"NEVER INTENDED TO BE APPLIED TO THE WHITE POPULATION": FIREARMS REGULATION AND RACIAL DISPARITY--THE REDEEMED SOUTH'S LEGACY TO A NATIONAL JURISPRUDENCE? [*]

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> I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. . . . [T]he Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population. . . . [I]t is a safe guess to assume that more than 80% of the white men living in the rural sections of Florida have violated this statute. . . . [T]here has never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested. [1]

Introduction

This Paper is part of our ongoing effort [2] to explore the connections between racial conflict [3] in American history and the evolution of the notion of the right to bear arms in American constitutionalism. [4]Although there has been a growing awareness on the part of historians and legal scholars of the connection between the attempt of Southern states to restrict the right to bear arms on the part of newly emancipated blacks immediately after the Civil War and the

enactment of the Fourteenth Amendment and contemporaneous civil rights legislation, [5] the study of the connection between racial conflict and the jurisprudence of the right to bear arms has hardly begun.

This Paper hopes to begin that inquiry. It asks questions about the South during the eras of Reconstruction and Redemption. To what extent did the white South, which had historically attempted to prevent blacks from having access to firearms, [6] try to restrict black access to arms after the enactment of the Fourteenth Amendment? [7]Were various statutes in Southern states restricting either the carrying of concealed pistols or prohibiting the sale of certain types of firearms [8] enacted with racial motives in mind? And if the motives behind these statutes were racial, which of several possible racial motives played the predominate role in influencing this type of legislation? Were legislators primarily concerned with maintaining traditional patterns of racial control? Did they see provisions that would disarm blacks as measures that would deprive blacks of the means of resisting the extra-legal violence that played such a crucial role in Southern Redemption, the re-establishment of white rule in the South at the turn of the century? [9] Or were measures that would work to disarm blacks enacted in response to the growing stereotype of the Negro as brute, which began to expand in the white South's consciousness in the years when Jim Crow was being implemented? [10] To what extent were Southern firearm restrictions, like restrictions that were developing in other parts of the nation, [11] a response to the view that new dangerous classes were beginning to emerge--classes that posed a danger not only to the better elements of society, but indeed classes whose members needed to be protected from the more vicious in their ranks?

If the motive behind restrictive firearms legislation raises interesting questions, the questions of enforcement and the judicial response to such legislation raise even more questions. If, as Judge Buford's concurrence indicated, these measures were enforced and only deemed acceptable with a significant amount of racial discrimination, [12] the story of the judicial treatment of these measures provides another chapter in the history of the evisceration of the notion of equal protection in American constitutionalism during the Jim Crow era. [13] It also provides an important chapter in the development of the jurisprudence of the right to keep and bear arms.

This Paper explores some of the questions raised by restrictive firearms legislation and the response of state judiciaries to that legislation. It is especially concerned with whether the experience of trying to fashion judicial doctrine that would sustain such legislation helped to alter constitutional notions concerning the right to bear arms. Our research in this area is still in the preliminary stages. For the most part, our conclusions are not definitive. Instead we intend to outline what our findings suggest at this point in our research as an indication of future directions that our research and, we hope, the research of others might take in this area.

That having been said, this Paper is divided into four parts. The first discusses the importance and prevalence of arms in Southern history and how that importance early on was recognized in state court jurisprudence in the region. The second part examines the enactment of state statutes regulating the carrying and purchase of firearms during and after Reconstruction and examines possible discriminatory motivations behind their passage. The third section examines judicial efforts to reconcile the new postbellum restrictions on the right to bear arms with the South's robust cultural and legal tradition supporting that right. The Paper's concluding section discusses

the difficulty of separating diverse racial and other motives behind the enactment of the statutes under consideration, the judicial response to such statutes, and the adoption of Southern precedents in this area in other jurisdictions.

I. Arms, Rights, and Race in Early Southern Law and Culture

A. A Neglected Jurisprudence

The right to keep and bear arms presents something of a paradox in American law. The ownership, and to a lesser extent the carrying, of firearms are indisputably a part of American culture. In this, the last decade of the twentieth century, the United States is one of a handful of modern, industrialized, western nations where firearms ownership is common--roughly fifty percent of American homes are reported to contain at least one firearm. [14] There are also an estimated 20,000 federal, state, and local statutes and ordinances regulating the ownership, possession, carrying, and use of firearms. [15] Finally, there is the Second Amendment to the Constitution and some forty-three analogous state provisions. [16]

Despite the prevalence of firearms and legislation directed at regulating firearms, the jurisprudence of the Second Amendment remains amazingly thin. The Supreme Court has pronounced directly on the subject in only three cases, the last occasion over fifty years ago. [17] Second Amendment claims have received rather cursory dismissal in lower federal courts in recent decades, [18] reflecting a combination of judicial hostility [19] and the predominance of Second Amendment claims made by those involved in criminal activity. [20] The Second Amendment has, in recent decades, attracted so little in the way of serious judicial or academic commentary that it has caused one federal appellate judge to call it "the orphan of the bill of rights." [21] Indeed, one leading constitutional scholar has called his discussion of the constitutional provision, "the Embarrassing Second Amendment." [22]

If there is little in the way of serious federal jurisprudence concerning the right to arms, the situation with respect to state court jurisprudence has been quite the reverse. From the early years of the nineteenth century until the present, state courts have had to wrestle with the complexities of reconciling a right with obvious dangers and perceived needs for regulation in the interest of public safety. State supreme courts have dealt with such issues as what kind of weapons were protected, [23] whether or not the right extended to the carrying of concealed weapons, [24] and whether or not the right to arms could be denied to aliens [25] or to those with previous criminal convictions. [26] The states have developed a widely contrasting jurisprudence. The Supreme Judicial Court of Massachusetts has held that the state's right to keep and bear arms provision [27] was meant to apply only to the state's militia, in effect nullifying any potential that provision was meant to have to safeguard an individual right to arms. In 1980 the Oregon Supreme Court interpreted that state's provision [28] as safeguarding virtually every type of weapon not outlawed by federal statute. [29] The jurisprudence of most state courts has tended to fall between these two poles. [30]

B. Antebellum Constitutional and Statutory Enactments

As they entered the period of Reconstruction, it was clear that, like their Northern sisters, the Southern states had long recognized the right, even the duty, to keep and carry arms. This right and duty were occasioned in part by the utility of arms in providing for the common defense against threats both from without and within. In the antebellum period, the threat from without was shared by Northern and Southern states, for both were threatened by the existence and possible responses of the Native American population and by foreign powers with designs on and, indeed, footholds in North America. [31] The threat from within, however, was not shared, for the South's large population of slaves constituted a potential danger to the free white population, a danger that had to be controlled. [32] Thus, the Southern states had long experimented with measures designed to disarm their black population, both slave and free. [33] For these states, firearms regulation was not tabula rasa and gun control would be an active consideration.

If the Southern states actively undertook firearms regulation before the Civil War, such legislation was not authorized explicitly by state constitutions. By negative inference, legislatures in Virginia, Delaware, Maryland, Georgia, and Louisiana had constitutional power in this area, for the antebellum constitutions of none of these states explicitly recognized a right to keep and bear arms. [34] Yet even the earliest constitutions of each of these states recognized the existence and importance of the militia in the scheme of constitutional liberty. Such recognition by implication spoke to and perhaps recognized a right to arms. A "well-regulated militia," stated the Virginia Bill of Rights, would be "composed of the body of the people, trained to arms." [35] The Delaware constitution made no such declaration, but recognized the militia's existence in authorizing its officers to hold seats in the legislature if elected [36] and recognized the militia's importance by forbidding standing armies "without the consent of the legislature." [37] Like the Virginia constitution, the Maryland constitution declared that the militia "is the proper and natural defence of a free government." [38] The Virginia Bill of Rights declared the militia a "safe" [39] defense as well, to be contrasted with that to be provided by a standing army. Such armies, at least in time of peace, were denominated both in Virginia and Maryland as "dangerous to liberty." [40] Louisiana is the sole exception among this group in that it maintained and gave constitutional recognition to, but did not constitutionally and explicitly recognize, the importance of a militia. [41] Thus, at least in these states that spoke to the importance of a militia, a right to bear arms might be inferred from this importance, and the regulation of firearms might be limited by the importance of the militia in the very maintenance of the state.

Yet if these states recognized a right to bear arms only by implication, other states would do so explicitly. The North Carolina Constitution of 1776 declared that "the people have a right to bear arms, for the defence of the State." [42] Kentucky's constitutions of 1792 and 1799 stated a right of "citizens to bear arms in defence of themselves and the State. . . ." [43] Mississippi in 1817 and 1832, [44] Kentucky in 1850, [45] and Texas in 1836 [46] declared the right to bear arms in similar language, and Missouri in 1820 declared this right to belong to "the people." [47]

An important distinction among these statutes is that only some of them explicitly spoke to a right to individual self-defense. This difference would take on significance as state courts encountered questions of the legitimacy of states controlling the use and carriage of firearms. A second distinction, between rights belonging to "the people" and those belonging to "citizens,"

arguably makes no difference, [48] but calls into question whether other distinctions might be made between the people or the citizens, on the one hand, and others.

Certainly, such distinctions were made. Setting aside the accuracy of Chief Justice Taney's dictum in the *Dred Scott* case, that persons of African descent were not, at the time of the Revolution and the framing of the Constitution, part of "the people" and thus not citizens of the United States as a nation, [49] it was increasingly apparent throughout the antebellum period that Southern states did not consider even free blacks to be citizens of the states themselves.

