

# Restoring the Right to Bear Arms: *New York State Rifle & Pistol Association v. Bruen*

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Justice Clarence Thomas's opinion for a 6-3 Supreme Court majority in *New York State Rifle & Pistol Association v. Bruen* vindicates the right of law-abiding Americans to carry handguns for lawful protection. That decision will directly affect three states where the right was entirely denied: New Jersey, Maryland, and Hawaii. It will also affect three other states where the right to bear arms was already respected by some local jurisdictions but denied by others: Massachusetts, New York, and California.

Perhaps even more important, *Bruen* announces a judicial standard of review that applies to all gun control laws throughout the United States. Gun control laws that are consistent with the history and tradition of the American right to keep and bear arms are constitutional. Gun control laws that are inconsistent with history and tradition are not.

One week after the *Bruen* opinion was released, the Court vacated decisions from federal courts of appeals that had upheld bans on common rifles or magazines in Maryland, California, and New Jersey. The Court remanded the cases to the lower courts and told the courts to reconsider their decisions in light of *Bruen*.<sup>1</sup>

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<sup>1</sup> U.S. Supreme Court, Order List, June 30, 2022, <https://bit.ly/3OBdFd7>. The cases were: *Bianchi v. Frosh*, 858 Fed. Appx. 645 (4th Cir. 2021), vacated by 142 S. Ct. 2898 (2022) (Mem.) (Maryland ban on common semiautomatic rifles); *Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Att'y Gen. N.J.*, 974 F.3d 237 (3d Cir. 2020) (upholding confiscation of magazines over 10 rounds), vacated by 142 S. Ct. 2894 (2022) (No. 20-1507);

## I. From *Miller* to *Heller* and *McDonald*

The Second Amendment has suffered from periods of judicial neglect: one was from 1940–2007, and another from 2011–2021. The first period began after the Court’s 1939 decision in *United States v. Miller* upholding a federal tax and registration system for sawed-off shotguns.<sup>2</sup> For decades thereafter, the right to keep and bear arms appeared only in occasional cameo roles, such as in the second Justice John Marshall Harlan’s famous explication of Fourteenth Amendment “liberty”:

This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints[.]<sup>3</sup>

Starting in 1989, the Court began occasionally to take cases that vindicated the rights of gun owners—but always on grounds other than the Second Amendment.<sup>4</sup> One such case was 1997’s *Printz v.*

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*Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) (also upholding magazine confiscation), vacated by 142 S. Ct. 2895 (2022).

Also granted, vacated, and remanded was *Young v. State of Hawaii*, 992 F.3d 765 (9th Cir. 2021) (en banc), which had held that Hawaii’s ban on open carry was constitutional because there is no right to bear arms outside one’s property. Presuming that Hawaii’s local law enforcement officials comply with the state attorney general’s advice to start issuing concealed carry permits, and given *Bruen*’s rule that states can decide whether carrying should be concealed or open, it is not clear what remains to be done with *Young* on remand. Presumably the plaintiff will be issued a concealed carry permit by his county of residence, Hawaii County (the Big Island).

<sup>2</sup> *United States v. Miller*, 307 U.S. 174 (1939).

<sup>3</sup> *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). *Poe* was a predecessor to *Griswold v. Connecticut*. Unlike the majority in *Poe*, Justice Harlan believed the plaintiffs had standing, and he would have ruled in favor of the liberty rights of married couples to use birth control. Justice Harlan’s words were quoted by *Roe v. Wade*, 410 U.S. 113, 167 (1973) (Stewart, J., concurring); *Moore v. East Cleveland*, 431 U.S. 494, 502, 542 (1976) (plurality op.) (White, J., dissenting); *Planned Parenthood v. Casey*, 505 U.S. 833, 848–49 (1992) (plurality op.); *Albright v. Oliver*, 510 U.S. 266, 306–08 (1994) (Stevens, J., dissenting).

<sup>4</sup> Michael P. O’Shea, *The Right to Defensive Arms after District of Columbia v. Heller*, 111 W. Va. L. Rev. 349, 390–91 (2009) (discussing *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505 (1992)); *Florida v. J.L.*, 529 U.S. 266 (2000); *Staples v. United States*, 511 U.S. 600 (1994) (the “long tradition of widespread lawful gun ownership” includes firearms like the semiautomatic AR-15).

*United States*.<sup>5</sup> Back in 1993, Congress enacted a statute ordering local law enforcement officials to carry out background checks on handgun buyers. Sheriffs around the nation sued, arguing that Congress had no power to dragoon local officials into enforcing congressional statutes. If Congress wanted background checks, it could hire federal employees to conduct the checks.

By 5-4, the Supreme Court agreed, with Justice Thomas joining Justice Antonin Scalia's majority opinion. While *Printz* was about federalism, not the Second Amendment, Justice Thomas wrote a brief concurring opinion to point out the Second Amendment issue. He was dubious that the 1993 statute was compliant with the Second Amendment.

Justice Thomas hoped that the Court would again address the Second Amendment. Quoting one of the greatest justices of the 19th century, he wrote: "Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms 'has justly been considered, as the palladium of the liberties of a republic.'"<sup>6</sup>

Eleven years later, the Court did so in Justice Scalia's 5-4 opinion in *District of Columbia v. Heller*.<sup>7</sup> Then in 2010, the Court ruled in *McDonald v. City of Chicago* that the Fourteenth Amendment makes the Second Amendment enforceable against state and local governments, just as are most other provisions of the Bill of Rights.<sup>8</sup> Here, Justice Samuel Alito's plurality opinion for the Court relied on precedents from the 1890s onward that "incorporate" items in the Bill of Rights into the Fourteenth Amendment via the clause "nor shall any state deprive any person of life, liberty, or property, without due process of law." Ever the originalist, Justice Thomas agreed with the result, but concurred to explain that the Fourteenth Amendment clause that did the work was "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."<sup>9</sup>

<sup>5</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>6</sup> *Id.* at 939 (Thomas, J., concurring).

<sup>7</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008); Clark Neily, *District of Columbia v. Heller: The Second Amendment Is Back, Baby*, 2007-2008 *Cato Sup. Ct. Rev.* 127 (2008).

<sup>8</sup> *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

<sup>9</sup> *Id.* at 805 (Thomas, J., concurring in part).

Almost immediately after *McDonald* was announced, the Court granted, vacated, and remanded a Second Circuit case that had upheld a ban on nunchaku (martial arts sticks connected by a chain).<sup>10</sup> After that, the Court entered another period of Second Amendment torpor.

## II. “Justice Breyer’s Triumph in the Third Battle over the Second Amendment”

Post-*Heller* some lower-court judges, including then-Judge Brett Kavanaugh of the D.C. Circuit, observed that the *Heller* decision had been based on text, history, and tradition. He argued that lower courts should follow the same methodology.<sup>11</sup>

But he was in the minority. Most of the lower federal courts adopted the test that Justice Stephen Breyer had proposed in his dissent in *Heller*, and which had specifically been repudiated by the *Heller* majority. Under this approach, judges engage in interest balancing; they decide for themselves if an infringement on traditional Second Amendment rights is acceptable.

Although the term “Breyer test” would have been accurate, the lower courts instead called it the “two-part test” or “two-step test.”

While some lower courts applied the test conscientiously, many others set things up so the government would always win. In some courts, all the government needed to do was introduce some evidence in favor of a gun control law. The fact that the government’s evidence was refuted by evidence from the other side was irrelevant. The Second, Fourth, and Ninth Circuits were particularly egregious.<sup>12</sup>

<sup>10</sup> *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009) (per curiam), vacated and remanded by 561 U.S. 1040 (2010). On remand, the district court held that nunchaku were in common use by law-abiding persons; being considerably less dangerous than handguns, they could not be prohibited. *Maloney v. Singas*, 351 F. Supp. 3d 222 (E.D.N.Y. 2018). New York State did not appeal.

