THE SECOND AMENDMENT: TOWARD AN AFRO-AMERICANIST RECONSIDERATION

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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, . . . 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.[1]

INTRODUCTION

Many of the issues surrounding the Second Amendment debate are raised in particularly sharp relief from the perspective of African-American history. With the exception of Native Americans, no people in American history have been more influenced by violence than blacks. Private and public violence maintained slavery.[2] The nation's most destructive conflict ended the "peculiar institution."[3] That all too brief experiment in racial egalitarianism, Reconstruction, was ended by private violence[4] and abetted by Supreme Court sanction Jim Crow was sustained by private violence, often with public assistance.

If today the memories of past interracial violence are beginning to fade, they are being quickly replaced by the frightening phenomenon of black-on-black violence, making life all too precarious for poor blacks in inner city neighborhoods. Questions raised by the Second Amendment, particularly those concerning self-defense, crime, participation in the security of the community, and the wisdom or utility of relying exclusively on the state for protection, thus take on a peculiar urgency in light of the modern Afro- American experience.

ARMED CITIZENS, FREEMEN, AND WELL-REGULATED MILITIAS: THE BEGINNINGS OF AN AFRO-AMERICAN EXPERIENCE WITH AN ANGLO-AMERICAN RIGHT

Any discussion of the Second Amendment should begin with the commonplace observation that the framers of the Bill of Rights did not believe they were creating new rights Instead, they believed that they were simply recognizing rights already part of

their English constitutional heritage and implicit in natural law.[5] In fact, many of the framers cautioned against a bill of rights, arguing that the suggested rights were inherent to a free people, and that a specific detailing of rights would suggest that the new constitution empowered the federal government to violate other traditional rights not enumerated.[6]

Thus, an analysis of the framers' intentions with respect to the Second Amendment should begin with an examination of their perception of the right to bear arms as one of the traditional rights of Englishmen, a right necessary to perform the duty of militia service. Such an analysis is in part an exercise in examining the history of arms regulation and militia service in English legal history. But a simple examination of the right to own weapons at English law combined with an analysis of the history of the militia in English society is inadequate to a full understanding of the framers' understanding of what they meant by "the right to keep and bear arms." By the time the Bill of Rights was adopted, nearly two centuries of settlement in North America had given Americans constitutional sensibilities similar to, but nonetheless distinguishable from, those of their English counterparts.[7] American settlement had created its own history with respect to the right to bear arms, a history based on English tradition, modified by the American experience, and a history that was sharply influenced by the racial climate in the American colonies.

ENGLISH LAW AND TRADITION

The English settlers who populated North America in the seventeenth century were heirs to a tradition over five centuries old governing both the right and duty to be armed. At English law, the idea of an armed citizenry responsible for the security of the community had long coexisted, perhaps somewhat uneasily, with regulation of the ownership of arms, particularly along class lines. The Assize of Arms of 118 required the arming of all free men, and required free men to possess armor suitable to their condition.[8] By the thirteenth century, villains possessing sufficient property were also expected to be armed and contribute to the security of the community.[9] Lacking both professional police forces and a standing army,[10] English law and custom dictated that the citizenry as a whole, privately equipped, assist in both law enforcement and in military matters. By law, all men between sixteen and sixty were liable to be summoned into the sheriff's posse comitatus. All subjects were expected to participate in the hot pursuit of criminal suspects,

supplying their own arms for the occasion. There were legal penalties for failure to participate.[11]

Moreover, able-bodied men were considered part of the militia, although by the sixteenth century the general practice was to rely on select groups intensively trained for militia duty rather than to rely generally on the armed male population. This move toward a selectively trained militia was an attempt to remedy the often indifferent proficiency and motivation that occurred when relying on the population as a whole.[12]

Although English law recognized a duty to be armed, it was a duty and a right highly circumscribed by English class structure. The law often regarded the common people as a dangerous class, useful perhaps in defending shire and realm, but also capable of mischief with their weapons, mischief toward each other, toward their betters, and toward their betters' game. Restrictions on the type of arms deemed suitable for common people had long been part of English law and custom. A sixteenth-century statute designed as a crime control measure prohibited the carrying of handguns and crossbows by those with incomes of less than one hundred pounds a year.[13] Catholics were also often subject to being disarmed as potential subversives after the English reformation.[14]

It took the religious and political turmoil of seventeenth-century England to bring about large scale attempts to disarm the English public and to bring the right to keep arms under English constitutional protection. Post-Restoration attempts by Charles II to disarm large portions of the population known or believed to be political opponents, and James II's efforts to disarm his Protestant opponents led, in 1689, to the adoption of the Seventh provision of the English Bill of Rights: "That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law."[15]

By the eighteenth century, the right to possess arms, both for personal protection and as a counterbalance against state power, had come to be viewed as part of the rights of Englishmen by many on both sides of the Atlantic. Sir William Blackstone listed the right to possess arms as one of the five auxiliary rights of English subjects without which their primary rights could not be maintained.[16] He discussed the right in traditional English terms:

The fifth and last auxiliary right of the subject, 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, which is also declared by the same statute 1 W. & M. st. 2 c. 2 and 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.[17]

B. ARMS AND RACE IN COLONIAL AMERICA

If the English tradition involved a right and duty to bear arms qualified by class and later religion, both the right and the duty were strengthened in the earliest American settlements. From the beginning, English settlement in North America had a quasi-military character, an obvious response to harsh frontier conditions. Governors of settlements often also held the title of militia captain, reflecting both the civil and military nature of their office. Special effort was made to ensure that white men, capable of bearing arms, were imported into the colonies.[18] Far from the security of Britain, often bordering on the colonies of other frequently hostile European powers, colonial governments viewed the arming of able-bodied white men and the requirement that they perform militia service as essential to a colony's survival.

There was another reason for the renewed emphasis on the right and duty to be armed in America: race. Britain's American colonies were home to three often antagonistic races: red, white, and black. For the settlers of British North America, an armed and universally deputized white population was necessary not only to ward off dangers from the armies of other European powers, but also to ward off attacks from the indigenous population which feared the encroachment of English settlers on their lands. An armed white population was also essential to maintain social control over blacks and Indians who toiled unwillingly as slaves and servants in English settlements.[19]

This need for racial control helped transform the traditional English right into a much broader American one. If English law had qualified the right to possess arms by class and religion, American law was much less concerned with such distinctions. Initially all Englishmen, and later all white men, were expected to possess and bear arms to defend their commonwealths, both from external threats and from the internal ones posed by blacks and Indians. The statutes of many colonies specified that white men be armed at public expense.[20] In most colonies, all white men between the ages of sixteen and sixty, usually with the exception of clergy and religious objectors, were considered part of the militia and required to be armed.[21] Not only were white

men required to perform traditional militia and posse duties, they were also required to serve as patrollers, a specialized posse dedicated to keeping order among the slave population, in those colonies with large slave populations.[22] This broadening of the right to keep and bear arms reflected a more general lessening of class, religious, and ethnic distinctions among whites in colonial America. The right to possess arms was, therefore, extended to classes traditionally viewed with suspicion in England, including the class of indentured servants.[23]

If there were virtually universal agreement concerning the need to arm the white population,[24] the law was much more ambivalent with respect to blacks. The progress of slavery in colonial America reflected English lack of familiarity with the institution, in both law and custom.[25] In some colonies, kidnapped Africans initially were treated like other indentured servants, held for a term of years and then released from forced labor and allowed to live as free people.[26] In some colonies, the social control of slaves was one of the law's major concerns; in others, the issue was largely of private concern to the slave owner.[27]

These differences were reflected in statutes concerned with the right to possess arms and the duty to perform militia service. One colony -- Virginia -- provides a striking example of how social changes were reflected, over time, in restrictions concerning the right to be armed. A Virginia statute enacted in 1639 required the arming of white men at public expense.[28] The statute did not specify the arming of black men, but it also did not prohibit black men from arming themselves.[29] By 1680 a Virginia statute prohibited Negroes, slave and free, from carrying weapons, including clubs.[30] Yet, by the early eighteenth century, free Negroes who were house owners were permitted to keep one gun in their house, while blacks, slave and free, who lived on frontier plantations were able to keep guns.[31] Virginia's experience reflected three sets of concerns: the greater need to maintain social control over the black population as caste lines sharpened;[32] the need to use slaves and free blacks to help defend frontier plantations against attacks by hostile Indians; and the recognition on the part of Virginia authorities of the necessity for gun ownership for those living alone.

These concerns were mirrored in the legislation of other colonies. Massachusetts did not have general legislation prohibiting blacks from carrying arms,[33] but free Negroes in that colony were not permitted to participate in militia drills; instead they were required to perform substitute service on public works

projects.[34] New Jersey exempted blacks and Indians from militia service, though the colony permitted free Negroes to possess firearms.[35] Ironically, South Carolina, which had the harshest slave codes of this period, may have been the colony most enthusiastic about extending the right to bear arms to free Negroes. With its majority black population, that state's need to control the slave population was especially acute. To secure free black assistance in controlling the slave population, South Carolina in the early eighteenth century permitted free blacks the right of suffrage, the right to keep firearms, and the right to undertake militia service.[36] As the eighteenth century unfolded, those rights were curtailed. [37]

Overall, these laws reflected the desire to maintain white supremacy and control. With respect to the right to possess arms, the colonial experience had largely eliminated class, religious, and ethnic distinctions among the white population. Those who had been part of the suspect classes in England-- the poor, religious dissenters, and others who had traditionally only enjoyed a qualified right to possess arms -- found the right to be considerably more robust in the American context. But blacks had come to occupy the social and legal space of the suspect classes in England. Their right to posses arms was highly dependent on white opinion of black loyalty and reliability. Their inclusion in the militia of freemen was frequently confined to times of crisis. Often, there were significant differences between the way northern and southern colonies approached this question, a reflection of the very different roles that slavery played in the two regions. These differences would become sharper after the Revolution, when the northern states began to move toward the abolition of slavery and the southern states, some of which had also considered abolition, began to strengthen the institution.

Ironically, while the black presence in colonial America introduced a new set of restrictions concerning the English law of arms and the militia, it helped strengthen the view that the security of the state was best achieved through the arming of all free citizens. It was this new view that was part of the cultural heritage Americans brought to the framing of the Constitution.

C. THE RIGHT OF WHICH PEOPLE?

1. Revolutionary Ideals

The colonial experience helped strengthen the appreciation of early Americans for the merits of an armed citizenry. That appreciation was strengthened yet further by the American

Revolution. If necessity forced the early colonists to arm, the Revolution and the friction with Britain's standing army that preceded it -- and in many ways precipitated it -- served to revitalize Whiggish notions that standing armies were dangerous to liberty, and that militias, composed of the whole of the people, best protected both liberty and security. [38]

These notions soon found their way into the debates over the new constitution, debates which help place the language and meaning of the Second Amendment in context. Like other provisions of the proposed constitution, the clause that gave Congress the power to provide for the organizing, arming, and disciplining of the militia excited fears among those who believed that the new constitution could be used to destroy both state power and individual rights. [39]

Indeed, it was the very universality of the militia that was the source of some of the objections. A number of critics of the proposed constitution feared that the proposed congressional power could subject the whole population to military discipline and a clear threat to individual liberty. Others complained that the Militia Clause provided no exemptions for those with religious scruples against bearing arms. [40]

But others feared that the Militia Clause could be used to disarm the population as well as do away with the states' control of the militia. Some critics expressed fear that Congress would use its power to establish a select militia, a group of men specially trained and armed for militia duty, similar to the earlier English experience. Richard Henry Lee of Virginia argued that that select militia might be used to disarm the population and that, in any event, it would pose more of a danger to individual liberty than a militia composed of the whole population. He charged that a select militia "commits the many to the mercy and the prudence of the few." A number of critics objected to giving Congress the power to arm the militia, fearing that such power would likewise give Congress the power to withhold arms from the militia. The fear that this new congressional authority could be used to both destroy state power over the militia and to disarm the people led delegates to state ratifying conventions to urge measures that would preserve the traditional right. The Virginia convention proposed language that would provide protection for the right to keep and bear arms in the federal constitution. [41]

In their efforts to defend the proposed constitution, Alexander Hamilton and James Madison addressed these charges. Hamilton's responses are interesting because he wrote

as someone openly skeptical of the value of the militia of the whole. The former Revolutionary War artillery officer expressed the view that, while the militia fought bravely during the Revolution, it had proven to be no match when pitted against regular troops. Hamilton, who Madison claimed initially wanted to forbid the states from controlling any land or naval forces, called for uniformity in organizing and disciplining of the militia under national authority. He also urged the creation of a select militia that would be more amenable to the training and discipline he saw as necessary.[42]

If Hamilton gave only grudging support to the concept of the militia of the whole, Madison, author of the Second Amendment, was a much more vigorous defender of the concept. He answered critics of the Militia Clause provision allowing Congress to arm the militia by stating that the term "arming" meant only that Congress's authority to arm extended only to prescribing the type of arms the militia would use, not to furnishing them.[43] But Madison's views went further. He envisioned a militia consisting of virtually the entire white male population, writing that a militia of 500,000 citizens could prevent any excesses that might be perpetrated by the national government and its regular army. Madison left little doubt that he envisioned the militia of the whole as a potential counterweight to tyrannical excess on the part of the government.[44]

It is against this background that the meaning of the Second Amendment must be considered. For the revolutionary generation, the idea of the militia and an armed population were related. The principal reason for preferring a militia of the whole over either a standing army or a select militia was rooted in the idea that, whatever the inefficiency of the militia of the whole, the institution would better protect the newly won freedoms than a reliance on security provided by some more select body.

2. Racial Limitations

One year after the ratification of the Second Amendment and the Bill of Rights, Congress passed legislation that reaffirmed the notion of the militia of the whole and explicitly introduced a racial component into the national deliberations on the subject of the militia. The Uniform Militia Act[45] called for the enrollment of every free, able-bodied white male citizen between the ages of eighteen and forty-five into the militia. The act further specified that every militia member was to provide himself with a musket or firelock, a bayonet, and ammunition.

This specification of a racial qualification for militia membership was somewhat at odds with general practice in the late eighteenth century. Despite its recognition and sanctioning of slavery, the Constitution had no racial definition of citizenship. [46][FN90] Free Negroes voted in a majority of states. A number of states had militia provisions that allowed free Negroes to Participate.[47] Particularly in the northern states, many were well aware that free Negroes and former slaves had served with their state forces during the Revolution. Despite the prejudices of the day, lawmakers in late eighteenth-century America were significantly less willing to write racial restrictions into constitutions and other laws guaranteeing fundamental rights than were their counterparts a generation or so later in the nineteenth century.[48] The 1972 statute restricting militia enrollment to white men was one of the earliest federal statutes to make a racial distinction.

The significance of this restriction is not altogether clear. For the South, there was a clear desire to have a militia that was reliable and could be used to suppress potential slave insurrections. But despite the fear that free Negroes might make common cause with slaves, and despite federal law, some southern states in the ante-bellum period enrolled free blacks as militia members. Northern states at various times also enrolled free Negroes in the militia despite federal law and often strident prejudice. States North and South employed free Negroes in state forces during times of invasion. While southern states often prohibited slaves from carrying weapons and strictly regulated access to firearms by free Negroes, northern states generally made no racial distinction with respect to the right to own firearms,[49] and federal law was silent on the subject.

The racial restriction in the 1792 statute indicates the unrest the revolutionary generation felt toward arming blacks and perhaps the recognition that one of the functions of the militia would indeed be to put down slave revolts. Yet, the widespread use of blacks as soldiers in time of crisis and the absence of restrictions concerning the arming of blacks in the northern states may provide another clue concerning how to read the Second Amendment. The 1792 act specified militia enrollment for white men between the ages of eighteen and forty-five. Yet, while it specifically included only this limited portion of the population, the statute excluded no one from militia service.

The authors of the statute had experience, in the Revolution, with a militia and Continental Army considerably broad in membership. Older and younger men had served with the

Revolutionary forces. Blacks had served, though their service had been an object of considerable controversy. Even women had served, though, given the attitudes of the day, this was far more controversial than black service. Given this experience and the fact that the constitutional debates over the militia had constantly assumed an enrollment of the male population between sixteen and sixty, it is likely that the framers of the 1792 statute envisioned a militia even broader than the one they specified. This suggests to us how broad the term "people" in the Second Amendment was meant to be.

The 1792 statute also suggests to us also how crucial race has been in our history. If the racial distinction made in that statute was somewhat anomalous in the late eighteenth century, it was the kind of distinction that would become more common in the nineteenth. The story of blacks and arms would continue in the nineteenth century as racial distinctions became sharper and the defense of slavery more militant.

II. ARMS AND THE ANTEBELLUM EXPERIENCE

If, as presaged by the Uniform Militia Act of 1792, racial distinctions became sharper in the nineteenth century, that development was at odds with the rhetoric of the Revolution and with developments of the immediate post-revolutionary era. Flush with the precepts of egalitarian democracy, America had entered a time of recognition and expansion of rights. Eleven of the thirteen original states, as well as Vermont, passed new constitutions in the period between 1776 and 1777. Five of these states rewrote their constitutions by the time of the ratification of the Bill of Rights in 1791. A twelfth original state, Massachusetts, passed a new constitution in 1780. Many of the new constitutions recognized the status of citizens as "free and equal" or "free and independent." In Massachusetts and Vermont, these clauses were interpreted as outlawing the institution of slavery. Many of the new constitutions guaranteed the right to vote regardless of race to all men who otherwise qualified,[50] and guaranteed many of the rights that would later be recognized in the Bill of Rights. In no instance were any of these rights limited only to the white population; several states explicitly extended rights to the entire population irrespective of race. [51]

The right to vote, perhaps the most fundamental of rights, was limited in almost all instances to men who met property restrictions, but in most states was not limited according to race. Ironically, only in the nineteenth-century would black voting

rights be curtailed, as Jacksonian democracy expanded voting rights for whites. In its constitution of 1821, New York eliminated a one hundred dollar property requirement for white males, and concomitantly increased the requirement to two hundred fifty dollars for blacks. Other states would eliminate black voting rights altogether. Other than Maine, no state admitted to the union in the nineteenth century's antebellum period allowed blacks to vote.[52]

This curtailment of black voting rights was part and parcel of a certain hostility toward free blacks, a hostility that ran throughout the union of states. In northern states, where slavery had been abandoned or was not a serious factor in social or economic relations, such hostility was the result of simple racism. In southern states, where slavery was an integral part of the social and economic framework, this hostility was occasioned by the threat that free blacks posed to the system of Negro slavery.[53]

A. THE SOUTHERN ANTEBELLUM EXPERIENCE: CONTROL OF ARMS AS A MEANS OF RACIAL OPPRESSION

The threat that free blacks posed to southern slavery was twofold. First, free blacks were a bad example to slaves. For a slave to see free blacks enjoy the trappings of white persons -- freedom of movement, expression, and association, relative freedom from fear for one's person and one's family, and freedom to own the fruits of one's labor -- was to offer hope and raise desire for that which the system could not produce. A slave with horizons limited only to a continued existence in slavery was a slave who did not threaten the system, whereas a slave with visions of freedom threatened rebellion.

This threat of rebellion is intimately related to the second threat that free blacks posed to the system of Negro slavery, the threat that free blacks might instigate or participate in a rebellion by their slave brethren. To forestall this threat of rebellion, southern legislatures undertook to limit the freedom of movement and decision of free blacks. States limited the number of free blacks who might congregate at one time; they curtailed the ability of free blacks to choose their own employment, and to trade and socialize with slaves. Free blacks were subject to question, to search, and to summary punishment by patrols established to keep the black population, slave and free, in order.[54] To forestall the possibility that free blacks would rebel either on their own or with slaves, the southern states limited not

only the right of slaves, but also the right of free blacks, to bear arms. [55]

The idea was to restrict the availability of arms to blacks, both slave and free, to the extent consistent with local conceptions of safety. At one extreme was Texas, which, between 1842 and 1850, prohibited slaves from using firearms altogether. Also at this extreme was Mississippi, which forbade firearms to both free blacks and slaves after 1852. At the other extreme was Kentucky, which merely provided that, should slaves or free blacks "wilfully and maliciously" shoot at a white person, or otherwise wound a free white person while attempting to kill another person, the slave or free black would suffer the death penalty. [56]

More often than not, slave state statutes restricting black access to firearms were aimed primarily at free blacks, as opposed to slaves, perhaps because the vigilant master was presumed capable of denying arms to all but the most trustworthy slaves, and would give proper supervision to the latter. Thus, Louisiana provided that a slave was denied the use of firearms and all other offensive weapons, unless the slave carried written permission to hunt within the boundaries of the owner's plantation. South Carolina prohibited slaves outside the company of whites or without written permission from their master from using or carrying firearms unless they were hunting or guarding the master's plantation. Georgia, Maryland, and Virginia did not statutorily address the question of slaves' access to firearms, perhaps because controls inherent to the system made such laws unnecessary in these states' eyes.

By contrast, free blacks, not under the close scrutiny of whites, were generally subject to tight regulation with respect to firearms. The State of Florida, which had in 1824 provided for a weekly renewable license for slaves to use firearms to hunt and for "any other necessary and lawful purpose,"[57] turned its attention to the question of free blacks in 1825. Section 8 of "An Act to Govern Patrols"[58] provided that white citizen patrols "shall enter into all negro houses and suspected places, and search for arms and other offensive or improper weapons, and may lawfully seize and take away all such arms, weapons, and ammunition . . . ." By contrast, the following section of that same statute expanded the conditions under which a slave might carry a firearm, a slave might do so under this statute either by means of the weekly renewable license or if "in the presence of some white person."[59]

Florida went back and forth on the question of licenses for free blacks but, in February 1831 repealed all provision for firearm licenses for free blacks.[60] This development predated by six months the Nat Turner slave revolt in Virginia, which was responsible for the deaths of at least fifty-seven white people[61] and which caused the legislatures of the Southern states to reinvigorate their repression of free blacks.[62] Among the measures that slave states took was to further restrict the right to carry and use firearms. In its December 1831 legislative session, Delaware for the first time required free blacks desiring to carry firearms to obtain a license from a justice of the peace.[63] In their December 1831 legislative sessions, both Maryland[64] and Virginia[65] entirely prohibited free blacks from carrying arms; Georgia followed suit in 1833, declaring that "it shall not be lawful for any free person of colour in this state, to own, use, or carry fire arms of any description whatever."[66]

Perhaps as a response to the Nat Turner rebellion, Florida in 1833 enacted another statute authorizing white citizen patrols to seize arms found in the homes of slaves and free blacks, and provided that blacks without a proper explanation for the presence of the firearms be summarily punished, without benefit of a judicial tribunal.[67] In 1846 and 1861, the Florida legislature provided once again that white citizen patrols might search the homes of blacks, both free and slave, and confiscate arms held therein.[68] Yet, searching out arms was not the only role of the white citizen patrols: these patrols were intended to enforce pass systems for both slaves and free blacks, to be sure that blacks did not possess liquor and other contraband items, and generally to terrorize blacks into accepting their subordination.[69] The patrols would meet no resistance from those who were simply unable to offer any.

B. THE NORTHERN ANTEBELLUM EXPERIENCE: USE OF FIREARMS TO COMBAT RACIALLY MOTIVATED DEPRIVATIONS OF LIBERTY

Even as northern racism defined itself in part by the curtailment of black voting rights,[70] it cumulatively amounted to what some have called a widespread "Negrophobia."[71] With notable exceptions, public schooling, if available to blacks at all, was segregated.[72] Statutory and constitutional limitations on the freedom of blacks to emigrate into northern states were a further measure of northern racism.[73] While the level of enforcement and the ultimate effect of these constitutional and statutory provisions may not have been great,[74] the very existence of these

laws speaks to the level of hostility northern whites had for blacks during this period. It is against this background -- if not poisonous, racist and hostile -- that the black antebellum experience with the right to bear arms must be measured.

Perhaps nothing makes this point better than the race riots and mob violence against blacks that occurred in many northern cities in the antebellum period. These episodes also illustrate the uses to which firearms might be put in pursuit of self-defense and individual liberty.

A good deal of racial tension was generated by economic competition between whites and blacks during this period, and this tension accounts in part for violent attacks against blacks.[75] Moreover, whites were able to focus their attacks because blacks were segregated into distinct neighborhoods in northern states, rendering it easy for white mobs to find the objects of their hostility.[76]

Quite often, racial violence made for bloody, destructive confrontations. Awareness of racial hostility generally, and of particular violent incidents made blacks desirous of forming militia units.

Though the Uniform Militia Act of 1792 had not specifically barred blacks from participation in the state organized militia,[77] the northern states had treated the act as such, and so the state organized militia was not an option.[78] Blacks could nonetheless form private militia groups that might serve to protect against racial violence, and did so. Free blacks in Providence formed the African Greys in 1821.[79] Oscar Handlin tells of an attempt by black Bostonians in the 1850s to form a private militia company.[80] Black members of the Pittsburgh community had no private militia but nonetheless took action against a mob expected to riot in April 1839. Instead of taking action on their own, they joined an interracial peacekeeping force proposed by the city's mayor, and were able to put a stop to the riot.[81]

It is not clear whether private black militia groups ever marched on a white mob. But that they may never have been called on to do so may be a measure of their success. The story of the July 1835 Philadelphia riot is illustrative. Precipitated when a young black man assaulted a white one, the two day riot ended without resort to military intervention when a rumor reached the streets that “fifty to sixty armed and determined black men had barricaded themselves in a building beyond the police lines.”[82]

Undoubtedly, the most striking examples of the salutary use of firearms by blacks in defense of their liberty, and

concurrently the disastrous results from the denial of the right to carry firearms in self-defense, lie in the same incident. In Cincinnati, in September 1841, racial hostility erupted in two nights of assaults by white mobs of up to 1500 people. On the first evening, after destroying property owned by blacks in the business district, mobs descended upon the black residential section, there to be repulsed by blacks who fired into the crowd, forcing it out of the area. The crowd returned, however, bringing with it a six-pound cannon, and the battle ensued. Two whites and two blacks were killed, and more than a dozen of both races were wounded. Eventually, the militia took control, but on the next day the blacks were disarmed at the insistence of whites, and all adult black males were taken into protective custody. On the second evening, white rioters again assaulted the black residential district, resulting in more personal injury and property damage.[83]

This history shows that if racism in the antebellum period was not limited to the southern states, neither was racial violence. Competition with and hostility toward blacks accounted for this violence in northern states, whereas the need to maintain slavery and maintain security for the white population accounted for racial violence in southern states. Another difference between the two regions is that in the southern states blacks did not have the means to protect themselves, while in northern states, blacks by and large had access to firearms and were willing to use them.

The 1841 Cincinnati riot represents the tragic, misguided irony of the city's authorities who, concerned with the safety of the black population, chose to disarm and imprison them -- chose, in effect, to leave the black population of Cincinnati as southern authorities left the black population in slave states, naked to whatever indignities private parties might heap upon them, and dependent on a government either unable or unwilling to protect their rights. As a symbol for the experience of northern blacks protecting themselves against deprivations of liberty, the 1841 riot holds a vital lesson for those who would shape the content and meaning of the Fourteenth Amendment.

III. ARMS AND THE POSTBELLUM SOUTHERN ORDER

The end of the Civil War did more than simply bring about the end of slavery; it brought about a sharpened conflict between two contrasting constitutional visions. One vision, largely held by northern Republicans, saw the former slaves as citizens[84] entitled to those rights long deemed as natural rights in

Anglo-American society. Theirs was a vision of national citizenship and national rights, rights that the federal government had the responsibility to secure for the freedmen and, indeed, for all citizens. This vision, developed during the antislavery struggle and heightened by the Civil War, caused Republicans of the Civil War and postwar generation to view the question of federalism and individual rights in a way that was significantly different from that of the original framers of the Constitution and Bill of Rights. If many who debated the original Constitution feared that the newly created national government could violate long established rights, those who changed the Constitution in the aftermath of war and slavery had firsthand experience with states violating fundamental rights. The history of the right to bear arms is, thus, inextricably linked with the efforts to reconstruct the nation and bring about a new racial order.

If the northern Republican vision was to bring the former slaves into the ranks of citizens, the concern of the defeated white South was to preserve as much of the antebellum social order as could survive northern victory and national law. The Emancipation Proclamation and the Thirteenth Amendment[85] abolished slavery; chattel slavery as it existed before the war could not survive these developments. Still, in the immediate aftermath of the war, the South was not prepared to accord the general liberties to the newly emancipated black population that northern states had allowed their free black populations.[86] Instead, while recognizing emancipation, southern states imposed on the freedmen the legal disabilities of the antebellum free Negro population.

In 1865 and 1866, southern states passed a series of statutes known as the black codes. These statutes, which one historian described as "a twilight zone between slavery and freedom,"[87] were an expression of the South's determination to maintain control over the former slaves. Designed in part to ensure that traditional southern labor arrangements would be preserved, these codes were attempts "to put the state much in the place of the former master."[88] The codes often required blacks to sign labor contracts that bound black agricultural workers to their employers for a year.[89] Blacks were forbidden from serving on juries, and could not testify or act as parties against whites.[90] Vagrancy laws were used to force blacks into labor contracts and to limit freedom of movement.[91]

As further indication that the former slaves had not yet joined the ranks of free citizens, southern states passed

legislation prohibiting blacks from carrying firearms without licenses, a requirement to which whites were not subjected. The Louisiana[92] and Mississippi[93] statutes were typical of the restrictions found in the codes. Alabama's was even harsher.[94]

The restrictions in the black codes caused strong concerns among northern Republicans. The charge that the South was trying to reinstitute slavery was frequently made, both in and out of Congress.[95] The news that the freedmen were being deprived of the right to bear arms was of particular concern to the champions of Negro citizenship. For them, the right of the black population to possess weapons was not merely of symbolic and theoretical importance; it was vital both as a means of maintaining the recently reunited Union and a means of preventing virtual reenslavement of those formerly held in bondage. Faced with a hostile and recalcitrant white South determined to preserve the antebellum social order by legal and extra-legal means,[96] northern Republicans were particularly alarmed at provisions of the black codes that effectively preserved the right to keep and bear arms for former Confederates while disarming blacks, the one group in the South with clear unionist sympathies.[97] This fed the determination of northern Republicans to provide national enforcement of the Bill of Rights.[98]

The efforts to disarm the freedmen were in the background when the 39th Congress debated the Fourteenth Amendment, and played an important part in convincing the 39th Congress that traditional notions concerning federalism and individual rights needed to change. While a full exploration of the incorporation controversy[99] is beyond the scope of this chapter, it should be noted that Jonathan Bingham, author of the Fourteenth Amendment's Privileges or Immunities Clause,[100] clearly stated that it applied the Bill of Rights to the states.[101] Others shared that same understanding.[102]

Although the history of the black codes persuaded the 39th Congress that Congress and the federal courts must be given the authority to protect citizens against state deprivations of the Bill of Rights, the Supreme Court in its earliest decisions on the Fourteenth Amendment moved to maintain much of the structure of prewar federalism. A good deal of the Court's decision-making that weakened the effectiveness of the Second Amendment was part of the Court's overall process of eviscerating the Fourteenth Amendment soon after its enactment.

That process began with the Slaughterhouse Cases,[103] which dealt a severe blow to the Fourteenth Amendment's Privileges or Immunities Clause, a blow from which it has yet to recover. It was also within its early examination of the Fourteenth Amendment that the Court first heard a claim directly based on the Second Amendment. Ironically, the party first bringing an allegation before the Court concerning a Second Amendment violation was the federal government. In United States v. Cruikshank,[104] federal officials brought charges against William Cruikshank and others under the Enforcement Act of 1870.[105] Cruikshank had been charged with violating the rights of two black men to peaceably assemble and to bear arms. The Supreme Court held that the federal government had no power to protect citizens against private action that deprived them of their constitutional rights. The Court held that the First and Second Amendments were limitations on Congress, not on private individuals and that, for protection against private criminal action, the individual was required to look to state governments.[106]

The Cruikshank decision, which dealt a serious blow to Congress' ability to enforce the Fourteenth Amendment, was part of a larger campaign of the Court to ignore the original purpose of the Fourteenth Amendment -- to bring about a revolution in federalism, as well as race relations.[107] While the Court in the late 1870s and 1880s was reasonably willing to strike down instances of state sponsored racial discrimination,[108] it also showed a strong concern for maintaining state prerogative and a disinclination to carry out the intent of the framers of the Fourteenth Amendment to make states respect national rights.

This trend was demonstrated in Presser v. Illinois,[109] the second case in which the Court examined the Second Amendment. Presser involved an Illinois statute which prohibited individuals who were not members of the militia from parading with arms.[110] Although Justice William Woods, author of the majority opinion, noted that the Illinois statute did not infringe upon the right to keep and bear arms,[111] he nonetheless went on to declare that the Second Amendment was a limitation on the federal and not the state governments. Woods's opinion also contended that, despite the nonapplicability of the Second Amendment to state action, states were forbidden from disarming their populations because such action would interfere with the federal government's ability to maintain the sedentary militia.[112] With its view that the statute restricting armed parading did not interfere with the right to keep and bear arms,

and its view that Congress's militia power prevented the states from disarming its citizens, the Presser Court had gone out of its way in dicta to reaffirm the old federalism and to reject the framers' view of the Fourteenth Amendment that the Bill of Rights applied to the states.

