

Colloquy Debate

MCDONALD V. CHICAGO: WHICH STANDARD OF SCRUTINY SHOULD APPLY TO GUN CONTROL LAWS?†

Lawrence Rosenthal* & Joyce Lee Malcolm**

In this Debate, Professors Rosenthal and Malcolm dispute the standard of scrutiny that the Supreme Court should apply to restrictions on the Second Amendment in the wake of its recent decision, McDonald v. City of Chicago. In Part I, Professor Rosenthal notes the importance of gun control laws to police, suggesting that a lower standard of scrutiny might be necessary to allow law enforcement officials to protect the community and is consistent with the Second Amendment's preamble. In Part II, Professor Malcolm responds by turning to the practical consequences of Chicago's and Washington, D.C.'s recent gun control laws, which make owning a gun nearly impossible in those cities; she argues for a standard of strict scrutiny for all gun control laws. In Part III, Professor Rosenthal replies.

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* Professor of Law, Chapman University School of Law. I am indebted to Zachariah Moura for highly capable research assistance. The reader should know that I represented the U.S. Conference of Mayors as amicus curiae in support of affirmance in *McDonald v. City of Chicago*. The views expressed herein are nevertheless mine alone and should not be attributed to the Conference or any of its members.

** Professor of Law, George Mason University School of Law. I wish to thank the scholars of the post-*Heller* online group for their thoughtful discussions, the National Constitution Center in Philadelphia for inviting me to discuss the issues involved in *McDonald*, and my colleagues at George Mason University School of Law.

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I. SECOND AMENDMENT PLUMBING AFTER *MCDONALD*: EXPLORING THE CONTRADICTION IN THE SECOND AMENDMENT

Lawrence Rosenthal

It took two landmark decisions to reach the end of the beginning. In *District of Columbia v. Heller*,¹ the Supreme Court, adopting what it characterized as “the original understanding of the Second Amendment,”² held that the Second Amendment secures an individual’s right to keep and bear arms against the federal government. On that basis, the Court invalidated the District of Columbia’s prohibition on the possession of handguns.³ In *McDonald v. City of Chicago*,⁴ the Court concluded that by virtue of the Fourteenth Amendment, the Second Amendment right to keep and bear arms is enforceable against state and local governments.⁵ Now, the more prosaic but perhaps more important work begins. It is time to start putting the doctrinal “plumbing” in place.⁶

A.

Likely the most important piece of plumbing that will need to be installed is the standard of scrutiny to be applied to gun control laws challenged under the Second Amendment. This is no small matter. As Eugene Volokh has observed, in light of the many difficulties in assessing the efficacy of gun control laws, a rigorous form of strict scrutiny, requiring the government to demonstrate that a challenged regulation is the essential

¹ 554 U.S. 570 (2008).

² *Id.* at 625.

³ *Id.* at 628–35.

⁴ 130 S. Ct. 3020 (2010).

⁵ *Id.* at 3050 (plurality opinion) (relying on the Due Process Clause); *id.* at 3077–88 (Thomas, J., concurring in part and concurring in the judgment) (relying on the Privileges or Immunities Clause).

⁶ For the source of the metaphor, see Stuart Banner, *The Second Amendment, So Far*, 117 HARV. L. REV. 898, 907–08 (2004) (reviewing DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* (2003)).

means for achieving a compelling governmental interest, would likely be the death knell for most gun control laws.⁷

The Supreme Court has not offered much guidance on the Second Amendment standard of scrutiny. In *Heller*, the Court invalidated the District's ban on handguns and its requirement that all firearms in a home remain unloaded and inoperable.⁸ At the same time, the Court refused to decide what type of justification is required for firearms regulation, although it did reject both a test limited to ascertaining whether a challenged regulation lacks a rational basis⁹ and Justice Breyer's proposed interest-balancing test.¹⁰ In *McDonald*, the Court was silent on the Second Amendment standard of scrutiny, with a four-Justice plurality adding only that Fourteenth Amendment standards for state and local gun control laws are no different than those applied to the federal government under the Second Amendment.¹¹ Since *Heller*, commentators have sharply divided on the appropriate standard for scrutiny under the Second Amendment,¹² as have the lower courts.¹³

⁷ See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1465–68 (2009). For a helpful discussion of the difficulties in assembling empirical evidence of the efficacy of gun control laws, see MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS* 77–85 (2007).

⁸ 554 U.S. at 628–30.

⁹ *Id.* at 628 n.27.

¹⁰ *Id.* at 634–35.

¹¹ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3048 (2010) (plurality opinion). Justice Thomas's separate opinion suggests this symmetry as well, *see id.* at 3083 (Thomas, J., concurring in part and concurring in the judgment), although he left open the question whether noncitizens may assert Second Amendment rights against state and local governments, *see id.* at 3084 n.19. To be sure, a majority characterized the right to keep and bear arms as “fundamental,” *see id.* at 3041–42 (opinion of the Court), and there is authority suggesting that burdens on rights regarded as fundamental should be subject to strict scrutiny, *see, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968). This rule, however, is not invariably applied. *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 696–700 (2007). More important for present purposes, we will see that the Second Amendment contains a textual basis for regulatory authority that makes strict scrutiny unwarranted. *See infra* Part I.B.

¹² *See, e.g.*, Ivan E. Bodensteiner, *Scope of the Second Amendment Right—Post-Heller Standard of Review*, 41 U. TOL. L. REV. 43, 66–71 (2009) (enhanced rational basis review); Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1379–80 (2009) (something less than strict scrutiny); Calvin Massey, *Second Amendment Decision Rules*, 60 HASTINGS L.J. 1431, 1442–43 (2009) (regulation must be proved by clear and convincing evidence to advance a compelling governmental interest); Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 79–84 (2009) (undue burden test); Allen Rostron, *Protecting Gun Rights and Improving Gun Control After District of Columbia v. Heller*, 13 LEWIS & CLARK L. REV. 383, 407–08 (2009) (reasonableness test); Mark Tushnet, *District of Columbia v. Heller and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 423–32 (2009) (strict scrutiny); Volokh, *supra* note 7, at 1454–61 (regulations imposing a substantial burden on Second Amendment rights should be evaluated by assessing the “magnitude of the burden” in light of its justification); Jason T. Anderson, Note, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in*

To make matters more concrete, consider the potential Second Amendment right to carry firearms in public. The Second Amendment provides, “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.”¹⁴ In *Heller*, the Court cautioned that:

“[T]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.¹⁵

The Court then relied on framing-era sources to define “arms” as “weapons . . . ‘in common use at the time,’”¹⁶ the right to “keep” arms as the right to possess them,¹⁷ and the right to “bear” arms as the right to “carry[] for a particular purpose—confrontation.”¹⁸ The Second Amendment provides that these rights “shall not be infringed.” According to what was likely the leading early American dictionary, Noah Webster’s 1828 *American Dictionary of the English Language*, “infringed” meant “[b]roken, violated, transgressed,”¹⁹ which seems to support a vigorous conception of an individual right to possess and carry firearms.²⁰ Indeed, in *Heller*, while noting

District of Columbia v. Heller, 82 S. CAL. L. REV. 547, 577–87 (2009) (intermediate scrutiny); Ryan L. Card, Note, *An Opinion Without Standards: The Supreme Court’s Refusal to Adopt a Standard of Constitutional Review in District of Columbia v. Heller Will Likely Cause Headaches for Future Judicial Review of Gun-Control Regulations*, 23 BYU J. PUB. L. 259, 286–87 (2009) (same); Lindsay Goldberg, Note, *District of Columbia v. Heller: Failing to Establish a Standard for the Future*, 68 MD. L. REV. 889, 904–13 (2009) (strict scrutiny); Andrew R. Gould, Comment, *The Hidden Second Amendment Framework Within District of Columbia v. Heller*, 62 VAND. L. REV. 1535, 1570–73 (2009) (a “deferential form of strict scrutiny”); Sarah Perkins, Note, *District of Columbia v. Heller: The Second Amendment Shoots One Down*, 70 LA. L. REV. 1061, 1079–90 (2010) (intermediate scrutiny); Jason Racine, Note, *What the Hell[er]? The Fine Print Standard of Review Under Heller*, 29 N. ILL. U. L. REV. 605, 617–20 (2009) (undue burden).

¹³ For a recent decision usefully summarizing the disarray in the lower courts, see *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 184–86 (D.D.C. 2010). At the appellate level, there has been something of a trend toward a form of intermediate scrutiny requiring that the challenged regulation be substantially related to an important governmental objective. See, e.g., *United States v. Chester*, 628 F.3d 673, 682–83 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800–04 (10th Cir. 2010); *United States v. Skoien*, 614 F.3d 638, 641–42 (7th Cir. 2010) (en banc); *United States v. Marzarella*, 614 F.3d 85, 95–98 (3d Cir. 2010).

¹⁴ U.S. CONST. amend. II.

¹⁵ 554 U.S. at 576–77 (citation omitted) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

¹⁶ *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

¹⁷ *Id.* at 582.

¹⁸ *Id.* at 584.

¹⁹ 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 110 (1828).

²⁰ See, e.g., STEPHEN P. HALBROOK, THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 328–30 (2008); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1404–09.

in dicta that “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues,”²¹ the Court added that antebellum nineteenth-century cases had understood the Second Amendment to secure a right to carry firearms openly.²² Professor Volokh, even while rejecting strict scrutiny of gun control laws, has opined that *Heller* likely secures a right to carry loaded firearms in public, at least openly.²³ He has also expressed doubt about prohibitions on carrying concealed weapons, stating that there is not much beyond the *Heller* dictum and their historical pedigree to support these laws.²⁴ I have also expressed doubts about whether these laws can survive *Heller*.²⁵

The consequences for urban law enforcement are potentially serious. As I have demonstrated elsewhere, the unprecedented spike in violent crime from the mid-1980s to the early 1990s was largely a function of urban firearms-related crime in disadvantaged and unstable inner-city neighborhoods, arising from competition in emerging markets for crack cocaine.²⁶ The ability of gang members and drug traffickers “to possess and carry weapons in case of confrontation”²⁷ was central to this violent competition, since the creation and control of territorial drug-distribution monopolies involved the ready availability of firearms.²⁸ There is, in turn, substantial evidence that the large declines in urban crime that followed the crime spike were attributable to aggressive stop-and-frisk tactics, which made it far riskier to carry guns and drugs in public.²⁹ Prohibitions on carrying weapons, in turn, played an important role in these police tactics, since they confer upon police a critical source of stop-and-frisk authority whenever officers reasonably suspect a suspect to be carrying a firearm.³⁰ Recognition of a constitutional right to carry firearms, at least openly, would grant drug traffickers and gang members effective immunity from stop-and-frisk tactics, potentially crippling the fight against urban violent crime.³¹

²¹ 554 U.S. at 626.

