"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* 341-434 (Spring 1995). Abridgement printed in 7 *Jour. on Firearms and Public Policy* 135-214 (Fall 1995).

PERSONAL SECURITY, PERSONAL LIBERTY, AND "THE CONSTITUTIONAL RIGHT TO BEAR ARMS": VISIONS OF THE FRAMERS OF THE FOURTEENTH AMENDMENT

by

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1984; reprinted by the Independent Institute, 1991).

The author thanks the following persons for their inspiration, suggestions for the direction of this study, or helpful comments on the manuscript: Akhil Reed Amar, David I. Caplan, Robert J. Cottrol, Michael Kent Curtis, Robert Dowlut, Richard E. Gardiner, and George S. Knight.

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I. INTRODUCTION

The same two-thirds of Congress that adopted the Fourteenth Amendment to the United States Constitution also adopted the Freedmen's Bureau Act, which protected the "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate . . ., including the constitutional right to bear arms . . . ."[1] Does the Fourteenth Amendment, which protects the individual rights to personal security and personal liberty from State violation,[2] incorporate the Second Amendment, which declares that "the right of the people to keep and bear arms, shall not be infringed"?[3]

In three cases decided in the last quarter of the nineteenth

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[1] Act of July 16, 1866, 14 STATUTES AT LARGE 173, 176.

[2] Griswold v. Connecticut, 381 U.S. 479, 485 n. (1965).

[3] 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."

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.

century, the United States Supreme Court stated in dicta that the First, Second, and Fourth Amendments do not directly limit state action,[4] but did not rule on whether the Fourteenth Amendment prohibited state violations of the rights therein declared.[5] Since then, the Supreme Court has held that most Bill of Rights freedoms are incorporated into the Fourteenth Amendment, with little analysis and no discussion of the intent of the framers of that amendment,[6] but has failed to decide whether the Second Amendment is so incorporated, despite the specific declaration of two-thirds of Congress in the Freedmen's Bureau Act.

The first local and state prohibitions in American history on firearms' possession by the citizenry at large--the Morton Grove, Illinois handgun ban, and California's prohibition on "assault weapons"

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[4] United States v. Cruikshank, 92 U.S. 542, 551, 553 (1876) (private harm to rights to assemble and bear arms held not to be a federal offense); Presser v. Illinois, 116 U.S. 252, 265, 267 (1886) (city's requirement of license for armed march on public streets held not to violate right to assemble or bear arms); Miller v. Texas, 153 U.S. 535, 538 (1894)(refusal to consider whether Fourteenth Amendment protects Second and Fourth Amendment rights because claim not made in trial court).

[5] Miller v. Texas, 153 U.S. 535, 538 (1894).

[6] E.g., Chicago, B.& Q.R.Co. v. Chicago, 166 U.S. 226, 238-39 (1897) (just compensation); Gitlow v. New York, 268 U.S. 652, 666 (1925) (speech and press); DeJong v. Oregon, 299 U.S. 353, 364 (1937) (assembly); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (search and seizure); Robinson v. California, 370 U.S. 660, 666 (1962) (cruel and unusual punishment); Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (counsel).

(primarily repeating rifles)--were upheld by the United States Courts of Appeals for the Seventh and Ninth Circuits in 1982 and 1992, respectively. Both opinions rejected any reliance on the intent of the framers of the Fourteenth Amendment, and interpreted Supreme Court precedent to reject incorporation of the right to keep and bear arms into that amendment.[7]

Previous studies document, primarily through floor speeches, that the framers of the Fourteenth Amendment did intend to protect Bill of Rights freedoms in general,[8] and the right to keep and bear arms in particular.[9] Critics have argued that speeches by individual framers of the Fourteenth Amendment are insufficient to demonstrate a consensus

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[7] 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."); Fresno Rifle & Pistol Club v. Van de Kamp, 965 F.2d 723, 730 (9th Cir. 1992) (refusing to consider "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.")

[8] A. Amar, The Bill of Rights and the Fourteenth Amendment, 101 YALE L.J. 1193 (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 (1908).

[9] S. HALBROOK, "Freedom, Firearms, and the Fourteenth Amendment," in THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 107-53 (1984); S. Halbrook "The Fourteenth Amendment and The Right To Keep and Bear Arms: The Intent of The Framers," in THE RIGHT TO KEEP AND BEAR ARMS: REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION, Senate Judiciary Committee, 97th Cong., 2d Sess., at 68-82 (1982).

to incorporate the Bill of Rights.[10]

The position that the Second Amendment protects individual rights, and is a deterrent to governmental tyranny, is undergoing a contemporary revival.[11] The pertinence of the right to keep and bear arms to defense of Afro-Americans has been analyzed.[12] Nonetheless, no study exists concerning the significance, for purposes of whether the Fourteenth Amendment prohibits state infringement of the right to keep and bear arms, of the passage of the Freedmen's Bureau Act declaration by over two-thirds of the members of the Thirty-Ninth Congress providing that the rights to personal security and personal liberty include the "constitutional right to bear arms."[13]

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[10] Compare C. Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 STANFORD L. REV. 5 (Dec. 1949) with W. Crosskey, Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority, 22 UNIV. OF CHICAGO L.REV. 1 (Autumn 1954).

[11] S. Levinson, The Embarrassing Second Amendment, 99 YALE L.REV. 637 (1989); A. Amar, The Bill of Rights as a Constitution, 100 YALE L.REV. ll31, 1162-73 (1991); E. Scarry, War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms, 139 U.OF PA. L.REV. 1257 (1991). On the intent of the framers of the Second Amendment, see S. Halbrook: Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment, 15 UNIV. OF DAYTON L. REV. 91 (Fall 1989) and S. Halbrook, The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and The Second Amendment, 26 VALPARAISO UNIV. L.REV. 131 (Fall 1991).

[12] R. Cottrol and R. Diamond, THE SECOND AMENDMENT: TOWARD AN AFRO-AMERICANIST RECONSIDERATION, 80 GEORGETOWN L.J. 309 (Dec. 1991).

[13] Supra note 1 and accompanying text. The significance of this declaration to support incorporation of the Second Amendment as well as other parts of the Bill of Rights into the Fourteenth Amendment is

The purpose of this study is to trace the adoption of, and to investigate the interrelationship between, the Fourteenth Amendment and the Freedmen's Bureau Act, with particular focus on the right to keep and bear arms. This will entail analysis of the Civil Rights Act of 1866 and other relevant proceedings in the Thirty-Ninth Congress. The study concludes with an overview of the concepts of personal liberty and personal security as recognized in the Freedmen's Bureau Act and the Fourteenth Amendment.

The sources for this study include the texts of and debates on the constitutional amendment and statutory enactments as they proceeded through Congress. The secret journal of the Joint Committee of Fifteen on Reconstruction, which drafted the Fourteenth Amendment, will also be examined. Occasional references to press reports will be made. Executive communications concerning conditions in the South and the role of the Freedmen's Bureau will be scrutinized.

In a unique methodology for Fourteenth Amendment history, the public proceedings before the Joint Committee of Fifteen is interwoven with the Congressional debates. Benjamin B. Kendrick noted:[14]

> The testimony taken by the joint committee on reconstruction served as the raison d'être of the fourteenth amendment and as a

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recognized in three of the best studies on the Fourteenth Amendment. See A. Amar, supra note 3, at 1245 n. 228; M. Curtis supra note 3, at 72; H. Flack, supra note 3, at 17.

[14] B. Kendrick, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 264-65 (1914).

> campaign document for the memorable election of 1866. 150,000 copies were printed in order that senators and representatives might distribute them among their constituents.
>
> . . . That this testimony was read by the people generally in the North, is proved by the fact that the newspapers of the time published copious extracts from it, as it was made public, together with editorial comments upon it.

As Kendrick further remarked, "the testimony in regard to the treatment of the freedmen will tend to show why Congress was determined to pass such measures as the Freedmen's Bureau bill, the Civil Rights bill, and the civil rights resolution for amending the Constitution."[15] Besides exhibiting what thoughts were on the minds of members of Congress who asked many searching questions at the hearings, the testimony shows what materials were considered by the congressmen who voted for the Fourteenth Amendment, and demonstrates the perceived evils that the public wanted remedied.

This study utilizes the above sources in a chronological fashion, so as to demonstrate as a continuous process the adoption of the Freedmen's Bureau Act, the Civil Rights Act, and the Fourteenth Amendment. These developments did not take place in isolation, but were closely interwoven. By following the legislative developments as they occurred, one obtains a rich sense of the reasons for adoption and anticipated application of the Fourteenth Amendment.

Although this study concentrates on the right to keep and bear

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[15] Id. at 269.

arms, it also includes a comprehensive analysis pertinent to the general topic of incorporation of all other Bill of Rights guarantees into the Fourteenth Amendment. The arms guarantee may be the cutting edge of what it means to take civil rights seriously, but its history supplies a broader context to the question of whether a political society insures liberty to all without regard to race or previous condition of slavery or involuntary servitude.

II. THAT NO FREEDMAN SHALL KEEP OR CARRY FIREARMS: THE BLACK CODES AS BADGES OF SLAVERY

Antebellum commentators, both moderate and abolitionist, interpreted the Second Amendment as a guarantee of an individual right to keep and bear arms free from both State and federal infringement.[16] In his widely known criminal law commentaries, Joel P. Bishop wrote in 1865:

> The constitution of the United States provides, that, "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." This provision is found among the amendments; and, though most of the amendments are restrictions on the General Government alone, not on the States, this one seems to be of a nature to bind both the State and National legislatures.[17]

Yet Bishop's references to state "statutes relating to the carrying of arms by negroes and slaves"[18] and to an "act to prevent free people of

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[16] See S. HALBROOK, THAT EVERY MAN BE ARMED, 89-106 (1984).

[17] 2 J. BISHOP, COMMENTARIES ON THE CRIMINAL LAW §124 (1865).

[18] Id. at 120 n.6.

color from carrying firearms"[19] exemplified the need for a further constitutional guarantee to clarify and to protect the rights of all persons, regardless of race.

With the conclusion of the Civil War, the slave codes, which limited the access of blacks to land, to arms, and to the courts, began to reappear in the form of the black codes,[20] and legislators in Congress turned their attention to these efforts to reenslave the freedmen.

E.G. Baker, a Mississippi planter, wrote a letter to members of the state legislature on October 22, 1865, warning of a possible negro insurrection, adding: "It is well known here that our negroes through the country are well equipped with fire arms, muskets, double barrel, shot guns & pistols,--& furthermore, it would be well if they are free to prohibit the use of fire arms until they had proved themselves to be good citizens in their altered state."[21] Forwarding a copy of the letter to the Union commander in Northern Mississippi, Governor Benjamin G. Humphreys stated that "unless some measures are taken to disarm [the freedmen] a collision between the races may be speedily

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[19] Id. at 125 n.2.

[20] W. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 167, 172-73, 223 (1962); E. COULTER, THE SOUTH DURING RECONSTRUCTION 40, 49 (1947).

[21] FREE AT LAST: A DOCUMENTARY HISTORY OF SLAVERY, FREEDOM, AND THE CIVIL WAR 520-21 (I. Berlin et al. eds. 1992).

looked for."[22]

The result of such views was the prototypical 1865 Mississippi statute entitled "Act to Regulate the Relation of Master and Apprentice Relative to Freedmen, Free Negroes, and Mulattoes." In addition to prohibiting seditious speeches and preaching by freedmen without a license, it provided:

> Section 1. Be it enacted, . . . That no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie-knife, and on conviction thereof in the county court shall be punished by fine, not exceeding ten dollars, and pay the costs of such proceedings, and all such arms or ammunition shall be forfeited to the informer; and it shall be the duty of every civil and military officer to arrest any freedman, free negro, or mulatto found with any such arms or ammunition, and cause him or her to be committed to trial in default of bail. . . .
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> Section 3 . . . . If any white person shall sell, lend, or give to any freedman, free negro, or mulatto any fire-arms, dirk or bowie-knife, or ammunition, or any spirituous or intoxicating liquors, such person or persons so offending, upon conviction thereof in the county court of his or her county, shall be fined not exceeding fifty dollars, and may be imprisoned, at the discretion of the court, not exceeding thirty days. . . .
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> Section 5. . . . If any freedman, free negro, or mulatto, convicted of any of the misdemeanors provided against in this act, shall fail or refuse for the space of five days, after conviction, to pay the fine and costs imposed, such person shall be hired out by the sheriff or other officer, at public outcry, to any white person who will pay said fine and all costs, and take said convict for the shortest time.[23]

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[22] Id. at 522.

[23] Laws of Miss., 1865, at 165 (Nov. 29, 1865); Ex.Doc. No. 6, 39th Cong., 1st Sess., at 195-96 (1867). J. BURGESS, RECONSTRUCTION AND THE

Two weeks after the above passes, Calvin Holly, a black private assigned to the Freedmen's Bureau in Mississippi wrote to Bureau Commissioner Howard, relating an article in the Vicksburg Journal about an incident involving blacks with a gun, and noted that "they was forbidden not to have any more but did not heed."[24] "The Rebbles are going about in many places through the State and robbing the colered peple of arms money and all they have and in many places killing."[25] Private Holly continued: "They talk of taking the armes away from (col[ored]) people and arresting them and put them on farmes next month and if they go at that I think there will be trouble and in all probability a great many lives lost."[26]

When the Thirty-Ninth Congress convened in December of 1865, the first significant event from the perspective of the constitutional developments to come was the formation of committees. On December 6, the House resolved that the Speaker appoint a Select Committee on

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CONSTITUTION, 1866-1876, at 47, 51-52 (1902) states of the Mississippi Act:

> This is a fair sample of the legislation subsequently passed by all the "States" reconstructed under President Johnson's plan. . . . The Northern Republicans professed to see in this new legislation at the South the virtual re-enslavement of the negroes.

[24] FREE AT LAST: A DOCUMENTARY HISTORY OF SLAVERY, FREEDOM, AND THE CIVIL WAR 520-21 (I. Berlin et. al. eds. 1992).

[25] Id.

[26] Id.

Freedmen, to which would be referred all matters concerning freedmen, and which would report by bill or otherwise.[27] A few minutes later, John A. Bingham of Ohio introduced a joint resolution to amend the Constitution "to empower Congress to pass all necessary and proper laws to secure to all persons in their rights, life, liberty, and property . . . ."[28] This would become, of course, the Fourteenth Amendment.

The House Select Committee on Freedmen consisted of Thomas D. Elliot of Massachusetts, William D. Kelley of Pennsylvania, Godlove S. Orth of Indiana, John A. Bingham of Ohio, Nelson Taylor of New York, Benjamin F. Loan of Missouri, Josiah B. Grinnell of Iowa, Halbert E. Paine of Wisconsin, and Samuel S. Marshall of Illinois.[29] John Bingham would author §1 of the Fourteenth Amendment. Other significant committees would be the Senate Judiciary Committee, chaired by Lyman Trumbull of Illinois,[30] and the House Judiciary Committee, chaired by James F. Wilson of Iowa.[31]

On December 12, after considerable debate, the Senate concurred in a House resolution to appoint a Joint Committee of Fifteen to

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[27] CONG. GLOBE, 39th Cong., 1st Sess., 14 (Dec. 6, 1865).

[28] Id.

[29] Id. at 22 (Dec. 11, 1865).

[30] Id. at 11 (Dec. 6, 1865).

[31] Id. at 21 (Dec. 11, 1865).

investigate the condition of the southern states.[32] This is the committee that would hear testimony on the violation of freedmen's rights, and would draft and report the Fourteenth Amendment.

The enactment of the black code provisions prompted initiation of civil rights legislation that culminated in the proposal of the Fourteenth Amendment. Among the first pieces of proposed legislation, Senate Bill No. 9--introduced on December 13 by Henry Wilson of Massachusetts--declared as void all laws or other state action in the rebel states "whereby or wherein any inequality of civil rights and immunities among the inhabitants of said states is recognized, authorized, established, or maintained, by reason or in consequence of any distinctions or differences of color, race or descent, or by reason or in consequence of a previous condition or status of slavery or involuntary servitude of such inhabitants. . . ."[33]

Senator Wilson led the debate, which was the first substantive discussion on civil and constitutional rights in the 39th Congress. Wilson deplored enforcement of the black codes as follows:

> In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them; and the same things are done in other sections of the country. . . . I am told by eminent gentlemen connected with the Freedmen's Bureau that where they have the power they arrest the execution of these laws, but as the laws exist they are enforced in the greater portions

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[32] Id. at 30 (Dec. 12, 1865).

[33] Id. at 39 (Dec. 13, 1865).

> of those States. If we now declare those laws to be null and void, I have no idea that any attempt whatever will be made to enforce them, and the freedmen will be relieved from this intolerable oppression.[34]

Senator Wilson grounded his bill in the federal military power rather than the Thirteenth Amendment, which abolished slavery.[35] Senator Edgar Cowan of Pennsylvania wanted to secure "the natural rights of all people," but maintained that a constitutional amendment was necessary.[36] Senator John Sherman of Ohio also wanted "to give to the freedmen of the Southern States ample protection in all their natural rights,"[37] but argued that legislation "should be in clear and precise language, naming and detailing precisely the rights that these men shall be secured in, so that in the southern States there shall be hereafter no dispute or controversy."[38]

On December 13, the House took its first action on a civil rights

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[34] Id. at 40.

[35] Id. at 39. The Thirteenth Amendment provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

[36] Id. at 40-41.

[37] Id. at 41.

[38] Id. at 42.

issue. Representative John W. Farnsworth of Illinois moved to refer to the Joint Committee of Fifteen[39] a resolution to protect freedmen in "their inalienable rights" and to "secure to the colored soldiers of the Union their equal rights and privileges as citizens of the United States."[40] John W. Chandler, a Democrat from New York, opposed the motion because "the people of the United States" as used in the Constitution meant only whites.[41] The resolution was referred to the committee.[42]

The House members appointed to serve on the Joint Committee included Thaddeus Stevens of Pennsylvania, Elihu B. Washburne of Illinois, Justin S. Morrill of Vermont, Henry Grider of Kentucky, John A. Bingham of Ohio, Roscoe Conkling of New York, George S. Boutwell of Massachusetts, Henry T. Blow of Missouri, and Andrew J. Rogers of New Jersey.[43] Grider and Rogers were Democrats, and the rest were Republicans. On December 18, the House resolved that the committee consider legislation securing to freedmen in the southern states "the political and civil rights of other citizens of the United States."[44]

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[39] See supra note 27 and accompanying text.

