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The Relationship Between the Second Amendment, Slavery, and the Decimation of the Native American Population

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Introduction

Readers who are not well familiar with the content of the US Constitution and the history of the genesis of the Constitution and the Bill of Rights will find the assertion that the Second Amendment was in any way related to the perpetuation of the institution of slavery to be blasphemous, if not downright treasonous. Those who are well familiar with the history of the Constitution will not be surprised. Similarly, readers whose understanding of the relationship between European settlers and Native Americans is shaped by the popular media will be highly offended by the assertion that the Second Amendment had anything to do with the drastic decline in the Native American population. Those who are better informed with regard to the reasons for this drastic decline may find my use of the term, "decimation," to be too kind. Others have used the term, "genocide," to describe this decline.[1] I will begin this essay by discussing issue of the relation between the Second Amendment and the institution of slavery.

A. Historical evidence that the Second Amendment was included to perpetuate the institution of slavery

The Declaration of Independence, written by a slave owner, Thomas Jefferson, and adopted by the Second Continental Congress on July 4, 1776, famously states:

> We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness….

The British commented on the hypocrisy in the American Declaration of Independence. The English author and abolitionist, Thomas Day, wrote in a letter to an American slave holder, "If there be an object truly ridiculous in nature, it is an American patriot signing resolutions of independence with the one hand, and with the other brandishing a whip over his affrighted slaves."[2]

The fear that slavery would be abolished, either directly through an article in the Constitution, or indirectly, by disarming or otherwise nullifying the slave patrols, was a prominent concern of the white residents of the colonies – later to become states – with high slave populations. Ironically, in his original draft of the Declaration of Independence,

Jefferson blamed the King of England for the enslavement of African people in America and for the threat of slave revolts. This clause, which was deleted from the final draft, stated:

> He has waged cruel war against human nature itself, violating it's most sacred rights of life & liberty in the persons of a distant people who never offended him, captivating & carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither…. He is now exciting those very people to rise in arms among us, and to purchase that liberty of which he has deprived them, by murdering the people for whom he also obtruded them [imposed slavery on them]….[3]

Reflecting back on Jefferson's first draft of the Declaration of Independence, President John Adams wrote to his former Secretary of State, Timothy Pickering, in 1822:

> I was delighted with its high tone, and the flights of Oratory with which it abounded, especially that concerning Negro Slavery, which though I knew his Southern Bretheren would never suffer to pass in [the Second Continental] Congress, I certainly never would oppose.[4]

There was extensive debate concerning the issue of slavery during the convention in Philadephia from May 14, 1787 through September 17, 1787 at which the Constitution was drafted by delegates from the 13 states. In the first two volumes of *Farrand's Records*, which quote or paraphrase statements made by the individual delegates during these debates, the word "slave," or some derivation of it, occurs 152 times.

Some of the delegates from the northern states passionately condemned the practice of slavery and objected to any mention or support of it in the Constitution. Delegates from the southern states with high slave populations defended slavery just as passionately and vowed that their states would not remain in the Union if the Constitution did not include assurances that the practice of slavery could continue unimpeded. Below are some examples from *Farrands Records* statements by representatives from the southern states at Constitutional. (The quotes, paraphrases, and abbreviations within quotations are copied directly from *Farrand's Records.* I've also added the name and the state of the speaker at the beginning of each quote and additional clarifications in brackets within the quotes)

> James Madison of Virginia: "It seemed now to be pretty well understood that the real difference of interests lay, not between the large & small but between the N. & Southn. States. The institution of slavery & its consequences formed the line of discrimination."[5]

> Pierce Butler of South Carolina: "The security the Southn. States want is that their negroes may not be taken from them which some gentlemen within or without doors [present or not present at the convention], have a very good mind to do."[6]

> John Rutledge of South Carolina: "Mr. Rutlidge *[sic]*. If the Convention thinks that N. C [North Carolina]; S. C. [South Carolina] & Georgia will ever agree to the plan, unless their right to import slaves be untouched, the expectation is vain. The people of those States will never be such fools as to give up so important an interest.[7]

> William Davie of North Carolina: “Mr. Davie, said it was high time now to speak out. He saw that it was meant by some gentlemen to deprive the Southern States of any share of Representation for their blacks. He was sure that N. Carola. [North Carolina] would never confederate on any terms that did not rate them at least as [some fraction of a person]. If the Eastern States meant therefore to exclude them altogether the business was at an end.”[8]
>
> Charles Cotesworth Pinckney of South Carolina: “General Pinkney [*sic*] declared it to be his firm opinion that if himself & all his colleagues were to sign the Constitution & use their personal influence, it would be of no avail towards obtaining the assent of their Constituents. S. Carolina & Georgia cannot do without slaves.” [9]

Some of the representatives from northern states chided the representatives from southern states for demanding that the Constitution, like the earlier Articles of Confederation, include protections for slavery, while at the same time they were too ashamed to call it by its real name, employing euphemisms instead. For example*:*

> William Patterson of New Jersey [concerning the proposal to consider slaves as three fifths of a person for the purpose of apportioning representatives in Congress]: “What is the true principle of Representation? It is an expedient by which an assembly of certain individls. chosen by the people is substituted in place of the inconvenient meeting of the people themselves. If such a meeting of the people was actually to take place, would the slaves vote? they would not. Why then shd. they be represented. He was also agst. such an indirect encouragement. of the slave trade; observing that Congs. in their act relating to the change of the 8 art: of Confedn. [Articles of Confederation] had been ashamed to use the term “Slaves” & had substituted a description.”[10]

The issue of the use of the militia being used to suppress slave insurrections was also brought up in these debates:

> Gouverneur Morris of Pennsylvania: “...The admission of slaves into the Representation when fairly explained comes to this: that the inhabitant of Georgia and S. C. [South Carolina] who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & dam?n?s them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the rights of mankind, than the Citizen of Pa [Pennsylvania] or N. Jersey who views with a laudable horror, so nefarious a practice….And What is the proposed compensation to the Northern States for a sacrifice of every principle of right, of every impulse of humanity. They are to bind themselves to march their militia for the defence of the S. States; for their defence agst those very slaves of whom they complain.”[11]

There is no doubt that the final version of the U.S. Constitution that was adopted at the convention in Philadelphia in September of 1787 and subsequently ratified by three fourths of the states by June of 1788 included four clauses that were specifically included to assure the southern states that the practice of slavery could continue unimpeded until at least 1808. In each of these four clauses, a euphemism was employed in place of the words, “slave” or “slavery.” The four clauses were (with euphemisms for the words “slave”

or “slavery” highlighted by us with italics):

> Article I, Section 2: …Representatives and direct Taxes shall be apportioned among the several States which may be included within the Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of *all other Persons*….
>
> Article I, Section 9 (first clause): The Migration or Importation of *Such Persons as any of the States now existing shall think proper to admit*, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for *each Person*….
>
> Article IV, Section 2: …*No Person held to Service or Labour in one State, under the Laws thereof*, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such *Service or Labour*, but shall be delivered up on Claim of the Party to whom *such Service or Labour may be due*.
>
> Article V: [The Constitution can be amended by a process outlined in this article] Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the *first* and fourth Clauses in the *Ninth Section of the first Article*….

Even with protections of slavery included in four different clauses in the Constitution, southern states remained concerned that Congress, which included more members from northern states than southern ones, would find a way to abolish slavery.[12] At the ratification convention in Richmond, Virginia in June of 1788, at which delegates debated whether Virginia would become the pivotal ninth state necessary to ratify the Constitution, thereby putting it into effect, Patrick Henry, who was the former Governor of Virginia, a slaveholder, and already well known for his “Give me liberty, or give me death” speech at the start of the American Revolution,[13] argued passionately against ratification of Constitution. Henry spoke bluntly about the fear that Congress would find a way to abolish slavery. Henry told fellow delegates and the large public audience:

> “In this state, there are two hundred and thirty-six thousand blacks, and there are many in several other states. But there are few or none in the Northern States….Slavery is detested….they will search that paper [the proposed Constitution] , and see if they have the power of manumission. And have they not, sir? Have they not the power to provide for the general defence and welfare? May they not think that these call for the abolition of slavery? May they not pronounce all slaves free, and will they not be warranted by that power?...This paper speaks to the point; they have the power in clear, unequivocal terms, and will clearly and certainly exercise it….The majority of Congress is to the north, and the slaves are to the south.”[14]

According to the 19th Century Virginia historical scholar Hugh Blair Grigsby:

> “I was told by a person on the floor of the Convention at the time, that when Henry had painted in the most vivid colors the dangers likely to result to the black population from the unlimited power of the general government wielded by men

> who had little or no interest in that species of property, and had filled his audience with fear, he suddenly broke out with the homely exclamation: *'They'll free your niggers!'* The audience passed instantly from fear to wayward laughter; and my informant said that it was most ludicrous to see men who a moment before were half frightened to death, with a broad grin on their faces."[15]