Then-Judge Sonia Sotomayor had been part of the *Maloney* Second Circuit panel. During her confirmation hearings, Sens. Orrin Hatch (R-UT), Russ Feingold (D-WI), and Jon Kyl (R-AZ) asked her about the *Maloney* case. She responded that the prohibition was legitimate because nunchaku could injure or kill someone. Tr. of the Sotomayor Confirmation Hearings, 37–38, 66, 248 (July 14, 2009), <https://bit.ly/3PYc9Tp>.

<sup>11</sup> *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011).

<sup>12</sup> David B. Kopel, Data Indicate Second Amendment Underenforcement, 68 *Duke L.J. Online* 79 (2018).

In the Ninth Circuit, civil rights advocates did sometimes win cases before three-judge panels. But the full circuit would then always order an *en banc* rehearing, even if none of the parties had requested it. *En banc*, the government would always win.<sup>13</sup> Of the 50 post-*Heller* Second Amendment cases decided by the Ninth Circuit, the government won all 50.<sup>14</sup>

In January 2022, a Ninth Circuit panel ruled in *McDougall v. County of Ventura* that Ventura County's pandemic lockdowns of gun stores and shooting ranges had violated the Second Amendment since the county had allowed other businesses with comparable (small) risks to stay open.<sup>15</sup> The three-judge panel had rigorously applied the Ninth Circuit's particular rules for the two-step test.

Judge Lawrence VanDyke, author of the *McDougall* panel opinion, knew it wouldn't last, so he also wrote a "concurring opinion" in which he predicted that *McDougall* would be reheard. Judge VanDyke's concurrence was a "draft" opinion for the future *en banc*, upholding the Ventura lockdown. As he explained, "Since our court's Second Amendment intermediate scrutiny standard can reach any result one desires, I figure there is no reason why I shouldn't write an alternative draft opinion that will apply our test in a way more to the liking of the majority of our court. That way I can demonstrate just how easy it is to reach any desired conclusion under our current framework, and the majority of our court can get a jump-start[.]"<sup>16</sup> The footnotes of the "concurring" opinion explained Judge VanDyke's disagreements with the sloppy and biased reasoning in the circuit's *en banc* gun cases.

As predicted, the *McDougall* decision was *en banc*ed a few weeks later, despite neither party having asked for *en banc* review.<sup>17</sup>

<sup>13</sup> *Duncan v. Becerra*, 970 F.3d 1133, 1138 (9th Cir. 2020), rev'd *en banc* sub nom. *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021); *Young v. Hawaii*, 896 F.3d 1044, 1048 (9th Cir. 2018), rev'd *en banc*, 992 F.3d 765 (9th Cir. 2021); *Teixeira v. Cnty. of Alameda*, 822 F.3d 1047 (9th Cir. 2016), rev'd *en banc*, 873 F.3d 670 (9th Cir. 2017); *Peruta v. Cnty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014), rev'd *en banc*, 824 F.3d 919 (9th Cir. 2016); *Richards v. Prieto*, 560 Fed. Appx. 681 (9th Cir. 2014), rev'd *en banc* sub nom. *Peruta v. Cnty. of San Diego*, 824 F.3d 919 (9th Cir. 2016).

<sup>14</sup> *Duncan v. Bonta*, 19 F.4th at 1165–66 (VanDyke, J., dissenting).

<sup>15</sup> *McDougall v. County of Ventura*, 23 F.4th 1095 (9th Cir. 2022).

<sup>16</sup> *Id.* at 1119–20.

<sup>17</sup> 26 F.4th 1016 (9th Cir. Mar. 8, 2022) (*en banc*). After the *Bruen* decision, the Ninth Circuit sent *McDougall* back to the district court, for reconsideration in light of *Bruen*. 38 F.4th 1162 (Mem.) (9th Cir. June 29, 2022).

Dissenting in *Heller* and *McDonald*, Justice Breyer had argued that Second Amendment cases should be decided on what he called “interest balancing.”<sup>18</sup> Breyer interest balancing is similar to intermediate scrutiny, but without intermediate scrutiny’s subrules. Law professor Allan Rostron accurately called the lower courts’ behavior, “Justice Breyer’s Triumph in the Third Battle over the Second Amendment.”<sup>19</sup>

Meanwhile, the Supreme Court stood idle. Every year petitions for certiorari were filed, pointing out how the lower courts were violating *Heller* and *McDonald*. But the petitions were not granted, and the lower courts took the cert denials as a signal to become ever more aggressive in ruling against the Second Amendment. Justice Thomas, sometimes joined by Justices Alito, Neil Gorsuch, or Kavanaugh, dissented five times from the cert denials. Gorsuch and Kavanaugh had joined dissents on the right to bear arms.<sup>20</sup>

But the majority of the Supreme Court acted in only one case after *McDonald*. In 2016 the Court vacated a Massachusetts case upholding a ban on electric stun guns, pointing out that the Massachusetts court’s rationales—that stun guns did not exist in 1791 and are not militia arms—flagrantly contradicted *Heller*.<sup>21</sup>

<sup>18</sup> *Heller*, 554 U.S. at 689–90 (Breyer, J., dissenting).

<sup>19</sup> Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 *Geo. Wash. L. Rev.* 703 (2012). Professor Rostron was formerly an attorney for Handgun Control, Inc., so he was not complaining.

<sup>20</sup> *Jackson v. City & Cnty. of San Francisco*, 576 U.S. 1013, 1013 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (“Despite the clarity with which we described the Second Amendment’s core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it.”); *Silvester v. Becerra*, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting from denial of certiorari) (“[T]he lower courts are resisting this Court’s decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment[.]”); *Friedman v. City of Highland Park*, 577 U.S. 1039 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (discussed *infra*, Part IV.B); *Peruta v. California*, 137 S. Ct. 1995 (2017) (Thomas, J., joined by Gorsuch J., dissenting from denial of certiorari) (“The Court has not heard argument in a Second Amendment case in over seven years. . . . Since that time, we have heard argument in, for example, roughly 35 cases where the question presented turned on the meaning of the First Amendment and 25 cases that turned on the meaning of the Fourth Amendment. This discrepancy is inexcusable, especially given how much less developed our jurisprudence is with respect to the Second Amendment as compared to the First and Fourth Amendments.”); *Rogers v. Grewal*, 140 S. Ct. 1865 (2020) (Thomas, J., partially joined by Kavanaugh, J., dissenting from denial of certiorari).

<sup>21</sup> *Caetano v. Massachusetts*, 577 U.S. 411 (2016) (per curiam). Concurring, Justices Alito and Thomas would have over-ruled the Massachusetts Supreme Judicial Court, rather than vacating and remanding. *Id.* at 412.

By 2020, the situation appeared bleak. That year, the Court had granted certiorari in a case challenging a New York City rule that licensed handgun owners in the city could not take their handguns out of the city—not to a nearby range in New Jersey, nor even to a second home in New York State.<sup>22</sup> The Second Circuit upheld the ban and claimed that it did not involve a Second Amendment issue, or even if the Second Amendment were implicated, the infringement was trivial. The Second Circuit said that the police department’s worries about “road rage” were sufficient to uphold the law, even though the department could not point to a single instance of misconduct by a New York City licensee transporting a handgun.<sup>23</sup>

When the Supreme Court granted certiorari, the New York City and state governments partially relegalized transport outside the city, giving the plaintiffs some but not all of the relief they had sought. Five Democratic U.S. senators—Sheldon Whitehouse (RI), Mazie Hirono (HI), Richard Blumenthal (CT), Richard Durbin (IL), and Kirsten Gillibrand (NY)—sent the Court a threat letter in the form of an amicus brief. They warned that unless the Supreme Court dismissed the case as moot, they would “restructure” the Court.<sup>24</sup>

For whatever reason, six justices complied, while Justices Alito, Gorsuch, and Thomas dissented. A month later, the Supreme Court also dismissed all 10 pending Second Amendment cert petitions. According to CNN, Chief Justice John Roberts had warned his pro-civil rights colleagues that if they took up any gun case, he would vote to uphold the restriction.<sup>25</sup>

The replacement of Justice Ruth Bader Ginsburg with Justice Amy Coney Barrett changed everything. On the Seventh Circuit, Judge Barrett had written a 37-page dissent in *Kanter v. Barr*, in which the other two judges had upheld a lifetime gun ban for a man who had been convicted of mail fraud for selling shoe pad inserts that were

<sup>22</sup> N.Y. State Rifle & Pistol Ass’n v. City of New York, 140 S. Ct. 1525 (2020).

