Chapter 11
The History of Gun Law and the Second Amendment in the United States

Elisabeth J. Ryan

Constitutional Congress and the Early United States

The Second Amendment to the United States Constitution [12] states, "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." Virtually no commentary exists specific to the Second Amendment from the time of the Bill of Rights ratification in 1791, aside from some limited records of debate in the new House of Representatives ([1], p. 1037). However, the Second Amendment reflected the influence of the English Bill of Rights, the colonial system of militias, and the fears of a tyrannical government and a standing army. Importantly, "the basic idea that gun possession must be balanced with gun safety laws was one that the founders endorsed" ([2], p. 117). More than 200 years after the fledging United States incorporated it into its Bill of Rights, the U.S. Supreme Court declared in 2008 that the Second Amendment primarily protects a preexisting right to self-defense and an individual right to bear arms (*District of Columbia v. Heller*, 554 U.S. 570 [3]). The Second Amendment's progression from a passage protecting a state militia system to a modern right protecting self-defense traces the country's complicated relationship with guns. Today, the United States has more firearms than it does people and a grossly disproportionate fatality rate from firearms as compared to most of the rest of the world [4, 5]. It is also one of only three countries that recognizes firearm possession as a constitutional right; the others are Mexico and Guatemala [6].

James Madison authored most of the first draft of the Bill of Rights, including what became the Second Amendment ([7], p. 136). Madison almost certainly looked for inspiration in the English Bill of Rights, which declared that "The subjects which are protestant may have arms for their defence suitable to their conditions

E. J. Ryan (✉)
Harvard University Extension School, Cambridge, MA, USA
e-mail: ejr102@mail.harvard.edu

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and as allowed by law"[1] ([1], p. 1022; [7], pp. 136, 335; [8], p. 305). Parliament drafted this limited protection after the fall of King James II in 1689 ([2], p. 99). King James II, a Roman Catholic ruling an overwhelmingly Protestant Britain openly hostile to Catholics, represented not just a religious threat, but also a threat to the entire English order ([1], p. 1016; [2], p. 100). He believed that he had absolute and unlimited power and answered solely to God ([2], p. 100). Accordingly, James II refused to adhere to the Magna Carta's centuries-old decree that monarchs had to abide by Parliament ([2], p. 100). One of James II's tactics to prevent a rebellion was to disarm his political opponents ([1], p. 1017; [2], p. 101; [9], p. 59). He did this by invoking the Militia Act of 1664, which authorized the king's men to confiscate the weapons of those determined to be "dangerous to the Peace of the Kingdom" ([2], p. 101). He deemed the Protestants (who made up about 98% of his population) to be "dangerous to the Peace of the Kingdom," so he ordered gunsmiths to turn over lists of customers and invoked the Game Act, which prohibited anyone below a certain wealth level to possess guns ([2], p. 101; [7], pp. 126–127; [8], pp. 302–303). After just a few years of reign, however, James's own daughter and son-in-law toppled him from the throne in the Glorious Revolution of 1689 ([2], pp. 101–102). As a condition of William and Mary of Orange then taking the throne, Parliament required them to abide by the new English Bill of Rights, which included a direct rebuke to James II's disarmament tactics ([1], pp. 1017–18; [2], p. 102; [9], p. 59). The provision that Protestants may have arms for defense, but also be subject to the laws of Parliament, was not necessarily a new right, but only newly codified, and by no means an absolute or unlimited right to arms ([1], p. 1019; [2], p. 102, 115). In particular, "the phrase 'as allowed by law' highlights that what Parliament giveth, Parliament could take away" ([1], p. 1019).

Almost 100 years later, the British crown again tried to utilize disarmament tactics against its subjects in the American colonies ([2], p. 103). In the 1770s, the colonies were hurtling toward rebellion ([7], pp. 248–253). This led King George III to not only stop all firearm and ammunition exports to the colonies, but also to order that any colonists seeking to leave British military-occupied Boston turn over their guns ([2], p. 103; [7], pp. 253–256, 264–266). So while Britain recognized the right to arms for the Protestants in its home territory, it used James II's disarmament tactics to push back against the rebellious colonies ([2], p. 103; [7], pp. 131–132).

