

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

*Stephen P. Halbrook**

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I. INTRODUCTION

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

In three cases decided in the last quarter of the nineteenth century, the United States Supreme Court stated in dicta that the First, Second, and

¹Act of July 16, 1866, 14 Stat. 173, 176 (1866).

²*Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (invalidating state birth control regulation as an impermissible intrusion of privacy despite there being no express provision in the Constitution). The Fourteenth Amendment provides in pertinent part:

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

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

U.S. CONST. amend. XIV

³U.S. CONST. amend II. The Second Amendment provides in full: "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." *Id.*

Fourth Amendments do not *directly* limit state action,⁴ but the Court did not rule on whether the Fourteenth Amendment prohibited state violations of the rights therein declared.⁵ Since then, the Supreme Court has held that most Bill of Rights' freedoms are incorporated into the Fourteenth Amendment.⁶ The Court, however, provided little analysis and no discussion of the intent of the Fourteenth Amendment's framers. Moreover, the Court has failed to decide whether the Second Amendment is correspondingly incorporated, despite the specific declaration of two-thirds of Congress in the Freedmen's Bureau Act.⁷

The first local and state prohibitions in American history on firearms possession by the citizenry at large, the Morton Grove, Illinois handgun ban⁸ and California's prohibition on "assault weapons" (primarily repeating rifles),⁹ were upheld by the United States Courts of Appeals for the Seventh and Ninth Circuits respectively in 1982 and 1992. Both opinions rejected any reliance on the intent of the framers of the Fourteenth Amendment and

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

⁵Miller, 153 U.S. at 538.

⁶E.g., Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (incorporating the right to counsel); Robinson v. California, 370 U.S. 660, 666 (1962) (incorporating the protection from cruel and unusual punishment); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (incorporating the right to be free from unreasonable search and seizure); DeJong v. Oregon, 299 U.S. 353, 364 (1937) (incorporating the right to assembly); Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating the right to freedom of speech and press); Chicago, Burlington, & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 238-39 (1897) (incorporating the right to just compensation).

⁷See Freedmen's Bureau Act, 14 Stat. 173, 177 (1866).

⁸Morton Grove Ill., Ordinance 81-11 [entitled "An Ordinance Regulating the Possession of Firearms and Other Dangerous Weapons"] (June 8, 1981).

⁹California's Roberti-Roos Assault Weapons Control Act of 1989 ["AWCA"], Cal. Penal Code §§ 12275-12290 (1989).

interpreted Supreme Court precedent to reject incorporating the right to keep and bear arms into that amendment.¹⁰

Previous studies document, primarily through floor speeches, that the framers of the Fourteenth Amendment intended to protect Bill of Rights freedoms in general¹¹ and the right to keep and bear arms in particular.¹² Critics, however, have argued that speeches by individual framers of the Fourteenth Amendment are insufficient to demonstrate a consensus to incorporate the Bill of Rights.¹³

The position that the Second Amendment protects individual rights and deters governmental tyranny is undergoing a contemporary revival.¹⁴ In addition, the pertinence of the right to keep and bear arms to defend African

¹⁰*Fresno Rifle & Pistol Club v. Van de Kamp*, 965 F.2d 723, 730 (9th Cir. 1992) (refusing to consider "remarks by various legislators during passage of the Freedmen's Bureau Act of 1866, the Civil Rights Act of 1866, and the Civil Rights Act of 1871"); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 n.8 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983) ("The debate surrounding the adoption of the Second and Fourteenth Amendments . . . has no relevance on the resolution of the controversy before us.").

¹¹See Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1131 (Apr. 1992); MICHAEL K. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); HORACE E. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908).

¹²STEPHEN P. HALBROOK, *Freedom, Firearms, and the Fourteenth Amendment*, in *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 107-53 (1984) [hereinafter HALBROOK, *THAT EVERY MAN BE ARMED*]; STEPHEN P. HALBROOK, *The Fourteenth Amendment and The Right To Keep and Bear Arms: The Intent of The Framers*, in STAFF OF SENATE COMM. ON THE JUDICIARY, 97TH CONG., 2D SESS., *THE RIGHT TO KEEP AND BEAR ARMS: REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION* 68-82 (Comm. Print 1982).

¹³Compare Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STANFORD L. REV. 5 (Dec. 1949) (arguing against incorporation) with William W. Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 UN. CHI. L. REV. 1 (Autumn 1954) (arguing for incorporation).

¹⁴See Amar, *supra* note 11; Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. OF PA. L. REV. 1257 (1991); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L. REV. 637 (1989). On the intent of the framers of the Second Amendment, see Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and The Second Amendment*, 26 VAL. U. L. REV. 131 (1991); Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 UNIV. DAYTON L. REV. 91 (Fall 1989).

Americans has been analyzed.¹⁵ Nonetheless, no study exists concerning the significance, for purposes of whether the Fourteenth Amendment prohibits state infringement of the right to keep and bear arms, of the Freedmen's Bureau Act's declaration that the rights to personal security and personal liberty include the "constitutional right to bear arms."¹⁶

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

The sources for this Article include the texts of, and debates on, constitutional amendments and statutory enactments as they proceeded through Congress.¹⁷ Moreover, the secret journal of the Joint Committee

¹⁵See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991).

¹⁶See *supra* note 1 and accompanying text (quoting the pertinent text of the Freedman's Bureau Act). The significance of this declaration to support incorporating the Second Amendment, as well as other parts of the Bill of Rights, into the Fourteenth Amendment is recognized in three of the best studies on the Fourteenth Amendment. See Amar, *supra* note 11, at 1182 n.228 ("[The] last clause was understood as declaratory, simply clarifying what was already implicit . . . that the Second Amendment right to bear arms . . . were [sic] encompassed by both the Freedmen's Bureau Act and its companion Civil Rights Act."); CURTIS *supra* note 11, at 72; FLACK, *supra* note 11, at 17.

¹⁷Benjamin B. Kendrick noted:

[T]he testimony taken by the joint committee on reconstruction served as the *raison d'être* of the [F]ourteenth [A]mendment and as a campaign document for the memorable election of 1866. 150,000 copies were printed in order that [S]enators and [R]epresentatives might distribute them among their constituents. . . . That this testimony was read by the people generally in the North, is proved by the fact that the newspapers of the time published copious extracts from it, as it was made public, together with editorial comments upon it.

BENJAMIN B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 264-65 (1914).

As Kendrick further remarked, "the testimony in regard to the treatment of the freedmen will tend to show why Congress was determined to pass such measures as the Freedmen's Bureau Bill, the Civil Rights Bill, and the . . . resolution for amending the Constitution." *Id.* at 269. Along with exhibiting what thoughts were on the minds of members of Congress who asked many searching questions at the hearings, the testimony reveals what materials Congressmen who voted for the Fourteenth Amendment considered

of Fifteen on Reconstruction, which drafted the Fourteenth Amendment, also will be examined, and occasional references will be made to press reports. Furthermore, executive communications concerning conditions in the South and the role of the Freedmen's Bureau will be scrutinized. In a unique methodology for Fourteenth Amendment history, the public proceedings before the Joint Committee of Fifteen on Reconstruction will be interwoven with the Congressional debates.

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

Although this Article concentrates on the right to keep and bear arms, it also includes a comprehensive analysis pertinent to the general topic of incorporating all the other Bill of Rights guarantees into the Fourteenth Amendment. The arms' guarantee may be the cutting edge of what it means to take civil rights seriously,¹⁸ but its history supplies a broader context to the question of whether a political society insures liberty to all without regard to race or previous condition of servitude.

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

Antebellum commentators, both moderate and abolitionist, interpreted the Second Amendment as a guarantee of an individual's right to keep and bear arms, free from both state and federal infringement.¹⁹ This right, however,

and demonstrates the perceived evils that the public wanted remedied. *Id.*

¹⁸In the Reconstruction context, one test of whether blacks had the same civil rights as whites was whether blacks would be trusted to own firearms.

¹⁹See HALBROOK, *THAT EVERY MAN BE ARMED*, *supra* note 12, at 89-106. Antebellum courts held that the Second Amendment recognized an individual right to keep and bear arms. *Id.* at 93-96. Slavery, however, became the exception to the rule. In an effort to disarm freedmen and slaves, some courts limited the Second Amendment guarantee as applying only to citizens, rather than all people, and found the Second Amendment inapplicable to the States. *Id.* at 96-98. In his widely known criminal law commentaries, Joel P. Bishop wrote in 1865:

was not guaranteed to everyone. One did not have to look hard to discover state "statutes relating to the carrying of arms by negroes and slaves"²⁰ and to an "act to prevent free people of color from carrying firearms."²¹ This discriminatory application of the Second Amendment exemplified the need for a further constitutional guarantee to clarify and protect the rights of all persons, regardless of race.

Following the Civil War, the slave codes began to reappear in the form of the black codes and limited the access of blacks to land, to arms, and to the courts.²² The origins of these codes are exemplified in a letter from E.G. Baker, a Mississippi planter, to members of the state legislature on October 22, 1865, warning of a possible black insurrection: "It is well known here that our negroes through the country are well equipped with fire arms, muskets, double barrel shot guns, & pistols, — & furthermore, it would be well if they are free to prohibit the use of fire arms until they had proved themselves to be good citizens in their altered state."²³ Forwarding

The [C]onstitution of the United States provides, that, "a well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." This provision is found among the amendments; and, though most of the amendments are restrictions on the General Government alone, not on the States, this one seems to be of a nature to bind both the State and National legislatures.

2 JOEL P. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 124 (1865).

²⁰BISHOP, *supra* note 19, at § 120 n.6.

²¹*Id.* at § 125 n.2.

²²W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 166-67, 223 (1962) (detailing laws passed against freedmen prohibiting ownership of firearms, authorizing arrest of freedmen for vagrancy, and otherwise limiting their rights); *see also* E. MERTON COULTER, THE SOUTH DURING RECONSTRUCTION 38, 49 (1947) (black code provisions on firearms). Coulter stated that:

To possess a gun and be followed by a dog which he could call his own greatly helped the freedman to enjoy his new freedom; and to carry a pistol distinguished the 'young colored gentleman' from the 'gun-toting' generality of Negroes who sometimes carried their [long] guns to the fields to produce a thrill or to shoot a rabbit.

Id. at 49.

²³FREE AT LAST: A DOCUMENTARY HISTORY OF SLAVERY, FREEDOM, AND THE CIVIL WAR 520-21 (I. Berlin et al. eds., 1992).

a copy of the letter to the Union commander in Northern Mississippi, Governor Benjamin G. Humphreys stated that "unless some measures are taken to disarm [the freedmen] a collision between the races may be speedily looked for."²⁴

The result of such views was the prototypical 1865 Mississippi statute entitled "Act to Regulate the Relation of Master and Apprentice Relative to Freedmen, Free Negroes, and Mulattoes."²⁵ In addition to prohibiting seditious speeches and preaching by freedmen without a license, the Act prohibited blacks from keeping or carrying firearms.²⁶

²⁴*Id.* at 522.

²⁵1865 Miss. Laws 165 (Nov. 29, 1865).

²⁶The Act provided in part:

Section 1. Be it enacted, . . . [t]hat no freedman, free negro or mulatto, not in the military service of the United States [G]overnment, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie-knife, and on conviction thereof in the county court shall be punished by fine, not exceeding ten dollars, and pay the costs of such proceedings, and all such arms or ammunition shall be forfeited to the informer; and it shall be the duty of every civil and military officer to arrest any freedman, free negro, or mulatto found with any such arms or ammunition, and cause him or her to be committed to trial in default of bail. . . .

. . . .
Section 3 If any white person shall sell, lend, or give to any freedman, free negro, or mulatto any fire-arms, dirk or bowie-knife, or ammunition, or any spirituous or intoxicating liquors, such person or persons so offending, upon conviction thereof in the county court of his or her county, shall be fined not exceeding fifty dollars, and may be imprisoned, at the discretion of the court, not exceeding thirty days. . . .

. . . .
Section 5 If any freedman, free negro, or mulatto, convicted of any of the misdemeanors provided against in this act, shall fail or refuse for the space of five days, after conviction, to pay the fine and costs imposed, such person shall be hired out by the sheriff or other officer, at public outcry, to any white person who will pay said fine and all costs, and take said convict for the shortest time.

Id. at 166-67; Ex. Doc. No. 6, 39th Cong., 1st Sess., at 195-96 (1867). John W. Burgess commented on the Mississippi Act, stating:

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

Two weeks after the above Act passed, Calvin Holly, a black Private assigned to the Freedmen's Bureau in Mississippi, wrote to Bureau Commissioner Howard, relating an article in the Vicksburg Journal.²⁷ The article described an incident involving blacks with a gun and noted that "they [were] forbidden not to have any more but did not heed."²⁸ Furthermore, the article asserted that "[t]he Rebels are going about in many places through the State and robbing the colored people of arms, money and all they have and in many places killing."²⁹ Holly continued that "[t]hey talk of taking the arms away from [colored] people and arresting them and put them on farms next month and if they go at that I think there will be trouble and in all probability a great many lives lost."³⁰

When the Thirty-Ninth Congress convened in December of 1865, the first significant event from the perspective of the constitutional developments to follow was the formation of the House Select Committee on Freedmen,³¹ to which would be referred all matters concerning freedmen and which would report by bill or otherwise,³² and the Judiciary Committees of the Senate and the House.³³ Shortly after the Committee on Freedmen was appointed, John A. Bingham of Ohio introduced a joint resolution to amend the Constitution "to empower Congress to pass all necessary and proper laws to

JOHN W. BURGESS, RECONSTRUCTION AND THE CONSTITUTION, 1866-1876, at 52 (1902).

²⁷See FREE AT LAST, *supra* note 23, at 523-25.

²⁸*Id.* at 523.

²⁹*Id.*

³⁰*Id.* at 524.

³¹CONG. GLOBE, 39th Cong., 1st Sess. 14 (Dec. 6, 1865). The House Select Committee on Freedmen consisted of Thomas D. Eliot of Massachusetts, William D. Kelley of Pennsylvania, Godlove S. Orth of Indiana, John A. Bingham of Ohio, Nelson Taylor of New York, Benjamin F. Loan of Missouri, Josiah B. Grinnell of Iowa, Halbert E. Paine of Wisconsin, and Samuel S. Marshall of Illinois. *Id.*

³²*Id.* at 14 (Dec. 6, 1865).

³³The Senate Judiciary Committee was chaired by Lyman Trumbull of Illinois, *id.* at 11 (Dec. 6, 1865), and the House Judiciary Committee was chaired by James F. Wilson of Iowa. *Id.* at 21 (Dec. 11, 1865).

secure to all persons in their rights, life, liberty, and property”³⁴ This would become, of course, the Fourteenth Amendment.

There was also appointed a Joint Committee of Fifteen to investigate the condition of the southern states.³⁵ This committee would hear testimony on the violation of freedmen’s rights and draft and report the Fourteenth Amendment.

The enactment of the black code provisions, as the following study shows, prompted initiation of civil rights’ legislation that culminated in the proposal of the Fourteenth Amendment. Among the first pieces of proposed legislation, Senate Bill No. 9 — introduced on December 13, 1865 by Senator Henry Wilson of Massachusetts — declared as void all laws or other state action in the southern states infringing on the civil rights and immunities of persons due to race, color, descent, or prior condition of slavery or involuntary servitude.³⁶ Senator Wilson led the debate on this the first substantive discussion on civil rights in the 39th Congress. Senator Wilson deplored the disarming of blacks and other enforcement of the black codes.³⁷

³⁴*Id.* John Bingham eventually would author § 1 of the Fourteenth Amendment.

³⁵*Id.* at 30 (Dec. 12, 1865).

³⁶CONG. GLOBE, 39th Cong., 1st Sess. 39 (Dec. 13, 1865). Senate Bill No. 9 declared void state laws:

[W]hereby or wherein any inequality of civil rights and immunities among the inhabitants of said states is recognized, authorized, established, or maintained, by reason or in consequence of any distinctions or differences of color, race or descent, or by reason or in consequence of a previous condition or status of slavery or involuntary servitude of such inhabitants

Id.

³⁷*Id.* at 40 (Dec. 13, 1865). Specifically, Senator Wilson exclaimed:

In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them; and the same things are done in other sections of the country. . . . I am told by eminent gentlemen connected with the Freedmen’s Bureau that where they have the power they arrest the execution of these laws, but as the laws exist they are enforced in the greater portions of those States. If we now declare those laws to be null and void, I have no idea that any attempt whatever will be made to enforce them, and the freedmen will be relieved from this intolerable oppression.

Id.

Senator Wilson grounded the bill in the federal military power, rather than in the Thirteenth Amendment, which abolished slavery.³⁸ Senator Edgar Cowan of Pennsylvania wanted to secure "the natural rights of all people," but maintained that a constitutional amendment was necessary.³⁹ Senator John Sherman of Ohio also wanted "to give to the freedmen of the [s]outhern [s]tates ample protection in all their natural rights."⁴⁰ Senator Sherman, however, argued that legislation "should be in clear and precise language, naming and detailing precisely the rights that these men shall be secured in, so that in the [s]outhern [s]tates there shall be hereafter no dispute or controversy."⁴¹

On December 13, the House took its first action on a civil rights issue. Representative John W. Farnsworth of Illinois moved to refer to the Joint Committee of Fifteen⁴² a resolution protecting freedmen in "their inalienable rights," and to "secure to the colored soldiers of the Union their equal rights and privileges as citizens of the United States."⁴³ John W. Chandler, a Democrat from New York, opposed the motion because the term "the people of the United States," as used in the Constitution, meant only whites.⁴⁴ Subsequently the resolution was referred to the Committee.⁴⁵

³⁸*Id.* at 39. The Thirteenth Amendment provides in part:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII §§ 1, 2

³⁹CONG. GLOBE, 39th Cong., 1st Sess. at 40-41.

⁴⁰*Id.* at 41.

⁴¹*Id.* at 42.

⁴²*See supra* note 31 and accompanying text (discussing the creation of the Joint Committee).

⁴³*Id.* at 46 (Dec. 13, 1865).

⁴⁴*Id.* at 47 (Dec. 13, 1865).

⁴⁵*Id.* at 48 (Dec. 13, 1865).

Meanwhile, the House members to serve on the Joint Committee were appointed.⁴⁶ On December 18, 1865, the House resolved that the Committee consider legislation securing freedmen in the southern states “the political and civil rights of other citizens of the United States.”⁴⁷

The next day, Senator Trumbull gave notice that he would introduce a bill enabling the Freedmen’s Bureau “to secure freedom to all persons in the United States, and protect every individual in the full enjoyment of the rights of person and property and furnish him with means for their vindication.”⁴⁸ The bill would be justified under the then pending Thirteenth Amendment,⁴⁹ which prohibited slavery and empowered Congress to enforce the prohibition.

Shortly thereafter, President Andrew Johnson transmitted to the Senate the report of Major General Carl Schurz, whom President Johnson had sent to tour the South.⁵⁰ There followed, in the Senate, a heated discussion on the importance of that report.⁵¹ The widely publicized report, on which Congress placed great credence,⁵² reviewed in detail abuses committed against freedmen, including deprivation of the right to keep and bear arms.⁵³ In addition to other methods that were meant to restore slavery in fact, the report stated that planters advocated that “the possession of arms or

⁴⁶They included Thaddeus Stevens of Pennsylvania, Elihu B. Washburne of Illinois, Justin S. Morrill of Vermont, Henry Grider of Kentucky, John A. Bingham of Ohio, Roscoe Conkling of New York, George S. Boutwell of Massachusetts, Henry T. Blow of Missouri, and Andrew J. Rogers of New Jersey. *Id.* at 57 (Dec. 14, 1865). Congressman Grider and Rogers were Democrats, while the others were Republicans.

⁴⁷*Id.* at 69 (Dec. 18, 1865).

⁴⁸*Id.* at 77 (Dec. 19, 1865).

⁴⁹*Id.*

⁵⁰*Id.* at 78 (Dec. 19, 1865).

