Millersville University

The Attempt to Curtail the Second Amendment in America

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Abstract

The purpose of this paper is to detail the erosion of the Second Amendment in the United States and review how laws surrounding the Second Amendment have impacted the rights of American citizens. Through this research I attempted to answer the question: How laws have changed through time and how do court cases impact the rights of the American people? The research was conducted throughout the time period of December 2022 through October 2023. The research showed that there were many laws that impacted citizens' right to bear arms and while there were many court cases reinstating those rights, there is an effort that is being made to curtail the Second Amendment rights of the American people.

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The Second Amendment to the United States Constitution is as follows: “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.” Being as explicit and straightforward as that is, there is much confusion surrounding the language used in the amendment. The first phrase is often construed to mean that there ought to be a government regulated militia of Americans, however, given those that were writing this phrase, the founding fathers of this nation, were writing these amendments based off of their experience with tyranny along with the language used in the day, we can see that “a well regulated militia” is not akin to the National Guard, but rather a group of Americans who want to protect their country from tyranny. This is further proven by the next phrase “being necessary to the security of a free state,” as those who have the ability to protect themselves from the wrongs of a government secures a free state. The last phrase of the Second Amendment is only contested by the use of the language of “arms” as other weapons, such as knives or bows, that do not include modern firearms. However, “shall not be infringed” is a quite clear statement presumably calling into question any sort of gun law as its unconstitutional. Nevertheless, gun laws have been created throughout most of the United States and are most prevalent in cities. The intention of this paper is to review the erosion of, and attempt to curtail the Second Amendment of the United States Constitution.

Let’s review some major gun control laws to see how it has evolved over the history of the nation. In the year 1927, Congress passed the Miller Act which banned the mail of concealable weapons. The Federal Firearms Act of 1938 is the first gun law to restrict in some way the sale of any sort of gun by having sellers obtain a Federal Firearm License each year at the cost of $1 as well as requiring them to maintain records of those who they sold to. One reasonable addition to this Act was that it prevented the sale to those convicted of violent

felonies. The Gun Control Act of 1968 expanded the requirements on gun dealers in terms of record-keeping and expanded those banned from the purchase of a gun to those convicted of any non-business-related felony, those found to be mentally incompetent, and drug users. Now in 1972, The Bureau of Alcohol Tobacco and Firearms is the executive bureau that enforces all gun laws. The Brady Handgun Violence Prevention Act of 1994 forces a five-day wait period on handgun purchases for the purpose of background checks on the purchaser. In 1997, the U.S. Supreme Court declared the previous Act unconstitutional in the case of *Printz v. United States*, pushing back against laws that threaten to eliminate the rights of the people. In January 2008, then-President Bush signed the National Instant Criminal Background Check Improvement Act which included legally declared mentally ill individuals as ineligible to purchase firearms. We will discuss the landmark case of *District of Columbia v. Heller* in more detail but in short, it overturned the 1976 ban on sale or possession of handguns in the District of Columbia. More recently, in 2022, the U.S. Supreme Court struck down a New York restriction on firearms in *New York State Rifle & Pistol Association v. Bruen* that will also be discussed in greater detail. However, a day later, President Joe Biden signed the Bipartisan Safer Communities Act which bars more domestic-violence offenders from purchasing guns, but also funds Red Flag programs that allow the police to forcefully seize guns from troubled individuals. There are plenty of understandable reasons for wanting to change the law regarding guns, such as barring convicted criminals from owning firearms, however, the Bill of Rights is not something the government allows for its citizens to have. But the ultimate purpose of the Bill of Rights as well as any amendment to the constitution is to protect the citizens of the United States from the government of the United States. To put it differently, amendments to the constitution create guidelines for

the United States Government so as to not infringe on the God-given rights of the people of the United States.