[40] Id. at 46 (Dec. 13, 1865).

[41] Id. at 47.

[42] Id. at 48.

[43] Id. at 57 (Dec. 14, 1865).

[44] Id. at 69 (Dec. 18, 1865).

The next day, Senator Trumbull gave notice that he would introduce a bill enabling the Freedmen's Bureau "to secure freedom to all persons in the United States, and protect every individual in the full enjoyment of the rights of persons and property and furnish him with the means for their vindication."[45] The bill would be justified under the pending Thirteenth Amendment,[46] which prohibited slavery and empowered Congress to enforce the prohibition.

Minutes later, President Andrew Johnson transmitted to the Senate the report of Major General Carl Schurz, who the President had sent to tour the South. [47] There followed a heated discussion on the importance of that report.[48] The widely publicized report, on which Congress placed great credence,[49] reviewed in detail abuses committed against freedmen, including deprivation of the right to keep and bear arms: "The militia [is] organized for the distinct purpose of enforcing the authority of the whites over the blacks . . . ."[50] In addition to other methods that were meant to restore slavery in fact,

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[45] Id. at 77 (Dec. 19, 1865).

[46] Id.

[47] Id. at 78.

[48] Id. at 79.

[49] J. BURGESS, RECONSTRUCTION AND THE CONSTITUTION, 1866-1876, 64 (1902).

[50] Sen. Exec. Doc. No. 2, 39th Cong., 1st Sess., pt. 1, at 40 (Dec. 13, 1865).

planters advocated that "the possession of arms or other dangerous weapons without authority should be punished by fine or imprisonment and the arms forfeited."[51] The report brought to the attention of Congress an ordinance enacted in Opelousas and in other Louisiana towns: "No freedman who is not in the military service shall be allowed to carry firearms, or any kind of weapon, without the special permission of his employer, in writing, and approved by the mayor or president of the board of police." Punishment was forfeiture of the weapon and either five days imprisonment and a fine of five dollars.[52] "This ordinance, if enforced, would be slavery in substance," and violated the Emancipation Proclamation, held the Freedmen's Bureau.[53]

The holiday adjournment nearing, the Senate appointments to the Joint Committee were finally made, and included William P. Fessenden of Maine, J.W. Grimes of Iowa, Ira Harris of New York, Jacob M. Howard of Michigan, Reverdy Johnson of Maryland, and George H. Williams of Oregon.[54] Johnson was the sole Democrat. Meanwhile, S. 9, Senator Wilson's civil rights bill, continued to be debated with great animosity between proponents and opponents.[55]

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[51] Id. at 85.

[52] Id. at 93-95.

[53] Id. at 96.

[54] CONG.GLOBE at 106 (Dec. 21, 1865).

[55] Id. at 109. See id. at 90-97.

III. INTRODUCTION OF THE FREEDMEN'S BUREAU AND CIVIL RIGHTS BILLS

On January 5, 1866, Senator Trumbull introduced S. 60, a bill to enlarge the powers of the Freedmen's Bureau, and S. 61, the civil rights bill, both of which were referred to the Judiciary Committee.[56] These bills would become of unprecedented importance in regard to both the passage of the Fourteenth Amendment and to recognition of the right to keep and bear arms. In the House, on January 8, Representative Eliot introduced a bill to amend the existing law establishing the Freedmen's Bureau, and it was referred to the Select Committee on Freedmen.[57]

On January 11, Senator Trumbull, Chairman of the Committee on the Judiciary, reported S. 60. and S. 61.[58] On the 12th, at Trumbull's request, the Senate briefly considered S. 60, the Freedmen's Bureau bill. S. 60 provided for jurisdiction of the Freedmen's Bureau in areas where the war had interrupted the ordinary course of judicial proceedings and:

> 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

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[56] Id. at 129 (Jan. 5, 1866).

[57] Id. at 135 (Jan. 8, 1866).

[58] Id. at 184 (Jan. 11, 1866). See also supra notes _____ and accompanying texts.

> real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate) 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. . . .[59]

Trumbull then opened up consideration of S. 61, the civil rights bill. It contained virtually identical language as the above, including the right "to full and equal benefit of all laws and proceedings for the security of person and property. . . ."[60]

While the Senate was openly considering the above statutory protections, the Joint Committee, behind closed doors, began to examine constitutional amendments to protect the same rights. It is instructive to compare the Freedmen's Bureau bill with the draft of a constitutional amendment proposed by John Bingham to the Joint Committee that same day: "The Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property."[61] Thaddeus Stevens proposed another draft as follows: "All laws, state or national, shall operate impartially and equally on all persons without regard to race or color."[62] These proposals resemble

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[59] Id. at 209 (Jan. 12, 1866)(emphasis added).

[60] Id. at 211.

[61] B. KENDERICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 46 (1914). Hereafter cited "JOURNAL OF THE JOINT COMMITTEE."

[62] Id.

what became the due process and equal protection clauses of the Fourteenth Amendment. A subcommittee consisting of William Fessenden, Stevens, Jacob Howard, Roscoe Conkling, and Bingham was appointed to consider proposed constitutional amendments.[63]

That same day, the House continued consideration of H.R. 1, a bill to allow black suffrage in the District of Columbia. Representative Chandler of New York quoted from a speech by Hon. Michael Hahn of Louisiana to the National Equal Suffrage Association on November 17, 1865, where Hahn had stated:

> It is necessary, in beginning our work, to see that slavery throughout the land is effectually abolished, and that the freedmen are protected in their freedom, and in all the advantages and privileges inseparable from the condition of freedom. . . . But I, who come from the South, and have seen the working of the institution for over a quarter of a century, tell you--and I do it regrettingly--that slavery in practice and substance still exists. . . .
>
> "The right of the people to keep and bear arms" must be so understood as not to exclude the colored man from the term "people."[64]

Thus, proponents saw suffrage and the right to keep and bear arms as dual protections in a free society.

The public was aware of the need to provide safeguards for freedoms in the Bill of Rights, especially those on which the states were infringing. On January 13, Harper's Weekly informed its readers

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[63] Id. at 45-47.

[64] CONG. GLOBE at 217 (Jan. 12, 1866).

of Mississippi's prohibition on firearms possession by freedmen in these words:

> The militia of this country have seized every gun and pistol found in the hands of the (so called) freedmen of this section of the country. They claim that the statute laws of Mississippi do not recognize the negro as having any right to carry arms. They commenced seizing arms in town, and now the plantations are ransacked in the dead hours of night. . . . The colored people intend holding a meeting to petition the Freedman's Bureau to re-establish their courts in the State of Mississippi, as the civil laws of this State do not, and will not protect, but insist upon infringing on their liberties.[65]

Such reports engendered demands that Congress accord protection to the right to have arms and to the freedom from unreasonable search and seizure.

On January 18, Senator William M. Stewart of Nevada called S. 60 "a practical measure . . . for the benefit of the freedmen, carrying out the constitutional provision to protect him in his civil rights."[66] Also supporting S. 61, Stewart explained:

> I am in favor of legislation under the constitutional amendment that shall secure to him a chance to live, a chance to hold property, a chance to be heard in the courts, a chance to enjoy his civil rights, a chance to rise in the scale of humanity, a chance to be a man. . . . The Senator from Illinois has introduced two bills, well and carefully prepared, which if passed by Congress will give full and ample protection under the constitutional amendment to the negro in his civil liberty, and guaranty to him civil rights, to which we are pledged.[67]

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[65] Harper's Weekly, Jan. 13, 1866, at 3, col. 2.

[66] CONG. GLOBE at 297 (Jan. 18, 1866).

[67] Id. at 298.

The same day in the House, Chairman Eliot of the Select Committee on Freedmen reported H.R. 87,[68] the House version of S. 60.

Meanwhile, the next day in the Senate, Thomas A. Hendricks (Democrat of Indiana) attacked S. 60 in detail. Hendricks feared that §7 of the bill, which guaranteed civil rights to all, including "the full and equal benefit of all laws and proceedings for the security of person and estate,"[69] might apply in Indiana. "We do not allow to colored people there [Indiana] many civil rights and immunities which are enjoyed by the white people. It became the policy of the State in 1852 to prohibit the immigration of colored people into the State."[70] Senator Hendricks was aware that his own state's constitution provided that "the people have a right to bear arms for the defence of themselves and the State."[71] Hendricks may have feared that, should the bill pass, blacks would have this right, but he limited his remarks to issues such as racial intermarriage.[72]

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[68] Id. at 302.

[69] Id. at 318 (Jan. 19, 1866).

[70] Id. "No negro or mulatto shall come into, or settle in, the state after the adoption of this constitution." Ind. Const., Art. XIII, §1 (1851).

[71] Ind. Const., Art. I, §32 (1851). A delegate at the constitutional convention which approved this provision, Hendricks had proposed that no law should "deprive" this right rather than "restrict" this right. JOURNAL OF THE CONVENTION OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION 574 (1851).

[72] CONG. GLOBE at 318 (Jan. 19, 1866).

Senator Trumbull denied that the jurisdiction of the Freedmen's Bureau would apply in Indiana, because it had not been in rebellion and its courts were open.[73] Willard Saulsbury, a Democrat from Delaware, noted that his state was the last slaveholding state in the United States, and "I am one of the last slaveholders in America."[74] Trumbull stated that while Delaware was not a rebellious State, the Bureau would protect freedmen there, and in fact would protect them in any state where they congregated in large numbers.[75] However, Bureau judicial authority under §7 of the bill would exist only in the rebellious states where the civil tribunals were overthrown.[76]

Trumbull argued that the Thirteenth Amendment, since it abolished slavery, would justify congressional legislation to eradicate the incidents of slavery anywhere. "When slavery was abolished, slave codes in its support were abolished also."[77] These codes prohibited, of course, the keeping and bearing of arms by slaves. "Even some of the non-slaveholding States passed laws abridging the rights of the colored man which were restraints on liberty. When slavery goes, all this system of legislation, devised in the interest of slavery . . .

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[73] Id. at 320.

[74] Id. at 321.

[75] Id.

[76] Id. at 322.

[77] Id.

goes with it."[78] Referring respectively to both the Freedmen's Bureau bill and the civil rights bill, Trumbull continued: "Its provisions are temporary; but here is another bill on your table, and somewhat akin to this, which is intended to be permanent, to extend to all parts of the country, and to protect persons of all races in equal civil rights."[79]

In the House, Representative Henry C. Deming of Connecticut introduced a constitutional amendment, similar to that of Bingham's, stating: "That Congress shall have power to make all laws necessary and proper to secure to all persons in every State equal protection in their rights of life, liberty, and property."[80] This would require "that the freedman shall be secured an absolute equality with the white man before the civil and criminal law, and shall be endowed with every political right necessary to maintain that equality . . . ."[81]

The next day, the Senate continued to debate S. 60. James Guthrie of Kentucky, a Democrat, opposed the extension of the Bureau's authority to his State, and argued that freedmen there had the same civil rights as whites.[82] Samuel C. Pomeroy of Kansas pointed out that

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[78] Id.

[79] Id.

[80] Id. at 331 (Jan. 19, 1866).

[81] Id.

[82] Id. at 335-36.

freedmen still could not testify against whites in Kentucky.[83]

On the 20th, the Joint Committee's subcommittee considering drafts of constitutional amendments reported to the full Joint Committee an expanded form of the Bingham proposal which read as follows: "Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property."[84] A wholly separate proposed amendment would have stated, in addition to the above: "All provisions in the Constitution or laws of any State, whereby any distinction is made in political or civil rights or privileges, on account of race, creed or color, shall be inoperative and void."[85] The word "creed" was deleted by the full committee, perhaps to exclude atheists or Confederate sympathizers.[86] Thaddeus Stevens proposed the following, but then withdrew it: "And whenever the words 'citizen of the United States' are used in the Constitution of the United States, they shall be construed to mean all persons born in the United States, or naturalized, excepting Indians."[87]

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[83] Id. at 337.

[84] JOURNAL OF THE JOINT COMMITTEE at 51.

[85] Id. at 50.

[86] Id. at 53.

[87] Id. at 52-53.

IV. "CONSTITUTIONAL PROTECTION IN KEEPING ARMS, IN HOLDING PUBLIC ASSEMBLIES . . ."

On January 22, Charles Sumner of Massachusetts made the following declaration to the Senate:

> I also offer a memorial from the colored citizens of the State of South Carolina in convention assembled, representing, as the Senate will remember, four hundred and two thousand citizens of that State, being a very large majority of the population. They set forth the present condition of things in South Carolina, and pray that Congress will see that the strong arm of law and order is placed over the entire people of that State that life and property may be secure. They also ask that government in that State shall be founded on the consent of the governed, and insist that 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. This memorial is accompanied by a printed document containing a report of the proceedings of this colored convention in South Carolina.[88]

The convention, held at Charleston in November 1865, included prominent blacks from South Carolina, several of whom would later be among America's first black congressmen.[89] Agents of the Freedmen's Bureau and pro-Republican newspaper publishers were among the delegates.[90] The specific language of the memorial to Congress concerning the Second Amendment was as follows:

> We ask that, inasmuch as the Constitution of the Untied States explicitly declares that the right to keep and bear arms shall not be infringed--and the Constitution is the Supreme law

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[88] Id. at 337 (Jan. 22, 1866) (emphasis added).

[89] 2 PROCEEDINGS OF THE BLACK STATE CONVENTIONS, 1840-1865, at 284 (P. Foner and G. Walker eds. 1980).

[90] Id. at 303.

> of the land--that the late efforts of the Legislature of this State to pass an act to deprive us or [sic] arms be forbidden, as a plain violation of the Constitution, and unjust to many of us in the highest degree, who have been soldiers, and purchased our muskets from the United States Government when mustered out of service.[91]

The only other guarantee in the Bill of Rights explicitly mentioned in the memorial related to jury trials and, indirectly, assembly.[92] Senator Summer's reference to free speech and press was an embellishment not appearing in the memorial, the emphasis of which on the Second Amendment indicated the perceived fundamental character of that right by the black convention.

The memorial was referred to the Joint Committee on Reconstruction.[93] Subcommittees of the Joint Committee began to hold hearings that same day. These hearings would document the violation of the freedmen's rights, including the right to keep and bear arms. Analysis of the hearings as they occurred contributes to the understanding of the legislative process as it unfolded on the floor of Congress.

In a preview of the testimony to come, the first witness testified about murders and acts of violence against freedmen in the Southern

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[91] Id. at 302.

[92] Id.

[93] CONG.GLOBE 337 (Jan. 22, 1866).

states.[94] It is easily understandable why members of Congress would focus on the individual right to keep and bear arms for protection against oppression, including deprivation of rights and racial violence enforced or sanctioned by local sheriffs and state militias.

When the Senate debated S. 60 (the Freedmen's Bureau bill) that day, Wilson referred to the laws of South Carolina, Mississippi, Louisiana, and other states as "codes of laws that practically make the freedman a peon or a serf."[95] After further debate, the committee of the whole reported the bill to the Senate.[96]

S. 60 was then debated by the Senate. On January 23, Willard Saulsbury of Delaware, attacked §7 of S. 60--which included protection for the right "to full and equal benefit of all laws and proceedings for the security of person and property"--as follows: "For the first time in the history of the legislature of this country it is attempted by Congress to invade the States of this Union, and undertake to regulate the law applicable to their own citizens."[97]

Yet even opponents of the bill recognized many of the same fundamental rights as the proponents; they only differed on whether

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[94] REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REP. NO. 30, 39th CONG., 1st SESS., pt. 3, at 3-4 (1866). Hereafter cited "REPORT OF THE JOINT COMMITTEE."

[95] CONG. GLOBE at 340 (Jan. 22, 1866).

[96] Id. at 349.

[97] Id. at 363 (Jan. 23, 1866).

freedmen were entitled to all the rights of citizenship, and whether the federal government should enforce these rights. Garrett Davis of Kentucky, who sought amendments to the bill, described himself as an "old-line Whig" who derived his principles "from the Constitution and from the interpretations of that instrument by Hamilton and Madison and Marshall and Webster and Clay."[98] While he had never been a Democrat, he continued:

> But there were some principles upon which those great, grand, noble old parties agreed; and what were they? They were for the Union under and by the Constitution. They were for the subordination of the military to the civil power in peace, in a war, and always. They were for the writ of habeas corpus. They were for the trial by jury according to the forms of the common law. They were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense. They were for every right and liberty secured to the citizens by the Constitution.[99]

Davis did not object to any of the bill's statements of rights, offering only unrelated amendments.[100] His objections to §7, made in a speech on January 25, were procedural, such as that it gave the Bureau judicial powers, deprived citizens of the right of trial by jury, and provided for enforcement by the military.[101]

Trumbull came to the bill's rescue, arguing that such rights are

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[98] Id. at 371.

[99] Id.

[100] Id. at 374-75. See also id. at 394-400 (Jan. 24, 1866).

[101] Id. at 416-17 (Jan. 25, 1866).

meaningless in places where the civil power is overthrown and the courts are not in operation.[102] A vote was then taken, and the Freedmen's Bureau bill passed 37 to 10.[103]

While the above debate was taking place, on January 24 the Joint Committee considered John Bingham's proposed constitutional amendment. Motions by Jacob Howard and George Boutwell to guarantee suffrage were defeated.[104] A subcommittee composed of Bingham, Boutwell, and Andrew Rogers--the New Jersey Democrat who had led the Opposition in the House--was appointed to review the proposal further.[105]

Meanwhile, members of the Joint Committee continued to hear how the state militias were repressing freedmen. On January 26, an army general noted that in Alabama, "the roads and public highways are patrolled by the State militia, and no colored man is allowed to travel without a pass from his employer . . . ."[106] "The arming of the militia is only for the purpose of intimidating the Union men, and enforcing upon the negroes a species of slavery . . . ."[107]

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[102] Id. at 420.

[103] Id. at 421. An analysis of the roll call voting on the Freedmen's Bureau bill and the Fourteenth Amendment is set forth in the Appendix herein.

[104] JOURNAL OF THE JOINT COMMITTEE at 55.

[105] Id. at 55-56.

[106] REPORT OF THE JOINT COMMITTEE, pt. 3, at 8.

[107] Id. at 10.

