BRUEN'S PRELIMINARY PRESERVATION OF THE SECOND AMENDMENT*

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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.[1]

In *District of Columbia v. Heller*,[2] decided in 2008, the Supreme Court held for the first time that the Second Amendment protects a private, individual right rather than a right to maintain or serve in a state militia. This was also the first time the Court invoked the Second Amendment to invalidate a law, in this case a federal ban on the civilian possession of handguns in D.C. Two years later, in *McDonald v. City of Chicago*,[3] the Court held that the Fourteenth Amendment makes the Second Amendment applicable to the states. This past June, *New York State Rifle & Pistol Association v. Bruen*[4] held that the Constitution protects not just the right to keep a handgun in one's home for self-defense (as *Heller* and *McDonald* established), but also the right to carry a weapon in public for that purpose.

The text of the Second Amendment expressly and unequivocally protects the right of the people to bear arms. New York, however, generally allowed that right to be exercised only if one persuaded a government official that one had "proper cause," which had been judicially defined to mean that one had been subjected to "particular threats, attacks or other extraordinary danger to

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[1] U.S. Const. amend. II.

[2] 554 U.S. 570 (2008).

[3] 561 U.S. 742 (2010).

[4] 142 S. Ct. 2111 (2022).

[one's] personal safety."[5] An official's decision to reject an application for permission to carry a weapon in public would be upheld by New York courts so long as "the record shows a rational basis for [the rejection]," or in another formulation, so long as the decision was not "arbitrary and capricious."[6]

Confronted with a similar regime in California several years ago, Ninth Circuit Judge Diarmuid O'Scannlain succinctly noted:

> To reason by analogy, it is as though [the government] banned all speech, but exempted from this restriction particular people (like current or former political figures), particular places (like private property), and particular situations (like the week before an election). Although these exceptions might preserve small pockets of freedom, they would do little to prevent destruction of the right to free speech as a whole. As the [Supreme] Court has said: "The Second Amendment is no different." *District of Columbia v. Heller*, 554 U.S. at 635. It too is, in effect, destroyed when exercise of the right is limited to a few people, in a few places, at a few times.[7]

Part I of this Article explains why *Bruen* was an easy case, which the Court resolved correctly. Part II explains why the Court was justified in repudiating the interpretive approach adopted by a consensus of the circuit courts after *Heller*. Part III explores some serious difficulties that will arise in applying the new approach that *Bruen* adopts. Part IV suggests some measures that could supplement *Bruen*'s effort to steer courts toward a jurisprudence that appropriately respects the original meaning of the Second Amendment.

I. NEW YORK'S DEFENSE OF ITS STATUTE WAS UNTENABLE

Judge O'Scannlain's analogy makes it obvious why New York had an enormous burden to overcome in defending its statute. The state argued that the Second Amendment's "right of the people to . . . bear arms" permits the government to prohibit anyone and everyone from bearing arms, at least wherever people typically congregate. In support of this counterintuitive proposition, New York collected examples of regulations, going back to 14th-century England and continuing into 20th-century America, that supposedly proved the existence of a long tradition of severe legal restrictions on bearing

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[5] N.Y. Penal Law Ann. § 400.00(2)(f); In re Martinek, 294 App. Div. 2d 221-222, 743 N.Y.S. 2d 80-81 (2002).

[6] In re Kaplan, 249 App. Div. 2d 199, 201, 673 N.Y. S. 2d 66, 68 (1998); In re Bando, 290 App. Div. 2d 691, 692. 735 N.Y.S. 2d 660, 661 (2002).

[7] Peruta v. Cty. of San Diego, 742 F.3d 1144, 1169–70 (9th Cir. 2014), *vacated,* 824 F.3d 919 (2016) (en banc).

arms in public. As Justice Samuel Alito noted at oral argument, New York's brief was not a model of scrupulous historical accuracy, which was a telling sign of the weakness of the state's position.[8]

The state's theory was that the Second Amendment merely codified that putative tradition. Justice Clarence Thomas's majority opinion thoroughly analyzes the evidence advanced by the state and its amici in defense of the New York statute. That review demonstrates that the state's evidence was overwhelmed by contrary evidence proving that no such tradition ever existed in America, at least not until long after the Second and Fourteenth Amendments were adopted. Even without going through Thomas's painstaking analysis, one can easily see how far-fetched New York's thesis was. It is hard to imagine that anyone who has even a passing familiarity with history could believe that Americans living in 1791 or 1868,[9] whether or not they resided in populated areas, needed the government's permission to step outside their homes with a gun in their hands, or that they needed an extraordinary justification for doing so.

Justice Stephen Breyer's dissent (joined by Justices Sonia Sotomayor and Elena Kagan) rather half-heartedly tries to refute the majority's historical argument. The dissent responds in part by attacking a straw man. It says, for example that "it is difficult to see how the Court can believe that English history fails to support legal restrictions on the public carriage of firearms."[10] The majority, however, never denies that legal restrictions existed in England, and the majority affirmatively agrees that the Second Amendment allows legal restrictions in the United States.

When the dissent tries to establish that the Second Amendment incorporates a traditional exception to the right to bear arms that would swallow the rule, it extrapolates wildly from narrow restrictions to the radically sweeping New York statute. It also gives unwarranted weight to practices (or in some

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[8] *See* Transcript of Oral Argument at 84-87.

[9] As the Court recognizes, and as Justice Amy Coney Barrett emphasizes in a concurrence, the right to arms that is protected against action by the states derives in a technical sense from the Fourteenth Amendment, not the Second Amendment. The Supreme Court long ago decided that Bill of Rights provisions "incorporated" into the Fourteenth Amendment have exactly the same scope whether applied to the federal or state governments. *See Bruen* 142 S. Ct. at 2137-38. As *Bruen* acknowledges, the Court has repeatedly assumed that the scope is "pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Id.* That assumption has been the subject of an academic debate, as the Court and Barrett point out. Because the Court concluded that it would make no difference it this case, *Bruen* does not take up that debate. *Id*. at 2138.

[10] *Bruen*, 142 S. Ct. at 2184 (Breyer, J., dissenting).

cases alleged practices) remote in time from the adoption of the relevant constitutional provisions. The dissent's best evidence is a small handful of outlier decisions by state and territorial governments, many of which proved to be evanescent. These regulations, moreover, were adopted long *after* the Bill of Rights was enacted, and long *before* the Supreme Court started to apply various provisions of the Bill of Rights to the states. Such outliers imply nothing about the original meaning of the Second Amendment.

Toward the end of his dissent, Justice Breyer asks a rhetorical question: "[I]f the examples discussed above, taken together, do not show a tradition and history of regulation that supports the validity of New York's law, what could?"[11] Well, here are some possibilities: Perhaps a consensus of state laws, in force in 1791 or even in 1868, that forbade the general population from carrying a weapon in public without an extraordinary reason for doing so. Or perhaps a long tradition, maintained without serious objection during the eras in which the Second and Fourteenth Amendments were adopted, in which American citizens were required to get the government's permission before carrying weapons in public. Breyer does not point to anything remotely resembling such examples. But he does ask one good question: "[W]ill the Court's approach permit judges to reach the outcomes they prefer and then cloak those outcomes in the language of history?"[12] His dissent in this case offers a convenient model for the result-oriented judges of the future.

