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NEW YORK STATE RIFLE & PISTOL ASSOCIATION
V. BRUEN

T.C. LISLE WHITMAN II

INTRODUCTION

Petitioners Brandon Koch and Robert Nash are two adult citizens of New York State; both individuals' application for an unrestricted license to carry a handgun in public pursuant to N. Y. Penal Law Ann. § 400.00(2)(f) (McKinney 2023). Petitioner Nash initially applied for an unrestricted license in 2014 to carry a handgun in public, but in 2015 New York authorities declined to issue an unrestricted license. Instead the state granted Petitioner Nash a restricted license to carry a firearm outside his home for hunting and target shooting only. At an informal hearing in 2016, a New York state licensing officer declined to remove the restriction on his license to carry a firearm in public. Mr. Nash cited a string of recent robberies in his neighborhood as evidence of a proper cause to carry a firearm under the statute, but the licensing officer denied his request and reiterated that Mr. Nash was prohibited "from carrying concealed in ANY LOCATION typically open to and frequented by the general public."

Petitioner Koch was similarly situated to Petitioner Nash, holding "a restricted license permitting his to carry a handgun outside the home for hunting and target shooting." In 2017, Mr. Koch's

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2. Id. at 2125.
3. Id.
4. Id.
5. Id. (emphasis original)
6. Id.
application for an unrestricted license was denied, but his restrictions were expanded to include permitting “Koch to ‘carry to and from work.’”

The Petitioners brought suit against the superintendent of the New York State Police under 42 U.S.C. § 1983 for a violation of their Second and Fourteenth Amendment rights when the State denied an unrestricted license to carry a firearm because the petitioners failed to show “proper cause”, that is, a unique need for self-defense. The District Court dismissed the complaint and the Second Circuit Court of Appeals affirmed the dismissal. Both courts relied on Kachalsky and sustained the “proper cause” requirement in the New York statute as “substantially related to the achievement of an important governmental interest.”

I. ISSUE

The fundamental issue in Bruen is whether the government can justify its regulation of an individual’s right under the Second Amendment “by demonstrating that [the regulation] is consistent with the Nation’s historical tradition of firearms regulation.” The Court acknowledges the two-step approach popular among the Courts of Appeal. First the Courts of Appeal considered whether the conduct is within the original scope of the right. “[I]f the historical evidence at this step is ‘inconclusive or suggests that the regulated activity is not categorically unprotected,’ the courts generally proceed to step two.”

Next, the Courts of Appeal would apply means-end scrutiny depending on “how close the law comes to the core of the Second Amendment right and the severity of the law’s burden on that right.” However, in Bruen, the Court rejects this two-step approach culminating in means-end scrutiny; instead the Court finds that “the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.” In Heller, the Court held that the Second Amendment guaranteed an “individual right to possess and

7. Id.
8. Id.
9. Id.
10. Id. (citing Kachalsky v. City of Westchester, 701 F.3d 81, 96 (2d Cir. 2012)).
11. Id.
12. Bruen, 142 S. Ct. at 2126 (quoting Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019)).
13. Id.
carry weapons in confrontation."\(^{15}\) Here, the Court considered whether there was a historical tradition of the government regulating that "pre-existing right" codified in the Second Amendment in a comparable manner to New York's "proper cause" requirement.

II. DEVELOPMENT

The *Bruen* decisions continues a line of cases before the Court concerning whether the Second Amendment includes an individual right to bear arms. *Heller* and *McDonald* found government regulations prohibiting "possession and use of handguns in the home" to be unconstitutional.\(^{16}\) In *Heller*, the court considered both the character of the right, whether the right to keep and bear arms applied to all people or only those in service of the militia, and the scope of the right, whether the right was absolute or subject to limitation or modification by the legislature. While the majority opinion authored by Justice Scalia and the dissent authored by Justice Stephens and joined by Justices Souter, Ginsburg, and Breyer disagree about the substance of the case, both opinions apply the same analytical methodology. Both the majority and dissenting opinions, representing all nine justices on the court, turn first to the express text of the Constitution and then historical sources and commentary to confirm their understanding of the text. *Bruen* confirms that the *Heller* text-history inquiry is the appropriate constitutional standard to apply in the case of enumerated, fundamental rights.

