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Gun Regulation and the U.S. Constitution

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Introduction

The United States is awash in guns and gun violence. According to a widely cited estimate, Americans possess around 400 million firearms for a population of about 330 million,[1] and the firearm homicide rate dwarfs that of other high-income countries. Using mostly 2015 data, researchers found that gun homicides were ten to forty times more likely in the United States than in almost all of its economic peers.[2]

While there are important economic, political, and social reasons for the high levels of gun ownership and gun violence in the United States, the U.S. Constitution has played a minor role. Indeed, state and local governments were not subject to the Second Amendment's right to keep and bear arms until 2010.[3] Until then, the Supreme Court only applied the Second Amendment to the national government. And even when it did apply, the right to keep and bear arms had little force. Not until 2008 did the U.S. Supreme Court invoke the Second Amendment to strike down a gun regulation, and not until 2022 did the Court give much breadth to the Second Amendment right.

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1 A. Karp, 2018. Estimating Global Civilian-Held Firearms Numbers, (Accessed 11 January 2023).

2 The firearm homicide rate in the United States was 4.1 per 100,000 population, compared to rates of 0.1 in Australia, Austria, France, Germany, and South Korea, 0.2 in Denmark, Greece, Switzerland and the Netherlands, and 0.3 in Canada, Italy, and Sweden. The only high-income countries with higher rates than 0.3 were Israel at 0.7 and Chile at 1.9. E. Grinshteyn, D. Hemenway, 2019. "Violent death rates in the US compared to those of the other high-income countries", 2015. *Preventive Medicine* 123, 20-26, p. 25. For six of the twenty-nine countries, 2015 data were not available, and the researchers relied on data from 2013 or 2014. Id. Two high-income countries, Iceland and Luxembourg, were excluded because of small populations. Id., p. 21.

3 In 1875, the Court held that like the other rights in the Bill of Rights, the Second Amendment only applied to Congress. United States v. Cruikshank, 92 U.S. 542 (1875). In 1897, the Court began to apply the Bill of Rights to state and local jurisdictions by "incorporating" the rights through the due process clause of the Fourteenth Amendment. E. Chemerinsky 2019. Constitutional Law: Principles and Policies, Sixth ed. Frederick, MD: Aspen Publishing, pp. 524-525. Some rights were incorporated in the early 1900's, some later. In 2010, the Court overruled *Cruikshank* and held that the states also are bound by the Second Amendment. McDonald v. Chicago, 561 U.S. 742 (2010).

Until the Court's June 2022 decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*,[4] federal, state, and local governments enjoyed expansive authority to limit gun ownership and use, and at times, lawmakers enacted strict regulations. Overall, though, the political process enabled a strong gun culture, and gun rights advocates have been able to protect their interests to a considerable degree without having to rely on the Constitution.[5]

The Court's decision in *Bruen* supplements the political power of gun rights advocates with an invigorated constitutional protection. The impact is likely to be felt most strongly in states with more liberal voters, who support regulation of firearms. At the writing of this article, the Court has not applied the new *Bruen* standard in other cases, so it will take some time to determine its full impact. But we can expect the Court to significantly narrow the authority of the government to regulate gun possession and use, at least as long as the Court maintains its current majority of justices with a strongly conservative tilt.

I. History of Supreme Court caselaw on gun regulation

For much of the United States' history, the Supreme Court did not invoke the Constitution to recognize an individual right to own or use guns. Under the traditional view, the Second Amendment's right to keep and bear arms only applied to people serving in a military role. There were few cases involving the Second Amendment, and the government won all of those cases. Thus, for example, in *U.S. v. Miller,* the Supreme Court upheld a federal ban on the possession or use of a short-barreled shotgun, observing that "we cannot say . . . that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense."[6] Regulation of gun possession or use was not decided in courts, but through the political process.

The absence of constitutional constraints on firearm regulations changed to a limited extent in 2008 with the Court's decision in *District of Columbia v. Heller*.[7] In *Heller*, the Court recognized an individual right to possess a handgun at home,

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4 142 S. Ct. 2111 (2022).

