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# Second Amendment Plumbing after Heller: Of Incorporation, Standards of Scrutiny, Well-Regulated Militias and Criminal Street Gangs

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# Second Amendment Plumbing After *Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs

Lawrence Rosenthal\*

THE DECISION OF THE UNITED STATES SUPREME COURT in *District of Columbia v. Heller*<sup>1</sup> ended one debate about the Second Amendment while beginning another.

Prior to *Heller*, the principal point on which courts and scholars had joined issue was whether the Second Amendment secures an individual right to bear arms or only a right to bear arms when related to participation in an organized militia.<sup>2</sup> In its 5-4 decision in *Heller*, the Court came down on the individual-rights side, adopting what it characterized as “the original understanding of the Second Amendment” to invalidate

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1. 128 S. Ct. 2783 (2008).

2. For the conflicting judicial views, compare, for example, *Parker v. District of Columbia*, 478 F.3d 370, 378-95 (D.C. Cir. 2007) (individual rights view), *aff’d sub nom. District of Columbia v. Heller*, 128 S. Ct. 2783 (2008); and *United States v. Emerson*, 270 F.3d 203, 218-60 (5th Cir. 2001) (same), *cert. denied*, 536 U.S. 907 (2002), with, for example, *Silveira v. Lockyer*, 312 F.3d 1052, 1066-87 (9th Cir. 2002) (militia-right view), *cert. denied*, 540 U.S. 1046 (2003). There was a similar dispute among scholars. For a sampling of pre-*Heller* literature advancing various formulations of the militia-rights view, see H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO BEAR ARMS, OR HOW THE SECOND AMENDMENT FELL SILENT* 37-106 (2002); DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* 39-96 (2003); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 362-75 (1998); Saul Cornell, *Don’t Know Much About History: The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 675-81 (2002); Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 300-44 (2000); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and*

the District of Columbia's prohibition on the possession of handguns,<sup>3</sup> while resolving little else about the extent to which the Second Amendment will constrain the power to regulate firearms.<sup>4</sup>

Among the many questions left for future litigation, the two most important are the extent to which firearms regulations must be justified in order to withstand constitutional attack, and whether the Second Amendment is applicable to the state and local laws. On the standard of scrutiny for firearms regulation, while invalidating the District's flat ban on handguns and its requirement that all firearms in a home remain unloaded and inoperable,<sup>5</sup> the Court refused to decide what burden of justification is required for firearms regulation, although it did reject a test limited to ascertaining whether a challenged regulation lacks a rational basis,<sup>6</sup> as well as Justice Breyer's proposed balancing test.<sup>7</sup> Indeed, the only clear boundary on Second Amendment rights to emerge, albeit in dicta, is that the right to keep and bear arms "does not protect those weapons not typically possessed by law abiding citizens for lawful purposes, such as short-barreled shotguns,"<sup>8</sup> or otherwise "dangerous and unusual weapons."<sup>9</sup> On the application of the Second Amendment to the states,

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*the Dereliction of Dialogic Responsibility*, 75 B.U.L. REV. 57, 63-68 (1995); Paul Finkelstein, "A Well Regulated Militia": *The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 230-36 (2000); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 984-95 (1975). For a sampling of literature advancing the individual rights view, see STEPHEN P. HALBROOK, *THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* 323-38 (2008); JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 135-64 (1994); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 211-43 (1983); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642-58 (1989); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 105-08 (1987); Thomas B. McAfee & Michael J. Quinlan, *Bringing Forward the Right to Bear and Keep Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C.L. REV. 781, 805-73 (1997); L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1397-402 (1997); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 464-88 (1995); William Van Alstyne, *The Second Amendment and the Personal Right to Bear Arms*, 43 DUKE L.J. 1236, 1241-50 (1994); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 794-807 (1998).

3. 128 S. Ct. at 2788, 2816-22.

4. Indeed, the Court acknowledged that it had "[e]ft so many applications of the right to keep and bear arms in doubt," *id.* at 2821.

5. *Id.* at 2817-19.

6. *Id.* at 2818 n.27.

7. *Id.* at 2821.

8. *Id.* at 2816 (citing *United States v. Miller*, 307 U.S. 174 (1939)).

9. *Heller*, 128 S. Ct. 2783, 2817 (citation omitted). Also in dicta, the Court characterized "prohibitions on carrying concealed weapons," "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in

although in three nineteenth-century cases the Court held that the Second Amendment does not apply to state or local laws,<sup>10</sup> those decisions predate the emergence of the rule that those rights thought fundamental to American jurisprudence are “incorporated” within the Fourteenth Amendment’s prohibition on state deprivations of life, liberty, or property, without due process of law.<sup>11</sup> Accordingly, the nineteenth-century cases rejecting incorporation are ripe for reconsideration, as the Court hinted in *Heller*.<sup>12</sup>

Thus far, academic consideration of these issues has been limited. As Stuart Banner has observed, there has not been much scholarly attention to the doctrinal “plumbing” of the Second Amendment, which seems to strike scholars as mere “lawyerly detail,” but which will be of critical importance to determining the scope of Second Amendment rights.<sup>13</sup> The limited individual-rights scholarship on incorporation argues that the right to bear arms is sufficiently historically rooted to merit incorporation,<sup>14</sup> although scholars must now consider whether the precise right

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sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms” as “presumptively lawful.” *Id.* at 2816-17 & n.26.

10. See *Miller v. Texas*, 153 U.S. 535, 538 (1894); *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1876).

11. See, e.g., *Benton v. Maryland*, 395 U.S. 784, 794-96 (1969); *Duncan v. Louisiana*, 391 U.S. 145, 147-49 (1968); *Malloy v. Hogan*, 378 U.S. 1, 4-6 (1964). The relevant portion of the Fourteenth Amendment provides: “No State shall make or enforce any law which shall abridge the privileges or immunities of any citizen of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

12. 128 S. Ct. at 2813 n.23. Although the lower courts remain obligated to follow all decisions of the Supreme Court, until overruled, even when they appear to be inconsistent with contemporary doctrine, the Supreme Court is not similarly constrained. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 235-38 (1997). For arguments that the nineteenth-century Second Amendment cases are out of step with contemporary incorporation doctrine and therefore ripe for reexamination, see, for example, Brannon Denning, *Gun Shy: The Second Amendment as an “Underenforced Constitutional Norm”*, 21 HARV. J.L. & PUB. POL’Y 719, 755-56 (1998); Kates, *supra* note 2, at 252-53; Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 56-59 (2007); Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1, 52-55 (1996); David E. Murley, *Private Enforcement of the Social Contract: DeShaney and the Second Amendment Right to Own Firearms*, 36 DUQ. L. REV. 827, 845-47 (1998); Reynolds, *supra* note 2, at 496-98; 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, 42-44 (2002); Koren Wai Wong-Ervin, Note, *The Second Amendment and the Incorporation Conundrum: Toward a Workable Jurisprudence*, 50 HASTINGS L.J. 177, 199-203 (1998).

13. Stuart Banner, *The Second Amendment So Far*, 117 HARV. L. REV. 898, 907-08 (2004) (reviewing WILLIAMS, *supra* note 2).

14. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 258-66 (1998); Stephen P. Halbrook, *The Freedmen’s Bureau Act and The*

articulated in *Heller* is sufficiently fundamental to merit incorporation. The even more limited scholarly opposition to Second Amendment incorporation has been largely premised on the view that the Second Amendment protects only activities related to participation in an organized militia<sup>15</sup>—an argument without traction after *Heller*. As for the type of scrutiny that should be applied to gun control laws, pre-*Heller* scholarship was sparse and inconsistent.<sup>16</sup>

This article addresses these critical issues of “plumbing” in the wake of *Heller*. Part I considers the stakes in the constitutional debates to come—a consideration that, we will see, bears importantly on both incorporation and the standard of scrutiny. Part I observes that although few seem to have noticed, we have had something of a natural experiment in the efficacy of firearms regulation in this country over the past few decades. There was an enormous spike in violent crime in the late 1980s and early 1990s—largely driven by handgun-related crime—as gangs

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*Conundrum Over Whether The Fourteenth Amendment Incorporates the Second Amendment*, 29 N. KY. L. REV. 683, 691-96 (2002); Kates, *supra* note 2, at 252-57; Lawrence, *supra* note 12, at 41-71; Sanford Levinson, *The Historians' Counterattack: Some Reflections on the Historiography of the Second Amendment*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA 91, 106-08 (Bernard E. Harcourt ed., 2003) [hereinafter GUNS, CRIME, AND PUNISHMENT IN AMERICA]; Lund, *supra* note 12, at 53-55; Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1133-35 (2000); Michael J. Quinlan, *Is There a Neutral Justification for Refusing to Implement the Second Amendment or Is the Supreme Court Just "Gun Shy"?*, 22 CAP. U.L. REV. 641, 679-72 (1993); Van Alstyne, *supra* note 2, at 1251-53.

15. See, e.g., UVILLER & MERKEL, *supra* note 2, at 197-209; Dorf, *supra* note 2, at 325-28; Gil Grantmore, *The Phages of American Law*, 36 U.C. DAVIS L. REV. 455, 473-77 (2003); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 648-68 (2000); David A. Lieber, Comment, *The Cruikshank Redemption: The Enduring Rationale for Excluding the Second Amendment from the Court's Modern Incorporation Doctrine*, 95 J. CRIM. L. & CRIMINOLOGY 1079, 1087-89 (2005).

16. See 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, 324-27 (2006) (advocating strict scrutiny of regulations aimed at specific types of firearms and intermediate scrutiny for regulations directed at all firearms, analogizing to First Amendment doctrine); Roy Lucas, *From Patsone & Miller to Silveira v. Lockyer: To Keep and Bear Arms*, 26 T. JEFFERSON L. REV. 257, 327-31 (2004) (advocating strict scrutiny); Massey, *supra* note 14, at 1126-38 (advocating intermediate scrutiny that examines the utility of the regulated firearm and the justification for the regulation); Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 706-26 (2007) (advocating a reasonableness test); Baker, *supra* note 12, at 57-60 (analogizing to First Amendment doctrine and advocating intermediate scrutiny for regulation of time, place, and manner and strict scrutiny otherwise); 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) (also analogizing to First Amendment doctrine and arguing that regulations aimed at specific weapons should be subject to strict scrutiny and regulation of time, place, and manner to intermediate scrutiny).

and drug dealers competed for domination in the lucrative crack cocaine market. Handgun-related crime subsequently declined even more dramatically; and the available data—much of it from New York City, where the decline in violent crime was especially large—suggest that stringent regulation of concealable weapons played an important role in driving down the rate of violent crime. By virtue of the underappreciated interaction between the constitutional rules governing search and seizure and the scope of firearms regulation, gun control laws enhance the ability of the police to utilize aggressive stop-and-frisk tactics when they suspect that a firearm is being carried unlawfully. These tactics, in turn, make it risky for gangs and drug dealers to carry firearms in public, thereby reducing the rate of violent confrontations in public places. The Second Amendment right articulated in *Heller*, however, imperils such efforts to drive firearms off the streets. The Second Amendment provides that “[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>17</sup> and *Heller* held that the right to “bear” arms includes a largely unqualified “right to possess and carry weapons in case of confrontation.”<sup>18</sup> This holding apparently grants gangs and drug dealers a constitutional right to be free from weapons searches—they seem to have a right to carry firearms as long as they commit no other criminal act, at least while police are watching. If this reading of the Second Amendment is incorporated against the states, the stop-and-frisk tactics that seem to have succeeded in New York will come to an end.

Part II turns to the historical evidence on incorporation. There has been something of a trend in the academy in favor of the view that incorporation of the Bill of Rights reflects the intentions of the authors of the Fourteenth Amendment. This scholarship, however, fails to take account of the emerging consensus among originalists that constitutional interpretation should not be guided by the intentions of constitutional drafters but instead by the meaning of the text as it would have been originally understood by the public—a view embraced by *Heller* itself. The historical case for incorporation is deeply problematic when measured against original public meaning. While many of those most instrumental in crafting the Fourteenth Amendment likely did believe that it rendered the first eight amendments applicable to the states, there is only deeply conflicting evidence about whether this had become an

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17. U.S. CONST. amend. II.

18. 128 S. Ct. at 2797.

accepted public meaning when the Fourteenth Amendment was ratified. The historical evidence therefore supplies no satisfactory basis for resolving the incorporation question.

Part III considers the case for incorporation under current doctrine, which asks whether a given right is “necessary to an Anglo-American regime of ordered liberty.”<sup>19</sup> To determine whether Second Amendment rights are sufficiently fundamental to merit incorporation, it is first necessary to examine the nature of those rights; and that leads to the Second Amendment standard of scrutiny. *Heller* contains an important clue; it defines the “militia” to include all those “physically capable of acting in concert for the common defense”<sup>20</sup>; the militia is accordingly not limited to only the members of an “organized militia.”<sup>21</sup> It follows that textual support for regulatory power over firearms is found in the Second Amendment’s preamble, which, *Heller* explains, is properly consulted to clarify the Amendment.<sup>22</sup> The preamble envisions a “well regulated militia”; thus, the preamble indicates that the entire populace capable of bearing arms may be “well regulated.” Regulation, however, cannot render the right itself nugatory, and for this reason, *Heller* suggests that firearms regulation should be sustained as long as it poses no undue burden to the right to keep and bear arms, much as the Court has evaluated abortion regulations. Part III then concludes that even this qualified version of the Second Amendment right does not merit incorporation. Although state or local laws that prohibit the possession of any type of weapon useful in self-defense, at least in one’s home or place of business, might violate a constitutionally protected right of self-defense, the eighteenth-century conception of the right to bear arms has not fared particularly well in subsequent jurisprudential history, and, even more important, in many high-crime urban areas, it may be effectively impossible to create the type of “well-regulated militia” envisioned by the Second Amendment. The demands of ordered liberty argue for leaving gun control policy at the state and local level.

### **I. The Imperiled Case for Gun Control**

Over the past few decades, although few seem to have noticed, the country has conducted something of a natural experiment in the efficacy of gun control. A strong case can now be made that stringent regulation of

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19. *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968).

20. 128 S. Ct. at 2799.

21. *Id.* at 2800.

22. *Id.* at 2789-90.



concealable weapons is critical to controlling violent crime in the inner cities. *Heller*, however, imperils such regulation.

A. *The Rise and Fall of Handgun-Related Urban Youth Crime*

Alfred Blumstein and Joel Wallman tell the story of violent crime over the past few decades:

Over the past 20 years, the United States has seen dramatic swings in violent crime. Its path can be broken into three periods: a rise, a drop, and a flattening. The rise period began in 1985 when a five-year national decline from 1980 was reversed almost entirely by a sharp spike in violence by adolescent and young adult males. This spike outweighed an ongoing downtrend in violence among the much larger older population that began at least as early as 1980. The rise period ended around 1993 with the beginning of a pronounced and much discussed crime drop in which the murder rate declined by 42% and robbery by 44%, resulting in levels not seen since the 1960s. The drop was succeeded by a third period, a flattening of violent crime rates beginning around 2000.<sup>23</sup>

The National Crime Victimization Survey tells a similar story. The violent victimization rate in the mid-1980s was approximately 40 per 1,000 population age 12 or older, then it started rising until it peaked at 52.2 in 1993, yet from there it fell steadily until it reached 25.9 by 2001, a decline of 50.4% from its peak, and by far the lowest since the survey had begun in 1973.<sup>24</sup> After that, the violent victimization rate continued dropping, albeit less steeply, through 2007, the most recent year for which figures are available.<sup>25</sup>

These aggregate figures, however, obscure critical realities. The swings in violent crime in recent decades have not been uniform—they have been disproportionately experienced by urban minority youth, and they are largely the result of a rise and fall in the rate of handgun-related crime.

Both the rise and decline periods involved youth crime; between the mid-1980s and late 1990s, murder arrest rates sharply rose and then fell among youth below age 24, while the arrest rate fell throughout the period among persons 30 and older.<sup>26</sup> As Philip Cook and John Laub noted,

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23. Alfred Blumstein & Joel Wallman, *The Crime Drop and Beyond*, 2006 ANN. REV. SOC. SCI. 125, 125.

24. See CALLIE RENNISON, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 2001: CHANGES 2000-01 WITH TRENDS 1993-2001, at 11-12 (Sept. 2002).

25. See MICHAEL RAND, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2007, at 1-2 (Dec. 2008).

26. See Alfred Blumstein, *Disaggregating the Violence Trends*, in THE CRIME DROP IN AMERICA 13, 20-25 (Alfred Blumstein & Joel Wallman eds., 2d ed. 2006) [hereinafter THE CRIME DROP IN AMERICA].



For adolescents, homicide commission rates more than tripled between 1984 and 1993, while they doubled for young adults ages eighteen to twenty-four. Victimization rates followed the same intertemporal pattern, although at a lower level: youths are much more likely to kill than be killed. All rates fell sharply after 1994.<sup>27</sup>

The crime spike also was limited to urban crime; during this period, homicide rates were essentially flat in cities with populations below 250,000, and most of the rise and subsequent fall in homicide occurred in cities with populations exceeding 1,000,000.<sup>28</sup> The rise and fall in homicide, moreover, involved handgun-related homicide. Virtually all of the increase in homicide during this period was a consequence of an increase in handgun-related killings.<sup>29</sup> This spike in handgun-related homicide was, again, concentrated among youth; from 1985 to 1994, the rate of handgun-related homicide for juveniles under 18 increased more than fivefold and the rate for persons ages 20 to 24 more than doubled while the rate for adults 25-44 remained essentially constant; by 2002, handgun-related homicide had returned to mid-1980s levels.<sup>30</sup>

The homicide spike was also largely confined to violent crime involving African-Americans and, to a lesser extent, Hispanics. Homicide offending rates demonstrate this racial skew; in 1984 offending rates per 100,000 population were 5.3 for whites and 32.8 for African-Americans, at their 1991 peak the offending rate for whites only rose to 5.7 while the African-American offending rate hit 50.4, but by 1998 the white offending rate had declined a bit to 4.7 while the African-American rate had dropped to 28.3.<sup>31</sup> This racial disparity is also reflected in homicide victimization rates; between 1950 and 1998, virtually all of the variation in homicide victimization rates is found among African-

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27. Philip J. Cook & John H. Laub, *After the Epidemic: Recent Trends in Youth Violence in the United States*, in 29 CRIME & JUSTICE: A REVIEW OF RESEARCH 1, 13 (Michael Tonry ed., 2002). For similar figures updating the analysis through 2005, see JAMES ALAN FOX, JACK LEVIN & KENNA QUINET, *THE WILL TO KILL: MAKING SENSE OF SENSELESS MURDER* 86-87 & fig. 5.1 (rev. 2008).

28. See FOX, LEVIN & QUINET, *supra* note 27, at 44-45 & fig. 3.2. To similar effect, see Blumstein & Wallman, *supra* note 23, at 127.

29. See COMM. TO IMPROVE RES. INF. & DATA ON FIREARMS, NAT'L RES. COUNCIL, *FIREARMS AND VIOLENCE: A CRITICAL REVIEW* 61 (Charles F. Wellford, John V. Pepper & Carol V. Petrie eds., 2005) [hereinafter FIREARMS AND VIOLENCE].

30. See Blumstein & Wallman, *supra* note 23, at 132, C-4 fig. 6. For a similar accounts covering somewhat differing time frames and age groupings, see FOX, LEVIN & QUINET, *supra* note 27, at 86-87 & fig. 5.1; Blumstein, *supra* note 26, at 30-35; Cook & Laub, *supra* note 27, at 26-27; Daniel Cork, *Examining Space-Time Interaction in City-Level Homicide Data: Crack Markets and the Diffusion of Guns Among Urban Youth*, 15 J. QUANTITATIVE CRIMINOLOGY 379, 395-404 (1999); Garen Wintemute, *Guns and Gun Violence*, in THE CRIME DROP IN AMERICA, *supra* note 26, at 45, 48 & fig. 3.2.

31. James Alan Fox, *Demographics and U.S. Homicide*, in THE CRIME DROP IN AMERICA, *supra* note 26, at 288, 295-97 & tbl. 9.2.

American males, with homicide rates among African-American females and whites remaining essentially constant.<sup>32</sup> Accordingly, when homicide rates are high, racial disparity is high; between 1979 and 1989, for example, the risk of homicide was approximately 7.8 times greater for African-Americans than whites, and approximately 3.7 times greater for Hispanics.<sup>33</sup>

The crime spike between the mid-1980s and early 1990s accordingly hit young, urban African-Americans particularly hard; from 1984 to 1993, the homicide victimization rate per 100,000 for whites aged eighteen to twenty-four rose from 11.9 to 17.1, while the homicide rates for African-American males in the same age range rose from 67.9 to 183.4.<sup>34</sup> The racial disparities are even more dramatic when urban firearms-related juvenile homicide is considered; in 1989, in the midst of the rise in violent crime, the firearm homicide rate per 100,000 population in core counties was 27.71, but it was 143.9 for African-American males aged 15-19 and only 21.5 for white males in the same age range.<sup>35</sup> The non-firearms homicide rates, in contrast, reflected much smaller racial disparities; the rate was 3.8 for white males and 10.4 for African-American males aged 15-19 in core counties.<sup>36</sup> The subsequent decline in homicide victimization was also experienced disproportionately among African-Americans aged 15-24, although their homicide victimization rates remain more than double that of either whites or Hispanics in that age group.<sup>37</sup> Overall, during the 1990s the homicide victimization rate declined 46% for nonwhites, compared to a 36% decline for whites.<sup>38</sup>

Despite these stark racial disparities, race appears to be a proxy for other factors that increase the risk of criminal victimization. Empirical evidence consistently demonstrates that crime rates, and especially rates of violent crime, are particularly high in areas of concentrated

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32. Augustine J. Kposowa, Glenn T. Tsunokai & James P. McElvain, *Race and Homicide in the U.S. National Longitudinal Mortality Study*, 4 J. ETHNICITY IN CRIM. JUST. 1, 11-13 & figs. 2-3 (2006).

33. *Id.* at 13-15 & tbl. 1.

34. Fox, *supra* note 31, at 300 tbl. 9.3.

35. Lois A. Fingerhut et al., *Firearm and Nonfirearm Homicide Among Persons 15 Through 19 Years of Age*, 267 JAMA 3048, 3049 tbl. 1 (1992).

36. *Id.* To similar effect, see Darnell F. Hawkins, *African Americans and Homicide*, in STUDYING AND PREVENTING HOMICIDE: ISSUES AND CHALLENGES 143, 152 & tbl. 8.1 (M. Dwayne Smith & Margaret A. Zahn eds., 1999) [hereinafter STUDYING AND PREVENTING HOMICIDE].

37. See Blumstein & Wallman, *supra* note 23, at 128, C-2 fig. 3.

38. See FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 10 & fig. 1.5 (2006).

poverty.<sup>39</sup> Among urban sociologists, there is widespread agreement that with the decline of residential segregation, disadvantaged African-American communities have increasingly suffered from an isolation effect, in which the absence of middle-class role models undermines the inculcation of middle-class values, including norms of law-abidingness.<sup>40</sup> These communities accordingly lack what sociologists call mechanisms of social control—a social infrastructure by which norms of law-abidingness are inculcated and enforced.<sup>41</sup> Whatever the cause, it is plain that the rapid changes in violent crime rates in the 1980s and 1990s were related to urban poverty; both the crime rise and fall periods were most pronounced in cities with the densest and most disadvantaged populations.<sup>42</sup>

### B. *The Cause of the Crime Spike*

There is a consensus among criminologists that the crime spike of the late 1980s and early 1990s was a function of the introduction of crack cocaine into big cities.<sup>43</sup> For example, a number of studies have documented an increase in violent crime following the introduction of crack

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39. See, e.g., ELLIOTT CURRIE, CRIME AND PUNISHMENT IN AMERICA 120-47 (1998); GARY LAFREE, LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA 117-34 (1998); JAMES F. SHORT, JR., POVERTY, ETHNICITY, AND VIOLENT CRIME 50-54 (1997); Kposowa, Tsunokai & McElvain, *supra* note 32, at 13-25; Ronald C. Kramer, *Poverty, Inequality, and Youth Violence*, 57 ANNALS AM. ACAD. POL. & SOC. SCI. 123 (2000); Lauren J. Krivo & Ruth D. Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 SOC. FORCES 621 (1996); Kenneth C. Land, Patricia McCall & Lawrence E. Cohen, *Structural Covariates of Homicide Rates: Are There Any Invariances Across Time and Social Space?*, 95 AM. J. SOC. 922 (1990); Janet J. Lauritzen & Robert J. Sampson, *Minorities, Crime, and Criminal Justice*, in THE HANDBOOK OF CRIME AND PUNISHMENT 58, 65-70 (Michael Tonry ed., 1998); Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918 (1997).

40. See, e.g., SHORT, *supra* note 39, at 55-74; WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 7-9, 46-62 (1987); Edward S. Shihadeh & Nicole Flynn, *Segregation and Crime: The Effect of Black Social Isolation on the Rates of Black Urban Violence*, 74 SOC. FORCES 1325 (1996).

41. See, e.g., ROBERT J. BURSİK & HAROLD G. GRASMICK, NEIGHBORHOODS AND CRIME: THE DIMENSIONS OF EFFECTIVE COMMUNITY CONTROL 15-18, 34-35 (1993); JOHN HAGAN, CRIME AND DISREPUTE 67-99 (1994); DAN A. LEWIS & GRETA SALEM, FEAR OF CRIME: INCIVILITY AND THE PRODUCTION OF A SOCIAL PROBLEM 11-22 (1986); Francis T. Cullen, *Social Support as an Organizing Concept for Criminology: Presidential Address to the Academy of Criminal Justice Sciences*, 11 JUST. Q. 527 (1994).

42. See Blumstein & Wallman, *supra* note 23, at 127.

43. See, e.g., ALFRED BLUMSTEIN & JACQUELINE COHEN, NAT'L CRIM. JUST. REF. SERV., DIFFUSION PROCESSES IN HOMICIDE 6-9 (1999); FOX, LEVIN & QUINET, *supra* note 27, at 87-88; Cook & Laub, *supra*, note 27, at 21-31; Alfred Blumstein & Richard Rosenfeld, *Explaining Recent Trends in U.S. Homicide Rates*, 88 J. CRIM. L. & CRIMINOLOGY 1175, 1209-10 (1998); Blumstein & Wallman, *supra* note 23, at 131.

into an urban area.<sup>44</sup> Although there are fewer studies that reliably measure the proportion of violent crime that is drug-related, what is probably the best study of this issue—a sampling of homicides in New York City during an eight-month period in 1988—found that 52.7% of homicides were drug-related, of those 60% involved crack, and 74% of drug-related homicides were classified as “systemic” or involving “the normally aggressive patterns of interactions within the systems of drug use and distribution” as opposed to homicides that were a function of the pharmacological effects of drugs or the economic compulsion to commit crimes to finance drug use.<sup>45</sup>

#### 1. GANGS AND THE ECONOMICS OF THE CRACK EPIDEMIC

The impact of crack on violent crime is largely a function of its economics. Because crack is relatively cheap, easy to manufacture, and intensely addictive, it can be sold at relatively high volume and profit.<sup>46</sup> Given crack’s profitability, it should be easy to understand the attraction of crack dealing in extremely disadvantaged urban neighborhoods. Moreover, drug buyers are likely to have limited information about prices, so the possibility of developing a geographic monopoly that enjoys substantial market power should be real. And, one would not expect drug dealers to have particular scruples about the manner in which they endeavor to suppress competition. The authors of the New York study, for example, concluded:

The entry of many small dealers into the crack marketplace has created a number of boundary disputes leading to violence. In an area as small as an apartment house, a tenement stoop, or a street corner, two or more crack dealers may be competing for the same customers. Dealers and customers interact in a highly volatile environment where disputes and conflicts are routinely settled by physical-force confrontation in which one or both of the parties tend to be carrying firearms. There appear to be

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44. See, e.g., Eric Baumer et al., *The Influence of Crack Cocaine on Robbery, Burglary, and Homicide Rates: A Cross-City, Longitudinal Analysis*, 35 J. RES. CRIME & DELINQ. 316, 328-30 (1998); Cork, *supra* note 30, at 403-04; Jeff Grogger & Michael Willis, *The Emergence of Crack Cocaine and the Rise of Urban Crime Rates*, 82 REV. ECON. & STATS. 519, 525-28 (2000); Steven F. Messner et al., *Locating the Vanguard in Rising and Falling Homicide Rates Across U.S. Cities*, 43 CRIMINOLOGY 661, 677-87 (2005); Graham Ousey & Matthew R. Lee, *Examining the Conditional Nature of the Illicit Drug Market-Homicide Relationship: A Partial Test of Contingent Causation*, 40 CRIMINOLOGY 73, 94-98 (2002).

45. See Paul J. Goldstein et al., *Crack and Homicide in New York City, 1988: A Conceptually Based Event Analysis*, 16 CONTEMP. DRUG PROBS. 651, 655-56, 681-82 (1989).

