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Legal Sidebar

The Second Amendment at the Supreme Court: *New York State Rifle & Pistol Ass'n v. Bruen*

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On June 23, 2022, the Supreme Court issued its opinion in *New York State Rifle & Pistol Association v. Bruen*, a case challenging the constitutionality of a portion of New York's firearms licensing scheme that restricts the carrying of certain licensed firearms outside the home under the Second and Fourteenth Amendments. In a 6-3 decision, the Court struck down New York's requirement that an applicant for an unrestricted license to carry a handgun outside the home for self-defense must establish "proper cause," ruling that the requirement is at odds with the Second Amendment (as made applicable to the states through the Fourteenth Amendment). In doing so, the Court recognized that the Second Amendment protects a right that extends beyond the home and also clarified that the proper test for evaluating Second Amendment challenges to firearms laws is an approach rooted in text and the "historical tradition" of firearms regulation, rejecting a "two-step" methodology employed by many of the lower courts.

This Legal Sidebar provides an overview of Supreme Court and lower court Second Amendment precedent, describes the underlying litigation and issues in *Bruen*, summarizes the Supreme Court's decision, and briefly discusses some possible implications of the decision.

Second Amendment Background

The Second Amendment provides in full: "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 its 2008 decision in *District of Columbia v. Heller*, a majority of the Supreme Court held, after a lengthy historical analysis, that the Amendment protects an individual right to possess firearms for historically lawful purposes, including at least self-defense in the home. The *Heller* majority also provided some guidance on the scope of the right, explaining that it "is not unlimited" and that "nothing in [the] opinion should be taken to cast doubt" on "longstanding prohibitions" like "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," among other "presumptively lawful" regulations. Nevertheless, the *Heller* Court struck down the District of Columbia's prohibition on the private possession of operative handguns in the home, specifying that the home is where the need for self-defense is "most acute." In a later case, *McDonald v. City of Chicago*, the Court concluded that the right to keep

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and bear arms is a "fundamental" right that is incorporated through the Fourteenth Amendment against the states, meaning that the Second Amendment constrains not just the federal government but state and local governments as well.

The Court has not meaningfully elaborated on the Second Amendment beyond *Heller* and *McDonald*, leaving key questions unanswered. First, the Court in *Heller* did not establish which level of scrutiny or methodology should ordinarily apply to laws implicating the Second Amendment right to keep and bear arms. Whether a law will withstand a constitutional challenge often depends on the level of "scrutiny" a court applies to that law, which can vary depending on the circumstances. Laws that burden constitutional rights such as the freedom of political speech typically receive "strict scrutiny," meaning that the government must show that the law is narrowly tailored to achieve a compelling government interest. Other laws may receive "intermediate scrutiny" or "rational basis" review and are more likely to be upheld under those standards. In *Heller*, the Court concluded that the D.C. regulations at issue failed constitutional muster under "any of the standards of scrutiny" the Court has traditionally applied. Second, the Court in *Heller* left unclear how far Second Amendment protections extend, if at all, beyond keeping firearms for self-defense in the home.

With no further Supreme Court guidance prior to *Bruen*, lower federal courts have generally adopted a two-step framework for reviewing federal, state, and local gun regulations. At step one, a court would ask whether the law at issue burdens conduct protected by the Second Amendment, which would typically involve an inquiry into the historical meaning of the right. If the law does not burden protected conduct, it would be upheld. If the challenged law does burden protected conduct, a court would next apply either intermediate or strict scrutiny to determine whether the law is nevertheless constitutional. Whether a court would apply intermediate or strict scrutiny would ordinarily depend on whether the law severely burdens the "core" protection of the Second Amendment. What precisely constitutes the "core" of the Second Amendment, however, has produced some disagreement among the circuit courts, particularly with respect to whether such protections extend beyond the home. Nonetheless, using the two-step framework, the federal circuit courts have upheld many firearms regulations, often after concluding that the "core" of the Second Amendment is not severely burdened and thus intermediate scrutiny should be applied.

The *Bruen* Case

Against this backdrop, the Supreme Court in *New York State Rifle & Pistol Association v. Bruen* agreed to consider the constitutionality of a portion of New York's handgun licensing regime that relates to concealed-carry licenses for self-defense. In the state of New York, it has long been a crime to possess a handgun without a license. In general, a New York resident who wants to possess a handgun in public lawfully must get a "carry" license authorizing concealed carry. Among other things, "carry" licenses are limited to those who hold certain types of employment or who can show "proper cause." State and federal courts in New York have interpreted the phrase *proper cause* to mean either that (1) the applicant wants to use the handgun for target practice or hunting, in which case the license may be restricted to those purposes; or (2) the applicant has a "special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."