The rest of the story is all too well known. The Court's denial of an expanded roll for the federal government in enforcing civil rights played a crucial role in redeeming white rule. The doctrine in Cruikshank, that blacks would have to look to state government for protection against criminal conspiracies, gave the green light to private forces, often with the assistance of state and local governments, that sought to subjugate the former slaves and their descendants. Private violence was instrumental in driving blacks from the ranks of voters.[113] It helped force many blacks into peonage, a virtual return to slavery,[114] and was used to force many blacks into a state of ritualized subservience.[115] With the protective arm of the federal government withdrawn, protection of black lives and property was left to largely hostile state governments. In the Jim Crow era that would follow, the right to posses arms would take on critical importance for many blacks. This right, seen in the eighteenth century as a mechanism that enabled a majority to check the excesses of a potentially tyrannical national government, would for many blacks in the twentieth century become a means of survival in the face of private violence and state indifference.

IV. ARMS AND AFRO-AMERICAN SELF-DEFENSE IN THE TWENTIETH CENTURY: A HISTORY IGNORED

For much of the twentieth century, the black experience in this country has been one of repression. This repression has not been limited to the southern part of the country, nor is it a development divorced from the past. Born perhaps of cultural predisposition against blacks,[116] and nurtured by economic competition between blacks and whites, particularly immigrant groups and those whites at the lower rungs of the economic scale,[117] racism in the North continued after the Civil War, abated but not eliminated in its effects.[118] In the South, defeat in the Civil War and the loss of slaves as property confirmed white Southerners in their determination to degrade and dominate their black brethren.[119]

Immediately after the Civil War and the emancipation it brought, white Southerners adopted measures to keep the black population in its place.[120] Southerners saw how Northerners had utilized segregation as a means to avoid the black presence in

their lives,[121] and they already had experience with segregation in southern cities before the war.[122] Southerners extended this experience of segregation to the whole of southern life through the mechanism of "Jim Crow." Jim Crow was established both by the operation of law, including the black codes and other legislation, and by an elaborate etiquette of racially restrictive social practices. The Civil Rights Cases [123] and Plessy v. Ferguson[124] gave the South freedom to pursue the task of separating black from white. The Civil Rights Cases went beyond Cruikshank, even more severely restricting congressional power to provide for the equality of blacks under Section 5 of the Fourteenth Amendment,[125] and Plessy v. Ferguson declared separate facilities for blacks and whites to be consonant with the Fourteenth Amendment's mandate of "equal protection of the laws."[126] In effect, states and individuals were given full freedom to effect their "social prejudices"[127] and "racial instincts"[128] to the detriment of blacks throughout the South and elsewhere.[129]

This is not to say that blacks went quietly or tearfully to their deaths. Oftentimes they were able to use firearms to defend themselves, though usually not with success: Jim McIlherron was lynched in Estell Springs, Tennessee, after having exchanged over one thousand rounds with his pursuers.[130] The attitude of individuals such as McIlherron is summed up by Ida B. Wells- Barnett, a black antilynching activist who wrote of her decision to carry a pistol: "I had bought a pistol the first thing after [the lynching], because I expected some cowardly retaliation from the lynchers. I felt that one had better die fighting against injustice than to die like a dog or a rat in a trap. I had already determined to sell my life as dearly as possible if attacked. I felt if I could take one lyncher with me, this would even up the score a little bit."[131]

When blacks used firearms to protect their rights, they were often partially successful but were ultimately doomed. In 1920, two black men in Texas fired on and killed two whites in self-defense. The black men were arrested and soon lynched.[132] When the sheriff of Aiken, South Carolina, came with three deputies to a black household to attempt a warrantless search and struck one female family member, three other family members used a hatchet and firearms in self-defense, killing the sheriff. The three wounded survivors were taken into custody, and after one was acquitted of murdering the sheriff, with indications of a similar verdict for the other two, all three were lynched.[133]

Although individual efforts of blacks to halt violence to their persons or property were largely unsuccessful, there were times that blacks succeeded through concerted or group activity in halting lynchings. In her autobiography, Ida Wells-Barnett reported an incident in Memphis in 1891 in which a black militia unit for two or three nights guarded approximately 100 jailed blacks who were deemed at risk of mob violence. When it seemed the crisis had passed, the militia unit ceased its work. It was only after the militia unit left that a white mob stormed the jail and lynched three black inmates.[134]

A. Philip Randolph, the longtime head of the Brotherhood of Sleeping Car Porters, and Walter White, onetime executive secretary of the National Association for the Advancement of Colored People, vividly recalled incidents in which their fathers had participated in collective efforts to use firearms to successfully forestall lynchings and other mob violence. As a thirteen- year-old, White participated in his father's experiences,[135] which, he reported, left him "gripped by the knowledge of my own identity, and in the depths of my soul, I was vaguely aware that I was glad of it."[136] After his father stood armed at a jail all night to ward off lynchers,[137] Randolph was left with a vision, not "of powerlessness, but of the 'possibilities of salvation,' which resided in unity and organization."[138]

The willingness of blacks to use firearms to protect their rights, their lives, and their property, alongside their ability to do so successfully when acting collectively, renders many gun control statutes, particularly of Southern origin, all the more worthy of condemnation. This is especially so in view of the purpose of these statutes, which, like that of the gun control statutes of the black codes, was to disarm blacks.

That the Southern states did not prohibit firearms ownership outright is fortuitous. During the 1960s, while many blacks and white civil rights workers were threatened and even murdered by whites with guns, firearms in the hands of blacks served a useful purpose, to protect civil rights workers and blacks from white mob and terrorist activity.[139]

It struck many, then, as the height of blindness, confidence, courage, or moral certainty for the civil rights movement to adopt nonviolence as its credo, and to thus leave its adherents open to attack by terrorist elements within the white South. Yet, while nonviolence had its adherents among the mainstream civil rights organizations, many ordinary black people in the South believed in resistance and believed in the necessity of maintaining firearms for personal protection, and these people

lent their assistance and their protection to the civil rights movement.[140]

Daisy Bates, the leader of the Little Rock NAACP during the desegregation crisis, wrote in her memoirs that armed volunteers stood guard over her home.[141] Moreover, there are oral histories of such assistance. David Dennis, the black Congress of Racial Equality (CORE) worker who had been targeted for the fate that actually befell Goodman, Schwerner, and Chaney during the Freedom Summer,[142] has told of black Mississippi citizens with firearms who followed civil rights workers in order to keep them safe.[143]

Ad hoc efforts were not the sole means by which black Southern adherents of firearms protected workers in the civil rights movement. The Deacons for Defense and Justice were organized first in 1964 in Jonesboro, Louisiana, but received prominence in Bogalousa, Louisiana.[144] The Deacons organized in Jonesboro after their founder saw the Ku Klux Klan marching in the street and realized that the "fight against racial injustice include[d] not one but two foes: White reactionaries and police."[145] Jonesboro's Deacons obtained a charter and weapons, and vowed to shoot back if fired upon.[146] The word spread throughout the South, but most significantly to Bogalousa, where the Klan was rumored to have its largest per capita membership.[147] There, a local chapter of the Deacons would grow to include "about a tenth of the Negro adult male population," or about 900 members, although the organization was deliberately secretive about exact numbers.[148] What is known, however, is that in 1965 there were fifty to sixty chapters across Louisiana, Mississippi, and Alabama.[149] In Bogalousa, as elsewhere, the Deacons' job was to protect black people from violence, and they did so by extending violence to anyone who attacked.[150] This capability and willingness to use force to protect blacks provided a deterrent to white terroristic activity.

A prime example of how the Deacons accomplished their task lies in the experience of James Farmer, then head of (CORE), a frontline, mainstream civil rights group. Before Farmer left on a trip for Bogalousa, the Federal Bureau of Investigation informed him that he had received a death threat from the Klan. The FBI apparently also informed the state police, who met Farmer at the airport. But at the airport also were representatives of the Bogalousa chapter of the Deacons, who escorted Farmer to the town. Farmer stayed with the local head of the Deacons, and the Deacons provided close security

throughout the rest of this stay and Farmer's next. Farmer later wrote in his autobiography that he was secure with the Deacons, "in the knowledge that unless a bomb were tossed . . . the Klan could only reach me if they were prepared to swap their lives for mine."[151]

Blacks in the South found the Deacons helpful because they were unable to rely upon police or other legal entities for racial justice. This provided a practical reason for a right to bear arms: In a world in which the legal system was not to be trusted, perhaps the ability of the system's victims to resist might convince the system to restrain itself.

CONCLUSION: SELF-DEFENSE AND THE GUN CONTROL QUESTION TODAY

Throughout American history, black and white Americans have had radically different experiences with respect to violence and state protection. Perhaps one reason the Second Amendment has not been taken very seriously by the courts and the academy is that for many of those who shape or critique constitutional policy, the state's power and inclination to protect them is a given. But for all too many black Americans, that protection historically has not been available. Nor, for many, is it readily available today. If in the past the state refused to protect black people from the horrors of white lynch mobs, today the state seems powerless in the face of the tragic black-on-black violence that plagues the mean streets of our inner cities, and at times seems blind to instances of unnecessary police brutality visited upon minority populations.[152]

The history of blacks, firearms regulations, and the right to bear arms should cause us to ask new questions regarding the Second Amendment. These questions will pose problems both for advocates of stricter gun controls and for those who argue against them. Much of the contemporary crime that concerns Americans is in poor black neighborhoods and a case can be made that greater firearms restrictions might alleviate this tragedy. But another, perhaps stronger case can be made that a society with a dismal record of protecting a people has a dubious claim on the right to disarm them. Perhaps a re-examination of this history can lead us to a modern realization of what the framers of the Second Amendment understood: that it is unwise to place the means of protection totally in the hands of the state, and that self-defense is also a civil right.

ENDNOTES

1. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1857) (emphasis added).

2. See KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH 141-91 (1956).

3. The Civil War cost the Union and Confederate armies a combined casualty total of 498,332 deaths. By way of contrast, World War II, the nation's second bloodiest conflict, cost the United States 407,316 fatalities. See THE WORLD ALMANAC & BOOK OF FACTS 793 (Mark S. Hoffman ed., 1991).

4. See generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 564-600 (1988); GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION (1984).

5. Ibid. Especially pertinent is John Philip Reid's reminder: "There are other dimensions that the standing-army controversy, when studied from the perspective of law, adds to our knowledge of the American Revolution. One is the degree to which eighteenth-century Americans thought seventeenth-century English thoughts." JOHN PHILLIP REID, IN DEFIANCE OF THE LAW: THE STANDING- ARMY CONTROVERSY, THE TWO CONSTITUTIONS, AND THE COMING OF THE AMERICAN REVOLUTION 4 (1981) (emphasis added).

6. See, e.g., THE FEDERALIST NO. 84 (Alexander Hamilton).

7. This can be seen with reference to the right of trial by jury. A number of scholars have noted that Americans in the late 18th century regarded the right of trial by jury as including the right to have the jury decide issues of law as well as fact. This was, of course, a departure from traditional English practice. See MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780- 1860, at 28-29 (1977); WILLIAM EDWARD NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 3-4, 8, 20-30 (1975).

8. 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 421-42, 565 (1968).

9. Ibid.

10. Historian Joyce Lee Malcolm notes that England did not have a standing army until the late 17th century and did not have a professional police force until the nineteenth. See Malcolm, supra note 9, at 391.

11. ALAN HARDING, A SOCIAL HISTORY OF ENGLISH LAW 59 (1966); Malcolm, supra note 9, at 391.

12. Malcolm, supra note 9, at 391-92.

13. Ibid. at 393.

14. Ibid. at 393-94.

15. Ibid. at 408.

16. 1 WILLIAM BLACKSTONE, COMMENTARIES *143-45. Blackstone listed three primary rights--the right of personal security, the right of personal liberty, and the right of private property--all of which he regarded as natural rights recognized and protected by the common law and statutes of England. He also argued that these would be "dead letters" without the five auxiliary rights which he listed as: (1) the constitution, powers and privileges of

Parliament; (2) the limitation of the king's prerogative; (3) the right to apply to the courts of justice for redress of injuries; (4) the right of petitioning the King or either house of Parliament, and for the redress of grievances; and (5) the right of subjects to have arms for their defence. Ibid. at *121-45.

Some commentators have argued that Blackstone's remarks and other evidence of English common-law and statutory rights to possess arms should be viewed in the light of the extensive regulation of firearms that traditionally existed in England and also in light of English strict gun control in the 20th century. See, e.g., SUBCOMMITTEE REPORT, supra note 8, at 26; FRANKLIN E. ZIMRING & GORDON HAWKINS, THE CITIZEN'S GUIDE TO GUN CONTROL 142-43 (1987); Ehrman & Henigan, supra note 6, at 9-10. Two points should be made in that regard. First, much of English firearms regulation had an explicit class base largely inapplicable in the American context. Second, neither a common law right to keep and bear arms nor a similar statutory right such as existed in the English Bill of Rights of 1689 would, in the light of Parliamentary supremacy, be a bar to subsequent statutes repealing or modifying that right. Blackstone is cited here not as evidence that the English right, in precise form and content, became the American right; instead it is evidence that the idea of an individual right to keep and bear arms existed on both sides of the Atlantic in the 18th century.

Blackstone's importance to this discussion is twofold. His writings on the right to possess arms can be taken as partial evidence of what the framers of the Second Amendment regarded as among the rights of Englishmen that they sought to preserve. Blackstone's views greatly influenced late 18th-century American legal thought. But Blackstone's importance in this regard does not cease with the Second Amendment. Blackstone also greatly influenced 19th-century American legal thinking. One influential antebellum American jurist, Justice Joseph Story, was significantly influenced by his readings of Blackstone. See R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 40-45, 137, 246 (1985). Story viewed the Second Amendment as vitally important in maintaining a free republic. In his Commentaries on the Constitution, he wrote:

The right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if they are successful in the first instance, enable the people to resist, and triumph over them.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 708 (Carolina Academic Press 1987) (1833).

While it would be inaccurate to attribute Story's Second Amendment views solely to his reading of Blackstone, Blackstone doubtless helped influence Story and other early 19th-century lawyers and jurists to regard the right to keep and bear arms as an important prerogative of free citizens. All of this is important for our discussion, not only with regard to antebellum opinion concerning the Second Amendment, but also in considering the cultural and legal climate that informed the framers of the Fourteenth Amendment who intended to extend what were commonly regarded as the rights of free men to the freedmen, and who also intended to extend the Bill of Rights to the states. See infra Part III.

17. 1 BLACKSTONE, supra note 46, at *143-44.

18. ABBOTT E. SMITH, COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA, 1607-1776, at 30-34 (Norton 1971) (1947).

19. BOORSTIN, supra note 18, at 355-56.

20. See A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 32 (1978).

It should also be added that the abundant game found in North America during the colonial period eliminated the need for the kind of game laws that had traditionally disarmed the lower classes in England. Malcolm, supra note 9, at 393-94.

21. See, e.g., 2 LAWS OF THE ROYAL COLONY OF NEW JERSEY 15-21, 49, 96, 133, 289 (Bernard Bush ed., 1977).

22. HIGGINBOTHAM, supra note 51, at 260-262.

23. For a good discussion of the elevation of the rights of white indentured servants as a means of maintaining social control over the black population, see generally EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA (1975)

24. Stephen Halbrook notes that Virginia's royal government in the late 17th century became very concerned that the widespread practice of carrying arms would tend to foment rebellion, and that, as a result, statutes were enacted to prevent groups of men from gathering with arms. See HALBROOK, THAT EVERY MAN BE ARMED, supra note 6, at 56-57. The sharpening of racial distinctions and the need for greater social control over slaves that occurred toward the end of the seventeenth and beginning of the 18th century lessened the concern authorities had over the armed white population. See MORGAN, supra note 54, at 354-55.

25. See Raymond T. Diamond, No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution, 42 VAND. Law Review 93, 101-102 (1989) (colonies dealt with slavery in an unsystematic and piecemeal fashion). See generally WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARDS THE NEGRO, 1550-1812, at 48-52 (1968).

26. HIGGINBOTHAM, supra note 51, at 21-22.

27. See HERBERT APTHEKER, AMERICAN NEGRO SLAVE REVOLTS (5th ed. 1983); Diamond, supra note 56, at 101-102, 104; Robert J. Cottrol & Raymond T. Diamond, Book Review, 56 TUL. Law Review 1107, 1110-1112 (1982) (reviewing A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978)).

28. 1 WILLIAM W. HENING, STATUTES AT LARGE OF VIRGINIA 226 (New York, R. & W. & G. Bartow 1823); see HIGGINBOTHAM, supra note 51, at 32.

29. 1 HENING, supra note 59, at 226; see HIGGINBOTHAM, supra note 51, at 32.

30. HIGGINBOTHAM, supra note 51, at 39.

31. Ibid. at 58.

32. Ibid. at 38-40.

33. Higginbotham informs us that the Boston selectmen passed such an ordinance after some slaves had allegedly committed arson in 1724. See Ibid. at 76.

34. See LORENZO J. GREENE, THE NEGRO IN COLONIAL NEW ENGLAND 127 (1968). Greene notes that blacks probably served in New England militias until the latter part of the 17th century. Ibid. It is interesting to note that, despite this prohibition on militia service, blacks served with New England forces during the French and Indian Wars. Ibid. at 188-89. Winthrop Jordan notes that in 1652 the Massachusetts General Court ordered Scotsmen, Indians, and Negroes to train with the Militia, but that, in 1656, Massachusetts and, in 1660, Connecticut excluded blacks from Militia service. See JORDAN, supra note 56, at 71.

35. See 2 LAWS OF THE ROYAL COLONY OF NEW JERSEY, supra note 52, at 49, 96, 289.

36. See HIGGINBOTHAM, supra note 51, at 201-15.

37. Ibid.

38. See generally REID, supra note 34.

39. Elbridge Gerry of Massachusetts thought a national government which controlled the militia would be potentially despotic. James Madison's Notes on the Constitutional Convention of 1787 (Aug. 21, 1787), in 1 1787: DRAFTING THE U.S. CONSTITUTION 916 (Wilbowin E. Benton, ed., 1986). With this power, national government "may enslave the States." Ibid. at 846. Oliver Ellsworth of Connecticut suggested that "[t]he whole authority over the Militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power." Ibid. at 909.

It is interesting, in light of the current debate, that both advocates and opponents of this increase in federal power assumed that the militia they were discussing would be one that enrolled almost all of the white male population between the ages of 16 and 60, and that that population would supply their own arms. George Mason of Virginia proposed "the idea of a select militia," but withdrew it. Ibid. at 909.

40. THE ANTIFEDERALISTS, supra note 74, at 57. This concern was the reason for the original language of the Second Amendment. See supra note 4.

41. The Virginia convention urged the adoption of the following language:

That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence for a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that in all cases, the military should be under strict subordination to, and governed by, the civil power.

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 TOGETHER WITH THE JOURNAL OF THE FEDERAL CONVENTION 657-59 (Jonathan Elliot ed., Ayer Co. 1987) (1907) [hereinafter ELLIOT'S DEBATES].

42. THE FEDERALIST NO. 25, at 161 (Alexander Hamilton) (The Heritage Press 1945). For a modern study that supports Hamilton's views concerning the military ineffectiveness of the militia, see BOORSTIN, supra note 18, at 352-72.

43. 5 ELLIOT'S DEBATES, supra note 80, at 464-65.

44. THE FEDERALIST NO. 46, at 319 (James Madison) (The Heritage Press 1945). The census of 1790 listed the white male population over age 16 as 813,298. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT 16 (1976). The census did not list the number over 60 that would have been exempt from militia duty.

45. 1 Stat. 271.

46. U.S. CONST. art I, s 2, cl. 3 (specifying congressional representation) is often cited for the proposition that blacks were not citizens because of the three-fifths clause. It should be noted that, under this clause, free Negroes were counted as whole persons for purposes of representation. The original wording of this provision specifically mentioned "white and other citizens," but that language was deleted by the committee on style as redundant. See 5 ELLIOT'S DEBATES, supra note 78, at 451.

47. JORDAN, supra note 56, at 125-26, 411-12.

48. Robert J. Cottrol, The Thirteenth Amendment and the North's Overlooked Egalitarian Heritage, 11 NAT'L BLACK LawJ. 198, 202-03 (1989) (discussing racism in early 19th-century America).

49. Paul Finkelman, Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North, 17 RUTGERS L.J. 415, 476 (1986).

50. See, e.g., GA. CONST. of 1779, art. IV, s 1, 1 FEDERAL AND STATE CONSTITUTIONS, supra note 104, at 386; MD. CONST. OF 1776, art. II, 1 FEDERAL AND STATE CONSTITUTIONS, supra note 104, at 821; MASS. CONST. of 1776, pt. I, declaration of rights, art. IX, 1 FEDERAL AND STATE CONSTITUTIONS, supra note 104, at 958; N.H. CONST. OF 1784, pt. I, bill of rights, art. XI, 2 FEDERAL AND STATE CONSTITUTIONS, supra note 104, at 1281; N.J. CONST. of 1776, art. IV, 2 FEDERAL AND STATE CONSTITUTIONS, supra note 104, at 1311; N.C. CONST. of 1776, constitution or frame of government, art. IX, 2 FEDERAL AND STATE CONSTITUTIONS, supra note 104, at 1411-12; PA. CONST. of 1776, declaration of rights, art. VII, 2 FEDERAL AND STATE CONSTITUTIONS, supra note 104, at 1541; VT. CONST. of 1777, ch. 1, declaration of rights, art. VIII, 2 FEDERAL AND STATE CONSTITUTIONS, supra note 104, at 1859.

Only Georgia, under its 1776 constitution, and South Carolina, in its 1790 constitution, provided explicit racial restrictions on the right to vote. See GA. CONST. of 1776, art. IX, 1 FEDERAL AND STATE CONSTITUTIONS, supra note 104, at 379; S.C. CONST. of 1790, art. I s 4, 2 FEDERAL AND STATE CONSTITUTIONS, supra note 104, at 1628.

51. See GA. CONST. of 1776, art. LVI, 1 FEDERAL AND STATE CONSTITUTIONS, supra note 104, at 283; GA. CONST. of 1789, art. IV, s 5, 1 FEDERAL AND STATE CONSTITUTIONS, supra note 104, at 386; MD. CONST. of 1776, art. XXXIII, 1 FEDERAL AND STATE CONSTITUTIONS, supra note 104, at 819-20 (freedom of religion for "all persons"); N.C. CONST. of 1776, art. VIII (rights in criminal proceedings to be informed of charges, to confront witnesses, and to remain silent for "every man," and freedom of

religion for "all men"), 2 FEDERAL AND STATE CONSTITUTIONS, supra note 104, at 1409; N.Y. CONST. of 1777, art. XIII (due process to be denied "no member of this state"), art. XXXVIII (freedom of religion "to all mankind"); PA.CONST. of 1776, art. II (freedom of religion for "all men"), art. VIII (due process for "every member of society"), 2 FEDERAL AND STATE CONSTITUTIONS, supra note 104, at 1541; PA. CONST. of 1790, art. XI, s 3 (freedom of religion to be denied to "no person"), art. XI, s 7 (freedom of the press for "every person" and freedom of speech for "every citizen"), art. XI, s 10 (due process to be denied to "no person"), 2 FEDERAL AND STATE CONSTITUTIONS, supra note 104, at 1554-55; S.C. CONST. of 1778, art. XXXVIII (freedom of religion), 2 FEDERAL AND STATE CONSTITUTIONS, supra note 104, at 1626-27; S.C. CONST. of 1790, art. VIII (freedom of religion "to all mankind"), 2 FEDERAL AND STATE CONSTITUTIONS, s supra note 104, at 1632.

52. LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790- 1860, at 79 (1961).

53. See STAMPP, supra note 27, at 215-17.

54. STAMPP, supra note 27, at 214-16.

55. See infra text accompanying notes 126-46.

56. Chapter 448, s 1, of the Kentucky Acts of 1818 was limited solely to slave offenders. Act of Feb. 10, 1819, ch. 448, s 1, 1819 Acts of Ky. 787. The Kentucky Acts of 1850 extended these provisions to free blacks as well. Act of Mar. 24, 1851, ch. 617, art. VII, s 7, 1850 Acts of Ky. 291, 300-01.

57. An Act Concerning Slaves, s 11, Acts of Fla. 289, 291 (1824). In 1825, Florida had provided a penalty for slaves using firelight to hunt at night, but this seems to have been a police measure intended to preserve wooded land, for whites were also penalized for this offense, albeit a lesser penalty. Act of Dec. 10, 1825, s 5, 1825 Laws of Fla. 78-80. Penalties for "firehunting" were reenacted in 1827, Act of Jan. 1, 1828, 1828 Laws of Fla. 24-25, and the penalties for a slave firehunting were reenacted in 1828, Act of Nov. 21, 1828, s 46, 1828 Laws of Fla. 174, 185.

58. 1825 Acts of Fla. 52, 55.

59. Ibid. s 9.

60. Act of Jan 31, 1831, 1831 Fla. Laws 30.

61. APTHEKER, supra note 58, at 298. For a full account of the revolt, the bloodiest in United States history, see Ibid. at 293-324. For a compilation of documentary sources on the revolt, see also HENRY I. TRAGLE, THE SOUTHAMPTON SLAVE REVOLT OF EIGHTEEN THIRTY-ONE: A COMPILATION OF SOURCE MATERIAL (1971). An account of the revolt novelized from Turner's confession can be found in WILLIAM STYRON, THE CONFESSIONS OF NAT TURNER (1967). Styron's novel has been criticized as failing to capture the power of religion to the 19th century black, and thus failing to tell the truth of the revolt. See, e.g., WILLIAM F. CHEEK, BLACK RESISTANCE BEFORE THE CIVIL WAR 116-17 (1970).

62. See HERBERT APTHEKER, NAT TURNER'S SLAVE REBELLION 74-94 (1966).

63. Ibid. at 74-75.

64. Ibid. at 75.

65. Ibid. at 81.

66. Act of Dec 23, 1833, s 7, 1833 Ga. Laws 226, 228.

67. Act of Feb. 17, 1833, ch. 671, ss 15, 17, 1833 Fla. Laws 26, 29. The black person offending the statute was to be "severely punished," incongruously enough "by moderate whipping," not to exceed thirty-nine strokes on the bare back. Ibid. s 17.

68. Act of Jan. 6, 1847, ch. 87, s 11, 1846 Fla. Laws 42, 44; Act of Dec. 17, 1861, ch. 1291, s 11, 1861 Fla. Laws 38, 40.

69. STAMPP, supra note 27, at 214-15.

70. See supra text accompanying notes 112-16.

71. See, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 10 (1977).

72. After Roberts v. Boston, 59 Mass. (5 Cush.) 198 (1849), upheld the provision of segregated public education in the City of Boston, the Massachusetts legislature outlawed segregated education. Act of Mar. 24, 1855, ch. 256, 1855 Mass. Acts 256; see Finkelman, supra note 99, at 465-467. In Connecticut, most schools were integrated before 1830; only in response to a request from the Hartford black community was a separate system established in that year. Ibid. at 468. The Iowa constitution provided for integration in public schools. See Clark v. Board of Directors, 24 Iowa 266 (1868) (construing IOWA CONST. of 1857, art. IX, s 12).

In Ohio, blacks were excluded entirely from public schools until 1834 when the state Supreme Court ruled that children of mixed black ancestry who were more than half white might attend; not until 1848 did the legislature provide for public education of any sort for other black children. Williams v. Directors of Sch. Dist., Ohio 578 (1834); see also Lane v. Baker, 12 Ohio 237 (1843). In 1848, the state legislature allowed blacks to be serviced by the public schools unless whites in the community were opposed; in the alternative, the legislature provided for segregated education. Act of Feb. 24, 1848, 1848 Ohio Laws 81. The following year, the legislature provided that the choice of segregated or integrated public education lie at the option of local school districts. Act of Feb. 10, 1849, 1849 Ohio Laws 17. Cincinnati refused to comply with the mandate to educate blacks until forced to do so by a combination of statutory and judicial persuasion. Act of Mar. 14, 1853, s 31, 1853 Ohio Laws 429; Act of Apr. 18, 1854, 1854 Ohio Laws 48; Act of Apr. 8, 1856, 1856 Ohio Laws 117; State ex rel. Directors of the E. & W. Sch. Dist. v. City of Cincinnati, 19 Ohio 178 (1850); see Finkelman, supra note 99, at 468-470. See generally UNITED STATES OFFICE OF EDUCATION, HISTORY OF SCHOOLS FOR THE COLORED POPULATION (1969). In Philadelphia, public education was provided for whites in 1818, and separate education was provided for blacks in 1822. Finkelman, supra note 99, at 468. In Providence, public education was segregated. COTTROL, supra note 111, at 90. Rural schools in Rhode Island, however, were integrated. Ibid. In New York, some school districts were segregated, among them that of New York City. Finkelman, supra note 99, at 463, 467-68.

73. From 1807 to 1849, Ohio required blacks entering the state to post a bond. Act of Jan. 25, 1807, ch. VIII, 1807 Ohio Gen. Assem. Laws 53, repealed by Act of Feb. 10, 1849, 1849 Ohio Laws 17. Michigan Territory passed a similar law in 1827, though there was only one recorded attempt to enforce it. Act of Apr 13, 1827, 1827 Mich. Review Laws 1-10 (1st & 2d Councils). DAVID M. KATZMAN, BEFORE THE GHETTO: BLACK DETROIT IN THE NINETEENTH CENTURY 7 n.6 (1973). Indiana required a bond from 1831

until 1851, when a new constitution forbade black immigration entirely. Act of Feb. 10, 1831, 1831 Ind. Review Laws 375, superseded by IND. CONST. of 1851, art. XIII, s 1 (amended 1881). Illinois went the same route by coupling the repeal of its 1829 bond provisions with a prohibition on black immigration in its 1848 constitution. ILL. CONST. of 1848, art. XIV; Act of Jan. 17, 1832-33, Ill. Review Laws 463, amended by Act of Feb 1, 1831, 1832-33 Ill. Review Laws 462, repealed by Act of Feb. 12, 1853, 1853 Ill. Laws 57. Oregon's 1859 constitution forbade blacks to enter the state, OR. CONST. of 1859, art. XVIII (repealed 1926), and Iowa provided for a fine of two dollars a day for any black remaining in the state for more than three days. Act of Feb. 5, 1851, 1851 Iowa Laws 172.

74. From 1833 to 1838, Connecticut prohibited the establishment of schools for nonresident blacks. Act of May 24, 1833, ch. IX, 1833 Conn. Pub. Acts 425, repealed by Act of May 31, 1838, ch. XXXIV, 1838 Conn. Pub. Acts 30; see also Crandall v. State, 10 Conn. 339 (1834) (attempted prosecution under this statute failed due to an insufficient information). See Finkelman, supra note 99, at 430-43 (discussing the lack of enforcement of statutes regulating black immigration).

75. See LITWACK, supra note 116, at 159, 165 (in fields where blacks were allowed to compete with whites, who were often the new Irish immigrants, violence often erupted).

76. Ibid. at 153; see also LEONARD P. CURRY, THE FREE BLACK IN URBAN AMERICA 1800-1850: THE SHADOW OF THE DREAM 96-111 (1981).

77. See supra Part I.c.2.

78. JACK D. FONER, BLACKS AND THE MILITARY IN AMERICAN HISTORY: A NEW PERSPECTIVE 20-21 (1974).

79. See COTTROL, supra note 97, at 63.

80. OSCAR HANDLIN, BOSTON'S IMMIGRANTS: A STUDY IN ACCULTURATION 175 & n.110 (1959).

81. CURRY, supra note 153, at 100; VICTOR ULLMAN, MARTIN R. DELANY: THE BEGINNINGS OF BLACK NATIONALISM 29-31 (1971).

82. CURRY, supra note 153, at 105-06.

83. Ibid. at 107-08; WENDELL P. DABNEY, CINCINNATI'S COLORED CITIZENS: HISTORICAL, SOCIOLOGICAL AND BIOGRAPHICAL 48-55 (Dabney Publishing Co. 1970) (1926); Cincinnati Riot, NILES' NAT'L REG. (Baltimore), Sept. 11, 1841, at 32.

84. Even during the Civil War, the Lincoln administration and Congress acted on the legal assumption that free blacks were citizens. Despite Chief Justice Taney's opinion in Dred Scott that neither free blacks nor slaves could be citizens, Dred Scott v. Sanford, 60 U.S. (15 How.) 393, 417 (1856), Lincoln's Attorney General Edward Bates issued an opinion in 1862 declaring that free blacks were citizens and entitled to be masters of an American vessel. See 10 Op. Atty. Gen. 382, 413 (1862). That same year, Congress amended the 1792 militia statute, striking out the restriction of militia membership to white men. See Act of July 17, 1862, ch. 36, s 12, 12 Stat. 597, 599. While it could be argued that these measures were in part motivated by military needs, it should be noted that the United States and various states had previously enlisted black troops during time of crisis despite the restrictions in the 1792 Act. See supra Part I.c.2. Thus, these measures reflected long standing Republican and

antislavery beliefs concerning the citizenship of free Negroes. See generally Cottrol, supra note 91. For a good discussion of black citizenship rights in the antebellum North, see generally Finkelman, supra note 99.

85. 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.

86. See generally Finkelman, supra note 99.

87. KENNETH STAMPP, THE ERA OF RECONSTRUCTION, 1865-1877, at 80 (1965).

88. FONER, supra note 29, at 198 (1988) (quoting letter from William H. Trescot to James Law Orr, Dec. 13, 1865, South Carolina's Governor's Papers).