5 A. Winkler, 2018. "Is the Second Amendment Becoming Irrelevant?", *Indiana Law Journal*, 93:253-265 (discussing how firearm regulations have been shaped more by what gun rights advocates think the Second Amendment should mean than by what courts have said the Second Amendment means). One might wonder whether the Second Amendment right to keep and bear arms has played an important symbolic role. Its presence in the Bill of Rights may have discouraged aggressive gun regulation even if not actually invoked by the Supreme Court to strike down gun laws. But legislators have frequently tested other provisions in the Bill of Rights, including the First Amendment's ban on establishment of religion and on abridging the freedom of speech.

6 307 U.S. 174, 178 (1939).

7 554 U. S. 570 (2008).

emphasizing the important use of handguns in defending against intruders. No longer could states or cities try to reduce gun violence by preventing people from keeping handguns where they resided. But courts continued to uphold most other firearm regulations, including bans on assault weapons and high-capacity magazines,[8] bans on gun possession after a misdemeanor conviction for domestic violence,[9] and a ban on bringing loaded weapons into national parks.[10]

Even after *Heller*, the regulation of guns continued to be a matter generally sorted out by the political process.[11] In the politically more liberal states, legislatures passed more restrictions on gun possession or use[12] while in politically more conservative states, gun regulations were adopted to preserve or enhance the right to keep and bear arms.[13] In June 2022, after horrific firearm attacks in Buffalo, New York[14] and Uvalde, Texas,[15] Congress passed gun regulation for the first time in nearly three decades.[16] The legislation encourages state adoption of "red flag" laws,[17] strengthens prohibitions on gun trafficking and "straw purchasing,"[18] enhances background

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8 Kolbe v. Hogan, 849 F.3d 114, 135 (4th Cir. 2017).

9 Voisine v. United States, 579 U.S. 686 (2016).

10 United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011).

11 A. Winkler, 2018. "Is the Second Amendment Becoming Irrelevant?", *Indiana Law Journal* 93, 253-265, p. 259.

12 In Nevada, for example, the legislature banned the manufacture or sale of "ghost guns," that is, guns without serial numbers that allow for tracking of gun ownership. Nevada Assembly Bill 286 (2021), (Accessed 11 January 2023).

13 In Georgia, for example, the legislature eliminated the need for a permit to carry a firearm. Giffords Law Center to Prevent Gun Violence, 2023. Concealed Carry in Georgia, (Accessed 11 January 2023). For more discussion, see J.D. Charles, 2022. "Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution", *Michigan Law Review*, 120:581-642.

14 J. McKinley, A. Traub, T. Closson, 2022. "10 people are killed and 3 are wounded in a mass shooting at a Buffalo grocery store. N.Y. Times", May 14, 17 (Accessed 11 January 2023).

15 J. Ulloa, J.D. Goodman, N. Bogel-Burroughs, J. Bosman, 2022. "Deadliest U.S. School Shooting in Decade Shakes Rural Texas Town". N.Y. Times, May 25 (Accessed 11 January 2023).

16 Public Law No: 117-159, 2022 (Accessed 11 January 2023). This legislation was finalized the day after the Supreme Court issued its decision in *Bruen*. E. Cochrane, 2022. "Congress Passes Bipartisan Gun Legislation, Clearing It for Biden". N.Y. Times, June 24 (Accessed 11 January 2023). It had been introduced more than eight months earlier. Earlier in 2022, the Biden Administration issued an executive order banning ghost guns. The White House, 2022 (Accessed 11 January 2023). The executive order cited as statutory authority the National Firearms Act of 1934 and the Gun Control Act of 1968. Definition of "Frame or Receiver" and Identification of Firearms, 2022. 87 FR 24652 (Accessed 11 January 2023).

17 Red flag laws allow a judge to issue an "extreme risk protection order" denying possession of guns for persons found to be a danger to self or others. Giffords Law Center to Prevent Gun Violence. Extreme Risk Protection Orders (Accessed 11 January 2023).