This was certainly the case in North Carolina, as *State v. Newsom*, [50] an 1844 case involving the right to bear arms, indicates. In *Newsom*, the North Carolina Supreme Court decided the constitutionality of a statute requiring a license for free blacks to keep or carry arms. [51] The North Carolina Constitution of 1776 provided in part "[t]hat the people have a right to bear arms, for the defense of the State . . . ." [52] Only a year previous, the court had determined that this right included an individual right. [53] In *Newsom*, however, the court determined that although this individual right to arms extended to "the people" and thus to all citizens, free blacks were not citizens and were thus excluded from exercising the right.

Other states, too, denied blacks the right to arms that was guaranteed all citizens. Newly constituted as a state and fresh with the egalitarian ideals of the Revolution, Tennessee in its original constitution declared in 1796 a right of all "freemen" to bear arms for the common defense. [54] Tennessee would be explicit in 1834 by limiting the right to "free white men." [55] This was the tack taken by Arkansas in 1836 and Florida in 1838, which in identical language declared "[t]hat the free white men of this State shall have a right to keep and to bear arms for their common defence." [56]

One way or another, then, either because states had been explicit about limiting the right to bear arms to free white men or because blacks were defined outside the class of citizen, the antebellum legislatures of the Southern states were free to control the access of their black population to firearms, and they exercised this freedom. At one end of the spectrum of controls was Mississippi, which forbade arms to both slaves and free blacks after 1852. [57] At the other end was Kentucky, which did not legislate the possession and carrying of arms by blacks, but instead provided that a slave or free black who "willfully and maliciously" shot at a white person would suffer the death penalty. [58] Between these two choices were a variety of alternatives. Slaves were generally governed under less restrictive measures, perhaps on the theory that they were already under the supervision of their masters. [59] Free blacks fared harshly under antebellum firearms controls, [60] as they did generally under Southern regimes, [61] in which they served as a threat to the system of racial oppression, both because they served as a bad example to slaves and because they might instigate or participate in a rebellion by their slave brethren. [62] Free blacks were subject to a variety of measures meant to limit black access to firearms through licensure or to eliminate such access through outright prohibitions on firearms ownership. [63]

C. Judicial Interpretation in a Region at Arms

It was in the South as a region that state courts first began the effort to reconcile the right to arms with restrictions designed to promote public safety. This effort began the still largely unrealized project of transforming the notion of a right to arms from an object of Whiggish political theory [64] to a matter of workable jurisprudence. In many ways it was natural that the South would play this pioneering role. If guns and a right to arms have been a peculiar part of American culture, [65] they have been perhaps even more distinctively a part of the lawways and folkways of the South. [66] Almost from the beginning, the unique need to maintain white domination in the nation's first truly multi-racial society [67] led the South to a greater vigor with respect to the private possession of arms and to the universal depulization of the white population as a means of insuring racial control. [68] This pattern would begin long before the American evolution and the subsequent adoption of the Second Amendment. [69]

And it would continue and be strengthened well into the nineteenth century. After the War of 1812, at a time when national commentators came to decry the decreased willingness of the population as a whole to participate in militia training and to fear that neglect might erode either the right to arms or the effectiveness of private arms in resisting potential tyranny, [70] the practice of widespread active militia [71] participation would remain a vigorous part of Southern culture.

Southern culture would also come to sanction the use of arms in contexts that went far beyond either personal or communal defense. For white men, the use of arms to resolve personal disputes and the frequent preference for dueling instead of use of the courts to redress insults and other slights, real or perceived, helped lend a different flavor to the Southern experience with arms--a flavor that was remarkable even in a nation distinguished by widespread firearms ownership and use. [72]

It was in this Southern atmosphere that in so many ways encouraged the use of arms, that legislative bodies first came to consider, on a widespread level, limits on the right to arms. The first set of limits were widespread throughout the South and generally agreed upon, that blacks whether slave or free would have severely limited access to firearms. [73] This form of firearms control provoked little controversy in the white South, even amongst slave-owners who felt secure enough to allow their own slaves to possess firearms and hunt on their land. [74]

But it was the attempt of some Southern legislatures to regulate the behavior of whites, to set limits on the manner in which white people could carry arms, that brought about controversy and an attempt to develop a jurisprudence that balanced the right to arms with legislation done in the interest of public safety. Three cases construing legislation of this period bear enduring significance. Two, *Aymette v. State* [75] and *Nunn v. State*, [76] pioneered analytical constructs that face even today's state and federal courts. The third, *Bliss v. Commonwealth*, [77] represents the road not taken.

In *Bliss*, at issue was the construction of the Kentucky constitutional proscription "[t]hat the right of the citizens to bear arms in defence of themselves and the State, shall not be questioned." [78] Bliss had been charged with carrying a sword in a cane, in violation of a statute forbidding the carrying of concealed weapons. [79] The Kentucky Supreme Court found the statute unconstitutional, although it left undisturbed the carrying of many sorts of arms under other

circumstances. Unconstitutionality did not require "a prohibition against bearing arms in every possible form . . . [for] whatever restrains the full and complete exercise of that right, though not [a complete] destruction of it, is forbidden. . . ." [80] The Kentucky Supreme Court thus viewed the right to bear arms as an absolute, and *Bliss* represents the maximum extension of the right, against which less extensive interpretations are measured. [81]

By contrast, in *Aymette v. State*, [82] the Tennessee Supreme Court adopted a more flexible interpretation of the right to arms. Faced with judging the constitutionality of a statute that prohibited carrying, among other concealed weapons, Bowie knives, [83] the *Aymette* court construed in two respects the Tennessee constitutional provision that "the free white men of [the] State have a right to keep and to bear arms for their common defence." [84]

The first was the constitutionality of prohibiting the carrying of concealed weapons. The court held that a prohibition on concealed weapons was a valid exercise of the legislature's police powers. The right to bear arms in defense of the state was the right to bear them openly, for "[t]o bear arms in defence of the State is to employ them in war . . . [and to do so, such arms] must necessarily be borne openly." [85] Wearing concealed weapons, the court maintained, was manifestly different. [86] Moreover, the court held:

> To hold that the Legislature could pass no law upon this subject by which to preserve the public peace, and protect our citizens from the terror which a wanton and unusual exhibition of arms might produce, or their lives from being endangered by desperadoes with concealed arms, would be to pervert a great political right to the worst of purposes, and to make it a social evil of infinitely greater extent to society, than would result from abandoning the right itself. [87]

The *Aymette* court also sustained the statute as to the constitutionality of singling out some weapons and not others. [88] Drawing the distinction between those weapons suited for civilized warfare and thus protected as "arms" under the state constitution and those which were not, the court found that the Bowie knife fell in the latter category. [89] It was a distinction that would later be adopted by the United States Supreme Court in *United States v. Miller*. [90]

Nunn v. State [91] involved a similar Georgia statute [92] passed in 1837 restricting the sale and carrying of concealable weapons. Significantly, though Georgia's constitution provided for a militia, [93] it failed entirely to mention a right to arms. Nonetheless, Judge Joseph Henry Lumpkin, writing for the Georgia Supreme Court, wrote that the "priviledge of keeping and bearing arms in defence of themselves and their country" was in effect a fundamental right of the citizens of the nation, a right created neither by the various state constitutions that recognized it nor by the Second Amendment of the United States Constitution. [94] Indeed, though contrary to the United States Supreme Court's holding in *Barron v. Baltimore*, [95] which held that the Bill of Rights established rights against the federal government and not the states, [96] Lumpkin held that the Second Amendment proscribed even state legislation restricting the open carrying of arms and that such legislation restricting concealed weapons was constitutional. [97]

The evidence from the antebellum era complicates our efforts to determine the motives of those who passed restrictive firearms legislation later in the century. The antebellum South was a

society with a robust tradition of bearing arms, calling on the citizen to maintain social order and a tolerance for extra-legal violence. Southern constitutional law recognized the importance of the right to bear arms with perhaps even greater vigor than the nation as a whole. At the same time even, in the antebellum era, Southern legislators and jurists began to recognize the desirability of placing limits, and given the cultural milieu, we are forced to wonder whether these were more honored in the breach than by the observance of that right. The mixed legal and cultural legacy of the antebellum South suggests no easy answers in determining motive in the decades that would follow.

II. Postbellum Development of Restrictive Interpretations of the Right to Bear Arms

A. Accommodating Freedom in the Immediate Post-Civil War Era

By the end of the Civil War, the white South knew that slavery was doomed. President Lincoln's Emancipation Proclamation had in 1863 ordered the freedom of all slaves in that part of the Confederacy not under Union authority. [98] But even before Lincoln's proclamation, even temporary Union ascendancy in a Confederate locale meant de facto emancipation of slaves. Thus, with the Emancipation Proclamation, Lincoln made explicit what many had assumed all along, what the white South saw as a threat, and what black slaves came to count on: the Civil War was a war to end slavery. [99]

It was important to white Southerners, however, to maintain as much of the status quo as possible. If freedom for the slaves was inevitably to come, in the form of the Thirteenth Amendment as it did or otherwise, Southern legislatures did their best to assure that such freedom at best would be nominal. With passage of the "Black Codes," Southern legislatures tried to guarantee that the freedmen would assume nearly their same positions as slaves.

The Black Codes included laws limiting the rights of blacks: restrictions on the right to testify against whites, [100] the allowance of onerous enforcement of labor contracts, [101] restrictions on the right to travel, to assemble, and to engage in certain businesses, [102] and the requirement that blacks work for and be responsible to whites. [103] Racial restrictions such as these found their way as well into state constitutions passed at the end of the Civil War [104] and, similar to like statutory law, were intended to achieve the effect of keeping blacks in their place.