Henry's fellow Virginian and Anti-federalist, George Mason, who owned 300 slaves,[16] and who had also been one of just three delegates who refused to sign the final draft of the Constitution at the 1787 Constitutional Convention in Philadelphia, also spoke at the Virginia ratification convention about the risk that the federal government would find a way to abolish slavery despite the protections included in the Constitution. Mason was more discrete than Henry in his speaking style, and without using the words "slave" or "slavery," he described to fellow delegates a mechanism by which Congress might take indirect action to abolish slavery:

> "Mr. Chairman, unless there be some restrictions on the power [of Congress] of calling forth the militia…we may very easily see that it will produce dreadful oppressions. 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 [the northernmost state], to call them from Georgia [the southernmost state]….I wish such a check, as the consent of the state legislature, to be provided."[17]

It was undoubtedly understood by the other delegates and the public audience at the convention in Richmond that the "dreadful oppressions," "unsafe" repercussions, and "very bad purpose" of which Mason spoke were the threat of slave rebellions in the absence of a militia to suppress them.[18]

In case it wasn't apparent what Mason was driving at, Henry made it perfectly clear in his later remarks. Speaking in regard to Article I, Section 10 of the Constitution, which states that, "No State shall, without the Consent of Congress…engage in War, unless actually invaded," Henry warned:

> "If you give this clause a fair construction, what is the true meaning of it? What does this relate to? Not domestic insurrections, but war. 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."[19]

In addition to nullifying the power of the militia by failing to call it out or by sending it to another state, Henry warned that the federal government might emasculate the militia through intentional neglect. Henry warned:

> "Let me here call your attention to that part [of the Constitution] which gives the Congress power '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.' By this, sir, you see that their control over our last and best defence is unlimited. 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."[20]

George Mason reinforced Henry's warning concerning the possibility that Congress might nullify the power of the militia through willful neglect:

> "The militia may be here destroyed by that method which has been practiced 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."[21]

The threat that slaves might violently revolt was a constant fear of the white population in the South, and the threat grew more acute as the slave population increased. Thomas Jefferson alluded to the inevitability of an eventual apocalyptic conflict between Whites and Blacks in his 1787 book, *Notes on the State of Virginia.* Jefferson, who owned more than a hundred slaves himself, and who allegedly fathered two children with a slave mistress, reasoned that if slavery were to be abolished, all of the state's Blacks would have to be deported back to Africa. Jefferson wrote:

> "Why not retain and incorporate the blacks into the state, and thus save the expence of supplying, by importation of white settlers, the vacancies they will leave? Deep rooted prejudices entertained by the whites; ten thousand recollections, by the blacks, of the injuries they have sustained; new provocations; the real distinctions which nature has made; and many other circumstances, will divide us into parties, and produce convulsions which will probably never end but in the extermination of the one or the other race."[22]

The largest slave insurrection up to the time of Jefferson's writing had been the 1739 Stono Rebellion in South Carolina which about 25 Whites were killed before a hastily assembled militia under the command of South Carolina Lieutenant Governor William Bull captured or killed most of the 60-100 rebelling slaves.[23] Between 1739 and 1787, there had been at least 20 other smaller slave uprisings in the colonies.[24] In order to forestall the day when black slaves would successfully free themselves from, and likely retaliate against, their white suppressors on a wide scale, the southern colonies that later became the southern states increased the size and number of their slave patrols and organized them into militias that were one and the same as the militias to which Patrick Henry and James Mason referred in their speeches at the Virginia ratification convention in 1788.[25]

James Madison, who would subsequently be elected to the first U.S. House of Representatives and write the first draft of what would eventually become the Second Amendment, was also a delegate to the Virginia convention. Madison was also a slave owner, but he'd helped write the draft of the Constitution at the convention in Philadelphia, and he argued for its ratification without amendments. Madison responded to Mason's argument that the federal government might drag the militia "unnecessarily from one end of the continent to the other" as being "preposterous" and "full of mischief."[26] He also argued that it was unlikely that the federal government would disarm or otherwise emasculate the militia through neglect. Madison stated:

> I cannot conceive that this Constitution, by giving the general government the power of arming the militia, takes it away from the state governments. The power is concurrent, and not exclusive.[27]

Henry replied to Madison's reassurance concerning the militia:

> When this power is given up to Congress without limitation or bounds, how will your militia be armed? You trust to chance; for I am sure that that nation which shall trust its liberties in other hands cannot long exist. If gentlemen are serious when they suppose a concurrent power, where can be the impolicy to amend it? Or, in other words, to say that Congress shall not arm or discipline them [the militia], till the states shall have refused or neglected to do it? This is my object. I only wish to bring it to what they themselves [Madison and other Federalists] say is implied.[28]

Patrick Henry, George Mason, and other Anti-federalist delegates to the Virginia ratifying convention submitted a resolution that a bill of rights should be written at the convention and sent to the other states to consider adding it to the Constitution before Virginia voted whether to ratify the Constitution in its present form. This resolution was defeated by a vote of 88 opposed to 80 in favor. The delegates then voted on June 15, by a margin of 89 to nine to 79 to ratify the Constitution as it was currently written. By the time that Virginia ratified the Constitution on June 25, 1788, it was already in effect, as New Hampshire had become the necessary ninth state to ratify it on June 21.

The Virginia ratification convention was not the only one at which concerns about the possibility that Congress might abolish slavery through its control over the militia were raised. Similar concerns were discussed in North Carolina, South Carolina, and Georgia.[29] The debates at the Virginia convention are particularly relevant, though, to the rationale for including the Second Amendment in the Bill of Rights. Following the Virginia convention, James Madison ran in a tightly contested race against an anti-federalist for a seat in the first U.S. House of Representatives. Although Madison had spoken against the need for amendments to the Constitution at the ratification convention, during the congressional race, he was forced to commit to supporting the addition of a bill of rights in order to win the election. Madison was given the responsibility of drafting a bill of rights when the first U.S. Congress convened in the spring of 1789. It's likely that the debates with Patrick Henry and James Mason were still fresh in his mind when he penned the first draft of what would become the Second Amendment. On June 8, 1789, Madison presented nine proposed amendments, several of them with multiple clauses, that contained in total at least 20 separate provisions.[30] The fourth of these amendments included 10 separate provisions, including:

> 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.[31]

After Madison presented his proposed amendments, there was a great deal of further discussion concerning the merits of the various amendments and whether the full House should continue to debate them openly or whether the matter should be referred to a committee.[32] None of this discussion reflected any concerns, however, about whether the "right to keep and bear arms" provision in the fourth amendment conferred an individual right to own firearms for personal use outside of service in a well regulated militia. It was finally agreed that the proposed amendments would be referred to a committee for further refinement.[33]

A House committee was formed with one representative on the committee from each state, with Madison representing the state of Virginia. The committee brought a revised version of the amendments back to the full House for further debate on several occasions in August of 1789. Most of the debate concerning the "right to bear arms" amendment was focused on the issue of who would control the militia and whether the conscientious objector clause might be abused. Again, while there are many pages of transcripts of debates in the House concerning other aspects of the proposed amendments during this time period, there is no record of any debate as to whether there should be an amendment that conferred an individual right to bear arms outside of service in the militia.[34] The committee brought the amendments back to the full House one last time on August 29, 1789. The amendments were now 17 in number, but the individual amendments no longer contained multiple provisions. The fourth proposed amendment now stated:

> A well regulated militia, composed of the body of the People, being the best security of a free State, the right of the People to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms shall be compelled to render military service in person.[35]

It should be noted that the first part of the proposed fourth amendment satisfies the concerns of Patrick Henry, James Mason, and other southern anti-federalists that the federal government not be allowed to nullify the militia through neglect or by intentionally disarming it. The last part satisfies the concerns of Quakers in northern states that they not be required to render military service.

It is clear from the debates in Congress on what would become the Second Amendment that it was understood by all the members who discussed it that the "right to keep and bear arms" was directly related to service in a well regulated militia for the common defense. During all of the recorded debates on what would become the Second Amendment, from its introduction in Congress by James Madison on June 18, 1789, to the time that it was sent to the Senate for further discussion on August 29, 1789, there are 22 instances in *Gales and Seaton's History of Debates in Congress* of members of the House of Representatives speaking on the topic of a "militia."[36] There are also 24 recorded instances of the use of the term "bear arms," all in the context of service in a militia, or a religious objection to such service. There's not a single recorded instance during this same time period of a congressman speaking on the topic of "self-defence" (as the word, "defense," was spelled at the time) or "hunting."

