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Issue Brief

## **The Constitutional Case for Limiting Public Carry**

**By Lawrence Rosenthal**

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# The Constitutional Case for Limiting Public Carry

Lawrence Rosenthal\*

Perhaps the single most important question arising in the wake of the Supreme Court's holding that the Second Amendment protects an individual right to keep and bear arms, even for purposes unrelated to service in an organized militia, is whether the Constitution permits limitations on the ability to carry firearms in public. For high-crime, unstable urban neighborhoods, an absolute constitutional right to carry firearms would likely cripple the type of problem-oriented, preventative policing that has successfully driven guns and drugs off of many urban streetscapes and has produced concomitant reductions in violent crime. This Issue Brief addresses the constitutional status of laws that endeavor to facilitate preventative policing by limiting the right to carry firearms in public.

## I. Introduction

The Second Amendment is the only provision in the Bill of Rights with a preamble: "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."<sup>1</sup> Relying on the Second Amendment's preamble, which contemplates that those exercising the right to keep and bear arms should be "well regulated," and the U.S. Supreme Court's approach when the government attempts to regulate other core rights, this Issue Brief attempts to define the scope of the government's power to regulate the ability of individuals to carry firearms in public places.

Contemporary Second Amendment jurisprudence is traceable to the Supreme Court's 5-4 decision in *District of Columbia v. Heller*,<sup>2</sup> recognizing, for the first time, an individual right to keep and bear arms. Relying on evidence of what the terms of the Second Amendment meant in the framing era, a majority of the Court concluded that the "right of the People" referred to an individual right,<sup>3</sup> while "Arms" included "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding,"<sup>4</sup> but excluded "dangerous and unusual weapons."<sup>5</sup> The right to "keep" arms, the majority concluded, meant the right to possess them,<sup>6</sup> and the right to "bear" arms meant the right to "carry[] for a particular purpose – confrontation."<sup>7</sup> As for the preamble, the majority concluded that it would not have been understood in the framing era to "limit or expand the scope of the operative clause," but instead

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\*Professor of Law, Chapman University Fowler School of Law. This paper is adapted from *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, which will appear in the Washington University Law Review. A pre-publication draft is available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2414681](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414681).

<sup>1</sup> U.S. CONST. amend. II.

<sup>2</sup> 554 U.S. 570 (2008).

<sup>3</sup> *Id.* at 579–81.

<sup>4</sup> *Id.* at 581, 582.

<sup>5</sup> *Id.* at 627.

<sup>6</sup> *Id.* at 582.

<sup>7</sup> *Id.* at 584. In his dissent, to which Justice Souter, Justice Ginsburg and Justice Breyer joined, Justice Stevens asserted that, "there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution." *Id.* at 637 (Stevens, J., dissenting).

merely “announce[d] the purpose for which the right was codified: to prevent elimination of the militia.”<sup>8</sup>

The Court then considered whether the right to keep and bear arms was infringed by the District’s prohibition on the registration and possession of handguns and its requirement that firearms be locked or otherwise stored in an inoperable condition. The Court wrote that “the inherent right of self-defense has been central to the Second Amendment right,” adding that the District of Columbia’s “handgun ban amounts to a prohibition on an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose,” and that the ban “extends, moreover, to the home, where the need for defense of self, family, and property is most acute.”<sup>9</sup> The Court noted that “[f]ew laws in the history of our Nation have come close to the severe restriction of the District of Columbia’s handgun ban. And some of them have been struck down.”<sup>10</sup> Inasmuch as “the American people have considered the handgun to be the quintessential self-defense weapon,” it follows, the Court wrote, that “a complete prohibition on their use is invalid.”<sup>11</sup> As for the trigger-lock requirement, because it required that “firearms in the home be kept inoperable at all times,” this prohibition “makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional.”<sup>12</sup>

## II. The Stakes

It takes little imagination to see how an expansive conception of Second Amendment rights that undermines virtually all gun regulation could facilitate criminal activity. For example, there is considerable evidence that members of criminal street gangs carry firearms at elevated rates.<sup>13</sup> The same is true of those involved in drug trafficking.<sup>14</sup> This should not be surprising; those engaged in unlawful but intensely competitive enterprises will often turn to violence as a means of enhancing their position in illegal, if lucrative, markets. For example, there is ample evidence that homicides spiked in major cities following the introduction of crack cocaine, which

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<sup>8</sup> *Id.* at 578, 599.

<sup>9</sup> *Id.* at 628.

<sup>10</sup> *Id.* at 619.

<sup>11</sup> *Id.* at 629.

<sup>12</sup> *Id.* at 630.

<sup>13</sup> See, e.g., SCOTT H. DECKER & BARRICK VAN WINKLE, *LIFE IN THE GANG: FAMILY, FRIENDS, AND VIOLENCE* 175–76 (1996); JAMES C. HOWELL, *GANGS IN AMERICAN COMMUNITIES* 218 (2012); JOSEPH E. SHELEY & JAMES D. WRIGHT, *IN THE LINE OF FIRE: YOUTHS, GUNS, AND VIOLENCE IN URBAN AMERICA* 95–103 (1995); TERENCE P. THORNBERRY ET AL., *GANGS AND DELINQUENCY IN DEVELOPMENTAL PERSPECTIVE* 123–25, 131 (2003); Scott H. Decker, *Youth Gangs and Violent Behavior*, in *THE CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR AND AGGRESSION* 388, 391–92 (Daniel J. Flannery et al. eds., 2007) [hereinafter *CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR*]; Beth Bjerregaard & Alan J. Lizotte, *Gun Ownership and Gang Membership*, 86 *J. CRIM. L. & CRIMINOLOGY* 37, 46–53 (1995); C. Ronald Huff, *Comparing the Criminal Behavior of Youth Gangs and At-Risk Youth*, in *AMERICAN YOUTH GANGS AT THE MILLENNIUM* 78, 83 (Finn-Aage Esbensen, Stephen F. Tibbets & Larry Gaines eds., 2004) [hereinafter *GANGS AT THE MILLENNIUM*]; Alan J. Lizotte et al., *Factors Influence Gun Carrying Among Urban Males Over the Adolescent-Young Adult Life Course*, 38 *CRIMINOLOGY* 811, 812–13 (2000).

<sup>14</sup> See, e.g., SHELEY & WRIGHT, *supra* note 13, at 75–76, 83–93; Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 *J. CRIM. L. & CRIMINOLOGY* 10, 29–31 (1995); Lizotte et al., *supra* note 13, at 814–16, 826–28.

created new competitive opportunities and pressures.<sup>15</sup> The prevalence of violent competition, in turn, is likely to increase the rate at which offenders, and others in the community, carry firearms.

