

Perspective

EXPERT INSIGHTS ON A TIMELY POLICY ISSUE

State Firearm Laws After *Bruen*

DARRELL A. H. MILLER, ANDREW R. MORRAL, ROSANNA SMART



November 2022

A PART OF THE RAND

**Gun Policy
in America**

INITIATIVE

Contents

The <i>Bruen</i> Case	3
<i>Bruen</i> 's New Standards for Evaluating Second Amendment Claims	4
State Regulation of Concealed Carry	6
Prohibiting Firearms in Sensitive Places	8
Prohibitions Against Individuals' Ownership or Carriage of Firearms	9
Prohibitions on Firearm Technologies	10
Many Remaining Questions Will Be Tested as Courts Hear New Cases.....	11
Areas of Further Research.....	12
Conclusions: State Options for Regulating Firearms After <i>Bruen</i>	13

About RAND

The RAND Corporation is a research organization that develops solutions to public policy challenges to help make communities throughout the world safer and more secure, healthier and more prosperous. RAND is nonprofit, nonpartisan, and committed to the public interest.

Research Integrity

Our mission to help improve policy and decisionmaking through research and analysis is enabled through our core values of quality and objectivity and our unwavering commitment to the highest level of integrity and ethical behavior. To help ensure our research and analysis are rigorous, objective, and nonpartisan, we subject our research publications to a robust and exacting quality-assurance process; avoid both the appearance and reality of financial and other conflicts of interest through staff training, project screening, and a policy of mandatory disclosure; and pursue transparency in our research engagements through our commitment to the open publication of our research findings and recommendations, disclosure of the source of funding of published research, and policies to ensure intellectual independence. For more information, visit www.rand.org/about/research-integrity.

RAND's publications do not necessarily reflect the opinions of its research clients and sponsors. **RAND**® is a registered trademark.

Limited Print and Electronic Distribution Rights

This publication and trademark(s) contained herein are protected by law. This representation of RAND intellectual property is provided for noncommercial use only. Unauthorized posting of this publication online is prohibited; linking directly to its webpage on rand.org is encouraged. Permission is required from RAND to reproduce, or reuse in another form, any of its research products for commercial purposes. For information on reprint and reuse permissions, please visit www.rand.org/pubs/permissions.

For more information on this publication, visit www.rand.org/t/PEA243-1.

© 2022 RAND Corporation

Cover image: [renaschild/Getty Images](#)

On June 23, 2022, the Supreme Court issued a landmark Second Amendment decision striking down New York’s regime for issuing firearm concealed carry permits, and for the first time specifying that individuals have a constitutional right to carry firearms outside their homes. The sweeping decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. ____ (2022) (hereafter, *Bruen*), extended beyond New York’s carry laws, raising broader questions about the constitutionality of many other federal and state laws regulating firearm possession and use.

Although gun rights advocates were jubilant and gun violence prevention advocates horrified after *Bruen*, that reaction was soon complicated by closer examination of the opinion. There was some conflict in the actual scope of the opinion, given that three justices in the six-member majority wrote concurrences that seemed to limit the Court’s decision. In addition, some of the broadest language in the decision was ambiguous, leaving unresolved many questions about how states should or could modify their existing firearm regulations to remain in compliance with the Court’s decision while serving other objectives, such as ensuring public safety.

To explore the range of options available to states after *Bruen*, the RAND Corporation convened a panel of academics, policy experts, and practitioners to discuss the decision on July 12, 2022 (attendees are listed in the appendix). Attendees at the meeting were selected to represent a range of expert viewpoints. The purpose of this meeting was threefold: first, to consider the implications of *Bruen* for existing state firearm policies in light of the decision’s Second Amendment interpretation; second, to identify innovative ways states might respond to the *Bruen* decision if they wished to make their laws more permissive or more restrictive; and, third, to consider how new research might support policymaking in a post-*Bruen* world.

This Perspective, while informed by ideas and discussion offered by meeting participants, represents our own assessment of how *Bruen* affects state firearm laws, the options available to states for firearm regulation in the post-*Bruen* environment, and opportunities for research to support policy decisions. It is not a consensus document, and, indeed, we made no attempt to drive the panel’s discussion toward such a consensus.

After briefly describing the *Bruen* case and the majority and dissenting opinions, we consider the implications of the novel *text, history, and tradition-only* methodology

Key Insights

Bruen is a major change to Second Amendment jurisprudence and could eventually lead to large-scale changes in the U.S. firearm regulatory landscape. Nevertheless, key ambiguities and contradictions in the decision and its concurring opinions lead us to conclude that sharp departures from the regulatory regimes currently pursued by states are unlikely until new cases are heard by the Supreme Court that resolve those ambiguities. Therefore, states wishing to impose restrictive firearm regulations will continue to be able to do so, though sometimes in modified ways, and those wishing to make their laws more permissive will similarly find arguments under *Bruen* to support that course.

