

“The Freedmen’s Bureau Act and the Conundrum Over Whether the Fourteenth Amendment Incorporates the Second Amendment,” 29 *Northern Kentucky Law Review*, No. 4, 683-703 (2002).

**THE FREEDMEN’S BUREAU ACT AND THE CONUNDRUM  
OVER WHETHER THE FOURTEENTH AMENDMENT  
INCORPORATES THE SECOND AMENDMENT**

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Does the Fourteenth Amendment to the United States Constitution<sup>2</sup> incorporate the Second Amendment,<sup>3</sup> so as to protect the right of the people to keep and bear arms from State infringement? This author has sought to address that issue comprehensively in his book *Freedmen, the Fourteenth*

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<sup>2</sup> The Fourteenth Amendment provides in pertinent part:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. . . .

§ 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<sup>3</sup> The Second Amendment provides: “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.”

*Amendment, and the Right to Bear Arms, 1866-1876.*<sup>4</sup> This article addresses the most telling and dramatic but most neglected single item of evidence of the Framers' intent concerning that issue.

It is well established that the Fourteenth Amendment protects the rights to personal security and personal liberty from State violation.<sup>5</sup> The same two-thirds of Congress that proposed the Fourteenth Amendment to the United States Constitution in 1866 also enacted the Freedmen's Bureau Act, which declared protection for the "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate . . . , including the constitutional right to bear arms . . . ."<sup>6</sup> The significance of this declaration to support incorporation of the Second Amendment into the Fourteenth Amendment has been recognized, albeit in passing, in at least three important general studies on the Fourteenth Amendment.<sup>7</sup> However, the declaration is not acknowledged or mentioned in any law review article or

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<sup>4</sup> S. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (Westport, Conn.: Praeger Publishers, 1998). See Nelson Lund, "Outsider Voices on Guns and the Constitution," 17 *Constitutional Commentary*, No. 3, 701 (2000). The book was preceded by Halbrook, "Personal Security, Personal Liberty, and 'the Constitutional Right to Bear Arms': Visions of the Framers of the Fourteenth Amendment," 5 *Seton Hall Constitutional Law Journal* 341 (Spring 1995); and Halbrook, "The Fourteenth Amendment and the Right to Keep and Bear Arms: The Intent of the Framers," *The Right to Keep and Bear Arms*, Report of the Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, 97th Cong., 2d Sess., 68 (1982), reprinted in R. Cottrol ed., *Gun Control and the Constitution* 360 (N.Y.: Garland Pub., 1994).

<sup>5</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 n. (1965).

<sup>6</sup> Act of July 16, 1866, 14 Stat. 173, 176. The Act was reenacted in 1868. 15 Stat. 83 (1868). In the following century, Congress twice more passed statutes recognizing the Second Amendment as protecting individual rights. Firearms Owners' Protection Act, §1(b), P.L. 99-308, 100 Stat. 449 (1986); Property Requisition Act, P.L. 274, 55 Stat. 742, pt. 1 (1941). See Halbrook, "Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms," 62 *Tennessee Law Review* 597 (Spring 1995).

<sup>7</sup> A. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *Yale L.J.* 1193, 1245 n.228 (Apr. 1992); M. Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986); H. Flack, *The Adoption of the Fourteenth Amendment* 17 (1908).

other publication which argues against Fourteenth Amendment protection for Second Amendment rights.

The story begins at the dawn of Reconstruction. On January 5, 1866, Senator Lyman Trumbull introduced S. 60, the Freedmen's Bureau Bill, and S. 61, the Civil Rights Bill.<sup>8</sup> These bills would become of unprecedented importance in regard both to the passage of the Fourteenth Amendment and to recognition of the right to keep and bear arms.

The need for congressional action was exemplified in the presentation by Senator Charles Sumner of a Memorial from the Colored Citizens of the State of South Carolina, assembled in convention, which urged Congress to protect the lives, liberty, and personal rights of the freedmen. Sumner paraphrased as follows:

They also ask that government in that State shall be founded on the consent of the governed, and insist that can be done only where equal suffrage is allowed. . . . They ask also that they should have the constitutional protection in keeping arms, in holding public assemblies, and in complete liberty of speech and of the press.<sup>9</sup>

On January 30, the House took up consideration of the Freedmen's Bureau Bill. Thomas Eliot, Chairman of the Select Committee on Freedmen, reported a committee substitute.<sup>10</sup> As an example of the newly-enacted Black Codes the bill was designed to nullify, Eliot quoted the ordinance of Opelousas,

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<sup>8</sup> *Cong. Globe*, 39th Cong., 1st Sess. 129 (Jan. 5, 1866).

<sup>9</sup> *Id.* at 337 (Jan. 22, 1866). The freedmen's resolution stated:

We ask that, inasmuch as the Constitution of the United States explicitly declares that the right to keep and bear arms shall not be infringed--and the Constitution is the Supreme law of the land--that the late efforts of the Legislature of this State to pass an act to deprive us of arms be forbidden, as a plain violation of the Constitution . . . .

<sup>2</sup> *Proceedings of the Black State Conventions, 1840-1865*, at 302 (P. Foner and G. Walker eds. 1980).

<sup>10</sup> *Cong. Globe*, 39th Cong., 1st Sess. 512 (Jan. 29, 1866).

Louisiana, which required freedmen to have a pass, prohibited their residence in the town, prohibited their religious and other meetings, and infringed their right to keep and bear arms:

No freedman who is not in the military service shall be allowed to carry fire-arms, or any kind of weapons, within the limits of the town of Opelousas without the special permission of his employer, in writing, and approved by the mayor or president of the board of police. Anyone thus offending shall forfeit his weapons, and shall be imprisoned and made to work five days on the public streets, or pay a fine of five dollars in lieu of said work.<sup>11</sup>

Nathaniel P. Banks, a former governor of Massachusetts and Union general, gave notice that he would offer an amendment to the bill so that it would explicitly protect for everyone “the civil rights belonging to white persons, including *the constitutional right to bear arms*, the right to make and enforce contracts, to sue, & c.”<sup>12</sup> (Banks offered the italicized phrase.)

As instructed by the Select Committee on the Freedmen’s Bureau, Chairman Eliot on February 5 offered a substitute for S. 60.<sup>13</sup> Changes included the following:

The next amendment is in the seventh section, in the eleventh line, after the word “estate,” by inserting the words “including the constitutional right to bear arms,” so that it will read, “to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right to bear arms.”<sup>14</sup>

Arguing for adoption of the Freedmen’s Bureau Bill, Eliot quoted from a report by Brevet Major General Fisk to General Howard, Commissioner of the Freedmen’s Bureau, which outlined the following circumstances in Kentucky: “The civil law prohibits the colored man from bearing arms; returned soldiers

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<sup>11</sup> *Id.* at 517.