²² *Id.* at 612–13.

²³ See Volokh, *supra* note 7, at 1516–20.

²⁴ See *id.* at 1521–24.

²⁵ Rosenthal, *supra* note 12, at 45–47.

²⁶ See *id.* at 7–15.

²⁷ 554 U.S. at 592.

²⁸ See Rosenthal, *supra* note 12, at 15–20.

²⁹ See *id.* at 30–35.

³⁰ See *id.* at 37–44.

³¹ See *id.* at 45–48. One article questions this conclusion, speculating that police would respond to a constitutional right to carry firearms by utilizing alternate grounds for stop-and-frisk, “such as suspicion of drug crimes or even curfew violations” or relying on an “officer safety justification.” Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1080 n.214 (2009). This speculation rests on an assumption that there is some sort of equilibrium of reasonable suspicion such that if one basis for suspicion becomes unavailable to officers, they can always shift to another. The authors offer no support for this as-

Thus, the stakes are high. A vigorous conception of Second Amendment rights could enable urban street gangs to act as occupying armies. As long as they commit no overt crimes while police officers are present, they could use their ability to go about armed to establish criminal mini-states based on drug trafficking—much as they did during the crime-spike era.³² Everything depends on the type of justification that courts will require to regulate the possession of guns.³³

sumption, however, and there is little basis to suppose that when one justification for stop-and-frisk is eliminated, police can always come up with another. Given that police in departments committed to aggressive stop-and-frisk practices already have an incentive to maximize stop-and-frisk rates, it is doubtful that a reduction in stop-and-frisk authority of one type will be offset by increasing stop-and-frisk authority on other grounds.

The available data, moreover, show that weapons searches are an especially important source of stop-and-frisk authority for departments that use stop-and-frisk tactics aggressively. For example, in New York, in an eighteen-month period studied by the Attorney General during the crime-decline period, stop-and-frisks reflected in mandated reports based on suspected weapons offenses made up 44.6% of all stops, while suspected drug offenses were involved in 8.4% and misdemeanor/quality of life offenses were involved in 7.7%. CIVIL RIGHTS BUREAU, OFFICE OF ATTORNEY GEN. OF THE STATE OF N.Y., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES app. tbl.I.A.5 (1999), available at http://books.google.com/books?id=fGJTRZgvUBoC&printsec=frontcover&source=gbs_ge_summary_r&cad=0. Reports are mandated "when a suspect is (i) 'stopped' by the use of force; (ii) frisked (i.e., patdown) and/or 'searched' (i.e., searched inside clothing); (iii) arrested; or (iv) 'stopped' and the suspect refused to identify him or herself." *Id.* at 63–64 (emphasis omitted) (footnote omitted). For all reports, even if not mandated, 19.2% are based on suspicion of violent crime, 34.0% are based on weapons offenses, 15.8% are based on property crime, 8.7% are based on drug offenses, and 10.2% are based on misdemeanor/quality of life offenses. *Id.* at 109–10 & tbl.I.A.5.

Moreover, there is no free-floating authority consistent with the Fourth Amendment to stop and frisk an individual based on "officer safety" absent reasonable suspicion that the suspect is engaged in unlawful activity. The rule permitting a stop-and-frisk based on reasonable suspicion permits an officer to approach a suspect "for purposes of investigating possibly criminal behavior." *Terry v. Ohio*, 392 U.S. 1, 22 (1968). This requirement is fully applicable to stop-and-frisks involving suspected firearms. *See, e.g., Florida v. J.L.*, 529 U.S. 266, 272 (2000) ("Our decisions recognize the serious threat that armed criminals pose to public safety; *Terry's* rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern. But an automatic firearm exception to our established reliability analysis would rove too far." (citation omitted)). Thus, *Terry* requires suspicion of illegality; it follows that when applicable law does not ban carrying a firearm, the Fourth Amendment does not permit a stop-and-frisk for firearms because there is no reason to believe that the suspect violated any law. *See, e.g., United States v. Burton*, 228 F.3d 524, 528–30 (4th Cir. 2000); *United States v. Ubiles*, 224 F.3d 213, 217–18 (3d Cir. 2000); *Gomez v. United States*, 597 A.2d 884, 890–91 (D.C. 1991); *Commonwealth v. Couture*, 552 N.E.2d 538, 541 (Mass. 1990); 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.6(a) (4th ed. 2004). *Heller* leaves open the possibility of requiring a license to carry firearms, *see* 554 U.S. at 631, but in the context of vehicles, the Court has held that the Fourth Amendment forbids investigative stops to check the license and registration of a vehicle absent some particularized reason to believe that the suspect has violated licensing requirements or another law. *See Delaware v. Prouse*, 440 U.S. 648, 655–63 (1979); *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 40–48 (2000) (invalidating roadblocks to check vehicles for guns and drugs in high-crime areas).

³² *See Rosenthal, supra* note 12, at 11–14, 45–48.

³³ Some have argued that the Second Amendment right should be limited to possessing and using firearms within one's home, since privacy interests subside and governmental regulatory interests are

B.

At first blush, *Heller* seems to clinch the case for a right of gang members and drug dealers to carry firearms. As we have seen, *Heller* defined the right to “bear” arms as a right to carry firearms for purposes of confrontation. The Court did not define the right in terms limited to those who carry for purposes of legitimate self-defense; indeed, it explained that the term includes “the carrying of the weapon . . . for the purpose of ‘offensive or defensive action,’”³⁴ adopting a definition of “carry” originally used in connection with a federal statute that enhances sentences for anyone who “during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm.”³⁵ Thus, it seems that even the criminally minded have a right to “bear” arms.

Yet there is more going on in *Heller* than first meets the eye. The Court took a rigorously textualist approach when defining the right to “keep and bear arms,” but when it considered whether the District of Columbia’s handgun ban ran afoul of the Second Amendment, the Court found that textualism offered little assistance. Instead of making an effort to determine whether a handgun ban “infringed” the right to keep and bear arms in light of the original meaning of that term, the Court approached the question in a

greater once firearms are taken outside the home. See, e.g., Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 231–33 (2008); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1297–355 (2009). Whatever the merits of this view in terms of policy, however, it is hard to reconcile with *Heller*’s textualism. As we have seen, *Heller* defined the right to bear arms to include carrying weapons for purposes of confrontation, and it does not seem particularly plausible to understand this analysis of the text as recognizing only a right to “bear” arms from the bedroom to the living room. For additional critical discussion of this understanding of Second Amendment rights, see Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97 (2009), http://www.columbialawreview.org/Sidebar/volume/109/97_Volokh.pdf.

Others have argued that Second Amendment doctrine should adopt the rule found in First Amendment doctrine that permits reasonable regulation of the time, place, and manner of speech and apply it to the right to keep and bear arms. See, e.g., Christopher A. Chrisman, *Mind the Gap: The Missing Standard of Review Under the Second Amendment (and Where to Find It)*, 4 GEO. J.L. & PUB. POL’Y 289 (2006); Janice Baker, Comment, *The Next Step in Second Amendment Analysis: Incorporating the Right to Bear Arms into the Fourteenth Amendment*, 28 U. DAYTON L. REV. 35, 57–60 (2002); Gary E. Barnett, Note, *The Reasonable Regulation of the Right to Keep and Bear Arms*, 6 GEO. J.L. & PUB. POL’Y 607, 621–28 (2008).

Yet the analogy between First and Second Amendment rights is a difficult one because “the right to arms stems from concerns about self defense and the defense of public liberty. . . . [T]he Second Amendment’s right to arms is about capabilities more than expression.” Glenn Harlan Reynolds, *Guns and Gay Sex: Some Notes on Firearms, the Second Amendment, and “Reasonable Regulation,”* 75 TENN. L. REV. 137, 147–48 (2007) (footnote omitted). Beyond that, First Amendment doctrine treats differentially laws directed not at the content of speech but rather at some nonspeech evil, whereas gun control laws are usually directed at the right to keep and bear arms as defined in *Heller*. See Tushnet, *supra* note 12, at 429–31.

³⁴ *Heller*, 554 U.S. at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

³⁵ 18 U.S.C. § 924(c)(1)(A) (2006).

more indirect way, perhaps recognizing that the term “infringed” is ambiguous as applied to a law that permits the District’s residents to possess some types of “arms” but not others. The Court wrote that “[t]he handgun ban amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose,” and “extends, moreover, to the home, where the need for defense of self, family, and property is most acute.”³⁶ It added that “[f]ew laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban. And some of those few have been struck down.”³⁷ Handguns, the Court wrote, are considered “the quintessential self-defense weapon.”³⁸ The Court also characterized a number of firearms regulations as “presumptively lawful,”³⁹ including “prohibitions on carrying concealed weapons,” and “prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.”⁴⁰

Commentators have suggested that the Court took a categorical approach in which “core” Second Amendment interests receive something close to absolute protection, while more penumbral interests are subject to greater regulation.⁴¹ Still, it is far from clear how to go about determining whether a challenged regulation implicates only penumbral interests. Framing-era practice appears to be of little help. Not only did the Court claim no historical support for a core-and-penumbra approach, but it also acknowledged that there was little framing-era support for firearms regulation aside from laws addressing gunpowder storage and the discharge of firearms.⁴² Nevertheless, the Court treated some regulations that lack support in framing-era practice as presumptively lawful. Prohibitions on carrying concealed weapons, for example, did not emerge in the United States until the 1820s and 1830s in response to a surge in violent crime in the nation’s growing cities.⁴³ Prohibitions on the possession of firearms by convicted felons were uncommon until they emerged in the twentieth century in response to a crime wave that followed the First World War.⁴⁴ For this

³⁶ 554 U.S. at 628.