A. Heller – Defining the Second Amendment Right

In *Heller*, the Court was confronted with the interpretation of an individual's right under the Second Amendment.\(^{17}\) The Court separated the Second Amendment into two components: "its prefatory clause and its operative clause."\(^{18}\) The Court found that the prefatory clause announced the purpose of the amendment while the operative clause expressed the right of the people.\(^{19}\) The Court then turned to the history surrounding the drafting and ratification of the Second Amendment to confirm their understanding of the relationship between the two clauses.\(^{20}\) Using two source of historical record, the

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15. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 592 (2008)).
18. *Id.* at 577.
19. *Id.* at 577.
20. *Id.* at 598.
ratification debates about whether to codify the right to keep and bear arms in the new constitution and similar, contemporaneous rights in state constitutions, the *Heller* Court construed the Second Amendment to guarantee individual’s a right to bear arms for self-defense. The Court held that the District of Columbia law which prohibited handgun possession in the home was unconstitutional because it prohibited individuals from possessing an entire class of arms in common use for the purpose of self-defense. Furthermore, the Court held that the District’s requirement that all firearms be rendered and kept inoperable in the home also violated the Second Amendment’s “core lawful purpose of self-defense and is hence unconstitutional.”

B. McDonald – *Applicability of Second Amendment to State*

In McDonald, the Court held that the Second Amendment right that it had announced in *Heller* was equally applicable to the several states under the doctrine of selective incorporation. Writing for the majority, Justice Alito frames the critical inquiry as whether the Second Amendment right is “fundamental to our scheme of ordered liberty” or “deeply rooted in this Nation’s history and tradition.” The Court recounts the history of the right announced in *Heller* as sufficient evidence to incorporate the Second Amendment right to keep and bear arms against the states. Affirming the central holding of *Heller*, “that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home,” the Court found that right was properly incorporated against the States through the Fourteenth Amendment’s Due Process Clause.

III. IMPLICATIONS

The implications of *Bruen* will likely be significant both in the context of the Second Amendment and in the broader context of pre-existing or fundamental rights enumerated in the Constitution.

A. The Future of Gun Regulation

*Bruen* clearly stands for the proposition that there is an individual right to keep and bear arms in the United States Constitution, but

21. *Id.* at 630.
23. *Id.* at 767 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).
that the majority confirms that the right is not absolute.\textsuperscript{24} The opinion provides several examples of gun regulations supported by historical analogues.

Background check laws enjoy bipartisan support to regulate gun purchases. Under the historical analogue approach, the government should be able to point to various measures to deprive individuals convicted of certain crimes from possessing firearms.

Other regulations according to the type of firearm may be under closer scrutiny using the \textit{Bruen} methodology. For example, the recent regulation of pistol braces by the Bureau of Alcohol, Tobacco, Firearms, and Explosives may be challenged for lack of a similar historical analogue.\textsuperscript{25} The government would likely argue that the regulation of short barreled rifles under the National Firearms Act was a valid exercise of regulatory power over "dangerous and unusual weapons"\textsuperscript{26}, and the reclassification of pistol brace equipped firearms as short barreled rifles were valid restrictions on the arms which the people have a constitutional right to keep and bear.

As the Biden Administration continues to reaffirm the priority of an assault weapons ban, advocates of a broad Second Amendment right prepare to challenge the historical precedent of such a prohibition. The majority in \textit{Bruen}, echoing \textit{Heller}, unequivocally states that the Second Amendment does not provide for an absolute, unlimited right to "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."\textsuperscript{27} Will the federal government be able to sustain the burden of proving a relevantly similar historical analog to such regulations?

