

Nos. 08-4241, 08-4243, 08-4244 (consolidated)

**IN THE
United States Court of Appeals for the Seventh Circuit**

OTIS MCDONALD, ET AL., *and*
NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., ET AL.,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO, ET AL., *and* VILLAGE OF OAK PARK,
Defendants-Appellees.

On Appeal From The United States District Court
For The Northern District of Illinois
Hon. Milton I. Shadur, Senior District Judge

**BRIEF OF THE UNITED STATES CONFERENCE OF MAYORS
AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Fed. R. App. P. 26.1, Circuit Rule 26.1

1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

The United States Conference of Mayors

2) The names of all law firms whose partners or associates have appeared for the party in the case (including administrative proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

None

3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any:

None

And

ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:

None.

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INTEREST OF AMICUS CURIAE

The United States Conference of Mayors is the official non-partisan organization of all United States cities with populations of 30,000 or more. Its members suffer a disproportionate share of gun violence in the United States and have a common interest in maintaining the flexibility to address this problem in the manner local officials determine to be most effective and appropriate.¹

SUMMARY OF ARGUMENT

Intensive stop-and-frisk tactics targeting “hot spots” of crime have been a critical tactic in the fight against violent crime. Stringent gun control laws, in turn, facilitate these tactics by granting police authority to conduct a stop-and-frisk when they reasonably believe that a suspect is unlawfully carrying a firearm. The stringent eighteenth-century version of the right to bear arms found in the Second Amendment, however, threatens to cripple state and local law enforcement by granting gang members and drug dealers a right to carry firearms.

The first eight amendments are properly applied to state and local laws by virtue of the Fourteenth Amendment only when they secure rights thought to be implicit in the concept of ordered liberty. In high-crime, gang-ridden neighborhoods, however, it may be effectively impossible to grant a

¹ This brief is filed with the express consent of all parties to these consolidated appeals.

right to bear arms while preserving any semblance of “ordered liberty.” For this reason, the Second Amendment’s right to bear arms is not applicable to state and local governments by virtue of the Fourteenth Amendment.

ARGUMENT

I. GUN CONTROL LAWS PLAY A CENTRAL ROLE IN FIGHTING CRIME IN CITIES.

Over the past few decades, the country has conducted something of a natural experiment in the efficacy of gun control. A strong case can now be made that stringent regulation of concealable weapons is critical to the ability of cities to control violent crime.

A. The Rise and Fall of Crime in Cities

The story of violent crime over the past few decades is one of a dramatic rise and fall:

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

Alfred Blumstein & Joel Wallman, *The Crime Drop and Beyond*, 2006 AM.

REV. SOC. SCI. 125, 125.

This crime spike was limited to major cities; during this period, homicide rates were essentially flat in cities with populations below 250,000, and the rise and subsequent fall in homicide occurred in cities with populations exceeding 1,000,000. *See* JAMES ALAN FOX, JACK LEVIN & KENNA QUINET, *THE WILL TO KILL: MAKING SENSE OF SENSELESS MURDER* 44-45 & fig. 3.2 (rev. 2008). Moreover, virtually all of the increase in homicide during this period was a consequence of an increase in handgun-related killings. *See* COMM. TO IMPROVE RES. INF. & DATA ON FIREARMS, NAT'L RES. COUNCIL, *FIREARMS AND VIOLENCE: A CRITICAL REVIEW* 61 (Charles F. Wellford, John V. Pepper & Carol V. Petrie eds., 2005) [hereafter "FIREARMS AND VIOLENCE"].

B. The Crime Rise

Competition in illegal drug markets will frequently turn violent. This is reflected in the ample evidence that the crime spike of the late 1980s and early 1990s was a function of the introduction of crack cocaine into cities and the violent competition that it produced. *See, e.g.*, ALFRED BLUMSTEIN & JACQUELINE COHEN, *DIFFUSION PROCESSES IN HOMICIDE* 6-9 (Nat'l Crim. Just. Ref. Serv. July 17, 1999); FOX, LEVIN & QUINET, *supra* at 87-88; Philip J. Cook & John H. Laub, *After the Epidemic: Recent Trends in Youth Violence in the United States*, in *CRIME & JUSTICE: A REVIEW OF RESEARCH* 1, 21-31 (Michael Tonry ed., 2002); Blumstein & Wallman, *supra* at 131. Probably the best study of this issue – a sampling of homicides in New York City during an eight-month period in 1988 – found that 52.7% of homicides were drug-

related, of those 60% involved crack, and 74% of drug-related homicides were classified as “systematic” or involving “the normally aggressive patterns of interactions within the systems of drug use and distribution” as opposed to homicides that were a function of the pharmacological effects of drugs or the economic compulsion to commit crimes to finance drug use. See Paul J. Goldstein et al., *Crack and Homicide in New York City, 1988: A Conceptually Based Event Analysis*, 16 CONTEMP. DRUG PROBS. 651, 655-56, 681-82 (1989).