⁵¹*Id.* at 79 (Dec. 19, 1865).

⁵²BURGESS, *supra* note 26, at 64.

⁵³The report noted that, “The militia [is] organized for the distinct purpose of enforcing the authority of the whites over the blacks” Ex. Doc. No. 2, 39th Cong., 1st Sess. pt. 1, at 40 (Dec. 13, 1865).

other dangerous weapons without authority should be punished by fine or imprisonment and the arms forfeited.”⁵⁴

Major General Schurz’ report brought to the attention of Congress ordinances enacted in Opelousas and in other Louisiana towns, which provided: “[n]o 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.”⁵⁵ Punishment for violating these ordinances was forfeiture of the weapon and either five days imprisonment or a fine of five dollars.⁵⁶ The Freedmen’s Bureau held that “[t]his ordinance, if enforced, would be slavery in substance” and, thereby, would violate the Emancipation Proclamation.⁵⁷

During the holiday adjournment, the Senate appointments to the Joint Committee finally were made.⁵⁸ Meanwhile, S. 9,⁵⁹ Senator Wilson’s civil rights bill, was continually debated with great animosity between proponents and opponents.⁶⁰

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

On January 5, 1866, Senator Trumbull introduced S. 60, a bill to enlarge the powers of the Freedmen’s Bureau, and S. 61, the Civil Rights bill.⁶¹

⁵⁴*Id.* at 85.

⁵⁵Ordinance No. 34, § 7 (July 3, 1865), *in id.* at 93. *See also id.* at 94-95 (St. Landry and Franklin ordinances).

⁵⁶*Id.* at 93-95.

⁵⁷*Id.* at 95.

⁵⁸Senate Committee members included William P. Fessenden of Maine, J.W. Grimes of Iowa, Ira Harris of New York, Jacob M. Howard of Michigan, Reverdy Johnson of Maryland, and George H. Williams of Oregon. Of these members, Senator Johnson was the sole Democrat. *Cong. Globe*, 39th Cong., 1st Sess. 106 (Dec. 21, 1865).

⁵⁹*See supra* note 36 and accompanying text.

⁶⁰CONG. GLOBE, 39th Cong., 1st Sess. 109 (Dec. 21, 1865). *See also id.* at 90-97 (Dec. 21, 1865) (debate regarding Senator Wilson’s proposed civil rights bill).

⁶¹*Id.* at 129 (Jan. 5, 1866).

Both bills were then referred to the Judiciary Committee.⁶² As this study will show, these bills would become of unprecedented importance in prompting passage of the Fourteenth Amendment and recognition of the right to keep and bear arms. In the House, on January 8, 1866, Representative Eliot introduced a bill to amend the existing law establishing the Freedmen's Bureau, and the bill was referred to the Select Committee on Freedmen.⁶³

Thereafter, on January 11, 1866, Senator Trumbull, Chairman of the Committee on the Judiciary, reported out S. 60 and S. 61.⁶⁴ The following day, at Senator Trumbull's request, the Senate briefly considered S. 60, the Freedmen's Bureau bill. S. 60 provided for jurisdiction of the Freedmen's Bureau in areas where the Civil War had interrupted the ordinary course of judicial proceedings and:

[W]herein, 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*) 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 servitude⁶⁵

Then Senator Trumbull opened up consideration of S. 61, the Civil Rights bill. 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"⁶⁶

While the Senate was openly considering the above statutory protection, the Joint Committee, behind closed doors, began to examine constitutional

⁶²*Id.*

⁶³CONG. GLOBE, 39th Cong., 1st Sess. 135 (Jan. 8, 1866).

⁶⁴*Id.* at 184 (Jan. 11, 1866).

⁶⁵*Id.* at 209 (Jan. 12, 1866) (emphasis added).

⁶⁶*Id.* at 211 (Jan. 12, 1866).

amendments to protect the same rights.⁶⁷ A subcommittee consisting of Congressmen William Fessenden, Stevens, Jacob Howard, Roscoe Conkling, and Bingham was appointed to consider proposed constitutional amendments.⁶⁸

That same day, the House considered H.R. 1,⁶⁹ a bill allowing black suffrage in the District of Columbia. Proponents of H.R. 1 saw suffrage and the right to keep and bear arms as dual protections in a free society.⁷⁰

Through various channels, the public was made aware of the need to provide safeguards for those freedoms in the Bill of Rights, including the Second and Fourth Amendments, on which the States were infringing. *HARPER'S WEEKLY*, for example, informed its readers of Mississippi's prohibition on firearms possession by freedmen and of how the militia enforced it by ransacking houses.⁷¹

⁶⁷It is instructive to compare the Freedmen's Bureau bill with the draft of a constitutional amendment proposed by John Bingham to the Joint Committee that same day, which read: "[t]he Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty, and property." KENDRICK, *supra* note 17, at 46. Thaddeus Stevens proposed the following draft to the Joint Committee: "[a]ll laws, state or national, shall operate impartially and equally on all persons without regard to race or color." *Id.* These proposals resemble what became the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

⁶⁸*Id.* at 45-47.

⁶⁹CONG. GLOBE, 39th Cong., 1st Sess. 216-17 (Jan. 12, 1866).

⁷⁰Representative Chandler of New York quoted from a speech by Honorable Michael Hahn of Louisiana to the National Equal Suffrage Association on November 17, 1865, where Judge Hahn stated:

It is necessary, in beginning our work, to see that slavery throughout the land is effectually abolished, and that the freedmen are protected in their freedom, and in all the advantages and privileges inseparable from the condition of freedom. . . . But I, who come from the South, and have seen the working of the institution for over a quarter of a century, tell you — and I do it regrettingly — that slavery in practice and substance still exists. . . .

'The right of the people to keep and bear arms' must be so understood as not to exclude the colored man from the term 'people.'

Id. at 217 (Jan. 12, 1866).

⁷¹Specifically, the article stated:

On January 18, 1866, Senator William M. Stewart of Nevada called S. 60 “a practical measure . . . for the benefit of the freedmen, carrying out the constitutional provision to protect him in his civil rights.”⁷² That same day, Chairman Eliot of the House Select Committee on Freedmen reported H.R. 87,⁷³ the House version of S. 60.

The following day in the Senate, Senator Thomas A. Hendricks, a Democrat from Indiana, attacked S. 60 in detail. Senator Hendricks feared that § 7 of the bill, guaranteeing civil rights to all, including “the full and equal benefit of all laws and proceedings for the security of person and estate,” might apply to Indiana.⁷⁴ Indiana law did not accord blacks the same civil rights and immunities that were enjoyed by white people,⁷⁵ and Indiana prohibited the immigration of blacks into the State.⁷⁶ However,

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

HARPER’S WEEKLY, Jan. 13, 1866, at 3, col. 2.

⁷²CONG. GLOBE, 39th Cong., 1st Sess. 297 (Jan. 18, 1866). Also supporting S. 61, Stewart explained:

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

Id. at 298 (Jan. 18, 1866).

⁷³*Id.* at 302 (Jan. 18, 1866).

⁷⁴*Id.* at 318 (Jan. 19, 1866). For the pertinent text of § 7 of S. 60, see *supra* note 65 and accompanying text.

⁷⁵*Id.* at 318 (Jan. 19, 1866).

⁷⁶*Id.* See also Ind. Const., Art. XIII, § 1 (1851) (“No negro or mulatto shall come into, or settle in, the state after the adoption of this [C]onstitution.”).

Senator Hendricks was aware that his own state's constitution provided that "the people have a right to bear arms for the defense of themselves and the State."⁷⁷ As such, Senator Hendricks may have feared that, should the bill pass, blacks would have this right, but the Senator limited his remarks to other racial issues such as interracial marriage.⁷⁸

Senator Trumbull denied that the jurisdiction of the Freedmen's Bureau would apply in Indiana, noting that Indiana had not been in rebellion and that its courts were open.⁷⁹ Willard Saulsbury, a Democrat from Delaware, acknowledged that Delaware was the last slaveholding state in the United States and exclaimed, "I am one of the last slaveholders in America."⁸⁰ Senator Trumbull further stated that while Delaware was not a rebellious State, the Freedmen's Bureau would protect freedmen there and, in fact, would do so in *any* state where they congregated in large numbers.⁸¹ The Freedmen's Bureau's judicial authority under § 7 of the bill, however, would exist only in the rebellious states where the civil tribunals were overthrown.⁸²

Senator Trumbull argued that the Thirteenth Amendment, because it abolished slavery, would justify congressional legislation to eradicate the incidents of slavery anywhere.⁸³ Senator Trumbull continued by stating that "[w]hen slavery was abolished, slave codes in its support were abolished also."⁸⁴ Of course, slave codes prohibited the keeping and bearing of arms

⁷⁷Ind. Const., Art. I, § 32 (1851). As a delegate at the constitutional convention which approved this provision, Senator Hendricks proposed that no law should "deprive," rather than "restrict," this right. JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION, assembled at Indianapolis, October 1850, at 574 (A.H. Brown 1851).

⁷⁸CONG. GLOBE, 39th Cong., 1st Sess. 318 (Jan. 19, 1866).

⁷⁹*Id.* at 320 (Jan. 19, 1866).

⁸⁰*Id.* at 321 (Jan. 19, 1866).

⁸¹*Id.*

⁸²*Id.* at 322 (Jan. 19, 1866).

⁸³*Id.*

⁸⁴*Id.* Senator Trumbull continued:

Even some of the non-slaveholding States passed laws abridging the rights of the colored man which were restraints on liberty. When slavery goes, all this system

by slaves. Referring respectively to both the Freedmen's Bureau bill and the Civil Rights bill, Senator Trumbull noted that the former's provisions were temporary, but the latter's were "intended to be permanent, to extend to all parts of the country, and to protect persons of all races in equal civil rights."⁸⁵

In the House, Representative Henry C. Deming of Connecticut introduced a constitutional amendment, similar to that of Representative Bingham's.⁸⁶ Representative Deming's amendment stated "[t]hat Congress shall have power to make all laws necessary and proper to secure to all persons in every State equal protection in their rights of life, liberty, and property."⁸⁷ This proposed amendment would secure the freedman absolute equality before civil and criminal law, endowing him with "every political right necessary to maintain that equality"⁸⁸

The following day, the Senate continued debating S. 60. James Guthrie of Kentucky, a Democrat, opposed the extension of the Freedmen's Bureau's authority to his State and argued that freedmen in Kentucky had the same civil rights as whites.⁸⁹ Samuel C. Pomeroy of Kansas, however, argued that freedmen in Kentucky still could not testify against whites.⁹⁰

On January 20, 1866, the Joint Committee's subcommittee considering drafts of constitutional amendments reported to the Joint Committee an expanded form of Senator Bingham's proposal, which read as follows: "Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the

of legislation, devised in the interest of slavery . . . goes with it.

Id.

⁸⁵*Id.*

⁸⁶CONG. GLOBE, 39th Cong., 1st Sess. 331 (Jan. 19, 1866).

⁸⁷*Id.*

⁸⁸*Id.*

⁸⁹*Id.* at 335-36 (Jan. 20, 1866).

⁹⁰*Id.* at 337 (Jan. 20, 1866).

enjoyment of life, liberty and property.”⁹¹ Thaddeus Stevens proposed, and then withdrew, the definition that “the words ‘citizen of the United States’ . . . shall be construed to mean all persons born in the United States, or naturalized, excepting Indians.”⁹²

IV. “CONSTITUTIONAL PROTECTION IN KEEPING ARMS, IN HOLDING PUBLIC ASSEMBLIES . . .”

On January 22, 1866, Senator Charles Sumner of Massachusetts brought to the Senate’s attention a resolution passed by a black convention in South Carolina, which asked “that [the freedman] should have the constitutional protection in keeping arms”⁹³ The convention, held at Charleston in November 1865, included prominent blacks from South Carolina, several of whom would later be among America’s first black congressmen.⁹⁴ Agents of the Freedmen’s Bureau and pro-Republican newspaper publishers also

⁹¹KENDRICK, *supra* note 17, at 51. A wholly separate amendment, proposed by the subcommittee, would have stated, in addition to Senator Bingham’s proposal: “[a]ll provisions in the Constitution or laws of any State, whereby any distinction is made in political or civil rights or privileges, on account of race, creed or color, shall be inoperative and void.” *Id.* at 50. The word “creed,” however, eventually was deleted by the full Joint Committee, perhaps to exclude atheists or Confederate sympathizers. *Id.* at 53.

⁹²*Id.* at 52-53.

⁹³CONG. GLOBE, 39th Cong., 1st Sess. 337 (Jan. 22, 1866). Senator Sumner stated in more detail:

I also offer a memorial from the colored citizens of the State of South Carolina in convention assembled, representing, as the Senate will remember, four hundred and two thousand citizens of that State, being a very large majority of the population. They set forth the present condition of things in South Carolina, and pray that Congress will see that the strong arm of law and order is placed over the entire people of that State that life and property may be secure. They also ask that government in that State shall be founded on the consent of the governed, and insist that that can be done only where equal suffrage is allowed. . . . *They ask also that they should have the constitutional protection in keeping arms, in holding public assemblies, and in complete liberty of speech and of the press.* This memorial is accompanied by a printed document containing a report of the proceedings of this black convention in South Carolina.

Id.

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

were among the delegates.⁹⁵ The resolution adopted by the delegates complained that South Carolina's black code violated the Second Amendment.⁹⁶

The resolution was then referred to the Joint Committee on Reconstruction.⁹⁷ That same day subcommittees of the Joint Committee began to hold hearings. These hearings documented the violation of the freedmen's rights, including the right to keep and bear arms.⁹⁸ An analysis of the hearings as they occurred will aid in understanding the legislative process as it unfolded on the floor of Congress.

Beginning with the first witness, Joint Committee members heard about murders and other acts of violence against freedmen in the Southern states.⁹⁹ This type of testimony explains why members of Congress focused on the individual right to keep and bear arms for protection against oppression, particularly the deprivation of rights sanctioned by local sheriffs and state militia.¹⁰⁰

⁹⁵*Id.* at 302-03.

⁹⁶The actual language of the memorial to Congress concerning the Second Amendment was as follows:

We ask that, inasmuch as the Constitution of the United States explicitly declares that the right to keep and bear arms shall not be infringed — and the Constitution is the Supreme law of the land — that the late efforts of the Legislature of this State to pass an act to deprive us [of] arms be forbidden, as a plain violation of the Constitution, and unjust to many of us in the highest degree, who have been soldiers, and purchased our muskets from the United States Government when mustered out of service.

Id. at 302. The only other guarantee in the Bill of Rights explicitly mentioned in the memorial related to jury trials and, indirectly, to assembly. *Id.* Senator Sumner's reference to free speech and press was an embellishment not appearing in the memorial. Rather, the emphasis of the memorial was on the Second Amendment, which indicated the perceived fundamental character of that right by the black convention.

⁹⁷CONG. GLOBE, 39th Cong., 1st Sess. 337 (Jan. 22, 1866).

⁹⁸*See infra* notes 113, 132-38, 234-35, 294-97, 317-18 and accompanying text (providing testimony given before the Joint Committee).

⁹⁹REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REPORT NO. 30, 39th Cong., 1st Sess., pt. 3, at 3-4 (1866).

¹⁰⁰*See supra* note 98 and accompanying text.

Still on the same day, the Senate debated S. 60, the Freedmen's Bureau bill. Senator Wilson referred to black codes of South Carolina, Mississippi, Louisiana, and other states as "codes of laws that practically make the freedman a peon or a serf."¹⁰¹

The following day, Senator Willard Saulsbury of Delaware attacked § 7 of S. 60 — which included protection of the right "to full and equal benefit of all laws and proceedings for the security of person and property" — calling it an invasion of state powers.¹⁰²

Opponents of the bill recognized many of the same fundamental rights as the bill's proponents, but differed as to whether freedmen were entitled to all the rights of citizenship and whether the United States should enforce these rights.¹⁰³ Senator Garrett Davis of Kentucky, who sought amendments to the bill, advocated the right to keep and bear arms and other Bill of Rights guarantees with language similar to that used by the Republicans.¹⁰⁴

Senator Davis did not object to any of the bill's statements of rights but offered only unrelated amendments.¹⁰⁵ His objections to § 7, made in a speech on January 25, 1866, were largely procedural.¹⁰⁶ Senator Davis decried the fact that § 7 gave the Freedmen's Bureau judicial powers,

¹⁰¹CONG. GLOBE, 39th Cong., 1st Sess. 340 (Jan. 22, 1866).

¹⁰²*Id.* at 363 (Jan. 23, 1866) ("For the first time in the history of the legislature of this country it is attempted by Congress to invade the States of this Union, and undertake to regulate the law applicable to their own citizens.").

¹⁰³*Id.* at 371 (Jan. 23, 1866).

¹⁰⁴*Id.* Senator Davis stated:

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

Id. (emphasis added).

¹⁰⁵*Id.* at 374-75 (Jan. 23, 1866). *See also id.* at 394-400 (Jan. 24, 1866) (offering amendments to prohibit or diminish the Freedmen's Bureau exercise of judicial powers).

¹⁰⁶*Id.* at 416-17 (Jan. 25, 1866).

deprived citizens of the right to trial by jury, and provided for military enforcement.¹⁰⁷

Senator Trumbull came to the bill's rescue, arguing that such rights are meaningless in places where the civil power is overthrown and the courts are not in operation.¹⁰⁸ A vote was then taken, and the Freedmen's Bureau bill passed 37 to 10.¹⁰⁹

While the above debate was taking place, on January 24, 1866, the Joint Committee considered Senator John Bingham's proposed constitutional amendment.¹¹⁰ Motions by Senators Jacob Howard and George Boutwell to guarantee suffrage were defeated.¹¹¹ A subcommittee, composed of Senators Bingham, Boutwell, and Andrew Rogers, the New Jersey Democrat who led the Opposition in the House, was appointed to review the proposal further.¹¹²

Meanwhile, members of the Joint Committee continued to hear testimony regarding the state militias' repression of freedmen.¹¹³ Committee members, some of whom would eventually play a key role in adoption of the Fourteenth Amendment,¹¹⁴ asked questions concerning the keeping and bearing of arms.¹¹⁵ Later, the Joint Committee considered a draft of

¹⁰⁷*Id.*

¹⁰⁸*Id.* at 420 (Jan. 25, 1866).

¹⁰⁹*Id.* at 421 (Jan. 25, 1866).

¹¹⁰KENDRICK, *supra* note 17, at 55.

¹¹¹*Id.*

¹¹²*Id.* at 55-56.

¹¹³REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, pt. 3, at 8. On January 26, 1866, an army general noted that in Alabama "the roads and public highways are patrolled by the State militia, and no colored man is allowed to travel without a pass from his employer" *Id.* The General further stated that "[t]he arming of the militia is only for the purpose of intimidating the Union men, and enforcing upon the negroes a species of slavery" *Id.* at 10.

¹¹⁴*See infra* notes 367-70 and accompanying text (introducing the Fourteenth Amendment on Senate floor by Jacob Howard).

¹¹⁵For example, on January 27 a federal employee testified to having been threatened with murder. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, at 20. Senator Jacob Howard asked the employee: "[h]ad you any arms?" *Id.* The employee answered: "I never carried arms in my life." Senator Howard persisted, asking,

the constitutional amendment reported by the subcommittee of Senators Bingham, Boutwell, and Rogers, but no decision was made regarding the draft that day.¹¹⁶

On January 29, 1866, the Senate considered S. 61, the civil rights bill. Senator Lyman Trumbull opened the debate by arguing that the bill simply enforced the Thirteenth Amendment.¹¹⁷ According to Senator Trumbull,

"[y]ou were unarmed and in the power of a drunken man who was armed?" The witness replied: the man "would have shot me as quick as he would have shot a hog if I had got into an altercation" *Id.* at 22.

¹¹⁶As amended by the Joint Committee, the draft read:

Congress shall have power to make laws which shall be necessary and proper to secure all persons in every state full protection in the enjoyment of life, liberty and property; and to all citizens of the United States in any State the same immunities and also equal political rights and privileges.

