1-2023

No Balancing For Anticonstitutional Government Conduct

Bruce Ledewitz
Thomas R. Kline School of Law of Duquesne University, ledewitz@duq.edu

NO BALANCING FOR ANTI-CONSTITUTIONAL GOVERNMENT CONDUCT

*Bruce Ledewitz**

I. INTRODUCTION: ANTI-CONSTITUTIONALITY

Noted Supreme Court critic Eric Segall has been criticizing the majority opinion in *New York State Rifle & Pistol Ass'n v. Bruen*[1] for its failure to engage in any kind of means-end balancing in striking down a New York gun control measure—balancing that he argues the Court has engaged in since the Reconstruction era.[2] Segall is hardly the only American law professor to level this charge.[3]

But the lack of balancing in *Bruen* is neither unprecedented nor methodologically innovative. It certainly does not reflect a victory of originalism.[4] Instead, the *Bruen* decision stands firmly in the tradition that courts do not engage in balancing when confronting a certain kind of unlawful government action.[5] I call that kind of conduct anti-constitutional, as opposed to the more usual unconstitutional government conduct.

Although this terminology is novel,[6] the distinction is nothing new.[7] Most of the time, when regulating in the field of constitutional rights, the government itself balances the weight of its interests against the importance of the

* Professor of Law and Adrian Van Kaam C.S.Sp. Endowed Chair in Scholarly Excellence, Thomas R. Kline School of Law of Duquesne University.

1. 142 S. Ct. 2111 (2022).

2. Eric Segall, *Text, History, and Tradition in the 2021-2022 Term: A Response to Professors Barnett and Solum*, DORF ON L. (Feb. 1, 2023, 7:30 AM), http://www.dorfonlaw.org/2023/02/text-history-and-tradition-in-2021-2022.html [https://perma.cc/S4KC-92L5].

3. *See, e.g.*, Albert W. Alschuler, Twilight-Zone Originalism: The Supreme Court's Peculiar Reasoning in *New York State Pistol & Rifle Association v. Bruen* (forthcoming 2023), U of Chi. Pub. L. Rsch. Paper, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4330457* [https://perma.cc/JX7R-FK9R].

4. See A.W. Geisel, Bruen is Originalish (Jan. 23, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335950 [https://perma.cc/8MWA-ZDTX].

5. *See infra* Section II.

6. "[T]he term 'anticonstitutional' does not appear frequently in the literature . . . ." Katherine Shaw, *Impeachable Speech*, 70 EMORY L.J. 1, 49 (2020). David Kopel utilized the concept of anti-constitutional purpose in constitutional adjudication, David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417, 461–64 (2014), but my suggestion does not address purpose, *see infra* Section II.

7. *See infra* Section II.

constitutional value at issue.[8] When the government judges that balance differently from the way the courts do, a good-faith error has been made and the government action in question—whether a statute or some administrative decision—may be held unconstitutional.[9] In contrast, cases involving anti-constitutional government conduct do not follow this pattern.

II. SUPREME COURT PRECEDENT: BALANCING AND NO BALANCING

A typical case of unconstitutionality in the introductory constitutional law curriculum is *Lorillard Tobacco Co. v. Reilly*.[10] In that case, apart from other issues, the Court struck down Massachusetts's regulations that prohibited smokeless tobacco or cigar advertising—the Court also held that state regulation of the location of cigarette advertising was preempted—within 1,000 feet of schools or playgrounds.[11]

Justice O'Connor's majority opinion applied the *Central Hudson*[12] balancing test to assess the permissibility of the government's regulation of commercial speech.[13] The Court held that the First Amendment protected the advertising, as the advertising was a lawful activity and was not misleading, the government's interest (keeping minors from using tobacco products) was substantial, and the advertising ban advanced that government interest directly.[14] But the ban was deemed unconstitutional because it was more restrictive than necessary to serve that interest.[15]

In reaching that conclusion, O'Connor noted that, in some areas of the state, the 1000-foot prohibition would practically amount to a complete ban on advertising these products to adults, at least in terms of outdoor advertising.[16] Given the relatively small advertising budgets of some of the retailers affected by the ban, this burden on commercial speech was too great to justify a statewide restriction that did not take local conditions into account.[17] Whatever one thinks of this decision, it presumably represents the kind of means-end balancing that Segall argues the Court should have conducted in *Bruen*.[18]

But there is another context in which government regulates constitutional interests. In this context, the issue is not the importance of a constitutional value given the weight of other interests but whether a constitutional value is present at all. For various reasons, the government may not believe a constitutional value is present. If the courts disagree, the interests that the government is serving,

8. *Id.*
9. *Id.*
10. 533 U.S. 525 (2001).
11. *Id*. at 550–51.
12. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).
13. *Lorillard Tobacco Co*., 533 U.S. at 554–63.
14. *Id.* at 554–55.
15. *Id.* at 561.
16. *Id.* at 562.
17. *Id.* at 563.
18. *See Segall*, *supra* note 2.

though weighty, may not be the kind of interests the courts are willing to consider when constitutional rights are at stake.