46. See, e.g., HENRY H. BROWNSTEIN, *THE RISE AND FALL OF A VIOLENT CRIME WAVE: CRACK COCAINE AND THE SOCIAL CONSTRUCTION OF A CRIME PROBLEM* 33-36 (1996); Cork, *supra* note 30, at 381-84.

efforts toward consolidation of these independents into larger organizations, and . . . this trend toward consolidation may involve considerable violence also.<sup>47</sup>

One type of criminal organization is particularly well suited to this type of competition—the criminal street gang. Precisely because a gang is likely to be well organized and unconcerned with norms of law-abidingness, it is ideally suited to create and enforce a territorial monopoly.<sup>48</sup> The available empirical evidence bears this out.

One of the most persistent observations in the scholarly literature about gangs is their heavy involvement in drug distribution.<sup>49</sup> Ethnographic studies of drug dealing in New York City, for example, observed the tendency of drug dealing to become organized by gangs during the

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47. Goldstein et al., *supra* note 45, at 682.

48. Among criminologists, the definition of a “gang” is a matter of some controversy. See, e.g., RANDALL G. SHELDEN, SHARON K. TRACY & WILLIAM B. BROWN, *YOUTH GANGS IN AMERICAN SOCIETY* 17-21 (2d ed. 2001); Richard A. Ball & G. David Curry, *The Logic of Definition in Criminology: Purposes and Methods for Defining “Gangs”*, 33 *CRIMINOLOGY* 225 (1995); Finn-Aage Esbensen et al., *Youth Gangs and Definitional Issues: When Is a Gang a Gang, and Why Does it Matter*, 47 *CRIME & DELINQ.* 105 (2001). The definition offered by Ball and Curry is particularly useful for present purposes because it stresses structural features: “The gang is a spontaneous, semisecret, interstitial, integrated but mutable social system whose members share common interests and that functions with relatively little regard for legality but regulates interaction among its members and features a leadership structure with processes of organizational maintenance and membership services and adaptive mechanisms for dealing with other significant social systems in its environment.” Ball & Curry, *supra* at 240.

49. See, e.g., HERBERT C. COVEY, SCOTT MENARD & ROBERT J. FRANZESE, *JUVENILE GANGS* 51-54 (2d ed. 1997); SCOTT H. DECKER & BARRICK VAN WINKLE, *LIFE IN THE GANG: FAMILY, FRIENDS AND VIOLENCE* 153-71 (1996); JAMES C. HOWELL & SCOTT H. DECKER, U.S. DEP’T OF JUSTICE, *THE YOUTH GANGS, DRUGS, AND VIOLENCE CONNECTION* 2-5, 7 (Jan. 1999); C. RONALD HUFF, U.S. DEP’T OF JUSTICE, *COMPARING THE CRIMINAL BEHAVIOR OF YOUTH GANGS AND AT-RISK YOUTHS* 4, 7 (Oct. 1998); MARTIN SANCHEZ JANKOWSKI, *ISLANDS IN THE STREET: GANGS AND AMERICAN URBAN SOCIETY* 120-21 (1991); JOAN W. MOORE, *HOMEBOYS: GANGS, DRUGS AND PRISON IN THE BARRIOS OF LOS ANGELES* 75-93 (1978); FELIX M. PADILLA, *THE GANG AS AN AMERICAN ENTERPRISE* 97-117, 129-51 (1993); CARL S. TAYLOR, *DANGEROUS SOCIETY* 92, 97, 99 (1990); Ronald Glick, *Survival, Income, and Status: Drug Dealing in the Chicago Puerto Rican Community*, in *DRUGS IN HISPANIC COMMUNITIES* 77-101 (Ronald Glick & Joan Moore eds., 1990); Finn-Aage Esbensen & David Huizinga, *Gangs, Drugs, and Delinquency in a Survey of Urban Youth*, 31 *CRIMINOLOGY* 565, 573-75 (1993); Jeffrey Fagan, *The Social Organization of Drug Use and Drug Dealing Among Urban Gangs*, 27 *CRIMINOLOGY* 633, 635, 648-51 (1989); John M. Hagedorn, *Homeboys, Dope Fiends, Legits, and New Jacks*, 32 *CRIMINOLOGY* 197 (1994); Thomas Mieczkowski, *Geeking Up and Throwing Down: Heroin Street Life in Detroit*, 24 *CRIMINOLOGY* 645 (1986); Brenda C. Coughlin & Sudhir Alladi Venkatesh, *The Urban Street Gang After 1970*, 2003 *ANN. REV. SOC.* 41, 43-45. To be sure, there is ample evidence that less structured and organized gangs are less effective drug sellers. See, e.g., MALCOLM W. KLEIN, *THE AMERICAN STREET GANG: ITS NATURE, PREVALENCE, AND CONTROL* 40-42, 126-29 (1995). Still, there is widespread agreement that better organized gangs have become adept at drug trafficking. See, e.g., ARLEN EGLEY JR. ET AL., U.S. DEP’T OF JUSTICE, *NATIONAL YOUTH GANG SURVEY 1999-2001*, at 33-34 (2006);

crime-rise period.<sup>50</sup> Similarly, surveys of youth gang members consistently document the involvement of gang youth in drug trafficking at much higher rates than other youth.<sup>51</sup> Moreover, ethnographic research on gang crime concludes that gangs endeavor to organize drug markets in order to maximize the economic benefits of drug dealing while using the threat of violence to police competition.<sup>52</sup> In particular, the ethnographic studies find that drug dealing gangs endeavor to establish monopolies in identifiable turf in order to enhance their profitability.<sup>53</sup> As for the economic motive to exclude competitors from gang-controlled turf, Steven Levitt and Sudhir Venkatesh obtained the records of a large African-American gang involved in drug trafficking, and found that as the gang increased the turf it controlled, its market power increased as well.<sup>54</sup> Indeed, another consistent observation in the ethnographic work is that the lure of money is often central to the appeal of gangs in the

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Scott H. Decker, *Youth Gangs and Violent Behavior*, in *THE CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR AND AGGRESSION* 388, 392-93 (Daniel J. Flannery et al. eds., 2007) [hereinafter *CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR*]; Finn-Aage Esbensen et al., *Initiation of Drug Use, Drug Sales, and Violent Offending Among a Sample of Gang and Nongang Youth*, in *GANGS IN AMERICA III* 37, 39-40 (C. Ronald Huff ed., 2002) [hereinafter *GANGS IN AMERICA III*]; Malcolm W. Klein, *Street Gang Cycles*, in *CRIME* 217, 219-21, 227 (James Q. Wilson & Joan Petersilia eds. 1998) [hereinafter *CRIME*]; Malcolm W. Klein & Cheryl Lee Maxson, *Gangs and Crack Cocaine Trafficking*, in *DRUGS AND CRIME: EVALUATING PUBLIC POLICY INITIATIVES* 42, 47-52 (Doris Layton MacKenzie & Craig D. Uchida eds., 1994) [hereinafter *DRUGS AND CRIME*].

50. See Richard Curtis, *The Improbable Transformation of Inner-City Neighborhoods: Crime, Violence, Drugs, and Youth in the 1990s*, 88 *J. CRIM. L. & CRIMINOLOGY* 1233, 1244-63 (1998); Jeffrey Fagan & Ko-lin Chin, *Violence as Regulation and Social Control in the Distribution of Crack*, in *DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES* 8, 21-24 (Mario de la Rosa et al. eds., 1990).

51. See, e.g., DECKER & VAN WINKLE, *supra* note 49, at 159-60; TERENCE P. THORNBERRY ET AL., *GANGS AND DELINQUENCY IN DEVELOPMENTAL PERSPECTIVE* 110-15 (2003); C. Ronald Huff, *Comparing the Criminal Behavior of Youth Gangs and At-Risk Youth*, in *AMERICAN YOUTH GANGS AT THE MILLENNIUM* 78, 81-82 & exh. 3 (Finn-Aage Esbensen, Stephen G. Tibbets & Larry Gaines eds., 2004) [hereinafter *GANGS AT THE MILLENNIUM*].

52. See, e.g., DECKER & VAN WINKLE, *supra* note 49, at 163-64; JANKOWSKI, *supra* note 49, at 126-29; PADILLA, *supra* note 49, at 129-52; IRVING A. SPERGEL, *THE YOUTH GANG PROBLEM: A COMMUNITY APPROACH* 47-49 (1995); Ansley Hamid, *The Political Economy of Crack-Related Violence*, 17 *CONTEMP. DRUG PROBS.* 31, 61-63 (1990); Jerome H. Skolnick et al., *The Social Structure of Street Drug Dealing*, 9 *AM. J. POLICE* 1, 16-17 (1990).

53. See, e.g., PADILLA, *supra* note 49, at 137-41; TAYLOR, *supra* note 49, at 6; John M. Hagedorn, *Neighborhoods, Markets, and Gang Drug Organizations*, 31 *J. RES. CRIME & DELINQ.* 264, 289-91 (1994); Jacqueline Cohen et al., *The Role of Drug Markets and Gangs in Local Homicide Rates*, 2 *HOMICIDE STUDS.* 241, 246-47 (1998); Paul J. Goldstein et al., *Crack and Homicide in New York City: A Case Study in the Epidemiology of Violence*, in *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* 113, 118-24 (Craig Reinerman & Harry G. Levine eds., 1997).

54. See Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang's Finances*, 115 *Q.J. ECON.* 755, 781-82 (2000).



inner city.<sup>55</sup> Levitt and Venkatesh, noting the relatively paltry wages paid to those at the bottom of gang hierarchy, characterized the economic motivation of gang members thusly: “[T]he most reasonable way to view the economic aspects of the decision to join the gang is as a tournament, i.e., a situation in which participants vie for large awards that only a small fraction will eventually obtain.”<sup>56</sup>

If inner-city drug sales did no more than recycle the little money to be found in disadvantaged communities, its profitability would be limited. Control over locations that are readily accessible to outsiders from more affluent communities, however, should yield more profit—and accordingly give rise to the most intense competition for control of those areas. The available empirical evidence supports this supposition. Jeffrey Fagan’s study of two New York neighborhoods, for example, found that the area that was more accessible to buyers from other communities had more organized, profitable, and violent gangs.<sup>57</sup> John Hagedorn’s study of Milwaukee’s drug dealing gangs concluded that the most profitable drug markets were those accessible to relatively affluent whites from the more prosperous suburbs.<sup>58</sup> Ralph Taylor’s study of drug dealing in Baltimore found that African-American neighborhoods with open-air drug markets frequented by white customers had the highest homicide rates.<sup>59</sup> Indeed, the importance to relatively afflu-

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55. See, e.g., G. DAVID CURRY & SCOTT H. DECKER, *CONFRONTING GANGS: CRIME AND COMMUNITY* 62-63, 137-40 (2d ed. 2003); JANKOWSKI, *supra* note 49, at 40-42; JOAN W. MOORE, *GOING DOWN TO THE BARRIO: HOMEBOYS AND HOMEGIRLS IN CHANGE* 42-44 (1991); PADILLA, *supra* note 49, at 101-03; SPERGEL, *supra* note 52, at 94; MERCER L. SULLIVAN, “GETTING PAID”: YOUTH CRIME AND WORK IN THE INNER CITY 117, 222-50 (1989); TAYLOR, *supra* note 49, at 5-6, 10-12, 61, 99-102; Jeffrey Fagan, *The Political Economy of Drug Dealing Among Urban Gangs*, in *GANGS AND THE COMMUNITY: INVOLVING COMMUNITY RESIDENTS IN COMBATING THE SALE OF ILLEGAL DRUGS* 19, 27-45 (Robert C. Davis et al. eds., 1993); Joan W. Moore, *Understanding Youth Street Gangs: Economic Restructuring and the Urban Underclass*, in *CROSS-CULTURAL PERSPECTIVES ON YOUTH AND VIOLENCE* 65, 71-72 (Meredith W. Watts ed., 1998). I have elsewhere advanced a theory of gang formation that endeavors to explain the special appeal of gangs in disadvantaged, disproportionately minority inner-city communities. See Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99, 115-30 (2000).

56. Levitt & Venkatesh, *supra* note 54, at 773 (citation omitted).

57. See Jeffrey Fagan, *Drug Selling and Licit Income in Distressed Neighborhoods: The Economic Lives of Street-Level Drug Users and Dealers*, in *DRUGS, CRIME, AND SOCIAL ISOLATION: BARRIERS TO URBAN OPPORTUNITY* 99, 119-32 (Adele V. Harrell & George E. Peterson eds., 1992).

58. See John Hagedorn, *Gangs and the Informal Economy*, in *GANGS IN AMERICA III*, *supra* note 49, at 101, 114-19; Hagedorn, *supra* note 53, at 275-89.

59. See RALPH B. TAYLOR, *BREAKING AWAY FROM BROKEN WINDOWS: BALTIMORE NEIGHBORHOODS AND THE NATIONWIDE FIGHT AGAINST CRIME, GRIME, FEAR, AND DECLINE* 186-87 (2001).



ent white customers from outside the neighborhood of readily accessible and convenient drug markets helps to explain the popularity of open-air drug markets, which the available empirical evidence suggests are prevalent in the inner city.<sup>60</sup> One might think that open-air markets would be avoided because they are vulnerable to surveillance, but stable open-air markets in predictable locations provide relatively affluent outsiders with an easy and attractive way to buy drugs curbside in what they are likely to regard as dangerous inner-city neighborhoods—neighborhoods they would likely hesitate to traverse on foot.

The ubiquity of open-air drug markets, as well as the need to control identifiable turf, in turn, necessitates the use of intimidation tactics. Gangs could hardly commit crimes outdoors unless they were able to so cow law-abiding community residents that they were unlikely to complain to the police or testify in court. Indeed, the literature confirms the prevalence of gang intimidation as a means of inhibiting community cooperation with the authorities.<sup>61</sup>

## 2. GANGS AND VIOLENCE

Most surveys of homicides classified by police as gang-related find that relatively few are characterized as involving drugs.<sup>62</sup> This appears to be a definitional issue; a homicide may not be classified as drug-related if no drugs are found at the scene; but criminologists widely report that gang competition is the leading cause of gang-related violence,<sup>63</sup> and, as we have seen, gang competition over turf is often drug-related. Whatever the reason, gang competition over turf is plainly a major cause of gang-related violence.

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60. See K. JACK RILEY, U.S. DEP'T OF JUSTICE, *CRACK, POWDER COCAINE AND HEROIN: DRUG PURCHASE AND USE PATTERNS IN SIX U.S. CITIES* 16-17 (1997); BRUCE G. TAYLOR ET AL., NAT'L INST. OF JUSTICE, *ADAM PRELIMINARY 2000 FINDINGS ON DRUG USE AND DRUG MARKETS: MALE ARRESTEES* 24-25 (2001).

61. See, e.g., AL VALDEZ, *GANGS: A GUIDE TO UNDERSTANDING STREET GANGS* 19-20 (1997); Bruce D. Johnson et al., *Drug Abuse in the Inner City: Impact on Hard-Drug Users and the Community*, in *DRUGS AND CRIME* 9, 35-37 (Michael Tonry & James Q. Wilson eds., 1990).

62. See Cheryl L. Maxson, *Gang Homicide: A Review and Extension of the Literature*, in *GANGS AT THE MILLENIUM*, *supra* note 51, at 275, 289-91; James C. Howell, *Youth Gang Homicide: A Literature Review*, 45 *CRIME & DELINQ.* 208, 217-29 (1999).

63. See, e.g., KLEIN, *supra* note 49, at 116-18, 130-31; John M. Hagedorn, *Gang Violence in the Postindustrial Era*, in *YOUTH VIOLENCE* 365, 380-84 (Michael Tonry & Mark H. Moore eds., 1998) [hereinafter *YOUTH VIOLENCE*]; James C. Howell, *Youth Gangs: An Overview*, in *GANGS AT THE MILLENIUM*, *supra* note 51, at 36-37.

Ethnographic studies consistently report that gang violence is most often a function of competition for turf.<sup>64</sup> It is harder to find statistics reflecting the impact of gang competition on violent crime, but some exist. A study of gang-related homicides in Chicago from 1987 to 1994 found that 75% involved members of different gangs and these were geographically clustered in areas of gang competition.<sup>65</sup> A study of gang-related homicides in Los Angeles between 1979 and 1994 found that the majority were intergang shootings.<sup>66</sup> Scott Decker and Barrick Van Winkle's survey of gang members in St. Louis found that nearly 90% had defended gang turf in the preceding year, the primary method of defending turf was through violence, and 95% of the fights for turf described by gang members involved firearms.<sup>67</sup> And, as we have seen, competition in drug markets was a major cause of homicide in New York during the crime-rise period of the late 1980s.<sup>68</sup>

Rates of gang-related violence are unquestionably high. Although reliable statistics on gang-related crime are difficult to come by because of the difficulties and disparate practices in identifying crime as gang-related,<sup>69</sup> there is widespread agreement among gang researchers that

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64. See, e.g., DECKER & VAN WINKLE, *supra* note 49, at 163-64; JANKOWSKI, *supra* note 49, at 161-62; PADILLA, *supra* note 49, at 137; TAYLOR, *supra* note 49, at 6; WILLIAM B. SANDERS, GANGBANGS AND DRIVE-BYS: GROUNDED CULTURE AND JUVENILE GANG VIOLENCE 83 (1994); Scott H. Decker, *Collective and Normative Features of Gang Violence*, 13 JUSTICE Q. 243, 258-59 (1996); Fagan, *supra* note 49, at 648-52; Sudhir Alladi Venkatesh, *The Social Organization of Gang Activity in an Urban Ghetto*, 103 AM. J. SOC. 82, 93-97 (1997).

65. See ILL. CRIM. JUST. INFO. AUTH., STREET GANGS AND CRIME: PATTERNS AND TRENDS IN CHICAGO, 10-12, 14-16, 19-22 (Sep. 1996). Intriguing as well is a study of drug and gang-related homicide in St. Louis and Chicago between 1985 and 1995 that found in both cities that a drug or gang-related homicide tended to reduce the probability of a similar homicide in the same neighborhood for a year or so. See Cohen et al., *supra* note 53, at 254-59. This result is consistent with the view that drug or gang-related homicides tend to stabilize local drug markets and therefore reduce violence for a time. This result may be skewed, however, by the likelihood that retaliatory violence will occur on a rival gang's turf rather than in the same neighborhood. See *id.* at 259. Yet another study attributed Chicago's failure to reduce homicide during a period in which it was falling sharply in New York to a series of prosecutions of Chicago gang leaders and the displacement of gangs in connection with the redevelopment of public housing projects that destabilized gang structures and turf, thereby stimulating gang rivalries in Chicago even as homicide rates fell sharply in New York. See John Hagedorn & Brigid Rauch, *Housing, Gangs, and Homicide: What We Can Learn from Chicago*, 42 URB. AFFAIRS REV. 435, 445-52 (2007).

66. See H. Range Hutson et al., *The Epidemic of Gang-Related Homicide in Los Angeles County from 1979 through 1994*, 274 JAMA 1031, 1033 (1995).

67. See DECKER & VAN WINKLE, *supra* note 49, at 113.

68. See *supra* text accompanying note 45.

69. See, e.g., COVEY, MENARD & FRANZESE, *supra* note 49, at 3-13; CURRY & DECKER, *supra* note 55, at 2-6; SHELDEN, TRACY & BROWN, *supra* note 48, at 22-24.

the rate of violent crime among gang members is much higher than rates of violent crime even among otherwise comparable populations.<sup>70</sup> A study of Los Angeles County gang members during the crime-rise period estimated that they were 60 times more likely to be homicide victims than were members of the general population.<sup>71</sup> A study of gang members in St. Louis found they had a homicide rate 1,000 times higher than that of the general population.<sup>72</sup> Sudhir Venkatesh's 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.<sup>73</sup>

Gang violence, in turn, constitutes a substantial proportion of urban violent crime. One survey found that more than half of the homicides in Los Angeles and Chicago were gang-related, as were roughly one-quarter of the homicides in the 171 other cities with a population of over 100,000.<sup>74</sup> Another found that in the twelve cities reporting the largest numbers of gang-related homicides, 40% of all homicides were considered gang-related.<sup>75</sup> Gang-related homicides appear to have risen disproportionately during the crime-rise period of the 1980s and 1990s; a study of gang-related homicide in Los Angeles County found that from 1979 to 1994, gang-related homicides increased from 18.1% to 43.0% of all homicides, with the use of semi-automatic handguns increasing from 5.3% in 1986 to 44.3% in 1994.<sup>76</sup>

Gang-related homicide has distinctive characteristics; gang-related homicide is more likely to be committed in public, involve strangers,

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70. See, e.g., SHELDEN, TRACY & BROWN, *supra* note 48, at 98-101; THORNBERRY ET AL., *supra* note 51, at 47-48; Howell, *supra* note 63, at 29-32; Terence P. Thornberry, *Membership in Youth Gangs and Involvement in Serious or Violent Offending*, in *SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS* 147, 147-48, 157-66 (Rolf Loeber & David Farrington eds., 1998); Cheryl L. Maxson, *Gang Homicide*, in *STUDYING AND PREVENTING HOMICIDE*, *supra* note 36, at 197, 197; Paul B. Stretsky & Mark R. Pogrebin, *Gun-Related Gang Violence: Socialization, Identity, and Self*, 36 *J. CONTEMP. ETHNOGRAPHY* 85, 86-87 (2007). For a particularly careful study along these lines, see Rachel A. Gordon et al., *Antisocial Behavior and Youth Gang Membership: Selection and Socialization*, 42 *CRIMINOLOGY* 55, 69-78 (2004).

71. See 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).

72. See DECKER & VAN WINKLE, *supra* note 49, at 173.

73. See Sudhir Venkatesh, *The Financial Activity of a Modern American Street Gang*, in *GANGS AT THE MILLENNIUM*, *supra* note 51, at 239, 242.

74. See FOX, LEVIN & QUINET, *supra* note 27, at 90. Although surveys of this type depend on police reporting, there is widespread agreement that police reports are generally a reliable means of measuring gang crime. See, e.g., KLEIN, *supra* note 49, at 13-14.

75. See Maxson, *supra* note 62, at 279.

76. See Hutson et al., *supra* note 66, at 1033-34.

multiple participants, and firearms.<sup>77</sup> Gang-related homicide is also, by and large, youth homicide; one survey found that of all gang-related homicides from 1976 to 2005, 24.2% of the victims were under 18 and 68.4% were ages 18-34.<sup>78</sup> Gang-related homicide is also primarily an urban problem; the same survey found that 69.3% of all gang-related homicides occurred cities with a population of over one million.<sup>79</sup> Even within urban areas, gang homicide clusters; the Los Angeles County study, for example, found that gang homicides were most likely to occur in areas of concentrated economic disadvantage.<sup>80</sup> The same pattern was observed in a study of gang-related homicide in St. Louis and Chicago.<sup>81</sup> A study of gang-related violence in Pittsburgh yielded the same conclusion.<sup>82</sup> Yet another study similarly found that gang activity clusters in areas of concentrated disadvantage.<sup>83</sup> In short, gang crime mirrors the characteristics of the crime wave of the late 1980s and early 1990s which, as we have seen, was concentrated among urban minority youth.

### 3. GANGS AND FIREARMS

Given the violent world of gangs, it should come as no surprise that gang researchers find that gang members carry firearms at elevated rates.<sup>84</sup> A study of gang members in Rochester, for example, found that gang membership increased the likelihood of carrying a firearm between seven and twelve times, depending on age, even when controlling for past and current offending.<sup>85</sup> Research shows the same is true for those

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77. See Howell, *supra* note 62, at 210-12; Maxson, *supra* note 62, at 287; Maxson, *supra* note 70, at 211-12. For example, 96% of gang-related homicides in Chicago from 1987 to 1994 involved firearms. See ILL. CRIM. JUST. INF. AUTH., *supra* note 65, at 16.

78. See FOX, LEVIN & QUINET, *supra* note 27, at 53 & tbl. 3.5.

79. See *id.* at 56 & tbl. 3.6. The National Youth Gang Survey, a United States Department of Justice survey of law enforcement agencies, also found that gang-related homicide is concentrated in the largest cities. See EGLEY ET AL., *supra* note 49, at 28-32.

80. See Hutson et al., *supra* note 66, at 1035.

81. See Cohen et al., *supra* note 53, at 251.

82. See George A. Tito, Jacqueline Cohen & John Engberg, *An Empirical Study of the Location of Gang "Set Space"*, 52 SOC. PROBS. 272, 292-96 (2005).

83. See Pamela Irving Jackson, *Crime, Youth Gangs, and Urban Transition: The Social Dislocations of Postindustrial Economic Development*, 8 JUSTICE Q. 379 (1991).

84. See, e.g., JOSEPH F. SHELEY & JAMES D. WRIGHT, *IN THE LINE OF FIRE: YOUTHS, GUNS, AND VIOLENCE IN URBAN AMERICA* 95-103 (1995); THORNBERRY ET AL., *supra* note 51, at 123-25. Decker, *supra* note 49, at 391-92; Beth Bjerregaard & Alan J. Lizotte, *Gun Ownership and Gang Membership*, 86 J. CRIM. L. & CRIMINOLOGY 37, 46-53 (1995); Huff, *supra* note 51, at 83; 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).

85. See THORNBERRY ET AL., *supra* note 51, at 128-31. Similarly, among a sample of 99 St. Louis gang members they studied, Decker and Van Winkle found that

involved in selling drugs; research shows that those involved in drug trafficking also carry firearms at elevated levels.<sup>86</sup> One study found that involvement in what the subjects described as “high” levels of selling drugs increased the likelihood of carrying concealed firearms between eight and thirty-five times, depending on age.<sup>87</sup>

The prevalence of firearms among gang members and drug dealers, in turn, helps to explain the rise of the drive-by shooting, which gang researchers note is unusually common in gang-related shootings.<sup>88</sup> For example, drive-by shootings accounted for 33% of gang-related shootings in Los Angeles County between 1989 and 1994, with 590 victims, and nearly half of the persons shot at and a quarter of homicide victims were innocent bystanders.<sup>89</sup> The frequency with which innocent bystanders are shot vividly illustrates the disadvantage of a drive-by shooting—it is not so 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, gang competition is the leading engine of gang-related violence, 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.<sup>90</sup>

High levels of violence in gang-ridden disadvantaged neighborhoods, in turn, become a further stimulus to the carrying of firearms, as self-protection becomes an additional motive.<sup>91</sup> The prevalence of violence in gang dominated neighborhoods accordingly creates a kind of contagion effect. As Jeffrey Fagan and Deanna Wilkinson’s ethnographic study of at-risk youth in New York explains, when inner-city youth live

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80 owned firearms, the median number of firearms owned was four, and 75% were handguns. See DECKER & VAN WINKLE, *supra* note 49, at 175-76.

86. See, e.g., SHELEY & WRIGHT, *supra* note 84, 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 84, at 814-16.

87. See Lizotte et al., *supra* note 84, at 826-28.

88. See, e.g., KLEIN, *supra* note 49, at 117-18; Deanna L. Wilkinson & Jeffrey Fagan, *The Role of Firearms in Violence “Scripts”: The Dynamics of Gun Events Among Adolescent Males*, LAW & CONTEMP. PROBS., Winter 1996, at 55, 70.

89. See H. Range Hutson, Deidre Anglin & Marc Eckstein, *Drive-by Shootings by Violent Street Gangs in Los Angeles: A Five Year Review*, 3 ACAD. EMERGENCY MED. 300 (1996). In 1991 alone, there were more than 1,500 gang-related drive-by shootings in Los Angeles. See H. Range Hutson, Deidre Anglin & Michael J. Pratts, *Adolescents and Children Injured or Killed in Drive-By Shootings in Los Angeles*, 330 NEW ENG. J. MED. 324 (1994).

90. See SANDERS, *supra* note 64, at 65-74; Howell, *supra* note 62, at 214-16.

91. See BLUMSTEIN & COHEN, *supra* note 43, at 4-5; SHELEY & WRIGHT, *supra* note 84, at 102-03, 110-13; Lizotte et al., *supra* note 84, at 813-14; Stretsky & Pogrebin, *supra* note 70, at 105-08.

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.<sup>92</sup> There are statistical indications of contagion as well; a number of studies find that gang-related homicides have an independent and positive effect on the homicide rate.<sup>93</sup> 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.<sup>94</sup>

Thus, the story of the spike in violent crime in the late 1980s and early 1990s is a grim one. Not only had violent crime rates risen dramatically in the inner cities, but the prevalence of violence then created an “ecology of danger”<sup>95</sup> in high-crime communities in which the need to carry firearms and be prepared to use them came to be seen as essential. One might despair of any improvement under the circumstances. Yet, as we have seen, the crime wave did subside, declining to levels that had not been seen for forty years.

### C. *A Theory About the Crime Drop*

While there is a consensus among criminologists about the cause of the crime increase, there is no similar agreement about the decline. The most common explanation offered for the decline is that it involved a decrease in crack-related violence and a stabilization of drug markets, although an explanation for this phenomenon is rarely offered.<sup>96</sup> It will prove helpful to turn to potential explanations for the crime drop that can be ruled out before advancing a theory about its probable cause.

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92. See Jeffrey Fagan & Deanna Wilkinson, *Guns, Youth Violence, and Social Identity*, in *YOUTH VIOLENCE*, *supra* note 63, at 105, 137-74. For a similar account, see David Hemenway et al., *Gun Carrying Among Adolescents*, *LAW & CONTEMP. PROBS.*, Winter 1996, at 39, 44-47.