Members of the Joint Committee who would play a key role in adoption of the Fourteenth Amendment then asked questions concerning the keeping and bearing of arms. On January 27, a federal employee testified to having been threatened with murder, and Senator Jacob Howard, who would introduce to the Senate the proposed Fourteenth Amendment, asked: "Had you any arms?" The answer: "I never carried arms in my life."[108] Howard persisted, "You were unarmed and in the power of a drunken man who was armed?" The witness replied that the man "would have shot me as quick as he would have shot a hog if I had got into an altercation . . . ."[109]

That same day, the Joint Committee considered a draft of the constitutional amendment reported by the subcommittee of Bingham, Boutwell, and Rogers. As amended by that Committee, it now read: "Congress shall have power to make laws which shall be necessary and proper to secure all persons in every state full protection in the enjoyment of life, liberty and property; and to all citizens of the United States in every State the same immunities and also equal political rights and privileges."[110] Reverdy Johnson of Maryland lost his motion to strike out the second clause.[111] Further consideration

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[108] Id. at 20.

[109] Id. at 22.

[110] JOURNAL OF THE JOINT COMMITTEE at 56-57.

[111] Id. at 57.

was postponed until the next meeting.[112]

On January 29, the Senate went on to consider S. 61, the civil rights bill. Lyman Trumbull opened debate on the bill by arguing that it enforced the Thirteenth Amendment. He stated:

> Of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slaveholding States laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?
>
> It is the intention of this bill to secure those rights. The laws in the slaveholding States have made a distinction against persons of African descent on account of their color, whether free or slave. I have before me the statutes of Mississippi. They provide that if any colored person, any free negro or mulatto, shall come into that State for the purpose of residing there, he shall be sold into slavery for life. If any person of African descent residing in that State travels from one county to another without having a pass or a certificate of his freedom, he is liable to be committed to jail and to be dealt with as a person who is in the State without authority. Other provisions of the statute prohibit any negro or mulatto from having fire-arms; similar provisions are to be found running through all the statutes of the late slaveholding States.
>
> When the constitutional amendment was adopted and slavery abolished, all these statutes became null and void, because they were all passed in aid of slavery, for the purpose of maintaining and supporting it. Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the

[112] Id. at 58.

constitutional amendment.[113]

Trumbull went on to quote §7 of the bill, which referred to "full and equal benefit of all laws and proceedings for the security of person and property."[114] As is clear, Trumbull made two pertinent assumptions: first, that both positive rights and equal protection were to be guaranteed, not just equality; and second, that a prohibition on having firearms was a badge of slavery.

He also quoted §2, Article IV of the Constitution, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Trumbull asked: "What rights are secured to the citizens of each State under that provision? Such fundamental rights as belong to every free person."[115] Trumbull went on to refer to "the great fundamental rights set forth in this bill . . . as appertaining to every freeman."[116] The bill would secure "freedom in fact and equality in civil rights to all persons in the United States."[117]

James A. McDougall, a Democrat from New York, asked for the meaning of "civil rights," to which Trumbull replied:

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[113] CONG. GLOBE at 474 (Jan. 29, 1866) (emphasis added).

[114] Id.

[115] Id.

[116] Id. at 475.

[117] Id. at 476.

> The first section of the bill defines what I understand to be civil rights: the right to make and enforce contracts, to sue and be sued, and to give evidence, to inherit, purchase, sell, lease, hold, and convey real and personal property, and to full and equal benefit to all laws and proceedings for the security of person and property. These I understand to be civil rights, fundamental rights belonging to every man as a free man, and which under the Constitution as it now exists we have a right to protect every man in.[118]

Willard Saulsbury of Delaware led the attack on the bill, denying its basis in the Thirteenth Amendment.[119] Raising the specter of black suffrage, he stated that "your bill gives to these persons every security for the protection of person and property which a white man has"--including the ballot.[120] Similarly, Saulsbury continued:

> This bill positively deprives the State of its police power of government. In my State for many years, and I presume there are similar laws in most of the southern States, there has existed a law of the State based upon and founded in its police power, which declares that free negroes shall not have the possession of firearms or ammunition. This bill proposes to take away from the States this police power, so that if in any State of this Union at anytime hereafter there shall be such a numerous body of dangerous persons belonging to any distinct race as to endanger the peace of the State, and to cause the lives of its citizens to be subject to their violence, the State shall not have the power to disarm them without disarming the whole population.[121]

Actually, the bill was even worse to an ex-slaveholder of Saulsbury's mentality, because it guaranteed "full and equal"--not just

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[118] Id.

[119] Id.

[120] Id. at 478.

[121] Id.

equal--"benefit of all laws and proceedings for the security of person and property." Trumbull's comments clarify the intent to protect positive rights, not just equality which could include equal slavery for everyone. The states could not, by the bill's language and Trumbull's logic, equally disarm the whole population.

Senator Edgar Cowan of Pennsylvania made this point on January 30, noting of the Thirteenth Amendment: "Its intention was to make him the opposite of a slave, to make him a freeman."[122] Equality in deprivation of rights was not contemplated.

The same day, the House took up consideration of the Freedmen's Bureau bill. Chairman Eliot of Massachusetts reported the committee substitute.[123] As an example of black codes the bill was designed to nullify, Eliot quoted the ordinance of Opelousas, Louisiana, of July 3, 1865, which required freedmen to have a pass, prohibited their residence within the town, prohibited their religious and other meetings, and infringed their right to keep and bear arms as follows:

> 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

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[122] Id. at 504 (Jan. 30, 1866).

[123] Id. at 512.

work.[124]

In the Joint Committee that day, in response to questions by Congressman Boutwell, Major General Clinton Fisk told of the paranoia in the South concerning blacks with firearms. "I went myself into northern Mississippi to look after a reported insurrection of negroes there, and found the whole thing had grown out of one negro marching through the woods with his fowling-piece [shotgun] to shoot squirrels to feed his family."[125] Fisk also pointed out the need to protect the right of freedmen to keep and bear arms:

> One of the causes for the late disturbances in northern Mississippi was the arming of their local militia. They were ordered by the adjutant general of the State to disarm the negroes and turn their arms into the arsenals. That caused great dissatisfaction and disturbance. We immediately issued orders prohibiting the disarming of the negroes, since which it has become more quiet.[126]

At the hearings on the following day, during questioning by Senator Howard, the committee obtained the report of Brigadier General Charles H. Howard to his brother and head of the Freedmen's Bureau, Major General O. O. Howard.[127] Dated December 30, 1865, the report stated:

The militia organizations in the opposite county of South Carolina

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[124] Id. at 517.

[125] REPORT OF THE JOINT COMMITTEE, pt. 3, at 30.

[126] Id. at 32.

[127] Id at 39.

> (Edgefield) were engaged in disarming the negroes. This created great discontent among the latter, and in some instances they had offered resistance. In previous inspecting tours in South Carolina much complaint reached me of the misconduct of these militia companies towards the blacks. Some of the latter of the most intelligent and well-disposed came to me and said: "What shall we do? These militia companies are heaping upon our people every sort of injury and insult, unchecked . . . ." I assured them that this conduct was not sanctioned by the United States military authorities, and that it would not be allowed . . . .
>
> Now, at Augusta, about two months later, I have authentic information that these abuses continue. In southwestern Georgia, I learned that the militia had done the same, sometimes pretending to act under orders from United States authorities. I reported these facts to General Branon, commanding the department of Georgia, and to General Sickles, commanding the department of South Carolina.
>
> I am convinced that these militia organizations only endanger the peace of the communities where they exist, and are a source of constant annoyance and injury to the freed people; that herein is one of the greatest evils existing in the southern States for the freedmen. They give the color of law to their violent, unjust, and sometimes inhuman proceedings.[128]

General Howard recommended the abolition of the State militias.[129]

Senator Howard conducted a great deal, perhaps most, of the examination of witnesses at the hearings. A federal tax commissioner from Fairfax County, Virginia, responded to a question by the Senator concerning the disposition of whites toward freedmen as follows:

> The corporate authorities of Alexandria refused to grant them licenses to do business, the law of the State not allowing it; and attempts were made in that city to enforce the old law against them in respect to whipping and carrying fire-arms, nearly or quite up to the time of the establishment of the Freedmen's

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[128] Id. at 46.

[129] Id. at 46-47.

Bureau in that city.[130]

V. S. 60 AMENDED TO RECOGNIZE "THE CONSTITUTIONAL RIGHT OF BEARING ARMS"

On February 1, Senator Benjamin G. Brown of Missouri introduced, and the Senate adopted, a resolution that the Joint Committee consider an amendment to the Constitution "so as to declare with greater certainty the power of Congress to enforce and determine by appropriate legislation all the guarantees contained in that instrument . . . ."[131] This resolution thus anticipated the intent of what was to become the Fourteenth Amendment to incorporate the Bill of Rights.

Debate on the civil rights bill centered on whether citizenship would be race-neutral, with some Western senators wishing to exlude Indians (as well as Chinese) from being considered citizens. Senator George H. Williams of Oregon made the following argument against recognition of Indians as citizens:

> Now sir, in the State of Oregon it has been found necessary to pass laws regulating the intercourse between the Indians and white persons. The Indians are put under certain disabilities, and it is supposed that those disabilities are necessary in order to protect the peace and safety of the community. As an illustration, it is made an indictable offense in the State of Oregon for any white man to sell arms or ammunition to any Indians. Suppose these Indians have equal rights with white men in that State. Then if a man is indicted for selling arms and ammunition to an Indian, may he not defend that prosecution successfully upon the ground that Congress has declared that an Indian is a citizen, and has the same right to buy and hold any

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[130] Id., pt. 2, at 21.

[131] CONG. GLOBE 566 (Feb. 1, 1866) (emphasis added).

> kind of property that a white man of the State has? In that way, the white people of that State would be deprived of the power of protecting themselves, or of enacting such laws as they might deem necessary for their own protection.[132]

While Senator Williams focused on the issue of firearms in the context of equal rights to buy and sell, it was just as obviously unacceptable to recognize a right of Indians to keep and bear arms. The suppression of Native Americans and the seizure of their lands was proceeding in earnest. Thus, the Senate voted to define all persons born in the United States, without distinction of color, as citizens, "excluding Indians not taxed."[133]

In the House, debate on the Freedmen's Bureau bill, S. 60, began with a procedural ruling that amendments could not be offered just then. Nathaniel P. Banks, a former governor of Massachusetts and Union general, stated: "I shall move, if I am permitted to do so, to amend the seventh section of this bill by inserting after the word 'including' the words 'the constitutional right to bear arms;' so that it will read, 'including the constitutional right to bear arms, the right to make and enforce contracts, to sue, &c.'"[134] The section would thus have recognized "the civil rights belonging to white persons, including the constitutional right to bear arms . . . ."

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[132] Id. at 573.

[133] Id. at 574-75.

[134] Id. at 585.

The House then returned to debate on the bill. Representative Ignatius Donnelly of Minnesota, supporting passage of the bill, noted that "there is an amendment offered by the distinguished gentleman from Ohio [Mr. Bingham] which provides in effect that Congress shall have power to enforce by appropriate legislation all the guarantees of the Constitution."[135] Thus, Bingham's draft of the Fourteenth Amendment was seen as protecting Bill of Rights guarantees.

That same day, a witness before the Joint Committee submitted a resolution of Union men from Arkansas stating in part that "he [the negro] is entitled to all the 'absolute rights' of a citizen, namely: personal security, personal liberty, and private property, and to the necessary legislation to secure him the full and perfect enjoyment of those rights."[136] However, suffrage was not considered an absolute right.[137]

On February 2, Senator Davis of Kentucky introduced a substitute for S. 61, the Civil Rights bill. It declared that any person "who shall subject or cause to be subjected a citizen of the United States to the deprivation of any privilege or immunity in any State to which such citizen is entitled under the Constitution and laws of the United States" shall have an action for damages, and that such conduct would

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[135] Id. at 586.

[136] REPORT OF THE JOINT COMMITTEE, pt. 3, at 54.

[137] Id. at 55.

be a misdemeanor.[138] This suggests that even opponents of the civil rights bill were willing to concede that the explicit guarantees of the Bill of Rights should be protected. Davis felt that this compromise would be grounded in the privileges-and-immunities clause.[139]

Senator Henry Wilson of Massachusetts argued the necessity of the civil rights bill on the basis that military decrees were still necessary to overturn the black codes. "General Sickles has just issued an order in South Carolina of twenty-three sections, more full, perfect, and complete in their provisions than have ever been issued by an official in the country, for the security of the rights of the freedmen."[140] That order, which was quoted in full in later floor debates, recognized "the constitutional rights of all loyal and well disposed inhabitants to bear arms," and the same right for ex-Confederates who had taken the amnesty oath.[141]

While decrying "military despotism," Senator Edgar Cowan of Pennsylvania conceded that, by the Thirteenth Amendment, "the slave codes of the several States have been abolished."[142] After further debate, the civil rights bill passed the Senate by a vote of 33 to

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[138] CONG. GLOBE 595 (Feb. 2, 1866)(emphasis added).

[139] Id.

[140] Id. at 603.

[141] Id. at 908-09 (Feb. 17, 1866).

[142] Id. at 603 (Feb. 2, 1866).

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On February 3, an interesting view of the scope of S. 60's reference to "all laws and proceedings for the security of person and estate" was set forth by Representative L. H. Rousseau of Kentucky. A Democrat and an opponent of the bill, he quoted §7 and then referred in part to "the security to person and property from unreasonable search, and in various other provisions."[144] This suggests that he considered the Fourth Amendment and other Bill of Rights provisions to be encompassed in the "laws and proceedings for the security of person and estate." This would be declared explicitly with reference to the Second Amendment.[145]

On the same day in the Joint Committee, Senator Howard asked Bureau official J. W. Alvord, who had visited most of the Southern States, the following:

> Question. Have the negroes arms?
>
> Answer. Not generally, and yet I think some of them have arms.
>
> Question. Do they keep them publicly in their houses so that they can be seen, or are they concealed.
>
> Answer. It may be that some of them are concealed, but generally they are proud of owning a musket or fowling-piece.

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[143] Id. at 606-07.

[144] Id., App., at 69 (Feb. 3, 1866).

[145] Act of July 16, 1866, 14 STATUTES AT LARGE 173, 176.

They use them often for the destruction of vermin and game.[146]

The Joint Committee met in secret that day to consider the proposed constitutional amendment. Bingham offered the following substitute for the subcommittee draft: "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 (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)."[147] The substitute was agreed to by a nonpartisan vote of 7 to 6, with Democrat Andrew Rogers joining with Jacob Howard in voting in the affirmative.[148] Of course, Rogers then voted against the amendment as such.[149]

In House debate on February 5, Representative Lawrence S. Trimble of Kentucky, a Democrat, argued that S. 60 (the Freedmen's Bureau bill) was based on military rule and violated the Fourth, Fifth, and Sixth Amendments, which he called "these inalienable rights of an American freeman."[150] Bill supporters pointed to the rights violated under

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[146] REPORT OF THE JOINT COMMITTEE, pt. 2, at 246.

[147] JOURNAL OF THE JOINT COMMITTEE at 61.

[148] Id.

[149] Id.

[150] CONG. GLOBE at 648 (Feb. 5, 1866).

current State law. Representative Josiah B. Grinnell of Iowa complained: "A white man in Kentucky may keep a gun; if a black man buys a gun he forfeits it and pays a fine of five dollars, if presuming to keep in his possession a musket which he has carried through the war."[151] In Kentucky, according to the Report of the Commissioner of the Freedmen's Bureau, "the civil law prohibits the colored man from bearing arms," and

> their arms are taken from them by the civil authorities. . . . Thus, the right of the people to keep and bear arms as provided in the Constitution is infringed . . . .[152]

Representative Samuel McKee of Kentucky noted that 27,000 black soldiers from Kentucky

> have been returned to their homes by the order of the Secretary of War, approved by the President, and they are allowed to retain their arms. I suppose those men, who are now freedmen, would like to have this law to protect them. . . . As freedmen they must have the civil rights of freemen.[153]

Congressman Eliot, "by instruction of the select committee on the Freedmens' Bureau," offered a substitute for S. 60.[154] He proceeded "to explain the changes proposed by the select committee," including the following:

> The next amendment is in the seventh section, in the

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[151] Id. at 651.

[152] Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236 (1866).

[153] CONG. GLOBE 654 (Feb. 5, 1866).

[154] Id.

> 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."[155]

As noted, Representative Nathaniel Banks had suggested this language four days earlier, although he would then have placed the term "the constitutional right to bear arms" first in the list of civil rights.[156] Banks and Eliot both represented Massachusetts, although the above language seems to have been supported by consensus of all Republicans.

John Bingham, whose proposed constitutional amendment was being debated, was a member of the Select Committee on Freedmen, which had instructed Eliot to report the above substitute for S. 60. While the House debated other provisions, no one objected to the proposed amendment to S. 60 explicitly recognizing the right to bear arms.

Arguing for adoption of the Freedmen's Bureau bill, Eliot quoted from a report on Kentucky from Brevet Major General Fisk to General Howard, Commissioner of the Freedmen's Bureau, stating in part:

> On the very day last week that [Senator] Garret Davis [of Kentucky] was engaged in denouncing the Freedmen's Bureau in the United States Senate, his own neighbors, who had fought gallantly in the Union Army, were pleading with myself for the protection which the civil authorities failed to afford. The civil law prohibits the colored man from bearing arms; returned soldiers are, by the civil officers, dispossessed of their arms and fined

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[155] Id.

[156] Id. at 585 (Feb. 1, 1866).

for violation of the law.[157]

Eliot also quoted from a letter from a teacher at a freedmen's school in Maryland. Because of attacks on the school, "both the mayor and sheriff have warned the colored people to go armed to school, (which they do,). . . . The superintendent of schools came down and brought me a revolver."[158]

The next day, a vote was taken in the House on the final passage of S. 60, the Freedmen's Bureau bill. The Select Committee's substitute as reported by Eliot, which included "the constitutional right to bear arms" as a "civil right,"[159] passed by a vote of 136 to 33.[160]

In the Senate the following day, Lyman Trumbull moved that the House amendments to S. 60 be referred to the Committee on the Judiciary.[161] In the Joint Committee, Senator Howard questioned a loyalist from rural Virginia, who testified that no danger existed of either a negro insurrection or a revival of the rebellion. Part of this discussion was as follows:

> Question. Have the negroes arms?

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[157] Id. at 657 (Feb. 5, 1866).

