

Regulating 3D-Printed Guns Post-Heller

Key takeaways from the *Journal of Law, Medicine & Ethics* article by Thaddeus Talbot and Adam Skaggs

THE JUSTICE COLLABORATORY

Yale Law School



Since the Supreme Court's 2008 decision in *District of Columbia v. Heller*, there have been disagreements on how to settle future Second Amendment cases. Some courts use a two-step methodology that first asks whether a regulated activity falls within the Second Amendment's scope and then determines whether the regulation survives means-end scrutiny. The dissenting approach solely takes a historical approach to constitutional inquiries.

The two-step inquiry is the best approach to handling new Second Amendment cases involving new, emerging technology, such as 3D-printed ghost guns.

Dangers of 3D-printed ghost guns



- ▶ Lack serial numbers so *cannot be traced* by law enforcement.
- ▶ Parts can be obtained or created *without background checks*, which makes it easy for these weapons to fall into the wrong hands.
- ▶ Plastic 3D-printed ghost guns are usually *undetectable* by x-ray machines and can be smuggled into high-security environments such as airplanes.
- ▶ More than *2,500 ghost guns* were connected to criminal activity in 114 federal cases from 2010 to April 2020, according to Everytown Research & Policy.¹
- ▶ Online purchases of undetectable gun kits and 3D printers have *skyrocketed* since the COVID-19 outbreak.²

The **two-step** methodology:

Since 2008, more than 1,300 cases have raised Second Amendment claims in the lower courts, according to the Giffords Law Center.³ Judges usually take the following approach to review these gun laws:

Step 1:

Assess whether a challenged law falls into one of several, non-exhaustive categories of "longstanding" laws that *District of Columbia v. Heller* deemed lawful.

- ▶ If the challenged law falls within a category, the inquiry ends and the law is deemed constitutional. If not, the court proceeds to step 2.

Step 2:

Assess whether the law burdens the "core" right and to what degree.

The "history-only" test



Other judges argue that courts should look solely to text, history, and tradition to interpret the meaning of the Second Amendment.

According to Justice Brett Kavanaugh, this method could address new firearm technologies if courts

"simply reason by analogy from history and tradition."⁴

Why a historical test doesn't work for 3D-printed ghost gun regulation



Quality control laws

These are aimed at prohibiting the sale of cheap, fragile guns. However, most of these laws are aimed to protect users by preventing a malfunction, while the regulation of ghost guns involves ensuring weapons can be detected by a magnetometer.

Sensitive time and place laws

These regulate the presence of guns in locations such as schools, churches and polling places. This is not comparable to the regulation of ghost guns because such legislation would make certain guns illegal everywhere, not just in certain places.

Open carry laws

These laws historically allowed gun owners to openly carry their weapons instead of concealing them. However, most open carry laws were only prevalent in the U.S. South and rooted in problematic slavery culture. The goals of these open carry laws are extremely different than the goals of modern ghost gun regulation.

Why the two-step method **is a better fit:**



- ▶ The historical test evaluates modern gun laws based on the types of laws policymakers adopted in the past, regardless of changes in technology and societal norms.
- ▶ By contrast, the two-step approach ensures that constitutional inquiries reflect modern realities while also taking past cases into account.

Conclusion:

Gun technology, patterns of gun violence and societal norms have drastically changed in the past few decades. Modern problems require modern solutions – therefore, a purely historical test is insufficient in determining new gun regulations, especially for advanced technologies like 3D-printed plastic guns that have no precedent in American history.

View the entire article [here](#).

Thaddeus Talbot is a J.D. candidate at Yale Law School focusing on issues of federalism and criminal law. As a Yale ISPS Policy Fellow, he is focusing on U.S. domestic gun policy. He also currently serves as an editor of the *Yale Law Journal*. He received his B.A. from Cornell University.

Adam Skaggs is the Chief Counsel and Policy Director at Giffords Law Center. He previously served as the Senior Counsel at Everytown for Gun Safety and at the Brennan Law Center for Justice, where he worked on election law issues. He graduated from Brooklyn Law School and holds a M.S. in Urban Affairs from Hunter College of the City University of New York.

¹ Everytown, *Untraceable: The Rising Specter of Ghost Guns* (May 2020), available at <<https://everytownresearch.org/reports/untraceable-ghost-guns/>>

² D. Pucino, "Ghost Guns: How Untraceable Firearms Threaten Public Safety," *Giffords Law Center* (May 2020); T. Owen, "People Are Panic-Buying Untraceable 'Ghost Guns' Online in the Coronavirus Pandemic," *VICE*, available at <https://www.vice.com/en_us/article/g5xq3/people-are-panic-buying-untraceable-ghost-guns-online-in-the-coronavirus-pandemic>

³ Giffords Law Center, *Post-Heller Litigation Summary*, June 2019

⁴ *NY State Rifle & Pistol Ass'n v. City of New York*, No. 18-280 (Apr. 27, 2020) (arguing that "some federal and state courts may not be properly applying *Heller* and *McDonald*").