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THE RIGHT TO BEAR ARMS IN THE ERA OF THE FOURTEENTH AMENDMENT: GUN RIGHTS OR GUN REGULATION?

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Reminiscing fifty years after the end of Reconstruction, attorney Louis Post recalled the murder of Jim Williams, a Freedman and captain in South Carolina's so-called "Negro militia."[1] The crime was so heinous it had become permanently etched in Post's memory, and his description of the event was chilling: "On the dangling corpse, those despicable savages then pinned a slip of paper inscribed, as I remember it, with these grim words 'Jim Williams gone to his last muster.'"[2] In *District of Columbia v. Heller*, Justice Stevens invoked this image as a cautionary reminder to Justice Scalia and the other members of the *Heller* majority that the militia purpose of the Second Amendment could not be so easily cast aside without doing violence to the text and history of this provision of the Bill of Rights.[3]

Just two years after deciding *Heller*, the Court has taken on another major gun rights case, *McDonald v. City of Chicago*.[4] This case will not only determine the future course

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1. SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 184–85 (Oxford University Press 2006).

2. *Id.*

3. Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2842 (2008) (Stevens, J., dissenting).

4. Nat'l Rifle Ass'n of America, Inc. v. City of Chicago, 567 F.3d 856 (7th

of gun regulation in America, but it will provide an occasion for the Roberts Court to shape its own approach to, and establish its place in, history.

The issue before the Court—the relationship between the Second and Fourteenth Amendments—is historically and doctrinally complex. Because the statute at issue in *Heller* regulated arms in the District of Columbia, a federal district, the Court did not have occasion to resolve whether (and if so, how) the Constitution's right to bear arms limits states and their political subdivisions. The *McDonald* petitioners and their allies argue that the gun control regulations in Chicago and Oak Park, Illinois violate the right to bear arms guaranteed in the U.S. Constitution.[5] The petitioners' brief draws heavily on historical materials, as do several amicus curiae briefs supporting the constitutional challenge.[6] These briefs present a pro-gun rights version of history that is plagued by half-truths, anachronisms, and ideological distortion—one that bears little relationship to the actual history of the Second and Fourteenth Amendments.

In *McDonald*, the Court must decide whether to correct the historical and interpretive errors it made in *Heller*, or to exacerbate them. And it must determine whether it will rely on history in a way that is responsible and that best equips it to grapple with the full complexity of the provisions that come before it. If the Court does so, it will see that in the era surrounding the adoption of the Fourteenth Amendment, states regularly enacted robust firearms regulations to protect the public safety, including bans on dangerous weapons of the type before the Court.[7] The historical record thus supports Chicago's position, not that of the petitioners.

I. SETTING THE STAGE: *HELLER*'S MISUSE OF HISTORY

The *Heller* majority's misuse of history is well

Cir. 2009), *cert. granted sub nom.* McDonald v. City of Chicago, 130 S. Ct. 48 (2009).

5. Petitioners' Brief at 3–4, McDonald v. City of Chicago, No. 08-1521 (Nov. 16, 2009).

6. *Id.*; *e.g.*, Brief for Academics for the Second Amendment as Amici Curiae Supporting Petitioners, McDonald v. City of Chicago, No. 08-1521 (Nov. 23, 2009); Brief for Respondents the Nat'l Rifle Ass'n of America, Inc. et al. in Support of Petitioners, McDonald v. City of Chicago, No. 08-1521 (Nov. 16, 2009) [hereinafter Brief for the NRA].

7. *See infra* Part III.

documented.[8] Although the Court's opinion is couched in an originalist veneer, *Heller*'s use of historical materials has drawn fire from historians and constitutional scholars across the contemporary political spectrum.[9] Reva Siegel, for example, notes that Justice Scalia's logic appears to exclude military weapons but give preferred status to handguns.[10] If one applied the logic of Justice Scalia's opinion during the Founding era itself, it would seem to give greater constitutional protection to the pistols used by Alexander Hamilton and Aaron Burr in their ill-fated duel than to a musket owned by a Concord Minuteman—an outcome that is hard to reconcile with the original vision of a well-regulated militia. Pistols were not standard military issue for the eighteenth-century militiamen (apart from the horsemen's pistol carried by mounted soldiers and the pistols carried by some officers), but muskets certainly were.[11] This fact is hard to square with the *Heller* Court's decision to give more constitutional protection to civilian guns than to militia weapons.

Perhaps the most significant interpretive error of the *Heller* majority—given Justice Scalia's proclaimed textualism—was its ahistorical approach to reading the text of the Second Amendment. Justice Scalia used nineteenth-century interpretive sources to support making the Second Amendment's preamble subservient to the statement of the right. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[12] Rather than construe the second clause in light

8. Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, THE NEW REPUBLIC, Aug. 27, 2008, at 32, 32–33; J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009); Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 260, 263–64 (2008).

9. *See, e.g.*, Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008); *see* Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625, 639–40 (2008).

10. *See* Siegel, *supra* note 9, at 193.

11. New York's militia law was typical; it required militia men to obtain a musket or rifle and the "Captain of the Troop of Horse" to certify that his men had either a "carbine" or set of "good pistols." *See* Act of Mar. 11, 1780, ch. 55, 1780 N.Y. Laws 237.

12. U.S. CONST. amend. II.

of the preamble, as the Founding generation would have, Justice Scalia adopted a nineteenth-century interpretive approach. He interpreted the latter part of the Second Amendment first, effectively rewriting the Amendment and undoing the work of the First Congress, which had consciously rewritten the text to place the right to bear arms after the militia clause.[13] This upends the claim that the opinion's application of originalism is a neutral interpretive method.

Justice Scalia has famously claimed that we do not have a living Constitution, but rather a dead one.[14] It might be more apt to describe the majority's interpretation in *Heller* as something akin to a constitutional etch a sketch. Like the popular children's toy, inconvenient fragments magically disappear and then miraculously reappear at the whim of the interpreter. In *Heller*, the preamble effectively vanishes and only reappears after the Court has interpreted the meaning of the right to bear arms. This "Cheshire Cat Rule of Construction"—now you see the preamble, now you don't—represents a surrealist turn in constitutional interpretation.[15] Indeed, this approach prompted Justice Stevens to wryly note in dissent that this method was not how courts typically read texts.

> The Court today tries to denigrate the importance of this clause of the Amendment by beginning its analysis with the Amendment's operative provision and returning to the preamble merely "to ensure that our reading of the operative clause is consistent with the announced purpose." That is not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the Amendment was adopted.[16]

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13. On the drafting of the Amendment, see Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 158 (2001).

14. All Things Considered, *Scalia Vigorously Defends a "Dead" Constitution*, NPR, Apr. 28, 2008, http://www.npr.org/templates/story/story.php?storyId=90011526.

15. On *Heller*'s use of a "Cheshire Cat Rule of Construction," see Saul Cornell, Heller, *New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095, 1101–06 (2009) (discussing orthodox Blackstonian modes of construction and contrasting them with Scalia's approach).

16. Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2826 (2008) (Stevens, J., dissenting) (citation omitted).

