Part one of this article.

Part two of this article.

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[FN255]. United States v. Muscarello, 524 U.S. 125 (1998) (Ginsburg, J., dissenting), supra text at note 57.

[FN256]. See, e.g., sources cited at supra note 6.

[FN257]. See, e.g., Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, supra note 8.

[FN258]. Stearns v. Wood, 236 U.S. 75 (1915).

[FN259]. Id. at 76. Colonel would be the next rank up.

[FN260]. Id. at 78.

[FN261]. Id.

[FN262]. Id.

[FN263]. Salina v. Blaksley, 83 P. 619 (Kan. 1905).

[FN264]. Twining v. New Jersey, 211 U.S. 78 (1908)(overruled by Malloy v. Hogan, 378 U.S. 1 (1964).

[FN265]. Id. at 98-99.

[FN266]. Maxwell v. Dow, 176 U.S. 581 (1899).

[FN267]. Id. at 597.

[FN268]. The war led to the development of the Colt .45 self-loading pistols, since smaller pistol rounds often had insufficient stopping power against the Filipino warriors.

[FN269]. Trono v. United States, 199 U.S. 521 (1905).

[FN270]. Kepner v. United States, 195 U.S. 100 (1904).

[FN271]. Trono, 199 U.S. at 528.

[FN272]. Id.

[FN273]. 32 Stat. 691 (1902).

[FN274]. Trono, 199 U.S. at 528.

[FN275]. Id.

[FN276]. See id.

[FN277]. Kepner, 195 U.S. at 123-24.

[FN278]. Id. They are the familiar language of the Bill of Rights, slightly changed in form, but not in substance, as found in the first nine amendments to the Constitution of the United States, with the omission of the provision preserving the right of trial by jury and the right of the people to bear arms, and adding the prohibition of the 13th Amendment against slavery or involuntary servitude except as punishment for crime, and that of Article I, Section 9, to the passage of bills of attainder and ex post facto laws.

[FN279]. Robertson v. Baldwin, 165 U.S. 275, 277 (1897).

[FN280]. Id. at 281.

[FN281]. Id. at 281-82.

[FN282]. Id. at 282.

[FN283]. See, e.g., State v. Workman, 35 W. Va. 367 (1891). See generally, Kopel, The Second Amendment in the Nineteenth Century, supra note 9; Cramer, For the Defense of Themselves and the State, supra note 9.

[FN284]. Brown v. Walker, 161 U.S. 591 (1896).

[FN285]. The Presser case, discussed infra at notes 310-20, appears in the Justice Brown's majority opinion, as part of a string cite for the proposition, "the first eight amendments are limitations only upon the powers of congress and the federal courts, and are not applicable to the several states, except so far as the fourteenth amendment may have made them applicable." Id. at 606.

[FN286]. Id. at 631 (Field, J., dissenting).

[FN287]. Id. at 632.

[FN288]. Id. at 635.

[FN289]. Id. (em phases added).

[FN290]. Henigan, Guns and the Constitution, supra note 4.

[FN291]. Miller v. Texas, 153 U.S. 535 (1894).

[FN292]. Id. at 538.

[FN293]. Id. at 539.

[FN294]. Robertson, 165 U.S. at 281-82, supra text at notes 280-82.

[FN295]. Id. at 538.

[FN296]. Id.

[FN297]. Miller, 153 U.S. at 538.

[FN298]. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897) (takings clause).

[FN299]. Spies v. Illinois, 123 U.S. 131 (1887). See generally Paul Avrich, The Haymarket Tragedy (1986).

[FN300]. John Randolph Tucker, The Constitution of the United States (Fred B. Rothman & Co. 1981) (1899); William G. Bean, John Randolph Tucker, in The Dictionary of American Biography (CD-Rom ed. 1997).

[FN301]. I hold the privilege and immunity of a citizen of the United States to be such as have their recognition in or guaranty from the Constitution of the United States. Take then the declared object of the Preamble, "to secure the blessings of liberty to ourselves and our posterity," we ordain this Constitution--that is, we grant powers, declare rights, and create a Union of States. See the provisions as to personal liberty in the States guarded by provision as to ex post facto laws, &c.; as to contract rights--against States' power to impair them, and as to legal tender; the security for habeas corpus; the limits imposed on Federal power in the Amendments and in the original Constitution as to trial by jury, &c.; the Declaration of Rights--the privilege of freedom of speech and press--of peaceable assemblages of the people--of keeping and bearing arms--of immunity from search and seizure--immunity from self-accusation, from second trial--and privilege of trial by due process of law. In these last we find the privileges and immunities secured to the citizen by the Constitution. It may have been that the States did not secure them to all men. It is true that they did not. Being secured by the Constitution of the United States to all, when they were not, and were not required to be, secured by every State, they are, as said in the Slaughter-House Cases, privileges and immunities of citizens of the United States.
The position I take is this: Though originally the first ten Amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental rights--common law rights--of the man, they make them privileges and immunities of the man as citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment. In other words, while the ten Amendments, as limitations on power, only apply to the Federal government, and not to the States, yet in so far as they declare or recognize rights of persons, these rights are theirs, as citizens of the United States, and the Fourteenth Amendment as to such rights limits state power, as the ten Amendments had limited Federal power.

