NYSRPA v. Bruen

By Paul Engel

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- Is your right to self-defense enough “good cause” to carry a concealed weapon?
- Does a state like New York have the legal authority to only issue carry licenses if they think it is appropriate?
- How will the decision in the case New York State Rifle and Pistol Association v. Bruen effect the other “may issue” states?

Can a state arbitrarily decide whether or not you get to exercise a right protected by the Constitution of the United States? That is the question in the case New York State Rifle and Pistol Association (NYSRPA) v. Bruen, Superintendent of the New York State Police. New York State is a “may issue” state, meaning that you may not get your carry license even if you’ve met all of the legal requirement and you had to show you had a “good cause” to carry a firearm in public. However, self-defense was not considered a “good cause” by the New York courts. You had to show you had a special need for self-defense, greater than the general public. Does that sound like infringement on your right to keep and bear arms to you?

What limits can a state put on a person’s right to keep and bear arms?

The State of New York makes it a crime to possess a firearm without a license, whether inside or outside the home. An

individual who wants to carry a firearm outside his home may obtain an unrestricted license to "have and carry" a concealed "pistol or revolver" if he can prove that "proper cause exists" for doing so.

New York State Rifle & Pistol Association v. Bruen

Let's start with the obvious. The Constitution, as the supreme law of the land, makes this New York State law invalid and void.

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.

U.S. Constitution, Amendment II

The Constitution says that your right to keep and bear arms "shall not be infringed." I cannot understand how making the exercising of a right illegal is not an infringement of it.

To break, as contracts; to violate, either positively by contravention, or negatively by non-fulfillment or neglect of performance.

INFRINGE – Webster's 1828 Dictionary

New York, and other states, claim that it is not an infringement because you can get a permission slip from the government to exercise your right, but New York State law is quite clear: The keeping and bearing of arms is illegal. Then the State of New York furthers the infringement by placing special conditions on the issuing of that permission slip and makes you show "proper cause".

Petitioners Brandon Koch and Robert Nash are adult, law-abiding New York residents who both applied for unrestricted licenses to carry a handgun in public based on their generalized interest in self-defense. The State denied both of their applications for unrestricted licenses, allegedly

because Koch and Nash failed to satisfy the "proper cause" requirement.

New York State Rifle & Pistol Association v. Bruen

Why did the state of New York deny both Koch and Nash their carry licenses? Because they did not show that they had a "proper cause" to carry in public. But isn't self-defense a good enough reason to carry a weapon in public? Isn't the right to defend oneself "proper cause" to be able to use the most effective tool to do so?

An applicant satisfies the "proper cause" requirement only if he can "demonstrate a special need for self-protection distinguishable from that of the general community."

New York State Rifle & Pistol Association v. Bruyn

According to New York State, you need to show you have a special need to defend yourself in order to have proper cause to defend yourself or your family. Interestingly, the State of New York recognizes the carrying of large sums of money or valuables as "proper cause", but not living in a dangerous neighborhood.

This was the core question in this case. Does New York State's requirement to show a special need for self-protection violate the Constitution of the United States?

Petitioners then sued respondents—state officials who oversee the processing of licensing applications—for declaratory and injunctive relief, alleging that respondents violated their Second and Fourteenth Amendment rights by denying their unrestricted-license applications for failure to demonstrate a unique need for self-defense.

New York State Rifle & Pistol Association v. Bruen

OK, the Second Amendment seems pretty simple, and I've already shown how New York State is violating the right of the people

to keep and bear arms. So what does the Fourteenth Amendment have to do with this case?

Strictly speaking, New York is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second.

New York State Rifle & Pistol Association v. Bruen

The court has continued to hold that the Bill of Rights is somehow not completely a part of the Constitution. Even though the language of the Second Amendment says nothing about limiting its effect to the federal government, the court has used their doctrine of "selective incorporation" to determine if and when they will hold the states accountable to the supreme law of the land. This is why the Fourteenth Amendment was brought into the case. While the court believes the Bill of Rights does not apply to the states, unless they want it to, Section 1 of the Fourteenth Amendment explicitly says it does:

… No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment XIV, Section 1

Which is why, I believe, the court ultimately wrote the holding in their decision the way they did.

Held: 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 keep and bear arms in public for self-defense.

New York State Rifle & Pistol Association v. Bruen

The court isn't wrong; the State of New York was denying its citizens the right to keep and bear arms in public. I would have liked to see the court recognize that the legislature and officials of the State of New York were required to fulfill their oath to support the Constitution of the United States, including the Second Amendment, but that isn't how they got there. Instead, in the tradition of the court, they used previous opinions to come to their conclusion.

