The Courts and Political Controversy

POLI 104I

Where are we going?

- 6/27 - the relationship between law and politics.
- 6/29 - incorporation (OB2 – 4a)
- 7/4 - incitement (OB2 – 5a)
- 7/6 - obscenity (OB2 – 5b (first half))
- 7/11 - executive power (OB1 – 4a-d)
- 7/13 - election law (OB1 - 8c)
- 7/18 – threats & offensive speech (OB2 – 5b (second half))
- **7/20 - guns (OB2 365-387 + Bruen)**
- 7/25 - privacy (OB2 – 11 + Dobbs)
- 7/27 - review

Constitutional Amendments

- 2nd: 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.

- 14th: [1868] Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are **citizens** of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the **privileges or immunities** of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without **due process of law**; nor deny to any person within its jurisdiction the **equal protection of the laws**.

Reading for 7/18

- guns (OB2 365-387)
  - common law limitations on weapons
  - United States v. Cruikshank
  - Presser v. Illinois
  - Miller v. Texas
  - District of Columbia v. Heller
  - McDonald v. City of Chicago
  - New York State Rifle and Pistol Association v. Bruen

Guns

- Limitations on weapons at common law:
  - Statute of Northampton (1328): crime against the peace to go or ride about with "dangerous weapons."
  - Massachusetts code (1693): "justices of the peace could arrest any person riding or going about armed offensively, could commit him to prison until sureties were found for the peace, and could [seize] his armor and weapons"
  - "The first volume of Alabama Supreme Court Reports recorded the case of State v. Reid,8 decided at Montgomery in 1840. The Alabama statute prohibiting the carrying of any species of concealed firearms about the person was upheld in this case. In 1831, shortly after Indiana became a state, a statute similar to that of Alabama was enacted, which, when questioned, was upheld by the Indiana Supreme Court.6 In 1839 the Arkansas Supreme Court upheld the local firearm statute which made it a misdemeanor to wear a pistol, dirk or other concealed weapon except on a journey This form of firearm regulation is contained in the Uniform Firearms Act and in many present state statutes."

Guns

- Limitations on weapons at common law:
  - ""Uniform Act to Regulate the Sale and Possession of Firearms" (1926): model code
    - Adopted by CA, ND, NH, PA, DC.
    - Unlicensed handguns prohibited, transfer prohibited.
  - "Uniform Machine Gun Act" (1932):"[T]he possession or use of a machine gun of any kind for offensive purpose is declared to be a crime. Such possession or use is presumed if the gun is found on premises not owned or rented for legitimate use by the possessor/user..."
  - 2nd Amendment:

(b) Interpretation of the words, "bear arms."

The expression "to bear arms" should be distinguished from "to carry weapons."

The former originally referred to the arming of an organized group with weapons of warfare, such as swords, muskets, and artillery. The latter expression has been used to denote weapons generally concealable on the person, such as blackjacks, bowie knives, pistols, and such other weapons as are commonly employed in brawls or by criminals.

(c) Interpretation of: "A well regulated Militia, being necessary to the security of a free State, . . ."

The purpose of the Second Amendment is set forth in this phrase. The right of the people to bear arms is protected by the Constitution because a well-regulated militia is necessary for the security of the state. The entire provision must be read in the light of this expression, and no regulation or restriction of firearms or weapons is in conflict with this Amendment unless it substantially impedes the maintenance of a militia sufficiently well-equipped to assure the safety of the state.

Guns

- United States v. Cruikshank (1876): decided 5-4, reversed.
- Background: “The case arose from the hotly-disputed 1872 Louisiana gubernatorial election and the subsequent Colfax massacre, in which dozens of black people and three white people were murdered. Federal charges were brought against several white terrorists under the Enforcement Act of 1870, which prohibited two or more people from conspiring to deprive anyone of their constitutional rights. Charges included hindering the freedmen's First Amendment right to freely assemble and their Second Amendment right to keep and bear arms” [McDonald has more details].”

Guns

- United States v. Cruikshank (1876): decided 5-4, reversed.
- Holding: “In his majority opinion, Chief Justice Morrison Waite overturned the convictions of the defendants, holding that the plaintiffs had to rely on Louisiana state courts for protection. Waite ruled that neither the First Amendment nor the Second Amendment limited the powers of state governments or individuals.”
- “He further ruled that the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment limited the lawful actions of state governments, but not of individuals. The decision left African Americans in the South at the mercy of increasingly hostile state governments dominated by white Democratic legislatures, and allowed groups such as the Ku Klux Klan to continue to use paramilitary force to suppress black voting.”

