

# GENDERING THE SECOND AMENDMENT

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## I

### INTRODUCTION

Guns have come to occupy an increasingly visible place in American society. In recent decades, most states have relaxed their laws regulating the carrying of concealed weapons, and many states have expanded the right to use guns defensively through Stand Your Ground laws. Congress has allowed a decade-long ban on semi-automatic assault weapons to expire and provided a legal shield to gun makers and sellers. Public support for stricter gun laws has declined sharply, while self-protection has emerged as the dominant reason for American gun ownership.<sup>1</sup> And, gun rights proponents increasingly are carrying guns concealed, but also openly, into public spaces. The Supreme Court and at least one Court of Appeals have validated these developments by recognizing an individual right (albeit not absolute) under the Second Amendment “to keep and bear arms.”<sup>2</sup>

These pro-gun developments and the growing pro-regulation countermovement have provided occasion for legal scholars to re-examine the Second Amendment, both as a legal principle and a social fact. However, these examinations have neglected a powerful theoretical lens that has been hiding in plain sight: gender. It is time to take seriously that the exercise of gun rights and responsibilities is and always has been gendered, that the state is and always has been gendered, and that these two dynamics are intertwined. Complementing existing theoretical insights into the history of guns in America, a gender-centered approach can help make sense of this historical patterning—including

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1. *Why Own a Gun? Protection is Now Top Reason*, PEW RES. CTR., <http://www.people-press.org/2013/03/12/why-own-a-gun-protection-is-now-top-reason/> [<https://perma.cc/W83V-CP2E>] (last visited May 14, 2016).

2. U.S. CONST. amend. II; see *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

the contemporary debate over guns in public spaces—in a way that other lenses cannot.

Understanding the Second Amendment as gendered first requires understanding governance as a gendered phenomenon.<sup>3</sup> Gendered governance encompasses two understandings: (1) the ways that the apparatus of government (laws, bureaucratic institutions, and so forth) reflect and reinforce the traditional social ordering of men and women—the governance of gender; and (2) the ways that the state and its agents perform functions historically associated with men and women—the gender of governance.<sup>4</sup> The American state was created by and in the image of men, while American state building has largely been about the task of defining and redefining the boundaries between the male citizenry and the masculine state. Since the founding, the question of firearms regulation has been at the heart of debates over the state's prerogatives in both the public and private spheres. Though the article focuses on state apparatuses, it uses the term governance, rather than the state, because the term governance is more expansive. It incorporates gun policy as both a set of laws and a set of commonly accepted practices, and it calls attention to patterned dispositions toward solving problems.

In short, one way to understand American governance is as a gendered narrative in which firearms figure prominently. The genealogy unfolds in three overlapping but conceptually distinct modes of governance, each embodying a different masculine ethos and each making different assumptions about women's civic incorporation. In the first, here termed "chivalrous governance," private male citizens crafted, embodied, and defended the rights and duties of citizenship, while women, defined by their membership in the household, remained outside the purview of the state. Citizen militias epitomized this era, as they mobilized private firearms ownership in the service of the commonweal. Chivalrous governance gave way to "paternal governance." Here, the state assumed many of the public protective functions, such as national defense and policing, once left to male volunteers, and usurped private protective functions over women and children left vulnerable by patriarchal structures. Paternal governance is now becoming "fixed governance," as an armed citizenry—now explicitly including women—reasserts its prerogative over private and public protection. This is not to say that private armed self-defense was absent in previous historical contexts but rather that it has become central to the present moment. The Supreme Court's landmark ruling in *District of Columbia v. Heller*, followed by a parallel decision in *McDonald v. City of Chicago*, has lent particular moral and legal weight to this push.<sup>5</sup>

Although these three modes of governance unfold chronologically, their dividing lines are not sharply demarcated and their logics overlap. In this way,

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3. See Wendy Brown, *Finding the Man in the State*, 18 FEMINIST STUD. 7 (1992).

4. See Rekha Mirchandani, "Hitting is not Manly": *Domestic Violence Court and the Re-Imagination of the Patriarchal State*, 20 GENDER & SOC'Y 781 (2006).

5. See *McDonald*, 561 U.S. 742; *Heller*, 554 U.S. 570; *Moore*, 702 F.3d 1993.

this article's approach is implicitly Foucaultian: the goal is to trace out broad trends in governance, with the state being a central, but not exclusive, seat of these trends.<sup>6</sup> Following Foucault, this article recognizes that governance takes particular forms at particular historical moments but that different modes of governance can also co-exist.<sup>7</sup> Thus, the article offers a soft periodization that emphasizes historical thrusts rather than sharply delineated epochs. For example, though the 1994 Violence Against Women Act is treated as an example of paternal governance, by the 1990s, a broader shift toward fixed governance was underway. Overall, the relationship between gender and guns follows a coherent, albeit complex, historical progression.

This article begins with gender scholarship on the state, citizenship, and governance as a framework for introducing the three governance strategies proposed: chivalrous governance, paternal governance, and fixed governance. Each governance strategy is considered in turn. Part III examines the laws and social practices that demarcated chivalrous governance, with a focus on the founding era. Part IV turns to paternal governance, highlighting how expanding government purviews, particularly with regard to gendered violence, became implicated in the regulation of guns. Finally, Part V analyzes the present period of fixed governance, paying special attention to the increasing significance of guns as everyday objects carried on the hips of Americans. Though much of the analysis focuses on masculinity, the article concludes by returning to broader questions regarding the relationship between gender, governance, and guns, including the contested place of women in the gun debate.

## II

### GENDER AND GOVERNANCE

With the legal meaning of the Second Amendment clarified by *Heller* and *McDonald*,<sup>8</sup> scholars working within a second generation of Second Amendment studies have increasingly turned to the social life of guns, specifically how Americans draw and then police the boundaries between citizens and the state as a matter of law and everyday practice.<sup>9</sup> As legal scholars, political theorists, historians, and sociologists have documented, citizen–state relationships are gendered in at least two respects. Gender serves, first, as a set of norms and power relations that pattern social interaction—that is, what men do and what women do.<sup>10</sup> The “governance of gender” refers to how the state influences these

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6. Michel Foucault, *Governmentality*, in *POWER* 201, 201–22 (James D. Faubion ed., 1994).

7. *Id.* at 219.

8. See *McDonald*, 561 U.S. 742; *Heller*, 554 U.S. 570; *Moore*, 702 F.3d 1993.

9. See generally JOSHUA BLOOM & WALDO E. MARTIN, JR., *BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY* (2013); JENNIFER CARLSON, *CITIZEN-PROTECTORS: THE EVERYDAY POLITICS OF GUNS IN AN AGE OF DECLINE* (2015); NICHOLAS JOHNSON, *NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS* (2014); ROBERT J. SPITZER, *GUNS ACROSS AMERICA: RECONCILING GUN RULES AND RIGHTS* (2015); SIMON WENDT, *THE SPIRIT AND THE SHOTGUN: ARMED RESISTANCE AND THE STRUGGLE FOR CIVIL RIGHTS* (2007).

10. See, e.g., JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX”*

patterns. Gender serves, second, as a set of logics that naturalize public institutions, such that some “do what men do” and others “do what women do.”<sup>11</sup> The “gender of governance” expresses this understanding.

The distinction between gender and sex is a familiar one: gender is the social laid upon the biological.<sup>12</sup> Gender as a construct holds that women comport themselves as innocent, dainty, docile, sexually available, and maternal, while men be courageous, strong, assertive, independent, and paternal.<sup>13</sup> Gender is sustained by the presumption that men and women have different, perhaps complementary social purposes, with men as public actors and women the keepers of the private sphere. Gender hierarchies are reproduced as individuals embrace them as natural.<sup>14</sup> Such naturalized assumptions become absorbed and reinforced within organizations, laws, and the state. Thus, gender not only naturalizes power relations, but also equips institutions with an organizing logic.<sup>15</sup>

Social and political institutions reflect and reinforce gender by acting as people-sorters, funneling people into appropriate roles and positions and validating certain social concerns—which are always embedded in social position—as more or less important.<sup>16</sup> In the early state and market economy, women’s concerns fell outside the nascent legal system’s purview and instead were subject to men’s authority as householders.<sup>17</sup> As a result, social institutions privileged men and naturalized their interests as the interests of all. With this arrangement women were formally or effectively excluded from the public sphere and thus denied the opportunity—with some exceptions—to serve as elected officials, judges, voters, jurors, and—importantly for the present analysis—members of arms-wielding forces for public defense.<sup>18</sup> As the mechanism for governing the public sphere, the state reinforced gender relations operating in the private sphere.