³⁷ *Id.* at 629.

³⁸ *Id.*

³⁹ *Id.* at 627 n.26.

⁴⁰ *Id.* at 626.

⁴¹ See, e.g., Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 404–11 (2009); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 976–77 (2009).

⁴² 554 U.S. at 632–34.

⁴³ See, e.g., SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 138–44 (2006); Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 STAN. L. & POL’Y REV. 571, 582–85 (2006).

⁴⁴ See C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL’Y 695, 698–728 (2009).

reason, some have denounced the Court's treatment of these "presumptively lawful" regulations as inconsistent with the Court's originalist analysis.⁴⁵

Perhaps *Heller*'s dicta regarding presumptively lawful firearms regulation will one day be discarded as inconsistent with the original meaning of the Second Amendment. After all, in the operative clause, the only term that could be thought to support a regulation of the right to "carry" "in case of confrontation" is the term "infringed," and as we have seen, that term, at least as a matter of its common framing-era usage, does not appear to allow regulatory power over the right to bear arms. There is, however, a textual basis for regulatory authority: the Second Amendment's preamble, in particular its reference to "[a] well regulated militia."

In *Heller*, the Court explained that the original meaning of the term "militia" was not the members of a formal military organization, but rather "the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty."⁴⁶ The Court therefore concluded that the original meaning of the term included all those "physically capable of acting in concert for the common defense,"⁴⁷ rather than being limited to "the organized militia."⁴⁸ The Court breezed past the adjective "well-regulated," writing that it "implies nothing more than the imposition of proper discipline and training."⁴⁹ But we should pause to consider the interaction between the noun "militia" and its adjective, "well-regulated." If the militia includes everyone capable of bearing arms, even if not part of an organized militia, and the government may subject this unorganized "militia" to "proper training and discipline," then the preamble envisions comprehensive regulation of all who possess and carry firearms, not merely those in formal military or paramilitary organizations. After all, the word "militia" appears only once in the Second Amendment, and if it includes all who are capable of bearing arms even if not part of an organized military organization, then this same group is subject to regulatory authority. Accordingly, the regulatory power envisioned in the preamble extends to the whole of the populace capable of exercising Second Amendment rights. Moreover, *Heller* adds that the preamble is properly consulted to clarify the meaning of the Second Amendment's operative clause.⁵⁰

⁴⁵ See, e.g., Larson, *supra* note 12, at 1372–79; Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1356–62 (2009).

⁴⁶ 554 U.S. at 627. The dissenters added that the first militia act, enacted the same year the Second Amendment was ratified, defined the militia as "every able-bodied white male citizen between the ages of 18 and 45" and required each "to 'provide himself with a good musket or firelock' and other specified weaponry." *Id.* at 672 (Stevens, J., dissenting) (quoting Act of May 8, 1792, ch. 33, 1 Stat. 271).

⁴⁷ *Id.* at 595 (majority opinion) (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939) (internal quotation mark omitted)).

⁴⁸ *Id.* at 596.

⁴⁹ *Id.* at 597.

⁵⁰ *Id.* at 577–78.

Accordingly, the Second Amendment, construed in light of the preamble, recognizes a general regulatory power over the possession and carrying of firearms (although presumably the source of regulatory authority would be found outside of the preamble, such as state and local police powers or the federal power to regulate interstate commerce). For this reason, it is appropriate to construe the term “infringed” in the Second Amendment’s operative clause in a manner that preserves the regulatory power acknowledged in the preamble. This approach, in turn, does a great deal to explain the basis for the Court characterizing as “presumptively lawful” regulations that would otherwise seem to “infringe” the right to “possess” firearms or “carry in case of confrontation,” such as laws forbidding concealed carry.

To be sure, one could argue that regulatory power under the Second Amendment is limited to the eighteenth-century regulations extant at the time of the Second Amendment’s ratification, but that rationale not only is inconsistent with *Heller*’s dicta but also fails to take adequate account of *McDonald*. In *McDonald*, a majority of the Court concluded that the Second Amendment must be understood as it had come to be regarded at the time of the Fourteenth Amendment’s ratification.⁵¹ By then, of course, there was the widespread acceptance of prohibitions on concealed carrying of firearms,⁵² as *Heller* acknowledged.⁵³ It follows that by the time of the ratification of the Fourteenth Amendment, it was understood that under the Second Amendment, regulatory powers were not static and could expand in response to felt exigencies such as the wave of urban crime in the 1820s and 1830s that produced the first concealed-carry prohibitions in America.⁵⁴

Thus, even though the Court rejected an interest-balancing test in *Heller*,⁵⁵ a point reiterated in the four-Justice plurality opinion in *McDonald*,⁵⁶ the historical acceptance of concealed-carry prohibitions cannot be explained by anything other than this very type of interest-balancing—an approach that does not require the kind of compelling empirical evidence of necessity that the strict scrutiny test demands. Despite *Heller*, interest-

⁵¹ See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3038–42 (2010). For elaboration on the argument that the Second Amendment’s incorporation into the Fourteenth Amendment requires that the Second Amendment be interpreted as it was understood at the time of the Fourteenth Amendment’s adoption, see AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 258–66 (1998).

⁵² See, e.g., ALEXANDER DECONDE, *GUN VIOLENCE IN AMERICA* 71–74 (2001); HALBROOK, *supra* note 20, at 93–96; Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 516–17 (2004); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 *HARV. J.L. & PUB. POL’Y* 559, 615–17 (1986); Kopel, *supra* note 20, at 1416–33; Calvin Massey, *Guns, Extremists, and the Constitution*, 57 *WASH. & LEE L. REV.* 1095, 1115–18 (2000).

⁵³ See 554 U.S. at 626.

⁵⁴ See *supra* note 43 and accompanying text.

⁵⁵ 554 U.S. at 634–35.

⁵⁶ 130 S. Ct. at 3050.

balancing may be inescapable in Second Amendment jurisprudence.⁵⁷ To avoid the need to repudiate what seems like a clear statement to the contrary in *Heller*, the Court may utilize a different form of words, such as an undue burden test, but in practical operation, its approach is likely to be little different.⁵⁸ No other provision of the Bill of Rights contains the type of textual acknowledgement of governmental regulatory power found in the Second Amendment. It would be anomalous, to say the least, for the Court to recognize less regulatory power with respect to Second Amendment rights than is generally acknowledged with respect to the rest of the Bill of Rights.⁵⁹

C.

Even granting that prohibitions on carrying concealed firearms are likely to survive under some version of an undue burden or interest-balancing test, the question remains whether the Second Amendment grants a right to carry firearms openly—a right that could effectively immunize urban gangs from stop-and-frisk tactics, at least for gang members who are not convicted felons or not otherwise subject to the regulatory powers acknowledged as legitimate in *Heller*. After all, an undue burden test cannot render a right nugatory, and as *Heller* defined the right to bear arms, it seems inescapable that some sort of right to carry firearms—at least in non-sensitive public places—must be recognized if the right to “bear” arms is to avoid becoming superfluous in light of the right to “keep” them. Now, we have finally reached the essential contradiction in the Second Amendment as applied to contemporary urban America.

While *Heller* characterized the right to keep and bear arms as an aspect of what was regarded in the framing era as a natural right of self-defense,⁶⁰ in contemporary America, a right to keep and bear arms does not necessarily enhance security. Research discloses, for example, that gang members carry firearms at significantly elevated rates.⁶¹ Yet their ability to defend themselves does not make gang members safer; instead, they face an enormous risk of violent victimization. For example, a study of Los Angeles County gang members during the crime-spike period estimated that

⁵⁷ See Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1569–73 (2009).

⁵⁸ One student commentator discounted the possibility that the Court would adopt an undue burden test on the ground that this test has been repudiated by Justices Scalia and Thomas as a matter of due process jurisprudence. See Gould, *supra* note 12, at 1573–75. Nevertheless, a majority of the remaining Justices might well unite behind this approach, and even Justices Scalia and Thomas have proved willing to subscribe to this test when it was necessary to assemble a majority behind a result that they otherwise approved. See *Gonzales v. Carhart*, 550 U.S. 124, 146, 146–68 (2007).

⁵⁹ For a discussion that considers the appropriate standard of scrutiny for the Second Amendment in light of standards employed for other provisions in the Bill of Rights, see Winkler, *supra* note 11, at 693–96.

⁶⁰ 554 U.S. at 584–86, 593–95, 606, 609.

⁶¹ See Rosenthal, *supra* note 12, at 18–19.

they were sixty times more likely to be homicide victims than were members of the general population.⁶² A study of gang members in St. Louis found a homicide rate 1000 times higher than that of the general population.⁶³ A study of a large African-American drug trafficking gang found that over a four-year period, gang members had a 25% chance of being killed.⁶⁴

The prevalence of violence in gang-dominated neighborhoods, moreover, serves to make firearms more pervasive in those communities, as the perception of danger in high-crime neighborhoods becomes a further stimulus to carry a gun as a means of self-protection.⁶⁵ As Jeffrey Fagan and Deanna Wilkinson's study of at-risk youth in New York explains, when inner-city youth live under the threat of violence in an environment in which firearms are prevalent, not only are they more likely to arm themselves, but they also become increasingly likely to respond to real or perceived threats and provocations with lethal violence, creating what the authors characterize as a contagion effect.⁶⁶ There are statistical indications of contagion as well. A number of studies found that gang-related homicides have an independent and positive effect on the homicide rate.⁶⁷ One study of homicide in New York, for example, found evidence of a contagion effect of firearms-related violence, which stimulated additional firearms violence in nearby areas.⁶⁸ In such an environment, the prevalence of firearms compromises security rather than enhances it.⁶⁹

⁶² Armando Morales, *A Clinical Model for the Prevention of Gang Violence and Homicide*, in *SUBSTANCE ABUSE AND GANG VIOLENCE* 105, 111–12 (Richard C. Cervantes ed., 1992).

⁶³ SCOTT H. DECKER & BARRIK VAN WINKLE, *LIFE IN THE GANG: FAMILY, FRIENDS, AND VIOLENCE* 173 (1996).

⁶⁴ See Sudhir Venkatesh, *The Financial Activity of a Modern American Street Gang*, in *AMERICAN YOUTH GANGS AT THE MILLENNIUM* 239, 242 (Finn-Aage Esbensen et al. eds., 2004).