93. See, e.g., Cohen et al., *supra* note 53, at 257-58; Jacqueline Cohen & George Tito, *Diffusion in Homicide: Exploring a General Method for Detecting Spatial Diffusion Processes*, 15 *QUANTITATIVE CRIMINOLOGY* 451, 490-91 (1999).

94. See Jeffrey Fagan, Deanna L. Wilkinson & Garth Davies, *Social Contagion of Violence*, in *CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR*, *supra* note 49, at 688, 701-10.

95. Fagan & Wilkinson, *supra* note 92, at 174.

96. See, e.g., FOX, LEVIN & QUINET, *supra* note 27, at 92-96; Blumstein & Rosenfeld, *supra* note 43, at 1207-10; Blumstein & Wallman, *supra* note 23, at 130-31; Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Drop and Six that Do Not*, 18 *J. ECON. PERSP.* 163, 179-81 (2004).



## 1. PROBLEMATIC EXPLANATIONS FOR THE CRIME DROP

One can start by ruling out a drop in the demand for crack cocaine as an explanation for the crime drop. Although it is difficult to measure the demand for cocaine, the available proxies suggest no change during the crime-drop era. Cocaine-related emergency room admissions, for example, actually rose from 1994 to 2001, as did the proportion that involved crack.<sup>97</sup> Federal seizures of cocaine, another proxy for demand, remained roughly constant from 1989 through 2002.<sup>98</sup> Trends in the price of crack were also not noticeably different during the crime-rise and crime-decline periods.<sup>99</sup> There is therefore little evidence that indicates crack lost its appeal during the 1990s. Indeed, the United States Department of Justice still estimates that cocaine abuse and cocaine-related crime remain at levels exceeding any other drug.<sup>100</sup>

Since the crime wave of the late 1980s and early 1990s was concentrated among young urban minority males, one might look to a demographic explanation; perhaps there was a fall in the size of this high-crime cohort. Yet, as we have seen in Part I.A above, the crime rise, as well as the ensuing decline, was not a function of the size of the high-crime cohort; per capita victimization and offending rates rose during the crime spike, and then fell even more dramatically, even in high-crime cohorts. Demographic studies have consistently found that there was no change in the size of the high-crime cohort that explains the rise and then even more dramatic fall in rates of violent crime.<sup>101</sup>

A particular kind of demographic claim has been advanced by John Donahue and Steven Levitt, who claim that as much as half of the crime decline was a function of the legalization of abortion, which reduced the size of a cohort particularly likely to commit crimes.<sup>102</sup> There have been a number of challenges to the methodology and evidence supporting

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97. See SUBSTANCE ABUSE & MENTAL HEALTH ADMIN., DEP'T OF HEALTH & HUM. SERVS., EMERGENCY DEPARTMENT TRENDS FROM THE DRUG ABUSE WARNING NETWORK: FINAL ESTIMATES 1994-2001, at 50, 53 fig. 3 (Aug. 2002).

98. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: 2003, at 389 tbl. 4.36 (Aug. 2004) [hereinafter SOURCEBOOK].

99. See OFF. OF NAT'L DRUG CONTROL POL'Y, EXECUTIVE OFF. OF THE PRESIDENT, THE PRICE AND PURITY OF ILLICIT DRUGS: 1981 THROUGH THE SECOND QUARTER OF 2003, at 9-10, 29 fig. 10 (Nov. 2004).

100. See NAT'L DRUG INTELLIGENCE CENTER, U.S. DEP'T OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT: 2009, at 1-2 (Dec. 2008).

101. See, e.g., ZIMRING, *supra* note 38, at 56-60; Blumstein & Rosenfeld, *supra* note 43, at 1187-91; Blumstein & Wallman, *supra* note 23, at 140; Cook & Laub, *supra* note 27, at 22-25; Levitt, *supra* note 96, at 171-72.

102. See John J. Donahue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q.J. ECON. 379, 407-15 (2001).



this thesis.<sup>103</sup> I do not propose to enter this methodological debate here, although it is worth noting that quite elementary issues of timing seem to controvert the abortion thesis. Anti-abortion laws were invalidated by the Supreme Court in 1973, and some states legalized abortion even earlier, so if abortion reduced crime, one would expect crime rates to already be falling by 1993, when all teenagers had been born after legalization. Yet, violent crime peaked in 1993, casting considerable doubt on the abortion thesis.<sup>104</sup> For present purposes, however, most important is Donahue and Levitt's observation that crime declined sooner in the early legalization states than it did elsewhere.<sup>105</sup> If the thesis about abortion were true, by 2007, with the entire cohort up to age 34 born after legalization, one would expect to see the differences in crime rates between early-legalization jurisdiction and others diminish. As we will see, this prediction has not been borne out in New York City, where the crime decline has been particularly dramatic. Abortion may have played some role in the crime decline, but the New York data suggests that its role was limited, at least in that city.

Another demographic explanation involves the effect of incarceration rates. Incarceration incapacitates potential offenders and offers the possibility of general deterrence, and some give it at least a portion of the credit for the crime drop.<sup>106</sup> While incarceration probably had some effect on crime rates, sorting out its effects is a perilous business. For one thing, as we have seen, both the crime rise and ensuing decline occurred among youthful offenders, and incarceration rates are lower for youth.<sup>107</sup> For another, incarceration may have crime-generating effects; one study of incarceration in New York City found that high rates of incarceration in high-crime communities adversely affect the economic prospects of offenders and their families and therefore destabilize communities and ultimately contribute to increased crime rates.<sup>108</sup> There is

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103. See, e.g., Blumstein & Wallman, *supra* note 23, at 141-42.

104. See, e.g., Fox, *supra* note 31, at 302-04. For particularly powerful statistical attacks on the abortion thesis showing that even cohorts born before and well after legalization experienced enormous variability in violent offending rates during the 1980s and 1990s, see Cook & Laub, *supra* note 27, at 22-25; Ted Joyce, *Did Legalized Abortion Lower Crime?*, 39 J. HUM. RES. 1 (2004).

105. See Donahue & Levitt, *supra* note 102, at 395-99.

106. See, e.g., Levitt, *supra* note 96, at 178-79; William Spelman, *The Limited Importance of Prison Expansion*, in *THE CRIME DROP IN AMERICA*, *supra* note 26, at 97, 97-129.

107. See Cook & Laub, *supra* note 27, at 29-30.

108. See Jeffrey Fagan, Valerie West & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 *FORDHAM URB. L.J.* 1551, 1588-95 (2003).

also reason to doubt the significance of the deterrent effect of incarceration in high-crime urban neighborhoods. In the inner city, where demand for drugs is high, and many residents likely believe that alternative sources of legitimate income are limited, the incentive to deal in drugs may be so great that the calculus of potential offenders is likely to be only marginally affected by an increase in drug prosecutions or sentences.<sup>109</sup> Whatever the reason, the evidence of a relation between incarceration rates and the crime drop is wanting; between 1975 and 2000, even as incarceration rates increased dramatically, there was no statistically significant relationship between incarceration and homicide rates.<sup>110</sup>

Without satisfactory evidence supporting a demographic explanation for the crime drop, one might turn to economics. We have seen that violent crime is concentrated in areas of economic disadvantage; perhaps an improving economy drove rates of violent crime down in the 1990s. Yet once again, the statistics are disappointing; there is no relationship between local economic conditions and crime rates.<sup>111</sup> At the national level, inflation-adjusted wages were essentially flat from the mid-1980s to 1996, so economic explanations for the dramatic movements in violent crime rates during that period seem unpromising.<sup>112</sup>

Yet another possibility was suggested by John Lott and David Mustard, who argued that crime declines are produced by laws authorizing

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109. See Jeffrey A. Fagan, *Do Criminal Sanctions Deter Drug Crimes?*, in DRUGS AND CRIME, *supra* note 49, at 188, 204-08. The same may be true of efforts to target the unlawful use of firearms in connection with drug trafficking through the use of felony prosecutions. One study of an effort to target gun offenders for federal felony prosecutions in Richmond known as "Project Exile" found no statistically significant results. See Steven Raphael & Jens Ludwig, *Prison Sentence Enhancements: The Case of Project Exile*, in EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 251, 274-77 (Jens Ludwig & Philip J. Cook eds., 2003) [hereinafter EVALUATING GUN POLICY]; accord Jens Ludwig, *Better Gun Enforcement, Less Crime*, 4 CRIMINOLOGY & PUB. POL'Y 677, 691-98 (2005). A more recent study using a different methodology did find statistically significant crime reductions following the Richmond program. See Richard Rosenfeld, Robert Fornango & Eric Baumer, *Did Ceasefire, Compstat, and Exile Reduce Homicide?*, 4 CRIMINOLOGY & PUB. POL'Y 419, 436-38 (2005). Still, Richmond's homicide rate remained significantly higher than the average rate for cities with a population of 175,000 or more. See *id.* at 428-32 & fig. 1. The same study found no statistically significant effects of Boston's effort to generate deterrence by direct communication with gang youth about the consequences of firearms possession and use. See *id.* at 434-35.

110. See ZIMRING, *supra* note 38, at 50-52.

111. See Richard B. Freeman, *Does the Booming Economy Help Explain the Fall in Crime?*, in PERSPECTIVES ON CRIME AND JUSTICE: 1999-2000 LECTURE SERIES 23, 40-41 (Nat'l Inst. of Justice, U.S. Dep't of Justice Mar. 2001) [hereinafter PERSPECTIVES ON CRIME AND JUSTICE]; Levitt, *supra* note 96, at 170-71.

112. See ZIMRING, *supra* note 38, at 66-67.

the carrying of concealed firearms, which are said to enhance the likelihood that an intended victim will be able to provide armed resistance.<sup>113</sup> The study's methodology, however, has been subject to fierce criticism.<sup>114</sup> In any event, Lott and Mustard studied 1979 to 1992, prior to the crime-decline period.<sup>115</sup> Ian Ayres and John Donahue then extended the analysis forward seven years, and found no relationship between concealed carry and crime reductions.<sup>116</sup> Whatever the correct resolution of this dispute, there seems to be no one claiming that any significant portion of the crime drop since the early 1990s can be attributed to concealed-carry laws. Indeed, we will see that the largest crime decline occurred in New York City, which largely prohibits concealed carry.

One obvious cause to consider for the crime decline is the police. Steven Levitt found a statistical relationship between increases in the number of police and subsequent decreases in violent crime.<sup>117</sup> But this explanation must be viewed with caution.

There are a great many studies of the effect of increased number of police or frequency of patrol, and their results are mixed.<sup>118</sup> Nor does it stand to reason that increased numbers of police is likely to reduce

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113. See John R. Lott & David B. Mustard, *Crime, Deterrence, and Right-To-Carry Concealed Handguns*, 26 J. LEG. STUD. 1 (1997). For an updated elaboration, see JOHN R. LOTT, *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* (2d ed. 2000).

114. See, e.g., DAVID HEMENWAY, *PRIVATE GUNS, PUBLIC HEALTH* 100-04 (2004); MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS* 85-95 (2007).

115. See Blumstein & Wallman, *supra* note 23, at 134-35.

116. See Ian Ayres & John J. Donahue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193 (2003). This finding has since been replicated. See FIREARMS AND VIOLENCE, *supra* note 29, at 125-51. For the most recent round in the debate, see Carlisle E. Moody & Thomas B. Marvell, *The Debate on Shall-Issue Laws*, 5 ECON J. WATCH 269 (2008); and Ian Ayres & John J. Donahue III, *Yet Another Refutation of the More Guns, Less Crime Hypothesis—With Some Help from Moody and Marvell*, 6 ECON J. WATCH 35 (2009). A similar claim—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 THE USE OF FIREARMS* 8-11 (May 1997); HEMENWAY, *supra* note 114, at 66-69, 239-40.

117. See Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime*, 87 AM. ECON. REV. 270 (1997); Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime: Reply*, 92 AM. ECON. REV. 1244 (2002).

118. See COMM. TO REVIEW RES. ON POLICE POL'Y AND PRACTICES, NAT'L RES. COUNCIL, *FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE* 225 (Wesley Skogan & Kathleen Frydl eds., 2005) [hereinafter *FAIRNESS AND EFFECTIVENESS IN POLICING*]; JOHN E. CONKLIN, *WHY CRIME RATES FELL* 60-63 (Jennifer Jacobson ed., Pearson Educ., Inc. 2003); Lawrence W. Sherman & John E. Eck, *Policing for Crime*

crime regardless of the tactics that they employ. Officers who are merely driving through a neighborhood on patrol are unlikely to be very effective at disrupting drug or gang activity—a gang or drug dealer with a modicum of sophistication need only post a lookout who can warn his confederates to cease any overt criminality as the squad car drives past. It seems likely that the tactics police use must be at least as important as the number of officers.

As it happens, the 1990s saw alterations in the tactics employed by a great many urban police departments that moved from more passive and reactive systems of patrol to proactive efforts at intensive and aggressive patrol of specific high-crime areas.<sup>119</sup> There are, however, no studies that assess on a national basis whether specific police tactics are statistically associated with crime reduction. Still, with changes in police tactics an obvious factor worth considering, it seems worthwhile to focus on a jurisdiction that has been particularly effective in reducing violent crime after it had adopted new tactics.

## 2. THE EXPERIENCE OF NEW YORK

Homicide in New York City rose from a rate of 4.7 per 100,000 in 1960 to a 1991 peak of 31.0 in waves that roughly corresponded to drug epidemics, with the increases concentrated in firearms-related homicide.<sup>120</sup> New York was no outlier; in 1990, its homicide rate was at the average for large cities,<sup>121</sup> and, as we have seen, it experienced the same gang and drug-related competitive pressures during the crack era that produced a spike in violent crime throughout the nation's major cities.<sup>122</sup> The overrepresentation of minorities among its homicide victims was also typical for large cities; in 1990 African-Americans comprised 48.5% of New York's homicide victims and Hispanics were 30.9% even though these groups comprised less than half of the city's population.<sup>123</sup>

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*Prevention*, in EVIDENCE-BASED CRIME PREVENTION 295, 306-07 (Lawrence W. Sherman et al. eds., 2006) (2002) [hereinafter EVIDENCE-BASED CRIME PREVENTION]; John E. Eck & Edward G. McGuire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in THE CRIME DROP IN AMERICA, *supra* note 26, at 207, 209-17. Moreover, as Franklin Zimring points out, Levitt's own model predicts smaller declines in New York's crime rates as a result of increases in the size of the police force than actually occurred. See ZIMRING, *supra* note 38, at 153.

119. See, e.g., Eck & McGuire, *supra* note 118, at 228-45; Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 572-84 (1997).

120. See Fagan, Wilkinson & Davies, *supra* note 94, at 688, 694-99.

121. See ZIMRING, *supra* note 38, at 139.

122. See *supra* text accompanying notes 45, 57, 92-94.

123. See ZIMRING, *supra* note 38, at 160 fig. 6.8.

At the 1991 peak of New York's crime wave, the homicide victimization rate was 58 per 100,000 population for African-Americans, 44 for Hispanics, and 8 for whites.<sup>124</sup> Then came the decline.

Over the 1990s the decline in each of the seven categories of "index" crime reported to the Federal Bureau of Investigation in New York was approximately double the decline in the rest of the country.<sup>125</sup> By 2000, even when compared to the other nine of the ten largest cities, New York had the lowest rates for five of the seven index crimes, and for murder, its rate in 2000 of 8.7 per 100,000 population was nearly half of the nine-city average of 16.3.<sup>126</sup> In fact, New York outperformed every one of the nation's fifteen largest cities during the 1990s.<sup>127</sup> By 1998, the African American homicide victimization rate had declined by more than two-thirds to 17 per 100,000 population, the Hispanic rate had declined by more than four-fifths to 8, and the white rate was 4.<sup>128</sup> Moreover, New York has been able to keep its homicide rate down; New York's 2007 homicide rate reached 6.03, while the two next largest cities, Los Angeles and Chicago, had homicide rates of 10.07 and 15.68, respectively.<sup>129</sup>

No non-police explanation for New York's success is apparent; for example, growth in incarceration rates and declines in unemployment during the 1990s were smaller than the national averages.<sup>130</sup> In the late 1990s the poverty rate in New York stabilized at about twice the national average, about where it was in the early 1990s, and there was no statistical relationship between New York's poverty, unemployment and homicide rates in the 1990s.<sup>131</sup> As for drugs, there is no evidence of a decline in the demand for crack or other illegal drugs in New York prior to the crime drop.<sup>132</sup> As for abortion, Donahue and Levitt concede that

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124. See ANDREW KARMEN, *NEW YORK MURDER MYSTERY: THE TRUE STORY BEHIND THE CRIME CRASH OF THE 1990s* 54 graph 2.2 (2000).

125. See ZIMRING, *supra* note 38, at 136-37 fig. 6.1.

126. See *id.* at 139-41 fig. 6.3.

127. See *id.* at 12-15. To similar effect, see KARMEN, *supra* note 124, at 23-28.

128. See KARMEN, *supra* note 124, at 54 graph 2.2.

129. For the underlying population and homicide statistics from which I have calculated each city's homicide rate, see FEDERAL BUREAU OF INVESTIGATION, *CRIME IN THE UNITED STATES*, 2007 tbl. 8 (Sept. 2008). Moreover, the Los Angeles figures reflect a substantial decline in homicide since the appointment as police chief of William Bratton, one of the architects of the New York strategy, who has brought many elements of that approach to Los Angeles. See Andrew Blankstein & Sharon Bernstein, *Why L.A. Renewed Bratton*, L.A. TIMES, June 20, 2007, at A1.

130. See ZIMRING, *supra* note 38, at 147, 229-32.

131. See KARMEN, *supra* note 124, at 197-98, 201-04.

132. See *id.* at 177-82. The federal government's estimates of the price of crack cocaine in New York during the 1980s and 1990s did not vary materially from that in other major cities. See OFF. OF NAT'L DRUG CONTROL POL'Y, *supra* note 99, at 34 fig. 15.

abortion had less effect in New York than in most jurisdictions.<sup>133</sup> Moreover, as we have seen, if the abortion thesis were correct, we would expect to see the disparity between the crime drop in early legalization states and others disappear over time. Although New York was an early legalization state, permitting widespread abortion in 1970,<sup>134</sup> as we have seen, it outperformed other big cities in terms of reducing violent crime throughout the 1990s and beyond. Moreover, as Franklin Zimring has observed, New York City's crime drop was not clustered at the beginning of the 1990s, as one might expect if its three-year head start in legalizing abortion was the explanation for the crime drop, and it experienced crime declines far in excess of those elsewhere in New York State, suggesting that the cause of the decline can be found at the city and not the state level.<sup>135</sup> Finally, there were substantial increases in the size of New York's police force during the period of dramatic declines in violent crime in that city,<sup>136</sup> and Hope Corman and H. Naci Mocan found a statistically significant relationship between the two.<sup>137</sup>

Still, as we have seen, there is reason to doubt that additional officers alone are likely to drive down crime.<sup>138</sup> More police using more effective tactics, in contrast, surely could reduce crime. In fact, there were important changes in policing tactics in New York that corresponded to New York's crime drop. In 1991, not only did the size of New York's police force begin to increase, but it also adopted a community policing model that employed an increased emphasis on foot patrols and low-level disorder.<sup>139</sup> In 1994, after the appointment of a new police chief, the department placed greater emphasis on aggressive stop-and-frisk tactics, misdemeanor arrests for drug and public-order offenses, adopted a system of statistical analysis that directed enforcement efforts at statistical "hot spots" of criminal activity, and imposed greater

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133. See Donahue & Levitt, *supra* note 102, at 405-06.

134. See *id.* at 383-84.

135. See ZIMRING, *supra* note 38, at 148-49.

136. See Hope Corman & H. Naci Mocan, *A Time-Series Analysis of Crime, Deterrence, and Drug Abuse in New York City*, 90 AM. ECON. REV. 584, 588 fig. 1 (2000).

137. See *id.* at 595. Their data covered the period from January 1970 to December 1996. See *id.* at 586. Interestingly, there was no relationship between indicia of the prevalence of drug use and violent crime, suggesting, consistent with the account advanced in Part I.B above, that "drug-related violence stems mostly from the interaction between sellers." *Id.* at 599.

138. See *supra* text accompanying notes 118-19.

139. See CIVIL RIGHTS BUR., OFF. OF THE ATT'Y GEN. OF THE ST. OF N.Y., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES: A REPORT TO THE PEOPLE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL 47-52 (Dec. 1, 1999) [hereinafter STOP AND FRISK REPORT].



managerial accountability.<sup>140</sup> The architects of the New York policing strategy of the 1990s single out as responsible for the crime drop the use of “Broken Windows” policing tactics that focus on reducing signs of physical and social disorder in the streetscape.<sup>141</sup> In a later study, Mocan and Corman found that citywide felony arrest rates had a statistically significant effect in reducing all seven index crimes, and misdemeanor arrests had a statistically significant effect on robbery, motor vehicle theft, and grand larceny.<sup>142</sup> In another study, George Kelling and William Sousa found an inverse relationship between a New York precinct’s misdemeanor arrests between 1989 and 1998 and reductions in the rate of violent crime.<sup>143</sup> The authors of both studies claimed that each provided support to the Broken Windows thesis.<sup>144</sup>

These studies have their critics. Bernard Harcourt and Jens Ludwig, for example, attacked the Corman and Mocan study by noting that a

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140. See *id.* at 52-56. The emphasis on geographically-targeted enforcement reflects the reality that even within high-crime communities, crime is not uniform but instead tends to cluster at identifiable “hot spots.” See, e.g., BURSİK & GRASMICK, *supra* note 41, at 62-72; John E. Eck & David Weisburd, *Crime Places in Crime Theory*, in CRIME AND PLACE 1, 7-18 (John E. Eck & David Weisburd eds., 1995); John E. Eck, *Preventing Crime at Places*, in EVIDENCE-BASED CRIME PREVENTION, *supra* note 118, at 241, 241-42; Ralph B. Taylor, *Crime and Small-Scale Places: What We Know, What We Can Prevent, and What Else We Need to Know*, in CRIME AND PLACE: PLENARY PAPERS OF THE 1997 CONFERENCE ON CRIMINAL JUSTICE RESEARCH AND EVALUATION 3-9 (U.S. Dep’t of Justice 1998); Lawrence W. Sherman et al., *Hot Spots of Predatory Crime: Routine Activities and the Criminology of Place*, 27 CRIMINOLOGY 27 (1989). As to the changes in the New York City Police Department in 1994, one study found that although crime continued to decline between 1994 and 2001 it did not do so at a statistically significantly greater rate than in the 1992-93 period. See Rosenfeld, Fornango & Baumer, *supra* note 109, at 435-36. This begs the question whether the crime decline would have continued absent the additional changes in tactics in 1994. As we will see, had the crime decline halted in 1994, there would have been a much stronger case that New York’s early 1990s crime decline was nothing more than regression to the mean.

141. See WILLIAM BRATTON & PETER KNOBLER, TURNAROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC 152-56, 228-29, 233-39 (1998); George L. Kelling, *Why Did People Stop Committing Crimes? An Essay About Criminology and Ideology*, 28 FORDHAM URB. L.J. 567, 573-79 (2000). For the classic statement of the “Broken Windows” thesis, see James Q. Wilson & George Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 31-38. For a more recent defense of the Broken Windows thesis, see William H. Sousa & George L. Kelling, *Of “Broken Windows,” Criminology, and Criminal Justice*, in POLICE INNOVATION: CONTRASTING PERSPECTIVES 77, 83-87 (David Weisburd & Anthony A. Braga eds., 2006) [hereinafter POLICE INNOVATION].

142. See Hope Corman & H. Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J. LAW & ECON. 235, 250-61 (2005). They also found a far smaller relationship between economic variables and crime. See *id.* at 259-61.

143. See GEORGE L. KELLING & WILLIAM H. SOUSA, JR., THE MANHATTAN INST., DO POLICE MATTER?: AN ANALYSIS OF NEW YORK CITY’S POLICE REFORMS 6-10 (1999).

144. See *id.* at 9-10; Corman & Mocan, *supra* note 142, at 262.



time-series study of a single-jurisdiction can be misleading, using as an example their own finding that successful New York Yankees teams were associated with a decline in New York's homicide rate.<sup>145</sup> Jeffrey Fagan and Garth Davies criticized Kelling and Sousa by suggesting alternative explanatory variables and noting that if arrests reduced violent crime one would expect to see a lagged effect.<sup>146</sup> Beyond these criticisms, there are more basic reasons to question the significance of the studies for the Broken Windows thesis. For one thing, misdemeanor arrests are a poor proxy for Broken Windows policing, and felony arrests are an even worse one. For another, the studies are inconsistent. Corman and Mocan found that felony arrests, not misdemeanor arrests, were related to reductions in homicide, while Kelling and Sousa found that it was levels of misdemeanor, not felony arrests that reduced violent crime. Perhaps these results can be reconciled; Corman and Mocan's citywide analysis may have obscured the effects of high levels of misdemeanor arrests at specific hot spots of crime. Still, the meaning of these results for Broken Windows policing is unclear.

Indeed, the overall evidence of the efficacy of Broken Windows policing is thin. Wesley Skogan's study aggregating data from six cities found that physical disorder stimulated violent crime,<sup>147</sup> but Professor Harcourt claims that the relationship disappeared when neighborhood poverty, stability, and race are held constant.<sup>148</sup> Another study found no relationship between physical disorder on the streetscape in Chicago, and concluded that indicia of concentrated social disadvantage better predicted crime rates.<sup>149</sup> A study of disorder in Baltimore found an

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145. See Bernard Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 297-99 (2006). One can surely question how much this proves; Harcourt and Ludwig picked an example that they surely knew correlated with the New York crime drop of the 1990s. Such a strategy, especially when attacking a peer-reviewed paper in one not subject to peer review, should perhaps raise an eyebrow.

146. See Jeffrey Fagan & Garth Davies, *Policing Guns: Order Maintenance Policing and Crime Rates in New York*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA, *supra* note 14, at 191, 198.

147. See WESLEY SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 9-11, 73-75 (1990).

148. See BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 59-78 (2001). Other critics argued that the results of the study were unduly sensitive to the data in just a few neighborhoods. See Eck & McGuire, *supra* note 118, at 24.

149. See Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 637-39 (1999).

inconsistent relationship to homicide rates.<sup>150</sup> Yet another study found that moving the residents of low-income areas into stable and more affluent communities did not reduce crime rates among participants,<sup>151</sup> although this study has itself been attacked.<sup>152</sup> An aggressive quality-of-life policing initiative in New York in the mid-1980s, moreover, failed to reduce violent crime.<sup>153</sup> A committee of distinguished social scientists, in a report co-edited by none other than Skogan, recently reviewed the available evidence and concluded that the efficacy of Broken Windows policing has yet to be demonstrated.<sup>154</sup>

Still, the evidence points to a police-based explanation for the crime decline in New York. The crime drop began in 1991, and this correlates well with the beginning of the change in the strength and tactics of the police.<sup>155</sup> As we have seen, Corman and Mocan found a relationship between increasing numbers of police officers and declines in violent crime.<sup>156</sup> Moreover, police ought to have their greatest effect on murders committed in visible locations, and in the late 1990s, murders in visible locations continued to drop in New York even as the size of the police force stabilized.<sup>157</sup> Indeed, as we have seen, the available empirical evidence casts doubts on the view that increases in the numbers of police alone reduce crime.<sup>158</sup>

### 3. THE STOP-AND-FRISK THESIS

Perhaps the citywide felony arrests studied by Corman and Mocan, on the one hand, and the precinct-level misdemeanor arrests studied by Kelling and Sousa, on the other, are both a proxy for something else—something that the New York police did in such great volume that it

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150. See TAYLOR, *supra* note 59, at 185-90.

151. See Harcourt & Ludwig, *supra* note 145, at 298-314.

152. See Maria Cruz Melendez, Note, *Moving to Opportunities and Mending Broken Windows*, 32 J. LEGIS. 238, 251-62 (2006).

153. See Benjamin Bowling, *The Rise and Fall of New York Murder*, 39 BRIT. J. CRIMINOLOGY 531, 547 (1999).

154. See FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 118, at 229-30. Doubts about the efficacy of Broken Windows policing as a means of reducing violent crime, however, may not be fatal to the enterprise. I have elsewhere argued that whatever the relationship between disorder and violent crime, the evidence is clear that disorder stimulates the fear of crime, and for that reason policing disorder will reduce the likelihood of neighborhood destabilization. See Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL'Y REV. 53, 92-95 (2003).