This is what occurred with the anti-pornography ordinance that Catharine MacKinnon and Andrea Dworkin drafted in the 1980s, which was adopted first in Minneapolis and later in other municipalities.[19] The ordinance defined pornography as the "graphic sexually explicit subordination of women through pictures and/or words," defined trafficking in pornography as sex discrimination, and granted a damage action to any person aggrieved by a violation of the ordinance.[20]

The Indianapolis version of the ordinance was struck down by the Seventh Circuit in an opinion by Judge Easterbrook, whose judgment was affirmed without opinion by the U.S. Supreme Court.[21] Easterbrook explained that the court accepted the premise of the ordinance that depictions of subordination tend to perpetuate subordination, resulting in genuine and serious harm to women.[22] But this just showed the power of pornography, as defined by the ordinance, as speech.[23] Thus, the ordinance, by its terms, rejected the First Amendment's commitment that the government may not censure ideas regardless of how damaging those ideas are.[24]

In terms of balancing, there was nothing for the court to do:

> We do not try to balance the arguments for and against an ordinance such as this. The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way—in sexual encounters "premised on equality"—is lawful no matter how sexually explicit. Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.[25]

In describing a government action as anti-constitutional, I do not mean to suggest that the government action in question is reprehensible. It may simply be, as was the case with the pornography ordinance, that the government and the courts disagree about the interpretation of the constitutional value at issue. Anti-constitutional should be understood as meaning anti-constitutional as the courts currently understand the Constitution.

Nor am I describing the government's purpose or motive. It may happen that the government is acting with an anti-constitutional motive but will be judged by the courts to have acted constitutionally, given the government's proclaimed justification for its action.

19. *See* Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 607–08 (1987).

20. *Id.* at 619.

21. Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), affirmed 475 U.S. 1001 (1986).

22. *Id.* at 329.

23. *Id.*

24. *Id.* at 329–30.

25. *Id.* at 325.

Arguably, this occurred in *United States v. O'Brien*,[26] where a conviction for knowingly destroying one's draft card was upheld against a challenge that the government had targeted draft card burning in protest of the Vietnam War.[27] Chief Justice Warren's majority opinion refused to consider "this alleged illicit motive" as a basis for striking down an otherwise valid government action.[28] It is not motive or purpose in a government action like the pornography statute that renders it unconstitutional without balancing. It is simply that what the government has done that constitutes a rejection of the constitutional value as the courts understand it.

The anti-constitutional/unconstitutional distinction clarifies the structure of many areas of constitutional law. For example, the unanimous opinion in *Brown v. Board of Education*[29] did not engage in any sort of balancing because the case changed the meaning of Equal Protection.[30] Prior to *Brown*, separate but equal had been held to satisfy Equal Protection under the regime of *Plessy v. Ferguson*.[31] But once the Court decided that separate but equal was inherently unequal and damaging to students of color,[32] the idea of balancing that harm against the benefits that racial segregation brings to some whites would have been a repudiation of Equal Protection.

Conversely, in the realm of prior restraint, despite being often described as categorically prohibited, the per curiam decision in the *Pentagon Papers* case[33] specifically pointed to the "'heavy burden of showing justification for the enforcement of such a restraint,'" a burden that a majority of the Justices held had not been satisfied.[34] The reason that balancing was appropriate in *Pentagon Papers* is that the government correctly acknowledged the constitutional value of the prohibition against prior restraints but argued that under the unique circumstances of that case, with its attendant threat to national security interests, issuance of injunctions was nevertheless justified.[35] Thus, although the Court ultimately disagreed with the balancing of interests the government undertook,[36] the government action in seeking injunctions in the case was unconstitutional rather than anti-constitutional.

26. 391 U.S. 367 (1968).
27. *Id.* at 382.
28. *Id.*
29. Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan, 347 U.S. 483 (1954).
30. *See id.* at 493–95.
31. 163 U.S. 537 (1896).
32. Brown, 347 U.S. at 494–95.
33. N. Y. Times Co. v. United States, 403 U.S. 713 (1971).
34. *Id.* at 714.
35. United States v. N.Y. Times Co., 328 F. Supp. 324, 330 (S.D.N.Y. 1971).
36. *N.Y. Times Co.*, 403 U.S. at 714.

