

eignty. It is, instead, based on the practical plausibility of the idea that in our contemporary democracy, rights and politics go hand in hand.

OUTSIDER VOICES ON GUNS AND THE CONSTITUTION

**FREEDMEN, THE FOURTEENTH AMENDMENT,
AND THE RIGHT TO BEAR ARMS, 1866-1876.** By
Stephen P. Halbrook.¹ Westport, Ct. Praeger Publishers.
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*Nelson Lund*²

If there is any good justification for the economic cartel in legal services, perhaps it lies in our aspirations as a learned profession. In recent years, those aspirations—or pretensions—have been looking insecure. On one side, the practice of law has become harder to distinguish from other business ventures, for it is increasingly specialized and ever more openly oriented toward profit maximization. On another side, legal academics seem to have less and less to do with the practicing bar and the concerns of its members. At least in law schools where scholarship is rewarded, success is practically defined as getting yourself taken seriously by other academics at similar institutions. When someone is said to deserve tenure on the basis of a “widely cited” article, it’s usually assumed that this does not refer to citations in CLE materials or legal briefs.

1. Attorney at Law Fairfax, Virginia. Cases argued in the U.S. Supreme Court include *Printz v. United States*, 521 U.S. 898 (1997).

2. Professor of Law, George Mason University School of Law. Thanks to Stephen G. Gilles, Mara S. Lund, and John O. McGinnis for helpful comments, and to George Mason Law School for research support.

Notwithstanding these trends, and whatever the net of their advantages and disadvantages may be, law has not simply ceased to be a scholarly profession. For two reasons, the publication of Stephen P. Halbrook's *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876*, provides a fitting occasion to celebrate the contributions that practicing lawyers can make to academic life. First, law professors have recently and belatedly begun to think about the Second Amendment, a development that occurred only after the ground had been broken by practitioners like Halbrook and Don B. Kates, Jr. These pioneers have had to fight long and hard before receiving the satisfaction of seeing their claims taken seriously by the academic establishment. Second, Halbrook's latest contribution focuses on the Privileges or Immunities Clause,³ another constitutional provision that has been revived as a serious subject of study in significant part through the efforts of learned legal practitioners. In the course of celebrating such contributions from outside the academy, we should also pause to ask why they were needed. I'll return to that question at the end of this review.

Halbrook's book presents a chronological account of the background and evolution of the Fourteenth Amendment and several important pieces of related legislation, as well as of initial enforcement efforts during Reconstruction. Halbrook's eye is always focused on showing that protection of the freedmen's right to arms was both a central and a "cutting edge" element in the Reconstruction effort. This is followed by a very detailed description of the events leading up to the Supreme Court's decision in *United States v. Cruikshank*.⁴ This case arose when federal authorities used the Enforcement Act of 1870 to prosecute a number of whites who had allegedly participated in a massacre of black citizens. In a decision that Halbrook treats as the death knell for Reconstruction, the Supreme Court held that the indictment was legally insufficient.

Halbrook's exploration of Reconstruction history is a means to other ends. His principal goals are to show that the Privileges or Immunities Clause prohibits infringement by the states of the right to keep and bear arms, that the Supreme Court has never decided otherwise, and that the Court should now decide that the Fourteenth Amendment does protect that

3. U.S. Const., Amend. XIV, § 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

4. 92 U.S. 542 (1875).

right. Though it does not fully address every question relevant to its thesis, this book is a valuable addition to the literature, and it deserves more serious consideration than it is likely to get today. But perhaps its time will come.

I. A BRIEF HISTORY OF THE REDISCOVERY OF THE SECOND AMENDMENT

Before turning to the issues raised by Halbrook's book, let's set the stage. For well over a century after its ratification, the Second Amendment was barely noticed by the courts.⁵ And understandably so. The federal government was not in the business of infringing the right to arms, and Second Amendment challenges to state laws were foreclosed by *Barron v. Baltimore*.⁶ Eventually, in the aftermath of Prohibition, Congress enacted restrictions on a few "gangster" weapons—machine guns, sawed-off shotguns and rifles, and silencers. The Supreme Court rejected a Second Amendment challenge to this statute in a lazy and ambiguous 1939 opinion from which almost nothing—or almost anything—could be inferred.⁷

The lower federal courts decided to infer a kind of nothingness. For decades, they uniformly held that the right to keep and bear arms belonged only to *governments*,⁸ or at most was a right that individual citizens could exercise only in the *service* of their governments.⁹ The Supreme Court had never adopted either of these propositions, and the lower courts accepted them on the basis of intuitions rather than cogent arguments. But they did so quite consistently.¹⁰ Thus, the Second Amendment's

5. See U.S. Const., Amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.")

6. 32 U.S. (7 Pet.) 243 (1833) (Bill of Rights applies only against federal government).

7. See *United States v. Miller*, 307 U.S. 174 (1939).

8. The leading case is *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942), rev'd on other grounds, 319 U.S. 463 (1943). *Tot* featured the dictum that "this amendment, unlike those providing for protection of free speech and freedom of religion, was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power." 131 F.2d at 266 (footnote citing *Federalist Papers* omitted).