Justice Scalia defended his approach to interpreting the Second Amendment by relying on rules of interpretation drawn from nineteenth-century treatises written many decades after the Founding era.[17] In this version of history, presumably, Washington Irving's Rip Van Winkle would have awoken to find nothing changed in America after his long slumbers.[18] Historian Gordon Wood begins his magisterial contribution to the *Oxford History of America* with Irving's classic tale.[19] The story of Rip Van Winkle captured the profound changes that had swept over America in the period between the Revolution and the Jeffersonian era. Wood's characterization seems apt: "In a few short decades Americans had experienced a remarkable transformation in their society and culture, and, like Rip and his creator, many wondered what had happened and who they really were."[20]

The Federalist and Jeffersonian eras were deeply contentious periods in American constitutional life, and the rules governing the interpretation of constitutional texts were among the most bitterly contested questions that jurists faced in the new nation.[21] These fierce debates extended to the use of preambles in legal texts.[22] The most high profile examples of this conflict occurred within the context of the battle over the Alien and Sedition Acts.[23] There, the Federalists used an expansive reading of preambles to justify the Acts, which led to a backlash against such latitudinarian constructions.[24]

Even more illuminating is an 1807 opinion of the New Jersey Supreme Court, which focused precisely on the proper mode of interpreting preambles—a case not mentioned by

17. *See id.* at 2789–90 & nn.3–4.

18. Washington Irving, *Rip Van Winkle: A Posthumous Writing of Diedrich Knickerbocker*, *in* HEATH ANTHOLOGY OF AMERICAN LITERATURE 941 (concise ed. 2004).

19. *See* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 1 (Oxford University Press 2009).

20. *Id.* (citation omitted).

21. *Id.* at 400–68.

22. *Id.* at 95–173.

23. OBSERVATIONS ON THE ALIEN AND SEDITION LAWS 25 (John Colerick printer, Telegraphe 1799); An Act for the Punishment of Certain Crimes Against the United States, ch. 74, 1798 Stat. 596 (1848).

24. For a more detailed discussion of the constitutional struggle over preambles, see David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295, 1299–1307 (2009).

Justice Scalia or Eugene Volokh, the scholar whose work informed *Heller*'s reading of preambles.[25] The New Jersey Court addressed the suggestion "that the enacting clause [of a legal text] being couched in clear and positive terms, must be literally obeyed, without regard to the preamble;" and "that a preamble cannot control the plain enacting clause of a statute, but it is only called in when the *intention* of the legislature is doubtfully expressed."[26] Although Justice Scalia claimed this was a standard interpretive approach at the Founding, the New Jersey Court squarely rejected it. The majority opinion invoked Blackstone's authority, particularly his paramount rule for interpreting statutes:

> But I confess, I cannot find either in the authorities cited, or in many others which I have carefully searched, any thing which does away that great fundamental principle, that *the clear reason and spirit* of a law should govern *in its construction*. In 1 *Blac. 59*, we find it laid down that, "The fairest and most rational method to interpret the will of the Legislature is, by exploring his intentions at the time when the law was made."[27]

The dissenting opinion, in contrast, supported Justice Scalia's view, claiming that:

> It appears to me, to be a settled principle of law, that the preamble cannot control the enacting part of the statute, in cases where the enacting part is expressed in clear, unambiguous terms; but in case any doubt arises on the enacting part, the preamble may be resorted to, to explain it, and show the intention of the law maker. The enacting part of this statute is clear and explicit; there is no ambiguity on the face of it. Shall we then go out of the enacting part, which is clear and intelligible, and resort to the preamble, to create an ambiguity, and then have recourse to the same preamble, to explain this ambiguity?[28]

In contrast to Justice Scalia's *Heller* opinion, though, this New Jersey high court dissent written by Justice Pennington was conversant with the relevant English authorities and

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25. Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998); Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2790 n.4 (2008).

26. Lloyd v. Urison, 2 N.J.L. 197, 202 (1807) (quoting the contentions of one of the parties).

27. *Id.* at 202–03.

28. *Id.* at 210 (Pennington, J., dissenting).

noted that they were divided on the appropriate use of preambles. The restrictive view of preambles advocated by Lord Cowper—the one adopted by Justice Scalia—had been articulated at the start of the eighteenth-century but rejected at the end of the century by "Lord Chief Baron PARKER and Lord HARDWICKE, in the case of *Ryal v. Rowles*."[29] The New Jersey dissent's preference for Cowper's views over those of Hardwicke are enlightening, and show how much of an outlier Justice Scalia's approach would have been at the time of the Founding. The dissent explained:

> Preambles are often very loosely drawn, and not very minutely attended to, by the members of the Legislature, in giving their assent to a law. The enacting clause being reasonable and proper, is, in all ordinary cases, sufficient to gain their approbation and assent to an act. But may not the Legislature have had a further intent, than what is expressed in the preamble?[30]

To justify using the Pennington's dissent over Rossell's majority view of preambles, then, one would have to assume that the First Congress had written the Second Amendment without much thought or attention. But that is not the case; the Framers carefully considered the text of the Amendment.

The New Jersey Supreme Court case was not alone in instructing that a preamble cannot be set aside when seeking the intent of the legislator. Justice John Jay, riding circuit in a 1790s case, stated the Founding era's view of the role of preambles in unambiguous terms: "A preamble cannot annul enacting clauses; but when it evinces the intention of the legislature and the design of the act, it enables us, in cases of two constructions, to adopt the one most consonant to their intention and design."[31] Jay's advice seems especially useful given that the court was trying to determine two different constructions of the phrase "bear arms."[32]

Although Justice Scalia claimed the mantle of originalism, his approach rejected the Founding Era's preferred method for handling preambles in favor of interpretive techniques at odds with that practice. Citing nineteenth-century treatises to support this interpretive

29. *Id.* at 211 (Pennington, J., dissenting).
30. *Id.* (Pennington, J., dissenting).
31. Jones v. Walker, 13 F. Cas. 1059, 1065 (C.C.D. Va. 1800).
32. *Id.*

move is the worst sort of "law office history"—cherry-picking sources and ignoring the full historical context.[33] Put simply, *Heller* demonstrates that Justice Scalia's version of originalism is not the neutral interpretive tool he fancies it to be.[34]

The *Heller* majority's faux originalism is particularly troubling because it uses a purportedly neutral method to cloak a profoundly anti-democratic decision. It is important to recall that the *Heller* Court struck down laws enacted by the democratically elected representatives of the District of Columbia, and did so through a novel reading of the Second Amendment contrary to long-standing precedent. Moreover, the Court was not defending an insular minority, but rather a "self proclaimed majority" that has used the political process to successfully forward its agenda across the nation.[35] As Cass Sunstein has noted, Justice Scalia's *Heller* opinion seems to represent a form of living constitutionalism driven by a powerful popular constitutionalist support for gun rights.[36] The problem for Justice Scalia was that Washington is one locality in which popular support favored gun control, not gun rights. But rather than acknowledge that the Court was striking down the democratic law because of the majority's own ideological views on the issue, the majority purported to apply a neutral theory.