⁶⁵ See Rosenthal, *supra* note 12, at 19–20.

⁶⁶ Jeffrey Fagan & Deanna L. Wilkinson, *Guns, Youth Violence, and Social Identity in Inner Cities*, in 24 *CRIME & JUSTICE: YOUTH VIOLENCE* 105, 137–75 (Michael Tonry & Mark H. Moore eds., 1998). For similar accounts, see, for example, MARK R. POGREBIN, PAUL B. STRETESKY & N. PRABHA UNNITHAN, *GUNS, VIOLENCE & CRIMINAL BEHAVIOR: THE OFFENDER'S PERSPECTIVE* 69–71 (2009); David Hemenway et al., *Gun Carrying Among Adolescents*, 59 *LAW & CONTEMP. PROBS.* 39, 44–47 (1996).

⁶⁷ See, e.g., Jacqueline Cohen & George Tita, *Diffusion in Homicide: Exploring a General Method for Detecting Spatial Diffusion Processes*, 15 *J. QUANTITATIVE CRIMINOLOGY* 451, 490–91 (1999); Jacqueline Cohen et al., *The Role of Drug Markets and Gangs in Local Homicide Rates*, 2 *HOMICIDE STUD.* 241, 257–58 (1998).

⁶⁸ See Jeffrey Fagan, Deanna L. Wilkinson & Garth Davies, *Social Contagion of Violence*, in *THE CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR AND AGGRESSION* 688, 701–10 (Daniel J. Flannery et al. eds., 2007). For a similar finding about Chicago, see Elizabeth Griffiths & Jorge M. Chavez, *Communities, Street Guns and Homicide Trajectories in Chicago, 1980–1995: Merging Methods for Examining Homicide Trends Across Space and Time*, 42 *CRIMINOLOGY* 941, 965–69 (2004).

⁶⁹ Some have claimed that laws entitling individuals to carry concealed firearms have produced reductions in crime. See, e.g., JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME* 170–336 (3d ed. 2010). This conclusion, however, has been subject to fierce criticism. See, e.g., DAVID HEMENWAY, *PRIVATE GUNS*,

Consider drive-by shootings, which gang researchers note is unusually common in gang-related violence.⁷⁰ Drive-bys accounted for 33% of gang-related homicides in Los Angeles County between 1989 and 1993, with 590 victims; nearly half of the persons shot at and a quarter of the homicide victims were innocent bystanders.⁷¹ The frequency with which innocent bystanders are shot illustrates the disadvantage (from the perpetrator's standpoint) of a drive-by shooting—it is not easy to hit the intended target from a moving vehicle. The tactic makes sense, however, in light of the rate at which gang members carry firearms. As we have seen,⁷² with gang membership comes firearms, and if gang members believe that their targets are likely to be armed, the drive-by tactic often constitutes the safest way of approaching one's target and then making a getaway.⁷³

These are the consequences of a right to “carry in case of confrontation” in high-crime, inner-city neighborhoods. They lay bare the contradiction within the Second Amendment. In the framing era, it may have been possible to speak of a “right to keep and bear arms” that was “necessary to the security of a free state,” but in high-crime inner-city neighborhoods, this formula does not hold. At a minimum, keeping the “militia” “well regulated” is likely to require a great deal more in the way of regulation than in the framing era. Perhaps a demanding and highly discretionary system of carry permits, similar to that employed by New York City,⁷⁴ could lend

PUBLIC HEALTH 100–04 (2004); NAT'L RES. COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 125–51 (Charles F. Wellford et al. eds., 2005); TUSHNET, *supra* note 7, at 85–95; Ian Ayres & John J. Donohue III, *Yet Another Refutation of the More Guns, Less Crime Hypothesis—With Some Help from Moody and Marvell*, 6 ECON J. WATCH 35 (2009). In any event, even the advocates of this view make no claim that it applies in high-crime, urban neighborhoods. Another argument used by firearms proponents—although not linked to declining crime rates—is that firearms are used for defensive purposes at very high rates. See, e.g., Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995). More recent work has cast great doubt on this claim. See, e.g., PHILIP J. COOK & JENS LUDWIG, U.S. DEP'T OF JUSTICE, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS 8–11 (1997); HEMENWAY, *supra*, at 66–69, 239–40.

⁷⁰ See, e.g., MALCOLM W. KLEIN, THE AMERICAN STREET GANG 117–18 (1995); Deanna L. Wilkinson & Jeffrey Fagan, *The Role of Firearms in Violence “Scripts”: The Dynamics of Gun Events Among Adolescent Males*, 59 LAW & CONTEMP. PROBS. 55, 70 (1996).

⁷¹ See H. Range Hutson et al., *Drive-By Shootings by Violent Street Gangs in Los Angeles: A Five-Year Review from 1989 to 1993*, 3 ACAD. EMERGENCY MED. 300, 302 (1996). In 1991, there were more than 1500 gang-related drive-by shootings in Los Angeles. H. Range Hutson et al., *Adolescents and Children Injured or Killed in Drive-by Shootings in Los Angeles*, 330 NEW ENG. J. MED. 324, 324 (1994).

⁷² See *supra* notes 61–69 and accompanying text.

⁷³ See WILLIAM B. SANDERS, GANGBANGS AND DRIVE-BYS: GROUNDED CULTURE AND JUVENILE GANG VIOLENCE 65–74 (1994); James C. Howell, *Youth Gangs: An Overview*, in AMERICAN YOUTH GANGS AT THE MILLENNIUM, *supra* note 64, at 16, 36–37.

⁷⁴ In New York, state law prohibits possession of a handgun without a license and generally requires that handguns be kept within the licensee's home or place of business unless the licensee is engaged in law enforcement. See N.Y. PENAL LAW § 400.00(2) (McKinney 2008). In New York City, an additional permit must be obtained to possess or carry a handgun. See *id.* § 400.00(6). The issuance of

some substance to a right to “bear” arms without threatening urban mayhem, but it is doubtful that high-crime urban areas could go much further without reinstating the dynamics that led to the crime spike of the late 1980s and early 1990s.⁷⁵ Such are the problems when an eighteenth-century right is applied in the twenty-first century. Even so, concern about the consequences of a right to bear arms in urban America is more than a policy objection to a constitutional command that a Court can properly brush aside⁷⁶: it is a concern that the Second Amendment’s preamble requires us to keep in mind.

How then, are we to resolve the contradiction within the Second Amendment? It seems that only the still-unresolved Second Amendment standard of scrutiny can do the critical work.

II. *MCDONALD V. CITY OF CHICAGO*: THE SECOND AMENDMENT MADE CLEARER, THE FOURTEENTH AMENDMENT MADE MURKY

Joyce Lee Malcolm

Ironically, the landmark Supreme Court decision in *McDonald v. City of Chicago*⁷⁷ resolved one important question, the right of individuals to be armed, but managed to spawn an even more fundamental one, the proper standard for incorporation. Two years ago in *District of Columbia v. Heller*, the Court recognized the Second Amendment’s protection of an individual right “to keep and bear arms,”⁷⁸ and now, in *McDonald*, the Court has incorporated the Second Amendment as a right that must be recognized by the states.⁷⁹ These decisions were a triumph for adherence to the popular understanding at the time of the Amendment’s inclusion in the Bill of Rights and its acceptance as a fundamental principle of American liberty. Yet apart from the anticipated impact on gun laws that I consider below, the conflicting approaches to incorporation so glaring in the *McDonald* opinions go to the core of our constitutional system. Before replying to Professor Rosenthal’s misgivings about the practical implications of the *McDonald* decision, this response considers the issues of how to incorporate the Second Amendment and the appropriate standard for incorporation.

these permits is highly discretionary and generally requires an applicant to demonstrate some extraordinary danger. See N.Y.C., N.Y., COMP. R. CITY tit. 38, §§ 5-01 to -04 (2007).

⁷⁵ As I have demonstrated elsewhere, there is considerable evidence that New York’s restrictive permit system has been an important part of its ability to drive violent crime down after the crime-spike period. See Rosenthal, *supra* note 12, at 39–40.

⁷⁶ Cf. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (“The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”).

⁷⁷ 130 S. Ct. 3020 (2010).

⁷⁸ 554 U.S. at 595.

⁷⁹ 130 S. Ct. at 3050.

In considering the basis for incorporation, the Justices were seriously divided on what the proper means should be. Justice Alito, writing for the majority, employed the long-accepted approach of incorporating the Amendment through the Due Process Clause.⁸⁰ Justice Thomas agreed that the Second Amendment should be incorporated but wrote a lengthy and compelling opinion, insisting, as petitioners urged, that the Privileges or Immunities Clause is the appropriate means for incorporation.⁸¹ And Justice Stevens, in his dissent, sidestepped the clear case for incorporation by devising an amorphous new standard for it—one the Second Amendment fails to meet—under a version of the Due Process Clause that he dubbed the “liberty clause.”⁸² This brief Debate is not the place to explore fully the implications of these conflicting approaches for Fourteenth Amendment jurisprudence, but I consider them briefly before turning to the appropriate-level-of-scrutiny aspect of the *McDonald* decision. I hope to reassure Professor Rosenthal about any potential harm to the “stop and frisk” tactic he finds essential in combating gang violence.

A.

The debate over the proper means for incorporation begins with the *McDonald* petitioners’ argument for incorporating the Second Amendment through the Privileges or Immunities Clause rather than through the Due Process Clause—although the issue likely would have arisen anyway.⁸³ Justice Alito and three concurring Justices were unwilling to make that shift. “For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment,” Justice Alito wrote.⁸⁴ “We therefore decline to disturb the *Slaughter-House* holding.”⁸⁵ The Justices were not only concerned with disturbing precedent but also uncertain about the scope of the Privileges or Immunities Clause.⁸⁶ In addition to recounting the historical evidence that an individual right to be armed is “so rooted in the traditions and conscience of our people as to be ranked as fundamental,”⁸⁷ the opinion provided a history of evolving standards for incorpora-

⁸⁰ *Id.* at 3036. Justice Alito was joined in the opinion of the Court by Chief Justice Roberts, Justice Kennedy, and Justice Scalia. *Id.* at 3026. Justice Scalia also authored a separate concurring opinion. *Id.* at 3050. Justice Thomas concurred in part and concurred in the judgment but wrote a separate opinion. *Id.* at 3020.

