

**THE DIVERGING RIGHT(S) TO BEAR ARMS:
PRIVATE ARMAMENT AND THE SECOND AND FOURTEENTH
AMENDMENTS IN HISTORICAL CONTEXT**

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ABSTRACT

This article compares the historical evolution of the social understanding of private armament with contemporary legal doctrine on the right to bear arms. The *District of Columbia v. Heller* decision, which held that the Second Amendment protects a personal right to self-defense, and the *McDonald v. City of Chicago* decision, which held the Second Amendment to be incorporated by the Fourteenth Amendment, both turned on extensive historical analysis. But by reading a broad “individual right to self-defense” into both the Second and Fourteenth Amendments, the Court assumed continuity between the social understandings at the time of these amendments’ respective ratifications. This assumed continuity is belied by the changing roles private weaponry played in American society.

This article analyzes the historical development of the ideology of private armament between 1791 and 1868. While the framers of the Second Amendment were motivated by their suspicion of professional standing armies and their preference for citizen militias, the framers of the Fourteenth Amendment harbored no such beliefs and were strongly committed to the vitality of the U.S. Army. And while the arms right established by the Second Amendment may be described as primarily embodying libertarian political principles, the arms right embodied in the Fourteenth Amendment cannot be similarly viewed. Instead, civilian armament after the Civil War served both to protect newly freed African Americans in the South and also to expropriate land from indigenous peoples in the West—two goals that envisioned close cooperation between civilians and federal authorities. These radically different understandings can only be reconciled by defining the right to bear arms at such a high level of generality as to overlook the actual intentions of both amendments’ framers, thus undermining the project of originalism to which these contemporary decisions were ostensibly committed.

INTRODUCTION

Historical analysis of the right to bear arms has played an outsized role in the Supreme Court’s Second Amendment jurisprudence. The landmark decision *District of Columbia v. Heller*, which held that the Second Amendment protects a personal right to self-defense, thoroughly discussed society’s understanding of the arms right at the time of the amendment’s ratification.¹ Similarly, *McDonald v. City*

1. 554 U.S. 570, 658 (2008); *see also* Roberts, C.J., Transcript of Oral Argument at 44, *District of Columbia v. Heller*, 554 U.S. 570 (No. 07-290) (“Isn’t it enough to determine the scope of the existing right that the amendment refers to, *look at the various regulations that were available at the time, including ‘you can’t take the gun to the marketplace’ and all that, and determine . . . how this restriction and the scope of this right looks in relation to those?*”) (emphasis added).

of *Chicago*, which held the Second Amendment to be incorporated by the Fourteenth Amendment (thus binding on the states as well as the federal government), engaged in extensive historical analysis of the Reconstruction period during which the Fourteenth Amendment was ratified.² Before his appointment to the Supreme Court, then-Judge Kavanaugh stated that “courts are to assess gun bans and regulations based on text, history, and tradition,”³ implying that historical interpretation may again play a significant role in the Court’s forthcoming *New York State Rifle & Pistol Association* decision. In contrast, for example, First Amendment decisions have rarely devoted comparable levels of analysis to the origins of the right to free speech, no matter how substantially our current understanding of free speech diverges from the understanding of the First Amendment’s framers.⁴ The Second Amendment drives the Court towards historical explication to an extent other amendments do not.⁵

But this historical explication has assumed a level of continuity between the meaning of the arms right at the times when the two operative amendments were ratified. Problematically, in the century following ratification of the Constitution, American society’s understanding of the right to bear arms changed dramatically (as it had likewise done in the century preceding the Revolution).⁶ While the drafters of the Second Amendment were deeply concerned by the specter of a peacetime standing army and its presumed power to suppress dissent on behalf of a centralized

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2. 561 U.S. 742, 770–78 (2010).
 3. *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).
 4. *Citizens United v. FEC*, for example, devotes little more than a single paragraph to the understanding of the First Amendment’s framers. 558 U.S. 310, 335-37 (2010). For discussion of the original understanding of the First Amendment, see John C. Coates, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 229-30 (2015) (“[N]one of the corporations in existence at the time the First Amendment was adopted was legally authorized to engage in speech as a business activity . . . [C]orporations generally had no First Amendment rights because they had no authorization to engage in the activities protected by the First Amendment . . .”).
 5. Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706 (2012) (“Justice Antonin Scalia’s majority opinion in *Heller* heavily emphasized historical investigation of the original meaning and traditional understandings of the right to keep and bear arms.”); *id.* at 723 (explaining that *McDonald v. Chicago* “[a]gain undert[ook] an in-depth exploration of American history.”).
 6. See generally David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. 1359 (1998) (providing an overview of the different views of the right to bear arms across the nineteenth century).

authority, the U.S. Army was seen as a virtuous institution by the drafters of the Fourteenth.⁷ Nineteenth century Americans generally envisioned a cooperative relationship between privately armed civilians and the forces of the central government—a presumed relationship that would have been incomprehensible to the framers of the Second Amendment.⁸

The speed at which American society's relationship with private armament evolved undermines a purely originalist analysis of the right to bear arms. Any such analysis depends on continuity between the understandings of 1791 and 1868. When the diverging and contradictory understandings that developed over time are taken into account, a difficult question is raised: did the incorporation of the Second Amendment against the states through the Fourteenth Amendment adopt the right to bear arms as it was understood in 1791 or in 1868?

The procedural postures of *Heller* and *McDonald* allowed the Court to largely avoid this question. Because the events giving rise to the *Heller* decision took place in a federal jurisdiction—the District of Columbia—only the federal government's gun regulations were at issue, and thus only the Second Amendment was implicated.⁹ The *Heller* Court thus formulated a definition of the right to bear arms according to the context of 1791.¹⁰ Later, in *McDonald*, a case arising in Illinois, the Court determined that the Second Amendment was incorporated through the Fourteenth

7. Compare THE FEDERALIST NO. 46 (James Madison) (explaining the Framers' arguments against a standing army) with GIAN GENTILE ET AL., THE EVOLUTION OF U.S. MILITARY POLICY FROM THE CONSTITUTION TO THE PRESENT 13–28 (2017), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1700/RR1759/RAND_RR1759.pdf (explaining changing preferences for a standing army).

8. See GENTILE ET AL., *supra* note 7, at 13–28.

9. 554 U.S. 570, 574–76 (2008).

10. The majority in *Heller* did cite to sources from after the ratification of the Second Amendment, though it acknowledged “they do not provide as much insight into its original meaning as earlier sources.” *Id.* at 614. This approach drew criticism from some commentators. See Symposium, *The Second Amendment and the Right to Bear Arms After D.C. V. Heller: Gun Control After Heller: Threats and Sideshows From a Social Welfare Perspective*, 56 U.C.L.A. L. REV. 1041, 1065 (2009) (“*Heller*’s rendition of nineteenth-century characterizations of the Second Amendment . . . help[s] us understand postenactment traditions much better than [it] can reveal any settled meaning at the founding . . . [I]t is a departure from strong and pure originalism.”). Regardless, the Court’s treatment of nineteenth century cases in *Heller* was brief. To the extent the decision can be read as implying that the Reconstruction era understanding of the right to bear arms was aligned with the understanding of the late eighteenth century, I argue that it is incorrect.

Amendment, thus restricting state governments as it does the federal government.¹¹ In doing so, it relied on *Heller's* articulation of the scope and meaning of the right to bear arms, asking only whether the framers of the Fourteenth Amendment intended to incorporate that right against the states.¹²

But by bifurcating its analysis of the arms right into two decisions, the Court failed to address the extent to which the understanding of private armament in American society had changed over the seventy-six intervening years between the ratification of the Second and Fourteenth Amendments. This article will analyze that change, arguing that it was profound and has significant implications. By doing so, I hope to raise a broader question about the utility of originalism as a method of interpreting questions of incorporation.¹³ Did the Fourteenth Amendment incorporate parts of the Bill of Rights, not as the amendment's own framers understood those rights, but instead as the framers of the eighteenth-century amendments did? To answer yes is to limit the agency of the Fourteenth Amendment's drafters in a problematic and undemocratic way, suggesting that they were restricted by the dead hand of the founding generation. To answer no is to imply that the fundamental rights set forth in the Bill of Rights should properly be given different interpretations, depending on whether federal or state jurisdiction is involved, contrary to Supreme Court precedent.¹⁴ Neither answer is satisfactory. Thus, I argue that the problem lies with originalist analysis itself, which is poorly suited to answering questions involving the interplay of amendments adopted at different times.

This article will first analyze the initial role of firearms in colonial life and the development of the founding generation's suspicions against the institution of the peacetime standing army. After laying out the role that suspicion played in the ratification of the Second Amendment, it then discusses America's changing attitudes towards the standing army over the course of the nineteenth century. While distrust of a peacetime standing army was a core concern undergirding the Second

11. 561 U.S. 742, 791 (2010) (“We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”).

12. *Id.* at 787.

13. For a discussion of various controversies related to the incorporation of the Bill of Rights through the Fourteenth Amendment, see David A. Strauss, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 47–50 (2015).

14. 561 U.S. at 765 (quoting *Malloy v. Hogan*, 378 U.S. 1, 5–6 (1964) (“[T]he Court 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.’”).

Amendment, this concern reached its zenith in the aftermath of the Revolutionary War and almost entirely faded in significance by the end of the Civil War.¹⁵

This article will next discuss what replaced the suspicion against the standing army in the public conception of the right to bear arms. It will first analyze the role the right to bear arms played in Reconstruction and how the extension of that right to emancipated African Americans in the South was intended to empower them. It will next discuss how the declining fear of the national army was accompanied by a rise of settler militarism and the use of private armed violence to expedite the public expropriation of Native American land. Throughout the nineteenth century, as the U.S. government adopted an increasingly expansionist posture towards western territories, the role of civilian armament in American life was partly defined by close cooperation with federal authorities in a project of expropriation.¹⁶ These initial two sections seek to demonstrate that, by 1868, the bearing of arms by American civilians cannot easily be characterized as a commitment to federalism, local control of military force, libertarian political principles, or the related ideologies that influenced the Second Amendment.

This article will then discuss the implications of the discontinuity between the American understanding of the arms right in 1868 and that of 1791. The *Heller* and *McDonald* decisions have defined the right to bear arms by reference to the concept of self-defense.¹⁷ But the conception of the arms right in 1791 diverged so widely from the conception of the right in 1868 that both understandings cannot easily be swept under the concept of self-defense, unless “self-defense” is defined at such a high level of generality so as to undermine the project of originalism.

Among the more influential works addressing the divergence between the understanding of the Second Amendment and the Fourteenth—which predates the *Heller* and *McDonald* decisions—is Akhil Amar’s *The Bill of Rights: Creation and Reconstruction*.¹⁸ Amar stated succinctly that, “between 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman,”¹⁹ arguing that the Fourteenth Amendment achieved a “rewriting of the arms right,” shifting its meaning from a collectivist militia right to an individualist defense right.²⁰ Amar sees the Civil War experience as driving this change, noting that

15. See GENTILE ET AL., *supra* note 7, at 27.

16. See DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848 707–08 (2007).

17. *Heller v. District of Columbia*, 554 U.S. 570, 629 (2008).

18. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 257–68 (1998).

19. *Id.* at 266.

20. *Id.* at 259.

“Massachusetts militiamen may have fought for freedom at Lexington and Concord in 1775, but Mississippi militiamen had killed for slavery at Vicksburg in 1863.”²¹

This work will diverge from Amar’s in the following respects. First, I argue that public understanding of the right to bear arms in the late Nineteenth Century cannot be easily characterized as individualist or libertarian. To borrow Amar’s phrase, the “poster boy of arms” could arguably have been the Carolina freedman, but could just as easily have been the frontiersman, coordinating with regular troops to expropriate land from indigenous peoples pursuant to legislation such as the Armed Occupation Act.²² Many of the preeminent Reconstructionists, like Charles Sumner, were also prominent advocates for westward expansion.²³

Second, this article will also diverge from Amar’s account in that it identifies a more gradual and incremental transition from the Second Amendment arms paradigm to the Fourteenth Amendment arms paradigm. While agreeing that the Civil War played a role in establishing the ideological supremacy of the regular army over the militia, the long-term decline of the militia and the increasing prestige of the regular army took place over the course of the Nineteenth Century and was grounded in a variety of factors, ranging from class perceptions to military necessity. Nor is it true that the militia was universally associated with slavery by Reconstruction Republicans—indeed, during the Civil War, Congress acted to amend the National Militia Act to allow African Americans to serve in that institution.²⁴

Third, this article includes an analysis of *Heller* and *McDonald*, both decided after Amar’s *The Bill of Rights*. While Amar concludes that the Fourteenth Amendment accomplished a “rewriting of the arms right,” he does not examine how the Fourteenth Amendment could, by implication, alter the application of the Second Amendment when it is applied in a federal jurisdiction.²⁵ The *Heller* decision, analyzing the right to bear arms without reference to the Fourteenth Amendment, shows that both amendments must be addressed on their own terms. Doing so reveals contradictions of originalism that are difficult to resolve.

21. *Id.* at 258.

22. *See* 5 Stat. 502 (1842).

23. Mary Alice Cook, *Manifest Opportunity: The Alaska Purchase as a Bridge Between United States Expansion and Imperialism*, 26 ALASKA HIST. 1, 6 (2011).

24. *See* 1 Stat. 271 (1792) (“every free able-bodied white male citizen” between eight and forty-five enrolled) (repealed 1903); 12 Stat. 597 (1862) (“the militia shall in all cases include all able-bodied male citizens between the ages of eighteen and forty-five . . .”).

25. *See* AMAR, *supra* note 18, 257–68.

I. “THAT DREADFUL INSTRUMENTALITY”: THE STANDING ARMY AND THE RIGHT TO BEAR ARMS

A. *Private Armament in Early Colonial America*

The earliest laws relating to civilian armament in colonial America were not concerned with protecting the right to bear arms *from* interference by authorities; instead, they sought to ensure that white civilian populations were sufficiently armed to engage in a project of expropriating Native American land.²⁶ Such laws served a practical rather than ideological purpose.

Ownership of weaponry was usually required for all white men of military age in order to provide for colonial security. In Connecticut, for example, the 1672 Military Affairs Act required that men aged fifteen to fifty (excepting certain professions such as physicians and teachers) “shall have in continual readiness, a good [Musket], Carbine or other Gun.”²⁷ The law further provided that those too poor to purchase arms could instead bring “Corn or other Merchantable Goods” to the public clerk, who would then “endeavour to furnish him with Arms and Ammunition as soon as may be.”²⁸ By 1645, Massachusetts law required all inhabitants to “endeavor after such armes as may be most usefull for their owne & ye countryes defence.”²⁹ In some cases, armament was provided to colonists directly by the home government. For example, when colonial militia in Virginia were defeated by Native Americans in 1622, the English government searched its arsenals for unneeded weaponry and sent any that could be spared across the Atlantic to help them rearm.³⁰

A Virginia law enacted in 1665 explicitly outlined the colonial government’s concern that its white citizens were unarmed, stating that:

26. In March 31, 1639, the Dutch New Netherland Colony passed an ordinance mandating that “every Inhabitant of *New Netherland* . . . is most expressly forbidden to sell any Guns, Powder or Lead to the Indians, on pain of being punished by Death, and if any one shall inform against any person who shall violate this Law, he shall receive a reward of Fifty guilders.” N.Y. Col. Miss. IV. 36, *reprinted in* E.B. O’CALLAGHAN, LAWS AND ORDINANCES OF NEW NETHERLAND, 1638–1674, 19 (1868).

27. *Military Affairs*, GENERAL LAWS AND LIBERTIES OF CONNECTICUT COLONIE 49 (1672).

28. *Id.*

29. 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 134 (Nathaniel B. Shurtleff ed., 1853).

30. *Id.* at 322. The shipment consisted of a variety of weapons, including both firearms and longbows. The Virginians, fearing that Native Americans might study and reproduce the longbow, requested that the bows be stored in nearby Bermuda rather than delivered. *Id.* at 11–12.

the careless manner of the English in going unarmed into churches, courts, and other publique meetings may probably in time invite the Indians to make some desperate attempt upon them, *It is further enacted* that the honourable . . . governour be requested to issue his commands to the officers of the militia to take care to prevent the same.³¹

Militia organizations were relied upon both to intimidate indigenous peoples and to exert control over enslaved populations.³² Thus, in 1729, Lieutenant Governor William Gooch of Virginia relayed an account of the recapture of fifteen escaped slaves, writing:

Tho' this attempt has happily been defeated, it ought nevertheless to awaken us into some effectual measures for preventing the like hereafter . . . To prevent this and many other mischiefs I am training and exercising the Militia in the several Counties as the best means to deter our Slaves from endeavouring to make their Escape, and to suppress them if they should; . . . I doubt not your Lordships will approve of that part of my conduct, for, it is to this new Regulation of the Militia, and the good disposition of the Officers I have now appointed to instruct those under their Command in the exercise of Arms that we owe the present peace with our tributary Indians.³³

Gooch's letter, and its references to the two primary targets of early colonial state power, is representative of the role firearms played in early colonial life. Armed colonists served as adjuncts of that state power, controlling territory and upholding a social order through violence.

Aware of the importance of firearms to the colonial project, governments undertook military censuses, keeping track of the number of arms present in the colonies.³⁴ For instance, according to Virginia's military census of 1624, the area designated as "Neck of Land Near James [City]" was inhabited by 126 men and 19

31. An act concerning Indians (1665), *reprinted in* 2 VA. GEN. ASSEMBLY, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, 219 (William Waller Hening, ed., 1823).

32. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 324 (1991).

33. *Letter from Governor Gooch (1729)*, in 28 VA. MAG. HIST. BIOGRAPHY 299, 300 (1920).

34. HAROLD L. PETERSON, ARMS AND ARMOR IN COLONIAL AMERICA 11, 322 (1956).

women.³⁵ In that year, these 145 colonists registered two “pieces of ordinance,” 158 muskets of various types, 11 pistols, 46 suits of full armor, and 67 swords.³⁶ This substantial arsenal (and the extreme disparity in the ratio of men to women) shows that early settlements in effect resembled private military garrisons. As will be discussed below, this phenomenon would be repeated at the nineteenth century American frontier.

The militia system of this era, with its attendant armament of civilians, developed at the behest of colonial governments because it was a decentralized and effective method of control.³⁷ The colonists were keenly aware of the fact that they could not rely on traditional military formations to secure their vast and undeveloped borders with Native American nations, which were able to launch effective raids conducted by small groups of fighters. As Benjamin Franklin wrote,

security[] will not be obtained by . . . forts, unless they were connected by a wall like that of China, from one end of our settlements to the other. If the Indians when at war, march’d like the Europeans[] with great armies, . . . all might be sufficiently secure; but the case is widely different.³⁸

Instead, each colonist would serve in a semi-public role in providing military security when necessary.³⁹

But that role would be reshaped when colonial wars with France drew regular British Army units to the “New World.”⁴⁰ The presence of such units would reframe society’s view of private armament and its relationship to state authority, illustrating the flexibility and rapidity with which that view could evolve. The role of civilian armament in the early periods of European settlement was constantly in flux, and its meaning to the colonists defies easy definition.

35. *Id.* at 324.

36. *Id.*

37. ROBERT W. COAKLEY & STETSON CONN, *THE WAR OF THE AMERICAN REVOLUTION* 12 (1975).

38. See Benjamin Franklin, *The Interest of Great Britain Considered*, (1760), FOUNDERS ONLINE <http://founders.archives.gov/documents/Franklin/01-09-02-0029> (last visited Feb. 18, 2019).

39. COAKLEY & CONN, *supra* note 37 (“When a particular area of a colony was threatened, the colonial government would direct the local militia commander to call out his men and the commander would mobilize as many as he could or as he thought necessary, selecting the younger and more active men for service.”).

40. See *infra* Section B.

B. *The Path to the Second Amendment: Colonial War, Revolution, and Suspicion of the Standing Army*

Between 1689 and 1783, four global conflicts between Britain and France⁴¹ drew traditional military conflict—and continued civilian armament—to the Americas. Britain “sent arms to equip colonial troops, and most of these arms remained in America.”⁴² And as the British Army modernized and standardized its weaponry at home, the obsolete weapons that were being replaced were often sent to the colonies.⁴³ These wars would thus entail both an increase in private armament and a recontextualizing of what social purposes that armament served.

Interactions between the British professional army and the colonists did not go smoothly. The idea that a standing, professional army was incompatible with a free society was already germane to English colonists, who remembered how the establishment of the professional New Model Army in England had been followed by the rise of Oliver Cromwell.⁴⁴ Contemporaries assumed that such an army would be loyal to whatever centralized authority issued its pay.⁴⁵ At the beginning of this period, the first printed assertion of a right to bear arms would also appear in England, when the English Bill of Rights of 1689, passed during the “Glorious Revolution” in response to abuses by the latter Stuart kings, barred the disarmament of Protestant Englishmen.⁴⁶

Many have analyzed the ideological dimensions of colonial distrust of the standing army.⁴⁷ But the colonial elite’s distaste for the professional soldiers who were being deployed to the Americas must also be viewed in the context of class bias

41. Known in the colonies as King William’s War (1689–1697), Queen Anne’s War (1701–1713), King George’s War (1744–1748), and the French and Indian War (1756–1763). CTR. OF MILITARY HISTORY, AMERICAN MILITARY HISTORY 32 (Richard W. Stewart, ed. 2009).

42. PETERSON, *supra* note 34, at 164.

43. *Id.* at 167.

44. See JASON W. WARREN, DRAWDOWN: THE AMERICAN WAY OF POSTWAR 53–54 (2016).

45. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 338–339 (50th ann. ed. 2017).

46. LOIS G. SCHWOERER, GUN CULTURE IN EARLY MODERN ENGLAND 156–157 (2016); see also *District of Columbia v. Heller*, 554 U.S. 570, 592–593 (2008).

