ATTENTION ORIGINALISTS: THE SECOND AMENDMENT WAS ADOPTED IN 1791, NOT 1868

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In June 2022, the Supreme Court decided *New York State Rifle & Pistol Association, Inc. v. Bruen*,[1] its most significant case interpreting the scope of the Second Amendment since the landmark decision in *District of Columbia v. Heller*.[2] In rejecting a two-part interest balancing test, the Supreme Court instead adopted a "text, history, and tradition" test to determine the Second Amendment's meaning and scope.[3] *Bruen* requires governmental defendants to prove that there are "historical analogues" to modern restrictions on activity falling within the plain text of the Second Amendment by showing that the reason why those restrictions were imposed and the nature of the burden they entailed are sufficiently similar to the modern restriction in question.[4] *Bruen* approvingly quoted *Heller* that "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*,"[5] and noted that *Heller* looked at mid-to-

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[1] 142 S. Ct. 2111 (2022).

[2] 554 U.S. 570 (2008).

[3] *Bruen* held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct . . . ." To justify a restriction on such conduct, the government has the burden to "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 1126. Contrary to what some courts have held, the "plain text" means the textual right determined in accordance with accepted principles of constitutional interpretation and Supreme Court precedent. For example, in a case challenging a law involving a ban on "self-manufacture of firearms" and a prohibition on "the sale of the tools and parts necessary to complete the self-manufacturing process," a court held that history need not be consulted because "[t]ry as you might, you will not find a discussion of those concerns (or any such 'right(s)') in the 'plain text' of the Second Amendment." *Defense Distributed v. Bonta*, Case No. 2:22-cv-06200, Doc. 19 at 7 (C.D. Cal. Oct. 21, 2022). But *Heller* held that the right to "keep" arms refers to "possessing arms." *Heller*, 554 U.S. at 583. The right to possess arms necessarily includes the right to acquire them (through purchase, self-manufacture, gift, inheritance, or otherwise) because no one is born with firearms in hand. The unreasonably literal interpretation adopted by the *Defense Distributed* case would require nearly every issue that could arise under the Second Amendment to be discussed and decided in the text of the Amendment itself. That, of course, would obviate the need for any historical inquiry.

[4] 142 S. Ct. 2111, 2130–33 (2022).

[5] *Bruen*, 142 S. Ct. at 2136 (emphasis added).

late nineteenth century evidence only "as mere confirmation of what the Court thought had already been established."[6]

After *Bruen*, government defendants and their amici in Second Amendment lawsuits began arguing that the relevant period for determining original meaning is not 1791, when the Second Amendment became effective, but 1868, when the Fourteenth Amendment was enacted.[7] But every Supreme Court case that has examined historical evidence to determine the meaning or scope of the first eight provisions of the Bill of Rights has looked entirely or principally at the Founding period or earlier, not 1868.[8]

Here is the *Bruen* passage on which gun control defenders base their argument. After reviewing the historical methodology for courts to deploy, the Court observed:

> Strictly speaking, New York is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second. See, *e.g.*, *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243, 250–251 (1833) (Bill of Rights applies only to the Federal Government). Nonetheless, we have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government. [citations omitted] And we have *generally assumed* that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right *when the Bill of Rights was adopted in 1791.* See, *e.g.*, *Crawford v. Washington*, 541 U.S. 36, 42–50 (2004) (Sixth Amendment); *Virginia v. Moore*, 553 U.S. 164, 168–169 (2008) (Fourth Amendment); *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 122–125 (2011) (First Amendment).
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> We also *acknowledge* that there is an *ongoing scholarly debate* on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government). See, *e.g.*, A. Amar, The Bill of Rights: Creation and Reconstruction xiv, 223, 243 (1998); K. Lash, Re-Speaking the Bill of Rights: A New Doctrine of Incorporation (Jan. 15, 2021) (manuscript, at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3766917 ("When the people adopted the Fourteenth Amendment into existence, they readopted the original Bill of Rights, and did so in a manner that invested those original 1791 texts with new 1868 meanings").[9]

This language has led gun control advocates to argue that the relevant time period is an open question and that the answer is 1868, not 1791. Undoubtedly, that is because there were more gun control laws on the books (think: Southern Black Codes) in 1868 than in 1791, and thus more opportunities to find historical "analogues" to restrict individual rights. For example, at the Founding period, there were no restrictions on the peaceable carrying of arms, other than by slaves, free blacks in certain jurisdictions, and Native Americans.[10] "There have been epochs or

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[6] *Id*. at 2137.