After the House voted to approve the final version of the proposed amendments, the House sent the proposed amendments to the Senate for further discussion. The Senate met privately, and records of what was debated are not available. The Senate cut down the number of amendments from 17 to 12, though, and shortened the fourth proposed amendment to read:

> 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.[37]

The final versions of the 12 amendments were approved by two thirds of the members of both the House and the Senate on September 15, 1789, and sent to the states for ratification.

There are few records of any debates at the state level concerning ratification of the proposed amendments. The first proposed amendment, dealing with how members of Congress would be apportioned, and the second proposed amendment, which would have prevented Congress from raising its own pay, failed to garner the ratification of the necessary three fourths of the states. The third proposed amendment, therefore, became the First Amendment, the fourth proposed amendment, became the Second Amendment, and so on. On December 15, 1791, Virginia became the tenth state to ratify the ten amendments, meeting the requirement for the approval of three fourths of the states necessary to add what would become known as the Bill of Rights to the U.S. Constitution.

B. References to slavery in the Justice Scalia's majority opinion in the Supreme Court's 2008 *Heller* decision

Throughout his majority opinion in *Heller*, Justice Scalia repeatedly claims that one of the purposes of the Second Amendment, if not the main purpose, was to confer an individual right to own firearms for personal self defense. In making this claim, however, Scalia studiously avoids the records of the Constitutional Convention in Philadelphia in 1887 at which the Constitution was written, the records of debates at the ratification conventions of the states, and the debates concerning the Bill of Rights itself during the First Congress. Justice Stevens comments on this feature of Scalia's majority opinion in his dissent:

> Although it gives short shrift to the drafting history of the Second Amendment, the Court dwells at length on four other sources: the 17th-century English Bill of Rights; Blackstone's Commentaries on the Laws of England; postenactment commentary on the Second Amendment; and post-Civil War legislative history. All of these sources shed only indirect light on the question before us, and in any event offer little support for the Court's conclusion.[38]

Scalia's avoidance of the drafting history of the Constitution and the Second Amendment is ironic, given his claim of being an "originalist."[39] But this omission is clearly not accidental, for the records from this part of the founding era are entirely inconsistent with his claim that one of the main reasons for the inclusion of the Second Amendment in the Bill of Rights was to confer an individual right to keep and bear firearms outside of service in a well regulated militia. On the other hand, as I have shown above, the records support the thesis that the Second Amendment was included in the Bill of Rights in part – and quite possibly in large part - to reassure the southern states with large slave populations that they could keep the armed militias that were necessary to suppress slave insurrections.

Scalia briefly discusses the relationship between slavery and the Second Amendment in three sections of his majority opinion in *Heller.* In section II-D-1, "Postratification Commentary," Scalia claims:

> "Antislavery advocates routinely invoked the right to bear arms for self-defense."[40]

This claim is false. During the Founding Era, the Quakers, who were religiously opposed to "bearing arms" (except in extraordinary cases, as I discuss below), were the most vocal opponents of slavery. Although the institution of slavery was protected in the U.S.

Constitution, there was extensive and acrimonious debate on the issue in the U.S. House of Representatives during the first session of Congress in February and March of 1790, after Quakers from Pennsylvania, New Jersey, Delaware, Maryland, and Virginia introduced a resolution condemning slavery.[41] There is no record of "antislavery advocates" invoking a "right to bear arms" in association with the abolition of slavery during the first Congress, including during the discussions of the Bill of Rights. Nor does Scalia provide any other example of an "antislavery advocate" who also advocated a "right to bear arms" prior to 1845, fifty-four years after the Second Amendment was ratified.

Scalia's Joel Tiffany and Lysander Spooner as the first two of his three examples of abolitionists who "routinely invoked the right to bear arms for self-defense."[42] Both men published treatises (Tiffany in 1845[43] and Spooner in 1848[44]) claiming, contrary to the facts cited above, that the Constitution prohibited slavery. Scalia quotes a portion of a sentence from Tiffany's treatise, implying that Tiffany supported the view that the Second Amendment conferred an individual right to own firearms for self defense. Scalia fails to acknowledge, though, that the section of Tiffany's treatise from which this partial quote is taken is entitled, "Militia."[45]

Scalia cites Lysander Spooner with the aside:

> "see also L. Spooner, The Unconstitutionality of Slavery 116 (1845) (right enables 'personal defence')."[46]

The author finds Spooner's reference to the Second Amendment and "personal defence" on a different page than Scalia cites in Spooner's treatise, but once again, even in his brief aside, Scalia takes the quote out of context. In the same sentence in which Spooner states that there is a "natural right of all men 'to keep and bear arms' for their personal defense," he adds, "and more especially of any whom Congress have power to include in their militia."[47] Scalia also fails to mention that Spooner was an anarchist who, following the Civil War, expressed as much sympathy for the slaveholders who had lost the war as for the black slaves who had, in theory at least, been emancipated by it. Spooner wrote in a later treatise:

> "On the part of the North, the war was carried on, not to liberate the slaves, but by a government that had always perverted and violated the Constitution, to keep the slaves in bondage; and was still willing to do so, if the slaveholders could be thereby induced to stay in the Union…. If it be really established, the number of slaves, instead of having been diminished by the war, has been greatly increased; for a man, thus subjected to a government that he does not want, is a slave."[48]

If there were any doubt that Spooner was referring to southern Whites as having become slaves as a result of the Civil War, he made this point perfectly clear later in his essay:

> "The principle that the majority have a right to rule the minority, practically resolves all government into a mere contest between two bodies of men, as to which of them shall be masters, and which of them slaves; a contest, that—however bloody—can, in the nature of things, never be finally closed, so long as man refuses to be a slave."[49]

Scalia cites U.S. Senator Charles Sumner of Massachusetts as his third and final example of anti-slavery advocates who "routinely invoked the right to bear arms for self-defense."[50]

Scalia quotes[51] the portion of Sumner's two day long speech on the floor of the Senate on May 19-20, 1856, in which Sumner stated:

> "The rifle has ever been the companion of the pioneer and, under God, his tutelary protector against the red man and the beast of the forest. Never was this efficient weapon more needed in just self-defence, than now in Kansas, and at least one article in our National Constitution must be blotted out, before the complete right to it can in any way be impeached. And yet such is the madness of the hour, that, in defiance of the solemn guarantee, embodied in the Amendments to the Constitution, that 'the right of the people to keep and bear arms shall not be infringed,' the people of Kansas have been arraigned for keeping and bearing them, and the Senator from South Carolina has had the face to say openly, on this floor, that they should be disarmed—of course, that the fanatics of Slavery, his allies and constituents, may meet no impediment."[52]

As usual, Scalia doesn't acknowledge the context in which Sumner made the statement quoted above. The main subject of Sumner's speech, which was published under the title, *The Crime Against Kansas,*[53] was the issue of whether Kansas would be admitted to the Union as a slave state or a free state. Under the terms of the Missouri Compromise of 1820, Missouri was allowed to join the Union as a slave state, balanced by the addition of Maine to the Union as a free state.[54] The Compromise also included the stipulation that with the exception of Missouri, all other future states that were included in the Louisiana Purchase and that were north of latitude 36 degrees 30 minutes would be admitted as free states. In 1854, though, the Kansas-Nebraska Act was passed by Congress over the strenuous objections of opponents to slavery, repealing the Missouri Compromise and replacing it with an agreement that territories seeking statehood would decide for themselves whether they wished to be admitted as free states or slave states.[55]

Residents of Nebraska would subsequently vote overwhelmingly in an uncontested referendum to join the Union as a free state, but there was intense political conflict, sometimes escalating into physical violence, between pro-slavery and anti-slavery advocates in Kansas. Both sides accused the other of voter fraud, including importing settlers to stuff the ballot boxes, and both sides armed themselves and engaged in voter intimidation, and in some cases, murder.[56] The moniker, "Bleeding Kansas," was adopted to describe the conflict.