To be fair, or perhaps charitable, maybe Breyer and the other dissenters do not actually care whether New York's statute is supported by a tradition and history of regulation. Perhaps what they really believe is that the constitutional right of the people to keep and bear arms is one that legislatures should be free to curtail up to the point (if such a point exists) at which the Supreme Court is satisfied that a given restriction has no rational basis.

This interpretation of the dissenting opinion is supported by two of its leading features. First, the opinion opens with a lengthy recitation of various incidents and statistics establishing that guns are sometimes misused. As Justice Alito points out in a concurring opinion, much of this information is irrelevant to the question at issue in the case, and the little that might be relevant is based on dubious evidence.[13]

Second, Justice Breyer repackages the kind of deference to legislative choices that he advocated in his *Heller* dissent. Although he had tried to sell

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[11] *Id.* at 2190.
[12] *Id.* at 2178.
[13] *Id.* at 2157-59.

that approach under the rubric of "intermediate scrutiny," Justice Antonin Scalia's majority opinion rightly rejected that characterization.[14] *Heller*'s reasons for rejecting that approach apply equally in *Bruen*. Indeed, *Heller* itself had indicated that these reasons would apply in cases involving the right to bear arms.[15] Although Breyer's *Bruen* dissent disclaims an intent to "relitigate" *Heller*, he unmistakably proposes to give as much deference to legislatures as he did in that case, if not more. Just as his *Heller* dissent would effectively have eliminated any meaningful right to keep arms, Breyer's rationale for upholding the New York statute at issue in *Bruen* would effectively read the right to bear arms out of the Constitution.

II. *BRUEN* RESETS SECOND AMENDMENT JURISPRUDENCE

If *Bruen* had done nothing more than confirm that there is a meaningful right to carry weapons for self-defense outside one's home, which the New York statute violated, it would be a significant decision. But the Court went further, repudiating a settled consensus among the federal circuit courts about the meaning of *Heller* and the appropriate analytical framework for resolving Second Amendment cases. *Bruen* wipes away a large body of circuit precedent and instructs the lower courts to start over with a new interpretive method. This applies not only to regulations of public carry, but to a wide range of other gun control laws. This reset could have real effects. The circuit courts have spent more than a decade ensuring that almost every form of gun control survives constitutional scrutiny, and *Bruen* should make it harder for those courts to do so again.

In order to understand this development, one must begin with the baseline set by *Heller*. Justice Scalia's majority opinion is an exquisite tapestry of sound textual and historical arguments interspersed with fallacious lapses, ambiguous and inconsistent obiter dicta, self-confident ipse dixits, and mischaracterizations of precedent.[16] Most importantly for understanding *Bruen*, *Heller* equivocated about the appropriate way to determine the scope of the protection implied by the Second Amendment's absolute language.

Some passages focus exclusively on the text and history of the Constitution. "[W]e find that [the text] guarantee[s] the individual right to possess

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[14] *See Heller*, 554 U.S. at 628-29.

[15] *See id*. at 592, 595, 634-35.

[16] For a detailed analysis, see Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009); Heller *and Second Amendment Precedent*, 13 LEWIS & CLARK L. REV. 335 (2009).

and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment."[17] Accordingly, the Court considered and dismissed the relevance of a few founding-era regulations that did not remotely resemble a handgun ban.[18]

But when explaining why D.C.'s law was unconstitutional, the Court did *not* rely on the absence of historical precedents. Instead, it held that there is a specific constitutional right to possess handguns, even if the challenged law allows one to keep other guns for self-defense. *Heller* justified that specific holding by pointing to the popularity of handguns in the 21st century.[19]

What's more, the Court *approved* a variety of gun control regulations without providing historical support of any kind for their validity.[20]

Heller rejected what it called the "freestanding 'interest-balancing' approach" that Breyer's dissent would have applied.[21] But it did not reject the "tiers of scrutiny" framework that is familiar from other areas of constitutional law such as the First Amendment, to which *Heller* repeatedly likened the Second Amendment. Instead, *Heller* said that D.C.'s handgun ban would not survive scrutiny under that framework.[22] Thus, *Heller* neither adopted nor rejected the tiers of scrutiny framework, or the kind of interest-balancing generally applied under that framework.

Presented with *Heller*'s equivocations, the federal circuit courts adopted a two-step legal test.[23] A reviewing court would first decide whether the challenged law regulated conduct that is categorically unprotected by the Second Amendment. If not, courts were supposed to apply either strict scrutiny (to regulations that affected the core of the right recognized in *Heller*) or intermediate scrutiny (to all other regulations).[24]

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[17] *Heller*, 554 U.S. at 592.

[18] *Id.* at 631-32.

[19] *Id.* at 628-29.

[20] *Id.* at 626-27, 635.

[21] *Id.* at 634.

[22] *Heller* stated that Breyer's freestanding interest-balancing approach was not among "the traditionally expressed levels [of review] (strict scrutiny, intermediate scrutiny, rational basis)." *Id.* The Court specifically rejected the use of the rational basis test in the context of the Second Amendment. *Id*. at 628 n.27.

[23] The seminal case is *United States v. Mazzarella*, 614 F.3d 85, 89 (3d Cir. 2010). With relatively minor variations, all the other courts of appeals except the Eighth Circuit adopted its test.

[24] Strict scrutiny requires the government to prove that a challenged regulation is the least restrictive means of pursuing a compelling government interest. Intermediate scrutiny requires the government to prove that its interest is important, significant, or substantial, and that the means is not substantially broader than necessary to achieve the government's interest.

In practice, this meant that almost every challenged regulation was upheld. Courts often relied on one of several ipse dixits in *Heller* that approved regulations such as "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[25] In other cases, courts purported to apply intermediate scrutiny, or something similar, and concluded that the regulation was a reasonable means of pursuing an important government interest such as preventing the misuse of weapons.[26]

In a small handful of cases, courts found that a regulation violated the Second Amendment. The D.C. Circuit, for example, enjoined the enforcement of a discretionary licensing scheme similar to the one at issue in *Bruen*.[27] The Seventh Circuit invalidated a ban on carrying loaded firearms in public, which did not provide any opportunity to obtain a carry license.[28] The same court enjoined a ban on firing ranges, as well as some of the regulations that were subsequently imposed on ranges.[29] And the Third Circuit sustained an as-applied challenge to the federal ban on possession of firearms by felons, brought by two individuals who had been convicted of non-violent crimes that could have been punished by more than one year in prison.[30]

Generally, however, applications of the two-step framework were so deferential to legislative judgments that they amounted to freestanding interest-balancing, or even rational basis review, both of which had been expressly rejected by *Heller*.

In *Drake v. Filco*,[31] for example, the Third Circuit upheld a New Jersey law that required an applicant for a carry license to demonstrate a justifiable

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[25] *Heller*, 554 U.S. at 626-27. Although the Court called these regulations "presumptively lawful," it also described them as "permissible." *Compare id*. at 627 n. 26 *with id*. at 635.

[26] For reviews of the case law, see Sarah Herman Peck, Cong. Rsch. Serv., R44618, Post-*Heller* Second Amendment Jurisprudence (2019); David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193 (2017); David B. Kopel & Joseph G.S. Greenlee, *Federal Circuit Second Amendment Developments 2017-2018* (Univ. Denver Legal Studies Research Paper No. 18-29, 2018), *available at* https://ssrn.com/a=3227193 [https://perma.cc/C9LX-QZNQ].

[27] Wrenn v. District of Columbia, 864 F.2d 650 (D.C. Cir. 2017).

