the emergence of the Ku Klux Klan as a powerful political and social entity.<sup>29</sup> The Klan raged against any extension of constitutional liberties to Black Americans. It was particularly concerned with what it saw as the mutually reinforcing nature of the right to vote and the “right to keep and bear arms,” with the fear that the latter would be employed to enforce the former.<sup>30</sup> Seeking to offset the newfound rights of Black Americans granted during Reconstruction, the Klan “embarked on a campaign of terror to . . . enforce the gendered and racial norms so essential to white supremacy.”<sup>31</sup> The right to vote and the “right to keep and bear arms” functioned as overt symbols of male privilege and citizenship, undermining preexisting gender and racial hierarchies and making these rights chief targets of the Klan’s outrage.

Assaults also came in the form of state and local regulations. For example, in Mississippi, “no freedman, free negro, or mulatto could keep or carry firearms of any kind, or any ammunition” beginning as early as 1866.<sup>32</sup> The expansive promulgation of state laws restricting the rights of Blacks, a problem particularly intractable in the South, spurred the federal government’s intervention. The Freedmen’s Bureau Act

26. See BOORSTIN, *supra* note 21, at 355.

27. Walker, *Ballots to Bullets*, *supra* note 11, at 523.

28. See *id.*

29. See JONATHAN M. BRYANT, *Ku Klux Klan in the Reconstruction Era*, NEW GA. ENCYCLOPEDIA: HIST. AND ARCHAEOLOGY (Aug. 12, 2020), <https://www.georgiaencyclopedia.org/articles/history-archaeology/ku-klux-klan-in-the-reconstruction-era/>.

30. See NICHOLAS JOHNSON, *NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS* 104 (2014).

31. Williams, *Second Amendment through a Feminist Lens*, *supra* note 12, at 1012.

32. Walker, *Ballots to Bullets*, *supra* note 11, at 523.

and the Civil Rights Act, both passed in 1866, sought to prevent southern states from again suppressing their Black populations after the Civil War.<sup>33</sup> The right of Blacks “to keep and bear” arms was considered a key provision of the Freedmen’s Bureau Act.<sup>34</sup> The Civil Rights Act similarly emphasized the importance of preventing southern states from prohibiting Black gun ownership.<sup>35</sup> These federal actions demonstrate the extent to which firearm possession was viewed as a key construct of citizenship, while simultaneously showing the lengths to which whites would go to defend white supremacy.

Nevertheless, many states predictably circumvented federal attempts to castrate their police powers by creatively constructing new state laws with provisions that were less explicit in their targeting of Black gun ownership while remaining equally effective. Some states prohibited ownership of particular classes of inexpensive firearms, in practice excluding lower class freedmen from gun ownership by banning all guns that might be affordable to them.<sup>36</sup> Other states prevented Black gun ownership through the imposition of extortionate taxes on firearms sales, again excluding poor Black buyers by artificially inflating gun prices. Some states, ignoring federal law, even confiscated weapons from Black Americans.<sup>37</sup>

State-sanctioned Black disarmament was only part of a more expansive scheme of oppression. Often, state laws disarming Black persons coincided with vigilante attacks on Black communities. For example, in one South Carolina county, a local sheriff confiscated arms from a predominantly Black community only days before “five hundred masked [white] men went on a killing spree” in the same neighborhood.<sup>38</sup> These actions compounded the harm to Black citizens while strongly reinforcing white supremacy.<sup>39</sup>

Scholar Maxine Burkett summarizes best how one should understand this history of gun regulation in America: as “evidence that the Second Amendment was intended, in large part at least, to serve as an instrument of slave control.”<sup>40</sup> Today, gun ownership is still highly racialized and gendered.<sup>41</sup> A 2013 survey conducted by the Pew Research Center reported that 82% of gun owners are white males.<sup>42</sup> Black Americans as a group are also less likely to support the Second Amendment, with

---

33. *See id.*

34. *See* DAVID B. KOPEL, *THE TRUTH ABOUT GUN CONTROL* 22 (1st ed. 2013).

35. *See id.*

36. *See id.* at 524-25.

37. *See id.* at 525.

38. Walker, *Ballots to Bullets*, *supra* note 11, at 525.

39. *See id.*

40. Maxine Burkett, *Much Ado about . . . Something Else: D.C. v. Heller, the Racialized Mythology of the Second Amendment, and Gun Policy Reform*, 12 J. GENDER, RACE & JUST. 57, 58-59 (2008) (describing the history of American legal impediments to Black armament and arguing that cultural and racial “values” act to restrict Black gun ownership while promoting white supremacy).

41. *See* Leigh Paterson, *Weekend Edition Sunday Black Gun Ownership Rises Amid Pandemic, Protests for Racial Justice*, NPR (Sept. 6, 2020, 7:59 AM), <https://www.npr.org/2020/09/06/910194857/black-gun-ownership-rises-amid-pandemic-protests-for-racial-justice>.

42. *See* Williams, *Second Amendment through a Feminist Lens*, *supra* note 12, at 985.



only 24% viewing it favorably, compared to 57% of white Americans.<sup>43</sup> Babu Omowale, the Black co-founder of the Huey P. Newton Gun Club, explained that the right to “keep and bear arms” afforded by the Second Amendment is in practice often applied dissimilarly to Blacks as compared to whites, saying, “Just because a Black man has a license to carry, he’s not viewed the same as a white man who is licensed to carry. A Black man is still a threat as far as the police department is concerned.”<sup>44</sup> This predetermination of armed Black persons as “threatening” is not an accidental flaw, but rather the obvious result of a long history of intentional othering designed to construct Blackness outside the bounds of citizenship.