18 Giffords Law Center to Prevent Gun Violence. Trafficking & Straw Purchasing (Accessed 11 January 2023). Straw purchasers buy a gun ostensibly for themselves but in reality for other individuals, thereby facilitating the acquisition of firearms by person who would not pass a background check or who want to maintain the anonymity of their ownership. Z. Schonfeld, 2022. What is straw purchasing a gun?, The Hill, June 13 (Accessed 11 January 2023).

checks on buyers under age 21, and closes the "boyfriend loophole"[19] for possession of firearms by those convicted of domestic violence.

In 2022, in its decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*,[20] the Court issued a decision that portends a substantial expansion of gun rights in the United States, giving gun owners a constitutional fallback when they fail to prevail in legislative arenas. Under *Bruen*, the government now needs to demonstrate an historical tradition underlying the regulation it wishes to impose. And that is a demanding standard. Indeed, since the Court's decision, lower courts have struck down regulations that had seemed to be on solid ground. For example, federal appellate and district courts have invalidated laws that ban the obliteration of a gun's serial numbers[21] or that restrict firearm possession by domestic abusers.[22] Even laws prohibiting firearm possession by convicted felons were questioned. Despite the fact that the *Heller* Court specifically wrote that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons,"[23] a federal trial court judge declined to uphold such a ban, asking instead for the parties to file briefs analyzing the question under the Court's new standard that was announced in *Bruen*.[24]

II. The traditional understanding

The traditional absence of an individual right to bear arms reflected the distinctive wording of the Second Amendment. For other fundamental rights, the constitutional drafters simply stated the right. Under the First Amendment, for example, "Congress

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19 The boyfriend loophole referred to the fact that the ban on possession after conviction for domestic violence applied to perpetrators who were married to, living with, or had a child with the victim. National Public Radio, 2022. The Senate gun bill would close the 'boyfriend loophole.' Here's what that means. June 13 (Accessed 11 January 2023). Now, the ban applies to persons who have, or recently had, a "continuing serious relationship of a romantic or intimate nature." 18 U.S.C. 921(a)(37)(A).

20 142 S. Ct. 2111 (2022).

21 U.S. v. Price, 2022 WL 6968457 (S.D. W.Va. October 12). For a decision upholding the ban on removing serial numbers, see U.S. v. Holton, 2022 WL 16701935 (N.D. Tex., November 3).

22 U.S. v. Rahimi, 2023 WL 1459240 (5th Cir. February 2); U.S. v. Perez-Gallan, 2022 WL 16858516 (W.D. Tex. November 10). For discussion of recent cases, see S. Lubet, 2022. "Is the Supreme Court turning the Constitution into a homicide pact?", The Hill, November 30 (Accessed 11 January 2023).

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

24 U.S. v. Bullock, 2022 WL 16649175 (S.D. Miss. October 27). Other federal district courts have upheld the ban. U.S. v. Ridgeway, 2022 WL 10198823 (S.D. Cal. October 17); U.S. v. Riley, 2022 WL 7610264 (E.D. Va. October 13). A three-judge panel of a federal court of appeals upheld the federal ban on firearm possession by persons convicted of a felony, Range v. Attorney General United States, 53 F.4th 262 (3rd Cir. 2022), but the appellate court decision has been vacated and the case has been scheduled for an *en banc* hearing, Range v. Attorney General United States, 56 F.4th 992 (3rd Cir. 2023). The federal statute specifically applies to crimes that are "punishable by imprisonment for a term exceeding one year," 18 U.S.C. § 922(g)(1), so could include defendants convicted of a serious misdemeanor crime.

shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Similarly, under the Fifth Amendment, no person shall "be deprived of life, liberty, or property, without due process of law."

For the Second Amendment, the drafters did not simply state that the right to keep and bear arms "shall not be infringed." Rather the drafters began the Second Amendment with a preamble, writing that "A well regulated Militia, being necessary to the security of a free State." Hence, continued the Framers, "the right of the people to keep and bear Arms, shall not be infringed."

The presence of the Amendment's preamble was long understood as the drafters' way of limiting the right to keep and bear arms to military contexts. As a dissenting Justice John Paul Stevens wrote for a minority of four justices in *Heller*, the prevailing view of the Second Amendment, "that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons—is both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption."[25] Accordingly, for more than two centuries, the Supreme Court did not recognize a general constitutional right to keep and bear arms.

