

# LOADED QUESTIONS

## PUBLIC SAFETY AND INDIVIDUAL RIGHTS IN THE AGE OF FIREARMS



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1

## BACKGROUND

- The overturned New York Penal Law §400.00(2)(f) (“Sullivan’s Law”) required CCW permit applicants to prove “proper cause” through a demonstration of “special need for self-protection distinguishable from that of the general community”



Legislative sponsor New York state Senator Timothy Sullivan



2

## BRUEN DECISION: REJECTION OF TWO-STEP FRAMEWORK

- Rejected two-step framework and tiers of scrutiny traditionally used to evaluate Second Amendment claims under *District of Columbia v. Heller* and *McDonald v. Chicago*:
  - First Step: Does the challenged law fall outside of the original constitutional scope?
  - Second Step: If the activity is constitutionally protected, does the law burden a core right?
    - If so, courts applied strict scrutiny
    - If not, courts applied intermediate scrutiny



Courtroom sketch by Art Lien



3

## NEW BRUEN TEST

- Reformulated test focuses on constitutional text and history
  - Does the plain text of the Second Amendment encompass the individual's conduct?
  - Is the law consistent with the historical tradition of firearm regulation?



Courtroom sketch by Art Lien



4

## THE SEARCH FOR A HISTORICAL ANALOGUE

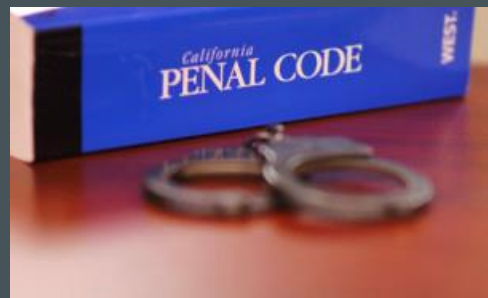
- “Analogous enough” and “relevantly similar” to challenged modern law
- Well-established tradition; not an isolated example
- Must not long predate or postdate either adoption of Second Amendment in 1791 or Fourteenth in 1868



5

## VALID CCW LICENSE CRITERIA UNDER CA PENAL CODE

- GOOD MORAL CHARACTER - ?
- ~~GOOD CAUSE~~
- RESIDENCY
- FIREARM TRAINING



6

## GOOD CAUSE REQUIREMENT REJECTED – WHY?

- “Open-ended” discretion granted to licensing officials in “may-issue” states is incompatible with Second Amendment
- Cited “may-issue” requirements:
  - California’s “good cause,”
  - D.C.’s “proper reason,”
  - Hawaii’s “exceptional case,”
  - Maryland’s “good and substantial reason,”
  - Massachusetts’ “good reason,” and
  - New Jersey’s “justifiable need”



7

## GOOD MORAL CHARACTER REQUIREMENT – POTENTIAL PERILS AHEAD...

- Licensing officials may enforce: “narrow, objective, and definite standards” designed to ensure that only “law-abiding, responsible citizens” obtain weapons
- Examples of permissible criteria: fingerprinting, a background check, a mental health records check, and training in firearms handling and use of force laws



8

## WHO MAY BE EXCLUDED?\*

- MENTALLY ILL PERSONS ADJUDICATED AS A DANGER TO OTHERS,
- CONVICTED FELONS,
- AND OTHER DANGEROUS INDIVIDUALS

\*THIS LIST IS NOT EXHAUSTIVE.



9

## HOW TO EVALUATE MORAL CHARACTER...

- Focus on suitability to be entrusted with a weapon
- Conviction of a violent crime is more likely a permissible disqualifying factor than a less serious crime
- Not all past run-ins with the law may serve as basis to deny a permit
- Evaluation of personal characteristics such as “honesty, trustworthiness, diligence, reliability,” etc. as suggested by the Attorney General must not grant officials too much discretion to make subjective determinations

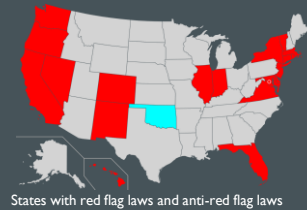


10

## DO OTHER PUBLIC SAFETY LAWS PASS THE *BRUEN* TEST?

### ANALYSIS OF TWO CATEGORIES OF LAWS:

- (1) Laws prohibiting or regulating firearm possession by convicted felons and mentally ill individuals adjudicated as a danger to others
- (2) “Red Flag” firearm laws related to domestic violence, workplace harassment, gun-related violence, general harassment, etc.



