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COMMENTARY

It Is Time for States To Protect Citizens

 While the Court's decisions surely haven't caused the epidemic of firearm deaths, they make it all but impossible for the states to regulate guns in a way that would effectively reduce the number of such deaths.

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 Constitutional Law

 By Steven Goldman | January 23, 2023 at 10:00 AM



According to the Gun Violence Archive, in the United States in 2022 there were 648 mass shootings, defined as at least four people shot in a single incident, not including the shooter. That amounts to almost two mass shootings every day last year. Overall there were 20,181 gun related homicides last year, more than 55 homicides every day of the year. These are truly shocking numbers. We are once again engaged in a great civil war, but unlike the first Civil War, we don't know why we are fighting. An army of aggrieved people take up arms and shoot their fellow citizens. It is as though some violent and irrational force seizes them one by one, and they have no choice but to arm themselves and kill people. If every war tells a story, this war tells the story of people overwhelmed by an angry impulses that regularly boil over into homicidal rage.

How did we get here? For starters, we are a country awash in firearms. 393 million of them. We have more guns than people. Is there any reason to be surprised that we are also awash in gun violence? Imagine for a moment that, instead of guns, there were 393 million flame throwers in people's hands. If that were the case, is there any doubt that we'd have a similar epidemic of flamethrower attacks? When the impulse to kill takes hold of someone, as it does about 55 times every day in this country, the would-be killer would naturally turn to the one device in their possession that could efficiently kill, and a flamethrower nicely fits the bill.

If that were our world, we'd certainly also have the National Flamethrower Association (NFA) telling us that flamethrowers don't kill people, people kill people. NFA lobbyists would patiently explain to our congressional representatives that if every good guy had a flamethrower, the bad guys with flamethrowers could be dealt with. Republican politicians would be tripping over themselves to demonstrate their support for a person's right to own and

carry flamethrowers. Looking to burnish their image on education, they would helpfully pass a law providing flame retardant clothing to all students. In the legal sphere, Justice Thomas, writing for the majority of the Supreme Court, would hold that under *Bruen*, flamethrowers are historically “analogous” to the muskets that were in use when our constitution was passed, and as such are fully protected by the Second Amendment. Finally, in the fashion sphere, some enterprising ad exec would generate an ad featuring a beautiful young woman walking down a street, a flamethrower tossed jauntily over her shoulder, with the line “Safe has never been so sexy.”

It’s not difficult to imagine this world because it’s basically our current world with a slight twist. If you can imagine that alternate reality, perhaps you can also imagine this one: a month without a single mass shooting; a month without a thousand plus families mourning the loss of their parents, children and spouses; a month without bloodstained streets and chalk drawings in the shape of fallen bodies; a month, in short, when people just lived their lives rather than mourned for lives lost to gun violence. An impossible scenario you protest? It is impossible if we continue to value guns more than people’s lives, and if our common sense continues to be held hostage by the NRA.

One might reasonably ask, aren’t our hands tied by the Second Amendment? After all, the Supreme Court has held in a pair of decisions that Americans have a right to own guns in their home (*Heller*) and carry them in most public places (*Bruen*). It is true that the Supreme Court is the final arbiter of constitutional questions. It is also true, however, that just as all humans are fallible, so too are all human institutions, including the Supreme Court. The pair of decisions interpreting the Second Amendment was plain overreach by the majority of the Court. They directly conflict with what is every government’s chief responsibility: protecting its citizens from harm. The ongoing massacre in this country is possible only because firearms regularly find their way into the hands of people who cannot be trusted to have them. This, in turn, represents a stunning failure by our government to protect its own citizens. While the Court’s decisions surely haven’t caused the epidemic of firearm deaths, they make it all but impossible for the states to regulate guns in a way that would effectively reduce the number of such deaths.

It is time states recognize that protecting their citizens is more important than protecting an arrogant and errant Supreme Court. The Court went off the rails when it decided *Heller* and *Bruen*. It likewise went off the rails when it decided *Plessy v. Ferguson*, which notoriously held that separate accommodations for Black and White people did not violate the Constitution. When *Plessy* was decided, would the states have been justified in refusing to enforce that decision? If the answer is yes, why should states today take a more deferential position toward the pair of Second Amendment decisions that are feeding the civil war in which we find ourselves embroiled?

Each state must make a choice. Will it side with its citizens and do what is necessary to mitigate the killing, or will it side with the NRA aligned Supreme Court, whose jurisprudence permits the killing to continue? It is time that New York take the lead in this vital area. Doing so would send a message to the rest of the country that we will no longer participate in the governmental malfeasance that the Supreme Court erroneously claims is mandated by the Constitution. New York’s example may also inspire other states to follow its lead.

Like all journeys, this journey must begin with a single step: a public discussion of the merits of refusing to follow the Supreme Court’s Second Amendment jurisprudence. There is value in simply engaging in the conversation. The Court could ill afford to have its authority called into question by any of the states over which it presides, much less one as big as New York. The judiciary, after all, has no enforcement arm of its own. It relies on the executive branch of the federal government and the states for that important task. Should one or more states decline to follow its Second Amendment jurisprudence, the Court would find itself in an untenable position. It is worth recalling that when President Roosevelt suggested packing the Court with justices who were more friendly to his New Deal policies than the Court’s majority at that time, the Court blinked first and relented in its opposition, thereby allowing Roosevelt’s New Deal to be enacted. It is feasible that an act of state recalcitrance to the Court’s Second Amendment jurisprudence, or even just a serious discussion of that possibility, might cause the current Court to blink first and reconsider its position on the Second Amendment.

We have the tools to stanch the bloodshed from gun violence if we just have the courage to use those tools. It is time for New York to stand up for the safety of its citizens by standing up to the U.S. Supreme Court's misguided decisions in *Heller* and *Bruen*.

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