Indeed, gang researchers have found that the prevalence of violence in gang-dominated neighborhoods serves to make firearms more pervasive in those communities.<sup>16</sup> Researchers have similarly found that a perception of danger in high-crime neighborhoods becomes a stimulus for the carrying of firearms as a means of self-protection.<sup>17</sup> As Jeffrey Fagan and Deanna Wilkinson's ethnographic study of at-risk youth in New York explains, when inner-city youth live under the increasing threat of violence in an environment in which firearms are prevalent, not only are they more likely to arm themselves, but they become increasingly likely to respond to real or perceived threats and provocations with lethal violence, creating what Fagan and Wilkinson characterize as a contagion effect.<sup>18</sup> A study of homicide in New York, for example, found evidence that firearms violence stimulated additional firearms-related violence in nearby areas.<sup>19</sup> Fagan and Wilkinson have labeled this phenomenon an "ecology of danger" in which the need to carry firearms and be prepared to use them came to be seen as essential.<sup>20</sup> Ironically, this does not make those who carry firearms in high-crime neighborhoods safer; to the contrary, even though gang members carry firearms at elevated rates, they also experience vastly higher homicide victimization rates than the public at large.<sup>21</sup>

Some have claimed that laws expanding the right to carry firearms in public, specifically permitting concealed carry of firearms, have produced reductions in crime.<sup>22</sup> This conclusion has

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<sup>15</sup> See, e.g., ALFRED BLUMSTEIN & JACQUELINE COHEN, DIFFUSION PROCESSES IN HOMICIDE 6–9 (Nat'l Crim. Just. Ref. Serv., July 17, 1999); JAMES ALAN FOX, JACK LEVIN & KENNA QUINET, THE WILL TO KILL: MAKING SENSE OF SENSELESS MURDER 87-88 (6th ed. 2008); BENJAMIN PEARSON-NELSON, UNDERSTANDING HOMICIDE TRENDS: THE SOCIAL CONTEXT OF A HOMICIDE EPIDEMIC 37-41 (2008); Alfred Blumstein & Richard Rosenfeld, *Explaining Recent Trends in U.S. Homicide Rates*, 88 J. CRIM. L. & CRIMINOLOGY 1175, 1209-10 (1998); Alfred Blumstein & Joel Wallman, *The Crime Drop and Beyond*, 2006 ANN. REV. SOC. SCI. 125, 131 (2006); Philip J. Cook & John H. Laub, *After the Epidemic: Recent Trends in Youth Violence in the United States*, in CRIME & JUSTICE: A REVIEW OF RESEARCH 1, 21-31 (Michael Tonry ed., 2002).

<sup>16</sup> See, e.g., James C. Howell, *Youth Gang Homicide: A Literature Review*, 45 CRIME & DELINQ. 208, 216 (1999).

<sup>17</sup> See BLUMSTEIN & COHEN, *supra* note 15, at 4–5; SHELEY & WRIGHT, *supra* note 13, at 102–03, 110–13; Jeffrey Fagan & Deanna Wilkinson, *Guns, Youth Violence, and Social Identity*, in CRIME AND JUSTICE VOL. 24: YOUTH VIOLENCE 105, 174 (Michael Tonry & Mark H. Moore eds., 1998); Lizotte et al., *supra* note 13, at 813–14.

<sup>18</sup> See Fagan & Wilkinson, *supra* note 17.

<sup>19</sup> See Jeffrey Fagan, Deanna L. Wilkinson & Garth Davies, *Social Contagion of Violence*, in CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR, *supra* note 13, at 688, 701–10. 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).

<sup>20</sup> Fagan & Wilkinson, *supra* note 17, at 174.

<sup>21</sup> See, e.g., DECKER & VAN WINKLE, *supra* note 13, at 173; Sudhir Venkatesh, *The Financial Activity of a Modern American Street Gang*, in GANGS AT THE MILLENNIUM, *supra* note 13, at 239, 242. Gang members also appear to experience other forms of violent victimization at elevated rates. See, e.g., Chris L. Gibson et al., *Using Propensity Score Matching to Understand the Relationship between Gang Membership and Violent Victimization: A Research Note*, 26 JUSTICE Q. 624, 639–41 (2012).

<sup>22</sup> See, e.g., JOHN R. LOTT, JR., MORE GUNS, LESS CRIME 170–336 (3d ed. 2010); John R. Lott & David B. Mustard, *Crime, Deterrence, and Right-To-Carry Concealed Handguns*, 26 J. LEG. STUD. 1 (1997).

faced fierce criticism.<sup>23</sup> Even a leading advocate for the right to possess firearms has pronounced the evidence in support of this theory unpersuasive.<sup>24</sup> Furthermore, no gun rights advocate has claimed that expanding concealed carry in high-crime, urban neighborhoods – where levels of drug and gang-related violence are common – reduces crime. As we have seen, for example, gang members and drug traffickers carry firearms at elevated rates but also experience elevated rates of homicide victimization. Similarly, the fact that permit-holders under existing schemes seem unlikely to commit crimes does not necessarily apply if a robust Second Amendment right ultimately made the right to carry available to a far broader class of individuals.

A related claim is that firearms are used for defensive purposes at very high rates.<sup>25</sup> While other work has cast great doubt on this claim, even the advocates of this view concede that increasing the number of residents carrying firearms does not operate to make high-crime neighborhoods safer.<sup>26</sup> To the contrary, there is good reason to suspect that the prevalence of firearms in such neighborhoods produced the phenomenon of the drive-by shooting, which is a common tactic of criminal street gangs.<sup>27</sup> When gang members believe that an intended target may be armed, they are more likely to employ this tactic because it enables them to both approach and leave the target quickly and enjoy the benefits of tactical surprise.<sup>28</sup> Finally, some argue that history suggests that racial and other minorities have found firearms of particular value for purposes of self-defense, although these claims are unaccompanied by empirical evidence that the use of firearms have enabled minorities to achieve acceptable (or even enhanced) levels of personal security.<sup>29</sup> The persistence of high rates of firearms-related crime and its contagion effects instead suggest a powerful argument to the contrary. The presence of guns in high-crime areas, it seems, serves to perpetuate violence and crime in these areas.

It would seem to follow that police tactics designed to make it more difficult and risky for offenders to carry guns in public would reduce the risk of violent confrontation and increase the difficulties facing criminal enterprises engaged in violent competition. Indeed, there is something approaching consensus among criminologists that one of the very few interventions that consistently reduces rates of violent crime involves aggressive patrols targeting statistical

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<sup>23</sup> See, e.g., NAT'L RES. COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 125–51 (Charles F. Wellford et al. eds., 2005); DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 100–04 (2004); ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL 69–73 (5th ed. 2012); see MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS 85–95 (2007).

<sup>24</sup> See Gary Kleck, *Gun Control after Heller and McDonald: What Cannot Be Done and What Ought To Be Done*, 39 FORDHAM URB. L.J. 1383, 1411–15 (2012).

<sup>25</sup> See, e.g., GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 193–211 (1995).

<sup>26</sup> 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 (May 1997); HEMENWAY, *supra* note 23, at 66–69, 239–40; SPITZER, *supra* note 23, at 64–65.