Since the early days of the colonies, militias proved to be an essential and central component of life ([7], pp. 225–234; [9], p. 8; [10], p. 14). Without a standing army and without formalized law enforcement, "the national defense depended upon an armed citizenry," capable of providing both local and national defense ([2], p. 113; [10], p. 15). Militias, "provided a necessary pool of manpower from which men could be drawn by volunteering, by calling up units, even by draft if need be" ([10], p. 33). While rules varied, most colonies generally required that free men between

[1] Madison also believed, however, that the English Bill of Rights was merely an act of Parliament and could thus be easily overturned by a later Parliament ([1], p. 1037).

ages 16 and 60 years participate in the militia,[2] which provided both local protection (largely from the Native tribes who occupied the land the colonists had seized and declared their own) and eventually, larger wartime service ([2], pp. 113, 115; [7], p. 225; [10], pp. 14, 16, 19; [11], p. 2). Part of militia service was a requirement that every member provide his own firearm, likely a musket or a rifle that he already kept in his home ([2], p. 113; [7], p. 238). Several times a year, the local government would call for a "muster" and militia members would have to appear with their military-ready firearms for inspection ([2], pp. 113–114). While militias fulfilled many practical purposes, the system also represented "the only form of defense compatible with liberty," especially in contrast to a potentially tyrannical and overpowering standing army ([11], p. 3). Once Britain began to rachet up taxes and punishments on the colonists in the 1770s, the militias became serious undertakings out of necessity ([9], pp. 9–10). Although their actual effectiveness during the Revolution was varied, militias still represented the force of the people, not of the government ([9], pp. 14–15; [10], pp. 39, 43–44).[3] But even after the colonists' victory in the war against Britain, the fear of an oppressive government in the new United States remained acute and entirely within the realm of possibility ([9], pp. 16, 22–23, 89).

When drafting the Constitution for the new American government, the founders recognized that relying on the de-centralized system of state militias would be inadequate and potentially dangerous for the security of the nation as a whole ([7], pp. 304–306). But the fear of a standing army persisted, as did fear that a standing army could take over state militias and disarm them ([1], p. 1022; [2], p. 24). The system that emerged in Article I of the Constitution represented a compromise between the federal and state governments, which also characterized the new government structure as a whole ([7], pp. 304–206; [9], pp. 22–23). The federal government would have a professional standing army, but funding for only 2 years at a time (U.S. Constitution, Art. I § 8; [1], pp. 1022–23). The states would also maintain their militias and have power over training and the choosing of officers (U.S. Constitution, Art. I § 8). "[T]he necessity of providing for the common defense had to be satisfied while guarding against the national government's abuse of power" ([1], p. 1023). If needed, however, the federal government could call the militias into national service (U.S. Constitution, Art I § 8; [2], p. 108; [11], p. 43). This still did not satisfy everyone, particularly those known as "Anti-federalists" who greatly feared that the Constitution ceded too much control of state militias to Congress, which might "disarm the militia or destroy it through neglect" ([7], p. 406).

Although the Constitution was enacted without a Bill of Rights, the fear that a strong federal government would impose on individual rights proved sufficient

[2] The wealthy, however, could often buy their way out of service ([9], p. 9).

