THE LIMITS OF SECOND AMENDMENT ORIGINALISM AND THE CONSTITUTIONAL CASE FOR GUN CONTROL

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The Second Amendment is the only provision in the Bill of Rights with a preamble: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[1] The relationship between the Second Amendment's preamble and its operative clause is far from obvious; yet, it has critical implications for the future of gun control.

For decades, Second Amendment jurisprudence was dominated by *United States v. Miller*,[2] in which the Court rejected a constitutional attack on a federal statute prohibiting the interstate transportation of a short-barrel shotgun by observing that a short-barrel shotgun has no "relationship to the preservation or efficiency of a well regulated militia."[3] Lower courts generally "invoke[d] *Miller* with vehemence and regularity in dismissing, out of hand, challenges to the various pieces of gun control legislation."[4]

This changed with the 5–4 decision in *District of Columbia v. Heller*.[5] Assessing the constitutionality of an ordinance banning the possession of handguns and requiring that firearms remain unloaded and disassembled or locked, the Court began by stating its interpretive methodology:

> [W]e 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

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1. U.S. CONST. amend. II.
2. 307 U.S. 174 (1939).
3. *Id.* at 178.
4. Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of* United States v. Miller *and the Second Amendment*, 26 CUMB. L. REV. 961, 998 (1996).
5. 554 U.S. 570 (2008).

> 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.[6]

Relying on evidence of the meaning of the terms of the Second Amendment in the framing era, the Court concluded that the "right of the people" referred to an individual right,[7] while "Arms" included "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding,"[8] but excluded "dangerous and unusual weapons."[9] The right to "keep" arms, the Court concluded, meant the right to possess them,[10] and the right to "bear" arms meant the right to "carry[] for a particular purpose—confrontation."[11] As for the preamble, the Court concluded that it would not have been understood in the framing era to "limit or expand the scope of the operative clause," but instead merely "announce[d] the purpose for which the right was codified: to prevent elimination of the militia."[12] As for *Miller*, the Court concluded that it should be understood as holding "only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[13] The Court then held that the right to keep and bear arms was infringed by the District's prohibition on the registration and possession of handguns,[14] as well as its requirement that firearms be locked or otherwise stored in an inoperable condition.[15]

At first blush, *Heller*'s originalist methodology appears to embrace a largely unqualified right of every person to possess and carry any firearm in common civilian use. Its practical significance grew when, two years later, a majority of the Court concluded that the Second Amendment's protections are fully applicable to state and local gun-control laws by virtue of the Fourteenth Amendment.[16] *Heller*'s importance was

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6. *Id.* at 576–77 (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)) (citations omitted) (second brackets in original).
7. *Id.* at 579–81, 592.
8. *Id.* at 582.
9. *Id.* at 627.
10. *Id.* at 582.
11. *Id.* at 584.
12. *Id.* at 578, 599.
13. *Id.* at 625.
14. *Id.* at 628–31.
15. *Id.* at 630.
16. *See* McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (plurality opinion) (relying on the Due Process Clause); *id.* at 839–58 (Thomas, J., concurring in part and concurring in the judgment) (relying on the Privileges or Immunities Clause).

methodological as well. Justice Scalia, the author of *Heller*, has long been an advocate of originalist approaches to constitutional interpretation.[17] His advocacy of originalism, which "regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present,"[18] is ultimately premised on his view about the proper way to divine the meaning of a text: "originalism remains the normal, natural approach to understanding anything that has been said or written in the past."[19] Justice Scalia has added that, in his view, treating legal rules as having evolving content to be fleshed out by judicial decision "is preeminently a common-law way of making law, and not the way of construing a democratically adopted text."[20] In this, Justice Scalia is not alone; originalists, whatever their differences, frequently defend their methodology as the proper approach for ascertaining the meaning of a legal text.[21]

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17. *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–64 (1989).

18. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004). Lawrence Solum has elaborated:

> [M]ost or almost all originalists agree that original meaning was *fixed* or determined at the time each provision of the constitution was framed and ratified. We might call this idea *the fixation thesis*. It is no surprise that originalists agree on the fixation thesis. The term "originalism" was coined to describe a family of textualist and intentionalist approaches to constitutional interpretation and construction that were associated with phrases like "original intentions," "original meaning," and "original understanding." These phrases and the word "originalist" share the root word "origin." The idea that meaning is fixed at the time of origination for each constitutional provision serves as the common denominator for all of these expressions.

Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 33 (Grant Huscroft & Bradley W. Miller eds., 2011) [hereinafter THE CHALLENGE OF ORIGINALISM]. Justice Scalia has similarly described originalism as the consequence of what he has called the "Fixed-Meaning Canon": "Words must be given the meaning they had when the text was adopted." ANTONIN SCALIA & BRYAN A. GARNER: READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78 (2012).

19. SCALIA & GARNER, *supra* note 18, at 82.

20. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 40 (Amy Gutmann ed., 1997) [hereinafter A MATTER OF INTERPRETATION].

21. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 35–37 (2011); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 92–117 (2004); GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 67–90 (1992); 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); Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1103–07 (1991); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 550–59 (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*

Heller has been called "the most explicitly and self-consciously originalist opinion in the history of the Supreme Court."[22] *Heller* offered Justice Scalia an inviting opportunity to inject originalism into constitutional adjudication. Although Justice Scalia is reluctant to repudiate well-settled nonoriginalist precedent by virtue of his respect for the doctrine of stare decisis,[23] Second Amendment jurisprudence was unencumbered by numerous nonorginalist precedents. By cabining *Miller*—the only important Second Amendment precedent before *Heller*—as a case about unusual weapons, Justice Scalia had little difficulty in concluding that "nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment."[24] Accordingly, the path was clear to an originalist Second Amendment jurisprudence.

In *Heller*, the Court pointedly refused to adopt any standard of judicial scrutiny by which a challenged gun-control law could be tested to determine if it was sufficiently justified, although it did reject the view that

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Framers' Intention, 100 HARV. L. REV. 751, 756–60 (1987); Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1641–57 (2009); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 229–36 (1988); Vasan 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, 1833–36 (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, 1278–87 (1997); Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not to)*, 115 YALE L.J. 2037, 2056–62 (2006); Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 540–45 (1998); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 512–14 (1988); Lawrence B. Solum, *We Are All Originalists Now*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 38–42 (Robert W. Bennett & Lawrence B. Solum eds., 2011).

22. Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 246 (2008).

23. *See* SCALIA & GARNER, *supra* note 18, at 87, 411–14; Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION, *supra* note 20, at 129, 138–40. Nonorginalist precedent poses difficult questions for those who advocate both originalism and the virtues of stare decisis. Although some originalists largely reject nonoriginalist precedent, *e.g.*, Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 262–69 (2005); Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POL'Y 947, 947 (2008); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005); others are more sympathetic to nonoriginalist precedent, at least in some circumstances. *See, e.g.*, Kurt T. Lash, Essay, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437, 1444–61 (2007); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 823–50 (2009); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 739–72 (1988); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 195–96 (2006); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 436–79 (2006).

24. District of Columbia v. Heller, 554 U.S. 570, 625 (2008).

a challenged regulation need only to have a rational basis, as well as the interest-balancing test Justice Breyer advocated in dissent.[25] Given *Heller*'s originalism, this should be unsurprising; the advocates of balancing tests and standards of scrutiny do not claim that they have any basis in the original meaning of the Constitution's text.[26] Thus, *Heller* seemed to promise the dawn of Second Amendment originalism unencumbered by the nonoriginalist balancing tests and standards of scrutiny common in other areas of constitutional law, but lacking any grounding in the original meaning of the Constitution's text.

Commentators have provided many helpful, if often conflicting, assessments of *Heller*'s conclusions regarding the original meaning of the Second Amendment.[27] Much less scholarly attention has been paid to the Second Amendment jurisprudence emerging in *Heller*'s wake. This Article takes *Heller*'s conclusions about the original meaning of the Second Amendment as given and assesses whether they have produced—or even are capable of producing—an authentically originalist Second Amendment jurisprudence. In *Heller*'s wake, the outlines of a new jurisprudence—one that countenances surprisingly robust regulatory authority and in which originalism plays a surprisingly limited role—are starting to become clear. The discussion that follows seeks to explicate and defend this emerging jurisprudence in terms of the relationship between the Second Amendment's preamble and its operative clause. It explores, as well, the constitutional case for a robust regime of gun control.

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25. *Id.* at 628 n.27, 634–35.

26. For a helpful discussion, albeit predating *Heller*, of the origins and character of the various approaches to judicial review and standards of scrutiny employed in other areas of constitutional law and how they might be applied to the Second Amendment, see Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 693–705 (2007).

27. For examples, see Akhil Reed Amar, Heller, HLR, *and Holistic Legal Reasoning*, 122 HARV. L. REV. 145 (2008); Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing "Standard Model" Moving Forward*, 39 FORDHAM URB. L.J. 1727 (2012); Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625 (2008); Paul Finkelman, *It Really Was About a Well Regulated Militia*, 59 SYRACUSE L. REV. 267 (2008); David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295 (2009); Nelson Lund, *The Second Amendment,* Heller, *and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009); Joyce Lee Malcolm, *The Supreme Court and the Uses of History:* District of Columbia v. Heller, 56 UCLA L. REV. 1377 (2009); William G. Merkel, The District of Columbia v. Heller *and Antonin Scalia's Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349 (2009); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008); David C. Williams, *Death to Tyrants:* District of Columbia v. Heller *and the Uses of Guns*, 69 OHIO ST. L.J. 641 (2008).

Part I examines the problems with *Heller*'s effort to ground constitutional adjudication in the original meaning of constitutional text. As Part I explains, nonoriginalism lurks in *Heller*, which helps to explain why lower courts have increasingly utilized the type of balancing tests and standards of scrutiny seemingly eschewed by *Heller*. Part II reviews and ultimately dismisses the efforts to salvage an originalist Second Amendment jurisprudence after *Heller*, casting doubt on the utility of originalism to produce a coherent Second Amendment jurisprudence. Part III then offers an account that accommodates both the right recognized in *Heller* and comprehensive regulatory power over firearms by focusing on the relationship between the Second Amendment's preamble and its operative clause. It concludes that there is a textual basis in the Second Amendment for both firearms rights and regulation, while acknowledging that there is little in the original meaning of the Second Amendment that helps to identify the boundary between rights and regulatory authority. Instead, Part III argues that common-law methodology—what originalists often call constitutional construction and nonoriginalists celebrate as living constitutionalism—is up to the task. Existing nonorginalist constitutional doctrine supplies the framework for constructing a post-*Heller* Second Amendment jurisprudence. Part III then applies this framework and demonstrates that the Second Amendment poses little obstacle to comprehensive firearms regulation.

I. THE UNRAVELING OF *HELLER*'S SECOND AMENDMENT ORIGINALISM

At first blush, *Heller*'s account of the Second Amendment seems straightforwardly hostile towards firearms regulation. The Court concluded that the right to keep and bear arms was originally understood as an "individual right to possess and carry weapons in case of confrontation."[28] Although the Court offered no account of the original meaning of an "infringe[ment]" of this right, the first edition of Webster's *American Dictionary of the English Language*, which Justice Scalia frequently consults to ascertain the original meaning of eighteenth-century constitutional text,[29] including in *Heller* itself,[30] defined "infringed" as

28. *Heller*, 554 U.S. at 592.

29. *See, e.g.*, Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2644 (2012) (Scalia, Kennedy, Thomas, Alito, JJ., dissenting); Michigan v. Bryant, 131 S. Ct. 1143, 1168 (2011) (Scalia, J., dissenting); Citizens United v. FEC, 558 U.S. 310, 390–91 n.6 (2010) (Scalia, J., concurring); Giles v. California, 554 U.S. 353, 360 (2008); Crawford v. Washington, 541 U.S. 36, 51 (2004); Kyllo v. United States, 533 U.S. 27, 32 n.1 (2001); Dep't of Commerce v. U.S. House of Representatives, 525

"[b]roken, violated, transgressed."[31] Other framing-era sources are to similar effect.[32] Accordingly, the original meaning of the command in the Second Amendment's operative clause that the right to keep and bear arms "shall not be infringed" suggests that no individual can be denied the right to possess or carry firearms in common civilian use in case of confrontation. Thus, some have argued that the original meaning of the Second Amendment contemplates an expansive right to possess and carry arms.[33]

Yet, much in *Heller* actually suggests that the original meaning of the Second Amendment's operative clause tells us little about the scope of permissible firearms regulation. This becomes clear through an examination of *Heller*'s discussion of permissible firearms regulation, its precise holding, and its application in the lower courts.

A. Heller*'s Dicta on Permissible Firearms Regulation*

Heller went to some lengths to emphasize that limitations on the right to keep and bear arms—that is, to possess and carry firearms in case of confrontation—are consistent with the Second Amendment. The Court wrote: "Like most rights, the right secured by the Second Amendment is not unlimited."[34] "For example," the Court observed, "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."[35] Moreover,

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws

U.S. 316, 347 (1999) (Scalia, J., concurring in part); California v. Hodari D., 499 U.S. 621, 624 (1991); Grady v. Corbin, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting).

30. *Heller*, 554 U.S. at 581, 582, 584, 595.

31. 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 110 (1828).

32. *See, e.g.*, 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE IN WHICH THE WORDS ARE DEDUCED FROM THEIR ORIGINALS mxlvi (6th ed. 1785) ("To violate; to break laws or contracts.").

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

34. *Heller*, 554 U.S. at 626.

35. *Id.*

> imposing conditions and qualifications on the commercial sale of arms.[36]

The Court added that it "identif[ied] these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."[37]

A number of respected commentators have doubted that *Heller*'s list of "presumptively lawful" regulatory measures reflects the original meaning of the Second Amendment.[38] Indeed, the Court's discussion of presumptively lawful gun-control measures is in considerable tension with its conclusions regarding the original meaning of the Second Amendment's operative clause. For example, if the operative clause recognizes an individual right to possess and carry in case of confrontation all firearms in common civilian use, then there would seemingly be no textual basis to deprive some individuals of that right on the basis of a prior conviction or mental illness or to prevent individuals from exercising the right to carry firearms if concealed or in "sensitive places." While there may be good policy reasons for such regulations, *Heller* states that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."[39] In this fashion, *Heller*'s originalism breaks down. There may be some basis on which to sustain the regulations that *Heller* describes as presumptively lawful, but it cannot be found in *Heller*'s account of the original meaning of the Second Amendment's operative clause.

Yet, it may be perilous to place too much weight on *Heller*'s discussion of presumptively lawful gun control. This discussion was, after all, only dicta unnecessary to the Court's holding; Heller sought only "to enjoin the

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36. *Id.* at 626–27.

37. *Id.* at 627 n.26. When the Court subsequently concluded that the Second Amendment is applicable to state and local governments through the Fourteenth Amendment, four of the five Justices in the majority referred to *Heller*'s discussion of presumptively lawful regulations, stating: "We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms." McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (opinion of Alito, J.).

38. *See, e.g.*, Philip J. Cook, Jens Ludwig & Adam M. Samaha, *Gun Control After* Heller*: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1064–66 (2009); Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 HASTINGS L.J. 1371, 1373–79 (2009); Rory K. Little, Heller *and Constitutional Interpretation: Originalism's Last Gasp*, 60 HASTINGS L.J. 1415, 1427 (2009); Lund, *supra* note 27, at 1356–62; Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 729–32 (2012); Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1562–65 (2009). Even *Heller*'s exclusion of "dangerous and unusual" weapons from Second Amendment protection has questionable historical support. *See* Lund, *supra* note 27, at 1362–64.

39. *Heller*, 554 U.S. at 634–35.

city from enforcing the bar on the registration of handguns . . . and the trigger-lock requirement insofar as it prohibits the use of 'functional firearms within the home.'"[40] Moreover, in its discussion of presumptively lawful regulations, the Court acknowledged that it "d[id] not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment," and added that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us."[41] At most, *Heller*'s dicta erect a presumption that can, presumably, be rebutted. Still, *Heller*'s precise holding, no less than its dicta on permissible firearms regulation, reflects the limits of Second Amendment originalism, as we shall now see.

B. Heller*'s Holding*

Since *Heller* explained that the Second Amendment's operative clause conferred an individual right to possess and carry in case of confrontation any firearm in common civilian use, it should have been a simple matter to invalidate the District of Columbia's prohibition on the possession of handguns and their use within the home. If one has the right to possess and carry in case of confrontation any firearm in common civilian use, then the invalidity of the challenged regulations should have been plain. The Court's precise holding, however, was not nearly so straightforward. Indeed, the Court's assessment of the constitutionality of the ordinance does not rest on the Court's account of the original meaning of the Second Amendment. Instead, it seems to rest on nonoriginalist considerations.

The Court introduced its discussion of the challenged ordinance by observing that "the inherent right of self-defense has been central to the Second Amendment right," adding that the District of Columbia's "handgun ban amounts to a prohibition on an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose," and that the ban "extends, moreover, to the home, where the need for defense of self, family, and property is most acute."[42] The Court noted that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. And some of those few have been struck down."[43] Inasmuch as "the American people have considered the handgun

40. *Id.* at 576. Heller also challenged the District's requirement that firearms be licensed, but the Court found it unnecessary to reach that provision. *Id.* at 630–31.

41. *Id.* at 626, 635.

42. *Id.* at 628.

43. *Id.* at 629.

to be the quintessential self-defense weapon," it follows, the Court wrote, that "a complete prohibition of their use is invalid."[44] As for the trigger-lock requirement, because it required that "firearms in the home be rendered and kept inoperable at all times," this prohibition "makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional."[45]

Thus, the Court invalidated the District's ordinance not on the ground that the Second Amendment confers an individual right to possess and carry firearms in common civilian use, but because the District's ordinance imposed a particularly severe burden on a right of armed defense. Some commentators have argued that *Heller* is best read as protecting a core right to possess and use firearms for lawful defense of the home, while leaving open the possibility of greater restrictions on liberty interests at a distance from that core right.[46] Indeed, it is plain that the Court regarded lawful, armed defense as the core of the Second Amendment right; it described lawful self-defense as "the *central component* of the right itself" and the Amendment's "core lawful purpose," and concluded that the Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[47] The Court even adverted to the burden imposed by the challenged regulations, contrasting it with the more modest burden imposed by framing-era regulations.[48] For present purposes, however, what is most significant is that none of this can be deduced from the Court's explication of the original meaning of the Second Amendment's text, which says not a word about self-defense or the importance of hearth and home.[49] Instead, according to *Heller*, the original meaning of the right to "keep and bear arms" was to confer an individual right to possess and carry in case of confrontation firearms in common civilian use without apparent qualification. *Heller*'s discussion of the centrality of self-defense and the defense of the home, and the extent to

44. *Id.*

45. *Id.* at 630.

46. *See, e.g.*, Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 975–77, 978–79 (2009); Mark Tushnet, Heller *and the Perils of Compromise*, 13 LEWIS & CLARK L. REV. 419, 423–28 (2009).

47. *Heller*, 554 U.S. at 599, 630, 635.

48. *Id.* at 632 (noting that framing-era firearms safety laws "d[id] not remotely burden the right of self-defense as much as an absolute ban on handguns").

49. To be sure, the text refers, in the preamble, to "[a] well regulated Militia, being necessary to the security of a free State," U.S. CONST. amend. II, which the Court acknowledged was a reference not to an individual right of self-defense, but "meant 'security of a free polity.'" *Heller*, 554 U.S. at 597.

which a challenged regulation impinges on the interest in such defense, has no apparent footing in the original meaning of the Second Amendment's operative clause.[50]

C. Heller *in the Lower Courts*

Heller's focus on the original meaning of the Second Amendment's operative clause suggests that in applying it, courts need only ask whether a challenged regulation infringes an individual's right to possess and carry firearms in common civilian use. Yet, original meaning has rarely played a decisive role in the Second Amendment jurisprudence that has developed in the lower courts following *Heller*.

One obstacle to judicial reliance on original meaning when assessing the validity of a challenged regulation is that courts often find the relevant historical evidence to be uncertain or inconclusive.[51] Beyond that, serious difficulties lurk in defining Second Amendment rights by reference to *Heller*'s definition of the right to keep and bear arms.

First, an effort to define the scope of Second Amendment protection in terms of the original meaning of the operative clause could in many cases inappropriately circumscribe constitutional protection. Some regulations, such as laws prohibiting the sale of ammunition, or target practice, do not by their terms infringe the right to "keep" or "bear" "arms" under the original meaning of those terms as defined in *Heller*, yet they could impose enormous and unjustified burdens on Second Amendment rights.[52]

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50. One might argue that the text's reference to a right to "bear" arms implies a right to carry firearms only for lawful purposes, but *Heller* undermines that view. The Court adopted a definition of the term "bear" first advanced by Justice Ginsburg in a case interpreting a federal statute that provides for an enhanced sentence for individuals who carry a firearm during the commission of a crime, *Heller*, 554 U.S. at 584 (citing Muscarello v. United States, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)), and concluded that the phrase "bear arms" "implies that the carrying of the weapon is for the purpose offensive or defensive action." *Id.* (internal quotation marks omitted).

51. *See, e.g.*, Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 90–91 (2d Cir. 2012) (carrying firearms in public); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 204 (5th Cir. 2012) (selling handguns to juveniles); United States v. Huitron-Guizar, 678 F.3d 1164, 1167–68 (10th Cir. 2012) (ability of noncitizens to keep and bear arms); United States v. Chester, 628 F.3d 673, 680–81 (4th Cir. 2010) (prohibition on possession of firearms by domestic-violence misdemeanants); United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010) (prohibition on possession of firearms by convicted felons).

52. *See, e.g.*, Brannon P. Denning, *Anti-Evasion Doctrines and the Second Amendment*, 81 TENN. L. REV. 551, 559–60 (2014) ("At a minimum, laws that seek to make it extremely difficult or unreasonably expensive to obtain or maintain a gun at home, or which make it difficult to have the gun available and operable for self-defense ought to raise constitutional concerns."); Glenn Harlan Reynolds, Essay, *Second Amendment Penumbras: Some Preliminary Observations*, 85 S. CAL. L. REV. 247, 248–49 (2012) ("If the core right is, as indicated in *District of Columbia v. Heller*, the right to

Indeed, such laws have been invalidated since *Heller*.[53] Yet, nothing in the original meaning of the Second Amendment's operative clause as articulated in *Heller* offers a methodology for determining what types of burdens on the right to keep and bear arms are impermissible.

Second, a focus on the original meaning of the operative clause does little to explain *Heller*'s discussion of permissible firearms regulation. *Heller*'s discussion of presumptively valid regulation has no apparent basis in the original meaning of the operative clause, but it does suggest that the Second Amendment preserves considerable regulatory power. Indeed, a number of courts have reasoned that regulations that fall within the categories branded presumptively lawful in *Heller* should be sustained even when they prevent individuals from possessing or carrying firearms in common civilian use.[54] Still, there are perils in placing too much weight on this dictum, and a number of courts have refused to treat it as dispositive.[55] Yet, *Heller*'s precise holding seems to rest on the extent to which the District of Columbia's ordinance burdened a core constitutional interest in armed defense of the home, even though this approach has no apparent grounding in the original meaning of the Second Amendment's operative clause.