III. APPLYING THE ANTI-CONSTITUTIONALITY DOCTRINE TO *BRUEN*

Given the conceptual framework of unconstitutional, as opposed to anti-constitutional, government conduct, *Bruen* becomes an easy case in which balancing would have been inappropriate.

Under a 1913 amendment to New York's "Sullivan Law," any person was required to show "proper cause" to receive a license to carry a firearm outside the person's home or place of business.[37] The New York courts had defined proper cause as "a special need for self-protection distinguishable from that of the general community."[38] Since the Supreme Court held in *District of Columbia v. Heller*[39] that the Second Amendment protects the right of self-defense—presumably including the ordinary need for self-defense in the general community—New York was rejecting the constitutional value at issue: the right of ordinary people to carry a firearm outside the home without any "special need."[40]

Just as the First Amendment does not balance the worth of ideas,[41] the Second Amendment does not balance the need of ordinary people for self-defense. Ordinary self-defense is in part precisely the right that the Amendment protects.[42] The only question in *Bruen*, really, was whether that right of self-defense extends from the home, as found in *Heller*, to carrying a firearm in public.[43] The home/public distinction did not cause the Court much difficulty since self-defense in public is where the greatest need for self-defense would be.[44] New York's regulation took a different view of the right to bear arms, and this different view explains why the ordinance can be regarded as anti-constitutional given the Court's understanding of the Second Amendment.

In his concurrence, Justice Alito memorably captured the sense of this different view in characterizing Justice Breyer's dissent: "the real thrust of today's dissent is that guns are bad."[45] New York's approach to firearms starts with the assumption that the more people carry guns, the more likely gun violence becomes.[46] Therefore, restrictions that keep guns out of the hands of ordinary people should be the norm.[47] Possessing a firearm, especially in public, should be some kind of rare exception.[48]

This is not only a reasonable view of public policy—certainly one that I share—but it is also consistent with a different understanding of how the Second Amendment should be interpreted. And under this view, the special reason for

37. N.Y. State Pistol & Rifle Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2122 (2022).
38. *Id.* at 2123.
39. 554 U.S. 570 (2008).
40. *Bruen*, 142 S. Ct. at 2156.
41. Ayers v. W. Line Consol. Sch. Dist., 555 F.2d 1309, 1319 (5th Cir. 1977).
42. *See generally Heller*, 554 U.S. 570.
43. *Id.* at 635; *Bruen*, 142 S. Ct. at 2122.
44. *Bruen*, 142 S. Ct. at 2135.
45. *Id.* at 2160 (Alito, J., concurring).
46. *See id.* at 2157 (Alito, J., concurring).
47. *See id.* at 2164 (Breyer, J., dissenting).
48. *See id.* at 2167 (Breyer, J., dissenting).

needing a firearm implied by New York's proper cause standard makes perfect sense.

But if the Second Amendment is interpreted as considering guns to be a good thing for people to have even in public—which is how this Court currently sees it—New York's starting point is simply anti-constitutional. Similarly to *Brown* and Equal Protection, no court could balance New York's mistaken starting point against the public good of less gun violence that its supporters claim would result from removing guns from ordinary people. The Second Amendment requires that such evidence be ignored, just the Court ignored in *Brown* any suggestion that racial segregation might have beneficial results.[49]

Given this analysis, Justice Thomas's bald statement that *Heller* "does not support applying means-end scrutiny"[50] should not be understood as a general limit on balancing under the Second Amendment. In context, the requirement that any regulation of firearms must be "consistent with the Second Amendment's text and historical understanding" just means that the starting point of any such regulation cannot be at odds with the Second Amendment itself.[51] Gun regulation must have as its starting point that ordinary people have a right to bear arms.

IV. IMPLICATIONS OF *BRUEN* THROUGH ANTI-CONSTITUTIONALITY

There is thus no reason to distrust Justice Alito's insistence that the *Bruen* decision says nothing about who may have a firearm or the type of firearm that people may generally possess.[52] There is no reason to think that the particular question raised by Albert Alschuler, "whether requiring applicants for firearms permits to complete and pay for 18 hours of firearms training violates the Second Amendment," is particularly difficult.[53]

Nor is there any reason to doubt that courts will engage in means-ends balancing in deciding that question. Even if it is assumed that there were no requirements for gun-safety training during the Founding Era or period of Reconstruction (perhaps because the widespread use of firearms in these periods led to the presumption that no such training was needed) and that no comparable burden on gun possession was in place during these periods, the Court would likely engage in means-end balancing in deciding on the constitutionality of mandatory firearms training.