One type of criminal organization is particularly well suited to this type of competition is the criminal street gang. Precisely because a gang is likely to be well organized and unconcerned with norms of law-abidingness, it is ideally suited to create and enforce a territorial monopoly. In fact, a persistent observation in the scholarly literature about gangs is their heavy involvement in drug distribution. See, e.g., HERBERT C. COVEY, SCOTT MENARD & ROBERT J. FRANZESE, *JUVENILE GANGS* 51-54 (2d ed. 1997); JAMES C. HOWELL & SCOTT H. DECKER, U.S. DEP'T OF JUSTICE, *THE YOUTH GANGS, DRUGS, AND VIOLENCE CONNECTION* 2-5, 7 (Jan. 1999). Ethnographic research on gang crime also discloses that gangs endeavor to organize drug markets in order to maximize the economic benefits of drug dealing while using the threat of violence to suppress competition. See, e.g., SCOTT H. DECKER & BARRICK VAN WINKLE, *LIFE IN THE GANG: FAMILY, FRIENDS AND VIOLENCE* 163-64 (1996); MARTIN SANCHEZ JANKOWSKI, *ISLANDS IN THE STREET: GANGS AND AMERICAN URBAN SOCIETY* 126-29 (1991); FELIX M. PADILLA, *THE GANG AS AN*

AMERICAN ENTERPRISE 129-66 (1993); IRVING A. SPERGEL, THE YOUTH GANG PROBLEM: A COMMUNITY APPROACH 47-49 (1995); Ansley Hamid, *The Political Economy of Crack-Related Violence*, 17 CONTEMP. DRUG PROBS. 31, 61-63 (1990).

C. The Crime Drop

The explanation most frequently offered for the crime decline is that it involved a decrease in crack-related violence and a stabilization of drug markets. *See, e.g.*, FOX, LEVIN & QUINET, *supra* at 92-96; Blumstein & Wallman, *supra* at 130-31; Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Drop and Six that Do Not*, 18 J. ECON. PERSP. 163, 179-81 (2004).

There is little evidence that a drop in the demand for crack cocaine explains the crime drop. Although it is difficult to measure the demand for cocaine, the available proxies suggest no change during the crime-drop era. Cocaine-related emergency room admissions, for example, actually rose from 1994 to 2001, as did the proportion that involved crack. *See* SUBSTANCE ABUSE & MENTAL HEALTH ADMIN., DEP'T OF HEALTH & HUM. SERVS., EMERGENCY DEPARTMENT TRENDS FROM THE DRUG ABUSE WARNING NETWORK: FINAL ESTIMATES 1994-2001, at 50, 53 fig. 3 (Aug. 2002). Federal seizures of cocaine, another proxy for demand, remained roughly constant from 1989 through 2002. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: 2003, at 389 tbl. 4.36 (Aug.

2004). Trends in the price of crack were also not noticeably different during the crime-rise and crime-decline periods. See OFF. OF NAT'L DRUG CONTROL POL'Y, EXECUTIVE OFF. OF THE PRESIDENT, THE PRICE AND PURITY OF ILLICIT DRUGS: 1981 THROUGH THE SECOND QUARTER OF 2003, at 9-10, 29 fig. 10 (Nov. 2004). Indeed, the United States Department of Justice still estimates that cocaine abuse and cocaine-related crime remain at levels exceeding any other drug. See NAT'L DRUG INTELLIGENCE CENTER, U.S. DEPT OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT: 2009, at 1-2 (Dec. 2008).

In contrast, the evidence that law enforcement played an important role in the crime drop is abundant. There is, for example, a substantial relationship between increases in the number of police and subsequent decreases in violent crime. See Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime*, 87 AM. ECON. REV. 270 (1997); Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime: A Reply*, 92 AM. ECON. REV. 1244 (2002).

Nevertheless, there are a great many studies of the effect of increased number of police or frequency of patrol, and their results are mixed. See COMM. TO REVIEW RES. ON POLICE POL'Y AND PRACTICES, NAT'L RES. COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 225 (Wesley Skogan & Kathleen Frydl eds., 2005) [hereafter "FAIRNESS AND EFFECTIVENESS IN POLICING"]; JOHN E. CONKLIN, WHY CRIME RATES FELL 60-63 (2003); Lawrence W. Sherman & John E. Eck, *Policing for Crime*

Prevention, in EVIDENCE-BASED CRIME PREVENTION 295, 306-07 (Lawrence W. Sherman et al. eds., rev. 2006). Nor does it stand to reason that increasing size of police forces is likely to reduce crime regardless of the tactics that they employ. Officers merely driving through a neighborhood on patrol are unlikely to be effective at disrupting drug or gang activity – a gang or drug dealer with even a modicum of sophistication knows that he need only post a lookout to warn his confederates to cease any overt criminality as the squad car drives past. It seems likely that the tactics police use must be at least as important as the number of officers.