[FN302]. Id.

[FN303]. Id.

[FN304]. Spies, 123 U.S. at 166.

[FN305]. Eilenbecker v. District Court of Plymouth County, 134 U.S. 131 (1890):
The first three of these assignments of error, as we have stated them, being the first and second and fourth of the assignments as numbered in the brief of the plaintiffs in error, are disposed of at once by the principle often decided by this court, that the first eight articles of the amendments to the Constitution have reference to powers exercised by the government of the United States and not to those of the States. Livingston v. Moore, 7 Pet. 469; The Justices v. Murray, 9 Wall. 274; Edwards v. Elliott, 21 Wall. 532; United States v. Cruikshank, 92 U.S. 542; Walker v. Sauvinet, 92 U.S. 90; Fox v. Ohio, 5 How. 410; Holmes v. Jennison, 14 Pet. 540; Presser v. Illinois, 116 U.S. 252.

[FN306]. Spies, 123 U.S. at 168.

[FN307]. During the nineteenth century, the official Supreme Court reports included summaries of counsels' arguments. Besides Tucker's argument in Spies, there are two other nineteenth century cases which record use by counsel of the Second Amendment; both uses were by the Attorney General's office, and both regarded the Second Amendment as an individual right. In the argument for In re Rapier, Assistant Attorney General Maury defended a federal ban on the mailing of lottery tickets: "Freedom of the press, like freedom of speech, and 'the right to keep and bear arms,' admits of and requires regulation, which is the law of liberty that prevents these rights from running into license." In re Rapier, 143 U.S. 110, 131 (1892). The other argument came from the Attorney General in Ex Parte Milligan. Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866); supra note 217.

[FN308]. Logan v. United States, 144 U.S. 263, 281-82 (1892).

[FN309]. Id. at 285-86.

[FN310]. Id. at 286-88.

[FN311]. See Levinson, supra note 9; Stephen Halbrook, The Right of Workers to Assemble and to Bear Arms: Presser v. Illinois, Last Holdout Against Application of the Bill of Rights to the States, 76 U. Det. Mercy L. Rev. (1999, forthcoming).

[FN312]. Presser v. Illinois, 116 U.S. 252, 265 (1886).

[FN313]. 1 William Hawkins, A Treatise of the Pleas of the Crown 126 (Garland Publ. 1978) (1716) (A Justice of the Peace may require surety from persons who "go about with unusual Weapons or Attendants, to the Terror of the People.")

[FN314]. Presser, 116 U.S. at 265.

[FN315]. Id. at 266.

[FN316]. Id.

[FN317]. U.S. Const., amend. XIV, § 1.

[FN318]. E.g., Fresno Rifle Club v. Van de Kamp, 965 F.2d 723 (9th Cir. 1992).

[FN319]. Id. at 265.

[FN320]. Id. at 265-66.

[FN321]. Id. For the subsequent interpretation of Presser, see Malloy v. Hogan, supra note 184 (Second Amendment is not a Fourteenth Amendment Privilege or Immunity); Poe v. Ullman, supra note 204 (Harlan, J., dissenting) (Fourteenth Amendment liberty is not co-extensive with Bill of Rights); Adamson v. California, supra note 222 (Black, J., dissenting) (Second Amendment not directly applicable against states); Twining v. New Jersey, supra note 264 (Second Amendment not a Fourteenth Amendment Privilege or Immunity); Maxwell v. Dow, supra note 266 (Second Amendment not directly applicable to states); Brown v. Walker, supra note 284 (same); Miller v. Texas, supra notes 291-96 (Second Amendment not directly applicable, not a Privilege or Immunity) but enforcement against states via Fourteenth Amendment is an open question; Spies v. Illinois, supra note 303 (Second Amendment not directly applicable against states); Eilenbecker, supra note 304 (same).

[FN322]. 16 Stat. 140 § 6 (1870); 18 U.S.C. §§ 241, 242: "That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another...or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege secured or granted him by the Constitution or laws of the United States...."

