American Bar Association
www.supremecourtpreview.org

No. 08-1521

In The
# Supreme Court of the United States

OTIS MCDONALD, et al.,

*Petitioners,*

v.

CITY OF CHICAGO, et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## *AMICUS* BRIEF FOR ACADEMICS FOR THE SECOND AMENDMENT IN SUPPORT OF THE PETITIONERS

PROF. JOSEPH EDWARD OLSON*
HAMLINE UNIVERSITY
SCHOOL OF LAW
1536 Hewitt Avenue
St. Paul, MN 55104
651-523-2142

*Counsel of Record

DAVID T. HARDY
8951 East Driftwood Trail
Tucson, AZ 85749
520-749-0241

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

# TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | iv |
| INTEREST OF THE *AMICUS* | 1 |
| SUMMARY OF ARGUMENT | 1 |
| ARGUMENT | 3 |
| I. The Antebellum Years Saw Expansion and Increasing Individualization of the American Right to Arms | 5 |
| A. The Virtual Extinction of the Militia Linkage | 6 |
| 1. The Militia Linkage circa 1789 | 6 |
| 2. The Militia Linkage circa 1860 | 8 |
| B. The "Individual Right" Understanding of the Right to Arms Expanded During the Antebellum Period | 11 |
| 1. Constitutional Commentators | 11 |
| 2. Antebellum State Case Law | 13 |
| 3. The Antebellum Ruling of This Court | 14 |
| 4. The Impact of the Abolitionist Movement and of Slavery's Violent Response | 15 |
| II. DISARMAMENT MEASURES TAKEN BY FORMER CONFEDERATE STATES IMMEDIATELY FOLLOWING THE WAR THREW THE INDIVIDUAL RIGHT TO ARMS INTO SHARP FOCUS | 20 |

TABLE OF CONTENTS – Continued

Page

A. THE IMPORTANCE OF AVOIDING ANACHRONISM .................................. 20

B. THE FOURTEENTH AMENDMENT WAS UNDERSTOOD AS AN ANSWER TO STATE ATTEMPTS TO DISARM THE FREEDMEN AND THEIR SUPPORTERS ............................................ 21

1. Original Popular Understanding of the Need for a Constitutional Amendment ..................................... 21

2. Original Popular Understanding of the Purpose of the Proposed Amendment ..................................... 24

3. Textualism and the Privileges of U.S. Citizenship ............................... 27

C. CONGRESSIONAL REFERENCES TO THE VIOLATIONS OF THE RIGHT TO ARMS RELATE TO DISARMAMENT OF INDIVIDUALS, NOT TO THREATS TO MILITIAMEN .............. 30

III. THE AMERICAN RIGHT TO ARMS HAS CONTINUED TO EVOLVE IN WAYS THAT MAKE IT EVER MORE INDIVIDUALISTIC AND PERSONAL.............. 34

A. AMERICANS HAVE CONTINUED TO ADOPT, AT THE STATE LEVEL, INCREASINGLY CLEAR GUARANTEES OF AN INDIVIDUAL RIGHT TO ARMS ............................................... 34

TABLE OF CONTENTS – Continued

Page

B. Congress has Repeatedly Recognized an Individual Right to Arms ................. 37

CONCLUSION ....................................................... 39

## TABLE OF AUTHORITIES

Page

CASES

*Andrews v. State*, 50 Tenn. 165 (1871)......................14

*Aymette v. State*, 21 Tenn. 154 (1840) .................13, 14

*Corfield v. Coryell*, 6 Fed. Cas. 546, no. 3,230 (C.C.E.D.Pa. 1823)..........................................27, 28

*District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).............................................................*passim*

*Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857)..................................................................14

*Nunn v. State*, 1 Ga. 243 (1846) ................................13

*State v. Chandler*, 5 La. App. 489, 52 Am. Dec. 599 (1850)...............................................................13

*State v. Friel*, 508 A.2d 123 (Me. 1986).....................37

*State v. Reid*, 1 Ala. 612 (1840) .................................13

STATUTES

18 U.S.C. §311(b)(2).......................................................5

Act of March 2, 1867, 14 Stat. 487.............................32

Act of January 14, 1869, 15 Stat. 266........................32

Act of July 15, 1870, 16 Stat. 364 ..............................32

Firearm Owners' Protection Act, 100 Stat. 449 (1986)..................................................................38

First Reconstruction Act, 14 Stat. 428 (1867) ...........21

Freedmen's Bureau Act, 14 Stat. 173 (1867) ...23, 24, 37

TABLE OF AUTHORITIES – Continued

Page

Louisiana Cession Act, 8 Stat. 200 (1803) ................29

Militia Act of 1792, 1 Stat. 271 ...........................8, 14

Protection of Lawful Commerce in Arms Act, 119 Stat. 2095 (2005) ..........................................38

Treaty with Spain, 8 Stat. 252 (1819).......................29

Treaty with Russia, 15 Stat. 539 (1867) ...................29

Vernon's Texas Code Ann., Gov. Code §431.081(a) (2009)...................................................5

WYO. STAT. §19-8-101(c) (2009)...................................5

LEGISLATIVE MATERIALS

ANNALS OF CONGRESS ..................................................6

CONG. GLOBE, 39th Cong. ..................25, 28, 31, 32, 33

CONG. GLOBE, 42nd Cong...........................................30

JOURNAL OF THE FIRST SENATE OF THE UNITED STATES ..............................................................8, 14

REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. Rep. No. 39-30..............................23

TREATISES

AKHIL REED AMAR, THE BILL OF RIGHTS (1998) ....*passim*

ELIZABETH KELLY BAUER, COMMENTATORS ON THE CONSTITUTION 1790-1960 (1965) .............................13

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (St. George Tucker, ed. 1803) ......11

TABLE OF AUTHORITIES – Continued

Page

WILLIAM BRYSON, LEGAL EDUCATION IN VIRGINIA (1982) ....... 12

Cassius Marcellus Clay, *THE WRITINGS OF CASSIUS MARCELLUS CLAY: INCLUDING SPEECHES AND ADDRESSES* 257 (1848) ....... 16

THOMAS COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW (3d ed. 1898) ....... 12

CLAYTON E. CRAMER, ARMED AMERICA (2006) ....... 1

CLAYTON E. CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE (1994) ....... 1

MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE" (2000) ....... 4

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen, ed. 1976) ....... 7

DOCUMENTS OF THE STATE OF NEW-YORK, FIFTY-FIFTH SESSION 1 REPORT 4 (1832), *Adjutant-General's Office to the New York State Senate*, January 5, 1832, 2 ....... 9

MICHAEL D. DOUBLER, CIVILIAN IN PEACE, SOLDIER IN WAR (2003) ....... 9, 10

FREDERICK DOUGLASS, THE ESSENTIAL FREDERICK DOUGLASS (2008) ....... 21

ELLIOT'S DEBATES ....... 8

2 WENDELL PHILLIPS GARRISON & FRANCIS JACKSON GARRISON, WILLIAM LLOYD GARRISON 1805-1879 (1885) ....... 16

TABLE OF AUTHORITIES – Continued

Page

WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION 1869-1879 (1979) ....................................33

STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS 1866-1876 (1998) ....................................23

STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984) ....................................26