<sup>27</sup> See, e.g., 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).

<sup>28</sup> See WILLIAM B. SANDERS, GANGBANGS AND DRIVE-BYS: GROUNDED CULTURE AND JUVENILE GANG VIOLENCE 65–74 (1994).

<sup>29</sup> See, e.g., Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 349–58 (1991); Nicholas Johnson, *Firearms Policy and the Black Community: An Assessment of Modern Orthodoxy*, 45 CONN. L. REV. 1491, 1516–53 (2012).

concentrations of crime and focusing on finding guns.<sup>30</sup> There is, for example, substantial evidence that stop-and-frisk tactics targeting these statistical “hot spots” have played an important role in New York City’s crime decline.<sup>31</sup> Although, there is evidence as well that in recent years New York’s enthusiasm for a tactic that it regards as effective has produced such high rates of stop-and-frisk that the tactic has perhaps reached, if not exceeded, the point of diminishing returns.<sup>32</sup>

If the Second Amendment conferred a right to carry firearms in public, however, the ability to execute a policing strategy aimed at driving guns off the streetscape would be sharply circumscribed, if not altogether eliminated. The Fourth Amendment’s prohibition on unreasonable search and seizure, for example, permits the use of stop-and-frisk tactics only when an officer reasonably believes that criminal activity is afoot.<sup>33</sup> If the Second Amendment granted individuals a right to carry firearms in public, the Fourth Amendment would necessarily prohibit search and seizure based on a police officer’s reasonable belief that an individual was armed.<sup>34</sup> Even if a permit were required to carry firearms in public places, if the Second Amendment were understood to require that permits be made liberally available, the Fourth Amendment could well prohibit any form of investigative detention to determine if an individual reasonably believed to be carrying firearms had the proper permit, just as it prohibits the police from stopping vehicles to determine if drivers possess the requisite license and registration.<sup>35</sup>

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<sup>30</sup> See NAT’L RES. COUNCIL, *supra* note 23, at 230–35; Blumstein & Wallman, *supra* note 15, at 136–37; Jacqueline Cohen & Jens Ludwig, *Policing Crime Guns*, in *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE* 217, 238–39 (Jens Ludwig & Philip J. Cook eds., 2003); Philip J. Cook, Anthony A. Braga & Mark H. Moore, *Gun Control*, in *CRIME AND PUBLIC POLICY* 257, 289 (James Q. Wilson & Joan Petersilia eds., 2010); Jens Ludwig, *Better Gun Enforcement, Less Crime*, 4 *CRIMINOLOGY & PUB. POL’Y* 677, 701–08 (2005); Edward F. McGarrell, *Reducing Firearms Violence Through Directed Patrol*, 1 *CRIMINOLOGY & PUB. POL’Y* 119, 126–30 (2001); Lawrence W. Sherman, *Reducing Gun Violence: What Works, What Doesn’t, What’s Promising*, in *PERSPECTIVES ON CRIME AND JUSTICE: 1999–2000 LECTURE SERIES* 69, 78–79 (2001); Lawrence W. Sherman & John E. Eck, *Policing for Crime Prevention*, in *EVIDENCE-BASED CRIME PREVENTION* 295, 308–10 (Lawrence W. Sherman et al. eds., rev. 2006); Lawrence W. Sherman & Dennis Rogan, *Effects of Gun Seizures on Gun Violence: Hot Spots Patrol in Kansas City*, 12 *JUST. Q.* 673, 675–86 (1995); Cody W. Telep & David Weisburd, *What Is Known About the Effectiveness of Police Practices in Reducing Crime and Disorder?*, 15 *POLICE Q.* 331, 340–41 (2012).

<sup>31</sup> See, e.g., DENNIS C. SMITH & ROBERT PURTELL, *AN EMPIRICAL ASSESSMENT OF NYPD’S “OPERATION IMPACT”*: A TARGETED ZONE CRIME REDUCTION STRATEGY 49–50 (2007); FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK’S LESSONS FOR URBAN CRIME CONTROL* 131–44 (2012); Jeffrey Fagan, Garth Davies & Jan Holland, *The Paradox of the Drug Elimination Program in New York City Public Housing*, 13 *GEO. J. ON POVERTY L. & POL’Y* 415, 418, 442–53 (2006); David Weisburd, Cody W. Telep & Brian A. Lawton, *Could Innovations in Policing Have Contributed to the New York City Crime Drop even in a Period of Declining Police Strength? The Case of Stop, Question, and Frisk as a Hot Spots Policing Strategy*, \_\_ *JUSTICE Q.* \_\_ (forthcoming), available at <http://www.tandfonline.com/doi/abs/10.1080/07418825.2012.754920#preview>.

<sup>32</sup> See, e.g., Stephen J. Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 *J. CRIM. L. & CRIMINOLOGY* 335, 349–53 (2011).

<sup>33</sup> See, e.g., *Florida v. J.L.*, 529 U.S. 266, 269–74 (2000).

<sup>34</sup> For an opinion discussing the potential of the Second Amendment to circumscribe stop-and-frisk tactics directed at armed suspects, see *United States v. Williams*, 731 F.3d 678, 690–94 (7th Cir. 2013) (Hamilton, J., concurring in part and concurring in the judgment).

<sup>35</sup> See *Delaware v. Prouse*, 440 U.S. 648, 655–63 (1979) (stops of vehicles to check license and registration violate the Fourth Amendment in the absence of probable cause, or at least reasonable suspicion that the driver does not have proper license and registration or has committed some other offense); see also *City of Indianapolis v. Edmond*,

In addition to prohibiting police from independently inquiring about an individual's authorization to carry a firearm, laws targeting possession or carrying of firearms by only convicted felons are of limited efficacy in preventing violent crimes. One leading study found that only about 43 percent of adult homicide offenders in Illinois had a prior felony conviction.<sup>36</sup> Another found that about 41 percent of adults arrested for felony homicide and just 30 percent of adults arrested for all felonies in Westchester County, New York, had a prior felony conviction, and just 33 percent of all adults arrested for felonies in New York State had a prior felony conviction.<sup>37</sup> Thus, even assuming officers on patrol can effectively enforce these laws by somehow identifying convicted felons on the streetscape through tactics consistent with the Fourth Amendment, these laws would permit many offenders to remain armed, and perhaps even prompt drug traffickers and criminal street gangs to recruit younger individuals without criminal records to lawfully carry the firearms necessary to protect their criminal enterprises.

In short, a broad Second Amendment right to carry firearms in public would likely pose a substantial inhibition on the ability of the authorities to prevent violent crime – and thereby disrupt the ecology of danger in high-crime neighborhoods – through regulations that make it risky to carry guns in public.

