

## **HELLER, THE SECOND AMENDMENT, AND RECONSTRUCTION: PROTECTING ALL FREEDMEN OR ONLY MILITIAMEN?**

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In *District of Columbia v. Heller*, Justice Scalia began his analysis of the perceived meaning of the Second Amendment during Reconstruction by writing that “[i]n the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves.”<sup>1</sup> This was part of a broader historical narrative that began with the right’s English origins and concluded with late-nineteenth century legal scholarship as a means of expositing the common understanding of “the right of the people to keep and bear

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1. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2809–10 (2008) (citing generally STEPHEN P. HALBROOK, *FREEDMEN, THE FOURTEENTH AMENDMENT, & THE RIGHT TO BEAR ARMS, 1866–1876* (Greenwood Publishing Group 1998) [hereinafter HALBROOK, *FREEDMEN*] *reprinted as* STEPHEN P. HALBROOK, *SECURING CIVIL RIGHTS: FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS* (Independent Institute 2010). Other works by this author on the subject include: Stephen P. Halbrook, *The Freedmen’s Bureau Act & the Conundrum Over Whether the Fourteenth Amendment Incorporates the Second Amendment*, 29 N. KY. L. REV. 683 (2002); 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); S. COMM. ON THE JUDICIARY, 97TH CONG., *THE RIGHT TO KEEP AND BEAR ARMS: REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION* 68 (2d Sess. 1982).

arms” as an individual liberty which could be exercised for self defense, hunting, and other lawful purposes.<sup>2</sup> Because it was espoused seventy-five years after the Second Amendment’s ratification, the Court did not believe the Reconstruction prospective provided as much of an insight as the earlier sources, but it was nonetheless instructive in illustrating the common understanding of the Amendment in an era when the Southern States sought to disarm African-Americans.<sup>3</sup>

The discussion of Reconstruction, however, bears special significance given the consequences of the Court’s holding that the Second Amendment protects the individual right to keep and bear arms not only for militia use, but also for self-defense, hunting, and other lawful purposes. This opens the door to the issue of whether the Second Amendment is incorporated into the Privileges or Immunities Clause or the Due Process Clause of the Fourteenth Amendment so as to make it applicable to the States and localities.<sup>4</sup> That question is now pending before the Supreme Court, and, as this article explains, the Reconstruction-era understanding suggests that the Second Amendment is applicable to the States.<sup>5</sup>

#### I. THE *HELLER* MAJORITY: DISARMING OF AFRICAN-AMERICANS UNDER THE BLACK CODES

The *Heller* Court’s analysis begins with an acknowledgment that “[b]lacks were routinely disarmed by Southern States after the Civil War.”<sup>6</sup> While the opinion does not explain in detail how this was done in the period just after the war, it is useful to note two ways in which the

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2. *Heller*, 128 S. Ct. at 2805–12.

3. *See id.* at 2810.

4. Section 1 of the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

5. *Nat’l Rifle Ass’n v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009), *cert. granted sub nom. McDonald v. Chicago*, 130 S. Ct. 48 (2009).

6. *Heller*, 128 S. Ct. at 2810.

disarming took place. First, the Southern States enacted statutes prohibiting African-Americans from possessing firearms. For instance, a Mississippi law provided that: “[N]o freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind . . . .”<sup>7</sup> Second, these laws were enforced not only by local sheriffs, but also by the state militias. This led to the introduction of civil rights legislation in Congress. Bill sponsor Senator Henry Wilson explained in part: “In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them . . . .”<sup>8</sup>

Concerning disarming, the *Heller* Court notes that: “Those who opposed these injustices frequently stated that they infringed blacks’ constitutional right to keep and bear arms. Needless to say, the claim was not that blacks were being prohibited from carrying arms in an organized state militia.”<sup>9</sup> This showed historical continuity in the common understanding that the Second Amendment protects individual rights rather than State powers to maintain a militia or a “right” to be conscripted to bear arms in the militia. Justice Stevens’ dissenting opinion disputes this point.<sup>10</sup>

The *Heller* Court gave examples—all but one of them from the critical year of 1866—of when Congress enacted civil rights legislation and proposed the Fourteenth Amendment to the States.<sup>11</sup> A Freedmen’s Bureau report stated that Kentucky law prohibited African-Americans from possessing arms: “Their arms are taken from them by the civil authorities . . . . Thus, the right of the people to keep and bear arms as provided in the Constitution is *infringed*.”<sup>12</sup> A report by the Joint Committee on Reconstruction stated that in South Carolina “armed parties are, without proper authority,

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7. 1865 Miss. Laws 165.

8. CONG. GLOBE, 39th Cong., 1st Sess. 40 (1865).

9. *Heller*, 128 S. Ct. at 2810.

10. *See infra* Parts V and VI.

11. *Heller*, 128 S. Ct. at 2810–11.