DONALD BRUCE JOHNSON & KIRK H. PORTER, NATIONAL PARTY PLATFORMS 1840-1972 (1973).......19

NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR 125 (2006)....................................33

LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS (2001) ....................................3

JAMES K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD (1983) ....................................8, 9

THE PAPERS OF GEORGE MASON (Robert A. Rutland, ed. 1970)....................................6, 7, 8

WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (2d ed. 1829) ....................................12

H. EDWARD RICHARDSON, CASSIUS MARCELLUS CLAY: FIREBRAND OF FREEDOM (1976)....................................16

A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1908 (James Daniel Richardson, ed. 1909)....................................33

OTIS A. SINGLETARY, NEGRO MILITIA AND RECONSTRUCTION (1957) ....................................31

TABLE OF AUTHORITIES – Continued

Page

LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (Burt Franklin 1965) (1865)................17

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833)..................4, 8, 11

SUBCOMM. ON THE CONSTITUTION, SENATE JUDICIARY COMM., THE RIGHT TO KEEP AND BEAR ARMS (97th Cong., 2nd Sess. Feb. 1982)................37

CHARLES SUMNER, THE CRIME AGAINST KANSAS: THE APOLOGIES FOR THE CRIME: THE TRUE REMEDY (1856)........................................................18

JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY (1849) .............18

ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION (1971)........................................31, 33

ARTICLES

Richard L. Aynes, *The 39th Congress (1865-67) and the 14th Amendment: Some Preliminary Perspectives*, 42 AKRON L. REV. 1021 (2009).....20, 26

Robert J. Cottrol and Raymond T. Diamond, *The Second Amendment: Towards an Afro-Americanist Reconsideration*, 80 GEORGETOWN L. J. 361 (1991)..............................................22

TABLE OF AUTHORITIES – Continued

Page

Clayton E. Cramer, Nicholas J. Johnson & George A. Mocsary, *"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 GEORGE MASON L. REV. ___ (forthcoming, 2010)........................16, 19

Stephen P. Halbrook, *Congress interprets the Second Amendment: Declarations by a Co-equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597 (1995) ........38

Stephen P. Halbrook, *Personal Security, Personal Liberty, and The Constitutional Right to Bear Arms*, 5 CONST. L. J. 310 (1995).................22

David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J. OF LAW & POLITICS 1 (1987).......................................6

David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NORTHWESTERN U. L. REV. 1527 (2009)....................................................................12

David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-1868*, 30 WHITTIER L. REV. 695 (2009).............................23, 26

David T. Hardy, *Originalism and its Tools: A Few Caveats*, 2 AKRON L. REV. STRICT SCRUTINY 1 (forthcoming, 2009).....................................12

TABLE OF AUTHORITIES – Continued

Page

Frank Johnson, *Suffrage and Reconstruction in Mississippi*, 6 PUBLICATIONS OF THE MISSISSIPPI HISTORICAL SOCIETY 198 (1902)................................33

Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 727 (2005)...........36

Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983) .................4, 5, 16

David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. 1359 ...........................................................11, 13, 18

Kurt D. Lash, *Origins of the Privileges or Immunities Clause, Part I: "Privileges or Immunities" as an Antebellum Term of Art*, GEORGETOWN L. J. (forthcoming 2010) ...................28

Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POLICY 191 (2006)...............................................35, 36

Bryan Wildenthal, *Nationalizing the Bill of Rights: Revisiting Original Understanding of the Fourteenth Amendment in 1866-67*, 68 OHIO St. L. J. 1509 (2007).......................................26

TABLE OF AUTHORITIES – Continued

Page

NEWSPAPERS

*For the Sentinel*, ADAMS SENTINEL AND GENERAL ADVERTISER, April 1, 1833 ....................................9

Harris Interactive, *Second Amendment Supreme Court Ruling Matches With Public Opinion From The Harris Poll*, http://www.harrisinteractive.com/harris_poll/index.asp?PID=922 ....................................34

*New York*, 70 NILES NATIONAL REGISTER, June 6, 1846 ....................................9

*New Militia Law*, OHIO REPOSITORY, March 21, 1814 ....................................8

*Report of the Adjutant General of the Militia of Maine*, [Bangor] DAILY WHIG AND COURIER, January 5, 1842 ....................................9

*Stupendous Farce*, OSHKOSH DEMOCRAT, Nov. 14, 1851 ....................................9

## INTEREST OF THE *AMICUS*

*Amicus curiae* Academics for the Second Amendment ("A2A"), is a §501(c)(3) tax-exempt organization. Formed in 1992 by law school teachers, A2A's goal is to secure the right to keep and bear arms as a meaningful, individual right. A2A has filed *amicus* briefs in this Court in *United States v. Lopez* and in *District of Columbia v. Heller*.[1]

## SUMMARY OF ARGUMENT

Lincoln's hope that his age would see a "new birth of freedom" took tangible form in the Civil War amendments. The nation and the Constitution as we know them today were not created in the events of 1776, nor those of 1787, but forged in the cataclysm of 1861-65.

To interpret these events we must look initially to the intent of Congress in 1866 and to the

---

[1] No counsel for a party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of this brief. *Amicus* is a not-for-profit corporation, and obtains contributions from individual supporters primarily via internet appeals. If the Court desires, *Amicus* will provide a proprietary list of recent contributors. This brief is filed with the written consent of the parties. *Amicus* complied with the conditions by providing ten days advance notice.

Clayton E. Cramer, author of ARMED AMERICA (2006) and FOR THE DEFENSE OF THEMSELVES AND THE STATE (1994), provided historical assistance in the preparation of this brief.

understanding of the public in 1866-68. It is difficult to overstate the differences between Americans of 1789 and those of the late 1860s, differences that went far deeper than railroads and telegraphs. Americans of 1789 anticipated, and often feared, an untried national government, a new "Crown" that they were imposing on themselves; the victors of 1866 had experienced three generations under a federal system and a strong central government. The former saw regular troops as a menace to the Republic; the latter saw them as its saviors. The former looked to the several States as protection for individual rights against the national government; the latter to the national government for protection of individual rights against some States.

Nowhere was this change more obvious than in the public understanding of the American right to arms.

> [B]etween 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman. The Creation motto, in effect, was that if arms are outlawed only the central government would have arms. In Reconstruction a new vision was aborning: when guns are outlawed, only the Klan will have guns.

AKHIL REED AMAR, THE BILL OF RIGHTS 266 (1998) [hereinafter AMAR, BILL OF RIGHTS]. Americans of 1789 saw their right to arms as linked to self-defense, and also to a universal militia system, the only safe defense of a free nation. By 1866 the universal militia as a source of soldiers had gone extinct, with no loss

of liberty. Americans of that era saw the right to arms purely as an individual right: the right to shoot a Klansman at the front door, *even if he was a militia-man*.

## ARGUMENT

The process whereby individual rights are protected against State action by the Fourteenth Amendment has come to be termed "incorporation." *Amicus* Academics for the Second Amendment will suggest that the term is misleading. "Incorporation" implies that the determination is whether the 1868 Amendment applies the intent or understanding of 1789 to the States. **Instead, the proper approach involves examining the intent of the framers of the Fourteenth Amendment in 1866 and the understanding of the American people in 1866-68;[2] these are the views that undergird the Amendment.**

One major difference between Americans of 1789 and 1866 lies in the latter's expanded understanding of individual rights, an expansion largely driven by conflicts over abolitionism. Freedom of expression is one example. As late as 1804, American *aspirations* in this area involved immunity for publishing "truth, with good motives, for justifiable ends ... ". LEONARD

[2] For the sake of brevity, we will hereafter substitute "1866" for the phrase "1866-1868."

