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Stephen P. Halbrook. *Freedmen, The Fourteenth Amendment, and the Right to Bear Arms, 1866-1876.* Westport, Conn.: Praeger, 1999. xiii + 230 pp. $55.00 (cloth), ISBN 978-0-275-96331-6.

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Understanding The Fourteenth Amendment

There have been many treatises written on the Fourteenth Amendment and the history of its development and interpretation, but this one is, in many ways, the most complete and comprehensive to date, covering many aspects that others have neglected, and providing its historical background and development, how its wording was drafted, and how its framers understood it.

The end of the war of 1861-65 brought legal freedom to blacks, but began a struggle to protect their rights, which were systematically violated, not only in former states of the Confederacy, but even in many northern states. The former Confederate states began passing a series of laws, often called Black Codes, which denied civil rights to freedmen, especially the right to keep and bear arms, and white gangs systematic harassed and attacked freedmen, with an emphasis on forcibly disarming them.

In attempting to establish a legal order under which federal courts could protect civil rights from such violations, the Republican-led Congress began with the antebellum legal system, especially several Supreme Court decisions that they felt needed to be overturned. The first of these was the case of Barron v. Baltimore, 32 U.S. 243 (1831), in which a state case claiming protection under the Fifth Amendment takings clause was appealed to federal court. Justice Marshall ruled that the protections of the Bill of Rights did not apply to the states, and the federal courts did not have appellate jurisdiction over state cases involving such rights. The second of these was Dred Scott v. Sandford, 60 U.S. 393 (1857), in which Justice Taney ruled that the Constitution permitted slavery, on the grounds that the rights protected by the Constitution and Bill of Rights were rights of citizens rather than of persons.

Halbrook shows how the debates over the drafting of what was to become the Fourteenth Amendment were intertwined with the debates over two main bills, the Civil Rights Act, which was to operate in those areas in which civil government had been restored, and the Freedman's Bureau Act, for those areas still under military rule. Much of the background on these comes from the secret journal of the Joint Committee of Fifteen on Reconstruction, which drafted the Fourteenth Amendment. Halbrook also examines the debates in the press, in the state legislatures ratifying the amendment, and statements made by its framers.

All of these sources make several things clear. First, the amendment was definitely intended to incorporate all of the civil rights protections of the Constitution and all of the Bill of Rights into restrictions on the states, and to extend the original and appellate jurisdiction of the federal courts to cases involving such rights. This was the intent of the privileges and immunities, due process, and equal protection clauses. The word "incorporate" was used in the debates in Congress, and it was intended that all of the Bill of Rights were to be incorporated, even the Ninth and Tenth Amendments. This evidence refutes the doctrine of "selective incorporation".

Second, despite the focus of the author on the right to keep and bear arms, it is clear from the evidence of the debates that that was the right of greatest concern to the framers of the Fourteenth Amendment.

Third, it is clear that the purpose of the citizenship clause was to overturn the jurisprudence of Dred Scott, not just to establish that the rights protected were the rights of persons rather than of citizens, but also that all persons born in a state or territory or naturalized were citizens, thereby extending all state legal protections for citizens to blacks, Indians, and other immigrant minorities who had not previously been considered citizens.

Fourth, Halbrook provides convincing evidence that the firearms which persons had the right to keep and bear were the latest firearms available, that the right was individual, intended to provide protection against abuse by

government officials and their agents as well as against criminal attack, and that neither federal or state governments had the power to prohibit or disband militias, even if they were not state-sanctioned.

What is less clear is whether the enforcement clause was intended to delegate power to Congress to impose penalties on only civil rights violations by state officials and their agents, or also by private individuals. It appears that the purpose of the framers of the Fourteenth was that it cover private acts, and the first Civil Rights Act applied to private as well as public acts, but the language of the Fourteenth only referred to states, and the decision in U.S. v. Cruikshank, 92 U.S. 542 (1876) was that, based on the language, only the acts of state officials or their agents were within the legislative jurisdiction of Congress. This leaves acts of federal officials and agents, and of private individuals, outside that jurisdiction, on state territory.

What Halbrook shows is, that by neglecting the right to keep and bear arms, previous commentators have ignored the one right that is the key to understanding the Fourteenth Amendment, how it came to be drafted in the way that it was, how it came to be adopted, and how it should be interpreted. He also shows how subsequent court decisions and state legislation, such as Jim Crow laws, have departed from that intent, and discusses the unresolved legal issues that such departures represent.

This treatise is a major contribution to legal history and commentary, and should be read by everyone having an interest in civil rights or firearms rights.

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