

The State of Gun Policy After *Bruen*



A Primer from the Duke Center for Firearms Law and Arnold Ventures

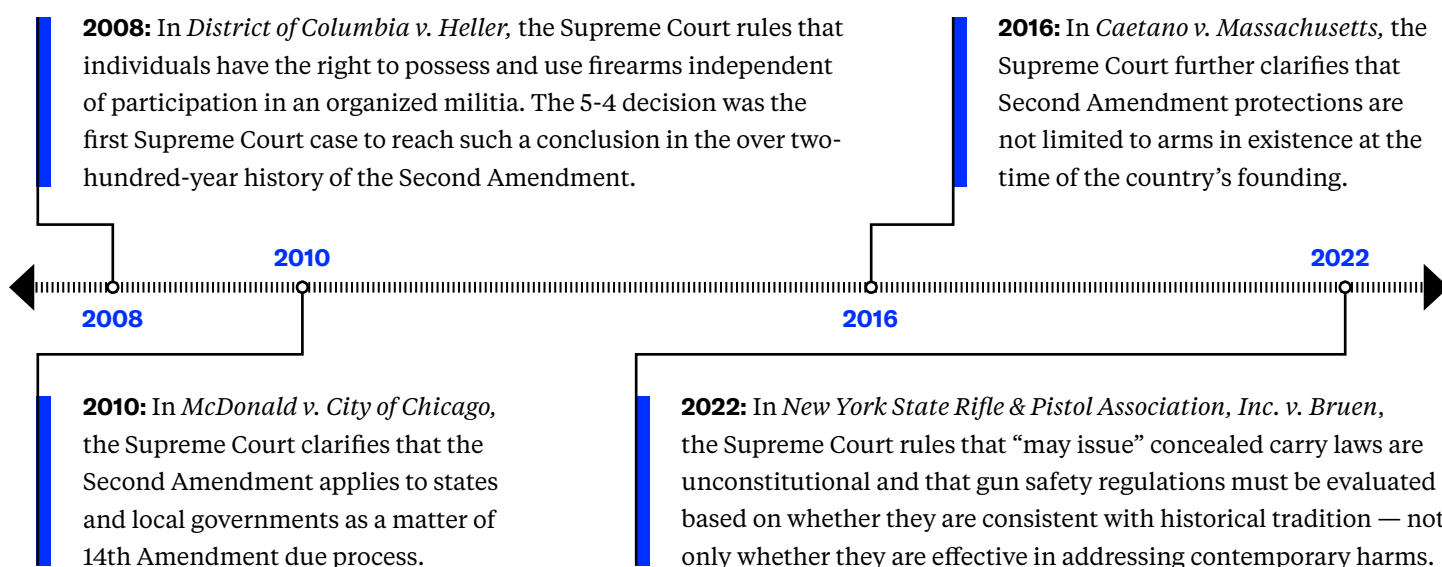
KEY FACTS

- The United States had **48,830 gun deaths** in 2021, up 23% from 2019.ⁱ
- In 2021, the gun death rate was 14.6 per 100,000 people, the highest since the early 1990s.ⁱⁱ
- There was a 50% increase in gun deaths among children and teens between 2019 and 2021.ⁱⁱⁱ
- The country has a large stock of privately owned guns in circulation, estimated to be somewhere between 265 million and 393 million firearms.^{iv}

The landscape of gun safety policy has shifted significantly in recent years. Several high-profile multiple mass shootings in May 2022 led to renewed calls for gun regulation. One month later, Congress passed the Bipartisan Safer Communities Act (BSCA) and President Biden [signed it into law](#), creating the first meaningful gun legislation in over a decade.

However, the legal territory where bipartisan policy accomplishments like BSCA can happen remains unsettled. In June 2022, the Supreme Court in *New York State Rifle & Pistol Association, Inc. v. Bruen* struck down New York’s century-old concealed-carry law and in doing so introduced a new requirement that the constitutionality of modern gun regulations be evaluated based on whether they are consistent with historical tradition. In its wake, many lawmakers, courts, and advocates are uncertain about what constitutes constitutional gun safety policy. Legal scholarship can help provide guidance.