\textbf{B. Future Prooed: No Mention of Fourteenth Amendment Due Process}

In the majority opinion, Justice Thomas only mentions the incorporation of the Second Amendment against the states under the Fourteenth Amendment merely by reference to \textit{McDonald}. "[P]ublic carry for self-defense remained a central component of the protection that the Fourteenth Amendment secured for all citizens."\textsuperscript{28} The

\begin{itemize}
\item \textsuperscript{24} \textit{Bruen}, 142 S.Ct. at 2128.
\item \textsuperscript{26} \textit{Bruen}, 142 S.Ct. at 2128.
\item \textsuperscript{27} \textit{Id}.
\item \textsuperscript{28} \textit{Id.} at 2151.
\end{itemize}
conspicuous omission of a specific clause of the Fourteenth Amendment that sustains such protection from the opinion may be an attempt to “future-proof” the Bruen opinion if the Court revisits its substantive due process jurisprudence.

The Court utilizes extensive historical analysis of sources such as The Freedmen’s Bureau Act, legislative committee findings, and even Chief Justice Taney’s infamous opinion in Dred Scott to support the Framers’ intent to include the right to keep and bear arms in the Fourteenth Amendment. Taken in combination with the reasoning by analogy endorsed by the Bruen court, there are likely new avenues to explore other “protection[s] that the Fourteenth Amendment secured for all citizens.”

C. In Defense of Fundamental Rights

Many commentators have characterized Bruen as equating the Second Amendment with the other rights of the people enshrined in the Bill of Rights that was amended to the US Constitution. The opinion itself references the standard of review the Court has used on matters concerning the First, Fourth, Fifth, and Sixth Amendments. Bruen expressly prohibits means-end scrutiny for the Second Amendment and by inference all fundamental, enumerated rights. Without the option of the various tiers of scrutiny, courts that are faced with the constitutionality of government regulation of a fundamental right will not be able to balance interests. Instead, courts will be limited to a binary decision: constitutional or unconstitutional. The question remains how to define the fundamental rights protected from regulation by the government in the United States Constitution. Bruen classifies the right of an individual to keep and bear arms as a “pre-existing right codified in the Constitution”; and the opinion makes clear the proper text and historical approach to determining the constitutionality of a government regulation. While the dissent along with many commentators have decried the insufficiency of historical analysis, the methodology did garner a majority of the court. Justice Thomas provides some insight into the application of the Bruen methodology to “unprecedented social concerns or dramatic technological changes.”

The Bruen methodology calls for reasoning by analogy; that is, to consider whether the proposed historical regulation of the right is “relevantly similar” in the manner and purpose for burdening the

29. Id.
30. Id. at 2132.
right of the citizen. As advocates seek to defend the rights of citizens the similarity of analogous government regulation will likely become a strongly contested issue. Consider the implications of some of the First Amendment issues in the gender affirming healthcare debate. In a case where a healthcare provider claims the Department of Health and Human Services Regulation violates their First Amendment Right to the Free Exercise of Religion by excluding a provider from payment for any of their services if they refuse to perform a double mastectomy on a thirteen-year-old biological female who identifies as a male. Can the government sustain its burden with a sufficiently analogous regulation of the healthcare provider’s First Amendment rights?

Or consider the implication within the context of the citizen’s Fourth Amendment right against unreasonable searches or seizures in a world of open-source intelligence. Non-governmental organizations on both sides of the Russian invasion of Ukraine have used advanced open-source intelligence techniques to target drone and missile strikes with devastating accuracy. Domestic law enforcement can certainly integrate these techniques along with artificial intelligence to exponentially expand their ability to enforce the law of the land, but how does the individual’s expectation for the use of that information impact the reasonability of a search? Under Bruen, would the use of these techniques against United States’ citizens represent an unreasonable search or seizure within the context of the Framers’ understanding of the Fourth Amendment at the time of ratification?

CONCLUSION

In sum, many legal scholars may criticize and challenge the Bruen decision on public policy grounds or over concerns for public safety, others may take issue with the text and history approach to constitutional interpretation, but on a different level Bruen offers a novel approach to the protections secured by the Fourteenth Amendment. Through historical analysis and reasoning by analogy, advocates have an opportunity to shape a new understanding of the Fourteenth Amendment.

31. Id. (quoting Cass Sunstein, On Analogical Reasoning, 106 Harv. L. Rev. 741, 773 (1993)).