Guns

- United States v. Cruikshank (1876): decided 5-4, reversed.
- Holding: “There is in our political system a government of each of the several States, and a Government of the United States. Each is distinct from the others, and has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of those governments will be different from those he has under the other” [Compare Barron v. Baltimore].
- “The right there specified [2nd Amendment] is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government…”

Guns

- Presser v. Illinois (1886): decided 9-0; affirmed.
- Background: “In this 1886 case, Herman Presser was part of a citizen militia group, the *Lehr und Wehr Verein* (Instruct and Defend Association), a group of armed ethnic German workers, associated with the Socialist Labor Party. The group had been formed to counter the armed private armies of companies in Chicago.”
- “The indictment charged in substance that Presser, on September 24, 1879, in the county of Cook, in the State of Illinois, "did unlawfully belong to, and did parade and drill in the city of Chicago with an unauthorized body of men with arms, who had associated themselves together as a military company and organization, without having a license from the Governor, and not being a part of, or belonging to, 'the regular organized volunteer militia' of the State of Illinois, or the troops of the United States." A motion to quash the indictment was overruled. Presser then pleaded not guilty, and both parties having waived a jury the case was tried by the court, which found Presser guilty and sentenced him to pay a fine of $10.”

Guns

- Presser v. Illinois (1886): decided 9-0; affirmed.
- Background: “In December 1879, [Presser] marched at the head of said company, about four hundred in number, in the streets of the city of Chicago, he riding on horseback and in command; that the company was armed with rifles and Presser with a cavalry sword; that the company had no license from the governor…to drill or parade as a part of the militia of the State, and was not a part of the regular organized militia of the State, nor a part of troops of the United States, and had no organization under the militia law of the United States.

Guns

- Presser v. Illinois (1886): decided 9-0; affirmed.
- Holding: “We think it clear that the sections [of the Act] under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, **do not infringe the right of the people to keep and bear arms**. But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of congress and the national government, and not upon that of the state.”

Guns

- Presser v. Illinois (1886): decided 9-0; affirmed.
- Holding: “It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and in view of this prerogative of the general government, as well as of its general powers, **the States cannot**, even laying the constitutional provision in question out of view, **prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security**, and disable the people from performing their duty to the general government. But, as already stated, we think it clear that the sections under consideration do not have this effect.”

Guns

- Miller v. Texas (1894): decided 9-0, affirmed.
- "[W]e think there is **no federal question** properly presented by the record in this case, and that the writ of error must be dismissed upon that ground…In his motion for a rehearing, however, defendant claimed that the law of the state of Texas forbidding the carrying of weapons, and authorizing the arrest, without warrant, of any person violating such law, under which certain questions arose upon the trial of the case, was in conflict with the second and fourth amendments to the constitution of the United States, one of which provides that the right of the people to keep and bear arms shall not be infringed, and the other of which protects the people against unreasonable searches and seizures."
- "We have examined the record in vain, however, to find where the defendant was denied the benefit of any of these provisions, and, even if he were, it is well settled that **the restrictions of these amendments operate only upon the federal power**, and have no reference whatever to proceedings in state courts. Barron v. Baltimore…"

Guns

- Miller v. Texas (1894): decided 9-0, affirmed.
- Background: “This was an indictment against Franklin P. Miller in a court of the state of Texas for murder, on which he was convicted.”
- “[W]e think there is **no federal question** properly presented by the record in this case, and that the writ of error must be dismissed upon that ground…”

Guns

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Guns

- United States v. Miller (1939): decided 9-0; reversed.
- Background: “An Arkansas federal district court charged Jack Miller and Frank Layton with violating the National Firearms Act of 1934 ("NFA") when they transported a sawed-off double-barrel 12-gauge shotgun in interstate commerce. Miller and Layton argued that the NFA violated their Second Amendment right to keep and bear arms. The district court agreed and dismissed the case.”
- Holding (McReynolds): “The Supreme Court reversed the district court, holding that the Second Amendment does not guarantee an individual the right to keep and bear a sawed-off double-barrel shotgun. Writing for the unanimous Court, Justice James Clark McReynolds reasoned that **because possessing a sawed-off double barrel shotgun does not have a reasonable relationship to the preservation or efficiency of a well-regulated militia**, the Second Amendment does not protect the possession of such an instrument.”