[7] *See, e.g.*, Defendant John Harrington's Memorandum in Support of His Motion for Summary Judgement at 24, Worth v. Harrington (D. Minn. 2022) (No. 0:21-CV-01348); Amicus Letter of Everytown Law at 2, Lara v. Comm'r Pa. State Police (3d Cir. 2022) (No. 21-1832); [Proposed] Amicus Br. of Everytown for Gun Safety in Support of Defendant's Opposition to Plaintiff's Motion for a Preliminary Injunction at 7, Antonyuk v. Bruen (N.D.N.Y. 2022) (No. 1:22-cv-00734).

[8] *See infra* Parts C, D, and E.

[9] *Bruen*, 142 S. Ct. at 2137–38 (emphasis added). Professor Lash's SSRN article was published as *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439 (2022).

[10] *See* STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT chapters 6–7 (2008) (analyzing the constitutions and laws of the original states).

phases in the latter part of the nineteenth and early part of the twentieth centuries in which the right to bear arms was impaired or denied to selected groups of people."[11] During Reconstruction and thereafter, a minority of states (mostly Southern) enacted bans on the carrying of small pistols, required pistols to be carried openly and, in the case of Texas, prohibited carrying pistols at all, other than on a journey. Some carry bans were invalidated by the courts.[12]

Apart from the Black Codes and Jim Crow laws, *Bruen* itself noted that there was a "slight uptick in gun regulation during the late-19th century—principally in the Western Territories."[13] The Court continued on to discount this gun regulation evidence because "As we suggested in *Heller*, however, late-19th century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence."[14]

But the relevant time period is not an open question. That the Founding period is the correct time to determine the original public meaning of an individual right is not a mere "assumption," as Justice Thomas stated in his respectful nod to an "ongoing scholarly debate." It is an integral and controlling part of the Court's Bill of Rights jurisprudence. As shown herein, it has been the Court's universal practice to look to the Founding period and relevant antecedents to determine original public understanding. No Supreme Court case has ever looked to 1868 as the principal period for determining the meaning of an individual right in the Bill of Rights. If periods after 1791 are consulted at all, it is only to confirm that subsequent authorities remained consistent with the public understanding in 1791.

The Court has held that the meanings of the Constitution and the Bill of Rights are fixed when they were adopted. A provision of the Bill of Rights has only one meaning, whether applied against the federal government or the states. The time period for determining that single meaning, when history must be examined, is 1791. That is true of the three cases cited by *Bruen* in the quote above; it is true of all of the Supreme Court's Second Amendment cases beginning with *Heller*; and it is true of Supreme Court cases examining other rights provisions of the Bill of Rights. The Court has also declared that if a later interpretation differs from the original meaning when the Bill of Rights was ratified, the later interpretation must yield.

Even if one examines the ratification period of the Fourteenth Amendment, there is no evidence that the ratifiers thought the existing rights in the Bill of Rights somehow changed in meaning. Rather, the Fourteenth Amendment's purpose was to include blacks within the protections granted to citizens, and to protect their rights against state encroachments.

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[11] STEPHEN P. HALBROOK, THE RIGHT TO BEAR ARMS 255 (2021) (analyzing restrictions in the "Wild West," Jim Crow South, and anti-immigrant cities like New York).

[12] Stephen P. Halbrook, The Right to Bear Arms 241–47 (2021).

[13] *Bruen*, 142 S. Ct. at 2153–54.