W. LEVY, ORIGINS OF THE BILL OF RIGHTS 131 (2001). As late as 1833, JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 736-44 (1833), still argued that freedom of the press prevented only prior restraint – not a protection from punishment for "licentiousness." Story quoted Blackstone that "A man may be allowed to keep poisons in his closet; but not publicly to vend them as cordials."

Then came the abolitionist authors and slavery's response – which took the form of laws broadly penalizing (sometimes with death) distribution of abolitionist publications, demands to extradite authors from free States, interception of the mails, mob attack, and homicide. MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE" 182-93, 202, 250, 271 (2000). By 1866, the *existing* popular concept of freedom of expression largely paralleled the modern view as a right to publish political opinions without fear of punishment after the fact.

The right to arms provides an even clearer example of this transition. In 1789, it was a two-pronged right that arose from the fundamental right of self-defense – defense against capital "T" tyrants and against small "t" thugs.[3] The Second Amendment preserved the armed individual – both for his own

[3] Eighteenth century colonials drew no distinction between self-defense against either source of threat. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 230 (1983).

sake and for the infrastructure of the universal militia from which enrolled units were formed. The universal militia was seen as essential to a republican "free state."[4] By 1866, the emphasis had undergone a dramatic shift. The practice of enrolling the universal militia for mandatory military service had gone into eclipse, with no loss of freedom. Conversely, prewar conflicts over slavery, and postwar terrorist attacks on freedmen and other Unionists, made individual self-defense the predominant underpinning of the American right to arms.

## I. THE ANTEBELLUM YEARS SAW EXPANSION AND INCREASING INDIVIDUALIZATION OF THE AMERICAN RIGHT TO ARMS.

Over the period 1789-1860, popular understanding of the American right to arms underwent considerable change. The militia linkage declined into near nothingness, even as the individual nature of the right gained prominence in the writings of early commentators and early case law. Then came the abolitionist movement, with slavery's violent response putting the focus upon the individual's right to personal self-defense.

---

[4] *Id.* at 214-218. The universal militia still exists in theory and law. *For example see* 18 U.S.C. §311(b)(2) (2009), Vernon's Texas Code Ann., Gov. Code §431.081(a) (2009), and WYO. STAT. §19-8-101(c) (2009).

### A. The Virtual Extinction of the Militia Linkage

The right to arms' militia linkage, which existed to a measurable extent in 1789,[5] had by 1860 virtually vanished.

#### 1. The Militia Linkage circa 1789

In 1789, the States all had universal militias, composed of males of military age. The 1789 view had been that this universal, mandatory, militia – "composed of the whole body of the people," in the words of the first House of Representatives[6] – was not merely useful but "*necessary* to the security of a free State."

There simply were no conceivable alternatives. Standing armies were pathways to tyranny. "Recollect the history of most nations of the world," asked George Mason. "What havock, desolation, and destruction, have been perpetrated by standing armies?" George Mason, *An Amendment to the Constitution is Needed to Prevent the Danger of a Standing Army*, in

[5] We differentiate here between the concept of a right to arms and the specific language of the Second Amendment. There is a case to be made that the Amendment has two clauses because it had two separable purposes, meant to appease two different bodies of critics of the Constitution. *See* David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J. OF LAW & POLITICS 1 (1987).

[6] 1 ANNALS OF CONGRESS 766-67 (20 Aug. 1789).

3 THE PAPERS OF GEORGE MASON 1073, 1074 (Robert A. Rutland, ed. 1970).

Select militias, composed only of a part of the people, with special training, were no better. "Congress may give us a select militia, which will in fact be a standing army," argued a delegate to the Pennsylvania ratifying convention. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 509 (Merrill Jensen, ed. 1976). It would be impossible for a republic to survive without mandatory service by the universal militia consisting of all males of military age. Hence the Second Amendment's militia clause, explaining why the right to arms had been selected for explicit constitutional guarantee. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2801 (2008).[7]

---

[7] There is one militia connection that can be ruled out. The *Heller* dissent argues that the Second Amendment was meant to redress George Mason's fear that Congress would fail to order the arming of the militia, and the States would be unable to fill the gap. 128 S. Ct. at 2822, 2833 (Stevens, J., dissenting).

Mason's concern, however, had nothing to do with the Second Amendment. On June 8-11, 1788, Mason drafted for Virginia and New York a proposed bill of rights and a separate list of proposed structural amendments to the Constitution. 3 THE PAPERS OF GEORGE MASON 1054, 1068 (Robert A. Rutland, ed., 1970). The former contained the direct ancestor of the Second Amendment; the latter said nothing about militia arms. The concern about militia armament apparently had not yet occurred to Mason.

On June 14, in the Virginia convention, Mason *for the first time* raised militia armament worries, adding "I wish that, in case the general government should neglect to arm and discipline

(Continued on following page)

### 2. The Militia Linkage circa 1860

In his 1833 commentaries, Justice Story noted "a growing indifference to any system of militia discipline," and expressed a fear "that indifference may lead to disgust, and disgust to contempt ... " 3 JOSEPH STORY, *supra,* at 746-47 (1833). When Story wrote, Delaware and Ohio had already abandoned their mandatory militias, JAMES K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 83 (1983); *New Militia Law*, OHIO REPOSITORY, March 21, 1814, at 3.[8]

After decades of peace, requiring the enrollment of the universal militia to engage in service and training had come to be seen as a waste of time. The

---

the militia, there should be an express declaration that state governments might arm and discipline them." *Id.* at 1075.

On June 27, the convention voted out a bill of rights, containing the Second Amendment's *individual* rights ancestor, and separately adding to the structural amendments "11th. That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same." 3 ELLIOT'S DEBATES 660. This *state power* proposal was ignored by Madison as he drafted the federal Bill of Rights and expressly rejected by the First Congress. JOURNAL OF THE FIRST SENATE OF THE UNITED STATES 75. The defeated state power proposal, and not the Second Amendment, would have been the answer to Mason's fears.

[8] This was done pursuant to the exemption power given States by the 1792 Militia Act, §2, 1 Stat. 271 (exempting from militia duty "all persons who now are or may hereafter be exempted by the laws of the respective states ... ").

popular press derided it as "a stupendous farce,"[9] "a bore and a nuisance," and as "odious and oppressive."[10] It referred to muster as "but a season of intoxication and quarrelling,"[11] and praised abolition of militia muster as "emancipation from mock military duty."[12]

In the 1840s, mandatory militia service was abolished in Massachusetts, Maine, Ohio, Vermont, Connecticut, New York, and Missouri; New Hampshire followed in the early 1850s. JAMES K. MAHON, *supra*, at 83. "By the middle of the 1840s, the enrolled militia system had all but faded away into obsolescence." MICHAEL D. DOUBLER, CIVILIAN IN PEACE, SOLDIER IN WAR 90 (2003). The mandatory enrollment of the universal militia was supplanted by organizing

---

[9] *Stupendous Farce*, OSHKOSH DEMOCRAT, Nov. 14, 1851 at 2. This and the following articles were retrieved via www.newspaperarchive.com.