<sup>12</sup> *Id.* at 585 (Feb. 1, 1866).

<sup>13</sup> *Id.* at 654 (Feb. 5, 1866).

<sup>14</sup> *Id.*

are, by the civil officers, dispossessed of their arms and fined for violation of the law.”<sup>15</sup> As the report of the Commissioner concluded: “Thus, the right of the people to keep and bear arms as provided in the Constitution is *infringed* . . . .”<sup>16</sup>

The Freedmen's Bureau Bill, including the new language which listed “the constitutional right to bear arms” as a “civil right,”<sup>17</sup> passed the House by a resounding vote of 136 to 33.<sup>18</sup>

Senator Trumbull informed the Senate that he was instructed by the Committee on the Judiciary to recommend that the Senate concur in the House amendments.<sup>19</sup> Trumbull noted:

There is also a slight amendment in the seventh section, thirteenth line. That is the section which declares that negroes and mulattoes shall have the same civil rights as white persons, and have the same security of person and estate. The House have inserted these words, “including the constitutional right of bearing arms.” *I think that does not alter the meaning.*<sup>20</sup>

Thus, the author of the Freedmen’s Bureau and Civil Rights Bills verified that the common language of both bills protected the constitutional right to bear arms, regardless of whether those terms explicitly appeared.

The Senate then concurred in S. 60 as amended without a recorded vote.<sup>21</sup> Unrelated Senate amendments were approved by the House the next day.<sup>22</sup> Congress had at last passed the Freedmen’s

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<sup>15</sup> *Id.* at 657 (Feb. 5, 1866).

<sup>16</sup> Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236 (1866) (emphasis in original).

<sup>17</sup> *Cong. Globe*, 39th Cong., 1st Sess. 1292 (Mar. 9, 1866).

<sup>18</sup> *Id.* at 688 (Feb. 6, 1866).

<sup>19</sup> *Id.* at 742 (Feb. 8, 1866).

<sup>20</sup> *Id.* at 743 (emphasis added).

<sup>21</sup> *Id.* at 748.

<sup>22</sup> *Id.* at 775 (Feb. 9, 1866).

Bureau Bill.

As passed, the Freedmen's Bureau Bill provided in § 7 that, in areas where ordinary judicial proceedings were interrupted by the rebellion, the President shall extend military protection to persons whose rights are violated. The contours of rights violations were described by the bill in part as follows:

wherein, in consequence of any State or local law, ordinance, police or other regulation, custom, or prejudice, any of the *civil rights or immunities* belonging to white persons, including the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to have *full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms*, are refused or denied to negroes, mulattoes, freedmen, refugees, or any other persons, on account of race, color, or any previous condition of slavery or involuntary servitude.  
. . .<sup>23</sup>

Meanwhile, the Congress was moving toward the protection of such rights in the Constitution itself.

On February 13, it was reported in both houses of Congress that the Joint Committee of Fifteen on Reconstruction had recommended adoption of a constitutional amendment to read as follows:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty, and property.<sup>24</sup>

This appears to be the first reported draft of what would become § 1 of the Fourteenth Amendment.

Representative William Lawrence discussed the need to protect freedmen, quoting General D. E. Sickles' General Order No. 1 for the Department of South Carolina. That order declared:

I. To the end that civil rights and immunities may be enjoyed, . . . the following regulations are established for the government of all concerned in this department: . . .

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<sup>23</sup> *Id.* at 1292 (emphasis added).

<sup>24</sup> *Id.* at 806, 813 (Feb. 13, 1866).

XVI. The constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed . . . .

Ex-Confederates were allowed the same right after taking the Amnesty oath or the Oath of Allegiance.<sup>25</sup>

This “most remarkable order,” repeatedly printed in the headlines of the *Loyal Georgian*,<sup>26</sup> a prominent black newspaper, was thought to have been “issued with the knowledge and approbation of the President if not by his direction.”<sup>27</sup> The first issue to print the order included the following editorial:

Editor Loyal Georgian:

Have colored persons a right to own and carry fire arms?  
A Colored Citizen

Almost every day we are asked questions similar to the above. We answer *certainly* you have the *same* right to own and carry arms that other citizens have. You are not only free but citizens of the United States and as such entitled to the same privileges granted to other citizens by the Constitution. . . .

Article II, of the amendments to the Constitution of the United States, gives the people the right to bear arms, and states that this right shall not be infringed. Any person, white or black, may be disarmed if convicted of making an improper or dangerous use of weapons, but no military or civil officer has the right or authority to disarm any class of people, thereby placing them at the mercy of others. All men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves.<sup>28</sup>

The last paragraph above, taken from a Freedmen’s Bureau circular, was printed numerous times in the

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<sup>25</sup> *Id.* at 908-09 (Feb. 17, 1866).

<sup>26</sup> *The Loyal Georgian* (Augusta), Feb. 3, 1866, at 1, col 2.

<sup>27</sup> *Id.* at 2, col. 2.

<sup>28</sup> *Id.* at 3, col. 4 (emphasis in original).

*Loyal Georgian*.<sup>29</sup>

By now members of Congress were startled to learn that President Andrew Johnson had vetoed the Freedmen's Bureau Bill.<sup>30</sup> However, his objections did not include the provision which included protection for “the constitutional right to bear arms.”

Lyman Trumbull expressed great surprise at the veto, pointing out that the bill’s purpose was to protect constitutional rights.<sup>31</sup> Trumbull again detailed the oppression of the freedmen, quoting the letter from Colonel Thomas in Vicksburg, Mississippi, that “nearly all the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of this [State] militia,” which typically would “hang some freedman or search negro houses for arms.”<sup>32</sup>

The proponents of S. 60 sought to override the veto, but it failed by a vote of 30 to 18, just 2 votes shy of the necessary two-thirds.<sup>33</sup> This defeat mooted any need for a House override vote. The veto, the first break between President Johnson and the Congress, began a saga that would culminate in the unsuccessful impeachment of the President.<sup>34</sup>

Meanwhile the proposed Fourteenth Amendment and the Civil Rights Bill continued to be debated. A significant debate in the House on S. 61 took place on March 1. Representative James Wilson,

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<sup>29</sup> Circular No. 5, Freedmen's Bureau, Dec. 22, 1865. *See, e.g.*, issues of *Loyal Georgian* for Jan. 20, 27, Feb. 3, 1866.

<sup>30</sup> *Cong. Globe*, 39th Cong., 1st Sess. 916 (Feb. 19, 1866).

<sup>31</sup> *Id.* at 936 (Feb. 20, 1866).

