

**THE SECOND AMENDMENT WAS ADOPTED TO PROTECT  
LIBERTY, NOT SLAVERY:  
A REPLY TO PROFESSORS BOGUS AND ANDERSON**

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### **Introduction: A "History" So "Secret" That It Was Not Discovered Until 1998**

The Bill of Rights recognizes "the right of the people" "peaceably to assemble," "to keep and bear arms," and "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."<sup>1</sup> These rights and others were denied to African Americans in the slave states at the time of America's founding. It would take the abolition of slavery and the adoption of the Fourteenth Amendment to ensure that all persons, black and white, were recognized as included in "the people" entitled to these rights.

The argument has been made that the Second Amendment was adopted to protect slavery. Professor Carl Bogus originally advanced this thesis in a 1998 law review article "The Hidden History of the Second Amendment."<sup>2</sup> His basic argument is that the Amendment was adopted so that the Southern states could maintain militias to suppress slave rebellions. As Bogus freely concedes, no direct evidence exists of historical records to support the thesis.<sup>3</sup>

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<sup>1</sup> U.S. Const., Amendments I, II, & IV.

<sup>2</sup> Carl T. Bogus, "The Hidden History of the Second Amendment," 31 *U.C. Davis L. Rev.* 309 (1998). Hereafter cited "Bogus."

<sup>3</sup> *Id.* at 372.

The Bogus thesis flares up periodically by advocates of increasing criminalization of firearms ownership. In response to one such article in 2013,<sup>4</sup> Professor Paul Finkelman – himself a supporter of gun control – took the argument to task, calling it “mostly wrong, and very misleading.”<sup>5</sup>

More recently, in her 2021 book *The Second: Race and Guns in a Fatally Unequal America*, Professor Carol Anderson maintains: “The Second Amendment was . . . not some hallowed ground but rather a bribe, paid again with Black bodies.”<sup>6</sup> Despite its title, very little in this book is actually about the meaning and adoption of the Second Amendment. Its focus is racial injustice in American history. Few would quarrel with the account of many instances in which African Americans have been deprived of Second Amendment rights.

As to the meaning and reasons for adoption of the Second Amendment, Anderson cites no original sources. One of the secondary sources cited is this author’s book, *The Founders’ Second Amendment*. Reference is made to antebellum Southern state laws that banned possession of firearms by slaves, ending with the quotation: “Citizen(s) had the right to keep arms; the slave did not.”<sup>7</sup> This author has documented the antebellum slave codes and the postbellum black codes in greater detail elsewhere.<sup>8</sup>

But Anderson’s main secondary source on the Second Amendment is Bogus’ “Hidden History,” which has never gained traction as credible in Second Amendment scholarship. Anderson has now resurrected and popularized Bogus’ thesis, to the possible acclaim of those who support increased criminalization of firearms possession. But African Americans are invariably in the receiving end of mala prohibita firearm prohibitions that result in felony records and imprisonment of persons who peaceably possess firearms for self-defense. For instance, New York punishes the possession of a loaded firearm with 3.5 to 15 years imprisonment unless one has a license that is unavailable to the general public. “In 2020, while Black people made up

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<sup>4</sup> Thom Hartmann, “The Second Amendment was Ratified to Preserve Slavery,” *Truthout*, Jan. 15, 2013. <http://truth-out.org/news/item/13890-the-second-amendment-was-ratified-to-protect-slavery>.

<sup>5</sup> Paul Finkelman, “2nd Amendment Passed to Protect Slavery? No!” *The Root*, Jan. 21, 2013. <https://www.theroot.com/2nd-amendment-passed-to-protect-slavery-no-1790894965> (hereafter cited “Finkelman”).

<sup>6</sup> Carol Anderson, *The Second: Race and Guns in a Fatally Unequal America* 32 (2021). Hereafter cited “Anderson.”

<sup>7</sup> *Id.* at 5 & 172 n.20, quoting Stephen P. Halbrook, *The Founders’ Second Amendment* 128, 142, 166, 168 (Chicago: Ivan R. Dee, 2008).

<sup>8</sup> Stephen P. Halbrook, *The Right to Bear Arms: A Constitutional Right of the People or a Privilege of the Ruling Class* 256-63 (New York: Post Hill Press, 2021) (slave codes); Stephen P. Halbrook, *Securing Civil Rights: Freedmen, the Fourteenth Amendment, & the Right to Bear Arms* 1-50 (black codes and Congressional action thereon).

18% of New York’s population, they accounted for 78% of the state’s felony gun possession cases.”<sup>9</sup>

Anderson’s book was received uncritically by media such as CNN and the *New York Times*.<sup>10</sup> Its thesis was welcomed by the gun ban lobby such as Brady (previously named Handgun Control).<sup>11</sup>

This Article is limited to the meaning and reasons for adoption of the Second Amendment. The predecessor of the Amendment was the English Declaration of Rights of 1689, which protected the right of Protestants to have arms. Beginning in 1776, some states adopted bills of rights that recognized the right to bear arms. Some of the Northern states began to pass laws to abolish slavery. When the federal Constitution was proposed in 1789, the antifederalists criticized it for lack of a bill of rights, including recognition of the right to bear arms, and also found fault with the power over the militia given to Congress. Some of these antifederalists were also abolitionists who sought the end of slavery.

Simply put, the Bogus thesis is that the Virginia convention that ratified the Constitution somehow reached an unstated understanding with the Northern states to ensure strong state control over the militia to protect slavery. James Madison drafted the Second Amendment to consummate the secret deal. Bogus fails to analyze the other state conventions in which champions of the right to bear arms were also champions of the abolition of slavery. This Article tells the entire story.

But first, consider the text: “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.” Use of “the people” was subversive in the long run to limiting the right to white people. As abolitionists would argue, the explicit text here and in other Bill of Rights guarantees was plainly inconsistent with excluding African Americans from the right. The defect at the founding was not in recognizing the rights of *white* Americans, but was in *not* recognizing the rights of *black* Americans. And as will be seen, the impetus for recognition of the right to bear arms came from the Northern states, which had abolished or were in the process of abolishing slavery.

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<sup>9</sup> Brief of the Black Attorneys of Legal Aid et al., *New York State Rifle and Pistol Association v. Bruen*, No. 20-843, at 14 (U.S. Supreme Court 2021), citing NYC Open Data, NYPD Arrests, <https://data.cityofnewyork.us/Public-Safety/NYPD-Arrests-DataHistoric-/8h9b-rp9u>.

<sup>10</sup> “Was the Constitutional Right to Bear Arms Designed to Protect Slavery?” *New York Times*, May 28, 2021. <https://www.nytimes.com/2021/05/28/books/review/the-second-carol-anderson.html>. “Second Amendment is not about guns – it’s about anti-Blackness,” *CNN*, May 30, 2021. <https://www.msn.com/en-us/news/us/second-amendment-is-not-about-guns-it-s-about-anti-blackness-a-new-book-argues/ar-AAKxczm>.

<sup>11</sup> “140: The Second Amendment in an Unequal America,” Brady Podcast. <https://www.bradyunited.org/podcast/episodes/second-amendment-racially-unequal-america>.

The Amendment's militia clause states a principle of political philosophy – a well regulated militia is necessary for the security of a free state – that is a reason for the recognition of the right to keep and bear arms. But it is not a delegation or reservation of state or federal power. It did nothing to alter the following powers of Congress in Article I, § 8, of the Constitution:

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 . . . .

As will be seen, much of the debate over the Constitution raised by Professors Bogus and Anderson concerned *not* the Second Amendment as they mistakenly argue, but Congress' power over the militia in Article I, § 8. The Second Amendment did nothing to alter the federal-state balance of power over the militia and instead recognized a right of the people to keep and bear arms.

## **I. ORIGIN AND TEXT OF THE SECOND AMENDMENT**

### **A. The Second Amendment Derived from the English Declaration of Rights of 1689, Which Plainly Had No Relevance to Slavery**

The right to keep and bear arms long antedated the Second Amendment, which was derived in part from the English Declaration of Rights of 1689. Recognition of the right had nothing to do with slavery.

In the Glorious Revolution of 1688, the Catholic King James II – who had carried out a policy of disarming the Protestant subjects – was overthrown and replaced by William and Mary. The Declaration of Rights of 1689 listed among the ways that James II attempted to subvert “the Laws and Liberties of this Kingdom”: “By causing several good Subjects, being Protestants, to be disarmed, at the same Time when Papists [Catholics] were both armed and employed, contrary to law.”<sup>12</sup> The act accordingly declared thirteen “true, ancient and indubitable rights,” including the following: “That the Subjects which are Protestants, may have Arms for their Defence suitable to their Condition, and as are allowed by Law.”<sup>13</sup>

The Declaration was plainly not grounded in the need to suppress a domestic slave population – England had none. However, limitation of the right to the majority Protestant

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<sup>12</sup> An Act Declaring the Rights and Liberties of the Subject, 1 W. & M., Sess. 2, c.2, (1689).

<sup>13</sup> *Id.*

population made possible laws disarming the minority Catholic population.<sup>14</sup> In drafting the Second Amendment, James Madison recognized the fallacy of limiting arms to Protestants, thus extending the right to “the people.”<sup>15</sup> Moreover, as St. George Tucker would write: “The right of the people to keep and bear arms shall not be infringed . . . and this without any qualification as to their condition or degree, as is the case in the British government . . . .”<sup>16</sup>

Bogus concedes: “This Article does not quarrel with the premise that the Second Amendment was inspired by the Declaration of Rights.”<sup>17</sup> He claims that the 1788 Virginia ratifying convention “provided the impetus for embodying a right to bear arms in the Bill of Rights,” but that “Madison and the Founders borrowed more than they created. A right to have arms provision was contained in the English Declaration of Rights of 1689, a document considered part and parcel of the English Constitution.”<sup>18</sup> His discussion of the Declaration includes nothing that supports the simplistic thesis that the Second Amendment was invented to protect slavery.<sup>19</sup>

### **B. Laws Excluding Slaves from the Rights of “the People” in the Bill of Rights Did Not Imply that the Guarantees Were Adopted to Protect Slavery**

In the colonial, founding, and early republic periods, Americans were recognized as having the right to keep and bear arms. The major exception was the slave codes in the Southern states that prohibited slaves and, in some states, free blacks from the exercise of the right.

Slaves were deprived of all of the rights that would be set forth in the Bill of Rights. The Second Amendment was not unique in that regard. St. George Tucker summarized their plight thus:

To go abroad without a written permission; to keep or carry a gun, or other weapon; to utter any seditious speech; to be present at any unlawful assembly of slaves; to lift the hand in opposition to a white person, unless wantonly assaulted, are all offences punishable by whipping.<sup>20</sup>

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<sup>14</sup> E.g., 1 W.&M., Sess. 1, c. 15 § 4 (1689).

<sup>15</sup> Madison, Notes for Speech in Congress, June 8, 1789, 12 *Papers of James Madison*, 193-94 (1979).

<sup>16</sup> 1 St. George Tucker, *Blackstone’s Commentaries* \*143 n.40 (1803).

<sup>17</sup> Bogus at 322.

<sup>18</sup> Bogus at 375-76.

<sup>19</sup> Bogus at 383-86.

<sup>20</sup> St. George Tucker, *A Dissertation on Slavery: With a Proposal for the Gradual Abolition of It, in the State of Virginia* 65 (1796).

Such provisions were included, for instance, in Virginia's slave code of 1748. Some of these activities would find explicit protection in the First and Second Amendments when exercised by "the people." The First Amendment protected "the freedom of speech" and "the right of the people peaceably to assemble." But the slave code strictly prohibited "the meetings of slaves" and punished "every slave, present at any unlawful meeting."<sup>21</sup> Of course, the fact that slaves were deprived of First Amendment rights does not imply that the First Amendment was adopted to protect slavery.

Virginia's gun control provisions provided that "no negroe, mulattoe, or Indian whatsoever, shall keep, or carry any gun, powder, shot, club, or other weapon, whatsoever, offensive, or defensive . . . ."<sup>22</sup> However, "every free negroe, mulattoe, or Indian, being a house keeper, may be permitted to keep one gun, powder, and shot: And all negroes, mulattoes, and Indians, bond or free, living at any frontier plantation, may be permitted to keep and use guns, powder, shot, and weapons, offensive, or defensive, by licence, from a justice of peace . . . ."<sup>23</sup>

Similar laws persisted through the antebellum period. Professor Anderson relies in part on this author's work detailing Southern state laws that banned possession of firearms by slaves, ending with the quotation: "Citizen(s) had the right to keep arms; the slave did not."<sup>24</sup>

The obvious purpose of these laws was to maintain the institution of slavery. Had they been able to assemble, to speak freely, and to have arms, slaves would be able to escape, to defend themselves, and to revolt. That did not mean that the right to bear arms existed to protect slavery any more than did the right to assemble and to free speech. It was the denial of these rights that protected slavery.