[10] *Report of the Adjutant General of the Militia of Maine*, [Bangor] DAILY WHIG AND COURIER, January 5, 1842 at 2.

[11] *For the Sentinel*, ADAMS SENTINEL AND GENERAL ADVERTISER, April 1, 1833 at 3. The same issue reported that the State House of Representatives had passed a bill abolishing mandatory militia duty.

[12] *New York*, 70 NILES NATIONAL REGISTER, June 6, 1846 at 213. Theory and practice diverged. As recently as 1832, New York's Adjutant-General had argued that what made the militia "dangerous to the existence of an arbitrary government, render[s] it indispensable to the existence of ours." *Adjutant-General's Office to the New York State Senate*, January 5, 1832, 2, in DOCUMENTS OF THE STATE OF NEW-YORK, FIFTY-FIFTH SESSION 1 report 4 (1832).

smaller and better-trained volunteer militia units. In the North, following the Civil War, even these voluntary militia units temporarily died off. *Id.* at 110.

The world had changed, and Americans' outlook changed with it. What would have been heresy in 1789 was commonplace in 1860. The universal militia was long gone as the preferred source of soldiers, with no ill effect to the Republic. Select militias and even standing armies were perfectly acceptable and a more efficient means of national defense.

The American of 1789 believed that the loss of a universal militia and the mustering of a standing army would inevitably be followed by military dictatorship. The American of 1860 had experience his colonial counterpart lacked, and knew that this was a *non sequitur*. Neither the Regular Army nor the nascent National Guard would be likely to produce a Cromwell. Millions of men had served in uniform, and the only time they marched on Washington was for the Grand Parade. "A well-regulated militia, being necessary to the security of a free state" was by 1860 an obsolete political principle. "Time and again Founding republicans in 1789 spoke of 'the militia'; Reconstruction Republicans in 1866 almost never did." AMAR, BILL OF RIGHTS at 259 (1998).

### B. The "Individual Right" Understanding of the Right to Arms Expanded During the Antebellum Period

As the militia linkage faded, so grew the importance of a purely individual right to arms, with no link at all to a militia system. We can most readily trace this in the work of recognized constitutional commentators, and in antebellum case law.

#### 1. Constitutional Commentators

The early great commentaries were described by this Court in *Heller*, 128 S. Ct. at 2805-06, 2811, and we will accordingly not deal with them at length.[13]

Of the great constitutional commentators of the 19th century, only Story, as noted above, emphasized the militia component[14] and even he did not contend that the right to arms extended only to militia service. Writing in 1803, St. George Tucker stressed the individual right to self-defense as the basis of the Second Amendment. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Appendix 310

---

[13] *See generally* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. 1359.

[14] It should be noted that, of the commentators, Story is by far the least concerned with individual rights and the most concerned with preserving government power. His discussion of freedom of expression is largely devoted to supporting crackdowns on "licentious" writings, 3 JOSEPH STORY, *supra*, at 740-42, that threaten to "break up, in an instant, all the foundations of society ... ". *Id.* at 743.

(St. George Tucker, ed. 1803).[15] Writing in 1825, William Rawle saw the militia clause and the right to arms clauses as separate guarantees, one being the corollary of the other. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125 (2d ed. 1829). Late in the century, Thomas Cooley argued, on pragmatic grounds, that the right to arms would be meaningless if confined to militia duty. THOMAS COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 298-99 (3d ed. 1898).

These commentators represent exceptional minds in exceptionally good positions to observe and understand. Tucker was a pre-eminent teacher of law, who attended the Annapolis Convention, and whose brother served in the First Congress; his Blackstone was, for a quarter of a century, the treatise most often cited by this Court. WILLIAM BRYSON, LEGAL EDUCATION IN VIRGINIA 670, 682 (1982). Rawle was a friend of Washington, Franklin, and other members of the

---

[15] A *Heller* dissent expressed the concern that Tucker was not consistent and in writings *circa* 1790 had stressed the militia aspect. 128 S. Ct. at 2839 n. 32 (Stevens, J., dissenting). The dissent was misled by an article that set forth Tucker's 1790 discussion of Congressional militia powers (predictably mentioning the Amendment only in that context), and omitted mention of his 1790 discussion of the Second Amendment, which was entirely consistent with his 1803 text. *See* David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NORTHWESTERN U. L. REV. 1527, 1533-34 (2009); David T. Hardy, *Originalism and its Tools: A Few Caveats*, 2 AKRON L. REV. STRICT SCRUTINY 1 (forthcoming, 2009: Available at SSRN: http://ssrn.com/abstract=1508604).

Constitutional Convention; he served in the Pennsylvania legislature when it ratified the Bill of Rights. ELIZABETH KELLY BAUER, COMMENTATORS ON THE CONSTITUTION 1790-1960, at 61 (1965). Justice Dean Thomas Cooley has been called the most influential legal author of his period, and his constitutional treatise has been described as "the most influential lawbook ever published." David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. 1359, 1462.

### 2. Antebellum State Case Law

State rulings prior to 1860 overwhelmingly treated the Second Amendment, or State right to arms provisions, as individual in nature. Even those decisions that held the right had some association with the militia still recognized it was individual and not conditioned on enrolled militia service. Those cases simply held that protected "arms" were those suited for militia use, thus excluding weapons such as daggers and brass knuckles. *See Nunn v. State*, 1 Ga. 243 (1846) (applying Second Amendment in a state context: "The right of whole people, old and young, men, women and boys, and not militia only ... "); *State v. Reid*, 1 Ala. 612, 619 (1840); *State v. Chandler*, 5 La. App. 489, 52 Am. Dec. 599 (1850) (referring by analogy to the Constitution of the United States); *Aymette v. State*, 21 Tenn. 154, 159-60 (1840) (right to bear arms under a state constitution

expressly limiting the right to actions "in the common defense"[16] only covers militia-type arms; *cf. Andrews v. State*, 50 Tenn. 165 (1871); distinguishing *Aymette*; its militia-type arms limit does not apply to keeping arms, since "keep" arms has no military connotation).

### 3. The Antebellum Ruling of This Court

In *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), Chief Justice Taney, writing for the majority, ruled that free blacks could not be citizens of the United States. He noted that the Militia Act of 1792 excluded them from militia duty. *Id.* at 420. Taney concluded that the slave States could not have ratified the Constitution with the understanding that free blacks could become citizens, knowing that they would then have the rights of citizens, including specifically the right to "keep and carry arms wherever they went." *Id.* at 417.

It is hard to reconcile this reasoning with any belief that rights to arms were coterminous with duty in the enrolled militia. To Justice Taney and a majority of the Court, it was obvious – so obvious as to require no citation of authority – that exclusion from militia service left intact the right to arms. That the dissents did not dispute this underscores our

[16] The First Senate *rejected* a motion to add a similar "in the common defense" limitation to the Second Amendment. JOURNAL OF THE FIRST SENATE OF THE UNITED STATES 77.

point. To whatever extent the 1789 understanding linked militia duty and the right to arms (a linkage which this brief denies ever existed), this linkage had evaporated by 1857. On this everyone, no matter where they stood on the slavery issue, agreed. "Roger Taney and Joel Tiffany hardly saw eye to eye in the 1850s, but they both agreed on this: *if* free blacks were citizens, it would necessarily follow that they had a right of *private* arms bearing." AMAR, BILL OF RIGHTS 263 (1998) (emphasis original).