9. An early example of this variant is *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942), where the court rejected a Second Amendment claim by a defendant who had violated a federal statute forbidding those convicted of violent crimes from possessing firearms: "[T]here is no evidence that the [defendant] was or ever had been a member of any military organization or that his use of the weapon under the circumstances disclosed was in preparation for a military career."

10. Until the recent decision in *United States v. Emerson*, 46 F. Supp. 2d 598 (N.D.

“right of the people” to keep and bear arms became as empty as the First Amendment’s “right of the people” to petition the government would be if it belonged only to lobbyists employed by government agencies. Or as empty as the Fourth Amendment’s “right of the people” to be secure against unreasonable searches and seizures would be if it applied only to the offices of government officials.

In 1965, a practicing lawyer named Robert Sprecher challenged the regnant “states’ right” theory in an essay that he submitted in a contest sponsored by the American Bar Foundation. Sprecher’s essay, *The Lost Amendment*, won the contest and was published in the *ABA Journal*.¹¹ The essay briefly sketched the historical roots of the right to arms and identified several arguments in favor of its rediscovery. As Sprecher observed, the Second Amendment was adopted at a time when the armed citizenry, organized into a well trained militia, was widely regarded as an appropriately republican check on potentially tyrannical governments. But Sprecher argued that this did not necessarily imply that the right to arms had become outmoded or superfluous, let alone that it was a right belonging to governments rather than individuals. Notwithstanding the advent of the atomic age, he contended, a true citizen militia has utility for civil defense and even for the continued deterrence of political coups. Even more important, government’s inability to suppress criminal violence and its increasing taste for discouraging legitimate self defense had combined to embolden criminals while fostering a morally decadent national apathy.¹² Sprecher concluded that the Second Amendment protects both the right to arm a state militia and the right of the individual to keep and bear arms for self defense, and he urged that the right actually be “enlarged” by applying it against the state governments through the ongoing process of Fourteenth Amendment incorporation.

The Lost Amendment was itself promptly lost.¹³ During the following two decades, a handful of practicing lawyers published

Tex. 1999) (appeal pending), no statute had ever been invalidated by the federal courts on Second Amendment grounds.

11. Robert A. Sprecher, *The Lost Amendment*, 51 A.B.A. J. 554-57, 665-69 (1965).

12. This point has been developed with great force by another thoughtful practitioner. See Jeffrey R. Snyder, *A Nation of Cowards*, 113 Pub. Interest 40 (1993).

13. Apart from a few citations in articles written by practicing lawyers, I have found only one citation to Sprecher’s Second Amendment analysis in any law review prior to the mid-1980’s. This citation occurred in a footnote that dismissed the right to arms as obsolete without addressing Sprecher’s arguments for the contrary conclusion. See Peter

articles suggesting that the Second Amendment guarantees an individual right to arms,¹⁴ but their work was placed in obscure journals and was quite ignored by the academic establishment and the courts. Thus, Laurence Tribe's *American Constitutional Law*, which may serve as a handy proxy for establishment views, casually dismissed the Second Amendment in 1978 at the end of a footnote to a discussion of state sovereignty, claiming that "the sole concern of the second amendment's framers was to prevent such federal interferences with the state militia as would permit the establishment of a standing national army and the consequent destruction of local autonomy."¹⁵

All of this should have changed in the early 1980s, when Halbrook and Kates published their first major works on the Second Amendment. Kates' article in the *Michigan Law Review* presented a detailed and thoroughly annotated critique of the judicially favored "states' right" interpretation, arguing at length its incompatibility with the constitutional language and with the historical and philosophical background against which that language had been adopted.¹⁶ Halbrook's even more ambitious book on the evolution of the right to arms undertook a survey extending all the way back to ancient Greece and exploring a wealth of English and American historical and legal materials.¹⁷ Like Kates (and Sprecher), Halbrook concluded that the Second Amendment protects an individual or private right, and that this right should be enforced against both the federal and state governments.

Although there are important points on which one can quarrel with Halbrook and Kates, one cannot quarrel with the proposition that they produced serious scholarship deserving of

Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 75-76 n.6 (1974).

14. See, e.g., David T. Hardy and John Stompoly, *Of Arms and the Law*, 51 Chi.-Kent L. Rev. 62 (1974); David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 Fordham Urban L.J. 31 (1976); Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 Okla. L. Rev. 65 (1983).

15. Laurence H. Tribe, *American Constitutional Law* 226 n.6 (Foundation Press, 1978). Professor Tribe purported to support this proposition by citing one fragment of legislative history. The cited snippet from the congressional debates neither said nor implied any such thing. Professor Tribe also cited a series of three Supreme Court opinions that he asserted "comports with the narrowly limited aim of the amendment as merely ancillary to other constitutional guarantees of state sovereignty." *Id.* None of the cited cases said or implied that the Second Amendment has any such narrowly limited aim.

