

“This Right Is Not Allowed By Governments That Are Afraid Of The People”: The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified

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ABSTRACT: If the Fourteenth Amendment is found to incorporate the Second Amendment against the states, what meaning of the Second Amendment does it include? This paper examines judicial and popular understandings of the Second Amendment in the period between ratification of the Bill of Rights and the Fourteenth Amendment.

Introduction

The lingering question following the U.S. Supreme Court’s decision in *District of Columbia v. Heller*,⁴ is whether the Court will employ the Fourteenth Amendment to incorporate the newly confirmed right to keep and bear arms as a limitation on states.⁵ The answer will hinge substantially on the Court’s assessment of the intent and purpose of the Fourteenth Amendment with regard to the right to keep and bear arms. Discerning such intent requires detailed evaluation of the context within which the amendment emerged and the understanding of the right to keep and bear arms at the time.

This is an historical assessment that poses a threshold methodological question. Whose views on these matters should we credit? Should we privilege the drafters, the signers, opinions expressed in newspaper accounts? The predominant originalist theory today is original public meaning.⁶ “Theories of original public meaning, in contrast to original intent, interpret the Constitution according to how the words of the document would have been understood by a competent and reasonable speaker of the language at the time of the document’s enactment.”⁷ This article adopts that methodology.

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⁴ 128 S. Ct. 2783 (2008).

⁵ Immediately on the heels of *Heller*, plaintiffs filed claims challenging state and local laws that plausibly infringed on the right to keep and bear arms. These claims raise a variety of issues and implicate a range of interpretative methodologies and perspectives. Michael Kent Curtis offers a rich summary of the multiple perspectives from which we might draw answers in *The Bill of Rights and the States Revisited After Heller*, 60 *Hastings L. J.* 1445, 1448 (2009).

⁶ John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 *Nw. U.L. Rev.* 751, 761 (2009).

⁷ *Id.*

Assessing the constitutional right to arms in the context of the Fourteenth Amendment is different from assessing it purely as a matter of Second Amendment originalism. Things change. Cultures evolve. When those changes lead to modifications of governing political documents, our understanding of those documents must reflect the changed context. This is *not* living constitutionalism wherein social change drives continuously evolving conceptions of constitutional boundaries. Instead it is an acknowledgment that the public understanding in 1866 of the right to arms protected by the Fourteenth Amendment might be different from the public understanding in 1791 of that same right. The public meaning of 1866 is a fixed point of reference that generates the interesting possibility that originalism may give the Second Amendment one meaning when applied to the federal government, and a different meaning when applied to the states, through the Fourteenth Amendment. Akhil Reed Amar, for example, argues that the right to keep and bear arms in 1791 was focused substantially on the dangers of a strong standing army. By 1866, when the authors of the Fourteenth Amendment were proposing to extend the Bill of Rights to apply to the states, Amar argues, they “were hardly in the mood to rail against a federal standing army; these men, after all, wanted to use precisely such an army to reconstruct recalcitrant southern states.”⁸

“[T]he right. . . to keep and bear arms” takes on a different coloration and nuance when they are relabeled “privileges or immunities of citizens” rather than “the right of the people,” and when they are severed from their association with a well-regulated militia. To recast the textual point as a historical one, the core applications and central meanings of the right to keep and bear arms and other key rights were very different in 1866 than in 1789 [W]e must first and foremost reflect on the meaning and the spirit of the amendment in 1866, not the Bill of 1789.⁹

This article pursues in detail the public meaning of the “right to keep and bear arms” during the period leading up to enactment of the Fourteenth Amendment. It elaborates five broad categories of original public meaning. Part I examines nineteenth century scholarly commentary and case law. Part II examines popular understandings of the Second Amendment as the militia declined in importance and the struggle over abolition of slavery took center stage. Part III examines Civil War era claims about the meaning of the Second Amendment. Part IV details how Reconstruction and the Black Codes energized debate about the right to keep and bear arms. Part V reviews the debate and enactment of the Fourteenth Amendment, as it relates to the constitutional right to arms.

I. Between The Ratifications: Original Public Meaning of the Second Amendment—Commentary and Case Law in the Nineteenth Century

There is abundant evidence about the public understanding of the Second Amendment between 1791 and the Civil War. All scholarly commentaries and most case law viewed the “right of the people” in the Second Amendment to be an individual liberty, like other constitutional rights enjoyed by the people. There was something of a divide as to the *purpose* of the right. Some articulated its purpose as resistance to tyranny—a conception of the right that protected the option of political violence. Even with this public purpose, the right was individual.¹⁰ Others acknowledged the purpose of

⁸ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 216 (1998).

⁹ AMAR, *supra* note 8, at 223.

¹⁰ The Supreme Court, in adopting the individual right view of the Second Amendment while acknowledging its tyranny-control purpose effectively confirmed what scholars have been saying for some time: that the Second Amendment’s tyranny-control purpose was consistent with, and perhaps even required, the individual ownership of arms. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798–99, 2801–02, 2805–07 (2008) (discussing how the tyranny-control aspects of the Second Amendment were

resisting tyranny, but explicitly recognized that the right also included individual self-defense. With a few remarkable exceptions, none of the case law or commentary explicitly rejects the idea of a right to arms for individual self-defense.

Most early constitutional commentaries articulate an individual right to keep and bear arms. St. George Tucker's 1803 gloss on Blackstone's COMMENTARIES ON THE LAWS OF ENGLAND, William Rawle's 1829 A VIEW OF THE CONSTITUTION and Justice Joseph Story's COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833), present an individual right explicitly intended to enable resistance to tyranny. This view reflects the expectation that the people from whom the militia is drawn would appear bearing their own private arms.¹¹

Tucker's edition of Blackstone's COMMENTARIES lists the Second Amendment, and contrasts the right it protects with the more limited guarantee of the English Bill of Rights of 1689: "And this without any qualification as to their condition or degree, as is the case in the British government."¹²

William Rawle's analysis is more detailed:

The corollary, from the first position, is, that *the right of the people to keep and bear arms shall not be infringed*.

The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretense by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both . . . This right ought not, however, in any government, to be abused to the disturbance of the peace.¹³

Justice Story emphasizes that while the purpose is to allow the people to rise up against a tyrannical government, this is a "right of the citizens," not a right of the states, or of the militia:

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 these are successful in the first instance, enable the people to resist and triumph over them.¹⁴

served by individual right adopted by the Court); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359 (discussing a plethora of nineteenth-century commentaries and case law); *C.f.* George A. Mocsary, Note, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 FORDHAM L. REV. 2113, 2154–75 (2008) (thoroughly analyzing the Second Amendment from a primarily founding-era viewpoint assuming the tyranny-control model as its primary purpose, and concluding that "[p]roperly understanding 'well regulated Militia' to refer to the armed and ready body of the people, and considering the founders' concern with tyranny, the Second Amendment can be translated into modern parlance: 'Armed and ready citizens being necessary to prevent tyranny, the right of the people to keep and bear arms shall not be infringed.'"); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991) (describing the adoption of the Second Amendment as a distinctly individual right, as opposed to a state power, which often intersected with the founders' concerns about tyranny).

¹¹ Pursuing the question in the modern era, the U.S. Supreme Court in *United States v. Miller* and recently in *Heller*, acknowledged this aspect of the individual right. *United States v. Miller*, 307 U.S. 174, 179 (1939); *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799–2800 (2008) (citing *Miller*).

¹² 2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 143 nn.40–41 (Phila., William Young Birch & Abraham Small 1803).

¹³ WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 121–22 (Phila., H.C. Carey & I. Lea 1825).

¹⁴ JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 746–47 (Boston, Hilliard, Gray, and Company 1833). Story's understanding of the Second Amendment must have been pretty close to that of Tucker and Rawle because his citation for that sentence are the pages cited in the previous two footnotes.

Rawle's commentary also adds a significant new dimension to this general theme. He viewed the Second Amendment as a limitation not only on the federal government, but also on the states. This amplifies the point that he does not conceive of it as a state right. As discussed below, this aspect of Rawle's view may have been a minority view, but it was hardly unique.

The one commentator of the period who argues against an individual right for self-defense, Benjamin L. Oliver, still acknowledges that this is the dominant understanding:

The provision of the constitution, declaring the right of the people to keep and bear arms, &c. was *probably* intended to apply to the right of the people to bear arms for such purposes only, and not to prevent congress or the legislatures of the different states from enacting laws to prevent the citizens from always going armed. *A different construction however has been given to it.*¹⁵

Oliver's objection to the individual right construction is evidently a point of policy. He amplifies the primary point with a lengthy and passionate criticism of the "common practice in some parts of the United States" of carrying concealed deadly weapons.¹⁶ "This cowardly and disgraceful practice, *if it is really unconstitutional to restrain it by law*, ought to be discountenanced by all persons who are actuated by proper feelings of humanity or a just regard for the dictates of religion."¹⁷

A textbook on the U.S. Constitution published during this period articulates the tyranny-control model (as well as the benefits of rapid response to external attack). While not as explicit as other statements of the time, its use of the term "citizens" suggests an individual right rather than a collective or state right to maintain a militia:

"ARTICLE II A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

§ 622. If citizens are allowed to keep and bear arms, it will be likely to operate as a check upon their rulers, and restrain them from acts of tyranny and usurpation. The necessity of maintaining a large standing army is also diminished by arming and disciplining the citizens generally, so that they may be ready and qualified at any time, to defend the country in a sudden emergency.¹⁸

From our modern perspective, the search for case law concerning the right to arms during this period is curious. There is a dearth of federal gun control laws in the antebellum period. Except for the Militia Acts of 1792 and 1803, which *required* every "free white male citizen" between the ages of 18 and 45 to own a gun, there were not many gun control questions to litigate.¹⁹ Consequently, there are very few federal court decisions in this period that address the Second Amendment. In a few cases the individual right to arms is referenced by comparison. For example, *United States v. Sheldon*, analogizes the right to arms to the First Amendment. Sheldon was prosecuted for falsely reporting a court case, and fined for contempt of court. Sheldon argued that the First Amendment protected his freedom of expression. The Michigan Territorial Supreme Court ruled that, "[T]he constitution of the United States also grants to the citizen the right to keep and bear arms. But the grant of this privilege cannot be construed into the *right in him who keeps a gun to destroy his neighbor.*"²⁰ In *Johnson v.*

¹⁵ BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN: WITH A COMMENTARY ON STATE RIGHTS, AND ON THE CONSTITUTION AND POLICY OF THE UNITED STATES* 177 (Boston, Marsh, Capen & Lyon 1832) (emphasis added).

¹⁶ *Id.* at 177–79.

¹⁷ *Id.* at 177 (emphasis added).

¹⁸ FURMAN SHEPPARD, *THE CONSTITUTIONAL TEXT-BOOK: A PRACTICAL AND FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES* 247 (Philadelphia: Sower, Potts & Co., 1855).

¹⁹ 1 Stat. 271–72 (1792); 2 Stat. 207 (1803).

²⁰ *United States v. John P. Sheldon*, 1829 WL 3021, at *12 (Mich. Terr. 1829) (Comparing the right to keep and bear arms to freedom of the press: "The constitution of the United States also grants to the citizen the right to keep and bear arms. But the grant of this privilege cannot be construed into the right in him

Tompkins, Justice Henry Baldwin operating as a circuit judge acknowledged that the plaintiff Johnson had a right to recapture a runaway slave in Pennsylvania. In determining whether Johnson’s tactics for reclaiming his slave had broken Pennsylvania law, Baldwin listed several rights that Johnson enjoyed under both the U.S. and Pennsylvania Constitutions—including a personal right to keep and bear arms.²¹

Legislation and litigation in the states is both more abundant and more complex. In the period 1813 to 1840 there was a burst of state laws, primarily in the Old Southwest, that either restricted concealed carry of deadly weapons, or banned sale of certain knives and concealable handguns.²² One result of these laws is a series of state high court decisions that attempted to define the limits of the right to keep and bear arms. While most of these decisions are limited to right to arms provisions in state constitutions,²³ a number of them comment on the Second Amendment.

