

UNDERSTANDING THE SECOND AMENDMENT

GUN REGULATION IN AMERICA TODAY AND YESTERDAY

REPORT OF THE NEW YORK STATE BAR ASSOCIATION
TASK FORCE ON GUN VIOLENCE
MARCH 2015



NEW YORK STATE BAR ASSOCIATION

New York State Bar Association Continuing Legal Education publications are intended to provide current and accurate information to help attorneys maintain their professional competence. Publications are distributed with the understanding that NYSBA does not render any legal, accounting or other professional service. Attorneys using publications or orally conveyed information in dealing with a specific client's or their own legal matters should also research original sources of authority.

We consider the publication of any NYSBA practice book as the beginning of a dialogue with our readers. Periodic updates to this book will give us the opportunity to incorporate your suggestions regarding additions or corrections. Please send your comments to: CLE Publications Director, New York State Bar Association, One Elk Street, Albany, NY 12207.

Copyright 2015
New York State Bar Association
All rights reserved
ISBN: 1-57969-441-1
Product Number: 4340

TABLE OF CONTENTS

PRELIMINARY OVERVIEW	1	
EXECUTIVE SUMMARY	17	
SECTION ONE	<i>District of Columbia v. Heller</i> and the Current State of The Law	21
SECTION TWO	The History of the Second Amendment and Its Judicial Interpretation Before <i>Heller</i>	71
SECTION THREE	Beyond the Law: Missing Gun Violence Data	105
APPENDIX		113

DETAILED TABLE OF CONTENTS

Foreword by NYSBA President David P. Miranda.....	ix
Introduction by NYSBA Task Force on Gun Violence co-chairs	xi

PRELIMINARY OVERVIEW.....	1
Gun Violence in America	3
Suicide.....	6
Mass Shootings and Mental Health	7
Urban Violence	11
Intimate Partner Violence Against Women	12
Impact of Firearm Violence in All Forms.....	13
The Association’s Role.....	13
Public Education	15
Beyond the Law: Supporting Gun Violence Research	15
Organization of Report	15

EXECUTIVE SUMMARY	17
<i>Heller</i> and the Current State of the Law	17
Second Amendment History.....	18
Beyond the Law: Supporting Gun Violence Research	19

REPORT SECTION ONE

<i>District of Columbia v. Heller</i> and the Current State of The Law.....	21
1. The Supreme Court’s Decision in <i>District of Columbia v. Heller</i>	23
1.1 <i>Heller</i> Background	23
1.2 <i>Heller</i> Majority Opinion	24
1.3 <i>Heller</i> Dissenting Opinions.....	26
1.4 <i>Heller</i> ’s Unusual Critics and Proponents	27
1.5 The Quality of the Guidance Provided by <i>Heller</i>	28
1.6 The Supreme Court’s Follow-on Decision in <i>McDonald v. City of Chicago</i>	30
2. Federal Court Decisions Applying <i>Heller/McDonald</i>	31
2.1 Decisions Rejecting Second Amendment Challenges to Gun Laws	32
2.1.1 <i>Heller</i> ’s Safe Harbors.....	32
2.1.2 A Further Word About Public Carry Laws	40
2.1.3 Regulation of Certain Dangerous Firearms	41
2.2 Decisions Striking Down Gun Laws Based on Second Amendment Violations.....	44

2.2.1	Public Carry Laws.....	44
2.2.2	Chicago City Ban on Shooting Ranges.....	47
2.2.3	Chicago City Ban on Sales of Firearms	48
2.2.4	Chicago Ordinance Restricting Gun Licenses to People Convicted of Non-Violent Misdemeanor Offenses.....	49
2.2.5	Sensitive Places	50
2.2.6	Waiting Periods	52
2.3	A Word About the Standard of Review	53
2.4	Western District of New York Decision on New York SAFE Act	58
2.5	Southern District of New York Decision Upholding New York City Premise Residence Firearm Licensing Law	60
3.	New York State Court Post- <i>Heller</i> Challenges to Gun Laws	62
3.1	Cases Decided Before <i>McDonald v. City of Chicago</i>	62
3.2	Cases Decided After <i>McDonald v. City of Chicago</i>	64