[3] Not everyone was allowed to join the militia or to possess arms. This included selective (and often forceful) disarmament of several groups, including "slaves, free blacks, and people of mixed race out of fear that these groups would use guns to revolt against slave maters." In some places, bans extended to Catholics, Loyalists, Native people, and sometimes "anyone deemed untrustworthy" ([2], pp. 115–116; [9], pp. 41–42; [10], p. 32).

enough to add one almost immediately ([2], p. 50; [9], p. 48). James Madison principally authored the first drafts of the Bill of Rights, which then became subject to the approval of the new Congress ([7], p. 334, [9], pp. 50–51). Madison's original proposal for what would become the Second Amendment read, "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person" ([7], p. 335). However, Madison never revealed his thinking or intentions behind the amendment, officially or otherwise ([9], p. 52). The inaugural House of Representatives, which reviewed the first versions of the proposed Bill of Rights, only slightly altered Madison's original draft ([9], p. 52). The limited record of debate from that time reflects that some representatives objected to the "religiously scrupulous" clause because of fear that it would allow the federal government to forcibly disarm anyone it deemed religiously scrupulous ([1], p. 1037; [7], pp. 336–37; [9], p. 54). When the House-approved version was sent to the Senate, however, all debate occurred behind closed doors and no records exist detailing the discussion or giving any hints as to why the version that emerged was different from the version that went in ([9], pp. 56–57). The Senate version, soon adopted officially, is the version enshrined in the Constitution today and "reassured wary Americans that Congress would not have the power to destroy state militias by disarming the people" ([2], p. 109). The final amendment may have represented an uneasy compromise between politicians pushing for a stronger central military and citizens who opposed it, but the full intention of the Framers is simply unknown ([9], p. 58). None of the records of the Constitutional Convention, state ratification debates, or U.S. House mention the individual right to a gun for self defense ([9], p. XII).

Nineteenth-Century Second Amendment: Slave Laws and the Wild West

The importance of militias and the fear of a standing army diminished significantly in the nineteenth century ([2], pp. 132–133; [9], p. 67). Indeed, the Second Amendment, which had been so important to protecting the young country against potential tyranny, was virtually ignored until around the Civil War era. By then, many southern militias had transformed into violent slave patrols, "posses of armed whites [that] would hunt down escaped slaves and terrorize free blacks" ([2], pp. 133, 137; [7], p. 406). The "slave patrols" eventually developed into groups like the Ku Klux Klan, created to target freedmen, including by disarming them and leaving them virtually defenseless against such terrorism ([2], pp. 142, 167; [7], p. 429; [9], p. 67). This era saw a rise in gun violence and also the first real arguments that a right to arms meant an individual right to gun ownership ([2], pp. 142, 167; [9], p. 67). Only in the years surrounding the Civil War, when southern states

began to enact firearms regulations (many aimed specifically at preventing black freedmen from possessing weapons[4]) did any courts look to the Second Amendment to evaluate laws ([2], p. 132; [7], p. 404; [9], p. 72). And even then, many courts based decisions on state constitutions, most of which codified some version of a right to bear arms. The 1840 Tennessee case of *Aymette v. State* (21 Tenn. (2 Humph.) 152 [13]), for example, held that both the Second Amendment and the state constitution proclaiming "That the free white men of this State, have a right to keep and bear arms for their common defence," (Aymette, 21 Tenn. at 153) protected "the arms…[which] are usually employed in civilized warfare," (Aymette, 21 Tenn. at 157) but not "weapons [that] would be useless in war" (Aymette, 21 Tenn. at 156). In other words, "bearing arms" was a right inextricably linked to military service ([11], p. 146).

After the Civil War, the drafters of the Fourteenth Amendment intended not just to require "equal protection of the laws" to everyone, but to incorporate the first eight amendments of the Bill of Rights to the states, in addition to the federal government ([2], p. 141; [7], p. 433; [9], p. 74). However, the few state court decisions addressing the Second Amendment found that it only applied to the federal government, not to the states; the U.S. Supreme Court supported that view ([2], pp. 144–45).[5] States, therefore, did not have to concern themselves with what the Second Amendment did and did not protect. The provision became essentially obsolete until well into the twentieth century ([2], pp. 212–13).