The case *District of Columbia v. Heller* answered the aforementioned question whether the right to "keep and bear arms" is an individual right that does not require connections to militia service, or is a collective right that only applies to militias that are state-regulated. The case struck down an unconstitutional law that banned the possession of a handgun by non-law enforcement officials and required all lawfully owned firearms be unloaded or disassembled when in storage or locked when being used for recreational activity or at a place of business. The law also prohibited carrying handguns anywhere in District of Columbia. without a license that a police chief could issue for up to one year at a time. At the district court level, the complaint from the plaintiffs was dismissed on the grounds that the right to bear arms was separate and apart from service in organized militias. The appeals court reversed the lower court's decision holding that the requirement to keep firearms nonfunctional violates the right of the people to use their firearms for self-defense. The Supreme Court determined that having it be unloaded or disassembled would make it difficult and impractical for home defense thus undermining the whole purpose of lawful self-defense. The court also claims that the Second Amendment right is still held to a number of gun control laws that were previously mentioned.

Justices Stevens and Breyer filed separate dissenting opinions although they joined in dissent for both opinions. Justice Stevens argued that the individual right to keep and bear arms is only protected through the pretense of military service and that it is within the government's authority to regulate the possession or use of civilian firearms. Justice Breyer, while agreeing with Stevens about the militia issue, argues that a sound approach to gun control would be a "balancing test" that focuses on what would be consistent with the amendment practically even if

it can be interpreted as protecting a "wholly separate interest in individual self-defense." According to the majority opinion, the handgun ban was basically a ban on an entire class of arms that were popular among Americans for the purpose of self-defense. The ban also extended into the home of Americans, where it is argued that the need is most urgent, therefore, it would not meet the constitutional standards that Courts had applied in the past to the enumerated constitutional rights. The majority opinion also held that keeping the requirement for firearms to be inoperable at all times was unconstitutional because it made it impossible for citizens to use them for its designed purposes. The Court did not address the licensing requirement as Heller indicated that the law would be acceptable if not enforced in an arbitrary and capricious manner.

After the review of historical records and the Second Amendment, Scalia concluded that the interpretation of individual rights is supported by historical record, the drafting history of the Second Amendment, and interpretations of the amendment by scholars, courts, and legislators through the late nineteenth century. Scalia viewed the text of the amendment's operative clause "the right of the people to keep and bear Arms, shall not be infringed" as controlling. He also asserted that "the people" refers to all citizens of the United States, and not a subset that goes unspecified. He determined the phrase "to keep and bear arms" means to have weapons and carry them, and that "the right of the people" refers to a preexisting right. Scalia recognized that Congress simply codified a widely recognized right and was not creating a new right. The prefatory clause "well regulated militia, being necessary to the security of a free State," corresponds with operative clause and means that well-trained citizen militias are necessary to deny Congress from shortening the rights of the people. Scalia makes it clear that preserving a well-regulated militia was not the only reason that Americans valued the right to bear arms and that self-defense and hunting were included in that right.

Scalia did find that the Second Amendment rights were not absolute. Meaning that the right to keep and carry any weapon for any purpose is not granted by the Second Amendment. Scalia found that the "presumptively lawful" regulations are the laws that prohibit concealed carry, prohibit possession of firearms by felons and mentally ill people, forbid firearms in sensitive places like schools or government buildings, and impose conditions and qualifications on commercial sales of firearms. He included that he would support the historical tradition of prohibiting dangerous and unusual weapons. Furthermore, Scalia stated in a footnote that the list "does not purport to be exhaustive" leaving the door open for future laws restricting the Second Amendment. While the court could not make a specific standard, it rejected the rational basis standard and Breyer's interest balancing approach. Scalia did acknowledge that there is an issue of handgun violence but still asserted that the Second Amendment "necessarily takes certain policy choices off the table."

Moving on, the recent case *New York State Rifle & Pistol Association, Inc. v. Bruen*, was argued on November 3, 2021, and decided June 23, 2022. The basis for this case is that the state of New York makes it illegal to possess any firearm without a license whether in or outside of the home. Anyone who wants to carry a firearm outside his home can obtain an unrestricted license if they can prove that a proper cause exists for doing so. Applicants only can satisfy that requirement if his need is distinguishable from that of the general community. Two petitioners, Brandon Kock and Robert Nash, who are both adult law-abiding citizens, applied for this license but were denied for supposedly failing to satisfy the proper cause requirement. The two then sued the state officials who oversee the application process for violating their Second and Fourteenth Amendment rights by denying their unrestricted license applications. Both the District Court and the Court of Appeals dismissed their complaints relying on the prior decision

Kachalsky v. County of Westchester which held the proper cause standard to be "substantially related to the achievement of an important governmental interest."