KENDRICK, *supra* note 17, at 56-57. Senator Reverdy Johnson of Maryland lost his motion to strike the second clause. *Id.* at 57. Further consideration of the draft was postponed until the next meeting. *Id.* at 58.

¹¹⁷CONG. GLOBE, 39th Cong., 1st Sess. 474 (Jan. 29, 1866). As Senator Trumbull articulated:

[O]f what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slaveholding States laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?

It is the intention of this bill to secure those rights. The laws in the slaveholding States have made a distinction against persons of African descent on account of their color, whether free or slave. I have before me the statutes of Mississippi. They provide that if any colored person, any free negro or mulatto, shall come into that State for the purpose of residing there, he shall be sold into slavery for life. If any person of African descent residing in that State travels from one county to another without having a pass or a certificate of his freedom, he is liable to be committed to jail and to be dealt with as a person who is in the State without authority. *Other provisions of the statute prohibit any negro or mulatto from having fire-arms*; . . . similar provisions are to be found running through all the statutes of the late slaveholding States.

When the constitutional amendment was adopted and slavery abolished, all these statutes became null and void, because they were all passed in aid of slavery, for the purpose of maintaining and supporting it. Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed

black code provisions prohibiting blacks from having firearms violated the Thirteenth Amendment.¹¹⁸ Senator Trumbull next quoted § 7 of the bill, which referred to the “full and equal benefit of all laws and proceedings for the security of person and property.”¹¹⁹ He made two pertinent assumptions: first, that positive rights *and* equal protection, not just equality, were to be guaranteed, and second, a prohibition on having firearms was a badge of slavery.¹²⁰

Senator Trumbull continued by quoting § 2, Article IV of the Constitution, which provides: “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”¹²¹ The bill, Senator Trumbull stated, would secure “freedom in fact and equality in civil rights to all persons in the United States.”¹²² James A. McDougall, a Democrat from New York, asked for the meaning of “civil rights,” and Trumbull replied that they are those fundamental rights which belong to every free man.¹²³

upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the constitutional amendment.

Id. (emphasis added).

¹¹⁸*Id.*

¹¹⁹*Id.*

¹²⁰*Id.*

¹²¹*Id.* at 475 (Jan. 29, 1866). Senator Trumbull asked and then answered: “[w]hat rights are secured to the citizens of each State under that provision? Such fundamental rights as belong to every free person.” Senator Trumbull next referred to “the great fundamental rights set forth in this bill . . . as appertaining to every freeman.” *Id.*

¹²²*Id.* at 476 (Jan. 29 1866).

¹²³*Id.* Senator Trumbull stated:

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

Senator Willard Saulsbury of Delaware led the attack on the bill, feverishly denying its basis in the Thirteenth Amendment.¹²⁴ Raising the specter of black suffrage, Senator Saulsbury stated that the bill “gives to these persons [freedmen] every security for the protection of person and property which a white man has,” including the ballot and an equal right to have arms.¹²⁵ Such an extension, Saulsbury explained, stripped the States of their police power.¹²⁶

The bill guaranteed “*full and equal*” — not just equal — “benefit of all laws and proceedings for the security of person and property.”¹²⁷ Senator Trumbull’s comments clarify the intent to protect positive rights and not just the promotion of equality, which could include equal slavery for everyone. Based upon the bill’s language and Senator Trumbull’s logic, the States could not equally disarm the whole population. Senator Edgar Cowan of Pennsylvania made this point during the debates on January 30, 1866, noting that the Thirteenth Amendment’s “intention was to make him the opposite of a slave, to make him a freeman.”¹²⁸ Equality through deprivation of rights, however, was not contemplated.

That same day, the House considered the Freedmen’s Bureau bill. Chairman Eliot of Massachusetts reported to the House the committee

Id. (emphasis added).

¹²⁴*Id.*

¹²⁵*Id.* at 478 (Jan. 29, 1866). Senator Saulsbury stated in part:

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

Id.

¹²⁶*Id.*

¹²⁷*See supra* note 65 and accompanying text (providing the pertinent text of § 7 of S. 61).

¹²⁸CONG. GLOBE, 39th Cong., 1st Sess. 499 (Jan. 30, 1866).

substitute for the bill.¹²⁹ As an example of the black codes that the bill was designed to nullify, Chairman Eliot quoted the 1865 ordinance of Opelousas, Louisiana, which required freedmen to have a pass, prohibited their residence within the town and their religious and other meetings, and forbade them from carrying arms.¹³⁰

The same day, Major General Clinton Fisk, responding to questions by Congressman Boutwell, told the Joint Committee of the paranoia in the South concerning blacks with firearms.¹³¹ Major General Fisk advocated the need to protect the right of freedmen to keep and bear arms.¹³²

The following day, the Joint Committee obtained the report of Brigadier General Charles H. Howard to his brother and head of the Freedmen's Bureau, Major General O. O. Howard.¹³³ The report, dated December 30,

¹²⁹*Id.* at 512 (Jan. 30, 1866).

¹³⁰*Id.* at 516-17 (Jan. 30, 1866). Specifically, § 7 of the ordinance read:

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

Id.

¹³¹REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, pt. 3, at 30 ("I went myself into northern Mississippi to look after a reported insurrection of negroes there, and found the whole thing had grown out of one negro marching through the woods with his fowling-piece [shotgun] to shoot squirrels to feed his family.").

¹³²*Id.* at 32. Major General Fisk noted:

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

Id.

¹³³*Id.* at 39.

1865, described how the militia disarmed and oppressed blacks.¹³⁴ General Howard concluded the report by recommending the abolition of the Southern State militia.¹³⁵

Senator Jacob M. Howard conducted a great deal, perhaps even most, of the examination of witnesses at the hearings.¹³⁶ During this process, Senator Howard asked a Federal Tax Commissioner from Fairfax County, Virginia, about the disposition of whites towards freedmen.¹³⁷ The Commissioner responded that Alexandria City authorities attempted to enforce old laws against blacks in regard to carrying firearms.¹³⁸ These abuses continued until the Freedman's Bureau was established in Alexandria.¹³⁹ The hearings confirmed the need for civil rights legislation

¹³⁴*Id.* at 46. The report read in part:

The militia organizations in the opposite county of South Carolina (Edgefield) were engaged in disarming the negroes. This created great discontent among the latter, and in some instances they had offered resistance. In previous inspecting tours in South Carolina much complaint reached me of the misconduct of these militia companies towards the blacks. Some of the latter of the most intelligent and well-disposed came to me and said: "What shall we do? These militia companies are heaping upon our people every sort of injury and insult, unchecked" I assured them that this conduct was not sanctioned by the United States military authorities, and that it would not be allowed

Now, at Augusta, about two months later, I have authentic information that these abuses continue. In southwestern Georgia, I learned that the militia had done the same, sometimes pretending to act under orders from United States authorities. I reported these facts to General Branon, commanding the department of Georgia, and to General Sickles, commanding the department of South Carolina.

I am convinced that these militia organizations only endanger the peace of the communities where they exist, and are a source of constant annoyance and injury to the freed people; that herein is one of the greatest evils existing in the southern States for the freedmen. They give the color of law to their violent, unjust, and sometimes inhuman proceedings.

Id.

¹³⁵*Id.* at 46-47.

¹³⁶*See id. passim.*

¹³⁷*Id.*, pt. 2, at 21.

¹³⁸*Id.*

¹³⁹*Id.*

in general, and protection of the right of freedmen to have arms in particular. Congress would focus on these goals in the coming weeks.

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

On February 1, 1866, Senator Benjamin G. Brown of Missouri introduced, and the Senate adopted, a resolution that the Joint Committee consider an amendment to the Constitution, "so as to declare with greater certainty the power of Congress to enforce and determine by appropriate legislation *all the guarantees contained in that instrument . . .*"¹⁴⁰ This resolution suggested the intent of what was to become the Fourteenth Amendment to incorporate the Bill of Rights.

The debate on the civil rights bill turned to the issue of whether citizenship would be race-neutral.¹⁴¹ Some Western Senators wished to exclude Indians, as well as Chinese, from being considered citizens, partly because citizens had a right to bear arms, a right not to be accorded to Indians.¹⁴² The oppression of Native Americans and the seizure of their lands proceeded in earnest. Accordingly, the Senate voted to define all persons born in the United States, without distinction of color, as citizens, "excluding Indians not taxed."¹⁴³

¹⁴⁰CONG. GLOBE, 39th Cong., 1st Sess. 566 (Feb. 1, 1866) (emphasis added).

¹⁴¹*Id.* at 573 (Feb. 1, 1866).

¹⁴²*Id.* Senator George H. Williams of Oregon made the following argument against recognizing Indians as citizens:

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

Id.

¹⁴³*Id.* at 574-75 (Feb. 1, 1866).

In the House, debate on the Freedmen's Bureau bill, S. 60, began with a procedural ruling that amendments could not yet be offered.¹⁴⁴ Congressman Nathaniel P. Banks, a former governor of Massachusetts and Union General, made known his intent to offer an amendment, so that the Freedmen's Bureau bill would recognize "the civil rights belonging to white persons, including the constitutional right to bear arms"¹⁴⁵

The House then returned to debate on the Freedmen's Bureau bill. Representative Ignatius Donnelly of Minnesota, supporting passage of the bill, noted that an amendment offered by Congressman Bingham effectively provided that "Congress shall have power to enforce by appropriate legislation *all* the guarantees of the Constitution."¹⁴⁶ As such, Congressman Bingham's draft of the Fourteenth Amendment was seen as protecting Bill of Rights guarantees.

That same day, a witness before the Joint Committee submitted a resolution of Union men from Arkansas, stating in part that the freedman is entitled to all the "absolute rights" of a citizen, including "personal security, personal liberty, and private property."¹⁴⁷ Suffrage, however, was not considered an absolute right.¹⁴⁸

On February 2, 1866, Senator Davis of Kentucky introduced a substitute for the Civil Rights bill. This substitute declared that any person "who shall subject or cause to be subjected a citizen of the United States to the deprivation of *any privilege or immunity in any State to which such citizen is entitled under the Constitution and laws of the United States*" shall have an action for damages and that such conduct would be considered a

¹⁴⁴*Id.* at 585 (Feb. 1, 1866).

¹⁴⁵*Id.* Congressman Banks stated:

I shall move, if I am permitted to do so, to amend the seventh section of this bill by inserting after the word 'including' the words 'the constitutional right to bear arms;' so that it will read, 'including the constitutional right to bear arms, the right to make and enforce contracts, to sue'

Id.

¹⁴⁶*Id.* at 586 (Feb. 1, 1866). For Bingham's draft, see *supra* note 117.

¹⁴⁷REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, pt. 3, at 54.

¹⁴⁸*Id.* at 55.

misdemeanor.¹⁴⁹ Senator Davis explained that this compromise would be grounded in the Privileges and Immunities Clause.¹⁵⁰ This suggests that even opponents of the Civil Rights bill were willing to concede that the explicit guarantees of the Bill of Rights should be protected.

Senator Henry Wilson of Massachusetts argued the necessity of the Civil Rights bill on the basis that military decrees still were necessary to overturn the black codes.¹⁵¹ The specific military decree praised by Senator Wilson 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.¹⁵²

Decrying “military despotism,” Senator Edgar Cowan of Pennsylvania conceded that, by the Thirteenth Amendment, “the slave codes of the several States have been abolished.”¹⁵³ After further debate, the Civil Rights bill passed the Senate by a vote of thirty-three to twelve.¹⁵⁴

On February 3, 1866, Representative L.H. Rousseau set forth an interesting view of the scope of S. 60’s reference to “all laws and proceedings for the security of person and estate.”¹⁵⁵ A Democrat and an opponent of the bill, Representative Rousseau quoted § 7, and then referred to “the security to person and property from unreasonable search, and in various other provisions.”¹⁵⁶ Representative Rousseau’s reference to unreasonable searches suggests that he considered the Fourth Amendment, and other Bill of Rights provisions, to be encompassed in the “laws and

¹⁴⁹CONG. GLOBE, 39th Cong., 1st Sess. 595 (Feb. 2, 1866) (emphasis added).

¹⁵⁰*Id.*

¹⁵¹*Id.* at 603 (Feb. 2, 1866) (“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.”).

¹⁵²*Id.* at 908-09 (Feb. 17, 1866).

¹⁵³*Id.* at 603 (Feb. 2, 1866).

¹⁵⁴*Id.* at 606-07 (Feb. 2, 1866).

¹⁵⁵CONG. GLOBE, 39th Cong., 1st Sess., Appendix, 69 (Feb. 3, 1866)

¹⁵⁶*Id.*

proceedings for the security of person and estate.”¹⁵⁷ This consideration would be declared explicitly with reference to the Second Amendment.¹⁵⁸

On that same day in the Joint Committee, Senator Howard questioned Bureau official J. W. Alvord, who had visited most of the Southern States, regarding whether the freedmen owned arms.¹⁵⁹ Mr. Alvord responded that some kept muskets and shotguns, and used them to hunt.¹⁶⁰

The Joint Committee met in secret that day to consider the proposed constitutional amendment. Senator Bingham offered the following substitute for the subcommittee draft:¹⁶¹ “Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states [Art. 4, Sec. 2]; and to all persons in the several States equal protection in the rights of life, liberty and property [5th Amendment].”¹⁶² The substitute was agreed to by a nonpartisan vote of seven to six, with Democrat Andrew

¹⁵⁷See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”).

¹⁵⁸Act of July 16, 1866, 14 Stat. 173, 176.

¹⁵⁹REPORT OF THE JOINT COMMITTEE OF RECONSTRUCTION, *supra* note 99, pt. 2, at 246.

¹⁶⁰*Id.* The following was stated:

Question: Have the negroes arms?

Answer: Not generally, and yet I think some of them have arms.

Question: Do they keep them publicly in their houses so that they can be seen, or are they concealed.

Answer: It may be that some of them are concealed, but generally they are proud of owning a musket or fowling-piece. They use them often for the destruction of vermin and game.

Id.

¹⁶¹See *supra* note 116 and accompanying text (discussing the subcommittee’s draft and providing the pertinent text).

¹⁶²KENDRICK, *supra* note 17, at 61.

Rogers joining Jacob Howard in voting affirmatively.¹⁶³ Of course, Senator Rogers then voted against the proposal on the merits.¹⁶⁴

In the House debate on February 5, 1866, Representative Lawrence S. Trimble of Kentucky, a Democrat, argued that S. 60 was based on military rule and violated the Fourth, Fifth, and Sixth Amendments, which the Representative called "inalienable rights of an American freeman."¹⁶⁵ Bill supporters countered that S. 60 would protect rights violated by existing state laws. As 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."¹⁶⁶

Representative Samuel McKee of Kentucky noted that 27,000 black ex-soldiers from Kentucky retained their arms and "would like to have [S. 60] to protect them As freedmen they must have the civil rights of freemen."¹⁶⁷

Congressman Thomas Eliot, as instructed by the Select Committee on the Freedmen's Bureau, offered a substitute for S. 60.¹⁶⁸ Congressman Eliot explained his proposed changes, including the following:

The next amendment is in the seventh section, in the eleventh line, after the word "estate," by inserting the words "including the constitutional right to bear arms," so that it will read, "to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right to bear arms."¹⁶⁹

¹⁶³*Id.*

¹⁶⁴*Id.*

¹⁶⁵CONG. GLOBE, 39th Cong., 1st. Sess. 648 (Feb. 5, 1866).

¹⁶⁶*Id.* at 651 (Feb. 5, 1866). In Kentucky, according to 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*" Ex. Doc. No. 70, 39th Cong., 1st Sess. 233, 236 (1866).

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

¹⁶⁸*Id.*

¹⁶⁹*Id.*

As noted, Representative Nathaniel Banks had suggested this language four days earlier, although Representative Banks would have placed the term “the constitutional right to bear arms” first in the list of civil rights.¹⁷⁰

Representative Bingham, whose proposed constitutional amendment was then being secretly debated in the Joint Committee, was a member of the Select Committee on Freedmen, which previously instructed Congressman Eliot to report the above substitute for S. 60.¹⁷¹ While the House debated other provisions, no one objected to Representative Eliot’s proposed amendment to S. 60 explicitly recognizing the right to bear arms.

Arguing for adopting the Freedmen’s Bureau bill, Congressman Eliot quoted from a report on Kentucky from Brevet Major General Fisk to General Howard, Commissioner of the Freedmen’s Bureau.¹⁷² Congressman Eliot complained that civil authorities enforcing state law were seizing firearms from blacks and imposing fines on them.¹⁷³

The following day, a vote was taken in the House on the final passage of S. 60, the Freedmen’s Bureau bill. The Select Committee’s substitute report by Eliot, including “the constitutional right to bear arms” being termed a

¹⁷⁰*Id.* at 585 (Feb. 1, 1866). Although Congressmen Banks and Eliot both represented Massachusetts, the above language seems to have been supported by a consensus of all Republicans.

¹⁷¹*See supra* note 31 and accompanying text.

¹⁷²CONG. GLOBE, 39th Cong., 1st Sess. 657 (Feb. 5, 1866).

¹⁷³*Id.* Reflecting the report, Congressman Eliot stated:

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

Id.

Congressman Eliot also quoted from a letter by a teacher at a freedmen’s school in Maryland. The letter stated that because of attacks on the school, “both the mayor and sheriff have warned the colored people to go armed to school, (which they do,) . . . The superintendent of schools came down and brought me a revolver.” *Id.* at 658 (Feb. 5, 1866).

“civil right,”¹⁷⁴ passed by a vote of one-hundred thirty-six to thirty-three.¹⁷⁵

The next day, Senator Lyman Trumbull moved that the House amendments to S. 60 be referred to the Senate Committee on the Judiciary.¹⁷⁶ In the Joint Committee, Senator Howard questioned a loyalist from rural Virginia, who testified that no danger existed of either a black insurrection or a revival of the Confederate rebellion.¹⁷⁷ On February 8, 1866, Senator Ira Harris of New York elicited testimony from a Mississippi judge, who explained that the reason blacks were disarmed was because of an unjustified fear of insurrection.¹⁷⁸

¹⁷⁴*Id.* at 1292 (Mar. 9, 1866).

¹⁷⁵*Id.* at 688 (Feb. 6, 1866).

¹⁷⁶*Id.* at 702 (Feb. 7, 1866).

¹⁷⁷REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, pt. 2, at 68. Part of this discussion was as follows:

Question: Have the negroes arms?

Answer: Not that I know of.

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

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

Id.

¹⁷⁸*Id.*, pt. 3, at 68. The judge responded in part:

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

Id.

At the Joint Committee on February 10, 1866, Senator Howard asked the pro-slavery speaker of the Virginia House of Delegates the following about freedmen: “Have you any idea that they have collected arms together for protection?” *Id.*, pt. 2, at 109. The witness responded: “I have not the least idea of anything of the sort. I think they would be very

That same day, Senator Trumbull informed the Senate that the Committee on the Judiciary instructed him to report back S. 60 and to recommend that the Senate concur with the House amendments.¹⁷⁹ Explaining the House amendments, Senator Trumbull noted that the insertion of the term “the constitutional right of bearing arms” did not change the meaning of S. 60.¹⁸⁰ Thus, the authors of the Freedmen’s Bureau bill and of the Civil Rights bill believed that the common language of both bills would protect the constitutional right to bear arms.

Once again, opponents objected that S. 60 was based on military rule and denied individuals their right to a jury trial.¹⁸¹ No one, however, objected to the right to keep and bear arms being acknowledged.¹⁸² The Senate then concurred in the amended S. 60 without a recorded vote.¹⁸³ The next day the House approved unrelated Senate amendments.¹⁸⁴ The Freedmen’s Bureau bill had reached final passage by the Congress.