The cowboy on the frontier in the late nineteenth century remains one of the prevailing images of American gun culture ([2], pp. 157–60). But contrary to popular Western movies, the cities and towns that developed during the western expansion actually had strict rules against gun carrying within their borders ([2], pp. 160, 163; [9], pp. 77–78). While gun possession was indeed widespread when traveling (in case of an encounter with bears or stagecoach robbers), once a frontiersman entered city limits, the local sheriff often required him to turn over his gun for a token, much like a coat check ([2], p. 165). When Dodge City, Kansas, officially organized a local government, one of its first enacted rules proscribed the carrying of concealed weapons ([2], p. 166). This allowed law enforcement to know that its residents and visitors would not, in fact, resort to the dramatic shoot-outs that characterize the pop culture version of the West ([2], pp. 171–73).

[4] See, e.g., *State v. Newsom*, 27 N.C. (5 Ired.) 250 (1844).

[5] See *United States v. Cruikshank*, 92 U.S. 542 (1875) and *Presser v. Illinois*, 116 US 252 (1886). "As Pulitzer Prize-winning historian Leonard Levy remarked, 'Cruikshank paralyzed the federal government's attempt to protect black citizens by punishing violators of their Civil Rights and, in effect, shaped the Constitution to the advantage of the Ku Klux Klan'" ([2], p. 145).

Twentieth Century: Crime and Public Safety

Until the 1930s, crime and public safety were almost entirely the purview of the states ([2], pp. 144–45; [9], p. 80). The number of guns and accompanying state gun laws had both increased with the Industrial Revolution ([14], p. 49). But with the rise in "gangster" crime due to Prohibition and the spreading infrastructure that allowed criminals to easily travel across state lines, the federal government began to involve itself out of necessity ([2], pp. 187–88,193–94; [9], p. 81; [14], pp. 49, 52). Due at least in part to the likes of Al Capone trading in illegal alcohol and utilizing automatic "Tommy Guns" to publicly slaughter their enemies—like they did at the 1929 Valentine's Day Massacre in Chicago—the federal government enacted the first substantial federal gun legislation with the National Firearms Act of 1934 ([2], pp. 188–93; [9], p. 81; [11], p. 200; [14], p. 55). This law imposed a hefty excise tax on the sale of certain weapons, such as machine guns and sawed-off shotguns, and required all such firearms to be registered ([2], p. 203; [9], p. 81).[6] The NFA was, at least in part, "a ban disguised as a tax, intended to discourage the possession and use of covered firearms" ([15], p. 61). President Franklin Roosevelt's Attorney General Homer Cummings carefully crafted not only the NFA but also its challenge in court ([7], pp. 530–31). In the midst of a larger general expansion of federal power with the New Deal, Cummings knew that the courts were wary of this spreading federal power, so he intentionally crafted a case that would reach the Supreme Court in a form that would make upholding the federal firearms law very easy ([2], pp. 198, 201–02, 213).

Cummings honed in on a small-time bank robber named Jack Miller, who had previously testified readily against his collaborators in exchange for leniency from the FBI ([2], p. 213; [9], p. 82; [15], pp. 55–56). In April 1938, Arkansas law enforcement found him in possession with an unregistered sawed-off shotgun, a violation of the newly enacted National Firearms Act ([2], p. 214; [15], p. 58). The district court judge tossed out the case against Miller by proclaiming that the NFA violated the Second Amendment—a decision that was likely, if not explicitly, in corroboration with Cummings and aimed to get the case to the Supreme Court ([2], p. 214; [9], p. 82; [15], p. 60). When it did, Miller himself had disappeared and his lawyer refused to appear without being paid, so only the federal government presented its case via brief and at oral argument ([2], p. 214; [9], p. 83).[7] Thus, only the federal government presented evidence as to why the NFA should be upheld as constitutional, and no opposing parties argued against it. In 1939, the U.S. Supreme Court issued a convoluted and far from clear decision that nonetheless upheld the NFA as not violating the Second Amendment because there was no evidence that showed a sawed-off shotgun was appropriate for military use ([2], pp. 215–16; [9],