Yet whatever their degree of discomfort with the arming of slaves or free blacks before emancipation and whatever racist provisions found their way into legislation or other provisions of constitutional law after emancipation, manipulation of their constitutions respecting the right to arms was not a universal device among the Southern States. Virginia effected no change in that article of its Bill of Rights recognizing the right to arms. [105] South Carolina broke with the example of previous, its constitutions of 1776, 1778, and 1790, to establish with the Constitution of 1868 the right to keep and bear arms for the common defense. [106] Mississippi and North Carolina essentially effected no change in the constitutional right to arms. What had been a right of "every citizen" to bear arms for self-defense and common defense under the Mississippi

constitutions of 1817 and 1832 [107] became a right of "all persons" to self-defense in the constitution of 1868. [108] North Carolina merely replaced the 1776 constitutional provision "[t]hat the people have a right to bear arms for the defense of the State" [109] with the language of the Second Amendment. [110]

Yet concerns about arms in the hands of blacks made their way into other constitutions promulgated in the years after the Civil War, when the confederate states were under occupation by union forces. Racial animus seems to have motivated two distinct patterns of constitutional changes in the right to arms. The first is demonstrated in Arkansas and Florida, where there was initial contraction of the right and later expansion on a non-racial basis. In 1864 Arkansas continued the restriction of the right to arms to free white men, [111] but in 1868 extended the right to the citizens of the state. [112] In 1865 Florida eliminated the right to bear arms altogether, [113] but in 1868 returned the right to bear arms to its constitution, extending the right from one in favor of the common defense to include the right to self-defense. [114]

The second and more prominent pattern of constitutional development respecting the right to arms was an initial expansion of the right on a non-racial basis, only later to provide for ostensibly nonracial restrictions of the right. Tennessee lies outside but approaches the pattern, for the state called but one constitutional convention in the early post-war years. As a result of that convention, the 1870 Constitution expanded the right to arms to all citizens from all free white men, but at the same time it provided that the legislature would "have the power, by law, to regulate the wearing of arms with a view to prevent crime." [115]

Other states, however, fit the pattern exactly. Georgia, for example, in 1865 explicitly instituted a constitutional right to arms, [116] a right previously recognized as fundamental in *Nunn v. State* [117] but which had not been enshrined in the state constitution. The new provision adopted the language of the Second Amendment [118] and in effect confirmed the reasoning of *Nunn.* Yet, in 1868 Georgia provided as well that the legislature had the authority to "prescribe by law the manner in which arms may be borne," [119] thus rejecting the absolutist position of *Nunn.* Texas in 1866 reinstituted the right to bear arms for self-defense and common defense [120] and in 1868 added the proviso that the legislature might regulate the right. [121] Louisiana in 1864 declared that "[a]ll able-bodied men shall be armed and disciplined for its defence," [122] liberalizing the rule of previous constitutions limiting the duty to be armed to free white men. [123] Yet the Louisiana Constitution of 1868 eliminated the duty of able-bodied males to be armed and provided instead that the legislature organize the militia of the state; [124] able men of requisite age would merely be "subject to military duty" at the discretion of the state. [125]

The South's history of slavery, its passage of post-war black codes, and its collective resistance to racial equality render suspicious these modifications and contractions of the right to arms and indeed, given the South's history of racially oriented firearms restrictions in antebellum history, renders these new constitutional provisions especially so. Yet it is not clear that the South's motivation was solely or even primarily a racial one. As has been suggested in Part I of this Paper, violence was endemic to Southern society, [126] and lawmakers may well have had a genuine interest in reducing both the level and the effect of such violence.

Such an interest is suggested by constitutional provisions aimed at curtailing dueling, a practice that already was illegal in most states but nonetheless continued. [127] Anti-dueling provisions appeared even in constitutions that did not contract the right to arms. In Arkansas, for example, the 1864 Constitution that continued to limit the right to bear arms to free white men [128] also provided that duelists and those who issued challenges to duel, as well as any who might second or otherwise aid a duelist, would be denied the rights of voting and of holding public office. [129] North Carolina, which adopted the language of the Second Amendment in its Constitution of 1868, [130] simultaneously adopted a provision denying those participating in duels the right to hold public office. [131]

Such provisions were also adopted in Tennessee in 1870 [132] and Texas after Reconstruction in 1876 [133] as part of constitutions that contracted the right to bear arms. [134] Yet dueling was a problem among whites and not blacks in the South, [135]and any racial animus that might have existed respecting blacks and the right to bear arms did not exist with respect to dueling. A commonality between authority for the legislature to "regulate the wearing of arms with a view to prevent crime," [136] as adopted in constitutions that contracted the right to bear arms, and disqualification from voting and office holding is the incentive to eliminate illegal activity. This incentive would be a completely legitimate one for the constitution makers in the postbellum period.

B. Constitutional Change and the Right to Arms

If white Southerners after the Civil War desired to maintain, as closely as possible, their former slaves' legal status, they realized too that obvious and direct measures to this end would be seen to violate the Fourteenth Amendment and so be ineffective. The constitutions adopted by the Southern states after the Fourteenth Amendment came into effect or in anticipation of its ratification were not explicit in any discrimination against blacks, and neither were the laws the Southern states adopted.

Before the Fourteenth Amendment, these states had been free to enact discriminatory weapons restrictions as an instrument of racial subjugation. Mississippi in 1865, for example, required blacks not in military service to obtain a license to carry firearms, ammunition, and certain other lethal weapons. [137] Louisiana in 1865 prohibited any black not in military service from carrying any kind of weapon without the approval of an employer and the local chief of patrol. [138] Alabama made it entirely unlawful for any black "to own fire-arms, or carry about his person a pistol or other deadly weapon." [139] Whites in no Southern state were restricted in like fashion. Such explicitly racial restrictions could not survive Fourteenth Amendment scrutiny, however. A new tack was needed if racial discrimination in the control of arms was to prevail.

Such a tack had been hinted at in *Nunn v. State* [140] and in *Aymette v. State*, [141] cases involving firearms control statutes in the antebellum era. These cases each involved statutes restricting the carrying of concealed weapons, and each had determined that the right to bear arms was not absolute. *Aymette*, construing the right to bear arms for the common defense of the state, had suggested that the right to bear arms was only the right to bear them publicly and that the only arms one had the right to bear were those useful in warfare. [142] *Nunn* posited a right to bear arms in favor of both self-defense and the common defense and agreed that the state

might restrict the carrying of concealed weapons as a matter of police power. [143] Hence, a state might well restrict all weapons of certain character and might even restrict all weapons that were concealed.

III. Judicial Response to a Changing Right to Arms

The response of the Arkansas judiciary to legislative restrictions on the right to arms serves as a proxy for the response of the judiciary of the Southern states to such restrictions. An examination of the relevant opinions reveals that the insistence of most of the Southern states on making explicit the prerogative of the legislature to restrict the right to bear arms may have been unnecessary. It reveals also that the analytical construct pioneered in *Aymette* and *Nunn* served not only to legitimate genuine concerns of the legislature respecting safety, violence, crime, and inappropriate conduct, but also to mask concerns respecting the carrying of weapons by the state's black citizens.

Under a statute passed on February 16, 1875, the Arkansas legislature provided as follows:

> That any person who shall wear or carry any pistol of any kind whatever, or any dirk, butcher or bowie knife, or a sword or a spear in a cane, brass or metal knucks, or razor, as a weapon, shall be adjudged guilty of a misdemeanor. . . . Provided, that nothing herein . . . shall be so construed as to prohibit any person wearing or carrying any weapon aforesaid on his own premises, or to prohibit persons traveling through the country, carrying such weapons while on a journey with their baggage, or to prohibit . . . any person summoned by [an officer of the law] to assist in the execution of any legal process. [144]

That the statute was passed less than a year after the Arkansas Constitution of 1874 was ratified is not material to the legitimacy of the statute, for the Arkansas constitutional provision providing for a right to bear arms had gone essentially unchanged since its original incarnation in 1836. The original constitution had provided "[t]hat the free white men of [the] State shall have a right to keep and to bear arms for their common defence," [145] as did the Constitution of 1864; [146] the sole change in this provision effected by the Constitution of 1868, a change adopted as well by the Constitution of 1874, was that the right no longer attended to the "free white men" of the state, but instead to "the citizens." [147] Thus, the legislature had no more constitutional power after the 1874 Constitution to restrict the rights of those whose rights were protected than it did before. [148]

When a criminal defendant charged with carrying a pistol or pocket revolver questioned the constitutionality of the statute in *Fife v. State*, [149] the Arkansas Supreme Court made short work of the arguments that the statute violated the Second Amendment and that it violated the Arkansas constitutional provision. As to the former argument, the court implicitly rejected the reasoning of *Nunn v. State* [150] and, citing *Barron v. Baltimore*, [151] declared the statute beyond the scope of the Second Amendment's protection. [152] As to the suggestion that the statute violated the state provision, the court cited *Aymette v. State* [153] for the proposition that all arms were not protected, but only those "to be exercised by the people in a body for their common defense." [154] The only arms protected were those that constituted "ordinary military

equipments." [155] A pistol might be distinguished from the repeaters used by the army and navy in the Civil War, for such repeaters had shown themselves in practice to be useful in warfare; a pistol, declared the court, "was not an arm for war purposes" and thus was susceptible of a ban on carrying in public. [156]

This distinction between ordinary pistols and pistols like those used in war was crucial in *Wilson v. Arkansas*, [157] decided in 1878. Wilson argued that his conviction for carrying a pistol in violation of the 1875 statute was void because the trial judge failed to instruct the jury that "if they believed from the evidence, that the pistol carried by him was an army size pistol, such as are commonly used in warfare, they should acquit." [158] The appellate court agreed, declaring that to prohibit "a citizen from wearing or carrying a war arm [in public] . . . is an unwarranted restriction upon his constitutional right to keep and bear arms." [159]

The court suggested in dicta that there were limits to its statement of the unreasonable nature of unconcealed carrying restrictions, for "[n]o doubt in time of peace, persons might be prohibited from wearing war arms to places of public worship, or elections, etc." [160] On this point the Arkansas court agreed with the Supreme Court of Tennessee:

> While the private right to keep and use such weapons as we have indicated as arms, is given as a private right, its exercise is limited by the duties and proprieties of social life, and such arms are to be used in the ordinary mode in which used in the country, and at the usual times and places. [161]

The legislature in 1881 finally adopted statutorily the standard laid down by the courts when it forbade, with exceptions, the wearing or carrying of "any such pistol as used in the army or navy of the United States" except uncovered and in the hand. [162] In response to an appeal by a defendant who had been convicted of carrying such a weapon openly in a holster buckled around his waist, the Arkansas Supreme Court in an 1882 case, *Haile v. State*, [163] declared the restriction a reasonable one, within the limits of the Arkansas constitution. The legislature, the court found, had perceived a danger that armed citizens had the means to do violence to their fellows upon any offense. The court looked to the reasons that underlay the right to bear arms to evaluate the legislature's judgment that only military weapons might be carried and only openly and in the hand.

