[J-29-2023] [MO: Dougherty, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

JONATHAN BARRIS,	:	No. 68 MAP 2022
	:	
Appellee	:	Appeal from the Commonwealth Court Order dated May 28, 2021 at No. 671 CD 2020 Reversing the
v.	:	Order of the Court of Common Pleas of Monroe County, Civil Division, at No. 6773 Civil 2015 dated May 26,
STROUD TOWNSHIP,	:	2020.
	:	
Appellant	:	ARGUED: May 24, 2023

DISSENTING OPINION

JUSTICE MUNDY **DECIDED: February 21, 2024**

I respectfully dissent. I would affirm the judgment of the Commonwealth Court as I find the challenged ordinance invalid under the Second Amendment of our Federal Constitution.

I

Introduction

As the Majority explains, we granted allowance of appeal in this case to address the facial constitutionality of the Township's ordinance with additional instructions to address issues implicated by *District of Columbia v. Heller*, 554 U.S. 570 (2008) as then interpreted.[1] The United States Supreme Court subsequently handed down its decision

[1] Our order directed the parties to brief, *inter alia*,

> (1) whether this Court should adopt the two-step framework for addressing Second Amendment challenges utilized by the lower court; (2) whether the core Second Amendment right to

(continued…)

in *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 597 U.S. 1 (2022), which abrogated the two-step approach court's had adopted when interpreting *Heller*, the approach the Commonwealth Court had employed. This led us to redirect the parties to brief the case under the standards announced in *Bruen*. My disagreement is with the Majority's application of the newly clarified historical analysis test for determining the constitutionality of legislative restrictions on the Second Amendment's right to keep and bear arms set forth by *Bruen* to the Township's regulations in this case.

The Majority provides a thorough exposition of the decisional law from the past fifteen years following the Supreme Court's decisions in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and of how federal courts have interpreted those decisions by applying a "means-ends test" abrogated by *Bruen*. *See* Majority Op. at 2-19. And I agree with the Majority's summary of the new test under *Bruen* that retained the notion that conduct plainly covered by the text of the Second Amendment is presumptively protected and that any regulation of such conduct must be shown, from an historical perspective, to be consistent with national tradition of the meaning and scope of the right to keep and bear arms. *Id.* at 19.[2]

II

Application of the *Bruen* Test – Textually Protected Conduct

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> possess firearms for self-defense recognized in [*Heller*], also implies a corresponding right to acquire and maintain proficiency in their use; (3) whether such a corresponding right, if it exists, must extend to one's own home; and (4) the level of scrutiny courts should apply when reviewing enactments that burden individuals' ability to maintain firearms proficiency.

Per Curiam Order, 6/6/22.

[2] The Majority Opinion has also fairly summarized the history of this case and the arguments of the Parties and Amici.

A Conduct vs. Consequence

I also concur with the Majority's conclusion that the ordinance at issue in this case, which combines discharge regulation, shooting range guidelines, and siting restrictions via zoning limitations, satisfies the threshold inquiry of whether the regulations implicate an aspect of the right to keep and bear arms implicated by the text of the Amendment. *See* Majority Op. at 46-49. However, I reach this conclusion on a different basis. This aspect of our inquiry stems from the decisions in *Heller* and *McDonald* and was unaltered by *Bruen*. In our initial briefing order, we sought to explore this textual connection by requesting briefing on the existence of a right to acquire proficiency in the use of a firearm at one's own home. *See* n. 1, *supra*. The Majority does not reach its conclusion on that basis. Rather it identifies the textual implication of the regulations as the potential confiscation of a firearm for violation of the regulations. In this way, the Majority purposely avoids deciding the key issue concerning the threshold aspect of the *Bruen* test of whether the **regulations** at issue, as they affect the core right to self-defense by gaining competency or proficiency in the use of arms, are implicated by the text of the Amendment. The Majority's approach is also inconsistent with its subsequent application of the second aspect of the *Bruen* analysis in that it reviews purportedly comparable historical regulatory antecedents to the restrictions imposed by the Township's ordinances rather than the freedom from confiscation issue it uses as the right presumptively protected. It does not explore, and the Township does not proffer, historical precedent for confiscation of weapons as a penalty for violation of these types of restrictions.[3]

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[3] In this regard, the Majority's analysis of the textual connection with the right at issue is inconsistent with the Majority's subsequent review of purportedly comparable historical regulatory antecedents to the restrictions imposed by the Township's ordinances rather than analogous historical antecedents relating to confiscation. *Accord* Concurring and Dissenting Op., Donohue, J., at 3-4. Unlike Justice Donohue, however, and as explained further herein, I conclude the Township's ordinances do implicate the rights protected in the text of the Second Amendment.