<sup>23</sup> 883 F.3d 45 (2d Cir. 2018).

<sup>24</sup> Br. of Sens. Sheldon Whitehouse et al. as Amici Curiae Supporting Respondents, N.Y. State Rifle & Pistol Ass’n v. City of New York, 140 S. Ct. 1525 (2020) (No. 18-280).

<sup>25</sup> Joan Biskupic, Behind Closed Doors during One of John Roberts’ Most Surprising Years on the Supreme Court, CNN (July 27, 2020), <https://cnn.it/3BuONku> (“Roberts also sent enough signals during internal deliberations on firearms restrictions, sources said, to convince fellow conservatives he would not provide a critical fifth vote anytime soon to overturn gun control regulations. As a result, the justices in June denied several petitions regarding Second Amendment rights.”).

too thin. In Judge Barrett’s view, the history and tradition of the Second Amendment did not allow a lifetime ban for conviction of a non-violent felony.<sup>26</sup>

### III. The *Bruen* Decision

Soon after, the Court granted certiorari in *New York State Rifle & Pistol Association v. Bruen*.<sup>27</sup> Under New York law, an applicant for a carry permit needed to have “a proper cause.”<sup>28</sup> In some counties, permits were issued reasonably, with lawful self-defense being considered a proper cause. But in others, such as Rensselaer County, applicants had to prove “a special need for self-protection distinguishable from that of the general community.”<sup>29</sup>

In an opinion for six justices, including Chief Justice Roberts, Justice Thomas explained, “The constitutional right to bear arms in public for self-defense is not ‘a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.’ We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need.”<sup>30</sup> Hence, New York may not prevent “law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.”<sup>31</sup>

#### A. *Bruen* Adopts Text, History, and Tradition

*Bruen* affirmed that using text, history, and tradition as the basis for a decision is the correct methodology in Second Amendment cases, not interest balancing:

[T]he Courts of Appeals have coalesced around a “two-step” framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. . . .

<sup>26</sup> 919 F.3d 437 (7th Cir. 2019).

<sup>27</sup> N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111 (2022).

<sup>28</sup> N.Y. Penal Law § 400.00(2).

<sup>29</sup> Bruen, 142 S. Ct. at 2123.

<sup>30</sup> *Id.* at 2156 (quoting McDonald, 561 U.S. at 780).

Paul Clement and Erin Murphy were the winning lawyers in *Bruen*. Hours after the opinion was announced, their firm, Kirkland & Ellis, ordered them to cease representation of all Second Amendment clients. Rather than desert clients in ongoing cases, they formed the new D.C. firm of Clement & Murphy.

<sup>31</sup> *Id.* at 2150.



Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history. But *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.<sup>32</sup>

The (Breyerish) two-step test failed because it put judges in the role of policymakers, as if their policy assessments could override the policy choice made by adoption of the Second Amendment:

If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of “intermediate scrutiny” often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here. The Second Amendment “is the very *product* of an interest balancing by the people” and it “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms” for self-defense. It is this balance—struck by the traditions of the American people—that demands our unqualified deference.<sup>33</sup>

Thus, “[w]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.”<sup>34</sup>

## *B. Bruen’s Rules for Analyzing Text, History, and Tradition*

### 1. How the Government Can Meet its Burden of Proof

The burden of proof is thus on the government, which “must affirmatively prove that its firearms regulation is part of the

<sup>32</sup> *Id.* at 2126–27.

<sup>33</sup> *Id.* at 2131 (quoting *Heller*, 554 U.S. at 635) (emphasis in original).

<sup>34</sup> *Id.* at 2129–30.

historical tradition that delimits the outer bounds of the right to keep and bear arms.”<sup>35</sup> This does not mean that judges bear the burden of becoming legal history researchers. As with anything else that the government must prove, the government must present persuasive legal history to the court. “Courts are thus entitled to decide a case based on the historical record compiled by the parties.”<sup>36</sup>

In practice, government production of historic evidence in support of gun control laws has long been outsourced to professional gun control organizations, such as Michael Bloomberg’s “Everytown” or the Giffords Law Center. The groups often provide pro bono assistance to governments defending gun control laws, without formally displacing the government’s own attorneys.

Sometimes, the government and its allies will win because there are many original-era laws that are twins of modern ones—for example prohibiting reckless discharge of a firearm in populated areas. Additionally, the government can prove its case by “analogical reasoning.” This means “a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.”<sup>37</sup>

## 2. The “How” and the “Why” of Burdens on Self-Defense

As the *Bruen* opinion states, “analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check.”<sup>38</sup> “[C]ourts should not ‘uphold every modern law that remotely resembles a historical analogue,’ because doing so ‘risk[s] endorsing outliers that our ancestors would never have accepted.’”<sup>39</sup>

The first question is whether modern gun control and the alleged historical analogue are “relevantly similar.” *Bruen* does not purport to “exhaustively” define how judges may consider similarity.

<sup>35</sup> *Id.* at 2127.

<sup>36</sup> *Id.* at 2130 n.5. “Of course, we are not obliged to sift the historical materials for evidence to sustain New York’s statute. That is respondents’ burden.” *Id.* at 2150.

<sup>37</sup> *Id.* at 2133 (emphasis in original).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (quoting *Drummond v. Robinson*, 9 F.4th 217, 226 (3d Cir. 2021)).

Instead, *Bruen* states that *Heller* and *McDonald* point to “at least two metrics: how and why the regulations burden a law-abiding citizen’s right to armed self-defense.”<sup>40</sup>

“How” means: “whether modern and historical regulations impose a comparable burden on the right of armed self-defense.”<sup>41</sup>

“Why” means: “whether that burden is comparably justified.”<sup>42</sup>

The second metric, the “why,” is immensely important. It prevents historical, burdensome laws that were enacted for one purpose from being used as a pretext to impose burdens for other purposes. As Mark Frassetto, an attorney for Everytown for Gun Safety, writes, “[m]ilitia and fire prevention laws imposed substantial burdens on founding era gun owners.” In his view, courts should uphold laws that impose equally substantial burdens “regardless of the underlying motivation for regulation.”<sup>43</sup> *Bruen* expressly forbids this methodology.

Besides the two most central self-defense metrics from *Heller* and *McDonald*, there are certainly more. As both cases state, the right to arms is for all “lawful purposes.”<sup>44</sup> For example, recreational arms activities, such as hunting or target shooting, are in themselves part of the right. Additionally, they build skills for defense of self and others.

### 3. Why originalism allows analogies

Why not limit modern gun control to only the twins of laws that existed in 1791, when the Second Amendment was ratified, or in 1868 when the Fourteenth Amendment made the Second Amendment enforceable against the states?

