

# **THE SECOND AMENDMENT: TOWARD AN AFRO-AMERICANIST RECONSIDERATION**

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*It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, . . . and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.<sup>1</sup>*

## **INTRODUCTION**

Many of the issues surrounding the Second Amendment debate are raised in particularly sharp relief from the perspective of African-American history. With the exception of Native Americans, no people in American history have been more influenced by violence than blacks. Private and public violence maintained slavery.<sup>2</sup> The nation's most destructive conflict ended the "peculiar institution."<sup>3</sup> That all too brief experiment in racial egalitarianism, Reconstruction, was ended by private violence<sup>4</sup> and abetted by Supreme Court sanction Jim Crow was sustained by private violence, often with public assistance.

If today the memories of past interracial violence are beginning to fade, they are being quickly replaced by the frightening phenomenon of black-on-black violence, making life all too precarious for poor blacks in inner city neighborhoods. Questions raised by the Second Amendment, particularly those concerning self-defense, crime, participation in the security of the community, and the wisdom or utility of relying exclusively on the state for protection, thus take on a peculiar urgency in light of the modern Afro- American experience.

## **ARMED CITIZENS, FREEMEN, AND WELL-REGULATED MILITIAS: THE BEGINNINGS OF AN AFRO-AMERICAN EXPERIENCE WITH AN ANGLO-AMERICAN RIGHT**

Any discussion of the Second Amendment should begin with the commonplace observation that the framers of the Bill of Rights did not believe they were creating new rights. Instead, they believed that they were simply recognizing rights already part of

their English constitutional heritage and implicit in natural law.<sup>5</sup> In fact, many of the framers cautioned against a bill of rights, arguing that the suggested rights were inherent to a free people, and that a specific detailing of rights would suggest that the new constitution empowered the federal government to violate other traditional rights not enumerated.<sup>6</sup>

Thus, an analysis of the framers' intentions with respect to the Second Amendment should begin with an examination of their perception of the right to bear arms as one of the traditional rights of Englishmen, a right necessary to perform the duty of militia service. Such an analysis is in part an exercise in examining the history of arms regulation and militia service in English legal history. But a simple examination of the right to own weapons at English law combined with an analysis of the history of the militia in English society is inadequate to a full understanding of the framers' understanding of what they meant by "the right to keep and bear arms." By the time the Bill of Rights was adopted, nearly two centuries of settlement in North America had given Americans constitutional sensibilities similar to, but nonetheless distinguishable from, those of their English counterparts.<sup>7</sup> American settlement had created its own history with respect to the right to bear arms, a history based on English tradition, modified by the American experience, and a history that was sharply influenced by the racial climate in the American colonies.

## ENGLISH LAW AND TRADITION

The English settlers who populated North America in the seventeenth century were heirs to a tradition over five centuries old governing both the right and duty to be armed. At English law, the idea of an armed citizenry responsible for the security of the community had long coexisted, perhaps somewhat uneasily, with regulation of the ownership of arms, particularly along class lines. The Assize of Arms of 118 required the arming of all free men, and required free men to possess armor suitable to their condition.<sup>8</sup> By the thirteenth century, villains possessing sufficient property were also expected to be armed and contribute to the security of the community.<sup>9</sup> Lacking both professional police forces and a standing army,<sup>10</sup> English law and custom dictated that the citizenry as a whole, privately equipped, assist in both law enforcement and in military matters. By law, all men between sixteen and sixty were liable to be summoned into the sheriff's posse comitatus. All subjects were expected to participate in the hot pursuit of criminal suspects,

supplying their own arms for the occasion. There were legal penalties for failure to participate.<sup>11</sup>

Moreover, able-bodied men were considered part of the militia, although by the sixteenth century the general practice was to rely on select groups intensively trained for militia duty rather than to rely generally on the armed male population. This move toward a selectively trained militia was an attempt to remedy the often indifferent proficiency and motivation that occurred when relying on the population as a whole.<sup>12</sup>

Although English law recognized a duty to be armed, it was a duty and a right highly circumscribed by English class structure. The law often regarded the common people as a dangerous class, useful perhaps in defending shire and realm, but also capable of mischief with their weapons, mischief toward each other, toward their betters, and toward their betters' game. Restrictions on the type of arms deemed suitable for common people had long been part of English law and custom. A sixteenth-century statute designed as a crime control measure prohibited the carrying of handguns and crossbows by those with incomes of less than one hundred pounds a year.<sup>13</sup> Catholics were also often subject to being disarmed as potential subversives after the English reformation.<sup>14</sup>

It took the religious and political turmoil of seventeenth-century England to bring about large scale attempts to disarm the English public and to bring the right to keep arms under English constitutional protection. Post-Restoration attempts by Charles II to disarm large portions of the population known or believed to be political opponents, and James II's efforts to disarm his Protestant opponents led, in 1689, to the adoption of the Seventh provision of the English Bill of Rights: "That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law."<sup>15</sup>

By the eighteenth century, the right to possess arms, both for personal protection and as a counterbalance against state power, had come to be viewed as part of the rights of Englishmen by many on both sides of the Atlantic. Sir William Blackstone listed the right to possess arms as one of the five auxiliary rights of English subjects without which their primary rights could not be maintained.<sup>16</sup> He discussed the right in traditional English terms:

The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed

by law, which is also declared by the same statute 1 W. & M. st. 2 c. 2 and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.<sup>17</sup>

## B. ARMS AND RACE IN COLONIAL AMERICA

If the English tradition involved a right and duty to bear arms qualified by class and later religion, both the right and the duty were strengthened in the earliest American settlements. From the beginning, English settlement in North America had a quasi-military character, an obvious response to harsh frontier conditions. Governors of settlements often also held the title of militia captain, reflecting both the civil and military nature of their office. Special effort was made to ensure that white men, capable of bearing arms, were imported into the colonies.<sup>18</sup> Far from the security of Britain, often bordering on the colonies of other frequently hostile European powers, colonial governments viewed the arming of able-bodied white men and the requirement that they perform militia service as essential to a colony's survival.

There was another reason for the renewed emphasis on the right and duty to be armed in America: race. Britain's American colonies were home to three often antagonistic races: red, white, and black. For the settlers of British North America, an armed and universally deputized white population was necessary not only to ward off dangers from the armies of other European powers, but also to ward off attacks from the indigenous population which feared the encroachment of English settlers on their lands. An armed white population was also essential to maintain social control over blacks and Indians who toiled unwillingly as slaves and servants in English settlements.<sup>19</sup>

This need for racial control helped transform the traditional English right into a much broader American one. If English law had qualified the right to possess arms by class and religion, American law was much less concerned with such distinctions. Initially all Englishmen, and later all white men, were expected to possess and bear arms to defend their commonwealths, both from external threats and from the internal ones posed by blacks and Indians. The statutes of many colonies specified that white men be armed at public expense.<sup>20</sup> In most colonies, all white men between the ages of sixteen and sixty, usually with the exception of clergy and religious objectors, were considered part of the militia and required to be armed.<sup>21</sup> Not only were white

men required to perform traditional militia and posse duties, they were also required to serve as patrollers, a specialized posse dedicated to keeping order among the slave population, in those colonies with large slave populations.<sup>22</sup> This broadening of the right to keep and bear arms reflected a more general lessening of class, religious, and ethnic distinctions among whites in colonial America. The right to possess arms was, therefore, extended to classes traditionally viewed with suspicion in England, including the class of indentured servants.<sup>23</sup>

If there were virtually universal agreement concerning the need to arm the white population,<sup>24</sup> the law was much more ambivalent with respect to blacks. The progress of slavery in colonial America reflected English lack of familiarity with the institution, in both law and custom.<sup>25</sup> In some colonies, kidnapped Africans initially were treated like other indentured servants, held for a term of years and then released from forced labor and allowed to live as free people.<sup>26</sup> In some colonies, the social control of slaves was one of the law's major concerns; in others, the issue was largely of private concern to the slave owner.<sup>27</sup>

These differences were reflected in statutes concerned with the right to possess arms and the duty to perform militia service. One colony -- Virginia -- provides a striking example of how social changes were reflected, over time, in restrictions concerning the right to be armed. A Virginia statute enacted in 1639 required the arming of white men at public expense.<sup>28</sup> The statute did not specify the arming of black men, but it also did not prohibit black men from arming themselves.<sup>29</sup> By 1680 a Virginia statute prohibited Negroes, slave and free, from carrying weapons, including clubs.<sup>30</sup> Yet, by the early eighteenth century, free Negroes who were house owners were permitted to keep one gun in their house, while blacks, slave and free, who lived on frontier plantations were able to keep guns.<sup>31</sup> Virginia's experience reflected three sets of concerns: the greater need to maintain social control over the black population as caste lines sharpened;<sup>32</sup> the need to use slaves and free blacks to help defend frontier plantations against attacks by hostile Indians; and the recognition on the part of Virginia authorities of the necessity for gun ownership for those living alone.

These concerns were mirrored in the legislation of other colonies. Massachusetts did not have general legislation prohibiting blacks from carrying arms,<sup>33</sup> but free Negroes in that colony were not permitted to participate in militia drills; instead they were required to perform substitute service on public works

projects.<sup>34</sup> New Jersey exempted blacks and Indians from militia service, though the colony permitted free Negroes to possess firearms.<sup>35</sup> Ironically, South Carolina, which had the harshest slave codes of this period, may have been the colony most enthusiastic about extending the right to bear arms to free Negroes. With its majority black population, that state's need to control the slave population was especially acute. To secure free black assistance in controlling the slave population, South Carolina in the early eighteenth century permitted free blacks the right of suffrage, the right to keep firearms, and the right to undertake militia service.<sup>36</sup> As the eighteenth century unfolded, those rights were curtailed.<sup>37</sup>

Overall, these laws reflected the desire to maintain white supremacy and control. With respect to the right to possess arms, the colonial experience had largely eliminated class, religious, and ethnic distinctions among the white population. Those who had been part of the suspect classes in England-- the poor, religious dissenters, and others who had traditionally only enjoyed a qualified right to possess arms -- found the right to be considerably more robust in the American context. But blacks had come to occupy the social and legal space of the suspect classes in England. Their right to possess arms was highly dependent on white opinion of black loyalty and reliability. Their inclusion in the militia of freemen was frequently confined to times of crisis. Often, there were significant differences between the way northern and southern colonies approached this question, a reflection of the very different roles that slavery played in the two regions. These differences would become sharper after the Revolution, when the northern states began to move toward the abolition of slavery and the southern states, some of which had also considered abolition, began to strengthen the institution.