[14] *Id.* at 2154.

I. 1791 IS THE PROPER YEAR FOR DETERMINING THE ORIGINAL UNDERSTANDING OF THE SECOND AMENDMENT

A. The meaning and scope of each provision in the Bill of Rights is the same whether applied against the states or the federal government

The key to understanding why the original public meaning of the Bill of Rights—including the Second Amendment—should be determined by reference to the Founding is found in *Bruen* itself: "[W]e have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment *have the same scope* as against the Federal Government."[15] The Court does not apply one meaning when invoked against potential federal infringement and a different meaning when invoked against a potential state or locality infringement.

This has been a fundamental principle of Bill of Rights jurisprudence for over five decades. That an incorporated right has only a single meaning was made crystal clear in *McDonald*, which quoted *Malloy v. Hogan* as establishing that the Court has:

> abandoned "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," stating that it would be "incongruous" to apply different standards "depending on whether the claim was asserted in a state or federal court."[16]

B. A constitutional provision's meaning is fixed when adopted

Bruen explained that the Constitution's "meaning is fixed according to the understandings of those who ratified it."[17] Since the Bill of Rights is part of the Constitution and was ratified just three years after the unamended Constitution went into effect, its meaning was fixed then. Noting that the "Constitution can, and must, apply to *circumstances* beyond those *the Founders* specifically anticipated,"[18] *Bruen* quoted from *United States v. Jones*,[19] which concluded that installation of a tracking device on a vehicle was "a physical intrusion [that] would have been considered a 'search' within the meaning of the Fourth Amendment *when it was adopted*".[20] Circumstances may change, but the central meaning is fixed.

The conception that the Constitution has a fixed, original meaning goes far back in constitutional jurisprudence. As Justice Thomas noted in his concurrence in *McIntyre v. Ohio Elections Comm'n*:[21]

> When interpreting the Free Speech and Press Clauses, we must be guided by their original meaning, for "[t]he Constitution is a written instrument. *As such its meaning does not alter. That which it meant when adopted, it means now.*" *South Carolina v. United States*, 199 U.S. 437, 448 (1905). We have long recognized that the meaning of the Constitution "must necessarily depend on the words of

[15] *Bruen*, 142 S. Ct. at 2137 (emphasis added).
[16] McDonald v. City of Chicago, 561 U.S. 742, 765 (2010) (quoting Malloy v. Hogan, 378 U.S. 1, 5–6 (1964)).
[17] *Bruen,*142 S. Ct. at 2132.
[18] *Id.*
[19] 565 U.S. 400, 404–405 (2012).
[20] *Id.* (emphasis added).
[21] 514 U.S. 334, 359 (1995).

> the constitution [and] *the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions* . . . in the several states." *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838).

Thus, as long ago as 1838, that was an accepted proposition. It remained an accepted proposition in 1905 and remains so today.

C. The Bill of Rights means what it meant when it was adopted

The relevant period for ascertaining the *single* meaning of a provision of the Bill of Rights is the ratification of those amendments during the Founding, not when the right was incorporated into the Fourteenth Amendment. *Bruen* recognized that the "Second Amendment's *historically fixed meaning*" must date, like the Amendment itself, to 1791, when the Court reaffirmed *Heller*'s finding that the right applies to new circumstances, specifically that the Second Amendment's "reference to 'arms' does not apply 'only [to] those arms in existence *in the 18th century*.'"[22]

In the passage from *Bruen* quoted above regarding the "assumption" that 1791 is the relevant time period, the Court cited three cases, all of which looked to the time of ratification of specific amendments in 1791 to determine their original public meaning: *Crawford v. Washington*, 541 U.S. 36 (2004) (Sixth Amendment); *Virginia v. Moore*, 553 U.S. 164 (2008) (Fourth Amendment); and *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117 (2011) (First Amendment). These cases all involve applications against the states of incorporated provisions of the Bill of Rights.

