CONSTITUTIONAL LAW — GUN RESTRICTIONS ON MINORS — THIRD CIRCUIT HOLDS INCORPORATED FIREARM RIGHTS DEFINED BY FOUNDING NOT RECONSTRUCTION — *Lara v. Commissioner Pennsylvania State Police*, 125 F.4th 428 (3d Cir. 2025).

If a constitutional amendment were written today, one might assume an originalist would interpret it according to its meaning today. If that originalist were on the Third Circuit, however, one might be wrong. Recently, in *Lara v. Commissioner Pennsylvania State Police*,[1] the Third Circuit struck down a Pennsylvania statute, which restricted the firearm rights of eighteen- to twenty-year-olds, due to the lack of analogous restrictions when the Second Amendment was ratified in 1791.[2] However, the right to bear arms only applies to the states because of the Fourteenth Amendment,[3] passed during Reconstruction in 1868, at which point analogous age-based restrictions abounded.[4] The question of which period defines the incorporated right to bear arms — Founding or Reconstruction — was central to the case. The Third Circuit read an answer into Supreme Court precedent, but the precedent offered no such clarity. The court should have instead performed an originalist analysis, which would have revealed that Reconstruction-era meanings are central to interpreting the right to bear arms.

Pennsylvania's Uniform Firearms Act of 1995[5] (UFA) restricted the firearm rights of those under twenty-one via a licensing scheme.[6] Normally, these minors could open carry, but not concealed carry, in public.[7] However, during a state of emergency, they could do neither, subject to exceptions for work and for urgent defense of self and property.[8] In 2020, Pennsylvania had been in a state of emergency for nearly three years due to the opioid epidemic and then COVID-19[9] — effectively barring many eighteen- to twenty-year-olds from carrying weapons in public. That October, three eighteen- to twenty-year-olds and two Second Amendment advocacy groups sued the Pennsylvania State Police Commissioner to enjoin enforcement of the UFA.[10]

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[1] 125 F.4th 428 (3d Cir. 2025).

[2] *See id.* at 444–46, 454.

[3] *See* McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

[4] Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 202 & n.14 (5th Cir. 2012), *abrogated by* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022); *see also, e.g.*, David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. LEGIS. 223, 312, 318, 321 (2024).

[5] 18 PA. CONS. STAT. §§ 6101–6128 (2024).

[6] *See id.* § 6109(b) (restricting licenses to those "21 years of age or older").

[7] *See id.*; Lara v. Evanchick, 534 F. Supp. 3d 478, 479 (W.D. Pa. 2021).

[8] 18 PA. CONS. STAT. § 6107(a) (prohibiting carrying a firearm during a state or municipal emergency); *id.* § 6106(b)(7) (exempting from licensing requirements, for example, gun manufacturer employees).

[9] *Evanchick*, 534 F. Supp. 3d at 479.

[10] *Id.* at 479–81, 492.

In 2021, the U.S. District Court for the Western District of Pennsylvania granted the Commissioner's motion to dismiss.[11] Judge Stickman examined the interplay of the various statutory provisions and noted the wide-ranging professional and recreational exceptions allowing plaintiffs to carry guns even during states of emergency.[12] Then, under *District of Columbia v. Heller*,[13] the district court asked whether the restrictions in question were "longstanding" and "presumptively lawful."[14] Relying on a variety of cases confronting similar questions, the court held that Pennsylvania's law was consistent with "longstanding" practices and therefore "presumptively lawful."[15]

The Third Circuit reversed,[16] finding the UFA unconstitutional under *New York State Rifle & Pistol Ass'n v. Bruen*.[17] The Commissioner petitioned the Supreme Court, which granted certiorari, vacated the judgment, and remanded "in light of *United States v. Rahimi*."[18] On remand, writing for the same panel, Judge Jordan again held the law unconstitutional, in an opinion largely "repetitive of [the] earlier decision."[19] As before, the panel found eighteen- to twenty-year-olds part of "the people" referenced in the Second Amendment, in part based on interpretations of "the people" elsewhere in the Constitution and on *Heller*'s "strong presumption" that gun rights extend "to all Americans."[20] Then, the panel again found there was *one* Second Amendment, whether applied against the federal government or the states, and its unitary scope was defined by 1791, when it was ratified, not 1868, when the Fourteenth Amendment was ratified.[21]

