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The Fourteenth Amendment and the Right To Keep and Bear Arms: The Intent of the Framers

By Stephen P. Halbrook[*]

> A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. --*U.S. Const. amend. II*.
>
> ... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. --*U.S. Const. amend. XIV, § 1*.

If African Americans were citizens, observed Chief Justice Taney in *Dred Scott v. Sandford*,[1] "it would give to persons of the negro race ... the full liberty of speech ...; to hold public meetings upon political affairs, *and to keep and carry arms wherever they went*."[2] If this interpretation ignores that Articles I and II of the Bill of Rights designate the respective freedoms guaranteed therein to "the people" and not simply the citizens (much less a select group of orators or militia), contrariwise *Dred Scott* followed antebellum judicial thought in recognizing keeping and bearing arms as an individual right[3] protected from both federal and state infringement.[4] The exception to this interpretation were cases holding that the Second Amendment only protected citizens[5] from federal, not state,[6] infringement of the right to keep and bear arms, to provide judicial approval of laws disarming black freemen and slaves.

Since the Fourteenth Amendment was meant to overrule *Dred Scott* by extending individual constitutional rights to black Americans and by providing protection thereof against state infringement,[7] the question arises whether the framers of Amendment XIV and related enforcement legislation recognized keeping and bearing arms as an individual right on which no state could infringe. The congressional intent in respect to the Fourteenth Amendment is revealed in the debates over both Amendments XIII and XIV as well as the Civil Rights Act of 1866, the Anti-KKK Act of 1871, and the Civil Rights Act of 1875. Given the unanimity of opinion concerning state regulation of privately held arms by the legislators who framed the Fourteenth

Amendment and its enforcement legislation, it is surprising that judicial opinions and scholarly articles fail to analyze the Reconstruction debates.[8]

a. arms and slavery

Having won their national independence from England through armed struggle, post-Revolutionary War Americans were acutely (p.69)aware that the sword and sovereignty go hand in hand, and that the firearms technology ushered in a new epoch in the human struggle for freedom. Furthermore, both proponents and opponents of slavery were cognizant that an armed black population meant the abolition of slavery, although plantation slaves were often trusted with arms for hunting.[9] This sociological fact explained not only the legal disarming of blacks but also the advocacy of a weapons culture by abolitionists. Having employed the instruments for self-defense against his pro-slavery attackers, abolitionist and Republican Party founder Cassius Marcellus Clay wrote that "`the pistol and the Bowie knife' are to us as sacred as the gown and the pulpit."[10] And it was John Brown who argued that "the practice of carrying arms would be a good one for the colored people to adopt, as it would give them a sense of their manhood."[11]

The practical necessities of the long, bloody Civil War, demanding every human resource, led to the arming of blacks as soldiers. While originally they considered it a "white man's war," Northern authorities by 1863 were organizing black regiments on a wide scale. At the same time, black civilians were forced to arm themselves privately against mob violence. During the anti-draft riots in New York, according to a Negro newspaper of the time, "The colored men who had manhood in them armed themselves, and threw out their pickets every day and night, determined to die defending their homes.... Most of the colored men in Brooklyn who remained in the city were armed daily for self-defense."[12]

Toward the end of the war Southerners began to support the arming and freeing of slaves willing to fight the invaders, and the Virginia legislature, on passing a bill providing for the use of black soldiers, repealed its laws against the bearing of arms by blacks.[13] One opponent of these measures declared: "What would be the character of the returned negro soldiers, made familiar with the use of fire-arms, and taught by us, that freedom was worth fighting for?"[14] Being evident that slaves plus guns equaled abolition, the rebels were divided between those who valued nationhood to slavery and those who preferred a restored union which might not destroy the servile condition of black labor.

As the movement began before the end of the war for the complete abolition of slavery via the Thirteenth Amendment, members of the U.S. Congress recognized the key role that the bearing of arms was already playing in the freeing of the slaves. In debate over the proposed Amendment, Rep. George A. Yeaman (Unionist, Ky.) contended that whoever won the war, the abolition of slavery was inevitable due to the arming of blacks:

> Let proclamations be withdrawn, let statutes be repealed, let our armies be defeated, let the South achieve its independence, yet come out of the war ... with an army of slaves made freemen for their service, who have been contracted with,

> been armed and drilled, and have seen the force of combination. Their personal status is enhanced.... They will not be returned to slavery.[15]

At the same time, members of the slavocracy were planning to disarm the freedmen. Arguing for speedy adoption of the Thirteenth Amendment, Rep. William D. Kelley (R., Penn.) expressed (p.70)shock at the words of an anti-secessionist planter in Mississippi who expected the union to restore slavery. Kelly cited a letter from a U.S. brigadier general who wrote: "`What,' said I, `these men who have had arms in their hands?' `Yes,' he said, `we should take the arms away from them, of course.'"[16]

The northern government won the war only because of the arming of the slaves, according to Sen. Charles Sumner (R., Mass.), who argued that necessity demanded "first, that the slaves should be declared free; and secondly, that muskets should be put into their hands for the common defense.... Without emancipation, followed by the arming of the slaves, rebel slavery would not have been overcome."[17]

b. the civil rights act of 1866

After the war was concluded, the slave codes, which limited access of blacks to land, to arms, and to the courts, began to reappear in the form of the black codes,[18] and United States legislators turned their attention to the protection of the freedmen. In support of Senate Bill No. 9, which declared as void all laws in the rebel states which recognized inequality of rights based on race, Sen. Henry Wilson (R., Mass.) explained in part: "In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them...."[19]