16. See Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204 (1983).

17. See Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (U. New Mexico Press, 1984).

serious examination. But this is not how they were treated. In the 1988 edition of *American Constitutional Law*, for example, Professor Tribe repeated verbatim what he had said ten years earlier. He then added some additional remarks, and cited Kates' *Michigan Law Review* article. Rather than confront Kates' elaborate and thoroughly researched arguments, however, Professor Tribe concluded with the offhand comment that "the use in the amendment's preamble of the qualifying phrase 'well regulated' makes any invocation of the amendment as a restriction on state or local gun control measures extremely problematic."¹⁸

Things finally did begin to change in 1989. A constitutional law professor, whose introduction to the Second Amendment evidently came from outside the academy, published a comment in the *Yale Law Journal* sympathetically summarizing the arguments that had been developed by Halbrook, Kates, and other non-academics.¹⁹ Without endorsing their conclusions,²⁰ he asked whether the principles generally espoused among his own "elite" portion of the bar did not require that such serious arguments at least be seriously confronted.²¹ The following decade produced a flood of writing, by members of the "elite" and others,²² almost unanimously rejecting the judicially dominant state's right interpretation. In the latest edition of his treatise, Professor Tribe has finally conceded that the Second Amendment recognizes "a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes," and that this right may well be among the privileges and immunities protected by the Fourteenth Amendment.²³

18. Laurence H. Tribe, *American Constitutional Law* 299 n.6 (Foundation Press, 2d ed. 1988).

19. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 *Yale L.J.* 637 (1989). On the origins of this piece, see *id.* at 637 n.†.

20. *Id.* at 642 ("It is not my style to offer 'correct' or 'incorrect' interpretations of the Constitution.").

21. *Id.* ("[W]e might consider the possibility that 'our' views of the Amendment, perhaps best reflected in Professor Tribe's offhand treatment of it, might themselves be [as] deserving of the 'tendentious' label [as the views of NRA advocates]").

22. Cf. *id.* at 639 n.13 ("One might well find this overt reference to 'elite' law reviews and 'major' writers objectionable, but it is foolish to believe that these distinctions do not exist within the academy. . .").

23. Laurence H. Tribe, 1 *American Constitutional Law* 902 n.221 (Foundation Press, 3d ed. 2000). Space limitations preclude a summary of the evidence and arguments supporting this conclusion, which I believe are poorly presented in Professor Tribe's treatise. My own views are set forth in Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Or-*

A counter thrust now appears to be getting underway, and we can probably expect to see a new wave of scholarship devoted to undermining the consensus recognized by Professor Tribe. Several dozen law professors and historians, for example, recently signed a brief contending: "The Second Amendment is about the allocation of military force. Those who framed and ratified it intended to prevent the new central government from disarming the states' militia. Because the Statute [at issue in this case] has no effect on the militia, it does not violate the Second Amendment."²⁴

But the odds of anyone finding solid grounds for such assertions appear slim. One of the historians who signed this brief, for example, recently published a blunt article attacking the new consensus and claiming that "recent writing on the Second Amendment more closely resembles the intellectual equivalent of a check kiting scheme than it does solidly researched history."²⁵ Archly noting that legal journals are typically not subject to blind peer review and that writers on the Second Amendment often cite one another,²⁶ Professor Saul Cornell sought to explode the individual-right interpretation of the Second Amendment by showing that its proponents "have not only read constitutional texts in an anachronistic fashion, but have also ignored important historical sources vital to understanding what Federalists and Anti-Federalists might have meant by the right to bear arms."²⁷ The demonstration consists largely of evidence that some supporters of the Second Amendment were willing to use the power of *state* governments to restrict the right to arms. But so what? This is perfectly consistent with the claim that the Second Amendment was meant to protect the individual right to arms against the *federal* government. Professor Cornell has demolished a straw man,²⁸ and it is revealing that the three

ders, 4 Tex. Rev. L. & Pol. 157 (1999); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1 (1996); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103 (1987).

24. Brief for an Ad Hoc Group of Law Professors and Historians as Amici Curiae in Support of Appellant, United States v. Emerson, No. 99-10331 (appeal pending, U.S. Court of Appeals for the Fifth Circuit). I was the principal draftsman of a critique of this brief: Brief Supporting Appellee of Amicus Curiae Academics for the Second Amendment, in the same case.

25. Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 Const. Comm. 221, 223 (1999).

26. See id. at 223 n.10.

27. Id. at 223.

28. This is not the only straw man to draw Professor Cornell's fire. For someone

historians who published comments on his article gave no hint that they noticed this fatal error.²⁹ We may see more of this kind of specious argumentation, but that would only serve to suggest the difficulty of actually refuting the arguments and evidence that Professor Cornell failed to address.