### **III. The Puzzle of Regulatory Power in *Heller***

In *Heller*, the Supreme Court went to some lengths to make clear that some limitations on the right to keep and bear arms – that is, to possess and carry firearms in case of confrontation – are consistent with the Second Amendment. The Court wrote: “Like most rights, the right secured by the Second Amendment is not unlimited.”<sup>38</sup> “For example,” the Court observed, “the majority of 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or its state analogues.”<sup>39</sup> Moreover, “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons or the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools or government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”<sup>40</sup> The Court added that it “identif[ied] these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”<sup>41</sup> In a subsequent decision, in which the Court concluded that the Second Amendment is applicable to state and local governments through the Fourteenth Amendment, four of the five Justices in the majority referred to *Heller*'s discussion of

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531 U.S. 32, 40–48 (2000) (road blocks in high-crime areas where all vehicles are stopped and checked for guns and drugs violate the Fourth Amendment).

<sup>36</sup> See Philip J. Cook, Jens Ludwig & Anthony A. Braga, *Criminal Records of Homicide Offenders*, 294 JAMA 598 (2005).

<sup>37</sup> See Philip J. Cook, *Q&A on Firearms Availability, Carrying, and Misuse*, 14 N.Y. ST. BAR ASS'N GOV'T L. & POL'Y J. 77, 80 (2012).

<sup>38</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

<sup>39</sup> *Id.* (citations omitted).

<sup>40</sup> *Id.* at 626–27 (footnote omitted).

<sup>41</sup> *Id.* at 627 n.26.

presumptively lawful regulations, stating that “[d]espite municipal respondents’ doomsday proclamations, incorporation does not imperil every law regulating firearms.”<sup>42</sup>

It is not obvious, at least at first blush, how to reconcile the Second Amendment, as interpreted in *Heller*, with the very laws that the Court labeled presumptively lawful, even though those laws prevent some individuals from exercising their right to keep and bear arms – that is, to possess and carry firearms in common civilian use. Consider, for example, statutory prohibitions on the possession of firearms by convicted felons. As Professor Eugene Volokh has observed, “[f]elons may need arms for lawful self-defense as much as the rest of us do.”<sup>43</sup> Thus, if *Heller* prohibits all laws that impose very severe burdens on an individual right of armed self-defense, it is entirely unclear why convicted felons can be entirely deprived of that right consistent with *Heller*’s account of the Second Amendment’s original meaning.

It is therefore unclear how to reconcile *Heller*’s focus on the original meaning of the Second Amendment with prohibitions on the possession of firearms by convicted felons. These laws have little originalist support; they did not become common until early in the twentieth century in the wake of a crime wave following the First World War.<sup>44</sup> Don Kates nevertheless argued that these laws can be sustained because most felonies in the framing era were punished by death and forfeiture of property, effectively extinguishing the right to keep and bear arms in a manner analogous to contemporary laws barring felons from possessing firearms.<sup>45</sup> Kevin Marshall, however, has observed that the imposition of capital punishment and forfeiture upon a felony conviction was far from universal in the framing era.<sup>46</sup> Even absent the universal imposition of capital punishment and forfeiture, Kates and others have contended that framing-era rhetoric often associated the right to bear arms with the full membership in the polity afforded to law-abiding citizens, which could presumably be forfeited as a consequence of criminal misconduct.<sup>47</sup> Marshall and others have replied that, although there were some framing-era proposals that would have carved out from the right to bear arms those who had committed crimes or were otherwise dangerous or untrustworthy, the text of the Second Amendment was not framed in those terms; indeed, it protected a right of all people, not merely those regarded as virtuous or law-abiding.<sup>48</sup> All this suggests that we have some analytical work to do if we are to

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<sup>42</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (plurality opinion).

<sup>43</sup> 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, 1499 (2009).

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

<sup>45</sup> See Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1983).

<sup>46</sup> See Marshall, *supra* note 44, at 714–16. For helpful explications of the limited use of capital punishment for felony convictions in the framing era, see, e.g., STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 53–70, 94–100 (2002); Jeffrey K. Sawyer, “Benefit of Clergy” in *Maryland and Virginia*, 34 AM. J. LEG. HIST. 49, 57–67 (1990).

<sup>47</sup> See, e.g., Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1359–62 (2009); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480–81 (1995).

<sup>48</sup> See 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, 1374–76 (2009); Marshall, *supra* note 44, at 712–13; Allen Rostron, *Justice Breyer’s Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 731–32 (2012).



reconcile prohibitions on the possession of firearms by convicted felons with the majority's reading of the Second Amendment in *Heller*.

*Heller*'s most direct consideration of laws limiting the ability of individuals to carry firearms in public is its discussion of the presumptive validity of laws prohibiting the carrying of concealed weapons. In the 1820s and 30s, laws prohibiting the carrying of concealed firearms emerged in the wake of a surge in violent crime.<sup>49</sup> Although laws prohibiting open carry were more often than not invalidated, concealed-carry bans were generally upheld against constitutional challenge under the Second Amendment or state-law analogues.<sup>50</sup> Some commentators find originalist support for these laws in the fourteenth-century Statute of Northampton, which they believe was understood as a broad prohibition on carrying firearms because of their potential to alarm others.<sup>51</sup> Yet, a concealed weapon, precisely because it is hidden from view, cannot alarm others unaware of its presence. Instead, as Professor Volokh has noted, those jurisdictions that drew a distinction between concealed and open carry seem to have proceeded on the view that law-abiding persons carried weapons openly, while concealed carry was thought suspicious or threatening.<sup>52</sup> There is ample expression in nineteenth-century decisions to this effect.<sup>53</sup> Professor Volokh rightly questions, however, whether this view has fair application to contemporary circumstances, in which many might find open carry far more alarming than a discreetly concealed firearm.<sup>54</sup> There is surely more than a little merit to this point. Thus, whether framing-era practice provides fair analogical support for analyzing the contemporary scope of the right to carry weapons in public, whether openly or concealed, is far from clear.

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<sup>49</sup> See, e.g., SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 138-44 (2006); CLAYTON E. CRAMER, *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM* 2-3, 139-41 (1999); ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 166-69 (2011); Robert Leider, *Our Non-Originalist Right To Bear Arms*, 89 IND. L.J. 1587, 1599-601 (2014).

<sup>50</sup> See, e.g., CRAMER, *supra* note 49, at 4; ALEXANDER DECONDE, *GUN VIOLENCE IN AMERICA: THE STRUGGLE FOR CONTROL* 51-52 (2001); Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 516-17 (2005); Leider, *supra* note 49, at 1606-19; Jonathan Meltzer, Note, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1510-16 (2014).

<sup>51</sup> See, e.g., Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLE. ST. L. REV. 1, 8-30 (2012); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1317-18 (2009).

<sup>52</sup> See Volokh, *supra* note 43, at 1522-23. For an analysis along similar lines, see Meltzer, *supra* note 50, at 1518-20; and Leider, *supra* note 49, at 1602-05.

