

# THE LIMITS OF INCORPORATION: VIOLENCE, GUN RIGHTS, AND GUN REGULATION IN THE RECONSTRUCTION SOUTH

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On Monday morning, September 14, 1874, a group of several thousand of the New Orleans's "best men" barricaded the streets of the French Quarter in preparation for a battle with the city's racially integrated Metropolitan Police force. The men had answered the call of the Crescent City White League (CCWL), the paramilitary arm of the city's Democratic establishment, to "defend their rights" against the depredations of the police whose primary transgression had been the seizure of the League's guns in a raid the day before. The White League fashioned themselves as the city's new militia bound to protect white citizens' right to bear arms and defend civilians against the dangers of black policemen. The battle that ensued lasted only a few hours, but it left the government of Louisiana in doubt and the relationship of arms bearing to postwar citizenship at the center of Reconstruction politics. The Second Amendment, however, currently holds no solid place in the social and political history of Reconstruction, and as a result, we are left to wonder about the power of the White League's call to arms.<sup>1</sup>

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1. The standard narratives of Reconstruction pay little, if any, attention to how Democrats and Republicans used the right to bear arms as part of their larger political ideologies; nor do they explore how the controversies over black arms bearing, specifically the enrolling of black militias in the South, brought the Second Amendment to the forefront of Reconstruction political debates. *See, e.g.,* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988); MICHAEL PERMAN, THE ROAD TO REDEMPTION: SOUTHERN POLITICS, 1869-1879 (1984). Neither Foner, who argues for Reconstruction's

While the legal scholarship is not nearly as silent on Reconstruction, the majority of work looking at the Second Amendment after the Civil War is limited in scope, focusing almost exclusively on the question of the Fourteenth Amendment's incorporation of the right to bear arms as one of the "privileges and immunities" of individual citizenship. The incorporation obsession, which pervades much of the scholarship on the Fourteenth Amendment, hinders our ability to assess the controversies stemming from the arming of black men in the South and their impact on the emergence of a popular understanding of the Second Amendment. This obsession is epitomized in the work of Akhil Amar and others who claim that its framers intended the Fourteenth Amendment to consume or incorporate the Bill of Rights—including the Second Amendment—under its aegis, thereby making it a right of all individuals.<sup>2</sup> This work obscures the complexity of congressional and judicial thought regarding the meaning of the Second Amendment after 1866. And more importantly from this essay's perspective, Amar's simplistic collective-right-turned-individual-right model completely ignores the important role popular protest played in the unfolding of the Southern militia debate during Reconstruction.

Fortunately, recent scholarship is beginning to challenge the incorporation obsession. In his biography of Supreme Court Justice Samuel Miller, historian Michael Ross argues that although Miller restricted the Fourteenth Amendment's privileges and immunities clause so that states could retain a

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more radical aspects, nor Perman, in taking the opposite view and criticizing Republicans for being too conservative, looks at the Second Amendment as one of the fundamental Constitutional principles up for grabs during the postwar period. One exception is Otis Singletary's classic but often overlooked social history of the black militia, which traces the organization, activities, and other social characteristics of the militias but does not link them to a broader conversation about the Second Amendment, the emerging nation-state, or popular politics. OTIS SINGLETARY, *NEGRO MILITIA AND RECONSTRUCTION* (1957); *see also* STEVEN HAHN, *A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION* 265 (2003) (expanding upon Singletary's suggestion that militia organizing played a central role in Reconstruction politics). Saul Cornell has begun to link the Reconstruction militia controversy with the evolution of judicial opinion regarding the Second Amendment. SAUL CORNELL, *A WELL REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (forthcoming 2006). For the most part, however, the social history of Reconstruction and the legal history of the Second Amendment remain separate areas of inquiry.

Historians who have considered the CCWL and what came to be known as "The Battle of Liberty Place" have overlooked the League's call to arms, but their reconstruction of events are nonetheless important. *See, e.g.*, ELLA LONN, *RECONSTRUCTION IN LOUISIANA AFTER 1868* (P. Smith 1967) (1918); JOE GRAY TAYLOR, *LOUISIANA RECONSTRUCTED, 1863-1877* (1974). For a fascinating treatment on the memory of the White League's attack on the city police, see Lawrence Powell, *Reinventing Tradition: Liberty Place, Historical Memory, and Silk-Stocking Vigilantism in New Orleans Politics*, *SLAVERY & ABOLITION*, Apr. 1999, at 127, and SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* 45 (1998).

2. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

hand in the regulation of business in the *Slaughter-House Cases*,<sup>3</sup> he did so out of a belief in fundamental agrarian Republican principles that included free labor and a distrust of the power of corporations.<sup>4</sup> Although Ross's explanation for Miller's much decried abandonment of Reconstruction policy is debatable, the implications of his argument are clear: the conventional focus on formal legal opinion does not reveal the complexities of postwar political thought. More specifically to the case at hand, the incorporation narrative does not satisfy the question of how Republican lawmakers and their opponents envisioned the role arms bearing would play in the wake of unprecedented military mobilization during the Civil War and the inclusion of black men in the nation's armed forces.

As a remedy, I take a cue from Larry Kramer's recent insights into what he terms "popular constitutionalism" to understand the widening cultural importance of arms bearing in the Reconstruction-era South and its role in the development of a nascent individual rights model of gun ownership.<sup>5</sup> Kramer argues that contrary to the views of many legal historians, the processes of Constitutional interpretation "assigned ordinary citizens a central and pivotal role in implementing their Constitution."<sup>6</sup> Kramer identifies a variety of historical moments when ordinary Americans took the Declaration of Independence seriously and acted out their belief that as "the people" they deserved a role in the process of deciding the constitutionality of laws. Through protests, street theatre, and even mobbing, these ordinary people assumed an active role in the process of judicial review. These expressions of popular constitutionalism, Kramer believes, impacted the outcomes of the judicial review in profound ways. It maintained a balance between the branches of government and kept the judiciary from establishing complete supremacy over the process of lawmaking. In particular instances, such as the Dred Scot case, popular dissatisfaction with Chief Justice Roger Taney's heavy-handed decision against the citizenship rights of African-Americans initiated a revolution in legal thought that was to favor a more liberal, activist view of government and state intervention on behalf of the burgeoning idea of civil rights.