47. E.g., Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 647 (1989).

that a wealthy and educated section of society⁴⁸ held toward men who were “normally recruited for long terms of service, sometimes by force, from among the peasants and the urban unemployed.”⁴⁹ A large proportion of recruits into the British Army “were ‘enlisted’ by the press-gangs and kidnapping parties.”⁵⁰ Indeed, a British impressment statute of the period mandated that “[a]ny sturdy beggar, any fortune teller, any idle, unknown or suspected fellow in a parish that cannot give an account of himself . . . shall be taken before anyone else.”⁵¹

These soldiers fought for a meager wage after accounting for deductions for clothing and equipment.⁵² Alcohol abuse among enlisted men was rampant, and wages were occasionally paid in liquor.⁵³ Enlisted British soldiers during the Revolution were rationed roughly a gallon of rum per month, and they would frequently barter their possessions or steal from civilians so as to purchase more.⁵⁴ Officers’ commissions were purchased, not achieved via military schooling or earned through promotion from the ranks,⁵⁵ and even officers generally “amused themselves by drinking, gambling, and quarreling.”⁵⁶

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48. See MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION* 25 (2003) (discussing the relationship of elites at the Constitutional Convention to the general public). For an analysis of John Adams’s keen observations on the role of socioeconomic class in the power structures of the founding generation, see Luke Mayville, *Fear of the Few: John Adams and the Power Elite*, 47 *POLITY* 5 (2015).
49. CTR. OF MILITARY HISTORY, *supra* note 41, at 23; see also Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1169 (1991) (“full-time soldiers who had sold themselves into virtual bondage to the government[] were typically considered the dregs of society—men without land, homes, families, or principles.”).
50. ALAN KEMP, *THE BRITISH ARMY IN THE AMERICAN REVOLUTION* 7 (1973).
51. *Id.*
52. *Id.*
53. Paul E. Kopperman, “*The Cheapest Pay*”: *Alcohol Abuse in the Eighteenth-Century British Army*, 60 *J. MIL. HIST.* 445, 445–52 (1996).
54. *Id.* at 446–47, 450.
55. See Eric Robson, *Purchase and Promotion in the British Army in the Eighteenth Century*, 36 *HIST.* 57, 57–61 (1951).
56. DAVID M. DELO, *PEDDLERS AND POST TRADERS: THE ARMY SUTLER ON THE FRONTIER* 13 (1998).

This desperate and unruly collection was turned into an effective fighting force through a regime of savage and dehumanizing discipline.⁵⁷ An anonymous observer during the Revolution reported that, “of all the Regiments gone to America before they were Six Months in the country they have had more flogging among them for drunkenness alone, than they would have had in Europe for three years all occasion’d by the immense quantity of cheap Rum.”⁵⁸ The arrival of such an army in large numbers to combat the French in North America was a shock to colonial society and would have profound implications for its conception of the relationship between professional soldiers and armed civilians.

The British Army also contained significant multinational elements that troubled insular colonial elites. Famously, it deployed German troops throughout the Eighteenth century,⁵⁹ leading to the charge in the Declaration of Independence that King George III was “transporting large Armies of foreign Mercenaries to compleat the Works of Death, Desolation, and Tyranny . . .”⁶⁰ George III, who held the title of Elector of Hannover as well as King of England, was able to recruit soldiers from across the Holy Roman Empire, and by 1778, “Germans made up one-third of the total British army strength in North America.”⁶¹ The Royal American Regiment, formed in 1756, also had special parliamentary dispensation to recruit European Protestants as officers, and as a result was commanded in part by a collection of Swiss soldiers.⁶² Friction between the British and foreign elements of the army was common, and German officers were accused of looting and fighting only for money.⁶³

The fighting men deployed by the British crown to the Western Hemisphere were not all Europeans. Prior to abolition in Britain, the British Army also maintained “a corps of black service troops and, more importantly, a standing army of professional slave soldiers in the West Indies” to guard against any invasion of

57. In a typical case in 1740, a private convicted of attempted desertion was subject to a flogging of at least 1,500 and at most 3,000 lashes, administered to him by his comrades in his regiment. Sylvia R. Frey, *Courts and Cats: British Military Justice in the Eighteenth Century*, 43 MIL. AFF. 5, 8 (1979).

58. Kopperman, *supra* note 53, at 457–58.

59. Stephen Conway, *The British Army, “Military Europe,” and the American War of Independence*, 67 WM. & MARY Q. 69, 78–89 (2010).

60. THE DECLARATION OF INDEPENDENCE para. 27 (U.S. 1776).

61. Conway, *supra* note 59, at 78–89.

62. *Id.*

63. *Id.* at 97.

Britain's Caribbean possessions.⁶⁴ Even when abolition was achieved in Britain and the slave trade was outlawed, a British Order in Council directed that fit African men "freed" from illegal slavers be turned over to military authorities for enlistment.⁶⁵

In stark contrast to this working-class and multi-ethnic body, the men serving in a militia were "independent yeomen,"⁶⁶ considered "less likely to become uncivilized marauders or servile brutes."⁶⁷ Eighteenth-century Tory politicians specifically advocated for militia service as a means to instill civic virtue,⁶⁸ and Whig politician James Burgh, an acquaintance of Benjamin Franklin, wrote that a "militia consisting of any others than the men of *property* in a country, is no militia; but a m[o]ngrel army."⁶⁹ Likewise, eighteenth-century Scots pressed George III to restore Scotland's militias, in part to cultivate a sense of civic virtue and discipline in the population.⁷⁰ Burgh's writing did not reflect formal practice in America, where militia service was not restricted to property owners.⁷¹ But militia rank generally corresponded with social status, and militias were "closely integrated with the social and economic structure of colonial society."⁷² Thus, a contemporary wrote to John Adams extolling the "continued influence of the militia in producing pride of character, respect for authority, obedience to the laws, and a just subordination among the people."⁷³

In the events leading up to the Revolution, as regular British troops occupied Boston and attempted to suppress colonial resistance to royal policies,

64. Roger N. Buckley, *The British Army's African Recruitment Policy, 1790–1807: Some Further Thoughts on the Abolition Issue*, 5 CONTRIBUTIONS IN BLACK STUD. 5 (1981).

65. *Id.* at 14.

66. Levinson *supra* note 47.

67. Amar, *supra* note 49, at 1170.

68. SCHWOERER, *supra* note 46 at 166.

69. Levinson, *supra* note 47, at 648 n.57 (quoting J. BURGH, 2 POLITICAL DISQUISITIONS: OR, AN ENQUIRY INTO PUBLIC ERRORS, DEFECTS, AND ABUSES 402 (1774)) (emphasis in original).

70. David Thomas Konig, *The Second Amendment, A Missing Transatlantic Context for the Historical Meaning of "the Right of the People to Keep and Bear Arms,"* 22 LAW & HIST. REV. 119, 133 (2004).

71. *See id.* at 143.

72. CTR. OF MILITARY HISTORY, *supra* note 41, at 30.

73. Letter from William H. Sumner to John Adams (May 3, 1823), <http://founders.archives.gov/documents/Adams/99-02-02-7811> (last visited Feb. 18, 2019).

these contrasting perceptions of militiamen and professional soldiers would coalesce into a firm opposition against any standing army.⁷⁴ Ultimately, the Declaration of Independence charged that George III “kept among us, in times of peace, Standing Armies without the Consent of our legislatures.”⁷⁵ Contemporary statements referring to the institution of a standing army as “that dreadful instrumentality by which a perfect despotism governs a people,”⁷⁶ and “the bane of liberty”⁷⁷ are emblematic of the founding generation’s views.

Given the ideological, class, and ethnic prejudices that elite American society held towards the professional soldier, it is perhaps no surprise that the victorious Continental Army was almost completely disbanded after the Revolutionary War, rather than retained as a credible standing army.⁷⁸ The first peacetime American “army” was thus a miniscule force of seven hundred men, authorized by Congress under the authority of the Articles of Confederation.⁷⁹ The working-class and multiethnic characteristics of the British Army were recreated in miniature by this force.⁸⁰ American officers “concentrated their efforts at a few recruiting stations, located in commercial cities and towns containing pools of economically deprived workers.”⁸¹ A majority of the enlisted soldiers were foreign-born immigrants (primarily from Germany, Ireland, and other parts of the British Isles).⁸² These working-class immigrants were driven by an economic downturn to the army and its promise of food, clothing, and four dollars a month.⁸³

74. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 113–16 (1967); Konig, *supra* note 70, at 140–41; see generally JOHN PHILIP REID, *IN DEFIANCE OF THE LAW: THE STANDING-ARMY CONTROVERSY, THE TWO CONSTITUTIONS, AND THE COMING OF THE AMERICAN REVOLUTION* (1981).

75. THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776).

76. Daniel Webster, *An Address Delivered at the Completion of the Bunker Hill Monument* (June 17, 1843).

77. 1 ANNALS OF CONG. 778 (1789) (Joseph Gales ed., 1834) (statement of Rep. Elbridge Gerry).

78. Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 20 (1989).

79. William B. Skelton, *The Confederation’s Regulars: A Social Profile of Enlisted Service in America’s First Standing Army*, 46 WM. & MARY Q. 770, 771 (1989).

80. *Id.* at 779.

81. *Id.* at 773.

82. *Id.* at 774.

83. *Id.* at 776–77.

Thus, at the time of the ratification debates for the proposed Constitution, peacetime standing armies were associated with the foreign-born and the economically downtrodden.⁸⁴ They had also been used against colonists in Boston and other cities during the unrest that led to the Revolutionary War.⁸⁵ Antipathy toward a peacetime standing army, and its supposed ability to disarm state militias, became one of the central rallying cries that Anti-Federalists raised against the Constitution.⁸⁶ The Militia Clause of the proposed Constitution was particularly feared, as Anti-Federalists warned that Congress's power over the militias could be used to disarm them and imperil individual liberties.⁸⁷

A speaker at South Carolina's ratifying convention warned that a national standing army would suppress resistance to the Constitution "like Turkish Janissaries enforcing despotic laws . . . with the points of bayonets."⁸⁸ In keeping with the times, the Federalist response did not extol the virtues of a standing army. Instead, Federalists argued that structural safeguards were unnecessary in the American context, where the people would be armed and on guard against such a threat to their liberty: as Noah Webster wrote, "the principles and habits of the Americans are directly opposed to standing armies; and there is as little necessity to guard against them by positive constitutions as to prohibit the establishment of the [Islamic] religion."⁸⁹

Nonetheless, the Constitutional system envisioned by the Federalists ultimately addressed Anti-Federalist concerns by allowing state militias to serve as a

84. Of course, while the "difficulties of reconstructing the political ideals of the nonelite" are substantial, it seems unlikely that the working class felt the same levels of disdain for the wage-earning professional soldier as early American elites did. EDLING, *supra* note 48, at 35.