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possess firearms for defense of self, family, and home, then the auxiliary protections that might matter most would be those that would make that right practicable in the real world." (footnote omitted)).

53. *See, e.g.*, Ezell v. City of Chicago, 651 F.3d 684, 708–10 (7th Cir. 2011) (granting preliminary injunction against law prohibiting firing ranges); Herrington v. United States, 6 A.3d 1237, 1243–45 (D.C. 2010) (invalidating prohibition on the possession of ammunition).

54. *See, e.g.*, Peterson v. Martinez, 707 F.3d 1197, 1210–12 (10th Cir. 2013) (concealed carry); Nordyke v. King, 681 F.3d 1041, 1044–45 (9th Cir. 2012) (commercial sales); United States v. Moore, 666 F.3d 313, 316–19 (4th Cir. 2012) (convicted felons); United States v. Rehlander, 666 F.3d 45, 48 & n.3 (1st Cir. 2012) (mentally ill); United States v. Torres-Rosario, 658 F.3d 110, 112–13 & n.1 (1st Cir. 2011) (convicted felons); United States v. Barton, 633 F.3d 168, 170–75 (3d Cir. 2011) (same); United States v. Rozier, 598 F.3d 768, 770–71 (11th Cir. 2010) (same); *Williams*, 616 F.3d at 691–94 (same); United States v. Vongxay, 594 F.3d 1111, 1114–15 (9th Cir. 2010) (same); United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009) (same); People v. Brown, 173 Cal. Rptr. 3d 812, 818–21 (Ct. App. 2014) (short-barrel shotguns); City of San Diego v. Boggess, 157 Cal. Rptr. 3d 644, 652–53 (Ct. App. 2013) (mentally ill); People v. Ellison, 128 Cal. Rptr. 3d 245, 249–52 (Ct. App. 2011) (concealed carry); Gamble v. United States, 30 A.3d 161, 164–66 (D.C. 2011) (same); People v. Garvin, 994 N.E.2d 1076, 1083–84 (Ill. App. Ct. 2013) (convicted felons); State v. Knight, 241 P.3d 120, 132–33 (Kan. Ct. App. 2010) (same); State v. Craig, 826 N.W.2d 789, 793–98 (Minn. 2013) (convicted felons); Pohlabel v. State, 268 P.3d 1264, 1267 (Nev. 2012) (same); People v. Johnson, 974 N.Y.S.2d 453, 455 (App. Div. 2013) (convicted felons); Kelly v. Riley, 733 S.E.2d 194, 198–99 (N.C. Ct. App. 2012) (concealed carry); *In re* Keyes, 83 A.3d 1016, 1025–26 (Pa. Super. Ct. 2013) (mentally ill); Caba v. Weaknecht, 64 A.3d 39, 51–53 (Pa. Cmmw. Ct. 2013) (concealed carry); Perry v. State Civil Serv. Comm'n, 38 A.3d 942, 955 (Pa. Commw. Ct. 2011) (sensitive places); DiGiacinto v. Rectors & Visitors of Geo. Mason Univ., 704 S.E.2d 365, 369–70 (Va. 2011) (same).

55. *See, e.g.*, *Moore*, 666 F.3d at 319; *Barton*, 633 F.3d at 172–73; *Williams*, 616 F.3d at 692–93; United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc).

Scholars have wrestled with the complexities lurking in *Heller*'s precise holding. In light of its apparent focus on the extent to which a challenged regulation impairs a core Second Amendment interest in lawful armed defense, a number of scholars have argued that *Heller* is best understood as requiring inquiry into the extent to which a challenged regulation burdens core Second Amendment rights as compared to its regulatory justification, though none have claimed any basis for this approach in the original meaning of the Second Amendment's operative clause.[56] Others have offered alternate proposals to govern judicial review of challenged gun-control laws, including enhanced rational-basis review,[57] a stringent form of reasonableness review,[58] clear and convincing evidence that a challenged regulation enhances safety,[59] intermediate scrutiny requiring that the government demonstrate the substantial efficacy of a challenged regulation,[60] or strict scrutiny for regulations that implicate core Second Amendment interests and some form of balancing test for other challenged laws.[61] Notably, none of these proposals claim any

56. *See, e.g.*, James E. Fleming & Linda C. McClain, *Ordered Gun Liberty: Rights with Responsibilities and Regulation*, 94 B.U. L. REV. 849, 872–73 (2014); Nelson Lund, *Second Amendment Standards of Review in a* Heller *World*, 39 FORDHAM URB. L.J. 1617, 1634–35 (2012); Lawrence Rosenthal, *Second Amendment Plumbing After* Heller*: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1, 79–84 (2009); Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What's a Court to Do Post-*McDonald*?*, 21 CORNELL J.L. & PUB. POL'Y 489, 517–20 (2012); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1448–73 (2009).

57. *See, e.g.*, Ivan E. Bodensteiner, *Scope of the Second Amendment Right—Post-*Heller *Standard of Review*, 41 U. TOL. L. REV. 43, 66–71 (2009).

58. *See, e.g.*, Fleming & McClain, *supra* note 56, at 869–72; Larson, *supra* note 38, at 1385–86; Allen Rostron, *Protecting Gun Rights and Improving Gun Control After* District of Columbia v. Heller, 13 LEWIS & CLARK L. REV. 383, 407–08 (2009).

59. *See, e.g.*, Calvin Massey, *Second Amendment Decision Rules*, 60 HASTINGS L.J. 1431, 1442–43 (2009).

60. *See, e.g.*, David T. Hardy, *The Right to Arms and Standards of Review: A Tale of Three Circuits*, 46 CONN. L. REV. 1435, 1454–57 (2014); Jason T. Anderson, Note, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in* District of Columbia v. Heller, 82 S. CAL. L. REV. 547, 587–93 (2009); Ryan L. Card, Note, *An Opinion Without Standards: The Supreme Court's Refusal to Adopt a Standard of Constitutional Review in* District of Columbia v. Heller *Will Likely Cause Headaches for Future Judicial Review of Gun-Control Regulations*, 23 BYU J. PUB. L. 259, 286–87 (2009); Sarah Perkins, Note, District of Columbia v. Heller*: The Second Amendment Shoots One Down*, 70 LA. L. REV. 1061, 1079–90 (2010); Stephen Kiehl, Comment, *In Search of a Standard: Gun Regulations After* Heller *and* McDonald, 70 MD. L. REV. 1131, 1160–69 (2011).

61. *See, e.g.*, Tushnet, *supra* note 46, at 431–32; Lindsay Goldberg, Note, District of Columbia v. Heller*: Failing to Establish a Standard for the Future*, 68 MD. L. REV. 889, 904–13 (2009); Jeff Golimowski, Note, *Pulling the Trigger: Evaluating Criminal Gun Laws in a Post-*Heller *World*, 49 AM. CRIM. L. REV. 1599, 1613–19 (2012); Andrew R. Gould, Comment, *The Hidden Second Amendment Framework Within* District of Columbia v. Heller, 62 VAND. L. REV. 1535, 1570–73

footing in the original meaning of the Second Amendment as described in *Heller*.

Indeed, originalism has had a limited role in post-*Heller* Second Amendment litigation. The emerging consensus in the lower courts uses original meaning only as a threshold test, which screens out some claims, but contemplates that laws—even those limiting the extent to which individuals can exercise the textually recognized right to keep and bear arms—may be sustained upon sufficient justification. The prevailing approach involves a two-pronged inquiry:

> The first question is "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid. If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny.[62]

The first prong of this test is ostensibly originalist, although it functions only to weed out claims that are considered outside the scope of constitutional protection. Accordingly, historical evidence is never alone sufficient to sustain a Second Amendment claim. Instead, if the first prong is satisfied, courts proceed to means-end scrutiny. Thus, in actual practice, the first prong, while ostensibly focused on historical evidence of original meaning, operates only to defeat Second Amendment claims.[63]

(2009); Michael J. Habib, Note, *The Future of Gun Control Laws Post*-McDonald *and* Heller *and the Death of One-Gun-Per-Month Legislation*, 44 CONN. L. REV. 1339, 1365–74 (2012).

62. United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010) (citations omitted) (quoting United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010)). *Accord*, *e.g.*, United States v. Chovan, 735 F.3d 1127, 1136–37 (9th Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 874–75 (4th Cir. 2013); Peterson v. Martinez, 707 F.3d 1197, 1208 (10th Cir. 2013); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 194 (5th Cir. 2012); GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1252 (D.C. Cir. 2011); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); *Marzzarella*, 614 F.3d at 89; Hertz v. Bennett, 751 S.E.2d 90, 93 (Ga. 2013); Wilson v. County of Cook, 968 N.E.2d 641, 654 (Ill. 2012); People v. Deroche, 829 N.W.2d 891, 896 (Mich. Ct. App. 2013) (per curiam); Pohlabel v. State, 268 P.3d 1264, 1267 (Nev. 2012); State v. Warmus, 967 N.E.2d 1223, 1236 (Ohio Ct. App. 2011); State v. Christian, 307 P.3d 429, 442–43 (Or. 2013).

63. *See, e.g.*, Drake v. Filko, 724 F.3d 426, 429–30 (3d Cir. 2013) (no right to carry firearms in public without permit); United States v. Carpio-Leon, 701 F.3d 974, 977–82 (4th Cir. 2012) (undocumented noncitizens not part of the "people" who enjoy the right to keep and bear arms); *GeorgiaCarry.Org*, 687 F.3d at 1261–66 (Second Amendment has not been historically understood to

As for the second prong, there is some diversity of opinion about the appropriate character of means-end scrutiny. The vast majority of appellate decisions to consider the question have rejected the claim that regulations limiting the ability to keep and bear arms in common civilian use are necessarily subject to strict scrutiny, in which a challenged regulation can be sustained only if it is narrowly tailored to achieve a compelling governmental interest.[64] To be sure, *Heller* suggests that very serious burdens on core Second Amendment rights trigger strict scrutiny, if not per se invalidation. Lower courts have accommodated the point with essentially two approaches. Some have concluded all but the most serious burdens should be evaluated under a form of intermediate scrutiny, in which a challenged regulation is permissible when substantially related to an important governmental objective, and have applied this test in the vast majority of cases to uphold even laws that limit the ability to possess or carry firearms in common civilian use.[65] Others have taken a more flexible

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confer a right to carry arms onto the property of another without the owner's consent); United States v. Rene E., 583 F.3d 8, 11–16 (1st Cir. 2009) (juveniles are not part of the "people" who enjoy the right to keep and bear arms); State v. Sieyes, 225 P.3d 995, 1005 (Wash. 2010) (juveniles are not part of the "people" who enjoy the right to keep and bear arms).

64. *See, e.g.*, Schrader v. Holder, 704 F.3d 980, 989 (D.C. Cir. 2013); Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 93–97 (2d Cir. 2012); *Nat'l Rifle Ass'n*, 700 F.3d at 195–98; United States v. Carter, 669 F.3d 411, 416–17 (4th Cir. 2012); *Heller II*, 670 F.3d at 1256–58; United States v. Masciandaro, 638 F.3d 458, 470–71 (4th Cir. 2011); Chester, 628 F.3d at 682–83; People v. Mitchell, 148 Cal. Rptr. 3d 33, 40–41 (Ct. App. 2012); State v. DeCiccio, 105 A.3d 165, 204–06 (Conn. 2014). *But see* Tyler v. Hillsdale Cnty. Sheriff's Dep't, 775 F.3d 308, 326–29 (6th Cir. 2014), *reh'g granted*, 2015 U.S. App. LEXIS 6638 (6th Cir. Apr. 21, 2015).

65. *See, e.g.*, United States v. Carter, 750 F.3d 462, 465–70 (4th Cir. 2014) (upholding prohibition on possessing firearms for those who are unlawful users or addicted to a controlled substance); Jackson v. City & Cnty. of San Francisco, 746 F.3d 953, 961–70 (9th Cir. 2014) (upholding requirement that handguns be secured when not carried and a prohibition on the sale of hollow point bullets); *Chovan*, 735 F.3d at 1136–41 (upholding statute prohibiting possession of firearms by individuals convicted of misdemeanor domestic violence); *Drake*, 724 F.3d at 435–40 (upholding discretionary permit system to carry firearms requiring that applicant demonstrate particularized need); *Woollard*, 712 F.3d at 876–83 (same); *Schrader*, 704 F.3d at 989–91 (upholding prohibition on common-law misdemeanant possessing firearms); United States v. Huitron-Guizar, 678 F.3d 1164, 1169–70 (10th Cir. 2010) (upholding prohibition on possession of firearms by undocumented noncitizens); United States v. Chapman, 666 F.3d 220, 226–31 (4th Cir. 2012) (upholding statute prohibiting possession of firearms by individuals under a domestic violence order of protection); United States v. Staten, 666 F.3d 154, 158–67 (4th Cir. 2011) (upholding statute prohibiting possession of firearms by individuals convicted of misdemeanor domestic violence); *Heller II*, 670 F.3d at 1257–59 (upholding ordinance prohibiting possession of semi-automatic rifles and large-capacity magazines); United States v. Booker, 644 F.3d 12, 25–26 (1st Cir. 2011) (upholding statute prohibiting possession of firearms by individuals convicted of misdemeanor domestic violence); *Reese*, 627 F.3d at 800–04 (upholding statute prohibiting possession of firearms by individuals under a domestic violence order of protection); *Marzzarella*, 614 F.3d at 95–99 (upholding statute prohibiting possession of firearms with obliterated serial number); United States v. Skoien, 614 F.3d 638, 641–42 (7th Cir. 2010) (en banc) (upholding statute prohibiting possession of firearms by individuals convicted of misdemeanor domestic violence); People v. Ellison, 128 Cal. Rptr. 3d 245,

approach in which laws imposing more onerous burdens on the right to keep or bear firearms should be subject to concomitantly more demanding scrutiny, but these courts still frequently uphold such laws.[66] In either case, analysis centers on the extent to which a challenged law burdens the core interest in armed defense, without any claim that this type of inquiry is rooted in original meaning. Accordingly, the second prong of this test contains two analytically distinct steps in which, first, the extent of the burden on the right of lawful, armed defense is assessed in order to determine, then, the extent to which the challenged regulation will be regarded as constitutionally suspect.

Yet, before concluding that Second Amendment jurisprudence is premised on an analysis of the extent to which a challenged law burdens the individual right to armed defense described in *Heller*, it is worth

249–50 (Ct. App. 2011) (upholding statute prohibiting concealed carry); *Mitchell*, 148 Cal. Rptr. 3d at 40–43 (same); *Hertz*, 751 S.E.2d at 93–95 (upholding statute requiring license to carry firearms in public and disqualifying limited classes including convicted felons); Norman v. State, 159 So. 3d 205, 222–23 (Fla. Dist. Ct. App. 2015) (upholding permitting requirement for carrying concealed firearms); People v. Garvin, 994 N.E.2d 1076, 1084–85 (Ill. App. Ct. 2013) (upholding prohibition on possession of firearms by convicted felons); People v. Spencer, 965 N.E.2d 1135, 1143–45 (Ill. App. Ct. 2012) (same); Chardin v. Police Comm'r of Boston, 989 N.E.2d 392, 402–03 (Mass. 2013) (same); Chief of Police of Worcester v. Holden, 26 N.E.3d 715, 726–28 (Mass. 2015) (upholding discretionary licensing standard for carrying firearms in public); People v. Hughes, 1 N.E.3d 298, 300–02 (N.Y. 2013) (upholding licensing requirement); *In re* Wheeler, 81 A.3d 728, 757–62 (N.J. Super. Ct. App. Div. 2013) (upholding requirement for permit issued on showing of justifiable need to carry handguns); Johnston v. State, 735 S.E.2d 859, 869–70 (N.C. Ct. App. 2012) (remanding for evaluation of statute prohibiting possession of firearms by convicted felons); State v. Shover, 8 N.E.3d 358, 361–65 (Ohio Ct. App. 2014) (upholding prohibition on transporting accessible and loaded firearm in vehicle); *Christian*, 307 P.3d at 444 (upholding ordinance prohibiting carrying loaded firearms in public without permit); *In re* Keyes, 83 A.3d 1016, 1025–26 (Pa. Super. Ct. 2013) (upholding prohibition on possession of firearms by mentally ill); Commonwealth v. McKown, 79 A.3d 678, 687–91 (Pa. Super. Ct. 2013) (upholding ordinance prohibiting carrying loaded firearms in public without permit); State v. Jorgenson, 312 P.3d 960, 966–68 (Wash. 2013) (en banc) (upholding prohibition on possessing firearms by persons charged with serious crimes); State v. Pocian, 814 N.W.2d 894, 897 (Wis. Ct. App. 2012) (upholding statute prohibiting possession of firearms by convicted felons).

66. *See, e.g.*, Moore v. Madigan, 702 F.3d 933, 939–42 (7th Cir. 2012) (invalidating a statute that prohibited carrying readily operable firearms in public); *Kachalsky*, 701 F.3d at 93–97 (upholding statute that prohibited carrying firearms absent a permit issued on a showing of special need); *Nat'l Rifle Ass'n*, 700 F.3d at 195–98 (upholding statute prohibiting the sale of handguns to persons under age 21); United States v. Decastro, 682 F.3d 160, 166–68 (2d Cir. 2012) (upholding statute prohibiting the purchase of firearms in another state and their transport to state of residence); Ezell v. City of Chicago, 651 F.3d 684, 708–11 (7th Cir. 2011) (granting preliminary injunction against ordinance prohibiting firing ranges within city); *DeCiccio*, 105 A.3d at 204–10 (invalidating prohibition on transportation of dirk knives and police batons as applied to individual transporting from a former to a new residence). *Cf.* Friedman v. City of Highland Park, 784 F.3d 406, 409 (7th Cir. 2015) ("But instead of trying to decide what 'level' of scrutiny applies, and how it works, inquiries that do not resolve any concrete dispute, we think it better to ask whether a regulation bans weapons that were common at the time of ratification or those that have 'some reasonable relationship to the preservation or efficiency of a well regulated militia,' and whether law-abiding citizens retain adequate means of self-defense." (citations omitted)).

pausing to consider laws that prevent entire classes of individuals from possessing firearms under any circumstance, such as statutory prohibitions on the possession of firearms by convicted felons. Appellate courts have universally upheld such laws under *Heller*,[67] a perhaps unsurprising result given the *Heller* dicta seemingly blessing such laws.[68] The same result has been obtained for statutes barring the possession of firearms by convicted domestic violence misdemeanants or those subject to a domestic violence order of protection.[69] At most, some courts have left open the possibility that such laws might be invalidated as applied to particular individuals presenting little risk of misusing firearms,[70] although other courts have concluded that the facial validity of a statutory prohibition on the possession of firearms precludes an as-applied challenge.[71] But, as Eugene Volokh has observed, "[f]elons may need arms for lawful self-defense just as much as the rest of us do."[72] Thus, if *Heller* prohibits all laws that impose very severe burdens on an individual right of armed self-defense, it is unclear why convicted felons, for example, can be entirely deprived of that right consistent with *Heller*'s account of the Second Amendment's original meaning.

It is remarkable that an opinion that focused so consciously on the original meaning of the Second Amendment's operative clause, and which abjured any form of interest balancing, has resulted in litigation that pays so little attention to the original meaning of the operative clause, and which seems to utilize interest balancing with abandon. Indeed, one of the

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67. *See, e.g.*, United States v. Bogle, 717 F.3d 281, 281–82 (2d Cir. 2013) (per curiam); United States v. Moore, 666 F.3d 313, 318–19 (4th Cir. 2012); United States v. Torres-Rosario, 658 F.3d 110, 112–13 (1st Cir. 2011); United States v. Joos, 638 F.3d 581, 586 (8th Cir. 2011); United States v. Barton, 633 F.3d 168, 175 (3d Cir. 2011); United States v. Williams, 616 F.3d 685, 693–94 (7th Cir. 2010); United States v. Carey, 602 F.3d 738, 741 (6th Cir. 2010); United States v. Rozier, 598 F.3d 768, 770–71 (11th Cir. 2010); United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010); United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009); United States v. Anderson, 559 F.3d 348, 352 (5th Cir. 2009); Epps v. State, 55 So. 3d 710, 711 (Fla. Dist. Ct. App. 2011); *Hertz*, 751 S.E.2d at 94–95; *Spencer*, 965 N.E.2d at 1144–45; *Deroche*, 829 N.W.2d at 895; State v. Craig, 826 N.W.2d 789, 793–98 (Minn. 2013); *Pohlabel*, 268 P.3d at 1267; *Pocian*, 814 N.W.2d at 897.

68. *See supra* text accompanying note 36.

69. *See, e.g.*, *Chovan*, 735 F.3d at 1141–42; *Chapman*, 666 F.3d at 227–31; *Staten*, 666 F.3d at 160–67; United States v. Bena, 664 F.3d 1180, 1184–85 (8th Cir. 2011); *Booker*, 644 F.3d at 25; *Reese*, 627 F.3d at 800–04; *Skoien*, 614 F.3d at 641–42.

70. *See, e.g.*, *Moore*, 666 F.3d at 319; *Barton*, 633 F.3d at 172–74; *Williams*, 616 F.3d at 692–93; *Johnston*, 735 S.E.2d at 869–70; *see also* Alexander C. Barrett, Note, *Taking Aim at Felony Possession*, 93 B.U. L. REV. 163, 192–98 (2013) (arguing that as-applied challenges should be permitted).

71. *See, e.g.*, United States v. Carter, 752 F.3d 8, 12–13 (1st Cir. 2014); *Chovan*, 735 F.3d at 1141–42; *Rozier*, 598 F.3d at 770–71; *Vongxay*, 594 F.3d at 1116–18.

72. Volokh, *supra* note 56, at 1499.

few lower courts to reject the prevailing approach characterized the embrace of means-ends scrutiny in post-*Heller* jurisprudence as "near-identical to the freestanding 'interest-balancing inquiry' that Justice Breyer proposed—and that the majority explicitly rejected—in *Heller*."[73]

Some commentators believe that interest balancing is inevitable in Second Amendment jurisprudence despite its seeming rejection in *Heller*.[74] Moreover, *Heller* can be read narrowly on this point; when discussing interest balancing, the Court referred to Justice Breyer's advocacy of "none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering 'interest-balancing inquiry,'" and responded, "[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."[75] It may be that this passage is best read to reject interest balancing only when not performed as part of one of the previously recognized approaches to means-ends scrutiny.[76] Still, that lower courts seem to have experienced something of a gravitational pull toward common-law methods of adjudication that lack any grounding in original meaning suggests either that *Heller*'s Second Amendment originalism is something of a dead end, or that lower courts have taken a wrong turn. It is to the latter possibility that we next turn.

