

# Episode 207-- How History is Against Expanded Gun Rights

📅 Sat, Oct 15, 2022 1:53PM ⌚ 32:44

## SUMMARY KEYWORDS

gun laws, courts, book, law, gun, second amendment, decisions, history, supreme court, state, constitutional, nullification, bruin, case, happening, judges, brady, originalism, uphold, constitution

## SPEAKERS

Robert Spitzer, JJ Janflone, Kelly Sampson

---



JJ Janflone 00:09

This is the legal disclaimer where I tell you that the views, thoughts, and opinions shared on this podcast belong solely to our guests and hosts and not necessarily Brady or Brady's affiliates. Please note, this podcast contains discussions of violence that some people may find disturbing. It's okay, we find it disturbing too.



JJ Janflone 00:22

Hey everybody, welcome back to another episode of Red, Blue, and Brady. I'm your host today, JJ, and I am so excited to essentially nerd out with our guests today. I am joined by Dr. Robert Spitzer. He's been on the pod before, but today he's joining us to talk all about his new book, which is entitled "The Gun Dilemma: How History is Against Expanded Gun Rights." And it's really that tagline, the how it's against expanded gun rights, that I'm really excited to dig into because contemporary gun discussion is almost always tied to some sort of historical argument, but a lot of times that history is misunderstood or misrepresented. And so I'm really excited to dig in, to talk about what happened in the U.S. in regards to firearm laws, what recent Supreme Court decisions have to say about gun laws, and where we're all going to go from there.



Robert Spitzer 01:29

I'm Robert Spitzer, I'm Distinguished Service Professor Emeritus of Political Science at the State University of New York at Cortland and the author of six books on gun policy. And my newest book is called "The Gun Dilemma: How History is Against Expanded Gun Rights."



JJ Janflone 01:47

Well, and this book was so, so timely. Did you have to rush to get it out, you know, with everything that was happening, sort of, from 2019 with the courts, or?

R

Robert Spitzer 01:57

I did not rush it, but I worked rather long on it. However, the thing that was hanging over my head and that of the book was the Supreme Court, what became the Supreme Court's decision this past summer, in the Bruin case, where, as I predict and assumed in the book, I was completely convinced that the Supreme Court would not only not uphold the New York State carry law, or at least the relevant provisions, but also that it would extend the Second Amendment right, expand Second Amendment rights in some manner. And indeed, it did just that by saying that people now have a right to carry guns around with them out in society for personal protection.



JJ Janflone 02:35

Well, and you do this so beautifully in the gun dilemma, but I think before we can have really any conversation here today, I'm wondering if I can ask you to put your lecturer hat on and break down for our listeners, what originalism as a legal theory, what that even is, and how it's applicable when we're talking about sort of the state of gun laws in the U.S.?

R

Robert Spitzer 02:58

There are two prevailing theories about how to approach interpreting the Constitution. One is what's referred to as the living constitutional view, which says that you look at the Constitution, at the document, at the text, etc., and also history, but you also need to take into account historical evolution over time, and current needs and problems today. Obviously, there are a plethora of things in our life today, that nobody could have anticipated in the 18th century, when the Constitution was written. The competing view is originalism, which essentially was created as a constitutional theory in the 1970s and early 1980s. But basically, it says that your interpretation of contemporary constitutional controversies should be based solely on the text and original meaning of the relevant portions of the Constitution when they were written back in the late 18th century, and perhaps take into account subsequent amendments, most importantly, the 14th Amendment added to the Constitution in 1868, referencing equal protection and due process. And the idea is that you just focus on that alone. Well, okay, that's at least a theory that, you know, seems pretty consistent and coherent, but it's based on a huge presumption, which is that you can actually determine what those things are to a sufficiently concise and precise manner that you can then use that information to judge the constitutionality of laws.

R

Robert Spitzer 04:31

Now, and what it means is that judges increasingly are becoming sort of amateur historians. But, unfortunately, too many judges and lawyers don't do historical originalism very well, as a matter of fact, they do it rather badly. There's even an old term for this. It's been around for years and years called law office history, which means that you reach into history to find little

bits and things that support your argument, regardless of whether it's historically accurate or correct or contextualized, as historians would say. And historians have been fiercely critical of originalism, because a lot of judges and lawyers do it badly.

