Evaluating Constitutionality of Gun / Public Safety Laws

This paper is part of the **Prevent Gun Violence: Public Health, Evidence-Based and Constitutional Approaches** self-study course. It is for section 6 in the Study Guide with title **The 2nd Amendment – Evaluating Laws' Constitutionality by the Courts.**

United States Court System - U.S. Courts were created under Article III of the Constitution to administer justice fairly and impartially, . . . Federal courts hear cases involving the constitutionality of a law, . . . The Supreme Court is the highest court in the United States. In the federal court system's present form, 94 district level trial courts and 13 courts of appeals sit below the Supreme Court. The federal government and each of the state governments have their own court systems. www.uscourts.gov

Evaluating Constitutionality Can Be Confusing

In July 2023, in Bloomberg Law, Lydia Wheeler wrote:

> "Confusion over the US Supreme Court's last gun rights ruling is likely to persist even after the justices decide a new Second Amendment case next term.
>
> Establishing a constitutional right to carry a handgun in public in a landmark 2022 decision forced lower courts to play historian and look to Colonial-era laws to justify the lawfulness of gun restrictions, a duty that has frustrated some judges."

There are two focuses in this paper: 1) methods the Supreme Court, lower courts and state courts have used to evaluate constitutionality of laws and 2) court case decisions on constitutionality of gun laws. Key terms (underlined in the descriptions), and key recent key court cases are described with the majority and dissent (minority) opinions.

Resources used have the name of the author and/or court case (in bold), and her/his or its description of the key terms (start this page) and cases (start on page 6). The Links to the resources listed by name or case are in the **NOTES** that start on page 8 of 9.

From 1840: Public Safety v. Amendment Text

December 1840, Aymetter v. State – Tennessee Supreme Court **Judge Green**'s opinion:

"Suppose it were to suit the whim of a set of ruffians to enter the theatre in the midst of the performance, with drawn swords, guns, and fixed bayonets, or to enter the church in the same manner, during service, to the terror of the audience, and this were to become habitual; can it be that it would be beyond the power of Legislature to pass laws to remedy such an evil? Surely not....

To hold that the Legislature could pass no law upon this subject by which to preserve the public peace, and protect our citizens from the terror which a wanton and unusual exhibition of arms might produce or their lives from being endangered by desperadoes with concealed arms, would be to pervert a great political right to the worst purposes, and to make it a social evil of infinitely greater extent to society than would result from abandoning the right itself. . . .

But the right to bear arms is not of that unqualified character, the citizens may bear them for the common defence, but it does not follow that they may be borne by an individual merely to terrify the people for purposes of private assassination."

Key Terms

● Two-Step Framework, ● Scrutiny, Strict Scrutiny, Intermediate Scrutiny ● Burden ● Public Safety, Compelling Government (People's) Interest, Unprecedented Societal Concerns, General Welfare; ● Historical Tradition, Text and History Only, Plain Text, and Originalism; ● Interest Balancing Inquiry

Evaluating Constitutionality of Gun / Public Safety Laws

Two-Step Framework

Judge Karin **Immergut**, in her ruling on an Oregon gun control case described the two-step framework. “Following Heller and McDonald, circuit courts across the country—including the Ninth Circuit—adopted a two-step means-end analysis for Second Amendment challenges. First, courts considered whether the challenged regulation burdened conduct protected by the Second Amendment. If it did, courts then balanced the state’s interests in the regulation against the burden on the constitutional right. This inquiry allowed courts to consider not only the text and history of the Second Amendment, but also the state’s interest in public safety and the general welfare.

The **Annotated Constitution** has this description: “With respect to the question of how to evaluate the constitutionality of gun laws under the Second Amendment, the lower federal courts in post-Heller cases generally applied a two-step framework. At step one, a court would ask whether the law at issue burdened conduct protected by the Second Amendment, which typically involved an inquiry into the historical meaning of the right. If the law did not burden protected conduct, it was upheld. If the challenged law did burden protected conduct, a court would next [step two] apply either strict scrutiny—an exacting form of constitutional review requiring the government to show that the law is narrowly tailored to achieve a compelling government interest—or a somewhat lower standard of intermediate scrutiny to determine whether the law was nevertheless constitutional. Whether a court applied intermediate or strict scrutiny would ordinarily depend on whether the law severely burdened the core protection of the Second Amendment.