#### 4. The Impact of the Abolitionist Movement and of Slavery's Violent Response

The abolitionist movement was a major component of the individualization of arms rights in this period. *District of Columbia v. Heller*, 128 S. Ct. at 2807. Beginning as a tiny and unappreciated minority, largely viewed as troublemakers even at the outset of the Civil War, the movement by the end of the war had the supermajority required to pass and ratify *three* constitutional amendments.

Early in the antebellum period, abolitionists found themselves facing violent attack and suppression, with no hope of protection by any government. Publisher Elijah P. Lovejoy had multiple presses destroyed by mobs before his 1837 murder. When a British abolitionist, Joseph Thompson, was invited to speak in Boston, placards circulated announcing a $100 reward for whomever "shall first lay violent

hands on Thompson, so that he may be brought to the tar-kettle before dark." 2 WENDELL PHILLIPS GARRISON & FRANCIS JACKSON GARRISON, WILLIAM LLOYD GARRISON 1805-1879, at 9 (1885). Thompson did not show up, and his replacement, William Lloyd Garrison, had to be jailed to protect his life from the mob. *Id.* at 24-26.

Assailed by mobs, unprotected by the law, abolitionists found they had to defend themselves. Attacked by a hired gunman, Cassius Marcellus Clay laid into him with a Bowie knife; when a mob surrounded him, he used the blade to keep them at bay. H. EDWARD RICHARDSON, CASSIUS MARCELLUS CLAY: FIREBRAND OF FREEDOM 34-35 (1976). Abolitionists, such as Clay, echoed the near religious attitude toward arms held by the Framers of the Constitution[17] making statements such as this: " ... 'the pistol and Bowie knife' are to us as sacred as the gown and the pulpit."[18] The individual right to arms received frequent coverage in William Lloyd Garrison's journal THE LIBERATOR. Clayton E. Cramer, Nicholas J. Johnson & George A. Mocsary, *"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 GEORGE MASON L. REV. ___ (forthcoming 2010; http://ssrn.

[17] Don B. Kates, Jr., *supra* n. 3 at 228-30.

[18] Cassius Marcellus Clay, *THE WRITINGS OF CASSIUS MARCELLUS CLAY: INCLUDING SPEECHES AND ADDRESSES* 257 (1848).

com/abstract=1491365) [Hereinafter Cramer, Johnson & Mocsary].

Abolitionist authors such as Lysander Spooner and Joel Tiffany wrote in support of an individual right to arms for self-defense. Spooner viewed the Second Amendment as a right belonging to individuals:

> This right "to keep and bear arms," implies the right to use them – as much as a provision securing to the people the right to buy and keep food, would imply their right also to eat it. But this implied right to use arms, is only a right to use them in a manner consistent with natural rights – as, for example, in defence of life, liberty, chastity, &c.[19]

Joel Tiffany agreed and spoke of the right to arms in the abolitionist rhetoric of "privileges or immunities":

> Here is another of the immunities of a citizen of the United States, which is guaranteed by the supreme, organic law of the land ... there is another thing implied in this guaranty; and that is *the right of self defence*. For the right to keep and bear arms, also implies the right to use them if necessary in self defence; without this right to use the

[19] LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 66 (Burt Franklin 1965) (1865).

> guaranty would have hardly been worth the paper it consumed.[20]

Then, in 1855 came Bloody Kansas, as both sides rushed to populate the Territory and win the plebiscite to determine whether the land would be free or slave. Pro-slavery bands used force to drive anti-slavery forces from the Territory, and to disarm Free-Soilers. Abolitionists responded by shipping in Sharps rifles, nicknamed "Beecher Bibles" because their crates were labeled as Bibles. *Id.;* David B. Kopel, *supra,* at 1441.

Attempts to disarm Free-Soilers drew national attention as violations of the American right to arms. Abolitionist leader Senator Charles Sumner argued, in one of his most publicized addresses:

> The rifle has ever been the companion of the pioneer.... Never was this efficient weapon more needed in just self-defense than now in Kansas, and at least one article in our National Constitution must be blotted out, before the complete right to it can in any way be impeached.[21]

Sumner was no outlier. The 1856 Republican Platform complained that "[T]he dearest Constitutional rights of the people of Kansas have been fraudulently

---

[20] JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 117-18 (1849).

[21] CHARLES SUMNER, THE CRIME AGAINST KANSAS: THE APOLOGIES FOR THE CRIME: THE TRUE REMEDY 64-65 (1856).

and violently taken away from them," and that "tyrannical and unconstitutional laws have been enforced; the right of the people to keep and bear arms has been infringed ... ". DONALD BRUCE JOHNSON & KIRK H. PORTER, NATIONAL PARTY PLATFORMS 1840-1972 at 27 (1973).

Nor was this an exclusively Republican understanding. Eight years later, tables had been reversed; Union armies were occupying Confederate territory, and sometimes disarming the residents. Cramer, Johnson & Mocsary, *supra*, at 18-21. The Democrats' 1864 platform thus complained of "the interference with and denial of the right of the people to bear arms in their defense ... ". DONALD BRUCE JOHNSON & KIRK H. PORTER, *supra*, at 34.

In sum: by the 1860s mandatory service by the universal militia was long gone and *everyone*, Republican and Democrat, accepted that the American right to arms related to *private possession for private purposes*, especially self-defense. This common belief was particularly strong in the abolitionist movement whose members would play a prominent role in the passage and ratification of the Fourteenth Amendment.

This common belief is the key to understanding the response of the 39th Congress to the former Confederate States' attempts to disarm and terrorize the freedmen and Unionists during the months that followed Appomattox.

## II. DISARMAMENT MEASURES TAKEN BY FORMER CONFEDERATE STATES IMMEDIATELY FOLLOWING THE WAR THREW THE INDIVIDUAL RIGHT TO ARMS INTO SHARP FOCUS

### A. The Importance of Avoiding Anachronism

It is natural to associate the end of the Confederacy with the beginning of Reconstruction, but in fact most of the background to the Fourteenth Amendment occurs *during* an interregnum that spanned 1865 and 1866. During this period the former Confederate States had reconstituted their governments under exclusively white rule. President Andrew Johnson, a pro-Union Democrat, was prepared to throw the freedmen under the bus, or perhaps under the wagon, as a price of reunion and reconciliation.

The 38th Congress was stalemated by Johnson and the threat of veto. The 1864 elections gave Republicans, for the first time, 3-1 majorities in both the House and Senate. When the 39th Congress convened in December 1865, some eight months after the surrender of Lee's army, Republicans and their allies at last had a veto-proof majority. Richard L. Aynes, *The 39th Congress (1865-67) and the 14th Amendment: Some Preliminary Perspectives*, 42 AKRON L. REV. 1021, 1024 (2009). At that, the 39th Congress faced a considerable agenda: the first Reconstruction Act was not passed until March 1867, long after the 39th Congress had acted on the Fourteenth Amendment. *See*

14 Stat. 428. The electoral franchise was not secured for blacks until the Fifteenth Amendment was ratified in 1870.

It must thus be borne in mind that the events underlying the Fourteenth Amendment occurred, not in the context of reconstruction governance, but in that of reconstituted, white supremacist, governments bound upon subjugating black freedmen, suppressing white Unionists, and restoring, as far as possible, the antebellum status quo.