In 2018, the New York State Rifle & Pistol Association, a firearms advocacy organization composed of individuals and clubs throughout the state, and two of its individual members (collectively "the petitioners") filed suit in federal court against relevant New York licensing officials, alleging that the denial of licenses to carry firearms outside the home for self-defense was a violation of the Second Amendment. Specifically, the petitioners asserted that although they had been issued restricted licenses to carry for purposes of hunting and target shooting, and one petitioner was permitted to "carry to and from work," they had been denied unrestricted licenses because they had only a generalized desire to carry for self-defense outside the home and thus could not establish "proper cause" under New York law.

The Second Circuit summarily affirmed dismissal of the petitioners' claims, relying on a previous decision in which the court applied the two-step inquiry described above to New York's proper cause requirement. The court assumed at step one that the Second Amendment had some application outside the home but held that the proper cause requirement fell "outside the core Second Amendment protections identified in *Heller*" because it applied only in public, where the state's ability to regulate firearms is "qualitatively different" than in the home. The court therefore decided to apply intermediate scrutiny and, under that standard, concluded that the licensing scheme requiring proper cause was constitutional because it was substantially related to the state's "substantial, indeed compelling, governmental interests in public safety and crime prevention."

The Supreme Court Decision in *Bruen*

In a 6-3 decision, the Supreme Court reversed the Second Circuit's judgment, holding that New York's licensing regime violates the Constitution. Justice Thomas's majority opinion began by addressing the proper standard for evaluating Second Amendment challenges to firearm regulations and rejecting the two-step framework that "combines history with means-end scrutiny." In the majority's view, the two-step approach was inconsistent with *Heller*, which focused on text and history and "did not invoke any means-end test such as strict or intermediate scrutiny." As such, the majority on behalf of the Court concluded that the standard for applying the Second Amendment is rooted *solely* in text and history, stating the test as follows:

> 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."

Turning, then, to the first question in the analysis—whether the Second Amendment's text covers the conduct at issue—the majority opinion concluded that it did, as the word *bear* in the text "naturally encompasses public carry." As such, according to the majority, the Second Amendment "presumptively guarantees . . . a right to 'bear' arms in public for self-defense."

On the next question of consistency with the country's "historical tradition of firearm regulation," the majority opinion provided some further guidance as to how to conduct the analysis, acknowledging that the "regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868." For this reason, the majority explained that historical analysis of modern-day gun laws may call for reasoning by analogy to determine whether historical and modern firearm regulations are "relevantly similar."

With respect to how to determine what qualifies as relevantly similar, the majority opinion identified "at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." As an example of modern laws that could pass muster by means of historical analogy, the majority opinion pointed to laws prohibiting firearms in "sensitive places" such as schools or government buildings, though the majority rejected the proposition that the "sensitive place" category could apply so broadly as to cover "all places of public congregation that are not isolated from law enforcement."

Throughout the majority opinion, the Court provided further guideposts as to what sort of historical evidence would be most valuable, cautioning, among other things, against reading too much into early English law that did not necessarily "survive[] to become our Founders' law" or ascribing too much significance to post-enactment history, at least where that history was inconsistent with the original meaning of the constitutional text. The majority declined to weigh in on whether the prevailing historical understanding for analytical purposes should be pegged to when the Second Amendment was adopted in

1791 or when the Fourteenth Amendment was ratified in 1868, as the majority opinion concluded that the public understanding was the same at both points for relevant purposes with respect to public carry.

With framework and guidance in place, the majority opinion turned to its historical analysis, assessing whether a variety of laws from England and the United States proffered by the respondents met the burden of establishing that New York's laws were consistent with the country's historical tradition of firearms regulation. Ultimately, the majority concluded that the respondents did not meet the burden "to identify an American tradition justifying the State's proper-cause requirement." While acknowledging that history reflected restrictions on public carry, which limited "the intent for which one could carry arms, the manner by which one carried arms," or the particular circumstances "under which one could not carry arms," the majority opinion concluded that "American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense" or made public carry contingent on a showing of a special need. The few historical laws that the majority viewed as extending that far were, according to the opinion, "late-in-time outliers."