The reason for confidence about balancing here is that the government would presumably argue that under modern conditions, many persons who seek to possess firearms for self-defense will be unable to use them for this purpose

49. *See* Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan, 347 U.S. 483, 494–95 (1954).
50. *Bruen*, 141 S. Ct. at 2127.
51. *Id.* at 2131.
52. *Id.* at 2157 (Alito, J., concurring).
53. *See* Alschuler, *supra* note 3.

without training. Because most Americans are unfamiliar with firearm use,[54] it is very likely that many persons using firearms for self-defense will end up either shooting themselves or an innocent bystander, or worse, will end up yielding their firearm to their assailant. Furthermore, without training in firearm safety, many people will not understand the danger of guns, potentially leading to more gun accident deaths. Thus, in this example, the government would be regulating by balancing the burden that is placed on the constitutional value against other interests not incompatible with the constitutional value. It would be a classic context for balancing by the courts.

Of course, gun safety training might be held to be unconstitutional under a balancing approach. The right to bear arms is a constitutional right, after all, and the government will have to demonstrate convincingly that its assertions are true.[55] The Court might also hold that given the right to bear arms, the government will have to subsidize firearms training for persons who are unable to afford the cost. But these are typical issues in all balancing cases.

While there is nothing in Thomas's majority opinion in *Bruen* to justify my assertion that balancing would be done in this situation, there is reason to believe that the Court's current conservative majority is not at all averse to balancing in considering the regulation of constitutional rights in general.

In one of the other momentous decisions of the last term, *Kennedy v. Bremerton School Dist.*,[56] Justice Gorsuch's majority opinion expressly endorsed "strict scrutiny" as the proper standard to measure potential violations of the Free Exercise Clause.[57] The School District argued that it had satisfied that test because avoiding a violation of the Establishment Clause by prohibiting a football coach from praying after a game constituted both a compelling state interest and was narrowly drawn in pursuit of that interest.[58]

The Court not only agreed with the School District's approach to balancing, but the Gorsuch opinion also implicitly conceded that if the coach's actions had constituted a violation of the Establishment Clause, the District would have been justified in prohibiting them and in disciplining the coach when he did not comply.[59] In the end, the Court held that the private prayers of the coach did not violate the Establishment Clause and, therefore, the School District's actions were unconstitutional as lacking a compelling interest.[60]

That the Court in *Kennedy* really was balancing is further reinforced by the references in the opinion to other actions of the coach that were curtailed—offering locker room prayers before games and incorporating religious prayers in postgame motivational talks to the team after games—without any hint that the

54. Jared Keller, *Americans Love Guns, But They Have No Idea How to Use Them*, PAC. STANDARD (Jul. 27, 2017), https://psmag.com/news/americans-love-guns-but-they-have-no-idea-how-to-use-them [https://perma.cc/A8NR-3WSB].

55. *See* Duncan v. Bonta, 19 F.4th 1087, 1108 (9th Cir. 2021).

56. 142 S. Ct. 2407 (2022).

57. The Court also held that Kennedy's right to free speech had been violated. *Id.* at 2421–22, 2433.

58. *Id.* at 2426–27.

59. *See id.* at 2432.

60. *Id.*

District was unjustified in prohibiting these practices by the coach.[61] In other words, in these instances, there might well have been potential Establishment Clause violations that could be balanced against infringements on religious liberty.[62]

Bruen and *Kennedy* were decided by identical 6-3 votes only days apart.[63] It is not reasonable to treat one of these cases as substituting historical analysis for means-end balancing as a general methodology while the other one blithely practices traditional balancing.

V. CONCLUSION

We are in a period of monumental and controversial, change in constitutional interpretation. Many people passionately oppose the new directions in which a conservative Court majority is taking various constitutional values.

But, as the saying goes in financial markets, "don't fight the Fed."[64] If government engages in regulation in accordance with the Court's new constitutional interpretations, the Justices will undoubtedly engage in means-end balancing in traditional ways.

But if government officials reject those new interpretations of constitutional values and regulate from some other understanding, the Court will hold, again and again, that there is no balancing to be done for such anti-constitutional government conduct.

The problem in *Bruen* and other controversial cases should not be described as a refusal to balance. Rather, critics should candidly acknowledge the more fundamental critique: the Justices are misinterpreting the Constitution.

61. *Id.* at 2429.

62. *See id.*

63. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2121 (2022); *Kennedy*, 142 S. Ct. at 2414.

64. *See* Kent Thune, *What Does "Don't Fight the Fed" Mean?*, THE BALANCE (Apr. 9, 2022), https://www.thebalancemoney.com/what-is-the-meaning-of-dont-fight-the-fed-2466886 [https://perma.cc/F3Q6-XQQF].