Justice Thomas answers: Although a constitutional provision’s “meaning is fixed according to the understandings of those who

<sup>40</sup> *Id.* at 2132–33. *Heller* and *McDonald* declared that “whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are ‘central’ considerations when engaging in an analogical inquiry.” *Id.* at 2133 (citing *McDonald*, 561 U.S. 767).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Mark Frassetto, *The Duty to Bear Arms: Historical Militia Law, Fire Prevention Law, and the Modern Second Amendment*, in *New Histories of Gun Rights and Regulation: Essays on the Place of Guns in American Law and Society* (Jacob Charles, Joseph Blocher & Darrell Miller eds., forthcoming).

<sup>44</sup> *Heller*, 554 U.S. at 625; *McDonald*, 561 U.S. at 78.

ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.”<sup>45</sup>

Does analogical analysis of self-defense burdens and gun control rationales just amount to interest balancing with new language? Justice Thomas says not:

This does not mean that courts may engage in independent means-end scrutiny under the guise of an analogical inquiry. Again, the Second Amendment is the “product of an interest balancing by the people,” not the evolving product of federal judges. Analogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances. . . . It is not an invitation to revise that balance through means-end scrutiny.<sup>46</sup>

“[N]ot all history is created equal.”<sup>47</sup> Most important is the Founding era.<sup>48</sup> For the Fourteenth Amendment, this means Reconstruction.<sup>49</sup> Old English practices that ended long before American independence are of little relevance.<sup>50</sup> Postratification history is “secondary”; it can confirm or illuminate but not contradict or override the original public understanding.<sup>51</sup> The same is true for mid to late 19th century.<sup>52</sup>

### C. *The Nuances of Analogy*

How to deal with technological or societal changes? Per Justice Thomas:

While the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. The regulatory challenges

<sup>45</sup> Bruen, 142 S. Ct. at 2132.

<sup>46</sup> *Id.* at 2133 n.7.

<sup>47</sup> *Id.* at 2136.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868. Fortunately, the Founders created a Constitution—and a Second Amendment—“intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.<sup>53</sup>

It may be argued that mass murders are “unprecedented societal concerns.” Actually, massacres of American settlers by Native Americans were unfortunately common for three centuries, as were massacres of Natives by Americans. As of 1791, it was well known that governments were more likely to massacre victims who had first been disarmed. In the 20th century, over 200 million disarmed victims (not soldiers killed in battle) were murdered by governments. Mass killing is a very serious problem, but it is definitely not unprecedented.

As for “dramatic technological changes,” the 19th century saw a cascade. The century began with muzzle-loading single-shot flintlocks and concluded with semiautomatic rifles and handguns. The 1804 Lewis and Clark expedition carried the Girandoni rifle, which could shoot 22 rounds in 30 seconds. One round could penetrate an inch of wood, or take an elk.<sup>54</sup>

#### *D. What Are Permissible Controls on Bearing Arms?*

As of 1791, carrying a firearm openly was lawful in every state, and so was carrying a concealed firearm. The first state law against concealed carry was enacted by Kentucky in 1813 and was held to violate Kentucky’s constitutional right to arms.<sup>55</sup> However, other states

<sup>53</sup> *Id.* at 2132 (citing *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819)).

<sup>54</sup> Frederick J. Chiaventone, “The Girandoni Air Rifle: The Lewis and Clark Expedition’s Secret Weapon,” Warfare History Network, <https://bit.ly/3S5s3NE>; Nicholas J. Johnson, David B. Kopel, et al., *The Evolution of Firearms Technology from the Sixteenth Century to the Twenty-first Century*, chapter 23 in *Firearms Law and the Second Amendment: Regulation, Rights and Policy* (3d ed. 2022), <https://bit.ly/3Q19tV6>.

<sup>55</sup> *Bliss v. Commonwealth*, 12 Ky. 90 (1822).

passed similar laws, and these were held not to violate the right to bear arms, since open carry was still lawful.<sup>56</sup>

Based on the case law, *Heller* had implied that concealed carry might be outside the protection of the Second Amendment.<sup>57</sup> This was wrong for two reasons. First, the concealed carry cases cited by *Heller* had generally not gone so far; rather, they had simply affirmed legislative discretion to regulate the mode.<sup>58</sup> Second, a holding that open carry is a constitutional right while concealed carry has nothing to do with the Second Amendment would force states that want to (or must) comply with the Second Amendment to authorize open carry only. That would be perfectly fine for social norms in 1870, when some people considered concealed carry to be sneaky and not “manly.” But in the 21st century, social norms are different. If you go to a crowded shopping mall in any of the 44 states that were already respecting the right to arms before *Bruen*, it is likely that at least several people will be carrying handguns, and all those handguns will be concealed. That is how many people like things these days. Peaceable lawful carry is now most socially harmonious when it is concealed carry.<sup>59</sup>

Wisely, *Bruen* accurately characterizes the 19th century concealed carry cases as recognizing legislative discretion on the mode of carry rather than requiring one particular mode.<sup>60</sup> So, for example, Florida since 1987 has issued concealed carry permits fairly, yet bans open carry.<sup>61</sup>

Another important limitation on the right to bear arms is that firearms may be forbidden in certain “sensitive places”:

Consider, for example, *Heller*’s discussion of “longstanding” “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” Although the

<sup>56</sup> *Bruen*, 142 S. Ct. at 2146–48.

<sup>57</sup> *Heller*, 554 U.S. at 626.

<sup>58</sup> Joseph G.S. Greenlee, *Concealed Carry and the Right to Bear Arms*, 20 *Federalist Soc’y Rev.* 32 (2019).

<sup>59</sup> James Bishop, *Hidden or On the Hip: The Right(s) to Carry after Heller*, 97 *Cornell L. Rev.* 907, 908, 926 (2012).

<sup>60</sup> “The historical evidence from antebellum America does demonstrate that *the manner of public carry* was subject to reasonable regulation. . . . States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly.” *Bruen*, 142 S. Ct. at 2150.

<sup>61</sup> *Norman v. State*, 215 So.3d 18 (Fla. 2017) (upholding statute).

historical record yields relatively few 18th- and 19th-century “sensitive places” where weapons were altogether prohibited—*e.g.*, legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions. . . . We therefore can assume it settled that these locations were “sensitive places” where arms carrying could be prohibited consistent with the Second Amendment. And courts can use analogies to those historical regulations of “sensitive places” to determine that modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible.<sup>62</sup>

However, analogies to “sensitive places” cannot be expanded wildly to, say, ban carrying in cities. As Justice Thomas wrote, “expanding the category of ‘sensitive places’ simply to all places of public congregation that are not isolated from law enforcement defines the category of ‘sensitive places’ far too broadly” and would “eviscerate the general right to publicly carry arms for self-defense.”<sup>63</sup>

The sensitive places issue had taken a lot of time at oral argument. For modern analogies, the *Heller* and *Bruen* combined list is schools, government buildings, legislative assemblies, courthouses, and polling places. The *Bruen* text, if read strictly, would seem to limit additions to the list to “new” types of sensitive places. This would rule out carry bans in types of places that were well known in the 18th or 19th centuries, such as municipal parks. At present, there is much variance in state law on sensitive places, even in states that have generally respected the right to bear arms.

#### *E. Fair Permitting Systems Are Constitutional*

When the *Bruen* decision was issued, the right to bear arms was respected in 44 states. One of them, Vermont, has never required a permit for either concealed or open carry and does not issue permits.<sup>64</sup> In most states, open carry without a permit was lawful and had long

<sup>62</sup> *Bruen*, 142 S. Ct. at 2133 (citing David B. Kopel & Joseph G.S. Greenlee, The “Sensitive Places” Doctrine: Locational Limits on the Right to Bear Arms, 13 *Charleston L. Rev.* 205, 229–36 (2018), and Br. for Independent Institute as Amicus Curiae Supporting Petitioners, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843)).

<sup>63</sup> *Bruen*, 142 S. Ct. at 2134.