[FN323]. Stephen Halbrook, Freedmen, Firearms, and the Fourteenth Amendment (1998); Eric Foner, Reconstruction 258-59 (1988); Richard L. Aynes, On Misreading John Bingham and the Fourteenth Amendment, 103 Yale L.J. 57 (1993).

[FN324]. George C. Rable, But There Was No Peace: The Role of Violence in the Politics of Reconstruction 125-29 (Athens Univ. of Georgia Pr., 1984).

[FN325]. United States v. Cruikshank, 92 U.S. 542, 551 (1875) (emphasis added).

[FN326]. Id. at 553 quoting New York v. Miln, 36 U.S. (11 Pet.) 125, 139 (1837). Cf. Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 92, 13 Am. Dec. 251, 253 ("The right [to arms in the Kentucky Constitution] existed at the adoption of the constitution; it had no limits short of the moral power of the citizens to exercise it, and it in fact consisted in nothing else but the liberty of the citizens to bear arms.").

[FN327]. "The Second Amendment protects only the right of the states to maintain and equip a militia and does not guarantee individuals the right to bear arms; United States v. Cruikshank (1875)." C. Herman Pritchett, The American Constitution 397 n. 1 (2d ed. McGraw-Hill, 1968).

[FN328]. Malloy v. Hogan, supra note 186; Knapp v. Schweitzer, supra note 208. For different interpretations of Cruiksbank, see Spies v. Illinois, supra note 303 (Second Amendment not directly applicable to states); Eilenbecker, supra note 304 (same); Logon v. United States, supra note 309 (First Amendment assembly right and Second Amendment arms right are similar; Bill of Rights protects neither against private interference).

[FN329]. DeJonge v. Oregon, 299 U.S. 353 (1937).

[FN330]. Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). Among Chief Justice Taney's proofs that free blacks were not citizens was the fact that blacks were often excluded from militia service. The Taney opinion explained that the parties to the original American social compact were only those "who, at that time [American independence], were recognized as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms." Id. at 407. The new nation's federal militia law of 1792 had enrolled only free white males in the militia of the United States, and blacks had been excluded from the New Hampshire militia. Id. at 420. These facts suggested to Chief Justice Taney that free blacks were not recognized as citizens, since they were not in the militia.
Justice Curtis retorted by pointing to the language of the 1792 Militia Act, which enrolled "every free, able-bodied, white male citizen." Justice Curtis pointed out the implication of the language that "citizens" included people who were not able-bodied, were not male, or were not white; otherwise, there would have been no need to limit militia membership of able-bodied white males. Id. at 442 (Curtis, J., dissenting). But Justice Curtis's argument had one problem: the use of the word "free" in the Militia Act. It was undisputed that slaves were not citizens, since they were deprived of all rights of citizenship. The Militia Act enrolled only "free, able-bodied, white male citizens." If we follow Justice Curtis's logic to conclude that the Militia Act proves that non-whites could be citizens, then the same logic would show that unfree persons could be citizens.
The stronger part of the Curtis dissent was his evidence showing that many of the thirteen original states did recognize blacks as citizens. The Taney majority never directly addressed this part of the Curtis argument, except by listing various disabilities (such as prohibitions on racial intermarriage, or bans on operating schools for blacks) which even anti-slavery states like Massachusetts and Connecticut imposed on free blacks. Thus, in a bizarre way, the Taney majority (despite its pro-slavery taint) pre-figures twentieth century Supreme Court jurisprudence that there can be no second-class citizens in the United States. The Curtis opinion argues that various civil disabilities (including exclusion from the militia) are consistent with citizenship. For the Taney majority, citizenship is all or nothing; exclusion from education, from intermarriage with whites, or from the militia are all incompatible with citizenship. Thus, once a constitutional amendment conclusively declared that blacks are citizens, the logic of the Dred Scott majority leads to the results in Brown v. Board, 349 U.S. 294 (1955) (racial discrimination in schooling is incompatible with citizenship rights); Loving v. Virginia, 388 U.S. 1 (1967) (laws against intermarriage are incompatible with citizenship rights); and Bell v. Maryland, 378 U.S. 226, 260 (1964) (segregation in restaurants and lunch counters "is a badge of second-class citizenship."); Id at 288 (Douglas, J., concurring) ("The Thirteenth,

Fourteenth, and Fifteenth Amendments do not permit Negroes to be considered as second-class citizens in any aspect of our public life."). In contrast, the Curtis dissent (while laudably humane in its anti-slavery sentiments) allows for second-class citizenship on the basis of race.