155. See ZIMRING, *supra* note 38, at 149-51.

156. See *supra* text accompanying note 137.

157. See KARMEN, *supra* note 124, at 102-04 & graph 3.1.

158. See *supra* text accompanying note 118.

could have had a material deterrent effect in high-crime neighborhoods. The intervention that the New York Police performed at greatest volume was the stop-and-frisk. Unlike most departments, New York's stop-and-frisk activity can be quantified because officers must complete a form whenever a suspect is forcibly stopped and frisked or searched, or when a suspect who had been forcibly stopped refuses to identify himself.<sup>159</sup> Stop-and-frisk was ubiquitous in New York during the crime-decline period; the New York Attorney General's review of the reports covering stops during 1998 and the first three months of 1999 disclosed 126,753 stops.<sup>160</sup> It appears that the rate of stops in New York City has only increased since then, reaching 506,491 reported stops in 2006.<sup>161</sup> With stop-and-frisk at such high levels, especially in areas targeted as "hot spots," outdoor drug markets could be expected to go into decline, as suspects perceive elevated risks in carrying guns or drugs, or in attempting to purchase the latter.<sup>162</sup> If gang members and drug dealers cannot go about armed, in turn, their ability to defend their turf against rival gangs or drug dealers, or simply to walk about with the confidence that they can defend themselves if they encounter a rival, will be substantially reduced. In short, high rates of stop-and-frisk may make gang and drug crime more risky and less lucrative by increasing the risk of arrest and the difficulty of establishing stable drug-market monopolies.<sup>163</sup>

The impact of stop-and-frisk rates and gang and drug-related violent crime may well be captured by the Corman and Mocan and Kelling and Sousa studies. High precinct-levels of misdemeanor arrests are a reasonable proxy for precincts in which aggressive stop-and-frisk tactics at violent-crime hot spots are in use. High levels of felony arrests may also reflect more aggressive tactics aimed at gangs and drugs—more frisks

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159. See STOP AND FRISK REPORT, *supra* note 139, at 64.

160. *Id.* at App. tbl. 1.A.5.

161. See GREG RIDGEWAY, RAND CORP., TECHNICAL REPORT: ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT'S STOP, QUESTION, AND FRISK PRACTICES 7 (2007).

162. One ethnographic study documented a decline in outdoor drug markets in New York's Bushwick neighborhood, and observed that it had created a system of middlemen who arrange transactions between purchasers and indoor sellers, and this system, in turn, increased transaction costs because of purchasers' fears of fraud or deception. See R. Terry Furst et al., *The Rise of the Street Middleman/Woman in a Declining Drug Market*, 7 ADDICTION RES. 103, 114-24 (1999).

163. In this connection, it is worth noting that Levitt and Venkatesh found that inter-gang violence adversely affected gang revenues because drug purchasers are deterred from patronizing violent markets and gang members demand higher wages to compensate them for increased risk. See Levitt & Venkatesh, *supra* note 54, at 775-80. Thus, a strategy that makes it more difficult for gangs to establish stable drug monopolies will adversely affect the economic motivations for gang membership.

will presumably lead to more felony arrests. The inference that stop-and-frisk tactics are at the center of New York's success is strengthened by a more recent study which found that intensive patrols near public housing in New York resulted in substantial reductions in violent crime in the areas surrounding public housing projects.<sup>164</sup> Intensive patrols are another good proxy for stop-and-frisks, and the pattern of results suggests that these tactics reduced visible crime in public places—the kind of crime most likely to be responsive to stop-and-frisk tactics.

To be sure, Harcourt and Ludwig are properly skeptical of any single study that purports to show the efficacy of a policing tactic.<sup>165</sup> But, as we have seen, there are at least three studies that provide support for the stop-and-frisk thesis. Beyond that, a rather impressive number of studies throughout the nation have found that aggressive policing at hot spots with an emphasis on finding guns reduces levels of violent crime.<sup>166</sup> Moreover, nationwide arrest statistics show that during the crime-decline period, there was a reduction in weapons arrest rates without any evidence that police were decreasing the rate at which they

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164. See 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, 442-53 (2006).

165. For a good summary of the dangers of the type of regression analysis used by these studies with particular reference to the debate over firearms crime, see TUSHNET, *supra* note 114, at 77-85.

166. See FIREARMS AND VIOLENCE, *supra* note 29, at 230-35; Blumstein & Wallman, *supra* note 23, at 136-37; Lawrence W. Sherman, *Reducing Gun Violence: What Works, What Doesn't, What's Promising*, in PERSPECTIVES ON CRIME AND JUSTICE, *supra* note 111, at 69, 78-79; Sherman & Eck, *supra* note 118, at 308-10. Studies of directed patrol focusing on high-crime hot spots reach similar conclusions. See FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 118, at 235-40; Anthony A. Braga, *The Effects of Hot Spot Policing on Crime*, 578 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 113-19 (2001); Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, in CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 29-33 (Michael Tonry ed., 1998); Lawrence W. Sherman, *The Police*, in CRIME, *supra* note 49, at 327, 328-34. For some of the leading studies, see, for example, Anthony A. Braga et al., *Problem-Oriented Policing in Violent Crime Places: A Controlled, Randomized Experiment*, 37 CRIMINOLOGY 541 (1999); Jacqueline Cohen & Jens Ludwig, *Policing Crime Guns*, in EVALUATING GUN POLICY, *supra* note 109, at 217; Ludwig, *supra* note 109, at 701-08; Edward F. McGarrell, *Reducing Firearms Violence Through Directed Patrol*, 1 CRIMINOLOGY & PUB. POL'Y 119 (2001); and Lawrence W. Sherman & Dennis Rogan, *Effects of Gun Seizures on Gun Violence: Hot Spots Patrol in Kansas City*, 12 JUSTICE Q. 679 (1995). One might think that targeting patrol in this manner would merely move crime to other locations, but displacement effects appear to be limited. This is a function of the same criminological insight that explains the geographic lumpiness of crime even within high-crime neighborhoods. Criminological theory predicts that there will only be a limited number of locations desirable to criminals at which motivated offenders, desirable targets, and a lack of adequate public or private surveillance intersect. See, e.g., BURSİK & GRASMICK, *supra* note 41, at 62-72; MICHAEL R. GOTTFRIEDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 22-44 (1990); Lawrence E. Cohen & Marcus Felson, *Social Change and Crime Rate Trends: A Routine Activities Approach*,

engaged in weapons searches, suggesting a decline in the rate at which potential offenders carried firearms.<sup>167</sup> During the relatively stable crime rates of 2000-2005, in turn, rates of weapons arrests were constant as well.<sup>168</sup> This suggests that lower crime rates are associated with lower rates at which firearms are carried in public—the kind of response one might expect from an aggressive regime of weapons searches.

There is additional evidence specific to New York. Not only is the crime drop well timed to increases in the size of the New York Police Department, as we have seen,<sup>169</sup> but reductions in violent crime were concentrated in visible crimes committed in public places, suggesting that offenders were responding to the tactics of officers on patrol.<sup>170</sup> Crime reductions were also concentrated in crimes involving handguns, suggesting that patrol tactics directed at handguns were responsible.<sup>171</sup> In addition, ethnographic studies of the crime drop in New York lend support to the stop-and-frisk thesis. In his study of several Brooklyn neighborhoods, Richard Curtis concluded that after police crackdowns began in 1992, gang drug dealing was largely driven indoors and became less attractive to neighborhood residents, producing a decline in violent crime.<sup>172</sup> He concluded: “[t]he reconfiguration of drug markets in the mid-1990s appreciably reduced the level of neighborhood violence. As distribution retired indoors, turf battles were eliminated.”<sup>173</sup> Bruce Johnson, Andrew Golub and Eloise Johnson’s study of drug subcultures in New York concluded that aggressive policing in the 1990s, in particular stop-and-frisk tactics that focus on discovering concealed

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44 AM. SOC. REV. 558 (1979); Eck & Weisburd, *supra* note 140, at 7-18. In fact, the evidence is that targeted enforcement practices have limited displacement effects. *See, e.g.*, Eck, *supra* note 140, at 282; Eck & Weisburd, *supra* note 140, at 19-20; Renee B.P. Hesserling, *Displacement: A Review of the Empirical Literature*, in 3 CRIME PREVENTION STUDIES 197-230 (Ronald V. Clarke ed., 1994); David Weisburd & Anthony A. Braga, *Hot Spots Policing as a Model for Police Innovation*, in POLICE INNOVATION, *supra* note 141, at 225, 231-36.

167. *See* BLUMSTEIN & COHEN, *supra* note 43, at 11-12.

168. *See* Joel Wallman & Alfred Blumstein, *After the Crime Drop*, in THE CRIME DROP IN AMERICA, *supra* note 26, at 319, 324-25.

169. *See supra* text accompanying notes 136-37.

170. *See* ZIMRING, *supra* note 38, at 141-42. In addition, the same pattern observed in homicide was also observed in motor vehicle thefts in New York, demonstrating that the cause of the crime drop was not likely due to factors unique to homicide. *See* KARMEN, *supra* note 124, at 20-22.

171. *See* Steven F. Roth, *Decreasing Violent Crime in: A Result of Vigorous Law Enforcement Efforts, Other, or Both?*, in PROCEEDINGS OF THE HOMICIDE RESEARCH WORKING GROUP MEETINGS, 1997 AND 1998, at 179, 179-83 (1999).

172. *See* Curtis, *supra* note 50, at 1267-74.

173. *Id.* at 1274. For similar accounts, *see* KARMEN, *supra* note 124, at 172-73; and Travis Wendel & Ric Curtis, *The Heraldry of Heroin: “Dope Stamps” and the Dynamics of Drug Markets in New York City*, 30 J. DRUG ISSUES 225, 243-44 (2000).

handguns, reduced crime by disrupting open-air drug sales.<sup>174</sup> An ethnographic study of the Bushwick neighborhood similarly concluded that aggressive police tactics employed since 1992 pushed drug dealing indoors.<sup>175</sup> As another researcher explained: “The shift indoors reduced the risk of being ‘ripped off’, including murderously. . . . The effects of this shift can be directly related to the reduction in homicide. As one police officer put it: ‘There are no more drive-by shootings. There’s no one on the corner to drive by and shoot.’”<sup>176</sup> Thus, “the result of persistent stop, frisk, and arrests meant that young men thought twice before carrying their guns. . . . That guns were not immediately accessible during routine confrontations was a frequently cited explanation for the reduction in murder in the mid-1990s.”<sup>177</sup>

The case for aggressive stop-and-frisk tactics as the cause of New York’s crime decline is not airtight. Jeffrey Fagan and Garth Davies examined the stop-and-frisk data obtained by the New York Attorney General and found that the rate of stops in a precinct in 1998 did not predict homicide rates in the first three months of 1999.<sup>178</sup> This data, however, came relatively late in New York’s crime drop, and given the short span of time and the small number of homicides in any given precinct, this finding is not particularly probative.<sup>179</sup> Moreover, other work by Fagan and Davies—the study of public housing patrols—supports the stop-and-frisk thesis.<sup>180</sup> Professor Fagan, for his part, has pronounced himself persuaded that policing can reduce crime rates, citing, among others, the Corman and Mocan study.<sup>181</sup> But perhaps the most powerful support for the thesis is the lack of any plausible alternative.

As we have seen, non-police explanations for New York’s crime drop are wanting. Only one remains to be explored, and it was advanced by Professors Harcourt and Ludwig, who have argued that Kelling and Sousa’s data could reflect nothing more than a regression to the mean since the greatest declines in violent crime occurred in the precincts

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174. See Bruce D. Johnson, Andrew Golub & Eloise Dunlop, *The Rise and Decline of Hard Drugs, Drug Markets, and Violence in Inner-City New York*, in *THE CRIME DROP IN AMERICA*, *supra* note 26, at 164, 185-89.

175. See Furst et al., *supra* note 162, at 108-09, 126-27.

176. Bowling, *supra* note 153, at 540.

177. *Id.* at 546.

178. See Fagan & Davies, *supra* note 146, at 205-06.

179. Franklin Zimring levels this charge at the study questioning the effectiveness of New York’s police management reforms, see ZIMRING, *supra* note 38, at 153-54, and it applies with equal if not greater force to the Fagan and Davies result.

180. See *supra* text accompanying note 164.

181. See Jeffrey Fagan, *Death and Deterrence Redux: Science, Law, and Causal Reasoning in Capital Punishment*, 4 OHIO ST. CRIM. L.J. 255, 272-74 & n.90 (2006).



with the highest crime rates.<sup>182</sup> Indeed, criminologists widely agree that crime tends to be cyclical and that crime waves are often followed by a regression to the mean.<sup>183</sup> New York's homicide decline, however, does not exhibit the characteristics of a regression to the mean. By 2000 New York's homicide rate had declined to about one-third of its average during the 1980s.<sup>184</sup> This decline was the longest and largest in that city since World War II.<sup>185</sup> As we have seen, the decline continued after 2000, even after the crime rate had reached an unusual low, it was concentrated in the kind of crimes likely to be responsive to stop-and-frisk tactics—visible crime in public places involving handguns—and it roughly doubled the decline observed in other comparable cities. A crime decline of such a magnitude and duration does not reflect the kind of ordinary variability seen in a regression to the mean.<sup>186</sup> Moreover, the fact that the greatest declines occurred in the precincts with the highest crime rates is consistent with the stop-and-frisk thesis, since the most aggressive patrols were conducted in the areas that had been identified as hot spots of crime, as we have seen.<sup>187</sup>

The stop-and-frisk thesis may not be airtight, but it is surely better than any of its competitors. To be sure, it is unlikely that any single factor is responsible for the lion's share of New York's crime drop; but there is a substantial case that New York's aggressive use of stop-and-frisk tactics targeted at hot spots of gang and drug activity played an important role.

One other thing should be mentioned about the use of stop-and-frisk tactics in New York—the claim that these tactics permit the police to utilize highly subjective criteria that unfairly single out racial minorities as targets for investigation.<sup>188</sup> For example, one study found that for the period studied by the New York Attorney General, 1 in 7.9 whites who

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182. See Harcourt & Ludwig, *supra* note 145, at 287-97.

183. See, e.g., Gary LaFree, *Declining Violent Crime Rates in the 1990s: Predicting Crime Booms and Busts*, 23 ANN. REV. SOC. 145, 161-64 (1999).

184. ZIMRING, *supra* note 38, at 138 & fig. 6.2.

185. *Id.* at 23, 196-97.

186. See, e.g., KARMEN, *supra* note 124, at 17; ZIMRING, *supra* note 38, at 136-41; Michael D. Maltz, *Which Homicides Decreased? Why?*, 88 J. CRIM. L. & CRIMINOLOGY 1489, 1490-96 (1998).

187. See *supra* text accompanying note 140.

188. See, e.g., Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 496-503 (2000); David A. Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies*, 6 MICH. J. RACE & L. 237, 256-57 (2001); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 345-46 (2001); Jerome H. Skolnick & Abigail Caplovitz, *Guns, Drugs, and Profiling: Ways to Target Guns and Minimize Racial Profiling*, 43 ARIZ. L. REV. 413, 425-30 (2001).



were stopped were later arrested, compared to 1 in 8.8 Hispanics and 1 in 9.5 African-Americans, and also concluded that minorities were stopped disproportionately to the available proxies for their underlying offending rate (although the authors acknowledge that underlying offending rates are difficult to calculate, especially for weapons and drug offenses).<sup>189</sup> A complete response to this charge is well beyond the scope of the current project; I have attempted it elsewhere.<sup>190</sup> For present purposes, it should suffice simply to note that since the problem of violent crime is disproportionately one involving disadvantaged minority offenders and victims in impoverished inner-city communities, an efficacious anti-violence strategy would naturally deploy disproportionate resources in these areas, even though it will increase the rates at which minority residents of these communities are stopped and frisked. Such a strategy reflects not discrimination but the allocation of scarce resources where they are most needed, even if police may, understandably, be a bit more likely to engage in stop-and-frisk tactics when deployed in high-crime communities. It is, moreover, awfully odd to criticize on grounds of racial unfairness police tactics that have reduced the homicide rate by two-thirds in a city in which almost 80% of homicide victims were minorities.<sup>191</sup> As it happens, during the period studied by the Attorney General, while stop-and-frisk “hit” rates for minorities were modestly elevated, the racial skew for rates of firearm assault and homicide among African-Americans in New York was far greater: “more than twice the rate for Hispanics and nearly ten times the rate for whites.”<sup>192</sup> If the cost of saving lives in the minority community is a modest racial skew in policing—at least if the hit rates are any guide—it seems a price worth paying.

It is perhaps too easy to criticize aggressive inner-city policing when one does not actually reside in a neighborhood that has become a battle zone. In my experience, the residents of high-crime inner-city neighborhoods are far more concerned with driving down rates of violent crime than with debates over racial profiling. Available data bears this out; studies consistently find that once indicia of perceived crime rates

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189. See Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop and Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813, 818-22 (2007). For a contrasting study of stops in 2006 that found little evidence of discrimination, see RIDGEWAY, *supra* note 161, at 13-19.

190. See Rosenthal, *supra* note 154, at 95-102; Lawrence Rosenthal, *The Crime Drop and the Fourth Amendment: Toward an Empirical Jurisprudence of Search and Seizure*, 29 N.Y.U. REV. L. & SOC. CHANGE 641, 662-69 (2005).

191. See *supra* text accompanying note 123.

192. Fagan & Davies, *supra* note 146, at 203.

or neighborhood stability are taken into account, the statistical relationship between race and satisfaction with the local police largely if not entirely disappears.<sup>193</sup> What people care about most, regardless of race, is whether the police are keeping them safe. In terms of the priorities of the African-American community, polls show that African-Americans express greater fear of crime and greater opposition to legalization of drugs than whites.<sup>194</sup> The African-American community is well aware of the threat it faces from drugs and violence. In terms of addressing that threat, New York's stop-and-frisk tactics stack up pretty well.

#### D. *The Stop-and-Frisk Thesis and Gun Control*

It remains to consider why New York City achieved much greater reductions in violent crime than other big cities. Part of the reason may be that it used stop-and-frisk tactics more widely and aggressively than other cities; this, however, is only an educated guess since there are no studies comparing the rate of stop-and-frisk tactics across cities. It may also be that New York's unusual population density magnified the efficacy of its stop-and-frisk tactics.<sup>195</sup> But New York's gun control laws played an important part as well.

##### 1. GUN CONTROL LAWS AND THE SCOPE OF POLICE AUTHORITY ON THE STREETScape

The authority of the police to utilize stop-and-frisk tactics is regulated by the Fourth Amendment's prohibition on "unreasonable search and seizure."<sup>196</sup> It has been settled since *Terry v. Ohio*<sup>197</sup> that when an officer forcibly detains an individual there has been a "seizure" within the meaning of the Fourth Amendment.<sup>198</sup> A forcible stop and brief detention is nevertheless considered reasonable when the officer reasonably

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193. See, e.g., CHERYL MAXSON, KAREN HENNIGAN & DAVID SLOAN, U.S. DEP'T OF JUSTICE, FACTORS THAT INFLUENCE PUBLIC OPINION OF THE POLICE 8 (June 2003); RONALD WEITZER & STEVEN A. TUCH, RACE AND POLICING IN AMERICA: CONFLICT AND REFORM 41-45 & tbl. 2.2 (2006); Michael D. Reisig & Roger B. Parks, *Experience, Quality of Life, and Neighborhood Context: A Hierarchical Analysis of Satisfaction with Police*, 17 JUSTICE Q. 607, 623-25 (2000); Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 LAW & SOC'Y REV. 777, 798-800 (2000).

194. See SOURCEBOOK, *supra* note 98, at 130-31 tbl. 2.38, 132 tbls. 2.39 & 2.40, 134-35 tbl. 2.42, 158-59 tbl. 2.68.

195. See ZIMRING, *supra* note 38, at 157.

196. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV.

197. 392 U.S. 1 (1968).

198. *Id.* at 16-20; *accord*, e.g., *Brendlin v. California*, 127 S. Ct. 2400, 2405-06 (2007); *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

suspects that criminal activity is afoot.<sup>199</sup> Similarly, a frisk is considered reasonable when an officer reasonably suspects that the subject may be armed and dangerous.<sup>200</sup> There is an as-yet unappreciated relationship between the scope of police authority to engage in stop-and-frisk tactics and firearms regulation.

When applicable law bans the possession or carrying of firearms, whenever an officer reasonably suspects that an individual is illegally carrying a firearm—such as a suspicious bulge in a waistband—a stop-and-frisk is considered constitutionally reasonable.<sup>201</sup> In this fashion, gun control laws expand the authority of the police to intervene on the streetscape. When applicable law does not ban carrying a firearm, however, the Fourth Amendment does not permit a stop-and-frisk regardless of any indication that a suspect is armed or potentially dangerous because there is no indication that the suspect is violating the law.<sup>202</sup>

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199. *See, e.g.*, *Florida v. J.L.*, 529 U.S. 266, 269-74 (2000); *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000); *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989).

200. *See, e.g.*, *Minnesota v. Dickerson*, 508 U.S. 366, 374 (1993); *Michigan v. Long*, 463 U.S. 1032, 1046-50 (1983).

201. *See, e.g.*, *United States v. Black*, 525 F.3d 359, 364-65 (4th Cir. 2008) (officers saw bulge in clothing consistent with weapon and Virginia law prohibited carrying concealed weapons); *United States v. Mayo*, 361 F.3d 802, 807-08 (4th Cir. 2004) (officers had reasonable suspicion that suspect was unlawfully carrying firearm when they encountered suspect in high-crime area, he kept a hand in his pocket which appeared to contain something heavy, walked evasively and looked nervous); *United States v. Gibson*, 64 F.3d 617, 622-24 (11th Cir. 1995) (responding to anonymous report of armed African-American males in area known for firearms crime, officers saw suspect in a trench coat who reached behind his back), *cert. denied*, 517 U.S. 1173 (1996); *United States v. Morton*, 400 F. Supp. 2d 871, 875-79 (E.D. Va. 2005) (based on report of reliable confidential informant that suspect was carrying a concealed firearm, officers properly frisked suspect matching description); *Commonwealth v. DePeiza*, 868 N.E.2d 90, 95-96 (Mass. 2007) (officers had reasonable suspicion that suspect was illegally carrying a firearm when they encountered suspect in a high-crime area known for incidents involving firearms and saw him walking with his right arm stiff and pressed against his right side, he appeared nervous and shifted his weight from side to side, repeatedly hiding his right side from the officers' view, and the officers noticed the right pocket of his jacket appeared to contain something heavy); *Commonwealth v. Stevenson*, 894 A.2d 759, 770 (Pa. Super. Ct. 2006) (officers had reasonable suspicion that the defendant was unlawfully in possession of a firearm when they saw the outline of the handgun through the defendant's jacket pocket); *Herring v. State*, 393 So. 2d 67, 68-69 (Fla. Dist. Ct. App. 1981) (officer knew suspect had previously carried a handgun and when officer later observed large bulge under his coat officer had reasonable suspicion that suspect was unlawfully carrying a firearm); *People v. Coulombe*, 102 Cal. Rptr. 2d 798, 799, 803-04 (Cal. Ct. App. 2000) (suspect who matched description of an individual reported to be unlawfully carrying a gun and clutched the pocket area of his pants was properly frisked); *People v. Miles*, 242 Cal. Rptr. 107, 108-10 (Cal. Ct. App. 1987) (pat-down proper when officers, in response to report of suspicious loiterers, approached suspect, who initially faced them and then turned around, and saw suspicious bulge).

202. *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); *Commonwealth v. Couture*, 552

2. THE IMPORTANCE OF WEAPONS SEARCHES  
TO STOP-AND-FRISK POLICING IN NEW YORK

In New York, state law prohibits possession of a handgun without a license and it generally requires that handguns be kept only within the licensee's home or place of business, with an exception for licensees engaged in law enforcement.<sup>203</sup> In New York City, an additional permit must be obtained.<sup>204</sup> The issuance of permits in New York City is highly discretionary, and an applicant must face some extraordinary personal danger that requires the applicant to carry a handgun.<sup>205</sup> The New York City authorities rarely exercise their discretion to issue permits for handguns;<sup>206</sup> for this reason, New York City has been characterized as maintaining a virtual ban on handguns.<sup>207</sup> And, because individuals are rarely permitted to carry guns, when an officer perceives some reasonable indication that an individual is carrying a firearm, a stop-and-frisk is permissible under the Fourth Amendment because the officer reasonably believes that a crime is underway.

The data collected by the New York Attorney General makes plain the central role of weapons searches to the New York regime of stop-and-frisk:

**Table 1**<sup>208</sup>

Suspected Charge	Total Stops	% of Total Stops
Violent Crime	23,587	18.6
Weapon	56,499	44.6
Property Crime	14,822	11.7
Drug Sale/Possession	10,684	8.4
Misdemeanor/Quality of Life	9,731	7.7
Other	3,818	3.0
Missing Suspected Charge	7,612	6.0

N.E.2d 538, 541 (Mass. 1990); *Gomez v. United States*, 597 A.2d 884, 890-91 (D.C. 1991); 4 WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 9.6(a) (4th ed. 2004).

203. See N.Y. PENAL LAW § 400.00(2) (McKinney 2007).

204. See *id.* § 400.00(6).

205. See RULES OF THE CITY OF N.Y. tit. 38, § 5-03 (2008).

206. See, e.g., David B. Kopel, *Clueless: The Misuse of BATF Firearms Tracing Data*, 1999 L. REV. MICH. ST. U. DETROIT C.L. 171, 176-77.

207. See, e.g., 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).

208. STOP AND FRISK REPORT, *supra* note 139, at App. tbl. I.A.5.

The data also indicates that the kind of stop most likely to result in a frisk is a weapons stop because of the high proportion of stops in which a report was mandated.<sup>209</sup>

Thus, weapons searches were central to the New York stop-and-frisk strategy; indeed, the 1994 management reforms stressed the role of weapons searches in the new policing strategy.<sup>210</sup> For this reason, the New York experience may well be a citywide and decade-long replication of the aggressive weapons patrol tactics that have demonstrated their efficacy in a number of studies elsewhere in the country.<sup>211</sup> We have seen, however, that the ability of the authorities to conduct weapons searches consistent with constitutional limitations is vitally dependent on the gun control laws. The New York Attorney General's assessment of Fourth Amendment law governing New York City's stop-and-frisk practices illustrates the importance of gun-control laws to the scope of stop-and-frisk authority; in the Attorney General's view, an officer may conduct stop-and-frisk after observing a suspicious bulge consistent with the presence of a gun in a suspect's waistband area,<sup>212</sup> but may not stop-and-frisk based on more generalized indicia of criminality, such as a suspect's refusal to answer questions or provide identification, avoidance of the police, nervous reaction on questioning, or presence in a high-crime area.<sup>213</sup> Accordingly, if it were generally legal to carry and possess handguns in New York, the ability of the police to utilize a regime of stop-and-frisk would be sharply circumscribed by the Fourth Amendment. The stop-and-frisk data suggest that New York's gun control laws deserve a good part of the credit for New York's precipitous decline in violent crime.

It should be noted that the Attorney General's report 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 23.5% of all forms did not provide sufficient information to make a determination about whether the stop was justified.<sup>214</sup> In addition, the data shows that the error rate for weapons searches

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209. See *id.* App. tbl. I.B.3. It is useful to compare these figures to the New York quality-of-life initiative of the 1980s. Over 38 months, that program produced only 48,960 arrests. See Bowling, *supra* note 153, at 547.

210. See STOP AND FRISK REPORT, *supra* note 139, at 53.

211. See *supra* text accompanying note 166.

212. See STOP AND FRISK REPORT, *supra* note 139, at 36-40.

213. See *id.* at 30-34.

214. See *id.* 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.

was higher than for other types of searches, and highest for African-Americans.<sup>215</sup> Of course, part of the explanation for this pattern is that it is likely that officers were less thorough in filling out forms when they knew there would be no criminal case arising from the encounter. As for the racial skew, as we have seen, both the benefits and burdens of the stop-and-frisk tactic fall disproportionately on the African-American community, and when the benefits include saving so many lives, charges of unwarranted discrimination are perilous.<sup>216</sup> Still, there is little doubt that evaluating suspicious bulges and the like involve a substantial risk of error or discrimination. This objection, however, cannot be limited to weapons searches.

*Terry*'s regime of stop-and-frisk on less than probable cause inevitably requires officers to make difficult judgments laden with a risk of error—weapons searches involve little more ambiguity than the facts of *Terry* itself, in which an officer was called on to decide whether individuals pacing and conferring in front of a store were planning a burglary.<sup>217</sup> The Court has stressed that the *Terry* standard “falls con-

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215. The Attorney General's report indicates that of weapons stops, 2.6% resulted in an arrest on a weapons charge and 3.4% resulted in an arrest on another charge. *See id.* at App. tbl. I.b.3. Arrest and stop-to-arrest rates in New York during the period studied by the Attorney General, broken down demographically:

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Crime Type	Mean Arrest Rate	Stop-Arrest Ratio (per 10,000 precinct population)
White		
Violent	75.6	5.94
Property	57.9	7.61
Drugs	581.0	5.22
Weapons	102.7	15.89
Black		
Violent	285.6	7.03
Property	89.3	7.04
Drugs	956.1	6.94
Weapons	675.3	20.08
Hispanic		
Violent	70.1	7.20
Property	24.9	8.47
Drugs	194.5	6.14
Weapons	218.8	16.74

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Fagan & Davies, *supra* note 146, at 202 tbl. 9.1.

216. *See supra* text accompanying notes 188-94.