<sup>64</sup> *State v. Rosenthal*, 75 Vt. 293 (1903).

been so.<sup>65</sup> *Bruen*, however, focused on concealed carry, for which laws are typically more restrictive. According to *Bruen*, 43 states had a “shall-issue” system for licensed concealed carry, mandating that the licensing authority shall issue a concealed carry permit to applicants who meet certain specific standards.<sup>66</sup> As previously noted, concealed carry permits are not necessary in 25 of the 44, as those states allow permitless “constitutional carry.”

Even though permits were not needed in 1791, *Bruen* holds that shall-issue licensing is constitutional:

To be clear, nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States’ “shall-issue” licensing regimes, under which “a general desire for self-defense is sufficient to obtain a [permit].” . . . Because these licensing regimes do not require applicants to show an atypical need for armed self-defense, they do not necessarily prevent “law-abiding, responsible citizens” from exercising their Second Amendment right to public carry.<sup>67</sup>

Shall-issue systems are based on narrow and objective criteria:

[I]t appears that these shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, “law-abiding, responsible citizens.” And they likewise appear to contain only “narrow, objective, and definite standards” guiding licensing officials, rather than requiring the “appraisal of facts, the exercise of

<sup>65</sup> Open carry in the United States, Wikipedia <https://bit.ly/3b8Pbu3> (last visited Aug. 1, 2022).

<sup>66</sup> Three of these 43 (Conn., R.I., and DE) have statutes that seemed to read like “may issue,” but practice and judicial precedents made these three states functionally “shall issue.” See *Dwyer v. Farrell*, 193 Conn. 7, 12 (1984) (“suitable person” denials are only for “individuals whose conduct has shown them to be lacking the essential character of temperament necessary to be entrusted with a weapon.”); *Gadomski v. Tavares*, 113 A.3d 387, 392 (R.I. 2015) (“Demonstration of a proper showing of need” is not part of the licensing process); Eugene Volokh, 43 States to 6 States, Says the S. Ct. about Shall-Issue Concealed Carry Rules: What’s the Missing State?, Volokh Conspiracy (June 25, 2022), <https://bit.ly/3oIFB4v> (concealed carry licenses are issued at a high rate in Delaware, and unlicensed open carry is lawful).

<sup>67</sup> *Bruen*, 142 S. Ct. at 2138 n.9 (citing *Drake v. Filko*, 724 F.3d 426, 442 (3d Cir. 2013) (Hardiman, J., dissenting); *Heller*, 554 U.S. at 635).



judgment, and the formation of an opinion”—features that typify proper-cause standards like New York’s.<sup>68</sup>

The language about law-abiding “citizens” should not be taken hyperliterally. Post-*Heller* cases have long made it clear that states may not discriminate in carry permits against legal resident aliens.<sup>69</sup>

Narrow and objective criteria are not the only requisites of a constitutionally compliant permit system:

[B]ecause any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry.<sup>70</sup>

Allegedly “exorbitant” fees will be litigated in the future. Georgetown law professor Randy Barnett described the \$505 cost of obtaining a D.C. permit, and, thereafter \$235 triennially for permit renewals. In Barnett’s view, some of the mandatory training was essential information for students to know about D.C.’s rules about deadly force, sensitive places, and so on. But he considered the 18 hours of training to be excessive—and mainly for the purpose of erecting barriers to applicants. Unlike many jurisdictions, D.C. mandates that all the training must take place in person in classrooms. Many other states allow training online at one’s own pace, plus in-person live fire training at a range. “I can afford all this, of course, though I cannot say the same for all other citizens of D.C.,” Barnett concluded.<sup>71</sup>

#### *F. Legal Tradition*

By a wide margin, the New York attorney general and her amici allies failed to carry their burden of proving a tradition of prohibiting peaceable carry. Much of the supposed historical evidence was based on the imaginative but unreliable writings of Fordham history professor Saul Cornell.

<sup>68</sup> *Id.* (citations omitted).

<sup>69</sup> See, e.g., *Fletcher v. Haas*, 851 F. Supp. 2d 287 (D. Mass. 2012).

<sup>70</sup> *Bruen*, 142 S. Ct. at 2138 n.9.

<sup>71</sup> Randy Barnett, *A Minor Impact on Gun Laws but a Potentially Momentous Shift in Constitutional Method*, SCOTUSBlog (June 27, 2022), <https://bit.ly/3ByF3Wc>.

New York and others pointed to the 1328 English Statute of Northampton, which they claimed prohibited peaceable carry of all arms. But that statute was authoritatively interpreted in *Sir John Knight's Case* in 1686. Consistent with English practice in the 17th century, and in following centuries, the chief judge stated that the statute applied only to carrying "*malo animo*"—with evil intent.<sup>72</sup> Two colonial statutes copied some of the Northampton language to forbid carrying "Offensively"—again, a ban on misconduct only.<sup>73</sup>

For a few years in the late 17th century, the short-lived colony of East Jersey (separate from West Jersey) banned concealed carry and also forbade frontiersmen from carrying handguns at all, while allowing them to carry long guns. This "solitary" example, lasting "[a]t most eight years," was not enough to create a tradition.<sup>74</sup>

In the 19th century, statutes in nine states stated that someone whose carrying threatened to cause a breach of the peace could continue carrying only if he posted a bond for good behavior. But he could carry without need for a bond for self-defense against a specific threat or for militia duty. These laws presumed that people could carry; if a court found someone was behaving dangerously, he could be ordered to post a bond for peaceable behavior.<sup>75</sup> A study by George Mason law professor Robert Leider found that such surety statutes were enforced only against people engaged in other misconduct, except for a handful of possibly pretextual cases against black people.<sup>76</sup> To the arguable extent there was ambiguity about the above, the ambiguity did not meet New York's burden of proof.

After the Civil War, Texas enacted a statute that prohibited handgun carrying in most situations, while imposing no restriction on long gun carrying. The Texas Supreme Court upheld the statute in

<sup>72</sup> *Rex v. Sir John Knight*, 90 Eng. Rep. 330, 330 (K.B. 1686); Bruen, 142 S. Ct. at 2139–41.

<sup>73</sup> Bruen, 142 S. Ct. at 2142–43. The same was true for three post-Independence state statutes. *Id.* at 2144–45.

<sup>74</sup> *Id.* at 2143–44.

<sup>75</sup> *Id.* at 2148–50.

<sup>76</sup> *Id.* at 2149–50, citing Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms*, in *New Histories of Gun Rights and Regulation: Essays on the Place of Guns in American Law and Society* (Joseph Blocher, Jacob D. Charles & Darrell A.H. Miller eds., forthcoming). For a short overview, see Robert Leider, *The Myth of the 'Massachusetts Model'*, *Duke Center for Firearms Law* (June 16, 2022).

two cases.<sup>77</sup> In the latter 19th century, five of the western territories had statutes against handgun carrying in cities, but the territorial statutes were repudiated by the adoption of state constitutions guaranteeing the right to bear arms. Besides, “late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence.”<sup>78</sup> The “few late-19th-century outlier jurisdictions” were insufficient to prove that bearing arms for lawful defense was outside the American historical tradition.<sup>79</sup>

Broad state restrictions on peaceable carry did become more common in the 20th century, most famously with the 1911 New York “Sullivan Act” at issue in *Bruen*. But, “[a]s with their late-19th-century evidence, the 20th-century evidence presented by respondents and their amici does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence.”<sup>80</sup>

### *G. Three Concurrences*

While joining Justice Thomas’s opinion in full, Justice Kavanaugh wrote a concurring opinion, joined by Chief Justice Roberts. They stated that “a mental health records check” could be part of a shall-issue system.<sup>81</sup> They also reiterated the continuing validity of two paragraphs from *Heller* and *McDonald* that had created a rebuttable presumption in favor of certain gun control laws: “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 imposing conditions and qualifications on the commercial sale of arms.”<sup>82</sup> The concurrence repeated the *Heller* and *McDonald* language that the Second

<sup>77</sup> *Bruen*, 142 S. Ct. at 2153; *English v. State*, 35 Tex. 473, 480 (1872) (bemoaning “the early customs and habits of the people of this state,” and tracing the problem to Spanish law and its Carthaginian, Visigoth, and Arab influences); *State v. Duke*, 42 Tex. 455 (1875). West Virginia enacted a similar statute in 1887, based on the defective theory that the right to bear arms did not include handguns. *Bruen*, 142 S. Ct. at 2153.