<sup>32</sup> *Id.* at 941.

<sup>33</sup> *Id.* at 943.

<sup>34</sup> William Rehnquist, *Grand Inquests* 204 ff. (1992).



Chairman of the Judiciary Committee, explained the background to the bill’s phraseology “civil rights and immunities” and “full and equal benefit of all laws and proceedings for the security of person and property . . . .”<sup>35</sup> Quoting Kent’s *Commentaries*, Wilson explained: “I understand civil rights to be simply the absolute rights of individuals, such as—‘The right of personal security, the right of personal liberty, and the right to acquire and enjoy property.’”<sup>36</sup> Wilson added that “we are reducing to statute from the spirit of the Constitution,”<sup>37</sup> a clear reference to the Bill of Rights. Referring to “the great fundamental civil rights,” Wilson pointed out:

Blackstone classifies them under three articles, as follows:

1. The right of personal security; which, he says, “Consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.”
2. The right of personal liberty; and this, he says, “Consists in the power of locomotion, of changing situation, or moving one’s person to whatever place one’s own inclination may direct, without imprisonment or restraint, unless by due course of law.”
3. The right of personal property; which he defines to be, “The free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the law of the land.”<sup>38</sup>

To protect “the principal absolute rights which appertain to every Englishman,” Blackstone further explained that there are “auxiliary” rights to “maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.”<sup>39</sup> Blackstone included among these rights “that

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<sup>35</sup> *Cong. Globe*, 39th Cong., 1st Sess., 1117 (Mar. 1, 1866).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1118.

<sup>39</sup> 1 Blackstone, *Commentaries* 140-41 (St. Geo. Tucker ed. 1803).

of having arms for their defence suitable to their condition and degree, and such as are allowed by law,” which made possible “the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.”<sup>40</sup> Together with justice in the courts and the right of petition, “the right of having and using arms for self-preservation and defense” were available to preserve the rights to life, liberty, and property.<sup>41</sup>

The Freedmen’s Bureau Bill likewise declared that the rights of personal security and personal liberty included what Blackstone referred to as “the right of having and using arms for self-preservation and defense.”<sup>42</sup> Senator Wilson had the Second Amendment partly in mind when he stated that every right enumerated in the federal Constitution is “embodied in one of the rights I have mentioned, or results as an incident necessary to complete defense and enjoyment of the specific right.”<sup>43</sup>

On March 7, Representative Elliot reintroduced the Freedmen's Bureau Bill.<sup>44</sup> This version had a more refined formulation of the rights of personal security and personal liberty than the Civil Rights Bill as well as explicit recognition of “the constitutional right to bear arms.”<sup>45</sup>

In debate on the Civil Rights Bill, John Bingham quoted its provisions, including the protection for

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<sup>40</sup> *Id.* at 143-44.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Cong. Globe*, 39th Cong., 1st Sess. 1118-19 (Mar. 1, 1866).

<sup>44</sup> *Cong. Globe*, 39th Cong., 1st Sess. 1238 (Mar. 7, 1866).

<sup>45</sup> *Id.* at 3412 (June 26, 1866).

“full and equal benefit of all laws and proceedings for the security of person and property,”<sup>46</sup> and reiterated his support for “amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future.”<sup>47</sup> He explained that “the seventh and eighth sections of the Freedmen’s Bureau bill enumerate the same rights and all the rights and privileges that are enumerated in the first section of this [the Civil Rights] bill. . . .”<sup>48</sup> Bingham then quoted the seventh section of the Freedmen’s Bureau Bill, which provided that all persons shall “have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms . . . .”<sup>49</sup>

Bingham wished to “arm Congress with the power to . . . punish all violations by State Officers of the bill of rights . . . .”<sup>50</sup> In drafting the first section of the Fourteenth Amendment, Bingham clearly sought to protect these rights.

The Civil Rights Bill passed both houses,<sup>51</sup> but on March 27 President Johnson surprised everyone by vetoing it.<sup>52</sup> In the override debate in the Senate, Lyman Trumbull argued that every citizen has “inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights

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<sup>46</sup> *Id.* at 1291 (Mar. 9, 1866).

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

<sup>48</sup> *Id.* at 1292.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Cong. Globe*, 39th Cong., 1st Sess. 606 (Feb. 2, 1866) (Senate); 1367 (Mar. 13, 1866) (House).

<sup>52</sup> *Id.* at 1679 (Mar. 27, 1866).

enumerated in this bill . . . .<sup>53</sup> Trumbull quoted from Kent's *Commentaries* as follows:

The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country to be natural, inherent, and inalienable.<sup>54</sup>

Again, these were the same rights generally recited in the Civil Rights Bill and explicitly expounded by the Freedmen's Bureau Bill as including the right to bear arms.

On April 6, the Senate voted to override President Johnson's veto of the Civil Rights Bill.<sup>55</sup> An editorial in the *New York Evening Post* on the vote referred to "the mischiefs for which the Civil Rights bill seeks to provide a remedy . . . --that there will be no obstruction to the acquirement of real estate by colored men, no attempts to prevent their holding public assemblies, freely discussing the question of their own disabilities, keeping fire-arms . . . ."<sup>56</sup>

On April 9, after both houses had mustered the requisite two-thirds vote to override President Johnson's veto, the Civil Rights Act of 1866 became law.<sup>57</sup> As enacted, § 1 provided:

[C]itizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to *full and equal benefit of all laws and proceedings for the security of person and property*, as is enjoyed by white citizens. . . .<sup>58</sup>

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<sup>53</sup> *Id.* at 1757 (Apr. 4, 1866).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1809 (Apr. 6, 1866).

<sup>56</sup> "The Civil Rights Bill in the Senate," *New York Evening Post*, Apr. 7, 1866, at 2, col. 1.

<sup>57</sup> *Cong. Globe*, 39th Cong., 1st Sess. 1861 (Apr. 9, 1866).

<sup>58</sup> 14 Stat. 27 (1866) (emphasis added).

Virtually the same language survives today as 42 U.S.C. § 1981.

Meanwhile, the proposed Fourteenth Amendment passed the House.<sup>59</sup> Soon thereafter, Representative Eliot, on behalf of the Select Committee on Freedmen's Affairs, reported the second Freedmen's Bureau Bill,<sup>60</sup> which would become H.R. 613. As before, the new bill recognized "the constitutional right to bear arms."<sup>61</sup> John Bingham, author of § 1 of the Fourteenth Amendment, was a member of the select committee that drafted this bill.