When Congress took up Senate Bill No. 61, which became the Civil Rights Act of 1866,[20] Sen. Lyman Trumbull (R., Ill.), Chairman of the Senate Judiciary Committee, indicated that the bill was intended to prohibit inequalities embodied in the black codes, including those provisions which "prohibit any negro or mulatto from having fire-arms."[21] In abolishing the badges of slavery, the bill would enforce fundamental rights against racial discrimination in respect to civil rights, the rights to contract, sue and engage in commerce, and equal criminal penalties. Sen. William Saulsbury (D., Del.) added: "In my State for many years, and I presume there are similar laws in most of the southern States, there has existed a law of the State based upon and founded in its police power, which declares that free negroes shall not have the possession of firearms or ammunition. This bill proposes to take away from the States this police power...." The Delaware Democrat opposed the bill on this basis, anticipating a time when "a numerous body of dangerous persons belonging to any distinct race" endangered the state, for "the State shall not have the power to disarm them without disarming the whole population."[22] Thus, the bill would have prohibited legislative schemes which in effect disarmed blacks but not whites. Still, supporters of the bill were soon to contend that arms bearing was a basic right of citizenship or personhood.

In the meantime, the legislators turned their attention to the Freedmen's Bureau Bill. Rep. Thomas D. Eloit (R., Mass.) attacked an Opelousas, Louisiana ordinance which deprived blacks of various civil rights, including the following provision: "No freedman who is not in the

military service shall be allowed to carry firearms, or any kind of weapons, within the limits of the town of Opelousas without the special permission of his employer ... and (p.71)approved by the mayor or president of the board of police."[23] And Rep. Josiah B. Grinnell (R., Iowa) complained: "A white man in Kentucky may keep a gun; if a black man buys a gun he forfeits it and pays a fine of five dollars, if presuming to keep in his possession a musket which he has carried through the war."[24] Yet the right of blacks to have arms existed partly as self-defense against the state militia itself, which implied that militia needs were not the only constitutional basis for the right to bear arms. Sen. Trumbull cited a report from Vicksburg, Mississippi which stated: "Nearly all the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of this militia."[25] Rather than restore order, the militia would typically "hand some freedman or search negro houses for arms."[26] As debate returned to the Civil Rights Bill, Rep. Henry J. Raymond (R., N.Y.) explained of the rights of citizenship: "Make the colored man a citizen of the United States and he has every right which you or I have as citizens of the United States under the laws and Constitution of the United States.... He has a defined status; he has a country and a home; a right to defend himself and his wife and children; a right to bear arms...."[27] Rep. Roswell Hart (R., N.Y.) further states: "The Constitution clearly describes that to be a republican form of government for which it was expressly framed. A government ... where 'no law shall be made prohibiting a free exercise of religion;' where 'the right of the people to keep and bear arms shall not be infringed;'...."[28] He concluded that it was the duty of the United States to guarantee that the states have such a form of government.[29]

Rep. Sidney Clarke (R., Kansas) referred to an 1866 Alabama law providing: "That it shall not be lawful for any freedman, mulatto, or free person of color in this State, to own firearms, or carry about his person a pistol or other deadly weapon."[30] This same statute made it unlawful "to sell, give, or lend fire-arms or ammunition of any description whatever, to any freedman, free negro, or mulatto...."[31] Clarke also attacked Mississippi, "whose rebel militia, upon the seizure of the arms of black Union Soldiers, appropriated the same to their own use."[32]

> Sir, I find in the Constitution of the United States an article which declares that "the right of the people to keep and bear arms shall not be infringed." For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws....[33]

Emotionally referring to the disarming of black soldiers, Clarke added:

> Nearly every white man in that State 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 the arms with which they went to battle.... The "reconstructed" State authorities of Mississippi were allowed to rob and disarm our veteran soldiers....[34](p.72)

In sum, Clarke presupposed a constitutional right to keep privately held arms for protection against oppressive state militia.

c. the fourteenth amendment

The need for a more solid foundation for the protection of freedmen as well as white citizens was recognized, and the result was a significant new proposal--the Fourteenth Amendment. A chief exponent of the amendment, Sen. Jacob M. Howard (R., Mich.), referred to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press; ... the right to keep and bear arms...."[35] Adoption of the Fourteenth Amendment was necessary because presently these rights were not guaranteed against state legislation. "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[36]

The Fourteenth Amendment was viewed as necessary to buttress the objectives of the Civil Rights Act of 1866. Rep. George W. Julian (R., Ind.) noted that the act

> Is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. South Carolina has the same enactments... Cunning legislative devices are being invented in most of the States to restore slavery in fact.[37]

It is hardly surprising that the arms question was viewed as part of a partisan struggle. "As you once needed the muskets of the colored persons, so now you need their votes," Sen. Sumner explained to his fellow Republicans in support of black suffrage in the District of Columbia.[38] At the opposite extreme, Rep. Michael C. Kerr (D., Ind.) an opponent of black suffrage and of the Fourteenth Amendment, attacked a military ordinance in Alabama that set up a volunteer militia of all males between ages 18 and 45 "without regard to race or color" on these grounds:

> Of whom will that militia consist? Mr. Speaker, it will consist only of the black men of Alabama. The white men will not degrade themselves by going into the ranks and becoming a part of the militia of the State with negroes.... Are the civil laws of Alabama to be enforced by this negro militia? Are white men to be disarmed by them?[39]

Kerr predicted that the disfranchisement of white voters and the above military measures would result in a "war of races."[40]

d. the anti-kkk act

Although the Fourteenth Amendment became law in 1868, within three years the Congress was considering enforcement legislation to suppress the Ku Klux Klan. The famous report by Rep. Benjamin F. Butler (R., Mass.) on violence in the South assumed that the right to keep arms was necessary for protection against the militia but also against local law enforcement agencies. Noting (p.73)instances of "armed confederates" terrorizing the negro, the report stated that "in many counties they have preceded their outrages upon him by disarming him, in violation of his right as a citizen to `keep and bear arms,' which the Constitution expressly says shall never be infringed."[41] The congressional power based on the Fourteenth Amendment to legislate to

prevent states from depriving any U.S. citizen of life, liberty, or property justified the following provision of the committee's anti-KKK bill:

> That whoever shall, without due process of law, by violence, intimidation, or threats, take away or deprive any citizen of the United States of any arms or weapons he may have in his house or possession for the defense of his person, family, or property, shall be deemed guilty of a larceny thereof, and be punished as provided in this act for a felony.[42]

Rep. Butler explained the purpose of this provision in these words:

> Section eight is intended to enforce the well-known constitutional provision guaranteeing the right in the citizen to "keep and bear arms," and provides that whoever shall take away, by force or violence, or by threats and intimidation, the arms and weapons which any person may have for his defense, shall be deemed guilty of larceny of the same. This provision seemed to your committee to be necessary, because they had observed that, before these midnight marauders made attacks upon peaceful citizens, there were very many instances in the South where the sheriff of the county had preceded them and taken away the arms of their victims. This was specially noticeable in Union County, where all the negro population were disarmed by the sheriff only a few months ago under the order of the judge...; and then, the sheriff having disarmed the citizens, the five hundred masked men rode at night and murdered and otherwise maltreated the ten persons who were in jail in that county.[43]

The bill was referred to the Judiciary Committee, and when later reported as H.R. No. 320 the above section was deleted--probably because its proscription extended to simple individual larceny over which Congress had no constitutional authority, and because state or conspiratorial action involving the disarming of blacks would be covered by more general provisions of the bill. Supporters of the rewritten anti-KKK bill continued to show the same concern over the disarming of freedmen. Sen. John Sherman (R., Ohio) stated the Republican position: "Wherever the negro population preponderates, there they [the KKK] hold their sway, for a few determined men ... can carry terror among ignorant negroes ... without arms, equipment, or discipline."[44]

Further comments clarified that the right to arms was a necessary condition for the right of free speech. Sen. Adelbert Ames (R., Miss.) averred: "In some counties it was impossible to advocate Republican principles, those attempting it being hunted like wild beasts; in other, the speakers had to be armed and supported by (p.74)not a few friends."[45] Rep. William L. Stoughton (R., Mich.) exclaimed: "If political opponents can be marked for slaughter by secret bands of cowardly assassins who ride forth with impunity to execute the decrees upon the unarmed and defenseless, it will be fatal alike to the Republican party and civil liberty."[46]

Section 1 of the bill, which was taken partly from Section 2 of the Civil Rights Act of 1866 and survives today as 42 U.S.C. § 1983, was meant to enforce Section 1 of the Fourteenth Amendment by establishing a remedy for deprivation under color of state law of federal constitutional rights of all people, not only former slaves. This portion of the bill provided:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities to which ... he is entitled under the Constitution or laws of the United States, shall ... be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."[47]

Rep. Washington C. Whitthorne (D., Tenn.), who complained that "in having organized a negro militia, in having disarmed the white man," the Republicans had "plundered and robbed" the whites of South Carolina through "unequal laws," objected to Section 1 of the anti-KKK bill on these grounds:

> It will be noted that by the first section suits may be instituted without regard to amount or character of claim by any person within the limits of the United States who conceives that he has been deprived of any right, privilege, or immunity secured him by the Constitution of the United States, under color of any law, statute, ordinance, regulation, custom, or usage of any State. This is to say, that if a police officer of the city of Richmond or New York should find a drunken negro or white man upon the streets with a loaded pistol flourishing it, &c., and by virtue of any ordinance, law, or usage, either of city or State, he takes it away, the officer may be sued, because the right to bear arms is secured by the Constitution, and such suit brought in distant and expensive tribunals.[48]

The Tennessee Democrat assumed that the right to bear arms was absolute, deprivation of which created a cause of action against state agents under Section 1 of the anti-KKK bill. In the minds of the bill's supporters, however, the Second Amendment as incorporated in the Fourteenth Amendment recognized a right to keep and bear arms safe from state infringement, not a right to commit assault or otherwise engage in criminal conduct with arms by pointing them at people or wantonly brandishing them about so as to endanger others. Contrary to the congressman's exaggerations, the proponents of the bill had the justified fear that the opposite development would occur, i.e., that a black or white man of the wrong political party would legitimately have or possess arms and a police officer of the city of Richmond or New York who was (p.75)drunken with racial prejudice or partisan politics would take it away, perhaps to ensure the success of an extremist group's attack. Significantly, none of the representative's colleagues disputed his assumption that state agents could be sued under the predecessor to § 1983 for deprivation of the right to keep arms.

