NY STATE RIFLE & PISTOL ASS'N V. BRUEN: THE SUPREME COURT'S INSENSITIVITY TO SENSITIVE PLACES

ABSTRACT

The Supreme Court's decision in *N.Y. State Rifle and Pistol Ass'n v. Bruen* jeopardized state licensing authorities' abilities to use discretion when deciding whether a person is legally permitted to carry a concealed gun in public places. If states' abilities to legislate on this issue are limited or states are unable to impose effective gun regulations, gun violence will certainly continue and perhaps increase. To solve this problem, and to undo the damage of *Bruen*, the Court must give power back to state legislatures so they can impose gun control regulations voted for by their citizens. There is extensive scholarly literature on the interpretation of the Second Amendment and gun regulations throughout history. Courts' overreliance on historical analysis and failures to balance Second Amendment interests with public welfare are epitomized by the *Bruen* decision. This comment connects rich Second Amendment literature to *Bruen* and argues that *Bruen* was wrongly decided by the Court's misapplication of *District of Columbia v. Heller* and *McDonald v. City of Chicago*, abolishment of the Courts of Appeals' well-established two-step analysis, and reliance almost solely on a historical analysis which disregarded history of the government regulating firearms in sensitive areas. It also discusses the tension between *Bruen*'s implications and the principles of federalism.

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INTRODUCTION

Many divisive issues in the United States can be reduced to a fundamental tension between freedom and safety.[1] Following the Revolutionary War and America's separation from Britain, self-determination and independence motivated the Founders; accordingly, these motivations influenced the rights guaranteed by the Constitution and Bill of Rights.[2] Freedom yields opportunity. Since this country's inception, stories of the "Land of Opportunity" have inspired millions of people to immigrate to the United States in pursuit of the "American Dream."[3] Many people also come to the United States "in search of safety from persecution, torture, and sometimes death."[4]

However, the majority of Americans feel less free and less safe today than they have in the past ten years.[5] Several factors contribute to this cultural shift, but gun violence is a major one. A portion of the public's fear of gun violence stems from the pervasive news about mass shootings, but mass shootings are only part of the gun violence issue in this country.[6] In 2019, a national study by the American Psychological Association found that almost 80% of Americans worry about the possibility of a mass shooting and more than a third reported that fear prevents them from traveling

1. *See generally* Gonzalo Herranz de Rafael & Juan S. Fernández-Prados, *The Security Versus Freedom Dilemma. An Empirical Study of the Spanish Case*, 7 FRONTIERS IN SOCIO. 1 (2022), at Article 774485; *see also* Gary E. Barnett, *The Reasonable Regulation of the Right to Keep and Bear Arms*, 6 GEO. J. L. & PUB. POL'Y 607, 607 (2008) ("The government, under the police power, can place restrictions on individuals' activities to further the goals of health and safety. The question is: at what point does a restriction unconstitutionally abridge the individual's right?").

2. *See generally* U.S. CONST.; *see also* U.S. CONST. amends. I–X; *see* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

3. Isabel V. Sawhill, *Still the Land of Opportunity?*, BROOKINGS (March 1, 1999), https://www.brookings.edu/articles/still-the-land-of-opportunity/.

4. *Asylum Seekers & Refugees*, NAT'L IMMIGRANT JUST. CTR. (2011-2020) https://immigrantjustice.org/issues/asylum-seekers-and-refugees.

5. Emily Schmidt, Craig Helmstetter, & Benjamin Clary, *Poll: Most Americans Think Liberty Has Waned, Rights Will Further Diminish*, APM RSCH. LAB (June 30, 2022), https://www.apmresearchlab.org/motn/what-americans-think-about-liberty-rights-freedom-may-2022; Sophie Bethune & Elizabeth Lewan, *One-Third of US Adults Say Fear of Mass Shootings Prevents Them from Going to Certain Places or Events*, AM. PSYCH. ASS'N (Aug. 15, 2019), https://www.apa.org/news/press/releases/2019/08/fear-mass-shooting.

6. John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (April 26, 2023), https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about-gun-deaths-in-the-u-s/.

to certain places or attending events.[7] Mass shootings are not new to the United States but are a uniquely American problem.[8] In 1994, Congress enacted a temporary ban on assault weapons, which expired in 2004 and was not renewed.[9] Mass shootings decreased while this bill was in effect, only to rise again after the bill lapsed.[10] Firearms killed more American civilians between 1968 and 2015 than American military combatants in all the wars of American history combined.[11]

Americans' growing fear of gun violence is in tension with the Second Amendment of the United States's Constitution, which has historically been interpreted as conferring a broad right to bear arms publicly.[12] Scholars have published extensively on the background of the Second Amendment: its history, interpretations, and effect on modern American gun control regulations.[13] There has also been significant scholarly discussion of the Supreme Court's decision in *District of Columbia v. Heller*,[14] explaining that the *Heller* Court declined to define a standard of review for firearm regulation challenges.[15] Moreover, others have linked states'

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7. Bethune & Lewan, *supra* note 5.

8. *See* Katherine Leach-Kemon & Rebecca Sirull, *On Gun Violence, the United States is an Outlier*, INST. FOR HEALTH METRICS AND EVALUATION, https://www.healthdata.org/acting-data/gun-violence-united-states-outlier (May 31, 2022) (when looking at "exclusively high-income countries and territories with populations of 10 million or more, the US" has the highest rate of firearm homicides); Gramlich, *supra* note 6.

9. Robert J. Spitzer, *Gun Accessories & the Second Amendment: Assault Weapons, Magazines, & Silencers*, 83 L. & CONTEMP. PROBS. 231, 235 (2020).

10. *Id.*; Charles DiMaggio, Jacob Avraham, Cherisse Berry, Marko Bukur, Justin Feldman, Michael Klein, Noor Shah, Manish Tandon, & Spiros Frangos, *Changes in US Mass Shooting Deaths Associated with the 1994-2004 Federal Assault Weapons Ban: Analysis of Open-Source Data*, NAT'L LIBR. OF MED.: J. TRAUMA & ACUTE CARE SURGERY (2019) https://pubmed.ncbi.nlm.nih.gov/30188421/ (demonstrating the assault weapons ban's effectiveness).

11. Chelsea Bailey, *More Americans Killed by Guns Since 1968 Than in All U.S. Wars—Combined*, U.S. NEWS (Oct. 4, 2017, 2:12 PM); *see also* Dan MacGuill, *Fact Check: Do U.S. Gun Deaths Since 1968 Outnumber Deaths in All American Wars?*, SNOPES (Oct. 12, 2017) ("The gap between the two totals may be significantly smaller than stated in some versions of this claim.").

12. *See* Schmidt, Helmstetter, & Clary, *supra* note 5; *see also* N.Y. State Rifle & Pistol Ass'n Inc. v. Bruen, 142 S. Ct. 2111, 2134–35 (2022).

13. *See generally, e.g.*, Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 637–40 (1989) (galvanizing legal scholars to seriously address the Second Amendment); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 321 (1998) (positing the Second Amendment was written to assure Southern states that Congress could not disarm them in the fight over slavery); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 793 (1998) (arguing contemporaneous state provisions should inform interpretation of the Second Amendment); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1368–69 (1998) (thoroughly examining nineteenth century treatises and cases regarding the Second Amendment); Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 294 (2000) ("[T]he Second Amendment is probably best read to prevent the federal government from abolishing state militias."); Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV 683, 686–89 (2007) (elaborating on the increasing popularity of interpreting the Second Amendment through an individual-rights approach). *See generally* Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703 (2012) (explaining that the lack of guidance from *Heller* and *McDonald* left the lower courts floundering when faced with Second Amendment issues).

14. 554 U.S. 570 (2008).

15. *See, e.g.*, Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 977—80 (2009); Andrew Kimball, *Strictly Speaking: Courts Should Not Adopt Strict Scrutiny for Firearm Regulations*, 83 BROOK. L. REV. 441, 441–46 (2017) (outlining arguments for

public carry restrictions to the sensitive places doctrine.[16] The Supreme Court has declined to comprehensively define the sensitive places doctrine, leaving lower courts and scholars to speculate which areas are "'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment."[17] On June 23, 2022, as gun violence soared to record highs, the Supreme Court published *New York State Rifle & Pistol Association v. Bruen*,[18] which held that New York's proper-cause requirement for obtaining a concealed carry permit was unconstitutional.[19]

This comment's contribution is linking the rich literature of Second Amendment interpretations to *Bruen*. I argue that the Supreme Court's decision in *Bruen* was incorrect. Indeed, the Court erred in three ways: misapplying *Heller* and *McDonald v. City of Chicago*,[20] abolishing the Courts of Appeals' well-established two-step analysis, and relying almost solely on a historical analysis which disregarded history of the government regulating firearms in sensitive areas.[21] This comment will discuss the Second Amendment's history and its interpretations over time.[22] Part I will contextualize *Bruen* by reviewing its most significant precedent, *Heller* and *McDonald*, explaining the Courts of Appeals' approach to Second Amendment challenges prior to *Bruen*, and introducing potential implications for principles of federalism.[23] Then, Part II will summarize the *Bruen* Court's opinion.[24] Part III will analyze the Court's emphasis on historical analogies, dismissal of the Courts of Appeals' methods, and weakening of

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and against a strict scrutiny standard for firearm regulations); Michael P. O'Shea, *The Right to Defensive Arms After* District Court of Columbia v. Heller, 111 W. VA. L. REV. 349, 362 (2009); *see also* Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 301 (2016) (describing *Heller* as progress towards more clearly defining the boundaries of the Second Amendment and gun control regulations).

16. *See e.g.*, Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 CLEV. ST. L. REV. 373, 377, 481 (2016) (reviewing the nation's history of public carry regulations and predicting that the Court will need to choose what version of history to adopt); *see* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POLS. 191, 192 (2006) (outlining state constitutional rights to bear arms as independent from the Second Amendment); *see also* Lewis M. Wasserman, *Gun Control on College and University Campuses in the Wake of* District of Columbia v. Heller *and* McDonald v. City of Chicago, 19 VA. J. SOC. POL'Y & L. 1, 1, 36, 52 (2011) ("examin[ing] the capacity of public colleges and universities to enact campus gun control policies affecting students, faculty, staff, and others, in light of the landmark *Heller* and *McDonald* decisions").

17. *Bruen*, 142 S. Ct. at 2133–34; *see e.g.*, David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 293–94 (2018).

18. 142 S. Ct. 2111 (2022).

19. *Id.* at 2123, 2156; *see* Centers for Disease Control and Prevention, *Firearm Deaths Grow, Disparities Widen*, CDC, https://www.cdc.gov/vitalsigns/firearm-deaths/index.html (last updated June 6, 2022); It would be remiss to not also mention that the rate at which gun violence disproportionately affects minority groups has also increased. *Id.*

20. 561 U.S. 742 (2010).

21. *Bruen*, 142 S. Ct. at 2111; District of Columbia v. Heller, 554 U.S. at 570; *McDonald*, 561 U.S. at 742.

22. *See infra* Part I.

23. *See infra* Part I.

24. *See infra* Part II.

states' powers.[25] Finally, this comment concludes that *Bruen* was wrongly decided and contemplates the potential consequences.[26]

I. BACKGROUND

This section will survey the drafting, ratification, and implementation of the Second and Fourteenth Amendments.[27] It will then examine modern Second Amendment jurisprudence, including *Heller* and *McDonald*, as well as the influence of Second Amendment interpretations on principles of federalism.[28]

A. The Second Amendment

The Second Amendment, distributed to the states in 1789, declared "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[29] Congress passed the Second Amendment on September 25, 1789, and ratified it, as part of the Bill of Rights, on December 15, 1791.[30] When James Madison proposed the Second Amendment, it is unlikely that he imagined the power and sophistication of modern weapons.[31] However, there is evidence that founding-era Americans contemplated and debated how much power federal and state governments should have to regulate local militias' arms.[32] For example, Massachusetts's 1780 Declaration of Rights stated, "[I]n time of peace armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature."[33] The Founders feared that too much power in the federal government's control was dangerous to liberty.[34] Since then, people have intensely debated the Second Amendment's proper interpretation.[35]