[28] Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012).

[29] Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011); Ezell v. City of Chicago, 846 F.3d 888 (7th Cir. 2017).

[30] Binderup v. Attorney General, United States of America, 836 F.3d 336 (3d Cir. 2016) (en banc).

[31] 724 F.3d 426 (3d Cir. 2013).

need, defined as an "urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun."[32] Not surprisingly, almost no one qualified for a license under this standard.[33]

The Third Circuit assumed, arguendo, that there might be some kind of right to carry a gun outside one's home. On that assumption, the court held that the challenged statute should be upheld on the grounds that New Jersey had begun imposing restrictions on public carry in 1924 and that other states had adopted similar regulations. The court asserted that this regulatory history made the statute "presumptively lawful" under *Heller*, and therefore put the regulated conduct "outside the scope of the Second Amendment's guarantee."[34]

For two reasons, this argument is fallacious. First, it depends on interpreting the word "presumptively" to mean "conclusively." More important, the very notion that the statute was presumptively lawful is based on a misreading of a dictum in *Heller*. The Supreme Court *characterized* certain regulations as "longstanding" and pronounced them "presumptively lawful."[35] The Court said that the list was not exhaustive, but it never said or implied that *all* longstanding regulations are presumptively lawful. Furthermore, *Heller* only approved laws prohibiting concealed carry, without saying anything about laws imposing severe restrictions on *both* open and concealed carry. Even apart from these misreadings of *Heller*, New Jersey's severe restrictions on both open and concealed carry dated back only to 1966, not 1924,[36] so they were barely more "longstanding" than the handgun ban that *Heller* had invalidated.[37]

Drake went on to hold in the alternative that the statute survived intermediate scrutiny. The only reason offered was that "[t]he predictive judgment of New Jersey's legislators is that limiting the issuance of permits to carry a

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[32] *Id.* at 428.

[33] *See* Petition for a Writ of Certiorari at 6, Drake v. Jerejian, 572 U.S. 1100 (2014) (No. 13–827) (estimating that only 0.02% of New Jersey citizens are granted public carry permits).

[34] *Drake*, 724 F.3d at 434.

[35] *Heller*, 554 U.S. at 626-27. Grammatically, the modifier "longstanding" applies only to prohibitions on the possession of firearms by felons and the mentally ill. *See id.* Although the opinion was authored by Justice Scalia, who is justly famous as an extremely careful writer, the modifier has generally been thought to apply to other regulations as well. *See*, *e.g.*, *Bruen*, 142 S. Ct. at 2133.

[36] *See Drake*, 724 F.3d at 448 (Hardiman, J., dissenting).

[37] The D.C. ban was instituted in 1976. *See, e.g.,* Parker v. District of Columbia, 478 F.3d 370, 399-400 (D.C. Cir. 2007).

handgun in public to only those who can show a 'justifiable need' will further its substantial interest in public safety."[38] In support of this conclusion, the court alluded vaguely to "history, consensus, and simple common sense."[39] *Drake* included no analysis showing so much as an effort to comply with Supreme Court doctrine, under which intermediate scrutiny requires that the means chosen must not be "substantially broader than necessary to achieve the government's interest."[40]

Other problematic regulations have been given similarly cavalier rubberstamps of approval. In *Friedman v. Highland Park*,[41] for example, the Seventh Circuit upheld a local ordinance banning the possession of semi-automatic rifles that had certain essentially cosmetic features, as well as ammunition magazines capable of holding more than ten rounds. Although the court acknowledged that these arms are in some circumstances more useful for legitimate self-defense than other options, and less dangerous than some weapons that were not banned, the court speculated (without evidence) that the net effect of the ban could conceivably be some reduction of deaths in mass shootings.

This is rational-basis review, which *Heller* expressly rejected. Once again implicitly applying rational-basis review, the court proclaimed that "[i]f a ban on semiautomatic guns and large-capacity magazines reduces the perceived risk from a mass shooting, and makes the public feel safer as a result, that's a substantial benefit.[42] This authorized a kind of Second Amendment heckler's veto, which effectively constitutes freestanding interest-balancing in which the constitutional right is assigned a value of zero.

Perhaps the most extreme example of hostility to the Second Amendment was the Ninth Circuit's decision in *Young v. Hawaii*.[43] Having previously

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[38] *Drake*, 724 F.3d at 437.

[39] *Id.* at 438 (quoting IMS Health, Inc. v. Ayotte, 550 F.3d 42, 55 (1st Cir. 2008)). Notably, the court chose not to cite a Supreme Court precedent suggesting that a conflict between two fundamental rights may be resolved by a "*long* history, a *substantial* consensus, and simple common sense." Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion) (emphasis added). Even on the dubious assumption that this formula would have been applicable to the statute at issue in *Drake*, it would obviously not have been satisfied in this case.

[40] Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989); see also Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480–81 (1989) ("[S]ince the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require." (citation omitted)).

[41] 784 F.3d 406 (7th Cir. 2015).

[42] *Id.* at 412.

[43] 992 F.3d 765 (9th Cir. 2021) (en banc).

held that there is no constitutional right to carry a concealed weapon,[44] the court concluded in this case that there is also no right to carry openly:

> [F]or centuries we have accepted that, in order to maintain the public peace, the government must have the power to determine whether and how arms may be carried in public places. There is no right to carry arms openly in public; nor is any such right within the scope of the Second Amendment.[45]

This holding went beyond the use of rational-basis review or Justice Breyer's freestanding interest-balancing. It simply eradicated the textually guaranteed right of the people to bear arms on the ground that an unlimited power of the government to deny that right has existed for centuries. The court never explained what the constitutional text means or could mean if it doesn't put any constraints on the government.[46] As anyone familiar with American history should anticipate, the court provided no evidence that would support its claim that such an absolute government power was "accepted" when the Second Amendment was adopted.

Instead, the court relied largely on a literal reading of the 14th-century Statute of Northampton, which appears on its face to impose an absolute proscription on public carry of weapons. By the 17th century, that interpretation had been rejected in England,[47] and the American laws that resembled the Statute of Northampton all contained an express qualification that was not in the English text.[48] *Young* also pointed to several 19th-century state surety laws, which in fact did *not* forbid anyone to carry arms in public, and in any event were apparently seldom invoked.[49] The court did not cite a single judicial opinion declaring, let alone holding, that the individual right

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[44] Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016) (en banc).

[45] *Young*, 992 F.3d at 821.

[46] At two points in the opinion, the court seems to assume that the Constitution's protection of the right to bear arms could mean something, but it never says what that something might be. *See id*. at 782-83, 813.

[47] *See Bruen*, 142 S. Ct. at 2139-42.

[48] The qualification contained words to the effect that one may not go armed to the terror of the people. *See* Nelson Lund, *The Future of the Second Amendment in a Time of Lawless Violence*, 116 NW. U. L. REV. 81, 104 (2021). *See also* Lund, *Second Amendment,* Heller*, and Originalist Jurisprudence*, *supra* note 16, at 1362-64 (discussing similar qualifications applicable to American prohibitions on carrying "dangerous or unusual weapons").