Ironically, while the black presence in colonial America introduced a new set of restrictions concerning the English law of arms and the militia, it helped strengthen the view that the security of the state was best achieved through the arming of all free citizens. It was this new view that was part of the cultural heritage Americans brought to the framing of the Constitution.

## C. THE RIGHT OF WHICH PEOPLE?

### *1. Revolutionary Ideals*

The colonial experience helped strengthen the appreciation of early Americans for the merits of an armed citizenry. That appreciation was strengthened yet further by the American

Revolution. If necessity forced the early colonists to arm, the Revolution and the friction with Britain's standing army that preceded it -- and in many ways precipitated it -- served to revitalize Whiggish notions that standing armies were dangerous to liberty, and that militias, composed of the whole of the people, best protected both liberty and security.<sup>38</sup>

These notions soon found their way into the debates over the new constitution, debates which help place the language and meaning of the Second Amendment in context. Like other provisions of the proposed constitution, the clause that gave Congress the power to provide for the organizing, arming, and disciplining of the militia excited fears among those who believed that the new constitution could be used to destroy both state power and individual rights.<sup>39</sup>

Indeed, it was the very universality of the militia that was the source of some of the objections. A number of critics of the proposed constitution feared that the proposed congressional power could subject the whole population to military discipline and a clear threat to individual liberty. Others complained that the Militia Clause provided no exemptions for those with religious scruples against bearing arms.<sup>40</sup>

But others feared that the Militia Clause could be used to disarm the population as well as do away with the states' control of the militia. Some critics expressed fear that Congress would use its power to establish a select militia, a group of men specially trained and armed for militia duty, similar to the earlier English experience. Richard Henry Lee of Virginia argued that that select militia might be used to disarm the population and that, in any event, it would pose more of a danger to individual liberty than a militia composed of the whole population. He charged that a select militia "commits the many to the mercy and the prudence of the few." A number of critics objected to giving Congress the power to arm the militia, fearing that such power would likewise give Congress the power to withhold arms from the militia. The fear that this new congressional authority could be used to both destroy state power over the militia and to disarm the people led delegates to state ratifying conventions to urge measures that would preserve the traditional right. The Virginia convention proposed language that would provide protection for the right to keep and bear arms in the federal constitution.<sup>41</sup>

In their efforts to defend the proposed constitution, Alexander Hamilton and James Madison addressed these charges. Hamilton's responses are interesting because he wrote

as someone openly skeptical of the value of the militia of the whole. The former Revolutionary War artillery officer expressed the view that, while the militia fought bravely during the Revolution, it had proven to be no match when pitted against regular troops. Hamilton, who Madison claimed initially wanted to forbid the states from controlling any land or naval forces, called for uniformity in organizing and disciplining of the militia under national authority. He also urged the creation of a select militia that would be more amenable to the training and discipline he saw as necessary.<sup>42</sup>

If Hamilton gave only grudging support to the concept of the militia of the whole, Madison, author of the Second Amendment, was a much more vigorous defender of the concept. He answered critics of the Militia Clause provision allowing Congress to arm the militia by stating that the term "arming" meant only that Congress's authority to arm extended only to prescribing the type of arms the militia would use, not to furnishing them.<sup>43</sup> But Madison's views went further. He envisioned a militia consisting of virtually the entire white male population, writing that a militia of 500,000 citizens could prevent any excesses that might be perpetrated by the national government and its regular army. Madison left little doubt that he envisioned the militia of the whole as a potential counterweight to tyrannical excess on the part of the government.<sup>44</sup>

It is against this background that the meaning of the Second Amendment must be considered. For the revolutionary generation, the idea of the militia and an armed population were related. The principal reason for preferring a militia of the whole over either a standing army or a select militia was rooted in the idea that, whatever the inefficiency of the militia of the whole, the institution would better protect the newly won freedoms than a reliance on security provided by some more select body.

## *2. Racial Limitations*

One year after the ratification of the Second Amendment and the Bill of Rights, Congress passed legislation that reaffirmed the notion of the militia of the whole and explicitly introduced a racial component into the national deliberations on the subject of the militia. The Uniform Militia Act<sup>45</sup> called for the enrollment of every free, able-bodied white male citizen between the ages of eighteen and forty-five into the militia. The act further specified that every militia member was to provide himself with a musket or firelock, a bayonet, and ammunition.

This specification of a racial qualification for militia membership was somewhat at odds with general practice in the late eighteenth century. Despite its recognition and sanctioning of slavery, the Constitution had no racial definition of citizenship.<sup>46</sup>[FN90] Free Negroes voted in a majority of states. A number of states had militia provisions that allowed free Negroes to Participate.<sup>47</sup> Particularly in the northern states, many were well aware that free Negroes and former slaves had served with their state forces during the Revolution. Despite the prejudices of the day, lawmakers in late eighteenth-century America were significantly less willing to write racial restrictions into constitutions and other laws guaranteeing fundamental rights than were their counterparts a generation or so later in the nineteenth century.<sup>48</sup> The 1792 statute restricting militia enrollment to white men was one of the earliest federal statutes to make a racial distinction.

The significance of this restriction is not altogether clear. For the South, there was a clear desire to have a militia that was reliable and could be used to suppress potential slave insurrections. But despite the fear that free Negroes might make common cause with slaves, and despite federal law, some southern states in the ante-bellum period enrolled free blacks as militia members. Northern states at various times also enrolled free Negroes in the militia despite federal law and often strident prejudice. States North and South employed free Negroes in state forces during times of invasion. While southern states often prohibited slaves from carrying weapons and strictly regulated access to firearms by free Negroes, northern states generally made no racial distinction with respect to the right to own firearms,<sup>49</sup> and federal law was silent on the subject.

The racial restriction in the 1792 statute indicates the unrest the revolutionary generation felt toward arming blacks and perhaps the recognition that one of the functions of the militia would indeed be to put down slave revolts. Yet, the widespread use of blacks as soldiers in time of crisis and the absence of restrictions concerning the arming of blacks in the northern states may provide another clue concerning how to read the Second Amendment. The 1792 act specified militia enrollment for white men between the ages of eighteen and forty-five. Yet, while it specifically included only this limited portion of the population, the statute excluded no one from militia service.

The authors of the statute had experience, in the Revolution, with a militia and Continental Army considerably broad in membership. Older and younger men had served with the

Revolutionary forces. Blacks had served, though their service had been an object of considerable controversy. Even women had served, though, given the attitudes of the day, this was far more controversial than black service. Given this experience and the fact that the constitutional debates over the militia had constantly assumed an enrollment of the male population between sixteen and sixty, it is likely that the framers of the 1792 statute envisioned a militia even broader than the one they specified. This suggests to us how broad the term “people” in the Second Amendment was meant to be.

The 1792 statute also suggests to us also how crucial race has been in our history. If the racial distinction made in that statute was somewhat anomalous in the late eighteenth century, it was the kind of distinction that would become more common in the nineteenth. The story of blacks and arms would continue in the nineteenth century as racial distinctions became sharper and the defense of slavery more militant.

## II. ARMS AND THE ANTEBELLUM EXPERIENCE

If, as presaged by the Uniform Militia Act of 1792, racial distinctions became sharper in the nineteenth century, that development was at odds with the rhetoric of the Revolution and with developments of the immediate post-revolutionary era. Flush with the precepts of egalitarian democracy, America had entered a time of recognition and expansion of rights. Eleven of the thirteen original states, as well as Vermont, passed new constitutions in the period between 1776 and 1777. Five of these states rewrote their constitutions by the time of the ratification of the Bill of Rights in 1791. A twelfth original state, Massachusetts, passed a new constitution in 1780. Many of the new constitutions recognized the status of citizens as “free and equal” or “free and independent.” In Massachusetts and Vermont, these clauses were interpreted as outlawing the institution of slavery. Many of the new constitutions guaranteed the right to vote regardless of race to all men who otherwise qualified,<sup>50</sup> and guaranteed many of the rights that would later be recognized in the Bill of Rights. In no instance were any of these rights limited only to the white population; several states explicitly extended rights to the entire population irrespective of race.<sup>51</sup>

The right to vote, perhaps the most fundamental of rights, was limited in almost all instances to men who met property restrictions, but in most states was not limited according to race. Ironically, only in the nineteenth-century would black voting

rights be curtailed, as Jacksonian democracy expanded voting rights for whites. In its constitution of 1821, New York eliminated a one hundred dollar property requirement for white males, and concomitantly increased the requirement to two hundred fifty dollars for blacks. Other states would eliminate black voting rights altogether. Other than Maine, no state admitted to the union in the nineteenth century's antebellum period allowed blacks to vote.<sup>52</sup>

This curtailment of black voting rights was part and parcel of a certain hostility toward free blacks, a hostility that ran throughout the union of states. In northern states, where slavery had been abandoned or was not a serious factor in social or economic relations, such hostility was the result of simple racism. In southern states, where slavery was an integral part of the social and economic framework, this hostility was occasioned by the threat that free blacks posed to the system of Negro slavery.<sup>53</sup>

#### *A. THE SOUTHERN ANTEBELLUM EXPERIENCE: CONTROL OF ARMS AS A MEANS OF RACIAL OPPRESSION*

The threat that free blacks posed to southern slavery was twofold. First, free blacks were a bad example to slaves. For a slave to see free blacks enjoy the trappings of white persons -- freedom of movement, expression, and association, relative freedom from fear for one's person and one's family, and freedom to own the fruits of one's labor -- was to offer hope and raise desire for that which the system could not produce. A slave with horizons limited only to a continued existence in slavery was a slave who did not threaten the system, whereas a slave with visions of freedom threatened rebellion.