Scrutiny

In his article, Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law, Michael **Smith** wrote: “Applying strict or intermediate scrutiny allows courts to account for present-day circumstances, the nature of problems a government is trying to address, and the likelihood that a law will solve or mitigate these problems. In Second Amendment cases, the government's interest in gun control laws is often the prevention of harm:® In considering this interest and how gun restrictions may accomplish this interest, courts take into account the dangers guns may pose, harm caused by unlawful gun use, and other present-day circumstances.’

The **Annotated Constitution** says this about scrutiny in step two of the two-step framework. “If the challenged law did burden protected conduct, a court would next [step two] apply either strict scrutiny—an exacting form of constitutional review requiring the government to show that the law is narrowly tailored to achieve a compelling government interest—or a somewhat lower standard of intermediate scrutiny to determine whether the law was nevertheless constitutional. Whether a court applied intermediate or strict scrutiny would ordinarily depend on whether the law severely burdened the core protection of the Second Amendment.”

Strict Scrutiny

In his article, Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law, Michael Smith wrote: ”a content-based restriction on political speech in a public forum must be subjected to the most exacting scrutiny,” and that in such cases the government must “show that [a] regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end”.”

Intermediate Scrutiny

Judge **Immergut** wrote: Finding that California's restrictions imposed only a minimal burden on the Second Amendment right, the Ninth Circuit proceeded to analyze the law under intermediate scrutiny. At this second step, the Ninth Circuit concluded that California's LCM [large-capacity magazines] restrictions were a reasonable fit for the compelling state interest of reducing gun violence, and held that the law did not violate the Second Amendment.

Major Questions (or Rules) Doctrine – NOTE: not specific to Second Amendment but is an example of the two-step framework

The **Congressional Research Service** describes the two-step approach with regard to economic and political significance. The Supreme Court has declared that if an agency seeks to decide an issue of in National Federation of Independent Business v. OSHA, the Court considered OSHA's emergency temporary standard to be of major economic and political significance because, in its estimation, it seriously intruded upon the lives of more than 80 million people. major national significance, its action must be supported by clear congressional authorization. If Chevron applies, a court will typically engage in a two-step analysis to determine if it must defer to an agency's statutory interpretation. At step one, the court asks whether the statute directly addresses the precise issue before the court. If the statute is ambiguous or silent in that respect, the court must proceed to step two, which instructs the court generally to defer to the agency's reasonable interpretation. ------ if Congress wants an agency to decide issues in an area courts would likely consider to be of vast economic and political significance, Congress should clearly specify that intention in the relevant underlying statute as opposed to relying on vague or imprecise statutory language.

Burden

The **Annotated Constitution** says "Justice Breyer asked how the statute seeks to further the governmental interests that it serves, how the statute burdens the interests that the Second Amendment seeks to protect, and whether there are practical less burdensome ways of furthering those interests. ---- (1) the laws sought to further compelling public-safety interests; (2) the D.C. restrictions minimally burdened the Second Amendment's purpose to preserve a well regulated Militia and burdened to some degree an interest in self-defense; and (3) there were no reasonable but less restrictive alternatives to reducing the number of handguns in the District."

In his book, Reading the Constitution – Why I chose Pragmatism, not Textualism, prefers a "traditionalist" or "pragmatic" approach that takes not just text but also "purpose" into account. He argues that judges who try to strip away any extra-textual considerations, like evolving values and legislative history, "diminish the effectiveness and vibrancy of their interpretive palette."

Public Safety, Compelling Government (People's) Interest, Unprecedented Societal Concerns, General Welfare

In his dissent in the **Heller** case, Justice Breyer (in District of Columbia v. Heller, joined by Souter and Ginsburg) wrote "Respondent proposes that the Court adopt a "strict scrutiny" test, which would require reviewing with care each gun law to determine whether it is "narrowly tailored to achieve a compelling governmental interest.**"** Additionally, Breyer wrote "The Court

has deemed that interest, as well as "the Government's general interest in preventing crime," to be "compelling," and the Court has in a wide variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties, . . ."

Judge **Immergut** wrote in her Oregon gun ruling: "While Bruen's test for Second Amendment challenges is grounded in history and tradition, Bruen also acknowledged that modern regulations may implicate either "unprecedented societal concerns" or "dramatic technological changes" different from those that existed at the Second Amendment's ratification in 1791 or at the Fourteenth Amendment's ratification in 1868. In those circumstances, Bruen directs courts to consider "a more nuanced approach" and determine whether historical regulations are "relevantly similar" to the current challenged regulation based on two metrics: "how and why the regulations burden a law-abiding citizen's right to armed self-defense."