## II. GUN OWNERSHIP AS A MEANS OF EXCLUSION THROUGH CONSTRUCTIONS OF CITIZENSHIP

Though certainly a formal categorization with legal implications,<sup>45</sup> “citizenship” can also be used to describe conceptions that are more abstract and encompassing. In addition to the legal status of national citizenship, “citizenship” also encompasses broader formulations, including, “the possession of certain rights or benefits, the exercise of political participation, and inclusion in a collective social and cultural identity.”<sup>46</sup> As critical race scholars Jennifer Gordon and Robin Lenhardt further emphasize, these varying conceptions of citizenship can work both in tandem or independently. Perhaps the most nebulous conception—but also the most useful conception for this analysis—is the one described by Professor Kenneth Karst, which characterizes citizenship as a sense of “belonging” within the larger social fabric.<sup>47</sup> In describing this characterization of citizenship, Karst explains that “[t]he principle of equal citizenship presumptively insists that the organized society treat each individual as a person, one who is worthy of respect, one who ‘belongs.’”<sup>48</sup> Scholar Leti Volpp captures a similar concept of citizenship, which she characterizes as “citizenship as identity.”<sup>49</sup> Volpp describes this conception of citizenship as “peoples’ collective experience of themselves, in terms of their belonging to a particular community as expressed on the terrain of culture.”<sup>50</sup>

43. See Tessa Stuart, *Black Gun Owners Speak Out About Facing a Racist Double Standard*, ROLLING STONE (July 14, 2016, 6:15 PM), <https://www.rollingstone.com/culture/culture-news/black-gun-owners-speak-out-about-facing-a-racist-double-standard-75081/> (detailing the story of Black activist misidentified as a shooter at Dallas BLM protest).

44. *Id.*

45. See Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOB. LEGAL STUD. 447, 456 (2000) (acknowledging the commonly understood concept of citizenship to be “a matter of legal recognition”).

46. Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1185 (2008).

47. See generally KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989); KENNETH L. KARST, *LAW’S PROMISE, LAW’S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* (1993); See also Gordon & Lenhardt, *supra* note 46, at 1186.

48. Gordon & Lenhardt, *supra* note 46, at 1186 (quoting KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 6 (1989)).

49. Leti Volpp, “*Obnoxious to Their Very Nature*”: *Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71, 82 (2001).

50. *Id.*



Citizenship—that is, belonging—has always been and remains the defining characteristic of one’s experience of America. For many People of Color, the badge of “citizen” has always been just out of reach—first through explicitly legal channels, and now through more insidious means. Americans brand themselves as champions of equality while simultaneously trampling on the rights of People of Color. In analyzing how it came to be that “[Americans] have always embraced the ideal of equal citizenship. . . yet [ . . . ] have also tolerated the subordination of groups,” scholar Kenneth Karst writes:

...white Americans were genuinely devoted to the nation’s individualistic and egalitarian ideals; yet they also accepted the systematic denial of black people’s equality and individuality. . . How have successive generations of Americans managed to live with this incongruity between their egalitarian ideals and their behavior? The technique is simple enough: define the community’s public life—or the community itself—in a way that excludes the subordinated groups.<sup>51</sup>

Explaining the mechanism by which Black Americans are “excluded” from the polity, Karst continues:

Culture shapes identity by contrasting ‘our’ beliefs and behavior, which are examples to be followed, with those of the Other, which must be avoided. Among full members of the community, the ideal of equality prevails; as to outsiders, the issue of equality seems irrelevant. Equality and belonging are inseparably linked. To define the scope of the ideal of equality in America is to define the boundaries of the national community.<sup>52</sup>

Here, Karst’s “national community” is synonymous with Gordon and Lenhardt’s definition of citizenship—namely, belonging. It is first decided who does not belong—and therefore branded as “other”—and then benefits and privileges are apportioned based on citizenship status. Thus, in order to be excluded, one must first be labeled as non-citizen.

Volpp emphasizes this point, explaining the role that race plays in this understanding of citizenship: “. . . citizenship has served as a proxy for race, so that ‘American’ is equated with being white.”<sup>53</sup> Scholars Gordon and Lenhardt analyze the role of race in constructing citizenship in their piece *Rethinking Work and Citizenship*, wherein they argue that citizenship serves as a useful lens for understanding the working relationship between African American and Latino immigrant low wage workers.<sup>54</sup> The framework of citizenship they—along with scholars like Volpp and Karst before them and Williams after them—articulate is similarly applicable in the gun rights context. Certainly, just as conceptions of citizenship function as the frames of other grants of rights and interactions between actors of the polity,<sup>55</sup> so too do lenses of citizenship drive the dispensation of rights in the realm of the Second Amendment.

51. Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1, 2 (1988).

52. *Id.* at 2-3.

53. Volpp, *supra* note 47, at 82.

54. See generally Gordon & Lenhardt, *supra* note 44.

55. See, e.g., Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being “Out of Place” from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1119 (2017) (identifying both Emmett

As a careful review of the history of “the right to keep and bear arms” demonstrates, the “right” enshrined in the Second Amendment and touted by many gun-toting Americans is not now, nor was it ever intended to be, a “right” granted to the entire polity. Rather, a more candid characterization might be “the *privilege* to keep and bear arms.” This privilege, like other privileges, is bestowed only upon those anointed by the public as deserving. The “privilege to keep and bear arms” serves a gatekeeping function to true citizenship in the sense that it is accessible only to those who society has decided “belong.” Verna L. Williams accurately described the privilege of gun ownership during the colonial period as follows: “The Second Amendment contemplated ‘people’ who were white and male.”<sup>56</sup> Just as Williams identified a key purpose of gun ownership restrictions in colonial America as “serv[ing] the function of reinforcing social and economic status,” that purpose remains true in the contemporary context.<sup>57</sup> However, providing added specificity to the category of people “fit” to partake in the privilege of carrying firearms is the most salient characteristic: race.