Guns

- United States v. Miller (1939): decided 9-0; reversed.
- Holding (McReynolds): “In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.”

Guns

- United States v. Miller (1939): decided 9-0; reversed.
- Holding (McReynolds): “The Constitution as originally adopted granted to the Congress power- 'To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.' U.S. Const. art. 1, 8. **With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view**.”

Guns

- District of Columbia v. Heller (2008): decided 5-4; reversed.
- Background: “Provisions of the District of Columbia Code made it illegal to carry an unregistered firearm and prohibited the registration of handguns, though the chief of police could issue one-year licenses for handguns. The Code also contained provisions that required owners of lawfully registered firearms to keep them unloaded and disassembled or bound by a trigger lock or other similar device unless the firearms were located in a place of business or being used for legal recreational activities.”
- “Heller was a D.C. special police officer who was authorized to carry a handgun while on duty. He applied for a one-year license for a handgun he wished to keep at home, but his application was denied. Heller sued the District of Columbia.”

Guns

- District of Columbia v. Heller (2008): decided 5-4; reversed.
- Background: Heller "sought an injunction against the enforcement of the relevant parts of the Code and argued that they violated his Second Amendment right to keep a functional firearm in his home without a license. The district court dismissed the complaint. The U.S. Court of Appeals for the District of Columbia Circuit reversed and held that the Second Amendment protects the right to keep firearms in the home for the purpose of self-defense, and the District of Columbia's requirement that firearms kept in the home be nonfunctional violated that right."
- Question Presented: "Whether the following provisions, D.C. Code §§ 7-2502.02(a)(4), 22–4504(a), and 7-2507.02, violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?"

Guns

- District of Columbia v. Heller (2008): decided 5-4; reversed.
- Holding: “The ban on registering handguns and the requirement to keep guns in the home disassembled or nonfunctional with a trigger lock mechanism violate the Second Amendment. Justice Antonin Scalia delivered the opinion for the 5-4 majority. The Court held that the first clause of the Second Amendment that references a “militia” is a prefatory clause that does not limit the operative clause of the Amendment.”
- “Because the text of the Amendment should be read in the manner that gives greatest effect to the plain meaning it would have had at the time it was written, the operative clause should be read to “guarantee an individual right to possess and carry weapons in case of confrontation.” This reading is also in line with legal writing of the time and subsequent scholarship. Therefore, banning handguns, an entire class of arms that is commonly used for protection purposes, and prohibiting firearms from being kept functional in the home, the area traditionally in need of protection, violates the Second Amendment.”

Guns

- District of Columbia v. Heller (2008): decided 5-4; reversed.
- Majority (Scalia): “The Second Amendment provides: "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." In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.”
- “The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”
  - “apart from [a] clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.”

Guns

- District of Columbia v. Heller (2008): decided 5-4; reversed.
- Majority (Scalia): “[I]n all six other provisions of the Constitution that mention "the people," the term unambiguously refers to all members of the political community, not an unspecified subset.”
- “The term [arms] was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity.”
  - “Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way.”
- “At the time of the founding, as now, to "bear" meant to "carry"… Although the phrase implies that the carrying of the weapon is for the purpose of "offensive or defensive action," it in no way connotes participation in a structured military organization.”

Guns

- District of Columbia v. Heller (2008): decided 5-4; reversed.
- Majority (Scalia): “Petitioners justify their limitation of "bear arms" to the military context by pointing out the unremarkable fact that it was often used in that context--the same mistake they made with respect to "keep arms.”
- “Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation.”
- “We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly…”
- “The limited discussion of the Second Amendment in *Cruikshank* supports, if anything, the individual-rights interpretation.”
- “*United States* v. *Miller*… positively suggests that the Second Amendment confers an individual right to keep and bear arms.”

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- “*United States* v. *Miller*… positively suggests that the Second Amendment confers an individual right to keep and bear arms.”

Guns

- District of Columbia v. Heller (2008): decided 5-4; reversed.
- Majority (Scalia): “We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods... For most of our history the question did not present itself.”

Guns

- District of Columbia v. Heller (2008): decided 5-4; reversed.
- Majority (Scalia): “We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." 307 U. S., at 179. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons.”