89. FONER, supra note 29, at 200.

90. STAMPP, supra note 171, at 80

91. Ibid.

92. No Negro who is not in the military service shall be allowed to carry fire-arms, or any kind of weapons, within the parish, without the special permission of his employers, approved and endorsed by the nearest and most convenient chief of patrol. Any one violating the provisions of this section shall forfeit his weapons and pay a fine of five dollars, or in default of the payment of said fine, shall be forced to work five days on the public road, or suffer corporal punishment as hereinafter provided.

Louisiana Statute of 1865, reprinted in DOCUMENTARY HISTORY OF RECONSTRUCTION, supra note 170, at 280

93. [N]o freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife, and on conviction thereof in the county court shall be punished by fine, not exceeding ten dollars, and pay the cost 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.

Mississippi Statute of 1865, reprinted in DOCUMENTARY HISTORY OF RECONSTRUCTION, supra note 170, at 290.

94. 1. That it shall not be lawful for any freedman, mulatto, or free person of color in this State, to own fire-arms, or carry about his person a pistol or other deadly weapon.

2. That after the 20th day of January, 1866, any person thus offending may be arrested upon the warrant of any acting justice of the peace, and upon conviction fined any sum not exceeding $100 or imprisoned in the county jail, or put to labor on the public works of any county, incorporated town, city, or village, for any term not exceeding three months.

3. That if any gun, pistol or other deadly weapon be found in the possession of any freedman, mulatto or free person of color, the same may by any justice of the peace, sheriff, or constable be taken from such freedman, mulatto, or free

person of color; and if such person is proved to be the owner thereof, the same shall, upon an order of any justice of the peace, be sold, and the proceeds thereof paid over to such freedman, mulatto, or person of color owning the same.

4. That it shall not be lawful for any person to sell, give, or lend fire- arms or ammunition of any description whatever, to any freedman, free negro or mulatto; and any person so violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined in the sum of not less than fifty nor more than one hundred dollars, at the discretion of the jury trying the case.

See THE RECONSTRUCTION AMENDMENTS' DEBATES 209 (Alfred Avins ed., 1967).

95. See FONER, supra note 29, at 225-227; STAMPP, supra note 171, at 80-81.

96. The Ku Klux Klan was formed in 1866 and immediately launched its campaign of terror against blacks and southern white unionists. See FONER, supra note 29, at 342; infra text at notes 217-223.

97. During the debates over the Civil Rights Act of 1866, Republican Representative Sidney Clarke of Kansas expressed the fears of many northern Republicans who saw the clear military implications of allowing the newly formed white militias in Southern states to disarm blacks:

Who, sir, were those men? Not the present militia; but the brave black soldiers of the Union, disarmed and robbed by this wicked and despotic order. Nearly every white man in [Mississippi] 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 their arms with which they went to battle. And I regret, sir, that justice compels me to say, to the disgrace of the Federal Government, that the "reconstructed" state authorities of Mississippi were allowed to rob and disarm our veteran soldiers and arm the rebels fresh from the field of treasonable strife. Sir, the disarmed loyalists of Alabama, Mississippi, and Louisiana are powerless today, and oppressed by the pardoned and encouraged rebels of those States.

THE RECONSTRUCTION AMENDMENTS' DEBATES, supra note 178, at 209.

98. Representative Roswell Hart, Republican from New York, captured those sentiments during the debates over the Civil Rights Act of 1866:

The Constitution clearly describes that to be a republican form of government for which it was expressly framed. A government which shall "establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty"; a government whose "citizens shall be entitled to all privileges and immunities of other citizens"; where "no law shall be made prohibiting the free exercise of religion"; where "the right of the people to keep and bear arms shall not be infringed"; where "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated," and where "no person shall be deprived of life, liberty, or property without due process of law."

Have these rebellious States such a form of government? If they have not, it is the duty of the United States to guaranty that they have it speedily.

THE RECONSTRUCTION AMENDMENTS' DEBATES, supra note 178, at 193.

99. For a good general discussion of the incorporation question, see MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986). For a good discussion of the 39th Congress's views concerning the Second Amendment and its incorporation via the Fourteenth, see HALBROOK, supra note 6, at 107-23.

100. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . ." U.S. CONST. amend. XIV, s 1.

101. THE RECONSTRUCTION AMENDMENTS' DEBATES, supra note 178, at 156-60, 217- 18.

102. Ibid. at 219 (remarks by Republican Sen. Jacob Howard of Michigan on privileges and immunities of citizens).

103. Butchers Benevolent Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 83 U.S. (16 Wall.) 36 (1872).

104. 92 U.S. 542 (1876)

105. 16 Stat. 140 (1870) (codified as amended at 18 U.S.C. ss 241- 42 (1988)). The relevant passage reads:

> That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States or because of his having exercised the same, such persons shall be held guilty of a felony . . . .

Ibid. at 141

106. 92 U.S. at 548-59.

107. This can also be seen in the Court's reaction to the federal government's first public accommodations statute, the Civil Rights Act of 1875. With much the same reasoning, the Court held that Congress had no power to prohibit discrimination in public accommodations within states. See The Civil Rights Cases, 109 U.S. 3 (1883).

108. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) (declaring the administration of a municipal ordinance discriminatory); Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (striking down a statute prohibiting blacks from serving as jurors).

109. 116 U.S. 252 (1886).

110. Ibid. at 253.

111. Ibid. at 265.

112. Ibid.

113. RABLE, supra note 29, at 88-90; STAMPP, supra note 171, at 199-204.

114. Benno C. Schmidt, Jr., Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases, 82 COLUM. Law Review 646, 653-55 (1982).

115. GEORGE M. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN

HISTORY 251-52 (1981); CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 32 (1978); JOEL WILLIAMSON, A RAGE FOR ORDER: BLACK/WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION 124 (1986).

116. See generally JORDAN, supra note 56, at 3-43.

117. LITWACK, supra note 116, at 153-86.

118. Cottrol, supra note 91, at 1007-19.

119. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 22-23 (3d ed. 1974).

120. See infra text accompanying notes 169-178. See generally WOODWARD, supra note 203, at 22-29.

121. See Ibid. at 18-21 (the Jim Crow system was born in the North where systematic segregation, with the backing of legal and extralegal codes, permeated black life in the free states by 1860); see also LITWACK, supra note 116, at 97-99 (in addition to statutes and customs that limited the political and judicial rights of blacks, extralegal codes enforced by public opinion perpetuated the North's systematic segregation of blacks from whites).

122. See RICHARD C. WADE, SLAVERY IN THE CITIES: THE SOUTH 1820-1860, at 180- 208 (1964) (although more contact between blacks and whites occurred in urban areas of the South, both social standards and a legal blueprint continued the subjugation of blacks to whites).

123. 109 U.S. 3 (1883).

124. 163 U.S. 537 (1896).

125. 109 U.S. 3.

126. 163 U.S. at 548.

127. Ibid. at 551.

128. Ibid.

129. Jim Crow was not exclusively a southern experience after the Civil War. For example, at one point or another, antimiscegenation laws have been enacted by forty-one of the fifty states. Harvey M. Applebaum, Miscegenation Statutes: A Constitutional and Social Problem, 53 GEO. L.J. 49, 50-51 & 50 n.9 (1964). The Adams case, in which the federal government challenged separate university facilities throughout the union, involved the State of Pennsylvania. See Adams v. Richardson, 356 F. Supp. 92, 100 (D.D.C. 1973); Adams v. Richardson, 351 F. Supp. 636, 637 (D.D.C. 1972). Hansberry v. Lee, 311 U.S. 32 (1940), involved a covenant restricting the sale of property in Illinois to blacks. The set of consolidated cases that outlawed the separate but equal doctrine would later be known as Brown v. Board of Educ., 347 U.S. 483 (1954), the defendant board of education was located in Kansas, a Northern state.

130. Blood-Curdling Lynching Witnessed by 2,000 Persons, CHATTANOOGA TIMES, Feb. 13, 1918, reprinted in GINZBURG, supra note 231, 114-116.

131. IDA B. WELLS-BARNETT, CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS 62 (Alfreda M. Duster ed., 1970). Wells-Barnett's fears for her safety, fortunately, were never realized. Born a slave in 1862, she died of natural causes in 1931. Ibid. at xxx-xxxi, 7. Eli Cooper of Caldwell, Georgia was not so lucky, however. Cooper was alleged to

have said that the "Negro has been run over for fifty years, but it must stop now, and pistols and shotguns are the only weapons to stop a mob." Cooper was dragged from his home by a mob of 20 men and killed as his wife looked on. Church Burnings Follow Negro Agitator's Lynching, CHI. DEFENDER, Sept. 6, 1919, reprinted in GINZBURG, supra note 231, at 124.

132. Letter from Texas Reveals Lynching's Ironic Facts, N.Y. NEGRO WORLD, Aug. 22, 1920, reprinted in GINZBURG, supra note 231, at 139-40.

133. Lone Survivor of Atrocity Recounts Events of Lynching, N.Y. AMSTERDAM NEWS, June 1, 1927, reprinted in GINZBURG, supra note 231, at 175-78.

134. WELLS-BARNETT, supra note 240, at 50. To forestall the occurrence of future incidents of the same nature, a Tennessee court ordered the local sheriff to take charge of the arms of the black militia unit. Ibid.

135. WALTER WHITE, A MAN CALLED WHITE 4-12 (1948), reprinted in THE NEGRO AND THE CITY, supra note 219, at 121-26.

136. Ibid. at 126.

137. JERVIS ANDERSON, A. PHILLIP RANDOLPH: A BIOGRAPHICAL PORTRAIT 41-42 (1973).

138. Ibid. at 42.

139. See, e.g., John R. Salter, Jr. & Donald B. Kates, Jr., The Necessity of Access to Firearms by Dissenters and Minorities Whom Government is Unwilling or Unable to Protect, in RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT, 185, 189-93 (Donald B. Kates, Jr. ed., 1979).

140. Donald B. Kates, Jr., recalls that:

As a civil rights worker in a Southern State during the early 1960's, I found that the possession of firearms for self-defense was almost universally endorsed by the black community, for it could not depend on police protection from the KKK. The leading civil rights lawyer in the state (then and now a nationally prominent figure) went nowhere without a revolver on his person or in his briefcase. The black lawyer for whom I worked principally did not carry a gun all the time, but he attributed the relative quiescence of the Klan to the fact that the black community was so heavily armed. Everyone remembered an incident several years before, in which the state's Klansmen attempted to break up a civil rights meeting and were routed by return gunfire. When one of our clients (a school-teacher who had been fired for her leadership in the Movement) was threatened by the Klan, I joined the group that stood armed vigil outside her house nightly. No attack ever came--though the Klan certainly knew that the police would have done nothing to hinder or punish them.

RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT, supra note 256, at 186.

141. DAISY BATES, THE LONG SHADOW OF LITTLE ROCK, A MEMOIR 94 (1982).

142. HOWELL RAINES, MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED 275-76 (1977).

143. Telephone interview with David Dennis (Oct. 30, 1991).

144. Hamilton Bims, Deacons for Defense, EBONY, Sept. 1965, at 25, 26; see also Roy Reed, The Deacons, Too, Ride by Night, N.Y. TIMES, Aug. 15, 1965, Magazine, at 10.

145. Bims, supra note 271, at 25-26.

146. Ibid. at 26. Like the Deacons for Defense and Justice was the Monroe, North Carolina chapter of the NAACP, which acquired firearms and used them to deal with the Ku Klux Klan. ROBERT F. WILLIAMS, NEGROES WITH GUNS 42-49, 54- 57 (1962). The Deacons for Defense and Justice are to be contrasted with the Black Panther Party for Self Defense. The Black Panther Program included the following statement:

We believe we can end police brutality in our black community by organizing black self-defense groups that are dedicated to defending our black community from racist police oppression and brutality. The Second Amendment to the Constitution of the United States gives a right to bear arms. We therefore believe that all black people should arm themselves for self-defense.

Black Panther Party--Platform and Program, reprinted in REGINALD MAJOR, A PANTHER IS A BLACK CAT 286 (1971). Yet, the Black Panthers deteriorated into an ineffective group of revolutionaries, at times using arguably criminal means of effectuating their agenda. See generally GENE MARINE, THE BLACK PANTHERS (1969); BOBBY SEALE, SEIZE THE TIME: THE STORY OF THE BLACK PANTHER PARTY AND HUEY P. NEWTON (1968).

147. JAMES FARMER, LAY BARE THE HEART: AN AUTOBIOGRAPHY OF THE CIVIL RIGHTS MOVEMENT 287 (1985).

148. See Bims, supra note 271, at 26; see also Reed, supra note 268, at 10.

149. See Reed, supra note 271, at 10; see also Bims, supra note 268, at 26.

150. RAINES, supra note 269, at 417 (interview with Charles R. Sims, leader of the Bogalousa Deacons); see Bims, supra note 271, at 26; Reed, supra note 271, at 10-11.

151. FARMER, supra note 274, at 288.

152. The beating of Rodney King on March 3, 1991, by members of the Los Angeles Police Department, captured on tape by a serendipitous amateur photographer, has focused attention recently on the problem of police brutality, though the problem predates and presumably continues beyond the incident. See Tracey Wood & Faye Fiore, Beating Victim Says He Obeyed Police, L.A. TIMES, Mar. 7, 1991, at A1.

ETHICAL PROBLEMS OF MASS MURDER COVERAGE IN THE MASS MEDIA

by Clayton Cramer[1]

This article analyzes news coverage of mass murders in and Newsweek for the period 1984-91 for evidence of disproportionate, perhaps politically motivated coverage of certain categories of mass murder. After discussing ethical problems related to news and entertainment attention to mass murder, the article suggests methods of enhancing the public's understanding of the nature of murder. The article was awarded First Place in the 1993 Association for Education in Journalism and Mass Communications Writing Contest. The article was first published in Volume 9 of the Journal of Mass Media Ethics, and is reprinted, with revisions, by permission. Clayton Cramer is the author of, among other works, For the Defense of the Themselves and the State: The Original Intent and Judicial Interpretation of the Right to Keep and Bear Arms (Praeger: 1994); "Shall Issue": The New Breed of Concealed Handgun Permit Laws (co-author David B. Kopel, Independence Institute: 1994); and Firing Back: A Clear, Simple Guide to Defending Your Constitutional Right to Bear Arms (Krause: 1994).

On January 17, 1989, a homosexual prostitute and drug addict with a long history of criminal offenses and mental disturbance, Patrick Purdy, drove up to Cleveland Elementary School in Stockton, California. He firebombed his car, entered a playground during recess carrying a Chinese-made AK56s rifle, shot to death five children, wounded 29 other children and a teacher, then shot himself in the head with a 9mm handgun.

Initial coverage of Purdy's crime was relatively restrained, and only the essential details were reported. gave Purdy only part of a page in the first issue after the crime ("Slaughter in a School Yard", 1989). *Newsweek* gave a single page to "Death on the Playground," and pointed to four prior attacks on school children, starting with Laurie Dann. Purdy's photograph was included in the *Newsweek* article. *Newsweek's* article (Baker, Joseph, and Cerio, 1989) quoted one of the authors of a book on mass murder: "There's a copycat element that cannot be denied."

But a week later, Patrick Purdy's name continued to receive press attention, and consequently his fame increased. The front

cover of showed an AK-47 and an AR-15 crossed, beneath an outline of the U.S., stylized into a jawless skull, entitled, "Armed America." Inside, George Church's "The Other Arms Race," (1989) which occupied slightly more than 6½ pages, opened with Patrick Purdy's name. Articles referencing Purdy or his crime continued to appear in both *Newsweek* or *Time* for many months.

On September 14, 1989, Joseph Wesbecker, a disabled employee of Standard Gravure Co. in Kentucky, entered the printing plant carrying an AKS and a 9mm handgun. How profoundly similar Wesbecker's actions were to Purdy's was shortly detailed by UPI wire service stories, such as William H. Inman's "Wesbecker's rampage is boon to gun dealers" (1989a):

> When Joseph Wesbecker, a mental patient, read about the destructive power of Patrick Purdy's weapon in a Stockdale[sic], Calif., schoolyard massacre in January, Wesbecker knew he'd have to have the gun.
>
> So he bought an AK-47, a Chinese-made assault rifle firing 7.62mm rounds capable of blowing holes in concrete walls. He used a picture to describe the gun to a local dealer, who ordered it through the mail.
>
> Wesbecker, police say, was already planned a massacre of his own -- one which killed eight Thursday and wounded 13. He used an AK-47 on all victims but himself. He committed suicide with a pistol.
>
> In the same way Wesbecker's interest was peaked[sic] -- he had clipped out a February *Time* magazine article on some of Purdy's exploits -- gun dealers expect a renewed blaze of interest in the big gun.

"With all the media attention since then," said Ray Yeager, owner of Ray's Gun Shop in Louisville, "and all the anti-gunners's attempts to ban (assault rifles), the result has been massive sales."[2]

How important was the news coverage of Purdy's crime in influencing Wesbecker's actions, above and beyond identifying the weapon of choice for such an act of savagery?

> Police now believe Wesbecker had begun plotting the suicide rampage for at least seven months. Searching Wesbecker's house, police found a copy of a Feb. 6 *Time* magazine detailing mass murders in California,

> Oklahoma, Texas and elsewhere. A headline underlined by Wesbecker read "Calendar of Senseless Shootings."
>
> The major gun purchases were made between February and May.
>
> Initially police thought Wesbecker was an ardent gun handler or paramilitary buff, but evidence indicates his interest in guns was relatively young.
>
> "We have no information indicating he had a collection of guns, or was even interested in them before last year," said Lt. Jeff Moody, homicide investigator. "As far as we know he had no formal training in weapon use." (Inman, 1989b)

This disturbing information about the connection between the article and Wesbecker's actions didn't make it into , *Newsweek*, or many newspapers' coverage of this tragedy. The Los Angeles Times, New York Times, and Santa Rosa (Cal.) Press-Democrat, all left this embarrassing detail—at least embarrassing to —out of their coverage. It wasn't a lack of space that was responsible for this omission, for this was a front-page story in the Los Angeles Times and the Press-Democrat.

Nor was it that no one in the media saw a connection between Wesbecker's reading material and the crime. The Los Angeles Times, the Press-Democrat, and the New York Times all suggested a connection between Wesbecker's actions and *Soldier of Fortune* magazine. Wesbecker had taken to reading *Soldier of Fortune*, but none of the articles indicate that *Soldier of Fortune* had been found in such an incriminating position as the article (Harrison, 1989). Apparently, *Soldier of Fortune's* mere presence in Wesbecker's home was an important piece of news, while the marked-up copy of , left open, wasn't important enough to merit coverage. Of the four newspapers examined for coverage, only the San Francisco Chronicle included the disturbing connection between *Time's* coverage and the crime:

> At Wesbecker's home, police found manuals on weapons and a February 6 issue of *Time* magazine devoted to mass killers, including Robert Sherrill, who slaughtered 14 people in an Oklahoma post office three years ago, and Patrick Purdy, who killed five children with an AK-47 assault rifle in Stockton, Calif., in January. An AK-47 was the main weapon used by Wesbecker. ("Kentucky Killer's Weird Collection", 1989)

Clearly, Joseph Wesbecker was not a healthy, well-adjusted person driven to commit his crime simply because of the sensational news coverage. We should not take away Joseph Wesbecker's personal responsibility for his actions. As tempting as it might be to hold *Time* responsible for having indirectly caused this horrible crime, the temptation must be resisted. The editors of *Time* might have foreseen the possibility of their coverage promoting "copycat" crimes, but to hold *Time* legally liable would make it impossible to ever write a factual account of a serious crime, without fear of being hauled into a court to answer for the actions of a deranged reader. Indeed, even this article's discussion of the ethical problems could be considered inflammatory, by such a standard.

But even absent a notion of legal responsibility, there should be a notion of moral responsibility, and awareness of a causal relationship should provoke concern among journalists. Joseph Wesbecker, without question, was headed towards some sort of unpleasant ending to his life. But in the absence of the February 6th coverage by *Time*, would he have chosen this particular method of getting attention? Wesbecker was under psychiatric care at the time, and had already made three suicide attempts (Inman, 1989b). Did *Time's* sensational coverage, transforming the short unhappy life of Patrick Purdy from obscurity to permanent notoriety, encourage Wesbecker to transform the end of his life from, at most, a local news story of a suicide, into a story that was carried from coast to coast?

Newsweek and especially , perhaps for reasons of circulation, perhaps for political reasons, have engaged in ethically questionable practices in recent years in their coverage of mass murder in the United States. These practices were a major cause of the murder of seven people in 1989, and may have played a role in the murders of others in recent years. The actions they took provide a concrete example of a problem in media ethics that is at least two centuries old: how much coverage should the press give to violent crime?

There are three related ethical problems that will be addressed in this article:

1. The level of coverage given by and *Newsweek* (and perhaps, by the other news media) to certain great crimes appears to encourage unbalanced people, seeking a lasting fame, to copy these crimes.

2. Analysis of the quantity of press coverage given to mass murder suggests that political motivations may have caused

Newsweek and especially to give undue attention to a particular type of mass murder, ultimately to the detriment of public safety.

3. The coverage given to murder by *Newsweek* and gives the electorate a very distorted notion of the nature of murder in the United States, almost certainly in the interests of promoting a particular political agenda.

Fame and infamy are in an ethical sense, opposites. Functionally, they are nearly identical. Imagine an alien civilization that does not share our notions of good and evil, studying the expanding shell of television signals emanating from our planet. To such extraterrestials, Winston Churchill and Adolph Hitler are both "famous"; without an ability to appreciate the vituperation our civilization uses to describe Hitler, they might conclude that both were "great men." Indeed, they might assume that Hitler was the "greater" of the two, because there has certainly been more broadcast about Hitler than about Churchill. The human need to celebrate human nobility, and to denounce human depravity, has caused us to devote tremendous attention, both scholarly and popular, to portraying the polar opposites of good and evil.

The pursuit of fame can lead people to acts of great courage and nobility. It can also lead to acts of great savagery. The Italian immigrant Simon Rodia, builder of Los Angeles' Watts Towers, once explained that his artistic effort was the result of an ordinary person's desire for fame, because, "A man has to be good-good or bad-bad to be remembered." ("Simon Rodia, 90, Tower Builder", 1965) But for most people, fame isn't as easy as building towers of steel and concrete. Unfortunately, being "bad-bad" is easier than being "good-good"—as history amply demonstrates.

In 356 BC, an otherwise unremarkable Greek named Herostratus burned the Temple of Artemis at Ephesus in an effort to immortalize his name. That we remember the name of this arsonist, the destroyer of one of the Seven Wonders of the World, shows that great crimes can achieve lasting fame (Bengston, 1968, p. 305; De Camp, 1963, p. 91; Coleman-North, 1963, 10:414).[3] Fisher Ames, a Massachusetts Federalist who sat in the House of Representatives from 1789 to 1800, expressed his concerns about this very subject in the October 1801 issue of the Palladium:

> Some of the shocking articles in the papers raise simple, and very simple, wonder; some terror; and some horror and disgust. Now what instruction is there in these

> endless wonders? Who is the wiser or happier for reading the accounts of them? On the contrary, do they not shock tender minds, and addle shallow brains? They make a thousand old maids, and eight or ten thousand booby boys, afraid to go to bed alone. Worse than this happens; for some eccentric minds are turned to mischief by such accounts as they receive of troops of incendiaries burning our cities; the spirit of imitation is contagious; and boys are found unaccountably bent to do as men do...

Every horrid story in a newspaper produces a shock; but, after some time, this shock lessens. At length, such stories are so far from giving pain, that they rather raise curiosity, and we desire nothing so much as the particulars of terrible tragedies (Allen, 1983, pp. 14-15).

The problem that concerned Rep. Ames remains with us today—as the two 1989 mass murders discussed above, linked by this "spirit of imitation," demonstrate.

Mass murder isn't new to America (or anywhere else)—nor is the popular horror and interest in such crimes. Consider the following children's doggerel about the 1892 murders in Fall River, Massachusetts ("Borden, Lizzie Andrew", 1963, 4:266):

> Lizzie Borden took an ax
> and gave her mother forty whacks.
> When she saw what she had done,
> she gave her father forty-one.

As a child growing up in the 1960s, I remember vividly the horror at, but also widespread coverage of, the crimes of Richard Speck, Charles Manson and family, and the Zodiac killer. In the mid-1960s, Charles Whitman made himself a national figure by perpetrating a murderous rampage from a university tower in Texas, killing 16 people with a rifle.

In the 1980s, there were a number of mass murders in the United States, and yet the quantity of press coverage for these crimes varied widely. All other things being equal, when mass murder is committed in this country, we should expect the coverage to be generally proportionate to the number of victims. How do we measure the quantity of press coverage for a major crime? The more remote a newspaper is from a crime, the less extensive the coverage we should expect. As a result, it would not be a meaningful measure of the quantity of press coverage to

examine local or even regional newspaper coverage; the coverage of a West Coast crime in California newspapers will doubtless be far greater than coverage of a similar crime that took place on the East Coast. A more meaningful measurement is the press coverage given by the national news magazines, such as and *Newsweek.*

An analysis of articles in and *Newsweek*, America's mass circulation news magazines, shows some interesting characteristics of how mass murder in America is covered. For the purposes of this article, any article which mentioned a mass murderer, even by referring to his specific criminal act without using his name, was considered to be "fame" in the sense we defined earlier in this paper. Even if the article was primarily about some related subject, if the mass murderer was mentioned, the entire article was considered as adding to that killer's fame.

Why the entire article? Because a potential mass murderer will consider any future article that mentions him to be "publicity." Wesbecker demonstrated this by leaving open in his room the February 6th *Time* article. Although the article was primarily about gun control and mass murder, it included Purdy's name and crime as part of the introduction.

In the case of mass murderers who used guns, I looked through all the articles during the period 1984-1991 that were about gun control or mass murder, and I included only those that referenced the murderers or their crimes. For arson murders, I looked up articles about arson and fire hazards. Articles purely about gun control or fire hazards that failed to mention these mass murderers by name or action, were not included in the analysis. For mass murders committed with other weapons, I looked up appropriate articles about the weapon used, as well as articles about mass murder.

The criticism could be made that even a brief mention of a mass murderer's actions in a larger article will tend to exaggerate the level of coverage given to that crime. This is a valid concern, but as long as all categories of mass murder receive identical treatment, the results should be roughly equivalent. Where an article contained no mention of the mass murderer or his actions, and a sidebar article did, only the sidebar article was included in the computation of the space given.

What constitutes mass murder? Clearly, there is a difference between serial murderers, and mass murderers, and a difference that makes them non-comparable from the standpoint of analyzing the news coverage. The difference is that serial

murderers commit their crimes over a very long period of time, and so each murder is, by itself, a minor story. Also, because serial murderers sometimes are successful in making the remains of the victim disappear, the only news story is when that serial murderer's actions are finally noticed.

For these reasons, and for the purposes of this article, a mass murder has two distinguishing characteristics:

1. Actions intentionally taken, with the expectation that great loss of life will result, or where any reasonable person would recognize that great loss of life will result. The component of expecting loss of life, of course, is a fundamental part of the question of whether publicity plays a role in promoting such crimes.

For this reason, I have excluded such tragedies as Larry Mahoney's drunken driving motor vehicle wreck that caused 27 deaths in May of 1988. Mahoney was convicted of manslaughter, so the essential element of premeditation was lacking, except in the sense that getting drunk and operating a motor vehicle is potentially quite dangerous ("Convicted. Larry Mahoney", 1990). However, including crimes like Mahoney's in this study would tend to strengthen my argument that and *Newsweek* give special treatment to firearms mass murderers, since Mahoney received no press in *Newsweek*, and only 0.15 square inches per victim in .

2. The actions causing the loss of life all take place within 24 hours, or the deaths are all discovered within 24 hours. This is an arbitrary period of time, of course. It could have been extended to 48 hours, or 72 hours, however, without significantly widening the bloody pool of crimes whose coverage we will study.

Most people I talk to are quite surprised to find out that there are mass murderers who kill with weapons other than guns. They are even more surprised when they find out that arson mass murder victims in the last few years have outnumbered gun mass murders. Why is this a surprise? The reason is that press coverage of non-firearms mass murders is almost non-existent. As the table below shows, arson mass murderers and knife mass murderers receive relatively little attention from and *Newsweek*. As should be obvious, there is a very large discrepancy between the amount of coverage given to arson mass murders, and mass murderers involving guns exclusively.[4] Almost nine times as much coverage were given to exclusive firearms mass murderers, as to arson mass murderers.

Murderer	Month/ Year	Dead	sq. in.	Sq. Inches /Dead	*Newsweek* sq. in.	*Newsweek* Sq. Inches/ Dead	Total Sq. Inches/ Dead
Firearms Murders		**152**	**1420.44**	**9.34**	**849.59**	**5.59**	**14.93**
Firearms Murders excl. Patrick Purdy		**146**	**700.44**	**4.80**	**479.25**	**3.28**	**8.08**
James Huberty	Jul-84	22	109.63	4.98	157.50	7.16	116.78
Sylvia Seegrist	Nov-85	2	20.75	10.38	0.00	0.00	20.75
William Bryan Cruse	Apr-87	6	33.06	5.51	0.00	0.00	33.06
David Burke	Dec-87	43	52.50	1.22	57.75	1.34	53.84
Robert Dreesman	Dec-87	7	105.00	15.00	0.00	0.00	105.00
Ronald Gene Simmons	Dec-87	16	15.94	1.00	78.75	4.92	20.86
Richard Wade Farley	Feb-88	7	11.25	1.61	0.00	0.00	11.25
Laurie Wasserman Dann	May-88	2	107.63	53.81	54.00	27.00	134.63
Patrick Purdy	Jan-89	6	720.00	120.00	370.34	61.72	781.72
Joseph T. Wesbecker	Sep-89	8	19.69	2.46	52.50	6.56	26.25
James E. Pough	Jun-90	9	0.00	0.00	0.00	0.00	0.00
George Hennard	Oct-91	24	225.00	9.38	78.75	3.28	228.28
Knife/Gun Murders		**7**	**78.75**	**11.25**	**0.00**	**0.00**	**11.25**
Ramon Salcido	Apr-89	7	78.75	11.25	0.00	0.00	11.25
Arson Murders		**183**	**232.25**	**1.27**	**78.75**	**0.43**	**1.70**
Hector Escudero	Dec-87	96	155.63	1.62	78.75	0.82	2.44
Julio Gonzalez	Apr-90	87	76.63	0.88	0.00	0.00	0.88

A large part of this discrepancy, however, is because of the many articles that mentioned Patrick Purdy's crime. But even excluding all coverage of Patrick Purdy's crimes, the square inches per dead body for firearms mass murderers is still 4.75 times the coverage for the arson mass murderers. Plotting the square inches per dead body coverage by murderer shows how dramatic a difference this was.

In *Newsweek*, mass murder coverage rose dramatically with the crimes of Laurie Wasserman Dann and Patrick Purdy—and suddenly dived back to the pre-Dann levels with the Wesbecker incident. , more prone to covering firearms mass murders before Dann and Purdy, was the more noticeably restrained of the two magazines in its coverage of mass murders from Wesbecker onward. Did someone at see the connection between their coverage of Purdy, and Wesbecker's bloody rampage?

Was Wesbecker just one amazing case? While considerable energy has been devoted by the academic community to research on the effects of violent entertainment on aggression, a search of the available literature suggests that the influence of *news* coverage on aggression has not been examined. The only work even remotely related to this topic is Cairns' study (1990) of how television news coverage of political violence influenced children's perceptions of the level of political violence in Northern Ireland. The study made no attempt to determine what effect, if any, this news coverage had on levels of violence or aggression among the children themselves.

In the area of entertainment violence, a rich scientific literature exists, but serious questions exist as to its applicability to the effects of news coverage on adults. Those studies that attempted to evaluate the effects of regular televised entertainment violence either explicitly excluded special news programs that appeared in prime time (Price, Merrill, and Clause, 1992), or implied that only entertainment programs were rated for violence (Harris, 1992).

The applicability to adults of the research that has been done regarding violent entertainment's effects on children is also a troubling question. Wood, Wong, and Chachere's paper (1991) which summarized the existing research on children, aggression, and media violence, concluded that the results demonstrated a statistically significant relationship between media violence and subsequent aggressive behavior, but also admitted:

> All of our studies were conducted with children and adolescents, and our results may be peculiar to young samples. Children are sometimes characterized as especially susceptible to media impact (cf. Wartella, 1988). However, the relation between age and impact may be complex. Hearold (1986) found a decline in media effects on physical aggression with age for girls but not for boys. (Wood, Wong, and Chacere, p. 380)

Similarly, Harris explains that one of the reasons for her research with college students was because "much of the research has been done with children and young adolescents... rather than adults..." Harris' work found that the violence of television shows watched "was weakly but significantly correlated with aggression against males... and total aggression..." as measured by surveys of the test subjects. A deficiency of this study is that the 416 test subjects were all college students, and so excludes those members of the population who are sufficiently antisocial to have already become involved in the criminal subculture.

More troubling about these studies is that a critical reading suggests the researchers approached the problems with a goal to prove a particular point, and assumptions so heavily loaded as to prevent an accurate assessment of the significance or validity of information.