[49] *See Bruen*, 142 S. Ct. at 248-50; Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right To Bear Arms* 15–17, *in* NEW HISTORIES OF GUN RIGHTS AND REGULATION (J. Blocher, J. Charles, & D. Miller eds.) (forthcoming).

protected by the Second Amendment could lawfully be taken away by a general ban on carrying weapons in public.[50]

In the end, the court displayed a naked willingness to substitute a figment of the judicial imagination for legal analysis:

> Notwithstanding the advances in handgun technology, and their increasing popularity, pistols and revolvers remain among the class of deadly weapons that are easily transported and concealed. That they may be used for defense does not change their threat to the "king's peace." It remains as true today as it was centuries ago, that the mere presence of [pistols and revolvers] presents a terror to the public and that widespread carrying of handguns would strongly suggest that state and local governments have lost control of our public areas. Technology has not altered those very human understandings.[51]

According to the Ninth Circuit, it is a kind of self-evident truth, for which no actual evidence is required, that the American people are and always have been terrorized by the mere presence of handguns in public. The very human understandings to which the court alludes might better be called the all too human impulse of some judges to impute their own irrational anxieties to other people. Not just the citizens of the 43 states in which law-abiding citizens can obtain a license to carry, and not just the citizens of the 25 states that allow public carry without any license, but also the citizens who constitutionalized "the right of the people to keep and bear Arms" in 1791. This en banc decision must have been seen as a vivid signal to the Supreme Court about the need to discipline the lower courts.[52]

III. *BRUEN*'S FUTURE

In any event, the *Bruen* majority certainly did see that the circuit courts were generally treating the Second Amendment with dismissive hostility, as if it were a second-class provision of the Bill of Rights.[53] In an effort to prevent these courts from continuing on the path they had followed for more than a decade after *Heller*, the Court expressly repudiates the second step in the framework they had adopted. This repudiation effectively eliminates the

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[50] *See* Lund, *Future of the Second Amendment*, *supra* note 48, at 105 n.111.
[51] *Young*, 992 F.3d at 821.
[52] *Cf. Bruen*, 142 S. Ct. at 2135, 2149 (specifically criticizing *Young*).
[53] *See* 142 S. Ct. at 2156 (quoting *McDonald*, 561 U.S. at 742 (plurality opinion)).

precedential value of all the cases that conducted freestanding interest-balancing under the rubric of intermediate scrutiny.

In place of the circuit courts' two-step framework, *Bruen* announces a test based entirely on text and history, without any room for interest-balancing or judicial policy judgments:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command." *Konigsberg v. State Bar of Cal.*, 336 U.S. 36, 50 n.10 (1961)).[54]

Contrary to the impression that might be created by the citation to *Konigsberg*, this test is quite novel. The text following note 10 in *Konigsberg* endorses the very same two-part test used by the post-*Heller* circuit courts, which *Konigsberg* says is the one the Court has used "[t]hroughout its history" to determine the scope of the constitutionally protected freedom of speech. Immediately after this strange invocation of authority for the self-evident proposition that the texts of both the First and Second Amendments contain unqualified commands, *Bruen* goes on to exaggerate the extent to which the Court's First Amendment jurisprudence has relied on historical evidence rather than interest-balancing under the tiers of scrutiny. As we will see, it's doubtful that the test announced in *Bruen* will prove workable, and the Court's First Amendment jurisprudence does not suggest otherwise.

The *Bruen* opinion does insist that it will not accept the use of history to engage in the kind of fake originalism deployed by the Ninth Circuit in *Young v. Hawaii*. *Bruen* reiterates *Heller*'s insistence that "[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*."[55] For that reason, a medieval law like the Statute of Northampton is only relevant if it "survived to become our Founders' law," and the government has the burden of demonstrating that fact in defending a regulation.[56] Similarly, the public understanding of *ambiguous* constitutional provisions may sometimes be inferred from post-enactment government

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[54] *Id.* at 2129-30.

[55] *Id.* at 2136 (quoting *Heller*, 554 U.S. at 634-35) (emphasis added by the *Bruen* Court).

[56] *Id.*

practices that were open, widespread, and unchallenged, but such evidence cannot overcome the original meaning of the constitutional text.[57]

In applying this text-and-history test to the New York statute, *Bruen* concluded that the state failed to meet its burden of proving the existence of the requisite regulatory tradition. Notwithstanding the numerosity of the laws that were presented as evidence for the purported tradition,[58] not a single American state in the founding or antebellum periods forbade ordinary citizens to carry a weapon for self-defense unless they faced some extraordinary threat to their personal safety. Nor was there a consensus that such laws are permissible until long after the adoption of the Fourteenth Amendment, if then. That is why *Bruen* was an easy case under the mode of analysis that the Court adopted in place of the circuit courts' two-step framework.

Not all cases will be so easy, and the most important questions in the future will involve the interpretation and application of *Bruen*'s text-and-history test. There is good reason to doubt that the Court will be able and willing to apply it consistently and reliably.

The most obvious reason for skepticism is that the *Bruen* opinion itself does not consistently apply its own stated test. Just as *Heller* issued ipse dixits endorsing several forms of gun control without any evidence of their historical pedigree, *Bruen* emphasizes that nothing in the Court's opinion should be interpreted even to suggest the unconstitutionality of the "shall-issue" licensing regimes adopted by 43 states. These regimes typically impose conditions for obtaining a carry license that most law-abiding citizens can meet, such as passing a background check and taking a handgun safety class. *Bruen* notes the obvious fact that these regulations impose a much smaller burden on the right to bear arms than New York's highly restrictive statute. But the Court does not provide so much as a shred of evidence that any kind of licensing requirements had ever been imposed on the general population before the 20th century.[59] Furthermore, the first shall-issue statute was apparently not

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[57] *Id*. at 2136-37. The text of the Second Amendment may be ambiguous in certain respects, such as whether "arms" includes weapons that an individual cannot "bear," and whether "the people" includes some aliens.

[58] *See id*. at 2138-56.

[59] During the founding era, there were disarmament and licensing laws aimed at discrete groups of people who were politically distrusted, such as slaves, free blacks, American Indians, and those who refused to sign loyalty oaths. *See* Adam Winker, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1562 (2009). Such laws cannot serve as precedents for modern regulations of general applicability. First, such laws would themselves be held unconstitutional today because they involved racial classifications or compelled speech. Second, selectively disarming people on the basis of their race or

enacted until 1961, whereas may-issue statutes were enacted decades earlier.[60] Under the Court's announced methodology, how in the world could only the later, rather than the earlier, of two very late "traditions" reflect the original meaning of the Second Amendment? If there is any plausible answer to that question, it won't be found in the *Bruen* opinion.

It is striking that the Court did not simply remain silent about shall-issue regulations, which were not at issue in the case. It is also interesting that Justice Brett Kavanaugh, joined by Chief Justice John Roberts, issued a concurrence meant "to underscore two important points about the limits of the Court's decision."[61] The concurrence begins by stressing the majority's gratuitous endorsement of shall-issue regulations. It then goes on to reiterate the peremptory approval of various gun control regulations that were included in *Heller* and *McDonald*. The felt need to "underscore" these points may suggest that the majority's sua sponte dicta in this case were a concession to Kavanaugh and Roberts.[62] If that is a plausible speculation, one might also suspect that Kavanaugh and Roberts may be inclined to invalidate gun regulations only in easy cases like *Bruen* itself, especially if the regulations look like mere political grandstanding. Notably, Kavanaugh and Roberts did *not* underscore the caveat that the majority placed on its endorsement of shall-issue laws: constitutional challenges to such regulations may succeed when permitting schemes are used to pursue "abusive ends."[63]

Whether or not log-rolling took place in *Bruen*, the majority's test is inherently manipulable, just like the two-step approach embraced by the circuit courts after *Heller*. Even if the Supreme Court stops issuing ipse dixits that greenlight regulations a majority of the Justices don't care to call into question, all courts are going to face serious challenges in faithfully applying the *Bruen* test.