In both intent and implementation, regulation of firearms focused on more than simply limiting Black violence: it was part of a greater legislative scheme designed to craft Black men as “other.” Excluding Black people from the category of colonists permitted to own guns prevented Black people from engaging in full citizenship.<sup>58</sup> Gun ownership served as a demonstration of social activity and an indicator of citizenship, much like the right to vote.<sup>59</sup> The “right to keep and bear arms” demonstrated membership in the community, serving as a visible act of civic engagement, and by extension, citizenship. These laws also functioned as “disenfranchisement qua disarmament” by barring Black people from engaging in the political sphere.<sup>60</sup> Because gun ownership was viewed as a crucial right that evidenced membership in the community, exclusion of Black people from the gun-owning class cast them as outsiders who did not belong. Indeed, gun ownership became so central to notions of basic citizenship that historian Orlando Patterson characterized the denial of arms ownership to Blacks as imposing upon them a condition he called “social death.”<sup>61</sup>

Black Americans have never been fully incorporated into the American citizenry, and gun ownership has been one of the longstanding privileges withheld from them to perpetuate their less-than-full citizenship. Sadly, the grant of the privilege to keep and bear arms is still drawn predominantly on racialized lines. Gun ownership functions now—as it always has—as another force reifying the nation’s racial and gender hierarchies.<sup>62</sup> Disarmament of Black Americans strongly reinforces white supremacy. The Ku Klux Klan has long recognized that the right to keep and bear arms is

---

Till and Trayvon Martin’s cases as sharing a “basis in the policing of boundaries of whiteness as a means of preserving the material benefits and the psychological wages of whiteness”).

56. Williams, *Second Amendment through a Feminist Lens*, *supra* note 12, at 994.

57. *See id.*

58. *See id.* at 1004.

59. *See id.* at 998.

60. Walker, *Ballots to Bullets*, *supra* note 9, at 512.

61. *Id.* at 520.

62. *See Williams, Second Amendment Through a Feminist Lens*, *supra* note 12, at 1020

integral to constructing an inclusive understanding of both “citizen” and “nation.”<sup>63</sup> Though the fear tactics of explicitly racist groups may no longer be the driving force of Black disarmament, the American polity nevertheless retains a consciousness of race when drafting and enforcing both written law and societal norms relating to gun ownership.

Disarmament also reinforces gender hierarchies, and the ways in which gender has historically prevented full citizenship for women. Because the right to keep and bear arms was so closely tied to militia service, inability to participate in militia service meant restricted ability to participate in public life generally. This relegated men of color to domestic service, thus constraining them to a feminized role with access to limited societal participation. Though the explicit *de jure* nature of restrictions of gun ownership no longer prevail, subtler reinventions of these barriers still remain and function to promote constructions of “citizenship” through a lens of whiteness and masculinity.

The protracted history of *de jure* discrimination has enabled cultural discrimination to supplant legal fixtures of discrimination. Explicitly racist state laws prohibiting Black Americans from owning firearms are no longer in force. However, other insidious presumptions about Black gun ownership still prevail. While these Second Amendment inequities no longer manifest in slave patrols or state regulations banning Black gun ownership,<sup>64</sup> racial disparities in the context of the “right to keep and bear arms” nevertheless persist. Overt discriminatory language no longer needs to be enshrined in legal avenues in order to generate the same racially discriminatory effects because its remnants remain so deeply embedded within the American psyche. Even in the absence of explicit legal barriers, the “right to keep and bear arms” still does not operate race-neutrally.

Although the *de jure* discrimination enacted through gun control legislation of the colonial period is gone, vestiges of that past discrimination remain to further *de facto* desegregation in the modern context.

Today’s responses to Black gun ownership and use, when contrasted with reactions to similar ownership and use by whites, highlight the ways in which gun ownership and use are still employed to exclude Black Americans from accessing full American citizenship. The stark contrast of these reactions emphasizes that Black Americans still do not receive the presumptions of lawful ownership and use that protect white Americans. The “right to keep and bear arms” remains a right for whites, an automatic presumption of lawfulness, that is not attributed to their Black neighbors. Rather, gun ownership and carrying continues to be used, as it always has, to other Black people, therefore justifying their exclusion from the polity. Two contemporary cases demonstrate clearly the different responses to white and Black lawful gun owners: first, the case of Mark and Patricia McCloskey defending their home amid Black Lives Matter protests in St. Louis, and second, the case of Kenneth

---

63. See Williams, *Second Amendment through a Feminist Lens*, *supra* note 12, at 1001.

64. See generally Steve Ekwall, *The Racist Origins of US Gun Control: Laws Designed To Disarm Slaves, Freedmen, And African-Americans*, <https://www.sedgwickcounty.org/media/29093/the-racist-origins-of-us-gun-control.pdf>.