⁸¹ *See id.* at 3088 (Thomas, J., concurring in part and concurring in the judgment).

⁸² *See id.* at 3091–104, 3109–10 (Stevens, J., dissenting). Justice Breyer also dissented, joined by Justices Ginsburg and Sotomayor.

⁸³ *See* Petitioners’ Brief at 9–65, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

⁸⁴ *McDonald*, 130 S. Ct. at 3030–31 (opinion of the Court).

⁸⁵ *Id.* at 3031.

⁸⁶ *Id.* at 3030.

⁸⁷ *Id.* at 3032 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (internal quotation marks omitted)).

tion. Justice Alito pointed out that, beginning in the 1960s, “the 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’”;⁸⁸ the Court no longer asks “whether *any* ‘civilized system [can] be imagined that would not accord the particular protection.’”⁸⁹ The modern standard for incorporation is simply whether the guarantee in question “is fundamental to *our* scheme of ordered liberty and system of justice.”⁹⁰

By contrast, Justice Thomas, while providing a moving account of the atrocities perpetrated against disarmed blacks and abolitionists as well as society’s acceptance of the fundamental nature of the right to be armed, made a compelling case for incorporation under the Privileges or Immunities Clause. “I cannot agree,” he wrote, “that [the Second Amendment right] is enforceable against the States through a clause that speaks only to ‘process.’”⁹¹ “The notion that a constitutional provision that guarantees only ‘process’ before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.”⁹² Whereas the majority found the Privileges or Immunities Clause too vague,⁹³ Justice Thomas found the Due Process Clause equally problematic:

While this Court has at times concluded that a right gains “fundamental” status only if it is essential to the American “scheme of ordered liberty” or “deeply rooted in this Nation’s history and tradition,” the Court has just as often held that a right warrants Due Process Clause protection if it satisfies a far less measurable range of criteria.⁹⁴

Justice Thomas concluded that the Second Amendment is “fully applicable to the States,” but he did so “because the right to keep and bear arms is guaranteed by the Fourteenth Amendment as a privilege of American citizenship.”⁹⁵

In his dissent, Justice Stevens moved into a different realm. Since historical evidence would have led him to support incorporation, he damned its use, proclaiming that “a rigid historical methodology is unfaithful to the

⁸⁸ *Id.* at 3035 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964)).

⁸⁹ *Id.* at 3034 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968)). Many American rights such as the separation of church and state, the prohibition against double jeopardy, and the latitude permitted in freedom of speech are distinct from rights recognized in other Western countries.

⁹⁰ *Id.*

⁹¹ *Id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment).

⁹² *Id.* at 3062.

⁹³ *See id.* at 3030 (opinion of the Court).

⁹⁴ *Id.* at 3061–62 (Thomas, J., concurring in part and concurring in the judgment) (citation omitted) (second and third quotations quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

⁹⁵ *Id.* at 3088.

Constitution's command."⁹⁶ This is especially strange for a Justice who relied upon the historical method in *Heller* to refute the notion that the Second Amendment guaranteed an individual right.⁹⁷ But Justice Stevens went even further, cutting judges free from the text and intent of the Constitution by insisting that the historical approach "is unfaithful to the expansive principle Americans laid down when they ratified the Fourteenth Amendment and to the level of generality they chose when they crafted its language."⁹⁸ Since he refused to consider the history of ratification, one wonders where he got the odd notion that Americans wanted the Fourteenth Amendment to embody "an expansive principle" rather than to focus on venerable constitutional rights. Justice Stevens added that the historical approach "masks the value judgments that pervade any analysis of what customs, defined in what manner, are sufficiently 'rooted' . . . [and] effaces this Court's distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes."⁹⁹ Justice Scalia objected vehemently to this view of objectivity and subjectivity.¹⁰⁰

Having rejected any examination of the historical approach, Justice Stevens resorted to a lengthy linguistic analysis of the words "liberty" and "incorporation."¹⁰¹ Indeed, not until page twenty-seven of his dissent did he actually turn to a consideration of the Second Amendment.¹⁰² Justice Stevens then reverted, for this one Amendment, to those approaches to incorporation that Justice Alito explained were discarded by the Court fifty years earlier: that the right incorporated "need not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights";¹⁰³ that as "local differences are to be cherished as elements of liberty,"¹⁰⁴ judges must be concerned about "undu-

⁹⁶ *Id.* at 3098 (Stevens, J., dissenting).

⁹⁷ See Joyce Lee Malcolm, *The Supreme Court and the Uses of History: District of Columbia v. Heller*, 56 UCLA L. REV. 1377, 1378–79 (2009).

⁹⁸ *McDonald*, 130 S. Ct. at 3098 (Stevens, J., dissenting).

⁹⁹ *Id.* at 3098–99.

¹⁰⁰ *Id.* at 3051–52 (Scalia, J., concurring) ("The subjective nature of Justice Stevens' standard is also apparent from his claim that it is the courts' prerogative—indeed their *duty*—to update the Due Process Clause so that it encompasses new freedoms the Framers were too narrow-minded to imagine. Courts, he proclaims, must 'do justice to [the Clause's] urgent call and its open texture' by exercising the 'interpretive discretion the latter embodies' And it would be 'judicial abdication' for a judge to . . . 'outsourc[e]' the job to 'historical sentiment.'" (citations omitted)). Justice Scalia's opinion is primarily devoted to refuting Justice Stevens's novel approach to Fourteenth Amendment incorporation rather than to Justice Stevens's treatment of the Second Amendment. *Id.* at 3051–56.

¹⁰¹ See *id.* at 3090–101 (Stevens, J., dissenting).

¹⁰² See *id.* at 3103.

¹⁰³ *Id.* at 3093.

¹⁰⁴ *Id.* (internal quotation mark omitted) (quoting *NRA v. City of Chicago*, 567 F.3d 856, 860 (7th Cir. 2009)).

ly restricting the States' 'broad latitude in experimenting';¹⁰⁵ and lastly, that judges need to consider whether the right under scrutiny is one that "other civilized societies" recognize as central to liberty.¹⁰⁶ In any event, Justice Stevens frankly refused to accept the Court's holding in *Heller*, claiming it "sheds no light on the meaning of the Due Process Clause of the Fourteenth Amendment."¹⁰⁷ To Justice Stevens, the Second Amendment "still serves the structural function of protecting the States from encroachment by an overreaching Federal Government."¹⁰⁸ In his view, it is, in fact, a federal provision with no individual-right aspect related to self-defense.¹⁰⁹

Justice Breyer, agreeing with the dissenters, argued for an additional requirement for incorporation: popular consensus.¹¹⁰ Justice Alito rejected this proposition out of hand, writing: "We have never held that a provision of the Bill of Rights applies to the States only if there is a 'popular consensus' that the right is fundamental, and we see no basis for such a rule."¹¹¹ However, Justice Alito added, in this instance there is evidence of such a consensus since 58 members of the Senate and 251 members of the House submitted an amicus brief in support of incorporation and 38 states submitted another.¹¹²

To summarize, the Court has given us three distinct means for incorporation: (1) the now-customary Due Process Clause; (2) the more historically accurate Privileges or Immunities Clause; and (3) Justice Stevens's novel "Liberty Clause." Justice Breyer's "popular consensus" approach is arguably a fourth method. Justice Scalia particularly took issue with Justice Stevens's approach because it reverted, at least for the Second Amendment, to separating rights into different classes. It would leave judges, rather than the Constitution and the political process, as the propounders of what is or is not a fundamental right. Although the issue may seem of minor importance since nearly all of the amendments in the Bill of Rights have been incorporated already, there is a universe of other "liberties" the Court might in the future decide are fundamental rights. Justice Scalia found great danger in Justice Stevens's vision of the role of the Court:

Justice Stevens abhors a system in which "majorities or powerful interest groups always get their way" but replaces it with a system in which unelected

¹⁰⁵ *Id.* at 3100 (internal quotation mark omitted) (quoting *Whalen v. Roe*, 429 U.S. 589, 597 (1977)).

¹⁰⁶ *See id.* at 3096.

¹⁰⁷ *Id.* at 3090. It seems surprising that a case about the meaning of one amendment should be regarded as remiss for not shedding light on another. Justice Stevens found no need for what he characterized as "jot-for-jot incorporation" of an amendment. *See id.* at 3095.

¹⁰⁸ *Id.* at 3111.

¹⁰⁹ *See id.* at 3107 n.33, 3112–13 & nn.41–42.

¹¹⁰ *See id.* at 3124 (Breyer, J., dissenting). A "popular" consensus carries the implication of a current, even ephemeral, view.

¹¹¹ *Id.* at 3049 (majority opinion).

¹¹² *Id.*

and life-tenured judges always get their way. That such usurpation is effected unabashedly . . . makes it even worse. In a vibrant democracy, usurpation should have to be accomplished in the dark. It is Justice Stevens' approach, not the Court's, that puts democracy in peril.¹¹³

Justice Scalia's warning about the hazard to our constitutional system posed by Justice Stevens's approach is well taken. Justice Stevens's approach would free judges from the restraint of legal precedent and constitutional text. It would give unelected judges license to indulge their personal views with little regard for the Constitution or the legal system they swear to uphold. None of the other Justices joined Justice Stevens in this last opinion of his tenure on the Court.

B.

This Rebuttal now turns to the *McDonald* decision and the serious question of the appropriate level of scrutiny for Second Amendment rights. Since fundamental rights are not to be separated into first- and second-class status, the strict scrutiny applied to the First Amendment freedom of the press and freedom of speech should also be applied to Second Amendment rights.¹¹⁴ All rights have some restrictions, and the Second Amendment is no different. Indeed, the *Heller* opinion explicitly acknowledged that nothing in the opinion “should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”¹¹⁵ As Professor Rosenthal correctly notes, beyond this disclaimer, the *Heller* Court did not squarely deal with the term “infringed” in the Amendment's text.¹¹⁶ In *Heller*, it was not a significant issue. Nonetheless, Justice Scalia assured in his opinion in *Heller* that the Court is not ignorant of the handgun violence in this country.¹¹⁷ But as Justice Scalia put it, “*the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohi-*

¹¹³ *Id.* at 3058 (Scalia, J., concurring) (citations omitted) (quoting *id.* at 3119 (Stevens, J., dissenting)).