The panel acknowledged that the Supreme Court left the time-frame issue unsettled in *Bruen* and *Rahimi* because both approaches — defining the Second Amendment according to 1791 or 1868 — led to the same result.[22] Judge Jordan thus relied on two aspects of *Bruen* to infer a 1791 time frame: the Court's statement that it had "generally assumed" the Bill of Rights should be interpreted in terms of its meaning in 1791[23] and its string citation to prior cases exemplifying that assumption.[24] The Commissioner's evidence that over half of the states restricted the

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11 *Id.* at 492.

12 *Id.* at 484–86.

13 554 U.S. 570 (2008).

14 *Evanchick*, 534 F. Supp. 3d at 489 (citing Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011)).

15 *Id.* at 492.

16 Lara v. Comm'r Pa. State Police, 91 F.4th 122, 127 (3d Cir. 2024).

17 142 S. Ct. 2111 (2022); *see Lara*, 91 F.4th at 132, 137.

18 Paris v. Lara, 145 S. Ct. 369 (2024) (mem.) (citing United States v. Rahimi, 144 S. Ct. 1889 (2024)) (granting certiorari).

19 *Lara*, 125 F.4th at 431. Judge Jordan was joined by Judge Smith.

20 *Id.* at 435–37 (quoting District of Columbia v. Heller, 554 U.S. 570, 581 (2008)).

21 *Id.* at 440–41.

22 *Id.* at 439.

23 *Id.* at 441 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2137 (2022)).

24 *Id.* at 440 (citing *Bruen*, 142 S. Ct. at 2137–38).

firearm rights of eighteen- to twenty-year-olds in the nineteenth century was thus treated as mere "postenactment history"[25] with limited potential to illuminate 1791 understandings.[26] After canvassing Founding-era firearm regulations, the court found the provisions of the UFA barring eighteen- to twenty-year-olds from openly carrying firearms during an emergency[27] "[in]consistent with the principles that underpin [those] regulations"[28] and enjoined the Commissioner from enforcing them.[29] The court also addressed the Commissioner's argument that a recent amendment to the Pennsylvania Constitution rendered the case moot by limiting the duration of emergency declarations.[30] The panel held that the case was still justiciable because the issue was likely to recur, even if temporarily resolved.[31]

Judge Restrepo dissented.[32] In his view, the Second Amendment did not apply to eighteen-to-twenty-year-olds because, as the majority conceded, "those under the age of 21 were considered *minors*"[33] since before the Founding and were not part of "the people," which includes all "*adult* Americans."[34] Judge Restrepo also found Pennsylvania's regulation "consistent with this Nation's historical tradition."[35] Given that minors were not considered part of "the people," a search for statutes specifically barring them from firearm ownership at the Founding was a flawed enterprise: "Legislatures tend not to enact laws to address problems that do not exist."[36] He also argued that the firearm regulations after the Founding were evidence of Founding-era understandings.[37]

The question raised in *Lara* of the relevant time period for an analysis of the incorporated Second Amendment has far-reaching implications for all incorporated rights. It is also a question the Supreme Court has yet to answer[38] and one on which the Third Circuit's sister courts have split.[39] Instead of searching for an answer amidst case law that explicitly disavowed one, the Third Circuit could have added clarity to

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[25] *Id.* at 441 (quoting *Bruen*, 142 S. Ct. at 2136).

[26] *Id.* at 441–42; *see also id.* at 442 n.20 (cataloguing the nineteenth-century laws).

[27] *Id.* at 431.

[28] *Id.* at 445.

[29] *Id.* at 431.

[30] *Id.* at 445.

[31] *Id.* at 446 (using the "capable of repetition yet evading review" exception (quoting Hamilton v. Bromley, 862 F.3d 329, 335 (3d Cir. 2017))).

[32] *Id.* at 446 (Restrepo, J., dissenting).

[33] *Id.* at 448 (quoting *id.* at 436 (majority opinion)).

