

## NYSRPA v. BRUEN: A SUPREME COURT VICTORY FOR THE RIGHT TO KEEP AND BEAR ARMS—AND A STRONG REBUKE TO “INFERIOR COURTS”

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On June 23, 2022, the U.S. Supreme Court decided its first Second Amendment firearms case in over a decade. Its decision is enormously consequential—and highly encouraging for those who wish to see the individual right to keep and bear arms enforced according to its text. Building on *District of Columbia v. Heller*<sup>2</sup> and *McDonald v. Chicago*,<sup>3</sup> the Court held in *New York State Rifle & Pistol Association v. Bruen*<sup>4</sup> that the Second Amendment’s protection of “the right to keep and bear arms”<sup>5</sup> extends to individual self-defense outside the home. While that may seem obvious and uncontroversial given the text of “to bear arms,” some lower courts provided limited constitutional protections to the right by effectively treating it as a privilege—the *en banc* Ninth Circuit even going so far as to hold that there is no right to carry arms outside the home at all.<sup>6</sup>

*Bruen* further held that an individual’s ability to obtain a carry license cannot be conditioned on her ability to convince a government official that she faces some “special need for armed self-defense” that is different from the defense needs of the general populace.<sup>7</sup> Six states, including New York, had denied the Second Amendment right to carry to the majority of their citizens—in some states nearly all citizens—by applying an amorphous, discretionary test requiring the applicant to show a special need to carry a firearm.<sup>8</sup> In contrast to these outlier regimes, the Court cited with approval the forty-three states that have “shall-issue” permitting regimes, in which carry licenses or permits must be issued to anyone who meets specific, objective criteria.<sup>9</sup>

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<sup>2</sup> 554 U.S. 570 (2008).

<sup>3</sup> 561 U.S. 742 (2010).

<sup>4</sup> 142 S. Ct. 2111 (2022).

<sup>5</sup> U.S. CONST. amend. II.

<sup>6</sup> *Young v. Hawaii*, 992 F.3d 765, 813 (9th Cir. 2021) (en banc) (holding that “we can find no general right to carry arms into the public square for self-defense”), *cert. granted, vacated, and remanded* Jun. 30, 2022; see also *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011) (holding that “outside the home, firearm rights have always been more limited”).

<sup>7</sup> *Bruen*, 141 S.Ct. at 2122.

<sup>8</sup> *Id.* at 2123 n.2.

<sup>9</sup> *Id.* at 2124 n.1.

These holdings alone would go far to overcome the Second Amendment's treatment as a "disfavored right"<sup>10</sup> and "constitutional orphan"<sup>11</sup> by the lower courts. At a stroke, the Court invalidated the outlier "may-issue" approach in the six states and effectively required them to replace those restrictive regimes with "shall-issue" systems like those in the forty-three other states. As the Court noted, "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.'"<sup>12</sup> They are thus consistent with the Second Amendment, to the extent they "contain only 'narrow, objective, and definite standards' guiding licensing officials" rather than discretionary standards that require the "exercise of judgment" on the part of the licensing officer.<sup>13</sup>

However, several of the six restrictive states whose laws were effectively invalidated in *Bruen*, including New York itself, moved immediately to circumvent the decision and to deprive their citizens of any effective right to self-defense in public. New York has done this in two major ways. The first is to enormously expand the places in which a person with a valid license cannot carry a firearm for self-defense. In *Heller*, the Court stated that nothing in that opinion should be construed to cast doubt on "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."<sup>14</sup> "Sensitive places" is a euphemism for government-created gun free zones. But in *Bruen*, the Court recognized that there were relatively few sensitive places during the 18<sup>th</sup> and 19<sup>th</sup> centuries where carry could be altogether prohibited. The Court pointed to only three specific, historically supported, government-related locations where firearms were restricted: "legislative assemblies, polling places, and courthouses."<sup>15</sup> Yet New York has proposed to take things much further than the government-specific locations identified by the Court; New York has declared that "sensitive places" include, among many others:

- any place of worship or religious observation;
- libraries, public playgrounds, zoos, and public parks (which presumably would include New York City's Central Park);
- nursery schools, preschools, and summer camps;
- any place used for performances, art, entertainment, gaming, or sporting events such as theaters, stadiums, racetracks, museums, amusement parks, performance venues, concerts, exhibits, conference centers, banquet halls, licensed gaming facilities, and video lottery terminal facilities;
- the location of any program licensed, regulated, certified, operated, or funded by any of five listed state offices and departments;
- any place, conveyance, or vehicle used for public transportation or public transit, subway cars, train cars, buses, ferries, railroad, omnibus, marine or aviation

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<sup>10</sup> *Silvester v. Becerra*, 138 S.Ct. 945, 945 (2018) (Thomas, J., dissenting from denial of certiorari).

<sup>11</sup> *Id.* at 952.

<sup>12</sup> *Bruen*, 141 S.Ct. at 2138 n.9.

<sup>13</sup> *Id.*

<sup>14</sup> *Heller*, 554 U.S. at 626.

<sup>15</sup> *Bruen*, 141 S.Ct. at 2133.

- transportation; or any facility used for or in connection with service in the transportation of passengers, airports, train stations, subway and rail stations, and bus terminals;
- any establishment issued a license for on-premises consumption of alcohol or cannabis;
  - any gathering of individuals to collectively express their constitutional rights to protest or assemble;
  - the area commonly known as Times Square, as such area is determined and identified by the city of New York; and
  - any location providing health, behavioral health, or chemical dependence care or services.<sup>16</sup>

Possession of a firearm in these locations is now a felony, even for individuals holding a concealed carry license.<sup>17</sup> Tellingly, only one location was viewed by statute as a “sensitive place” before the ruling in *Bruen*. School grounds were the *only* place in which New York statutorily banned firearms<sup>18</sup>—even *government buildings* like the state capitol, the executive mansion, and state courthouses were considered sensitive places only by regulation.<sup>19</sup>

Under New York’s new statute, it is also now a felony for anyone who possesses a firearm to “enter[] into or remain[] on or in private property where such person knows or reasonably should know that the owner or lessee of such property has not permitted such possession by clear and conspicuous signage indicating that the carrying of firearms, rifles, or shotguns on their property is permitted or has otherwise given express consent.”<sup>20</sup> Unlike many states that allow businesses and other private venues to post signs *prohibiting* firearms (generally giving rise only to low-level trespass violations if ignored), New York law now makes it a felony for anyone, including individuals with valid carry licenses, to carry a firearm into a private business, or on any private property, where the owner or operator has not posted signage affirmatively *allowing* carry. New York thus took the ordinary rule about firearms on private property—a presumption in favor of *allowing* carriage—and transformed it into a new, draconian rule that creates a presumption *against* the right to bear arms.

This portion of New York’s new law is certainly unconstitutional under *Bruen*. In fact, the Court anticipated this move by New York<sup>21</sup> when it rejected the state’s argument that its “proper

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<sup>16</sup> N.Y. PENAL LAW § 265.01-e.

<sup>17</sup> *See id.*

<sup>18</sup> N. Y. PENAL LAW § 265.01-a.

<sup>19</sup> 9 CRR-NY 300-3.1.

<sup>20</sup> N.Y. PENAL LAW § 265.01-d.

<sup>21</sup> The Court had every reason to be wary of New York’s litigation tactics. In a previous case, a Second Amendment challenge had been brought against certain aspects of New York City’s rules regarding transportation of firearms by license holders. *New York State Rifle & Pistol Ass’n v. City of New York*, 140 S.Ct. 1525 (2020). New York City insisted that the challenged provisions were crucial for public safety, and was successful through the Second Circuit. As soon as certiorari was granted, New York City repealed or amended the provisions at issue, and the State of New York passed state laws to enable those changes, to attempt to moot the case. When asked at oral argument whether people in New York City were less safe because