In my view, it is the conduct restricted by the Township's regulations that is challenged in this case and must be analyzed to determine if the rights being restricted are implicated by the text of the Amendment. I do not say that the issue of confiscation of weapons might not present a separate inquiry, but it is not one the parties have pursued. I therefore proceed to review whether the right to achieve proficiency in the use of firearms on one' own premises is implicated by the text of the Amendment.

B Right to Achieve Competency in Use of Arms for Self-Defense

The Township argues that Barris did not establish that its regulations for siting shooting ranges within the municipality implicate the plain text of the Second Amendment in accordance with *Bruen*'s textual/historical approach. *See* Appellant's Brief at 33-37. However, it does so by defining only one aspect of its means of regulation, "[t]he right to erect a shooting range on a tract where such range is not allowed." *Id.* at 33 (capitalizations removed). The Township does not focus on the protected right to acquire competency and proficiency through practiced use of arms asserted by Barris. The Township argues that this regulation does not affect the plain text rights to "keep" and "bear" arms that were at issue in *Heller* and *Bruen*. *Id*. at 33-37.[4] But as the Majority acknowledges, the Township's regulations present a "dizzying web of cross-referencing zoning and conduct ordinances." Majority Op. at 28. The Township merely focuses on one aspect of its **regulations** rather than the **right** affected by those regulations. These regulations, as argued by Barris and Amici in support of Appellee, do impact upon his **right** to keep arms for self-defense by restricting his ability to gain competency in the use of his legally possessed arms. Compare Appellant's Brief at 37 ("The identified plain text rights in the Second Amendment involve ownership and physical possession. Our ordinance disturbs neither right, nor any other right identified in the plain text."), with Firearms Policy Coalition and FPC Action Foundation's Amici brief at 6 ("*Heller's* analysis

[4] As noted by the Majority, the Township does not present any authority for placing this burden upon Barris. *See* Majority Op. at 36 n.29.

revealed that training is covered by several aspects of the Second Amendment's plain text.").

As explicated by the United States Supreme Court in *Heller* and *MacDonald*, included in the operative clause of the Second Amendment is the concept of self-defense both in keeping a weapon in the home and when bearing a weapon outside the home:

> [The Framers] understood the right to enable individuals to defend themselves. As the most important early American edition of Blackstone's Commentaries (by the law professor and former Antifederalist St. George Tucker) made clear in the notes to the description of the arms right, Americans understood the "right of self-preservation" as permitting a citizen to "repe[l] force by force" when "the intervention of society in his behalf, may be too late to prevent an injury."

Heller, 554 U.S. at 594-95 (quoting 1 Blackstone's Commentaries 145-46, n.42 (1803)) (brackets in original). That view was further endorsed in *Bruen*:

> As we stated in *Heller* and repeated in *McDonald*, "individual self-defense is 'the *central component*' of the Second Amendment right." *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 599; see also *id.,* at 628 ("the inherent right of self-defense has been central to the Second Amendment right"). Therefore, 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. *McDonald*, 561 U.S. at 767(quoting *Heller*, 554 U.S. at 599).

Bruen, 597 U.S. at 29 (emphasis in original).

