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The Second Amendment: Toward an Afro-Americanist Reconsideration*

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TABLE OF CONTENTS

INTRODUCTION	310
I. ARMED CITIZENS, FREEMEN, AND WELL-REGULATED MILITIAS: THE BEGINNINGS OF AN AFRO-AMERICAN EXPERIENCE WITH AN ANGLO-AMERICAN RIGHT	320
A. ENGLISH LAW AND TRADITION	321
B. ARMS AND RACE IN COLONIAL AMERICA	323
C. THE RIGHT OF WHICH PEOPLE?	327
1. Revolutionary Ideals	327
2. Racial Limitations	331
II. ARMS AND THE ANTEBELLUM EXPERIENCE	333
A. THE SOUTHERN ANTEBELLUM EXPERIENCE: CONTROL OF ARMS AS A MEANS OF RACIAL OPPRESSION	335
B. THE NORTHERN ANTEBELLUM EXPERIENCE: USE OF FIREARMS TO COMBAT RACIALLY MOTIVATED DEPRIVATIONS OF LIBERTY	339
III. ARMS AND THE SOUTHERN ORDER ^(pg.310)	342
IV. ARMS AND AFRO-AMERICAN SELF-DEFENSE IN THE TWENTIETH CENTURY: A HISTORY IGNORED	349

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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.*¹

INTRODUCTION

The often strident debate over the Second Amendment² is like few others in American constitutional discourse and historiography. It is a constitutional debate that has taken place largely in the absence of Supreme Court opinion.³ It is a historical controversy where the framers' intentions have (pg.311) best been gleaned from indirect rather than direct evidence.⁴ It is a scholarly debate that

¹ Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1857) (emphasis added).

² "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.

³ The Supreme Court has directly ruled on Second Amendment claims in only four cases. *See* United States v. Miller, 307 U.S. 174 (1939); Miller v. Texas, 153 U.S. 535 (1894); Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542 (1876). Proponents of the collective rights theory have frequently cited these cases as supportive of their views. It is more accurate to describe the first three cases as having recognized the individual right, but also as having construed the Second Amendment as a bar to federal, but not state or private, infringement of the right. *See infra* Part III. *United States v. Miller* limited the Second Amendment's protection to weapons useful for militia duty. *See infra* Part IV. Since then, a number of lower federal courts have heard Second Amendment claims, often dismissing them on grounds that the Amendment has not been incorporated into the Fourteenth Amendment, which would make it binding on the states. Other courts have dismissed the claims by employing the collective rights theory. Almost all of these cases involved persons involved in criminal activity who were also convicted of firearms charges and thus are not really a good test of the extent to which the Second Amendment protects the rights of the public at large. *See, e.g.,* United States v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F.2d 1288 (7th Cir. 1974) (statute prohibiting possession of firearms by previously convicted felon does not infringe upon Second Amendment). In a recent case in which a federal court sustained a general prohibition against handgun ownership, the Supreme Court refused to consider the case on appeal. *See* Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

If the federal jurisprudence concerning the Second Amendment is somewhat thin, it should be noted that there is extensive case law concerning analogous provisions in state bills of rights. Indeed it is likely, should the Supreme Court ever seriously consider the question, that it might borrow Second Amendment doctrine from the state courts. For some recent constructions of state right to keep and bear arms provisions see, *e.g.,* Hoskins v. State, 449 So.2d 1269 (Ala. Crim. App. 1984) (statute prohibiting a person convicted of committing a crime of violence from owning or possessing a pistol does not deny right to keep and bear arms); Rabbitt v. Leonard, 413 A.2d 489 (Conn. Super. Ct. 1979) (statute permitting revocation of pistol permit for cause and providing notice of revocation and opportunity for de novo postrevocation hearing does not violate citizen's right to bear arms); State v. Friel, 508 A.2d 123 (Me. 1986) (statue prohibiting possession of a firearm by a convicted felon does not violate constitutional right to keep and bear arms); People v. Smelter, 437 N.W.2d 341 (Mich. Ct. App. 1989) (statute prohibiting possession of stun guns does not impermissibly infringe upon right to keep and bear arms); State v. Vlacic, 645 P.2d 677 (Utah 1982) (statute making it a Class A misdemeanor for any noncitizen to own or possess a dangerous weapon is not unconstitutional). For a historical discussion of state right to keep and bear arms provisions, see generally STEPHEN P. HALBROOK, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES (1989).

⁴ The debates in the House of Representatives over what became the Second Amendment (it was originally proposed as the Fourth Amendment) centered on a clause excepting conscientious objectors from militia duty. The original text of the Amendment read: "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms." THE FOUNDERS' CONSTITUTION 210 (Phillip B. Kurland & Ralph Lerner eds., 1987). The House debate, focusing on the religious exemption, sheds little light on the individual versus collective rights debate, although the phrase "body of the people" used to

members of the academy have been until recently somewhat reluctant to join,⁵ leaving the field to independent scholars primarily concerned with the modern gun control controversy.⁶ In short, the Second Amendment (pg.312) is an arena of constitutional jurisprudence that still awaits its philosopher.

The debate over the Second Amendment is ultimately part of the larger debate over gun control, a debate about the extent to which the Amendment was either meant to be or should be interpreted as limiting the ability of government to prohibit or limit private ownership of firearms.

describe the militia does suggest the idea of a militia of the whole. Still, the best evidence of the framers' intentions in this matter comes from the surrounding history and the comments of the constitutional framers generally with respect to the composition of the militia. *See infra* Part I.

⁵ See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 639-42 (1989) (discussing the reluctance of most constitutional scholars to treat the Second Amendment as a subject worthy of serious scholarly or pedagogical consideration). Recently, however, one scholar has examined the Second Amendment within the context of the Bill of Rights as a whole. See Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991). In Amar's view, the Bill of Rights was designed with both populist and collective concerns in mind. It was designed to protect both the right of the people and to prevent potential tyranny from an overreaching federal government. Amar sees the purpose of the Second Amendment as preventing Congress from disarming freemen, so that the populace could resist tyranny imposed by a standing army. *Id.* at 1162-73.

⁶ See, e.g., David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31 (1976) (current efforts to limit firearm possession undermine the Second Amendment's twin goals of individual and collective defense); Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59 (1989) (laws seeking to disarm the people violate the Second Amendment); Robert Dowlut, *The Right to Arms: Does the Constitution or the predilection of Judges Reign?*, 36 OKLA. L. REV. 65 (1983) (interpretation of the Second Amendment is controlled by the framers' intent to guarantee the individual right to keep and bear arms rather than a more narrow judicial interpretation); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989) (Second Amendment's historical origins erect no real barrier to federal or state laws affecting handguns); Richard E. Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63 (1982) (advocates of gun control have twisted the original and plain meaning of the Second Amendment); Alan M. Gottlieb, *Gun Ownership: A Constitutional Right*, 10 N. KY. L. REV. 113 (1982) (modern antipathy to firearms has influenced interpretation of the Second Amendment as a collective right); David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1 (1987) (the Second Amendment has a dual purpose stemming from the merger of the militia and the right to bear arms provisions); Maynard H. Jackson, Jr., *Handgun Control: Constitutional and Critically Needed*, 8 N.C. CENT. L.J. 189 (1977) (Second Amendment is central to any discussion of the legal merits of gun control); Nelson Lund, *The Second Amendment, Political Liberty and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987) (suggesting a Second Amendment jurisprudence consistent with modern treatment of the Bill of Rights such that handgun regulation be reasonably tailored to public safety); James A. McClure, *Firearms and Federalism*, 7 IDAHO L. REV. 197 (1970) (Second Amendment precludes federal interference but leaves to debate the issue of state regulation of handguns); Robert J. Riley, *Shooting to Kill the Handgun: Time to Martyr Another American "Hero,"* 51 J. URB. L. 491 (1974) (construing the Second Amendment as a surmountable barrier to handgun control by finding the handgun a weapon of marginal military utility); Jonathan A. Weiss, *A Reply to Advocates of Gun Control Law*, 52 J. URB. L. 577 (1974) (placing the Second Amendment in context of the Bill of Rights, provides an inviolable right to bear arms and an absolute bar to government restriction).

Two advocates of the individual rights theory who are outside the academy, but have nonetheless been quite instrumental in influencing the constitutional debate among law teachers and historians, are Donald B. Kates, Jr. and Stephen P. Halbrook. See, e.g., Donald B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983) (Second Amendment right to bear arms, applicable against both federal and state government, does not foreclose, but limits, gun control options); Donald B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143 (1986) (Second Amendment substantially limits the arbitrariness of granting gun permits); Steven P. Halbrook, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984) [hereinafter HALBROOK, *THAT EVERY MAN BE ARMED*] (the right of citizens to keep and bear arms has deep historical roots and overly restrictive interpretations of the Second Amendment are associated with reactionary concepts including elitism, militarism, and racism); Steven P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON U. L. REV. 1 (1981) (the fundamental character of the Second Amendment and the increasingly restrictive forms of gun control legislation necessitate Supreme Court precedent on the status of the Amendment's applicability to the states); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms,"* 49 LAW & CONTEMP. PROBS. 151 (1986) (Second Amendment right to bear arms is incompatible with the suggestion of no right to bear arms without state or federal permission).

Waged in the popular press,⁷ in the halls of Congress,⁸ and increasingly in historical and (pg.313) legal journals,⁹ two dominant interpretations have emerged. Advocates of stricter gun controls have tended to stress the Amendment's Militia Clause, arguing that the purpose of the Amendment was to ensure that state militias would be maintained against potential federal encroachment. This argument, embodying the collective rights theory, sees the framers' primary, indeed sole, concern as one with the concentration of military power in the hands of the federal government, and the corresponding need to ensure a decentralized military establishment largely under state control.¹⁰

Opponents of stricter gun controls have tended to stress the Amendment's second clause, arguing that the framers intended a militia of the whole—or at least the entire able-bodied white male—population, expected to perform its duties with privately owned weapons.¹¹ Advocates of this view also frequently urge that the Militia Clause should be read as an amplifying, rather than a qualifying, clause. They argue that, while maintaining a "well-regulated militia"¹² was the predominate reason for including the Second Amendment in the Bill of Rights, it should not be

⁷ See, e.g., Daniel Abrams, *What 'Right to Bear Arms'?*, N.Y. TIMES, July 20, 1989, at A23; Robert J. Cottrol, *It's Time to Enforce the Second Amendment*, PLAIN DEALER (Cleveland), Feb. 17, 1990, at 5B; Ervin N. Griswold, *Phantom Second Amendment Rights*, WASH. POST, Nov. 4, 1990, at C7; Sue Wimmershoff-Caplan, *The Founders and the AK-47*, WASH. POST, July 6, 1989, at A18. Even former Chief Justice Warren Burger has used this arena to opine on the subject. See Warren Burger, *The Right to Keep and Bear Arms*, PARADE MAG., Jan. 14, 1990, at 4.

For one interesting example of a writer who (reluctantly) supports the individual rights interpretation of the Second Amendment and who, as a member of the gun control group Handgun Control, Inc., is also a strong advocate of stricter gun control, see columnist Michael Kinsley, *Slicing Up the Second Amendment*, WASH. POST, Feb. 8, 1990, at A25. More recently, conservative columnist George Will, also an advocate of stricter gun control, has stated that "The National Rifle Association is perhaps correct and certainly plausible in its 'strong' reading of the Second Amendment protection for private gun ownership." Will argues for repeal of the Second Amendment on the grounds that the right is not as important as it was 200 years ago.

Will also makes the interesting observation that "The subject of gun control reveals a role reversal between liberals and conservatives that makes both sides seem tendentious. Liberals who usually argue that constitutional rights (of criminal defendants, for example) must be respected regardless of inconvenient social consequences, say that the Second Amendment right is too costly to honor. Conservatives who frequently favor applying cost-benefit analysis to constitutional construction (of defendants' rights, for example) advocate an absolutist construction of the Second Amendment." See George Will, *Oh That Annoying Second Amendment: It Shows No Signs of Going Away*, PHILADELPHIA INQUIRER, March 22, 1991.