But the state also incorporates and performs in the public sphere gender roles developed in the private sphere.<sup>19</sup> Indeed, the state’s legitimacy may rest in part

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(2011); R. W. CONNELL, *MASCULINITIES* (2d ed. 2005); Candace West & Don H. Zimmerman, *Doing Gender*, 1 *GENDER & SOC’Y* 125 (1987).

11. See, e.g., Brown, *supra* note 3; Joan W. Scott, *Gender: A Useful Category of Historical Analysis*, 91 *AM. HIST. REV.* 1053 (1986).

12. However, feminist scholars question whether the causal arrow is reversed here, such that the construct of sex is social, as well. See BUTLER, *supra* note 10; ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* (2000).

13. See West & Zimmerman, *supra* note 10; IRIS MARION YOUNG, *THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY* (1990).

14. See also BUTLER, *supra* note 10; CONNELL, *supra* note 10; West & Zimmerman, *supra* note 10.

15. See Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 *GENDER & SOC’Y*, 139 (1990).

16. See *id.*

17. See LINDA KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES* (1998).

18. B. ANN TLUSTY, *THE MARTIAL ETHIC IN EARLY MODERN GERMANY: CIVIC DUTY AND THE RIGHT OF ARMS* 12 (2011).

19. See EILEEN McDONAGH, *THE MOTHERLESS STATE: WOMEN’S POLITICAL LEADERSHIP AND AMERICAN DEMOCRACY* (2009); CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988); Scott, *supra* note 11.

on how faithfully it reflects the gendered organization of society.<sup>20</sup> With its origins in a gendered social contract, the American state grew and evolved to project a variety of masculine faces.<sup>21</sup> These configurations of governance adopt distinct gendered stances vis-à-vis the regulation and sanction of guns.

From this body of work, several considerations emerge. First, understanding gender means paying particular attention to the relationship between the public and private spheres and between men's and women's roles.<sup>22</sup> Second, gender exists in the multiple, not the singular: There are masculinities and femininities that are contextually defined and historically specific.<sup>23</sup> Third, gender is not simply about bodies and norms; it is also about power relations that both shape the social world and provide a legitimating framework to forge new institutions of governance or remake existing ones.<sup>24</sup>

If governance is gendered, guns have been integral to defining its parameters. Guns delineate the shifting and at times blurry boundary between private men and public men. Likewise, gun policy reveals the evolving and at times contradictory approaches to how society and the state mobilize and regulate armed men in the private and public spheres. Gendered governance of firearms has evolved in three modes: chivalrous governance, paternal governance, and fixed governance. Each mode reflects different configurations of the governance of gender and the gender of governance. As Table 1 shows, firearms are central to defining how gender roles are organized and projected under different kinds of gendered governance.

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20. See PATEMAN, *supra* note 19.

21. See Brown, *supra* note 3.

22. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

23. See CONNELL, *supra* note 10.

24. See Scott, *supra* note 11.

**Table 1: Guns & Governance**

	<b>Governance of Gender</b>	<b>Gender of Governance</b>
<b>Chivalrous Governance</b>	<p>State endorses public use of arms; recognizes private use of arms (for example, on behalf of state; think: martial ethic)</p> <p>Women are relegated to the private sphere; men are political actors.</p>	<p>Masculine Protectionism:</p> <p>Masculine private prerogative is constitutive of the state; individual men are required to serve in militia and are chief instruments of state power; masculine prerogative is central to early modern state formation</p> <p>Public is an effect of the private</p>
<b>Paternal Governance</b>	<p>State regulates and delimits public and private use of arms (for example, as state consolidation)</p> <p>Women are policy beneficiaries; men are political actors. Women are victims in need of protection; men are state agents charged with protection role.</p>	<p>Paternalism:</p> <p>Masculine private prerogative is absorbed into the state; individual men carry out manly prerogative on behalf of state as a form of state consolidation</p> <p>Public shapes the private</p>
<b>Fixed Governance</b>	<p>State recognizes and expands private use of arms relative to paternal governance (for example, on behalf of individuals; think: Stand Your Ground)</p> <p>Women as actors capable of self-protection; men as actors charged with household protection.</p>	<p>Masculine Private Prerogative:</p> <p>Prerogative to protect is reclaimed from the state; individual men act out masculine prerogative as a form of neoliberal state devolution</p> <p>Private is an effect of the public</p>

Each of these styles of governance draws on gender ideologies (for example, men as protectors, women as victims) as a means of organizing who should have access to guns, on what grounds, with what kinds of restrictions, and to what ends. Notice, however, that the manner in which gender is mobilized differs across these modes of governance. First, the governance of gender varies with respect to men's versus women's incorporation in the political sphere. Women were excluded under chivalrous governance, recognized as policy beneficiaries under paternal governance, and framed as empowered citizens under fixed governance. Second, the gender of governance varies with respect to the relationship between

public and private prerogatives. Under chivalrous governance, men's individual private prerogatives became a critical component of early state-building. In other words, the public functions of the state were an effect of the private prerogatives of men. Under paternal governance, the state consolidation of masculine police power came into its own; the public prerogatives of the state could now be marshaled to reshape the private. Under fixed governance, this process comes full circle. Men and (to a lesser extent) women claim the prerogative to protect and police as a duty of citizenship amid state failure. The relationship between the private and public prerogatives calls attention to the third distinction across these three modes of governance: Who serves as the guarantor of public order? The three modes suggest three answers: the militia (chivalrous governance); the state (paternal governance); and the individual (fixed governance).

### III

#### CHIVALROUS GOVERNANCE

The early American Republic illustrates "chivalrous governance." Chivalrous governance centers on the male-dominated militia as a model of state-building, both in a practical and symbolic sense. Able-bodied men were required to serve in the militia and were chief instruments of state power. The masculine prerogative to protect, built on a notion of household discipline, provided a *raison d'être* for the early modern state.<sup>25</sup> A masculine ethos of honor and duty held sway, and guns were a means of upholding these values. Recognizing and at times regulating this honor culture, laws and jurisprudence surrounding firearms both reinforced and strengthened their collective, civic uses and recognized men's prerogatives within the home.<sup>26</sup> Domestic relations, particularly with regard to the protection of women, generally remained outside the state's purview.<sup>27</sup>

#### A. Chivalrous Governance: Militias And The Birth Of The Public Sphere

One body of scholarship on the Second Amendment takes the militia as its point of departure.<sup>28</sup> Citizen militias were articulated by Aristotle and resuscitated by Machiavelli as a foundation of a true and virtuous citizenry and a bulwark against authoritarianism.<sup>29</sup> Indeed, Machiavelli placed the militia at the

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25. MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* (2005); Markus Dirk Dubber, "The Power to Govern Men and Things": *Patriarchal Origins of the Police Power in American Law*, 52 *BUFF. L. REV.* 1277 (2004).

26. SPITZER, *supra* note 9; Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 *HARV. J.L. & GENDER* 237 (2008).

27. See, e.g., ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* (2004); see also Brown, *supra* note 3.

28. See, e.g., SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006); SPITZER, *supra* note 9; Brief for Professors of Linguistics and English as Amici Curiae, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

29. STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A*

center of his concept of republican citizenship.<sup>30</sup> He believed that militias were more effective than mercenaries because militiamen had deeper ties to their communities and hence more at stake.<sup>31</sup> Motivated by duty, honor, and protection of hearth and home, citizen militias were the centerpieces of good government because of their ability to enforce order both within communities on behalf of rulers and against rulers on behalf of communities.

The public bearing of arms as a civic duty dates back to practices surrounding early state formation in Europe. In the shift from subject to citizen, heads of households (by and large white, non-clerical, non-Jewish men) were expected to generalize the obligations, duties, and prerogatives from their households to the community at large.<sup>32</sup> In seventeenth century Germany, for example, men's civic oaths included "not only a pledge of obedience to authority, but also expressions of loyalty to the town and its residents and a promise specifically to protect the community from harm."<sup>33</sup> Militia service, reinforced by historical lore, associated masculinity with bravery, courage, and strength. Emerging out of this obligation was a martial ethic that linked men's self-understanding as householders to their identity as citizens and provided them with an arms-centric sense of honor and duty.<sup>34</sup> In this way, gendered citizenship, grounded in property ownership, carried with it the abstract obligation to protect and the concrete requirement to bear arms. The protectionist logic was rooted in the private sphere: "The gallantly masculine man is loving and self-sacrificing, especially in relation to women. . . . The role of this courageous, responsible, and virtuous man is that of a protector."<sup>35</sup> Such household arrangements of early modern Europe provided fodder to imagine order maintenance—that is, militias and later more formalized state apparatuses such as public law enforcement—in gendered terms.<sup>36</sup> The personal became political.