Guns

- District of Columbia v. Heller (2008): decided 5-4; reversed.
- Majority (Scalia): “It may be objected that if weapons that are most useful in military service--M-16 rifles and the like--may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.”

Guns

- District of Columbia v. Heller (2008): decided 5-4; reversed.
- Majority (Scalia): “In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.
  - “We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach…The Second Amendment is…the very *product* of an interest-balancing by the people.”

Guns

- District of Columbia v. Heller (2008): decided 5-4; reversed.
- Dissent (Stevens): “In his dissent, Justice John Paul Stevens wrote that the Second Amendment does not create an unlimited right to possess guns for self-defense purposes. Instead, the most natural reading of the the Amendment is that it protects the right to keep and bear arms for certain military purposes but does not curtail the legislature’s power to regulate nonmilitary use and ownership of weapons. Justice Stevens argued that the Amendment states its purpose specifically in relation to state militias and does not address the right to use firearms in self-defense, which is particularly striking in light of similar state provisions from the same time that do so. ”

Guns

- District of Columbia v. Heller (2008): decided 5-4; reversed.
- Dissent (Breyer): “Justice Breyer also wrote a separate dissent in which he argued that the Second Amendment protects militia-related, not self-defense-related, interests, and it does not provide absolute protection from government intervention in these interests. Historical evidence from the time of ratification indicates that colonial laws regulated the storage and use of firearms in the home. Justice Breyer argued that the Court should adopt an interest-balancing test to determine when the government interests were sufficiently weighty to justify the proposed regulation.”

Guns

- McDonald v. City of Chicago (2010): decided 5-4; reversed and remanded.
- Background: “In McDonald v. City of Chicago, Chicago resident Otis McDonald, a 76-year-old retired maintenance engineer, had lived in the Morgan Park neighborhood since buying a house there in 1971. McDonald described the decline of his neighborhood and claimed it was being taken over by gangs and drug dealers. His lawn was regularly littered with refuse, and his home and garage had been broken into a combined five times, the most recent robbery being committed by a man whom McDonald recognized from his own neighborhood.[As an experienced hunter, McDonald legally owned shotguns but believed them to be too unwieldy in the event of a robbery and so he wanted to purchase a handgun for personal home defense. Chicago's requirement that all firearms in the city be registered but its refusal of all handgun registrations since 1982, when a citywide handgun ban was passed, made him unable to own a handgun legally. As a result, he joined in 2008 three other Chicago residents in filing a lawsuit that became McDonald v. City of Chicago.”

Guns

- McDonald v. City of Chicago (2010): decided 5-4; reversed and remanded.
- Background: “Several suits were filed against Chicago and Oak Park in Illinois challenging their gun bans after the Supreme Court issued its opinion in *District of Columbia v. Heller*. In that case, the Supreme Court held that a District of Columbia handgun ban violated the Second Amendment. There, the Court reasoned that the law in question was enacted under the authority of the federal government and, thus, the Second Amendment was applicable. Here, plaintiffs argued that the Second Amendment should also apply to the states. The district court dismissed the suits. On appeal, the U.S. Court of Appeals for the Seventh Circuit affirmed.”
- Question Presented: “Does the Second Amendment apply to the states because it is incorporated by the Fourteenth Amendment's Privileges and Immunities or Due Process clauses and thereby made applicable to the states?”
  - Note: possible overturning of the Slaughterhouse Cases [incorporation].

Guns

- McDonald v. City of Chicago (2010): decided 5-4; reversed and remanded.
- Holding: “The Supreme Court reversed the Seventh Circuit, holding that the Fourteenth Amendment makes the Second Amendment right to keep and bear arms for the purpose of self-defense applicable to the states.”
- “With Justice Samuel A. Alito writing for the majority, the Court reasoned that rights that are "fundamental to the Nation's scheme of ordered liberty" or that are "deeply rooted in this Nation's history and tradition" are appropriately applied to the states through the Fourteenth Amendment.”
- “The Court [had previously] recognized in *Heller* that the right to self-defense was one such "fundamental" and "deeply rooted" right. The Court reasoned that because of its holding in *Heller*, the Second Amendment applied to the states. Here, the Court remanded the case to the Seventh Circuit to determine whether Chicago's handgun ban violated an individual's right to keep and bear arms for self-defense.”“

Guns

- McDonald v. City of Chicago (2010): decided 5-4; reversed and remanded.
- Holding: “Justice Alito, writing in the plurality, specified that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*. He rejected Justice Clarence Thomas's separate claim that the Privileges or Immunities Clause of the Fourteenth Amendment more appropriately incorporates the Second Amendment against the states. Alito stated that the Court's decision in the *Slaughterhouse Cases* -- rejecting the use of the Privileges or Immunities Clause for the purpose of incorporation -- was long since decided and the appropriate avenue for incorporating rights was through the Due Process Clause.”
  - Plurality Opinion: ““When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”” [Marks v. United States (1977)].