"The constitutional provision," the court found, "sprung from the former tyrannical practice, on the part of governments, of disarming the subjects, so as to render them powerless against oppression . . . [and was] not intended to afford citizens the means of prosecuting, more successfully, their private broils. . . ." [164] Thus, the legislature, mindful of the perceived danger of increased levels of violence, reached a constitutionally acceptable balance between achieving the purposes of the constitutional provision and achieving safety, "by conceding the right to keep such arms, and to bear or use them at will, upon one's own premises, and restricting the rights to wear them elsewhere in public." [165]

Haile achieved two ends, perhaps both intended by the legislature, both an example for the future, but only one to arguably salutary effect and the other not. The first end was that *Haile* had achieved a clear formula, albeit one presaged by *Aymette v. State* [166] forty years earlier, for

testing and validating firearms regulation. The restriction would be judged against the civic end to be accomplished by the constitutional provision, and the restriction would be valid if it did not deny entirely the right to use a protected weapon, perhaps even all protected weapons.

The second end carried a pernicious effect. The period of Reconstruction and later Redemption was marked by racial violence in a way that the period of slavery was not. Violence on the part of the Ku Klux Klan and other nightriding terrorists were instruments of the oppression of the former slaves and of the maintenance of the Southern way of life. The right to bear arms had been intended by the champions of the freedmen as a hedge against oppression by their former masters, and the right had in fact functioned to this end. White Southerners recognized this, and both the authorities and nightriders sought to confiscate arms from those blacks who had them and often to kill or otherwise cow those who would not give them up. The Arkansas legislature had made clear that restrictions on those weapons that were not useful in war were constitutionally valid. With *Haile*, they had combined to render safe the high quality, expensive, military issue handguns that many former Confederate soldiers still maintained but that were often out of financial reach for cash poor freedmen. [167]

IV. The Enduring Legacy?

The model of gun control that emerged from the redeemed South is a model of distrust for the South's untrustworthy and unredeemed class, a class deemed both different and inferior, the class of Americans of African descent. There are indications that this model was followed elsewhere in the nation. These indications may be found in the treatment of southern and eastern European immigrants to America in the early twentieth century in the state and city that had been both a point of entry and the point of settlement for many of them, New York.

If the white South saw blacks as a threat, the country as a whole saw southern and eastern Europeans in similar terms. For this reason, in part, the numbers of such immigrants were subject to significant limits. [168] Beyond this, these immigrants were associated with mental deficiency, with crime, and most dangerously, with the sort of anarchist inspired crime that was feared in Europe, such as political assassination and politically motivated robberies. [169]

In New York, these fears found expression in the passage of the Sullivan Law in 1911. [170] Of statewide dimension, the Sullivan Law was aimed at New York City, where the large foreign born population was deemed susceptible to peculiarly susceptible and perhaps inclined to vice and crime. The statute went beyond the practice of many gun control statutes by not only prohibiting the carrying of concealed weapons, but also requiring a permit for ownership or purchase of weapons. [171] It is not without significance that the first person convicted under the statute was a member of one of the suspect classes, an Italian immigrant. [172]

If the story of New York's Sullivan Law suggests that a fear of and a desire to control suspect classes of undesirables bears likeness to the story of the white South's ventures into gun control in the Reconstruction and post-Reconstruction periods, it is true as well that the Sullivan Law, like the Southern statutory and constitutional provisions inaugurated in those periods, spoke to what on its surface was a legitimate societal goal in advancing the cause of public safety. Such goals would be argued in later years with the passage of the National Firearms Act of 1934 [173]

and in the 1960s and beyond, when concerns with "Saturday Night Specials" [174] and with "assault weapons" [175] would take center stage. If safety concerns must be conceded, it should be recognized as well that local governments have sought to ban firearms from what is frequently considered one of today's untrustworthy and suspect classes, the urban poor. [176]

The extent of these correspondences is a subject that should engender more research both of historical and legal scholars. The question for such scholars is whether the freedom to pursue individual rights should ever be regulated in accordance with whether the citizens are deemed worthy of exercising them.

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[1] Watson v. Stone, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring).

[2] For our first effort in this regard, see Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309 (1991).

[3] Like our previous study, this Paper is written from the perspective of two Afro-Americanists, that is those who study the experiences of peoples of African descent in the Americas. We are focusing on the history of black-white conflict and the role that conflict has played both in shaping the constitutional concept of the right to bear arms and in influencing legislation governing the ownership and carrying of firearms. There are other issues concerning race or ethnicity and its influence on the right to bear arms that are or should also be of concern to students of American legal history. Clearly the conflict between white settlers and the native Indian population profoundly influenced the development of both the practice of owning and carrying arms in American culture and the state and federal constitutional provisions guaranteeing the right to bear arms. *See*, *e.g.*, David B. Kopel, The Samurai, the Mountie and the Cowboy: Should America Adopt the Gun Controls of Other Democracies? 307-11 (1992); Cottrol & Diamond, *supra* note 2, at 323-24.

Ethnic conflict and the fear of southern and eastern European immigrants influenced the development of firearms laws in parts of the nation. *See*, *e.g.*, Don B. Kates, Jr., *Toward a History of Handgun Prohibition in the United States* [hereinafter *Handgun Prohibition*], *in* Restricting Handguns: The Liberal Skeptics Speak Out 15-24 (Don B. Kates, Jr. ed., 1979); Kopel, *supra*, at 34244.

[4] Here we will be concerned not only with the issue of the Second Amendment, but also with what it was originally intended to mean and how courts and commentators have subsequently treated this constitutional provision. We will also be concerned with state constitutional doctrine covering the right to keep and bear arms. There is often lively dispute concerning the extent to which the Second Amendment was meant to protect the right of individuals to keep and bear arms as opposed to the right of states to maintain militias. *See*, *e g.*, Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right (1984); Joyce L. Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right (1994); Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1210-12 (1992); Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991); Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. Am. Hist. 22 (1984); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. Dayton L. Rev. 5 (1989); David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & Pol'y 1 (1987); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 Val. U. L. Rev. 107 (1991); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. Rev. 57 (1995); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204 (1983); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103 (1987); Glenn H. Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 Tenn. L. Rev. 647 (1994); Robert E. Shalhope, *The Ideological Origins of the Second Amendment* 69 J. Am. Hist. 599 (1982); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L.J. 1236 (1994); David E. Vandercoy, *The History of the Second Amendment* 28 Val. U. L. Rev. 1007 (1994); David Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551 (1991). It cannot be disputed, however, that the notion of the right to bear arms has long been a part of American constitutional thought. It is, of course, a part of the jurisprudence and commentary treating the Second Amendment to the United States Constitution. Legal doctrine concerning the right to keep and bear arms has perhaps been even better developed in state constitutional jurisprudence. Some forty-three state constitutions have provisions safeguarding the right to bear arms, and there has been extensive state court jurisprudence on the subject, far more so than the rather restricted federal jurisprudence. *See* Stephen P. Halbrook, A Right to Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees (1989) [hereinafter Right to Bear Arms]; Robert J. Cottrol, *The Second Amendment: Invitation to a Multi-Dimensional Debate in* 1 Gun Control and the Constitution: Sources and Explorations on the Second Amendment xxxiii-xxxiv (Robert J. Cottrol ed., 1993) [hereinafter *Invitation*].

We do not intend in this Paper to say much concerning the debate over whether or not the Second Amendment was meant to safeguard an individual right to keep and bear arms or

whether it was simply meant to preserve the right of states to maintain militias. We have participated in that debate in previous efforts and will doubtlessly do so in the future. *See* Robert J. Cottrol & Raymond T. Diamond, *Public Safety and the Right to Bear Arms in* The Bill of Rights in Modern America: After 200 Years 72 (James W. Ely, Jr. & David J. Bodenhamer eds., 1993); Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 Yale L.J. 995 (1995) (book review); Cottrol & Diamond, *supra* note 2, at 309; Cottrol, *Invitation*, *supra.*

Suffice it to say that in our view the best reading of the history of the Second Amendment indicates that the framers of that constitutional provision did intend to protect an individual right to arms and that their view of the militia was of a body that would include virtually the entire adult white male population, which was expected to muster bearing their private arms. With few exceptions, historian Lawrence Cress being most prominent among these, advocates of the collective right or militia only theory of the Second Amendment have simply not made much in the way of a convincing historical argument that the Second Amendment was not meant to protect the private possession of arms.

Advocates of the collective rights view, of course, have been more convincing when discussing federal courts jurisprudence, particularly since the Second World War, but that of course is far from a discussion of the intent of the framers.