85. See König, *supra* note 70, at 140.

86. Letter from George Mason to Thomas Jefferson (May 26, 1788), <https://founders.archives.gov/documents/Jefferson/01-13-02-0117> (last visited Jan. 16, 2019) ("There are many other things very objectionable in the proposed new Constitution; particularly the almost unlimited Authority . . . [to] disarm, or render useless the Militia, the more easily to govern by a standing Army . . ."); see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 338 (enlarged ed. 1992) ("[N]othing excited antifederalist passions more than Congress' power, . . . 'to raise and support armies . . .'").

87. Cottrol & Diamond, *supra* note 32, at 328.

88. Çargı Erhan, *The American Perception of the Turks: An Historical Record*, 31 *TURKISH Y.B.* 75, 77 (2000/02).

89. BAILYN, *supra* note 86, at 354 (quoting Noah Webster); Amar, *supra* note 49, at 1171 ("[T]he militia system was carefully designed to protect liberty through localism.").

check on the national army.⁹⁰ The Second Amendment, in turn, was included in the Bill of Rights to provide insurance that state militias would remain viable.⁹¹ By guaranteeing the armament of U.S. citizens, it would ensure that the militias were capable of providing a counterweight to the national army, and multiple state-constitution equivalents to the Second Amendment from this period directly reference the danger posed by standing armies.⁹²

By providing that American civilians would be sufficiently armed when called to serve, the Second Amendment was “about the critical difference between the vaunted ‘well regulated Militia’ . . . of ‘the people’ and the despised standing army.”⁹³ The perceived advantage of an armed and organized citizenry “was not merely the defense of American borders; a standing army might well accomplish that . . . [but] in protecting political liberty.”⁹⁴ In Federalist Number 46, Madison sought to provide reassurance that, should a standing army pose a threat to liberty, they:

would be opposed [by] a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by [state] governments possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.⁹⁵

The Second Amendment he drafted had as its animating spirit the objective of ensuring that those citizens would indeed have “arms in their hands” to defend

90. *Id.* at 355.

91. Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 351 (2000).

92. *E.g.*, N.C. DECL. OF RIGHTS OF 1776, § XVII (“That the people have a right to bear arms, for the defence of the State; and, as *standing armies, in time of peace, are dangerous to liberty*, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.”) (emphasis added); MD. DECL. OF RIGHTS OF 1776, §§ XXV–XXVII (“That standing armies are dangerous to liberty, and ought not to be raised or kept up, without consent of the Legislature.”).

93. Amar, *supra* note 49, at 1172.

94. Levinson, *supra* note 47, at 647, 649 (“A central fear of . . . all future republicans was a standing army, composed of professional soldiers.”).

95. THE FEDERALIST NO. 46 (James Madison).

against such “regular troops.”⁹⁶ But at the same time, the rapid evolution from the pragmatic, public-private conception of armament among the earliest colonists into the libertarian and civic-republican conception of 1791 presaged that the social understanding of armament could quickly change again.

C. *The U.S. Army in the Antebellum Period*

For reasons both financial and ideological, the defining feature of the early nineteenth century American army was its tiny size compared to the armies of other powers with expansionist ambitions. This remained true even when Congress temporarily expanded the army’s size during wartime. For example, when the United States mobilized to fight the War of 1812, Congress authorized a force of 35,600 but was able to recruit an actual strength of just 11,744.⁹⁷ By comparison, that same year, Napoleon’s French Empire counted over a million soldiers under arms.⁹⁸ Among nations with international ambitions and expansionist designs, the United States was an outlier. But as the century progressed, the U.S. Army gradually expanded and gained social status, steadily moving past the founding generation’s distrust of professional soldiers.⁹⁹

Neither the regular army nor the militia met expectations during the War of 1812, and initial American war plans to conquer Canada ended in disaster.¹⁰⁰ This wartime experience prompted successive U.S. administrations “to approach defense in a less ideological, more pragmatic fashion.”¹⁰¹ Counterintuitively, the implosion of the Federalist Party, which had traditionally supported a relatively strong national military, gave the Army the opportunity to develop without being ensnared in political battles.¹⁰²

At the same time, state militias began to atrophy, transitioning from universal organizations that could plausibly claim to be representative of “the people” towards voluntary organizations, divided into units along lines drawn according to “class, ethnicity, or trade.”¹⁰³ The Jacksonian period saw an increase

96. *Id.*

97. CENTER OF MILITARY HISTORY, *supra* note 41, at 132, 134.

98. ANDREW ROBERTS, *NAPOLEON: A LIFE* 577 (2014).

99. J.P. CLARK, *PREPARING FOR WAR: THE EMERGENCE OF THE MODERN U.S. ARMY, 1815–1917* 24 (2017).

100. *See id.* at 20.

101. *Id.* at 23.

102. *Id.* at 24.

103. *Id.* at 25.

in the popularity of voluntary “militia” units that resembled social clubs, where prospective members applied and current members voted on their admission.¹⁰⁴ Thus, as the regular army became more credible, the militias became less so. John Calhoun, who became Secretary of War in 1817, would determine that calling up—and paying—the militia to patrol the frontier was both “harassing to them and exhausting to the treasury.”¹⁰⁵

This period also saw an increase in the social status and prestige of the professional soldier, who came to be seen more as a civil servant and less as a venal mercenary. Following the War of 1812, the Military Academy at West Point adopted a standardized curriculum and more rigorous admission requirements.¹⁰⁶ Instructors at the new academy embarked on postgraduate study of subjects ranging from the engineering of fortresses to the campaigns of Frederick the Great.¹⁰⁷ The goal was to produce a graduate who would be “a complete officer and gentleman with a rational, scientific mind.”¹⁰⁸ Such a man would be a far cry from the officers of the eighteenth-century British Army, whose commissions were purchased rather than earned.¹⁰⁹

As for enlisted men, the army made a concerted effort to improve their diet and reduce disease.¹¹⁰ And the antebellum U.S. Army even saw the creation of temperance movements within its ranks, dramatically distinguishing it from the rum-fueled British regiments of the Revolution.¹¹¹ While the army that had garrisoned the colonies for Britain consisted in part of impressed men forced into service, American regulars enlisted for defined terms of service, viewing that service as a contractual relationship between themselves and their government.¹¹²

Indeed, in a stroke of historical irony, the professional army began to face criticism from political leaders during this period—not for being uncouth mercenaries, but instead for being overeducated elitists. With the populist Jacksonian Democrats in political ascent, the army’s leaders, who engaged in extensive academic study of European military methods, found themselves “at odds

104. Ricardo A. Herrera, *Self-Governance and the American Citizen as Soldier, 1775–1861*, 65 J. MIL. HIST. 21, 26 (2001).

105. CENTER OF MILITARY HISTORY, *supra* note 41, at 164.

106. *Id.* at 161; CLARK, *supra* note 99, at 32.

107. CLARK, *supra* note 99, at 35.

108. *Id.* at 32.

109. Kopperman, *supra* note 53, at 445–452.

110. CENTER OF MILITARY HISTORY, *supra* note 41, at 165.

111. Herrera, *supra* note 104, at 29.

112. *Id.* at 31–32.

with the egalitarian and nationalistic spirit of the age.”¹¹³ While Jacksonian-Era charges that West Point-trained officers were “aristocrats, dandies, and Indian sympathizers”¹¹⁴ may have created political headaches for the military, they also made clear that the eighteenth-century dichotomy—which held militia men to be virtuous citizen-soldiers and professional soldiers to be servile mercenaries—had been thoroughly disrupted.

None of this is to say that traditional enmity between professional soldiers and citizen volunteers disappeared. But it largely evolved from the bitter ideological opposition envisioned by the Second Amendment (recall Federalist 47’s vision of an armed militia rising to oppose despotic regular troops) into a rivalry without structural implications.¹¹⁵ Thus, after a mixed force landed at Veracruz during the Mexican War, gray-uniformed Massachusetts militia protested that the only replacement uniforms available to them were “U.S. blue.”¹¹⁶ When they protested, the general in command of the expedition “gave them a dressing down” and assigned them to hard labor until they accepted the color change.¹¹⁷ While the pride of the Massachusetts volunteers may have been injured, this was far from the type of conflict between the standing army and the people’s militia that the antifederalists had anticipated.

D. *“The Pride of Every American Citizen”: The Preeminence of the Standing Army After the Civil War*

The Civil War fundamentally and irrevocably altered the military structure of the United States. Over a million men served in the Union Army,¹¹⁸ which, pursuant to the Confiscation Act of 1862, freed all slaves located in Confederate territory under its control.¹¹⁹ Staggering numbers of these men had died in the field; others had suffered in abominable conditions in Confederate prisoner-of-war camps like Andersonville.¹²⁰ To the Republicans that would push for the ratification of the Thirteenth and Fourteenth Amendments after the war, this was a heroic force of liberation, not a mercenary army of oppression.

113. CLARK, *supra* note 99, at 37–39.

114. *Id.* at 40.

115. *See* THE FEDERALIST NO. 47 (Madison).

116. Herrera, *supra* note 104, at 36.

117. *Id.* at 37.

118. CLARK, *supra* note 99, at 99.

119. Second Confiscation Act, ch. 95, 12 Stat. 589 (1862).

120. CLAUDINE L. FERRELL, RECONSTRUCTION 13 (2013).

Far from being distrusted after the end of hostilities, as the Continental Army was after Yorktown, the postbellum army was held in wide esteem throughout American society after the war. James Garfield, then a Congressman from Ohio and later President, said in 1869 that the Army, when properly organized and managed, “ought to be the pride of every American citizen; it ought to be an institution that we desire to protect.”¹²¹ After the war, abolitionist congressmen also spoke of the many slaves who escaped to join the Union forces and fight for their freedom, underscoring the liberatory role of the Army: “Nearly all of [the] able-bodied colored men who could reach our lines enlisted under the old flag. Many of these brave defenders of the nation paid for the arms with which they went to battle.”¹²²

The class bias against the regulars of the Eighteenth Century had been replaced by a nationalist spirit that honored the common soldier (to the detriment of the educated officer), to the extent that Congress expressed a preference for awarding postwar officers’ commissions to those who had volunteered during the fighting rather than to new graduates of West Point.¹²³ Senator John Logan, a supporter of this measure, expressed the view that “[n]o degree of scholastic education and training can make a distinguished soldier of a man who has not the inherent qualifications of a soldier.”¹²⁴ This laudatory view of the inherent characteristics of a professional soldier would have been incomprehensible to members of the founding generation, who regarded soldiering as “a profession that is liable to dangerous perversion.”¹²⁵

That the framers of the Fourteenth Amendment held the standing army in a far higher regard than the framers of the Second Amendment is demonstrated by the history of the Civil Rights Act of 1866. After his assassination, Lincoln was succeeded by Andrew Johnson, who—in a surprise to many Republicans—refused to embark on the Reconstruction reforms that Congress demanded.¹²⁶ The states of the former Confederacy reacted by adopting legal codes barring African American political participation, threatening to restore the oppressive social order that Union forces had fought to overthrow.¹²⁷ The Republican Congress responded in part by turning to the U.S. military to enforce the newly ratified Thirteenth Amendment.