[34] *Id.* (quoting *id.* at 435 (majority opinion)).

[35] *Id.* at 453 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022)).

[36] *Id.*

[37] *See id.* at 454.

[38] *See supra* note 22 and accompanying text.

[39] *See* Nat'l Rifle Ass'n v. Bondi, No. 21-12314, 2025 WL 815734, at *5 (11th Cir. Mar. 14, 2025) (en banc) (declining to resolve the question). *Compare* Worth v. Jacobson, 108 F.4th 677, 692–93 (8th Cir. 2024) (relying on a 1791 meaning), *with* Antonyuk v. James, 120 F.4th 941, 972 (2d Cir. 2024) (relying on both 1868 and 1791 understandings).

this area of law by reasoning through the question with a higher-order principle like originalism. Had it done so, it would have found that 1868 meanings are essential to any Second Amendment analysis.

The *Lara* court relied entirely on precedent to answer the time frame question. But that authority did not provide an answer. The *Bruen* Court distanced itself from its "assumed"[40] focus on the Founding by acknowledging an "ongoing scholarly debate"[41] and choosing not to wade in.[42] Justice Barrett wrote separately to emphasize the non-answer to this question.[43] Looking at the same language, an Eleventh Circuit panel said "an assumption is not a holding."[44] When the *Bruen* Court referenced the ongoing scholarly debate, it cited two originalist arguments against this assumption.[45] The *Rahimi* Court cited to the same academic debate when it too refrained from picking a time frame.[46] The Third Circuit neither cited nor addressed their arguments. It thus rested on the "wafer-thin reed"[47] of "assum[ptions]."[48]

Lara's reliance on the cases that *Bruen* cited to exemplify the Court's prior assumptions was similarly unavailing.[49] The Third Circuit failed to note how the Court distanced itself from those cases. Further, some were more complex than they appeared. *Nevada Commission on Ethics v. Carrigan*[50] relied on interpretations of 1791 "laws [that] . . . have been in place ever since,"[51] and *Crawford v. Washington*[52] declared "[t]he right to confront one's accusers . . . dates back to Roman times,"[53] suggesting a focus on longevity, not one time frame. The Third Circuit also failed to look beyond *Bruen*'s examples. *McDonald v. City of Chicago*,[54] which first applied the Second Amendment to the states, relied heavily

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40 *Bruen*, 142 S. Ct. at 2137 ("[W]e have generally assumed that the scope of the [Bill of Rights] is pegged to the public understanding [when it] was adopted in 1791.").

41 *Id.* at 2138.

42 *Id.* at 2137–38.

43 *Id.* at 2162–63 (Barrett, J., concurring).

44 Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317, 1323 (11th Cir. 2023), *vacated en banc*, No. 21-12314, 2025 WL 815734 (11th Cir. Mar. 14, 2025).

45 *See Bruen*, 142 S. Ct. at 2138 (citing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION, at xiv, 223, 243 (1998); Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1441 (2022)).

46 United States v. Rahimi, 144 S. Ct. 1889, 1898 n.1 (2024) (quoting *Bruen*, 142 S. Ct. at 2138).

47 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam).

48 *Bruen*, 142 S. Ct. at 2137.

49 *See supra* note 24 and accompanying text.

50 564 U.S. 117 (2011).

51 *Id.* at 122.

52 541 U.S. 36 (2004).

53 *Id.* at 43 (citing Coy v. Iowa, 487 U.S. 1012, 1015 (1988); Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481 (1994)).

54 561 U.S. 742 (2010).

on Reconstruction-era history.[55] The wider body of law did not overcome *Bruen*'s self-professed restraint on the time frame question.