But popular constitutionalism did not always ensure an expansion of civil or political rights. Ordinary people acted out their vision of the Second Amendment by joining organizations such as the White League and struggled along with and sometimes against Congress and the courts in deciding how the

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3. 83 U.S. 36 (1873).

4. MICHAEL A. ROSS, *JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA* (2003).

5. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004). Kramer's work strikes a challenge at the heart of the legal history discipline, which has resulted in some strident criticism from its practitioners. See Laurence Tribe, *The People's Court*, N.Y. TIMES BOOK REV., Oct. 24, 2004, at 32-35 (book review).

6. KRAMER, *supra* note 5, at 7-8.

Second Amendment should apply to freedmen in a post-emancipation society. Intense federal legislation like the 1868 militia law, which allowed African-Americans to be included in Southern state forces, and later the Enforcement Acts, in addition to a variety of state-level action restricting the use of personal firearms and the legality of various forms of political organizing, became increasingly unpopular in no small way due to the ability of conservatives—both North and South—to paint these measures as heavy-handed, tyrannical attempts to maintain the political hegemony of Republicans over a subjugated people. Even while Republicans attempted to highlight the depth of Southern depravity against freedmen in the media and with carefully staged public spectacles, like the Ku Klux Klan trials of 1871-72, their enemies reaped more success in portraying the government as the true source of political terror and, as Saul Cornell explains, by cultivating a discourse of self-defense that overpowered liberal theories of incorporation.<sup>7</sup> When the White League incited an armed rebellion against the Metropolitan Police and Republican government in Louisiana, they enacted a popular understanding of the Second Amendment that would influence not only judicial interpretation of the issue but also formed the ideological basis for a conservative counterrevolution that would sweep across the South for the next three years bringing about Reconstruction's end.<sup>8</sup>

#### I. READING THE SECOND AMENDMENT FROM THE BOTTOM UP

Written nearly half a century ago, Otis Singletary's social history of the Reconstruction "black" militias provides a better point of departure than Amar for scholars interested in the evolution of the Second Amendment after the Civil War.<sup>9</sup> Singletary examined a wide variety of sources, including but not limited to Congressional debates and judicial opinion, and found that the arming of freedmen in so-called black militias—a misnomer since none of them were wholly black—to be one of the most controversial and highly divisive issues of the Reconstruction era. It set Republicans against Democrats (not so surprising), but also Republicans against other Republicans (more surprising if you believe Amar's description of party unanimity on the issue of incorporation). According to Singletary, Republicans voiced no consensus on the efficacy of arming black men; in fact, many were adamantly opposed to it for fear it would incite a war of the races.<sup>10</sup> The actual arming of black men in the Reconstruction South progressed in fits and starts as those party leaders who used black militias to secure their election to a state office soon grew wary of such a militant symbol of black independence or sought to placate white constituents for whom black militiamen personified the ultimate indignity.

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7. CORNELL, *supra* note 1.

8. *Id.*

9. SINGLETARY, *supra* note 1.

10. *Id.*

Whatever their reason, the Republican commitment to arms bearing for black men was anything but sure and hardly as straightforward as Amar would lead us to believe. Most Republicans did not advocate a full incorporation of the Second Amendment into their civil rights policy while even their most reactionary critics sought tighter restrictions on arms bearing within their local communities. Whether Republican or Democrat, all could agree that the Second Amendment posed a significant danger to their respective visions of republican government if not properly adjudicated. But that adjudication did not occur in courtrooms.

If Congressional and state lawmakers' purported silence on the issue of incorporation reflects *either* their tacit consent *or* rejection of the theory (depending on one's own perspective on the incorporation debate),<sup>11</sup> then perhaps it is time to look beyond the walls of Congress and the state legislatures to inquire how Republicans actually understood the implications of the Fourteenth Amendment for the task of governing a highly volatile and violent South. With regards to the question of arms bearing for Southern blacks, Reconstruction lawmakers and politicians in the South raised a cacophony of questions, protests, and disagreements. In the South the issue transcended mere speculation. Southern violence precipitated a crisis in public safety and political viability for the Republican Party to which arming black men offered a possible solution. To understand why the militia issue ignited such controversy, it is important to grasp the importance of militias to the antebellum Southern body politic. Local militias served as the "the basic unit of local politics," according to Stephanie McCurry, and enabled yeomen as well as elite men to act politically.<sup>12</sup> Arguably the two most important Southern political institutions, the militia and the slave patrol, brought white men together under a common purpose and taught them the fundamental lessons of discipline and hierarchy. Although the citizen-soldier ideal embodied in militia duty claimed to equalize men of all ranks in the performance of their republican duty, it remained an institution deeply involved in the replication of social and political status. The militia represented the "contradictory character of lowcountry politics" by bringing planter officers and yeoman soldiers together under the banner of protecting their homes and families from outside interference but subordinated the ranks to the greater power of planter interests.<sup>13</sup> The militia offered slaveholders a relatively secure way to recognize the growing impetus for republican democracy while ensuring societal order and

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11. On the "sounds of silence," see Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); AMAR, *supra* note 2, at 197-214.

12. STEPHANIE MCCURRY, *MASTERS OF SMALL WORLDS: YEOMAN HOUSEHOLDS, GENDER RELATIONS, AND THE POLITICAL CULTURE OF THE ANTEBELLUM SOUTH CAROLINA LOW COUNTRY* 265-71 (1995).