And historical practices reflected this traditional understanding. Restrictive gun regulations were well known and also supported by the National Rifle Association (NRA) after its founding in 1871.[26] For example, as Adam Winkler has written, the states often employed strict gun laws during the Revolutionary period.[27] States restricted ownership of firearms to white males, or to white males who were loyal to the revolutionary cause.[28] Overall, only a minority of the public was able to own a firearm. And those who did own firearms were regulated closely. With no standing army yet, the national defense depended on the government's ability to mobilize its citizens and their guns. Accordingly, free men between the ages of eighteen and fifty were required to own a firearm suitable for military service, and government officials would regularly enforce this mandate with inspections of guns and a registration of their ownership.[29]

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25 District of Columbia v. Heller, 554 U.S. 570, 637-638 (2008) (J. Stevens, dissenting)

26 A. Winkler, 2011. *Gunfight: The Battle Over the Right to Bear Arms in America*, New York, NY: W.W. Norton & Co., p. 26.

27 Winkler, *Gunfight: The Battle Over the Right to Bear Arms in America*, pp. 224-225.

28 Winkler, *Gunfight: The Battle Over the Right to Bear Arms in America*, pp. 229-231.

29 Winkler, *Gunfight: The Battle Over the Right to Bear Arms in America*, pp. 224-225; S. Cornell, N. DeDino, 2007. "A Well Regulated Right: The Early American Origins of Gun Control". *Fordham Law Review* 73, 487-528, pp. 508-510.

Concerns about public safety also led to strict firearm regulations, particularly in urban areas. Because of the risk posed by the combustibility of gunpowder, states regulated the storage and transport of gunpowder, and Massachusetts prohibited the keeping of a loaded firearm in buildings, including homes, in Boston.[30]

Examples of strict gun regulations to protect public safety persisted for more than two centuries. Consider in this regard the status of gun laws during the "Wild West" period of the 1800's. While the 20th Century popular image of that period included gunfights often erupting in frontier towns, these towns were actually quite peaceful.[31] As one historian wrote, "many more people have died in Hollywood westerns than ever died on the real frontier.[32] Gun violence was uncommon in frontier towns because gun laws were restrictive. Typically, only law enforcement officers were authorized to carry firearms within a town's boundaries. Under local ordinances, anyone else was required to deposit their guns with the police or at another facility until they left town.[33] And these ordinances were enforced. The second most common reason for being arrested in frontier towns (after drunk and disorderly conduct) was for illegally carrying a concealed weapon.[34]

While state and local governments were the primary regulators of gun ownership and use, the federal government began to expand its oversight in the 1930's. Gangsters brought a new level of violence to their criminal activities after the 1920 invention of the small, automatic "Tommy Gun,"[35] and President Franklin Delano Roosevelt responded by urging a greater federal role in addressing guns and crime.[36] During that era, the Supreme Court often struck down federal regulatory statutes as beyond the Commerce Clause power of Congress, so Congress turned first to stiff taxes to take guns off the streets. The 1934 National Firearms Act imposed a substantial tax on the manufacture or sale of machine guns and short-barreled shotguns or rifles, and legitimate sales of the guns plummeted.[37] Since then, Congress has banned sales of machine guns or short-barreled shotguns or rifles,[38] and a 1994 law extended the bans to cover semi-automatic, assault-style

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30 Winkler, *Gunfight: The Battle Over the Right to Bear Arms in America*, pp. 231-232; S. Cornell, N. DeDino, 2007. "A Well Regulated Right: The Early American Origins of Gun Control". *Fordham Law Review* 73, 487-528, pp. 510-512.

31 Winkler, *Gunfight: The Battle Over the Right to Bear Arms in America*, pp. 315-320.

32 R. Shenkman, 1988. *Legends, Lies, and Cherished Myths of American History*, New York, NY: Morrow, p. 112 (cited in Winkler, *Gunfight: The Battle Over the Right to Bear Arms in America*, p. 317).