Rep. William D. Kelly (R., Penn.), speaking after and in reply to Rep. Whitthorne, did not deny the argument that Section 1 allowed suit for deprivation of the right to possess arms, but emphasized the arming of the KKK. He referred to "great numbers of Winchester rifles, and a particular species of revolving pistol" coming into Charleston's ports. "Poor men, without visible means of support, whose clothes are ragged and whose lives are almost or absolutely those of vagrants, are thus armed with new and costly rifles, and wear in their belts a brace of expensive pistols."[49] These weapons were used against Southern Republicans, whose constitutional rights must thereby be guaranteed by law and arms.

However, like Congressman Whitthorne, Rep. Barbour Lewis (R., Tenn.) also decried the loss of state agent's immunity should the bill pass: "By the first section, in certain cases, the judge of a State court, through acting under oath of office, is made liable to a suit in the Federal Court and subject to damages for his decision against a suitor, however honest and conscientious that decision may be; and a ministerial officer is subject to the same pains and penalties...."[50]Tennessee Republicans and Democrats alike thus agreed that what is today § 1983 provided an action for damages against state agents in general for deprivation of constitutional rights.

Debate over the anti-KKK bill naturally required exposition of Section 1 of the Fourteenth Amendment, and none was better qualified to explain that section than its draftsman, Rep. John A. Bingham (R., Ohio):

> Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of a State, are chiefly defined in the first eight amendments to the constitution of the United States. Those eight amendments are as follows:
>
> article i
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

article ii

> A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.... [Amendments III-VIII, also listed by Bingham, are here omitted.](p.76)
>
> These eight articles I have shown never were limitations upon the power of the States, until made so by the Fourteenth Amendment. The words of that amendment, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," are an express prohibition upon every State of the Union....[51]

This is a most explicit statement of the incorporation thesis by the architect of the Fourteenth Amendment. Although he based the incorporation on the privileges and immunities clause and not the due process clause as did subsequent courts of selective incorporation, Rep. Bingham could hardly have anticipated the judicial metaphysics of the twentieth century in this respect. In any case, whether based on the due process clause or on the privileges and immunities clause, the legislative history supports the view that the incorporation of Amendments I-VII was clear and unmistakable in the minds of the framers of Amendment XIV.

In contrast with the above legal analysis, some comments on the enforcement of the Fourteenth Amendment returned to discussion of power struggle between Republicans and unreconstructed Confederates. While Republicans deplored the armed condition of white Southerners and the unarmed state of black Southerners, Democrats argued that the South's whites were disarmed and endangered by armed carpetbaggers and negro militia. Thus, Rep. Ellis H. Roberts (R., N.Y.) lamented the partisan character of KKK violence: "The victims whose property is destroyed, whose persons are mutilated, whose lives are sacrificed, are always Republicans. They may be black or white...." Of the still rebellious whites: "Their weapons are often new and of improved patterns; and however poor may be the individual member he never lacks for arms or ammunition.... In many respects the Ku Klux Klan is an army, organized and officered, and armed for deadly strife."[52]

Rep. Boyd Winchester (D., Ky.) set forth the contrary position, favorably citing a letter from an ex-governor of South Carolina to the reconstruction governor regretting the latter's "Winchester rifle speech" which "fiendishly proclaimed that this instrument of death, in the hands of the negroes of South Carolina, was the most effective means of maintaining order and quiet in the State."[53] Calling on the governor to "disarm your militia," the letter referred to the disaster which resulted "when you organized colored troops throughout the State, and put arms into their hands, with powder and ball, and denied the same to the white people."[54] The letter proceeded to cite numerous instances where the "colored militia" murdered white people. According to Rep. Winchester, it was the arming of blacks and disarming of whites which resulted in white resistance. "It would seem that wherever military and carpetbagger domination in the South has been marked by the greatest contempt for law and right, and practiced the greatest cruelty toward the people, Ku Klux operations have multiplied."[55]

An instance of black Republican armed resistance to agents of the state who were in the Klan was recounted in a letter cited by Rep. Benjamin F. Butler:(p.77)

> Then the Ku Klux fired on them through the window, one of the bullets striking a colored woman ... and wounding her through the knee badly. The colored men then fired on the Ku Klux, and killed their leader or captain right there on the steps of the colored men's house.... There he remained until morning when he was identified, and proved to be "Pat Inman," a constable and deputy sheriff....[56]

By contrast, Rep. Samuel S. Cox (D., Ohio) assailed those who "arm negro militia and create a situation of terror," exclaimed that South Carolinians actually clamored for United States troops to save them from the rapacity and murder of the negro bands and their white allies," and saw the Klan as their only defense: "Is not repression the father of revolution?" The congressman compared the Klan with the French Jacobians, Italian Carbonari, and Irish Fenians.[57] Rep. John Coburn (R., Ind.) saw the situation in an opposite empirical light, deploring both state and private disarming of blacks. "How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men?"[58]

