HISTORY ON TRIAL: THE EFFECTS ON HISTORIANS IN A POST-BRUEN WORLD

by Ashley Hlebinsky

In March 2023, the *The New York Times* wrote an article entitled, "In the Gun Law Fights of 2023, a Need for Experts on the Weapons of 1791." The journalist, in the subtitle, continues by stating, "*A Supreme Court decision has forced courts to consider what gun restrictions existed two centuries ago, sending demand soaring for historians*."[1] Not only is demand soaring, but also the referenced ruling has pitted historians against one another in ways that are potentially detrimental to the field.

In June 2022, the Supreme Court ruled in favor of the plaintiff in the *New York State Rifle and Pistol Association et al v Bruen* (henceforth to be referred to as *Bruen*). In general, this ruling challenged existing laws restricting public carry in "sensitive places," however, the standard put forth in determining the constitutionality of said restriction has had a far broader impact on the country, thrusting history into the spotlight. Although it should be noted that *Bruen* was not the first-time history has been relevant to the modern gun debate. The 2008 Supreme Court ruling, *Heller v District of Columbia* (henceforth to be referred to as *Heller*), which identified the Second Amendment as an individual right, argued that while relevant "*not all history is created equal*…[and that] *Constitutional rights are enshrined with the scope they were understood to have when the people adopted them*."[2] Two important exemptions in *Heller* though are the allowances for regulation of firearms deemed not in common use and considered unusually dangerous – although it did not completely define either. *Bruen* took that concept one step further by creating a formula, referred to as the *Bruen Test*, to establish a hierarchy of relevant time periods when deciding court cases.

Under the *Bruen Test*, the most relevant time frame in consideration regarding the constitutionality of modern regulations is the Founding Era, surrounding the ratification of the Second Amendment. *Bruen* then acknowledges the second most important period surrounds the ratification of the Fourteenth Amendment, known as the Second Founding Era. Although, it should be noted that in certain cases, as with *Bruen*, the Second Founding Era is not always found relevant when discussing the historical pedigree of regulation and, therefore, can be ruled inadmissible.[3] Subsequent time periods can be used to provide the context of what was available leading up to the formation of the Second Amendment. Additionally, the period directly after can provide insight "*to determine the public understanding of a legal text in the period after its enactment or ratification*."[4] Late nineteenth century history can be helpful in instances when it affirms what has been established by earlier history. The same can be said about twentieth century history, although significantly less relevant than the other periods. These eras do not necessarily provide insight though if they contradict earlier evidence.[5]

Ultimately, it is for the courts to determine what time periods

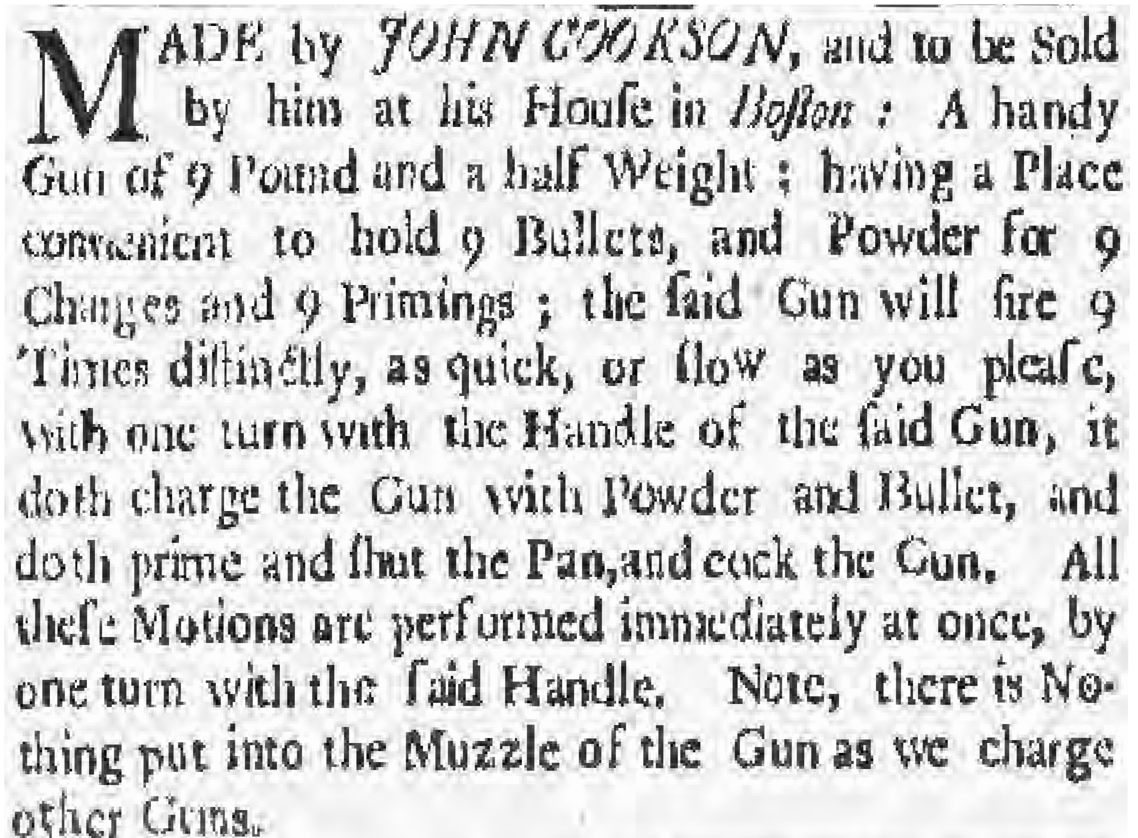
MADE by *JOHN COOKSON*, and to be Sold by him at his Houſe in *Boſton* : A handy Gun of 9 Pound and a half Weight ; having a Place convenient to hold 9 Bullets, and Powder for 9 Charges and 9 Primings ; the ſaid Gun will fire 9 Times diſtinctly, as quick, or ſlow as you pleaſe, with one turn with the Handle of the ſaid Gun, it doth charge the Gun with Powder and Bullet, and doth prime and ſhut the Pan, and cock the Gun. All theſe Motions are performed immediately at once, by one turn with the ſaid Handle. Note, there is Nothing put into the Muzzle of the Gun as we charge other Guns.