One rather obvious example is David Lester's 1989 study, "Media Violence And Suicide and Homicide Rates." This one page article summarizes two reports from the National Coalition on TV Violence. The first report asserted a negative correlation between suicide and violent, top 10 best-selling books (apparently in the U.S.) from 1933 to 1984, and a positive correlation to homicide during that same period. The second report asserted similar, but not statistically significant relationships between best-attended films and suicide and homicide. That the National Coalition on Television Violence is a less than objective source on this topic should be obvious, but this does not preclude it being a valid source. Unfortunately, Lester made no attempt to analyze the methods used, or critically evaluate the significance of these reports.

There are serious problems proving or disproving a causal relationship between television entertainment and violent behavior, and there is no reason to assume that television news provides any easier opportunity for such research. But even though we can't *prove* that the coverage of Purdy's crime

provoked Wesbecker, the evidence found in Wesbecker's home should make managing editors ask themselves, "What should we do about this?" The editors of should especially ask themselves, "Would less sensational coverage of Patrick Purdy have prevented the massacre at Standard Gravure? What if we hadn't run the February 6th article?"

The ethical issues here are more than just how coverage of one crime causes a copycat crime. Not only did both and *Newsweek* give disproportionate coverage to firearms mass murder (relative to other types of mass murder), but even relative to other types of murder, mass murder is grossly over represented in the news magazines. In the years 1987-1991, a total of 96,666 people were murdered in the United States (FBI, 1992). Mass murder victims from our sampled articles during this period totaled 318.[5] and *Newsweek*, in order to give equivalent coverage to the other 96,348 murders, would have needed 693,657.12 square inches, or more than 42 pages per week between them!

There are reasons why mass murders are given exceptional coverage relative to other murders. The most obvious is that in many ordinary murders, there may be insufficient information to determine who did it, or even who *might* have done it. In 1991, 34% of the murderers were a mystery to the police (FBI, 1992, p. 16). The tawdry little details of tens of thousands of murders would be mind-numbingly boring, especially without an explanation of who did it, and why; a news magazine that fails to entertain, fails to keep subscribers. (A less cynical explanation is that reporters simply don't consider these "little" murders to be newsworthy.)

An example of this approach is 's "Seven Deadly Days." In this article, obtained photographs and details of every person killed with a gun in the week May 1-7, 1989. This included not only murders, but also justifiable homicides (both police and civilian), suicides and accidents. While this could have been a useful mechanism for providing the sort of balance needed to obtain a more complete picture of murder in the U.S., because it excluded the one-third of murders done with other weapons, the effect was unbalanced (Magnuson, Leviton, and Riley, 1989a). That the intent was to promote restrictive gun control laws was made clear in the article that followed, "Suicides: The Gun Factor." (Magnuson, Leviton, and Riley, 1989b)

It should be obvious that balance can't be fully achieved by expanding coverage of the "little" murders. But how can a news magazine achieve coverage that conveys the reality of murder in the U.S.? One way would be to either reduce coverage of these

very atypical firearms mass murders, or enlarge dramatically their coverage of more typical murders. In looking through the *Reader's Guide To Periodical Literature* for the years 1984-91, I found that murders involving guns were worth coverage in and *Newsweek*, while murders of equally minor importance to the nation committed with other weapons were simply not covered. In spite of the 17,489 murders committed with knives and other "cutting instruments" in the years 1987-1991 (about 18% of the total murders), these crimes are almost non-existent in and *Newsweek*. The same is true for the murders with blunt objects, hands, fists, and feet (11,088 in 1987-1991, or 11% of the total murders).

The net result is a very misleading understanding of what sort of murders are committed in the United States. My experience over the years, when engaged in discussions with journalists, elected public officials, and ordinary citizens, is that they are usually quite surprised to find that firearms mass murder is a rare event, and are even more surprised to find that more than one-third of U.S. murders involve weapons other than firearms (FBI, 1992, p. 17). This misunderstanding doubtless plays a part in the widespread support for restrictive gun control laws, and the relatively unfocussed attitude about more general solutions to the problem of violent crime of all sorts.

Nor is this problem limited to the subject of murder and firearms. Meyer (1987, pp. 155-156) points to the problem of how unbalanced reporting of health and safety issues in the popular media causes wildly inaccurate notions of the relative risks of various causes of death. As an example, a surveyed group greatly underestimated deaths caused by emphysema, relative to deaths by homicide. Meyer describes a study done by researchers at the University of Oregon, which found "the pictures inside the heads of the people they talked to were more like the spooky, violent world of newspaper content than they were like the real world."

It is important that we recognize that this misleading portrayal of the real world is not only an artifact of popular morbid curiosity, which newspapers must satisfy or lose circulation, it may also reflect what Meyer calls, "The Distorting Effect of Perceptual Models." In brief, journalists (like the rest of the human race) bring certain assumptions to their work. Facts that do not fit into the journalist's perceptual model tend to be downgraded in importance, or ignored. When the facts include statistical analysis, at even the most basic level, the primarily liberal arts orientation of many journalists comes to the

forefront, and the perceptual model takes precedence. (Meyer, 1987, pp. 48-50) Especially because of the deadline pressure of daily or weekly journalism, the opportunity for careful reflection about the validity of these perceptual models may not exist.

How should the news media respond? First of all, let us be clear on what is *not* appropriate: the government taking any action to regulate or limit news coverage. Even ignoring the First Amendment guarantee of a free press, there are sound pragmatic arguments against giving this sort of power to the government. This article asks only ethical questions, not political or legal questions.

Governmental power to decide the "appropriateness" of news coverage of violent crime would almost certainly become a tool for manipulation in favor of the agenda of the moment. A government that sought to whip the populace into a frenzy of support for (depending on ideology) restrictive gun control laws, reduced protections of civil liberties, or even something as mundane as higher pay for police, could, and almost certainly would, use its power over press coverage of crime to achieve these goals.

The same power, of course, can be used by the news media, and I argue that and *Newsweek* engaged in exactly this sort of manipulative coverage in 1988 and 1989, attempting to get restrictive gun control laws passed, by exaggerating the significance of firearms mass murders. What would be the practical difference between a system where the government used regulatory authority in this way, and the current system?

The difference is that, even within the current system, diversity does still exist. While three of the four newspapers sampled chose to not cover the instructional influence of on Wesbecker's killing spree, at least the fourth newspaper let its readers know that there was more to the problem of mass murder in America than just the availability of guns. In a system where the government held this power, and shared the clear goal of and *Newsweek*, all four newspapers would have agreed with and *Newsweek's* coverage of this event.

Violent crime as entertainment serves no public interest. As art or simply as entertainment, amusements that portray violence can perhaps be justified. But we must remember that entertainment in the United States is a big business, and however much someone may justify slasher movies as "art," the real reason is profit, and lots of it.

In the recent film *Grand Canyon*, Steve Martin plays a director of "action" movies that contain violence, bloodshed, and lots of

weaponry. Early in the movie, we see the director watching the studio's cut of his new film. He complains that they have cut out an essential piece of the scene: "The bus driver's head, brains on the window, viscera on the visor shot." Later in the film, after the director is shot and seriously injured by a robber, he realizes that his "art" is part of what cheapens and brutalizes life in modern America, and he decides that he would rather make quality films that promote humanistic values, instead of violent films that degrade the viewer. But by the end of the film, the director is reminded by his accountant that his "action" movies are very profitable, and the sort of films he wants to make won't support him in the sybaritic manner to which he has become accustomed. As a consequence, he again defends his films as "art," and resumes making bloody, gratuitously violent "action" movies (Kasdan, 1991).

Clearly, the writer and director of *Grand Canyon* were expressing their opinion about how profit corrupts people—and that violence on the screen helps to create violence on the street. (This sort of criticism of the current system from Hollywood insiders is especially telling.) While it is tempting to blame the producers of films that glorify violence, it is important to recognize that what makes violent entertainment profitable is that the audience for such films is very large. We have only to recall the popularity of the gladiatorial contests in the Circus Maximus, fought to the death, to see that the purveyors of such films are to some extent, captives of popular taste, and there is no reason to believe that these tastes are recently degraded.

News coverage of violent crimes does serve the public interest. How much coverage is necessary? Is it necessary to cover every violent crime, in the same level of detail?

In balance, coverage of crimes in our society can be a valuable tool for decision making. In the political realm, the electorate and their representatives *may* make rational governmental decisions based on news coverage. Individuals, properly informed, can make rational decisions about their personal safety. But when the population has been misled, intentionally or not, about the nature of the crimes in a society, and the rarity or commonality of those crimes, their decision making will be anything *but* rational. When the coverage is simply endless repetition of apparently meaningless tragedies, the numbing effect described by Rep. Ames doubtless takes its toll on our population today.

While the public interest may be the justification for the coverage of mass murders, profit is almost certainly the real

motivation, because the mass media are in the business of making money. Should the mass media *ignore* mass murders?

No, because the news media are in grave danger of losing credibility if they simply pretend that bad things aren't going on out there. To the extent that our mass media play a part in acting as a watchdog on governmental actions, it is necessary that they be a Doberman, not a Basset hound. Ignoring mass murder would quickly destroy media credibility.

The problem of unintentionally promoting mass murder is a serious one. How should the mass media determine what is an appropriate level of coverage? Is it necessary to cover every such crime? Are there methods of discouraging the "shoot your way to fame" approach? Unfortunately, this problem has not been adequately addressed in existing works on media ethics. A review of a number of recent works in this field suggests that while the general problem of psychological and economic harm caused by inaccurate or unethical reporting has been considered in great depth, this very severe form of harm—unintentionally encouraging mass murder—has not been specifically discussed.

Klaidman & Beauchamp (1987, pp. 93-123) discuss the issue of journalistic-induced harm, but only with respect to damaged reputations and business losses. While Klaidman & Beauchamp (pp. 201-7) also point to the problems of news organizations that *create* news events, the possibility that a journalist's efforts might play a part in causing a *specific* murder, is not discussed. Lambeth (1986) while providing a very thorough theoretical model for addressing the ethical issues of journalism, also fails to address this specific problem of media-induced harm. Hulteng (1981, pp. 71-86) samples the ethical codes of a number of American newspapers; he also reprints the complete text of the codes of ethics for the Associated Press Managing Editors, American Society of Newspaper Editors, and the Society of Professional Journalists. While all address the issue of harm and balance in a general way, none directly discuss how coverage of a particular criminal act can lead to copycat crimes.

Can the news media satisfy both the obligation accurately to inform the public about the nature of America's murder problem, and the obligation to stockholders to keep circulation up, or does the inevitable public boredom with coverage of the tens of thousands of meaningless "little" murders make a balancing act impossible?

The tradition of covering some murders in a sensational manner isn't new. Doubtless, editors will continue to justify this time-honored (or time-worn) tradition based on economic

considerations. But in light of the major role that the disproportionate coverage of Patrick Purdy's crimes played in the bloody way that Joseph Wesbecker chose to end his life, editors need to ask themselves: "How many innocent lives will we sacrifice to boost circulation, or promote political agendas?"

Can we develop a code of ethics that resolves this problem? Let us consider the following as a first draft of such a standard: "A crime of violence should be given attention proportionate to its size, relative to other crimes of violence, and relative to the importance of its victim. Violent crime of all types should be given attention, relative to other causes of suffering, proportionate to its social costs." We must develop a strategy for dealing with this problem now—before another disturbed person decides to claim his fifteen minutes of fame.

Epilogue

Unfortunately, it happened again. As I was finishing revising this article for publication, Gian Luigi Ferri entered a San Francisco law office, murdered eight people, and wounded six others. When it became apparent that he would not escape the building alive, he killed himself. In his briefcase he had "the names and addresses of more than a dozen TV shows, including 'Oprah Winfrey,' 'Phil Donahue' and even 'Washington Week in Review.'" Ferri apparently believed that this infamous crime would provide him a platform from which to describe his "victimization" by lawyers, real estate firms, and the manufacturers of monosodium glutamate. (Brazil, Rosenfeld, and Williams, 1993, p. A1) When we consider the sort of characters interviewed on the afternoon talk shows (sometimes characterized as "freak of the week"), it is only *slightly* absurd that Ferri thought this brutal act would provide him a national soap box. Local coverage of this brutal crime and its aftermath was dramatic, continuous, and heart-rending.

This wasn't the end of the media-induced bloodshed. Less than two weeks later, in Antioch, California, a suburb of San Francisco, Joel Souza murdered his children, then killed himself as an act of revenge against his estranged wife. When police searched a van that Souza had rented, they found a copy of a July 4th newspaper with headlines about Ferri's crime. Was the presence of the newspaper a coincidence? Apparently not—the newspaper was already a week old when Souza rented the van, so Souza had been holding on to this reminder of Ferri's fame when he made the decision to murder. (Hallissy, 1993, p. A18)

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FOOTNOTES

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[2] Wire service stories are not available in a printed form, since they are not intended for direct consumption. Fortunately, I was able to obtain wire service stories in their undigested form through Clarinet Communications, a provider of telecommunications services to the computer network community.

[3] Perhaps as some sort of unconscious revenge on Herostratus' desire for lasting fame, two of the three sources consulted had some type of typographical error or disagreement about at least one fact: Conway's translation of Bengtson mangled "Temple of Artemis" into "Treaty of Artemis"; and Coleman-Norton appears to have suffered a typographical error that misrendered the date as 336 BC instead of 356 BC, the date agreed upon by the other sources, and consistent with other parts of Coleman-Norton's article.

[4] Ramon Salcido's seven murders were two with a handgun, and five with a knife (Rossman, 1989), and for this reason, I have placed them in their own mass murder category. Even the very limited coverage given to Ramon Salcido by was only as part of an article on extradition treaties (Sanders, Kroon, and Wyss, 1989). The crimes themselves were not covered by either or *Newsweek*.

[5] It would be nice to have some sort of statistics on the number of such mass murders committed during this period, but the FBI Uniform Crime Reporting does not separately categorize such killings.

THE FEDERAL FACTOID FACTORY ON FIREARMS AND VIOLENCE:
A Review of CDC Research and Politics

by Paul H. Blackman, Ph.D.
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Since the late 1980s, proponents of severe gun laws have made the argument that gun control is a "public health" issue, and that medical research demonstrates the need for stringent gun controls. The chief proponent of the view that gun control is a public health necessity has been the federal Centers for Disease Control. In this article, Paul Blackman carefully examines the various "factoids" that have been produced by CDC research. This article was originally presented at the annual meeting of the Academy of Criminal Justice Sciences in Chicago, Illinois, in March 1994.

INTRODUCTION

"The CDC [Centers for Disease Control and Prevention] has proven that violence is a public health problem, and cannot escape looking at the role of firearms (noticing also ethnic variations), and is developing a multi-faceted approach toward improving data collection and reducing the amount of violence." (Rosenberg et al., 1992) This from a CDC editorial, indicates the CDC's view that it has proven violence to be a public health problem by constantly stating that it is, and that public health approaches can reduce that problem. By its very nature, however, the public health approach is only valid if there is a problem preventable or curable using public health approaches. While the CDC believes it has proven firearms and violence to be public health problems, it has merely repeated the statement until few consider it worth challenging.

Although a few M.D.s and M.P.H.s have considered a public-health approach to the study of violence (e.g., Browning, 1976), and others have done research without federal assistance, the real impetus toward public health studies began between 1977 and 1979 when the Centers for Disease Control—now the Centers for Disease Control and Prevention—and others worked to prepare the Surgeon General's report Healthy People (PHS[Public Health Service], 1979a, 1979b), which included a series of recommendations for improving the health of the American people especially setting preliminary 1990 goals, and

including efforts to reduce violence. By the mid-1980s, the violence especially aimed at was suicide among the young, aged 15-24, and homicide among young black males (Smith et al., 1986:269). Since then, youth suicide has been fairly stable, and young black male homicide rates have skyrocketed, particularly firearm-related homicides. (Fingerhut, 1993)

The effort to treat violence as a public health issue was to be centered in the PHS's Centers for Disease Control, where the Center for Health Promotion and Education was established in 1981, followed by the Violence Epidemiology Branch in 1983, and finally reorganized in 1986 into the Division of Injury Epidemiology and Control in the CDC's Center for Environmental Health. In the early 1990s, the CDC demonstrated its commitment to the project, adding a new center, the National Center for Injury Prevention and Control, with Mark Rosenberg as its first director, to treat firearms and other violence epidemiologically.

The epidemiological approach merely requires massive amounts of data, allowing various "risk factors" to be determined, which may be associated with a particular "disease." The risk factors are simply factors associated with an increased incidence of a particular problem, not necessarily the cause of the problem. A risk factor is something with a higher association than is the norm. With regard to violence, the question would be whether firearms are more associated with violence, or owned more commonly by victims or perpetrators of violence, than is the norm in society—or in a particular portion of society. Although firearms are generally involved in about 30% of reported violent crime (FBI, 1992 and 1993), and about 13% of National Crime Survey crime (Rand, 1990), firearms are generally found in nearly half of U.S. households and handguns in about 20-25% of households. (Kleck, 1991:51-52) As a risk factor for violence, more data would be needed—particularly addressing particular segments in society.

Little is shown simply by finding something to be a risk factor, since a risk factor is merely a thing or condition more apt to be present where a particular ailment occurs than in society as a whole, and is not necessarily a cause of morbidity or mortality.[1] The risk factor need not necessarily be dealt with; indeed, attempting to deal with some risk factors may mislead and prevent proper medical treatment. Symptoms, after all, are risk factors, and, while some symptoms should be treated, treating others may mask discovery of the underlying ailment and prevent proper treatment. To use a real medical example, to

the extent hypertension is an indication of another problem, lowering blood pressure may create the false impression that the real problem has been solved and prevent seeking the true cause and attempting to cure it. (Moore, 1990) To the extent firearms may be a risk factor in some violence, gun laws may simply be attempts to mask the symptom without treating the actual cause of the violence.

Are gun-owning households more at risk for injury than other households, with other factors controlled for? Is gun ownership—or handgun ownership—only a risk factor among certain categories of persons? In medical studies, after all, not everyone is equally at risk from the same substance (salt, for example), nor are medications necessarily equally beneficial. What may be beneficial for the middle-aged white males used for most medical research may prove counterindicated for females with the same apparent condition. (Moore, 1990) Gun ownership without injury would also have to be studied before one could determine firearms were a "risk factor," just as hypertension without strokes or heart disease, or salt without hypertension, would have to be studied before determining whether hypertension was a risk factor for strokes or salt a risk factor for hypertension. A legitimate epidemiological approach would be concerned with both trends and with factors associated both with higher and lower levels of death.

The CDC approach to firearms, however, misses all of those factors for a number of reasons. First, by often combining the types of firearm-related deaths—suicides, homicides, and accidents—explanatory factors are confused. The different death rates among ethnic groups are minimized by combining traditionally high elderly-white male suicide rates with high young-black male homicide rates. Second, all factors except firearms are simply ignored, or presumed comparable in the groups studied—either expressly (Sloan et al., 1988) or implicitly. Third, in looking at firearms, there is no examination of those not "afflicted." CDC would have to look both at the healthy and the unhealthy to find the differences between the two. They show no interest in the former.

Instead, only misuse is addressed, with the CDC and its leading spokesmen, Mark Rosenberg and James Mercy, believing that because they can demonstrate that firearms are involved in some morbidity and mortality, the epidemiological approach proves that any and all proposals will be effective in solving the endemic problem of violence in America, which they mislabel an "epidemic."

Others believe they have proven harm merely by showing access to a firearm, even if there is no mortality, morbidity, or other harm from such access. (Weil and Hemenway, 1992; Callahan and Rivara, 1992) Two authors believed they had demonstrated a problem requiring legislative and educational correction based not on harm from "latchkey" children's access to firearms—as might be demonstrated by showing disproportionate amounts of accidental deaths or gun-related delinquency from such children—nor even from proof of actual access to firearms by those children, but by demonstrating that guns were often present in the homes of "latchkey" children. (Lee and Sacks, 1990)

From proving that firearms exist and are sometimes misused, the CDC regularly presumes that any and all restrictions on firearms—self- or government-imposed—would benefit individuals and society. To enhance that conclusion, the CDC produces research showing bad things associated with firearms, based on a fairly open anti-gun bias (Blackman, 1990:2-4): "The Public Health Service [parent agency of the CDC] has targeted violence as a priority concern....There is a separate objective to reduce the number of handguns in private ownership...." (Fingerhut and Kleinman, 1989:6)

Much of the research and rhetoric produced for or by the CDC has been presented to the public in such a way as to allow simplistic conclusions of the findings. Despite occasional claims that the goal is science (Mercy and Houk, 1988), the rhetoric makes it clear the goal is to emotionalize the issues of firearms and violence. Rosenberg expresses fear that the numbers will "lose their emotional impact" (Rosenberg, 1993:3).[2]

Although some of the more studies are replete with warnings that their results apply only to a particular place and time, tentative conclusions are accepted by authors, the CDC, and the news media as definitive. Such conclusions are generally presented in the form of an easy-to-remember factoid—a fact-like statement, based upon the data presented, but without meaning for various reasons. The CDC does not want the news media or the general public to focus on any acknowledged weaknesses or limitations in the studies, but to accept the tentative conclusions as gospel.[3]

RHETORICAL FACTOIDS

Some of the factoids are presented more as rhetoric than as science. There is some irony in this, since two CDC spokesmen most dedicated to rhetoric are also ones who began encouraging

Kellermann's research with an editorial "call for science." (Mercy and Houk, 1988) The rhetorical factoids, too, generally are based upon some actual data, distorted for rather unscientific purposes.

Factoid: Today there is truly an epidemic of firearm-related violence in the United States.

Violence has been endemic to the United States since its settlement by Europeans. And most of the dramatic increases in firearms misuse since World War II occurred prior to 1981. Since that time, for most age groups, trends have varied depending upon whether the cause of death is homicide, suicide, or accident. For suicide, most of the increase in recent decades occurred while the percentage of households owning firearms, or handguns, remained stable; there was no increase in homicide or suicide following the rise in household ownership of handguns. In fact, the recent increase in homicide came at a time when the firearms market was in the doldrums. More significantly, during the 1980s, for most age, ethnic, and gender groups, firearms-related deaths declined—including deaths among women and domestic homicides, even as there were widespread reports of gun manufacturers targeting women. Most of the recent increase in youth suicide has been less than that in Europe, and most of the increase in homicide has been among persons with traditionally the lowest levels of gun ownership and facing the most restrictive gun laws: young, inner-city blacks and Hispanics.

Data from the CDC's National Center for Health Statistics (NCHS) over recent years show neither an epidemic, nor, since the gun market has been in a slump, any relationship between firearm-related deaths and firearm availability. Most firearms-related deaths declined during the early years of the 1980s, with major changes between 1980 and 1990 based on increases in the later years of the decade. Non-gun homicide and suicide among white males aged 25-34 rose in the 1980s, and for black men and women aged 25-44. Firearm-related homicides and suicides for elderly white males have risen, as have gun-related homicides for older white women, presumably murder-suicides following declining health. Both gun and non-gun homicides have declined for black males over the age of 44, as have firearms-related deaths in general for black women over 44. And gun-related suicides among white women have trended down over the past two decades. Non-gun homicide and suicide rose for white women, particularly younger ones, during the 1970s, but then declined. But non-gun suicides for middle-aged blacks increased during the

1980s. While most gun-related death rates rose during the 1970s and then declined, gun-related suicide for black males has continued to rise.

Perhaps most strikingly, for younger black males, in addition to increases in gun-related homicides have been increases defying the general downward trend in firearms-related accidental deaths, and motor vehicle deaths since 1982. Indeed, black males in most age groups have increasingly been victims of motor vehicle accidents. Overall, the only consistent trend has been for relatively young blacks, particularly males, and since the mid-1980s. Increases during the 1970s were followed by declines first. And, for most age, race, and sex groupings, the peak occurred in 1979-81, not in the 1990s.

There is some irony in this. Since specific congressional authorization for the CDC to emphasize efforts to curtail violent deaths among "children," firearm-related violence among teenagers and young adults, among blacks and Hispanics, has increased dramatically.[4]

Factoid: Firearms are now the 8th leading cause of death.

Firearms-related deaths account for slightly under 2% of American deaths, and only sound like an "epidemic" when listed as the eighth leading "cause." The seemingly high ranking is generally achieved by combining all four types of gun-related deaths—homicides, suicides, accidents, and undetermined motivation—while keeping multiple types of other "causes" (from the International Classification of Diseases) separated. This mathematical sleight-of-hand exaggerates the significance of firearms, and invites confusion as the rhetoric switches from topic to topic. The CDC has asserted that firearms and, in the same year, that suicide are the eighth leading "cause" of death. (Cotton, 1992; Kellermann et al., 1992) Once causes of death are separated out, and merged with different categories of death, a certain amount of consistency and certainty in discussion is lost. The official causes of death separate homicide and suicide from unintentional injuries (World Health Organization, 1977). But public health professionals also like to combine various "causes" in different ways, which will alter the rank-order. When tobacco becomes a "cause" of death, it outranks cancer (since many malignant neoplasms must be switched from one category to another); if alcohol is a "cause" of death, the rank-ordering changes in other ways. The medical profession would presumably be less pleased with combining unintentional deaths

due to medical mistakes into a new cause of death (Kleck, 1991:43), although it has also been suggested that hospital-caused blood infections could justifiably be listed as a new "cause" of death, probably competing with suicide for, now, ninth place. (Wenzel, 1988)

A more consistent and honest approach would be to find various external causes of both injury- and disease-related deaths and consistently adjust other deaths. If one attempts to find the causes of death—whether from injury or disease—and adjust the remaining non-externally caused deaths accordingly, firearms cease to be eighth. Thus, deaths from cancer or heart disease credited to such "actual causes" as diet/inactivity, alcohol, or tobacco, would still rank fairly high, but removing strokes credited to tobacco, diet/inactivity, or alcohol might cause remaining strokes might fall to fifth place, or even lower. The researchers who tried that approach (McGinnis and Foege, 1993), however, were not entirely honest. Firearms would probably have ranked ninth or tenth using that approach, but the authors either double-counted some homicides and suicides as both firearm- and alcohol-related or, more likely, counted all gun-related homicides and suicides as "caused" by firearms, and most non-gun-related homicides and suicides as "caused" by alcohol. Of alcohol-related suicides and homicides involving firearms were put into the alcohol category, firearms would probably fall to tenth or 11th place, following deaths caused by "sexual behavior"—where CDC rhetoric has been silent regarding possible government-imposed bans or other restrictions.

In other cases, firearms have been named as the third, fourth, fifth, or sixth leading cause of accidental death among a particular age group, or firearms-related deaths or homicides as higher on the "cause of death" chart for particular age groups. For accidents, as Kleck has repeatedly pointed out, while the statement may be true, the actual numbers—particularly estimates for handguns as a portion of the firearm-related accidental deaths—are fairly small, and declining. And the actual accidents may be still fewer, with child-abuse homicides disguised as firearm-related accidents. The three leading causes of accidental deaths among children—motor vehicles, drowning, and fires—are far ahead of firearms. (Kleck, 1991; U.S. House of Representatives, 1989:50-69; NSC, 1992:22) Occasionally, some distortion is made by ignoring that a rank has been stable for years and nevertheless saying that firearms have "become" the *n*th leading cause.

Once causes of death are revised by advocates and researchers, different groupings and divisions can be made, some of which may be useful in evaluating trends and treatments, and some of which are largely rhetorical. Most scholars will separate out causes of accidental death into motor vehicle and other; but motor vehicle deaths are further capable of being broken down into categories by victim—passenger, bicyclist, pedestrian, and the like. At that point, bicycle accidents tend to supersede firearm accidents as a cause of death among children, thus possibly changing some rank-ordering for some age groups. (Baker and Waller, 1989) Alternatively, cancers and heart diseases could be broken down into sub-categories (lungs, digestive system), some of which would be ahead of "firearms," suicides, and homicides. (NCHS, 1991; CDC, 1992b)

The key flaw in combining different types of firearm-related deaths into one "cause" is that the public health approach presumes the "disease" to be preventable or curable. Finding a way to curb homicide, whether involving firearms or other weapons, is more likely to be productive than finding a way to curb firearm-related deaths, whether other-directed (homicide), inner-directed (suicide), or accidental. The combination is thus misleading to researchers seriously attempting a public health approach to violence.

Factoid: Gun-related accidental deaths disproportionately affect youth. (CDC, 1992a)

Firearms-related accidents, like accidents in general, disproportionately affect geriatric Americans followed by teenagers and young adults. The overall rate for children 0-14, the rate, 0.5 per 100,000 population, is not much different from the overall rate of 0.6. (NSC, 1992; U.S. Bureau of the Census, 1992:18) For young children, aged 0-9, the rate is half the national rate.

Firearm-related accidents are declining more rapidly than other types of accidents—motor vehicle, other public accidents, home accidents. The assumption that gun accidents involving children occur with loaded firearms in the home more than with unloaded guns or elsewhere is true, but not a contribution to scientific debate.

Overall, bicycle accidents kill more children under the age of 15 than do firearms-related accidents. But, whereas arguments against firearms focus on what occurs in the privacy of the

home, where regulation might be difficult or impossible to enforce, efforts to curb bicycle accidents would be aimed at public activities in public places. Unlike firearms, which are generally used by adults, children's bicycles are rarely used by anyone but children; and regulation of them would be aimed at public activity. Yet efforts to curb bicycle accidents among children by banning children's bicycles are rarely, if ever, heard, even among CDC researchers.

*Factoid: Firearm death rates in the 1980s were the highest ever for females. (*Cotton, 1992)

In order to associate an increase in handgun availability to women with an increase in gun-related deaths by women, the CDC's Mercy and Rosenberg, and the CDC-funded Garen Wintemute simply relied on facts which did not exist. Accompanying a box saying: "The rate of firearm-related deaths among women is increasing," Dr. Wintemute notes that "Gun sales plummeted in the 1980s, and the gun companies went looking for new markets. They found the same markets that the tobacco industry did in the 1950s—overseas markets and women." (Wintemute, 1991) And Mercy noted that "Firearm death rates in the 1980s were ...the highest ever for females and teenage and young adult males." (Cotton, 1992) And "Firearm mortality rates for women...have been higher during the 1980s than at any time previously." (Rosenberg and Mercy, 1991:5) The problem is that the source for the statement regarding a peak in women's gun-related death rates was an article which stopped collecting data in 1982, and which demonstrated that firearm-related deaths among women peaked in the early-mid 1970s, and that gun-related death rates for women declined irregularly after that. (Wintemute, 1987) During the 1980s, the firearm-related death rate for women fell. (NCHS, 1991) Trends are more convincingly associated with other factors trending in the same direction at some reasonably associated time.

Factoid: Two years of gun deaths here surpass the losses in Vietnam.

This is one of the CDC's James Mercy's favorite factoids as he eschews science for rhetoric. It neglects the fact that America's mission was ancillary, and the vast majority of casualties were Vietnamese, so that their missing-in-action totals about five or six times our battlefield death total. For scientists,

it ignores the key element of rates per 100,000. America's presence in Vietnam rarely exceeded 600,000, with an annual death rate in excess of 500. America's population hovers around 250,000,000.[5]

A similar recent comparison is of the number of gun-related deaths, or homicides, in a particular city or state with the number of American dead in the Gulf War—neglecting the fact that over 99.8% of the war dead were not Americans. Another way of looking at the comparison of crime with war would note that the firearm-related homicide rate of inner-city black teenagers—among the highest rates recorded for subgroups in America at 144 per 100,000 (Fingerhut et al., 1992)—is only about one-twentieth the battlefield death rate of French men of fighting age during World War I. (Johnson, 1985:140-141)

Factoid: Gun-related deaths are not limited to the inner city; the epidemic of childhood violence knows no boundaries of race, geography, or class. (Cotton, 1992; Henkoff, 1992)

Violence is endemic in America, but it is epidemic only among young blacks and Hispanics. For most other age- and ethnic-groups, gunshot wounds are stable or declining. For example, a recent study of the change in gun-related homicide in Philadelphia between 1985 and 1990 found 100% of the increase due to deaths among minority groups; among non-Hispanic whites, the number killed actually declined. (McGonigal, et al., 1993)

The gun-related homicide rate among males 15-19 years of age varies dramatically based upon race and location. Among big-city blacks, the rate was about 144 per 100,000; among rural blacks, the rate was 89% lower, at 15. In central cities, the white rate was about 21 (Fingerhut et al., 1992), and an analysis of some of the FBI's Supplementary Homicide Reports, supported by limited data on 15-34 year olds from the CDC (Fingerhut, et al., 1994) would suggest this means the non-Hispanic white rate was probably in the 10-14 range. For the most part, gun-related violence is a growing problem among young urban black and Hispanic males. For girls, women, and men over the age of 30, gun-related violence was stable or decreasing in the 1980s. (Fingerhut and Kleinman, 1989; Fingerhut et al., 1991; Hammett et al., 1992) Even one of the articles describing the problem as "epidemic" noted that the 50% increase in mortality of late in the "urban pediatric population" occurred with no change or a

slight decline in the suburban and national pediatric populations. (Ropp et al., 1992)

To support the idea that everyone should be concerned about homicide, the CDC pretends that homicide threatens everyone. The statements are true only in the sense that dramatically lower levels of violence are not the equivalent of no violence at all in small towns, suburban, and rural areas. One might as well suggest that private airplane crashes can threaten anyone—but available evidence suggests that the rate for persons on board private airplanes is vastly higher than for those on the ground or in commercial airliners. Homicide, and particularly escalating homicide rates, largely, are limited to the inner city, and, indeed, to low-income minorities within inner cities. (Fingerhut et al., 1992)

A recent study of the victims of gun-related homicides in Philadelphia found that "84% of victims in 1990 had antemortem drug use or criminal history." (McGonigal et al., 1993) Even accident victims are apt to involve persons unusually aggressive, and from the underclass, persons with criminal records, rather than ordinary citizens. (Kleck, 1991:285-287)

Factoid: There is a threat to trauma centers, which are being overcome with the large numbers of victims of violence. (Organ, 1992)

The threat to trauma centers is that surgeons are reluctant to work in them. Surgery residents complain that blunt trauma (motor vehicle accidents) requires too much non-operative care, and of "the unsavory type of patients encountered with most penetrating trauma injuries" (knife and gunshot wounds). Other surgeons believe treating trauma victims "would have a negative impact on their practice," presumably because those unsavory characters may come to their offices for post-emergency-room care. (Organ, 1992) Not noted is that there is increasing reluctance of surgeons to treat trauma victims since the combination of drug use with lots of blood is an invitation to contamination and exposure to HIV. The significance of these facts is that they belie the notion that the average victim of gunshot wounds is just an ordinary person, that we are all victims. The victims are largely unsavory persons; some are just poor; many are just unsavory. Again, this lends support to the proposition that victims of violence are frequently not innocent bystanders but are involved in lives of violence. One recent study, for example, found that 71% of children and adolescents injured in drive-by shootings "were

documented members of violent street gangs." (Hutson et al. 1994:325)

Factoid: There were more firearms- than AIDS-related deaths in the 1980s. (Cotton, 1991)

This, another of the CDC's James Mercy's favorite statistics, includes years before which AIDS existed and began its epidemic growth. AIDS now exceeds suicide and homicide as a cause of death in the U.S. The CDC rhetorically notes that firearms, or homicides and suicides, exceed natural causes as a cause of death for adolescents and youth adults—something to be expected since, once children escape the killers of infancy and childhood, external causes remain the leading expected cause of death until ailments of middle age come on. In fact, the real change over the past decade has not been that young adults are not killed by natural causes, but that persons aged 25-44 increasingly are, by AIDS.