For a collection presenting articles and essays on both sides of the Second Amendment controversy see Gun Control and the Constitution: Sources and Explorations on the Second Amendment, *supra*; Restricting Handguns: The Liberal Skeptics Speak Out, *supra.*

[5] *See*, Harold M. Hyman & William M. Wiecek, Equal Justice under the Law: Constitutional Development, 1835-1875, at 405 (1982); Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 Geo. Mason U. L. Rev. 1 (1981). Some very interesting work along these lines has been done by Akhil Amar who argues that the response of the Thirty-Ninth Congress to disarm blacks caused the framers of the Fourteenth Amendment to attempt not merely to incorporate or apply the Second Amendment to the states, but to transform the Second Amendment from a provision that was meant to safeguard the right of individuals to have weapons in order to participate in the militia to a right of individuals to have weapons for self-defense, including defense against state and private deprivations of rights. *See* Amar, *The Bill of Rights and the Fourteenth Amendment*, *supra* note 4, at 1260-62.

[6] *See*, *e.g.*, Cottrol & Diamond, *supra* note 2, at 325-26, 336-38, 344 46.

[7] The intent of many of the framers of the Fourteenth Amendment was to make the Second Amendment's right to keep and bear arms apply to the states through the privileges or immunities clause of the Fourteenth Amendment. *See* Hyman & Wiecek, *supra* note 5, at 405; *see also* Michael K. Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986). That intention was thwarted fairly early on by judicial construction. *See* Presser v. Illinois, 116 U.S. 252, 266 (1886). Despite this, the Fourteenth Amendment's Equal Protection Clause presented a formidable barrier to the disarming of blacks. The antebellum laws that prohibited the possession of arms by slaves and free Negroes and similar restrictions in the immediate post-war black codes probably could not have survived even the lax equal protection

scrutiny that had developed by the early part of the twentieth century. *See* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745, 1753-54 (1989). After the Fourteenth Amendment, the difficulty faced by the white south was how to express its historical desire to disarm the black population, when the Fourteenth Amendment placed severe restrictions on openly discriminatory disarmament and neither Southern culture, politics nor indeed state constitutional law would permit a general disarmament of the population.

[8] For example, see David Kopel's discussion of the origins of Saturday Night Special legislation. Kopel, *supra* note 3, at 336.

[9] Among the works that have investigated the role of white terror in "redeeming" the South, see Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877, at 564-600 (1988); George C. Rable, But There Was No Peace: The Role of Violence in the Politics of Reconstruction (1984); Allen W. Trelease, White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction (1971).

[10] *See*, *e.g.*, I. A. Newby, Jim Crow's Defense: Anti-Negro Thought in America, 1900-1930, at 42-44, 123-24 (1965); Joel Williamson, A Rage for Order: Black/White Relations in the American South Since Emancipation (1986); Robert J. Cottrol, *The Historical Definition of Race Law*, 21 Law & Soc'y Rev. 865, 867 (1988).

[11] For a discussion of the role of anti-immigrant and particularly anti-Italian sentiment in the passage and initial enforcement of New York's Sullivan Law, which requires a permit in order to carry a pistol, see Kopel, *supra* note 3, at 342-44; *Handgun Prohibition*, *supra* note 3, at 15-24.

[12] Judge Buford's views were anticipated in an earlier Ohio case. In his dissent from an opinion upholding the conviction of Mike Nieto, a Mexican laborer, for carrying a loaded pistol on the property of the United Alloy Steel Company, Judge Wanamaker of the Ohio Supreme Court noted:

> I desire to give some special attention to some of the authorities cited, supreme court decisions from Alabama, Georgia, Arkansas, Kentucky, and one or two inferior court decisions from New York. . . . The southern states have very largely furnished the precedents. It is only necessary to observe that the race issue there has extremely intensified a decisive purpose to entirely disarm the negro, and this policy is evident upon reading the opinions. What may have seemed sufficient reason for a holding concerning the carrying of concealed weapons in one's own home in those states, does not oblige the supreme court of Ohio to make a similar holding in this state.

State v. Nieto, 130 N.E. 663, 669 (Ohio 1920).

[13] For a discussion of how willing the academy was to ignore the principle earlier in the century, see Kennedy, *supra* note 7, at 1753-54.

[14] James D. Wright et al., Under the Gun: Weapons, Crime and Violence in America 106 (1983). The commonly accepted figure is that there are some 200 million firearms in private hands in the United states. *Id*. The U.S. figure of 50% of households might be contrasted with other nations where a high percentage of households have firearms prefient. *Id*. In Switzerland the entire adult male population is issued firearms by the government as part of that nation's universal militia system. Kopel, *supra* note 3, at 278-302. Similarly, in Israel, government issued firearms are common in Jewish households as part of that nation's military reserve system. *Id*. at 301 n.90.

[15] Wright, *supra* note 14, at 323.

[16] *See* Right to Bear Arms, *supra* note 4.

[17] *See* United States v. Miller, 307 U.S. 174 (1939); Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542 (1875).

[18] *See*, *e.g.*, Love v. Pepersack, 47 F.3d 120, 123-24 (4th Cir. 1995); United States v. Hale, 978 F.2d 1016, 1020 (8th Cir. 1992); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977); United States v. Three Winchester 30-30 Caliber Lever Action Carbines, 504 F.2d 1288, 1289-90, 1293 (7th Cir. 1974).

[19] *Invitation*, *supra* note 4, at xxxix-xli; Michael J. Quinlan, *Is There a Neutral Justification for Refusing to Implement the Second Amendment or Is the Supreme Court Just "Gun Shy"?*, 22 Cap. U. L. Rev. 641 (1993).

[20] *See* Cottrol & Diamond, *supra* note 2, at 310 n.3.

[21] United States v. Lopez, 2 F.3d 1342,1364 n.46 (5th Cir. 1993).

[22] Levinson, *supra* note 4.

[23] Aymette v. State, 21 Tenn. (2 Hum.) 154, 156 (1840).

[24] *Id.* at 157; State v. Nieto, 130 N.E. 663, 664 (Ohio 1920); Andrews v. State, 50 Tenn. 165, 171 (1871).

[25] People v. Nakamura, 62 P.2d 246 (Colo. 1936).

[26] *See*, *e.g.*, People v. Marques, 498 P.2d 929 (Colo. 1972); Nelson v. State, 195 So.2d 853, 855-56 (Fla. 1967).

[27] Commonwealth v. Davis, 343 P.2d 847, 848-49 (Or. 1976).

[28] "The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power. . . . " Or. Const. art. I, § 27.

[29] State v. Kessler, 614 P.2d 94 (Or. 1980).

[30] *See generally* Right to Bear Arms, *supra* note 4.

[31] Cottrol & Diamond, *supra* note 2, at 323-27.

[32] Herbert Aptheker, American Negro Slave Revolts 8-52, 162-208 (1983); Robert J. Cottrol & Raymond T. Diamond, Book Review, 56 Tul. L. Rev. 1107, 1110-12 (1982).

[33] Cottrol & Diamond, *supra* note 2, at 325, 335-38.

[34] *See* The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States (Benjamin P. Poore ed., 2d ed., Washington, Government Printing Office 1878) [hereinafter Constitutions].

[35] Va. Bill of Rights of 1776, § 13, *reprinted in* 2 Constitutions, *supra* note 34, at 1908. The Bill of Rights was adopted by all subsequent constitutions of the state. 2 Constitutions, *supra* note 34, at 1908-76.

[36] Del. Const. of 1792, art. II, § 12, *reprinted in* 1 Constitutions, *supra* note 34, at 280-81; Del. Const. of 1831, art. II, § 12, *reprinted in* 1 Constitutions, *supra* note 34, at 291-92; *see also* Del. Const. of 1776, art. 28, *reprinted in* 1 Constitutions, *supra* note 34, at 277 (forbidding musters of the militia on election days).

[37] Del. Const. of 1792, art. I, § 17, *reprinted in* 1 Constitutions, *supra* note 34, at 279; Del. Const. of 1831, art. I, § 17, *reprinted in* 1 Constitutions, *supra* note 34, at 290.

[38] Md. Const. of 1776, declaration of rights, art. XXV, *reprinted in* 1 Constitutions, *supra* note 34, at 819; Md. Const. of 1851, declaration of rights, art. 25, *reprinted in* 1 Constitutions, *supra* note 34, at 839; Md. Const. of 1864, declaration of rights, art. 28, *reprinted in* 1 Constitutions, *supra* note 34, at 861; Md. Const. of 1867, declaration of rights, art. 28, *reprinted in* 1 Constitutions, *supra* note 34, at 861; *see also* Va. Bill of Rights of 1776, § 13, *reprinted in* 2 Constitutions, *supra* note 34, at 1908.

[39] Va. Bill of Rights of 1776, § 13, *reprinted in* 2 Constitutions, *supra* note 34, at 1908; Md. Const. of 1776, declaration of rights, art. XXVI, *reprinted in* 1 Constitutions, *supra* note 34, at 819; Md. Const. of 1851, declaration of rights, art. 25, *reprinted in* 1 Constitutions, *supra* note 34, at 839; Md. Const. of 1864, declaration of rights, art. 28, *reprinted in* 1 Constitutions, *supra* note 34, at 861; Md. Const. of 1867, declaration of rights, art. 28, *reprinted in* 1 Constitutions, *supra* note 34, at 890.

[40] Va. Bill of Rights of 1776, § 13, *reprinted in* 2 Constitutions, *supra* note 34, at 1908; Md. Const. of 1776, declaration of rights, art. XXVII, *reprinted in* 1 Constitutions, *supra* note 34, at 819; Md. Const. of 1851, declaration of rights, art. 26, *reprinted in* 1 Constitutions, *supra* note 34, at 839; Md. Const. of 1864, declaration of rights, art. 29, *reprinted in* 1 Constitutions, *supra*

note 34, at 861; Md. Const. of 1867, declaration of rights, art. 29, *reprinted in* 1 Constitutions, *supra* note 34, at 890.