217. *See* 392 U.S. at 5-6.



siderably short of satisfying a preponderance of the evidence standard,”<sup>218</sup> and added that “*Terry* accepts the risk that officers may stop innocent people.”<sup>219</sup> The Court has also—unanimously—rejected the view that police practices that create an unacceptable risk of pretextual seizures should be condemned on the ground that there is no reliable and principled method for identifying the threshold for condemning such practices.<sup>220</sup> There is, to be sure, a cottage industry of academic criticism of the *Terry* standard on the ground that it grants excessive discretion to police.<sup>221</sup> Yet, as the academic criticism of *Terry* demonstrates, if there is an objection to excessive discretion, it pervades the whole of the *Terry* doctrine. Weapons searches may be a category where the risk of error is on the high side—although the benefits of such searches may be unusually high as well—but many *Terry* stops will involve comparable risks of error. Absent fundamental revision in the Court’s Fourth Amendment jurisprudence, there is no basis for singling out weapons searches for constitutional condemnation; there is little reason to believe that the typical weapons search involves a greater risk of error than the stop-and-frisk at issue in *Terry* itself.

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218. *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (citation omitted).

219. *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000). Accordingly, the ratio of weapons stop-and-frisk to arrest should not be especially troubling. *Terry* assesses the reasonableness of a stop-and-frisk by balancing the individual’s liberty interests against the law enforcement interests underlying a search, and considers officer safety to be an especially weighty interest. *See Terry*, 392 U.S. at 20-27. For that reason, it is doubtful that the Fourth Amendment should be understood to require an especially high probability before an officer is permitted to perform a brief pat-down of a person suspected to be armed. A rule requiring a relatively high probability would most likely cause officers who indulge even a modicum of regard for their own safety to refrain from ever approaching a suspect at a gang or drug hot spot, granting effective immunity to a large volume of gang and drug activity.

220. *See Whren v. United States*, 517 U.S. 806, 813-16 (1996).

221. *See, e.g.,* Devon W. Carbado, *Erasing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness”*, 98 COLUM. L. REV. 1642, 1648-63 (1998); Frank Rudy Cooper, *New Voices on the War on Drugs: The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling, and Arvizu*, 47 VILL. L. REV. 851 (2002); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); Diana Roberto Donahoe, “*Could Have*,” “*Would Have*”: *What the Supreme Court Should Have Decided in Whren v. United States*, 34 AM. CRIM. L. REV. 1193 (1997); Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 FORDHAM L. REV. 329 (2002); David A. Harris, *Car Wars: The Fourth Amendment’s Death on the Highway*, 66 GEO. WASH. L. REV. 556 (1998); Wayne R. LaFave, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843 (2004); Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419 (2002); Erik Luna, *New Voices on the War on Drugs: Drug Exceptionalism*, 47 VILL. L. REV. 753 (2002); Tracey Maclin, *Race and the Fourth*

New York's tactics represent an unsurprising effort to take the most aggressive possible steps to drive down the rate of violent crime consistent with prevailing constitutional standards. New York's police can hardly be faulted for utilizing the discretion that the Court has been content to grant them. Indeed, the stop-and-frisk thesis suggests that the Fourth Amendment's effort to balance liberty and order should be especially solicitous of police authority when it comes to weapons searches precisely because they combat such a serious threat of violent crime.

The case for gun control suggested by the stop-and-frisk thesis is quite different from the conventional case made for restrictive firearms regulations. The conventional case asserts that some kinds of firearms, especially handguns, are unusually prone to misuse, and by restricting the possession and distribution of such firearms, they will, over time, become less accessible to those who would misuse them, although the evidence in support of this approach is, at best, mixed.<sup>222</sup> The conventional case is roundly attacked on the view that criminals will find it all too easy to circumvent such regulations.<sup>223</sup> Even those persuaded by the conventional case are skeptical of the value of state or local gun regulation under circumstances in which it is relatively easy for

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*Amendment*, 51 VAND. L. REV. 333 (1998); Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998); Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?*, 3 U. PA. J. CONST. L. 398 (2001); Thomas Regnier, *The "Loyal Foot Soldier": Can the Fourth Amendment Survive the Supreme Court's War on Drugs?*, 72 U.M.K.C.L. REV. 631 (2004); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999); Katheryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C.L. REV. 717 (1999); Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry "Stop and Frisk"*, 60 OKLA. L. REV. 451 (1997); Stephen A. Saltzburg, *The Supreme Court, Criminal Procedure, and Judicial Integrity*, 40 AM. CRIM. L. REV. 143 (2003); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271; Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391 (2003); Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian To the Internment*, 70 FORDHAM L. REV. 2257 (2002); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U.L. REV. 956 (1999).

222. See, e.g., FIREARMS AND VIOLENCE, *supra* note 29, at 97-98. For a recent summary of what I have labeled the conventional case, see Carl T. Bogus, *Public Policy Approach: Gun Control and America's Cities: Public Policy and Politics*, 1 ALB. GOV'T L. REV. 440, 443-64 (2008).

223. For a useful summary of the evidence against the conventional case, see Don B. Kates, *Would Banning Firearms Reduce Murder and Suicide? A Review of International and Some Domestic Evidence*, 30 HARV. J.L. & PUB. POL'Y 649 (2007).

guns to leak in from nearby jurisdictions.<sup>224</sup> The stop-and-frisk thesis, however, argues that gun control works by increasing the ability of the police to intervene on the streetscape in a manner likely to drive gangs and drug dealing indoors, thereby reducing the risk of violent confrontations.

Moreover, increasing the authority of the police to engage in stop-and-frisk tactics may not be the only means by which New York's gun control laws contribute to the success of its policing tactics. Because it is difficult to purchase a handgun legally in New York, it may be the case that stop-and-frisk tactics are especially effective because of the difficulty in replacing handguns that are seized by the police.<sup>225</sup> To be sure, a would-be offender can always leave the jurisdiction and endeavor to buy a handgun legally elsewhere, or buy a weapon illegally from a gunrunner, but the legal and practical difficulties of such endeavors may reduce the rate at which firearms can be replaced. The available empirical evidence, though limited, suggests that the wages of gang foot soldiers are not much higher than those in legitimate low-skill labor markets.<sup>226</sup> Thus, even modest increases in the price of handguns may have a significant inhibitory effect on gang crime. Although there is no study of New York gun markets on this point, a study of Chicago, which bans the possession of handguns, found that the ban dramatically increased the difficulty of obtaining handguns even for potential offenders in high-crime communities.<sup>227</sup> It may well be that when a jurisdiction bans the possession and sale of handguns, raising the cost and difficulty of replacing handguns once they are seized by the authorities, offenders are less likely to carry them in public places where they are vulnerable to stop-and-frisk tactics. Similarly, when it is also illegal to carry rifles and other non-concealable firearms in public, the risk that violent public confrontations will turn deadly is reduced. And, as we have seen, when firearms disappear from public places, levels of violence are likely to subside.

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224. See, e.g., Joseph A. Peters, Philip J. Cook & Jens Ludwig, *Gun Crime and Gun Control: The Hawaiian Experience*, 2005 U. CHI. LEG. F. 55.

225. See ZIMRING, *supra* note 38, at 157-58.

226. See, e.g., PHILIPPE BOURGOIS, IN SEARCH OF RESPECT: SELLING CRACK IN EL BARRIO 91-105 (1995); PADILLA, *supra* note 49, at 169-74; Hagedorn, *supra* note 49, at 202-04; Levitt & Venkatesh, *supra* note 54, at 756, 770-75.

227. See Philip J. Cook et al., *Underground Gun Markets*, 117 ECON. J. F588 (2007).

*E. The Second Amendment Threat To Stop-and-Frisk*

It should by now be evident that there is a case to be made that New York's law banning the carrying of firearms in public, as well as its effective prohibition on the possession of handguns, was central to its ability to drive down the rate of violent crime. After *Heller*, however, there is a serious question whether the Second Amendment permits laws banning the carrying of firearms in public. Although *Heller* asserted only a right to keep a handgun in his home,<sup>228</sup> the Second Amendment protects the rights to both "keep" and "bear" arms, and the Court defined neither right in terms limited to the home. The Court defined the right to "keep" arms as the right to possess them;<sup>229</sup> and it defined the right to "bear" arms as the right to "carry[] for a particular purpose—confrontation."<sup>230</sup> The Court added that "nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools of government buildings,"<sup>231</sup> confirming that it had recognized a right reaching outside of the home. Equally important, the Court did not limit this right to bear arms to those who carry for purposes of legitimate self-defense; it explained that the term includes "the carrying of the weapon . . . for the purpose of 'offensive or defensive action,'"<sup>232</sup> 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."<sup>233</sup>

As a consequence of this holding, it should follow that the Second Amendment protects a right to carry firearms in public; if the text recognizes a right to carry firearms for purposes of confrontation, it would seemingly confer an unqualified right to carry firearms in public, whether openly or concealed. After all, the text contains nothing to suggest that it confers a right to bear arms only within the home, or when visible to others.<sup>234</sup> To be sure, the Court noted in dicta that "the

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228. 128 S. Ct. at 2788.

229. *Id.* at 2792.

230. *Id.* at 2793.

231. *Id.* at 2816-17.

232. *Id.* at 2793 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (Ginsburg, J., dissenting)).

233. 18 U.S.C. § 924(c)(1) (2006). This was the statute at issue in *Muscarello*. See 524 U.S. at 126.

234. For a pre-*Heller* argument along these lines against concealed-carry prohibitions, see William J. Michael, *Questioning the Necessity of Concealed Carry Laws*, 38 AKRON L. REV. 53, 66 (2005).

majority of 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues,<sup>235</sup> but it is difficult to reconcile such cases with the Court's interpretation of the text as recognizing a "right to possess and carry weapons in case of confrontation."<sup>236</sup> It is equally difficult to reconcile these laws with the Court's insistence that the Second Amendment should be construed as it was originally understood by the public at the time of its adoption. The Court did not identify any framing-era support for concealed-carry prohibitions, in contrast to its limitation on the type of "arms" protected by the Second Amendment, for which the Court identified framing-era support.<sup>237</sup>

Indeed, under *Heller*, police-power justifications for limiting the right to carry firearms seem to be irrelevant to the constitutional inquiry given the Court's emphatic rejection of Justice Breyer's view that reasonable gun-control regulations should be upheld.<sup>238</sup> The Court rejected any type of balancing test that would weigh the right to bear arms against police-power justifications for regulation not rooted in framing-era understandings: "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) judges think that scope too broad."<sup>239</sup> For this reason as well, it is difficult to square the Court's dicta, which seemingly expresses approval for concealed-carry and other laws, with its holding that the right to bear arms includes an unqualified right to carry that is not to be balanced against regulatory interests.<sup>240</sup>

At a minimum, the Court's holding, including its apparent rejection of police-power regulations lacking historical support, suggests that gang members have a right to visibly carry firearms consistent with their constitutional right to carry arms for purposes of confrontation. Indeed, the Court noted that nineteenth-century cases had understood the Second Amendment to secure a right to carry firearms openly in public.<sup>241</sup> This

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235. *Heller*, 128 S. Ct. at 2816.

236. *Id.* at 2797.

237. *Id.* at 2788, 2816-17.

238. *Id.* at 2817 n. 27, 2821.

239. *Id.* at 2821.

240. Justice Breyer had the same difficulty in grasping the basis for the Court's apparent willingness to uphold such laws. *Id.* at 2869-70 (dissenting opinion).

241. *Id.* at 2809. Michael Dorf nevertheless argues that the privacy interests associated with the home might enhance Second Amendment protections in the home. See Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 231-33 (2008). This view seems inconsistent with the Court's definition of the right to "bear" arms, which is not limited to private contexts.

outcome would give effective immunity to a common means by which gangs occupy turf and dominate the drug trade, as we have seen. To be sure, if a gang member is part of a conspiracy to distribute drugs or otherwise violate the law, he is subject to arrest, but it is hard to assemble the proof for such cases, especially given the prevalence of gang intimidation of potential witnesses. Undercover operations are of some utility in controlling gang violence, or at least the gang dominated drug trade, but there are obvious resource limitations on undercover operations given the need to keep a substantial uniformed presence on the streets, especially in high-crime, unstable neighborhoods. There are limitations as well on the number of officers that can be used in an undercover capacity without their identities becoming known. If undercover operations could have eliminated urban drug dealing and violence, they would have done so long ago.

As we have seen, the New York stop-and-frisk strategy relied on the interaction of the reasonable suspicion standards and its strict gun control laws, but if the Court has conferred constitutional protection on all who carry firearms for purposes of confrontation unless the authorities can assemble a conspiracy case, the New York strategy would become wholly impracticable. Moreover, even if the Second Amendment were thought to tolerate laws requiring a license to carry a concealed weapon (perhaps only so long as licenses issued liberally), as the Court assumed in *Heller*,<sup>242</sup> this would not permit stop-and-frisk tactics based on an officer's speculation that a suspect lacks the requisite license any more than an officer can stop vehicles by speculating that the driver lacks the requisite license or registration.<sup>243</sup>

Thus, the Second Amendment, as construed in *Heller*, poses a potent threat to the regime of stop-and-frisk as practiced in New York. To be sure, the case that stop-and-frisk tactics deserve the credit for the crime drop in New York—and perhaps elsewhere—is not unassailable, and it seems highly unlikely that any single factor can be isolated as a substantial cause of New York's crime drop. Nevertheless, the Second Amendment's limits on firearms regulation, in conjunction with the Fourth Amendment's limits on search and seizure, threaten to end

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242. *Heller*, 128 S. Ct. at 2819.

243. The Court has held that stops of vehicles to check license and registration violate the Fourth Amendment in the absence of probable cause or reasonable suspicion. See *Delaware v. Prouse*, 440 U.S. 648, 655-63 (1979). The Court has also held that roadblocks erected to stop and check vehicles for guns and drugs, even when placed in high-crime areas, do not comport with the Fourth Amendment. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 40-48 (2000).



the experimentation that is necessary to obtain a definitive answer to the questions raised by the stop-and-frisk thesis.

Of course, the Second Amendment would end experimentation with weapons searches only if it applies to state and local governments. It is to this question that we next turn.

## II. The Originalist Case for Second Amendment Incorporation

As we have seen, nineteenth-century precedents rejected application of the Second Amendment to the states,<sup>244</sup> but that is not the end of the matter. Many of the nineteenth-century precedents that rejected incorporation did not survive; and historical evidence regarding the intentions of the Framers of the Fourteenth Amendment was often critical as the jurisprudence of incorporation evolved. As the Supreme Court has itself observed, that Court “has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which is contemplated by its Framers when they added the Amendment to our constitutional scheme.”<sup>245</sup> Thus, evidence regarding the intentions of the Framers of the Fourteenth Amendment is critical to the question of Second Amendment incorporation.

### A. *The Historical Case for Incorporation of the Bill of Rights*

Led by the work of Akhil Amar and Michael Kent Curtis, building on the earlier work of William Winslow Crosskey, there is something of a scholarly trend favoring the view that the Fourteenth Amendment was intended to secure the Bill of Rights against state interference, not through the Amendment’s Due Process Clause,<sup>246</sup> but instead by virtue of its command that no state “abridge the privileges or immunities of any citizen of the United States.”<sup>247</sup>

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244. See *supra* text accompanying note 10.

245. *Malloy v. Hogan*, 378 U.S. 1, 5 (1964).

246. The fundamental obstacle to incorporation of the Bill of Rights under the Due Process Clause is textual. If the Fourteenth Amendment’s Due Process Clause incorporated the first eight amendments, it would create a redundancy with the Fifth Amendment’s Due Process Clause. See *Adamson v. California*, 332 U.S. 46, 63-66 (1947) (Frankfurter, J., concurring). I have previously undertaken to survey the evidence regarding the original meaning of due process. See Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 28-47 (2007).

247. U.S. CONST. amend. XIV, § 1. For the views of Amar, Curtis and Crosskey, see AMAR, *supra* note 14, at 163-230; MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 57-91, 215-20 (1986); 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF*

The crown jewel in the case for incorporation is the speech of Sen. Jacob Howard as he introduced what would become the Fourteenth Amendment on the floor of the Senate. Howard explained the new Privileges or Immunities Clause by reference to a leading case construing the Privileges and Immunities Clause in Article IV of the existing Constitution:<sup>248</sup>

It would be a curious question to solve what are the privileges and immunities of citizens of each of the States in the several States. . . . [W]e may gather some intimation of what probably will be the opinion of the judiciary by referring to a case adjudged many years ago in one of the circuit courts of the United States by Judge Washington. . . . It is the case of *Corfield vs. Coryell*. . . .

“The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.”

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THE UNITED STATES 1089-95 (1953). For leading attacks on the historical case for incorporation, see, for example, RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 155-89 (2d ed. 1997); DONALD A. DRIPPS, *ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE* 27-36 (2003); JACOBUS TENBROEK, *EQUAL UNDER LAW: THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 228-39 (1951); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down that Wrong Road Again”*, 74 N.C. L. REV. 1559, 1574-82 (1996); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

248. “The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states.” U.S. CONST. art. IV, § 2, cl. 1.

Such is the character of the privileges and immunities spoken of in the second section of the Fourth Article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot fully be defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments to the Constitution; such as the freedom of speech and of the press, the right of the people peaceably to assemble and petition the Government for redress of grievances, a right appertaining to each and all of the people, *the right to keep and bear arms*; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.<sup>249</sup>

Almost as plain was Rep. John Bingham, a principal drafter of the Amendment.<sup>250</sup> Although he made no express reference to the first eight amendments in the debate over what became the Fourteenth Amendment, during the debate over an earlier proposal that would have granted Congress “power to enact all laws which shall be necessary and proper to assure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property,”<sup>251</sup> Bingham repeatedly stated that the proposal would permit enforcement of the “Bill of Rights” against the states.<sup>252</sup> While no other member of Congress was that clear, many others indicated that they understood the proposed Fourteenth Amendment to provide a remedy for violations by the states of the preexisting provisions of the Constitution.<sup>253</sup> Moreover, one influential antebellum treatise, albeit in the course of a rather unconventional

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249. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (emphasis added) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230) (internal quotations omitted)).

250. On the role of Bingham, see, for example, EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869*, at 52-60, 79-92 (1990).

251. CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).

252. See *id.* at 1088-94. During the debate over the final version, moreover, Bingham indicated that the proposed amendment would authorize a remedy against states for “cruel and unusual punishments” in violation of the Eighth Amendment. *Id.* at 2542. In the debates over what would become the Civil Rights Act of 1871, moreover, Bingham reiterated his view that the privileges and immunities of citizens included the first eight amendments. See CONG. GLOBE, 42d Cong., 1st Sess. 84 (1871).

253. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 586 (proposed Amendment “provides in effect that Congress shall have power to enforce by appropriate legislation all the guarantees of the Constitution”) (Rep. Donnelly), 1054 (proposal would “give vitality and life to portions of the Constitution that probably were intended from the beginning to have life and vitality”) (Rep. Higby), 1057 (proposal protected rights “already to be found in the Constitution”) (Rep. Kelley), 1066 (proposal would protect “freedom of speech from state suppression”) (Rep. Price), 1088 (proposal protected “those privileges and immunities which are guaranteed . . . under the Constitution”) (Rep. Woodbridge), 1263 (characterizing “the right of speech” “the writ of habeas corpus, and the right of

attack on the constitutionality of slavery, described the right to bear arms as among the “immunities of a citizen of the United States.”<sup>254</sup>

There is also evidence that the Framers of the Fourteenth Amendment were especially concerned about the right to bear arms. In the aftermath of the Civil War, violence against the newly freed slaves and Union sympathizers became widespread in the South.<sup>255</sup> The newly freed slaves were frequently denied the right to possess firearms, a fact of considerable concern to the Reconstruction Congress,<sup>256</sup> as the Court noted in *Heller*.<sup>257</sup> In its report recommending adoption of the Fourteenth Amendment, the Joint Committee on Reconstruction stressed the magnitude of Southern lawlessness.<sup>258</sup> A number of members of Congress also expressed particular concern that the freedmen and Union sympathizers should enjoy the right to bear arms.<sup>259</sup>

Congressional concern about the right to bear arms was not limited to the stray statements of individual legislators. The Freedmen’s Bureau Act provides particularly powerful evidence of the centrality of the Second Amendment to the Reconstruction Congress; it provided that “the constitutional right to bear arms, shall be secured to and enjoyed by all

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petition” as “the rights and immunities of citizens”) (Rep. Broomall), 1294 (referring to proposal as a “bill of rights”) (Rep. Wilson), 2459 (proposal’s protections “all are asserted, in some form or another, in our . . . organic law”) (Rep. Stevens), 2555-56 appendix (proposal is “more valuable for clearing away bad interpretations and bad uses of the Constitution as it is than for any positive grant of new power”) (Rep. Baker), 2961 (proposal would enable enforcement of “all the provisions of the Constitution”) (Sen. Poland) (1866).

254. JOEL TIFFANY, *A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY* 117 (1849).

255. See, e.g., ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877*, at 119-23 (1988); JOHN HOPE FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR* 51-53 (1961); KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION: 1865-1877*, at 75 (1965).

256. See, e.g., SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 168-71 (2000); STEPHEN P. HALBROOK, *FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876*, at 1-44 (1998); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 *GEO. L.J.* 309, 342-46 (1991).

257. 128 S. Ct. at 2810-11.

258. See REPORT OF THE JOINT COMM. ON RECONSTRUCTION, H.R. Rep. No. 39-30, at xvii (1866).

259. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 337 (“[Freedmen] also ask that they should have the constitutional protection in keeping arms, in holding public assemblies, and in complete liberty of speech and of the press.”) (Sen. Sumner), 1072 (“As citizens of the United States, [freedmen] have equal right to protection, and to keep and bear arms for self-defense”) (Rep. Nye), 1182 (“Every man should have . . . the right to bear arms for the defense of himself and family and his homestead.”) (Sen. Pomeroy), 1266 (“Make the colored man a citizen of the United States and he has every right which you or I have. . . . He has . . . a right to defend himself and his wife and children; a right to bear arms”) (Rep. Raymond), 1838 (“I find in the Constitution . . . an article

citizens . . . without respect to race or color, or previous condition of slavery.”<sup>260</sup>

### B. *Original Public Meaning and the Historical Case for Incorporation*

Evidence of the intentions of key legislators does not cinch the historical case for incorporation of the Bill of Rights into the Fourteenth Amendment, at least under contemporary thinking about the role of historical evidence in constitutional interpretation. Although in the 1970s and 1980s, the advocates of originalism frequently argued that the Constitution should be construed according to the intentions of those who framed its text,<sup>261</sup> the original-intentions approach met two powerful objections. First, because the process of adopting constitutional text is a collective one, the difficulties of ascertaining some sort of collective intention when multitudes were involved in framing and ratification are formidable.<sup>262</sup> Second, there is considerable evidence that under the rules for interpreting texts that the framers would have understood as controlling in the eighteenth and nineteenth centuries, legal texts were to be construed according to the ordinarily understood meaning of their terms without regard to the subjective intentions of the drafters.<sup>263</sup> By

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which declares that ‘the right of the people to keep and bear arms shall not be infringed.’ For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws.”) (Rep. Clarke), 2774 (“The Union soldier is fined for bearing arms. Thus the right of the people to keep and bear arms is infringed.”) (Rep. Eliot), 3210 (“Florida makes it a misdemeanor for colored men to carry weapons without a license. . . . South Carolina has the same enactments. . . . Cunning legislative devices are being invented in most of the states to restore slavery in fact.”) (Rep. Julian) (1866).

260. Act of July 10, 1866, § 14, 14 Stat. 173, 176-77 (1866).

261. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 363-72 (1977); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Edwin Meese III, *Interpreting the Constitution*, in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 13-21 (Jack N. Rakove ed., 1990); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL’Y 5 (1988).

262. See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 14-25 (2002); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* 284-398 (1988); Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 456-74 (1984); Boris I. Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?*, 19 HARV. J.L. & PUB. POL’Y 9, 30-36 (1995); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 209-22 (1980); Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989); Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 FORDHAM L. REV. 1587 (1997); Marc V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793-804 (1983).

263. See, e.g., JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 340-65 (1996); Hans W. Baade, “*Original Intent*” in

the 1990s, originalists had largely acknowledged the force of these objections and embraced the view that the Constitution should be construed in light of the generally understood meaning of its text at the time of adoption rather than by reference to the likely intentions of the drafters or ratifiers.<sup>264</sup>

The Court in *Heller*, for its part, endorsed public-meaning originalism:

In interpreting this text, we are guided by the principle 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.<sup>265</sup>

The Court additionally rejected the use of “statements of those who drafted or voted for the law that are made after its enactment” in favor of “examination of a variety of legal and other sources to determine the *public understanding* of a legal text . . . .”<sup>266</sup>

As we have seen, the historical case for incorporation largely rests on evidence of the intentions of the most critical drafters of the Fourteenth Amendment. To date, the advocates of incorporation have made little

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*Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1006-62 (1991); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

264. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 92-117 (2004); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143-51 (1990); MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 28-53 (1994); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 160-212 (1999); Baade, *supra* note 263, at 1103-07; Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295-307 (2007); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 550-60 (1994); Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution"*, 72 IOWA L. REV. 1177, 1186-259 (1987); Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751, 756-60 (1987); Richard S. Kay, *Adherence to Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226, 229-36 (1988); Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127-48 (2003); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269 (1997); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507 (1988); Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529 (1998) (reviewing RAKOVE, *supra* note 263); Lawrence B. Solum, *Constitutional Texting*, 44 SAN DIEGO L. REV. 123 (2007).

265. 128 S. Ct. at 2788 (citation omitted) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931) (brackets in original)).

266. *Id.* at 2805 (emphasis in original). Justice Scalia, the author of the Court's opinion, is an avowed advocate of original public meaning. See Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 38-41 (Amy Gutmann ed., 1997).



effort either to meet the objections to original-intention originalism or to reframe the argument for incorporation in terms of original public meaning. When the case for incorporation is considered in terms of the original public meaning of the Privileges or Immunities Clause, it weakens considerably.

#### 1. TEXTUAL OBSTACLES TO INCORPORATION

The threshold obstacle to the historical case for incorporation as a matter of original public meaning is quite basic—it was settled by the time the Fourteenth Amendment was adopted that the first eight amendments did not grant citizens of the United States any “privilege” or “immunity” with respect to state or local laws. The Supreme Court had held just that in *Barron v. Mayor and City Council of Baltimore*.<sup>267</sup>

To be sure, there was a school that understood *Barron* to mean only that the federal government lacked power to enforce the Bill of Rights against the states, while still believing that the Bill of Rights limited the States no less than the federal government.<sup>268</sup> This view was expressed by Bingham in defense of his original effort at a constitutional amendment,<sup>269</sup> and was repeated with some frequency in the Thirty-Eighth and Thirty-Ninth Congresses.<sup>270</sup> Still, this reading of *Barron* is difficult to square with the opinion itself,<sup>271</sup> and is not reflected in the leading treatises of the day, which instead understood *Barron* as having settled that the Bill of Rights had no application to the states.<sup>272</sup> While Profes-

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267. 32 U.S. (7 Pet.) 243, 247-50 (1833).

268. See AMAR, *supra* note 14, at 181-87; CURTIS, *supra* note 247, at 37-41, 49-54, 59-91, 112.

269. See CONG. GLOBE, 39th Cong., 1st Sess. 1088-90 (1866).

270. Professor Curtis identified some 30 examples in the Thirty-Eighth and Thirty-Ninth Congresses in which Members reflected the view that the “privileges or immunities” of citizens included the Bill of Rights. See CURTIS, *supra* note 247, at 112.

271. For example:

The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

*Barron*, 32 U.S. (7 Pet.) at 247.

272. See, e.g., THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 19 (1868) (Da Capo Press 1972); 1 JAMES W. KENT, COMMENTARIES ON AMERICAN LAW 456 (O.W. Holmes rev. 1873) (1826).

sor Curtis has marshaled powerful evidence that in the framing era, the phrase “privileges and immunities” was used as a synonym for rights, including constitutional rights,<sup>273</sup> the more meager evidence that he has identified that the privileges and immunities of citizens were understood to include a right to be free from state legislation inconsistent with the Bill of Rights is limited to the views of those who believed, despite *Barron*, that the first eight amendments applied to the states.<sup>274</sup>

As a matter of contemporary public meaning, accordingly, an incorporationist understanding of the “privileges and immunities of citizens” is highly questionable. Under *Barron*, citizens had no right to be free from state legislation inconsistent with the Bill of Rights—the privileges and immunities described in the first eight amendments only applied to federal legislation. Indeed, as Professor Curtis acknowledged of those who believed the privileges and immunities of citizens extended to state laws inconsistent with the first eight amendments, “such claims were made even though the Supreme Court had ruled in 1833 [in *Barron*] that the guarantees of the federal Bill of Rights did not impose limits on the states.”<sup>275</sup> Another advocate of incorporation, Bryan Wildenthal, similarly admits that “the *Barron*-contrarian view was and remains unorthodox and incorrect.”<sup>276</sup> Under the inquiry into original public meaning demanded by *Heller*, these concessions are enormously harmful to the case for incorporation. Though there were some who refused to reconcile themselves to *Barron*, even the most avid incorporationists acknowledge that this was a minority view. It had to be—the Supreme Court had authoritatively declared the law to be otherwise. There is therefore considerable evidence that the contemporary public meaning of the privileges and immunities of citizens at the time of the Fourteenth Amendment’s framing and ratification did not include a right to resist state laws thought to be violative of the first eight amendments.<sup>277</sup>

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273. See Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges and Immunities of Citizens of the United States*, 78 N.C.L. REV. 1071, 1094-1136 (2000).

