Editorial: ‘History, tradition’ poor test for gun safety laws

Judge’s ruling against the state’s law on large-capacity gun clips is based on a problematic decision.

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By The Herald Editorial Board

Semi-automatic rifles fill a wall of a gun shop in Lynnwood, in October 2018. (Elaine Thompson / Associated Press file photo)

Among several pieces of firearms safety legislation passed by the state Legislature in recent years — including a ban last year on the sale of assault-style semiautomatic firearms — was 2022’s ban on high-capacity magazines that hold more than 10 rounds of ammunition.

There is common sense and public support behind the restrictions on such magazines. A 2020 poll by Cascade PBS (formerly Crosscut)/Elway found that 65 percent of state registered voters polled supported regulating or banning high-capacity magazines. As well, a 2019 study found that states that did not ban large-capacity magazines suffered more than twice the number of high-fatality mass shootings compared with states with such restrictions. Those states saw fewer overall shootings and fewer deaths from mass shootings.

Yet, Monday, Cowlitz County Superior Court Judge Gary Bashor ruled — in Washington v. Gator's Custom Guns — that the two-year-old law violated both the state constitution's right to bear arms for self-defense and U.S. Constitution's Second Amendment. The ruling briefly ended the ban until a state Supreme Court commissioner put the lower court ruling on hold while the state seeks review by full state Supreme Court.

The state law was challenged by a Kelso gun dealer, who faced enforcement by Attorney General Bob Ferguson after the shop continued to sell the magazines. Ferguson has defended the law as constitutional, pointing to past court cases upholding it and similar laws in other states on constitutional grounds.

Bashor bases much of his decision on the U.S. Supreme Court's ruling in New York Rifle & Pistol Association v. Bruen, announced the same month that Washington state's magazine ban took effect.

Writing for the 6-3 majority in Bruen, Justice Clarence Thomas broadened the right to keep and bear arms beyond the court's 2008 Heller ruling, which affirmed the right to keep firearms in the home for self-defense, expanding it to public areas outside the home.

But that ruling went even further, declaring that state and federal gun laws must comply with an originalist interpretation of the U.S. Constitution and the Second Amendment that focuses not on public safety but on its consistency "with the nation's historical tradition of firearm regulation" as the Framers understood it, requiring that legislation could only be based on a similar 18th-century law.

As the editorial board wrote following the ruling: "We await word from the Constitution's Framers regarding the 'history and tradition' of semi-automatic AR-15s and 30-round ammo clips."

That's the standard, however, applied by Bashor.

"Bruen was not an invitation to take a stroll through the forest of historical firearms regulation throughout American history to find a historical analogue from any random time period," Bashor wrote. Instead, the state would have to find a historical gun regulation from 1791, just after the Bill of Rights was adopted, the judge wrote.

Yet, Ferguson said in a statement after Bashor's ruling that — even after Bruen — every court that has heard challenges to laws restricting high-capacity magazines around the country has thus far either rejected the challenge or overruled it. Only two federal courts have ruled against such laws, Ferguson's statement said, and both have been stayed by higher courts pending review, one of which is a California case before the 9th Circuit Court of Appeals, which covers Washington state.

At the same time, the U.S. Supreme Court majority in Bruen may now be chafing under its earlier decision. Its originalist interpretation in Bruen and its “history and tradition” test may now be tested itself by two cases before the high court, writes a law professor in a recent guest essay in The New York Times.

Nelson Lund, a professor at the Antonin Scalia Law School at George Mason University, in the commentary lays out the problems with expecting 18th century laws to meet the challenges of 21st century public safety.

The first case in Lund’s review is U.S. v. Rahimi, which regards a Second Amendment challenge to federal law employed by state courts that bars possession of firearms by those subject to domestic violence restraining orders. Under Bruen’s test, Lund writes, the government during oral argument was unable to show a single law written before the 20th century that would bar someone convicted of a violent crime from owning a firearm.

The second case before it, Garland v. Cargill, involves the ban on bump stocks — devices that allow a semi-automatic weapon to fire at rates similar to automatic weapons — adopted after the 2017 massacre in Las Vegas that killed 60 people and injured hundreds more.

Here, Lund writes, the court will have to choose between making its own policy on firearms or ruling against the constitutional provision that only Congress can amend the text of a law, here the 1934 National Firearms Act, which instituted the ban on machine guns and updated it in 1986 and its description of machine guns as any weapon that shoots “automatically more than one shot, without manual reloading, by a single function of the trigger,” which is what a bump stock accomplishes.

The conundrum the court faces in the two cases, Lund writes: “No judge can relish being accused of siding with domestic abusers or of allowing a weapon to remain on the market that facilitated mass murder.”

Yet, that’s what Bruen’s “history and tradition” test appears to demand.

And that’s the folly in forcing today’s laws to fit a narrow reading of documents — that the Founders entrusted to us 233 years ago to provide a framework for our rights and responsibilities — that we now seek to apply to the challenges we face today.