In the early American civic republican tradition, good citizens (at this point in history, white men) were those who participated in public life, including through service in the militia. Militias were arms of and building blocks for the nascent state. Men of high station moved easily between militia leadership and

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CONSTITUTIONAL RIGHT 7, 17 (2013).

30. Maarten Prak, *Citizens, Soldiers and Civic Militias in Late Medieval and Early Modern Europe*, 228 PAST & PRESENT 97–98 (2015).

31. *Id.*

32. Because citizenship was predicated on property ownership, the citizen militia generally excluded women—they were property, rather than property owners. See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975). But it is important to remember that because women were not explicitly excluded, at times they were "provisionally included" or included to play a "supporting role." For example, in some areas, "[f]emale heads of households were expected to contribute to militia service, but only financially." Prak, *supra* note 30 at 93, 108. Here, the exception proves the centrality of "household rule" to early militia service.

33. TLUSTY, *supra* note 18, at 12.

34. *Id.* at 2.

35. Iris Marion Young, *The Logic of Masculinist Protection: Reflections on the Current Security State*, 29 SIGNS 1, 4 (2003).

36. See DUBBER, *supra* note 25; Dubber, *supra* note 25; Scott, *supra* note 11.



political leadership, and often held these positions simultaneously.<sup>37</sup> In this universe, masculinity equated to public virtue, while “effeminacy,” as applied to males, signified excessive concern with private striving.<sup>38</sup>

Debates surrounding the Second Amendment in particular centered on white men’s order-maintenance prerogatives within the public sphere. The founders “were heirs to an Anglo-Norman legal tradition which required free men to keep arms to defend the realm and suppress crime.”<sup>39</sup> For example, under English law going back at least to the Elizabethan era and affirmed repeatedly in the centuries afterward, “private individuals are not only permitted but expected by law to endeavor to suppress and prevent riots . . . [t]he law acknowledges no distinction in this respect, between the soldier and the private individual.”<sup>40</sup>

From the founding through the early decades of the nineteenth century, private men acted alone and collectively to police the public sphere. However, the state—here, meaning the separate American states—regulated these activities. States and their localities crafted laws to ensure that the private keeping and bearing of firearms by individual citizens served chivalrous aims, those that were “other regarding” and civic in their purpose. Early laws covered two purposes for arms: the private keeping of arms for public (militia) service and the public carrying of arms for private purposes. In both cases, the emerging (masculine) state sought to define honorable practices associated with men’s gun ownership while curbing its dishonorable excesses.

At the federal level, the Uniform Militia Act of 1792<sup>41</sup> defined the militia as all “free able-bodied white male citizens” between eighteen and forty-five but left the regulation of arms to the states.<sup>42</sup> States assumed an assertive posture. Many required men to own guns for public defense while reserving the right to confiscate these private arms when required for public purposes.<sup>43</sup> State agents conducted door-to-door firearms censuses to ensure compliance.<sup>44</sup> Armed males served as defenders of the commonweal, as well as of themselves and their homes.<sup>45</sup> The keeping of arms was a civic right (and in some instances, duty) subject to state oversight.<sup>46</sup> States acted early to regulate the manifestations of arms-bearing that exceeded this public function. In the late eighteenth century, colonial and state governments enacted laws against carrying firearms in a

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37. ALLAN R. MILLETT, PETER MASLOWSKI, & WILLIAM B. FEIS, FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES FROM 1607 TO 2012 5 (2012).

38. See generally Stephen T. Leonard & Joan C. Tronto, *The Genders of Citizenship*, 101 AM. POL. SCI. REV. 33 (2007).

39. Inge Anna Larish, *Why Annie Can’t Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 U. ILL. L. REV. 467, 481 (1996).

40. Note, *On the Law Respecting Riots, Routs, and Unlawful Assemblies*, 9 MONTHLY L. MAG. 210, 218–220 (1840–1841).

41. The Militia Act of 1792, art. 1, § 1.

42. CORNELL, *supra* note 28, at 67.

43. See SPITZER, *supra* note 9.

44. See *id.*

45. See CORNELL, *supra* note 28.

46. See *id.*

threatening manner or in crowded places, and in the early nineteenth century, some states enacted bans on the carrying of concealed weapons entirely.<sup>47</sup> States imposed these restrictions even while constitutionally acknowledging the private right of self-defense.<sup>48</sup>

Guns were regulated as a matter of public order, although different regional cultures would shape the form of this regulation. Northern states tended to more strictly link public gun carrying with collective defense and to consider the practice a “civic right.”<sup>49</sup> Whereas Northern states folded men’s prerogative into state prerogatives, Southern states took pains to differentiate between men’s honorable carrying, that which served personal or collective defense, and dishonorable carrying, which courts associated with arousing public fear, threatening public safety, offending public morals, or facilitating unmanly duplicity.<sup>50</sup> For example, upholding Louisiana’s 1813 ban on concealed weapons, the state’s Supreme Court in *State v. Chandler* held that the law

interfere[s] with no man’s right to carry arms . . . ‘in full open view,’ which places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.<sup>51</sup>

This “culture of honor” arguably was shaped by the economic and political specificities of the South relative to the North.<sup>52</sup> The southern states’ command of men’s use of force in the public sphere remained incomplete, as evidenced by the problem of dueling:

Dueling in the southern United States formed part of an unbroken tradition of violence . . . Courts and juries routinely acquitted those accused of homicide; it was an act of self-defense to shoot your enemy when you saw him, because he might shoot you next time. The fact that the antebellum South was an honor-and-shame society was related to the relative absence of a central monopoly on violence. . . . By contrast, spiritualized concepts of honor [in other words, in contrast to violence-centric notions], called gentility or dignity by historians, spread in the North in the course of the nineteenth century.<sup>53</sup>

While Northern white men increasingly framed their identities around market relations (for instance, the “self-made man”), Southern white men

47. See SPITZER, *supra* note 9.

48. Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715 (2006).

49. Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 STAN. L. & POL’Y REV. 571, 572 (2006); see also SPITZER, *supra* note 9.

50. See *State v. Reid*, 1 Ala. 612 (1840); *State v. Chandler*, 5 La. Ann. 489 (1850); *State v. Huntly*, 25 N.C. 418 (1843); *Andrews v. State*, 50 Tenn. 165 (1871); *Aymette v. State*, 21 Tenn. 154 (1840).

51. *State v. Chandler*, 5 La. Ann. at 490.

52. See RICHARD E. NISBETT & DOV COHEN, *CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH* (1996).

53. Pieter Spierenburg, *Introduction to MEN AND VIOLENCE: GENDER, HONOR, AND RITUALS IN MODERN EUROPE AND AMERICA* 1, 23–25 (Pieter Spierenburg ed., 1998).

emphasized “independency, mastery over female, child, and slave dependents, the use of violence to enforce patriarchy, and the importance of honor to unite the South’s white male community.”<sup>54</sup>

Regional variation notwithstanding, state firearms laws of the eighteenth and nineteenth centuries accepted the association of firearms with men’s positive civic roles. Regulations were designed to further these ends and facilitate a distinct brand of chivalrous masculinity. The implicit association between masculinity, citizenship, gun laws, and chivalrous governance is made explicit in the case of *Nunn v. State*.<sup>55</sup> There, the Georgia Supreme Court struck down a law that appeared to ban the open carrying of arms in public. To do so, the court had to reject the prevalent understanding that arms-bearing was a purely masculine function and decenter the militia’s constitutive significance to the right to keep and bear arms:

The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree.<sup>56</sup>

Legal cases surrounding the Second Amendment took place on masculine terrain—they were focused on how men’s use of guns fit into the maintenance of public order. This case, however, represents a departure insofar as it emphasizes women’s capacity to keep and bear arms on individualist rather than collectivist terms.<sup>57</sup> Perhaps reflecting fears ignited during the Civil War that would escalate into the lynch mobs of the Jim Crow era, women here are imagined as the appropriate bearers of arms for self-defense. Only with the rejection of the militia clause do women become imaginable as public arms-bearers.<sup>58</sup>

## B. Chivalrous Governance: The Sanctification Of Men’s Private Prerogatives

Guns in the early American republic, however, were not simply about civic duty. Another body of Second Amendment scholarship documents the broad legal recognition and social acceptance of private gun use.<sup>59</sup> Early jurisprudence on self-defense in the private sphere considered it “off-limits” to government intrusion, meaning that “self-defense is like breathing or whistling. It is like the multitude of rights that those who debated the Ninth Amendment argued were part of the innumerable rights retained by the people.”<sup>60</sup> In the context of the antebellum South, this presumption not only left women outside the purview of

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54. Bryan C. Rindfleisch, “*What it Means to Be a Man*”: *Contested Masculinity in the Early Republic and Antebellum America*, 10 HIST. COMPASS 852, 858 (2012).