In 1842, the Arkansas Supreme Court decided a case that took a very narrow view of the right to arms under both the Second Amendment and the more restrictively worded arms provision in the Arkansas Constitution. Chief Justice Ringo and Associate Justice Dickinson issued separate opinions that came to the same conclusion: the state’s authority to prohibit concealed carrying of deadly weapons did not violate the Second Amendment. Ringo’s opinion urged that the Second Amendment protected only a right of the “free white men of this State” to be armed “for the preservation and defence of the State, and her republican institutions.”²⁴ While Ringo appears to have assumed a right of individuals to *keep* arms appropriate to militia duty, he was evidently hostile to the right to *bear* arms for self-defense.²⁵

It is difficult to determine which of Ringo’s arguments apply only to the Second Amendment, which apply to the Arkansas Constitution’s more narrow “for their common defence” arms guarantee and how much to credit his advocacy of the collective rights theme. He moves from a nearly sourceless claim of a collective right with respect to the Second Amendment, to acknowledgement that “the militia, without arms, however well disposed, might be unable to resist, successfully, the efforts of those who should conspire to overthrow the established institutions of the country, or subjugate their common liberties....”²⁶ This second statement seems to acknowledge that the right to keep and bear arms limited the power of the government to disarm the population. The right was limited: it “surely was not designed to operate as an immunity to those, who should keep or bear their arms as to injure or endanger the private rights of others, or in any manner prejudice the common interests of society.”²⁷ Even if we ignore the federalism context and glibly conclude that the Second Amendment protects a right to arms only for common defense (as the Arkansas Constitution’s more narrow guarantee provided), we still come back to the definition of militia as constituting the people bearing their own private arms.

Associate Justice Dickinson’s concurrence came to the same conclusion, arguing that, “The militia constitutes the shield and defence for the security of a free State; and to maintain that freedom unimpaired, arms and the right to use them for that purpose are

who keeps a gun to destroy his neighbor.”)

²¹ *Johnson v. Tompkins*, Baldw. 571, 13 F.Cas. 840 (C.C.Pa. 1833) (holding that both the Pennsylvania Constitution and Second Amendment’s “right to keep and bear arms” were personal rights enjoyed by Johnson).

²² See generally CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM (1999) for the cultural factors involved.

²³ CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE: THE ORIGINAL INTENT AND JUDICIAL INTERPRETATION OF THE RIGHT TO KEEP AND BEAR ARMS 71–87 (1994), summarizes most of these state supreme court decisions, as well as raising questions of causation that CRAMER, *supra* note 22, answers.

²⁴ *State v. Buzzard*, 4 Ark. 18, 26, 27 (1842).

²⁵ *Id.* at 24, 25.

²⁶ *Id.* at 24–25.

²⁷ *Id.* at 25.

solemnly guaranteed.”²⁸ Dickinson also appears to argue that there was no personal right of self-defense: “The personal rights of the citizen are secured to him through the instrumentality and agency of the constitution and laws of the country; and to them he must appeal for the protection of his private rights and the redress of private injuries.”²⁹ This is a remarkable claim—an assertion that the government could, if it so chooses, criminalize self-defense even if such self-defense was necessary to prevent death. It is a fully Hobbesian view of the authority of the state over individuals—in a nation predominately grounded on Lockean principles.

Associate Justice Lacy dissented and urged an individual self-defense right construction:

I cannot separate the political freedom of the State from the personal rights of its citizens. They are indissolubly bound up together in the same great bond of union, and, to my mind, they are incapable of division Among these rights, I hold, is the privilege of the people to keep and bear their private arms, for the necessary defence of their person, habitation, and property, or for any useful or innocent purpose whatsoever. We derive this right from our Anglo-Saxon ancestors, and under the form of that government it has ever been regarded as sacred and inviolable.³⁰

None of these three opinions referenced any contemporaneous scholarly commentary. The opinions reasoned instead from case law and the text of arms provisions in other state constitutions (provisions that generally were textually very different from the Second Amendment) and the Arkansas Constitution’s arms guarantee.

Buzzard is widely cited after the Civil War by courts attempting to uphold weapons restrictions. This is not because *Buzzard* was the mainstream view. Rather, it is because *Buzzard* is one of the few precedents available to justify the postbellum laws aimed primarily at disarming freedmen.³¹

The vast majority of the antebellum decisions recognize an individual right to bear arms at least in part for self-defense, and fall into one of three categories: 1) the Second Amendment applies only to the federal government—although these decisions either explicitly or implicitly treat it as an individual right, 2) the state constitutional guarantee in question limits (although does not completely block) the authority of the state to regulate the bearing of arms, and 3) the Second Amendment or the state constitutional guarantee in question does not apply to blacks.

State v. Newsom (1844) illustrates the first and third themes. Elijah Newsom challenged his conviction under a state law requiring free blacks to have a license to possess deadly weapons. Newsom’s appeal argued that such a law violated the Second Amendment and the North Carolina Constitution’s similar guarantee of an individual right. Newsom, a free black man, had been convicted of carrying a shotgun without a license. The North Carolina Supreme Court had already recognized that the state constitution protected an individual right to keep and bear arms.³²

The Court disposed of the Second Amendment question by asserting that, “The limitations of power, contained in it and expressed in general terms, are necessarily confined to the General Government.” Citing *Barron v. Baltimore* (1833),³³ the Court explained that, “In the 2d article of the amended Constitution, the States are neither

²⁸ *Id.* at 32.

²⁹ *Id.* at 32.

³⁰ *Id.* at 43. See the somewhat similar statement of the Anglo-Saxon origin of the right of bearing arms with respect to self-defense and the arms guarantee in the Penn. Const. (1790) in U.S. Supreme Court Associate Justice James Wilson, 3 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 84 (Bird Wilson, ed., 1804).

³¹ See CRAMER, *supra* note 23, at 97–164 for an overview of postbellum arms decisions in state and federal courts.

³² *State v. Huntly*, 3 Iredell 418, 422 (N.C. 1843) (upholding a conviction for the common law crime of “riding or going armed with unusual and dangerous weapons to the terror of the people” in a case that might today be prosecuted for brandishing a firearm or assault with a deadly weapon).

³³ 32 U.S. (7 Pet.) 243 (1833). The court misspelled the decision as “Barrow.”

mentioned nor referred to. It is therefore only restrictive of the powers of the Federal Government.”³⁴ The Court dismissed Newsom’s parallel claim with respect to the North Carolina Constitutional arms guarantee. The Court did not dispute that the North Carolina provision protected an individual right. It simply argued that this right belonged only to white people.³⁵

The second general theme of the state cases embraces Rawle’s view of the Second Amendment as a limit on state power. For example, in *Nunn v. State*, Georgia’s Supreme Court upheld a ban on concealed carry of deadly weapons, but struck down a ban on sales of concealable handguns. The court ruled that the Second Amendment protected open carry against both federal and state restrictions.³⁶

Chief Justice Lumpkin’s decision was part of a broader objection to *Barron v. Baltimore*’s decision that the first eight Amendments limited only the federal government. It was a position that was contrary to Supreme Court precedent, but it was based on disagreement with the Court, not ignorance.³⁷ As we will see shortly, other state high courts believed that the Second Amendment protected an individual right against state encroachment.

Another aspect of Lumpkin’s decision in *Nunn* helps illustrate the range of opinions about the nature of the right protected by the Second Amendment. At one point, he articulates a right that extends broadly to “the people.”

The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree. . . .³⁸

But within a few paragraphs, he shifts to a focus on citizens and how legislation may not “deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms.”³⁹

The implications of the distinction between a right of the people and a right of citizens are evident. Two years after *Nunn*, in *Cooper and Worsham v. Savannah*, the Supreme Court of Georgia confronted the question of what rights blacks enjoyed under the Georgia constitution. The Court ruled that “Free persons of color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office.”⁴⁰ The court recognized a right to arms rooted in the Georgia constitution and the Second Amendment that extended to “old and young, men, women and boys.” The right was decidedly individual said the court. But it did not extend to blacks.

The view of the Second Amendment as an individual right restricting state law is amplified by three decisions from the Louisiana Supreme Court handed down in the 1850s. In *State v. Chandler*⁴¹ the court ruled that the Second Amendment was a

³⁴ *State v. Newsom*, 27 N.C. 250, 251 (1844).

³⁵ *Id.* at 254. “The defendant is not indicted for carrying arms in defence of the State, nor does the act of 1840 prohibit him from doing so. Its only object is to preserve the peace and safety of the community from being disturbed by an indiscriminate use, on ordinary occasions, by free men of color, of fire arms or others of an offensive nature. Self preservation is the first law of nations, as it is of individuals.”

³⁶ *Nunn v. State*, 1 Ga. 243, 250, 251 (1846).

³⁷ AMAR, *supra* note 8, at 153–56, shows that a contrarian argument that the Bill of Rights represented a common law tradition appears not only in *Nunn*, and Lumpkin’s *Campbell v. Georgia* (1852), but also in the plaintiff’s arguments in *Holmes v. Jennison* (1840) that *Barron* was wrongly decided.

³⁸ *Nunn*, 1 Ga. at 250, 251.

³⁹ *Id.*

⁴⁰ *Cooper and Worsham v. Savannah*, 4 Ga. 68, 72 (1848). Either this ordinance, or a very similar predecessor, was the basis for *A Fact*, 1 THE LIBERATOR 50, 51 (March 26, 1831), to suggest that a Massachusetts free black citizen move to Savannah and challenge the statute as violating the “privileges and immunities” clause of Article IV of the U.S. Constitution, implying that certain rights were fundamental, and not simply a guarantee of equal treatment for both residents and non-residents.

⁴¹ 5 La. An. 489, 489, 490, 491 (1850).

limitation on state legislation. There was as yet no right to arms provision in the Louisiana Constitution.⁴² The statute ultimately survived the challenge because it only prohibited *concealed* carry:

It interfered with no man's right to carry arms (to use its own words), "in full open view," which places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassination.⁴³

Louisiana Supreme Court decisions in 1856 and 1858 took similar positions. The first, *Smith v. State* (1856), involved a challenge to Louisiana's ban on concealed weapons based on the claim that a pistol in the pocket was only partially concealed, and was therefore protected by the Second Amendment. The court held that the concealed weapon statute applied to any weapon that was not fully exposed:

The statute against carrying concealed weapons does not contravene the second article of the amendments of the Constitution of the United States. The arms there spoken of are such as are borne by a people in war, or at least carried openly. The article explains itself. It is in these words: "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." This was never intended to prevent the individual States from adopting such measures of police as might be necessary, in order to protect the orderly and well disposed citizens from the treacherous use of weapons not even designed for any purpose of public defence, and used most frequently by evil-disposed men who seek an advantage over their antagonists, in the disturbances and breaches of the peace which they are prone to provoke.⁴⁴

The message of *Smith* is moderately contestable because of the reference to arms borne in war.⁴⁵ But that ambiguity is resolved by its position in sequence between *Chandler* (which is unequivocal on the individual nature of the right) and *State v. Jumel* (1858). In *Jumel*, the defendant challenged his conviction for carrying a concealed weapon both based on the statute of limitations (more than six months had elapsed between the offense and being charged), and that the Second Amendment protected his carrying of a weapon. The primary question was not the nature of the Second Amendment right but its boundaries. Recognizing that some regulation of the individual right was necessary to public safety, the court held:

The statute in question does not infringe the right of the people to keep or bear arms. It is a measure of police [regulation], prohibiting only a *particular* mode of bearing arms which is found dangerous to the peace of society.⁴⁶

The right articulated in these cases is not unlimited. Legislatures might restrict individuals from carrying concealed weapons, but laws that prohibited open carry faced a much more stringent burden. The type of weapons protected trends more toward weapons used in warfare, as contrasted with the treacherous tools of "unmanly assignation." But the focus on arms privately held shows that the right was conceived by as individual in nature.