In *Crawford*, a Confrontation Clause case, the Court relied on Founding-era history "to understand [the clause's] meaning."[23] There is no indication in *Crawford* that when the Sixth Amendment applies through the Fourteenth Amendment to a state, the public understanding of the Sixth Amendment at the time of ratification of the Fourteenth Amendment determines its meaning, or changes the 1791 meaning.

The second case is *Virginia v. Moore*,[24] a Fourth Amendment case, where the protection of that Amendment was asserted against a state's actions. The Court again looked to the Founding era: "In determining whether a search or seizure is unreasonable, we begin with history. We look to the *statutes and common law of the founding era* to determine the norms that the Fourth Amendment was meant to preserve."[25]

The Court stated that it was "aware of no historical indication that *those who ratified the Fourth Amendment* understood it as a redundant guarantee of whatever limits on search and seizure legislatures might have enacted."[26] As with *Crawford*, there was no indication in *Virginia v. Moore* that the understanding of the ratifiers of the Fourteenth Amendment was relevant or should even be considered.

In the third case, *Nevada Comm'n on Ethics v. Carrigan*,[27] the issue was whether a provision of the state's law requiring legislators to recuse themselves from voting on certain measures violated

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[22] *Bruen*, 142 S. Ct. at 2132 (quoting District of Columbia v. Heller, 554 U.S. 570, 582 (2008)) (emphasis added).
[23] Crawford v. Washington, 541 U.S. 36, 43 (2004).
[24] 553 U.S. 164 (2008).
[25] *Id.* at 168 (emphasis added).
[26] *Id.* (emphasis added).
[27] 564 U.S. 117 (2011).

the First Amendment. The Court held that it did not, partially on the basis that such recusal laws existed during the Founding and were not considered to be speech restraints.

As in *Crawford* and *Moore*, the Court never considered whether the scope of the First Amendment should be determined by the understanding of the ratifiers of the Fourteenth Amendment. Instead, it noted that "Laws punishing libel and obscenity are not thought to violate 'the freedom of speech' to which the First Amendment refers because such laws *existed in 1791* and have been in place ever since."[28]

When Supreme Court cases look at history to determine the intent of ratifiers, they always look to the Founding era as the period of sole or primary relevance.

D. All three of the Supreme Court's substantive interpretations of the Second Amendment assess its meaning and scope by looking at the Founding period

There have been two Supreme Court cases—*Heller* and *Bruen*—that engaged in historical analysis and applied the substantive meaning of the Second Amendment; both used the Founding period to determine its scope and meaning.

Heller first analyzed the meaning of the Second Amendment's text by examining sources that either preceded 1791 or were close enough in time thereafter to ascertain what the language meant to the Founding generation.[29]

For example, the Court stated that in interpreting the Second Amendment's text:

> [W]e are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.' Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens *in the founding generation*.[30]

Heller left no doubt that the meaning of the provisions of the Bill of Rights was set in 1791: "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*, whether or not future legislatures or (yes) even future judges think that scope too broad."[31]

Caetano applied the Second Amendment against Massachusetts.[32] Although this *per curiam* opinion did not itself engage in historical analysis, it expressly relied on *Heller*'s language and reasoning, which were rooted in the Founding period. There was no suggestion by the Court that 1868 was the proper date, or that the understanding of the ratifiers of the Fourteenth Amendment was even pertinent, much less controlling.

Bruen confirmed that the period when the Bill of Rights was ratified is the pertinent period. Addressing New York's historical arguments from medieval times to the end of the nineteenth century, the Court observed that "not all history is created equal" and then reaffirmed *Heller*'s

[28] *Id.* at 122 (emphasis added).
[29] District of Columbia v. Heller, 554 U.S. 570, 577–592 (2008).
[30] *Id.* at 576–77 (citations omitted) (emphasis added).
[31] *See id.* at 634–35 (emphasis added).
[32] Caetano v. Massachusetts, 577 U.S. 411 (2016).

statement that "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them."[33]

E. Supreme Court jurisprudence on all other provisions of the Bill of Rights looks to the Founding period, not 1868

As *Bruen* explained, the meaning of a constitutional provision is fixed when adopted. That includes the provisions of the Bill of Rights, which have the same meaning when incorporated against the states or the federal government.