Justice Alito joined the Court's majority opinion "in full" but wrote separately to respond primarily to points made by the dissent. Justice Alito emphasized in his concurrence that the majority opinion did not disturb *Heller* or *McDonald* and said nothing about who may be prohibited from possessing a firearm, what kinds of weapons may be possessed, or the requirements for purchasing a firearm. Justice Kavanaugh, joined by Chief Justice Roberts, wrote separately to underscore that the decision would not prohibit states from imposing licensing requirements for public carry based on objective criteria so long as the requirements "do not grant open-ended discretion to licensing officials and do not require a showing of some special need apart from self-defense." Justice Kavanaugh, quoting from *Heller*, reiterated that the Second Amendment right is not unlimited and may allow for many kinds of gun regulations. Justice Barrett wrote a solo concurrence to highlight two open methodological questions regarding the role of post-ratification practice in historical inquiry and whether 1791 or 1868 should be the relevant benchmark year. She underscored that both questions were unnecessary to resolve in the present case but may have a bearing on a future case.

Justice Breyer authored a dissent, joined by Justices Kagan and Sotomayor. The dissent objected to deciding the case on the pleadings without an evidentiary record as to how New York's standard was actually being applied. More fundamentally, Justice Breyer disagreed with the majority of the Court's "rigid history-only approach," which he argued unnecessarily disrupted consensus in federal circuit courts, misread *Heller*, and put the Second Amendment on a different footing than other constitutional rights. The dissent also viewed the history-focused approach as "deeply impractical" because it imposed on judges without historical expertise—and courts without needed resources—the task of parsing history, raised numerous intractable questions about what history to consider and how to weigh it, and would "often fail to provide clear answers to difficult questions" while giving judges "ample tools to pick their friends out of history's crowd." The dissent viewed the majority's historical analysis regarding public carry as an embodiment of these impracticalities, as the majority found reasons to discount the persuasive force of numerous historical regulations similar to New York's that, in Justice Breyer's view, appeared to meet the court's "analogical reasoning" test.

Considerations for Congress

Most immediately, it appears that the Supreme Court's decision in *Bruen* casts substantial constitutional doubt on other state public carry laws that, similar to New York, require a showing of cause or a special need to carry in public. According to the majority opinion, at least five states have discretionary public carry licensing regimes analogous to New York's "proper cause" standard. In a footnote, the majority opinion emphasized that its decision with respect to New York's regime did not suggest that licensing regimes in other states imposing objective requirements such as a background check or completion of a firearms safety course would be unconstitutional, though the majority would not rule out constitutional

challenges to more narrow regimes if circumstances such as "lengthy wait times" or "exorbitant fees deny ordinary citizens their right to public carry."

The Court's decision in *Bruen* could also have significant implications for other existing firearm laws and for the kinds of new laws Congress and state and local governments may consider enacting. Many firearm laws at the federal, state, and local levels have been upheld under the "two-step" methodology, and decisions upholding firearm regulations that apply in public have sometimes relied on the proposition that firearm restrictions beyond the home do not strike at the "core" of the Second Amendment right. Following *Bruen*, a number of provisions that were previously upheld could be subject to renewed constitutional challenge, though the majority in *Bruen* did indicate that the approach it endorsed is "neither a regulatory straightjacket nor a regulatory blank check."

For instance, some states and localities have restrictions or prohibitions on certain so-called "semiautomatic assault weapons," and multiple federal Courts of Appeals have upheld such laws using the two-step approach. In a 2012 case, the D.C. Circuit applied that approach to uphold the District of Columbia's version of a ban on certain semiautomatic rifles. However, Justice Kavanaugh, who was then a judge on the D.C. Circuit, wrote a dissenting opinion in the case, arguing that the court should instead use a "text, history, and tradition" approach (which appears similar to the historical approach ultimately endorsed by the Court in *Bruen*) and strike down the law. The Supreme Court may ultimately take up this issue in the near future—a petition for review of a Second Amendment challenge to Maryland's prohibition on "assault long guns" is currently pending.

The Supreme Court's express holdings that the Second Amendment applies outside the home and that the proper test for analyzing the constitutionality of gun regulations is historical analogism may also guide legislators in considering future gun legislation. In particular, Congress and other legislatures may wish to consider whether particular measures under consideration could be viewed as part of a "historical tradition" of regulation such that they would meet the *Bruen* standard, though as the majority opinion acknowledged, "[h]istorical analysis can be difficult" and can call for "nuanced judgments about which evidence to consult and how to interpret it."

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