⁴² Louisiana adopted its first arms-bearing constitutional provision in 1879. Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 742 & n.143 (2005). A total of forty-four state constitutions now have arms-bearing provisions. *Id.* at 724.

⁴³ *Id.* at 489, 490, 491 (1850).

⁴⁴ *Smith v. State*, 11 La. An. 633, 634 (1856).

⁴⁵ In arguments about the original meaning of the Second Amendment, Justice Stevens' dissent in *Heller* argued that bearing arms has a particularly military connotation that supports a purely collective or state right interpretation of the Second Amendment. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2827–28 (2008). However, the Louisiana Supreme Court's addition "or at least carried openly" undercuts that view. Clayton E. Cramer & Joseph Edward Olson, *What Did "Bear Arms" Mean in the Second Amendment?* 6 GEORGETOWN J.L. & PUB. POL'Y, 6:2 (2008) completely destroys the claim about "bear arms" having a particularly military connotation.

⁴⁶ *State v. Jumel*, 13 La. An. 399, 400 (1858).

The last of the antebellum decisions to express an opinion concerning the Second Amendment is the 1859 decision by the Supreme Court of Texas in *Cockrum v. State*. There, the court upheld a sentence enhancement of life in solitary for manslaughter committed with a Bowie knife. Because the sentence enhancement keyed on a cheap and common class of weapon, counsel argued it was a form of class discrimination,⁴⁷ and that the “right of bearing arms” (though not the right to use them for manslaughter) was protected by both the Second Amendment and the Texas constitution’s arms guarantee. The court’s discussion of the Second Amendment claim appears to recognize both an individual right for the purposes of tyranny control, and arguably, a collective view of the right.

The object of the first clause cited, has reference to the perpetuation of free government, and is based on the idea, that the people cannot be effectually oppressed and enslaved, who are not first disarmed. The clause cited in our Bill of Rights, has the same broad object in relation to the government, and in addition thereto, secures a personal right to the citizen. The right of a citizen to bear arms, in the lawful defence of himself or the State, is absolute.⁴⁸

The Court was clearly uncomfortable with the nature of the weapon—ascribing capabilities to Bowie knives that bear a striking similarity to current concerns about scary-looking semiautomatic weapons. And yet, they acknowledged the right to carry such weapons:

*The right to carry a bowie-knife for lawful defense is secured, and must be admitted. It is an exceeding destructive weapon. It is difficult to defend against it, by any degree of bravery, or any amount of skill. The gun or pistol may miss its aim, and when discharged, its dangerous character is lost, or diminished at least. The sword may be parried. With these weapons men fight for the sake of the combat, to satisfy the laws of honor, not necessarily with the intention to kill, or with a certainty of killing, when the intention exists. The bowie-knife differs from these in its device and design; it is the instrument of almost certain death.*⁴⁹

On the question of the Second Amendment, *Cockrum* poses the perpetual question that plagues militia-centered conceptions of the Second Amendment: Do references to collective defense, tyranny control or political violence, necessarily mean that the guns borne for these political aims are to be “kept” only by the state? Note: their claim would be that this is about state governments resisting the national government’s tyranny. Also this point launches us down the slope of how many citizens are needed to stage legitimate political violence. Or shall the arms be kept by individuals, who when called for militia service shall appear bearing arms provided by themselves in common use at the time?⁵⁰

If the Second Amendment protected a purely collective right, or an individual right subject to governmental control over the militia⁵¹ the Texas Supreme Court should have flatly dismissed *Cockrum*’s Second Amendment claim: he was not armed with a butcher knife, nor did he kill another person, as part of militia duty. The court’s failure to dismiss the argument suggests several aspects of how the Court understood the Second Amendment. The Second Amendment limited state authority to regulate the bearing of arms—and not limited to bearing arms as part of a militia. The precise nature of that right is left open.

Once it is decided that the Second Amendment applies to the State, the pure collective rights view seems untenable. The reason is structural: The collective rights

⁴⁷ *Cockrum v. State*, 24 Tex. 394, 395, 396 (1859). “A common butcher-knife, which costs not more than half a dollar, comes within the description given of a bowie-knife or dagger, being very frequently worn on the person. To prohibit such a weapon, is substantially to take away the right of bearing arms, from him who has not money enough to buy a gun or a pistol.”

⁴⁸ *Id.* at 401.

⁴⁹ *Id.* at 402 (emphasis added).

⁵⁰ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2815 (2008); *United States v. Miller*, 307 U.S. 174, 179 (1939).

⁵¹ *See Heller*, 128 S. Ct. at 2821–47 (Stevens, J., dissenting)

argument is essentially a claim about the federalist bargain at the core of our constitution. It asserts that the Second Amendment simply prevents the federal government from disarming state militias. That view (rejected by *Heller*) only makes sense in the context of a dispute about federal power. When applied to the states, the collective rights theory devolves into nonsense—a view that the Second Amendment prohibits the *state* from infringing on the *state's own right* to arm the *state's own militia*.

The scholarly commentary and judicial decisions of the antebellum period demonstrate that Americans recognized at least two different, not necessarily exclusive, purposes for the Second Amendment. One objective was to protect an individual right to preserve the potential for collective political violence, so that “being armed, they may as a body rise up to defend their just rights, and compel their rulers to respect the laws.”⁵² The other purpose was private self-defense—protection within the boundaries of what the Louisiana Supreme Court called “a manly and noble defence of themselves.”⁵³

II. Popular Understandings of the Second Amendment: Abolitionism, the Fugitive Slave Act, and Bleeding Kansas

Judges are not the only, and perhaps not even the primary, sources of information about the public understanding of the right to bear arms at the time of the Fourteenth Amendment. In a variety of contexts, public officials and private citizens in the nineteenth century discuss and describe the constitutional right to arms in predominately individual terms. Both the political violence/tyranny-control and private self-defense purposes continued to be advanced. However, consistent with Akil Amar’s surmise, articulation of the political violence purpose diminishes around the Civil War while private self-defense rationales become dominant.

Some articulated understandings of the Second Amendment in the first part of the nineteenth century focus on the Amendment’s public violence purpose, because of the militia context in which they appear. Recall that this purpose can be pursued either through an individual right (under the traditional conception of militia as the people bearing their own private arms) or arguably through a variety of collective rights theories where government has full control of all the arms. An 1832 report from the New York Adjutant-General, unsurprisingly, focuses on the tyranny control model. It describes how unusual the U.S. militia system was compared to other countries:

In most other countries it is a practical rule of government to limit as much as possible the influence of all, who live under it, over its measures and movements, and to arm and discipline such only as are in its pay and under its control. The spirit of our political organization, on the other hand, is, by extending as far as possible the right of suffrage, to subject the measures and operations of government to the influence of the greatest possible number, and, by arming and disciplining every citizen, to be prepared to sustain in all emergencies, by the united force of the whole community, a system instituted for the benefit of the whole.⁵⁴

As a consequence, the system required “that every citizen shall be armed, and that he shall be instructed also in the use of arms.” The report also argued “it is doubted by the

⁵² This is the Tennessee Supreme Court’s explanation of the Tennessee Constitution’s somewhat more narrowly written arms guarantee in *Aymette v. State*, 2 Hump. (21 Tenn.) 154, 157 (1840). While *Aymette* denied that the right to keep and bear arms protected an individual right to self-defense, this decision was based on the more restrictive “for their common defence” language of the Tennessee Const., Art. XI, § 26 (1834).

⁵³ The Georgia and Louisiana Supreme Courts found that the right was not unlimited; concealed carry could be regulated or prohibited—a position that in the latter half of the nineteenth century became increasingly the norm. See CRAMER, *supra* note 23, 141–64 for a detailed examination of the development of case law and constitutional provisions that usually recognized that concealed carry could be regulated or even banned as long as open carry was allowed.

⁵⁴ *Adjutant-General’s Office to the New York State Senate*, January 5, 1832, at 2, in DOCUMENTS OF THE STATE OF NEW-YORK, FIFTY-FIFTH SESSION 1:report 4 (1832).

most sagacious observers whether our civil liberties could be maintained for a length of time without the influence and protection of a militia.” What made the militia “dangerous to the existence of an arbitrary government, render it indispensable to the existence of ours.” Finally, the report draws the connection to the Second Amendment:

That this was the opinion of the original parties to the constitution of the United States, is apparent from the second article of the amendments of that instrument, which assumes that “a well-regulated militia” is “necessary to the security of a free state,” and declares that “the right of the people to keep and bear arms shall not be infringed;” showing that the militia was designed by those who had the largest share in its institution, not merely as a support to the public authority, but, in the last resort, as a protection to the people against the government itself.⁵⁵

Like Tucker, Rawle, Story, and Oliver, the Adjutant-General saw the militia system as a fundamental part of our government—something that could not be excised without serious damage: “So intimately, indeed, are they all interwoven with each, other, that the connexion which exists between them could not be dissolved without impairing the strength of the whole fabric.”⁵⁶

As the century progressed, enthusiasm for and attention to the militia system declined.⁵⁷ At the same time, the declining legal status of free blacks, and the growing abolition movement, prompts a robust articulation of the Second Amendment as a guarantee of arms for private self-defense. The struggle over the rights of free blacks, which grew along with the abolition movement, led to this 1838 complaint from black Ohioans about laws that sought to prevent free blacks from entering the state:⁵⁸

Nor were the projectors of this measure satisfied with casting them out beyond the protection of law, and depriving them of the means of obtaining a lawful subsistence: but they made it the duty of the officers of townships to remove them by force out of the state, for disobedience to these laws. By the same process of legislation, every right secured by the constitution may be taken from the citizens of the state. The right of suffrage, *the right to bear arms*, the right of the people to assemble together and consult for the common good; the right to speak, write, and print upon any subject, might be trammelled with such conditions, as to preclude their free exercise by a large portion of the citizens to whom they are secured. There is no greater security given for the right of suffrage, to those who now enjoy it, by the constitution, than is given to all men of acquiring and protecting property, pursuing happiness and safety, and of enjoying personal liberty. The constitution was formed with a full knowledge that our population was comprised of white and colored persons.⁵⁹

To this point, the complaint gives no basis for determining whether “the constitution” was that of Ohio, or of the United States. But the following sentences clarify that they are appealing to the U.S. Constitution—and making an argument that resonates with views decades later that the aim of the Fourteenth Amendment was to overturn the *Dred Scott* decision:

The rights and privileges of the one class were as clearly defined and settled, and as sacredly secured, as the other, by that instrument. The discrimination was distinctly made and expressed in unequivocal terms, whenever it was intended to confer any political privilege upon the one, from which the other was to be excluded. But these laws are not only repugnant to the constitution of this state, and to the principles of our free institutions, they are also in direct contravention of the constitution of the United States. That document declares, that ‘the citizens of each shall be

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Militia act of 1862; 12 Stat. 597., RICHARD H. KOHN, *EAGLE AND SWORD: THE BEGINNINGS OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802* (1975), examines in detail the decline of the militia system.

⁵⁸ See CLAYTON E. CRAMER, *BLACK DEMOGRAPHIC DATA, 1790–1860: A SOURCEBOOK* 32–33, 43–49, (1997), for a discussion of Old Northwest immigration restrictions and “slave-dumping.” STEPHEN MIDDLETON, *THE BLACKS LAWS IN THE OLD NORTHWEST: A DOCUMENTARY HISTORY* 1–156 (1993) gives a detailed list of discriminatory laws in Ohio.