Heller also discussed gaining proficiency in the use of arms in the context of the opening clause of the Second Amendment dealing with a "well regulated militia," concluding "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Heller*, 554 U.S. at 598. The Court in *Heller* went on to hold the prefatory clause aids in the construction of the operative clause of the Amendment but does not limit the operative clause's scope. *Id.* at 580. "Reading the

Second Amendment as protecting only the right to 'keep and bear Arms' in an organized militia . . . fits poorly with the operative clause's description of the holder of the right as 'the people.'" *Id.* at 580-81. It follows that the training aspect of a "well-regulated militia" pertains as well to the individual right to keep arms for self-defense. The term "self-defense" does not appear verbatim in the text of the Amendment, yet it is deemed central to the textual right to keep and bear arms. Keeping or bearing a firearm for self-defense with which one has no familiarity or competency can do little to contribute to the right to self-defense articulated in *Heller*. Similarly, while the term "competency" (or "proficiency") in the use or operation of a firearm is not in the literal text of the Amendment, it is subsumed in any realistic conception of self-defense, which, as noted, is implicated in the text of the Amendment.

Accordingly, the right burdened by the Township's interrelated regulations is the right to achieve competency or proficiency in keeping arms for self-defense at one's home. The core self-defense protections of the Amendment, as identified in *Heller* and subsequent cases, would be severely limited if regulation of the ability to safely train in the use of a firearm at one's home prevented or overly burdened an individual's ability to effectively use the firearm. Further, the Township's ordinance imposes those burdening limitations in more than one way, including: a general ban on the discharge of arms (albeit subject to exceptions); regulations on the design and operation of shooting ranges; and restrictions on where approved shooting ranges may be sited. Thus, my focus is not solely upon the consequences of Barris's weapons possibly being confiscated for acting in opposition to the ordinances (which I agree is a concern). I also deem the ability to safely train with a weapon at one's own premises as itself implicating the text of the Second Amendment's right to keep arms, which in turn triggers *Bruen's* directive to review the challenged regulations for a determination of whether they are consistent with the national tradition and understanding of the right to keep and bear arms at the time

enshrined in the Constitution.[5] *See Bruen*, 597 U.S. 29 ("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.")

III

Application of the *Bruen* Test – National Historical Tradition of Analogous Regulation

A Township's Burden

I also part company with the Majority's application of *Bruen's* second step historical analysis in which it concludes the regulations in this case comport with the "National historical tradition." *Bruen* places the burden to establish this conformity upon the government entity imposing the restrictions. "[T]he government 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. . .." *Id.* at 19. As the Majority explains, *Bruen* did not go beyond the historical analysis necessary for the case before it, which left aspects of the test yet to be defined. The Majority also highlights *Bruen's* admonition that the "analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check." Majority Op. at 15 (*quoting Bruen*, 597 U.S. at 30).

The Township, with little analysis, lists myriad examples of what it deems to represent comparable regulation during the relevant periods of time surrounding the adoption of the Second and Fourteenth Amendments.[6] Again the Township focuses on

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[5] The facts in *Heller* and *Bruen* dealt with the right to bear arms outside one's home. The current regulation affects the right to keep arms at one's home.

[6] Interestingly, the bulk of the Township's examples concern regulations of the discharge of a firearm, which it did not articulate as the relevant regulation in its argument of the first aspect of the *Bruen* test regarding the implication of a right linked to the text of the (continued…)

its means of regulation rather than the regulation of the right asserted by Barris. The Township's list reads like little more than a key word search of the term "discharge" and/or "shooting range." The Township does not provide any explanation of how those examples do or do not represent a National tradition that would inform us of the Framer's understanding of the right to keep arms as encompassing the regulation of an individual's ability to gain competency in the use of arms for self-defense or to do so on private property. Nor does the Township sift among its "dizzying web of cross-referencing zoning and conduct ordinances" to hone its examples to the respective burdens they impose. The existence of regulation cannot be separated from the purpose of regulation and the Township's generalized shotgun approach does little to maintain its burden to show the regulations it wishes to impose are consonant with the Framer's notion of the right to keep and bear arms. It would be sufficient to affirm the judgment of the lower court upon this failure of the Township to meet its burden, but the Majority engages in an independent review of its own to bootstrap the Township's mere listing of purportedly relevant examples. "We are not obliged to sift the historical materials for evidence to sustain New York's statute. That is respondents' burden." *Bruen*, 597 U.S. at 60.