R

Robert Spitzer 05:10

And I think the example of the Second Amendment is the exemplar of that, of judges interpreting the Second Amendment badly, simply historically incorrectly. And I would make the argument, and many others have that in 2008, when the Supreme Court handed down its well-known, famous and controversial decision of *D.C. versus Heller*, they ruled, five-member majority ruled in 2008, for the first time in history, that the meaning of the Second Amendment pertains to a personal right of an average person to own a handgun for personal self-protection in the home, and essentially pushing aside the militia-based understanding, which is referenced in the first half of the sentence of the Second Amendment. Because the Second Amendment says, "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." And if you look at the debate, back in 1789, in the first Congress, about what that draft amendment meant, because they talked about it, you know, and modified the amendment and if you look at how courts and how it was generally interpreted from 1789, up to and through the mid-20th century, it was as a militia-based, right. That is to say, the right to keep and bear arms pertained only to citizens in service in the context of service in a well-organized and regulated militia, militia, controlled, regulated by the states and or by the federal government.

R

Robert Spitzer 05:10

So they changed this interpretation in 2008. And, okay, I mean, the judges changed the constitutional law, the Second Amendment, they can do that, and they did it and they can change the law, but they can't change the history. And not only, I would argue and many, many other people would too, that they got the history wrong in 2008. I would argue they compounded their error this past summer in the *Bruin* decision, which was a specific challenge to a carry and conceal, the pistol permit law, that allows citizens to carry pistols with them in New York State. That's New York state law, which had been around since 1911. And they struck down a portion of that law, saying that the test essentially was too strict. And even though a great deal of evidence was presented, showing that concealed carry laws were common in the United States. As a matter of fact, from the 1600s, up to the start of the 20th century, every single state in the union restricted concealed carry, except for one state, which I believe was New Hampshire. Every single state did. Concealed carry regulation and restriction was the default. But the court was not persuaded by that historical fact. So originalism, well, it's a coherent theory. But, if you're going to do history, you better get it right. And I just don't think they're getting it right on the second amendment.



JJ Janflone 08:06

Yeah, one of the things I think that you tease out really so well, is that, you know, this view of originalism in some ways, you're right, the history isn't right, because it seems to ignore all previous regulation of firearms or ammunition or weaponry more broadly in the U.S.

R

**Robert Spitzer 08:23**

And it turns out that our past was full of old gun laws. And indeed, the default in our history regarding guns was gun regulation, the old sort of assumption that there's so much a part of our popular culture that every American, especially white males, carried guns with them, that they engaged in constant gunfights, that every adult male owned a gun, knew how to use it, and was skilled in its use. I mean, basically, none of those things are true. I mean, there was gun ownership. Gun ownership is as old as a country, but so are gun laws. And some of the gun law history that I report on in this book is new stuff that I came across that I've not seen commented on or reported anywhere else.

R

**Robert Spitzer 09:08**

So I think it makes a pretty important point about what our history actually is. But it also becomes even more important, because in the Bruin decision from the Supreme Court this past summer, they said that they were changing, the majority opinion was changing the standard for determining whether current gun laws are constitutional or not. And that standard essentially is based on is there a historical precedent or antecedent for these gun laws, current gun laws? And the answer is absolutely, it turns out. So I think some judges will get to the conclusion that they want to get to regardless of the evidence. But if you look at the evidence, the evidence is, I would argue, not only extremely strong but even overwhelming that our history is one of gun regulation, and also regulation of other dangerous weapons. Certain types of knives, certain types of clubs, when they were invented, began to circulate around the country, and those things were restricted too. So that's how this is a more timeless book, I think, because this new history really is the core of what is new about the book and what I think will continue to make it relevant.

**JJ Janflone 10:19**

And one of the things that I think is so useful is that it does directly sort of attack that very American gun mythos, right, of the, I mean, that's tied into a whole lot of other things in the U.S. that we do not have time to get into in this podcast today. But this idea that the original "white American landowning guy," his relationship to firearms, being a very particular relationship that is somehow being replicated now, today. And so I think getting into that directly, all of the misconceptions, I think, is very helpful, particularly for folks who might just now be kind of coming into learning about gun rights and gun violence prevention.