I have not found, and litigants in post-*Bruen* litigation have so far not identified, a *single* Supreme Court case in which the Court looked to the time of the Fourteenth Amendment's ratification as the principal period for determining the scope or meaning of any provision of the Bill of Rights.[34] A multitude of cases, beyond those cited above, discuss the Founding period and earlier as exclusively or primarily relevant.[35]

F. If later understandings contradict the original understanding of the text, the original understanding controls

It's true that *Heller*, *McDonald*, and *Bruen* all considered some amount of 19th-century history. *McDonald* did so not to discern the meaning or scope of the right to keep and bear arms, but rather to determine whether it has historically been considered "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition."[36]

The post-Founding-era history examined by *Heller* and *Bruen* was used by the Court only to confirm, rather than to define or contradict, the Founding-era understanding. Regarding *Heller*, the *Bruen* Court observed:

> [W]e made clear in *Gamble* that *Heller*'s interest in mid- to late-19th-century commentary was secondary. *Heller* considered this evidence "only after surveying what it regarded as a wealth of authority for its reading—including the text of the Second Amendment and state constitutions." In other words, this 19th-century evidence was "treated as mere confirmation of what the Court thought had already been established."[37]

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[33] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2136 (2022).

[34] Litigants have cited lower court decisions, and I discuss the errors in those arguments in Part I.G.

[35] *See, e.g.*, Near v. Minnesota, 283 U.S. 697, 713–17 (1931) (First Amendment, freedom of the press); Reynolds v. United States, 98 U.S. 145, 163 (1878) (First Amendment, Free Exercise Clause); Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 182–84 (2012) (First Amendment, Establishment Clause and Free Exercise Clause); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1894–912 (2021) (First Amendment, Free Exercise Clause) (lengthy concurrence by Justices Alito, Thomas, and Gorsuch); Lynch v. Donnelly, 465 U.S. 668, 673–74 (1984) (First Amendment, Establishment Clause); Wyoming v. Houghton, 526 U.S. 295, 299 (1999) (Fourth Amendment); Wilson v. Arkansas, 514 U.S. 927, 931 (1995) (Fourth Amendment); Benton v. Maryland, 395 U.S. 784, 795–96 (1969) (Fifth Amendment, Double Jeopardy Clause); Gamble v. United States, 139 S. Ct. 1960, 1965 (2019) (Fifth Amendment, Double Jeopardy Clause); Ramos v. Louisiana, 140 S. Ct. 1390, 1395–96 (2020) (Sixth Amendment, Jury Trial Clause); Powell v. Alabama, 287 U.S. 45, 60–67 (1932) (Sixth Amendment, Right to Counsel Clause); Klopfer v. North Carolina, 386 U.S. 213, 223–25 (1967) (Sixth Amendment, right to speedy trial); *In re* Oliver, 333 U.S. 257, 266–268 (1948) (Sixth Amendment, right to public trial); Duncan v. Louisiana, 391 U.S. 145, 151–54 (1968) (Sixth Amendment, right to jury trial in state cases); Washington v. Texas, 388 U.S. 14, 20, 23 (1967) (Sixth Amendment, Compulsory Process Clause); Timbs v. Indiana, 139 S. Ct. 682, 687–99 (2019) (Eighth Amendment, Excessive Fines Clause) (post-Civil War history discussed only to show the right's fundamental importance).

[36] McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).

[37] *Bruen*, 142 S. Ct. at 2137 (quoting Gamble v. United States, 139 S. Ct. 1960, 1975–76 (2019)).