These problems have roots in *Heller*. The Second Amendment originally applied only to the federal government, and there appear to have been no

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political views is not analogous to regulating the general population in an effort to reduce the misuse of weapons.

[60] *See* David B. Kopel, *Restoring the Right to Bear Arms:* New York State Rifle & Pistol Association v. Bruen, 2022 CATO SUPREME CT. REV. 305, 325-26, *available at* https://www.cato.org/sites/cato.org/files/2022-09/Supreme-Court-Review-2022-Chapter-11.pdf.

[61] *Bruen*, 142 U.S. at 2161-62 (Kavanaugh, J., concurring).

[62] Alito also noted the narrowness of the *Bruen* holding in his concurrence, but only in the context of responding to a lengthy section of Breyer's dissent (whose legitimate purpose Alito could not see). *See id.* at 2157 (Alito, J., concurring).

[63] *Id.* at 2138 n.9.

bans on keeping and carrying weapons in the founding period.[64] As the *Bruen* Court points out, the language of the Second Amendment is "unqualified."[65] Absent evidence to the contrary, one might think the right that was codified in the Second Amendment was the right to be completely free of federal restrictions.[66] Because the states retained what we call the police power, it might have been quite plausible for people at the time to understand the Second Amendment as an absolute prohibition, though one that applied only to the federal government.

Heller implicitly rejected this interpretation. And it's easy to imagine why. The Justices undoubtedly foresaw that the Second Amendment would almost certainly be incorporated against the states through substantive due process. Settled doctrine requires state and federal laws to be treated identically,[67] so incorporation, which promptly did take place in *McDonald*, would entail a sweeping expansion of the federal right to keep and bear arms. It would obviously be absurd to forbid all levels of government from imposing any restrictions at all on the possession and use of weapons.

Of course, it's possible that the Second Amendment was meant to place the same restraints on the federal government that already applied to the states under their own laws. Although *Heller* never specified how to identify the scope of the "pre-existing right" that it assumed was codified by the Second Amendment, it hinted at something along these lines, perhaps with the proviso that there might be post-ratification evidence showing that certain additional restrictions *would have* been considered permissible in 1791.[68]

Bruen thus encounters a problem that *Heller* avoided when it announced a right to possess a handgun without any historical analysis of that specific issue. There were very few restrictions on weapons in the founding period, but that might have been because legislatures saw no need for them. The absence of a regulation does not necessarily imply the absence of a power to

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[64] There were some militia regulations, authorized by Art. I, § 8, cl. 15, *requiring* able-bodied men to keep and bear arms. There had also been colonial regulations *requiring* citizens to carry weapons in certain circumstances. It is obvious that such regulations did not stop anyone from carrying weapons anywhere they chose to carry them, and it is equally obvious that such regulations did not imply that governments were authorized to stop people from doing so.

[65] 142 S. Ct. at 2126.

[66] *Heller* called this a "pre-existing right" but offered no evidence except an ipse dixit from a late 19th century judicial opinion. *See* 554 U.S. at 592 (citing United States v. Cruikshank, 92 U.S. 542, 553 (1876) (right to bear arms was not created by the federal Constitution or protected by the Constitution from restrictions imposed by the state governments)).

[67] *See*, *e.g.*, *Bruen*, 142 S. Ct. at 2137-38.

[68] *See* 554 U.S. at 592-619.

adopt that regulation. Among the infinity of regulations that were not adopted, how can courts decide which ones would have been considered unconstitutional if they had been proposed?

Bruen's answer to this contrafactual historical question is somewhat equivocal. In framing the applicable test, the Court seems to place a heavy burden of proof on the government. Any regulation of conduct covered by the plain language of the text is presumptively unconstitutional, and "the government *must affirmatively prove* that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[69] Or, in another formulation, the government must "justify its regulation *by demonstrating* that it is consistent with the Nation's historical tradition of firearm regulation."[70] On their face, these statements would seem to imply that the absence of substantial evidence that a given modern regulation was or would have been considered constitutional during the relevant historical period means that the regulation is unconstitutional.

Consider, for example, a modern regulation banning the possession or carrying of handguns in order to prevent violent crime. If there is no evidence of a tradition of addressing this problem by forbidding most citizens to possess handguns or to carry them in public, it would seem to follow inexorably from *Bruen*'s test that such bans are unconstitutional. But *Bruen* indicates that the lack of a historical tradition of such bans is merely "relevant evidence" of their unconstitutionality.[71] The Court does not say what additional evidence might be required to confirm that they are unconstitutional. Nor does the Court say what evidence would justify upholding them. *Bruen* does not address these issues because New York came nowhere near to proving that such handgun bans could be justified by "'historical precedent' from before, during, and even after the founding [that] evinces a comparable tradition of regulation."[72] But such questions are bound to arise in future cases.

The Court recognizes that changes in society, especially technological changes, will demand a "more nuanced approach" than *Heller*, *McDonald*, and *Bruen* required.[73] Apparently, this will primarily involve the use of analogical reasoning, which is presented as a superior alternative to the kind of

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[69] 142 S. Ct. at 2127 (emphasis added).
[70] *Id.* at 2129-30 (emphasis added).
[71] *Id.* at 2131.
[72] *Id.* at 2131-32.
[73] *Id.*

freestanding interest-balancing adopted by Justice Breyer and the post-*Heller* circuit courts.

Bruen suggests how this will work. *Heller* had approved regulations banning firearms in "sensitive places such as schools and public buildings" without giving any historical examples of such laws. Without calling this unsupported dictum into question, *Bruen* rejects New York's effort to cast its statute as such a regulation: "[T]here is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place' simply because it is crowded and protected generally by the New York City Police Department."[74] In an effort to indicate how narrower regulations might be justified, *Bruen* alludes to historic bans on carrying weapons to legislative assemblies, polling places, and courthouses, apparently on the assumption that schools and public buildings are analogous to these locations.[75]

Whatever one thinks of this analogy, a fundamental problem arises from the nature of the evidence for a historical tradition of gun bans at legislatures, polling places, and courthouses. *Bruen* acknowledges that this is a short list, but it does not acknowledge that even these few prohibitions were extremely rare until long after the adoption of the Second Amendment. According to the scholarly source on which *Bruen* relies, there were only *two jurisdictions* that enacted "sensitive place" laws in America prior to the adoption of the Second Amendment: the colony of Maryland prohibited arms from being carried into the legislature in the mid-17th century, and Delaware's 1776 constitution prohibited bearing arms at polling places or assembling the militia nearby.[76] After the Bill of Rights was ratified, it seems that *zero* such laws were adopted until after the Fourteenth Amendment was ratified.[77]

Notwithstanding *Heller*'s unsupported dictum about bans on guns in schools, they, too, seem to have been nonexistent. In 1824, the University of Virginia prohibited its students from keeping alcohol, chewing tobacco, weapons, servants, horses, or dogs on campus. This rule was an effort to discourage juvenile misbehavior by students, and it did not apply to faculty and staff. Neither this law nor later regulations of students at other universities

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[74] *Id.* at 2134.

[75] *Id.* at 2133.