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25. *See infra* Part III.
26. *See infra* Parts III, IV.
27. *See infra* Sections I.A, I.B.
28. *See infra* Section I.C.
29. U.S. CONST. amend. II annot., Constitution Annotated, https://constitution.congress.gov/browse/essay/amdt2-2/ALDE_00013262/ (last visited Dec. 20, 2022).
30. U.S. CONST. amend. II.
31. U.S. CONST. amend. II; Bogus, *supra* note 13, at 367 ("Madison's language does not so much grant a right as acknowledge that one exists and protect that right, whatever it may be, from being infringed by the federal government. Madison may have been suggesting that one must look outside the amendment – to state or common law perhaps – for the definition of this right.").
32. *See e.g.*, GREY HOUSE PUBLISHING, THE GUN DEBATE: AN ENCYCLOPEDIA OF GUN RIGHTS & GUN CONTROL IN THE UNITED STATES 103–04 (Glenn H. Utter, ed., 3rd ed., 2016) (describing the tension between Hamilton and Madison's visions for the American militias).
33. MASS. CONST. of 1780, art. XVII, *reprinted in* THE FOUNDERS' CONSTITUTION 442–48 (Philip B. Kurland & Ralph Lerner eds., The University of Chicago Press 1986), https://press-pubs.uchicago.edu/founders/documents/bill_of_rightss6.html.
34. *See* Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 271–74 (2000) (anti-federalist objections regarding power over militia and to raise a standing army that could be used to destroy public liberty and erect a military despotism); *see also* ADAM WINKLER, GUNFIGHT 109 (W.W. Norton & Co., Inc. 2013) ("The Second Amendment reassured wary Americans that Congress would not have the power to destroy state militias by disarming the people.").
35. *See* Wasserman, *supra* note 16, at 6; MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION 61 (2019) ("The gun lobby has been so successful in associating the Second

B. The Fourteenth Amendment

The Fourteenth Amendment, forbidding states from denying citizens of "life, liberty, or property, without due process of law," was ratified on July 9, 1868,[36] and expanded constitutional protections by making the Bill of Rights applicable to the states.[37] Thus, the Second Amendment is applicable to the states through the Fourteenth Amendment.[38] Scholars debate "whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope."[39] However, the *Bruen* Court found this controversy inconsequential, concluding there was no difference in the public perception of the right to publicly carry arms between 1791 and 1868.[40]

C. Tenth Amendment Police Powers

A controversy over whether the power to regulate gun control should be entrusted to the federal government or state governments underlies Second Amendment interpretations.[41] The Second Amendment applies to states through the Fourteenth Amendment.[42]

The Tenth Amendment declares that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[43] This clause is meant to distinguish powers of federal and state governments; it grants Congress the authority to pass laws that are "necessary and proper" for executing its powers.[44] The powers not expressly granted to the federal government by the Constitution are left to the states and referred to as police powers.[45] Accordingly, there is extensive jurisprudence interpreting the omission of "expressly" from the Tenth Amendment.[46] The challenge of delineating

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Amendment with an individual right to use guns for self-defense that it is difficult to remember that this interpretation breaks with more than two hundred years of legal, political, and social consensus about what the Second Amendment protects.").

36. U.S. CONST. amend. XIV, § 1; Ken Drexler, *14th Amendment to the U.S. Constitution: Primary Documents in American History*, LIBRARY OF CONGRESS RESEARCH GUIDES (Nov. 26, 2018), https://guides.loc.gov/14th-amendment.

37. *See* N.Y. State Rifle & Pistol Ass'n Inc. v. Bruen, 142 S. Ct. 2111, 2137 (2022); Drexler, *supra* note 36.

38. *Bruen*, 142 S. Ct. at 2135.

39. *Id.* at 2138.

40. *Id.*

41. *Bruen*, 142 S. Ct. at 2168.

42. U.S. CONST. amend. XIV.

43. U.S. CONST. amend. X.

44. McCulloch v. Maryland, 17 U.S. 316, 367 (1819).

45. WILLIS REED BIERLY, POLICE POWER, STATE AND FEDERAL: DEFINITIONS AND DISTINCTIONS 14–15, 18–19 (1907).

46. *See e.g.*, *id.*; *see also* Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and Expressly Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1890–91 (2008) (arguing the Framers' omission of "expressly" indicated Congress has "incidental or implied powers" in addition to those expressly enumerated); *see also* Frederick D. Drake & Lynn R. Nelson, *Federalism and the Meaning of the Tenth Amendment, 1789–1835*, *in* STATES' RIGHTS AND AMERICAN FEDERALISM: A DOCUMENTARY HISTORY 70–72 (Greenwood Press 1999) (explaining that there was spirited debate among the Founders over the diction of the Tenth Amendment because the use of "expressly" would have entirely negated the Constitution's necessary and proper clause).

federal and state powers began in the nineteenth century with John Marshall's theory of broad federal power and has transformed into a narrower interpretation of federal power.[47]

State police powers are not unlimited, but traditionally include "[p]ublic safety, public health, morality, peace and quiet, [and] law and order."[48] The courts have a very limited role in determining when state power is being exercised for a public purpose.[49] Although historically, there has been intense debate about the practical implications of the Tenth Amendment, "the text remains universally accepted as a statement of states' rights . . . ."[50]

D. District of Columbia v. Heller

Heller involved a special police officer who challenged the District of Columbia's (D.C.) complete ban on "handgun possession in the home" and its accompanying law that firearms in the home be inoperable.[51] Through statutory interpretation and historical analysis, the *Heller* Court held that D.C.'s "ban on handgun possession *in the home* violates the Second Amendment, as does its prohibition against rendering any lawful firearm *in the home* operable for the purpose of immediate self-defense."[52] In sum, the *Heller* Court found these laws unconstitutional under the Second Amendment right to possess a firearm in the home "for traditionally lawful purposes, such as self-defense *within the home*."[53]

In deciding *Heller*, the Supreme Court analyzed state constitutions, preceding and immediately following the Second Amendment's ratification, as well as other laws on arms-bearing rights, to reason by analogy.[54] The *Heller* Court carefully noted its decision did not affect D.C.'s ability to combat gun violence by regulating handguns; the city simply could not enforce a complete ban, which would render the Second Amendment obsolete.[55] The Court also specified that nothing about its "opinion should be

47. Lash, *supra* note 46, at 1946–47.
48. Berman v. Parker, 348 U.S. 26, 32 (1954).
49. *Id.* at 32.
50. Lash, *supra* note 46, at 1954.
51. *Heller*, 554 U.S. at 628; "The term Special Police Officer, is any person who is commissioned which have been approved pursuant to this act, and who may be authorized to carry a weapon. They are privately commissioned police officers with full arrest powers within an area or premises which the officer has been employed to protect. The commission is conditional and is required to be renewed each year. C. Code, §4-114 (1981)." *DC Special Police Officer: FAQ's*, STATEWIDE PROTECTIVE SERVICES, http://statewideprotectiveservice.com/site2/dc-faqs/ (last visited Nov. 24, 2023).
52. *Heller*, 554 U.S. at 635 (emphasis added).
53. *Id.* at 577 (emphasis added); Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1138 (2011) ("Heller emphasized that its holding did not invalidate all gun regulations.").
54. Drexler, *supra* note 36. *See generally* Winkler, *supra* note 34, at 280–88 (indicating Justice Scalia's historical methodology throughout *Heller* was regarded as a successful demonstration of originalism).
55. *Heller*, 554 U.S. at 636.

taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . ."[56]

Heller did not dictate a particular level of scrutiny for Second Amendment challenges; aside from rejecting rational-basis review, it left the issue unresolved because D.C.'s challenged laws would have been unconstitutional under any heightened standard of scrutiny.[57] However, the *Heller* Court implicitly rejected Heller's request for strict scrutiny review by broadly approving regulations of concealed weapons and firearms in certain areas while enforcing the right to possess a firearm at home for self-defense.[58] Even if the Court had accepted a strict scrutiny standard, the constitutionality of concealed carry prohibitions would be unclear.[59] Justice Breyer explained that, in practice, applying strict scrutiny to gun regulations becomes an interest-balancing inquiry between the Second Amendment's protected interests and the government's general public safety concern of preventing crime and promoting public welfare because there is no other way to compare the burden on the right with the governmental interest.[60] The alternative to strict scrutiny is intermediate scrutiny, where the Supreme Court considers whether a regulation is "substantially related to the achievement of an important governmental interest."[61] This level of review had been adopted for Second Amendment challenges by many Courts of Appeals by the time the Supreme Court decided *Bruen*.[62]

E. McDonald v. City of Chicago

Two years after *Heller*, in *McDonald*, the Court considered a challenge to Chicago's firearm laws which effectively banned handgun possession by private residents through restrictive registration requirements.[63] Four Chicago residents, including McDonald, who had been targets of

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56. *Id.* at 626.

57. Ali Rosenblatt, *Proper Cause for Concern: New York State Rifle & Pistol Association v. Bruen*, 17 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 239, 246 (2022); *see* Craig v. Boren, 429 U.S. 190, 211–14 (1976) (Stevens, J., concurring) (positing that courts have not been directed to apply varying standards of scrutiny).

58. *Heller*, 554 U.S. at 688 (Breyer, J., dissenting); *Heller*, 554 U.S. at 626–27.

59. *Id.* at 688 (Breyer, J., dissenting) ("[T]he majority implicitly, and appropriately, rejects that suggestion by broadly approving a set of laws—prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales—whose constitutionality under a strict-scrutiny standard would be far from clear."); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 794–98 (2006) (illustrating the controversial nature of standards of scrutiny by examining the effect of context on case outcomes when applying strict scrutiny); Tina Mehr & Adam Winkler, *The Standardless Second Amendment*, AM. CONST. SOC'Y L. & POL'Y, 4 (Oct. 2010), https://www.acslaw.org/wp-content/uploads/2018/04/Mehr_and_Winkler_Standardless_Second_Amendment.pdf (prior to Bruen, a gun control law had never been invalidated by applying strict scrutiny under the Second Amendment).

60. *See* N.Y. State Rifle & Pistol Ass'n Inc. v. Bruen, 142 S. Ct. 2111, 2126 (2022) (quoting Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017)); *Bruen*, 142 S. Ct. at 2175–76 (Breyer, J., dissenting).

61. *Bruen*, 142 S. Ct. at 2126–27 (citing Kachalsky v. County of Westchester, 701 F.3d 81, 96 (2d Cir. 2012)).

62. *Id.* at 2127.

63. *McDonald*, 561 U.S. at 742.

threats and violence, wanted to keep handguns in their homes for self-defense and challenged Chicago's firearm laws under the Second and Fourteenth Amendments.[64] Before the Court could reach the merits of the challenge, it first addressed whether Fourteenth Amendment Due Process incorporates the Second Amendment.[65] Chicago argued that to respect federalism and state experimentation, the right to bear arms should not be fully binding on the states.[66] The Court disagreed and held that the Bill of Rights, including the Second Amendment, fully binds the states, even if it limits the states' abilities to solve social problems or meet local needs.[67] The Supreme Court's historical analysis confirmed that the Second Amendment is a fundamental right and, therefore, protected by Fourteenth Amendment Due Process.[68] Referencing *Heller*, the Court concluded that the Second Amendment applies to the states and federal government alike, as it is a provision of the Bill of Rights and protects a fundamental American right.[69]

F. Courts of Appeals' Two-Step Analysis

After *Heller* and *McDonald*, the United States Courts of Appeals analyzed Second Amendment issues under a two-step framework, combining history with means-end scrutiny.[70] The Supreme Court's decision in *Bruen* has since rejected this two-step framework.[71] In the first step of this framework, courts considered whether the law at issue "burden[ed] conduct that falls within the scope of the Second Amendment" as it has been historically understood.[72] Courts decided that when a state law was challenged, the relevant time frame for historical analysis was around 1868 because that is when the Fourteenth Amendment was ratified.[73] This first step required judges to analyze whether the Second Amendment, when it was ratified, would implicate the conduct at issue.[74] If the challenged law did not implicate conduct within the scope of the Second Amendment when it was ratified, it was constitutional.[75] "[W]hen [the] historical evidence '[was] inconclusive or suggest[ed] that the regulated activity [was] *not* categorically unprotected,'" the Courts of Appeals moved to the

64. *Id.* at 750–52.
65. *Id.* at 767.
66. *Id.* at 783.
67. *Id.* at 784–85.
68. *Id.* at 776–78.
69. *Id.* at 791.
70. N.Y. State Rifle & Pistol Ass'n Inc. v. Bruen, 142 S. Ct. 2111, 2126 (2022); Kiehl, *supra* note 53, at 1145–46 (explaining the courts applied intermediate scrutiny because "Heller's list of presumptively lawful regulations is inconsistent with strict scrutiny" and there were cases in which the regulation at issue fell "outside of the core right identified in Heller.").
71. *Bruen*, 142 S. Ct. at 2117.
72. Rosenblatt, *supra* note 57, at 247 (citing U.S. v. Chester, 628 F.3d 673, 680 (4th Cir. 2010)).
73. *Id.* (citing Gould v. Morgan, 907 F.3d 659, 669 (1st Cir. 2018)); U.S. CONST. amend. XIV.
74. Rosenblatt, *supra* note 57, at 247.
75. *Id.* (citing Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 700 F.3d 185, 195 (5th Cir. 2012)).

second step of the analysis—determining the applicable level of scrutiny.[76] Courts determine the appropriate level of scrutiny by considering how connected the regulated conduct is to the core of the Second Amendment.[77] Prior to the Court's decision in *Bruen*, the more the conduct burdened the Second Amendment, the higher the level of scrutiny would be.[78] If the Court adopted a strict scrutiny test, it would need to determine whether the challenged firearm regulation was "narrowly tailored to achieve a compelling governmental interest."[79]

This comment will next summarize the Supreme Court's *Bruen* opinion, before analyzing its merits and concluding that neither *Heller* nor *McDonald* precluded the *Bruen* Court from adopting intermediate scrutiny.[80] Finally, it will conclude by discussing the implications for federalism and possible practical effects of *Bruen*.[81]

II. *N.Y. STATE RIFLE & PISTOL ASSOCIATION V. BRUEN*

This section describes and analyzes *Bruen*. It emphasizes Justice Thomas's historical and political discussions of firearm regulations in the United States, as well as the implications of *Heller*, *McDonald*, and overturning the Courts of Appeals' formerly, widely accepted constitutionality test.[82]

A. Facts

The Petitioners in *Bruen*, Brandon Koch and Robert Nash, were citizens of Rensselaer County, New York.[83] Both were members of the New York State Rifle & Pistol Association, Inc. (NYSRPA), "a public-interest group organized to defend the Second Amendment rights of New Yorkers."[84] Respondents were the New York State Police Superintendent, Kevin Bruen, and New York Supreme Court justice, Richard J. McNally; together, the respondents oversaw enforcement of New York's gun licensing laws and application processing in Rensselaer County.[85]

In 2015, New York denied Nash's application to carry a handgun for self-defense with an unrestricted license, and instead granted him a restricted license for hunting and target shooting because he did not claim

76. *Id.* (citing Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011)); *Id.* (citing *Ezell*, 651 F.3d at 703) ("Borrowing from the Court's First Amendment doctrine, the rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right.").