The next day Rep. Henry L. Dawes (R., Mass.) returned to a legal analysis which again asserted the incorporation thesis. Of the anti-Klan bill he argued:

> The rights, privileges, and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject-matter of this bill....
>
> ... In addition to the original rights secured to him in the first article of amendments he had secured the free exercise of his religious belief, and freedom of speech and of the press. Then again he has secured to him the right to keep and bear arms in his defense. [Dawes then summarizes the remainder of the first eight amendments.] ...
>
> ... And still later, sir, after the bloody sacrifice of our four years' war, we gave the most grand of all these rights, privileges, and immunities, by one single amendment to the Constitution, to four millions of American citizens....
>
> ... [I]t is to protect and secure to him in these rights, privileges, and immunities this bill is before the House.[59]

Rep. Horatio C. Burchard (R., Ill.), while generally favoring the bill insofar as it provided against oppressive state action, rejected the interpretation by Dawes and Bingham regarding the definition of "privileges and immunities," which Burchard felt were contained only in Articles IV, V, and VI rather than I-VIII. However, Burchard still spoke in terms of "the application of their eight amendments to the States,"[60] and in any case Dawes had used the terms "*rights,* privileges and immunities." The anti-Klan bill finally was passed along partisan lines as An Act to Enforce the Provisions of the Fourteenth Amendment.[61]

e. the civil rights act of 1875

After passage of the anti-Klan bill, discussion concerning arms persisted as interest developed toward what became the Civil (p.78)Rights Act of 1875, now 42 U.S.C. § 1984. A report on affairs in the South by Sen. John Scott (R., Penn.) indicated the need for further enforcement legislation: "negroes who were whipped testified that those who beat them told them they did so because they had voted the radical ticket, and in many cases made them promise that they would not do so again, and wherever they had guns took them from them."[62]

Following the introduction of the civil rights bill the debate over the meaning of the privileges and immunities clause returned. Sen. Matthew H. Carpenter (R., Wis.) cited *Cummings v. Missouri*,[63] a case contrasting the French legal system, which allowed deprivation of civil rights, "and among these of the right of voting, ... of bearing arms," with the American legal system, averring that the Fourteenth Amendment prevented states from taking away the privileges of the American citizen.[64]

Sen. Allen G. Thurman (D., Ohio) argued that the "rights, privileges, and immunities of a citizen of the United States" were included in Amendments I-VIII. Reading and commenting on each of these amendments, he said of the Second: "Here is another right of a citizen of the United States, expressly declared to be his right--the right to bear arms; and this right, says the Constitution, shall not be infringed." After prodding from John A. Sherman (R., Ohio), Thurman added the Ninth Amendment to the list.[65]

The incorporationist thesis was stated succinctly by Senator Thomas M. Norwood (D., Ga.) in one of the final debates over the civil rights bill. Referring to a U.S. citizen residing in a Territory, Senator Norwood stated:

> His right to bear arms, to freedom of religious opinion, freedom of speech, and all others enumerated in the Constitution would still remain indefeasibly his, whether he remained in the Territory or removed to a State.
>
> And those and certain others are the privileges and immunities which belong to him in common with every citizen of the United States, and which no State can take away or abridge, and they are given and protected by the Constitution ...
>
> The following are most, if not all, the privileges and immunities of a citizen of the *United States:*
>
> The right to writ of *habeas corpus*; of peaceable assembly and of petition; ... to *keep and bear arms*; ... from being deprived of the right to vote on account of race, color or previous condition of servitude.[66]

Arguing that the Fourteenth Amendment created no new rights but declared that "certain existing rights should not be abridged by States," the Georgia Democrat explained:

> Before its [Fourteenth Amendment] adoption any State might have established a particular religion, or restricted freedom of speech and of the press, or *the right to bear arms* ... A State could have deprived its citizens of any of the privileges and immunities contained in those eight articles, but the Federal Government could not ...(p.79)
>
> ... And the instant the Fourteenth amendment became a part of the Constitution, every State was at that moment disabled from making or enforcing any law which would deprive any citizen of a State of the benefits enjoyed by citizens of the United States under the first eight amendments to the Federal Constitution.[67]

In sum, in the understanding of Southern Democrats and Radical Republicans alike, the right to keep and bear arms, like other Bill of Rights freedoms, was made applicable to the states by the Fourteenth Amendment.