II. THE IRONIES OF THE PRO-*MCDONALD* BRIEFS

The briefs filed on behalf of the *McDonald* petitioners evidence the same tendency toward law office history found in the *Heller* majority's opinion.[37] If good history forms a rich tapestry drawn from a variety of different sources, this results-oriented exercise looks rather different. The petitioners and their amici have presented the Court with a

33. For a useful discussion of the problem of law office history in recent legal scholarship, see Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479 (2008).

34. *See* Wilkinson, *supra* note 8.

35. *See, e.g.*, Michael C. Dorf, *Identity Politics and the Second Amendment*, 73 FORDHAM L. REV. 549 (2004); Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 FORDHAM L. REV. 681 (2004). Without a gun census, it is impossible to tell if the majority of American households actually own firearms.

36. Sunstein, *supra* note 8, at 265–67.

37. *See* discussion *infra* Part I.

flat monochromatic version of the past, drained of its complexity. According to this simplistic account, the Fourteenth Amendment protects a constitutional right to possess any arms that could possibly be used for self-defense, and it precludes the states from enacting reasonable gun regulations—even regulations that are non-discriminatory, do not interfere with the militia, and serve the purpose of protecting the public from harm.

The *McDonald* petitioners' and their amici's arguments are profoundly ahistorical.[38] Second Amendment scholarship has often been the worst sort of law office history, packaged in originalist rhetoric. Rather than faithfully portray the Founders' world, it has conjured up a mirror image of the world it purports to represent—a carnivalesque inversion of reality[39]—in which the Dissent of Pennsylvania's Anti-Federalist Minority matters more than the debates of the First Congress that actually wrote the Second Amendment.[40] The use of history by the *McDonald* petitioners and their amici fails on its own terms. Moreover, as explained in Part III, these parties entirely ignore the dominant understanding of the relationship between states and gun regulation in the era following adoption of the Fourteenth Amendment—in particular, the fact that states had broad power to enact non-discriminatory firearms regulations to protect the public safety.[41]

A. The Founding Era's Self-Defense Theory Versus the Modern Gun Rights Theory

One historically flawed aspect of the majority opinion in *Heller* is the claim that the Second Amendment was intended or understood to effectively constitutionalize the common law right of self-defense.[42] These two rights (to bear arms in a militia, and bear a gun for personal self-defense) were legally

38. *See generally* ROBERT SPITZER, SAVING THE CONSTITUTION FROM LAWYERS: HOW LEGAL TRAINING AND LAW REVIEWS DISTORT CONSTITUTIONAL MEANING (2008); *see also* Jack N. Rakove, *Confessions of an Ambivalent Originalist*, 78 N.Y.U. L. REV. 1346, 1354–55 (2003).

39. Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 405–07 (2003).

40. Saul Cornell, *A New Paradigm for the Second Amendment*, 22 LAW & HIST. REV. 161 (2004).

41. *See infra* Part III.

42. Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2817–18 (2008).

distinct in the Founding era. Certainly, some proposals were made to constitutionalize the right to self-defense, including Jefferson's alternative model for the Virginia Declaration of Rights and the rejected alternatives framed by two Massachusetts towns during the debate over the state's 1780 Constitution.[43] By 1790 the most forward-looking legal thinkers, such as James Wilson, had started to think about the issue in more individualistic terms, yet it would take several decades before this view gained a foothold in American law. Once this new theory took root, it provided an alternative to the traditional common law understanding of self-defense embodied in eighteenth-century Anglo-American law.[44]

The debates in state constitutional conventions and legislatures during the decades following the adoption of the Second Amendment, which include the waves of constitutional revision that swept across the nation throughout the nineteenth century, demonstrate that by the middle of the nineteenth century two opposing views of the right to bear arms had gained currency in American law.[45] Indeed, the two competing visions of the right to bear arms—one militia-based and the other rooted in the right of private self-defense—generated two opposing constitutional visions in antebellum American jurisprudence, a fact revealed by the radically different holdings in the antebellum cases of *State v. Buzzard* and *Bliss v. Commonwealth*.[46]

By the time the Fourteenth Amendment was adopted, constitutional experts (including those cited by the *Heller* majority) recognized this divide. In his comprehensive review of this body of law, John Foster Dillon, an eminent late nineteenth-century legal authority, recognized that

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43. OSCAR HANDLIN & MARY HANDLIN, THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 574, 624 (Harvard University Press 1966); Library of Congress, Virginia Colonial Convention, August 1774, Declaration of Rights, http://memory.loc.gov/cgi-bin/query/P?mtj:1:./temp/~ammem_NENu:: (last visited Apr. 14, 2010).

44. CORNELL, *supra* note 1, at 148–55.

45. *Id.* at 137–166; Cornell, *supra* note 40, at 161.

46. *Compare* Bliss v. Commonwealth, 12 Ky. 90 (1822) (declaring that Kentucky's concealed-weapons ban conflicted with the state constitution), *superseded by state constitutional amendment*, KY. CONST. of 1850 art. XII, § 25, *with* State v. Buzzard, 4 Ark. 18, 21 (1842) (upholding arms regulation statute against constitutional challenge).

competing paradigms existed.[47] Dillon shared the view of another celebrated legal theorist, Joel Prentiss Bishop, who argued that the more limited militia-based conception of arms-bearing articulated in *Buzzard* was the dominant paradigm.[48] Both Dillon and Bishop recognized it was beyond dispute that the more expansive individual right discussed in *Bliss* was not (yet) the orthodox view in American law.[49]

Although the militia purpose of the Second Amendment and similar state arms-bearing provisions controlled the meaning of the Amendment, this is not to say that Americans, including leading commentators, did not believe in a right of individual self-defense. Neither Bishop nor Dillon would have doubted that such a right was well established under common law and that the right included the liberty to use firearms or any other item of property legally possessed. Dillion's discussion of this notion was particularly thoughtful. He argued that society may extensively regulate the right of self-defense, but cannot abrogate it.[50] Echoing the ruling in *Andrews v. State*,[51] an influential Reconstruction-era case, Dillon confidently declared that "every good citizen is bound to yield his preference as to the means [of self-defense] to be used, to the demands of the public good."[52] Dillon also explained that each state might "regulate the bearing of arms in such a manner as it may see fit, or restrain it altogether."[53] And, as discussed in Part III, the states did just that in the era surrounding the adoption of the Fourteenth Amendment.[54]

Part of the problem with the modern gun rights theory is that it has effectively misconstrued the connection between the right to have guns and the right to keep and bear arms. For modern gun rights advocates, the Constitution protects an individual right to have guns for self-defense, which makes it possible to have a well-regulated militia. The

47. John Foster Dillon, *The Right to Keep and Bear Arms for Public and Private Defense*, 1 CENT. L.J. 259 (1874).

48. *See generally* JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW (Boston, Little, Brown, and Co. 1868) (1856).

49. Dillon, *supra* note 47, at 286.

50. *Id.*

51. Andrews v. State, 50 Tenn. 165 (1871).

52. Dillon, *supra* note 47, at 286.

53. *Id.* at 296.