¹¹⁴ *See, e.g.,* *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2987–88 (2010) (citing *Widmar v. Vincent*, 454 U.S. 263, 270, 276 (1981)) (applying strict scrutiny in the context of regulating religious speech); *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (applying strict scrutiny to assess laws burdening political speech). Not all restrictions on speech are reviewed under a strict scrutiny standard. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–84 (1992) (holding that strict scrutiny should not be applied to challenge regulation of obscene or defamatory speech).

¹¹⁵ *See* *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

¹¹⁶ *See supra* Part I.B (Rosenthal Opening); *cf. Heller*, 554 U.S. at 592–95 (discussing the portion of the Second Amendment that establishes that the right shall not be infringed but declining to analyze the word “infringed”).

¹¹⁷ *See* 554 U.S. at 636.

bition of handguns held and used for self-defense in the home.”¹¹⁸ The Court also emphasized that the District of Columbia has many constitutional options to combat the problem of violent crime.¹¹⁹

In that light, the regulations put in place by Washington, D.C., after the *Heller* Court overturned its gun ban are clearly designed to achieve the same result as the former ban by making the procedures for registering a handgun in the city as onerous as possible.¹²⁰ An applicant must go through two background checks; make four visits to the police department; provide fingerprints, a photo, and a job history; pass a twenty-question test on D.C. firearms laws; pass a five-hour class with a trainer selected from a list the city provides, including one hour on a gun range (the city doesn’t have one nor will it permit a gun shop or gun sales in city limits); and pay \$300 in fees—after all of which the gun must be taken back to the police and fired for a ballistic test.¹²¹ As of 2011, a gun must be equipped with a special identification technology that has not yet been adopted by the industry.¹²² The registration expires after three years; if it lapses the police may seize the gun, and the owner is subject to up to one year in jail and to a fine of \$1000.¹²³

Likewise, Chicago passed a new ordinance four days after the Supreme Court overturned its gun ban.¹²⁴ The new rule permits residents to own a handgun in the home but imposes serious restrictions and a series of bureaucratic hurdles intended to discourage ownership.¹²⁵ Gun shops are banned in the city, as are all firearms sales.¹²⁶ The registrant must pass a four-hour class; spend one hour on a gun range (the city bans gun ranges); and transport the gun “broken down,” unloaded, and in a case.¹²⁷ The owner must keep the gun inside a building; it is illegal to take it into a garage or to bring it onto a porch or to a yard.¹²⁸ Each gun must be registered within five days of purchase.¹²⁹ The first test of the *McDonald* decision will be these new municipal regulations that are seemingly designed to circumvent citi-

¹¹⁸ *Id.* (emphasis added).

¹¹⁹ *See id.*

¹²⁰ For a description of the new regulations, see Gary Fields, *New Washington Gun Rules Shift Constitutional Debate*, WALL ST. J., May 17, 2010, available at <http://online.wsj.com/article/SB10001424052748704093204575216680860962548.html>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *See Chicago’s New Gun Law Goes into Effect Today*, CHICAGOBREAKINGNEWS.COM, July 12, 2010, <http://www.chicagobreakingnews.com/2010/07/chicagos-new-gun-law-goes-into-effect-today.html>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

zens' lawful right to keep a handgun in their homes for self-defense. Five days before the new Chicago gun regulation went into effect, a federal lawsuit had already been filed against the city.¹³⁰

C.

As to further tests of the *McDonald* decision, Professor Rosenthal has particular anxieties. Are they justified? Is Professor Rosenthal correct that not only allowing law-abiding residents of Chicago to have firearms in their homes but granting them the right to carry weapons would severely hamper the effectiveness of the city's stop-and-frisk strategies—with dire results?¹³¹ Indeed, Professor Rosenthal raises the specter that this would produce an escalating homicide rate and also “could enable urban street gangs to act as occupying armies.”¹³² He even envisions a world where gangs could commit no overt crimes in police officers' presence and in turn use “their ability to go about armed” in order to “establish criminal mini-states based on drug trafficking.”¹³³

Calm reflection is called for to put the situation in context. The City of Chicago has banned residents from keeping handguns, rifles, and shotguns for their defense since 1982,¹³⁴ some twenty-eight years. But as Justice Alito reminded us, that has not made Otis McDonald or others living in what are still high-crime areas safer.¹³⁵ Chicago's prohibition has not swept guns from the city. It has only succeeded in disarming those who obey the law, leaving them vulnerable to thugs who have no intention of registering their guns. Although the police are free to “stop and frisk” those they suspect of criminal intent, the number of Chicago homicide victims this year equaled the number of American soldiers killed during the same period in Afghanistan and Iraq together.¹³⁶ In fact, two Illinois legislators representing Chicago districts called on the Governor of the state to deploy the National Guard to patrol the city streets.¹³⁷

The 1976 District of Columbia gun ban overturned by the *Heller* decision was no more successful. A study comparing the District with forty-nine other major cities found the District's homicide rate was substantially higher relative to those cities than it had been before its gun ban was

¹³⁰ See Duaa Eldeib & Dahleen Glanton, *Plaintiffs Aim to Shoot Down Chicago's Gun Ordinance*, CHICAGOBREAKINGNEWS.COM, July 7, 2010, <http://www.chicagobreakingnews.com/2010/07/lawsuit-filed-against-chicagos-new-gun-ordinance.html>.

¹³¹ See *supra* Part I.A (Rosenthal Opening).

¹³² See *supra* Part I.A (Rosenthal Opening).

¹³³ See *supra* Part I.A (Rosenthal Opening).

¹³⁴ See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010).

¹³⁵ *Id.* at 3049.

¹³⁶ See *id.*

¹³⁷ *Id.*

passed.¹³⁸ However, as Justice Breyer noted, other scholarship has shown that ownership of a handgun increases public safety.¹³⁹

While forty states presently permit law-abiding residents who fulfill certain requirements to carry a concealed weapon, Professor Rosenthal can take heart from the fact that firearms crime on the whole has not risen. This permissive approach to gun possession has not unleashed a rash of shootouts; the nation's homicide rate has been declining for more than thirty years.¹⁴⁰ Although gun ownership surged in 2009,¹⁴¹ the FBI crime report for that year shows that crime rates dropped across America.¹⁴² Firearms in the hands of lawful citizens can and do deter would-be assailants.¹⁴³ Success, of course, has many fathers, but Professor Rosenthal would have you believe the power of police to stop and frisk people on the street was the sole cause for this decline. An article in the *Christian Science Monitor* suggests six reasons why serious crime has been in decline—of which “proactive” policing is only one—and includes a variety of approaches to reducing crime in addition to frisking.¹⁴⁴

One rather strained concern Professor Rosenthal raises involves the use of the word “well regulated” in the Second Amendment’s Militia Clause.¹⁴⁵ He notes that “the [*Heller*] Court breezed past” the adjective “well-regulated,” dismissing it as “impl[ying] nothing more than the imposition of proper discipline and training.”¹⁴⁶ Quite right. They did breeze by it, and it does merely mean “well-trained.” A militia that is not well-trained is more dangerous than useful. However, while the militia was, with certain exceptions, drawn from the entire population of citizens, the well-trained and drilled militia included only those physically fit men between the ages of

¹³⁸ *District of Columbia v. Heller*, 554 U.S. 570, 700–02 (2008) (Breyer, J., dissenting). Justice Breyer included this information in his dissent, nevertheless insisting that, although the gun ban had left city residents even more at risk, that did not mean they should have the right to guns in their homes for protection. *Id.* at 702.

¹³⁹ *See id.* at 703–04.

¹⁴⁰ For the impact on crime of permitting law-abiding citizens to carry concealed firearms, see LOTT, *supra* note 69.

¹⁴¹ Peter Schworm & Matt Carroll, *Gun Permits Surge in State*, BOS. GLOBE, Dec. 20, 2009, at A1, available at http://www.boston.com/news/local/massachusetts/articles/2009/12/20/gun_permits_surge_in_state; Chris McGreal, *Americans Stick to Their Guns as Firearms Sales Surge*, GUARDIAN.CO.UK (Apr. 13, 2009), <http://www.guardian.co.uk/world/2009/apr/13/guns-nra-america-obama-virginia>.

¹⁴² Husna Haq, *US Crime Rate Is Down: Six Key Reasons*, CHRISTIAN SCI. MONITOR, May 24, 2010, at 5, available at <http://www.csmonitor.com/USA/2010/0524/US-crime-rate-is-down-six-key-reasons>.

¹⁴³ *See* LOTT, *supra* note 69, at 56–99.

¹⁴⁴ *See* Haq, *supra* note 142.

¹⁴⁵ *See supra* text accompanying note 49 (Rosenthal Opening).

¹⁴⁶ *See supra* text accompanying note 49 (Rosenthal Opening).

eighteen and forty-five.¹⁴⁷ But since the text merely describes the militia as “well-regulated,” Professor Rosenthal argues that the Second Amendment, “construed in light of the preamble,” gives government the authority to subject the larger group—the unorganized militia—to “proper training and discipline,” thereby giving the government “comprehensive regulation of all who possess and carry firearms.”¹⁴⁸ He goes on to posit that such an approach explains the Court’s acceptance of regulations—such as concealed weapons prohibitions—that would otherwise seem to infringe on the right to possess firearms.¹⁴⁹

Professor Rosenthal gets an *A* for invention, but this interpretation is not credible. It waives aside the acknowledged fact that no right is absolute and that therefore laws that in some way restricted the right to be armed by prohibiting unsafe use before the adoption of the Second Amendment were not regarded as infringing on the core right. Professor Rosenthal’s reference to an argument limiting regulations to those of the eighteenth century is, he admits, “inconsistent with *Heller*’s dicta”¹⁵⁰—or, one might add, common sense. But he nevertheless tethers his argument for the government’s (necessary) regulatory authority to the Second Amendment’s “well-regulated militia” reference. That analysis is a bucket that will not hold water.

D.