The plaintiffs held that the New York proper-cause requirement violates the Fourteenth Amendment by preventing law-abiding citizens from exercising their Second Amendment right to keep and bear arms in public for self-defense. The cases *District of Columbia v. Heller* and *McDonald v. Chicago* sets a precedent that protects the individual right to keep and bear arms. *Heller* set the precedent that in order to justify a firearm regulation, the government must demonstrate that the regulation is consistent with the historical tradition of firearm regulation of this Nation. The court holds that historical analysis, while being difficult and can be nuanced, is a more legitimate and administrable method than forcing judges to "make difficult empirical judgements" on "the costs and benefits of firearm restrictions." Since it is undisputed that both petitioners are two ordinary, law-abiding, adult citizens, they are part of "the people" that the Second Amendment protects. The Court concludes that along with protecting the proposed conduct by the petitioners (that being self-defense), the Second Amendment makes no distinction between home use and public use and that the definition of "bear" naturally includes public carry. Therefore, it is up to the respondents to show that the New York proper-cause requirement is consistent with the Nation's historical tradition of firearm regulation. The court recognized that 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" according to the *McDonald* plurality opinion.

In the opinion of the court for *New York State Rifle & Pistol Association, Inc. v. Bruen*, the court found that the second step of the Court of Appeals' two-part approach that applies means-end scrutiny to be inconsistent with *Heller's* historical approach. The court concluded that

only when the government can justify regulation with consistency to the historical tradition of firearm regulation can the court conclude that an individual's conduct falls outside the Second Amendment's "unqualified command." The court also directly mentioned that the reference to "arms" in the Second Amendment does not only apply to 18th century weapons, "just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of founding." Therefore even though the definition is fixed in accordance with historical understanding, modern instruments that facilitate armed self-defense are covered within its definition. The court makes it clear that courts should not simply uphold laws that resemble historical analogue because that would include outliers that would have never been accepted, but on the other hand, analogical reasoning merely requires the government to identify a well-established historical analogue and not twin so that even if modern regulation is not exactly the same as historical precursors, it can still be analogous enough to be considered constitutional. In the conclusion of the opinion of the court, they found that the constitutional right to bear arms in public for self defense is not a "second-class right." They add that there is no other constitutional right that individuals can only exercise following the demonstration of need to government officials. That is not how the First Amendment works when it comes to unpopular speech or religion. In the end, the court found that New York's proper-cause requirement violated the Fourteenth Amendment insofar as preventing law-abiding citizens from exercising their right to bear arms. The court reversed the judgment of the Court of Appeals and remanded the case for further proceedings consistent with this opinion.

At the district level, *Miller v. Bonta* alleged that the California ban on high-capacity magazines was an unconstitutional restriction of the Second Amendment. The plaintiffs at the time argued that the definition of "assault weapon" was politically motivated and prevented law-abiding citizens from other legal activities such as self-defense and hunting. The Attorney General's office argued that the bans were necessary due to their lethality and their considerable use in mass shooting instances. The judge of the District Court, Judge Roger Benitez, ruled in favor of the plaintiffs, comparing the AR-15 to a knife and citing statistics for deaths related to use of either weapon. The ruling was originally put on hold until the proceedings of the *New York State Rifle & Pistol Association, Inc. v. Bruen* were finished as they significantly affected the standards of which *Miller v. Bonta* were to be held. In his conclusion, Judge Benitez states that "California's answer to the criminal misuse of a few is to disarm its many good residents," he continues that in both early America and today, the Second Amendment right of self-preservation permits a citizen to "'repel force by force' when 'the intervention of society in his behalf, may be too late to prevent that injury.'" California is punishing their good citizens for the misuse of its bad ones.

Plaintiffs James Miller et al. filed a complaint that was dated September 26, 2022 further suing Attorney General of California Rob Bonta and Director of the California Department of Justice Bureau of Firearms Luis Lopez. The Californian lawsuit challenges a recently enacted California law that aims to decrease the litigation of firearm-related issues by making civil rights litigants and their attorneys responsible for the government's attorney's fees if the result of a case ends in anything but a complete victory for plaintiffs on every claim alleged in a complaint. This law was clearly enacted to deter potential litigants from suing the government and avoid any sort of judicial review of the Second Amendment in California. Given that California has

some of the most restrictive gun laws in the nation, Senate Bill 1327, which Governor Newsom signed into law on July 22, 2022, creates an ominous tone while trying to prevent their laws from being reviewed for constitutionality.