<sup>78</sup> *Id.* at 2154.

<sup>79</sup> *Id.* at 2147 n.22, 2153–55.

<sup>80</sup> *Id.* at 2154 n.28.

<sup>81</sup> *Id.* at 2162 (Kavanaugh, J., concurring).

<sup>82</sup> *Id.*

Amendment right is for arms “in common use,” not “dangerous and unusual weapons.”<sup>83</sup>

While also joining the *Bruen* opinion in full, Justice Alito concurred to respond to the dissent. As he pointed out,

Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess. Nor have we disturbed anything that we said in *Heller* or *McDonald v. Chicago*, about restrictions that may be imposed on the possession or carrying of guns.<sup>84</sup>

The most “law and order” justice of the present Court, Justice Alito may be much less sympathetic than Justice Barrett to challenges to federal laws imposing lifetime gun bans for nonviolent crimes.<sup>85</sup>

Justice Alito criticized the dissent’s laundry list of the harmful effects of gun misuse, such as mass shootings, domestic violence, or suicide, which had nothing to do with the law in question, that is, whether to grant carry licenses to adults who pass background checks and safety training. Alito asked of Justice Breyer’s dissent: “Will a person bent on carrying out a mass shooting be stopped if he knows that it is illegal to carry a handgun outside the home? . . . Does the dissent think that a lot of people who possess guns in their homes will be stopped or deterred from shooting themselves if they cannot lawfully take them outside?”<sup>86</sup> Notwithstanding the dissent’s cherry-picked statistics from gun control activists, the full body of social science data showed that shall-issue laws are either socially beneficial or not harmful.<sup>87</sup> As Alito summarized, “the real thrust of today’s dissent is that guns are bad and that States and local jurisdictions should be free to restrict them essentially as they see fit.”<sup>88</sup>

Also joining the majority opinion, Justice Barrett pointed out some unsettled issues about historical analysis. For example, “How long

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 2157 (Alito, J., concurring).

<sup>85</sup> This perhaps is part of the reason why the Court denied two cert petitions challenging lifetime bans on nonviolent felons. *Folajtar v. Garland*, 141 S. Ct. 2511 (2021); *Holloway v. Garland*, 141 S. Ct. 2511 (2021).

<sup>86</sup> *Bruen*, 142 S. Ct. at 2157.

<sup>87</sup> *Id.* at 2158 n.1.

<sup>88</sup> *Id.* at 2160–61.

after ratification may subsequent practice illuminate original public meaning?" Should courts rely on original understanding as of 1791, when the Second Amendment was ratified, or also 1868, when the Fourteenth Amendment made the Second Amendment enforceable against the States? In Justice Barrett's view, "today's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights. On the contrary, the Court is careful to caution 'against giving postenactment history more weight than it can rightly bear.'"<sup>89</sup>

#### H. Justice Breyer's Dissent

Joined by Justices Elena Kagan and Sonia Sotomayor, Justice Breyer argued in favor of the old two-part test because courts should be specially deferential to gun control laws since guns are dangerous.<sup>90</sup> As Justice Alito had pointed out in *McDonald*, and Justice Thomas reiterated in *Bruen*, the criminal procedure protections in the Bill of Rights can also be dangerous.<sup>91</sup> They set some dangerous, guilty criminals free, and some of those criminals later perpetrate more harm.

Whereas Justice Breyer's *Heller* dissent had carefully summarized the pro/con social science evidence about handguns, the *Bruen* dissent acknowledges none of the evidence from the briefs that handgun carry by responsible persons sometimes saves lives and stops crime.<sup>92</sup> The strongest part of the Breyer dissent in *Heller* was the criticism of the majority's ipse dixit (requoted by the Kavanaugh concurrence in *Bruen*) granting a safe harbor to certain types of modern gun control laws, even though some of those laws have a weak basis in pre-1900 history and tradition.<sup>93</sup> In this respect, Justice Breyer implicitly showed that living constitutionalism does influence even mostly originalist opinions. The same point could have been made about the *Bruen* majority's blessing of shall-issue

<sup>89</sup> *Id.* at 2162–63 (Barrett, J., concurring) (quoting *Espinosa v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2136 (2020)).

<sup>90</sup> *Id.* at 2164 (Breyer, J., dissenting).

<sup>91</sup> *Id.* at 2126 n.3 (quoting *McDonald*, 561 U.S. at 783).

<sup>92</sup> *Heller*, 554 U.S. at 696–703 (Breyer, J., dissenting).

<sup>93</sup> *Bruen*, 142 S. Ct. at 2162 (reiterating the argument from *Heller*). For an extended critique of *Heller* on this issue, see Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 *UCLA L. Rev.* 1343 (2009).

licensing laws. The first such law was Washington State in 1961.<sup>94</sup> The norm from the Jamestown settlement in 1607 to 1900 was permitless handgun carry, with the legislature having the authority to regulate the mode of carry.

A purely originalist *Bruen* decision would have told states to adopt permitless carry and, in a concession to postratification tradition, allowed states to choose whether that permitless carry would be open or concealed. Besides the six states directly affected by *Bruen*, such an originalist decision would have affected the laws of Minnesota, South Carolina, Connecticut, and Rhode Island (all of which require a shall-issue license for open or concealed carry), and Florida (shall issue for concealed carry, open carry forbidden).<sup>95</sup> As in *Heller*, originalism partly gave way to practicality.

#### IV. What Next for the Second Amendment?

##### A. Right to Bear Arms

After *Brown v. Board of Education*, some jurisdictions adhered to the rule of law, and some did not. Following the *Bruen* decision, Massachusetts, New Jersey, Maryland, and Hawaii seem to be following the law. Officials in those states have instructed licensing administrators to issue concealed carry permits under existing procedures, while omitting any requirement that the applicant prove some sort of special need.<sup>96</sup>

After *Brown*, a notable noncomplier was Mississippi Gov. Ross Barnett (1960–64). As his campaign song promised, “[h]e’s not a moderate like some of the gents. He’ll fight integration with forceful intent.”<sup>97</sup> After *Bruen*, a notable noncomplier is New York Gov. Kathy Hochul. She also follows in the footsteps of her predecessor, Andrew Cuomo. Both passed their big gun control bills by sending a “message

<sup>94</sup> Wash. RCW 9.41.070.

<sup>95</sup> Open carry in the United States, Wikipedia <https://bit.ly/3Q31kPV> (last visited Aug. 1, 2022).

<sup>96</sup> Mass. Att’y Gen. and Exec. Off. of Pub. Safety, Joint Advisory Regarding the Massachusetts Firearms Licensing System after the Supreme Court’s Decision in *New York State Rifle & Pistol Association v. Bruen*; Md. Att’y Gen., letter to Captain Andrew Rossignol, Commander of the Maryland State Police Licensing Division; N.J. Att’y Gen. Enforcement Directive No. 22-07; Haw. Att’y Gen., Op. No. 22-02 (July 7, 2022).

<sup>97</sup> Ross Barnett, Wikipedia <https://bit.ly/3PW5f12> (last visited Aug. 1, 2022).

of necessity”—a maneuver to prevent legislative hearings and to deprive legislators of time to read a bill before they vote on it.