As it happens, the 1990s saw alterations in the tactics employed by a great many local police departments that moved from more passive and reactive systems of patrol to proactive efforts at intensive and aggressive patrol of specific high-crime areas. See, e.g., John E. Eck & Edward G. McGuire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in THE CRIME DROP IN AMERICA 207, 228-45 (Alfred Blumstein & Joel Wallman eds., 2d ed. 2006) [hereafter “THE CRIME DROP IN AMERICA”]; Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 572-84 (1997).

The experience of New York is illuminating. Homicide in New York City rose from a rate of 4.7 per 100,000 in 1960 to a 1991 peak of 31.0 in waves that roughly corresponded to drug epidemics, with the increases

concentrated in firearms-related homicide. See Jeffrey Fagan, Deanna L. Wilkinson & Garth Davies, *Social Contagion of Violence*, in THE CAMBRIDGE HANDBOOK OF VIOLENT BEHAVIOR 688, 694-99 (Daniel J. Flannery et al. eds., 2007). New York was no outlier; in 1990, its homicide rate was at the average for large cities. See FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 139 (2006). Yet, over the 1990s, the decline in each of the seven categories of “index” crime reported to the Federal Bureau of Investigation in New York was approximately double of the decline in the rest of the country. See ANDREW KARMEN, NEW YORK MURDER MYSTERY: THE TRUE STORY BEHIND THE CRIME CRASH OF THE 1990S 54 graph 2.2 (2000). By 2000, even when compared to the other nine of the ten largest cities, New York had the lowest rates for five of the seven index crimes, and for murder, its rate in 2000 of 8.7 per 100,000 population was nearly half of the nine-city average of 16.3. See ZIMRING, *supra* at 139-41 & fig. 6.3.

There were substantial increases in the size of New York City’s police force during the period of dramatic declines in violent crime in that city, and a leading study found a statistically significant relationship between the two. See Hope Corman & H. Naci Mocan, *A Time-Series Analysis of Crime, Deterrence, and Drug Abuse in New York City*, 90 AM. ECON. REV. 584 (2000). Moreover, reductions in violent crime were concentrated in visible crimes committed in public places, suggesting that offenders were responding to the tactics of officers on patrol. See ZIMRING, *supra* at 141-42. Crime reductions

were also concentrated in crimes involving handguns, suggesting that patrol tactics directed at handguns were responsible. See Steven F. Roth, *Decreasing Violent Crime in New York City: A Result of Vigorous Law Enforcement Efforts, Other, or Both?*, in PROCEEDINGS OF THE HOMICIDE RESEARCH WORKING GROUP MEETINGS, 1997 AND 1998, at 179, 179-83 (1999). Still, as we have seen, there is reason to doubt that additional officers alone are likely to drive down crime. More police using more effective tactics, in contrast, surely could reduce crime.

There were important changes in policing tactics in New York that corresponded to the crime drop. In 1991, not only did the size of New York's police force begin to increase, but it also adopted a community policing model that employed an increased emphasis on foot patrols and low-level disorder. See CIVIL RIGHTS BUR., OFF. OF THE ATT'Y GEN. OF THE ST. OF N.Y., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES: A REPORT TO THE PEOPLE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL 47-52 (Dec. 1, 1999) [hereafter "STOP AND FRISK REPORT"]. In 1994, after the appointment of a new police chief, the department placed greater emphasis on aggressive stop-and-frisk tactics, misdemeanor arrests for drug and public-order offenses, and it adopted a system of statistical analysis that

directed enforcement efforts at statistical “hot spots” of criminal activity and imposed greater managerial accountability. *See id.* at 52-56.²

The conclusion that policing tactics was responsible for the crime drop is powerfully suggested by studies finding statistically significant relationships between decreases in crime and available proxies for the rate of search and seizure. *See* Jeffrey Fagan, Garth Davies & Jan Holland, *The Paradox of the Drug Elimination Program in New York City Public Housing*, 13 GEO. J.L. & POL’Y 415, 442-53 (2006) (intensive patrols near public housing in New York resulted in substantial reductions in violent crime in nearby areas); Hope Corman & H. Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J. LAW & ECON. 235 (2005) (citywide felony arrest rates had a statistically significant effect in reducing all seven index crimes, and misdemeanor arrests had a statistically significant effect on robbery, motor vehicle theft, and grand larceny); GEORGE L. KELLING & WILLIAM H. SOUSA, JR., THE MANHATTAN INST., DO POLICE MATTER?: AN ANALYSIS OF NEW YORK CITY’S POLICE REFORMS 6-10 (1999) (finding an inverse relationship between

² The architects of the New York policing strategy of the 1990s single out as responsible for the crime drop the use of “Broken Windows” policing tactics that focus on reducing signs of physical and social disorder in the streetscape. *See* WILLIAM BRATTON & PETER KNOBLER, TURNAROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC 152-56, 228-29, 233-39 (1998); George L. Kelling, *Why Did People Stop Committing Crimes? An Essay About Criminology and Ideology*, 28 FORDHAM URB. L.J. 567, 573-79 (2000). The Broken Windows thesis, however, is not a promising explanation for the crime drop; most studies to date of the theory have failed to provide it with convincing support. *See* FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* at 229-30.