II. THE PROBLEMATIC EFFORTS TO RESCUE SECOND AMENDMENT ORIGINALISM

Perhaps lower courts have erred in paying so little attention, in *Heller*'s wake, to the original meaning of the Second Amendment's operative clause. Although *Heller* offered scant guidance as to the original meaning

73. Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1176 (9th Cir. 2014), *reh'g granted* 781 F.3d 1106 (9th Cir. 2015). For a useful discussion of the extent to which *Heller* labored to embrace a categorical rather than a balancing methodology, see Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 404–21 (2009). For a more general attack on the Second Amendment jurisprudence emerging in the lower courts, see Alice Marie Beard, *Resistance by Inferior Courts to Supreme Court's Second Amendment Decisions*, 81 TENN. L. REV. 673, 680–91 (2014).

74. *See, e.g.*, Jamal Greene, *The Rule of Law as a Law of Standards*, 99 GEO. L.J. 1289, 1297–99 (2011); Rostron, *supra* note 38, at 756–64; Winkler, *supra* note 38, at 1571–73.

75. District of Columbia v. Heller, 554 U.S. 570, 634 (2008).

76. For this insight, I am indebted to my co-author in an essay assessing the constitutionality of leading gun-control proposals advanced in the wake of the shootings in Newtown, Connecticut. *See* Lawrence E. Rosenthal & Adam Winkler, *The Scope of Regulatory Authority Under the Second Amendment*, *in* REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 225, 229 (Daniel W. Webster & Jon S. Vernick eds., 2013) [hereinafter REDUCING GUN VIOLENCE].

of an "infringe[ment]" on the right to keep and bear arms, it did note that original meaning "may of course include an idiomatic meaning," and that "the Second Amendment . . . was widely understood to codify a pre-existing right, rather than to fashion a new one."[77] An inquiry into framing-era practices and understandings may shed light on the original meaning of both the right to bear arms and the scope of regulatory authority.

A. Framing-Era Practice

Framing-era practice may shed considerable light on the original meaning of the Second Amendment. For example, in his extrajudicial writing, Justice Scalia, though acknowledging that the Constitution contains much that is "abstract and general rather than specific and concrete," has added, "The context suggests that the abstract and general terms, like the concrete and particular ones, are meant to nail down current rights, rather than aspire after future ones—that they are abstract and general references to *extant* rights and freedoms possessed under the then-current regime."[78] This observation seems particularly pertinent in light of *Heller*'s conclusion that the Second Amendment codified a preexisting right.[79] On this view, framing-era practice fleshes out the original understanding of the framing-era right codified in the Second Amendment.[80] Chief Justice Roberts may have had something like this in mind at oral argument in *Heller* when, in response to the Solicitor General's suggestion that the Court adopt a test for assessing the constitutionality of firearms regulation like those utilized in other areas of constitutional law, he observed:

> Well, these various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard.

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77. *Heller*, 554 U.S. at 576–77, 603.

78. Scalia, *supra* note 23, at 135.

79. *Heller*, 554 U.S. at 592.

80. For similar arguments supporting reliance on framing-era practice to ascertain original meaning, see, for example, Kay, *supra* note 21, at 253; Larry Kramer, *Fidelity to History—and Through It*, 65 FORDHAM L. REV. 1627, 1654–55 (1997); John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378–81 (2007); Steven D. Smith, *Reply to Koppelman: Originalism and the (Merely) Human Constitution*, 27 CONST. COMMENT. 189, 194–99 (2010); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 172–74 (1996).

> Isn't it enough to determine the scope of the existing right that the amendment refers to, look at the various regulations that were available at the time, including you can't take the gun to the marketplace and all that, and determine how these—how this restriction and the scope of this right looks in relation to those?[81]

In terms of framing-era regulation, *Heller* tells us that there is little framing-era precedent for anything other than "gunpowder storage laws" and laws "restrict[ing] the firing of guns within the city limits to at least some degree."[82] These laws, of course, did not prohibit anyone from possessing or carrying firearms. On this view, the *Heller* dicta on permissible firearms regulation, as well as the lower-court decisions upholding a variety of laws without framing-era support, are simply wrong. Yet, there are a number of reasons to resist this conclusion.

1. The Perils of Reliance on Framing-Era Practice

There are considerable perils in relying on framing-era practice when evaluating contemporary regulation. Consider, for example, the framing-era firearm. The most advanced type of bearable firearm in the framing era was the flintlock smoothbore musket, which was difficult to load, could produce at most three shots per minute, and was inaccurate except at close range.[83] Firearms in common civilian use have since evolved to include weapons capable of a far greater accuracy, range, and rate of fire, and they are far more likely to discharge accidentally.[84] Thus, what was regarded as sufficient regulation in the framing era might accordingly be regarded as insufficient today, considering the greater dangers posed by contemporary firearms. As one eminent historian explained:

> [B]ecause eighteenth-century firearms were not nearly as threatening or lethal as those available today, we . . . cannot expect the discussants of the late 1780s to have cast their comments about keeping and bearing arms in the same terms that we would. Theirs

81. Transcript of Oral Argument at 44, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

82. *Heller*, 554 U.S. at 632 (internal quotation marks omitted). The Court also acknowledged a Massachusetts law prohibiting the storage of loaded firearms in buildings, but explained that it was little more than a fire-safety measure and was entitled to little weight in light of its apparent uniqueness. *Id.* at 631–32.

83. *See* Michael S. Obermeier, Comment, *Scoping Out the Limits of "Arms" Under the Second Amendment*, 60 U. KAN. L. REV. 681, 684–87 (2012).

84. *See, e.g.*, TOM DIAZ, MAKING A KILLING: THE BUSINESS OF GUNS IN AMERICA 98–105 (1999).

> was a rhetoric of public liberty, not public health; of the danger from standing armies, not that of casual strangers, embittered family members, violent youth gangs, freeway snipers, and careless weapons keepers. Guns were so difficult to fire in the eighteenth century that the very idea of being accidentally killed by one was itself hard to conceive. Indeed, anyone wanting either to murder his family or protect his home in the eighteenth century would have been better advised (and much more likely) to grab an axe or knife than to load, prime, and discharge a firearm.[85]

Indeed, constitutional law has already recognized the perils of relying on framing-era practice in light of the increased lethality of firearms. In *Tennessee v. Garner*,[86] for example, the Court invalidated a statute codifying the framing-era rule of the common law that deadly force could be used to stop a fleeing felon as violative of the Fourth Amendment's prohibition on unreasonable search and seizure, concluding: "Because of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry."[87] The Court elaborated:

> [T]he common-law rule developed at a time when weapons were rudimentary. Deadly force could be inflicted almost solely in a hand-to-hand struggle during which, necessarily, the safety of the arresting officer was at risk. Handguns were not carried by police officers until the latter half of the last century. Only then did it become possible to use deadly force from a distance as a means of apprehension. As a practical matter, the use of deadly force under the standard articulation of the common-law rule has an altogether different meaning—and harsher consequences—now than in past centuries.[88]

Accordingly, "though the common-law pedigree of Tennessee's rule is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied."[89]

Justice Scalia made a similar point when considering the permissibility of a stop-and-frisk in the absence of probable cause to arrest under the

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85. Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 110 (2000).
86. 471 U.S. 1 (1985).
87. *Id.* at 13.
88. *Id.* at 14–15 (citations and footnote omitted).
89. *Id.* at 15.

Fourth Amendment. He opined that although a frisk in such circumstances was likely regarded as unlawful in the framing era, it may have become constitutionally reasonable once "concealed weapons capable of harming the interrogator quickly and from beyond arm's reach have become common—which might alter the judgment of what is 'reasonable' under the original standard."[90]

Scholars frequently acknowledge that original meaning can be distorted when framing-era practice is consulted without reference to historical context.[91] Even most originalists draw a distinction between original meaning and original expected applications, and regard only the former as binding.[92] Justice Scalia, too, has acknowledged that constitutional interpretation should be based on "semantic intention" and not "the concrete expectations of lawgivers."[93] Thus, there is reason to doubt the utility of framing-era practice as a means of ascertaining the boundaries of contemporary regulatory authority. Even in terms of original meaning, there is reason to doubt that only those regulations that were common in the framing era should be regarded as constitutionally permissible, for even the framers may have regarded semantic meaning, and not framing-era practice, as the proper measure of constitutionality.[94]

2. The Breadth of Framing-Era Regulatory Authority

Framing-era practice embraces authority to undertake prophylactic regulation. For example, consider that *Heller* described the Second

90. Minnesota v. Dickerson, 508 U.S. 366, 382 (1993) (Scalia, J., concurring). For additional examples of Justice Scalia's willingness to depart from framing-era practice in light of changed circumstances, see Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1199–203 (2012).

91. *See, e.g.*, BALKIN, *supra* note 21, at 10–16, 75–81; RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 291–94 (1996); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1804–10 (1997); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 591–617 (1998); Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1205–08; Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1169–71 (1993).

92. *See, e.g.*, BALKIN, *supra* note 21, at 6–14; Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405, 410 (2007); Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 385–89 (2007); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 668–72 (2009); Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 580–82 (2006); McConnell, *supra* note 21, at 1284–87; Paulsen, *supra* note 21, at 2059–62; Rotunda, *supra* note 21, at 513–14; James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1539–46 (2011); Solum, *supra* note 46, at 935.

93. Scalia, *supra* note 23, at 144.

94. *Cf.* District of Columbia v. Heller, 554 U.S. 570, 582 (2008) ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way.").

Amendment as "codif[ying] a right 'inherited from our English ancestors,'"[95] traceable to the English Bill of Rights.[96] The English Bill of Rights, in turn, provided that "the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by law."[97] Note that this right was highly qualified. The limitation of the right to Protestants, and for the entire populace, protecting only arms "suitable to their condition," likely reflects the widespread suspicion of Catholics as well as the lower classes.[98] Moreover, the right was framed to preserve a power to regulate by statute, indicating, as *Heller* explained, that the right "was held only against the Crown, not Parliament."[99] By the framing era, English law had evolved to remove the religious qualification but continued to recognize a legislative power to regulate; as Blackstone put it, English law protected the people's right "of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which . . . is indeed a public allowance, under due restrictions . . . ."[100] Thus, the preexisting English iteration of the right to keep and bear arms twinned both right and regulatory authority.

To be sure, as Don Kates has argued, the Second Amendment is a constitutional limitation, and, accordingly, reliance on the regulatory power preserved in the English Bill of Rights might be thought to "miss[] the distinction between the American system of constitutional rights and the non-constitutional English system in which even the most sacrosanct rights guaranteed by one Parliament may be abrogated by its successors."[101] Nevertheless, to the extent that the Second Amendment is thought to have codified a preexisting right derived from English law, the limited character of that right surely is of some importance in ascertaining

95. *Id.* at 599 (quoting Robertson v. Baldwin, 165 U.S. 275, 281 (1897)).

96. *Id.* at 592–93, 599. For similar characterizations, see, for example, HALBROOK, *supra* note 33, at 20–21, 43–46; JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 162–64 (1994); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 235–39 (1983); Thomas B. McAffee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C. L. REV. 781, 834–41 (1997).

97. Act Declaring the Rights and Liberties of the Subject, 1688, 1 W&M Sess. 2, c. 2.

98. *See, e.g.*, Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27, 43–47 (2000).

99. *Heller*, 554 U.S. at 593. For a helpful discussion of the point, see Schwoerer, *supra* note 98, at 47–48.

100. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139 (1765) (modern spelling added). In *Heller*, the Court described Blackstone as "the preeminent authority on English law for the founding generation." *Heller*, 554 U.S. at 593–94 (quoting Alden v. Maine, 527 U.S. 706, 715 (1999)).

101. Kates, *supra* note 96, at 237–38.

the original meaning of the right to keep and bear arms. Indeed, American experience with firearms regulation reflects recognition of evolving regulatory power consistent with the character of the preexisting English right.

Although, as *Heller* noted, framing-era regulation was limited, it was not insignificant. Classes of individuals such as slaves, freed blacks, and people of mixed race were frequently prohibited from owning or carrying guns, and some states extended this bar to Catholics or whites unwilling to swear allegiance to the Revolution.[102] Indeed, it was widely believed that only loyalists possessed a right to bear arms, with others facing sanctions including disarmament.[103] Laws even regulated the manner of owning firearms; such as regulations requiring the safe storage of firearms or gunpowder or barring loaded firearms indoors.[104] Militia laws also frequently required individuals to appear at periodic musters with their firearms and have them registered and inspected.[105]

Subsequently, in the 1820s and '30s, laws prohibiting the carrying of concealed firearms emerged following a surge in violent crime.[106] Although laws prohibiting open-carry were more often than not invalidated, concealed-carry bans were generally upheld against constitutional challenge under the Second Amendment or state-law analogues,[107] as *Heller* acknowledged.[108]

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102. *See, e.g.*, ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 113–17 (2011); 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, 159–65 (2007); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 506–12 (2004).

103. *See* Patrick J. Charles, *The Constitutional Significance of a "Well-Regulated Militia" Asserted and Proven with Commentary on the Future of Second Amendment Jurisprudence*, 3 NE. U. L.J. 1, 59–61, 97–98 (2011).

104. *See* WINKLER, *supra* note 102, at 116–17; Cornell & DeDino, *supra* note 102, at 510–12; Churchill, *supra* note 102, at 163–64.

105. *See, e.g.*, SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 3, 27 (2006); WINKLER, *supra* note 102, at 113–14; Churchill, *supra* note 102, at 161.

106. *See, e.g.*, CORNELL, *supra* note 105, at 138–44; CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM 2–3, 139–41 (1999); WINKLER, *supra* note 102, at 166–69; Robert Leider, *Our Non-Originalist Right To Bear Arms*, 89 IND. L.J. 1587, 1599–601 (2014).

107. *See, e.g.*, CRAMER, *supra* note 106, at 4; ALEXANDER DECONDE, GUN VIOLENCE IN AMERICA: THE STRUGGLE FOR CONTROL 51–52 (2001); Cornell & DeDino, *supra* note 102, at 516–17; David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 615–17 (1986); Kopel, *supra* note 33, at 1416–33; Leider, *supra* note 106, at 1606–19; Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 640 (2012); Jonathan Meltzer, Note, *Open Carry for All:* Heller *and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1510–16 (2014); *see also* Robertson v. Baldwin,

Later, the same Congress that framed the Fourteenth Amendment—which rendered the Second Amendment applicable to state and local laws[109]—enacted legislation abolishing the militia in most southern states and prohibiting any effort to arm militias in those states.[110] The measure's sponsors dismissed Second Amendment objections, arguing that the prohibition was justified by the prevalence of armed groups in the South, in the wake of the Civil War, "dangerous to the public peace and to the security of Union citizens in those States."[111] This legislation was one in a series of gun-control measures undertaken at the time in an effort to suppress what was seen as unacceptable levels of violence, principally in the South.[112] Also in the nineteenth century, in response to rampant violence, some frontier towns limited or even banned the carrying of firearms, an approach taken in many cities as well.[113]

Regulation continued apace in the twentieth century. Early in the century, a number of state and local governments enacted new restrictions on the sale and carrying of firearms.[114] For example, prohibitions on the possession of firearms by convicted felons emerged early in the twentieth century in response to a crime wave following the First World War.[115] At the federal level, the National Firearms Act of 1934 required manufacturers to obtain a federal license and register machine guns, short-barrel rifles, silencers, and other weapons regarded as dangerous.[116] The Firearms Act of 1938 required a license to ship firearms in interstate commerce and prohibited transfers to specified classes of individuals including certain convicted felons, fugitives from justice, and persons

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165 U.S. 275, 281–82 (1897) (dictum) ("[T]he right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons.").

108. District of Columbia v. Heller, 554 U.S. 570, 612–14, 626 (2008).

109. *See supra* text accompanying note 16.

110. Act of March 2, 1867, ch. 170, § 6, 14 Stat. 485, 487.

111. CONG. GLOBE, 39th Cong., 2d Sess. 1849 (1867) (Sen. Lane); *accord id.* at 1848–49 (Sen. Wilson).

112. *See* Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL'Y REV. 615, 620–23 (2006); Leider, *supra* note 106, at 1619–23.

113. *See, e.g.*, Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 114–18 (2013). For a compilation of firearms laws enacted before 1900, see Mark Frassetto, *Firearms and Weapons Legislation up to the Early Twentieth Century* (Working Paper, 2013), *available at* https://papers.ssrn.com/sol3/ papers.cfm?abstract_id=2200991.

114. *See, e.g.*, DECONDE, *supra* note 107, at 105–11

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

116. *See, e.g.*, DECONDE, *supra* note 107, at 141–44; WINKLER, *supra* note 102, at 202–04; Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 138–39 (1975).

under indictment.[117] The Gun Control Act of 1968 later prohibited the interstate shipment of firearms except to a licensed dealer or collector, required all dealers to obtain federal licenses, placed limitations on the importation of firearms, and prohibited the sale of firearms to, and their possession by, additional classes of disqualified individuals, including convicted felons, those suffering from serious mental illness, substance abusers, and minors.[118] In 1993, Congress required a background check to purchase handguns, and, the following year, it banned the possession of specified assault weapons for the ensuing decade.[119]

In *Heller*, in order to ascertain the original meaning of the Second Amendment, the Court examined commentary and practice from "after its ratification through the end of the 19th century."[120] It did so to undertake "the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification," adding that "[t]hat sort of inquiry is a critical tool of constitutional interpretation."[121] There is indeed a convincing case for utilizing post-enactment practice as evidence of original meaning.[122] Yet, this methodology suggests that the Second Amendment did not fix regulatory authority in terms of only those regulations prevalent at the Second Amendment's ratification, but instead was capable of changing to meet felt exigencies. The recognition that regulatory infrastructure does not seem to have been fixed at the framing does not offer a very precise methodology for ascertaining the scope of regulatory power. But it does suggest that, even in terms of original meaning, framing-era regulatory practice is of limited interpretive significance.

B. Historical Analogy

Before abandoning framing-era practice as a means to flesh out the original meaning of the Second Amendment, it is worth considering whether framing-era practice, even if not dispositive, can nevertheless provide useful insights to guide constitutional interpretation. Perhaps the leading scholarly advocate of this approach to originalism is Lawrence

117. *See, e.g.*, DECONDE, *supra* note 107, at 146–47; Zimring, *supra* note 116, at 139–41.

118. *See, e.g.*, WINKLER, *supra* note 102, at 251–52; Zimring, *supra* note 116, at 148–57.

119. *See, e.g.*, DECONDE, *supra* note 107, at 249–56; ROBERT J. SPITZER, THE POLITICS OF GUN CONTROL 141–53 (5th ed. 2012).

120. District of Columbia v. Heller, 554 U.S. 570, 605 (2008).

121. *Id.*

122. For a powerful argument in support of this view, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–39 (2003).

Lessig, who contends that the presuppositions underlying framing-era practices and understandings should be identified and then "translated" in light of contemporary understandings and circumstances.[123] Darrell Miller has made a similar suggestion for the Second Amendment, arguing that Second Amendment jurisprudence could be modeled on that of the Seventh Amendment, which evaluates contemporary civil-jury practice through analogical reasoning based on framing-era practice.[124]

1. Historical Analogy's Questionable Originalist Pedigree

At the outset, it is questionable whether Professor Miller's approach is premised on the original meaning of the Second Amendment. The Seventh Amendment provides that "[i]n Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[125] This formulation expressly embraces extant common-law jury practice, and thus it should come as no surprise that the Supreme Court has looked to framing-era jury practice when interpreting the Seventh Amendment.[126] The Second Amendment, however, employs a different textual formulation; it forbids "infringe[ment]" of the right to keep and bear arms rather than "preserv[ing]" that right.

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123. *See* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 401–14 (1995); Lessig, *supra* note 91, at 1174–1211.

124. *See* Darrell A. H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 893–907 (2013); *see also* Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("[W]hen legislatures seek to address new weapons that have not traditionally existed or to impose new gun regulations because of conditions that have not traditionally existed, there obviously will not be a history or tradition of banning such weapons or imposing such regulations. . . . [I]n such cases, the proper interpretive approach is to reason by analogy from history and tradition."). For a proposal along similar lines, advocating the use of analogical reasoning based on "historical guideposts," see Patrick J. Charles, *The Second Amendment Standard of Review After* McDonald*: "Historical Guideposts" and the Missing Arguments in* McDonald v. City of Chicago, 2 AKRON J. CONST. L. & POL'Y 7, 13–16 (2010).

125. U.S. CONST. amend. VII.

126. *See, e.g.*, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708 (1999); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 347–52 (1998); Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996); Ross v. Bernhard, 396 U.S. 531, 533–34 (1970). This is not, however, the only plausible understanding of the original meaning of the Seventh Amendment. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 89–93 (1998) (Seventh Amendment guarantees a jury in federal court only when a jury is available in state court); Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 479–83 (1999) (Seventh Amendment leaves federal jury rights to congressional discretion); Rachael E. Schwartz, *"Everything Depends on How You Draw the Lines": An Alternative Interpretation of the Seventh Amendment*, 6 SETON HALL CONST. L.J. 599, 616–29 (1996) (same).

Professor Miller nevertheless argues that whenever there is a failure to "preserve" the right to keep and bear arms there is necessarily an infringement, suggesting parallelism between the Second and Seventh Amendments.[127] This reading of the Second Amendment, however, treats different textual formulations as if they were identical. It also fails to explain how the Amendment could tolerate any limitations on the right to "keep or bear," that is, to possess or carry firearms, if the text is properly understood to prohibit any infringement on an individual right to possess and carry anything that qualifies as bearable "Arms." Professor Miller acknowledges the problem, writing that the Second Amendment could not possibly "mean what it says," but must tolerate limitations on the right to keep and bear arms by virtue of an "idiomatic meaning."[128] If the term "infringe[d]" in the Second Amendment had this type of an idiomatic meaning in the framing era, however, Professor Miller does not identify any historical evidence that it was understood as a synonym for the term "preserve" in the Seventh Amendment.

2. The Difficulties of Historical Analogy

Even if the Second Amendment's meaning is properly discoverable through analogy to framing-era practice, the process of applying framing-era practice and understandings to contemporary circumstances presents considerable difficulty, as the critics of Professor Lessig's methodology have contended.[129] In the context of the civil jury right, reasoning by historical analogy has often proven difficult; it requires a challenging counterfactual inquiry into whether a civil action unknown in the framing era would have been tried to a jury at the framing, as Professor Miller admits.[130] Indeed, the Court has acknowledged that drawing analogies to framing-era practice does not always supply an adequate basis for assessing whether an action, unknown in the framing era, must be tried to a jury, and it has for that reason concluded the Seventh Amendment inquiry turns primarily on whether the remedy sought in a new form of

127. *See* Miller, *supra* note 124, at 897–99.

128. *Id.* at 896, 898 (footnotes omitted).