R

**Robert Spitzer 10:59**

Yes. I'm certainly a person who grew up watching cowboy movies, for example, movies about the early days of the country's history, and, you know, well-made movies, entertaining movies, right. But they reflect a misunderstanding of what our past actually was, and actually was like, and there's no clear instance of that, than people's impressions of the American west, frontier west of the really late 18th century, and especially the 19th century. But that was not typical at all of how the west, the old phrase "how the west was won," but how Easterners moved west

and immigrants moved west and gradually settled the area, driving out the Indians, fighting Native Americans in the process, of course. But the process of settling the West really was not attributable primarily to every man carrying a sixth gun. That simply was not the case.

R

Robert Spitzer 12:00

And in addition, there's another kind of evidence of the typical adult male Americans lack of knowledge about firearms, which is the fact that when we had major military mobilizations, most notably the Civil War, 1861 to 1865, the big lesson to military leaders was that the typical military recruit didn't know one end of a gun from the other and had to be trained in that sort of skill.



JJ Janflone 12:27

That's how the NRA initially formed.

R

Robert Spitzer 12:29

That is exactly right that the NRA is created in 1871 by two Civil War veterans, who were appalled at the lousy gun-related skills of the typical young male military recruit. So they formed the NRA to improve shooting marksmanship skills and gun handling skills. Well perfectly fine, but the organization is a testament to the fact that the typical adult white male didn't know one end of a gun from the other. I mean, there was always gun ownership since the very earliest days, that's certainly true. But especially as the eastern portion of the country became settled, as the Native American threat receded, as threats from other nations receded, gun ownership and use declined dramatically. And it was only much later, as gun manufacturers are aggressively trying to sell their weapons to a civilian public because they had a product in search of a market that you began to see gun ownership increase, and also with it, the rise in interpersonal violence.



JJ Janflone 13:31

I, to take a step back, you know, you mentioned, in particular *Heller* and *Bruin*, which I think if you do anything related to gun violence prevention, those are two court cases that you're like, can win that pub trivia inside and out, you know, those two quite well. But there was an additional case that you bring up in the gun dilemma that I found incredibly interesting, that I was not familiar with despite being in this space, and that was the case of *Printz*. And I'm wondering if we can talk about that. But *Printz* versus the U.S. and why that case, in particular seems like it actually was incredibly significant too, but doesn't really get the attention that *Heller* does.

R

Robert Spitzer 14:10

Yes, in the 1990s, there was a Supreme Court case, the *Printz*, P-R-I-N-T-Z case, 1996, I believe, and it was a decision where the Supreme Court for I think the second time in recent decades, ruled against Congressional power. In this case, it had to do with a federal law, the Brady law that

ruled against Congress' power. In this case, it had to do with a federal law, the Brady law that required local law enforcement to conduct background checks. The law was challenged on the argument that the Congress didn't have the power to tell local law enforcement that they were required to conduct background checks. The Supreme Court majority agreed. So it was a limitation on the federal government's power and you can debate about where the line should be drawn between federal government power and state government power. But also in that decision, one of the Justices, Clarence Thomas, who wrote the majority opinion in the Bruin case last summer, so he writes a concurring opinion where he raises an issue that didn't come up in the Printz case. That is, what about second amendment rights?

R

Robert Spitzer 14:10

And he essentially, in a footnote, invited challenges to gun laws based on Second Amendment, right to bear arms grounds. And that was an important turning point, because it emboldened and encouraged others, to start to bring such litigation. And indeed, what happens, 12 years later, comes the Heller decision, 2008. And the court was now more conservative, owing to new appointees than it had been in the 1990s or 80s, or 70s, or before, and indeed, there were five members who are now willing to say, yeah, we're going to expand and redefine the nature of Second Amendment. So yeah, the Printz decision was, and judges do this, Justices do this, they'll drop hints or say, you know, we don't have this issue before us, but why don't you bring a case like this? And that's just what Clarence Thomas did, in his concurring opinion in Printz. And here we are.