The Court warned against giving "post-enactment history more weight than it can rightly bear," and reaffirmed *Heller*'s observation that "because post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.'"[38] In fact, faced with twentieth-century evidence that *did* contradict the Founding-era evidence, the *Bruen* Court rejected that evidence, stating that the Court will not "address any of the 20th-century historical evidence brought to bear by respondents or their *amici*. As with their late-19th-century evidence, the 20th-century evidence presented by respondents and their *amici* does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence."[39]

Justice Barrett, concurring in *Bruen*, also cautioned that "today's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights."[40] If there are no analogues at the Founding, one cannot simply jump to the late 19th century to look for them. Justice Barrett pointedly quoted from *Espinoza v. Montana Dept. of Revenue*,[41] which stated that a practice that "arose in the second half of the 19th century . . . cannot by itself establish an early American tradition" informing our understanding of the First Amendment.[42] If such a practice cannot establish a pertinent American tradition for the First Amendment, it cannot do so for the Second Amendment, either.

G. The Court of Appeals' decisions cited to support 1868 as the determinative year have been abrogated or rely on an obvious misreading of McDonald

The briefs supporting gun control in the *Worth*, *Lara*, and *Antonyuk* cases[43] rely on lower court cases that supposedly establish the time of the ratification of the Fourteenth Amendment as the key time period. Of the three submissions, the *Lara* brief has the most extensive argument on the point. The discussion in the *Lara* brief[44] cites *Gould v. Morgan*, noting that it was "criticized on other grounds by *Bruen*";[45] *Ezell v. City of Chicago*, which stated that "*McDonald* confirms that if the claim concerns a state or local law, the 'scope' question asks how the right was publicly understood when the Fourteenth Amendment was proposed and ratified";[46] *United States v. Greeno*;[47] and closes with a "see also" to *Drummond v. Robinson Twp.*;[48] and to *Binderup v. Att'y Gen*.[49]

But *Gould* was abrogated by *Bruen*. The Seventh Circuit in *Ezell* cites "*McDonald*, 130 S.Ct. at 3038–47" in support of the quoted sentence.[50] But there is no such holding in those pages of

[38] *Id.* at 2136–37 (quoting District of Columbia v. Heller, 554 U.S. 570, 614 (2008)).
[39] *Id.* at 2154 n.28.
[40] *Id.* at 2163 (Barrett, J., concurring).
[41] 140 S. Ct. 2246, 2258–2259 (2020).
[42] *Bruen*, 142 S. Ct. at 2163 (Barrett, J., concurring).
[43] *See supra* note 7.
[44] Amicus Letter of Everytown Law at 2, Lara v. Comm'r Pa. State Police (3d Cir. 2022) (No. 21-1832).
[45] 907 F.3d 659, 669 (1st Cir. 2018).
[46] 651 F.3d 684, 702 (7th Cir. 2011).
[47] 679 F.3d 510, 518 (6th Cir. 2012).
[48] 9 F.4th 217, 227 (3d Cir. 2021).
[49] 836 F.3d 336, 362 (3d Cir. 2016) (en banc) (Hardiman, J., concurring in part and in the judgments).
[50] *Ezell*, 651 F.3d at 702.

McDonald, and *Bruen* certainly did not read *McDonald* that way. The Seventh Circuit corrected itself shortly after *Ezell*, observing that "1791, the year the Second Amendment was ratified—[is] the critical year for determining the amendment's historical meaning, according to *McDonald v. City of Chicago*."[51] *Greeno* quoted the mistaken language in *Ezell*,[52] as did *Binderup*.[53] The *Drummond* case did not hold that 1868 is the proper date.

II. THE INDIVIDUAL RIGHT TO BEAR ARMS IN THE SECOND AMENDMENT WAS UNDERSTOOD THE SAME WAY IN 1868 AS IN 1791

The debate about whether 1791 or 1868 is the critical year is significant only if there were important differences in the understandings of the ratifiers between those two time periods. But in the discourse that led to the Fourteenth Amendment, the right to keep and bear arms was represented as its text dictates, consistent with the same meaning as at the Founding.