There is a chronological problem with the thesis that the Second Amendment was adopted to suppress slave revolts. The last major slave revolt had taken place a half century before the Amendment was adopted. As described by Anderson, in the 1739 Stono River revolt in South Carolina, twenty slaves raided a storehouse where weapons were sold and seized arms. The number of slaves reached ninety as they "carved a path of death and destruction through the colony en route, it appears, to Florida . . . ."<sup>25</sup> The South Carolina militia struck back and brutally repressed the rebellion, killing many slaves.<sup>26</sup>

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<sup>21</sup> 6 Hening, Statutes at Large 107-08 (1748).

<sup>22</sup> *Id.* at 109.

<sup>23</sup> *Id.* at 110.

<sup>24</sup> Anderson at 5 & 172 n.20, quoting Stephen P. Halbrook, *The Founders' Second Amendment* 128, 142, 166, 168 (Chicago: Ivan R. Dee, 2008).

<sup>25</sup> *Id.* at 15.

<sup>26</sup> *Id.* at 16.

Implying a cause-and-effect relation, Anderson then states: “Meanwhile, whites, particularly on plantations were stacking up the arms.” She quotes a study of probate records that concluded that 50% of all wealthholders in the Thirteen Colonies *in 1774* owned guns.<sup>27</sup> The percentages were higher than average in four southern states. (Without commenting on the study, probate records underestimated firearms ownership – Thomas Jefferson owned many firearms in his life, but the inventories of his three estates included none.<sup>28</sup>)

That’s quite a jump from 1739 to 1774, when impending conflict with Britain was escalating and colonists were scrambling to obtain more and more arms to resist the Redcoats. Gun ownership in the South may have been higher for several reasons, given that it was a rural society with a hunting culture, continued conflict with Indians, and yes, for some, fear of potential slave resistance.

But in 1774, the colonies were engaged in an escalating conflict with the British, which would break out into open war the following year and would not end until 1783. Some 25,000 people died in the American Revolution,<sup>29</sup> which dwarfed the relatively few deaths in the long-since passed 1739 slave revolt, which took place in a single colony. The then-recent events leading to and during the War for Independence, with the horrendous amount of death and destruction that occurred, was paramount in the minds of the Founders when they adopted the Second Amendment.

To determine why the Second Amendment was adopted, one must turn to the history of how it was adopted and who adopted it. Bogus constructs a simplistic theory, echoed by Anderson, that unstated machinations at the 1788 Virginia ratifying convention virtually tell the whole story. But other states ratified the Constitution as well and then ratified the Second Amendment. The complete story must be told.

From the American Revolution through the adoption of the Second Amendment, the impetus for recognition of the right to bear arms came more from the Northern states, where slavery was abolished or dying, than from the Southern states. In no way was the Second Amendment a devil’s bargain extracted by the slave states from a reluctant North. The history of how this occurred demonstrates the fundamental basis of the right to bear arms for self-defense, resistance to tyranny, hunting, and other legitimate purposes.

The following analyzes chronologically the adoption of the Constitution by states in which demands for recognition of the right to bear arms was significant. Of these states, Pennsylvania and Massachusetts had state arms guarantees but ratified without suggesting

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<sup>27</sup> *Id.* at 17 & 179 n.49, quoting James Lindgren and Justin L. Heather, “Counting Guns in Early America,” *William and Mary Law Review* 43, no. 5 (2002): 1800, 1803-1804, 1806, 1817.

<sup>28</sup> Halbrook, *The Founders’ Second Amendment*, 318-19.

<sup>29</sup><https://www.reference.com/history/many-people-died-revolutionary-war-237d2dd048292590>.



amendments, although there were strong demands for doing so. Both of these states had abolished slavery at that point. New Hampshire, where slavery was considered illegal, was the first state to adopt the Constitution and demand a bill of rights, including that Congress may not disarm citizens.

Virginia was next, tipping the scales in favor of ratification of the Constitution while proposing amendments, including a bill of rights to include the right to bear arms and structural amendments to include state militia powers. Bogus focuses on the Virginia convention but finds nothing linking the right to bear arms to slavery. New York ratified next and followed Virginia's demand for a bill of rights; slavery was on the decline there but not yet abolished at that time.

Next, James Madison proposed the Bill of Rights in Congress, where it worked its way through until passage. The Second Amendment was understood there as a measure to prevent tyranny. Congress rejected proposals amending the federal-state balance regarding the militia.

An alliance of three states remained with the goal of ensuring ratification of the Bill of Rights. North Carolina waited to ratify the Constitution until the Bill of Rights was proposed. Rhode Island and Vermont, both of which had abolished slavery, demanded recognition of an arms guarantee but waited to ratify the Constitution until it appeared that the Bill of Rights would be ratified by the states. No evidence exists that these two states were tricked into ratifying the Second Amendment to protect slavery.

Bogus rests his claims by consideration of the Virginia convention and Madison's proposals in the first federal Congress. He concedes that no direct evidence exists in that context that the Second Amendment was adopted to protect slavery. He ignores the big picture, namely the demands for recognition of the right to bear arms in the Northern states that had already abolished slavery. The Bogus theory collapses when the full story is told.

## **II. IMPETUS FOR RECOGNITION OF THE RIGHT TO BEAR ARMS ORIGINATED FROM THE NORTHERN STATES WHERE SLAVERY WAS ABOLISHED OR DYING OUT**

### **A. Pennsylvania Becomes the First State to Recognize the Right to Bear Arms and to Abolish Slavery**

In 1776, Pennsylvania became the first state to adopt a formal guarantee that was a precursor of the Second Amendment: "That the people have a right to bear arms for the defense of themselves, and the state . . . ."<sup>30</sup> In 1780, it became the first state to pass an act for the abolition of slavery.<sup>31</sup> And in 1787, Pennsylvania ratified the federal Constitution, with a strong minority in the ratifying convention demanding a bill of rights, including the right to bear arms. That set the stage for demands by other states culminating in adoption of the Second Amendment.

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<sup>30</sup> Pennsylvania Declaration of Rights, Art. XIII (1776).

<sup>31</sup> An Act for the Gradual Abolition of Slavery (1780).

The state's 1776 constitutional convention was presided over by Benjamin Franklin.<sup>32</sup> A contemporary wrote that the Pennsylvania Constitution "was understood to have been principally the work of Mr. George Bryan, in conjunction with Mr. Can[n]on, a schoolmaster."<sup>33</sup> George Bryan, later a Justice of the Pennsylvania Supreme Court, was the most influential member of the convention.<sup>34</sup> Professor James Cannon of the College of Philadelphia contributed most of the phraseology of the document.<sup>35</sup> Judge Bryan sought "to identify himself with the people, in opposition to those, who were termed the *well born*."<sup>36</sup> Also instrumental was Timothy Matlack, who when once asked by a Quaker why he wore a sword, replied: "That is to defend my property and my liberty."<sup>37</sup>

It is not surprising that these patriots would frame the Declaration of Rights with the following two provisions. First: "That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety."<sup>38</sup> Second: "That the people have a right to bear arms for the defense of themselves, and the state; and as standing armies in the time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by the civil power."<sup>39</sup>

In 1780, Pennsylvania passed an Act for the Gradual Abolition of Slavery, the first law of its kind in the Western Hemisphere.<sup>40</sup> This law was "advocated, written, and its passage secured

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<sup>32</sup> J. Paul Selsam, *The Pennsylvania Constitution of 1776: A Study in Revolutionary Democracy 175-76* (Philadelphia: University of Pennsylvania Press, 1936).

<sup>33</sup> Alexander Graydon, *Memoirs of His Own Time: With Reminiscences of the Men and Events of the Revolution*, John Stockton Littell ed., 286-87 (Philadelphia: Lindsay & Blakiston, 1846).

<sup>34</sup> Burton Alva Konkle, *George Bryan and the Constitution of Pennsylvania, 1731-1791*, at 119 (Philadelphia: William J. Campbell, 1922).

<sup>35</sup> *Id.* at 121.

<sup>36</sup> Graydon, *Memoirs*, 287.

<sup>37</sup> Selsam, *The Pennsylvania Constitution of 1776*, 207 n.6.

<sup>38</sup> Pennsylvania Declaration of Rights, Art. I (1776).

<sup>39</sup> *Id.* Art. XIII.

<sup>40</sup> See Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North 124-37* (1967) (hereafter "Zilversmit").

by George Bryan.”<sup>41</sup> As Vice President of the Pennsylvania Executive Council, in 1777 Bryan urged passage of an abolition law, but it did not succeed. By 1780, he succeeded in writing the law and a lengthy defense thereof, and it passed.<sup>42</sup> “So it was that George Bryan became the father of legal emancipation in America, under the influence of our great revolution for national independence . . . .”<sup>43</sup> He was also assisted by Timothy Matlack, secretary of the Executive Council, who worked hard to win passage.<sup>44</sup>

On December 12, 1787, after a bitter debate in which the federalists defeated the antifederalists’ push for a declaration of rights, the Pennsylvania convention voted to ratify the federal Constitution.<sup>45</sup> That was followed by publication of the antifederalist Dissent of Minority demanding a declaration, including: “That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . . .”<sup>46</sup> This was obviously not an attempt to protect slavery.

The Dissent also included objections to various parts of the Constitution, including “the absolute command of Congress over the militia,” which could be made into “the unwilling instruments of tyranny.” It explained: “The militia of Pennsylvania may be marched to New England or Virginia to quell an insurrection occasioned by the most galling oppression, and aided by the standing army, they will no doubt be successful in subduing their liberty and independency . . . .”<sup>47</sup>

George Bryan may have had a hand in drafting the Dissent, which he promoted and sent to allies in other states.<sup>48</sup> His son, Samuel Bryan, claimed credit for authorship of the Dissent.<sup>49</sup>

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<sup>41</sup> Konkle, *George Bryan*, dedication in front.

<sup>42</sup> *Id.* at 164-65, 189-98. For a transcript of the law and Bryan’s defense of it, see An Act for the Gradual Abolition of Slavery - March 1, 1780. <http://www.phmc.state.pa.us/portal/communities/documents/1776-1865/abolition-slavery.html>.

<sup>43</sup> *Id.* at 198.

<sup>44</sup> Chris Coelho, “Timothy Matlack, Scribe of the Declaration of Independence,” *Journal of the American Revolution*, August 24, 2021. <https://allthingsliberty.com/2021/08/timothy-matlack-scribe-of-the-declaration-of-independence/>.

<sup>45</sup> *2 Documentary History of the Ratification of the Constitution*, Merrill Jensen ed., 597-600 (Madison: State Historical Society of Wisconsin, 1976).

<sup>46</sup> *2 Documentary History of the Ratification of the Constitution*, 623-24.

<sup>47</sup> *Id.* at 638.

<sup>48</sup> Konkle, *George Bryan*, 309-38.

George Bryan and other dissidents would reconvene in 1788 in the Harrisburg convention. It called for an amendment guaranteeing “every reserve of the rights of individuals” declared in the state constitutions, and separately: “That each state, respectively, shall have power to provide for organizing, arming, and disciplining the militia thereof, whensoever Congress shall omit or neglect to provide for the same.”<sup>50</sup>

Thus it was that leading proponents of the right to bear arms in Pennsylvania were also abolitionists. Pennsylvania had no hesitation in ratifying the Bill of Rights in 1790.

### **B. Massachusetts Recognizes Unalienable Rights, Including the Right to Bear Arms, and its Courts Declare Slavery Unconstitutional**

In many ways, the American Revolution began in Massachusetts, where the Crown initiated efforts to disarm the colonists and the colonists defended themselves with arms. When British occupation troops approached Boston in 1768, the warning went out that “the Inhabitants of this Province are to be disarmed . . .”<sup>51</sup> Quoting the English Declaration of Rights, Boston resolved that all inhabitants arm themselves.<sup>52</sup>

When the Redcoats sought to seize arms from the patriots in 1775, self-armed patriots repulsed them at Lexington and Concord. They believed they had a right to bear arms no matter that the Royal government aimed to confiscate them. They fought to protect themselves from political slavery, not to protect chattel slavery. As Law Professor Jonathan Turley humorously wrote, “The Minutemen at Concord, after all, were not running to a Klan meeting in 1775.”<sup>53</sup>

The Massachusetts Declaration of Rights of 1780, Article I, provided: “All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and

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<sup>49</sup> 2 *Documentary History*, 617.