II. THE SECOND AMENDMENT AND FOURTEENTH AMENDMENT INCORPORATION

At least as an intellectual matter, the debate about the states' right versus individual right interpretations seems now to be essentially over. Because the Supreme Court has never endorsed the states' right theory, one can reasonably hope that the Justices will resolve this issue correctly when they next choose to review a Second Amendment case. One reason for expecting that they might accept the overwhelmingly powerful arguments supporting the individual right interpretation, however, is that doing so will resolve very little. Once one agrees that the right to keep and bear arms belongs to individuals rather than to states, one immediately begins to confront a swarm of much more difficult questions. What is the scope of the right? To what kinds of arms does it apply? What level of "scrutiny" should courts apply when governmental restrictions are chal-

whose main point is to attack certain writers for engaging in "law office history" that fails "to adequately contextualize constitutional texts," Cornell, 16 Const. Comm. at 225 (cited in note 25), Professor Cornell is surprisingly prone to distort his opponents' positions through omission and mischaracterization. Thus, for example, Eugene Volokh is assailed for "assum[ing] that a common set of terms implied a deeper consensus on what those terms meant." *Id.* at 224. In fact, however, the passage from Volokh cited by Professor Cornell makes no such assumption. Volokh simply notes the indisputable fact that eighteenth century state constitutions protecting "the right of the people to bear arms" necessarily protected a right belonging to someone other than the state, and claims that this "suggests" that the Second Amendment likewise refers to a right of individuals. Volokh's claim is both plausible and modest, and it does not entail the unjustified assumption that Professor Cornell imputes to him. Similarly, Glenn Harlan Reynolds is cited for advancing the questionable proposition that "the Second Amendment was intended by the framers to incorporate a right of revolution into the fabric of constitutionalism." *Id.* at 237 n.57. But when one looks up the citation, it turns out that Reynolds didn't say this. What he said was that two state constitutions of the period contained an explicit recognition of the right of citizens to rebel against a tyrannical government, so that "the argument that a constitutional right of revolt was unthinkable or absurd to the Framers contradicts some rather obvious historical evidence to the contrary." Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 472 (1995). Like Volokh's claim, Reynolds' statement is plausible and modest, and Professor Cornell provides no refutation of what Reynolds actually said.

29. See Michael A. Bellesiles, *Suicide Pact: New Readings of the Second Amendment*, 16 Const. Comm. 247 (1999); Don Higginbotham, *The Second Amendment in Historical Context*, 16 Const. Comm. 263 (1999); Robert E. Shalhope, *To Keep and Bear Arms in the Early Republic*, 16 Const. Comm. 269 (1999).

lenged? And, not least in importance, does the Fourteenth Amendment render the right good against action by state governments?

A. HALBROOK'S ARGUMENT

Halbrook's book takes on this last question, and offers a thundering "yes." The nature of Halbrook's argument can be illustrated with what he offers as his single most striking piece of evidence. The very same Congress that sent the Fourteenth Amendment to the states for ratification also voted overwhelmingly for a Freedmen's Bureau bill that created special, temporary law enforcement authority for areas in which the war had interrupted the ordinary operation of the judiciary.³⁰ That statute specifically provided that

the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color, or previous condition of slavery.³¹

This evidence alone suggests at least three propositions. First, that the framers of the Fourteenth Amendment believed that the constitutional right to bear arms is a personal right—an aspect of "personal liberty, personal security"—rather than some sort of right to serve in the government's military organizations. Second, that these framers specifically and consciously decided that it was absolutely essential that this personal right to arms be extended to the freed slaves, notwithstanding the obvious dangers in arming a largely uneducated group of people who had good reason to be filled with resentments of the most profound nature. Third, that the framers of the Fourteenth Amendment believed that the personal right to bear arms should be "secured to and enjoyed by all the citizens."

It looks like a short step, though it may not really be so short, from these plausible propositions to the further conclusion

30. The bill, which was enacted over President Johnson's veto, was supported by a coalition almost identical to the one that sent the Fourteenth Amendment to the states. (pp. 41-42)

31. Act of July 16, 1866, 14 Stat. 173, 176 (1866) (emphasis added).

that the right to arms is protected from state infringements by the Privileges or Immunities Clause, just as it is protected by the Second Amendment from federal infringements. The bulk of Halbrook's book is devoted to amassing additional evidence supporting this conclusion. From detailed descriptions of the simultaneous evolution of the Fourteenth Amendment, the Civil Rights Act of 1866, and the Freedmen's Bureau statute in Congress, to the ratification struggle over the constitutional amendment, and the subsequent Reconstruction statutes, Halbrook convincingly shows that legal protection for the individual right to arms was a central and well-publicized element in the Republican effort to secure the results of the war.

This shouldn't be much of a shocker. Whatever the exact contours of the rights protected by the Fourteenth Amendment and the early civil rights statutes, none of those rights would mean much of anything if blacks and their white allies could be murdered or intimidated into submission by the Ku Klux Klan and various equivalents. And not having been gripped by fantasies of universal disarmament, those intent on preventing the restoration of racial despotism would naturally have sought to stop state governments from stripping the freedmen of their ability to defend themselves against those who were obviously intent on violent oppression.