On May 23, on behalf of the Joint Committee on Reconstruction, Jacob Howard introduced the proposed Fourteenth Amendment in the Senate.<sup>62</sup> Senator Howard referred to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press; . . . the right to keep and bear arms. . . ."<sup>63</sup> Howard averred: "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."<sup>64</sup>

In the ensuing debate, no one questioned Howard's premise that the Amendment made the first eight amendments applicable to the states. Howard explained that Congress could enforce the Bill of Rights through the Enforcement Clause, "a direct affirmative delegation of power to Congress to carry out all the

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<sup>59</sup> *Cong. Globe*, 39th Cong., 1st Sess. 2545 (May 10, 1866).

<sup>60</sup> *Id.* at 2743 (May 22, 1866).

<sup>61</sup> *Id.* at 3412 (June 26, 1866).

<sup>62</sup> *Id.* at 2765 (May 23, 1866).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2766.

principles of all these guarantees.’<sup>65</sup> Howard added: “It [the amendment] will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who happen to be within their jurisdiction.’<sup>66</sup>

That same day, the House was debating the second Freedmen’s Bureau Bill,<sup>67</sup> § 8 of which protected “the constitutional right to bear arms.’<sup>68</sup> Representative Eliot observed that § 8 “simply embodies the provisions of the civil rights bill, and gives to the President authority, through the Secretary of War, to extend military protection to secure those rights until the civil courts are in operation.’<sup>69</sup>

Eliot cited Freedmen’s Bureau reports, such as that of General Fisk, who wrote of 25,000 discharged Union soldiers who were freedmen returning to their homes:

Their arms are taken from them by the civil authorities and confiscated for the benefit of the Commonwealth. The Union soldier is fined for bearing arms. Thus the right of the people to keep and bear arms as provided in the Constitution is infringed, and the Government for whose protection and preservation these soldiers have fought is denounced as meddlesome and despotic when through its agents it undertakes to protect its citizens in a constitutional right.<sup>70</sup>

Fisk added that the freedmen “are defenseless, for the civil-law officers disarm the colored man and hand

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<sup>65</sup> *Id.*

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

<sup>67</sup> *Id.* at 2773 (May 23, 1866).

<sup>68</sup> *Id.* at 3412 (June 26, 1866).

<sup>69</sup> *Id.* at 2773 (May 23, 1866).

<sup>70</sup> *Id.* at 2774.

him over to armed marauders.’<sup>71</sup>

The Fourteenth Amendment and the second Freedmen’s Bureau Bill, H.R. 613, continued to be debated in the Senate and House respectively for several days. On May 29, the House passed H.R. 613 by a vote of 96 to 32, with 55 abstaining.<sup>72</sup> The House immediately proceeded to consideration of the proposed constitutional amendment.<sup>73</sup>

After further debate, the Fourteenth Amendment passed the Senate by a vote of 33 to 11,<sup>74</sup> or 75% of the votes, far more than the necessary two-thirds for a constitutional amendment. On June 13, the House passed the proposed Fourteenth Amendment as amended by the Senate by a vote of 120 to 32,<sup>75</sup> a margin of 79%, again far more than the necessary two-thirds.

Another pertinent bill was H.R. No. 543, which required the Southern States to ratify the Fourteenth Amendment. Representative George W. Julian argued the necessity of that bill to remedy the following:

Although the civil rights bill is now the law, . . . [it] is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. South Carolina has the same enactments; and a black man convicted of an offense who fails immediately to pay his fine is whipped. . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.<sup>76</sup>

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<sup>71</sup> *Id.* at 2775.

<sup>72</sup> *Id.* at 2878.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 3042 (June 8, 1866).

<sup>75</sup> *Id.* at 3149 (June 13, 1866).

<sup>76</sup> *Id.* at 3210 (June 17, 1866).

This again shows the common objective of the Civil Rights Act and the Freedmen's Bureau Bill to protect the right to keep and bear arms, and the need for the Fourteenth Amendment to provide a constitutional foundation.

On June 26, the Senate took up H.R. 613, the second Freedmen's Bureau Bill. Unrelated amendments resulted in § 8, which recited "the constitutional right to bear arms," being renumbered as § 14.<sup>77</sup> Senator Thomas Hendricks moved to strike out the section because "the same matters are found in the civil rights bill substantially that are found in this section." Hendricks' proposal was rejected.<sup>78</sup>

Senator Trumbull replied that, while the two bills protected the same rights, the Civil Rights Act would apply in regions where the civil tribunals were in operation, while the Freedmen's Bureau Bill would apply in regions where the civil authority was not restored.<sup>79</sup> The bill then passed without a roll-call vote.<sup>80</sup>

The bill went to a conference committee, was reported, and the Senate concurred.<sup>81</sup> A motion to table in the House was rejected by a vote of 25 to 102.<sup>82</sup> Because the report was then agreed to without another roll call vote, the recorded procedural vote represented yet another landslide vote in favor of passage of the bill.

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<sup>77</sup> *Id.* at 3412 (June 26, 1866).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

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

<sup>81</sup> *Id.* at 3524 (July 2, 1866).

<sup>82</sup> *Id.* at 3562 (July 3, 1866).



As expected, President Johnson vetoed the second Freedmen's Bureau Bill.<sup>83</sup> The House overrode the veto by a vote of 104 to 33, or 76%.<sup>84</sup> The Senate then overrode the veto by a vote of 33 to 12, or 73%.<sup>85</sup>

As finally passed into law on July 16, 1866, the Freedmen's Bureau Act extended the Bureau's existence for two more years.<sup>86</sup> The full text of § 14 of the Act declared:

That in every State or district where the ordinary course of judicial proceedings has been interrupted by the rebellion, and until the same shall be fully restored, and in every State or district whose constitutional relations to the government have been practically discontinued by the rebellion, and until such State shall have been restored in such relations, and shall be duly represented in the Congress of the United States, the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have *full and equal benefit of all laws and proceedings concerning personal liberty, personal security*, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery. And whenever in either of said States or districts the ordinary course of judicial proceedings has been interrupted by the rebellion, and until the same shall be fully restored, and until such State shall have been restored in its constitutional relations to the government, and shall be duly represented in the Congress of the United States, the President shall, through the commissioner and the officers of the bureau, and under such rules and regulations as the President, through the Secretary of War, shall prescribe, extend military protection and have military jurisdiction over all cases and questions concerning *the free enjoyment of such immunities and rights*, and no penalty or punishment for any violation of law shall be imposed or permitted because of race or color, or previous condition of slavery, other or greater than the penalty or punishment to which white persons may be liable by law for the like offense. But the jurisdiction conferred by this section upon the officers of the bureau shall not exist in any State where the ordinary course of judicial proceedings has not been interrupted by the rebellion, and shall cease in every State when the courts of the State and the United States are not disturbed in the peaceable course of justice, and after such State shall be fully restored in its constitutional relations to the government, and shall be duly represented in the

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<sup>83</sup> *Id.* at 3849 (July 16, 1866).