New York precinct's misdemeanor arrests between 1989 and 1998 and the rate of violent crime).

Stop-and-frisk was ubiquitous in New York during the crime-decline period; the New York Attorney General's review of the reports covering stops during 1998 and the first three months of 1999 disclosed 126,753 stops. *See* STOP AND FRISK REPORT, *supra* tbl. I.A.5. With stop-and-frisk at high levels, especially in areas targeted as "hot spots," outdoor drug markets could be expected to go into decline, as suspects perceive elevated risks in carrying guns or drugs, or in attempting to purchase the latter. If gang members and drug sellers cannot go about armed, in turn, their ability to defend their turf against rival gang or drug dealers, or simply to walk about with the confidence that they can defend themselves if they encounter a rival, will be substantially reduced. In short, high rates of stop-and-frisk may make gang and drug crime more risky and less lucrative by increasing the risk of arrest and the difficulty of establishing stable drug-market monopolies.

There is substantial ethnographic evidence of the efficacy of New York's aggressive stop-and-frisk tactics. One study of several Brooklyn neighborhoods concluded that after police crackdowns beginning in 1992, gang drug dealing was largely driven indoors and became less attractive, producing a decline in violent crime. *See* Richard Curtis, *The Improbable Transformation of Inner-City Neighborhoods: Crime, Violence, Drugs, and Youth in the 1990s*, 88 J. CRIM. L. & CRIMINOLOGY 1233, 1267-74 (1998).

Another concluded that aggressive policing in the 1990s, in particular stop-and-frisk tactics that focus on discovering concealed handguns, reduced crime by disrupting open-air drug sales. See Bruce D. Johnson, Andrew Golub & Eloise Dunlop, *The Rise and Decline of Hard Drugs, Drug Markets, and Violence in Inner-City New York*, in *THE CRIME DROP IN AMERICA*, *supra* at 164, 185-89. An ethnographic study of the Bushwick neighborhood similarly concluded that aggressive police tactics employed since 1992 pushed drug dealing indoors. See Terry Furst et al., *The Rise of the Street Middleman/Woman in a Declining Drug Market*, 7 *ADDICTION RES.* 103, 108-09, 126-27 (1999). As one researcher explained: “The shift indoors reduced the risk of being ‘ripped off’, including murderously The effects of this shift can be directly related to the reduction in homicide. As one police officer put it: “There are no more drive-by shootings. There’s no one on the corner to drive by and shoot.” See Benjamin Bowling, *The Rise and Fall of New York Murder*, 39 *BRIT. J. CRIMINOLOGY* 531, 54 (1999). Thus, “the result of persistent stop, frisk, and arrests meant that young men thought twice before carrying their guns That guns were not immediately accessible during routine confrontations was a frequently cited explanation for the reduction in murder in the mid-1990s.” *Id.* at 546.³

³ To be sure, Jeffrey Fagan and Garth Davies, examining the stop-and-frisk data obtained by the New York Attorney General, found that the rate of stops in a precinct in 1998 did not predict homicide rates in the first three months of 1999. See Jeffrey Fagan & Garth Davies, *Policing Guns: Order Maintenance Policing and Crime Rates in New York*, in *GUNS, CRIME, AND PUNISHMENT IN AMERICA* 191, 205-06 (Bernard E. Harcourt ed., 2003). This data, however, came relatively late in New

Indeed, an impressive number of studies throughout the nation have found that aggressive policing at hot spots with an emphasis on finding guns reduces levels of violent crime. See FIREARMS AND VIOLENCE, *supra* at 230-35; Blumstein & Wallman, *supra* at 136-37; 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, U.S. Dep't of Justice 2001); Sherman & Eck, *supra* at 308-10.

D. The Importance of Gun Control Laws to the Crime Decline

There is accordingly ample evidence that aggressive stop-and-frisk tactics played an important role in the crime decline. Gun control laws, in turn, play an important role in the ability of police departments to utilize these tactics.

