The Supreme Court Expands Second Amendment Rights as the Nation Experiences Historic Levels of Firearms Violence

On June 25, 2022, President Joe Biden signed the Bipartisan Safer Communities Act, which enhances background checks for individuals younger than 21 years seeking to purchase a firearm, incentivizes states’ implementation of extreme risk protection orders (ERPOs), and expands access to mental health services. Two days earlier, the Supreme Court declared a broad right to carry firearms in public, which will be far more consequential for gun violence.

The Supreme Court’s ruling coincided with a historic rise in firearms violence, including a mass elementary school shooting in Uvalde, Texas; a racist attack in Buffalo, New York; and a mass shooting during an Independence Day parade in suburban Chicago that resulted in at least 6 deaths and wounding of at least 30 other people. In 2020, the US reached an unprecedented total of more than 45,000 firearms deaths. Mass shootings (4 or more injuries or deaths) now occur more than once every day. The US firearms death rate is 25 times higher than in other high-income countries. In this Viewpoint, we discuss the recent Supreme Court decision and offer a public health strategy for firearms safety laws.

The Bruen Decision
In New York State Rifle & Pistol Association v Bruen, the Supreme Court struck down a 109-year-old New York law requiring “proper cause” (a special need for self-defense) for obtaining a license to carry a concealed weapon in public. Seven additional states, and many localities, have “proper cause” concealed carry laws. Justice Clarence Thomas, writing for a 6-3 majority, held that New York’s proper-cause requirement violates the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to possess firearms in public for self-defense.

The Second Amendment reads, “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.” In District of Columbia v Heller (2008) and McDonald v Chicago (2010), the Supreme Court effectively disregarded the militia clause, finding an individual right to bear arms for self-defense. Following Heller and McDonald, lower courts balanced the right to bear arms with states’ reasonable public safety needs. Instead, the Supreme Court in Bruen ruled courts must apply a single test: whether laws are “consistent with the Nation’s historical tradition of firearm regulation.” The Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms” for self-defense.

Justice Antonin Scalia’s ruling in Heller in 2008 explicitly permitted a wide range of firearm regulations: “nothing in [the] 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.” He suggested that firearms storage regulations were permissible, as well as bans on “dangerous and unusual weapons,” such as “M-16 rifles and the like.” The Supreme Court in Bruen reiterated states’ longstanding ability to “forbid the carrying of firearms in sensitive places.” It remains unclear which places are sufficiently “sensitive” to permit restricting firearms. Beyond that, it is uncertain which evidence-based firearm safety laws would meet Bruen’s strict historical test.

Civilian Concealed Carry Laws
According to the Supreme Court, modern firearms regulations should be judged by standards at the time the Second Amendment was adopted in 1791. Supreme Court justices do not have expertise to conduct historical analyses, and the Founding Fathers could not have foreseen high-powered firearms or the historic rise in fatal shootings. Concealed carry laws do have deep historical traditions, with Kentucky first enacting a ban in 1813. It was not until the late 1980s that states began to adopt laws allowing most legal owners to obtain a license to carry concealed guns in public. “Right to carry” laws, supporters argued, would deter violent attacks. Most recent studies have found that right to carry laws often were associated with increased violent crime. Until Bruen, courts have found concealed carry laws to be on solid legal footing, but now any discretionary licensing requirements will be vulnerable.

Public Health Strategies
Evidenced-based public health strategies could significantly reduce firearms violence, mass shootings, suicides, and unintended weapons discharge. Judicial orders can reduce firearms access for potentially dangerous
individuals, such as through domestic violence restraining orders (DVROs) and ERPOs. DVROs are associated with reductions in intimate partner homicides, but their effectiveness is contingent on whether laws cover dating partners and explicitly require firearm surrender. Raising the minimum age to purchase firearms to 21 years would reduce access by adolescents who have elevated rates of violence. Safe storage regulations are associated with reductions in youth suicides, youth-perpetrated homicides, weapon-related violence in schools, and unintentional shootings.

Background checks can reduce firearm access by persons with a record of dangerous behavior most effectively when applied to sales between unlicensed parties, such as 2 private parties. The Bipartisan Safer Communities Act requires anyone selling firearms in the US to obtain a license.

Laws that require a license or permit to purchase handguns are associated with reductions in guns being diverted for use in crime, homicides, suicides, fatal mass shootings, and law enforcement officers shot in the line of duty. Prior court rulings have found these laws to be constitutional.

In 1994, Congress enacted a 10-year ban on the manufacture for civilian use of certain semiautomatic firearms and high-capacity ammunition magazines. A 2020 study of both the lapsed federal assault weapons ban and state-level assault weapons bans show high-capacity ammunition magazine bans are associated with significant reductions in fatalities and injuries from mass shootings.

The Future of Firearm Violence Prevention After Bruen
The most immediate effect of the Bruen decision will be that New York and 7 other states with discretionary licensing for concealed carry will have to discontinue “good cause” requirements. These states should consider whether their laws need reform to adequately screen out individuals most likely to be violent or unsafe with guns. State officials could, for example, refuse to issue a license based on relevant risk factors, such as a history of violent behavior, expired DVROs, or multiple alcohol-related offenses. States could also require applicants to pass firearm proficiency tests, for example, accuracy in hitting a target and appropriate decisions about whether to use a gun under high-stress situations. In addition, states could expand the types of sensitive places where civilian gun carrying is banned (such as government buildings, places that serve alcohol, and public transportation).

Beyond concealed carry, it will be difficult to apply a test that requires judges to understand and apply late 18th century traditions to modern firearms laws. Registration of handguns and safe storage laws are vigorously contested, yet they predate the Second Amendment. Boston, for example, enacted the first safe storage law in 1786, banning loaded firearms in any domestic dwelling.

Judicial protection orders, such as ERPOs and DVROs, have broad public support and have been shown to be effective. Yet, ERPOs date back only to a 1999 Connecticut law. Today, at least 19 states have ERPOs, and Congress incentivized them in the Bipartisan Safer Communities Act. DVROs are even more widely used legal interventions, with all 50 states and the District of Columbia providing civil remedies for individuals at risk of future harm. Yet, these laws only began in the 1970s.

The Supreme Court’s historical test will be even more problematic when applied to assault rifles or fully automatic machine guns, which have no historical precedents. What is clear is that the ruling in Bruen will render many firearms safety laws vulnerable to constitutional challenge and add inconsistency in judges’ opinions as they interpret the text, history, and traditions of gun safety at the time the Second Amendment was adopted.

Conclusions
The Bruen decision and a conservative Supreme Court supermajority will not foreclose all regulation of firearms, but some firearm laws will be in jeopardy in a country that already has very weak firearm laws by international standards. There are, however, evidence-based strategies to reduce gun violence that policymakers could adopt that do not involve regulation of guns but are consistent with public health principles. These include altering built environments to make high-risk locations safer, including blight abatement, renovation of vacant buildings and low-income housing, and reduced outlets and hours for alcohol sales. Programs offering behavioral and employment supports for individuals at highest risk for violence could also be an effective strategy that is fully consistent with the Second Amendment.