13. *Id.* at 265-71.

their own political supremacy. On the most practical level, the beat company formed “the basic unit of local politics,” and office seekers were required to patronize them with fetes and dinners.<sup>14</sup> Moreover, an officership in the local militia was practically required of all political aspirants. Militia companies often voted in blocs, and musters typically doubled as political rallies. On a more symbolic level, militias paraded to the cheers of adoring female crowds who urged the men to protect them from the impending threats to their “liberty” as they interpreted the deepening sectional crisis. Militia culture, with its regalia, regimentation, and arms bearing formed the foundation for antebellum Southern masculinity and political power. After the war, the Ku Klux Klan, and then eventually, the more coordinated White Leagues and Red Shirts, replicated not only many aspects of antebellum militia organization but also its symbolic importance to the Southern way of life. So too did the black militias whose cooptation of the symbols of political power deeply angered white Southerners.<sup>15</sup>

It is only within the historical context of paramilitary nature of Southern politics that we can begin to appreciate the complexity of arms bearing in the post-emancipation South. It is in light of this tradition of paramilitary politics that Republicans expressed their concerns over the racial composition of Southern militias and proposed to rewrite the nation’s militia law. After the war, defeated Southerners attempted to re-establish their political dominance through the militia. Organized by Confederate-friendly provisional governors, Southern militias wreaked havoc on the already fragile civil governments in the first two years after surrender. Armed and often uniformed in Confederate grey, these militias formed shadow governments that undermined the legitimacy of Republican efforts at political reform by arresting, disarming, and assaulting freedmen and their white allies.<sup>16</sup> In 1867, Congress passed an unprecedented and highly controversial federal militia law that outlawed any military organization in the South not a part of the regular Army.<sup>17</sup> But as gun violence against freedmen continued to be a dire problem, Republicans soon realized

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14. *Id.* at 265-71.

15. *Id.*; see generally SALLY HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* (2001) (regarding the slave patrol); HAHN, *supra* note 1 (regarding the importance of militia organizing and military symbolism for freedmen); JULIE SAVILLE, *THE WORK OF RECONSTRUCTION: FROM SLAVE TO WAGE LABORER IN SOUTH CAROLINA, 1860-1870* (1994) (regarding the importance of militia organizing and military symbolism for freed people); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998) (arguing that the Second Amendment was part of a slaveholding compromise aimed to assure Southern delegates to the Constitutional Convention that the federal government would not call out the militia and leave Southerners vulnerable to slave revolt); Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM. & MARY Q. 39 (1998) (regarding the general role of the militia).

16. SINGLETARY, *supra* note 1, at 6-7.

17. *Id.*

that a prohibition on the militia handicapped their state governments because it forbade the arming of their allies. Without adequate federal military support, Republicans decided their own best interests necessitated a state militia, and barely a year later Congress revoked the militia ban.

The disarming of freedmen was indeed troubling, but the federal government was not beyond disarming those whom it deemed a threat to public safety. Although General Daniel Sickles issued an order declaring that “the constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed” as a remedy to white South Carolinians’ rampant disarming of freedmen, he also warned that this policy “shall not be construed to sanction the unlawful practice of carrying concealed weapons, nor to authorize any person to enter with arms on the premises of another against his consent.”<sup>18</sup> The Army prohibited the sale of pistols and knives in Charleston after “several outrages [were] committed by whites upon Blacks and the reverse.”<sup>19</sup> In St. James, South Carolina, men and women of all races were prohibited from carrying “guns, pistols, or other weapons of War.”<sup>20</sup> Eventually, the Department of South issued a regional order outlawing any “Organizations of white or colored persons bearing arms, or intended to be armed, not belonging to the military or naval forces of the United States.”<sup>21</sup> The Army was not alone in its efforts to stop the wanton violence it believed stemmed, in part, from an excess of firearms in public hands. In Mobile, Alabama, the editor of the city’s Democratic paper even conceded the problem posed by the “fact that guns and pistols were being fired in all parts of the city, day and night.”<sup>22</sup> The paper called for a ban on all concealed weapons and urged “all good, law-abiding citizens” to “Lay aside all deadly weapons like brave men.”<sup>23</sup> Even the Alabama legislature, under the guidance of many former Confederates in 1866, banned individuals from carrying concealed guns, pistols, brass knuckles, and even slingshots. Bowie knives were taxed, and given their popularity on the Southern frontier, surely provided a useful source of revenue: that is, if such taxes could actually be collected.<sup>24</sup>

Obviously, nineteenth-century Americans, even the most conservative among them, were not opposed to the idea that the state should be able to

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18. Order of General Sickles, Jan. 17, 1866, in *THE POLITICAL HISTORY OF THE UNITED STATES DURING RECONSTRUCTION* 35 (Edward McPherson ed., 1969).

19. Letter from Brvt. Brig. Gen. W. Bennet to Capt. Rice (Feb. 27, 1866), Letters and Reports Received Relating to Freedmen and Civil Affairs in Records of the U.S. Army Continental Commands, RG 393. (on file with the National Archives and Records Administration).

20. *Id.*

21. Department of the South, General Order No. 7 (Sept. 1, 1866), in *DOCUMENTARY HISTORY OF RECONSTRUCTION*, vol. I at 211 (Walter Fleming ed., 1966).

22. Ray Granade, *Violence: An Instrument of Policy in Reconstruction Alabama*, 30 *ALA. HIST. Q.* 182, 184 (1968).

23. *Id.* at 184.

24. *Id.*

control the use of firearms. Tennessee Democrat Washington Whithorne worried that the Civil Rights bill, if interpreted to include an unfettered individual right to bear arms, would make it impossible for state forces to control crime and violence.<sup>25</sup> He wondered whether a police officer in any Northern or Southern city that disarmed a drunken man could be sued for breach of the man's civil right to bear arms. Whithorne believed he could be sued, and that the plaintiff was likely to succeed, making a common duty performed on behalf of the public safety—and very necessary in the Reconstruction South—unconstitutional.<sup>26</sup> Republicans, however, attempted to walk a fine line by establishing the particular contexts within which firearms could be legally carried in the South. U.S. soldiers and state militiamen (after the passage of the new militia law) were the only groups whose right to bear arms was categorically protected. Thus, Republicans endeavored to create a simultaneous expansion (of blacks in the state forces) and restriction (on the personal use and display of firearms for civilians) of the Second Amendment in light of the new parameters set by the Fourteenth Amendment.