As the New York State Sheriffs’ Association explained:

The new firearms law language first saw the light of day on a Friday morning and was signed into law Friday afternoon. A parliamentary ruse was used to circumvent the requirement in our State Constitution that Legislators—and the public—must have three days to study and discuss proposed legislation before it can be taken up for a vote. The Legislature’s leadership claimed, and the Governor agreed, that it was a “necessity” to pass the Bill immediately, without waiting the Constitutionally required three days, even though the law would not take effect for two full months.<sup>98</sup>

The Sheriffs’ Association criticized “thoughtless, reactionary action, just to make a political statement,” and “the burdensome, costly, and unworkable nature of many of the new law’s provisions.”<sup>99</sup> “We do not support punitive licensing requirements that aim only to restrain and punish law-abiding citizens who wish to exercise their Second Amendment rights.”<sup>100</sup>

New York county clerks had no opinion on gun policy but focused instead on workability. As the Association of Clerks wrote to the governor, “[i]n haste to pass the new regulations as a reaction to the recent United States Supreme Court ruling, the process as it stands now will be riddled with complex, confusing and redundant barriers of compliance.”<sup>101</sup>

<sup>98</sup> New York State Sheriffs’ Association, “Statement Concerning New York’s New Firearms Licensing Laws,” July 6, 2022. The N.Y. Constitution states:

No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the governor, or the acting governor, shall have certified, under his or her hand and the seal of the state, the facts which in his or her opinion necessitate an immediate vote thereon[.]

N.Y. Const., art. III, §14.

<sup>99</sup> Statement of Sheriffs’ Association, *supra* note 98.

<sup>100</sup> *Id.*

<sup>101</sup> Wendy Wright, NY County Clerks Question Feasibility of Enacting Gun Permit Changes, SpectrumLocalNews (Rochester) (July 18, 2022), <https://bit.ly/3zIXomJ>.

But the governor was moving too fast to care about reality. A reporter asked her, “do you have the numbers to show that it’s the concealed carry permit holders that are committing crimes?” She answered, “I don’t need to have a data point to say this. I know that I have a responsibility of this state to sensible gun safety laws[.]”<sup>102</sup> Where will concealed carry permit holders be allowed to carry? “Probably some streets,” she explained.<sup>103</sup> This directly contradicts *Bruen’s* rule that “expanding the category of ‘sensitive places’ simply to all places of public congregation that are not isolated from law enforcement defines the category . . . far too broadly.”<sup>104</sup>

Yet the first reason why the new New York law is unconstitutional has nothing to do with the right to *bear* arms. The law designates an enormous variety of places as “sensitive locations.” Not only does the law prohibit concealed carry licensees from bringing their guns into these locations, the law makes felons of proprietors, owners, and employees who simply possess arms in the location.<sup>105</sup> Thus, a doctor who runs her own practice cannot have a handgun in a lock box in her office. A church cannot have volunteer security guards, such as the former police officer who thwarted a mass shooter at the New Life Church in Colorado Springs in 2007.<sup>106</sup> The same goes for every school of any level, government or independent, regardless of what the school wants.

Under the new law, licensed carry is also banned in all forms of public transportation, including in one’s own car on a ferry. All these restrictions defy *Bruen’s* rule that “*new*” (emphasis in original) types of “sensitive places” may be authorized by analogy to sensitive places from the 19th century and before. Ferries, churches, and doctors’ offices are not “*new*,” nor are restaurants with a liquor license that serve meals to customers who don’t order drinks. Nor are

<sup>102</sup> Anne McCloy, Hochul Won’t Allow NYS to Become “Wild West,” Defends New Proposed Limits on Conceal-Carry, CBS6 (Albany) (June 29, 2022), <https://bit.ly/3OYONfO>.

<sup>103</sup> Luis Ferré-Sadurní & Grace Ashford, N.Y. Democrats to Pass New Gun Laws in Response to Supreme Court Ruling, N.Y. Times (June 30, 2022), <https://nyti.ms/3OOZL7L>.

<sup>104</sup> *Bruen*, 142 S. Ct. at 2135.

<sup>105</sup> N.Y. Penal Law § 265.01-e.

<sup>106</sup> CNN, Security Guard Who Stopped Shooter Credits God (Dec. 10, 2007), <https://cnn.it/3OMS15L>; Judy Keen & Andrea Stone, This Month’s Mass Killings a Reminder of Vulnerability, USA Today (Dec. 21, 2007); Jeanne Assam, God, The Gunman & Me (2010). New Life Church is a megachurch; there were thousands of worshippers present in the sanctuary when the killer entered.



entertainment facilities. Firearms possession is also forbidden at “any gathering of individuals to collectively express their constitutional rights to protest or assemble.”<sup>107</sup> In other words, if two dozen members of the county branch of New York’s Conservative Party gather anywhere (even in a private home) for a meeting, they may not protect themselves.

Beyond the enumerated list of sensitive locations, bringing a gun into *any* building is a felony unless the owner has posted a permission sign or granted express permission.<sup>108</sup> And permit applicants must submit “a list of former and current social media accounts of the applicant from the past three years.”<sup>109</sup>

In California, S.B. 918, presently before the legislature, would expand no-carry areas in a manner similar to New York’s. For the time being, California Attorney General Rob Bonta has urged county sheriffs to apply the statutory “good moral character” test on the model of the Riverside County Sheriff’s Department: “Legal judgments of good moral character can include . . . absence of hatred and racism, fiscal stability[.]”<sup>110</sup> The attorney general added that “social media accounts” were fair game for inquiry. Further, denials could be based on “[a]ny arrest in the last five years, regardless of the disposition,” or any conviction in the last seven.<sup>111</sup>

UCLA law professor Eugene Volokh suggests that it is plainly unconstitutional to deny the exercise of constitutional rights because of an arrest without a conviction. Likewise, under the First Amendment, “[t]he government can’t restrict ordinary citizens’ actions—much less their constitutionally protected actions—based on the viewpoints that they express.”<sup>112</sup> For example, some people, such as followers of author Robin DiAngelo, believe that white people are inherently and irredeemably toxic. Other people, such as many

<sup>107</sup> N.Y. Penal Law § 265.01-e(s).

<sup>108</sup> *Id.* at § 265.01–d.

<sup>109</sup> *Id.* at § 400 1.

<sup>110</sup> Cal. Dep’t of Justice, Off. of the Att’y Gen., “U.S. Supreme Court’s Decision in *New York State Rifle & Pistol Association v. Bruen*, No. 20-843,” OAG-2022-02, June 24, 2022.

<sup>111</sup> *Id.*

<sup>112</sup> Eugene Volokh, *State Attorney General Suggests Considering Applicants’ Ideological Viewpoints in Denying Carry Licenses*, Volokh Conspiracy (June 26, 2022), <https://bit.ly/3OFsbk3>.

in Hollywood, express hatred of conservatives. Wrongful as these views might be, under the First Amendment they are not a lawful basis for government retaliation. Volokh is also skeptical about the denial of rights for “[l]ack of ‘fiscal stability’—which may simply mean being very poor or insolvent.”<sup>113</sup> Indeed, poor people are generally at greater risk of criminal attack than are wealthier people.

*B. The Remanded Cases on Bans of Common Arms*

As previously noted, after *Bruen*, the Supreme Court granted, vacated, and remanded several cases.<sup>114</sup> In the California magazine confiscation case, the Ninth Circuit shipped the case back to district court. Judge Patrick Bumatay dissented, preferring to hear what the parties had to say about whether the circuit should just redecide the case itself rather than sending to a lower court for eventual appeal.<sup>115</sup> In the New Jersey magazine confiscation case, the Third Circuit did ask for party briefs “addressing the proper disposition of this matter in light of” *Bruen*. The Fourth Circuit has not yet acted on the remand of the Maryland ban on common semiautomatic rifles.