Although the Second Amendment and gun control debates involve far more than a simple liberal/conservative dichotomy, there are numerous exceptions on both sides; Will's point is well taken. If we accept the conventional view that the National Rifle Association is a predominantly conservative organization and that advocates of gun control tend to be politically liberal, we can see rather interesting role reversals. For example, the NRA has attacked firearms bans in public housing, bans which mainly affect people who are poor and black, while liberal groups have generally remained silent on the issue.

⁸ See THE RIGHT TO KEEP AND BEAR ARMS: REPORT OF THE SUBCOMM. ON THE CONSTITUTION OF THE COMM. ON THE JUDICIARY, S. REP. NO. 522, 97th Cong., 2d Sess. 3 (1982) [hereinafter SUBCOMMITTEE REPORT].

⁹ See *id.*; see also Lawrence Delbert Cress & Robert E. Shalhope, *The Second Amendment and the Right to Bear Arms: An Exchange*, 71 J. AM. HIST. 587 (1984) (debate whether correct interpretation of Second Amendment rests on rights to bear arms or communal prerogatives implied in Militia Clause); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 [290-294] (1983), reprinted in FIREARMS AND VIOLENCE: ISSUES OF PUBLIC POLICY 391-95 (Donald B. Kates, Jr. ed. 1984) (proper reading of Second Amendment extends to every citizen right to bear arms for personal defense); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982) (armed citizen and militia existed as distinct, yet interrelated, elements within American republican thought).

¹⁰ See, e.g., Jackson, *supra* note 6, at 194 (the purpose of the Second Amendment was to maintain the militia, not to provide an individual right to bear arms); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 963, 995, 1000 (1975) (Second Amendment was designed solely to protect the states against the federal government, using a historical analysis of the relationship between citizens and their sovereign as evidence).

¹¹ See, e.g., Halbrook, THAT EVERY MAN BE ARMED, *supra* note 6, at 55-87; Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, *supra* note 6, at 214-18, 273.

¹² U.S. CONST. amend. II.

viewed as the sole or (pg.314) limiting reason. They argue that the framers also contemplated a right to individual and community protection.¹³ This view embodies the individual rights theory.

This debate has raised often profound questions, but questions generally treated hastily, if at all, by the community of constitutional scholars.¹⁴ For example, if one accepts the collective rights view of the Amendment, serious questions arise concerning whether the federal government's integration of the National Guard into the Army and, later, the Air Force have not in all but name destroyed the very institutional independence of the militia that is at the heart of what the collective rights theorists see as the framers' intentions.¹⁵ Even the gun control debate is not completely resolved by an acceptance of the collective rights theory. If the Second Amendment was designed to ensure the existence of somewhat independent state militias immune from federal encroachment, then the question arises to what extent states are free to define militia membership. Could a state include as members of its militia all adult citizens, thus permitting them an exemption from federal firearms restrictions? If, instead, the federal government has plenary power to define militia membership and chooses to confine such membership to the federally controlled National Guard, does the Second Amendment become a dead letter under the collective rights theory?

If the collective rights theory raises difficult questions, the individual rights theory raises perhaps even more difficult, and perhaps more interesting ones. Some of these questions are obvious and frequently asked, such as where to draw the line between an individual's right to possess arms and the corollary right to self-defense on the one hand, and the community's interest in public safety and crime control on the other. Other questions are more elusive, more difficult to pose as well as to answer. At the heart of the individual rights view is the contention that the framers of the Second Amendment intended to protect the right to bear arms for two related purposes. The first of these was to ensure popular participation in the security of the community, an outgrowth of the English and early American reliance on posses and militias made up of the general citizenry to provide police and military forces.¹⁶ The second purpose was to ensure an armed citizenry in order to prevent potential tyranny by a government empowered and perhaps emboldened by a monopoly of force.¹⁷ (pg.315)

The second argument, that an armed populace might serve as a basis for resistance to tyranny, raises questions of its own. The framers had firsthand experience with such a phenomenon, but they lived in an age when the weapon likely to be found in private hands, the single shot musket or pistol, did not differ considerably from its military counterpart. Although the armies of the day possessed heavier weapons rarely found in private hands, battles were fought predominately by infantry or cavalry with weapons not considerably different from those employed by private citizens for

¹³ See, e.g., Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, *supra* note 6.

¹⁴ See *supra* note 5.

¹⁵ See *Perpich v. Department of Defense*, 110 S. Ct. 2418, 2422-26 (1990) (discussing the history of legislation governing the militia and the National Guard, and Congress's plenary authority over the National Guard).

¹⁶ See *Malcolm*, *supra* note 9, at 290-95.

¹⁷ See Stephen Halbrook's exploration of that idea within the context of classical political philosophy in *THAT EVERY MAN BE ARMED*, *supra* note 6, at 7-35; see also Gardiner, *supra* note 6, at 73-82 (the history of the Second Amendment indicates that one of its purposes was to ensure the existence of an armed citizenry as a defense against domestic tyranny); Lund, *supra* note 6, at 111-16 (Second Amendment protects an individual's right to bear arms in order to secure his political freedom); Shalhope, *supra* note 9, at 610-13 (framers of the Second Amendment, motivated by their distrust of government, intended to protect the right of individuals to bear arms).

personal protection or hunting.¹⁸ Battles in which privately armed citizens vanquished regular troops, or at least gave "a good account of themselves," were not only conceivable—they happened.¹⁹

Modern warfare has, of course, introduced an array of weapons that no government is likely to permit ownership by the public at large²⁰ and that few advocates of the individual rights view would claim as part of the public domain.²¹ The balance of power has shifted considerably and largely to the side of governments and their standing armies. For individual rights theorists, this shift immediately raises the question of whether, given the tremendous changes that have occurred in weapons technology, the framers' presumed intention of enabling the population to resist tyranny remains viable in the modern world.²² Although partly a question of military tactics, (pg.316) and thus beyond the scope of this discussion,²³ it is also a constitutional question. (pg.317) If private ownership

¹⁸ The American civilian of the mid-18th century was typically armed with the "Pennsylvania" rifle, later to be known as the "Kentucky" rifle. See Daniel Boorstin's discussion of the relative merits of the Pennsylvania Rifle and the muskets that British soldiers were equipped with in DANIEL J. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 350-51 (1958).

¹⁹ For one account of the battles of Lexington and Concord, see DAVID HAWKE, *THE COLONIAL EXPERIENCE* 573-78 (1966).

²⁰ It should not be necessary to detail such obvious examples as stinger missiles and nuclear weapons, but even more ordinary military weapons are also unlikely to be permitted to the public at large. For example, the U.S. Army expects every soldier, regardless of military specialty, to be proficient with the M203 grenade launcher (a shoulder-fired light mortar capable of firing a 40 millimeter high explosive round 400 meters), the M72A2 light antitank weapon (LAW) (a handheld disposable antitank weapon capable of penetrating an armored vehicle at 300 meters), the M67 fragmentation grenade, and the M18A1 Claymore antipersonnel mine. See DEPARTMENT OF THE ARMY, *SOLDIER'S MANUAL OF COMMON TASKS: SKILL LEVEL 1* (1985).

²¹ For one of the better efforts to reconcile modern weaponry with the type of weapons the framers intended to protect, see Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, *supra* note 6, at 204, 261.

²² We are putting aside for the moment the question of the utility or potential utility of an armed population as a useful auxiliary to national or local governments in maintaining either national or community security. It should be noted that during the Second World War, when the National Guard had been mobilized into the Army, impromptu home defense forces—some organized by state governments, some privately organized—patrolled beach areas and likely sabotage sights. The individuals who performed this service were usually equipped with their own weapons. And while this American version of "Dad's Army" encountered no significant enemy activity—doubtless to the relief of all concerned, particularly the participants—the utility of these patrols should be noted. If such patrols were necessary, and some undoubtedly were, from the military point of view, it was probably better to have civilian auxiliaries performing this function, freeing regular military units for more pressing duties. See *id.* at 272 n.284. It should also be noted that, immediately after the attack on Pearl Harbor, the Hawaiian territorial governor ordered citizens to report with their own firearms for defense of the Islands in anticipation of Japanese invasion. Ironically, given the later treatment of Japanese Americans on the mainland, a good percentage of the men who made up the citizens' home guard in Hawaii were of Japanese descent. See *id.*

In light of our later discussion of whether or not, given the racial restriction in the Uniform Militia Act of 1792, free Negroes were considered part of the militia, see *infra* Part I. c.2, it should be noted that many of the individuals who served in these home guard organizations probably did not meet the statutory definition of militia members. By statute, membership in the militia is defined as men from 18-45. Most men in that age group were in the armed forces during the Second World War so that those performing home guard duties were probably older and younger than the statutory age limits. See Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, *supra* note 6, at 272 n. 284 (research indicates that men between the ages of 16 and 65 served in home guard units). It is also probable that a fair number of women performed those tasks. For our purposes, what is interesting about this history is that it indicates that militia membership is even broader than the statutory definition. Perhaps the best way of viewing the issue is to regard statutory militia provisions as defining those who may be compelled to perform militia service, but to realize that the whole population might be permitted to volunteer for militia service.

²³ Despite modern technological advances, the impotence of privately-armed civilians against organized armies is by no means obvious. Afghan guerrillas, to cite a recent example, were quite successful in resisting the Soviet Army largely with small arms. Harry Summers, retired Army Colonel and Professor at the Army War College, indicated in a recent column that he believed an armed population could resist a tyrannical government or at least do so better than an unarmed one. See Harry Summers, *Gun Collecting and Lithuania*, WASH. TIMES, Mar. 29, 1990, at F4 (public should protect its right to bear arms as a protection against government).

There are at least three ways to approach the question of an armed population resisting the government. The first is to look

of firearms is constitutionally protected, should this right be protected with the original military and political purposes in mind, or should the protection of firearms now be viewed as protecting only those weapons used for personal protection or recreation?²⁴ Or, given that all firearms are potentially multi-purpose, and that all firearms potentially may be used for military, recreational, or personal defense as well as for criminal purposes, what effect should legislatures and courts give to the framers' original military rationale? Where should the proper lines be drawn with respect to modern firearms, all of which employ technologies largely unimagined by the framers?²⁵

Societal, as well as technological, changes raise questions for advocates of the individual rights view of the Second Amendment. In the eighteenth century, the chief vehicle for law enforcement was the *posse comitatus*, and the major American military force was the militia of the whole. While these institutions are still recognized by modern law,²⁶ they lie dormant in late

at what happens when actual armed conflict breaks out between a nation's military forces and the population or a segment of the population. Although modern technology weights the odds heavily in the government's favor, other considerations, including whether or not military forces are overextended, the skill of the population in general with arms (which might be influenced by the number of military veterans in the population or the number of people who regularly practice with firearms), the terrain, and the morale of military forces called upon to suppress the population, might tend to redress the technological imbalance.

The second way of viewing this question is to look at it as a question of deterrence. From this perspective, one might argue that, even if a government would ultimately win a confrontation with an armed population, the cost to the government is higher. It will endure substantially larger casualties and may have to endure large scale destruction of economically valuable infrastructure in order to achieve its objectives. This higher cost might cause a government to seek compromise, or cause a reluctance on the part of many in the military to participate, even if ultimate victory was assured. In the Soviet Union, press reports indicated great resistance on the part of citizens to sending reservists to the Azerbaijan region, in part because the population was armed and willing to resist. See Bill Keller, *Gorbachev Issues Emergency Decree Over Azerbaijan*, N.Y. TIMES, Jan. 16, 1990, at A1 (Azerbaijani leader threatens armed resistance against military); Bill Keller, *Moscow Dispatches 11,000 Troops to Azerbaijan*, N.Y. TIMES, Jan. 17, 1990, at A1 (Gorbachev hesitated in sending troops partly from fear of wide-scale popular resistance); Bill Keller, *Troops Seek to Calm Azerbaijan: Soviets Debate Cause of Violence*, N.Y. TIMES, Jan. 18, 1990, at A1 (one reason for hesitation before sending troops was fear of popular disapproval of sending troops to dangerous area); Esther B. Fein, *Gorbachev is Backed on Azerbaijan Combat*, N.Y. TIMES, Jan. 18, 1990, at A8 (Gorbachev criticized in the past for sending troops to control civil unrest); Bill Keller, *Soviet Troops Bugged Down by Azerbaijanis Blockades of Railroads and Airfields*, N.Y. TIMES, Jan. 19, 1990, at A1 (many young Soviets not eager to be mobilized); Frances X. Clines, *Soviet Force Said to Battle With Azerbaijani Militants: Call Up of Reserves Halted*, N.Y. TIMES, Jan. 20, 1990, at A1 (Moscow ends mobilization of reservists after wide protests); Bill Keller, *Cry of Won't Give Up My Son! And Soviets End the Call-Up*, N.Y. TIMES, Jan. 20, 1990, at A6 (same).