<sup>50</sup> 2 *Debates of the Several State Conventions, on the Adoption of the Federal Constitution*, Jonathan Elliot ed., 245-46 (Philadelphia: J. B. Lippincott, 1836). Hereafter cited “Elliot.”

<sup>51</sup> *Boston Gazette*, Sept. 26, 1768, at 3.

<sup>52</sup> *Boston Chronicle*, Sept. 19, 1768, at 363.

<sup>53</sup> Jonathan Turley, “Second Amendment latest issue to be reframed — wrongly — as ‘racist,’” *The Hill*, July 28, 2021. <https://thehill.com/opinion/judiciary/565177-second-amendment-latest-issue-to-be-reframed-wrongly-as-racist>.

happiness.”<sup>54</sup> It further provided: “The people have a right to keep and to bear arms for the common defence.”<sup>55</sup> This was the first state bill of rights to use both terms “to keep and to bear” arms, and this individual right to keep arms made them available for all lawful purposes.

The author of the Declaration was John Adams, who had argued at the Boston Massacre trial in 1770, defending the soldiers, that “Self Defence [is] the primary Canon of the Law of Nature,” and that “the inhabitants had a right to arm themselves . . . for their defence, not for offence . . . .”<sup>56</sup> Adams would later write: “Every measure of prudence . . . ought to be assumed for the eventual total extirpation of slavery from the United States. . . . I have, through my whole life, held the practice of slavery in . . . abhorrence . . . .”<sup>57</sup>

Massachusetts court decisions in 1781-83 declared slavery unconstitutional under Article I.<sup>58</sup> Chief Justice William Cushing of the Massachusetts Supreme Court declared that “slavery is . . . as effectively abolished as it can be by the granting of rights and privileges wholly incompatible and repugnant to its existence.”<sup>59</sup>

Samuel Adams proposed in the Massachusetts ratification convention in 1788 “that the said Constitution be never construed to authorize Congress, to infringe the just liberty of the press; . . . or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms . . . .”<sup>60</sup> Massachusetts would ratify the Constitution without demanding a bill of rights, but this proposal exemplified support for such a declaration. Adams’ proposal would be seen as having been reflected in the Bill of Rights when it was pending in Congress in 1789.<sup>61</sup>

Some delegates to the Massachusetts convention dissented from ratification of the Constitution because it did not allow abolition of the slave trade until 1808. Three of them, antifederalists, published a statement noting: “This practice of enslaving mankind is in direct

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<sup>54</sup> Mass. Declaration of Rights, Art. I (1780).

<sup>55</sup> *Id.*, Art. 17.

<sup>56</sup> 3 John Adams, *Legal Papers* 248 (Cambridge, Mass.: Belknap Press/Harvard University Press, 1965).

<sup>57</sup> Letter to Robert J. Evans, June 8, 1819, in 10 Charles Francis Adams, *The Works of John Adams* 379-80 (Boston: Little, Brown and Co., 1856).

<sup>58</sup> Zilversmit at 113-15.

<sup>59</sup> *Id.* at 114.

<sup>60</sup> 6 *Documentary History of the Ratification of the Constitution*, John P. Kaminski and Gaspare J. Saladino eds., 1453 (Madison: State Historical Society of Wisconsin, 2000).

<sup>61</sup> *Independent Chronicle*, Aug. 6, 1789, in *id.*

opposition to a fundamental maxim of truth, on which our state constitution is founded, viz. ‘All men are born free and equal.’ . . . Indeed no man can justify himself in enslaving another . . . .”<sup>62</sup>

In sum, the Massachusetts Declaration of “natural, essential, and unalienable rights,” including “the right of enjoying and defending their lives and liberties,” entailed both the right to keep and bear arms and to freedom from slavery. The suggestion that the right to bear arms was recognized to protect slavery is an illusion.

### **C. Four Southern States Ratify the Constitution Without Demanding a Bill of Rights**

None of the first four Southern states to ratify the Constitution – Delaware, Georgia, Maryland, and South Carolina – proposed amendments. Evidently these states had no inkling, per the Bogus-Anderson theory, that something like the Second Amendment was necessary to protect slavery.

The Constitution raised little controversy in Delaware, the very first state to ratify it.<sup>63</sup> Georgia ratified shortly thereafter, although its convention had been delayed because some members were “engaged in defending their families and property on the frontiers” – a reference to hostilities with Indians.<sup>64</sup>

Luther Martin had been Maryland’s delegate to the federal convention that drafted the Constitution in 1787, but opposed it, in part because the federal government would have power “to increase and keep up a standing army as numerous as it would wish, and, by placing the militia under its power, enable it to leave the militia totally unorganized, undisciplined, and even to disarm them.”<sup>65</sup> But the Maryland convention ratified the Constitution without proposing any amendments at all.<sup>66</sup>

South Carolina was the next state to ratify the Constitution. Professors Bogus and Anderson both depict the 1739 Stono River revolt in South Carolina, and fear of a recurrence, as giving impetus a half century later for adoption of the Second Amendment.<sup>67</sup> If that thesis is accurate, South Carolina would have been the first state to demand a bill of rights with an arms

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<sup>62</sup> Consider Arms et al., Dissent to the Massachusetts Convention, April 1788, in 7 *Documentary History of the Ratification of the Constitution*, John P. Kaminski and Gaspare J. Saladino eds., 1440 (Madison: State Historical Society of Wisconsin, 2001).

<sup>63</sup> 3 *Documentary History of the Ratification of the Constitution*, Merrill Jensen ed., 41 (Madison: State Historical Society of Wisconsin, 1976).

<sup>64</sup> *Id.* at 223.

<sup>65</sup> 1 Elliot 372.

<sup>66</sup> *Id.* at 324.

<sup>67</sup> Bogus at 332-35; Anderson at 34.

guarantee. Bogus even suggests that “[t]he South’s fear that the North might destabilize the slave system . . . gave anti-Federalists a powerful weapon.”<sup>68</sup>

But Bogus has it upside down. It was the federalists who opposed a bill of rights. Charles Cotesworth Pinckney, a leading federalist, explained that neither the 1776 South Carolina Constitution nor the proposed federal Constitution had a bill of rights because only express powers were delegated and all else was reserved. But he added the following sinister reason: “Such bills generally begin with declaring that all men are by nature born free. Now, we should make that declaration with a very bad grace, when a large part of our property consists in men who are actually born slaves.”<sup>69</sup>

It was the antifederalists who demanded a bill of rights, and it had nothing to do with slavery. Alluding to the Revolution, Patrick Dollard stated about his constituents:

In the late bloody contest, they bore a conspicuous part, when they fought, bled, and conquered, in defence of their civil rights and privileges, which they expected to transmit untainted to their posterity. They are nearly all, to a man, opposed to this new Constitution, because, they say they have omitted to insert a bill of rights therein, ascertaining and fundamentally establishing, the unalienable rights of men, without a full, free, and secure enjoyment of which there can be no liberty . . .<sup>70</sup>

The South Carolina federalists voted, by a two-thirds margin, to ratify the Constitution without proposing amendments.<sup>71</sup> But South Carolinians who supported a bill of rights had allies in New Hampshire, a state where slavery was unlawful. As the following describes, the New Hampshire convention would ratify next, and it would be the first to demand a bill of rights – including a predecessor of the Second Amendment.

**D. New Hampshire Recognizes Unalienable Rights,  
Which its Courts Read to Abolish Slavery,  
and Demands that the Federal Constitution  
Prohibit Disarming Citizens**

New Hampshire adopted its first constitution in 1784, the Bill of Rights of which began:

I. All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.

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<sup>68</sup> Bogus at 337.

<sup>69</sup> 4 Elliot at 316.

<sup>70</sup> *Id.* at 337.

<sup>71</sup> *Id.* at 340.

II. All men have certain natural, essential, and inherent rights. among which are –the enjoying and defending life and liberty –acquiring, possessing and protecting property –and in a word, of seeking and obtaining happiness.<sup>72</sup>

The Bill of Rights further declared that “whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old, or establish a new government. The doctrine of non-resistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.”<sup>73</sup> It also stated: “A well regulated militia is the proper, natural, and sure defence of a state.”<sup>74</sup>

Sections I and II were read as abolishing slavery. In 1788, Jeremy Belknap stated that “the negroes in Massachusetts and New Hampshire are all *free*, by the first article in the Declaration of Rights. This has been pleaded in law, and admitted.”<sup>75</sup>

In the New Hampshire ratification convention in 1788, antifederalist leader Joshua Atherton led the opposition to adoption of the federal Constitution.<sup>76</sup> “The strongest and leading argument urged against it was derived from the fact that the Constitution sanctioned or tolerated human slavery. Hon. Jos. Atherton, of Amherst, had used this argument in opposition to its adoption with much force and effect.”<sup>77</sup> Atherton argued that, if the Constitution is ratified, “we become *Consenters to* and *Partakers in*, the sin and guilt of this abominable traffic,” adding that “[t]he clause has not secured its [slavery’s] abolition.”<sup>78</sup>

In another speech, Atherton argued that the proposed constitution was “a system calculated to forge the chains of tyranny upon the citizens of the United States.” He cited “standing armies, . . .the insecurity of the liberty of the press – . . . bill of rights . . . .”<sup>79</sup>

The New Hampshire convention was headed to a compromise in which the Constitution would be ratified, but amendments would be recommended. A committee to propose

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<sup>72</sup> N.H. Bill of Rights §§ I & II (1783).

<sup>73</sup> *Id.* § X.

<sup>74</sup> *Id.* § XXIV.

<sup>75</sup> Belknap to Ebenezer Hazard, Jan. 25, 1788, quoted in Zilversmit at 117.

<sup>76</sup> E.g., 28 *Documentary History of the Ratification of the Constitution* 314.

<sup>77</sup> George W. Nesmith to Joseph B. Walker, Aug. 25, 1888, in 28 *Documentary History of the Ratification of the Constitution*, John P. Kaminski et al. eds., 193 (Madison: State Historical Society of Wisconsin, 2017).

<sup>78</sup> Atherton Convention Speech, Feb. 18, 1788, in *id.* at 208.

<sup>79</sup> Atherton Convention Speech, June 19, 1788, in *id.* at 371.



amendments was appointed, the federalists being led by convention president John Sullivan and the antifederalists being led by Joshua Atherton.<sup>80</sup> The committee agreed on twelve amendments, including: “Congress shall never disarm any citizen, unless such as are or have been in actual rebellion.”<sup>81</sup>

Atherton then moved that the convention ratify the constitution subject to the condition that it not be operable in New Hampshire without ratification of the amendments.<sup>82</sup> Instead, the federalist majority voted unconditionally to ratify the constitution and to recommend the amendments to Congress.<sup>83</sup>

New Hampshire thus became the first state to ratify the Constitution and to propose amendments thereto, including that “Congress shall never disarm any citizen” – the equivalent to what became the Second Amendment’s language that the arms right “shall not be infringed.” And New Hampshire’s demand for amendments may be attributed above all to Joshua Atherton, whose most prominent argument against the Constitution was that it sanctioned slavery.

In 1789, the federalists won the Congressional elections in New Hampshire, in part by championing adoption of a federal bill of rights which had been demanded by several states. Atherton wrote: “To carry on the farce the Federalists have taken the liberty to step onto the ground of their opponents, and, clothing themselves with their armor, talk high of amendments . . . New York, Virginia, and other states having gone so fully into the detail of amendments, the strokes of abler hands ha[ve] rendered the lines of my feeble pen unnecessary.”<sup>84</sup>

By that point, Virginia and New York had demanded amendments, including the wording “that the people have a right to keep and bear arms.”<sup>85</sup> Atherton thus saw these proposals as equivalent to that offered by New Hampshire. These demands led to the proposal of what became the Second Amendment, which New Hampshire would ratify with the rest of the federal Bill of Rights on January 25, 1790. And given the above background, it would be ludicrous to suggest that New Hampshire ratified the Second Amendment to protect slavery.

New Hampshire was the ninth state to ratify the Constitution, which thereby became effective. Given that slavery was unlawful there, it is obvious that the state did not demand

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<sup>80</sup> *Id.* at 372.

<sup>81</sup> *Id.* at 373.

<sup>82</sup> *Id.* at 373.

<sup>83</sup> *Id.* at 375.

<sup>84</sup> 1 *Documentary History of the First Federal Elections*, Merrill Jensen et al. eds., 839-40 (Madison: University of Wisconsin, 1976).

<sup>85</sup> See *infra*.

recognition of the right to bear arms to protect slavery. It would be Virginia, according to the Bogus thesis, that dreamed up that idea.