In 2011, then-Judge Kavanaugh wrote a dissenting opinion concluding that bans like those above were unconstitutional under *Heller*’s text, history, and tradition methodology.<sup>116</sup> In a 2015 dissent from denial of certiorari, Justice Thomas (joined by Justice Scalia) argued that bans on common firearms, such as AR platform semiautomatic rifles, plainly violated *Heller* and *McDonald*.<sup>117</sup> However, Justice Alito’s *Bruen* concurrence expressly reserved the issue of “the kinds of weapons that people may possess.”<sup>118</sup>

<sup>113</sup> *Id.*

<sup>114</sup> See *supra* note 1.

<sup>115</sup> Eugene Volokh, Ninth Circuit Panel Sends California ‘Assault Weapons’ Ban Challenge Back to District Court, Volokh Conspiracy (June 28, 2022), <https://bit.ly/3PHQhMn>.

<sup>116</sup> *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1285–91 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (semiautomatic long gun ban unconstitutional under any test); *id.* at 1296 n.20 (urging remand for “whether magazines with more than 10 rounds have traditionally been banned and are not in common use”).

<sup>117</sup> *Friedman v. City of Highland Park*, 577 U.S. 1039 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari).

<sup>118</sup> *Bruen*, 142 S. Ct. at 2157.

In the remands, the lower courts will presumably examine the history of bans on particular types of arms, as well as ammunition capacity laws. Before 1900, there were no ammunition capacity limits. The first such laws were enacted by six states during Prohibition in the 1920s. All were later repealed, and all were less onerous than the California or New Jersey bans.<sup>119</sup>

The first American law against repeating firearms was enacted by Florida in 1893 after incidents in which armed black men had deterred lynch mobs. The new law required a license and an exorbitant bond to carry a “Winchester rifle or other repeating rifle.” Handguns were added in 1901.<sup>120</sup> In 1941, a Florida Supreme Court justice wrote:

The statute was never intended to be applied to the white population and in practice has never been so applied. . . . [T]here has never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and nonenforceable if contested.<sup>121</sup>

The racist statute was repealed in 1987 by the same bill that created Florida’s nationally influential shall-issue law for concealed carry licensing.<sup>122</sup>

Once “redeemed” white racist governments regained control over Tennessee and Arkansas after the end of Reconstruction, they banned concealable handguns, and the bans were upheld by state courts.<sup>123</sup> Given that *Bruen* affirms the right to carry a concealed handgun, these precedents are invalid.

## **V. Conclusion: Other Implications of *Bruen***

Between *Heller* in 2008 and *Bruen* in 2022, a very large number of lower court cases were decided under the now-defunct two-step test. Theoretically, the issues in every one of those cases are now

<sup>119</sup> David B. Kopel, *The History of Firearms Magazines and of Magazine Prohibition*, 78 *Albany L. Rev.* 849 (2015).

<sup>120</sup> Fla. Laws 1893, ch. 4147, § 1, amended by Fla. Laws 1901, ch. 4928, § 1. The 1893 statute had said “carry or own,” but was narrowed to “carry” in 1901.

<sup>121</sup> *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring) (agreeing with majority holding that statute does not apply to automobile carry).

<sup>122</sup> 1987 Fla. Laws ch. 24, § 4.

<sup>123</sup> *State v. Wilburn*, 66 *Tenn.* (7 *Bax.*) 57 (1872); *Fife v. State*, 31 *Ark.* 455 (1876).

open for relitigation under text, history, and tradition. These issues include:

*Prohibited persons.* Various people are prohibited from having a firearm, such as felons and people who have been convicted of a misdemeanor domestic violence offense. Challenges to these categories have little chance of success. Under the text, history, and tradition test, analogies can be drawn to historical laws disarming perceived dangerous persons, namely slaves, hostile Native Americans, and persons who support the enemy during wartime.<sup>124</sup>

*Red flag laws.* Red flag laws purport to identify potentially dangerous people (such as a possible mass shooter) and take away their guns. Proponents will argue that the surety of the peace statutes from the 19th century are historical analogues.<sup>125</sup> But modern red flag laws are much harsher, in that they confiscate arms rather than requiring the person to post a bond. Further, due process protections in red flag laws are much weaker than in the surety statutes.<sup>126</sup> Yet some courts might consider the surety laws a good enough analogy.

*Special restrictions on 18–20 year-olds.* During the colonial period, the most typical age for militia service (with militiamen required to bring their own arms to service) was 16–60. The minimum militia age was raised to 18 by the 1792 Militia Act, and many states followed suit. The first age-based restriction was an 1856 Alabama statute against giving handguns to male minors. By 1900, a significant minority of states had enacted some sort of limit on handgun sales to minors. There were few such laws for long guns.<sup>127</sup> In 2021, the Fourth Circuit held unconstitutional a federal statute barring young adults from buying handguns from licensed handgun stores, but the case was later vacated as moot after the plaintiffs turned 21.<sup>128</sup> This year, a three-judge panel of the Ninth Circuit ruled against a

<sup>124</sup> Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249 (2020).

<sup>125</sup> Discussed *supra*, Part III.F.

<sup>126</sup> David B. Kopel, *Red Flag Laws: Proceed with Caution*, 45 L. & Psychol. Rev. 39 (2021).

<sup>127</sup> David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. Ill. U. L.J. 495 (2019).

<sup>128</sup> *Hirschfeld v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 5 F.4th 407 (4th Cir. 2021), vacated as moot, 14 F.4th 322.

California law banning young adults from acquiring centerfire semiautomatic rifles.<sup>129</sup>

*Handgun bans.* California and several other states have laws forbidding the sale of all handguns, except to those on a government roster. California's onerous subrules have banned hundreds of models of older guns (whose manufacturers are no longer in business to submit exemplars to the state), and all new semiautomatic pistol models since 2013 (by requiring manufacturers to make guns that double-microstamp cartridges, which is technically impossible). The Supreme Court denied certiorari on the microstamping question in 2020.<sup>130</sup> Under a straightforward application of *Heller*, the law should have speedily been held unconstitutional. There is no pre-1900 precedent for such a law, other than, arguably, the now-unconstitutional Tennessee and Arkansas bans on concealable handguns.

Whatever happens in future cases, *New York State Rifle & Pistol Association v. Bruen* has established a more level playing field. Going forward, the personal views of judges on gun policy will matter less. Instead, judicial decisions will be based on analysis of the historical facts of the American right to keep and bear arms.

When Justice Thomas joined the Court, many fields of constitutional law were overgrown with thickets of precedent that had obscured their original public meaning. A quarter century ago, Justice Thomas called attention to the long-neglected Second Amendment, for which the Court's precedent was thin. This year, the Supreme Court of the United States affirmed the third of the three essentials of the right to arms: the right to keep (*Heller*), the right to bear (*Bruen*), and the application to governments at all levels (*McDonald*).

When my Second Amendment work for the Cato Institute began in 1988, things did not look so sanguine. But judicial engagement with the Second Amendment has improved immensely since then. Some things do get better.

<sup>129</sup> *Jones v. Bonta*, 34 F.4th 704 (9th Cir. 2022).

<sup>130</sup> *Pena v. Lindley*, 898 F.3d 969 (9th Cir. 2018), cert denied sub nom. *Pena v. Horan*, 141 S. Ct. 108 (2020). Cf. *Nat'l Shooting Sports Found., Inc. v. State*, 5 Cal. 5th 428, 420 P.3d 870 (2018) (California statute that "The law never requires impossibilities" applies only when individual circumstances make an act impossible; it does not apply to acts that no one can perform).