[158] Id. at 658.

[159] Id. at 1292.

[160] Id. at 688 (Feb. 6, 1866).

[161] Id. at 702 (Feb. 7, 1866).

Answer. Not that I know of.

Question. Have these secessionists, who have been in the rebellion, generally arms at their dwellings?

Answer. I do not know; the officers retained their side arms, and you may often see a gentlemen riding with pistols; there are some few fowling-pieces and arms of that kind in the neighborhood. If there are arms I have no knowledge of them.[162]

In the Joint Committee on February 8, Senator Ira Harris of New York asked a Mississippi judge about laws passed in his State concerning freedmen. The judge responded in part:

> They also enacted they should be disarmed, which grew out of an excitement in the country at the time there was likely to be an insurrection. . . . It was believed to exist by the officer of the Freedmen's Bureau for the State, but which I think was without foundation, and is now so understood.[163]

That same day, Senator Trumbull informed the Senate that he was instructed by the Committee on the Judiciary to report back S. 60 and to recommend that the Senate concur in the House amendments.[164] Explaining the amendments, 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.[165]

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[162] REPORT OF THE JOINT COMMITTEE, pt. 2, at 68.

[163] Id., pt. 3, at 68.

[164] CONG. GLOBE 742 (Feb. 8, 1866)

[165] Id at 743.

Thus the author of the Freedmen's Bureau bill and of the civil rights bill believed that the common language of both bills protected the constitutional right of bearing arms.

Once again, opponents objected that S. 60 was based on military rule and denied jury trial.[166] But no one objected to the acknowledgment of the right to keep and bear arms. The Senate then concurred in S. 60 as amended without a recorded vote.[167] Unrelated Senate amendments were approved by the House the next day.[168] The Freedmen's Bureau bill had at last reached final passage by the Congress.

VI. FROM ENFORCEMENT OF THE SECOND AMENDMENT TO THE VETO OF S. 60

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

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[166] Id.

[167] Id. at 748.

[168] Id. at 775 (Feb. 9, 1866).

> 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. . . .[169]

At the Joint Committee on February 10, Senator Howard asked the pro-slavery speaker of the Virginia House of Delegates the following about freedmen: "Have you any idea that they have collected arms together for protection?"[170] The witness responded: "I have not the least idea of anything of the sort. I think they would be very slow to do it."[171]

On the 13th of February, it was reported in both houses of Congress that the Joint Committee 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.[172]

This appears to be the first reported draft of what would become §1 of the Fourteenth Amendment. Now that the Freedmen's Bureau bill had been passed, Congress could turn its attention to a constitutional provision generalizing the same rights.

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[169] Id. at 1292 (emphasis added).

[170] REPORT OF THE JOINT COMMITTEE, pt. 2, at 109.

[171] Id.

[172] CONG. GLOBE 806, 813 (Feb. 13, 1866).

That same day, in a Senate debate on the apportionment of representation, Senator John B. Henderson, a Unionist from Missouri, noted: "General Sickles issued an order at Charleston, with twenty-three sections, making up an entire civil code for the government of South Carolina . . . ."[173] Senator Henry Wilson of Massachusetts dryly added, "The most comprehensive ever made."[174] Henderson attributed the order to President Johnson, because generals "act through the President only . . . ."[175] It is noteworthy that one section of Sickles' order declared that "the constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed . . . ."[176]

The Memorial of Citizens of Tennessee, the unionists in control of the State seeking recognition, was that day referred to the Joint Committee.[177] It included the texts of various acts passed by the Union legislature, including an apparent exemption in favor of all loyalists, perhaps including freedmen, from the State's prohibition on carrying concealed weapons:

> That all discharged Union soldiers, who have served either as State or Federal soldiers, and have been honorably discharged [from] the service, and all citizens who have always been loyal,

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[173] Id., App., at 112 (Feb. 13, 1866).

[174] Id.

[175] Id.

[176] CONG. GLOBE at 908-09 (Feb. 17, 1866).

[177] REPORT OF THE JOINT COMMITTEE, pt. 1, at 1.

> shall be permitted to carry any and all necessary side-arms, being their own private property, for their personal protection and common defence.[178]

The Tennessee legislature also passed a resolution ratifying the Thirteenth Amendment.[179]

The memoralists complained of "the acts of the rebel State government, including . . . the disarming and conscripting of the people . . . ."[180] They pleaded to be represented again in Congress.[181]

Witnesses from other states continued to parade before the committee. A Virginia music professor noted an incident where "two Union men were attacked. . . . But they drew their revolvers and held their assailants at bay."[182] The professor himself was armed for protection.[183]

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[178] Id. at 34.

[179] Id. at 73.

[180] Id. at 94. The Tennessee legislature had passed a war measure confiscating firearms from the public. When the war ended, a person whose gun was seized successfully sued for its value. Smith v. Ishenhour, 43 Tenn. (3 Coldwell) 214, 217 (1866) held:

> In the passage of this Act, the 26th section of the Bill of Rights, which provides, "that the free white men of this State have a right to keep and bear arms for the common defense," was utterly disregarded. This is the first attempt, in the history of the Anglo-Saxon race, of which we are apprised, to disarm the people by legislation.

[181] Id.

[182] Id., pt. 2, at 110.

[183] Id. at 112.

On February 15, Senator Howard questioned an assistant commissioner in the Freedmen's Bureau from Richmond, Virginia. If the Bureau were to be removed, asked Howard, what would be the result of the increased violence toward blacks? The following exchange took place:

> Answer: I think it would eventually result in an insurrection on the part of the blacks; black troops that are about being mustered out, and those that have been mustered out, will all provide themselves with arms; probably most of them will purchase their arms; and will not endure those outrages, without any protection except that which they obtain from Virginia; they have not confidence in their old masters, notwithstanding their great love for them, in which they have tried to make us believe.
>
> Question. Are there many arms among the blacks?
>
> Answer: Yes, sir; attempts have been made, in many instances, to disarm them.
>
> Question. Who have made the attempts?
>
> Answer: The citizens, by organizing what they call "patrols"--combinations of citizens.
>
> Question: Has that arrangement pervaded the State generally?
>
> Answer: No sir; it has not been allowed; they would disarm the negroes at once if they could.
>
> Question. Is that feeling extensive?
>
> Answer. I may say it is universal.[184]

Civil rights were frequently discussed in debates on Reconstruction policy. On February 17, Representative Burton C. Cook

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[184] Id. at 127-28.

of Illinois, noting the importance of the Freedmen's Bureau and civil rights bills, rhetorically asked about the Thirteenth Amendment: "Did this mean only that they [slaves] should no longer be bought and sold like beasts in shambles, or did not mean that they should have the civil rights of freedmen . . .?[185] He went on to advocate adoption of further constitutional amendments to secure full justice and equal rights.[186]

Representative William Lawrence of Ohio discussed the need to protect freedmen, quoting verbatim General D. E. Sickles' General Order No. 1 (dated January 1, 1866) for the Department of South Carolina, which negated the state's prohibition on possession of firearms by blacks and, at the same time, recognized the right of the conquered to bear arms:

> 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:
>
> XVI. The constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons; nor to authorize any person to enter with arms on the premises of another without his consent. No one shall bear arms who has borne arms against the United States, unless he shall have taken the Amnesty oath prescribed in the Proclamation of the President of the United States, dated May 19th, 1865 or the Oath of Allegiance, prescribed in the Proclamation of the President of the United States, dated December 8th, 1863, within the time prescribed therein. And no

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[185] CONG. GLOBE 903 (Feb. 17, 1866).

[186] Id.

disorderly person, vagrant, or disturber of the peace shall be allowed to bear arms.[187]

This "most remarkable order," repeatedly printed in the headlines of the Loyal Georgian,[188] a prominent black newspaper of the time, was thought to have been "issued with the knowledge and approbation of the President if not by his direction."[189] 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 amendment to the Constitution of the

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[187] Id. at 908-09. The proclamation's recognition of the same right of ex-Confederates as for freedmen not only stemmed from the constitutional guarantee but also was apparently in response to such situations as the following:

Mr. Ferebee [N.C.] . . . said that in his county the white citizens had been deprived of arms, while the negroes were almost all of them armed. . . .

Gen. Dockery . . . stated that in his county the white residents had been disarmed, and were at present almost destitute of means to protect themselves against robbery and outrage. 1 DOCUMENTARY HISTORY OF RECONSTRUCTION 90 (FLEMING ed. 1906), citing ANNUAL CYCLOPEDIA 627 (1865).

[188] The Loyal Georgian (Augusta), Feb. 3, 1866, at 1, col 2.

[189] Id. at 2, col. 2.

> 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.[190]

The last paragraph, taken from a Freedmen's Bureau circular, was also printed numerous times in the Loyal Georgian.[191] Indeed, "from the first days of freedom, the right to bear arms was defended in black newspapers. . . ."[192] The proposal of the first draft of the Fourteenth Amendment came about the same time as publication of the above issue of the Loyal Georgian, which followed the congressional debates carefully.[193] The freedmen readership of such newspapers could only have concluded that the new amendment would further protect their right to keep and bear arms as well as their right to many other liberties.

In the Joint Committee on February 17, Representative George S.

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[190] Id. at 3, col. 4 (emphasis in original).

[191] Circular No. 5, Freedmen's Bureau, Dec. 22, 1865. See, e.g., issues of Loyal Georgian for Jan. 20, 27, Feb. 3, 1866.

[192] D. Sterling, THE TROUBLE THEY SEEN: BLACK PEOPLE TELL THE STORY OF RECONSTRUCTION 394 (1976). Sterling documents numerous instances of blacks using firearms for self-defense as well as instances of searches and seizures of firearms by whites from blacks.

[193] E.g., "The Constitutional Amendment in the Senate," The Loyal Georgian, 24 Feb. 1866, at 2, cols. 3-4.

Boutwell of Massachusetts asked an Arkansas State official whether any danger of negro insurrection existed, if blacks were properly treated. The official replied: "No sir, but if they are told that they have no rights which white men are bound to respect, and if federal bayonets are turned against them, they will secrete arms for the purpose of defending themselves."[194]

Boutwell then examined Arkansas Supreme Court Judge Charles A. Harper. Concerning the rights of blacks in that state, Judge Harper stated:

> He has all the civil rights of the white man with the exception of suffrage and bearing arms. That was our purpose in the convention, and we think we have made sufficient change in our bill of rights to carry it out. We think the negro can hold real estate and that his testimony is admissible; but we did not grant him suffrage nor the privilege of bearing arms. The word "white" is not stricken out in the constitution, but we understand that the negro is not under civil disability, except as I have stated . . . . You are well aware that there is a feeling existing between the poor whites and the negroes, and we certainly could not have carried our constitution if we had given the negro all the rights of the white man.[195]

Ironically, the judge noted that the poor whites were nearly all loyalists.[196]

In the Senate on February 19, Henry Wilson of Massachusetts introduced S.R. 32, a joint resolution to disband the militia forces in

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[194] REPORT OF THE JOINT COMMITTEE, pt. 3, at 72.

[195] Id. at 73.

[196] Id. at 74.

most Southern States.[197] Wilson quoted detailed accounts of militia abuses, including the report of Brevet General Howard that had been submitted to the Joint Committee that "the militia organizations . . . in South Carolina (Edgefield) were engaged in disarming the negroes. This created great discontent among the latter . . . ."[198] The same abuses were taking place in Georgia.[199]

In opposition to referring the joint resolution to committee, Senator Willard Salisbury of Delaware argued that the power of Congress under Article I, §8 to organize, arm, and discipline the militia

> does not give power to Congress to disarm the militia of a State, or to destroy the militia of a State, because in another provision of the Constitution, the second amendment, we have these words:
>
> "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."
>
> The proposition here . . . is an application to Congress to do that which Congress has no right to do under the second amendment of the Constitution. . . . Unless the power is lodged in Congress to disarm the militia of Massachusetts, it cannot be pretended that any such power is lodged in Congress in reference to the State of Mississippi.
>
> We hear a great deal about the oppression of the negroes down South, and a complaint here comes from somebody connected with the Freedmen's Bureau. Only the other day I saw a statement in the papers that a negro, in violation of the law of Kentucky, was found with concealed weapons upon his person. The law of Kentucky, I believe, is applicable to whites and blacks alike.

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[197] CONG. GLOBE 914 (Feb. 19, 1866).

[198] Id.

[199] Id.

> An officer of the Freedmen's Bureau, however, summoned the judge of the court before him, ordered him to deliver up the pistol to that negro, and to refund the fine to which the negro was subject by the law of Kentucky. The other day your papers stated that one of these negroes shot down a Federal officer in the State of Tennessee. Yet, sir, no petitions are here to protect the white people against the outrages committed by the negro population; but if a few letters are written to members here that oppression has been practiced against negroes, then the whole white population of a State are to be disarmed.[200]

Senator Wilson responded that ex-Confederates went "up and down the country searching houses, disarming people, committing outrages of every kind and description."[201] He concluded: "Congress has power to disarm ruffians or traitors, or men who are committing outrages against law or the rights of men on our common humanity."[202] The resolution was then referred to committee.[203]

Both senators upheld the peaceful citizen's right to keep and bear arms, but they disagreed over who in the South were aggressors and consequently had lost this and other rights, or who were citizens. Wilson had complained two months earlier about the deprivations of arms of freedmen in Mississippi, pursuant to that state's firearms prohibition law which applied only to blacks.[204] And although just

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[200] Id. at 914-915.

[201] Id. at 915.

[202] Id.

[203] Id.

[204] Id. at 40 (Dec. 13, 1865).

three weeks earlier Saulsbury had opposed the Civil Rights bill because it would prohibit states from disarming free Negroes,[205] he now invoked the Second Amendment to protect the right of "the whole white population" not only to be armed but also to organize and operate as militia.

A few days later, Wilson reported his bill to disband the Southern State militias,[206] but it was not taken up until the next session, where it passed in a form not creating any infringement of the individual right to keep and bear arms.[207] In any event, the controversy demonstrates that, to those who supported civil rights and adoption of the Fourteenth Amendment, the individual right to keep and bear arms was far more important than the power of a state to maintain a militia force.

By now members of Congress were startled to learn that President Andrew Johnson had just vetoed the Freedmen's Bureau bill. The veto message was read in the Senate just minutes after the debate on Wilson's bill to disband militias. Johnson's primary objections were that the Freedmen's Bureau bill relied heavily on military rule and violated the right to trial by jury.[208] The only objection pertinent to

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[205] Id. at 478 (Jan. 29, 1866).

[206] Id. at 1100 (Mar. 1, 1866).

[207] See S. HALBROOK, THAT EVERY MAN BE ARMED 136-142 (1984).

[208] CONG. GLOBE 916 (Feb. 19, 1866).

this study was the President's point that §8 "subjects any white person who may be charged with depriving a freedman of 'any civil rights or immunities belonging to white persons' to imprisonment or fine, or both, without, however, defining the 'civil rights and immunities' which are thus to be secured to the freedmen by military law."[209] Johnson did not object to the civil suit provision in §7, or to its recognition of protection for the constitutional right to bear arms. The reading of the veto message caused such an uproar that the Senate galleries had to be cleared.[210]

Meanwhile, in the Joint Committee, Representative Boutwell of Massachusetts was eliciting further testimony concerning how the Union constitutional convention in Arkansas recognized the civil rights of freedmen, with the notable exceptions of bearing arms and suffrage. The witness, Senator William D. Snow of Arkansas, explained in part about "the civil and political rights of negroes":

> The old constitution and the new constitution are identical in this: The old constitution declares, "that the free white men of the State shall have a right to keep and to bear arms for their common defence." The new constitution retains the words "free white" before the word "men." I think I understand something of the reasoning of the convention on that score. At the time this new constitution was adopted we were yet in the midst of a war, and, to some southern eyes, there was yet an apparent chance as to which way the war might terminate; in other words, the rebellion was not entirely crushed. Two years ago in January, there was also some uncertainty in the minds of timid men as to

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[209] Id.

[210] Id. at 917.

> what the negro might do, if given arms, in a turbulent state of society, and in his then uneducated condition; and to allay what I was confident was an unnecessary alarm, that clause was retained. In discussing the subject, the idea prevailed that that clause, being simply permissive, would not prevent the legislature, if at a future time it should be deemed advisable, from allowing the same rights to the colored man.[211]

The old and new constitutions with the above arms guarantee had been adopted in 1836 and 1864 respectively.[212] Ironically, the 1861 secessionist constitution extended the arms guarantee to Indians: "That the free white men, and Indians, of this state shall have the right to keep and bear arms for their individual or common defence."[213]

On the 20th, the Senate debated the veto of the Freedmen's Bureau bill. Garrett Davis made an impassioned speech on the bill's unconstitutionality.[214] Lyman Trumbull expressed great surprise at the veto, pointing out that the bill's purpose was to protect constitutional rights.[215] Trumbull again detailed the oppression of the freedmen, such as 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 militia. . . . [It typically would] hang some freedman or search negro houses for

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[211] REPORT OF THE JOINT COMMITTEE, pt. 3, at 81.

[212] Ark. Const., Art. I, §21 (1836); Art. I, §21 (1864).

[213] Ark. Const., Art. I, §21 (1861).

[214] CONG. GLOBE 934 (Feb. 20, 1866).

[215] Id. at 936.

arms."[216] Trumbull appealed to the power under the Thirteenth Amendment to stamp out the incidents of slavery.[217]

The proponents of S. 60 then sought an override of the President's veto, but it failed by a vote of 30 to 18, just 2 votes shy of the necessary two-thirds.[218] This lack of success mooted any need for a House override vote.

The veto, the first break between President Johnson and the Congress, began a saga which would culminate in the unsuccessful impeachment of the President.[219] Republican newspapers, both Radical and Conservative, regretted the veto and unanimously supported the principles of the Freedmen's Bureau bill.[220] At least one state legislature, Wisconsin, praised Congress for passing the bill and decried the veto.[221]

It was business as usual in the Joint Committee. Senator Howard interrogated Major General Alfred H. Terry, who was in command at

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[216] Id. at 941.

[217] Id. at 941-42.

[218] Id. at 943.

[219] W. REHNQUIST, GRAND INQUESTS 204 ff. (1992).

[220] B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE 236 (1914). See "The Republican Press on the Veto Message," New York Tribune, Mar. 3, 1866, at 9, which reprinted twenty-two editorials from Republican newspapers.