Historical Tradition, Text and History Only, Plain Text, Textualism and Originalism

Smith wrote in his article, Historical Tradition: . . . , "The Court's broad historical tradition approach also opens multiple avenues for manipulation, allowing a court to pick and choose evidence it deems to be relevant and reach desired outcomes." And, "The Bruen Court set forth its historical tradition approach as an alternative to courts "make[ing] difficult empirical judgments" about the costs and benefits of gun control measures." The historical tradition approach, the Court contended, is "more legitimate, and more administrable, than" the empirical alternative. In June 2022, Justice Clarence Thomas, the court's most senior originalist, wrote a decision that expanded gun rights and the role of history in refereeing gun control policies. His majority opinion, in New York State Rifle & Pistol Association v. Bruen, says the Second Amendment confers a right for law-abiding citizens to carry guns in public. He also said that when courts evaluate gun policies, they must consider only if the policy "regulation is consistent with this Nation's historical tradition of firearm regulation."

In Justice Breyer's authored dissent in the Bruen case "viewed the history-focused approach as deeply impractical because it imposed on judges without historical expertise—and courts without needed resources—the task of parsing history, raised numerous intractable questions about what history to consider and how to weigh it, and would often fail to provide clear answers to difficult questions while giving judges ample tools to pick their friends out of history's crowd. Below are some resources on the history of the 2nd Amendment.

By saying courts must only consider historical tradition, he cut off the second half a "two-step" process used throughout the federal courts that combined historical analysis with scrutiny of government claims that its public safety concerns justify the burden on the rights of gun owners. Historical analysis "can be difficult," wrote Justice Thomas. But "in our view [it's] more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions." NOTE: Thomas only mentions "public safety" one time in his 66-page opinion and that was to criticize earlier rulings. His stated the dissent invoked statistics to presumably justify granting states greater leeway in restricting firearm ownership and use, and explained is "[t]he right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications."

Judge **Immergut**, in her ruling wrote that banning large capacity magazines and requiring a permit to purchase a gun falls in line with "the nation's history and tradition of regulating uniquely dangerous features of weapons and firearms to protect public safety.

"Bruen held that "when the Second Amendment's plain text covers an individual's conduct," the government must affirmatively "demonstrate that the [challenged] regulation is consistent with this Nation's historical tradition of firearm regulation.""

As the Supreme Court reiterated in Bruen, just as weapons that are commonly used for self-defense are presumptively covered by the Second Amendment, weapons that are "dangerous and unusual" fall outside of the Second Amendment's protections. Bruen, ("[In Heller], we found it 'fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons"' that the Second Amendment protects the possession and use of weapons that are 'in common use at the time.'") (citing Heller)" To determine [whether a firearm is dangerous and unusual], we consider whether the weapon has uniquely dangerous propensities and whether the weapon is commonly possessed by law-abiding citizens for lawful purposes."

Corpus Linguistics and the 2nd Amendment

This is another avenue for the Court's broad historical tradition approach for manipulation, allowing a court to pick and choose evidence it deems to be relevant and reach desired outcomes of the historical tradition approach.

Big Data rekindles the debate over the original meaning of the Second Amendment

"Corpus linguistics has the potential, . . to "revolutionize" constitutional interpretation.

Blackman, J, Phillips, J., Harvard Law Review. August 7, 2018.

Corpus Linguistics and Gun Control: Why Heller is Wrong

The results of Blackman and Phillips' corpus search with expanded sample sizes overwhelmingly support Justice Stevens's position in the Heller opinion that the original public meaning of the 2nd Amendment did not support the private right to use a firearm.

Woods, Kyra. BYU Law Review. Volume Summer 8-31-2020.

Smith also wrote in his article, Historic Traditional, . . .,: "Justice Scalia was a strong proponent of originalism and justified it, in part, on the ground that it was an objective approach to constitutional interpretation. Scalia asserted that originalism "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself" and that the historical research originalism required will "lead to a more moderate rather than a more extreme result." Modern originalists agree, "argu[Ing] that originalism is a principled [and neutral] theory of constitutional interpretation" that does not just lead to conservative results.