[FN331]. Id. at 417.

[FN332]. Id.

[FN333]. See, e.g., Edwards v. California, 314 U.S. 160, 168 (1994) (Douglas, J., concurring); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873).

[FN334]. Scott, 60 U.S. at 417.

[FN335]. Act of Mar. 6, 1820, ch. 22, 8, 3 Stat. 545, 548.

[FN336]. Scott, 60 U.S. at 450.

[FN337]. Id. at 450-51.

[FN338]. Id. at 399.

[FN339]. See, e.g., Stephen Douglas, The Dividing Line Between Federal and Local Authority: Popular Sovereignty in the Territories, Harper's (Sept. 1859) 519, 530.

[FN340]. U.S. Const., amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the Untied States and of the State wherein they reside.")

[FN341]. Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903) (Sixth Amendment requirement for unanimous jury not applicable in territory of Hawaii; only "fundamental" constitutional rights apply in the territories); De Lima v. Bidwell 182 U.S. 1 (1901) (Puerto Rican goods imported to the states are not subject to the tariff applicable to foreign imports); Dooley v. United States, 182 U.S. 222 (1901) (goods transported from the states to Puerto Rico not subject to tariff applicable to foreign imports to Puerto Rico); Downes v. Bidwell, 182 U.S. 244 (1901) (In taxing imports from Puerto Rico to the states, Congress need not obey the constitutional requirement that taxes imposed by Congress be uniform throughout the United States).

[FN342]. Downes, 182 U.S. at 379 (Harlan, J., dissenting).

[FN343]. Richard Warren Barkley, letter of May 28, 1901, to John Marshall Harlan, quoted in Tinsley E. Yarborough, Judicial Enigma: The First Justice Harlan 197 (1995)

[FN344]. Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820).

[FN345]. "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

[FN346]. Houston, 18 U.S. at 6.

[FN347]. U.S. Const. amend. X.

[FN348]. Houston, 18 U.S.at 46-47.

[FN349]. Id.

[FN350]. Id.

[FN351]. This was the only time that Justice Story dissented from a constitutional decision in which Chief Justice Marshall was in the majority. James McClellan, Joseph Story and the American Constitution 311 n. 161 (2d ed. 1990).

[FN352]. Houston, 18 U.S. at 46-47.

[FN353]. Id. at 47-48 (Story, J., dissenting)..

[FN354]. The Supreme Court decided one other militia case during this period. Writing for a unanimous Court, Justice Story held that the President's determination of the need for a militia call-out was not subject to judicial review. See Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

[FN355]. Joseph Story, A Familiar Exposition of the Constitution of the United States 264-65 (1842) For more on Justice Story's thoughts about the Second Amendment, see Kopel, The Second Amendment in the Nineteenth Century, supra note 4, at 119-20.

[FN356]. See, e.g., Henigan, Arms, Anarchy, supra note 5.

[FN357]. See Kopel, The Second Amendment in the Nineteenth Century, supra note 7, at 1388-97.

[FN358]. United States v. Miller, 307 U.S. 174 (1939), supra notes 16-27.

[FN359]. Adams v. Williams, 407 U.S. 143, 150-51 (1972) (Douglas, J., dissenting), supra note 141.

[FN360]. Lewis v. United States, 445 U.S. 55, 65-66 (1980), supra note 103.

[FN361]. Hamilton v. Regents of the Univ. of California, 293 U.S. 245, 260-61 (1934), supra note 238.

[FN362]. United States v. Schwimmer, 279 U.S. 644, 650-52 (1929), supra note 253.

[FN363]. Burton v. Sills, 394 U.S. 812 (1969), supra note 170.

[FN364]. Laird v. Tatum, 408 U.S. 1, 22-23 (1972), supra note 163.

[FN365]. Spencer v. Kemna, 523 U.S. 1, 36 (1998) (Stevens, J., dissenting), supra note 42.

[FN366]. Moore v. East Cleveland, 431 U.S. 494, 502 (1976), supra note 120.

[FN367]. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 47-48 (1820) (Story, J., dissenting), supra note 352.

[FN368]. See Story, supra note 354.

[FN369]. Printz v. United States, 521 U.S. 898, 938-39 (1997) (Thomas, J., concurring), supra note 64.

[FN370]. Justice Black did view the entire Bill of Rights as absolute within it terms. He explicitly so stated with regard to the Second Amendment in his James Madison lecture at New York University. It might be reasonable to read Justice Black's Supreme Court opinions which mention the Second Amendment as reflecting his absolutist view. See supra text at notes 179-82, 194-96, 221- 34.

[FN371]. Supra note 3.
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