[221] House Misc. Docu. No. 64, 39th Cong., 1st Sess. (1866).

Richmond, Virginia, as follows:

> Question. Have you reason to believe that the blacks possess arms to any extent at the present time?
>
> Answer. I have been told that they do. I have received that information from citizens of Virginia, including State officials, who have entreated me to take the arms of the blacks away from them.
>
> Question. Who were those officials?
>
> Answer. Some were members of the present legislature. I have also been asked to do so by a public meeting held in one of the counties.
>
> Question. Have you, in any case, issued orders for disarming blacks?
>
> Answer. I have not.[222]

Responding to questions by Representative E.B. Washburne of Illinois, Lieutenant Colonel H.S. Hall, an official with the Freedmen's Bureau, told how Texas Governor Hamilton authorized armed patrols to suppress an alleged negro insurrection:

> Under pretense of the authority given them, they passed about through the settlements where negroes were living, disarmed them--took everything in the shape of arms from them--and frequently robbed them of money, household furniture, and anything that they could make of any use to themselves. Complaints of this kind were very often brought to my notice by the negroes from counties too far away for me to reach.[223]

The next day, February 21, Senator Howard examined General Rufus Saxton, former assistant commissioner of the Freedmen's Bureau in South

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[222] REPORT OF THE JOINT COMMITTEE, pt. 2, at 143.

[223] Id., pt. 4, at 49-50.

Carolina. The following exchange took place:

> Question. Are you aware that the blacks have arms to any considerable extent in South Carolina?
>
> Answer. I believe that a great many of them have arms, and I know it to be their earnest desire to procure them.
>
> Question. While you were in command there has any request been made to you to disarm the blacks?
>
> Answer. I cannot say that any direct request has been made to me to disarm them; it would not be my duty to disarm them, as I was not the military commander, but I have had men come to my office and complain that the negroes had arms, and I also heard that bands of men called Regulators, consisting of those who were lately in the rebel service, were going around the country disarming negroes. I can further state that they desired me to sanction a form of contract which would deprive the colored men of their arms, which I refused to do. The subject was so important, as I thought, to the welfare of the freedmen that I issued a circular on this subject . . . .[224]

General Saxton then furnished the committee with a copy of his circular, which addressed peonage-like contracts as well as the following:

> It is reported that in some parts of this State, armed parties are, without proper authority, engaged in seizing all fire-arms found in the hands of the freedmen. Such conduct is in clear 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." The freedmen of South Carolina have shown by their peaceful and orderly conduct that they can safely be trusted with fire-arms, and they need them to kill game for sustenance, and to protect their crops from destruction by birds and animals.[225]

After asserting that South Carolina whites sought a "disarmed and

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[224] Id., pt. 2, at 219.

[225] Id. at 229.

defenseless" black population, General Saxton further testified:

> Question. What would be the probable effect of such an effort to disarm the blacks?
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> Answer. It would subject them to the severest oppression, and leave their condition no better than before they were emancipated, and in many respects worse than it was before. . . .
>
> Question. Do you think they would resist by violence such an attempt to disarm them?
>
> Answer. They would, provided the United States troops were not present . . . . But if the government protection were withdrawn, and they were left entirely to their former owners, and this attempt to disarm them were carried out, I believe there would be an insurrection.[226]

VII. PERSONAL SECURITY, PERSONAL LIBERTY, AND THE CIVIL RIGHTS ACT

The first draft of the proposed Fourteenth Amendment was debated in the House for three days, beginning on February 27. Representative John A. Bingham of Ohio, its author, argued on its behalf that previously "this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States."[227]

Representative Robert S. Hale of New York, although a Republican, saw no need for the amendment, partly because he apparently interpreted the existing Bill of Rights to bind not just Congress but also the States:

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[226] Id. at 219.

[227] CONG. GLOBE 1033-34 (Feb. 26, 1866).

> The gentleman from Ohio [Mr. BINGHAM] refers us to the fifth article of the amendments to the Constitution as the basis of the present resolution, and as the source from which he has taken substantially the language of that clause of the proposed amendment I am considering. Now, what are these amendments to the Constitution, numbered from one to ten, one of which is the fifth article in question? . . . They are all restrictions of power. They constitute the bill of rights, a bill of rights for the protection of the citizen, and defining and limiting the power of Federal and State legislation. They are not matters upon which legislation can be based. They begin with the proposition that "Congress shall make no law," &c.; and . . . I might perhaps claim that here was a sufficient prohibition against the legislation sought to be provided for by this amendment.[228]

Bingham responded: "The proposition pending before the House is simply a proposition to arm the Congress . . . with the power to enforce this bill of rights as it stands in the Constitution today."[229] Representative Frederick E. Woodbridge of Vermont characterized the sweep of the proposed Fourteenth Amendment in terms of protecting a broad panoply of rights: "It merely gives the power to Congress to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship."[230]

In related debate on February 28 on the representation of the Southern States in Congress, Senator James W. Nye of Nevada also opined

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[228] Id. at 1064 (Feb. 27, 1866).

[229] Id. at 1088 (Feb. 28, 1866). And see further comments of Bingham at 1089 ("the existing Amendments") and 1094 ("the law in its highest sense").

[230] Id. at 1088.

that the Bill of Rights already applied to the States, and that Congress has power to enforce it against the States. He stated:

> In the enumeration of natural and personal rights to be protected, the framers of the Constitution apparently specified everything they could think of--"life," "liberty," "property," "freedom of speech," "freedom of the press," "freedom in the exercise of religion," "security of person," &c.; and then, lest something essential in the specifications should have been overlooked, it was provided in the ninth amendment that "the enumeration in the Constitution of certain rights should not be construed to deny or disparage other rights not enumerated." This amendment completed the document. It left no personal or natural right to be invaded or impaired by construction. All these rights are established by the fundamental law. Congress has no power to invade them; but is has power "to make all laws necessary and proper" to give them effective operation, and to restrain the respective States from infracting them.
>
> Will it be contended, sir, at this day, that any State has the power to subvert or impair the natural and personal rights of the citizen?

Referring to "the colored population," Senator Nye continued: "As citizens of the United States they have equal right to protection, and to keep and bear arms for self-defense. They have long cherished the idea of liberty . . . ."[231] Nye's comments typify the thought of those who supported the Fourteenth Amendment in that it only confirmed the widely-held views that the Bill of Rights already applied to the States, that Congress could enforce it, that blacks were citizens, and that individuals have a right to keep and bear arms for personal protection.

In another reference to the concept of the Fourteenth Amendment

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[231] Id. at 1072 (Feb. 28, 1866).

in the debate on Southern representation, Senator William M. Stewart of Nevada repeated that the Bill of Rights is binding on the States:

> The Constitution of the United States forms a part of the constitution of each State, and what is more, the vital, sovereign, and controlling part of the fundamental law of every State. Sometimes a part of the Union Constitution is written out and ingrafted in form on a State constitution by what is called a "bill of rights." This adds nothing to the binding character of the provisions. A repetition of these fundamental provisions, as applicable to a locality, is merely incorporating what before, if I may use the expression, was the politically omniscient and omnipresent sovereignty, the national fundamental law. No State can adopt anything in a State constitution in conflict.[232]

A significant debate in the House on S. 61, the civil rights bill, took place on March 1. Representative James Wilson, Chairman of the Judiciary Committee, explained in detail the meaning of "civil rights and immunities" as used in the bill, which also protected in part the related right "to full and equal benefit of all laws and proceedings for the security of person and property . . . ."[233] Quoting Kent's Commentaries, Wilson stated: "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.'"[234] Wilson added that "we are reducing to statute from the spirit of the Constitution."[235] By this he apparently meant, in

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[232] Id. at 1077.

[233] Id. at 1117 (Mar. 1, 1866).

[234] Id.

[235] Id.

great part, the Bill of Rights.

Referring further to "the great fundamental civil rights," Representative 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."[236]

Blackstone also examined the right to have arms as one of "the rights of persons." In referring to "the principal absolute rights which appertain to every Englishman," Blackstone cautioned:

> But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has, therefore, established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.[237]

Blackstone then discussed these "auxiliary subordinate rights," including the right to petition the government, as being among the

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[236] Id. at 1118.

[237] 1 BLACKSTONE, COMMENTARIES *140-41 (St. Geo. Tucker ed. 1803).

methods of securing, protecting, and maintaining inviolate the "primary rights of personal security, personal liberty, and private property." Blackstone explained about one such right:

> The fifth and last auxiliary right of the subjects, that I shall at present mention, is that of having arms for their defence suitable to their condition and degree, and such as are allowed by law. . . . It is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.
>
> In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen. . . . To vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defense.[238]

The Freedmen's Bureau bill, of course, had 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."[239] Senator Wilson had the Second Amendment partly in mind when he stated of the federal Constitution that "there is no right enumerated in it by general terms or by specific designation which is not definitely embodied in one of the rights I have mentioned, or results as an incident necessary to complete defense

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[238] Id. at *143-44.

[239] Id.

and enjoyment of the specific right."[240] Particularizing this philosophy, the Second Amendment (like the Bill of Rights) reflected the Blackstonian philosophy, including the right of having arms as necessary for personal security, personal liberty, and personal property.

Opponents quite agreed. Representative Rogers of New Jersey, a Democrat, declared that S. 61, the civil rights bill, "is nothing but a relic of the Freedmen's Bureau bill . . . ."[241] The latter, of course, had declared explicitly that the rights of personal security and personal liberty included "the constitutional right of bearing arms." Yet even Rogers held that "the rights of nature" include "the right of self-defense, the right to protect our lives from invasion by others," and that "the great civil rights [are] the privileges and immunities created and granted to citizens of a country by virtue of the sovereign power. . . ."[242]

Recognition of the Second Amendment as protecting an individual right was not limited to Radical Republicans but was universal. Representative Anthony Thornton (Democrat of Illinois), who wanted to bury the bloody shirt and allow Southern States representation in Congress, noted in a speech on Reconstruction on March 3:

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[240] CONG. GLOBE at 1118-19 (Mar. 1, 1866).

[241] Id. at 1121.

[242] Id. at 1122.

> In all of the northern States, during the war, the privilege of the writ of habeas corpus was suspended; freedom of speech was denied; the freedom of the press was abridged; the right to bear arms was infringed. . . . Our rights were not thereby destroyed. They are inherent. Upon revocation of the proclamation, and a cessation of the state of things which prompted these arbitrary measures, the Constitution and laws woke from their lethargy, and again became our shield and safeguard.[243]

On March 5, the Senate debated the basis of representation, which became §2 of the Fourteenth Amendment. Senator Samuel Pomeroy of Kansas, a supporter of the proposed amendment, stated:

> And what are the safeguards of liberty under our form of Government? There are at least, under our Constitution, three which are indispensable--
>
> 1. Every man should have a homestead, that is, the right to acquire and hold one, and the right to be safe and protected in that citadel of his love. . . .
>
> 2. He should have the right to bear arms for the defense of himself and family and his homestead. And if the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should a well-loaded musket be in the hand of the occupant to send the polluted wretch to another world, where his wretchedness will forever remain complete; and
>
> 3. He should have the ballot . . . .[244]

Pomeroy made several more interesting comments. He referred to "the rights of an individual under the common law when his life is attacked. If I am assaulted by a highwayman, by a man armed and determined, my first duty is to resist him, and if necessary, use my

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[243] Id. at 1168 (Mar. 3, 1866).

[244] Id. at 1182 (Mar. 5, 1866).

arms also."[245]

Pomeroy did not know whether the proposed Fourteenth Amendment would pass, but relied on the enforcement clause of the Thirteenth Amendment:

> Sir, what is "appropriate legislation" on the subject, namely, securing the freedom of all men? It can be nothing less than throwing about all men the essential safeguards of the Constitution. The "right to bear arms" is not plainer taught or more efficient than the right to carry ballots. And if appropriate legislation will secure the one so can it also the other. And if both are necessary, and provided for in the Constitution as now amended, why then let us close the question by congressional legislation.[246]

In short, Pomeroy argued that the Bill of Rights--including the right to bear arms--could be enforced against the states and perhaps private individuals through the Thirteenth Amendment. The Fourteenth Amendment would be passed to buttress this same kind of legislation.

That same day in the Joint Committee, Senator Jacob Howard questioned Captain Alexander Ketchum, assistant to General O.O. Howard, concerning South Carolina. The witness noted that the freedmen as a general rule did not have arms, but removal of the Freedmen's Bureau would subject them to oppressive State legislation and would result in armed conflict. The Senator continued:

> Question. Could they do otherwise than arm themselves to defend their rights?

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[245] Id. at 1183.

[246] Id.

Answer. No, sir; they would be bound to do it.

Question. Do not you think that in such an exigency it would be imperative upon these men to arm themselves to defend their rights, and that it would be cowardly in them not to do it?

Answer. Certainly I do. They could not do otherwise than organize to protect themselves.[247]

The subject then turned to contracts of peonage between the former masters and slaves. Captain Ketchum noted:

> The planters are disposed, in many cases, to insert in their contracts tyrannical provisions, to prevent the negroes from leaving the plantation without a written pass from the proprietor; forbidding them to entertain strangers or to have fire-arms in their possession, even for proper purposes. A contract submitted a few days ago for approval stipulated that the freedman, in addressing the proprietor, should always call him "master."[248]

Senator Howard then produced a paper which the witness identified as a model contract drafted by a committee of planters. Under its terms, freedmen agreed "to keep no poultry, dogs or stock of any kind, except as hereinafter specified; no firearms or deadly weapons, no ardent spirits, nor introduce or invite visitors, nor leave the premises during working hours without the written consent of the proprietor or his agent."[249]

On March 6, President Johnson communicated to the Senate all reports made since December 1, 1865 by the assistant commissioners of

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[247] REPORT OF THE JOINT COMMITTEE, pt. 2, at 239.

[248] Id. at 240.

[249] Id. at 241.

the Freedmen's Bureau.[250] These reports were also communicated to the House on March 20.[251] The reports are filled with descriptions of infringements of the right to keep and bear arms.

The reports included a circular promulgated by Assistant Commissioner for the State of Georgia, Davis Tillson, on December 22, 1865, stating:

> Article 2 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 and 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 arms to defend their homes, families, or themselves.[252]

Among accounts of "outrages committed upon colored persons in Kentucky"[253] were the following:

> Lewis Dandy, (colored,) of Lexington, states, under oath, that on January 17, 1866, he had an empty pistol which he wished to sell; showed it to a number of different persons, one of whom offered him five dollars. The pistol being worth double that, he refused to take it. This man then arrested him, under the laws of Kentucky; was kept in prison all night, and in the morning the negro was brought before a magistrate. The pistol was given to the complainant, and the negro was fined five dollars and costs, making $15.90.

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[250] Ex. Doc. No. 27, Senate, 39th Cong., 1st Sess., at 1 (1866).

[251] Ex. Doc. No. 70, House of Representatives, 39th Cong., 1st Sess., at 1 (1866).

[252] Id. at 65 (emphasis in original).

[253] Id. at 203.

> Armstead Fowler, (colored,) of Lexington, states, under oath, that he owns a house and lot in Lexington . . . . That on the 29th day of January, 1866, an officer entered his house and took an unloaded pistol. He was taken before a magistrate and fined five dollars, besides nine dollars costs, and the pistol given to the man.[254]

Assistant Commissioner Clinton B. Fisk wrote that, in Kentucky, "the civil law prohibits the colored man from bearing arms,"[255] and

> their arms are taken from them by the civil authorities, and confiscated for benefit of the Commonwealth. . . . Thus, the right of the people to keep and bear arms as provided in the Constitution is infringed . . . .[256]

Fisk's report further noted that "the town marshal takes all arms from returned colored soldiers, and is very prompt in shooting the blacks whenever an opportunity occurs."[257] As a result, outlaws throughout the State "make brutal attacks and raids upon the freedmen, who are defenseless, for the civil law-officers disarm the colored man and hand him over to armed marauders."[258]

A report of Assistant Commissioner Wager Swayne from Alabama described the abuses committed by militia and special constables, adding that "the weaker portion of the community should not be forbid[den] to carry arms, when the stronger do so as a rule of

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[254] Id. at 205-06 (emphasis in original).

[255] Id. at 233.

[256] Id. at 236.

[257] Id. at 238.

[258] Id. at 239.

custom."[259] The following was also reported:

> It seems, in certain neighborhoods, a company of men, on the night before Christmas, under alleged orders from the colonel of the county militia, went from place to place, broke open negro houses and searched their trunks, boxes, &c., under pretence of taking away fire-arms, fearing as they said, an insurrection. Strange to say, that these so-called militiamen took the darkest nights for their purpose; often demanded money of the negroes, and took not only fire-arms, but whatever their fancy or avarice desired. In two instances negroes were taken as guides from one plantation to another, and when the party reached the woods the guides were most cruelly beaten.
>
> I really believe the true object of these nightly raids was, not the fear of an insurrection, but to intimidate and compel the blacks to enter into contract.[260]

In yet another report by Swayne, the following incident was detailed:

> Two men were arrested near here one day last week, who were robbing and disarming negroes upon the highway. The arrests were made by the provost marshal's forces. The men represented themselves as in the military service, and acting by my order. They afterwards stated, what was probable true, that they belonged to the Macon county militia.[261]

Swayne expected to place the militiamen on trial. He added:

> It is further desired to convince the local militia that stealing clothing, pistols, and money, under guise of "disarming the negroes," or stealing pistols only, is robbery, and will be so dealt with, according to the means we have. There must be "no distinction of color" in the right to carry arms, any more than in any other right.[262]

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[259] Id. at 291.

[260] Id. at 292.

[261] Id. at 297.

[262] Id. at 297.

On March 7, Representative Thomas D. Elliot reintroduced the Freedmen's Bureau bill, which was referred to the Select Committee on Freedmen,[263] of which Elliot was chairman. As will be seen, this bill had a more refined formulation of the rights of personal security and personal liberty than the civil rights bill, which had just been debated on the 1st, as well as explicit recognition of "the constitutional right to bear arms."[264] The debates on the civil rights bill which quoted Blackstone's language in detail apparently contributed to the more advanced draftsmanship in the Freedmen's Bureau bill.