Interest Balancing Inquiry

In **Annotated Constitution** - **Amdt2.4** Heller and Individual Right to Firearms notes that "Justice Breyer suggested an interest-balancing inquiry in which a court would evaluate the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation [in Heller] at issue impermissibly burdens the former in the course of advancing the latter. In making that evaluation, Justice Breyer would have asked how the statute seeks to further the governmental interests that it serves, how the statute burdens the interests that the Second Amendment seeks to protect, and whether there are practical less burdensome ways of furthering those interests. Applying those questions to the challenged D.C. laws, Justice Breyer concluded that (1) the laws sought to further compelling public-safety interests; (2) the D.C. restrictions minimally burdened the Second Amendment's purpose to preserve a well regulated Militia and burdened to some degree an interest in self-defense; and (3) there were no reasonable but less restrictive alternatives to reducing the number of handguns in the District.48 Thus, in Justice Breyer's

view, the District's gun laws were constitutional. He also anticipated that the majority's decision would encourage legal challenges to gun regulation throughout the Nation. The majority did not seem to voice disagreement with this prediction, but noted that since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field."

In the **DC v. Heller**, the majority states that "JUSTICE BREYER's assertion that individual self-defense is merely a "subsidiary interest" of the right to keep and bear arms, . . , is profoundly mistaken. He bases that assertion solely upon the prologue—but that can only show that self-defense had little to do with the right's codification; it was the central component of the right itself."

The majority goes on to state that "JUSTICE BREYER moves on to make a broad jurisprudential point: He criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions. He proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering "interest balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." Post, at 10. After an exhaustive discussion of the arguments for and against gun control, JUSTICE BREYER arrives at his interest-balanced answer: because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban."

Smith's article gives this opinion of the interest-balancing approach.

"In the place: of an interest-balancing approach, the Bruen Court stated that courts must apply a one-step method to Second Amendment cases. Where "the Second Amendment's plain text covers an individual's conduct,... [t]he government must justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."

At first, this historical tradition approach seems workable—perhaps even desirable. Courts and _ lawyers frequently rely on chains of precedent stretching far into the past when advancing everyday legal arguments. Presumably the parties before the court will present evidence of historical regulations and restrictions, meaning that the burden of conducting the historical research will fall on the parties—leaving the court to simply make a decision in light of the evidence. Additionally, the historical tradition approach seems objective: rather than courts engaging in a goal-oriented approach of researching and presenting empirical evidence regarding firearm regulations and harms caused by guns, courts can instead look to legal history and find clear answers on whether particular behaviors were traditionally regulated or restricted.

This article argues that these assumptions are misguided. The historical tradition approach to constitutional law: is far more complex. than the Court suggests, or we presume—as the Court's own shoddy historical analysis in Bruen illustrates. The historical tradition approach also leaves multiple avenues for attorneys and courts to frame and misrepresent historical evidence in ways that support their preferred outcomes, leaving questions unanswered about the significance of particular historical evidence. All of this is likely to cause confusion and diverging conclusions by

lower courts in future cases should they make earnest attempts at applying the historical tradition approach."

Key Recent Supreme, Lower and State Court Cases

Text for District of Columbia v. Heller, McDonald v. Chicago and NYSRPA v. Bruen are from Annotated Constitution. Text for the Oregon Firearms Federation v. Tina Kotek, et al., and Oregon Alliance for Gun Safety case come from Judge Immergut's ruling Section II. Procedurally Background and in the VIII. Conclusion section from last of the ruling's pages 120 and 121.

District of Columbia v. Heller (2008)

In the 2008 case District of Columbia v. Heller,6 the Supreme Court held, after a lengthy historical analysis, that the Second Amendment protects an individual right to possess firearms for historically lawful purposes, including self-defense in the home. The Heller majority also provided some guidance on the scope of the right, explaining that it is not unlimited and that nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions like laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, among other presumptively lawful regulations.

McDonald v. City of Chicago (2010)

Supreme Court the Second Amendment "protects the right to keep and bear arms for the purpose of self-defense. Two years after Heller, the Court revisited the question of whether the Second Amendment applies to the states, concluding in McDonald v. City of Chicago9 that the right to keep and bear arms is a fundamental right that is incorporated through the Fourteenth Amendment against the states.10 In a subsequent decision in Caetano v. Massachusetts,11 the Court issued a brief, per curiam opinion vacating a Massachusetts Supreme Court decision that had upheld a law prohibiting the possession of stun guns. The Court in Caetano reiterated that the Second Amendment applies to the states and extends to bearable arms that were not in existence at the time of the founding.