[41] The Louisiana Constitution of 1812 makes no mention of a right to bear arms, but explicitly recognizes the militia in that the governor is constituted as its commander-in-chief. La. Const. of 1812, art. III, § 8, *reprinted in* 1 Constitutions, *supra* note 34, at 703. Louisiana militia units manned by *gens de couleur libre* were in large measure responsible for victory at the Battle of New Orleans at the close of the War of 1812. Gary Donaldson, The History of African-Americans in the Military 29-30 (1991); Jack D. Foner, Blacks And The Military In American History: A New Perspective 24-25 (1974); Morris J. MacGregor & Bernard C. Nalty, 1 Blacks in the United States Armed Forces 207-17 (1977); Bernard C. Nalty, Strength for the Fight: A History of Black Americans in the Military 24-25 (1986); Lorenzo J. Greene, *The Negro in the War of 1812 and the Civil War*, 14 Negro Hist. Bull. 133-38 (1951). Black troops of the First Louisiana Native Guards, subsequently designated the Seventy-Third Regiment of the United States Colored Troops, were accepted into federal service during the Civil War on September 27, 1862, and were not only the first organized black troops in the union army, but on May 27, 1863, were also the first in combat in the Civil War. James M. McPherson, The Negro's Civil War: How American Negroes Felt and Acted 183-85 (1865); Nalty, *supra*, at 36-37.

[42] N.C. Const. of 1776, declaration of rights, art. XVII, *reprinted in* 2 Constitutions, *supra* note 34, at 1410.

[43] Ky. Const. of 1792, art. XII, § 23, *reprinted in* 1 Constitutions, *supra* note 34, at 655; Ky. Const. of 1799, art. X, § 23, *reprinted in* 1 Constitutions, *supra* note 34, at 657. These provisions supplemented Article VI, Section 2 of the Kentucky Constitution of 1792, which mandated that "[t]he freemen of this commonwealth shall be armed and disciplined for its defence" and Article III, Section 28 of the Kentucky Constitution of 1799, which rendered the same requirement by specifically excepting "negroes, mulattoes, and Indians." 1 Constitutions, *supra* note 34, at 652, 662.

[44] Miss. Const. of 1817, art. I, § 23, *reprinted in* 2 Constitutions, *supra* note 34, at 1056; Miss. Const. of 1832, art. I, § 23, *reprinted in* 2 Constitutions, *supra* note 34, at 1068.

[45] Ky. Const. of 1850, art. XIII, § 25, *reprinted in* 1 Constitutions, *supra* note 34, at 685.

[46] Tex. Const. of 1836, declaration of rights, art. 14, *reprinted in* 2 Constitutions, *supra* note 34, at 1763.

[47] Mo. Const. of 1820, art. XIII, § 3, *reprinted in* 2 Constitutions, *supra* note 34, at 1114.

[48] *See* United States v. Verdugo, 494 U.S. 259, 265 (1989).

[49] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 405, 418-19 (1857). Chief Justice Taney reached this conclusion primarily by looking to the mass of discriminatory state legislation and state constitutional law, limiting the rights of free blacks. *Id*. at 412-16; *see also* Leon F. Litwack, North of Slavery: The Negro in the Free States, 1790-1860 (1967); Cottrol & Diamond,

supra note 2, at 339-40; *cf.* V. Jacque Voegli, Free but Not Equal: The Midwest and the Negro During the Civil War (1967). Chief Justice Taney ignored or otherwise dismissed a body of politically and physically liberating legislative and constitutional law that states had adopted in the wake of the Revolution, law that cast doubt as to the legitimacy of Chief Justice Taney's conclusion. *See Dred Scott*, 60 U.S. (19 How.) at 572-76 (Curtis, J., dissenting); *see also* Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment,* 29 Loy. L. Rev. 255, 260-62 (1983).

[50] 27 N.C. (5 Ired.) 203 (1844).

[51] Act of Jan. 11, 1841, ch. 30, 1840-1841 N.C. Sess. Laws 61.

[52] N.C. Const. of 1776, declaration of rights, art. XVII, *reprinted in* 2 Constitutions, *supra* note 34, at 1410.

[53] State v. Huntly, 25 N.C. (3 Ired.) 311, 314 (1843).

[54] Tenn. Const. of 1796, art. XI, § 26, *reprinted in* 2 Constitutions, *supra* note 34, at 1675.

[55] Tenn. Const. of 1834, art. I, § 26, *reprinted in* 2 Constitutions, *supra* note 34, at 1679. Tennessee's Constitution of 1834 also denied blacks the right to vote. Tenn. Const. of 1834, art. IV, § 1, *reprinted in* 2 Constitutions, *supra* note 34, at 1683.

[56] Ark. Const. of 1836, art. II, § 21, *reprinted in* 1 Constitutions, *supra* note 34, at 103; Fla. Const. of 1838, art. I, § 21, *reprinted in* 1 Constitutions, *supra* note 34, at 318.

[57] Act of Mar. 15, 1852, ch. 206, 1852 Miss. Laws 328 (repealed Act of June 18, 1822, ch. 73, §§ 10, 12, 1822 Miss. Laws 179, 181-83, which allowed slaves and free blacks to obtain licenses to carry firearms).

[58] Act of Feb. 10, 1819, ch. CCCCXLVIII, § 1, 1819 Ky. Acts 787. The law was first limited to slave offenders. *Id.* In 1851 the legislature extended these provisions to free blacks as well. Act of Mar. 24, 1851, ch. 617, art. VII, § 7, 1850 Ky. Acts 300.

[59] *See* Cottrol & Diamond, *supra* note 2, at 336-38.

[60] *Id.*

[61] *Id.* at 335-36 & nn.125-29.

[62] *Id.* at 335. This fear was particularly felt when relatively successful slave uprisings did occur. For the discussion, see *Id.* at 338 & nn.138-46.

[63] *Id*. at 337-38 & nn.126-46. Such provisions were often susceptible of enforcement through patrols also mandated by statute. *Id*. at 336-38 & nn.134, 144-46.

[64] For the definitive discussion of the role that seventeenth- and eighteenth-century English Whigs played in transforming the traditional English duty to be armed for the common defense into the Anglo-American constitutional notion of a right to be armed as a hedge against potential governmental tyranny, see Malcolm, *supra* note 4.

[65] The discussion on guns as a cultural phenomenon in American society has produced a voluminous literature too extensive to be discussed here. Two works can provide a useful beginning to this literature: Lee Kennett & James L Anderson, The Gun in America: The Origins of a National Dilemma (1975); B. Bruce-Briggs, *The Great American Gun War*, 45 Pub. Interest 37 (1976).

[66] *See*, *e.g.*, Jo Dixon & Alan J. Lizotte, *Gun Ownership and the Southern Subculture of Violence*, 93 Am. J. Soc. 383 (1987); *see also* sources cited *infra* note 71.

[67] Cottrol & Diamond, *supra* note 2, at 323-27.

[68] *Id*.

[69] *Id*.

[70] Supreme Court Justice Joseph Story discussed the importance of the right to bear arms and the danger that popular neglect of the militia might ultimately impair the right or at least the practice of having an armed population capable of resisting tyranny:

> 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. And yet, though this truth would seem so . . . undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How is it practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.

Joseph Story, Commentaries on the Constitution of the United States 708-09 (Carolina Academic Press 1987) (1833).

[71] By militia, we mean not only the formal state militia, i.e., the state's military organization, but also other bodies of deputized citizens called upon to maintain the security of a community. This citizen support of law enforcement, the *posse comitatus*, would fall under this definition of militia. In the antebellum South, slave patrols designed to police the slave population were a specialized form of militia. Historian Eugene Genovese has captured some of the difficulties Southern communities encountered in recruiting members of slave patrols:

> To curb runaways, hold down interplantation theft, and prevent the formation of insurrectionary plots, the slaveholders developed an elaborate system of patrols. Some states required them, whereas others merely authorized local communities to organize them. Usually a captain and three others, appointed for a period of a few months, worked the roads and checked the plantation quarters every few weeks or as often as the current temper dictated. Slaves caught without passes could expect summary punishment of about twenty lashes.
>
> In normal times the patrols slacked off as conscripted citizens found the task irksome. In South Carolina and Alabama they functioned better than elsewhere, but in most states they periodically lapsed into passivity. A Georgia planter complained: "Our patrol laws are seldom enforced, and even where there is a mock observance of them, it is by a parcel of boys or idle men, the height of whose ambition is to 'ketch a nigger.'"
>
> Complaints against the patrols came from both masters and slaves. The masters, in ordinary times, bought their way out of patrol duty and then fumed because the poor whites who replaced them abused the slaves and unsettled the quarters. The brutality of the patrols drew widespread protest from the slaves who suffered from arbitrary or excessive beating. As a result, the slaves often regarded their masters as protectors against the patrols, and sometimes the masters in fact were. However irregular and lax, the patrols accomplished their main purpose: they struck terror in the slaves.

Eugene Genovese, Roll Jordan Roll: The World the Slaves Made 617-18 (1974).

For a discussion of the widespread depulization of the South Carolina white population and the use of vigilante tactics as a means of social control of the black population, see Michael Hindus, Prison and Plantation: Crime, Justice and Authority in Massachusetts and South Carolina, 1767-1878, at 36-42 (1980).

[72] A number of commentators have discussed the broad support for quasi-legal and extralegal violence in traditional Southern culture. *See* John H. Franklin, The Militant South, 1800-1861 (1956); Warren F. Schwartz et al., *The Duel: Can These Gentlemen Be Acting Efficiently?* 13 J. Legal Stud. 321 (1984); William M. Wiecek, *"Old Times There Are Not Forgotten": The Distinctiveness of the Southern Constitutional Experience*, *in* An Uncertain Tradition: Constitutionalism and the History of the South 159, 186-88 (Kermit L. Hall & James W. Ely, Jr. eds., 1989); Hindus, *supra* note 71, at 42-48; Williamson, *supra* note 10, at 84-85, 120-26.