In his lengthy speech, Senator Sumner employed the metaphor of sexual assault in describing the attempts to make Kansas a slavery state:

> It is the rape of a virgin Territory, compelling it to the hateful embrace of Slavery; and it may be clearly traced to a depraved longing for a new slave State, the hideous offspring of such a crime, in the hope of adding to the power of slavery in the National Government.[57]

Sumner also employed sexual imagery in verbally attacking one of his main adversaries in the Senate, Senator Andrew Butler of South Carolina, who was absent from the Senate chambers on May 19 and 20 when Sumner delivered his speech. Butler had co-authored the Kansas-Nebraska bill, and he was the "Senator from South Carolina" to whom Sumner referred in the portion of his speech quoted by Scalia.[58] Elsewhere in his speech, Sumner said of Butler:

> The Senator from South Carolina has read many books of chivalry, and believes himself a chivalrous knight, with sentiments of honor and courage. Of course, he has chosen a mistress to whom he has made his vows, and who, though ugly to others, is always lovely to him; though polluted in the sight of the world, is chaste in his sight; I mean the harlot, Slavery.[59]

Near the end of his speech, Sumner included another insult to Senator Butler and South Carolina:

> Were the whole history of South Carolina blotted out of existence, from its very beginning down to the day of the last election of the Senator to his present seat on this floor, civilization might lose -- I do not say how little; but surely less than it has already gained by the example of Kansas, in its valiant struggle against oppression, and in the development of a new science of emigration.[60]

Two days after Sumner delivered his *Crime Against Kansas* speech, as he was working at his desk in the Senate chambers after the Senate had adjourned, Senator Butler's cousin, Representative Preston Brooks of South Carolina, approached Sumner's desk and began beating Sumner over the head with a walking cane until Sumner, who had become entangled between his chair and his desk, which was affixed to the floor, lay bleeding and unconscious. Brooks not only admitted committing the assault, he boasted about.[61]

Brooks had at least one, and possibly two accomplices in the assault. Representative Laurence Keitt of South Carolina, who was reportedly armed with a pistol, prevented other senators from coming to Sumner's aid until Brooks had finished beating him into an unconscious state. Representative Henry Edmundson of Virginia also accompanied Brooks into the Senate chambers.[62]

A Senate select committee to investigate the assault referred the incident to the House for disciplinary action against Brooks, Keitt, and Edmundson.[63] A majority of the House, but not the necessary two thirds, voted for Brooks' expulsion. Keitt was censured, but not Edmundson. A federal court found Brooks guilty of assault and fined him $300, but he served no time in jail. Both Brooks and Keitt resigned from the House as a manner of honor, and both were promptly re-elected after running unopposed in their respective South Carolina districts. Sumner took a three year leave of absence from the Senate to recover from his injuries.[64]

The statement that Scalia quotes from Sumner's *Crime Against Kansas* speech is the only time in which Sumner makes any reference to the Second Amendment, either directly or indirectly, in his entire two-day, 95 page long address. Sumner's use of the word, "arraigned," in the part of the speech quoted by Scalia was apparently used in the sense of anti-slavery advocates being criticized for carrying rifles, not actually arrested and charged with a crime. In another part of his speech, Sumner claims that the only weapons that the anti-slavery advocates in Kansas possessed were "saw-mills, tools, and books."[65]

South Carolina Andrew Senator Butler spoke on the floor of the Senate on June 12 and June 13, 1856, in response to Sumner's *Crime Against Kansas* speech and the attack on Sumner by Brooks.[66] In addition to defending his own character and the character of his cousin, Butler warned about the danger of the escalating violence in Kansas:

> "Even in my own State, I perceive that parties are being formed to go to Kansas – adventurous young men who will fight anybody. Sir, let me caution you, do not hold out to the youth of this country a temptation to go into scenes of blood. If you do this, your will commit the gravest of all controversies on earth, and the most important concerns of society, to the youth of the country, for they will go there; and the cause of a republic may be decided by the judgment of youthful impulse….God knows, as I have said, one drop of blood shed in civil strife in this country may not only dissolve this Union, but may do worse."[67]

Butler also spoke specifically about the dangers of the opposing sides being armed with rifles:

> "Bigotry, fanaticism, and prejudice, are fatal counselors; and under the Sharpe's rifle influence they have exercised their influence on the issues of the day."[68]

Butler doesn't allude to the Second Amendment, either directly or indirectly, in either his March 5 or June 12-13 speeches. In the digital version of *the Complete Works of Charles Sumner*, which includes 6,944 digital pages, the term, "Second Amendment," doesn't appear once, and the terms, "right to bear arms," "right to keep and bear arms," or "right of the people to keep and bear arms," occur only three times – once in the *Crime on Kansas* speech in the excerpt Scalia quotes in his majority opinion, and twice in a speech on the Civil War presented in New York on September 9, 1863.[69] In the Civil War speech, Sumner's use of the term clearly refers to a collective right to maintain a military force. Given the fact that both pro-slavery and anti-slavery advocates had claimed victories in the disputed elections in Kansas and both had organized quasi-governmental militias, Sumner's use of the term, "the right of the people to keep and bear arms" in his *Crime on Kansas* speech is also just as consistent, if not more so, with a collective right interpretation of the Second Amendment than the individual right interpretation.

In summary, with regard to Scalia's claim that Charles Sumner was an example of "Antislavery advocates" who "routinely invoked the right to bear arms for self-defense," Sumner, who was indeed the epitome of an anti-slavery advocate during his entire political career, invoked the term, "right to bear arms," or some derivation of it, only three times in a collection of 6,994 digital pages of his writings and speeches, with the *Crime on Kansas* speech being the only case in which he used the term in relation to the issue of slavery. Even in that single example, his use of the term, "the right of the people to keep and bear arms," did not clearly indicate that he viewed the Second Amendment as conferring and individual right to own firearms unrelated to service in a militia.

The chain of events between the adoption of the Kansas-Nebraska Act and the Civil War, including the speeches of both Senators Sumner and Butler, should serve as a warning to any astute observer of the danger of a highly armed citizenry to democratic processes and to the right of the people to life, liberty, and the pursuit of happiness. It is disingenuous, to say the least, for Justice Scalia to cite the excerpt from Sumner's speech in support of his claim that the Second Amendment should be viewed as conferring an individual right for civilians to keep and bear arms outside of service in a well regulated militia.

As I have shown, there is no credible evidence to support Justice Scalia's claim that during the era between the ratification of the Second Amendment and the Civil War, "Antislavery advocates routinely invoked the right to bear arms for self-defense." I have also shown that during the time that the Constitution and Bill of Rights were being written

and debated, pro-slavery advocates from southern states were among the most vocal advocates for the right of states to maintain armed militias under state control. In his majority opinion, Scalia provides - though doesn't acknowledge – multiple examples of pro-slavery advocates who were also strong advocates of a "right to bear arms" - whether it be an individual right or a collective one - during the "postratification" period.

Earlier in Section II-D-1, Scalia cites "St. George" Tucker as his first example in support of his claim that:

> "Three important founding-era legal scholars interpreted the Second Amendment in published writings. All three understood it to protect an individual right unconnected with militia service."[70]

I dispute Scalia's claim that Tucker clearly supported the individual right interpretation of the Second Amendment, but I do acknowledge that Tucker spoke of "the right of the people to keep and bear arms" in exalted terms. Scalia fails to note, however, that Tucker was a slave owner and an apologist for slavery. In the paragraph from which Scalia takes an excerpt in support of his claim that Tucker supported an individual right "to repel force by force,"[71] Tucker writes:

> "Slaves, only, where slavery is tolerated by the laws, are excluded from social rights. Society deprives them of personal liberty, and abolishes their right to property; and, in some countries, even annihilates all their other natural rights: the life of the slave, in divers parts of the world, being held by a tenure, altogether a precarious as the ox he ploughs with."[72]

There's no indication in the text that precedes or follows the above statement that Tucker was offering this commentary as a criticism of slavery. Tucker was stating that slaves had no more rights than oxen as a fact of nature.

The second section his majority opinion in which Scalia makes reference to slavery is in section II-D-2, "Pre-Civil War Case Law." The second case that Scalia cites in support of his claim in his section that nineteenth century cases that address the Second Amendment "universally support an individual right unconnected to militia service" is the case of *Johnson v. Tompkins*.[73] Scalia writes in his majority opinion:

> "Even clearer was Justice Baldwin. In the famous fugitive-slave case of *Johnson v. Tompkins,* 13 F. Cas. 840, 850, 852 (CC Pa. 1833), Baldwin, sitting as a Circuit Judge, cited both the Second Amendment and the Pennsylvania analogue for his conclusion that a citizen has 'a right to carry arms in defence of his property or person, and to use them, if either were assailed with such force, numbers or violence as made it necessary for the protection or safety of either.'"[74]

Like *Cruikshank* and *Dred Scott, Johnson v. Tompkins* should rank among the worst Supreme Court decisions in U.S. history. The principle established by Justice Baldwin's decision in *Johnson v. Tompkins* was not that the Second Amendment confers an individual right to own firearms for personal protection, but rather that any white person could forcibly abduct any black person with impunity by claiming that the black person was a runaway slave, even in a state like Pennsylvania which was founded by Quakers.