### B. The Fourteenth Amendment Was Understood as an Answer to State Attempts to Disarm the Freedmen and Their Supporters

#### 1. Original Popular Understanding of the Need for a Constitutional Amendment

Petitioner has ably outlined the events of 1866-1868, as over 100,000 freedmen, now Union veterans, returned to the former Confederacy. These men knew, in the words of Frederick Douglass, that "the liberties of the American people were dependent upon the Ballot-box, the Jury-box, and the Cartridge-box, that without these no class of people could live and flourish in this country ... " FREDERICK DOUGLASS, THE ESSENTIAL FREDERICK DOUGLASS 491 (2008).

Those recalcitrant States, however, did not intend for the freedmen to "live and flourish," and set

out to subjugate them as far as was possible. Many former Confederate States enacted statutes, the "Black Codes," forbidding blacks to own arms. The States' postwar white militias enforced these arms restrictions. *See* Stephen P. Halbrook, *Personal Security, Personal Liberty, and The Constitutional Right to Bear Arms*, 5 CONST. L. J. 310, 348-49 (1995); Robert J. Cottrol and Raymond T. Diamond, *The Second Amendment: Towards an Afro-Americanist Reconsideration*, 80 GEORGETOWN L. J. 361, 344-45 (1991). Alabama forbade all gun ownership by blacks; Louisiana forbade blacks to carry guns unless authorized by their employer and a "chief of patrol"; Mississippi required a permit from the board of police. *Id.* at 344-45, nn. 176-78.

Disarmaments were often accompanied by political intimidation and murder: one report from Mississippi stated that the "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." Halbrook, *Personal Security*, at 350. Conventions of freedmen petitioned Congress to protect their arms rights; Federal legislators protested that these post-war measures violated the right to arms. AMAR, BILL OF RIGHTS 264-65 (1998). Federal government officials expressed a widespread awareness of violations:

> [I]n 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 plain 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" (emphasis added).[22]

These events were well known to the 39th Congress, and reinforced the prewar abolitionist position that the right to arms was an individual right, linked to self-defense. *See* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS 1866-1876 (1998). They were well known to the public. The Black Codes were discussed in major and minor newspapers of the day. David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-1868*, 30 WHITTIER L. REV. 695, 703-07 (2009).

Congressional outrage was so strong that it twice passed a Freedmen's Bureau Act (the first was vetoed and the second passed over another veto) that expressly protected the individual right to arms as follows:

> That in every State or district where the ordinary course of judicial proceedings has been interrupted by the rebellion, ... the right to make and enforce contracts ... and

---

[22] Statement of General Rufus Saxton, former assistant commissioner of the Freedmen's Bureau in South Carolina. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. Rep. No. 39-30, pt. 2, at 229 (1866).

> 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.

Freedmen's Bureau Act, 14 Stat. 173, 176-77 (1866) (emphasis added).

#### 2. Original Popular Understanding of the Purpose of the Proposed Amendment

Members of the 39th Congress were outraged at the actions of the former Confederate States.[23] Rep. Sidney Clarke read into the record Alabama's ban on firearms ownership by blacks and then excoriated Mississippi, "whose rebel militia, upon seizure of the arms of black Union soldiers, appropriated the same to their own use." He added:

---

[23] We include in this discussion Congressional remarks relating to the Fourteenth Amendment, the Civil Rights Act, the Freedmen's Bureau Act, and the question of re-admission of States to the Union. The 39th Congress globally treated all these issues, often in overlapping timeframes and with overlapping rationales. A State's misconduct might be motive for legislation, for an amendment to support that legislation, and for exclusion of the State from the Union.

> 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, before I will even consider their claims to representation in Congress.

CONG. GLOBE, 39th Cong., 1st Sess. at 1838 (April 7, 1866). Rep. Josiah Grinnell likewise complained,

> A white man may come into Kentucky when he pleases; the black man who comes there is a felon, though a discharged soldier and wounded in our battles. A white man in Kentucky may keep a gun; if a black man buys a gun he forfeits it, if presuming to keep a musket which he has carried through the war.

*Id*. at 651 (Feb. 5, 1866). Capping these are, of course, John Bingham's speech introducing the Fourteenth Amendment in the House – in the course of which he referred to the Bill of Rights a dozen times, AMAR, BILL OF RIGHTS 182 (1998), and Jacob Howard's speech introducing it in the Senate, which referred both to unenumerated rights and to those guaranteed by the first eight amendments. CONG. GLOBE, 39th Cong., 2nd Sess. 2764-66 (May 23, 1866).

Congressional opponents of the Fourteenth Amendment were under no misapprehension as to its effect. They knew it would make the first eight amendments enforceable against the states just as

Senator Howard and Representative Bingham had stated. That was precisely why they opposed the bill. STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 113-15 (1984).

Here also we find that the ratifying public had extensive notice of the intent. Transcripts of Howard's speech made the front page of the NEW YORK TIMES and the NEW YORK HERALD (then with greater circulation, and claiming to be the largest newspaper in the world), and internal pages of the PHILADELPHIA INQUIRER, D.C.'S NATIONAL INTELLIGENCER, and smaller newspapers. Bryan Wildenthal, *Nationalizing the Bill of Rights: Revisiting Original Understanding of the Fourteenth Amendment in 1866-67*, 68 OHIO ST. L. J. 1509, 1557-65 (2007); David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-1868*, 30 WHITTIER L. REV. 695, 711-17 (2009). Congress also promoted its purposes by direct contact. When the Joint Committee on Reconstruction issued its lengthy report on, *inter alia*, the oppressions of the Black Codes, Congress ordered 150,000 reprints for distribution. Richard L. Aynes, *The 39th Congress (1865-67) and the 14th Amendment: Some Preliminary Perspectives*, 42 AKRON L. REV. 1021, 1042 (2009). John Bingham ordered reprints of his floor speech on the Fourteenth Amendment, copies of which are to be

found in the Library of Congress.[24] The reprint subtitles his speech, in bold font, "IN SUPPORT OF THE PROPOSED AMENDMENT TO ENFORCE THE BILL OF RIGHTS."

In short, members of the 39th Congress intended the Fourteenth Amendment to render the Bill of Rights applicable to the States, and the Second Amendment was prominent among the rights that they meant to enforce. This purpose was widely communicated, directly and via the major media of the day. If a critic wishes to contend that the American people had a reading of the Amendment contrary to the widely publicized views of its creators, we would suggest that the critic bears the burden of so establishing this fact.

### 3. Textualism and the Privileges of U.S. Citizenship

Most examiners of the Fourteenth Amendment have drawn parallels between the privileges or immunities clause and Article IV, §2's guarantee that the citizens of each State "shall be entitled to the privileges and immunities of citizens in the several States," as glossed by Justice Bushrod Washington in *Corfield v. Coryell*, 6 Fed. Cas. 546, no. 3,230 (C.C.E.D.Pa. 1823). Washington saw these as "those

---

[24] AC901.M5 vol. 475, no. 11 Misc. Pam. Online image may be found at: http://ia311026.us.archive.org/0/items/onecountryonecon00bing/onecountryonecon00bing.pdf.

privileges and immunities which are, in their nature, fundamental," including "[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety ... to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal ... " *Id.* at 551-52.