33 Winkler, *Gunfight: The Battle Over the Right to Bear Arms in America*, pp. 319-320.

34 Winkler, *Gunfight: The Battle Over the Right to Bear Arms in America*, p. 330.

35 Winkler, *Gunfight: The Battle Over the Right to Bear Arms in America*, pp. 364-365.

36 Winkler, A., 2011. *Gunfight: The Battle Over the Right to Bear Arms in America*, pp. 375-376.

37 Winkler, *Gunfight: The Battle Over the Right to Bear Arms in America*, pp. 383-386.

38 18 U.S.C. § 922(b)(4).

firearms and large capacity magazines.[39] The 1994 bans expired in 2004. Congress also requires background checks of customers before completing firearm sales to prevent purchases by persons who have been convicted of a felony or who meet other disqualifying criteria.[40]

None of these gun laws were blocked by the Second Amendment.[41] Whether or not governments implemented gun regulations depended on economic, political, and social factors. And while the constitutional landscape did not change until 2008, the political landscape shifted earlier. After social unrest led to a period of stricter state regulation of firearms in the 1960s,[42] the tide started to turn, from both a backlash by gun owners and a more general societal objection to government regulation. In the 1970's, the National Rifle Association (NRA) changed from supporting gun regulation to promote public safety to opposing such regulation.[43] By effectively mobilizing its membership to oppose firearm regulation, the NRA made it difficult to pass gun safety laws at the national level and in the more conservative states. After Vice President Al Gore's loss in the 2000 presidential election, many political experts concluded that gun regulation was a losing policy for Democratic candidates.[44]

III. The change in course in *Heller*

Despite the long-held traditional understanding of the Second Amendment, the Supreme Court changed its view in 2008 when it decided *District of Columbia v. Heller*.[45] In that case, a gun owner challenged an ordinance adopted by Washington, DC that prohibited possession of a handgun in one's home.[46]

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39 Public Safety and Recreational Firearms Use Protection Act of 1994. (Accessed 11 January 2023). at: H.R.4296 - 103rd Congress (1993-1994): Public Safety and Recreational Firearms Use Protection Act | Congress.gov | Library of Congress

40 Brady Handgun Violence Prevention Act of 1993 (Accessed 11 January 2023). Other disqualifying criteria included being in the United States unlawfully, being a fugitive from justice, and having been committed to an institution because of mental illness. Since the passage of the Act, the disqualifying criteria have been expanded. For example, currently, persons convicted of a misdemeanor because of domestic violence cannot purchase a handgun. 18 U.S.C. § 922(d)(9).

41 Sometimes the Supreme Court might invoke other constitutional principles to limit gun regulation. For example, in United States v. Lopez, 514 U.S. 549 (1995), the Court cited principles of federalism in holding that Congress lacked authority to ban the possession of guns in or near schools. Such bans needed to be adopted by state legislatures, as they had been by more than 40 states when *Lopez* was decided. Id. at p. 581. After *Lopez*, Congress amended its statute to bring it within its Commerce Clause power, and it currently is in effect. 18 U.S.C. § 922(q)(2)(A).

42 Winkler, *Gunfight: The Battle Over the Right to Bear Arms in America*, pp. 469-476.

43 Winkler, *Gunfight: The Battle Over the Right to Bear Arms in America*, pp. 477-485.

44 A. Koppelman, 2007. Why Democrats dumped gun control. Salon, April 18 (Accessed 11 January 2023).

45 554 U.S. 570 (2008).

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

The ordinance was enacted in response to concerns about the high levels of gun violence in the city and the ease with which handguns could be obtained and used.