### III. THE DOMINOS BEGIN TO FALL

#### A. Virginia Tips the Scales in Favor of a Bill of Rights

The Supreme Court noted in *McDonald v. Chicago*: “During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric.”<sup>86</sup> That would become the impetus for adoption of the Second Amendment.

Virginia’s convention to consider ratification of the federal Constitution was preceded by strong demands for a bill of rights. Thomas Jefferson wrote to James Madison from Paris, approving of some parts of the Constitution but adding what he disliked: “First the omission of a bill of rights providing clearly & without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies . . . .”<sup>87</sup> Alexander White expressed the federalist position that a bill of rights was unnecessary: “There are other things so clearly out of the power of Congress, that the bare recital of them is sufficient, I mean the ‘rights of conscience, or religious liberty – the rights of bearing arms for defence, or for killing game . . . .’”<sup>88</sup>

When the convention began, Patrick Henry wrote to an antifederalist leader in New York that George Mason had drafted proposed amendments to the Constitution. It was divided into two parts. The first was “a Declaration or Bill of Rights, asserting and securing from Encroachment, the Essential and unalienable Rights of the People.”<sup>89</sup> It included protections for assembly and speech, and declared “That the People have a Right to keep and to bear Arms; that a well regulated Militia, composed of the Body of the People, trained to arms, is the proper, natural, and safe Defence of a free State . . . .”<sup>90</sup> The second part included structural amendments, such as that two-thirds of Congress was necessary to keep up a standing army.<sup>91</sup> It did not include a clause in support of state militia powers, but that would be added at the end of the convention.

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<sup>86</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 768-89 (2010) (citing, inter alia, S. Halbrook, *The Founders’ Second Amendment* 171–278 (2008)).

<sup>87</sup> Jefferson to Madison, Dec. 20, 1787, in 8 *Documentary History of The Ratification of the Constitution*, John P. Kaminski et al. eds., 250-51 (Madison: State Historical Society of Wisconsin, 1988).

<sup>88</sup> *Winchester Gazette* (Virginia), Feb. 22, 1788, in *id.* at 404.

<sup>89</sup> *Id.* at 819.

<sup>90</sup> *Id.* at 821.

<sup>91</sup> *Id.* at 823.

Early on in the convention debates, Patrick Henry raised the alarm that the power of Congress to arm and to call out the militia was exclusive of such state power. “If they neglect or refuse to discipline or arm our militia, they will be useless: the states can do neither – this power being exclusively given to Congress. The power of appointing officers over men not disciplined or armed is ridiculous; so that this pretended little remains of power left to the states may, at the pleasure of Congress, be rendered nugatory.”<sup>92</sup>

This is where Professor Bogus begins his “Hidden History of the Second Amendment,” asking: “What was Henry driving at? In 1788, Americans did not fear foreign invasion. . . . The militia were the last and best defense against slave insurrection but practically useless against a professional army.”<sup>93</sup> Not a single delegate in the convention said any such thing. Bogus goes on to read Henry’s mind by speculating: “Without spelling it out in so many words, Henry was raising the specter of the federal government using Article I, Section 8 powers to subvert the slave system indirectly.”<sup>94</sup>

But Henry was concerned largely with an overly powerful federal government. “Congress by the power of taxation – by that of raising an army, and by their controul over the militia, have the sword in one hand, and the purse in the other.”<sup>95</sup>

Bogus next finds George Mason arguing: “It is extremely unsafe, without some alterations. It would be to use the militia to a very bad purpose, if any disturbance happened in New Hampshire, to call them from Georgia . . . . I wish such an amendment as this – that the militia of any state should not be marched beyond the limits of the adjoining state; and if it be necessary to draw them from one end of the continent to the other, I wish such a check, as the consent of the state legislature, to be provided.”<sup>96</sup>

Bogus spins Mason’s concern about the power of Congress to march a militia from one state to another as follows: “The consequence of such an act was obvious to everyone in the audience: the state would be unprotected against its slaves.”<sup>97</sup> It must have been so “obvious” that no one even hinted at it. Anderson adds: “It was the militia, he [Mason] reminded his colleagues, that kept the state safe from the enslaved during the Revolutionary War.”<sup>98</sup> For that

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<sup>92</sup> 3 Elliot 52.

<sup>93</sup> Bogus 345-46.

<sup>94</sup> *Id.* at 346.

<sup>95</sup> 3 Elliot at 169.

<sup>96</sup> 3 Elliot 378-79.

<sup>97</sup> Bogus at 347.

<sup>98</sup> Anderson at 29.

she cites a secondary source,<sup>99</sup> which in turn did not pretend to quote Mason. Mason made no such statement. Indeed, under Mason's proposal, if a slave revolt occurred in one state, the militia of another state could not be required to come to its aid.

Moreover, Mason's concern was also expressed in states that had abolished slavery. For instance, Rhode Island abolished slavery in 1784. When it ratified the Constitution, Rhode Island proposed amendments including "that the people have a right to keep and bear arms," but added that until the amendments were agreed to, "the militia of this state will not be continued in service outside of this State for a longer term than six weeks, without the consent of the legislature thereof . . . ."<sup>100</sup> Rhode Island further called for the abolition of slavery.<sup>101</sup>

So much for the assertion that concern that Congress could send a state militia to another state was to protect slavery. The militia was all the states had to defend themselves from invasion by foreign powers like the British or the French, from attacks by hostile Indians, and from insurrection – which could be instigated by slaves in the Southern states but could also be sparked by other interests, such as Shay's Rebellion in 1786.

George Mason further argued: "The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless – by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them, &c."<sup>102</sup>

Sounding like something a Tory might have said, Bogus refers to the Whig origins of "bombast equating standing armies with tyranny," adding: "Mason's main concern was not the creation of a standing army but the preservation of the militia. Mason personally owned three hundred slaves."<sup>103</sup> Aside from there being no connection between those two sentences, Mason's purpose in urging a general militia was to *avoid* a standing army. Bogus did not see fit to include Mason's comment before the above quotation, which stated: "I abominate and detest the idea of a government, where there is a standing army."<sup>104</sup>

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<sup>99</sup> Michael Waldman, *The Second Amendment* 38 & 200 (New York: Simon and Schuster, 2014). Waldman uses no footnotes and fails to provide sources for most of his allegations, instead identifying only limited sources by reference to page numbers of the text.

<sup>100</sup> 26 *Documentary History of the Ratification of the Constitution*, John P. Kaminski *et al.* eds., 999 (Madison, Wisc.: Wisconsin Historical Society Press, 2013).

<sup>101</sup> *Id.* at 1002.

<sup>102</sup> 3 Elliot 379.

<sup>103</sup> Bogus at 349.

<sup>104</sup> 3 Elliot 379.

And more important for understanding the reason for recognition of the right to bear arms, Bogus ignores Mason's following explanation on the very next page:

Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised by an artful man [Sir William Keith], who was governor of Pennsylvania, to disarm the people; that it was the best and most effectual way to enslave them; but that they should not do it openly, but weaken them, and let them sink gradually, by totally disusing and neglecting the militia. [Here Mr. Mason quoted sundry passages to this effect.].<sup>105</sup>

Colonial Pennsylvania Governor Keith had advocated regular troops over militia "in Case of a War, or Rebellion," noting in part that "it may be question'd how far it would be consistent with good Policy, to accustom all the able Men in the Colonies to be well exercised in Arms . . . ." <sup>106</sup> He also held that every act of a colonial government must primarily benefit the mother state<sup>107</sup> and that colonies should not "claim an absolute legislative Power . . . ." <sup>108</sup> An armed populace would potentially create rebellion against colonial exploitation.

Mason thus saw the militia as a popular force to maintain a free society, whereas a tyrannical government would "disarm the people," which "was the best and most effectual way to enslave them . . . ." Nowhere did he hint that the militia's purpose was to maintain slavery.

Patrick Henry noted that, under article I, § 10, of the Constitution, no state may, without the consent of Congress, "engage in War, unless actually invaded," adding: "If the country be invaded, a state may go to war, but cannot suppress insurrections. If there should happen an insurrection of slaves, the country cannot be said to be invaded. They cannot, therefore, suppress it without the interposition of Congress . . . . Congress, and Congress only, can call forth the militia."<sup>109</sup>

Bogus comments: "If members of the audience were previously uncertain about the meaning of Mason and Henry's warning, this had made it plain. Congress might want to leave the South defenseless against its slaves."<sup>110</sup> Henry (not Mason) did indeed suggest in the above passage that an exclusive power of Congress to call out the militia negated a state power to do so to suppress insurrection, including a slave insurrection. But whether Congress had an exclusive

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<sup>105</sup> *Id.* at 380. First bracketed item added, second bracketed item in original.

<sup>106</sup> Sir William Keith, *A Collection of Papers and Other Tracts* 180 (London: J. Mechell, 1740).

<sup>107</sup> *Id.* at 170.

<sup>108</sup> *Id.* at 175.

<sup>109</sup> 3 Elliot 421.

<sup>110</sup> Bogus at 350.

power, or a concurrent power with the states, to summon the militia simply had no relation to what became the Second Amendment. The militia issue would be played out regarding a structural amendment to the Constitution, explained below, that would not be adopted.

Bogus then asserts: “The Federalists did their best to respond to the suggestions that the federal government would, in one way or another, render the militia impotent as a slave control device.”<sup>111</sup> In support, he quotes Wilson Nicholas, a federalist, who said that the Southern states may be more likely to need the aid of militia “from their situation,” but he did not explain further and said nothing about slavery.<sup>112</sup> Anderson then transforms Bogus’ unfounded assertion into the broader (and still unfounded) claim that Mason and Henry both made the alleged assertion about “a slave control device.”<sup>113</sup>

Professor Paul Finkelman relates, “The slave patrols were emphatically not the militia.” Bogus makes the fundamental error of equating the two. Finkelman adds: “Even if the [second] amendment did not exist and the national government had abolished the state militias, the states would have been free to create their own slave patrols, just as they can create police departments and other law-enforcement agencies.”<sup>114</sup>

After having repeated some of Bogus’ claims about the militia, without any reference to the right of the people to bear arms, Anderson leaps to the conclusion: “The Second Amendment was, thus, not some hallowed ground but rather a bribe, paid again with Black bodies.”<sup>115</sup> That is an extreme statement given the superficial arguments to support it and the fact that the Amendment gave no additional powers of the militia to the states, only substantively guaranteeing a right to the people.

Madison argued that the states had a concurrent power to arm and to call out the militia.<sup>116</sup> What harm could there be in Madison’s mind – Bogus suggests – in explicitly recognizing that? “Two years later Madison would write the Second Amendment, which has essentially the same effect as the provision that Henry claimed to be advocating.”<sup>117</sup> Not so. The power of states to arm the militia would be considered entirely separate from the right of the people to bear arms.

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<sup>111</sup> Bogus at 350.

<sup>112</sup> 3 Elliot 390.

<sup>113</sup> Anderson at 32, citing Bogus.

<sup>114</sup> Finkelman.

<sup>115</sup> Anderson at 32.

<sup>116</sup> 3 Elliot 382.

<sup>117</sup> Bogus at 352.

That became obvious when the Virginia convention voted to adopt the Constitution and to recommend amendments, which were divided into two separate parts. First was a bill of rights declaring “the essential and unalienable rights of the people,”<sup>118</sup> including: “That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state . . . .”<sup>119</sup>

Second, entirely separate structural changes were proposed that clarified or modified the federal-state balance. Included in these amendments was the following: “That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same.”<sup>120</sup> This concerned a state power, not a right of the people, and it would be rejected by the first federal Congress.

Try as he might to blend them, Bogus is unable to distinguish the two proposals. While the Second Amendment declares that a well regulated militia is necessary to a free state’s security, it is silent on a state power to arm the militia. Bogus suggests that “the phrase ‘to bear arms’ was a term of art that meant participating in military affairs, not merely carrying weapons. As Garry Wills put it: ‘(O)ne does not bear arms against a rabbit.’”<sup>121</sup> But the Second Amendment says nothing about bearing arms “against” anything. As the Dissent of Minority illustrated, the term “bear arms” was not limited to military affairs: “That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game . . . .”<sup>122</sup>

The Virginia Declaration of Rights of 1776 included a well-regulated militia clause, but did not explicitly state that the people have a right to bear arms. Bogus asks: “Why did Mason and the Richmond delegates attach greater significance to a right to bear arms in 1788 than in 1776? Mason and Henry had raised the specter of the national government undermining the slave system by disarming the state militia . . . .”<sup>123</sup> Mason made no such statement, and Henry had only referred to whether the states could call out the militia to suppress an insurrection, only on a single occasion referring to a slave insurrection. Again, the state militia power was a separate issue from “the right of the people” to bear arms.