77. *Gould*, 907 F.3d at 670–71, *abrogated by* N.Y. State Rifle & Pistol Ass'n Inc. v. Bruen, 142 S. Ct. 2111 (2022).

78. *Id.*

79. District of Columbia v. Heller, 554 U.S. 570, 688 (2008) (Stevens, J., dissenting) (Abrams v. Johnson, 521 U.S. 74, 82 (1997).

80. *See infra* IV.B.

81. *See infra* IV.C.

82. *See infra* III.

83. N.Y. State Rifle & Pistol Ass'n Inc. v. Bruen, 142 S. Ct. 2111, 2124–25 (2022).

84. *Id.*

85. *Id.* at 2125.

any "unique danger to his personal safety."[86] The following year, Nash applied to have the restrictions removed, citing robberies in his neighborhood.[87] At an informal hearing, a licensing officer denied Nash's request and reiterated that the laws were "intended to *prohibit* [Nash] from carrying concealed in ANY LOCATION typically open and frequented by the general public."[88] In 2017, Koch, facing no special danger but desiring to carry a handgun for self-defense, similarly applied for the removal of restrictions on his license, citing his experience safely handling firearms.[89] This application was denied, but he was permitted to carry while commuting to work.[90] Bruen claimed the Second Amendment allows states to condition carrying handguns in places frequently visited by the general public based on whether the permit applicant can demonstrate an objective need to be armed for self-defense in those places.[91]

B. Procedural History

Koch and Nash sued Bruen for declaratory and injunctive relief, alleging that New York's denial of their unrestricted license applications, based on lack of proper cause, violated their Second and Fourteenth Amendment rights.[92] The United States District Court for the Northern District of New York dismissed Koch and Nash's complaint.[93] The dismissal was affirmed by the United States Court of Appeals for the Second Circuit based on *Kachalsky v. County of Westchester*,[94] in which it had held that New York's proper-cause standard "was substantially related to the achievement of an important governmental interest."[95]

C. Majority Opinion

Justice Thomas authored the majority opinion.[96] Chief Justice Roberts and Justices Alito, Gorsuch, Kavanaugh and Barrett joined it.[97] The issue before the Court was whether New York's licensing conditions for an unrestricted concealed-carry permit of a pistol or revolver were constitutional, under the Second and Fourteenth Amendments, when they required applicants to demonstrate good moral character and proper cause.[98] The Court's answer hinged on whether the Second Amendment's plain language protected Koch's and Nash's rights to carry handguns publicly for self-defense,[99] and whether the "proper-cause requirement [was]

86. *Id.*
87. *Id.*
88. *Id.* (alteration in original).
89. *Id.*
90. *Id.*
91. *Id.* at 2134.
92. *Id.* at 2117.
93. *Id.*
94. 701 F.3d 81, 96 (2d Cir. 2012).
95. *Bruen*, 142 S. Ct. at 2125 (quoting *Kachalsky*, 701 F.3d at 96 (2d. Cir. 2012)).
96. *Id.* at 2121.
97. *Id.* at 2121.
98. *Id.* at 2124–25.
99. *Id.* at 2134.

consistent with this Nation's historical tradition of firearm regulation."[100] If Bruen satisfied both burdens, the Court would also consider whether the Second and Fourteenth Amendments protected Koch and Nash's conduct.[101] Ultimately, the Supreme Court held that New York's proper-cause requirement violated the Fourteenth Amendment by preventing law-abiding citizens, with ordinary self-defense needs, from exercising their right to keep and bear arms.[102]

1. New York's History of Firearm Regulation

The Court began its analysis by reviewing the relevant licensing scheme's history. Since 1905, it has been a misdemeanor for persons over the age of sixteen to carry a concealed firearm on their person anywhere in New York without a written permit.[103] Since the enactment of New York's Sullivan Law in 1911, applicants who wanted to carry a firearm at home or in their business had to prove good moral character, "no history of crime or mental illness, and that 'no good cause exists for the denial of the license.'"[104] To carry a concealed pistol or revolver in public for self-defense, applicants needed an unrestricted license, which could be obtained by proving proper cause to a judge or law enforcement officer.[105] New York courts generally held that applicants could prove proper cause by demonstrating "a special need for self-protection distinguishable from that of the general community."[106] If applicants could not prove proper cause to public carry for self-defense, they could be issued a restricted license to carry "for a limited purpose, such as hunting, target shooting, or employment."[107] If a licensing officer denied an application to publicly carry a concealed firearm on the basis of proper-cause, the standard of review for that decision on appeal was arbitrary and capricious.[108] New York's licensing scheme, prior to the *Bruen* decision, was referred to as "may-issue," as opposed to "shall-issue" because authorities had discretion to deny concealed-carry license applications even when the applicants had met the statutory requirements.[109]

2. Application of *Heller* and *McDonald*

The Court began with an analysis of *Heller*, which held that laws prohibiting possession and use of handguns in the home are unconstitutional under the Second Amendment.[110] The *Bruen* Court interpreted the

100. *Id.* at 2135.
101. *Id.* at 2135.
102. *Id.* at 2156.
103. *Id.* at 2122.
104. *Id.* at 2122–23; 1911 Laws of N.Y., ch. 195, § 1, at 443 (codifying N.Y. Penal Law § 1897, ¶ 3); *see also* N.Y. Legislative Service, *Dangerous Weapons—"Sullivan Law,"* 1911 Ch. 195 (1911).
105. *Bruen*, 142 S. Ct. at 2123.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 2123–24.
110. *Id.* at 2125; District of Columbia v. Heller, 554 U.S. 570 (2008).

Heller analysis to rely solely on textual and historical analysis, without incorporating means-end or intermediate scrutiny.[111] The Court, therefore, stated that the widely accepted second step of the framework used by the majority of the Courts of Appeals—under which the courts analyzed how close the law is to the core of the right and the severity of the law's burden—was inconsistent with *Heller*.[112] According to the *Bruen* Court, *Heller* stated that if the Second Amendment's plain text incorporates a citizen's conduct, that conduct was presumptively protected by the Constitution.[113] Thus, Bruen needed to prove consistency with America's historical tradition of firearm regulation to justify New York's licensing regulations.[114] The Court additionally asserted that *Heller* did not support means-end scrutiny because of its textually-focused analysis, which determined that the Second Amendment's protections do not depend on militia service.[115] The *Bruen* Court also interpreted the *Heller* majority's rejection of its dissent's "interest-balancing inquiry" as a rejection of intermediate scrutiny in this context.[116] The firearm restrictions during the founding era and colonial period, noted by the *Heller* dissent, were dismissed by the majority as irrelevant or not as burdensome as an absolute ban on handguns, which would also make them irrelevant.[117] *Heller*, according to Justice Thomas, also reinforced the principle that the fixed meaning of the Constitution, as understood by the Founders, mandates that the Court must apply the Second Amendment to modern circumstances beyond the Founders' imagination.[118]

The *Bruen* Court did not rely on *McDonald* beyond establishing that *Heller*'s holding applies equally to state and federal government.[119] Justice Thomas concluded that neither *Heller* nor *McDonald* supported the application of means-end scrutiny in Second Amendment cases, but that the constitutionality of New York's regulations could be determined by historical analogies.[120]

3. Historical Analysis of Public Carry Regulations

The Court next conducted an extensive historical analysis and concluded that there was no historical basis for Bruen's position that the Second Amendment permitted broad public carry prohibitions.[121] At the outset, it noted that because the Second Amendment was ratified in 1791, it must weigh the history presented close to that time more heavily than other

111. *Bruen*, 142 S. Ct. at 2127, 2129.
112. *Id.* at 2129.
113. *Id.* at 2129–30.
114. *Id.* at 2125.
115. *Id.* at 2127.
116. *Id.* at 2129.
117. *Id.* at 2128.
118. *Id.* at 2132.
119. *See id.* at 2133.
120. *Id.* at 2127, 2138–56.
121. *Id.* at 2138–56.

examples.[122] This was because "not all history is created equal," as "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*."[123] The Court noted that the text controls constitutionality even if the history after adoption of the Bill of Rights contradicts it.[124]

Proceeding sequentially, the Court began by addressing Bruen's reliance on Medieval English regulations (adopted in Colonial America), like the Statute of Northampton, which was passed as a result of acute terror in the area and prohibited riding armed.[125] The Court concluded that this statute would not have contemplated handguns and that there was no evidence that handguns would have created similar terror as riding armed, which necessitated the Statute.[126] Additionally, this example was too far removed from 1791 to carry much weight in the historical analysis.[127]

Next, the Court dismissed as irrelevant evidence of the Tudor and early Stuart Era's attempt to suppress the first handguns because the prohibition of handguns stemmed from a concern of inefficacy rather than public safety.[128] The Court announced that the time between 1660 and 1688 was particularly instructive.[129] Around this time, although the Statute of Northampton still existed, the 1689 English Bill of Rights allowed for Protestants to carry arms for their defense.[130] The English founded the colonies around the same time it began abolishing its own handgun ownership and usage restrictions.[131]

During the Colonial Era, there were three documented restrictions of public carry.[132] Massachusetts and New Hampshire had statutes authorizing justices of the peace to arrest people who were offensively armed.[133] Bruen interpreted theses statutes as a prohibition of dangerous and unusual weapons, including firearms.[134] The Court disagreed and read these regulations as the mere codification of "the existing common-law offense of bearing arms to terrorize the people."[135] The Court contended that even if Bruen's argument demonstrated colonial legislatures sometimes regulated carrying weapons, it would not bear any weight on today's gun restrictions.[136] Additionally, East New Jersey enacted a statute in 1686 which "prohibited the concealed carry of 'pocket pistol[s]' or other

122. *Id.* at 2136.
123. *Id.*
124. *Id.* at 2137 (citing Gamble v. U.S., 139 S. Ct. 1960, 1987 (2019) (Thomas, J., concurring)).
125. *Id.* at 2139–40.
126. *Id.* at 2142.
127. *Id.* at 2139.
128. *Id.* at 2140.
129. *Id.*
130. *Id.* at 2141–42.
131. *Id.* at 2142.
132. *Id.* at 2142–43.
133. *Id.*
134. *Id.* at 2143.
135. *Id.*
136. *Id.* at 2143.

'unusual or unlawful weapons,' and it further prohibited 'planter[s]' from carrying all pistols unless in military service or, if 'strangers,' when traveling through the Province."[137] The Court considered this restriction irrelevant to Bruen's argument because the law did not restrict all public carry, only concealed carry, and did not apply to all firearms; the statute was effective for about eight years, too long before the founding to inform Second Amendment interpretation.[138] The Court emphasized that these statutes should not be relied upon to interpret the Second Amendment because they were too few to establish a tradition of public-carry regulation and they only prohibited carrying weapons in a way that created fear or terror among the public.[139]

Public-carry restrictions, via common-law offenses, statutory prohibitions, and "surety" statutes, became more widespread after the ratification of the Second Amendment.[140] The Court did not consider these historically informative to Second Amendment interpretation, claiming none of the laws imposed a burden as substantial as New York's licensing regime did.[141] In 1833, the Tennessee Supreme Court held that the Statute of Northampton had not been a part of Tennessee law, but the state did have a prohibition on carrying pistols, publicly or privately, in a belt or pocket, although public carry of larger guns was permissible.[142] Nine years later, the North Carolina Supreme Court held that the Statute of Northampton had been codified into its state law, and the Alabama Supreme Court recognized that it was a common-law offense to carry a weapon "for the purpose of an affray, and in such manner as to strike terror to the people."[143] In the early to mid-nineteenth century, states enacted concealed carry laws and most courts upheld their constitutionality under the Second Amendment.[144] During this time, in Alabama, Louisiana, and Kentucky, concealed-carry regulations were held constitutional so long as they did not prohibit open carry.[145] In 1846, the Georgia Supreme Court held that statutes which completely prohibited public carry were unconstitutional.[146]

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137. *Id.* at 2143–44 (alterations in original) (citing An Act Against Wearing Swords, Etc., ch. 9, in Grants, Concessions, and Original Constitutions of the Province of New Jersey 290 (2d ed. 1881) (Grants and Concessions); RICHARD M. LEDERER, COLONIAL AMERICAN ENGLISH 175 (1985); Joseph R. Klett & New Jersey State Archives, Using the Records of the East and West Jersey Proprietors 31 (rev. ed. 2014), https://www.nj.gov/state/archives/pdf/proprietors.pdf) (a "planter" was simply a farmer or plantation owner who settled new territory)).