According to the *Heller* Court, a key reason for the proposal and adoption of the Second Amendment was a desire to ensure that people had the means to defend themselves, their family, and their homes from intruders who threatened harm. In cases involving other personal interests (e.g., sexual relationships with same-sex partners[47]), the Court had recognized that the Constitution provides greater protection for activities that occur where one resides, and the Court emphasized that factor in *Heller*. As the Court wrote,

> the inherent right of self-defense has been central to the Second Amendment. The handgun ban amounts to a probation of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute.[48]

While *Heller* clearly rejected prohibitions on handgun possession in one's home, it did not suggest a broad right to keep and bear arms. Indeed, wrote the court,

> 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 building, or laws imposing conditions and qualifications on the commercial sale of arms.[49]

Accordingly, lower courts upheld almost all firearm regulations after *Heller*, including requiring "good cause" for the issuance of a permit to carry a concealed firearm;[50] prohibiting the possession of machine guns, assault weapons, and large capacity ammunition magazines;[51] requiring that firearms be stored in a locked container or other secure manner when not in the possession of the owner;[52] and forbidding gun possession by dangerous persons including those convicted of felonies[53] or domestic violence misdemeanors[54] and those who have been

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47 Lawrence v. Texas, 539 U.S. 558, 567 (2003)

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

49 District of Columbia v. Heller, 554 U.S. 570, 626-627 (2008).

50 Gould v. Morgan, 907 F.3d 659 (1st Cir. 2018). While most courts upheld such requirements, the U.S. Court of Appeals for the D.C. Circuit disagreed. Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017). Ultimately, the Supreme Court rejected good cause requirements in *Bruen*.

51 Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017)

52 Jackson v. City & Cty. of San Francisco, 746 F.3d 953 (9th Cir. 2014)

53 United States v. Massey, 849 F.3d 262 (5th Cir. 2017)

54 Voisine v. United States, 579 U.S. 686 (2016)

involuntarily committed to psychiatric institutions.[55] Courts also upheld laws requiring the registration of all firearms[56] and requiring a waiting period before completing a firearm sale.[57]

Some lower courts struck down laws that were viewed as overly restricting the freedom to carry guns in public places,[58] but those decisions reflected a limited expansion of the *Heller* right to possess a handgun in one's home.

IV. The sea change in *Bruen*

In 2022, the Court gave a much more expansive take on the Second Amendment, and it did so even though it could have sided with gun owners on narrow grounds. That is, just as the *Heller* Court limited its recognition of Second Amendment rights to gun possession at home, the *Bruen* Court could have limited its application of Second Amendment rights outside one's home in a narrow way.

At stake in *New York* was a statute that allowed the carrying of a gun in public places only if the owner obtained a license to carry. Having a license requirement was not remarkable. Forty-eight other states have such a requirement. But while 43 state statutes authorized automatic licensure based on relatively objective criteria, such as age, legal residency, lack of criminal record, competence in using a firearm, and physical capability of safely handling a firearm,[59] New York, five other states, and the District of Columbia also required applicants to demonstrate good cause or suitability to carry a gun outside of the home for self-defense. The Court could simply have struck down the good cause requirement, ensuring that license applicants would be judged more objectively and more fairly.[60]

Instead, the Court announced a new standard for analyzing Second Amendment challenges to firearm regulations. According to the Court, a state may not justify its regulation on the ground that the regulation serves the important interest in public

55 United States v. Bartley, 9 F.4th 1128 (9th Cir. 2021)

56 Justice v. Town of Cicero, 577 F.3d 768, 774 (7th Cir. 2009).

57 Silvester v. Harris, 843 F.3d 816 (9th Cir. 2016). The Giffords Law Center to Prevent Gun Violence tracks judicial decisions regarding firearm regulation.

58 Moore v. Madigan, 702 F. 3d 933, 942 (7th Cir. 2012) (striking down an almost total ban on the public carrying of a gun); People v. Chairez, 104 N.E.3d 1158, 1176 (Ill. 2018) (striking down a ban on carrying a gun within 1,000 feet of a public park in part because the law would effectively prohibit the possession of a firearm for self-defense within a vast majority of the acreage in the city of Chicago).