In addition, we conclude the following:

- The Court's determination that New York state's concealed carry law was unconstitutional was narrowly focused on the use of subjective discretionary standards in issuing permits and seems to explicitly allow for states to use objective suitability and perhaps even good moral character standards that could serve similar risk management objectives as the former discretionary standards.
- Because the decision allows states to enact permitting systems that use objective standards for eligibility, state regulations that set objective training and competency standards for the acquisition, use, and carrying of firearms may be defensible under *Bruen*.
- Although the decision allows that firearms can be banned from certain sensitive places, no clear guidance on how to determine the legitimacy of such regulations was offered in *Bruen*, meaning that states wishing to broaden or limit bans on firearms in sensitive places may be able to justify their choices.
- Although prohibitions against gun possession by, for instance, children, those posing a risk to themselves or others, and those dishonorably discharged from the military could well be challenged on the basis of *Bruen*'s new method for evaluating Second Amendment claims, the Court again seems unlikely to reject most regulations specifying those who are prohibited from gun ownership.
- Because the Court emphasizes that weapons in common use cannot be considered dangerous and unusual, technologies that a state wishes to prohibit may need to be banned before they are in wide circulation.

Finally, although the *Bruen* decision limits the role of science and contemporary evidence in influencing how firearm regulations are evaluated, there are some limited empirical questions for which research could still help inform future court decisions on the regulation of firearms.

Bruen developed and how lower courts are likely to interpret and implement this new approach when analyzing Second Amendment cases. Next, we consider how *Bruen* affects four realms of firearm regulation: processes for determining the legal carrying of concealed weapons in public, restrictions on where firearms may be carried, regulations on who may carry or possess firearms, and regulations on the types of firearms that may be possessed. We conclude with a discussion of where new data or research might support the development of policies that both ensure individuals' Second Amendment rights as articulated by the Court and support states' interests in protecting public safety.

The *Bruen* Case

In *Bruen*, the Supreme Court took up a challenge to New York's concealed carry permitting regulation. To receive an unrestricted license to carry a firearm in New York state, an applicant had to demonstrate *proper cause*. Proper cause did not have a specific statutory definition, but case law specified that an applicant needed to show a need for self-protection greater than that of an average person in the general population. In a 6–3 majority decision written by Justice Clarence Thomas, the Court held that the Second Amendment right to keep and bear arms extends beyond the home, that the proper-cause licensing law in New York and similar regulations in five other states violate the Second Amendment, and that Second Amendment claims should not be evaluated by using a conventional weighing of government interests against burdens on the exercise of protected gun-related activity. The Court argued that where the plain text of the Second Amend-

ment covers a particular gun-related conduct, the conduct must be assumed to be protected. To pass constitutional muster to regulate that protected conduct, the government must prove that its regulation is consistent with a historical tradition of such regulations. Where there is not an exact duplicate in history or tradition, the courts are to analyze whether a contemporary regulation has a close historical analogue. The requirement to identify analogues is intended, the decision suggests, as neither a regulatory straitjacket nor a blank check for modern laws.

Justice Samuel Alito wrote a concurrence, stressing that the issue before the Court was limited to licensing laws similar to the one in New York and that the opinion did not touch on “who may lawfully possess a firearm or the requirements that must be met to buy a gun.” Nor did the majority opinion “decide anything about the kinds of weapons that people may possess.” Nor did the opinion disturb any other kinds of laws concerning “restrictions that may be imposed on the possession or carrying of guns.”

Justice Brett Kavanaugh also wrote a separate concurrence, joined by Chief Justice John Roberts, emphasizing that the opinion did not affect concealed carry licensing in those 43 states that had more-objective criteria for issuing licenses. He also indicated that, “properly interpreted, the Second Amendment allows a ‘variety’ of gun regulations.” Finally, Justice Kavanaugh’s concurrence reiterated the position stated in two prior Supreme Court Second Amendment cases: *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010):

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or

laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Again, with Justice Kavanaugh citing *Heller* and *McDonald*, these “presumptively lawful regulatory measures” were only “examples,” not “exhaustive.” Finally, the concurrence emphasized, the *Bruen* opinion did nothing to cast doubt on the constitutionality of regulations forbidding “dangerous and unusual weapons.”

Justice Amy Coney Barrett wrote a third concurrence, questioning whether the time frame for deciding the meaning of the Second Amendment should be 1791 (when the Second Amendment was ratified) or whether postenactment information, including information from the Reconstruction period, is relevant for understanding the meaning and scope of the Second Amendment.

Justice Stephen Breyer, joined by Justices Sonia Sotomayor and Elena Kagan, wrote a dissenting opinion. Justice Breyer began with a recitation of the serious harms caused by gun violence in America. He then questioned whether there was sufficient factual development of how New York implemented its law to support a judgment. Finally, he was critical of the text, history, and tradition approach endorsed by the majority. First, Justice Breyer argued, lawyers and lower courts do not have the resources to conduct the historical analysis this kind of test demands; second, even if they have the resources, lawyers and judges do not have the expertise to understand the materials they are reviewing; and, third, the exclusive use of analogy to historical laws would be insufficient to make principled decisions about what kind of regulations comply with the Second Amendment and which do not. Instead, Justice Breyer wrote that

he would preserve the mode of analysis that almost every federal court had converged on, which used history at step one and then did a conventional analysis considering the government’s interest, the effectiveness of the regulation in accomplishing that interest, and the impact the regulation has on protected gun-related activity.