<sup>53</sup> See, e.g., *State v. Reid*, 1 Ala. 612, 1840 WL 229 \*3 (1840) (“[A] law which is intended merely to promote personal security, and to put down lawless aggression and violence, and to that end inhibits the wearing of certain weapons, in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the constitution.”); *Nunn v. State*, 1 Kelly 243, 1846 WL 1167 \*8 (Ga. 1846); *State v. Smith*, 11 La. Ann. 633, 1856 WL 4793 (La. 1856) (“Th[e Second Amendment] was never intended to prevent the individual States from adopting such measures of police as might be necessary, in order to protect the orderly and well disposed citizens from the treacherous use of weapons not even designed for any purpose of public defence, and used most frequently by evil-disposed men who seek an advantage over their antagonists, in the disturbances and breaches of the peace which they are prone to provoke.”).

<sup>54</sup> See Volokh, *supra* note 43, at 1521-23.

In short, we have yet to discover how to reconcile the operative clause of the Second Amendment – conferring as it does, at least according to a majority of the Supreme Court, an unqualified individual right to possess and carry firearms – with the laws regarding both convicted felons and concealed carry that the Court has labeled presumptively lawful.

#### IV. Regulatory Power and the Preamble

Perhaps we are unable to reconcile the Second Amendment with what the Supreme Court described as longstanding and presumptively lawful regulations because we have confined our consideration of the Second Amendment to its operative clause. By referring to the existence of “[a] well regulated Militia,” the preamble expressly contemplates continued regulatory authority. Moreover, *Heller* concluded that the original meaning of the term “Militia” refers not to “the organized militia,” but rather “all able bodied men.”<sup>55</sup> Thus, the Court added, the militia was originally understood as comprised of “the body of all citizens capable of military service, who would be expected to bring the sorts of lawful weapons that they possessed at home to militia duty.”<sup>56</sup> Thus, the class that is to be “well regulated” consists of all who are able-bodied and capable of military service, regardless of whether they are actually enrolled in an organized militia. In short, *Heller* treats the militia and those entitled to exercise the right to keep and bear arms as, for all practical purposes, synonymous. Moreover, given that the framing-era understanding was that the right would be exercised by those subject to regulatory authority, it would do serious violence to the original understanding to disaggregate the right from the existence of regulatory authority.

As for the original meaning of the phrase “well regulated,” the first edition of Webster’s dictionary defined “regulated” as “[a]djusted by rule, method or forms; put in good order; subjected to rules or restrictions.”<sup>57</sup> *Heller*, for its part, stated that the original meaning of the phrase was “the imposition of proper training and discipline.”<sup>58</sup> These terms, of course, are expansive. They contemplate not merely training, but also rules and “discipline,” which could conceivably embrace everything from a forfeiture of the right to keep and bear arms as a consequence of misconduct, to a variety of prophylactic measures that endeavor to reduce the likelihood of misconduct.<sup>59</sup>

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<sup>55</sup> *District of Columbia v. Heller*, 554 U.S. 570, 596 (2008) (citing the Act of May 8, 1792, ch. 33, 1 Stat. 271) (The Court added that the first militia act, enacted the year after the Second Amendment’s ratification, defined the militia as “each and every free, able-bodied white male citizen between the ages of 18 and 45 . . .”).

<sup>56</sup> *Id.* at 627. This capacious definition of “Militia” is consistent with that of most scholars who have advanced the view that the Second Amendment protects an individual right. *See, e.g.*, Kates, *supra* note 45, at 214–18.

<sup>57</sup> NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 54 (1828); *see also* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE IN WHICH WORDS ARE DEDUCED FROM THEIR ORIGINALS cdlxxvi (6th ed. 1785) (defining “regulate” as “[t]o adjust by rule or method” or “[t]o direct”).

<sup>58</sup> *Heller*, 554 U.S. at 597.

<sup>59</sup> *See, e.g.*, Miller, *supra* note 51, at 1318–19 (“The imposition of proper discipline assumes someone with authority to impose discipline and presumes some consequence for drilling without adequate discipline . . . [O]nce the people exercise their right to keep and bear arms as a people’s militia and spill out into the street, then that right is textually constrained by the militia clauses in the Constitution. Those clauses curtail the authority of the people’s militia to assemble spontaneously.”) (footnotes omitted). For a discussion of the evidence demonstrating that the framing generation regarded broad and effective regulation of the militia as critical, see Patrick J. Charles, *The Constitutional*

Thus, even utilizing the same methodology the Court embraced in *Heller*, premised on the Court’s account of the purported original meaning of the Second Amendment, we find ample power to enact prophylactic regulations. Plainly, a “well regulated Militia” could well be subject to a variety of prophylactic rules intended to minimize the likelihood of misconduct, rather than only to rules that punish misconduct after-the-fact. Indeed, we have seen prophylactic firearms regulation throughout history, from the early nineteenth-century prohibitions on concealed carry to the more recent prohibitions on the possession of firearms by convicted felons. In the framing era, classes of individuals such as slaves, freed blacks, and people of mixed race were frequently prohibited from owning or carrying guns. Some states even extended the bar to Catholics or whites unwilling to swear allegiance to the Revolution. It was widely believed by both England and the Founders that only those loyal to the government possessed a right to bear arms, with others facing sanctions including disarmament.<sup>60</sup> Laws requiring the safe storage of firearms or gunpowder or barring loaded firearms indoors were common as well.<sup>61</sup>

To be sure, a fair construction of the Second Amendment must accommodate both the right found in the operative clause and the regulatory authority acknowledged in the preamble. Fortunately, the problem of accommodating a core right and legitimate regulatory interests is not a new one in constitutional law. The Court has frequently addressed this tension through a methodology that assesses the extent of the burden placed on the core right, such as free speech, reproductive freedom, and travel, by a challenged regulation. For example, the First Amendment protects the right to speech, press and association, but there are any number of legitimate governmental interests that support regulation in a variety of areas, including the political process. Similarly, with respect to abortion, the Court has faced the challenge of attempting to balance both right and regulatory authority, with the Court concluding that a woman has a cognizable liberty interest under the Due Process Clause in deciding whether to terminate her pregnancy, while determining that the government has a legitimate interest in safeguarding health, maintaining medical standards, and protecting potential life.<sup>62</sup> Even for constitutional rights as non-controversial as travel and access to the courts, the Court has upheld a durational residency requirement to obtain a divorce because it imposed no absolute bar to travel or access to the courts, while advancing legitimate governmental interests in assuring that an individual has an adequate attachment to the forum state before it endeavors to adjudicate an action for divorce.<sup>63</sup>

In the First Amendment context, for example, the Court mediates between right and regulation by subjecting regulations imposing what are regarded as severe burdens on First Amendment rights to strict scrutiny, while regulations imposing more modest burdens are upheld if reasonable.<sup>64</sup> Thus, the Court evaluates regulations that compel disclosure of the identities of

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*Significance of a “Well-Regulated Militia” Asserted and Proven with Commentary on the Future of Second Amendment Jurisprudence*, 3 NORTHEASTERN U.L.J. 1, 5–7, 87–97 (2011).