This made for inconsistent application of judicial principle on the ground in the Reconstruction South. The actual organization and use of black militias varied. Some states embraced the system while others resisted for fear of inciting further racial hostilities. This was the case in Georgia and Alabama where the state legislatures refused to authorize their formation. In Georgia, black legislators tried unsuccessfully three times to convince their white counterparts to raise a black militia. One black leader, Abram Colby, recalled, "I don't think we got twenty white Republicans to vote for it," when asked by the Congressional subcommittee investigating the Ku Klux Klan if there was widespread support among Republicans for arming blacks.<sup>27</sup> The same was true in Mississippi, where riots involving both armed blacks and whites crystallized public opinion against the prospect of raising black militia units. Governor Adelbert Ames often called upon federal military authorities to aid him in keeping the peace, but in the end he waited until his administration was on the verge of being overthrown before he called up black militia units in 1875.<sup>28</sup> Arkansas, on the other hand, actively enrolled men of both races and experienced an active militia movement that engaged in a protracted guerilla war with Klansmen and white Democrats. Although it prolonged Republican Governor Powell Clayton's official administration of the state, it proved to

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25. CONG. GLOBE, 42d Cong., 1st Sess. 337 (1867).

26. *Id.*

27. JOINT SELECT COMM. ON THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, REPORT OF THE JOINT SELECT COMMITTEE APPOINTED TO INQUIRE INTO THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, SO FAR AS REGARDS THE EXECUTION OF THE LAWS, AND THE SAFETY OF THE LIVES AND PROPERTY OF THE CITIZENS OF THE UNITED STATES AND TESTIMONY TAKEN, vol. 2, 705 (1871) [hereinafter *CONDITION OF AFFAIRS*].

28. SINGLETARY, *supra* note 1, at 50-65.

further alienate Arkansas Republicans from most of the state's white inhabitants.<sup>29</sup> Texas exhibited another variation in strategy by transforming the militia into a state police force that answered directly to the governor but did not rely on an executive order or legislative vote to be activated. But few white men were willing to serve under the auspices of the Republican Party or alongside black men, and thus the Texas State Police, like the other integrated forces elsewhere, was a mostly black and much maligned entity.<sup>30</sup>

North Carolina's William Holden convinced himself that he had managed a way around the problem. When he declared martial law in several Klan infested counties in 1871, he called in militia troops from the predominantly white sections of western North Carolina. Holden's militia captain, George Kirk, also recruited men from mountainous East Tennessee, where a strong Unionist sentiment prevailed during the war. Kirk himself was a native Volunteer and commanded a regiment of fellow Unionists from the region during the Civil War. But Holden's use of "outsiders," even though they were white, provided fodder for his opponents. They named the governor's roundup of Klansmen the "Kirk-Holden War" and decried the militia as an invading army. The underlying questions of who could legitimately participate in state militias and what the militia's activities should be guided the criticisms levied against Holden even when the race of militiamen was not an immediate issue. The Holden militia was not "of the people," at least not the people in Greensboro or Raleigh.<sup>31</sup>

While many of his fellow Southern governors were unwilling to use black troops to defend their governments, South Carolina's Robert Scott was not. In preparation for his re-election bid in 1870, Scott mobilized fourteen regiments of a new state militia consisting of nearly one thousand black men. Incensed by the recalcitrance of white Southerners, Scott was reported to have proclaimed that the only law they understood was the Winchester Rifle. Scott's previous position as a commander of black troops in the war and a Freedmen's Bureau

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29. *Id.* at 81-89. Local militias like the one led by white radical A.T. Morgan, Sheriff of Yazoo, had carried on guerrilla warfare with white paramilitaries for months. A.T. MORGAN, YAZOO; OR, ON THE PICKET LINE OF FREEDOM IN THE SOUTH (Univ. of South Carolina 2000) (1884). See also JAMES W. GARNER, RECONSTRUCTION IN MISSISSIPPI (Louisiana State Univ. Baton Rouge 1968) (1901); SINGLETARY, *supra* note 1, at 14.

30. SINGLETARY, *supra* note 1, at 13.

31. J.G. DE ROULHAC HAMILTON, RECONSTRUCTION IN NORTH CAROLINA (Univ. of North Carolina Chapel Hill 1964) (1914); SINGLETARY, *supra* note 1, at 14-15; see W. MCKEE EVANS, BALLOTS AND FENCE RAILS: RECONSTRUCTION ON THE LOWER CAPE FEAR 138 (1967) (discussing the demographic makeup of Holden's militia). Evans argues that the far eastern sections of the state enjoyed relative peace and stability along with a marked lack of Klan-related activities precisely because the militia was local and led by two native men who, despite being Confederate veterans, were staunch supporters of Governor Holden. One of the leaders, Col. George L. Mabson, was also a mulatto, a fact that had little bearing on the support he received from the white community given his ties to the local area and his Confederate past.

agent made him a favorite among black South Carolinians and ensured their loyalty to him. Thus, Scott relied exclusively upon black men to fill his militia. In black majority districts throughout the lowcountry, Scott recognized the key to victory lay in the black majority districts throughout South Carolina where blacks routinely outnumbered whites three to one. By ensuring their safe arrival at the polls, Scott believed he would soundly defeat his Union Reform opponent, R.B. Carpenter. Democrats in every way but in name, Carpenter and his ticket claimed to speak to the concerns of freedmen in an effort to woo them away from Scott and the Republicans. In actuality their declarations of friendship were tinged with threats of assault and other forms of reprisal. When a white militia company presented itself to Scott for its acceptance into the state militia, local agents advised him that most of its members were former Confederate cavalrymen. He refused their commission, relieved them of their weapons, and ordered that no armed bodies were allowed to organize that were not regular militia.<sup>32</sup>

Black South Carolinians readily organized themselves into companies and offered their services to their governor. Scott appointed black officers to recruit troops as well. One such captain arrived in Newberry County and easily enrolled six companies in one day. This disturbed Newberry resident C.H. Suber who testified before Congress that the companies “would be formed in front of the court-house, and they would occupy the whole square” inciting local blacks by telling them that “white men were their enemies.”<sup>33</sup> The mustering coincided with the summer canvassing season, and Suber declared that Republicans “never had any political gatherings or any celebrations, except these companies appeared with their arms.”<sup>34</sup> Scott’s opponent, R.B. Carpenter, credited Scott’s victory by nearly 35,000 votes to the militia. “It was organized to carry the election through the colored vote, to intimidate and overawe the colored people,” he explained. “On the day of the election,” Carpenter recalled, “they were parading, and then, not where there were many white people, but in the dense colored districts they overawed and drove off everybody that was obnoxious to them.”<sup>35</sup>