Guns

- McDonald v. City of Chicago (2010): decided 5-4; reversed and remanded.
- Plurality (Alito): “There is no need to reconsider the Court's interpretation of the Privileges or Immunities Clause in the *Slaughter-House Cases* because, for many decades, the Court has analyzed the question whether particular rights are protected against state infringement under the Fourteenth Amendment's Due Process Clause.”
- “We see no need to reconsider that interpretation here. For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding.”

Guns

- McDonald v. City of Chicago (2010): decided 5-4; reversed and remanded.
- Plurality (Alito): “An alternative theory regarding the relationship between the Bill of Rights and §1 of the Fourteenth Amendment was championed by Justice Black. This theory held that §1 of the Fourteenth Amendment totally incorporated all of the provisions of the Bill of Rights. See, *e.g.*, *Adamson*, *supra*, at 71-72 (Black, J., dissenting); *Duncan*, *supra*, at 166 (Black, J., concurring).”
- “As Justice Black noted, the chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States and, in so doing, overruled this Court's decision in *Barron*.[9] *Adamson*, 332 U. S., at 72 (dissenting opinion).[10] Nonetheless, the Court never has embraced Justice Black's "total incorporation" theory.

Guns

- McDonald v. City of Chicago (2010): decided 5-4; reversed and remanded.
- Plurality (Alito): “The decisions during this time [mid-20th century] abandoned three of the previously noted characteristics of the earlier period. The Court made it clear that the governing standard is not whether *any* "civilized system [can] be imagined that would not accord the particular protection." *Duncan v. Louisiana.* Instead, the Court inquired whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice. *Id*., at 149, and n. 14; see also *id.,* at 148 (referring to those "fundamental principles of liberty and justice which lie at the base of all *our* civil and political institutions.”

Guns

- McDonald v. City of Chicago (2010): decided 5-4; reversed and remanded.
- Plurality (Alito): “With this framework in mind, we now turn directly to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. In answering that question, as just explained, we must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty, *Duncan,* 391 U. S., at 149, or as we have said in a related context, whether this right is "deeply rooted in this Nation's history and tradition," ”
- “Our decision in *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller,* we held that individual self-defense is "the *central component*" of the Second Amendment right”

Guns

- McDonald v. City of Chicago (2010): decided 5-4; reversed and remanded.
- Plurality (Alito): “Municipal respondents argue, finally, that the right to keep and bear arms is unique among the rights set out in the first eight Amendments "because the reason for codifying the Second Amendment (to protect the militia) differs from the purpose (primarily, to use firearms to engage in self-defense) that is claimed to make the right implicit in the concept of ordered liberty.""
- “Municipal respondents suggest that the Second Amendment right differs from the rights heretofore incorporated because the latter were "valued for [their] own sake.“ But we have never previously suggested that incorporation of a right turns on whether it has intrinsic as opposed to instrumental value, and quite a few of the rights previously held to be incorporated--for example the right to counsel and the right to confront and subpoena witnesses--are clearly instrumental by any measure.”

Guns

- McDonald v. City of Chicago (2010): decided 5-4; reversed and remanded.
- Plurality (Alito): “In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. See *Duncan*, 391 U. S., at 149, and n. 14. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.”

Guns

- McDonald v. City of Chicago (2010): decided 5-4; reversed and remanded.
- Concurrence (Scalia): “Justice Antonin Scalia concurred. He agreed with the Court's opinion, but wrote separately to disagree with Justice John Paul Stevens' dissent.”
- Concurrence (Thomas): “Justice Clarence Thomas concurred and concurred in the judgment. He agreed that the Fourteenth Amendment incorporates the Second Amendment against the states, but disagreed that the Due Process Clause was the appropriate mechanism. Instead, Justice Thomas advocated that the Privileges or Immunities Clause was the more appropriate avenue for rights incorporation.”