54. *See infra* Part III.

Founders had the opposite view: the necessity of having a well-regulated militia meant that the people had the right to have certain weapons, which they were entitled to use for self defense, under common law and subject to reasonable state regulation.[55]

B. The Continuing Relevance of the Militia in the Reconstruction Era

To sustain their self-defense theory, gun rights advocates have once again tried to erase the first clause of the Second Amendment by falsely claiming that Republicans in the era of the Fourteenth Amendment's adoption had little interest in gun regulation and had abandoned their belief that the Second Amendment right to bear arms was linked to participation in the militia. For example, one brief filed in *McDonald* argues that by the middle of the nineteenth century the original militia-based view of the Amendment had largely disappeared and been supplanted by an individual rights conception of arms-bearing.[56] That brief does not come to terms with the leading legal authorities writing during that period and cannot be reconciled with the relevant scholarly literature on American constitutional development in this era. Historians have devoted an enormous amount of energy to charting the bumpy and disjointed transformation of American politics from a civic republican culture to a more liberal one.[57] No serious historian would doubt that over the course of the nineteenth

55. For a clear statement of the gun rights view, see Don B. Kates Jr., *The Second Amendment And The Ideology Of Self-Protection*, 9 CONST. COMMENT. 87 (1992). Rather than approach the right of self defense in a rigorous historical fashion, Kates plucks quotes out of context, cherry-picking snippets from a variety of philosophers from Plato to the Founders. The essay shows little historical understanding of early modern political thought, eighteenth-century social contract theory, or Anglo-American common law.

56. *See* Brief for Academics for Second Amendment, *supra* note 6. The table of authorities for this brief relies largely on publications of pro-gun rights activists such as Clayton Cramer, David Hardy, Stephen Halbrook, and Dave Kopel. *See id.* at vi–x. Indeed, the brief cites a forthcoming article written by one of the authors of the brief that appears to have been written with the idea of influencing the Court in *McDonald*. *See id.* at 12 n.15. The brief therefore effectively cites itself for authority.

57. *See* Festa, *supra* note 33; Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 30–34 (1992); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 551 n.23 (1986).

century a more democratic and individualistic culture gradually emerged in the United States.[58] But this does not mean that the older vision was obliterated.

The Second Amendment presents no exception to this general rule. The dominant understanding of the Amendment in the eighteenth century was unquestionably civic republican.[59] A more liberal, individualistic, and ultimately democratic conception of arms-bearing emerged at the end of the eighteenth century, and developed most fully in the early decades of the nineteenth.[60] It is, however, far too simplistic to assert that one view simply supplanted the other. The notion that the Second Amendment right to bear arms had been decoupled from the militia purpose of the Amendment would have shocked most of the leading legal minds of the late nineteenth century.

One leading authority writing in the late nineteenth century, John Norton Pomeroy, construed the Second Amendment using the Blackstonian method adopted by Justice Stevens and eschewed by Justice Scalia in *Heller*.[61] He observed that the meaning of the Second Amendment was to be gleaned from its preamble, noting that "[a]ll such provisions, all such guaranties, must be construed with reference to their intent and design."[62] He was insistent on this point:

> The object of this clause is to secure a well-armed militia. It has always been the policy of free governments to dispense, as far as possible, with standing armies, and to rely for their defence, both against foreign invasion and domestic turbulence, upon the militia. Regular armies have always been associated with despotism.[63]

While these sentiments are sure to please modern proponents of gun control, Pomeroy's views are not easily assimilated to the simple dichotomies of modern gun politics.

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58. WOOD, *supra* note 19, at 701–38 (suggesting that this change had taken place by the second decade of the nineteenth-century). For more on the changing view of the right to bear arms, see CORNELL, *supra* note 1.

59. *See* sources cited *supra* note 57.

60. WOOD, *supra* note 19, at 701–38.

61. *See generally* JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES (New York, Hurd and Houghton 3d ed. 1875).

62. *Id.* at 152.

63. *Id.*

Pomeroy continued to believe that the Amendment was defined by its militia purpose, but he viewed that purpose in expansive terms. Thus, Pomeroy was equally quick to point out that "a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons"[64]—a sentiment more likely to bring a smile to the faces of modern gun rights advocates.

Pomeroy was hardly alone in championing this understanding of the Second Amendment; Joel Prentiss Bishop articulated a similar view. After noting that state authority over the manner of carrying weapons was extensive (including the regulation of open carry and concealed carry), Bishop went on to discuss the more limited scope of the right to keep and bear arms. Bishop was emphatic that the right only protected military arms and, even then, only when used in a "military way."[65] Contrary to claims of gun rights advocates, the dominant view of the Second Amendment in the late nineteenth-century continued to be shaped by the preamble.[66]

C. The Incorporation Conundrum: What Did the Fourteenth Amendment Prohibit?

Much of the recent academic scholarship on the Fourteenth Amendment, particularly as espoused by those supporting full incorporation of the Bill of Rights against the states, has stressed its abolitionist origins. While this intellectual genealogy is important, it is not the only significant historical tradition relevant to the Fourteenth Amendment.[67] Republicans were also heirs to an older Whig

64. *Id.*

65. BISHOP, *supra* note 48, at 75.

66. *Id.* at 75–76.

67. For pro-incorporation arguments, see MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 57–91, 215–20 (3d prtg. 2001). For the opposing argument, see WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 114–24 (1988). The most measured and even-handed evaluation of the evidence and scholarship to date concludes that the evidence for total incorporation of the Bill of Rights fails to meet any reasonable historical standard of proof. Of course, depending on which theory of originalism the Court utilizes, the lack of compelling historical evidence for a broad consensus on incorporation among the framers, ratifiers, and the general public may not pose a serious bar to incorporation of the Second Amendment. Indeed, given the Court's "new originalist" methodology employed in *Heller*

vision of a well-regulated state. And while a more individualistic conception of arms-bearing had taken root among the most radical wing of the abolitionist movement, this was not the view of more mainstream Republicans who remained committed to the idea of well regulated society.[68]

Although the scholarly pendulum has shifted noticeably toward incorporation in recent years, no clear consensus has emerged on this issue. Few contemporary scholars would defend the extreme anti-incorporationist views of Charles Fairman or Raoul Berger.[69] Moreover, some points of agreement have emerged in this debate. If the meaning of the Fourteenth Amendment was to be gleaned from the intent of its primary architects, as evidenced by utterances made in the *Congressional Globe*, the case for something like incorporation is strong.[70] The problem, however, becomes increasingly complex if one moves beyond Bingham and Howard's speeches in Congress. The most recent effort to tally up the views of those Congressmen who spoke on the issue concluded that the case for incorporation remains inconclusive at best.[71] As one moves beyond congressional debate to try to survey the public understanding of the Amendment at the time of its adoption, the evidence becomes less clear, more fragmentary, and even more contradictory.[72]

The connection between the Second and Fourteenth Amendments is even more complex. Gun rights advocates claim that the right to bear arms was the pre-eminent right sought by supporters of the Fourteenth Amendment. Even allowing for the hyperbole that often appears in amicus briefs, such a simplistic claim strains credulity. While the

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there are almost no constraints on what the Court might do because any evidence, no matter how un-representative, can be used to construct an original public meaning argument.