[6] Full text available at https://archive.org/stream/NationalFirearmsActOf1934/National_Firearms_Act_of_1934_djvu.txt

[7] Mr. Miller was found shot to death a few months after the Supreme Court upheld his conviction ([2], p. 216; [15], pp. 66–67).

p. 83; [15], pp. 67, 69–70; *United States v. Miller*, 307 U.S. 174 [16]). Of course, Mr. Miller presented no case at all and therefore could not have possibly showed his firearm was appropriate for military use and thus protected by the Second Amendment. But until 2008 when the Supreme Court decided the landmark *District of Columbia v. Heller* [3] case, the prevailing Second Amendment case was *United States v. Miller* [16], which seemed to hold that the Second Amendment only protected firearms that were suitable for service in the military (*Miller*, 307 U.S. at 178; [2], pp. 25, 216; [15], p. 75). For the remainder of the twentieth century, federal courts interpreted *Miller* as protecting only the gun rights of militias, not individuals ([2], pp. 34–25, 122).

By the 1960s, the number of guns in American civilian hands had skyrocketed and the number of imported handguns had exploded from 67,000 per year in 1955 to over one million in 1968 ([2], p. 250). States began to increase their restrictions on firearms as well, sparked at least partially by the civil rights movement, the increasingly frequent so-called "race riots" in some cities, and the assassinations of John F. Kennedy, Robert Kennedy, and Martin Luther King Jr. ([2], p. 231; [9], p. 83; [17], p. 85). The Black Panthers, in particular, sparked California to enact its first significant firearm restrictions ([2], p. 231). Huey Newton and Bobby Seale founded the Black Panthers largely to fight back against the white city police wreaking havoc in their Black Oakland neighborhoods ([2], p. 232). Inspired by the teachings of Malcolm X (who had been shot to death in 1965), the Panthers emphasized firearm training for its members and openly carried their guns in public. ([2], pp. 233–36). California law allowed such public arms carrying, requiring a license only for concealed carry ([2], pp. 235–36). The Panthers often stood by when the police pulled over a Black driver, shouting legal advice and keeping watch on potential police harassment ([2], p. 237). A local state legislator introduced a bill aimed at changing the "open carry" law so that the Panthers could no longer legally walk in public holding guns ([2], pp. 239, 244–45). In response, 30 members of the Black Panthers went to the state capitol building on the day of the bill hearing ([2], p. 239). On May 2, 1967, they carried their loaded guns in an "unthreatening manner" into the legislative building, and Bobby Seale called "on the American people in general and the black people in particular to take careful note of the racist California legislature…aimed at keeping black people disarmed and powerless at the very same time that racist police agencies throughout the country are intensifying the terror and repression of black people" ([2], p. 240). After entering the building, the group got lost trying to find the legislative chamber and eventually left because of the attention they were attracting ([2], pp. 240–42). Their visit didn't have much impact on the legislature itself (which likely did not even know what was going on while it was in session), but the press coverage of the event gave the Black Panthers nationwide exposure and their membership soared ([2], pp. 242–43). Minutes after their visit, though, the police arrested many of the participants and then-Governor Ronald Reagan eventually signed the law aimed at disarming them in public ([2], pp. 243–45; [18]). One hundred years after the Civil War and the Reconstruction efforts aimed at preventing the Black population from possessing firearms, American gun regulations still followed the same racialized pattern.

Amidst the tumult of the 1960s—and immediately following the assassination of Robert Kennedy—the federal government passed the Gun Control Act of 1968, which added incrementally onto the NFA by establishing a licensing scheme for people in the business of selling firearms ([2], pp. 251–252; [17], pp. 84, 87–88). It also banned the importation of certain "military-style" weapons and it created a ban on gun sales to "prohibited persons," such as felons, individuals with mental illness, people with substance use disorders, and minors.[8] President Lyndon Johnson had originally intended the law to include a nationwide firearms registry, but the increasingly political National Rifle Association (NRA) and the outsized influence of rural members of Congress ensured that such a measure was not ultimately included ([2], pp. 252–53; [17], pp. 93, 96–97).