Since Heller and McDonald, the Courts of Appeals have developed a "two-step" framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. The Court rejects that two-part approach as having one step too many. Step one is broadly consistent with Heller, which demands a test rooted in the Second Amendment's text, as informed by history. But Heller and McDonald do not support a second step that applies means-end scrutiny in the Second Amendment context. Heller's methodology centered on constitutional text and history. It did not invoke any means-end test such as strict or intermediate scrutiny, and it expressly rejected any interest-balancing inquiry akin to intermediate scrutiny.

New York State Rifle & Pistol Association v. Bruen

Justice Thomas, who wrote he opinion, pointed out what the court saw as a problem with the two-step process the Courts of Appeals had adopted. The first step, that of looking to the text and history of the Second Amendment did not bother the court. The second step did.

The second of the two-step approach involves a means-ends analysis. "Means-ends" is a problem solving technique whereby the difference between impact of the means when compared to the impact of the ends, is minimized. Put another way, do the ends justify the means? The one problem is that the Constitution of the United States doesn't say your rights are protected unless the government has a good enough reason not

to do so.

One of the objections frequently heard about regulating arms is that the Founding Fathers could never have imagined an AR-15 or other arms popular today. Justice Thomas dealt with that as well.

But the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated, even though its meaning is fixed according to the understandings of those who ratified it. … Indeed, the Court recognized in Heller at least one way in which the Second Amendment's historically fixed meaning applies to new circumstances: Its reference to "arms" does not apply "only [to] those arms in existence in the 18th century."

New York State Rifle & Pistol Association v. Bruen

I've always found it foolish when people claim that the Second Amendment meant you only had a right to keep and bear muskets, because they were the arms of the day when the Second Amendment was written. After all, they extended the freedom of speech and press to include the telegraph, then radio, television, and even the Internet. Why not do the same for the right to keep and bear arms? Sure, there were also cannons, swords, and other weapons, but so many have become focused on the firearm that they fail to realize that the Second Amendment protects the right to keep and bear "arms":

Weapons of offense, or armor for defense and protection of the body.

ARMS – Webster's 1828 Dictionary

The other common claim made by those who wish to strictly regulate firearms is the purpose of the Second Amendment as stated in its opening few words.

A well regulated Militia, being necessary to the security of a

free State,

U.S. Constitution, Amendment II

But this ignores that plain language of the rest of the text.

the right of the people to keep and bear Arms, shall not be infringed.

U.S. Constitution, Amendment II

The court recognized that when the Constitution refers to the people, it means the rights of everyday, ordinary, individual people.

It is undisputed that petitioners Koch and Nash—two ordinary, law-abiding, adult citizens—are part of "the people" whom the Second Amendment protects. … And no party disputes that handguns are weapons "in common use" today for self-defense. … The Court has little difficulty concluding also that the plain text of the Second Amendment protects Koch's and Nash's proposed course of conduct—carrying handguns publicly for self-defense. Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms, and the definition of "bear" naturally encompasses public carry. Moreover, the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation," …, and confrontation can surely take place outside the home.

New York State Rifle & Pistol Association v. Bruen

Based on these facts, and the court's predilection for placing government interests above the constitutionally protected rights of the people, the court expects the respondents (in this case the Superintendent Of New York State Police), to prove why their regulations are consistent with history and tradition.

The burden then falls on respondents to show that New York's

proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation. To do so, respondents appeal to a variety of historical sources from the late 1200s to the early 1900s. But when it comes to interpreting the Constitution, not all history is created equal. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." … The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates or postdates either time may not illuminate the scope of the right. With these principles in mind, the Court concludes that respondents have failed to meet their burden to identify an American tradition justifying New York's proper-cause requirement.

New York State Rifle & Pistol Association v. Bruen

Here we see why the court's history and tradition standard is so dangerous. When in history do we look? What traditions do we consider? New York State went all the way back to English history in the 1200s in an attempt to justify their actions. But not only did the American colonies not exist in the 1200s, they declared themselves independent from the crown in 1776.

Respondents' substantial reliance on English history and custom before the founding makes some sense given Heller's statement that the Second Amendment "codified a right 'inherited from our English ancestors.' " … But the Court finds that history ambiguous at best and sees little reason to think that the Framers would have thought it applicable in the New World. The Court cannot conclude from this historical record that, by the time of the founding, English law would have justified restricting the right to publicly bear arms suited for self-defense only to those who demonstrate some special need for self-protection.