It may be significant that Bingham's first version of the Fourteenth Amendment indeed sought to protect "all privileges and immunities of citizens *in the several States*," CONG. GLOBE, 39th Cong., 2nd Sess. at 1088 (Feb. 28, 1866), whereas its ultimate version used the term "privileges or immunities of citizens *of the United States*."

Professor Kurt Lash has suggested that the change from "citizens in the several States" to "citizens of the United States" is significant. By the nineteenth century, "rights, advantages or immunities of citizens of the United States," or "immunities and privileges of citizens of the United States," had become a *term of art* for those rights guaranteed by the United States Constitution. Kurt D. Lash, *Origins of the Privileges or Immunities Clause, Part I: "Privileges or Immunities" as an Antebellum Term of Art*, GEORGETOWN L. J. (forthcoming 2010; http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1457360), at 39-50. Those terms were commonly used when the United States acquired territory and agreed that its residents, should they choose to remain, would have all the rights of citizens. This phrasing was used in

the Louisiana Cession Act of 1803, 8 Stat. 200, 202, the 1819 treaty with Spain by which we acquired Florida, 8 Stat. 252, 258, the 1867 treaty regarding acquisition of Alaska, 15 Stat. 539, 542, and other treaties. *See* AMAR, BILL OF RIGHTS 167-68 (1998) (similar provisions in treaties with the Stockbridge Tribe, with the Wyantotts, with the Ottawas and with the Sioux). So also President Andrew Johnson's proclamation of amnesty for former Confederates, which gave them "restoration of all rights, privileges and immunities under the Constitution and the laws...." 15 Stat. 711, 712.

This was the explanation advanced by John Bingham himself, in 1871:

> Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States.
>
> ....
>
> Mr. Speaker, that decision in the fourth of Washington's Circuit Court Reports, to which my learned colleague [Mr. Shellabarger] has referred is only a construction of the second section, fourth article of the original Constitution, to wit, 'The citizens of each State shall be entitled to all the privileges and

> immunities of citizens in the several States.' In that case the court only held that in civil rights the State could not refuse to extend to citizens the same general rights secured to its own.... Is it not clear that other and different privileges and immunities than those to which a citizen of a State was entitled are secured by the provision of the fourteenth article....?

CONG. GLOBE, 42nd Cong., 2nd Sess., Appendix at 82 (Mar. 31, 1871).

### C. Congressional References To The Violations Of The Right To Arms Relate To Disarmament Of Individuals, Not To Threats To Militiamen

A dissent in *District of Columbia v. Heller* suggests that Congressional references to blacks being denied the right to arms might not relate to disarmament of individual freedmen and Unionists, but to attacks upon members of the southern pro-Union "negro militia," 128 S. Ct. at 2841-42 (Stevens, J., dissenting).

This theory is factually unsupportable. When Congress debated the Fourteenth Amendment and related measures in 1866, these pro-Union militia units did not yet exist. As noted above, in early 1866 Congress was dealing, not with reconstruction governments, but with reconstituted Confederate State units. After Appomattox, these southern governments formed "provisional militias." These were composed

solely of whites, mostly Confederate veterans, many of whom still wore their gray uniforms. OTIS A. SINGLETARY, NEGRO MILITIA AND RECONSTRUCTION 5 (1957). Their major activity was to disarm blacks and Unionists:

> Disarming the freedmen was apparently considered a primary duty and once that was fulfilled with relish, according to his excerpt from a letter: "The militia of this county have seized every gun and pistol found in the hands of the (so-called) freedmen of this section of the county."

*Id.* The early postwar southern governments were shaken by panics in 1865 and 1866, based on rumors that the freed slaves were going to mount belated slave revolts, seeking vengeance rather than freedom. ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION xxii (1971). Several States called out their militia "to patrol the roads and search negro cabins for arms. This it did, in some cases with great brutality." *Id.* Throughout this period, the "legally constituted militia of the Johnson governments commonly went about disarming Negroes and frequently committing violence in the process." *Id.* at xliii.

These were the southern militias known to the 39th Congress, one of whose members complained that rather than restore order the militia preferred to "hang some freedman or search negro houses for arms." CONG. GLOBE, 39th Cong., 1st Sess., pt. 1, at 941 (Feb. 20, 1866).

This explains why, in March 1867, the 39th Congress voted to disband the militias of most Southern States and forbid their re-organization. Act of March 2, 1867, §6, 14 Stat. 487.[25] The act was not repealed until after the Fourteenth Amendment had been ratified.[26]

The legislative history of the measure is enlightening. Senator Wilson had moved for such a measure in March 1866. CONG. GLOBE, 39th Cong., 1st Sess. at 1100 (March 1, 1866). Nearly a year later, he managed to attach such a proposal to a vital appropriations bill: the provision would have caused militias in the listed States "to be forthwith disarmed and disbanded ... " CONG. GLOBE, 39th Cong., 2nd Sess. at 1848 (Feb. 26, 1867).

Senator Willey expressed a worry at the disarmament provision: "It strikes me also that there may be some constitutional objection against depriving men of the right to bear arms and the total disarming of men in time of peace." *Id.* Senator Wilson reiterated "These organizations, I say again, are completely rebel, not only in the men who compose them, but in the spirit which animates them, and I think they should not be permitted." To avoid the constitutional

---

[25] Tennessee was not named; it had already been re-admitted to the Union. Nor was Arkansas, presumably because it was not yet a problem.

[26] Act of January 14, 1869, 15 Stat. 266 (repeal as to five States); Act of July 15, 1870, §2, 16 Stat. 364 (repeal as to remaining four States).

problem he was "willing, however, to modify the amendment by striking out the word 'disarmed.' Then it will provide simply for disbanding these organizations." *Id.* at 1849. Senator Willey found the amended form, which dissolved militia units but carefully preserved the individual right to arms for these former enemies, "much more acceptable to me than it was previously." *Id.*[27]

The 39th Congress was, in short, not concerned about protecting State militias from Federal interference. The southern militias it knew were not composed of freedmen and Unionists, but of former Confederates and racists, and it disbanded rather than protected them. The battle over the "negro militias" occurred in the Reconstruction period, well after the Congressional references to deprivations of the right to arms.[28] The Congressional references to

---

[27] President Johnson did not veto the bill, but did send Congress a protest that the bill deprived the States of their right to "protect themselves in any emergency by means of their own militia." 6 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1908 at 472 (James Daniel Richardson, ed. 1909).

[28] The incident cited in the *Heller* dissent – the murder of militia officer Jim Williams – occurred in 1871. The conflict over the "negro militia" in Mississippi came in 1875. Frank Johnson, *Suffrage and Reconstruction in Mississippi*, 6 PUBLICATIONS OF THE MISSISSIPPI HISTORICAL SOCIETY 198, 201-02 (1902); NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR 125, 130-31 (2006). South Carolina's Hamburg Massacre, of a black militia unit, also came in 1875. WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION 1869-1879, at 307 (1979). In late 1868 Klansmen intercepted arms for the Florida militia, and an impromptu Arkansas unit was disarmed. ALLEN W. TRELEASE,

(Continued on following page)

arms seizures relate to what was occurring in 1865-1866: white militias seizing arms from individual blacks and white Union veterans.