Second Amendment concerns were prominent in debates over the Freedmen's Bureau Act and the Civil Rights Act of 1866. Rep. Thomas Eliot, who sponsored the Freedman's Bureau Act, noted that in Kentucky "[t]he civil law prohibits the colored man from bearing arms."[54] He also stated that the Act would invalidate a law providing that no freedman "shall be allowed to carry fire-arms" without employer permission and police approval.[55] As enacted, the Freedmen's Bureau bill guaranteed the right "to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right to bear arms."[56]

Another senator, Garret Davis, said that the Founders "were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense."[57] Senator Samuel Pomeroy counted among the "safeguards of liberty" "the right to bear arms for the defense of himself and family and his homestead."[58] The amendment was needed, Rep. George W. Julian argued, because Southern courts declared the Civil Rights Act void and some states made it "a misdemeanor for colored men to carry weapons without a license."[59]

Indeed, the Freedmen's Bureau Act explicitly declared:

> [T]he right . . . 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.[60]

Just as the ratifiers of the Second Amendment sought to guarantee a pre-existing right, the ratifiers of the Fourteenth Amendment sought only to *extend* that protection, not change the right.

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[51] Moore v. Madigan, 702 F.3d 933, 935 (7th Cir. 2012).
[52] *Greeno*, 679 F.3d at 518.
[53] *Binderup*, 836 F.3d at 362.
[54] CONG. GLOBE, 39th Cong., 1st Sess. 517 (1866).
[55] *Id.* at 657.
[56] *Id.* at 654.
[57] *Id.* at 371.
[58] *Id.* at 1182.
[59] *Id.* at 3210.
[60] Freedmen's Bureau Act of 1866, §14, 14 Stat. 173, 176–77 (1866) (emphasis added).

III. THE "SCHOLARLY DEBATE" REFERENCED IN *BRUEN* DOES NOT CHANGE THE SUPREME COURT'S SETTLED INCORPORATION JURISPRUDENCE

Bruen noted that "there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)."[61] But the only two sources cited for the existence of this debate were Kurt Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439 (2022) and AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION xiv, 223, 243 (1998). Both of their positions are flawed.

A. Professor Lash's approach is theoretically unsound and unlikely to be adopted

Professor Lash believes that if a provision of the Bill of Rights meant something different to the ratifiers of the Fourteenth Amendment than it did to the ratifiers of the Bill of Rights, the 1868 meaning must control.

Noting that the Supreme Court has definitively and repeatedly held that the rights must mean the same thing against the federal government and the states, Lash inquires: If the meanings must be the same, "are the original 1791 meanings carried *forward* into the 1868 amendment, or are the understandings of the people of 1868 carried *backward* into the original Bill of Rights and applied against the federal government by way of 'reverse incorporation'?"[62]

Lash's theoretical answer to his own question is that rights as understood in 1868 must be "reverse incorporated" into the Bill of Rights. He states that there is only "one Freedom of Speech Clause—the one the people spoke into existence in 1791 but then *respoke* in 1868."[63] He argues that "[w]hen the people adopted the Fourteenth Amendment, they readopted the original Bill of Rights, and did so in a manner that invested those original 1791 texts with new 1868 meanings."[64]

There are several problems with this approach.

Lash's analysis is completely contrary to Supreme Court precedents. As noted above, constitutional meanings are fixed when they are ratified. When consulting history to determine the meaning of incorporated provisions of the Bill of Rights, every Supreme Court case has considered the Founding era to be dispositive, even though later evidence is sometimes examined for confirmation.

There also is no compelling basis for concluding that the 1868 meaning, if different, ought to prevail. That 1868 is later in time does not preclude using the original meaning of the Bill of Rights, and simply applying those original meanings to additional persons and entities—that is, in favor of blacks, and against the states—especially since that is what the debates in 1868, to the extent they mentioned the first eight amendments, seemed to contemplate.

Next, it is untrue that the ratifiers "spoke into existence" Bill of Rights provisions in 1791, but then "respoke" them in 1868. The Bill of Rights was a confirmation of existing rights, not an

[61] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2138 (2022).
[62] *Id.* at 1440.
[63] *Id.* at 1441.
[64] *Id.* at 1441.

original grant of rights. The drafters of the Fourteenth Amendment extended those protections to people who had previously been denied them and guaranteed them against governments that had previously not been limited by them.

