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SECOND CLASS CITIZENSHIP AND THE SECOND AMENDMENT IN THE DISTRICT OF COLUMBIA

by

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INTRODUCTION

The District of Columbia, the murder capital of the United States, makes it difficult to impossible for a law-abiding citizen to keep a firearm in the home and, by policy, absolutely refuses to license the carrying of a firearm for self protection. No handgun may be possessed unless it was registered by 1977. Many ordinary rifles and pistols are, contrary to reality, defined as machineguns and are prohibited. Firearms kept at a business may be kept operable, but firearms kept at home must be disassembled and thus are unusable for self protection.

The D.C. Court of Appeals has held that peaceable persons who wish to keep firearms have no rights which the District is bound to respect, and that the Second Amendment to the U.S. Constitution does not apply in the District. 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." It is the thesis of this analysis that the Second Amendment does apply to the District of Columbia, and that the law-abiding citizens of the District are treated by the District's firearms prohibitions as second class citizens.

Challenges to the District's gun control laws in both the U.S. Court of Appeals for the D.C. Circuit and the D.C. Court of Appeals have been singularly unsuccessful. The latter court in Sandidge v. United States (1987)[1] held that the Second Amendment only guarantees a state militia right, and the concurring opinion argues that the "free State" clause of the Second Amendment restricts the amendment to the states. Modern scholarship has overwhelmingly established that the Second

[1] 520 A.2d 1057.

Amendment was intended to guarantee an individual right to keep and bear private arms, and that this would promote a well regulated militia, seen by the framers as necessary to guard a free society from a standing army.[2] However, Sandidge introduces a unique argument into the debate that, if valid, could only apply to the District: the District is not a state, and thus the "free State" language of the Second Amendment precludes the amendment's applicability to the District.

The following begins with an analysis of provisions of the D.C. Code concerning firearms ownership. It then reviews Sandidge and other decisions which, while not involving the Second Amendment, upheld or otherwise concern the District's firearms laws.

This analysis delves into the intent of the framers of the Second Amendment, beginning with the linguistic usage of the constitutional text, and then reviewing James Madison's draft of the Second Amendment which used the term "free country" instead of "free State." It explains why the framers considered the right to keep and bear arms to be essential to any free society, and thus would limit governmental action both in the states and in the seat of government.

In antebellum times, the District was governed by the Maryland code as of the date of cession. This included Maryland's slave code, which prohibited slaves from possessing firearms. Slavery and the slave code were abolished in the District in 1862 by statute, and the Thirteenth Amendment to the Constitution abolished slavery nationwide. The debates on this statute and the Amendment are analyzed here. Prohibition on firearms ownership by noncriminals appears to be the kind of incident or

[2] E.g., A. Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1162-68 (1991); S. Halbrook, The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment, 26 VALPARAISO U.L.REV. 131 (Fall 1991); S. Levinson, The Embarrassing Second Amendment, 99 YALE L.J. 637 (1989).

badge of slavery that would have been recognized as contrary to both the statutory and the constitutional abolition of slavery.

Scott v. Sandford (1857) taught that, if African Americans were citizens, they would enjoy all Bill of Rights freedoms, including the right "to keep and carry arms wherever they went."[3] The Reconstruction Congress took measures under the enforcement clause of the Thirteenth Amendment to guarantee this concept of citizenship. First, it passed the Civil Rights Act of 1866,[4] which survives today as 42 U.S.C. §1981(a) and provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens . . . ."

Second, Congress also passed the Freedmen's Bureau Act of 1866, which similarly protected "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate, . . . including the constitutional right to bear arms . . . ."[5] Representative John Bingham, draftsman of the Fourteenth Amendment, explained that this provision "enumerate[s] the same rights and all the rights and privileges that are enumerated in" the Civil Rights Act.[6] Thus, today's §1981(a) guarantees the substantive "constitutional right to bear arms." The Act is applicable both in the states and in the District.

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[3] 60 U.S. (19 How.) 393, 417.

[4] 14 Stat. 27 (1866).

[5] 14 Stat. 173, 176-77.

[6] CONG.GLOBE 1292 (Mar. 9, 1866).

Congress also passed, and the States ratified, the Fourteenth Amendment. While the "no State shall" clause of §1 does not apply to the District, the first sentence does: "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." To the framers of the Fourteenth Amendment, citizenship carried with it a bundle of rights, not the least of which was the individual right to keep and bear arms. Indeed, 120 years later, in the Firearms Owners' Protection Act of 1986, Congress recognized "the rights of citizens . . . to keep and bear arms under the second amendment to the United States Constitution . . . ."[7] In effect, Congress has declared, pursuant to the enforcement clause of the Fourteenth Amendment, that the right to keep and bear arms is a right of citizenship. The District's prohibition of possession of firearms by law-abiding citizens violates the rights of citizenship guaranteed by the Fourteenth Amendment.

Current D.C. Code §1-102(a) authorizes the District to "exercise all . . . powers of a municipal corporation not inconsistent with the Constitution and laws of the United States . . . ." This language derives from the Organic Act of 1871.[8] Accordingly, it would be appropriate to consider Congress' view in 1871 of what was inconsistent with the Constitution. Debates on the Civil Rights Act of 1871 make clear the general view in Congress that the individual right to keep and bear arms could not be infringed consistently with the Constitution.

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[7] 100 Stat. 449.

[8] 16 Stat. 419.

In the Sandidge case, the D.C. Court of Appeals argues that the militia act applicable to the District provides only that the National Guard may keep arms in armories. A historical review of militia legislation applicable to the District demonstrates that view to contain a narrow focus. Every able-bodied white male citizen of the District was required by early federal militia acts to provide himself with a musket, rifle, or pistols.[9] After the word "white" was stricken,[10] Congress passed a militia act for the District which recognized "every able-bodied male citizen within the District" as a member of the militia, but made provision only for the "organized militia," i.e., the National Guard.[11] This act remains a part of the D.C. Code.[12] However, in separate legislation "to promote the efficiency of the reserve militia," Congress provided for the issuance of service magazine arms to rifle clubs.[13] This survives today as 10 U.S.C. §4308, and provides for the promotion of rifle and pistol practice and for the sale to citizens of the United States of M-1 rifles. Accordingly, the District's citizens are members of the reserve militia and are entitled to possess arms.

This study concludes with an analysis of two lines of judicial decisions. The first involves decisions on the applicability of the Second Amendment to the federal government, and on the applicability of the Bill of Rights to the District. The second line of decisions concerns the Civil Rights Act of 1866, which restrains District as well as state action.

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[9] 1 Stat. 271, 272 (1792); 2 Stat. 103, 104 (1801).

[10] 14 Stat. 422, 423 (1867).

[11] 25 Stat. 772 (1889).

[12] D.C. Code §39-101 et seq.

[13] 33 Stat. 986, 987.

When it comes to the right to keep and bear arms, the District's residents are second class citizens. As the following demonstrates, this individual right was intended to be protected by the Second, Thirteenth, and Fourteenth Amendments as well as by several statutes related to those amendments.

I. GUN CONTROL LEGISLATION IN THE DISTRICT

A. From Congressional Regulation to Prohibition by the D.C. Council

Once the slave codes were abrogated, no gun control laws of any kind would exist in the District for thirty years. A drafting commission proposed in 1872 that persons be prohibited from carrying concealed weapons, but Congress never adopted the recommendation.[14] In the revision of the D.C. Code passed by Congress in 1874, mostly traditional crimes against person and property were punished, but the keeping and carrying of arms were not regulated in any manner.[15]

Finally, in 1892, Congress made it an offense to have concealed about one's person a deadly or dangerous weapon, including a pistol, dagger, and brass knuckles.[16] It was also unlawful to carry such weapons openly with the intent to use them unlawfully. One's place of business and dwelling house were exempted, and a concealed carry permit was available on showing the necessity thereof.[17]

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[14] Tit. 2, Ch. 2, §31, in House Misc. Doc. No. 25, 42d Cong., 3d Sess., at 610 (1872).

[15] Revised Statutes of the United States Relating to the District of Columbia Passed at the First Session of the Forty-Third Congress, 1873-'74, 18 Stat., Part 2, Chapter 36--Crimes and Offenses.

[16] 27 Stat. 116 (1892).

[17] Id.

The House Committee on the District of Columbia recommended passage of the act based on the following: "This community is possessed of a class of population who constantly arm themselves with concealed weapons. There is very little, if any, law which can reach these parties unless they actually use the weapon which they carry concealed upon their person."[18]

[18] House Report No. 1148, 52d Cong.. 1st Sess., at 1 (1892).

The bill passed the Senate easily because the prohibition on the open carrying of a weapon required proof of an unlawful purpose.[19] Two concerns were expressed when that body passed the final version. First, Senator White of Louisiana noted that the prohibition on carrying a concealed weapon "appears to leave it a matter of favoritism with a certain officer to issue a permit to carry them."[20] Senator Wolcott of Colorado responded that a permit would be warranted in event of "threatened assault" or "danger of attack."[21] He did not object to an amendment that the magistrate would issue a permit where a person had "well-grounded apprehension . . . that his life or his property or the lives of his family are in danger . . . ."[22]

A second concern with the bill was expressed by Senator Mills of Texas as follows:

> I desire to ask the friends of this measure what they do with this second amendment to the Constitution: The right of the people to keep and bear arms shall not be infringed.
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> . . . It is a natural right of a citizen to defend himself. I know that provision of the Constitution has by judge-made law been construed so as to invade and impair the right of the citizen. All these laws . . . intended to secure the person of the citizen, result in rendering him more insecure.
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> . . . You render the citizens of the country more defenseless by depriving them of the natural right to carry the arms which are necessary to secure their persons and their lives.[23]

Senator Wolcott did not dispute that the Second Amendment guaranteed an individual right, but argued that a prohibition on carrying concealed weapons did not violate that right:

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[19] CONG. REC. 1051 (Feb. 11, 1892).

[20] Id. at 5788 (July 6, 1892).

[21] Id.

[22] Id.

[23] Id.

> The constitutional provision is not affected by such a law. This bill is intended to apply to the criminal classes in the alleys of Washington who carry razors in their pockets, who carry concealed weapons, and brass knuckles. . . . It is not intended to affect the constitutional right of any citizen who desires to obey the law.
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> . . . Bearing arms and carrying concealed weapons are very different things.[24]

Thus, no one doubted that the Second Amendment guaranteed an individual right to keep a pistol in the home, or that the Second Amendment applied to the District. By enacting the law, Congress simply found that right not to be violated by a prohibition on carrying concealed weapons in public without a permit.

The 1892 provision was reenacted in 1901. The criterion for a carry permit was changed to "necessary self-defense."[25]

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[24] Id. at 5789.

[25] 31 Stat. 1328 (1901).

In 1906, Congress passed an act to prohibit the killing of wild birds and wild animals in the District of Columbia.[26] Committee reports[27] and floor remarks on the 1906 bill were restricted to the topic of hunting and animal conservation.[28] Representative Campbell of Kansas, the chief exponent, stated that "the object of this bill is to prohibit hunting in the District of Columbia, in the interests of public safety and bird protection and to make the suburbs of Washington practically a refuge for native birds and mammals."[29] No one suggested that the authority to regulate firearms would extend beyond the prevention of hunting.[30] For that purpose, the statute empowered the District commissioners "to make and enforce all such usual and reasonable police regulations . . . as they may deem necessary for the regulation of firearms . . . ."[31]

Congress passed a comprehensive firearms act in 1932 which remains largely in place today.[32] It continued the prohibition on carrying a concealed pistol on or about one's person without a license, which would be issued to a person with good reason to fear injury to his person or property or other proper reason.[33] A person who was convicted of a crime of violence could not possess a pistol, and

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[26] 34 Stat. 808 (1906).

[27] Senate Report 4338, 59th Cong., 1st Sess. (1906); House Report 4207, 59th Cong., 1st Sess. (1906).

[28] CONG. REC. 7569-70 (May 28, 1906).

[29] Id. at 7569.

[30] Id.

[31] Id. at 809.

[32] 47 Stat. 650 (1932).

[33] Id. at 651.

committing a crime while armed would result in enhanced punishment.[34] "Pistol" was defined as any firearm with a barrel less than 12 inches in length.[35]

The act also made it unlawful to possess a machine gun, shotgun with barrel less than 20 inches, or silencer.[36] However, "machine gun" was defined broadly to include "any firearm which shoots automatically or semiautomatically more than twelve shots without reloading."[37]

[34] Id. at 650-51.

[35] Id. at 650.

[36] Id. at 654.

[37] Id. at 650.

The House committee report on the 1932 bill stated that the measure would "meet the legitimate needs of all who are charged with the duty of protecting and defending life and property as well as those citizens who require firearms for protection or for sport . . . ."[38] In House floor debates, concern was expressed about a prohibition on mere possession of a sawed-off shotgun. Representative Blanton of Texas stated that they were "used by farmer boys everywhere. . . . In your effort to reach the thugs you are liable to reach innocent and honest boys who hunt . . . ."[39] Representative Stafford responded that the law would only apply to the District, and "otherwise I would accept the criticism of the gentleman from Texas as a proper one, but this law does not extend to a farming community."[40]

While no reference was made specifically to the Second Amendment, both the Senate report and Senator Capper supported the bill in part with the point that "the right of an individual to possess a pistol in his home or on land belonging to him would not be disturbed by the bill."[41] Of course, the open carrying of a pistol was not proscribed.

The 1932 act has remained in place with various amendments from time to time. It remained legal to carry a pistol openly until 1943, when Congress made it unlawful for a person to "carry either openly or concealed on or about his person" a pistol, with the previous exceptions for home and

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[38] House Report 767, 72d Cong., 1st Sess., at 2 (1932).

[39] CONG. REC. 7982 (Apr. 11, 1932).

[40] Id.

[41] Senate Report 575, 72d Cong., 1st Sess., at 3 (1932); CONG. REC. 12754 (June 13, 1934) (emphasis added).

business or with a permit.[42]

[42] 57 Stat. 586 (1943).

The House Committe on the District explained the need for the bill as follows: "In several recent cases . . . it has been held that a weapon is not 'concealed' within the meaning of the act unless it was actually concealed at the time it was proved to be in the possession of the defendant. Consequently, a person may escape conviction under this act merely by exhibiting his pistol or weapon when the law enforcement officer appears."[43]

On the House floor, Representative W. Sterling Cole of New York asked: "What effect will this bill have upon a person's carrying a shotgun or any kind of weapon that is not concealed?"[44] Representative Everett Dirksen of Illinois replied that the issue was discussed in committee, and that the law would not apply "to a person carrying a shotgun in a car . . . ."[45] Nothing in the bill prohibited the carrying or transportation of a rifle or shotgun without a permit.