## III. THE AMERICAN RIGHT TO ARMS HAS CONTINUED TO EVOLVE IN WAYS THAT MAKE IT EVER MORE INDIVIDUALISTIC AND PERSONAL

Like most other Bill of Rights freedoms, the right to arms has flourished in American minds over the past century. The great majority of Americans believe that their right to arms is an individual one;[29] it is hardly surprising that this belief is reflected in their making of laws and crafting of constitutions.

### A. Americans Have Continued to Adopt, at the State Level, Increasingly Clear Guarantees of an Individual Right to Arms

Over the last century, the people of the United States have increasingly adopted individual rights guarantees, or made existing guarantees more clearly

---

*supra*, at 119-20, 150-51. But legislators speaking in Spring 1866 can hardly be referring to events that occurred in 1868-1875.

[29] Harris Interactive, *Second Amendment Supreme Court Ruling Matches With Public Opinion From The Harris Poll*, http://www.harrisinteractive.com/harris_poll/index.asp?PID=922 (70% of Americans believe the Second Amendment protects an individual right, or both an individual and a State right).

individualistic. In no State did the people vote to weaken their guarantee, or make it less individual and more militia-related.

The most concise formats guaranteed a citizen the right to arms "in defense of himself or the State" (Arizona's original 1912 constitution), or referred to the right "of the individual citizen" (Illinois' new 1970 provision) or "of each citizen" (Louisiana's 1974 amendment).[30] These measures expressed an individual right with minimum use of words.

From there, the formulations grew more detailed and even more specifically individual. Oklahoma (1907) and Missouri (1945) guaranteed a person's right to arms "in defense of his home, person, or property," while New Hampshire (1982) chose the plural form: "themselves, their families, their property, and the State...."

The 1978 Idaho provision is the longest, reflecting a decision to strengthen the right to arms by expressly allowing some restrictions while expressly foreclosing others:

> The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage

[30] All State provisions are taken from Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POLICY 191 (2006).

> of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.[31]

The most popular 20th century model of the right to arms was even broader, coupling individual defense with recreational purposes. West Virginia (1986) added, to the listing of defensive uses, "and for lawful hunting and recreational use." North Dakota (1984) and Delaware (1987) added "and for lawful hunting, recreation, and other lawful purposes"; New Mexico (1971), Nevada (1982), Nebraska (1988) and Wisconsin (1998) used slight variations of this, while Utah (1984) simply appended "as well as for other lawful purposes." Passage was secured with large majorities. In 1998, for example, 74% of Wisconsin voters supported the right to arms amendment.[32]

---

[31] Eugene Volokh, *supra*, at 196. The 1978 provision replaced an 1889 version that broadly provided "the Legislature shall regulate the exercise of this right by law." *Id.*

[32] Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK L. REV. 715, 727 (2005).

On the occasions when a militia-related model of the right appeared, the people often moved to reject it. Alaska began its statehood in 1959 with provisions tracking the Federal Second Amendment. In 1994, Alaska voters added "the individual right to keep and bear arms." Starting in 1879, Louisiana's provision tracked the Second Amendment, but in 1974 its voters replaced "the right of the people" in that guarantee with "the right of each citizen." Maine's provision originally contained "for the common defense"; its highest court read this as creating a militia-limited right. *State v. Friel*, 508 A.2d 123, 125 (Me. 1986). In the following year, its voters responded by deleting "for the common defense" from the guarantee.

### B. Congress Has Repeatedly Recognized an Individual Right to Arms

Congressional action followed a similar pattern. In the 1866 Freedmen's Bureau Act, the 39th Congress recognized and protected against racial discrimination "the constitutional right to arms." 14 Stat. 176-77. It was the only Bill of Rights liberty singled out for specific mention in the statute.

In 1982 the Senate Judiciary Committee issued a lengthy report on the right to arms, concluding that it was an individual one. SUBCOMM. ON THE CONSTITUTION, SENATE JUDICIARY COMM., THE RIGHT TO KEEP AND BEAR ARMS (97th Cong., 2nd Sess. Feb. 1982). This

may in turn explain why, when Congress reformed the Federal gun laws four years later, it cited the "rights of citizens" to keep and bear arms. Firearm Owners' Protection Act §1(b), 100 Stat. 449.

Most recently, in 2005 Congress made a detailed finding that:

> (1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.
>
> (2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

Among the purposes of the 2005 legislation, Congress listed

> (3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

Protection of Lawful Commerce in Arms Act, 119 Stat. 2095-96. *See generally* Stephen P. Halbrook, *Congress interprets the Second Amendment: Declarations by a Co-equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597 (1995).

The individual right to arms is, in short, very much a living right. The people of the United States

believed that they had such a right in 1789; they believed this even more clearly in 1866; in 2009 they *overwhelmingly* believe that they hold it. Over the last century, they have consistently voted to adopt individual-oriented State guarantees, or to make existing guarantees more clearly individual. Their representatives in Congress have repeatedly evidenced an identical understanding of the right.

## CONCLUSION

In 1789 the American right to arms was individual, but it can be argued that much of the motivation for its adoption related to preserving the infrastructure for a mandatory, enrolled militia that could protect the States against the Federal government, and substitute for a dangerous standing army.

By 1866, all this had changed. The universal militia as the primary source of enrollees for mandatory military service had long been discarded, with no harm to our liberties. The regular army had saved, rather than overthrown, the Republic. In the North, even voluntary militias had vanished; in the South, the organized militias were oppressors rather than protectors. In 1789, "a well-regulated militia [is] necessary to a free state" was a truism; in 1866 it was a phrase of minor historic importance.

Between those dates, the individual aspect of the right to arms simply overwhelmed any other understanding of the right, prevailing among

commentators, both political parties, this Court, the lower courts, and the Congress. The persecution of abolitionists and the refusal of the authorities to protect them made the individual right to arms for self-defense a tenet of that movement as it expanded from a small minority to a great majority of Americans. The actions of the postwar southern militias in disarming freedmen and Unionists brought this individualist understanding into sharp focus, and Congress showed its understanding of the right to arms by disbanding those militias but not disarming individual members in order to protect the right to arms.

The 1866 Framers of the Fourteenth Amendment, and the Americans who ratified their recommendation, implemented the right to arms as it was understood *in their day*, which involved a *purely* personal right – the right to shoot a violent, unlawful intruder as he came through the door – a right to do so even if the intruder in question served the State. The Fourteenth Amendment was intended to, and does, enforce *that* Second Amendment right against the states and also against the Federal government.[33]

---

[33] By definition, the United States must respect privileges or immunities of federal citizenship.

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

PROF. JOSEPH EDWARD OLSON*
HAMLINE UNIVERSITY
SCHOOL OF LAW
1536 Hewitt Avenue
St. Paul, MN 55104
651-523-2142

DAVID T. HARDY
8951 East Driftwood Trail
Tucson, AZ 85749
520-749-0241

**Counsel of Record*