This threat of rebellion is intimately related to the second threat that free blacks posed to the system of Negro slavery, the threat that free blacks might instigate or participate in a rebellion by their slave brethren. To forestall this threat of rebellion, southern legislatures undertook to limit the freedom of movement and decision of free blacks. States limited the number of free blacks who might congregate at one time; they curtailed the ability of free blacks to choose their own employment, and to trade and socialize with slaves. Free blacks were subject to question, to search, and to summary punishment by patrols established to keep the black population, slave and free, in order.<sup>54</sup> To forestall the possibility that free blacks would rebel either on their own or with slaves, the southern states limited not

only the right of slaves, but also the right of free blacks, to bear arms.<sup>55</sup>

The idea was to restrict the availability of arms to blacks, both slave and free, to the extent consistent with local conceptions of safety. At one extreme was Texas, which, between 1842 and 1850, prohibited slaves from using firearms altogether. Also at this extreme was Mississippi, which forbade firearms to both free blacks and slaves after 1852. At the other extreme was Kentucky, which merely provided that, should slaves or free blacks “wilfully and maliciously” shoot at a white person, or otherwise wound a free white person while attempting to kill another person, the slave or free black would suffer the death penalty.<sup>56</sup>

More often than not, slave state statutes restricting black access to firearms were aimed primarily at free blacks, as opposed to slaves, perhaps because the vigilant master was presumed capable of denying arms to all but the most trustworthy slaves, and would give proper supervision to the latter. Thus, Louisiana provided that a slave was denied the use of firearms and all other offensive weapons, unless the slave carried written permission to hunt within the boundaries of the owner's plantation. South Carolina prohibited slaves outside the company of whites or without written permission from their master from using or carrying firearms unless they were hunting or guarding the master's plantation. Georgia, Maryland, and Virginia did not statutorily address the question of slaves' access to firearms, perhaps because controls inherent to the system made such laws unnecessary in these states' eyes.

By contrast, free blacks, not under the close scrutiny of whites, were generally subject to tight regulation with respect to firearms. The State of Florida, which had in 1824 provided for a weekly renewable license for slaves to use firearms to hunt and for “any other necessary and lawful purpose,”<sup>57</sup> turned its attention to the question of free blacks in 1825. Section 8 of “An Act to Govern Patrols”<sup>58</sup> provided that white citizen patrols “shall enter into all negro houses and suspected places, and search for arms and other offensive or improper weapons, and may lawfully seize and take away all such arms, weapons, and ammunition . . . .” By contrast, the following section of that same statute expanded the conditions under which a slave might carry a firearm, a slave might do so under this statute either by means of the weekly renewable license or if “in the presence of some white person.”<sup>59</sup>

Florida went back and forth on the question of licenses for free blacks but, in February 1831 repealed all provision for firearm licenses for free blacks.<sup>60</sup> This development predated by six months the Nat Turner slave revolt in Virginia, which was responsible for the deaths of at least fifty-seven white people<sup>61</sup> and which caused the legislatures of the Southern states to reinvigorate their repression of free blacks.<sup>62</sup> Among the measures that slave states took was to further restrict the right to carry and use firearms. In its December 1831 legislative session, Delaware for the first time required free blacks desiring to carry firearms to obtain a license from a justice of the peace.<sup>63</sup> In their December 1831 legislative sessions, both Maryland<sup>64</sup> and Virginia<sup>65</sup> entirely prohibited free blacks from carrying arms; Georgia followed suit in 1833, declaring that “it shall not be lawful for any free person of colour in this state, to own, use, or carry fire arms of any description whatever.”<sup>66</sup>

Perhaps as a response to the Nat Turner rebellion, Florida in 1833 enacted another statute authorizing white citizen patrols to seize arms found in the homes of slaves and free blacks, and provided that blacks without a proper explanation for the presence of the firearms be summarily punished, without benefit of a judicial tribunal.<sup>67</sup> In 1846 and 1861, the Florida legislature provided once again that white citizen patrols might search the homes of blacks, both free and slave, and confiscate arms held therein.<sup>68</sup> Yet, searching out arms was not the only role of the white citizen patrols: these patrols were intended to enforce pass systems for both slaves and free blacks, to be sure that blacks did not possess liquor and other contraband items, and generally to terrorize blacks into accepting their subordination.<sup>69</sup> The patrols would meet no resistance from those who were simply unable to offer any.

#### B. THE NORTHERN ANTEBELLUM EXPERIENCE: USE OF FIREARMS TO COMBAT RACIALLY MOTIVATED DEPRIVATIONS OF LIBERTY

Even as northern racism defined itself in part by the curtailment of black voting rights,<sup>70</sup> it cumulatively amounted to what some have called a widespread “Negrophobia.”<sup>71</sup> With notable exceptions, public schooling, if available to blacks at all, was segregated.<sup>72</sup> Statutory and constitutional limitations on the freedom of blacks to emigrate into northern states were a further measure of northern racism.<sup>73</sup> While the level of enforcement and the ultimate effect of these constitutional and statutory provisions may not have been great,<sup>74</sup> the very existence of these

laws speaks to the level of hostility northern whites had for blacks during this period. It is against this background -- if not poisonous, racist and hostile -- that the black antebellum experience with the right to bear arms must be measured.

Perhaps nothing makes this point better than the race riots and mob violence against blacks that occurred in many northern cities in the antebellum period. These episodes also illustrate the uses to which firearms might be put in pursuit of self-defense and individual liberty.

A good deal of racial tension was generated by economic competition between whites and blacks during this period, and this tension accounts in part for violent attacks against blacks.<sup>75</sup> Moreover, whites were able to focus their attacks because blacks were segregated into distinct neighborhoods in northern states, rendering it easy for white mobs to find the objects of their hostility.<sup>76</sup>

Quite often, racial violence made for bloody, destructive confrontations. Awareness of racial hostility generally, and of particular violent incidents made blacks desirous of forming militia units.

Though the Uniform Militia Act of 1792 had not specifically barred blacks from participation in the state organized militia,<sup>77</sup> the northern states had treated the act as such, and so the state organized militia was not an option.<sup>78</sup> Blacks could nonetheless form private militia groups that might serve to protect against racial violence, and did so. Free blacks in Providence formed the African Greys in 1821.<sup>79</sup> Oscar Handlin tells of an attempt by black Bostonians in the 1850s to form a private militia company.<sup>80</sup> Black members of the Pittsburgh community had no private militia but nonetheless took action against a mob expected to riot in April 1839. Instead of taking action on their own, they joined an interracial peacekeeping force proposed by the city's mayor, and were able to put a stop to the riot.<sup>81</sup>

It is not clear whether private black militia groups ever marched on a white mob. But that they may never have been called on to do so may be a measure of their success. The story of the July 1835 Philadelphia riot is illustrative. Precipitated when a young black man assaulted a white one, the two day riot ended without resort to military intervention when a rumor reached the streets that "fifty to sixty armed and determined black men had barricaded themselves in a building beyond the police lines."<sup>82</sup>

Undoubtedly, the most striking examples of the salutary use of firearms by blacks in defense of their liberty, and

concurrently the disastrous results from the denial of the right to carry firearms in self-defense, lie in the same incident. In Cincinnati, in September 1841, racial hostility erupted in two nights of assaults by white mobs of up to 1500 people. On the first evening, after destroying property owned by blacks in the business district, mobs descended upon the black residential section, there to be repulsed by blacks who fired into the crowd, forcing it out of the area. The crowd returned, however, bringing with it a six-pound cannon, and the battle ensued. Two whites and two blacks were killed, and more than a dozen of both races were wounded. Eventually, the militia took control, but on the next day the blacks were disarmed at the insistence of whites, and all adult black males were taken into protective custody. On the second evening, white rioters again assaulted the black residential district, resulting in more personal injury and property damage.<sup>83</sup>

This history shows that if racism in the antebellum period was not limited to the southern states, neither was racial violence. Competition with and hostility toward blacks accounted for this violence in northern states, whereas the need to maintain slavery and maintain security for the white population accounted for racial violence in southern states. Another difference between the two regions is that in the southern states blacks did not have the means to protect themselves, while in northern states, blacks by and large had access to firearms and were willing to use them.

The 1841 Cincinnati riot represents the tragic, misguided irony of the city's authorities who, concerned with the safety of the black population, chose to disarm and imprison them -- chose, in effect, to leave the black population of Cincinnati as southern authorities left the black population in slave states, naked to whatever indignities private parties might heap upon them, and dependent on a government either unable or unwilling to protect their rights. As a symbol for the experience of northern blacks protecting themselves against deprivations of liberty, the 1841 riot holds a vital lesson for those who would shape the content and meaning of the Fourteenth Amendment.

### III. ARMS AND THE POSTBELLUM SOUTHERN ORDER

The end of the Civil War did more than simply bring about the end of slavery; it brought about a sharpened conflict between two contrasting constitutional visions. One vision, largely held by northern Republicans, saw the former slaves as citizens<sup>84</sup> entitled to those rights long deemed as natural rights in

Anglo-American society. There was a vision of national citizenship and national rights, rights that the federal government had the responsibility to secure for the freedmen and, indeed, for all citizens. This vision, developed during the antislavery struggle and heightened by the Civil War, caused Republicans of the Civil War and postwar generation to view the question of federalism and individual rights in a way that was significantly different from that of the original framers of the Constitution and Bill of Rights. If many who debated the original Constitution feared that the newly created national government could violate long established rights, those who changed the Constitution in the aftermath of war and slavery had firsthand experience with states violating fundamental rights. The history of the right to bear arms is, thus, inextricably linked with the efforts to reconstruct the nation and bring about a new racial order.

If the northern Republican vision was to bring the former slaves into the ranks of citizens, the concern of the defeated white South was to preserve as much of the antebellum social order as could survive northern victory and national law. The Emancipation Proclamation and the Thirteenth Amendment<sup>85</sup> abolished slavery; chattel slavery as it existed before the war could not survive these developments. Still, in the immediate aftermath of the war, the South was not prepared to accord the general liberties to the newly emancipated black population that northern states had allowed their free black populations.<sup>86</sup> Instead, while recognizing emancipation, southern states imposed on the freedmen the legal disabilities of the antebellum free Negro population.