<sup>60</sup> See Charles, *supra* note 59, at 97–98.

<sup>61</sup> See, e.g., WINKLER, *supra* note 49, at 113–17; Cornell & DeDino, *supra* note 50, at 506–12.

<sup>62</sup> *Roe v. Wade*, 410 U.S. 113, 153–54 (1973).

<sup>63</sup> See *Sosna v. Iowa*, 419 U.S. 494, 405–09 (1972).

<sup>64</sup> See, *Wash. St. Grange v. Wash. St. Repub. Party*, 552 U.S. 442, 451–52 (2008); *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 189–91 (2008); *id.* at 204–05 (Scalia, J., concurring in the judgment); *Clingman v. Beaver*, 544

those involved in the political process through a test that assesses the strength of the governmental interest in disclosure in light of the magnitude of the burden imposed on First Amendment rights.<sup>65</sup> Similarly, in the reproductive rights context, the Court has concluded that, “[o]nly where state regulation imposes an undue burden on a woman's ability to make this decision [to terminate a pregnancy] does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”<sup>66</sup> The Court subsequently explained that “[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life . . . .”<sup>67</sup> A Court that embraces regulation of the constitutional rights to speech and reproductive freedom surely should be no less tolerant of regulation when it comes to firearms.

Although none of these contexts is precisely analogous to firearms regulation, in each case the Court confronted both a core right and a legitimate governmental interest in regulating the exercise of even the right itself. Such regulations have been expansive, going beyond incidental burdens created by regulations not directed at the exercise of the right.<sup>68</sup> Sufficiently serious burdens that threaten to negate the right are invalidated, or at least subjected to demanding review, while less serious burdens can be sustained under the less demanding review employed by the Court.

Importantly, an approach that keys judicial scrutiny to the extent to which a challenged regulation burdens the core right minimizes the extent to which the judiciary must engage in difficult predictive or empirical judgments about the efficacy of challenged regulation. Since very severe burdens are virtually per se invalid, little inquiry into their justification will be required beyond that typical in strict-scrutiny litigation. For less severe burdens, a degree of deference to legislative judgment is appropriate.

Not only does the Second Amendment reflect a textual commitment to regulation, as we have seen, the historical understanding of the Second Amendment reflects acceptance of prophylaxis. When it comes to keeping and bearing arms, those thought to pose unreasonable risks have long been regarded within the ambit of regulatory power. This type of prophylaxis inheres in the framing-era limitation on the right to bear arms to loyal white males, the nineteenth-century prohibitions on carrying concealed firearms, and the more recent prohibitions on the possession of firearms by convicted felons and dangerous misdemeanants. After all, a

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U.S. 581, 592–97 (2005); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992); *Rosario v. Rockefeller*, 410 U.S. 752, 760–62 (1973).

<sup>65</sup> *See, e.g., Doe v. Reed*, 130 S. Ct. 2011, 2818 (2010).

<sup>66</sup> *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Accord, e.g., Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000).

<sup>67</sup> *Gonzales v. Carhart*, 550 U.S. at 158.

<sup>68</sup> Laws that are not targeted at the exercise of a right are generally thought to impose only incidental burdens and trigger more deferential review. *See, e.g., Rumsfeld v. Forum for Acad. & Instit. Rights, Inc.*, 547 U.S. 47, 67–68 (2006) (law requiring military access to law school recruiting series applied to schools who object to military policies); *Emp. Div. v. Smith*, 494 U.S. 872, 877–80 (1990) (law prohibiting use of controlled substances applied to religious-motivated user); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704–07 (1986) (law requiring closure of business constituting a public nuisance applied to a bookstore); *United States v. Albertini*, 472 U.S. 675, 688–89 (1985) (law prohibiting entry to a military base applied to a demonstrator).

militia could hardly be well regulated if it contained individuals whom the government regarded as presenting undue threats to public safety. Moreover, there are enormous methodological difficulties in demonstrating the effect of any one regulation, in isolation, on crime rates, and therefore it would be enormously difficult to mount a convincing empirical demonstration of a particular regulation's efficacy in maintaining public safety.<sup>69</sup> Given these difficulties and the long history of permitting such regulation without demanding rigorous empirical proof of efficacy for all except regulations that impose the most severe burdens on Second Amendment rights, debates over efficacy should be regarded as raising issues of policy rather than constitutional law. Thus, considerable deference to legislative conclusions is warranted, as courts applying *Heller* have concluded.<sup>70</sup>

## V. The Scope of Regulatory Authority over Public Carry

We can now return to the question posed at the outset of this Issue Brief – What is the scope of governmental power to regulate the ability of individuals to carry firearms in public places? At the outset, one can question whether *Heller* has any application outside of the home. *Heller* indicates that the interest in lawful armed defense is particularly compelling in “the home, where the need for defense of self, family, and property is most acute.”<sup>71</sup> Some commentators, stressing these points as well as the enhanced regulatory interests that come into play when firearms are brought into public places, argue that Second Amendment rights do not extend outside the home.<sup>72</sup> Yet, as we have seen, there is some historical precedent for protecting the right to carry firearms in public, at least openly, although the rationale for distinguishing between open and concealed carry seems to have little contemporary application. Still, while the historical evidence is in conflict, there is some historical precedent for prohibitions on carrying firearms openly.<sup>73</sup> Moreover, as historian Saul Cornell has noted, virtually all the nineteenth-century laws and judicial decisions drawing a distinction between concealed and open carry were in the South, where the need to carry arms may have been regarded as greater, given the prevalence of slavery, which created a perceived need to remain armed in light of the dangers that slaves were frequently thought to present.<sup>74</sup> Yet, in the North, broader prohibitions on carrying arms in public seem to have been generally regarded as within the scope of the police power.<sup>75</sup> In the

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<sup>69</sup> For a general discussion of the difficulties in assembling empirical evidence of the efficacy of gun-control laws, see TUSHNET, *supra* note 23, at 77–85.

<sup>70</sup> See, e.g., Drake v. Filko, 724 F.3d 426, 436–37 (3d Cir. 2013); Schrader v. Holder, 704 F.3d 980, 990 (D.C. Cir. 2013); Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012); Cf. McDonald v. City of Chi., 130 S. Ct. 3020, 3050 (2010) (plurality opinion) (warning against “requir[ing] judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise”).

<sup>71</sup> *Heller v. District of Columbia*, 554 U.S. 570, 628 (2008).

<sup>72</sup> 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); Miller, *supra* note 51, at 1297–355.

<sup>73</sup> See Charles, *supra* note 51, at 31–41; Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1707–24 (2012). For judicial opinions upholding bans on open-carry laws, see, for example, Fife v. State, 31 Ark. 455, 1876 WL 1562, at \*4 (1876); Hill v. State, 53 Ga. 472, 474 (1874); English v. State, 35 Tex. 473, 1872 WL 7422, at \*3 (1871); Andrews v. State, 50 Tenn. 165, 1871 WL 3579, at \*11 (1871).