Stop-and-frisk tactics are regulated by the Fourth Amendment's prohibition on "unreasonable search and seizure." U.S. Const. amend. IV. It has long been settled since that when an officer forcibly detains an individual there has been a "seizure" within the meaning of the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 16-20 (1968). A forcible stop and brief detention is

York's crime drop, and given the short span of time and the small number of homicides in any given precinct, this finding is not particularly probative. Another paper suggested that the crime decline in New York could reflect no more than a regression to the mean. See Bernard Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 287-97 (2006). The magnitude and duration of New York's homicide decline, however, does not exhibit the characteristics of a regression to the mean. See, e.g., KARMEN, *supra* at 17; ZIMRING, *supra* at 136-41; Michael D. Maltz, *Which Homicides Decreased? Why?*, 88 J. CRIM. L. & CRIMINOLOGY 1489, 1490-96 (1998).

nevertheless considered constitutionally reasonable when the officer reasonably suspects that criminal activity is afoot. *See, e.g., Florida v. J.L.*, 529 U.S. 266, 269-74 (2000); *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000); *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989). A frisk is considered reasonable when an officer reasonably suspects that the subject may be armed and dangerous. *See, e.g., Minnesota v. Dickerson*, 508 U.S. 366, 374 (1993); *Michigan v. Long*, 463 U.S. 1032, 1046-50 (1983). Firearms regulation plays a central role in enhancing police authority to engage in stop-and-frisk tactics.

When applicable law bans the possession or carrying of firearms, a stop and frisk, when conducted by an officer who reasonably suspects that an individual is illegally carrying a firearm – such as a suspicious bulge in a waistband – is considered constitutionally reasonable. *See, e.g., United States v. Black*, 525 F.3d 359, 364 (4th Cir. 2004); *United States v. Mayo*, 361 F.3d 802, 807-08 (4th Cir. 2004); *United States v. Gibson*, 64 F.3d 617, 624 (11th Cir. 1995), *cert. denied*, 517 U.S. 1173 (1996). When applicable law does not ban carrying a firearm, however, the Fourth Amendment does not permit a stop-and-frisk even when there is reason to believe that a suspect is armed or dangerous because there is no indication of a violation of law. *See, e.g., United States v. Burton*, 228 F.3d 524, 528-30 (4th Cir. 2000); *United States v. Ubiles*, 224 F.3d 213, 217-18 (3d Cir. 2000). *See generally* 4 WAYNE

R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.6(a) (4th ed. 2004).

In New York, state law prohibits possession of a handgun without a license and generally requires that handguns be kept within the licensee's home or place of business except for those engaged in law enforcement. *See* N.Y. PENAL LAWS § 400.2 (McKinney 2007). In New York City, an additional permit must be obtained. *See id.* § 400.6. The issuance of permits in New York City is discretionary and requires an applicant to demonstrate some extraordinary danger. *See* RULES OF THE CITY OF N.Y. tit. 38, § 5-03 (2007). The New York authorities sparingly exercise their discretion to issue permits for handguns. *See, e.g.,* Jesse Matthew Ruhl, Arthur L. Rizer III, Mikel J. Wier, *Gun Control: Targeting Rationality in a Loaded Debate*, 13 KAN. J. L & PUB. POL'Y 413, 449-50 (2004). Because individuals are rarely permitted to carry guns in New York, a stop-and-frisk is permissible when an officer reasonably suspects that an individual is carrying a firearm. *See* STOP AND FRISK REPORT, *supra* at 36-40.

The data makes evident the importance of weapons searches to the New York regime of stop-and frisk:

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

STOP AND FRISK REPORT, *supra* at App. tbl. I.A.5. Thus, weapons searches were central to the New York stop-and-frisk strategy; indeed, the 1994 management reforms stressed the role of weapons searches in the new policing strategy. *See* STOP AND FRISK REPORT, *supra* at 53. New York’s restrictive gun control laws, in turn, facilitated this strategy; without such restrictive laws, the most important tool for stop-and-frisk would have disappeared.

Increasing the authority of the police to engage in stop-and-frisk tactics may not be the only means by which New York’s gun control laws contribute to the success of its policing tactics. Because it is difficult to purchase a handgun legally in New York, it may be the case that stop-and-frisk tactics are especially effective because of the difficulty in replacing handguns that are seized by the police. *See* ZIMRING, *supra* at 157-58. Although there is no study of New York gun markets on this point, a study of Chicago, which bans the possession of most handguns, found that the ban dramatically increased the difficulty of obtaining handguns even for potential offenders in high-crime communities, and reduced rates of illegal firearms

use compared to other cities. See Philip J. Cook et al., *Underground Gun Markets*, 117 *ECON. J.* F588, F603-10 (2007).⁴

Thus, it is reasonable to believe that when a jurisdiction generally bans the possession and sale of handguns, raising the cost and difficulty of replacing handguns once they are seized by the authorities, offenders become less likely to carry them in public places where they are vulnerable to stop-and-frisk tactics. Similarly, when it is also illegal to carry rifles and other non-concealable firearms in public, the risk that violent public confrontations will turn deadly is reduced. And, as we have seen, when firearms disappear from public places, levels of violence are likely to subside.