The third consideration is the one most relevant to the Afro-American experience. Governmental oppression can occur when the state actively oppresses the population or a segment of the population. It can also occur when the state displays an active indifference to the denial of one segment of the population's rights by another. This occurred most vividly for blacks during the Jim Crow era. See *infra* Part IV.

²⁴ The latter appears to be the view taken by former Chief Justice Burger. See Burger, *supra* note 7, at 4.

²⁵ In the 18th century, when the Second Amendment was adopted, firearms were single shot devices that were reloaded very slowly. Firearms were loaded by pouring black gunpowder down the muzzle of the firearm, followed by a separate bullet (usually a lead ball); the load was then rammed down with a ramrod. By way of contrast, modern firearms are usually loaded with self-contained cartridges—cartridges where the bullet and the powder are contained in one single capsule. Almost all modern firearms, with the exception of a few firearms designed almost exclusively for target shooting or training children in the use of firearms, are repeaters: they can fire more than one bullet before the shooter has to reload. Among the types of repeating firearms that exist today are revolvers (pistols with between five and nine rotating cylinders), manually operated rifles and shotguns, firearms that require the operation of a lever or bolt between pulls of the trigger in order to make a new round of ammunition ready to fire, semiautomatic firearms (pistols, rifles, and shotguns capable of firing a new round with each pull of the trigger), and automatic firearms (weapons that will fire a new round as long as the shooter depresses the trigger). These new developments make all modern firearms much more rapid fire than those employed in the 18th century. For books that illustrate the history of firearms technology, see ROBERT HELD, *THE AGE OF FIREARMS, A PICTORIAL HISTORY* (1957); BASIL P. HUGHES, *FIREPOWER: WEAPONS EFFECTIVENESS ON THE BATTLE FIELD, 1630-1850* (1975); HAROLD L. PETERSON, *THE TREASURY OF THE GUN* (1962).

²⁶ See, e.g., 10 U.S.C. § 311 (1988) (unorganized militia consists of all men between the ages of 18 and 45, and females who are commissioned National Guard officers); *Williams v. State*, 490 S.W.2d 117, 121 (Ark. 1973) (recognizing the continued validity of the *posse comitatus* power).

twentieth-century America. Professional police forces and a standing military (pg.318) establishment assisted by semi-professional auxiliaries—the reserves and the National Guard—have largely assumed the roles of public protection and national security. It is possible that the concept of a militia of the armed citizenry has been largely mooted by social change.

Yet, the effect of social change on the question of the Second Amendment is a two-edged sword. If one of the motivating purposes behind the Second Amendment was to provide a popular check against potential governmental excess, then does the professionalization of national and community security make the right to keep and bear arms even more important in the modern context? Furthermore, the question remains whether the concept of a militia of the whole is worth re-examining: Did the framers, by adopting the Second Amendment, embrace a republican vision of the rights and responsibilities of free citizens that, despite the difficulties, should somehow be made to work today?

Finally, the Second Amendment debate raises important questions concerning constitutional interpretation, questions that need to be more fully addressed by legal historians and constitutional commentators. It poses important questions about notions of the living Constitution, and to what extent that doctrine can be used to limit as well as extend rights. It also poses important questions about social stratification, cultural bias, and constitutional interpretation. Do courts really protect rights explicit or implicit in the Constitution, or is the courts' interpretation of rights largely a dialogue with the elite, articulate sectors of society, with the courts enforcing those rights favored by dominant elites and ignoring those not so favored?

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.²⁷ The nation's most destructive conflict ended the "peculiar institution."²⁸ That all too brief experiment in racial egalitarianism, Reconstruction, was ended by private violence²⁹ and abetted by Supreme Court sanction.³⁰ Jim Crow was sustained by private violence, often with (pg.319) public assistance.³¹

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.³² Questions raised by the Second Amendment, particularly those concerning self-defense, crime, participation in the security of the

²⁷ See KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH* 141-91 (1956).

²⁸ 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).

²⁹ 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).

³⁰ See, e.g., *United States v. Harris*, 106 U.S. 629 (1882) (holding unconstitutional a federal criminal statute designed to protect equal privileges and immunities for blacks from invasion by private persons); *United States v. Cruikshank*, 92 U.S. 542 (1876) (holding unconstitutional a federal criminal statute designed to prevent whites from conspiring to prevent blacks from exercising their constitutional rights).

³¹ See *infra* Part IV.

³² See *infra* Part V.

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.

This article explores Second Amendment issues in light of the Afro-American experience, concluding that the individual rights theory comports better with the history of the right to bear arms in England and Colonial and post-Revolutionary America. The article also suggests that Second Amendment issues need to be explored, not only with respect to how the right to keep and bear arms has affected American society as a whole, but also with an eye toward subcultures in American society who have been less able to rely on state protection.

The remainder of this article is divided into five parts. Part I examines the historical tension between the belief in the individual's right to bear arms and the desire to keep weapons out of the hands of "socially undesirable" groups. The English distrust of the lower classes, and then certain religious groups, was replaced in America by a distrust of two racial minorities: Native Americans and blacks. Part II examines antebellum regulations restricting black firearms ownership and participation in the militia. Part III examines the intentions of the framers of the Fourteenth Amendment with respect to the Second Amendment and how nineteenth-century Supreme Court cases limiting the scope of the Second Amendment were part of the general tendency of the courts to limit the scope of the Fourteenth Amendment. This Part also examines restrictions on firearms ownership aimed at blacks in the postbellum South and the role of private violence in reclaiming white domination in the South. Part IV examines black resistance to the violence that accompanied Jim Crow. In Part V, the article suggests directions of further inquiry regarding political access, the current specter of black-on-black crime, and the question of gun control today.^(pg.320)

I. 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.³³ Instead, they believed that they were simply recognizing rights already part of their English constitutional heritage and implicit in natural law.³⁴ 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.³⁵

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

³³ BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 184-89, 193-94 (1967).

³⁴ *Id.* 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).

³⁵ *See, e.g.,* THE FEDERALIST No. 84 (Alexander Hamilton).

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.³⁶ 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.(pg.321)

A. 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 1181³⁷ required the arming of all free men, and required free men to possess armor suitable to their condition.³⁸ By the thirteenth century, villeins possessing sufficient property were also expected to be armed and contribute to the security of the community.³⁹ Lacking both professional police forces and a standing army,⁴⁰ 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.⁴¹

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.⁴²

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

³⁶ 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).

³⁷ SELECT CHARTERS & OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD THE FIRST 181-84 (H.W.C. Davis ed., Fred B. Cothman & Co. 1985) (1921).

³⁸ I FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 421-42, 565* (1968).

³⁹ *Id.*

⁴⁰ 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.

⁴¹ ALAN HARDING, *A SOCIAL HISTORY OF ENGLISH LAW* 59 (1966); Malcolm, *supra* note 9, at 391.

⁴² Malcolm, *supra* note 9, at 391-92.

sixteenth-century statute designed as a crime control measure prohibited the carrying of handguns and crossbows (pg.322) by those with incomes of less than one hundred pounds a year.⁴³ Catholics were also often subject to being disarmed as potential subversives after the English reformation.⁴⁴

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."⁴⁵

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.⁴⁶ He discussed the right in traditional English (pg.323) terms:

⁴³ *Id.* at 393.

⁴⁴ *Id.* at 393-94.

⁴⁵ *Id.* at 408.

⁴⁶ 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. *Id.* 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; FRANKLINE 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

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.⁴⁷

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.⁴⁸ 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 (pg.324) 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.⁴⁹

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.⁵⁰ 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.⁵¹ In most colonies, all white men between the ages of sixteen and sixty, usually with the exception of clergy and religious objectors, were

to extend the Bill of Rights to the states. *See infra* Part III.

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

⁴⁸ ABBOTT E. SMITH, *COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA, 1607-1776*, at 30-34 (Norton 1971) (1947).

⁴⁹ BOORSTIN, *supra* note 18, at 355-56.

⁵⁰ *Id.* at 353.

⁵¹ *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.

considered part of the militia and required to be armed.⁵² 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.⁵³ 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.⁵⁴

If there were virtually universal agreement concerning the need to arm the white population,⁵⁵ the law was much more ambivalent with respect to (pg.325) blacks. The progress of slavery in colonial America reflected English lack of familiarity with the institution, in both law and custom.⁵⁶ 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.⁵⁷ 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.⁵⁸

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.⁵⁹ The statute did not specify the arming of black men, but it also did not prohibit black men from arming themselves.⁶⁰ By 1680 a Virginia statute prohibited Negroes, slave and free, from carrying weapons, including clubs.⁶¹ 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.⁶² Virginia's experience reflected three sets of concerns: the greater need to maintain social

⁵² See, e.g., 2 LAWS OF THE ROYAL COLONY OF NEW JERSEY 15-21, 49, 96, 133, 289 (Bernard Bush ed., 1977).

⁵³ HIGGINBOTHAM, *supra* note 51, at 260-262.

⁵⁴ 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).

⁵⁵ 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.

⁵⁶ See Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 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).

⁵⁷ HIGGINBOTHAM, *supra* note 51, at 21-22.

⁵⁸ See HERBERT APTHEKER, AMERICAN NEGRO SLAVE REVOLTS (5th ed. 1983); Diamond, *supra* note 56, at 101-102, 104; Robert J. Cottrol & Raymond T. Diamond, Book Review, 56 TUL. L. REV. 1107, 1110-1112 (1982) (reviewing A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978)).

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

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

⁶¹ HIGGINBOTHAM, *supra* note 51, at 39.

⁶² *Id.* at 58.

control over the black population as caste lines sharpened;⁶³ 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,⁶⁴ but free Negroes in that colony were not permitted to participate in (pg.326) militia drills; instead they were required to perform substitute service on public works projects.⁶⁵ New Jersey exempted blacks and Indians from militia service, though the colony permitted free Negroes to possess firearms.⁶⁶ 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.⁶⁷ 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.⁶⁸ As the eighteenth century unfolded, those rights were curtailed.⁶⁹

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 (pg.327) 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

⁶³ *Id.* at 38-40.

⁶⁴ Higginbotham informs us that the Boston selectmen passed such an ordinance after some slaves had allegedly committed arson in 1724. *See id.* at 76.

⁶⁵ *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. *Id.* It is interesting to note that, despite this prohibition on militia service, blacks served with New England forces during the French and Indian Wars. *Id.* 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.

⁶⁶ *See* 2 *LAWS OF THE ROYAL COLONY OF NEW JERSEY*, *supra* note 52, at 49, 96, 289.

⁶⁷ For a good discussion of black life in colonial South Carolina, see generally PETER H. WOOD, *BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION* (1974).

South Carolina in 1739 was the scene of the Stono Rebellion, one of the largest slave rebellions in North America. A recent study of the rebellion suggests that the presence of large numbers of African born men from the Kingdom of the Kongo played a critical role. The Kingdom, including parts of modern Zaire, Congo-Brazzaville, Gabon, and Angola, had been heavily influenced by Portuguese traders and missionaries in such areas as language, religion, and contemporary European military tactics including the use of firearms. The Stono Rebellion illustrated both the internal and external threats faced by many colonies. First, the presence of large numbers of African slaves, familiar with European military tactics and technology, posed a threat to slave society in South Carolina. Second, this threat was further enhanced by the fact that South Carolina bordered on the Spanish colony of Florida. Historical accounts of the rebellion indicate that Portuguese-speaking Catholic slaves acted in concert with Spanish agents. *See generally* John K. Thornton, *African Dimensions of the Stono Rebellion*, 96 *AM. HIST. REV.* 1101 (1991).