Figure 1. This image depicts an advertisement from 1756 for the Cookson nine-shot magazine-fed repeater. He also had this advertisement published at least one other time. It shows that while the question of legal commonality of repeaters is still up for debate, that gunmakers were advertising the technology with public presses for future consumers. *The Boston Gazette and Country Journal*. April 12, 1756.

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outside of the Founding Era, if any, to consider based on several factors: technology, availability, laws and fundamental changes in society. Firstly, the attorneys must identify what technology existed before and during the Founding Era and whether the public and/or the Founding Fathers would have been aware of said technology. Secondly, they must argue for or against historical laws they see as relevant to their cases. Thirdly, if there are no seemingly relevant laws, they then must argue for the admission to consider a later time frame. Often, this argument concerns a specific societal change that was not present previously, such as new technology, a shift in manufacturing and/or a stark increase in violent crime.

Founding Era: Firearms Technology

Although many cases are being heard in the courts, two of the most relevant concern repeating firearms, specifically the examination of 1. magazine restrictions and/or 2. assault weapons bans. While these definitions differ from state to state, the general rule of thumb is the regulation of detachable magazines over ten rounds and/or semi-automatic centerfire (sometimes rimfire) rifles with certain features, such as pistol grips, folding or telescoping stocks and threaded barrels.

Expert reports on both sides lay out histories of repeating firearms, usually with a focus on magazine-fed firearms and repeating firearms over ten rounds. Both sides agree that these technologies did exist, but they do argue the extent to which they are applicable to modern firearms and law. Often referenced firearms in these reports are repeaters such as the magazine-fed Kalthoff (1630s), Lorenzoni (1660s), Cookson (1756), Girardoni (1770s) and Belton-Jover firearms (1780s). (Figure 1) Another non-magazine repeater that garners a lot of attention is the original superposed design for the Belton Fusil (1750s), as well the Chambers repeating firearm (1790s). And recently, the Dafte self-rotating revolver (1680s) has entered the conversation on the side of those seeking less regulation.[6]

References to these firearms are used to argue several points. 1. As previously stated, whether the technologies are comparable to their modern counterparts. 2. The next concern is if people would have known about the existence of these technologies. Both sides do so through an examination of a) quantity found in America at the time of the Founding Era b) whether foreign-made examples would be known in the states and c) whether a technology's success or failure impacts a general population's knowledge of their existence (Figure 2). This determination is crucial to another part of the *Bruen Test* – historic laws.