***Bruen’s* New Standards for Evaluating Second Amendment Claims**

After *District of Columbia v. Heller*, lower courts had almost unanimously converged on the two-step framework to analyze Second Amendment challenges in a way that was meant to be functional and within the guidance of *Heller* itself. Step one considered whether a Second Amendment right was in any way implicated, usually by reference to history and sometimes to particular categories of *presumptively lawful* regulations identified in *Heller*; if so, then step two required a conventional tailoring analysis, whereby the court evaluated the importance of the government interest that the regulation is meant to advance, the evidence of how effectively the regulation advances that interest, and the burden on conduct that would otherwise be protected by the Second Amendment. Under this previous framework, lower courts could consider a range of evidence concerning each factor (although the common government interest for the regulation—public safety—was not usually seriously questioned). For instance, courts might review evidence concerning a regulation’s effectiveness in securing public safety, whether alternative policies might produce equal benefits but impose fewer costs on

gun owners, and the scope and magnitude of legitimate, protected conduct restricted by a regulation, given the alternatives available to gun owners.

An example of a court applying this two-part framework is the Third Circuit's analysis of prohibitions on weapons with missing or defaced serial numbers in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010). The Third Circuit first assessed that such weapons counted as "arms" for purposes of the Second Amendment under *Heller*. The court then evaluated the stated reason for the regulation (controlling illicit guns used in crime), the effectiveness of that regulation in preventing markets for untraceable guns to flourish, and the impact such a prohibition has on lawful self-defense in the home, given potential access to other firearms that have serial numbers. Finding that the prohibition had little impact, the Third Circuit upheld the prohibition.

The Court's *Bruen* decision, however, explicitly rejects step two—a step common to the evaluation of regulations on most individual rights, not just Second Amendment rights—in favor of its new text, history, and tradition-only analysis. Thus, *Bruen* introduces a new two-part analytic framework, the first part of which considers whether the plain text of the Second Amendment covers the conduct or regulation at issue; if so, the government must show that the regulation is consistent with the country's history and tradition of regulation. The Court acknowledges that identifying analogous historical regulations to justify contemporary ones will be approximate, saying that regulations must be justified through a "well-established and representative historical analogue, not a historical twin."

This test is likely to be difficult to apply with any precision or consistency. First, there is some ambiguity about

who bears the burden of showing that an activity falls within the plain text of the Second Amendment—is it on the party challenging or defending the law? Given the concurrence by Justice Kavanaugh, there may be some kinds of people, activity, and weapons that superficially fall within the plain meaning of *people, keep, bear, and arms* and yet still do not raise a prima facie case under the Second Amendment. For example, it seems unlikely that a convicted felon (person) who owns (keeps) and carries (bears) a hand grenade (arm) has a prima facie case of Second Amendment protection, such that the burden falls on the government to establish a tradition of prohibiting felons from carrying explosive devices.

Then there is the challenge of analogical reasoning. The Court did not indicate the level of generality needed to understand an analogue or determinants that make such an analogue "representative" of a tradition. To take the above example: There may be a history of prohibiting "dangerous people" from possessing weapons but not a tradition of prohibiting "felons" per se. (Is there, for instance, a history of prohibiting nonviolent felons, such as tax evaders, from accessing guns?) There may be a tradition of regulating barrels of gunpowder but not a tradition of regulating handheld explosives. What, moreover, might count as an analogue for modern innovations, such as high-capacity magazines?

Without guidance on how to evaluate sufficient similarity with historical analogues, a range of modern regulations would appear to be in jeopardy. For example, the concept of domestic violence as a punishable offense did not exist in the 18th century, possibly rendering unconstitutional those federal and state laws that temporarily restrict firearm possession by individuals subject to domes-

Bruen's new methodology for evaluating Second Amendment cases has competing interpretations.

tic violence restraining orders (DVROs). Similarly, there may be no close historical analogues for laws on extreme risk protection orders or even regulations concerning the minimum age of purchase or possession of firearms.

The majority decision in *Bruen* recognized that historical analogies are imperfect. Still, courts are likely to struggle both with the historical legal analysis they are now responsible for conducting but have little experience or training in and with constructing procedures for determining when a historical analogue is illustrative and when it is inapt. These questions are likely to be decided inconsistently by lower courts until the Supreme Court offers clarification and guidance in future cases.

It appears likely, moreover, that the justices do not all share an appetite for a broad dismantling of established firearm regulations. The concurrences filed by Justice Alito and Justice Kavanaugh (with Chief Justice Roberts), all of whom joined the majority opinion, seemed designed to emphasize the limits of the decision. In particular, these justices emphasized that *Bruen* should not be interpreted as challenging established regulations concerning who may possess a gun, the requirements for owning one, or what kind of weapons are lawful to possess.