The Third Circuit used ambiguous-at-best precedent to treat Reconstruction-era firearm regulations as postenactment history, but if it had instead grappled with the originalist arguments cited in *Bruen*, it would have found that 1868 understandings are key to the Second Amendment. One district court that did grapple with these arguments said "[i]t is difficult to see an[other] answer" under "originalist theory."[56] At oral argument in *Bruen*, counsel for the New York State Rifle and Pistol Association (a former Solicitor General[57]) agreed, saying that, given a conflict, in a "case [that] arose in the states," one should likely "look[] at . . . Reconstruction . . . and giv[e] preference to that over the founding."[58] To understand why, a bit of history is helpful. Before 1868, the Bill of Rights applied only to the federal government.[59] Then, the Fourteenth Amendment worked a sea change by requiring states to respect the rights embodied therein.[60] The Bill of Rights, newly applicable against the states, retained a *single* scope: There was one Second Amendment whether applied to the states or the federal government.[61]

This single-track incorporation theory, repeatedly affirmed by the Court,[62] is probably wrong from an originalist perspective,[63] but even taking it for granted, as the Third Circuit must, 1868 meanings should *still* have guided the *Lara* court's analysis. There are two primary ways to make sense of the current incorporation doctrine. Each produces a different answer to the time-frame question. Neither perfectly resolves

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[55] *See id.* at 770–78.

[56] Worth v. Harrington, 666 F. Supp. 3d 902, 919 (D. Minn. 2023) (focusing nonetheless on 1791 because it read the case law the same way as the *Lara* court did).

[57] *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 130 (2007) (listing former Solicitor General Paul Clement's position).

[58] Transcript of Oral Argument at 8, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-843_7m5e.pdf [https://perma.cc/3FYU-3N3X].

[59] *See, e.g.*, Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 247 (1833).

[60] *See* AMAR, *supra* note 45, at xiii–xiv; *see, e.g.*, *McDonald*, 561 U.S. at 758 (2010) (plurality opinion).

[61] *Bruen*, 142 S. Ct. at 2137 ("[R]ights . . . applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government.").

[62] *See id.* (collecting cases).

[63] The Bill of Rights was understood very differently in 1791 and 1868. *See, e.g.*, AMAR, *supra* note 45, at 223 ("[T]he . . . central meanings of the right to keep and bear arms . . . were very different in 1866 than in 1789. Mechanical incorporation obscured all this . . . ."). A "dual-track" approach thus seems more sensible. Will Baude, *Originalism and Dual-Track Incorporation*, REASON: VOLOKH CONSPIRACY (Apr. 24, 2020, 12:34 PM), https://reason.com/volokh/2020/04/24/originalism-and-dual-track-incorporation [http://perma.cc/XN2H-X7RZ]. On this view, incorporated rights would be defined with reference to 1868 when applied to states and 1791 when applied to the federal government. *See id.* (calling this "[perhaps] the most intuitive approach for an originalist"); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1536–41 (2005); Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, But the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729, 743–45 (2008).

the dubious way incorporated rights have been lashed to their original counterparts, but the 1868 approach hews closer to originalist tenets.

One approach *Lara* could have taken, consistent with its 1791 focus, would have been to find that the Fourteenth Amendment incorporated 1791 understandings. This approach avoids the legal jiu-jitsu of altering the first eight amendments via the Fourteenth. However, it is historically suspect. For example, the Fourteenth Amendment's drafters said it would vest "Congress . . . with the power to enforce the bill of rights as it stands in the Constitution *today*."[64] The Reconstruction generation often had a negative view of the original Constitution and its Framers.[65] It is thus unlikely that the Fourteenth Amendment was thought to protect whatever a judge might think the Founders meant.

Even those with "abiding originalistic reverence for the Constitution and the founding fathers" recognized that they were charting a new course.[66] The Founding generation viewed the Bill of Rights "through a federalism lens."[67] The Reconstruction generation viewed those rights as *individual* rights.[68] This is clearest with provisions like the Establishment Clause, which originally prevented the federal government from interfering with state-established religions.[69] By 1868, an individualist view pervaded the same clause, such that it prevented the federal government from impeding religious liberty.[70] And even when

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[64] Tom Donnelly, *John Bingham: One of America's Forgotten "Second Founders*," NAT'L CONST. CTR.: CONST. DAILY BLOG (July 9, 2018) (alteration in original) (emphasis added), https://constitutioncenter.org/blog/happy-birthday-john-bingham-one-of-americas-forgotten-second-founders [http://perma.cc/A4BS-6MKQ]. Scholars have looked to statements from before Reconstruction focusing on those rights that "have, at all times, been enjoyed." William Baude et al., *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1249 (2024) (emphasis omitted) (quoting Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823). However, these predate the passage of the Fourteenth Amendment.