A 1947 amendment is of interest from a Fourth Amendment perspective: it authorized a warrantless search and arrest in event of probable cause to believe a person is carrying a concealed weapon, but made inadmissible any evidence discovered if the person was not carrying a pistol or other weapon at the time of the arrest.[46]

In 1953, Congress extended the prohibition on possession of pistols to all felons (not just violent ones) and also to drug addicts and persons convicted of vagrancy.[47]

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[43] House Report No. 762, 78th Cong., 1st Sess., at 1 (1943).

[44] 88 CONG. REC., 78th Cong., 1st Sess., 8695 (Oct. 25, 1943).

[45] Id.

[46] 61 Stat. 743 (1947).

[47] 67 Stat. 93, 94 (1953).

The gun control provisions passed by Congress, currently Chapter 32 of the D.C. Code, are contained in the criminal code. Pertinent provisions include §22-3204(a), which provides: "No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed." Among the exceptions included in §22-3205 are "regularly enrolled members of any organization duly authorized to purchase or receive such weapons from the United States" who are at or going to or from places of assembly or target practice, i.e., participants in the Civilian Marksmanship Program; persons transporting pistols between their home or business and places of purchase or repair; and persons who are moving goods from one place or abode or business to another.

§22-3208 requires a 48 hour waiting period and notice to the police before a person transfers a pistol to another. Dealers must be licensed and must keep records pursuant to §§22-3209, 3210.

Additional penalties for committing a crime while armed and for possessing a firearm while committing a crime of violence are prescribed in §22-3202, 3204(b). Drug addicts, felons, and certain others may not own, keep, or possess a pistol. §22-3203.

The prohibition on machine guns and certain other weapons continues in §22-3214(a), and machine gun is still unusually defined to include a firearm which shoots automatically or semiautomatically over 12 shots without reloading. §22-3201(c). This definition is both overly narrow because it excludes a true machine gun which shoots 12 or fewer shots automatically, and overbroad because it includes a mere semiautomatic firearm.

As is clear, Congress has enacted a comprehensive regulatory scheme governing possession,

use, and commerce in firearms. Any provision which may be invalid would be so by reason of lack of constitutionality. A provision which is simply inconsistent with another statute passed by Congress, such as the Civil Rights Act of 1866, would not be thereby invalid.

Unable to persuade Congress to enact more draconian firearms prohibitions, the D.C. Council enacted the Firearms Control Regulations Act of 1975 (1976), which is codified as Chapter 23 of the Health and Safety Code. D.C. Code 26-2311(a) currently provides that "no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm."[48] However, §6-2312(a) provides:

> A registration certificate shall not be issued for a: . . . (4) Pistol not validly registered to the current registrant in the District prior to September 24, 1976, except that the provisions of this section shall not apply to any organization that employs at least 1 commissioned special police officer or other employee licensed to carry a firearm and that arms the employee with a firearm during the employee's duty hours or to a police officer who has retired from the Metropolitan Police Department.[49]

The D.C. Council sought to buttress the above by adoption in §6-2301 of the following statement of findings and purpose:

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[48] In addition to the standard governmental entities, §6-2311(a) exempts "any nonresident of the District participating in any lawful recreational firearm-related activity in the District, or on his way to or from such activity in another jurisdiction . . . Provided further, that such weapon shall be unloaded, securely wrapped, and carried in open view." To carry the firearm in open view, apparently the wrapping would have to be clear. Registration qualifications, requirements, and procedures are set forth in §6-2313 et seq.

The registration requirement was originally enacted in 1969, and was upheld in Maryland & D.C. Rifle & Pistol Ass'n v. Washington, 442 F.2d 123 (D.C.Cir. 1971).

[49] §6-2302 provides: "'Pistol' means any firearm originally designed to be fired by use of a single hand." The handgun ban was upheld in McIntosh v. Washington, 395 A.2d 744 (D.C. 1978).

> The Council of the District of Columbia finds that in order to promote the health, safety and welfare of the people of the District of Columbia it is necessary to:
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> (1) Require the registration of all firearms that are owned by private citizens;
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> (2) Limit the types of weapons persons may lawfully possess;
>
> (3) Assure that only qualified persons are allowed to possess firearms . . . .

Even for registered firearms, the Act eschews their use for lawful self-protection in the home. D.C. Code §2372 provides:

> Each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.

Almost twenty years after enactment of the above, in response to the District becoming known as the murder capital of the United States, in 1993 the D.C. Council legalized "self-defense spray."[50] Subject to being registered with the police, §6-2323 provides that "a person 18 years of age or older may possess and use a self-defense spray in the exercise of reasonable force in defense of the person or the person's property . . . ." While thus recognizing self-defense as a legitimate interest in society, the provision only allows use of a chemical which may be as likely to anger as to subdue an assailant.

B. District Firearms Legislation in the Courts

[50] In addition, in 1991 a referendum approved the Assault Weapons Manufacturing Strict Liability Act. §§6-2391 et seq. This provision creates absolute liability for named manufacturers of certain rifles and other firearms for criminal acts of third parties.

Until recently, the District of Columbia Court of Appeals had not considered the validity of the D.C. firearms prohibitions under the Second Amendment.[51] In addition to sustaining the denial of licenses to carry concealed handguns,[52] that court held that the Firearms Control Regulations Act is authorized under D.C.'s home rule powers,[53] and rejected, inter alia, equal protection challenges to the law.[54]

While upholding the disarming of the District's citizenry, the D.C. Court of Appeals also held that "official police personnel and the government employing them are not generally liable to victims of criminal acts for failure to provide adequate police protection . . . ."[55] The Court dismissed a civil lawsuit by women who were raped, robbed, and assaulted over several days and who repeatedly called the D.C. police to rescue them, to no avail.

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[51] See Williams v. United States, 237 A.2d 359, 360 (D.C. 1968)(refusing to consider Second Amendment when raised for first time on appeal).

[52] Jordan v. District of Columbia Board of Appeals and Review, 315 A.2d 153 (D.C. 1974); Jordan v. District of Columbia, 362 A.2d 114 (D.C. 1976).

[53] McIntosh v. Washington, 395 A.2d 744, 749-54 (1978).

[54] Id. at 755-56 (requiring disassembly of firearm at home, but not at business, not an equal protection violation); Fesjian v. Jefferson, 399 A.2d 861, 864 (D.C. 1979)(grandfather clause allowing some to register handguns and not others not an equal protection violation).

[55] Warren v. District of Columbia, 444 A.2d 1, 8 (1981).

District gun control legislation was originally challenged in the U.S. Court of Appeals for the District of Columbia. The requirement that all firearms be registered was upheld in Maryland & District of Columbia Rifle and Pistol Ass'n v. Washington (D.C. Cir. 1972).[56] The sole issue was whether the D.C. Council was authorized to require the registration of all rifles, pistols, and shotguns.[57] The court held the requirement to be authorized by D.C. Code §1-227, which empowered the Council "to make and enforce all such usual and reasonable police regulations . . . as they may deem necessary for the regulation of firearms . . . ." Congress originally passed that provision as part of a statute authorizing the District to regulate hunting.[58] The court found the provision to be sufficiently general to allow the registration requirement.[59] The Association also argued that in 1932 Congress enacted a gun control law for the District requiring licenses to carry pistols and prohibiting certain persons from possessing pistols, thereby demonstrating an intent to occupy the field. The court found the provisions not to be inconsistent and rejected the argument that Congress preempted the field.[60]

The D.C. Circuit also touched on the District's firearms laws in litigation stemming from the shooting of President Reagan and others by John Hinckley. In Delahanty v. Hinckley (D.C.Cir. 1988),[61] the Court was asked to apply to the District the legal theory created in Kelley v. R.G.

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[56] 442 F.2d 123 (D.C.Cir. 1971) aff'g 294 F.Supp. 1166 (D.D.C. 1969).

[57] Id. at 125.

[58] Id. at 125-28.

[59] Id. at 128.

[60] Id. at 129-31.

[61] 845 F.2d 1069.

Industries (1985).[62] In Kelley, the Maryland Court of Appeals created a cause of action against manufacturers and marketers of "Saturday Night Specials" on behalf of victims of criminal acts. According to the Maryland court, "The chief 'value' a Saturday Night Special handgun has is in criminal activity, because of its easy concealability and low price."[63] The court then stated:

> Moreover, the manufacturer or marketer of a Saturday Night Special knows or ought to know that he is making or selling a product principally to be used in criminal activity. For example, a salesman for R.G. Industries, describing what he termed to be a "special attribute" of a Rohm handgun, was said to have told a putative handgun marketer, "If your store is anywhere near a ghetto area, these ought to sell real well. This is most assuredly a ghetto gun."[64]

Strongly rejecting Kelly, the U.S. District Court for the District of Columbia stated in Delahanty v. Hinckley (1986):

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[62] 304 Md. 124, 497 A.2d 1143.

[63] 497 A.2d at 1158 (quoting Harper's magazine as evidence).

[64] Id.

> The salesman who was quoted seems to assume that anyone residing in a "ghetto" is criminal or suspect. The fact is, of course, that while blighted areas may be some of the breeding places of crime, not all residents of are so engaged, and indeed, most persons who live there are lawabiding but have no other choice of location. But they, like their counterparts in other areas of the city, may seek to protect themselves, their families and their property against crime, and indeed, may feel an even greater need to do so since the crime rate in their community may be higher than in other areas of the city. Since one of the reasons they are likely to be living in the "ghetto" may be due to low income or unemployment, it is highly unlikely that they would have the resources or worth to buy an expensive handgun for self defense. To remove cheap weapons from the community may very well remove a form of protection assuming that all citizens are entitled to possess guns for defense. This may be one explanation why the Saturday Night Special has a high rate of sale in the low income community.[65]

On appeal, the D.C. Circuit certified the issue to the D.C. Court of Appeals.[66] The opinion by Circuit Judge Mikva suggested that the theory in Kelley may apply because it was based on public policy considerations which derived from statutes, and the District had strict handgun control laws.[67] Judge Mikva suggested that the District might well recognize an action against manufacturers of "Saturday Night Specials" for crimes committed by third parties.[68]

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[65] 686 F.Supp. 920, 929 (D.D.C. 1986).

[66] Delahanty v. Hinckley, 845 F.2d 1069 (D.C.Cir. 1988).

[67] Id. at 1071.

[68] Id. at 1071-72.

The D.C. Court of Appeals rejected the theory that a manufacturer could be liable for criminal acts under the above circumstances, pointing to the anomaly that liability would be imposed only for misuse of inexpensive handguns and not of more expensive handguns.[69]

[69] Delahanty v. Hinckley, 564 A.2d 758, 762 (D.C. 1989).

Meanwhile, in Sandidge v. United States (1987),[70] the D.C. Court of Appeals affirmed a conviction for carrying a pistol without a license and possession of an unregistered firearm. The court held that "the Second Amendment guarantees a collective rather than an individual right. . . . It protects a state's right to raise and regulate a militia by prohibiting Congress from enacting legislation that will interfere with that right." Id. at 1058. The Second Amendment does not prohibit a state or the District of Columbia from restricting weapons "in derogation of the government's own right to enroll a body of militiamen 'bearing arms supplied by themselves' . . . ."[71]

No local legislation grants a right to bear unregistered firearms, the court stated, noting that D.C. Code §§39-101 through 39-105 provide for an "enrolled militia" but do not refer to arms, and §§39-105, -106, and -201 provide for a National Guard armed by the government.[72] "Assuming the second amendment applies to the District of Columbia, . . . the congressionally approved criminal law does not interfere with any government-created right to keep and bear arms."[73]

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[70] 520 A.2d 1057 (D.C.), cert. denied 484 U.S. 868 (1987).

[71] Id. (citing United States v. Miller, 307 U.S. 174, 179 [1939]).

[72] Id.

[73] Id.

The court rejected the argument that, under Supreme Court precedent, the government can only regulate weapons with no militia use.[74] The court also rejected the test that the Amendment protects only arms that one person can operate, noting that such a test would protect "high powered rifles, machine guns and even some antitank weapons . . . ."[75] Individual handgun possession bears no relation to a well regulated militia in the District.[76]

It is the concurring opinion of Judge Nebeker that introduces an unique and novel argument in the debate over the meaning of the Second Amendment:

> The second amendment does not apply to the seat of national government. This amendment is to ensure "the security of a free State." State militias were essential to that end--hence, the amendment. Nothing suggests that the founders were concerned about "free territories," "free protectorates" or a "free Seat of Government of the United States." See U.S. Const. art. I, §8, cl. 17. Indeed clause 17 gives to Congress exclusive legislative power in all cases over such "District." It may fairly be said that a federal militia is available in such places. Therefore, whatever may be said for the second amendment and its reach within the several states, I conclude first that is does not apply to the Seat of Government of the United States.[77]

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[74] Id. at 1058-59. However, United States v. Miller, 307 U.S. 174, 178 (1939) avoided determining whether a short barrel shotgun may be taxed under the National Firearms Act consistent with the Second Amendment and remanded the case for fact-finding to determine whether that type of arm was "any part of the ordinary military equipment or that its use could contribute to the common defense."

[75] Id. at 1059.

[76] Id.

[77] Id.

Sandidge[78] was approved in Brown v. United States (1988)[79] and again in Duval v. United States (1993).[80] Duval rejected as irrelevant U.S. Supreme Court dictum that "the people" means the same in the First, Second, Fourth, Ninth, and Tenth Amendments.[81]

II. THE RIGHT TO KEEP ARMS AND THE SECURITY OF "A FREE STATE": THE FRAMERS' INTENT

The meaning of the Second Amendment may be gleaned from the intent of its framers and the linguistic usage of the epoch of its adoption. It would be superficial to speculate that because the term "State" is capitalized in the constitutional text and in the Second Amendment, that the latter refers only to State governments and protects only State powers. "Militia" and "Arms" are also capitalized in the Second Amendment, as are other nonproper nouns in many eighteenth century political documents, without any substantive significance.

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[78] The same year Sandidge was decided, the D.C. Court of Appeals held that procedural due process required that the District give notice and an opportunity to be heard before forfeiting seized firearms, even if the firearms were unregistered. Ford v. Turner, 531 A.2d 233 (D.C. 1987).

[79] 546 A.2d 390, 399 n. 8 (D.C. 1988).

[80] No. 92-CM-69 (Feb. 11, 1993), at 2.