In 1865 and 1866, southern states passed a series of statutes known as the black codes. These statutes, which one historian described as “a twilight zone between slavery and freedom,”<sup>87</sup> were an expression of the South's determination to maintain control over the former slaves. Designed in part to ensure that traditional southern labor arrangements would be preserved, these codes were attempts “to put the state much in the place of the former master.”<sup>88</sup> The codes often required blacks to sign labor contracts that bound black agricultural workers to their employers for a year.<sup>89</sup> Blacks were forbidden from serving on juries, and could not testify or act as parties against whites.<sup>90</sup> Vagrancy laws were used to force blacks into labor contracts and to limit freedom of movement.<sup>91</sup>

As further indication that the former slaves had not yet joined the ranks of free citizens, southern states passed

legislation prohibiting blacks from carrying firearms without licenses, a requirement to which whites were not subjected. The Louisiana<sup>92</sup> and Mississippi<sup>93</sup> statutes were typical of the restrictions found in the codes. Alabama's was even harsher.<sup>94</sup>

The restrictions in the black codes caused strong concerns among northern Republicans. The charge that the South was trying to reinstitute slavery was frequently made, both in and out of Congress.<sup>95</sup> The news that the freedmen were being deprived of the right to bear arms was of particular concern to the champions of Negro citizenship. For them, the right of the black population to possess weapons was not merely of symbolic and theoretical importance; it was vital both as a means of maintaining the recently reunited Union and a means of preventing virtual reenslavement of those formerly held in bondage. Faced with a hostile and recalcitrant white South determined to preserve the antebellum social order by legal and extra-legal means,<sup>96</sup> northern Republicans were particularly alarmed at provisions of the black codes that effectively preserved the right to keep and bear arms for former Confederates while disarming blacks, the one group in the South with clear unionist sympathies.<sup>97</sup> This fed the determination of northern Republicans to provide national enforcement of the Bill of Rights.<sup>98</sup>

The efforts to disarm the freedmen were in the background when the 39th Congress debated the Fourteenth Amendment, and played an important part in convincing the 39th Congress that traditional notions concerning federalism and individual rights needed to change. While a full exploration of the incorporation controversy<sup>99</sup> is beyond the scope of this chapter, it should be noted that Jonathan Bingham, author of the Fourteenth Amendment's Privileges or Immunities Clause,<sup>100</sup> clearly stated that it applied the Bill of Rights to the states.<sup>101</sup> Others shared that same understanding.<sup>102</sup>

Although the history of the black codes persuaded the 39th Congress that Congress and the federal courts must be given the authority to protect citizens against state deprivations of the Bill of Rights, the Supreme Court in its earliest decisions on the Fourteenth Amendment moved to maintain much of the structure of prewar federalism. A good deal of the Court's decision-making that weakened the effectiveness of the Second Amendment was part of the Court's overall process of eviscerating the Fourteenth Amendment soon after its enactment.

That process began with the Slaughterhouse Cases,<sup>103</sup> which dealt a severe blow to the Fourteenth Amendment's Privileges or Immunities Clause, a blow from which it has yet to recover. It was also within its early examination of the Fourteenth Amendment that the Court first heard a claim directly based on the Second Amendment. Ironically, the party first bringing an allegation before the Court concerning a Second Amendment violation was the federal government. In *United States v. Cruikshank*,<sup>104</sup> federal officials brought charges against William Cruikshank and others under the Enforcement Act of 1870.<sup>105</sup> Cruikshank had been charged with violating the rights of two black men to peaceably assemble and to bear arms. The Supreme Court held that the federal government had no power to protect citizens against private action that deprived them of their constitutional rights. The Court held that the First and Second Amendments were limitations on Congress, not on private individuals and that, for protection against private criminal action, the individual was required to look to state governments.<sup>106</sup>

The Cruikshank decision, which dealt a serious blow to Congress' ability to enforce the Fourteenth Amendment, was part of a larger campaign of the Court to ignore the original purpose of the Fourteenth Amendment -- to bring about a revolution in federalism, as well as race relations.<sup>107</sup> While the Court in the late 1870s and 1880s was reasonably willing to strike down instances of state sponsored racial discrimination,<sup>108</sup> it also showed a strong concern for maintaining state prerogative and a disinclination to carry out the intent of the framers of the Fourteenth Amendment to make states respect national rights.

This trend was demonstrated in *Presser v. Illinois*,<sup>109</sup> the second case in which the Court examined the Second Amendment. *Presser* involved an Illinois statute which prohibited individuals who were not members of the militia from parading with arms.<sup>110</sup> Although Justice William Woods, author of the majority opinion, noted that the Illinois statute did not infringe upon the right to keep and bear arms,<sup>111</sup> he nonetheless went on to declare that the Second Amendment was a limitation on the federal and not the state governments. Woods's opinion also contended that, despite the nonapplicability of the Second Amendment to state action, states were forbidden from disarming their populations because such action would interfere with the federal government's ability to maintain the sedentary militia.<sup>112</sup> With its view that the statute restricting armed parading did not interfere with the right to keep and bear arms,

and its view that Congress's militia power prevented the states from disarming its citizens, the Presser Court had gone out of its way in dicta to reaffirm the old federalism and to reject the framers' view of the Fourteenth Amendment that the Bill of Rights applied to the states.

The rest of the story is all too well known. The Court's denial of an expanded roll for the federal government in enforcing civil rights played a crucial role in redeeming white rule. The doctrine in *Cruikshank*, that blacks would have to look to state government for protection against criminal conspiracies, gave the green light to private forces, often with the assistance of state and local governments, that sought to subjugate the former slaves and their descendants. Private violence was instrumental in driving blacks from the ranks of voters.<sup>113</sup> It helped force many blacks into peonage, a virtual return to slavery,<sup>114</sup> and was used to force many blacks into a state of ritualized subservience.<sup>115</sup> With the protective arm of the federal government withdrawn, protection of black lives and property was left to largely hostile state governments. In the Jim Crow era that would follow, the right to possess arms would take on critical importance for many blacks. This right, seen in the eighteenth century as a mechanism that enabled a majority to check the excesses of a potentially tyrannical national government, would for many blacks in the twentieth century become a means of survival in the face of private violence and state indifference.

#### IV. ARMS AND AFRO-AMERICAN SELF-DEFENSE IN THE TWENTIETH CENTURY: A HISTORY IGNORED

For much of the twentieth century, the black experience in this country has been one of repression. This repression has not been limited to the southern part of the country, nor is it a development divorced from the past. Born perhaps of cultural predisposition against blacks,<sup>116</sup> and nurtured by economic competition between blacks and whites, particularly immigrant groups and those whites at the lower rungs of the economic scale,<sup>117</sup> racism in the North continued after the Civil War, abated but not eliminated in its effects.<sup>118</sup> In the South, defeat in the Civil War and the loss of slaves as property confirmed white Southerners in their determination to degrade and dominate their black brethren.<sup>119</sup>

Immediately after the Civil War and the emancipation it brought, white Southerners adopted measures to keep the black population in its place.<sup>120</sup> Southerners saw how Northerners had utilized segregation as a means to avoid the black presence in

their lives,<sup>121</sup> and they already had experience with segregation in southern cities before the war.<sup>122</sup> Southerners extended this experience of segregation to the whole of southern life through the mechanism of "Jim Crow." Jim Crow was established both by the operation of law, including the black codes and other legislation, and by an elaborate etiquette of racially restrictive social practices. The Civil Rights Cases<sup>123</sup> and *Plessy v. Ferguson*<sup>124</sup> gave the South freedom to pursue the task of separating black from white. The Civil Rights Cases went beyond *Cruikshank*, even more severely restricting congressional power to provide for the equality of blacks under Section 5 of the Fourteenth Amendment,<sup>125</sup> and *Plessy v. Ferguson* declared separate facilities for blacks and whites to be consonant with the Fourteenth Amendment's mandate of "equal protection of the laws."<sup>126</sup> In effect, states and individuals were given full freedom to effect their "social prejudices"<sup>127</sup> and "racial instincts"<sup>128</sup> to the detriment of blacks throughout the South and elsewhere.<sup>129</sup>

This is not to say that blacks went quietly or tearfully to their deaths. Oftentimes they were able to use firearms to defend themselves, though usually not with success: Jim McIlherron was lynched in Estell Springs, Tennessee, after having exchanged over one thousand rounds with his pursuers.<sup>130</sup> The attitude of individuals such as McIlherron is summed up by Ida B. Wells-Barnett, a black antilynching activist who wrote of her decision to carry a pistol: "I had bought a pistol the first thing after [the lynching], because I expected some cowardly retaliation from the lynchers. I felt that one had better die fighting against injustice than to die like a dog or a rat in a trap. I had already determined to sell my life as dearly as possible if attacked. I felt if I could take one lyncher with me, this would even up the score a little bit."<sup>131</sup>

When blacks used firearms to protect their rights, they were often partially successful but were ultimately doomed. In 1920, two black men in Texas fired on and killed two whites in self-defense. The black men were arrested and soon lynched.<sup>132</sup> When the sheriff of Aiken, South Carolina, came with three deputies to a black household to attempt a warrantless search and struck one female family member, three other family members used a hatchet and firearms in self-defense, killing the sheriff. The three wounded survivors were taken into custody, and after one was acquitted of murdering the sheriff, with indications<sup>133</sup> of a similar verdict for the other two, all three were lynched.

Although individual efforts of blacks to halt violence to their persons or property were largely unsuccessful, there were times that blacks succeeded through concerted or group activity in halting lynchings. In her autobiography, Ida Wells-Barnett reported an incident in Memphis in 1891 in which a black militia unit for two or three nights guarded approximately 100 jailed blacks who were deemed at risk of mob violence. When it seemed the crisis had passed, the militia unit ceased its work. It was only after the militia unit left that a white mob stormed the jail and lynched three black inmates.<sup>134</sup>

A. Philip Randolph, the longtime head of the Brotherhood of Sleeping Car Porters, and Walter White, onetime executive secretary of the National Association for the Advancement of Colored People, vividly recalled incidents in which their fathers had participated in collective efforts to use firearms to successfully forestall lynchings and other mob violence. As a thirteen-year-old, White participated in his father's experiences,<sup>135</sup> which, he reported, left him "gripped by the knowledge of my own identity, and in the depths of my soul, I was vaguely aware that I was glad of it."<sup>136</sup> After his father stood armed at a jail all night to ward off lynchings,<sup>137</sup> Randolph was left with a vision, not "of powerlessness, but of the 'possibilities of salvation,' which resided in unity and organization."<sup>138</sup>

The willingness of blacks to use firearms to protect their rights, their lives, and their property, alongside their ability to do so successfully when acting collectively, renders many gun control statutes, particularly of Southern origin, all the more worthy of condemnation. This is especially so in view of the purpose of these statutes, which, like that of the gun control statutes of the black codes, was to disarm blacks.