cause” law could be considered a “sensitive place” restriction. New York had proposed to define as a gun-free “sensitive place” any location “where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available.”<sup>22</sup> The *Bruen* Court explained that New York’s conception of “sensitive places” was ahistorical and far too broad. The Court noted that to accept New York’s interpretation of “sensitive places” would “in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense. . . .”<sup>23</sup> “Put simply, there is no historical basis for New York to effectively declare the island of Manhattan a ‘sensitive place’ merely because it is crowded and protected generally by the New York City Police Department.”<sup>24</sup> Yet, apparently, New York has now decided to declare much of the Empire State a “sensitive place” in defiance of the Court. It has done this by drastically expanding the list of spaces where one cannot carry a firearm—now including, but not limited to, parks, libraries, places of worship, museums, public transit, and any business establishment that has not posted a sign saying concealed carriers are welcome.<sup>25</sup> When all the sensitive spaces are taken into account, a New Yorker’s exercise of Second Amendment rights is virtually restricted to the street.

The second way New York is attempting to evade *Bruen*’s invalidation of may-issue systems is by giving significantly more discretion to licensing officials in determining not the *need* for a carry license, but who is *good enough* to obtain a license. Existing law contained a “good moral character” requirement, but that was amended, following *Bruen*, to mean “having the essential character, temperament and judgement necessary to be entrusted with a weapon and to use it only in a manner that does not endanger oneself or others.”<sup>26</sup> To determine whether that test is met, New York has implemented a new, expanded list of disqualifiers and now also requires the applicant to meet in person with the licensing officer for an interview. It requires the applicant to submit contact information for the applicant’s current spouse or domestic partner, adult children, and four other references for the licensing officer to contact. It further demands a list of current and former social media accounts for the past three years, and “such other information required by the licensing officer that is reasonably necessary.”<sup>27</sup> In other words, New York has set up a new discretionary regime to determine “good moral character.”

The inherent vice in any discretionary scheme, whether based on special need, supposed lack of character, or any other factors that are not objective, is that it allows permits to be granted or denied because of favoritism, bribery, general dislike of gun owners, bias, hatred, politics, or other arbitrary, illegitimate reasons. For example:

In January 1956, Martin Luther King’s house was bombed. Rev. King said he was receiving threats “continuously” when he sought permission for gun licenses from an Alabama

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of the changes, counsel replied “no, I don’t think so.” *New York State Rifle & Pistol Ass’n v. City of New York*, No. 18-280, Transcript of Oral Argument 52 (Dec. 2, 2019). In a divided decision, the case was ultimately held to be moot.

<sup>22</sup> *Bruen*, 141 S.Ct. at 2133.

<sup>23</sup> *Id.* at 2133.

<sup>24</sup> *Id.* at 2134.

<sup>25</sup> N. Y. PENAL LAW § 265.01-e.

<sup>26</sup> N. Y. PENAL LAW § 400.00(1)(b).

<sup>27</sup> *Id.* § 400.00(1)(f).

sheriff for himself and two other clergymen helping to protect him and his family. On page 3B of the February 4, 1956 Montgomery Advertiser the headline read, “Negro Leader Fails to Get Pistol Permit.”<sup>28</sup>

Alabama’s then-may-issue regime, which gave discretion to officials to issue a license to carry a pistol if the applicant had “good reason to fear an injury” or “other proper reason,” left Reverend King defenseless in the face of the innumerable threats against him and his family.<sup>29</sup>

New Jersey and California, two of the outlier states expressly criticized by the *Bruen* Court, are working on similar laws to deny their law-abiding residents the constitutional right to carry.<sup>30</sup> These intentional circumventions of *Bruen*’s specific holding regarding “proper cause” are blatant affronts to the Supreme Court’s decision. These new, restrictive regimes should be struck down if the Court’s “text and history” test is honestly applied, and they will doubtless be a major focus of litigation immediately post-*Bruen*.