[65] Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 985 (2012).

[66] AKHIL REED AMAR, BORN EQUAL: REMAKING AMERICA'S CONSTITUTION, 1840–1920, at 523 (forthcoming Sept. 2025) (on file with the Harvard Law School Library) (describing how key Reconstruction players understood core rights as no longer "collective state right[s]," *id.* at 526, but rather "individual right[s]," *id.* at 527, and beautifully illustrating how Reconstruction-era artists sampled Founding-era art to highlight shifting attitudes, *id.* at 527–31). *But see* Mark Smith, *Attention Originalists: The Second Amendment Was Adopted in 1791, Not 1868*, HARV. J.L. & PUB. POL'Y: PER CURIAM, Fall 2022, art. 31, at 1, 3.

[67] Greene, *supra* note 65, at 985.

[68] AMAR, *supra* note 66, at 526–30; SPEECH OF HON. CHARLES SUMNER, IN THE SENATE OF THE UNITED STATES, 19TH AND 20TH MAY, 1856, at 4, 5 (Boston, John P. Jewett & Co. 1856) (analogizing personal rights of American citizens to those of Romans warding off injury by saying "I am a Roman citizen," *id.* at 4).

[69] Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1091 (1995) [hereinafter Lash, *Establishment*]. Whether this clause is or was purely federalist is contested and likely informs if it should be incorporated at all. *See id.* at 1153–54; Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1147 n.188 (1994) [hereinafter Lash, *Free Exercise*].

[70] Lash, *Establishment*, *supra* note 69, at 1130, 1137, 1141, 1152. *But see* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 597 n.452 (collecting critiques of this view).

Founding-era rights protected individuals, their purpose was often federalist. The Founding generation's Free Speech Clause covered individuals, but for the purpose of "safeguard[ing] the rights of popular majorities . . . against a . . . self-interested Congress."[71] The Reconstruction generation fought for speech rights "against the community"[72] to protect *unpopular* speakers, like abolitionist editors.[73] So too with the Second Amendment. The *Lara* court accurately spoke about an "individual . . . right,"[74] but its original purpose was preventing "a federal[] . . . army" from "overaw[ing] state-organized militias."[75] In contrast, the 1868 generation was focused on arming freedmen and Union sympathizers against the Klan.[76] This focus on individuals was a theme in speeches that made front-page news nationwide.[77] Thus, the Fourteenth Amendment likely did not incorporate 1791 understandings.[78]

There was another approach available to the *Lara* court. As Professor Akhil Amar put it in a passage cited by the Court in *Bruen*[79]: "[T]he Fourteenth Amendment has a doctrinal 'feedback effect' against the federal government, despite the amendment's clear textual limitation to state action."[80] As Professor Kurt Lash said in the other source cited by *Bruen*,[81] the Reconstruction generation "respoke" the original Bill of Rights, reinvesting 1791 structural rights with new 1868 meanings.[82] If the earlier discussion of a federalism-focused Bill of Rights seemed surprising, it is precisely *because* the Reconstruction minority-rights approach has suffused modern understanding of its content.[83] The First Amendment, for example, is associated with individuality, autonomy, and dissent — an understanding alien to the Founders but justified by Reconstruction.[84] *Heller*'s right to bear arms for self-defense would make little sense in 1791, while fitting in 1868.[85]

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71 AMAR, *supra* note 45, at 21.

72 Richard B. Kielbowicz, *The Law and Mob Law in Attacks on Antislavery Newspapers, 1833–1860*, 24 LAW & HIST. REV. 559, 560 (2006) (emphasis omitted) (quoting John P. Roche, *Civil Liberty in the Age of Enterprise*, 31 U. CHI. L. REV. 103, 103 (1963)).

73 *Id.* at 559–60; *see* Lash, *Free Exercise*, *supra* note 69, at 1150.

74 *Lara*, 125 F.4th at 435.