Overall, the majority opinion acknowledged that *Bruen*'s new methodology for evaluating Second Amendment cases has competing interpretations, leaving ambiguous who bears the burden at each stage of the new test and what counts as a valid historical analogue and the procedures for arriving at such judgment. States interested in retaining or expanding restrictive firearm regulations may defend their positions by noting the concurring assurances that long-standing prohibitions were not threatened by the *Bruen* decision, whereas states interested in challenging restrictive firearm regulations may propose a very narrow or precise understanding of what constitutes a valid historical analogue.

State Regulation of Concealed Carry

Bruen's most direct and immediate consequence is to render unconstitutional certain types of concealed carry restrictions. Specifically, the *Bruen* decision noted, "nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes," referring to concealed carry regulations that leave no room for discretion on the part of the authority in charge of granting concealed carry licenses. In contrast, *Bruen* overturned New York's "may issue" regime, which allowed police to exercise discretion in determining whether applicants had proper cause to carry a concealed firearm on an unrestricted basis because of a special need for self-protection different from that of an average state resident.

The Court noted that the problems it identified in New York's regulations are also shared by regulations in

five other “may issue” states: California, Hawaii, Maryland, Massachusetts, and New Jersey.¹ However, the Court also suggested that three other “may issue” states are not directly affected by the decision. Specifically, the Court said that Connecticut, Delaware, and Rhode Island “have discretionary criteria but appear to operate like ‘shall issue’ jurisdictions.” In the case of Connecticut, for instance, the Court clarified that the state’s discretion to decline to issue concealed carry permits is limited to those who are not “suitable persons,” a group narrowly defined to include only those whose behavior demonstrates that they cannot be entrusted with a weapon. This clarification suggests two possible inferences. First, suitable person standards, if sufficiently objective, do not violate *Bruen*’s restrictions on concealed carry permitting laws. Second, even a suitability standard that uses a quite imprecise definition of *unsuitable behavior* could be constitutional under *Bruen*.

Thus, although *Bruen* makes clear that licensing authorities shall not exercise subjective discretion in issuing concealed carry permits, they may establish and enforce objective suitability standards for obtaining permits. To the extent that the discretion previously exercised by state officials was designed to prevent dangerous people from carrying concealed weapons, rather than to require an exceptional need for self-defense, the *Bruen* decision may require states only to develop objective criteria for defining the classes of people not to be entrusted with concealed firearms and making these part of their *suitable person* definitions. Such changes to state laws do not necessarily entail making regulations more lax. States that currently use discretionary procedures to deny permits to persons with alcohol use problems, a history of violent misconduct, or multiple suicide attempts might specify that

individuals with a conviction for driving under the influence or for a violent misdemeanor, or who have threatened their own lives or those of others, are not suitable for concealed carry permits.

Objective suitability requirements currently used by states, which appear not to be directly affected by *Bruen*, cover a wide range of potential threats to public safety. Criteria in Colorado and Oregon prohibit the carrying of firearms by those with documented histories of drinking or drug problems, violence, or emotional instability (Giffords Law Center, 2021a, 2021b). Other states, such as Delaware, require that an applicant submit five character references from “respectable citizens” of the county and publish notice of the application in a newspaper of general circulation (Delaware Courts, 2021). Relatedly, the Court’s decision may allow states to retain existing or establish new *good moral character* suitability requirements. North Carolina, for instance, is a “shall issue” state that nevertheless requires sheriffs (the licensing authority in the state) to ensure that applicants are of good moral character, as demonstrated by their conduct and criminal history over the past five years (North Carolina G.S. § 14-404). Accordingly, California, which has had to revise its laws in light of *Bruen*, has indicated that it will retain their good moral character requirement (California Office of the Attorney General, 2022).

Other requirements commonly imposed by states (including “shall issue” states) before issuing a concealed carry permit, such as training or proficiency standards, were not explicitly addressed in *Bruen*. Florida and Michigan, for instance, require minimum levels of training, including with live fire (Florida Department of Agriculture and Consumer Services, 2017; Michigan Compiled Laws

§ 28.425j). Maryland requires 70 percent accuracy in a live-fire test to obtain a concealed carry license (Maryland State Police, undated). And soon after the *Bruen* decision, New York implemented a 16-hour training requirement and a competency test requiring 80 percent shooting accuracy (New York Police Division of Criminal Justice Services, 2022). Conceivably, training requirements might be expanded to include, for instance, training on the appropriate use of force or on implicit bias, which could help reduce the disproportionate harm that firearm violence imposes on Black and brown Americans (Wintemute, 2015). Although there are certainly historical analogues to training and proficiency requirements found among the requirements for militia service in early American history, the Court’s silence on this matter leaves ambiguous the extent to which modern competency standards are mirrored by historical regulation. Furthermore, the Court, noting high permitting fees and long wait times as examples, emphasized that some permitting requirements may be sufficiently onerous and present unconstitutional barriers to the right to self-defense.

Prohibiting Firearms in Sensitive Places

There have been limits on where firearms may be carried—such as at fairs and markets, places of worship, and polling places—for as long as there have been guns. In general, these *sensitive places* are often locations in which rights to carry guns may come in conflict with the exercise of other individual rights.