<sup>84</sup> *Id.* at 3850.

<sup>85</sup> *Id.* at 3842.

<sup>86</sup> 14 Stat. 173 (1866).

Congress of the United States.<sup>87</sup>

With the enactment of the Freedmen's Bureau Act, the civil rights revolution in the 39th Congress was won. The Fourteenth Amendment was proposed by Congress to the States, and the ratification process was the next step.

The following summarizes the roll-call voting behavior of Congressmen concerning the Freedmen's Bureau Act and the Fourteenth Amendment. Every Senator who voted for the Fourteenth Amendment also voted for the Freedmen's Bureau Bills, S. 60 and H.R. 613, and thus for recognition of the constitutional right to bear arms as embodied in the rights of "personal liberty" and "personal security." The only recorded Senate vote on S. 60, the first Freedmen's Bureau Bill, as amended to include recognition of the right to bear arms, was the 30 to 18 veto override vote of February 20, just two votes shy of the necessary two-thirds.<sup>88</sup> On June 8, the Senate passed the proposed Fourteenth Amendment by a vote of 33-11.<sup>89</sup> H.R. 613, the second Freedmen's Bureau Bill, then passed the Senate by voice vote on June 26.<sup>90</sup> On July 16, the Senate overrode the President's veto of H.R. 613 by a vote of 33 to 12 (73%).<sup>91</sup>

An analysis of the roll call votes reveals that all 33 senators who voted for the Fourteenth

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<sup>87</sup> *Id.* at 176-77.

<sup>88</sup> *Cong. Globe*, 39th Cong., 1st Sess. 943 (Feb. 20, 1866). *See id.* at 421 (Jan. 25, 1866) (original Senate passage of S. 60) and 748 (Feb. 8, 1866) (Senate concurs in House amendments by voice vote).

<sup>89</sup> *Id.* at 3042 (June 8, 1866).

<sup>90</sup> *Id.* at 3413 (June 26, 1866).

<sup>91</sup> *Id.* at 3842 (July 16, 1866).

Amendment also voted for either S. 60 or H.R. 613.<sup>92</sup> Of the 33 senators who voted for the Fourteenth Amendment, 28 (85%) voted for both S. 60 and H.R. 613. The eleven senators who voted against the Fourteenth Amendment also voted against either S. 60 or H.R. 613, or both.<sup>93</sup>

Members of the House cast recorded votes overwhelmingly in favor of the Freedmen's Bureau Bills and in favor of the Fourteenth Amendment on two occasions. On February 6, a day after inserting the right to bear arms into the bill,<sup>94</sup> the House passed S. 60 by a vote of 136 to 33.<sup>95</sup> Because the Senate failed to muster the necessary two-thirds to override the President's veto, the House had no override vote. The proposed Fourteenth Amendment passed the House on May 10 by a vote of 128-37,<sup>96</sup> and again, with the Senate amendments, on June 13 by a vote of 120-32.<sup>97</sup> The House passed H.R. 613 on May 29 by

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<sup>92</sup> Raw data of each individual member's voting record was compiled by the author. All voting tabulations were compiled from *id.* at 943, 3042, and 3842. George Edmunds voted for H.R. 613, but could not vote for S. 60 because he was not yet a Senator, having been appointed to that office on April 3, 1866. *Biographical Directory Of The United States Congress 1774-1989*, at 951 (1989). James Lane of Kansas voted for S. 60, but died on July 11, just before the vote on H.R. 613. *Id.* at 1339. Morgan, Stewart, and Willey had voted not to override the President's veto of S. 60, but then voted to override the veto of H.R. 613. Stewart explained that he would sustain the veto of S. 60 only because the President agreed to sign the Civil Rights Bill. When Johnson reneged, Stewart became a bitter enemy. B. Kendrick, *Journal of the Joint Committee of Fifteen on Reconstruction* 293 n.3 (1914).

<sup>93</sup> The chief objection against the Freedmen's Bureau Bills, as set forth in debate and the President's veto messages, were that they asserted military jurisdiction in lieu of the civil courts. *E.g.*, *Cong. Globe*, 39th Cong., 1st Sess. 915-918 (Feb. 19, 1866) and 933-43 (Feb. 20, 1866). No one objected to the provision that recognized the right to bear arms. On separate occasions, senators who voted against the Freedmen's Bureau Bills also favorably invoked the Second Amendment. *E.g.*, *id.* at 371 (Jan. 23, 1866) (remarks of Senator Davis).

<sup>94</sup> *Id.* at 654 (Feb. 5, 1866).

<sup>95</sup> *Id.* at 688 (Feb. 6, 1866).

<sup>96</sup> *Id.* at 2545 (May 10, 1866).

<sup>97</sup> *Id.* at 3149 (June 13, 1866).

a 96-33 margin,<sup>98</sup> and then on July 16 overrode the President's veto by a vote of 104-33, or 76%.<sup>99</sup>

The overwhelming majority of House members voted in the affirmative on all five recorded votes--once on S. 60, twice on the proposed Fourteenth Amendment, and twice on H.R. 613. Some voted only once on the proposed Fourteenth Amendment, or once or twice on the Freedmen's Bureau Bills. A total of 140 representatives voted at least once in favor of the proposed Fourteenth Amendment, and every one of the 140 voted at least once in favor of one of the Freedmen's Bureau Bills.<sup>100</sup> Of the 140 representatives who voted for the proposed Fourteenth Amendment, a total of 120 (86%) voted for both S. 60 and H.R. 613.

Accordingly, the same two-thirds-plus members of Congress who voted for the proposed Fourteenth Amendment also voted for the proposition contained in both Freedmen's Bureau bills that the constitutional right to bear arms is included in the rights of personal liberty and personal security. No other guarantee in the Bill of Rights was the subject of this formal approval by the same Congress that passed the Fourteenth Amendment.

The framers intended the Fourteenth Amendment to guarantee the right to keep and bear arms as a right and attribute of citizenship that no state government could infringe. The passage of the Fourteenth Amendment accomplished the goal that each State must respect all the guarantees (or at least all the

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<sup>98</sup> *Id.* at 2878 (May 29, 1866).

<sup>99</sup> *Id.* at 3850 (July 16, 1866). Colleagues excused 13 absentees who would have voted for the bill but were absent because of "indisposition." *Id.* at 3850-51.

