

Second Amendment Update

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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.

—Second Amendment
to United States Constitution



Current Issues in Firearms Law



Application of *Bruen's*
text and history test?



**What persons are prohibited from
having firearms?**



To what extent can government regulate the **public carry** of firearms?



What firearms can be
banned without violating
Second Amendment?

The Second Amendment

Key Supreme Court Decisions

- *District of Columbia v Heller* (2008): 2A protects individual right of all law-abiding persons to keep and bear arms for self-defense and other lawful purposes (individually and collectively)
 - Following *Heller*, lower courts applied “tiers of scrutiny” test to 2A challenges
- *NYSRPA v Bruen* (2022): Rejects “tiers of scrutiny” test in favor of text, history, and tradition (THT) test
 - Two-part **analysis**:
 1. Is the regulated activity **covered by the text** of the 2A? If so, the activity is presumptively protected by the 2A; if not, analysis ends here (compare free speech analysis)
 2. If protected, the burden shifts to government to prove that Nation’s **history and tradition of firearms regulation** legitimizes the challenged regulation
 - Govt must show historical analogue, not twin; outliers insufficient; analogue must have similar scope and purpose

The Second Amendment

Key Supreme Court Decisions

- *United States v Rahimi* (2024): Affirmed conviction for gun possession by person with DVRO so long as the defendant poses a credible threat to the physical safety of another
 - Recognized historical tradition of regulations to disarm individuals who pose clear threat of physical violence to another
- Two cases currently pending:
 - *Wolford v Lopez*: challenge to Hawaii law that makes it a crime for someone with a CCP to carry a gun onto private property that's open to the public without seekin—and receiving—permission to do so first
 - *US v Hemani*: whether 18 USC 922(g)(3), which prohibits a person from owning a gun if they are “an unlawful user of or addicted to any controlled substance,” violates the 2A
 - * Resolve circuit split: **7th Cir** (no violation for disarming “presumptively risky people” such as habitual drug users) v **5th Cir** (govt must prove person actually impaired by drug use when possessing firearm) v **8th Cir** (govt must prove that drug user poses a credible threat to safety of others)
 - * See *US v Alston*, 699 F.Supp.3d 424 (E.D.N.C. 2023): successful challenge under 922(g)(3)



NYSYRPA v. Bruen

The historical inquiry

1. Historical analysis will be “**relatively straightforward**” IF regulation addresses problem that has existed since 18th century—BUT . . .
 - ✓ No “**distinctly similar**” regulations (i.e. no historical twin)
 - ✓ Problem was addressed through “**materially different means**”
 - ✓ Similar regulations were **rejected on constitutional grounds**

*In such cases, government cannot carry burden and **law is unconstitutional***



NYSYRPA v. Bruen

The historical inquiry

2. Historical analysis will demand a “more nuanced approach” if there are **unprecedented societal concerns** or **dramatic technological changes**
- Requires “**reasoning by analogy**” to determine whether historical and present-day regulations are “**relevantly similar**”
 - Two **extremes** to avoid
 - ✓ Modern “**outliers**” that only “remotely resemble” historic analogues
 - ✓ “**Dead ringers**” (historical twins) rather than historical analogues
 - **Historical analogues**: must be “relevantly similar” as to **how** and **why** the regulations burden the right to armed self-defense
 - ✓ *“Whether 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.”*
 - ✓ Comparable **burden** (how) + comparable **justification** (why)



NYSYRPA v. Bruen

The historical inquiry

3. What history counts? (“not all history is created equal”)

- **Contemporaneous history**—when 2A was adopted
 - ➔ But what about Reconstruction period? (2A incorporated against states by 14A)
- **English common law precedents** that continued into the period immediately before and after the American founding era are relevant, but English practices that were short-lived or rejected by the colonists are not.
- **Postratification practices** that were “open, widespread, and unchallenged since the early days of the Republic” also can confirm or clarify the public meaning of the 2A, but later adoption of laws or practices that are inconsistent with the 2A’s original meaning cannot change or override that meaning.
- **Mid- to-late-nineteenth-century historical evidence** is “secondary”—it can confirm earlier understandings, but cannot provide new insight into original meaning or contradict earlier evidence. A few state law “**outliers**” from this period will not suffice to carry the government’s burden.
- **Twentieth-century evidence**—little or no insight into original meaning, especially when it contradicts that meaning.

Prohibited Persons

18 USC 922(g)

Prohibited Persons

Overview

1. A person with a conviction for an offense that carries a possible punishment of more than one year in prison
2. A fugitive from justice
3. A person who is an unlawful user of or addicted to any controlled substance
4. A person who “has been adjudicated as a mental defective or who has been committed to a mental institution”
5. A noncitizen who is either unlawfully in the United States or who is here on a nonimmigrant visa
6. A person who has been discharged from the Armed Forces under dishonorable conditions
7. Anyone who has renounced their U.S. citizenship
8. A person subject to certain domestic violence restraining orders (but see *US v Rahimi*)
9. Anyone convicted of a misdemeanor crime of domestic violence

Post-*Bruen* Cases

Prohibited Persons

- *US v. Rahimi* (2024): SCOTUS rejects facial challenge to **18 USC 922(g)(8)** prohibitor for persons under a domestic violence restraining order (DVRO)
- *US v. Hemani* (argued 3/2/26): as-applied challenge to **18 USC 922(g)(3)** that prohibits possession of firearm by person that is unlawful user of or addicted to any controlled substance
- *Multiple lower court cases* challenge **18 USC 922(g)(1)** prohibitor for felons-in-possession: *Range v. Garland* (3rd Cir) held permanent disarmament unconstitutional; *US v Diaz* (5th Cir) and *US v. Williams* (6th Cir) show willingness to consider as-applied challenges; six other circuits hold felons have no recourse at all
- *Age cases: Paris v. Second Amend Foundation* (cert pending) and *McCoy v. BATF* (cert pending)