⁶⁸ *See* HIGGINBOTHAM, *supra* note 51, at 201-15.

⁶⁹ *Id.*

toward the abolition of slavery and the southern states, some of which had also considered abolition,⁷⁰ 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.⁷¹

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 militia⁷² excited fears among those who believed that the new constitution could be used to destroy both state power and individual rights.⁷³ (pg.328)

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

⁷⁰ See Robert J. Cottrol, *Liberalism and Paternalism: Ideology, Economic Interest and the Business Law of Slavery*, 31 AM. J. LEGAL HIST. 359, 363-64 (1987).

⁷¹ See generally REID, *supra* note 34.

⁷² That clause is now found in U.S. CONST. art. I, § 8, cl. 15.

⁷³ 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." *Id.* 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." *Id.* 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. *Id.* at 909.

liberty.⁷⁴ Others complained that the Militia Clause provided no exemptions for those with religious scruples against bearing arms.⁷⁵

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.⁷⁶ 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."⁷⁷ 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.⁷⁸ At the constitutional convention, Massachusetts delegate Elbridge Gerry saw such potential danger in giving the new government power over the militia, that he declared:

This power in the United States as explained is making the states drill sergeants. He had as lief let the citizens of Massachusetts be disarmed, as to take the command from the states, and subject them to the General Legislature. It would be regarded as a system of Despotism.⁷⁹

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 (pg.329) right. The Virginia convention proposed language that would provide protection for the right to keep and bear arms in the federal constitution.⁸⁰

⁷⁴ This was a view argued by Luther Martin before the Maryland House of Representatives. Luther Martin Before the Maryland House of Representatives (1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 157 (Max Farrand ed., 1966) [hereinafter THE RECORDS OF THE FEDERAL CONVENTION]. Samuel Bryan, a Pennsylvania pamphleteer who argued against the proposed constitution, argued that it could subject the whole population to military discipline. Samuel Bryan, *Letter to the People of Pennsylvania*, INDEPENDENT GAZETTEER, Oct. 5, 1787, reprinted in THE ANTIFEDERALISTS 22-23, 27 (Cecelia M. Kenyon ed., 1966). A number of critics argued that the provision was a threat to the liberty of every man from 16 to 60. *Id.* at 57. Thus, the language of the Fifth Amendment requiring grand jury proceedings for cases arising in the militia, except when in actual service during time of war or public danger, may have been in response to this fear.

⁷⁵ THE ANTIFEDERALISTS, *supra* note 74, at 57. This concern was the reason for the original language of the Second Amendment. *See supra* note 4.

⁷⁶ *See supra* text accompanying note 43.

⁷⁷ THE ANTIFEDERALISTS, *supra* note 74, at 228.

⁷⁸ 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 74, at 385-87; 3 *id.* at 208-09, 272, 295.

⁷⁹ 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 74, at 385.

⁸⁰ 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].

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 officer⁸¹ 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,⁸² 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.⁸³ In what was perhaps a concession to sentiment favoring the militia of the whole, Hamilton stated: "Little more can be reasonably aimed at, with respect to the people at large, than to have them properly armed and equipped; and in order to see that this not be neglected, it will be necessary to assemble them once or twice in the course of a year."⁸⁴

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.⁸⁵ But Madison's (pg.330) views went further. He envisioned a militia consisting of virtually the entire white male population, writing that a militia of 500,000 citizens⁸⁶ 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:

Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government: still it would not be going too far to say, that the State governments with the people on their side, would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million citizens with arms in their hands, officered by men chosen among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this

⁸¹ RICHARD B. MORRIS, SEVEN WHO SHAPED OUR DESTINY: THE FOUNDING FATHERS AS REVOLUTIONARIES 228, 237-49 (1973).

⁸² 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 74, at 293.

⁸³ 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.

⁸⁴ THE FEDERALIST No. 29, at 183 (Alexander Hamilton) (The Heritage Press 1945). Interestingly enough, Hamilton's views anticipated the state of modern law on this subject; the National Guard has, in effect, become a select militia with a much larger reserve militia existing in the citizenry at large.

⁸⁵ 5 ELLIOT'S DEBATES, *supra* note 80, at 464-65.

⁸⁶ 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. DEP'T 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.

country against the British arms will be most inclined to deny the possibility of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the... governments are afraid to trust the people with arms....⁸⁷

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.^(pg.331)

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 Act⁸⁸ 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,⁸⁹ the Constitution had no racial definition of citizenship.⁹⁰ Free Negroes voted in a majority of states.⁹¹ A number of states had militia provisions that allowed free Negroes to participate.⁹² Particularly in the northern states, many were well aware that free Negroes and former slaves had served with their state forces during the Revolution.⁹³ 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

⁸⁷ *Id.*

⁸⁸ 1 Stat. 271.

⁸⁹ See U.S. CONST. art. I, § 2, cl. 3 (three-fifths of slave population counted for Apportionment purposes); U.S. CONST. art. I, § 9, cl. 1 (importation of slaves allowed until 1808); U.S. CONST. art. IV, § 2, cl. 3 (escaped slaves must be "delivered up" to their masters).

⁹⁰ U.S. CONST. art I, § 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.

⁹¹ See *infra* Part II; see also Robert J. Cottrol, *A Tale of Two Cultures: Or Making the Proper Connections Between Law, Social History and The Political Economy of Despair*, 25 SAN DIEGO L. REV. 989, 1004 & nn. 86-88 (1988).

⁹² JORDAN, *supra* note 56, at 125-26, 411-12.

⁹³ Robert J. Cottrol, *Law, Politics and Race in Urban America: Towards a New Synthesis*, 17 RUTGERS L.J. 483, 503 & n. 129 (1986).

generation or so later in the nineteenth century.⁹⁴ 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 antebellum period enrolled free blacks as militia members.⁹⁵ (pg.332) Northern states at various times also enrolled free Negroes in the militia despite federal law and often strident prejudice.⁹⁶ States North and South employed free Negroes in state forces during times of invasion.⁹⁷ While southern states often prohibited slaves from carrying weapons and strictly regulated access to firearms by free Negroes,⁹⁸ northern states generally made no racial distinction with respect to the right to own firearms,⁹⁹ 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.¹⁰⁰ 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.¹⁰¹ 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 (pg.333) 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

⁹⁴ Robert J. Cottrol, *The Thirteenth Amendment and the North's Overlooked Egalitarian Heritage*, 11 NAT'L BLACK L.J. 198, 202-03 (1989) (discussing racism in early 19th-century America).

⁹⁵ See JORDAN *supra* note 56, at 125-26, 411-12 (in varying degrees, North Carolina, South Carolina, and Georgia); BERNARD C. NALTY, *STRENGTH FOR THE FIGHT: A HISTORY OF BLACK AMERICANS IN THE MILITARY* 20 (1986) (same).

⁹⁶ See JORDAN, *supra* note 56, at 125-26 ("Although [the exclusion of Negroes from the militia] lay on the statute books of all four New England colonies, Negroes served in New England forces in every colonial war." Additionally, and in varying degrees, New York, New Jersey, Pennsylvania, and Delaware included Negroes.).

⁹⁷ This was particularly true during the War of 1812. See ROBERT J. COTTROL, *THE AFRO-YANKEES: PROVIDENCE'S BLACK COMMUNITY IN THE ANTEBELLUM ERA* 63 (1982); EUGENE D. GENOVESE, *ROLL, JORDON, ROLL: THE WORLD THE SLAVES MADE* 155 (1976); NALTY, *supra* note 95, at 24-28.

⁹⁸ See *infra* Part II.A; see also STAMPP, *supra* note 27, at 208-28.

⁹⁹ Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 476 (1986).

¹⁰⁰ See *supra* note 88.

¹⁰¹ NALTY, *supra* note 95, at 10-18. See generally BENJAMIN QUARLES, *THE NEGRO IN THE AMERICAN REVOLUTION* (1961).

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 1792,¹⁰² 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.¹⁰³ 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 1777.¹⁰⁴ Five of these states rewrote their constitutions by the time of the ratification of the Bill of Rights in 1791.¹⁰⁵ A twelfth original state, Massachusetts, passed a new constitution in 1780.¹⁰⁶ Many of the new constitutions recognized the status of citizens as "free and equal" or "free and independent."¹⁰⁷ In Massachusetts and Vermont, these clauses were interpreted as outlawing the institution of slavery.¹⁰⁸ Many of the new constitutions guaranteed the right to vote regardless of race to all men who otherwise qualified,¹⁰⁹ and guaranteed many of the rights that (pg.334) would later be recognized

¹⁰² 1 Stat. 271; *see supra* note 88.

¹⁰³ *See* Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255, 260-63 (1983).

¹⁰⁴ *See* FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES (Benjamin P. Poore ed., 2d ed., Washington, Government Printing Office 1878) [hereinafter FEDERAL AND STATE CONSTITUTIONS]. Massachusetts passed a new constitution in 1780. 1 *id.* at 956. Rhode Island would not do so until 1842. 2 *id.* at 1603.

¹⁰⁵ These states were: Georgia in 1789, *see* 1 *id.* at 384; New Hampshire in 1784, *see* 2 *id.* at 1280; Pennsylvania in 1790, *see* 2 *id.* at 1548; South Carolina in 1778 and 1780, *see* 2 *id.* at 1620, 1628; and Vermont in 1786, *see* 2 *id.* at 1866.

¹⁰⁶ 1 *id.* at 956.

¹⁰⁷ *See* N.H. CONST. of 1784, pt. I, art. I, 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1280; CONN. CONST. of 1776, pmbl., 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 257; MASS. CONST. of 1780, pt. I, art. I, 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 957; PA. CONST. of 1776, declaration of rights, art. I, 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1541; PA. CONST. of 1790, art. IX, § 1, 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1554; VT. CONST. of 1786, ch. 1, art. I, 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1867; VT. CONST. of 1776, bill of rights, § 1, 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1908.

¹⁰⁸ *See* Diamond, *supra* note 56, at 103 nn. 59-61.

¹⁰⁹ *See, e.g.,* GA. CONST. of 1779, art. IV, § 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. 1, 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 § 4, 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1628.

in the Bill of Rights.¹¹⁰ 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.¹¹¹

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.¹¹² Ironically, only in the nineteenth-century would black voting rights be curtailed, as Jacksonian democracy expanded voting rights for whites.¹¹³ 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 (pg.335) blacks.¹¹⁴ Other states would eliminate black voting rights altogether.¹¹⁵ Other than Maine, no state admitted to the union in the nineteenth century's antebellum period allowed blacks to vote.¹¹⁶

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.¹¹⁷ In southern states, where slavery was an integral part of the social and economic

¹¹⁰ See, e.g., GA. CONST. of 1776, art. LXI, 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 283 (freedom of the press); MASS. CONST. of 1780, pt. 1, declaration of rights, art. XVIII, 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 959 (freedom of assembly); MD. CONST. of 1776, declaration of rights, art. XXVII, 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 819 (prohibiting quartering troops in homes); N.H. CONST. of 1776, declaration of rights, art. XXIII, 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 959 (limits on searches and seizures and on general warrants); PA. CONST. of 1776, declaration of rights, art. XII, 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1542 (freedom of speech); S.C. CONST. of 1778, art. XLI, 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1627 (due process of law); VA. CONST. of 1776, bill of rights, § 16, 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1909 (freedom of religion); VT. CONST. of 1786, ch. 1, declaration of rights, art. XVIII, 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 1869 (right to bear arms).

¹¹¹ See GA. CONST. of 1776, art. LVI, 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 104, at 283; GA. CONST. of 1789, art. IV, § 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, § 3 (freedom of religion to be denied to "no person"), art. XI, § 7 (freedom of the press for "every person" and freedom of speech for "every citizen"), art. XI, § 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, § *supra* note 104, at 1632.