Extra-legal violence has of course existed in other regions. The American West in the nineteenth century had considerable vigilante activity and, of course, widespread dueling--the gunfights of western legend. The tradition of extra-legal violence in the West and South can, nonetheless be distinguished. Western vigilantism appears to have been a temporary response to the absence of official law enforcement in the early stages of frontier settlement. Recent research also suggests that dueling, or gunfighting, in western communities seems to have been largely confined to itinerant young men caught up in a desperado subculture. By and large, respectable western men did not engage in dueling or gun fights. By way of contrast, Southern vigilantism occurred even after formal law enforcement was capable of dealing with illegal activity, and dueling was

engaged in by some of the more socially prominent members of white Southern society. Thus, much of Southern extra-legal violence should be seen as an explicit rejection of the notion that certain injuries should be handled through legal mechanisms.

For a discussion of extra-legal violence in the nineteenth-century west, see Roger McGrath, Gunfighters, Highwaymen and Vigilantes (1984).

[73] Cottrol & Diamond, *supra* note 2, at 336-38.

[74] *Id*.

[75] 21 Tenn. (2 Hum.) 154 (1840).

[76] 1 Ga. 243 (1846).

[77] 12 Ky. (2 Litt.) 90 (1822).

[78] Ky. Const. of 1799, art. X, § 23, *reprinted in* 1 Constitutions, *supra* note 34, at 667.

[79] Act of Feb. 3, 1813, ch. LXXXIX, 1813 Ky. Acts 100 (preventing "persons in this Commonwealth from wearing concealed Arms, except in certain cases").

[80] Bliss, 12 Ky. (2 Litt.) at 91-92. The court explained its reasoning as to why the right to bear arms would brook no limitations whatever:

> The right existed at the adoption of the constitution; it had then no limits short of the moral power of the citizens to exercise it, and it in fact consisted in nothing else but in the liberty of the citizens to bear arms. Diminish that liberty, therefore, and you necessarily restrain the right.

Id. at 92.

[81] For example, see *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840):

> We are aware that the court of appeals of Kentucky, in the case of Bliss vs. The Commonwealth, . . . has decided that an act of their legislature, similar to the one now under consideration, is unconstitutional and void. We have great respect for the court by whom that decision was made, but we cannot concur in their reasoning.

Id. at 160.

[82] 21 Tenn. (2 Hum.) 154 (1840).

[83] Act of Jan. 27, 1838, ch. 137, § 2, 1837-1838 Tenn. Pub. Acts 200.

[84] Tenn. Const. of 1834, art. I, § 26, *reprinted in* 2 Constitutions, *supra* note 34, at 1679.

[85] *Aymette*, 21 Tenn. (2 Hum.) at 160-61.

[86] *Id.* at 160.

[87] *Id.* at 159.

[88] *Id.*

[89] *Id.* at 161.

[90] 307 U.S. 174, 178 (1939).

[91] 1 Ga. 243 (1846).

[92] Act of Dec. 25, 1837, §§ 1,4, 1837 Ga. Laws 90 ("An Act to guard and protect the citizens of this State against the unwarrantable and too prevalent use of deadly weapons").

[93] *See* Ga. Const. of 1789, art. II, § 6, *reprinted in* 1 Constitutions, *supra* note 34, at 385 (named the governor as the militia's commander-in-chief). The Georgia Constitution of 1777, promulgated at the start of the Revolutionary War, not only recognized the existence of the militia, but also mandated that militia units from each county be formed into battalions when their numbers reach 250 men "liable to bear arms." Ga. Const. of 1777, art. XXXV, *reprinted in* 1 Constitutions, *supra* note 34, at 381-82.

[94] Nunn v. State, 1 Ga. 243, 249-50 (1846).

[95] 32 U.S. (7 Pet.) 243 (1833).

[96] *Id*. at 250-51.

[97] *Nunn*, 1 Ga. at 250.

[98] Emancipation Proclamation, 12 Stat. 1268 (1863). On September 22, 1862, President Lincoln signed what became known as the Preliminary Emancipation Proclamation, 12 Stat. 1267 (1862). In it, President Lincoln declared his intent to free, on January 1, 1863, all slaves held in that part of the United States still in an active state of rebellion and not controlled by Union forces. *Id*.

[99] For a recount of the story of a conspiracy to rebel among Mississippi slaves in 1861 after the start of the Civil War, see Winthrop Jordan, Tumult and Silence at Second Creek: An Inquiry into a Civil War Slave Conspiracy (1993).

[100] Documentary History of Reconstruction: Political, Military, Social, Religious, Educational and Industrial, 1865 to 1906, at 275, 293 (Walter L. Fleming ed., 1966) [hereinafter

Documentary]; *see also* Tex. Const. of 1866, art. VIII, § 2, *reprinted in* 2 Constitutions, *supra* note 34, at 1798.

[101] Documentary, *supra* note 100, at 275.

[102] *Id.* at 279-80, 283-84.

[103] *Id.* at 280, 282, 287-88, 291.

[104] *See*, *e.g.*, Tex. Const. of 1866, art. VIII, § 2, *reprinted in* 2 Constitutions, *supra* note 34, at 1798.

[105] *Compare* Va. Const. of 1870, art. I, § 15, *reprinted in* 2 Constitutions, *supra* note 34, at 1954 *and* Va. Const. of 1864, bill of rights, art. XIII, *reprinted in* 2 Constitutions, *supra* note 34, at 1937 *with* Va. Bill of Rights of 1776, § 13, *reprinted in* 2 Constitutions, *supra* note 34, at 1908, Va. Const. of 1850, bill of rights, art. XIII, *reprinted in* 2 Constitutions, *supra* note 34, at 1920 *and* Va. Const. of 1830, art. I, *reprinted in* 2 Constitutions, *supra* note 34, at 1913.

[106] *Compare* S.C. Const. of 1868, art. I, § 30, *reprinted in* 2 Constitutions, *supra* note 34, at 1648 *with* S.C. Const. of 1776, S.C. Const. of 1778 *and* S.C. Const. of 1790, *reprinted in* 2 Constitutions, *supra* note 34, at 1616-36.

[107] Miss. Const. of 1817, art. I, § 23, *reprinted in* 2 Constitutions, *supra* note 34, at 1056; Miss. Const. of 1832, art. I, § 23, *reprinted in* 2 Constitutions, *supra* note 34, at 1068.

[108] Miss. Const. of 1868, art. I, § 15, *reprinted in* 2 Constitutions, *supra* note 34, at 1081. Nor did the state ignore the need for common defense. Article IX provided that able-bodied males between 18 and 45 be liable to militia duty, as the legislature might provide. 2 Constitutions, *supra* note 34, at 1090-91.

[109] N.C. Const. of 1776, declaration of rights, art. XVII, *reprinted in* 2 Constitutions, *supra* note 34, at 1410.

[110] N.C. Const. of 1868, art. I, § 24, *reprinted in* 2 Constitutions, *supra* note 34, at 1421. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

[111] Ark. Const. of 1864, art. II, § 21, *reprinted in* 1 Constitutions, *supra* note 34, at 122.

[112] Ark. Const. of 1868, art. I, § 5, *reprinted in* 1 Constitutions, *supra* note 34, at 135.

[113] *Compare* Fla. Const. of 1865, art. I, *reprinted in* 1 Constitutions, *supra* note 34, at 332-34 *with* Fla. Const. of 1838, art. I, § 21, *reprinted in* 1 Constitutions, *supra* note 34, at 318.

[114] Fla. Const. of 1868, art. I, § 22, *reprinted in* 1 Constitutions, *supra* note 34, at 348.

[115] Tenn. Const. of 1870, art. I, § 26, *reprinted in* 2 Constitutions, *supra* note 34, at 1697. Tennessee's Constitution of 1796 provided a right to bear arms for the common defense to all "freemen," and the Tennessee Constitution of 1834 to all free white men. Tenn. Const. of 1796, art. XI, § 26, *reprinted in* 2 Constitutions, *supra* note 34, at 1675; Tenn. Const. of 1834, art. I, § 26, *reprinted in* 2 Constitutions, *supra* note 34, at 1679. Neither of these provisions provided explicitly for the legislature's regulatory authority.

[116] Ga. Const. of 1865, art. I, § 4, *reprinted in* 1 Constitutions, *supra* note 34, at 402.

[117] 1 Ga. 243 (1846).

[118] *Id.*

[119] Ga. Const. of 1868, art. I, § 14, *reprinted in* 1 Constitutions, *supra* note 34, at 412.

[120] Tex. Const. of 1866, art. I, § 13, *reprinted in* 2 Constitutions, *supra* note 34, at 1785.

[121] Like its predecessor provisions, Article I, Section 13 of the Texas Constitution of 1868 declared that "[e]very person shall have the right to keep and bear arms, in the lawful defence of himself or the State," but added the proviso, "under such regulations as the legislature may prescribe." Tex. Const. Of 1868, art. I, § 13, *reprinted in* 2 Constitutions, *supra* note 34, at 1802.

[122] La. Const. of 1864, title IV, art. 67, *reprinted in* 1 Constitutions, *supra* note 34, at 747.

[123] *See* La. Const. of 1812, art. III, § 22, *reprinted in* 1 Constitutions, *supra* note 34, at 704; La. Const. of 1845, title III, art. 60, *reprinted in* 1 Constitutions, *supra* note 34, at 717; La. Const. of 1852, title III, art. 59, *reprinted in* 1 Constitutions, *supra* note 34, at 731.

[124] La. Const. of 1868, title VIII, art. 144, *reprinted in* 1 Constitutions, *supra* note 34, at 769.

[125] *Id.*

[126] *See* Dickson D. Bruce, Jr., Violence and Culture in the Antebellum South (1979).

[127] *Id.*

[128] Ark. Const. of 1864, art II, § 21, *reprinted in* 1 Constitutions, *supra* note 34, at 122.