138. *Bruen*, 142 S. Ct. at 2144.

139. *Id.* at 2142, 2145.

140. *Id.* at 2120; 2145. Surety statutes are laws which require "individuals to post bond before carrying weapons in public." *Id.* at 2120.

141. *Id.* at 2145.

142. *Id.* at 2145, 2147 (citing Simpson v. State, 13 Tenn. 356, 358 (1833)).

143. *Id.* at 2145–46 (quoting O'Neill v. State, 16 Ala. 65, 67 (1849)).

144. *Id.* at 2146 (citing District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).

145. *Id.* at 2146–47 (citing State v. Reid, 1 Ala. 612, 616, 619–21 (1840); State v. Chandler, 5 La. 489, 490 (1850); Bliss v. Commonwealth, 12 Ky. 90 (1822)).

146. *Id.* at 2147 (citing Nunn v. State, 1 Ga. 243, 251 (1846)).

Read together, the antebellum state courts held that it was unconstitutional under the Second Amendment to prohibit public carry of arms.[147]

Between 1836 and 1871, ten states adopted surety statutes, which required people to post bond after an arrest in order to legally, publicly carry a weapon again.[148] The Court found the surety statutes' reasonable-cause laws dissimilar to New York's proper-cause requirement because proof of a citizen's special need was only necessary after an accusation of breaching the peace.[149] Additionally, even if they were a burdensome restriction, there was little evidence of enforcement.[150] The Court concluded that laws from antebellum America evinced "*the manner* of public carry was subject to reasonable regulation" and states could prohibit concealed carry if they preserved the option to open carry.[151]

According to the Court, the Reconstruction period reinforced that all free persons were entitled to Second Amendment protections.[152] It noted that at this time Black citizens had a strong desire and ability to protect themselves with revolvers to compensate for the government's inadequate protection in the aftermath of the Civil War.[153] In response, various states passed laws limiting their ability to do so. South Carolina authorized the arrest of offensively armed people in 1870, West Virginia effected a surety statute, and Tennessee reinstated its 1821 prohibition on publicly carrying handguns (exempting large, military pistols).[154] In 1871, Texas required citizens desiring to carry a pistol to prove that they had reasonable grounds to fear an unlawful attack on their person.[155] The Texas Supreme Court recognized in *State v. Duke*[156] that the Second Amendment protected the right to carry concealed pistols, but it "held that requiring any pistol-bearer to have 'reasonable grounds fearing an unlawful attack on [one's] person' was a 'legitimate and highly proper' regulation of handgun carriage."[157] This conclusion expanded the scope of the state constitution's protections.[158] In 1891, the West Virginia Supreme Court also upheld a public carry prohibition, reasoning that the right to carry handguns was not protected by the Second Amendment.[159] The *Bruen* Court acknowledged that the postbellum Texas and West Virginia laws strongly supported Bruen's

147. *Id.* at 2145, 2147.
148. *Id.* at 2148.
149. *Id.* at 2148–49.
150. *Id.* at 2149.
151. *Id.* at 2150.
152. *Id.* at 2150–52.
153. *Id.* at 2151.
154. *Id.* at 2147, 2152–53 (citing 1870 S. C. Acts p. 403, no. 288, § 4; W. Va. Code, ch. 153, § 8; 1821 Tenn. Acts ch. 13, p. 15).
155. *Id.* at 2153 (citing 1871 Tex. Gen. Laws § 1).
156. 42 Tex. 455 (1875).
157. *Bruen*, 142 S. Ct. at 2153 (alteration in original).
158. *Id.*
159. *Id.*

position, but dismissed them in light of evidence of other states which allowed arms for self-defense in public.[160]

Bruen also cited increased gun regulation during the late nineteenth century, particularly in the Western Territories.[161] For example, Arizona and New Mexico prohibited carrying "pistols in towns, cities, and villages," while allowing long guns to be carried everywhere.[162] Wyoming and Idaho prohibited carrying any type of firearm in towns, cities, and villages.[163] Oklahoma, which had the strictest regulations, prohibited publicly carrying pistols anywhere, although shot-guns or rifles could be carried for specific reasons.[164] Kansas instructed cities with more than fifteen thousand inhabitants to enact ordinances prohibiting the public carry of guns.[165] By 1890, each city meeting this threshold had done so.[166] However, the *Bruen* Court emphasized that these nineteenth century regulations were the exception, rather than the rule, because they were merely a few examples amidst a more widespread tradition of legal open carry, and they only governed about 1% of the American population.[167] It, therefore, asserted that these restrictions did not justify New York's proper-cause requirement because, as territorial laws, they were short-lived and rarely subject to judicial scrutiny, meaning their existence did not prove constitutionality.[168]

As part of its historical analysis, the Court explained and ultimately overruled the Courts of Appeals' widely accepted and utilized "two-step" framework for analyzing Second Amendment issues.[169] Justice Thomas asserted that the second step was where the Courts of Appeals had been led astray; he argued it should be replaced with a historical analysis of the Second Amendment's limits because the Second Amendment is a product of the Founder's balancing interests, and therefore, demands unqualified deference.[170] Further, according to Justice Thomas, the two important metrics derived from *Heller* and *McDonald* are "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[171] The analogical inquiry should focus on whether the past regulation and the modern regulation impose comparable burdens on individuals' rights to armed self-defense.[172] The Court additionally stated that it understood the plain language of the Second Amendment to presumptively guarantee

160. *Id.* at 2153.
161. *Id.* at 2153–54.
162. *Id.* at 2154 (citing 1889 Ariz. Terr. Sess. Laws no. 13, § 1, p. 16; 1869 N. M. Laws ch. 32, §§ 1–2, p. 72).
163. *Id.* (citing 1875 Wyo. Terr. Sess. Laws ch. 52, § 1; 1889 Idaho Terr. Gen. Laws § 1, p. 23).
164. *Id.* at 2154 (citing 1890 Okla. Terr. Stats., Art. 47, §§ 1–2, 5, p. 495).
165. *Id.* at 2155.
166. *Id.* at 2155–56.
167. *Id.* at 2154–55.
168. *Id.* at 2155.
169. *Id.* at 2126.
170. *Id.* at 2127, 2131.
171. *Id.* at 2133.
172. *Id.*

petitioners the right to "bear" arms in public for self-defense and that the "definition of 'bear' naturally encompasses public carry."[173] It concluded that New York's regulation went too far because there is no other constitutional right where citizens must prove a special need in order to exercise it and no historical basis which would allow New York to effectively declare Manhattan a "sensitive place," worthy of special exemptions, "simply because it is crowded and generally protected by the New York City Police Department" (NYPD).[174]

The Court concluded its historical analysis by declaring that Bruen had failed to meet the burden of identifying an American tradition which could justify New York's proper-cause requirement.[175] It emphasized that the Second Amendment is a first-class right which guarantees Americans the right to public carry, and which may be limited only by "reasonable, well-defined restrictions."[176] Thus, the Court decided that "New York's proper-cause requirement violate[d] the Fourteenth Amendment [by] prevent[ing] law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms."[177]

D. Justice Alito's Concurrence

Justice Alito wrote separately to clarify that this opinion decided the Second Amendment was violated only because it was "virtually impossible" under New York's licensing scheme for law-abiding citizens to carry a gun outside the home for self-defense.[178] He affirmed that this decision did not require a trial or factual findings because all the necessary information was in the record.[179] Justice Alito agreed with the majority that means-end analysis is inapplicable to the Second Amendment.[180] He questioned the relevance of the dissent's statistics on increased gun violence and asserted that those statistics proved the Sullivan Law had not been effective.[181] He concluded by noting that because police cannot confiscate guns from every criminal, vulnerable people who are unable to carry a handgun for protection from a criminal attack have reasonable fear of serious injury.[182]

E. Justice Kavanaugh's Concurrence

Justice Kavanaugh joined the Court and wrote separately to emphasize two points on the limits of the majority opinion.[183] First, he wrote that this decision does not affect the forty-three states with "shall-issue"

173. *Id.* at 2134–35.
174. *Id.* at 2134, 2156.
175. *Id.* at 2156.
176. *Id.* at 2156 (citing District of Columbia v. Heller, 554 U.S. 570, 581 (2008)).
177. *Id.*
178. *Id.* at 2159 (Alito, J. concurring).
179. *Id.*
180. *Id.* at 2160.
181. *Id.* at 2158.
182. *Id.* at 2158.
183. *Id.* at 2161 (Kavanaugh, J., concurring).

licensing regimes. Justice Kavanaugh attempted to reassure the remaining six states that "may-issue" licensing regimes, including New York, can still require a license to carry a handgun for self-defense if they use the same requirements as "shall-issue" states.[184] Second, he emphasized that the Court has repeatedly recognized that the Second Amendment is not unlimited and "allows [for] a 'variety' of gun regulations."[185]

F. Justice Barrett's Concurrence

Justice Barrett wrote separately to identify two issues left unresolved by the majority opinion.[186] The first was that the Court did not determine how post-ratification practices could affect the Constitution's original meaning.[187] The second was that the Court did not decide which time period to rely on for constitutional interpretation: when the Fourteenth Amendment was ratified in 1868 or when the Bill of Rights was ratified in 1791.[188]

G. Justice Breyer's Dissent

Justice Sotomayor and Justice Kagan joined Justice Breyer's dissent.[189] Justice Breyer began by discussing the increasing rates of gun violence in the United States and the importance of addressing the dangers of firearms as they are "the leading cause of death among children and adolescents."[190] Justice Breyer's dissent found three crucial errors in the majority opinion.[191] First, it argued that this case was incorrectly decided solely on the basis of its pleadings, without data from discovery or creation of an evidentiary record.[192] With only the pleadings to consider, his dissent stated, the Court failed to truly investigate how the Sullivan Law worked in practice.[193] Second, Justice Breyer's dissent pointed out that the majority improperly conducted its analysis exclusively through historical analysis.[194] Third, it stated that in applying its purely historical approach, the Court disregarded historical evidence of firearm regulation which restricted public carriage by concluding those examples were irrelevant as outliers and inconsistent with the national tradition.[195] Justice Breyer wrote that he would have considered the present dangers and potential repercussions of gun violence that motivate gun regulations in interpreting the Second Amendment.[196] He also would have affirmed *Kachalsky* or, at a minimum, not invalidated New York's laws solely on the pleadings without

184. *Id.* at 2162.
185. *Id.*
186. *Id.* (Barrett, J., concurring).
187. *Id.* at 2162.
188. *Id.* at 2163.
189. *Id.* (Breyer, J., dissenting).
190. *Id.*
191. *Id.* at 2164.
192. *Id.*
193. *Id.*
194. *Id.* at 2164.
195. *Id.*
196. *Id.*

consideration of "the State's compelling interest in preventing gun violence."[197]

To illustrate the first point, Justice Breyer described the substance of the Sullivan Law and its true effect, since the record had not been fully developed.[198] He noted that the licensing laws in New York, for more than a century, had been constructed so that obtaining a concealed-carry permit was the only legal way to carry a handgun.[199] This law did not apply to all firearms: New Yorkers did not need a license to carry a rifle or shotgun (over a certain length) in public.[200] To be granted a concealed-carry license for a handgun, applicants had to be at least twenty-one years old, of "good moral character," and could not "have been convicted of a felony, dishonorably discharged from the military, or involuntarily committed to a mental hygiene facility."[201] If applicants met all the criteria, the law provided that a concealed-carry permit "shall be issued" to applicants with particular "professions, such as judges, corrections officers, or messengers of a 'banking institution or express company.'"[202] Outside of these professions, applicants could still be granted the permit if they were able to prove there was "proper cause" to issue.[203]

According to Justice Breyer, there was a great amount of case law to guide licensing officials on the boundaries of proper cause.[204] When the proper cause was self-defense, the applicant must have demonstrated "a special need for self-protection distinguishable from that of the general community."[205] If a licensing officer denied a permit application for lack of proper cause, the applicant could pursue judicial review and a court would determine if the denial was arbitrary and capricious.[206]

Justice Breyer's dissent highlighted that there was no evidence in this case that Koch or Nash ever applied for judicial review.[207] It found the majority's characterization of New York's licensing officers' discretion to be lacking because there was no discovery from the parties.[208] Without a developed record, there was no evidence that the New York courts

197. *Id.*; *see also* Kachalsky v. County of Westchester, 701 F.3d 81, 97-99, 101 (2012) ("decline[d] Plaintiffs' invitation to strike down New York's one-hundred-year-old law and call into question the state's traditional authority to extensively regulate handgun possession in public.").