⁵⁹ *Unconstitutional Laws of Ohio*, 8 *THE LIBERATOR* 53, 53 (April 6, 1838) (emphasis added).

entitled to all the privileges and immunities of citizens in the several states.’ ... Was it not intended to secure to all the citizens, in each state, the right of ingress and egress to and from them, and the privileges of trade, commerce, and employment in them, of acquiring and holding property, and sustaining and *defending life and liberty* in any state in the Union? Does it not form one of the conditions of our national compact?⁶⁰

Later that year, THE LIBERATOR advances again the view that the Bill of Rights is a limitation on state laws, and explicitly ties these rights to the “privileges and immunities” clause:

However, you must leave him by virtue of others, a few other incidentals, such as compulsory process for calling in all witnesses for him, of whatever color,— the inviolate right to be secure in person, house, papers and effects, against unreasonable searches and seizures; right of trial by jury in all cases over \$20 value; the free exercise of religion, of speech, of the press, of peaceable assembly and of petition; the civil rights of republican government, which is guaranteed to him in every State in this Union; the *privileges and immunities of citizens in every State*⁶¹

The reference to “right of trial by jury in all cases over \$20 value” and “civil rights of republican government” suggests that the editorial writer is invoking the U.S. Constitution, not a state constitution. The quotation of the U.S. Constitution’s Article IV, Section 2 “privileges and immunities in every State” leaves no doubt. He continues with a claim to habeas corpus and then invokes the right to bear arms this way. “We will mention one more—that is the unfringeable right to keep and bear arms.”⁶² A purely linguistic assessment of this statement might claim that the reference to the right to arms is still consistent with the political violence purpose of the Second Amendment and thus is contestably collective in nature. In context, as we will see, these are profoundly individual rights and individual self-defense conceptions of the Second Amendment.

The Fugitive Slave Act of 1850 created a firestorm of popular upset. Many Northerners had regarded slavery as a regional issue of little concern to them. The new legal requirement to assist U.S. marshals in the capture of runaway slaves, and the extraordinary fines for those assisting runaways,⁶³ injected the slavery question more directly into the lives and politics of Northerners. As an idea and in application, the Fugitive Slave Act led to the growth and increasing militancy of the abolition movement. Advocates of nonviolent protest had long dominated THE LIBERATOR. Now, voices such as Lysander Spooner’s appeared, promoting more aggressive solutions. Some of this advocacy explicitly invokes the Second Amendment in a style that is hard to reconcile with a states’ rights view:

The constitution contemplates no such submission, on the part of the people, to the usurpations of the government, or to the lawless violences of its officers. On the contrary, it provides that *‘The right of the people to keep and bear arms shall not be infringed.’* This constitutional security for *‘the right to keep and bear arms,’* implies the right to use them—as much as a constitutional security for the right to buy and keep food, would have implied the right to eat it. The constitution, therefore, takes it for granted that, as the people have the right, they will also have the sense to use arms, whenever the necessity of the case justifies it.⁶⁴

The New England Anti-Slavery Convention of 1853 articulated a similar view about the individual protections of the Bill of Rights, including the Second Amendment:

Then there were other provisions in the Constitution. They had *personal guarantees of the most express and liberal kind*. Gentlemen had claimed, and he granted that the word ‘persons’ was

⁶⁰ *Id.* (emphasis added).

⁶¹ *The Claim Of Property In Man*, 8 THE LIBERATOR 149, 149 (September 21, 1838) (emphasis added); See also Michael Kent Curtis, *The Bill of Rights and the States Revisited After Heller*, 60 Hastings L.J. 1445 (2009).

⁶² *Id.*

⁶³ Fugitive Slave Act (1850), § 7.

⁶⁴ Lysander Spooner, *The Fugitive Slave Bill*, 21 THE LIBERATOR 1,1 (January 3, 1851).

sometimes intended to cover slaves. But the same interpretation of words must go all through any instrument which is subject to criticism; and so, if the word ‘persons’ was intended to mean slaves, in the representation clause, then all the guaranties of personal liberty given to ‘persons’ belong to slaves also. *The people were guaranteed the right to bear arms, and, of course, by implication, to use them; they were guaranteed the right to assemble peaceably; the right of free discussion; the right to hold property.*⁶⁵

The struggle in the South against abolitionism led to trials alleging treason. As part of the political battle, in 1851, abolitionists reprinted St. George Tucker’s discussion of the differences between English and American standard for judging treason. It advances the Second Amendment as a personal right:

The same author observes elsewhere: “The very use of weapons by such an assembly, without the King’s licence, unless in some lawful and special cases, carries a terror with it, and a *presumption* of warlike force,” &c. The bare circumstance of having arms, therefore, of itself, creates a *presumption* of warlike force in England, and may be given in evidence there to prove *quo animo* the people are assembled. But ought that circumstance of itself to create any such presumption in America, *where the right to bear arms is recognised and secured in the Constitution itself? In many parts of the United States, a man no more thinks of going out of his house, on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side.*⁶⁶

The fight for control over Kansas Territory by proslavery and abolitionist factions soon led to barbarous attacks and deprivations of civil liberties. As the crisis in Kansas Territory grew, speeches by politicians and statements by ordinary citizens demonstrate that the Second Amendment was widely understood to protect an individual right to not only possess arms for self-defense but to carry them, and not dependent in any way on militia duty. Senator Charles Sumner’s speech of May 19-20, 1856 claims the Second Amendment as a decidedly individual right to be armed:

The rifle has ever been the companion of the pioneer, and, under God, his tutelary protector against the red man and the beast of the forest. Never was this efficient weapon more needed in just self-defence than now in Kansas, and *at least one article in our National Constitution must be blotted out, before the complete right to it can in any way be impeached.* And yet, such is the madness of the hour, that, in defiance of the solemn guaranty, embodied in the Amendments of the Constitution, that “*the right of the people to keep and bear arms shall not be infringed*” the people of Kansas have been arraigned for keeping and bearing them, and the senator from South Carolina has had the face to say openly, on this floor, that they should be disarmed—of course, that the fanatics of Slavery, his allies and constituents, may meet no impediment. Sir, the senator is venerable with years; ... but neither his years, nor his position, past or present; can give respectability to the demand he has made, or save him from indignant condemnation, when, to compass the wretched purposes of a wretched cause, he thus proposes to trample on one of the plainest provisions of constitutional liberty.⁶⁷

Bills proposed in Congress in June and July of 1856 reacting to the turmoil of “Bleeding Kansas” included a guarantee that the Bill of Rights would be respected in Kansas Territory. The list of rights in these bills corroborates later claims about what rights the Fourteenth Amendment was intended to impose on the states. These lists also show that the “right to keep and bear arms” along with other provisions of the Bill of Rights was understood as an individual right:

And the people of said Territory shall be entitled to *the right to keep and bear arms*, to the liberty

⁶⁵ *The New England Anti-Slavery Convention*, 23 THE LIBERATOR 96, 96 (June 3, 1853) (emphasis added).

⁶⁶ *Judge Tucker on the Law of Treason*, 5 THE NATIONAL ERA 174 (October 30, 1851) (emphasis added). See 5 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 19 (Phila., William Young Birch & Abraham Small 1803).

⁶⁷ CHARLES SUMNER, THE CRIME AGAINST KANSAS: THE APOLOGIES FOR THE CRIME: THE TRUE REMEDY 64–65 (1856) (emphasis added).

of speech and of the press, as defined in the constitution of the United States, and all other rights of person or property thereby declared and as thereby defined.⁶⁸

The bill provides that no law shall be of force or enforced in the Territory infringing the liberty of speech, or the liberty of the press, or *the right of the people to bear arms, &c.*⁶⁹

That inasmuch as the Constitution of the United States and the organic act of said Territory has secured to the inhabitants thereof certain inalienable rights, of which they cannot be deprived by any legislative enactment, therefore no religious test shall ever be required as a qualification to any office or public trust; no law shall be in force or enforced in said Territory respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble and petition for the redress of grievances; 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 no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized; nor shall *the rights of the people to keep and bear arms be infringed.*⁷⁰

In July 1856, THE LIBERATOR reprinted an article from the Alton, Illinois COURIER that invokes a constitutional right to bear arms without specific reference to the Second Amendment. However, because the “great constitutional right” is invoked in Kansas Territory which had no constitution the reference is evidently to the Second Amendment:

The right to bear arms is a great *constitutional right*; in Kansas it is also a great *necessity*. These thieves and murderers who pour over in armed bands to molest us, say we must be disarmed, and that Free-State settlers must not enter the Territory.⁷¹

Similarly, an August 1, 1856 letter from abolitionist settlers who had been arrested when entering Kansas includes a list of violations by the Territorial government that seems drawn from the U.S. Bill of Rights. While they do not explicitly reference the U.S. Constitution, because the letter refers to “quartering of soldiers in time of peace,”⁷² and there was as yet no state constitution in Kansas, the most plausible inference is that the claim invokes the federal constitution:

As for the acts of a body elected by the people of Missouri, calling themselves a Territorial Legislature of Kansas, which authorize ‘abridging the freedom of speech or the press,’ or the right of the people ‘peaceably to assemble, and to petition the Government for a redress of grievances;’ which authorize the destruction of printing presses, hotels, and private dwellings; the plundering of the people of their horses, cattle, and other property; the sacking and robbing of towns and their citizens; the murder of political opponents with impunity; the ‘quartering of soldiers in time of peace in homes without the consent of the owner’s; the infringement of the *‘right of the people to keep and bear arms;’* the violation of their right to be ‘secure in their persons, houses, papers, and effects against unreasonable searches and seizures;’ the issuing of warrants without ‘probable cause, supported by oath or affirmation; the requiring of excessive bail, the indictment of persons for high crimes, for the sole purpose of prosecution, or of depriving them of their liberty and lives; these, and such as these, who can dignify by the name of ‘laws adopted in pursuance thereof.’⁷³

The following day, August 2, Free Soil Party Rep. Edward Wade of Ohio made the same argument in a speech in the U.S. House of Representatives. He complained that, “The whole military force of the government, is put in requisition by the slave democracy” and listed the Second Amendment as one of the rights being infringed:

Second amendment . –“The right of the people to keep and bear arms shall not be infringed.” In

⁶⁸ H.R. J., 34th Cong. 1st Sess. 1126 (June 28, 1856).

⁶⁹ *Thirty-Fourth Congress: First Session. Monday, June 30, 1856: Senate*, 10 THE NATIONAL ERA 107, 107 (July 3, 1856) (emphasis added).

⁷⁰ Sen. J., 34th Cong. 1st Sess. 428–29 (July 8, 1856) (emphasis added).

⁷¹ *Kansas Closed Against Free-State Immigrants*, 26 THE LIBERATOR 129, 129 (Aug 15, 1856).

⁷² *Letter from the State Prisoners*, 26 THE LIBERATOR 122, 122 (August 1, 1856).

⁷³ *Id.*

this amendment the same SPIRIT OF LIBERTY is developed, as was so apparent in the preceding. The right to “keep and bear arms,” is thus guaranteed, in order that if the liberties of the people should be assailed, the means for their defence should be in their own hands. But this right of the people of the United States, of which the free state settlers of Kansas are part, has been torn from them by the treasonable violence of this ill-starred administration, which is used as the mere pack-mule of the slave democracy.⁷⁴

Wade’s articulation of the infringement and the importance of protecting the constitutional right to arms is incompatible with a states’ rights view that the Second Amendment.