274. See *id.* at 1111-21, 1132-37.

275. *Id.* at 1110-11 (footnote omitted). Indeed, among the evidence on which he relied are the decisions of a handful of state courts that expressly rejected *Barron*. See *id.* at 1118-21. Similarly, Professor Curtis cited on the treatise of abolitionist Joel Tiffany, while acknowledging that “he expressed what was then the view of a minority.” *Id.* at 1116

276. Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 OHIO ST. L.J. 1509, 1543 (2007).

277. For a similar argument, albeit not framed in terms of original public meaning, see Dripps, *supra* note 247, at 1576-79. Accordingly, in terms of original public meaning, there is more than a little to be said for the view, later taken in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), that the Fourteenth Amendment protected against state interference only those rights that inhered in the citizen’s relation to the federal

Equally important, the antebellum Constitution entitled the citizens of each state “to all privileges and immunities of citizens of the several states,”<sup>278</sup> a formulation close enough to the Fourteenth Amendment’s that both Bingham and Howard argued that the new clause rendered its Article IV analogue enforceable.<sup>279</sup> Yet, as we have seen, Howard himself relied on *Corfield v. Coryell* as the best indication of the meaning of the “privileges or immunities,” and that decision did not identify the Bill of Rights as among the privileges and immunities of citizens.<sup>280</sup> Instead, Howard had to supplement *Corfield* with his own views in order to stretch the “Privileges or Immunities” of citizenship to include the first eight amendments. Not much later, the Supreme Court confronted the Privileges or Immunities Clause; it construed the Clause as a non-discrimination obligation with respect to state-law rights rather than securing the protections of the Bill of Rights against the States.<sup>281</sup> Thus, the leading case law of the day did not identify “privileges and immunities” with the Bill of Rights. Similarly, the leading treatises cited *Corfield* and explained the Privileges or Immunities Clause as a non-discrimination obligation with respect to the “privileges and immunities” described in that case, rather than a reference to the Bill of Rights.<sup>282</sup>

There is, however, one precedent that provides some support for the view that the “privileges or immunities” of citizens included the Bill of Rights: *Dred Scott v. Sandford*.<sup>283</sup> In the course of its infamous holding that African-Americans have no rights under the Constitution, the Court explained that “the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government,” because “[t]he powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution.”<sup>284</sup> As an example of these limitations on

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government, such as the rights to engage in interstate travel, to use navigable waters, to the protection of treaties, and to petition the federal government for redress of grievances. See *id.* at 96-111. *Slaughter-House* is discussed at greater length below.

278. U.S. CONST. art. IV, § 2, cl. 1.

279. See CONG. GLOBE, 39th Cong., 1st Sess. 2542 (Rep. Bingham), 1089 (Rep. Bingham) 2765 (Sen. Howard) (1866). To similar effect, see *id.* at 1054 (Rep. Higby), 1057 (Rep. Kelley).

280. See *supra* text accompanying note 249.

281. See *Paul v. Virginia*, 75 U.S. (6 Wall.) 168, 179-83 (1868).

282. See COOLEY, *supra* note 272, at 15-16; 2 KENT, *supra* note 272, at 84-85; GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES: DEFINED AND CAREFULLY ANNOTATED 226 (1868); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1806 at 582 & n.4 (1832) (Melville M. Bigelow rev. 1891). For a helpful discussion of this understanding, see EARL M. MALTZ, THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION 28-32 (2003).

283. 60 U.S. (19 How.) 393 (1856).

284. *Id.* at 449.

congressional power, the Court added: “Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.”<sup>285</sup> This passage, however, does not quite say that the “privileges or immunities” of citizenship include the Bill of Rights, and it certainly does not claim that these were privileges and immunities with respect to state and local laws. Indeed, in terms of original public meaning, surely the best evidence of original public meaning is found in the leading legal treatises of the day, and as we have seen, they did not identify the Bill of Rights as among the “privileges and immunities” of citizenship.<sup>286</sup> *Dred Scott* is therefore flimsy evidence of original public meaning.

## 2. LEGISLATIVE HISTORY

As for the congressional debates on what was to become the Fourteenth Amendment, they do not speak with one voice. Following Howard’s speech, for example, two other senators denied that there was any settled meaning of “privileges or immunities.”<sup>287</sup> As George Thomas has suggested, if the public meaning of “privileges or immunities” were truly clear, this would have been an ineffective, if not laughable, position to take.<sup>288</sup>

Equally illuminating is the position of Thaddeus Stevens, a radical Republican and a member of the committee that drafted the Fourteenth Amendment.<sup>289</sup> During the debate over the earlier, unsuccessful proposal, to the charge that the proposal would mean that “all state legislation . . . may be overridden, may be repealed or otherwise abolished, and the laws of Congress established instead,”<sup>290</sup> Stevens responded:

Does the gentleman mean to say that, under this provision, Congress could interfere in any case where legislation of a State was equal, impartial to all? Or is it not simply to provide that, where any State makes a distinction in the law between different classes of individuals, Congress shall have the power to correct such discrimination and inequality? Does the proposition mean anything more than that?<sup>291</sup>

285. *Id.* at 450.

286. *Heller* itself regarded contemporary treatises as powerful evidence of original meaning. See 128 S. Ct. at 2805-07, 2811-12.

287. See CONG. GLOBE, 39th Cong., 1st Sess. 3039 (Sen. Hendricks), 3041 (Sen. Johnson) (1866). Earlier, in the House, Rep. Benjamin Boyer had similarly claimed that section one was “open to ambiguity and admitting of conflicting constructions.” *Id.* at 2467.

288. George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627, 1633, 1646 (2007). In particular, one of those who questioned the meaning of “privileges and immunities,” Reverdy Johnson, was no slouch; Earl Maltz, an advocate of incorporation, has acknowledged him as “the most brilliant opposition theoretician. . . .” MALTZ, *supra* note 250, at 101

289. For a useful discussion of the dynamics of the drafting process, see MALTZ, *supra* note 250, at 79-92.

290. CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866) (Rep. Hale).

291. *Id.*

With respect to the final version, Stevens similarly observed: “This amendment . . . allows Congress to correct the unjust legislation of the states, so far that the law which operates upon one man shall operate equally upon all.”<sup>292</sup> Senator Luke Poland thought that the proposal “secures nothing beyond what was intended” by Article IV’s Privileges and Immunities Clause,<sup>293</sup> which, as we have seen, was understood as a non-discrimination provision.<sup>294</sup> Even Bingham, when pressed, seemed to conflate the Bill of Rights with Article IV’s antidiscrimination requirement:

Who ever before heard that any state had reserved to itself the right, under the Constitution of the United States, to withhold from any citizen . . . any of the privileges of a citizen of the United States, or impose upon him, from whatever state he may have come, any burden contrary to that provision of the Constitution which declares that citizens shall be entitled in the several states to all the immunities of a citizen in the United States?

What does the word immunity in your Constitution mean? Immunity from unequal burdens. . . . If a state has not the right to deny equal protection to any human being under the Constitution of this country in the rights of life, liberty, and property, how can state rights be impaired by penal prohibitions of such denial as proposed?<sup>295</sup>

Thus, those who thought that the proposed amendment granted Congress the power to enforce provisions in the antebellum constitution may have thought that the proposal enabled Congress to enforce Article IV’s antidiscrimination requirement, rather than the first eight amendments.<sup>296</sup>

These references to Article IV are not the only evidence of an original understanding that focused on antidiscrimination rather than incorporation. Perhaps the single most frequently expressed understanding of the proposed Amendment was that it constitutionalized the Civil Rights Act of 1866.<sup>297</sup> That legislation, however, was an antidiscrimination provision that said nothing of the Bill of Rights:

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292. *Id.* at 2459.

293. *Id.* at 2961. Senator Garrett Davis similarly referred to the Privileges or Immunities Clause as tracking its Article IV analogues. *Id.* at App. 240.

294. See *supra* text accompanying notes 278-83.

295. CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866). See also *id.* at 2542 (“No State ever had the right . . . to deny any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic. . . .”).

296. For a detailed argument that many of the seemingly incorporationist statements in Congress may reflect no more than the view that the Fourteenth Amendment would enable congressional enforcement of Article IV’s antidiscrimination requirement, see Lambert Gingras, *Congressional Misunderstandings and the Ratifiers’ Understanding: The Case of the Fourteenth Amendment*, 40 AM. J. LEG. HIST. 41, 50-61 (1996).

297. See, e.g., *id.* at 2462 (Rep. Garfield), 2465 (Rep. Thayer), 2501 (Rep. Raymond), 2549 (Rep. Stevens), 2462 (Rep. Garfield), 2467 (Rep. Boyer), 2468 (Rep. Kelley), 2498 (Rep. Broomall), 2501 (Rep. Raymond), 2509 (Rep. Spaulding), 2511 (Rep. Eliot), 2534 (Rep. Eckley), 2538 (Rep. Rogers), 2539 (Rep. Farnsworth), 2883 (Rep. Latham), 2961 (Sen. Poland), 3031 (Sen. Henderson), 3069 (Rep. Van Aernam) (1866).

[A]ll persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to previous condition of slavery or involuntary servitude . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for security of person and property, as is enjoyed by white citizens. . . .<sup>298</sup>

Not only did the Civil Rights Act make no reference to the Bill of Rights, but it did not grant substantive rights either. Instead, the rights granted by law with respect to the identified categories are subjected to a nondiscrimination obligation. The Act cannot be read to grant a substantive entitlement without rendering its use of the term “same” surplusage; this view also does not account for the final clause, which protects minorities only with respect to rights enjoyed by white citizens.<sup>299</sup>

Some eminent scholars have argued that the original meaning of the Fourteenth Amendment’s Privileges or Immunities Clause originally was an antidiscrimination provision with respect to rights thought to be fundamental, with the new clause and its textual linkage to national citizenship expanding the reach of its antidiscrimination principle from only citizens of one state temporarily visiting another to all citizens, while the Equal Protection Clause served a more limited function of ensuring equal protection from government with respect to private lawbreaking.<sup>300</sup> To be sure, many of the statements in the congressional debates are imprecise; the frequent references to antidiscrimination could have merely been references to the proposed Equal Protection Clause, and the frequent efforts to equate the proposed amendment with the Civil Rights Act, at a minimum, overlook the proposal’s Due Process Clause. Still, the fact that so many legislators stressed the antidiscrimination aspects of the proposal and paid little attention to the question of incorporation surely raises significant doubts about

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298. See Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866).

299. Some scholars have taken a different view, arguing in particular that the Civil Rights Act’s reference to the “full and equal benefit of all laws and proceedings for security of person or property” was a reference to the Bill of Rights. See, e.g., Michael Kent Curtis, *Resurrecting the Privileges and Immunities Clause and Revising the Slaughter-House Cases without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C.L. REV. 1, 52-55 (1996); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U.L. REV. 863, 931-35 (1986). Still, this position accommodates neither the equality language in the Act nor the reality that under *Barron*, as a matter of contemporary public meaning, citizens had no legal right to the protections of the first eight amendments against inconsistent state legislation.

300. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 342-51 (1985); John Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 YALE L.J. 1385, 1397-432 (1992).



whether Congress could have created an incorporationist public meaning for the proposed Fourteenth Amendment.

Most important for present purposes, no single understanding of the Privileges or Immunities Clause emerges from the congressional debates. The late David Currie found “some support in the legislative history for no fewer than four interpretations of the . . . Privileges and Immunities Clause: it would authorize Congress to enforce the Privileges and Immunities Clause of Article IV; it would forbid discrimination between citizens with respect to fundamental rights; it would establish a set of basic rights that all citizens must enjoy; and it would make the Bill of Rights applicable to the States.”<sup>301</sup> As we will see, each of these views is reflected in the treatises and judicial decisions of the era as well. Moreover, as William Nelson has observed, the advocates of the Fourteenth Amendment had a political incentive to promote a degree of ambiguity; when pressed on the import of the proposed Amend-

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301. David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 406 (2008). The confusion did not end with the ratification of the Fourteenth Amendment. Consider this colloquy, had on the floor of the Senate in connection with the Civil Rights Act of 1871:

Mr. TRUMBULL. I come now, Mr. President, to those clauses of the fourteenth amendment which, it is supposed, have changed the Constitution as it was originally formed. The next is: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”

That is substantially what the Constitution was before, and I do not know that it enlarged at all the provision of the Constitution as it before existed, which declared that—“The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.”

In my judgment, that amounts to the same thing. It is a repetition of a provision in the Constitution as it before existed. It states it in a little different language. . . .

Mr. EDMUNDS. If my friend will pardon me, I do not wish to interrupt the course of his remarks, but on that point I should like to suggest to him that the language changes entirely in the description of the class of persons who are entitled to protection. The old clause provided that the citizens of each State, as citizens of a State, should be entitled to the rights of citizenship in any other State to which they might go. The new amendment provides that the citizens of the United States, whether they are the citizens of any particular State or not, shall have universal citizenship in the United States.

. . . .

Mr. CARPENTER. If my friend will allow me, I heard him say a moment ago that there were some things so plain in this country that they need not be in the Constitution, and I claim this to be exactly illustrative of that remark. There are certain privileges and immunities of American citizens that are recognized in every State in the Union and by every American as being peculiarly and especially the privileges of an American citizen, and that Constitution means to protect those, or else it is mere idle talk and protects nothing.

Mr. TRUMBULL. The protection which the Government affords to American citizens under the Constitution as it was originally formed is precisely the protection it affords to American citizens under the Constitution as it now exists. The fourteenth amendment has not extended the rights and privileges of citizenship one iota. They

ment for states' rights, they often found it convenient to retreat to the view that the Amendment merely required states to offer equality in whatever rights they chose to provide.<sup>302</sup> In the face of such cacophony, arguments based on original public meaning are perilous.

### 3. RATIFICATION

Another logical place to look for evidence of original public meaning is the ratification debates in the states. There is, however, little that is useful to be derived from the ratification process. As Professor Curtis has acknowledged, “[m]ost of the state legislatures that considered the Fourteenth Amendment either kept no record of their debates, or their discussion was so perfunctory that it sheds little light on their understanding of

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are right where they always were. The citizen of the United States was to be defended as against foreign aggression, as against foreign nations, in all his rights of a national character, under the old Constitution. The fourteenth amendment has not defined what the privileges and immunities of American citizenship are.

....

Mr. CARPENTER. . . . The Constitution now says to South Carolina, “You shall no longer enforce a law that abridges the privileges of any citizen.”

Mr. TRUMBULL. The Senator is entirely mistaken. The Constitution says no such thing. . . . It speaks of citizens of the United States, and you have not advanced one step in the argument unless you can define what the privileges and immunities of citizens of the United States are. . . . I stated at the commencement that this national Government was not formed for the purpose of protecting the individual in his rights of person and of property.

Mr. CARPENTER. That is what I understood to be the very change wrought by the fourteenth amendment. It is now put in that aspect and does protect them.

Mr. TRUMBULL. Then it would be an annihilation entirely of the States. Such is not the fourteenth amendment. The States were, and are now, the depositories of the rights of the individual against encroachment.

Mr. CARPENTER. And that Constitution forbids them to deny them, and authorizes Congress to legislate so as to carry that prohibition into execution.

Mr. TRUMBULL. If the Constitution had said that the privileges and immunities of citizens of the United States embraced all the rights of person and property belonging to an individual, then the Senator would be right; but it says no such thing. In my judgment, the fourteenth amendment has not changed an iota of the Constitution, as it was originally framed, in that respect.

CONG. GLOBE, 42d Cong., 1st Sess. 576-77 (1871). Moreover, congressional debates during this period may underestimate the strength of the evidence supporting antidiscrimination as the original understanding of the Fourteenth Amendment. As one leading historian of Reconstruction has argued: “It was not until the Ku Klux Klan violence of 1868 through 1872 that Republicans began to realize that superficially equal laws did not guarantee full protection of rights.” Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 50. It is widely accepted that Klan violence increased during this period and was the critical factor behind the civil rights legislation in 1870 and 1871. See, e.g., FONER, *supra* note 255, at 425-56.

302. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 114-24 (1988). We have seen that Thaddeus Stevens took just this tack, for example. See *supra* text accompanying notes 289-92.

its meaning. Messages by governors are available, but most are quite general. . . .”<sup>303</sup> Professor Wildenthal similarly concedes that “the evidence from the ratification process seems vague and scattered when it comes to any strong public awareness of nationalizing the entire Bill of Rights.”<sup>304</sup> Although there are a few isolated references to incorporation in the surviving evidence from ratification,<sup>305</sup> the proposal was also characterized as tracking the Civil Rights Act or an effort to end discrimination.<sup>306</sup> What comes clearest from Charles Fairman’s review of the evidence is how little attention was paid to the question of incorporation—either way—in the course of ratification.<sup>307</sup> Among the most thorough studies on this point is James Bond’s analysis of the debates surrounding ratification in Illinois, Ohio, and Pennsylvania, where the weight of that evidence indicates that the proposed amendment was understood to embody the Civil Rights Act rather than the Bill of Rights.<sup>308</sup> His study of the ratification debate in the former confederate states similarly found no hint of an incorporationist understanding, although he unearthed considerable evidence that the amendment was understood as an antidiscrimination rule.<sup>309</sup> To be sure, much of the discussion of antidiscrimination may have been directed at the proposed Equal Protection Clause, but the available evidence supplies little indication that an incorporationist public meaning developed around any portion of the Fourteenth Amendment.

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303. CURTIS, *supra* note 247, at 145. To similar effect, see JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 8-9 (1997). For a summary of the rather generic discussions during ratification, see CURTIS, *supra* note 247, at 131-54. Even Bingham spoke in generic platitudes during ratification, leading Saul Cornell to speculate that the framers were on the defensive during the ratification process and therefore limited their claims about the impact of the proposed Amendment. See CORNELL, *supra* note 256, at 173-75.

304. Wildenthal, *supra* note 276, at 1601.

305. For example, the governor of Ohio “described the amendment as necessary to protect ‘immunities’ such as freedom of speech.” CURTIS, *supra* note 247, at 147. Similarly, “Representative M’Camant of Blair County [Pennsylvania] insisted that the amendment was ‘necessary to secure . . . that freedom of speech which before the war was denied and even now is denied to every man who has not been a rebel or a rebel sympathizer, a secessionist, or a traitor.’” *Id.* at 148-49 (footnote omitted).

306. See, e.g., *id.* at 147 (“Some speakers [in the Pennsylvania debates] noted a correspondence between section 1 and the Civil Rights bill.”). For a valuable review of the evidence of public understanding during the ratification process in Illinois, Ohio, and Pennsylvania that suggests that the public understood the proposed amendment to track the Civil Rights Act rather than include the Bill of Rights, see James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435, 445-54 (1985).

307. See Fairman, *supra* note 247, at 84-126.

308. James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435, 445-54 (1985).

309. See BOND, *supra* note 303, at 10, 19-24, 45, 56-58, 80-81, 86-90, 103-07, 111, 123-24, 127-28, 148-50, 173-77, 180-82, 199, 215-17, 220-23, 234-38, 241-42, 252-55.

Nor did ratification produce any movement in the states to bring their laws into conformity with the Bill of Rights, even though, as Professor Fairman demonstrated, there were rather substantial variances between the laws of the ratifying states and federal constitutional standards,<sup>310</sup> and similar infirmities in the constitutions of many of the southern states later readmitted to Congress, despite the fact that Congress approved each southern state's constitution before it could regain representation in Congress.<sup>311</sup> Perhaps it is unreasonable to expect states or Congress to have conducted a comprehensive review of state law during or after ratification, but, as Professor Thomas has observed, it is surely significant that in the wake of ratification, five states modified their grand jury requirements in ways inconsistent with the Fifth Amendment's Grand Jury Clause.<sup>312</sup> This is hardly what one would expect if there had been a general public understanding that the Bill of Rights was now binding on the states.

Professor Wildenthal has undertaken the only effort of which I am aware to square incorporation with the original public meaning of the Fourteenth Amendment. Even so, he does not argue that the phrase "privileges or immunities" had a well-understood meaning that included the Bill of Rights. Instead, he relies on the intent of the framers, while acknowledging that he can square this position with the original public meaning only "if Congress's understanding is clearly, publicly, and candidly conveyed to the country. . . ."<sup>313</sup> On this point, Wildenthal notes that much of Howard's speech was reprinted in a number of major newspapers, albeit without any special mention of his comments regarding the Bill of Rights.<sup>314</sup> For an indication that someone had paid attention to the fine print in a lengthy speech, Wildenthal points to a subsequent editorial in the *New York Times* that called Howard's speech "clear and cogent,"<sup>315</sup> although even the *Times* editorial made no reference to the Bill of Rights. Moreover, as Wildenthal concedes, when the *Times* gave "prominent front-page coverage to Congress's final passage and submission of the Amendment to the States . . . there was no

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See also James E. Bond, *Ratification of the Fourteenth Amendment in North Carolina*, 20 WAKE FOREST L. REV. 89, 112-16 (1984).

310. See Fairman, *supra* note 247, at 84-85, 86-87, 88, 97-98, 98-100, 101, 102-03, 106, 110-11, 115-16, 123.

311. See *id.* at 127-32.

312. See Thomas, *supra* note 288, at 1654-55.

313. Wildenthal, *supra* note 276, at 1612.

314. See *id.* at 1564. To similar effect, see STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 117-18 (2d ed. 1994).

315. Wildenthal, *supra* note 276, at 1577 (quoting Editorial, *The Reconstruction Committee's Amendment in the Senate*, N.Y. TIMES, May 25, 1866, at 4).

mention of incorporation.”<sup>316</sup> In fact, Professor Wildenthal cannot produce any newspaper account that drew to the public’s attention the proposed incorporation of the Bill of Rights during the ratification debate.<sup>317</sup>

Wildenthal also points to an essay published in 1867, in which Kentucky jurist Samuel Smith Nicholas denounced “the recent attempt in Congress to treat” the Bill of Rights as “guaranties against the State governments,”<sup>318</sup> although Wildenthal admits that it is unclear whether Nicholas was referring to the proposed Fourteenth Amendment or the Civil Rights Act of 1866, and Wildenthal makes no claim that the book was widely read.<sup>319</sup> That Wildenthal grasps at such straws is an indication of just how thin is the available evidence.

Professor Curtis has noted that during the congressional campaign of 1866, a convention of southern loyalists issued a manifesto, widely reprinted in the Republican press, calling for protection of the “constitutional rights” of citizens, including the right of free speech, and a number of Republican candidates made similar calls, yet neither the manifesto nor the candidates’ speeches identify the Fourteenth Amendment, already proposed by Congress and before the states, as the vehicle to achieve this end.<sup>320</sup> This evidence from the campaign perhaps offers some support for an incorporationist public understanding of the Fourteenth Amendment, but the lack of similar evidence in the actual ratification debates leave the matter in considerable doubt.

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316. *Id.* at 1595.

317. As one of the first scholars to examine this issue observed:

The declarations and statements of newspapers, writers and speakers. . . show very clearly, it seems, the general opinion held in the North. That opinion, briefly stated, was that the Amendment embodied the Civil Rights Bill and gave Congress the power to define and secure the privileges of citizens of the United States. There does not seem to have been any statement at all as to whether the first eight Amendments were to be made applicable to the States or not. . . .

HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 153-54 (1908). If this is an overstatement, it is only to the extent that newspapers reprinted Howard’s speech, albeit without any special mention of incorporation.

318. Wildenthal, *supra* note 276, at 1592 (quoting 3 S.S. NICHOLAS, *CONSERVATIVE ESSAYS, LEGAL AND POLITICAL* (Bradley & Gilbert 1867)).

319. *Id.* at 1592-95.

320. See Curtis, *supra* note 273, at 1134-36. He has also called attention to a statement of the Republican National Committee in support of the proposed Fourteenth Amendment, also widely reported in the Republican press, describing the proposed amendment as preventing states from violating the constitutional rights of citizens. See CURTIS, *supra* note 247, at 131, 251 n.1. This statement, however, suffers from the same ambiguity as many of the arguably incorporationist statements in the Thirty-Ninth Congress; it could mean no more than that the proposal would permit congressional enforcement of the Article IV Privileges and Immunities Clause.

## 4. CONTEMPORANEOUS COMMENTARY

As we have seen, to find probative evidence of the original public meaning of a legal text, one should consult the leading treatises of the day.<sup>321</sup> One prominent advocate of incorporation, Richard Aynes, claims that of the four treatises to appear in the wake of the drafting of the Fourteenth Amendment, three understood it to accomplish incorporation.<sup>322</sup> That assessment, however, is a bit of an oversimplification.

George Paschal's treatise provides the most straightforward support for incorporation. He wrote the protection in section one of the Fourteenth Amendment "has already been guaranteed in the second and fourth sections of the fourth article, and in the thirteen amendments. The new feature is that the general principles, which had been construed to apply only to the national government, are thus imposed on the States."<sup>323</sup> Paschal did not explain his reasoning, but his view is clear. Still, Paschal seems something of an unreliable indicator of contemporary public meaning. No one, even Howard, thought that the Fourteenth Amendment incorporated the Ninth, Tenth, Eleventh, or Twelfth Amendments against the States; the Tenth and Eleventh Amendments expressly limit federal and not state power, and the Twelfth Amendment involves only the manner by which the President and Vice-President are elected.<sup>324</sup> Paschal's pro-incorporation position is clear, but he turns out to be not much of a lawyer.

Timothy Farrar, in the third edition of his treatise, after acknowledging *Barron* and other cases holding the Bill of Rights inapplicable to the States, added, without elaboration, that these precedents "are entirely swept away by the 14th Amendment."<sup>325</sup> Farrar's views should also be taken with a grain of salt. In his first edition, he advanced that under the antebellum Constitution, the Bill of Rights applied to the States,<sup>326</sup> a view that was both idiosyncratic and wrong, as we have seen.<sup>327</sup> Farrar

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321. See *supra* note 286.

322. See Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 *YALE L.J.* 57, 83-94 (1993).

323. PASCHAL, *supra* note 282, at 290.

324. See U.S. CONST. amends. X-XII. The Ninth Amendment presents some additional complexities, but whatever its meaning, no court or commentator has ever contended that it is incorporated by the Fourteenth Amendment. See, e.g., Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 *IOWA L. REV.* 801, 876-77 (2007).

325. TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES* 546 (3d ed. 1872).

326. TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES* 58-59, 395-97 (1867).

327. See *supra* text accompanying notes 268-77.



appears to be another rather unreliable indicator of contemporary public meaning.

John Norton Pomeroy's treatise is an even more difficult case; Professor Aynes may just be wrong about him. Written when the proposed Fourteenth Amendment was before the States, Pomeroy acknowledged that the States were not bound by the Bill of Rights, but added that "a remedy is easy, and the question of its adoption is before the people."<sup>328</sup> He then explained that this remedy "would [not] interfere with any of the rights, privileges, or functions which properly belong to the individual states" in terms that suggest Pomeroy was referring only to the proposed due process clause and not any theory of incorporation:

When the Constitution has from the beginning contained prohibitions upon the power of the states to pass bills of attainder, ex post facto laws, or laws impairing the obligation of contracts, it is strange that a provision forbidding acts which deprive a person of life, liberty, or property, without due process of law, was not also inserted at the outset; it is more than strange that any objections can be urged against the proposal now to remedy the defect.<sup>329</sup>

This passage is, at best, ambiguous. It is unclear whether Pomeroy's "remedy" is incorporation through the Privileges or Immunities Clause, or merely extending the guarantee of due process to the states. The inference that Pomeroy did not perceive the Privileges or Immunities Clause to incorporate the Bill of Rights is greatly strengthened by his third edition, in which he described constitutionally protected "privileges or immunities" without reference to the first eight amendments:

All the rights which inhere in national citizenship as such, are fully protected against hostile state legislation. The negative clauses of the XIVth Amendment, executing themselves in the same manner as the clauses forbidding *ex post facto* laws and the like, invalidate every state statute which is opposed to their inhibitions. The rights thus protected are all civil in their nature, and not political, and embrace the fundamental capacities and right to pass through the States at will, to enter and dwell in any one at will, to acquire, hold, and transmit personal and real property, to enter into contracts, to engage in and pursue all lawful trades and avocations, to obtain redress in the courts, and to be equal before the laws. Such civil rights make up the privileges and immunities of citizens of the United States.<sup>330</sup>

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328. JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 147 (1868).

329. *Id.* at 151.

330. JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 532 (3d ed. 1875). One might think that Pomeroy had been influenced by the Supreme Court's interpretation of the Privileges or Immunities Clause in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), but as we will see, the opinion in those cases contained only dicta on incorporation. In fact, Pomeroy's third edition states that *Slaughter-House* "can hardly be regarded as final in giving a construction of the XIVth Amendment." POMEROY, *supra* at 530.