198. *Bruen*, 142 S. Ct. at 2169–70 (Breyer, J., dissenting).

199. *Id.* at 2169.

200. *Id.*

201. *Id.* (citing N.Y. Penal Law Ann. § 400.00(1)).

202. *Id.* (citing N.Y. Penal Law Ann. § 400.00(2)).

203. *Id.*

204. *Id.* at 2169–70 (citing Kachalsky v. Cnty. of Westchester, 701 F.3d 81 (2d Cir. 2012), *abrogated by* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022) (additional internal citations omitted)).

205. *Id.* (quoting Klenosky v. New York City Police Dep't, 428 N.Y. S.2d 256, 257 (N.Y. App. Div. 1980), *aff'd*, 421 N.E. 2d 503 (N.Y. 1981), *abrogated by* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022)).

206. *Id.* at 2170 (citing N.Y. Civ. Prac. Law Ann. § 7803(3) (2021); 5 U.S.C § 706(2)(A)).

207. *Id.* at 217.

208. *Id.* at 2170.

deprived applicants of adequate review.[209] It was also unclear to Justice Breyer why the majority characterized the New York licensing scheme as too "demanding" when it only cited cases originating in New York City, which may not have been an accurate representation of how the licensing regulations were enforced throughout the state.[210]

Justice Breyer also noted that the majority's preference for "shall issue" regimes over "may issue" regimes failed to properly consider the variation within each group of states.[211] Some states technically categorized as "shall issue," he noted, have discretionary statutes similar to "may issue" states.[212] The Court did not acknowledge the ambiguity created by categorizing states as "shall" or "may issue" regimes, which Justice Breyer viewed as problematic because this decision had the potential to affect all "may issue" states, even if they operate differently than New York.[213] He also pointed out that though the Court engaged in a lengthy historical analysis of gun regulations in the United States, it failed to mention that "shall issue" licensing was a fairly new practice and that until the 1980s, "may issue" licensing predominated.[214] The seven remaining "may issue" jurisdictions accounted for over a quarter of the American population and had chosen not to convert to "shall issue" regimes because they were among the most densely populated areas in the country and, therefore, had different gun violence issues than rural areas.[215] Justice Breyer emphasized that disagreements about the significance of gun violence statistics when interpreting the difference between violence in urban and rural communities demonstrate why the legislature, not the courts, should determine gun regulations.[216]

Justice Breyer's second critique of the majority opinion focused on the Court's application of an improper standard of review.[217] As the majority acknowledged, every Court of Appeals had employed a two-step framework and means-end scrutiny to Second Amendment issues for more than a decade, until this decision.[218] The majority's refusal to adopt this method of analysis and disruption of settled consensus among the Courts of Appeals, which had been widely accepted, was extremely unusual in Justice Breyer's eyes.[219] It was particularly odd for the majority to rely so heavily on *Heller* to reject means-end scrutiny when *Heller* did not reject means-end scrutiny; the *Heller* Court simply did not conduct analysis beyond American history because the Second Amendment's plain language

209. *Id.* at 2170–71.
210. *Id.* at 2171 (internal citations omitted).
211. *Id.* at 2171–72.
212. *See id.* at 2172.
213. *Id.*
214. *Id.*
215. *Id.* at 2173.
216. *Id.* at 2174.
217. *Id.*
218. *Id.* at 2174–75.
219. *Id.* at 2175.

resolved the issue before the Court.[220] Justice Breyer also noted that the *Heller* Court had emphatically rejected a "freestanding interest balancing" review of constitutional issues, but made it clear that means-end scrutiny is a different standard of review which has traditionally been applied in constitutional contexts like First Amendment challenges.[221] It therefore concluded that applying means-end scrutiny to the Second Amendment, or other constitutional challenges, is not per se improper.[222]

Justice Breyer's third criticism of the majority opinion was the inadequacy of its historical analysis.[223] He noted that from the outset the historical approach was impractical because, without offering guidance, it imposed quite a difficult task upon lower court judges who are well-equipped to apply the law, but are not historians with "experience answering contested historical questions."[224] He also noted that the Court's only clear metric for determining whether a regulation was relevant to its Second Amendment analysis was by comparison of "how" and "why" the restrictions existed, which is ironic because "how" and "why" are the thrust of the means-end analysis the majority to vehemently rejects.[225] The Court dismissed Bruen's historical examples as unable to support New York's regulations, because they were outliers.[226] It stated "that just two . . . decisions or three colonial laws are not enough to satisfy its test," but did not decide how many examples would have been enough to illustrate a tradition of regulating public carry.[227] Justice Breyer also reviewed regulations from each time period: the ratification of the Second Amendment, the Colonial Era, the Founding Era, the nineteenth century, Reconstruction, and finally, the Sullivan Law, which had been upheld for over a century.[228]

Even if history were clear, according to Justice Breyer, it could not be an adequate means of interpreting modern challenges.[229] In addition to the fact that the Founders did not experience the same type of violent risks as cities today, he pointed out the unlikelihood that the Framers considered "ghost guns," "smart guns," or bullets designed to pierce body armor.[230] He also pointed out that the Court's suggestion of addressing these issues

220. *Id.* at 2175–76.
221. *Id.* at 2176.
222. *Id.*
223. *Id.* at 2164.
224. *Id.* at 2177.
225. *Id.* at 2179.
226. *Id.*
227. *Id.*
228. *Id.* at 2181–89.
229. *Id.* at 2180.
230. *Id.* at 2180–81. Ghost guns are constructed by three-dimension printers, making them unserialized and difficult to track. Press Release, White House, FACT SHEET: The Biden Administration Cracks Down on Ghost Guns, Ensures That ATF Has the Leadership It Needs to Enforce Our Gun Laws (Apr. 11, 2022). Smart guns use technology, such as fingerprint readers, to ensure only authorized users are able to fire the gun. Marissa Edmund, *Smart Guns: Technology That Can Save Lives*, CTR. FOR AM. PROGRESS (Mar. 29, 2022), https://www.americanprogress.org/article/smart-guns-technology-that-can-save-lives/.

by analogical reasoning is difficult without guidance.[231] The majority opinion affirmed *Heller*'s assertion that states could ban public carriage in "sensitive places."[232] However, it did not announce qualifications of sensitive places or provide the eighteenth or nineteenth century equivalent of modern cities, "subways, nightclubs, movie theaters, and sports stadiums."[233]

Justice Breyer framed the issue as determining the extent to which democratically elected officials can enact laws addressing gun violence.[234] The majority decided this, without analyzing the other compelling issue legislatures have attempted to address.[235] Justice Breyer also offered context on the unique nature of this issue.[236] As of 2017, he pointed out, there were about 120 guns per 100 people.[237] Forty-five thousand two-hundred and twenty-two Americans were killed by guns in 2020, which was a 25% increase in deaths as a result of gun violence since 2015.[238] Notably, "states with lower rates of gun ownership have lower rates of gun deaths."[239] The prominent issue of mass shootings, averaging more than one per day in 2022 at the issuance of this opinion, was only a fraction of the gun violence epidemic; more accessible firearms had led to an increase of injuries and deaths during road rage incidents, violent and destructive armed protests, and fatal interactions between civilians and police officers.[240]

Justice Breyer also acknowledged that not all firearm usage is harmful.[241] Sports like hunting or target shooting, certain vocational positions, and self-defense are all lawful purposes to own and use a firearm.[242] Legislatures, he emphasized, are tasked with "[b]alancing these lawful uses against the dangers of firearms."[243] It is more appropriate for elected bodies—tasked with interpreting data, hearing expert opinions, calculating predictive judgments—to legislate how and when gun regulations are implemented.[244] Judges, on the other hand, are encouraged to exercise "modesty and restraint" when interpreting application of the Second Amendment.[245] Justice Breyer concluded by reiterating his disagreement "with the Court's decision to strike New York's law down without allowing for

231. *Bruen*, 142 S. Ct. at 2181 (Breyer, J., dissenting).
232. *Id.* (citing District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).
233. *Id.*
234. *Id.* at 2164.
235. *Id.*
236. *Id.* at 2163–67.
237. *Id.* at 2164.
238. *Id.* at 2165.
239. *Id.* at 2164 (quoting Brief of the Educational Fund to Stop Gun Violence et al. as Amici Curiae in Support of Respondents at 17–18, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843), 2021 WL 4480474).
240. *Id.* at 2166.
241. *Id.* at 2167.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*

discovery or the development of any evidentiary record, without considering the State's compelling interest in preventing gun violence and protecting the safety of its citizens, and without considering the potentially deadly consequences of its decision."[246] He emphasized that the majority's decision ignored the seriousness of gun violence in the United States and weakened states' abilities to address the issue.[247]

III. THE AFTERMATH OF *BRUEN*

This analysis begins by arguing that the Court incorrectly decided *Bruen* by abolishing the Courts of Appeals' well-established two-step Second Amendment analysis and by relying almost exclusively on a historical analysis, but disregards a long history of the government regulating firearms in sensitive areas.[248] It further argues that while historical analysis is a useful tool to interpret the merits of modern constitutional challenges, the Court should not use it to dismiss history that is contrary to its position or ignore the modernization of the United States since the Bill of Rights was ratified.[249] It then examines *Bruen*'s implications for federalism and hypothesizes about the future of firearm regulations.[250]

A. Aggrandizing History

The *Bruen* Court disapproved of empirical judgments, deciding instead that historical analysis is the best way to determine the Second Amendment's scope.[251] The Court, however, failed to recognize that most judges are not historians and, therefore, do not have the special expertise to answer historical questions in a manner that applies to contemporary issues.[252] History requires expert analysis because it is "written by the victors," so its full context is often missing.[253] In addition to the inherent flaws of this interpretive method, the Court's application of it in *Bruen* was seemingly uninformed by precedent.[254] Neither *Heller* nor *McDonald* announced the proper method of analysis for Second Amendment challenges, yet the Court leapt to the conclusion that precedent indicated "the government must affirmatively prove that its firearms regulation is part of

246. *Id.* at 2191.
247. *Id.* at 2168.
248. *See infra* Section III.A; *see Bruen*, 142 S. Ct. at 2164, 2174–75 (Breyer, J., dissenting).
249. *See infra* Section III.A.
250. *See infra* Section III.C.
251. *See Bruen*, 142 S. Ct. at 2129–30 ("reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions,' especially given their 'lack [of] expertise' in the field." (quoting McDonald v. City of Chicago, 561 U.S. 742, 790–91 (2010) (plurality opinion) (alteration in original)).
252. *Id.* at 2177 (Breyer, J., dissenting).
253. Phrase adopted into the vernacular from Winston Churchill's joke in a speech before the House of Commons that, "For my part, I consider that it will be found much better by all Parties to leave the past to history, especially as I propose to write that history myself." The Churchill Project, *Churchillisms: "Leave the Past to History" (Which He Will Write)*, THE CHURCHILL PROJECT HILLSDALE COLLEGE (Oct. 19, 2016), https://winstonchurchill.hillsdale.edu/leave-past-history/.
254. *See Bruen*, 142 S. Ct. at 2181 (Breyer, J., dissenting).

the historical tradition that delimits the outer bounds of the right to keep and bear arms."[255] Justice Thomas presented a "straightforward" example of this test's application, where there was a regulation addressing a societal issue that had persisted since the eighteenth century.[256] He asserted that the lack of an eighteenth-century regulation attempting to address the persistent problem in a similar way to the modern regulation is strong evidence of the modern regulation's nonconformity with the Second Amendment.[257] In essence, Justice Thomas's contention is that today's lawmakers are limited to the methods of early generations' attempts to address gun violence, regardless of whether those methods where successful or not; an attempt to address gun violence in any materially different, novel way would be considered unconstitutional.[258] This severely hinders states' abilities to address persistent societal problems because it dictates that any solutions, aside from those which have already been proven to fail, are unconstitutional.[259]

After *Heller*, federal and state courts utilized a variety of factors to determine whether a location was suitable "for public carry, such as the likelihood that children are present, the use of a location for large public gatherings, whether the property is privately owned or owned by the government, and whether it is a location where people gather to engage in expressive or other constitutionally-protected conduct."[260] These are all logical factors in considering whether a firearm restriction should be upheld, because they consider both the compelling government interest in public safety and the historical value of laws which designated it inappropriate to carry weapons in places of congregation.[261] These factors have been used to uphold firearm prohibitions in government buildings, schools, "churches, university buildings and campus events, national parks, United States Postal Service parking lots, and county fairgrounds, among others."[262]

But the Court's failure to comprehensively define sensitive places makes the future of firearm regulation in the United States unclear.[263] The

255. Rosenblatt, *supra* note 57, at 249; *Bruen*, 142 S. Ct. at 2127.

256. *Bruen*, 142 S. Ct. at 2131.