JJ Janflone 16:08

Having not known any of this, I think it makes such a good case for why it's really important for everyone, whether you're, you know, a legal scholar or historian or not, you know, to be reading these decisions, because it does seem like they're really hinting, you know, where the courts are going to go.

R

Robert Spitzer 16:17

Yes, indeed, yes. And I cite other studies at the beginning of my book, where other researchers have plotted the ideological direction of the Supreme Court and other federal courts. And what they have observed is that the courts have become more conservative. And you know, you have ideological swings back and forth, but that in the last decade or so, thanks, mostly to appointees from the George W. Bush administration, and the Donald Trump administration, and Trump was, even though he was only in office for one term, he was unbelievably successful, thanks to Republican leader in the Senate Mitch McConnell, in filling essentially every judicial vacancy that existed, which is not something that past presidents have been able to do. And so he had a disproportionately greater impact on the makeup of the federal courts and of the Supreme Court.

R

Robert Spitzer 17:14

And indeed, the court now is more conservative or right-wing or however you want to characterize it, than it has been in nearly 100 years. I mean, it has moved based on ideological

examinations of their decisions, far, far, far, far to the right. And that has set the stage not only for the Bruin decision this summer, but a whole host of other decisions that I'm sure your listeners are well acquainted with, like the Dobbs ruling that overturned Roe versus Wade, the abortion rights case from 1973, and many other decisions and many more to come. So I thought it was important for me to talk about that, because it's a very specific and sharp rightward turn among the courts, but especially the Supreme Court. And that puts us where we are, yes.



JJ Janflone 18:00

Yeah, I wanted to make clear to our listeners that you. I mean, obviously, we're focusing on the Supreme Court at the moment here, understandably, I think, but you do make the case within the text, and this is why I highly recommend the book, that you know, that these decisions are also happening at lower courts as well. We're seeing this happen. You mentioned, you know, at the same time that gun laws actually had sustained popularity amongst the majority of Americans, that there's this decline, though, in the popularity or the the willingness of courts to uphold or push and in fact, are seem to be focusing on rolling it back, which is a very strange dichotomy that on one hand, you have a public that's said, you know, hey, for quite a long time, these are the things we've wanted, but at the local, state and kind of federal level judges are making the decisions of no, no thanks.



Robert Spitzer 18:48

And that is why I titled the book "The Gun Dilemma," because we are at this sort of fork in the road, this dilemma point where public opinion polls show clearly that large majorities of Americans favor stronger gun laws. And that is not a new phenomenon. It's been true in public opinion for decades. But there have been fluctuations over time. But we're in a period right now, where the degree of public support for stronger gun laws is very high. And yet we're at the very, at this very same point, where we have a federal court system and many state courts as well, where the courts are going really in the opposite direction. And the Bruin decision from this summer, expanding gun rights for the first time in history, demonstrates this stark split between where the courts are going and where the public is.



Robert Spitzer 19:37

And, you know, I understand, and I'm sure our listeners, the listeners understand that. It's the job of the courts after all to interpret the law and make legally based decisions based on legal factors, not be sitting with the latest Gallup opinion poll on your desk to decide how you're going to rule, but that takes us back again to the basis for the decisions that they're making, and among other things, the decisions are extremely anti-historical, ahistorical. So they're not really abiding by even the evidence that they claim they are being guided by. And public opinion does matter. We are still a democratic nation. Yes, we have a republican form of government, but we still count ourselves as a democracy where public opinion has to mean something. And we also know that, despite protestations to the contrary, the courts over time do tend to kind of follow public opinion in a very general way. And that's not, I would argue, that's not a bad thing. I mean, public will and the public good needs to count for something in a democratic society. And that doesn't mean that a court decision should rest on where the 51%

of the public supports it or not. Again, I understand that, and, and any lawyer would, as well. But the broader context of the public will certainly matters. And if historical gun laws matter, and they say they do, what the historical gun laws tell us is that the court has when it comes to guns, at least, his getting the history wrong.