New York State Rifle & Pistol Association v. Bruen

The State of New York looked at other pieces of history. The

state gave only gave three restrictions on public carry from the colonial era and early republic, but they prohibited the bearing of arms that intended to spread fear. But Koch and Nash were not seeking permission to carry in a way to spread fear, since according to New York law, if they had received their carry licenses, they would be required to carry concealed. Because of that, under New York State law, if they allowed their weapons to become unconcealed while in public they were committing a crime.

After reviewing the Anglo-American history of public carry, the Court concludes that respondents have not met their burden to identify an American tradition justifying New York's proper-cause requirement. Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense. Nor have they generally required law-abiding, responsible citizens to "demonstrate a special need for self-protection distinguishable from that of the general community" to carry arms in public.

New York State Rifle & Pistol Association v. Bruen

In short, the State of New York did not make its case. They showed no history, tradition, or even good reason for their requirement that an individual needed to demonstrate a special need for self-defense.

The constitutional right to bear arms in public for self-defense is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees."… The exercise of other constitutional rights does not require individuals to demonstrate to government officers some special need. The Second Amendment right to carry arms in public for self-defense is no different. New York's proper-cause requirement violates the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms in

public.

New York State Rifle & Pistol Association v. Bruen – Thomas Opinion

Probably my favorite phrase from Justice Thomas' opinion is that the right to keep and bear arms is not a second-class right. It must be treated like any other right protected by the Bill of Rights.

Dissent

As is so often the case, not all of the justices agreed.

In 2020, 45,222 Americans were killed by firearms. See Centers for Disease Control and Prevention, Fast Facts: Firearm Violence Prevention (last updated May 4, 2022) (CDC, Fast Facts), https://www.cdc.gov/violenceprevention/firearms/fastfact.html. Since the start of this year (2022), there have been 277 reported mass shootings—an average of more than one per day. See Gun Violence Archive (last visited June 20, 2022), https://www.gunviolence archive.org. Gun violence has now surpassed motor vehicle crashes as the leading cause of death among children and adolescents. J. Goldstick, R. Cunningham, & P. Carter, Current Causes of Death in Children and Adolescents in the United States, 386 New England J. Med. 1955 (May 19, 2022) (Goldstick).

New York State Rifle & Pistol Association v. Bruen – Breyer, Sotomayor, and Kagan Dissent

The dissent here sounds more like they are making an argument on the floor of Congress rather than debating the legality of the law in question. The judicial power of the United States extends to deciding the controversies of cases, not developing the policies of the nation. This appeal to people's emotions rather than the law did not get past Justice Alito in his concurrence:

What is the relevance of statistics about the use of guns to commit suicide? … Does the dissent think that a lot of people who possess guns in their homes will be stopped or deterred from shooting themselves if they cannot lawfully take them outside?

The dissent cites statistics about the use of guns in domestic disputes, … but it does not explain why these statistics are relevant to the question presented in this case. How many of the cases involving the use of a gun in a domestic dispute occur outside the home, and how many are prevented by laws like New York's?

The dissent cites statistics on children and adolescents killed by guns, … but what does this have to do with the question whether an adult who is licensed to possess a handgun may be prohibited from carrying it outside the home? Our decision, as noted, does not expand the categories of people who may lawfully possess a gun, and federal law generally forbids the possession of a handgun by a person who is under the age of 18, 18 U.S.C. §§922(x)(2)–(5), and bars the sale of a handgun to anyone under the age of 21, §§922(b)(1), (c)(1).

The dissent cites the large number of guns in private hands—nearly 400 million—but it does not explain what this statistic has to do with the question whether a person who already has the right to keep a gun in the home for self-defense is likely to be deterred from acquiring a gun by the knowledge that the gun cannot be carried outside the home. … And while the dissent seemingly thinks that the ubiquity of guns and our country's high level of gun violence provide reasons for sustaining the New York law, the dissent appears not to understand that it is these very facts that cause law-abiding citizens to feel the need to carry a gun for self-defense.

New York State Rifle & Pistol Association v. Bruen – Alito Concurrence

The dissenting justices also noted the importance of the case:

The question before us concerns the extent to which the Second Amendment prevents democratically elected officials from enacting laws to address the serious problem of gun violence. And yet the Court today purports to answer that question without discussing the nature or severity of that problem.