The framers of the Fourteenth Amendment and of the civil rights acts of Reconstruction, rather than predicating the right to keep and bear arms on the needs of an organized state militia, based it on the right of the people individually to possess arms for protection against any oppressive force--including racist or political violence by the militia itself or by other state agents such as sheriffs. At the same time, the militia was understood to be the whole body of the people, including blacks. In discussion concerning the Civil Rights Act of 1875, Sen. James A. Alcorn (R., Miss.) defined the militia in these terms: "The citizens of the United States, the Posse comitatus, or the militia if you please, and the colored man composes part of these."[68] Every citizen, in short, was a militiaman. With the passage of the Fourteenth Amendment, the right and

privilege individually to keep and bear arms was protected from both state and federal infringement.[69]

references

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[1] *Dred Scott v. Sanford, 60 U.S. (19 How.) 393 15 L. Ed. 691 (1857).*

[2] *15 L. Ed. at 705 [Emphasis added]. And see id. at 719.*

[3] Protection of the "absolute rights of individuals" to personal security, liberty, and private property is secured in part by "the right of bearing arms--which with us is ... practically enjoyed by every citizen, and is among his most valuable privileges, since it furnishes the means of resisting as a freeman ought, the inroads of usurpation." *1 Henry St. Geo. Tucker, Commentaries on the Laws of Virginia 43 (1831)* (reference to U.S. Constitution). And see *St. Geo. Tucker, 1 Blackstone, Commentaries *144 n.40 (1st ed. 1803)*; *W. Rawle, A View of the Constitution 125-26 (1829)*; *3 J. Story, Commentaries on the Constitution 746 (1833)*; *Bliss vs. Commonwealth, 2 Litt. (Ky.) 90, 13 Am. Dec. 251 (1822)*; *Simpson vs. State, 13 Tenn. Reports (5 Yerg.) 356 (1833)*; *Nunn v. State, 1 Ga. 243 (1846)*. Cf. *State v. Buzzard, 4 Ark, 18 (1843)*.

[4] *W. Rawle, supra note 3, at 125-26*, stated: "The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both."

Similarly, it was stated in *Nunn v. State, 1 Ga. 243, 250-51 (1846)*:

> "The language of the second amendment is broad enough to embrace both Federal and state governments--nor is there anything in its terms which restricts its meaning.... Is it not an unalienable right, which lies at the bottom of every free government?"

And see cases cited at *68 C.J. Weapons § 4 n.60 (1934).*

According to *II J. Bishop, Criminal Law § 124 (3rd ed. 1865)*: "Though most of the amendments are restrictions on the general government alone, not on the States, this one seems to be of a nature to bind both the State and National legislatures." Approved in *English v. State, 35 Tex.*

473 (1872). For an analysis of U.S. Supreme Court cases related to whether the Second and/or Fourteenth Amendments prohibit state action which infringes on keeping and bearing arms, see S. Halbrook, The Jurisprudence of the Second and Fourteenth Amendments, IV George Mason L. Rev. (1981).

[5] *State v. Newson, 27 N.C. 203, 204 (1844), Cooper v. Savannah, 4 Ga. 72 (1848)*.

[6] *State v. Newson, 27 N.C. 203, 207 (1844)*. Cf. cases cited at *68 C.J. Weapons § 5, n.19,21,22; § 8, n.37,40 (1934)*.

[7] "What was the fourteenth article designed to secure? ... [T]hat the privileges and immunities of citizens of the United States shall not be abridged or denied by the United States or by any State; defining also, what it was possible was open to some question after the Dred Scott decision, who were citizens of the United States." *Sen. George F. Edmunds (R., Vt.), CONG. GLOBE, 40th Cong., 3rd Sess., pt. 1, 1000 (Feb. 8, 1869)*.

[8] While it "cannot turn the clock back to 1868 when the Amendment was adopted," *Brown v. Board of Education of Topeka, 347 U.S. 483, 492 (1954)*, the Supreme Court is compelled to interpret Amendment XIV and Reconstruction legislation in accord with the Congressional intent. *Lynch v. Household Finance Corp., 405 U.S. 538, 549 (1972)*; *Monell v. Dep't. of Social Servies of City of New York, 436 U.S. 658 (1978)* ("fresh analysis of debate on the Civil Rights Act of 1871," *id. 665*, justified overruling *Monroe v. Pape, 365 U.S. 167 [1961]*). *Cf. Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stanford L. Rev. 5, 44-45, 57-58, 119-20 (1949)* (while contending that the Bill of Rights in general was not intended to apply to the states, cited references to the Second Amendment in congressional debates support incorporation).

Though beyond the scope of this study, the history of the prohibition of arms possession by native Americans or Indians presents a parallel example of the use of gun control to suppress or exterminate non-white ethnic groups. While legal discrimination against blacks in respect to arms was abolished during Reconstruction, the sale of arms and ammunition to "hostile" Indians remained a prohibition. E.g., *17 stat., 457, 42nd Cong., 3rd Sess., ch. 138 (1873)*. *See also Sioux Nation of Indians v. United States, 601 F.2d 1571, 1166 (Ct. Cl. 1979)*: "Since the Army has taken from the Sioux their weapons and horses, the alternative to capitulation to the government's demands was starvation ..." The federal government's special restrictions on selling firearms to native Americans were abolished finally in 1979. *Washington Post, Jan. 6, 1979, § A, at 11, col. 1*.

[9] See *State v. Hannibal, 51 N.C. 57 (1859)*; *State v. Harris, 51 N.C. 448 (1859)*; *D. Hundley, Social Relations in our Southern States 361 (1860)*. Blacks were experienced enough in the use of arms to play a significant, though unofficial, role as Confederate Soldiers, some even as sharpshooters. *H. Blackerby, Blacks in Blue and Gray 1-40 (Tusculoosa, Ala. 1979)*; *J. Obatala, Black Confederates, Players 13 ff. (April, 1979)*. In Louisiana, the only state in the Union to include blacks in the militia, substantial numbers of blacks joined the rebellion furnishing their own arms. *M. Berry, Negro Troops in Blue and Gray, 8 Louisiana History 165-66 (1867)*.