The NRA began after two Civil War Union veterans returned to civilian life disheartened by the poor marksmanship skills they had seen in younger soldiers during wartime ([2], pp. 63–64; [18]). Focusing on target shooting competitions and outdoor conservation, the early NRA existed as decidedly nonpolitical ([2], p. 64). The government even provided the organization with surplus guns for its target training and competitions ([2], p. 64; [9], p. 87). The organization waded into politics slightly in the 1930s federal firearm debates, but ultimately did not oppose the new laws because they did not impose upon the ability of hunters and competitive shooters to continue their sports ([2], pp. 64, 210–11; [9], p. 88). Until the 1960s, the NRA rarely even invoked the Second Amendment ([2], p. 8). In the 1970s, however, the larger polarization of the country reflected in the NRA as well—the old guard decided to pull out of political lobbying entirely and planned to move the organization from Washington, DC, to Colorado, where it would focus solely on outdoor activities ([2], p. 65; [9], p. 90; [18]). This angered the growing facet of the organization dedicated to preserving firearm rights for the purpose of self-defense ([2], pp. 65, 256). So at the annual meeting in 1977, the radical faction staged a coup by mounting an unexpected campaign against all existing NRA board members and taking the positions for themselves ([2], pp. 9, 67; [17], p. 81; [18]). That marked the birth of the modern NRA, which has created a massively powerful lobbying and political presence that values firearms above all else ([2], pp. 67–68; [9], p. 92). "Almost any gun control infringes the Constitution, in their view, and nearly every law puts us on the inevitable pathway to civilian disarmament" ([2], p. 9). The NRA succeeded in helping to ensure the federal government did not pass any further firearms laws until 1986. And that law, called the Firearms Owners Protection Act, succeeded in expanding the rights of gun owners, and enacting a prohibition on any nationwide registry of guns or gun owners ([2], pp. 257–58).[9]

[8] Full text available at https://www.govinfo.gov/content/pkg/STATUTE-82/pdf/STATUTE-82-Pg1213-2.pdf

[9] Full text available at https://www.congress.gov/bill/99th-congress/senate-bill/49

The Last 40 Years

In 1981, John Hinckley Jr. attempted to assassinate President Ronald Reagan and, in doing so, also shot Press Secretary James Brady in the head; Brady survived, but ended up permanently paralyzed ([2], p. 69). Sarah Brady, Secretary Brady's wife, became an outspoken advocate of gun control, and particularly of restricting the access of people with mental illness to firearms and of imposing a waiting period for purchasing a handgun ([2], p. 69; [9], p. 93). Although her policies faced opposition from the NRA, she managed to garner strong public and political support in Congress, leading to the enactment of the 1993 "Brady Bill" ([2], pp. 70–71; [19], p. 421).[10] The law's central component was a mandate to create the National Instant Criminal Background Check System (NICS), which all federally licensed firearms dealers must utilize to check a buyer's records for potential disqualifiers in a matter of minutes ([2], p. 71; [19], p. 426).[11] The NRA warned its members that this new law meant that the government would soon "go house to house, kicking in the law-abiding gun owners' doors" ([2], pp. 71–72).[12] But "through this legislation, the United States had clearly crossed a threshold. Gun control supporters had shown that they could defeat the much vaunted NRA" ([19], p. 428).