The oral arguments in *Bruen* discussed sensitive places at length, yet the decision did not itself render any defini-

tive ruling on this emerging and important part of Second Amendment doctrine. The concurrence by Justice Kavanaugh emphasized that the ruling should not be interpreted as calling into question established regulations concerning sensitive places. Although the majority decision did explicitly reference courts and other government locations as examples of sensitive locations where firearms can constitutionally be banned, it was silent on most other places where states and municipalities have established gun-free zones (e.g., schools, bars, and restaurants).

Moreover, the Court offers no clear framework for distinguishing which locations may legitimately be declared sensitive, nor what makes a location sensitive. *Bruen* said that the entire island of Manhattan cannot be declared sensitive, but what about specific areas within it? Do schools and government buildings remain sensitive places? Are places sensitive because of the presence of a specific person, such as a current or former President, or a special event, such as the Super Bowl? Might the existence of a large crowd make a place sensitive? Does there have to be a risk of fear in the populace to support a designation of sensitive place? Such questions are likely to remain unsettled until the Court offers additional clarification through future rulings.

This ambiguity in the ruling was quickly seized on by states concerned that the *Bruen* decision would lead to new threats to public safety resulting from a surge in concealed carry of firearms. New York, for example, declared that the default presumption would be that all private property forbids private firearms, unless the property owners specifically posts that they allow private firearms, a reversal of the presumption in other states, where the presumption is

that guns are permitted unless specifically excluded (New York Consolidated Laws, Penal Law § 265.01-e).

Another ambiguity concerns how the increasing range and lethality of firearm technology might affect historical understandings of sensitive places. For instance, the shooters in the 2017 Las Vegas and 2022 Highland Park mass shootings were not among the crowds at the concert or parade—that is, they were not in the places most likely to be defined as sensitive places in historical regulations. Conceivably, therefore, the areas within firing range of historically sensitive locations may also be sensitive, given modern firearm technologies.

Prohibitions Against Individuals' Ownership or Carriage of Firearms

There is relatively little discussion in *Bruen* about who may be prohibited from possessing a gun, other than to suggest that possession should not be denied to “law-abiding” persons. Again, Justice Kavanaugh’s concurrence indicated that the ruling should not be seen as challenging established regulations on the ownership of firearms.

Current federal regulations on gun possession date from 1968 and therefore are of far more recent vintage than the New York “may issue” requirements (from the state’s Sullivan Act of 1911) that were struck down with *Bruen* for being insufficiently represented in history and tradition. Examples of these more recent federal prohibitions that might be challenged under *Bruen* include age restrictions on possession or purchase of firearms, lifetime bans on firearm possession after felony convictions, and prohibitions on firearm ownership by those dishonorably discharged from the military.

Laws on extreme risk protection orders and laws prohibiting firearm possession by those subject to DVROs temporarily prohibit firearm possession by individuals deemed by a court to represent an imminent threat to themselves, a domestic partner, or others. Several panelists at the RAND meeting questioned whether adequate historical precedent could be found to sustain the constitutionality of these laws under *Bruen*’s two-part framework. However, one panelist suggested that historical surety laws may provide an appropriate historical analogue.² Surety laws, which were fairly common in the middle of the 19th century, allowed individuals to petition courts to require someone who posed a threat to public safety to post a bond (or surety) before carrying a weapon. These laws required the petitioner to demonstrate to the judge’s satisfaction that the subject of the petition posed a risk to public safety, similar to requirements of modern-day extreme risk protection orders and DVRO petitioners.

The Court has never previously taken up a case considering regulations of who may possess a firearm, despite multiple opportunities to do so. Lower courts prior to *Bruen* sometimes characterized historical laws as prohibiting “dangerous” persons from owning guns, and then applied this generality to present-day estimates of dangerousness. This approach could uphold prohibitions based on, for instance, DVROs, even though there may be no precise historical analogue for them. Further, as noted, the Kavanaugh concurrence indicates that a majority of the Court may be reluctant to support a wholesale overturning of modern restrictions on who may possess firearms (with the possible exception of age-based restrictions). Whether majorities would also protect red-flag or DVRO laws is less clear from the ruling.

Prohibitions on Firearm Technologies

The *Bruen* decision did not directly address whether different types of weapons (for instance, assault rifles) or components of weapons (such as high-capacity magazines) can be subjected to different forms of regulation, although the Kavanaugh concurrence suggested that the ruling should not be seen as affecting such existing regulations. Here too, the search for relevant historical analogues presents challenges. It is not clear that compelling analogies can be drawn between the equipment available for regulation in antebellum America and the types of modern firearms and features currently available, such as weapons capable of automatic or semiautomatic fire, high-capacity magazines, armor-piercing ammunition, bump stocks, and other more-recent innovations in firearm technology.

However, despite ample evidence that the early American regulation of “dangerous and unusual” weapons referred to handguns at the time, *Bruen*, as well as previous Court decisions, repeatedly affirmed that the Second Amendment protects the right to use weapons that “are in common use at the time.” That is, the Court has found that a weapon in common use cannot be considered dangerous and unusual. This reasoning creates a potential regulatory challenge: Unless a new dangerous technology is quickly determined to be dangerous and unusual, and regulated as such, it will no longer be subject to such regulation once it becomes popular and therefore in common use. States concerned with restricting access to new, more-dangerous weapon technologies would need to design mechanisms for quickly preventing their distribution and adoption by large numbers.