One suspects that the Supreme Court will not want to have the entirety of its Bill of Rights jurisprudence "transformed" retroactively based upon an unjustified and unprecedented reliance on 1868 as the focus for determining the meaning and scope of the Bill of Rights.

B. Professor Amar's approach contains similar flaws and his concerns have likely been superseded by Heller

Turning to Professor Amar's book,[65] his emphasis on 1866 (not 1868)[66] is more subtle and less drastic than that proposed by Lash. He commends Justice Black's view "that *all* of the privileges and immunities of citizens recognized in the Bill of Rights" are incorporated through the Fourteenth Amendment.[67] But he does not recognize all of the provisions of the Bill of Rights as "privileges or immunities of citizens," stating that some are more akin to rights of states, and others are "alloyed provisions," part citizen right and part state right, that may have to undergo "refinement and filtration" before their citizen-right elements can be "absorbed" by the Fourteenth Amendment.[68] Amar's "refined incorporation" diverges in critical respects from the Court's current test, as stated in *McDonald*: whether the right "is fundamental to our scheme of ordered liberty, or as we have said in a related context, whether this right is 'deeply rooted in this Nation's history and tradition.'"[69]

Next, even though the right to keep and bear arms was a paradigmatic "privilege" of "citizens of the United States," the "right in 1789 and the right in 1868 meant different things," according to Amar.[70] But it is unclear, at best, whether Amar's distinction between 1868's relabeling the right as a privilege or immunity of citizens, and 1791's the "right of the people" in connection with the militia, has any continuing relevance in Second Amendment interpretation. At the time of Amar's book, the Second Amendment had not been incorporated, and was generally held by lower courts to relate only to militia service. The Court's opinion in *Heller* carefully recognized the role of the citizen militia in the colonies and early Republic, but it accurately determined that the right was an individual right for self-defense as well, the position for which Amar seems to be contending. Thus, *Heller* may have largely dispelled Amar's concerns about the nature of the right. Critically, however, these findings in *Heller* did not depend in any way on the understandings of the ratifiers in 1868, but looked to that general time period only as confirmation of the nature of the right as both militia-related and individual, just as it considered some antebellum interpretations as confirmation.

[65] Akhil R. Amar, The Bill of Rights: Creation and Reconstruction xiv, 223, 243 (1998).

[66] Professor Amar typically refers to 1866, the year the Fourteenth Amendment was drafted and sent to the states for ratification.

[67] AMAR, *supra* note 65, at xiv (emphasis in original).

[68] *Id.*

[69] 561 U.S. at 767 (citations omitted) (emphasis omitted).

[70] AMAR, *supra* note 65, at 257.

CONCLUSION

The attempt to make the Fourteenth Amendment's ratification period the determinative time for ascertaining the Second Amendment's meaning has no basis in law or logic. The Supreme Court has held that provisions of the Bill of Rights have only a single meaning, whether applied against the federal government or the states. That meaning is fixed at the time of adoption: that is, in 1791.

All Supreme Court cases that have engaged in historical review of incorporated provisions have looked to 1791 as the determinative period. The Supreme Court has never looked to 1868 for anything more than confirmation of 1791 meaning. Neither litigants nor the scholars mentioned in the *Bruen* Court's reference to the "ongoing scholarly debate" have pointed to a single Supreme Court case that found the meaning of a provision of the Bill of Rights based primarily on the 1868 understanding to the exclusion of or in contradiction of the 1791 understanding.

In short, it can be said with confidence that the Supreme Court has not adopted and will not adopt 1868 as the primary or determinative period for construing the meaning of the Second Amendment or any other provisions of the Bill of Rights. Therefore, lower courts should confine themselves to looking to the Founding Era, not the Reconstruction Era, to define the meaning and scope of the Second Amendment.