[10] *The Writings of Cassius Marcellus Clay 257 (H. Greeley ed. 1848)*.

[11] *DuBois, John Brown 106 (1909)*.

[12] *J. McPherson, The Negro's Civil War 72-73 (1965)*. While all may be fair in love and war, experiences during the conflict suggest that deprivation of one right is coupled with deprivation of others. When the secession movement began, Lincoln suspended habeas corpus and enstated the disarming of citizens and military arrests in Maryland and Missouri. In the latter state, the death penalty was enstated by union officers for those caught with arms, and after an order was issued to arm the militia by random seizures of arms, the searches provided the occasion for general looting. See *3 War of the Rebellion 466-67 (Series 1)* and *13 id. at 506*; *R. Brownlee, Gray Ghosts of the Confederacy 37, 85, & 170 (L.S.U. 1958)*. The situation became so harsh for Northerners themselves that the Northern Democratic Platform of 1864 declared in its fourth resolution against the suppression of free speech and press and the denial of the right of the people to bear arms in their defense. *E. Pollard, The Lost Cause 574 (1867)*.

[13] *61 The War of the Rebellion, ser. 1, pt. 2, 1068 & 1315 (1880-1901)*; *R. Durden, The Gray & The Black 250 (1972)*.

[14] *R. Durden, supra note 13, at 169*.

[15] *Cong. Globe, 38th Cong., 2nd Sess., pt. 1, 171 (Jan. 9, 1865)*.

[16] *Id. 289 (Jan. 18, 1865)*.

[17] *Id., 39th Cong., 1st Sess., pt. 1, 674 (Feb. 6, 1866)*. But see *id. at pt. 4, 3215 (June 16, 1866)* (allegation by Rep. William E. Niblack (D., Ind.) that the majority of Southern blacks "either adhered from first to last to the rebellion or aided and assisted by their labor or otherwise those who did so adhere.").

[18] *DuBois, Black Reconstruction In America 167, 172, & 223 (New York 1962)*.

[19] *Cong. Globe, 39th Cong., 1st Sess., pt. 1, 40 (Dec. 13, 1865)*.

[20] *Civil Rights Act, 14 Stat. 27 (1866)*. A portion of this act survives as *42 U.S.C. § 1982*: "All citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

[21] *Cong. Globe, 39th Cong., 1st Sess., pt. 1, 474 (Jan. 29, 1866)*.

[22] *Id. 478*.

[23] *Id. 517 (Jan. 30, 1866)*.

[24] *Id. 651 (Feb. 5, 1866)*.

[25] *Id. 941 (Feb. 20, 1866).*

[26] *Id.*

[27] *Id., pt. 2, 1266 (Mar. 8, 1866).*

[28] *Id. 1629 (Mar. 24, 1866).*

[29] *Id. 3.*

[30] *Id. 1838 (Apr. 7, 1866).*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id. 1839.* Ironically, Clarke's home state, Kansas, adopted measures to prohibit former Confederates from possessing arms. *Kennett & Anderson at 154.*

[35] *Cong. Globe, 39th Cong., 1st Sess., pt. 3, 2765 (May 23, 1866).*

[36] *Id. 2766.* Italics added.

[37] *Id., pt. 4, 3210 (June 16, 1866).*

[38] *Id., 2nd Sess., pt. 1, 107 (Dec. 13, 1866).*

[39] *Id., 40th Cong., 2nd Sess. pt. 3, 2198 (Mar. 28, 1868).*

[40] Id.

[41] *1464 H.R. REP. No. 37, 41st Cong., 3rd Sess. 3 (Feb. 20, 1871).*

[42] *Cong. Globe, 42nd Cong., 1st Sess., pt. 1, 174 (Mar. 20, 1871).* Introduced as "an act to protect loyal and peaceable citizens in the south ...", *H.R. No. 189.*

[43] *H.R. Rep. No. 37, supra note 26, at 7-8.*

[44] *Cong. Globe, 42nd Cong., 1st Sess., pt. 1, 154 (Mar. 18, 1871).*

[45] *Id. 196 (Mar. 21, 1871).*

[46] *Id. 321 (Mar. 28, 1871).*

[47] *Id., pt. 2, Appendix, 68*. Passed as the *Enforcement Act, 17 Stat. 13 (1871),* § 1 survives as *42 U.S.C. § 1983*: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." The action for conspiracy to deprive persons of rights or privileges under *42 U.S.C. § 1985* derives from the same act.

[48] *Cong. Globe, 42nd Cong., 1st Sess., pt. 1, 337 (Mar. 29, 1871).*

[49] *Id. 339.*

[50] *Id. 385 (Apr. 1, 1871).*

[51] *Id., pt. 2, Appendix, 84 (Mar. 31, 1871).*

[52] *Id., pt. 1, 413 (Apr. 3, 1871).*

[53] *Id. 442 (Apr. 3, 1871).*

[54] Id.