<sup>74</sup> See Cornell, *supra* note 73, at 1716–25.

<sup>75</sup> *Id.* at 1719.

face of this cacophony, the historical evidence seems to supply little reliable basis for resolving the constitutionality of a law prohibiting the carrying of firearms in public.

To be sure, a blanket ban on carrying firearms in public seems difficult to reconcile with *Heller*'s account of the original meaning of the Second Amendment. As we have seen, *Heller* concluded that the original meaning of the right to bear arms meant the right to “carry[] for a particular purpose – confrontation.”<sup>76</sup> Of course, many if not most confrontations occur outside the home; the most natural understanding of the right to bear or carry arms is not limited to the interior of the home. This inference is reinforced by *Heller*'s caution that its holding does not “cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools or government buildings . . . .”<sup>77</sup> This dictum, of course, suggests that in locations other than sensitive places, the Second Amendment confers some right to carry firearms. Perhaps the most important reason to reject a view of Second Amendment rights that limits firearms to the home is *Heller*'s pronouncement that the Second Amendment codified a right of lawful armed defense, and the need to defend oneself is not limited to the home.

Still, one might question how much weight *Heller* should receive on this point. Recall that *Heller* sought only “to enjoin the city from enforcing the bar on the registration of handguns . . . and the trigger-lock requirement insofar as it prohibits the use of ‘functional firearms within the home.’”<sup>78</sup> Accordingly, discussion in *Heller* of whether Second Amendment rights extend outside the home was dictum unnecessary to the decision. Beyond that, in response to the argument that the phrase “bear arms” was ambiguous because it often referred to carrying arms in military service, the *Heller* Court concluded that this phrase “unequivocally bore that idiomatic meaning only when followed by the preposition ‘against,’ which was in turn followed by the target of the hostilities.”<sup>79</sup> Significantly, this stops short of a claim that the phrase was unambiguous; indeed, the Court acknowledged that “the phrase was often used in a military context . . . .”<sup>80</sup> Even on the Court's limited claim, Professor Saul Cornell has argued the historical evidence on this point was not nearly as clear as portrayed by the Court.<sup>81</sup> One post-*Heller* review of the historical evidence identified ample evidence that the phrase “bear arms” often had a military meaning in the framing-era, even when not followed by “against.”<sup>82</sup> In light of this evidence, in an appropriate case in which the contours of the right to bear arms are at issue, the Court might revisit the question whether the phrase “bear arms” is sufficiently ambiguous to warrant resort to the preamble as an interpretive aid. To the extent that the phrase “bear arms” is ambiguous, resort to the preamble is of particular importance to perform what

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<sup>76</sup> *Heller*, 554 U.S. at 584.

<sup>77</sup> *Id.* at 626.

<sup>78</sup> *Id.* at 576.

<sup>79</sup> *Id.* at 586 (emphasis in original).

<sup>80</sup> *Id.* at 587.

<sup>81</sup> See Saul Cornell, *Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”* 56 UCLA L. REV. 1095, 1109–10 (2009). For Professor Cornell's pre-*Heller* assessment of the historical evidence regarding the original meaning of this phrase, see Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 162–64 (2007).

<sup>82</sup> See Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, 29 J. EARLY REPUB. 585, 589–605 (2009). See also, e.g., *Aymette v. State*, 2 Tenn. 154, 1840 WL 1554, \* 3 (1840) (“The words ‘bear arms,’ too, have reference to their military use, and were not employed to mean wearing them about the person as part of the dress.”).

*Heller* called the preamble’s “clarifying function.”<sup>83</sup> This suggests that when it comes to the right to bear firearms – a right not squarely at issue in *Heller* – the regulatory authority contemplated by the preamble is of particular force. Indeed, this may explain why prophylactic regulations that disqualify even an entire class from possession of firearms, such as convicted felons, fall within the scope of regulatory power. The Second Amendment’s preamble represents a commitment to regulatory authority found nowhere else in the Bill of Rights.

As we have seen, the rationale supporting the nineteenth-century distinction between concealed and open carry has little contemporary resonance. Since the preamble preserves not framing-era practice but the power to well-regulate, it would seem to follow that limiting the right to carry firearms in contexts in which it seems to present unacceptable threats to public safety is more faithful to the preamble than preserving the now-obsolete historical rationale for distinguishing between concealed and open carry. A complete prohibition on carrying operable firearms in any public place renders the Second Amendment right to bear firearms for self-defense nugatory, or nearly so, and would likely be invalid.<sup>84</sup> But most courts to consider the question have upheld less complete prohibitions that require individuals to obtain a permit and demonstrate particularized need to carry a firearm for self-defense.<sup>85</sup>

On this point, however, judicial opinion is divided; a panel of the Ninth Circuit concluded that in a state where open carry is prohibited, a policy allowing applicants to obtain a concealed-carry permit only on a showing of particularized need to carry firearms for self-defense violates the Second Amendment. The court concluded that such a policy did not “allow[] the typical responsible, law-abiding citizen to bear arms in public for the lawful purpose of self-defense.”<sup>86</sup> It added that “[t]he challenged regulation does no more to combat [the state’s public safety concerns] than would a law indiscriminately limiting the issuance of a permit to every tenth applicant.”<sup>87</sup> The panel cautioned, however, that it “consider[ed] the scope of the right only with respect to responsible, law-abiding citizens,” adding that “[w]ith respect to irresponsible or non-law abiding citizens, a different analysis – which we decline to undertake – applies.”<sup>88</sup> This qualification was presumably compelled by *Heller*’s admonition that it “d[id] not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”<sup>89</sup>

Yet, the panel’s claim that concerns about irresponsible or non-law-abiding citizens acquiring the right to carry firearms in public are not relevant to the question whether to require

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<sup>83</sup> *Heller v. District of Columbia*, 554 U.S. 570, 578 (2008).

<sup>84</sup> For judicial opinions reaching this conclusion, *see* *Moore v. Madigan*, 702 F.3d 933, 940–42 (7th Cir. 2012); *see also* *People v. Aguilar*, 2 N.E.2d 321, 325–28 (Ill. 2013).

<sup>85</sup> *See, e.g., Drake v. Filko*, 724 F.3d 426, 435–40 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 876–83 (3d Cir. 2013); *see also* *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (upholding statute prohibiting loaded handguns in vehicles within a national park).

<sup>86</sup> *Peruta v. County of San Diego*, 742 F.3d 1144, 1169 (9th Cir. 2014).

<sup>87</sup> *Id.* at 1178 (second brackets in original) (quoting *Woollard v. Sheridan*, 863 F.Supp.2d 462, 474–75 (D. Md. 2012), *rev’d sub nom.* *Woollard v. Gallagher*, 712 F.3d 865, 876–83 (3d Cir. 2013)).

<sup>88</sup> *Id.* at 1150 n.2.