Even while the federal government was enacting national firearms legislation, however, the Second Amendment was still not at the forefront. The NRA did not embrace the Second Amendment as its mantra until the 1960s ([2], pp. 8, 65). But once it did, the NRA launched a low-key but very clever campaign to elevate the Second Amendment ([2], pp. 96–96; [9], p. 98). It did so by urging academia to examine the Second Amendment via essay contests, paid research, and even endowed professorships ([2], pp. 95–96; [9], p. 98). The goal was to get the academic world to legitimize the so-called "individual rights" theory of the Second Amendment, which held that the right to bear arms was not dependent on militia service, but rather belonged to every American as an individual right ([2], pp. 96–97). Through the flurry of circular academic attention—in which authors all utilized the same pool of material and cited each other back-and-forth—the heretofore minority view that the Second Amendment protected an individual right to arms wholly independent of the militia or military morphed into what became known as the "standard view" ([2], pp. 112–13; [7], p. 900; [9], pp. 97–98). This endowed the "individual rights" view with a historical gravitas that neither the courts nor most historians had actually legitimized ([9], p. 99).

Firearm laws in America entered a new era in 2008, when the U.S. Supreme Court decided *District of Columbia v. Heller* [3], the single most important firearms law decision in American history. In 1976, the District of Columbia city council passed a law that banned handguns from private possession and required long guns

[10] Full text available at https://www.congress.gov/bill/103rd-congress/house-bill/1025/text/rh

[11] Private sales between two private parties do not have to do a NICS check.

[12] In reality, the NICS checks prevented more than 1.5 million gun sales in its first decade ([2], p. 72).

to be disassembled or secured with a trigger lock ([2], p. 17). The regulations aimed to reduce the extraordinarily high crime rates and to keep weapons out of the city ([2], p. 42). Almost 30 years later, litigation carefully orchestrated by a small group of libertarian lawyers moved forward with deliberately selected plaintiff, Dick Heller ([2], pp. 47–48, 59, 90–91; [9], p. 119). He was a security guard who was allowed to have a handgun while on the job, but not at home because of the ban ([2], p. 42). Although he had expressed some antigovernment views, the case framed him as the ultimate "law abiding citizen" who was being denied his Second Amendment right to have a gun in his own home for self-defense. ([2], pp. 90–92). The case's architects intended, from the outset, for the case to go all the way to the U.S. Supreme Court, with the aim of receiving an explicit ruling that the Second Amendment protected an individual right to bear arms, as opposed to a "collective," or militia-only right ([2], pp. 24, 49). Although such a strategy risked getting an adverse decision that could potentially derail the direction of gun rights for the foreseeable future, Justice Antonin Scalia wrote the 5-4 majority opinion strongly in the plaintiff's favor, holding 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" (*Heller*, 554 U.S. at 635). In total, the Court held that "The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home" (*Heller*, 554 U.S. at 570 (*syllabus*)) [3]. Importantly, however, the decision also contained several qualifiers, such as, "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms" (*Heller*, 554 U.S. at 626–627). Scalia used a mix of originalism, questionable historical interpretations, and language that framed his assertions as far more conclusive than they actually were to reach the result ([2], pp. 278, 280; [9], pp. 122, 125). Justices Stevens and Breyer wrote vehement dissents questioning Scalia's process, interpretations, and misclassification of 200 years of judicial precedent (*Heller*, 554 U.S. at 636–681, Stevens, J., dissenting; *Heller*, 554 U.S. at 681–724, Breyer, J., dissenting). Ultimately, *Heller* "validated a compromise position on guns. Individuals have a right to possess a gun for self-defense, but that right can and should be subject to some regulation in the interest of public safety" ([2], p. 294).

The decision in *Heller* that found the Second Amendment protected an individual right to have a firearm in the home for self-defense ushered in a deluge of challenges to numerous other firearm regulations, including bans on assault weapons,[13] licensing schemes,[14] restrictions on sales,[15] and prohibitions on carrying a firearm

[13] See *Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019).

[14] See *Kachalsky v. County of Westchester*, 701 F.3d 81 (2nd Cir. 2012).