When it came to putting arms in the hands of Southern blacks, it was more a matter of the law of self-preservation than an ideological commitment to the citizen-soldier ideal of civic republicanism. Even in areas where black militias were active, such as South Carolina, Republicans used the militia to fulfill important political functions. Had it not been for a severe shortage of white recruits, would Robert Scott have been so eager to arm freedmen? His quick

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32. *CONDITION OF AFFAIRS*, *supra* note 27, vol. 1, 146, 147, 210, 239-40, 873, 1205; RICHARD N. CURRENT, *THOSE TERRIBLE CARPETBAGGERS* 224 (1988); SINGLETARY, *supra* note 1, at 15; HENRY T. THOMPSON, *OUSTING THE CARPETBAGGER FROM SOUTH CAROLINA* 48 (1927).

33. *CONDITION OF AFFAIRS*, *supra* note 27, at 147.

34. *Id.*

35. *Id.* at 239.

acquiescence to Democratic demands that he pull back the militias after his re-election suggests the answer to that question. This, too, was the case in Louisiana, where Republican governor William P. Kellogg demanded that William Ward's militia in Colfax desist in its pursuit of local Klansmen. When they refused, he officially disbanded them, an action that added fuel to the white supremacist fire and indirectly led to the militia's slaughter by an army of whites on Easter day 1873.<sup>36</sup>

Thus, the Democratic charges that Republicans like Robert Scott used the militias for "political" purposes were true, but this had always been the case. From antebellum political barbeques that feted local militia companies who marched to the polls in formation, to postwar companies that escorted black voters to the polls and held watch over Republican rallies, militias formed the basis for popular politics in the South. To say this should not rekindle Dunning-era critiques of the black militia as a device used to stir up trouble and demean Southern whites. This was, after all, the popular wisdom at the time and part of the Klan's defense strategy. It must be acknowledged, however, that the black militia shored up the inherently political nature of law enforcement, policing, and military structure in the South. Otis Singletary long ago encouraged historians to see the black militia movement, in all its variation, as a part of the larger struggle for "self-preservation" among Republicans and Southern blacks.<sup>37</sup> And the struggle for self-preservation should be understood as a part of Reconstruction that lent much to postwar political culture, contemporary worldviews, and structural policies, including the practical implementation of judicial theory. As Republican Sheriff, A.T. Morgan recalled of the unique political struggle he found himself a part of in Yazoo, Mississippi, "I was unused to guerilla warfare."<sup>38</sup> Such a state of affairs does not map well onto simple, linear narratives.

Where a Republican governor in the South came down on the question of arming freedmen as a part of his state's militia forces played a significant role in shaping white opposition to his administration. It is little wonder that states that employed black militiamen most aggressively held out the longest against white "Redemption." Black regiments in both Louisiana and South Carolina defended their state capitals against white paramilitaries until word came from newly sworn-in President Rutherford B. Hayes that all federal troops were to be withdrawn and "Home Rule" restored to Southern Democrats. Those states also harbored a vital black political community that exerted considerable influence on state and federal politics. States that refused to integrate their militias were redeemed early on, in Georgia's case 1870.<sup>39</sup> It is an observation that is important to note when trying to understand why militias—and guns—mattered

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36. HAHN, *supra* note 1, at 292-95.

37. SINGLETARY, *supra* note 1, at 10.

38. HAHN, *supra* note 1, at 302.

39. FONER, *supra* note 1, at 423.

in the postwar South.

The struggle over who would legitimately wield the means of organized force in the South animated Reconstruction both on the grassroots level as well as the state houses and even Congress.<sup>40</sup> Republican state officials believed they wielded a well-established right to integrate the militia and to control the use of firearms by its citizens when it threatened public safety or state authority. Otherwise, the Second Amendment amounted to little more than a suicide pact in the Constitution that required them to stand aside when armed bodies of “the people” chose to exercise a supposed right of revolution.<sup>41</sup> Did such a right exist? Had not the war decided with incredible finality the folly of such logic? Whether or not the Founding Fathers envisioned a right to armed revolution, the architects of Reconstruction certainly did not. Fresh from the battlefields of the Civil War, they sought to establish new legal and political controls over Southern society that would hopefully ensure that Southerners’ militant tendencies never again manifested such popular expression. However, white hardliners insisted that such a right did exist. This time they would fight not to break away from the Union but to alter the popular understanding of citizenship in post-emancipation America.

## II. A RIGHT TO REVOLUTION?

Immediately after the passage of the 1868 militia law that allowed Southern Republicans to enlist black men in their state defense forces, the *New York Herald* issued a call to arms for white men everywhere. The paper declared, “when armed negroes appear as military forces to keep white men in order—nay subjection—the spirit of the Anglo-Saxon must revolt.”<sup>42</sup> The Ku Klux Klan, rifle clubs, and White Leagues that emerged throughout the South in the days and months thereafter can all be considered, each in their own right, to answer that call. However, the Crescent City White League (CCWL) and its subsidiaries throughout Louisiana offered the most self-consciously revolutionary, or counterrevolutionary, justification for their armed attacks against Republican officials.

The CCWL’s call to arms demonstrates how the most powerful critique of Reconstruction—a critique based upon a theory of self-defense and racially encoded reading of the Second Amendment—resulted from the sometimes

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40. See Stephen Kantrowitz, *One Man’s Mob is Another Man’s Militia: Violence, Manhood and Authority in Reconstruction South Carolina*, in *JUMPIN’ JIM CROW: SOUTHERN POLITICS FROM CIVIL WAR TO CIVIL RIGHTS* 67 (Jane Dailey ed., 2000) (providing a nuanced perspective on this struggle).