257. *Id.*

258. *Id.*

259. *See id.* ("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.").

260. Carina Bentata Gryting & Mark Anthony Frassetto, NYSRPA v. Bruen *and the Future of the Sensitive Places Doctrine: Rejecting the Ahistorical Government Security Approach*, 63 B.C. L. REV. ELEC. SUPPLEMENT I.-60, I.-68 (2022); *see* Kiehl, *supra* note 53, at 1143 (explaining that post-*Heller*, "[l]ower courts have upheld gun regulations not specifically mentioned in *Heller* by relying on a footnote in *Heller* stating that its list of 'presumptively lawful regulatory measures' was only exemplary and not meant to be 'exhaustive.'").

261. *See* Gryting & Frassetto, *supra* note 260, at I.-67 to -69.

262. *Id.* at I.-68; *see* Kopel & Greenlee, *supra* note 17, at 261 ("As of the 1930s, several states had broad laws against guns in schools. A larger number of states had laws against arms at polling places. . . . Widespread bans on arms in government buildings or schools came in the later part of the twentieth century."); *see also* Rostron, *supra* note 13, at 712–13.

263. *See Bruen*, 142 S. Ct. at 2181 (Breyer, J., dissenting); Kiehl, *supra* note 53, at 1152–55; Gryting & Frassetto, *supra* note 260, at I.-61.

Bruen Court was clear that firearm regulations are still constitutional in "sensitive places," which include schools and government buildings according to *Heller*.[264] A "sensitive place" is where, under the Second and Fourteenth Amendments, it is lawful for the government to disarm law-abiding citizens.[265] The *Bruen* Court declined to further define "sensitive places," but concluded that New York's definition of a "sensitive place"—"places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available"—was far too broad.[266] The Court therefore declared that Manhattan did not qualify as a sensitive place despite its crowdedness and law enforcement's presence.[267]

The sensitive places doctrine has a long history that mirrors the history of firearm restrictions, from the founding through the present.[268] Contemporaneous with the founding, there were varying restrictions in Delaware, Maryland, Georgia, and Virginia forbidding guns on election grounds or university campuses.[269] During Reconstruction, these restrictions were expanded in Texas, Tennessee, Georgia, Virginia, and Missouri to include prohibitions in churches, schools, and public gatherings.[270] Additional restrictions were enacted in Oklahoma and Arizona to include prohibitions at public exhibitions and anywhere alcohol was sold.[271] The Court suggested that modern sensitive places can be determined by analogical reasoning.[272] However, it is hard to imagine what qualifies as the proper historical comparison at a time there were laws to regulate carrying firearms in populated places, but the White House did not have serious security.[273]

Additionally, contrary to the majority's position, there is sufficient evidence to prove that state governments historically prohibited discharging firearms in populated places to ensure public safety.[274] In addition to the examples provided in *Bruen*, there are two regulations from cities in Massachusetts in 1783 and 1786 which outlawed discharging firearms in

264. *Bruen*, 142 S. Ct. at 2133; *see* Adam Winkler, Heller's *Catch-22*, 56 UCLA L. REV. 1551, 1561 (2009) (emphasizing the *Heller* Court declared an individual right to keep and bear arms, while "suggest[ing] that nearly all gun control laws currently on the books are constitutionally permissible").

265. *See Bruen*, 142 S. Ct. at 2133.

266. *Id.* at 2133–34.

267. *Id.*

268. Gryting & Frassetto, *supra* note 260, at I.-62 to -65; *see generally* Kopel & Greenlee, *supra* note 17 (examining the sensitive places doctrine's history and modern application extensively).

269. Gryting & Frassetto, *supra* note 260, at I.-63 to -64.

270. *Id.* at I.-64 to -65.

271. *Id.* at I.-65.

272. *Bruen*, 142 S. Ct. at 2133.

273. Gryting & Frassetto, *supra* note 260, at I.-65; Katie Zezima, *People Used to Be Able to Walk into the White House. Legally.*, WASH. POST (Sept. 23, 2014, 6:00 AM), https://www.washingtonpost.com/news/post-politics/wp/2014/09/23/people-used-to-be-able-to-walk-into-the-white-house-legally/.

274. Charles, *supra* note 16, at 418; *see also, e.g.*, Kopel & Greenlee, *supra* note 17, at 237 (noting a 1760 New Jersey law which prohibited discharging a gun while hunting near a highway); *see also* Kopel, supra *note* 13, at 1411–36; *see also* Winkler, *supra* note 13, at 708–12.

response to incidents surprising and endangering citizens.[275] These regulations, along with others previously discussed, illustrate government concern and corresponding action for the "social cost" of gun regulations.[276]

It is difficult to articulate a single justification for upholding firearm restrictions in sensitive places that covers both courthouses and bars because the concerns in each place are unique.[277] However, the commonality between these areas is "[t]he number of potential targets, the nature of the activity, and the increased risk of conflict."[278] The Court's command to determine sensitive places solely by analogy to historical restrictions overinflates the importance and practicality of comparing modern regulations to ones from a time where today's technology to enable violence was inconceivable. In the eighteenth century, states justified gun regulations when public risk of an active shooter was about two potential deaths per minute.[279] With today's technological advances, the public risk of an active shooter is between twelve and twenty-four potential deaths per minute; if the shooter has firearm training, it increases to forty-eight potential deaths per minute.[280] If two deaths per minute was enough to justify gun regulations around the same time of the Second Amendment's ratification, it is disturbing that forty-eight deaths per minute is not considered a great enough public risk to uphold today's firearm regulations.[281]

B. Deserting Precedent

The *Bruen* Court disposed of the Courts of Appeals' two-step constitutionality test for gun regulations, derived from *Heller*, and replaced it with a new test: whether the challenged law is "consistent with the Second Amendment's text and historical understanding."[282] The *Bruen* Court also relied on *Heller* to validate this new test.[283] The societal issue addressed by each regulation is the same—handgun violence.[284] However, the challenged law in *Heller,* a complete prohibition on handgun possession in the home, was quite different from the challenged requirements to obtain a

275. *Bruen*, 142 S. Ct. at 2139–40, 2142–45, 2148 (citing several medieval English regulations, three public carry restrictions during the colonial era, including a statute from East New Jersey in 1686, three statues from late eighteenth to early nineteenth century, surety statutes); *id.* at 2181–90 (Breyer, J., dissenting); *Repository of Historical Gun Laws*, DUKE CTR. FOR FIREARMS L., https://firearmslaw.duke.edu/repository/search-the-repository/ (last visited Nov. 25, 2023).

276. *Bruen*, 142 S. Ct. at 2139–40, 2142–45, 2148; *id.* at 2181–90 (Breyer, J., dissenting).

277. Gryting & Frassetto, *supra* note 260, at I.-68 ("The concerns that would support prohibiting guns in places where alcohol is consumed are very different from those justifying prohibiting guns at public lectures or election precincts. The number of potential targets, the nature of the activity, and the increased risk of conflict all seem to be relevant in the historical determination that an area constitutes a sensitive place."); *see* Kopel & Greenlee, *supra* note 17, at 287–88; *see also* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1524–33 (2009).

278. Gryting & Frassetto, *supra* note 260, at I.-68.

279. Charles, *supra* note 16, at 47.

280. *Id.*

281. *See generally id.* at 47–48.

282. N.Y. State Rifle & Pistol Ass'n Inc. v. Bruen, 142 S. Ct. 2111, 2131 (2022).

283. *Id.*

284. *Id.* at 2131.

concealed public-carry permit in New York.[285] *Bruen* and *Heller* are significantly different because the home is one of the most constitutionally protected areas, illustrated by the government's inability to enter a private home without a warrant (barring exigent circumstances).[286] Citizens' rights in the privacy of their homes and out in public are vastly different.[287] *Heller* emphasizes that the unconstitutionality of D.C.'s prohibition of handguns is exacerbated by its extension into the home, where handguns' self-defense purposes are most acute.[288]

The challenge considered in *Bruen* to New York's Sullivan Law emerged from requests to concealed-carry deadly weapons not in the home, but rather in public spaces, just in case the need for self-defense arose.[289] To reiterate, New York's law, as it stood, allowed law-abiding citizens to obtain public-concealed carry licenses for a pistol or revolver if they were able to demonstrate a specific need for self-defense.[290] If the applicant could not evince danger to their personal safety, they were not barred from owning a firearm; they could still possess a handgun for self-defense at home, legally carry a concealed handgun in public for the purposes of sport shooting or employment, and even publicly carry a long gun.[291] The Sullivan Law was nowhere near as burdensome as the complete prohibition of owning handguns in *Heller* and did not even completely prohibit public carry for self-defense; it merely restricted concealed public-carry of handguns to those who could demonstrate a need.[292] NYSPRA's President himself, Tom King, described New York's licensing scheme as "an involved process, it's not an easy process, but it's certainly not an impossible process."[293]

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285. District of Columbia v. Heller, 554 U.S. 570, 628 (2008); *Bruen*, 142 S. Ct. at 2122–24.

286. Payton v. New York, 445 U.S. 573, 586–87 (1980) (citing U.S. CONST. amend. IV).

287. *See id.* at 573–74. This divide is emphasized in other areas of the law, such as constitutional and criminal law, where protection in the home is paramount. *Compare* Florida v. Jardines, 569 U.S. 1, 6 (2013) ("At the [Fourth] Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'"), *and Payton*, 445 U.S. at 589 ("The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms"), *and* California v. Ciraolo, 476 U.S. 207, 226 (1986) (Powell, J., dissenting) (privacy rights are most heightened in a person's home), *with* Hester v. U.S., 265 U.S. 57, 59 (1924) ("[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields.").

288. *Heller*, 554 U.S. at 574, 628 ("The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute.").

289. N.Y. State Rifle & Pistol Ass'n Inc. v. Bruen, 142 S. Ct. 2111, 2122 (2022). *But see* Erik Eckholm, *Rampage Killings Linger in Memory, but Toll of Gun Violence is Constant*, N.Y. TIMES (Oct. 8, 2015), https://www.nytimes.com/2015/10/09/us/rampage-killings-get-attention-but-gun-violence-is-constant.html (the need for self-defense arises more regularly in private, personal settings, than in public spaces).

290. *Bruen*, 142 S. Ct. at 2123.

291. *Id.*; *id.* at 2169–70 (Breyer, J., dissenting).

292. *See Heller*, 554 U.S. at 574–75; *Bruen*, 142 S. Ct. at 2123.

293. Robert J. Spitzer, *New York State and the New York Safe Act: A Case Study in Strict Gun Laws*, 78 ALB. L. REV. 749, 779 (2015) (quoting Monique Garcia, *On Concealed Carry Issue, Illinois May Look to N.Y. Laws*, CHI. TRIB., (Dec. 30, 2012), https://www.chicagotribune.com/news/ct-xpm-2012-12-30-ct-met-illinois-concealed-carry-models-20121230-story.html).

As previously discussed, the Courts of Appeals adopted a two-step test from *Heller* and *McDonald*.[294] The *Bruen* majority was wrong to reject this method for utilizing means-end scrutiny, when appropriate, because, contrary to the majority's assertion, *Heller* did not expressly reject means-end scrutiny or interest-balancing.[295] The *Heller* majority "dismissed Justice Breyer's proposed interest-balancing approach in part because it did not involve 'the traditionally expressed levels' of scrutiny."[296] Means-end scrutiny cannot be equated with interest-balancing.[297] Justice Breyer's dissent in *Bruen* criticizes *Heller* for not announcing a standard of review, and the majority acknowledges that fact but still declines to do so.[298]

The Court was not forced to indicate a standard of review in *Heller* nor *McDonald* because regardless of the standard applied, laws simply banning handguns altogether destroy Second Amendment rights, regardless of a compelling state interest.[299] Unlike the circumstances presented in *Heller* or *McDonald*, however, New York's laws did not ban all law-abiding citizens from possessing or carrying handguns.[300] The burden of the Sullivan Law on the Second Amendment was much less heavy than the burden of the laws challenged in *Heller* and *McDonald*, but the *Bruen* majority did not consider this when crafting its historical analogies.[301]

The Courts of Appeals' test should have remained intact and been applied in this case. If it was, the Court would have found that the Sullivan Law was governed by the Second Amendment because it addressed the right to carry arms as originally understood at the time the Bill of Rights was enacted.[302] The Court then would have still engaged in a historical analysis of the Second Amendment and its limitations, but simultaneously weighed the historical strength of the individuals' right to public carry with New York State's compelling interest in public safety.[303] Instead, the Court rejected the two-step method and adopted a new test: "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."[304] Under this new test, the

294. *Bruen*, 142 S. Ct. at 2126; *see* Kiehl, *supra* note 53, at 1137 (explaining the Supreme Court did not instruct the lowers courts on a standard of review for Second Amendment cases).