There can be little doubt that the Thirty-Ninth Congress was quite serious about preventing the effective reenslavement of the freedmen, and that this required federal measures to prevent *selective* disarmament of blacks (and of white supporters of blacks' rights). But this could have been accomplished without depriving the states of their full discretion to adopt *nondiscriminatory* restrictions on the right to arms. In order to find that Congress meant to go farther than prohibiting selective disarmament, one needs to show that the Privileges or Immunities Clause "incorporates" the Bill of Rights, or at least that the right to arms is among the privileges and immunities substantively protected by the Fourteenth Amendment.

Halbrook argues for substantive incorporation of all the individual rights in the Bill of Rights. The debate over this theory of "total incorporation"³² was well advanced before this book

32. Though commonly employed, this term is something of a misnomer: nobody supposes that the Fourteenth Amendment could possibly "incorporate" the entire Bill of Rights, which includes the Ninth and Tenth Amendments. If the Second Amendment were properly interpreted to protect a right belonging to states rather than to individuals,

appeared, and I did not find in it any significant new evidence or argument. It is also a debate that is not so easily resolved as Halbrook maintains.

There is certainly evidence that some members of the Thirty-Ninth Congress believed in the "total incorporation" theory, or something very like it. But the legislative history also offers support for treating the Privileges or Immunities Clause primarily as a prohibition against discriminatory abridgement of state-created rights, like the Comity Clause³³ on which it was modeled and like the Civil Rights Act of 1866 whose questionable constitutionality was the main provocation for the Fourteenth Amendment.³⁴ If this second reading of the legislative history is correct, then the incorporation theory is not necessarily foreclosed, but saving it requires one to show that the right to keep and bear arms is among the "privileges or immunities of citizens of the United States" referred to in the Fourteenth Amendment. At first, it may seem obvious that every individual right protected by the federal Constitution and the Bill of Rights falls into this category. After all, even the notorious *Slaughter-House Cases*,³⁵ which began a long tradition of narrowly construing the Privileges or Immunities Clause, acknowledged that rights created by the Constitution are substantively protected.³⁶

But it's not quite so obvious, and the *Cruikshank* case (to which Halbrook devotes so much attention) shows why. *Cruikshank* involved a federal prosecution that arose from a gun battle in which the white defendants and others allegedly massacred a large number of blacks who had gathered together for mutual protection after a black citizen had been shot down at his home by a group of whites. The first two counts of the indictment alleged an intent to deprive the black victims of their rights "peaceably to assemble together" and to "keep and bear arms for a lawful purpose." As in *Slaughter-House*, the Supreme

it might be appropriate to treat it like the Ninth and Tenth Amendments are treated. It is true that a similar argument against incorporating the Establishment Clause has been dismissed with barely a wave of the hand, for example, *Abington School Dist. v. Schempp*, 374 U.S. 203, 254-56 (1963) (Brennan, J., concurring), but this does not mean that the argument was wrong or that the Supreme Court can be counted on to treat the Second Amendment as it has the Establishment Clause.

33. U.S. Const., Art. IV, § 2: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

34. Another scholarly practitioner presented in detail the argument and evidence supporting this interpretation of the Clause. See generally John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992).

35. 83 U.S. (16 Wall.) 36 (1872).

36. See *id.* at 74-80.

Court conceded that the federal government is empowered to protect rights created by or under the federal Constitution, such as the right of assembling to petition *Congress*.³⁷ These are rights concomitant with one's status as a citizen of the United States. But most rights, including the general rights of peaceable assembly and arms bearing, were not created by the Constitution and are not attributes of national citizenship. The Bill of Rights did not create them, but only forbade the federal government from infringing them. For that reason, the Second Amendment did not give Congress authority to protect the right to arms, and the Court concluded that this authority presumptively remains with the states.³⁸

Cruikshank did not develop this line of analysis with satisfying rigor, and it may be wrong. But it is not absurd. It is also consistent with the main theme that emerges from Halbrook's historical evidence: that the Fourteenth Amendment was at a minimum meant to prevent the *discriminatory* disarmament of blacks and their supporters.³⁹ That, for example, is exactly what the Freedmen's Bureau statute did, and it is just what the Civil Rights Act of 1866 did with respect to other state-created rights. In order to show that *Cruikshank* was wrong, one would have to undertake a far more comprehensive study of the Fourteenth Amendment than Halbrook provides.

Notwithstanding this reservation, I should emphasize that Halbrook does succeed in showing that if the Privileges or Immunities Clause was meant to provide substantive protection of rights other than those peculiarly created by or under the federal Constitution, the right to keep and bear arms simply must be one of those included within its ambit. That demonstration is made convincing primarily by the persistence and consistency with which protection of the right to arms was treated as a central element in accomplishing the Reconstruction goal of securing equal civil rights. But one incident from the period offers a particularly useful illustration because it shows that the framers of the Fourteenth Amendment certainly did not believe that the Second Amendment's prefatory allusion to a "well regulated militia" means that the right to keep and bear arms is some sort of

37. See *Cruikshank*, 92 U.S. 542, 552-53 (1875).

38. See *id.* at 553.

39. The first two counts of the indictment at issue in *Cruikshank* do not appear to have alleged a racially discriminatory intent, and the Court's discussion of other counts shows that it was unwilling to read such allegations into the indictment. See *id.* at 542, 554-55.

right belonging only to governments or those engaged in government service.