Bogus concedes that the right to bear arms hardly originated in the Virginia convention. After all, it was in the English Declaration of Rights of 1689 and in four state constitutions adopted beginning in 1776. He claims: “But it was at Richmond that concerns about slave

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<sup>118</sup> 3 Elliot 657.

<sup>119</sup> *Id.* at 659.

<sup>120</sup> *Id.* at 660.

<sup>121</sup> Bogus at 356.

<sup>122</sup> 2 *Documentary History of the Ratification of the Constitution* 623-24.

<sup>123</sup> Bogus at 356-57.

control and federal authority over the militia were united, producing a new rationale for a right to bear arms.”<sup>124</sup> Henry’s remark about the use of the militia to suppress a slave insurrection was the only sentence on the subject in the 663 pages of debates in the Virginia convention published in Elliot’s *Debates*. More importantly, Bogus cannot distinguish a state power apart from a right of the people.

Professor Paul Finkelman, who has written extensively on slavery and the Constitution, wrote that it “is not even remotely true” that “the Second Amendment was adopted (or at least written) to get Virginia’s ‘vote’ for ratification of the Constitution, which took place in July 1788. . . . In 1788 the Second Amendment was not yet written and was not part of the debate over ratification of the Constitution.” The proposed amendments could not have been “a quid pro quo for ratification, since none of those advocating amendments, like Henry, voted for ratification.”<sup>125</sup>

Virginia had taken the decisive step – this large and influential state ratified the Constitution but was committed to use her great influence to demand a bill of rights. The remaining states, both large (New York and North Carolina) and small (Rhode Island and the future state of Vermont), would ratify the Constitution following Virginia in insisting that individual rights be declared. They did so without any hint of any alleged secret plot to adopt the Second Amendment to protect slavery.

### **B. New York Ratifies the Constitution and Demands a Bill of Rights**

The groundswell for a bill of rights, including the right to keep and bear arms, became overwhelming with Virginia’s ratification of the Constitution. The remainder of the states would hammer nails in the coffin. New York, another influential and populous state, would ratify and demand a declaration of rights a month after Virginia. North Carolina delayed ratification of the Constitution until after the first federal Congress met and proposed the Bill of Rights. Rhode Island and Vermont would not ratify the Constitution until it appeared that the ratification of the Bill of Rights by the states was a foregone conclusion.

The New York convention was preceded by serious antifederalist agitation. “Brutus” (thought to be Robert Yates) wrote: “In the bills of rights of the states it is declared, that a well regulated militia is the proper and natural defence of a free government . . . .”<sup>126</sup> “Common Sense” warned that “a citizen may be deprived of the privilege of keeping arms for his own

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<sup>124</sup> *Id.* at 358.

<sup>125</sup> Finkelman.

<sup>126</sup> *New York Journal*, Nov. 1, 1787, 19 *Documentary History of the Ratification of the Constitution*, John P. Kaminski *et al.* eds., 157 (Madison, Wisc.: Wisconsin Historical Society Press, 2003).



defence . . .”<sup>127</sup> Antifederalist John De Witt foretold that Congress “at their pleasure may arm or disarm all or any part of the freeman of the United States.”<sup>128</sup>

In the ratifying convention, Chancellor Robert R. Livingston gave a glowing speech with varied arguments for the constitution, just brushing on “the necessity of adding to the powers of Congress, that of regulating the militia . . .”<sup>129</sup> That was one of only a few references to the militia in the recorded debates.

Leading the antifederalists was John Lansing, Jr., who declared “the almost unanimous opinion” of his constituents in support of amendments, which “will have a tendency to lessen the danger of invasion of civil liberty by the general government.”<sup>130</sup> Of a free press, trial by jury, and religious liberties, Thomas Tredwell wished that “these and other invaluable rights of freemen had been as cautiously secured as some of the paltry local interests of some of the individual states.”<sup>131</sup> The latter included the importation of slaves until 1808, which was “repugnant to every principle of humanity.”<sup>132</sup>

In addition to proposing that a two-thirds vote of Congress be required for a standing army, Lansing offered the following structural amendment:

That the militia of any state shall not be marched out of such state without the consent of the executive thereof, nor be continued in service out of the state, without the consent of the legislature thereof, for a longer term than six weeks; and provided, that the power to organize, arm, and discipline the militia, shall not be construed to extend further than to prescribe the mode of arming and disciplining the same.<sup>133</sup>

In ratifying the Constitution, the New York convention proposed a bill of rights, including: “That the people have a right to keep and bear arms; that a well regulated militia,

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<sup>127</sup> “From the Wilmington Centinel, To the People of North Carolina,” *The New York Journal*, April 21, 1788, at 2, col. 2.

<sup>128</sup> *The Antifederalist Papers*, Morton Borden ed., 75 (Ann Arbor: Michigan State University, 1965).

<sup>129</sup> 2 Elliot 214.

<sup>130</sup> Elliot ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, vol. 2, at 220.

<sup>131</sup> *Id.* at 399.

<sup>132</sup> *Id.* at 402.

<sup>133</sup> *Id.* at 406.

including the body of the people *capable of bearing arms*, is the proper, natural, and safe defence of a free state.”<sup>134</sup> No one hinted that its purpose was to protect slavery.

The convention also adopted a separate resolution urging their representatives in Congress to approve a list of amendments concerning the structure of the federal government and the federal-state relation, including: “That the militia of any state shall not be compelled to serve without the limits of the state, for a longer term than six weeks, without the consent of the legislature thereof.”<sup>135</sup> Again, this concern had nothing to do with slavery.

A proposal to abolish slavery in New York’s 1777 constitutional convention did not succeed. The state later took various measures to end slavery and finally enacted abolition in 1799.<sup>136</sup> While slavery was still legal, albeit in decline, when New York ratified the Constitution, no evidence exists that it acceded to a demand for recognition of the right to bear arms as some kind of blackmail demanded by Virginia.

#### **IV. THE SECOND AMENDMENT IN CONGRESS: FROM MADISON’S PROPOSAL TO ADOPTION<sup>137</sup>**

The plot thickens as Bogus suggests that Madison would not have included the right to bear arms in his proposed bill of rights were it not for the Virginia convention demanding one for secret, nefarious reasons:

But for the events at Richmond, it is doubtful that Madison would have included a right to bear arms in his proposed list of rights. Only four of the thirteen state constitutions – Massachusetts, North Carolina, Pennsylvania, and Vermont – contained a right to bear arms provision. . . . Thus, over two-thirds of the state constitutions did not contain a right to bear arms . . . .<sup>138</sup>

But there were only eight states with a declaration of rights, meaning that half of them recognized the right to bear arms. By contrast, only two of those states recognized a right of the people to freedom of speech.<sup>139</sup> By Bogus’ logic, one could belittle even more the right to free speech.

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<sup>134</sup> *Id.* at 328.

<sup>135</sup> *Id.* at 331.

<sup>136</sup> Zilversmit at 139-40, 147-52, 181-82.

<sup>137</sup> What became the Second Amendment was originally proposed to the states as the Fourth Amendment, but is referred to here as the Second for simplicity.

<sup>138</sup> Bogus at 364-65.

<sup>139</sup> See declarations of rights of Pa. Art. XII (1776) and Vt. Art. XIV (1777) (recognizing free speech). Three recognized free speech only in the legislature. Md. Art. VIII (1776), Mass.

For his “invented in Richmond” theory, Bogus ignores the strong sentiment in support of the right to bear arms as expressed in Samuel Adams’ proposal in the Massachusetts convention, the Pennsylvania Dissent of Minority, and in antifederalist opinion generally. New Hampshire’s proposed amendment, that “Congress shall never disarm any Citizen,” does not count, according to Bogus, as it “was the only state to suggest a right to bear arms that was not connected to the militia.”<sup>140</sup> But neither were the proposals of Adams, the Dissent, and others, and those of Virginia and the states that followed did not limit bearing arms to the militia.

On June 8, 1789, Madison introduced his proposed amendments in the House of Representatives, including the following: “The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.”<sup>141</sup> He did not introduce the structural amendments sought by Virginia, such as the power of states to maintain militia. As Senator William Grayson of Virginia informed Patrick Henry, the amendments “altogether respected personal liberty . . . .”<sup>142</sup> And Joseph Jones wrote to Madison that “they are calculated to secure the personal rights of the people . . . .”<sup>143</sup>

Bogus claims: “We do not know why Madison chose to draft his provision precisely this way. He did not explain his thinking in any speech or letter that has come to light.”<sup>144</sup> To the contrary, he prepared notes for his speech introducing the amendments in which he noted the objection to the Constitution of “omission of guards in favor of rights & liberties,” which was the “most urged & easiest obviated.” He continued: “Read the amendments – They relate 1<sup>st</sup> to private rights.”<sup>145</sup> Madison observed a “fallacy on both sides – espec[ially] as to English Decl[aratio]n. of Rights – 1. mere act of parl[iamen]t. 2. no freedom of press – Conscience . . . attainders – arms to protest[an]ts.”<sup>146</sup> The Second Amendment was an improvement over the English Declaration of Rights of 1689 because it constitutionalized the right, thus prohibiting

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Art. XXI (1780), N.H. Art. XXX (1784). Three did not recognize free speech at all. N.C. (1776), Va. (1776), Del. (1776).

<sup>140</sup> Bogus at 365.

<sup>141</sup> 4 *Documentary History of the First Federal Congress*, Charlene Bangs Bickford ed., 9-10 (Baltimore: Johns Hopkins University Press, 1986).

<sup>142</sup> *Creating the Bill of Rights: The Documentary Record From the First Federal Congress*, Helen E. Veit *et al.* eds., 249 (Baltimore: Johns Hopkins University Press, 1991).

<sup>143</sup> *Id.* at 253.

<sup>144</sup> Bogus at 366.

<sup>145</sup> Madison, Notes for Speech in Congress, June 8, 1789, 12 *The Papers of James Madison*, Charles F. Hobson *et al.* eds. 193 (Charlottesville: University Press of Virginia, 1979).

<sup>146</sup> *Id.* at 193-94.

infringement by the legislature, and extended the right to the people at large rather than only to Protestants.

Madison further expressed his thinking in reaction to the publication of Tench Coxe's "Remarks on the First Part of the Amendments to the Federal Constitution," in the Philadelphia *Federal Gazette* ten days after Madison introduced his amendments. Under the pen name "A Pennsylvanian," Coxe wrote: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms."<sup>147</sup>

Who was Tench Coxe? Among other roles, in 1787 he was named secretary of the Pennsylvania Society for Promoting the Abolition of Slavery, of which Benjamin Franklin was president. Heir to America's first abolition society, it promoted action to abolish slavery and provided legal aid to free blacks. "The bulk of the society's paper work was handled by Coxe, who more than any other individual deserved credit for the accomplishments of the group."<sup>148</sup>

Coxe sent a copy of his above "Remarks" to Madison with a letter noting that the article "may perhaps be of use in the present turn of the public opinions in New York state that they should be republished there."<sup>149</sup> Madison replied, noting that the article was already printed "in the Gazettes here [New York]."<sup>150</sup> He added that ratification of the amendments "will however be greatly favored by explanatory strictures of a healing tendency, and is therefore already indebted to the co-operation of your pen."<sup>151</sup>

Coxe's defense of the amendments was also prominently reprinted on the front page of the special July 4, 1789, issue of the Boston *Massachusetts Centinel*.<sup>152</sup> A search of the literature reveals that no writer disputed Coxe's analysis that what became the Second Amendment protected the right of the people to keep and bear "their private arms" in order to prevent tyranny.

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<sup>147</sup> *Federal Gazette*, June 18, 1789, at 2, col. 1.

<sup>148</sup> Jacob E. Cooke, *Tench Coxe and the Early Republic* 92-93 (Chapel Hill: University of North Carolina Press, 1978).

<sup>149</sup> Coxe to Madison, June 18, 1789, 12 *The Papers of James Madison*, 239-40.

<sup>150</sup> Madison to Coxe, June 24, 1789, *id.* at 257. See *New York Packet*, June 23, 1789 at 2, col. 1-2.

<sup>151</sup> Madison to Coxe, June 24, 1789, 12 *The Papers of James Madison*, 257.

<sup>152</sup> *Massachusetts Centinel* (Boston), July 4, 1789, at 1, col. 2.

Bogus is silent about Coxe's article and Madison's endorsement of it. Perhaps he would explain that the abolitionist Coxe was in cahoots with Madison's secret plot to get the Second Amendment adopted in order *not* to prevent tyranny, but to protect slavery.