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

As passed, the Freedmen’s Bureau bill provided in § 7 that, in areas where ordinary judicial proceedings were interrupted by the rebellion, the President shall extend military protection to persons whose rights are

slow to do it.” *Id.*

¹⁷⁹CONG. GLOBE, 39th Cong., 1st. Sess. 742 (Feb. 8, 1866)

¹⁸⁰Specifically, Senator Trumbull stated:

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.

Id. at 743 (Feb. 8, 1866).

¹⁸¹*Id.*

¹⁸²*Id.*

¹⁸³*Id.* at 748 (Feb. 8, 1866).

¹⁸⁴*Id.* at 775 (Feb. 9, 1866).

violated.¹⁸⁵ The protected “civil rights or immunities” were recognized as “including the constitutional right of bearing arms.”¹⁸⁶

On February, 13, 1866, it was announced in both houses of Congress that the Joint Committee had recommended adoption of a constitutional amendment to read as follows:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty, and property.¹⁸⁷

This appears to be the first reported draft of what would become § 1 of the Fourteenth Amendment. Now that the Freedmen’s Bureau bill had been passed, Congress could focus its attention on a constitutional provision generalizing those same rights contained in the Freedman’s Bureau bill.¹⁸⁸

¹⁸⁵*Id.* at 1292 (Mar. 9, 1866) (providing the pertinent language of § 7).

¹⁸⁶*Id.* The rights protected from violation were described in the bill as follows:

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

Id. (emphasis added).

¹⁸⁷*Id.* at 806, 813 (Feb. 13, 1866).

¹⁸⁸That same day, in a Senate debate on the apportionment of representation, Senator John B. Henderson, a Unionist from Missouri, noted: “General Sickles issued an order at Charleston, with twenty-three sections, making up an entire civil code for the government of South Carolina” *Id.*, App., at 112 (Feb. 13, 1866). Senator Henry Wilson of Massachusetts described the order as “[t]he most comprehensive ever made.” *Id.* Senator Henderson attributed the order to President Johnson because generals “act through the President only” *Id.* It is noteworthy that one section of General Sickles’ order declared that “the constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed” CONG. GLOBE, 39th Cong., 1st.

The Memorial of Citizens of Tennessee, advocated by unionists in control of the state seeking recognition, was referred that day to the Joint Committee.¹⁸⁹ The Joint Committee included in the memorial the texts of various acts passed by the Union legislature, including an exemption from the state's prohibition on carrying concealed weapons that apparently favored all loyalists and perhaps freedmen.¹⁹⁰ Meanwhile, witnesses from other states continually paraded before the Joint Committee.¹⁹¹

Sess. 908-09 (Feb. 17, 1866).

¹⁸⁹REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, pt. 1, at 1.

¹⁹⁰*Id.* at 34. The exemption read as follows:

That all discharged Union soldiers, who have served either as State or Federal soldiers, and have been honorably discharged [from] the service, and all citizens who have always been loyal, shall be permitted to carry any and all necessary side-arms, being their own private property, for their personal protection and common defence.

Id. Those adopting the memorial complained of "the acts of the rebel State government, including . . . the disarming and conscripting of the people" *Id.* at 94. The Tennessee legislature had passed a war measure confiscating firearms from the public. When the Civil War ended, a person whose gun was seized successfully sued for the gun's value. *See Smith v. Ishenhour*, 43 Tenn. (3 Coldwell) 214, 217 (1866). In *Ishenhour*, the court held that:

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

Id.

¹⁹¹REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, pt.2, at 110-28. For example, a Virginia music professor noted an incident where "two Union men were attacked. . . ." *Id.* at 110. The professor further testified that the Union men "drew their revolvers and held their assailants at bay." *Id.* The professor himself was armed, he alleged, for his protection. *Id.* at 112.

On February 15, 1866, Senator Howard questioned an assistant commissioner in the Freedmen's Bureau from Richmond, Virginia. If the Bureau were to be removed, asked Howard, what would be the result of the increased violence toward blacks? The following exchange took place:

Civil rights were frequently discussed in debates on Reconstruction policy. On February 17, 1866, Representative Burton C. Cook of Illinois, noting the importance of the Freedmen's Bureau and Civil Rights bills, rhetorically asked the following about the Thirteenth Amendment: "Did this mean only that they [slaves] should no longer be bought and sold like beasts in the shambles, or did it mean that they should have the civil rights of freedmen . . . ?"¹⁹² Congressman Cook then advocated the adoption of further constitutional amendments to secure full justice and equal rights.¹⁹³

Representative William Lawrence of Ohio discussed the need to protect freedmen, quoting *verbatim* General D.E. Sickles' General Order No. 1, dated January 1, 1866, for the Department of South Carolina.¹⁹⁴ The order

Answer: I think it would eventually result in an insurrection on the part of the blacks; black troops that are about being mustered out, and those that have been mustered out, will all provide themselves with arms; probably most of them will purchase their arms; and will not endure those outrages, without any protection except that which they obtain from Virginia; they have not confidence in their old masters, notwithstanding their great love for them, in which they have tried to make us believe.

Question: Are there many arms among the blacks?

Answer: Yes, sir; attempts have been made, in many instances, to disarm them.

Question: Who have made the attempts?

Answer: The citizens, by organizing what they call "patrols" — combinations of citizens.

Question: Has that arrangement pervaded the State generally?

Answer: No sir; it has not been allowed; they would disarm the negroes at once if they could.

Question: Is that feeling extensive?

Answer. I may say it is universal.

Id. at 127-28.

¹⁹²CONG. GLOBE, 39th Cong., 1st. Sess. 903 (Feb. 17, 1866).

¹⁹³*Id.*

¹⁹⁴*Id.* at 904 (Feb. 17, 1866)

included among the "civil rights and immunities" the right to bear arms, negated the state's prohibition on possession of firearms by blacks, and even recognized the right of the conquered to bear arms.¹⁹⁵

This "most remarkable order," repeatedly printed in the headlines of the *LOYAL GEORGIAN*,¹⁹⁶ a prominent black newspaper of the time, was thought to have been "issued with the knowledge and approbation of the President if not by his direction."¹⁹⁷ The first newspaper issue to print the order editorialized that "all men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves."¹⁹⁸

¹⁹⁵*Id.* at 903 (Feb. 17, 1866). The order read in pertinent part:

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

XVI. The constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons; nor to authorize any person to enter with arms on the premises of another against his consent. No one shall bear arms who has borne arms against the United States, unless he shall have taken the amnesty oath prescribed in the proclamation of the President of the United States, dated May 20, 1865, or the oath of allegiance, prescribed in the proclamation of the President, dated December 8, 1863, within the time prescribed therein. And no disorderly person, vagrant, or disturber of the peace, shall be allowed to bear arms.

Id. at 908-09 (Feb. 17, 1866). The order's recognition of the same right of ex-Confederates as for freedmen not only stemmed from the constitutional guarantee but also was apparently in response to such situations as the following:

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

General Dockery . . . stated that in his county the white residents had been disarmed, and were at present almost destitute of means to protect themselves against robbery and outrage.

1 DOCUMENTARY HISTORY OF RECONSTRUCTION 90 (Fleming ed. 1906), *citing* ANNUAL CYCLOPEDIA 627 (1865).

¹⁹⁶*Important Orders*, THE *LOYAL GEORGIAN*, Feb. 3, 1866, at 1, col. 2.

¹⁹⁷*The New Georgia Code*, THE *LOYAL GEORGIAN*, Feb. 3, 1866, at 2, col. 2.

¹⁹⁸THE *LOYAL GEORGIAN*, Feb. 3, 1866, at 3, col. 4. The editorial stated more fully:

Editor *Loyal Georgian*:

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

The above statement, taken from a Freedmen's Bureau circular, was also printed numerous times in the *LOYAL GEORGIAN*.¹⁹⁹ The *LOYAL GEORGIAN* was not a stranger to the right to bear arms issue; in fact "[f]rom the first days of freedom, the right to bear arms was defended in black newspapers" ²⁰⁰ The proposal of the first draft of the Fourteenth Amendment came at about the same time as the publication of the above issue of the *LOYAL GEORGIAN*, which followed the congressional debates carefully.²⁰¹ The freedmen audience of such newspapers must have concluded that the then proposed amendment would further protect their right to keep and bear arms, as well as their right to many other liberties.

In the Joint Committee on February 17, 1866, Representative George S. Boutwell of Massachusetts asked an Arkansas State official whether any danger of negro insurrection existed if blacks were treated properly.²⁰² The official replied: "[n]o sir, but if they are told that they have no rights

A Colored Citizen

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

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

Id.

¹⁹⁹Circular No. 5, Freedmen's Bureau, Dec. 22, 1865 *reprinted in* issues of *LOYAL GEORGIAN* for Jan. 20, 27, Feb. 3, 1866.

²⁰⁰DOROTHY STERLING, *THE TROUBLE THEY SEEN: BLACK PEOPLE TELL THE STORY OF RECONSTRUCTION* 394 (1976). Sterling documents numerous instances of blacks using firearms for self-defense as well as instances of whites conducting searches and seizures of firearms owned by blacks. "The homes and barns of Klansmen were burned in some areas but blacks, for the most part, bent their efforts toward defense rather than retaliation. Armed men stood guard at the homes of political leaders and every village had its folk hero" *Id.* at 395. *See, e.g., id.* at 8, 84, 438, 443-44.

²⁰¹*See, e.g., The Constitutional Amendment in the Senate*, *THE LOYAL GEORGIAN*, Feb. 24, 1866, at 2, cols. 3-4 (discussing the proposed Fourteenth Amendment).

²⁰²REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, pt. 3, at 72.

which white men are bound to respect, and if federal bayonets are turned against them, they will secrete arms for the purpose of defending themselves.”²⁰³

In the Senate on February 19, 1866, Senator Henry Wilson of Massachusetts introduced S.R. 32, a joint resolution to disband the militia forces in most southern states.²⁰⁴ Senator Wilson quoted detailed accounts of the militias’ disarming of and other abuses of blacks, including a report of Brevet General Howard that had been submitted to the Joint Committee.²⁰⁵ Senator Willard Saulsbury of Delaware opposed sending the joint resolution to the Committee on Military Affairs and the Militia, arguing that the power of Congress under Article I, § 8 to organize, arm, and discipline the militia did not include the power to disarm the state militia.²⁰⁶

²⁰³*Id.* Congressman Boutwell then examined a statement made by Arkansas Supreme Court Judge Charles A. Harper. Concerning the rights of blacks in Arkansas, Judge Harper stated:

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

Id. at 73. Ironically, the Judge noted that the poor whites were nearly all loyalists. *Id.* at 74.

²⁰⁴CONG. GLOBE, 39th Cong., 1st. Sess. 914 (Feb. 19, 1866).

²⁰⁵General Howard noted: “the militia organizations . . . in South Carolina (Edgefield) were engaged in disarming the negroes. This created great discontent among the latter” *Id.* The same abuses were taking place in Georgia. *Id.*

²⁰⁶In support of this position, Senator Saulsbury argued:

[Article I, § 8] does not give power to Congress to disarm the militia of a State, or to destroy the militia of a State, because in another provision of the Constitution, the [S]econd [A]mendment, we have these words:

“A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.”

The proposition here . . . is an application to Congress to do that which Congress has no right to do under the [S]econd [A]mendment of the

Senator Wilson responded that ex-Confederates traveled the country, "searching houses, disarming people, [and] committing outrages of every kind" ²⁰⁷ Senator Wilson concluded: "Congress has power to disarm ruffians or traitors, or men who are committing outrages against law or the rights of men on our common humanity." ²⁰⁸ The resolution then was referred to the Committee on Military Affairs and the Militia. ²⁰⁹

Both Senator Wilson and Senator Saulsbury upheld the peaceful citizen's right to keep and bear arms, but disagreed over: (1) who in the South were the aggressors and, consequently, would lose this and other rights; and (2) who were citizens. ²¹⁰ Senator Wilson had previously complained about Mississippi's firearms prohibition law, which applied only to blacks. ²¹¹ Although Senator Saulsbury had opposed the Civil Rights bill because it would prohibit states from disarming free negroes, ²¹² the Senator now invoked the Second Amendment to protect the right of "the whole white

Constitution. . . . [U]nless the power is lodged in Congress to disarm the militia of Massachusetts, it cannot be pretended that any such power is lodged in Congress in reference to the State of Mississippi.

We hear a great deal about the oppressions of the negroes down South, and a complaint here comes from somebody connected with the Freedmen's Bureau. Only the other day I saw a statement in the papers that a negro, in violation of the laws of Kentucky, was found with concealed weapons upon his person. The law of Kentucky, I believe, is applicable to whites and blacks alike. An officer of the Freedmen's Bureau, however, summoned the judge of the court before him, ordered him to deliver up the pistol to that negro, and to refund the fine to which the negro was subject by the law of Kentucky. The other day your papers stated that one of these negroes shot down a Federal officer in the State of Tennessee. Yet, sir, no petitions are here to protect the white people against the outrages committed by the negro population; but if a few letters are written to members here that oppression has been practiced against negroes, then the whole white population of a State [is] to be disarmed.

Id. at 914-15 (Feb. 19, 1866).

²⁰⁷*Id.* at 915 (Feb. 19, 1866).

²⁰⁸*Id.*

²⁰⁹*Id.*

²¹⁰*Id.*

²¹¹*Id.* at 40 (Dec. 13, 1865). Mississippi's firearms prohibition law is set forth in *supra* note 26.

²¹²*Id.* at 478 (Jan. 29, 1866).

population” not only to be armed, but also to organize and operate as militia.²¹³

A few days later, Senator Wilson reported his bill to disband the southern state militias.²¹⁴ The bill, however, was not considered further until the next session, where it passed in a form that did not create any infringement of the individual's right to keep and bear arms.²¹⁵ Those who supported civil rights and adoption of the Fourteenth Amendment believed that the individual's right to keep and bear arms was far more important than the power of a state to maintain a militia.²¹⁶

At this point in time, members of Congress were startled to learn that President Andrew Johnson vetoed the Freedmen's Bureau bill.²¹⁷ The veto message was read in the Senate just minutes after the debate on Senator Wilson's bill to disband militias.²¹⁸ President Johnson's primary objections were that the Freedmen's Bureau bill relied heavily on military rule and violated the right to trial by jury.²¹⁹ President Johnson, however, did not object to the civil suit provision in § 7, nor did the President object to its recognition of protection for the constitutional right to bear arms. Reading the President's veto message caused such an uproar that the Senate galleries had to be cleared.²²⁰

Meanwhile, in the Joint Committee, Representative Boutwell of Massachusetts elicited further testimony concerning how the Union Constitutional Convention in Arkansas recognized the civil rights of

²¹³*Id.* at 914-15 (Feb. 19, 1866).

²¹⁴*Id.* at 1100 (Mar. 1, 1866).

²¹⁵*See* HALBROOK, THAT EVERY MAN MAY BE ARMED, *supra* note 12, at 136-139.

²¹⁶For further support, see *id.*, at 245 n.229 (voting records show that most Senators voting for the Fourteenth Amendment also voted to disband the southern state militias).

²¹⁷CONG. GLOBE, 39th Cong., 1st Sess. 915 (Feb. 19, 1866).

²¹⁸*Id.*

²¹⁹*Id.* at 916 (Feb. 19, 1866). The only objection pertinent to this study was the President's point that § 8 “subjects any white person who may be charged with depriving a freedman of ‘any civil rights or immunities belonging to white persons’ to imprisonment or fine, or both, without, however, defining the ‘civil rights and immunities’ which are thus to be secured to the freedmen by military law.” *Id.*

²²⁰*Id.* at 917 (Feb. 19, 1866).

freedmen, with the notable exceptions of bearing arms and suffrage.²²¹ The Arkansas Constitution declared the right to keep and bears arms only for the "free white men."²²²

On February 20, 1866, the Senate debated the veto of the Freedmen's Bureau bill.²²³ Senator Garrett Davis made an impassioned speech on the bill's unconstitutionality.²²⁴ Senator Lyman Trumbull expressed great surprise at the veto, noting that the bill's purpose was to protect constitutional rights.²²⁵ Again Senator Trumbull detailed the oppression of

²²¹REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, pt. 3, at 81.

²²²*Id.* Senator William D. Snow of Arkansas, testifying as a witness, explained in part "the civil and political rights of negroes":

The old constitution and the new constitution are identical in this: The old constitution declares, "that the free white men of the State shall have a right to keep and to bear arms for their common defence." The new constitution retains the words "free white" before the word "men." I think I understand something of the reasoning of the convention on that score. At the time this new constitution was adopted we were yet in the midst of a war, and, to some southern eyes, there was yet an apparent chance as to which way the war might terminate; in other words, the rebellion was not entirely crushed. Two years ago in January, there was also some uncertainty in the minds of timid men as to what the negro might do, if given arms, in a turbulent state of society, and in his then uneducated condition; and to allay what I was confident was an unnecessary alarm, that clause was retained. In discussing the subject, the idea prevailed that the clause, being simply permissive, would not prevent the legislature, if at a future time it should be deemed advisable, from allowing the same rights to the colored man.

Id.

The old and new constitutions with the above arms guarantee had been adopted in 1836 and 1864, respectively. ARK. CONST. of 1836, art. I, § 21; ARK. CONST. of 1864, art. I, § 21. Ironically, the 1861 secessionist constitution extended the arms guarantee to Indians: "That the free white men, and Indians, of this state shall have the right to keep and bear arms for their individual or common defence." ARK. CONST. of 1861, art. I, § 21.

²²³CONG. GLOBE, 39th Cong., 1st Sess. 934 (Feb. 20, 1866).

²²⁴*Id.*

²²⁵*Id.* at 936 (Feb. 20, 1866).

the freedmen²²⁶ and appealed to Congress to use its power under the Thirteenth Amendment to stamp out the incidents of slavery by passing the bill.²²⁷

The proponents of S. 60 sought to override the President's veto but failed by a vote of thirty to eighteen, just two votes shy of the necessary two-thirds.²²⁸ Thus any need for a House override vote became moot.

The veto was the first disagreement between President Johnson and the Congress, and began a saga that culminated in the unsuccessful attempt to impeach the President.²²⁹ Republican newspapers, both Radical and Conservative, regretted the veto and almost unanimously supported the principles of the Freedmen's Bureau bill.²³⁰ At least one state legislature, Wisconsin, praised Congress for passing the bill and decried the veto.²³¹

Nevertheless, it was business as usual in the Joint Committee. Senator Howard interrogated Major General Alfred H. Terry, who was in command at Richmond, Virginia.²³² Major General Terry explained that he refused the demand of state officials to disarm blacks.²³³ Responding to questions

²²⁶*Id.* at 936-43 (Feb. 20, 1866). Trumbull noted a letter from Colonel Thomas in Vicksburg, Mississippi, which stated: "[n]early all the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of this militia. . . . [The militia typically would] hang some freedman or search negro houses for arms." *Id.* at 941 (Feb. 20, 1866).

²²⁷*Id.* at 941-42 (Feb. 20, 1866).

²²⁸*Id.* at 943 (Feb. 20, 1866).

²²⁹WILLIAM REHNQUIST, *GRAND INQUESTS* 205 (1992).

²³⁰KENDRICK, *supra* note 17, at 236. *See also* "The Republican Press on the Veto Message," *NEW YORK TRIBUNE*, Mar. 3, 1866, at 9 (reprinting twenty-two editorials from Republican newspapers).

²³¹House Misc. Doc. No. 64, 39th Cong., 1st Sess. (1866).

²³²REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, pt. 2, at 143.

²³³The questioning proceeded as follows:

Question: Have you reason to believe that the blacks possess arms to any extent at the present time?

Answer: I have been told that they do. I have received that information from citizens of Virginia, including State officials, who have entreated me to take

by Representative E.B. Washburne of Illinois, Lieutenant Colonel H.S. Hall, an official with the Freedmen's Bureau, told how Texas Governor Hamilton authorized armed patrols to suppress an alleged negro insurrection, resulting in robberies committed against blacks.²³⁴ The next day, February 21, 1866, Senator Howard examined General Rufus Saxton, former assistant commissioner of the Freedmen's Bureau in South Carolina, who testified that South Carolina's militia were seizing firearms from freedmen and thereby, violating their Second Amendment rights.²³⁵ After asserting that South

the arms of the blacks away from them.