12. *Id.* at 2810 (quoting H.R. EXEC. DOC. NO. 39-70, at 233, 236 (1st Sess. 1866)).

engaged in seizing all fire-arms found in the hands of the freemen [sic],” and that this violated “their personal rights” guaranteed by the Second Amendment.<sup>13</sup> The report continued that the freedmen were peaceful and could be trusted with firearms, which they needed for subsistence hunting and crop protection.<sup>14</sup> The Heller Court made note of the fact that these views were widely held. For instance, *The Loyal Georgian* newspaper assured African-Americans that “[a]ll men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves.”<sup>15</sup>

## II. THE FREEDMEN’S BUREAU ACT

The right to bear arms was most explicitly recognized by Congress in the Freedmen’s Bureau Act, section 14 of which provided in part:

[T]he right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery . . .<sup>16</sup>

*Heller* was the first Supreme Court opinion to acknowledge those words, which had not been referenced in any judicial opinion until 2000, when Justice Janice Rodgers Brown of the Supreme Court of California did so to illustrate the correlation between self-defense, citizenship, and freedom during Reconstruction.<sup>17</sup>

Congressional debate concerning the Freedmen’s Bureau Act reflected the understanding that freed blacks had a Second Amendment right to keep and bear arms. An opponent even acknowledged that the founding generation “were for every man bearing his arms about him and keeping

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13. *Id.* (quoting H.R. REP. NO. 39-30, pt. 2, at 229 (1st Sess. 1866) (Proposed Circular of Brigadier General R. Saxton)).

14. *Id.*

15. *Id.* (quoting HALBROOK, FREEDMEN, *supra* note 1, at 19).

16. *Id.* (quoting Freedmen’s Bureau Act, 14 Stat. 176–177 (1866)).

17. *Kasler v. Lockyer*, 2 P.3d 581, 601–02 (Cal. 2000) (Brown, J., concurring) (citing Stephen P. Halbrook, *Second Class Citizenship & the Second Amendment in the District of Columbia*, 5 GEO. MASON U. CIV. RTS. L.J. 105, 141–150 (1995)).

them in his house, his castle, for his own defense.”<sup>18</sup>

While not further discussed in *Heller*, the Freedmen’s Bureau Act represents one of the most important aspects of the incorporation debate. First, the Act was a veto override passed by more than two-thirds of the same Congress that proposed the Fourteenth Amendment.<sup>19</sup> Such an enactment is obviously more indicative of Congressional intent than, say, a floor statement by a member of Congress. Second, the Freedmen’s Bureau Act and the Civil Rights Act of 1866 were companion enactments that sought to protect the same rights the Fourteenth Amendment was designed to guarantee.<sup>20</sup> As explained by Representative George W. Julian, the constitutional amendment was needed to uphold the Civil Rights Act, which:

[I]s pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.<sup>21</sup>

Third, the meaning of “personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal,” as “including the constitutional right to bear arms,” are basic concepts of the Anglo-American legal tradition. Blackstone explained that certain “auxiliary” rights were necessary to “maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.”<sup>22</sup> Together with justice in the courts and the right of petition, these included “the right of having and using arms for self-preservation and defense.”<sup>23</sup> The framers of the Fourteenth Amendment used similar terminology,<sup>24</sup>

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18. *Heller*, 128 S. Ct. at 2810 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 362, 371 (1866) (Sen. Davis)).

19. See HALBROOK, FREEDMEN, *supra* note 1, at 41–42. See also CONG. GLOBE, 39th Cong., 1st Sess. 3842, 3850 (1866).

20. “[Section] 14 of the amendatory Freedmen’s Bureau Act . . . re-enacted, in virtually identical terms for the unreconstructed Southern States, the rights granted in § 1 of the Civil Rights Act of 1866.” *Georgia v. Rachel*, 384 U.S. 780, 797 n.26 (1966).

21. CONG. GLOBE, 39th Cong., 1st Sess. 3210 (1866).

22. 1 WILLIAM BLACKSTONE, COMMENTARIES \*141.

23. *Id.* at \*144.

24. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (Rep. James Wilson, Chairman of the Judiciary Committee).

and the Supreme Court has held that the Fourteenth Amendment protects from state infringement upon the “indefeasible right of personal security, personal liberty, and private property.”<sup>25</sup>

While the *Heller* Court did not delve into this much detail, this rationale is of great significance in the incorporation issue. The Court did refer to floor speeches on the proposed Fourteenth Amendment. Senator Samuel Pomeroy described “‘indispensable’ ‘safeguards of liberty . . . under the Constitution’” as including a man’s “right to bear arms for the defense of himself and family and his homestead.”<sup>26</sup> According to Representative James Nye, the Amendment was unnecessary because “[a]s citizens of the United States [blacks] have equal right to protection, and to keep and bear arms for self-defense.”<sup>27</sup>

### III. AWOL FROM *HELLER*: SENATOR JACOB HOWARD’S SPEECH INTRODUCING THE FOURTEENTH AMENDMENT

The *Heller* majority conspicuously failed to mention what is perhaps the clearest floor statement of intent to incorporate the Second Amendment. Introducing the Fourteenth Amendment in the Senate, Jacob Howard began: “The first section of the amendment . . . relates to the privileges and immunities of citizens of the several States, and to the rights and privileges of all persons, whether citizens or others, under the laws of the United States.”<sup>28</sup> Explaining the actual text’s reference to “citizens of the United States,” Howard noted that the original Constitution sought to “put the citizens of the several States on an equality with each other as to all fundamental rights.” This was done via Article IV, which provided that “the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the

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25. *Griswold v. Connecticut*, 381 U.S. 479, 484 n.\* (1965) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). See *Washington v. Glucksberg*, 521 U.S. 702, 714 (1997) (“The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable.” (citation and internal quotation marks omitted)).

26. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2811 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866)) (ellipses in original).

27. *Id.* (citing CONG. GLOBE, 39th Cong., 1st Sess. 1073 (1866)).

28. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). He then read the clause, which referred to privileges or immunities of “citizens of the United States,” not of the “several States.” *Id.* It may be that he equated those terms.

several States.”<sup>29</sup>

Howard then distinguished the Article IV “privileges and immunities” from “the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; . . . the right to keep and bear arms.”<sup>30</sup> Aside from those rights, Howard mentioned the provisions on assembly and petition, non-quartering of soldiers, unreasonable search and seizure, the right of an accused person to be informed of the accusation and to be tried by jury, excessive bail, and cruel and unusual punishment.<sup>31</sup> He did not mention the requirements of indictment by grand jury or of civil jury trials where the amount at issue is over \$20—two provisions the Supreme Court has not incorporated.<sup>32</sup>

This “mass of privileges, immunities, and rights”—some secured by Article IV and others by the first eight amendments—did not restrain the States.<sup>33</sup> Howard averred 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.”<sup>34</sup> Of the Bill of Rights freedoms, it was clear that “these great fundamental guarantees” included the

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29. *Id.*

30. *Id.*

31. Howard stated in full:

Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

*Id.*

32. *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972) (discussing grand jury); *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) (discussing civil jury).

33. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

34. *Id.* at 2766.

rights he had explicitly mentioned; it is not clear, however, that he meant by that term every *procedure* (such as indictment and civil juries). It would thus be a mistake to characterize Howard as being a proponent of total incorporation of each and every provision of the Bill of Rights.

This point is reinforced by Howard's further reference to "those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism."<sup>35</sup> Rights related to speech and arms were indeed prohibited by the slave codes,<sup>36</sup> and despotisms historically prohibited commoners from arms possession.<sup>37</sup> But societies without grand juries and civil juries have never been considered as thereby being slave societies or despotisms.

Howard seems to have been referring to both the Privileges or Immunities and the Due Process Clauses when he further remarked: "It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction."<sup>38</sup> He then referred to the Equal Protection Clause as protecting "the same rights and the same protections before the law" for all.<sup>39</sup> Howard's words were reprinted on the front page of the *New York Times* and other leading newspapers.<sup>40</sup> The Supreme Court has repeatedly cited this speech as authority for the meaning

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35. *Id.*

36. *E.g.*, *Scott v. Sanford*, 60 U.S. (19 How.) 393, 417 (1857).

37. Madison referred to "the advantage of being armed, which the Americans possess over the people of almost every other nation," and in contrast: "Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms." THE FEDERALIST No. 46 (James Madison), *reprinted in* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, VOLUME XV 492-93 (John P. Kaminski & Gaspare J. Saladino eds., Madison: State Historical Society of Wisconsin, 1984) (1787-88). A popular school textbook commented: "Some tyrannical governments resort to disarming the people, and making it *an offence* to keep arms . . . . In all countries where despots rule with standing armies, the people are not allowed to keep guns and other warlike weapons." JOSEPH BARTLETT BURLEIGH, THE AMERICAN MANUAL 212 (Grigg, Elliot & Co. 1854).

38. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

39. *Id.*

40. HALBROOK, FREEDMEN, *supra* note 1, at 36.

of the Fourteenth Amendment guarantees.<sup>41</sup>

In the ensuing debates, no one—not even opponents of the Amendment—questioned Howard’s premise that the Amendment made the Bill of Rights guarantees he mentioned applicable to the states.<sup>42</sup> Senator Thomas A. Hendricks (D-Ind.) objected that “the rights and immunities of citizenship” were not “very accurately define[d].”<sup>43</sup> Yet such terms seemed clear enough when he objected to the Freedmen’s Bureau Bill because it might apply in his state: “We do not allow to colored people there [sic] many civil rights and immunities which are enjoyed by the white people.”<sup>44</sup> As he well knew, one such right was the right of the people “to bear arms for the defense of themselves and the State.”<sup>45</sup>

Similarly, Senator Reverdy Johnson (D-Md.) objected to the Privileges or Immunities Clause, noting that, “I do not understand what will be the effect of that.”<sup>46</sup> He made no such comment about the Due Process Clause. Moreover, at that point, Senator Howard had proposed what became the Citizenship Clause of the Fourteenth Amendment,<sup>47</sup> which was designed to overrule the *Dred Scott* decision.<sup>48</sup> As counsel for the slave owner in *Dred Scott*, Johnson was well aware of the Court’s holding that “the people” and “the citizens” were synonymous terms that excluded African-Americans.<sup>49</sup> If they were citizens, African-Americans would be exempt from the special “police regulations” applicable to them: “It would give to persons of the negro race . . . the full liberty of speech . . . ; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.”<sup>50</sup>

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41. See *infra* notes 65 and 66 and accompanying text.

42. See *Katzenbach v. Morgan*, 384 U.S. 641, 648 n.8 (1966) (noting that Howard’s explanation of the Enforcement Clause “was not questioned by anyone in the course of the debate”).

43. CONG. GLOBE, 39th Cong., 1st Sess. 3039 (1866).

44. *Id.* at 318 (1866).

45. IND. CONST. art. I, § 32. Hendricks had participated in debate over this very provision at the constitutional convention that approved the Indiana Constitution. JOURNAL OF THE CONVENTION OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION 574 (Austin H. Brown ed. 1851). See also *State v. Mitchell*, 3 Blackf. 229 (1832) (holding that the right protected the open carrying of firearms).

46. CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866).

47. *Id.* at 2890 (1866).