New York State Rifle & Pistol Association v. Bruen – Breyer, Sotomayor, and Kagan Dissent

Does the Constitution prevent "democratically elected officials" from enacting laws contrary to its language? This is exactly the point. The question before the court is not how severe a problem gun violence is, but does the state law violate the supreme law of the land? It seems the dissent wants to ignore the Constitution as long as it's an attempt to deal with a truly severe problem. But if We the People wanted states to be able to restrict our right to keep and bear arms if gun violence got really bad, we would have said so when we had the states ratify the Second Amendment.

Indeed, the Court's application of its history-only test in this case demonstrates the very pitfalls described above. The historical evidence reveals a 700-year Anglo-American tradition of regulating the public carriage of firearms in general, and concealed or concealable firearms in particular. The Court spends more than half of its opinion trying to discredit this tradition. But, in my view, the robust evidence of such a tradition cannot be so easily explained away.

New York State Rifle & Pistol Association v. Bruen – Breyer, Sotomayor, and Kagan Dissent

May I remind the dissenters that this is not the Anglo-American States of America, but the United States of America. As I've already pointed out, we fought a war to get away from much of the first 450 years of the Anglo-American tradition that the court wishes to subject us to. In fact, one of the

grievances listed in that document in which we declared our independence from the Anglo-American tradition of monarchal rule was:

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

Declaration of Independence

It appears, the dissenters of this court are also willing to subject us to jurisdictions foreign to our Constituiton and unacknowledged by our laws.

The historical examples of regulations similar to New York's licensing regime are legion. Closely analogous English laws were enacted beginning in the 13th century, and similar American regulations were passed during the colonial period, the founding era, the 19th century, and the 20th century. Not all of these laws were identical to New York's, but that is inevitable in an analysis that demands examination of seven centuries of history. At a minimum, the laws I have recounted resembled New York's law, similarly restricting the right to publicly carry weapons and serving roughly similar purposes. That is all that the Court's test, which allows and even encourages "analogical reasoning," purports to require.

New York State Rifle & Pistol Association v. Bruen – Breyer, Sotomayor, and Kagan Dissent

Funny, I did not know that three examples constitute a "legion". Yes, there were ancient English laws that restricted the carrying of arms, but we a no longer an English colony, neither are we part of the English commonwealth. As for the regulations from the colonial period to the early 20th century, as Justice Alito noted, they regulated the use of firearms in public, and none of them required a special need for self-defense to bear arms in public.

Conclusion

In sum, the Courts of Appeals' second step is inconsistent with Heller's historical approach and its rejection of means-end scrutiny. We reiterate that the standard for applying the Second Amendment is 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."

New York State Rifle & Pistol Association v. Bruen – Thomas Opinion

In other words, it is up to the state to prove that the ends justify the needs, not the courts. But this places the states above not only the Constitution, but the people themselves. It also places, supreme over all, the very court Justice Thomas sits on. This time, the court decided that the state did not justify the need to infringe on people's rights protected by the Constitution. I can only hope that future justices would uphold their oath to the Constitution, as the supreme law of the land, above the perceived "needs" of the state.

Finally, we come to the biggest question brought up by this court.

New York is not alone in requiring a permit to carry a handgun in public. But the vast majority of States—43 by our count—are "shall issue" jurisdictions, where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability. Meanwhile, only six States and the District of Columbia have "may issue" licensing laws, under which authorities have discretion to deny concealed-carry licenses

even when the applicant satisfies the statutory criteria, usually because the applicant has not demonstrated cause or suitability for the relevant license. Aside from New York, then, only California, the District of Columbia, Hawaii, Maryland, Massachusetts, and New Jersey have analogues to the "proper cause" standard. All of these "proper cause" analogues have been upheld by the Courts of Appeals, save for the District of Columbia's, which has been permanently enjoined since 2017.

New York State Rifle & Pistol Association v. Bruen – Thomas Opinion

What will the officials in these six states and the District of Columbia do? Will they recognize their mistake, that placing discretionary requirements on the exercise of a constitutionally protect right is both arbitrary and capricious? Will they learn from this opinion and begin to correct their infringements on the rights of the people they purport to serve? Based on what I've seen in the news so far, my guess is the answer is no. That these states will only recognize the Second Amendment if and when the citizens of their states force them or the other states in the compact punish them for their violation of the agreement. I'm not holding my breath for either solution to be tried in the near future.

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