Justice Kavanaugh’s concurrence in *Bruen*, which was joined by Chief Justice Roberts, further demonstrates the Court’s clear disapproval of the freewheeling inquisitions that states like New York, New Jersey, and California now seek to launch. Justice Kavanaugh doubled down on the majority’s rejection of discretionary licensing regimes, writing that New York’s regime was “constitutionally problematic because it grants open-ended discretion to licensing officials *and* authorizes licenses only for those applicants who can show some special need apart from self-defense.”<sup>31</sup> Justice Kavanaugh deemed problematic—as did the majority opinion in an important footnote<sup>32</sup>—*any* grant of “open-ended discretion to licensing officials,” regardless of its connection to a good-cause requirement. Justice Kavanaugh explained that “the 6 States including New York potentially affected by today’s decision may continue to require licenses for carrying handguns for self-defense so long as those States employ *objective licensing requirements* like those used by the 43 shall-issue States.”<sup>33</sup> He also kept the door wide open to as-applied challenges to state regimes that operate as anything but shall-issue in practice—regardless of how they look on paper. Where exorbitant costs of time and money are required to be expended by a concealed carry applicant, a shall-issue scheme would be ripe for an as-applied challenge.<sup>34</sup>

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<sup>28</sup> Stephen P. Halbrook, *Supreme Court’s Latest Second Amendment Case Isn’t about Race, It’s about Rights*, INDEPENDENT INSTITUTE (Oct. 26, 2021), <https://www.washingtontimes.com/news/2021/oct/25/supreme-courts-latest-second-amendment-case-isnt-a/> [<https://perma.cc/A6W7-VAKK>].

<sup>29</sup> Uniform Firearms Act, Acts 1936 Ala. Laws, Ex. Sess., No. 82, §§ 7, 51, 52.

<sup>30</sup> See, e.g., Brent Johnson, *Murphy wants to ban guns at N.J. hospitals, public transit, bars, and more after Supreme Court ruling*, NJ.com (Jun. 27, 2022), <https://www.nj.com/politics/2022/06/murphy-wants-to-ban-guns-at-nj-hospitals-public-transit-bars-and-more-after-supreme-court-ruling.html> [<https://perma.cc/5RB2-7S82>]; see also *Senator Portantino’s & California’s Response to Supreme Court’s Concealed Weapon Decision Passes Assembly Public Safety Committee*, Office of Senator Anthony J. Portantino (Jun. 28, 2022), <https://sd25.senate.ca.gov/news/2022-06-28/senator-portantino%E2%80%99s-california%E2%80%99s-response-supreme-court%E2%80%99s-concealed-weapon-decision>.

<sup>31</sup> *Bruen*, 142 S.Ct. at 2161 (Kavanaugh, J., concurring) (emphasis added).

<sup>32</sup> *Id.* at 2138 n.9.

<sup>33</sup> *Id.* at 2162 (Kavanaugh, J., concurring) (emphasis added).

<sup>34</sup> See also *id.* at 2138 n.9 (“[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.”).

In disapproving of such discretionary approaches to a constitutional right, the *Bruen* Court in truth did nothing novel. It simply raised the right to keep and bear arms to the same pedestal that has long been occupied by every other fundamental right. In the context of voting rights, for example, even the slightest burden on the exercise of this right is presumed invalid. From a poll tax of \$1.50 in *Harper v. Virginia Board of Elections*,<sup>35</sup> to redistricting that violated its “one person, one vote” standard in *Reynolds v. Sims*,<sup>36</sup> and in many later cases, the Court has been aggressive in finding voting rights abridgments unconstitutional. This is the standard to which the Second Amendment now will be held. Impediments such as fees, taxes, labor, and delay must be subjected to searching constitutional scrutiny, and any attempt to use these procedural maneuvers to burden the fundamental right to keep and bear arms must be struck down. Gun owners ask for nothing special—only that their rights under the Second Amendment be treated equally to their rights under every other constitutional provision.