[81] Id. at 2-3 n. 4, citing United States v. Verdugo-Urquidez, 494 U.S. 259, 108 L.Ed.2d 222, 232-33, 110 S.Ct. 1056, 1060-61 (1990).

The text of the Constitution makes several references to the states as political entities in the federal system. Using state-federal military powers as an example, Congress has "power" to provide for organizing and arming the militia, "reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress . . . ."[82] Just as Congress has power "to raise and support armies," "to provide and maintain a navy," and "to provide for calling forth the militia,"[83] the text of the Constitution also provides that "no State shall, without the consent of Congress, . . . keep troops, or ships of war in time of peace, . . . or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."[84] Thus, the text of the Constitution uses terms such as "the States respectively" and "no State" i.e., nouns without adjectives, when referring to the State governments.

The original Constitution also authorizes Congress to provide for a national capital. Article 1, §8, ends with the following clauses:

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, . . . --And
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

In the state ratification conventions, most objections to the seat-of-government clause asserted that the capital would become a center of despotism to oppress the people of the states. However, in

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[82] U.S. Const., Art. I, §8, Cl. 16.

[83] Id., Clauses 12, 13, and 15.

[84] Id., §10, Cl. 3.

the Virginia convention, Patrick Henry suggested that the inhabitants of the capital would also suffer loss of rights. Attacking both the seat-of-government and the necessary-and-proper clauses, Henry argued:

> They have a right, by this clause, to make a law that such a district shall be set apart for any purpose they please, and that any man who shall act contrary to their commands, within certain ten miles square, or any place they may select, and strongholds, shall be hanged without benefit of clergy. . . . Will not this clause give them a right to keep a powerful army continually on foot, if they think it necessary to aid the execution of their laws? Is there any act, however atrocious, which they cannot do by virtue of this clause?[85]

The greatest objection of the antifederalists to the Constitution, of course, was that it contained no bill of rights. No distinction in this regard was made between the residents of the states and those of the seat of government. The suggestion was never made that the people who lived in the capital should or would not have the same rights that would be declared in the Bill of Rights as the people who resided in the states.

On June 8, 1789, Representative James Madison introduced in the House of Representatives what would become the Bill of Rights. The bill, he declared, would "expressly declare the great rights of mankind secured under this constitution."[86] A declaration about "the great rights of mankind" is not exactly synonymous with a mere provision about the powers of a state government.

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[85] 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 436 (1836).

[86] 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: DEBATES IN THE HOUSE OF REPRESENTATIVES 820 (1992).

In a draft of his speech, Madison referred to the rights concerning "freedom of press--Conscience . . . arms" as "private rights."[87] What became the Second Amendment was drafted as follows: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."[88]

Ten days after the Bill of Rights was proposed in the House, Tench Coxe explained the right in question as an individual guarantee to have private arms: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms."[89] Obviously, the need to prevent tyranny would exist in the seat of government, not just in the states. Madison endorsed Coxe's analysis.[90]

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[87] MADISON PAPERS 193-94 (Rutland ed. 1979).

[88] 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 10 (1986) (emphasis added). In THE FEDERALIST No. 35, Alexander Hamilton wrote that "a well regulated militia [is] the most natural defence *of a free country* . . . ." 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 318 (1984) (emphasis added).

[89] Federal Gazette, June 18, 1789, at 2, col. 1.

[90] 12 MADISON PAPERS 239-40, 257 (1978).

Madison's amendments were referred to a House Select Committee, which reported back the following: "A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms."[91]

While Madison's term "a free country" was changed to "a free state," the committee retained the adjective "free," thus differentiating other uses of "State" throughout the constitutional text to denote the State governments. "A free state" and "a free country" meant, in eighteenth century usage, a free society. Citizens of the whole country must be free, not just those in the states.

Moreover, the intent was to declare that "a well regulated militia" is necessary for "the security of a free State." The federal government and its potential standing army was perceived as the danger. Securing a free country from the potential tyranny of the federal government was a primary purpose of the Second Amendment.

Like the Second Amendment's explicit "free State" clause, the First Amendment has implicit "free State" aims. The framers were well familiar with Blackstone's statement: "The liberty of the press is indeed essential to the nature of a free state . . . ."[92] Had this language appeared in the First Amendment, it would not mean that only citizens of a state have a "right" to freedom of the press. Both

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[91] 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 28 (1986).

[92] 4 BLACKSTONE, COMMENTARIES *151-152. Justice Kennedy, joined by Justices Blackmun and Stevens, dissenting in Alexander v. United States, 113 S.Ct. 2766, ___(1993), referred to the above as "early in our legal tradition . . . the oft cited passage from William Blackstone's 18-century Commentaries . . . ." See Near v. Minnesota, 283 U.S. 697, 713 (1931)(quoting Blackstone as stating "the liberty deemed to be established" by the First Amendment).

the liberty of the press and a well regulated militia--which is promoted by the keeping and bearing of arms by the people--are necessary for the existence of a free state. These are rights of the people in a free state, not merely prerogatives of citizens of a state.

The First Amendment's prohibition on the establishment of a religion was also seen as necessary for a free state. Madison's Memorial and Remonstrance Against Religious Assessments (17___) stated:

> We, the subscribers, citizens of the said Commonwealth, having taken into serious consideration . . . 'a Bill establishing a provision for teachers of the Christian religion,' and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State, to remonstrate against it . . . .[93]

The above linguistic usage is confirmed in An American Dictionary of the English Language (New York 1828) by Noah Webster, who had been a prominent federalist in the ratification debates of 1787-88.[94] Webster defined "free" in part as follows:

> In government, not enslaved; not in a state of vassalage or dependence; subject only to fixed laws, made by consent, and to a regular administration of such laws; not subject to the arbitrary will of a sovereign or lord; as a free state, nation or people.

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[93] 2 WRITINGS OF JAMES MADISON 183-91 (G. Hunt ed. 1901), quoted in Appendix to dissenting opinion of Justice Douglas, Walz v. Tax Commission, 397 U.S. 664, 719 (1970).

[94] Indeed, Webster, AN EXAMINATION OF THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 43 (Philadelphia 1787) commented directly on the right to keep and bear arms:

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States.

Webster defined "state," in turn, in pertinent part:

> A political body, or body politic; the whole body of people united under one government, whatever may be the form of the government . . . .
>
> More usually the word signifies a political body governed by representatives; a commonwealth; as the States of Greece; the States of America.
>
> In this sense, state has sometimes more immediate reference to the government, sometimes to the people or community. Thus when we say, the state has made provision for the paupers, the word has reference to the government, or legislature; but when we say, the state is taxed to support paupers, the word refers to the whole people or community.

Thus, "the States of America" refers to the political units known as States. "A free state" is far broader, encompassing as it does the entire body politic, including "the whole body of people."

In sum, the Second Amendment was intended to protect from infringement the right of "the people," which included the people residing in the seat of government, to keep and bear arms. Its political objective was to promote a well regulated militia, seen as necessary to secure "a free State," which also was intended to include the people who resided in the seat of government.

III. THE ABOLITION OF SLAVERY AND THE SLAVE CODES IN THE DISTRICT, INCLUDING THE PROHIBITION ON POSSESSION OF ARMS BY BLACKS

Washington, D.C. was originally carved out of ten square miles of Virginia and Maryland. The Act of Congress of February 27, 1801, provided that the laws in force in Virginia and Maryland, as they then existed, would be in force in the parts of the District ceded by each of those states respectively.[95] The portion ceded by Virginia was retroceded back to that state in 1846.[96]

Since slavery existed in those states, the slave codes of Maryland and, for a time, of Virginia, applied in the District. The codes, of course, of all of the Southern states prohibited slaves from

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[95] 2 Stat. 103, 104 (1801).

[96] 9 Stat. 35 (1846).

keeping or bearing any weapon.

In A Dissertation on Slavery (Philadelphia 1796), acclaimed jurist and early abolitionist St. George Tucker summarized the badges of slavery: 'To go abroad without a written permission; to keep or carry a gun, or other weapon; to utter any seditious speech; to be present at any unlawful assembly of slaves; to lift the hand in opposition to a white person, unless wantonly assaulted, are all offenses punishable by whipping.'[97]

Virginia law at the time that state's law applied to a portion of the District included a 1748 statute:

> No Negro or mulatto slave whatsoever shall keep or carry any gun, powder, shot, club or other weapon whatsoever, offensive or defensive. . . [under penalty of up to thirty-nine lashes]: Provided, that slaves living at any frontier plantation, may be permitted to keep and use guns, powder, shot, and weapons, offensive or defensive, by license from a justice of the peace of the county wherein such plantation lies . . . .

[97] ST. GEORGE TUCKER, A DISSERTATION ON SLAVERY 65 (1796).

> No free negro or mulatto, shall be suffered to keep or carry any fire-lock of any kind, any military weapon, or any powder or lead, with out first obtaining a license from the court of the county or corporation in which he resides, which license may, at any time, be withdrawn by an order of such court.[98]

By the same token, antebellum Maryland law included the following provision first enacted in 1715:

> That no negro or other slave within this province shall be permitted to carry any gun, or any other offensive weapon, from off their master's land, without license from their said master; and if any negro or other slave shall presume to do, he shall be carried before a justice of peace, and be whipped, and his gun or other offensive weapon shall be forfeited to him that shall seize the same and carry such negro so offending before a justice of peace.[99]

Slavery would be abolished in the District by statute in 1862, three years before its abolition nationally by ratification of the Thirteenth Amendment in 1865. The debates on both the antislavery statute and the constitutional amendment demonstrate the framers' intent to abolish the slave codes, including all of the deprivations of true citizenship contained therein. One such deprivation was the criminalization of possession of firearms.

A. Congress Abolishes Slavery in the District

[98] Code of Virginia, 1819, Chapter III, §§7, 8.

[99] THE GENERAL PUBLIC STATUTORY LAW AND PUBLIC LOCAL LAW OF THE STATE OF MARYLAND, FROM THE YEAR 1692-1839 INCLUSIVE at 31 (Baltimore: John D. Toy, 1840).

Abolition of slavery in the District in 1862 began with consideration by Congress of Senate Bill No. 108, a bill for the release of persons held to service in the District.[100] The bill provided that "neither slavery nor involuntary servitude, except for crime, whereof the party shall have been duly convicted, shall hereafter exist in the District . . . ."[101]

Senator John P. Hale of New Hampshire asserted that Congress had the power to abolish slavery in the District, and nothing in the Dred Scott decision questioned that power.[102] Scott v. Sanford (1857) had held that if African Americans were citizens, they would have the rights to free speech, to "keep and carry arms wherever they went," and to enjoy other rights which were illegal under the slave codes.[103] Hale averred that "by our laws, this system of human slavery exists, and we are called upon today to abolish it, to repeal the laws upon which it rests . . . ."[104]

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[100] CONG. GLOBE, 37th CONG., 2nd Sess., 1191 (Mar. 12, 1862).

[101] Id.

[102] Id. at 1267 (Mar. 18, 1862).

[103] 60 U.S. 393, 417.

[104] CONG.GLOBE, 37th Cong., 2d Sess., 1267 (Mar. 18, 1862).

Referring to the 1801 statute creating the District, Senator Henry Wilson, a Massachusetts Republican, stated: "By this act the inhuman and barbarous, the indecent and vulgar colonial slave codes of Maryland and Virginia became the laws of republican America for the government of its chosen capital."[105] Provisions included a prohibition on Negro testimony and cropping the ear of a slave who strikes a white person.[106]

Wilson continued that in 1820, Congress gave to the corporation of Washington power to "prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes," punishable by whipping with forty stripes.[107] The corporation could "prescribe the terms and conditions upon which free negroes and mulattoes may reside in the city . . . ."[108] The corporation, Wilson argued, passed ordinances "more oppressive, more inhuman, more degrading than the colonial black code of Maryland, which Congress reaffirmed in 1801." For instance, an 1827 ordinance punished any free person of color who went at large after 10:00 p.m. without a pass from a "respectable citizen".[109] An 1836 ordinance required a free person of color to exhibit evidence of his title to freedom and to give bond for good conduct.[110] The same prohibited secret meetings or assemblings, and authorized the police

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[105] Id. at 1350 (Mar. 25, 1862).

[106] Id. at 1351.

[107] Id.

[108] Id.

[109] Id.

[110] Id.

constable to enter homes and break up such meetings.[111] Senator Wilson noted the fate of these slave provisions once the bill passed:

[111] Id.

> These colonial statutes of Maryland, reaffirmed by Congress in 1801, these ordinances of Washington and Georgetown, sanctioned in advance by the authority of the Federal Government, stand this day unrepealed. Such laws and ordinances should not be permitted longer to insult the reason, pervert the moral sense, or offend the taste of the people of America. Any people mindful of the decencies of life would not longer permit such enactments to linger before the eye of civilized man. Slavery is the prolific mother of those monstrous enactments. Bid slavery disappear from the District of Columbia, and it will take along with it this whole brood of brutal, vulgar, and indecent statutes.[112]

Wilson concluded about the bill: "If it shall become the law of the land, it will blot out slavery forever from the national capital, transform three thousand personal chattels into freemen, obliterate oppressive, odious, and hateful laws and ordinances, which press with merciless force upon persons, bond or free, of African descent . . . ."[113]

In perhaps the most powerful speech in support of the bill, Senator Charles Sumner, a Massachusetts Republican, outlined how Maryland's slave code came to be the law of the District:

> Congress proceeded to assume that complete jurisdiction which is conferred in the Constitution by enacting, on the 27th February 1801, "that the laws of the State of Maryland, as they now exist, shall be and continue in force in that part of the said District which was ceded by that State to the United States, and by them accepted for the permanent seat of Government." Thus at one stroke all the existing laws of Maryland were adopted by Congress in gross, and from that time forward became the laws of the United States at the national capital. . . .
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> Among the statutes of Maryland thus solemnly reenacted in gross by Congress was the following, originally passed as early as 1715--in colonial days:

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[112] Id.

[113] Id. at 1353.

"All negroes and other slaves already imported or hereafter to be imported into this province, and all children now born or hereafter to be born of such negroes and slaves shall be slaves during their natural lives." Laws of Maryland, 1715, ch. 44, sec. 22.

But slavery cannot exist without barbarous laws in its support.[114]

[114] Id. at 1448 (Mar. 31, 1862).