That the Southern states did not prohibit firearms ownership outright is fortuitous. During the 1960s, while many blacks and white civil rights workers were threatened and even murdered by whites with guns, firearms in the hands of blacks served a useful purpose, to protect civil rights workers and blacks from white mob and terrorist activity.<sup>139</sup>

It struck many, then, as the height of blindness, confidence, courage, or moral certainty for the civil rights movement to adopt nonviolence as its credo, and to thus leave its adherents open to attack by terrorist elements within the white South. Yet, while nonviolence had its adherents among the mainstream civil rights organizations, many ordinary black people in the South believed in resistance and believed in the necessity of maintaining firearms for personal protection, and these people

lent their assistance and their protection to the civil rights movement.<sup>140</sup>

Daisy Bates, the leader of the Little Rock NAACP during the desegregation crisis, wrote in her memoirs that armed volunteers stood guard over her home.<sup>141</sup> Moreover, there are oral histories of such assistance. David Dennis, the black Congress of Racial Equality (CORE) worker who had been targeted for the fate that actually befell Goodman, Schwerner, and Chaney during the Freedom Summer,<sup>142</sup> has told of black Mississippi citizens with firearms who followed civil rights workers in order to keep them safe.<sup>143</sup>

Ad hoc efforts were not the sole means by which black Southern adherents of firearms protected workers in the civil rights movement. The Deacons for Defense and Justice were organized first in 1964 in Jonesboro, Louisiana, but received prominence in Bogaloussa, Louisiana.<sup>144</sup> The Deacons organized in Jonesboro after their founder saw the Ku Klux Klan marching in the street and realized that the “fight against racial injustice include[d] not one but two foes: White reactionaries and police.”<sup>145</sup> Jonesboro's Deacons obtained a charter and weapons, and vowed to shoot back if fired upon.<sup>146</sup> The word spread throughout the South, but most significantly to Bogaloussa, where the Klan was rumored to have its largest per capita membership.<sup>147</sup> There, a local chapter of the Deacons would grow to include “about a tenth of the Negro adult male population,” or about 900 members, although the organization was deliberately secretive about exact numbers.<sup>148</sup> What is known, however, is that in 1965 there were fifty to sixty chapters across Louisiana, Mississippi, and Alabama.<sup>149</sup> In Bogaloussa, as elsewhere, the Deacons' job was to protect black people from violence, and they did so by extending violence to anyone who attacked.<sup>150</sup> This capability and willingness to use force to protect blacks provided a deterrent to white terroristic activity.

A prime example of how the Deacons accomplished their task lies in the experience of James Farmer, then head of (CORE), a frontline, mainstream civil rights group. Before Farmer left on a trip for Bogaloussa, the Federal Bureau of Investigation informed him that he had received a death threat from the Klan. The FBI apparently also informed the state police, who met Farmer at the airport. But at the airport also were representatives of the Bogaloussa chapter of the Deacons, who escorted Farmer to the town. Farmer stayed with the local head of the Deacons, and the Deacons provided close security

throughout the rest of this stay and Farmer's next. Farmer later wrote in his autobiography that he was secure with the Deacons, "in the knowledge that unless a bomb were tossed . . . the Klan could only reach me if they were prepared to swap their lives for mine."<sup>151</sup>

Blacks in the South found the Deacons helpful because they were unable to rely upon police or other legal entities for racial justice. This provided a practical reason for a right to bear arms: In a world in which the legal system was not to be trusted, perhaps the ability of the system's victims to resist might convince the system to restrain itself.

### CONCLUSION: SELF-DEFENSE AND THE GUN CONTROL QUESTION TODAY

Throughout American history, black and white Americans have had radically different experiences with respect to violence and state protection. Perhaps one reason the Second Amendment has not been taken very seriously by the courts and the academy is that for many of those who shape or critique constitutional policy, the state's power and inclination to protect them is a given. But for all too many black Americans, that protection historically has not been available. Nor, for many, is it readily available today. If in the past the state refused to protect black people from the horrors of white lynch mobs, today the state seems powerless in the face of the tragic black-on-black violence that plagues the mean streets of our inner cities, and at times seems blind to instances of unnecessary police brutality visited upon minority populations.<sup>152</sup>

The history of blacks, firearms regulations, and the right to bear arms should cause us to ask new questions regarding the Second Amendment. These questions will pose problems both for advocates of stricter gun controls and for those who argue against them. Much of the contemporary crime that concerns Americans is in poor black neighborhoods and a case can be made that greater firearms restrictions might alleviate this tragedy. But another, perhaps stronger case can be made that a society with a dismal record of protecting a people has a dubious claim on the right to disarm them. Perhaps a re-examination of this history can lead us to a modern realization of what the framers of the Second Amendment understood: that it is unwise to place the means of protection totally in the hands of the state, and that self-defense is also a civil right.

ENDNOTES

1. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 417 (1857) (emphasis added).
2. See KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* 141-91 (1956).
3. The Civil War cost the Union and Confederate armies a combined casualty total of 498,332 deaths. By way of contrast, World War II, the nation's second bloodiest conflict, cost the United States 407,316 fatalities. See *THE WORLD ALMANAC & BOOK OF FACTS* 793 (Mark S. Hoffman ed., 1991).
4. See generally ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 564-600 (1988); GEORGE C. RABLE, *BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION* (1984).
5. *Ibid.* Especially pertinent is John Philip Reid's reminder: "There are other dimensions that the standing-army controversy, when studied from the perspective of law, adds to our knowledge of the American Revolution. One is the degree to which eighteenth-century Americans thought seventeenth-century English thoughts." JOHN PHILLIP REID, *IN DEFIANCE OF THE LAW: THE STANDING- ARMY CONTROVERSY, THE TWO CONSTITUTIONS, AND THE COMING OF THE AMERICAN REVOLUTION* 4 (1981) (emphasis added).
6. See, e.g., *THE FEDERALIST NO. 84* (Alexander Hamilton).
7. This can be seen with reference to the right of trial by jury. A number of scholars have noted that Americans in the late 18th century regarded the right of trial by jury as including the right to have the jury decide issues of law as well as fact. This was, of course, a departure from traditional English practice. See MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780- 1860*, at 28-29 (1977); WILLIAM EDWARD NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 3-4, 8, 20-30 (1975).
8. 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 421-42, 565 (1968).
9. *Ibid.*
10. Historian Joyce Lee Malcolm notes that England did not have a standing army until the late 17th century and did not have a professional police force until the nineteenth. See Malcolm, *supra* note 9, at 391.
11. ALAN HARDING, *A SOCIAL HISTORY OF ENGLISH LAW* 59 (1966); Malcolm, *supra* note 9, at 391.
12. Malcolm, *supra* note 9, at 391-92.
13. *Ibid.* at 393.
14. *Ibid.* at 393-94.
15. *Ibid.* at 408.
16. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*143-45. Blackstone listed three primary rights--the right of personal security, the right of personal liberty, and the right of private property--all of which he regarded as natural rights recognized and protected by the common law and statutes of England. He also argued that these would be "dead letters" without the five auxiliary rights which he listed as: (1) the constitution, powers and privileges of

Parliament; (2) the limitation of the king's prerogative; (3) the right to apply to the courts of justice for redress of injuries; (4) the right of petitioning the King or either house of Parliament, and for the redress of grievances; and (5) the right of subjects to have arms for their defence. *Ibid.* at \*121-45.

Some commentators have argued that Blackstone's remarks and other evidence of English common-law and statutory rights to possess arms should be viewed in the light of the extensive regulation of firearms that traditionally existed in England and also in light of English strict gun control in the 20th century. See, e.g., SUBCOMMITTEE REPORT, *supra* note 8, at 26; FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE CITIZEN'S GUIDE TO GUN CONTROL* 142-43 (1987); Ehrman & Henigan, *supra* note 6, at 9-10. Two points should be made in that regard. First, much of English firearms regulation had an explicit class base largely inapplicable in the American context. Second, neither a common law right to keep and bear arms nor a similar statutory right such as existed in the English Bill of Rights of 1689 would, in the light of Parliamentary supremacy, be a bar to subsequent statutes repealing or modifying that right. Blackstone is cited here not as evidence that the English right, in precise form and content, became the American right; instead it is evidence that the idea of an individual right to keep and bear arms existed on both sides of the Atlantic in the 18th century.

Blackstone's importance to this discussion is twofold. His writings on the right to possess arms can be taken as partial evidence of what the framers of the Second Amendment regarded as among the rights of Englishmen that they sought to preserve. Blackstone's views greatly influenced late 18th-century American legal thought. But Blackstone's importance in this regard does not cease with the Second Amendment. Blackstone also greatly influenced 19th-century American legal thinking. One influential antebellum American jurist, Justice Joseph Story, was significantly influenced by his readings of Blackstone. See R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 40-45, 137, 246 (1985). Story viewed the Second Amendment as vitally important in maintaining a free republic. In his *Commentaries on the Constitution*, he wrote:

The right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if they are successful in the first instance, enable the people to resist, and triumph over them.

JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 708 (Carolina Academic Press 1987) (1833).

While it would be inaccurate to attribute Story's Second Amendment views solely to his reading of Blackstone, Blackstone doubtless helped influence Story and other early 19th-century lawyers and jurists to regard the right to keep and bear arms as an important prerogative of free citizens. All of this is important for our discussion, not only with regard to antebellum opinion concerning the Second Amendment, but also in considering the cultural and legal climate that informed the framers of the Fourteenth Amendment who intended to extend what were commonly regarded as the rights of free men to the freedmen, and who also intended to extend the Bill of Rights to the states. See *infra* Part III.

17. 1 BLACKSTONE, *supra* note 46, at \*143-44.

18. ABBOTT E. SMITH, *COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA, 1607-1776*, at 30-34 (Norton 1971) (1947).

19. BOORSTIN, *supra* note 18, at 355-56.

20. See A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 32 (1978).

It should also be added that the abundant game found in North America during the colonial period eliminated the need for the kind of game laws that had traditionally disarmed the lower classes in England. Malcolm, *supra* note 9, at 393-94.

21. See, e.g., 2 *LAWS OF THE ROYAL COLONY OF NEW JERSEY* 15-21, 49, 96, 133, 289 (Bernard Bush ed., 1977).

22. HIGGINBOTHAM, *supra* note 51, at 260-262.

23. For a good discussion of the elevation of the rights of white indentured servants as a means of maintaining social control over the black population, see generally EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975)

24. Stephen Halbrook notes that Virginia's royal government in the late 17th century became very concerned that the widespread practice of carrying arms would tend to foment rebellion, and that, as a result, statutes were enacted to prevent groups of men from gathering with arms. See HALBROOK, *THAT EVERY MAN BE ARMED*, *supra* note 6, at 56-57. The sharpening of racial distinctions and the need for greater social control over slaves that occurred toward the end of the seventeenth and beginning of the 18th century lessened the concern authorities had over the armed white population. See MORGAN, *supra* note 54, at 354-55.