68. RONALD M. LABBÉ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT 230 (2003).

69. For an explanation of these views, see RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 155–89 (2d ed. 1997), and Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

70. Petitioners' Brief, *supra* note 5, at 24–26.

71. *See* George Thomas, III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627 (2007).

72. BERGER, *supra* note 69, at 155–89; Fairman, *supra* note 69.

outrages of the Black Codes, including the selective disarmament of Blacks, were widely reported in the North,[73] there is almost no evidence to support the contention that this was a general concern during public debate over the Fourteenth Amendment. Indeed, considering that Bingham and others were mercilessly attacked by Democrats who conjured up a host of horrors (including miscegenation) that would follow the Fourteenth Amendment's adoption,[74] it would have been political suicide to champion the rights of gun toting African-Americans to Northern or Midwestern audiences. Indeed, when Bingham took to the stump to sell the Fourteenth Amendment he stressed that the purpose of Section One was to "secur[e] equal political rights to all natural born or naturalized Citizens."[75]

Significantly, even Bingham expressly affirmed that the new Amendment would not diminish the powers of the states and would maintain the balance of power within the federal system. He expressly declared that the state would continue to be responsible for all issues of "local administration and personal security."[76] As described below, states had regulated weapons to protect public safety in the years leading up to the Fourteenth Amendment, and Bingham's public remarks seem a clear indication that he did not intend the new Amendment to alter that practice. Striking down a local gun control law seems hard to reconcile with Bingham's own view that the goal of Section One was to secure equal rights and preserve state power to protect and regulate matters relevant to personal security.[77]

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73. *See* Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners at 25–27, McDonald v. City of Chicago, No. 08-1521 (Nov. 23, 2009) [hereinafter Brief of Constitutional Law Professors]; Petitioners' Brief, *supra* note 5, at 11; Brief for the NRA, *supra* note 6, at 14.

74. James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435 (1985).

75. John Bingham, Speech, *in* CINCINNATI DAILY GAZETTE, Sept. 2, 1867.

76. *Id.*

77. For two other speeches by Bingham which stress equal rights, not incorporation, as the essence of Section One, see John A. Bingham, Politics in Ohio (Aug. 8, 1866), *in* CINCINNATI COMMERCIAL, Aug. 10, 1866, and John A. Bingham, The Constitutional Amendment (Aug. 24, 1866), *in* CINCINNATI COMMERCIAL, Aug. 27, 1866. For a useful summary of the scholarship on the public debate over Section One, see Lawrence Rosenthal, *Second Amendment Plumbing after* Heller*: Of Incorporation, Standards of Scrutiny, Well-Regulated Militias and Criminal Street Gangs*, 41 URB. LAW. 1 (2009). Rosenthal concludes that even the most ardent advocates for total incorporation have not

It is not just Bingham who is hard to fit into the gun rights incorporation paradigm. Even among those who believed that the Fourteenth Amendment had incorporated the right to bear arms, the theory of incorporation they advanced does not fit into the simple dichotomous model of the Second Amendment that dominated pre-*Heller* scholarship. Nor can this vision of incorporation be easily reconciled with *Heller*'s holding itself. Consider the view presented in the National Rifle Association (NRA) brief and a brief filed by Constitutional Law Professors in *McDonald*.[78] These briefs describe reactions from Congressmen concerned that the Black Codes in Mississippi, South Carolina, and elsewhere explicitly discriminated against the rights of freedmen and other African-Americans, preventing them from possessing the types of arms that others were permitted to own. Petitioners and the NRA, for example, cite an order from General Sickles, issued in January 1866, to suspend the South Carolina Black Codes.[79] Both quote the order selectively, however, cutting off the provision mid-sentence. Read in full, the order affirms: "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."[80]

The same provision further provides that "no disorderly person, vagrant, or disturber of the peace, shall be allowed to bear arms."[81] The non-discrimination principle of the Sickles order was thus entirely consistent with reasonable safety regulation. Nor was the right to bear arms one that all individuals could claim even in the era of the Fourteenth Amendment's adoption. Rather, the right was limited to loyal Americans able to demonstrate some permanent attachment to the community by showing, for instance, that they were not vagrants (i.e., they either held property or were gainfully

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been able to muster a compelling case that total incorporation was widely understood to be the public understanding of Section One. *Id.* *See generally* Thomas, *supra* note 71.

78. *See* Brief of Constitutional Law Professors, *supra* note 73; Brief for the NRA, *supra* note 6.

79. *See* Petitioners' Brief, *supra* note 5; Brief for the NRA, *supra* note 6.

80. CONG. GLOBE, 39th Cong., 1st Sess. 908–09 (1866).

81. *Id.*

employed). Thus, during this time, the right to bear arms was not universal and was indeed subject to far greater restrictions than were core First Amendment freedoms, including some forms of prior restraint that would not have been allowable for speech.[82]

Likewise, the NRA and Constitutional Law Professors both place great emphasis on the second Freedman's Bureau Bill, which Congress enacted in response to the discriminatory laws enacted and enforced by Southern States.[83] But, that bill focused on barring state action that discriminated against African-Americans. The relevant provision protected the freedmen's right:

> [T]o 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.[84]

Although petitioners' amici highlight the portion of this provision noting a "right to bear arms," they ignore the text surrounding that phrase, *viz.* "equal benefit of all laws" and "without respect to race or color or previous condition of slavery."[85] Likewise, other legislation enacted by the Reconstruction Congress targeted discriminatory state action. For example, the Civil Rights Act of 1866, which the Fourteenth Amendment was meant to constitutionalize,[86] explicitly enacted an antidiscrimination rule.[87] Senator Trumbull reasoned that the Act would "in no manner interfere[] with the municipal regulations of any State which

82. By rejecting Justice Breyer's balancing test, the *Heller* Court seemed to come close to treating the Second Amendment as though it were structurally the same as the First Amendment's protection for political speech. Although political speech triggers strict scrutiny, other types of speech do not. Of course as Winkler notes, most provisions of the Bill of Rights are not precluded from employing balancing tests. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 706–26 (2007).

83. *See* Brief of the Constitutional Law Professors, *supra* note 73, at 29; Brief for the NRA, *supra* note 6, at 12.

84. Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176–77.

85. *Id.*; *see also* Rosenthal, *supra* note 77, at 73.

86. *See, e.g.*, Bond, *supra* note 74, at 444.