Moreover, as the *Bruen* decision allows state permitting systems that entail no discretion, a graduated permitting system for increasingly dangerous firearm technologies may be acceptable to the Court. This system might resemble driver’s license classifications or graduated driver’s licenses, which require increasingly demanding standards and training depending on the type of vehicle (e.g., a person with a license to drive a car cannot legally drive a public bus or large truck) or driving conditions (e.g., some states dictate that adolescent drivers cannot drive at night or with other adolescents).

Some states and the federal government already have something like a graduated permitting system for firearms. Beginning in July 2019, for instance, residents of Washington state who wish to purchase a “semiautomatic assault rifle” must undergo an enhanced background check and complete special training requirements,³ requirements distinct from those for purchasers of other types of firearms (Revised Code of Washington § 9.41). Similarly, in accordance with the National Firearms Act of 1934 and subsequent amendments to it, the federal government regulates all automatic firearms, short-barreled shotguns, silencers, and certain other “destructive devices” differently from most other firearms, requiring, for instance, enhanced background checks and registration of the weapon with the Bureau of Alcohol, Tobacco, Firearms and Explosives. Although the Court would likely consider semiautomatic rifles and high-capacity magazines as in common use and thus covered under Second Amendment protections, regulations that impose higher standards of control over the acquisition, use, and carrying of specific types of weapons may be constitutional under *Bruen*.

Many Remaining Questions Will Be Tested as Courts Hear New Cases

Although not a direct result of the reasoning in *Bruen*, it is possible that states favoring increasingly permissive gun laws may be prompted by the decision to further liberalize their gun laws. This would continue a trend in many states. Indeed, before the *Heller* decision in 2008, only two states allowed concealed carry without a permit (i.e., permitless carry). Although *Heller* in no way required states to remove permitting requirements, in the years since that decision, 23 additional states have adopted a permitless carry regime.

Those wishing to repeal or challenge gun regulations will now have new arguments available to them after *Bruen*. They might, for instance, vote to repeal restrictions on laws for extreme risk protection orders or bans on high-capacity magazines because they are insufficiently traditional. Similarly, the limited evidence of historical restrictions on gun ownership based on age might be used to defeat the imposition of age restrictions on purchase or possessions of firearms.

Whether these types of political arguments in legislatures or by executive officials will become legally binding arguments that can be used in court depends on how lower courts resolve some of the puzzles that the *Bruen* decision has handed them, such as

- how to establish historical analogues when the historical record is unclear or poorly documented
- how to determine what counts as a legitimate historical analogue of a modern regulation
- how to circumscribe the locations that might legitimately be considered sensitive and therefore subject to prohibitions on carrying firearms

Courts deciding these cases will likely have to construct some new model of analyzing the surge of Second Amendment cases.

- how to distinguish between weapons that are dangerous and unusual, and hence subject to bans or severe restrictions, versus those that might once have been dangerous and unusual but have since come into common use
- when and how to discount historical or contemporary regulations as outliers that do not carry evidentiary weight, such as *Bruen* suggests repeatedly about early American laws that restricted firearm carriage.

Many panel members agreed that the *Bruen* decision will create confusion and uncertainty in lower courts on these and other issues. Courts deciding these cases will likely have to construct some new model of analyzing the surge of Second Amendment cases that *Bruen* will generate and perhaps construct another framework, much as they did after *Heller*.

Areas of Further Research

A key question we hoped to gain insight into through the meeting was where, if anywhere, the *Bruen* decision leaves room for science and empirical evidence about the effects of gun laws to play a role in determining the constitutionality of regulations. Relatedly, we wanted to understand where new research might help clarify issues courts need information about to reach decisions regarding the constitutionality of firearm regulations.

Because the new two-part framework for evaluating Second Amendment offered by *Bruen* dispenses with analysis of how interests of the state and the individual are balanced, it is less clear what role there is for courts to consider questions about the effectiveness of regulations, the magnitude and scope of harm resultant from regulations, alternative approaches that might be available to the individual or the state to otherwise satisfy their interests while generating less harm, and other such empirical considerations.

However, some on our panel believed that there is still a role for research and empirical evidence to influence future court decisions on Second Amendment cases. Examples of such opportunities include the following:

- Given the heavy reliance on text, history, and tradition and the identification of historical analogues to modern regulations, historical legal research may play an increasingly important role in future court rulings. What types of laws existed, in how many states and covering what percentage of the population, and to what degree were they enforced? What were the intended aims and effects of historical

firearm regulations, and are those congruent with the intent and effects of contemporary laws?

