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Editor's Note : This week, we are hosting a symposium before oral argument on December 2 in *New York State Rifle & Pistol Association v. City of New York*. Click here to read the contributions.

Breaking News : The Supreme Court released orders today from the November 22 conference. The justices added one new case, *FNU Tanzin v. Tanvir*, to their merits docket.

Robert Cottrol - Guest *Guest*
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McDonald â€“ Incorporation, Irony, and History

*Robert Cottrol is a professor at the George Washington University Law School who has written on the Second Amendment, including a 1991 Georgetown Law Journal article, "*The Second Amendment: Toward an Afro-Americanist Reconsideration,"□ *which was cited by Justice Thomas in his concurring opinion in* McDonald

Yesterday's decision in *McDonald v. Chicago* will be examined and debated by constitutional scholars and legal historians for decades. Justice Alito's decision for the Court, accompanied by Justice Thomas's concurrence stand as convincing if narrowly accepted rebuttals to two great examples of result oriented historical denial that have long plagued American constitutional debate. The first of these is that the constitution protects no meaningful or enforceable right of individuals to have arms for their own defense. The second is the idea that the incorporation of the Bill of Rights through the Fourteenth Amendment was purely a judicial invention with little or no foundation in the text or history of the amendment. The careful and accurate historical analyses provided in the Alito and Thomas opinions provide a convincing rebuttal of both views as well as furnishing some delicious ironies along the way.

Both opinions, like Justice Scalia's opinion in *District of Columbia v. Heller*, properly take the debate over the right to keep and bear arms beyond the confines of the late eighteenth century adoption of the Second Amendment and force us into considerations of slavery, abolition, civil war and the defeated South's determination that the newly freed black population might be free only in the most narrow, technical sense. The South showed its determination that that new birth of freedom would not include the rights long enjoyed by American citizens, including or perhaps especially the right to bear arms. The Black Codes enacted by southern states in 1865 and 1866 prohibited blacks from serving on juries and testifying or acting as parties in lawsuits against whites. Special vagrancy laws were used to force former slaves into unfavorable labor contracts. And the laws of the previously rebellious states had specific provisions prohibiting blacks from owning weapons. Men who had helped save the Union while in the ranks of the United States Colored Troops, were to be defenseless against their former enemies previously clad in Confederate Gray, now wearing the robes of the Ku Klux Klan.

This turn of events disgusted Republicans in Congress. It played a key role in their support for the Civil Rights Act of 1866, the Freedmen's Bureau Act of 1867 and ultimately the Fourteenth Amendment. The disarming of the freedmen figured prominently in the debates over all three provisions and furnish the most convincing evidence we have that the champions of the Fourteenth Amendment intended to make the Bill of Rights binding on the states. This is a history well known to students of Reconstruction. It is a history that was properly brought out in the Alito and Thomas opinions and not seriously disputed in the dissenting opinions authored by Justices Stevens and Breyer.

The opinions in *McDonald* are rich in ironies. We have conservative justices authoring opinions which squarely confront the tragic legacy of race and its impact on American Constitutional history, while we have liberal justices wanting to largely skip over that history. We have on the other hand liberal justices pleading for states' rights and federalism while conservative justices make the case for the soundness of incorporating the Bill of Rights as a matter of original intent. The Court got it right in *McDonald* but how it came to do so will fascinate students and commentators for some time to come.

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