121. J.A. Garfield, Reduction of the Army, Speech Delivered in the U.S. House of Representatives (Feb. 9, 1869).

122. CONG. GLOBE, 39TH CONG., 1ST SESS. (1866).

123. CLARK, *supra* note 99, at 100.

124. *Id.*

125. BAILY, *supra* note 45, at 377.

126. FERRELL, *supra* note 120, at 17.

127. DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–2015, at 164 (2016).

The Act expressly provided that federal officials in the former Confederacy “shall have authority to summon and call to their aid . . . such portion of the land or naval forces of the United States, or of the militia, as may be necessary to . . . insure a faithful observance of the clause of the Constitution which prohibits slavery.”¹²⁸ It further provided that it “shall be lawful for the President of the United States . . . to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the due execution of this act.”¹²⁹

Johnson vetoed the Act.¹³⁰ His veto message to Congress raised concerns that would have doubtlessly resonated with the framers of the Second Amendment—specifically that the Act would:

constitute a sort of police . . . authorized . . . even to call to their aid such portion of the land and naval forces of the United States, or of the militia, “as may be necessary to the performance of the duty with which they are charged.” This extraordinary power is to be conferred upon agents irresponsible to the Government and to the people, to whose number the discretion of the commissioners is the only limit, and in whose hands such authority might be made a terrible engine of wrong, oppression, and fraud.¹³¹

But Johnson’s concerns were rejected by Congress, which overrode his veto and passed the Civil Rights Act over his opposition.¹³² This showdown would lead to the drafting of the Fourteenth Amendment, as Congress came to realize that the Thirteenth Amendment alone would not be sufficient to protect the newly liberated former slaves from retaliation and further oppression.¹³³

Embodied directly in the Fourteenth Amendment was the need to protect the newly freed African-Americans of the South through a federal occupation.¹³⁴ Thus, the fear of the standing army that animated the establishment of the arms right in 1791 played no role in the 1868 amendment that would later be held to incorporate the arms right against the states.

128. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

129. *Id.*

130. KYVIG, *supra* note 127.

131. President Andrew Johnson, Veto Message of the Civil Rights Bill (Mar. 27, 1866).

132. KYVIG, *supra* note 127.

133. *Id.* at 164–68.

134. *Id.*

II. BEYOND MILITARY LOCALISM: CIVILIAN ARMAMENT IN THE NINETEENTH CENTURY

Even with society's gradual acceptance of the professional standing army, civilian armament continued to play a significant role in American life in 1868.¹³⁵ But it served different purposes, and its social significance had changed. In this section, I focus on two major roles that civilian arms played in nineteenth century life. First, the extension of the right to bear arms to emancipated African-Americans became an objective of Reconstruction policy, as it was believed that the armament of blacks in southern states would protect them and obviate the need for permanent federal military occupation.¹³⁶ And second, as the nation expanded, the federal government embraced a strategy of granting newly expropriated land to groups of armed settlers, who would in turn serve as cheap garrisons, alleviating the need for regular troops.¹³⁷ In both cases, civilian armament served as an adjunct to, rather than a check on, the expanding power of the state and its military, further establishing the discontinuity between the libertarian principles reflected in the Second Amendment and the public-private cooperation reflected in the Fourteenth.

A. *Civilian Armament and the Post-War Occupation of the South*

The systematic disarmament of slaves by post-War southern governments, and the desire of abolitionists to extend the right to bear arms to African-Americans, has been discussed in depth by others.¹³⁸ What I will focus on here is the cooperative relationship between armed southern blacks and national troops that was envisioned by abolitionist legislators like Sumner, who declared that "first, ... the slaves should be declared free; and secondly, ... muskets should be put into their hands for the common defense."¹³⁹ As will be discussed, this cooperative vision has been minimized today, as commentators have overemphasized the "libertarian political principles" supposedly reflected in the arms right established by the Fourteenth Amendment.¹⁴⁰ The extent to which the Reconstructionists envisioned a cooperative

135. See generally Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL'Y REV. 611 (2006).

136. See *infra* Part II.A.

137. See *infra* Part II.B.

138. STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 105-116 (1984); Cottrol & Diamond, *supra* note 32, at, 343-49; AMAR, *supra* note 18, at 257-268.

139. CONG. GLOBE, 39th Cong., 1st Sess. 674 (1866).

140. District of Columbia v. Heller, 554 U.S. 570, 593 (2008).

role between armed African-Americans and national troops should not be underestimated; this was not a libertarian project. The legislative history of Reconstruction makes clear that the military was to play the primary role in safeguarding new, hard-won liberties, and private armament would play a significant but ancillary role.¹⁴¹

After the war, Republicans advocated for legislation that would deploy federal troops to help secure the liberties that southern blacks had finally achieved.¹⁴² At the same time, the Army issued general orders to ensure that southern states could not prohibit blacks from bearing arms.¹⁴³

The Army came under intense criticism in 1866 for not intervening when a riot in New Orleans against freed blacks and their white supporters left thirty-seven dead.¹⁴⁴ A year later, the Reconstruction Act of 1867 divided the former Confederacy into five military districts, each supervised by a general reporting directly to the President.¹⁴⁵ Simultaneously, it mandated the restoration of certain civil rights to the freed slaves.¹⁴⁶ Ultimately, it was the showdown between Johnson and Republicans over the subsequent Tenure of Office Act and Army Appropriations Act, largely meant to protect those generals and their officers from undue presidential interference, that led to the nation's first presidential impeachment.¹⁴⁷ While there was no unified congressional vision of what Reconstruction should look like,¹⁴⁸ there can be no doubt that the Army was to play a central role.

Dissatisfied with the perceived inactivity of certain military governors, Congress then acted to clarify the scope of their powers, which were immense:

[T]he commander of any district ... shall have power, subject to the disapproval of the General of the army of the United States ... to suspend or remove from office ... any officer or person holding or exercising, or professing to hold or exercise, any civil or military office or duty in such district under any power, election,

141. Donald H. Zeigler, *A Reassessment of the Younger Doctrine in Light of Legislative History of Reconstruction*, 1983 DUKE L.J. 987, 1008–1009 (1983).

142. *See supra* Part I.

143. HALBROOK, *supra* note 138, at 18–19.

144. FERRELL, *supra* note 120, at 16–17.

145. *Id.* at 24.

146. *Id.*

147. *Id.* at 29–30.

148. *Id.* at 17.

appointment or authority derived from, or granted by, or claimed under, any so-called State or the government thereof.¹⁴⁹

General Philip Sheridan, commanding the Texas-Louisiana district, would replace the elected governor of Louisiana pursuant to these wide powers, along with the State Attorney General, a judge, and the Mayor, City Treasurer, City Surveyor, Chief of Police, and City Attorney, and 22 members of the Board of Aldermen from the city of New Orleans.¹⁵⁰

Halbrook is representative of those who, in emphasizing the intent of the Fourteenth Amendment's framers to protect freedmen through civilian armament, in turn minimize the extent to which the national army was to play the primary role in safeguarding new liberties in the old south.¹⁵¹ By doing so, such commenters overstate the "libertarian political principles"¹⁵² animating any Fourteenth Amendment arms right.

The army was always to be the primary instrument of Reconstruction, expected to "exercise police and judicial functions, oversee local governments, [and] deal with domestic violence" on a scale unprecedented, before or since, in the continental United States.¹⁵³ While reconstructed state governments did constitute black militias, these were generally not used to confront ex-Confederates irregulars—a task that was left to the occupying army.¹⁵⁴ Federal troops were deemed preferable both because they were not parties to local disputes and because they would not have to return as individuals to local communities (and potentially be subject to retaliation) after operations were complete.¹⁵⁵ This is not to say that blacks played a subordinate role in the defense of African American communities—to the contrary, black volunteer regiments were demobilized more slowly than white regiments were, and thus were disproportionately represented in the occupying forces.¹⁵⁶ But this defense of black communities was largely conducted through the

149. 15 Stat.14 (1867); FERRELL, *supra* note 120, at 39.

150. *Id.*; ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS: 1789–1878, at 288 (1988).

151. *See generally* HALBROOK, *supra* note 138, at 117–72.

152. *District of Columbia v. Heller*, 544 U.S. 570, 593 (2008).

153. COAKLEY, *supra* note 150, at 268.

154. *Id.* at 269.

155. *Id.* at 302.

156. *Id.*

standing army rather than through the private exercise of the individual right to bear arms.¹⁵⁷

Indeed, contemporary accounts of the type of violence confronting southern blacks in the years preceding the Fourteenth Amendment show they were facing organized military violence that could be resisted only by an organized military. In Norfolk, in 1866, a group of African Americans gathered to celebrate the passage of the Civil Rights Act, and chaos erupted after a white man fired into the crowd.¹⁵⁸ Federal troops who deployed to the area were then met by a formation of a hundred whites wearing Confederate uniforms that fired a volley at them.¹⁵⁹ Marine reinforcements were called from the Navy Yard, and while the rioting soon ended, soldiers were met with “sporadic sniper fire” while patrolling the town.¹⁶⁰ This was, for all intents and purposes, a minor continuation of the war. Likewise, a campaign to suppress terrorist groups including the Ku Klux Klan in Tennessee was determined to require twenty regular companies, supplemented by 1,600 state volunteers.¹⁶¹ In other states, even federal troops, generally deployed as infantry, were unable to effectively suppress the Klansmen, who conducted raids on horseback.¹⁶²

When the nation’s other interests, including militarization of the West, began to draw troops away from the south, the reign of terror against vulnerable minorities there would gain force in spite of civilian armament.¹⁶³ By 1870, fewer than 6,000 soldiers remained in the south, including a contingent in Texas campaigning against Native Americans there.¹⁶⁴ The occupation soon declined in popularity with Northern voters. When the governor of Mississippi appealed for federal troops in 1875, President Grant refused to send them for political reasons.¹⁶⁵ The governor would later complain, “I was sacrificed” so that a Republican “might be made [Governor] of Ohio.”¹⁶⁶ In summary, while the history of Reconstruction provides some support for the idea that an arms right is embodied in the Fourteenth

157. *Id.*

158. *Id.* at 273–74.

159. *Id.*

160. *Id.*

161. *Id.* at 302.

162. *Id.*

163. FERRELL, *supra* note 120 at 52–53.

164. *Id.*

165. *Id.* at 54.

166. *Id.*

Amendment, that history shows that any such arms right was intended to supplement the standing army's role in the project of Reconstruction and is thus incompatible with the anti-army understanding of the Second Amendment.