The case of *Johnson v. Tompkins* involves a black man, identified in Baldwin's decision only as "negro Jack," who fled from New Jersey to Pennsylvania in 1822. Jack had been

a slave up to age 30, but he claimed that he had been freed by the will of a former master and was being held in captivity illegally in New Jersey by Caleb Johnson. Jack got a job in Montgomery County in Pennsylvania. On Sunday, October 20, 1822, Johnson and three accomplices crossed the Delaware River into Pennsylvania. They gained entry into the residence in which Jack was living on false pretenses, and they were initially successful in forcibly abducting him. As they were heading back to New Jersey, though, an angry group of local residents accosted them and demanded that they release Jack unless they could prove that he was their slave. Johnson and his accomplices and the angry crowd reached an agreement that they would go that Sunday evening to the home of a Montgomery County Judge, Justice McNeil, where Johnson would plead his case that he legally owned Jack and was entitled to forcibly take him back to New Jersey. After hearing Johnson's arguments, which included no proof that he owned Jack, Justice McNeil ordered the local justice of the peace, Justice Tompkins, and the local constable, Silas Roney, to arrest Johnson and take him to jail pending further hearings on the matter. After a lengthy trial, Johnson and his three accomplices were acquitted of committing any crime, and Jack, who, not surprisingly, was unable to provide documentation that he had been freed in the will of a previous owner, was returned to the status of a slave under Johnson's ownership. Johnson subsequently sued Justice Tompkins and Montgomery County officials for false arrest and imprisonment. Defendants Tompkins *et al* were represented by William Rawle, who Scalia falsely claims in Section II-D-1 to be an important founding-era legal scholar who interpreted the Second Amendment as conferring an "individual right unconnected with militia service."[75] Justice Baldwin ruled in favor of Johnson and awarded him $4,000 (approximately $120,000 current U.S. dollars) in compensation, including punitive damages.

The Second Amendment was not directly at issue in *Johnson v. Tompkins,* but in handing down his opinion, Baldwin referenced both the Second Amendment and the 1776 Pennsylvania Constitution and Declaration of Rights. Baldwin also cited the portions of the Pennsylvania Constitution and the U.S. Constitution dealing with property rights. Baldwin stated:

> "The first section of the bill of rights in the constitution of Pennsylvania declares 'that all men have the inherent and indefeasible right of enjoying and defending life and liberty, of acquiring, possessing and protecting property,' 'that no man can be deprived of his liberty or property but by the judgment of his peers, or the law of the land.' Section 9 [*sic*]. That the right of citizens to bear arms in defence of themselves and the state, shall not be questioned. Section 21 [*sic*]…. The second amendment [to the U.S. Constitution] provides, 'that the right of the people to keep and bear arms shall not be infringed.' The sixth [amendment to the U.S. Constitution], 'that no man shall be deprived of liberty or property without due process of law.'"

Baldwin also referenced Article IV, Section 2, Clause 3 of the U.S. Constitution, which states:

> "No Person held to Service or Labour in one state, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party, to whom such Labour or Service shall be due."

In his majority opinion in *Heller,* Scalia usually employs an ellipsis to replace the portions

of statements that refute the point he is trying to make when he quotes historical records out of context. In the case of his quote from Baldwin's decision in *Johnson v. Tompkins,* though, there's no ellipsis preceding the quotation, "a right to carry arms in defence of his property or person, and to use them, if either were assailed with such force, numbers or violence as made it necessary for the protection or safety of either."[76] Scalia's failure to use an ellipsis in this case may have been a Freudian slip. Here's the full sentence, with just the portion quoted by Scalia highlighted by us in italics:

> "Jack was the property of the plaintiff, who had a right to possess and protect his slave or servant, whom he had a right to seize and take away to his residence in New Jersey by force, if force was necessary, he had a right to secure him from escape, or rescue by any means not cruel or wantonly severe—he had *a right to carry arms in defence of his property or person, and to use them, if either were assailed with such force, numbers or violence as made it necessary for the protection or safety of either*; he had a right to come into the state and take Jack on Sunday, the act of taking him up and conveying him to [a nearby town] was no breach of the peace, if not done by noise and disorder, occasioned by himself or his party—and their peaceable entry [on false pretenses] into the house of [his employer] was lawful and justifiable, for this purpose in doing these acts they were supported by laws which no human authority could shake or question."[77]

Johnson v. Tompkins was not the first time that Baldwin had issued an opinion related to slavery. As a Supreme Court justice, Baldwin wrote a dissenting opinion in the 1841 case of *Groves v. Slaughter,* which blocked the transport of slaves for sale across state lines. In his dissent, Baldwin wrote:

> "Other judges consider the Constitution as referring to slaves only as persons, and as property, in no other sense than as persons escaping from service; they do not consider them to be recognized as subjects of commerce, either "with foreign nations," or "among the several states;" but I cannot acquiesce in this position…. That I may stand alone among the members of this Court, does not deter me from declaring that I feel bound to consider slaves as property, by the law of the states before the adoption of the Constitution, and from the first settlement of the colonies; that this right of property exists independently of the Constitution, which does not create, but recognizes and protects it from violation, by any law or regulation of any state, in the cases to which the Constitution applies."[78]

Baldwin was also the sole dissenting Supreme Court justice in the 1841 case of *United States v. Amistad.*[79] Although he didn't write a dissenting opinion in this case, Baldwin was the only justice who disagreed that the Africans who overpowered their captors on the slave ship, *Amistad,* and who were subsequently rescued by a U.S. Navy vessel off the coast of Long Island, should be considered to be free men and not returned to the captivity of slave traders.

In summary, rather than supporting Scalia's view that the Second Amendment was intended to confer an individual right to own firearms for self defense, the full text of Baldwin's decision in *Johnson v. Tompkins* provides an example of a member of the judiciary misrepresenting the Second Amendment in order to promote the practice of slavery.

Scalia also cites the 1846 case of *Nunn v. State* In section II-D-2 in support of his claim

that nineteenth century cases that address the Second Amendment "universally support an individual right unconnected to militia service."[80]. In this case, Hawkins H. Nunn, a white citizen of Georgia, was indicted by a grand jury for possession of a pistol in violation of an 1837 Georgia law entitled, "An Act to guard and protect the citizens of this State against the unwarrantable and too prevalent use of deadly weapons." The act stated:

> ". . . it shall not be lawful for any merchant, or vender of wares or merchandize in this State, or any other person or persons whatsoever, to sell, or offer to sell, or to keep, or to have about their person or elsewhere, any of the hereinafter described weapons, to wit: Bowie, or any other kinds of knives, manufactured and sold for the purpose of wearing, or carrying the same as arms of offence or defense, pistols, dirks, sword canes, spears, &c., shall also be contemplated in this act, save such pistols as are known and used as horseman's pistols, &c." [81]

Nunn appealed his indictment to the Georgia Supreme Court on the basis that the 1837 Georgia weapons act violated the Second Amendment. In his majority opinion, Justice Joseph Henry Lumpkin agreed in part, and dismissed the indictment against Lumpkin. Scalia quotes[82] the portion of Lumpkin's majority opinion in which he states:

> "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* as are merely used by the *militia,* shall not be *infringed,* curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right,* originally belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta!"*

The hyperbole, inaccuracies, and internal contradictions within this statement seem to us to be self-evident, but Scalia states, with regard to the above excerpt from *Nunn*:

> "Its opinion perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause, in continuity with the English right."[83]

Scalia doesn't mention the first sentence of the following paragraph, in which Lumpkin states that a ban on the concealed carry of lethal weapons is not unconstitutional:

> We are of the opinion, then, that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly,* that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms.[84]

Nunn had not been accused of carrying a *concealed* pistol. Accordingly, the Court ordered that the indictment against him be dropped.

Scalia also fails to acknowledge that Joseph Henry Lumpkin was floridly racist, and that he exploited his position as a justice of the Georgia Supreme Court to become one of the

South's most ardent and recognizable proponents of slavery.[85] It is only in this context that the excerpt that Scalia quotes from Lumpkin's majority opinion in *Nunn v. State* can be reasonably understood. It obviously makes no sense from the point of view of maintaining a well regulated militia that would be competent to repel foreign invaders for men, women, and children to walk around openly carrying Bowie knives, pistols, dirks, sword canes, spears, and other weapons "not *such* as are merely used by the militia." And of course, the right of the "the whole people to keep and bear arms of every description" did not extend to slaves or even free Blacks. The Georgia Supreme Court had ruled in 1848, while Lumpkin was on the Court, "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."[86] Lumpkin's majority opinion makes perfect sense, though, if the purpose of white men, women, and children openly carrying lethal weapons is to intimidate Blacks and keep slaves in subjugation.