Founding Era: Laws and Relevance

After identifying technological developments, the following step concerns how these technologies were regulated, if at all. This is the most important component of the *Bruen Test*, providing guidance for how to determine a historical *analogue*. While the law does not

This is to give Notice to all Perſons that have any Demands on the Eſtate of Mr. *Joſeph Maſſey* deceaſed, to bring in their Accounts, in order that all poſſible means may be uſed to diſcharge the ſame, and all ſuch as are indebted to the ſaid Eſtate, are deſired to pay the ſame by the 1ſt of *Auguſt* next without fail, to *Philip Maſſey* Adminiſtrator of the ſaid Eſtate, living at the Sign of the Croſs Guns between Mr. *John Brand* and the Printer. He has to be ſold a Silver hilted ſmall Sword, two Silver Watches, a ſix times repeating Gun, a chamber'd Gun, and a double barrel Gun, &c. a pair of Smith's large double bellows, a new Anvil with a Beack-iron to it, ſundry pair of large Vices, ſortment of Files and many other tools, &c. a hiſtory of Mines and Minerals, *Harris*'s Lexicon technicum, in Folio two Volumes, and many other Books of the Mathematicks, all which will be ſold very reaſonable for ready Money.

N B. Whereas a Book in folio, intitled, *the Conſtruction and principal uſe of all mathematical Inſtruments*, tranſlated from the French of Mr *Bion* by *Edm Stone*, and ſeveral other Books have been lent out by theDeceaſed, the Perſons who have the ſame in poſſeſſion are kindly intreated to return them to PHILIP MASSEY.

Figure 2. This image depicts an advertisement for an estate sale in South Carolina in 1736. Among the items listed are repeating firearms. The *South Carolina Gazette*. No 125. June 12-June 19, 1736.

have to be a twin of a past law, there is some guidance to consider as "*courts should not 'uphold every modern law that remotely resembles a historical analogue*."[7] It should be noted however that the ways to interpret these guidelines are vague.

While technology has a straightforward history, regardless of whether the conclusions differ, the dialogue on relevant laws gets more complicated. While it is understood that early firearms laws did center around the regulation of people rather than technology, the arguments for why, are quite divergent.[8] Since those laws do not focus on firearms, ammunition or their features, some people shift focus on whether the regulation of trap guns and powder limits in the home count as analogues to modern laws through the lens of public safety.

One side argues that militia laws often contain carry requirements rather than restrictions of ammunition and arms. For example, in the Massachusetts Law of 1649, militiamen were required to carry twenty bullets. In 1785, Virginia required individuals to carry a cartridge box, four pounds of lead, including twenty blind cartridges. In 1786, New York signed into law a statute that required a box of no less than twenty-four cartridges. Even Paul Revere's Minutemen required individuals to carry thirty bullets and gunpowder.[9] That side argues that the legal requirement of a minimum number of munitions to be carried on one's person dispels any referenced historical analogue that would support a restriction of repeating firearm capacity.

The other side argues though that powder restrictions on the amount of powder one can possess in their home proves the opposite. Public powder houses provided a structurally safe place to store powder for people. In 1725 Philadelphia, the government enacted a law "for the better securing of the city of Philadelphia from the Danger of Gunpowder." Under this Act, it also identified the distance of beyond two miles outside of town limits to be safe. Similarly, Boston in 1783 also made a storage law citing the instability of black powder. "In the houses of the town of Boston, [it] is dangerous to the lives of those who are disposed to exert themselves when a fire happens to break out in town." While the above example concerned town limits, some places created an identifiable safe distance from the Powder House itself. For example, in 1762, Rhode Island enacted "that no person whatsoever shall fire a gun or other fireworks within one hundred yards of the said powder house." These laws, often referred to as fire prevention laws, were established for the purpose of public safety. As a result, this side argues that the government intervening for public health sets a precedent for laws regulating other firearms and features today that they associate as dangerous.

The search for a historical analogue has caused many to look deeply into the laws of the past and unsurprisingly, each side reaches different conclusions. Although it's interesting to note that both sides have successfully argued their positions in court since *Bruen*. The appeal process, however, reveals the larger grey area of this test because a win one day could still be a loss the next.

An Acceptable "Expert"

The establishment of the *Bruen Test* has created a flurry of activity within the history field, not all for the positive. In fact, an extreme amount of gatekeeping now exists to identify the adequacy of an individual's background and their sources to determine how much weight to give an expert report. While that sounds like a perfectly acceptable concept, it has devolved into a fight, with little respect being shown, between traditional academics, Ph.D.'s and J.D's versus nontraditional scholars, collectors and curators.

