2nd Amendment, U.S. Constitution

"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."

District of Columbia v. Heller, 554 U.S. 570 (2008)

Supreme Court expressly held for first time that the Second amendment protected an "individual right to possess and carry" firearms. Concluded that D.C. ordinance which effectively banned handguns/ keeping operable firearms in the home was unconstitutional.

However, the Court did not indicate which legal test the lower courts should use to evaluate firearms regulations going forward.

Post-*Heller*, courts generally analyzed firearms regulations under with intermediate scrutiny (regulation must be substantially related to an important state interest) or strict scrutiny (regulation must be narrowly tailored to serve a compelling state interest).

These tests required balancing the state's professed need for the regulation against its infringement on firearms rights, what is sometimes called a "means-end" test.

New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022)

In *Bruen*, the Court found that New York's firearms licensing system violated the Second Amendment because it required an applicant for a public carry license to demonstrate a special need, which gave too much unlimited discretion to the issuing authority.

Most importantly, the Court changed the legal analysis that must be used to evaluate firearms laws under the Second Amendment. The Court expressly rejected any type of means-end balancing test, and instead said that going forward the test would be:

"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."

Completely different than the analysis courts had been using; the presumption shifts burden to the state to establish that the challenged regulation is consistent with historical firearms regulations. Many courts appointing historians.

Laws that were previously upheld under *Heller* standard are being challenged under, and must be evaluated under, new *Bruen* standard. Dozens of lawsuits pending, more filed frequently, decisions vary substantially, in part because of questions left open by *Bruen*.

<u>What makes a modern firearm regulation "consistent" with historical firearm regulation?</u>

"(T)he test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding."

"(T)his historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge. Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a

distinctly modern firearm regulation requires a determination of whether the two regulations are "relevantly similar."

"To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not "uphold every modern law that remotely resembles a historical analogue," because doing so "risk[s] endorsing outliers that our ancestors would never have accepted." On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster."

But how much is enough? What level of generality is permissible?

For example, in post-Bruen challenge to federal law prohibiting FFL's from selling handguns to persons aged 18-21, court found that whether historical analogue exists "largely depends upon the level of generality employed." On the one had there was historical evidence that the Founders believed access to firearms could be restricted to those with "civic virtue," and that "safety-based restrictions were not thought to violate the second amendment," but on the other hand there were few (if any) specific restrictions on firearms possession by 18 to 20 year-olds. *Reese v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 2022 WL 17859138 (W.D. La., Dec. 21, 2022).

In another recent example, the U.S. Court of Appeals for the 5th Circuit held that the federal prohibition on firearms possession by persons subject to domestic violence restraining orders violated the 2nd Amendment. *U.S. v. Rahimi* (5th Cir., March 2, 2023). The Court held that colonial era laws that disarmed dangerous and

disloyal classes of persons were not "relevantly similar" to the federal prohibition on persons subject to the DV restraining orders.

What time period in history should be compared?

"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."

This is important because before 1868 the Bill of Rights applied only to the federal government, not the states. The passage of the Equal Protection Clause in the 14th Amendment in 1868 "incorporated" the Bill of Rights so it then applied to the states.

"We also acknowledge that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government). We need not address this issue today because, as we explain below, the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry."

This can make a difference because firearms regulations changed over time.

For example, the U.S. Court of Appeals for the 11th Circuit held a few weeks ago that "the more appropriate barometer is the public understanding of the right when the States ratified the Fourteenth Amendment and made the Second amendment applicable to the states." *National Rifle Association v. Biondi*, 2023 WL 2484818 (11th Cir., March 9, 2023). The Court that many laws restricting firearms possession by 18 to 20 year-olds were passed during the 1800s, and therefore a Florida statue prohibiting purchase of

firearms by persons under age 21 was consistent with historical firearms regulations and did not violate the Second Amendment.

Other courts have found, on the other hand, that the relevant historical era is "the time period within which the Second Amendment was enshrined." *U.S. v. Carrero*, 2022 Westlaw 9348792 (D. Utah, October 14, 2022).

What sorts of regulations may be permitted under the *Bruen* test?

Unclear if the 6 member *Bruen* majority agrees on the answer to that question.

Justice Kavanaugh wrote in a concurring opinion joined by Chief Justice Roberts:

I write separately to underscore two important points about the limits of the Court's decision.

"(A)s *Heller* and *McDonald* established and the Court today again explains, the Second Amendment "is neither a regulatory straightjacket nor a regulatory blank check." Properly interpreted, the Second Amendment allows a "variety" of gun regulations. As Justice Scalia wrote in his opinion for the Court in *Heller*, and Justice ALITO reiterated in relevant part in the principal opinion in *McDonald*:

'Like most rights, the right secured by the Second Amendment is not unlimited. . . the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.... [N]othing in our 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 such as schools and government buildings, or laws imposing conditions and qualifications on the commercial

sale of arms. [Footnote 26: We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.] We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those in common use at the time. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons.'"

Since only Chief Justice Roberts joined Justice Kavanaugh's opinion, this suggests they might uphold some firearms regulations that others in majority would not.

However, post-*Bruen* it will be more difficult for the government to show that firearms laws are constitutional under the Second Amendment, in part because under the *Bruen* test the government's asserted need for the law is no longer relevant. This makes it likely that some laws that were upheld before *Bruen* will be struck down, but the questions left unresolved by *Bruen* make it virtually impossible to predict which ones.