Question: Who were those officials?

Answer: Some were members of the present legislature. I have also been asked to do so by a public meeting held in one of the counties.

Question: Have you, in any case, issued orders for disarming blacks?

Answer: I have not.

REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, pt. 2, at 143.

²³⁴*Id.* at 49-50. In his testimony, Lieutenant Colonel Hall stated:

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

Id.

²³⁵*Id.*, pt. 2, at 219-29. The following exchange took place:

Question: Are you aware that the blacks have arms to any considerable extent in South Carolina?

Answer: I believe that a great many of them have arms, and I know it to be their earnest desire to procure them.

Question: While you were in command there has any request been made to you to disarm the blacks?

Answer: I cannot say that any direct request has been made to me to disarm them; it would not be my duty to disarm them, as I was not the military commander, but I have had men come to my office and complain that the negroes

Carolina whites sought a “disarmed and defenseless” black population, General Saxton further testified that the disarming of blacks would result in violence and oppression.²³⁶

had arms, and I also heard that bands of men called Regulators, consisting of those who were lately in the rebel service, were going around the country disarming negroes. I can further state that they desired me to sanction a form of contract which would deprive the colored men of their arms, which I refused to do. The subject was so important, as I thought, to the welfare of the freedmen that I issued a circular on this subject

Id., pt. 2, at 219.

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

It is reported that in some parts of this State, armed parties are, without proper authority, engaged in seizing all fire-arms found in the hands of the freedmen. Such conduct is in clear and direct violation of their personal rights as guaranteed by the Constitution of the United States, which declares that “the right of the people to keep and bear arms shall not be infringed.” The freedmen of South Carolina have shown by their peaceful and orderly conduct that they can safely be trusted with fire-arms, and they need them to kill game for sustenance, and to protect their crops from destruction by birds and animals.

Id. at 229.

²³⁶Specifically, the dialogue occurred as follows:

Question: What would be the probable effect of such an effort to disarm the blacks?

Answer: It would subject them to the severest oppression, and leave their condition no better than before they were emancipated, and in many respects worse than it was before. . . .

Question: Do you think they would resist by violence such an attempt to disarm them?

Answer: They would, provided the United States troops were not present But if the government protection were withdrawn, and they were left entirely to their former owners, and this attempt to disarm them were carried out, I believe there would be an insurrection.

Id. at 219.

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

Beginning on February 27, 1866, the first draft of the proposed Fourteenth Amendment was debated in the House for three days.²³⁷ Representative John A. Bingham of Ohio, the draft's author, argued that previously the "immortal [B]ill of [R]ights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States."²³⁸

Representative Robert S. Hale of New York, although a Republican, saw no need for the Fourteenth Amendment, interpreting the existing Bill of Rights to bind not just Congress, but also the States.²³⁹ Representative Bingham responded that "[t]he proposition pending before the House is simply a proposition to arm the Congress . . . with the power to enforce the [B]ill of [R]ights as it stands in the Constitution today."²⁴⁰ Representative Frederick E. Woodbridge of Vermont characterized the scope of the proposed Fourteenth Amendment in terms of protecting a broad panoply of

²³⁷CONG. GLOBE, 39th Cong., 1st Sess. 1054 (Feb. 27, 1866). Ohio Representative John A. Bingham from the Select Joint Committee on Reconstruction introduced joint resolution H.R. No. 63 as the proposed Fourteenth Amendment to the Constitution on February 26, 1866. *Id.* at 1033 (Feb. 26, 1866). On a motion to postpone, debate on the resolution was set to commence the following morning. *Id.* at 1035 (Feb. 26, 1866).

²³⁸*Id.* at 1033-34 (Feb. 26, 1866).

²³⁹*Id.* at 1064-66 (Feb. 27, 1866). Representative Hale argued:

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

Id. at 1064 (Feb. 27, 1866).

²⁴⁰*Id.* at 1088 (Feb. 28, 1866). *See also id.* at 1089, 1094 (further comments of Representative Bingham referring to "the existing Amendments" and "law in its highest sense").

rights, asserting that the proposed amendment “merely gives the power to Congress to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship.”²⁴¹

In debate on February 28, 1866, regarding the representation of the Southern States in Congress, Senator James W. Nye of Nevada opined that the Bill of Rights already applied to the States and that Congress had power to enforce the Bill of Rights against the States.²⁴² Referring to “the colored population,” Senator Nye continued that, “[a]s citizens of the United States[,] they have equal right to protection, and to keep and bear arms for self-defense. They have long cherished the idea of liberty”²⁴³ Senator Nye’s comments typify the thought of those who supported the Fourteenth Amendment, confirming the widely-held views that the Bill of Rights already applied to the States, that Congress could enforce it, that blacks were citizens, and that individuals have a right to keep and bear arms for personal protection. Senator William M. Stewart of Nevada repeated that the Bill of Rights was binding on the States.²⁴⁴

²⁴¹*Id.*

²⁴²*Id.* at 1072 (Feb. 28, 1866). Senator Nye stated:

In the enumeration of natural and personal rights to be protected, the framers of the Constitution apparently specified everything they could think of — “life,” “liberty,” “property,” “freedom of speech,” “freedom of the press,” “freedom in the exercise of religion,” “security of person,” . . . and then, lest something essential in the specifications should have been overlooked, it was provided in the [N]inth [A]mendment that “the enumeration in the Constitution of certain rights should not be construed to deny or disparage other rights not enumerated.” This amendment completed the document. It left no personal or natural right to be invaded or impaired by construction. All these rights are established by the fundamental law. Congress has no power to invade them; but it has power “to make all laws necessary and proper” to give them effective operation, and to restrain the respective States from infracting them.

Will it be contended, sir, at this day, that any State has the power to subvert or impair the natural and personal rights of the citizen?

Id.

²⁴³*Id.* at 1073 (Feb. 28, 1866).

²⁴⁴*Id.* at 1077 (Feb. 28, 1866). Senator Stewart elaborated as follows:

[T]he Constitution of the United States forms a part of the constitution of each State, and what is more, the vital, sovereign, and controlling part of the fundamental law of every State. . . . Sometimes a part of the Union Constitution

On March 1, 1866, a significant debate on S. 61 took place in the House. Representative James Wilson, Chairman of the Judiciary Committee, explained in detail the meaning of “civil rights and immunities” as used in the bill, which also protected in part the related right “to full and equal benefit of all laws and proceedings for the security of person and property”²⁴⁵ Representative Wilson stated: “I understand civil rights to be simply the absolute rights of individuals, such as — ‘[t]he right of personal security, the right of personal liberty, and the right to acquire and enjoy property.’”²⁴⁶ He added that the House, through its proposed enactment, was attempting to reduce to statute “the spirit of the Constitution.”²⁴⁷ By this Representative Wilson apparently meant, in great part, the Bill of Rights.

Representative Wilson further noted that William Blackstone had divided “the great fundamental civil rights” into three categories: the right of personal security, the right of personal liberty, and the right of personal property.²⁴⁸ Blackstone considered the right to bear arms as one of “the

is written out and ingrafted in form on a State constitution by what is called a “bill of rights.” This adds nothing to the binding character of the provisions. A repetition of these fundamental provisions, as applicable to a locality, is merely incorporating what before, if I may use the expression, was the politically omniscient and omnipresent sovereignty, the national fundamental law. No State can adopt anything in a State constitution in conflict.

Id.

²⁴⁵*Id.* at 1117 (Mar. 1, 1866).

²⁴⁶*Id.* (quoting 1 KENT, COMMENTARIES, 199).

²⁴⁷*Id.*

²⁴⁸*Id.* at 1118. Representative Wilson summarized these rights as delineated by Blackstone as follows:

1. The right of personal security; which, he says, “Consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.”

2. The right of personal liberty; and this, he says, “Consists in the power of locomotion, of changing situation, or moving one’s person to whatever place one’s own inclination may direct, without imprisonment or restraint, unless by due course of law.”

3. The right of personal property; which he defines to be, “[t]he free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the law of the land.”

rights of persons.”²⁴⁹ Blackstone then specified certain “auxiliary subordinate rights” including the right to petition and the right to have arms for defense as among the methods of securing, protecting, and maintaining the inviolate “primary rights of personal security, personal liberty, and private property.”²⁵⁰

The Freedmen’s Bureau bill, of course, declared that the rights of personal security and personal liberty included what Blackstone referred to as “the right of having and using arms for self-preservation and defence.”²⁵¹ Senator Wilson partly had in mind the Second Amendment when he said of the Federal Constitution that “there is no right enumerated in it by general terms or by specific designation which is not definitely

Id. (quoting 1 GEORGE SHARSWOOD, COMMENTARIES ON LAWS OF ENGLAND, vol. 1, chap. 1 (1862).

²⁴⁹In referring to “the principal absolute rights which appertain to every Englishman,” Blackstone cautioned:

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

2 WILLIAM BLACKSTONE, COMMENTARIES 140-41 (St. Geo. Tucker ed. 1803).

²⁵⁰*Id.* 143-44. Blackstone explained about the right to have arms:

The fifth and last auxiliary right of the subjects, that I shall at present mention, is that of having arms for their defence suitable to their condition and degree, and such as are allowed by law. . . . [I]t is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen. . . . [T]o vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence.

Id.

²⁵¹*Id.* For appropriate text of the Freedmen’s Bureau bill see *supra* note 186 and accompanying text.

embodied in one of the rights I have mentioned, or results as an incident necessary to complete defense and enjoyment of the specific right.”²⁵² Particularizing this philosophy, the Bill of Rights reflected the Blackstonian philosophy, which included the right of having arms to protect personal security, personal liberty, and personal property.

The opponents of S. 61 agreed, as evidenced by New Jersey Democrat Representative Rogers’ declaration that S. 61 “is nothing but a relic of the Freedmen’s Bureau bill”²⁵³ S. 60, of course, explicitly declared that the rights of personal security and personal liberty included “the constitutional right of bearing arms.”²⁵⁴ Yet even Representative Rogers held that “the rights of nature” include “the right of self-defense, [and] the right to protect our lives from invasion by others” and that “the great civil rights [are] the privileges and immunities created and granted to citizens of a country by virtue of the sovereign power”²⁵⁵

On March 5, 1866, the Senate debated the basis of representation in Congress, which ultimately became Section 2 of the Fourteenth Amendment.²⁵⁶ Senator Samuel Pomeroy of Kansas, a supporter of the proposed amendment, stated that the rights to have a home, bear arms, and

²⁵²CONG. GLOBE, 39th Cong., 1st Sess. 1118-19 (Mar. 1, 1866).

²⁵³*Id.* at 1121 (Mar. 1, 1866).

²⁵⁴For the pertinent text of S. 60 see *supra* note 186 and accompanying text.

²⁵⁵*Id.* at 1122 (Mar. 1, 1866). Recognition of the Second Amendment as protecting an individual right was not limited to Radical Republicans, but was universal. For example, Representative Anthony Thornton from Illinois, who wanted to bury the bloody shirt and allow Southern States representation in Congress, noted the following in a speech on Reconstruction on March 3, 1866:

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

Id. at 1168 (Mar. 3, 1866).

²⁵⁶*Id.* at 1180-84 (Mar. 5, 1866).

vote are indispensable for liberty.²⁵⁷ Senator Pomeroy did not know whether the proposed Fourteenth Amendment would pass, but argued that the enforcement clause of the Thirteenth Amendment justified federal legislation protecting the right to have arms and the right to vote.²⁵⁸ In short, Senator Pomeroy argued that the Bill of Rights — including the right to bear arms — could be enforced against the states and perhaps against private individuals through the Thirteenth Amendment.²⁵⁹

That same day in the Joint Committee, Senator Jacob Howard questioned Captain Alexander Ketchum, assistant to General O.O. Howard, concerning South Carolina.²⁶⁰ Captain Ketchum noted that, as a general rule, the

²⁵⁷Senator Pomeroy stated the following:

And what are the safeguards of liberty under our form of Government? There are at least, under our Constitution, three which are indispensable —

1. Every man should have a homestead, that is, the right to acquire and hold one, and the right to be safe and protected in that citadel of his love. . . .

2. He should have the right to bear arms for the defense of himself and family and his homestead. And if the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should a well-loaded musket be in the hand of the occupant to send the polluted wretch to another world, where his wretchedness will forever remain complete; and

3. He should have the ballot

Id. at 1182 (Mar. 5, 1866).

Senator Pomeroy also referred to “the rights of an individual under the common law when his life is attacked. If I am assaulted by a highwayman, by a man armed and determined, my first duty is to resist him, and if necessary, use my arms also.” *Id.* at 1183 (Mar. 5, 1866).

²⁵⁸*Id.* Senator Pomeroy elucidated:

[W]hat 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.

Id.

²⁵⁹*See id.* at 1182-83 (Mar. 5, 1866).

²⁶⁰REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, pt. 2, at 239.

freedmen did not have arms, but that removal of the Freedmen's Bureau would subject the freedmen to oppressive State legislation and would result in armed self protection by the freedmen.²⁶¹ The questioning then turned to contracts of peonage between the former masters and slaves. Captain Ketchum explained that these contracts typically prohibited the freedmen from leaving the plantation without a pass and from possessing firearms.²⁶² Senator Howard produced a paper that the witness identified as a model contract drafted by a committee of planters. Under the contract's terms, freedmen agreed "to keep no poultry, dogs or stock of any kind, except as hereinafter specified; no firearms or deadly weapons, no ardent spirits, nor introduce or invite visitors, nor leave the premises during working hours without the written consent of the proprietor or his agent."²⁶³

On March 6, 1866, President Johnson communicated to the Senate all reports made by the assistant commissioners of the Freedmen's Bureau since December 1, 1865.²⁶⁴ These reports were also received by the House on

²⁶¹*Id.* The Senator continued:

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

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

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

Answer: Certainly I do. They could not do otherwise than organize to protect themselves.

Id.

²⁶²*Id.* at 240. Captain Ketchum stated:

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

Id.

²⁶³*Id.* at 241.

²⁶⁴Ex. Doc. No. 27, Senate, 39th Cong., 1st Sess. at 1 (1866).

March 20, 1866.²⁶⁵ The reports included a circular promulgated by Assistant Commissioner for the State of Georgia, Davis Tillson, on December 22, 1865, stating that the Second Amendment protects the right to bear arms to all persons and that no civil or military officer was authorized to disarm a person, unless convicted of dangerous use of a weapon.²⁶⁶

Among accounts of "outrages committed upon colored persons in Kentucky" were instances of firearms seizure from, and arrests of, freedmen.²⁶⁷ Assistant Commissioner Clinton B. Fisk wrote that, in Kentucky, "the civil law prohibits the colored man from bearing arms," and that firearms seizures there infringed on the right to keep and bear arms.²⁶⁸

²⁶⁵Ex. Doc. No. 70, House of Representatives, 39th Cong., 1st Sess., at 1 (1866).

²⁶⁶*Id.* at 65. The circular read:

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.

Id.

²⁶⁷*Id.* at 203. The reports noted that:

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

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

Id. at 205-06.

²⁶⁸*Id.* at 233, 236. Commissioner Fisk asserted that "their arms are taken from them by the civil authorities, and confiscated for benefit of the Commonwealth. . . . Thus, the right of the people to keep and bear arms as provided in the Constitution is

Commissioner Fisk's report added that "the town marshal takes all arms from returned colored soldiers, and is very prompt in shooting the blacks whenever an opportunity occurs."²⁶⁹ As a result, Fisk added, outlaws throughout Kentucky "make brutal attacks and raids upon the freedmen, who are defenseless, for the civil law-officers disarm the colored man and hand him over to armed marauders."²⁷⁰

A report of Assistant Commissioner Wager Swayne described the abuses committed by militia and special constables in Alabama.²⁷¹ He exclaimed that "the weaker portion of the community should not be forbid[den] to carry arms, when the stronger do so as a rule of custom."²⁷² Commissioner Swayne explained that militiamen broke into the homes of the freedmen, seized firearms, and committed robberies against them.²⁷³

infringed" *Id.*

²⁶⁹*Id.* at 238.

²⁷⁰*Id.* at 239.

²⁷¹*Id.* at 291.

²⁷²*Id.*

²⁷³*Id.* at 292. As an example of this activity, Commissioner Swayne reported:

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

I really believe the true object of these nightly raids was, not the fear of an insurrection, but to intimidate and compel the blacks to enter into contract.

Id.

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

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

On March 7, 1866, Representative Thomas D. Elliot reintroduced the Freedmen's Bureau bill, and it then was referred to the Select Committee on Freedmen, of which Representative Elliot was chairman.²⁷⁴ This bill had a more refined formulation of the rights of security and personal liberty than the Civil Rights bill, which had just been debated, and also had explicit recognition of "the constitutional right to bear arms."²⁷⁵ The debates on the Civil Rights bill, which quoted William Blackstone's language in detail, apparently contributed to the more advanced draftsmanship in the Freedmen's Bureau bill.²⁷⁶

The Civil Rights bill was debated on March 8 and 9, 1866. Representative John M. Broomall of Pennsylvania identified "the rights and immunities of citizens" as including rights in the text of the Constitution and the Bill of Rights, such as the writ of habeas corpus and the right of petition.²⁷⁷

Representative Henry J. Raymond of New York, the editor of the *New York Times* and a member of the Joint Committee, proposed an amendment to the bill declaring that all persons born in the United States are "citizens of the United States and entitled to all rights and privileges as such."²⁷⁸

Id. at 297. Commissioner Swayne expected to place these militiamen on trial, adding:

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

Id. at 297.

²⁷⁴CONG. GLOBE, 39th Cong., 1st Sess. 1238 (Mar. 7, 1866).

²⁷⁵*Id.* at 3412 (June 26, 1866).

²⁷⁶*Id.*

²⁷⁷*Id.* at 1263 (Mar. 8, 1866).

²⁷⁸*Id.* at 1266 (Mar. 8, 1866). This formulation is similar to what would become the citizenship clause of the Fourteenth Amendment.

According to Raymond, citizenship included the rights to bear arms and to self defense.²⁷⁹

There ensued a debate spurred by the argument of Representative Martin R. Thayer of Pennsylvania that Congress already could enforce the first eleven amendments against the States.²⁸⁰ Representative Michael C. Kerr, a Democrat from Indiana, quoted *Barron v. Baltimore*²⁸¹ in support of his position that the first eleven amendments were limitations only on the power of Congress.²⁸² Representative Thayer asked “[o]f what value are those guarantees if you deny all power on the part of the Congress of the United States to execute and enforce them?”²⁸³ Representative Thayer’s argument may have been on shaky constitutional ground, but it exhibited the intent of what would become the Fourteenth Amendment.

Concerning the terms of the Civil Rights bill “all laws and proceedings for the security of person and property,” Representative James Wilson of Iowa, Chairman of the Judiciary Committee, stated that the right to testify, which the black codes denied, was part of a broader right to protect personal security and liberty.²⁸⁴ This was the same explanation set forth by both

²⁷⁹CONG. GLOBE, 39th Cong., 1st Sess. 1266 (Mar. 8, 1866). Representative 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 [C]onstitution of the United States. . . . He has a defined *status*; he has a country and a home; a right to defend himself and his wife and children; a right to bear arms

Id.

²⁸⁰*Id.* at 1267-70 (Mar. 8, 1866).

²⁸¹32 U.S. 243, 250-51 (1833).

²⁸²CONG. GLOBE, 39th Cong., 1st Sess. 1267 (Mar. 8, 1866).

²⁸³*Id.* at 1270 (Mar. 8, 1866).

²⁸⁴*Id.*, Appendix, at 157 (Mar. 8, 1866). As Representative Wilson reasoned:

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

William Blackstone and the authors of the Freedmen's Bureau Act regarding the right to keep and bear arms, because it too was necessary to guarantee personal liberty and personal security.

