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## LEGAL UPDATE

Legal Services Division



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### UNITED STATES SUPREME COURT DECISION — RESTRICTED LICENSE TO CARRY A HANDGUN IN PUBLIC

**Purpose.** *Legal updates are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update is intended to provide legislators, legislative staff, and other persons interested in legislative matters with summaries of recent meetings, court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although an update may identify issues for consideration by the General Assembly, it should not be interpreted as advocating any particular course of action.*

#### **New York State Rifle & Pistol Association, Inc. v. Bruen**

**Filed June 23, 2022**

**No. 20-843**

[www.supremecourt.gov/opinions/21pdf/20-843\\_7j80.pdf](http://www.supremecourt.gov/opinions/21pdf/20-843_7j80.pdf)

**Factual and Procedural Background.** The state of New York prohibits the possession of a handgun, whether inside or outside the home, without a license. To obtain a license to possess a handgun at home, a license applicant must convince a licensing officer that the applicant is of good moral character, has no history of crime or mental illness, and that no good cause exists to deny the issuance of a license. New York provided two different licenses to carry a handgun outside the home. An unrestricted license authorized a person to have and carry a concealed handgun. To obtain an unrestricted license, the license applicant must prove that proper cause exists to issue the license. New York courts have held that an applicant can show proper cause if the applicant demonstrates a special need for self-protection that is distinguishable from the general population's need for self-protection. If an applicant failed to show proper cause, the applicant could receive a restricted license that allowed the applicant to carry a handgun for a limited purpose, such as hunting, target shooting, or for certain occupations.

The petitioners each applied for and were denied issuance of an unrestricted license to carry a handgun in public. The petitioners brought suit in federal district court for declaratory and injunctive relief alleging a violation of their Second and Fourteenth Amendment rights. The District Court for the Northern District of New York dismissed the petitioners' complaint and the Second Circuit Court of Appeals affirmed the dismissal. Both lower courts held that New York's proper-cause standard was substantially related to the achievement of an important government interest. The United States Supreme Court (Court) granted certiorari to decide whether the denial of the petitioners' applications for unrestricted licenses to carry a handgun in public violated the petitioners' constitutional rights.

**Issue.** Whether a requirement to show proper cause in order to obtain a license to carry a handgun outside the home violates the Second Amendment right to bear arms for self-defense.

**Holding.** The Court, in a 6-3 decision, vacated the Second Circuit's dismissal of the petitioners' complaint because the Ninth Circuit applied a means-end analysis. The Court held that determining whether a firearm regulation restricting the right to bear arms violates the Second Amendment requires a court to determine whether such regulation is consistent with the historical tradition of firearm regulation in the United States. The Court determined there are no historical analogues consistent with New York's proper-cause requirement and therefore the regulation violated the Second Amendment.

**Analysis.** The Court explained that since deciding *District of Columbia v. Heller*, 554 U.S. 570 (2008), lower courts have erroneously applied a two-step analysis to determine whether a restriction on the right to keep and bear arms

violates the Second Amendment. The Court stated that lower courts properly applied the first step of the analysis framework, which requires a court to apply a textual analysis focused on the normal and ordinary meaning of the Second Amendment. Under a textual analysis, the right to keep and bear arms guarantees an individual the right to possess and carry weapons in case of confrontation and such guarantee is not dependent on the individual's service in the militia. Lower courts, however, went on to apply a means-end test, such as strict scrutiny or intermediate scrutiny. The Court stated that its prior decisions expressly rejected an interest-balancing inquiry, and *Heller* specifically rejected intermediate scrutiny. The Court stated that applying means-end scrutiny to an enumerated constitutional right is improper because subjecting an enumerated right to a judge's assessment of a right's usefulness does not provide a constitutional guarantee.

The Court ruled that when the government regulates conduct protected by the Second Amendment, the government must demonstrate that the regulation of the conduct is consistent with the nation's historical tradition of firearm regulation. Such a demonstration does not include determining whether the burden placed on individuals is necessary to achieve a legislative goal. The Court stated that requiring the government to make such a demonstration is consistent with analysis for restrictions on other conduct covered by the U.S. Constitution.

The Court provided two general methods for determining whether a firearm regulation is inconsistent with the Second Amendment. First, if a general societal problem has persisted since the 18th century and there is no distinctly similar regulation to address the problem, the lack of such regulation is evidence the regulation in dispute is inconsistent with the Second Amendment. Second, if earlier generations addressed the societal problem but did so in a dissimilar manner, then the fact that a different manner was used also provides evidence the regulation in dispute is inconsistent with the Second Amendment. Further, if a prior analogous regulation had been rejected on constitutional grounds, that rejection provides probative evidence of unconstitutionality.

When reviewing analogous firearm regulations throughout history, the Court should determine how and why a historic regulation is considered consistent with the nation's historical tradition of firearm regulation. Specifically, the Court stated that "[w]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are 'central' considerations when engaging in an analogical inquiry." The Court categorized historical evidence into five periods and noted that not all historical evidence is given equal weight because the Constitution and its amendments should be interpreted in the context of the time they were adopted.

The Court reviewed prohibitions on carrying firearms in sensitive places. The Court found few examples of outright prohibitions on the carrying of firearms throughout the 18th and 19th centuries but noted that the Court is aware of no disputes regarding the lawfulness of such prohibitions and therefore assumed the issue was settled that those prohibitions were lawful. Examples of sensitive places included legislative assemblies, polling places, and court-houses. The Court refused to define which places are considered sensitive places, but stated that considering a sensitive place to include any congregation of people would eviscerate the general right to carry a firearm in public for self-defense, therefore undermining the Second Amendment.