129. *See, e.g.*, Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 357, 370–75 (Andrei Marmor ed., 1995); Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435, 1436–38 (1997); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 31 (1998); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 394–412 (1997); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 941–44 (2003).

130. *See* Miller, *supra* note 124, at 884–86.

action resembles a damages remedy at common law.[131] A focus on remedy alone surely simplifies matters, but no comparable metric presents itself for assessing firearms regulation, which involves no single remedy for a legal wrong but rather a complex balance between liberty and the need for prophylactic regulation of weapons posing far greater dangers than were known in the framing era.

As Joseph Blocher has observed, analogical reasoning involves marked difficulty when it comes to the Second Amendment, since there is no agreement on a methodology for determining which similarities between contemporary and framing-era regulations should be regarded as relevant.[132] Beyond that, when the relevant historical context has sufficiently changed, it is doubtful that efforts to analogize to framing-era practice have utility.[133] For example, when a contemporary regulation has no fair framing-era analog, that may not be indication of its invalidity but, rather, merely a reflection of changed circumstances. Although there may have been relatively little gun control in the framing era, firearms were also far less lethal; accordingly, framing-era judgments about the need for regulation were made in a context far different from contemporary circumstances. The absence of an analogous framing-era regulation to a challenged contemporary law may therefore indicate no more than the fact that no fairly analogous regulatory issue arose in the framing era.

Even when analogous framing-era regulations can be identified, many difficulties remain. The prophylactic regulations of the framing era utilized proxies for dangerousness that we would today find wildly inaccurate, if not profoundly offensive, such as religion, race, and political loyalty. Yet, if contemporary regulation based on similarly unreliable proxies were permitted, virtually any regulation might be sustained. For example, such rough proxies for special dangerousness would seemingly provide sufficient support for the District of Columbia's handgun ban, since, as Justice Breyer observed in *Heller*, there was plenty of evidence that handguns were strongly linked to crime, injuries, and death.[134]

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131. *See, e.g.*, Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 570–74 (1990); Tull v. United States, 481 U.S. 412, 417–25 (1987).

132. *See* Joseph Blocher, *Second Things First: What Free Speech Can and Can't Say About Guns*, 91 TEX. L. REV. SEE ALSO 37, 41–43 (2012); *cf.* Riley v. California, 134 S. Ct. 2473, 2493 (2014) ("[A]n analogue test would launch courts on a difficult line-drawing expedition to determine which digital files are comparable to physical records. Is an e-mail equivalent to a letter? Is a voicemail equivalent to a phone message slip? It is not clear how officers could make these kinds of decisions before conducting a search, or how courts would apply the proposed rule after the fact.").

133. *See supra* text accompanying notes 83–94.

134. District of Columbia v. Heller, 554 U.S. 570, 693–99 (2008) (Breyer, J., dissenting).

Justice Scalia has himself rejected analogical reasoning as an originalist methodology. In *United States v. Jones*,[135] he authored the opinion of the Court that invoked framing-era conceptions of trespass to support its holding that the attachment and monitoring of a global positioning device to an automobile in order to determine its location was a "search" within the meaning of the Fourth Amendment.[136] In his separate opinion, however, Justice Alito observed that "it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case," such as "a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the owner," adding that, even then, "this would have required either a gigantic coach, a very tiny constable, or both."[137] Justice Scalia responded: "[I]t is quite irrelevant whether there was an 18th-century analog. . . . [O]ur task, *at a minimum*, is to decide whether the action in question would have constituted a 'search' within the original meaning of the Fourth Amendment."[138] This view plainly rejects the necessity to identify a framing-era analog in order to apply the original meaning of a constitutional provision.

Some concrete examples illustrate the manifold problems with the use of historical analogy. Consider, for example, laws prohibiting the possession of high-capacity magazines thought by some to facilitate mass shootings by enabling offenders to fire many rounds at a high rate.[139] Framing-era firearms were capable of nothing approximating this rate of fire. Thus, it is doubtful that the framing-era faced any fairly analogous regulatory issue.

Or, consider the surprisingly knotty problem of analogical reasoning presented by laws prohibiting the possession of firearms by convicted felons. Some commentators have argued that because laws prohibiting the possession of firearms by convicted felons appeared only in the twentieth century, they have questionable originalist support.[140] Don Kates responded with an analogy: most felonies in the framing era were

135. 132 S. Ct. 945 (2012).

136. *Id.* at 949–52.

137. *Id.* at 958 & n.3 (Alito, J., concurring in the judgment).

138. *Id.* at 950 n.3.

139. *See, e.g.*, Jennifer Steinhauer, *Pro-Gun Voices in Congress Are Open to Bullet Capacity Limits*, N.Y. TIMES, Feb. 19, 2013, at A1.

140. *See* Larson, *supra* note 38, at 1376; Lund, *supra* note 27, at 1356–58; Marshall, *supra* note 115, at 707–12. In the framing era, it appears that the only laws prohibiting the possession of firearms on the basis of criminal misconduct were laws prohibiting the possession of firearms by prisoners. *See* Leider, *supra* note 106, at 1599.

punished by death and forfeiture of property, and therefore a framing-era felony conviction effectively extinguished the right to keep and bear arms like contemporary laws barring felons from possessing firearms.[141] But Kevin Marshall observed that the imposition of capital punishment and forfeiture upon a felony conviction was far from universal in the framing era.[142] Thus, it seems that a felony conviction was not universally associated with a loss of firearms rights. Even so, Kates and others have responded, framing-era rhetoric often associated the right to bear arms with the full membership in the polity afforded to law-abiding citizens, which could presumably be forfeited as a consequence of criminal misconduct.[143] Still, the advocates of this view have not identified framing-era precedents to support their speculation. Moreover, Marshall and others have added, although there were some framing-era proposals that would have carved out from the right to bear arms those who had committed crimes or were otherwise dangerous or untrustworthy, the text of the Second Amendment was not framed in those terms.[144] Beyond that, it seems indisputable that a felony conviction has far different significance today than in the framing era. As the Court has explained:

> Almost all crimes formerly punishable by death no longer are or can be. And while in earlier times "the gulf between the felonies and the minor offences was broad and deep," today the distinction is minor and often arbitrary. Many crimes classified as misdemeanors, or nonexistent, at common law are now felonies.[145]

Thus, it is doubtful that a framing-era felony conviction is properly analogized to a contemporary felony conviction.

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141. *See* Kates, *supra* note 96, at 266.

142. *See* Marshall, *supra* note 115, at 714–16. For helpful explications of the limited use of capital punishment for felony convictions in the framing era, see, for example, STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 53–70, 94–100 (2002), and Jeffrey K. Sawyer, *"Benefit of Clergy" in Maryland and Virginia*, 34 AM. J. LEGAL HIST. 49, 57–67 (1990). Indeed, "[f]or 1791, the most comprehensive database available records only eleven executions in the United States: seven for murder, two for forgery, and one each for rape and for burglary." Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L.J. 1085, 1098 (2012).

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

144. *See* Larson, *supra* note 38, at 1374–76; Marshall, *supra* note 115, at 712–13; Rostron, *supra* note 38, at 731–32.

145. Tennessee v. Garner, 471 U.S. 1, 14 (1985) (citations omitted).

Therefore, it is small wonder that courts considering the historical evidence on felon disqualification often find it inconclusive.[146] Perhaps only those convicted of felonies regarded as dangerous should be barred from possessing firearms, as some commentators have argued.[147] This approach, however, would enmesh courts in the difficult predictive business of judging which felonies present unacceptable risk of future firearms-related misconduct, a type of judgment alien to the framing-era regime.[148] Even worse, many framing-era felonies did not require proof of violence.[149] This proposal might also warrant treating certain violent misdemeanors or other potential indicia of dangerousness as the basis for depriving individuals of their right to keep and bear arms. Whether this new constitutional inquiry has any fair analogy in framing-era practice, however, is highly uncertain.

Finally, consider laws that restrict carrying firearms in public places, whether concealed or openly. Laws prohibiting carrying concealed weapons became common in the nineteenth century.[150] Significantly, as *Heller* acknowledged, most nineteenth-century courts upheld bans on carrying firearms in public places against challenges under the Second Amendment or its state constitutional analogues.[151] Some commentators locate originalist support for laws limiting the right to carry firearms in the Statute of Northampton,[152] which they believe was understood as a broad prohibition on carrying firearms because of their potential to alarm others.[153] Blackstone's description of the statute seems to characterize it in these terms: "[R]iding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people

146. *See, e.g.*, United States v. Chester, 628 F.3d 673, 680–81 (4th Cir. 2010); United States v. Williams, 616 F.3d 685, 692–93 (7th Cir. 2010).

147. *See, e.g.*, Conrad Kahn, *Challenging the Federal Prohibition on Gun Possession by Nonviolent Felons*, 55 S. TEX. L. REV. 113, 127–32 (2013); Kates & Cramer, *supra* note 143, at 1362–64; Marshall, *supra* note 115, at 728–35.

148. *Cf.* James v. United States, 550 U.S. 192, 210 n.6 (2007) (determining what constitutes a "violent felony" for purposes of the Armed Career Criminal Act "requires judges to make sometimes difficult evaluations of the risks posed by different offenses").

149. *See, e.g.*, 4 BLACKSTONE, *supra* note 100, at 128 (falsifying records), 143–44 (unlawful hunting), 155 (smuggling), 156 (bankruptcy fraud), 163–64 (bigamy), 224 (burglary), 229–34 (larceny).

150. *See supra* text accompanying note 106.

151. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

152. 2 Edw. 3, c. 3, § 3 (1328) (Eng.).

153. *See, e.g.*, Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. L. REV. 1, 7–30 (2012); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1317–18 (2009).

of the land."[154] Hawkins provided a potentially narrower description, however, requiring that the firearm be carried in circumstances likely to provoke alarm: "[N]o Wearing of Arms is within the Meaning of this Statute, unless it be accompanied with such Circumstances as are apt to terrify the People."[155] Coke, in contrast, described the statute in broad terms, providing that all but royal officials, those assisting them, and those responding to "a Cry made for armies to keep the peace," are forbidden "to go nor ride armed by night nor by day."[156]

If the Second Amendment codified a preexisting right of English origin, perhaps it incorporated the limitation on that right represented by the Statute of Northampton, although the English sources describe the statute somewhat inconsistently. There is also, however, a line of nineteenth-century American precedent that seemingly recognized a right to carry firearms in public, at least openly,[157] and some commentators believe that the prevailing understanding was that the carrying of weapons could be prohibited only when it was done in a manner that could alarm others, as when they were concealed.[158] Still, the historical evidence is in conflict; there is some historical precedent for prohibitions on carrying firearms in public, whether openly or concealed.[159] Moreover, as Saul Cornell has noted, virtually all the nineteenth-century laws and judicial decisions drawing a distinction between concealed and open carry or embracing a right to carry firearms in public were in the South, where the need to carry arms may have been regarded as greater given the prevalence of slavery, while in the North broader prohibitions on carrying arms in public seem to have been generally regarded as within the scope of the

154. 4 BLACKSTONE, *supra* note 100, at 1489 (emphasis omitted).

155. 1 WILLIAM HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN 136 (3d ed. 1739) (modern spelling added).

156. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 160 (1644) (modern spelling added).

157. *See, e.g.*, John C. Frazer, *Home, Sweet Home? The Second Amendment and the Right to Carry Firearms in Public*, 4 REGENT J.L. & PUB. POL'Y 1, 7–16 (2012); Kopel, *supra* note 33, at 1416–33; O'Shea, *supra* note 107, at 623–42.

158. *See, e.g.*, MALCOLM, *supra* note 96, at 104–05; David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1126–27 (2010); Marshall, *supra* note 115, at 716–19; Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 101–02 (2009); *see also* Blocher, *supra* note 113, at 112–14 (discussing the debate over the scope of regulatory authority).

159. *See* Charles, *supra* note 153, at 31–41; Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1707–24 (2012). For judicial opinions endorsing the constitutionality of bans on open carry, see, for example, Fife v. State, 31 Ark. 455, 461–62 (1876); Hill v. State, 53 Ga. 473, 473–75 (1874); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 178–82 (1871); English v. State, 35 Tex. 473, 478–79 (1871).

police power.[160] Thus, the probative value of the historical evidence suggesting a right to carry firearms in public, at least openly, is quite unclear.

If one is willing to rely on the historical evidence from the antebellum South, despite its suspect provenance, perhaps there is a case for drawing a distinction between concealed and open carry on the ground. One could argued that laws prohibiting concealed carry are fairly analogous to the Statute of Northampton because of the potential for concealed weapons to alarm others, while open carry was not regarded as alarming. This explanation for the historical evidence, however, is, at best, incomplete. A concealed weapon, precisely because it is hidden from view, cannot alarm others unaware of its presence. Instead, as Professor Volokh has noted, those jurisdictions that drew a distinction between concealed carry and open carry seem to have proceeded on the view that law-abiding persons carried weapons openly, while concealed carry was thought suspicious or threatening.[161] There is ample expression in nineteenth-century decisions to this effect.[162] On this view, however, concealed carry is used as a proxy for dangerousness, a rather different type of regulation than is reflected in the Statute of Northampton, at least in its narrower formulations. Beyond that, Professor Volokh rightly questions the view that the Statute of Northampton can fairly justify prohibitions on carrying concealed firearms

160. *See* Cornell, *supra* note 159, at 1716–25.

161. *See* Volokh, *supra* note 56, at 1522–23. For an analysis along similar lines, see Leider, *supra* note 106, at 1604–05; and Meltzer, *supra* note 107, at 1518–20.

162. *See, e.g.*, State v. Reid, 1 Ala. 612, 617 (1840) ("[A] law which is intended merely to promote personal security, and to put down lawless aggression and violence, and to that end inhibits the wearing of certain weapons, in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the constitution."); Nunn v. State, 1 Ga. 243, 249 (1846) (same); State v. Smith, 11 La. Ann. 633, 633 (1856) ("Th[e Second Amendment] was never intended to prevent the individual States from adopting such measures of police as might be necessary, in order to protect the orderly and well disposed citizens from the treacherous use of weapons not even designed for any purpose of public defence, and used most frequently by evil-disposed men who seek an advantage over their antagonists, in the disturbances and breaches of the peace which they are prone to provoke."); State v. Chandler, 5 La. Ann. 489, 490 (1850) ("This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations."); Aymette v. State, 21 Tenn. (2 Hum.) 154, 160 (1840) ("[T]he right to bear arms is not of that unqualified character. . . . [T]hey may be borne by an individual, merely to terrify the people or for purposes of private assassination. And, as the manner in which they are worn and circumstances under which they are carried indicate to every man the purpose of the wearer, the Legislature may prohibit such manner of wearing as would never be resorted to by persons engaged in the common defence.").

under contemporary circumstances, in which many might find open carry far more alarming than a discreetly concealed firearm.[163]

Thus, whether framing-era practice provides fair analogical support for analyzing the contemporary scope of the right to carry weapons in public, whether openly or concealed, is quite unclear. It seems likely that the nineteenth-century approach of forbidding concealed but not open carry—even if that is regarded as the prevailing view of the day despite the evidence of a different approach in the north—is best understood as utilizing concealment as a proxy for identifying individuals likely to be carrying weapons for an improper purpose. We can fairly doubt, however, whether this proxy is fairly rooted in the Statute of Northampton, and whether it has fair application in contemporary conditions.

Of course, one could reject the historical basis for distinguishing between concealed carry and open carry. A divided panel of the Ninth Circuit did just that by holding that the Second Amendment permits a prohibition on either concealed or open carry, but not both, and for that reason invalidating a restrictive permitting policy for carrying concealed firearms in light of a concurrent statutory ban on open carry.[164] Again, however, it is debatable whether this approach represents a fair analogy to framing-era practice, which recognized regulatory power to restrict the carrying of firearms under what were regarded as suspicious or alarming circumstances. The Ninth Circuit panel, in contrast, appeared indifferent to whether either concealed or open carry is properly regarded as potentially dangerous or alarming. In any event, although the panel purported to ground its invalidation in a limitation on the ability to carry concealed firearms in the original understanding of the Second Amendment,[165] it is hard to miss the ahistorical character of this holding. As the dissenting judge noted, there is ample historical evidence indicating that prohibitions on concealed carry have long been regarded as consistent with the Second Amendment, yet the majority invalidated a law restricting concealed and not open carry.[166] A Second Amendment jurisprudence that is indifferent to whether concealed or open carry represents a threat to the public safety—instead leaving the legislature entirely free to decide which to ban—seems to offer little in the way of fair analogy to the framing-era

163. *See* Volokh, *supra* note 56, at 1521–23.

164. *See* Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1167–73 (9th Cir. 2014)), *reh'g granted* 781 F.3d 1106 (9th Cir. 2015); *see also* Norman v. State, 159 So. 3d 205, 225–26 (Fla. Dist. Ct. App. 2015) (upholding a permit requirement for concealed carry in a state that bans open carry but stressing that permits are liberally available).

165. *Peruta*, 742 F.3d at 1153–67.

166. *Id.* at 1181–91 (Thomas, J., dissenting).

understanding, which permitted regulation under circumstances regarded as suspicious or alarming. The Ninth Circuit's decision, rather than reflecting an authentic Second Amendment originalism, more likely demonstrates the limitations of that approach.[167]

Professor Miller has acknowledged that adjudication by historical analogy is, at best, "a partial solution,"[168] and admits that it supplies no clear answer even for the two regulatory issues he discusses in his own article: whether the Second Amendment permits prohibitions on carrying firearms in public and large-capacity magazines.[169] A methodology this imprecise hardly seems a satisfactory basis for constitutional adjudication. Indeed, plausible analogical arguments frequently can be deployed to attack or defend challenged regulations, yet no methodology presents itself, originalist or otherwise, for selecting the appropriate analogy. Like all counterfactual historical inquiries, an effort to determine how the framers would have assessed regulatory issues alien to their world is fraught with peril. Second Amendment originalism will need something more than analogical reasoning to produce a workable jurisprudence.

C. Longstanding Regulations

Another effort to develop an authentically originalist approach in contrast to that taken by lower courts in *Heller*'s wake would insist that a regulation have a substantial historical pedigree, even if lacking in framing era support.[170] This approach finds support in *Heller*'s dicta declining "to cast doubt on longstanding prohibitions."[171] Along these lines, Professor Blocher has argued that the Second Amendment should be understood to permit some local variability in the scope of firearms regulation in light of

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167. Conversely, one could take the view that Second Amendment jurisprudence should continue to ape the distinction drawn in the nineteenth century between concealed and open carry regardless of its likely inapplicability to contemporary circumstances, as did one student commentator. *See* Meltzer, *supra* note 107, at 1520. But, as we have seen, the Second Amendment has never been understood to freeze regulatory authority in place. And beyond that, an originalism that pays no attention to the historical context in which legal rules developed is deeply problematic: if the rationale on which the nineteenth-century law distinguished between concealed and open carry has no continuing vitality, perhaps even those who crafted the distinction would regard it as inapplicable to the contemporary context. Given that the Second Amendment does not codify framing-era practice and has long been understood to permit regulatory evolution, there is little justification for wooden adherence to past practice, as we have seen in Part II.A above.

168. Miller, *supra* note 124, at 917.

169. *See id.* at 919–21, 926–29.

170. *See, e.g.*, Drake v. Filko, 724 F.3d 426, 431–34 (3d Cir. 2013); United States v. White, 593 F.3d 1199, 1205–06 (11th Cir. 2010).

171. District of Columbia v. Heller, 554 U.S. 570, 626 (2008). *See also* Blocher, *supra* note 113, at 108–11 (discussing this approach).

the longstanding record of relatively more intensive firearms regulation in cities when compared to rural areas.[172]

It is difficult, however, to reconcile this approach with *Heller*'s originalism. Nothing in the original meaning of the Second Amendment's operative clause, as explicated in *Heller*, explains why longstanding regulations, especially when they lack a framing-era pedigree, deserve deference. Indeed, *Heller* tells us that the original meaning of the Second Amendment's operative clause conferred an individual right to possess or carry any firearms in common civilian use, with no exception for "longstanding" infringements on this right. To be sure, that a particular regulation managed to avoid invalidation for some substantial time might be some evidence that it is consistent with original meaning. There are also sound arguments for deference to longstanding practice, understandings, and traditions.[173] Nevertheless, treating regulations that lack a substantial historical pedigree as invalid for that reason alone is deeply problematic. Not only does this view have no footing in *Heller*'s account of the original meaning the operative clause, but it regards all novel regulations as invalid unless and until they somehow survive some type of incubation period. Yet, every regulation now regarded as longstanding went through such an incubation period. As Judge Easterbrook put it when discussing the constitutionality of section 922(g)(9) of Title 18 of the United States Code, which prohibits the possession of firearms by anyone "who has been convicted in any court of a misdemeanor crime of domestic violence"[174]:

> The first federal statute disqualifying felons from possessing firearms was not enacted until 1938; it also disqualified misdemeanants who had been convicted of violent offenses. A 1938 law may be "longstanding" from the perspective of 2008, when *Heller* was decided, but 1938 is 147 years after the states ratified the Second Amendment. The Federal Firearms Act covered only a few violent offenses; the ban on possession by *all* felons was not enacted until 1961. In 1968 Congress changed the "receipt" element of the 1938 law to "possession," giving 18 U.S.C. § 922(g)(1) its current form. If such a recent extension of the disqualification to non-violent felons (embezzlers and tax evaders, for example) is presumptively constitutional, as *Heller* said in note 26, it is difficult

172. *See* Blocher, *supra* note 113, at 108–21.
173. *See, e.g.*, Sunstein, *supra* note 22, at 269–71.
174. 18 U.S.C. § 922(g)(9) (2006).

> to condemn § 922(g)(9), which like the 1938 Act is limited to violent crimes. It would be weird to say that § 922(g)(9) is unconstitutional in 2010 but will become constitutional by 2043, when it will be as "longstanding" as § 922(g)(1) was when the Court decided *Heller*.[175]

Indeed, as the discussion in Part II.A above makes plain, the Second Amendment seems to have long been understood to permit novel regulations, despite the fact that those regulations were not "longstanding" for some period of time after they first appeared. A methodology that regards regulations as unconstitutional only during the period before they become "longstanding" is rooted in neither originalism nor any coherent program of constitutional interpretation.

D. Doctrinal Borrowing

A final possibility for developing an originalist Second Amendment jurisprudence would be to borrow doctrine from parallel constitutional text. If the Second Amendment bears textual similarities to other constitutional provisions, one plausible approach would be to interpret the Second Amendment in a similar fashion to those parallel provisions.[176] For example, Part II.B considered the proposal to utilize the analogical approach of Seventh Amendment jurisprudence to assess the propriety of contemporary firearms legislation. Yet, as that example demonstrates, there are formidable textual and practical obstacles to utilizing analogical reasoning in the Second Amendment context.