¹¹² See COTTROL, *supra* note 97, at 42-43.

¹¹³ See Cottrol, *supra* note 93, at 508-09. This is not to say that voting limitations were the sole measure of the failure of Jacksonian democracy to include blacks. *Id.* at 508-13.

¹¹⁴ N.Y. CONST. of 1821, art. II, *superceding* N.Y. CONST. of 1777, art. VII; see also Dixon R. Fox, *The Negro Vote in Old New York*, in FREE BLACKS IN AMERICA, 1800-1860, at 95, 97-112 (John H. Bracey, Jr. et. al. eds., 1970).

¹¹⁵ See COTTROL, *supra* note 97, at 42-43.

¹¹⁶ LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860, at 79 (1961).

¹¹⁷ It is to be questioned whether racism is ever "simple." Winthrop Jordan has theorized that the English and their cultural descendants were culturally predisposed to racism. JORDAN, *supra* note 56, at 3-43. Carl Jung has suggested that for white Americans the Negro represents the part of the unconscious that requires repression. ALEXANDER THOMAS & SAMUEL SILLEN, RACISM AND PSYCHIATRY 13-14 (1972); "America Facing its Most Tragic Moment"—Dr. Carl Jung, N.Y. TIMES, Sept. 29, 1912, § 5, at 3. Whatever accounts for racism, it is clear that racism is capable of actuating the lawmaking process. See generally HIGGINBOTHAM, *supra* note 51.

framework, this hostility was occasioned by the threat that free blacks posed to the system of Negro slavery.¹¹⁸

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,¹¹⁹ 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 (pg.336) movement and decision of free blacks.¹²⁰ States limited the number of free blacks who might congregate at one time;¹²¹ they curtailed the ability of free blacks to choose their own employment,¹²² and to trade and socialize with slaves.¹²³ 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.¹²⁴ 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.¹²⁵

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.¹²⁶ Also at this extreme was Mississippi,

¹¹⁸ See STAMPP, *supra* note 27, at 215-17.

¹¹⁹ Compare "Sambo," the idealized exposition of the slave psyche hypothesized by Stanley Elkins. Elkins viewed slaves as having internalized their circumstances to the point at which they became not only incapable of resisting the white masters but also actively cooperated in maintaining their own degradation. See STANLEY M. ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* 81-139 (3d ed., 1976).

¹²⁰ GENOVESE, *supra* note 97, at 51, 399; STAMPP, *supra* note 27, at 215-217; Eugene D. Genovese, *The Slave States of North America*, in *NEITHER SLAVE NOR FREE: THE FREEDMEN OF AFRICAN DESCENT IN THE SLAVE SOCIETIES OF THE NEW WORLD* 258, 261-262 (David W. Cohen & Jack P. Greene eds., 1972).

¹²¹ JOHN H. FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* 139-40 (6th ed. 1988).

¹²² *Id.* at 140.

¹²³ *Id.* at 140-41.

¹²⁴ STAMPP, *supra* note 27, at 214-16.

¹²⁵ See *infra* text accompanying notes 126-46.

¹²⁶ An Act Concerning Slaves, § 6, 1840 Laws of Tex. 171, 172. Chapter 58 of the Texas Acts of 1850, provided penalties for violators of the 1840 statute. Act of Dec. 3, 1850, ch. 58, § 1, 1850 Laws of Tex. 42-44 (amending § 6 of An Act Concerning Slaves). Masters, overseers, or employers were to be fined between \$25 and \$100, and the slave was to receive not less than 39 nor more than 50 lashes. But also under the 1850 Act, slaves were allowed to carry firearms on the premises of the master, overseer, or employer, where they presumably would receive proper supervision.

which forbade firearms to both free blacks and slaves after 1852.¹²⁷ 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.¹²⁸

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.¹²⁹ Thus, (pg.337) Louisiana provided that a slave was denied the use of firearms and all other offensive weapons,¹³⁰ unless the slave carried written permission to hunt within the boundaries of the owner's plantation.¹³¹ 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.¹³² 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,"¹³³ turned its attention to the question of free blacks in 1825. Section 8 of "An Act to Govern Patrols"¹³⁴ 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

¹²⁷ Act of Mar. 15, 1852, ch. 206, 1852 Laws of Miss. 328 (prohibiting magistrates from issuing licenses for blacks to carry and use firearms). This act repealed Chapter 73, sections 10 and 12 of the Mississippi Acts of 1822, allowing slaves and free blacks respectively to obtain a license to carry firearms. *See* Act of June 18, 1822, ch. 73, §§ 10, 12, 1822 Laws of Miss. 179, 181-82.

¹²⁸ Chapter 448, § 1, of the Kentucky Acts of 1818 was limited solely to slave offenders. Act of Feb. 10, 1819, ch. 448, § 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, § 7, 1850 Acts of Ky. 291, 300-01.

¹²⁹ This presumption was not dispositive of all regulation on this subject. Sale or other delivery of firearms to slaves was forbidden by several states, among them Florida, Georgia, Louisiana, and North Carolina. Act of Feb. 25, 1840, no. 20, § 1, 1840 Acts of Fla. 22-23; Act of Dec. 19, 1860, no. 64, § 1, 1860 Acts of Ga. 561; Act of Apr. 8, 1811, ch. 14, 1811 Laws of La. 50, 53-54; Act of Jan. 1, 1845, ch. 87, §§ 1, 2, 1845 Acts of N.C. 124. Moreover, slave states often provided for patrols manned by local men who would be authorized to search out and confiscate firearms in the possession of free blacks as well as slaves. *See Infra* text accompanying notes 133-46.

¹³⁰ Black Code, ch. 33, § 19, Laws of La. 150, 160 (1806).

¹³¹ *Id.* § 20. Moreover, in 1811, Louisiana forbade peddlers from selling arms to slaves, upon a fine of \$500 or one year in prison. Act of Apr. 8, 1811, ch. 14, 1811 Laws of La. 50, 53-54 (supplementing act relative to peddlers and hawkers).

¹³² Act of Dec. 18, 1819, 1819 Acts of S.C. 28, 31 (providing more effective performance of patrol duty).

¹³³ An Act Concerning Slaves, § 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, § 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, § 46, 1828 Laws of Fla. 174, 185.

¹³⁴ 1825 Acts of Fla. 52, 55.

so under this statute either by means of the weekly renewable license or if "in the presence of some white person."¹³⁵

Florida went back and forth on the question of licenses for free blacks¹³⁶ but, in February 1831 repealed all provision for firearm licenses for free (pg.338) blacks.¹³⁷ 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 people¹³⁸ and which caused the legislatures of the Southern states to reinvigorate their repression of free blacks.¹³⁹ 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.¹⁴⁰ In their December 1831 legislative sessions, both Maryland¹⁴¹ and Virginia¹⁴² 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."¹⁴³

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.¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶ The patrols would meet no resistance from those who were simply unable to offer any.(pg.339)

B. THE NORTHERN ANTEBELLUM EXPERIENCE: USE OF FIREARMS TO

¹³⁵ *Id.* § 9.

¹³⁶ In 1828, Florida twice enacted provisions providing for free blacks to carry and use firearms upon obtaining a license from a justice of the peace. Act of Nov. 17, 1828, § 9, 1828 Fla. Laws 174, 177; Act of Jan. 12, 1828, § 9, 1827 Fla. Laws 97, 100.

¹³⁷ Act of Jan 31, 1831, 1831 Fla. Laws 30.

¹³⁸ APTHEKER, *supra* note 58, at 298. For a full account of the revolt, the bloodiest in United States history, see *id.* 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).

¹³⁹ See HERBERT APTHEKER, *NAT TURNER'S SLAVE REBELLION* 74-94 (1966).

¹⁴⁰ *Id.* at 74-75.

¹⁴¹ *Id.* at 75.

¹⁴² *Id.* at 81.

¹⁴³ Act of Dec. 23, 1833, § 7, 1833 Ga. Laws 226, 228.

¹⁴⁴ Act of Feb. 17, 1833, ch. 671, §§ 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. *Id.* § 17.

¹⁴⁵ Act of Jan. 6, 1847, ch. 87, § 11, 1846 Fla. Laws 42, 44; Act of Dec. 17, 1861, ch. 1291, § 11, 1861 Fla. Laws 38, 40.

¹⁴⁶ STAMPP, *supra* note 27, at 214-15.

COMBAT RACIALLY MOTIVATED DEPRIVATIONS OF LIBERTY

Even as northern racism defined itself in part by the curtailment of black voting rights,¹⁴⁷ it cumulatively amounted to what some have called a widespread "Negrophobia."¹⁴⁸ With notable exceptions, public schooling, if available to blacks at all, was segregated.¹⁴⁹ Statutory and constitutional limitations on the freedom of blacks to emigrate into northern states were a further measure of northern racism.¹⁵⁰ While the level of enforcement and (pg.340) the ultimate effect of these constitutional and statutory provisions may not have been great,¹⁵¹ 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.

¹⁴⁷ See *supra* text accompanying notes 112-16.

¹⁴⁸ See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 10 (1977).

¹⁴⁹ 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. *Id.* 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, § 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, § 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. *COTTRILL*, *supra* note 111, at 90. Rural schools in Rhode Island, however, were integrated. *Id.* In New York, some school districts were segregated, among them that of New York City. Finkelman, *supra* note 99, at 463, 467-68.

¹⁵⁰ 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. Rev. 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. Rev. Laws 375, *superseded by* IND. CONST. of 1851, art. XIII, § 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. Rev. Laws 463, *amended by* Act of Feb. 1, 1831, 1832-33 Ill. Rev. 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.

¹⁵¹ 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).

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.¹⁵² 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.¹⁵³

Quite often, racial violence made for bloody, destructive confrontations. In July 1834, mobs in New York attacked churches, homes, and businesses of white abolitionists and blacks. These mobs were estimated at upwards of twenty thousand people and required the intervention of the militia to suppress.¹⁵⁴ In Boston in August of 1843, after a handful of white sailors verbally and physically assaulted four blacks who defended themselves, a mob of several hundred whites attacked and severely beat every black they could find, dispersed only by the combined efforts of police and fire personnel.¹⁵⁵

The Providence Snowtown Riot of 1831 was precipitated by a fight between whites and blacks at "some houses of ill fame"¹⁵⁶ located in the black ghetto of Snowtown. After a mob of one hundred or so whites descended on Snowtown, and after warning shots had been fired, a black man fired into the crowd, killing a white. The mob then descended on Snowtown in earnest, destroying no fewer than seventeen black occupied dwellings across a period of four days. The mobs did not disperse until the militia fired into the crowd, killing four men and wounding fourteen others.¹⁵⁷ (pg.341)

Similarly, the militia in Philadelphia put down an October 1849 race riot that resulted in three deaths, injuries, and the destruction of property.¹⁵⁸ By contrast, in the Providence Hardscrabble Riot of October 1824, militia were not called out and the police did nothing to stop a crowd of fifty or so whites from destroying every house in the black Hardscrabble area and looting household goods.¹⁵⁹

Awareness of racial hostility generally, and of incidents like these, made blacks desirous of forming militia units. The firing of the weapon in Providence in 1831 that sparked the mob to violence illustrated that blacks were willing to take up arms to protect themselves, but also illustrated the potentially counterproductive nature of individual action. The actions of the white militia in Providence and Philadelphia, as well as those of the police and fire units in Boston, proved the strength of collective armed action against mob violence. Moreover, the failure of police to take action in Providence in 1824 illustrated the vulnerability of the black community to mob violence, absent protection.

Though the Uniform Militia Act of 1792 had not specifically barred blacks from participation in the state organized militia,¹⁶⁰ the northern states had treated the act as such, and so the state

¹⁵² 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).

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

¹⁵⁴ CURRY, *supra* note 153, at 101.

¹⁵⁵ *Id.* at 100.

¹⁵⁶ *Id.* at 102.

¹⁵⁷ *Id.* at 102-03.