*Bruen*’s impact, however, does not end with definitively establishing the right of ordinary Americans to carry firearms in public. For those who have long waited for the Supreme Court to return its attention to this key constitutional right, the most significant aspect of *Bruen* is its interpretive approach. *Bruen* resoundingly repudiated the “two-step analysis” widely embraced in the lower courts. Under that test, a court first considered whether text and history brought the challenged government conduct within the Second Amendment’s scope. If no, then the gun rights plaintiffs did not prevail, as one would expect. If yes, the lower courts gave the government defendants a second bite at the apple to allow them to violate the fundamental right to keep and bear arms. That second step applied a means-end, interest-balancing scheme using a “tiers of scrutiny” approach.<sup>37</sup> Rejecting this two-step process as “one step too many,” the *Bruen* Court embraced a return to a simple textual and historical analysis. Under this text-and-history approach—first applied in *Heller* and now ratified beyond any dispute by *Bruen*—Second Amendment analysis is focused on studying relevant laws and practices, or analogues thereto, when the Second Amendment was ratified. This approach pointedly *does not* task judges with “mak[ing] difficult empirical judgments” and balancing the “costs and benefits” of firearms policies—enterprises far removed from their fields of expertise.<sup>38</sup> As the last decade of experience shows, the lower courts have in virtually every case used the two-part test to balance away Second Amendment rights.<sup>39</sup>

The text and history test requires instead that judges reason by analogy; that is, that they compare today’s challenged laws with any analogous laws at the time of the Founding. Justice

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<sup>35</sup> 383 U.S. 663 (1966).

<sup>36</sup> 377 U.S. 533 (1964).

<sup>37</sup> *Bruen*, 142 S.Ct. at 2125–27; see also Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT’L AFF. 72 (2019).

<sup>38</sup> *Id.* at 2127.

<sup>39</sup> See, e.g., *Worman v. Healy*, 922 F.3d 26 (1st Cir. 2019); *Libertarian Party of Erie Cty. v. Cuomo*, 970 F.3d 106 (2nd Cir. 2020); *Association of N. J. Rifle & Pistol Clubs, Inc. v. Attorney General N. J.*, 910 F.3d 106 (3rd Cir. 2018); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *National Rifle Assn. of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185 (5th Cir. 2012); *Stimmel v. Sessions*, 879 F.3d 198 (6th Cir. 2018); *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019); *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *vacated*, 142 S.Ct. 2895 (2022); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010); *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011).

Clarence Thomas, author of the *Bruen* opinion, set forth the kind of analogical reasoning that should be employed in Second Amendment cases:

For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.<sup>40</sup>

This kind of reasoning by analogy offers robust protection for the right to keep and bear arms because, contrary to what the opponents of that right sometimes pretend, there were very few limitations on firearms in the Founding period. For most of the restrictive laws in a handful of states today, there will be a “lack of a distinctly similar historical regulation,” which should lead to the invalidation of laws that trench upon Second Amendment rights.

One question left formally undecided by *Bruen* is whether the Second Amendment “text and history” test is limited to examining those bans and regulations that were widely accepted when the Bill of Rights was ratified in 1791 or includes those that were accepted as constitutional in 1868 when the Fourteenth Amendment (which applied the Second Amendment to the states) was ratified. *Bruen* did not require the resolution of this question because the evidence from 1791 and 1868 spoke with one voice in rejecting New York’s arguments. And the Court, at least formally, reserved the resolution of that question for a case in which the evidence of the two periods pointed in opposite directions.<sup>41</sup>

*Bruen*’s focus on history is doubly important: it not only is theoretically sound, but it also provides a clear interpretive command to the lower courts in future Second Amendment cases. The *Bruen* test also forces the government to shoulder the burden of showing that its laws and regulations have close historical analogues. As *Bruen* made clear at multiple points in the opinion, that burden is squarely on the government.<sup>42</sup> If there is no relevant analogy, or if the analogy is weak, the government loses and the law must be struck down. This is wonderful news for the right to keep and bear arms, which in the past has been systematically degraded by the lower “inferior” courts.

