

ment and is thus enforceable against the states.¹⁹ Relevant to this question, the Court examined whether the right to keep and bear arms is “fundamental to our scheme of ordered liberty”²⁰ or “deeply rooted in this Nation’s history and tradition.”²¹ The Court, relying on historical analysis set forth previously in *Heller*, noted the English common law roots of the right to keep arms for self-defense²² and the importance of the right to the American colonies, the drafters of the Constitution, and the states as a bulwark against overreaching federal authority.²³ Noting that by the 1850s the perceived threat that the National Government would disarm the citizens had largely faded, the Court suggested that the right to keep and bear arms became valued principally for purposes of self-defense, so that the passage of Fourteenth Amendment, in part, was intended to protect the right of ex-slaves to keep and bear arms. While it was argued by the dissent that this protection would most logically be provided by the Equal Protection Clause, not by the Due Process Clause,²⁴ the plurality also found enough evidence of then-existent concerns regarding the treatment of blacks by the state militia to conclude that the right to bear arms was also intended to protect against generally-applicable state regulation.

¹⁹ The portion of the opinion finding incorporation was authored by Justice Alito, and joined by Chief Justice Roberts, Justice Scalia and Justice Kennedy. Justice Thomas declined to join the plurality’s opinion as regards incorporation under the Due Process Clause. Instead, Justice Thomas, alone among the Justices, would have found that the Second Amendment is applicable to the states under the Privileges or Immunities Clause. For a more detailed discussion of incorporation and the Privileges or Immunities Clause, see *supra* Bill of Rights, Fourteenth Amendment and Fourteenth Amendment, Privileges or Immunities.

²⁰ *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

²¹ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted).

²² *McDonald*, 561 U.S. ___, No. 08–1521, slip op. at 20 (noting that Blackstone had asserted that the right to keep and bear arms was “one of the fundamental rights of Englishmen”).

²³ 561 U.S. ___, No. 08–1521, slip op. at 20–22.

²⁴ 561 U.S. ___, No. 08–1521, slip op. at 23–24 (Breyer, J., dissenting).