The civil rights bill was debated on March 8 and 9. Representative John M. Broomall of Pennsylvania identified "the rights and immunities of citizens" as including rights in the text of the Constitution as well as the Bill of Rights, such as the writ of habeas corpus and the right of petition.[265]

Representative Henry J. Raymond of New York, the editor of the New York Times and a member of the Joint Committee, proposed an amendment to the bill declaring that all person born in the United States are "citizens of the United States, and entitled to all rights and

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[263] CONG. GLOBE at 1238 (Mar. 7, 1866).

[264] CONG. GLOBE at 3412 (June 26, 1866).

[265] Id. at 1263 (Mar. 8, 1866).

privileges as such."[266] This formulation is similar to what would become the citizenship clause of the Fourteenth Amendment. Raymond explained:

> Sir, the right of citizenship involves everything else. Make the colored man a citizen of the United States and he has every right which you or I have as citizens of the United States under the laws and constitution of the United States. . . . He has defined status; he has a country and a home; a right to defend himself and his wife and children; a right to bear arms . . . .[267]

Thus, the right of citizenship, in and of itself, would protect a person from State deprivation in his or her right of self defense and of keeping and bearing arms.

Raymond was no Radical. He was skeptical of some of the horror stories printed in the newspapers and elsewhere about the South.[268] Nonetheless, he was solidly in support of the rights of freedmen and of all citizens.

There ensued a debate spurred by the argument of Representative Martin R. Thayer of Pennsylvania that Congress already could enforce the first eleven amendments against the States. Representative Michael C. Kerr, a Democrat from Indiana, quoting Barron v. Baltimore (1833),[269] found those amendments to be limitations only on the power of Congress.

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[266] Id. at 1266.

[267] Id.

[268] Id. at 1267.

[269] 32 U.S. (7 Pet.) 243, 250-51.

Thayer responded: "Of what value are those guarantees if you deny all power on the part of the Congress of the United States to execute and enforce them?"[270] Thayer may have been on shaky constitutional ground, but his argument exhibits the intent of what would become the Fourteenth Amendment.

There was a discussion about the meaning in the civil rights bill of "all laws and proceedings for the security of person and property." Representative James Wilson of Iowa, Chairman of the Judiciary Committee, had this to say about the right to testify, which the black codes denied:

> I place the power of Congress to secure to these citizens the right to testify in the courts upon the same basis exactly that I place the power of Congress to provide protection for the fundamental rights of the citizen commonly called civil rights, so that if the presence of a citizen in the witness box of a court is necessary to protect his personal liberty, his personal security, his right to property, he shall not be deprived of that protection by a State law declaring that his mouth shall be sealed and that he shall not be a witness in that court.[271]

This is the same explanation set forth both by Blackstone and the authors of the Freedmen's Bureau Act regarding the right to keep and bear arms, because it too was necessary to guarantee personal liberty and personal security.

Congressman John Bingham supported enactment of the pending civil rights bill because it would "enforce in its letter and its spirit the

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[270] CONG. GLOBE at 1270 (Mar. 8, 1866).

[271] Id., App., at 157 (Mar. 8, 1866) (emphasis added).

bill of rights as embodied in that Constitution."[272] He stated that "the term 'civil rights' as used in this bill does include and embrace every right that pertains to the citizen as such."[273]

Bingham's point was that by virtue of being a citizen, one is guaranteed every right in the Bill of Rights and elsewhere:

> The term civil rights includes every right that pertains to the citizen under the Constitution, laws, and Government of this country. The term "citizen" has had a definite meaning among publicists ever since the days of Aristotle.[274]

In the Politics and in other writings well familiar to nineteenth-century Americans, Aristotle had postulated that true citizenship included the right to possess arms, and that that those who are deprived of arms are oppressed by armed tyrants.[275]

Bingham then quoted §1 of the civil rights bill, including its provision concerning the "full and equal benefit of all laws and proceedings for the security of person and property . . . ."[276] He reiterated his support for "amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power

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[272] CONG. GLOBE at 1291 (Mar. 9, 1866).

[273] Id.

[274] Id. at 1291.

[275] ARISTOTLE, POLITICS 68, 71, 79, 136, 142, 218 (transl. T.A. Sinclair, 1962); ARISTOTLE, ATHENIAN CONSTITUTION 43-47 (transl. H. Rackman, 1935).

[276] CONG. GLOBE at 1291 (Mar. 9, 1866).

in the future."[277]

Bingham 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. . . ."[278] Bingham then quoted the seventh section of the Freedmen's Bureau bill, which provided that all persons, including negroes, 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 . . . ."[279] Bingham "would arm Congress with the power to . . . punish all violations by State Officers of the bill of rights . . . ."[280] In drafting the first section of the Fourteenth Amendment, Bingham thus sought to protect the same rights, privileges, and immunities.

On March 9 in the Joint Committee, Representative George S. Boutwell of Massachusetts examined Brevet Major General Wager Swayne, who was in charge of the Freedmen's Bureau in Alabama. Swayne described conditions there in part as follows:

> Before Christmas apprehensions were quite generally expressed that the disappointment of the negroes at not receiving lands would produce outbreaks and perhaps a general insurrection.

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[277] Id.

[278] Id. at 1292.

[279] Id.

[280] Id.

> This created a certain demand for militia organizations, and here and there over the State militia companies were formed. There was found to be a deficiency of arms of any one pattern, although nearly every man in the State carries arms of some kind. Some of these companies undertook to patrol their vicinities. Others of them were ordered to disarm the freedmen, and undertook to search in their houses for this purpose. It is proper to say that no order authorizing the disarming of freedmen was issued from the executive office, and that a bill for the disarming of freedmen was defeated in the legislature. Attempts to do this, however, were made, and induced outrages and plunder, lawless men taking advantage of authority obtained through these organizations for that purpose.[281]

Swayne did not intervene initially. Later, however, he decided to protect Second Amendment rights:

> But when, shortly after New Year, an order of the same kind came to my knowledge, I made public my determination to maintain the right of the negro to keep and to bear arms, and my disposition to send an armed force into any neighborhood in which that right should be systematically interfered with. This produced a quite general excitement and a good deal of abuse, but was nevertheless generally recognized. I think there were few instances in which it was interfered with after New Year, and that there have been since then few militia organizations in any degree of cohesion or efficiency.[282]

According to the testimony on March 10 given by Captain J.H. Matthews, officer of the colored infantry and subcommissioner of the Freedmen's Bureau, a similar situation existed in Mississippi. In response to questions by Representative Boutwell on March 10, Matthews described how militiamen, sometimes with their faces blackened, would patrol the country, flogging and mistreating freedmen and, at times,

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[281] JOURNAL OF THE JOINT COMMITTEE, pt. 3, at 140.

[282] Id.

Union men. The following exchange took place:

> Answer. About Christmas and New Year it was said there would be an insurrection, and orders were issued by the governor of the State to disarm the freedmen.
>
> Question. Was that order executed?
>
> Answer. Yes, sir; and mostly by the militia. And it was in the execution, or pretended execution, of that order, that the most of those outrages were committed.
>
> Question. Have the United States authorities interfered in that district to prevent the disarming of the negroes, or was it completed so far as the militia chose to do it?
>
> Answer. I think the United States authorities took no measures against it.[283]

In mid-March a controversy erupted concerning the proceedings of the Joint Committee. The House passed a resolution to print, for House members, 25,000 extra copies of the testimony before the committee.[284] The Senate, after rancorous debate, decided on 10,000 copies for its members.[285] Senator Garrett Davis of Kentucky attacked the testimony as grossly exaggerated. It seems that General Fisk, head of the Freedmen's Bureau in Kentucky, had alleged a major incident involving the malicious wounding of several black soldiers.[286] A committee of the Kentucky legislature, upon investigation, found some mistreatment, but

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[283] Id. at 142.

[284] Id. at 1368 (Mar. 13, 1866).

[285] Id. at 1407, 1413 (Mar. 15, 1866).

[286] Id. at 1407.

little actual violence. An Army officer informed that committee of the following interesting incident: "A negro, in United States uniform, stated to him that he had been beaten by a party of unknown men, who met him in the road at night, in Nicholas county, for admitting that he had a pistol at home."[287] Two members of the Joint Committee defended the credibility of the witness who had testified.[288]

Meanwhile, the proposed Reconstruction policy continued to be debated in earnest. On March 24, Representative Leonard Myers of Pennsylvania referred to "Alabama, . . whose aristocratic and anti-republican laws, almost reenacting slavery, among other harsh inflictions impose an imprisonment of three months and a fine of $100.00 upon any one owning fire-arms . . . ."[289] To overturn such conditions, Myers recommended the following imperatives:

> 1. That no law of any State lately in insurrection shall impose by indirection a servitude which the Constitution now forbids. . . .
>
> 2. That each State shall provide for equality before the law, equal protection to life, liberty, and property, equal right to sue and be sued, to inherit, make contracts, and give testimony.[290]

Quoting the Republican-Form-of-Government Clause of the

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[287] Id. at 1408.

[288] Id. at 1411.

[289] Id. at 1621 (Mar. 24, 1866).

[290] Id. at 1622.

Constitution, Article IV, §4,[291] Representative Roswell Hart of New York stated moments later: "The Constitution clearly describes that to be a republican form of government for which it was expressly framed. A government . . . where `the right of the people to keep and bear arms shall not be infringed' . . . ."[292] Hart also mentioned freedom of religion, search and seizure, and due process. He asserted the duty of the United States to guarantee that the States, especially in the South, have such a form of government.[293] Hart buttressed his speech with quotes from testimony before the Joint Committee.[294]

The civil rights bill passed both houses,[295] but on March 27 President Johnson surprised everyone by sending a veto message to the Senate.[296] The override debate in the Senate took place on April 4. During that debate, Senator Lyman Trumbull made an eloquent speech

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[291] Article IV, §4, of the United States Constitution provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

[292] CONG.GLOBE 1629 (Mar. 24, 1866).

[293] Id.

[294] Id.

[295] Id. at 606 (Feb. 2, 1866) (Senate); 1367 (Mar. 13, 1866) (House).

[296] Id. at 1679 (Mar. 27, 1866).

in defense of the bill. Trumbull argued that every citizen has certain rights which may be characterized as "those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill . . . ."[297] 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.[298]

Of course, these were the same rights generally recited in the civil rights bill, and explicitly expounded on both in Blackstone and in the Freedmen's Bureau bill as including the right to have arms. Indeed, Trumbull's further quotation from Kent specifically states that the existence of these rights means that one may protect them:

> The privileges and immunities conceded by the Constitution of the Untied States to citizens of the several States were to be confined to those which were, in their nature, fundamental, and belonged of right to the citizens of all free Governments. Such are the rights of protection of life and liberty, and to acquire and enjoy property.[299]

On April 6, 1866, the Senate voted to override President Johnson's veto of the Civil Rights bill.[300] An editorial published in the New

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[297] Id. at 1757 (Apr. 4, 1866).

[298] Id.

[299] Id.

[300] Id. at 1809 (Apr. 6, 1866).

York Evening Post on the override vote illustrates the public understanding of Congressional intent as expressed in the debates. It 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 . . . ."[301] On the page facing that argument for enforcement of First and Second Amendment rights against the States was a prominent advertisement for Remington rifles, muskets, "pocket and belt revolvers," and other arms, with the admonition: "In these days of housebreaking and robbery every house, store, bank and office should have one of Remington's revolvers."[302]

The same day as the override debate, in the Joint Committee Senator Howard examined Brevet Lieutenant Colonel W.H.H. Beadle, superintendent of the Freedmen's Bureau in North Carolina. Beadle testified of police abuses in Wilmington, North Carolina. In one instance, two policemen knocked out a small black woman with clubs. The type of club used was "18 or 20 inches long sometimes, such as boys use to play base ball with, with which you might knock a man's brain

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[301] "The Civil Rights Bill in the Senate," New York Evening Post, Apr. 7, 1866, at 2, col. 1.

[302] Id. at 3, col. 10. In fact, the New York police were seen as being "employed in the service of the wealthy and prosperous corporations" while crime was rampant. Id., Apr. 16, 1866, at 2, col. 2, and May 10, 1866, at 2, col. 4.

out at one blow." The police claimed self defense.[303] In another incident:

> A negro man was so beaten by these policemen that we had to take him to our hospital for treatment. These things are generally at the night-time. . . . The statement of the policeman is enough. I found usually the offence charged was slight, as in this case, only suspicion that he had fired a pistol in the night time. Nothing of that was proven, and the criminal was held for resisting an officer of the law. There are numerous cases of this kind in the city and country.[304]

As usual, Senator Howard asked a question related to the Second Amendment:

> Question. Have the blacks arms?
>
> Answer. Yes, sir; to some extent. They try to prevent it, (the whites do,) but cannot. Some of the local police have been guilty of great abuses by pretending to have authority to disarm the colored people. They go in squads and search houses and size arms. These raids are made often by young men who have no particular interest in hired and trusty labor, some of them being members of the police and others not. The tour of pretended duty often turned into a spree. Houses of colored men have been broken open, beds torn apart and thrown about the floor, and even trunks opened and money taken. A great variety of such offenses have been committed by the local police or mad young men, members of it.[305]

Representative William Lawrence of Ohio made the same arguments in the House override debate on April 7 as Trumbull had made in the Senate. After quoting the same passage from Kent on the rights of personal security and personal liberty, Lawrence explained:

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[303] REPORT OF THE JOINT COMMITTEE, pt. 2, at 271-72.

[304] Id.

[305] Id. at 272.

> It has never been deemed necessary to enact in any constitution or law that citizens should have the right to life or liberty or the right to acquire property. These rights are recognized by the Constitution as existing anterior to and independently of all laws and all constitutions.
>
> Without further authority I may assume, then, that there are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him. But not only are these rights inherent and indestructible, but the means whereby they may be possessed and enjoyed are equally so.[306]

The above expresses the Republican world view that the rights to life and liberty are inherent and could not be infringed by a State, and that the right to have means for protection of these rights--such as arms--are also inherent. Lawrence explained:

> Every citizen, therefore, has the absolute right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property. . . . As necessary incidents of these absolute rights, there are others, as the right . . . to share the benefit of laws for the security of person and property.[307]

As reasons for the necessity of the bill, Lawrence quoted the testimony of Major General Alfred H. Terry before the Joint Committee, that Terry had been entreated by Virginia State officers, including members of the legislature, "to take the arms of the blacks away from them." Terry had refused to disarm the freedmen.[308]

Representative Sidney Clarke of Kansas angrily referred to an 1866

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[306] CONG. GLOBE at 1833 (Apr. 7, 1866).

[307] Id.

[308] Id. at 1834.

Alabama law providing "that it shall not be lawful for any freedman, mulatto, or free person of color in this State, to own firearms, or carry about his person a pistol or other deadly weapon."[309] This same statute made it unlawful "to sell, give, or lend fire-arms or ammunition of any description whatever, to any freedman, free negro, or mulatto . . . ."[310] Clarke attacked Mississippi, "whose rebel militia, upon the seizure of the arms of black Union soldiers, appropriated the same to their own use."[311] He continued:

> Sir, I find in the Constitution of the United States an article which declares that "the right of the people to keep and bear arms shall not be infringed." For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws . . . .[312]

In emotionally referring to the disarmament of former black soldiers, Clarke added:

> Nearly every white man in that State that could bear arms was in the rebel ranks. Nearly all of their able-bodied colored men who could reach our lines enlisted under the old flag. Many of these brave defenders of the nation paid for the arms with which they went to battle. . . . The "reconstructed" State authorities of Mississippi were allowed to rob and disarm our veteran soldiers. . . .[313]

Thus, Clarke presupposed a constitutional right to keep privately held

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[309] Id. at 1838.

[310] Id.

[311] Id.

[312] Id.

[313] Id. at 1839.

arms for protection against oppressive state militia.

By April 9, both Houses had overridden President Johnson's veto by the requisite two-thirds vote, and the Civil Rights Act became law.[314] As enacted, §1 of the Civil Rights Act of 1866 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. . . .[315]

VIII. NO STATE SHALL ABRIDGE, DEPRIVE, OR DENY: THE PASSAGE OF THE FOURTEENTH AMENDMENT

In a secret meeting of the Joint Committee on April 21, Thaddeus Stevens proposed a plan of Reconstruction, which he stated he had not drafted.[316] §1 of the proposal stated: "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude."[317] That language had been submitted to Stevens by Robert Dole Owen, an ex-Representative and famous reformer,[318] who was a strong supporter of the

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[314] Id. at 1861 (Apr. 9, 1866).

[315] 14 Stat. 27 (emphasis added).

[316] JOURNAL OF THE JOINT COMMITTEE at 83. For a study of voting patterns in the committee, see E. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 82-92 (1990).

[317] JOURNAL OF THE JOINT COMMITTEE at 83.

[318] Id. at 295-303.

individual's right to keep and bear arms.[319]

Equality was necessary but not sufficient for John Bingham, who moved to add the following: "nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation."[320] The first phrase would become the equal protection clause of the Fourteenth Amendment. Since Stevens' proposal already had prohibited discrimination, Bingham's "equal protection" was more than mere equality--it was equal protection of rights, not equal deprivation of rights. Indeed, equal protection of "the laws" might well have included, in Bingham's mind, the Bill of Rights. The second phrase in Bingham's proposal, the "takings" clause of the Fifth Amendment, might have been intended to state explicitly only one of the Bill of Rights guarantees to be protected. This was similar to the usage in the Freedmen's Bureau bill of recitation of the constitutional right to bear arms, mention of which was not intended to preclude protection of

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[319] Owen had been the leading advocate of civil rights (including women's rights) at the Indiana constitutional convention of 1850, where he had advocated the right of "carrying of weapons," adding: "For if it were declared by Constitutional provision that the people should have the right to bear arms, no law of the Legislature could take away that right." REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION OF THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1385 (1850). In a U.S. Senate-commissioned report, Owen had written: "The most prized of personal rights is the right of self-defense." R. OWENS, THE WRONG OF SLAVERY 111-12 (1864).

[320] JOURNAL OF THE JOINT COMMITTEE at 85.

other guarantees.

Bingham's amendment was not successful, but the 5 to 7 vote was nonpartisan. Democrats Reverdy Johnson and Andrew Rogers voted with Bingham and Stevens in favor.[321] Stevens' original proposal was then adopted.[322] However, Bingham came back with another proposal for a separate section, which ten members of the committee (even Johnson) approved: "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."[323] With the inclusion of the "born or naturalized" citizenship clause, this would become §1 of the Fourteenth Amendment absent. The committee also approved the enforcement clause.[324]

A week later, on April 28, Bingham moved, and the Joint Committee voted, to delete Stevens' draft prohibiting race discrimination as to civil rights, and to insert Bingham's draft guaranteeing privileges and immunities, due process, and equal protection. This language became §1

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[321] Id.