Bogus next turns innocuous editing into further evidence of Madison's imaginary scam to introduce secret meanings to the Second Amendment. Instead of being "the proper, natural and safe defence of a free State," as proposed by some states, Madison's draft called the militia "the best security of a free country." According to Bogus, "no one who understood the recent history of the Revolutionary War considered the militia the best defense against foreign invasion. As a Virginian, Madison knew that the militia's prime function in his state, and throughout the South, was slave control."<sup>153</sup>

While there were times when the militia underperformed, it also won victories against the Redcoats. The battles of Bennington, Vermont, in 1777,<sup>154</sup> King's Mountain, North Carolina, in 1780,<sup>155</sup> and Cowpens, South Carolina, in 1781 (which involved both Continentals and militia),<sup>156</sup> proved the worth of the militia in the Revolution. No basis exists for Bogus' attribution to Madison of changing "defence" to "security" because the militia was worthless against foreign invasion and was good for nothing but slave control. Bogus further ignores the common belief by federalists and antifederalists that a general militia would act as a deterrent to domestic tyranny.

In support of his theory that the militia was worthless, Bogus relies on the faked research of Michael Bellesiles, who claimed to have found that "most militiamen were not even good shots," that it was a myth that they were "proficient with muskets to protect themselves from ruffians and Indians or to hunt to put food on the table," and that "few Americans owned guns."<sup>157</sup> Bellesiles' "research" would be revealed as falsified, creating a scandal that led to the withdrawal of his prestigious book award.<sup>158</sup>

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<sup>153</sup> Bogus at 368.

<sup>154</sup> "The Battle of Bennington, <https://revolutionarywar.us/year-1777/battle-of-bennington/>.

<sup>155</sup> 2 David Ramsay, *The History of the American Revolution* 499-501 (Philadelphia: R. Aitken, 1789; reprint, Indianapolis: Liberty Classics, 1990).

<sup>156</sup> "American Units at Cowpens," <http://www.battleofcowpens.com/american-units-at-cowpens/>.

<sup>157</sup> Bogus at 341-42, citing Michael A. Bellesiles, "The Origins of Gun Culture in the United States, 1760-1865," 83 *J. Am. History* 425, 440-41, 426-27 (1996). This article morphed into Bellesiles' book *Arming America: The Origins of a National Gun Culture* (2000).

<sup>158</sup> Report of the Investigative Committee in the matter of Professor Michael Bellesiles (2002), [https://www.emory.edu/news/Releases/Final\\_Report.pdf](https://www.emory.edu/news/Releases/Final_Report.pdf); Announcement of Columbia University Board of Trustees, <http://hnn.us/articles/1157.html>.

As to the Amendment's substantive guarantee of "the right of the people," Bogus limits that right to "keeping and bearing arms in the militia," which is "the collective rights position."<sup>159</sup> But the only constituent letter to a congressman about the meaning of the proposed Second Amendment did not see it that way. Antifederalist Samuel Nasson, as a delegate to the Massachusetts ratifying convention in 1787, had demanded a bill of rights<sup>160</sup> and denounced the slave trade.<sup>161</sup> Now in 1789, he wrote to Rep. George Thatcher of Massachusetts:

A Bill of Rights well secured that we the people may know how far we may Proceed in Every Department. Then there will be no Dispute Between the people and rulers in that may be secured the right to keep arms for Common and Extraordinary Occasions such as to secure ourselves against the wild Beast and also to amuse us by fowling and for our Defence against a Common Enemy. You know to learn the Use of arms is all that can Save us from a foreign foe that may attempt to subdue us, for if we keep up the Use of arms and become well acquainted with them, we Shall always be able to look them in the face that arise up against us.<sup>162</sup>

Madison's amendments were referred to a House select committee. Roger Sherman of Connecticut, a member, proposed the following state militia power, similar to that of the Virginia and Harrisburg conventions:

The militia shall be under the government of the laws of the respective states, when not in the actual service of the United States but such rules as may be prescribed by Congress for their uniform organization and discipline shall be observed in officering and training them . . .<sup>163</sup>

The committee disregarded Sherman's proposal and reported back an amended version of that of Madison: "A well regulated militia, composed of the body of the people, being the best

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<sup>159</sup> Bogus at 404.

<sup>160</sup> 5 *Documentary History of the Ratification of the Constitution*, John P. Kaminski et al. eds., 1397 (Madison: State Historical Society of Wisconsin, 1998).

<sup>161</sup> 6 *Documentary History of the Ratification of the Constitution*, John P. Kaminski et al. eds., 1358 (Madison: State Historical Society of Wisconsin, 2000).

<sup>162</sup> *Creating the Bill of Rights*, 260-61. Spelling and punctuation corrected.

<sup>163</sup> James C. Hutson, "The Bill of Rights: The Roger Sherman Draft," *This Constitution*, No. 18, at 36 (Spring/Summer 1988).

security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms.”<sup>164</sup>

Rep. William L. Smith of South Carolina wrote to fellow federalist Edward Rutledge that he supported three of the proposed amendments, namely that an exception to a power of Congress shall not be construed to give it powers not expressly given; the enumeration of rights shall not be construed to deny other rights; and the powers not delegated are reserved to the states. He continued that “if *these amendts.* are adopted, they will go a great way in preventing Congress from interfering with our negroes after 20 years . . . .”<sup>165</sup> Bogus quotes this comment but fails to note that Smith was referring only to those three amendments and *not* to the Second Amendment.<sup>166</sup>

In debate in the House, no one found fault with the right to bear arms clause, and the discussion centered on the exemption from the militia of conscientious objectors. Elbridge Gerry stated:

This declaration of rights, I take it, is intended to secure the people against the mal-administration of the government . . . . Now, I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms.

What, sir, is the use of militia? It is to prevent the establishment of a standing army, the bane of liberty.<sup>167</sup>

A motion to strike out the entire clause about the religiously scrupulous failed,<sup>168</sup> although later it was amended by adding “in person” at the end.<sup>169</sup>

Rep. Frederick A. Muhlenberg of Pennsylvania, the Speaker of the House, wrote to Benjamin Rush that “it takes in the principal Amendments which our Minority had so much at

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<sup>164</sup> 4 *Documentary History of the First Federal Congress of the United States of America*, 28.

<sup>165</sup> Letter from William L. Smith to Edward Rutledge, Aug. 10, 1789, in *Creating the Bill of Rights: The Documentary Record from the First Congress*, Helen E. Veit, et al. eds., 273 (Baltimore: Johns Hopkins University Press, 1991) (emphasis added).

<sup>166</sup> Bogus at 328.

<sup>167</sup> 11 *Documentary History of the First Federal Congress of the United States of America*, Charlene Bangs Bickford *et al.* eds., 1285-86 (Baltimore: Johns Hopkins University Press, 1992).

<sup>168</sup> *Id.* at 1287.

<sup>169</sup> *Id.* at 1309.

Heart”<sup>170</sup> – that referred to the Dissent of Minority, which included that “the people have a right to bear arms for the defense of themselves and their own state, or the United States . . . .”<sup>171</sup>

The Senate rejected a proposal to add “for the common defence” after “bear arms” in the Second Amendment.<sup>172</sup> And it whittled down the Amendment to state what would be adopted: “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.”<sup>173</sup>

The Senate rejected an explicit reservation of the state power to maintain militias that had been proposed by the Virginia and Harrisburg conventions: “That each state, respectively, shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same . . . .”<sup>174</sup>

The final text of the Second Amendment eschews the theory that its purpose was to protect slavery. Most importantly, it guarantees rights to “the people,” in the same way that the First Amendment protects the right of “the people” to petition and the Fourth Amendment protects the right of “the people” against unreasonable searches and seizures. Further, the militia clause is a declaration of political philosophy that has no effect on the power of states to maintain militias.

Despite none of the debates or proceedings in Congress hinting at any such thing, Bogus asserts: “Madison’s colleagues in the House and Senate almost certainly considered the Second Amendment to be part of the slavery compromise. . . . In effect, Madison proposed that the slavery compromise be supplemented by another constitutional provision prohibiting Congress from emasculating the South’s primary instrument of slave control, and Congress acceded to that request.”<sup>175</sup> But Madison never proposed the amendment protecting the state militia power, and Congress rejected that amendment.

Given the void, Bogus is forced to concede: “The evidence that the Second Amendment was written to assure the South that the federal government would not disarm its militia . . . is almost entirely circumstantial. Madison never expressly stated that he wrote the Second

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<sup>170</sup> Muhlenberg to Rush, Aug. 18, 1789, in *Creating the Bill of Rights*, 280.

<sup>171</sup> 2 *Documentary History of the Ratification of the Constitution* 623-24.

<sup>172</sup> *Journal of the First Session of the Senate of the United States of America* 129 (New York: Thomas Greenleaf, 1789).

<sup>173</sup> *Id.* at 163.

<sup>174</sup> *Id.* at 126.

<sup>175</sup> Bogus at 371.



Amendment for that purpose. If the thesis is sound, why is no direct evidence to be found supporting it?”<sup>176</sup>

Bogus suggests several reasons why no evidence supports his thesis. “The history of the Second Amendment was hidden by design,” “the available records are woefully incomplete,” “the slave comprise and slave control were sensitive topics,” and “if any express statements about slave control were made at ratifying conventions in the South or later in the First Congress, stenographers may have considered it both politic and convenient to abbreviate or omit those remarks.”<sup>177</sup> Evidently, the Second Amendment being adopted to protect slavery was such a closely guarded secret that no one knew it until Professor Bogus discovered this “Hidden History” in 1998.

## V. HOLDOUTS FOR THE BILL OF RIGHTS

### A. North Carolina Waits to Ratify the Constitution Until the Bill of Rights is Proposed

North Carolina delayed ratification of the Constitution until after the first federal Congress met and the Bill of Rights was proposed. Sentiment was strong in favor of the individual right to bear arms.

Before the ratifying convention met, one “Common Sense” warned that under the proposed Constitution, “a citizen may be deprived of the privilege of keeping arms for his own defence . . . .”<sup>178</sup> The guarantee of the North Carolina Constitution that “the People have a right to bear Arms for the Defense of the State”<sup>179</sup> was understood as protecting the right of “a citizen” – a person, not a collective – “of keeping arms for his own defence.”

The antifederalists were the majority in the North Carolina ratification convention, and they were leaving nothing to chance. The convention refused to ratify the Constitution until after Congress proposed the Bill of Rights. There was extensive debate on the need for a bill of rights. William Lenoir warned that Congress “can disarm the militia. If they were armed, they would be a resource against great oppressions. . . . If the laws of the Union were oppressive, they could not carry them into effect, if the people were possessed of proper means of defence.”<sup>180</sup> The topic was ability to resist federal tyranny, not slave control.

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<sup>176</sup> Bogus at 372.

<sup>177</sup> *Id.* at 372-75.

<sup>178</sup> “From the Wilmington Centinel, To the People of North Carolina,” *The New York Journal, and Daily Patriotic Register*, April 21, 1788, at 2, col. 2.

<sup>179</sup> North Carolina Declaration of Rights, XVII (1776).

<sup>180</sup> 4 Elliot 203.

In adopting the Constitution, the convention demanded, similar to those of Virginia, a “Declaration of Rights” and a separate document entitled “amendments to the Constitution” with structural changes. The Declaration included: “That the people have a right to keep and bear arms; that a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state . . . .”<sup>181</sup>

The separate Amendments included “That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same . . . .”<sup>182</sup> Once again, the proposal concerning the state militia power was entirely separate from the right of the people to bear arms.

The convention closed by resolving not to ratify the Constitution before amendments were proposed by Congress.<sup>183</sup> North Carolina then adopted the Constitution on November 21, 1789, several weeks after Congress passed the Bill of Rights and proposed it to the states.<sup>184</sup>

North Carolina was not part of a secret cabal with Madison to ensure the Second Amendment’s adoption to protect slavery. Instead, it was one of an alliance of states to guarantee the adoption of the Bill of Rights to protect liberty. The last holdouts in that alliance were Rhode Island and Vermont, where slavery was abolished. These states would not ratify the Constitution until it appeared that the ratification of the Bill of Rights by the states was a foregone conclusion.

### **B. Having Abolished Slavery, Rhode Island Demands Recognition of the Right to Bear Arms and Abolition of the Slave Traffic**

Rhode Island abolished slavery in 1784, declaring that “all Men are entitled to Life, Liberty, and the Pursuit of Happiness, and the holding Mankind in a State of Slavery, as private Property, which has gradually obtained by unrestrained Custom and the Permission of the Laws, is repugnant to this Principle, and subversive of the Happiness of Mankind, the great End of all civil Government . . . .”<sup>185</sup>

Rhode Island was the last of the original thirteen states to ratify the federal Constitution, which took place on May 29, 1790. In doing so, the convention declared:

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<sup>181</sup> *Id.* at 244.