The same slave code chapter quoted by Senator Sumner punished by whipping a "negro or other slave" who carried a gun or other weapon off the master's land without a license from the master.[115] Originally adopted in 1715, that provision became the law of the District in that part ceded by Maryland in 1801.[116]

Sumner observed that slavery "now continues only by virtue of this slave code borrowed from early colonial days . . . ."[117] He argued that Congress, being bound by the Fifth Amendment prohibition on depriving any "person" of "liberty" without due process, had acted unconstitutionally in sanctioning slavery in the District.[118] "But Congress can exercise no power except in conformity with the Constitution. Its exclusive jurisdiction in all cases whatsoever is controlled and limited by the

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[115] *Supra* note 99 and accompanying text (quoting §32 of chapter 44).

[116] As of 1860, the Maryland Code had no restriction of any kind on the peaceable keeping and bearing of arms by whites. Carrying concealed weapons was not regulated; the only marginally relevant prohibitions were on duelling and "gunning," i.e., hunting on another's land without permission. THE MARYLAND CODE 216, 220-21 (Baltimore 1860).

The 1860 Code contained the following slave code provision which derived from the 1715 statute:

> No slave shall carry any gun, or any other offensive weapon, from off his master's land, without a license from his said master, and any slave so offending shall be whipped, and the gun or other weapon (unless stolen by such slave) shall be forfeited to whoever will seize the same, and carry such slave before a justice of the peace. Id. at 454.

In 1864, slavery would be abolished in Maryland, and the following year the above and most other slave code provisions were repealed. 3 SUPPLEMENT TO THE CODE OF MARYLAND 52 (Baltimore 1865).

[117] CONG. GLOBE, 37th Cong., 2nd Sess., 1448 (Mar. 31, 1862).

[118] Id. at 1449.

Constitution, from which it is derived."[119]

[119] Id. at 1448.

The Seat of Government clause was seen as empowering Congress to abolish slavery in the District. The limits of congressional power over the people of the District, Senator John Sherman, an Ohio Republican, noted, is that "they have their personal rights secured to them by the bill of rights . . . ."[120]

Opening debate in the House on the bill to abolish slavery in the District, Representative Benjamin F. Thomas, a Unionist from Massachusetts, implied by the following remarks that the end of slavery would result in the guarantee of Bill of Rights freedoms for every person:

> Nor are we to forget that the Constitution is a bill of rights as well as a frame of government that among the most precious portions of the instrument are the first ten amendments; that it is doubtful whether the people of the United States could have been induced to adopt the Constitution except upon the assurance of the adoption of these amendments which are our Magna Carta, embodying in the organic law the securities of life, liberty, and estate, which, to the Anglo-Saxon mind, are the need and the fruit of free government. Some portions of our history have led to the conclusion that the existence of these amendments may, in the confusion of the times have been overlooked.[121]

Representative John Bingham of Ohio, a Republican and future author of the Fourteenth Amendment, gave a major speech comparing the Magna Carta of England and the American Constitution as follows:

> That provision, sir, only protected from unjust seizure, imprisonment, disseizin, outlawry, and banishment those fortunate enough to be known as FREEMEN; it secured no privileges to vassals or slaves. Sir, our Constitution, the new Magna Charta, which the gentleman aptly says is the greatest provision for the rights of mankind and for the amelioration of their condition, rejects in its bill of rights the restrictive word "freeman," and adopts in its stead the more comprehensive words "no person"; thus giving its protection to all, whether born free or bond. The provision of our constitution is, "no person shall be deprived of life, or liberty, or property

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[120] Id. at 1491 (April 2, 1862).

[121] Id. at 1614 (Apr. 10, 1862).

without due process of law."[122]

[122] Id. at 1638 (Apr. 11, 1862).

However, in part because it was "without State limitations," Bingham argued that "this sacred guarantee of life and liberty and property to all has been wantonly ignored and disregarded as to a large class of our natural-born citizens."[123] Referring to the federal Constitution, Bingham continued:

> That Constitution . . . proclaimed that all men in respect of the rights of life and liberty and property were equal before the law; and that no person, no human being, no member of the family of man shall, by virtue of Federal law or under the sanction of the Federal authority where ever the Federal Government has exclusive and supreme authority, be deprived of his life, or his liberty, or his property, but by the law of the land--not by the law of Maryland or Virginia, but by the law of the land, the law of the Republic, the law of the whole people of the United States.[124]

At this point, Bingham was surely opining that the Bill of Rights applied to the District, and that the Maryland slave code was repugnant to the Bill of Rights. Bingham explained that "no American citizen nor human being shall, within the limits of this District, 'be deprived of life or liberty or property without due process of law.' . . . These persons who are the subject-matter of this legislation were natural-born citizens of the Republic."[125] The implication is clear--Dred Scott taught, and the abolitionists concurred, that true citizens have Bill of Rights freedoms, including the right to keep and carry arms. For Bingham, the abolition of slavery meant making slaves into citizens. In fact, he "would have preferred if the bill had declared that 'all American citizens held to service or labor within the District of Columbia by reason of African descent are hereby discharged and forever freed from such servitude.'"[126]

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[123] Id.

[124] Id.

[125] Id. at 1639.

[126] Id.

Referring to Article 2, §1 of the Constitution, which provides that only "a natural born citizen" may be President, Bingham added: "who are natural-born citizens but those born within the Republic? Those born within the Republic, whether black or white, are citizens by birth--natural-born citizens."[127]

In language which presaged the Fourteenth Amendment, Bingham noted the connection between the Fifth Amendment and article 4, section 2 as follows:

> The Constitution does not read, as I have heard it quoted upon this floor, that the citizens of each State should be entitled to the privileges and immunities of citizens of the several States. No, sir, the word used in the Constitution in this clause is not of, but in, the several States. "All privileges and immunities of citizens of the United States in the several States," is what is guarantied by the Constitution. . . . The great privilege and immunity of an American citizen to be respected everywhere in this land, and especially in this District, is that they shall not be deprived of life, liberty, or property without due process of law.[128]

Referring to the slave codes as "inhuman and unjust statutes," Bingham called for the amelioration of "the condition of men who, in flagrant violation of your Constitution, are deprived of the right to enjoy the freedom of their own person . . . ."[129] Passage of the bill would give slaves "a sense of personal security" and would guarantee "that no man . . . be deprived of his life, of his liberty, or of his property without due process of law; and that slavery or involuntary servitude shall never be tolerated here . . . ."[130]

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[127] Id.

[128] Id. at 1639.

[129] Id. at 1640

[130] Id.

Representative Samuel C. Fessenden, a Maine Republican, agreed that the abolition of slavery would mean full citizenship rights for the freedmen: "these men and women and children will . . . be translated from the condition in which they had no rights for which this nation has had any respect into that condition in which they are invested with the rights of freemen, upon which none can trespass with impunity . . . ."[131]

As passed by Congress and signed by President Lincoln on April 16, 1862, the act abolishing slavery provided:

> That all persons held to service or labor within the District of Columbia by reason of African descent are hereby discharged and freed of and from all claim to such service or labor; and from and after the passage of this act neither slavery nor involuntary servitude, except for crime, whereof the party shall be duly convicted, shall hereafter exist in said District.[132]

The act also repealed the provisions of the Maryland slave code which applied in the District, including the prohibition on the right of a slave to own or carry arms, by providing: "That all acts of Congress and all laws of the State of Maryland in force in said District, and all ordinances of the cities of Washington and Georgetown, inconsistent with the provisions of this act, are hereby repealed."[133]

B. The Adoption of the Thirteenth Amendment

By 1864, Congress was almost ready to propose a constitutional amendment abolishing slavery throughout the United States. The result would be the Thirteenth Amendment, which was ratified in 1865 and which provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime

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[131] Id. at 1642.

[132] 12 Stat. 376.

[133] Id. at 378.

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.

As with the act to abolish slavery in the District, the framers of the Thirteenth Amendment expressed a clear intent to abrogate the slave codes as incidents of slavery. The slave codes, of course, uniformly prohibited the possession of firearms by slaves.

Heavily filled with wartime rhetoric, the debates on the Thirteenth Amendment do not include the more extensive legal and political comments as did the 1862 debate on the abolition of slavery in the District. Still, the intent was clear that the slave codes would be abrogated and that blacks would have the rights of citizens.

The anti-slavery amendment was proposed as Senate bill No. 16. Senator Henry B. Anthony, a Republican from Rhode Island, noted: "This proposition comes most appropriately from a senator [Sumner] from that State [Massachusetts] which declared that slavery was inconsistent with the Declaration of Independence and the Bill of Rights . . . ."[134]

Senator Henry Wilson, a Massachusetts Republican, made clear the intent to repeal the badges of slavery as follows:

> No man . . . can read the slave codes of the southern States without admitting that they are utterly repugnant to the genius of our free institutions and irreconcilably opposed to the theory of our Government. And yet every one knows that these tyrannical, hostile, and barbarous codes were absolutely necessary for the preservation of the slave system . . . . [K]een appreciation of every man's right to "life, liberty, and the pursuit of happiness" . . . bids defiance to slave codes, and effectively asserts and maintains the right of every man to own himself. The system, being a pure despotism, was forced to resort to despotic laws for support, defense, and

[134] CONG.GLOBE, 38th Cong., 1st Sess., 522 (Feb. 8, 1864).

perpetuation.[135]

Wilson argued that the privileges-and-immunities clause protected every citizen from state deprivation of Bill of Rights freedoms. Quoting that clause and the First Amendment, Wilson continued:

[135] Id. at 1200 (Mar. 19, 1864).

> The great rights here enumerated were regarded by the people as too sacred and too essential to the preservation of their liberties to be trusted with no firmer defense than the rule that "Congress can exercise no power, which is not delegated to it." Around this negative protection was erected the positive barrier of absolute prohibition. Freedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition belong to every American citizen, high or low, rich or poor, wherever he may be within the jurisdiction of the United States. With these rights no State may interfere without breach of the bond which holds the Union together. . . . The Constitution may declare the right, but slavery ever will, as it ever has, trample upon the Constitution and prevent the enjoyment of the right.[136]

These rights were abrogated in the slave states. "An aristocracy enjoyed unlimited power, while the people were pressed to the earth and denied the inestimable privileges which by right they should have enjoyed in all the fullness designed by the Constitution."[137] The slave states infringed on other Bill of Rights freedoms as well. "I might enumerate many other constitutional rights of the citizen which slavery has disregarded and practically destroyed . . . slavery disregards the supremacy of the Constitution and denies to the citizens of each State the privileges and immunities of citizens in the several States."[138] Senator Wilson suggested that "the people of the free States should insist on ample protection to their rights, privileges, and immunities, which are none other than those which the Constitution was designed to secure to all citizens alike . . . ."[139]

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[136] Id. at 1202.

[137] Id.

[138] Id.

[139] Id. at 1203.

In another speech, Senator Wilson again alluded to Dred Scott: 'The Attorney General pronounces the black man, who was said to have no rights that white men were bound to respect, a citizen of the United States."[140] "If this amendment shall be incorporated by the will of the nation into the Constitution of the United States, it will obliterate the last lingering vestiges of the slave system: its chattelizing, degrading, and bloody codes . . . ."[141]

Repeatedly referring to the violation of Bill of Rights guarantees and to Dred Scott's statement that "the negro had no 'rights which the white man was bound to respect,'"[142] Senator Clark averred that "the arming of the slaves will make the future enslaving of these men and their kindred well nigh impossible; but slavery will still exist . . . in the root and principle. This amendment will dig out the root and repudiate the principle."[143] The Senate would overwhelmingly pass the Thirteenth Amendment.[144]

In the House, Representative Ebon C. Ingersoll, an Illinois Republican, interpreted the anti-slavery amendment to enforce Bill of Rights guarantees for every person:

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[140] Id. at 1323 (Mar. 28, 1864).

[141] Id. at 1324.

[142] Id. at 1368-69 (Mar. 31, 1864).

[143] Id. at 1370.

[144] Id. at 1490 (Apr. 8, 1864).

> Sir, I am in favor in the fullest sense of personal liberty. I am in favor of the freedom of speech. The freedom of speech that I am in favor of is the freedom which guaranties to the citizen of Illinois, in common with the citizen of Massachusetts, the right to proclaim the eternal principles of liberty, truth, and justice in Mobile, Savannah, or Charleston with the same freedom, and security as though he were standing at the foot of Bunker Hill monument; and if this proposed amendment to the Constitution is adopted and ratified, the day is not far distant when this glorious privilege will be accorded to every citizen of the Republic. I am in favor of the adoption of this amendment because it will secure to the oppressed slave his natural and God-given rights. I believe that the black man has certain inalienable rights, which are as sacred in the sight of Heaven as those of any other race. I believe he has a right to live, and live in a state of freedom.[145]

The proposed constitutional amendment was defeated in the House that session.[146] Supporters would be more successful in the next session with the same arguments. Representative James M. Ashley, an Ohio Republican, derided the Dred Scott dictum that "black men had no rights which white men were bound to respect."[147] Representative John A. Kasson, an Iowa Republican, complained of the violation in the Southern states of the privileges-and-immunities clause and the Bill of Rights.[148]

Arguing for speedy adoption of the Thirteenth Amendment, Representative William D. Kelley (Republican of Pennsylvania) expressed shock at the words of an antisecessionist planter in Mississippi who expected the Union to restore slavery. Kelley cited a letter from a U.S. brigadier general, who wrote: "'What,' said I, 'these men who have had arms in their hands?' 'Yes,' he said, 'we should take the arms away from them, of course.'"[149]

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[145] Id. at 2990 (June 15, 1864).

[146] Id. at 2995.

[147] Id., 38th Cong., 2d Sess., 138 (Jan. 6, 1865).

[148] Id. at 193 (Jan. 10, 1865).

[149] Id. at 289 (Jan. 16, 1865).

The proposed constitutional amendment finally passed the House.[150] It would be ratified by the states as of December 6, 1865.

IV. THE INTENT OF THE CIVIL RIGHTS ACT OF 1866 AND THE CITIZENSHIP CLAUSE OF THE FOURTEENTH AMENDMENT TO PROTECT THE RIGHT TO KEEP AND BEAR ARMS

The Civil Rights Act of 1866, currently 42 U.S.C. §1981(a), as amended, provides in part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens . . . ." Moreover, §1 of the Fourteenth Amendment, which Congress passed in 1866 and the states ratified in 1868, provides in part: "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." The statutory protection of "the security of person and property" and constitutional recognition of citizenship were both intended by Congress to protect the individual right to keep and bear arms against any governmental infringement, including by the District of Columbia.

After the Civil War, the Southern states reenacted the slave codes in the form of the black codes, which prohibited freedmen from possession of firearms. By adopting the Civil Rights Act and the Fourteenth Amendment, Congress intended to prevent this and other infringements on the rights of the citizen.

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[150] Id. at 531 (Jan. 31, 1865).