Congressman John Bingham supported enactment of the pending Civil Rights bill because it would "enforce in its letter and its spirit the [B]ill of [R]ights as embodied in that Constitution."²⁸⁵ Congressman Bingham stated that "the term 'civil rights,' as used in this bill does include and embrace every right that pertains to the citizen as such."²⁸⁶ Alluding to Aristotle's concept of citizenship, Congressman Bingham argued that "[t]he term civil rights includes every right that pertains to the citizen under the Constitution, laws, and Government of this country."²⁸⁷ Congressman Bingham then quoted § 1 of the Civil Rights bill, including its provision concerning the "full and equal benefit of all laws and proceedings for the security of person and property"²⁸⁸

Congressman Bingham reiterated his support for "amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future."²⁸⁹ He explained that "the seventh and eighth sections of the Freedmen's Bureau bill enumerate the same rights and all the rights and privileges that are enumerated in the first section of this [Civil Rights] bill."²⁹⁰ Congressman Bingham quoted the seventh section of the Freedmen's Bureau bill, which provided that all persons, including blacks, shall "have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing

sealed and that he shall not be a witness in that could.

Id. (emphasis added).

²⁸⁵CONG. GLOBE, 39th Cong., 1st Sess. 1291 (Mar. 9, 1866).

²⁸⁶*Id.*

²⁸⁷*Id.* In the *POLITICS* and in other writings well familiar to nineteenth-century Americans, Aristotle postulated that true citizenship included the right to possess arms and that armed tyrants disarmed the oppressed. See ARISTOTLE, *POLITICS* 68, 71, 79, 136, 142, 218 (transl. T.A. Sinclair, 1962); ARISTOTLE, *ATHENIAN CONSTITUTION* 43-47 (transl. H. Rackman, 1935).

²⁸⁸CONG. GLOBE, 39th Cong., 1st Sess. 1291 (Mar. 9, 1866).

²⁸⁹*Id.*

²⁹⁰*Id.* at 1292 (Mar. 9, 1866).

arms”²⁹¹ He would have empowered Congress to punish state officers who violated the Bill of Rights.²⁹² In drafting the first section of the Fourteenth Amendment, Congressman Bingham thus sought to protect these same rights, privileges, and immunities.

On March 9, 1866, in the Joint Committee, Representative George S. Boutwell of Massachusetts examined Brevet Major General Wager Swayne, who was in charge of the Freedmen’s Bureau in Alabama.²⁹³ Swayne recounted the all-too-familiar story of blacks being disarmed and plundered by militia.²⁹⁴ He did not intervene initially, but later did so to protect Second Amendment rights.²⁹⁵

²⁹¹*Id.*

²⁹²*Id.*

²⁹³REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, pt. 3, at 140.

²⁹⁴*Id.*, pt. 3, at 140. Swayne described conditions in Alabama as follows:

Before Christmas apprehensions were quite generally expressed that the disappointment of the negroes at not receiving lands would produce outbreaks and perhaps a general insurrection. This created a certain demand for militia organizations, and here and there over the State militia companies were formed. There was found to be a deficiency of arms of any one pattern, although nearly every man in the State carries arms of some kind. Some of these companies undertook to patrol their vicinities. Others of them were ordered to disarm the freedmen, and undertook to search in their houses for this purpose. It is proper to say that no order authorizing the disarming of freedmen was issued from the executive office, and that a bill for the disarming of freedmen was defeated in the legislature. Attempts to do this, however, were made, and induced outrages and plunder, lawless men taking advantage of authority obtained through these organizations for that purpose.

Id.

²⁹⁵*Id.* Brevet Major General Swayne asserted that:

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

According to the March 10, 1866 testimony of Captain J.H. Matthews, officer of the colored infantry and Subcommissioner of the Freedmen's Bureau, a similar situation existed in Mississippi.²⁹⁶ Responding to questions by Representative Boutwell, Matthews described how militiamen, sometimes with their faces blackened, would patrol the country, flogging and mistreating freedmen.²⁹⁷

In mid-March, 1866, a controversy erupted concerning the proceedings of the Joint Committee. The House passed a resolution to print for House members 25,000 extra copies of the testimony before the Joint Committee.²⁹⁸ After rancorous debate, the Senate decided on 10,000 copies for its members.²⁹⁹ Senator Garrett Davis of Kentucky attacked most of the testimony as being grossly exaggerated. Apparently, General Fisk, head of the Freedmen's Bureau in Kentucky, had alleged a major incident involving the malicious wounding of several black soldiers.³⁰⁰ Upon investigation, a committee of the Kentucky legislature found some

Id.

²⁹⁶*Id.* at 142.

²⁹⁷*Id.* The following exchange took place between Representative Boutwell and the Captain:

Answer: About Christmas and New Year it was said there would be an insurrection, and orders were issued by the governor of the State to disarm the freedmen.

Question: Was that order executed?

Answer: Yes, sir; and mostly by the militia. And it was in the execution, or pretended execution, of that order, that the most of those outrages were committed.

Question: Have the United States authorities interfered in that district to prevent the disarming of the negroes, or was it completed so far as the militia chose to do it?

Answer: I think the United States authorities took no measures against it.

Id.

²⁹⁸CONG. GLOBE, 39th Cong., 1st Sess. 1368 (Mar. 13, 1866).

²⁹⁹*Id.* at 1407, 1413 (Mar. 15, 1866).

³⁰⁰*Id.* at 1407 (Mar. 15, 1866).

mistreatment, but little actual violence.³⁰¹ An Army officer informed the Joint Committee of the following interesting incident: “[a] negro, in United States uniform, stated that he had been beaten by a party of unknown men, who met him in the road at night, in Nicholas county, for admitting that he had a pistol at home.”³⁰²

Meanwhile, Reconstruction policy continued to be debated in earnest in Congress. On March 24, 1866, 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”³⁰³ To overturn such conditions, Representative Myers recommended civil rights legislation.³⁰⁴

Quoting the Republican-Form-of-Government Clause of the Constitution, Article IV, § 4,³⁰⁵ Representative Roswell Hart of New York stated that “[t]he 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’”³⁰⁶ Also included in Representative Hart’s list were

³⁰¹*Id.*

³⁰²*Id.* at 1408 (Mar. 15, 1866).

³⁰³*Id.* at 1621 (Mar. 24, 1866).

³⁰⁴*Id.* at 1622 (Mar. 24, 1866). Representative Myers proposed the following:

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

Id.

³⁰⁵Article IV, § 4 of the United States Constitution provides:

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

U.S. CONST. art. IV, § 4.

³⁰⁶CONG. GLOBE, 39th Cong., 1st. Sess. 1629 (Mar. 24, 1866).

freedom of religion, search and seizure, and due process.³⁰⁷ In addition, he asserted the duty of the United States to guarantee that the States, especially in the South, have a form of government where these rights are protected.³⁰⁸

The Civil Rights bill passed both Houses,³⁰⁹ but on March 27, 1866, President Johnson surprised everyone by sending a veto message to the Senate.³¹⁰ The debate to override the veto took place in the Senate on April 4, 1866.³¹¹ Senator Lyman Trumbull made an eloquent speech arguing that every citizen has "inherent, fundamental rights which belong to free citizens or free men in all countries, such as the rights enumerated in this bill"³¹² Of course, these were the same rights generally recited in the Civil Rights bill and explicitly expounded by both in Blackstone and the Freedmen's Bureau bill as including the right to have arms.

On April 6, 1866, the Senate voted to override President Johnson's veto of the Civil Rights bill.³¹³ An editorial published in the NEW YORK

³⁰⁷*Id.*

³⁰⁸*Id.*

³⁰⁹*Id.* at 606 (Feb. 2, 1866) (Senate); 1367 (Mar. 13, 1866) (House).

³¹⁰*Id.* at 1679 (Mar. 27, 1866).

³¹¹*Id.* at 1755 (Apr. 4, 1866).

³¹²*Id.* at 1757 (Apr. 4, 1866). Senator Trumbull quoted from KENT, COMMENTARIES as follows:

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

Id. Senator Trumbull further quoted Kent as follows:

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

Id.

³¹³*Id.* at 1809 (Apr. 6, 1866).

EVENING POST on the override vote illustrated the public's understanding of Congressional intent as expressed in the debates. The editorial referred to "the mischiefs for which the Civil Rights bill seeks to provide a remedy . . . — that there will be no obstruction to the acquirement of real estate by colored men, no attempts to prevent their holding public assemblies, freely discussing the question of their own disabilities, keeping fire-arms" ³¹⁴ On the next page was a prominent advertisement for Remington rifles, muskets, "pocket and belt revolvers," and other arms, with the admonition: "[i]n these days of housebreaking and robbery every house, store, bank, and office should have one of Remington's revolvers." ³¹⁵

On the same day as the override debate, in the Joint Committee, Senator Howard examined Brevet Lieutenant Colonel W.H.H. Beadle, superintendent of the Freedmen's Bureau in North Carolina. ³¹⁶ Beadle testified about

³¹⁴*The Civil Rights Bill in the Senate*, NEW YORK EVENING POST, Apr. 7, 1866, at 2, col. 1.

³¹⁵*E. Remington & Sons*, NEW YORK EVENING POST, Apr. 7, 1866, at 3, col. 10. In fact, the New York police were seen as being "employed in the service of the wealthy and prosperous corporations" and protected the interests of railway owners. *What are the Functions of the Metropolitan Police*, NEW YORK EVENING POST, Apr. 16, 1866, at 2, col. 2. Yet crime was rampant. *Id.*, May 10, 1866, at 2, col. 4.

³¹⁶REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, pt. 2, at 271-72.

police beatings of blacks in Wilmington, North Carolina,³¹⁷ affirming that the police ransacked homes, seized firearms, and committed thefts.³¹⁸

Representative William Lawrence of Ohio made similar arguments in the House override debate on April 7, 1866, as Senator Trumbull had made in the Senate. After quoting the same passage from KENT on the rights of personal security and personal liberty, Representative Lawrence explained that the rights to life and liberty are inherent and exist independently of any constitution.³¹⁹ Lawrence further elucidated the view that the rights to life

³¹⁷*Id.* Colonel Beadle described one instance where two policemen knocked out a small black woman with clubs. *Id.* at 271-72. The Colonel stated that the type of club used was "18 or 20 inches long sometimes, such as boys use to play base ball with, with which you might knock a man's brain out at one blow." *Id.* In that instance the police claimed self defense. *Id.* Beadle testified that in another incident:

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

Id.

³¹⁸*Id.* at 272. One question and answer was as follows:

Question: Have the blacks arms?

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

Id.

³¹⁹CONG. GLOBE, 39th Cong., 1st. Sess. 1833 (Apr. 7, 1866). Representative Lawrence elaborated upon this concept, stating that:

It has never been deemed necessary to enact in any constitution or law that citizens should have the right to life or liberty or the right to acquire property. These rights are recognized by the Constitution as existing anterior to and

and liberty are inherent and could not be infringed by a state, implying that the right to have the means for protection of these rights — such as arms — is also inherent.³²⁰ In support of the need for the bill, Representative Lawrence quoted the testimony of Major General Alfred H. Terry before the Joint Committee. Major General Terry had been entreated by Virginia State officers to take the arms of the blacks away from them, but had refused to disarm the freedmen.³²¹

Representative Sidney Clarke of Kansas angrily referred to an 1866 Alabama law providing “[t]hat 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.”³²² This statute, Representative Clarke noted, also made it unlawful “to sell, give, or lend fire-arms or ammunition of any description whatever, to any freedman, free negro, or mulatto”³²³ Representative Clarke then attacked Mississippi, “whose rebel militia, upon the seizure of the arms of black Union soldiers, appropriated the same to their own use,” and thereby violated the Second

independently of all laws and all constitutions.

Without further authority I may assume, then, that there are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him. But not only are these rights inherent and indestructible, but the means whereby they may be possessed and enjoyed are equally so.

Id.

³²⁰*Id.* As Lawrence explained:

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

Id.

³²¹*Id.* at 1834 (April 7, 1866). See REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, pt.2, at 143.

³²²CONG. GLOBE, 39th Cong., 1st Sess. 1838 (April 7, 1866).

³²³*Id.*

Amendment.³²⁴ Representative Clarke presupposed the existence of a constitutional right to keep privately held arms for protection against oppressive state militia.³²⁵

By April 9, 1866, both Houses had overridden President Johnson's veto by the requisite two-thirds vote, and the Civil Rights Act became law.³²⁶ 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 citizens³²⁷

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

In a secret meeting of the Joint Committee on April 21, 1866, Representative Thaddeus Stevens proposed a plan of Reconstruction, which

³²⁴*Id.* Representative Clarke stated:

Sir, I find in the Constitution of the United States an [A]rticle 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

Id. Emotionally referring to the disarmament of former black soldiers, Representative Clarke added:

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

Id. at 1839 (April 9, 1866).

³²⁵*Id.*

³²⁶*Id.* at 1861 (Apr. 9, 1866).

³²⁷The Civil Rights Act, 14 Stat. 27 (1866) (emphasis added).

he stated he had not drafted.³²⁸ Section 1 of his proposal stated that “[n]o discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.”³²⁹ That language had been submitted to Representative Stevens by Robert Dale Owen, an ex-Representative and famous reformer,³³⁰ who was a strong supporter of the individual’s right to keep and bear arms.³³¹

Equality was necessary but insufficient for Representative Bingham, who moved to add the following language: “nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation.”³³² The first phrase of Bingham’s proposal would become the Equal Protection Clause of the Fourteenth Amendment.³³³

Since Representative Stevens’ proposal already had prohibited discrimination, Representative Bingham’s addition of “equal protection” assured more than mere equality — it guaranteed equal *protection* of rights, not mere equal deprivation of rights. Indeed, equal protection of “the laws” might well have included, in Representative Bingham’s mind, the Bill of Rights. The second phrase in Representative Bingham’s proposal, derived

³²⁸KENDRICK, *supra* note 17, at 83. For a study of voting patterns in the committee, see EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869*, at 82-92 (1990). All meetings of the Joint Committee were secret other than public hearings where testimony took place.

³²⁹KENDRICK, *supra* note 17, at 83.

³³⁰*Id.* at 295-303.

³³¹Robert Dale Owen was the leading advocate of civil rights, including women’s rights, at the Indiana Constitutional Convention of 1850. REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION OF THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1385 (1850). At the Convention, delegate Owen advocated the right of “carrying of weapons” and added: “[f]or if it were declared by Constitutional provision that the people should have the right to bear arms, no law of the Legislature could take away that right.” *Id.* In a U.S. Senate-commissioned report, Owen wrote: “[t]he most prized of personal rights is the right of self-defense.” ROBERT OWEN, *THE WRONG OF SLAVERY* 111-12 (1864).

³³²KENDRICK, *supra* note 17, at 85.

³³³For the pertinent text of the Fourteenth Amendment see *infra* note 474 and accompanying text.

from the “takings” clause of the Fifth Amendment,³³⁴ might have been intended to state explicitly only one of the Bill of Rights guarantees to be protected. This was similar to the recitation of the constitutional right to bear arms in the Freedmen’s Bureau bill,³³⁵ the mention of which was not intended to preclude protection of other guarantees.

Although Representative Bingham’s amendment was not successful, the five to seven vote was nonpartisan.³³⁶ Democrats Reverdy Johnson and Andrew Rogers voted with Republicans Bingham and Stevens in favor of the amendment.³³⁷ Representative Stevens’ original proposal was then adopted.³³⁸ Representative Bingham, however, came back with another proposal for a separate section, which ten of the committee members, even Senator Johnson, approved.³³⁹ Absent the citizenship clause, Representative Bingham’s proposal would become § 1 of the Fourteenth Amendment. Additionally, the committee approved what became the Enforcement Clause.³⁴⁰

On April 28, 1866, Representative Bingham moved, and the Joint Committee voted, to delete Representative Stevens’ draft, which prohibited race discrimination as to civil rights, and to insert Representative Bingham’s draft, which guaranteed privileges and immunities, due process, and equal protection.³⁴¹ The language of Representative Bingham’s draft became § 1

³³⁴U.S. CONST. amend. V, provides: “nor shall private property be taken for public use, without just compensation.”

³³⁵*See supra* note 186 and accompanying text.

³³⁶KENDRICK, *supra* note 17, at 85.

³³⁷*Id.*

³³⁸*Id.*

³³⁹Representative Bingham’s proposal read as follows:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Id. at 87.

³⁴⁰*Id.* at 88. U.S. CONST., amend. XIV, § 5, provides that “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

³⁴¹KENDRICK, *supra* note 17, at 106.

of the then proposed constitutional amendment.³⁴² Representative Stevens voted in the affirmative, while Senator Howard wanted to keep both drafts.³⁴³ Furthermore, the committee also voted to require that the Southern States ratify the amendment as a price of readmission into the Union.³⁴⁴ Finally, the committee reported to Congress a joint resolution proposing the constitutional amendment and lifted the veil of secrecy, notifying the newspapers of the proposal.³⁴⁵ For all practical purposes, the work of the Joint Committee was now over.

Attention in Congress then focused upon the proposed Fourteenth Amendment and the second Freedmen's Bureau bill. Three months had passed since the first draft of the proposed Fourteenth Amendment was recommended in Congress.³⁴⁶ On April 30, 1866, Representative Thaddeus Stevens, the House leader and leader of the House delegation to the Joint Committee, brought forth to the House a joint resolution proposing the constitutional amendment.³⁴⁷ Section 1 was Representative Bingham's proposal.³⁴⁸ Representative Stevens also introduced a Joint Committee bill, mandating that when the constitutional amendment became effective, the southern states would be readmitted into the Union only if they ratified the amendment and accordingly conformed their constitutions and laws.³⁴⁹

On May 8, 1866, a report from President Johnson written by Benjamin C. Truman on the condition of the southern people was delivered to the

³⁴²*Id.*

³⁴³*Id.*

³⁴⁴*Id.* at 106, 110.

³⁴⁵*Id.* at 114-15.

³⁴⁶CONG. GLOBE, 39th Cong., 1st Sess. 806, 813 (Feb. 13, 1866).

³⁴⁷*Id.* at 2286 (Apr. 30, 1866).

³⁴⁸*Id.*

³⁴⁹*Id.*

Senate.³⁵⁰ Truman recalled the fear of a black insurrection in late 1865 and early 1866, which led to disarming measures against blacks.³⁵¹

Truman's account suggests that many blacks outwardly exhibited their perceived entitlement to the right to keep and bear arms, to the dismay of whites who were uncomfortable with allowing this liberty to recent slaves. Truman's choice of words combined a grain of white paternalism while still recognizing the utility of the right for lawful protection.

When the Fourteenth Amendment was debated in the House on May 8 through 10, 1866, Representative Thaddeus Stevens remarked that the amendment's provisions embodied "our Declaration of organic law."³⁵² Representative Martin R. Thayer of Pennsylvania stated that the amendment "simply brings into the Constitution what is found in the bill of rights of every State" and that "it is but incorporating in the Constitution of the United States the principle of the [C]ivil [R]ights bill which has lately become a law"³⁵³

³⁵⁰Ex. Doc. No. 43, U.S. Senate, 39th Cong., 1st Sess., at 1 (1866).

³⁵¹*Id.* In the words of Truman:

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

Id. at 8.

³⁵²CONG. GLOBE, 39th Cong., 1st Sess. 2459 (May 8, 1866). Representative Stevens stated about the Fourteenth Amendment's provisions:

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

Id.

³⁵³*Id.* at 2465 (May 8, 1866).