48. *Id.* at 3031 (1866) (explanation by Sen. John B. Henderson).

49. See *Scott v. Sanford*, 60 U.S. (19 How.) 393, 404 (1857).

50. *Id.* at 417.

While the *Heller* Court did not mention Senator Howard's contributions to the debate, it is likely that the Court will do so when it decides in *McDonald v. City of Chicago* whether the Second Amendment is incorporated into the Fourteenth.<sup>51</sup> A careful reading of Howard's speech does not necessarily support an understanding that the entire Bill of Rights would be incorporated or that the Privileges or Immunities Clause makes substantive Bill of Rights guarantees applicable to the States. He referred to "great fundamental guarantees" and mentioned selective Bill of Rights freedoms, not including some of the procedural provisions that do not necessarily guarantee fundamental rights. He discussed "rights," not just "privileges and immunities" guaranteed to "the people"; not just "citizens," which suggests incorporation under the Due Process Clause; and not the Privileges or Immunities Clause. The clause "nor shall any State deprive any person of life, liberty, or property, without due process of law" embodies the premise that life, liberty, and property are "rights," and that the people, not just citizens, hold them.<sup>52</sup> There is thus a textual basis for incorporation under the Due Process Clause, because a "right of the people" may be said to be not synonymous with a "privilege or immunity of the citizen."

#### IV. THE CIVIL RIGHTS ACT OF 1871

The *Heller* majority made note of discussion surrounding the passage of the Civil Rights Act of 1871,<sup>53</sup> quoting from Representative Benjamin Butler's explanation of his expansive version of the draft bill:

Section eight is intended to enforce the well-known constitutional provision guaranteeing the right of the citizen to "keep and bear arms," and provides that whoever shall take away, by force or violence, or by

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51. *Nat'l Rifle Ass'n v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009), *cert. granted sub nom.*, *McDonald v. Chicago*, 130 S. Ct. 48 (2009).

52. *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, VOL. II 59 (S. Converse 1828) ("RIGHT . . . All men have a *right* to the secure enjoyment of life, personal safety, liberty and property.").

53. Civil Rights Act of 1871, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (2006)).

threats and intimidation, the arms and weapons which any person may have for his defense, shall be deemed guilty of larceny of the same.<sup>54</sup>

This statement reflects a belief that the Second Amendment recognizes an individual right, but the Fourteenth Amendment only prohibits deprivation of rights by the States and not by private persons, and thus this provision was stripped out of the civil rights bill.

Had incorporation been the issue, the *Heller* Court would have found the words of Representative John Bingham—author of the Fourteenth Amendment—pertinent. The Supreme Court quoted Bingham as intending to nullify *Barron v. Baltimore* (1833),<sup>55</sup> which held the Bill of Rights inapplicable to the states.<sup>56</sup> In the same speech that the Court quoted, Bingham characterized “the right of the people to keep and bear arms” as one of the “limitations upon the power of the States . . . made so by the Fourteenth Amendment.”<sup>57</sup>

In *Patsy v. Board of Regents*, the Court quoted Representative Henry L. Dawes on the Fourteenth Amendment’s protection of “these rights, privileges, and immunities,”<sup>58</sup> which Dawes more specifically identified as follows:

He has secured to him the right to keep and bear arms in his defense. . . . It is all these, Mr. Speaker, which are comprehended in the words, “American citizen,” and it is to protect and to secure him in these rights, privileges and immunities this bill is before the House.<sup>59</sup>

*Patsy* also cited Representative Washington Whitthorne as an opponent who recognized the bill’s broad purposes. On the page of the *Globe* cited by the Court, Whitthorne stated that

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54. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2810–11 (2008) (citing H.R. REP. NO. 41-37, at 7–8 (1871)).

55. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

56. *Monell v. Dep’t of Soc. Services*, 436 U.S. 658, 686–87 (1978).

57. CONG. GLOBE, 42nd Cong., 1st Sess. 84 (1871).

58. *Patsy v. Board of Regents*, 457 U.S. 496, 503 (1982). *Patsy* further relied on the speeches of Rep. Butler, Rep. John Coburn, and Senator Allen Thurman. *Id.* at 504–06. In related statements each of them regarded the right to arms to be among the “rights, immunities, and privileges” guaranteed in the Constitution. H.R. Rep. No. 41-37, at 3 (3d Sess. 1871) (Rep. Butler); CONG. GLOBE, 42d Cong., 1st Sess. 459 (1871) (Rep. Coburn); CONG. GLOBE, 42d Cong., 2d Sess. 25-26 (1872) (Sen. Thurman).

59. CONG. GLOBE, 42nd Cong., 1st Sess. 475–76 (1871).

under the civil rights bill, if a police officer seized a pistol from a “drunken negro”—a racist slur intended to prevent blacks from vindicating their rights—then “the officer may be sued, because the right to bear arms is secured by the Constitution.”<sup>60</sup> This observation thus anticipated actions against police for violation of the right to bear arms under the Civil Rights Act of 1871, codified today as 42 U.S.C. § 1983.<sup>61</sup>

The *Heller* majority concluded that it “was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense.”<sup>62</sup> While the Court only scratched the surface, almost countless further sources support this conclusion.