Guns

- McDonald v. City of Chicago (2010): decided 5-4; reversed and remanded.
- Concurrence (Scalia): “I join the Court's opinion. Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights "because it is both long established and narrowly limited." Albright v. Oliver, 510 U. S. 266, 275 (1994) (SCALIA, J., concurring). This case does not require me to reconsider that view, since straightforward application of settled doctrine suffices to decide it.

Guns

- McDonald v. City of Chicago (2010): decided 5-4; reversed and remanded.
- Concurrence (Thomas): “Applying what is now a well-settled test, the plurality opinion concludes that the right to keep and bear arms applies to the States through the Fourteenth Amendment's Due Process Clause because it is "fundamental" to the American "scheme of ordered liberty," *ante*, at 19 (citing *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968)), and " 'deeply rooted in this Nation's history and tradition,' " *ante*, at 19 (quoting *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997)). I agree with that description of the right. But I cannot agree that it is enforceable against the States through a clause that speaks only to "process." Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.”

Guns

- McDonald v. City of Chicago (2010): decided 5-4; reversed and remanded.
- Dissent (Stevens): “[I]t is…an overstatement to say that the Court has "abandoned," a "two-track approach to incorporation,“. The Court moved away from that approach in the area of criminal procedure. But the Second Amendment differs in fundamental respects from its neighboring provisions in the Bill of Rights…and if some 1960s opinions purported to establish a general method of incorporation, that hardly binds us in this case. The Court has not hesitated to cut back on perceived Warren Court excesses in more areas than I can count.”
- “While I agree with the Court that our substantive due process cases offer a principled basis for holding that petitioners have a constitutional right to possess a usable fiream in the home, I am ultimately persuaded that a better reading of our case law supports the city of Chicago.”

Guns

- McDonald v. City of Chicago (2010): decided 5-4; reversed and remanded.
- Dissent (Breyer): “My aim in referring to this history is to illustrate the reefs and shoals that lie in wait for those nonexpert judges who place virtually determinative weight upon historical considerations. In my own view, the Court should not look to history alone but to other factors as well--above all, in cases where the history is so unclear that the experts themselves strongly disagree. It should, for example, consider the basic values that underlie a constitutional provision and their contemporary significance. And it should examine as well the relevant consequences and practical justifications that might, or might not, warrant removing an important question from the democratic decisionmaking process.”

Guns

- McDonald v. City of Chicago (2010): decided 5-4; reversed and remanded.
- Dissent (Breyer): “I thus think it proper, above all where history provides no clear answer, to look to other factors in considering whether a right is sufficiently "fundamental" to remove it from the political process in every State.”
- “For another thing, as *Heller* concedes, the private self-defense right that the Court would incorporate has nothing to do with "the *reason*" the Framers "codified" the right to keep and bear arms “in a written Constitution” . *Heller* immediately adds that the self-defense right was nonetheless "the *central component* of the right." *Ibid.* In my view, this is the historical equivalent of a claim that water runs uphill.”

Guns

- New York State Rifle and Pistol Association v. Bruen (2022): decided 6-3; reversed
- Background: “The state of New York requires a person to show a special need for self-protection to receive an unrestricted license to carry a concealed firearm outside the home. Robert Nash and Brandon Koch challenged the law after New York rejected their concealed-carry applications based on failure to show “proper cause.” A district court dismissed their claims, and the U.S. Court of Appeals for the Second Circuit affirmed.”
- Question Presented: “Does New York's law requiring that applicants for unrestricted concealed-carry licenses demonstrate a special need for self-defense violate the Second Amendment?”

Guns

- New York State Rifle and Pistol Association v. Bruen (2022): decided 6-3; reversed
- Holding: “New York’s proper-cause requirement violates the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public for self-defense.”
- “The right to carry a firearm in public for self-defense is deeply rooted in history, and no other constitutional right requires a showing of “special need” to exercise it. While some “sensitive places” restrictions might be appropriate, Manhattan is not a “sensitive place.” Gun restrictions are constitutional only if there is a tradition of such regulation in U.S. history.”
- Majority (Thomas): “We granted certiorari to decide whether New York's denial of petitioners' license applications violated the Constitution.”