One of the favored mechanisms for disarming and terrorizing the black population immediately after the war was apparently through "militias" composed largely of ex-Confederate soldiers. Accordingly, Senator James Wilson (R.-Iowa), chairman of the judiciary committee, introduced a bill in early 1866 to disarm and disband the militia forces in most of the southern states. The bill drew immediate opposition on the ground that it violated the Second Amendment, but the debate was not pursued until the following Session. (pp. 20-21) The next year, Wilson brought his bill up again. Again, it encountered substantial opposition, and not just from Democrats or Southern sympathizers. Senator Waitman Willey (R. -W. Va.), for example, favored "discriminating legislation that would regulate the use of arms by the militia in the South," presumably because such legislation was needed and is authorized by Article I.⁴⁰ (p. 68) But Willey would not agree to a bill "depriving men of the right to bear arms and the total disarming of men in time of peace." (p. 68) Similarly, Senator Thomas Hendricks (D.-Ind.) quoted the Second Amendment, and concluded that "[i]f this [bill] infringes the right of the people to bear arms we have no authority to adopt it." (p. 68) Wilson then modified the bill so that it "disbanded" the militias without "disarming" them. The bill was enacted in that form. (p. 69)

This incident perfectly illustrates why the Second Amendment had been adopted in the first place. The original Constitution had given Congress virtually plenary authority to regulate the militia, and Congress might easily consider it necessary and proper to enact civilian disarmament schemes in the form of militia regulations, as Wilson's initial bill would have done. The Second Amendment rules this out, and it is significant that even this most radically Republican Congress was unwilling to deprive ex-Confederates of the right to keep and bear their private arms. This is strong evidence indeed that those who gave us the Fourteenth Amendment believed that the right to arms is a fundamental constitutional right deserving of the most

40. U.S. Const., Art. I, § 8, cl. 15-16, provides Congress with the power

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

damental constitutional right deserving of the most scrupulous protection. If they meant for the Privileges or Immunities Clause to offer substantive protection for rights like most of those in the Bill of Rights, this right cannot be an exception.

B. HALBROOK'S PROBLEM WITH THE COURTS

Having marshaled his evidence, Halbrook is confronted with two obvious problems. First, if the Supreme Court ever thought that it was constrained by what the framers and ratifiers of the Fourteenth Amendment thought they were doing, it gave that notion up a very long time ago. Second, the Court has never recognized any security for the right to arms against state action.

There's not much that Halbrook can do about the first problem, except to hope that the Court will some day come to its senses. Halbrook does point to language in some of the Court's opinions that is easily broad enough to justify incorporating the Second Amendment. But this doesn't get one very far because there is little reason to suppose that a Court that has been so blithely unconcerned with the original meaning of the Fourteenth Amendment would think that mere logic compelled it to incorporate a provision of the Bill of Rights unless the Justices think that doing so would be good policy.⁴¹

Halbrook makes a more practically useful point when he argues that the Supreme Court has never *rejected* Fourteenth Amendment protection of the right to arms, though I believe the Court has at times come closer to doing so than he acknowledges. *Cruikshank* is a good example. Because the case involved a prosecution for a private conspiracy, Halbrook believes the Court had no occasion to consider whether the Fourteenth Amendment forbids *state* abridgements of the right to arms. (p. 172) The Court's holding on the right to arms, however, was not based on state action grounds. The Enforcement Act authorized prosecutions for private conduct, so long as the private conduct was aimed at the deprivation of federal rights. Implicitly avoiding the state action issue, the Court asked whether the rights of

41. There is an argument, which Halbrook doesn't mention, that incorporation of the Second Amendment is compelled by the substantive due process tests set out in *Palko v. Connecticut*, 302 U.S. 319 (1937), and *Duncan v. Louisiana*, 391 U.S. 145 (1968). See Lund, 31 Ga. L. Rev. at 49-55 (cited in note 23). That argument, however, depends on the heroic assumption that the Supreme Court would regard the tests adopted in those cases as legally binding, rather than as evolving doctrines that are every bit as malleable as substantive due process itself.

assembly and arms-bearing are federal rights.⁴² The Court said “no,” on the ground that protection of these rights was a state responsibility that had not been shifted to the federal government by the First and Second Amendments. The Court’s conclusion, that these are not federal rights, is inconsistent with “incorporation,” though the Court did not even discuss the possibility that the Privileges or Immunities Clause may have converted the right to arms into a federal right.