> The job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies. That "legal inquiry is a refined subset" of a broader "historical inquiry," and it relies on "various

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Amendment. Indeed, although the Commonwealth Court decided this case on now abrogated pre-*Bruen* analysis, it did identify the nature of the challenge at issue.

> To be clear, however, this case is not a challenge to the "use" of a property in the traditional zoning sense or an appeal of the denial of a zoning permit. Rather, this matter is a challenge to an ordinance set forth in Chapter 6 of the Stroud Township Code of Ordinances, pertaining to Conduct, and not a challenge under Chapter 27 of the Stroud Township Code of Ordinances (*i.e.*, the Township's Zoning Ordinance), pertaining to Zoning.

Barris v. Stroud Township, 257 A.3d 209, 225 (Pa. Cmwlth. 2021).

> evidentiary principles and default rules" to resolve uncertainties. W. Baude & S. Sachs, Originalism and the Law of the Past, 37 L. & Hist. Rev. 809, 810–811 (2019). For example, "[i]n our adversarial system of adjudication, we follow the principle of party presentation." *United States* v. *Sineneng-Smith*, 590 U.S. ——, ——.

Id. at 2130 n.6. "In short: '[C]ourts are essentially passive instruments of government.' *United States v. Samuels*, 808 F.2d 1298, 1301 (CA8 1987) (Arnold, J., concurring in denial of reh'g *en banc*). They 'do not, or should not, sally forth each day looking for wrongs to right.'" *United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020).[7] The *Bruen* Court noted in its review of historical regulations in that case that they often can be presented in circumstances that are "rarely subject to judicial scrutiny, [and] we do not know the basis of their perceived legality." *Bruen*, 597 U.S. at 68. Absent evidence of the basis for a historical regulation, its relevance to the regulations at issue here may be tenuous. "Thus, the court must compare the burden any modern regulation places on the right to armed self-defense with a proposed historical analogue." *United States v. James*, F.Supp. 3d, 2023 WL 3996075, at *6 (D.V. I. 2023). The Township's listing of exemplars lacks this focus on purpose in the same way it failed to evaluate the burden its regulations pose on the affected individual right at issue.

B Adequacy of Proffered Examples

Nevertheless, if we are to review the Township's examples absent any analysis from the Township, my own independent examination of the examples, and of those provided by Amici in support of the Township, compels me to a different result than the Majority. The Township advances two lists. The first comprises limitations of discharge

[7] This is distinct from the Majority's acceptance of the Township's invitation to take judicial notice of the examples it proffers under 42 Pa. C.S.§ 5327(b). *See* Majority Op. at 51 n.41. Taking notice of the enactments does not constitute a finding of fact or conclusion of law and is not a substitute for targeted analysis or argument regarding their relevance. *See Sch. Dist. of Phila. v. Bd. of Revision of Taxes*, 217 A.3d 472, 483–84 (Pa. Cmwlth. 2019).

of a firearm. The second comprises regulation of shooting galleries. Unlike the Majority, I do not find these "easily" meet the Township's burden.

Relative to the first list, the majority of examples advanced concern discharge in public areas and congested places. *See*, *e.g.*, Township's Brief at 4, 7.[8] Others concern specific setbacks rather than prohibitions. *See*, *e.g.*, *id.* at 9.[9] Some concern specific nuisances.[10] *See*, *e.g.*, *id.* at 4. Still others only restrict discharge subject to some form of permitting or permission. *See*, *e.g.*, *id.* at 20.[11] Aside from these exemplars that, in my view are clearly not analogous in purpose or effect to the Township's restrictions, many of the remaining examples lack any specificity regarding the purpose of the regulation or a clear indication of any limitation on activity pertaining to arms training on private property. This precludes any meaningful determination as to whether they constitute a National historical tradition for the type of regulations imposed here.

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[8] *Citing* Laws Of Maryland Image 300 (Annapolis, 1800), available at The Making of Modern Law: Primary Sources; 1713 Mass. Acts 291); Ordinances Ordained and Established by the Mayor & City Council of the City of New Orleans Page 68, Image 68 (New Orleans, 1817), available at The Making of Modern Law: Primary Sources.; and Ordinances of the City of Portland, Commencing May 23, 1832, Page 23-24, Image 23-24 (Portland [Maine], 1833), available at The Making of Modern Law: Primary Sources.