[55] Id. Nathan Bedford Forrest told Congressional investigators in 1871 that the Klan originated in Tennessee for self defense against the militia of Governor William G. Brownlow. *N. Burger and J. Bettersworth, South of Appomattox 129, 132, and 137 (1959)*. Still, two years before, Forrest denounced Klan lawlessness because "the order was being used ... to disarm harmless negroes having no thought of insurrectionary movements, and to whip both whites and blacks." *C. Bowers, THE TRAGIC ERA 311 (1929)*. The outrages in turn allegedly furnished "a plausible pretext for the organization of State militias to serve the purposes of Radical politics." *C. Bowers at 311*. Carpetbagger controlled militias were deeply involved in political violence to influence elections, and were blamed for infringing on their opponents' constitutional rights to free speech and to keep and bear arms, among numerous other abuses. E.g., *C. Bowers at 439 and passim*; *O. Singletary, Negro Militia and Reconstruction 35-41, 74-75 (1963).*

[56] *Cong. Globe, 42nd Cong., 1st Sess., pt. 1, 445 (Apr. 4, 1871).*

[57] *Id. 453.*

[58] *Id. 459.*

[59] *Id. 475-76 (Apr. 5, 1871).* [Emphasis added].

[60] *Id., 2, Appendix, 314.*

[61] *17 Stat. 13, 42nd Cong., 1st Sess., ch. 22 (1871).*

[62] *1484 S. Rep. No. 41, 42nd Cong., 2nd Sess., pt. 1, 35 (Feb. 19, 1872).*

[63] *Cummings v. Missouri, 71 U.S. 277, 321 (1866).*

[64] *Cong. Globe, 42nd Cong., 2nd Sess., pt. 1, 762 (Feb. 1, 1872).*

[65] *Id., pt. 6, Appendix, 25-26 (Feb. 6, 1872).* On Amendment IX as a source of an individual right to keep and bear arms, *see Caplan, Restoring the Balance: The Second Amendment Revisited, 5 Fordham Urban L.J. 31, 49-50 (1976).* See also *2 Cong. Rec. 43rd Cong., 1st Sess., pt. 1, 384-385 (Jan. 5, 1874)* (statement by Rep. Robert Q. Mills (D., Tex.) that Amendment XIV adopts Bill of Rights privileges).

[66] *Cong. Rec., 43rd Cong., 1st Sess., pt. 6, Appendix, 241-242 (May 4, 1874).* Emphasis added.

[67] *Id. 242.* Italic added.

[68] *Id. (May 22, 1874).* The antebellum exclusion of blacks from the armed people as militia was commented on by Sen. George Vickers (D., Md.), who recalled a 1792 law passed by Congress: "That every free able-bodied white male citizen shall be enrolled in the militia." Vickers added that as late as 1855 New Hampshire "confined the enrollment of militia to free white citizens." *Cong. Globe, 41st Cong., 2nd Sess., pt. 2, 1558-59 (Feb. 25, 1870).* Exclusion of a right to bear arms by blacks was further evidence of their lack of status as citizens. See *1464 H.R. Rep. No. 22, 41st Cong., 3rd Sess. 7 (Feb. 1, 1871), citing Cooper v. Savannah, 4 Ga. 72 (1848) (not entitled to bear arms or vote).*

[69] While unrelated to the debates over the Fourteenth Amendment, congressional deliberation over whether the federal government could abolish militias in the Southern states also gave rise to exposition of the Second Amendment. In support of repeal of a statute prohibiting the Southern militias, Sen. Charles R. Backalew (D., Penn.) pointed out that the U.S. President favored repeal of the statute because at all times, both when it was placed upon the statute-book and every moment since, it was and is in his judgement a violation of the Constitution of the United States. One of the amendments to our fundamental law expressly provides that "the right of the people to keep and bear arms shall not be infringed"--of course by this Government; and it gives the reason that a well-regulated militia in the several divisions of the country is necessary for the protection and for the interests of the people. *Cong. Globe, 40th Cong., 3rd Sess., pt. 1, 83-84.*

George F. Edmunds (R., Vt.) worried that repeal of the statute "will authorize anybody and everybody in the State of Texas, under what they call its ancient militia laws ... to organize a militia hostile to the Government," *id. at 81,* and thus advocated "a selected militia" chosen by State and federal governments. Id. In contrast, Garrett Davis (D. Ky.) stated: "Wherever a State organizes a government it has of its own inherent right and power authority to organize a militia for it. Congress ... has no right to prohibit that State from the organization of its militia." *Id. at 84.* Willard Warner (R., Ala.) stressed the first clause of the Second Amendment to form militias independent of federal control: we have the right now, being restored to our full relations to the Federal Government, to organize a militia of our own, and that we could have done so at any

time in the past, this law to the contrary notwithstanding. Article two of the amendments of the Constitution provides that--

> "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." *Id. at 85*.

The prohibitionary statute was repealed, *id. at 86*. *Cf. Houston v. Moore, 18 U.S. 1, 16-17 (1820)*.

Thus, while debates over the militia question suggested that the Second Amendment precluded federal legislation which prohibited the states or the people from forming militias, debates over the Fourteenth Amendment demonstrate the intent of Congress to preclude state militias or other state action from infringing on the individual right to keep and bear arms.