To conclude, the *McDonald* decision has incorporated the Second Amendment right as a core right, not as a second-class, watered-down version that can be effectively thwarted by state or city action. Are reasonable regulations “interest-balancing”? If so, then reasonable regulations of all core rights are interest-balancing. Are there dangers in granting lawful citizens a right to keep and bear arms? Yes, but there are dangers in every right. “It is implicit in a genuine right,” Professor T.R.S. Allan explains, “that its exercise may work against [some facet of] the public interest: a right to speak only where its exercise advanced the public welfare or public policy . . . would be a hollow guarantee against repression.”¹⁵¹ The experience of a majority of states, however, has shown that honoring the right of the people to keep and bear arms does in fact protect life.

¹⁴⁷ See JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 138–40 (1994).

¹⁴⁸ See *supra* Part I.B (Rosenthal Opening).

¹⁴⁹ See *supra* Part I.B (Rosenthal Opening).

¹⁵⁰ See *supra* Part I.B (Rosenthal Opening).

¹⁵¹ See T.R.S. ALLAN, *LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM* 140 (1993). Professor Allan, Professor of Public Law and Jurisprudence at Cambridge University, is paraphrasing Lord Justice Browne-Wilkinson’s dissent in *Wheeler v. Leicester County*, [1985] All E.R. 151 (A.C.) at 155–59 (Lord Browne-Wilkinson, L.J., dissenting) (Eng.), *rev’d*, [1985] A.C. 1054 (H.L.).

III. SECOND AMENDMENT PLUMBING AFTER *MCDONALD*: A REPLY TO PROFESSOR MALCOLM*Lawrence Rosenthal*

Professor Malcolm worries about some things and not others. She is concerned about what she regards as the historical inaccuracy of all of the opinions but Justice Thomas's in *McDonald v. City of Chicago*,¹⁵² but she is supremely confident that her vigorous conception of Second Amendment rights will not lead to chaos in the inner city. I am afraid that she rather has things backwards.

A.

Let us start with Professor Malcolm's assessment of *McDonald*. She commends Justice Thomas's opinion, which, she tells us, "made a compelling case for incorporation [of the Second Amendment] under the Privileges or Immunities Clause."¹⁵³ She tells us that this approach, of those taken by the various opinions in *McDonald*, is "the more historically accurate."¹⁵⁴ In the opinion that Professor Malcolm finds so compelling, Justice Thomas told us that "constitutional provisions are 'written to be understood by the voters.' Thus, the objective of this inquiry is to discern what 'ordinary citizens' at the time of ratification would have understood the Privileges or Immunities Clause to mean."¹⁵⁵ After reviewing the historical evidence, Justice Thomas concluded that "the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights, including the right to keep and bear arms."¹⁵⁶ Justice Thomas did indeed make a compelling case, if only because he so assiduously overlooked virtually all of the historical evidence inconsistent with his conclusion.

I have elsewhere canvassed the confusing and conflicting evidence on the original meaning of the Fourteenth Amendment's Privileges or Immunities Clause.¹⁵⁷ I will not repeat that discussion here, but it is worth noting some of Justice Thomas's most remarkable omissions. If, for example, the public understood that the Fourteenth Amendment made all constitutionally enumerated rights binding on the states, one might expect some effort in the ratifying states to make their own laws consistent with these enumerated

¹⁵² 130 S. Ct. 3020 (2010).

¹⁵³ *Supra* Part II.A (Malcolm Rebuttal).

¹⁵⁴ *Supra* Part II.A (Malcolm Rebuttal).

¹⁵⁵ *McDonald*, 130 S. Ct. at 3063 (Thomas, J., concurring in part and concurring in the judgment) (citations omitted) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008)) (some internal quotation marks omitted).

¹⁵⁶ *Id.* at 3077.

¹⁵⁷ See Rosenthal, *supra* note 12, at 48–78; Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361, 365–400 (2009).

rights. Yet ratification produced no effort to bring state laws into conformity with the Bill of Rights.¹⁵⁸ In particular, ratification did nothing to halt a trend in the states toward prosecution by information, despite its inconsistency with the Fifth Amendment's Grand Jury Clause.¹⁵⁹ This is not what one would expect had there been a general understanding that the Fourteenth Amendment had rendered all enumerated constitutional rights applicable to the states. About this historical evidence, Justice Thomas offered no comment.

Justice Thomas also noted that three framing-era treatises indicated that the Fourteenth Amendment incorporated constitutionally enumerated rights against the states.¹⁶⁰ Yet Justice Thomas ignored significant ambiguities and errors in those treatises and failed to mention that other leading treatises of the era found no incorporationist meaning in the Fourteenth Amendment.¹⁶¹ Again, if there had been a general understanding that the Fourteenth Amendment made the Second Amendment and other constitutional rights previously protected against only the federal government applicable to the states, surely it is remarkable that leading legal scholars of the day such as Joel Prentiss Bishop, Thomas Cooley, John Forrest Dillon, and Francis Wharton somehow did not get the message.¹⁶²

As for judicial discussions of the Fourteenth Amendment in the wake of ratification, Justice Thomas told us that one lower court, in a decision "written by a future Justice of this Court," issued an opinion embracing incorporation,¹⁶³ but he left unmentioned two other framing-era decisions to the contrary.¹⁶⁴ Even more striking, Justice Thomas was evidently unconcerned that those actually sitting on the Court rejected an incorporationist reading of the Fourteenth Amendment in a series of framing-era cases.¹⁶⁵ In *United States v. Cruikshank*,¹⁶⁶ for example, the Court found infirm counts of an indictment alleging violations of the right to keep and bear arms, brought under the Enforcement Act of 1870, which

¹⁵⁸ See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 82–84 (1949).

¹⁵⁹ See, e.g., Donald A. Dripps, *The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure Revolution*, 18 J. CONTEMP. LEGAL ISSUES 469, 478–90 (2009); George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627, 1633, 1654–55 (2007).

¹⁶⁰ *McDonald*, 130 S. Ct. at 3076 & n.14.

¹⁶¹ See Rosenthal, *supra* note 157, at 395–400.

¹⁶² See *id.* at 399–400.

¹⁶³ *McDonald*, 130 S. Ct. at 3076 (citing *United States v. Hall*, 26 F. Cas. 79, 82 (C.C.S.D. Ala. 1871) (No. 15,282) (Woods, J.)).

¹⁶⁴ See *United States v. Crosby*, 25 F. Cas. 701, 704 (C.C.D.S.C. 1871) (No. 14,893); *Rowan v. State*, 30 Wis. 129, 148–50 (1872).

¹⁶⁵ See Rosenthal, *supra* note 12, at 68–72; Rosenthal, *supra* note 157, at 391–95.

¹⁶⁶ 92 U.S. 542 (1876).

prohibited conspiracies to “hinder . . . free exercise and enjoyment of any right or privilege . . . secured . . . by the constitution or laws of the United States,”¹⁶⁷ writing: “The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress.”¹⁶⁸ The *Cruikshank* Court added that nondiscrimination was the animating principle of the Fourteenth Amendment: “The equality of the rights of citizens is a principle of republicanism. . . . The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more.”¹⁶⁹

For his part, Justice Thomas acknowledged that his view was inconsistent with *Cruikshank* and other framing-era precedents of the Supreme Court.¹⁷⁰ Yet he failed to consider whether the framing-era Court’s take on the meaning of the Fourteenth Amendment undermined his own assessment of the historical evidence of original meaning.¹⁷¹ It is curious, to say the least, that Justice Thomas gave more weight to the view of “a future Justice” than to the views of those actually serving on the Court.¹⁷² Justice Thomas’s disdain for the views of the framing-era Supreme Court is even more inexplicable when one considers that he had several years earlier joined an opinion affording special deference to the Court’s framing-era decisions interpreting the Fourteenth Amendment due to “the insight attributable to the Members of the Court at that time,” since they “obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.”¹⁷³

¹⁶⁷ *Id.* at 548 (quoting Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 141).

¹⁶⁸ *Id.* at 553.

¹⁶⁹ *Id.* at 555.

¹⁷⁰ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3084–86 (2010) (Thomas, J., concurring in part and concurring in the judgment).

¹⁷¹ The only members of the Court who asserted that the Amendment was framed with incorporation in mind were Justice Bradley and Justice Swayne in the former’s dissenting opinion in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 112–19 (1872). Yet by the time of *Cruikshank*, even these Justices had abandoned incorporation.

¹⁷² In his opinion, Justice Thomas suggested that the Court’s holding in *Cruikshank* undermined the efforts of the Reconstruction-era Congress to protect the newly freed slaves from violence, see *McDonald*, 130 S. Ct. at 3086–88, but hostility to the objectives of Reconstruction seems an unlikely explanation for the Court’s approach to the Fourteenth Amendment since by the time of *Cruikshank*, eight of the nine Justices had been appointed by Presidents Lincoln or Grant. See DONALD GRIER STEPHENSON, JR., *THE WAITE COURT: JUSTICES, RULINGS, AND LEGACY* 12 tbl.1.2 (2003). Moreover, within a few years, the Court held that the exclusion of African-Americans from juries violated the Fourteenth Amendment. See *Strauder v. West Virginia*, 100 U.S. 303 (1879). This holding was not a foregone conclusion; in the parlance of the day, jury service was considered a political and not a civil right, and many understood the Fourteenth Amendment to guarantee equality only with respect to the latter. See, e.g., Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867–1873*, 18 J. CONTEMP. LEGAL ISSUES 153, 266–67 (2009).

¹⁷³ *United States v. Morrison*, 529 U.S. 598, 622 (2000).

My point is not that the preponderance of the historical evidence tilts against incorporation. My own view is that the historical evidence is sufficiently near equipoise, and sufficiently fragmentary and unreliable, that it provides no satisfactory basis for resolution of the incorporation debate.¹⁷⁴ For present purposes, however, the important point is that Justice Thomas's opinion in *McDonald*—and Professor Malcolm's eager embrace of it—is rather an argument against originalist constitutional adjudication. Much has been written of the dangers of “law office history,” in which historical evidence of original meaning is assessed with an advocate's jaundiced eye that cherry-picks only the evidence supporting a predetermined conclusion.¹⁷⁵ Justice Thomas's opinion is a pretty good example of the problem. Any case looks easy if one looks to only the evidence in favor of one's preferred conclusion.