US v. Rahimi (US 2024)

922(g)(3) prohibitor for persons with DVROs

- *Reverses 5th Circuit:*
 - Holds that 2A is not infringed by laws that temporarily disarm individuals who pose a **credible threat to the physical safety** of others, at least after a **judicial finding** of such threat.
 - Recognized a **long historical tradition** of restricting **dangerous persons** from accessing firearms. Narrow decision: Court did not reach the question of whether 922(g)(8)(C)(2) is unconstitutional.
- Not at issue: DVROs based on harassment or emotional distress still may violate 2A.
- **Due process** issues
- Problem: DVROs often used as **tactical device** in divorce proceedings and issued without any credible threat to physical safety.

Garland v Range (3d Cir 2023)

922(g)(1) prohibitor for felons-in-possession

- Range's crimes = 1995 misdemeanor conviction making false statement to obtain food stamps punishable by up to 5 years in prison (did not involve firearm or threatened/actual violence)
- As-applied challenge, en banc opinion
- *Step one: Is Range one of "the people" covered by the 2A?*
 - Govt: felons are not part of political community of "law-abiding citizens" protected by 2A
 - Court: 2A applies to all Americans (gives four reasons)
- *Step two: Is applying 922(g)(1) to Range consistent with historical tradition?*
 - Govt: *Heller* says no effect on "longstanding" ban on possession of firearms by felons and cites status-based "analogues"
 - Court: FIP laws relatively recent and status-based restrictions on race, religion, etc inapplicable (plus additional reasons)

Prohibited Persons

Age restrictions

- *Jones v Bonta* (9th Cir 2022): holds unconstitutional CA ban on possession and purchase of semiautomatic rifles to 18-20 year old adults
 - ➔ Jones dissent denial of hearing en banc in *NRA v. BATF*: argues that historical inclusion of 18-20 year olds in militia suggests a heightened level of scrutiny
- *Worth v. Jacobson* (8th Cir 2024): holds unconstitutional MN law that requires CC license-holder to be 21 years old
 - ➔ MN argued 18-20 YOs not members of “the people”
 - ➔ MN cited 3 founding era sources: (1) freestanding “catch-all” for groups state deems dangerous; (2) founding-era and common law analogues; (3) Reconstruction-era analogues
- *Reese v. ATF* (5th Cir 2025): holding 18-20 YO prohibition unconstitutional, as inconsistent with 2A text, history, tradition
- *McCoy v. BATF* (4th Cir 2025): upholding federal ban on 18-20 YO from purchasing firearms because 18-20 YO lacked the contractual capacity to purchase firearms in founding era (cert pending)—same rationale used in *Rocky Mtn Gun Owners v. Polis* (10th Cir 2024) and *NRA v. Bondi* (11th Cir 2025)
- *Paris v. Second Amendment Foundation* (3rd Cir. 2025): unconstitutional to prohibit 18-20 YO from possessing guns during declared emergencies (cert pending)

Public Carry Questions

- Is there a 2A right to **carry** a firearm in public?
- Is there a 2A right to carry a **concealed** firearm in public?
- **Who** may carry a firearm in public?
- **What public places** may the state prohibit carrying firearms?

Firearms Laws

Federal

- National Firearms Act (NFA) of 1934
- Gun Control Act (GCA) of 1968
- Firearms Owners Protection Act (FOPA) (1986)
- Brady Handgun Violence Protection Act (1993) (amends GCA)
- Protection of Lawful Commerce in Arms Act (PLCAA) (2005)
- Bipartisan Safer Communities Act (2022) (amends GCA)

State and local

- Concealed public carry laws, including “sensitive place” regulations/bans
- Bans on certain firearms and accessories (e.g., “assault weapons” and “large-capacity” magazines)
- Laws on self-defense, stand your ground, etc.



Federal Regulation of Firearms in Modern Era

Overview

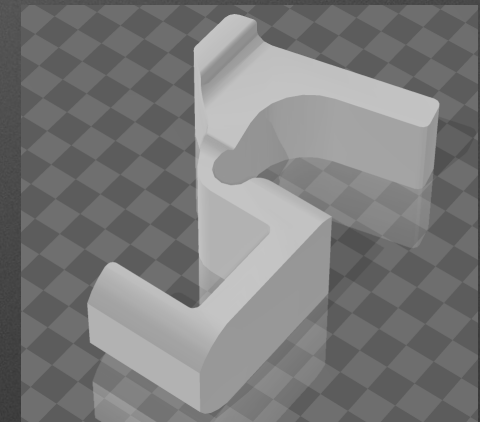
- **National Firearms Act (NFA) of 1934:**
Regulation of special firearms
- **Gun Control Act of 1968:** Regulation of sales of ordinary firearms
 1. Regulation of **buyers**
 2. Regulation of **sellers**
- **Firearms Owners Protection Act (1986):**
defines “engaged in business” requirement for FFL; no federal gun registry; Hughes Amendment (machine guns)



National Firearms Act

Machine Gun Conversion Devices

- Drop-in **auto sears** (DIAS)
- “**Glock Switch**” installed on Glock pistol slide
- “**Swift Link**” and “**Lightning Link**” devices for AR-15 style rifles
- Some **forced reset triggers**
- All are **illegal** under current law (18 USC 922(o))



Questions?