59 Fla. Stat. § 790.06(2); Ohio Rev. Code § 2923.125(D)(1)(A).

60 Note that the justices disagreed among themselves about the categorization of state laws. The dissenters observed that some of the states that seemed to require issuance of a license based on objective criteria allowed licensing authorities some discretion while other states that seemed to allow discretion operated in practice without licensing authority discretion. New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111, 2172 (2022) (J. Breyer, dissenting).

safety. "Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[61] If the regulation being challenged is rooted in "founding-era historical precedent," or is akin to a kind of regulation that is so rooted,[62] it will pass muster under the Second Amendment. But if there is no satisfactory historical tradition (either at the time of the adoption of the Second or Fourteenth Amendment[63]), then the regulation is invalid. Historical tradition is to be informed by the original understanding of the Second Amendment text and the historical background of the text.[64]

Critics have identified significant concerns with the Court's new standard for assessing the constitutionality of firearm regulations. For example, the *Bruen* standard makes it very difficult to justify limits on the right to keep and bear arms to ensure public safety. Ordinarily, when a fundamental right is at stake, such as freedom of speech, the government can still regulate when its law serves a compelling, sometimes, important, public interest.[65] The significance of the right must be weighed against the significance of countervailing public interests. The *Bruen* Court rejected that approach, writing that the "Second Amendment 'is the very *product* of an interest balancing by the people.'"[66] Hence, the Court's statement that regulations are invalid if they lack a satisfactory historical tradition.

More fundamentally, why base current understandings of fundamental rights on views that existed more than 230 years ago? The Framers themselves rejected that approach to constitutional interpretation,[67] and for good reason. People's understandings of a right are inextricably entwined with the moral assumptions of their day; rights need to take into account progress in moral thinking.

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61 New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111, 2126 (2022).

62 New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111, 2131-2133 (2022).

63 New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111, 2136 (2022). Looking at the time of the Second Amendment's adoption is designed to gain an appreciation of what the constitutional Framers intended when they wrote the Second Amendment, and looking at the time of the Fourteenth Amendment's adoption is designed to gain an appreciation of what the drafters intended when they wrote that Amendment since the Fourteenth Amendment applies the Second Amendment and other fundamental rights to the states. As the Court acknowledged, there is debate as to whether the understanding of the right to keep and bear arms at the time of the Fourteenth Amendment affects the Court's interpretation of the right or whether the Court is bound by the understanding of the right at the time of the Second Amendment. New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111, 2138 (2022). The *Bruen* Court did not resolve that debate since it concluded that with respect to the right to carry firearms outside the home, the understanding was the same in 1791 and 1868. New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111, 2138 (2022).

64 New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111, 2127-2128 (2022).

65 New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111, 2176-2177 (2022) (J. Breyer, dissenting).

66 New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111, 2131 (2022).

67 H.J. Powell, 1985. "The Original Understanding of Original Intent", *Harvard Law Review* 98:885-948.

Even if one accepts a constitutional standard based on historical analysis, there are other serious problems. First, the justices and lower court judges are not trained as historians and therefore are not properly equipped to undertake the kind of analysis required by the *Bruen* Court.

In addition, the historical record may not provide a clear answer. Indeed, in major cases, the majority and dissenting justices have come to different conclusions when looking at historical tradition. In *Heller*, the majority found a tradition in favor of an individual right to bear arms, while the dissenting justices found a tradition supporting a right to bear arms only for military service.[68] In *Bruen*, the majority did not find a tradition supporting the New York public carry law while the dissenting justices did identify a tradition in support. If the historical record is uncertain, justices and judges may end up misreading the record or invoking only the parts of the historical record that support their ideological leanings. This concern led one judge to write when applying *Bruen* to a federal statute prohibiting firearm possession by a felon, "Not wanting to itself cherry-pick the history, the Court now asks the parties whether it should appoint a historian to serve as a consulting expert in this matter."[69]

The uncertainty of an historical standard is exacerbated by the Court's discussion of how it should adapt its constitutional interpretations to a changing world. While the *Bruen* standard relies on original understandings of the Second Amendment's meaning, the Court also recognized the importance of contemporary analogues to historical practices. As the Court wrote, the Second Amendment, like the entire Constitution, is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[70] But as the Court acknowledged, what counts as a relevant analogue will not always be clear.