New York State Rifle & Postol Ass'n, Inc. V. Bruen (2022)

In the 2022 case New York State Rifle & Pistol Association v. Bruen,13 the Court considered the constitutionality under the Second Amendment of a portion of New York's firearms licensing scheme that restricts the carrying of certain licensed firearms outside the home. In a 6-3 decision, [which typically required the license applicant to show proper cause—for carry unrelated to specific purposes like hunting or target practice, a special need for self-protection distinguishable from that of the general community] the Court struck down New York's requirement that an applicant for an unrestricted license to carry a handgun outside the home for self-defense must establish proper cause, ruling that the requirement is at odds with the Second Amendment.14 In doing so, the Court recognized that the Second Amendment protects a right that extends beyond the home15 and also clarified that the proper test for evaluating Second Amendment challenges to firearms laws is an approach rooted in text and the historical tradition of firearms regulation, rejecting a two-step methodology employed by many of the lower courts.

Oregon Firearms Federation v. Tina Kotek, et al., and Oregon Alliance for Gun Safety (2023)

Evaluating Constitutionality of Gun / Public Safety Laws

From the ruling's II. Procedural Background: "Plaintiffs bring **six** constitutional challenges against BM 114 [Oregon Ballot Measure 114]:

1. a Second Amendment challenge to BM 114's large-capacity magazine ("LCM") restrictions,
2. a Second Amendment challenge to BM 114's permit-to-purchase regime,
3. a Fifth Amendment takings challenge to BM 114's LCM restrictions,
4. a Fourteenth Amendment due process challenge to BM 114's permit-to purchase regime, and two Fourteenth Amendment challenges—
5. due process and
6. void for vagueness—to BM 114's LCM restrictions."

From the ruling's VIII. Conclusions: "This Court enters judgment in favor of Defendants and Intervenor-Defendant on all [**six**] claims.

1. The Supreme Court has held that Second Amendment protects an individual right to self defense inside and outside of the home. LCMs are not commonly used for self-defense, and are therefore not protected by the Second Amendment.
2. The Second Amendment also allows governments to ensure that only law-abiding, responsible citizens keep and bear arms. BM 114's permit-to-purchase regime, on its face, sets forth objective criteria for the issuance of permits, and does not allow unfettered discretion by permitting agents in assessing an applicant's mental health status to ensure that only law-abiding and responsible citizens can purchase firearms in the state of Oregon.
3. The Fifth Amendment protects an individual from having their property taken by the government for public use without just compensation. But the Fifth Amendment does not prevent the government from exercising its police power to protect the public welfare.
4. The Due Process Clause of the Fourteenth Amendment prevents the government from depriving a person of liberty without due process of law. Plaintiffs have failed to show that BM 114's permitting provisions deprive them of liberty, because BM 114's permitting provisions do not violate their Second Amendment rights.
5. The Due Process Clause of the Fourteenth Amendment
   - prevents the government from depriving a person of liberty without due process of law. Plaintiffs have failed to show that BM 114's permitting provisions deprive them of liberty, because BM 114's permitting provisions do not violate their Second Amendment rights.
   - The Due Process Clause of the Fourteenth Amendment **also prevents** the government from passing retroactive laws, unless the government can point to a legitimate legislative purpose furthered by rational means. BM 114 does not impose retroactive penalties on the possession of LCMs, and is therefore not retroactive. Moreover, Defendants' interest in public safety provides a legitimate legislative purpose furthered by rational means.
6. Finally, the Due Process Clause of the Fourteenth Amendment prevents governments from passing laws that are so vague that they fail to give a person of ordinary intelligence fair notice of what is prohibited. BM 114's LCM restrictions give a person of ordinary intelligence fair notice of what is prohibited."
   - NOTE: Challenge/claim 6 relates to the **Major Questions (or Rules) Doctrine** which states "Congress should clearly specify that intention in the relevant underlying statute as opposed to relying on vague or imprecise statutory language.

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Background on Corpus Linguistics

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> "They [right wing special interests] have opened up a whole new arena for fake fact finding with a new so-called history and tradition analysis they brought to bear in Dobbs on reproductive rights cases and in Bruen on gun rights cases, because you can fake your way through history and tradition very easily. You just go back into history, and you cherry-pick the facts you like. Real historians will come in and say "Well, that was ridiculous," but it doesn't matter—you got what you wanted. The ability to do that fake

fact finding is going to get worse, not better. Citizens United and Shelby County are the worst of all. These two decisions have really hammered our democracy—Citizens United by letting unlimited amounts of dark money into our elections."

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