The problem lies in the ways to identify good scholarship. It is believed that the university system of peer-review is a superior process to research done by collectors. However, as the study of the technology of firearms is lacking within the academic community, their works are often riddled with flaws that cannot be caught through peer-review because the field has limited peers. On the other hand, firearms researchers and collectors do not need to go through the same rigors of peer review, so it can be difficult, unless one knows the scholars, to identify gun lore from fact. In essence, the courts must take the expert's word for it, which causes great confusion. In the end, the fate of firearms history, in a post-*Bruen* era, is unfairly left to lawyers and judges who do their best in determining historical legitimacy - a unique challenge to the future of firearms scholarship.

Endnotes

1. Hubler, Shawn. "In the Gun Law Fights of 2023, a Need for Experts on the Weapons of 1791." *The New York Times*. March 14,2023 <https://www.nytimes.com/2023/03/14/us/gun-law-1791-supreme-court.html> Accessed July 5, 2023.
2. This document makes great use of the following document: Johnson, Nicholas, Kopel, David B., Mocsary, George A, Wallace, E Gregory, & Donald Kilmer. *Firearms Law and the Second Amendment Regulation, Rights and Policy* (3rd ed. 2021) 2022 Supplement (August 2022). It provides a succinct summation of the Bruen decision. This particular reference is from pgs 86-88 quoting Bruen at 2136 (quoting *Heller* at 634-635).
3. For reference, the courts decided that analyzing the Founding Era only was sufficient for their ruling.
4. Wallace, pg 86; *Bruen* at 2136 (quoting *Heller*, 554 U.S. at 605)
5. Ibid pg 87 *Bruen* at 2154

[6] The following is a list of sources where you can find more information on the referenced firearms: (Kalthoff) Houze, Herbert G and Ashley Hlebinsky, Co-Curators. "Art of the Hunt: Decorated European Sporting Arms from 1500-1800." Exhibition. Houston Museum of Natural Science, 2019; (Lorenzoni) <https://royalarmouries.org/stories/our-collection/the-christmas-connection-to-captain-souths-lorenzoni-pistol-our-collection/> Accessed June 15, 2023; (Dafte) Ferguson, Jonathan. "An Important Early Self-Rotating Revolver c. 1680, possibly by John Dafte." *The Antique Arms Fair at Olympia Londo*n. Pg. 30; (Belton) Kopel, David and Joseph Greenlee. "The History of Bans on Type of Arms before 1900." *Journals of Legislation*, page 38; (Cookson) National Firearms Museum <https://www.nramuseum.org/the-museum/the-galleries/the-road-to-american-liberty/case-22-the-paper-cartridge/cookson-volitional-repeating-flintlock.aspx> Accessed July 5, 2023; (Belton-Jover) < https://www.youtube.com/watch?v=-wOmUM40G2U> Accessed June 15, 2023; Fagal, Andrew J.B. "The Promise of American Repeating Weapons, 1791-1821. *Age of Revolutions*. <https://ageofrevolutions.com/2016/10/20/the-promise-of-american-repeating-weapons-1791-1821/> June 15, 2023

[7] Wallace, pg 88 *Bruen* at 2131-2133. According to the authors: "the analogue must be "relevantly similar." One measure of these laws to consider according to *Heller and Mcdonald v. Chicago* (2012) is through "at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed defense." The how is defined as "whether modern and historical regulations impose comparable burden on the right of armed self-defense." The why is defined as "whether that burden is comparably justified."

[8] One of the best resources to search all firearms laws is the Duke Center for Firearms Law. <https://firearmslaw.duke.edu/> Accessed 10/25/2022.

[9] This information is compiled and referenced from Virginia Duncan et al v Bonta (2019) in the Order granting plaintiff's Motion for summary judgment, referencing *United States v. Miller* (1939)

[10] 1725 Pa. Laws 31, An Act for the Better Securing of the City of Philadelphia from the Danger of Gunpowder <https://firearmslaw.duke.edu/laws/1725-pa-laws-31-an-act-for-the-better-securing-of-the-city-of-philadelphia-from-the-danger-of-gunpowder-%c2%a7-2/> Accessed 10/25/22

[11] Thomas Wetmore, Commissioner, The Charter and Ordinances of the City of Boston <https://firearmslaw.duke.edu/laws/thomas-wetmore-commissioner-the-charter-and-ordinances-of-the-city-of-boston-together-with-the-acts-of-the-legislature-relating-to-the-city-page-142-143-image-142-1834-available-at-the-making-of/> Accessed 10/25/2022

[12] 1762 R.I. Pub. Laws 132 <https://firearmslaw.duke.edu/laws/1762-r-i-pub-laws-132/> Accessed 10/25/22