295. *Bruen*, 142 S. Ct. 2111, 2129 (2022); *see* Rostron, *supra* note 13, at 716–18.

296. Harvard Law Ass'n, *Article III—Justiciability—Mootness*—New York State Rifle and Pistol Ass'n v. City of New York, 134 HARV. L. REV. 440, 447 (2020).

297. *Id.* at 447 n.69. *See generally* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009) (comparing the tension between categoricalism and interest balancing for the *Heller* Court with the Court's prior address of First Amendment issues).

298. District of Columbia v. Heller, 554 U.S. 570, 635–36 (2008).

299. Elke C. Meeús, *The Second Amendment in Need of a Shot in the Arm: Overhauling the Courts' Standards of Scrutiny*, 45 W. ST. L. REV. 29, 69 (2017).

300. *Bruen*, 142 S. Ct. at 2122–23.

301. *Id.* at 2145 (characterizing the New York's restrictions as substantially burdensome). *See generally* Kiehl, *supra* note 53, at 1167–68 (noting that concealed carry laws do not at all burden the core right identified in *Heller*, firearm possession in the home).

302. *See Bruen*, 142 S. Ct. at 2182 (Breyer, J., dissenting).

303. *Id.* at 2175.

304. *Id.* at 2129–30 (majority opinion).

Court did not evade the "subjective" balancing inquiry because its review of the history of the Second Amendment and dismissal of any example of firearm restrictions being upheld was simply a biased balancing in which the Court first decided its desired outcome then worked backwards to disregard any piece of history which did not support its conclusion, tipping the scales in its favor.[305] In other words, as in *Heller*, the *Bruen* Court used "a results oriented methodology in which evidence is selectively gathered and interpreted to produce a preordained conclusion."[306]

It may seem cynical to imply that the Court engaged in this backwards analysis under the guise of historical analogies; however, revisionist history has been used with many constitutional issues, and the Second Amendment is no exception.[307] Revisionist history is a way of advancing a political agenda by reeducating "the public to believe a historical fiction was in fact a historical reality."[308] This type of undisciplined historical analysis led the Court to inadvertently create "[a] constitutional guarantee subject to future judges' assessments of [history's] usefulness," which is no guarantee at all.[309] Additionally, it is unusually disruptive for the Supreme Court to overturn the Courts of Appeals' well-established, widely accepted method of analysis, when it had been uncontested for more than a decade.[310] The Supreme Court should not have adopted this "malleable and impractical historical test" out of fear that lower courts would be "hostile to the Second Amendment."[311]

C. Weakening States

What power do states really have within this federalist system? Under the Tenth Amendment, public safety is the responsibility of the states.[312] Gun regulations affect public safety because they are a means to prevent and reduce violence.[313] It is "'self-evident' that firearms regulations are always created with a view to promoting public safety and reducing violent

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305. *See id.* at 2190 (Breyer, J., dissenting) ("In each instance, the Court finds a reason to discount the historical evidence's persuasive force.").

306. Saul Cornell, Heller*, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss"*.*"Meet the New Boss, Same as the Old Boss*,*"* 56 UCLA L. REV. 1095, 1098 (2009).

307. Charles, *supra* note 16, at 4; *see, e.g.*, Michael R. Ulrich, *Revisionist History? Responding to Gun Violence Under Historical Limitations*, 45 AM. J. L. & MED. 188, 191 (2019) (in the Heller opinion, "Justice Scalia found an individual right to possess and carry weapons in case of confrontation is 'strongly confirmed by the historical background of the Second Amendment.'").

308. Charles, *supra* note 16, at 4.

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

310. *Bruen*, 142 S. Ct. at 2175 (Breyer, J., dissenting).

311. Harvard Law Ass'n, *supra* note 296, at 449.

312. Berman v. Parker, 348 U.S. 26, 32 (1954); Library of Congress, *Intro.7.3 Federalism and the Constitution*, CONSTITUTION ANNOTATED (last visited Nov. 25, 2023), https://constitution.congress.gov/browse/essay/intro.6-2-3/ALDE_00000032/; U.S. CONST. amend. X.

313. *See Bruen*, 142 S. Ct. at 2163 (Breyer, J., dissenting); *see What Science Tells Us About the Effects of Gun Policies*, RAND CORPORATION (last updated Jan. 10, 2023), https://www.rand.org/research/gun-policy/key-findings/what-science-tells-us-about-the-effects-of-gun-policies.html; *see also How Communities Can Prevent Gun Violence*, PREVENTION INST. https://www.preventioninstitute.org/focus-areas/preventing-violence-and-reducing-injury/preventing-violence-advocacy (last visited Nov. 25, 2023).

crime."[314] The Court in *United States v. Lopez*,[315] addressing the Federal Gun-Free School Zones Act, clarified that regulating violent crime with firearm restrictions is a state function "by right of history and expertise."[316] The Second Amendment's substance inherently limits federal power to regulate firearm regulations because of police power implications.[317] Within the constraints of the Constitution, states should be able "to experiment with various solutions to social problems without national governmental supervision."[318] In addition to the states' abilities to regulate firearms through their public safety and police power authorities, the Founders secured state authority to control their militias without interference from the federal government, to ensure "states' ability to preserve liberty and check federal tyranny."[319] *Bruen* did not directly address what power, if any, states are left with to pass legislation for the protection of public health.[320] In doing so, *Bruen* robbed states of their abilities to address the serious issue of gun violence democratically.[321]

Bruen undermined the New York legislature's power to govern its citizens by allocating more power to the federal government.[322] The Second Amendment applies to the states through the Fourteenth Amendment and the *Bruen* Court's opinion heightened "the extent to which the Second Amendment restricts different States . . . from working out [democratic]

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314. Meeús, *supra* note 299, at 68.

315. 514 U.S. 549 (1995).

316. Michael P. O'Shea, *Federalism and the Implementation of the Right to Arms*, 59 SYRACUSE L. REV. 201, 206 (2008) (discussing *Lopez*).

317. *Id.* at 207; *see generally* Paul Finkelman, *"A Well Regulated Militia": The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195 (2000) (discussing the Federalists and Antifederalists' concerns about the Second Amendment when the Bill of Rights was ratified).

318. O'Shea, *supra* note 316, at 222.

319. Douglas Walker, Jr., *Necessary to the Security of Free States: The Second Amendment as the Auxiliary Right of Federalism*, 56 AM. J. OF LEGAL HIST. 365, 366 (2016); *see* Winkler, *supra* note 34, at 113 (during the Revolutionary Era some states conducted gun ownership surveys, so they knew where the necessary weapons were in case a need for defense arose).

320. N.Y. State Rifle & Pistol Ass'n Inc. v. Bruen, 142 S. Ct. 2111, 2163–64 (2022) (Breyer, J., dissenting).

321. *Id.* at 2168 (Breyer, J., dissenting). Tennessee is an example of extreme disconnect between constituents and lawmakers, and a worsening partisan divide regarding gun control laws. On March 27th, 2023, a twenty-eight-year-old shooter killed six people at the Covenant School. Adeel Hassan & Emily Cochrane, *What We Know About the Nashville School Shooting*, N.Y. TIMES (April 12, 2023), https://www.nytimes.com/article/nashville-school-shooting.html. The six victims were Hallie Scruggs, Evelyn Dieckhaus and William Kinney, all 9 years old; Mike Hill, 61, a school custodian; Cynthia Peak, 61, a substitute teacher; and Katherine Koonce, 60, the head of the school. *Id.* Hale was in treatment for an emotional disorder but still legally owned seven guns. *Id.* There has been a massive outcry for gun regulation reform, but it is unlikely to occur because of the gerrymandering of the state, influence of gun lobbyists, and legislatures consistently voting along party lines. *See id.*; *see also* Paige Pfleger & Blaise Gainey, *Tennesseans Want Gun Reform, So Why Hasn't the Legislature Gotten it Done?*, WPLN NEWS (Apr. 23, 2023), https://wpln.org/post/tennesseans-want-gun-reform-so-why-hasnt-the-legislature-gotten-it-done/; *see also* Martin Kaste & Barbara Sprunt, *Gun Legislation is Unlikely to Change on a Federal Level. Action Will Be Up to States*, NPR (March 29, 2023, 5:13 PM), https://www.npr.org/2023/03/29/1166885419/gun-legislation-is-unlikely-to-change-on-a-federal-level-action-will-be-up-to-st.

322. *See Bruen*, 142 S. Ct. at 2168 (Breyer, J., dissenting).

solutions . . . through democratic processes."[323] Though the majority did not acknowledge this shift in power from state government to federal government, it would be remiss to overlook the political underpinnings of this decision.[324] Gun regulation litigation can serve as an opportunity for activist courts to manipulate the past in order to further an ideological goal.[325]

Federalism is the distribution of power between the federal and state governments by which the Founders intended "to establish a unified national government of limited powers while maintain[ing] a distinct sphere of autonomy in which state governments could exercise a general police power."[326] A resurgence of constitutional federalism could help relieve the tension between deeply divided citizens "by protecting the ability of sub-national jurisdictions to adopt different policies that can satisfy different constituencies."[327] Almost 80% of Republicans prefer a concentration of power in the states to a concentration of power in the federal government.[328] When looking at gun ownership in this country by political party, more Republicans own guns than any other political party.[329] Traditionally, Republicans have been resistant to gun control regulations, finding them intrusive on individual rights.[330] To some degree, however, conservative philosophies are culturally rooted and evolving in the wake of increased gun violence in the last decade.[331] Valuing federalism and opposing firearm restrictions creates an overlooked ideological dilemma for the

323. *Id.* at 2137 (citing Barron *ex rel.* Tiernan v. Mayor of Baltimore, 8 L.Ed. 672 (1833); Ramos v. Louisiana, S. Ct. 1390, 1397 (2020); Timbs v. Indiana, 139 S. Ct. 682 (2019); Malloy v. Hogan, 378 U.S. 1, 10–11 (1964)); *Id.* at 2168 (Breyer, J., dissenting).

324. O'Shea, *supra* note 316 ("Disagreements over gun policy often reflect highly charged conflicts of cultural visions—conflicts that, according to some recent research, may derive from psychological attitudes so deep-seated that they are largely resistant to correction through new data").

325. *See generally* Cornell, *supra* note 306, at 1098; *see also* Ulrich, *supra* note 307, at 194 ("Justice Scalia demonstrated a clear disdain for Justice Breyer's suggested interest-balancing inquiry in *Heller*, calling it 'judge-empowering.' Yet, in *McDonald* Justice Scalia admits that even in using history, judges are empowered to make determinations that can have a significant impact on constitutional determinations."); *see also* FRANKS, *supra* note 35, at 72 ("Far from engaging in an objective, historically sensitive analysis of the plain meaning or understanding of the Second Amendment, the Court's holding in *Heller* essentially projected the views of modern-day gun rights activists onto an eighteenth-century document—precisely what originalists accuse 'living constitutionalists' of doing with regard to abortion and LGBT rights.").

326. Library of Congress, *supra* note 312.

327. O'Shea, *supra* note 316, at 324.

328. Justin McCarthy, *Majority in U.S. Prefer State Over Federal Government Power*, GALLUP NEWS (July 11, 2016), https://news.gallup.com/poll/193595/majority-prefer-state-federal-government-power.aspx.

329. *Percentage of population in the United States Owning At Least One Gun in 2022, by Political Party Affiliation*, STATISTA, https://www.statista.com/statistics/249775/percentage-of-population-in-the-us-owning-a-gun-by-party-affiliation/ (last visited Nov. 25, 2023); PHILIP J. COOK & KRISTIN A. GOSS, THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW 4 (2014) ("Republicans are almost twice as likely to own [guns] as are Democrats.").

330. *Republican Views on Gun Control*, REPUBLICAN VIEWS ON THE ISSUES (Dec. 27, 2013) https://www.republicanviews.org/republican-views-on-gun-control/.

331. *Id.*; Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (Sept. 13, 2023) https://www.pewresearch.org/fact-tank/2021/09/13/key-facts-about-americans-and-guns/.

Republican party.[332] Legal scholars have hypothesized that gun lobbies are the biggest threat to state governments, referring to this group as "fair-weather" federalists.[333] Notably, today, urban populations of both the Republican and Democratic parties favor stricter gun regulations than rural communities.[334] To respect both federalism and the Second Amendment, the federal government should not interfere with states' legislative decisions to regulate firearms, as these laws often reflect the culture of their voters.[335]

D. Shooting into the Future

This decision will have a significant impact not only in New York, but throughout the entire country.[336] It is difficult to predict exactly what the full effects of this decision will be because of its recency, but there are certainly signs that this decision has emboldened challenges to other existing firearm regulations.[337] There will not only be licensing effects, but also changes to the application of many well-founded doctrines in criminal law.[338] Since the *Bruen* Court declined to comprehensively define sensitive places, the next wave of litigation on this issue will likely surround sensitive place qualifications.[339]

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332. *See generally* Bradley W. Joondeph, *Federalism, the Rehnquist Court, and the Modern Republican Party*, 87 OR. L. REV. 117, 120 (2008) ("The modern GOP has generally endorsed the abstract principle of developing greater power to state governments and particularly the judicial enforcement of the limits on Congress's enumerated powers."); *see also* COOK & GOSS, *supra* note 329, at 183 ("By and large, Democrats favor stricter gun laws, while Republicans favor either keeping the laws the same or in some cases liberalizing them."); *see also* McCarthy, *supra* note 328 (indicating Republicans own more guns than any other political group).