<sup>100</sup> Eleven members who voted for either S. 60 or H.R. 613 but not both were not present for the vote on the other. Nine members voted yes on S. 60 and no on H.R. 613, no on H.R. 613 but yes on the H.R. 613 override, or otherwise voted inconsistently. Three members voted both for and against the Fourteenth Amendment on two occasions. These aberrations are statistically insignificant.

substantive, non-procedural guarantees) contained in the Bill of Rights.

The following years of Reconstruction were filled with countless other events, debates, reports, and developments further demonstrating the intent that the Fourteenth Amendment would protect the individual right to keep and bear arms. Congress would abolish the Southern State militias, in part because they violated the right of freedmen to keep arms.<sup>101</sup> Congress would also enact the Civil Rights Act of 1871, today's 42 U.S.C. § 1983, the effect of which, argued Rep. Whitthorne, was that if a policeman seized a firearm, "the officer may be sued, because the right to bear arms is secured by the Constitution."<sup>102</sup>

In 1867, Congress required by law that the constitutions of the reconstructed Southern States conform to the U.S. Constitution, including the Fourteenth Amendment, even though it was not yet fully ratified.<sup>103</sup> In response thereof, the Southern States adopted new constitutions and laws reflecting the understanding of the Fourteenth Amendment as incorporating Bill of Rights guarantees. The following analyzes this phenomenon as exemplified by the State of Georgia.

The Georgia Constitution of 1868 included the following provisions replicating the language of the Fourteenth Amendment and requiring the legislature to enforce "the rights, privileges, and immunities guaranteed" in that constitution:

Section 2. All persons born or naturalized in the United States, and resident in this State, are hereby declared citizens of this State, and no laws shall be made or enforced which shall abridge the privileges or immunities of citizens of the United States, or of this State, or deny to any person within its jurisdiction the equal protection of its laws. And it shall be the duty of the General Assembly, by appropriate legislation, to protect every person in the due enjoyment of the rights, privileges, and immunities guaranteed in this section.

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<sup>101</sup> See Halbrook, *Freedmen*, 68-69.

<sup>102</sup> See *id.* at 125, citing Cong. Globe, 42<sup>nd</sup> Cong., 1<sup>st</sup> Sess., 337 (Mar. 29, 1871).

<sup>103</sup> 14 Stat. 428 (1867).

Section 3. No person shall be deprived of life, liberty, or property, except by due process of law.<sup>104</sup>

The 1868 Constitution also provided for rights recognized in the federal Bill of Rights, including the following rendition of the Second Amendment: “A well-regulated militia being necessary to the security of a free people, the right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe by law the manner in which arms may be borne.”<sup>105</sup> When proposed in convention, the last part read, “borne by private persons.”<sup>106</sup> Deletion of this phrase made clear that the legislature could prescribe how officials, as well as private persons, may bear arms.

Although Georgia’s antebellum Constitution had no right-to-bear-arms provision, the Georgia Supreme Court had held in 1846 that “the language of the second amendment is broad enough to embrace both Federal and State governments.”<sup>107</sup> The court declared a state statute banning breast pistols violative of the Second Amendment, explaining: “The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* as are used by the *militia*, shall not be infringed . . . .”<sup>108</sup> However, a later decision held that “free persons of color have never been recognized as citizens of Georgia” and hence “are not entitled to bear arms.”<sup>109</sup> In any event,

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<sup>104</sup> Ga. Const., Art. I, §§ 2, 3 (1868).

<sup>105</sup> *Id.* at § 14.

<sup>106</sup> *Journal of Proceedings of the Constitutional Convention [Georgia]* 168 (1868).

<sup>107</sup> *Nunn v. State*, 1 Ga. 243, 250 (1846). This precedent was reaffirmed in *Hill v. State*, 53 Ga. 472 (1874); *Strickland v. State*, 137 Ga. 1, 72 S.E. 260, 267 (1911).

<sup>108</sup> *Id.* at 251.

<sup>109</sup> *Cooper v. Savannah*, 4 Ga. 72 (1848).

adoption of the language of the Second Amendment in 1868 reflected adherence both to the Fourteenth Amendment as well as to the original federal Bill of Rights.<sup>110</sup>

As noted above, Article I, section 2 of the 1868 Constitution required the legislature “to protect every person in the due enjoyment of the rights, privileges, and immunities guaranteed in this section.” The Georgia Code of 1868 did just that in part as follows: “Among the rights of citizens are the enjoyment of personal security, of personal liberty, of private property, and the disposition thereof, the elective franchise, the right to hold office, to appeal to the Courts, to testify as a witness, to perform any civil function, and to keep and bear arms.”<sup>111</sup> The source of this phraseology is clear – the reference to “rights, privileges, and immunities” derives from the Fourteenth Amendment, and in turn the rendition of Blackstone by the Freedmen’s Bureau Act was reflected in the reference to the rights of “personal security, personal liberty, and private property,” including the right “to keep and bear arms.” Also included, as noted, were the rights to participate in civic and judicial matters.

The Georgia Code reprinted an article on “Persons of Color” which was now rendered obsolete

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<sup>110</sup> Indeed, the 1865 Constitution adopted language identical to the Second Amendment. Ga. Const., I, § 4 (1865).

<sup>111</sup> The Code of the State of Georgia, § 1648 (Atlanta: Franklin Steam Printing House, 1867). This was known as “Irwin’s Code.” Despite the printed reference to 1867, this edition was actually printed in 1868 since it reprints the Fourteenth Amendment and its adoption date in 1868 as well as the Georgia Constitution of 1868. *See* Appendix, at 1075 ff.

The current Code of Georgia, § 1-2-6(a), continues to bear the influence of the language of the Freedmen’s Bureau Act:

The rights of citizens include, without limitation, the following:

- (1) The right of personal security;
- (2) The right of personal liberty;
- (3) The right of private property and the disposition thereof; . . .
- (9) The right to keep and bear arms.

by the Fourteenth Amendment and the above provisions of the 1868 Constitution. Although stopping short of declaring such persons entitled to all the rights of citizenship, one provision had almost identical language as the federal Civil Rights Act of 1866 and the corresponding version of S. 60, the Freedmen’s Bureau Bill as originally introduced.<sup>112</sup> The Georgia provision stated that persons of color “shall have the right to make and enforce contracts, to sue and be sued, to be parties and give evidence, to inherit, to purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate . . . .”<sup>113</sup> It bears repeating that the first Freedmen’s Bureau Bill provided for the right “to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right to bear arms.”<sup>114</sup>

Reflecting these constitutional values, there was only a single law on the books restricting the possession in any form of arms, which provided that “[a]ny person having or carrying about his person, unless in an open manner and fully exposed to view, any pistol (except horseman’s pistols),” or certain edged weapons, was guilty of a misdemeanor.<sup>115</sup> The reference to “any person” meant that persons of color were not subject to any further special restrictions. The exemption for carrying horseman’s pistols concealed reflected the deference toward the bearing of arms which could have uses for the militia or for

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<sup>112</sup> Civil Rights Act, 14 Stat. 27 (1866); B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 87 (1914) (S. 60 as introduced).