B. "A Title Independent of Their Will":
Civilian Armament and the Expansion of American Empire

As discussed above, colonial governments initially encouraged or mandated the armament of their citizens in order to facilitate the expropriationist project of colonization. This colonial project was paused in the wake of the French and Indian War, when the British Government sought to consolidate newly won territory and manage its diplomatic relations with Native American nations.¹⁶⁷ It did so by drawing the Proclamation Line at the Appalachian Mountains and prohibiting further colonization beyond the line.¹⁶⁸ Though wildly unpopular with unlanded Americans eager to claim land in the west, this policy was continued for pragmatic reasons by early U.S. administrations, which lacked the military and financial resources to expand westward.¹⁶⁹ At the time, the manpower available to the Native American nations on America's borders was greater than that available to the under-strength and underfunded U.S. Army.¹⁷⁰ In 1789, Secretary of War Henry Knox estimated Congress would need to raise an army of 5,000 men, at a price of \$1,500,000 per year should it seek to "reduc[e] the Creeks to submit to the will of the United States and acknowledge the validity of the treaties stated to have been made by that nation with Georgia."¹⁷¹ Furthermore, a major concern during the first years of the American state was that a war against Native American nations

167. Thomas D. Curtis, *Land Policy: Pre-Condition for the Success of the American Revolution*, 31 AM. J. ECON. & SOC. 209, 214 (1972). (explaining Great Britain's need for new policies that would balance economic interests of the new land and political peace with the Native Americans in these new lands).

168. *Id.* at 214–221 (outlining the development of the Proclamation of 1763, its effects and how other countries responded to the Proclamation).

169. Paul Frymer, "A Rush and a Push and the Land is Ours": *Territorial Expansion, Land Policy, and U.S. State Formation*, 12 PERSPECTIVES ON POLITICS 119, 122–23 (2014).

170. RICHARD DILLON, INDIAN WARS: 1850–1890, at 7 (1984).

171. *Letter from Henry Knox to George Washington (July 7, 1789)*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-11-02-0210> (last modified June 13, 2018).

could trigger the opportunistic intervention of the Spanish or British.¹⁷² The early American government feared that uncontrolled expansion could trigger such a disastrous war, which would need to be fought on multiple fronts.¹⁷³

But despite this conventional weakness of the American military position, expansion of American power and territory was a policy goal of the young state, and Hamilton wrote in *Federalist No. 7* that “a large part of the vacant Western territory is, by cession at least, if not by any anterior right, the common property of the Union.”¹⁷⁴ As the Supreme Court put it in 1831, Native Americans occupied “a territory to which we assert a title independent of their will.”¹⁷⁵ The question facing the nation’s leaders was how, not whether, to expand into that territory. One answer would be legislation to incentivize the use of private force to carry out expansionist policy. As Paul Frymer explained, early U.S. legislation “enab[led] the government to overcome a weak conventional state by incentivizing and strategically privatizing an ‘armed occupation’ of citizens to settle and secure territory.”¹⁷⁶ Frymer focuses on land-use policies, but these, operating in conjunction with a legal system that armed American settlers and restricted the armament of Native Americans, guaranteed that the U.S. could secure and control territory without the burden of occupying it with understrength regular units.

The Jefferson Administration’s acquisition of the Louisiana Purchase territory from France vastly increased the territory that America would need to at least nominally defend. Jefferson’s primary strategy for garrisoning the new territory was “the immediate settlement, by donation of lands, of such a body of militia in the territories of Orleans & Missisipi [sic], as will be adequate to the defence of New Orleans.”¹⁷⁷ Accordingly, he proposed to give land to white men of military age who would agree to reside in Louisiana Territory for seven years.¹⁷⁸ Then-General

172. See, e.g., THE FEDERALIST NO. 24 (Alexander Hamilton) (“The savage tribes on our Western frontier ought to be regarded as our natural enemies, [and Britain’s or Spain’s] natural allies, because they have most to fear from us, and most to hope from them.”)

173. Frymer, *supra* note 169, at 122–23.

174. THE FEDERALIST NO. 7 (Alexander Hamilton).

175. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

176. Frymer, *supra* note 169, at 119.

177. *Letter from Thomas Jefferson to John Armstrong, Jr. (May 2, 1808)*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/99-01-02-7944> (last visited June 13, 2018).

178. Frymer, *supra* note 169, at 124.

Andrew Jackson advocated a similar policy to provide for the defense of newly acquired territory in Florida.¹⁷⁹

Armed-occupation policies were expanded through the use of military bounty lands, through which the government distributed strategically important land to veterans of the federal army.¹⁸⁰ This both saved money and “plant[ed] a brave, a hardy and respectable race of people as our advanced post, who would be always ready and willing (in case of hostility) to combat the savages and check their incursions.”¹⁸¹ Veterans of the War of 1812 were awarded land to settle on the border with Indian Territory in Illinois, where they would provide the government with an effective (and free) garrison force.¹⁸² These settlement acts “paid attention to security issues—instead of scattering far and wide, the surveys moved in small, compact, rectangular patterns that pushed settlers to live close to each other so as to provide a common defense.”¹⁸³ These acts demonstrate the fluid relationship between armed civilians and the standing army in the nineteenth century.

An example of these policies came in the aftermath of the brutal Second Seminole War, fought between the Seminole peoples of Florida and both regular and private American forces. During the war, the overstretched regular army had been forced to divert resources to Florida from coastal defenses, and 14% of the soldiers serving on the six-year campaign were lost to disease in the Florida swamps.¹⁸⁴ As a result, the army faced a wave of resignations such that it lost 18% of its commissioned officers.¹⁸⁵ But American settlers participated as well, pooling their funds to raise bounties and hire “those whose patriotism may induce them to volunteer to march against the hostile Indians in Florida.”¹⁸⁶ As the war had been semi-private to begin with (and had been a debacle for the U.S. Army), it is

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. Paul Frymer, Symposium, “*Law As . . .*” *Theory and Method in Legal History: Building an American Empire: Territorial Expansion in the Antebellum Era*, 1 U.C. IRVINE L. REV. 913, 935 (2011).

184. CLARK, *supra* note 99, at 44.

185. *Id.* at 45.

186. “We, the subscribers, do hereby agree to pay the sum placed opposite to our respective names [manuscript]: for the purpose of raising a fund to be distributed, as a bounty, among those whose patriotism may induce them to volunteer to march against the hostile Indians in Florida.” American Indian Histories and Cultures, *Agreement to raise funds to pay volunteers to fight in the second Seminole War, 1835–1842*, http://www.aihc.amdigital.co.uk/Documents/SearchDetails/Ayer_MS_286 (last visited Apr. 10, 2018)

unsurprising that the government turned to private settlers to garrison the territory afterwards.

The Armed Occupation Act of 1842 provided land to settlers who were privately armed and willing to occupy territory on which the United States had fought the Seminole people.¹⁸⁷ The Act provided that “any person, being the head of a family, or single man over eighteen years of age, able to bear arms” would be granted 160 acres of land in specific areas of Florida.¹⁸⁸ The terms of the act ensured that this new garrison force would not be redundant with the regular army, specifying that no land would be granted within two miles of any permanent military post that was “established and garrisoned at the time such settlement and residence was commenced.”¹⁸⁹ After the passage of the act, President John Tyler gave an address to Congress, saying of the defeated Seminoles:

The further pursuit of these miserable beings by a large military force seems to be as injudicious as it is unavailing. The history of the last year’s campaign in Florida has satisfactorily shown that ... the Indian mode of warfare ... render[s] any further attempt to secure them by force impracticable except by the employment of the most expensive means ... [I]t is essential that settlements of our citizens should be made within the line so established, and that they should be armed ... [I]t would be expedient to authorize the loan of muskets and the delivery of a proper quantity of cartridges or of powder and balls.¹⁹⁰

Settlers would generally be left to defend their new lands with their own armament. Thus, in 1849, the commanding officer at Fort Marion received a request for aid from settlers after they claimed to have been attacked by Native Americans.¹⁹¹ The officer declined to intervene, writing to the War Department, “If it becomes necessary, I can furnish muskets and cartridge. I need scarcely add that the best reliance of the inhabitants ought to be upon their own efforts.”¹⁹²

187. Armed Occupation Act, Ch. 122 (1842).

188. *Id.*

189. *Id.*

190. President John Tyler, *Message Addressing Indian Affairs in Florida (May 10, 1842)*, VIRGINIA MILLER CENTER, <https://millercenter.org/the-presidency/presidential-speeches/may-10-1842-message-regarding-indian-affairs-florida> (last visited Feb. 18, 2019).

191. Letter from C.F. Smith, (1850) *in* S. EXEC. DOC. NO. 49, at 25–27.

192. *Id.*

The Armed Occupation Act served as a model for other nineteenth-century land grants to armed civilians designed to facilitate westward expansion; for instance, Congressman Willard Preble Hall urged the House to “induce a portion of our people to remove to Oregon—to join the army of occupation of that country.”¹⁹³ Widespread private armament of American citizens was an integral part of the expansionist policy of the midcentury United States government. As Senator Charles Sumner (later a leading advocate for the Reconstruction-era amendments¹⁹⁴) put it in 1856, the “rifle has ever been the companion of the pioneer, and, under God, his tutelary protector against the red man and the beast of the forest.”¹⁹⁵ These policies came to a head with the Homestead Act, initially blocked by pro-slavery interests, which feared the creation of new free states in the west.¹⁹⁶ The act was finally passed during the Civil War, when Southern states were not able to block it.¹⁹⁷ As Paul Frymer observed, the Homestead Act “worked lock step” with a formal militarization of policy towards Native Americans.¹⁹⁸

Critical to the success of this project, the Second Amendment (which applied directly to territorial governments before they achieved statehood) ensured the armament of U.S. settlers.¹⁹⁹ Native Americans, who were as a group granted citizenship only in 1924,²⁰⁰ were the beneficiaries of no arms right.²⁰¹ This structure enabled the same result as the colonial arms statutes from the seventeenth and early-

193. Frymer, *supra* note 169, at 125.

194. KYVIG, *supra* note 127 at 176.

195. Senator Charles Sumner, The Crime Against Kansas (May 19–20, 1856). This racist and aggressive sentiment has been recast as a defensive one in modern discourse. Thus, during oral argument for *District of Columbia v. Heller*, Justice Kennedy asked whether the Second Amendment had “to do with the concern of the remote settler to defend himself and his family against hostile Indian tribes . . .” Transcript of Oral Argument at 8, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

196. Frymer, *supra* note 169, at 128–29.

197. *Id.*, at 128–29.

198. *Id.*, at 129.

199. Today, of course, many protections of the bill are provided to certain non-citizens as well. But during the Nineteenth Century, such rights were construed as the “privileges of a citizen,” as was made clear in the ugly *Dred Scott* decision. 60 U.S. 393, 406 (1857).

200. Act of June 2, 1924, Pub. L. No. 68-175, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. 1401). *But see* Mark Savage, *Native Americans and the Constitution: the Original Understanding*, 16 AM. INDIAN L. REV. 57 (1991).

201. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (Native Americans distinguished from “our citizens”); *Elk v. Wilkins*, 112 U.S. 94 (1884) (holding the Fourteenth Amendment did not confer citizenship on Native Americans).

eighteenth centuries had mandated: the creation of a military gap between white settlers and indigenous peoples. At times, Congress went further, passing a statute in 1802 barring the sale of firearms to Native Americans in geographically defined areas, which would be cited favorably by the Supreme Court (in a dissent to the infamous *Dred Scott* decision) in 1857.²⁰²

The relationship between arms rights and Native American policy can be further seen through state constitutional analogues to the Second Amendment. The antebellum Arkansas constitution provided the right to bear arms for “free white men of this state.”²⁰³ When the state seceded (and the Confederacy looked to ally with Native American nations against their common adversary), the protection was broadened to provide that “the free white men, and Indians, of this state shall have the right to keep and bear arms.”²⁰⁴ After the Confederacy’s defeat, a pro-Union state convention would revert to the original version, which was revised after the Fourteenth Amendment to provide the right to “citizens of this state.”²⁰⁵ The exclusion of Native Americans, other than those who may have individually achieved naturalized citizenship, was by design.