Factoid: Semi-automatic firearms are possessed only with the intent to harm people; no person needs a semi-automatic firearm for hunting or target shooting.[6] (Houk, 1991)

It would be interesting to learn how effectively the CDC's Vernon Houk thinks America's international athletes could prepare for competition with revolvers or single-shot pistols, since semi-automatic firearms are required for some international target shooting competitions. It is also unclear why Houk believes international competitive shooters own their firearms only to harm people.

With rifles of any description involved in 3% of homicides (down from 5% in 1980), it is hard to explain the view that while handguns "account for three-fourths of all gun-related homicides,...recent increases in gang warfare and the adoption of assault weapons by drug traffickers may create different patterns of firearms deaths." (Rice, et al., 1989:23) There is simply no basis for the CDC's assertion. (Morgan, 1990: 151-54)

And, while the ammunition feeding-device capacity may be larger for many semi-automatics than for revolvers, that is irrelevant for almost all crimes. Studies of shoot-outs involving criminals and law enforcement in New York City indicate that criminals average fewer than three shots. A study of shootings in Washington, D.C., while indicating more gunshot wounds per victim later in the 1980s than earlier, nonetheless report that 92% were shot fewer than five times, a number less than ordinary

revolver capacity. (Webster et al., 1992a) More recently, a study of firearm-related homicides in Philadelphia indicated that despite a sharp rise in the number of shots fired, whether revolvers or semi-automatics were used, between 1985 and 1990, there were an average of 2.1 shots fired per revolver and 2.7 per semi-automatic. None of the guns used were so-called "assault weapons." (McGonigal et al., 1993) And a study, limited to children through the age of 17, of drive-by shootings incidents in Los Angeles—where the alleged use of so-called "assault weapons" in drive-by shootings first achieved media attention, and where military-style semi-automatics make up a higher percentage of alleged crime guns (3%) than in most cities which have reported hard data—found that in only one of 583 drive-by shootings was use of an assault weapon documented, with 79% of injuries involving a single gunshot wound.[7] (Hutson et al., 1994:325-326)

Military-looking semi-automatics are rarely involved in crime. Kleck (1992), Morgan and Kopel (1991), and others indicate involvement in perhaps half of one percent to one percent of violent crime or homicide. The recent study of 469 firearm-related homicides in Philadelphia in 1985 and 1990 (McGonigal et al., 1993) noted: "Assault or military-style rifles were not used in either year."

The only "study" showing significant involvement was the Cox Newspapers report which falsely asserted there were only about one million "assault weapons" privately owned (Cox Newspapers, 1989:1)—while contradictorily noting that there were 1.5 million privately owned M1s, which they identified as "assault weapons" (Cox Newspapers, 1989:10). At the time, the Smithsonian Institution's firearms expert, Edward Ezell, was testifying to Congress that there were 3-3.5 million military-style semi-automatic rifles, plus an unspecified number of handguns. The Cox claims were based on BATF tracing data disingenuous effort, since the Congressional Research Service (CRS) noted that the tracing system was designed "to identify the ownership path of individual firearms. It was not designed to collect statistics....the firearms selected for tracing do not constitute a random sample and cannot be considered representative of the larger universe of all firearms used by criminals, or of any subset of that universe." (Bea, 1992:65) For example, at a time when Los Angeles Police Officer Jimmy Trahin was testifying before a congressional subcommittee (May 5, 1989) that military-style semi-automatics accounted for 3% of the crime guns in custody, the Cox study was reporting that 19% of crime guns traced by BATF from Los Angeles were "assault weapons." (Cox Newspapers, 1989:4)

RESEARCH-RELATED FACTOIDS

Factoid: Firearms are rapidly overcoming motor vehicles as a public health issue. And we should apply the same efforts to overcome gun-related deaths as we did with motor vehicles. (CDC, 1994; Koop and Lundberg, 1992)

According to Koop and Lundberg, citing earlier CDC studies (CDC, 1992c), firearms should be treated like motor vehicles, with age limits, registration, and licensing, because there was a decline in motor vehicle deaths reported between 1970 and 1990. But the CDC study regarding motor vehicle deaths cited seven factors influencing that decline, including redesign of cars, of roads, seat-belt laws, focus on drunk driving, and child restraints, but, understandably, it did not mention registration or licensing, since most registration and licensing was enacted between the world wars.

The self-laudatory CDC also imagines that the motor vehicle accidental death decline is their doing: "Just as we were able to save countless lives from motor vehicles without banning cars, we can save many lives from firearm injuries without a total ban on firearms." Thus, the CDC's Vernon Houk (1991) uses motor vehicle regulation as an example for firearms, noting they aren't banned, but that there are regulations and licensing, cars and highways are made safer, driver behavior is strictly regulated and enforced. As a result, according to Houk, we now save 25,000 lives relative to 1980 and even greater "when compared with three decades ago when we had about 380,000 deaths per year."[8]

Similarly, the more recent study claims in its title to be examining "Effectiveness in Disease and Injury Prevention," pretending that the decline in motor-vehicle-related accidental deaths during the period covered (1968-91) is due to "the multifaceted, science-based approach to reduce mortality from motor-vehicle crashes [which] have included public information programs, promotion of behavioral change, changes in legislation and regulations, and advances in engineering and technology." Their claim is that this resulted in safer driving practices, safer vehicles, safer roads, and improved medical services. They credit the drop in motor-vehicle accidents to these changes which developed "[s]ince 1966, when the federal government identified highway safety as a major goal." Unfortunately, while the motor-vehicle accidental death rate did decline 37% between 1968 and 1991, that decline trailed all other major types of accidental deaths: non-motor vehicle public deaths declined 38%, home

accidents 41%, work accidents 49%, and firearm-related accidents 50%. Only improved medical services cover all types of accidents. Further, the comparison is dishonest in that it compares accidental deaths involving motor vehicles to firearm related deaths, over 95% of which are intentional. There is no reason to believe that approaches geared toward reducing accidents are applicable to intentional actions.

Another problem with the misleading comparison, in view of the suggestion that firearms will soon exceed motor vehicles as a public health problem, is that, although reported in something called the "morbidity and mortality weekly report," the only concern is with mortality (death) rather than morbidity (injury). There is a misleading implication that the harm to society associated with the misuse of firearms is closing in on the harm associated with motor vehicle misuse. In fact, there are over two-million disabling injuries associated with motor vehicles annually—with medical costs exceeding $20-billion (National Safety Council, 1993:1-2)—and only 65-135,000 serious or disabling injuries involving firearms (Martin et al., 1988; Kleck, 1991:62), with medical costs approximating $1.4-billion (Max and Rice, 1993)(about one-fifth of one percent of the nation's annual expenditures on medical care—U.S. Bureau of the Census, 1992:97).

At least the focus of federal attention on motor-vehicle deaths after 1966 was associated with declines in motor-vehicle deaths from the period beginning two years later. The same cannot be said for CDC's activities on the issue of firearms. On the other hand, Congress encouraged the CDC to be concerned with firearms-related deaths, particularly among the young, in 1986, and precisely two years later is when the dramatic rise in firearm-related deaths—particularly among the young—began. (CDC, 1994:38)

Ironically, the opening date used for the CDC comparison of motor-vehicle and firearms-related deaths is 1968, the year the federal government first imposed major federal restrictions on firearms, largely aimed at legally isolating the states so that they could enforce their own gun laws despite more lenient laws in other states. Whatever legislative effects might be on motor vehicle accidents, the CDC's selection of an opening year fails to inspire confidence in regulation of firearms as a way to curb firearm-related violence.

Curiously, the CDC recommends legislative efforts as one way to curb gun-related deaths even though their state-by-state look at relative firearm- and motor-vehicle-related death rates

(CDC, 1994:39-40) show that the states where firearm-related deaths equal or exceed motor-vehicle-related deaths are split between highly restrictive and generally non-restrictive jurisdictions, the states where motor-vehicle-related deaths exceed firearm-related deaths by 10% or less are similarly split, but the states where motor-vehicle-related deaths exceed firearm-related deaths by over 10% are overwhelmingly non-restrictive with regard to the acquisition and possession of firearms. Indeed, 14 of the 17 states with lenient carry laws (82%) are among the 34 states (67%) where motor-vehicle deaths still well exceed firearm-related deaths.[9]

Having compared intentional firearm-related deaths to unintentional motor-vehicle deaths, the legislative and technological changes recommended are largely aimed at the accidental firearms fatalities which constitute under 5% of gun-related deaths, including "regulating the storage, transport, and use of firearms" and modifying "firearms and ammunition to render them less lethal (e.g., a requirement for childproof safety devices [i.e., trigger locks] and loading indicators"—a recommendation followed by a citation to a GAO (1991) study expressly dealing with accidental deaths among young children.

Factoid: A gun in the home is 43 times more likely to be used to kill oneself, a family member, or a friend than a criminal. (Kellermann and Reay, 1986a)

This study looked at firearm-related deaths in the home in King County (Seattle), Washington. It was limited to fatalities in the home involving a firearm which belonged in the home, and added together the total number of suicides, accidents, and criminal homicides. It compared that misleading total to the number of fatal justifiable and self-defense shootings, coming up with a 43-to-1 ratio. Sometimes, the ratio given is 18-to-1, in which case it is residents killed in gun-related non-suicides compared to strangers shot. Although this study was not funded by the CDC, it served as the basis for Kellermann's establishing his anti-gun bona fides with the CDC, leading to numerous research grants thereafter. In the popular media, it is often forgotten that suicides accounted for 37 of every 43 shooting deaths in the home. For example, "A firearm in the home is 43 times more likely to cause the death of a family member or a friend than a criminal." (USA Today, February 16, 1994, p. 12A)

The most egregious flaw in the study is that it ignores non-fatal protective uses of guns, which number over two million per year and thus exceed criminal misuses (plus suicides and accidents) by a 2.5- or 3-to-one margin. (Kleck, 1994) Although the authors originally warned that the study was of a single non-representative county, and noted that non-fatal protective uses were ignored, they have freely used the 43 as if it were definitive and national. As has been noted by others, their key approach was that, since the data which would test the hypothesis about the net risk-benefit of firearms for protection were not available, they would use data which was available. Of course, that meant ignoring the fact that some protective-use data were available, but were dismissed as irrelevant or imprecise.

Kellermann and Reay (1986a:1557) concluded that "The advisability of keeping firearms in the home for protection must be questioned," even though "our files rarely identified why the firearm involved had been kept in the home. We cannot determine, therefore, whether guns kept for protection were more or less hazardous than guns kept for other reasons" (1986a:1559). They assumed protection based on surveys showing that three-fourths cite protection as one reason for having a gun, although the same surveys cite protection as the primary reason only one-quarter of the time, although protection is more commonly the reason for gun ownership in a metropolitan area like the one studied. The actual reason for initial acquisition or continued ownership of firearms involved in injuries remains open to research.

And Kellermann and Reay (1986b), responding to criticism that their data counted only deaths to conclude that firearms were less often used for protection than misused, and attempting to show that surveys supported their conclusion, wrote: "In 1978, both the National Rifle Association and the National [sic] Center for the Study and Prevention of Handgun Violence sponsored door-to-door surveys. Both included questions regarding firearms and violence in the home....Taken together, these two polls suggest that guns kept in homes are involved in unintentional deaths or injuries at least as often as they are fired in self-defense." In fact, the NRA-sponsored survey, while it asked about protective uses of firearms, and whether the firearm was fired, did not ask about the location of the incident, and did not ask any questions about accidents. The survey commissioned by the Center did not ask whether protective uses of guns involved their being fired, nor where accidents occurred, although it did ask where protective incidents occurred (the

majority occurred outside the home). The Center's protective-use questions were asked only of persons who, at the time of the survey, owned handguns *for protection*.[10] The Kellermann and Reay conclusion is refuted by Kleck (1988). The controversial study was followed by grants to Kellermann and his associates, with each of the following studies deliberately distorted to produce anti-gun factoids.

Factoid: The difference in Seattle and Vancouver homicide rates is totally explained by there being five times more gun-related homicides in the less restrictive American city, so the Canadian gun law is saving lives. (Sloan, et al., 1988)

This study, one of a number where the lead or one of the leading authors was Arthur Kellermann, compared homicide in Vancouver, British Columbia, with homicide in Seattle. The authors claimed the difference in handgun-related homicide totally explained Seattle's higher homicide rate. In fact, for the non-Hispanic Caucasians who account for over three-fourths of each city's population, the homicide rates were virtually identical (6.2 for Seattle and 6.4—insignificantly *higher*—for Vancouver). The difference was very high homicide rates for Seattle Hispanics and blacks, who are few in Vancouver, and a high homicide rate among Seattle's volatile Asian population, while Vancouver's Asian population has a lower homicide rate than for non-Hispanic Caucasians. Unscientifically, the authors "are disinclined to calculate a summary odds ratio stratified by race," which would allow a determination of whether ethnicity, rather than firearms, explained the homicide rate differences. (Centerwall, 1991:1246) Generally speaking, non-Hispanic Caucasians in the U.S. have significantly higher rates of gun ownership than prevails among Hispanics, blacks, and Asians.

The study assumed that, aside from handgun laws and handgun availability, the two cities were quite similar, based on such simplistic measures as the rough estimate by police of the clearance rate for homicides, the sentence established by law for unlawful carrying of firearms, and some aggregate economic data. Again, the popular media have taken the assertion of similarities and expressly declared the cities comparable in terms of ethnicity.[11]

The Vancouver/Seattle comparison simply assumed the gun laws were the primary differences between the two cities, an assumption which is unjustified. A more thorough effort did find both lower levels of handgun ownership and handgun involvement

in homicides in Canadian provinces than in bordering American states, but no significant differences in homicide rates, except where two cities demographically unlike anything in Canada—New York and Detroit—were in the state bordering a Canadian province. (Centerwall, 1991) But that was not a test of law but availability.

One of the criticisms of the Seattle/Vancouver comparison—with its conclusion that "Canadian-style gun control...is associated with lower rates of homicide" (Sloan et al., 1988:1261)—was that no effort was made to determine how Canadian homicide had changed since adopting the law as described in their article. In fact, the homicide rate had risen slightly with handgun use unchanged at about one-eighth of homicides. (Blackman, 1989) The authors responded that the "intent of our article was not to evaluate the effect of the 1978 Canadian gun law" (Sloan et al., 1989).

The Vancouver/Seattle homicide comparison noted that the gun ownership data might not be reliable—significant for something suggesting a relationship between ownership or availability and homicide rates. It also acknowledged that Seattle and Vancouver might be different and thus not comparable, and noted that the Seattle area might not be projectable to the rest of the United States (Sloan et al., 1988). The difference in gun ownership may not be that great, even if handgun ownership rates are. They assert that handguns explain the difference in firearm-related homicide in the two cities and emphasize the differences in handgun regulations, asserting relatively few Canadian restrictions on long guns. It is unclear that it is solely the difference in handgun misuse in homicide which distinguishes Seattle from Vancouver. In the figure produced in the article, their chart makes the relative difference between the cities' rifle/shotgun homicides look similarly different from the handgun differences. Requests for specific data breaking down homicides by type of firearm have been ignored by the authors of the study. The significance is that, while handguns are sharply restricted in Canada, rifles and shotguns were relatively unrestricted in both jurisdictions during the study period. Interestingly, the authors assumed there were dramatically higher levels of gun ownership in Seattle than in Vancouver—largely based on comparing protective handgun ownership in Seattle to sporting handgun ownership in Vancouver, and using a peculiar test which presumes that firearm availability among the general public can be determined by measuring the percentage of suicides and homicides involving firearms. However, a survey by Gary A. Mauser in British

Columbia, and Gary Kleck's analysis of two decades of national general social survey data suggests that gun ownership levels in the two cities might be similar. (Private communication)

The CDC said "The paper by Sloan et al....applies scientific methods to examine a focus of contention between advocates and opponents of stricter regulation of firearms, particularly handguns" (Mercy and Houk, 1988). Criminologist Gary Kleck told National Public Radio's "All Things Considered" (Dec. 16, 1989): "The research was worthless. There isn't a legitimate gun control expert in the country who regarded it as legitimate research. There were only two cities studied, one Canadian, one U.S. There are literally thousands of differences across cities that could account for violence rates, and these authors just arbitrarily seized on gun levels and gun control levels as being what caused the difference. It's the sort of research that never should have seen the light of day."

Factoid: Restrictive gun laws explain why Vancouver has a lower youth suicide rate than Seattle. (Sloan et al., 1990a)

After studying homicide in Seattle and Vancouver, Kellermann and his colleagues (Sloan, et al.) went on to compare suicide in the two locales, but switched, inexplicably, from the cities to the metropolitan areas. The overall suicide rate in Vancouver was found to be higher. They also found that among most ethnic groups and overall, the suicide rate was higher in Vancouver, where guns were presumably fewer.

Eventually, they figured out that they could claim that the Canadian gun law helped explain the fact that the suicide rate among 15-24 year olds was lower in the Canadian city than in the American. They have not been able to explain how a gun law could lower the suicide rate among a particular group while failing to lower the rate overall—how a restrictive law can shrink a subset without affecting the size of the set, unless it caused a higher rate of suicide among some other age group.

Crediting Canadian gun laws with this peculiarity would at least have required looking at trends in suicide—which rose in Canada after adopting the law in effect at the time of the study. Another study (Rich et al., 1990) looked at Toronto suicide before and after adoption of the Canadian gun law in effect in Vancouver at the time of the Sloan et al. study, and found that there was a change in the means of committing suicide but not in the suicide rate, and thus concluded that, absent guns, other means would be substituted with no net effect on the suicide rate. This is similarly

the finding of Gary Kleck (Point Blank, 1991), that gun laws might affect the method but not the outcome.

And a recent, as-yet-unpublished study by Brandon Centerwall looked at suicide in Canadian provinces and neighboring American states, and found that suicide rates were generally slightly higher overall, and among persons 15-24 years of age, in Canada, even though gun ownership, and handgun ownership in particular, was significantly higher in the American states than in their neighboring Canadian provinces and territories. Those details were presented to a world conference on violence held in Atlanta, under the leadership of the Centers for Disease Control and Prevention (CDC) in May 1993.

Like the earlier study (Sloan et al., 1988a), the study misstated somewhat the laws affecting Seattle/King County (Washington State and U.S. federal law) and Vancouver and its metropolitan area (Canadian national law). The most seriously ignored aspect was in the second study, of suicide, where age groups were studied and most of the emphasis was on the age groups below the age of 25. Although, in general, the laws of the U.S. are less restrictive than those of Canada, acquisitions of firearms during the period studied were lawful at a younger age in Canada than in the U.S.—18 vs. 21 for handguns; 16 vs. 18 for rifles and shotguns.

Their study warned that they were ignoring such suicide-related factors as alcoholism, mental illness, and unemployment; it noted that the area might not be comparable to the rest of the United States—especially since gun use in suicide was lower; noted that the suicide data might have been flawed; and again noted that the gun ownership rates between the Seattle and Vancouver metropolitan areas might not have been measured comparably (Sloan et al., 1990a).

Kellermann and his colleagues often respond to criticism of their research not with factual material but with the claim that the critic is biased. One example: "Coming from an official spokesman for the National Rifle Association [NRA], Blackman's invective is no surprise. Kleck's and Wright's long-held views on the issue of gun control are also well known, and their criticism was predictable." (Sloan et al., 1990b) As it happens, Wright's long-held views were as an advocate of restrictive gun laws whose mind was changed by his research (Wright, 1988); and Kleck remains a supporter of restrictive gun laws (Kleck, 1991) and has been criticized for that by the NRA. (Blackman, 1993) Neither gibe is a scientific response.[12] They went on to respond to the NRA's criticism by irrelevantly saying the NRA should "return to

the Defense Department the $4.5 million in annual funding provided to firing ranges operated by the National Rifle Association"—an apparent misunderstanding of Defense appropriations, since none of it goes to NRA-operated ranges. (Sloan et al., 1990b)

Factoid: Suicide is five times more likely to occur in a home with a gun. (Kellermann et al., 1992)

This study used King County (Seattle) and Shelby County (Memphis), Tennessee (then home base for Kellermann). The authors combined the suicides in the two counties, and then used a "case control" methodology to compare the suicides to persons otherwise somewhat similar (same neighborhood, age range, sex, ethnicity) who did not commit suicide. They found that suicides were more likely to be gun owners than non-suicides. There were a number of problems with the study, of course, but it provides two "ratios" which are now popular in public health anti-gun literature. One is the crude odds ratio, asserting that persons with guns in the home were three times more likely to commit suicide than those without guns in the home. Even if the ratio were accurate, the "three" pales compared to the crude odds ratio of over 70 for persons who had been treated for depression or mental illness, and various other so-called risk factors, including illicit drug use, living alone, and domestic violence.

The more popular odds ratio is the so-called adjusted odds ratio which controls for a few other factors, and found suicide is five times more likely if a gun is in the home than otherwise. One problem with this is that five is still half the adjusted risk of illegal drug use, which was about 10.

With one-third of the suicide study above the age of 60, no question of physical health was asked. And, while the question of treatment for depression or mental illness was asked, it was not included in the factors for which crude or adjusted odds ratios for suicide were calculated: In fact, the odds ratio, if calculated, would have been about 25 times higher for depression than for firearms ownership.

Incredibly, mental illness and depression have been ignored or denied in suicide studies sponsored by the CDC. Kellermann et al. asked about history of mental illness or depression, but the odds ratio was not calculated. And the CDC's leading spokesmen have denied its relevance to recent increases in suicide, without citation (Rosenberg and Mercy, 1991:4) or, it would seem, justification. (O'Carroll et al., 1991:185) To the CDC, Kellermann et al.'s

failing to control for mental illness and depression was consistent with calling it a "well-designed study that controlled for other known risk factors...." (Mercy et al., 1993:17)

The study's exclusion of many of the suicides which occurred in the two counties was a deliberate twisting of the data. For various statistical reasons, about 25% of the suicides could not be used. More importantly, they started out by excluding all suicides outside the home, which amounted to roughly 30% of the suicides in the two cities, on the grounds that "most suicides committed with guns occur there [in the home]." (Kellermann et al., 1992:470) Although excluding outside suicides may have changed the Shelby County data minimally, the percentage of suicides involving firearms fell from 51% in the home to 36% outside the home in King County. So they started out by deliberately skewing the sample by excluding suicides less apt to fit their pattern. They imagine they have proven that other methods will not be substituted, but they have not really measured any such thing, of course. (One study, by Rich et al., looked at Toronto before and after the 1977 Canadian gun law took effect and found that suicide rates did not change, but there was a switch from guns to jumping.) One epidemiologist, attempting to unravel the data, calculates that the crude odds ratio would fall from 3.2 to 1.9. (David N. Cowan, private communication)

Even if the odds ratios were accurate—and the 5-to-1 is based on less than half of the two counties' suicides—factors with greater risks than firearms were illicit drug use (suggesting that legislative remedies with regard to guns might not be effective), a history of domestic violence, living alone, alcohol abuse, and taking prescription psychotropic medication. And, of course, the study failed to note that there was no relationship between gun availability and levels of suicide anywhere in the world.

Factoid: A gun in the home increases the chance of homicide by three to one, and does not offer protection from homicide. (Kellermann et al., 1993)

The fatal flaw in the effort by Kellermann et al. (1993) to evaluate the protective value of firearms is that it uses only homicide data. As Kellermann has acknowledged elsewhere, no study of homicide, however sophisticated or simplistic, can evaluate the protective value of firearms. (Kellermann and Reay, 1986a) The reason is that, as Gary Kleck's analysis (Point

Blank, 1991) and recently completed survey show, only 0.1% of the 2.5-million protective uses of firearms involves mortality. (Kleck, 1994) Survey research data are essential for that evaluation.

It is the authors' belief, however, that if guns offered protection, the level of gun ownership among homicide victims should have been lower than the level among the "controls" who were similar except for not having been homicide victims. Interestingly, the study also found that security devices such as deadbolt locks, window bars, and dogs offered no security, and that "controlled security access to residence" was a greater risk for homicide than gun ownership. Unlike guns, they noted "these data offer no insight into the effectiveness of home-security measures against...burglary, robbery, or sexual assault." (1993:1090) Since the study merely found an association between gun ownership, some home security precautions, and homicide, there was no way to determine causation. Presumably, some security precautions are taken because one is at greater risk for attack. As Kleck has noted, a similarly distorted case-control study would have found a connection between diabetes and insulin, and concluded that insulin increases ones risk of diabetes rather than offering protection against it. (Polsby, 1994) Alternatively, one could begin with the fact that Kellermann has indicated, in an 1993 op-ed piece he entitled "Gunsmoke," that the association he is showing between guns and homicide is similar to early studies relating smoking and cancer, noting that the tobacco industry called the studies inconclusive and misleading. What Kellermann does not note is that there were also similar preliminary studies falsely concluding there might be a causal relationship between coffee and pancreatic cancer and between inhalers and AIDS. (David N. Cowan, personal communication)

The entire "case control" approach, justified on the grounds it is useful for studying events which rarely happen,[13] confuses rather than contributes to learning about homicide or suicide. By selecting controls similar to persons who die from homicide or suicide means selecting persons largely unrepresentative of society at large or even of the unrepresentative counties chosen. The homicide study, for example, involved persons less affluent and less educated than the counties in general, and the population studied was 62% black while the counties studied were 25% black. It was a study of very high risk individuals compared to high risk individuals, not a study comparing homicide victims to ordinary citizens or gun owners.

A substantial minority of the high-risk population studied may already be proscribed from firearms possession, since, of the victim households, 53% reported an arrest record and 32% illicit drug use. At any rate, the case control can tell nothing about whether use of alcohol —found to be riskier than gun possession with no concomitant teetotaling recommendation — or possession of firearms is risky behavior for ordinary citizens. Had a serious study been envisioned, Kellermann et al. could have compared characteristics of homicide victims to those of the communities as a whole, based upon survey research.

The basis for finding gun ownership levels higher in homes where homicides occurred than in the controls may also be flawed. Some household homicides—less likely to have involved firearms and thus quite possibly less likely to have involved households with guns—were excluded. For example, they excluded homicides of persons under the age of 13. In general, children are more apt to be killed at home and less apt to be killed with firearms (one-quarter of killings of children vs. two-thirds of homicides overall). (FBI, 1993:18) It is theoretically possible that using all persons killed in the home would have reduced the crude odds ratio of gun possession below the level of significance.

In addition, it is quite possible that the gun ownership data are flawed, with missing guns in the households of the controls, and it would not take many mistakes for significance to be lost. The proxies for the homicide victims, after all, would just have gone through the effects of the deceased, following a police investigation of the scene of the homicide—the home --which may have alerted proxies to firearms of which they were previously ignorant. For the controls, however, household ownership was based on ordinary survey research. And those data consistently show that females report dramatically less household ownership than males—too much to be explained by the number of female-headed households without guns. Women simply do not always know there is a firearm in their home or are less willing to acknowledge it in a survey. It would only have taken 11 controls, of 388, erroneously denying household firearms ownership for the crude odds ratio to fall below the level of statistical significance. With women reporting 10-15 percentage points lower gun ownership than men, the Kellermann et al. survey could easily have interviewed 20-40 control households which incorrectly reported that there was no firearm in the home.[14] The statistical difference in gun

ownership levels—the basis for all of their conclusions—may simply not be there.

Kellermann et al. reveal nothing new or valid about homicide, since they studied only homicides in their three metropolitan counties which occurred in the home of the victim, and then arbitrarily excluded those involving persons under age 13. The result was an unrepresentative sample of homicide—over 40% were family members killing family members, although nationally that figure would be just over 10%, according to the FBI's Crime in the United States, 1992 (1993:19). Their finding that most killings in and around homes involve people who know each other is as newsworthy as finding alcohol involvement in barroom slayings. So limited was their study that the "crude odds ratios"—a statistical way to approximate the relative risk of various possible risk factors—were based on 21% of the areas' homicides. The "adjusted odds ratios"—another way, attempting to hold for the effects of a five other factors, four of which were found riskier than guns—was based on just 17% of the counties' homicides.

Another problem deals with ignorance or indifference of criminological and other findings as to what constitutes a risk factor. (Nettler, 1982) Part of this is owing to the inappropriate methodologies. Case control, for example, requires assuming certain factors to be risk factors—ethnicity, age, gender, perhaps income or education—which prevents further measurement. Other factors recognized by criminologists have been ignored in most public health studies, including family structure and values, influences of peer groups and the mass media, unemployment, and the like. Sometimes the ignorance leads to pretending a major discovery has been made when the criminologically-obvious was happened upon. Kellermann et al. thus discovered that homicides in the home generally involve persons who know one another, rather than strangers, and that intruders are rarely involved. To criminologists, it would be mindboggling that anyone might think otherwise, with burglary-related homicides always a small percentage of homicide and, otherwise, it being obvious that people in one's home are persons one knows. Factors ignored included family upbringing at a time when even the media are noticing, as criminologists long have, the importance of one-parent families as a risk factor, and whether socialization is by peers or family.

Despite the distortions, with the adjusted odds ratio, firearms came in fifth of six factors tested for the adjusted odds ratio, behind illicit drug use and domestic violence. Other

factors were either not checked at all or were ignored in the calculations. Firearms may actually have been even further behind various other risk factors, due to dishonest reporting by the case subjects, or refusals to answer. When the proxies for the homicide victims were interviewed, if they did not answer certain questions, they were excluded from the comparison on that particular factor, not counting either the non-response of the case subject or the response of the control. It may be reasonably presumed that more socially undesirable characteristics were sometimes not acknowledged, as the missing data are greater for such factors as being involved in fights, household use of illicit drugs, serious problems caused by drinking, and the like.

In addition, while most (87%) controls were interviewed in person, only 60% of case proxies were so interviewed, with the rest done by telephone. It has generally been found that in-person interviews get more accurate data than telephone interviews on such socially undesirable activities as tax cheating and illegal drug use. (Westat, 1980; Gfroerer and Hughes, 1992) If the responses, if given or given honestly, would have indicated affirmation of the undesirable behavior, the odds ratios might have been still greater for such factors, with firearms ownership further behind.

The dramatically higher odds ratios for domestic violence than for firearms ownership —which could have been still higher had more of the 30 respondents who did not answer that question answer in the affirmative—led Kellermann et al. to conclude something should be done about that problem. However, the policy of the CDC, which funded their research, as announced at the November 1992 meetings of the American Society of Criminology, by the CDC's James Mercy, is that funding firearms research is a high priority but funding domestic violence research is not. If the CDC finds the research by Kellermann et al. credible, its funding priorities should be changed immediately.

Without endorsing teetotaling, the study found that if any member of the household drank at all, the risk of homicide was greater than was the case with gun ownership. And, as with most CDC studies, credibility is undermined by inaccurate citations. Wright et al. (1983) do not validate their gun availability measures, and two of the four studies cited did not demonstrate a link between gun availability and community homicide rates. Credibility should also be undermined by the public presentations. In the press conference presenting the study, co-author Frederick Rivara asserted that the three metropolitan

counties—including Seattle, Memphis, and Cleveland—were representative of not merely urban, but suburban and rural America. King, Shelby, and Cuyahoga county are major metropolitan areas, and the study of homicides would have emphasized the inner-city of each, with little representation of the suburbs. The counties were not chosen to be representative of America, but for the convenience of the researchers who lived or had connections in those three counties.