Some of plaintiff's amici observe that Chicago's crime rate exceeds national averages. See Brief of International Law Enforcement Educators' & Trainers' Association et al. at 25-28. This confuses cause and effect; it is high crime rates that produced the political will to enact and retain Chicago's handgun bans. In fact, high levels of violent crime are attributable to the high levels of gang membership and intergang competition in Chicago. See ILL. CRIM. JUST. INF. AUTH., *STREET GANGS AND CRIME: PATTERNS AND TRENDS IN CHICAGO* 10-12, 14-16, 19-22 (Sep. 1996). Thus, the relevant question is not Chicago's absolute crime rate, but whether that rate would be higher without the handgun ban. On this point, the data we discuss above suggests

⁴ Some of the plaintiffs' amici distort this paper by taking isolated sentences out of context while ignoring its actual conclusions. See Brief of International Law Enforcement Educators' & Trainers' Association et al. at 24-25.

an affirmative answer. In any event, amici say nothing about New York which, as we have seen, employs restrictive firearms laws to great effect.

II. INCORPORATION OF THE SECOND AMENDMENT SHOULD BE REJECTED.

The Supreme Court has used somewhat varying formulations in describing its approach to incorporating into the Fourteenth Amendment the rights enumerated in the first eight amendments. When it incorporated the right to a jury in criminal cases, and the protection against Double Jeopardy, the Court considered whether the right at stake was “fundamental to the American scheme of justice.” *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)). When it incorporated the rights to counsel, to confront adverse witnesses, and to compulsory process, the Court asked whether these rights were “fundamental and essential to a fair trial.” *Washington v. Texas*, 388 U.S. 14, 17 (1967); *Pointer v. Texas*, 380 U.S. 400, 403 (1965); *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). When it incorporated the Fifth Amendment right against compelled self-incrimination, the Court wrote that “the American system of justice is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its mainstay.” *Malloy v. Hogan*, 378 U.S. 1, 7 (1964).

These decisions deal with the rights of an accused in the adjudicative process; hence the references to rights considered fundamental to the administration of justice are natural. The Second Amendment, in contrast,

addresses conduct outside the courtroom. Accordingly, the Court's decisions concerning constitutional rights directed at primary conduct are more instructive, such as the Court's decision to incorporate the Fourth Amendment's protection against unreasonable search and seizure against the States because "the 'security of one's privacy against arbitrary intrusion by the police' is 'implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause.'" *Mapp v. Ohio*, 367 U.S. 643, 650 (1961) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (internal quotations omitted)). Similarly, the incorporation of the First Amendment rights of free speech, freedom of the press, free exercise of religion and the right to peaceably assembly was premised upon these rights being "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds by* *Benton v. Maryland*, 395 U.S. 784 (1969). Even the cases involving trial rights have been attentive to question whether a given right is "necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. at 149 n.14.

Whatever the formulation, it is essential to characterize the right at stake in order to determine whether it has the sufficiently fundamental and rooted character to qualify for incorporation. The Second Amendment is sufficiently rooted to warrant inclusion in the original Bill of Rights, but if that were sufficient for incorporation, then the Court would have adopted a

regime of total incorporation rather than the approach we describe above. Thus, a more discriminating analysis is required.

A. The Second Amendment Protects A Largely Unqualified Eighteenth-Century Right.

In *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the Supreme Court, adopting what it characterized as “the original understanding of the Second Amendment,” invalidated the District of Columbia’s prohibition on the possession of handguns. *Id.* at 2788, 2817-22. The Court considered only the application of the Second Amendment to the federal government; it expressly reserved decision on whether the Second Amendment is applicable to state and local governments by virtue of the Fourteenth Amendment. *Id.* at 2813 n.23.

In *Heller*, the Court defined the right to “keep” arms as the right to possess them, 128 S. Ct. at 2792, and it defined the right to “bear” arms as the right to “carry[] for a particular purpose – confrontation.” *Id.* at 2793. The Court added that the term includes “the carrying of the weapon . . . for the purpose of ‘offensive or defensive action,’” *Id.* at 2793 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). Accordingly, the Second Amendment apparently protects a right to carry firearms in public. After all, the right to “bear” arms seems to involve something more than taking them from the bedroom to the living room. Indeed, in *Heller*, the Court wrote that “nothing in our opinion should be

taken to cast doubt on prohibitions on the possession of firearms by felons or the mentally ill, or laws forbidding *the carrying of firearms in sensitive places* such as schools or government buildings,” 128 S. Ct. at 2816-17 (emphasis supplied), suggesting that it had recognized a right reaching outside of the home. The Court may one day retreat from this expansive understanding of the Second Amendment, but as it stands, *Heller* describes a right of some scope.