Consider in this regard the Court's acceptance of one analogue and rejection of another. Since the Second Amendment secures the right to keep and bear arms for self-defense, the Court observed that the right extends to contemporary firearms commonly used for self-defense even if those firearms were not in existence when the Second (or Fourteenth) Amendment was written.[71] Stun guns were not invented until the 20th Century, but the Second Amendment still provides a right to own and use those firearms.[72] On the other hand, when it came to the definition of

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68 Similarly, when the Supreme Court rejected a right to abortion in Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022), it did not see the history of a right to abortion that the dissenting justices saw.

69 U.S. v. Bullock, 2022 WL 16649175 (S.D. Miss. October 27), p. 3.

70 New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111, 2132 (2022).

71 New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111, 2132 (2022).

72 Caetano v. Massachusetts, 577 U. S. 411 (2016).

a sensitive public place, the Court took a narrower view of modern analogues. The Court discerned an historical tradition for limitations on the carrying of firearms in sensitive places, but it resisted the idea that because many more places are at high risk for gun violence than 230 years ago, more places should be considered sensitive.

In determining which places are sensitive, one could understand the increasingly violent nature of American society in two different ways. The majority would seem to say that because of the increase in violence, the right to self-defense becomes more important. The minority would say that because of the increase in violence, more places have become sensitive places amenable to regulation. As the *Bruen* dissent noted, we have seen mass shootings not only at schools, but also at entertainment venues, spas, a supermarket, and houses of worship.[73]

This difference in perspective also would shape how justices answer other questions about the reach of the Second Amendment—should the Court worry more about the need for self-defense or the about the need for the state to ensure public safety? So far, one federal district court has sided with the need for self-defense. In a challenge to a New York statute, the judge enjoined enforcement of a ban on possession of a firearm at "any place of worship or religious observation."[74]

The difficulties adapting historical tradition to contemporary settings also were illustrated by an application of the *Bruen* standard to a federal statute. A federal court of appeals considered the constitutionality of a prohibition on firearm possession by a person who was subject to a protective order to prevent domestic abuse.[75] In defending the statute, the government was not able to invoke an historical tradition of firearm prohibitions connected to protective orders.[76] The government cited analogous firearm regulations with a strong historical tradition, but the court did not view the protective order regulation as sufficiently similar to the historically-based regulations.[77] Hence, the court struck the prohibition down.

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[73] New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111, 2165 (2022) (J. Breyer, dissenting).

[74] Hardaway v. Nigrelli, 2022 WL 16646220 (W.D. N.Y. September 3). The U.S. Court of Appeals for the Second Circuit has stayed the district court's injunction pending appeal. Antonyuk v. Nigrelli, 143 S. Ct. 481 (2023), 2023 WL 150425 (U.S. Sup. Ct. January 11).

[75] U.S. v. Rahimi, 2023 WL 1459240 (5th Cir. February 2) (considering the constitutionality of 18 U.S.C.§ 922(g)(8)).

[76] As a federal trial court observed in rejecting the same statute, the statute had been passed less than thirty years earlier. U.S. v. Perez-Gallan, 2022 WL 16858516 (W.D. Tex. November 10), p. 4.

[77] U.S. v. Rahimi, 2023 WL 1459240 (5th Cir. February 2), pp. 7-10.

As this and other cases indicate, much will depend on how narrowly the Court interprets its historical tradition standard. For a long time, the American tradition limited gun rights to white men. With the adoption of the Fourteenth Amendment and its interpretation by the Supreme Court, it would not be possible today to deny Second Amendment rights to Black Americans or women. One could apply equal rights principles as well to gun possession by persons who commit domestic abuse. The absence of an historical tradition for denying the possession of guns because of domestic abuse reflects the fact that domestic abuse was once viewed largely as a private matter. Since that view resulted from the unequal status of women, it should not be given weight in interpreting the Second Amendment.

Because the *Bruen* decision was issued so recently (June 2022), and the Supreme Court has not applied its new standard to other firearm regulations yet, it is difficult to be very certain about the breadth of the Second Amendment right. In addition, the imprecision of the *Bruen* standard means that its shape will depend considerably on the ideological makeup of the Court. But we know that at the least, the Second Amendment now includes an individual right to bear arms and that its protections extend well beyond the core right identified in *Heller* of the right to possess a handgun in one's home for purposes of self-defense.