[76] *See* David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 229-36, 244-47 (2018).

[77] *Id.*

are precedents for treating schools as "sensitive places" that may be declared gun-free zones.[78]

Because the Court was unaware of any objections to these extraordinarily rare laws, only one of which was even in force in 1791, it assumed that it was and is settled that the Second Amendment permits gun bans at these "sensitive places," as well as at new and analogous places.[79] If that's all it takes to identify a regulatory tradition that authorizes a gun regulation, it won't be very hard for courts to limit *Bruen* to its facts.

One might object that the regulatory tradition to which *Bruen* refers should include statutes enacted during the Reconstruction and early Jim Crow periods because they imply that such statutes would have been considered constitutional earlier. In 1870, Louisiana prohibited the bearing of arms when the polls were open. In 1873, Texas banned the carrying of arms near an open polling place. In 1874 and 1886, Maryland imposed similar bans in two specific counties. And in 1874, the Georgia Supreme Court upheld a ban on carrying weapons into a courthouse.[80] These few post-ratification statutes add next to nothing to the body of founding-era precedent, itself so tiny as to be essentially nonexistent, even under the vague standard *Bruen* announces: a government practice that "has been open, *widespread*, and unchallenged since the early days of the Republic."[81] And they can hardly be used as evidence of a practice that liquidated an ambiguity in the Fourteenth Amendment. It was settled during that time period that the Fourteenth Amendment did not incorporate the Second Amendment against the states.[82]

Bruen's endorsements in dicta of shall-issue permitting schemes and gun-free zones in "sensitive places" suggest that this Court may find a way to uphold (or allow the lower courts to uphold) all but the most outlandish and onerous regulations. And when personnel changes give us a new Court, the Second Amendment could almost be turned back into a dead letter.

That may not happen. But the alternative is probably not going to be the rigorous historical analysis that *Bruen* seems at points to promise. The Court cites Justice Scalia's acknowledgment that "[h]istorical analysis can be

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[78] *See id*. at 249-52.

[79] *Bruen*, 142 S. Ct. at 2133.

[80] Kopel & Greenlee, *supra* note 76, at 245-47.

[81] *See Bruen*, 142 S. Ct. at 2137 (emphasis added) (quoting NLRB v. Noel Canning, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment)); *see also id*. at 2131-32 (referring to "'historical precedent' from before, during, and even after the founding [that] evinces a comparable tradition of regulation").

[82] *See Cruikshank*, 92 U.S. at 553.

difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it."[83] *Bruen* insists that reliance on history is "more legitimate and more administrable" than asking judges to make difficult empirical judgments about the costs and benefits of firearms restrictions, as Breyer would have them do.[84] More legitimate for sure, at least when it comes to issues where history provides meaningful guidance. But it is not true that reliance on history is always more *administrable* than making difficult empirical judgments. Modern regulations that have little or no historical pedigree will often be quite amenable to empirical analysis even if that analysis sometimes requires difficult judgments.

More important, the Court has posed a false choice by conflating Breyeresque interest-balancing with means-end scrutiny.[85] What *Heller* called "freestanding 'interest-balancing'" is certainly a *form* of means-end scrutiny, but not all such scrutiny is or need be "freestanding." *Heller* and *Bruen* both insist that the balance struck by the American people when they adopted the Second Amendment is the only balance to which courts should defer.[86] That's right, but it will sometimes, perhaps often, be impossible as a practical matter to determine where that balance was struck without performing means-end scrutiny.

Bruen itself shows why. The Court endorses shall-issue licensing regimes on the ground that these regulations apparently "are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'"[87] This is nothing other than means-end analysis: the government's end (restricting public carry to responsible citizens) is assumed to be consistent with the balance struck by the people when they adopted the Second Amendment, and the means chosen by the government is assumed to be confined to that constitutionally permissible end. Persuasive or not, the argument is disconnected from any identified historical tradition.

At the end of its analysis of shall-issue regulations, the Court adds: "[B]ecause any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny

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[83] *Bruen*, 142 S. Ct. at 2130 (quoting *McDonald*, 561 U.S. at 803-04 (Scalia, J., concurring)).
[84] *See id*. (quoting *McDonald*, 561 U.S. at 790-91 (plurality opinion)).
[85] *See id*. at 2129.
[86] *See Heller*, 554 U.S. at 635; *Bruen*, 142 U.S. at 2131 (quoting *Heller*).
[87] *Bruen*, 142 U.S. at 2138 n.9 (quoting *Heller*, 554 U.S. at 635).

ordinary citizens their right to public carry."[88] This is means-end analysis again. If the government chooses a means that seems to have an end that is inconsistent with what a court thinks is the balance struck by the people when they adopted the Second Amendment, the regulation may be invalidated. The Court does not even suggest that historical evidence could be found to distinguish "lengthy" wait times from constitutionally permissible wait times, or "exorbitant" fees from appropriate fees.

Recognizing that many modern regulations do not have close historical analogues, the Court notes that *Heller* and *McDonald* identified self-defense as the central component of the Second Amendment right.[89] "Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry."[90] Once again, comparing the burden on a constitutional right with the justification for that burden is nothing other than means-end scrutiny.

Bruen's rejection of "independent" means-end scrutiny is equivalent to *Heller*'s rejection of Breyer's "freestanding" interest-balancing. The crucial difference between the practice the Court has now repeatedly condemned and the practice it now aspires to require is whether courts maintain fidelity to the central purpose of the Second Amendment, namely protecting the right of armed self-defense. Contrary to the Court's suggestion, such fidelity does not necessarily require finding a historical regulation with which to compare a modern regulation.

Recognizing that courts can engage in result-oriented means-end scrutiny under the guise of an analogical inquiry, the Court warns that this is impermissible: the judicial role requires faithful adherence to the balance struck by the founding generation in the Constitution.[91] The warning is perfectly appropriate. But *faithfully* applying means-end scrutiny to the "sensitive place" issue, for example, would actually be easier than applying *Bruen*'s historical-tradition inquiry. At oral argument, Justice Alito suggested one way to do it:

> [C]ould we start with the purpose of the personal right to keep and bear arms? And the core purpose of that right, putting aside the military aspect, is self-defense.

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[88] *Id.*
[89] *Id.* at 2133.
[90] *Id.* (quoting *Heller* and *McDonald*) (cleaned up).
[91] *Id.* at n.7.

> So starting with that, could we analyze the sensitive place question by asking whether this is a place where the state has taken alternative means to safeguard those who frequent that place?
>
> If it's a place like a courthouse, for example, a government building, where everybody has to go through a magnetometer and there are security officials there, that would qualify as a sensitive place.
>
> Now that doesn't provide a mechanical answer to every question, but would that be a way of beginning to analyze this?[92]

This is exactly the kind of analysis that "elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense.[93] It's an attempt to faithfully carry out the purpose of the constitutional provision under modern circumstances, without undermining the balance that the people struck when they adopted the Bill of Rights. This straightforward approach would have been more creditable, and more workable in future cases, than *Bruen*'s effort to manufacture a historical tradition of gun-free zones out of virtually no historical precedents.