55. *Nunn v. State*, 1 Ga. 243 (1846).

56. *Id.* at 251.

57. See Larish, *supra* note 39, at 472.

58. See *id.* at 481 n.101.

59. See Robert H. Churchill, *Gun Regulation, The Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139 (2007); Johnson, *supra* note 48.

60. Nicholas J. Johnson, *Self-Defense?* 2 J. L. ECON. & POL’Y 187, 194 (2006).

state protection but also protected the prerogative of white masters to “discipline” slaves.<sup>61</sup>

Besides recognizing guns as enabling civic duty, the chivalrous state empowered men to wield firearms in defense of themselves and their “castle.” From the eighteenth century onward, state constitutions routinely—and explicitly—incorporated gun rights as individual rights. Although the provisions varied, Kentucky’s Constitution is illustrative: “[t]he rights of the citizens to bear arms in defense of themselves and the State shall not be questioned.”<sup>62</sup> Though states, particularly after the Civil War, declared gun rights on behalf of gender-neutral citizens as doctrine,<sup>63</sup> court cases provide insight into how gender shaped the practice of gun rights.

In the nineteenth and twentieth centuries, courts developed legal standards defining the circumstances under which self-defensive force was lawful and morally legitimate. These standards were self-consciously tailored to the American context and applied both to the home and to the public sphere. “No duty to retreat” doctrine was developed in concert with “the values of masculine bravery in a frontier nation” to protect the right of the blameless “true man” to fight back if provoked.<sup>64</sup> Standing one’s ground was especially suited to the American man, for “the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed.”<sup>65</sup> In *Beard v. United States*, the U.S. Supreme Court held that an individual who is where he has a right to be, and who reasonably fears serious bodily harm or death, may respond with force to protect himself.<sup>66</sup> Citing *Beard*, the Wisconsin Supreme Court made the redefinition of masculinity explicit: The old doctrine of retreat to the wall “may have been all right in the days of chivalry, so called” but had become “unadaptable to our modern development.”<sup>67</sup> Thus the courts began to recognize a new variant of American chivalry, one that understood male citizenship as each man to his own, untethered to civic service.

The prevalence of guns in nineteenth century America was fundamental to the redefinition of the individual right to exercise violence. The Supreme Court of Minnesota spelled out the connection in *State v. Gardner*.<sup>68</sup> While it would make “good sense” to require retreat to the wall when fights involved merely fists or clubs, the Court reasoned, it would be “rank folly” to require retreat when

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61. See MARK V. TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE* (2003).

62. Johnson, *supra* note 48, at 730.

63. For example, the 1836 Arkansas Constitution read, “the free white men of this State shall have a right to keep and to bear arms for their common defense.” This was modified in 1874 to “[t]he citizens of this State shall have the right to keep and bear arms for their common defense.” Johnson, *supra* note 48, at 734 n. 94.

64. RICHARD MAXWELL BROWN, *NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY* 17 (1991); see also *Erwin v. State*, 29 Ohio St. 186 (1876).

65. *Runyan v. State*, 57 Ind. 80, 84 (1877).

66. *Beard v. United States*, 158 U.S. 550 (1895).

67. *Miller v. State*, 139 Wis. 57, 75 (1909).

68. *State v. Gardner*, 96 Minn. 318 (1905).

coming face to face with “experienced men, armed with repeating rifles.”<sup>69</sup> By 1921, the U.S. Supreme Court affirmed the “no duty to retreat doctrine” in *Brown v. the United States*.<sup>70</sup> Reflecting in private correspondence on the decision he had penned, Justice Oliver Wendell Holmes maintained that “‘it is well settled’ that ‘a man is not born to run away’ . . . [and that] the law ‘must consider human nature and make some allowances for the fighting instinct at critical moments.’”<sup>71</sup> A few years later, this principle of masculine courage would be tested in the case of Ossian Sweet, an African American doctor who moved to an all-white block in Detroit and faced an angry mob shortly after his arrival.<sup>72</sup> After firing shots at the all-white crowd and killing one man, Sweet and the other occupants of the house were tried for murder.<sup>73</sup> In the two trials that ensued in 1925 and 1926,<sup>74</sup> Clarence Darrow famously framed the Castle Doctrine in terms of America’s past and present regimes of racial terror, asserting to jurors that “[i]f you had the courage, you would have done as Dr. Sweet did. You would have been crazy or a coward if you hadn’t.”<sup>75</sup> Summarizing the acquittal of another defendant in the second trial, Darrow noted in his memoir that “[t]he verdict meant simply that the doctrine that a man’s house is his castle applied to the black man as well as to the white man. If not the first time that a white jury had vindicated this principle, it was the first that ever came to my notice.”<sup>76</sup> With this case, the true American man crossed the color line, but the emphasis on men’s prerogative to protect remained intact.

The early state regulation and warranting of civilian guns, therefore, seemed in line with the private/public divide whereby men’s public activities both constituted and came under the purview of the state—but men’s prerogatives in the home remained, as natural rights, outside of the state’s reach. This public/private binary was implicitly gendered and embodied the Second Amendment right to keep and bear arms. Public man acted for the state by bearing arms; private man protected the home—castle and the women therein by keeping arms.

Such tolerance for private prerogatives within the household, however, would not last. Soon, the state that deemed men’s household prerogatives a useful trope for forging early statecraft would expand to more explicitly define, endorse, and,

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69. *Id.* at 327.

70. *Brown v. United States*, 256 U.S. 335 (1921).

71. BROWN, *supra* note 64, at 34.

72. See generally KEVIN BOYLE, *ARC OF JUSTICE: A SAGA OF RACE, CIVIL RIGHTS, AND MURDER IN THE JAZZ AGE* (2004).

73. See Michael Hannon, *The People of Michigan v. Ossian Sweet et al. (1925) The People of Michigan v. Henry Sweet (1926)* (2010).

74. A mistrial was declared, and charges against all but one of the original defendants were dismissed. In the subsequent trial, *People v. Henry Sweet* (1926), the defendant, Henry Sweet, would be tried and acquitted.

75. MICHAEL S. LIEF & H. MITCHELL CALDWELL, *THE DEVIL’S ADVOCATES: GREATEST CLOSING ARGUMENTS IN CRIMINAL LAW* 302 (2006).

76. CLARENCE DARROW, *THE STORY OF MY LIFE* 311 (1996).

at times, restrict those private prerogatives while continuing to demarcate the public use of force.

#### IV

#### PATERNAL GOVERNANCE

The state began as assemblies of men acting in a voluntary capacity, often with arms at their side. But soon a formal, if complementary, governing apparatus arose: paternal governance. Two developments characterize paternal governance: first, the state's absorption of the masculine prerogative to protect, and, second, greater efforts by the state to circumscribe public and private uses of guns. Beginning in the early nineteenth century and accelerating after the Civil War, government began assuming many of the public protective functions once performed by volunteer militiamen, as well stepping in to fill private protective functions over women's welfare that had been the province of male householders. Paternal governance arrived at a time when women still lacked the legal, economic, and political standing to protect themselves. During this time, as discussed in part III, courts and legislatures fortified individual men's prerogative to use protective force honorably to defend themselves and their castle. Thus, under the paternal governance, a state constructed in the masculine image, supplemented by legally empowered men, served as society's protectors, while women were understood to benefit from such protection. These developments and their tensions helped lay the groundwork for the political battles over guns today.

##### A. Paternal Governance: Policing The Public Sphere

Throughout the nineteenth and twentieth centuries, the state consolidated its prerogative to protect the citizenry and to regulate privately held arms. America witnessed the growth and professionalization of the fulltime military, the National Guard, and the police, putting the authoritative wielding of firearms firmly in state hands. The U.S. Military Academy at West Point was founded in 1802 to train army officers, and in the aftermath of the War of 1812, Congress provided money to enlarge, professionalize, and—in the case of the Army—centralize the military apparatus.<sup>77</sup> On the domestic front, police forces developed in 1850–1880 in most large cities and embraced military elements such as ranks and uniforms to distinguish police from civilians.<sup>78</sup> The bureaucratic face of paternal governance was well in place by the Civil War.