11

## (1) CATEGORICAL LIMITS ON POSSESSION BY CONVICTED FELONS AND MENTALLY ILL PERSONS

“PRESUMPTIVELY LAWFUL” ACCORDING TO *HELLER* MAJORITY, *MCDONALD* PLURALITY, AND JUSTICE KAVANAUGH’S *BRUEN* CONCURRENCE

- California Penal Code section 29800 – Disqualifies felons from purchasing, receiving, or possessing firearms
- Welfare & Institutions Code section 8103 – Disqualifies persons “adjudicated to be a danger to others as a result of a mental disorder or mental illness, or who has been adjudicated to be a mentally disordered sex offender”



12

## BUT ARE THESE “PRESUMPTIVELY LAWFUL” REGULATIONS REALLY ROOTED IN HISTORICAL TRADITION?

- The origin of these types of regulations was disputed during oral argument
  - Justice Kagan noted that these exclusions were first codified in the 20<sup>th</sup> century
  - New York Rifle & Pistol Association responded that these 20<sup>th</sup> century prohibitions were based on a “tradition from the beginning for keeping certain people outside of the group of people that were eligible for possession of firearms”
  - Numerous historical documents, laws, and state constitutions dating back to the 18<sup>th</sup> and 19<sup>th</sup> centuries support argument that dangerous or unfit individuals were historically disqualified
- **Takeaway:** While historical analogues to these particular modern laws were proposed in the 20<sup>th</sup> century, long postdating the 2<sup>nd</sup> and 14<sup>th</sup> amendments, the Court accepts that these laws are “sufficiently longstanding” and not unprecedented



13

## (2) “RED FLAG” FIREARM LAWS



- Designed to prevent dangerous persons, *in addition to mentally ill persons and convicted felons*, from acquiring firearms or in some cases, to require them to forfeit their weapons
- Intended to prevent the use of such weapons for suicide or harm to others
- These laws are rooted in individual’s specific, unsuitable conduct

### Examples

- Code of Civil Procedure section 527.6 – civil harassment restraining orders
- Code of Civil Procedure section 527.8 – workplace violence restraining orders
- Welfare & Institutions Code section 15657.03 – protective orders for elder abuse
- Penal Code Section 136.2 – protective orders based on victim or witness intimidation
- Penal Code section 646.91 – stalking
- Penal Code section 18250 – domestic violence
- Penal Code sections 18100-18175 – gun violence prevention



14

## KEY QUESTION UNDER *BRUEN*:

### ARE THESE “RED FLAG” LAWS CONSISTENT WITH THE HISTORICAL TRADITION OF FIREARM REGULATION IN THE U.S?

**Short Answer:** Yes, these laws are consistent with the Second Amendment under *Bruen* because the nation’s historic traditions prevented violent or dangerous persons from possessing firearms

- Historical precedent ranging from the English common law to the 20<sup>th</sup> century and supporting documents indicate that the U.S. government has been empowered to defend “law-abiding citizens” from those likely to spread “fear” or terror” through bearing of arms since the nation’s inception
  - For instance, founding father Samuel Adams clarified that “peaceable” citizens could not be disallowed from keeping their own arms



15

## QUICK HISTORICAL SURVEY OF RELEVANT FIREARM LAWS

### English Common Law

- 1328 Statute of Northampton – prohibited use of weapons to cause “affray of the peace”
- *Sir John Knight’s Case* (1686) – the weapon is prohibited if carried with evil intent (“in Terrorem Populi,” meaning “to the terror of the people”)



### Colonial Period

- 1 Pleas of the Crown 136 (1716 treatise) – “persons of quality” permitted to bear arms were “in no Danger of Offending against [the Statute of Northampton] by wearing common Weapons” because it was clear there was no “Intention to commit any Act of Violence or Disturbance of the Peace”
- States enacted discriminatory controls similar to anti-Catholic regulations to deprive Native Americans and African-Americans from gun ownership under pretense of being “high-risk”



16



## HISTORICAL SURVEY CONT'D



### Founding Period

- Legislators maintained tradition of disarming “unvirtuous citizens” like criminals as the right to bear arms was tied to “civic virtue”
- British loyalists were dispossessed of weapons
- Surety statutes to punish those who roamed in public “armed to the terror of people”

### Antebellum and Reconstruction Periods

- “Affray” offenses continued to criminalize carrying firearms “to the terror of people”
- Surety statutes required a showing of special need for a firearm “only after an individual was reasonably accused of intending to injure another or breach the peace”

### 20<sup>th</sup> Century

- Uniform Firearms Act – late-1920s and mid-1930s
- Federal Firearms Act of 1938
- Gun Control Act of 1968



17

## WHAT DOES THIS MEAN FOR STATE AND LOCAL REGULATIONS?

- California’s “good cause” requirement is now invalidated
  - A law-abiding, responsible applicant is entitled to a permit if the individual passes the background check, completes the required firearm training, and satisfies the residency requirement
- Licensing officials must be careful not to transform the “good moral character” requirement into a purely subjective inquiry such that it runs afoul of *Bruen*
- Prohibitions of firearm possession by convicted felons and mentally ill individuals are “presumptively lawful” as reaffirmed by *Bruen*
- Historical precedent supports “red flag” laws disarming dangerous individuals who are unfit to possess weapons as subjects to various protective orders, but whether the “presumptively lawful” presumption will attach remains unclear**



18

## QUESTIONS ABOUT 18<sup>TH</sup> CENTURY FIREARM PROHIBITIONS?

Remember: Challenged “red flag” laws do not need to be matched with twin historical analogues to pass muster



19

# Thank you!

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20