Of course, faithless judges could misapply the kind of means-end analysis suggested by Alito by deciding that the New York Police Department provides an adequate substitute for the right to keep and bear arms throughout the island of Manhattan. But faithless judges could get exactly the same result under the guise of a historical inquiry. They could simply analogize urban areas to courthouses, polling places, and legislative buildings: all are places where some people might be afraid to exercise their constitutional rights because they are intimidated by the presence of armed civilians.[94]

Consider another issue, which is likely to generate considerable litigation in the coming years: the numerous regulations that modern legislatures have applied to particular kinds of weapons. These include bans or severe restrictions on highly destructive armaments, such as nuclear bombs, shoulder-fired anti-aircraft missiles, and artillery. They also include regulations that look more like political grandstanding than serious efforts to protect the

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[92] Transcript of Oral Argument at 32-33 (cleaned up).

[93] *Bruen*, 142 S. Ct. at 2131 (quoting *Heller*, 554 U.S. at 635).

[94] For an extended argument along these lines, see Joseph Blocher & Reva Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation under* Heller, 116 NW. U. L. REV. 139 (2021).

public, such as bans on so-called assault weapons,[95] on high-capacity magazines, and on nonlethal stun guns. As with "sensitive places," judges could faithfully apply means-end scrutiny by requiring the government to justify every regulation in light of the purpose of the Second Amendment, which is principally to secure the natural or inherent right to self-defense.[96] There would undoubtedly be some easy cases at both ends of the spectrum, such as nuclear weapons and nonlethal stun guns.[97] There would also be harder cases in between, as there are in the First Amendment context.

In the harder cases, *Bruen* apparently expects courts to start with founding-era laws, or perhaps with pre-1868 regulations, and then uphold analogous regulations. Genuinely analogous precedents, however, may be very hard to find. Evidence has already been found that cannons, which were among the most destructive devices that existed at the time, were freely available to civilians at least until the mid-19th century.[98] One wonders what historical analogy will be used to justify bans on cannons today, let alone less destructive devices like machine guns, which appear to have been unregulated until the 20th century. Perhaps new historical research will obviate these problems, though the likelihood of significant new findings seems small.

More importantly, we can hope that the courts will display a heightened respect for the purpose and value of the Second Amendment. Where judges have such respect, they can begin to develop a jurisprudence that is more consistent with the Constitution than the case law that *Bruen* repudiated. Progress can no doubt be made within *Bruen*'s newly announced framework, and many judges will take that obligation seriously. In the long run, however, the courts are unlikely to protect an appropriately robust right to keep and bear arms unless judges from across the political spectrum arrive at a shared consensus that the right remains valuable today, just as they have with respect to the freedom of speech.

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[95] Such bans invariably apply only to guns with certain cosmetic features, leaving functionally similar weapons unaffected. *See*, *e.g.*, Stephen P. Halbrook, *Banning America's Rifle: An Assault on the Second Amendment?* 22 FEDERALIST SOC'Y REV. 152 (2022).

[96] *See Heller*, 554 U.S. at 628 ("the inherent right of self-defense has been central to the Second Amendment right").

[97] For a legal argument in favor of upholding bans on nuclear weapons, see Lund, *Second Amendment, Heller, and Originalist Jurisprudence*, *supra* note 16, at 1373-74. For a legal argument in favor of invalidating bans on nonlethal stun guns, see *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028-33 (2016) (Alito, J., concurring).

[98] For evidence, see Nelson Lund, *The Proper Use of History and Tradition in Second Amendment Jurisprudence*, 30 FLA. J.L. & PUB. POL'Y 171, 177-78 (2020).

IV. EDUCATING CITIZENS, INCLUDING JUDGES

The Second Amendment was completely uncontroversial when it was adopted, partly because of a broad consensus about the validity of the political principles articulated in the Declaration of Independence. Those principles had famously been given a reasoned elaboration by the Declaration's true father, John Locke. Thanks largely to William Blackstone, who was the foremost expositor of English law for the founding generation, Locke's teaching was more than merely a theory. It was understood to be the basis of the legal tradition we inherited from England, a tradition that Americans thought was founded on truths that were self-evident and unchangeable. A more widespread understanding of the relation between those principles and the Second Amendment would help promote a better understanding of the continuing value of the right to keep and bear arms.

Locke argued that reason dictates natural laws that include a duty to refrain from harming others in their life, health, liberty, or possessions. That duty, in turn, implies that everyone has a natural right to enforce the natural law by punishing those who offend against it. And that right was not completely relinquished when men left the state of nature by entering into political society.[99] In support of what the Declaration calls the unalienable rights to life, liberty, and the pursuit of happiness, Locke reasoned that a forcible attack on one's freedom or property, whether in the state of nature or in society, implies a design to take away everything else, including one's life. And that creates a state of war, even within society.[100]

For that reason, Locke recognized a natural right to kill a robber even if he is only trying to take your horse or your coat. The same reasoning that establishes the right to kill a robber also establishes the right to overthrow a predatory ruler.[101] Locke is especially famous for his defense of the right to revolt against a tyrant, but that is merely a special case of the right to self-defense. Whereas political revolts may seldom be justified, and are very rarely prudent, common criminals frequently present an immediate threat to the lives of a large portion of the public, probably even more so today than when the Second Amendment was adopted.

Similarly, William Blackstone stressed that when one's person or property is forcibly attacked, nature itself prompts an immediate violent response

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[99] John Locke, *Second Treatise of Government*, ch. 2.

[100] *Id.*

[101] *Id.*, ch. 3.

because the future process of law may not offer an adequate remedy.[102] He linked this natural law with the legal right to keep and bear arms, which he put among the indispensable auxiliary rights "which serve principally as barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property."[103]

The right to arms, Blackstone said, is rooted in "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[104] Violent oppression is not by any means limited to direct oppression by the government. In fact, government's failure to control violent criminals is the reason that the sanctions of society and laws are most commonly found insufficient to protect us from oppression. As with Locke's right to revolution, a Blackstonian right to resist tyrannical violence by the government would be a special case, and one that is rarely exercised.

Locke's understanding of correlative rights and duties in nature has an analog in the structure of the Second Amendment, which is the constitutional provision that most directly addresses the most fundamental element of our political tradition. The Second Amendment links the right of self-defense against threats to personal safety with the right of self-defense against the threat of tyranny. Just as there are natural duties along with natural rights, the Second Amendment refers to the well-regulated militia as an institution necessary to the security of a free state.

This textual reference is perfectly consistent with an individual right to arms. A well-regulated militia is, among other things, one that is not *inappropriately* regulated, as it would be if militia regulations were used to infringe the right of the people to keep and bear arms.[105] But the militia tradition also entailed a legal *duty* of able-bodied men to arm themselves, to undergo militia training, and to fight when called on to do so. The Constitution expressly recognizes a wide range of activities in which the militia may be called on to serve: enforcing the law, suppressing insurrections, and repelling invasions.[106]

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[102] 3 William Blackstone, *Commentaries* *3-4 (1st ed.).

[103] 1 *Id.* at *136.

[104] 1 *Id.* at *139.

[105] *See* Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157, 175–76 (1999); Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 GEO. MASON U. C.R.L.J. 229, 241–44 (2008).

[106] *See* U.S. CONST. art. I, § 8, cl. 15.

Of course, our statutes no longer require citizens to undergo militia training or to arm themselves in case they are called out for militia duties. In one obvious sense, these changes have made us more free. But the freedom to rely entirely on the government for protection against criminal violence also has the potential to undermine our freedom.