41. See Michael Bellesiles, *Suicide Pact: New Readings in the Second Amendment*, 16 *CONST. COMMENT.* 247 (1999); Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional History*, 16 *CONST. COMMENT.* 221 (1999).

42. *North Carolina*, N.Y. *HERALD*, Oct. 1, 1868, at 7.

violent spasms of popular political struggle. When the CCWL convened on that late summer morning in 1874, it rallied many of New Orleans' white male citizenry to their cause. Like the revolutionaries of days past in whose image they fashioned themselves, the League issued a written list of grievances against Louisiana's seated Governor William Pitt Kellogg and demanded his resignation.<sup>43</sup> Two years earlier, Kellogg had been awarded the governor's seat after a contested election outcome resulting in dual governments. Kellogg's opponent, William McEnery, represented the interests of these "best men" who opposed Republicans and Reconstruction. After President Grant sent federal troops to install Kellogg as Louisiana's rightful governor and see that the McEnery faction relented, the Republican Party lingered under charges of illegitimacy and "bayonet rule." For two years, Democrats tallied the alleged misdeeds of Kellogg's administration (misdeeds that included integration of the state militia and city police force) so that when the crowd gathered that late summer morning at the feet of the South's great compromiser, they were ready to give the call to war.<sup>44</sup> When Kellogg failed to appear and refused to "receive a communication from an armed assemblage," a League organizer called on the crowd to "defend their rights" and "hold the city against Kellogg and his hirelings, to make the place an armed camp, and to never leave off until the Kellogg gang was 'wiped out'." <sup>45</sup> *The Louisianian* reported that by three o'clock that afternoon, "fully six thousand men were under arms" and ready to perform what they saw as their patriotic duty.<sup>46</sup>

The ensuing battle was over in a matter of minutes. The large number of Leaguers easily overawed the small group of Metropolitans that met them.<sup>47</sup> They barricaded streets with overturned barrels and wagons, cut telegraph lines, and hurled volleys from balconies above the French Quarter streets onto the policemen down below. Skirmishing continued throughout the evening and night, but by Tuesday morning the State House and the nearby police headquarters had been surrendered to the White League. The League then installed McEnery as governor. In all, eleven Metropolitans died alongside twenty-one White Leaguers with seventy-nine more men wounded, but the relatively small casualty list belies the importance of the event in the nation's political history. The Battle of Liberty Place, as it came to be remembered after

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43. LONN, *supra* note 1, at 269-70.

44. *Id.* at 206-29; TAYOR, *supra* note 1, at 253-313.

45. *Civil War and Revolution*, THE LOUISIANIAN, Sept. 19, 1874, at 2.

46. *Id.* at 2.

47. It is difficult to ascertain with any certainty the actual number of combatants on either side. By all accounts, the White League and its various regiments commanded several thousand men. The Metropolitan Police numbered less than a thousand, with estimates ranging from three hundred to eight hundred men. See STUART OMAR LANDRY, THE BATTLE OF LIBERTY PLACE (1999); Walter Pritchard, ed., *The Origin and Activities of the 'White League' in New Orleans (Reminiscences of a Participant in the Movement)*, 23 LA. HIST. Q. 525 (1940).

the city erected “Liberty Place Monument” in 1891 to commemorate its location, had been the shortest—and only—coup d’etat in American history.<sup>48</sup>

But what governmental misdeeds could be so outrageous as to authorize an armed overthrow of the Louisiana state government? Like all arch-conservative opponents of Reconstruction, the White League spewed a litany of charges against Governor Kellogg, chief among them his illegitimate control of the state militia and the denial of Louisiana’s citizens their right to bear arms. In the days leading up to September 14, the state militia had intercepted a large arms shipment aboard the steamer *Mississippi* that the White League had purchased from a Northern supplier. After a brief skirmish with a few Leaguers, the militia took control of 264 muskets and twenty-five cases of ammunition headed for the Leeds Foundry where they were to be distributed among League members. The former Democratic mayor who had been stripped of much of his municipal power by the state’s first Reconstruction governor, Henry Clay Warmoth, owned Leeds Foundry. Among Warmoth’s most notable—and controversial—achievements was relieving the mayor of his control over the Metropolitan Police and making them into a branch of the state militia under the governor’s watchful eye. This among Warmoth’s other efforts to centralize his authority as governor earned him the designation as “the Boss Tweed of Louisiana.”<sup>49</sup> The White League decried the militia’s seizure of arms, adding it to the list of Kellogg’s transgressions, including his continued control of the state’s armed forces.<sup>50</sup>

This was salt in an already sore wound on the Southern body politic. Government interference with state militias and policing mechanisms had irritated Southerners to no good end. A participant in the White League movement, speaking to a gathering of Liberty Place “veterans” the following year, reminded the group that action had been needed because the “militia [meaning the White Militia] was disbanded, their arms taken from them, and an exclusively negro militia organized instead.”<sup>51</sup> In the summer of 1874, the city’s newspapers told story after story of crimes perpetrated against women and other innocents left unpunished because of the ineptitude of the racially integrated Metropolitan Police force. The black policemen also were accused of harassing unoffending white citizens, drunkenness, and thievery. Newspaper accounts relayed a sense of apprehension and dread that escalated with every passing day leading up to the “September Rebellion.” According to the White

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48. TAYLOR, *supra* note 1, at 294.

49. Francis Byers Harris, *Henry Clay Warmoth, Governor of Louisiana*, 30 LA. HIST. Q. 523, 529 (1974).

50. The Leeds Foundry requested the return of a portion of the seized arms shipment. Letter from Leeds Foundry to Adjutant General (Oct. 16, 1874), in *Battle of Liberty Place Papers* (on file with the Howard-Tilton Memorial Library, Tulane University).

51. Dr. J. Dickson Bruns, Address to White League of New Orleans [hereinafter Bruns Address] (clipping in Frederick Ogden Nash Scrapbook) [hereinafter Nash Scrapbook] (on file with the Howard-Tilton Memorial Library, Tulane University).