Walker, III shooting at police officers executing a “no-knock” warrant that ultimately cost Walker’s girlfriend, Breonna Taylor, her life. These cases both garnered extensive media attention, as well as partisan criticism. Juxtaposed, the cases highlight the pervasive and lasting effects of centuries of legal, judicial, and extralegal efforts to disarm Black Americans as a means of excluding them from achieving full and meaningful American citizenship.

Analysis of these two incidents as case studies elucidates that the protections afforded by the “right to keep and bear arms” are not available to Black Americans as they are to white Americans and never have been. These cases demonstrate that there is a presumption of lawful gun ownership by white Americans, which is starkly contrasted with a presumption of unlawful gun possession and use by Black Americans. It matters little that racial exclusions are no longer explicitly penned into laws and regulations, as American culture permits the result to remain the same: the “right to keep and bear arms” affords protections to white Americans that cannot be invoked by their Black counterparts.

### III. THE MODERN ANALOGUE OF JIM CROW GUN RESTRICTIONS: RACIAL DISPARITIES IN THE APPLICATION OF THE “RIGHT TO KEEP AND BEAR ARMS”

#### *A. Whiteness as a Proxy for Presumptive Lawfulness: The Story of Mark and Patricia McCloskey*

On June 28 2020, Mark and Patricia McCloskey were catapulted to fame after a video went viral of them pointing guns at Black Lives Matter demonstrators from the front lawn of their St. Louis, Missouri mansion. The group of a few hundred protestors were marching down Kingshighway, a main thoroughfare in the Central West End of St. Louis, towards the home of Mayor Lyda Krewson.<sup>65</sup> The protesters marched as part of a nationwide movement against police brutality that erupted following the killing of George Floyd at the hands of Minneapolis, Minnesota, police on May 25, 2020. This particular march was organized in response to an event two days earlier, in which Mayor Krewson, during a live streamed briefing, read aloud letters from citizens urging her to defund the St. Louis Metropolitan Police Department.<sup>66</sup> Demonstrators collaborated to end their march at Mayor Krewson’s doorstep, where they planned to demand her resignation. En route to the Mayor’s home, protestors approached the residence of Mark and Patricia McCloskey. The McCloskeys are wealthy, well-educated, middle-aged attorneys. Most importantly, the McCloskeys are white.

As the protestors advanced down the roadway, Mark McCloskey emerged onto his patio, toting an assault rifle. Gun in hand, Mark McCloskey shouted at protestors to “get the hell out of my neighborhood!”<sup>67</sup> Soon thereafter, Patricia McCloskey

---

65. See Jessica Lussenhop, *Mark and Patricia McCloskey: What really went on in St. Louis that day?*, BBC NEWS (Aug. 25, 2020), <https://www.bbc.com/news/election-us-2020-53891184>.

66. Mayor Krewson read some of the names and addresses of the letters’ authors aloud during the briefing, which some activists viewed as an attempt to intimidate and silence them. See *id.*

67. *Id.*

joined her husband, armed with a silver pistol that she pointed at demonstrators. Patricia McCloskey's finger placement—squarely on the trigger of her firearm—seemed to confirm that she was willing to fire rather than merely engaging in a display intended to warn. Powerful photographs of an enraged Patricia McCloskey taking aim at protestors plastered media outlets far and wide following the confrontation. The McCloskeys vigorously invoked their “Second Amendment right to keep and bear arms” as justification for their reactions.<sup>68</sup>

The McCloskeys' access to “the right to keep and bear arms” is itself evidence of their inclusion within the polity. They are, at least subconsciously, aware of their privilege, as they readily recognize—and indeed display—their power to invoke the “right to keep and bear arms.” Additionally, their self-perception is shared by others; their invocation of the Second Amendment to shield themselves from criticism succeeded only because others view the McCloskeys as “belonging,” a belonging that is profoundly contingent on their race, as well as their genders.

This is particularly true of Patricia McCloskey, who occupies an inferior societal position relative to her husband due to her gender. Whereas Mark McCloskey benefits from overlapping spheres of privilege afforded by both his race and his gender, patriarchy offers no respite for Patricia McCloskey. For Patricia McCloskey, the power bestowed by her whiteness—which was, without question, compounded by her wealth—is enough to overcome her gender in order to pardon her behavior. Nevertheless, her lesser position is clearly distinguished from that occupied by her husband, as evidenced by the different responses the couple themselves received. Unsurprisingly, in many instances Patricia McCloskey was more strongly critiqued than her husband, despite him initiating the gun-flinging behavior.<sup>69</sup>

Many vocal Second Amendment advocates also rushed to the McCloskeys' defense, the most notable of whom being President Donald Trump. President Trump retweeted a video of the confrontation between the McCloskeys and protestors. He also supported their narrative that they acted reasonably in the face of threats, saying they were in imminent danger of being “beat [sic] up badly, if they were lucky.”<sup>70</sup> The McCloskeys gave interviews to a multitude of national news outlets, including CNN and Fox News. An initial statement from the McCloskeys' lawyer emphasized the threat the McCloskeys perceived, making their display of firearms rational and responsible, saying, “Both Mr. and Mrs. McCloskey acted

---

68. See John Fritze, *Supreme Court Declines Appeal over Law Licenses from St. Louis Couple who Waved Guns at 2020 Protest*, USA TODAY (June 6, 2022), <https://www.usatoday.com/story/news/politics/2022/06/06/supreme-court-declines-gun-mark-mccloskey/7498228001/>.