A speech by Rep. Giddings in the U.S. House, August 17, 1856, reprinted in the NATIONAL ERA also describes violations of the Second Amendment in Kansas Territory. Giddings’ describes a robustly individual right with a focus on self-defense:

By the use and power of the army, *he has taken from the people of that Territory their arms, and when the citizens were thus left without the means of defence*, they have been set upon by ruffians, by Missouri Democrats, friends of the President, and robbed of their property, their persons insulted, their dwellings burned, and in some instances individuals were murdered. *The second article in the amendments of our Federal Constitution declares that “the right of the people to keep and bear arms shall not be infringed.”* But in that Western Territory the Constitution is trampled upon by our arms, acting under the President's orders; and we are called on to give the President money to support the army, while thus engaged in over-throwing the Constitution⁷⁵

Iowa Governor (and later, U.S. Senator) James W. Grimes’ letter to President Pierce, August 28, 1856, concerning the antislavery citizens of Kansas, echoes the private self-defense theme:

Citizenship has been virtually denied them. Their right to defend themselves and “to keep and bear arms” has been infringed by the act of the Territorial officers, who have wrested from them the means of defense, while putting weapons of offense into the hands of their enemies.⁷⁶

This is an illuminating equation: By denying these immigrants the right to arms for self defense, territorial officials had virtually stripped them of citizenship.

The Republican National Platform of 1856, makes a similar charge, explicitly including the right to keep and bear arms in a list of individual liberties guaranteed by the Bill of Rights that were being violated by territorial officers:

[T]he dearest Constitutional rights of the people of Kansas have been fraudulently and violently taken away from them; their territory been invaded by an armed force; spurious and pretended legislative, judicial and executive officers have been set over them, by whose usurped authority, sustained by the military power of the Government, *tyrannical and unconstitutional laws have been enacted and enforced; the right of the people to keep and bear arms has been infringed*, test oaths of an extraordinary and entangling nature have been imposed as a condition of exercising the right of suffrage and holding office; the right of an accused person to a speedy and public trial by an impartial jury has been denied; the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizure has been violated, and they have been deprived of life, liberty, and property without due process of law; the press has been abridged. . . .⁷⁷

Some called for impeachment of President Pierce, on the grounds that he had violated multiple provisions of the Bill of Rights, including the right of “peaceable citizens” to “keep and bear arms.” The petition of Impeachment from citizens of Earlville, Illinois, is

⁷⁴ *Slavery Question: Speech of Hon. Edward Wade, of Ohio, in the House of Representatives*, 10 THE NATIONAL ERA 148, 148 (September 11, 1856).

⁷⁵ *The Right Of The People To Control The National Treasure: Speech of Mr. Giddings, on his Motion, That the House of Representatives Adhere to it’s Position on the Bill making Appropriations for the Support of the Army*, 10 NATIONAL ERA 140, 140 (August 28, 1856) (emphasis added).

⁷⁶ WILLIAM SALTER, THE LIFE OF JAMES W. GRIMES 85 (1876).

⁷⁷ THE LIFE OF THOMAS MORRIS: PIONEER AND LONG A LEGISLATOR OF OHIO, AND U.S. SENATOR FROM 1833 TO 1839, 314–15 (Thomas Morris & B.F. Morris, eds., 1856) (emphasis added).

a good example. Importantly, this is a collective enterprise where objections about the details and contestable minor claims—e.g. controversial claims of individual rights—might be filtered out by the need for consensus on the primary message. So it is significant that the Earlville citizens petition reflects a distinctly individual rights understanding of the Second Amendment:

We, the undersigned, citizens of Earlville, and vicinity, La Salle County, State of Illinois, believing FRANKLIN PIERCE, President of the United States, to be guilty of high crimes and misdemeanors: That he has, in the exercise of the functions of his office, trampled the Constitution of the United States, which he has sworn to support, under his feet, in many of its most vital and essential provisions—to wit—That he, as commander-in-chief, has used the military of the nation to destroy 'freedom of speech and of the press in Kansas'; *to take from peaceable citizens of that Territory the 'right to keep and bear arms'*; to prevent the people from 'peaceably assembling to petition the government for redress of grievances: That he has 'quartered soldiers, in time of peace, in houses, without comment of the owners:' That he has caused the arrest of peaceable citizens for a political object, and without 'probable cause, supported by oath or affirmation': That he has violated the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures'⁷⁸

Senator William H. Seward of New York sought the Republican nomination for President in 1856, and later served as Secretary of State under Presidents Abraham Lincoln and Andrew Johnson. In an October 2, 1856 speech in Detroit, he argued that the Constitution was not in fact a “pact with the devil” as William Lloyd Garrison had claimed. Rather, Seward argued, the Constitution actually had sought to abolish slavery:

While they aimed at an ultimate extinction of that caste, and the class built upon it, by authorizing Congress to prohibit the importation of “persons” who were slaves after 1808, and to tax it severely in the mean time, and while they necessarily left to the individual States the management of the domestic relations of all classes and castes existing therein, they especially declared what should be the rights and relations of all “persons,” so far as they were to be affected by the action of the Federal Government which they were establishing.

Among the individual rights Seward claimed are protected by the Constitution are the writ of habeas corpus, the prohibition on bills of attainder and ex post facto laws, and the individual right to arms:

“The right of the people to keep and bear arms shall not be infringed.” “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” They ordained “trial by jury,” prohibited “excessive bail and excessive fines, and cruel and unusual punishments,” and “reserved to the States and to the people all the powers of Government not expressly delegated to the United States.”⁷⁹

In November 1856 a report concerning the arrest of a group of immigrants to Kansas Territory, and their seizure of their arms, included a letter to the territorial governor asserting a right to bear arms:

All I have to say is this, that our mission to this Territory is entirely peaceful. We have no organization, save a police organization for our own regulation and defense on the way; and coming in that spirit to this Territory, we claim *the right of American citizens to bear arms* and to be exempt for unlawful search or seizure.⁸⁰

This is another case where the reference is not tied explicitly to the Second Amendment. However, the claim is staked as a right of “American citizens.” Such a

⁷⁸ *Impeachment of Franklin Pierce*, 26 THE LIBERATOR 140, 140 (August 22, 1856) (emphasis added).

⁷⁹ *The Slaveholding Class Dominant In The Republic. Speech Of William H. Seward*, 11 NATIONAL ERA 24, 24 (February 5, 1857) (emphasis added).

⁸⁰ *Official Dispatches Concerning the Arrest of Col. Eldridge's Party*, 10 THE NATIONAL ERA, 178, 178 (November 6, 1856) (emphasis added).

national claim seems less likely to be in reference to a state constitutional guarantee, and more likely invocation of the Second Amendment.

III. Disparate Claims to Civil Liberties: The Run up to War and Wartime

It was not just Republicans and abolitionists who invoked the Second Amendment. In 1857 as the crisis over slavery grew, Mississippi Governor McWillie sent a message to the legislature that called for vigilance and a willingness to fight to preserve the peculiar institution. Excerpted in *THE LIBERATOR*, McWillie's address declares:

The North already has a large majority in the House of Representatives, a majority of two in the Senate, and the power to elect the President; far that power they cannot want but for purposes of aggression. In this view of the question, it is our duty to be prepared for any contingency, never losing sight of *that article of the Constitution of the United States which declares the axiomated truth that a "well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."* Our fathers well understood, when they adopted this provision of the Constitution; the dangers to which our institutions might be exposed, and thereby secured the means of safety. This, however, to be available, must be accompanied by the courage and the will to use those arms when necessary against all enemies, either foreign or domestic. Our institutions are already protected by the Constitution and by the decisions of the Supreme Court of the United States, but as Constitutions or decrees of courts have no self-[?] power, it may yet be that the duty will be for upon us of standing to our arms in the maintenance of our just rights.⁸¹

It is possible to read this as a states' right claim. But the authority of the states to train the militia under Article I, Section 8 of the U.S. Constitution was not in dispute. Later in his address, McWillie employs language that suggests an individual right with a political violence purpose—*viz.*, the armed people as a bulwark against tyranny:

Eternal vigilance and sacrifice is the price of liberty. No people ever have been great and free, no people ever can be free, who are not military in their habits, and ever ready to defend their institutions and their laws. We, as a people, enjoy the peculiar privilege of bearing arms, and being the defenders of our own rights and liberties. If we should ever be deprived of the one or lose the other, it will be because we are unworthy of them, and had not the courage to defend them.⁸²

If McWillie understood the Second Amendment purely as protecting the right of states to organize militias to fight against federal tyranny, his contention that the privilege of bearing arms extends to the people seems odd. Indeed, given the State's claim of authority over the militia under Article 1, Section 8, it seems misplaced. Moreover, since it is common for governments at various levels to have military capabilities, his reference to the "peculiar privilege of bearing arms" that "We, as a people, enjoy" argues that he is invoking an individual right conception of the Second Amendment with a focus on its political violence purpose.

On the other side of the race question, Rep. Wells of the Massachusetts House of Representatives, in his criticism of the *Dred Scott*, employs Chief Justice Taney's articulation of the rights of citizens to illustrate the fundamental rights of Americans and highlight the fundamental injustice of the decision.

Thank heaven! there are higher privileges embraced in this term, 'Citizen of the United states,' than all that comes to; and it is of these privileges and rights that the colored man is deprived, and it is of that deprivation he complains. I could find, sir, in that very *Dred Scott* decision, an enumeration, by the Supreme Court itself, of the rights guaranteed by the Constitution of the United States, but I will not occupy the time of the House in searching for it now. *Those rights*

⁸¹ *Impertinence of the Abolitionists. Slavery Forever!* 27 *THE LIBERATOR* 1,1 (December 11, 1857) (emphasis added).

⁸² *Id.*

are to bear arms, to meet in public assemblies, and various other rights therein enumerated, entirely distinct from that class of political rights of which the gentlemen speaks. Of all these, in the express terms of the decision, the colored man is deprived, as well as of those other rights to which I have already alluded.⁸³

Wells' view is consistent with Republican sentiment at the time. In December 1859, THE NATIONAL ERA quoted the Republican platform as follows.

Spurious and pretended Legislative, Judicial, and Executive officers have been set over them, by whose usurped authority, sustained by the military power of the Government, tyrannical and unconstitutional laws have been enacted and enforced; *The rights of the people to keep and bear arms have been infringed*; Test oaths of an extraordinary and entangling nature have been imposed, as a condition of exercising the right of suffrage and holding office; The right of an accused person to a speedy and public trial by an impartial jury has been denied; The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, has been violated; They have been deprived of life, liberty, and property, without due process of law; That the freedom of speech and of the press has been abridged⁸⁴

Rep. Orris Ferry, Republican of Connecticut, speaking about the problem of slavery and the Constitution a few months later, argued that the Constitution was fundamentally a document “that breathed the very spirit of freedom” and proceeded to list the Second Amendment right to arms alongside a list of other individual rights as exemplars of that freedom:

It forbids the enactment of any law by the Federal Legislature “respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances;” it declares that “*the right of the people to keep and bear arms shall not be infringed*; that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated;” that “no person shall be deprived of life, liberty, or property, without due process of law;”⁸⁵

Not all the evidence of the period suggests that the Second Amendment protected an individual right. In Massachusetts, the struggle over what rights blacks enjoyed led to legislative attempts to include black men in the state militia. The primary conflict concerned the respective powers of the state over its militia and broad authority over the militia granted to the federal government under Article 1, Section 8. The federal militia Act of 1792 declared that only white males were members of the militia.⁸⁶ One response to this was Francis W. Bird's pamphlet urging that blacks be allowed into the state militia. In one place, Bird's tract employs an explicitly collective right view of the Second Amendment:

“To keep and bear arms,”—not for self-defence, nor for “military instruction,” not for “special service in keeping guard;” but as members of a “well regulated” [State] militia. This was the very purpose of adopting this second amendment to the federal constitution—to put this matter of the independence of the State militia beyond the domain of controversy⁸⁷

A few paragraphs later, Bird confounds this view with the suggestion there was some *other* right that the Second Amendment *ought* to protect. First he argues that the Massachusetts Constitution's guarantee of “the right of the people to keep and bear arms for the common defence” means essentially the same thing as the Second Amendment's guarantee. Then he seems to complain that neither right goes far enough in guaranteeing

⁸³ *Who Are American Citizens?*, 29 THE LIBERATOR 10, 10 (January 21, 1859) (emphasis added).