III. *HELLER*, *MCDONALD*, AND HISTORICAL CHANGE

As set forth in Parts One and Two, the American understanding of the role of private armament in society evolved over time and was anything but constant. During the period of initial colonization, governments mandated the keeping and bearing of arms, which ensured European military superiority over indigenous peoples.²⁰⁶ Later, as Eighteenth-Century European wars brought to the Americas a professional military that clashed with colonists, discussions of private armament were swept up with the fear that a mercenary force answerable to a centralized government would disarm colonial militias.²⁰⁷ This concern reached its height after the Revolutionary War and unquestionably motivated the framers of the Second Amendment, but it had largely receded by the Reconstruction period. As the

202. *Scott*, 60 U.S. at 631 (Curtis, J. dissenting) (“If one who was an inhabitant of Louisiana at the time of the [Louisiana Purchase] had afterwards taken property then owned by him, consisting of fire-arms ... and had gone into the Indian country ... to sell them to the Indians, all must agree the third article of the treaty would not have protected him from indictment under the act of Congress of March 30, 1802.”)

203. HALBROOK, *supra* note 138, at page 116.

204. *Id.*

205. *Id.* at 138–39.

206. *See, e.g., supra* note 25.

207. *See supra* note 44 and accompanying text.

Nineteenth Century progressed, the American military gained social respectability and focused on westward expansion.²⁰⁸ And during the Civil War and Reconstruction, the U.S. Army was seen as a liberatory force by the pro-Union Republicans who would draft the Fourteenth Amendment.²⁰⁹ Rather than constraining centralized state authority, private armament provided the state with a cheap and efficient garrison force as it expanded its borders. Can this history be reconciled with the historical analysis in *Heller* and *McDonald*?

A. District of Columbia v. Heller

Writing for the majority in *Heller*, Justice Scalia's analysis began after the Glorious Revolution, with the English Bill of Rights and its stipulation that Protestants would not be disarmed by the Crown.²¹⁰ According to Scalia, the recognition of this right grew out of attempts by James II and Charles II to use "select militias loyal to them to suppress political dissidents, in part by disarming their opponents."²¹¹ The majority then explained that, "what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists," noting the Crown's attempts to disarm rebellious colonists during the 1760s and 1770s.²¹² Analyzing the colonists' reaction to these attempts, Scalia concluded that they understood the right to bear arms as "enabl[ing] individuals to defend themselves."²¹³

The Court then examined the Second Amendment's prefatory clause,²¹⁴ noting that the militia was understood to comprise "all males physically capable of acting in concert for the common defense."²¹⁵ According to *Heller*, the founding generation believed "history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by

208. *See supra* note 173 and accompanying text.

209. *See supra* note 130 and accompanying text.

210. *District of Columbia v. Heller*, 554 U.S. 570, 593–95 (2008).

211. *Id.* at 592.

212. *Id.* at 594.

213. *Id.*

214. "A well regulated Militia, being necessary to the security of a free State..." U.S. CONST. amend II.

215. *Heller*, 554 U.S. at 595 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). This definition, of course, omits that the militia was commonly understood to be comprised only of all *white* males, but the Court's primary point—that "the militia" was not synonymous with "a select militia" was accurate.

taking away the people's arms, enabling a select militia or standing army to suppress political opponents."²¹⁶ Scalia detailed how this belief informed the debate over Congressional power that took place leading up to ratification.²¹⁷ Finally, the majority in *Heller* considered certain state constitutional analogues to the Second Amendment that were adopted between 1789 and 1820.²¹⁸

Irrespective of the merits of the Court's conclusion that the framers of the Second Amendment viewed the right to bear arms as protecting "an individual citizen's right to self-defense,"²¹⁹ what is clear is that the Court's analysis focused on society's understanding of the right to bear arms *leading up to and during ratification* of the Second Amendment. As the Court recognized, trepidation that a professional military could be used to disarm the body politic was integral to society's understanding of the right to bear arms at that time.²²⁰

The *Heller* opinion also considered "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century."²²¹ Despite the fact that the Fourteenth Amendment was not before the Court, the majority briefly discussed the Reconstruction context, noting the Republican Congress's concern that "[b]lack were routinely disarmed by Southern States after the Civil War."²²² As discussed above, there can be no doubt that the systematic disarmament of recently emancipated African American populations was an animating concern for the framers of the Fourteenth Amendment.

But unaddressed by *Heller* is the extent to which protection from a standing army was *no longer* a concern by this point. Instead, the African American communities that the Congress of 1868 sought to safeguard were expected to work hand-in-hand with the U.S. Army, which was explicitly envisioned as their protector by the Civil Rights Act.²²³ This parallels the way that nineteenth century communities of armed settlers closely coordinated with the regular army to engage in a project of expansion and expropriation. The *Heller* decision treats the post-Civil War era as an example of continuity with the Revolutionary era, but as we have seen, the public understanding had in fact undergone profound change.

216. *Id.* at 598.

217. *Id.* at 598–602.

218. *Id.* at 602–03.

219. *Id.*

220. *Id.*

221. *Id.* at 605–08.

222. *Id.* at 614.

223. *Id.*

B. *McDonald v. City of Chicago*

In *McDonald*, gun regulations similar to those in *Heller* were challenged, and the defendant cities argued that the Second Amendment had “no application to the states.”²²⁴ Justice Alito rejected this assertion, citing *Heller*’s conclusion that the Second Amendment “protects the right to keep and bear arms for the purpose of self-defense” and holding that the Second Amendment was incorporated by the Fourteenth Amendment.²²⁵ The Court reiterated Supreme Court doctrine that incorporated amendments be applied to the states to the same extent as the Federal Government.²²⁶

Alito examined the intention of the Fourteenth Amendment’s framers to incorporate the Bill of Rights.²²⁷ In analyzing the arms right, the majority began by reiterating *Heller*’s analysis of late colonial period, noting that “King George III’s attempt to disarm the colonists in the 1760’s and 1770’s ‘provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms.’”²²⁸ While not incorrect, as discussed above, the framers of the Fourteenth Amendment conceptualized the relationship between the federal government and armed citizens in a fundamentally different way. Alito then briefly acknowledged that, by the 1850s “the fear that the National Government would disarm the universal militia[] had largely faded as a popular concern.”²²⁹ He then explained the goal of Reconstruction era reformers to protect emancipated blacks from predations in the South by extending the arms right to them.²³⁰

But rather than distinguish between the eighteenth and nineteenth century understandings of the right to bear arms, *McDonald* argues for and implies continuity, sweeping those two divergent understandings into a broad “individual right to self defense.”²³¹ Some problems posed by the Court’s framing will be discussed below.

224. 561 U.S. 742, 748–50 (2010).

225. *Id.* at 742. Justice Thomas concurred in part and concurred in the judgment, agreeing that the Fourteenth Amendment “makes the right to keep and bear arms set forth in the Second Amendment ‘fully applicable to the states’” but arguing that such a result should be reached through that amendment’s Privileges and Immunities Clause rather than its Due Process Clause. *Id.* at 806–858 (Thomas, J., concurring).

226. *Id.* at 765.

227. *Id.* at n.9.

228. *Id.* at 768 (quoting *Heller*, 554 U.S. at 594).

229. *Id.* at 770.

230. *Id.* at 770–778.

231. *Id.* at 777.

IV. IMPLICATIONS AND CONCLUSIONS

A. *Gun Regulations*

This analysis has dramatic implications for discourse on gun issues in the United States, which rarely takes into account either the independent relevance of the Fourteenth Amendment context or the extent to which the civilian ownership of firearms coexisted with, rather than checked, state authority throughout much of American history.

Many proponents of gun regulations have argued that the right to bear arms directly relates only to the fear of a standing army and has been rendered irrelevant by the overwhelming superiority a modern army is presumed to have over its citizens.²³² Thus, the question has been raised as to whether, “given the tremendous changes that have occurred in weapons technology, the framers’ presumed intention of enabling the population to resist tyranny remains viable in the modern world.”²³³ I would argue that this specific objection to the arms right has been overstated. As an initial matter, for all its modern weaponry, America’s twenty-first century standing army faced difficulties occupying Iraq that paralleled the difficulties the British Army faced in colonial America. But the most effective weapon of the Iraqi insurgency—the improvised explosive device or IED²³⁴—is a far cry from the weapons protected by the Second Amendment under *Heller*.²³⁵ And no remotely serious argument can be made advancing such a weapon’s social desirability.²³⁶ The comparison merely demonstrates how far the holding of *Heller* truly lies from the understanding of the Second Amendment’s drafters, who sought to protect those types of private armament that would be effective against regular forces.

But more fundamentally, popular framing overlooks the extent to which the Fourteenth Amendment’s incorporation of the arms right against the states reflected

232. *E.g.*, John Paul Stevens, *Repeal the Second Amendment*, N.Y. TIMES, Mar. 27, 2018. (“Concern that a national standing army might pose a threat to the security of the separate states led to the adoption of that amendment . . . [t]oday, that concern is a relic of the 18th Century.”)

233. Cottrol & Diamond, *supra* note 32, at 315.

234. *See* NICHOLAS J. SCHLOSSER, *THE SURGE* 28 (2017).

235. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

236. Spitzer, *supra* note 91, at 363 (“Academics who toy with any serious notions about revolutions would be well advised to consult the voluminous scholarly literature on the subject . . . which details and underscores the extent to which violence . . . societal dislocation, and disruption . . . make revolution or armed insurrection anything but a simple, reasoned, desirable, or commensurate alternative to peaceful methods of social change.”).

and adopted an understanding that emphasized *cooperation* rather than *confrontation* with the national military. It is far from clear that resistance against centralized tyranny was a core concern of the framers of the Fourteenth Amendment.

Vocal opponents of gun regulations have arguably been even more neglectful of this historical context. What seems bizarre to say about an Eighteenth-Century amendment to the United States Constitution is nonetheless true: public discussion of the Second Amendment often leads to references to Nazi Germany, and the idea that Nazi-era gun regulations (which disarmed Jewish citizens) enabled the many horrors committed by that regime.²³⁷ While the “Nazi/gun control” paradigm is met with disdain by most academics,²³⁸ its pervasiveness in American public discourse has affected and influenced more formal analysis of the Second Amendment.²³⁹ Accordingly, Judge Kozinski of the Ninth Circuit speculated that

237. See generally, Bernard E. Harcourt, *On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars (A Call to Historians)*, 73 FORDHAM L. REV. 653 (2004); Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 FORDHAM L. REV. 681 (2004) (While no “survey has explored the extent to which everyday Americans liken gun control advocates to Hitler . . . there is some evidence that gun-rights advocates’ slippery slope argument . . . has been effective.”). Perhaps inevitably, during the writing of this article, the survivors of the Stoneman Douglas High School massacre, while advocating for stricter gun regulation, were compared to Nazis by political opponents. See Molly Olmstead, *The Public Attacks on the Parkland Teens Are Getting Nastier*, SLATE (Mar. 29, 2018), (<https://slate.com/news-and-politics/2018/03/the-insults-pro-gun-people-use-against-parkland-students-david-hogg-and-emma-gonzalez.html>).