Guns

- New York State Rifle and Pistol Association v. Bruen (2022): decided 6-3; reversed
- Majority (Thomas): “In *Heller* and *McDonald*, we held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense. In doing so, we held unconstitutional two laws that prohibited the possession and use of handguns in the home. In the years since, the Courts of Appeals have coalesced around a "two-step" framework for analyzing Second Amendment challenges that combines history with means-end scrutiny.”
- “As the foregoing shows, *Heller*'s methodology centered on constitutional text and history. Whether it came to defining the character of the right (individual or militia dependent), suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation, *Heller* relied on text and history. It did not invoke any means-end test such as strict or intermediate scrutiny.”

Guns

- New York State Rifle and Pistol Association v. Bruen (2022): decided 6-3; reversed
- Majority (Thomas): “Today, we decline to adopt that two-part approach. In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, **the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation**. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command.“”
- “Despite the popularity of this two-step approach, it is one step too many…*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context.”

Guns

- New York State Rifle and Pistol Association v. Bruen (2022): decided 6-3; reversed
- Majority (Thomas): "*Heller*'s methodology centered on constitutional text and history. Whether it came to defining the character of the right (individual or militia dependent), suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation, *Heller* relied on text and history. It did not invoke any means-end test such as strict or intermediate scrutiny."

Guns

- New York State Rifle and Pistol Association v. Bruen (2022): decided 6-3; reversed
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Guns

- New York State Rifle and Pistol Association v. Bruen (2022): decided 6-3; reversed
- Majority (Thomas): “This Second Amendment standard accords with how we protect other constitutional rights. Take, for instance, the freedom of speech in the First Amendment, to which *Heller* repeatedly compared the right to keep and bear arms. 554 U. S., at 582, 595, 606, 618, 634-635. In that context, "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." ”
- “If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of "intermediate scrutiny" often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable--and, elsewhere, appropriate--it is not deference that the Constitution demands here.”

Guns

- New York State Rifle and Pistol Association v. Bruen (2022): decided 6-3; reversed
- Majority (Thomas): “To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not "uphold every modern law that remotely resembles a historical analogue," because doing so "risk[s] endorsing outliers that our ancestors would never have accepted." *Drummond* v. *Robinson*, 9 F. 4th 217, 226 (CA3 2021). On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.”
- “Having made the constitutional standard endorsed in *Heller* more explicit, we now apply that standard to New York's proper-cause requirement.”

Guns

- New York State Rifle and Pistol Association v. Bruen (2022): decided 6-3; reversed
- Majority (Thomas): [many pages later] “At the end of this long journey through the Anglo-American history of public carry, we conclude that respondents have not met their burden to identify an American tradition justifying the State's proper-cause requirement. The Second Amendment guaranteed to "all Americans" the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions. *Heller*, 554 U. S., at 581. Those restrictions, for example, limited the intent for which one could carry arms, the manner by which one carried arms, or the exceptional circumstances under which one could not carry arms, such as before justices of the peace and other government officials. Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense. Nor, subject to a few late-in-time outliers, have American governments required law-abiding, responsible citizens to "demonstrate a special need for self-protection distinguishable from that of the general community" in order to carry arms in public.”

Guns

- New York State Rifle and Pistol Association v. Bruen (2022): decided 6-3; reversed
- Majority (Thomas): “The constitutional right to bear arms in public for self-defense is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U. S., at 780 (plurality opinion). We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant's right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense.”
- “New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.”

Guns

- New York State Rifle and Pistol Association v. Bruen (2022): decided 6-3; reversed
- Concurrence (Alito): “Justice Samuel Alito authored a concurring opinion arguing that the effect of guns on American society is irrelevant to the issue.”
- Concurrence (Kavanaugh): “Justice Brett Kavanaugh authored a concurring opinion, in which Chief Justice John Roberts joined, noting that many state restrictions requiring background checks, firearms training, a check of mental health records, and fingerprinting, are still permissible because they are objective, in contrast to the discretionary nature of New York’s law.”
- Concurrence (Coney Barrett): “Justice Amy Coney Barrett authored a concurring opinion noting two methodological points the Court did not resolve.”
- Dissent (Breyer): “Justice Stephen Breyer authored a dissenting opinion, in which Justices Sonia Sotomayor and Elena Kagan joined. Justice Breyer argued that states should be able to pass restrictions in an effort to curb the number of deaths caused by gun violence, and the Court’s decision “severely burdens the States’ efforts to do so.””