League, the Metropolitan Police had succeeded in “overawing the citizens and dragooning the parishes” for the sake of the governor’s “political ends.”<sup>52</sup>

The Metropolitan Police received the brunt of white hostility in New Orleans. The force consisted of the “scum of the earth,” according to one White League member, and its leaders were “outcasts of all nationalities.”<sup>53</sup> Its ranks were, in fact, racially integrated; but the police force had traditionally been a favored profession of the city’s Irish and Italian immigrant populations. The Irish “machine” that oversaw much of New Orleans antebellum political organization at the ward level rankled the city’s elite establishment for decades, but prior to Republican Reconstruction, such elements could be more easily controlled. Now, racial integration threatened to throw off the delicate cross-class alliance the city’s establishment had crafted. The Metropolitan Police was but the most conspicuous sign of this.<sup>54</sup>

The CCWL delivered a specific and well-articulated justification for armed violence based on the governor’s use of the Metropolitan Police to control arms and militia organizing. Their military commander, Frederick Ogden Nash, claimed that the safety of New Orleanians was the primary impetus for the League’s organization and its rebellious activities. In a post-September 14 interview with the Chicago *Inter-Ocean*, Nash told the correspondent that the League formed in order to protect the city against armed bands of negroes.<sup>55</sup> When the reporter pointed out that many blacks were legally included in the state militia, Nash agreed, but retorted, “It alarmed our people. They didn’t feel safe.”<sup>56</sup> Nash portrayed the White League as a peacekeeping force. “One of the objects of the White League is to preserve the peace and hold in check our turbulent element.”<sup>57</sup> The turbulent element, according to Nash, included Kellogg and his black militia but not his band of Leaguers. When the correspondent pushed Nash to admit that the League was just as “turbulent” as the militia Nash replied, “*The right to bear arms is guaranteed to every citizen.* Would you have us deprived of that right? We have no armories. We have not held a meeting for more than a week.” He admonished the interviewer that he did not understand the true purpose of the White League, saying it was not “the terrible band of assassins you Northern people suppose it to be.”<sup>58</sup>

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52. *Id.*; see also POWELL, *supra* note 1, at 130 (providing more on the “steady fusillade of crime stores” reported in the papers).

53. Pritchard, *supra* note 47, at 530.

54. *Id.*; see also DENNIS ROUSEY, *POLICING THE SOUTHERN CITY: NEW ORLEANS, 1805-1889* (1996) (providing more on the history of the New Orleans police); MARY RYAN, *CIVIC WARS: DEMOCRACY AND PUBLIC LIFE IN THE AMERICAN CITY DURING THE NINETEENTH CENTURY* (1997) (analyzing New Orleans’ antebellum political turmoil).

55. The White League: Why Does It Not Disband? (clipping in Nash Scrapbook) (on file with the Howard-Tilton Memorial Library, Tulane University).

56. *Id.*

57. *Id.*

58. *Id.* (emphasis added).

Nash's explanation of the White League's motivations is important in two ways. First, by prefacing the need for adequate policing and security, he questioned the state's ability to provide the fundamental right of protection to its citizens. Second, by attaching this lack of protection to the Second Amendment, he opened a new context in which an individual interpretation of the right to bear arms could take root in the nation's public consciousness. Nash intentionally distanced himself and his League from any perceptions that they were "combinations" or "conspiracies" that would make them eligible for prosecution under the Enforcement Acts; rather, the White League as an organization was "rather a myth than the terrible band of assassins" the reporter made them out to be.<sup>59</sup> The White League included "every white man not a Republican in the city."<sup>60</sup> The fact that they had no armories and that they drew their fire power from the guns that members owned individually furthered Nash's claim that the White League was a popular movement with broad-based support and community endorsement. Nash insisted that although he was the commander for the troops that marched on Canal Street against the Metropolitans, the White League was bigger than that single encounter. According to Nash, the League transcended its leaders as well. "If my order could compel these citizens to give up their arms, or could prevent them from using them, then I might disband the White League," Nash stated, "but as it is a mere formal order by me could not accomplish this."<sup>61</sup> Such an order "might discontinue meetings and drills, but the League would remain just as effective as ever."<sup>62</sup> According to Nash, the White League was *the people*.

Thus, the Louisiana state government's attempts to control *the people's* access to arms and their right to police their own streets when the state failed to do so became the ultimate betrayal of democratic government. Nash succeeded not only in routing the Metropolitan Police but also in initiating a new cultural understanding of arms bearing in the post-emancipation South. The League's racialized reinterpretation of the Second Amendment retracted Republican efforts to "incorporate" a limited vision of black arms bearing into the Constitution. Nash's racially exclusive notion of arms bearing, which portended the dangers of black arms bearing and policing, reinvigorated old fears of black violence and insurrection and premised the white militia as the levies holding back imminent bloodshed. The culture of violence that emerged from Reconstruction, a culture that men like Nash helped to create, made possible a reformulation of the basic principles of American government so that the White League's September Rebellion could be understood and accepted as a justifiable—even admirable—expression of popular discontent.

For most of the nineteenth century, as historian Mary Ryan demonstrates,

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59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

New Orleanians, like many other urban Americans, had contested the definition and social makeup of the People as democracy expanded and contracted in the antebellum era.<sup>63</sup> Exactly who the People were, and what rights they could demand from the state, animated political action prior to the Civil War. Emancipation and attempts at democratic reform in the South only strengthened the importance of these questions. The violent protests that had often accompanied them became endemic to their discussion during Reconstruction, and, as a result, new questions emerged about the relationship of violence and politics. Was violence ever justified? What effects did it have on political life? Could it be controlled? The state's need to control citizens' access to arms became apparent after September 14, 1874. But could its efforts to do so overstep the legitimate boundaries for a democratic society? The White League believed so, especially if it inhibited white men's ability to act as protectors of their communities against the threat of black violence. Leaguers thus radicalized the defense Klansman offered in South Carolina two years before. There, defendants had denied their participation in a larger movement and insisted that their actions were merely representative of the lengths individual men would go to protect their families. The White League transformed what Saul Cornell identifies as the natural law of self-defense into a revolutionary ideology.<sup>64</sup>

Nash's successful reconstruction of the Second Amendment and its importance in postwar Southern society undermined Republican attempts to regulate arms and otherwise contain the magnitude of the violence and prevent it from becoming a full-fledged counterrevolution. The Battle of Liberty Place became the post-war South's Battle of Concord. The "Spirit of '74" infused the previously uncoordinated paramilitary groups throughout the South with a vital new ideology.<sup>65</sup> Although federal troops returned Kellogg to office two days after he fled the State House, the White League showed no sign of discouragement. One veteran asserted, "No battle for freedom, won or lost, is ever in vain. The fight itself is victory."<sup>66</sup> From Canal Street sprang forth a counterrevolutionary movement that would eventually sweep the Southern state legislatures clean of all Republican influence.<sup>67</sup> And while the Supreme Court

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63. RYAN, *supra* note 54; *see also* CORNELL, *supra* note 1; EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1988).