Congress' awareness of the attempts to reenslave the freedmen was sparked by the presidentially-transmitted report of Major General Carl Schurz. The widely publicized report, on which Congress placed great credence,[151] reviewed in detail abuses committed against freedmen. In addition to other methods to restore slavery, planters advocated that "the possession of arms or other dangerous weapons without authority should be punished by fine or imprisonment and the arms forfeited."[152] 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."[153] "This ordinance, if enforced, would be slavery in substance," and violated the Emancipation Proclamation, held the Freedmen's Bureau.[154]

On January 5, 1866, Senator Lyman Trumbull introduced S. 60, a bill to enlarge the powers of the Freedmen's Bureau, and S. 61, the civil rights bill.[155] 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,

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

[152] Sen. Exec. Doc. No. 2, 39th Cong., 1st Sess., pt. 1, at 85 (Dec. 13, 1865).

[153] Id. at 93-95.

[154] Id. at 96.

[155] CONG.GLOBE, 39th Cong., 1st Sess., 129 (Jan. 5, 1866).

> purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate) 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. . . .[156]

S. 61 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. . . ."[157]

In debate on 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, 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. . . .

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

[157] Id. at 211.

"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."[158]

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

Senator Charles Sumner of Massachusetts expressed demands by freedmen for protection of their rights as follows:

> 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 . . . 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 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.[159]

Senator Lyman Trumbull opened debate on S. 61, the civil rights 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. . . . 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

[158] Id. at 217.

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

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. . . . The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the constitutional amendment.[160]

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."[161] 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.

In the House, Nathaniel P. Banks, a former governor of Massachusetts and Union general, stated of the Freedmen's Bureau bill, S. 60: "I shall move . . . 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.'"[162] The section would thus have recognized "the civil rights belonging to white persons, including the constitutional right to bear arms . . . ."

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[160] Id. at 474 (Jan. 29, 1866) (emphasis added).

[161] Id.

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

Senator Henry Wilson of Massachusetts argued the necessity of the civil rights bill, noting 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."[163] 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.[164]

In House debate on S. 60 (the Freedmen's Bureau bill), 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."[165] 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 . . . ."[166]

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

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[163] Id. at 603.

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

[165] Id. at 651 (Feb. 5, 1866).

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

freedmen, would like to have this law to protect them. . . . As freedmen they must have the civil rights of freemen.[167]

Congressman Eliot, by instruction of the Select Committee on the Freedmens' Bureau, offered a substitute for S. 60, including the following:

[167] CONG. GLOBE, 39th Cong., 1st Sess., 654 (Feb. 5, 1866).

> The next amendment is in the seventh section, in the eleventh line, after the word "estate," by inserting the words "including the constitutional right to bear arms," so that it will read, "to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right to bear arms."[168]

After the above passed the House, the Senate Committee on the Judiciary recommended that the Senate concur.[169] Explaining the amendments, Senator 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.[170]

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.

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

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

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[168] Id.

[169] Id. at 742 (Feb. 8, 1866)

[170] Id at 743.

refugees, or any other persons, on account of race, color, or any previous condition of slavery or involuntary servitude. . . .[171]

The President vetoed the bill, but Congress would soon override the veto in an improved version of the above.

Meanwhile, the Fourteenth Amendment was working its way through Congress. 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

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

3. He should have the ballot . . . .[172]

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.[173]

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

[173] Id.

By request of each House, President Johnson communicated to the Congress all reports made since December 1, 1865 by the assistant commissioners of the Freedmen's Bureau.[174] 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.[175]

Representative Henry J. Raymond of New York proposed an amendment to the civil rights bill declaring that all person born in the United States are "citizens of the United States, and entitled to all rights and privileges as such."[176] 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 . . . .[177]

Thus, the right of citizenship, in and of itself, would protect a person from deprivation in his or her right

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[174] Ex. Doc. No. 27, Senate, 39th Cong., 1st Sess., at 1 (1866); Ex. Doc. No. 70, House of Representatives, 39th Cong., 1st Sess., at 1 (1866).

[175] Ex. Doc. No. 70, id., at 65 (emphasis in original).

[176] CONG.GLOBE at 1266 (Mar. 8, 1866).

[177] Id.

of self defense and of keeping and bearing arms.

Representative John 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. . . ."[178] 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 . . . ."[179] Bingham "would arm Congress with the power to . . . punish all violations by State Officers of the bill of rights . . . ."[180] In drafting the first section of the Fourteenth Amendment, Bingham thus sought to protect the same rights, privileges, and immunities.

Echoing the above concerns, 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 . . . ."[181] To overturn such conditions, Myers recommended the following imperatives:

> i) That no law of any State lately in insurrection shall impose by indirection a servitude which the Constitution now forbids. . . .
>
> ii) 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.[182]

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[178] Id. at 1292 (Mar. 9, 1866).

[179] Id.

[180] Id.

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

[182] Id. at 1622.

Likewise, Representative Roswell Hart of New York stated: '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' . . . ."[183] In further debate on the civil rights bill, Representative Sidney Clarke of Kansas angrily referred to an 1866 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."[184] Clarke attacked Mississippi, whose militia seized arms of black soldiers, and 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 . . . .[185]

The President vetoed the civil rights bill, but Congress overrode the veto. 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. . . .[186]

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[183] Id. at 1629.

[184] Id. at 1838 (Apr. 7, 1866).

[185] Id.

[186] 14 Stat. 27 (emphasis added).

Meanwhile in the Senate, Jacob M. Howard introduced the Fourteenth Amendment on behalf of the Joint Committee on Reconstruction promising to present "the views and motives which influenced that Committee . . . ."[187] Howard examined §1 of the proposed constitutional amendment, referring 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. . . ."[188] 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."[189]

The same day, the House debated the newly-introduced second Freedmen's Bureau bill,[190] §8 of which protected "the constitutional right to bear arms."[191] 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 to secure those rights until the civil courts are in operation."[192] The constitutional basis of the bill, Eliot noted, was the Thirteenth Amendment.[193]

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[187] CONG.GLOBE, 39th Cong., 1st Sess., at 2765 (May 23, 1866).

[188] Id. Emphasis added.

[189] Id. at 2766.

[190] Id. at 2773 (May 23, 1866).

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

[192] Id. at 2773 (May 23, 1866).

[193] Id.

Eliot argued the need for the bill based on Freedmen's Bureau reports of abuses, such as that of General Fisk, who wrote of freedmen returning to their homes after discharge from the Union army:

> 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.[194]

After §1 of the proposed Fourteenth Amendment was amended to include the citizenship clause,[195] 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.[196]

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.'"[197] However, Taney had disregarded the plain meaning of the term

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[194] Id. at 2774.

[195] Id. at 2890 (May 30, 1866).

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

[197] Id.

"the people" and had excluded blacks.[198]

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:

[198] Id.

> 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 to keep and carry arms wherever they went.[199]

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."[200] Henderson characterized them as "civil rights" and as "the muniments of freedom."[201]

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."[202]

Representative Godlove S. Orth of Indiana characterized §1 of the Fourteenth Amendment as follows: "Secures to all persons born or naturalized in the United States the rights of American citizenship."[203] Representative George W. Julian of Indiana noted as follows:

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

[200] CONG. GLOBE, 39th Cong., 1st Sess., 3034-35 (June 8, 1866).

[201] Id. at 3035.

[202] Id. at 3037.

[203] Id. at 3201 (June 15, 1866).

> The civil rights bill . . . 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.[204]

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

In the Senate, §8 of the second Freedmen's Bureau bill, which recited "the constitutional right to bear arms," was renumbered as §14.[205] 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. . . . The same matters are found in the civil rights bill substantially that are found in this section.[206]

Overriding the President's second veto, over two-thirds of Congress passed the Freedmen's

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

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

[206] Id.

Bureau Act.[207] §14 of the Act provided in part:

[207] 14 Stat. 173 (1866).

> That in every State or district where the ordinary course of judicial proceedings has been interrupted by the rebellion, . . . the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery. . . . 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.[208]

In sum, 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. The Civil Rights Act of 1866 also protected the right "to the full and equal benefit of all laws and proceedings for the security of person and property," and its framers explained that clause to be identical in meaning with that of the Freedmen's Bureau Act. To top that off, the Fourteenth Amendment would recognize all persons born

[208] Id. at 176-77.

in the United States as citizens, who would thereby gain every right of citizenship, including, in the words of Dred Scott, the right "to keep and carry arms wherever they went."

V. THE ORGANIC ACT AND THE CIVIL RIGHTS ACT OF 1871

Current D.C. Code §1-102(a) provides: "The District is created a government by the name of the 'District of Columbia,' by which name it is constituted a body corporate for municipal purposes, and may . . . exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States . . . ." This language originated in the Organic Act of February 21, 1871.[209] Thus, Congress' perception of the Constitution in 1871 would be pertinent to interpretation of the current statute prohibiting District action inconsistent with the Constitution.

Debate on the Organic Act itself generated few disquisitions on the general nature of constitutional rights. However, in discussions of constitutional provisions pertaining to the District, such as the seat-of-government clause, members of Congress relied on what they believed to be correct expositions of the Constitution. Representative Poland, who was active in the debate on the Civil Rights Act, relied on James Madison in The Federalist and Joseph Story, Commentaries on the Constitution. Representative Hoar referred to "one of the highest legal authorities in this country, St. George Tucker, editor of Blackstone's Commentaries . . . ."[210] Madison, Story, and Tucker all viewed the Second Amendment as guaranteeing a fundamental, personal right to keep and bear private arms.[211]

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[209] 16 Stat. 419. See District of Columbia v. John R. Thompson Co., 346 U.S. 100, 104-105 (1953).

[210] CONG.GLOBE, 41st Cong., 3rd Sess., 646 (Jan. 20, 1871).

[211] Madison, The Federalist No. 46, 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 492 (1984); 3 J. STORY, COMMENTARIES ON

Bingham, Poland, and the members of the Congress who passed the Civil Rights Act of 1871 agreed, and intended that that Act, based on the Fourteenth Amendment, would protect this right from state infringement.

THE CONSTITUTION 746 (1833); 1 BLACKSTONE, COMMENTARIES, APPENDIX 300 (ST. GEO. TUCKER ED. 1803).

Representative John Bingham, Chairman of the House Judiciary Committee, took an active role in the debate on the District bill.[212] In debate on the civil rights bill, Bingham characterized "the right of the people to keep and bear arms" as one of the "limitations upon the power of the States . . . made so by the Fourteenth Amendment."[213]

Representative Henry L. Dawes explained about the civil rights bill:

> The rights, privileges, and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject matter of this bill. . . . He has secured to him the right to keep and bear arms in his defense. . . . It is all these, Mr. Speaker, which are comprehended in the words, "American citizen," and it is to protect and to secure him in these rights, privileges and immunities this bill is before the House.[214]

Representative Benjamin Butler argued for protection of "rights, immunities, and privileges" guaranteed in the Constitution.[215] In a report introducing the civil rights bill, Butler described Klan attacks on blacks who had been disarmed by sheriffs, and advocated protection for "the well-known constitutional provision guaranteeing the right in the citizen to 'keep and bear arms' . . . ."[216] Representative John Coburn, an Indiana Republican, supported the bill to prevent the following state infringement: "How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men?"[217]

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[212] Id. at 643.

[213] CONG GLOBE, 42nd Cong., 1st Sess., App. 84 (Mar. 31, 1871).

[214] Id. at 475-76 (Apr. 5, 1871).

[215] Id. at 448-49.

[216] H.R.REP. No. 37, 41st Cong., 3d Sess., 3 (Feb. 20, 1871).

[217] CONG.GLOBE, 42d Cong., 1st Sess., 459 (Apr. 4, 1871).

Opponents of the bill also recognized this purpose. Representative Washington Whitthorne, Democrat of Tennessee, noted that the bill would allow suits by any person deprived by state action "of any right, privilege, or immunity secured to him by the Constitution of the United States." If a police officer seized a pistol from a "drunken negro," Whitthorne stated, "the officer may be sued, because the right to bear arms is secured by the Constitution. . . ."[218]

Senator Allen G. Thurman (Democrat of Ohio) included among Fourteenth Amendment protections: "Here is another right of a citizen of the United States, expressly declared to be his right--the right to bear arms; and this right, says the Constitution, shall not be infringed."[219]

It is little wonder that the Reconstruction Congress never passed any regulation of any kind of the right peaceably to keep and bear arms. Congress never acted on a proposed revision of the statutes in force in the District submitted to Congress in 1872, which contained only one provision concerning the possession of firearms:

> If any person shall, without good reason, carry about his person, concealed from common observation, any pistol, dirk, slung-shot, razor, bowie knife, or other weapon of life kind, he shall be fined not exceeding fifty dollars for the first offense, and for any other like offense imprisonment in jail not over six months may be imposed in addition to said fine.[220]

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[218] CONG.GLOBE, 42d Cong., 1st Sess., 337 (1871).

[219] CONG.GLOBE, 42d Cong., 2d Sess., App. 25-26 (1872).

[220] Tit. 2, Ch. 2, §31, in House Misc. Doc. No. 25, 42d Cong., 3d Sess., at 610 (1872). History of the D.C. Code, 1 D.C. Code 3 (1991 repl.vol.) states:

> This compilation was prepared under the direction of the Legislative Assembly of the District of Columbia. While purporting to be a compilation only, it includes many innovations. It was transmitted by the Governor of the District of Columbia to the House of Representatives, but was never adopted.

In sum, D.C. Code §1-102(a) provides that the District may not exercise any power "inconsistent with the Constitution." The same Congress that originally passed this provision also adopted the Civil Rights Act of 1871, and in debate concerning the latter expressed the view that any infringement of the individual right to keep and bear arms would be inconsistent with the Constitution.

VI. THE MILITIA LAW OF THE DISTRICT

The federal Militia Act of 1792 required "every able-bodied white male citizen of the respective states," ages 18-44, to provide himself with a musket, rifle, or pair of pistols.[221] Each state, including Virginia and Maryland, required the same.[222] The Act concerning the District of Columbia (1801) provided that the laws of Virginia and Maryland respectively shall be the laws of the District in the areas ceded by those two states.[223]

An amendatory Act (1802) provided: "That the President of the United States be authorized to cause the militia, of the respective counties of Washington and Alexandria to be formed into regiments and other corps, conformably, as nearly as may be, to the laws of Maryland and Virginia . . . ."[224]

An Act more effectually to provide for the organization of the Militia of the District of Columbia (1803) further empowered the President to organize the militia in the District. This act recognized that

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[221] 1 Stat. 271, 272.