Another approach to doctrinal borrowing invokes the jurisprudence developed under the First Amendment's prohibition on laws "abridging the freedom of speech, or of the press."[177] *Heller* invoked the First Amendment at several points in the opinion as an example of an analogous individual right.[178] Since the First Amendment confers an individual right

175. United States v. Skoien, 614 F.3d 638, 640–41 (7th Cir. 2010) (en banc) (citations omitted).

176. For a useful discussion of this approach, see Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010).

177. U.S. CONST. amend. I.

178. *E.g.*, District of Columbia v. Heller, 554 U.S. 570, 582 (2008) ("Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." (citations omitted)); *id.* at 592 ("[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right."); *id.* at 595 ("[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*."); *id.* at 635 ("The First

in a seemingly unambiguous fashion, but has been interpreted to permit some forms of regulation under various formulations, perhaps Second Amendment jurisprudence should be constructed in a parallel fashion.[179]

Some commentators have argued that First Amendment doctrine should be used as a model for Second Amendment jurisprudence.[180] Some courts have embraced that view.[181] Others have been more skeptical.[182]

At the outset, there is little reason to believe that a Second Amendment jurisprudence constructed to mirror free-speech doctrine would qualify as originalist. The original meaning of the First Amendment is itself unclear; there is something verging on consensus among scholars that no coherent account emerges from the historical evidence, and certainly no account that explains contemporary doctrine.[183] Indeed, no one contends that

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Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrongheaded views. The Second Amendment is no different. Like the First, it is the very *product* of an interest balancing by the people . . . .").

179. For accounts of the structure of free-speech doctrine and the variety of tests that are used to assess different types of regulation, see, for example, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 61.1 (8th ed. 2010); and 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §§ 2:61 to :72 (2009).

180. *See, e.g.*, Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 270–72 (2004) (reviewing H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT (2002)); Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 18–23 (2012); 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, 319–31 (2006); Kenneth A. Klukowski, *Making Second Amendment Law with First Amendment Rules: The Five-Tier Free Speech Framework and Public Forum Doctrine in Second Amendment Jurisprudence*, 93 NEB. L. REV. 429, 441–43 (2014); David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417, 449–78 (2014); Lund, *supra* note 27, at 1375–76; Miller, *supra* note 153, at 1297–303; L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1398–402 (1997); Jordan E. Pratt, *A First Amendment-Inspired Approach to* Heller*'s "Schools" and "Government Buildings"*, 92 NEB. L. REV. 537, 574–84 (2014); William Van Alstyne, *The Second Amendment and the Personal Right to Bear Arms*, 43 DUKE L.J. 1236, 1254 (1994); Janice Baker, Comment, *The Next Step in Second Amendment Analysis: Incorporating the Right to Bear Arms into the Fourteenth Amendment*, 28 U. DAYTON L. REV. 35, 57–59 (2002); Gary E. Barnett, Note, *The Reasonable Regulation of the Right to Keep and Bear Arms*, 6 GEO. J.L. & PUB. POL'Y 607, 621–28 (2008).

181. *See, e.g.*, Schrader v. Holder, 704 F.3d 980, 989 (D.C. Cir. 2013); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 197–98 (5th Cir. 2012); Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1257 (D.C. Cir. 2011); Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011); United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 n.4 (3d Cir. 2010); State v. Craig, 826 N.W.2d 789, 794 n.3 (Minn. 2013).

182. *See, e.g.*, Drake v. Filko, 724 F.3d 426, 435 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 883 n.11 (4th Cir. 2013); Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 91–92 (2d Cir. 2012); Hightower v. City of Boston, 693 F.3d 61, 80–81 (1st Cir. 2012).

183. *See, e.g.*, ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 16 (1941) ("The framers of the First Amendment make it plain that they regarded freedom of speech as very important .

contemporary doctrine is premised on the original meaning of the First Amendment; to the contrary, as Chief Justice Roberts put it during the *Heller* argument, "[T]hese standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up."[184] Nor is there historical evidence that the First and Second Amendments were understood to have parallel original meanings.[185] Thus, in terms of original meaning, there is slight support that borrowing First Amendment jurisprudence would supply a basis for an authentically originalist Second Amendment jurisprudence.

In any event, the similarities between the First and Second Amendment are more apparent than real. The First Amendment does not identify a purpose for which speech and the press receive protection; it instead seems to offer protection for written and oral expression without any particular instrumental objective in mind. Indeed, the Court has resolutely rejected linking First Amendment protection to any discrete instrumental objective. Instead, the Court tells us that anything conveying some sort of idea is eligible for First Amendment protection,[186] and that the First Amendment protects not only "discussion of governmental affairs" but also "expression about philosophical, social, artistic, economic, literary, or ethical

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. . . But they say very little about its exact meaning."); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 281 (1985) ("[W]e do not know what the First Amendment's freedom of speech-and-press clause meant to the men who drafted and ratified it at the time that they did so. Moreover, they were themselves at that time sharply divided and possessed no distinct understanding either."); LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 23 (1991) ("[I]t is simply impossible to turn to discussions by the framers . . . for definitive answers on the scope of freedom of the press."); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 42 (2004) ("[T]he framers of the First Amendment . . . embraced a broad and largely undefined constitutional principle, not a concrete, well-settled legal doctrine."); DAVID A. STRAUSS, THE LIVING CONSTITUTION 52 (2010) ("[T]he actual views of the drafters and ratifiers of the First Amendment are in many ways unclear."); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 307 (1978) ("History tells us little . . . about the precise meaning contemplated by those who drafted the Bill of Rights."); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971) ("[T]he framers seem to have had no coherent theory of free speech . . . ."); Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 26 (2011) ("[T]he evidence regarding the original meaning of the Speech and Press Clauses is anything but easy to sort out.").

184. Transcript of Oral Argument at 44, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

185. For a discussion of the evidence on this point, see Charles, *supra* note 153, at 51–54.

186. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011) (video games); Texas v. Johnson, 491 U.S. 397, 404–06 (1989) (burning flag as part of protest); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969) (wearing black armband as part of antiwar protest); Brown v. Louisiana, 383 U.S. 131, 141–42 (1966) (plurality opinion) (silent sit-in to protest segregation).

matters."[187] Even "a narrow, succinctly articulable message is not a condition of constitutional protection," since the First Amendment embraces "the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[188] As a consequence, any governmental interest in suppressing expression is considered impermissible: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[189]

Second Amendment rights have a far different character. Gregory Magarian has argued that it is difficult to analogize between expression and the right to keep and bear arms, since speech serves a far broader set of purposes and has a far more tenuous relation to concrete harms inflicted on others than the right to keep and bear arms.[190] He and Mark Tushnet have also observed that First Amendment jurisprudence cannot easily be applied to firearms regulation because firearms regulation can never be firearms-neutral in the way that speech regulation can be content-neutral; any regulation triggered by the content of speech or expression is considered suspect under the First Amendment, while gun-control laws—even those characterized as presumptively lawful in *Heller*—necessarily focus on the manner in which firearms are possessed or carried.[191] Yet, even these criticisms understate the problems with constructing Second Amendment jurisprudence by borrowing First Amendment doctrine.

Heller concluded that the individual right to keep and bear arms was codified to protect the interest in lawful armed defense and that regulations that impermissibly impinge on that interest are invalid. Indeed, *Heller* cautioned that the Second Amendment right "[i]s not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose" and invalidated the challenged ordinance because it "makes it impossible for citizens to use [firearms] for the core lawful purpose of self-defense."[192] Consequently, as we have seen, lower courts have applied

187. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977).

188. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995) (citation omitted).

189. *Johnson*, 491 U.S. at 414. *Accord, e.g.*, Virginia v. Black, 538 U.S. 343, 358 (2003); Ashcroft v. Free Speech Coal., 535 U.S. 234, 245 (2002). For a useful, though critical, description of the leading philosophical theories that have been advanced to support constitutional protection for expression, see FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15–59 (1982).

190. *See* Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 55–58 (2012).

191. *See id.* at 63–64; Tushnet, *supra* note 46, at 430–31.

192. District of Columbia v. Heller, 554 U.S. 570, 626, 630 (2008).

Heller in a fashion that assesses the extent to which a challenged regulation burdens the core interest in lawful defense. Accordingly, it would be anomalous to borrow a free-speech and free-press jurisprudence developed with no discrete instrumental objective in mind and apply it to a Second Amendment right formulated with reference to precisely such an objective. First Amendment protection, in other words, is not consequentialist, but Second Amendment protection, *Heller* tells us, is, and deeply so.

Two examples illustrate the point. First, consider again laws that prohibit the possession of firearms by convicted felons. *Heller* treats these regulations as presumptively lawful, and there are serious arguments for sustaining such laws, which have been consistently upheld by appellate courts since *Heller*.[193] In the First Amendment context, however, the Court long ago held that the right to speak or publish cannot be denied as a result of past misconduct, such as the publication of false and defamatory material, under the framing-era rule against prior restraints on publication.[194] It has also held that convicted felons retain First Amendment rights, even when writing about the crime for which they were convicted.[195] If the Second Amendment is properly understood to permit prohibitions on possessing firearms by convicted felons, there must be some fundamental difference between First Amendment and Second Amendment rights.

Second, consider laws that provide for enhanced penalties when a firearm is used or carried during the commission of a substantive crime. Since *Heller*, these laws have also been routinely upheld against Second Amendment attack.[196] In light of *Heller*'s admonition that the Second Amendment is directed at protection of an interest in lawful armed defense, this result seems correct. Conversely, First Amendment doctrine insists that all speech receive equal treatment regardless of its communicative effects.[197] Thus, while all expression within the scope of

193. *See supra* text accompanying note 67.

194. *See* Near v. Minn. ex rel. Olson, 283 U.S. 697, 713–23 (1931).

195. *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) (invalidating statute requiring publishers to pay into a crime victims fund sums owed to authors for works describing crimes that the authors were accused or convicted of committing).

196. *See, e.g.*, United States v. Napolitan, 762 F.3d 297, 311 (3d Cir. 2014); United States v. Bryant, 711 F.3d 364, 368–70 (2d Cir. 2013); United States v. Greeno, 679 F.3d 510, 520 (6th Cir. 2012); United States v. Potter, 630 F.3d 1260, 1261 (9th Cir. 2011) (per curiam); United States v. Jackson, 555 F.3d 635, 636 (7th Cir. 2009); People v. Cisneros, 2014 WL 1671766, at *4–6 (Colo. App. Apr. 24, 2014).

197. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 394 (1992); Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 134–35 (1992); Boos v. Barry, 485 U.S. 312, 321–23, 334 (1988).

the First Amendment's protection is normally afforded protection, *Heller* appears to condition constitutional protection on the purpose for which individuals keep and bear arms.[198] This similarly suggests a fundamental difference between First and Second Amendment rights.

In short, any effort to construct a Second Amendment jurisprudence using First Amendment principles is deeply problematic. The character of these constitutional protections seems far too disparate to give rise to fruitful doctrinal borrowing.

III. THE CONSTITUTIONAL CASE FOR FIREARMS REGULATION

Thus far, the search for an authentic Second Amendment originalism has borne little fruit. If the original meaning of the Second Amendment's operative clause is taken literally, there appears to be little basis for limiting anyone's ability to possess or carry firearms in common civilian use. Yet, this is inconsistent with the approach taken in *Heller*, its application in lower courts, and the history of firearms regulation. Accordingly, it is difficult to reconcile an understanding of the Second Amendment's original meaning with *Heller*'s dicta on permissible regulation, its focus on a core interest in lawful armed defense, and the history of firearms regulation. Perhaps for these reasons, some commentators have argued that the scope of permissible firearms regulation has its basis in popular sentiment rather than the Constitution's text.[199] But there is something deeply anomalous about reading the individual rights protected by the Constitution to ensure that the scope of regulatory authority mirrors public sentiment. After all, there is little reason to believe that a Bill of Rights is necessary to ensure that elected officials hew to the public's sensibilities about gun control or any other issue. As Justice Scalia has put it: "If the Constitution were . . . a novel invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature?"[200] Surely the more persuasive account is that the purpose and effect of codifying an individual right as constitutional law is to protect it

198. *Cf.* Glenn Harlan Reynolds, *Guns and Gay Sex: Some Notes on Firearms, the Second Amendment, and "Reasonable Regulation"*, 75 TENN. L. REV. 137, 148 (2007) ("[T]he Second Amendment's right to arms is about capabilities more than expression.").

199. *See, e.g.*, Leider, *supra* note 106, at 1650–51; Siegel, *supra* note 27, at 236–45.

200. Scalia, *supra* note 17, at 854. This is not a concern only of originalists such as Justice Scalia; the quintessentially nonoriginalist John Ely made essentially the same point. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 63–69 (1980).

against the vagaries of popular opinion.[201] If Second Amendment jurisprudence is properly understood to sustain gun-control laws when they reflect majoritian sensibilities rather than hewing to the constitutional text, perhaps the courts have made a wrong turn.

There is, however, one more source of regulatory authority to consider, one that has been hiding in plain sight.

A. Regulatory Power and the Preamble

It is time to return to the Second Amendment's preamble. After all, by referring to the existence of "[a] well regulated Militia,"[202] the Second Amendment's preamble, rather than abolishing the regulatory power over the militia conferred by Article I,[203] expressly contemplates continued regulatory authority, whether by Congress or the States.[204] Moreover, *Heller* concluded that the original meaning of the term "Militia" refers not to "the organized militia," but rather "all able-bodied men."[205] The Court added that the "militia" was originally understood as comprised of "the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty."[206] Thus, the class that is to be "well regulated" consists of all who are able-bodied and capable of military service, regardless of whether they are actually enrolled in an organized militia. In short, *Heller* treats the militia and those entitled to exercise the right to keep and bear arms as, for all practical

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201. *Cf.* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.").

202. U.S. CONST. amend. II.

203. *See* U.S. CONST. art. I, § 8, cl.16 (conferring power on Congress to "[t]o provide for organizing, arming, and disciplining, the Militia . . . and the Authority of training the Militia according to the discipline prescribed by Congress").

204. Even after the ratification of the Constitution, Congress and the States continued to exercise concurrent authority to regulate the militia. *See* Charles, *supra* note 103, at 5–7, 69–71.

205. District of Columbia v. Heller, 554 U.S. 570, 596 (2008). The Court added that the first Militia Act, enacted the year after the Second Amendment's ratification, defined the militia as "each and every able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years." *Id.* (quoting Act of May 8, 1792, ch. 33, 1 Stat. 271).

206. *Id.* at 627. This capacious definition of "Militia" is consistent with that of most scholars who have advanced the view that the Second Amendment protects an individual right. *See, e.g.*, Kates, *supra* note 96, at 214–18; McAfee & Quinlan, *supra* note 96, at 807–22; Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 810–12 (1998). *But see* Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 GEO. MASON U. C.R. L.J. 229, 240–41 (2008) (arguing that the "Militia" in the preamble and "the people" in the operative clause differ).

purposes, synonyms. Moreover, because the framing-era understanding was that the right would be exercised by those subject to regulatory authority, it would do serious violence to this original understanding to disaggregate the right from the existence of regulatory authority. After all, the framing-era understanding was that the right would be exercised by individuals subject to regulation.[207]

As for the phrase "well regulated," the first edition of Webster's dictionary defined "regulated" as "[a]djusted by rule, method or forms; put in good order; subjected to rules or restrictions."[208] *Heller* stated that the original meaning of the phrase was "the imposition of proper discipline and training."[209] These terms, of course, are expansive, contemplating not merely training but also rules and "discipline," which could conceivably embrace everything from a forfeiture of the right to keep and bear arms as a consequence of misconduct to a variety of prophylactic measures that endeavor to reduce the likelihood of misconduct.[210] Thus, the preamble indicates that the Second Amendment preserves substantial regulatory authority.

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207. One scholar has wondered whether a militia-based regulatory power might not reach "those too old or too feeble to serve in the militia." Michael C. Dorf, *Commerce, Death Panels, and Broccoli: Or Why the Activity/Inactivity Distinction in the Health Care Case Was Really About the Right to Bodily Integrity*, 29 GA. ST. U. L. REV. 897, 906 (2013). This possible limitation on regulatory power seems to have little practical significance—debates over gun control rarely center on its application to the aged or infirm. In any event, the history of firearms regulation, as we have seen, has never limited regulatory authority to those regarded as capable of militia service. To the contrary, those regarded as unable to serve in the militia, such as loyalists or free blacks in the framing era and convicted felons thereafter, were still regarded as subject to regulatory authority. If history is any guide, regulatory power seems to have been regarded as comprehensive if only to ensure that the privileges associated with militia service were limited to those subject to regulation as part of the militia. In any event, given the relation between the preamble and the operative clauses of the Second Amendment, it seems plain that the preamble expresses the circumstances under which the right could be exercised—that is, those exercising the right should comprise a "well regulated militia." The framing-era understanding, in short, is that the right could not be considered except when subject to regulatory authority.

208. 2 WEBSTER, *supra* note 31, at 54. To similar effect, see 2 JOHNSON, *supra* note 32, at cdlxxvi (defining "regulate" as "[t]o adjust by rule or method" or "[t]o direct").

209. *Heller*, 554 U.S. at 597.

210. *See, e.g.*, Miller, *supra* note 153, at 1318–19 ("The imposition of proper discipline assumes someone with authority to impose discipline and presumes some consequence for drilling without adequate discipline. . . . [O]nce the people exercise their right to keep and bear arms as a people's militia and spill out into the street, then that right is textually constrained by the militia clauses in the Constitution. Those clauses curtail the authority of the people's militia to assemble spontaneously." (footnotes omitted)); Winkler, *supra* note 26, at 707 ("Training and discipline does not simply happen; laws must be adopted to ensure that the people are properly educated about guns and that the people understand the rules governing the use of guns. Discipline implies control, and the state disciplines individual gun users by teaching them the rules and by punishing them for failure to obey. . . . Some measure of regulatory authority, even though its precise contours are unclear, does seem to be called for by the text."). For a discussion of the evidence demonstrating that the framing generation regarded broad and effective regulation of the militia as critical, see Charles, *supra* note 103, at 87–97.

This understanding of the regulatory authority preserved by the preamble explains a great deal. The original meaning of the Second Amendment's operative clause, as explicated in *Heller*, offers no apparent basis for any limitation on the right of an individual to possess or carry firearms in common civilian use, nor does it appear to concern itself with a core interest in lawful armed defense. Yet, *Heller* acknowledges that the preamble can be used to shed light on the operative clause; it explains that "[l]ogic demands that there be a link between the stated purpose and the command," and that this "requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause," thereby serving the preamble's "clarifying function."[211] Although the Court found no ambiguity in the original meaning of the phrase "the right of the people to keep and bear arms,"[212] it made no such claim regarding the term "infringed" in the operative clause. Indeed, both the Court's dicta on permissible firearms regulation and its precise holding suggest a good deal of ambiguity in that term. In any event, nothing in *Heller* suggests that the operative clause should be read in a manner inconsistent with the preamble; just as *Heller* concluded that the preamble could not be read to limit the operative clause, it would be untenable to read the operative clause to render nugatory the regulatory authority acknowledged in the preamble. The two clauses must be harmonized, not placed in conflict with each other. Understanding the preamble as supplying a textual acknowledgement that not all regulation amounts to an "infringement" on the right to keep and bear arms, in turn, solves a good number of textual problems lurking in *Heller*'s treatment of firearms regulation. The Second Amendment, read in light of its preamble, reflects a textual commitment to regulation found nowhere else in the Bill of Rights.[213]

It is therefore unsurprising that history yields ample evidence of expansive regulatory authority over firearms, as Part II.A above reflects. Indeed, the right to keep and bear arms has long been understood to permit prophylactic regulation, including prohibitions on the possession of firearms by classes of individuals seen as posing unacceptable risks to public safety, such as Catholics at the time of the English Bill of Rights or

211. *Heller*, 554 U.S. at 577–78.

212. *Id.* at 579–92.

213. One commentator, for example, has observed that in other areas of constitutional law, there is usually not a tolerance for broad, categorical prophylactic regulation similar to the type of regulation that is seemingly permitted under the Second Amendment. *See* Josh Blackman, *The Constitutionality of Social Cost*, 34 HARV. J.L. & PUB. POL'Y 951, 1004–05, 1032–33 (2011). The preamble's acknowledgement of regulatory authority, however, explains the unique breadth of regulatory authority in this context.

free Blacks and loyalists in the framing era. The Second Amendment also seems to have been understood to permit prophylactic regulation where firearms were carried under circumstances regarded as suspicious, such as prohibitions on carrying concealed weapons. If the right coexists with broad regulatory power, then these limitations on the right to keep and bear arms become textually comprehensible. Moreover, since the preamble preserves regulatory authority in a generic manner, rather than endeavoring to preserve framing-era practice as in the Seventh Amendment, it becomes possible to explain why the right to keep and bear arms tolerates regulations unknown in the framing era.

To be sure, the preamble does not contemplate limitless regulation. For one thing, a boundless regulatory power could convert the right into a nullity, which is not a plausible reconciliation of the operative clause and the preamble. For another, as Nelson Lund has observed, "something can only be 'well regulated' when it is not overly regulated or inappropriately regulated."[214] Yet, beyond its recognition of both a right and a regulatory power that evidently must be tailored in some appropriate way, the text offers nothing like a doctrinal formula for reconciling right and regulatory authority.

When constitutional text is written at a high level of generality, original meaning will frequently be insufficient to resolve many interpretive questions. For this reason, even many originalists acknowledge that there are occasions on which original meaning is insufficient to resolve a constitutional debate, necessitating resort to what they label nonoriginalist "construction."[215] Nonoriginalists, for their part, cheerfully acknowledge that the interpretation of constitutional text must often be supplemented by judicially created doctrine because of the inadequacy of the text to resolve any number of constitutional controversies.[216] Whether labeled "constitutional construction" or "living constitutionalism," the frequently acknowledged necessity to resort to nonoriginalist doctrine to address

214. Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157, 175 (1999) (emphasis removed).

215. *See, e.g.*, BALKIN, *supra* note 21, at 14, 31–32; BARNETT, *supra* note 21, at 118–30; WHITTINGTON, *supra* note 21, at 5–14; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 467–72 (2013); Grégoire C. N. Webber, *Originalism's Constitution*, *in* THE CHALLENGE OF ORIGINALISM, *supra* note 18, at 147, 173–76.

216. *See, e.g.*, RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 7–101 (2001); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 79–107 (2004); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1655–67 (2005).

matters on which the Constitution's text is inconclusive reflects the limits of originalism as a vehicle for constitutional adjudication.

The Second Amendment presents a case study in the limits of originalism. Even accepting *Heller*'s originalist methodology and its account of original meaning, originalism is of highly limited utility in developing Second Amendment jurisprudence. This observation surely leads one to question the utility of the originalist project—if even *Heller* cannot produce an authentically originalist jurisprudence, what might originalism offer constitutional adjudication? Perhaps the original meaning of constitutional text, when drafted at a high level of generality as is so often the case, is simply too abstract to offer much useful guidance for constitutional adjudication.[217] That seems to be the case with the Second Amendment, with its text offering only the broadest hint at the relationship between right and regulatory power.