⁸⁴ *The Republican Platform*, 13 THE NATIONAL ERA 203, 203 (December 22, 1859) (emphasis added).

⁸⁵ *Speech Of Orris. S. Ferry, of Connecticut, in the House Of Representatives, February 10, 1860*, 14 THE NATIONAL ERA, 32, 32 (February 23, 1860) (emphasis added).

⁸⁶ 1 Stat. 271 (1792).

⁸⁷ F.W. Bird, REVIEW OF GOVERNOR BANKS' VETO OF THE REVISED CODE ON ACCOUNT OF ITS AUTHORIZING THE ENROLMENT OF COLORED CITIZENS IN THE MILITIA 30 (1860).

to citizens a natural right of armed self-defense: “[T]his right is as sacred to colored citizens as to white citizens; and it is a miserable evasion to tell them that they have the natural right of self-defence against lawless violence. So have savages and dogs.”⁸⁸ This suggests that Bird viewed the Second Amendment and the state constitution both as protecting only a state right to arms, but viewed that result as unfortunate and unjust. The minor puzzle here is how to make sense of his view of the state constitutional provision. What is the utility of a state constitutional provision protecting the state militia from interference by the state?

In the months preceding the outbreak of hostilities, it was evident that civil war was coming. In New York City, police seized weapons and ammunition bound for Georgia. An editorial in the February 15, 1861 Democratic NEW YORK HERALD invokes the Second Amendment as an individual right:

But, whatever is coming, we are not yet under martial law and a military dictatorship; and the right of the citizens of Georgia to have and to hold as many arms as they please is clear and undoubted. The second amendment to the constitution was expressly adopted to guarantee this right. It is in the following words: --- ‘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.’⁸⁹

On the same question, Rep. Burnett of Kentucky complains in a July 16, 1861 speech on the floor of the House that President Lincoln had “violated the first, second, third, fourth, fifth, and sixth amendments to the Constitution”:

The President has likewise violated the second amendment, which secures to the people the right to keep and bear arms. That right has been infringed. Arms, the private property of citizens, have, upon mere suspicion, been taken at the order of military commanders, and are now withheld from the citizens, whose property they are, and whose rights have thus been violated.⁹⁰

While another member of the House challenged Burnett as to where this seizure of arms took place,⁹¹ no one contested that the Second Amendment protected an individual right to possess arms.

Once the war began, Northern Democrats continued to invoke the Second Amendment’s protection of an individual right. Clement Vallandigham was a prominent Ohio Democrat before the Civil War. When hostilities commenced, he continued to express Confederate sympathies. He was tried in 1863 by a military commission,⁹² and eventually exiled from the United States. In an August 2, 1862 speech at Dayton, he decried the loss of the individual rights protected by the Bill of Rights:

These guarantees were not in the original Constitution, but demanded by the States and the people, and added afterwards. They were added for fear some President might be elected who would claim to have the power, if not expressly withheld by the Constitution. What are they! Freedom of speech, of the press, peaceable assemblages, *the right to keep and bear arms*, freedom from illegal arrest. Yet you have been told that we shall not be allowed to enjoy these rights—that “executive orders” shall be issued against us—that men who represent the voice of the people shall not be heard—that the press shall be muzzled, and men’s mouths gagged, and no censure or criticism of the acts of the President, or of the officials under him, shall be permitted, under penalty of arrest and imprisonment; and, thus, that our personal and political liberties shall be disregarded, and the Constitution trampled under foot.⁹³

⁸⁸ *Id.* at 30–31.

⁸⁹ *More Unconstitutional Violence of the New York Police*, NEW YORK HERALD, February 15, 1861, at 4.

⁹⁰ CONG. GLOBE, 37th Cong., 1st Sess. 151–52 (July 16, 1861).

⁹¹ *Id.*

⁹² CLEMENT LAIRD VALLANDIGHAM, THE TRIAL OF HON. CLEMENT L. VALLANDIGHAM, BY A MILITARY COMMISSION 10–12 (1863).

⁹³ CLEMENT L. VALLANDIGHAM, SPEECHES, ARGUMENTS, ADDRESSES, AND LETTERS OF CLEMENT L. VALLANDIGHAM 403 (1864) (emphasis added); *see also id.* at 473. Rep. Vallandigham as early as July 17, 1861, indicated his intent to introduce bills to enforce “the writ of habeas corpus” as well as protections of

At a mass meeting in Hamilton Ohio, in March 1863, Vallandigham delivered a speech that decried the infringements of the individual right to arms. Quoting Col. Henry B. Carrington's General Order No. 15, (that no one was to carry arms), Vallandigham railed:

“At this time—“ at a time when Democrats are threatened with violence everywhere; when mobs are happening every day, and Democratic presses destroyed; when secret societies are being formed all over the country to stimulate to violence; when, at hotels and in depots, and in railroad cars and on the street corners, Democrats are scowled at and menaced, a military order coolly announces that it is unnecessary, impolitic, and dangerous to carry arms! And who signs this order? “Henry B. Carrington, Colonel 18th U. S. Infantry, Commanding”—Commanding what? The 18th U. S. Infantry, or at most the United States forces of Indiana—but not the people, the free white American citizens of American descent, not in the military service. That is the extent of his authority, and no more. And now, sir, I hold in my hand a general order also—an order binding on all military men and all civilians alike—on colonels and generals and commanders-in-chief—State and Federal. (Applause.) Hear it:

“The right of the people to KEEP AND BEAR arms shall not be infringed” By order of the States and people of the United States. George Washington, commanding. (Great cheering.)

That, sir, is General Order No. 1—the Constitution of the United States. (Loud cheers.) Who now is to be obeyed—Carrington or Washington?⁹⁴

General Order No. 15 also prohibited sales of “arms, powder, lead, and percussion caps.” Vallandigham continued:

Sir, the Constitutional right to keep and bear arms, carries with it the right to buy and sell arms; and fire-arms are useless without powder, lead, and percussion caps. It is our right to have them, and we mean to obey General Orders Nos. 1 [the Second Amendment] and 2 [referring to the Ohio Constitution's guarantee of a right to keep and bear arms], instead of No. 15.⁹⁵

Vallandigham's views were shared by many Northern Democrats, as well as others who were sympathetic to slave owners. In January of 1864, Senator Garrett Davis of Kentucky introduced a resolution attacking the Lincoln Administration for subverting “in large portions of the loyal States, the freedom of speech, the freedom of the press, and free suffrage, the constitutions and laws of the States and of the United States” and causing citizens “to be tried and punished without law, *in violation of the constitutional guarantee to the citizen of his right to keep and bear arms*, and of his rights of property; it has forcibly deprived as well the loyal as the disloyal of both”⁹⁶ The Democratic National Platform adopted in August, 1864 also complained about the Lincoln Administration's use of military authority in the north.

The subversion of the civil by military law in States not in insurrection; the arbitrary military arrest, imprisonment, trial and sentence of American citizens in States where civil law exists in full force; the suppression of freedom of speech and of the press; the denial of the right of asylum; the open and avowed disregard of State rights; the employment of unusual test-oaths, and *the interference with and denial of the right of the people to bear arms in their defence*⁹⁷

the First, Second, Third, and Fourth Amendments. H.R. J, 37th Cong., 2d Sess. 102 (1861). It is not clear whether this was a genuine desire to add enforcing legislation for the Bill of Rights, or a satirical criticism of the Lincoln Administration's wartime measures. It does not appear from the index that such bills were ever introduced. H.R. J, 37th Cong., 2d Sess. 311 (1861).

⁹⁴ *Id.* at 503.

⁹⁵ *Id.* at 504.

⁹⁶ Sen. J., 34th Cong., 1st Sess. 53–54 (January 5, 1864).

⁹⁷ EDWARD MCPHERSON, CLERK OF THE HOUSE OF REPRESENTATIVES (U.S.), POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 118 (1875).

Similarly, S. S. Nicholas, a conservative Democrat, described the rights protected by the Constitution in a collection of essays published in 1865. He listed the individual rights protected by the Constitution and the Bill of Rights:

Hence the guarantee that “the trial of all crimes, except in cases of impeachment, shall be by jury;” also the guarantee of the sacred privilege of the writ of habeas corpus, *of the right to bear arms*, of the right of petition, of the right of free conscience, free speech, free press, and free ballot, with the right of exemption from “unreasonable searches or seizures,” and from any other arrest or seizure but by “warrant issued upon probable cause, supported by oath particularly describing the place to be searched, and the persons or things to be seized;”

Significantly, when he listed the Constitution’s guarantee of a “Republican form of government” he distinguished from the other rights by explaining that it was guaranteed “to each State.” This suggests that Nicholas’ inclusion of the Second Amendment in the list of individual rights was not careless.⁹⁸

Republicans regarded the Democratic concerns about civil liberties with considerable suspicion. An 1866 history of the overthrow of slavery, describes the concern:

Mr. Lincoln soon discovered “the enemy’s programme,” as he termed it; yet thoroughly imbued with a reverence for the guaranteed rights of individuals, he was slow to adopt the strong measures indispensable to public safety. The rights guaranteed by the Constitution to loyal citizens, such as freedom of the press, freedom of speech, the right of trial by jury, *the right to bear arms*, were all claimed by traitors in the North, even when used only to protect the notorious enemies of the Union in the execution of their treasonable plans.⁹⁹

Rights in the context of civil war are tenuous as, for example, the passage of the Test Acts in Pennsylvania and Virginia during the Revolution showed.¹⁰⁰ Also, some rights claims might be less than principled, since the stage of civil discourse and debate has long passed. On this basis, one might discount the complaints of Democrats and southern sympathizers about infringements of the individual right to arms. However, the complaints about infringement of the individual right ranged across the political spectrum. Democrats and Republicans, abolitionists and slaveholders, in slave states and in free states, all invoked the Second Amendment as an individual right. In the context of the time this view is entirely understandable. So it is fair to believe that their claims were genuine; that their understanding of the right was plausible; and that by the time the Fourteenth Amendment was finally adopted, the individual right vision of the Second Amendment was broadly shared.

IV. Reconstruction and the Black Codes

With the shooting war over and four million slaves now freed, it is no surprise that support by Democrats for the right to keep and bear arms becomes more selective. Representative Thaddeus Stevens gets to the heart of things: “When it was first proposed to free the slaves, and arm the blacks, did not half the nation tremble? The prim conservatives, the snobs, and the male waiting-maids in Congress, were in hysterics.”¹⁰¹ This was not simply objection to an abstract principle of legal equality for blacks; it was strongly tied to fear of blacks with guns (a situation that has been recurrent throughout American history, and the origin of many of America’s first gun control laws).¹⁰² Senator Willard Saulsbury, a Delaware Democrat, expressed his opposition to the presence of

⁹⁸ S. S. NICHOLAS, CONSERVATIVE ESSAYS: LEGAL AND POLITICAL 2nd ser. 19–20 (1865).

⁹⁹ ISAAC N. ARNOLD, THE HISTORY OF ABRAHAM LINCOLN, AND THE OVERTHROW OF SLAVERY 702 (1866) (emphasis added).

¹⁰⁰ CLAYTON E. CRAMER, ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE 144 (2006).

¹⁰¹ KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION, 1865–1877, 104 (1965).