[129] Ark. Const. of 1864, art. VIII, § 12, *reprinted in* 1 Constitutions, *supra* note 34, at 132; *see also* Ark. Const. of 1868, art. I, § 22, *reprinted in* 1 Constitutions, *supra* note 34, at 136 (with identical provisions); Ark. Const. of 1874, art. XIX, § 2, *reprinted in* 1 Constitutions, *supra* note 34, at 179 (providing merely that a duelist, their second, and any who might send, accept, or carry a challenge to duel, would be denied the right to hold public office for ten years).

[130] N.C. Const. of 1868, art. I, § 24, *reprinted in* 2 Constitutions, *supra* note 34, at 1421.

[131] N.C. Const. of 1868, art. XIV, § 2, *reprinted in* 2 Constitutions, *supra* note 34, at 1435. This prohibition attended to any who should "fight a duel, or assist in the same as a second, or send, accept, or knowingly carry a challenge therefor, or agree to go out of this State to fight a duel." *Id.* This provision was reenacted in 1876. N.C. Const. of 1876, art. XIV, § 2, *reprinted in* 2 Constitutions, *supra* note 34, at 1451.

[132] Tenn. Const. of 1870, art. IX, § 3, *reprinted in* 2 Constitutions, *supra* note 34, at 1706.

[133] Tex. Const. of 1876, art. XVI, § 4, *reprinted in* 2 Constitutions, *supra* note 34, at 1851.

[134] *See* Tenn. Const. of 1870, art. I, § 26, *reprinted in* 2 Constitutions, *supra* note 34, at 1697; Tex. Const. of 1876, art. I, § 23, *reprinted in* 2 Constitutions, *supra* note 34, at 1825.

[135] *See* Bruce, *supra* note 126.

[136] Tenn. Const. of 1870, art. I, § 26, *reprinted in* 2 Constitutions, *supra* note 34, at 1697.

[137] Documentary, *supra* note 100, at 289-90.

[138] *Id*. at 280.

[139] *See* The Reconstruction Amendments' Debates 209 (Alfred Avins ed., 1967).

[140] 1 Ga. 243 (1846).

[141] 21 Tenn. (2 Hum.) 154 (1840).

[142] *See supra* notes 81-88 and accompanying text.

[143] *See supra* notes 90-96 and accompanying text.

[144] Act of Feb. 16, 1875, § 1, 1874 Ark. Acts 155.

[145] Ark. Const. of 1836, art. II, § 21, *reprinted in* 1 Constitutions, *supra* note 34, at 103.

[146] Ark. Const. of 1864, art. II, § 21, *reprinted in* 1 Constitutions, *supra* note 34, at 122.

[147] *See* Ark. Const. of 1868, art. I, § 5, *reprinted in* 1 Constitutions, *supra* note 34, at 135; Ark. Const. of 1874, art. II, § 5, *reprinted in* 1 Constitutions, *supra* note 34, at 155.

[148] Indeed, Arkansas' highest court would make this point explicitly in 1882, when it declared that clauses such as those reserving to the legislature the power "to regulate the wearing of arms, with a view to prevent crime," to be "superabundant," and expressive of nothing more than "the undefined police powers inherent in all governments." Haile v. State, 38 Ark. 564, 567 (1882) (quoting the Tennessee Bill of Rights).

[149] 31 Ark. 455 (1876).

[150] 1 Ga. 243 (1846).

[151] 32 U.S. (7 Pet.) 243 (1833).

[152] *Fife*, 31 Ark. at 458.

[153] 21 Tenn. (2 Hum.) 154 (1840).

[154] *Fife*, 31 Ark. at 458 (quoting *Aymette*, 21 Tenn. (2 Hum.) at 158).

[155] *Id.* at 459 (quoting *Aymette*, 21 Tenn. (2 Hum.) at 158).

[156] *Id.* at 460-61 (quoting Page v. State, 50 Tenn. (3 Heisk.) 198, 200 (1871)).

[157] 33 Ark. 557 (1878).

[158] *Id.* at 559.

[159] *Id.* at 560.

[160] *Id.*

[161] Andrews v. State, 50 Tenn. (3 Heisk.) 165, 181-82 (1871).

[162] Act of Apr. 1, 1881, ch. 96,1881 Ark. Acts 191.

[163] 38 Ark. 564 (1882).

[164] *Id.* at 566. In language reminiscent of the contemporary debate about the advisability of controls on the availability and use of handguns, the court added:

> It would be a perversion of [the provision's] object, to make it a protection to the citizen, in going, with convenience to himself, and after his own fashion, prepared at all times to inflict death upon his fellow-citizens, upon the occasion of any real or imaginary wrong. The "common defense" . . . does not require that. The consequent terror to timid citizens, with the counter violence which would be incited amongst the more fearless, would be worse than the evil intended to be remedied.

Id.

[165] *Id*.

[166] 21 Tenn. (2 Hum.) 154 (1840).

[167] *See* Kopel, *supra* note 3, at 336.

[168] Immigration Act, ch. 190, § 11, 43 Stat. 153 (1924).

[169] Kennett & Anderson, *supra* note 65, at 167.

[170] Sullivan Law, ch. 195, 1911 N.Y. Laws 442 (1911) ("amend[ing] the penal law, in relation to the sale and carrying of dangerous weapons").

[171] *Id.* at 443.

[172] Kennett & Anderson, *supra* note 65, at 183. To be fair, not only was the individual in question a member of a suspect class, but he was also suspect individually. Giuseppe Costabile was "an Italian mobster of some notoriety . . . [and] reputedly a chief of the Black Hand . . . ." *Id.* at 184.

[173] Act of June 26, 1934, ch. 757, 48 Stat. 1236. The purpose of the act was to control guns that gangsters used, but beyond this, to control gangsters. *See* Robert Sherrill, The Saturday Night Special 57-58 (1973).

[174] For example, see this comment by Patrick V. Murphy, then New York City's Police Commissioner, who in 1971 testified as follows:

> What kinds of guns are used by our criminals? . . . 24 percent of [illegal weapons seized by New York City police] were . . . of this type. . . .
>
> There is absolutely no legitimate reason to permit the importation, manufacture, or sale of these weapons, or their parts. They are sought only by people who have illicit motives, but who may have some difficulty securing a better gun.

Sherrill, *supra* note 173, at 116 (quoting *Gun Control Act to Prohibit the Sale of Saturday Night Special Handguns, 1968: Hearings on S. 2507 Before the Subcomm. on Juvenile Delinquency of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 177 (1986)).

The term "Saturday Night Special" defies a fixed definition, and while most agree that the Saturday Night Special is objectionable, there are no consistent reasons as to why. American gun manufacturers label cheap foreign made competition as Saturday Night Specials, and to law enforcement personnel, often any gun that causes trouble is a Saturday Night Special, especially if it is cheap, small, and available. *Id.* at 98-99. Such handguns predate the term Saturday Night Special. The Derringer and other less notorious pocket pistols, such as the Protector, Little Joker, Little All Right, Little Giant, Tramps Terror, and Banker's Pal, antedated the term by as much as a century. *Id.* at 101. For all its recognizability as a term, the Saturday Night Special is no longer a matter of special police concern. "In the past, we used to face criminals armed with a cheap Saturday Night Special that could fire off six rounds before loading. Now it is not at all unusual for a cop to look down the barrel of a TEC-9 with a 32 round clip." H.R. Rep. No. 498, 103d Cong., 2d Sess. 13 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1821-22 (quoting *Public Safety and Recreational Firearms Use Protection Act, 1994: Hearings on H.R. 4296 and H.R. 3527 Before*

the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 103d Cong., 2d Sess. (1994) (statement of Tony Loizzo, Executive Vice President, National Association of Police Organizations)).

[175] Consider, for example, the recent passage of the Violent Crime Control Act. 18 U.S.C. § 921 (1994). Part of the Violent Crime Control Act made unlawful the transfer or possession of certain assault rifles. *Id.* at § 922. House Report 489, accompanying this part of the bill, quotes the Committee on the Judiciary, citing the threat posed by "criminals and mentally deranged people armed with . . . semi-automatic assault weapons, . . ." and "[t]he carnage [thus] inflicted on the American people [by such persons] armed with Rambo-style, semi-automatic assault weapons has been overwhelming and continuing." H.R. Rep. No. 489, 103d Cong., 2d Sess. 13 (1994), *reprinted in* 1991 U.S.C.C.A.N. 1821 (quoting House Comm. on the Judiciary, Omnibus Crime Control Act, H.R. Rep. No. 242, 102d Cong., 1st Sess. 203 (1991)).

House Report 489 cites statistics that though "assault weapons make up only about 1 percent of the firearms in circulation. . . . [T]hey are proportionally more often used in crimes." *Id.* (quoting *Public Safety and Recreational Firearms Use Protection Act, 1994: Hearings on H.R. 4296 & H.R. 3527 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong., 2d Sess. (1994) (statement of John Magaw, Director, ATF)). Moreover, the report cites several shootings in which large numbers of innocent people have been killed or wounded and in which law enforcement officers have been murdered, as having raised public consciousness about "semi-automatic assault weapon[s]." *Id.* at 1822. Among these incidents are several prominent shootings that have taken place and have been widely reported in the recent past. These include the December 1993 Long Island Railroad Commuter train murders, in which six were killed and nineteen wounded; the February 1993 raid at the compound of the Branch Davidian in Waco, Texas, during which four special agents of the Bureau of Alcohol, Tobacco, and Firearms were killed and fifteen wounded; the January 1993 killing of two Central Intelligence Agency employees and the wounding of three others outside the CIA headquarters in McClean, Virginia; and the January 1989 murder of five schoolchildren and the wounding of twenty-nine others in Stockton, California. *Id.* at 1823.

[176] *See* Cottrol & Diamond, *supra* note 2, at 312-13 n.7.

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