Consider, then, the possibilities that nonoriginalist construction offers for reconciling firearms rights and regulatory authority. Constitutional law is, after all, replete with instances of nonoriginalist construction. One type of nonoriginalist construction—the requirement that legislation have at least a rational basis (a standard that no one contends is rooted in original meaning)—was rejected by *Heller* as duplicative of other constitutional protections that require that challenged regulations have a rational basis.[218] Conversely, the most rigorous, if nonoriginalist, approach to judicial review is strict scrutiny, which requires that a challenged law "is justified by a compelling government interest and is narrowly drawn to serve that interest."[219] Some commentators have argued for strict scrutiny on the view that it has long been regarded as appropriate for individual rights regarded as fundamental.[220] Yet, under many other provisions in the Bill of Rights, the propriety of challenged regulations is not judged by strict scrutiny even if those rights are regarded as fundamental, as Adam Winkler has demonstrated.[221] In any event, the preamble provides textual and even originalist reasons to reject strict scrutiny.

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217. For a more elaborate argument along these lines, see LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 31–64 (1991).

218. District of Columbia v. Heller, 554 U.S. 570, 627 n.27 (2008).

219. *E.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011).

220. *See, e.g.*, Lawrence Rosenthal & Joyce Lee Malcolm, Colloquy Debate, McDonald v. Chicago*: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437, 455–57 (2011) (Malcolm); Kyle Hatt, Note, *Gun-Shy Originalism: The Second Amendment's Original Purpose in* District of Columbia v. Heller, 44 SUFFOLK U. L. REV. 505, 520–21 (2011).

221. *See* Winkler, *supra* note 26, at 696–700; Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 228–32 (2006). For a similar argument, see Fleming & McClain, *supra* note 56, at 861–68.

The text of the Second Amendment, read in light of its preamble as well as the history of firearms regulation, powerfully suggests ample power to enact prophylactic regulations. Plainly, a "well regulated Militia" could well be one subject to a variety of prophylactic rules intended to minimize the likelihood of misconduct, rather than only to rules that punish misconduct after the fact. Indeed, we have seen prophylactic firearms regulation throughout history, from the early nineteenth-century prohibitions on concealed carry to the more recent prohibition on the possession of firearms by violent misdemeanants. This textual and historical commitment to regulation means an invariable requirement of strict scrutiny would be anomalous. For one thing, the myriad methodological difficulties in demonstrating the effect of any one regulation in isolation on crime rates would make it difficult to mount a convincing empirical demonstration that a particular regulation was narrowly tailored to achieve a compelling governmental interest.[222] For another, the narrow tailoring required by strict scrutiny forbids regulations that are significantly over- or underinclusive.[223] In the First Amendment context, for example, the Court has held that a statutory prohibition on corporate-funded electioneering could not be justified as a means to prevent corruption because the prohibition swept beyond the type of corrupt quid pro quo that the government has a compelling interest in preventing.[224] Yet, prophylactic regulations are necessarily over- or underinclusive; for example, not all those who carry concealed weapons do so to commit crimes, and not all convicted felons recidivate.[225] Both the textual basis for and longstanding acceptance of prophylactic regulation, in short, strongly argue against an invariable requirement of strict scrutiny.

With the problems inherent to rational-basis review and strict scrutiny, and in light of the requirement that the militia must be "well regulated," an intermediate form of review might prove tempting. Yet, as Part I.B above indicates, *Heller* suggests that very serious burdens on the core constitutional interest in armed defense amount to a virtually per se infringement of the right to keep and bear arms. Beyond that, if original

222. *See, e.g.*, Volokh, *supra* note 56, at 1464–69. For a more general discussion of the difficulties in assembling empirical evidence of the efficacy of gun-control laws, see MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS 77–85 (2007).

223. *See, e.g.*, *Entm't Merchs. Ass'n*, 131 S. Ct. at 2738–42; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543–46 (1993); Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231–32 (1987); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 786, 792–95 (1978).

224. *See, e.g.*, FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 479 (2007).

225. For an argument that none of the examples of presumptively lawful regulations offered in *Heller* can be reconciled with strict scrutiny, see Larson, *supra* note 38, at 1379–85.

meaning is to set the boundaries for permissible nonoriginalist construction, a nonoriginalist construction must accommodate both the right found in the operative clause and the regulatory authority acknowledged in the preamble.

The task of reconciling a core right and legitimate regulatory interests is not a new one in constitutional law. It has frequently been addressed through a methodology that assesses the extent of the burden placed on the core right by a challenged regulation. For example, the First Amendment protects the right to vote and to participate in the political process, but there are nonetheless legitimate governmental interests that support regulation of the electoral process. The Court mediates between right and regulation by imposing strict scrutiny on regulations imposing what are regarded as severe burdens on First Amendment rights, while regulations imposing more modest burdens are upheld if reasonable.[226] Thus, the Court evaluates regulations that compel disclosure of the identities of those involved in the political process through a test that weighs the strength of the governmental interest in disclosure against the magnitude of the burden imposed on First Amendment rights.[227] Similarly, content-neutral regulation of speech is upheld if it does not burden substantially more speech than necessary to further a legitimate governmental interest, an inquiry that turns in significant part on the magnitude of the burden imposed by the challenged regulation.[228] And, because public employees have a constitutionally protected interest in speaking on matters of public concern, restrictions on public-employee speech require heightened justifications to the extent that a challenged regulation imposes particularly great burdens on employee free speech.[229]

This mode of inquiry is not unique to free-speech jurisprudence. For example, while the Constitution secures both a right to travel and a right of access to the courts, the Court upheld a durational residency requirement to obtain a divorce because it imposed no absolute bar to travel or access to the courts and advanced legitimate governmental interests in assuring

226. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189–91 (2008) (opinion of Stevens, J.); *id.* at 204–05 (Scalia, J., concurring in the judgment); Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 451–52 (2008); Clingman v. Beaver, 544 U.S. 581, 592–97 (2005); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997); Burdick v. Takushi, 504 U.S. 428, 433–34 (1992); Rosario v. Rockefeller, 410 U.S. 752, 760–62 (1973).

227. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 366–67 (2010).

228. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 213–17 (1997).

229. *See, e.g.*, United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 465–70 (1995).

that an individual has an adequate attachment to the forum state before it endeavors to adjudicate an action for divorce.[230]

Perhaps most familiar, however, is the Court's approach to abortion regulation, where the Court has been careful to protect both right and regulatory authority.[231] In *Roe v. Wade*,[232] the Court concluded that a woman had a cognizable liberty interest under the Due Process Clause in deciding whether to terminate her pregnancy,[233] but it also acknowledged that the government had a legitimate interest in safeguarding health, maintaining medical standards, and protecting potential life.[234] The Court endeavored to accommodate these conflicting interests by holding that after the first trimester the government may regulate abortion to protect maternal health but may not regulate to protect potential life until viability.[235]

Subsequently, in *Planned Parenthood of Southeast Pennsylvania v. Casey*,[236] the joint opinion of Justices O'Connor, Kennedy, and Souter concluded that this framework gave insufficient weight to the concededly legitimate governmental interest in protecting potential life by requiring that "any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest."[237] Instead, "[o]nly where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."[238] Later, when upholding a statutory prohibition on "intact dilation and extraction" or "partial-birth abortion," the Court explained that "[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain

230. *See* Sosna v. Iowa, 419 U.S. 393, 405–09 (1975).

231. Notably, even one scholarly advocate of a vigorous conception of the right to bear arms has argued, "[T]he ideas and principles used . . . to draw the unenumerated right to abortion out of the Constitution run remarkably parallel to, and in core cases build directly upon, arguments and principles supporting a constitutional right to arms for self-defense." Nicholas J. Johnson, *Supply Restrictions at the Margins of* Heller *and the Abortion Analogue:* Stenberg *Principles, Assault Weapons, and the Attitudinalist Critique*, 60 HASTINGS L.J. 1285, 1309–10 (2009). *See also* Fleming & McClain, *supra* note 56, at 866–67; Mark Tushnet, *Permissible Gun Regulations After* Heller*: Speculations About Method and Outcomes*, 56 UCLA L. REV. 1425, 1437 (2009).

232. 410 U.S. 113 (1973).

233. *Id.* at 153.

234. *Id.* at 153–54.

235. *Id.* at 163–64.

236. 505 U.S. 833 (1992).

237. *Id.* at 871 (opinion of O'Connor, Kennedy & Souter, JJ.).

238. *Id.* at 874 (opinion of O'Connor, Kennedy & Souter, JJ.). *Accord, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 146 (2007); Stenberg v. Carhart, 530 U.S. 914, 921 (2000).

procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life."[239] After concluding that the statute advanced this legitimate interest by banning "a procedure itself laden with the power to devalue human life,"[240] the Court considered whether the statute created an undue burden in light of the "documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women," and concluded that legislatures enjoy "wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[241]

Although none of these contexts is precisely analogous to firearms regulation, in each of them, the Court confronted both a core right and a legitimate governmental interest in regulating the exercise of a right itself—not merely the type of incidental burden created by regulations not directed at the exercise of the right itself.[242] Sufficiently serious burdens that threaten to negate the right are invalidated, or at least subjected to demanding review, while less serious burdens can be sustained under less demanding review.[243] Accordingly, it is unsurprising that the emerging

239. *Gonzales*, 550 U.S. at 158.

240. *Id.*

241. *Id.* at 162–63.

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

243. This point likely explains the single case to embrace a rule of strict scrutiny for firearms regulation. In *Tyler v. Hillsdale County Sheriff's Department*, 775 F.3d 308 (6th Cir. 2014), *reh'g granted*, 2015 U.S. App. LEXIS 6638 (6th Cir. Apr. 21, 2015), the majority of a divided Sixth Circuit panel utilized strict scrutiny to conclude that a federal prohibition on the possession of firearms by individuals who had been committed to a mental institution was unconstitutional as applied to an individual who had been committed decades earlier and who was unable to petition for relief from the disability because he resided in a state that offers no relief from this disability, at least absent evidence of the individual's current dangerousness. *See id.* at 313–15, 331–34, 342–44. The statute at issue imposed a particularly severe burden on individuals subject to its prohibition absent a legislative determination that persons subject to the disability posed an unreasonable risk; indeed, the court stressed that Congress, by permitting states to offer relief from the statutory disability, "has *already* determined that the class of individuals previously committed to a mental institution is *not* so dangerous that all members must be permanently deprived of firearms." *Id.* at 333. Thus, the majority could well have been correct to apply strict scrutiny to the case before it, even if its more general comments on the propriety of strict scrutiny cannot be reconciled with the scope of regulatory authority contemplated by the Second Amendment's preamble. Indeed, the court's opinion implies that it grasped that it is the extent and character of the burden imposed by a challenged regulation and not the standard of scrutiny alone that is critical to post-*Heller* jurisprudence. *See id.* at 329 ("The courts of

Second Amendment jurisprudence in lower courts since *Heller* has latched onto an inquiry into the extent of the burden imposed on core Second Amendment interests by a challenged regulation; this mode of nonoriginalist construction is familiar to constitutional law when right and legitimate regulatory authority must be reconciled.

Importantly, an approach that keys judicial scrutiny to the extent to which a challenged regulation burdens the core right has the virtue of minimizing the extent to which the judiciary must engage in difficult predictive or empirical judgments about the efficacy of the challenged regulation.[244] Since very severe burdens are virtually per se invalid, little inquiry into their justification will be required beyond that typical in strict-scrutiny litigation, but for less severe burdens, a degree of deference to legislative judgment is appropriate. Not only does the Second Amendment reflect a textual commitment to regulation, the historical understanding of the Second Amendment reflects acceptance of prophylaxis. For example, persons thought to pose unreasonable risks have long been regarded within the ambit of regulatory power. Consider the framing-era limitation on the right to bear arms to loyal white males, the nineteenth-century prohibitions on carrying concealed firearms, and the more recent prohibitions on the possession of firearms by convicted felons and dangerous misdemeanants discussed in Part II above. Each of these illustrates the historical acceptance of prophylaxis, which, after all, seems to follow from the Second Amendment's preamble. A militia could hardly be "well regulated" if it contained individuals that present undue threats to public safety.

Thus, history suggests that when the legislature restricts the possession of firearms by discrete classes of individuals reasonably regarded as posing an elevated risk for firearms violence, prophylactic regulations of this character should be sustained. For example, Mary Fan has argued that available crime data strongly suggests that individuals with a history of intimate-partner conflict or domestic violence present a sharply elevated risk of firearms violence.[245] Surely regulations premised on data of this character stand on better footing than framing-era regulations premised on archaic generalizations poorly adapted to contemporary circumstances.

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appeals' post-*Heller* jurisprudence does not suggest that the decision to apply intermediate scrutiny over strict scrutiny was generally the crucial keystone that won the government's case.").

244. *Cf.* McDonald v. City of Chicago, 561 U.S. 742, 790–91 (2010) (plurality opinion) (warning against "requir[ing] judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise").

245. See Mary D. Fan, *Disarming the Dangerous: Preventing Extraordinary and Ordinary Violence*, 90 IND. L.J. 151, 168–72 (2015).

Moreover, as courts applying *Heller* have concluded, difficulties in assessing the efficacy of prophylactic regulation and the long history of permitting such regulation without demanding rigorous empirical proof of efficacy suggest that deference should be given to legislative conclusions on questions of efficacy, except where regulations impose the most severe burdens on Second Amendment rights.[246]

All this may strike the reader as a bit abstract. For that reason, the discussion below applies this framework to some specific regulatory regimes. To be sure, there may be any number of policy and technological objections to the regulatory options considered below. Indeed, assessing the wisdom and utility of firearms regulation presents many challenges. And in addition to the formidable methodological challenges considered above,[247] research into firearms-related violence has been handicapped by a variety of restrictions imposed on government funding for such research in recent years.[248] "As a result, the past 20 years have witnessed diminished progress in understanding the causes and effects of firearm violence."[249] Accordingly, the state of the research hampers that inquiry. Nevertheless, the remaining discussion will focus on a number of areas of potential regulation to illustrate that the Second Amendment, properly understood, tolerates quite a vigorous regime of gun control. The discussion is offered less as a concrete agenda than as a thought experiment to demonstrate the scope of regulatory authority that may be exercised consistent with the Second Amendment.

B. Assault-Weapons Bans

The character of constitutional review focusing on the extent to which a challenged restriction burdens the core constitutional interest in lawful armed defense is well illustrated by a prohibition on semi-automatic, assault-type weapons with military features, especially large-capacity magazines.

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246. *See, e.g.*, Drake v. Filko, 724 F.3d 426, 436–37 (3d Cir. 2013); Schrader v. Holder, 704 F.3d 980, 990 (D.C. Cir. 2013); Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 97 (2d Cir. 2012); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 210 n.21 (5th Cir. 2012); *In re* Wheeler, 81 A.3d 728, 756–57 (N.J. Super. Ct. App. Div. 2013).

247. *See supra* text accompanying note 222.

248. *See, e.g.*, Arthur L. Kellermann & Frederick P. Rivara, *Silencing the Science on Gun Research*, 309 JAMA 549 (2013).

249. COMM. ON PRIORITIES FOR A PUB. HEALTH RESEARCH AGENDA TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE, INST. OF MED. & NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 23 (Alan I. Leshner et al. eds., 2013).

There is some evidence that assault-type firearms and large-capacity magazines are frequently used in mass shooting incidents,[250] and some reason to believe that prohibiting weapons that enable unusual rates of fire or that accept unusually large magazines, as well as a prohibition on such magazines, "may prevent some shootings, particularly those involving high numbers of shots and victims."[251] Critics have argued, however, that because such weapons are commonly owned by civilians for purposes of self-defense, and do not meaningfully differ from other types of semi-automatic weapons, there is little point to a ban.[252] Still, there is a case to be made for such laws. Although there is, unsurprisingly, little evidence of the efficacy of the now-lapsed federal ban on assault weapons given the ready availability of functional substitutes that were not prohibited by that law, there is some evidence that more comprehensive prohibitions on high-capacity, semi-automatic firearms reduce firearms violence.[253] Critics, however, remain unpersuaded.[254]

Despite the uncertain empirical evidence on the efficacy of a comprehensive prohibition on such weapons, there is a strong case to be made for their constitutionality. *Heller* ensures protection for handguns with typical features, since handguns are "the quintessential self-defense weapon."[255] Thus, the burden on the core right of armed defense imposed by a prohibition on assault-type weapons is modest. As Professor Volokh, generally an advocate of expansive firearms rights, acknowledges: "[B]ans on such weapons don't substantially burden the right to keep and bear arms for self-defense, precisely because equally useful guns remain available."[256] Professor Volokh may be overstating things a bit; a weapon that can fire more rounds at a higher rate of speed may have some marginal utility for self-defense when compared to more traditional handguns.[257] Still, in light of the modest burden that such a law likely imposes on lawful defense, and the potential benefits of such a prohibition, the approach that the Court has taken in other areas in which right and

250. Christopher S. Koper, *America's Experience with the Federal Assault Weapons Ban, 1994-2004: Key Findings and Implications*, *in* REDUCING GUN VIOLENCE, *supra* note 76, at 157, 161–62.

251. *Id.* at 168.

252. *See, e.g.*, Johnson, *supra* note 231, at 1292–302. For a historical survey demonstrating that high-capacity magazines have a lengthy history of civilian use, see David B. Kopel, *The History of Firearms Magazines and of Magazine Prohibition*, 78 ALB. L. REV. 849, 851–60 (2015).

253. *See, e.g.*, Koper, *supra* note 250, at 162–69.

254. *See, e.g.*, Gary Kleck, *Gun Control After* Heller *and* McDonald*: What Cannot Be Done and What Ought To Be Done*, 39 FORDHAM URB. L.J. 1383, 1397–99 (2012).

255. District of Columbia v. Heller, 554 U.S. 570, 629 (2008).

256. Volokh, *supra* note 56, at 1489.

257. *See, e.g.*, Johnson, *supra* note 231, at 1302–09.

regulatory authority must be reconciled likely counsels for deference to the legislature's judgment, even in the face of uncertain evidence of efficacy.[258]

C. Comprehensive Firearms Registration and Tracing

There is a serious case to be made for a comprehensive system of registration, thus enabling firearms, bullets, or cartridges recovered in connection with a crime to be readily traceable. Such a system could make it far easier to identify the perpetrators of firearms-related crime and far more difficult for criminals to acquire untraceable weapons and circumvent background checks.

Under the current system of firearms tracing, when a firearm is recovered by the authorities in the course of a criminal investigation, only a crude system of tracing the firearm's provenance is available. Law enforcement officials may request that the National Tracing Center perform a trace on a recovered firearm by contacting the manufacturer, requesting that the manufacturer identify the transferee that received it from that manufacturer, and then contacting subsequent transferees until the trace identifies the first sale at retail made by a licensed dealer.[259] As tracing became more frequent in the 1990s, the utility of the trace database as a means of studying the illegal use of firearms increased.[260]

The value of the trace database as a source of information for policy debate has been hampered in recent years as a consequence of a rider inserted into federal appropriations legislation prohibiting the release of trace data to the public.[261] Even so, the trace data that is available offers some important insights. In particular, studies have consistently found that

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258. For decisions upholding prohibitions on semi-automatic rifles or high-capacity magazines along these lines, *see*, for example, Friedman v. City of Highland Park, 784 F.3d 406, 409 (7th Cir. 2015); Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1262–64 (D.C. Cir. 2011); People v. Zondorak, 163 Cal. Rptr. 3d 491 (Ct. App. 2013); People v. James, 94 Cal. Rptr. 3d 576 (Ct. App. 2009). *See also* Fyock v. City of Sunnyvale, 779 F.3d 991, 998–1001 (9th Cir. 2015) (denying preliminary injunction).

259. *See* BUREAU OF ALCOHOL, TOBACCO & FIREARMS, DEP'T OF TREAS., COMMERCE IN FIREARMS IN THE UNITED STATES 19–20 (2000).

260. *See, e.g.*, Philip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 ARIZ. L. REV. 277, 287–91 (2001). There are, to be sure, fierce critics of trace data who argue it is likely to represent a skewed sample. *See, e.g.*, Gary Kleck & Shun-Yung Kevin Wang, *The Myth of Big-Time Gun Trafficking and the Overinterpretation of Gun Tracing Data*, 56 UCLA L. REV. 1233, 1271–76 (2009); David B. Kopel, *Clueless: The Misuse of BATF Firearms Tracing Data*, 1999 L. REV. M.S.U.-D.C.L. 171, 173–80.

261. *See* Colin Miller, *Lawyers, Guns, and Money: Why the Tiahrt Amendment's Ban on the Admissibility of ATF Trace Data in State Court Actions Violates the Commerce Clause and the Tenth Amendment*, 2010 UTAH L. REV. 665, 676–82.

traced firearms are rarely recovered from those who bought the firearms at retail from a licensed dealer. For example, an analysis of crime-gun trace requests during calendar year 2000 in cities with populations greater than 250,000 participating in a crime-gun interdiction initiative indicated that, of the trace requests in which both the purchaser and possessor at the time of recovery could be ascertained, in 88% the possessor and purchaser were not the same person.[262] A study of trace requests in Chicago between 2009 and 2013 similarly showed that only 7.8% of traced guns were recovered from the original buyer.[263]

This pattern is also reflected in surveys of offenders. A survey of federal prisoners who used or carried a firearm during their offense of conviction found that 9.1% of inmates reported obtaining the firearm from a theft or burglary, 15.0% from a drug dealer, 8.7% from a fence or the black market, 35.4% from a family member or friend, and 3.4% reported that the firearm was either borrowed or given to them, while only 22.5% reported obtaining the gun from a retail transaction, either through a retail store (15%), a pawnshop (4.2%), a flea market (1.7%) or a gun show (1.7%).[264] Even if we assume, unrealistically, that all retail sales were made by a licensed dealer, the vast majority of firearms were obtained elsewhere. This pattern is also reflected in other surveys of offenders, which have consistently found that the vast majority of firearms in the hands of offenders were not purchased from a licensed dealer.[265]

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262. BUREAU OF ALCOHOL, TOBACCO & FIREARMS, DEP'T OF TREASURY, CRIME GUN TRACE REPORTS (2000), at 29 (2002).

263. *See* Philip J. Cook et al., *Some Sources of Crime Guns in Chicago: Dirty Dealers, Straw Purchasers, and* Traffickers, 104 J. CRIM. L. & CRIMINOLOGY 717, 740 (2015). A study of 1999 traces similarly found that only 11.2% of guns were recovered from the original buyer. *See* Glenn L. Pierce et al., *Characteristics and Dynamics of Illegal Firearms Markets: Implications for a Supply-Side Enforcement Strategy*, 21 JUST. Q. 391, 400 (2004).

264. JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, FEDERAL FIREARMS OFFENDERS, 1992–98, at 10 (2000).

265. *See, e.g.*, PHILIP J. COOK & KRISTIN A. GOSS, THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW 87–88 (2014); JOSEPH F. SHELEY & JAMES D. WRIGHT, IN THE LINE OF FIRE: YOUTHS, GUNS, AND VIOLENCE IN URBAN AMERICA 47 tbl.3.6 (1995); Anthony A. Braga et al., *The Illegal Supply of Firearms*, 29 CRIME & JUST. 319, 332–33 & tbl.2; Daniel W. Webster et al., *Preventing the Diversion of Guns to Criminals Through Effective Firearm Sales Laws*, *in* REDUCING GUN VIOLENCE, *supra* note 76, at 109, 110 [hereafter Webster et al., *Preventing the Diversion*]; Daniel W. Webster et al., *How Delinquent Youths Acquire Guns: Initial Versus Most Recent Gun Acquisitions*, 79 J. URB. HEALTH 60, 62–65 (2002).

The existing regulatory scheme does much to explain offenders' preferences for acquiring firearms outside of licensed dealers. As one study explained:

> It is easy to understand why offenders would prefer private sellers over licensed firearms dealers. Under federal law and laws in most states, firearms purchases from unlicensed private sellers require no background check or record keeping. The lack of record keeping requirements helps to shield an offender from law enforcement scrutiny if the gun were used in a crime and recovered by police. Indeed, of the offenders in the [Survey of Inmates in State Correctional Facilities] who were not prohibited from possessing a handgun prior to the crime leading to their incarceration, two-thirds had obtained their handguns in a transaction with a private seller.[266]

There is also some evidence, based on both surveys and trace data, that newer guns are disproportionately represented among firearms used by criminals.[267] In any event, it seems plain that there must be vigorous demand for firearms among offenders: "Each new cohort of violent criminals must obtain guns somewhere."[268]

Thus, the vast majority of armed offenders are able, without undergoing background checks, to obtain guns that cannot be traced to them. Consider, as a response to this state of affairs, a system of comprehensive firearms registration and tracing that might be adopted. All owners of firearms would be required to register them, and all new sales and other transfers would be registered as well. Registration data would be placed in a comprehensive database, and all subsequent transfers would be performed through a licensed dealer required to perform a background check and then register the transfer should the transferee prove eligible to possess firearms. Unregistered transfers would incur significant penalties, as would the failure to report the loss or theft of a firearm. Penalties could be enhanced if such a firearm were subsequently used in a crime. Moreover, whenever a firearm was transferred, it could be test-fired, and the unique rifling impressions left on the bullet or cartridge casings could be recorded in a national database that could be matched to bullets or

266. Webster et al., *Preventing the Diversion*, *supra* note 265, at 110.

267. *See, e.g.*, Anthony A. Braga et al., *Interpreting the Empirical Evidence on Illegal Gun Market Dynamics*, 89 J. URB. HEALTH 779, 784–88 (2012).

268. Philip J. Cook, Stephanie Molliconi & Thomas B. Cole, *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59, 63 (1995). For a helpful discussion of the evidence with respect to the prevalence of markets that supply firearms to criminals, see Braga et al., *supra* note 267, at 783–88, 791.

casings recovered at crime scenes.[269] New firearms and ammunition could also be microstamped with a unique serial number that could be recovered from spent ammunition or casings.[270] Finally, to guard against the possibility of theft, the law might require that firearms be kept securely locked except when in the actual possession of their owners.[271] There could also be a requirement that new firearms be equipped with technology that renders them inoperable except when in the possession of their owner.[272]

This type of regulatory regime could have dramatic consequences for firearms-related crime. It would become far more difficult for offenders to acquire untraceable firearms if there were a credible threat of sanctions, not only against any individual found without a properly registered firearm, but also against any individual who transferred a firearm to another without registering it or who failed to report a lost or stolen firearm. After all, in this type of regulatory regime, whenever a firearm is recovered in a criminal investigation from someone other than the registered owner, the registered owner would face sanctions if he had failed to report the transfer, loss, or theft of the firearm. Firearms trafficking outside of licensed dealers would likely diminish greatly. Moreover, if all registered firearms produced traceable bullets or cartridges, there would be enormous risks in discharging firearms, not unlike leaving fingerprints or DNA at the scene of the crime. Presumably

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269. For a consideration of the possibilities for such a system, see COMM. TO ASSESS THE FEASIBILITY, ACCURACY, & TECHNICAL CAPABILITY OF A NAT'L BALLISTICS DATABASE, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., BALLISTIC IMAGING 223–51 (Daniel L. Cork et al. eds., 2008) [hereinafter BALLISTIC IMAGING]. For laws embodying this approach, see CONN. GEN. STAT. § 29-7h (2012), and MD. CODE ANN., PUB. SAFETY § 5-131 (West 2011).

270. For a consideration of this possibility, see BALLISTIC IMAGING, *supra* note 269, at 255–71, and Jon S. Vernick, Daniel W. Webster & Katherine A. Vittes, *Law and Policy Approaches To Keeping Guns from High-Risk People*, *in* RECONSIDERING LAW AND POLICY DEBATES: A PUBLIC HEALTH PERSPECTIVE 153, 173–75 (John G. Culhane ed., 2011). For laws requiring the use of this technology, see CAL. PENAL CODE § 319109(7) (West 2012), and D.C. Code §§ 7-2504.08, 7-2505.03 (West Supp. 2012).

271. *See* Cook, Molliconi & Cole, *supra* note 268, at 86. There is some evidence that this approach reduces rates of firearms theft. *See* AMERICANS FOR GUN SAFETY FOUND., STOLEN FIREARMS: ARMING THE ENEMY 12 (2002). There is also some evidence that this approach can reduce accidental deaths and suicides. *See* Peter Cummings et al., *State Gun Safe Storage Laws and Child Mortality Due to Firearms*, 278 JAMA 1084, 1084 (1997); David C. Grossman et al., *Gun Storage Practices and Risk of Youth Suicide and Unintentional Firearm Injuries*, 293 JAMA 707, 711–13 (2005); Vernick, Webster & Vittes, *supra* note 270, at 169–70; Daniel W. Webster et al., *Association Between Youth-Focused Firearm Laws and Youth Suicides*, 292 JAMA 594, 596–98 (2004).

272. For a discussion of this possibility, see Stephen P. Teret & Adam D. Mernit, *Personalized Guns: Using Technology to Save Lives*, *in* REDUCING GUN VIOLENCE, *supra* note 76, at 173, 177–80, and Philip J. Cook & James A. Leitzel, *"Smart" Guns: A Technological Fix for Regulating the Secondary Market*, 20 CONTEMP. ECON. POL'Y 38, 38–48 (2002).

such a system would greatly increase demand among criminals for older, unregistered firearms, but the resulting increase in price should produce a dampening effect on this illegal market, especially given the risks that would be run by those who transfer older firearms without registering the transfer. The limited empirical evidence available suggests that more stringent systems of regulation—ones that currently operate to increase the risks of supplying guns later used in crimes—reduce the flow of firearms to criminals.[273]

What is particularly striking from a constitutional standpoint about such a regime of comprehensive regulation and tracing is that there is so little basis to challenge it under the Second Amendment. The classic objection to gun registration is that it is the first step toward confiscation.[274] Although this kind of slippery-slope argument is familiar in legal discourse, there is widespread agreement that the existence of a constitutional right that stakes out an end-point of an otherwise slippery slope is one mechanism to defeat this type of claim.[275] *Heller* functions in just this fashion; by securing an individual right to keep and bear arms, it undercuts a claim that registration could lead to confiscation.[276] Moreover, registration has ample originalist support. In the framing era, militia laws frequently required individuals to produce their firearms at muster and have them registered.[277]

Beyond that, a comprehensive system of registration and tracing imposes a negligible burden on the core interest in lawful armed defense

273. *See, e.g.*, Anthony A. Braga & Glenn L. Pierce, *Disrupting Illegal Firearms Markets in Boston: The Effects of Operation Ceasefire on the Supply of New Handguns to Criminals*, 4 CRIMINOLOGY & PUB. POL'Y 717, 737–44 (2005) (enhanced enforcement targeting firearms traffickers); Philip J. Cook et al., *Underground Gun Markets*, 117 ECON. J. F588, F610–12 (2007) (prohibition on handguns and aggressive police enforcement produce high transaction costs and a thin underground market); Daniel W. Webster, Jon S. Vernick & Maria T. Bulzacchelli, *Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking*, 86 J. URB. HEALTH 525, 525–27 (2009) (more comprehensive regulation reduces incidence of gun trafficking); D.W. Webster et al., *Effects of Undercover Police Stings of Gun Dealers on the Supply of New Guns to Criminals*, 12 INJ. PREVENTION 225, 229–30 (2006) (undercover enforcement targeting dealers reduced flow of firearms to criminals); D.W. Webster, J.S. Vernick & L.M. Hepburn, *Relationship Between Licensing, Registration, and Other Gun Sales Laws and the Source State of Crime Guns*, 7 INJ. PREVENTION 184, 186–89 (2001) (jurisdictions with greater regulation generated fewer guns used in crimes); Daniel W. Webster & Garen J. Wintemute, *Effects of Policies Designed to Keep Firearms from High-Risk Individuals*, 36 ANN. REV. PUB. HEALTH 21, 29–31 (2015) (same).

274. *See, e.g.*, Lund, *supra* note 56, at 1630.

275. *See, e.g.*, Mario J. Rizzo & Douglas Glen Whitman, *The Camel's Nose Is in the Tent: Rules, Theories, and Slippery Slopes*, 51 UCLA L. REV. 539, 580–91 (2003); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1047–48 (2003).

276. For similar observations, see, for example, Fleming & McClain, *supra* note 56, at 856–57, and Tushnet, *supra* note 231, at 1436.

277. *See supra* text accompanying note 105.

central to *Heller* because it does not limit the ability of individuals to use properly licensed firearms for lawful purposes.[278] Comprehensive registration also enhances the efficacy of regulations that validly prohibit classes of individuals, such as convicted felons, from possessing firearms.[279] Moreover, a registration requirement that enhances traceability of recovered firearms, bullets, and casings makes it far riskier to use firearms unlawfully and imposes little burden on lawful defensive uses of firearms, as long as systems of registration and tracing can be implemented without dramatic increases in the cost of firearms or the time it takes to acquire one. Similarly, safe-storage laws impose little burden on armed defense as long as the firearms may lawfully remain available and readily operable when in the presence of the owner.[280] Abortion jurisprudence, for example, instructs: "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."[281] It is hard to understand why this rule should not have equal application to the Second Amendment in light of the textual basis for regulatory authority.[282]

In sum, a system of comprehensive firearms registration and tracing, far more aggressive than anything on the current regulatory horizon, faces little in the way of a constitutional threat.

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278. *See, e.g.*, Denning, *supra* note 52, at 561 ("One consequence of the Court's choice to place self-defense—as opposed to deterring governmental tyranny—at the core of the Second Amendment, however, is that proposals to require licensing or registration of guns or records of gun sales are less likely to face serious constitutional challenge."). For judicial opinions upholding such laws, see, for example, Hightower v. City of Boston, 693 F.3d 61, 71–75 (1st Cir. 2012) (revocation of license because of misstatements in application), Justice v. Town of Cicero, 577 F.3d 768, 773–75 (7th Cir. 2009) (upholding registration requirement), and Lowery v. United States, 3 A.3d 1169, 1175–76 (D.C. 2010) (upholding licensing requirement).

279. *See, e.g.*, People v. Taylor, 3 N.E.3d 288, 295–97 (Ill. App. Ct. 2013) (upholding licensing as a means of laws limiting high-risk groups from carrying firearms); Commonwealth v. Loadholt, 954 N.E.2d 1128, 1130–31 & n.7 (Mass. 2011) (upholding licensing requirement as a means of enforcing prohibition on felons possessing firearms).

280. For judicial opinions along these lines, see, for example, Jackson v. City & Cnty. of San Francisco, 746 F.3d 953, 961–67 (9th Cir. 2014), and Commonwealth v. McGowan, 982 N.E.2d 495, 500–04 (Mass. 2013). For a scholarly discussion justifying this conclusion, see Fleming & McClain, *supra* note 56, at 874–86.

281. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (opinion of O'Connor, Kennedy & Souter, JJ.). This approach was applied to sustain a twenty-four-hour waiting period to receive an abortion despite the increases in cost and the burden that this policy would produce. *See id.* at 885–87.

282. *Cf.* Kwong v. Bloomberg, 723 F.3d 160, 167–68 (2d Cir. 2013) (upholding $340 residential handgun licensing fee).

D. Carrying Firearms in Public

Another important question is the scope of regulatory authority over those who carry firearms in public. *Heller* observes: "From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right [to keep and bear arms] was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[283] While some persons carry firearms for lawful purposes, others carry firearms with different ends in mind.

For example, there is considerable evidence that members of criminal street gangs carry firearms at elevated rates.[284] The same is true of those involved in drug trafficking.[285] This should not be surprising; those engaged in unlawful but intensively competitive enterprises will often turn to violence as a means of enhancing their position in illegal, if lucrative, markets. There is ample evidence that homicide spiked in major cities following the introduction of crack cocaine, which created new competitive opportunities and pressures.[286] The prevalence of violent competition, in turn, is likely to increase the rate at which offenders carry firearms.

Indeed, gang researchers have found that the prevalence of violence in gang-dominated neighborhoods serves to make firearms more pervasive in

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283. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

284. *See, e.g.*, SCOTT H. DECKER & BARRIK VAN WINKLE, LIFE IN THE GANG: FAMILY, FRIENDS, AND VIOLENCE 175–76 (1996); JAMES C. HOWELL, GANGS IN AMERICA'S COMMUNITIES 218 (2012); SHELEY & WRIGHT, *supra* note 265, at 95–103; TERENCE P. THORNBERRY ET AL., GANGS AND DELINQUENCY IN DEVELOPMENTAL PERSPECTIVE 123–25, 131 (2003); Scott H. Decker, *Youth Gangs and Violent Behavior*, *in* THE CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR AND AGGRESSION 388, 391–92 (Daniel J. Flannery et al. eds., 2007) [hereinafter CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR]; Beth Bjerregaard & Alan J. Lizotte, *Gun Ownership and Gang Membership*, 86 J. CRIM. L. & CRIMINOLOGY 37, 46–53 (1995); C. Ronald Huff, *Comparing the Criminal Behavior of Youth Gangs and at-Risk Youth*, *in* AMERICAN YOUTH GANGS AT THE MILLENNIUM 77, 83 (Finn-Aage Esbensen, Stephen G. Tibbetts & Larry Gaines eds., 2004) [hereinafter GANGS AT THE MILLENNIUM]; Alan J. Lizotte et al., *Factors Influencing Gun Carrying Among Young Urban Males over the Adolescent-Young Adult Life Course*, 38 CRIMINOLOGY 811, 812–13 (2000).

285. *See, e.g.*, SHELEY & WRIGHT, *supra* note 265, 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 284, at 814–16, 826–28.

286. *See, e.g.*, ALFRED BLUMSTEIN & JACQUELINE COHEN, DIFFUSION PROCESSES IN HOMICIDE 6–9 (1999); JAMES ALAN FOX, JACK LEVIN & KENNA QUINET, THE WILL TO KILL: MAKING SENSE OF SENSELESS MURDER 87–88 (rev. 2008); BENJAMIN PEARSON-NELSON, UNDERSTANDING HOMICIDE TRENDS: THE SOCIAL CONTEXT OF A HOMICIDE EPIDEMIC 37–41 (2008); Alfred Blumstein & Richard Rosenfeld, *Explaining Recent Trends in U.S. Homicide Rates*, 88 J. CRIM. L. & CRIMINOLOGY 1175, 1209–10 (1998); Alfred Blumstein & Joel Wallman, *The Crime Drop and Beyond*, 2 ANN. REV. L. & SOC. SCI. 125, 131 (2006); Philip J. Cook & John H. Laub, *After the Epidemic: Recent Trends in Youth Violence in the United States*, 29 CRIME AND JUST. 1, 21–31.

those communities.[287] Researchers have similarly found that a perception of danger in high-crime neighborhoods becomes a stimulus for the carrying of firearms as a means of self-protection.[288] As Jeffrey Fagan and Deanna Wilkinson's ethnographic study of at-risk youth in New York explains, when inner-city youth live under the increasing threat of violence in an environment in which firearms are prevalent, not only are they more likely to arm themselves, but they become increasingly likely to respond to real or perceived threats and provocations with lethal violence, creating what Fagan and Wilkinson characterize as a contagion effect.[289] A study of homicide in New York, for example, found evidence of what it characterized as a contagion effect, in which firearms violence stimulated additional firearms-related violence in nearby areas.[290] Fagan and Wilkinson have labeled this phenomenon an "ecology of danger" in which the need to carry firearms and be prepared to use them came to be seen as essential.[291] Ironically, this does not make those who carry firearms in high-crime neighborhoods safer; to the contrary, even though gang members carry firearms at elevated rates, they also experience vastly higher homicide victimization rates than the public at large.[292]

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287. *See, e.g.*, James C. Howell, *Youth Gang Homicides: A Literature Review*, 45 CRIME & DELINQ. 208, 216 (1999).

288. *See* BLUMSTEIN & COHEN, *supra* note 286, at 4–5; MARK R. POGREBIN, PAUL B. STRETESKY & N. PRABHA UNNITHAN, GUNS, VIOLENCE, AND CRIMINAL BEHAVIOR: THE OFFENDER'S PERSPECTIVE 69–71 (2009); SHELEY & WRIGHT, *supra* note 265, at 102–03, 110–13; Jeffrey Fagan & Deanna L. Wilkinson, *Guns, Youth Violence, and Social Identity in Inner Cities*, *in* 24 YOUTH VIOLENCE 105, 174 (Michael Tonry & Mark H. Moore eds., 1998); David Hemenway et al., *Gun Carrying Among Adolescents*, 59 LAW & CONTEMP. PROBS. 39, 44–47 (1996); Lizotte et al, *supra* note 284, at 813–14; Paul B. Stretesky & Mark R. Pogrebin, *Gang-Related Gun Violence: Socialization, Identity, and Self*, 36 J. CONTEMP. ETHNOGRAPHY 85, 105–08 (2007).

289. *See* Fagan & Wilkinson, *supra* note 288, at 174.

290. *See* Jeffrey Fagan, Deanna L. Wilkinson & Garth Davies, *Social Contagion of Violence*, *in* CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR, *supra* note 284, at 688, 701–10. For a similar finding about Chicago, see Elizabeth Griffiths & Jorge M. Chavez, *Communities, Street Guns and Homicide Trajectories in Chicago, 1980–1995: Merging Methods for Examining Homicide Trends Across Space and Time*, 42 CRIMINOLOGY 941, 965–69 (2004).

291. Fagan & Wilkinson, *supra* note 288, at 174.

292. *See, e.g.*, DECKER & VAN WINKLE, *supra* note 284, at 173; 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); Sudhir Venkatesh, *The Financial Activity of a Modern American Street Gang*, *in* GANGS AT THE MILLENNIUM, *supra* note 284, at 239, 242. Gang members also appear to experience other forms of violent victimization at elevated rates. *See, e.g.*, Chris L. Gibson et al., *Using Propensity Score Matching to Understand the Relationship Between Gang Membership and Violent Victimization: A Research Note*, 26 JUST. Q. 625, 639–41 (2009). Related are several other points of empirical debate. First, some have claimed that laws entitling individuals to carry concealed firearms have produced reductions in crime. *See, e.g.*, JOHN R. LOTT, JR., MORE GUNS, LESS CRIME 170–336 (3d ed. 2010); John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-To-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1, 64–65 (1997). This conclusion has been subject to fierce criticism. *See, e.g.*, DAVID HEMENWAY, PRIVATE GUNS, PUBLIC

It seems to follow that police tactics to make it more difficult and risky for offenders to carry guns in public would reduce the risk of violent confrontation and increase the difficulties facing criminal enterprises engaged in violent competition. Indeed, there is something approaching consensus among criminologists that one of the very few interventions that consistently reduces rates of violent crime involves aggressive patrol targeting statistical concentrations of crime and focusing on finding guns.[293] For this reason, I have elsewhere argued that an important factor

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HEALTH 100–04 (2004); NAT'L RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 125–51 (Charles F. Wellford et al. eds., 2005); SPITZER, *supra* note 119, at 69–73; TUSHNET, *supra* note 222, at 85–95; Ian Ayres & John J. Donohue III, *Yet Another Refutation of the More Guns, Less Crime Hypothesis—With Some Help from Moody and Marvell*, 6 ECON J. WATCH 35, 37–55 (2009). Even a leading firearms-rights advocate has pronounced the evidence in support of this theory unpersuasive. *See* Kleck, *supra* note 254, at 1411–15. In any event, even the advocates of this view make no claim that it applies in high-crime, urban neighborhoods where levels of drug- and gang-related violence are common. As we have seen, for example, gang members and drug traffickers carry firearms at elevated rates but also experience elevated rates of homicide victimization. Similarly, the fact that permit-holders under existing schemes seem unlikely to commit crimes does not necessarily apply if a robust Second Amendment right ultimately made the right to carry available to a far broader class of individuals. A related claim is that firearms are used for defensive purposes at very high rates. *See, e.g.*, GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 193–211 (1997). Other work has cast great doubt on this claim. *See, e.g.*, PHILIP J. COOK & JENS LUDWIG, U.S. DEP'T OF JUSTICE, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS 8–11 (1997); HEMENWAY, *supra*, at 66–69, 239–40; SPITZER, *supra* note 119, at 64–65. But again, even the advocates of this view do not claim that it operates to make high-crime neighborhoods safer. To the contrary, there is good reason to suspect that the prevalence of firearms in such neighborhoods, rather than producing a reduction in crime, has facilitated and produced the drive-by shooting, which is a common tactic of criminal street gangs. *See, e.g.*, H. Range Hutson et al., *Drive-by Shootings by Violent Street Gangs in Los Angeles: A Five-Year Review from 1989 to 1993*, 3 ACAD. EMERGENCY MED. 300, 302–03 (1996); H. Range Hutson et al., *Adolescents and Children Injured or Killed in Drive-by Shootings in Los Angeles*, 330 NEW ENG. J. MED. 324, 324 (1994). When gang members believe that an intended target may be armed, they are more likely to employ this tactic because it enables them to both approach and leave the target quickly and enjoy the benefits of tactical surprise. *See* WILLIAM B. SANDERS, GANGBANGS AND DRIVE-BYS: GROUNDED CULTURE AND JUVENILE GANG VIOLENCE 65–74 (1994); James C. Howell, *Youth Gangs: An Overview*, *in* GANGS AT THE MILLENNIUM, *supra* note 284, at 16, 33–34. Finally, some argue that history suggests that racial and other minorities have found firearms of particular value for purposes of self-defense, although these claims are unaccompanied by empirical evidence that the use of firearms has enabled minorities to achieve acceptable (or even enhanced) levels of personal security. *See, e.g.*, Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 349–58 (1991); Nicholas J. Johnson, *Firearms Policy and the Black Community: An Assessment of Modern Orthodoxy*, 45 CONN. L. REV. 1491, 1516–53 (2013). The persistence of high rates of firearms-related crime and its contagion effects instead suggest a powerful argument to the contrary.