25. See Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 *VAND. Law Review* 93, 101-102 (1989) (colonies dealt with slavery in an unsystematic and piecemeal fashion). See generally WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARDS THE NEGRO, 1550-1812*, at 48-52 (1968).

26. HIGGINBOTHAM, *supra* note 51, at 21-22.

27. See HERBERT APTHEKER, *AMERICAN NEGRO SLAVE REVOLTS* (5th ed. 1983); Diamond, *supra* note 56, at 101-102, 104; Robert J. Cottrell & Raymond T. Diamond, *Book Review*, 56 *TUL. Law Review* 1107, 1110-1112 (1982) (reviewing A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978)).

28. 1 WILLIAM W. HENING, *STATUTES AT LARGE OF VIRGINIA* 226 (New York, R. & W. & G. Bartow 1823); see HIGGINBOTHAM, *supra* note 51, at 32.

29. 1 HENING, *supra* note 59, at 226; see HIGGINBOTHAM, *supra* note 51, at 32.

30. HIGGINBOTHAM, *supra* note 51, at 39.

31. *Ibid.* at 58.

32. *Ibid.* at 38-40.

33. Higginbotham informs us that the Boston selectmen passed such an ordinance after some slaves had allegedly committed arson in 1724. See *Ibid.* at 76.

34. See LORENZO J. GREENE, *THE NEGRO IN COLONIAL NEW ENGLAND* 127 (1968). Greene notes that blacks probably served in New England militias until the latter part of the 17th century. *Ibid.* It is interesting to note that, despite this prohibition on militia service, blacks served with New England forces during the French and Indian Wars. *Ibid.* at 188-89. Winthrop Jordan notes that in 1652 the Massachusetts General Court ordered Scotsmen, Indians, and Negroes to train with the Militia, but that, in 1656, Massachusetts and, in 1660, Connecticut excluded blacks from Militia service. See JORDAN, *supra* note 56, at 71.

35. See 2 *LAWS OF THE ROYAL COLONY OF NEW JERSEY*, *supra* note 52, at 49, 96, 289.

36. See HIGGINBOTHAM, *supra* note 51, at 201-15.

37. *Ibid.*

38. See generally REID, *supra* note 34.

39. Elbridge Gerry of Massachusetts thought a national government which controlled the militia would be potentially despotic. James Madison's Notes on the Constitutional Convention of 1787 (Aug. 21, 1787), in 1 1787: *DRAFTING THE U.S. CONSTITUTION* 916 (Wilbowin E. Benton, ed., 1986). With this power, national government "may enslave the States." *Ibid.* at 846. Oliver Ellsworth of Connecticut suggested that "[t]he whole authority over the Militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power." *Ibid.* at 909.

It is interesting, in light of the current debate, that both advocates and opponents of this increase in federal power assumed that the militia they were discussing would be one that enrolled almost all of the white male population between the ages of 16 and 60, and that that population would supply their own arms. George Mason of Virginia proposed "the idea of a select militia," but withdrew it. *Ibid.* at 909.

40. *THE ANTIFEDERALISTS*, *supra* note 74, at 57. This concern was the reason for the original language of the Second Amendment. See *supra* note 4.

41. The Virginia convention urged the adoption of the following language:

That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence for a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that in all cases, the military should be under strict subordination to, and governed by, the civil power.

3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 TOGETHER WITH THE JOURNAL OF THE FEDERAL CONVENTION* 657-59 (Jonathan Elliot ed., Ayer Co. 1987) (1907) [hereinafter *ELLIOT'S DEBATES*].

42. THE FEDERALIST NO. 25, at 161 (Alexander Hamilton) (The Heritage Press 1945). For a modern study that supports Hamilton's views concerning the military ineffectiveness of the militia, see BOORSTIN, *supra* note 18, at 352-72.
43. 5 ELLIOT'S DEBATES, *supra* note 80, at 464-65.
44. THE FEDERALIST NO. 46, at 319 (James Madison) (The Heritage Press 1945). The census of 1790 listed the white male population over age 16 as 813,298. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT 16 (1976). The census did not list the number over 60 that would have been exempt from militia duty.
45. 1 Stat. 271.
46. U.S. CONST. art I, s 2, cl. 3 (specifying congressional representation) is often cited for the proposition that blacks were not citizens because of the three-fifths clause. It should be noted that, under this clause, free Negroes were counted as whole persons for purposes of representation. The original wording of this provision specifically mentioned "white and other citizens," but that language was deleted by the committee on style as redundant. See 5 ELLIOT'S DEBATES, *supra* note 78, at 451.
47. JORDAN, *supra* note 56, at 125-26, 411-12.
48. Robert J. Cottrol, The Thirteenth Amendment and the North's Overlooked Egalitarian Heritage, 11 NAT'L BLACK LawJ. 198, 202-03 (1989) (discussing racism in early 19th-century America).
49. Paul Finkelman, Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North, 17 RUTGERS L.J. 415, 476 (1986).
50. See, e.g., GA. CONST. of 1779, art. IV, s 1, 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 386; MD. CONST. OF 1776, art. II, 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 821; MASS. CONST. of 1776, pt. I, declaration of rights, art. IX, 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 958; N.H. CONST. OF 1784, pt. I, bill of rights, art. XI, 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1281; N.J. CONST. of 1776, art. IV, 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1311; N.C. CONST. of 1776, constitution or frame of government, art. IX, 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1411-12; PA. CONST. of 1776, declaration of rights, art. VII, 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1541; VT. CONST. of 1777, ch. I, declaration of rights, art. VIII, 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1859.
- Only Georgia, under its 1776 constitution, and South Carolina, in its 1790 constitution, provided explicit racial restrictions on the right to vote. See GA. CONST. of 1776, art. IX, 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 379; S.C. CONST. of 1790, art. I s 4, 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1628.
51. See GA. CONST. of 1776, art. LVI, 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 283; GA. CONST. of 1789, art. IV, s 5, 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 386; MD. CONST. of 1776, art. XXXIII, 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 819-20 (freedom of religion for "all persons"); N.C. CONST. of 1776, art. VIII (rights in criminal proceedings to be informed of charges, to confront witnesses, and to remain silent for "every man," and freedom of

religion for "all men"), 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1409; N.Y. CONST. of 1777, art. XIII (due process to be denied "no member of this state"), art. XXXVIII (freedom of religion "to all mankind"); PA.CONST. of 1776, art. II (freedom of religion for "all men"), art. VIII (due process for "every member of society"), 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1541; PA. CONST. of 1790, art. XI, s 3 (freedom of religion to be denied to "no person"), art. XI, s 7 (freedom of the press for "every person" and freedom of speech for "every citizen"), art. XI, s 10 (due process to be denied to "no person"), 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1554-55; S.C. CONST. of 1778, art. XXXVIII (freedom of religion), 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1626-27; S.C. CONST. of 1790, art. VIII (freedom of religion "to all mankind"), 2 FEDERAL AND STATE CONSTITUTIONS, s *supra* note 104, at 1632.

52. LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790- 1860*, at 79 (1961).

53. See STAMPP, *supra* note 27, at 215-17.

54. STAMPP, *supra* note 27, at 214-16.

55. See *infra* text accompanying notes 126-46.

56. Chapter 448, s 1, of the Kentucky Acts of 1818 was limited solely to slave offenders. Act of Feb. 10, 1819, ch. 448, s 1, 1819 Acts of Ky. 787. The Kentucky Acts of 1850 extended these provisions to free blacks as well. Act of Mar. 24, 1851, ch. 617, art. VII, s 7, 1850 Acts of Ky. 291, 300-01.

57. An Act Concerning Slaves, s 11, Acts of Fla. 289, 291 (1824). In 1825, Florida had provided a penalty for slaves using firelight to hunt at night, but this seems to have been a police measure intended to preserve wooded land, for whites were also penalized for this offense, albeit a lesser penalty. Act of Dec. 10, 1825, s 5, 1825 Laws of Fla. 78-80. Penalties for "firehunting" were reenacted in 1827, Act of Jan. 1, 1828, 1828 Laws of Fla. 24-25, and the penalties for a slave firehunting were reenacted in 1828, Act of Nov. 21, 1828, s 46, 1828 Laws of Fla. 174, 185.

58. 1825 Acts of Fla. 52, 55.

59. *Ibid.* s 9.

60. Act of Jan 31, 1831, 1831 Fla. Laws 30.

61. APTHEKER, *supra* note 58, at 298. For a full account of the revolt, the bloodiest in United States history, see *Ibid.* at 293-324. For a compilation of documentary sources on the revolt, see also HENRY I. TRAGLE, *THE SOUTHAMPTON SLAVE REVOLT OF EIGHTEEN THIRTY-ONE: A COMPILATION OF SOURCE MATERIAL* (1971). An account of the revolt novelized from Turner's confession can be found in WILLIAM STYRON, *THE CONFESSIONS OF NAT TURNER* (1967). Styron's novel has been criticized as failing to capture the power of religion to the 19th century black, and thus failing to tell the truth of the revolt. See, e.g., WILLIAM F. CHEEK, *BLACK RESISTANCE BEFORE THE CIVIL WAR* 116-17 (1970).

62. See HERBERT APTHEKER, *NAT TURNER'S SLAVE REBELLION* 74-94 (1966).

63. *Ibid.* at 74-75.

64. *Ibid.* at 75.

65. *Ibid.* at 81.

66. Act of Dec 23, 1833, s 7, 1833 Ga. Laws 226, 228.

67. Act of Feb. 17, 1833, ch. 671, ss 15, 17, 1833 Fla. Laws 26, 29. The black person offending the statute was to be "severely punished," incongruously enough "by moderate whipping," not to exceed thirty-nine strokes on the bare back. *Ibid.* s 17.

68. Act of Jan. 6, 1847, ch. 87, s 11, 1846 Fla. Laws 42, 44; Act of Dec. 17, 1861, ch. 1291, s 11, 1861 Fla. Laws 38, 40.

69. STAMPP, *supra* note 27, at 214-15.

70. See *supra* text accompanying notes 112-16.

71. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 10 (1977).