- The Court made clear that although some permitting fees and waiting times might be so onerous as to represent an unconstitutional barrier, permitting itself is not unconstitutional. This raises empirical questions about how burdensome different features of permitting laws are. What amount of training, for instance, represents a reasonable demand made by the state before issuing a permit to carry a concealed weapon, and what benefits might arise from such requirements?
- Because the Court did not clarify what makes a location a legitimate sensitive place where guns might be banned, courts around the country may seek information about where firearms have most commonly posed a threat to public safety, whether armed citizens have effectively countered those threats or made them worse, or the conditions that present the greatest risks of accidental or intentional firearm violence. Where does the presence of firearms interfere with the exercise of other protected rights, and what are the magnitudes of such harms? Where does the public support restricting firearms?
- Given that the Court is likely to continue allowing prohibitions on firearm possession for certain groups, and that dangerousness would appear to be the metric used to establish the constitutionality of the prohibition, what factors predict dangerousness? For example, evidence about people aging out of committing violent crimes could help inform decisions about whether lifetime bans are appropriate.

- Because *Bruen* reiterates from both *Heller* and *McDonald* that “individual self-defense is ‘the central component’ of the Second Amendment right,” questions about the extent to which regulations impede individuals’ ability to defend themselves (with firearms or other weapons) would seem to be fundamental to determining constitutionality.

In short, for research to have legal relevancy, it may be that empirical evidence and studies need to be driven by the kinds of historical categories or analogies that the Court mentions in *Bruen* rather than the product of freestanding empirical inquiries that cannot be translated into such historical categories or analogies.

Conclusions: State Options for Regulating Firearms After *Bruen*

According to what we heard at the meeting we held at RAND in July 2022, *Bruen* is a major change to Second Amendment jurisprudence that could eventually lead to large-scale changes in the U.S. firearm regulatory landscape. Nevertheless, key ambiguities and contradictions in the decision and its concurring opinions lead us to conclude that the most-likely outcomes for states will be that those wishing to impose restrictive firearm regulations will continue to be able to do so, though sometimes in modified ways, and those wishing to make their laws more permissive will similarly find arguments under *Bruen* to support that trajectory.

Specifically, we believe the following:

- *Bruen* is likely to engender a period of confusion as the lower courts struggle to implement unclear new

Empirical evidence and studies may need to be driven by the kinds of historical categories or analogies that the Court mentions in *Bruen*.

standards on how to evaluate Second Amendment claims.

- Although these new standards would appear to raise questions about many existing state laws, there is reason to believe that the current Supreme Court would not extend the implications of its new approach to any wide-scale dismantling of existing regulations on who may possess firearms, where they may be carried, or what types of firearms are legal to possess.
- The Court’s determination that New York state’s concealed carry law was unconstitutional was narrowly focused on the use of subjective discretionary standards in issuing permits and seems to explicitly allow for states to use objective suitability and perhaps even *good moral character* standards that could serve similar risk management objectives as the former discretionary standards.

- Because the decision allows states to enact permitting systems that use objective standards for eligibility, state regulations that set objective training and competency standards for the acquisition, use, and carrying of firearms may be defensible under *Bruen*.
- Although the decision allows that firearms can be banned from certain sensitive places, no clear guidance on how to determine the legitimacy of such regulations was offered in *Bruen*, meaning that states wishing to broaden or limit bans on firearms in sensitive places may be able to justify their choices.
- Although prohibitions against gun possession by, for instance, children, those posing a risk to themselves or others, and those dishonorably discharged from the military could well be challenged on the basis of *Bruen*'s new method for evaluating Second Amendment claims, the Court again seems unlikely to reject most regulations specifying those who are prohibited from gun ownership.
- Because the Court emphasizes that weapons in common use cannot be considered *dangerous and unusual*, technologies that a state wishes to prohibit may need to be banned before they are in wide circulation.

Finally, although the *Bruen* decision limits the role of science and contemporary evidence in influencing how firearm regulations are evaluated, there are some limited empirical questions for which research could still help inform future Supreme Court decisions on the regulation of firearms.

APPENDIX

Meeting Attendees

Panel Members

Shani Buggs, University of California, Davis, Violence Prevention Research Program, and California Firearm Violence Research Center

Jacob Charles, Pepperdine University, Caruso School of Law, and Duke Center for Firearms Law

Thomas Chittum, Bureau of Alcohol, Tobacco, Firearms and Explosives (retired)

Saul Cornell, Fordham University

Cassandra Crifasi, Johns Hopkins University, Bloomberg School of Public Health

Brannon P. Denning, Samford University, Cumberland School of Law

David Hemenway, Harvard University, Injury Control Research Center

Julia Jenkins, Legal Aid Society of New York, Criminal Defense Practice

Eric Ruben, Southern Methodist University, Dedman School of Law, and Brennan Center for Justice

Anne Teigen, National Conference of State Legislatures

Adam Winkler, University of California, Los Angeles, School of Law

April Zeoli, Michigan State University, School of Criminal Justice

Organizers

Darrell A. H. Miller, Duke University, School of Law

Andrew R. Morral, RAND Corporation

Rosanna Smart, RAND Corporation

Staff

Liisa Ecola, RAND Corporation

Ryan Bradley, RAND Corporation

Notes

¹ We focus our discussion on *Bruen*'s implications for concealed carry regulation and assume that open carry is similarly regulated in the state. If, on the other hand, the state allows open carry, it might have far greater discretion in issuing concealed carry permits. In particular, the Court's opinion noted that Delaware's "may issue" regime is not unconstitutional by virtue of the state having no restrictions on open carry, suggesting that states may continue to exercise discretion in the issuance of concealed carry permits if they can demonstrate that individuals have other legal ways to carry weapons and defend themselves.