293. *See* NAT'L RESEARCH COUNCIL, *supra* note 292, at 230–35; Blumstein & Wallman, *supra* note 286, at 136–37; Jacqueline Cohen & Jens Ludwig, *Policing Crime Guns*, *in* EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 217, 238–39 (Jens Ludwig & Philip J. Cook eds., 2003); Philip J. Cook, Anthony A. Braga & Mark H. Moore, *Gun Control*, *in* CRIME AND PUBLIC POLICY 257, 280 (James Q. Wilson & Joan Petersilia eds., 2011); Jens Ludwig, *Better Gun Enforcement, Less Crime*, 4 CRIMINOLOGY & PUB. POL'Y 677, 701–08 (2005); Edmund F. McGarrell et al., *Reducing*

in New York City's efforts at driving down violent crime so effectively is its restrictive gun-control laws, which are enforced through an aggressive stop-and-frisk regime targeting statistical hot spots of crime aimed at "suspicious bulges" and other indications that a suspect is unlawfully carrying firearms—tactics which effectively make it prohibitively risky to carry guns or drugs at hot spots.[294] There is, in fact, substantial evidence that stop-and-frisk tactics targeting these statistical hot spots have played an important role in New York's crime decline,[295] even if there may be some evidence that in recent years, the tactic has perhaps reached, if not exceeded, the point of diminishing returns, at least in New York.[296]

If the Second Amendment conferred a right to carry firearms in public, however, the ability to execute a stop-and-frisk strategy aimed at driving guns off the streetscape would be sharply circumscribed, if not altogether eliminated. The Fourth Amendment's prohibition on unreasonable search and seizure, for example, permits the use of stop-and-frisk tactics only when an officer reasonably believes that criminal activity is afoot.[297] If the Second Amendment granted individuals a right to carry firearms in public, the Fourth Amendment would necessarily prohibit search and seizure based on no more than reason to believe that an individual was armed.[298]

Firearms Violence Through Directed Police Patrol, 1 CRIMINOLOGY & PUB. POL'Y 119, 126–30 (2001); Lawrence W. Sherman, *Reducing Gun Violence: What Works, What Doesn't, What's Promising*, *in* PERSPECTIVES ON CRIME AND JUSTICE: 1999–2000 LECTURE SERIES 69, 78–79 (Nat'l Inst. of Justice, Dep't of Justice, 2001); Lawrence W. Sherman & John E. Eck, *Policing for Crime Prevention*, *in* EVIDENCE-BASED CRIME PREVENTION 295, 308–10 (Lawrence W. Sherman et al. eds., rev. 2006); Lawrence W. Sherman & Dennis P. Rogan, *Effects of Gun Seizures on Gun Violence: "Hot Spots" Patrol in Kansas City*, 12 JUST. Q. 673, 675–86, 691–92 (1995); Cody W. Telep & David Weisburd, *What Is Known About the Effectiveness of Police Practices in Reducing Crime and Disorder?*, 15 POLICE Q. 331, 340–41 (2012).

294. *See* Rosenthal, *supra* note 56, at 39–44.

295. *See, e.g.*, DENNIS C. SMITH & ROBERT PURTELL, AN EMPIRICAL ASSESSMENT OF NYPD'S "OPERATION IMPACT": A TARGETED ZONE CRIME REDUCTION STRATEGY 49–50 (2007); FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL 131–44 (2012); Jeffrey Fagan, Garth Davies & Jan Holland, *The Paradox of the Drug Elimination Program in New York City Public Housing*, 13 GEO. J. ON POVERTY L. & POL'Y 415, 418, 442–53 (2006); David Weisburd, Cody W. Telep & Brian A. Lawton, *Could Innovations in Policing Have Contributed to the New York City Crime Drop Even in a Period of Declining Police Strength?: The Case of Stop, Question and Frisk as a Hot Spots Policing Strategy*, 31 JUST. Q. 129, 146–149 (2013).

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

297. *See, e.g.*, Florida v. J.L., 529 U.S. 266, 269–74 (2000).

298. For an opinion discussing the potential of the Second Amendment to circumscribe stop-and-frisk tactics directed at armed suspects, see United States v. Williams, 731 F.3d 678, 690–94 (7th Cir. 2013) (Hamilton, J., concurring in part and concurring in the judgment). For a general discussion of the potential for a robust conception of Second Amendment rights to constrain widespread policing

Even if a permit were required to carry firearms in public places, if the Second Amendment were understood to require that permits be made liberally available, the Fourth Amendment could well prohibit any form of investigative detention to determine if an individual, reasonably believed to be carrying firearms, had the proper permit, just as it forbids the police to stop vehicles to determine if the driver possesses the requisite license and registration.[299] It is quite unclear, for example, that merely observing an armed individual in public, even in a high-crime area, would supply an adequate basis to stop and question that individual based on reasonable suspicion that he lacked the requisite permit. Even aside from these problems, a sophisticated criminal organization might be able to acquire permits authorizing some of its members to carry firearms in public. In short, a broad Second Amendment right to carry firearms in public would likely pose a substantial inhibition on the ability of the authorities to prevent violent crime by making it risky to carry guns in public and thereby to disrupt Fagan and Wilkinson's "ecology of danger" in high-crime neighborhoods.

One can question, however, whether *Heller* has any application outside of the home. *Heller* indicates that the interest in lawful armed defense is particularly compelling in "the home, where the need for defense of self, family, and property is most acute."[300] Some commentators, stressing this language *in Heller*, as well as the enhanced regulatory interests that come

tactics, see Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574230.

299. *See* Delaware v. Prouse, 440 U.S. 648, 655–63 (1979) (stops of vehicles to check license and registration violate the Fourth Amendment in the absence of probable cause or at least reasonable suspicion that the driver does not have proper license and registration or has committed some other offense); *see also* City of Indianapolis v. Edmond, 531 U.S. 32, 40–48 (2000) (roadblocks in high-crime areas where all vehicles are stopped and checked for guns and drugs violate the Fourth Amendment). Laws targeting possession or carrying of firearms by only convicted felons are also of limited efficacy. One leading study found that only about 43% of adult homicide offenders in Illinois had a prior felony conviction. *See* Philip J. Cook, Jens Ludwig & Anthony A. Braga, *Criminal Records of Homicide Offenders*, 294 JAMA 598, 598 (2005). Another found that about 41% of adults arrested for felony homicide and just 30% of adults arrested for all felonies in Westchester County, New York had a prior felony conviction, and just 33% of all adults arrested for felonies in New York State had a prior felony conviction. *See* Philip J. Cook, *Q&A on Firearms Availability, Carrying, and Misuse*, 14 N.Y. ST. B. ASS'N. GOV'T L. & POL'Y J. 77, 80 (2012). Thus, even assuming officers on patrol can effectively enforce these laws by somehow identifying convicted felons on the streetscape through tactics consistent with the Fourth Amendment, these laws would permit many offenders to remain armed and, perhaps, even stimulate the recruitment of younger individuals without criminal records by drug traffickers and criminal street gangs.

300. District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

into play when firearms are brought into public places, argue that Second Amendment rights do not extend outside the home.[301]

Yet, as we have seen, there is some historical precedent for protecting the right to carry firearms in public, at least openly, although the evidence is in conflict, perhaps tainted by the prevalence of slavery in the South, and the rationale for distinguishing between open and concealed carry seems to have little contemporary application.[302] In the face of this cacophony, the historical evidence that seemingly supports a right to carry firearms in public, at least openly, offers little in the way of a reliable basis for resolving the constitutionality of a law prohibiting the carrying of firearms in public.

To be sure, a blanket ban on carrying firearms in public seems difficult to reconcile with *Heller*'s account of the original meaning of the Second Amendment. *Heller* concluded that the original meaning of the right to "bear" arms meant the right to "carry[] for a particular purpose—confrontation." Of course, many, if not most, "confrontations" occur outside the home; the most natural understanding of the right to "bear" or carry arms is not limited to the interior of the home. This inference is reinforced by *Heller*'s caution that its holding does not "cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."[303] This dictum, of course, suggests that, in locations other than "sensitive places," the Second Amendment confers a right to carry firearms.

As for the historical evidence, Judge Posner reached this conclusion:

> [A] right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home. Suppose one lived in what was then the wild west . . . . One would need from time to time to leave one's home to obtain supplies from the nearest trading post, and en route one would be as much (probably more) at risk if unarmed as one would be in one's home unarmed.[304]

The import of this discussion in terms of original meaning is debatable; although arms were surely carried outside the home with frequency on the

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301. *See, e.g.*, Michael C. Dorf, *Does* Heller *Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 231–33 (2008); Miller, *supra* note 153, at 1297–355.

302. *See supra* text accompanying notes 157–63.

303. *Heller*, 554 U.S. at 626.

304. Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012). To similar effect, see Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1152 (9th Cir. 2014)), *reh'g granted* 781 F.3d 1106 (9th Cir. 2015).

frontier, it is unclear whether this was regarded as a matter of right or merely because legislative restriction of the right to carry arms was regarded as unwarranted in unsettled areas. After all, in frontier towns, strict gun control often took hold.[305] But, implicit in Judge Posner's discussion is perhaps the most important reason to reject a view of Second Amendment rights that limits firearms to the home: *Heller* tells us that the Second Amendment codified a right of lawful armed defense, and the need to defend oneself is not limited to the home.[306]

Still, one might question how much weight *Heller* should receive on this point. Recall that Heller sought only "to enjoin the city from enforcing the bar on the registration of handguns . . . and the trigger-lock requirement insofar as it prohibits the use of 'functional firearms within the home.'"[307] Accordingly, discussion in *Heller* of whether Second Amendment rights extend outside the home was dictum unnecessary to the decision. Beyond that, in response to the argument that the phrase "bear arms" was ambiguous because it often referred to carrying arms in military service, in *Heller* the Court concluded that this phrase "*unequivocally* bore that idiomatic meaning only when followed by the preposition 'against,' which was in turn followed by the target of the hostilities."[308] Significantly, this stops short of a claim that the phrase was unambiguous; indeed, the Court acknowledged that "the phrase was often used in a military context."[309] Even on the Court's limited claim, Professor Cornell has argued that the historical evidence on this point was not nearly as clear as portrayed by the Court.[310] One post-*Heller* review of the historical evidence identified ample evidence that the phrase "bear arms" often had a military meaning in the framing era, even when not followed by "against."[311]

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305. *See supra* text accompanying note 112.

306. *See, e.g.*, O'Shea, *supra* note 107, at 667–70; Pratt, *supra* note 180, at 554–56; Volokh, *supra* note 56, at 1516–19; Winkler, *supra* note 38, at 1569–71.

307. *Heller*, 554 U.S. at 576.

308. *Id.* at 586.

309. *Id.* at 587.

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

311. *See* Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right To Bear Arms*, 29 J. EARLY REPUB. 585, 589–605 (2009); *see also* Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840) ("The words 'bear arms,' too, have reference to their military use, and were not employed to mean wearing them about the person as part of the dress.").

Thus, in an appropriate case in which the contours of the right to "bear" arms are at issue, the Court may be warranted in revisiting the question whether the phrase "bear arms" is sufficiently ambiguous to warrant resort to the preamble as an interpretive aid. And, to the extent that the phrase "bear arms" is ambiguous, resort to the preamble is of particular importance to perform what *Heller* called the preamble's "clarifying function."[312] This suggests that when it comes to the right to bear, or carry firearms—a right not squarely at issue in *Heller*—the regulatory authority contemplated by the preamble is of particular force.[313]

In any event, as we have seen, the rationale supporting the nineteenth-century distinction between concealed and open carry has little contemporary resonance. Since the original meaning of the Second Amendment, unlike the Seventh, does not preserve framing-era practice, legislatures should have the freedom to reach some other accommodation between the right and regulatory power than one based on a now-obsolete historical distinction between the dangers posed by concealed and open carry. A complete prohibition on carrying operable firearms in any public place renders the Second Amendment right to bear, or carry, firearms for self-defense nugatory, or nearly so, and might well be difficult to justify.[314] But less complete prohibitions that require individuals to obtain a permit and demonstrate a particularized need to carry a firearm for self-defense have been upheld by most courts to consider the question.[315]

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312. *Heller*, 554 U.S. at 578.

313. This does not mean that *Heller* was necessarily wrong to recognize an individual right to bear arms outside of a military context. As *Heller* observed, treating the phrase "bear arms" as an idiomatic reference to the use of arms in a military context creates anomalies:

> Giving "bear Arms" its idiomatic meaning would cause the protected right to consist of the right to be a soldier or to wage war—an absurdity that no commentator has ever endorsed. Worse still, the phrase "keep and bear Arms" would be incoherent. The word "Arms" would have two different meanings at once: "weapons" (as the object of "keep") and (as the object of "bear") one-half of an idiom. It would be rather like saying "He filled and kicked the bucket" to mean "He filled the bucket and died."

Id. at 586–87 (citation omitted). There is no anomaly, however, in relying on the preamble to inform the interpretation of the scope of the right to bear arms even in a nonmilitary context. As we have seen, *Heller* also concluded that the term "militia," as it appeared in the preamble, referred to all citizens able to keep and bear arms and not only to the members of a formal military organization. Thus, the preamble does not compel the conclusion that only the carrying of firearms in connection with service in an organized militia is protected by the operative clause.

314. For judicial opinions reaching this conclusion, see Moore v. Madigan, 702 F.3d 933, 940–42 (7th Cir. 2012), and People v. Aguilar, 2 N.E.3d 321, 325–28 (Ill. 2013).

315. *See, e.g.*, Drake v. Filko, 724 F.3d 426, 435–40 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 876–83 (4th Cir. 2013); Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 89–101 (2d Cir. 2012); Williams v. State, 10 A.3d 1167, 1177–79 (Md. 2011); *In re* Wheeler, 81 A.3d 728, 757–62 (N.J. Super. Ct. App. Div. 2013); *In re* Pantano, 60 A.3d 507, 511–14 (N.J. Super. Ct. App. Div. 2013); People v. Perkins, 880 N.Y.S.2d 209, 210 (App. Div. 2009); *see also* United States v.

On this point, however, judicial opinion is divided; a panel of the Ninth Circuit concluded that in a state where open carry is prohibited, San Diego's policy allowing applicants to obtain a concealed-carry permit only on a showing of particularized need to carry firearms for self-defense violates the Second Amendment because it does not "allow[] the typical responsible, law-abiding citizen to bear arms in public for the lawful purpose of self-defense."[316] It added that "[t]he challenged regulation does no more to combat [the state's public safety concerns] than would a law indiscriminately limiting the issuance of a permit to every tenth applicant."[317] The panel cautioned, however, that it "consider[ed] the scope of the right only with respect to responsible, law-abiding citizens," adding that "[w]ith respect to irresponsible or non-law-abiding citizens, a different analysis—which we decline to undertake here—applies."[318] This qualification was presumably compelled by *Heller*'s admonition that it "d[id] not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*."[319]

Yet, the panel's claim that it need not concern itself with the question whether "irresponsible or non-law abiding citizens" might carry firearms if all applicants must be given permits without any special showing of need misses the point of prophylactic regulation. While the criminal history of an applicant for a carry permit can be readily ascertained, whether he is a "responsible, law abiding citizen," as well as the actual "purpose" for which he seeks to carry, are not so easy to know. There is, of course, a considerable likelihood that some individuals who are not "responsible, law-abiding citizens" will obtain concealed-carry permits if permits must be issued to anyone not disqualified by a prior conviction and who

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Masciandaro, 638 F.3d 458, 474 (4th Cir. 2011) (upholding statute prohibiting loaded handguns in vehicles within a national park); Chief of Police of Worcester v. Holden, 26 N.E.3d 715, 726–28 (Mass. 2015) (upholding statute providing that "suitable" persons be licensed to carry concealed firearms); Charlie Sarosy, Comment, *California's Unloaded Open Carry Bans: A Constitutional and Risky, but Perhaps Necessary, Gun Control Strategy*, 61 UCLA L. REV. 464, 488–98 (2014) (arguing that a prohibition on open carry without a permit, with an exception for individuals facing a specific and immediate threat, is constitutional).

316. Peruta v. County of San Diego, 742 F.3d 1144, 1169 (9th Cir. 2014), *reh'g granted* 781 F.3d 1106 (9th Cir. 2015); *cf.* Norman v. State, 159 So. 3d 205, 225–26 (Fla. Dist. Ct. App. 2015) (upholding a permit requirement for concealed carry in a state that bans open carry, but stressing that permits are liberally available).

317. *Peruta*, 742 F.3d at 1178 (quoting Woollard v. Sheridan, 863 F. Supp. 2d 462, 474–75 (D. Md. 2012), *rev'd sub nom.* Woollard v. Gallagher, 712 F.3d 865, 876–83 (4th Cir. 2013)) (second brackets in original).

318. *Id.* at 1150 n.2.

319. District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

proclaims a generalized desire to carry firearms for self-defense.[320] This is precisely the context in which the case for prophylactic regulation is strongest, given the inevitable error rate that inheres in any effort to make predictive judgments about persons who wish to carry firearms in public, especially when applicants proclaim only a generalized and conclusory interest in carrying firearms for lawful purposes. Carrying firearms in public, moreover, represents the context in which the safety of third parties is most plainly implicated. And, as we have seen, both the Second Amendment's preamble and the history of firearms regulation suggest that the right to bear arms permits a wide variety of prophylactic regulations and argues for a measure of deference to legislative assessments of the efficacy of and justification for such regulation.

Using a showing of particularized need protects Second Amendment rights in cases in which the core constitutional interest in lawful self-defense is most plainly implicated, supplying an administrable basis to decide whether applicants are likely to be "responsible, law-abiding citizens," while denying applications that present substantial risk of error. This criterion is probably as reliable as the nineteenth-century criterion of requiring open carry to determine the likely purpose for which firearms are carried and a good deal better suited to the contemporary urban landscape. Although prohibiting only concealed carry may have been a reasonable approach to identifying those individuals most likely to be carrying firearms for an improper purpose in the nineteenth century, that rationale has little contemporary application.[321] And a constitutional requirement that licenses must be liberally granted could well produce potent Fourth Amendment limitations on the ability of the authorities to stop armed individuals and determine whether they are properly licensed, further undermining prophylactic policing.[322]

Equally important, the view that rigorous permit requirements operate as a rationing system fails to acknowledge that when the law enables police to keep guns off the streets in high-crime urban hot spots, the likelihood of violent confrontations that prove fatal is reduced. In these areas, it may be effectively impossible to have a "well regulated militia" if everyone expressing a generalized interest in carrying firearms for self-defense, who is not disqualified by a prior conviction, can carry firearms

320. As we have seen, the available data indicates that most homicide offenders, for example, do not have prior felony convictions. *See supra* note 299.

321. *See supra* text accompanying notes 156–63.

322. *See supra* text accompanying notes 297–99.

"in case of confrontation."[323] Conversely, a system in which either open or concealed carry must be permitted could prove constitutionally vulnerable precisely because it might do little to keep guns off the streets and thereby reduce firearms-related crime, at least if the Second Amendment is understood—not unreasonably—to require that a challenged enactment make some meaningful contribution to public safety.[324]

Especially in high-crime jurisdictions riven by gang and drug crime, carrying firearms in public may be accompanied by unacceptable risks, and for that reason, warrant prophylactic restriction.[325] Indeed, there is a long tradition of more restrictive firearms regulation in urban areas.[326] If the Second Amendment permitted the development of concealed-carry prohibitions directed at those who carried firearms under circumstances that were thought to pose unacceptable risks, surely the Second Amendment also permits regulations directed at what are properly regarded, under contemporary conditions, as circumstances posing unacceptable risk. Given the difficulty in assessing the purpose of someone carrying firearms in public, a requirement that an individual be licensed and demonstrate some special need to carry the firearm serves a far more important public purpose than the now largely outdated judgment that law-abiding persons are more likely to engage in open and not concealed carry. Such an approach has the added benefit of preserving the ability of the police to take action to stop and search individuals who they reasonably suspect to be unlawfully armed and dangerous. This is the kind of "discipline" to which a well-regulated militia would surely submit.

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Dissenting from the Court's decision to apply the Second Amendment to the state and local gun-control laws in *McDonald v. City of Chicago*,[327]

323. *Heller*, 554 U.S. at 592.

324. Some have speculated that a preference for open carry might advance public safety because of social pressure that could reduce the prevalence of carrying firearms if they must be carried openly. *See* Sarosy, *supra* note 315, at 500–01. There is, however, little relevant empirical evidence on this point. *See generally* James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After* Heller, 97 CORNELL L. REV. 907, 922–26 (2012) (noting the absence of data on the effects of concealed as opposed to open carry). Moreover, outside of middle class communities in which openly-carried firearms might offend prevailing sensibilities, this assumption may well have little purchase; indeed, in high-crime communities, open carry might well be welcomed by those most likely to be carrying for unlawful purposes.

325. *Cf.* Rosenthal, *supra* note 56, at 10–20 (exploring the causes of crime associated with drugs, gangs, and high rates of carrying firearms in unstable urban areas).

326. *See supra* text accompanying note 172.

327. 561 U.S. 742 (2010).

Justice Stevens wrote: "[F]irearms have a fundamentally ambivalent relationship to liberty. Just as they can help homeowners defend their families and property from intruders, they can help thugs and insurrectionists murder innocent victims."[328] One need not agree with Justice Stevens's ultimate conclusion in *McDonald* to acknowledge his point. *Heller* upheld a Second Amendment right to carry firearms, but sentencing enhancements for criminals who carry firearms have been invariably upheld as well.[329] It is hard to think of any other constitutional right the exercise of which could be used as a sentencing enhancement, yet this result seems entirely consistent with *Heller*'s admonition that the Second Amendment "[i]s not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[330] *Heller*'s originalism confirms the linkage between right and regulation, but it offers little more aid in evaluating the justification for a challenged regulation under circumstances so radically different from those that prevailed at the framing. A largely nonoriginalist common law of the Second Amendment must inevitably develop to reconcile right and regulation in twenty-first century America. That process is already well under way in the lower courts.

All that said, history tells us something important about the Second Amendment. Firearms rights and regulation have always been twinned: in the English Bill of Rights; the Second Amendment's preamble and operative clause; and in the evolving history of firearms regulation. Indeed, no right is more Janus-faced than the right to keep and bear arms. Thus goes the constitutional case for gun control.

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328. *Id.* at 891 (Stevens, J., dissenting).
329. *See supra* text accompanying note 196.
330. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).