There is no indication that the guns actually used in the homicides are those which were in the home. Since the victims all must reside in the home for the homicide to have counted (thus excluding any self-defense killings of intruders), and only 43% of killings involved persons who probably lived in the house, odds are that a majority of the killings with guns involved guns not owned by the victim. For that matter, handguns belonged in the home of only 35% of victims, but 43% died by handgun, so in some 8% of cases it would have been impossible for the household handgun to be involved. Very few attempted to use a gun for protection. The issue then becomes whether a gun is supposed to offer protection against homicide of ordinary mortals the way being dipped in the River Styx was supposed to protect Achilles, or a roof protects the house against rain, with no need for further action by the gun owner. Kellermann et al. may have demonstrated that when the NRA says the mere presence of a gun can offer protection, it means that the mere presence accessible in some way to its owner—or with widespread ownership providing general deterrence.

Self-defense killings were (properly) excluded from the study, as non-criminal homicide, but there was no effort to determine any relationship between gun ownership and protective killings. Despite their insistence that their "methodology was capable of demonstrating significant protective effects of gun ownership as readily as any evidence of increased risk," their study was not capable of finding a relationship between gun ownership and protective homicide, since those were excluded. In addition, any homicide of someone who did not belong in the house was excluded, thus excluding slayings of burglars and other criminal offenders in the home. What they seem to mean is that if guns were useful for protection, then gun ownership levels should have been higher among control than among case households. And, of course, the study would still say nothing about non-fatal protective (or criminal) gun use. If nothing else, they should have been alerted to the possibility that gun ownership is associated with self-

defense killings by their earlier study comparing Vancouver and Seattle (Sloan et al., 1988:1259) where 81% of the justifiable or self-defense killings occurred in Seattle, where they presumed there to be higher levels of handgun ownership.

Factoid: Family and intimate assaults are 12 times more likely to result in death if a firearm is involved than domestic assaults where a firearm is not involved. (Saltzman et al., 1992)

This study has some of the same failings as the article introducing the 43-to-1 factoid. Written by four of the most active of the CDC-employed anti-gunners, however, caveats about the limitations of the study are left out.

The key problem is the same as when similar claims were made for homicide/assault overall by Newton and Zimring (1969:44) in the 1960s: It begs the question of whether guns are used because killing is intended or killing results because guns are used. Intent is ignored; all assaults are presumed equally likely to be intended to kill, or not intended to kill—including pistol whipping. The researchers merely assume it makes no difference what intention was; good would come from restricting firearms access anyway—and, again, there is no consideration of whether firearms use was defensive or aggressive. Interestingly, the article appeared the same month as another article suggesting that one reason there were more gunshot wounds per patient than earlier was an increasing motivation to kill. (Webster, et al., 1992a)

The 12-to-1 study was of one atypical jurisdiction (Atlanta/Fulton County) for a period of one year, with a grand total of 23 deaths, or approximately one-tenth of one percent (0.1%) of those which occurred in the U.S. during 1984. It was published at a time when, with the massively reported increase in female firearms ownership, the domestic homicide rate is at, at least, a quarter-century low. (FBI, 1993) There were no data presented involving either the sex of the victim or the determination of the police, prosecutors, or others, as to whether any of the 23 deaths (or any of the 14 involving firearms) were justifiable or self-defense killings.

The only domestic violence included in the study was that reported to the police. If their Atlanta figures are projected, then there were approximately 50,000 gun-related domestic violence incidents reported to police nationally, and 440,000 total domestic violence incidents reported to police, although the Bureau of Justice Statistics (1984) projects about a quarter-

million gun-related domestic violence incidents reported to police out of a total of 1.3 million domestic violence incidents reported to police; and the BJS reports a total of 2.3 million domestic violence incidents (including those respondents said were not reported to police). Both the BJS and JAMA (June 17, 1992) assume that many domestic violence incidents are not reported to either police or the victimization surveys, putting the overall estimate of annual domestic violence incidents at roughly two to four million domestic assaults on wives, plus others on children, husbands, and other family members. With such a small sample reported to the Atlanta police, absolutely nothing is known about the effects of gun use on domestic violence. Too much is left out—perhaps deliberately, in order to come up with a catchy ratio.

The data base is not only unrepresentative of the nation as a whole—based on comparisons to National Crime Survey (NCS/victimization surveys)—but the authors knew their sample was unrepresentative, noting that the NCS often shows weapons often used in other than ordinary ways or not used to injure without firing. "For example, an offender with a firearm may push, hit, or kick the victim. However, in all but two incidents in this study, the injuries sustained were those expected from the types of weapons involved...."

Factoid: When a woman kills someone with a gun, it is five times more likely to be loved one than stranger. (Kellermann and Mercy, 1992)

In terms of women and guns, Kellermann and Mercy (1992) reported that, when women killed men with a gun, the man was five times more likely to be an intimate than a stranger. They ignored the fact that the same ratio was found when women killed men with knives, and that it only fell to four when the killing involved some other weapon. There was no suggestion that the killings were other than self-defensive, a view supported by criminological literature: "Moreover, it seems clear that a large proportion of spousal killings perpetrated by wives, but almost none of those perpetrated by husbands, are acts of self-defense....women kill male partners after years of suffering physical violence, after they have exhausted all available sources of assistance, when they feel trapped, and because they fear for their own lives." (Wilson and Daly, 1992) Comparable to the five-to-one ratio, a study of rape found it 3.5 times more likely to be by a non-stranger. (National Victim Center and the Crime

Victims Research and Treatment Center, 1992) Thus, domestic self-defense is bemoaned as something women should try to avoid by avoiding firearms ownership.

Factoid: The actual medical costs of treating gunshot wounds is $4 billion, 86% of which is paid for by tax dollars, with lifetime costs of $14-20(-40) billion. (Chafee, 1992; Mercy, 1993:9; Mercy et al., 1993:11)

Although popular with anti-gun advocacy groups and politicians (Chafee, 1992), there is no apparent basis for the $4-billion figure for actual costs for medical treatment of gunshot wounds, and it is not a figure commonly used by the CDC. There is similarly no basis for the $40 billion figure. The $14.4 and the updated $20.4 billion figures are based on two studies by Dorothy P. Rice (Rice et al., 1989:217; Max and Rice, 1993)

Of the $20.4 billion, however, only $1.4 billion goes for actual medical care of gunshot wound victims, even estimating there to be some 171,000 non-serious gunshot injuries in addition to the 65,000 estimated elsewhere (Martin, et al., 1988). The 171,000 figure would mean that the vast majority of gunshot wound victims do not need hospitalization, or even emergency-room care. One study suggested that releasing 60% of emergency-room gunshot wound victims was unusually large, and due in part to the minor injuries likely to be inflicted in drive-by shootings. (Ordog et al., 1994) The figure of $1.4 billion, if accurate, would mean that gunshot wounds account for approximately one-fifth of one percent of the nation's annual medical costs. (U.S. Bureau of the Census, 1992:97)

While the $1.4 billion figure may have been carefully calculated, the estimate of $17.4 billion—most of the remainder of the $20 billion—is for lost productivity of those killed. It is the figure which leads Mercy to assert that gunshot fatalities are the costliest of premature deaths to society. The reason Mercy finds them costliest is that the victims of gunshot fatalities are, on the average, younger than victims of most other injury fatalities, and thus in theory have more years of productive life lost. The flaw in the assumption regarding the costs to society is that the presumption is that persons killed with guns would, absent the gunshot wound, have led productive working lives. In fact, studies of homicide victims—especially the increasing number of younger ones—suggest they are frequently criminals themselves and/or drug abusers. It is quite possible that their deaths, in terms of economic consequences to society, are net

gains. Society is freed from costs of $20,000 per year for imprisonment, and of the costs criminals impose on society, which, among the most active of criminals, has been estimated at upwards of $400,000 per year. (Zedlewski, 1987) A failure to understand who is dying of gunshot wounds, and what they would have done had they not died, makes the "lost productivity" costs nonsensical.

The 85.6% figure for tax dollars is a slight misreading of a study (Martin et al., 1988), indicating that in a single study in a single city, only 14.4% of the medical costs were paid for by the patient or covered by his medical insurance. Some of the remaining costs were borne by the hospital, cutting in to profits, but not requiring actual expenditures of public funds. And other studies have found much larger percentages of gunshot wound victims covered by medical insurance. A Washington, D.C., study, for example, for 37% of patients insured. (Webster et al., 1992a) However, the fact that a majority—whether five-eighths or six-sevenths—of medical costs of gunshot wound victims are not covered by insurance undermines still further the pretense that firearm-related violence affects ordinary folks. Nationally, about 85% of hospital costs are covered by the patient or his insurance. (U.S. Bureau of the Census, 1992:99)

Factoid: The restrictive licensing law in the District of Columbia saved about 47 lives per year, with firearm-related deaths down in the city but not in the surrounding areas. (Loftin et al., 1991)

One of the only efforts to test the effects of a gun law similarly deliberately distorted data to reach a conclusion—but started by distorting the law, referring to a handgun ban as a restrictive licensing law. While most scientists will compare cities to cities, these researchers compared the numbers of homicides in a city, which was rapidly losing population, to those in the surrounding suburbs, which were growing. In addition, for the methodology to be persuasive, the trends before the intervention point—the effective date of the law—should be similar for the control jurisdiction and the one being tested, which was not the case for the District and its suburbs. (Kleck et al., 1993:3-4) Perhaps worse, the model used disguised the fact any chart on the homicides would have shown, that the rate of homicide fell before the Washington, D.C., gun law went into effect, and then was stable, rose slightly, fell for a brief time, and then skyrocketed.[15] (Office of Criminal Justice Plans and

Analysis, 1992) Applying the model 6, 12, 18, or even 24 months before the effective date of the law (as asserted by Loftin et al.) would similarly have shown that homicide went down after those arbitrarily selected starting points, and, indeed, went down faster using the 6 or 12 or 18 months before the law took effect. (Kleck et al., 1993:19)

The model used essentially averaged pre-law with post-law homicides to take advantage of the fact that the homicide rate had been quite high in the early 1970s before falling until the year (1976) the gun law was enacted. When challenged with the assertion that homicide dropped during the two years before the law took effect, between 1974 and 1976 (Blackman, 1992b), the authors dishonestly asserted that the critic had said that the drop in homicide began in January 1974, thus suggesting that January 1974 is 24 months before October 1976. (Loftin, et al., 1992) The authors had checked no other possible factors to explain what they perceived as a drop in homicide; they assumed it must have been the gun law, even though other factors certainly existed in Washington, D.C., including increased efforts to enforce federal gun laws in the District in the mid-1970s (Kleck, 1992)—and, indeed, even though they found a dramatic drop in homicide to be an unexpected consequence of a law aimed at gradually reducing the number of lawfully-owned handguns in the city. (Loftin, et al., 1991:1619-20) Using the same model to test for a gradual decline in homicide, which should have been expected if the handgun freeze worked, shows that the law did not work. (Kleck et al.:11-12) Similarly, the law does not work if the time period is extended by two years, even though a law intended for a gradual effectiveness should be steadily working more, and extending the time frame three years beyond the date Loftin et al. ended would have shown the law to be counterproductive. (Kleck et al., 1993:8)

The methodology chosen and its use were eviscerated by Kleck et al. (1993), who noted that similar sudden drops in homicide could be found by putting the starting point for the month-by-month comparison at any number of starting points in the years around the time the law was adopted, and that one could use the same methodology to show that a state preemption law which repealed an existing city waiting period also reduced homicides sharply. The same methodology and same time period would also show a sharper decline in Baltimore homicide—a better control jurisdiction than the District's suburbs—without any such legislative initiative as a handgun "freeze." In addition, they noted that the same result would not be achieved if FBI

homicide data were used rather than NCHS homicide data, and questioned a conclusion which depends upon which source of homicide data is used. (Kleck et al., 1993:16-18) One might also note that the primary distinction is that the NCHS data would include non-criminal homicides by law enforcement and civilians, leading to the odd conclusion that a restrictive gun law saved the lives of criminals, while the lack of similar conclusions from FBI data would indicate that the lives of the law abiding were not saved.

Like Kellermann and Reay (1986), the Loftin et al. study was apparently not funded by the CDC, but served as the first demonstration of an approach to evaluating gun laws which the CDC was asked to fund with $368,443 (Public Health Service Grant Application Number 306268-01, September 26, 1990). The first CDC funded study (Grant #R49/CCR-306268) using the same approach found, with (thus far) little publicity, that "mandatory sentencing reduces firearm homicides, while waiting periods have no influence on either homicides or suicides with guns." (McDowall, 1993:1) While the conclusion is probably accurate, the only improvement in the methodology is using several jurisdictions with the same sort of legislative change, which may increase slightly the likelihood that the otherwise seriously flawed interrupted time series approach (Kleck, 1992; Kleck et al., 1993) may yield persuasive results.

FACTOIDS REGARDING "CHILDREN"

Factoid: Firearms education may increase the risk of gun-related injuries. (Kellermann et al., 1991:19)

Although education is not dismissed entirely as a means to reduce firearm-related injuries, it is generally dismissed as inadequate. And education is perceived as a possible threat to produce an increase in the misuse of firearms. And, while education is a generally approved, if inadequate, in other facets of life as an approach to reducing injury, when it comes to firearms, education becomes a possible threat lest "safety benefits of such courses are outweighed by their ability to promote an interest in firearms, an interest which increases the number of firearms in circulation and the potential for both intentional and unintentional injuries." (NCIPC, 1989:266) And the CDC has opined that "educational interventions...are often expensive and rarely result in lasting behavioral change. Some

educational interventions...may actually increase the probability of injury." (Kellermann et al., 1991:19)[16]

One survey noted no difference in how firearms were stored (locked and loaded or not) related to whether the owner had firearms instructions; "instruction in the proper handling of firearms was not associated with whether a gun was kept loaded when not in use." (Weil and Hemenway, 1992:3037) Unfortunately, instruction was measured by asking about training, including military training, which is not generally designed to address the issue of proper storage of firearms in the home. In addition, the dismissal came despite acknowledgment that the only study possibly relevant to actual misuse found that owners of guns involved in accidental shooting deaths of children were unlikely to have received any safety training. (Heins et al., 1974) The study did not deal with misuse of firearm, only with whether guns were stored in a potentially dangerous way.

Surveys of pediatricians and their patients' parents found that pediatricians were uncomfortable with the idea of counseling regarding firearms, recognizing their ignorance on the topic, and that parents would be unlikely to seek advice on firearms from pediatricians, or to heed advice if offered. (Webster et al., 1992b) Considering physicians' reluctance even to ask about domestic violence in potentially battered patients (Jecker 1993), it is unlikely the professions' members will willingly turn to invading privacy with questions not clearly related to an ailment they are treating. In addition, non-gun owning parents indicated a likelihood to turn to the police for firearms instruction, with gun owners more likely to turn to gun organizations. (Webster et al., 1992b, 1992c) Under the circumstances, a more effective way for physicians to reduce the firearms-related injuries due to accidents would be to cooperate with the National Rifle Association's "Eddie Eagle" program for teaching children firearms avoidance and safety, a program which won a National Safety Council community service award for NRA Vice President Marion Hammer for her work in getting the program adopted in the schools in Florida. (Tallahassee Democrat, Oct. 6, 1993, p. 12A)

Factoid: There is an epidemic of children killing children with guns. (Rosenberg, 1984:127; Rice et al., 1989:23)

Recent trends in homicide, particularly firearms-related homicide, in America have been discouraging, (Law

Enforcement News, 1990) although the push to tie restrictive gun laws to misuse by children began while reported trends were still moving the right direction. And, for the most part, the real sharp increase in homicide—and firearms-related homicide—occurred in the 1960s and 1970s, and went down during the early 1980s. (Baker et al., 1984:90-91) As Kleck has noted, the homicide rate, and gun involvement in homicide, for persons 0-19, improved somewhat in the late 1970s and 1980s, and did not begin its upwards drift until 1987 (U.S. House of Representatives, 1989:60), by which time the anti-gun groups had already begun to emphasize children as the reason for needing more restrictive gun laws (Treanor and Bijlefeld, 1989: Unpaginated letter from Constance A. Morella), and after Congress had passed legislation calling upon the CDC to study injury-related deaths among children. The suspected assailants were under 18 in about 6% of the homicides in 1986, rising to about 20% in 1989 and 1990, and falling back to 10% for the first half of 1991. (Johnson and Robinson, 1992)

Overall, the involvement of younger persons (under age 15, or 18) in violent crime was generally stable or declining from the mid-1970s to 1987, as has been demonstrated by Gary Kleck (U.S. House of Representatives, 1989:60-61). Since that time, there has been an increase, coincidentally beginning almost exactly the time Congress expressly authorized the CDC to begin addressing the issue of injury-deaths among youths. The rise has not been across the board, either in terms of who is apparently committing the crimes (based on arrest record), or on the types of criminal violence. (FBI, 1992:220-229,279-289). For most crimes, the 1980s saw stability in the arrest rate among white youth and other non-black races, except for slight very recent increases. Overall, and particularly for homicide, the black arrest rate rose dramatically. For all races, one of the more shocking aspect of the arrest trends is that there is a dramatically greater increase in arrests for homicide than for other violent crimes. Violent crime arrest rates were fairly stable from the late 1970s to the late 1980s, but then rose substantially, while property offenses dropped. (Snyder, 1992) Similarly, teenage victims in crime surveys indicate a decrease in theft but with a downward trend in violent victimizations during the early 1980s being replaced by a increase in violent victimizations more recently, up to levels reported around 1979-81. (Whitaker and Bastian, 1991:3)

But clear and dramatic increases in crimes involving young persons, especially blacks, as perpetrators and victims, have

occurred. The same trend is clear with CDC data. In order to show dramatic increases, the CDC has to be careful to use the mid-1980s for comparison, since the late 1970s and early 1980s will fail to show dramatic changes, or, for some age- and racial groups, any changes, whether looking at homicide overall or at gun-related homicide. Compared to 1979-81, only the homicide rate for infants under the age of one has risen dramatically—and almost none of those homicides (3-4%) involve firearms. (FBI, 1992:18 and 1993:18; Hammett et al., 1992) For other youthful age groups (1-4, 5-9, 10-14, 15-24), the homicide rate remained fairly stable, and for all other age groups, the homicide rate declined during the 1980s. (Hammett et al., 1992) The same is generally true as well for firearm-related homicides, except among young black males up to the age of 25, and for black females aged 10-14. For most five-year age groups, homicide was fairly stable, declining, or rising only modestly, between 1979 and 1988. (Fingerhut et al., 1991:7-8)

To find a clearly upward trend in homicide and gun-related homicide, it is necessary to use the mid-1980s at a starting point and to emphasize young black males (aged 10-24), for whom a decline in the early 1980s was followed by a much greater increase in more recent years. Even with recent homicide increases, the rates are generally lower for others than around 1979-81. (Hammett et al., 1992; Fingerhut et al., 1991) Furthermore, one has to emphasize young blacks from central cities, since the firearm-related homicide rates for other black teenagers are dramatically lower. (Fingerhut et al., 1992)

And to play up the threat to "children," it is essential to use data from the 15-19 age group, or 15-24 age group, or a 10-19 age group. For young children, the homicide rate and the gun-related homicide rate have minimal trend, with the greatest overall rise among infants, where firearms are not a factor. And even the upward trends among some age/race/sex groups below the age of 15 are all with very small numbers and rates. Indeed, the homicide rates are higher for children below the age of five than for children aged 5-14, for whom the homicide rates have remained around 2 per 100,000 and the gun-related homicide rates around 1 per 100,000, although gun-related homicide has risen faster than other homicide for those 10-14 years of age. (Hammett et al., 1992; Fingerhut et al., 1991) Yet homicide rarely involves firearms for those youngest of children with a homicide rate about 8 per 100,000 (3-4% involving firearms), and almost as rarely for the next youngest age group, at about 15% for 1-4 year olds. (FBI, 1992:18 and 1993:18)

Factoid: The availability of handguns to urban high school students is pervasive and it is not limited to high-risk groups. (Callahan and Rivara, 1992)

One of the authors of this work (Rivara) is part of the Kellermann et al. group specializing in pretending Vancouver and Seattle are similar. The survey was exclusively in Seattle high schools, thus excluding all non-city students, who presumably have greater access to firearms (based on a North Carolina survey often cited with horror as showing widespread male high schooler access to firearms, despite the lack of any problem).

The report pretends that access is rather common—it is similar to the response one would get if one asked adults about whether there was a firearm in the home. That is, what the researchers are learning is that high school students know if there is a firearm in their home, a not terribly shocking or informative result.

The authors note, too, that about 6% of the males say they own a handgun, and about 6.6% have carried it to school at some point. (Note: At this point, one is talking about 30 persons in a survey of nearly 1,000, in an unrepresentative urban area.) Although claiming the access is widespread and not limited to high-risk groups, there was a significant relationship between access to handguns and gang membership, drug selling, involvement in criminal violence, and trouble making at school. Perhaps most importantly, in terms of undoing credibility for the survey, it conflicts with a more extensive CDC survey which found that 4% had carried a gun (not necessarily a handgun) for protection (not necessarily or likely to school) during the preceding 30 days. The Seattle survey would appear not to be representative of the nation's high schoolers.

Factoid: Having a gun in the home increases the risk of adolescent suicide 75 fold.

Recently, advocates of restrictive gun laws have a new bogus figure: "teen-agers in homes with guns are 75 times more likely to kill themselves than teen-agers living in homes without guns." (Reeves, 1992) That particular invention had an interesting development. In a small-scale study[17] of suicides, attempted suicides, and non-suicidal teenagers with psychiatric problems, firearms were roughly twice as likely to be in the

homes of the suicides than in the homes of those western Pennsylvanians who unsuccessfully committed suicide or those had psychiatric problems but were non-suicidal. (Brent et al., 1991) There was no suggestion, nor any study, of the possible risk factor of firearms in the home of teenagers who were not suicidal. Indeed, the ownership levels overall for the sample of mentally disturbed teenagers was lower than would have been expected in western Pennsylvania overall, based on the popularity of hunting in the area.[18]

The Journal of the American Medical Association (JAMA) frequently accompanies major articles with an editorial written in or out of house. In this case, three employees of the CDC authored an editorial, asserting that "the odds that potentially suicidal adolescents will kill themselves go up 75-fold when a gun is kept in the home." (Rosenberg et al., 1991) There was nothing in either article or editorial to suggest that there was any increased risk for non-suicidal adolescents; and the suggestion that access to firearms by suicidal teenagers should be restricted was clearly not controversial (Blackman, 1992a).

But the 75-fold or 75 times figure was sheer invention, as was noted in unpublished portions of the letter published by JAMA (Blackman, 1992a). Instead, the false statement was withdrawn in a "correction" printed in JAMA. Unfortunately, corrections in JAMA are fairly well hidden compared to corrections in news media like the *Washington Post*, but the relevant portion read: "The second sentence of the Editorial should have read as follows: 'In fact, the odds that potentially suicidal adolescents will kill themselves more than double [not "go up 75-fold"] when a gun is kept in the home.'"[19] (JAMA [April 8, 1992] 267:1922)

Although the CDC corrected its error, there is no indication that any steps have been taken to correct those misusing their figure. Certainly, this author has seen no letters to the editor correcting the falsehood when it appears, and in a discussion with HCI officials for *Washingtonian* magazine reporter in Washington in July 1992, HCI denied there was any correction, so the CDC apparently did not correct themselves to one of their most avid readers. And the lie lives on in congressional testimony by Senator John Chafee (1992).

Factoid: Eleven (or 12) percent of children who die are shot to death.

The CDC study which came up with 11% (Fingerhut and Kleinman, 1989) carefully excluded deaths of those under the age of one. If included, firearm-related deaths would have accounted for 4.5% of the deaths of "children" aged 0-19. Of deaths in the 1-14 age group, firearms are involved in about 5% (NCHS, 1991). Redefining children as 1-19 allows the 11% figure from 1989 to be updated to about 12%.

Factoid: More teenagers now die from firearms than from all natural causes put together. (Fingerhut, 1993)

Thanks to modern medicine, that is how it should be. Persons who survive the killers of childhood—perinatal conditions, birth defects, sudden infant death syndrome—should be generally safe from natural causes until middle age. The change is not increased violence, but decreased deaths from infectious and parasitic diseases. And the main threat to alter that statistic, particularly among the young adults occasionally included in the "children" category, comes from infectious diseases, particularly the human immunodeficiency virus. Deaths of teenagers and young adults are tied to reckless or aggressive behavior.

The study is similar to one published in 1991 (Fingerhut and Kleinman), but limited to 1985-1990, since the 1980-1985 data would have shown a dramatic decrease during the first half of the '80s. (Or, as she worded it, the earlier time frame was ignored because "it was during the second half of the decade that firearm mortality increased for the younger population.") The dramatic recent increase is largely limited to a small segment in society—already least apt to own guns and most restricted from lawful access by federal and state law: young urban black and (for the past year or two) Hispanic males. The study makes reference to a dramatic recent increase among whites, but that figure included Hispanics, and there is no breakdown in the study for non-Hispanic whites; Fingerhut has acknowledged to the press that she expects much of the increase for whites was among Hispanics, a statement supported by a more recent study where Hispanic data were included, showing firearm-related death rate for Hispanics 15-34 years of age nearly double the firearm-related death rate for non-Hispanic whites, albeit less than half of that for blacks. (Fingerhut, et al., 1994:8)

By limiting their data to those over 1 and under 35, the CDC disguises the fact that firearm-related deaths are down for much of the population. The study data show a small decline for those

1-9. Similar declines occur across the board among those over 34, for whom gun ownership levels are higher than among those under 35. Interestingly, almost all of the dramatic increase in firearm-related deaths among young persons has occurred since 1987 when the CDC received from Congress the task of reducing firearm-related deaths among young persons.

Factoid: A large and increasing number of high school students are taking guns to school.

No one knows how many high-school students, male or female, carry guns, or handguns, to school, either on a daily, monthly, or annual basis. In 1990, the CDC began surveying high-school students regarding weapons carrying, and that report has served as the basis for some of the disinformation publicized. (CDC, 1991) If follow-up surveys do not improve the question wording, little is likely to be learned.[20]

The CDC survey of high school students asked about carrying weapons for protection or because it might be needed in a fight, and then asked about the type of weapon. The time frame was the preceding 30 days, with frequency asked. Unfortunately, the question did not ask about carrying onto school grounds, nor about carrying on the person. Other surveys regarding carrying have made it clear that carrying in a motor vehicle is included by respondents as carrying for protection. (Kleck, 1991:117-119) And most of the carrying was infrequent; nearly 60% who carried did so at most three of the 30 days.

With mathematical sleight of hand, the 4.1% of students who carried or transported firearms someplace for protection became, in the CDC editorial, "Approximately one of 20" rather than one of 25. The news media were left to put the guns in the schools. In addition, as Kleck has noted (private communication), the percentage of students carrying regularly for protection is far lower than the percentage of adults carrying regularly for protection, despite a substantially higher violent victimization rate for the teenagers. Only a minority of the violent victimization occurs on school grounds (37% for those 12-15, and 17% for those 16-19). (Whitaker and Bastian, 1991:8) A more recent survey, too, suggests that the place most threatening to students is not apt to be school. (Sheley et al., 1992 and 1994; Sheley and Wright, 1993) The survey recently conducted by James D. Wright and his colleagues at Tulane University, emphasizing inner-city schools, found that most carrying by students was <u>not</u> on to school grounds, that the

carrying was for protection, and that this very rarely included carrying onto school property (although it might include carrying to and from school, hiding the gun someplace before going onto school grounds). Wright and his colleagues also noted that "it is useful to point out that nearly everything that leads to gun-related violence among youths is already against the law. What is needed are not new and more stringent gun laws but rather a concerted effort to rebuild the social structure of the inner cities." (Sheley et al., 1992:682)

How much of the carrying is on school grounds is unknown and unknowable from the CDC survey. Assuming rationality in choosing when to carry for protection—and most students who carry apparently choose to do so rarely—the fact that only a minority of offenses which might require weapons for protection occur at school, that victimization in general is more common at times when students are rarely in school, that much carrying normally is in motor vehicles rather than on the person, and the like, Kleck has estimated that the number carrying firearms might drop to one in 200 carrying part of the average day, with half of that on the person, and half of that half on school grounds. The number carrying guns on the person onto school grounds any given day would then be about one in 800, or roughly 15-20,000 nationally.

As with other practices, carrying of firearms for protection (wherever and however) was not something affecting everyone equally. Males were more than twice as likely to carry for protection as females, and blacks and Hispanics more likely to carry than other whites. And, while overall only one-fifth of those who carried a weapon identified it as a firearm, the majority of black male students who carried a weapon identified it as a firearm.

As with the number carrying, no one knows the trends in firearms carrying. CDC survey between 1990 and 1991 suggests a drop, based upon a preliminary comment on it by the CDC's Rosenberg (1992). The 1990 survey indicated about 20% carrying a weapon of some kind during the preceding 30 days, and 4% carrying a *firearm*, with the comment that "[m]ost students who reported carrying firearms carried handguns." (CDC, 1991) More recent testimony indicated 26% carrying a weapon, but "[a]mong students who carried a weapon, 11% most often carried a handgun." That would project to about 2.5% handgun carrying, compared to 4% gun carrying. And, while carrying a weapon was up, for handguns, the CDC goal of a 20% reduction in weapon carrying by the year 2000 (Rosenberg and

Mercy, 1991:9) was met in 1992. On the other hand, speeches by the CDC's Rosenberg indicate that there was an increase in handgun carrying between the 1990 and 1991 surveys. Since CDC calculates carrying not by percentages alone but in combination with frequency, it is possible that what the CDC is finding is that fewer students carry handguns for protection, but those who do so are carrying more frequently.

Factoid: Latchkey children threatened by access to guns. (Lee and Sacks, 1990)

Another popular means of attacking firearms by public health professionals is the suggestion that "latchkey children"—those who are home alone after school because both adults in the household work—are at risk for firearms related accidents. The study asserting that firearms and latchkey children pose of risk for accidents did not study accidents to see if there was a disproportionate number of accidents involving such children, but only suggested that there were firearms in a substantial proportion of households with latchkey children. There was no proof of children's access to the guns. Incidentally, while about 450-500 children 14 and under died in firearms-related accidents in the 1960s and early '70s, the number has been in the 230-250 range in recent years, although the number of latchkey children has probably risen and the proportion of households with firearms has remained stable overall, with the proportion having handguns rising from about one-sixth of U.S. households in the early '60s to about one-quarter now.

CONCLUSORY COMMENTS

The number of factoids could be lengthened, and the CDC will undoubtedly continue to produce others as time goes by and its budget increases—while that of the Department of Justice research arms stays stable of declines, at least in terms of discretionary grants for research on criminal justice issues. There is no consistent trend in the CDC research on the firearms and violence issue. There are, and will for the foreseeable future continue to be, three basic types of studies.

One will consist largely of gathering and disseminating data showing the misuses, or trends in the misuses, of firearms. The data collected and reported will, to the best of the CDC's ability, be complete and accurate—potentially useful to more capable researchers. Those studies will not be complex efforts to look at

myriad factors affecting trends, nor to evaluate firearm availability or gun laws in relation to misuse. The studies will, as they have done in the past (e.g., CDC, 1994; Fingerhut and Kleinman, 1989 and 1990; Fingerhut, 1993; Kellermann and Mercy, 1992), simply report the data, accompanied by some rhetoric, and conclude that various interventions—regulating the types of guns and ammunition which can be manufactured or owned, limiting availability, etc.—would work to reduce firearm-related deaths and injuries. To the extent the conclusion is based on anything, it will be based on interventions in other sorts of ailments, where illnesses or accidents, or with citation to previous CDC-endorsed research of generally low quality.

The second type of study will involve more sophisticated methodology. As in the past (Kellermann et al., 1992 and 1993; Loftin et al. 1991), however, such studies can be expected to be deliberately distorted. Relevant data will be ignored or misused; citations will be occasionally—often deceptively—inaccurate; methodologies will be inaccurately or inappropriately chosen; "controls" will be improperly chosen, and the like. And the clear goal will be to produce an easy-to-remember factoid for the news media to use to suggest that firearms ownership is harmful and counterproductive.

And the third type of study will be a literature review, often mostly rhetoric (Cotton, 1992), summarizing the results of the two other types, and promising that in the future the public health approach will actually result in finding ways to reduce the amount of firearms-related violence (Kellermann et al., 1991; Rosenberg et al., 1992; Mercy et al., 1993). Thus far, the CDC has made no actual progress in treating violence as a disease, but has achieved widespread acclaim for talking about it, much as the police in the "Pirates of Penzance" sang at length of going off to confront the pirates, finally eliciting the outburst, "Yes, but you don't go."

And those three types of studies will continue to be produced and widely reported so long as social scientists and public health professionals prefer to praise studies which reach conclusions they like regardless of the methods used, and Congress does not actively oversee how supposedly limited federal moneys are spent.

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Endnotes

1. One could observe, for example, that the "risk factor" most commonly associated with premature death in the United States is the M.D.

2. To bring back emotion, he tells of the near-fatal shooting of a woman by her husband, a state trooper, who used his service revolver and successfully won acquittal, claiming that the shooting was accidental. It is unclear what action the CDC would propose to prevent shootings by law enforcement officers, or prevent their being able to claim the shootings were accidental in a court of law. (Rosenberg, 1993)

3. Sometimes, of course, there is no basis for a statement. For example, Surgeon General Antonia C. Novello felt compelled to discuss firearms in her plenary remarks to a CDC-sponsored conference on violence. (Novello, 1991) She said: "Today, homicide and suicide are the second and third leading causes, respectively, of death among children. Investigators believe that ready access to loaded firearms in the home for children under 15 is the chief contributing factor in unintentional shootings, with an increase in the use of firearms a paralleling an increase in violent deaths." Yet firearms accidents, overall and among children, have been declining, and her statements regarding homicide and suicide, while perhaps accurate for slightly older age groups, are untrue when speaking of children under 15, or even 1-14.