Finally, there is Thomas Cooley's treatise, which *Heller* accurately described as "massively popular."<sup>331</sup> The first edition of the treatise, appearing in the same year that the Fourteenth Amendment was ratified,<sup>332</sup> restated the rule of *Barron* without giving any hint that it was about to be altered.<sup>333</sup> In Cooley's second edition, Professor Aynes claimed some ambiguity, noting that Cooley wrote that it was "doubtful" whether the Privileges or Immunities Clause "surround the citizen with any protections additional to those before possessed under the State Constitutions . . . but a principle of State constitutional law has now been made part of the Constitution of the United States."<sup>334</sup> When placed in context, however, it seems likely that Cooley meant no more than that the Article IV Privileges or Immunities Clause was now enforceable as a matter of federal constitutional law. Citing *Corfield v. Coryell*, Cooley wrote:

Although the precise meaning of "privileges and immunities" is not very definitely settled as yet, it appears to be conceded that the Constitution secures in each State to the citizens of all other States the right to remove to, and carry on business therein; the right by the usual modes to acquire and hold property; and to protect and defend the same in the law; the right to the usual remedies for the collection of debts and the enforcement of other personal rights, and the right to be exempt, in property and person, from taxes or burdens which the property, or persons, of citizens of the same State are not subject to.<sup>335</sup>

This is a pretty odd way to describe incorporation of the Bill of Rights; it seems instead to read "privileges and immunities" in terms of the right recognized in *Corfield*.

In any event, whatever ambiguity there was in Cooley's 1871 edition disappeared by 1873, when Cooley published a revision of Story's treatise. That revision defined the Privileges or Immunities Clause as an antidiscrimination provision, citing *Corfield* and the Civil Rights Act, among other authorities.<sup>336</sup> The next year, Cooley published a new edi-

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331. 128 S. Ct. at 2811. On the influence of the Cooley treatise, see, for example, EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING, AND DECLINE OF A FAMOUS JURIDICAL CONCEPT* 116-18 (1948); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 628-29 (2d ed. 1985); CLYDE E. JACOBS, *LAW WRITERS AND THE COURTS, THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON ON AMERICAN CONSTITUTIONAL LAW* 27-32 (1954); BENJAMIN R. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* 18-41 (1942).

332. See Proclamation No. 13, 15 Stat. 708, 710 (July 28, 1868).

333. See COOLEY, *supra* note 272, at 19.

334. Aynes, *supra* note 322, at 92 (quoting THOMAS COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE UNION* \*294 (2d ed. 1871)).

335. COOLEY, *supra* note 334, at \*397 (footnote omitted).

336. See 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 1934-37 (4th ed. Thomas L. Cooley rev. 1873).

tion of his own treatise, and on this point he cited the previous year's revision of *Story*.<sup>337</sup>

The Second Amendment's applicability to the States was also addressed in the June 18, 1874 issue of the *Central Law Journal*, which opined without equivocation and by reference to *Barron*, that the Second Amendment had no application to the states.<sup>338</sup> The *Review* is worthy of respectful consideration; it was edited by John Forrest Dillon, "one of the most accomplished legal figures in America."<sup>339</sup> Similarly, new editions of the leading criminal law treatises of the day, those of Joel Prentiss Bishop and Francis Wharton, appeared in the wake of the Fourteenth Amendment, and both failed to discern any applicability of the first eight amendments to the states.<sup>340</sup> Again, if the process of framing and ratification had informed the public that the first eight amendments were to bind the states, it is odd that these commentators missed it.<sup>341</sup>

Thus, of the leading treatises that appeared in the aftermath of the drafting of the Fourteenth Amendment, incorporation is clearly endorsed by only two, and both of those reflected some decidedly idiosyncratic thinking. Moreover, as Professor Curtis acknowledges, Cooley's was "the most eminent treatise of the four."<sup>342</sup> There is certainly no indication that Cooley, Dillon, Wharton or Bishop was attempting to do anything but capture the contemporary understandings of the applicability of the Bill of Rights to the States. Their failure to perceive what incorporation advocates necessarily must claim was the widespread public understanding of the incorporationist meaning of the Fourteenth Amendment surely damages the case for incorporation.

## 5. JUDICIAL INTERPRETATIONS

Judicial interpretations offered in the wake of the enactment of the Fourteenth Amendment should also provide probative evidence of original

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337. THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES \*12, \*573 n.3 (3d ed. 1874).

338. See *The Right to Keep and Bear Arms for Public and Private Defense (Part 3)*, 1 CENT. L. J. 295 (John F. Dillon ed., 1874).

339. 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, 593 (2006). On the influence of Dillon, see, for example, JACOBS, *supra* note 331, at 111-14.

340. See 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE §§ 99, 145, 891-92, 946, 981 (2d ed. Rev. 1872); 1 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES: PRINCIPLES, PLEADING AND EVIDENCE §§ 213, 573 (7th ed. 1874); 3 *id.* § 3405.

341. For a similar discussion of the understanding of framing-era lawyers and commentators, see DRIPPS, *supra* note 247, at 30-34.

342. MICHAEL KENT CURTIS, FREE SPEECH: "THE PEOPLE'S DARLING PRIVILEGE" 365 (2000).

public meaning.<sup>343</sup> On this score, the evidence is, once again, conflicting, if not tilted against incorporation.

Only months after the ratification of the Fourteenth Amendment, in *Twitchell v. Pennsylvania*,<sup>344</sup> the Supreme Court unanimously rejected a claim that a state indictment was inconsistent with the Fifth and Sixth Amendments on the strength of *Barron* and its progeny.<sup>345</sup> Professor Amar notes that *Twitchell*'s counsel relied only on the Fifth and Sixth Amendments, and explains *Twitchell* on the basis that the newly-minted Fourteenth Amendment was simply not pressed.<sup>346</sup> Still, if everyone understood that the Fourteenth Amendment's Privileges or Immunities Clause had overturned *Barron*, one might expect the Court to at least note that fact, and rest its decision on waiver.<sup>347</sup>

The Court's first construction of the Fourteenth Amendment's Privileges or Immunities Clause came in *The Slaughter-House Cases*,<sup>348</sup> in which the Court rejected both *Corfield* and the Bill of Rights as measures of the privileges and immunities of citizenship, and instead described them in terms of rights thought to be national in scope, such as the right to travel, to seek the protection of the federal government, to use navigable waters, and to assert rights under treaties.<sup>349</sup> Justice Bradley, joined by Justice Swayne, understood the privileges and immunities of citizenship to include all fundamental rights, including those in the first eight amendments,<sup>350</sup> but Justice Field's separate dissent argued that the privileges and immunities of citizenship was a nondiscrimination obligation with respect to the rights recognized in the Civil Rights Act and *Corfield*.<sup>351</sup> Thus, only two Justices understood the Privileges or Immunities Clause to accomplish incorporation.

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343. *Heller* placed considerable weight on judicial interpretations in the wake of the ratification of the Second Amendment. See 128 S. Ct. at 2807-09.

344. 74 U.S. (7 Wall.) 321 (1868).

345. *Id.* at 325-26.

346. See AMAR, *supra* note 14, at 206-07.

347. The same could be said for the decision three years later in *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. (13 Wall.) 169 (1871), in which the Court explained that "though the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States." *Id.* at 176-77.

348. 83 U.S. (16 Wall.) 36 (1872).

349. *Id.* at 96-111.

350. *Id.* at 112-19. This was also the view taken in the single lower court decision of the era to embrace incorporation. See *United States v. Hall*, 26 F. Cas. 79, 82 (C.C.S.D. Ala. 1871) (No. 15,282). Two other decisions at about the same time, however, rejected incorporation. See *United States v. Crosby*, 25 F. Cas. 701, 704 (C.C.C.S.C. Ala. 1871) (No. 14,893); *Rowan v. State*, 30 Wis. 129, 148-50 (1872).

351. 83 U.S. (16 Wall.) at 96-101.

One can make too much of *Slaughter-House*. In these cases, the plaintiff butchers argued that the Louisiana legislature's grant of a monopoly right to operate a slaughterhouse in New Orleans denied them the "privilege and immunity" of pursuing their chosen trade.<sup>352</sup> This argument relied on no specific provision of the Bill of Rights; incorporation was not strictly at issue. Moreover, the Court mentioned among the privileges and immunities of citizenship "[t]he right to peaceably assemble and petition for redress of grievances, [and] the privilege of habeas corpus,"<sup>353</sup> which could be examples of the right to seek the assistance of the federal government, but also could leave room for incorporation, or some have argued.<sup>354</sup> Perhaps *Slaughter-House* should be regarded as inconclusive on the issue of incorporation.

Incorporation was more squarely addressed, however, in *Edwards v. Elliott*,<sup>355</sup> in which the Court considered a claim that a state statute abridged a privilege and immunity of citizenship by denying the right to trial by jury protected by the Seventh Amendment.<sup>356</sup> The Court unanimously rejected this argument: "Two answers may be made to that objection, either of which is decisive: (1.) That [the Seventh Amendment] does not apply to trials in the State courts. (2.) That no such error was assigned in the [New Jersey] Court of Errors, and that the question was not presented to, nor was it decided by, the Court of Errors."<sup>357</sup> Professor Wildenthal argues that little attention was paid to this issue by the parties or the Court,<sup>358</sup> but surely if there were a general public understanding of incorporation surrounding the ratification of the Bill of Rights, it is strange that every Member of the Court would have so quickly forgotten.<sup>359</sup>

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352. *Id.* at 50-54.

353. *Id.* at 79.

354. See Kevin Christopher Newsom, *Setting Incorporation Straight: A Reinterpretation of the Slaughterhouse Cases*, 109 YALE L.J. 643, 666-87 (2000); Robert C. Palmer, *The Parameters of Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739, 744-56; Bryan A. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress On Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1095-1115 (2000).

355. 88 U.S. (21 Wall.) 532 (1874).

356. *Id.* at 544.

357. *Id.* at 557-58.

358. See Wildenthal, *supra* note 354, at 1135-37.

359. The Court's memory was no better the following year, when it again rejected application of the Seventh Amendment to the states. See *Walker v. Sauvinet*, 92 U.S. (2 Otto) 90, 92-93 (1875).

The incorporation issue returned to the Court in *United States v. Cruikshank*.<sup>360</sup> Addressing the sufficiency of an indictment brought under the Enforcement Act of 1870, which prohibited conspiracies to “hinder . . . free exercise of any right or privilege . . . secured by the constitution or laws of the United States,”<sup>361</sup> the Court rejected counts alleging that the defendants deprived the victims of their First Amendment rights, citing, among other cases, *Barron*, *Twitchell*, and *Edwards*,<sup>362</sup> and echoed *Slaughter-House* in treating as protected only “[t]he right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the power or duties of the national government. . . .”<sup>363</sup> As for the counts alleging a violation of the right to bear arms, the Court wrote: “The second amendment declares that it shall not be infringed; but this, as we have seen, means no more than that it shall not be infringed by Congress.”<sup>364</sup> *Cruikshank*, moreover, called nondiscrimination 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.”<sup>365</sup> Only Justice Clifford failed to join the Court’s opinion; and he confined his own opinion to the question whether the indictment was fatally vague.<sup>366</sup>

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360. 92 U.S. (2 Otto) 542 (1875).

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

362. *Id.* at 552.

363. *Id.*

364. *Id.* at 553. Professor Newsom read *Cruikshank* narrowly, arguing that the Court is properly understood as having narrowly construed the First Amendment and that the indictment was defective because the defendants were not state actors. *See* Newsom, *supra* note 354, at 714-20. This view, however, is impossible to square with the Court’s language, especially on the Second Amendment issue. For its part, the Court has read *Cruikshank* as decisive on the question of incorporation. *See Heller*, 128 S. Ct. at 2813 n.23; *Miller v. Texas*, 153 U.S. 535, 538 (1894); *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886). Others have explained *Cruikshank* by arguing that the Attorney General’s brief, perhaps influenced by *Slaughter-House*, argued for incorporation in only a conclusory fashion. *See, e.g., HALBROOK, supra* note 256, at 168-71. In fact, the government rather plainly advanced the theory that the Fourteenth Amendment made all rights considered fundamental enforceable against the States. *See* Brief for the United States at 5-10, *reprinted in 7 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES* 292-97 (Philip B. Kurland & Gerhard Casper eds., 1975). Moreover, the defendants’ briefs repeatedly advanced the competing theory that the Privileges or Immunities Clause required only nondiscrimination. *See* Brief for the Defendants at 506 (No. 609), *reprinted in id.* at 416-17; Brief for Defendants Cruikshank, Hadnot & Irwin at 4-11, *reprinted in id.* at 357-64; Brief for Defendants at 4-11, 24-26, *reprinted in id.* at 385-92, 405-07.

365. 92 U.S. (2 Otto) at 555.

366. *Id.* at 565-69 (dissenting opinion).



The obvious question raised by these decisions is why, if there had been a widely understood public understanding that the Fourteenth Amendment had accomplished incorporation, the Supreme Court did not get the message. The explanation usually offered by incorporation advocates is that a states-rights majority on the Court was concerned with a potentially unlimited expansion of federal power that would erode traditional understandings of state prerogatives.<sup>367</sup> Some explain *Cruikshank* in particular as a reflection of the growing disillusionment with Reconstruction.<sup>368</sup> Surely skepticism is warranted about these theories with respect to a Court on which eight of the nine Justices had been appointed by Presidents Lincoln or Grant,<sup>369</sup> and which, within only a few years, held that the exclusion of African-Americans from state juries violated the Fourteenth Amendment.<sup>370</sup> Perhaps speculation about the motives of the Court is worth something, but the Court's failure to grasp what the advocates of incorporation contend was a clearly expressed and widely understood meaning of the Privileges or Immunities Clause should provoke some skepticism about the clarity of that asserted understanding.

#### 6. THE CASE FOR SECOND AMENDMENT-SPECIFIC INCORPORATION

When viewed through the lens of original public meaning, the historical case for specific incorporation of Second Amendment rights encounters many of the same difficulties as the case for total incorporation of the Bill of Rights. As we have seen, it is far from clear that the phrase "privileges or immunities of citizens" in 1868 included any aspect of

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367. See, e.g., PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 77-81 (1999); MALTZ, *supra* note 282, at 92-96, 100-02; Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 655-70 (1994); Robert J. Kaczorowski, *The Chase Court and Fundamental Rights: A Watershed in American Constitutionalism*, 2 N. KY. L. REV. 151, 174-89 (1993); Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 133-34 (1994); Walter F. Murphy, *Slaughterhouse, Civil Rights, and Limits on Constitutional Change*, 32 AM. J. JURIS. 1, 5-9 (1987).

368. See, e.g., BRANDWEIN, *supra* note 367, at 81-84; CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 205-14 (2008); Lawrence, *supra* note 12, at 38-39.

369. See DONALD GRIER STEPHENSON, JR., THE WAITE COURT: JUSTICES, RULINGS, AND LEGACY 12 tbls. 1.2 & 1.3 (2003).

370. See *Strauder v. West Virginia*, 100 U.S. 303 (1879). Indeed, throughout this period, the Court was careful to preserve federal authority not only in cases in which states themselves discriminated, but even when they failed to protect African-Americans from discrimination. See, e.g., *Benedict*, *supra* note 301, at 66-79; Leslie Friedman Goldstein, *The Second Amendment, the Slaughter-House Cases (1873), and United States v. Cruikshank*, 1 ALB. GOV'T L. REV. 365, 397-408 (2008).

the first eight amendments: *Barron* cuts against that view; *Corfield* did not list the right to bear arms as among the privileges and immunities protected by Article IV; and the leading antebellum treatises understood the concept of privileges and immunities as a nondiscrimination obligation. Accordingly, the scattered references to the right to bear arms in the legislative history of the Fourteenth Amendment may seem more like the views of individual legislators than a reliable indication of original public meaning. *Cruikshank* casts additional doubt on the original meaning; it is unclear how the Court could forget the original public meaning of such a recent constitutional amendment if it truly had been understood to protect Second Amendment rights against the States.

To be sure, the Freedman's Bureau Act recognized the right to bear arms, and this could be thought to provide some evidence that Congress considered the Second Amendment to be a "privilege or immunity" of citizenship. Yet its text deserves careful scrutiny:

*[I]n every State or district where the ordinary course of judicial proceedings has been interrupted by rebellion, and until the same shall be fully restored . . . the right to make and enforce contracts . . . and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real, and personal, including the constitutional right to bear arms, shall be secured and enjoyed by all citizens of such State or district without respect to race or color, or previous condition of slavery.<sup>371</sup>*

The first italicized passage suggests that this legislation was not an effort to articulate the "privileges or immunities" of citizens—this was a temporary measure applicable only in areas where rebellion persisted. Indeed, the statute was enacted before the ratification of the Fourteenth Amendment; its sponsors defended its constitutionality by relying on the enforcement clause of the Thirteenth Amendment and congressional war powers and not any notion of the privileges and immunities of citizenship.<sup>372</sup> Moreover, as the second italicized passage suggests, this provision was an antidiscrimination provision rather than a substantive right—if the statute is read as recognizing a substantive right, the second italicized passage is surplusage. Indeed, many of the statements in the Thirty-Ninth Congress about the right to bear arms are, at best ambiguous; it is unclear whether the concern is about substantive rights or selective and discriminatory treatment of freedmen.<sup>373</sup>

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371. Act of July 10, 1866, § 14, 14 Stat. 173, 176 (1866) (emphasis supplied).

372. See CONG. GLOBE, 39th Cong., 1st Sess. 319, 322, 420, 936, 939-40 (Sen. Trumbull), 340 (Sen. Wilson), 365 (1866) (Sen. Fessenden), 2773 (Rep. Eliot) (1866).

373. See *supra* note 259.

Equally important, it may be that when it comes to its legislation respecting the right to bear arms, the Thirty-Ninth Congress believed that it was faced with an exigency in the South rather than with a decision about fundamental constitutional principles. The very same Congress that crafted the Fourteenth Amendment also abolished the militia in most southern states and prohibited any effort to arm militias in those states.<sup>374</sup> The sponsor explained it was necessary to “suppress and prevent military organizations in the rebel States. . . . Great abuses have grown out of it, and in that country under present circumstances . . . there should be no military organizations allowed until matters are settled.”<sup>375</sup> In response to Second Amendment objections,<sup>376</sup> the sponsors replied that what seemed to be a paradigmatic violation of the Second Amendment was justified by the presence of armed groups “dangerous to the public peace and to the security of Union citizens in those states.”<sup>377</sup> Moreover, the measure abolishing southern militias makes it entirely clear that the Freedman Bureau’s Act prohibited only discrimination—if it had granted substantive protection to the right to bear arms, it would have been squarely inconsistent with the prohibition on arming southern militias—and there is no indication that the Freedman Bureau’s Act was intended to repeal this newly enacted prohibition on those militias. Indeed, Congress did not think that it had repealed its militia prohibition in the Freedmen’s Bureau Act; that

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374. See Act of March 2, 1867, ch. 170, § 6, 14 Stat. 485, 487 (1866) (“[A]ll militia forces now organized or in service in either of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Louisiana, Mississippi, and Texas, be forthwith disbanded, and that the further organization, arming, or calling into service of the said militia forces, or any part thereof, is hereby prohibited under any circumstances whatever, until the same shall be authorized by Congress.”).

375. CONG. GLOBE, 39th Cong., 1st Sess. 1848 (1866) (Sen. Wilson). See also, e.g., *id.* at 914 (Sen. Wilson) (quoting reports that Southern Militias “were engaged in disarming the negroes” as reasons to disband such militias), 915 (Sen. Wilson) (reporting that ex-Confederates were “searching houses, disarming people, committing outrages of every kind and description”), 941 (Sen. Trumbull) (noting reports of the “abusive conduct of [a Mississippi] militia” which would “hang some freedman or search negro houses for arms”); *id.* at 39, 40 (1865) (Sen. Wilson) (noting reports that in Mississippi “rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, disarming them, perpetrating murders and outrages on them; and the same things are done in other sections of the country”).

376. See *id.* at 1849 (Sens. Willey & Hendricks).

377. *Id.* (Sen. Lane). To similar effect, see *id.* at 1848-49 (Sen. Wilson). The sponsor did agree, however, to delete a provision calling for the disarming of militias. See *id.* at 1849 (Sen. Wilson). This legislation is one of a series of gun control measures undertaken at the time in an effort to suppress violence in the then-turbulent south. See Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL’Y REV. 615, 621-23 (2006).

prohibition was instead repealed in the next Congress, legislation that would have been unnecessary if the Freedmen's Bureau Act had already worked a repeal by granting a substantive right to bear arms.<sup>378</sup>

When the Thirty-Ninth Congress endeavored to articulate the rights of all citizens, in the Civil Rights Act of 1866, the right to bear arms was missing.<sup>379</sup> Similarly, although there was an effort to include the right to bear arms as among the rights protected in what became the Enforcement Act of 1870, as the Court noted in *Heller*,<sup>380</sup> that language was removed prior to passage of the bill.<sup>381</sup> Thus, while there is no doubt that some legislators considered the right to bear arms—or perhaps the discriminatory denial of that right—to be of special concern, it is far from clear that the original public meaning of the Fourteenth Amendment's "privileges and immunities" clause included Second Amendment rights.

### C. *The Failure of the Historical Case*

As we have seen, the view that the "privileges and immunities" of citizenship included the Bill of Rights was a far from settled at the time of the Fourteenth Amendment's adoption. To be sure, at least some of the Framers proclaimed that view in congressional debate, but it is far less clear that such statements created a public understanding of the type that *Heller* requires. Contemporaneous treatises are also far from conclusive—it is hard to grasp, for example, how Cooley's landmark treatise could have missed the incorporationist original meaning if a widespread incorporationist public understanding of the type demanded by *Heller* truly existed. The judicial interpretations of the period are

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378. The prohibition on southern militias was repealed by the Fortieth Congress as it related to Alabama, Arkansas, Florida, Louisiana, North Carolina, and South Carolina. See Act of March 3, 1869, 15 Stat. 337 (1869). The sponsors argued that events had made clear that with the reduction in the size of the occupying force in the south, these reconstructed southern states required militias in order to suppress violent elements in their midst. See CONG. GLOBE, 40th Cong., 2d Sess. 81, 82 (Sen. Fessenden), 83 (Sens. Rice & Sawyer), 84 (Sen. Wilson) (1868). For a discussion of the events surrounding the enactment and repeal of the militia prohibition, see OTIS A. SINGLETARY, *NEGRO MILITIA AND RECONSTRUCTION* 4-9 (1957).

379. See *supra* text accompanying note 298. One of the bill's sponsors, Sen. Lyman Trumbull, citing *Corfield*, explained that the bill was an effort to secure "privileges and immunities of citizens" within the meaning of Article IV. See CONG. GLOBE, 39th Cong., 1st Sess. 474-75 (1866). The bill's advocates insisted that it protected only the rights it enumerated. See, e.g., *id.* at 474-75, 476, 605 (Sen. Trumbull), 603 (Sen. Wilson), 744 (Sen. Sherman), 1151 (Rep. Windom).

380. See 128 S. Ct. at 2810-11 (citing H.R. REP. NO. 37, 41st Cong., 3d Sess. 7-8 (1871)).

381. See Act of April 20, 1871, ch. 22, 17 Stat. 13 (1871). For a description of the process by which the bill's reference to the right to bear arms was removed, see HALBROOK, *supra* note 256, at 120-30.

similarly mixed at best—between ratification and *Cruikshank*, as we have seen, only two Justices embraced incorporation. Perhaps most important, given how fragmentary and unreliable is the historical record when it comes to ratification, any effort to ascertain the original public understanding is fraught with peril.

When it assessed the constitutionality of segregation under the Fourteenth Amendment in *Brown v. Board of Education*,<sup>382</sup> the Supreme Court famously characterized the historical evidence as “inconclusive.”<sup>383</sup> This would be an equally apt assessment for the evidence on incorporation.

Some probabilities may illustrate the point. Assume (in my view generously) that when the available historical is weighed, there is a 60% likelihood that the original understanding of the Fourteenth Amendment included protection for Second Amendment rights. Still, it is necessary to determine the degree of confidence one can have in any conclusion based on an incomplete historical record. Given the incompleteness of the record—especially the limited evidence pointing in either direction from the ratification process—one might also assume that any conclusion based on such incomplete evidence can be stated with only a 70% likelihood of accurately ascertaining the original public meaning. This means that recognition of a Fourteenth Amendment right to bear arms based on the historical evidence has a less-than-even chance of being correct. It is far from evident that adjudication should be based on such an unreliable methodology, even for those who accept originalism as an interpretative methodology. Indeed, the most sophisticated originalists acknowledge that originalism cannot be the exclusive method of constitutional interpretation because original meaning is sometimes vague or ambiguous.<sup>384</sup> To be sure, originalists rarely seem to give explicit consideration to the need to assess both the likelihood that a given originalist interpretation is correct and the reliability with which that conclusion can be stated, but if originalism is premised on the desirability of identifying the fixed meaning of the original text, surely it must consider the degree to which this identification can be accurately performed. Similarly, to the extent that originalism is said to be desirable because it reduces the likelihood of the judge’s own preferences in-

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382. 347 U.S. 483 (1954).

383. *Id.* at 489.

384. *See, e.g.*, BARNETT, *supra* note 264, at 118-30; WHITTINGTON, *supra* note 264, at 5-14.

fluencing adjudication,<sup>385</sup> when the available historical evidence is near equipoise and itself fragmentary and unreliable, the ability of originalism to constrain judicial discretion will also be circumscribed.<sup>386</sup>

I make no general claims about the utility of originalism as an interpretive methodology. My claim is instead that when it comes to incorporation, the evidence is sufficiently unreliable, and what evidence exists is sufficiently close to equipoise, that historical evidence is not a satisfactory basis for adjudication.<sup>387</sup>

The demands of stare decisis weigh in balance as well. Stare decisis, after all, is entitled to weight even in constitutional adjudication.<sup>388</sup> In considering the weight of precedent, the Court considers whether it “has proven to be intolerable simply in defying practical workability”; induced “a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation”; “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine,”; and “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”<sup>389</sup> These factors favor retention of the Court’s current approach to incorporation, rather than adopting an originalist approach to incorporation.

For more than a century, the Supreme Court has hewed to a doctrine of selective incorporation that asks whether a right is considered so fundamental that it should be deemed an aspect of due process of law.<sup>390</sup> There is little indication that this approach has proven unworkable, inconsistent with related doctrine, or overtaken by new developments—as we have seen, while recent scholarship may have revived the historical case for incorporation, it has hardly made the case in a conclusive fashion. As for reliance, even putting the Second Amendment aside, a regime of total incorporation would require the Court overrule a vener-

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385. This point, for example, is central to Justice Scalia’s advocacy of originalism. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-64 (1989).

386. For some empirical evidence to support this view, see Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning*, 52 U.C.L.A. L. REV. 217 (2004).

387. William Nelson took a similar view, albeit without consideration of the original public meaning methodology adopted in *Heller*. See NELSON, *supra* note 302, at 110-47.

388. See, e.g., *Harris v. United States*, 536 U.S. 545, 557 (2002); *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Vazquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

389. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (opinion of O’Connor, Kennedy & Souter, JJ.) (citations omitted).

390. See, e.g., *Malloy v. Hogan*, 378 U.S. 1, 4-5 (1964).



able precedent refusing to apply the Fifth Amendment's requirement that felony charges be brought by a grand jury against the states,<sup>391</sup> yet only eighteen states currently require grand juries to return felony charges.<sup>392</sup> Thus, by repudiating its prior approach to incorporation, the Court would disrupt longstanding state procedures created in reliance on prior law.<sup>393</sup> And, as we will see, settled state law has permitted a very different regime of gun control than is apparently envisioned by *Heller*; indeed, we have already seen that the Second Amendment as articulated by *Heller* threatens to disrupt urban law enforcement strategies developed under the prior legal regime. Thus, reliance interests argue against a radical change in incorporation doctrine.

Accordingly, the historical case for incorporation is far from conclusive, or even satisfactory as a basis for adjudication. For that reason, it provides little reason for the Court to turn its back on its longstanding approach to questions of incorporation.

### III. Standards of Scrutiny and Incorporation

The Court has used somewhat varying formulations in describing its approach to incorporating of the specific provisions of the Bill of Rights into the Fourteenth Amendment. When it incorporated the right to a jury in criminal cases, and the protection against Double Jeopardy, the Court considered whether the right at stake was "fundamental to the American scheme of justice."<sup>394</sup> When it incorporated the rights to counsel, to confront adverse witnesses, and to compulsory process, the Court asked whether these rights were "fundamental and essential to a fair trial."<sup>395</sup> When it incorporated the Fifth Amendment right against compelled self-incrimination, the Court wrote that "the American system of justice is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its mainstay."<sup>396</sup>

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391. See *Hurtado v. California*, 110 U.S. 516 (1884).

392. See BUR. OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION: 2004 at 215-17 tbl. 38 (Aug. 2006).

393. The Court has continued to treat *Hurtado* as good law. See, e.g., *Campbell v. Louisiana*, 523 U.S. 392, 399 (1998); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 431 (1994); *Rose v. Mitchell*, 443 U.S. 545, 557 n.7 (1979); *Francis v. Henderson*, 425 U.S. 536, 545 n.1 (1976); *Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972); *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972); *Beck v. Washington*, 369 U.S. 541, 545 (1962).