#### V. JUSTICE STEVENS’ DISSENT: WAS THE CONCERN THAT BLACKS WERE DISARMED ONLY BY REASON OF MILITIA MEMBERSHIP?

In his dissenting opinion, Justice Stevens conceded that some of the legislative history of the post-Civil War period supports the understanding of the Second Amendment as securing a right to firearm ownership “for purely private purposes like personal self-defense.”<sup>63</sup> He mentioned, however, that the legislative statements were made long after the Amendment’s framing and thus shed no “insight into the intent of the Framers”;<sup>64</sup> query what he will say about the Fourteenth Amendment’s Framers when the Court considers whether that Fourteenth Amendment incorporates the Second. Stevens further averred that the statements “were made during pitched political debates, so that they are better characterized as advocacy than good-faith attempts at constitutional interpretation.”<sup>65</sup>

But in other cases, the Court—including Justice Stevens—has routinely relied on the same debates to explain the reach of the Fourteenth Amendment. Senator Howard’s

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60. *Patsy*, 457 U.S. at 504 n.6; CONG. GLOBE, 42d Cong., 1st Sess. 337 (1871).

61. Civil Rights Act of 1871, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (2006)).

62. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2811 (2008).

63. *Id.* at 2841 (Stevens, J., dissenting).

64. *Id.*

65. *Id.*

speech introducing the Amendment is a prime example. Writing for the Court in *Jones v. Helms*, Justice Stevens favorably quoted from the same page of the *Globe* where Howard stated that the personal right to keep and bear arms would be protected from State action.<sup>66</sup> Other precedents also rely on Howard's speech.<sup>67</sup>

Justice Stevens took issue with the majority's suggestion that the disarming of the freedmen was perceived as infringing on their constitutional right to keep and bear arms. Justice Scalia said "the claim was not that blacks were being prohibited from carrying arms in an organized state militia,"<sup>68</sup> but Stevens responded that "some of the claims of the sort the Court cites may have been just that."<sup>69</sup> Stevens further explained that Republican governments in the South created what came to be known as "negro militias," the arming of which led to resistance and Klan terror,<sup>70</sup> where "[l]eading members of the Negro militia were beaten or lynched and their weapons stolen."<sup>71</sup> The statement's source, however, was dated 1872, and as the following explains, such events took place in a later period of Reconstruction than the debates of 1866, which Justice Scalia quoted.<sup>72</sup>

When the war ended in 1865, the southern states passed the Black Codes, which disarmed African-Americans and were enforced by local authorities and state militias.<sup>73</sup> This was viewed as a violation of the rights of individual freedmen to keep and bear arms.<sup>74</sup> Justice Stevens does not mention the Black Codes at all. Yet it could hardly be argued that

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66. *Jones v. Helms*, 452 U.S. 412, 424 n.23 (1981) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866)). Justice Stevens also joined the majority in *Plyler v. Doe*, 457 U.S. 202, 214–15 (1982) (stating that Howard was "explicit about the broad objectives of the Amendment").

67. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533, 600 (1964) (quoting Howard on "those fundamental rights lying at the basis of all society"); *Katzenbach v. Morgan*, 384 U.S. 641, 648 n.8 (1966) (stating that Howard's explanation of the Enforcement Clause "was not questioned by anyone in the course of the debate").

68. *Heller*, 128 S. Ct. at 2810.

69. *Id.* at 2841 (Stevens, J. dissenting).

70. *Id.*

71. *Id.* (quoting SAUL CORNELL, *A WELL-REGULATED MILITIA* 176–177 (Oxford University Press 2006)).

72. CORNELL, *supra* note 72, at 177, 254 n.16–17 (citing generally H.R. REP. NO. 42-22 (1872)). *See also* HALBROOK, *FREEDMEN*, *supra* note 1, at 137.

73. *See, e.g.*, HALBROOK, *FREEDMEN*, *supra* note 1, at 1–5.

74. *Id.* at 6–11.

those who favored rights for the freedmen objected only to the application of such laws to the extent they disarmed blacks by reason of militia membership, and did not object to the disarming of blacks who kept firearms for self defense, hunting, or shooting crows.

In 1866, Congress responded by enacting the Civil Rights and Freedmen's Bureau Acts and proposing the Fourteenth Amendment. In 1867, when Senator Wilson could still say that the militia organizations "go up and down the country taking arms away from men who own arms, and committing outrages of various kinds,"<sup>75</sup> he succeeded in having his bill passed to "disband" the southern state militias. Yet he did so only after removing the term "disarm" from the text, based on Senator Waitman Willey's objection against "disarming the whole people of the South."<sup>76</sup>

It was only after Republicans gained control over the Southern governments that the State power to maintain militias was restored in 1869–70.<sup>77</sup> This led to the creation of the "Negro militias," which were confronted by armed white groups.<sup>78</sup> Justice Stevens is incorrect in suggesting that the complaints about disarming the freedmen in 1866 actually concerned the disarming of black militias that were organized three or four years later.

#### VI. WAS MILITIA MEMBERSHIP THE BASIS OF PROSECUTIONS UNDER THE ENFORCEMENT ACT OF 1870?

Justice Stevens' opinion recounts the 1871 murder of black militia captain Jim Williams by Klansmen in South Carolina.<sup>79</sup> It concludes that "[i]n light of this evidence, it is quite possible that at least some of the statements on which the Court relies actually did mean to refer to the disarmament of black militia members."<sup>80</sup>

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75. CONG. GLOBE, 39th Cong., 2d Sess. 1849 (1867).

76. *Id.*; 14 Stat. 487 (1867); see HALBROOK, FREEDMEN, *supra* note 1, at 68–69.