There is little doubt from Lumpkin's other published writings, including other court decisions, that preserving the institution of slavery was foremost in Lumpkin's mind when he wrote the opinion in *Nunn v. State.* In a letter to Georgia Congressman Howell Cobb in 1849, Lumpkin wrote:

> I believe at this very moment that the institution [of slavery] stands upon a firmer basis than it ever has done since the formation of the Republic. Had the Abolitionists let us alone we should have been guilty, I verily believe, of political and social suicide by emancipating the African race, a measure fatal to them, to ourselves, and to the best interest of this Confederacy and of the whole world. The violent assaults of these fiends have compelled us in self defense to investigate this momentous subject in all of its bearings, and the result has been a firm and settled conviction that duty to the slave as well as to the master forbids that the relation should be disturbed; **. .** there is but one mind among the whole of our people upon this subject.[87]

In writing the majority opinion for the Georgia Supreme Court in the 1854 case of Cleland v. Waters, which involved interpretation of a will that expressed the wish of the deceased party to free his slaves, Lumpkin included *dicta* in which he railed against northern abolitionists, writing:

> And notwithstanding the persevering efforts which have been made by the fanatics of the North to jeopardy [*sic*] the-safety of our people — rob them of their property — desecrate and disregard their constitutional rights, and violate and harrass [*sic*] their domestic peace, it is truly gratifying to contemplate the justice, wisdom and moderation of our Legislature, respecting slaves and free persons of color. All the cruel attempts of, these infuriated incendiaries have, hitherto, utterly failed to influence our people to forget their duty to themselves and this dependent race….[88]

In a similar case in 1855, Lumpkin boasted:

> We have, in this State [of Georgia], the most stringent Statutes which the ingenuity of our wisest statemen could devise, to prevent domestic manumission [granting freedom to slaves].[89]

In still another case in 1856, Lumpkin referred to laws barring southern whites from

bringing slaves with them when they visited northern states as a "fungus" that had been "engrafted upon their Codes by the foul and fell spirit of modern fanaticism."[90] He also wrote in this case:

> Slavery is a cherished institution in Georgia - founded in the Constitution and laws of the United States; in her own Constitution and laws, and guarded, protected and defended by the whole spirit of her legislation; approved by her people; intimately interwoven with her present and permanent prosperity.[91]

As one final example of Lumpkin's extreme, pro-slavery bias, I'll quote from a report that he wrote for the Georgia legislature in 1850 on the topic of law reform. The legislature had not asked for a commentary on slavery, but Lumpkin apparently felt compelled to address the issue nevertheless. He wrote:

> The conscience of the whole South, after having been thoroughly aroused to the most earnest and intense investigation of this subject by the merciless and unremitting assaults of our relentless foes, has become thoroughly satisfied that this institution [slavery] - like government itself - is of God. That being recognized and regulated by the Decalogue [Ten Commandments], it will, we have every reason to believe, be of perpetual duration. That it subserves the best interests of both races, and that we will preserve and defend it at any and all hazards.[92]

Scalia statement that Lumpkin's majority opinion in *Nunn v. State* "perfectly captured" his own argument regarding the proper interpretation of the Second Amendment should be an embarrassment to the entire Supreme Court. Like Justice Baldwin's decision in *Johnson v. Tompkins,* rather than supporting Scalia's view that the Second Amendment was intended to confer an individual right to own firearms for self defense, Lumpkin's decision in *Nunn v. State* provides another example of a member of the judiciary misrepresenting the Second Amendment in order to promote the practice of slavery.

It's noteworthy that Scalia doesn't mention *Dred Scott* in support of his claim that nineteenth century cases that address the Second Amendment "universally support an individual right unconnected to militia service." In his majority opinion in the 1857 case of *Dred Scott v. Sandford,* Chief Justice Roger Taney indicated just as clearly as Justice Baldwin in *Johnson v. Tompkins,* and far more clearly than Justice Lumpkin in *Nunn v. State,* that he believed that the Second Amendment conferred an individual right to own guns unrelated to service in a well regulated militia. In writing for the majority, Taney included, among the infamous "parade of horribles" that would result if Blacks were ever given the status of citizens, "the right to keep and bear arms."[93] Scalia clearly did not want his majority opinion in *Heller* to be associated with what is widely regarded as the worst, and most racist, Supreme Court decision in U.S. history. In citing the decisions in *Johnson v. Tompkins* and *Nunn v. State*, though, Scalia is citing the opinions of justices who were every bit as racist as Taney, and decisions that, although not nearly as well known or as broad in scope as *Scott v. Sandford,* were just as egregiously wrong.

The third section of Scalia's majority opinion in which he references slavery is in Section II-D-3, "Post-Civil War Legislation."[94] In this section, Scalia cites a joint congressional report that "decried:"

> "[I]n some parts of [South Carolina,] armed parties are, without proper authority, engaged in seizing all fire-arms found in the hands of the freedmen. Such conduct is in plain and direct violation of their personal rights as guaranteed by the

> Constitution of the United States, which declares that 'the right of the people to keep and bear arms shall not be infringed.'"[95]

Scalia cites the Freedmen's Bureau Act of 1866 and the Civil Rights Act of 1871 that were intended to guarantee the rights of freed slaves and other Blacks, including a right "to keep and bear arms."[96] Scalia concludes this section of his majority opinion with the statement:

> "It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense."

Without going into detail whether the acts of Congress and reports to which Scalia refers in this section of his majority opinion support his concluding statement, I'd like to point out some glaring omissions. The first is that although Scalia includes section II-D-2 on "Pre-Civil War Case Law," there's no section in his majority opinion on "Post-Civil War Case Law." As I've noted above, in *United States v. Cruikshank*[97] in 1876 and in *Presser v. Illinois*[98] in 1886, the Supreme Court ruled that the Second Amendment did not confer an individual right to own guns.

A second glaring omission is the lack of any discussion concerning why freed slaves and other Blacks needed guns for self defense. Who composed the "armed parties" that "without proper authority" were terrorizing Blacks in the South, and how was it that they were armed? The answer, of course, is obvious. The Civil Rights Act of 1871 to which Scalia refers was also called the "Ku Klux Klan Act,"[99] and members of the Klan and other similar organizations were invoking their own "Second Amendment rights" to arm themselves in "self defense" against Blacks. Even when Blacks organized into militia like organizations, they were no match for Klan members who were far better armed – many of them being former Confederate soldiers who had retained their weapons from the war - and probably more importantly, far better positioned in the political-social hierarchy of the South. The Ku Klux Klan would continue to wage an armed reign of terror against Blacks for almost a century after the Civil War.[100]

In a report that U.S. Attorney Daniel Corbin prepared for President Grant after investigating the situation in the South in 1871, Corbin described "a catalogue of crimes probably never surpassed, if equaled, in the history of any country."[101] These crimes were facilitated, not prevented, by a highly armed citizenry. This is not the kind of future that we at Americans Against Gun Violence envision for American society. I find it deeply troubling that Scalia cites quotations taken out of context from this dark period as evidence in support of his argument that the Second Amendment was intended to confer a broad individual right to own guns.

C. Historical evidence linking the Second Amendment to the decimation of the Native American population

The relative degree to which the dramatic reduction in the Native American population was due to the spread of diseases, either intentionally or unintentionally, from European settlers to immunologically naive Native Americans; to the displacement of Native Americans from livable habitat; and to intentional acts of physical violence by Europeans against Native Americans, is a matter of some controversy. It is generally agreed, though, that the Native American population in North America was reduced from approximately 5 million people at the time of the first settlement by Europeans to fewer than 250,000 by the year 1900, and that many tribes and cultures were completely eliminated.[102] There is

also overwhelming evidence that the attitudes of the Founders and toward Native Americans were flagrantly racist; that innumerable horrific acts of violent aggression were committed against Native Americans by European settlers in the name of defense; that militias – some government controlled, others not - were often involved in these attacks; and that there was extensive overlap between proponents of a "right to bear arms" and proponents of armed aggression against Native Americans. In this section of our brief, I will present a small but representative sample of the extensive evidence from the Founding Era in support of these assertions.

European colonists rationalized displacing Native Americans from their lands through a variety of social theories. One such theory, advanced by the English philosopher, John Locke, was that cultivation of land increased its value immensely, and that as a corollary, people who took possession of land for the purpose of cultivating it were doing a favor to all mankind, even if they took the land from someone who was already living on it.[103] Another similar social theory was the Roman doctrine of *res nullis,* which in the case of land ownership, implies that land is not owned until it is actively cultivated. In his 1758 book, *The Law of Nations* (published in English in 1760), the Swiss born international lawyer, Emer de Vattel, applied the principle of *res nullis* to colonizing North America.[104]

The Second President of the United States, John Adams, echoed the philosophies of Locke and Vattel, and demonstrated his own racist views toward Native Americans, in a letter he wrote to the Boston lawyer, William Tudor, on September 23, 2018. Adams wrote:

> Shall we say that a few handfuls of scattering tribes of savages have a right of dominion and property over a quarter of this globe capable of nourishing hundreds of millions of happy human beings? Why had not Europeans a right to come and hunt and fish with them?...What infinite pains have been taken and expenses incurred in treaties, presents, stipulated sums of money, instruments of agriculture, education, what dangerous and unwearied labors to convert these poor, ignorant savages to Christianity? And to what avail?[105]

Adams went on in the letter to also insult Muslims, Hindus, Chinese, ancient Romans, and Jews.