¹⁵⁸ *Id.* at 104.

¹⁵⁹ *Id.* at 102.

¹⁶⁰ See *supra* Part I.C.2.

organized militia was not an option.¹⁶¹ 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 1821.¹⁶² Oscar Handlin tells of an attempt by black Bostonians in the 1850s to form a private militia company.¹⁶³ 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.¹⁶⁴

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 (pg.342) barricaded themselves in a building beyond the police lines."¹⁶⁵

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.¹⁶⁶

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.

¹⁶¹ JACK D. FONER, *BLACKS AND THE MILITARY IN AMERICAN HISTORY: A NEW PERSPECTIVE* 20-21 (1974).

¹⁶² See COTTROL, *supra* note 97, at 63.

¹⁶³ OSCAR HANDLIN, *BOSTON'S IMMIGRANTS: A STUDY IN ACCULTURATION* 175 & n. 110 (1959).

¹⁶⁴ CURRY, *supra* note 153, at 100; VICTOR ULLMAN, *MARTIN R. DELANY: THE BEGINNINGS OF BLACK NATIONALISM* 29-31 (1971).

¹⁶⁵ CURRY, *supra* note 153, at 105-06.

¹⁶⁶ *Id.* 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.

III. ARMS AND THE POSTBELLUM SOUTHERN ORDER

The end of the Civil War did more than simply bring about the end of (pg.343) slavery; it brought about a sharpened conflict between two contrasting constitutional visions. One vision, largely held by northern Republicans, saw the former slaves as citizens¹⁶⁷ entitled to those rights long deemed as natural rights in Anglo-American society. Their's 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 Amendment¹⁶⁸ 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.¹⁶⁹ Instead, while recognizing emancipation, southern states imposed (pg.344) on the freedmen the legal disabilities of the antebellum free Negro population. As one North Carolina statute indicated:

All persons of color who are now inhabitants of this state shall be entitled to the same privileges, and are subject to the same burdens and disabilities, as by the laws of the state

¹⁶⁷ 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, § 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.

¹⁶⁸ 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.

¹⁶⁹ *See generally* Finkelman, *supra* note 99.

were conferred on, or were attached to, free persons of color, prior to the ordinance of emancipation, except as the same may be changed by law.¹⁷⁰

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,"¹⁷¹ 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."¹⁷² The codes often required blacks to sign labor contracts that bound black agricultural workers to their employers for a year.¹⁷³ Blacks were forbidden from serving on juries, and could not testify or act as parties against whites.¹⁷⁴ Vagrancy laws were used to force blacks into labor contracts and to limit freedom of movement.¹⁷⁵

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 Louisiana¹⁷⁶ and Mississippi¹⁷⁷ statutes were typical of the (pg.345) restrictions found in the codes. Alabama's¹⁷⁸ was even harsher.

¹⁷⁰ North Carolina Black Code, ch. 40, 1866 N.C. Sess. Laws 99, *reprinted in* 1 DOCUMENTARY HISTORY OF RECONSTRUCTION: POLITICAL, MILITARY, SOCIAL, RELIGIOUS, EDUCATIONAL AND INDUSTRIAL, 1865 TO THE PRESENT TIME 291 (Walter L. Fleming, ed., 1960) [hereinafter DOCUMENTARY HISTORY OF RECONSTRUCTION].

¹⁷¹ KENNETH STAMPP, THE ERA OF RECONSTRUCTION, 1865-1877, at 80 (1965).

¹⁷² FONER, *supra* note 29, at 198 (1988) (quoting letter from William H. Trescott to James L. Orr, Dec. 13, 1865, South Carolina's Governor's Papers). Eugene Genovese has quoted an antebellum observer who described the free Negro as "a sort of inmate on parole." GENOVESE, *supra* note 97, at 399.

¹⁷³ FONER, *supra* note 29, at 200.

¹⁷⁴ STAMPP, *supra* note 171, at 80.

¹⁷⁵ *Id.*

¹⁷⁶ 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 indorsed 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.

¹⁷⁷ [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.

¹⁷⁸

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

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.¹⁷⁹ 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,¹⁸⁰ 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.¹⁸¹ This fed the determination of northern Republicans (pg.346) to provide national enforcement of the Bill of Rights.¹⁸²

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).

¹⁷⁹ See FONER, *supra* note 29, at 225-227; STAMPP, *supra* note 171, at 80-81.

¹⁸⁰ 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.

¹⁸¹ 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.

¹⁸² 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.

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 controversy¹⁸³ is beyond the scope of this article, it should be noted that Jonathan Bingham, author of the Fourteenth Amendment's Privileges or Immunities Clause,¹⁸⁴ clearly stated that it applied the Bill of Rights to the states.¹⁸⁵ Others shared that same understanding.¹⁸⁶

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 (pg.347) 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*,¹⁸⁷ 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*,¹⁸⁸ federal officials brought charges against William Cruikshank and others under the Enforcement Act of 1870.¹⁸⁹ 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.¹⁹⁰

¹⁸³ 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.

¹⁸⁴ "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, § 1.

¹⁸⁵ THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 178, at 156-60, 217-18.

¹⁸⁶ *Id.* at 219 (remarks by Republican Sen. Jacob Howard of Michigan on privileges and immunities of citizens).

¹⁸⁷ *Butchers Benevolent Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 83 U.S. (16 Wall.) 36 (1872).

¹⁸⁸ 92 U.S. 542 (1876).

¹⁸⁹ 16 Stat. 140 (1870) (codified as amended at 18 U.S.C. §§ 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

Id. at 141.

¹⁹⁰ 92 U.S. at 548-59.

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.¹⁹¹ While the Court in the late 1870s and 1880s was reasonably willing to strike down instances of state sponsored racial discrimination,¹⁹² it also showed a strong concern for maintaining state prerogative and a disinclination to carry out (pg.348) the intent of the framers of the Fourteenth Amendment to make states respect national rights.

This trend was demonstrated in *Presser v. Illinois*,¹⁹³ 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.¹⁹⁴ 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,¹⁹⁵ he nonetheless went on to declare that the Second Amendment was a limitation on the federal and not the state governments. Curiously enough, 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.¹⁹⁶ 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.¹⁹⁷ It helped force many blacks into peonage, a virtual return to slavery,¹⁹⁸ and was used to force many blacks into a state of ritualized subservience.¹⁹⁹ 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

¹⁹¹ 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).

¹⁹² *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).

¹⁹³ 116 U.S. 252 (1886).

¹⁹⁴ *Id.* at 253.

¹⁹⁵ *Id.* at 265.

¹⁹⁶ *Id.*

¹⁹⁷ RABLE, *supra* note 29, at 88-90; STAMPP, *supra* note 171, at 199-204.

¹⁹⁸ Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646, 653-55 (1982).

¹⁹⁹ 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).

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 (pg.349) 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,²⁰⁰ and nurtured by economic competition between blacks and whites, particularly immigrant groups and those whites at the lower rungs of the economic scale,²⁰¹ racism in the North continued after the Civil War, abated but not eliminated in its effects.²⁰² 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.²⁰³

Immediately after the Civil War and the emancipation it brought, white Southerners adopted measures to keep the black population in its place.²⁰⁴ Southerners saw how Northerners had utilized segregation as a means to avoid the black presence in their lives,²⁰⁵ and they already had experience with segregation in southern cities before the war.²⁰⁶ Southerners extended this experience of segregation to the whole of southern life through the mechanism of "Jim Crow."²⁰⁷ Jim Crow was established both by the operation of (pg.350) law, including the black codes and other legislation, and by an elaborate etiquette of racially restrictive social practices. The *Civil Rights Cases*²⁰⁸ and *Plessy*

²⁰⁰ See generally JORDAN, *supra* note 56, at 3-43.

²⁰¹ LITWACK, *supra* note 116, at 153-86.

²⁰² Cottrol, *supra* note 91, at 1007-19.

²⁰³ C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 22-23 (3d ed. 1974).

²⁰⁴ See *infra* text accompanying notes 169-178. See generally WOODWARD, *supra* note 203, at 22-29.

²⁰⁵ See *id.* 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).

²⁰⁶ 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).

²⁰⁷ See generally WOODWARD, *supra* note 204. Jim Crow has been said to have established

an etiquette of discrimination. It was not enough for blacks to be second class citizens, denied the franchise and consigned to inferior schools. Black subordination was reinforced by a racist punctilio dictating separate seating on public accommodations, separate water fountains and restrooms, separate seats in courthouses, and separate Bibles to swear in black witnesses about to give testimony before the law. The list of separations was ingenious and endless. Blacks became like a group of American untouchables, ritually separated from the rest of the population.

Diamond & Cottrol, *supra* note 103, at 264-65 (footnote omitted).

²⁰⁸ 109 U.S. 3 (1883).

*v. Ferguson*²⁰⁹ 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,²¹⁰ 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."²¹¹ In effect, states and individuals were given full freedom to effect their "social prejudices"²¹² and "racial instincts"²¹³ to the detriment of blacks throughout the South and elsewhere.²¹⁴

These laws and customs were given support and gruesome effect by violence. In northern cities, violence continued to threaten blacks after Reconstruction and after the turn of the century. For instance, in New York, hostility between blacks and immigrant whites ran high.²¹⁵ Negro strike-breakers were often used to break strikes of union workers.²¹⁶ Regular clashes occurred between blacks and the Irish throughout the nineteenth century,²¹⁷ until finally a major race riot broke in 1900 that lasted four days.²¹⁸ (pg.351) And in 1919, after a Chicago race riot, 38 deaths and 537 injuries were reported as a result of attacks on the black population.²¹⁹

²⁰⁹ 163 U.S. 537 (1896).

²¹⁰ 109 U.S. 3.

²¹¹ 163 U.S. at 548.

²¹² *Id.* at 551.

²¹³ *Id.*

²¹⁴ 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.

²¹⁵ GILBERT OSOFSKY, *HARLEM: THE MAKING OF A GHETTO: NEGRO NEW YORK 1890-1930*, at 46-52 (1963).

²¹⁶ *Id.* at 42.

²¹⁷ *Id.* at 45-46.

²¹⁸ *Id.* at 46-52.

After the riot ended, the situation nevertheless remained tense. Negroes began to arm. Revolvers and other weapons were easily purchased at local pawnshops and hard ware stores. In a survey made of [the area where the riot took place], just one day after the riot, it was found that 145 revolvers and a substantial amount of ammunition had been sold—"all had gone to negroes." Lloyd Williams, a Negro bartender, was seen leaving one store with an arsenal of weapons. When asked what he was going to do with them, he replied, "I understand they're knocking down negroes 'round here. The first man tries it on me gets this...." Other Negroes warned that no white men were going to bother them. As policemen patrolled the Negro blocks they were showered with bricks, bottles, and garbage, thrown from rooftops and tenement windows. They fired back with revolvers. It seems miraculous that no one was killed.

Id. at 49-50.

²¹⁹ CHICAGO COMMISSION OF RACE RELATIONS, *THE NEGRO IN CHICAGO: A STUDY OF RACE RELATIONS AND A RACE RIOT* (1922) 595-98, 602, 640-49, reprinted in *THE NEGRO AND THE CITY* 126-33 (Richard B. Sherman ed., 1970). After World War I, an outbreak of racial violence against blacks was recorded from 1917 to 1921. Riots occurred in Chicago, Omaha, Washington, D.C., and East St. Louis, Illinois. *Id.* at 126.