4. Public Law 99-649 essentially calls upon the CDC to study the issue of injury to children, without defining that which is to be studied. The bipartisan legislation was enacted at a time when the data available to Congress would have shown trends moving in the right direction. The legislative findings—part of the Act of Congress—asserted that injuries caused the deaths of half of "children" 1-15 and two-thirds of all deaths of "children" over the age of 15. In order for that to be approximately true, Congress's view of "children" was that they constituted persons aged 1-34 or 1-35. For younger children over the age of one, the data available to Congress would have indicated that injuries were the cause of 75-80% of deaths. (NCHS, 1987) The legislative history of a bill to study children's injury deaths also noted that injuries were the leading cause of all deaths of persons aged 1-44—an accurate statement, but perhaps a misleading suggestion about possible definitions of children. U.S. Code Congressional and Administrative News, 99th Congress, 2nd Session (1986) 6:6162.

5. An alternative wording of this in a resolution proposed at the American Medical Association semi-annual meeting in December 1993 was that there have been more deaths by gunshot between 1933 and 1989 (1,209,199) than in all the United States wars from the Revolutionary War to the present (1,177,956). In addition to some obvious inaccuracy, the comparison is one of apples and oranges. Wars, particularly American involvement in wars, generally involve a tiny percentage of the population, a very short span of time, and very high death rates per 100,000; ordinary life represents the population as a whole, with very low death rates from gunshot wounds. The period for gunshot wounds, for example, covers a population of 100-250,000,000 and a period of 57 years; the period for war actually involves less than 25 years and normally less than 500,000 American servicemen. The numbers are, of course,

fanciful: no precise numbers are known about either the number of persons lost to gunshot wounds or to war during any period of time.

6. In his health system reform speech in 1994, President William J. Clinton expressed a similar sentiment, claiming health care costs are driven up in part because "this is the only country in the world where teenagers can roam the streets at random with semi-automatic weapons and be better armed than the police." Generally speaking, the guns used by police retail at $300-800 and those used by teenagers at $50-350. If police wished the same arms as teenagers, their departments could save money by downgrading, with funds left over for care of the officers injured when their new service arms jammed. Regarding health care costs, gunshot wounds for all—whether caused by teenagers or adults—account for approximately one-fifth of one-percent of health care costs (U.S. Bureau of the Census, 1992:97; Max and Rice, 1993) Total medical costs for all injuries to persons 0-19 were estimated to be $5.1 billion (in 1987 dollars), of which 6.6% were attributable to assaults and suicides (by whatever means inflicted) and firearms accidents. (Malek et al., 1991:1003) So gunshot injuries to teenagers probably account for about one-twentieth of one percent of the nation's medical costs. And the suggestion that teenagers can roam the streets with firearms was addressed by Sheley et al. (1992:682): "[I]t is useful to point out that nearly everything that leads to gun-related violence among youths is already against the law. What is needed are not new and more stringent gun laws but rather a concerted effort to rebuilt the social structure of inner cities."

7. A study in a major trauma center in Los Angeles of the 60% of shootings which could be treated on an outpatient basis after emergency-room treatment, found that 91% of cases involved single missiles from handguns, 3% multiple missiles, with rifles—the most common type of the so-called "assault weapon"—used in 3% of cases, only 5% involved high-velocity missiles, and none were reported to involve tissue damage from shock waves often rhetorically associated with military-style rifles. Even if the more serious injuries were somewhat more apt to involve such firearms, the percentage would remain fairly low. And 80% of the injuries studied involved the drive-by shootings rhetorically associated with military-style semi-automatics. (Ordog et al., 1994)

8. It is unclear what Houk was thinking of, since the total number of motor vehicle deaths peaked at about 56,000, and the number per 100-million vehicle miles has been declining fairly steadily for the past decade, unsteadily in the '70s, and was stable in the '60s, so the rate has been cut in half since 1960—a bit less than the rate of accidental firearms fatalities. That is, of course, comparing rate per 100,000 population to rate per 100,000,000 motor-vehicle miles. Doing both on a rate per 100,000 population, with strict regulation, improved cars and highways, lowered speed limits, and registration and licensing, the motor vehicle accidental death rate fell about 11% between 1960 and 1990, while the accidental death rate from firearms fell over 50%. (National Safety Council, 1993:33)

9. Similarly, Fingerhut and Kleinman (1990) looked at variations in the homicide rates, and gun use in homicide, across the state lines for half of the states, indicating an interest in the possible effectiveness of restrictive firearms laws, without noting that the gun laws fluctuated greatly in the states involved. They ignored the fact that, in the various states—especially among blacks (a supposed CDC area of focus)—restrictive laws were associated with higher homicide rates

and lenience and availability with lower rates. Similarly, while they suggested firearms laws and availability might explain differences internationally, no effort was made to determine gun laws or availability in the nations cited. And, while noting that the American homicide rates were "four to eight times higher than the rates in most other countries," they failed to note that the same was true of robbery, where American firearms involvement is about 40%, and rape, where guns are used less than 10% of the time. (INTERPOL, n.d.; FBI, 1993; BJS, 1989:64)

The 1994 CDC report notes that there have been some legislative efforts to curb firearm-related injuries and deaths, but says "efforts to evaluate these approaches have been limited." Actually, of course, thanks to Gary Kleck's *Point Blank: Guns and Violence in America* (1991), awarded the 1993 Michael J. Hindelang Award by the American Society of Criminology as the book from "the past two to three years that makes the most outstanding contribution to criminology," evaluative effort has been extensive. Kleck's is not among the three works cited by the CDC.

10. Accuracy of citation is not the strong suit of Kellermann and his colleagues. This miscitation of surveys followed the study which cited two FBI sources for the proposition that "Less than 2 percent of homicides nationally are considered legally justifiable." Neither source reported that figure. The FBI did not then report data on the number of homicides police thought might be legally justifiable, and still does not collect data on the number determined by prosecutors or others to be legally justifiable. Their next study cited Wright et al.(1983) to support the assertion that "restricting access to handguns could substantially reduce our annual rate of homicide." (Sloan et al., 1988:1256) Wright et al. considered and dismissed the theory as not demonstrated.

11. Although the public health profession is not responsible for media going beyond their studies, Kellermann may have had some chance to make sure NBC News understood what the situation was in Vancouver when interviewed for an NBC news segment discussing whether handguns should be banned. Using the Vancouver/Seattle study, NBC reported that in Vancouver there is a handgun ban. (NBC Evening News, January 27, 1994) There is not; handgun ownership is restricted to sporting purposes, which generally involves joining a gun club.

12. A more imaginative effort at *ad hominem* criticism occurred when Kellermann wished to suggest that the theory that, absent a firearm, a potential suicide would simply use a different method, was flawed. He and his colleagues first cited a letter to the *New England Journal of Medicine* where the substitution theory was enunciated by an employee of the NRA, but the employee's affiliation could not properly be included in the citation, so they then cited a paper by the same person, where the substitution theory was not mentioned, but the NRA could arguably be listed as the "publisher." (Kellermann et al., 1992:467, 472)

13. If the article were right that the chance of being killed is increased by 2.7 times if a gun is owned, that means the chances rise to about one in 15,000 that the average gun owner will be murdered in his or her home each year. The chance that a gun owner will use a gun for protection each year is better than one in 50. Protective gun use is not a rare event requiring or benefiting from case-control methodology.

14. Kellermann et al. believe underreporting of gun ownership is not a problem based on a study of whether ownership was accurately reported in "a pilot study of homes listed as the addresses of owners of registered handguns...." (Kellermann et

al., 1993:1089) It is certainly possible that persons in households where gun ownership has been reported to the authorities will also more willingly report it to pollsters.

15. Using FBI data, the following is the number of homicides per year before and after a gun law was enacted which took full effect in February 1977—although Loftin et al. prefer to use the late-September 1976 date, in Washington and Baltimore. (By quarter, the number of homicides in the District from the last quarter of 1974 through the last quarter of 1978 were: 90; 56, 59, 66, 55; 57, 51, 38, 42; 50, 50, 51, 41; 37, 49, 60, 43.)

	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981
Washington	245	268	277	235	188	192	189	180	200	223
Baltimore	330	280	293	259	200	171	197	245	216	228

In 1987, the last year of the Loftin et al. study, Baltimore had 226 homicides and the District 225. The 1992 figures were 335 and 443, respectively, although Loftin et al. had concluded that, but for the gun law, the post-1987 trend would have been worse in the District.

16. While not generally enthusiastic about the National Rifle Association, an article in the Washington Post described the NRA's "Eddie Eagle" book on firearms safety education for children as "[a] must for any parent who keeps a gun in the home." (January 7, 1992, p. B5) Others have refused to consider using the "Eddie Eagle" program, while admitting it to be a good program, because of the policies of the NRA. It is apparently more important to avoid the appearance of endorsement of NRA policies than to promote child safety. (Jackson, 1992)

17. The basis for the study was 47 suicides in western Pennsylvania (Brent et al., 1991), and a letter to the editor described it as a small-scale study (Blackman, 1992). The authors responded that it was not really small scale, since it replicated an earlier study involving 27 suicides (Brent and Perper, 1992).

18. Blackman suggested that perhaps the higher level of gun ownership among non-disturbed teenagers than, overall, among the mentally disturbed, might mean there is a positive relationship between firearms in the home and mental health, suggesting more study of the hypothesis. The authors responded oddly, ignoring the fact that none of their study involved any mentally healthy teenager, that: "Both the suicide victims and suicide attempters were psychiatrically ill, but the rate of firearm ownership was higher in families of suicide victims, suggesting that there is no relationship between psychiatric illness in an adolescent and gun availability." (Blackman, 1992a; Brent and Perper, 1992)

19. Doctors sometimes have trouble with simple arithmetic. When a representative for the anti-animal testing Physicians Committee for Responsible Medicine wrote to the JAMA claiming to speak for 3,000 physician-members, the official AMA response was to belittle the figure by noting that "its membership represents less than 0.005% of the total US physician population." (JAMA 268:789[1992])

20. If, and to the extent, survey questions are improved, trend knowledge will be distorted or delayed.

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

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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 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, 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 ban[8] 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 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 general[11] 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 for defense by African 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 both have proceeded through Congress.[17] Moreover, the secret journal of the Joint Committee 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, 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 negro insurrection: "It is well known here that our negroes through the country are well equipped with fire arms, muskets, double barrel, shot guns & pistols, Ä & 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 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]

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 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]

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] Also, Senator John Sherman of Ohio also wanted "to give to the freedmen of the Southern States 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 Fifteen[42] 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]

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 "the possession of arms or 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: "No freedman who is not in the military service shall be allowed to carry firearms, or any kind of weapon, without the special permission of his employer, in writing, and approved by the mayor or president of the board of police."[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 "This ordinance, if enforced, would be slavery in substance" and, thereby, would violate the Emancipation Proclamation.[57]

During the holiday adjournment hearing, 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] 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 servitude . . . .[65]

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, began to examine constitutional amendments to protect the same rights behind closed doors.[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 protection 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]

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, 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 slave holding state in the United States and exclaimed, "I am one of the last slave holders 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 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 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 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 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]

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, 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] Then, a vote was 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 who 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 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, 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]

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.

Later that day, the House considered the Freedmen's Bureau bill. Chairman Eliot of Massachusetts reported to the House the committee 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]

That 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, 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 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]

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 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, for instance, 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 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, S. 60. 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 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]

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 "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 of the Judiciary.[176] In the Joint Committee, Senator Howard questioned a loyalist from rural Virginia, who testified that no danger existed of either a negro insurrection or a revival of the Confederate rebellion.[177] On February 8, 1866, Senator Ira Harris of New York elicited testimony from a Mississippi judge, which explained that the reason blacks were disarmed was because of an unjustified fear of insurrection.[178]

That same day, Senator Trumbull informed the Senate that the Committee of 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 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. Same that the Freedmen's Bureau bill had been passed, Congress now could focus its attention on a constitutional provision generalizing those same rights contained in the Freedman's Bureau bill.[188] 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 (that apparently favored all loyalists and perhaps freedmen) from the state's prohibition on carrying concealed weapons.[190] Meanwhile, witnesses from other states continually paraded before the Joint Committee.[191]

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 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]

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 "From 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: "No sir, but if they are told that they have no rights which white men are bound to respect, and if federal bayonets are turned against them, they will secrete arms for the purpose of defending themselves."[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]

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 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 militia.[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 militia.[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 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] Next, 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 the freedmen[226] and appealed to Congress to use its power under the Thirteenth Amendment to stamp out the incidents of slavery by passing the bill.[227]

Next, 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 by Representative E.B. Washburne of Illinois, Lieutenant Colonel H.S. Hall, and officials 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 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]

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 bill of rights 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 "The proposition pending before the House is simply a proposition to arm the Congress . . . with the power to enforce the bill of rights 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 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, "As citizens of the United States they have equal right to protection, and to keep and bear arms for self-defense. They have long cherished the idea of liberty . . . ."[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]

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–'the 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.

Furthermore, Representative Wilson 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 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 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 of Blackstone's philosophy, which included the right of having arms to protect for personal security, personal liberty, and personal property.

The opponents of S. 60 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 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 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 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] 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]

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

Later, 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 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 bill of rights 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 "The 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 negroes, shall "have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms . . . ."[291] As such, 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]

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 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 "The Constitution clearly describes that to be a republican form of government for which it was expressly framed[,] A government . . . where 'the right of the people to keep and bear arms shall not be infringed . . . .'"[306] Also included in Representative Hart's list were 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 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: "In 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 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 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 "That it shall not be lawful for any freedman, mulatto, or free person of color in this State, to own firearms, or carry about his person a pistol or other deadly weapon."[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 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 citizens . . . .[327]

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 he stated he had not drafted.[328] Section 1 of his proposal stated that "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude."[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 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 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 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 civil rights bill which has lately become a law . . . ."[353]

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 the 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 southern States."[361] Senator Mackay's statement was accurate for Texas, which 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 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 "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[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 clause, Howard asserted, "Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution."[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, 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]

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 "The eighth section simply embodies the provisions of the civil rights bill, and gives to the President authority, through the Secretary of

War, to extend military protection to secure those rights until the civil courts are in operation."[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 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, "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."[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.

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 distinctly asserts that the words 'people of the United States' and 'citizens' are 'synonymous terms.'"[401] However, Senator Henderson noted 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]

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 Clause 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]

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 the 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] 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 lawyer extra money because he wanted a man "sued harder" and analogize 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 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, however, 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]

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 Freemen'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 override 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 "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 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-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 cast 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 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 mustered 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-seven[466] 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 margin[468] 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.

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 effectuated the defense and practical realization of the 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 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 Klansman 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.

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

2. Griswold v. Connecticut, 381 U.S. 479, 485 (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

3. U.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.*

4. Miller 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).

5. *Miller*, 153 U.S. at 538.

6. *E.g.*, Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (including 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) (integrating 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, and Quincy R.R. Co. v. Chicago, 166 U.S. 226, 238-39 (1897) (incorporating the right to just compensation).

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

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

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

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.").

11. *See* Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1131 (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).

12. STEPHEN P. HALBROOK, 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 THE RIGHT TO KEEP AND BEAR ARMS: REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION, Senate Judiciary Committee, 97th Cong., 2d Sess., at 68-82 (1982).

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

14. *See, e.g.*, 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.J. 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).

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

16. *See supra* note 1 and accompanying text. 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.

17. Benjamin B. Kendrick noted:

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

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

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

19. *See* 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:

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

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

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

21. *Id.* at § 125 n.2.

22. W.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 expressed 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.

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

24. *Id.* at 522.

25. 1865 Miss. Laws 165 (Nov. 29, 1865).

26. The 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.

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

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

28. *Id.* at 523.

29. *Id.*

30. *Id.* at 524.

31. CONG. 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).

33. The Senate Judiciary Committee, 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).

34. *Id.* John Bingham eventually would author section one of the Fourteenth Amendment.

35. *Id.* at 30 (Dec. 12, 1865).

36. CONG. 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.

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.

39. CONG. 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 implementation 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).

46. They 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).

52. BURGESS, *supra* note 26, at 64.

53. The 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).

54. Id. at 85.

55. Ordinance 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.

58. Some Senate 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.

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

61. *Id.* at 129 (Jan. 5, 1866).

62. *Id.*

63. CONG. 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).

67.It is instructive to compare the Freedmen's Bureau bill with the draft of a constitutional amendment proposed by John Bingham to the Joint Committee that same day, 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: "All 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.

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

70. Representative 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).

71. Specifically, the article stated:

> 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.

72. . CONG. 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 full 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 constitution.").

77Ind. Const., Art. I, § 32 (1851). 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).

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

Id.

85. *Id.*

86. *Id.*

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

88. *Id.*

89. *Id.* at 335-36 (Jan. 19, 1866).

90. *Id.* at 337 (Jan. 19, 1866).

91. KENDRICK, *supra* note 17, at 51. A wholly separate amendment, proposed by the subcommittee, would have stated, in addition to Senator Bingham's proposal: "All provisions in the Constitution or laws of any State, whereby any distinction is made in political or civil rights or privileges, on account of race, creed or color, shall be inoperative and void." *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.

93. CONG. 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.

94. 2 PROCEEDINGS OF THE BLACK STATE CONVENTIONS 1840-1865, at 284 (P. Foner and G. Walker eds., 1980).

95. *Id.* at 302-03.

96. The 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.

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

98. *See infra* notes 99-139 and accompanying text (providing testimony given before the Joint Committee).

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

100. *See infra* notes 118, 121 and accompanying text.

101. CONG. 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. 24-25, 1866).

107. *Id.*

108. *Id.* at 420 (Jan. 25, 1866).

109. *Id.* at 421 (Jan. 25, 1866).

110. KENDRICK, *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 361-70 and accompanying text (introducing the Fourteenth Amendment on Senate floor by Jacob Howard).

115. For 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, "[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.

116. As 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.

117. CONG. 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 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.

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).

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

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.

131. REPORT 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.

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.*

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

141. CONG. GLOBE, 39th Cong., 1st Sess. 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).

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 121.

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

148. *Id.* pt. 3, at 55.

149. CONG. 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).

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

156. *Id.*

157. *See* 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.").

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

159. REPORT 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.

161. *See supra* notes 117 and accompanying text (discussing the subcommittee's draft and providing the pertinent text).

162. KENDRICK, *supra* note 17, at 61.

163. *Id.*

164. *Id.*

165. CONG. 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).

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

168. *Id.*

169. *Id.*

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.

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

173. *Id.* The report read in part:

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

174. *Id.* at 1292 (Mar. 9, 1866).

175. *Id.* at 688 (Feb. 6, 1866).

176. *Id.* at 702 (Feb. 7, 1866).

177. REPORT 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 slow to do it." *Id.*

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

180. Specifically, 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).

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).

188. That same day, in a Senate debate on the apportionment of representation, Senator John B. Henderson, a Unionist from Missouri, noted: "General Sickles issued an order at Charleston, with twenty-three sections, making up an entire civil code for the government of South Carolina . . . ." *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. Sess. 908-09 (Feb. 17, 1866).

189. REPORT 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 the Government 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.

191. REPORT 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:

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" Ä 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.

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

193. *Id.*

194. *Id.* at 904 (Feb. 17, 1866)

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 Georgian Code*, THE LOYAL GEORGIAN, Feb. 3, 1866, at 2, col. 2.

198. 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?

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 [and bear] arms to defend their homes, families or themselves.

Id.

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

200. DOROTHY 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 Klansman 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).

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

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 constitution 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.

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

205. General 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.*

206. In 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 second amendment, we have these words:

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

The proposition here . . . is an application to Congress to do that which Congress has no right to do under the second amendment of the Constitution. . . . unless the power is lodged in Congress to disarm the militia of Massachusetts, it cannot be pretended that any such power is lodged in Congress in reference to the State of Mississippi.

We hear a great deal about the 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).

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.

216. For 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).

217. CONG. 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).

221. REPORT 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.

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

224. *Id.*

225. *Id.* at 936 (Feb. 20, 1866).

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).

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

230. KENDRICK, *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).

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

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

233. The 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 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 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.

236. Specifically, 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.

237. CONG. 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. 26, 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").

241. *Id.* at 1088.

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 ninth amendment that "the enumeration in the Constitution of certain rights should not be construed to deny or disparage other rights not enumerated." This amendment completed the document. It left no personal or natural right to be invaded or impaired by construction. All these rights are established by the fundamental law. Congress has no power to invade them; but it has power "to make all laws necessary and proper" to give them effective operation, and to restrain the respective States from enacting 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 1069-77. 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 is written out and engrafted 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. at 1077 (Feb. 28, 1866).

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, "The free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the law of the land."

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

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

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

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. . . . it is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

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

Id.

251. *Id.* For appropriate text of the Freedmen's Bureau bill see *supra* notes 65 and accompanying text.

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

253. *Id.* at 1121 (Mar. 1, 1866).

254. For the pertinent text of S. 60 see *supra* notes 65 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).

257. Senator 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 Ä

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.

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. 3, 1866).

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

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.

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

265. Ex. 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 *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 colonel 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.

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.

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

275. *Id.* at 3412 (June 26, 1866).

276. *Id.* at 3412 (June 26, 1866).

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.

279. CONG. 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).

281. 32 U.S. 243, 250-51 (1833).

282. CONG. 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 sealed and that he shall not be a witness in that court.

Id. (emphasis added).

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

286. *Id.*

287. *Id.* In *Politics* and in other writings 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).

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

289. *Id.*

290. *Id.* at 1292 (Mar. 9, 1866).

291. *Id.*

292. *Id.*

293. REPORT 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.

Id.

296. *Id.* at 142.

297. *Id.* at 142. The following exchange took place between Representative Boutwell 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.

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

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

300. *Id.* at 1407 (Mar. 15, 1866).

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:

That no law of any State lately in insurrection shall impose by indirection a servitude which the Constitution now forbids. . . .

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.

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

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

U.S. CONST. art. IV, § 4.

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

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).

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" when they disposed to protect the interests of railway owners. *What are the Functions of the Metropolitan Police*, NEW YORK EVENING POST, Apr. 16, 1866, at 2, col. 2.

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

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.

319. CONG. 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 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). Terry had been asked by Virginia citizens and State officers but he refused to do so. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, pt.2, at 143.

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

323. *Id.*

324. *Id.* Representative Clarke stated:

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

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).

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

328. KENDRICK, *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.

329. KENDRICK, *supra* note 17, at 83.

330. *Id.* at 295-303.

331. Robert 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, Representative Owen advocated the right of "carrying of weapons," added: "[For if it were declared by Constitutional provision that the people should have the right to bear arms, no law of the Legislature could take away that right." *Id.* In a U.S. Senate-commissioned report, Owen wrote: "The most prized of personal rights is the right of self-defense." ROBERT OWEN, THE WRONG OF SLAVERY 111-12 (1864).

332. KENDRICK, *supra* note 17, at 85.

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

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

335. *See supra* note 65 and accompanying text.

336. KENDRICK, *supra* note 17, at 85.

337. *Id.*

338. *Id.*

339. Representative 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 "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

341KENDRICK, *supra* note 17, at 106.

342. *Id.*

343. *Id.*

344. *Id.* at 106, 110.

345. *Id.* at 114-15.

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

347. *Id.* at 2286 (Apr. 30, 1866).

348. CONG. GLOBE, 39th Cong., 1st. Sess. 2286 (Apr. 30, 1866).

349. *Id.*

350. Ex. 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.

352. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (May 8, 1866). Representative Stevens stated that 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).

354. *Id.* at 2538 (May 10, 1866).

355. *Id.* at 2542 (May 10, 1866).

356. *Id.* at 2542-43 (May 10, 1866).

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

358. CONG. 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.

361. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, pt. 4, at 150, 160.

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

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

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

365. Ex. 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 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.

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

368. *Id.* at 2765.

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).

372. CONG. 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.

376. NEW 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.

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

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

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

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

381. STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED 96-97, 124-44 (1084).

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

383. CHARLESTON 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, E. Remmington & Sons, supra* note 315, at 3, col. 10.

385. CONG. 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 meddlesome 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).

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. . . .

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

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

394. CONG. 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).

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, quoting 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 constitution and the laws of the State notwithstanding.

Id.

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 [free 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).

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

405. *Id.* at 3035 (June 8, 1866).

406. *Id.* at 3037 (June 8, 1866).

407. *Id.* at 3039 (June 8, 1866).

408. *Id.*

409. *Id.* at 3041 (June 8, 1866).

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).

411. CONG. 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: "The first section is altered by defining who are citizens of the United States and of the States. . . . It declares this great privilege to belong to every person born or naturalized in the United States." *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).

419. *Id.* at 3210 (June 16, 1866).

420. *Id.* at 3326 (June 21, 1866).

421. *See* KENDRICK, *supra* note 17.

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

431. *Id.* at 3501 (June 29, 1866).

432. *See supra* notes 65-415 and accompanying text.

433. CONG. 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).

441. *Id.*

442. *Id.*

443. *See* KENDRICK, *supra* note 17.

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

445. *Id.*

446. *Id.*

447. *Id.* at 3850 (July 16, 1866).

448. *Id.*

449. *Id.*

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).

456. The Bureau's existence was extended again two years later, after which it was phased out. 15 Stat. 83 (1866).

457. 14 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 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).

458. This author compiled the raw data of each member's voting record as set forth in the recorded votes referenced *infra* notes 459-62. This raw data is available from the author on request.

459. CONG. 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. *Id.* 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).

464. The chief objection against the Freedmen's Bureau bills, as set forth in debate and the President's veto messages, was that it asserted military jurisdiction in lieu of the civil courts. *E.g.* . CONG. GLOBE, 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).

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).

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

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

472. FLACK, *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).

474. That section provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

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

476. 14 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 Gouled 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.

THE SECOND AMENDMENT AND THE PERSONAL RIGHT TO ARMS

William Van Alstyne†

For many years, the Second Amendment was politely ignored, or summarily dismissed, by America's legal academy. In recent years, however, more and more law professors have begun taking the Second Amendment seriously. Professor William Van Alstyne, one of the nation's most respected Constitutional law professors, and the author of a leading Constitutional law casebook, offers his contribution in this essay. Van Alstyne suggests that the Second Amendment means exactly what it says: that individual citizens have a right, not merely a privilege, to own and carry firearms. He also commends the National Rifle Association for its constructive role as a defender of civil liberties. This essay was first published in 1994, in volume 43 of the Duke Law Journal, beginning on page 1,236. It is reprinted by permission.

INTRODUCTION

Perhaps no provision in the Constitution causes one to stumble quite so much on a first reading, or second, or third reading, as the short provision in the Second Amendment of the Bill of Rights. No doubt this stumbling occurs because, despite the brevity of this amendment, as one reads, there is an apparent non se-qui-tur—or disconnection of a sort—in midsentence. The amendment opens with a recitation about a need for "[a] well regulated Militia."[1] But having stipulated to the need for "[a] well regulated Militia," the amendment then declares that the right secured by the amendment—the described right that is to be free of "infringement"—is not (or not just) the right of a state, or of the United States, to provide a well regulated militia. Rather, it is "the right of the people to keep and bear Arms."

> 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.[2]

The postulation of a "right of the people to keep and bear Arms" would make sense standing alone, however, even if it necessarily left some questions still to be settled.[3] It would make sense in just the same unforced way we understand even upon a first reading of the neighboring clause in the Bill of Rights, which uses the exact same phrase in describing something as "the right of the people" that "shall not be violated" (or "in-

fringed"). Just as the Second Amendment declares that "the right of the people to keep and bear Arms[] shall not be infringed," so, too, the Fourth Amendment declares:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .[4]

Here, in the familiar setting of the Fourth Amendment, we are not at all confused in our take on the meaning of the amendment; it secures to each of us personally (as well as to all of us collectively) a certain right—even if we are also uncertain of its scope.[5] Nor are we confused in turning to other clauses. For example, the Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .[6]

And so, too, the Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .[7]

That each of these rights—that all of these rights—are examples of personal rights protected by the Bill of Rights seems perfectly clear. And, were it not for the opening clause in the Second Amendment, though there would still be much to thrash out, it is altogether likely the Second Amendment would be taken in the same way.

To be sure, as we have already once noted, were the Second Amendment taken in just this way, the scope of the right that *is* protected (namely, the right to keep and bear arms) would still remain to be defined.[8] But by itself, that sort of definitional determination would be of no unusual difficulty. For so much is true with respect to every right secured from government infringement, whether it be each person's freedom of speech (that freedom is not unbounded, either) or any other right specifically protected from infringement elsewhere in the Bill of Rights.[9] And in addressing this type of (merely general) problem, neither has the Supreme Court nor have other courts found it intractable and certainly none of these other clauses have been disparaged, much less have they been ignored. To the contrary, with respect to each, a strong, supportive case law has developed in the courts, albeit case law that has developed gradually, over quite a long time.

In startling contrast, during this same time, however, the Second Amendment has generated almost no useful body of law. Indeed, it is substantially accurate to say that the useful case law of the Second Amendment, even in 1994, is mostly just missing in action. In its place, what we have is roughly of the same scanty

and utterly underdeveloped nature[10] as was characteristic of the equally scanty and equally underdeveloped case law (such as it then was) of the First Amendment in 1904, as of which date there was still to issue from the Supreme Court a single decision establishing the First Amendment as an amendment of any genuine importance at all.[11] In short, what was true of the First Amendment as of 1904 remains true of the Second Amendment even now.

The reason for this failure of useful modern case law, moreover, is not that there has been no occasion to develop such law. So much is true only of the Third Amendment.[12] In contrast, it is no more true of the Second Amendment than of the First Amendment or the Fourth Amendment that we have lacked for appropriate occasions to join issue on these questions. The tendency in the twentieth century (though not earlier) of the federal government has been ever increasingly to tax, ever more greatly to regulate, and ever more substantially to prohibit various kinds of personal gun ownership and use.[13] This tendency, that is, is at least as commonplace as it was once equally the heavy tendency to tax, to regulate, and too often also to prohibit, various kinds of speech. The main reason there is such a vacuum of useful Second Amendment understanding, rather, is the arrested jurisprudence of the subject as such, a condition due substantially to the Supreme Court's own inertia—the same inertia that similarly afflicted the First Amendment virtually until the third decade of this twentieth century when Holmes and Brandeis finally were moved personally to take the First Amendment seriously[14] (as previously it scarcely ever was).

With respect to the larger number of state and local regulations (many of these go far beyond the federal regulations), moreover, the case law of the Second Amendment is even more arrested; and this for the reason that the Supreme Court has simply declined to reconsider its otherwise discarded nineteenth-century decisions—decisions holding that the Fourteenth Amendment enacted little protection of anything, and none (i.e., *no* protection) drawn from the Bill of Rights.[15]

To trust to this arrested treatment of the Second Amendment—and of the Fourteenth Amendment—in 1994, in short, is as though one were inclined so to trust to the arrested treatment of the First Amendment in 1904. The difficulty in such a starting place is perfectly plain. No convincing jurisprudence is itself really possible under such circumstances. In the case of the First Amendment, we know quite well that such a jurisprudence effectively became possible only rather late, in the 1920s (but, one may

add, better late than never). In the case of the Second Amendment, in an elementary sense, that jurisprudence is even now not possible until something more in the case law of the Second Amendment begins finally to fall into place. That "something more," I think, requires one to consider what one might be more willing to think about in the following way—that *perhaps the NRA is not wrong, after all, in its general Second Amendment stance*—a stance we turn here briefly to review.

I

The stance of those inclined to take the Second Amendment seriously reverts to the place we ourselves thought to be somewhat worthwhile to consult—namely, the express provisions of the Second Amendment—and it offers a series of suggestions fitting the respective clauses the amendment contains. Here is how these several propositions run:

1. The reference to a "well regulated *Militia*" is in the first as well as the last instance a reference to the ordinary citizenry. It is not at all a reference to regular armed soldiers as members of some standing army.[16] And quite obviously, neither is it a reference merely to the state or to the local police.

2. The very assumption of the clause, moreover, is that ordinary citizens (rather than merely soldiers, or merely the police) *may* themselves possess arms, for it is from these ordinary citizens who as citizens have a right to keep and bear arms (as the second clause provides) that such well regulated militia as a state may provide for, is itself to be drawn.

3. Indeed, it is more than merely an "assumption," however, precisely because "the right of the people to keep and bear Arms" is itself stipulated in the second clause. It is *this* right that is expressly identified as "*the* right" that is not to be ("*shall not be*") infringed. That right is made the express guarantee of the clause.[17] There is thus no room left for a claim that, despite this language, the amendment actually means to reserve to Congress some power to contradict its very terms (e.g., that "the Congress may, if it thinks it proper, forbid the people to keep and bear arms to such extent Congress sees fit to do").[18]

4. Nor is there any basis so to read the Second Amendment as though it said anything like the following: "Congress may, if it thinks it proper, forbid the people to keep and bear arms if, notwithstanding that these restrictions it may thus enact are inconsistent with the right of the people to keep and bear arms, they are not inconsistent with the right of each state to maintain some kind of militia as it may deem necessary to its security as a free state."[19]

Rather, the Second Amendment adheres to the guarantee of the right of the people to keep and bear arms as the predicate for the other provision to which it speaks, i.e., the provision respecting a militia, as distinct from a standing army separately subject to congressional regulation and control. Specifically, it looks to an ultimate reliance on the common citizen who has a right to keep and bear arms rather than only to some standing army, or only to some other politically separated, defined, and detached armed cadre, as an essential source of security of a free state.[20] In relating these propositions within one amendment, moreover, it does not disparage, much less does it subordinate, "the right of the people to keep and bear arms." To the contrary, it expressly *embraces* that right and indeed it erects the very scaffolding of a free state upon *that* guarantee. *It derives its definition of a well-regulated militia in just this way for a "free State*": The militia to be well-regulated is a militia to be drawn from just such people (i.e., people with a right to keep and bear arms) rather than from some other source (i.e., from people without rights to keep and bear arms).