The state also built up a regulatory structure, including gun laws at the local and state levels and later federally, to shift the maintenance of public order toward government. Laws regulating firearms, particularly in public places, proliferated in the first half of the nineteenth century and later spread across the

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77. See MILLETT, MASLOWSKI, & FEIS, *supra* note 37.

78. See ERIC H. MONKKONEN, *POLICE IN URBAN AMERICA, 1860–1920* (2004).

country as states were added to the union.<sup>79</sup> These laws banned dueling, barred discharging of firearms in public places, and prohibited the carrying of concealed weapons. Courts generally deferred to legislatures and upheld these laws.<sup>80</sup> For example, in *Presser v. Illinois*, the U.S. Supreme Court upheld the state of Illinois' right to bar a private paramilitary militia from parading without a license.<sup>81</sup> And in *United States v. Miller*, the Court let stand an early federal gun control law, the National Firearms Act, on the grounds that it regulated guns that did not "contribute to the common defense."<sup>82</sup> Although emerging from very different circumstances, these cases reflect a common tilt toward state authority vis-à-vis individual gun rights.

Even as the state regulated privately armed groups, it also empowered them in certain circumstances. The National Rifle Association, founded in 1871, received substantial federal support to operate marksmanship training to the ultimate benefit of the U.S. military.<sup>83</sup> Meanwhile, at the state and local levels, authorities looked the other way as Southern vigilante groups such as the Ku Klux Klan arose during Reconstruction to conduct a reign of racial terror. Even the U.S. Supreme Court declined to intervene, as illustrated by *United States v. Cruikshank*.<sup>84</sup> The armed vigilante groups of the South emerged as a backlash to Northern efforts to arm Negro militias for the common defense of freedmen and would outlast Reconstruction to shape the racial terror of the Jim Crow era.<sup>85</sup> Thus, as the state was empowering white people with guns, states were often restricting firearm access to people of color, especially recently freed slaves.<sup>86</sup>

Under paternal governance, the state expanded its public protection functions throughout the twentieth century. The three bursts of federal lawmaking on guns—in the 1930s, 1960s, and 1990s—came in response to growing anxieties about violence and disorder. The National Firearms Act of 1934<sup>87</sup> and the Federal Firearms Act of 1938<sup>88</sup> grew out of Prohibition-era gangland violence and an attempted assassination of President Franklin Roosevelt. The Omnibus Crime Control and Safe Streets Act<sup>89</sup> and the Gun Control Act<sup>90</sup> passed in 1968 amid assassinations of key political figures, anti-war protests, rising crime, and urban riots. The Brady Handgun Violence Prevention

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79. See SPITZER, *supra* note 9.

80. *But see* *Nunn v. State*, 1 Ga. 243 (1846); *Bliss v. Commonwealth*, 12 Ky. 90 (1822).

81. *Presser v. Illinois*, 116 U.S. 252 (1886).

82. *United States v. Miller*, 307 U.S. 174, 178 (1939).

83. See KRISTIN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA* 75 (2006).

84. *United States v. Cruikshank*, 92 U.S. 542 (1875).

85. ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 143 (2011).

86. R. J. Cottrol & R. T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); JOHNSON, *supra* note 9.

87. Pub. L. No. 73-474, 48 Stat. 1236 (1934) (codified as 26 U.S.C. § 5801 et seq.).

88. Pub. L. No. 75-785, 52 Stat. 1250 (1938) (codified as 15 U.S.C. § 901 et seq.) (repealed).

89. Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified at 42 U.S.C. § 3711).

90. Pub. L. No. 90-618, 82 Stat. 1213 (codified as 18 U.S.C. § 921 et seq.).

Act of 1993<sup>91</sup> and the Violent Crime Control and Law Enforcement Act of 1994<sup>92</sup> were the products of a gun violence epidemic fueled by gang wars over illegal drug markets.<sup>93</sup> As in previous eras, this disorder—both real and imagined—compelled a collectivist response that entailed a bolstering of paternal governance.

### B. Paternal Governance: Protecting Women In The Private Sphere

When it came to the protection of women in the private sphere, paternal governance was slow to evolve. Even as the state absorbed protective functions once associated with chivalrous men in the public sphere, it let stand patriarchal relations within the home and offered little if any recourse to women threatened by violence.<sup>94</sup> The sluggish evolution was historically anomalous, for in other realms, women successfully enlisted the state to intervene on their behalf. Early policy victories, such as prohibition measures in the late nineteenth and early twentieth centuries<sup>95</sup> and state widows' pensions in the 1910s,<sup>96</sup> can be understood as efforts by organized womanhood to secure state protection of wives whose husbands could not or would not perform their socially prescribed role.

Surprisingly, however, violence against women in the home did not become an enduring policy issue until many decades later. Although Massachusetts Puritans outlawed wife beating in the seventeenth century, and female reformers of the 1870s–80s called attention to spousal abuse and neglect, the state generally deferred to the “family ideal,” which prioritized family privacy and unity over female protection.<sup>97</sup> The second-wave women's movement, which emerged in the mid-1960s and had institutionalized by the early 1980s, challenged those assumptions. Battered-women's activists turned to the state to protect women from violent men. This effort began in the civil society sector through the creation of battered women's shelters, then shifted to legislative advocacy resulting in public funding of domestic violence services and changes in laws and protocols that would empower police, prosecutors, and other state agents to intervene in abusive domestic relations.<sup>98</sup> Coinciding with the 1970s War on Crime, the movement enjoyed other policy advances, including the introduction of rape kits and the criminalization of marital rape and stalking.<sup>99</sup> Interestingly, however,

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91. Pub. L. No. 103-159, 107 Stat. 1536 (codified as 18 U.S.C. § 921 et seq.).

92. Pub. L. No. 103-322, 108 Stat. 1796 (codified as 18 U.S.C. § 921 et seq.).

93. See RANDOL CONTRERAS, *THE STICKUP KIDS: RACE, DRUGS, VIOLENCE, AND THE AMERICAN DREAM* (2013).

94. See Brown, *supra* note 3.

95. See RUTH BORDIN, *WOMAN AND TEMPERANCE: THE QUEST FOR POWER AND LIBERTY, 1873–1900* (1981).

96. See THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992).

97. PLECK, *supra* note 27.

98. See SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* (1982); Nancy Whittier, *Carceral and Intersectional Feminism in Congress: The Violence Against Women Act, Discourse, and Policy*, 30 *GENDER & SOC'Y* 791(2016).

99. See KRISTIN BUMILLER, *IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE*



histories of these movements suggest that they placed little emphasis on guns as tools of gender violence.

By the mid-1990s, however, movements against gender violence began to see the paternal state as an ally in policing the use of guns in the private sphere. Policymakers leveraged the moral language of the feminine sphere, alongside a crime-fighting mandate, to summon the masculine state to restrain male power. These understandings were central to the Violence Against Women Act (VAWA), passed as part of the 1994 crime bill.<sup>100</sup> This important legislation empowered the state to figuratively enter the home of adjudicated abusers, defying the state's traditional deference toward men's autonomy within the home.<sup>101</sup> The law banned the receipt, possession, and transfer of firearms by broad categories of civilians (spouses, co-parents, co-habitants) who were subject to a domestic violence protection order.<sup>102</sup> The law also created a new arm of the state—the federal Office of Violence Against Women—to disburse money to law enforcement agencies and civil society organizations to enforce the new regulations and otherwise prevent and prosecute domestic abuse.<sup>103</sup> Thus, VAWA represented an expansion of state authority into the violence-prone home, giving police both a clearer monopoly on the use of force and greater funding to carry out their mandate.

Although the law provided important tools for women's protection, VAWA's implications for gendered governance have been ambiguous. On the one hand, gaps in enforcement have persisted despite VAWA. Although police notification and perpetrator arrests have increased since VAWA's enactment,<sup>104</sup> police are not constitutionally obligated to enforce restraining orders.<sup>105</sup> Meanwhile, the association of gun prohibitions with restraining orders may, perversely, motivate judges to deny restraining order requests altogether because of the gun restrictions they entail.<sup>106</sup> On the other hand, some critics have worried about over-enforcement, wondering if the law has rendered women (as well as men of color) more vulnerable to state coercion.<sup>107</sup> Mandatory arrest policies, for example, have drawn feminist criticism for undermining women's agency by disregarding their judgment about how best to ensure their safety,<sup>108</sup> and in the

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FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE (2008).