69. The gendered disparate treatment of the McCloskeys was perhaps most evident in commentary on social media platforms. Criticisms of Patricia McCloskeys abounded, including those critiquing her gun handling and likening her to a “Karen,” a moniker popularized on social media to describe a middle-aged white woman who acts in an entitled and privileged way in public. See Rachel E. Greenspan, *How the Name ‘Karen’ Became a Stand-In for Problematic White Women and a Hugely Popular Meme*, INSIDER (Oct. 26, 2020), <https://www.insider.com/karen-meme-origin-the-history-of-calling-women-karen-white-2020-5>.

70. Luis Casiano, *St. Louis Couple Who Waved Guns at Protest Have Spoken to Trump About Their Case, Lawyer Says*, FOX NEWS (Oct. 14, 2020, 8:28 PM), <https://www.foxnews.com/us/st-louis-trump-case-lawyer-mccloskeys>.

lawfully on their property, which sits on a private gated lane in the City of St. Louis. Their actions were borne solely of fear and apprehension, the genesis of which was not race related.”<sup>71</sup> Seeking to further dispel any notion that the McCloskeys may have been motivated to bear arms by the race or views of the protestors, the McCloskeys’ lawyer added, “My clients, as melanin-deficient human beings, are completely respectful of the message Black Lives Matter needs to get out, especially to whites.”<sup>72</sup> This caricature of the McCloskeys as patriotic would-be victims defending home and hearth from invading “others” was often provided as justification by the popular media.

In August of 2020, following outcries from Black Lives Matter activists, St. Louis Circuit Attorney Kim Gardner charged both Mark and Patricia McCloskey with felony charges for “unlawful use of a weapon.”<sup>73</sup> According to the complaint, the charges were based on the fact that both McCloskeys had displayed weapons “readily capable of lethal use, in an angry or threatening manner.”<sup>74</sup> Despite Prosecutor Gardner’s remarkable leniency, vocally committing to “recommend the McCloskeys participate in diversion programs designed to reduce unnecessary involvement with the courts,” conservative politicians and fervent Second Amendment advocates rushed to the McCloskeys’ defense.<sup>75</sup> Josh Hawley, a Republican Senator from Missouri, characterized the decision to charge the McCloskeys as “an outrageous abuse of power” on the part of Prosecutor Gardner.<sup>76</sup> The White House Press Secretary said publicly that President Trump viewed the charges brought against the McCloskeys as “absolutely absurd.”<sup>77</sup> The Governor of Missouri, Mike Parson, promised to pardon the McCloskeys, should they be convicted.<sup>78</sup> Missouri Attorney General Eric Schmitt filed a brief arguing the case should be dismissed, as prosecuting the McCloskeys would violate their “right to keep and bear arms.”<sup>79</sup>

Apparently untarnished by their freshly-minted felony charges, the McCloskeys appeared as guest speakers at the Republican National Convention, where they capitalized on their newfound notoriety by championing their noble exercise of their Second Amendment “right to keep and bear arms.”<sup>80</sup> Characterizing himself and his

71. See Lussenhop, *supra* note 65.

72. Lussenhop, *supra* note 65.

73. See Lussenhop, *supra* note 65.

74. *Id.*

75. *Id.*

76. *Id.*

77. Tom Jackman, *67 Current, Former Prosecutors Defend St. Louis Prosecutor from Attacks in McCloskey Gun Case*, WASH. POST (July 22, 2020), <https://www.washingtonpost.com/nation/2020/07/22/67-current-former-prosecutors-defend-st-louis-prosecutor-attacks-mccloskey-gun-case/>.

78. Jack Suntrup, *Parson Says He’d ‘Certainly’ Pardon the McCloskeys, the St. Louis Couple Indicted on Evidence Tampering and Gun Charges*, ST. LOUIS POST DISPATCH (Oct. 8, 2020), [https://www.stltoday.com/news/local/govt-and-politics/parson-says-he-d-certainly-pardon-the-mccloskeys-the-st-louis-couple-indicted-on-evidence/article\\_e89c04a4-39e9-5dce-90ec-d6b5cb113a5a.html](https://www.stltoday.com/news/local/govt-and-politics/parson-says-he-d-certainly-pardon-the-mccloskeys-the-st-louis-couple-indicted-on-evidence/article_e89c04a4-39e9-5dce-90ec-d6b5cb113a5a.html). (Editor’s Note: Ultimately, Governor Parson pardoned the McCloskeys after they plead guilty to misdemeanor charges. As of June 2022, the McCloskeys law licenses have been suspended. See Fritze, *supra* note 68.)

79. Lussenhop, *supra* note 62.

80. See *St. Louis Couple Who Pointed Guns at Protestors Plead Not Guilty to Felony Charges*, CBS NEWS (Oct. 14, 2020, 4:02 PM), <https://www.cbsnews.com/news/mark-patricia-mccloskey-st-louis-couple-guns-protesters-plead-not-guilty-felony-charges-today-2020-10-14/>.



wife as unsung victims and lovers of liberty, Mark McCloskey offered no apology but instead sought sympathy and support for his actions, saying, “Not a single person in the out-of-control mob you saw at our house was charged with a crime. But you know who was? We were. They’ve actually charged us with a felony for daring to defend our home.”<sup>81</sup> Mark McCloskey’s anger and righteous indignation at having his behavior questioned demonstrates his belief in the inviolability of his right to keep and bear arms underpinned by the white supremacy that he knows will continue to secure it. This same entitled fury stirs within the other Second Amendment advocates that rushed to his defense.