II

There is, to be sure, in the Second Amendment, an express reference to the security of a "*free* State."[21] It is not a reference to *the* security of THE STATE.[22] There are doubtless certain national constitutions that put a privileged emphasis on the security of "the state," but such as they are, they are all *unlike* our Constitution and the provisions they have respecting their security do not appear in a similarly phrased Bill of Rights. Accordingly, such constitutions make no reference to any right of the people to keep and bear arms, apart from state service.[23] And why do they not do so? Because, in contrast with the premises of constitutional government in this country, they reflect the belief that recognition of any such right "in the people" might well pose a threat to the security of "the state." In the view of these different constitutions, it is commonplace to find that no one within the state other than its own authorized personnel has any right to keep and bear arms[24]—a view emphatically rejected, rather than embraced, however, by the Second Amendment to the Constitution of the United States.

This rather fundamental difference among kinds of government was noted by James Madison in *The Federalist Papers*, even prior to the subsequent assurance expressly furnished by the Second Amendment in new and concrete terms. Thus, in *The Federalist* No. 46, Madison contrasted the "advantage . . . the Americans possess" (under the proposed constitution) with the circumstances in "several kingdoms of Europe . . . [where] the

governments are afraid to trust the people with arms."[25] Here, in contrast, as Madison noted, they were, and no provision was entertained to empower Congress to abridge or to violate that trust, any more than, as Alexander Hamilton noted, there was any power proposed to enable government to abridge the freedom of the press.[26]

To be sure, in the course of the ratification debates, doubts were expressed respecting the adequacy of this kind of assurance (i.e., the assurance that no power was affirmatively proposed for Congress to provide any colorable claim of authority to take away or to abridge these rights of freedom of the press and of the right of the people to keep and bear arms).[27] And the quick resolve to add the Second Amendment, so to confirm that right more expressly, as not subject to infringement by Congress, is not difficult to understand.

The original constitutional provisions regarding the militia[28] placed major new powers in Congress beyond those previously conferred by the Articles of Confederation. These new powers not only included a wholly new power to provide for a regular, standing, national army even in peacetime,[29] but also powers for "calling forth the Militia,"[30] for "*organizing, arming, and disciplining,* the Militia,"31 and for "governing such Part of them as may be employed in the Service of the United States."32 Indeed, all that was *expressly* reserved from Congress's reach was "the Appointment of the officers" of this citizen militia, for even "the Authority of training the Militia," though reserved in the first instance from Congress, was itself subordinate to Congress in the important sense that such training was to be "according to the discipline prescribed *by Congress*."33

These provisions were at once highly controversial, respecting their scope and possible implications of congressional power. In attempting to counter anti-ratification objections to the proposed constitution—objections that these lodgments of powers would concentrate excessive power in Congress in derogation of the rights of the people—Hamilton and Madison argued essentially three points:34 (a) the appointment of militia officers was exclusively committed to state hands;35 (b) the localized civilian-citizen nature of the militia would secure its loyalty to the rights of the people;36 and (c) the people otherwise possessed a right to keep and bear arms—which right Congress was given no power whatever to regulate or to forbid.37 And, as to the argument that the plan was defective insofar as it left the protection of the rights of the people insecure because no *express* prohibition on Congress was *separately* provided in respect to those rights (rather, the

powerlessness of Congress to infringe them was solely a deduction from the doctrine of enumerated powers alone), Hamilton insisted that to specify anything further—to provide an *express* listing of particular prohibitions on Congress—was not only unnecessary but itself would be deeply problematic, because the implication of such a list would be that anything not named in the list might somehow be thought therefore in fact to be subject to regulation or prohibition by Congress though no enumerated power to affect any such subject was provided by the Constitution itself.38 In brief, Hamilton maintained that to do anything in the nature of adding a Bill of Rights would cast doubt upon the doctrine of enumerated powers itself.

These several explanations were deemed insufficient, however, and to meet the objections of those in the state ratifying conventions unwilling to leave the protection of certain rights to mere inference from the doctrine of enumerated powers, objections raised in the course of several state ratification debates, the Bill of Rights was promptly produced by Madison, in the first Congress to assemble under the new Constitution, in 1789. Accordingly, as with "the freedom of the press," the protection of "the right of the people to keep and bear arms" was thus made *doubly* secure in the Bill of Rights.[39] Thomas Cooley quite accurately recapitulated the controlling circumstances in the leading nineteenth century treatise on constitutional law:

> The [Second] [A]mendment, like most other provisions in the Constitution, has a history. It was adopted with some modification and enlargement from the English Bill of Rights of 1688, where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people, and as a pledge of the new rulers that this tyrannical action should cease. . . .
>
> *The Right is General*. . . . The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose.[40]

Cooley's reference to English history, moreover, in illuminating the Second Amendment right (as personal to the citizen as such), is useful as well. For in this, he merely followed William Blackstone, from Blackstone's general treatise from 1765.

In chapter 1, appropriately captioned "Of The Rights of Persons," Blackstone divided what he called natural personal rights into two kinds: "primary" and "auxiliary."[41] The distinction was between those natural rights primary to each person intrinsically and those inseparable from their protection (thus themselves in-

dispensable, "auxiliary" personal rights). Of the first kind, generically, are "the free enjoyment of personal security, of personal liberty, and of private property."[42] Of the latter are rights possessed "to vindicate" one's primary rights; and among these latter, Blackstone listed such things as access to "courts of law," and, so, too, "the right of petition[ ]," and "*the right of having and using arms for self-preservation and defence*."[43]

In contrast with all of this, the quite different view—the view of "the secure state" we were earlier considering—of countries *different* from the United States—assumes no right of the people to keep and bear arms. Rather, these differently constituted states put their own first stress on having a well regulated army (and also, of course, an internal state police). To be sure, such states also may provide for some kind of militia, but insofar as they may (and several do),[44] one can be quite certain that it will *not* be a militia drawn from the people with a "right to keep and bear Arms." For in these kinds of states, there is assuredly no such right. To the contrary, such a state is altogether likely to forbid the people to keep and bear arms unless and until they are conscripted into the militia, after which—to whatever extent they are deemed suitably "trustworthy" by the state—they might then (and only then) have arms fit for some assigned task.

But, again, the point to be made here is that the Second Amendment represented not an adoption, but a rejection, of this vision—a vision of the security state. It did not concede to any such state. Rather, it speaks to sources of security within a free state, within which (to quote the amendment itself still again) "*the right of the people to keep and bear Arms[ ] shall not be infringed*." The precautionary text of the amendment refutes the notion that the "well regulated Militia" the amendment contemplates is somehow a militia drawn from a people "who have no right to keep and bear arms." Rather, the opposite is what the amendment enacts.[45]

III

The Second Amendment of course does not assume that the right of the people to keep and bear arms will not be abused. Nor is the amendment insensible to the *many* forms which such abuses may take (e.g., as in robbing banks, in settling personal disputes, or in threatening varieties of force to secure one's will). But the Second Amendment's answer to the avoidance of abuse is to support such laws as are directed to those who threaten or demonstrate such abuse and to no one else. Accordingly, those who do neither—who neither commit crimes nor threaten such crimes—are entitled to be left alone.

To put the matter most simply, the governing principle here, in the Second Amendment, is not different from the same principle governing the First Amendment's provisions on freedom of speech and the freedom of the press. A person may be held to account for an abuse of that freedom (for example, by being held liable for using it to publish false claims with respect to the nutritional value of the food offered for public sale and consumption). Yet, no one today contends that just because the publication of such false statements is a danger one might in some measure reduce if, say, *licenses* also could be required as a condition of owning a newspaper or even a mimeograph machine, that therefore licensing can be made a requirement of owning either a newspaper or a mimeograph machine.[46]

The Second Amendment, like the First Amendment, is thus not mysterious. Nor is it equivocal. Least of all is it opaque. Rather, one may say, today it is simply unwelcome in any community that wants no one (save perhaps the police?) to keep or bear arms at all. But assuming it to be so, i.e., assuming this is how some now want matters to be, it is for them to seek a repeal of this amendment (and so the repeal of its guarantee), in order to have their way. Or so the Constitution itself assuredly appears to require, if that is the way things are to be.

IV

In the first instance, enacted as it was as part of the original Bill of Rights of 1791, the Second Amendment merely was addressed to Congress and not to the states. The mistrust and uncertainty of how *Congress* might presume to construe its new powers—powers newly enumerated in Article I of the Constitution—resulted in the Bill of Rights inclusive of the Second Amendment, proposed in the very first session of the new Congress in 1789. As it was then apprehended that although Congress was never given any power to preempt state constitutional provisions respecting freedom of speech or of the press, Congress might nonetheless presume to regulate those subjects to its own liking under pretext of some other authority if not barred from doing so by amendment, the Second Amendment—and the other amendments composing the original Bill of Rights—reflected the same mistrust and were adopted for the same reason as well. But, to be sure, neither the First nor the Second Amendment,[47] nor any of the other amendments in the Bill of Rights were addressed as limits on the states.[48]

In 1866, however, this original constitutional toleration of state differences with respect to their internal treatment of these rights came to an end, in the aftermath of the Civil War. The

immunities of citizens with respect to rights previously secured only from abridging acts of Congress were recast in the Fourteenth Amendment as immunities secured also from any similar act by any state.[49] It was precisely in this manner that the citizen's right to keep and bear arms, formerly protected only from acts of Congress, came to be equally protected from abridging acts of the states as well.

So, in reporting the Fourteenth Amendment to the Senate on behalf of the Joint Committee on Reconstruction in 1866, Senator Jacob Meritt Howard of Michigan began by detailing the "first section" of that amendment, i.e., the section that "relates to the privileges and immunities of citizens."[50] He explained that the first clause of the amendment (the "first section"), once approved and ratified, would "restrain the power of the States"[51] even as Congress was already restrained (by the Bill of Rights) from abridging

> the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; *the right to keep and to bear arms*; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures[; etc., through the Eighth Amendment].[52]

In the end, Senator Howard concluded his remarks as follows: "*The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees*."[53] There was no dissent from this description of the clause.

Following ratification of the Fourteenth Amendment, therefore, some state constitutions might presume to provide even *more* protection of these same rights than the Fourteenth Amendment (and some continue even now to do so[54]), but none could thereafter presume to provide any less—whether the object of regulation was freedom of speech and of the press or of the personal right to arms. And it is quite clear that in the ratification debates of the Fourteenth Amendment, no distinction whatever was drawn between the "privileges and immunities" Congress was understood already to be bound to respect (pursuant to the Bill of Rights) and those now uniformly also to bind the states. Each was given the same constitutional immunity from abridging acts of state government as each was already

recognized to possess from abridgment by Congress. What was previously forbidden only to Congress to do was, by the passage of the Fourteenth Amendment, made equally forbidden to any state. Moreover, the point was acknowledged to be particularly important in settling the Second Amendment right as a citizen's personal right, i.e., personal to each citizen as such.[55]

V

Again, however, one does not derive from these observations that each citizen has an uncircumscribable personal constitutional right to acquire, to own, and to employ any and all such arms as one might desire so to do, or necessarily to carry them into any place one might wish. To the contrary, restrictions generally consistent merely with safe usage, for example, or restrictions even of a particular "Arms" kind, are not all per se precluded by the two constitutional amendments and provisions we have briefly reviewed. There is a "rule of reason" applicable to the First Amendment, for example, and its equivalent will also be pertinent here. It is not the case that one may say whatever one wants and however one wants, wherever one wants, and whenever one likes—location, time, and associated circumstances do make a difference, consistent even with a very strong view of the freedom of speech and press accurately reflected in conscientious decisions of the Supreme Court. The freedoms of speech and of the press, it has been correctly said, are not absolute.

Neither is one's right to keep and bear arms absolute. It may fairly be questionable, for example, whether the type of arms one may have a "right to keep" consistent with the Second Amendment extend to a howitzer.[56] It may likewise be questionable whether the "arms" one *does* have a "right to keep" are necessarily arms one also may presume to "bear" wherever one wants, e.g., in courtrooms or in public schools. To be sure, each kind of example one might give will raise its own kind of question. And serious people are quite willing to confront serious problems in regulating "the right to keep and bear arms," as they are equally willing to confront serious problems in regulating "the freedom of speech and of the press."[57]

The difference between these serious people and others, however, was a large difference in the very beginning of this country and it remains as a large difference in the end. The difference is that such serious people begin with a constitutional understanding that declines to trivialize the Second Amendment or the Fourteenth Amendment, just as they likewise decline to trivialize any other right expressly identified elsewhere in the

Bill of Rights. It is difficult to see why they are less than entirely right in this unremarkable view. That it has taken the NRA to speak for them, with respect to the Second Amendment, moreover, is merely interesting—perhaps far more as a comment on others, however, than on the NRA.

For the point to be made with respect to Congress and the Second Amendment[58] is that the essential claim (certainly not every claim—but the essential claim) advanced by the NRA with respect to the Second Amendment is extremely strong. Indeed, one may fairly declare, it is at least as well anchored in the Constitution in its own way as were the essential claims with respect to the First Amendment's protection of freedom of speech as first advanced on the Supreme Court by Holmes and Brandeis, seventy years ago.[59] And until the Supreme Court manages to express the central premise of the Second Amendment more fully and far more appropriately than it has done thus far, the constructive role of the NRA today, like the role of the ACLU in the 1920s with respect to the First Amendment (as it then was), ought itself not lightly to be dismissed.[60] Indeed, it is largely by the "unreasonable" persistence of just such organizations in this country that the Bill of Rights has endured.

Footnotes

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1. The subject is that of "*A* well regulated Militia"—a militia the amendment declares to be "necessary to the security of a free State." U.S. CONST. amend. II. But it is hard to say on first reading whether the reference is to a well-regulated *national* militia or, instead, to a well-regulated *state* militia (i.e., a militia *in each state*). Perhaps, however, the reference is to both at once—a militia in each state, originally constituted under each state's authority, but subject to congressional authority to arm, to organize, and to make provision to call into national service, as a national militia. The possibility that this may be so tends to send one looking for other provisions in the Constitution that may help to clear this matter away. And a short search readily turns up several such provisions: Article I, section 8, clauses 15 and 16, and Article II, section 2, clause 1. *See infra* note 16.

2. U.S. CONST. amend. II.

3. For example, one might well still be uncertain of the breadth of the right to keep and bear arms (e.g., just what *kinds* of "Arms"?).

4. U.S. CONST. amend. IV.

5. For example, does the protection of "houses" and "effects" from unreasonable searches and seizures extend to trash one may have put outside in a garbage

can? May it matter whether one has put the can itself outside one's garage or farther out, beside the street? *See* California v. Greenwood, 486 U.S. 35, 37 (1988).

6. U.S. CONST. amend. VI.

7. *Id*. amend. VII.

8. For example, with respect to the kind of "Arms" one may have. Perhaps these include all arms as may be useful (though not exclusively so) as an incident of service in a militia—and indeed, this would make sense of the introductory portion of the amendment as well. *See* United States v. Miller, 307 U.S. 174, 178 (1939).

9. So, for example, though the Sixth Amendment provides a right to a "*speedy*" and "*public*" trial whenever one is accused of a (federal) crime, the amendment does not declare just *how* "speedy" the trial must be (i.e., exactly how soon following indictment the trial must be held) nor *how* "public" either (e.g., must it be televised to the world, or is an open courtroom, albeit with very limited seating, quite enough?). And the Fourth Amendment does not say there can be *no* searches and seizures—rather, only no "unreasonable" searches and seizures. Yet there is a very substantial body of highly developed case law that has given this genuine meaning and effect.

Likewise, when the Sixth and Seventh Amendments speak of the right to trial by "jury," then (even as is true of the Second Amendment in its reference to "Arms"?), though each of these amendments is silent as to what a jury means (a "jury" of how many people? a "jury" selected in what manner and by whom?), the provision means to be—and tends to be—given some real, some substantial, and some constitutionally significant effect. The point is, of course, that though there are questions of this sort with respect to *every* right furnished by the Bill of Rights, the expectation remains high that the right thus furnished will neither be ignored—treated as though it were not a right at all—nor so cynically misdefined or "qualified" in its ultimate description as to be reduced to an empty shell. It is only in the case of the Second Amendment that this is approximately the current state of the law. Indeed, it is only with respect to the Second Amendment that the current state of the law is roughly the same as was the state of the law with respect to the First Amendment's guarantees of freedom of speech and of the press as recently as 1904. As a restraint on the federal government, the First Amendment was deemed to be a restriction merely on certain kinds of prior restraint and hardly at all on what could be forbidden under threat of criminal sanction. *See, e.g.*, Patterson v. Colorado, 205 U.S. 454, 462 (1907). As to the states, the amendment was not known as necessarily furnishing any restraint at all. *See id*.

10. The most one can divine from the Supreme Court's scanty decisions ("scanty" is used advisedly—essentially there are only two) is that such right to keep and bear arms as may be secured by this amendment may extend to such "Arms" as would be serviceable within a militia but not otherwise (so a "sawed-off" shotgun may not qualify, though presumably—by *this* test—heavy duty automatic rifles assuredly would). *See* United States v. Miller, 307 U.S. 174, 178 (1939); *see also* Lewis v. United States, 445 U.S. 55, 65 n.8 (1980) (noting that legislative restrictions on the right of felons to possess firearms do not violate any constitutionally protected liberty); Robertson v. Baldwin, 165 U.S. 275, 282 (1897) (referring to "the right of the people to keep and bear Arms" as a personal right). These casual cases aside ("casual," because in *Miller*, for example, there was not even an appearance entered by the defendant-appellant in the Supreme Court), there are a few 19th-century decisions denying any relevance of the Second Amendment to the states; but these decisions,

which have never been revisited by the Supreme Court, merely mimicked others of the same era in holding that *none* of the rights or freedoms enumerated in the Bill of Rights were made applicable by the Fourteenth Amendment to the states. *See, e.g.*, Presser v. Illinois, 116 U.S. 252, 265 (1886) (citing United States v. Cruikshank, 92 U.S. 542, 553 (1875)). The shaky foundation of these cases ("shaky" because the effect was to eviscerate the Fourteenth Amendment itself) has long since been recognized—and long since repudiated by the Court in general. Notwithstanding, the lower courts continue ritually to rely upon them, and the Supreme Court quite as regularly declines to find any suitable for review. *See, e.g.*, Quilici v. Village of Morton Grove, 695 F.2d 261, 269-70 (7th Cir. 1982) (holding that municipal handgun restrictions were constitutional), *cert. denied*, 464 U.S. 863 (1983). And why does one suppose that this is so?

11. *See supra* note 9.

12. Troops have not generally been quartered in private homes "in time of peace . . . without the consent of the Owner," nor even "in time of war," U.S. CONST. amend. III, for a very long time, and no Third Amendment case has ever been decided by the Supreme Court. Evidently, a Third Amendment case has arisen only once in a lower federal court. *See* Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982) (holding that the Third Amendment protects the legitimate privacy interests of striking correction officers in keeping their housing from being used for quartering National Guard troops).

13. For a comprehensive review of congressional action since 1934, see United States v. Lopez, 2 F.3d 1342, 1348-60 (5th Cir. 1993).

14. *See, e.g.*, Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis and Holmes, JJ., concurring); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes and Brandeis, JJ., dissenting); United States *ex rel*. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 417 (1921) (Holmes and Brandeis, JJ., dissenting); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes and Brandeis, JJ., dissenting). *See generally* SAMUEL J. KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS 181-256 (1956) (reviewing the Holmes-Brandeis legacy of the First Amendment).

15. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); GERALD GUNTHER, CONSTITUTIONAL LAW 408-10 (12th ed. 1991). The *Slaughter-House Cases* denied that the Privileges and Immunities Clause of the Fourteenth Amendment extended any protection from the Bill of Rights against the states. Within three decades, however, the Court began the piecemeal abandonment of that position (albeit by relying on the Due Process Clause instead). *See* Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897) (applying the Fifth Amendment prohibition against the taking of private property for public use without just compensation and holding it to be equally a restraint against the states). In 1925, the Court proceeded in like fashion with respect to the Free Speech Clause of the First Amendment, *see Gitlow*, 268 U.S. at 666, and subsequently with respect to most of the rights enumerated in the Bill of Rights (exclusive, however, of the right to keep and bear arms). As already noted, the Court has declined to reexamine its 19th century cases (*Presser* and *Cruikshank*) that merely relied on the *Slaughter-House Cases* for their rationale. *Cf.* discussion *infra* Part IV.

16. Article I vests power in Congress "[t]o raise and support Armies," i.e., to provide for a national standing army as such, *see* U.S. CONST. art. I, § 8, cl. 12.

It is pursuant to two different clauses that Congress is given certain powers with respect to the militia, such as the power "for *calling forth the Militia* to execute the Laws of the Union, suppress Insurrections and repel Invasions," *id.* cl. 15 (emphasis added), and the power "[t]o provide for organizing, arming, and disciplining, *the Militia*, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of *training the Militia* according to the discipline prescribed by Congress," *id.* cl. 16 (emphasis added). So, too, the description of the executive power carries over the distinction between the regular armed forces of the United States in a similar fashion. Accordingly, Article II, section 2 provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, *and of the Militia* of the several States, when called into the actual Service of the United States." *Id.* art. II, § 2, cl. 1 (emphasis added).

17. And it is from the people, whose right this is, that such militia as the state may (as a free state) compose and regulate, shall be drawn—just as the amendment expressly declares.

18. Compare the utter incongruity of this suggestion with the actual provisions the Second Amendment enacts.

19. Compare this incompatible language and thought with the actual provisions of the amendment. Were the Second Amendment a mere federalism ("States' rights") provision, as it is not, it would assuredly appear in a place appropriate to that purpose (i.e., not in the same list with the First through the Eighth Amendments, but nearby the Tenth Amendment), and it would doubtless reflect the same federalism style as the Tenth Amendment; for example, it might read: "*Congress shall make no law impairing the right of each state to maintain such well regulated militia as it may deem necessary to its security as a free state*." But it neither reads in any such fashion nor is it situated even to imply such a thought. Instead, it is cast in terms that track the provisions in the neighboring personal rights clauses of the Bill of Rights. Just as the Fourth Amendment provides that "*[t]he right of the people to be secure in their persons, houses, papers, and effects . . . shall not be violated*," U.S. CONST. amend. IV (emphasis added), so, too, the Second Amendment matches that language and likewise provides that "*the right of the people to keep and bear Arms, shall not be infringed*," *id*. amend. II (emphasis added); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) ("The Second Amendment protects 'the right of the people to keep and bear Arms' . . . ."). In further response to the suggestion that the Second Amendment is a mere States' rights clause in analogy with the Tenth Amendment (by, e.g., Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 57 (1989)), see STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984). As Halbrook notes,

> In recent years it has been suggested that the Second Amendment protects the "collective" right of states to maintain militias, while it does not protect the right of "the people" to keep and bear arms. If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for *no known writing surviving from the period between 1787 and 1791 states such a thesis*.

Id. at 83 (emphasis added).

20. *See supra* note 16 and accompanying text.

21. U.S. CONST. amend. II (emphasis added). In James Madison's original draft of the amendment, moreover, the reference is to "a free country" (and not merely to "a free State"). *See* BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1026 (1971).

22. Once again, see the amendment, and compare the difference in thought conveyed in these different wordings as they might appear, in contrast, in actual print.

23. *See, e.g.*, XIANFA (1982) [Constitution] art. 55, cl. 2 (P.R.C.), *translated in* THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA 41 (1983); *infra* note 44.

24. A position evidently preferred by many today in this country as well, with the apparent approval even of the ACLU. *See* AMERICAN CIVIL LIBERTIES UNION, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION 95 (1986) ("Except for lawful police and military purposes, the possession of weapons by individuals is not constitutionally protected."). It is quite beyond the scope of this brief Essay to attempt to account for the ACLU's stance—which may even now be undergoing some disagreement and internal review.

25. THE FEDERALIST NO. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961).

26. *Id*. NO. 84 at 513-14 (Alexander Hamilton).

27. *See, e.g.*, Leonard W. Levy, *Bill of Rights (United States)*, *in* 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 113, 114-15 (Leonard W. Levy et al. eds., 1986).

28. *See supra* note 16.

29. U.S. CONST. art. I, § 8, cls. 12-13.

30. *Id.* cl. 15.

31. *Id*. cl. 16 (emphasis added).

32. *Id*.

33. *Id*. (emphasis added).

34. *See* THE FEDERALIST NOS. 28, 29, 84 (Alexander Hamilton); *id*. NO. 46 (James Madison) (Clinton Rossiter ed., 1961).

35. *Id.* NO. 29 at 182, 186 (Alexander Hamilton) (emphasizing this point).

36. *See id*. at 185-87.

37. *See id*. NO. 46 at 299-300 (James Madison).

38. *Id.* NO. 84 at 512-14 (Alexander Hamilton).

39. *See* JOYCE L. MALCOLM, TO KEEP AND BEAR ARMS 164 (1994). William Rawle, George Washington's candidate for the nation's first attorney general, made the same point. *See* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125-26 (2d ed. 1829).

40. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 270-71 (1880). To be sure, Cooley went on to note that the Second Amendment had, as a "further" purpose (not the chief purpose—which, as he says, was to confirm the citizen's personal right to keep

and bear arms—but as a "further purpose"), the purpose to preclude any excuse of alleged need for a large standing army. *Id*.; *see also* PA. CONST. of 1776, art. VIII ("That the people have a right to bear arms for the defence of themselves, and the state; and as standing armies in the time of peace, are dangerous to liberty, they ought not to be kept up: and that the military should be kept under strict subordination to, and governed by the civil power.").

41. 1 WILLIAM BLACKSTONE, COMMENTARIES *129, *141.

42. *Id.* at *144.

43. *Id*. (emphasis added). Against this background, incidentally, the Supreme Court's decision in DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989), may be important to take into account in understanding the underpinnings of the personal right to keep and bear arms in the Blackstone minimal sense of the right to keep arms for self-preservation itself. To the extent that there is no enforceable constitutional obligation imposed on government in fact to protect every person from force or violence—and also no liability for a per se failure to come to any threatened person's aid or assistance (as *DeShaney* declares altogether emphatically)—the idea that the same government could nonetheless threaten one with criminal penalties merely "for having and using arms for self-preservation and defense" becomes impossibly difficult to sustain consistent with any plausible residual view of auxiliary natural rights. *See also* Nicholas Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through The Ninth Amendment*, 24 RUTGERS L.J. 1, 64-67 (1992) (collecting prior articles and references to the strong natural rights history of the personal right to possess essential means of self defense).

An impressive number of authors, whose work Nicholas Johnson reports (and to which he adds in this article), have sought to locate the right to keep and bear arms in the Ninth Amendment. They note that the Ninth Amendment provides precautionarily that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. And they go forward to show that the right to bear arms was a right of just this sort, i.e., that "the right to keep and bear Arms" was itself so utterly taken for granted, and so thoroughly accepted, that it fits the Ninth Amendment's description very aptly. *See* Johnson, *supra*, at 34-37. Unsurprisingly, however, the sources relied upon to show that this was so, strong as they are (and they are quite strong), are essentially just the very same sources that inform the Second Amendment with respect to the predicate clause on the right of the people to keep and bear arms. That is, they are the same materials that also show that there was a widespread understanding of a common right to keep and bear arms, which is itself the express right the Second Amendment expressly protects. Recourse to the same materials to fashion a Ninth Amendment ("unenumerated") right is not only largely replicative of the Second Amendment inquiry, but also singularly inappropriate under the circumstances—the right to bear arms is not left to the vagaries of Ninth Amendment disputes at all.

44. *E.g.*, XIANFA [Constitution] art. 55, cl.2 (P.R.C.), *translated in* THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA 41 (1983) ("It is the honourable duty of citizens of the People's Republic of China to perform military service and join the militia in accordance with the law.").

45. *See* MALCOLM, *supra* note 39, at 135-64 (tracing the English antecedents and reviewing the full original history of the Second Amendment). Professor Mal-

colm concludes, exactly as Thomas Cooley did a century earlier, *see supra* note 40, that

[t]he Second Amendment was meant to accomplish two distinct goals, each perceived as crucial to the maintenance of liberty. First, it was meant to guarantee the individual's right to have arms for self-defence and self-preservation. Such an individual right was a legacy of the English Bill of Rights [broadened in scope in America from the English antecedent]. . . .

. . . .The clause concerning the militia was not intended to limit ownership of arms to militia members, or return control of the militia to the states, but rather to express the preference for a militia over a standing army.

MALCOM, *supra*, at 162-63. For other strongly confirming reviews, see, e.g., SUBCOMMITTEE ON THE CONSTITUTION OF THE COMM. ON THE JUDICIARY, THE RIGHT TO KEEP AND BEAR ARMS, 97th Cong., 2d Sess. (1982); HALBROOK, *supra* note 19, at 67-80; David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 FORDHAM URB. L.J. 31, 33-43 (1976); 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); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 604-15 (1986); David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1, 43-62 (1987); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 206, 211-45 (1983); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 645-51 (1989); Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS., Winter 1986, at 125, 133-41. *But see* Ehrman & Henigan, *supra* note 19; Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107, 111 n.17 (1991) (listing additional articles by others).

46. Compare the claim of a power in government to require "licensing" the right to keep arms.

47. The Second Amendment was originally the fourth amendment of twelve approved by the requisite two-thirds of both houses of Congress in 1789 and at once submitted for ratification by the state legislatures. Because only six states approved either the first or second of these twelve amendments during the ensuing two years (1789-1791), however, neither of these was adopted (since, unlike the others, they failed to be confirmed by three-fourths of the states). So, what was originally proposed as the third amendment became the First Amendment and what was originally proposed as the fourth amendment became the Second Amendment in turn. (On May 22, 1992, however, the original proposed second amendment of 1789 was declared by Congress to have acquired sufficient state resolutions of ratification as of May 7, 1992, as also itself to have become effective as well. The result is that what was originally submitted as the second amendment has become the Twenty-Seventh Amendment instead.) *See* William Van Alstyne, *What Do You Think About the Twenty-Seventh Amendment?*, 10 CONST. COMMENTARY 9 (1993).

48. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 249 (1833) ("These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.").

49. *See* U.S. CONST. amend. XIV.

50. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Jacob Meritt Howard). Senator Howard is speaking here—and in his ensuing remarks—in explanation of the "first section" of the Fourteenth Amendment that provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."

51. *Id*. at 2766.

52. *Id*. at 2765 (emphasis added).

53. *Id*. at 2766 (emphasis added). For the most recent review of this matter, with useful references to the previous scholarship on the same subject, and reaching the same conclusion still again, see Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993).

54. *See* Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 79 (1989) ("State courts have on at least 20 reported occasions found arms laws to be unconstitutional."); Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U. L. REV. 177 (1982) (reviewing state constitutional clauses and the right to keep and bear arms).

55. The inclusion of this entitlement for personal protection is, in the Fourteenth Amendment, even more clear than as provided (as a premise) in the Second Amendment itself. It was, after all, the defenselessness of Negroes (denied legal rights to keep and bear arms by state law) from attack by night riders—even to protect their own lives, their own families, and their own homes—that made it imperative that they, as citizens, could no longer be kept defenseless by a regime of state law denying them the common right to keep and bear arms. Note the description of the right as a personal right in the report by Senator Howard. *See supra* text accompanying note 52. For confirming references, see also the examples provided in MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE 24, 43, 56, 72, 138-41, 164, 203 (1986); HALBROOK, *supra* note 19, at 107-23; Skayoko Blodgett-Ford, *Do Battered Women Have a Right to Bear Arms?*, 11 YALE L. & POL'Y REV. 509, 513-24 (1993); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Kates, *supra* note 45, at 254-57. For an overall responsible general review, see also Levinson, *supra* note 45. For the most recent critical review, however, see Raoul Berger, *Constitutional Interpretation and Activist Fantasies*, 82 KY. L.J. 1 (1993-1994) (with additional references to previous books and articles).

56. In contrast, the suggestion that it does not extend to handguns (in contrast to howitzers) is quite beyond the pale (i.e., it is wholly inconsistent with any sensible understanding of a meaningful right to keep arms as a personal right).

57. Such questions, moreover, are hardly on that account (merely as questions) necessarily hard or difficult to answer in reasonable ways, even fully conceding a strong view of the right to keep and bear arms (e.g., rules of tort or of statutory liability for careless storage endangering minors or others foreseeably put at unreasonable risk).

58. And equally with respect to the states, pursuant to the Fourteenth Amendment.

59. *See supra* notes 9-14 and accompanying text.

60. Unless, of course, one holds the view that it is really desirable after all that the Constitution should indeed be construed—the Second and Fourteenth

Amendments to the contrary notwithstanding—to say that the right to keep and bear arms is the right to keep and bear arms as it is sometimes understood (i.e., as though it had the added words, "but only according to the sufferance of the state").