² The majority opinion in *Bruen* rejects surety statutes as historical analogues to New York's *proper cause* requirement because "showing of special need was required only *after* an individual was reasonably accused of intending to injure another or breach the peace. And even then, proving special need simply avoided a fee."

³ Washington state's statute defines a *semiautomatic assault rifle* as "any rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge" (Revised Code of Washington § 9.41).

References

California Office of the Attorney General, "U.S. Supreme Court's Decision in New York State Rifle & Pistol Association v. Bruen, No. 20-843," Legal Alert OAG-2022-02, June 24, 2022.

Delaware Courts, "Instructions: New Applications for a License to Carry a Concealed Deadly Weapon," revised September 2021. As of October 25, 2022:
<https://courts.delaware.gov/forms/download.aspx?ID=33278>

Florida Department of Agriculture and Consumer Services, "Florida Concealed Weapon or Firearm License: Application Instructions," July 2017.

Giffords Law Center, "Concealed Carry in Colorado," webpage, last updated September 15, 2021a. As of October 25, 2022:
<https://giffords.org/lawcenter/state-laws/concealed-carry-in-colorado/>

Giffords Law Center, "Concealed Carry in Oregon," webpage, last updated September 15, 2021b. As of October 25, 2022:
<https://giffords.org/lawcenter/state-laws/concealed-carry-in-oregon>

Maryland State Police, "Wear and Carry Permit Training" webpage, undated. As of October 26, 2022:
<https://mdsp.maryland.gov/Organization/Pages/CriminalInvestigationBureau/LicensingDivision/Training/WearandCarryPermit.aspx>

New York Police Division of Criminal Justice Services, "Minimum Standards for New York State Concealed Carry Firearms Safety Training," August 23, 2022

Wintemute, Garen J., "The Epidemiology of Firearm Violence in the Twenty-First Century United States," *Annual Review of Public Health*, Vol. 36, 2015.

About This Perspective

On July 12, 2022, the RAND Corporation convened a panel of experts in firearm law, policy, and U.S. history to discuss the implications of the Supreme Court's recent decision in *New York State Rifle & Pistol Association, Inc. v. Bruen* for state firearm laws. This Perspective describes the authors' conclusions from that meeting about how new and existing state firearm regulations will be evaluated by lower courts in the post-*Bruen* legal landscape. This project was supported by a grant from Arnold Ventures.

Justice Policy Program

RAND Social and Economic Well-Being is a division of the RAND Corporation that seeks to actively improve the health and social and economic well-being of populations and communities throughout the world. This research was conducted in the Justice Policy Program within RAND Social and Economic Well-Being. The program focuses on such topics as access to justice, policing, corrections, drug policy, and court system reform, as well as other policy concerns pertaining to public safety and criminal and civil justice. For more information, email justicepolicy@rand.org.

Acknowledgments

We wish to thank the participants (listed in the appendix) in the July 12, 2022, meeting convened by RAND. In addition, we thank Liisa Ecola for her assistance organizing the meeting and documenting our discussion and two independent quality assurance reviewers, Jacob B. Charles of Pepperdine University and Nancy Staudt of RAND.

About the Authors

Darrell A. H. Miller is the Melvin G. Shimm Professor of Law at the Duke University School of Law. He writes and teaches in the areas of civil rights, constitutional law, civil procedure, state and local government law, and legal history, and his scholarship on the Second and Thirteenth Amendments has been cited by the Supreme Court. He has a J.D. from Harvard Law School.

Andrew R. Morral is a senior behavioral scientist at the RAND Corporation; leader of Gun Policy in America, a RAND initiative to understand the effects of gun policies; and director of the National Collaborative on Gun Violence Research. His expertise includes program evaluation, modeling and simulation, survey research, and performance measurement. He holds a Ph.D. in psychology from New School for Social Research.

Rosanna Smart is an economist at the RAND Corporation. Her research is in applied microeconomics, with a focus on issues related to health behaviors, illicit markets, drug policy, programs to reduce crime and improve police operations and outcomes, and the determinants of gun violence. She received her Ph.D. in economics from the University of California, Los Angeles.

New York State Rifle & Pistol Association, Inc. v. Bruen is a major change to Second Amendment jurisprudence and could eventually lead to large-scale changes in the U.S. firearm regulatory landscape. Nevertheless, key ambiguities and contradictions in the decision and its concurring opinions lead the authors to conclude that sharp departures from the regulatory regimes currently pursued by states are unlikely until new cases are heard by the Supreme Court that resolve those ambiguities. Therefore, states wishing to impose restrictive firearm regulations will continue to be able to do so, though sometimes in modified ways, and those wishing to make their laws more permissive will similarly find arguments under *Bruen* to support that course. Although the *Bruen* decision limits the role of science and contemporary evidence in influencing how firearm regulations are evaluated, there are some limited empirical questions for which research could still help inform future court decisions on the regulation of firearms.