<sup>113</sup> The Code of the State of Georgia, § 1662 (1867), referencing Acts of 1865-6, p. 239. Apparently to indicate that this provision was obsolete, it was in brackets. An annotation to the article “Of Persons of Color” in a later edition stated: “Sections 1662 . . . superseded by Constitution of 1868, Article I, section 2.” The Code of the State of Georgia, Part II, Title I, Chapter I, Article III (2<sup>nd</sup> Ed., Macon: J.W. Burke, 1873).

<sup>114</sup> Cong. Globe, 39th Cong., 1st Sess. 654 (Feb. 5, 1866).

<sup>115</sup> The Code of the State of Georgia, § 4454 (1867), referencing Acts of 1865-6, p. 233.



self defense.

Despite the civil rights gains on paper, controversy ensued. A “memorial of a convention of the colored citizens of Georgia” which was raised in Congress appealed to the provision of the Georgia Code referencing the rights to personal security, to hold office, and to bear arms, to protest the expulsion of blacks from the State legislature.<sup>116</sup> Because of the Civil Rights Act of 1866 and the Fourteenth Amendment, the memorial reasoned, “we became citizens of the State of Georgia, and as such entitled to the same ‘rights,’ privileges, and immunities belonging to other citizens . . . .”<sup>117</sup>

This issue was resolved by an opinion of the Georgia Supreme Court upholding the right of blacks to hold office. The opinion referred to the above provision as “a clear, definite specification of certain rights, which belong to citizens as such . . . .”<sup>118</sup> Predictably, a dissenting opinion declared: “Persons of color were not in the contemplation or purview of the law-makers when they declared and defined the rights of citizens in the Code with respect to holding office, and to keep and bear arms, as therein expressed.”<sup>119</sup> The dissent relied in part on the concept of “citizenship” set forth in the *Dred Scott* decision,<sup>120</sup> which the Fourteenth Amendment and the 1868 Constitution had overruled.

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<sup>116</sup> Cong. Globe, 40th Cong., 3rd Sess. 3 (Dec. 7, 1868) (memorial presented by Senator Wilson).

<sup>117</sup> *Id.*

<sup>118</sup> *White v. Clements*, 39 Ga. 232, 262 (1869). *And see id.* at 271.

<sup>119</sup> *Id.* at 280 (Warner, J., dissenting). *And see id.* at 278-79.

<sup>120</sup> *Id.* at 276, quoting *Scott v. Sanford*, 60 U.S. 393, 422 (1857). In *Scott*, Chief Justice Taney argued that blacks could not be considered citizens because they would then have the rights of citizens:

For if they [African Americans] were . . . entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons

In any event, the above experience exemplifies the understanding of the obligation of the Southern States to adopt constitutions and laws consistent with the Fourteenth Amendment. The rights, privileges, and immunities the State of Georgia proceeded to protect included the right of “personal security,” including “the right to keep and bear arms.”

In response to violence by the Ku Klux Klan which was invariably associated with attempts to disarm freedmen, Congress enacted the Enforcement Act of 1870, which criminalized civil rights violations by private parties.<sup>121</sup> United States attorneys aggressively prosecuted Klansmen for various criminal offenses under the Act, at times alleging violation of the rights to assemble, to keep and bear arms, and against unreasonable searches.<sup>122</sup> These efforts ended with the Supreme Court’s decision in *United States v. Cruikshank* (1876), which held that private individuals, unlike the States, cannot violate Bill of Rights guarantees (the First and Second Amendments in that case), and hence persons cannot be prosecuted for such conduct under the federal Enforcement Act.<sup>123</sup>

Two post-Reconstruction decisions by the Supreme Court briefly addressed the Second Amendment. *Presser v. Illinois* (1886) held that requiring a permit for an armed march in a city did not

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of the negro race . . . the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.

60 U.S. at 416-17.

<sup>121</sup> 16 Stat. 140, 144 (1870). Portions of the Enforcement Act survive today as 18 U.S.C. §§ 241, 242.

<sup>122</sup> See Halbrook, *Freedmen*, chapters 5 and 6.

<sup>123</sup> *United States v. Cruikshank*, 92 U.S. 542 (1876). Complete details on the facts and prosecution of the Cruikshank case are set forth in Halbrook, *Freedmen*, chapter 7.

violate the rights to associate or to bear arms, and that in any event the First and Second Amendments did not apply to the States.<sup>124</sup> However, *Presser* did not consider whether the Fourteenth Amendment protects those rights by incorporating the Second Amendment, an issue not raised by the parties.<sup>125</sup>

*Miller v. Texas* (1894) rejected direct application of the Second and Fourth Amendments to the States, but refused to consider whether those amendments were incorporated into the Fourteenth Amendment:

And if the Fourteenth Amendment limited the power of the States as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court. . . . A privilege or immunity under the Constitution of the United States cannot be set up here . . . when suggested for the first time in a petition for rehearing after judgment.<sup>126</sup>

Had the issue been decided previously, the Court would have so stated rather than refusing to consider what was an open question but which had not been raised below. To date, the Supreme Court has not resolved that issue.

In the twentieth century, the Court held most Bill of Rights guarantees applicable to the States through the due process clause of the Fourteenth Amendment,<sup>127</sup> but has been silent on whether the Second Amendment is included. However, *Planned Parenthood v. Casey* (1992) discussed the broad

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<sup>124</sup> *Presser v. Illinois*, 116 U.S. 252, 265, 267 (1886).

<sup>125</sup> The tumultuous background to this case originating in labor struggles is detailed in Halbrook, “The Right of Workers to Assemble and to Bear Arms: *Presser v. Illinois*, One of the Last Holdouts Against Application of the Bill of Rights to the States,” 76 *University of Detroit Mercy Law Review* 943 (Summer 1999).

<sup>126</sup> *Miller v. Texas*, 153 U.S. 535, 538-39 (1894). For the intriguing background to this case, see C. Leonardatos, D. David Kopel, & S. Halbrook, “*Miller versus Texas*: Police Violence, Race Relations, Capital Punishment, and Gun-toting,” 9 *Journal of Law and Policy*, No. 3, 737 (2001), <http://i2i.org/SuptDocs/Crime/LawReviews/MillerVersusTexas.htm>.