The impact of *Bruen* is to require that nearly all of the hundreds of lower court decisions since *Heller* and *McDonald* that upheld restrictions under a balancing test be re-litigated under the proper constitutional test. The string of lower federal-court cases that have—in the teeth of *Heller*’s instructions—blessed every type of gun control measure imaginable are no longer good law, and each of these issues must now be considered anew. From age-based restrictions on adults, to onerous storage requirements, and from bans on non-violent felons, to taxes and fees

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<sup>40</sup> *Id.* at 2131.

<sup>41</sup> *Id.* at 2138.

<sup>42</sup> *Id.* at 2129, 2135, and 2138.

that single out gun and ammunition purchases, *Bruen* has remade the landscape of Second Amendment analysis.<sup>43</sup> The lower courts will now have to take a fresh look at all of these restrictions and more, under a test far more protective of the right to keep and bear arms.

Important issues that must be reconsidered under *Bruen*'s text-and-history test include so-called "assault weapon" and "large capacity" magazine bans. A case from Maryland regarding "assault weapons" was sent back by the Supreme Court to the Fourth Circuit for reconsideration in light of the *Bruen* decision.<sup>44</sup> *Bruen*'s embrace of the text-and-history test provides clear guideposts for how the constitutionality of these types of bans must now be assessed. In short, there is zero historical support from the Founding—or even the Reconstruction era—for banning commonly possessed arms; under the *Bruen* test, that is the end of the matter.

States that ban so-called "assault weapons" and "large capacity" magazines will undoubtedly quote the passage by Justice Thomas suggesting that "cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach" to analogizing modern restrictions to historical ones.<sup>45</sup> They will argue that mass killings are "unprecedented societal concerns" and that semiautomatic firearms and the magazines they use are "dramatic technological changes." These arguments are incorrect for several reasons. Most importantly, the Founders *never* imposed gun bans as a solution to a societal problem, no matter how serious. Instead, they affirmed in the Second Amendment an unrestricted right to possess arms. Gun bans of any kind are strictly a 20<sup>th</sup> and 21<sup>st</sup> century phenomenon. So, the Government's burden to sustain state or local bans on commonly possessed semiautomatic rifles and magazines over (most frequently) ten rounds will prove an exceedingly heavy one, since outright bans on common arms have no basis whatsoever in the early history of the republic.

Instead, in the Founding period, there were laws *requiring* people to be armed with particular kinds of weapons. The Militia Acts of 1792 required every "free able-bodied white male citizen of the respective states" between eighteen and forty-five years of age to be enrolled in the state militias. Those men were required to provide themselves, at their own expense, very specific firearms, ammunition, and equipment. Each man had to:

provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder. . . ."<sup>46</sup>

There was no tradition of banning particular weapons when the Bill of Rights was adopted (or during the Reconstruction Era). It goes without saying, then, that there was no tradition of banning weapons commonly possessed by the law-abiding for lawful purposes, which is the Heller test for Second Amendment protection. The laws at the Founding prescribed the firearms citizens had to have, not those they could not have.

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<sup>43</sup> *Id.* at n.4.

<sup>44</sup> *Bianchi v. Frosh*, 142 S.Ct. 2898 (2022).

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

<sup>46</sup> 1 STAT. 271 (1792).

The Founding generation's solution for mass killings was not to deprive ordinary citizens of weapons needed for defense, but for armed citizens to have an active role in preventing, or minimizing the harm caused by, mass killings. Second Amendment scholar Stephen Halbrook explains that in 1775, "In a widely published message to the committees of safety, Richard Caswell, William Hooper, and Joseph Hewes, North Carolina's members of the Continental Congress, stated 'It is the Right of every English Subject to be prepared with Weapons for his Defense.'" <sup>47</sup> Halbrook continues: "Incidentally, the same issue of the North-Carolina Gazette which published the above also reported an incident in which 'a Demoniac being left in a Room, in which were 18 loaded Muskets,' shot three men and wounded another with a sword, 'upon which the People present, without further Ceremony, shot him dead.'" <sup>48</sup> He concludes: "For the Founders, the right of the subject to be armed for defense of self and the community was necessary to suppress such tragedies—they never imagined a world in which they would be disarmed for the supposed benefit of preventing access to weapons by madmen." <sup>49</sup>