*B. Blackness and the Presumption of Illegality: The Story of Kenneth Walker, III*

The haste taken to defend the McCloskeys’ exercise of their “right to keep and bear arms” despite incontrovertible evidence of firearm misuse serves as a stark contrast to the public response to another widely-covered invocation of Second Amendment protection: that of Kenneth Walker, III. A few minutes after midnight on March 13, 2020, three Louisville Metro Police Department officers—armed with a “no-knock” warrant—entered the apartment unit occupied by Breonna Taylor and Kenneth Walker, III.<sup>82</sup> The officers, dressed in plainclothes, used a battering ram to force the apartment door open.<sup>83</sup> Believing the police to be intruders, Walker responded by firing a warning shot in the direction of the door with his Glock 9 mm.<sup>84</sup> The three officers returned fire, shooting blindly more than twenty-five times in total.<sup>85</sup> At least eight of these bullets struck—and mortally wounded—Taylor.

The officers retreated outside the apartment, while Walker frantically dialed an emergency dispatcher and explained what he believed to be true: that his girlfriend had been shot by home invaders.<sup>86</sup> When Walker exited the apartment, thinking that the police on the scene were responding to his 911 call, he instead met police

81. Axios (@axios), Twitter (Aug. 24, 2020, 9:47 PM), <https://twitter.com/axios/status/1298074590472790017>.

82. Christina Carrega & Sabina Ghebremedhin, *Timeline: Inside the Investigation of Breonna Taylor’s Killing and Its Aftermath*, ABC NEWS (Nov. 17, 2020, 2:31 PM), <https://abcnews.go.com/US/timeline-inside-investigation-breonna-taylors-killing-aftermath/story?id=71217247>. Whether officers in fact knocked prior to forcing open the door of the apartment unit is hotly contested. Police assert that they knocked; Walker insists, “I’m a million percent sure that nobody identified themselves.” *Breonna Taylor’s Boyfriend, Kenneth Walker, is ‘a Million Percent Sure’ Police Didn’t Identify Themselves*, CBS NEWS (Oct. 13, 2020 12:54 PM), <https://www.cbs8.com/article/entertainment/entertainment-tonight/breonna-taylors-boyfriend-kenneth-walker-is-a-million-percent-sure-police-didnt-identify-themselves/603-33b16a96-c8fd-46a6-9d31-4a8ad3037878>.

83. *Id.*

84. Elliott C. McLaughlin, *Real Justice Would Mean ‘Breonna Taylor Sitting Right Next to Me,’ Boyfriend Kenneth Walker III Says*, CNN (Oct. 14, 2020, 5:11 PM), <https://www.cnn.com/2020/10/14/us/kenneth-walker-breonna-taylor-cbs-interview/index.html>.

85. Darcy Costello & Tessa Duvall, *What We Know about Breonna Taylor’s Boyfriend and Why Charges Against Him Were Dropped*, LOUISVILLE COURIER J. (May 15, 2020, 6:27 AM), <https://www.courier-journal.com/story/news/crime/2020/05/15/breonna-taylor-shooting-boyfriend-kenneth-walker-faces-charges-what-know/5183805002/>.

86. *Id.*



guns trained on him and police dogs barking at him.<sup>87</sup> Despite his attempts to explain the misunderstanding to police, Walker was handcuffed and taken into police custody.<sup>88</sup> Walker had no criminal record.<sup>89</sup> Walker was licensed to carry firearms.<sup>90</sup> Kentucky is a “stand your ground” state, meaning that Walker was legally justified in shooting at police if he genuinely believed them to be intruders.<sup>91</sup> At the very least, these facts should have provided Walker with a passing presumption of lawfulness. Instead, Walker was quickly cast as a criminal by police on the scene and characterized as the villain by reports describing the event. Shortly thereafter, Walker was charged with attempted murder of a police officer.<sup>92</sup> The defining distinction between Kenneth Walker, III, and Mark and Patricia McCloskey? Walker is a Black man.

Two weeks after his arrest, Walker was released from jail and transitioned into home confinement due to concerns about the spread of the Coronavirus in carceral institutions.<sup>93</sup> Ryan Nichols, president of the Louisville police union, characterized Walker’s release as “a slap in the face to everyone wearing a badge” and suggested, without foundation, that Walker’s release endangered the public.<sup>94</sup> Coming to his own defense, Walker explained his actions, saying, “I was raised by a good family. I am a legal gun owner and I would never knowingly shoot at a police officer.”<sup>95</sup>

In the middle of May, while Walker was still confined to his home, a salacious revelation from Louisville Postal Inspector Tony Gooden revealed that his office was not part of an inspection of possible drug trafficking activity in packages delivered to Taylor’s address.<sup>96</sup> This announcement directly contradicted the story provided by Louisville police, who had used the false narrative to secure the “no-knock” warrant for Taylor’s address.<sup>97</sup> It was only then, in the face of overwhelming pressure from Black Lives Matter activists, that Jefferson County Commonwealth’s Attorney Tom Wine announced that he was temporarily dismissing the charges against Walker while the Federal Bureau of Investigations, Department of Justice, and Kentucky Attorney General conducted their own investigations into Taylor’s death.<sup>98</sup>

Unquestionably, the unsubstantiated narcotics investigation that spurred issuance of a “no-knock” warrant at Breonna Taylor’s residence and the subsequent police raid that ensued were an unmitigated disaster—one that resulted in the untimely

---

87. Janelle Griffith, *Breonna Taylor’s Boyfriend ‘Devastated Kentucky AG Blamed Him for Her Murder,’ Lawyer Says*, NBC NEWS (Sept. 24, 2020, 1:12 PM), <https://www.nbcnews.com/news/us-news/breonna-taylor-s-boyfriend-devastated-kentucky-ag-blamed-him-her-n1240955>.