The complaint addresses that the attempt to insulate state and local firearm regulations from legal challenges through fee-shifting is unconstitutional in many respects. The plaintiffs of this case have been in a long-running challenge against California's ban on so-called "assault weapons" and after the decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, the court vacated judgment and remanded *Miller v. Bonta* for further consideration. The new law however, forces Plaintiffs to litigate their challenges under the threat of potentially ruinous fees if they do not prevail on every claim in the case. The complaint addresses that Section 1021.11, that went into effect at the beginning of 2023, violates the First Amendment because it singles out firearm advocates and seeks to choke their access to the courts for protected constitutional activity. The plaintiffs also suggest that Section 1021.11 violates the Equal Protection Clause because it creates classifications with respect to fundamental right to petition as well as singling out the right to keep and bear arms. Plaintiffs reason that California adopted this fee-shifting scheme as a tit-for-tat response to a similar issue in Texas involving abortion. The plaintiffs also suggest that said reasoning is not a permissible justification for the classifications as *U.S. Dep't of Agric. v. Moreno* says that "a bare… desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Plaintiffs make it clear that the case does not challenge the general features of SB 1327, rather the radical effort to suppress firearm-related litigation. Plaintiffs argue that the design of SB 1327 could leave future plaintiffs liable for the government's fees even if the plaintiff obtained all sought relief. Benitez ruled that the statutes and penalty provisions were unconstitutional and were enjoined.

In the case *McDonald v Chicago,* four residents of Chicago petitioned to keep handguns in their homes for self-defense but were prohibited from doing so by the city's firearms laws. The law was initially enacted as a way to protect residents "from the loss of property and injury or death from firearms," however the Chicago Police Department statistics revealed that following the ban on handguns, the handgun murder rate increased and Chicago residents face one of the highest murder rates in the country. The main argument held by the petitioners was that the 14th Amendment's Due Process Clause "incorporates" the Second Amendment right to bear arms. In his majority opinion, Justice Samuel Alito does point out in his majority opinion that originally the Bill of Rights, including the Second Amendment, only applied to the Federal Government and courts rejected the idea that the first eight Amendments applied to the States. However, Justice Alito also mentions that the aftermath of the Civil War fundamentally altered the United States' federal system and alongside other issues, he stated that a State may not abridge "the privileges or immunities of citizens of the United States" or deprive "any person of life, liberty, or property, without due process of law." Justice Alito further backs the Second Amendment saying that the Supreme Court's previous decision in *Heller* defines self-defense as a basic right recognized by many legal systems from the past to the present. Since self-defense was seen as the "central component" to the Second Amendment, and that "the need for defense of self, family, and property is most acute in the home," Justice Alito states that the court found that the Second Amendment applies to handguns since they are the most preferred firearm in the nation to keep and use for the protection of one's home. In Justice Thomas' concurring opinion, he clarifies that while the case *District of Columbia v. Heller* did declare handgun bans unconstitutional at a federal level, it "explicitly refrained" from opining on whether the Second Amendment applies to the States. The case of *McDonald v. City of Chicago* now asks the court if

the Second Amendment applies to the States; or can the States in any way prohibit firearms. In short, the Supreme Court in the case of *McDonald v. City of Chicago* found that the Second Amendment is in fact fully applicable to the States.

Even more recently there was a bill introduced in the Senate by the late Californian Senator Dianne Feinstein that is being cited as the "Assault Weapons Ban of 2023". While this bill has yet to pass the Senate, it gives us a look at what kind of future restrictions the people of America will have to deal with in the coming years. The big-ticket item on the proposed act restricts the possession, sale, transfer, importation, and manufacturing of a semiautomatic assault weapon. While it does state that the previous statement "shall not apply to the possession, sale, or transfer of any semiautomatic assault weapon otherwise lawfully possessed under Federal law on the date of enactment of the Assault Weapons Ban of 2023," that does mean following the enactment of that bill, Americans can only purchase guns manually operated by either a bolt, pump, lever, or slide action, with exception to a shotgun that was described in section 921(a)(40)(G). The bill does not fully ban semiautomatic weapons for everyone in the United States though. It allows semiautomatic weapons to be possessed and sold to departments or agencies of the United States government. It also allows for members of these agencies to possess these firearms for law enforcement whether they are on or off duty. This bill solely restricts the access of semiautomatic weapons to normal citizens of the United States, only allowing the government itself to use these weapons, completely ignoring the Second Amendment. This congressional bill explicitly goes against the opinions of landmark Supreme Court cases regarding the Second Amendment and was unsurprisingly brought to the Senate by a senator of a state that expressly ignores the guidance of the *McDonald v. City of Chicago* case.