<sup>89</sup> *Heller v. District of Columbia*, 554 U.S. 570, 595 (2008).

applicants to demonstrate particularized need to carry concealed firearms for purposes of lawful armed defense rather misses the point of prophylactic regulation. While the criminal history of an applicant for a carry permit can be readily ascertained, whether he is a responsible, law-abiding citizen, as well as the actual purpose for which he seeks to carry, are not so easy to know. *Heller* went to some pains to make clear that the Second Amendment protection turns on the purpose for which individuals keep or bear arms: “From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right [to keep and bear arms] was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>90</sup> While some persons carry firearms for lawful purposes, others carry firearms with different ends in mind. It is, however, enormously difficult to know why any particular individual is carrying a firearm. For just this reason, a prophylactic rule that limits the likelihood of misuse in contexts in which others are at greatest risk seems amply justified. There is, of course, a considerable likelihood that some individuals who are not responsible, law-abiding citizens will obtain concealed-carry permits if permits must be issued to anyone not disqualified by a prior conviction who proclaims a generalized desire to carry firearms for self-defense. This is precisely the context in which the case for prophylactic regulation is strongest, given the inevitable error rate in any effort to make predictive judgments about persons who wish to carry firearms in public, especially when applicants proclaim only a generalized and conclusory interest in carrying firearms for lawful purposes. As we have seen, both the Second Amendment’s preamble and the history of firearms regulation suggest that the right to bear arms permits a wide variety of prophylactic regulations, and argues for a measure of deference to legislative assessments of the efficacy of and justification for such regulation.

Using a showing of particularized need protects Second Amendment rights in cases in which the core constitutional interest in lawful self-defense is most plainly implicated, supplying an administrable basis to decide whether applicants are likely to be responsible, law-abiding citizens, while denying applications that present substantial risk of error. This criterion is probably as reliable as the nineteenth-century criterion of requiring open carry to determine the likely purpose for which firearms are carried, and a good deal better suited to the contemporary urban landscape. Although, in the nineteenth century, prohibiting only concealed carry may have been a reasonable approach to identifying those individuals most likely to be carrying firearms for an improper purpose, that rationale has little contemporary application. Additionally, a constitutional requirement that licenses must be liberally granted could well produce potent Fourth Amendment limitations on the ability of the authorities to stop armed individuals and determine whether they are properly licensed, further undermining prophylactic policing.

Equally important, the view that rigorous permit requirements operate as a rationing system fails to acknowledge that when the law enables police to keep guns off the streets in high-crime urban areas, the likelihood of violent confrontations that prove fatal is reduced. In these areas, it may be effectively impossible to have a “well regulated Militia” if everyone not disqualified by a prior conviction can carry firearms “in case of confrontation.”<sup>91</sup> Conversely, a system in which either open or concealed carry must be permitted could prove constitutionally vulnerable precisely because it might do little to keep guns off the streets and thereby reduce

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<sup>90</sup> *Id.* at 626.

<sup>91</sup> *Id.* at 592.



firearms-related crime, at least if the Second Amendment is understood – not unreasonably – to require that a challenged enactment make some meaningful contribution to public safety.

Especially in high-crime jurisdictions riven by gang and drug crime, carrying firearms in public may be accompanied by unacceptable risks, and for that reason warrants prophylactic restriction.<sup>92</sup> Indeed, there is a long tradition of more restrictive firearms regulation in urban areas.<sup>93</sup> If the Second Amendment permitted the development of concealed-carry prohibitions directed at those who carried firearms under circumstances that were thought to pose unacceptable risks, surely the Second Amendment permits regulations directed at analogous contemporary threats. Given the difficulty in assessing the purpose of someone carrying firearms in public – at least prior to the point at which someone is shot – a requirement that an individual be licensed and demonstrate some special need to carry the firearm serves a far more important public purpose than the largely outdated judgment that law-abiding persons are more likely to engage in open and not concealed carry. Such an approach has the added benefit of preserving the ability of the police to take action to stop and search individuals who they reasonably suspect to be unlawfully armed and dangerous. This is the kind of “discipline” that may well be essential, at least in many high-crime urban environments, if we are to have a “well regulated Militia.”

## VI. Conclusion

Two years after *Heller*, in his dissent from the Court’s decision to apply the Second Amendment to the state and local gun-control laws in *McDonald v. City of Chicago*,<sup>94</sup> Justice Stevens wrote “[F]irearms have a fundamentally ambivalent relationship to liberty. Just as they can help homeowners defend their families and property from intruders, they can help thugs murder innocent victims.”<sup>95</sup> One need not agree with Justice Stevens’ ultimate conclusion in *McDonald* to acknowledge his point. Even while *Heller* upheld a Second Amendment right to carry firearms, laws providing lengthier sentences for criminals who carry firearms have been invariably upheld as well.<sup>96</sup> It is hard to think of any other constitutional right the exercise of which could be used as a sentencing enhancement, yet this result seems entirely consistent with *Heller*’s admonition that the Second Amendment “[i]s not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>97</sup>

One similarly need not embrace *Heller*’s enthusiasm for originalism to agree that history tells us something important about the Second Amendment. Firearms rights and regulation have always been twinned – in the English Bill of Rights; the Second Amendment’s preamble and operative clause; and in the evolving history of firearms regulation. Indeed, no right is more Janus-faced than the right to keep and bear arms. Thus goes the constitutional case for gun

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<sup>92</sup> Cf. Lawrence Rosenthal, *Second Amendment Plumbing after Heller*, 41 URB. LAW. 1, 10–20 (2009).

<sup>93</sup> See Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 108–20 (2013).

<sup>94</sup> 130 S. Ct. 3020 (2010).

<sup>95</sup> *Id.* at 3107.

<sup>96</sup> See, e.g., *United States v. Napolitan*, 762 F.3d 297, 311 (3d Cir. 2014); *United States v. Bryant*, 711 F.3d 364, 368–70 (2d Cir. 2013); *United States v. Greeno*, 679 F.3d 500, 520 (6th Cir. 2012); *United States v. Potter*, 630 F.3d 1260, 1261 (9th Cir. 2011) (per curiam); *United States v. Jackson*, 555 F.3d 635, 636 (7th Cir. 2009); *People v. Cisneros*, No. 09CA2717, 2014 WL 1671766 (Co. Ct. App. 2014).

<sup>97</sup> *Heller v. District of Columbia*, 554 U.S. 570, 626 (2008).

control – and nowhere is gun control more important than when it comes to the task of getting guns off the streetscape in our most violent and unstable neighborhoods. The least privileged among us face enough difficulties without having to live in communities in which gang members cannot be disarmed until someone is shot, and someone else is willing to testify. Regulations limiting public carry in high-crime urban areas should survive Second Amendment attack; indeed, in high-crime areas in which a largely unlimited right is more likely to produce than curb crime, these are the type of regulations to which a “well regulated Militia” would surely submit.