The Court noted that the Second Amendment does not distinguish the right to bear arms between home and public settings. The Court also noted that the use of the word "bear" implies public carrying of firearms because while many people keep firearms at home for self-defense purposes, those people likely do not bear their arms on their person while in the home. Additionally, confrontation can occur outside the home. Although the Court in *Heller* noted that the need for armed self-defense is most acute inside the home, the Court did not find that the need for armed self-defense was insignificant elsewhere.

The respondents argued that the Second Amendment allows a state to condition the carrying of firearms in areas frequented by the general public if a person shows a nonspeculative need for armed self-defense in those areas. The Court required the respondents to show that New York's proper-cause requirement is consistent with the nation's historical tradition of firearm regulations. The Court reviewed historical evidence provided by the respondents and found no laws analogous to a proper-cause requirement that are rooted in the nation's historical tradition of firearm regulation, and laws presented by the respondents that restrict the public carrying of firearms to an extent as severe as New York's law were irrelevant to consider because those laws required specific motives, applied to unusual or unlawful weapons, failed to continue when a territory became a state, or affected a population that was significantly smaller than the rest of the population. The Court determined these reasons demonstrate that the analogous laws are not part of the nation's historical tradition of firearm regulation. Because the respondents could not show that

New York's law was part of the nation's historical tradition of firearm regulation, the Court ruled the proper-cause requirement unconstitutional.

**Concurrences.** Justice Alito concurred with the majority opinion in full but wrote separately to respond to arguments made by the dissenting justices and emphasize that the majority opinion's decision does not decide certain matters still left to legislative processes.

Justice Kavanaugh concurred with the majority opinion in full but wrote separately to emphasize that the majority opinion does not prohibit states from requiring a license to carry handguns in public, but rather addresses laws that leave the decision to issue a license to the discretion of licensing officials upon demonstrating a special need. Justice Kavanaugh also emphasized that a proper interpretation of the Second Amendment still allows for a variety of firearm regulations.

Justice Barrett concurred with the majority opinion in full but wrote separately to highlight two methodological points that the majority opinion does not resolve. First, Justice Barrett stated that the majority opinion failed to conclusively determine at which point poststratification practices no longer provide weight in an analysis of the original meaning of the U.S. Constitution. Second, and relatedly, Justice Barrett stated that the majority opinion also failed to provide guidance on whether courts should primarily rely on history when the Bill of Rights was ratified or when the Fourteenth Amendment was ratified when interpreting the scope of an individual right.

**Dissent.** Justice Breyer wrote the dissenting opinion joined by Justice Sotomayor and Justice Kagan. Justice Breyer noted statistics about gun violence and rephrased the issue in the case as determining the extent to which the Second Amendment prevents democratically elected officials from enacting laws to address gun violence. Justice Breyer argued that the Court is incapable of determining how New York's law is applied in practice because the parties had only submitted their pleadings before the case moved through the appeals process. Justice Breyer stated that it is unfair for the majority opinion to characterize New York's law as substantively demanding when there was no evidentiary record presented to the Court. Justice Breyer also argued that the majority opinion incorrectly determines the New York law to be an outlier when categorized as a "may issue" law because the difference between the two regulatory systems is not always clear in practice. The majority opinion noted that certain firearm regulations in western territories were outliers because the population affected was a small percentage of the total population, among other reasons, but Justice Breyer noted that the seven states categorized as "may issue" states are among the most densely populated states in the nation.

Justice Breyer stated that the majority opinion, not the majority of appellate courts, misinterpreted *Heller*, arguing that although *Heller* did focus primarily on constitutional text and history, the case did not reject means-end scrutiny. Additionally, Justice Breyer noted that the *Heller* decision stated the right to possess a handgun for self-defense is not an unlimited right and the case itself referenced the application of means-end scrutiny to an enumerated constitutional right. Further, Justice Breyer stated that the majority opinion actually created a constitutional anomaly by refusing to apply means-end scrutiny to a constitutional right and by using a history-only approach instead.

Justice Breyer argued that the majority opinion's near-exclusive reliance on history is impractical for courts to apply because judges and attorneys are not historians and will be inclined to select historical evidence that leads to a favorable outcome. Because courts may interpret the same history differently, Justice Breyer argued that applying means-end scrutiny is necessary. Additionally, Justice Breyer argued that using historically analogous laws to determine whether a modern law is part of the nation's historical tradition of firearm regulation is essentially a means-end analysis because the Court must look at how conduct is regulated (means) and the historical context that led a legislative body to adopt the regulation (end). Justice Breyer stated that the majority opinion offered many arguments for rejecting a modern regulation, but did not provide clear guidance for when a new regulation is constitutional, which can potentially prevent any new laws from enactment. Justice Breyer then performed a historical analysis using the same time periods as the majority opinion to determine that New York's law should be considered constitutional. Justice Breyer argued that even if analogous laws reviewed on their own are not persuasive enough for whatever reason that the majority opinion decides to reject them, the laws as a whole demonstrate that New York's law is not an outlier in the nation's historical tradition of firearm regulation.

**Impact on Iowa.** The State of Iowa is a shall-issue jurisdiction, meaning a licensing officer does not have discretion to withhold the issuance of a permit to carry weapons if the applicant is qualified to receive the permit. Since July 1, 2021, Iowans are not required to have a permit to own or carry handguns or other dangerous weapons. The

Court found that the shall-issue framework is consistent with the nation's historical tradition of firearm regulation and is therefore constitutional. Any other law in Iowa that regulates conduct that falls under the scope of the Second Amendment must also be consistent with the nation's historical tradition of firearm regulation.

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