[322] Id.

[323] Id. at 87.

[324] Id. at 88.

of the proposed constitutional amendment.[325] Stevens himself voted affirmatively, while Howard wanted to keep both.[326] The committee also voted to require that Southern States ratify the amendment as a price of readmission into the Union.[327] Finally, the committee decided to report to Congress a joint resolution proposing the constitutional amendment, and to lift the veil of secrecy to notify the newspapers of the proposal.[328] The work of the Joint Committee was now over for all practical purposes.

Attention in Congress focused on the proposed Fourteenth Amendment and the second Freedmen's Bureau bill. Three months had passed since the House had considered a first draft of the constitutional amendment. On April 30, Thaddeus Stevens, the House leader and leader of the House delegation to the Joint Committee, reported to the House a joint resolution proposing the constitutional amendment. §1 was the Bingham proposal, which stated: "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

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[325] Id. at 106.

[326] Id.

[327] Id. at 106, 110.

[328] Id. at 114-15.

jurisdiction the equal protection of the laws."[329] Stevens also introduced a bill from the Joint Committee that when the constitutional amendment became effective, Southern States would be readmitted into the Union only if they would ratify the amendment and conform their constitutions and laws thereto.[330]

On May 8, a report from the President written by Benjamin C. Truman on the condition of the Southern people was read in, and ordered to be printed by, the Senate. Truman recalled the fear of a black insurrection in late 1865 and early 1866, commenting:

> In consequence of this there were extensive seizures of arms and ammunition, which the negroes had foolishly collected, and strict precautions were taken to avoid any outbreak. Pistols, old muskets, and shotguns were taken away from them as such weapons would be wrested from the hands of lunatics. Since the holidays, however, there has been a great improvement in this matter; many of the whites appear to be ashamed of their former distrust, and the negroes are seldom molested now in carrying the fire-arms of which they make such a vain display. In one way or another they have procured great numbers of old army muskets and revolvers, particularly in Texas, and I have, in a few instances, been amused at the vigor and audacity with which they have employed them to protect themselves against the robbers and murderers that infest that State.[331]

This suggests that many blacks outwardly exhibited their perceived entitlement to the right to keep and bear arms, to the dismay of whites who were uncomfortable with allowing this liberty to recent slaves.

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[329] CONG. GLOBE at 2286 (Apr. 30, 1866).

[330] Id.

[331] Ex. Doc. No. 43, U.S. Senate, 39th Cong., 1st Sess., at 8 (1866).

Truman's choice of works combines a grain of white paternalism with recognition of the utility of the right for lawful protection.

When what would become the Fourteenth Amendment was debated in the House on May 8 through 10, Thaddeus Stevens remarked that its provisions

> are all asserted, in some form or another, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This Amendment supplies that defect, and allows Congress to correct the unjust legislation of the States . . . .[332]

Representative Martin R. Thayer of Pennsylvania stated that "it simply brings into the Constitution what is found in the bill of rights of every State," and that "it is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law . . . ."[333]

The broad character of the amendment prompted this objection by Representative Andrew J. Rogers (Democrat of New Jersey): "What are privileges and immunities? Why, sir, all the rights we have under the law of the country are embraced under the definition of citizenship."[334] Representative Bingham averred that the amendment would protect "the privileges and immunities of all the citizens of the Republic and the

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[332] CONG. GLOBE at 2459 (May 8, 1866).

[333] Id. at 2465 (May 8, 1866).

[334] Id. at 2539 (May 10, 1866).

inborn rights of every person within its jurisdiction . . . ."[335] He added that it would furnish a remedy against state injustices, such as infliction of cruel and unusual punishment.[336] By stating as an example that Eighth Amendment violations would be prohibited, Bingham indicated that the Fourteenth Amendment would also prohibit deprivations of any of the rights recognized in the rest of the Bill of Rights.[337]

The proposed Fourteenth Amendment passed the House on May 10.[338] The New York Evening Post remarked: "The first section merely reasserts the Civil Rights Act."[339] That act had been perceived by the same paper as protecting "public assemblies" and "keeping firearms,"[340] i.e., the rights set forth in the First and Second Amendments.

At the Joint Committee on May 18, under questioning by Senator Howard, T.J. Mackay, an ex-Confederate who had assisted in the surrender of arms to the Northern army,[341] stated that "a majority of

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[335] Id. at 2542.

[336] Id. at 2542-43.

[337] H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 80 (1908).

[338] CONG. GLOBE at 2545 (May 10, 1866).

[339] New York Evening Post, May 11, 1866, at 2, col. 1.

[340] Id., Apr. 7, 1866, at 2, col. 1.

[341] REPORT OF THE JOINT COMMITTEE, pt. 4, at 150.

[the freedmen] are armed, and entitled to bear arms under the existing laws of the southern States."[342] That statement was accurate for Texas, which passed no black code provision for disarming freedmen, but was inaccurate for some Southern States.

On May 22, Representative Eliot, on behalf of the select committee on freedmen's affairs, reported the second Freedmen's Bureau bill,[343] which would become H.R. 613. The Republicans were not going to accept defeat in the aftermath of the failure, by a slim margin, to override President Johnson's veto. The reintroduced bill, as before, explicitly recognized and guaranteed "the constitutional right to bear arms."[344] As noted, John Bingham, author of §1 of the Fourteenth Amendment, was a member of the Select Committee which had drafted this bill.

The need for recognition of this right to have arms persisted. That same day the President transmitted a report to the House--which duly referred it to the Joint Committee the next day--on provisions in Southern State laws concerning freedmen. The report included black code provisions prohibiting possession of firearms by freedmen. The South Carolina criminal laws approved on December 19, 1865, included

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[342] Id. at 160. Mackay also visited the Indian Territory, and found the Indians of the Five Nations to be armed with rifles and shotguns, although tribes which had not been part of the Confederate war effort still used tomahawks, bows and arrows. Id. at 163.

[343] CONG.GLOBE at 2743 (May 22, 1866).

[344] Id. at 3412 (June 26, 1866).

the following:

> Persons of color constitute no part of militia of the State, and no one of them shall, without permission in writing from the district judge or magistrate, be allowed to keep a firearm, sword, or other military weapon, except that one of them, who is the owner of a farm, may keep a shot-gun or rifle, such as is ordinarily used in hunting, but not a pistol, musket, or other firearm or weapon appropriate for purposes of war. . . . The possession of a weapon in violation of this act shall be a misdemeanor, and in case of conviction, shall be punished by a fine equal to twice the value of the weapon so unlawfully kept, and if that be not immediately paid, by corporal punishment.[345]

Similarly, the State of Florida passed an act on January 15, 1866 prohibiting blacks from entering white churches and the white sections of railroad cars--and whites from entering black churches and black sections of railroad cars--as well as the following:

> It shall not be lawful for any negro, mulatto, or other person of color, to own, use, or keep in his possession or under his control, any bowie-knife, dirk, sword, fire-arms, or ammunition of any kind, unless he first obtain a license to do so from the judge of probate of the county in which he may be a resident for the time being; and the said judge of probate is hereby authorized to issue such license, upon the recommendation of two respectable citizens of the county, certifying to the peaceful and orderly character of the applicant; and any negro, mulatto, or other person of color, so offending, shall be deemed to be guilty of a misdemeanor, and upon conviction shall forfeit to the use of the informer all such fire-arms and ammunition, and in addition thereto, shall be sentenced to stand in the pillory for one hour, or be whipped, not exceeding thirty-nine stripes, or both, at the discretion of the jury.[346]

Although these state laws had been generally known in Congress for

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[345] Ex. Doc. No. 118, House of Representatives, 39th Cong., 1st Sess., at 7 (1866).

[346] Id. at 20.

some time, it is significant that they were received again in Congress on May 23, because that was a significant day in the process of guaranteeing the right to keep and bear arms against such state infringements.

May 23 was the first time that the Senate considered H.R. No. 127, which would become the Fourteenth Amendment. Senator Jacob M. Howard introduced the subject on behalf of the Joint Committee, promising to present "the views and motives which influenced that Committee . . ."[347] After acknowledging the important role of the testimony before the Joint Committee, Howard examined §1 of the proposed constitutional amendment.

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. . . ."[348] Because state legislation infringed these rights, adoption of the Fourteenth Amendment was imperative. "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."[349] In the ensuing debate on the Fourteenth Amendment, no one questioned Howard's statement that the Amendment made

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[347] CONG.GLOBE at 2765 (May 23, 1866).

[348] Id. Emphasis added.

[349] Id at 2766.

the first eight amendments enforceable against the States.[350] After all, Howard held a long-established role as a leading political authority in the Republican party. Twelve years earlier, Howard had drafted the first Republican party platform, which called for the abolition of slavery. He had also been instrumental in the passage of the Thirteenth Amendment.[351]

Howard explained that Congress could enforce the above rights through §5 of the proposed amendment, which provided that "'the Congress shall have power to enforce by appropriate legislation the provisions of this article.' Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution."[352] Of the Amendment, Howard added: "It 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."[353]

Front-page press coverage was given to Senator Howard's speech

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[350] I. BRANT, THE BILL OF RIGHTS 337 (1965).

[351] REPUBLICAN CENTENNIAL COMM., THE STORY OF SHAFTSBURY 14-15 (1954).

[352] CONG. GLOBE at 2766 (May 23, 1866).

[353] Id.

introducing the Fourteenth Amendment to the Senate. That speech included his explanation that the Fourteenth Amendment would compel the states to respect "these great fundamental guarantees . . . the personal rights guaranteed by the first eight amendments of the United States Constitution such as . . . the right to keep and bear arms . . . ." On the next day, these same words appeared on the first page of the New York Times[354] and the New York Herald,[355] and were also printed in such papers as the Washington, D.C., National Intelligencer[356] and the Philadelphia Inquirer.[357]

Numerous editorials appeared on Senator Howard's speech, none of which disputed his explanation that the Fourteenth Amendment would protect freedoms in the Bill of Rights (such as keeping and bearing arms) from state infringement. The New York Times editorialized:

> With reference to the amendment, as it passed the House of Representatives, the statement of Mr. Howard, upon which the opening task devolved, is frank and satisfactory. His exposition of the consideration which led the Committee to seek the protection, by a Constitutional declaration, of "the privilege and immunities of the citizens of the several states of the Union," was clear and cogent.[358]

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[354] New York Times, May 24, 1866, at 1, col. 6.

[355] New York Herald, May 24, 1866, at 1, col 3.

[356] National Intelligencer, May 24, 1866, at 3, col. 2.

[357] Philadelphia Inquirer, May 24, 1866, at 8, col. 2.

[358] New York Times, May 25, 1866, at, col. 4.

The Chicago Tribune noted that Howard's explanation "was very forcible and well put, and commanded the close attention of the Senate."[359] "It will be observed," summarized the Baltimore Gazette, "that the first section is a general prohibition upon all of the States of abridging the privileges and immunities of the citizens of the United States, and secures for all the equal advantages and protection of the laws."[360] Several papers were impressed with the "length" or "detail" in which Howard explained the amendment.[361]

The Southern Democratic newspapers generally did not publish any speeches by Republicans, but they reacted to the Howard Amendment in a revealing manner. The Amendment's supporters, complained the Daily Richmond Examiner, "are first to make citizens and voters of the negroes."[362] For every Southerner, being a citizen meant, of course, keeping and bearing arms. Yet the Examiner had a little glee for the Senator from Michigan: "Howard, who explained [the Amendment] on the part of the Senate, himself objected to the disenfranchisement [of ex-Confederates] feature."[363] The Southern papers never claimed that the

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[359] Chicago Tribune, May 29, 1866, at 2, col. 3.

[360] Baltimore Gazette, May 24, 1866, at 4, col. 2.

[361] Boston Daily Journal, May 24, 1866, at 4, col. 4; Boston Daily Advertiser, May 24, 1866, at 1, col. 6; Springfield Daily Republican, May 24, 1866, at 3, col. 1.

[362] Daily Richmond Examiner, May 25, 1866, at 2, col. 3.

[363] Id., May 26, 1866, at 1, col. 6.

amendment was unclear, but they objected to its breadth in guaranteeing to blacks the kinds of rights to be found in the first eight amendments as well as the privilege of suffrage. Typifying the Southern world view, attacks on Howard, along with prominently displayed advertisements for Remington revolvers, laced the Charleston Daily Courier.[364] Of course, Remington placed similar advertisements in such papers as the New York Evening Post, which at the time championed the right of blacks to keep and bear arms.[365]

The same day that Howard was explaining in the Senate that the Fourteenth Amendment would protect "the right of the people to keep and bear arms" from State infringement, the House was debating the second Freedmen's Bureau bill,[366] §8 of which protected "the constitutional right to bear arms."[367] In a section-by-section explanation, Representative Eliot explained: "The eighth section simply embodies the provisions of the civil rights bill, and gives to the President authority, through the Secretary of War, to extend military protection

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[364] Charleston Daily Courier, May 28, 1866, at 1, col. 2, and at 4, col. 2; id., May 29, 1866, at 1, cols. 1-2 (comment on Howard's speech). The revolver ads are found in every issue.

[365] E.g., New York Evening Post, Apr. 7, 1866, at 2, col. 1, and at 3, col. 10.

[366] CONG. GLOBE at 2773 (May 23, 1866).

[367] Id. at 3412 (June 26, 1866).

to secure those rights until the civil courts are in operation."[368] The constitutional basis of the bill, Eliot noted, was the Thirteenth Amendment.[369]

Eliot argued the need for the bill based on Freedmen's Bureau reports of abuses, 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.[370]

Fisk added that the freedmen "are defenseless, for the civil-law officers disarm the colored man and hand him over to armed marauders."[371]

The Fourteenth Amendment and the second Freedmen's Bureau bill, H.R. 613, continued to be debated simultaneously 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 not voting.[372] The House immediately

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[368] CONG. GLOBE at 2773 (May 23, 1866).

[369] Id.

[370] Id. at 2774.

[371] Id. at 2775.

[372] Id. at 2878.

proceeded to consideration of the proposed constitutional amendment.[373]

Noting the House's passage of the Freedmen's Bureau bill, the New York Evening Post reprinted some of the black code provisions, which had been communicated to Congress by the President, including those punishing freedmen with flogging for keeping arms.[374] An editorial sarcastically stated:

> In South Carolina and Florida the freedmen are forbidden to wear or keep arms.
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> . . . We feel certain the President, who is, as he says, the peculiar friend and protector of the freedmen, was not aware of the code of South Carolina, or Florida, or Mississippi, when he vetoed that [Civil Rights] act. The necessity for such a measure, to secure impartial justice, will not be denied by any one who reads the extracts we have made. . . .[375]

May 30 began with Senator Howard proposing a new sentence to §1 of the Fourteenth Amendment as follows: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."[376] This would settle the issue raised in Dred Scott--i.e., who are "citizens" and thus have the bundle of rights appertaining to citizenship. After a raucous debate over making Indians, coolies, and gypsies into

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[373] Id.

[374] New York Evening Post, May 30, 1866, at 2, Col. 3.

[375] "The Freedmen's Bureau Bill," id. at 2, col. 1.

[376] CONG. GLOBE at 2890 (May 30, 1866).

citizens, the Senate passed Howard's new language.[377]

"What citizenship is, what are its rights . . . are not defined," complained Senator Thomas A. Hendricks of Indiana on June 4, who nonetheless recognized "the rank, privileges, and immunities of citizenship . . . ."[378] The Senate also debated the proposed requirement that the Southern States adopt the constitutional amendment as a condition to reentry into the Union,[379] a requirement that would make little sense unless the amendment was intended to protect broad rights.

Supporters of what became known as the "Howard Amendment" repeatedly asserted the broad character of the rights that needed to be protected. Senator Luke P. Poland of Vermont analyzed §1 on June 5 as follows:

> It is the very spirit and inspiration of our system of government, the absolute foundation upon which it was established. It is essentially declared in the Declaration of Independence and in all the provisions of the Constitution. Notwithstanding this we know that State laws exist, and some of them of very recent enactment, in direct violation of these principles. Congress has already shown its desire and intention to uproot and destroy all such partial State legislation in the passage of what is called the civil rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the foundation of all republican government if they be denied or

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[377] Id. at 2897.

[378] Id. at 2939 (June 4, 1866).

[379] Id. at 2947.

violated by the States . . . .[380]

The reference to "all the provisions of the Constitution" obviously includes the entire Bill of Rights, just as the reference to recently enacted state laws included the black code provision depriving freedmen of the rights to free speech and to keep and bear arms. Senator Poland also made clear above that the constitutional amendment had the same objective as the Civil Rights Act and, by implication, the second Freedmen's Bureau bill.

On June 8, Senator John B. Henderson of Missouri expounded the concept of citizenship by reference to Dred Scott. Senator Henderson quoted from the opinion of the Supreme Court as follows:

> If persons of the African race are citizens of a State and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them; for they would hold these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the constitution and the laws of the State notwithstanding.[381]

In Dred Scott, according to Henderson, Chief Justice Taney had conceded to members of the State communities "all the personal rights, privileges, and immunities guarantied to citizens of this 'new Government.' In fact, the opinion distinctly asserts that the words 'people of the United States' and 'citizens' are 'synonymous terms.'"[382]

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[380] Id. at 2961 (June 5, 1866) (emphasis added).

[381] Id. at 3032 (June 8, 1866).

[382] Id.

However, Taney had disregarded the plain meaning of the term "the people" and had excluded blacks.[383]

Taney's opinion also declares explicitly that citizens are entitled to Bill of Rights guarantees, including those of the Second Amendment. The following passage from the opinion particularizes the rights discussed in the passages to which Henderson referred, and illustrates the objectives sought by the Republicans in Congress:

> For if they [blacks] were so received [as citizens], and 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 of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them 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 <u>to keep and carry arms wherever they went</u>.[384]

Henderson noted that one objective of the second Freedmen's Bureau bill and the Civil Rights Act was to recognize the right "to enjoy in the respective States those fundamental rights of person and property which cannot be denied without disgracing the Government itself."[385] Henderson characterized them as "civil rights" and as "the muniments of

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[383] <u>Id</u>.

[384] Scott v. Sanford, 60 U.S. 393, 416-17 (1857) (emphasis added).