[222] 9 HENING, STATUTES 267-69 (Virginia); LAWS OF MARYLAND, Ch. 182, §§ 1, 4, 11 (1811).

[223] 2 Stat. 103, 104.

[224] 2 Stat. 193, 195.

the 1792 Act also applied.[225] Accordingly, every militia member was required to appear armed and equipped on muster days.[226]

[225] 2 Stat. 215, 225.

[226] Id. at 219.

In Wise v. Withers (1806), Chief Justice Marshall wrote that "the militia law of the district refers to the general law of the United States . . . ."[227] A justice of the peace was held exempt from militia duty.

A report of the House Committee on the Militia in 1829 asserted that "a well organized and efficient national militia is . . . the most appropriate and legitimate defence of a free, high-minded, and enlightened people . . . ."[228] The committee recommended that the militia include all able-bodied white males between the ages of 21 and 40 years old.[229] The states and territories should have a uniform organization. 'The District of Columbia, which is an anomaly in our form of Government, may be permitted to maintain its unique character, by the application to its militia of a mode or plan of organization adapted to its peculiarities . . . . An indispensable requisite in forming an efficient militia is a knowledge of the correct theory and practice of the use of fire arms, as well as the certain means of acquiring them."[230] The committee recommended that the United States furnish the arms, a suggestion Congress would not approve. The report illustrates that common notion that a well regulated militia is necessary for the "defence of a free . . . people," including the District, and that the populace should be armed.

In 1867, a controversy took place involving volunteer black militia companies in the District of Columbia. The existence of these independent black militias contributed to the already divisive

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[227] 7 U.S. 331, 335.

[228] House Rep. No. 68, 20th Cong., 2d Sess., at 1 (1829).

[229] Id. at 2.

[230] Id.

relationship between supporters of civil rights and President Johnson. In the fall of 1867, Johnson ordered the disbandment of these militias, which Radicals saw as protected by the Constitution.

The controversy was mentioned by George W. Pascal, a prominent jurist and law professor,[231] in his explanation of the Second Amendment in *The Constitution of the United States* (1868) as follows:

> This clause has reference to a free government, and is based on the idea, that people cannot be oppressed or enslaved, who are not first disarmed. . . .
>
> The President, by order, disbanded the volunteer companies of the District of Columbia, in November, 1867. His right to do so has been denied.[232]

Pascal wrote that "the people" meant the citizens, not the States,[233] and that the term "embraces all the inhabitants – citizens and aliens – who are entitled to the protection of the law."[234] Referring to the militia clause of the Constitution, he noted: "Militia here means the body of arms-bearing citizens, as contradistinguished from the regular army." [235] Regarding the Fourteenth Amendment, Pascal wrote:

> The new feature declared is that the general principles which had been construed to apply only to the national government, are thus imposed upon the States. Most of the

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[231] Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment,* 103 YALE L.J. 57, 85-89 (1993).

[232] GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES: DEFINED AND CAREFULLY ANNOTATED 256 (Washington, D.C.: W.H. & O.H. Morrison, Law Booksellers, 1868).

[233] *Id*. at 54.

[234] *Id*. at 257.

[235] *Id.* at 135.

States, in general terms, had adopted the same bill of rights in their own constitutions.[236]

[236] *Id*. at 86.

Two independent black militias had drilled in the District of Columbia since the end of the Civil War, when their members purchased their muskets from the government.[237] Commented Washington's *Daily Chronicle*: "The time may come when they may be essential in preserving the peace of the District as they were essential in preserving their liberties."[238] However, the *Daily National Intelligencer* replied that the "negro companies were drilling . . . for the avowed purpose of supporting Congress in the enforcement of the laws to be enacted for the purpose of deposing the President during his impeachment."[239]

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[237] DAILY CHRONICLE (Washington, D.C.), Oct. 22, 1867, at 2.

[238] *Id.*

[239] *Unauthorized Negro Military Organizations,* DAILY NATIONAL INTELLIGENCER (Washington, D.C.), Nov. 5, 1867, at 2.

President Johnson ordered General Grant to suppress all such organizations in the District of Columbia, which the *Chronicle* saw as an order "to disarm or disband the freedman before he commences his campaign against them."[240] The President's constitutional and statutory powers to order the militias disbanded were debated in the press.[241] The military commander for the District reported to General Grant that, in the absence of martial law, he had no authority to execute the President's

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[240] A *Panic in the White House,* DAILY CHRONICLE (Washington, D.C.), Nov. 6, 1867, at 2. President Johnson's order to General Grant, printed in *Unauthorized Negro Military Organizations*, DAILY NATIONAL INTELLIGENCER, Nov. 8, 1867, at 2, stated:

> I am reliably advised that there are within the District of Columbia a number of armed organizations, formed without authority of law, and for purposes which have not yet been communicated to the Government. Being at the present time unnecessary for the preservation of order or the protection of the civil authority, they have excited serious apprehensions as to their real design. You will, therefore, take official steps for promptly disbanding and suppressing all such illegal organizations.

[241] *The Militia and Regular Forces in Washington,* NEW YORK HERALD, Nov. 8, 1867, at 3 noted: "A very old act of Congress, passed late in the last century, provided that all military volunteer organizations in the District of Columbia shall be under control of the President." However, *Affairs at the National Capital*, THE NEW YORK TIMES, Nov. 7, 1867, at 5, observed:

> It remains to be seen whether the President will decide that he has any more authority over the militia of the District of Columbia that he would have over that of a State. Military organizations have always existed here with the sanction of the local authorities, and have never been prohibited, even if not specially authorized by act of Congress. With regard to disbanding the colored militia organizations at the South, . . . the President has called the attention of the Secretary of War to what he deems their dangerous character, but has not yet issued any order to suppress them, possibly for the reason that he regards the States as States, and that he has no right to interfere, as he has no constitutional power over the militia except in time of war.

order.[242] The President asked the Attorney General for an opinion as to his power.[243]

District Mayor Wallach stated that "the negroes had as much right as white men to raise companies in conformity with the militia laws of the District."[244] The scope of the President's order encompassed all militia-type organizations, not just black ones, leading the *New York Times* to comment that "in attempting to snub the African [the President] has literally 'put his foot into it' with his white friends to an embarrassing degree."[245] However, the *Baltimore Sun* noted:

> Under the wording of the order it would seem to embrace all societies and organizations in possession of arms. . . . It must be borne in mind that upon no construction of the order has it ever been contemplated to interfere with the rights of citizens to possess arms as individuals.[246]

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[242] *President Johnson Asks Advice of Binckley in the Colored Militia Case*, THE PRESS (Philadelphia), Nov. 8, 1867, at 1.

[243] *The Colored Militia of the District of Columbia*, THE NEW YORK TIMES, Nov. 9, 1867, at 1.

[244] *Unauthorized Military Organizations*, THE SUN (Baltimore), Nov. 9, 1867, at 1.

[245] *Affairs at the National Capital*, THE NEW YORK TIMES, Nov. 8, 1867, at 5.

[246] *Letter from Washington*, THE SUN (Baltimore), Nov. 9, 1867, at 4.

Charles Fischer, major of one of the black militia companies, wrote to General Grant that the "armed portion of the organization is made up of those members who purchased arms from the Government." Denying that "we are hostile bands of armed negroes," Fischer asserted: "Our object is to show to the world that we are worthy of the freedom obtained by the late war."[247] The freedman militias stopped parading in the streets, but did not disband, and promised a challenge to the President's order in the courts.[248]

While the outcome of any such challenge is unknown, the *Daily Chronicle* attacked the President's order as a violation of the First Amendment right to assemble and the Second Amendment right to bear arms:

> In every State of the Union the people have claimed the right of peaceably assembling and organizing themselves into military and civic associations at will. They have asserted their right to do this in their Declaration of Rights; and, in the Constitution of the United States, the right to bear arms is expressly reserved. . . . It has remained for the present apostate Executive to assail the reserved constitutional rights of the citizen, by issuing an order for the disbandment of such companies. . . . If the President may order their disbandment, he may also disperse a religious society or a debating club. If he can take away the arms of a citizen, why may he not also take away his

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[247] *Our Colored Militia*, DAILY CHRONICLE (Washington, D.C.), Nov. 9, 1867, at 1.

[248] *Concerning the Disbandment of the Freedmen's Military Organizations,* THE PRESS (Philadelphia), Nov. 7, 1867, at 1.

clothes or his Bible.[249]

The *New York Tribune* accused the President of infringing on the Second Amendment and acting beyond his power under Article I, § 8, clause 17, which entrusts to Congress authority to exercise exclusive jurisdiction over the District.[250] It commented:

[249] *Volunteer Military Organizations*, DAILY CHRONICLE (District of Columbia), Nov. 12, 1867, at 2. The editorial added: "The rapid strides which the President is making toward absolute despotism already presents us with the spectacle of a lawless Government, in which one man, by virtue of official position, defies the Constitution, usurps power, and overrules law."

[250] *The Militia Disbandment*, NEW YORK TRIBUNE, Nov. 13, 1867, at 4.

> The President might, if he had the power, disband all the baseball clubs and confiscate the bats and other apparatus; but he would have no *right* to do it. Similarly he may abolish the Militia of the District of Columbia and seize their arms; but the act would be one of the most flagrant and despotic usurpation, combing in about equal proportions audacity, treason, and larceny. Even Congress itself has no authority to infringe upon "the right of the people to keep and bear arms." It may "not regulate" the militia, nor can it, without a violation of the Constitution, take away any man's musket while he "keeps it" and "bears it" for lawful purposes. Monarchical governments have claimed and exercised the right to disarm people, as the English Government disarmed the Highlanders, and subsequently Irishmen. It was with a full recollection of the fantastic tricks of tyrants that our fathers framed the Constitutional provision which we have quoted. They foresaw a President desperately bent upon grasping supreme and irresponsible power, and they reserved to the people the means of defending themselves, in the law resort, against the violence of a possible usurper.[251]

The militia controversy came right on the eve of, and was overshadowed by, the beginning of President Johnson's impeachment trial. In any event, the issue gave rise to the expression of opinion during a critical period of Reconstruction concerning the rights to associate and to bear arms as a militia in the District of Columbia.

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[251] *Id.*

The 1803 militia act for the District was repealed by the 1889 Act to provide for the organization of the militia of the District of Columbia.[252] That act, with minor amendments not pertinent here, is retained in the current D.C. Code. D.C. Code §39-101 provides: "Every able-bodied male citizen within the District of Columbia, of the age of 18 years and under the age of 45 years, . . . shall be enrolled in the militia." Under §39-104, "the enrolled militia shall not be subject to any duty except when called into the service of the United States, or to aid the civil authorities in the execution of the laws or suppression of riots." §39-106 provides: "The organized militia shall be composed of volunteers, and shall be designated the National Guard of the District of Columbia."

The arms of the National Guard are to be the same as those furnished to the regular Army, and are to be issued from the Army. §39-201. Armories are to be provided for the "safekeeping of the arms . . . and other militia property in their [the National Guard's] possession." §39-214.

The requirement of the 1792 federal Militia Act that every able-bodied white male person must provide himself with a firearm remained on the books when the 1889 D.C. Militia Act passed, except that the term "white" was stricken by the Reconstruction Congress in 1867, thereby broadening the militia to include adult non-white males. [253] However, an Act to promote the efficiency of the militia (1903) repealed the 1792 Act which required every man to keep a firearm.[254] The 1903 Act defined the militia as "every able-bodied male citizen of the respective States . . . and the District of Columbia,"

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[252] 25 Stat. 772, 781 (1889).

[253] 14 Stat. 422, 423 (1867).

[254] 32 Stat. 775, 780.

dividing it between the "organized militia" (National Guard) and the "Reserve Militia."[255] The Secretary of War was authorized to issue service magazine arms for arming all of the organized militia in the states and the District.[256]

[255] Id. at 775.

[256] Id. at 777.

Shortly thereafter, Congress passed "An Act to promote the efficiency of the reserve militia and to encourage rifle practice among the members thereof" (1905).[257] It provided for sale of "magazine rifles belonging to the United States as are not necessary for the equipment of the Army and the organized militia, for the use of rifle clubs formed under regulations prepared by the national board for the promotion of rifle practice and approved by the Secretary of War."[258]

The 1905 reserve militia act was then expanded by a military appropriations act (1924) which provided in part for:

> Sale to members of the National Rifle Association, at cost to the Government, and issue to clubs organized, for practice with rifled arms, under the direction of the National Board for the Promotion of Rifle Practice, of arms, ammunition, targets, and other supplies and appliances necessary for target practice . . . . [259]

After being amended over the years, what began as the 1905 reserve militia act is now codified as 10 U.S.C. §§4307-4313. Those provisions provide for the federal Civilian Marksmanship Program (CMP), which sponsors rifle and pistol competitions at the state, regional, and national level. Under §4308, the Secretary of the Army is required to provide for "the instruction of citizens of the United States in marksmanship," "the promotion of practice in the use of rifled arms," and the loan or sale of rifles and ammunition to citizens over 18 years old who are members of a gun club under the direction of the National Board for the Promotion of Rifle Practice.

Congress passed the above under its powers over the army and the militia. 32 C.F.R.

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[257] 33 Stat. 986.

[258] Id. at 987.

[259] 43 Stat. 509, 510.

§544.4(b) provides in part:

> As part of the CMP, these matches are intended to promote the national defense. The CMP provides and encourages voluntary marksmanship training for persons who are not reached by training programs of the Armed Forces and who might be called into service in an emergency.

Competitors are generally required to provide their own arms. §544.52(d) requires the following for pistol competition: "US pistol, caliber .45M1911 or M1911A1. Competitors may use the Caliber .45M1911 or M1911A1 as issued by the US Armed Forces or a commercial pistol of the same type and caliber."

The District pistol prohibition interferes with the national defense particularly because no person who is presently young would have registered a pistol by 1976. Young citizens are the most likely to be called by the Armed Forces in event of a national emergency. Of course, older citizens are also used to train others in marksmanship. Thus, the District law is inconsistent with and preempted by federal law.

In sum, pursuant to the 1889 Act which is still effective, the organized militia of the District is its National Guard, while the reserve militia includes every able-bodied male citizen aged 18 through 44. The District's National Guard is not the well regulated militia anticipated by the Second Amendment, for the latter provides that "the right of the people to keep . . . arms, shall not be infringed." Moreover, the "free State" which the Second Amendment seeks to secure includes the District. The District was subject to the 1792 Militia Act requirement that every free white male keep a firearm, and to the 1867 requirement that every male, without regard to race, keep a firearm. Today, pursuant to an act designed to promote the reserve militia, all qualified male or female citizens of the United States,

including District residents, are eligible to participate in rifle and pistol matches promoted by the Civilian Marksmanship Program. Since it interferes with this Program devised by Congress for the national defense, the District's handgun ban is preempted.