100. See Whittier, *supra* note 98.

101. BUMILLER, *supra* note 99; JEANNIE SUK, *AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY* (2009).

102. 18 U.S.C. § 922(g)(8).

103. U.S. Department of Justice, Office of Violence Against Women, *About the Office*, <https://www.justice.gov/ovw/about-office> [<https://perma.cc/85GH-TSUR>].

104. See Hyunkag Cho & Dina J. Wilke, *How Has the Violence Against Women Act Affected the Response of the Criminal Justice System to Domestic Violence?* 32 J. SOC. & SOC. WELFARE 125 (2005).

105. See *Town of Castle Rock v. Gonzales* 545 U.S. 748, 766 (2005).

106. See Lisa D. May, *The Backfiring of the Domestic Violence Fire Arms Bans*, 14 COLUM. J. GENDER & L. 1, 1 (2005).

107. BUMILLER, *supra* note 99.

108. See Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657 (2004).

process potentially increasing harm to women.<sup>109</sup> Similar worries about unintended consequences have surrounded policies requiring the seizure or surrender of firearms from abusers. These debates epitomize risks inherent in the patriarchal bargain.<sup>110</sup> Women summoned the state to challenge patriarchal norms and power arrangements but then found themselves subject to new forms of paternalism.<sup>111</sup>

The 1994 VAWA was also beset by another set of contradictions endemic to paternal governance. The law followed a precedent of government exceptions: Police officers were exempt from VAWA's protective-order provision, even though police families experience elevated rates of domestic violence.<sup>112</sup> This was not new. The 1968 Gun Control Act barred certain classes of presumptively dangerous people (felons, indicted persons, fugitives, drug addicts, and adjudicated "mental defectives") from possessing firearms<sup>113</sup> but carved out an exception for firearms "issued for the use of" government agencies.<sup>114</sup> Thus, it was possible to deny firearm rights to presumptively dangerous individuals in their capacity as private citizens, while guaranteeing firearm rights to these same classes of people operating as agents of the state.<sup>115</sup> The government exception effectively ensured that regulation of firearms in the private sphere would not interfere with the state's prerogative power.

Soon after VAWA's passage, two cornerstones of paternal governance—the bureaucratization of public protection and the extension of the state into the private sphere—collided over the issue of firearm rights. The 1996 Lautenberg Amendment barred all domestic violence misdemeanants—whether civilians or state agents—from obtaining, possessing, or transferring a firearm.<sup>116</sup> The Amendment and subsequent legal challenges forced a difficult reckoning between the two incarnations of paternal governance, that which deploys armed men in public protection and that which seeks to protect women in the private

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109. See Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws*, 93 J. PUB. ECON. (2009).

110. See Heidi I. Hartmann, *The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union*, 3 CAP. & CLASS, Summer 1979, at 17.

111. See Sack, *supra* note 108; Brown, *supra* note 3.

112. See Peter H. Neidig, Harold E. Russell, & Albert F. Seng, *Interspousal Aggression in Law Enforcement Families: A Preliminary Investigation*, 15 POLICE STUD. INT'L REV. POLICE DEV. 30, 30 (1992).

113. 18 U.S.C. § 922(g) (2012).

114. 18 U.S.C. § 925(a)(1) (2012). For a discussion, see May, *supra* note 106.

115. Officer-involved domestic violence (OIDV) is under-reported and under-studied. The International Association of Chiefs of Police promulgated a model policy in 1999 and updated it in 2003, but the policy has not been widely adopted. By one account, ten states have incorporated model policies on OIDV, and another nine at least recognize OIDV as a distinct issue. See Alejandra Ávila, *When the Batterer Wears a Badge: Regulating Officer-Involved Domestic Violence as a Line-of-Duty Crime*, 42 AM. J. CRIM. L. 213, 226–27 (2015).

116. Pub. L. No. 104-208 (codified as 18 U.S.C. § 922(g)(9)); see also Alison J. Nathan, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822 (1999).

sphere. In *Gillespie v. City of Indianapolis*,<sup>117</sup> a city police officer argued that prohibiting domestic violence misdemeanants from possessing guns interfered with states' sovereignty under the Tenth Amendment, specifically with respect to states' prerogative to establish the qualifications for police forces. In *Fraternal Order of Police v. United States*,<sup>118</sup> a police union argued that the Lautenberg Amendment had an unlawful disparate impact on law enforcement officers, whose employment typically requires the bearing of arms. Courts in both cases rejected these claims. In *Gillespie*, the police misdemeanant also argued that the Lautenberg Amendment violated his right to bear arms as a member, effectively, of a state militia. Reluctant to weigh in on the original intent of the Second Amendment, the U.S. District Court for the Southern District of Indiana ruled that, under any reading of the Amendment, the law should stand.<sup>119</sup>

These cases and the law that provoked them exposed the heart of the gendered state as both the embodiment of masculine power in the public sphere and the masculine agent of female protection in the private sphere. The Lautenberg Amendment brought these two dimensions of paternal governance into conflict. The courts deferred to the state's interest in entering the home to protect (mostly) women from male violence, even if that meant depriving state agents of their arms. In entering the private sphere to police traditional masculine prerogatives, the law simultaneously delineated new boundaries for the state in the public sphere.

## V

### FIXED GOVERNANCE

For at least two generations, paternal governance has been troubled. Public trust in government's capacity to solve problems has plunged.<sup>120</sup> Violent crime has served as a particularly visible manifestation of the failure of governance, as has the state's hyper-militarized reaction to social disorder. When the state underperforms or overreacts, private gun ownership may offer an enticing alternative.<sup>121</sup> Advocates of a muscular gun culture seek to fix public governance in two senses of the word: first, by neutering the state and, second, by rectifying the problems that state failure presents. "Fixed governance" describes the reclamation of the prerogative to protect by individuals (mostly men) from the state. The status of men and women as political actors is characterized by their

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117. *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999).

118. *Fraternal Order of Police v. United States*, 981 F. Supp. 1 (D.D.C. 1997); *Fraternal Order of Police v. United States*, 159 F.3d 1362 (D.C. Cir. 1998).

119. See May, *supra* note 106. In two recent cases not involving law enforcement officers, the Supreme Court upheld statutory challenges to the Lautenberg Amendment. See *United States v. Castleman*, 134 S. Ct. 1405 (2014); *Voisine v. United States* 136 S. Ct. 2272 (2016).

120. *Beyond Distrust: How Americans View Their Government*, PEW RES. CTR. (Nov. 23, 2015), <http://www.people-press.org/2015/11/23/beyond-distrust-how-americans-view-their-government/> [<https://perma.cc/4Y5W-YMRU>].

121. CARLSON, *supra* note 9.

willingness to engage in private acts of self-protection that are independent of the state but legally endorsed by it.

Gun policies established under paternal governance did not create these conditions, but they may have inadvertently facilitated American gun culture's turn toward fixing the state. Both the 1968 and 1994 laws increased restrictions on private gun ownership while validating the militarization and federalization of urban public law enforcement. The decades-long War on Crime, bookended by these laws, encouraged a victim-centric and individualist understanding of the Second Amendment.<sup>122</sup> As a set of both legal doctrines and social practices, the War on Crime led to a logical, yet contradictory conclusion: The gun violence problem was so massive and terrifying that it warranted a vast expansion of police and prisons, but even this response would fail to meet the seemingly towering challenges posed.<sup>123</sup> To reconcile these logics, Americans—any one of whom could be a victim—increasingly moved to take matters into their own hands, not as republican citizens but as individualists. As Americans endorsed widening the state's prerogative powers in the 1960s and 1990s, a countercurrent was already underway. That countercurrent favored “fixing” the state in the colloquial (and gendered) meaning of the term: “neutering.”

Fixed governance is an emerging paradigm. It is most pronounced at the level of the states, particularly those in the South, Midwest, and non-coastal West. Its most noteworthy policy manifestations include relaxed regulations surrounding concealed carrying that, increasingly, altogether remove permitting processes; organized efforts to normalize open carrying; and Stand Your Ground laws.<sup>124</sup> At the same time, fixed governance has its limits. Federal policy has retained its paternal orientation, although efforts to fix these arrangements have succeeded on occasion. Two notable examples are a 1996 appropriations rider restricting the U.S. Centers for Disease Control's ability to fund gun violence research and the 2005 Protection of Lawful Commerce in Arms Act, which constrained the courts as a venue for challenging gun industry practices.<sup>125</sup> A handful of states, mostly on the coasts, have also resisted the move toward fixed governance and, especially since the 2012 Sandy Hook school shooting, have shored up their systems of paternal governance.<sup>126</sup> These states include California, Colorado, Connecticut, Nevada, New York, and Washington, among others. Nevertheless, most of the momentum over the past three decades—both legislatively and

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122. See RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* (2013); Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 *SOC. PROBS.* 1 (1997).

123. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); David Garland, *The Culture of High Crime Societies: Some Preconditions of Recent 'Law and Order' Policies*, 40 *BRIT. J. CRIMINOLOGY* 347 (2000).

124. CARLSON, *supra* note 9.

125. Pub. L. No. 104-208, 100 Stat. 3009 (codified at 15 U.S.C. § 7901-7903).

126. Jack Holmes, *It's the Fourth Anniversary of Sandy Hook. Here's What We've Done to Stop the Next One*, *ESQUIRE* (Dec. 14, 2016), <http://www.esquire.com/news-politics/news/a51553/sandy-hook-shooting-fourth-anniversary/> [https://perma.cc/9P3N-JFER].

culturally—has been in the direction of fixing, rather than reinforcing, paternal governance.<sup>127</sup>

#### A. Fixed Governance: Reclaiming Men’s Prerogative To Protect

Over the last several decades, a distinct post-1960s gun culture has emerged that has increasingly framed gun ownership in terms of personal protection and self-defense. Though hunting used to be the number one reason Americans owned guns, today self-defense is the primary motivator.<sup>128</sup> Millions of Americans carry guns concealed, and some gun rights activists now openly bear handguns and rifles in parks, grocery stores, government buildings, and other public spaces.<sup>129</sup> These displays are intended to normalize the place of firearms in everyday life and to reinforce the image of their bearers as good citizens with guns.<sup>130</sup> This emphasis on self-defense is reflected not just in what Americans do with their guns but also in how they imagine the place of guns in the public sphere. A majority of Americans—far more than the proportion of gun owners or gun carriers—see concealed carrying as making the United States safer.<sup>131</sup>

This emphasis on self-defense reflects both a bottom-up and a top-down political shift led by a gun rights movement that made a hard turn to the right in the 1970s.<sup>132</sup> The movement’s bulwark, the National Rifle Association, has led the charge with a sophisticated strategy for transforming American gun laws. These efforts have included the loosening of concealed-carry licensing systems in most states; the preemption of municipal authority to regulate firearms and the resulting obsolescence many local ordinances in many states; the enactment of federal and state laws authorizing the restoration of firearms rights for those previously committed to mental institutions; and the passage of robust Stand Your Ground laws that effectively expand the police powers of private gun owners.<sup>133</sup> Although the National Rifle Association receives most of the credit for these policy victories, the organization has been buttressed by national and state groups promulgating even more hardline positions.

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127. CARLSON, *supra* note 9; PHILIP J. COOK & KRISTIN A. GOSS, *THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW* (2014); GOSS, *supra* note 83.

128. Art Swift, *Personal Safety Top Reason Americans Own Guns Today*, GALLUP (Oct. 28, 2013), <http://www.gallup.com/poll/165605/personal-safety-top-reason-americans-own-guns-today.aspx> [https://perma.cc/T9VL-YFES].

129. Matt Valentine, *Tallying the Costs of Open Carry*, THE ATLANTIC (Jan. 31, 2016), <http://www.theatlantic.com/politics/archive/2016/01/open-carry-laws/436665/> [https://perma.cc/4XRF-8SM2].

130. See CARLSON, *supra* note 9, at 129–31; Charles Fruehling Springwood, *Gun Concealment, Display, and Other Magical Habits of the Body*, 34 *CRITIQUE OF ANTHROPOLOGY* 450 (2014).

131. Frank Newport, *Majority Say More Concealed Weapons Would Make U.S. Safer*, GALLUP (Oct. 20, 2015), <http://www.gallup.com/poll/186263/majority-say-concealed-weapons-safer.aspx> [https://perma.cc/8XGY-55Y6].

132. See GOSS, *supra* note 83; ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* (2015).

133. See COOK & GOSS, *supra* note 127; Kristin A. Goss, *Defying the Odds on Gun Regulation: The Passage of Bipartisan Mental Health Laws Across the States*, 85 *AM. J. ORTHOPSYCHIATRY* 203 (2015); GOSS, *supra* note 83.

And yet, the shift toward protection-oriented gun ownership is not simply the work of a cadre of gun rights proponents. Rather, it has occurred within a “constitutional moment” centered “around the problem of criminal violence and the widespread and enduring fear among Americans that our systems of public security, primarily our criminal justice system, could not protect them from becoming victims.”<sup>134</sup> The *Heller* Court blessed the individual-protection perspective and may have facilitated its absorption by the mass public. But popular sensibilities about crime and punishment likely have also played a role: the gun rights position “seem[s] to have an even stronger hand” because proponents “can argue that gun ownership offers the most direct way for citizens to assure their own defense against lethal violence by others.”<sup>135</sup> Laws enacted at the federal and state levels since 1968 resonate with the pro-gun position insofar as:

It is profoundly mistrustful of government action, especially by New-Deal-type collectivist social agencies.

It believes in a zero-sum game of security between victims and criminals.

It celebrates crime victims as possessors of the truth more important than scientific studies or political hierarchies.

It recognizes lethal violence as a legitimate response to lethal violence.<sup>136</sup>

In this list, two ideas are especially relevant to the present analysis: the rejection of paternal governance (“collectivist social agencies”) and the embrace of fixed governance (individuals’ supremacy over “political hierarchies,” that is, the state). The household, especially the suburban home, is not the foundation of engaged citizenship, as under chivalrous governance, but rather a place where governance is left to the individual: “[s]uburban life had a soft white underbelly. If a malevolent stranger were to penetrate the geographic divide, the individual homeowner would be largely on his or her own.”<sup>137</sup> It is through the linkage between the home-as-vulnerable and crime-as-rampant constructs that the Second Amendment was recognized as an individual right in *Heller*: “the key situation in which Americans want to be armed is in protecting their home against a malevolent invader.”<sup>138</sup>

This centering of the Second Amendment on the home and the family provides a ripe context for men to stake their status as men. Contemporary gun culture often follows a familial prerogative that locates men’s rights and obligations to own, carry, and use guns in their social roles as fathers and husbands.<sup>139</sup> This citizen-protector model of gun-oriented masculinity makes the political personal: Men’s obligations, rights, and duties associated with firearms

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134. Jonathan Simon, *Gun Rights and the Constitutional Significance of Violent Crime*, 12 WM. & MARY BILL RTS. J. 335, 339 (2004).

135. *Id.* at 355.

136. *Id.* at 356.

137. Jonathan Simon, *Consuming Obsessions: Housing, Homicide, and Mass Incarceration Since 1950*, 2010 U. CHI. LEGAL F. 165, 173 (2010).

138. *Id.* at 192.

139. See CARLSON, *supra* note 9.

are focused on their respective households and, to a lesser extent, on their communities.<sup>140</sup> As men, particularly but not exclusively white conservative men, face socioeconomic insecurity<sup>141</sup> and political and social threat,<sup>142</sup> guns provide a means to a version of masculinity marked by dutiful protection and justified violence. As the New Right emphasizes a narrative about the state's inadequacy in the public sphere and its illegitimacy in the private sphere, guns provide a space for men to practice and affirm their role in community and family protection.<sup>143</sup>

At times efforts to fix the paternal state have involved a frontal challenge to state policing of gender relations in the private sphere. Four high-profile cases exemplify this challenge: *United States v. Emerson* (2001)<sup>144</sup>; *United States v. Hayes* (2009)<sup>145</sup>; *United States v. Castleman* (2014)<sup>146</sup>; and *Voisine v. United States* (2016).<sup>147</sup> In each of these cases, a man barred from gun possession due to a domestic violence adjudication challenged the relevant federal prohibitor either on statutory or constitutional grounds. In each of these cases, the Supreme Court either interpreted the law's intent expansively, so as to reject the prohibited man's challenge or, in the case of *Emerson*, deferred to the Circuit Court's judgment along the same lines. Although the challenges failed, these cases nevertheless epitomize efforts to fix the paternal state by pushing it out of the home.<sup>148</sup>

## B. Fixed Governance: Incorporating Women

Aided by the liberalization of state gun laws and validated by *Heller* and other recent rulings, some gun enthusiasts are embracing the state's policing functions—and enlisting women in the cause. This process presents a dilemma for women: By exercising their Second Amendment rights, are they becoming more equal and empowered citizens, or are they acquiescing to a hyper-masculine culture that their reform-minded sisters have long sought to tame? The battle over the place of women in the gun culture is unfolding in conjunction with a weakening of state capacity and a political project of shoring up American gun culture for future generations. It also reflects a longer trend in which the traditional distinctions between men and women are becoming unsettled.

