



# LITIGATING SECOND AMENDMENT ISSUES AFTER *BRUEN*

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# Second Amendment: The Supreme Court Leading Cases

- *DC v. Heller* (2008) – protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.
- *McDonald v. Chicago* (2010) – Fourteenth Amendment makes the Second Amendment right to keep and bear arms for the purpose of self-defense applicable to the states.
- *NYSRPA v. Bruen* (2022) – Discretion in who may exercise the 2A right is not allowed.

# The *Bruen* Rules

- The core rule: Discretion in who may exercise the 2A right is not allowed.
- Two-step approach and judicial interest balancing are not allowed.
- The judiciary may not defer to legislative interest balancing:
  - “[W]hile ... judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here. The 2A ‘is the very product of an interest balancing by the people’ and it ‘elevates above all other interests the right of law-abiding, responsible citizens to use arms’ for self-defense.”
- The burden of proof is on the gov’t:
  - “the gov’t 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.”

# The *Bruen* Rules Cont.

- When the 2A's plain text covers an individual's conduct, the Constitution presumptively protects that conduct.
  - The gov't must then justify its regulation by demonstrating that it's consistent with the Nation's historical tradition of firearm regulation.
  - Only then may a court conclude that the individual's conduct falls outside the 2A's "unqualified command."
- For 2A cases, Qs about whether the text is implicated will likely revolve around whether the arm in question is "bearable" and "dangerous and unusual."

# What History Matters?

- Five eras:

- (1) medieval to early modern England;
- (2) the American Colonies and the early Republic;
- (3) antebellum America;
- (4) Reconstruction; and
- (5) the late-19th and early-20th centuries.

# English Tradition and the First Founding

- (1) England: “English practices that ‘prevailed up to the ‘period immediately before and after the framing of the Constitution’” and were “acted upon or accepted in the colonies” are relevant.
- (2) The colonial period is relevant to the extent that it informed the original understanding of the Second Amendment.
  - Practice Tip: Lean into Originalism (OPM) in your briefing. This is particularly important at trial for purposes of preserving the record.
  - It is helpful to your judge to explain the purpose of these early statutes.

# Antebellum America

- (3) Antebellum America: “[H]ow the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century” is **“a critical tool of constitutional interpretation to determine the public understanding of a legal text in the period after its enactment or ratification.”**
- But, one must “guard against giving post-enactment history more weight than it can rightly bear.”
- “[T]o the extent later history contradicts what the text says, the text controls.”
- “[P]ostratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text.”

# Reconstruction and the Second Founding

- (4) Reconstruction: The period is important because of the 14A's **incorporation** of the 2A.
  - But, what if the “Second Founding’s” meaning of the right to arms is different from the First Founding’s?
  - It didn’t matter here because evidence of a robust 2A right to bear arms during Reconstruction was just as strong as it was for the original Founding Period. Personal self defense, it arguably much stronger.
    - Open Question: McDonald says that included rights keep their 1791 meanings, but the majority and Justice Barrett in *Bruen* suggest that a different 1868 meaning might be relevant.



# Post-Reconstruction

- (5) late-19th and early-20th centuries: “cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence.”

# Historical Analogies: How to Apply History

- A valid modern restriction can be “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.”
- A modern gun control and a possible historical analogue must be “relevantly similar.”
- To consider relevant similarity, *Heller* and *McDonald* point to “at least two metrics: how and why the regulations burden a law-abiding citizen’s right to armed self-defense.”
  - “*How*” means: “*whether modern and historical regulations impose a comparable burden on the right of armed self-defense.*”
  - “*Why*” means: “*whether that burden is comparably justified.*”

# Post-*Bruen* Controversies

- 18 USC 922
  - *(g) (1) Felon in possession / Mississippi Code 97-37-5*
    - Violent v. Nonviolent felons – Circuit split
  - *(g) (3) Unlawful user in possession / Mississippi Code 41-29-152*
    - See US v. Yancey (7<sup>th</sup> Circuit)
    - Past v. Current Use (*The Addiction Restriction; Armed and Under the Influence*)
  - *(g) (8) Possession while subject to DV order (US v. Rahimi)*
  - *922(n)*
    - Possession while indicted

# Felon in possession

- 922(g)(1) – Felon in Possession of Firearm
  - *US v. Bullock (2023) (SDMS)*
  - *Court held ban did not comport with history and tradition of Second Amendment.*
- **Mississippi Code 97-37-5**
- Circuit Split between (Range) 3<sup>rd</sup>, (Jackson) 8<sup>th</sup>, (Vincent) 10<sup>th</sup>
- Open Question: Do the “long standing prohibitions” apply to violent or nonviolent felons?

# The Addiction/Use Restriction

- 922(g)(3) – Unlawful User (past or current) Defined
  - *Addict means any individual who **habitually uses** any narcotic... or who is so far addicted to the use of narcotic drugs as to have **lost the power of self-control** with reference to his addiction. (21 USC 802)*
- *US v. Daniels* (2023) (5<sup>th</sup> Circuit)—past use.
- *US v. Beverly* (Appeal pending) (4<sup>th</sup> Circuit)—past addiction.
- **Mississippi Code 41-29-152** – Possession of firearm and a controlled substance
- Open Questions: Are addicts inherently dangerous? Are addicts mentally ill?

# Defining Dangerousness

## ■ Dangerousness Test

- The relevant inquiry centers on two elements: **(1) illicit use, and (2) imminent danger.**
- Such a showing mandates that the facts and circumstances present **clear and demonstrable evidence** that a person actually poses a significant and imminent risk of causing injury.
- To make this determination, **courts should thoroughly examine the underlying facts and alleged conduct separate from the resulting charging decision.**

# Questions?

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Fall 2023  
OSPD & MPDA  
Public Defender  
Conference



Wednesday, Oct. 26, 2023  
12:00pm-1:00pm

*Litigating the Second  
Amendment*

Lee Francis