87. *See* Rosenthal, *supra* note 77, at 58–59.

protects all alike in their rights of person and property."[88]

The NRA also relies heavily on Pomeroy's treatise,[89] but ignores its clear statement of the Amendment's non-discrimination principle. Pomeroy observed that if a state statute provided that "certain classes of the inhabitants—say negroes—are required to surrender their arms," the federal Bill of Rights offered no relief.[90] The "first section" of the Fourteenth Amendment "now pending before the people," however, "would give the nation complete power to protect its citizens against local injustice and oppression."[91] Indeed, Pomeroy's explication of how Section One would function to protect rights merits closer scrutiny. Pomeroy posited a scenario in which a state enacts a discriminatory law disarming Freedmen.[92] Interestingly, he further posited another crucial fact ignored by the NRA brief: not only did the hypothetical state enact a discriminatory act, but its constitution also contained an arms-bearing provision.[93] If Pomeroy believed that the right to bear arms was a privilege and immunity of citizenship or an element of substantive due process liberty, there would have been no need to construct the fact pattern in this manner. In the absence of a discriminatory law and a state arms-bearing provision there would have been no means for the Fourteenth Amendment to trigger federal intervention. The reason for this is evident in Pomeroy's forceful statement that the individual state's police powers remained undiminished after the Fourteenth Amendment. Pomeroy was emphatic on this point, declaring that the Amendment would not "interfere with any of the rights, privileges, and functions which properly belong to the individual states."[94] Among those rights was the power to regulate "dangerous" weapons.

Indeed, Pomeroy's view—that the first section of the Fourteenth Amendment prohibited state statutes directed at "certain classes of inhabitants," but did not prohibit reasonable and neutral regulations aimed at protecting the

88. CONG. GLOBE, 39th Cong., 1st Sess. 1761 (1866).
89. Brief for the NRA, *supra* note 6, at 17, 46.
90. POMEROY, *supra* note 61, at 150.
91. *Id.* at 151, *quoted in* Brief for the NRA, *supra* note 6, at 17.
92. POMEROY, *supra* note 61, at 150.
93. *Id.*
94. *Id.* at 151.

public[95]—also reflected the view of the Reconstruction Congress. Senator Morrill (R-Me.), for example, emphasized that the "principle of equality before the law . . . does not prevent the State from qualifying the rights of the citizen according to the public necessities."[96] Representative Stevens (R-Pa.) explained that the Fourteenth Amendment "allow[ed] Congress to correct the unjust legislation of the States, so far that the law which operates on one man shall operate equally upon all."[97] Representative Hotchkiss (R-N.Y.) understood the Amendment to mean "no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another."[98] As a result of the Fourteenth Amendment, states could thus no longer enact or enforce firearms laws that discriminated against particular "classes of inhabitants."[99] But no contemporary evidence suggests that the Fourteenth Amendment was intended or understood to preclude neutral, non-discriminatory regulations.

D. Second Amendment Incorporation Comes Before the Court

One glaring omission in the briefs filed on behalf of the *McDonald* petitioners is that not one brief discusses the two cases in which the federal government pressed a Second Amendment claim by arguing in favor of something like incorporation. Why would gun rights advocates ignore an on-point case that argued for Second Amendment incorporation? If one examines the two cases, *United States v. Mitchell* and *United States v. Avery*, the answer becomes clear.[100] These cases highlight the historical flaws in the *McDonald* petitioners' attempt to erase the relevance of the militia while creating a constitutional right to self-defense in the Fourteenth Amendment.[101]

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95. *Id.* at 150.

96. CONG. GLOBE, 39th Cong., 2d Sess. 40 (1866).

97. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

98. *Id.* at 1095.

99. POMEROY, *supra* note 61, at 150.

100. United States v. Avery, 80 U.S. 251 (1871) (noting, but not addressing, the division between two lower court judges on the prosecution's Second Amendment theory); United States v. Mitchell, 26 F. Cas. 1283 (C.C.D.S.C. 1871).

101. The claim of petitioners' amici—that in the Reconstruction era, "[a]rms were needed not as part of political and politicized militia service," Brief of Constitutional Law Professors, *supra* note 73, at 28 (quoting AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 258–59 (1998))—is

Both cases were part of the South Carolina Ku Klux Klan (KKK) trials—the prosecution triggered by the crimes that haunted Louis Post. The lead attorney on the cases, U.S. Attorney Daniel Corbin, developed a strategy to use the Fourteenth Amendment to pursue the Klan's violations of the Second Amendment rights of Jim Williams and other members of the Negro militia.[102] The South Carolina KKK trials were the only instance that the U.S. government pressed a Second Amendment claim in court by using the Fourteenth Amendment. The case confounds the categories of modern Second Amendment analysis; the KKK trials vindicate the notion of Second Amendment incorporation, but in a way that hardly fits with the gun rights ideology or *Heller*'s account of the Amendment. For gun rights advocates, the problem is that Corbin and the Department of Justice prosecuted the Klan for disarming members of the Negro militia.[103] Even more troubling to gun rights advocates is that the individual rights self-defense view was championed by the South Carolina KKK as a justification for violating the Second Amendment rights of the members of the Negro militia.

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belied by this history. The Brief of Constitutional Law Professors relies on Akhil Amar's erroneous claim that militias had become irrelevant to Republican policy in the era of the Fourteenth Amendment. *See* Brief of Constitutional Law Professors, *supra* note 73 (citing AMAR, *supra* note 101, at 258–29). The importance of the Negro militias was first documented by OTIS A. SINGLETARY, NEGRO MILITIA AND RECONSTRUCTION (Greenwood Press 1957). For the most recent vindication of the importance of the Negro militias, see STEVEN HAHN, A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION (2003). The attempt by Academics for the Second Amendment to dismiss these subsequent events is equally flawed. The very source that is relied on by the Brief of the Academics for the Second Amendment describes the Republicans' desire to re-form militias in the South in early 1868—the precise time of the Fourteenth Amendment's ratification. *See* SINGLETARY, *supra* note 101, at 7. For additional evidence that the militia-based view did not simply fade away, see the discussion of POMEROY, *supra* note 61, and accompanying text and the cases discussed *infra* Part II.D. Moreover, as Michael Benedict notes, the growing problem posed by the Klan sharpened conceptions about the meaning of Section One that were inchoate at the time it was framed. *See* MICHAEL LES BENEDICT, PRESERVING THE CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE RECONSTRUCTION ERA 24 (2006).

102. CORNELL, *supra* note 1, at 179–80.

103. Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871–1872*, 33 EMORY L.J. 921, 926–27 (1984); *see also* LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871–1872, 22–29 (1996).

Corbin's opening statement laid out a constitutional theory quite unlike any presented to the Supreme Court in the *McDonald* briefs arguing for incorporation of the Second Amendment. Here is what Corbin said in his opening remarks in the trial:

> Imagine, if you like—but we have not to draw upon the imagination for the facts—a militia company, organized in York County, and a combination and conspiracy to rob the people of their arms, and to prevent them from keeping and bearing arms furnished to them by the State Government. Is not that a conspiracy to defeat the right of citizens, secured by the Constitution of the United States, and guaranteed by the Fourteenth Amendment?[104]

In contrast to Justice Scalia, Corbin viewed the right to bear arms as tethered to the militia. That view made perfect sense to Republicans trying to restore political stability to the South. The newly formed Negro militias, heavily armed by the Republican-controlled Southern governments, not only helped restore order, but also provided a potent means of organizing and rallying Freedmen. It was the political power of the militias, as much as their firepower, that frightened the Klan.[105] In the end the judges divided over the issue of incorporation, providing additional evidence that there was no consensus on this issue in the era of the Fourteenth Amendment.