To be sure, the account of Second Amendment rights in *Heller* is not unlimited. In addition to the firearms regulations we discuss above that the Court noted with evident approval, the Court wrote that the Second Amendment “does not protect those weapons not typically possessed by law-abiding for lawful purposes, such as short-barreled shotguns,” 128 S. Ct. at 2816, or otherwise “dangerous and unusual weapons.” *Id.* at 2783, 2817. The Court also noted, albeit in dicta, that “the majority of 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or its state analogues.” *Id.* at 2816. Still, *Heller* creates the alarming possibility that gang members have a Second Amendment right to carry firearms visibly – the consequence of the Court’s recognition of a right to carry arms for purposes of confrontation. Indeed, the Court noted that nineteenth-century cases had understood the Second Amendment to secure a right to carry firearms openly in public. *See id.* at 2809. If applicable to state and local governments, this right would

grant effective immunity for gangs from stop-and-frisk tactics, at least as long as they carry firearms openly, and enable them to more readily compete in the violent drug trade by enforcing territorial drug-distribution monopolies.

Equally alarming, police-power justifications for limiting the right to carry firearms seemed to be irrelevant to the constitutional inquiry under *Heller*. The Court emphatically rejected Justice Breyer's view that reasonable gun-control regulations should be upheld, 128 S. Ct. at 2817 n. 27, 2821, as well as any balancing test that would weigh the right to bear arms against police-power justifications for regulation not rooted in framing-era understandings: "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.* at 2821. If incorporated within the Fourteenth Amendment, the right recognized in *Heller* could therefore become a potent obstacle to the cities' efforts to combat violent crime.

B. Second Amendment Rights Are Not an Aspect of Ordered Liberty.

Heller acknowledged as "debatable" the question whether "the Second Amendment is outmoded in a society in which our standing army is the pride of the Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem." 128 S. Ct. at 2822. This reality argues strongly against incorporation of the Second Amendment.

As it incorporated the Sixth Amendment right to jury trial in criminal cases in *Duncan*, the Court noted “the long debate . . . as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings,” but distinguished the unincorporated Seventh Amendment right to a civil jury by noting that “most of the controversy has centered on the jury in civil cases.” 391 U.S. at 156-57, 157. Thus, the controversial character of a right to possess and carry handguns – conceded in *Heller* itself – is surely one reason to question whether this right should be considered a fundamental aspect of ordered liberty.

In fact, history suggests that the right identified in *Heller* is far from a fundamental character of our jurisprudence. As we explain above, *Heller* recognized a right to bear arms not subject to any form of interest balancing. This formulation has not prospered in post-1791 jurisprudence. As Adam Winkler has demonstrated, although forty-four states afford constitutional protection for the right to bear arms, state courts since the nineteenth century have reached consensus on a reasonable regulation standard that carefully weighs the justification for the regulation at issue against the extent of the burden it creates on the right to bear arms. See Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686-87, 711-12, 716-17 (2007). Indeed, the same Congress that framed the Fourteenth Amendment believed that the right to bear arms should be balanced against regulatory interests; the Thirty-Ninth Congress also abolished the militia in

most southern states and prohibited any effort to arm militias in those states. See Act of March 2, 1867, ch. 170, § 6, 14 Stat. 485, 487 (1866). The sponsors of this measure brushed aside Second Amendment objections, arguing that the prohibition was justified by the emergence of armed groups “dangerous to the public peace and to the security of Union citizens in those states.” CONG. GLOBE, 39th Cong., 1st Sess. 1849 (1866) (Sen. Lane). To similar effect, see *id.* at 1848-49 (Sen. Wilson). This, of course, is the very type of interest-balancing that *Heller* rejects.

Indeed, in high-crime neighborhoods, the Second Amendment becomes something of a non sequitur. The Second Amendment states that “[a] well-regulated militia,” that is, a populace subject to “proper discipline and training,” *Heller*, 128 S. Ct. at 2800, is “necessary to the security of a free state,” and for that reason “the right of the people to keep and bear arms, shall not be infringed.” U.S. CONST. amend. II. The preamble and the operative clause may have been easy to reconcile in eighteenth-century America, but in contemporary America, they will often be at odds. As we have seen, in high-crime drug and gang-ridden communities, gang members and drug dealers are all too likely to exploit their ability to carry firearms in order to terrorize the community and engage in a violent competition for the spoils of the drug trade; this is not a world in which one can speak of “proper discipline and training” of a “well-regulated” urban “militia.” Contemporary street gangs bear greater resemblance to the violent militias that led the

Reconstruction Congress to effectively suspend the right to bear arms than to any eighteenth century conception of a “well-regulated militia.” Thus, in some cities, it may be effectively impossible to grant a right to carry firearms while preserving the “security of a free state,” and it may be unrealistic to suppose that this right can be granted to a “well-regulated” populace.