Timeline of 2nd Amendment Supreme Court Cases:



The [Duke Center for Firearms Law](#) was founded in 2019. The center’s co-directors, [Joseph Blocher](#), Lanty L. Smith ’67 Professor of Law, and [Darrell A. H. Miller](#), Melvin G. Shimm Professor of Law, are advancing nonpartisan scholarship around gun rights and regulation and the U.S. constitution.

Now, with support from Arnold Ventures (AV), the Center is analyzing the implications of the *Bruen* decision and helping to clarify which gun safety policies are consistent with this new interpretation of the Second Amendment.

The Center will be holding symposia with policymakers and legal experts, expanding their vast repository of historical local gun laws, and publishing Second Amendment legal primers, video lessons, and reading lists.

“Blocher and Miller are experts in the field. The way they’ve approached the issue from a nonpartisan perspective is instrumental in this time of uncertainty. Our partnership with Duke is really exciting because it provides a historical framework and addresses real-world applications of *Bruen*.”
– [Asheley Van Ness](#), *Director of Criminal Justice at AV*

QUESTIONS & ANSWERS

Arnold Ventures (AV): What did the Supreme Court’s decide in the *Bruen* case?

Joseph Blocher (JB): There are two parts to it. The first is the substantive holding. Essentially, what the court did was strike down a form of public carry permitting known as “may-issue” licensing. This is where a state official has discretion to give a person a license to publicly carry a concealed handgun, predicated on that person having shown some sort of elevated need for self-defense. New York had a law like that since 1911, and the court struck it down, saying it’s unconstitutional and violates the Second Amendment.

The second and more important thing about *Bruen* is the method by which the court reached its decision, which it says lower courts now have to apply. Prior to *Bruen*, courts had been doing something called a two-part framework, which basically combined historical analysis with some sort of consideration of modern empirics, like the effectiveness of modern gun safety regulations.

In *Bruen*, the majority seemed to say that from now on modern gun safety regulation must be evaluated solely on the basis of whether they have historical analogs — that is, whether the law under review is relevantly similar to some historical gun law. That’s a pretty radical change in constitutional doctrine, and it’s not something we see in other areas of constitutional rights litigation. It has led to a lot of upheaval in the lower courts.

“The test that the Court set forth in Heller and applies today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment’s text and historical understanding.” – *New York State Rifle & Pistol Association v. Bruen*

AV: Why is the *Bruen* decision important?

JB: For very good reasons, all types of people — from policymakers to community members — are focused on trying to figure out what kinds of gun safety regulations might save lives and prevent gun-related harms. The Second Amendment puts limitations on the kinds of regulations that we can adopt and *Bruen* is the Supreme Court’s latest statement of what those limits are. That makes it hugely important at a practical level.

Darrell Miller (DM): Before the *Heller* decision in 2008, there was a fairly broad scope of actions that governments could take to regulate firearms for the purpose of public safety. After 2008, when the Supreme Court began framing the Second Amendment as an individual right for personal purposes, the scope of constitutional regulations became more constrained. The debates now are about how much constraint there is — how much room there is for policymakers to say, “here’s a policy that we would like to try out for purposes of safety.” Today, every policymaker has to factor in not just the political question about getting a policy passed, but also the legal question of whether a policy has the relevant historical precedent to survive constitutional scrutiny if challenged.

The Duke Center for Firearms Law maintains a searchable “Repository of Historical Gun Laws.” With more than 1,800 categorized laws going back to the medieval era in England, the repository is an important and accessible resource for policymakers, lawyers, and advocates who are interested in navigating the Supreme Court’s new historical analog standard. Access the repository [here](#).^v

AV: What are some common misconceptions you have been hearing about the *Bruen* decision in lower courts and among policymakers and the public?

DM: *Bruen* has generated a lot of confusion about what the majority opinion holds and its implications. One misconception is that all licensing is now a Second Amendment violation, and so every state has to go to a permitless carry rule. That’s clearly not what *Bruen* says. It allows states to enact and enforce permitting laws if they use objective standards. So, in other words, regulations that link permits to objective training and competency standards may still be permissible.

The second thing is that you have to find something historically that looks pretty close to what the modern regulation is. I think that’s an overreading of *Bruen* and the historical analog approach. The opinion says that there is room for a nuanced approach, especially when there are modern problems or modern technologies for which there would be no historical analog — like a gun on an airplane, for example.