75 AMAR, *supra* note 45, at 216; *see* District of Columbia v. Heller, 554 U.S. 570, 599 (2008).

76 AMAR, *supra* note 45, at 266.

77 *See, e.g.*, David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866–1868*, 30 WHITTIER L. REV. 695, 713–17 (2009).

78 A careful reader might object that "whatever the Reconstruction generation *thought* they were doing, they were wrong." However, an argument of this sort is less apt when dealing with ambiguous constitutional text. *See* William N. Eskridge, Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History*?, 66 GEO. WASH. L. REV. 1301, 1302 (1998).

79 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2138 (2022).

80 AMAR, *supra* note 45, at 243.

81 *Bruen*, 142 S. Ct. at 2138.

82 Lash, *supra* note 45, at 1441 (emphasis omitted).

83 *See, e.g.*, AMAR, *supra* note 45, at xii.

84 *Id.* at 21, 242–44.

85 *Id.* at 49, 258, 266.

This approach also works at a theoretical level. The first eight amendments can be seen as pointing to and emphasizing bits and pieces of a large preexisting substratum of rights.[86] The Fourteenth Amendment took that old 1791 set of rights and replaced it with a new one, such that the Bill of Rights points to 1868 meanings. And at the textual level, when the Fourteenth Amendment implicitly defined the rights in the first eight amendments as *part* of "due process" (or as *part* of the "privileges or immunities" of citizenship[87]), like raw iron passed through a forge, the text of those amendments came out refined and updated.

Precedent also supports this approach. The Fourteenth Amendment has long been held to modify the Eleventh despite a lack of explicit text to that effect.[88] And through reverse incorporation, the Fourteenth Amendment alters the Fifth.[89] If the *Lara* court had grappled with these arguments, it would have seen that an originalist analysis leads to the conclusion that, when 1791 and 1868 meanings conflict in an analysis of the Second Amendment, as in *Lara*, the latter prevail.

Judicial decisionmaking is not just about principled interpretational methodologies. It is also a form of storytelling.[90] And instead of starring Reconstruction and honoring the sacrifices of those who died in America's bloodiest war[91] to realize the promise of a more equal country, the *Lara* court's doctrinal choices continued the national hagiography of Founding-era Fathers and banishment of Reconstruction-era Founders to the backwaters of history.[92] If the Supreme Court ever does confront the question of the proper time frame for analyzing fundamental rights, hopefully it makes a more grounded interpretational choice and one that gives Reconstruction a more deserving place in the national story.

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[86] Jud Campbell, *Determining Rights*, 138 HARV. L. REV. 921, 923–24, 982 (2025). The Ninth Amendment makes clear that many rights were left unenumerated. *Id.*; *see also* McDonald v. City of Chicago, 561 U.S. 742, 842–43 (2010) (Thomas, J., concurring in part and concurring in the judgment) (explaining that some courts enforced firearm rights against the states before 1868, "*Barron* notwithstanding," *id.* at 842 (referring to Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 247 (1833))).

[87] Many originalists and at least two Justices suspect incorporation should happen via the Privileges or Immunities Clause, not the Due Process Clause. *See, e.g.*, Stephen E. Sachs, Dobbs *and the Originalists*, 47 HARV. J.L. & PUB. POL'Y 539, 542 & n.19 (2024).

[88] *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

[89] Lash, *supra* note 45, at 1452–53, 1453 n.69.

[90] *See* Robert M. Cover, *The Supreme Court, 1982 Term — Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 5 (1983) (discussing the role of narrative in judicial decisionmaking).

[91] Joan Barceló et al., *New Estimates of US Civil War Mortality from Full-Census Records*, PNAS, Nov. 18, 2024, art. e2414919121, at 1.

[92] *See* Greene, *supra* note 65, at 1000–01. Take this description of one of the Fourteenth Amendment's drafters:

> [John] Bingham was . . . the most significant drafter of the Fourteenth Amendment, but as a descriptive matter, he is not a national hero. In Cadiz, Ohio, where Bingham spent most of his life, the main road . . . once bore Bingham's name, but [no longer]. The local . . . school used to be called Bingham Grammar School, but [no longer] . . . . The Wikipedia page for Mercer, Pennsylvania, where Bingham was born, does not [even] mention [him] . . . .

Id.