72. After *Roberts v. Boston*, 59 Mass. (5 Cush.) 198 (1849), upheld the provision of segregated public education in the City of Boston, the Massachusetts legislature outlawed segregated education. Act of Mar. 24, 1855, ch. 256, 1855 Mass. Acts 256; see Finkelman, *supra* note 99, at 465-467. In Connecticut, most schools were integrated before 1830; only in response to a request from the Hartford black community was a separate system established in that year. *Ibid.* at 468. The Iowa constitution provided for integration in public schools. See *Clark v. Board of Directors*, 24 Iowa 266 (1868) (construing IOWA CONST. of 1857, art. IX, s 12).

In Ohio, blacks were excluded entirely from public schools until 1834 when the state Supreme Court ruled that children of mixed black ancestry who were more than half white might attend; not until 1848 did the legislature provide for public education of any sort for other black children. *Williams v. Directors of Sch. Dist.*, Ohio 578 (1834); see also *Lane v. Baker*, 12 Ohio 237 (1843). In 1848, the state legislature allowed blacks to be serviced by the public schools unless whites in the community were opposed; in the alternative, the legislature provided for segregated education. Act of Feb. 24, 1848, 1848 Ohio Laws 81. The following year, the legislature provided that the choice of segregated or integrated public education lie at the option of local school districts. Act of Feb. 10, 1849, 1849 Ohio Laws 17. Cincinnati refused to comply with the mandate to educate blacks until forced to do so by a combination of statutory and judicial persuasion. Act of Mar. 14, 1853, s 31, 1853 Ohio Laws 429; Act of Apr. 18, 1854, 1854 Ohio Laws 48; Act of Apr. 8, 1856, 1856 Ohio Laws 117; *State ex rel. Directors of the E. & W. Sch. Dist. v. City of Cincinnati*, 19 Ohio 178 (1850); see Finkelman, *supra* note 99, at 468-470. See generally UNITED STATES OFFICE OF EDUCATION, *HISTORY OF SCHOOLS FOR THE COLORED POPULATION* (1969). In Philadelphia, public education was provided for whites in 1818, and separate education was provided for blacks in 1822. Finkelman, *supra* note 99, at 468. In Providence, public education was segregated. COTTROL, *supra* note 111, at 90. Rural schools in Rhode Island, however, were integrated. *Ibid.* In New York, some school districts were segregated, among them that of New York City. Finkelman, *supra* note 99, at 463, 467-68.

73. From 1807 to 1849, Ohio required blacks entering the state to post a bond. Act of Jan. 25, 1807, ch. VIII, 1807 Ohio Gen. Assem. Laws 53, repealed by Act of Feb. 10, 1849, 1849 Ohio Laws 17. Michigan Territory passed a similar law in 1827, though there was only one recorded attempt to enforce it. Act of Apr 13, 1827, 1827 Mich. Review Laws 1-10 (1st & 2d Councils). DAVID M. KATZMAN, *BEFORE THE GHETTO: BLACK DETROIT IN THE NINETEENTH CENTURY* 7 n.6 (1973). Indiana required a bond from 1831

until 1851, when a new constitution forbade black immigration entirely. Act of Feb. 10, 1831, 1831 Ind. Review Laws 375, superseded by IND. CONST. of 1851, art. XIII, s 1 (amended 1881). Illinois went the same route by coupling the repeal of its 1829 bond provisions with a prohibition on black immigration in its 1848 constitution. ILL. CONST. of 1848, art. XIV; Act of Jan. 17, 1832-33, Ill. Review Laws 463, amended by Act of Feb 1, 1831, 1832-33 Ill. Review Laws 462, repealed by Act of Feb. 12, 1853, 1853 Ill. Laws 57. Oregon's 1859 constitution forbade blacks to enter the state, OR. CONST. of 1859, art. XVIII (repealed 1926), and Iowa provided for a fine of two dollars a day for any black remaining in the state for more than three days. Act of Feb. 5, 1851, 1851 Iowa Laws 172.

74. From 1833 to 1838, Connecticut prohibited the establishment of schools for nonresident blacks. Act of May 24, 1833, ch. IX, 1833 Conn. Pub. Acts 425, repealed by Act of May 31, 1838, ch. XXXIV, 1838 Conn. Pub. Acts 30; see also Crandall v. State, 10 Conn. 339 (1834) (attempted prosecution under this statute failed due to an insufficient information). See Finkelman, *supra* note 99, at 430-43 (discussing the lack of enforcement of statutes regulating black immigration).

75. See LITWACK, *supra* note 116, at 159, 165 (in fields where blacks were allowed to compete with whites, who were often the new Irish immigrants, violence often erupted).

76. *Ibid.* at 153; see also LEONARD P. CURRY, *THE FREE BLACK IN URBAN AMERICA 1800-1850: THE SHADOW OF THE DREAM* 96-111 (1981).

77. See *supra* Part I.c.2.

78. JACK D. FONER, *BLACKS AND THE MILITARY IN AMERICAN HISTORY: A NEW PERSPECTIVE* 20-21 (1974).

79. See COTTROL, *supra* note 97, at 63.

80. OSCAR HANDLIN, *BOSTON'S IMMIGRANTS: A STUDY IN ACCULTURATION* 175 & n.110 (1959).

81. CURRY, *supra* note 153, at 100; VICTOR ULLMAN, *MARTIN R. DELANY: THE BEGINNINGS OF BLACK NATIONALISM* 29-31 (1971).

82. CURRY, *supra* note 153, at 105-06.

83. *Ibid.* at 107-08; WENDELL P. DABNEY, *CINCINNATI'S COLORED CITIZENS: HISTORICAL, SOCIOLOGICAL AND BIOGRAPHICAL* 48-55 (Dabney Publishing Co. 1970) (1926); Cincinnati Riot, NILES' NAT'L REG. (Baltimore), Sept. 11, 1841, at 32.

84. Even during the Civil War, the Lincoln administration and Congress acted on the legal assumption that free blacks were citizens. Despite Chief Justice Taney's opinion in *Dred Scott* that neither free blacks nor slaves could be citizens, *Dred Scott v. Sanford*, 60 U.S. (15 How.) 393, 417 (1856), Lincoln's Attorney General Edward Bates issued an opinion in 1862 declaring that free blacks were citizens and entitled to be masters of an American vessel. See 10 Op. Atty. Gen. 382, 413 (1862). That same year, Congress amended the 1792 militia statute, striking out the restriction of militia membership to white men. See Act of July 17, 1862, ch. 36, s 12, 12 Stat. 597, 599. While it could be argued that these measures were in part motivated by military needs, it should be noted that the United States and various states had previously enlisted black troops during time of crisis despite the restrictions in the 1792 Act. See *supra* Part I.c.2. Thus, these measures reflected long standing Republican and

antislavery beliefs concerning the citizenship of free Negroes. See generally Cottrol, *supra* note 91. For a good discussion of black citizenship rights in the antebellum North, see generally Finkelman, *supra* note 99.

85. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

86. See generally Finkelman, *supra* note 99.

87. KENNETH STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877*, at 80 (1965).

88. FONER, *supra* note 29, at 198 (1988) (quoting letter from William H. Trescot to James Law Orr, Dec. 13, 1865, South Carolina's Governor's Papers).

89. FONER, *supra* note 29, at 200.

90. STAMPP, *supra* note 171, at 80

91. *Ibid.*

92. No Negro who is not in the military service shall be allowed to carry fire-arms, or any kind of weapons, within the parish, without the special permission of his employers, approved and endorsed by the nearest and most convenient chief of patrol. Any one violating the provisions of this section shall forfeit his weapons and pay a fine of five dollars, or in default of the payment of said fine, shall be forced to work five days on the public road, or suffer corporal punishment as hereinafter provided.

Louisiana Statute of 1865, reprinted in *DOCUMENTARY HISTORY OF RECONSTRUCTION*, *supra* note 170, at 280

93. [N]o freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife, and on conviction thereof in the county court shall be punished by fine, not exceeding ten dollars, and pay the cost of such proceedings, and all such arms or ammunition shall be forfeited to the informer; and it shall be the duty of every civil and military officer to arrest any freedman, free negro, or mulatto found with any such arms or ammunition, and cause him or her to be committed to trial in default of bail.

Mississippi Statute of 1865, reprinted in *DOCUMENTARY HISTORY OF RECONSTRUCTION*, *supra* note 170, at 290.

94. 1. That it shall not be lawful for any freedman, mulatto, or free person of color in this State, to own fire-arms, or carry about his person a pistol or other deadly weapon.

2. That after the 20th day of January, 1866, any person thus offending may be arrested upon the warrant of any acting justice of the peace, and upon conviction fined any sum not exceeding \$100 or imprisoned in the county jail, or put to labor on the public works of any county, incorporated town, city, or village, for any term not exceeding three months.

3. That if any gun, pistol or other deadly weapon be found in the possession of any freedman, mulatto or free person of color, the same may by any justice of the peace, sheriff, or constable be taken from such freedman, mulatto, or free

person of color; and if such person is proved to be the owner thereof, the same shall, upon an order of any justice of the peace, be sold, and the proceeds thereof paid over to such freedman, mulatto, or person of color owning the same.

4. That it shall not be lawful for any person to sell, give, or lend fire-arms or ammunition of any description whatever, to any freedman, free negro or mulatto; and any person so violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined in the sum of not less than fifty nor more than one hundred dollars, at the discretion of the jury trying the case.

See THE RECONSTRUCTION AMENDMENTS' DEBATES 209 (Alfred Avins ed., 1967).

95. See FONER, *supra* note 29, at 225-227; STAMPP, *supra* note 171, at 80-81.

96. The Ku Klux Klan was formed in 1866 and immediately launched its campaign of terror against blacks and southern white unionists. See FONER, *supra* note 29, at 342; *infra* text at notes 217-223.

97. During the debates over the Civil Rights Act of 1866, Republican Representative Sidney Clarke of Kansas expressed the fears of many northern Republicans who saw the clear military implications of allowing the newly formed white militias in Southern states to disarm blacks:

Who, sir, were those men? Not the present militia; but the brave black soldiers of the Union, disarmed and robbed by this wicked and despotic order. Nearly every white man in [Mississippi] that could bear arms was in the rebel ranks. Nearly all of their able-bodied colored men who could reach our lines enlisted under the old flag. Many of these brave defenders of the nation paid for their arms with which they went to battle. And I regret, sir, that justice compels me to say, to the disgrace of the Federal Government, that the "reconstructed" state authorities of Mississippi were allowed to rob and disarm our veteran soldiers and arm the rebels fresh from the field of treasonable strife. Sir, the disarmed loyalists of Alabama, Mississippi, and Louisiana are powerless today, and oppressed by the pardoned and encouraged rebels of those States.

THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 178, at 209.

98. Representative Roswell Hart, Republican from New York, captured those sentiments during the debates over the Civil Rights Act of 1866:

The Constitution clearly describes that to be a republican form of government for which it was expressly framed. A government which shall "establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty"; a government whose "citizens shall be entitled to all privileges and immunities of other citizens"; where "no law shall be made prohibiting the free exercise of religion"; where "the right of the people to keep and bear arms shall not be infringed"; where "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated," and where "no person shall be deprived of life, liberty, or property without due process of law."

Have these rebellious States such a form of government? If they have not, it is the duty of the United States to guaranty that they have it speedily.

THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 178, at 193.

99. For a good general discussion of the incorporation question, see MICHAEL K. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986). For a good discussion of the 39th Congress's views concerning the Second Amendment and its incorporation via the Fourteenth, see HALBROOK, *supra* note 6, at 107-23.

100. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . ." U.S. CONST. amend. XIV, s 1.

101. THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 178, at 156-60, 217- 18.

102. *Ibid.* at 219 (remarks by Republican Sen. Jacob Howard of Michigan on privileges and immunities of citizens).

103. *Butchers Benevolent Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 83 U.S. (16 Wall.) 36 (1872).

104. 92 U.S. 542 (1876)

105. 16 Stat. 140 (1870) (codified as amended at 18 U.S.C. ss 241- 42 (1988)). The relevant passage reads:

That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States or because of his having exercised the same, such persons shall be held guilty of a felony . . .

*Ibid.* at 141

106. 92 U.S. at 548-59.

107. This can also be seen in the Court's reaction to the federal government's first public accommodations statute, the Civil Rights Act of 1875. With much the same reasoning, the Court held that Congress had no power to prohibit discrimination in public accommodations within states. See *The Civil Rights Cases*, 109 U.S. 3 (1883).

108. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (declaring the administration of a municipal ordinance discriminatory); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (striking down a statute prohibiting blacks from serving as jurors).

109. 116 U.S. 252 (1886).

110. *Ibid.* at 253.

111. *Ibid.* at 265.

112. *Ibid.*

113. RABLE, *supra* note 29, at 88-90; STAMPP, *supra* note 171, at 199-204.

114. Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases*, 82 COLUM. Law Review 646, 653-55 (1982).

115. GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN*

HISTORY 251-52 (1981); CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 32 (1978); JOEL WILLIAMSON, A RAGE FOR ORDER: BLACK/WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION 124 (1986).

116. See generally JORDAN, *supra* note 56, at 3-43.

117. LITWACK, *supra* note 116, at 153-86.

118. Cottrol, *supra* note 91, at 1007-19.

119. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 22-23 (3d ed. 1974).

120. See *infra* text accompanying notes 169-178. See generally WOODWARD, *supra* note 203, at 22-29.

121. See *Ibid.* at 18-21 (the Jim Crow system was born in the North where systematic segregation, with the backing of legal and extralegal codes, permeated black life in the free states by 1860); see also LITWACK, *supra* note 116, at 97-99 (in addition to statutes and customs that limited the political and judicial rights of blacks, extralegal codes enforced by public opinion perpetuated the North's systematic segregation of blacks from whites).

122. See RICHARD C. WADE, SLAVERY IN THE CITIES: THE SOUTH 1820-1860, at 180- 208 (1964) (although more contact between blacks and whites occurred in urban areas of the South, both social standards and a legal blueprint continued the subjugation of blacks to whites).

123. 109 U.S. 3 (1883).

124. 163 U.S. 537 (1896).

125. 109 U.S. 3.

126. 163 U.S. at 548.

127. *Ibid.* at 551.

128. *Ibid.*

129. Jim Crow was not exclusively a southern experience after the Civil War. For example, at one point or another, antimiscegenation laws have been enacted by forty-one of the fifty states. Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49, 50-51 & 50 n.9 (1964). The Adams case, in which the federal government challenged separate university facilities throughout the union, involved the State of Pennsylvania. See *Adams v. Richardson*, 356 F. Supp. 92, 100 (D.D.C. 1973); *Adams v. Richardson*, 351 F. Supp. 636, 637 (D.D.C. 1972). *Hansberry v. Lee*, 311 U.S. 32 (1940), involved a covenant restricting the sale of property in Illinois to blacks. The set of consolidated cases that outlawed the separate but equal doctrine would later be known as *Brown v. Board of Educ.*, 347 U.S. 483 (1954), the defendant board of education was located in Kansas, a Northern state.

130. *Blood-Curdling Lynching Witnessed by 2,000 Persons*, CHATTANOOGA TIMES, Feb. 13, 1918, reprinted in GINZBURG, *supra* note 231, 114-116.

131. IDA B. WELLS-BARNETT, CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS 62 (Alfreda M. Duster ed., 1970). Wells-Barnett's fears for her safety, fortunately, were never realized. Born a slave in 1862, she died of natural causes in 1931. *Ibid.* at xxx-xxxi, 7. Eli Cooper of Caldwell, Georgia was not so lucky, however. Cooper was alleged to

have said that the "Negro has been run over for fifty years, but it must stop now, and pistols and shotguns are the only weapons to stop a mob." Cooper was dragged from his home by a mob of 20 men and killed as his wife looked on. Church Burnings Follow Negro Agitator's Lynching, CHI. DEFENDER, Sept. 6, 1919, reprinted in GINZBURG, supra note 231, at 124.

132. Letter from Texas Reveals Lynching's Ironic Facts, N.Y. NEGRO WORLD, Aug. 22, 1920, reprinted in GINZBURG, supra note 231, at 139-40.

133. Lone Survivor of Atrocity Recounts Events of Lynching, N.Y. AMSTERDAM NEWS, June 1, 1927, reprinted in GINZBURG, supra note 231, at 175-78.

134. WELLS-BARNETT, supra note 240, at 50. To forestall the occurrence of future incidents of the same nature, a Tennessee court ordered the local sheriff to take charge of the arms of the black militia unit. *Ibid.*

135. WALTER WHITE, A MAN CALLED WHITE 4-12 (1948), reprinted in THE NEGRO AND THE CITY, supra note 219, at 121-26.

136. *Ibid.* at 126.

137. JERVIS ANDERSON, A. PHILLIP RANDOLPH: A BIOGRAPHICAL PORTRAIT 41-42 (1973).

138. *Ibid.* at 42.

139. See, e.g., John R. Salter, Jr. & Donald B. Kates, Jr., The Necessity of Access to Firearms by Dissenters and Minorities Whom Government is Unwilling or Unable to Protect, in RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT, 185, 189-93 (Donald B. Kates, Jr. ed., 1979).

140. Donald B. Kates, Jr., recalls that:

As a civil rights worker in a Southern State during the early 1960's, I found that the possession of firearms for self-defense was almost universally endorsed by the black community, for it could not depend on police protection from the KKK. The leading civil rights lawyer in the state (then and now a nationally prominent figure) went nowhere without a revolver on his person or in his briefcase. The black lawyer for whom I worked principally did not carry a gun all the time, but he attributed the relative quiescence of the Klan to the fact that the black community was so heavily armed. Everyone remembered an incident several years before, in which the state's Klansmen attempted to break up a civil rights meeting and were routed by return gunfire. When one of our clients (a school-teacher who had been fired for her leadership in the Movement) was threatened by the Klan, I joined the group that stood armed vigil outside her house nightly. No attack ever came--though the Klan certainly knew that the police would have done nothing to hinder or punish them.

RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT, supra note 256, at 186.

141. DAISY BATES, THE LONG SHADOW OF LITTLE ROCK, A MEMOIR 94 (1982).

142. HOWELL RAINES, MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED 275-76 (1977).

143. Telephone interview with David Dennis (Oct. 30, 1991).

144. Hamilton Bims, Deacons for Defense, *EBONY*, Sept. 1965, at 25, 26; see also Roy Reed, The Deacons, Too, Ride by Night, *N.Y. TIMES*, Aug. 15, 1965, Magazine, at 10.

145. Bims, *supra* note 271, at 25-26.

146. *Ibid.* at 26. Like the Deacons for Defense and Justice was the Monroe, North Carolina chapter of the NAACP, which acquired firearms and used them to deal with the Ku Klux Klan. ROBERT F. WILLIAMS, *NEGROES WITH GUNS* 42-49, 54- 57 (1962). The Deacons for Defense and Justice are to be contrasted with the Black Panther Party for Self Defense. The Black Panther Program included the following statement:

We believe we can end police brutality in our black community by organizing black self-defense groups that are dedicated to defending our black community from racist police oppression and brutality. The Second Amendment to the Constitution of the United States gives a right to bear arms. We therefore believe that all black people should arm themselves for self-defense.

Black Panther Party--Platform and Program, reprinted in REGINALD MAJOR, *A PANTHER IS A BLACK CAT* 286 (1971). Yet, the Black Panthers deteriorated into an ineffective group of revolutionaries, at times using arguably criminal means of effectuating their agenda. See generally GENE MARINE, *THE BLACK PANTHERS* (1969); BOBBY SEALE, *SEIZE THE TIME: THE STORY OF THE BLACK PANTHER PARTY AND HUEY P. NEWTON* (1968).

147. JAMES FARMER, *LAY BARE THE HEART: AN AUTOBIOGRAPHY OF THE CIVIL RIGHTS MOVEMENT* 287 (1985).

148. See Bims, *supra* note 271, at 26; see also Reed, *supra* note 268, at 10.

149. See Reed, *supra* note 271, at 10; see also Bims, *supra* note 268, at 26.

150. RAINES, *supra* note 269, at 417 (interview with Charles R. Sims, leader of the Bogalousa Deacons); see Bims, *supra* note 271, at 26; Reed, *supra* note 271, at 10-11.

151. FARMER, *supra* note 274, at 288.

152. The beating of Rodney King on March 3, 1991, by members of the Los Angeles Police Department, captured on tape by a serendipitous amateur photographer, has focused attention recently on the problem of police brutality, though the problem predates and presumably continues beyond the incident. See Tracey Wood & Faye Fiore, *Beating Victim Says He Obeyed Police*, *L.A. TIMES*, Mar. 7, 1991, at A1.