The true stories of Jim Williams, the Klan, and the Negro militias can have no place in the *McDonald* petitioners' or the NRA's history of the Second and Fourteenth Amendments. The argument that the Fourteenth Amendment was about gun rights, not civil rights, has become a central dogma of the modern gun rights movement. This fact was made evident in a remarkable exchange between gun rights lawyer Alan Gura

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104. *The Case of Robert Hayes Mitchell, Sylvanus Shearer and Others, in* PROCEEDINGS IN THE KU KLUX TRIALS AT COLUMBIA, S.C. IN THE UNITED STATES CIRCUIT COURT 148 (Negro Univ. Press 1969) (transcript of the Ku Klux Trials (1872)). On the newly created Department of Justice's support for Corbin, see ROBERT J. KACZOROWSKI, THE NATIONALIZATION OF CIVIL RIGHTS: CONSTITUTIONAL THEORY AND PRACTICE IN A RACIST SOCIETY, 1866–1883, at 153 (1987) (noting that Akerman was committed to enforcing the rights of citizens through the Fourteenth Amendment); ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876, at 122–29 (1985).

105. *See* HAHN, *supra* note 101.

(one of the gun rights lawyers in *Heller* and *McDonald*) and the United States Court of Appeals for the Seventh Circuit during oral argument in the *McDonald* case. When asked if Northern Republicans were averse to restrictive gun controls laws in the South, Gura boldly claimed that gun rights ideology was so pervasive that Northerners were even willing to allow Klansmen to retain their guns.[106] The KKK cases demonstrate that nothing could be further from the truth. The Republicans who drafted, debated, and adopted the Fourteenth Amendment were not blindly pro-gun. These individuals resolutely opposed discriminatory gun regulations, but favored neutrally applicable ones intended to promote public safety.[107]

Rather than acknowledge this history, gun rights advocates have attempted to rewrite it by eliminating the Negro militia from the story and casting the Fourteenth Amendment as if it were written by the most violent and radical wing of the abolitionist movement. The radical individualist conception of the right to bear arms championed by Lysander Spooner or John Brown has become central to modern gun rights ideology.[108] It is no surprise that gun rights advocates treat John Bingham and Jacob Howard as if they are simply clones of radical Republicans such as Charles Sumner. While abolitionism was certainly an important

106. For the exchange between Gura and the Seventh Circuit during oral argument, see List of Documents in *National Rifle Association v. City of Chicago*, http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=08-4241&submit=showdkt&yr=08&num=4241 (last visited Apr. 8, 2010).

107. *See id.*

108. For the most recent effort to read the Fourteenth Amendment through the lens of pre-war radical abolitionist thought, see Clayton E. Cramer et al., *This Right Is Not Allowed by Governments That Are Afraid of the People: The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified*, 17 GEO. MASON L. REV. (forthcoming 2010). Although this essay provides multiple citations to the work of other gun rights advocates, such as STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876 (1998), and Stephen P. Halbrook, *Personal Security, Personal Liberty, and "the Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341 (1995), it ignores the key work of the most respected authorities on Reconstruction. For instance, it fails to cite Michael Les Benedict, the leading authority on Congressional politics during Reconstruction. Benedict noted the important conservative strains within Republican thought, and expressly warned about the dangers of viewing the Fourteenth Amendment as the product of the most radical wing of the Republican party. *See* BENEDICT, *supra* note 101, at 24.

strand of Republican thought, it was by no means the only one. Abraham Lincoln's party, it is worth recalling, also had roots in antebellum Whig thought. Nothing was more central to this vision than the idea of a well-regulated society, which was reflected in the expansive theory of the police power that evolved during the antebellum era.[109] As explained below, it is impossible to understand the Fourteenth Amendment's connections to the Second Amendment without recognizing this tradition.

III. STATE REGULATION OF GUNS IN THE ERA OF THE FOURTEENTH AMENDMENT'S ADOPTION

Rather than mark a retreat from the robust regulation of firearms enacted before the Civil War, the era of the Fourteenth Amendment's adoption saw no diminution in the scope of firearms regulation at the state level; indeed, the scope of regulation actually increased. Although modern Americans have come to view the Wild West as the embodiment of a radical gun rights ideology, the high levels of gun violence in this region spurred among the most far-reaching gun control laws in the nation's history. Wyoming forbade anyone from "bear[ing] upon his person, concealed or openly, any fire arm or other deadly weapon, within the limits of any city, town or village."[110] Similar bans were enacted by Arkansas and Texas,[111] and other states outlawed the sale of non-military pistols.[112]

If one looks at the language of judicial opinions from this period, the evidence demonstrates not only a continuing recognition of a robust police power, but an actual expansion of the scope of permissible regulation. In *Hill v. State*, the Supreme Court of Georgia elaborated at great length on the meaning of the right to bear arms and the proper mode of interpreting a constitutional text.[113] Needless to say, the views of the Georgia Supreme Court in *Hill* flatly contradict Justice Scalia's claims in *Heller*. The *Hill* Court held that:

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109. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 86 (1996).

110. Act of Dec. 2, 1875, ch. 52, § 1, 1876 Wyo. Sess. Laws 352.

111. *See* Act of Apr. 1, 1881, No. 96, § 1, 1881 Ark. Acts 191; Act of Apr. 12, 1871, ch. 34, § 1, 1871 Tex. Gen. Laws 25.

112. Act of Mar. 14, 1879, ch. 96, 1879 Tenn. Pub. Acts 135.

113. Hill v. State, 53 Ga. 472 (1874).

> The language of the constitution of this state, as well as that of the United States, guarantees only the right to keep and bear the "arms" necessary for a militiaman. It is to secure the existence of a well regulated militia; that by the express words of the clause, was the object of it . . . .[114]

Indeed, in contrast to modern gun rights ideology and the *Heller* decision, the *Hill* Court expressed some puzzlement over how anyone might arrive at the opposite conclusion: "I have always been at a loss to follow the line of thought that extends the guarantee to the right to carry pistols, dirks, Bowie-knives, and those other weapons of like character, which, as all admit, are the greatest nuisances of our day."[115]

The *Hill* Court reaffirmed the traditional Blackstonian method employed by Justice Stevens and rejected by Justice Scalia in *Heller*. Rather than apply the Cheshire Cat Rule of Construction, the *Hill* Court accepted that the preamble of the Second Amendment defined its purpose: "The preamble to the clause is the key to the meaning of it."[116] In regard to the suggestion that the right to bear arms included weapons possessed for private as well as public purposes, Georgia continued to treat the term as a legal term of art. "The very words, 'bear arms,' had then and now have, a technical meaning. The 'arms bearing' part of a people, were its men fit for services on the field of battle."[117] Whatever popular variation in meaning might have occurred in the decades after the adoption of the Second Amendment, the Justices of the Georgia Supreme Court expressed grave doubt that any of the authors of the Second Amendment would have thought that "word arms when applied to a people," also included "pocket-pistols, dirks, sword-canes, toothpicks, [and] Bowie-knives."[118]

Nor was Georgia's high court alone in this view. The Tennessee Supreme Court pursued a similar line of

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114. *Id.* at 474.