64. CORNELL, *supra* note 1.

65. LANDRY, *supra* note 47, at 193.

66. Bruns Address, *supra* note 51.

67. Explicitly counterrevolutionary, the "Mississippi Plan" for redeeming the South from Republican rule proclaimed as its motto "Peaceably if we can, forcibly if we must." In their efforts to win the Mississippi state elections in 1875, Democrats provoked "riots" with black Republicans, broke up Republican rallies with armed force, and posted armed regiments at polling places to block freedmen from voting who did not vow to support Democratic candidates. The next year South Carolina followed suit, and a motley crew of Rifle Clubs and Red Shirts waged war against the remaining black militia regiments, leading

would not issue a decision on an individual's right to bear arms outside of state-sponsored militias or armed forces until the twentieth century, the CCWL reinvigorated a notion of popular self-defense that laid mostly dormant since the American Revolution. Only in the turmoil of Reconstruction did it reemerge, when the state's ability to protect its citizens adequately became the focus of national politics and a touchstone in expressions of popular will.

Despite what I anticipate to be a scholarly reluctance on the part of some "Standard Modelers"<sup>68</sup> to acknowledge the contributions of the Klan and White League to a popular understanding of an individual's right to bear arms for protection against violence, either from a criminal element *or* from the state (and of course, to the White League there was no distinction to be made here), it is difficult to ignore the impact of paramilitary struggle on the Second Amendment debates during Reconstruction. Just as Carl Bogus identifies the "hidden history" of a slavery compromise in the original militia debates in the 1780s,<sup>69</sup> there is also a hidden history of white supremacy in the individual rights discourse of the Second Amendment as it emerged within a post-emancipation context. Surely, the Standard Modelers would not wish to include such nefarious characters as the White League in their pantheon of Original Intent?<sup>70</sup>

The story of the September Rebellion in New Orleans complicates the linear narrative of incorporation as well. If the debates over black militias and paramilitary violence in the South tell us anything, it is that little, if any, consensus existed among lawmakers as to how the Fourteenth Amendment would affect black Americans' right to bear arms. Some Radical Republicans imagined racially integrated Southern militias and police forces, but not all Southern Republicans shared this vision. The ones who did, like South Carolina's Robert Scott, armed blacks when it was politically expedient to do so and not out of any high-minded commitment to civil rights. The struggle to govern the Reconstruction South made for a tricky application of strict constitutional principles.

Likewise, the popularization of those principles resulted in a white

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to several infamous massacres, including the one at Hamburg. This paramilitary campaign mimicked the earlier efforts of the CCWL. *See generally* KENNETH STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877* 201 (1965); Kantrowitz, *supra* note 40.

68. *See* JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994) (providing a good synthesis of the Standard Model, which argues that the Founders envisioned both a collective *and* an individual right to bear arms); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 *J. OF AM. HIST.* 599 (1982) (providing another good synthesis of the Standard Model); *see also* Cornell, *supra* note 41 (providing a thorough critique of the Standard Model); Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637 (1989) (bringing scholars to task for not acknowledging what he sees as the implicit individual rights model embedded within the Second Amendment).

69. Bogus, *supra* note 15.

70. *See* MALCOLM, *supra* note 68.

conservative backlash that Radicals did not anticipate. White Southerners did not care for the new activist state or its fiddling with *their* Constitution. Some worked through conventional legal avenues to see that the courts implemented their interpretations of it. The *Slaughter-House Cases*, among others, are but the most obvious examples of this. Others, however, like Frederick Nash Ogden, blazed a rougher trail to judicial review. While it is not the object of this essay to say with absolute certainty that Ogden's work influenced the judicial outcome of Reconstruction, Saul Cornell suggests as much when he discusses the Supreme Court's tacit denial of African-Americans' right to bear arms in *United States v. Cruikshank*, 92 U.S. 542 (1875).<sup>71</sup> Nash and the White League add an interesting if ultimately depressing chapter to the long history of "popular constitutionalism."

And what about the question of an "Afro-Americanist Reconsideration" of the Second Amendment in light of this story?<sup>72</sup> If the ideological legacy of the individual rights model were linked to the emergence of white supremacist politics during Reconstruction, would that cause legal scholars who mercilessly flog the collective rights model for being racist to reconsider their own position? Probably not. Nonetheless, scholars of nineteenth-century America will all attest that no political party or organization held the corner on the market of racial politics or exclusionary visions of citizenship. The real tragedy of Reconstruction's many unfulfilled promises is that the legacy of the federal government's abandonment of Southern blacks to the tender mercies of the White League and other such groups leads some scholars to advocate an every-man-for-himself vision of post-emancipation justice. I cannot imagine living in a world where my personal safety was entirely my own responsibility and the government felt little or no obligation to pursue, capture, or prosecute those who violated my person. Yet this is surely how Southern blacks felt, and it accurately reflects both the federal and state governments' attitude toward them for the first century after emancipation. When self-defense becomes an individual rather than a collective endeavor, the result is not a state of freedom but a state of nature.

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71. CORNELL, *supra* note 1.

72. See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991) (providing the most thorough exploration of this question); see also STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1877 (1998); Clayton E. Cramer, *The Racist Roots of Gun Control*, 17 KAN. J.L. & PUB. POL'Y 17 (1995).