¹⁰² See generally, Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 Kan. J.L. & Pub. Pol’y 17, 17–25 (1995).

black soldiers in the post-war Regular Army: “‘What would be the effect,’ he asked his fellow senators, ‘if you were to send negro regiments into the community in which I live to brandish their swords and exhibit their pistols and their guns?’”¹⁰³

In the South particularly, white unease with the new situation led to widespread fear. Myrta Lockett Avary’s *DIXIE AFTER THE WAR* contains a chapter on “Secret Societies” which articulates white fears of bloodthirsty freedmen, out to murder white men, in order to rape the white women. Many of the hearsay accounts involve armed blacks, engaging in wanton murders, and negligent discharges of firearms.¹⁰⁴

Fear of black retribution for slavery provoked tremendous stress among white Georgians in the summer of 1865: “Everywhere there were vivid secondhand accounts of armed blacks drilling in nightly conclaves, waiting only for the signal that would trigger a coordinated massacre sometime during the Christmas holidays.” Similar fears soon appeared in the Carolinas. While no evidence was found that such uprisings were actually planned, by November, the panic had spread to more than sixty counties throughout the former Confederacy—largely in the states with the largest black populations. These fears increasingly centered on organized black rifle companies, and not surprisingly, many whites began to see disarming the freedmen as necessary for their safety, or at least used this as a cover for some other motivations.

In the late summer of 1865 a Summerton, South Carolina, vigilance committee agreed to disarm the freedmen of the area because of the danger of insurrection. At the vigilance meeting, a conservative planter, Warren Manning raised an unusual objection given the context. But one that seems significant in terms of the quest for the public understanding of the Second Amendment. Manning argued that some of his slaves carried weapons for the protection of the plantation before the war, and now these men had been “made free and therefore had a right to carry arms.” Manning’s objection seems courageous as a general matter. That he advanced it at all and in such basic and concise terms suggests that he and his audience understood it to be part of the basic rights of men, at least white ones.¹⁰⁵

White-dominated state governments that formed immediately after the war rapidly began to form militias; their concern was that the federal troops which occupied the region would be insufficient, or perhaps unwilling, to protect whites from the feared insurrection of the freedmen. In many cases, militias formed without formal state recognition, and began searching black homes, confiscating the freedmen’s firearms. In Eufala, Alabama, a militia company was joined by federal troops in confiscating arms from free blacks.¹⁰⁶

With the close of 1865, Union generals and Southern legislatures advanced conflicting statutes and orders attempting to govern Freedmen’s access to arms. In November 1865, Mississippi required all blacks “not in the military service of the United States Government” to obtain a license from the county’s board of police to “keep or carry fire-arms of any kind, or any ammunition, dirk, or bowie-knife” The same measure made it unlawful for “any white person” to “sell, lend, or give to any freedman, free negro, or mulatto, any fire-arms, dirk, or bowie-knife, or ammunition”¹⁰⁷ The same month, Alabama enacted an even more severe penalty—and without any provision for granting of a license.¹⁰⁸ In January 1866, Florida passed a law that tracked the Mississippi restriction. It required all blacks to obtain a license “to own, use, or keep in

¹⁰³ BERNARD C. NALTY, *STRENGTH FOR THE FIGHT: A HISTORY OF BLACK AMERICANS IN THE MILITARY* 51 (1986).

¹⁰⁴ MYRTA LOCKETT AVARY, *DIXIE AFTER THE WAR: AN EXPOSITION OF SOCIAL CONDITIONS EXISTING IN THE SOUTH, DURING THE TWELVE YEARS SUCCEEDING THE FALL OF RICHMOND* 263–78 (1906).

¹⁰⁵ DAN T. CARTER, *WHEN THE WAR WAS OVER: THE FAILURE OF SELF-RECONSTRUCTION IN THE SOUTH, 1865–1867* 192–94, 199–201, 219–21 (1985).

¹⁰⁶ *Id.*

¹⁰⁷ MCPHERSON, *supra* note 97, at 32.

¹⁰⁸ *Id.* at 33.

his possession or under his control any bowie-knife, dirk, sword, fire-arms, or ammunition of any kind”¹⁰⁹

The Federal government responded with military orders countermanding this discriminatory arms legislation. Commander of federal troops in occupation, General Dan Sickles, issued an order on January 17, 1866 declaring that “[t]he constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons, nor to authorize any person to enter with arms on the premises of another against his consent.”

Federal treatment of the right to arms also was not color coded, but it was not blind to the reality of policing the peace. One order commanded, “No one shall bear arms who has borne arms against the United States, unless he shall have taken the amnesty oath prescribed in the proclamation of the President of the United States, dated May 20, 1865, or the oath of allegiance, prescribed in the proclamation of the President, dated December 8, 1863, within the time prescribed therein. And no disorderly person, vagrant, or disturber of the peace, shall be allowed to bear arms.”¹¹⁰ This was a “constitutional right,” that citizens could lose because of bad behavior.

While hostilities had formally ceased, the importance of the individual right to arms was plain to black people. One month after “General Order Confirming the Freedmen’s Right to Arms,” THE CHRISTIAN RECORDER (published by the African Methodist Episcopal Church) editorialized:

The Charleston (S.C.) Leader says: “We have several times alluded to the fact that *the Constitution of the United States, guaranties to every citizen the right to keep and bear arms.* Gen. Tilson, Assistant Commissioner, for Georgia, has issued a circular, in which he clearly defines the right as follows: “IV. *Article II. of the amendment to the Constitution of the United States, gives the people the right to bear arms , and states that this right, ' shall not be infringed.'* Any person, white or black, may be disarmed, if convicted of making an improper and dangerous use of weapons; but no military or civil officer has the right or authority to disarm any class of people, thereby placing them at the mercy of others. All men, without the distinction of color, have the right to keep arms to defend their homes, families or themselves.” We are glad to learn that Gen. Scott, Commissioner for this State, has given freedmen to understand that they have as good a right to keep fire arms as any other citizens. The Constitution of the United States is the supreme law of the land, and we will be governed by that at present.¹¹¹

V. The Meaning of the Second Amendment Surrounding Debate and Enactment of the Fourteenth Amendment

Given the complex interrelationships between the factions involved, some scholars suggest that there may not be a single meaning discernable from the statements of the legislators who produced the Fourteenth Amendment.¹¹² Contemporary views about the

¹⁰⁹ *Id.* at 40.

¹¹⁰ *Id.* at 36–37.

¹¹¹ 6 CHRISTIAN RECORDER1, 1–2 (February 24, 1866).

¹¹² RICHARD B. BERNSTEIN & JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? 105–6 (1993). Michael Kent Curtis explains that our understanding of the Fourteenth Amendment is beset by dueling theories that he summarizes this way:

First, one can read Section 1 (and particularly the Privileges or Immunities Clause) as protecting both equality and basic liberties for Americans throughout the nation against state denial or abridgement. Second, one can read Section 1 of the Privileges or Immunities Clause as simply, and only, prohibiting racial and similar caste discrimination in rights provided by—and revocable under—state law. By the first reading, all persons would have rights, for example, to free speech and to bear arms (assuming, as I do, that the right was considered an individual constitutional right of all citizens by 1868) and these rights or privileges would be protected at least against state denial. By the second reading, a state could not take free speech or the right to keep and bear arms away from African Americans if it granted the right to whites. But it could abridge the right for both.

nature of the constitutional right to arms seem less complicated.¹¹³ A variety of scholars have mined the legislative history of the Fourteenth Amendment for signals about contemporary views of the right to keep and bear arms.¹¹⁴ Some of the strongest statements of support for an individual rights interpretation come out of this period. There is solid evidence that both supporters *and* opponents of the Fourteenth Amendment viewed the Second Amendment as an individual right—and in some cases, the opposition to the Fourteenth Amendment was driven by fear that it would preclude the Black Code provisions from disarming the freedmen.

The post war Congress was well aware of the racially discriminatory black codes that the Southern states were passing to maintain the status quo. Senate debate of the Civil Rights Act of 1866 and the Freeman’s Bureau Legislation shows that a central aim was to combat racially discriminatory legislation in the Southern states, including laws and practices that disarmed freedmen. There are numerous indications in the period from the end of the war to the adoption of the Fourteenth Amendment suggesting that people who disagreed about many other things viewed the right to keep and bear arms in the federal constitution as an individual right.

In 1865, The Thirty Ninth Congress convened a joint House and Senate, Committee of Fifteen that would evaluate the plight of freedmen in the South and eventually would draft the Fourteenth Amendment.¹¹⁵ The Committee of Fifteen, the Congress, and the nation would come to understand that while the war was over, subjugation of black Americans was not. Through enactment of Black Codes and private terror, southerners attempted to continue slavery in a different form. These depredations, included peonage contracts, denial of the right to assembly, denial of access to the courts and the taking of private firearms through discriminatory legislation or government sanctioned robbery. The denial of arms to freedmen received substantial attention in the debates and conversation of the times. Given the context, it should be no surprise that these conversations reflect an individual rights view of the Second Amendment.¹¹⁶ The country had just emerged from a tragic and horribly bloody episode of political violence of the type that the states’ rights view of the Second Amendment enables. Abuses by southern state militias were one of the problems Republicans were attempting to combat. A report in HARPERS WEEKLY illustrates the situation.¹¹⁷

The Militia of this country have seized every gun and pistol found in the hands of the (so called) freedmen of this section of the country. . . . They commenced seizing arms in town and now the plantations are ransacked . . . The civil laws of this State do not and will not protect, but insist upon infringing their liberties.

The reaction of freedmen is not surprising. One petition to the Congress in response to such deprivations invokes the federal constitution and an understanding of the right to arms that cannot plausibly be construed as a states’ rights understanding.

We ask that inasmuch as the Constitution of the united States explicitly declares that the right to keep and bear arms shall not be infringed—and the Constitution is the Supreme law of the land – that the late efforts of the Legislature of this state to pass and act to deprive us or [sic] arms be forbidden, as a plain violation of the Constitution.¹¹⁸

Curtis, *supra* note 5, at 1448, 1449.

¹¹³ See STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876 (1998).

¹¹⁴ See, e.g., David Kopel *The Second Amendment in the Nineteenth Century*, 1998 BYU L. Rev. 1359 (1998). Stephen P. Halbrook, *Personal Security, Personal Liberty, And “The Constitutional Right To Bear Arms”*: *Visions Of The Framers Of The Fourteenth Amendment*, 5 SETON HALL CONST. L. J. 341 (1995).

¹¹⁵ CONG. GLOBE, 39th Cong., 1st Sess. 30 (Dec. 12, 1865).

¹¹⁶ See AMAR, *supra* note 8, at 216. Fresh out of Civil War, there was little advocacy for any sort of states’ rights conception of the Second Amendment—or any other states’ right.

¹¹⁷ HARPERS’S WEEKLY, Jan. 13, 1866, at 3, col 2.

¹¹⁸ 2 PROCEEDINGS OF THE BLACK STATE CONVENTIONS, 1840–1865, 284 (1980).