77. 15 Stat. 266, 337 (1869); see HALBROOK, FREEDMEN, *supra* note 1, at 113–15.

78. OTIS A. SINGLETARY, NEGRO MILITIA AND RECONSTRUCTION 8–15 (University of Texas Press 1957).

79. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2842 (Stevens, J., dissenting) (citing Louis F. Post, A "Carpetbagger" in South Carolina, 10 J. NEGRO HIST.10 (1925)).

80. *Id.*

Actually, both Justice Scalia and Justice Stevens are correct in a sense. The white supremacists—whether acting as state governments or, later, as private armed organizations such as the Klan—sought to disarm *all* African-Americans,<sup>81</sup> especially those suspected of voting the Radical Republican ticket.<sup>82</sup> It did not matter whether the freedman kept a pistol in his cabin for self-defense, was out hunting with a shotgun, or had a musket for use in a militia;<sup>83</sup> confiscation of firearms in any of those scenarios was perceived as a violation of Second Amendment rights.<sup>84</sup>

What Justice Stevens considers “quite possible” simply did not occur. On the night they killed Williams, Klansmen raided the houses of numerous blacks, seized their firearms, and sought to intimidate them into not voting Republican.<sup>85</sup> Indictments brought in *United States v. Avery* and other cases alleged violation of the rights of citizens to keep and bear arms and to vote.<sup>86</sup> It was never suggested that Williams and the other victims had Second Amendment rights only because

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81. For instance, a House of Representatives Report explained about a predecessor bill which would be partly enacted as the Civil Rights Act of 1871:

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

H.R. REP. NO 41-37, at 7-8 (1871).

82. See, e.g., PROCEEDINGS IN THE KU KLUX TRIALS AT COLUMBIA, S.C. IN THE UNITED STATES CIRCUIT COURT 233–34, 242 (Republican Printing Co. 1872) [hereinafter PROCEEDINGS IN THE KU KLUX TRIALS].

83. See, e.g., *Mississippi, The Attitude of the State and the Explanation—The Civil Rights Bill Declared Unconstitutional by a State Court*, N.Y. TIMES, Oct. 26, 1866, at 2, col. 3 (reporting a conviction of an African-American who was engaged in hunting, for possessing a firearm).

84. See generally HALBROOK, FREEDMEN, *supra* note 1, chs. 1, 2, 5, & 6.

85. See, e.g., PROCEEDINGS IN THE KU KLUX TRIALS, *supra* note 83, at 206, 222–23, 233–37, & 242.

86. *United States v. Avery*, 80 U.S. (13 Wall.) 251 (1872); PROCEEDINGS IN THE KU KLUX TRIALS, *supra* note 83, at 142–43.

they were militiamen. The court did not allow the Second Amendment counts to go to trial because no state action was involved.<sup>87</sup>

During this period, the United States brought indictments against private parties alleging violations of First, Second, and Fourth Amendment rights under the 1870 Enforcement Act.<sup>88</sup> The indictments typically involved Klan attacks on freedmen who exercised their rights to assemble and to keep and bear arms, and who were subjected to unlawful searches and seizures.<sup>89</sup>

In one such case, Circuit Judge William Woods found Bill of Rights guarantees to be “secured” by the Constitution because: “They are expressly recognized, and both congress and the states are forbidden to abridge them. Before the fourteenth amendment, congress could not impair them, but the states might. Since the fourteenth amendment, . . . the states are positively inhibited from impairing or abridging them . . . .”<sup>90</sup>

In a trial involving alleged violation of free speech and assembly, where both antagonists were bearing arms and a riot ensued, Judge Woods charged the jury:

[I]t is the right of an American citizen, whether he be black or white, to bear arms, provided he does so for his defense or for no unlawful purpose, and in a manner not forbidden by law. . . . But if a man carries his weapon in full view, whether gun or pistol, and does so with unlawful [sic] purpose, his right to do so is as clear as his right to carry a watch or wear a chain.<sup>91</sup>

These trials were soon nipped in the bud by a Supreme Court decision that, as no State action was involved, rights protected by the Fourteenth Amendment were inapplicable.

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87. See HALBROOK, FREEDMEN, *supra* note 1, at 141–45 (describing the prosecutions for the Williams murder and related Klan attacks).

88. 16 Stat. 140 (1870) (protecting rights “granted or secured” by the Constitution).

89. See HALBROOK, FREEDMEN, *supra* note 1, chs. 6–7.

90. *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,202). When later appointed to the Supreme Court, Justice Woods authored *Presser v. Illinois*, 116 U.S. 252 (1886).

91. *Important Trial, The Enforcement Act, Charge of Judge Woods, LOUISIANIAN*, Mar. 28, 1872 (stating jury instructions for the 1872 case *United States v. Jolly*).

VII. THE *CRUIKSHANK* PROSECUTION: “BEARING ARMS FOR A  
LAWFUL PURPOSE”

The indictment in *United States v. Cruikshank* alleged a conspiracy under the Enforcement Act and identified the victims as Levi Nelson and Alexander Tillman, two freedmen who were disarmed and shot.<sup>92</sup> Nelson survived but Tillman did not. The first two counts were as follows:

The *first* count was for banding together, with intent “unlawfully and feloniously to injure, oppress, threaten, and intimidate” two citizens of the United States, “of African descent and persons of color,” “with the unlawful and felonious intent thereby” them “to hinder and prevent in their respective free exercise and enjoyment of their lawful right and privilege to peaceably assemble together with each other and with other citizens of the said United States for a peaceable and lawful purpose.”