88. McLaughlin, *supra* note 78.

89. Griffith, *supra* note 81.

90. *Id.*

91. See Ivan Pereira, *Kenneth Walker, Boyfriend of Breonna Taylor, Sues Police and City of Louisville, Kentucky*, ABC NEWS (Sept. 1, 2020, 6:55 PM), <https://abcnews.go.com/US/kenneth-walker-boyfriend-breonnataylor-sues-police-city/story?id=72754382>.

92. *See id.*

93. Carrega & Ghebremedhin, *supra* note 76.

94. *Id.*

95. Pereira, *supra* note 85.

96. Carrega & Ghebremedhin, *supra* note 76.

97. *Id.*

98. *Id.*

death of Taylor herself and inflamed another wave of protests for racial justice across the country. One might assume that bearing witness to one's girlfriend bleeding to death from gunshot wounds—as Kenneth Walker did—would engender sympathy. If nothing else, one might at least assume these circumstances would serve as a buffer between Walker and potential criticisms. However, despite all that Walker experienced and all charges against him being dropped, Walker still received little support from sources typically first to defend gun owners.

In many ways, the silence of Second Amendment advocates has been deafening. Perhaps the most noticeable failure to offer public support has come from the National Rifle Association (NRA). Despite its claim of being “America’s longest-standing civil rights organization” and a militant defender of gun rights, the NRA issued no statement supporting Walker.<sup>99</sup> However disheartening, the NRA’s failure to offer support for Walker is consistent with its reaction to other highly publicized instances of lawful Black gun owners being harmed by police.<sup>100</sup>

Also noticeably missing was comparable support for Walker from prominent politicians. In contrast to his support for the McCloskeys, President Trump offered his “regards to the family of Breonna [Taylor]” without any reference to Walker’s actions or invoking his Second Amendment rights.<sup>101</sup> In this same statement, President Trump simultaneously emphasized his sympathies for the white officers involved in the case, saying, “I also think it’s so sad what is happening with everything about that case—including [to] law enforcement.”<sup>102</sup> These sparse comments not only failed to offer support to Walker as a lawful gun owner, they effectively shifted attention towards the police officers as the rightful heroes of the narrative, a position very much at odds with President Trump’s characterization of the McCloskeys.

In a turn of events so absurd as to almost be otherworldly, Louisville Sergeant Jonathan Mattingly, one of the police officers who executed the “no-knock warrant” at Walker’s home on the night of the raid, filed a civil suit against Walker. In it Mattingly brought claims for emotional distress, assault, and battery, alleging that he experienced “severe trauma, mental anguish, and emotional distress” as a result of Walker’s actions on March 13.<sup>103</sup> Walker’s lawyer firmly asserts that such a lawsuit is

---

99. See *A Brief History of the NRA*, NAT’L RIFLE ASS’N, <https://home.nra.org/about-the-nra/> (last visited July 17, 2022).

100. Among the startling examples of the NRA’s failure to defend Black gun owners are the highly publicized cases of Alton Sterling and Philando Castile. In early July of 2016, Alton Sterling was killed by police in Baton Rouge, Louisiana, outside a store where he was selling CDs; the next day in St. Paul, Minnesota, Philando Castile was killed by police during a traffic stop with his girlfriend and young daughter in the car. Both men were lawfully carrying guns at the time of their death and made no threats towards police officers. The NRA did not release statements supporting the gun owners in either case. See Britni De La Cretaz, *Philando Castile & Alton Sterling’s Killings Show An Indifferent System for Black Gun Owners*, REFINERY29 (July 5, 2020, 11:00 AM), <https://www.refinery29.com/en-us/2020/07/9896047/philando-castile-alton-sterling-killed-black-gun-owners>.

101. Quint Forgey & Nick Niedziwadek, *Trump Extends Condolences to Breonna Taylor’s Family, Says He’s ‘Praying’ for Officers Shot at Louisville Protests*, POLITICO (Sept. 24, 2020, 8:07 AM), <https://www.politico.com/news/2020/09/24/trump-breonna-taylor-protests-420948>.

102. *Id.*

103. April Siese, *Louisville Police Officer Sues Kenneth Walker, Boyfriend of Breonna Taylor, for Emotional Distress, Assault, and Battery*, CBS NEWS (Oct. 30, 2020, 2:22 AM), <https://www.cbsnews.com/news/>

a “baseless attempt to further victimize and harass Kenny [Walker],” affirming that “Kenny Walker is protected by law. . . and is immune from both criminal prosecution and civil liability as he was acting in self defense in his own home.”<sup>104</sup>

Mattingly doubled down in an interview with Michael Strahan, saying that Walker was partially responsible for the death of Breonna Taylor: “With this narrow hallway, shooting from it, him diving out, he just put her [Taylor] in an impossible situation.”<sup>105</sup> Mattingly went so far as stressing that he “was a victim” of the March 13 raid. In the interview, Mattingly went to great lengths to distance the killing of Breonna Taylor from other recent killings of Black people, such as George Floyd and Ahmaud Arbery, that inflamed calls for racial justice. Mattingly took no responsibility for Taylor’s death, saying that “this is not a race thing like people want to try to make it to be . . . This is not kneeling on a neck. This is nothing like that.”<sup>106</sup> During the interview, Mattingly rejected out of hand any suggestions that he himself might harbor racial biases, even asserting, “Let’s address the fact that just because you’re Black, you’re a threat. It’s not the case. I’m not scared of you.”<sup>107</sup> When pushed by interviewer Strahan to recognize that Black men are indeed afraid of being perceived as a threat by police, Mattingly retorted dismissively, “Because you feel that way. . . doesn’t make it real.”<sup>108</sup>