<sup>182</sup> *Id.* at 245.

<sup>183</sup> *Id.* at 251.

<sup>184</sup> 1 Elliot 333.

<sup>185</sup> Act authorizing the Manumission of Negroes, Mulattoes and others, & for the gradual Abolition of Slavery (Feb. 26, 1784), <https://americasbesthistory.com/abhtimeline1784m.html>. See Zilversmit at 119-21.

1<sup>st</sup>. That there are certain natural rights, of which men when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of Life and Liberty, with the means of acquiring, possessing and protecting Property, and pursuing and obtaining happiness and safety. . . .

17<sup>th</sup>. That the people have a right to keep and bear arms, that a well regulated militia, including the body of the people capable of bearing arms, is the proper, natural and safe defence of a free state . . . .<sup>186</sup>

Declaring “that the rights aforesaid cannot be abridged or violated,” the convention ratified the Constitution.<sup>187</sup> But that was not all. The convention also demanded the ratification of amendments to the Constitution, and of laws to be passed by Congress in the meantime, including:

As a traffick tending to establish or continue the slavery of any part of the human species, is disgraceful to the cause of liberty and humanity, that Congress shall, as soon as may be, promote and establish such laws and regulations, as may effectually prevent the importation of slaves of every description into the United States.<sup>188</sup>

Until the amendments were agreed to, the convention declared that “the militia of this state will not be continued in service outside of this State for a longer term than six weeks, without the consent of the legislature thereof . . . .”<sup>189</sup> That was a weaker form of a prior proposal: “The militia, when called forth, shall not be marched out of the State to which they belong, except some one of the States shall be actually invaded by a foreign enemy, or extreme necessity require it.”<sup>190</sup>

On June 11, 1790, Rhode Island ratified all of the amendments that constituted the Bill of Rights, but rejected an amendment concerning compensation for members of Congress (which would never be ratified).<sup>191</sup> As this reflected, the states could pick and choose which amendments to ratify or reject. If the Second Amendment was part of an unspoken understanding to protect slavery, Rhode Island would have rejected it. Rhode Island had

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<sup>186</sup> 26 *Documentary History of the Ratification of the Constitution*, John P. Kaminski *et al.* eds., 997, 999 (Madison, Wisc.: Wisconsin Historical Society Press, 2013).

<sup>187</sup> *Id.* at 999.

<sup>188</sup> *Id.* at 1002.

<sup>189</sup> 26 *Documentary History of the Ratification of the Constitution*, John P. Kaminski *et al.* eds., 999 (Madison, Wisc.: Wisconsin Historical Society Press, 2013).

<sup>190</sup> 24 *Documentary History of the Ratification of the Constitution*, John P. Kaminski *et al.* eds., 218 (Madison, Wisc.: Wisconsin Historical Society Press, 2011).

<sup>191</sup> 26 *Documentary History of the Ratification of the Constitution* 1041-42.

abolished slavery six years earlier, adopted the Constitution with the understanding that the people had a right to keep and bear arms and at the same time demanded an end to the importation of slaves, and now ratified the Bill of Rights. In no manner was the right to bear arms considered to protect slavery.

**C. Vermont Adopts the First Constitution Both to Recognize  
the Right to Bear Arms and to Abolish Slavery,  
and Later Ratifies the Second Amendment**

In its first constitution, adopted in 1777, Vermont would copy Pennsylvania's guarantee of the right to bear arms and would also abolish slavery. As it was not recognized as a state to enter the Union until 1791, technically it was not the first "state" to abolish slavery. But it did so three years before Pennsylvania's abolition act.

Vermont's Declaration of Rights of 1777 set forth the following fundamental rights and abolished slavery, all in the same article:

That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety. Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave, or apprentice, after he arrives to the age of twenty-one years; nor female, in like manner, after she arrives to the age of eighteen years . . .

<sup>192</sup>

Adoption of this provision did not immediately end all forms of slavery in Vermont, but it was a major step forward. Professor Amani Whitfield writes: "Without question, the Green Mountain State's 1777 abolition provision provided an essential foundation for the end of slavery in Vermont and other Northern states. It stands as an important monument to the slow legislative strangling of slavery in the North."<sup>193</sup>

The Vermont Declaration also provided: "That the people have a right to bear arms for the defence of themselves and the State; and, as standing armies, in the time of peace, are dangerous to liberty, they ought not to be kept up . . . ."<sup>194</sup> Exercise of that right was exemplified by Ethan and Ira Allen, Vermont's leading founders, who carried firearms for self-defense, hunting, and target shooting. On one occasion, while lodging with a Quaker, Ira Allen recalled: "We took our pistols out of our holsters and carried them in with us. He looked at the pistols

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<sup>192</sup> Vt. Constitution, Art. I, § 1 (1777). See Zilversmit at 116.

<sup>193</sup> H. Amani Whitfield, *The Problem of Slavery in Early Vermont, 1777-1810*, at 3 (Vermont Historical Society, 2014).

<sup>194</sup> Vt. Constitution, § 15 (1777).

saying ‘What doth thee do with those things?’ He was answered ‘Nothing amongst our friends,’ but we were Green Mountain boys, and meant to protect our persons and property . . . .’<sup>195</sup>

Exercise of the right to bear arms in defense of the State was exemplified in the Battle of Bennington on August 16, 1777. General John Burgoyne sent a party of Hessians along with some loyalists and Indians to seize the town of Bennington, Vermont, to confiscate cattle and other provisions and to intimidate the people in that area. He was met by New Hampshire Militia General John Starks – who had “assembled 1,492 militiamen in civilian clothes with personal firearms”<sup>196</sup> – joined by some of the Green Mountain Boys from Vermont.

Contemporary historian David Ramsay described the outcome: “On this occasion about 800 undisciplined militia, without bayonets, or a single piece of artillery, attacked and routed 500 regular troops advantageously posted behind entrenchments – furnished with the best arms, and defended with two pieces of artillery.” This defeat of regulars by the militia greatly encouraged the Americans.<sup>197</sup>

When the federal Constitution was proposed, Vermont had not yet been admitted to the Union as a state. But the conversation over ratification spilled over into newspapers like the *Vermont Gazette*. One author described how the strength of the Massachusetts militia had dissuaded a French invasion decades before, adding “how great a dread must a due arrangement of the militia of Columbia, strike on the mind of any European despot, who may meditate to disturb our peace.”<sup>198</sup>

An antifederalist found the proposed Constitution “so dangerous to the rights and liberties of the people” that it would “end in tyranny and slavery” unless amended.<sup>199</sup>

Vermont ratified the Constitution on January 10, 1791, and the following month, Congress passed an act admitting Vermont to statehood. On November 3, 1791, Vermont ratified the proposed amendments.<sup>200</sup> Its ratification of the Second Amendment, given that it expressed Vermont’s own 1777 Declaration – which also abolished slavery – was a foregone

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<sup>195</sup> Ira Allen, *Autobiography* (1799), in James B. Wilbur, *Ira Allen: Founder of Vermont, 1751-1814*, at 40 (Boston: Houghton Mifflin, 1928).

<sup>196</sup> “The Battle of Bennington, <https://revolutionarywar.us/year-1777/battle-of-bennington/>.

<sup>197</sup> 2 David Ramsay, *The History of the American Revolution*, 375-769.

<sup>198</sup> *Vermont Gazette*, Feb. 4, 1789, in 29 *Documentary History of the Ratification of the Constitution*, John P. Kaminski *et al.* eds., 158 (Madison, Wisc.: Wisconsin Historical Society Press, 2017).

<sup>199</sup> *Vermont Gazette*, Feb. 4, 1789, in *id.* at 161.

<sup>200</sup> *Id.* at 230-31.

conclusion. In no way were Vermonters, per the Bogus hypothesis, secretly tricked into adopting a provision to protect slavery.

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The Bill of Rights became effective on December 15, 1791. It included the Second Amendment, which Professor Anderson asserts was “steeped in anti-Blackness, swaddled in the desire to keep African-descended people rightless and powerless, and as yet another bone tossed to keep the South mollified and willing to stay aligned with the grand experiment of the United States of America.”<sup>201</sup> The scholarly source she cites for that baseless proposition says nothing of the kind other than that the Bill of Rights became the law of the land on that date.<sup>202</sup>

As Anderson notes, “numerous states, especially in the North, allowed free Blacks to be members of their militias.”<sup>203</sup> However, the federal Militia Act of 1792 required “every free able-bodied white male citizen” to enroll in the militia and to “provide himself with a good musket” or other arms.<sup>204</sup> By contrast with the “right” of “the people” protected by the Second Amendment, this imposed a legal duty on a subclass of the people defined by race. Even so, as Professors Robert Cottrol and Ray Diamond point out, the Act did not exclude African Americans, who were included in the militias of some of the Southern states.<sup>205</sup> In 1867, the term “white” was deleted from the Act so as to include the now-freed blacks in the militia.<sup>206</sup>

The drive for what became the Second Amendment came more from the Northern states, several of which had their own state guarantee, or demanded one for the federal Constitution, of the right to bear arms. And these were the same states that had abolished or were in the process of abolishing slavery. The defect in the American polity was the failure of the Southern states, due to slavery, to extend recognition of that and all other fundamental rights to African Americans.

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<sup>201</sup> Anderson at 145.

<sup>202</sup> Nicholas J. Johnson, David B. Kopel, George A. Mocsary, and Michael P. O’Shea, *Firearms Law and the Second Amendment* 218 (New York: Wolters Kluwer Law and Business, 2012).

<sup>203</sup> Anderson at 47, citing Robert J. Cottrol and Raymond T. Diamond, “The Second Amendment: Toward an Afro-Americanist Reconsideration,” 80 *Georgetown Univ. Law Rev.* 309, 331 (1991).

<sup>204</sup> 1 Stat. 271 (1792).

<sup>205</sup> Cottrol and Diamond, *supra*, at 331-32.

<sup>206</sup> 14 Stat. 422, 423 (1867).

## VI. THE AFTERMATH: EXTENDING SECOND AMENDMENT RIGHTS TO ALL OF “THE PEOPLE,” INCLUDING AFRICAN AMERICANS

Now that the Constitution and Bill of Rights were ratified, the Union began to grow. The right to bear arms was recognized for free citizens. Calling the Second Amendment “the true palladium of liberty,” St. George Tucker wrote: “The right of self defence is the first law of nature . . . . Wherever . . . the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.”<sup>207</sup>

But American liberties continued to be marred by slavery in the Southern states. Moreover, restrictions extended even to free persons of color. For instance, Virginia’s 1819 Code provided: “No free negro or mulatto, shall be suffered to keep or carry any firelock of any kind, any military weapon, or any powder or lead, without first obtaining a license from the court of the county or corporation in which he resides . . . .”<sup>208</sup> As a Virginia court held, among the “numerous restrictions imposed on this class of people [free blacks] in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States,” was the restriction “upon their right to bear arms.”<sup>209</sup>

Similarly, an 1806 Maryland law made it unlawful “for any negro or mulatto . . . to keep any . . . gun, except he be a free negro or mulatto . . . .”<sup>210</sup> It was further unlawful “for any free negro or mulatto to go at large with any gun, or other offensive weapon,” but this did not “prevent any free negro or mulatto from carrying a gun” if he had “a certificate from a justice of the peace, that he is an orderly and peaceable person . . . .”<sup>211</sup> A Maryland court described “free negroes” as being treated as “a vicious or dangerous population,” as exemplified by laws “to prevent their migration to this State; to make it unlawful for them to bear arms; to guard even their religious assemblages with peculiar watchfulness.”<sup>212</sup> Even so, some free blacks obtained both licenses to travel and to carry firearms. Professor Martha Jones studied court records of such licenses and observes: “As they traveled with a permit or carried a licensed gun, they were that much closer to citizenship.”<sup>213</sup>

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<sup>207</sup> 1 St. George Tucker, *Blackstone’s Commentaries*, App., 300 (1803).

<sup>208</sup> Ch. 111, §§ 7 & 8, 1 Va. Code 423 (1819).

<sup>209</sup> *Aldridge v. Commonwealth*, 2 Va. 447, 449 (Gen. Ct. 1824).

<sup>210</sup> Ch. 86, § I (1806), 3 Laws of Md. 297 (1811).

<sup>211</sup> *Id.* § II.

<sup>212</sup> *Waters v. State*, 1 Gill 302, 309 (Md. 1843).