115. *Id.*; *cf.* Nunn v. State, 1 Ga. 243 (1846) (including arguments from gun rights advocates about the orthodox view of the right to bear arms in antebellum jurisprudence). For a discussion of how leading commentators in the era of the Fourteenth Amendment interpreted antebellum case law, see *supra* Part II.A.

116. *Hill*, 53 Ga. at 474.

117. *Id.*

118. *Id.* at 475.

reasoning.[119] According to that court, the Constitution protected only "the usual arms of the citizen of the country."[120] Justice Scalia's claim that pistols were part of the ordinary arms of eighteenth-century militiamen is historically inaccurate. Yet even if one sets aside this additional glaring historical error in *Heller*, the situation by the time of the Fourteenth Amendment's adoption had become even less favorable to Justice Scalia's claims about handguns. By this time, weapons such as the pocket pistol and revolver were clearly not within the orbit of constitutional protection and could, therefore, be prohibited altogether.[121] Even the use of protected weapons such as "the rifle . . . the shot gun, the musket, and repeater," could "be subordinated to such regulations and limitations as are or may be authorized by the law of the land, passed to subserve the general good."[122]

Modern debate on the Second Amendment and incorporation has been deeply anachronistic.[123] In modern-day America, one is likely to be either pro-gun or pro-regulation—yet this Hobson's choice is an artifact of modern politics. Earlier generations saw the matter differently. Prior to the modern era, regulation was the necessary pre-condition for the exercise of the right to bear arms, not its antithesis. Pomeroy's views were typical. He was neither a proponent of gun rights nor gun control in the modern sense; he was both pro-gun and pro-regulation. It is this position that has been effectively erased from the pages of history and it is this ideal that is essential to understand if we wish to grapple with the connections between the Second and Fourteenth Amendments. Gun regulation was not inimical to the Second Amendment during Reconstruction; it remained the indispensable foundation for its fulfillment as a constitutional ideal. As historian Carole Emberton has documented, Republicans enacted a variety of gun control regulations in the South, including a prohibition on the sale

119. *See* Andrews v. State, 50 Tenn. 165 (1871).
120. *Id.* at 179.
121. *Id.*
122. *Id.* at 179–80.
123. For a discussion of the problems with modern Second Amendment debate, see Cornell, *supra* note 40.

of pistols in the city of Charleston.[124] Such laws were absolutely necessary to deal with the widespread violence directed at Republicans and Blacks. Rather than mark an end to gun regulation, the era of the Fourteenth Amendment's adoption saw new and unprecedented efforts to regulate guns.[125]

Pomeroy's influential treatise echoed the dominant pro-regulation vision of the Fourteenth Amendment. After stating the militia purpose of the Amendment, he went on to declare in unambiguous terms that "this constitutional inhibition is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons, or laws forbidding the accumulation of quantities of arms with the design to use them in a riotous or seditious manner."[126] There is absolutely no evidence from this time period to suggest that the Fourteenth Amendment was intended to limit the scope of the state's police powers, including those that allowed the states to pass non-discriminatory gun regulations aimed at promoting public safety.[127]

In *McDonald*, the NRA and their supporters have ignored this history altogether. Inspired by Justice Scalia's approach in *Heller*, they take the view that an "originalist" reading of the Fourteenth Amendment simply requires stringing together a few isolated historical anecdotes and quotes and using them to reconstruct the original public meaning of the Fourteenth Amendment. Only by ignoring the actual meaning and understanding of the Constitution—as reflected by the state legislatures that ratified the Fourteenth Amendment, judicial decisions in the post-Fourteenth Amendment period, and leading treatise-writers of the time—can such a view be maintained. If the Court in *McDonald* takes that history seriously, it could only conclude that regulations like Chicago's would have been constitutionally

124. Carole Emberton, *The Limits of Incorporation*, 17 STAN. L. & POL'Y REV. 621 (2006).

125. *See* Brief of Thirty-Four Professional Historians and Legal Historians as Amici Curiae in Support of Respondents, McDonald v. City of Chicago, 130 S. Ct. 48 (Jan. 6, 2010) (No. 08-1521).

126. POMEROY, *supra* note 61, at 152–53.

127. On the scope of the police power, see LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW: THE EVOLUTION OF AMERICAN LAW 183–86 (1957); NOVAK, *supra* note 109; Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CAL. L. REV. 217 (1984).

permissible in 1868.

CONCLUSION

The pro-gun rights version of American constitutional history is resolutely ahistorical. Rather than try to understand what the Second Amendment meant to Americans in the past, it tries to make historical texts choose sides in contemporary debates over gun control. The great difficulty in interpreting the meaning of the right to bear arms is not that technology has changed, but rather that the political and constitutional assumptions at the root of the Second Amendment have changed.

Justice Scalia and gun rights advocates believe that the Second Amendment protects an individual right that facilitates the possibility of a well-regulated militia. The Founders and many Americans during the era of the Fourteenth Amendment saw it in reverse. To have a well-regulated militia, it was necessary to have a population that was well armed, well trained, and most importantly, well regulated. The Founders understood the difference between an armed mob and a well-regulated militia, and this distinction remained important during Reconstruction, when paramilitary groups such as the KKK embarked on a campaign of terror throughout much of the Reconstructed South. Gun regulation was not inimical to the right to bear arms for Reconstruction era Republicans; it was the only sensible foundation for the proper exercise of any such right.

Akhil Amar has argued that the meaning of the Second Amendment morphed in the era of the Fourteenth Amendment from a collective right to an individual right.[128] While Amar's theory about constitutional change may be correct, his history is wrong. Amar is surely right that there was an important change in the meaning and application of the Second Amendment between the Founding era and Reconstruction. But the right to bear arms had not been, as Amar suggests, decoupled from its original militia purpose. Rather, the scope of regulation increased. While antebellum courts were divided over the scope of acceptable gun regulation, courts and leading commentators in the era of the Fourteenth Amendment's adoption agreed that the individual

128. AMAR, *supra* note 101.

state's police powers gave them vast powers to regulate firearms, including a right to ban pistols, as long as this did not impair the ability of citizens to keep and bear those arms most needed for militia service—long guns.

If the Supreme Court is true to history, it ought to recognize that, by the time the Fourteenth Amendment was adopted, handguns were indisputably outside the scope of protection afforded by the Constitution. This is a view that even those who supported incorporation would have been hard pressed to dispute. Applying the logic of the pro-*McDonald* briefs to the laws in place during the era of the Fourteenth Amendment would have resulted in far more violence in the Reconstructed South and untold carnage in the cattle towns of the West. If the Roberts Court is genuinely committed to an originalist methodology, it ought to uphold Chicago's law—a regulation no more restrictive than many statutes on the books at the time of the Fourteenth Amendment's adoption.

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