Despite Mattingly’s adamant protestations, one truth remains: a comparable scenario—in which officers raid a home in the dead of the night and fatally shoot one of its occupants, only to respond by filing suit against the surviving occupant—is entirely unimaginable when the races of the parties involved are switched. The postures of the parties alone are extraordinary, as one NPR reporter highlighted, saying, “a police officer suing a civilian in court for emotional distress is unprecedented.”<sup>109</sup> Abhorrently, the characterizations of Walker as just another dangerous Black man with a gun have painfully deep historical roots.

### CONCLUSION

What explains the starkly different reactions to the invocations of the Second Amendment “right to keep and bear arms?” In short, race. A comparison of the cases of Mark and Patricia McCloskey and Kenneth Walker III demonstrates that the racial disparities that were once enshrined in law still persist, even in the absence of explicit legal prohibitions. Presumptions about Black gun ownership and use are informed by centuries of societal notions surrounding race, gender, and citizenship. Perhaps scholar Verna L. Williams phrased it best: “The Second Amendment [and

---

breonna-taylor-boyfriend-kenneth-walker-sued-by-louisville-police-sgt-jonathan-mattingly-for-emotional-distress-2020-10-29/.

104. *Id.*

105. Darcy Costello, *Sgt. Jonathan Mattingly Files Counterclaim Against Breonna Taylor’s Boyfriend for Assault*, LOUISVILLE COURIER J. (Oct. 29, 2020, 10:02 PM), <https://www.courier-journal.com/story/news/local/breonna-taylor/2020/10/29/breonna-taylor-case-lmpd-sgt-mattingly-sues-kenneth-walker/6079711002/>.

106. *Id.*

107. *Id.*

108. *Id.*

109. Eleanor Klivanoff, *All Things Considered, Louisville Police Officer Files Lawsuit Against Breonna Taylor’s Boyfriend*, NPR (Oct. 30, 2020, 3:52 PM), <https://www.npr.org/2020/10/30/929609029/louisville-police-officer-files-lawsuit-against-breonna-taylors-boyfriend>.

more generally, the “right to keep and bear arms,”] is less an instrument for protecting individual rights than a component of a legislative, political, and social framework to protect and advance white patriarchy.”<sup>110</sup> The concept of citizenship has always been, and still remains, a lens for assigning belonging. To determine the group who belongs—citizens—necessarily requires a determination of the who is outside the bounds of American citizenship. This construction of citizenship has never been fully accessible to Black Americans, and “the right to keep and bear arms” has long been used as a means of restricting the citizenship of Black Americans. The use of the Second Amendment as a tool for reifying Blackness as non-citizen, though no longer explicitly written in America’s laws as it was at the time of the nation’s founding, remains an integral part of the American narrative.

The vestiges of these *de jure* restrictions on Black gun ownership remain embedded in American culture and are visible through careful analysis of current events, such as reactions from both the legal system and the American public writ large in the cases of the McCloskeys and Kenneth Walker, III. As this note has argued, the “right to keep and bear arms” continues to be used to assign citizenship on the basis of whiteness. The historical practice of race-based disarmament continues, albeit in more insidious forms. Even without explicitly racist laws on the books regulating gun ownership, racial disparities in gun ownership are perpetuated through remnants of those former regulations that have been solidified in culture. So long as gun ownership continues to be used to define citizenship, the “right to keep and bear arms” will never provide the same presumed protections and presumptions of lawfulness to Black Americans that it has historically and consistently made accessible to white Americans.

In the current climate rife with racial tension, this reality presents grave possibilities of exacerbating existing aggression and violence. This reality is particularly concerning in light of increasing public displays of weapons by white Americans across the country,<sup>111</sup> as well as similar performative displays by Black Americans.<sup>112</sup> Simmering racial hostilities, paired with the growing popularity of the practice of publicly carrying firearms, particularly in tense situations such as rampant protests across the country, present serious risks of explosions into violence.<sup>113</sup> Without addressing the centuries-long history of exclusionary gun ownership laws that elevate whiteness and reify exclusionary conceptions of citizenship, presumptions about lawful gun ownership will continue to withhold protections from Black Americans and fan the flames of racial tension burning swiftly across the nation. For those reasons, it seems impossible to envision a world in which the Second Amendment “right to keep and bear arms” is applied race-neutrally to afford the same presumptions of lawfulness to Black Americans that it currently affords to white Americans.

---

110. Williams, *Second Amendment through a Feminist Lens*, *supra* note 12, at 1026.

111. See Firmin DeBrabander, *The Great Irony of America’s Armed Anti-Lockdown Protesters*, ATLANTIC (May 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/guns-protesters/611560/>.

112. See Derek Major, *Black Armed Protesters March in Kentucky to Demand Justice for Breonna Taylor*, BLACK ENTER. (July 28, 2020), <https://www.blackenterprize.com/black-armed-protesters-march-to-demand-justice-for-breonna-taylor>.

113. See generally Katlyn E. DeBoer, *Clash of the First and Second Amendments: Proposed Regulation of Armed Protests*, 45 HASTINGS CONST. L.Q. 333 (2018).