**JJ Janflone 21:10**

I think it, that whole section on the idea of like innovation and regulation happening together, in many ways, I think, is incredibly useful, because I do, you know, if you spend any time in the gun violence prevention space, you do get this argument that comes up again, and again. You know, on one side, folks will say that, you know, the founding fathers certainly did not know that an AR-15 was going to exist, and then another side will come back and say, well, yes, it doesn't matter. The law is the law, a gun is a gun. And so you know, the laws don't need to change to reflect technology. But we know that's not the case. And having more, I always just ended up citing the laws changing in the 20s, over tommy guns and things of that nature, but knowing that even pre sort of what we would define as modernity that that's happening, I think, is really, really useful.

**R**

**Robert Spitzer 21:56**

It absolutely is. And no matter what your approach to the Constitution is, or current controversies, it's important to know our history, just because it is. And for me, that's more than reason enough to, to have written this book. Because, you know, this is very interesting to me. I've been, I'm a trained political scientist, I'm not trained as a historian, but most of my professional writing and career have revolved around studying constitutional history, legal history, America's political development as a nation. So just knowing this history is useful, valuable and enlightening for us. And then when you apply it to the contemporary gun debate and gun controversy, I think it casts a light on the contemporary debates we're having in a much different way.



**JJ Janflone 22:49**

Well, speaking of controversy, I really want to dial down on something that you discuss in the book, too, which is the rise of the so-called Second Amendment sanctuaries. I wonder if we can talk about you know, what they are? And what sort of their existence, how this relates to the decisions that are being made in the courts?

**R**

**Robert Spitzer 23:07**

Yes, this has been a widespread movement in the United States, but it is one that has received remarkably little attention. So second amendment sanctuary is the term that its supporters have applied to their movement of the states and many localities around the country, counties, towns, for the most part of more rural conservative areas, who adopt resolutions or laws saying that they will not follow any gun laws that they believe violate their Second Amendment rights.



Now, this is based on what? Well, it's based on their own opinions about what they think is a constitutional or unconstitutional gun law. And that's a problem on its face, because these things are not purely subjective.

R

Robert Spitzer 23:50

I mean, we have a system of courts, in part to conclude, well, some things are constitutional, some things are not. And in the past, gun laws around America, when they have been challenged in court, have for the vast majority of time, been upheld as constitutional. That's going to be changing now, I think, to some degree, with this new, more conservative decision coming this past summer. But you know, we have legislators who enact laws, we have executives who carry out laws, we have courts that adjudicate laws. And there is no such thing as the right of a township, let's say, to just say on its own well, we don't like the new gun law that our state passed, or we are afraid of the and we disagree with the new proposed law that they might pass, such that if they enacted law, we're going to ignore it, we're not going to carry out that law.

R

Robert Spitzer 24:39

Well, you know, when you're a local office holder, you swear an oath to uphold your usually, your state constitution and the federal constitution, and you're not upholding either those things when you're just deciding on your own you're going to ignore lowest laws that you just don't like, because that's what it boils down to. And most of these resolutions are purely symbolic. That is they don't have any heavy hammer, any enforcement mechanism, except some are starting to adopt measures that provide for enforcement. The state of Missouri has enacted a very, pretty harsh law of this sort a year or two ago. And it's tied up in the courts now, as you can well imagine. And the governor has said, well, we need to look at this, again, to fix it. But it's this sort of broader movement, that's a very important understand, partly because it's not a new idea. And I talked about the history of this kind of thinking in America.

R

Robert Spitzer 25:35

And it actually goes back to the pre-Civil War era, and the embrace by the south of the doctrine of nullification, which said, it came from the brain of then-Senator John C. Calhoun. Actually, he was vice president by then, saying, well, the southern states are afraid that the federal government might curtail slavery, or try to force us to set our enslaved persons free. And so we are adopting this idea of nullification, saying that a state on its own can nullify federal law, if it thinks that law is not appropriate, and precipitated the nullification crisis of the early 1830s. It was diffused, but it was a central sort of pillar of the ideology that ultimately led to the Civil War, and not nullification as a constitutional theory or doctrine has been thoroughly refuted, for obvious reasons. Not to mention by, even by the Civil War, and the enactment of the post-Civil War, constitutional amendments, but the idea hasn't died. And it cropped up in the South, when the southern states were fighting and opposing racial integration. And a different version of the idea, has been of sanctuaries, has also been adopted by pro-immigration groups. And this is where the Second Amendment sanctuary people got their name from.