394. *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

395. *Washington v. Texas*, 388 U.S. 14, 17 (1967); *Pointer v. Texas*, 380 U.S. 400, 403 (1965); *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

396. *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

These decisions, however, deal with the rights of an accused in the adjudicative process; hence the references to rights considered fundamental to the administration of justice are natural. The Second Amendment, in contrast, addresses conduct outside the courtroom. Accordingly, the Court's decisions concerning constitutional rights directed at primary conduct are more instructive, such as the Court's decision to incorporate the Fourth Amendment's protection against unreasonable search and seizure against the States because "the 'security of one's privacy against arbitrary intrusion by the police' is 'implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause.'"<sup>397</sup> Similarly, the incorporation of the First Amendment rights of free speech, freedom of the press, free exercise of religion and the right to peaceably assemble was premised upon these rights being "implicit in the concept of ordered liberty."<sup>398</sup> Even the cases involving trial rights have been attentive to question whether a given right is "necessary to an Anglo-American regime of ordered liberty."<sup>399</sup>

Whatever the formulation, it is essential to characterize the right at stake in order to determine whether it has the sufficiently fundamental and rooted character to qualify for incorporation. To be sure, the Second Amendment is sufficiently rooted to warrant inclusion in the original Bill of Rights, but if that were sufficient, then the Court would have adopted a regime of total incorporation. Instead, a more discriminating analysis is required. For this reason, a closer look at the right recognized in *Heller* is essential.

#### A. *The Second Amendment Standard of Scrutiny*

As we have seen, in *Heller*, the Court held that the right to "keep and bear arms" is a right to possess and carry firearms.<sup>400</sup> In dicta, the Court identified some longstanding regulations that it characterized as "presumptively lawful," including prohibitions on carrying concealed weapons, which the Court explained had been upheld by "the majority of 19th-century courts to consider the question."<sup>401</sup> The scholarly literature similarly observes that prohibitions on concealed carry were usually upheld by the state

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397. *Mapp v. Ohio*, 367 U.S. 643, 650 (1961) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (internal quotations omitted)).

398. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969).

399. *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968).

400. *See supra* Part I.E.

401. 128 S. Ct. at 2816-17 & n.26.

courts prior to the Civil War.<sup>402</sup> Indeed, a number of these cases, following the view that the Second Amendment reflected a fundamental principle applicable to the states despite *Barron*, expressly considered the Second Amendment as it upheld these laws.<sup>403</sup> Nevertheless, as we have seen, concealed-carry laws do not date to the framing era; they appeared in the 1820s and 1830s in response to a surge in violent crime.<sup>404</sup> Still, by the late nineteenth century, the constitutionality of concealed-carry prohibitions was settled.<sup>405</sup> As for other gun control laws, in *Heller*, the Court added that “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>406</sup> but the Court again identified no framing-era support for such laws.

As we have seen, it is hard to identify the constitutional basis for these “presumptively lawful” regulations given the manner in which the Court defined the right to bear arms in *Heller*; it is difficult to square the dicta seemingly expressing approval for concealed-carry and other laws with the Court’s holding that the right to bear arms includes an unqualified right to carry not to be balanced against regulatory interests.<sup>407</sup> We will see, however, that there is plausible textual support for this and other “presumptively lawful” regulations, and this point provides an important clue about the character of Second Amendment rights.

#### 1. THE PREAMBLE AS A TEXTUAL SOURCE OF REGULATORY AUTHORITY

The most promising textual support for regulatory authority over firearms is the Second Amendment’s preamble, which envisions a “well-

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402. See ALEXANDER DECONDE, *GUN VIOLENCE IN AMERICA: THE STRUGGLE FOR CONTROL* 51-52 (2001); HALBROOK, *supra* note 314, at 93-96; Saul Cornell & Nathan DeNino, *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); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 *B.Y.U.L. REV.* 1359, 1416-33; Massey, *supra* note 14, at 1115-18.

403. See *State v. Buzzard*, 4 Ark. 18 (1842); *Nunn v. State*, 1 Ga. 243, 251 (1846); *State v. Jumel*, 13 La. Ann. 399 (1858); *State v. Smith*, 11 La. Ann. 633 (1856); *State v. Chandler*, 5 La. Ann. 489 (1850); *State v. Newsom*, 27 N.C. (Ired. Eq.) 250 (1844); *Aymette v. State*, 21 Tenn. (2 Hum.) 154 (1840).

404. See CORNELL, *supra* note 256, at 138-44; Cornell, *supra* note 339, at 581-85.

405. See JOEL PRENTISS BISHOP, *COMMENTARIES ON THE LAW OF STATUTORY CRIMES* §§ 786-88 (2d ed. 1883).

406. 128 S. Ct. at 2816-17 (footnote omitted).

407. See *supra* Part I.E.

regulated militia.” *Heller* concluded that the original meaning of the term “militia” included all those able to bear arms regardless of whether they served in an organized militia.<sup>408</sup> In particular, *Heller* defined the “militia” to include all those “physically capable of acting in concert for the common defense,”<sup>409</sup> rather than limited to “the organized militia.”<sup>410</sup> If the militia includes everyone qualified to possess and carry arms, even if not part of an organized militia, then the preamble envisions comprehensive regulation of all who possess and carry firearms, and not merely those in organized militias. Moreover, *Heller* explains that the preamble is properly consulted to clarify the meaning of the Second Amendment.<sup>411</sup> Accordingly, the Second Amendment, construed in light of the preamble, recognizes a general regulatory power over the possession and carrying of firearms. For that reason, it is reasonable to construe the term “infringed” in the Second Amendment’s operative clause in a manner that preserves the regulatory power acknowledged in the preamble.

Strangely, *Heller* gave short shrift to this aspect of the preamble, writing that “the adjective ‘well-regulated’ implies nothing more than the imposition of proper discipline and training.”<sup>412</sup> Although this passage suggests that the preamble envisions only the regulation of organized militias, we have seen that the Court held that the term “militia” includes all those capable of bearing arms, not only those in an organized body. The term militia, appearing only once in the preamble, could hardly mean two different things, one for purposes of the operative right, and another for purposes of regulatory authority. The import of *Heller*’s definition of militia is that the preamble contemplates governmental regulatory authority over all who possess or carry firearms. This, in turn, supplies textual support for the kind of regulations that the Court identified as “presumptively lawful.”

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408. *Id.* at 2799-800. This is also the view reflected in the leading scholarship. *See, e.g.,* AMAR, *supra* note 14, at 51-52; TUSHNET, *supra* note 114, at 10-14; Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 144-49 (2007); Cornell & DeNino, *supra* note 402, at 508-10; Hardy, *supra* note 402, at 623-24; Kates, *supra* note 2, at 214-18; Levinson, *supra* note 2, at 646-51; Reynolds, *supra* note 2, at 473-74.

409. 128 S. Ct. at 2799.

410. *Id.* at 2800.

411. 128 S. Ct. at 2789-90.

412. *Id.* at 2800. A number of advocates of the individual-rights view take a similar position. *See, e.g.,* HALBROOK, *supra* note 2, at 330; Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1210-14 (1996).

## 2. THE PROHIBITION ON UNDUE BURDENS ON SECOND AMENDMENT RIGHTS

In light of the preamble's textual commitment to regulatory power—a textual commitment found nowhere else in the Bill of Rights—one might think that the scope of regulatory power with respect to firearms would be quite broad. That view, however, encounters *Heller's* rejection of both rational-basis scrutiny and balancing as a method of gauging regulatory power over firearms under the Second Amendment. As the Court explained, the rational-basis test is applied to “constitutional commands that are themselves prohibitions on irrational laws.”<sup>413</sup> *Heller* construed the Second Amendment to recognize a substantive right to possess and carry firearms commonly used by civilians and not merely a right to be free from irrational discrimination. Moreover, the preamble surely cannot be properly read to make the right to possess and carry firearms conferred by the operative clause nugatory. The Court was equally emphatic in rejecting a balancing test, as we have seen.<sup>414</sup> Thus, the standard by which Second Amendment rights and regulatory power can be reconciled is elusive.

Seeking guidance from the standards of scrutiny under the First Amendment, although advocated by some,<sup>415</sup> encounters serious problems. As one prominent advocate of the individual-rights view of the Second Amendment has observed, “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.”<sup>416</sup> Accordingly, deriving guidance from an Amendment that reflects a very different kind of right is perilous. In particular, the First Amendment's textually unqualified protection for “the freedom of speech”<sup>417</sup> is thought to “reflect[] ‘our profound national commitment to the principal that debate on public issues should be uninhibited, robust, and wide-open.’”<sup>418</sup> Thus, regulation of the content of speech that disadvantages particular content, ideas or viewpoints is

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413. 128 S. Ct. at 2817 n.27.

414. See *supra* text accompanying notes 238-40.

415. See *supra* note 16.

416. 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).

417. “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and petition for a redress of grievances.” U.S. CONST. amend. I.

418. *McIntyre v. Ohio Elec. Comm’n*, 514 U.S. 334, 346 (1995) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1963)).

considered suspect.<sup>419</sup> In contrast, the Second Amendment contains a textual recognition of regulatory power not found in the First Amendment; and *Heller* itself, by identifying prohibitions on concealed carry as presumptively lawful, suggests that the right to bear arms is not to be treated as “uninhibited, robust, and wide-open.” Moreover, despite its absolutist rhetoric, *Heller* seems to contemplate some inquiry into the extent to which a challenged restriction limits the right to keep and bear arms; the Court took pains to describe the District’s ban on handguns as implicating “the inherent right of self-defense [that] has been central to the Second Amendment right,” because it “amounts to a prohibition of an entire class of arms that is overwhelmingly chosen by Americans for that lawful purpose,” and “extends, moreover, to the home, where the need for defense of self, family, and property is most acute.”<sup>420</sup> For these reasons, the Court characterized the handgun ban as a particularly “severe restriction.”<sup>421</sup>

Accordingly, the most useful guidance for regulation of the right to keep and bear comes from the Court’s treatment of the constitutional right to abortion. Although the Due Process is understood to protect the right of a woman to seek an abortion prior to viability, the government is also thought to have a legitimate interest in protecting potential life, and accordingly it may impose regulation that does not create what is thought to be an undue burden on the abortion right.<sup>422</sup> This test was fashioned to respect the core right while accommodating legitimate regulatory interests, even when prophylactic in character, such as a requirement that physicians provide women with information about the procedure, the development of the fetus, and alternatives such as adoption, and perform the procedure only after a specified waiting period has elapsed.<sup>423</sup> The test even permits a prohibition on abortion procedures with particular potential “to devalue human life” or which may lead a woman to “come[] to regret her choice to abort” long after the fact, at least when other procedures remain available.<sup>424</sup>

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419. See, e.g., *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Texas v. Johnson*, 491 U.S. 397, 406-08, 414 (1989).

420. 128 S. Ct. at 2817.

421. *Id.* at 2818.

422. See, e.g., *Gonzales v. Carhart*, 127 S. Ct. 1610, 1626-27 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 875-79 (1992) (opinion of O’Connor, Kennedy & Souter, JJ.).

423. See *Casey*, 505 U.S. at 881-87 (opinion of O’Connor, Kennedy & Souter, JJ.).

424. See *Gonzales v. Carhart*, 127 S. Ct. at 1633-35.



An “undue burden” test fits nicely with the approach taken in *Heller*. It recognizes the absolute protection for the core right, while acknowledging that any number of regulations may be permissible. Under an “undue burden” test, for example, it is possible to justify a prohibition on carrying concealed firearms as well as the other regulations the Court identified in *Heller* as “presumptively lawful.”<sup>425</sup> Carrying concealed firearms could be thought to unreasonably facilitate unlawful conduct, yet this prohibition still leaves ample room to protect the core “right to possess and carry firearms in case of confrontation.”<sup>426</sup> Special risks could also be thought to justify a prohibition 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.”<sup>427</sup> To be sure, there are not framing-era precedents for such laws, but unlike the Seventh Amendment, which provides that “[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,”<sup>428</sup> the Second Amendment’s text does not “preserve” a preexisting right or regulatory scheme, but rather contemplates more generally that the militia be “well-regulated.”<sup>429</sup>

#### B. *Second Amendment Incorporation*

It remains to assess the case for Second Amendment incorporation under current incorporation doctrine. As we have seen, this requires an inquiry into whether the Second Amendment right to keep and bear arms is properly deemed sufficiently fundamental to become an aspect of due process.

*Heller* itself acknowledged as “debatable” the question whether “the Second Amendment is outmoded in a society in which our standing

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425. 128 S. Ct. at 2817 n.26.

426. *Id.* at 2797.

427. *Id.* at 2816-17 (footnote omitted).

428. U.S. CONST. amend. VII.

429. This interpretive approach bears considerable resemblance to the originalism advanced by Jack Balkin, who argues that as a form of textualism, originalism commands deference not to the original intentions or expected applications of the framers, but to the principles reflected in the text, at the level of generality found in the text. See Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST.COMMENT. 427, 486-99 (2007). Indeed, precisely because public-meaning originalism treats text rather than intentions as dispositive, many of its advocates deny that framing-era practices are controlling. See, e.g., Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 591-617 (1998); Aileen Kavanaugh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 279-83 (2002); Note, *Original Meaning and Its Limits*, 120 HARV. L. REV. 1279, 1292-1300 (2007).

army is the pride of the Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem.”<sup>430</sup> The Court nevertheless refused to consider the justifications for a handgun ban on the ground that the Second Amendment “is the very *product* of an interest balancing by the people,” and “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.”<sup>431</sup> Although the Court concluded that the adoption of the Second Amendment represented a choice to prevent Congress from banning the possession or carrying of firearms in common civilian use, as we have seen, it is far from clear that the adoption of the Fourteenth Amendment represented a similar conclusion with respect to the states. Moreover, when the wisdom of a right is subject to intense debate, it becomes difficult to characterize it as sufficiently fundamental to merit incorporation.

As it incorporated the Sixth Amendment right to jury trial in criminal cases in *Duncan v. Louisiana*,<sup>432</sup> the Court noted “the long debate . . . as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings,”<sup>433</sup> but distinguished the unincorporated Seventh Amendment right to a civil jury by noting that “most of the controversy has centered on the jury in civil cases.”<sup>434</sup> The controversial character of a right to possess and carry handguns—conceded in *Heller* itself—is surely one reason to question whether this right should be considered a fundamental aspect of ordered liberty. In fact, history suggests that the right identified in *Heller* is far from a fundamental character of our jurisprudence.

We have seen that *Heller* recognized an absolute right not subject to any form of interest balancing, albeit perhaps subject to regulation that creates no undue burden on the right to possess and carry firearms commonly used by civilians. This formulation of the right to bear arms has not prospered in our post-1791 jurisprudence. As Adam Winkler has demonstrated, although forty-four states afford constitutional protection for the right to bear arms, since the nineteenth century state courts have reached consensus on a reasonable regulation standard that carefully weighs the justification for the regulation at issue against the extent of the burden it creates on the right to bear arms.<sup>435</sup> Similarly, the

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430. 128 S. Ct. at 2822.

431. *Id.* at 2821, 2822 (emphasis in original).

432. 391 U.S. 145 (1968).

433. *Id.* at 156-57 (footnote omitted).

434. *Id.* at 157. The Court continues to take the position that the Seventh Amendment civil jury right is not applicable to the states. *See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999).

435. *See* Winkler, *supra* note 16, at 686-87, 711-12, 716-19.

Thirty-Ninth Congress seems to have thought that the Second Amendment tolerated balancing of regulatory against liberty interests when it prohibited the arming of southern militias. This, of course, is just the type of balancing approach that *Heller* rejects. Indeed, the state-court balancing approach has been used to uphold prohibitions on stun guns, semiautomatic weapons, and even the possession of handguns,<sup>436</sup> a result squarely inconsistent with *Heller*'s rejection of a ban on any firearm commonly used by civilians. Indeed, it should be easy to see how, under a reasonableness test, a ban on handguns in a high-crime, gang-ridden urban area could be sustained; whatever the marginal benefits of handguns for self-defense and other legitimate purposes as compared to rifles and other weapons more difficult to conceal,<sup>437</sup> handguns are far more prone to unlawful use as concealed weapons, and as we have seen, there is reason to believe that a handgun ban will increase the cost and difficulties facing gang members seeking handguns.<sup>438</sup> Indeed, it is for just these reasons that there is a serious case to be made for the wisdom of handgun bans in urban areas, as *Heller* acknowledged. One need not reject *Heller*'s understanding of the original meaning of the Second Amendment to acknowledge that *Heller* has recognized a far more muscular right than is consistent with the broad swath of American firearms-regulation history.

What is more, to the extent that one rejects the argument advanced above that the Second Amendment's preamble supplies a textual basis for a general regulatory power over the possession and carrying of firearms, then the historical footing for the right recognized by *Heller* becomes even more unsteady. If the preamble is set aside, as we have seen, the Second Amendment's text, as construed in *Heller*, confers an unqualified "right to possess and carry firearms in case of confrontation."<sup>439</sup> Accordingly, the text would leave no room to prohibit the carry-

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436. *Id.* at 719.

437. In *Heller*, the Court wrote, albeit without citation of supporting evidence:

[T]he American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police.

128 S. Ct. at 2818.

438. See *supra* text accompanying note 227.

439. 128 S. Ct. at 2797.

ing of concealed firearms even though, as we have seen, a consensus in favor of the propriety of such laws emerged in the nineteenth century.<sup>440</sup> Thus, if the preamble is put aside, the eighteenth-century version of the right-to-bear arms is one that did not survive the crime wave of the early nineteenth century. It is accordingly difficult to characterize such a right as a fundamental aspect of our jurisprudence.

Even crediting the preamble as a source of regulatory authority, however, the problems with incorporation remain fundamental. No one should welcome a right to possess and carry firearms in case of confrontation more than criminal street gangs. Even assuming the validity of concealed-carry prohibitions, an incorporated Second Amendment would make it effectively impossible for police to raise the risks of carrying guns in public through stop-and-frisk tactics, since gang members would have a constitutional right to carry firearms, as long as they did so openly. To be sure, *Heller* grants gang members no right to use their guns to harm—or even intimidate—others, but gang members are unlikely to do that in front of a uniformed officer, and civilian witnesses are readily subject to intimidation or worse if they complain to the authorities about what gang members do with their guns when the police are absent, as we have seen.<sup>441</sup> Moreover, as we have also seen, there are serious limitations on the ability of undercover operations to control gang violence.<sup>442</sup>

In an urban environment in which gang members have a constitutional right to carry guns, the ability of the police to combat gang control over neighborhoods and drug distribution operations would be sharply circumscribed. Gangs could act as virtual occupying armies, enjoying constitutional impunity as long as they commit no criminal act in the presence of the authorities. In such an urban landscape, the Second Amendment becomes the enemy of ordered liberty, not its guarantor.

Indeed, in high-crime urban neighborhoods, the Second Amendment may be something of a non sequitur. The Second Amendment is premised on the view that it is “necessary to the security of a free state” to grant a right to bear arms, that is, a “right to possess and carry firearms in case of confrontation,”<sup>443</sup> to a “well-regulated militia,” that is, a

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440. See *supra* text accompanying notes 402-405.

441. See *supra* text accompanying note 61.

442. See *supra* Part I.E.

443. 128 S. Ct. at 2797.

populace subject to “proper discipline and training.”<sup>444</sup> The preamble and the operative clause may well have been easy to reconcile in eighteenth-century America, but in contemporary urban America, they will often be at odds with each other. In high-crime, gang-ridden neighborhoods, it may be effectively impossible to grant a right to carry firearms while preserving the “security of a free state.” Given the conditions in high-crime urban neighborhoods, where middle-class norms of law-abidingness are in retreat, and where firearms are used to establish drug-dealing monopolies, it may be quite unrealistic to suppose that this right can be granted to a “well-regulated” populace. As we have seen, gang members and drug dealers are all too likely to exploit their ability to carry firearms in order to terrorize the community and engage in a violent competition for the spoils of the drug trade in communities isolated from middle-class norms of law-abidingness; this is not a world in which one can speak of “proper discipline and training” of a “well-regulated” urban “militia.” Contemporary street gangs bear greater resemblance to the violent militias that led the Reconstruction Congress to effectively suspend the right to bear arms than to any eighteenth-century conception of a “well-regulated militia.”

To be sure, the account of urban crime advanced in Part I above is not unassailable. Although there is substantial evidence to support the centrality of the ability to carry firearms to the prevalence of urban violence, and evidence as well suggesting that the ability of the police to remove firearms from the streetscape, through aggressive stop-and-frisk tactics, has been an important component of the reduction in violent crime since the early 1990s, these propositions have not been conclusively proven. Even if they were, and even if the muscular eighteenth-century version of the right to bear arms recognized in *Heller* were applied to state and local governments, perhaps they would find other, equally effective ways to battle urban crime.<sup>445</sup> Moreover, the problems posed by

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444. *Id.* at 2800.

445. Some approaches presented as alternatives to stop-and-frisk, however, are anything but. For example, a recent study claims success in reducing violent crime for a program in Chicago that utilized increased federal prosecutions for weapons offenders, multi-agency teams focusing on weapons recoveries, and the use of offender notification forums to warn potential offenders and offer them social services. See Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. EMP. LEG. STUD. 223, 231-33 (2007). The study found significant reductions in homicide related to attendance at forums and weapons recoveries. See *id.* at 254-59. The authors characterize the program as an effort to enhance deterrence by stressing norms of procedural justice. See *id.* at 236-39. Yet, the program is critically dependent on stop-and-frisk; without it, no weapons would be recovered, no prosecutions would ensue, and credibility of the forums would evaporate.

recognition of a right to carry firearms in case of confrontation do not face all jurisdictions, or even most. As we have seen, firearms violence is largely a problem faced by the disadvantaged minority populations of the largest cities. It may well be that in the vast majority of jurisdictions, the benefits of liberal firearms laws—in terms of self-defense, sporting activities, and other legitimate pursuits—far outweigh the costs. This, in turn, may explain the relative political inefficacy of the gun-control movement outside of the largest cities—suburban and rural whites may be unlikely to see a reason to limit their own liberty in order to address a problem principally faced by urban minorities. Still, one deeply rooted aspect of our jurisprudence is a conception of federalism in which state and local governments “serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>446</sup> Urban areas facing unique problems may be compelled to devise unique solutions. It is hardly a fundamental aspect of our jurisprudence that an eighteenth-century conception having limited relevance to contemporary urban America must control contemporary law enforcement policy.

This conclusion does not mean that the Fourteenth Amendment holds nothing for firearms rights. Even if the eighteenth-century version of the right to bear arms has not proven sufficiently fundamental to merit incorporation, a generic right of defense may well be an aspect of constitutionally protected liberty. *Heller* concluded that the Second Amendment embodied what was widely thought to be a natural right of defense.<sup>447</sup> And, as we have seen, recognition of the right of freedmen to protect themselves was of considerable concern to the Reconstruction Congress, even as it gave short shrift to the Second Amendment rights of the militias that were terrorizing them.<sup>448</sup> Given its historical grounding, the right to defend oneself, one’s family, and one’s property may well be one

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446. *Chandler v. Florida*, 449 U.S. 560, 579 (1981) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). *Accord*, e.g., *Arizona v. Evans*, 514 U.S. 1, 8 (1995); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980); *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973). In a similar vein, and with particular regard for the problem of firearms violence, Justice Kennedy has written:

While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.

*United States v. Lopez*, 514 U.S. 549, 581 (1995) (concurring opinion).

447. 128 S. Ct. at 2793-94, 2798-99, 2805, 2807.

448. *See supra* Part II.B.6.



of the unenumerated rights that nevertheless qualifies for constitutional protection under the Fourteenth Amendment.<sup>449</sup> If so, a complete prohibition on the possession in one's home or place of business on any form of weapon reasonably useful for defense could impose an impermissible burden on this right.<sup>450</sup> A right of defense that does not go so far as the more robust "right to possess and carry firearms in case of confrontation" recognized in *Heller*, in turn, would not pose a comparable threat to legitimate governmental interests. As we have seen, it is principally the presence of firearms in public places that has been the spur to urban violence, and when the police are able to drive firearms off the streetscape in high-crime inner-city neighborhoods, there is reason to believe that they can drive down violent crime in the process. A right carefully calibrated to balance the competing interests in the urban landscape is consistent with the traditional test that courts have used to assess firearms rights, rather than the eighteenth-century version embraced in *Heller*.

There is appeal to the notion that the populace should not have to depend on the government to keep it safe from lawbreakers. There is considerably less appeal to the notion that in a complex urban environment of a type utterly alien to the eighteenth-century Framers, everyone should have a right to carry firearms in case of confrontation. In an urban terrain defined by conflict over street gang territorial prerogatives, a right to bear arms seems more likely to imperil ordered liberty than to secure it.

#### IV. Conclusion

There is likely something comforting to the judicial mind—or at least a certain type of judicial mind—about originalism. Just as *Heller* dis-

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449. For arguments along these lines, see Nicholas J. Johnson, *Self-Defense?*, 2 J.L. ECON. & POL'Y 187, 193-202 (2006); Nelson Lund, *A Constitutional Right to Self-Defense?*, 2 J.L. ECON. & POL'Y 213, 218-20 (2006); Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1818-20 (2007); Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 TEX. REV. L. & POL. 399, 415-17 (2007); Victoria Dorfman & Michael Koltonyuk, Note, *When the Ends Justify the Reasonable Means: Self-Defense and the Right to Counsel*, 3 TEX. REV. L. & POL. 381, 382-89 (1999).

450. In dicta in one of the nineteenth-century cases rejecting incorporation, the Court has also suggested that a state law requiring complete disarmament might impermissibly interfere with the right of the United States to call state militias into federal service. See *Presser v. Illinois*, 116 U.S. 252, 265-66 (1886). This suggestion, however, could do no more than limit state laws regulating organized militias. Moreover, at present federal law does not require members of the organized militia to maintain weapons. See 10 U.S.C. § 311 (2006). This no doubt reflects the reality that at present, it is no longer practicable to permit private possession of the kind of weapons that are useful for military purposes. See *Heller*, 128 S. Ct. at 2817.

claimed responsibility for the consequences of its interpretation of the Second Amendment, the originalist judge can always claim that he honors the limits of his office by hewing to the original meaning of constitutional text, regardless of the consequences. This defense of originalism puts me in mind the exchange between Justice Holmes and Judge Hand when the latter exhorted his friend to “Do justice!”, and Holmes is said to have replied: “Justice? What’s that? That’s none of my business. *Law* is my business.”<sup>451</sup>

Whatever the comforts of originalism, it is surely unrealistic to expect it to provide a reliable guide for decisionmaking in every case. Just two weeks before it decided *Heller*, the Supreme Court confronted the question whether the constitutional right to habeas corpus extended to detainees held in Guantanamo Bay, Cuba. After reviewing the parties’ historical arguments, the Court wrote:

Both arguments are premised, however, upon the assumption that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before us. There are reasons to doubt both assumptions. Recent scholarship points to the inherent shortcomings in the historical record. And given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one.<sup>452</sup>

The Court accordingly relied on its own assessment of the constitutional interests at stake in order to decide the question before it.<sup>453</sup>

The historical record can provide only illusory certitude on the question whether the Second Amendment’s right to bear arms applies to the states. The historical record is of limited utility in assessing the validity of gun-control laws as well; as we have seen, in *Heller* the Court treated as presumptively lawful regulations with no framing-era support.

The nation may have carefully weighed the costs and benefits of federal firearms regulation in the eighteenth century, when it adopted the Second Amendment, but the historical record discloses no similarly clear judgment with respect to state firearms regulation in the course of the Fourteenth Amendment’s adoption. Even the eighteenth-century judgment was notably accompanied by textual recognition of the need for regulation; a formulation found nowhere else in the Bill of Rights.

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451. Abram Chayes, *How Does the Constitution Establish Justice?*, 101 HARV. L. REV. 1026, 1041 (1988). There are a number of versions of the story. See Michael Herz, *Do Justice! Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111 (1996).

452. *Boumediene v. Bush*, 128 S. Ct. 2229, 2251 (2008) (citation omitted). This passage is followed by a reference to *Brown’s* assessment of the historical evidence regarding the original meaning of the Fourteenth Amendment. *Id.*

453. *Id.* at 2251-62.

A court that must decide this question cannot help but attend to the consequences of applying an eighteenth-century right to a twenty-first century metropolis. Justice surely demands at least a peek at the havoc that a ruling threatens to wreak, especially on the poorest and most vulnerable in our society.

My onetime teacher Abe Chayes had a response to Justice Holmes' (perhaps apocryphal) riposte about law having no relation to justice:

We know that is not true. We know that law is inevitably concerned with justice. A judicial commission is not a license to decide cases at large according to the judge's personal ideas about just results. But there is no way to talk about law without eventually coming to talk about justice. . . .

The ultimate irony of the story is that we celebrate Holmes not because he was a superb technical lawyer and judge, although he certainly was. Holmes is a folk hero—America is the only country in the world that has judges for folk heroes—because he was a fighter for justice, or at least is seen as one. What resonate for us are the great cadences of the *Lochner* and *Abrams* dissents and others in which he used his craft in the law to force us to explore the meaning of justice. His utterances—and those of the other hero-judges—help keep the discourse of justice alive for us.

That is how the Constitution establishes justice.<sup>454</sup>

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454. Chayes, *supra* note 451, at 1041-42.