In the South, racism found expression, not only through the power of unorganized mobs, but also under the auspices of organized groups like the Ku Klux Klan. The Klan started in 1866 as a social organization of white Civil War veterans in Pulaski, Tennessee,²²⁰ complete with pageantry, ritual, and opportunity for plain and innocent amusement.²²¹ But the group soon expanded and turned its attention to more sinister activities. The Klan's activities, primarily in the South, expanded to playing tricks on blacks and then to terroristic nightriding against them.²²² The Ku Klux Klan in this first incarnation was disbanded, possibly as early as January 1868, and no later than May 1870.²²³ By that time, the Klan's activities had come to include assaults, murder, lynchings, and political repression against blacks,²²⁴ and Klan-like activities would continue and contribute to the outcome of the federal election of 1876 that ended Reconstruction.²²⁵ As one author has put it, "The Invisible Empire faded away, not because it had been defeated, but because it had won."²²⁶

The Ku Klux Klan would be revived in 1915 after the release of D.W. Griffith's film *Birth of a Nation*,²²⁷ but, both pre- and post-dating the Klan's revival, Klan tactics would play a familiar role in the lives of black people in the South; for up to the time of the modern civil rights movement, lynching would be virtually an everyday occurrence. Between 1882 and 1968, 4,743 (pg.352) persons were lynched, the overwhelming number of these in the South;²²⁸ 3,446 of these persons were black,²²⁹ killed for the most part for being accused in one respect or another of not knowing their place.²³⁰ These accusations were as widely disparate as arson,²³¹ theft,²³² sexual contact or even being

²²⁰ WYN CRAIG WADE, *THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA* 33 (1987).

²²¹ *Id.* at 33-35.

²²² *Id.* at 37.

²²³ STANLEY F. HORN, *INVISIBLE EMPIRE: THE STORY OF THE KU KLUX KLAN 1866-1871*, at 356-59 (1969).

²²⁴ *See generally* WILLIAM L. KATZ, *THE INVISIBLE EMPIRE: THE KU KLUX KLAN IMPACT ON HISTORY 19-59* (1986).

²²⁵ *See* WADE, *supra* note 220, at 57, 110-11. Through the intimidation of black voters, the Democratic party in the South, with which most Klansmen were affiliated, recovered, and Republican strength waned. The Democrats captured the House of Representatives in 1874, and with the controversial compromise between Democrats and Republicans that elevated Rutherford B. Hayes to the Presidency in 1877, the end of Reconstruction was marked. *Id.*

²²⁶ KATZ, *supra* note 224, at 58.

²²⁷ WADE, *supra* note 220, at 120.

²²⁸ STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* 5 (1988).

²²⁹ *Id.*

²³⁰ NATIONAL ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, *THIRTY YEARS OF LYNCHING IN THE UNITED STATES: 1889-1918* (1919) reported as follows:

Among colored victims [of lynching], 35.8 per cent were accused of murder; 28.4 per cent of rape and "attacks upon women" (19 per cent of rape and 9.4 per cent of "attacks upon women"); 17.8 per cent of crimes against the person (other than those already mentioned) and against property; 12 per cent were charged with miscellaneous crimes and in 5.6 per cent no crime was charged. The 5.6 per cent. [sic] classified under "Absence of Crime" does not include a number of cases in which crime was alleged but in which it was afterwards shown conclusively that no crime had been committed.

Id. at 10.

²³¹ *See, e.g., Negro and Wife Hanged, Suspected of Barn-Burning*, ST. PAUL PIONEER PRESS, Nov. 26, 1914, reprinted in RALPH GINZBURG, *100 YEARS OF LYNCHINGS* 92 (1988).

²³² *See, e.g., Negro Hanged as Mule Thief*, ATLANTA CONST., July 15, 1914, reprinted in GINZBURG, *supra* note 231, at 92; *Would be Chicken Thief*, N.Y. HERALD, Dec. 6, 1914, reprinted in GINZBURG, *supra* note 231, at 93 (reporting a black man having been lynched "[f]or the crime of crawling under the house of a white citizen, with the intention of stealing chickens").

too familiar with a white woman,²³³ murdering or assaulting a white person,²³⁴ hindering a lynch mob,²³⁵ protecting one's legal rights,²³⁶ not (pg.353) showing proper respect,²³⁷ or simply being in the wrong place at the wrong time.²³⁸

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.²³⁹ 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 been warned repeatedly by my own people that something would happen if I did not cease harping on the lynching of three months before 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

²³³ See, e.g., WHITFIELD, *supra* note 228 (Emmett Till was killed in 1955 because he was thought to have whistled at a white woman). Other major works describing individual lynchings are JAMES R. MCGOVERN, ANATOMY OF A LYNCHING: THE KILLING OF CLAUDE NEAL (1982) (describing a lynching in 1934 occasioned by the rape of a white woman); HOWARD SMEAD, BLOOD JUSTICE: THE LYNCHING OF MACK CHARLES PARKER (1986) (describing another lynching of a black man for the rape of a white woman). See also *Blacks Lynched for Remark Which May Have Been 'Hello,'* PHILA. INQUIRER, Jan. 3, 1916, reprinted in GINZBURG, *supra* note 231, at 98; *Inter-Racial Love Affair Ended by Lynching of Man*, MEMPHIS COM. APPEAL, Jan. 14, 1922, reprinted in GINZBURG, *supra* note 231, at 158; *Negro Ambushed, Lynched for Writing White Girl*, MEMPHIS COM. APPEAL, Nov. 26, 1921, reprinted in GINZBURG, *supra* note 231, at 156; *Negro Insults White Women; Is Shot and Strung Up*, MONTGOMERY ADVERTISER, Oct. 10, 1916, reprinted in GINZBURG, *supra* note 231, at 111; *Negro Shot Dead for Kissing His White Girlfriend*, CHI. DEFENDER, Feb. 31, 1915, reprinted in GINZBURG, *supra* note 231, at 95; *Negro Youth Mutilated for Kissing White Girl*, BOSTON GUARDIAN, Apr. 30, 1914, reprinted in GINZBURG, *supra* note 231, at 90; *White Girl Is Jailed, Negro Friend Is Lynched*, GALVESTON TRIB. (Texas), June 21, 1934, reprinted in GINZBURG, *supra* note 231, at 217.

²³⁴ See, e.g., *Hoosiers Hang Negro Killer*, CHI. REC., Feb. 27, 1901, reprinted in GINZBURG, *supra* note 231, at 37; *Negro and White Scuffle, Negro Is Jailed, Lynched*, ATLANTA CONST., July 6, 1933, reprinted in GINZBURG, *supra* note 231, at 197; *Negro Shot After Striking Merchant Who Dirtied Him*, MONTGOMERY ADVERTISER, Aug. 28, 1913, reprinted in GINZBURG, *supra* note 231, at 88; *Negro Suspected of Slaying Bartender Is Hung by Mob*, KANSAS CITY STAR, Oct. 31, 1899, reprinted in GINZBURG, *supra* note 231, at 23.

²³⁵ See, e.g., *Negro father is Lynched; Aided Son to Escape Mob*, BALT. AFRO-AM., July 6, 1923, reprinted in GINZBURG, *supra* note 231, at 170.

²³⁶ See, e.g., *Miss. Minister Lynched*, N.Y. AMSTERDAM NEWS, Aug. 26, 1944, reprinted in GINZBURG, *supra* note 231, at 236 (reporting the lynching of a black man for having hired a lawyer in a property dispute).

²³⁷ See, e.g., *Impertinent Question*, BIRMINGHAM NEWS, Sept. 23, 1913, reprinted in GINZBURG, *supra* note 231, at 88 (relating that a black man was lynched after he asked whether a white woman's husband was home); *Insulting Remark*, MONTGOMERY ADVERTISER, Oct. 23, 1913, reprinted in GINZBURG, *supra* note 231, at 89 (relating that a black man was lynched for having made an insulting remark to a white woman); *Negro Half-Wit is Lynched; Threatened to Lynch Whites*, MONTGOMERY ADVERTISER, Aug. 25, 1913, reprinted in GINZBURG, *supra* note 231, at 87; *Negro Insults White Women; Is Shot and Strung Up*, MONTGOMERY ADVERTISER, Oct. 10, 1916, reprinted in GINZBURG, *supra* note 231, at 111; *Train Porter Lynched After Insult to Woman*, ATLANTA CONST., May 9, 1920, reprinted in GINZBURG, *supra* note 231, at 130.

²³⁸ See, e.g., *An Innocent Man Lynched*, N.Y. TIMES, June 11, 1900, reprinted in GINZBURG, *supra* note 231, at 31; *Boy Lynched at McGhee for No Special Cause*, ST. LOUIS ARGUS, May 27, 1921, reprinted in GINZBURG, *supra* note 231, at 150; *Negro Suspect Eludes Mob; Sister Lynched Instead*, N.Y. TRIB., Mar. 17, 1901, reprinted in GINZBURG, *supra* note 231, at 38; *Posse Lynches Innocent Man When Thwarted in Its Hunt*, WILMINGTON ADVOC., Dec. 16, 1922, reprinted in GINZBURG, *supra* note 231, at 166; *Texans Lynch Wrong Negro*, CHI. TRIB., Nov. 22, 1895, reprinted in GINZBURG, *supra* note 231, at 9; *Thwarted Mob Lynches Brother of Intended Victim*, MONTGOMERY ADVERTISER, Aug. 5, 1911, reprinted in GINZBURG, *supra* note 231, at 73.

²³⁹ *Blood-Curdling Lynching Witnessed by 2,000 Persons*, CHATANOOGA TIMES, Feb. 13, 1918, reprinted in GINZBURG, *supra* note 231, 114-116.

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.²⁴⁰

When blacks used firearms to protect their rights, they were often partially successful but were ultimately doomed. In 1920, two black men in Texas (pg.354) fired on and killed two whites in self-defense. The black men were arrested and soon lynched.²⁴¹ 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 of a similar verdict for the other two, all three were lynched.²⁴²

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.²⁴³

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,²⁴⁴ 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."²⁴⁵ After his father stood armed at a jail all night to ward off lynchings,²⁴⁶ Randolph was left with a vision, not "of powerlessness, but of the 'possibilities of salvation,' which resided in unity and organization."²⁴⁷

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

²⁴⁰ 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. *Id.* at xxx-xxxii, 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.

²⁴¹ *Letter from Texas Reveals Lynching's Ironic Facts*, N.Y. NEGRO WORLD, Aug. 22, 1920, reprinted in GINZBURG, *supra* note 231, at 139-40.

²⁴² *Lone Survivor of Atrocity Recounts Events of Lynching*, N.Y. AMSTERDAM NEWS, June 1, 1927, reprinted in GINZBURG, *supra* note 231, at 175-78.

²⁴³ 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. *Id.*

²⁴⁴ WALTER WHITE, *A MAN CALLED WHITE* 4-12 (1948), reprinted in *THE NEGRO AND THE CITY*, *supra* note 219, at 121-26.

²⁴⁵ *Id.* at 126.

²⁴⁶ JERVIS ANDERSON, *A. PHILLIP RANDOLPH: A BIOGRAPHICAL PORTRAIT* 41-42 (1973).

²⁴⁷ *Id.* at 42.

statutes, particularly of Southern origin, all the more worthy of condemnation. This is especially so in view of the (pg.355) purpose of these statutes, which, like that of the gun control statutes of the black codes, was to disarm blacks.

This purpose has been recognized by some state judges. The Florida Supreme Court in 1941 refused to extend a statute forbidding the carrying of a pistol on one's person to a situation in which the pistol was found in an automobile glove compartment.²⁴⁸ In a concurrence, one judge spoke of the purpose of the statute:

I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in the turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied.²⁴⁹

The Ohio Supreme Court in 1920 construed the state's constitutional right of the people "to bear arms for their defense and security" not to forbid a statute outlawing the carrying of a concealed weapon.²⁵⁰ In so doing, the court followed the lead of sister courts in Alabama,²⁵¹ Arkansas,²⁵² Georgia,²⁵³ and Kentucky,²⁵⁴ over the objections of a dissenting judge who recognized that "the race issue [in Southern states] has intensified a decisive purpose to entirely disarm the negro, and this policy is evident upon reading the opinions."²⁵⁵

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.²⁵⁶

While the rate of lynchings in the South had slowed somewhat,²⁵⁷ it was still clear by 1960 that Southerners were capable of murderous violence in (pg.356) pursuit of the Southern way of life. The 1955 murder of Emmett Till, a fourteen-year-old boy killed in Money, Mississippi for

²⁴⁸ *Watson v. Stone*, 4 So. 2d 700 (Fla. 1941).

²⁴⁹ *Id.* at 703 (Buford, J., concurring).