Thomas Jefferson, author of the Declaration of Independence and third president of the United States, demonstrated similar racist and expansionist views, though in a somewhat more subtle manner, in a letter to James Monroe on November 24, 1801:

> However our present interests may restrain us within our own limits, it is impossible not to look forward to distant times, when our rapid multiplication will expand itself beyond those limits, & cover the whole Northern, if not the Southern continent with a people speaking the same language, governed in similar forms, & by similar laws: nor can we contemplate, with satisfaction, either blot or mixture on that surface.[106]

In 1763, King George III issued a proclamation prohibiting Europeans colonists in America from settling west of the crest of the Appalachian Mountains, approximately 200 miles west of Philadelphia. This proclamation was probably issued more out of the Crown's desire to maintain control of the colonists than to protect Native Americans. In either case, it was greatly resented by the colonists, many of whom were already living west of the

proclamation line, and most of whom felt no obligation to abide by the proclamation.[107]

In Scalia's majority opinion in *Heller*, he places great emphasis on the fact that Pennsylvania, which was the only state to adopt a "right to bear arms" clause prior to the introduction of the Second Amendment in 1789, included the following statement in its 1776 constitution:[108]

> That the people have a right to bear arms for the defence of themselves and the state….

In order to understand the full significance of this clause, it must be acknowledged that the inclusion of this clause in the Pennsylvania State Constitution was in keeping with demands made by an armed mob known as the "Paxton Boys" after they had committed a brutal and sadistic murder of defenseless Native Americans in western Pennsylvania.

Early on the morning of December 14, 1763, dozens of armed men from Paxton and other nearby towns murdered six sleeping Conestoga Native Americans and burned their village to the ground.[109] Fourteen Native Americans who survived the attack were moved by the government into protective custody in a government detention center (referred to as a "gaol" in some documents and a "work house" in others) in Lancaster, Pennsylvania. On December 27, a group of Paxton Boys broke into the detention center and brutally murdered all fourteen of the defenseless Conestogans. The massacre scene was described in graphic detail by William Henry, a Lancaster merchant and inventor, who later served as a delegate from Pennsylvania to the Continental Congress:

> At about sixty or eighty yards from the gaol, we met from twenty- five to thirty men, well mounted on horses, and with rifles, tomahawks, and scalping knives, equipped for murder. I ran into the prison yard, and there, O what a horrid sight presented itself to my view! - Near the back door of the prison, lay an old Indian and his squaw (wife), particularly well known and esteemed by the people of the town, on account of his placid and friendly conduct. His name was Will Sock; across him and his squaw lay two children, of about the age of three years, whose heads were split with the toma- hawk, and their scalps all taken off. Towards the middle of the gaol yard, along the west side of the wall, lay a stout Indian, whom I particularly noticed to have been shot in the breast, his legs were chopped with the tomahawk, his hands cut off, and finally a rifle ball discharged in his mouth; so that his head was blown to atoms, and the brains were splashed against, and yet hanging to the wall, for three or four feet around. This man's hands and feet had also been chopped off with a tomahawk. In this manner lay the whole of them, men, women, and children, spread about the prison yard: shot-scalped-hacked-and cut to pieces.[110]

After the massacre, one of the Paxton Boys boasted:

> Tell me not of Cassius, Brutus, Caesar, Pompey, or even Alexander the Great! We! we Paxton Boys have done more than all, or any of them! We have, and it gives me Pleasure to think on't, Slaughter'd, kilTd and cut off a whole Tribe! a Nation at once![111]

The Governor of Pennsylvania, John Penn, offered a £200 reward for the capture of the murderers, but even though the massacre occurred in broad daylight, no suspect was

ever apprehended or prosecuted for the mass murder.

Emboldened by the fact that they'd literally gotten away with murder in Conestoga and Lancaster, the Paxton Boys recruited additional frontier settlers to march to Philadelphia where they intended to massacre another 140 Native Americans who had converted to Christianity and were living under government protection. Benjamin Franklin, having recently returned from England to Philadelphia, summarized what happened next in a letter to Richard Jackson, a British Lawyer and Member of Parliament who was the English agent over Pennsylvania at the time. Franklin wrote to Jackson on February 11, 1764:

> In my last I mention'd to you the Rioting on our Frontiers, in which 20 peaceable Indians were kill'd, who had long liv'd quietly among us. The Spirit of killing all Indians, Friends and Foes, spread amazingly thro' the whole Country: The Action was almost universally approved of by the common People; and the Rioters thence receiv'd such Encouragement, that they projected coming down to this City, 1000 in Number, arm'd, to destroy 140 Moravian and Quaker Indians, under Protection of the Government. To check this Spirit, and strengthen the Hands of the Government by changing the Sentiments of the Populace, I wrote the enclos'd Pamphlet, which we had only time to circulate in this City and Neighbourhood, before we heard that the Insurgents were on their March from all Parts. It would perhaps be Vanity in me to imagine so slight a thing could have any extraordinary Effect. But however that may be, there was a sudden and very remarkable Change; and above 1000 of our Citizens took Arms to support the Government in the Protection of those poor Wretches. Near 500 of the Rioters had rendezvous'd at Germantown, and many more were expected; but the Fighting Face we put on made them more willing to hear Reason, and the Gentlemen sent out by the Governor and Council to discourse with them, found it no very difficult Matter to persuade them to disperse and go home quietly. They came from all Parts of our Frontier, and were armed with Rifle Guns and Tomhawks…[112]

As Franklin notes in his letter, upon learning that the Paxton Boys were marching toward Philadelphia he and others quickly raised a voluntary armed militia of approximately a thousand Philadelphians to defend the Native Americans. The volunteer militia included Quakers who had previously refused to "bear arms" on religious grounds. The bravado with which the Paxton Boys had celebrated after massacring defenseless Native Americans in Canestoga and Lancaster quickly evaporated when they encountered other armed white Pennsylvanians. On the other hand, Franklin was dismayed at the popular support that the Paxton Boys had managed to engender up to this point for the extermination of all Native Americans. The "enclos'd pamphlet" to which Franklin refers in his letter was entitled, *A Narrative of the Late Massacres, in Lancaster County, of a Number of Indians, Friends of this Province, By Persons Unknown. With some Observations on the same*.[113] In the pamphlet, Franklin wrote:

> If an Indian injures me, does it follow that I may revenge that Injury on all Indians? It is well known that Indians are of different Tribes, Nations and Languages, as well as the White People. In Europe, if the French, who are White-People, should injure the Dutch, are they to revenge it on the English, because they too are White People? The only Crime of these poor Wretches seems to have been, that they had a reddish brown Skin, and black Hair; and some People of that Sort, it seems, had murdered some of our Relations. If it be right to kill Men for such a Reason,

> then, should any Man, with a freckled Face and red Hair, kill a Wife or Child of mine, it would be right for me to revenge it, by killing all the freckled red-haired Men, Women and Children, I could afterwards any where meet with.

He added, with regard to the Native Americans the Paxton Boys had massacred:

> These poor People have been always our Friends. Their Fathers received ours, when Strangers here, with Kindness and Hospitality. Behold the Return we have made them! When we grew more numerous and powerful, they put themselves under our *Protection.* See, in the mangled Corpses of the last Remains of the Tribe, how effectually we have afforded it to them!

After being prevented by the volunteer Philadelphia militia from committing their planned massacre of an additional 140 defenseless Native Americans, the Paxton Boys distributed a pamphlet of their own. The pamphlet was entitled, *The Apology of the Paxton Volunteers, adapted to the candid & impartial World.*[114] In fact, however, there was no apology. In the introduction, the anonymous authors of the pamphlet state:

> This pamphlet is an account of grievances that the Paxton Volunteers, on behalf of the back settlers, want redressed against hostile Indian tribes. It is not intended as an admission of guilt or regret, but as an explanation of why they are defending themselves in the province of Pennsylvania…. They further state that by giving aid and comfort to the enemy Indians, the Quakers are actually subverting the King of England's efforts of bringing civilization to the province of Pennsylvania…. They claim self defense against the Indians who are charged with murdering and maiming white people and destroying their property…. The Volunteers also feel betrayed by their own Assembly that refused to send militia to protect them or their borders…."

In their lengthy *Apology of the Paxton Volunteers,* the Paxton Boys included multiple references to the need for an armed militia to "defend" against Native Americans, and they blamed the Quakers for not providing for such a force. For example:

> When we applied to the Government for Relief, the far greater Part of our Assembly were Quakers, some of whom made light of our Sufferings, plead Conscience, so that they could neither take Arms in Defense of themselves or their Country, nor form a Militia Law to oblige the Inhabitants to arm nor even grant the King any Money to enable his loyal Subjects in the Province to reduce the common Enemy.