[385] CONG. GLOBE at 3034-35 (June 8, 1866).

freedom."[386]

Senator Richard Yates of Illinois then argued that the abolition of slavery by the Thirteenth Amendment itself overruled Dred Scott and conferred citizenship on the Negro, who was thereby "entitled to be protected in all his rights and privileges as one of the citizens of the United States."[387]

When Senator Hendricks claimed not to understand the meaning of the word "abridged" in the privileges-or-immunities clause, Senator Howard responded that "it is easy to apply the term 'abridged' to the privileges and immunities of citizens, which necessarily include within themselves a great number of particulars."[388] Henricks countered that no one had defined "what are the rights and immunities of citizenship . . . ."[389]

Although he would join with Senator Hendricks in voting against the Fourteenth Amendment,[390] Senator Reverdy Johnson of Maryland more moderately declared:

> I am decidedly in favor of the first part of the section which defines what citizenship shall be, and in favor of that part of the section which denies to a State the right to deprive any

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[386] Id. at 3035.

[387] Id. at 3037.

[388] Id. at 3039.

[389] Id.

[390] Id. at 3042.

> person of life, liberty, or property without due process of law, but I think it is quite objectionable to provide that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," simply because I do not understand what will be the effect of that.[391]

If his reservation implied that he thought the privileges-or immunities clause to be too broad, Senator Johnson knew that citizenship and protection of life, liberty, and property would include the right of every citizen to keep and bear arms. As counsel for the slave owner in Dred Scott, Johnson was well aware of that opinion's language that citizenship "would give to persons of the negro race . . . the full liberty . . . to keep and carry arms wherever they went."[392] In earlier Senate debate, Johnson had reminded his colleagues that Dred Scott had held African descendants not to be citizens.[393] Yet in response to Senator Henry Wilson's complaint about the "disarming" and other abuses of freedmen in Mississippi, Johnson had acknowledged the reports of "these outrages" as being to a certain extent true.[394]

After debate on the other sections of the proposed constitutional

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[391] Id. at 3041.

[392] Scott v. Sandford, 60 U.S. 393, 416-17 (1857). Johnson's oral argument in Dred Scott has not been preserved. See 3 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES (1978).

[393] CONG. GLOBE at 504 (Jan. 30, 1866).

[394] Id. at 40 (Dec. 13, 1865).

amendment, a vote was taken, and it passed 33 to 11.[395] Thus, it received 75% of the votes, far more than the necessary two-thirds for a constitutional amendment.

The Senate having passed the proposed Fourteenth Amendment, on June 11 Senator Wilson reported H.R. No. 613, the second Freedmen's Bureau bill, on behalf of the Committee on Military Affairs and Militia.[396] The next day, the Senate resolved to print 50,000 additional copies of the Report of the Joint Committee.[397]

On the 13th, the House considered the proposed Fourteenth Amendment as amended by the Senate.[398] Thaddeus Stevens thought the amendments to be so slight that he would not speak further.[399] He could not quite keep this promise, but briefly explained the amendments: "The first section is altered by defining who are citizens of the United States and of the States. . . . It declares this great privilege to belong to every person born or naturalized in the United States."[400] The amended proposed Fourteenth Amendment then passed the House by a

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[395] Id. at 3042 (June 8, 1866).

[396] Id. at 3071 (June 11, 1866).

[397] Id. at 3097-98 (June 12, 1866).

[398] Id. at 3144 (June 13, 1866).

[399] Id.

[400] Id. at 3148.

vote of 120 to 32.[401] This amounted to a victory of 79%, again far more than the necessary two-thirds for a constitutional amendment.

IX. CONGRESS OVERRIDES THE PRESIDENT'S VETO OF H.R. 613, THE SECOND FREEDMEN'S BUREAU BILL

On June 15, Senator Wilson moved to take up H.R. No. 613, the second Freedmen's Bureau bill, as expeditiously as possible.[402] The House debated H.R. No. 543, which required the Southern States to ratify the Fourteenth Amendment. Representative Godlove S. Orth of Indiana characterized §1 as follows: "Secures to all persons born or naturalized in the United States the rights of American citizenship."[403] That was shorthand for the entire Bill of Rights.

Representative George W. Julian of Indiana continued the discussion two days later, noting as follows:

> Although the civil rights bill is now the law, none of the insurgent States allow colored men to testify when white men are parties. The bill, as I learn from General Howard, 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.[404]

This again shows the common objective of the Civil Rights Act and the

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[401] Id. at 3149.

[402] Id. at 3180-81 (June 15, 1866).

[403] Id. at 3201.

[404] Id. at 3210 (June 17, 1866).

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 and mandate for protecting this right and others.

On the 21st, the House resolved that 100,000 copies of the Report of the Joint Committee be printed.[405] This Report, detailing the violations of freedmen's rights, was destined for mass circulation.

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.[406] Senator Thomas Hendricks of Indiana moved to strike out the entire section on the following basis:

> I am not able to see the necessity of this section. If the civil rights bill has any force at all, I cannot see the necessity of repeating legislation at periods of two months to the same point. The civil rights bill is claimed to be a law, having the force of law, and it regulates the very matter, so far as I can now recollect, that the fourteenth section in this bill is intended to regulate. Are Senators not satisfied with the provisions in what is called the civil rights bill, or do they think that by reenacting the same matter it will acquire some validity? . . . The same matters are found in the civil rights bill substantially that are found in this section.[407]

Hendricks told a joke about the client who paid his lawyer extra money because he wanted a man "sued harder," and analogyzed that Congress was trying "to legislate harder" than it had already done in

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[405] Id. at 3326 (June 21, 1866).

[406] Id. at 3412 (June 26, 1866).

[407] Id.

the Civil Rights Act. Members laughed at the joke but rejected the amendment to strike.[408] Once again, the Civil Rights Act was seen as embodying the same principles as the Freedmen's Bureau Act bill--which included protection for "the constitutional right to bear arms"--and the Fourteenth Amendment was seen as the necessary constitutional basis for guaranteeing such rights against state action.

Senator Lyman Trumbull replied that, while the two bills protect 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 "protect . . . the rights of person and property in those regions of the country, like Virginia and Alabama, where the civil authority is not restored . . . ."[409] Hendricks agreed that the purpose of the bill was "to protect civil rights . . . and to secure men in their personal privileges . . . ."[410] The bill then passed without a roll-call vote.[411]

Because the House did not concur in certain amendments made by the Senate to the second Freedmen's Bureau bill,[412] a conference committee was necessary. While the amendments were not germane to the topic here, the committee appointments again indicate the commonality of

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[408] Id.

[409] Id.

[410] Id. at 3413.

[411] Id.

[412] Id. at 3465 (June 28, 1866).

thought and intent of the prime movers of the second Freedmen's Bureau bill and the Fourteenth Amendment. For the House, the Speaker appointed Thomas D. Eliot of Massachusetts, John A. Bingham of Ohio, and Hiram McCullough of Maryland.[413] The first two of these, of course, were the respective authors of both Freedmen's Bureau bills and the Fourteenth Amendment.[414] The Senate Chair appointed Henry Wilson, Ira Harris, and J.W. Nesmith.[415]

Senator Wilson, on behalf of the conference committee, reported on July 2, and the Senate concurred in the report.[416] Eliot raised the report in the House the next day. Representative William E. Finck (Democrat of Ohio) made a last-minute attempt to kill the bill by moving to lay the report of the conference committee on the table. This was rejected in a roll call vote with 25 yeas and 102 nays.[417] Since 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.

In July a controversy was brewing about publication of the Report of the Joint Committee. On the 11th, Representative Francis C. Le

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[413] Id. at 3501 (June 29, 1866)

[414] See text accompanying notes _____ supra.

[415] Id. at 3502.

[416] Id. at 3524 (July 2, 1866).

[417] Id. at 3562 (July 3, 1866).

Blond (Democrat of Ohio) noted that the Report, including all testimony, was available but that the minority report was not included.[418] Since the report and testimony was already published in book form,[419] the Radical Republicans thereby succeeded in keeping the minority report from being distributed nationally on a massive basis.[420]

Addison H. Laflin of New York indicated that "the testimony was printed immediately after it was presented," and once the committee reported, the report and the testimony were sent to be bound.[421] 25,000 copies were quickly printed.[422] Thus, the testimony was available contemporaneously with Congressional action on the second Freemen's Bureau bill and the Fourteenth Amendment, and then was printed in large volume for distribution to the public. 100,00 copies would be printed.[423]

Not unexpectedly, President Johnson vetoed the second Freedmen's Bureau bill. The veto message was read to the House on July 16. The President conceded that previously, because the civil courts were closed, the need existed for military tribunals to exercise

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[418] Id. at 3749 (July 11, 1866).

[419] Id. at 3750.

[420] Id. at 3766 (July 12, 1866).

[421] Id.

[422] Id.

[423] Id.

"jurisdiction over all cases concerning the free enjoyment of the immunities and rights of citizenship, as well as the protection of person and property . . . ."[424] But now, Johnson claimed, the courts were again in operation, and "the protection granted to the white citizen is already conferred by law upon the freedmen . . . ."[425] He trusted protection of "the rights, privileges, and immunities of the citizens" to the civil tribunals, where one is entitled to trial by jury.[426] The President believed that the Civil Rights Act, which protected, inter alia, the "full and equal benefit of all laws and proceedings for the security of person and property," was ample.[427]

The House then decided to vote without further debate, and overrode the President's veto by a vote of 104 to 33, i.e., 76%.[428] Over a dozen of the 45 members who did not vote were excused by their Republican colleagues as absent due to "indisposition."[429] It is unclear whether the indisposition stemmed from a large party with spirituous liquors the night before or from political considerations.

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[424] Id. at 3849 (July 16, 1866).

[425] Id.

[426] Id. at 3850.

[427] Id.

[428] Id.

[429] Id. at 3850-51.

Word of the House's override then reached the Senate.[430] Henry Wilson urged the body to proceed to immediate action. Thomas Hendricks and Willard Saulsbury--the latter of whom months before had defended the power of States to prohibit firearms possession by selected groups[431]--gave speeches urging members to sustain the veto, primarily because of the miliary jurisdiction established by the bill. No one else spoke, and the Senate overrode the veto by a vote of 33 to 12 (73%), once again a good margin more than the necessary two thirds.[432]

X. SUMMARY OF CONGRESSIONAL ACTION ON THE FREEDMEN'S BUREAU ACT AND THE FOURTEENTH AMENDMENT

As finally passed into law on July 16, 1866, the Freedmen's Bureau Act continued the Bureau's existence for two more years.[433] The full text of §14 of the Act is as follows:

> 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 <u>full and equal benefit of all laws and proceedings concerning personal liberty, personal security</u>, and the acquisition, enjoyment, and disposition of

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[430] <u>Id</u>. at 3838.

[431] <u>Id</u>. at 478 (Jan. 29, 1866).

[432] <u>Id</u>. at 3842 (July 16, 1866.

[433] 14 STATUTES AT LARGE 173 (1866).

> 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 offence. 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 Congress of the United States.[434]

With enactment of the Freedmen's Bureau Act, the civil rights revolution in the Thirty-Ninth Congress was complete. The Fourteenth Amendment was passed by Congress, and the ratification process was the next step. The following summarizes the roll-call voting behavior of Congressmen concerning the Freemen's Bureau Act and the Fourteenth Amendment. Raw data of each individual member's voting record is included in the Appendix to this study.

Every single Senator who voted for the Fourteenth Amendment also

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[434] Id. at 176-77.

voted for the Freedmen's Bureau bills, S. 60 and H.R. 613, and thus for recognition of the constitutional right to bear arms. 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, which barely failed to reach the necessary two-thirds.[435] On June 8, the Senate passed the proposed Fourteenth Amendment by a vote of 33-11.[436] H.R. 613, the second Freedmen's Bureau bill, then passed the Senate by voice vote on June 26.[437] On July 16, the Senate overrode the President's veto of H.R. 613 by a vote of 33 to 12 (73%), more than the necessary two-thirds.[438]

An analysis of the roll call votes reveals that all 33 senators who voted for the Fourteenth Amendment also voted for either S. 60 or H.R. 613.[439] Of the 33 who voted for the Fourteenth Amendment, 28 (85%)

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[435] 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).

[436] Id. at 3042 (June 8, 1866).

[437] Id. at 3413 (June 26, 1866).

[438] Id. at 3842 (July 16, 1866).

[439] All voting tabulations are made 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 due to a death. 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

voted for both S. 60 and H.R. 613. All 11 who voted against the Fourteenth Amendment voted against either S.60 or H.R. 613, or both.[440]

Members of the House cast recorded votes overwhelmingly in favor of the Freedmen's Bureau bills, with recognition of the right to bear arms, on three occasions, 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,[441] the House passed S. 60 by a vote of 136 to 33.[442] Since the Senate barely 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,[443] and again, with the Senate amendments, on June 13 by a vote

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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 293 n.3 (1914).

[440] The chief objection against the Freedmen's Bureau bills, as set forth in debate and the President's veto messages, was that it asserted military jurisdiction in lieu of the civil courts. E.g., CONG. GlOBE at 915-918 (Feb. 19, 1866) and 933-43 (Feb. 20, 1866). No one objected to the provision which 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)

[441] Id. at 654 (Feb. 5, 1866).

[442] Id. at 688 (Feb. 6, 1866).

[443] Id. at 2545 (May 10, 1866).

of 120-32.[444] The House passed H.R. 613 on May 29 by a 96-33 margin,[445] and then on July 16 overrode the President's veto by a vote of 104-33, i.e., 76%.[446]

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 Freemen'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.[447] Of the 140 representatives who voted for the proposed Fourteenth Amendment, a total of 120--i.e., 86%--voted for both S. 60 and H.R. 613.

Accordingly, to a man, the same two-thirds-plus members of

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[444] Id. at 3149 (June 13, 1866).

[445] Id. at 2878 (May 29, 1866).

[446] Id. at 3850 (July 16, 1866). There may have been a large spiritous party before this vote, for colleagues excused over a dozen of their fellow members as absent because of "indisposition." Members specifically identified 13 absentees who would have voted for the bill, and 3 against. Id. at 3850-51.

[447] 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.

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 official approval by the same Congress that passed the Fourteenth Amendment.

The framers intended, and opponents well recognized, that the Fourteenth Amendment was designed to guarantee the right to keep and bear arms as a right and attribute of citizenship that no State could infringe. The passage of the Fourteenth Amendment accomplished the abolitionist goal that each state recognize all the freedoms contained in the Bill of Rights. Representative Bingam, author of the Amendment, intended, in Flack's words, "to confer power upon the Federal Government, by the first section of the Amendment, to enforce the Federal Bill of Rights in the States. . . ."[448] Flack generalized as follows:

> In conclusion, we may say that Congress, the House, and the Senate, had the following objects and motive in view for submitting the first section of the Fourteenth Amendment to the States for ratification:
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> 1. To make the Bill of Rights (the first eight amendments) binding upon, or applicable to, the States.[449]

Specifically, "it might be said that the following objects and rights

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[448] H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 80 (1908).

[449] Id. at 94.

were to be secured by the first section. . . the right peaceably to assemble, to bear arms, etc. . . ."[450]

Each clause of §1 of the Fourteenth Amendment reflects the broad character of the rights for which protection was sought. That section provides:

> 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.

Among other freedoms in the Bill of Rights, keeping and bearing arms had been considered part of the definition of "citizen" since the time of Aristotle.[451] Depicted as a civil right and a privilege or immunity in Dred Scott and in the debates on the Fourteenth Amendment and on related civil rights legislation, this liberty interest effectuated the defense and practical realization of the guarantees of "life, liberty, or property." This fundamental right under "the laws" (that is, the Bill of Rights) also qualified for "equal protection," but never for deprivation, whether equal or unequal. To the framers of the Amendment, these universally recognized rights, too numerous to

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[450] Id. at 96. All of the above quotations are from pages of Flack, which are cited as authority in Lynch v. Household Finance Corp., 405 U.S. 538, 544 (1972).

[451] See supra note ____ and accompanying text.

list individually, were to be protected by the all-inclusive language which they proposed and which was adopted as part of the Constitution.

The Freedmen's Bureau Act declared that "the constitutional right to bear arms" is included among the "laws and proceedings concerning personal liberty, personal security," and property, and that "the free enjoyment of such immunities and rights" is to be protected.[452] The Supreme Court has repeatedly recognized the "indefeasible right of personal security, personal liberty and private property . . . ."[453] The Court has emphasized:

> Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[454]

It remains to be seen whether the Supreme Court will decide if the Fourteenth Amendment incorporates the Second Amendment, so as to invalidate state infringements of the right of the people to keep and

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[452] 14 STATUTES AT LARGE 173, 176 (1866).

[453] Griswold v. Connecticut, 381 U.S. 479, 485 n. (1965), quoting Boyd v. United States, 116 U.S. 616, 630 (1886).

[454] Coolidge v. New Hampshire, 403 U.S. 443, 454 (1971), quoting Boyd, supra, at 635. Coolidge, supra at 454 n.4, also quotes Gouled v. United States, 255 U.S. 298, 303-304 (1921) concerning rights "declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen . . . ."

bear arms. Clearly the Fourteenth Amendment protects the rights to personal security and personal liberty, which its authors declared in the Freemen's Bureau Act include "the constitutional right to bear arms." To the members of the Thirty-Ninth Congress, possession of arms was a fundamental, individual right worthy of protection from both federal and state violations.

The arms which the Fourteenth Amendment's framers believed to be constitutionally protected included the latest firearms of all kinds, from military muskets (which were fitted with bayonets) and repeating rifles to shotguns, pistols, and revolvers. The right of the people to keep arms meant the right of an individual to possess arms in the home and elsewhere; the right to bear arms meant to carry arms on one's person. The right to have arms implied the right to use them for protection of one's life, family, and home against criminals and terrorist groups of all kinds, whether attacking Klansmen or lawless "law" enforcement. Far from being restricted to official militia activity, the right to keep and bear arms could be exercised by persons <u>against</u> the state's official militia when the latter raided and plundered the innocent.

In the above sense, "the constitutional right to bear arms" was perhaps considered as the most fundamental protection for the rights of personal liberty and personal security, which may explain its unique mention in the Freedmen's Bureau Act. To the framers of the Fourteenth

Amendment, human emancipation meant the protection of this great human right from all sources of infringement, whether federal or state.