333. Jonathan Lowy, *The Gun Lobby: Fair-Weather Federalists*, NATIONAL L.J. (Apr. 30, 2012, 12:00 AM), https://www.law.com/nationallawjournal/almID/1202550419791/; *see* Jacob Sullum, *Fair-Weather Federalists*, REASON (July 2012), https://reason.com/2012/06/14/fair-weather-federalists/; *see generally* COOK & GOSS, *supra* note 329, at 195 ("Although the gun lobby is suspicious, even contemptuous, of the federal government, one longtime scholar of gun politics has observed that 'the NRA probably owes its existence to its long-term, intimate association with government subsidies and other forms of support.'").

334. Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (Sept. 13, 2021), https://www.pewresearch.org/short-reads/2021/09/13/key-facts-about-americans-and-guns/; *see also* COOK & GOSS, *supra* note 329, at 4 ("Gun ownership is more than twice as common in rural areas than urban").

335. *See* O'Shea, *supra* note 316, at 208–11; *see generally* COOK & GOSS, *supra* note 329, at 183–84 ("[G]un ownership is a better predictor of a person's political party than lots of other characteristics that often serve as pretty good signals, including whether a voter is gay, female, Latino, or southern.").

336. Margaret J. Finerty, *Supreme Court Takes Gun Law Case for the First Time in a Decade*, 93-AUG N.Y. ST. B. J. 12, 16 (2021); *see* Margaret J. Finerty, *The Supreme Court's Bruen Decision and Its Impact: What Comes Next?*, NYSBA (Aug., 9, 2022), https://nysba.org/the-supreme-courts-bruen-decision-and-its-impact-what-comes-next/ ("Federal lawsuits have been filed in New York, New Jersey and California, citing to the *Bruen* decision, challenging those states' ban on various semi-automatic firearms.").

337. *See generally* Jennifer Mascia, *Tracking the Effects of the Supreme Court's Gun Ruling*, THE TRACE (updated Oct. 14, 2022), https://www.thetrace.org/2022/08/nysrpa-v-bruen-challenge-gun-regulations/.

338. Eric Ruben, *Public Carry and Criminal Law After* Bruen, 135 HARV. L. REV. F. 505, 511 (2022).

339. Kevin R. Eberle, *A Review of Significant Supreme Court Decisions of the 2021-2022 Term*, 34 S.C. L. 30, 3 (2022); N.Y. State Rifle & Pistol Ass'n Inc. v. Bruen, 142 S. Ct. 2111, 2133 (2022).

The *Bruen* decision will likely not have a direct impact on "shall issue" states unless they attempt to become a "may issue" state.[340] However, the aftermath of this decision is already visible in the New York courts. Following *Bruen*, on August 19, 2022, the NYPD issued instructions for concealed-carry applicants to reapply for licenses if they had been denied on proper cause grounds.[341] On July 1, 2022, Governor of New York, Kathy Huchul, signed the Concealed Carry Improvement Act which, among other things, banned guns in sensitive locations, including "public transit, government buildings, places of worship, polling places, medical facilities, bars, and Times Square."[342] The ban in sensitive locations has been challenged twice thus far since *Bruen* in *Christian v. Nigrelli*[343] and *Antonyuk v. Hochul*.[344] On October 6, 2022, a New York District Court Judge ordered a temporary halt of the NYPD's enforcement of the gun ban in sensitive places.[345] New York State intends to appeal this order.[346] Interestingly, on August 31, 2022, NYSRPA and the same group of residents in the case decided on June 23, 2022 filed a challenge to the Concealed Carry Improvement Act, arguing "that the law 'is intentionally vague, overbroad, and in contradiction of *Bruen*.'"[347] It is likely that similar laws will be challenged in the remaining "may issue" states and perhaps some "shall issue" states as well, for the Court almost invites these challenges by noting it did "not rule out constitutional challenges to shall-issue regimes" where ordinary law-abiding citizens are denied the right to public carry.[348]

Without concealed carry licensing restrictions, the public will become increasingly armed, which will continue to harm public health.[349]

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340. Christian Burney, *What Impact Could a Supreme Court Ruling Have on Colorado Gun Laws?*, THE DURANGO HERALD (Dec. 27, 2021, 5:00 AM).

341. Mascia, *supra* note 337.

342. *Id.*

343. 642 F. Supp. 3d 393 (W.D.N.Y. 2022). *Christian v. Nigrelli* was an action brought by the Firearms Policy Coalition and the Second Amendment Foundation that challenged New York's ban on guns in "sensitive places," arguing that the *Bruen* decision made clear that "sensitive places" cannot be defined in the broad manner employed in the ban. *Id.* at 406–08. The challenged laws listed government buildings, medical facilities, public parks, and bars among the "sensitive places" where concealed carry was prohibited. *Id.* at 408.

344. 639 F. Supp. 3d 232 (N.D.N.Y. 2022). *Antonyuk v. Hochul* followed Plaintiff Ivan Antonyuk's initial complaint (Antonyuk v. Bruen), which was dismissed for lack of standing. *Id.* at 250. Antonyuk joined five new plaintiffs and added several defendants, including New York Governor Kathy Hochul, in his challenge against the state's concealed carry law. *Id.* at 250. Chief U.S. District Court Judge George Suddaby issued a temporary restraining order on a number of provisions of the subject law, including the "sensitive places" provision that banned concealed carry in public places like Times Square. *See Id*. at 292.

345. Mascia, *supra* note 337.

346. *Id.*

347. *Id.*

348. N.Y. State Rifle & Pistol Ass'n Inc. v. Bruen, 142 S. Ct. 2111, 2138 n.9 (2022).

349. Michael R. Ulrich, *Public Carry Versus Public Health—The Harms to Come from the Supreme Court's Decision in* Bruen, N. ENGL. J. MED. 1245, 1245–46 (2022); *see, e.g.*, Becky Sullivan, *2 Shootings at Mistaken Addresses Renew the Focus on Controversial Self-Defense Laws*, NPR (Apr. 20, 2023, 9:45 PM), https://www.npr.org/2023/04/18/1170648617/how-stand-your-ground-laws-have-proliferated-in-the-last-decade (Ralph Yarl, 16, and Kaylin Gillis, 20, were shot and killed about 48 hours and 1,200 miles apart for the same mistake—simply arriving to the wrong address.).

Permitting more people to legally carry weapons will not decrease gun violence; further, it does not "address the real drivers of criminal behavior, which include social determinates such as poverty, neighborhood violence, poor education, and substandard housing."[350] More guns in public hands will escalate confrontations and likely exacerbate "racial disparities in gun violence and racial injustice."[351] Additionally, the broader public will be affected by a continued deterioration of mental health because of increased gun presence and violence, which ultimately increases fear, anxiety, isolation, and stress.[352] These factors, ironically, are reasons that the *Bruen* Court decided people should be able to carry guns for self-protection.[353]

When the rates of gun violence increase, criminal law proceedings may look different. Along with the ability to legally public-carry comes "the 'he was going for my gun' defense," which creates greater leeway to use deadly force in self-defense.[354] Courts' analyses of this defense may evolve along with the deadly weapons doctrine, which is used to determine malice aforethought in murder cases.[355] If a person kills another person with a deadly weapon, the jury can be instructed to infer malice aforethought, the requisite mens rea for murder, from the mere carrying of the deadly weapon.[356] Courts will face novel questions about self-defense and be asked to decide what the intention behind carrying a deadly weapon really is in specific contexts, as there will undoubtably be more litigation over violent confrontations.[357]

Finally, Justice Alito's concurrence suggested that the Sullivan Law was unable to deter gun violence and, therefore, the goal of preventing future violence was not a valid reason to uphold it.[358] This suggestion is wrong for two reasons. First, it is the role of the legislature, not the Court, to determine whether laws are effectively serving their purpose or should be amended.[359] Second, the assertion that gun laws should not exist because criminals ignore them anyway and tragedies would still occur carries no weight, as the same could be said for any law.[360] The absurdity of this sentiment is clear in the hypothetical of legalizing murder because people

350. *Id.*; *see also* FRANKS, *supra* note 35, at 81 ("The more gun violence there is, the more people fear gun violence, and the more they fear gun violence, the more the gun lobby tells them that the only answer to bad gun violence is good gun violence.").

351. Ulrich, *supra* note 349, at 1246; FRANKS, *supra* note 35, at 80 (explaining populations most likely to be victims of gun violence—children, people with disabilities, and the poor—are least likely to be able to access a gun for self-defense).

352. Ulrich, *supra* note 349, at 1246.

353. *Id.*; *Bruen*, 142 S. Ct. at 2158 (Alito, J., concurring).

354. Ruben, *supra* note 338, at 506–07.

355. *Id.* at 509–10.

356. *Id.*

357. *See id.* at 511.

358. *Bruen*, 142 S. Ct. at 2157–58 (Alito, J., concurring).

359. Boumediene v. Bush, 553 U.S. 723, 831, 842 (2008) (Scalia, J., dissenting) (explaining the Court must avoid "an inflated notion of judicial supremacy" and not second guess Congress when improper); FRANKS, *supra* note 35, at 74 ("Courts do not make laws; legislatures do.").

360. Spitzer, *supra* note 293, at 759–60.

will murder anyway.[361] The American legal system is based on its citizens' acceptance that laws matter.[362] Gun laws should be just as enforceable as other laws.[363]

CONCLUSION

This comment argues that the Supreme Court's decision in *Bruen* was incorrect by explaining the Court's three major errors: misapplying *Heller* and *McDonald*, abolishing the Courts of Appeals' well-established two-step analysis, and relying almost solely on a historical analysis which dismissed examples of states' public carry restrictions as irrelevant for various illegitimate reasons.[364] The *Bruen* Court's analysis rejected the Courts of Appeals' second step of determining the proper level of scrutiny by wrongly asserting that *Heller* had already determined means-end scrutiny was inappropriate, and consequently relying heavily on revisionist history to analogize.[365] *Bruen* weakened New York's ability to protect its citizens with gun control regulations and permit requirements, and consequently, created the risk of an increasingly armed populace.[366] Gun control regulations can be consistent with the Second Amendment.[367] Gun violence is persistent, but it is preventable.[368]

"We do not have to accept this carnage as the price of freedom."[369]

Catherine O'Toole[*]

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361. *Id.* at 759.

362. *Id.* at 781; *see also What is the Rule of Law*, AM. BAR ASS'N (2023), https://www.americanbar.org/advocacy/rule_of_law/what-is-the-rule-of-law/. *See generally* Joshua Kleinfeld, *Enforcement and the Concept of Law*, 121 YALE L.J. ONLINE 293 (2011) (available at http://yalelawjournal.org/forum/enforcement-and-the-concept-of-law) (explaining enforcement is necessary for laws to exist and vice versa).

363. Spitzer, *supra* note 293, at 760.

364. *See* discussion *supra* IV. *See generally* N.Y. State Rifle & Pistol Ass'n Inc. v. Bruen, 142 S. Ct. 2111, 2164 (2022) (Breyer, J., dissenting).

365. *See Bruen*, 142 S. Ct. at 2129.

366. *See id.* at 2168 (Breyer, J., dissenting); O'Shea, *supra* note 316, at 204.

367. *See Bruen*, 142 S. Ct. at 2128 (citing District of Columbia v. Heller, 554 U.S. 570, 626 (2008)) ("[T]he right secured by the Second Amendment is not unlimited.").

368. As of April 25, 2023, there have been 13,292 gun violence deaths in the United States. GUN VIOLENCE ARCHIVE 2023 (last updated Apr. 25, 2023), https://www.gunviolencearchive.org/; *Gun Violence is a Public Health Crisis*, AM. PUBLIC HEALTH ASS'N (2022), https://www.apha.org/-/media/files/pdf/factsheets/200221_gun_violence_fact_sheet.ashx ("Primary prevention involves the use of core public health activities to interrupt the transmission of violence: (1) conducting surveillance to track gun-related deaths and injuries gain insight into the causes of gun violence and assess the impact of interventions; (2) identifying risk factors associated with gun violence (e.g., poverty and depression) and resilience or protective factors that guard against gun violence (e.g., youth access to trusted adults); (3) developing, implementing and evaluating interventions to reduce risk factors and build resilience; and (4) institutionalizing successful prevention strategies.").

369. Barack Obama, Remarks by the President on Common-Sense Gun Safety Reform, THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY (Jan. 05, 2016, 11:43 AM), https://obamawhitehouse.archives.gov/the-press-office/2016/01/05/remarks-president-common-sense-gun-safety-reform.

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