<sup>213</sup> Martha S. Jones, *Birthright Citizens: A History Of Race and Rights in Antebellum America* 106-07 (Cambridge: Cambridge University Press, 2018).

In 1846, the Georgia Supreme Court invalidated a ban on the open carry of pistols, explaining: “The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the militia, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree . . . .”<sup>214</sup> As Professor Anderson points out, that did not invalidate a Georgia law (similar to those in other Southern states) prohibiting free persons of color from owning or carrying firearms, thus showing that “[t]he ‘right to bear arms’ was not a right at all.”<sup>215</sup>

But the problem was that this right, like other rights, was not extended to African Americans. As the Georgia high court would hold: “Free persons of color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office.”<sup>216</sup>

But it was the Dred Scott decision that ultimately denied citizenship to blacks. It argued against recognition of the citizenship of African Americans because that “would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased . . . ; and it would give them the full liberty of speech . . . , and to keep and carry arms wherever they went.”<sup>217</sup>

Exclusion of African Americans from the rights of “the people” in the Second Amendment and other Bill of Rights guarantees was in conflict with the explicit text. The abolitionists—unaware of the unknown “hidden history” of the Amendment discovered by Bogus—took advantage of this discrepancy in arguing that slavery was unconstitutional.<sup>218</sup> Lysander Spooner wrote that the Second Amendment “recognize[s] the natural right of all men ‘to keep and bear arms’ for their personal defence: and prohibit both Congress and the State governments from infringing the right of ‘the people’—that is, of any of the people—to do so . . . .”<sup>219</sup> And Joel Tiffany wrote that the Second Amendment “is absolutely inconsistent with permitting a portion of our citizens to be enslaved.”<sup>220</sup>

Frederick Douglass agreed that Spooner and Tiffany “vindicated the Constitution from any design to support slavery for an hour.”<sup>221</sup> The constitutionality of slavery upheld in *Dred*

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<sup>214</sup> *Nunn v. State*, 1 Ga. 243, 251 (1846).

<sup>215</sup> Anderson at 70-71.

<sup>216</sup> *Cooper v. Savannah*, 4 Ga. 68, 72 (1848).

<sup>217</sup> *Scott v. Sanford*, 60 U.S. (19 How.) 393, 417 (1857).

<sup>218</sup> Jacobus tenBroek, *Equal Under Law* 110-13, 126 (New York: Collier Books, 1965).

<sup>219</sup> Lysander Spooner, *The Unconstitutionality Of Slavery* 98 (1860).

<sup>220</sup> Joel Tiffany, *A Treatise on the Unconstitutionality of Slavery* 117-18 (1849).

<sup>221</sup> 2 Frederick Douglass, *Life and Writings* 201 (1950).



Scott disregarded “the plain and commonsense reading of the instrument itself; by showing that the Constitution does not mean what it says, and says what it does not mean . . . .”<sup>222</sup> With slavery ending, Douglass advised that the freed people “must have the cartridge box, the jury box, and the ballot box, to protect them.”<sup>223</sup>

Frederick Douglass embraced the Second Amendment. Today, Professor Anderson denounces it.

While the Thirteenth Amendment abolished slavery, the Southern states enacted the black codes. For instance, an 1865 South Carolina law provided that no person of color “shall, without permission in writing from the District Judge or Magistrate, be allowed to keep a fire arm . . . .”<sup>224</sup> An African American convention resolved that “the late efforts of the Legislature of this State to pass an act to deprive us of arms be forbidden, as a plain violation of the Constitution . . . .”<sup>225</sup> Senator Charles Sumner summarized the petition, noting “that they should have the constitutional protection in keeping arms, in holding public assemblies, and in complete liberty of speech and of the press.”<sup>226</sup>

The *Loyal Georgian*, a black newspaper, editorialized: “Article II, of the amendments to the Constitution of the United States, gives the people the right to bear arms, and states that this right shall not be infringed. . . . All men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves.”<sup>227</sup>

Deprivation of the right to bear arms was debated in bills leading to enactment of the Freedmen’s Bureau Act of 1866, which declared that the rights to “personal liberty” and “personal security, . . . including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race or color or previous condition of slavery.”<sup>228</sup>

Introducing the Fourteenth Amendment in the Senate, Jacob Howard referred to “the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as

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<sup>222</sup> *Id.* at 420.

<sup>223</sup> “Frederick Douglass on the American Crisis,” *Newcastle Weekly Courant*, May 26, 1865, at 6.

<sup>224</sup> S.C. Stat., No. 4730, § XIII, 250 (1865).

<sup>225</sup> 2 *Proceedings of the Black State Conventions, 1840-1865*, 302 (1980).

<sup>226</sup> Cong. Globe, 39th Cong., 1st Sess. 337 (1866).

<sup>227</sup> *Loyal Georgian*, Feb. 3, 1866, at 3.

<sup>228</sup> § 14, 14 Stat. 173, 176-77 (1866).

. . . the right to keep and bear arms . . . .”<sup>229</sup> He averred: “The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.”<sup>230</sup> The Amendment was ratified in 1868. As the Supreme Court would rule in *McDonald v. Chicago* (2010), “the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”<sup>231</sup>

The Civil Rights Act of 1871, today’s 42 U.S.C. § 1983, provides that any person who, under color of State law, subjects a person “to the deprivation of any rights, privileges, or immunities secured by the Constitution” is civilly liable.<sup>232</sup> As *McDonald* relates, in passing the Act, “Congress routinely referred to the right to keep and bear arms and decried the continued disarmament of blacks in the South.”<sup>233</sup> A year after the Act’s passage, President Grant reported that in parts of the South, Ku Klux Klan groups continued to seek “to deprive colored citizens of the right to bear arms and of the right to a free ballot . . . .”<sup>234</sup>

The Fourteenth Amendment did away with actually naming African Americans in laws prohibiting the right to bear arms. Instead, in the Jim Crow era facially-neutral laws imposed prohibitive fees and restrictions on the poor and were selectively enforced in ways to deny the right of black citizens to possess and carry arms. One such Florida law was “for the purpose of disarming the negro laborers . . . . The statute was never intended to be applied to the white population . . . .”<sup>235</sup>

Despite such Jim Crow laws, there is a long tradition of exercise of Second Amendment rights by African Americans. In 1892, Ida B. Wells wrote that a “Winchester rifle should have a place of honor in every black home, and it should be used for that protection which the law refuses to give.”<sup>236</sup> Professor Anderson mentions Wells, but ignores that advice. But she does describe how in 1906 in Atlanta armed African Americans fought off mobs intent on death and destruction.<sup>237</sup>

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<sup>229</sup> Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

<sup>230</sup> *Id.* at 2766.

<sup>231</sup> *McDonald*, 561 U.S. at 777.

<sup>232</sup> 17 Stat. 13 (1871).

<sup>233</sup> *McDonald*, 561 U.S. at 776, citing Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms* 120-31(1998).

<sup>234</sup> Ex. Doc. No. 268, 42nd Cong., 2d Sess. 2 (1872).

<sup>235</sup> *Watson v. Stone*, 148 Fla. 516, 524, 4 So. 2d 700 (1941) (Buford, J., concurring).

<sup>236</sup> Ida B. Wells, *Southern Horrors: Lynch Law in All its Phases* 16 (1892).

<sup>237</sup> Anderson at 104-08.

The Jim Crow era, with its regime of legal discrimination based on race, ended with the enactment of federal civil rights legislation in the 1960s. Exercise of the right to bear arms for self-defense was essential to protect members of the civil rights movement. African Americans, including civil rights icons, had a long tradition of carrying firearms to protect themselves and their communities.<sup>238</sup>

Laws that bestow discretion on officials to decide whether a person has a “special need” to exercise Second Amendment rights make possible discrimination based on race or other irrelevant characteristics, and may even result in denial of the right to the public at large. At the time of the protest against segregated seating on buses in Birmingham, Alabama, in 1956, a news item reported about Martin Luther King, Jr.: “A Negro boycott leader whose home was bombed earlier this week has been denied a pistol permit, the sheriff’s department said yesterday.”<sup>239</sup> At a meeting of the boycott committee, Rev. King was quoted as stating: “I went to the sheriff to get a permit for those people who are guarding me. ‘Couldn’t get one’. In substance he was saying ‘you are at the disposal of the hoodlums.’”<sup>240</sup>

At that time, Alabama law gave discretion to officials to issue a license to carry a pistol if the applicant had “good reason to fear injury” or “other proper reason.”<sup>241</sup> Today, most states issue carry permits to all law-abiding persons without regard to an official’s subjective decision about the applicant’s “need.” A handful of states ban the right to bear arms to all persons except those with what the police deem a “special need,” such as the New York law<sup>242</sup> that at the time of this writing is pending before the Supreme Court.<sup>243</sup>

As Professor Anderson recounts, in 1967 the Black Panther Party for Self Defense adopted a Ten-Point Program that included: “The Second Amendment of the Constitution of the United States gives us a right to bear arms. We therefore believe that all Black people should

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<sup>238</sup> See Nicholas Johnson, *Negroes and the Gun: The Black Tradition of Arms* (2014); Charles E. Cobb, Jr., *This Nonviolent Stuff’ll Get You Killed: How Guns Made the Civil Rights Movement Possible* (2014).

<sup>239</sup> “Negro Leader Fails to Get Pistol Permit,” *Montgomery Advertiser*, Feb. 4, 1956, at 3B.

<sup>240</sup> Donald T. Ferron, Notes on MIA Executive Board Meeting (Feb. 2, 1956). <https://kinginstitute.stanford.edu/king-papers/documents/notes-mia-executive-board-meeting-donald-t-ferron-1>.

<sup>241</sup> Uniform Firearms Act, Acts 1936, Ex. Sess., No. 82, § 7, at 51, 52.

<sup>242</sup> *Kachalsky v. County of Westchester*, 701 F.3d 81, 86 (2nd Cir. 2012), *cert. denied*, 569 U.S. 918 (2013) (citations omitted).

<sup>243</sup> *New York State Rifle and Pistol Association v. Bruen*, No. 20-843 (pet. granted April 26, 2021).

arm themselves for self-defense.”<sup>244</sup> When they exercised that very right, the California legislature passed legislation to infringe on the right. Since then, the law has become even more restrictive in giving officials’ power to limit the right to a privileged few. When the Supreme Court declined to review a decision upholding the law, Justice Clarence Thomas wrote:

For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self- defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it.<sup>245</sup>

At bottom, Professor Anderson’s actual critique centers on the infringement of Second Amendment rights, not on the right to bear arms itself. By contrast, Professor Bogus denies that the Amendment recognizes any individual right to be armed for self-defense and seeks to reduce the Amendment to a state militia power with the purpose of repressing the right to bear arms of an enslaved population.

### **Conclusion: Hidden History – Or No History?**

Bogus ends his “Hidden History” – which should be called “No History”– with two points that betray the work as a political tract to support laws criminalizing the right to bear arms. First, he claims: “The Amendment deals with keeping and bearing arms in the militia, subject to federal and state regulation. Therefore, to the extent original intent matters, the hidden history of the Second Amendment strongly supports the collective rights position.”<sup>246</sup> Of course the Amendment recognizes “the *right of the people* to keep and bear arms,” not the duty of a segment of the people to serve in the militia. The “collective rights” theory was invented to deny Second Amendment rights, has no basis in text, history, or tradition, and was soundly rejected by the Supreme Court in *District of Columbia v. Heller* (2008).<sup>247</sup>

Second, Bogus asserts with apparent hope: “The Second Amendment takes on an entirely different complexion when instead of being symbolized by a musket in the hands of the minuteman, it is associated with a musket in the hands of the slave holder.”<sup>248</sup> A musket in the hands of the minuteman, which is historically accurate, symbolizes the use of arms to win freedom. The musket in the hands of the slave holder, and the ban on the musket by the slave,

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<sup>244</sup> Anderson at 130.

<sup>245</sup> *Peruta v. County of San Diego*, 137 S. Ct. 1995, 1999-2000 (2017) (Thomas, J., dissenting from denial of cert.).

<sup>246</sup> Bogus at 404.

<sup>247</sup> *District of Columbia v. Heller*, 554 U.S. 570, 584-89 (2008).

<sup>248</sup> Bogus at 407.

symbolizes the denial of Second Amendment rights. The musket in the hands of the black freedman symbolizes the end of slavery and the extension of the right to bear arms – as the text requires – to “the people,” all of them.

The right to keep and bear arms enables the people to have arms for self-defense, hunting, and resistance to invasion and tyranny. Slavery infringed on Second Amendment rights as well as many other rights. If the Second Amendment was the result of a covert deal to protect slavery, about which no record survives, it remains perhaps the best kept secret of the eighteenth century.