Debates over the Freedman's Bureau Bill show that even Southerners who opposed extending full rights of citizenship to Freedmen might agree that the individual rights of Americans included "*every man bearing his arms about him and keeping them in this house, his castle, for his own defense.*"¹¹⁹ Similarly, the attack by Senator Saulsbury on the Civil Rights Bill reflected an individual rights understanding of the federal protection:

There has existed a law of the State based upon and founded in his police power, which declares that free Negroes shall not have the possession of fire-arms or ammunition. This bill proposes to take away from the States this police power, so that if in any State of this Union at anytime hereafter there shall be such a numerous body of dangerous persons belonging to any distinct race as to endanger the peace of the State, and to cause the lives of its citizens to be subject to their violence, the State shall not have the power to disarm them without disarming the whole population.¹²⁰

Debate over the Civil Rights Bill reveals another aspect of the racial dynamic of the time that confirms the individual rights understanding. As the debate progressed in the Senate, Senator George H. Williams from Oregon worried that if the act extended the rights of citizens to Indians, it would invalidate state laws prohibiting whites from selling guns to Indians. This was a period where the U.S. was still engaged in the conquest of Indian tribes so it is no surprise that the Senate voted to exclude "Indians not taxed" from the definition of citizens.¹²¹

Consideration of the Civil Rights Bill reflected a concern at many levels about who was armed and under what authority. Northern Congressmen worried about disarmament of freedmen and noted that the right to arms currently required protection through military orders of occupying federal forces. One of those orders, issued by General D.E. Sickles, claimed to protect the "constitutional rights of all loyal and well disposed inhabitants to bear arms."¹²² It is not a reference to states, and under the circumstances seems decidedly individual in character.

A report of the Commissioner of the Kentucky Freedman's Bureau elaborates the context and the individual right understanding in unequivocal terms: "The civil law prohibits the colored man from bearing arms . . . their arms are taken from them by the civil authorities. . . . The right of the people to keep and bear arms as provided in the constitution is infringed."¹²³

Congress reflected this concern explicitly in the Freedman's Bureau Bill by providing military protection to those whose rights were violated and left defenseless due to the interruptions of civil process caused by the rebellion. Among those explicitly protected rights was "the constitutional right of bearing arms."¹²⁴

The black press widely circulated General Order No. 1, General Sickles' declaration that freedman, now citizens, enjoyed an individual right to arms. The order was reprinted in the *LOYAL GEORGIAN*, accompanied by a robustly individual rights editorial.

Editor *Loyal Georgian*:

Have colored persons a right to own and carry fire arms?

Almost every day we are asked questions similar to the above . We answer certainly now have the same right own and carry arms that other citizens have. You are not only free but citizens of the unities States and as such entitled to the same privileges granted to other citizens by the Constitution.

¹¹⁹ CONG. GLOBE, 39th Cong., 1st Sess. 371 (Jan. 23, 1866) (Senator Garrett Davis in opposition to the Freedman's Bill).

¹²⁰ CONG. GLOBE, 39th Cong., 1st Sess. 478 (Jan. 29, 1866).

¹²¹ CONG. GLOBE, 39th Cong., 1st Sess. 574–75 (Feb. 1, 1866).

¹²² *Id.* at 908–09 (Senator Wilson citing Sickles order).

¹²³ Exec Doc. No. 70, 39th Cong., 1st Sess. 654 (Feb. 5, 1866).

¹²⁴ CONG. GLOBE, 39th Cong., 1st Sess. 1292 (March 9, 1866).

Article II of the amendment to the Constitution of the United States, gives the people the right to bear arms and states that this right shall not be infringed. Any person, white or black may be disarmed if convicted of making an improper or dangerous use of weapons, but no military or civil officer has the right or authority to disarm any class of people, thereby placing them at the mercy of others. All men, without distinction of color have the right to keep and bear arms to defend their homes, families or themselves.¹²⁵

Concern about infringement of the basic liberties of Freedmen also prompted arguments for disbanding the militias of the rebel states.¹²⁶ Significantly, this occurred consistent with arguments that the right to keep and bear arms should be respected. The right in this context was an individual not a state right. In February of 1866, Senator Wilson introduced a resolution to disband militia forces in most southern states where militias had disarmed freedmen. In the debate both supporters and opponents agreed that peaceful citizens maintained a right to keep and bear arms.¹²⁷ Wilson's bill ultimately passed in a form that disbanded militias but maintained the right of individuals to their private firearms.¹²⁸

The threats and violence of the southern militias were palpable, but other deprivations were subtler. In February of 1866 General Rufus Saxon, former Assistant Commissioner of the Freedmen's Bureau in South Carolina testified before the Joint Committee about the use of peonage contracts that deprived freedmen of basic rights including a right to arms. Saxon explained to the committee that white southerners "desired me to sanction a form of contract which would deprive the colored men of their arms, which I refused to do. The subject was so important, as I thought, to the welfare of the freedmen that I issued a circular on this subject."¹²⁹ Saxon's circular frames the right to arms in decidedly individual terms.

It is reported that in some parts of this State, armed parties are, without proper authority, engaged in seizing all fire-arms found in the hands of the freedmen. Such conduct is in clear and direct violation of their personal rights as guaranteed by the Constitution of the United States, which declares that "the right of the people to keep and bear arms shall not be infringed." The freedmen of South Carolina have shown by their peaceful and orderly conduct that they can safely be trusted with fire-arms, and they need them to kill game and for sustenance and to protect their crops for destruction by birds and animals.¹³⁰

At the end of February, 1866 the house began debating the proposed Fourteenth Amendment.¹³¹ Some objected that the amendment was unnecessary. Senator Nye, for example, argued that the Bill of Rights already was "established by the fundamental law . . . that [no] state has the power to subvert or impair the natural and personal rights of the citizen." On the question of a right to arms he argued, that blacks "[a]s citizens of the United States. . . . Have equal right to protection, and to keep and bear arms for self-defense."¹³²

Debate over provisions of the Civil Rights bill in March 1866 referenced language that parallels what we would come to know as the citizenship clause of the Fourteenth Amendment. Explaining this proposal, Representative Henry Raymond of New York declared, "Make the colored man a citizen of the United States and he has every right which you and I have as citizens of the United States under the laws and constitution. . . . He has a defined *status*; he has a country and a home; a right to defend himself and his

¹²⁵ Letter to the Editor, THE LOYAL GEORGIAN (AUGUSTA), Feb. 3, 1866, at 3.

¹²⁶ CONG. GLOBE, 39th Cong., 1st Sess. 914 (Feb. 19, 1866).

¹²⁷ *Id.* at 40 (Dec. 13, 1865).

¹²⁸ STEPHEN HALBROOK, THAT EVERY MAN BE ARMED 136–42 (1984).

¹²⁹ REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REPORT NO. 30, 39th Cong., 1st Sess., pt. 2 at 219 (1866).

¹³⁰ *Id.* at 229.

¹³¹ CONG. GLOBE 39th Cong., 1st Sess. 1033–34 (Feb. 26, 1866).

¹³² CONG. GLOBE 39th Cong., 1st Sess. 1072 (Feb. 1866).

wife and children; a right to bear arms.”¹³³ True, Raymond separates the right of personal defense and the right to arms with a semicolon. But this is far from endorsement of a states’ rights argument. Raymond makes no mention of states or militias and in this context; the very prospect that Raymond was arguing for a collective right is implausible.

Testimony before the Joint Committee of Fifteen in March of 1866 reminds us that the state militias were the source of infringement of a right to arms that was understood as vested in individual freedmen. Major General Wager Sayne, assistant commissioner of the Freedman’s Bureau in Alabama testified that “Militias were ordered to disarm the freedmen”; that when he learned of one order in particular, “I made public my determination to maintain the right of the Negro to keep and to bear arms and my disposition to send an armed force into any neighborhood in which that right should be systematically interfered with.”¹³⁴

The statements of commanders such as Major General Sayne are important because they reflect broadly dispersed public announcements. Some of the Congressional debates during this time are arguably more obscure—i.e., exchanges in the House or Senate. However, the thrust of those debates is reflected strongly in the newspapers of the time. This is particularly so for the vote to override Andrew Johnson’s veto of the Civil Rights Bill. An April 1866 New York EVENING POST editorial about the override vote described the “mischiefs for which the Civil Rights Bill seeks to provide a remedy.” Listed among their rights to public assembly and the right to own property was “keeping firearms.”¹³⁵

By the end of April 1866, the Joint Committee of Fifteen reported its proposal for the Fourteenth Amendment out to the congress and the debate became public.¹³⁶ Introducing the proposed amendment to the Senate, Senator Howard explained the view of the Joint Committee that the “Great object of the first section of this amendment is therefore to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.” These guarantees he urged were the “personal rights guaranteed and secured by the first eight amendments of the Constitution” including “the right to keep and bear arms.”¹³⁷ Howard’s explanation was widely reported in the press.¹³⁸

In the summer of 1866, Congress voted to override Andrew Johnson’s veto of the second Freedman’s Bureau Bill and to approve for ratification the Fourteenth Amendment. Stephen Halbrook highlights that

Every Senator who voted for the Fourteenth Amendment also voted for the Freedmen’s Bureau Bills. The Freedman’s Bureau Act explicitly declared that “the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such state or district without respect to race or color or previous condition of slavery.” The act extended “military protection to and gave the military jurisdiction over questions concerning “the free enjoyment of such immunities and rights.”

The right to arms discussed in the act, argues Halbrook, is squarely within the privileges and immunities the Fourteenth Amendment was designed to protect.¹³⁹ And that right, as the context shows, was anchored to individuals. Not only is there no reference to militias or states’ rights in the Freedmen’s Bureau Act, but it was states and militias who were the principal violators of the rights the Act aimed to protect. As further evidence, as the controversy over ratification of the Fourteenth Amendment

¹³³ CONG. GLOBE, 39th Cong., 1st Sess. 1263, 1266 (Mar. 8, 1866).

¹³⁴ REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REPORT NO. 30, 39th Cong., 1st Sess., pt. 3 at 140 (1866).

¹³⁵ CONG. GLOBE, 39th Cong., 1st Sess. 1266 (Mar. 8, 1866).

¹³⁶ BENJAMIN B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 114-20 (1914).

¹³⁷ CONG. GLOBE, 39th Cong., 1st Sess. 2765, 2766 (May 23, 1866).

¹³⁸ HALBROOK, *supra* note 113, at 36.

¹³⁹ *Id.* at 40-44.

swirled, Congress passed legislation to abolish southern state militias—the ultimate repudiation of a states’ rights view of the Second Amendment.¹⁴⁰ Senator Wilson explained that the legislation was necessary because the state militias had been used “to disarm the people,” namely freedmen.¹⁴¹

On first pass, the Fourteenth Amendment was unanimously rejected by the southern states. But chafing under federal military rule and the stipulation that they could not reenter the Union unless they approved the Amendment, the southern states ultimately capitulated.¹⁴² By 1868 the Fourteenth Amendment was the law of the land. The evils it addressed, the aims it pursued, and the context in which it arose show that the right to arms that flowed with it was decidedly individual.

Conclusion

The nature and boundaries of the rights of citizens and the rights of men were burning questions in the nineteenth century. They culminated in war, reconstruction and constitutional change that aimed to extend the rights and privileges of American citizenship to those previously held in bondage. The discussion and discord over the right to arms in this context reveals that people all along the political spectrum held a decidedly individual rights understanding. Those who supported the Fourteenth Amendment frequently articulated that the freedmen, now citizens, enjoyed the same right to keep and bear arms as others. Freedmen themselves claimed and embraced the individual right. Even those who were committed to stripping blacks of their new status considered the individual right to arms an attribute of citizenship.

The description of the right from an 1872 school textbook elaborates the point:

15. What are the rights which are secured to every individual by the Constitutions and laws of the United States? . . .

K. The right to keep and bear arms.¹⁴³

Every individual throughout the nation has the Constitutional right to keep and bear arms. This accustoms the people to their use. (*This right is not allowed by governments that are afraid of the people.*)¹⁴⁴

¹⁴⁰ *Id.* at 69.

¹⁴¹ *Id.*; CONG. GLOBE, 39th Cong., 2nd Sess. 1848 (Feb. 26, 1867).

¹⁴² 15 Stat. 708, 709–11 (1868).

¹⁴³ CASPAR T. HOPKINS, A MANUAL OF AMERICAN IDEAS 49 (1872).

¹⁴⁴ *Id.* at 177–78.