The third thing is that the majority says that modern regulations have to have some sort of historical analog. But this doesn’t necessarily mean that all empirical data is now completely worthless. It just means that the data needs to be linked up with some kind of tradition of American regulation.

MYTHS ABOUT *BRUEN*

- **Myth #1:** Modern gun regulations are unconstitutional.
Reality: *Bruen* does not say that all gun regulations are unconstitutional. In fact, it emphatically and explicitly says that some forms of gun regulation are still constitutional.
- **Myth #2:** Modern gun regulations need a clear and direct historical “twin” in order to be considered constitutional.
Reality: *Bruen* does not require that contemporary gun laws have an exact and direct historical precedent. Rather it requires that they be grounded in an analogy to historical regulation.
- **Myth #3:** There is too much legal uncertainty about gun policy to justify enacting new laws or regulations.
Reality: Policymakers have a responsibility to save lives and promote public safety, and the *Bruen* decision provides helpful clues on how they can continue to craft gun policy in ways that are compliant with the constitution.

In 2022, with AV support, RAND convened leading scholars to consider the implications of Bruen for existing state firearm policies. Experts discussed how 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. Read the report [here](#).^{vi}

AV: In the absence of more comprehensive restrictions on gun ownership and possession, many policymakers from both parties have been focused on ensuring guns stay out of the hands of “dangerous people.” What does the Bruen decision mean for these types of policy approaches?

JB: There’s a long historical tradition of denying firearms to people thought to be “dangerous.” And while the general concept has remained consistent, the specific people thought to be dangerous has changed over time — for good reason. While *Bruen* isn’t directly about person-based restrictions — it’s about licensing for public carry — it does announce a new test for all gun restrictions under the Second Amendment. Person-based restrictions like those that target people considered to be dangerous are now going to have to be evaluated based on whether they are consistent with historical tradition. If a jurisdiction wants, for example, to prohibit gun possession by people who’ve committed certain kinds of crimes or people who are exhibiting certain kinds of mental illness, they’re going to have to ground those contemporary laws in some kind of analogy to historical regulation.

That’s complicated because the founding generation just had a very different conception of what kinds of people are “dangerous” than we have today. In the founding era, a proxy for dangerousness was race: for example, being Indigenous or of African descent. Those kinds of laws are obviously unconstitutional today, and we have better tools than racist stereotypes to determine who is in fact dangerous, but they do show that historically government had the power to disarm those it thought to be dangerous.

The founders also failed to restrict gun ownership by many groups that we regard as dangerous today, like people who are charged or convicted of domestic violence or are subject to certain kinds of restraining orders. *Bruen* makes those kinds of laws challenging for courts to evaluate. It’s still perfectly constitutional to deny guns to certain people, though there is some uncertainty about which people qualify under this standard.

“§ 4. And whereas it is very improper and dangerous that persons disaffected to the liberty and independence of this state shall possess or have in their own keeping, or elsewhere, any firearms, or other weapons used in war, or any gun powder. § 5. ... That from and after the passing of this act, the lieutenant or any sub lieutenant of the militia of any county or place within this state, shall be, and is hereby empowered to disarm any person or persons who shall not have taken any oath or affirmation of allegiance to this or any other state...” – 1779 Pa. Laws 193.

AV: In the recent *United States v. Rahimi* case, a federal court rejected policy that regulates gun possession based on dangerousness. What did the court decide, and why is it important to this discussion?

JB: In *Rahimi*, the Fifth Circuit Court of Appeals struck down a federal law that prohibits gun possession by persons subject to a domestic violence restraining order because the government did not identify sufficient historical tradition. *Rahimi* shows how *Bruen's* method can be misapplied — it's a really good example of mistaking the requirement for historical analysis for a requirement to find a historical twin. Effectively, the decision says that in 1791, when the Second Amendment was ratified, there were no restrictions that disarmed people who would have been subject to a domestic violence restraining order.

This kind of historically hidebound reasoning shows how an overly strict reading of *Bruen's* historical test can be problematic. Moreover, I think it's just a bad reading of the history, since in 1791, there were numerous laws restricting gun ownership for groups of people thought to be dangerous. That means that there is a historical comparator.