And even if the Founders could not foresee specific modern weapons, that is of no consequence in determining the scope of the Second Amendment's protections. As the *Bruen* Court stated:

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." *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819). . . . 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>50</sup>

That principle includes technological improvement. The *Heller* opinion observed:

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications . . . and the Fourth Amendment applies to modern forms of search . . . the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding. <sup>51</sup>

There is every reason to believe that the Founders would have welcomed the continued development of more capable firearms. The development of firearms was then, as it remains now, focused on increasing the number of available shots and minimizing the pause while reloading. From hostile Native American tribesmen to roving bands of criminals, attackers were to be feared

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<sup>47</sup> STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 105 (2008) (citing NORTH CAROLINA GAZETTE (Newbern), July 7, 1775, at 2, col. 3).

<sup>48</sup> *Id.* at 106 (citing NORTH CAROLINA GAZETTE (Newbern), July 7, 1775, at 3, col. 1).

<sup>49</sup> *Id.* at 106.

<sup>50</sup> *Bruen*, 142 S.Ct. at 2132.

<sup>51</sup> *Heller*, 554 U.S. at 582 (citations omitted). That the Founders anticipated technological advancements in all facets of life is illustrated by their adoption of the Patents and Useful Arts Clause in Article I, Section 8, Clause 8 of the Constitution, which grants Congress the enumerated power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

from every quarter—often with little warning or opportunity for preparation.<sup>52</sup> This prompted the continuous evolution of arms that could be fired quickly and accurately. As Justice Alito observed in his *Bruen* concurrence, “In 1791, when the Second Amendment was adopted, there were no police departments, and many families lived alone on isolated farms or on the frontiers. If these people were attacked, they were on their own.”<sup>53</sup> Or, as this author has previously written, “you are your own first responder.”<sup>54</sup> This is one more reason why the Founding generation prized private ownership of firearms for purposes of lawful self-defense.

The *Bruen* approach also vindicates the Constitution’s faith in the American people. There are many constitutional rights that are built on this faith. Indeed, the whole idea of a republican form of government rests on the presumption that the people ultimately are the source of authority and sovereignty in the Nation. And we have seen the practical wisdom of Americans in practice with respect to the right to arms specifically.

Weapons like muzzle-loading black powder cannons have existed for centuries, were unregulated at the Founding, and generally remain unregulated today. Crank-fired Gatling guns have been around for over a century and a half and remain legal at the federal level. Yet, we have not seen Americans rush to acquire or use these powerful weapons for improper purposes. They have acted with restraint. Our fellow law-abiding citizens best understand their needs for self-defense and have proven that they can be trusted to determine how best to protect themselves, their families, and their communities.

It has taken well over two centuries for the American people to see the Supreme Court fully induct the Second Amendment into the family of constitutional rights. *Bruen*’s clear and welcome injunction to the lower courts to faithfully apply the Constitution’s text and history should keep it there in the years to come. *Bruen* is not just a victory for the right to keep and bear arms. It is a victory for originalism, constitutionalism, and the rule of law—and it should be recognized and celebrated as such.

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<sup>52</sup> During oral argument in *Heller v. District of Columbia*, Justice Kennedy astutely recognized that the right to keep and bear arms concerned the need of “the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that.” Transcript of oral argument, *District of Columbia v. Heller*, No. 07-290, at 8 (Mar. 18, 2008).

<sup>53</sup> *Bruen*, 142 S.Ct. at 2161 (Alito, J., concurring).

<sup>54</sup> See, e.g., Mark W. Smith, “Assault Weapon” Bans: Unconstitutional Laws for a Made-Up Category of Firearms, 43 HARV. J.L. & PUB. POL’Y 357, 370 (2019).