Under a reasonableness test of the type that has prevailed in the nineteenth and twentieth centuries, a ban on handguns in a high-crime, gang-ridden area could readily be sustained; whatever the marginal benefits of handguns for self-defense and other legitimate purposes as compared to rifles and other weapons more difficult to conceal, *see Heller*, 128 S. Ct. at 2818, handguns are far more prone to unlawful use as concealed weapons, and as we have seen, there is reason to believe that a handgun ban will increase the cost and difficulties facing gang members seeking handguns. Indeed, as *Heller* acknowledged, there is a serious case to be made for the wisdom of handgun bans in urban areas. *See* 128 S. Ct. at 2822.⁵ One need not reject *Heller*’s understanding of the original eighteenth-century meaning of the Second Amendment to acknowledge that *Heller* recognized a far more

⁵ Some of the plaintiffs’ amici argue that handguns yield substantial benefits since they are frequently used for purposes of self-defense. *See* Brief of International Law Enforcement Educators’ & Trainers’ Association et al. at 3-12. If so, it is unclear that long guns cannot provide equivalent benefits; when they criticize the efficacy of long guns, amici are conspicuously unable to supply supporting data. *See id.* at 23-24. In any event, the reliability of studies that depend on self-reports of defensive gun use is doubtful. *See, e.g.*, PHILIP J. COOK & JENS LUDWIG, U.S. DEP’T OF JUSTICE, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND THE USE OF FIREARMS 8-11 (May 1997); DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 66-69, 239-40 (2004).

muscular right than is consistent with the broad swath of American firearms-regulation history. And, as we have seen, the incorporation inquiry is not limited to an assessment of eighteenth-century understandings; it examines all of American history and experience to determine if a right is sufficiently rooted and fundamental to merit incorporation.

To be sure, the problems posed by recognition of a right to carry firearms in case of confrontation do not exist in all jurisdictions. As we have seen, firearms violence is largely a problem faced by the largest cities. Still, our jurisprudence reflects a conception of federalism in which state and local governments “serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *Chandler v. Florida*, 449 U.S. 560, 579 (1981) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Accord, e.g., *Arizona v. Evans*, 514 U.S. 1, 8 (1995); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980); *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973). Municipalities facing unique problems should be permitted to devise unique solutions. It is hardly a fundamental aspect of our jurisprudence that an eighteenth-century conception having limited relevance to contemporary America must control contemporary law enforcement policy.⁶

⁶ For a more elaborate defense of this submission, see Lawrence Rosenthal, *Second Amendment Plumbing after Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs*, 41 URB. LAW. 1 (2009).

This conclusion does not mean that the Fourteenth Amendment holds nothing for firearms rights. Even if the eighteenth-century version of the right to bear arms is not sufficiently fundamental to merit incorporation, a more limited right of defense may well qualify for constitutional protection under the Fourteenth Amendment. *Heller* concluded that Second Amendment embodied what was widely thought to be a natural right of defense. *See* 128 S. Ct. at 2793-94, 2798-99, 2805, 2807. Given its historical grounding, the right to defend oneself, one's family, and one's property may well be one of the unenumerated rights that qualifies for constitutional protection. If so, a complete prohibition on the possession in one's home or business of any form of weapon reasonably useful for defense could impose an impermissible burden on this right. Such a right of defense, however, need not go so far as the more robust "right to possess and carry firearms in case of confrontation" recognized in *Heller*, which, as we explain above, could wreak havoc in high-crime communities. A right carefully calibrated to balance the competing interests is consistent with the traditional test that courts have used to assess both incorporation and firearms rights, rather than the eighteenth-century version of the right to bear arms at issue in *Heller*.

There is doubtless appeal to the notion that the populace should not have to depend on the government to keep it safe from lawbreakers. There is considerably less appeal to the notion that in a contemporary city of a type utterly alien to the eighteenth-century Framers, everyone should have a right

to carry firearms in case of confrontation. In a community defined by conflict over street gang territorial prerogatives, a right to bear arms seems more likely to imperil ordered liberty than secure it.

CONCLUSION

For the preceding reasons, the judgment of the district court should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(B)(I)

I hereby certify that the foregoing brief complies with the type and volume limitations of Fed. R. App. P. 32(a)(7)(B). This brief contains 6,905 words, excluding portions of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 7th Cir. R. 32(b), and the type-style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in proportionately spaced typeface using Microsoft Word in 12-point Century Schoolbook font with footnotes in 11-point Century Schoolbook font.

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CERTIFICATE OF COMPLIANCE WITH 7TH CIR. R. 31(e)(1)

In accordance with 7th Cir. R. 31(e)(1), I certify that a digital version of the Brief of Amicus Curiae United States Conference of Mayors has been furnished to the court.

Lawrence Rosenthal, Attorney

CERTIFICATE OF SERVICE

I certify that I caused the Brief of the Defendants-Appellees to be served by placing two bound paper copies and one computer disc containing the digital version in an envelope with sufficient postage affixed and directed to the persons named below at the addresses indicated, and by depositing the envelopes in the United States mail box located at 1200 New Hampshire Avenue, N.W., Washington, DC 20036, before 5:00 p.m. on April 24, 2009.

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