²⁵⁰ *State v. Nieto*, 130 N.E. 663 (Ohio 1920).

²⁵¹ *Dunston v. State*, 27 So. 333 (Ala. 1900).

²⁵² *Carroll v. State*, 28 Ark. 99 (1872).

²⁵³ *Brown v. State*, 39 S.E. 873 (Ga. 1901).

²⁵⁴ *Commonwealth v. Walker*, 7 Ky. L. Rptr. 219 (1885) (abstract).

²⁵⁵ *Nieto*, 130 N.E. at 669 (Wanamaker, J., dissenting).

²⁵⁶ *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).

²⁵⁷ According to records kept by the Tuskegee Institute, 4,733 lynchings occurred between 1882 and 1959. *4,733 Mob Action Victims Since '82, Tuskegee Reports*, MONTGOMERY ADVERTISER, April 26, 1959, reprinted in GINZBURG, *supra* note 231, at 244. Tuskegee Institute's records show only ten more lynchings to have occurred by 1968. WHITFIELD, *supra* note 228, at 5.

wolf-whistling at a white woman, sent shock waves throughout the nation.²⁵⁸ Two years later, the nation again would be shocked, this time by a riotous crowd outside Little Rock's Central High School bent on preventing nine black children from integrating the school under federal court order; President Eisenhower ordered federal troops to effectuate the court order.²⁵⁹ News of yet another prominent lynching in Mississippi reached the public in 1959.²⁶⁰

In the early 1960s, Freedom Riders and protesters at sit-ins were attacked, and some suffered permanent damage at the hands of white supremacists.²⁶¹ In 1963, Medgar Evers, Mississippi secretary of the NAACP was killed.²⁶² Three college students were killed in Mississippi during the 1964 "Freedom Summer"; this killing would render their names—Andrew Goodman, James Chaney, and Michael Schwerner—and their sacrifice part of the public domain.²⁶³ A church bombing in Birmingham that killed four small black children,²⁶⁴ the killing of a young white housewife helping with the march from Montgomery to Selma,²⁶⁵ and the destructive riot in Oxford, Mississippi,²⁶⁶ that left two dead when James Meredith entered the University of Mississippi helped make clear to the nation what blacks in the South had long known: white Southerners were willing to use weapons of violence, modern equivalents of rope and faggot, to keep blacks in their place.

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 (pg.357) protection to the civil rights movement.²⁶⁷

²⁵⁸ See WHITFIELD, *supra* note 228, at 23-108; see also *Eyes on the Prize: America's Civil Rights Years, 1954-1965: Awakenings (1954-56)* (PBS television broadcast, Jan. 21, 1986).

²⁵⁹ See *Cooper v. Aaron*, 358 U.S. 1 (1958); see also TONY A. FREYER, *THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION* (1984); Raymond T. Diamond, *Confrontation as Rejoinder to Compromise: Reflections on the Little Rock Desegregation Crisis*, 11 NAT'L BLACK L.J. 151, 152-164 (1989); *Eyes on the Prize: America's Civil Rights Years, 1954-1965: Fighting Back (1957-62)* (PBS television Broadcast, Jan. 28, 1986).

²⁶⁰ See generally SMEAD, *supra* note 233.

²⁶¹ RHONDA BLUMBERG, *CIVIL RIGHTS: THE 1960S FREEDOM STRUGGLE* 65-81 (1984).

²⁶² *CIVIL RIGHTS: 1960-66* 190-91 (Lester A. Sobel ed., 1967).

²⁶³ *Id.* at 244-46.

²⁶⁴ *Id.* at 187-88.

²⁶⁵ *Id.* at 303-05.

²⁶⁶ *Id.* at 110-18.

²⁶⁷ 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.

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.²⁶⁸ 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,²⁶⁹ has told of black Mississippi citizens with firearms who followed civil rights workers in order to keep them safe.²⁷⁰

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.²⁷¹ 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."²⁷² Jonesboro's Deacons obtained a charter and weapons, and vowed to shoot back if fired upon.²⁷³ The word spread throughout the South, but most significantly to Bogaloussa, where the (pg.358) Klan was rumored to have its largest per capita membership.²⁷⁴ 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.²⁷⁵ What is known, however, is that in 1965 there were fifty to sixty chapters across Louisiana, Mississippi, and Alabama.²⁷⁶ 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.²⁷⁷ This capability and willingness to use force to protect blacks provided a deterrent to white terroristic activity.

²⁶⁸ DAISY BATES, *THE LONG SHADOW OF LITTLE ROCK, A MEMOIR* 94 (1982).

²⁶⁹ HOWELL RAINES, *MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED* 275-76 (1977).

²⁷⁰ Telephone interview with David Dennis (Oct. 30, 1991).

²⁷¹ 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.

²⁷² Bims, *supra* note 271, at 25-26.

²⁷³ *Id.* 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).

²⁷⁴ JAMES FARMER, *LAY BARE THE HEART: AN AUTOBIOGRAPHY OF THE CIVIL RIGHTS MOVEMENT* 287 (1985).

²⁷⁵ See Bims, *supra* note 271, at 26; see also Reed, *supra* note 268, at 10.

²⁷⁶ See Reed, *supra* note 271, at 10; see also Bims, *supra* note 268, at 26.

²⁷⁷ RAINES, *supra* note 269, at 417 (interview with Charles R. Sims, leader of the Bogaloussa Deacons); see Bims, *supra* note 271, at 26; Reed, *supra* note 271, at 10-11.

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."²⁷⁸

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.^(pg.359)

CONCLUSION: SELF-DEFENSE AND THE GUN CONTROL QUESTION TODAY

There are interesting parallels between the history of African-Americans and discussion of the Second Amendment. For most of this century, the historiography of the black experience was at the periphery of the historical profession's consciousness, an area of scholarly endeavor populated by those who were either ignored or regarded with suspicion by the mainstream of the academy.²⁷⁹ Not until after World War II did the insights that could be learned from the history of American race relations begin to have a major influence on the works of constitutional policy makers in courts, legislatures, and administrative bodies. Moreover, it should be stressed that, for a good portion of the twentieth century, the courts found ways to ignore the constitutional demands imposed by the reconstruction amendments.²⁸⁰

While discussion of the Second Amendment has been relegated to the margin of academic and judicial constitutional discourse, the realization that there is a racial dimension to the question, and that the right may have had greater and different significance for blacks and others less able to rely on the government's protection, has been even further on the periphery. The history of blacks and the right to bear arms, and the failure of most constitutional scholars and policymakers to seriously examine that history, is in part another instance of the difficulty of integrating the study of the black experience into larger questions of legal and social policy.²⁸¹

Throughout American history, black and white Americans have had radically different experiences with respect to violence and state protection. Perhaps another reason the Second Amendment has not been taken very seriously by the courts and the academy is that for many of

²⁷⁸ FARMER, *supra* note 274, at 288.

²⁷⁹ August Meir & Elliot Rudwick, *J. Franklin Jameson, Carter G. Woodson, and the Foundation of Black Historiography*, 89 AM. HIST. REV. 1005, 1005 (1984).

²⁸⁰ *See, e.g.*, Schmidt, *supra* note 198, at 647 (describing the way in which the Supreme Court failed to uphold the Fifteenth Amendment in the late 19th and early 20th centuries); *see also* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1753-54 (1989) (discussing the legal academia's willingness to ignore the Reconstruction Amendments in the early 20th century).

²⁸¹ One scholar has criticized the failure of legal scholars with a left perspective "to incorporate the authentic experience of minority communities in America." Jose Bracamonte, *Foreword to Symposium, Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. REV. 297, 298 (1982).

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, (pg.360) and at times seems blind to instances of unnecessary police brutality visited upon minority populations.²⁸²

Admittedly, the racial atmosphere in this nation today is better than at any time prior to the passage of the Voting Rights Act of 1965.²⁸³ It must also be stressed, however, that many fear a decline in the quality of that atmosphere.

One cause for concern is the Supreme Court's assault in its 1989 Term on gains of the civil rights movement that had stood for decades.²⁸⁴ Another is the prominence of former Ku Klux Klan leader David Duke, a member of the Louisiana state legislature and a defeated, but nonetheless major, candidate for the Senate in 1990.²⁸⁵ In the last several years, two blacks who had entered the "wrong" neighborhood in New York City have been "lynched."²⁸⁶ Is this a sign of more to come? The answer is not clear, but the question is.

Twice in this nation's history—once following the Revolution, and again after the Civil War—America has held out to blacks the promise of a nation (pg.361) that would live up to its ideology of equality and of freedom. Twice the nation has reneged on that promise. The ending of separate but equal under *Brown v. Board* in 1954,²⁸⁷—the civil rights movement of the 1960s, culminating

²⁸² 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.

²⁸³ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (1988)).

²⁸⁴ See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (urging, *sue sponte*, not only reconsideration of *Runyon v. McCrary*, 427 U.S. 160 (1976), on the issue of whether the right to contract on a basis equal with whites under Civil Rights Act of 1866 includes the right to be free from discriminatory working conditions, but also overruling *Runyon*); *Martin v. Wilkes*, 490 U.S. 755 (1989) (conferring on whites claiming reverse discrimination a continuing right to challenge consent decrees involving affirmative action); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (essentially shifting the burden of proof in employment discrimination cases, such that an employee must go beyond the showing of a disparate impact on a group protected by the statute; also allowing an employer to establish a legitimate business justification as a defense, replacing the standard established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which required an employer to show that a discriminatory practice was indispensable or essential); *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) (subjecting remedial measures involving affirmative action to the same standard of strict scrutiny as in cases of invidious racial discrimination).

²⁸⁵ See, e.g., Peter Applebome, *Louisiana Tally is Seen as a Sign of Voter Unrest*, N.Y. TIMES, Oct. 8, 1990, at A1; David Maraniss, *Duke Emerges from Loss Stronger Than Ever*, WASH. POST, Oct. 8, 1990, at A1; James M. Perry, *Duke's Strong Run in Louisiana Sends National Politicians a Shocking Message*, WALL. ST. J., Oct. 9, 1990, at A5. Moreover, as of the time of final editing, Duke had emerged from a field of four major candidates, including a member of Congress and the incumbent governor, to face a former governor in a runoff election. See *Ex Klan Leader in Louisiana Runoff; Primary: David Duke Will Face Former Gov. Edwin Edwards, Who Led In Ballotting*, L.A. TIMES, Oct. 20, 1991, at A1.

²⁸⁶ Michael Griffith, "a 23-year-old black man[,] was struck and killed by a car on a Queens highway ... after being severely beaten twice by 9 to 12 white men who chased him and two other black men through the streets of Howard Beach in what the police called a racial attack." Robert D. McFadden, *Black Man Dies After Beating by Whites in Queens*, N. Y. TIMES, Dec. 21, 1986, § 1, at 1. Yusef Hawkins, "[a] 16-year-old black youth[,] was shot to death ... in an attack by 10 to 30 white teenagers in the Bensonhurst section of Brooklyn...." Ralph Blumenthal, *Black Youth is Killed by Whites; Brooklyn Attack Is Called Racial*, N.Y. TIMES, Aug. 25, 1989, at A1.

²⁸⁷ 347 U.S. 483 (1954).

in the Civil Rights Act of 1964,²⁸⁸ the Voting Rights Act of 1965,²⁸⁹ and the judicial triumphs of the 1960s and early 70s—all these have held out to blacks in this century that same promise. Yet, given this history, it is not unreasonable to fear that law, politics, and societal mores will swing the pendulum of social progress in a different direction, to the potential detriment of blacks and their rights, property, and safety.

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 neighborhoods²⁹⁰ 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.

²⁸⁸ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000 (1988)).

²⁸⁹ Pub. L. No. 89-110, 79 Stat 437 (codified as amended at 42 U.S.C. § 1973 (1988)).

²⁹⁰ *E.g.*, SILBERMAN, *supra* note 199, at 160-61; Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988); Howard A. Palley & Dana A. Robinson, *Black on Black Crime*, SOCIETY, July/Aug. 1988, at 5, 59.