The failure to discuss this possibility is particularly interesting because another count in the indictment almost compelled the *Cruikshank* Court to confront it. That count alleged a race-based deprivation of “the rights, privileges, immunities, and protection” belonging to the victims as citizens of the United States and of their state of residence. One might expect the Court to have sustained this count either on the ground that the Privileges or Immunities Clause applies to discriminatory deprivations of state-law rights or on the ground that it makes the right to arms a federal right. But the Court did neither, holding instead (in a passage that Halbrook does not discuss) that the indictment was too vague to satisfy the Sixth Amendment.⁴³

The best reading of *Cruikshank*, I believe, is that the Court was deliberately avoiding the incorporation question because it is genuinely difficult. Of course, that leaves Halbrook’s main point intact: I agree that *Cruikshank* did not rule out incorporation of the right to arms, and I also agree that it has not been ruled out subsequently. When the Court finally gets around to deciding whether the Fourteenth Amendment forbids the states to abridge the right to keep and bear arms, it will at least not have the excuse that the issue was settled long ago.

C. THE INCORPORATION DEBATE

Halbrook’s dream, that the courts will eventually recognize a Fourteenth Amendment right to keep and bear arms, does not necessarily depend upon a claim that the Second Amendment applies against the states by virtue of its “incorporation” in the Fourteenth Amendment. Much of his argumentation, however, plausibly assumes that incorporation would be the path most inviting for the courts. But isn’t this hopelessly naïve? Incorporation has *never* had anything to do with the Privileges or Immuni-

42. *Cruikshank* invoked a state action requirement with respect to other counts in the indictment, but not with respect to these.

43. See *Cruikshank*, 92 U.S. at 557-58.

ties Clause, having proceeded entirely on the basis of willful invention.

The willfulness of the Court in this area has gone well beyond the natural human tendency to resolve competing legal arguments in the way that accords with one's own policy preferences. First, incorporation has proceeded under the aegis of the Due Process Clause, through the oxymoronic doctrine of "substantive due process." Second, the Court began incorporating various provisions of the Bill of Rights without the slightest effort to explain how or why such a thing was justified.⁴⁴ Third, such efforts as there have been to provide a rationalizing principle for this behavior have relied on the supposedly deep but barely articulated philosophizing of certain Justices about the meaning of liberty.⁴⁵ Fourth, the Court has flitted among the Bill of Rights, sometimes pecking away with one supposedly legal test and sometimes with another, carrying some rights back to the sheltering nest of substantive due process and casting others out, but never even seeking to unify its various decisions.⁴⁶

If it is fair to call Halbrook naïve, that should be a term of praise, for his book is permeated with faith in the proposition that it *should* matter what the misty clause about privileges or immunities meant to those who placed it in our Constitution. Like the Second Amendment, the Privileges or Immunities Clause was until recently rarely taken seriously by legal academics, and partly for the same reason that the Second Amendment was ignored for so long: the *courts* didn't take it seriously. And like the Second Amendment, Privileges or Immunities has been rediscovered in large part through the efforts of scholarly legal practitioners. Although legal academics have not been so absent from the field in this case as in debates about the right to arms,⁴⁷ two of the most important major figures in the modern incorporation debate have been scholarly practitioners: Raoul Berger

44. See, for example, *Stromberg v. California*, 283 U.S. 359, 368 (1931), in which the Court relied solely on unexplained dicta in prior cases to hold that the right of free speech is protected by the Fourteenth Amendment's Due Process Clause.

45. See, e.g., *Palko v. Connecticut*, 302 U.S. at 327.

46. See, for example, *Duncan v. Louisiana*, 391 U.S. 145 (1968), where the Court threw out *Palko's* theory that incorporation applies only to those rights that are "of the very essence of a scheme of ordered liberty" and replaced it with a new test under which a right must be "necessary to an Anglo-American regime of ordered liberty." See *id.* at 149-50 n.14. The Court made no effort to explain how the free speech or religion provisions of the First Amendment could pass this new test, given the facts of British legal history.

47. In line with my focus on the contributions of legal practitioners, I omit a number of citations to professional academics that might otherwise be obligatory.

held occasional temporary appointments in law schools, but he spent almost all of his career in practice, while Michael Kent Curtis entered legal academia only after he wrote his book on incorporation. While Berger and Curtis came to opposite conclusions about incorporation,⁴⁸ they shared Halbrook's naïve approach to constitutional interpretation. And we are all much the richer for it.⁴⁹

The oddity of this is striking. One might think that academics would be more free to seek the truth for its own sake, while practitioners would be more apt to have their vision confined within horizons established by the courts. The disdain of legal academics toward the Second Amendment might be explained largely by hostility to guns and those who own them, but the same cannot be said about the Privileges or Immunities Clause, for the academic establishment has not exhibited much reluctance about the policy of applying the federal bill of rights against the states. A more likely story, and one that would apply both to incorporation and to the Second Amendment, might focus on the self interest of academics. It's more fun to spend one's time coming up with arguments and theories that explain why the Constitution should be interpreted to produce what we're sure would be a better world than to figure out what its makers meant by what they said. The Justices, too, often exhibit the same fun-loving spirit, which means that imitating them is more likely to influence them. And, perhaps not least important in terms of academic incentives, it is a whole lot easier to give voice to one's moral and political intuitions than to discover something significantly new about the Constitution's original meaning. Besides, such conjurings from intuition are pretty much immune to objective falsification, which makes this kind of theorizing pretty safe for the career-minded scholar. Especially when one is among the large majority blessed with academically fashionable political opinions. Writers like Halbrook are not

48. Compare Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Harvard U. Press, 1977) (Fourteenth Amendment covers only racial discrimination involving the rights enumerated in the Civil Rights Act of 1866), with Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Duke U. Press, 1986) (Privileges or Immunities Clause was meant to apply the protections of the Bill of Rights, as well as other fundamental rights, to the states).