VII. SUPREME COURT JURISPRUDENCE

A. The Applicability of the Bill of Rights, Including the Second Amendment, to Congress and the District

It is well established that the Bill of Rights, including the Second Amendment, limits Congress. Previous controversies concerned the applicability of Bill of Rights provisions to the states, either directly or through the Fourteenth Amendment.[260] Does the Second Amendment limit Congress or the District government (which acts only pursuant to delegation of power from Congress) regarding firearms prohibitions in the District? The anomalous suggestion that it does not, at least superficially, turns established jurisprudence on its head.

In three nineteenth century cases, the Supreme Court held that the First, Second, and Fourth Amendments do not limit state action, but failed to consider whether the Fourteenth Amendment incorporates these provisions so as to limit state action. These cases do, however, address whether the Second Amendment limits action by Congress as well as the nature of the right protected by the Second Amendment.

United States v. Cruikshank (1876)[261] involved indictments under the Enforcement Act of 1870, today's 18 U.S.C. §§241, 242, for murder and a conspiracy to deprive freedmen of the rights to

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[260] See M. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

[261] 92 U.S. 542.

assemble and to keep and bear arms. The Court decided that the right to assemble is fundamental, but that private persons cannot violate this right:

> The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is and always had been, one of the attributes of citizenship under a free government. . . . It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection.[262]

[262] Id. at 551.

The Court concluded that the First Amendment "was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone."[263]

The Court then subjected the Second Amendment to the same analysis as the First:

> The right there specified [in the indictment] is that of bearing arms for a lawful purpose. This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this . . . means no more than that it shall not be infringed by Congress. This is one of the Amendments that has no other effect than to restrict the powers of the national government . . . ."[264]

The Court did not question that the freedmen had an individual right to assemble and to bear arms for a lawful purpose. Had the Court interpreted the Second Amendment to protect only a state power to maintain a militia, it could have disposed of the Second Amendment claim on that basis. Instead, it held that Congress, but not private individuals, was precluded from infringing on the freedmen's right to bear arms.

Unlike Cruikshank, state action was involved in Presser v. Illinois (1886).[265] Presser was indicted under an Illinois act for parading four hundred armed men in Chicago without a license from the governor. The Court rejected defendant's claim that the Second Amendment protects a right to form a private military unit:

> The sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms. But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation upon the power of Congress and the National government, and not

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[263] Id. at 552.

[264] Id. at 553.

[265] 116 U.S. 252.

upon that of the States.[266]

[266] Id. at 265

In short, the Court held that the armed paraders went beyond the individual right of keeping and bearing of arms, adding in dictum that the Second Amendment does not apply directly to the states.[267] Similarly, the Court rejected a right of assembly applicable to Presser's band, because the First Amendment does not protect "the right voluntarily to associate together as a military company . . . ."[268] Once again, the Court questioned neither Presser's individual right to keep and bear arms nor Congress' inability to infringe on that right.

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[267] Presser did, however, recognize that the states may not infringe on the right to keep and bear arms:

> All citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government . . . the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government. But . . . the sections under consideration do not have this effect. 116 U.S. at 265 (emphasis added).

By this reasoning, neither may the District, whose citizens are also in the reserve militia.

[268] Id. at 267.

In Miller v. Texas (1894),[269] the defendant claimed for the first time on appeal that a state statute concerning the carrying of pistols was violative of the Second, Fourth, and Fourteenth Amendments. The Court found that the Second and Fourth Amendments, of themselves, "operate only upon the Federal power . . . ."[270] Once again, the Court was emphatic that Congress could not infringe on the Second and Fourth Amendments, and assumed that Miller had an individual right to keep and bear arms. Otherwise, the Court could have disposed of the case on the basis that only states have this right.

Indeed, just after the above decision, the Court reiterated that the right to keep and bear arms is an ancient, fundamental right, not creature of a constitution makers who were defining the federal-state balance. Robertson v. Baldwin (1897)[271] states:

> The law is perfectly well settled that the first ten Amendments to the constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principle of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors. . . . In incorporating those principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, . . . the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons. . . .[272] (Emphasis added).

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[269] 153 U.S. 535.

[270] Id. at 538. Since the issue had not been raised at trial, the Court refused to consider the claim that the statute violated the rights to bear arms and against warrantless searches as incorporated in the Fourteenth Amendment. Id. at 538-39.

[271] 165 U.S. 275.

[272] Id. at 281-82.

The Court thus depicted the right as fundamental, noting that it may be regulated but not prohibited. Nothing in the above language is consistent with the argument that District residents do not have this right.

In United States v. Miller (1939),[273] the Court avoided determining whether a short barrel shotgun may be taxed under the National Firearms Act consistent with the Second Amendment. The district court had declared the Act unconstitutional as in violation of the Second Amendment,[274] and thus no evidence was in the record that such a shotgun was an ordinary military arm. The Supreme Court remanded the case for fact-finding based on the following:

[273] 307 U.S. 174 (1939).

[274] 26 F.Supp. 1002, 1003 (W.D. Ark. 1939).

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. Aymette v. State, 2 Hump. 154, 158.[275]

The Miller court did not suggest that the possessor must be a member of the militia or National Guard, asking only whether the arm could have militia use. The private, individual character of the right protected by the Second Amendment went unquestioned.

The Aymette opinion was a Tennessee case which stated on the page cited above by the U.S. Supreme Court: "If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments on their rights, etc."[276]

Referring to the militia clause of the Constitution, the Supreme Court stated that "to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made."[277] The Court then surveyed colonial and state militia laws to demonstrate that "the Militia comprised all males physically capable of acting in concert for the common defense" and that "these men were expected to appear bearing arms supplied by themselves and of the

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[275] 307 U.S. at 178 (emphasis added).

[276] 2 Hump. (21 Tenn.) 154, 158 (1840).

[277] 307 U.S. at 178.

kind in common use at the time."[278] Despite these references to state militia laws, from the time of the District's creation its citizens were also required to provide arms for themselves.

[278] Id. at 179.

Miller cites approvingly the commentaries of Joseph Story and Thomas M. Cooley.[279] Justice Story stated: "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against usurpation and arbitrary power of the rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."[280] Miller's reference to Judge Cooley finds him stating:

> Among the other safeguards to liberty should be mentioned the right of the people to keep and bear arms. . . . The alternative to a standing army is 'a well-regulated militia'; but this cannot exist unless the people are trained to bearing arms. The federal and state constitutions therefore provide that the right of the people to bear arms shall not be infringed . . . .[281]

The above language makes clear that the objective of the Second Amendment is to preserve freedom and prevent tyranny, an interest which the District's inhabitants share with those of the states.

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[279] 307 U.S. at 182 n.3.

[280] 2 J. Story, COMMENTARIES ON THE CONSTITUTION 646 (5th ed. 1891). "One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people, and making it an offense to keep arms . . . ." J. Story, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1893).

[281] T. Cooley, CONSTITUTIONAL LIMITATIONS 729. T. Cooley, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 281-282 (2d ed. 1891) states further:

> The right declared was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation.
>
> The right is General--It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. . . . But the law may make provision for the enrollment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is that the people from whom the militia must be taken shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.

Perpich v. Department of Defense (1990)[282] recognized that the National Guard is part of the Armed Forces of the United States and that the Reserve Militia includes all able-bodied citizens.[283] The issue was whether the militia clause allows the President to order members of the National Guard to train outside the United States without the consent of a state governor or the declaration of a national emergency.[284] Perhaps the most noteworthy fact about the opinion is its failure to mention the Second Amendment at all, that amendment being irrelevant to the issue of the state power to maintain a militia. In fact, the Court refers to the state power over the militia as being recognized only in "the text of the Constitution," not in any amendment.[285]

Although it involved the Fourth Amendment, United States v. Verdugo-Urquidez (1990) makes clear that the Second Amendment protects the rights of the citizenry at large.[286] The Court stated:

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[282] 110 S.Ct. 2418.

[283] Id. at 2423-26.

[284] Id. at 2420.

[285] Id. at 2422-23.

[286] United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

> 'The people" seems to have been a term of art employed in select parts of the Constitution. . . . The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." See also U.S. Const., Amdt. 1, ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble"); Art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second year by the People of the several States")(emphasis added). While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.[287]

Certainly the residents of the District belong to the "class of persons who are part of a national community." The Court did not suggest that the "free State" language of the Second Amendment precludes District citizens from being part of "the people."

The 1992 case of Planned Parenthood of Southeastern Pennsylvania v. Casey[288] discussed the broad parameters of the Fourteenth Amendment's due process clause, noting:

> The controlling word in the case before us is "liberty" . . . . Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.[289]

Everything the Court stated about the Fourteenth Amendment as protection from state action would apply equally to the Bill of Rights as protection from federal action. "It is a promise of the

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[287] Id. at 265 (emphasis added in part).

[288] 120 L.Ed.2d 674.

[289] Id. at 695 (citation omitted).

Constitution that there is a realm of personal liberty which the government may not enter."[290] The Court stated:

> Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Const., Amend. 9. As the second Justice Harlan recognized:

[290] Id.

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution . . . [such as] the freedom of speech, press, and religion; the right to keep and bear arms. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ."[291]

Thus, Planned Parenthood recognizes "the right to keep and bear arms" as one of the "specific guarantees" provided in the Constitution. This right is protected from congressional (and hence District) infringement by the Second Amendment.

The Supreme Court has uniformly rejected the argument that Bill of Rights provisions do not apply in the District. In Callan v. Wilson (1888),[292] government counsel argued that the jury guarantees of article 3 and the Sixth Amendment, and the due process clause of the Fifth Amendment, did not apply in the District, and thus that crimes could be tried without juries. The Court responded that each constitutional guarantee

> Is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the states to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia as those residing or being in the several states. There is nothing in the history of the constitution, or of the original amendments, to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty, and property.[293]

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[291] Id. 696 (citation omitted) (emphasis added).

[292] 127 U.S. 540, 550.

[293] Id.

Under the Seat of Government clause, held the Court in 1899, Congress "may exercise within the District all legislative powers that the legislature of a state might exercise within the state, . . . so long as it does not contravene any provision of the constitution of the United States."[294]

Again, in Wright v. Davidson (1901),[295] while holding the Fourteenth Amendment inapplicable to the District, the Court also held:

> No doubt, in the exercise of such legislative powers, Congress is subject to the provisions of the 5th Amendment to the Constitution of the United States, which provide, among other things, that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.

Quoting from the above cases, the U.S. Court of Appeals for the District of Columbia Circuit in Wilson v. McDonnell considered

> To what extent the people of this District are protected by the Constitution of the United States. The assertion has been made that, Congress having power "to exercise exclusive legislation in all cases whatsoever" in the District (Constitution, art. 1, § 8, par. 17), the provisions of the Constitution, which protect persons and property in all other places under the jurisdiction of the United States, are without particular force here. To this we cannot accede. It would be an anomalous situation, indeed, if nearly half a million people at the seat of government, under the very dome of the capitol, should suffer such a discrimination and be outside the protection of the Constitution. Fortunately this question has been set at rest by the Supreme Court of the United States.[296]

More recent Supreme Court precedents have been unwavering. Said the Court in 1974: "Like other provisions of the Bill of Rights, it [the Seventh Amendment] is fully applicable to courts

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[294] Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899).

[295] 181 U.S. 371, 384 (1901).

[296] 265 F. 432, 434 (D.C. 1919).

established by Congress in the District of Columbia."[297] Being solely a creature of Congress, the District is without question a place where the Bill of Rights fully applies.

B. The Civil Rights Acts and the Reconstruction Amendments

[297] Pernell v. Southall Realty, 416 U.S. 363, 370-71 (1974).

The declaration of the Freedmen's Bureau Act concerning "the constitutional right to bear arms" has never been mentioned in any reported decision concerning the Fourteenth Amendment or the Civil Rights Act of 1866. The same Congress, of course, passed both Acts and the amendment by over two-thirds vote. The 1866 Act is currently codified at 42 U.S.C. §§1981 and 1982. The portion codified at §1981 protects, inter alia, the "full and equal benefit of all laws and proceedings for the security of person and property . . . ."[298]

While the Supreme Court has never considered whether the Civil Rights Act of 1866 protects the right to have arms, in 1872 Justice Bradley stated that §1 of the Act "is in direct conflict with those state laws which forbade a free colored person . . . from having firearms."[299]

In civil rights cases decided in the 1960s and 70s, the Supreme Court recognized the common origins and purposes of the Freedmen's Bureau Act, the Civil Rights Act of 1866, and the Fourteenth Amendment. More broadly, the Court has recognized the fundamental character of the rights to personal security and personal liberty, which the framers of those acts and the Fourteenth Amendment declared as including the constitutional right to bear arms.

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[298] 42 U.S.C. §1981 provides in full:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[299] Blyew v. United States, 80 U.S. 581, 643 (1872) (Bradley, J., dissenting).

Hurd v. Hodge (1948)[300] held that, for purposes of the Civil Rights Act of 1866, today's 42 U.S.C. §1981, §§1982, the District is included in the term "State and Territory." In determining the scope of the Act, "reference must be made to the scope and purpose of the Fourteenth Amendment; for that statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve."[301] "In many significant respects the statute and the Amendment were expressions of the same general congressional policy."[302] A purpose of the Fourteenth Amendment "was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land."[303]

While the Fourteenth Amendment does not apply to the District, the Fifth Amendment's due process clause incorporates Fourteenth Amendment ideals of fairness. Bolling v. Sharpe (1954)[304] stated:

> The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[305]

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[300] 334 U.S. 24, 30-31.

[301] Id. at 32.

[302] Id.

[303] Id.

[304] 347 U.S. 497.

[305] Id. at 499.

District of Columbia v. Carter (1973)[306] held that the District is not a "State or Territory" in the meaning of the Civil Rights Act of 1871, 42 U.S.C. §1983. The Civil Rights Act of 1866, however, does restrain the District, because it was enacted to enforce the Thirteenth Amendment, which applies nationally.[307] However, §1983 was passed to enforce the Fourteenth Amendment, which only pertains to the states.[308] For §1983 to apply to the District, Congress would have to exercise its power under Art. 1, §8, cl. 17 of the Constitution.[309] Indeed, following the Carter decision, Congress did just that by amending §1983 to include the District.[310]

In Goodman v. Lukens Steel Co., (1987)[311] Justice Brennan, joined by Justices Marshall and Blackmun, concurring in part and dissenting in part, noted of §1981: "Clearly, the 'full and equal benefit' and 'punishment' clauses guarantee numerous rights other than equal treatment in the execution, administration, and the enforcement of contracts."[312] Justice Brennan noted:

> The main targets of the Civil Rights Act of 1866 were the "Black Codes," enacted in Southern States after the Thirteenth Amendment was passed. Congress correctly perceived that the Black Codes were in fact poorly disguised substitutes for slavery:

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[306] 409 U.S. 418, 419.