<sup>127</sup> See Halbrook, *Freedmen*, 185-88.

parameters of the Fourteenth Amendment's due process clause, noting that "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States."<sup>128</sup>

The Court recognized that the Fourteenth Amendment extends its protection to, but is not limited by, the specific guarantees expressed in the Bill of Rights, adding:

Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. . . . As the second Justice Harlan recognized:

"[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution . . . [such as] the freedom of speech, press, and religion; the right to keep and bear arms. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ."<sup>129</sup>

The Supreme Court has recognized the common origins and purposes of the Freedmen's Bureau and Civil Rights Acts of 1866 and the Fourteenth Amendment.<sup>130</sup> Noting that "the Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen's Bureau Act," Justice Thurgood Marshall concluded that the rights set forth in the Freedmen's Bureau Act were dispositive of Congress' intent in the Fourteenth Amendment.<sup>131</sup> The Court has held that the Fourteenth Amendment protects from State infringement the "indefeasible right of personal security, personal liberty and private

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<sup>128</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992) (citation omitted).

<sup>129</sup> *Id.* at 841 (citation omitted).

<sup>130</sup> See, e.g., *Hurd v. Hodge*, 334 U.S. 24, 32 (1948); *Georgia v. Rachel*, 384 U.S. 780, 796-97 & n.26 (1966); *City of Greenwood, Mississippi v. Peacock*, 384 U.S. 808, 817 n.11 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 423-24 (1968). For an analysis of these and other cases, see Halbrook, *Freedmen*, 192-95.

<sup>131</sup> *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 397-98 (1978) (opinion of Marshall, J.).

property”<sup>132</sup> – the very rights the Fourteenth Amendment’s framers declared, in the Freedmen’s Bureau Act, included the right to bear arms.

No reported judicial decision at any level reflects knowledge of the declaration of the Freedmen’s Bureau Act about personal security and the right to bear arms and the relation thereof to the Fourteenth Amendment. In upholding California’s prohibition on possession of certain semiautomatic rifles (pejoratively characterized as “assault weapons”), the U.S. Court of Appeals for the Ninth Circuit rejected incorporation of the Second Amendment into the Fourteenth, refusing to consider what it referred to as “remarks by various legislators during passage of the Freedmen’s Bureau Act of 1866, the Civil Rights Act of 1866, and the Civil Rights act of 1871.”<sup>133</sup> That court was fully aware from the appellants’ briefs of the existence of the Freedmen’s Bureau Act, but chose to acknowledge only “remarks” by legislators rather than an enactment passed by over two thirds of the members of Congress. Similarly, the court held that the Supreme Court’s *Presser* decision held that the Second Amendment did not apply to the States,<sup>134</sup> ignoring – as *Miller v. Texas* made painfully clear – that the Supreme Court had never even considered whether the Fourteenth Amendment incorporated the Second Amendment.

The same law was later upheld by the California Supreme Court against an equal protection challenge. The concurring opinion by Justice Brown states: “After the Civil War a series of enactments,

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<sup>132</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 n. (1965).

<sup>133</sup> *Fresno Rifle & Pistol Club v. Van de Kamp*, 965 F.2d 723, 730 (9th Cir. 1992). *And see Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 n.8 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983) (“the debate surrounding the adoption of the second and fourteenth amendments . . . has no relevance on the resolution of the controversy before us”; local handgun ban upheld). This rejection of the usual rule that the intent of the framers governs construction of the Constitution’s provisions suggests that the framers’ intent was adverse to the result the court wished to reach.

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

culminating with the Fourteenth Amendment, acknowledged the correlation between self-defense, citizenship, and freedom.”<sup>135</sup> The language of the Freedmen’s Bureau Act about the right to bear arms is quoted<sup>136</sup> – for the first time in American judicial history.

There is a growing judicial recognition of the Second Amendment as establishing a fundamental, individual right. Justice Thomas has written: “Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the ‘right to keep and bear arms’ is, as the Amendment’s text suggests, a personal right.”<sup>137</sup> In *United States v. Emerson* (2001), the U.S. Court of Appeals for the Fifth Circuit held that “the Second Amendment protects the right of individuals to privately keep and bear their own firearms that are suitable as individual, personal weapons . . . , regardless

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<sup>135</sup> *Kasler v. Lockyer*, 23 Cal. 4th 472, 505, 2 P.3d 581 (2000) (Brown, J., concurring).

<sup>136</sup> *Id.* at 505-06, quoting Freedmen's Bureau Act, § 14, 14 Stat. 176 (1866), and endorsing related analysis in Halbrook, “Second Class Citizenship and the Second Amendment in the District of Columbia,” 5 Geo. Mason U. Civ. Rts. L.J. 105, 141-150 (1995). In response to the argument that the right to bear arms is outweighed by the right to be “safe,” Justice Brown wrote:

I suspect the freedmen of the Reconstruction Era would vehemently disagree. So would the Armenians facing the Ottoman Turks in 1915, the embattled Jews of the Warsaw Ghetto in 1943, and the victims of Pol Pot’s killing fields.

The media keep the horrific visions of gun violence ever before our eyes. These acts of individual madness are undeniably tragic and totally unacceptable in a civilized society. But there are other horrific visions--the victims of which number in the millions--perpetrated by governments against unarmed populations.

The framers could have had no conception of the massive scale on which government-sanctioned murder would be committed in the 20th century, but they had a keen appreciation of the peril of being defenseless. That wariness is reflected in the Constitution.

*Id.* at 510.

<sup>137</sup> *Printz v. United States*, 521 U.S. 898, 939 n.2 (1997) (Thomas, J., concurring), citing, *inter alia*, J. Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 162 (1994); S. Halbrook, *That Every Man Be Armed, The Evolution of a Constitutional Right* (1984).

of whether the particular individual is then actually a member of a militia.”<sup>138</sup>

Appreciation of the character of the right to keep and bear arms as a personal liberty rather than some elusive, collective State “right” requires the incorporation of this right into the Fourteenth Amendment. None of the other Bill of Rights guarantees were endorsed by the same two thirds of Congress as proposed the Fourteenth Amendment as was the right to bear arms in the Freedmen’s Bureau Act. The framers of that amendment understood from hard experience that the rights to personal security and personal liberty are inseparable from the rights to self defense and to keep and bear arms.

If firearms ownership by ordinary citizens seems reprehensible by pacifists and prohibitionists today, one can imagine how possession of firearms by newly-freed slaves seemed to ex-slave owners and Klansmen during Reconstruction. To say the least, incorporation of the Second Amendment into the Fourteenth has historically been on the cutting edge of whether civil rights are taken seriously.

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<sup>138</sup> *United States v. Emerson*, 270 F.3d 203; 2001 U.S. App. LEXIS 22386, \*145 (5<sup>th</sup> Cir. 2001).