Fundamental principles of our political tradition, articulated by Locke and Blackstone and confirmed in the Second Amendment, have at least two related implications that bear on the interpretation of the Second Amendment. First, I do not lose my right to the means of protecting myself merely because others are vulnerable to violent attacks, whether through their own choices or through bad luck. Second, a robust right to keep and bear arms provides a barrier against the kind of tyranny that arises when governments acquiesce in violence, including political violence, by private groups.

The Jim Crow period offers the most vivid examples of that kind of tyranny. During this era, state governments frequently allowed or even encouraged private groups like the Ku Klux Klan to terrorize the black population.[107] The politically motivated riots of our own time, such as those that many government officials tolerated or even encouraged after George Floyd was killed, provide another example.[108]

We are obviously a long way from anything like an ascendant Ku Klux Klan, but we are not necessarily immune from serious government efforts to disarm citizens who are threatened by political violence. After Hurricane Katrina, for example, the government tried to disarm a civilian population that was threatened by common criminals during a collapse of civil order.[109] How much more tempting might it be to disarm a population threatened by political extremists pursuing aims with which many government officials sympathize?

Finally, and perhaps most important, political self-government depends for its ultimate success on citizens who possess the moral temper befitting a

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[107] *See*, *e.g.*, Ngiraingas v. Sanchez, 495 U.S. 182, 187-88 (1990).

[108] *See, e.g.,* David E. Bernstein, *The Right to Armed Self-Defense in Light of Law Enforcement Abdication*, 19 GEO. J.L. & PUB. POL'Y 177, 185-202 (2021).

[109] *See*, *e.g.*, Alex Berenson & John M. Broder, *Police Begin Seizing Guns of Civilians*, N.Y. TIMES, Sept. 9, 2005 (reporting that "after a week of near anarchy in the city, no civilians in New Orleans will be allowed to carry pistols, shotguns, or other firearms of any kind"); Stephen P. Halbrook, *"Only Law Enforcement Will Be Allowed to Have Guns": Hurricane Katrina and the New Orleans Firearms Confiscations*, 18 GEO. MASON U. C.R.L.J. 339, 339 (2008) ("Police proceeded to seize firearms at gunpoint . . . . Citizens were left without protection in a city besieged by looters and criminals.").

free people. Citizens who arm themselves are recognizing and insisting that their lives and safety are not a gift from the government, and that they claim responsibility for their own freedom and security.

The importance of this attitude was recognized almost two centuries ago by Alexis de Tocqueville in *Democracy in America*. While Tocqueville was cautiously hopeful about our future, one of his greatest fears was that democratic countries would succumb to a kind of soft despotism imposed through what we now call the administrative state. He imagined a future power, "immense and tutelary," which he described in the following way:

> [It is] absolute, detailed, regular, far-seeing, and mild. It would resemble paternal power if, like that power, it had for its object preparing men for manhood; but it only seeks, on the contrary, to keep them fixed irrevocably in childhood; it likes citizens to enjoy themselves, provided that they think only of enjoying themselves. It willingly works for their happiness; but it wants to be the unique agent and sole arbiter of that happiness; it provides for their security, foresees and provides for their needs, facilitates their pleasures, conducts their principal affairs, directs their industry, regulates their estates, divides their inheritances; can it not take away from them entirely the trouble of thinking and the pain of living?[110]

The spirit of the Second Amendment can help to retard our nation's slide into the kind of moral and political stupor that Tocqueville warned us against. That spirit survived among many millions of Americans despite the neglect and hostility with which courts treated the Second Amendment for so long. One effect has been the remarkable relaxation of onerous gun control laws in the vast majority of states since the late 1980s.[111] If it hadn't been for that political development, a majority of the Justices may never have dared to revive the Second Amendment in *Heller*.

More could be done today to fortify and preserve this revival, including steps that Congress could take under its almost plenary constitutional authority over the militia.[112]

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[110] Alexis de Tocqueville, *Democracy in America*, vol. 2, pt. 4, chap. 6, at 663 (trans. Harvey C. Mansfield & Delba Winthrop). I have slightly altered the translation.

[111] *See*, *e.g.*, Nelson Lund, *Public Opinion and the Second Amendment*, 5 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 85, 86 (2015).

[112] U.S. CONST. art. I, § 8, cl. 16 ("[The Congress shall have Power] . . . To provide for organizing, arming, and disciplining, the Militia, and for governing, such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.").

First, Congress could define the militia to include all able-bodied adults between the ages of 17 and 44. This would require little more than removing the outdated exemption for women from the current statute.[113] (The National Guard, or "organized militia,"[114] is a small subset of the militia, which has always included most able-bodied men.)

Second, Congress could make training in the use of small arms a condition of receiving a high school diploma or admission to a college or university. This training would obviously be useful if the militia were ever summoned to deal with a sudden emergency. And it would be useful to many individuals, especially women, who would be less likely to fall victim to violent crime. But most important, training in the use of small arms would help instill a spirit of self-confidence and self-reliance in America's future decisionmakers, who will need those qualities if they are going to be genuinely responsible citizens rather than docile sheep or whining victims of governmental pettiness and indifference.

V. CONCLUSION

Heller and *Bruen* were right to insist that the Second Amendment "is the very *product* of an interest balancing by the people [and it] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms" for self-defense.[115] Courts that make a good-faith effort to discover that balance will surely start with the text and history of the provision, as the Supreme Court often does when confronted with issues of first impression in other areas of the law.

Bruen was an easy case because the text and the relevant history overwhelmingly support the conclusion that New York's severe restriction on carrying guns in public was unconstitutional. Many future cases will not be so easy, and the *Bruen* opinion contains some conspicuous indications that some of those cases will not be decided solely on the basis of text and history.

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[113] *See* 10 U.S.C. 246(a) ("The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.").

Even assuming that the current exemption for women would survive a constitutional challenge, the prominent role of women in the military today demonstrates that a blanket exemption from militia duties is unnecessary, if not insulting.

[114] *Id.* § 246(b).

[115] *Bruen*, 142 U.S. at 2131 (quoting *Heller*).

This need not lead to decisions inconsistent with the policy choices made by the people when they adopted the Second Amendment. But significant deviations from the policies of the Constitution are almost certain to infect judicial decisions unless a majority of Supreme Court Justices appreciate the continuing value of a robust right to keep and bear arms. *Bruen*'s instruction to focus on regulatory traditions will not provide the education that judges need because that test is inherently manipulable. Only if a sufficient number of judges internalize the spirit of the Second Amendment will the Court's jurisprudence come to reflect its original meaning. That spirit of self-confidence and self-reliance is also worth cultivating in all Americans because genuine political self-government is ultimately impossible without it.

Other Views:

- Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012), *available at* https://cite.case.law/f3d/701/81.
- Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017), *available at* https://cite.case.law/f3d/849/114/.
- Joseph Blocher & Reva Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation under* Heller, 116 NW. U. L. REV. 139 (2021), *available at* https://scholarlycommons.law.northwestern.edu/nulr/vol116/iss1/5/.
- Eric Ruben & Joseph Blocher, *"Second-Class" Rhetoric, Ideology, and Doctrinal Change*, 110 GEO. L.J. 613 (2022), *available at* https://www.law.georgetown.edu/georgetown-law-journal/in-print/volume-110/volume-110-issue-3-may-2022/second-class-rhetoric-ideology-and-doctrinal-change/.
- Patrick J. Charles, *The Fugazi Second Amendment:* Bruen*'s Text, History, and Tradition Problem and How to Fix It*, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4222490#.