The *second* avers an intent to hinder and prevent the exercise by the same persons of the “right to keep and bear arms for a lawful purpose.”<sup>93</sup>

Judge Woods, together with a second judge, tried the *Cruikshank* case. Similar to the case above, he issued the following charge to the jury:

The right to bear arms is also a right secured by the constitution and laws of the United States. Every citizen of the United States has the right to bear arms, provided it is done for a lawful purpose and in a lawful manner. A man who carries his arms openly, and for his own protection, or for any other lawful purpose, has as clear a right to do so as to carry his own watch or wear his own hat.<sup>94</sup>

The jury could not reach a verdict,<sup>95</sup> and a retrial was presided over by Judge Woods and by U.S. Supreme Court Justice J.S. Bradley.<sup>96</sup> The defendants were convicted, but Justice Bradley granted a motion to arrest judgment in part

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92. *United States v. Cruikshank*, 92 U.S. 542, 544–45, 548 (1876).

93. *Id.* at 544–45.

94. *The Grant Parish Prisoners*, NEW ORLEANS REPUBLICAN, Mar. 14, 1874, at 1. An almost identical instruction was given when the case was retried. THE DAILY PICAYUNE (New Orleans), June 9, 1874, at 2.

95. *The Grant Parish Prisoners*, NEW ORLEANS REPUBLICAN, Mar. 14, 1874, at 1.

96. *The Grant Parish Case*, THE DAILY PICAYUNE, May 19, 1874, at 1, 4.

because, as he said from the bench: “The United States courts have no jurisdiction over a violation by an individual of the right of another to bear arms.”<sup>97</sup> In a formal opinion, he explained why the First and Second Amendment counts were defective:

The 14th amendment declares that no state shall by law abridge the privileges or immunities of citizens of the United States. Grant that this prohibition now prevents the states from interfering with the right to assemble, as being one of such privileges and immunities, still, does it give congress power to legislate over the subject? . . . If the amendment is not violated, it has no power over the subject.

The second count, which is for conspiracy to interfere with certain citizens in their right to bear arms, is open to the same criticism as the first. . . .

. . . In none of these counts is there any averment that the state had, by its laws interfered with any of the rights referred to . . . .<sup>98</sup>

Judge Woods disagreed, and their certificate of division sent the case to the Supreme Court.<sup>99</sup> The Brief for the United States contained no argument on the First and Second Amendments, only one superficial reference to the Fourteenth Amendment, and no discussion of the state-action requirement.<sup>100</sup>

In *Cruikshank* the Court opined that the First and Second Amendments only applied to the federal government, but no state action was involved in the case and incorporation was not mentioned.<sup>101</sup> The Court stated that both rights predated the Constitution: “The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. . . . It was not,

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97. *The Grant Parish Case*, NEW ORLEANS REPUBLICAN, June 28, 1874, at 1.

98. *United States v. Cruikshank*, 25 F. Cas. 707, 714–15 (C.C.D. La. 1874).

99. *United States v. Cruikshank*, 92 U.S. 542, 546 (1876).

100. Brief for the United States at 2, 6, *Cruikshank*, 92 U.S. 542. This default was somewhat similar to, but not quite as egregious as, *United States v. Miller*, 307 U.S. 174 (1939), in which, “[t]he respondent made no appearance in the case, neither filing a brief nor appearing at oral argument; the Court heard from no one but the Government (reason enough, one would think, not to make that case the beginning and the end of this Court’s consideration of the Second Amendment).” *District of Columbia v. Heller*, 128 S. Ct. 2783, 2814 (2008).

101. *Cruikshank*, 92 U.S. 542.

therefore, a right granted to the people by the Constitution.”<sup>102</sup> Similarly, the Court noted of the right of “bearing arms for a lawful purpose”: “This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.” It left “the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes” to the States.<sup>103</sup> No violation by the States or localities was involved in the case.

The *Heller* majority made two references to *Cruikshank*. First, it repeated the above quotation about the right not being “granted” by the Constitution to support the claim that “[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it ‘shall not be infringed.’”<sup>104</sup> It then wrote, contrary to Justice Stevens’ assertion, that “there was no pre-existing right in English law ‘to use weapons for certain military purposes’ or to use arms in an organized militia.”<sup>105</sup>

Second, *Heller* discusses *Cruikshank* as (among other precedents) not foreclosing its conclusions about the Second Amendment’s meaning. The *Heller* Court wrote that *Cruikshank* vacated “the convictions of members of a white mob for depriving blacks of their right to keep and bear arms,” and “held that the Second Amendment does not by its own force apply to anyone other than the Federal Government.”<sup>106</sup> This is not entirely accurate; the only issue in *Cruikshank* that was pertinent in *Heller* was whether private actors—the only ones involved in the case—could violate the Amendment. What a court says about matters not before it is dictum. To be sure, the dictum was weighty: “The second amendment . . . means no more than that it shall not be infringed by Congress.”<sup>107</sup>

The *Heller* majority continued: “States, we said, were free to restrict or protect the right under their police powers.”<sup>108</sup> Actually, *Cruikshank* said nothing about States restricting

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102. *Id.* at 551–52.

103. *Id.* at 553.

104. *Heller*, 128 S. Ct. at 2797.