[307] Id. at 421-22.

[308] Id. at 423.

[309] Id. at 424 n. 9.

[310] P.L. 96-170, 93 Stat. 1284 (1979). See House Report 96-548, reprinted in 1979 U.S. Code Cong. & Admin. News 2609, 2610.

[311] 482 U.S. 656.

[312] Id. at 671.

> "They defined racial status; forbade blacks from pursuing certain occupations or professions (e.g., skilled artisans, merchants, physicians, preaching with a license); forbade owning firearms or other weapons; controlled the movement of blacks by systems of passes; required proof of residence; prohibited the congregation of groups of blacks; restricted blacks from residing in certain areas; and specified an etiquette of deference to whites, as, for example, by prohibiting blacks from directing insulting words at whites."[313]

In Bell v. Maryland (1964), Justice Douglas noted that "the Fourteenth Amendment was intended to eradicate the black codes, under which "Negroes were not allowed to bear arms or to appear in all public places . . . ."[314] Justice Goldberg, joined by the Chief Justice and Justice Douglas, traced the Fourteenth Amendment to the Civil Rights Act and Freedmen's Bureau bill, quoting the latter's reference to "full and equal benefit of all laws and proceedings for the security of person and estate . . . ."[315] Justice Goldberg wrote:

> The first sentence of §1 of the Fourteenth Amendment, the spirit of which pervades all the Civil War Amendments, was obviously designed to overrule Dred Scott v. Sandford, 19 How. 393, and to ensure that the constitutional concept of citizenship with all attendant rights and privileges would henceforth embrace Negroes.[316]

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[313] Id. at 672-73 (emphasis added), quoting H. Hyman & W. Wiecek, Equal Justice Under Law 319 (1982).

[314] Bell v. Maryland, 378 U.S. 226, 247-48 & n.3 (1964) (Douglas, J., concurring).

[315] Id. at 292-93 (Goldberg, J., concurring).

[316] Id. at 300-01. As noted in United States v. Wong Kim Ark, 169 U.S. 649, 676 (1898):

> The first section of the Fourteenth Amendment of the Constitution begins with the words, "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." . . . It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief

Concurring in Duncan v. Louisiana (1968), Justice Black recalled the following words of Senator Jacob M. Howard in introducing the Fourteenth Amendment to the Senate in 1866:

Justice Taney in Dred Scott v. Sandford, (1857) 19 How. 393; and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States.

> The personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms. . . . 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.[317]

§14 of the Freedmen's Bureau Act, which expressly recognized the right of bearing arms, was discussed in Georgia v. Rachel (1966) in reference to "the enforcement of the numerous statutory rights created under the Civil War Amendments":[318]

> See, e.g., §14 of the amendatory Freedmen's Bureau Act of July 16, 1866, 14 Stat. 176, which re-enacted, in virtually identical terms for the unreconstructed Southern States, the rights granted in §1 of the Civil Rights Act of 1866, and provided for the enforcement of those rights under the jurisdiction of military tribunals.[319]

In City of Greenwood, Mississippi v. Peacock (1966),[320] the Court again referred to §14 of the Freedmen's Bureau Act, which recognized the right to bear arms:

> Section 14 of the amendatory Act of 1866 established, in essentially the same terms for States where the ordinary course of judicial proceedings had been interrupted by the rebellion, the rights and obligations that had already been enacted in §1 of the Act of April 9, 1866 (the Civil Rights Act) and provided for the extension of military jurisdiction to those states in order to

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[317] Duncan v. Louisiana, 391 U.S. 145, 166-67 (1968) (Black, J., concurring). Duncan involved incorporation of the right to jury trial.

[318] Georgia v. Rachel, 384 U.S. 780, 796 (1966).

[319] Id. at 797 n.26.

[320] City of Greenwood, Mississippi v. Peacock, 384 U.S. 808 (1966) (holding that certain criminal defendants were not entitled to removal of their case to federal court under the 1866 Civil Rights Act).

protect the rights secured. 14 Stat. 176-177. By the Act of July 6, 1868, 15 Stat. 83, the Freedmen's Bureau legislation was continued for an additional year.[321]

[321] Id. at 817 n.11.

In Jones v. Alfred H. Mayer Co. (1968), the Court held that §1982 barred both public and private racial discrimination in the sale or rental of property, and that the Act "is a valid exercise of the power of Congress to enforce the Thirteenth Amendment."[322] In its opinion, the Court explained the common meaning of the Civil Rights Act and the Freedmen's Bureau bill, as well as the origins of the Fourteenth Amendment in this legislation.

The first Freedmen's Bureau bill, S. 60, would have protected the right of every person "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."[323] While not contained in the original version, the explicit reference to the arms guarantee was inserted by the House on the recommendation of the select committee on the Freedmen's Bureau.[324] Senator Lyman Trumbull, author of the bill and Chairman of the Senate Judiciary Committee, explained that the above addition did not alter the meaning.[325] Similarly, John Bingham, author of §1 of the Fourteenth Amendment, explained that above section of the Freedmen's Bureau bill "enumerate[s] the same rights and all the rights and privileges that are enumerated in the first section of this [the Civil Rights] bill . . . ."[326]

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[322] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968).

[323] CONG. GLOBE, 39th Cong., 1st Sess., 654 (Feb. 5, 1866).

[324] Id.

[325] Id. at 743 (Feb. 8, 1866).

[326] Id. at 1292 (Mar. 9, 1866).

Outlining some of the same legislative history, Jones v. Mayer noted the origin of the Civil Rights Act in S. 60, the first Freedmen's Bureau bill.[327] Even though Congress could not override the President's veto, "the bill [S. 60] was significant for its recognition"[328] of certain rights. The Court further noted:

> When Congressman Bingham of Ohio spoke of the Civil Rights Act, he charged that it would duplicate the substantive scope of the bill [S. 60] recently vetoed by the President, . . . and that it would extend the territorial reach of that bill throughout the United States. . . . Although the Civil Rights Act . . . made no explicit reference to "prejudice," . . . the fact remains that nobody who rose to answer the Congressman disputed his basic premise that the Civil Rights Act of 1866 would prohibit every form of racial discrimination encompassed by the earlier bill the President had vetoed. Even Senator Trumbull of Illinois, author of the vetoed measure as well as of the Civil Rights Act, had previously remarked that the latter was designed to "extend to all parts of the country," on a permanent basis, the "equal civil rights" which were to have been secured in rebel territory by the former [S.60] , . . . to the end that "all the badges of servitude . . . be abolished."[329]

Similarly, no member of Congress disputed the explanation by both Bingham and Trumbull that the Civil Rights Act would protect the rights explicitly listed in the Freedmen's Bureau bill, which included the right to bear arms. The Court further remarked: "The congressional discussion proceeded upon the understanding that all discriminatory conduct reached by the Freedmen's Bureau bill would be reached as well by the Civil Rights Act."[330]

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[327] 392 U.S. at 423 n.23.

[328] Id.

[329] Id. at 424 n.31.

[330] Id. at 428 n.39.

The Jones Court also noted the link between the above understanding and the Fourteenth Amendment: "Nor was the scope of the 1866 Act altered when it was re-enacted in 1870, some two years after the ratification of the Fourteenth Amendment. It is quite true that some members of Congress supported the Fourteenth Amendment in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States."[331]

The Court further observed that "Senator Trumbull's bill would, as he pointed out, 'destroy all [the] discriminations' embodied in the Black Codes, but it would do more: It would affirmatively secure for all men, whatever their race or color, what the Senator called the 'great fundamental rights' . . . ."[332] The black code provisions that would be eradicated, explained Trumbull on the same page of the Congressional Globe cited by the Court, included the "provisions of the [Mississippi] statute [which] prohibit any negro or mulatto from having fire-arms . . . ."[333]

The right to keep and bear arms could be found to be protected both by 42 U.S.C. §1981 and by the Thirteenth and Fourteenth Amendments, according to the standards set forth in Jones v. Mayer. The Court remarked: "We think that history leaves no doubt that, if we are to give [the law] the scope that its origins dictate, we must accord it a sweep as broad as its language."[334] Further, the Thirteenth Amendment clothed "Congress with power to pass all laws necessary and proper for abolishing all

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[331] Id. at 436.

[332] Id. at 432.

[333] CONG. GLOBE at 474 (Jan. 29, 1866).

[334] 392 U.S. at 437 (brackets in original and citation omitted).

badges and incidents of slavery in the United States."[335] The black-code prohibitions on possession of firearms were a badge of slavery.[336]

[335] Id. at 439.

[336] Id. at 436.

The significance of the rights declared in the Freedmen's Bureau bill and the Civil Rights Act to the Fourteenth Amendment has also been articulated in several other cases. In Oregon v. Mitchell (1970),[337] Justice Harlan traced the legislative history, noting that protection for the "full and equal benefit of all laws and proceedings for the security of person and property" appeared in §1 of the Civil Rights Act, and that:

> The appropriate starting point is the fact that the framers of the Fourteenth Amendment expected the most significant portion of §1 to be the clause prohibiting state laws "which shall abridge the privileges or immunities of citizens of the United States." These privileges were no doubt understood to include the ones set out in the first section of the Civil Rights Act. To be prohibited by law from enjoying these rights would hardly be consistent with full membership in a civil society.[338]

Similarly, the Civil Rights Act of 1871, 42 U.S.C. §1983, which protects "any rights" that are "secured" by the Constitution, and which enforces the Fourteenth Amendment, has been traced in part to the Freedmen's Bureau bill.[339]

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[337] Oregon v. Mitchell, 400 U.S. 112, 160-61 (1970) (Harlan, J., concurring and dissenting).

[338] Id. at 162 n.13 & 163.

[339] Adickes v. Kress & Co., 398 U.S. 144, 215 n.25, 225 n.30 (1970) (Brennan, J., concurring and dissenting).

Justice Marshall's opinion in Regents of the Univ. of California v. Bakke (1978) states: "The Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen's Bureau Act. . . . Rejecting the concerns of the President and the bill's opponents, Congress overrode the President's second veto."[340] Justice Marshall concluded that the rights set forth in the Freedmen's Bureau Act were dispositive of Congress' intent in the Fourteenth Amendment.[341]

The Court does not always seem to be aware that the Freedmen's Bureau Act actually passed. Four references to the bill by the Supreme Court state only that it was vetoed and that the override vote failed;[342] three cases mention that the bill actually passed in a second override vote.[343] Only a few appellate courts have recognized the passage of the Freedmen's Bureau Act of 1866.[344]

The Freedmen's Bureau Act has never been mentioned by any court in a case concerning

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[340] Regents of the Univ. of California v. Bakke, 438 U.S. 265, 397 (1978).

[341] "Since the Congress that considered and rejected the objections to the 1866 Freedmen's Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures." Id. at 398.

[342] Oregon v. Mitchell, 400 U.S. 112, 159 (1970) (Harlan, J., concerning and dissenting); Loving v. Virginia, 388 U.S. 1, 9 (1967); Patterson v. McLean Credit Union, 491 U.S. ___, 105 L.Ed.2d 132, 162 (1989) (Brennan, J., concurring and dissenting); Jones v. Mayer Co., 392 U.S. 409, 423 n.30 (1968).

[343] Georgia v. Rachel, 384 U.S. 780, 797 n.26 (1966); Regents of the University of California v. Bakke, 438 U.S. 265, 397 (1978) (Marshall, J.); City of Greenwood, Mississippi v. Peacock, 384 U.S. 808, 817 n.11 (1966).

[344] United States v. Timmons, 672 F.2d 1373, 1375 (11th Cir. 1982) (land title claims); Baines v. City of Danville, 357 F.2d 756, 768 (4th Cir. 1966) (post-judgment removal procedures). See Croker v. Boeing Co., 662 F.2d 975, 1004, 1006 (3rd Cir. 1981) (dissenting opinion) (Congress unable to pass bill over veto).

whether the Civil Rights Act or the Fourteenth Amendment protects the right to keep and bear arms. The only exception is the Ninth Circuit, which did not acknowledge the recognition in the Act of "the constitutional right to bear arms."[345]

[345] Fresno Rifle and Pistol Club v. Van de Kamp, 965 F.2d 723 (9th Cir. 1992).

However, noting that today's "section 1981 rests on the thirteenth and fourteenth amendments," Croker v. Boeing Co.. (3rd Cir. 1981) (en banc)[346] explains:

> The 1866 Act was a response to burgeoning abuses against former slaves, which threatened to render illusory the freedom granted to them in the thirteenth amendment. . . . This threat came from the growing power of the Klu Klux Klan and the adoption by the Southern States of the "Black Codes," which restricted such varied rights as the rights to serve as minister, to receive an education, and to own arms.[347]

Concerning the Freedmen's Bureau bill, the Civil Rights Act, and the Fourteenth Amendment, the dissent noted: "Both temporally and politically the . . . measures were related."[348]

CONCLUSION

When it comes to the right of the people to keep and bear arms, District residents are considered by the D.C. Court of Appeals not to be any more among "the people" than the Supreme Court considered Dred Scott. However, the framers of the Second Amendment intended to secure "a free State," meaning a free country, and never hinted that residents of the seat of government had fewer civil rights than residents of the states. Moreover, the full and equal rights of all "citizens" were forever settled in the 1860s--slavery was abolished in the District and then nationally, the Freedmen's Bureau Act and the Civil Rights Act were passed in 1866, and the Fourteenth Amendment became part of the

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[346] 662 F.2d 975, 987.

[347] Id. at 988.

[348] Id. at 1004 (dissenting opinion).

Constitution.

Making it a criminal act for a law-abiding citizen to keep and bear arms is tantamount to a badge of slavery. It is unlawful in the District to keep a pistol in the home, many semiautomatic firearms are unlawful to possess, a registered firearm must be kept unloaded and disassembled or trigger-locked and thus worthless for self-defense, and by policy no person may be issued a permit to carry a concealed weapon, no matter how dire the threat. The honest, law-abiding citizens of the nation's capital, the murder capital of the United States, are no more than second class citizens.