[9] *Citing* James Ewing, Ordinances of the Common Council of the City of Trenton; Page 80, Image 80 (Trenton, 1842), available at The Making of Modern Law: Primary Sources.

[10] *Citing* Laws And Ordinances Of New Netherland 1638-1674 Page 138, image 170 (Albany, 1868), Available at The Making of Modern Law: Primary Sources (restricting pigeon shooting).

[11] *Citing* Massachusetts: At a Legal Meeting of the Freeholders and other Inhabitants of the Town of Newburyport ... On the Twenty-ninth Day of March, A.D. 1785, reprinted in Essex Journal, and the Massachusetts and New Hampshire General Advertiser (Essex, Mass.), May 11, 1785, pg. 2, col. 2; and Pennsylvania Archives. Selected And Arranged From Original Documents In The Office Of The Secretary Of The Commonwealth, Conformably To Acts Of The General Assembly, February 15, 1851, & March 1, 1852, Page 160, Image 162 (Philadelphia, 1852), available at The Making of Modern Law: Primary Sources.

The examples highlighted by the Majority suffer the same shortcomings and reveal little of the purpose of the subject regulations or their intent to regulate training. Not all "discharges" are equal and those enactments regulating discharge of firearms for a completely different purpose than regulation of the protectable right at issue are of little use in resolving the current issue. These examples did not burden the right to practice safely on one's own property and do not provide comparable analogues to the actions of the Township. As the Court in *Bruen* noted, while not purporting to present an exhaustive list of criteria for determining whether an historical example is analogous, "we do think that *Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Bruen***,** 597 U.S. at 29.

Another concern with the list of examples by the Township, limiting their usefulness as analogues, is the wide range of pertinent dates of the enactments. Many are sufficiently distant in time from the adoption of the Second Amendment (1791) and Fourteenth Amendment (1868) to have diminished relevance as to the National tradition at those times. *See* Township's Brief at 4-19 (including nine examples from the 1890 decade). Additionally, most of the Township's examples are more pertinent to the period surrounding the adoption of the Fourteenth Amendment. This implicates a question left unanswered in *Bruen* as to which period would prevail if there were a divergence on the perceived "National tradition" borne out by their respective regulatory practices. Based on the Township's examples, I discern such a divergence and would resolve the question as perhaps suggested by Justice Barrett in her concurring opinion in *Bruen*. Justice Barrett, highlighting questions remaining unanswered by *Bruen*, cautioned against an overbroad historical survey of examples. "So today's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights. On the contrary, the Court is careful to caution 'against giving postenactment history more weight than it can rightly bear.'" *Bruen*, 597 U.S. at 83 (Barrett, J. Concurring) (internal citation omitted).

The Township's second list, focused on regulation of shooting ranges, suffers similar shortcomings. The Township's first six examples, as well as many others, do not prohibit shooting ranges and do not ban discharge of firearms, subject to licensing or permitting. *See* Township's Brief at 19-29. Others concern the safety features of a shooting range, not its location or use.[12] *Id.* These examples reflect regulations that are particularized to individual circumstances and safety concerns. None of the examples present the type of restrictive zoning ban, divorced from independent and individualized safety concerns, that the Townships regulations impose. *Id.* Also, as with the first list, the examples span periods of time that may limit their probative value to the critical question of whether such regulation reflects the national tradition implicit in the textual right - to safely practice with a firearm on one's own premises to achieve competency.

IV Conclusion

For these reasons, I conclude the Township's regulations cover Barris's conduct as it pertains to the text of the Second Amendment, in particular as it pertains to the ability to proficiently use a firearm in aid of self-defense. I also conclude the Township has not met its burden under *Bruen* to demonstrate its regulations are analogous with those existing at the time the Second Amendment or Fourteenth Amendment were adopted to reflect a National tradition for such regulation that would inform the scope of the conduct presumptively protected. Therefore, I would affirm the judgment of the Commonwealth Court.

[12] It is not this aspect of the Township's regulations that is being challenged.