105. *Id.* at 2798 n.16.

106. *Id.* at 2812.

107. *Id.* at 2813 (quoting *Cruikshank*, 92 U.S. at 553).

108. *Id.*

the right, it only said—as *Heller* acknowledges—that “the people [must] look for their protection against any violation by their fellow-citizens of the rights it recognizes’ to the States’ police power.”<sup>109</sup> In other words, people who stole or seized firearms would be prosecuted by local authorities for larceny. At any rate, the *Heller* majority remarked, “[t]hat discussion makes little sense if it is only a right to bear arms in a state militia.”<sup>110</sup>

The *Heller* Court went on to write that *Cruikshank*, supports “the individual-rights interpretation.”<sup>111</sup> There was no claim in *Cruikshank* that the victims had been deprived of their right to carry arms in a militia; indeed, the Governor had disbanded the local militia unit the year before the mob’s attack . . . .<sup>112</sup> Additionally, while not mentioned in *Heller*, the various indictments against white supremacists for violating the right of freedmen to possess arms did not mention the “militia,” and this term does not appear anywhere in *Cruikshank*.

Justice Stevens disputed this notion. He said “it is entirely possible” that the basis for the Second Amendment counts in the *Cruikshank* indictment:

[W]as the prosecutor’s belief that the victims—members of a group of citizens, mostly black but also white, who were rounded up by the Sheriff, sworn in as a posse to defend the local courthouse, and attacked by a white mob—bore sufficient resemblance to members of a state militia that they were brought within the reach of the Second Amendment.<sup>113</sup>

Yet the prosecutor, U.S. Attorney G.R. Beckwith, never expressed any such belief. He indicted the defendants for conspiracy to prevent two freedmen from exercising the “right to keep and bear arms for a lawful purpose,”<sup>114</sup> not specifically for a militia purpose. Indeed, nothing in the case suggests any such theory, which is absent from the testimony,

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109. *Id.* (quoting *Cruikshank*, 92 U.S. at 553).

110. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 (2008).

111. *Id.*

112. *Id.* (citing CHARLES LANE, *THE DAY FREEDOM DIED* 62 (Henry Holt & Co. 2008)). See also LEEANNA KEITH, *THE COLFAX MASSACRE* (Oxford University Press 2008) (describing the incident).

113. *Id.* at 2843 (Stevens, J., dissenting) (citing generally LANE, *supra* note 113).

114. *Cruikshank*, 92 U.S. at 544–45.

arguments of counsel, jury instructions, or rulings by the trial court and the Supreme Court.<sup>115</sup>

Justice Stevens went on to denounce what the prosecutor had in mind, based on what was expressed in the indictment. *Cruikshank* “explained that the defective *indictment* contained such language [‘bearing arms for a lawful purpose’], but the Court did not itself describe the right, or endorse the indictment’s description of the right.”<sup>116</sup> In response, Justice Scalia wrote: “But, in explicit reference to the right described in the indictment, the Court stated that ‘[t]he second amendment declares that it [i.e., the right of bearing arms for a lawful purpose] shall not be infringed.’”<sup>117</sup>

Justice Stevens concluded his discussion with a reference to “*Cruikshank*’s holding that the Second Amendment posed no obstacle to regulation by state governments.”<sup>118</sup> Aside from the fact that *Cruikshank* did not involve regulation by a state government, that may be wishful thinking based on the majority’s final word on the subject: “With respect to *Cruikshank*’s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases.”<sup>119</sup>

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115. See HALBROOK, FREEDMEN, *supra* note 1, at 159–82.

116. *Heller*, 128 S. Ct. at 2843 (Stevens, J., dissenting) (brackets in original).

117. *Id.* at 2813 n.22 (brackets in original) (quoting *Cruikshank*, 92 U.S. at 553).

118. *Id.* at 2843 (Stevens, J., dissenting).

119. *Id.* at 2813 n.23. The Court added, “[o]ur later decisions in *Presser v. Illinois* and *Miller v. Texas*, reaffirmed that the Second Amendment applies only to the Federal Government.” *Id.* (citations omitted). *Presser* held that a state ban on armed parades in cities did not violate the Second Amendment, but made no mention of the applicability of the Fourteenth Amendment. *Presser v. Illinois*, 116 U.S. 252, 264–66 (1886). *Miller* held that the Second and Fourth Amendments did not apply directly to the states, and refused to consider whether they so applied through the Privileges or Immunities Clause of the Fourteenth Amendment, as the issue had not been raised at trial. *Miller v. Texas*, 153 U.S. 535, 537–39 (1894). For an analysis of these cases, see generally, Stephen P. Halbrook, *The Rights of Workers to Assemble and to Bear Arms: Presser v. Illinois, One of the Last Holdouts Against Application of the Bill of Rights to the States*, 76 U. DET. MERCY L. REV. 943 (1999); Cynthia Leonardatos, David B. Kopel, & Stephen P. Halbrook, *Miller versus Texas: Police Violence Race Relations, Capital Punishment, and Gun-toting*, 9 J. L. & POL’Y 737 (2001).

## VIII. CONCLUSION

The stage is set for the Court to resolve in 2010 whether the Second Amendment is incorporated into the Fourteenth Amendment, either through its Due Process Clause or Privileges or Immunities Clause, so as to protect from State infringement the right of the people to keep and bear arms. The common understanding during Reconstruction was that the Fourteenth Amendment did protect the right from violation by the States.