[15] See *Teixeira v. County of Alameda*, 873 F.3d 670 (9th Cir. 2017).

outside the home.[16] But courts have overwhelmingly upheld most existing and new firearms laws [20, 21], largely looking to the passage from *Heller* which carved out exceptions for many existing prohibitions and included a footnote reading, "We identify these presumptively lawful regulatory measures only as examples' our list does not purport to be exhaustive" (*Heller*, 664 U.S. at 627, n. 26). Both state and federal courts have cited that language to uphold about 91% of challenged firearms laws [20].

Since *Heller*, the Supreme Court has only taken up only two cases that implicate the Second Amendment. The first, in 2010, was *McDonald v. Chicago* (561 U.S. 742) [22], which extended the Second Amendment and the *Heller* analysis to apply to the states in addition to the federal government; the *Heller* decision covered only federal territory in the District of Columbia. Per the McDonald decision, *Heller* now applies to all governments, not just the federal one (*McDonald*, 561 U.S. at 750). In *Caetano v. Massachusetts* (136 S. Ct. 1027 (2016) (per curiam)) [23], the Court reversed, in less than two pages, a Massachusetts court ruling that had found "stun guns" to be outside of Second Amendment protection. The Court did not hold that the electronic weapons were, in fact, protected by the Second Amendment; it only dictated that the Massachusetts Supreme Judicial Court had misinterpreted the Court's Second Amendment precedent analysis in reaching its conclusion (*Caetano*, 136 S. Ct. at 1028). *Caetano* was essentially a Second Amendment case that barely addressed the Second Amendment.

Since 2008, no gun regulation has gained traction on the federal level, even after the massacre of 26 people (20 of them children) at Sandy Hook Elementary School in Newtown, Connecticut, in 2012 [24–25]. In 2018, after a former student killed 17 people at his high school in Parkland, Florida, several of the teenaged survivors managed to renew a push to institute several reforms [27]. Despite initial support from national politicians, nothing came to fruition in Congress [26, 28, 29]. Most firearm regulation takes place in the states, which creates a confusing patchwork of laws and regulations in which one state may require a strict licensing process while the next state over does not require licenses at all [30, 31].

The history of firearms law in the United States has been fraught with fears of tyranny, racism, and an exceptionally powerful lobby group that elevates gun ownership over human lives. The Centers for Disease Control and Prevention (CDC) has been stymied from conducting research into gun violence because of the "Dickey Amendment," a clause that has been included in every Congressional budget since 1995 [32]. It reads, "[N]one of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention may be used to advocate or promote gun control."[17] The studies that do exist show many promising connections between stronger gun laws and a reduction in firearms fatalities [33–35]. But the existence of the Second Amendment means that instituting widespread and

[16] See *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016).

[17] Original budget inclusion language available at https://www.govinfo.gov/content/pkg/PLAW-104publ208/pdf/PLAW-104publ208.pdf

sweeping reforms on firearms—including outright bans, like what Australia and New Zealand have done—is legally impossible in the United States [36, 37]. In fact, in 2019, the U.S. Supreme Court seemed poised to expand Second Amendment protection to include the right to carry a firearm outside the home when it agreed to hear the case of *New York State Rifle & Pistol Association v. City of New York* [38, 39]. In that case, a local gun club challenged New York City's ban on the transportation of firearms to anywhere except seven ranges within city limits (883 F.3d 45 [40]). But before scheduled oral arguments, New York City made the case moot by changing its ordinance and therefore averting a likely expansion of the Second Amendment from protecting the individual right to have a handgun in the home for self-defense to a much broader protection that would have also included the right to carry a firearm outside the home (*N.Y. Rifle & Pistol Association v. City of New York*, 149 S. Ct. 1525 [41] (per curiam)). While the country has come a long way from the fear of a tyrannical government disarming state militias, the arms referenced in the eighteenth-century Second Amendment have managed to remain at the forefront of political, legal, and moral debate. And tens of thousands of people die every year because of it [42].

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