The Paxton Boys elaborated in subsequent pamphlets concerning exactly what they meant by the last sentence in the statement above to the effect that the Quakers would not even "grant the King any Money to enable his loyal Subjects in the Province to reduce the common Enemy." In a subsequent pamphlet that they presented to the Governor of Pennsylvania, they explained, "…it was impossible to obtain thro' the Summer or even yet any Premium for Indian Scalps…."[115] In other words, the Paxton Boys expected to be paid a bounty for each Native American they killed upon submitting the victim's scalp to the government.

In their "*Apology,"* the Paxton Boys claimed that in killing the Conestogans in Lancaster,

they were doing the work that the government should have been doing itself:

> We understand that it was said, that the Conestoga Indians were under the Protection of the Government; & therefore it was flying in the Face of lawful Authority to kill these Indians, especially some of them as were in the Work-House in Lancaster. We are of a very different Opinion in this Particular, & believe that altho. the Indians were by the Consent of the Magistrates of Lancaster in the Work House there, they were not, could not be under the Protection of the Government. For there is never Power in any Government to protect its Enemies; that is, to ruin itself. 'Tis time that the Governour, for the Time being, is vested, in the 16th Article of the Royal Charter & with the Power & Office of a Captain General, to levy muster & train all sort of Men, of what Condition soever, or wheresoever born, in the Providence, to make War & to pursue all Enemies….[116]

The Paxton Boys agreed to return to the frontier in February of 1764, but not before they had scored a major political victory in addition to immunity from prosecution for the mass murder that they had already committed.[117] A representative of the Pennsylvania's Proprietary Party gave a speech in which he "thanked them for their zeal, and assured them there was no farther occasion for their services; since the Paxton men, though falsely represented as enemies of government, were in fact its friends, entertaining no worse design than that of gaining relief to their sufferings, without injury to the city or its inhabitants."[118] The Paxton Boys also got the scalp bounty they'd asked for. The Pennsylvania government proclaimed on July 7, 1764, "Whereas, it is necessary for the better carrying on Offensive Operations against our Indian Enemies, and bringing the unhappy war with them to a speedy issue, that the greatest Encouragements should be given to all his Majesty's Subjects to exert and use their utmost Endeavors to pursue, attack, and destroy our said Enemy Indians."[119] The Proclamation of July 7, 1764 announced that the government would pay $134 for the scalps of male Native Americans who were older than ten years of age and $50 for the scalps of females older than ten.[120]

The handling of the Paxton Boys incident was a major issue in the Pennsylvania state election in the fall of 1764. The Proprietary Party, which had not only failed to prosecute the Paxton Boys for their heinous crime, but which had rewarded them for it with the scalp bounty they requested, was itself rewarded by the voters of Pennsylvania, taking eight Assembly seats from the Quakers in the fall election.[121] Benjamin Franklin lost his own seat in the Pennsylvania Assembly – the only election defeat in his lengthy American political career. Franklin attributed his defeat in large part to the enmity that he'd engendered by publishing his *Narrative of the Late Massacres* and other criticisms of the Paxton Boys.[122]

The Paxton Boys and other settlers allied with them continued to wage a reign of terror in the name of self defense for years to come on Pennsylvania's western frontier. The commander of English troops in North America, Major General Thomas Gage, wrote to John Penn, the Governor of Pennsylvania, on March 10, 1766, that he was committing more English soldiers to help battle "the lawless Banditti on your Frontiers" who were emboldened by "every Act of Violence" that they committed "with Impunity…whilst they flatter themselves that they are secure from Punishment."[123] Sir William Johnson, the English superintendent for Indian affairs in Pennsylvania, wrote to Major General Gage on June 27, 1766, noting that it would be futile to "[send] Murderers to be tried within the [Pennsylvania] Governments, as from the present disposition of our People we can expect little Justice for the Indians."[124] In his letter, Johnson documented numerous recent

murders of peaceful Native Americans by European settlers. Benjamin Franklin wrote to Johnson on September 12, 1766, "It grieves me to hear that our Frontier People are yet greater Barbarians than the Indians, and continue to murder them in time of Peace."[125] Historian Jeremy Engels writes, "By encouraging colonial violence, then, in a very real way, the Proprietary government equipped the Paxton Boys for murder and also undermined the rule of law in Pennsylvania by demonstrating that, in spite of rhetoric attacking murder, violence against Native Americans had become the political norm in the colony."[126]

The clause codifying the "right to bear arms for the defence of themselves and the state" in the 1776 Philadelphia Constitution, upon which Justice Scalia places great importance in his majority opinion in *Heller* as the precursor to the Second Amendment, must be viewed in the context of what the Paxton Boys, the other western Pennsylvania settlers who allied with them, the majority in the Pennsylvania state legislature, and a significant portion of the Pennsylvania electorate considered to be "self defence" and a legitimate function of a militia – namely, the mass murders of innocent Native Americans.

The violent aggression committed against Native Americans by European settlers in western Pennsylvania in the name of self defense, and the racist, hypocritical attitudes that fueled this aggression, were the rule, not the exception, in colonial America, and the violence and the racism continued through the Founding Era. The Declaration of Independence itself, written by Thomas Jefferson, contains an example of racist rhetoric that could have been written just as easily by the Paxton Boys. The final complaint against the King of England in the Declaration states:

> He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages whose known rule of warfare, is an undistinguished destruction of all ages, sexes, and conditions.

Volunteer militias were almost entirely ineffective in battling the English regulars during the Revolutionary War. In an open letter from George Washington, who commanded the Continental Army, to fellow revolutionaries in October of 1780, Washington wrote that the idea of substituting a volunteer militia for a professional army was "chimerical," explaining:

> Tis time we should get rid of an error which the experience of all mankind has exploded, and which our own experience had dearly taught us to reject….We have frequently heard the behavior of the Militia extolled…by visionary Men whose credulity easily swallowed every vague story in support of a favorite Hypothesis….I solemnly declare I never was witness to a single instance that can countenance an opinion of Militia or raw troops being fit for the real business of fighting.[127]

But just as the militias were effective in keeping slaves in subjugation, they were also effective in killing Native Americans and driving them from their lands. In a letter to Patrick Henry on October 5, 1776, Washington again disparaged the militia's efforts against British regulars:

> I own my fears [that victory is not possible] when our dependence is placed on men, enlisted for a few months, commanded by such officers as party or accident may have furnished; and on militia, who as soon as they are fairly fixed in the camp, are impatient to return to their own homes; and who, from an utter disregard of all discipline and restraint among themselves, are but too apt to infuse the like

> spirit into others.[128]

Washington added, however:

> I would not wish to influence your judgement with respect to militia, in the management in Indian affairs, as I am fully persuaded that the inhabitants of the frontier counties in your colony are, from inclination as well as ability, peculiarly adapted to that kind of warfare.[129]

D. Summary of the evidence linking the Second Amendment to the perpetuation of slavery and the decimation of the Native American population:

Many, if not most, of the Founders of the United States of America held flagrantly racist views toward Blacks and Native Americans. The Founders, in general, believed that they had a natural right to forcibly displace Native Americans from their land, and Founders from the southern colonies, which would become the southern states, believed they had a natural right to own slaves.

The Founders included four different sections in the main body of the Constitution to ensure that the practice of slavery would remain legal, but they used a euphemism for the term, “slave” or “slavery” in all four of these sections. Despite these four sections being included in the Constitution to protect slavery, the southern states remained concerned that the northern states would abolish slavery indirectly by disarming their militias, which were one and the same as their slave patrols, and which were essential to keeping slaves in subjugation.

The term, “the people,” in the Second Amendment is clearly a euphemism for “white people.” In the case of the southern states, the term, “free state,” can also be reasonably be considered to be a euphemism for “slave state.” Replacing the term, “the people,” with “white people;” and replacing the term, “free state” with “slave state,” the Second Amendment reads:

> A well regulated militia, being necessary to the security of a *slave state*, the right of *white people* to keep and bear arms, shall not be infringed.

There are well-documented examples of horrific acts of violence being committed by white settlers against peaceful Native Americans in the name of self defense, and of such acts going unpunished.

At the time that the Second Amendment was written, the Founders knew, or should have known, that militias had been largely ineffective against English regulars during the Revolutionary War, and that a citizens militia would not be adequate to defend the country in future wars. At the same time, the Founders knew that the militias were effective in keeping slaves in subjugation and in driving Native Americans from their land.

Putting all of these facts together, a thesis that upon first consideration might seem unfathomable – the thesis that the Second Amendment was included in the Bill of Rights in part, at least, to perpetuate the institution of slavery and to facilitate driving Native Americans from their lands and decimating the Native American population – becomes not only plausible, but highly credible. At the very least, there is far more historical evidence to

support this thesis than the thesis that the Second Amendment was included to confer an individual right to own guns unrelated to service in a well regulated militia.

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