B.

Professor Malcolm, while advocating “strict scrutiny” for firearms regulations,¹⁷⁶ seems unconcerned with what this may mean for firearms violence in the inner city because “the nation's homicide rate has been declining for more than thirty years,”¹⁷⁷ and a reporter for the *Christian Science Monitor* assures her that there are six reasons for the crime decline “of which ‘proactive’ policing is only one—and includes a variety of approaches to reducing crime in addition to frisking.”¹⁷⁸ For those who take their criminology from sources other than the *Christian Science Monitor*, however, there is cause for concern.

Professor Malcolm's account of homicide rates in recent decades is flat-out wrong; as I have explained elsewhere, there was an enormous and unprecedented spike in homicide and other forms of violent crime in the late 1980s and early 1990s, concentrated in firearms-related crime in disadvantaged inner-city communities, as a consequence of the violent competition following the introduction of crack cocaine.¹⁷⁹ The crime-rise period was followed by a crime decline reaching levels not seen in nearly four decades,¹⁸⁰ which had no evident demographic or economic explanation.¹⁸¹ Professor Malcolm seems to favor John Lott's theory that the prevalence of laws permitting the carrying of concealed wea-

¹⁷⁴ See Rosenthal, *supra* note 12, at 75–78; Rosenthal, *supra* note 157, at 401–08.

¹⁷⁵ See, e.g., Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155–58; Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 402–07 (2003); John Philip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 197–204 (1993).

¹⁷⁶ See *supra* Part II.B (Malcolm Rebuttal).

¹⁷⁷ *Supra* Part II.C and note 140 (Malcolm Rebuttal).

¹⁷⁸ *Supra* Part II.C and note 144 (Malcolm Rebuttal).

¹⁷⁹ See Rosenthal, *supra* note 12, at 7–20.

¹⁸⁰ See *id.* at 7.

¹⁸¹ See *id.* at 23.

pons stimulated crime declines,¹⁸² but as I noted in my Opening, there are serious methodological challenges to Lott's work.¹⁸³ In any event, Lott himself makes no claim that any significant portion of the crime drop since the early 1990s can be attributed to concealed-carry laws.¹⁸⁴ And as I also noted in my Opening, the ability to carry firearms offers no guarantee of effective self-defense, at least in unstable urban neighborhoods. Members of criminal street gangs carry firearms at vastly elevated levels compared to the general population, yet they also have vastly elevated homicide victimization rates.¹⁸⁵ More guns do not always mean less crime.

Consider New York City, which had violent crime rates typical of other large cities in 1990, but in the succeeding decade achieved crime declines of about double those in the rest of the country and outperformed each of the nation's other fifteen largest cities.¹⁸⁶ There is much evidence that the decline resulted from an escalation in stop-and-frisk tactics associated with enforcement of New York's tough gun control laws.¹⁸⁷ Those laws are indeed stringent: New York rarely issues permits authorizing the possession or carrying of handguns, and for that reason, its laws have been characterized as imposing an effective handgun ban.¹⁸⁸ Thus, a regulatory regime nearly as rigorous as that invalidated in *Heller*—and quite different than that advocated by Lott—when coupled with aggressive stop-and-frisk tactics, has the best record in the country when it comes to reducing big-city violent crime.¹⁸⁹

¹⁸² See *supra* note 140 and accompanying text (Malcolm Rebuttal).

¹⁸³ See *supra* note 69 (Rosenthal Opening).

¹⁸⁴ See LOTT, *supra* note 69, at 253–305.

¹⁸⁵ See *supra* notes 61–64 and accompanying text (Rosenthal Opening).

¹⁸⁶ See Rosenthal, *supra* note 12, at 25–26.

¹⁸⁷ See *id.* at 26–44. Although she does not comment on New York, Professor Malcolm points to high crime rates in the District of Columbia and Chicago to suggest that handgun bans are ineffective. See *supra* notes 136–38 and accompanying text (Malcolm Rebuttal). Aside from ignoring the fact that the manner in which a handgun ban is enforced is surely more important than the fact that it is on the books, the evidence on the efficacy of handgun bans is actually mixed, as Justice Breyer has observed. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3127 (2010) (Breyer, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 699–704 (2008) (Breyer, J., dissenting). For a quite different assessment than that of Professor Malcolm of the evidence relating to Chicago, offered by professional criminologists, see Brief and Appendix of Professors of Criminal Justice as Amici Curiae in Support of Respondents, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

¹⁸⁸ See Jesse Matthew Ruhl, Arthur L. Rizer III & Mikel J. Wier, *Gun Control: Targeting Rationality in a Loaded Debate*, 13 KAN. J.L. & PUB. POL'Y 413, 449–50 (2004).

¹⁸⁹ In fairness, it should be noted that a report of New York's Attorney General, based on a review of forms officers must file when conducting forcible stops, expresses some skepticism about the New York Police Department's compliance with the Fourth Amendment, concluding through the use of a sampling procedure that 15.4% of all forms failed to articulate facts sufficient to justify the stop and that 23.5% of all forms did not provide sufficient information to make a determination about whether the stop was justified. See CIVIL RIGHTS BUREAU, *supra* note 31, at 161–64. The sampling procedure also found that forms that articulated facts amounting to reasonable suspicion were four times more likely to result in an arrest. See *id.* at 164. It is difficult to know what to make of this point; it may well be that

C.

As for her advocacy of strict scrutiny,¹⁹⁰ although she never bothers to explain how her proposal for strict scrutiny of firearms regulations can be squared with *Heller*'s list of "presumptively lawful regulatory measures,"¹⁹¹ Professor Malcolm claims that my reliance on the Second Amendment's preamble as a source of regulatory authority "is a bucket that will not hold water."¹⁹² She does not, however, actually get around to giving a reason to support this conclusion.

As I explained in my Opening, if one were to consult no more than the original meaning of the Second Amendment's operative clause, there would seem to be no power to limit the right to possess and carry firearms in common civilian use.¹⁹³ Nor is framing-era practice much help; although Professor Malcolm claims that "laws that in some way restricted the right to be armed by prohibiting unsafe use before the adoption of the Second Amendment were not regarded as infringing on the core right,"¹⁹⁴ in *Heller*, the Court concluded that there was little framing-era support for firearms regulation aside from laws addressing gunpowder storage and the discharge of firearms.¹⁹⁵ Such regulations seem entirely compatible with the operative clause's protection of a right to possess and carry firearms in common use—unlike many of the other prohibitions deemed presumptively lawful in *Heller*. Professor Malcolm, in short, has

officers were less thorough in filling out forms when they knew there would be no criminal case arising from the encounter. Reliance on these reports to assess compliance with the Fourth Amendment is perilous since the reports are not made for that purpose but rather are intended as a source of investigative leads. See James J. Fyfe, *Stops, Frisks, Searches, and the Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 376, 392–94 (2004). In any event, these data do not endeavor to establish that police reports involving arrests based on probable cause were any more likely to fail to articulate sufficient facts to support the arrest than were reports involving stops. At most, the data may reflect no more than the risk of error inherent in all police activity.

¹⁹⁰ The basis for Professor Malcolm's view seems to be that "fundamental rights are not to be separated into first- and second-class status," and therefore "the strict scrutiny applied to the First Amendment freedom of the press and freedom of speech should also be applied to Second Amendment rights." *Supra* Part II.B (Malcolm Rebuttal). Yet, as Professor Malcolm acknowledges, in many contexts, First Amendment jurisprudence does not require strict scrutiny. See *supra* note 114 (Malcolm Rebuttal); see also Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 695 (2007). For a particularly clear example, see *Ward v. Rock Against Racism*, 491 U.S. 781, 798–800 & n.6 (1989). Professor Malcolm offers no explanation as to why strict scrutiny should be invariably applied in Second Amendment jurisprudence when that is not the case in First Amendment jurisprudence. Beyond that, as I explained in Part I, there are important differences between First and Second Amendment rights that bear on the appropriate standard of scrutiny. *Supra* note 33 (Rosenthal Opening).

¹⁹¹ 554 U.S. at 627 n.26.

¹⁹² *Supra* Part II.D (Malcolm Rebuttal).

¹⁹³ See *supra* Part I.A (Rosenthal Opening).

¹⁹⁴ See *supra* Part II.C (Malcolm Rebuttal).

¹⁹⁵ See 554 U.S. at 632–34.

no textual explanation for the *Heller* dicta on permissible firearms regulation—dicta she nevertheless endorses.¹⁹⁶

Nor does the rubric of “strict scrutiny” explain *Heller*’s discussion of “presumptively lawful” gun control measures. Even if some allowance for regulations that pass searching judicial scrutiny could be squared with the Second Amendment’s text as Professor Malcolm reads it, strict scrutiny does not ordinarily tolerate purely prophylactic regulation such as prohibitions on carrying concealed weapons justified as an effort to prevent violent confrontations. In one of the First Amendment strict scrutiny cases that Professor Malcolm cites, for example, the Court rejected an argument that a statutory prohibition on corporate-funded electioneering could be justified as a means to prevent corruption because the prohibition swept beyond the type of corrupt quid pro quo that the government has a compelling interest in preventing.¹⁹⁷ If we are to take strict scrutiny seriously, it is hard to understand how a ban on carrying concealed firearms could fare any better.

If, however, the Second Amendment’s operative clause is construed in light of the preamble’s contemplation of a “well regulated militia,” that is, “the imposition of proper discipline and training” on not only those enrolled in a formal military organization but also all who are “physically capable of acting in concert for the common defense,”¹⁹⁸ then the Second Amendment envisions unusually comprehensive regulatory authority of the type blessed by the *Heller* dicta.

The Second Amendment is, after all, a legal text. Surely an approach to the Second Amendment standard of scrutiny that is compatible with the text is preferable to one that is not. My own reliance on the Second Amendment’s preamble to establish a standard of scrutiny has a textual foundation; Professor Malcolm’s approach, as far as I can tell, has none. I’ll take mine.

¹⁹⁶ See *supra* Part II.C (Malcolm Rebuttal).

¹⁹⁷ See *Citizens United v. FEC*, 130 S. Ct. 876, 908–11 (2010).

¹⁹⁸ *District of Columbia v. Heller*, 554 U.S. at 595, 597 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).