The broad character of the amendment prompted New Jersey Representative Andrew J. Rogers to object and ask: "What are privileges and immunities? Why sir, all the rights we have under the law of the country are embraced under the definition of privileges and immunities."³⁵⁴ Representative Bingham averred that the amendment would protect "the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction"³⁵⁵ Bingham added that the amendment would furnish a remedy against state injustices, such as the infliction of cruel and unusual punishment.³⁵⁶ By stating that Eighth Amendment violations by states would be prohibited under the Fourteenth Amendment, Representative Bingham indicated that the Fourteenth Amendment also would prohibit State deprivations of any rights recognized in the remainder of the Bill of Rights.³⁵⁷

The proposed Fourteenth Amendment passed the House on May 10, 1866.³⁵⁸ The NEW YORK EVENING POST remarked that "[t]he first section [of the amendment] merely reasserts the Civil Rights Act."³⁵⁹ The POST earlier asserted that the Civil Rights Act protected "public assemblies" and "keeping firearms,"³⁶⁰ *i.e.*, the rights set forth in the First and Second Amendments.

At the Joint Committee on May 18, 1866, and under questioning by Senator Howard, T.J. Mackay, an ex-Confederate who had assisted in the surrender of arms to the Northern army, stated that "a majority of [the freedmen] are armed and entitled to bear arms under the existing laws of the [S]outhern States."³⁶¹ Mackay's statement was accurate for Texas, which

³⁵⁴*Id.* at 2538 (May 10, 1866).

³⁵⁵*Id.* at 2542 (May 10, 1866).

³⁵⁶*Id.* at 2542-43 (May 10, 1866).

³⁵⁷FLACK, *supra* note 11, at 80 (1908).

³⁵⁸CONG. GLOBE, 39th Cong., 1st Sess. 2545 (May 10, 1866).

³⁵⁹*The Vote in the House*, NEW YORK EVENING POST, May 11, 1866, at 2, col. 1.

³⁶⁰*Id.*, Apr. 7, 1866, at 2, col. 1.

³⁶¹REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, pt. 4, at 150, 160. Mackay also visited the Indian Territory and found the Indians of the Five Nations to be armed with rifles and shotguns, although tribes which had not been part of the Confederate war effort still used tomahawks, bows, and arrows. *Id.* at 163.

passed no explicit black code provision for disarming freedmen, but was inaccurate for some other southern states.³⁶²

On May 22, 1866, Representative Eliot, on behalf of the Select Committee on Freedmen's Affairs, reported the second Freedmen's Bureau bill, H.R. 613.³⁶³ The Republicans were not going to accept defeat in the aftermath of the failure to override President Johnson's veto. As with H.R. 61, this reintroduced bill explicitly recognized and guaranteed "the constitutional right to bear arms."³⁶⁴

That same day, President Johnson provided a report to the House, which referred it to the Joint Committee, on provisions in southern state laws concerning freedmen.³⁶⁵ The report included black code provisions prohibiting possession of firearms by freedmen.³⁶⁶ Although these state

³⁶²See HALBROOK, THAT EVERY MAN BE ARMED, *supra* note 12, at 108-10, 131.

³⁶³CONG. GLOBE, 39th Cong., 1st Sess. 2743 (May, 22, 1866). H.R. 613 would be passed as 14 Stat. 173 (1866).

³⁶⁴CONG. GLOBE, 39th Cong., 1st Sess. 3412 (June 26, 1866).

³⁶⁵Ex. Doc. No. 118, House of Representatives, 39th Cong., 1st Sess., at 1 (1866).

³⁶⁶*Id.* at 7. The South Carolina criminal laws approved on December 19, 1865 included the following:

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

Id.

Similarly, the State of Florida passed an act on January 15, 1866 prohibiting blacks from entering white churches and white sections of railroad cars — and whites from entering black churches and black sections of railroad cars. *Id.* at 20. Additionally, the Florida act provided:

It shall not be lawful for any negro, mulatto, or other person of color, to own, use, or keep in his possession or under his control, any bowie-knife, dirk, sword, fire-arms, or ammunition of any kind, unless he first obtain a license to do so from the judge of probate of the county in which he may be a resident for the time being; and the said judge of probate is hereby authorized to issue such

laws generally had been known in Congress for some time, it was significant that they were received again in Congress on May 23, 1866, because that day proved to be an important day in the process of guaranteeing the right to keep and bear arms against such state infringements.

May 23, 1866, was the first time that the Senate considered H.R. No. 127, which would become the Fourteenth Amendment.³⁶⁷ Senator Jacob M. Howard introduced the subject on behalf of the Joint Committee, promising to present “the views and motives which influenced that Committee”³⁶⁸ After acknowledging the important role of the testimony before the Joint Committee, Senator Howard examined § 1 of the proposed constitutional amendment. Senator Howard referred to “the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press; . . . *the right to keep and bear arms*”³⁶⁹ Because state legislation infringed these rights, adoption of the Fourteenth Amendment was imperative. As Senator Howard explained, “[t]he 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.”³⁷⁰

In the ensuing debate on the Fourteenth Amendment, no one questioned Senator Howard’s statement that the Amendment made the first eight amendments enforceable against the States.³⁷¹ Quoting the enforcement

license, upon the recommendation of two respectable citizens of the county, certifying to the peaceful and orderly character of the applicant; and any negro, mulatto, or other person of color, so offending, shall be deemed to be guilty of a misdemeanor, and upon conviction shall forfeit to the use of the informer all such fire-arms and ammunition, and in addition thereto, shall be sentenced to stand in the pillory for one hour, or be whipped, not exceeding thirty-nine stripes, or both, at the discretion of the jury.

Id.

³⁶⁷CONG. GLOBE, 39th Cong., 1st Sess. 2764-65 (May 23, 1866).

³⁶⁸*Id.* at 2765 (May 23, 1866).

³⁶⁹*Id.* (emphasis added).

³⁷⁰*Id.* at 2766 (May, 23, 1866).

³⁷¹IRVING BRANT, *THE BILL OF RIGHTS* 337 (1965). A long term leader in the Republican party, Senator Howard drafted the first Republican party platform which called for the abolition of slavery, and was instrumental in passing the Thirteenth Amendment. REPUBLICAN CENTENNIAL COMMITTEE, *THE STORY OF SHAFTSBURY* 14-15 (1954).

clause, Howard asserted, “[h]ere is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.”³⁷² Howard added that the proposed amendment “will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who happen to be within their jurisdiction.”³⁷³

Front-page press coverage was given to Senator Howard’s speech introducing the Fourteenth Amendment to the Senate. Part of the speech that was printed included Senator Howard’s explanation that the Fourteenth Amendment would compel the States to respect “these great fundamental guarantees . . . the personal rights guaranteed by the first eight amendments of the United States Constitution, such as . . . the right to keep and bear arms” On the day after they were uttered, these words appeared on the first page of the NEW YORK TIMES and the NEW YORK HERALD and also were printed in such papers as the NATIONAL INTELLIGENCER, published in Washington, D.C., and the PHILADELPHIA INQUIRER.³⁷⁴

Numerous editorials appeared on Senator Howard’s speech, but none disputed his explanation that the Fourteenth Amendment would protect freedoms in the Bill of Rights, such as keeping and bearing arms, from state infringement.³⁷⁵ The NEW YORK TIMES editorialized that Senator Howard’s exposition was “clear and cogent.”³⁷⁶ The CHICAGO TRIBUNE noted that Senator Howard’s explanation “was very forcible and well put,

³⁷²CONG. GLOBE, 39th Cong., 1st Sess. 2766 (May 23, 1866).

³⁷³*Id.*

³⁷⁴*See* NEW YORK TIMES, May 24, 1866, at 1, col. 6.; NEW YORK HERALD, May 24, 1866, at 1, col. 3.; NATIONAL INTELLIGENCER, May 24, 1866, at 3, col. 2.; PHILADELPHIA INQUIRER, May 24, 1866, at 8, col. 2.

³⁷⁵*See infra* notes 376-79.

³⁷⁶NEW YORK TIMES, May 25, 1866, at 2, col. 4. The NEW YORK TIMES editorial stated:

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

Id.

and commanded the close attention of the Senate.”³⁷⁷ “It will be observed,” summarized the BALTIMORE GAZETTE, “that the first section [of the amendment] is a general prohibition upon all of the States of abridging the privileges and immunities of the citizens of the United States, and secures for all the equal advantages and protection of the laws.”³⁷⁸ Several newspapers were impressed with the “length” or “detail” in which Senator Howard explained the amendment.³⁷⁹

The Southern Democratic newspapers did not normally publish any speeches by Republicans, but reacted to Senator Howard’s amendment in a revealing manner. The DAILY RICHMOND EXAMINER complained that the amendment’s supporters “are first to make citizens and voters of the negroes.”³⁸⁰ In the southern states, being a citizen included the right of keeping and bearing arms.³⁸¹ Yet, the EXAMINER had a little glee for the Senator from Michigan and reported that, “Howard, who explained [the Amendment] on the part of the Senate, himself objected to the disenfranchisement [of ex-Confederate’s] feature.”³⁸² The Southern papers never claimed that the amendment was unclear, but objected to its breadth in guaranteeing to blacks the kinds of rights found in the first eight amendments as well the as the privilege of suffrage. Typifying the Southern view, attacks on Senator Howard, along with prominently displayed advertisements for Remington revolvers, laced the CHARLESTON DAILY COURIER.³⁸³ Remington placed similar advertisements in such papers as the NEW YORK EVENING POST, which at the time championed the right of blacks to keep and bear arms.³⁸⁴

³⁷⁷CHICAGO TRIBUNE, May 29, 1866, at 2, col. 3.

³⁷⁸BALTIMORE GAZETTE, May 24, 1866, at 4, col. 2.

³⁷⁹BOSTON DAILY JOURNAL, May 24, 1866, at 4, col. 4; BOSTON DAILY ADVERTISER, May 24, 1866, at 1, col. 6; SPRINGFIELD DAILY REPUBLICAN, May 24, 1866, at 3, col. 1.

³⁸⁰DAILY RICHMOND EXAMINER, May 25, 1866, at 2, col. 3.

³⁸¹STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED 96-97, 124-33 (1084).

³⁸²DAILY RICHMOND EXAMINER, May 26, 1866, at 1, col. 6.

³⁸³CHARLESTON DAILY COURIER, May 28, 1866, at 1, col. 2, and at 4, col. 2. *See also*, May 29, 1866, at 1, cols. 1-2 (commenting on Howard’s speech).

³⁸⁴*See, e.g., supra* notes 314, 315.

The same day that Senator Howard was explaining in the Senate that the Fourteenth Amendment would protect the people's right to keep and bear arms from state infringement, the House was debating the second Freedmen's Bureau bill, § 8 of which protected "the constitutional right to bear arms."³⁸⁵ In a section-by-section explanation, Representative Eliot explained that "[t]he eighth section simply embodies the provisions of the [C]ivil [R]ights 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."³⁸⁶ The constitutional basis of the bill, Representative Eliot noted, was the Thirteenth Amendment.³⁸⁷

Representative Eliot argued the need for the bill based upon Freedmen's Bureau reports of abuses of blacks.³⁸⁸ General Fisk described 25,000 discharged black Union soldiers returned to their homes only to be disarmed.³⁸⁹ General Fisk added that civil authorities seized the freedmen's arms and rendered them defenseless.³⁹⁰

For several days the Fourteenth Amendment and the second Freedmen's Bureau bill, H.R. 613, continued to be debated simultaneously in the Senate and House. On May 29, 1866, the House passed H.R. 613 by a vote of ninety-six to thirty-two, with fifty-five members not voting.³⁹¹ The House

³⁸⁵CONG. GLOBE, 39th Cong., 1st. Sess. 2773 (May 23, 1866); 3412 (June 26, 1866).

³⁸⁶*Id.* at 2773 (May 23, 1866).

³⁸⁷*Id.* U.S. CONST. amend XIII prohibited slavery and involuntary servitude and delegated enforcement power to Congress.

³⁸⁸*Id.*

³⁸⁹*Id.* at 2774 (May 23, 1866). General Fisk wrote:

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 meddling and despotic when through its agents it undertakes to protect its citizens in a constitutional right.

Id.

³⁹⁰*Id.* at 2775 (May 23, 1866).

³⁹¹*Id.* at 2878 (May 29, 1866).

immediately proceeded to consider the proposed constitutional amendment.³⁹²

Noting the House's passage of the second Freedmen's Bureau bill, the NEW YORK EVENING POST reprinted some of the Black Code provisions which had been communicated to Congress by the President, including those punishing freedmen with flogging for keeping arms.³⁹³

May 30, 1866 began with Senator Howard proposing a new sentence to § 1 of the Fourteenth Amendment, which would begin, "[a]ll persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."³⁹⁴ This would settle the issue raised in *Dred Scott* — *i.e.*, who are "citizens" and thus who would have the bundle of rights appertaining to citizenship. After a raucous debate over making "Indians, coolies, and gypsies" into citizens, the Senate passed Howard's new language.³⁹⁵

On June 4, 1866, Indiana Senator Thomas A. Hendricks complained that "What citizenship is, what are its rights . . . are not defined."³⁹⁶ The Senate also debated the proposed requirement that the southern states adopt the constitutional amendment as a condition to reentry into the Union,³⁹⁷ a requirement that would make little sense unless the amendment was intended to protect broad rights.

³⁹²*Id.*

³⁹³*The Freedmen, Laws of the Southern States Concerning Them*, NEW YORK EVENING POST, May 30, 1866, at 2, Col. 3. A *Post* editorial stated sarcastically that:

In South Carolina and Florida the freedmen are forbidden to wear or keep arms. . . .

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

The Freedmen's Bureau Bill, NEW YORK EVENING POST, May 30, 1866, at 2, col. 1.

³⁹⁴CONG. GLOBE, 39th Cong., 1st. Sess. 2890 (May 30, 1866).

³⁹⁵*Id.* at 2897 (May 30, 1866).

³⁹⁶*Id.* at 2939 (June 4, 1866). Nonetheless Senator Hendricks recognized "the rights, privileges, and immunities of citizenship" *Id.*

³⁹⁷*Id.* at 2947 (June 4, 1866).

Supporters of what became known as the "Howard Amendment" repeatedly asserted the broad character of the rights that needed to be protected. On June 5, 1866 Senator Luke P. Poland of Vermont analyzed § 1 and argued that it protected "all the provisions of the Constitution."³⁹⁸ This obviously included the entire Bill of Rights, just as the state laws to be invalidated deprived freedmen of the rights to free speech and to keep and bear arms. Senator Poland also made it clear that the constitutional amendment had the same objective as the Civil Rights Act and, by implication, the second Freedmen's Bureau bill.³⁹⁹

On June 8, 1866, Senator John B. Henderson of Missouri expounded the concept of citizenship by reference to the *Dred Scott* case, which held that if blacks were citizens, the State could not violate the privileges and immunities to which they would be entitled.⁴⁰⁰ In *Dred Scott*, according to Senator Henderson, Chief Justice Taney had conceded to members of the State communities "all the personal rights, privileges, and immunities guaranteed to citizens of this 'new Government.'" In fact, the opinion

³⁹⁸*Id.* at 2961 (June 5, 1866). Senator Poland explained that:

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

Id. (emphasis added).

³⁹⁹*Id.*

⁴⁰⁰*Id.* at 3032 (June 8, 1866). Senator Henderson, quoted from the Supreme Court's opinion 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 [C]onstitution and the laws of the State notwithstanding.

Id.

distinctly asserts that the words 'people of the United States' and 'citizens' are 'synonymous terms.'"⁴⁰¹ However, Senator Henderson noted that the Chief Justice had disregarded the plain meaning of the term "the people" and had excluded blacks.⁴⁰² Chief Justice Taney's opinion also explicitly declared that citizens are entitled to Bill of Rights guarantees, including those of the Second Amendment.⁴⁰³

Senator Henderson further 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."⁴⁰⁴ He characterized these rights as "civil rights" and as "the muniment of freedom."⁴⁰⁵ Senator Richard Yates of Illinois agreed that the abolition of slavery by the Thirteenth Amendment overruled *Dred Scott* and conferred citizenship on the freedman, who was thereby "entitled to be protected in all his rights and privileges as one of the citizens of the United States."⁴⁰⁶

⁴⁰¹*Id.*

⁴⁰²*Id.*

⁴⁰³*Id.* The following passage from the opinion particularizes the rights discussed in the passages to which Senator Henderson referred and illustrates the objectives sought by the Republicans in Congress:

For if they [blacks] were so received [as citizens], and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to *keep and carry arms wherever they went*.

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

⁴⁰⁴CONG. GLOBE, 39th Cong., 1st Sess. 3034-35 (June 8, 1866).

⁴⁰⁵*Id.* at 3035 (June 8, 1866).

⁴⁰⁶*Id.* at 3037 (June 8, 1866).

When Senator Hendricks claimed not to understand the meaning of the word "abridged" in the privileges-and-immunities clause, Senator Howard responded that "it is easy to apply the term 'abridged' to the privileges and immunities of citizens, which necessarily include within themselves a great number of particulars."⁴⁰⁷ Senator Hendricks countered that no one had defined "what are the rights and immunities of citizenship" ⁴⁰⁸

Although he would join with Senator Hendricks in voting against the Fourteenth Amendment, Senator Reverdy Johnson of Maryland supported the Citizenship and Due Process Clauses and only opposed the Privileges and Immunities Clause.⁴⁰⁹ If Senator Hendricks' reservation implied that he thought the Privileges and Immunities Clause to be too broad, Senator Johnson knew that citizenship and protection of life, liberty, and property would include the right of every citizen to keep and bear arms. As counsel for the slave owner in *Dred Scott*, Senator Johnson was well aware that citizenship "would give to persons of the negro race . . . the full liberty . . . to keep and carry arms wherever they went."⁴¹⁰

⁴⁰⁷*Id.* at 3039 (June 8, 1866).

⁴⁰⁸*Id.*

⁴⁰⁹*Id.* at 3041 (June 8, 1866). Senator Johnson declared:

I am decidedly in favor of the first part of the section which defines what citizenship shall be, and in favor of that part of the section which denies to a State the right to deprive any person of life, liberty, or property without due process of law, but I think it is quite objectionable to provide that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," simply because I do not understand what will be the effect of that.

Id.

⁴¹⁰*Scott v. Sandford*, 60 U.S. 393, 416-17 (1857). Senator Johnson's oral argument in *Dred Scott* has not been preserved. See 3 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES (1978). In an earlier debate, Senator Johnson had reminded his colleagues that *Dred Scott* had held African descendants not to be citizens. CONG. GLOBE, 39th Cong., 1st Sess. 504 (Jan. 30, 1866). Yet, in response to Senator Henry Wilson's complaint about the "disarming" and other abuses of freedmen in Mississippi, Senator Johnson had acknowledged the reports of "these outrages" as being to a certain extent true. *Id.* at 40 (Dec. 13, 1865).

The Fourteenth Amendment passed the Senate by a vote of thirty-three to eleven.⁴¹¹ Thus, it received seventy-five percent of the total votes, far more than the necessary two-thirds for a constitutional amendment.

On June 11, 1866, Senator Wilson reported H.R. No. 613, the second Freedmen's Bureau bill, on behalf of the Committee on Military Affairs and Militia.⁴¹² Four days later, the Senate resolved to print 50,000 additional copies of the Report of the Joint Committee.⁴¹³

On June 13, 1866, the House considered the proposed Fourteenth Amendment as amended by the Senate. Representative Thaddeus Stevens found the amendments to be so slight that he would not speak further.⁴¹⁴ The amended proposed Fourteenth Amendment then passed the House by a vote of one-hundred twenty to thirty-two.⁴¹⁵ This amounted to a victory of seventy-nine percent, again far more than the necessary two-thirds for a constitutional amendment.

IX. CONGRESS OVERRIDES THE PRESIDENT'S VETO OF H.R. No. 613, THE SECOND FREEDMEN'S BUREAU BILL

On June 15, Senator Wilson moved to revive H.R. No. 613, the second Freedmen's Bureau bill, as expeditiously as possible.⁴¹⁶ Additionally, the House debated H.R. No. 543, which required the southern states to ratify the Fourteenth Amendment.⁴¹⁷ Representative Godlove S. Orth of Indiana stated that the Fourteenth Amendment "[s]ecures to all persons born or naturalized in the United States the rights of American citizenship."⁴¹⁸

⁴¹¹CONG. GLOBE, 39th Cong., 1st Sess. 3042 (June 8, 1866).

