

NATIONAL REVIEW

How Limiting the Second Amendment Can Also Threaten the First

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January 18, 2023

Whatever one's views of guns in American life, nobody should tolerate diminishing the freedom of speech to inhibit the exercise of another provision of the Bill of Rights.

Last year, the United States Supreme Court struck down a New York law that would have required citizens to show “proper cause” before they'd be allowed to legally carry a gun. In that decision, *New York State Rifle & Pistol Association v. Bruen*, the Court set out a rigorous test for whether a gun regulation is consistent with the Second Amendment. Under *Bruen*, firearm regulations are permissible only if consistent with the “historical tradition” of the right to keep and bear arms.

Several states notoriously hostile to gun rights, such as New York and New Jersey, quickly moved to enact legislation to limit the impact of *Bruen* within their borders. Among other things, both states' laws prohibit carrying firearms in “sensitive locations,” and reverse the presumption of how and when an individual may carry a concealed firearm on private property. New York's bill was challenged as quickly as it was passed, and several parts of the law were recently blocked. And last week, a federal district court temporarily blocked several parts of New Jersey's bill. Both courts held, correctly, that these regulations are unlikely to survive *Bruen's* stringent historical test for Second Amendment rights.

But these laws infringe on another constitutional right, one whose encroachment may not be as obvious at first glance: the First Amendment right against compelled speech.

First Amendment doctrine has long held that the government cannot compel people to engage in particular forms of expression against their will. By requiring businesses who wish to allow, or don't mind, concealed handguns on their premises to post a sign stating that they welcome firearms, the states are doing exactly that.

New York's and New Jersey's laws essentially require these businesses to publicly adopt a position on guns and gun policy — an inherently political subject in 2023. If businesses in generally anti-gun areas decide to allow firearms on their premises and post the state-mandated sign to that effect, they may make themselves targets for boycotts, protests, or even vandalism. When a state forces businesses to adopt and announce such viewpoints, those businesses unnecessarily risk alienating customers and being subjected to retaliation by those who don't share their positions.

Businesses that choose to allow firearms on their premises should not be forced to announce it, as they may choose to allow firearms for any reason or no reason, just as they may any other legal item. Before these laws were enacted, businesses did not have to explain themselves for making that choice. The absence of a sign prohibiting firearms might have meant that the business owners enthusiastically approved of concealed carry or that they simply didn't have strong views either way. Since most firearms are carried concealed (the only way civilians in New York and New Jersey may do so), businesses didn't need to take a public stance on property that is usually out of sight and out of mind.

There is no compelled-speech problem under the traditional presumption, which is that businesses must advise would-be customers only when a licit item is *prohibited* on their premises. Under this traditional rule, a property owner who chooses to exclude firearms from his premises by posting a sign is exercising his right: The state isn't telling him what he must say or how he must say it. In this case, the rights of both gun owners and property owners are left intact; the exercise of one fundamental right isn't set at odds with the exercise of another.

States looking to implement new gun-control measures will inevitably concoct more elaborate regulatory schemes in an attempt to circumvent the Second Amendment's explicit protections. But as the examples of New York and New Jersey show — and since, in the wake of *Bruen*, courts can no longer simply rubber-stamp gun-control laws — these tactics of indirect gun-control regulation are likely to implicate other rights and liberties, beyond those of the Second Amendment.

Whether New Jersey's *Bruen*-response bill survives Second Amendment review in the next phase of litigation, the speech rights at issue here are worth acknowledging and protecting for their own sake. Whatever one's views of guns in American life, nobody should tolerate diminishing the freedom of speech to inhibit the exercise of another provision of the Bill of Rights.

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