49. In the 1988 edition of *American Constitutional Law* at 772 n.5 (cited in note 18), Professor Tribe claimed that the "total incorporation" theory advanced in Hugo Black's dissent in *Adamson v. California*, 332 U.S. 46 (1947), had not "won scholarly approval," citing only Professor Charles Fairman's famous 1949 attack on Justice Black. This ignored Curtis' detailed critique of Fairman, as well as Curtis' debate with Berger.

subject to such incentives, which may help to explain why practitioners continue to make important scholarly contributions.

CONCLUSION

Stephen Halbrook has written an old-fashioned book, of a kind that requires a great deal of diligent research and a willingness to relate in detail what other people said and did. Because these other people were the ones who made a particularly important provision of our Constitution, this is a valuable book that should be useful to those who claim to take the Constitution seriously.

This is not to say that we have been given the last word on the right to arms under the Fourteenth Amendment. Halbrook is a talented and indefatigable advocate in the cause of firearms rights, who reads the evidence for all it's worth, and sometimes more. This is a risk, of course, that every student of the Fourteenth Amendment's origins must run, simply because the text is so ambiguous and the relevant history so voluminous and variegated. It is also true that Halbrook does not attempt to confront all of the academic work on the Privileges or Immunities Clause, and cannot resolve the most serious disagreements that have arisen among its students. Nevertheless, Halbrook's evidence seems quite adequate to establish that if the Privileges or Immunities Clause was meant to incorporate the substance of any of the individual privileges and immunities in the Bill of Rights, it was certainly meant to protect the individual's right to keep and bear arms.

It is less clear whether any of this will ever matter to those who are most obviously charged with taking the Constitution seriously. For well over a century after its decision in the *Slaughter-House Cases*, the Supreme Court treated the Privileges or Immunities Clause almost as though it had been written in Sanskrit or obliterated by an ink blot.⁵⁰ In all that time, only one holding invoked the Clause, and that decision was soon overruled.⁵¹ The Court recently signaled a revival of interest in the Clause, but it did so in a way that suggests a continuing solipsis-

50. Cf. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 166 (Free Press, 1990) (approving such treatment of the Clause).

51. See generally *Colgate v. Harvey*, 296 U.S. 404 (1935), overruled by *Madden v. Kentucky*, 309 U.S. 83, 93 (1940).

tic elevation of its own precedents and its own philosophizing over the original meaning of the Constitution.⁵²

In *Saenz v. Roe*,⁵³ the Court struck down a California law that limited new residents, for the first year they live in the state, to the level of welfare benefits they would have received in their prior state of residence. Seizing on a dictum in *Slaughter-House*—according to which “a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State”—the Court applied strict scrutiny and concluded that California did not have an adequate justification for discriminating between new arrivals and established residents. As Chief Justice Rehnquist pointed out in his dissent, the *Slaughter-House* dictum is quite compatible with allowing states to employ objective criteria such as durational residence requirements to test a new resident’s intent to remain before providing all the benefits of citizenship.⁵⁴ More important, as Justice Thomas noted in his dissent, the *Saenz* majority proceeded without the slightest effort “to understand what the framers of the Fourteenth Amendment thought that it meant,” and thereby raised “the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the ‘predilections of those who happen at the time to be Members of this Court.’”⁵⁵

Like Halbrook and many of the other scholarly practitioners who have done so much to recover the lost thoughts that underlie the Second and Fourteenth Amendments, Justice Thomas takes the naïve starting point that the Constitution means what it was meant to mean. Should a majority of the Court ever be seized with the same grace and modesty, books like Halbrook’s will become more important than they have been in the past. This might not produce a judicial recognition of the robust right to private arms that Halbrook hopes for, but it should at

52. Notwithstanding the conventional wisdom, which holds that incorporation through the Privileges or Immunities Clause is foreclosed by *Slaughter-House*, yet another scholarly practitioner has made a case for upsetting this consensus. See Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 *Yale L.J.* 643 (2000). Sad to say, it is quite conceivable that the Justices would be more impressed by arguments about the original meaning of its own precedents than by evidence of the original meaning of the Constitution itself.

53. 526 U.S. 489 (1999).

54. See *id.* at 517 (Rehnquist, J., dissenting).

55. *Id.* at 528 (Thomas, J., dissenting) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977)).

least produce more careful thinking about the subject than the Court has managed in the past.