238. See e.g., Joseph Blocker, *Has the Constitution Fostered a Pathological Rights Culture? The Right to Bear Arms*, 94 B. U. L. REV. 823 (2014) (describing the comparison between gun control and the Nazis as a rhetorical device to stoke fear); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107, 128 (1991) (arguing that this is “not a question of constitutional law, as it “presuppose[s] the end of constitutional government.”); Jack N. Rakove, *The Second Amendment: The Highest State of Originalism*, 76 CHI.-KENT. L. REV. 103, 165 n. 156 (2000) (rejecting the argument “that our own frame of reference should include the experience of totalitarian rule and genocide in countries” that lacked a “democratic or constitutional culture . . . across a period of some generations”).

239. See *Silviera v. Lockyer*, 328 F.3d 567, 569–70 (9th Cir. 2003) (Kozinski, J., dissenting); See Stephen P. Halbrook, *Nazism, the Second Amendment, and the NRA: A Reply to Professor Harcourt*, 11 TEX. REV. L. & POL. 113, 119-123 (2006-2007); Stephen P. Halbrook, *Nazi Firearms Laws and the Disarming of the German Jews*, 17 ARIZ. J. INT’L & COMP. L. 483 (2000); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87 (1992) (“The disarming of minorities or dissenters in a climate in which they may be subject to private violence (often encouraged by government) has been a well-established policy in many countries including Nazi Germany and the Soviet Union.”).

“six million Jews armed with rifles could not so easily have been herded into cattle cars,” noting that “[a]ll too many of the other great tragedies in history ... were perpetrated by armed troops against unarmed populations.”²⁴⁰

The link between the Holocaust and the gun laws of Nazi Germany has no basis in historical fact,²⁴¹ but the contemporary fixation on it reveals much about the modern American conceptualization of civilian arms ownership. In Kozinski’s historical counterfactual (and in the countless similar ones posed by today’s “gun-rights” advocates²⁴²), greater civilian armament would have served as a check on a genocidal regime by empowering its opponents and victims. But the arms right incorporated by the Fourteenth Amendment—and the history of civilian weaponry in America, dating back to the first colonial settlements—embodies a spirit of armed civilians working in coordination with the forces of national government, for goals both laudable (the protection of free blacks from the predations of the Ku Klux Klan) and indefensible (the coordinated expropriation of indigenous land, enabling the ultimate dismantling of Native American nations).²⁴³

In light of this history, we must view with a critical eye the popular idea of the Second Amendment as enabling resistance to state coercion. Kozinski’s assertion that “[a]ll too many of the other great tragedies in history... were perpetrated by armed troops against unarmed populations” bears little relation to the lived history of private armament in America, which in fact enabled armed populations to take part in several great tragedies of history as private adjuncts to state power.²⁴⁴

B. *Examining the Utility of Originalist Analysis*

Arguably, portions of the Bill of Rights were originally intended to apply only against the Federal government, while other portions were intended to apply against the states as well. On a purely textual basis, the language of the First Amendment (“Congress shall make no law...”) is directed purely at the Federal Government, while the text of the Second Amendment (“...the right of the people

240. *Silviera*, 328 F.3d at 569–70 (Kozinski, J., dissenting).

241. Robert J. Spitzer, *Don’t Know Much About History, Politics, or Theory: A Comment*, 73 FORDHAM L. REV. 721 (2004).

242. *E.g.*, WAYNE R. LAPIERRE, GUNS, CRIME, AND FREEDOM 86–87 (1994) (“In Germany, Jewish extermination began with the Nazi Weapon Law of 1938 ... that required police permission of ownership of a handgun.”) (quoted in Bernard E. Harcourt, *On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars (A Call to Historians)*, 73 FORDHAM L. REV. 653 (2004)).

243. Spitzer, *supra* note 91, at 351.

244. *Silviera*, 328 F.3d at 569–70 (Kozinski, J., dissenting).

... shall not be infringed”) is directed at both federal and state governments.²⁴⁵ And the concern about standing armies that the Second Amendment was intended to address would have logically applied in equal force against any select militia established by state governments—hence the inclusion of analogues to the Second Amendment in many contemporary state constitutions. Indeed, the Supreme Court of Georgia determined that the state (which lacked a constitutional analogue) *was* bound by the Second Amendment in *Nunn v. State*, which cited the English Bill of Rights as the first declaration of the right to bear arms.²⁴⁶ Nevertheless, in 1833, the Supreme Court unanimously determined that the entire Bill of Rights bound only the federal government.²⁴⁷

Decades later, the drafters of the Fourteenth Amendment attempted to alter this course through the Privileges and Immunities Clause.²⁴⁸ Their effort would be stymied by the Supreme Court in the *Slaughter-House Cases*, which rendered the Privileges and Immunities Clause a virtual nullity.²⁴⁹ Only during the Warren Court, with its doctrine of selective incorporation, would the Bill of Rights begin to be systematically applied against the states.²⁵⁰ This project reached the Second Amendment with *McDonald*.²⁵¹

The Court has also held that incorporated amendments should be applied to the states to the same extent as the federal government.²⁵² Specifically, in *Malloy v. Hogan*, a case involving the incorporation of the Fifth Amendment privilege against self-incrimination, the Court held that incorporated rights “are all to be enforced against the States under the Fourteenth Amendment according to the same

245. U.S. CONST. amends. I, II.

246. 1 Ga. 243 (1846). The logic of the decision’s reference to the English Bill of Rights is questionable, as it bound only the crown and did not restrict the authority of Parliament. As Parliament remained free to disarm populations at will, the Bill is difficult to characterize as a declaration of the people’s rights. Moreover, the Supreme Court of Georgia ignored binding United States Supreme Court precedent, which had already established that the Bill of Rights did not bind the states. See *infra* n. 247. Though questionably decided, the *Nunn* decision provides an intriguing glimpse into what an alternative line of jurisprudence—one where portions of the Bill of Rights had been applied against the states from the beginning—might have looked like.

247. See *Barron v. Mayor of Baltimore*, 32 U.S. 243, 250–51 (1833).

248. KYVIG, *supra* note 127, at 164; see also *McDonald v. City of Chicago*, 561 U.S. 742, 806–12 (2010) (Thomas, J. concurring).

249. 83 U.S. 36 (1873).

250. AMAR, *supra* note 18, at 238–39.

251. *McDonald*, 561 U.S. at 750.

252. *Id.* at 765.

standards that protect those personal rights against federal encroachment.”²⁵³ The Court reasoned that it “would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court.”²⁵⁴ While this reasoning might seem specific to the context of those rights relating to criminal procedure, *Malloy* was cited by the *McDonald* decision in holding that the right to bear arms applied equally against state and federal governments.²⁵⁵ Thus, current Supreme Court doctrine leaves little room to consider the profound changes in understanding between ratifications of the Bill of Rights and the Fourteenth Amendment.

Taken together, *Heller* and *McDonald* create an appearance of continuity between the Second and Fourteenth Amendment understandings of the arms right by including both in the broad concept of an “individual right to self defense.”²⁵⁶ This is partly enabled by an uncritical modern sanitation of the offensive and militarized historical uses of civilian armament: compare Tyler’s pronouncement against the Seminoles that “further pursuit of these miserable beings” should be accomplished by “settlements of our citizens... that... should be armed”²⁵⁷ with Justice Kennedy’s statement during oral argument for *Heller* that the Second Amendment had “to do with the concern of the remote settler to defend himself and his family against hostile Indian tribes. . . .”²⁵⁸ Such sanitation has allowed aggressive historical expropriation to be reimagined as “self defense.”

To create the appearance of continuity, “self defense” must be defined so broadly as to encompass: (1) the militiaman, standing against the deprivations of a mercenary regular army “with arms in their hands, officered by men chosen from among themselves, . . . and united and conducted by [state] governments,”²⁵⁹ (2) the freedman, standing with a “musket[] . . . put into [his] hands for the common defense” of his community in coordination with a federal army of occupation,²⁶⁰ and (3) the settler, often a veteran of the federal army, granted newly conquered land and “loan[ed] . . . muskets and . . . a proper quantity of cartridges or of powder and

253. 378 U.S. 1, 10 (1964).

254. *Id.* at 11.

255. *McDonald*, 561 U.S. at 765.

256. *Id.* at 770.

257. Tyler, *supra* note 190.

258. Sumner, *supra* note, 195.

259. THE FEDERALIST NO. 46, at 247 (James Madison) (George W. Carey & James McClellan eds., 2001).

260. CONG. GLOBE, 39TH CONG., 1ST SESS., PT. 1, 674 (FEB. 6, 1866).

balls”²⁶¹ by the government for confrontation with Indigenous Peoples. These distinct purposes and specific understandings were blurred by the Court’s contemporary formulation, which represents an abandonment of any real attempt to precisely discern the intentions of the Amendments’ framers.

But perhaps this project was doomed from the beginning. Society’s understanding of civilian armament has been in flux since the first Virginian military censuses registered the number of weapons owned by the inhabitants of its various outposts.²⁶² It continued to evolve afterwards in response to changing needs of American society and the American state.²⁶³ If originalist analysis seeks to interpret constitutional provisions according to “the meaning the words and phrases of the Constitution would have had, in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted,”²⁶⁴ it will inevitably lead to an incoherent result when attempting to reconcile understandings and meanings at two specific points in time, separated by decades and momentous social, economic, and political changes. Only a vague and nebulous definition, that does no justice to the nuanced and complex meanings ascribed to the concepts governed by constitutional provisions is likely to result from such analysis.

One solution would be to reconsider the application of *Malloy* to the incorporation of the Second Amendment. This would allow us to interpret the incorporated arms right by reference to the meaning of civilian armament to the framers of the Fourteenth Amendment in 1868. But the creation of different constitutional standards governing gun regulations, separating states and federal possessions, would be a victory for legal formalism over social function. In the alternative, I suggest that the incorporation of the arms right should be reconsidered using different modes of analysis, leaving more room to consider the many changes in the social understanding of private armament that separated 1791 and 1868, and perhaps also those that separate 1868 and the present day.

261. Tyler, *supra* note 190.

262. William G. Merkel, *Mandatory Gun Ownership, the Militia Census of 1806, and Background Assumptions Concerning the Early American Right to Arms: A Cautious Response to Robert Churchill*, 25 LAW & HIST. REV. 187, 190 (2007).

263. *Id.* at 187.

264. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1118 (2003).