To summarize the above cases, *District of Columbia v. Heller* laid the foundations for the definitions and interpretations of the Second Amendment. The court ultimately ruled that a ban on personal handgun possession was unconstitutional because they interpreted the wording of the Second Amendment did not require citizens to participate in a state-regulated militia in order to be able to exercise their Second Amendment rights and applies to any individual regardless of their association with service in the militia. *New York State Rifle & Pistol Association, Inc. v. Bruen* brought to light the unconstitutional law in New York State that made it illegal to possess a handgun unless you have a permit. The case makes it clear that much like the First Amendment applies to modern forms of communication, the Second Amendment applies to the modern forms of arms even though the arms were not in existence at the time the Constitution was written. The court found that the defendants erred when denying the plaintiffs' applications for not citing that a proper cause exists for the plaintiffs to obtain an unrestricted license to "have and carry" a concealed "pistol or revolver." Next, the case *Miller v. Bonta*, while being an ongoing case, revealed the effort of the Californian government to reduce the ability for citizens to fight for their rights given in the Constitution. After going through the general layout of *District of Columbia v. Heller*, *New York State Rifle & Pistol Association, Inc. v. Bruen*, and *Miller v. Bonta*, we can see that there are laws that were enacted that deteriorate the rights of American citizens. Finally, the case *McDonald v. City of Chicago* confirmed that States, as well as the Federal government, cannot infringe upon the rights of the citizens to keep and bear arms. Yet we see in 2023 a bill being introduced to the Senate that has the sole purpose of undermining the Second Amendment in the name of "safety." Whether or not that is their purpose is an entirely different discussion altogether. Given that we see a number of laws that restrict firearm usage as the foundations of the aforementioned cases, as well as riddled throughout many state and local

laws, and even in new legislation that is being pushed by the current president and congress, we can see that there is some sort of attempt to minimize the constitutional right of the people to keep and bear arms codified by the Second Amendment. Although my opinions about what rights the Second Amendment gives do not perfectly line up with the definitions and meanings courts have given it in recent time, I believe that there is a strong attempt in the United States of America to limit the God-given rights of the citizens of the United States of America, and in order to limit its citizens without reprimand, government officials see it fit to erode away and curtail the rights of the people that are again codified in the Second Amendment of the United States Constitution.

How Laws Have Affected Firearm Dealing Businesses

Changes to the Second Amendment can greatly affect how a firearm distributor is allowed to run their business. The law enforcement agency responsible with ensuring compliance of federal law is The Bureau of Alcohol, Tobacco, Firearms and Explosives or more commonly known as the ATF. One cost of doing business legally for firearm dealers is their FFL or Federal Firearm License. According to RocketFFL, in order to apply for an FFL, an individual or company must spend between $30 and $3,000 on the application depending on the license type and must spend between $30 and $3,000 to renew their license every three years. Cheaper $30 FFLs, allow citizens to collect firearms or manufacture ammunition with the more exorbitant FFLs of $3,000 allow citizens to import, manufacture, and deal destructive devices. The normal application for a dealer of firearms costs $200 with a $90 renewal fee. According to a recent fact sheet on the implementation of the Bipartisan Safer Communities Act, one federal law that impacts how firearm deals operate is the 1994 law that requires federally licensed firearm dealers

to run background checks prior to selling or transferring a weapon. Only licensed firearm dealers can access NICS which is the database ran by the FBI to run background checks on individuals looking to purchase a firearm. The new action expands the definition of those who are "engaged in the business" of selling firearms and who are required to become licensed by the ATF. While this action is intended to seal the possibilities of the "gun show loophole," it can make everyday Americans into felonies just for selling off their property.

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