Gun rights discourse as it relates to women imagines a more expansive liberal and civic republican citizenship for women, one that extends to them the

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140. *See id.*

141. *See* CHIP BERLET & MATTHEW N. LYONS, RIGHT-WING POPULISM IN AMERICA: TOO CLOSE FOR COMFORT (2000); Jennifer Carlson, *Mourning Mayberry: Guns, Masculinity, and Socioeconomic Decline*, 29 GENDER & SOC'Y 386 (2015); Angela Stroud, *Good Guys with Guns: Hegemonic Masculinity and Concealed Handguns*, 26 GENDER & SOC'Y 216 (2012).

142. *See* BERLET & LYONS, *supra* note 141.

143. *See* Carlson, *supra* note 141.

144. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002).

145. *United States v. Hayes*, 555 U.S. 415 (2009).

146. *United States v. Castleman*, 134 S. Ct. 1405 (2014).

147. *Voisine v. United States*, 136 S. Ct. 2272 (2016).

148. The authors thank Professor Emily Sack for this insight.

prerogatives of private and public force traditionally associated with male citizens. Guns have become for gun-rights women a tool of feminism in post-feminist guise. To that end gun-toting men began to echo feminist critiques of the state, in particular why women should trade “a man for *the* man.” Thus, gun rights advocates ridicule the idea that women can stop rapists with tongue depressors or rely on personal protection orders or the 911 system to protect them from harm. Instead, as National Rifle Association magazine features have long argued, armed self-defense is the only practical response in the face of unreliable institutions of paternal governance.<sup>149</sup>

Pro-gun men’s attention to the state’s dereliction of duties with regard to women’s vulnerability has come with an alternative: men as protectors of women. This emphasis on men’s capacity to protect the household—supplemented, at times, by an exhortation that women arm themselves in men’s absence—is oriented around outside threats. But this construction creates a blind spot in that it casts women’s victimization in men’s terms by emphasizing stranger violence, especially stranger rape, rather than acknowledging the exigencies of intimate partner violence. For example, Stand Your Ground laws protect (presumably) defensive violence in public, but these laws do little to address the kinds of violence that women disproportionately experience: namely, violence from the husbands and partners with whom they live.<sup>150</sup> Faced with abuse in the home, the law in most states would require women to retreat and presume that doing so was possible. Such laws reveal the gender double-standard in the application of the Castle Doctrine: “[i]t is difficult to imagine asking a man why he ‘didn’t just leave’ when an intruder broke into his house and threatened him,” yet this is the question often asked of women who use force against their abusers.<sup>151</sup> Although states have begun erasing the distinction between stranger violence and intimate violence, standing one’s ground remains far more legally and culturally accepted in the public sphere, where both men and women are vulnerable, than in the private sphere, where women are disproportionately at risk.<sup>152</sup>

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149. See Kevin Lewis O’Neill, *Armed Citizens and the Stories They Tell: The National Rifle Association’s Achievement of Terror and Masculinity*, 9 MEN & MASCULINITIES 457 (2007).

150. See Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women’s Syndrome, and Violence as Male Privilege*, 68 U. MIAMI L. REV. 1099 (2014); Brandi L. Jackson, *No Ground on Which to Stand: Revise Stand Your Ground Laws So Survivors of Domestic Violence Are No Longer Incarcerated for Defending Their Lives*, 30 BERKELEY J. GENDER L. & JUST. 154 (2015); Suk, *supra* note 26.

151. Franks, *supra* note 150, at 1111.

152. Consider the case of Marissa Alexander, a Florida woman who fired a warning shot at her abusive estranged husband. Despite a stand-your-ground defense, she was convicted of aggravated assault and sentenced to twenty years in prison. After an appeals court vacated her conviction, she accepted a plea deal and was released. Sam Sanders, *Florida Woman in ‘Stand Your Ground’ Case Accepts Plea Deal*, NPR (Nov. 25, 2014), <http://www.npr.org/sections/thetwo-way/2014/11/25/366567307/florida-woman-in-stand-your-ground-case-accepts-plea-deal> [https://perma.cc/2YE9-RQJ6].



Thus, guns can be powerful antidotes to “stranger danger,”<sup>153</sup> but their desirability and utility in the context of private violence is less straightforward.<sup>154</sup> Following state efforts to address violence against women—particularly VAWA and the Lautenberg Amendment—gun-rights proponents have sought to celebrate the armed woman as both a symbolic counterpoise to the female victim and as an archetype of pro-gun activism. As such, the contemporary pro-gun movement occupies contradictory terrain in terms of gender. For one, men reclaim the prerogative to protect and make the political personal. At the same time, women’s capacity to wield violence against “stranger danger” is celebrated while women’s unique threats from the men they know are often rendered invisible. This dilemma has opened up a political opportunity for advocates of greater gun regulation to mobilize women by highlighting the blind spots of pro-gun discourse. Rather than fixing the state by shrinking its regulatory authority, these advocates can marshal the state’s regulatory capacity, effectively placing paternal governance in tension with fixed governance.

## VI

### CONCLUSION

Guns, along with the rights and duties they entail, have been central to American citizenship and state-building from the Colonial era to the present day. Historically, three architectures of governance—chivalrous, paternal, and fixed—have organized these rights and duties along gendered lines. Chivalrous governance centers on individual men’s prerogatives as the building blocks for both legitimating the state and carrying out state functions, while acknowledging individual men’s prerogatives within the home. Paternal governance elaborates the masculine prerogatives to protect and carves them out as state prerogatives distinct from those of citizens. Fixed governance is a reaction to paternal governance by which individual men claim—and, in doing so, shape—the private prerogative to protect.<sup>155</sup>

To outline these distinctive gendered arrangements, however, is not simply to reiterate that guns are masculine-marked objects but also to show that their gendering has been dynamic over time and nuanced within historical periods. Guns may be consistently masculine, but a closer look at how and why gender shapes gun use, gun politics, and gun policies suggests far more texture to the relationship between guns and gender than is often acknowledged.

Further, this genealogy calls attention to the importance of the public/private divide in shaping gun politics. Guns gain traction as gendered objects in relation

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153. See Martha McCaughey, *The Fighting Spirit: Women’s Self-Defense Training and the Discourse of Sexed Embodiment*, 12 *GENDER & SOCIETY* 277 (1998).

154. See Jennifer Carlson, *The Equalizer? Crime, Vulnerability, and Gender in Pro-Gun Discourse*, 9 *FEMINIST CRIMINOLOGY* 59 (2014).

155. For a critique of state monopolization of prerogative power, see Lucia Zedner, *Policing Before and After the Police: The Historical Antecedents of Contemporary Crime Control*, 46 *BRIT. J. CRIMINOLOGY* 78 (2006).

to the home as tools of men's household prerogative and as weapons of domestic victimization. They also matter as gendered objects in the public square, as both spectacles of liberal freedom and instruments of "stranger danger." Meanwhile, gun regulation likewise operates across the public/private divide. In relation to the home, gun regulation appears as a paternal intervention in the private sphere and as a mechanism of protecting women. In the public square, it emerges as a consolidation of prerogative power in the hands of public law enforcement and as a means of social order. Such regulation often is justified as operating on behalf of women.

Viewing guns in light of the private/public divide forces a reckoning with the curious and under-appreciated role of women in gun politics. Increasingly women are becoming a central battleground in the gun debate, with gun rights and gun safety groups both claiming that they mobilize "on behalf of" this constituency.<sup>156</sup> Although women tend to be more in favor of gun regulation than are men, there is no straightforward "pro-woman" position on the issue. That is in part because women's victimization occurs both in public (for instance, stranger rape), where gun rights arguments are focused; and in private (namely, domestic violence), where gun control arguments gain traction. That said, gender is a relation such that struggles over women are also struggles about men, including men's prerogatives, men's rights, men's obligations, and men's duties. In this sense, women's increasing prominence as political symbols in the gun debate signals that guns remain a tool, not just for hunting and protecting, but also for working out the boundaries of a gendered politics of citizenship.

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156. Kristin A. Goss, *The Socialization of Conflict and Its Limits: Gender Identity and Gun Politics in America*, SOC. SCI. Q. (forthcoming).