JJ Janflone 27:04

And but yet, though, they do seem to be spreading, and, you know, you open the book, sort of with this prediction that came true, right that we see it in the Bruin decision. And I'm wondering if I can ask you, you know, if you're comfortable, I know, no one ever is when I ask this question, but forecasting, you know, into the future, where do you think you see gun laws and sort of this strange mix of American opinion, right, this almost stratification of opinion on gun laws going in, you know, 2023 and beyond?

R

Robert Spitzer 27:38

I think there's two phenomena that I would identify. The first is what's happening in the States and has been happening in recent years, which is that liberal states have been adopting stronger gun laws, conservative states have been doing the opposite, rolling back their gun laws. So they've been moving farther apart. That's also part of the gun dilemma. We've become a more bifurcated nation, not just on the gun issue, but it's a good example of that. And I think that will continue.

R

Robert Spitzer 28:04

The other element to this is what's going to be happening, especially in the federal courts. I mean, we saw this past summer, within weeks of when the Court handed down the Second Amendment Bruin decision, Congress and the president, a closely divided Congress and President Biden, getting together and successfully enacting the first significant national gun law in nearly 30 years. And its supporters, some of them criticize it for not going far enough, and you can debate that, obviously, but the fact is, they enacted it, and it has some significant provisions in it. So the key question to me is, what's going to be happening with the composition of the federal courts in the next several years? And that will depend directly on who succeeds President Biden, whether it's after one term or two terms, and who controls the United States Senate, because the Senate, of course, confirms judicial nominees. And, you know, if the Democrats, who are obviously the more liberal, more liberal political party maintain that control, then you will see the composition of the judiciary change over time, although the Supreme Court still has fairly young members on it, relatively speaking, and if not, you'll see the judiciary going in the other direction. So it depends very much on those things. And I could not hazard a guess as to what the likely outcome of the elections of 2022, 2024, 2026 and 2028 are going to be, but they will be decisive.



JJ Janflone 29:38

Dr. Spitzer, this was amazing. And there were about a thousand things in the book that I wanted to talk about with you that we did not have time for today. So I highly recommend folks pick it up. And where can they do that?

R

Robert Spitzer 29:48

Well, thank you. My newest book, "The Gun Dilemma," it's just published by Oxford University Press. It's available on amazon.com, on Barnes and Noble, on the Oxford University Press

website, and I'm happy if anybody's interested enough to purchase a copy. The other book of the several on gun policy I've written that I would mention is called "The Politics of Gun Control." It's kind of an A to Z look at the issue, looking at law, history, politics, policy, criminology, and that book is now in its eighth edition. So it's been around for almost 30 years, I'm very proud to say, especially in these days, where book publishing has become a pretty tight business. And it is, it's a book that's often used in college classrooms as well, aside from others who have an interest in the issue.



JJ Janflone 30:39

Well, of course, we will link to you and your texts, and where folks can find them in the description of the episode. So thank you so much for being here and for sharing your research with us this is this is really, really helpful. So I think it made it really pretty clear, I really enjoyed reading "The Gun Dilemma" as much as anyone can enjoy reading about the Supreme Court and gun violence. But one of my big takeaways is that a lot of the justifications for changes to gun laws in the U.S., particularly when it comes to like this idea of expanding Second Amendment rights, they're rooted in misinformation. And I think I just want to keep, I think I just keep coming back to that, how deeply important it is for everybody, no matter what your opinion is, when you're making historical argument for your basis of decisions, to make sure you know your history appropriately. And so I think I'm just going to be kind of coming back to that a lot in the next couple days.



JJ Janflone 31:35

Want to share it the podcast? Listeners can now get in touch with us here at Red, Blue, and Brady via phone or text message. Simply call or text us at 480-744-3452 with your thoughts, questions, concerns, ideas, whatever! Kelly and I are standing by.



Kelly Sampson 31:50

Thanks for listening. As always, Brady's life-saving work in Congress, the courts, and communities across the country is made possible thanks to you. For more information on Brady or how to get involved in the fight against gun violence, please like and subscribe to the podcast. Get in touch with us at [Bradyunited.org](http://Bradyunited.org) or on social @BradyBuzz. Be brave and remember, take action, not sides.