REPORT SECTION TWO

	The History of the Second Amendment and Its Judicial Interpretation Before <i>Heller</i>	71
1.	Contours of the Current Debate Over the Second Amendment.....	73
2.	Historical Analysis of the Second Amendment: Pre-Enactment (Before 1791) Historical Record	75
2.1	English Statutes and Common Law Regulating Right to Keep Arms.....	75
2.2	Colonial and Confederate Laws Regarding Firearms	78
2.3	Colonial/State Constitutions Enshrining Right to Bear Arms	79
2.4	The Second Amendment as a Drafting Exercise: What Contemporaneous Records Show About the Evolution of the Text.....	82
2.5	The Second Amendment in the Context of the Times	86
2.5.1	Shays' Rebellion	89
2.5.2	Slave Rebellions.....	91
2.6	Contemporaneous (1786) Musings About the Limited Nature of the Constitutional Right Enshrined.....	92
3.	An Aside: The Modern Constructions of the Second Amendment Based on Old Dictionaries and Rules of Grammar.....	93
4.	Post-Enactment Developments (After 1791) That Bear on the Interpretation of the Second Amendment	95

4.1	Nineteenth Century Gun Regulations	95
4.2	Nineteenth Century Jurisprudence— Mostly Upholding State Restrictions on Firearms	96
4.3	Early Twentieth Century Gun Laws and Judicial Rulings...	100
4.4	Modern Era Legislation and Judicial Decisions Pre- <i>Heller</i>	102

REPORT SECTION THREE

	Beyond the Law: Missing Gun Violence Data	105
1.	Introduction	107
2.	Background: Congressional Actions That Block Gun Violence Research and Information Sharing	107
2.1	1996 Appropriations Act.....	107
2.2	Tiahrt Amendments.....	108
2.3	2013 Effort to Improve Knowledge	110
2.4	Change of Heart Since 1996	112
2.5	Proposed Policy Statement.....	112

APPENDIX A

	Plain English Summary of Second Amendment Law.....	113
--	--	-----

APPENDIX B

	Summary of New York SAFE Act	119
--	------------------------------------	-----

APPENDIX B-1

	Model Gun Show Procedures	125
--	---------------------------------	-----

APPENDIX C

	New York State Bar Association Task Force on Gun Violence: List of Members	127
--	---	-----

FOREWORD

We at the New York State Bar Association owe a great deal of thanks to the NYSBA's Task Force on Gun Violence. The members have accomplished the herculean task of producing a clear-eyed, fact-based report that relies on a thorough legal analysis of the case law and research into the historical underpinnings of the Second Amendment to the United States Constitution.

In recent years, varying interpretations have made the Second Amendment the source of both controversy and confusion as gun-related issues have been debated. By exploring the legal framework that governs ownership, possession and use of firearms in the United States, and the role of the courts, the Task Force has sought to bring clarity to the legal issues that underlie the policy debates surrounding gun regulation as well as clarity to the debate itself.

This report is a resource to be used to inform and educate all participants in the debate—be they policy makers, law makers or members of the general public—with respect to gun rights and regulations. It will be made widely available so anyone with an interest in the debate can benefit from its historical and legal analysis. By doing so, the Association hopes that this report will help bring about a better understanding of the Second Amendment and the applicable law.

David P. Miranda
President, New York State Bar Association
2015–2016

INTRODUCTION

Dear Reader:

We invite you to explore the legal framework that governs ownership, possession and use of firearms in the United States. You likely have heard a great deal about the Second Amendment. But despite the frequent press and public discussion devoted to gun rights and the Second Amendment, the conversation about guns in America tends to be emotional and polarizing. This report is intended to help educate the public, law makers, and policy makers with respect to gun rights and regulations. We do so by surveying the law and history of gun regulation in the United States—based on facts. All the sources cited in the report are available to the reader by one click if you are reading a digital hyperlinked version of this report (available at nysba.org). We encourage all readers to learn more by reading these source documents.

The New York State Bar Association, the largest voluntary bar association in the United States, commissioned a Task Force on Gun Violence in early 2013 following the mass shootings at Sandy Hook Elementary School in Newtown, Connecticut, on December 14, 2012, a tragedy that brought renewed focus to the issue of gun regulation. The members of the Task Force were carefully selected to provide both geographic and political balance. Its members include an active duty police officer, current and former prosecutors, criminal defense lawyers, and lawyers in private practice. The members also include gun owners, collectors, and sportsmen. The report of the Task Force was produced over two years and represents a consensus document that emerged from a collaborative process.

Ultimately it will be you, the reader, who decides whether the information we present furthers your understanding of these divisive issues.

Our report is divided into three parts: (1) a current survey of the law with an analysis of the Supreme Court’s 2008 decision in *Heller v. District of Columbia* and cases decided after it; (2) a compact history of the Second Amendment; and (3) a section that we call “beyond the law”—a segment that supports non-partisan, scientific research into the causes of gun violence and intervention strategies to reduce deaths and injuries from firearms, to enable informed decision making by lawmakers and others.

We thank you for your interest.

David H. Tennant
Earamichia Brown
Co-chairs, NYSBA Task Force on Gun Violence