Many legal scholars have further noted that the decision is also flawed because the 5th Circuit court did not consider *Bruen's* direction that courts evaluate whether a law reflects an “unprecedented societal concern.” The modern domestic violence restraining order is supported by vast amounts of data showing the connection between domestic violence and gun possession, and a person who is subject to such a restraining order has been found dangerous by a judge. Put those things together and they do look relevantly similar. At the time we're talking, the government has asked the Supreme Court to take the *Rahimi* case. The court could hear it as early as next fall.

Read more about the Duke Center for Firearms Law's analysis of the Rahimi ruling [here](#).^{vii}

DOMESTIC VIOLENCE FACTS

- Each year, more than 600 American women are shot to death by intimate partners —roughly one every 14 hours.^v
- There is a 500% increased risk of homicide when a gun is present during a case of domestic violence.^{vi}
- Research shows that laws restricting people who are subject to domestic violence restraining orders from owning firearms decreases homicides overall and intimate partner homicides in particular.^{vii}

AV: Given the *Bruen* decision, do you have any recommendations on how lawmakers, courts, and advocates should go about crafting and implementing gun policies?

JB: *Bruen* does not rule out the constitutionality of gun safety regulation. It emphatically and explicitly says that some forms of gun regulation are still constitutional. States absolutely need to do their best to save lives and preserve public safety with gun laws. In a variety of settings, the work that legislators have traditionally done to evaluate the effectiveness of policies — for example, by using modern empirical data — still matters, even in this historical *Bruen* framework.

Legislatures should continue to look at policies like [extreme risk protection order \(ERPO\) laws](#), which have a substantial amount of political support and have been shown to save lives by allowing courts, with due process, to temporarily remove guns from individuals who present a specific threat to others or themselves. When people are working on policies they hope to be adopted as legislation — and that will presumably at some point be subject to a Second Amendment challenge — it will be useful when drafting those policies or laws to make explicit the connections to historical analogs. For example, when legislatures draft statutes, they often have prefatory language, and I think it will be increasingly valuable for that kind of language to point to the history that supports the law.

RECOMMENDATIONS

- Continue to craft evidence-based gun policies that will save lives. For instance, RAND’s Gun Policy in America (GPIA) initiative has [found](#):
 - There is strong evidence showing that child access prevention laws reduce fatal and non-fatal youth firearm injuries.
 - There is moderate evidence showing that minimum age of purchase laws, background check requirements, waiting periods, and prohibitions on gun ownership by people subject to domestic violence restraining orders all reduce homicides.
- Do not neglect empirical data, such as that analyzed by GPIA, as it is still important to making the legal case.
- Make explicit connections to historical analogs in the legislative text. The Supreme Court was clear in *Bruen* that a historical ‘twin’ isn’t necessary — the historical tradition just needs to be analogous to the motivation and operation of the current law.

ENDNOTES

- i John Gramlich, “What the Data Says About Gun Deaths in the U.S.,” <https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about-gun-deaths-in-the-u-s/#:~:text=The%20record%2048%2C830%20total%20gun,rose%2010%25%20during%20that%20span>
- ii John Gramlich, “What the Data Says About Gun Deaths in the U.S.,” <https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about-gun-deaths-in-the-u-s/#:~:text=The%20record%2048%2C830%20total%20gun,rose%2010%25%20during%20that%20span>
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- iv “Evidence About Effects of Gun Policies Grows and Supports Laws Intended to Restrict Child Access to Guns,” <https://www.rand.org/news/press/2023/01/10.html>
- v “Search the Repository,” <https://firearmslaw.duke.edu/repository/search-the-repository/>
- vi Darrell A.H. Miller, et al., “State Firearm Laws After Bruen,” https://www.rand.org/content/dam/rand/pubs/perspectives/PEA200/PEA243-1/RAND_PEA243-1.pdf
- vii Andrew Willinger, “Federal Judge Strikes Down Ban on Possessing Guns While Subject to a Domestic Violence Restraining Order,” <https://firearmslaw.duke.edu/2022/11/federal-judge-strikes-down-ban-on-possessing-guns-while-subject-to-a-domestic-violence-restraining-order/>
- viii Federal Bureau of Investigation, “Uniform Crime Reporting Program: Supplementary Homicide Reports (SHR), 2014-2018.”
- ix NCADV, “Statistics,” <https://ncadv.org/STATISTICS>
- x Rosanna Smart, et al., “The Science of Gun Policy, Third Edition,” https://www.rand.org/pubs/research_reports/RRA243-4.html