⁴¹²*Id.* at 3071 (June 11, 1866).

⁴¹³*Id.* at 3097-98 (June 12, 1866).

⁴¹⁴*Id.* at 3144 (June 13, 1866). However, Representative Stevens could not keep his promise, and briefly explained the amendments: "[t]he first section is altered by defining who are citizens of the United States and of the States. . . . It declares this great privilege to belong to every person born or naturalized in the United States." *Id.* at 3148 (June 13, 1866).

⁴¹⁵*Id.* at 3149 (June 13, 1866).

⁴¹⁶*Id.* at 3180-81 (June 15, 1866).

⁴¹⁷*Id.* at 3181 (June 15, 1866).

⁴¹⁸*Id.* at 3201 (June 15, 1866).

Representative Orth's statement suggests that the Amendment would incorporate the entire Bill of Rights.

Representative George W. Julian of Indiana continued the discussion the next day, noting as follows:

Although the [C]ivil [R]ights bill is now the law, none of the insurgent States allow colored men to testify when white men are parties. The bill, as I learn from General Howard, is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. South Carolina has the same enactments; and a black man convicted of an offense who fails immediately to pay his fine is whipped. . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.⁴¹⁹

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

On June 21, 1866, the House resolved that 100,000 copies of the Report of the Joint Committee would be printed.⁴²⁰ This Report, detailing the violations of freedmen's rights, was destined for mass circulation.⁴²¹

On June 26, 1866, the Senate considered H.R. No. 613, the second Freedmen's Bureau bill. Unrelated amendments resulted in § 8, which recited "the constitutional right to bear arms," being renumbered as § 14.⁴²² Senator Thomas Hendricks of Indiana moved to strike out this entire section on the basis that the Civil Rights Act already protected the same rights.⁴²³ Senator Hendricks told a joke about the client who paid his

⁴¹⁹*Id.* at 3210 (June 16, 1866).

⁴²⁰*Id.* at 3326 (June 21, 1866).

⁴²¹*See* KENDRICK, *supra* note 17.

⁴²²CONG. GLOBE, 39th Cong., 1st Sess. 3412 (June 26, 1866).

⁴²³*Id.* Senator Hendricks asserted that:

I am not able to see the necessity of this section. If the [C]ivil [R]ights bill has any force at all, I cannot see the necessity of repeating legislation at periods of two months to the same point. The [C]ivil [R]ights bill is claimed to be a law,

lawyer extra money because he wanted a man “sued harder” and analogized that Congress was trying “to legislate harder” than it had already done in the Civil Rights Act.⁴²⁴ Members laughed at the joke, but rejected the amendment to strike.⁴²⁵ Once again, the Civil Rights Act was seen as embodying the same principles as the Freedmen’s Bureau bill, which included protection for “the constitutional right to bear arms,” and the Fourteenth Amendment was seen as the necessary constitutional basis for guaranteeing such rights against state action.⁴²⁶

Senator Lyman Trumbull replied that, although the two bills protected the same rights, the Civil Rights Act would apply in regions where the civil tribunals were in operation, while the Freedmen’s Bureau bill would “protect . . . the rights of person and property in those regions of the country, like Virginia and Alabama, where the civil authority is not restored”⁴²⁷ Senator Hendricks agreed that the purpose of the Second Freedmen’s Bureau bill was “to protect civil rights . . . and to secure men in their personal privileges”⁴²⁸ The bill passed without a roll-call vote.⁴²⁹

Since the House did not concur on certain amendments made by the Senate to the second Freedmen’s Bureau bill, a conference committee was necessary.⁴³⁰ While these amendments are not germane to the topic here, the committee appointments again indicate the commonality of thought and

having the force of law, and it regulates the very matter, so far as I can now recollect, that the fourteenth section in this bill is intended to regulate. Are Senators not satisfied with the provisions in what is called the [C]ivil [R]ights bill, or do they think that by reenacting the same matter it will acquire some validity? . . . The same matters are found in the [C]ivil [R]ights bill substantially that are found in this section.

Id.

⁴²⁴*Id.*

⁴²⁵*Id.*

⁴²⁶*Id.*

⁴²⁷*Id.*

⁴²⁸*Id.* at 3413 (June 26, 1866).

⁴²⁹*Id.*

⁴³⁰*Id.* at 3465 (June 28, 1866).

intent of the prime movers of the second Freedmen's Bureau bill and the Fourteenth Amendment. For the House, the Speaker appointed Thomas D. Eliot of Massachusetts, John A. Bingham of Ohio, and Hiram McCullough of Maryland.⁴³¹ The first two of these, of course, were the respective authors of both Freedmen's Bureau bills and the Fourteenth Amendment.⁴³² The Senate Chair appointed Henry Wilson, Ira Harris, and J.W. Nesmith to the committee.⁴³³

Senator Wilson, on behalf of the Conference Committee, filed a report on the Freedmen's Bureau bill on July 2, and the Senate concurred in the report.⁴³⁴ Representative Eliot raised the report in the House the next day. Representative William E. Finck, an Ohio Democrat, made a last-minute attempt to kill the bill by moving to lay the report of the conference committee on the table.⁴³⁵ Finck's motion was rejected in a roll call vote with twenty-five yeas and one-hundred and two nays.⁴³⁶ Since the report then was agreed to without another roll call vote, the recorded vote represented yet another landslide vote in favor of passing the bill.⁴³⁷

Meanwhile a controversy was brewing about publication of the Report of the Joint Committee. On July 11, Representative Francis C. Le Blond, a Democrat from Ohio, noted that the report, including all testimony, was available, but that the minority report was not included.⁴³⁸ Since the report and testimony were already published in book form,⁴³⁹ the Republicans succeeded in keeping the minority report from being nationally distributed.⁴⁴⁰

⁴³¹*Id.* at 3501 (June 29, 1866).

⁴³²*See supra* notes 61, 339 and accompanying text.

⁴³³CONG. GLOBE, 39th Cong., 1st Sess. 3502 (June 29, 1866).

⁴³⁴*Id.* at 3524 (July 2, 1866).

⁴³⁵*Id.* at 3562 (July 3, 1866).

⁴³⁶*Id.*

⁴³⁷*Id.*

⁴³⁸*Id.* at 3749 (July 11, 1866).

⁴³⁹*Id.* at 3750 (July 11, 1866).

⁴⁴⁰*Id.* at 3766 (July 11, 1866).

Addison H. Laflin of New York indicated that “the testimony was printed immediately after it was presented,” and once the committee presented the report, it was sent to be bound with the testimony.⁴⁴¹ As such, 25,000 copies were quickly printed.⁴⁴² Thus, the testimony was available contemporaneously with congressional action on the second Freeman’s Bureau bill and the Fourteenth Amendment. The report was then printed in large volume for distribution to the public. Ultimately, 150,000 copies would be printed.⁴⁴³

Not unexpectedly, President Johnson vetoed the second Freedmen’s Bureau bill, and the veto message was read to the House on July 16, 1866.⁴⁴⁴ The President conceded that previously, because the civil courts were closed, the need existed for military tribunals to exercise “jurisdiction over all cases concerning the free enjoyment of the immunities and rights of citizenship, as well as the protection of person and property”⁴⁴⁵ President Johnson claimed that now, however, the courts were again in operation and “the protection granted to the white citizen is already conferred by law upon the freedmen”⁴⁴⁶ The President trusted protection of “the rights, privileges, and immunities of the citizens” to the civil tribunals, where one is entitled to trial by jury.⁴⁴⁷ President Johnson believed that the Civil Rights Act, which protected, among other things, the “full and equal benefit of all laws and proceedings for the security of person and property,” was ample for such purposes.⁴⁴⁸

The House then decided to vote without further debate and overrode the President’s veto by a vote of one hundred and four to thirty-three, a seventy-six percent margin.⁴⁴⁹ Over a dozen of the forty-five members who did not vote were excused by their Republican colleagues as absent due to

⁴⁴¹*Id.*

⁴⁴²*Id.*

⁴⁴³*See* KENDRICK, *supra* note 17.

⁴⁴⁴CONG. GLOBE, 39th Cong., 1st Sess. 3849 (July 16, 1866).

⁴⁴⁵*Id.*

⁴⁴⁶*Id.*

⁴⁴⁷*Id.* at 3850 (July 16, 1866).

⁴⁴⁸*Id.*

⁴⁴⁹*Id.*

"indisposition."⁴⁵⁰ The nature of the "indisposition" was not explained, but one could speculate that it could have involved anything from spirituous liquors the night before to political considerations.

Word of the House's override then reached the Senate.⁴⁵¹ Senator Henry Wilson urged the body to proceed to immediate action.⁴⁵² Senator Thomas Hendricks and Senator Willard Saulsbury, the latter of whom months before had defended the power of States to prohibit firearms possession by selected groups,⁴⁵³ gave speeches urging members to sustain the veto primarily because of the military jurisdiction established by the bill.⁴⁵⁴ No other member spoke, and the Senate overrode the veto by a vote of thirty-three to twelve, seventy-three percent of the total vote, once again a good margin more than the necessary two thirds.⁴⁵⁵

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

As finally passed into law on July 16, 1866, the Freedmen's Bureau Act prolonged the Bureau's existence for two more years.⁴⁵⁶ The Act protected "personal liberty" and "personal security," including "the constitutional right to bear arms," and characterized these as "immunities and rights."⁴⁵⁷ With

⁴⁵⁰*Id.* at 3850-51 (July 16, 1866).

⁴⁵¹*Id.* at 3838 (July 16, 1866).

⁴⁵²*Id.*

⁴⁵³*Id.* at 478 (Jan. 29, 1866).

⁴⁵⁴*Id.* at 3839-42 (July 16, 1866).

⁴⁵⁵*Id.* at 3842 (July 16, 1866).

⁴⁵⁶The Bureau's existence was extended again two years later, after which it was phased out. 15 Stat. 83 (1868).

⁴⁵⁷14 Stat. 173 (1866). The full text of § 14 of the Act is as follows:

That in every State or district where the ordinary course of judicial proceedings has been interrupted by the rebellion, and until the same shall be fully restored, and in every State or district whose constitutional relations to the government have been practically discontinued by the rebellion, and until such State shall have been restored in such relations, and shall be duly represented in

the enactment of the Freedmen's Bureau Act, the civil rights revolution in the Thirty-Ninth Congress was complete. The Fourteenth Amendment was proposed by Congress, and the ratification process was the next step. The following summarizes the roll-call voting behavior of Congressmen concerning the Freedmen's Bureau Act and the Fourteenth Amendment.⁴⁵⁸

Every single Senator who voted for the Fourteenth Amendment also voted for the Freedmen's Bureau bills, S. 60 and H.R. No. 613, and thus for recognition of the constitutional right to bear arms. The only recorded Senate vote on S. 60 (the first Freedmen's Bureau bill) as amended to include recognition of the right to bear arms, was the thirty to eighteen veto override vote of February 20, 1866, that barely failed to reach the necessary two-

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

Id. at 176-77 (emphasis added).

⁴⁵⁸This author compiled the raw data of each member's voting record as set forth in the recorded votes referenced *infra* notes 459-70. This raw data is available from the author on request.

thirds.⁴⁵⁹ On June 8, 1866, the Senate passed the proposed Fourteenth Amendment by a vote of thirty-three to eleven.⁴⁶⁰ H.R. 613, the second Freedmen's Bureau bill, then passed the Senate by voice vote on June 26, 1866.⁴⁶¹ On July 16, the Senate overrode the President's veto of H.R. 613 by a vote of thirty-three to twelve, receiving seventy-three percent of the votes, more than the necessary two-thirds.⁴⁶²

An analysis of the roll call votes revealed that all thirty-three senators who voted for the Fourteenth Amendment also voted for either S. 60 or H.R. 613.⁴⁶³ Of the thirty-three who voted for the Fourteenth Amendment, twenty-eight voted for both S. 60 and H.R. No. 613. All eleven who voted against the Fourteenth Amendment voted against either S. 60 or H.R. No. 613 or both.⁴⁶⁴

Members of the House casted recorded votes overwhelmingly in favor of the Freedmen's Bureau bills on three occasions, and the Fourteenth Amendment on two occasions. On February 6, 1866, a day after inserting

⁴⁵⁹CONG. GLOBE, 39th Cong., 1st Sess. 943 (Feb. 20, 1866). *See also id.* at 421 (Jan. 25, 1866) (original Senate passage of S. 60); 748 (Feb. 8, 1866) (setting forth the Senate concurrence in the House amendments by voice vote).

⁴⁶⁰*Id.* at 3042 (June 8, 1866).

⁴⁶¹*Id.* at 3413 (June 26, 1866).

⁴⁶²*Id.* at 3842 (July 16, 1866).

⁴⁶³*Id.* All voting tabulations are made from the Congressional Globe. *See id.* at 943, 3042, 3842. Senator George Edmunds voted for H.R. No. 613 but could not vote for S. 60 because he was not yet a Senator, having been appointed to that office on April 3, 1866 due to a death. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-1989, at 951 (1989). Senator James Lane of Kansas voted for S. 60 but died on July 11, 1866, just before the vote on H.R. 613. *Id.* at 1339. Senators Morgan, Stewart, and Willey had voted not to override the President's veto of S. 60, but then voted to override the veto of H.R. 613. CONG. GLOBE, 39th Cong., 1st Sess. 3842 (July 16, 1866). Senator Stewart explained that he would sustain the veto of S. 60 only because the President agreed to sign the Civil Rights bill, but when President Johnson reneged, Stewart became a bitter enemy. KENDRICK, *supra* note 17, at 293 n.3 (1914).

⁴⁶⁴The chief objection against the Freedmen's Bureau bills, as set forth in debate and the President's veto messages, was that it asserted military jurisdiction in lieu of the civil courts. *E.g.* CONG. GLOBE, 39th Cong., 1st Sess. 915-918 (Feb. 19, 1866), 933-43 (Feb. 20, 1866). No one objected to the provision that recognized the right to bear arms. On separate occasions, senators who voted against the Freedmen's Bureau bills also favorably invoked the Second Amendment. *See e.g., id.* at 371 (Jan. 23, 1866) (remarks of Senator Davis).

the right to bear arms into the bill, the House passed S. 60 by a vote of one-hundred thirty-six to thirty three.⁴⁶⁵ Since the Senate barely failed to muster the necessary two-thirds to override the President's veto, the House had no override vote. The proposed Fourteenth Amendment passed the House on May 10, 1866 by a vote of one-hundred twenty-eight to thirty-seven⁴⁶⁶ and again, with the Senate amendments on June 13, 1866, by a vote of one-hundred and twenty to thirty-two.⁴⁶⁷ The House passed H.R. 613 on May 29 by a ninety-six to thirty-three margin⁴⁶⁸ and then on July 16 overrode the President's veto by a vote of one-hundred and four to thirty-three.⁴⁶⁹

The overwhelming majority of House members voted in the affirmative on all five recorded votes — once on S. 60, twice on the proposed Fourteenth Amendment, and twice on H.R. 613. Some voted only once on the proposed Fourteenth Amendment, or once or twice on the Freedmen's Bureau bills. A total of one-hundred and forty representatives voted at least once in favor of the proposed Fourteenth Amendment, and every one of the one-hundred and forty voted at least once in favor of one of the Freedmen's Bureau bills.⁴⁷⁰ Of the one-hundred forty representatives who voted for the proposed Fourteenth Amendment, a total of one-hundred and twenty — *i.e.*, eighty-six percent — voted for both S. 60 and H.R. 613.

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

⁴⁶⁵*Id.* at 654 (Feb. 5, 1866), 688 (Feb. 6, 1866).

⁴⁶⁶*Id.* at 2545 (May 10, 1866).

⁴⁶⁷*Id.* at 3149 (June 13, 1866).

⁴⁶⁸*Id.* at 2878 (May 29, 1866).

⁴⁶⁹*Id.* at 3850 (July 16, 1866). During this vote, colleagues excused over a dozen of their fellow members as absent because of "indisposition." *Id.* Members specifically identified 13 absentees who would have voted for the bill, and 3 against. *Id.* at 3850-51 (July 16, 1866).

⁴⁷⁰Eleven members who voted for either S. 60 or H.R. 613 but not both were not present for the vote on the other. Nine members voted yes on S. 60 and no on H.R. 613, no on H.R. 613 but yes on the H.R. 613 override, or otherwise voted inconsistently. Three members voted both for and against the Fourteenth Amendment on two occasions. These aberrations are statistically insignificant.

The Framers intended, and opponents well recognized, that the Fourteenth Amendment was designed to guarantee the right to keep and bear arms as a right and attribute of citizenship on which no State could infringe.⁴⁷¹ The passage of the Fourteenth Amendment accomplished the abolitionist goal that each state recognize all the freedoms contained in the Bill of Rights. In Horace Edgar Flack's words, Representative Bingham, author of the Amendment, intended "to confer power upon the Federal Government, by the first section of the Amendment, to enforce the Federal Bill of Rights in the States"⁴⁷² Flack added "the following objects and rights were to be secured by the first section . . . the right peaceably to assemble, to bear arms, etc. . . ."⁴⁷³

Each clause of § 1 of the Fourteenth Amendment reflects the broad character of the rights for which protection was sought.⁴⁷⁴ Among other freedoms in the Bill of Rights, the keeping and bearing of arms had been considered part of the definition of "citizen" since the time of Aristotle. Depicted as a civil right and a privilege or immunity in *Dred Scott*, the debates on the Fourteenth Amendment, and related civil rights legislation, this liberty interest promoted the defense and practical realization of the

⁴⁷¹See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2765 (May 23, 1866) (introduction of the Fourteenth Amendment in Senate by Senator Howard).

⁴⁷²FLACK, *supra* note 11, at 80. Dr. Flack generalized as follows:

In conclusion, we may say that Congress, the House, and the Senate, had the following objects and motive in view for submitting the first section of the Fourteenth Amendment to the States for ratification:

1. To make the Bill of Rights (the first eight amendments) binding upon, or applicable to, the States.

Id. at 94.

⁴⁷³*Id.* at 96. All of the above quotations are from pages of Flack which are cited as authority in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 544 (1972).

⁴⁷⁴That section provides:

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

guarantees of life, liberty, or property. This fundamental right under “the laws,” including the Bill of Rights, also qualified for “equal protection” but never for deprivation, whether equal or unequal. To the Framers, these universally recognized rights, too numerous to list individually, were to be protected by the all-inclusive language of the Amendment.⁴⁷⁵

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 estate, and that “the free enjoyment of such immunities and rights” is to be protected.⁴⁷⁶ The Supreme Court has repeatedly recognized the “indefeasible right of personal security, personal liberty, and private property”⁴⁷⁷

XI. CONCLUSION

It remains to be seen whether the Supreme Court will decide if the Fourteenth Amendment incorporates the Second Amendment so as to invalidate state infringements of the right of the people to keep and bear arms. Clearly, the Fourteenth Amendment protects the rights to personal

⁴⁷⁵*See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2542-43 (May 10, 1866) (remarks of Representative Bingham).

⁴⁷⁶14 Stat. 173, 176 (1866).

⁴⁷⁷*Griswold v. Connecticut*, 381 U.S. 479, 485 n. (1965) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). The Court has emphasized:

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

Coolidge v. New Hampshire, 403 U.S. 443, 453-54 (1971) (quoting *Boyd*, 116 U.S. at 635). *Coolidge* also quotes *Gould v. United States*, 255 U.S. 298, 303-304 (1921), concerning rights:

[D]eclared to be indispensable to the ‘full enjoyment of personal security, personal liberty and private property;’ that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen

Id. at 454 n.4.

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

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

In the above sense, "the constitutional right to bear arms" was perhaps considered as the most fundamental protection for the rights of personal liberty and personal security, which may explain its unique mention in the Freedmen's Bureau Act. To the framers of the Fourteenth Amendment, human emancipation meant the protection of this great human right from all sources of infringement, whether federal or state.