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Dominic Lamartina

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THE FIREARMS SAFETY ACT AND THE FUTURE OF SECOND AMENDMENT DEBATE

By: Dominic Lamartina

INTRODUCTION: *HELLER* AND THE 2013 GUN DEBATE

The Second Amendment to the U.S. Constitution confers the "right of the people" to "keep and bear arms."[1] By itself, this is a vague standard that many contest to this day.[2] In 2008, the U.S. Supreme Court was tasked with defining the breadth of the Second Amendment as it relates to government attempts to limit access to firearms.[3] The *District of Columbia v. Heller* decision was one that crafted an individual right for American citizens to possess firearms protected under the Second Amendment.[4] In the aftermath of *Heller*, and in response to recent mass shootings such as the ones carried out in Aurora, Colorado and Newtown, Connecticut, many states now struggle to find a balance between the benefits of public safety with more strict legislation and the difficulties of potentially taking away the liberties of its citizenry.[5]

Maryland is no exception. On May 16, 2013 Governor Martin O'Malley signed the Firearm Safety Act of 2013 into law.[6] This law creates new restrictions devised to promote public safety in the State of Maryland by limiting gun access.[7] The law adds forty-five new weapons to a list of banned weapons in Maryland.[8] Another major regulation outlaws handgun magazines that hold more than ten rounds.[9] Finally, the State crafted a new licensing system for prospective handgun buyers.[10]

This article will address these controversial issues in the framework of Constitutional challenges. The discussion section will lay out the arguments,

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[1] District of Columbia v. Heller, 554 U.S. 570, 579, 581 (2008).
[2] *See id.*
[3] *See id.*
[4] *See id.* at 635-36.
[5] *See Governor O'Malley Signs Historic Firearms Safety Act*, MARYLANDERS TO PREVENT GUN VIOLENCE (May 16, 2013), https://marylanderstopreventgunviolence.org/governor-omalley-signs-historic-firearms-safety-act/.
[6] *Id.*
[7] *Id.*
[8] S.B. 281, 2013 Leg., 430th Sess. (Md. 2013). However, there is a clause allowing individuals who have already purchased one of these items, or did so before the October 1 deadline, to keep their weapons.
[9] *Id.*
[10] *Id.*

both in support of and in opposition to, these particular regulations. After outlining the arguments, the analysis section will determine which side of the argument is likely to succeed if there are legal challenges.

II. CORRESPONDENCE WITH DELEGATE KATHLEEN DUMAIS

Delegate Kathleen Dumais of the Maryland House of Delegates was heavily involved in the debate on the bill.[11] She was one of the main delegates involved in building the narrative of the bill as the Vice Chairperson of the House Judiciary Committee.[12] According to Dumais, the major aspects of the law discussed above were the central points of legal debate on the gun issue.[13] In discussing the law's assault weapons ban,[14] Dumais commented on how the House of Delegates took a deep interest in the effects that this regulation would have on the Maryland citizenry.[15] Thus the House called a separate work group to meet with stakeholders on the matter of assault weapons.[16] These individuals included those who work in gun shops as well as gun owners.[17] Dumais highlighted that the legislation was designed so that their input would craft a regulation that is no more restrictive than necessary.[18] However, this regulation has raised substantial Second Amendment concerns, because many gun rights activists argue that any kind of limitation on the ability to purchase any type of gun infringes on the rights of the people.[19] Delegate Dumais argued that this new regulation, however, does not impede on the rights of individuals enough to be a Second Amendment violation.[20] She asserted that there simply is no reason for a civilian to possess a military style weapon for their own protection.[21]

Another key component of the law is the new handgun licensing requirement.[22] Delegate Dumais said that the new licensing requirement involves an one-hundred dollar license which individuals must purchase before they can possess a handgun.[23] Many opponents, however, see the

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[11] Telephone Interview with Kathleen Dumais, Delegate, Maryland House of Delegates (July 29, 2013).
[12] Dumais, *supra* note 11.
[13] *Id.*
[14] *Id.*
[15] Dumais, *supra* note 11.
[16] *Id.*
[17] *Id.*
[18] Dumais, *supra* note 11.
[19] Jim Bach, *NRA Plans to Fight Maryland Gun Control Law,* THE DIAMONDBACK (Apr. 26, 2013), http://www.diamondbackonline.com /news/national/article_e7175a06-ae31-11e2-93d8-0019bb30f31a.html.
[20] Dumais, *supra* note 11.
[21] *Id.*
[22] *Id.*
[23] *Id.*

licensing requirement as another restriction that violates their Second Amendment rights.[24] Some even go so far as to equate the one-hundred dollar fee for the license to a poll tax, essentially alleging that the government requires individuals to pay a fee to exercise their Second Amendment Rights.[25] However, Delegate Dumais argued that one-hundred dollars is a paltry sum, and is not nearly as inhibitive of people's rights as opponents may argue.[26]

III. ARGUMENTS FOR AND AGAINST THE FIREARM SAFETY ACT

A. The Assault Weapons Ban

As mentioned above, Maryland's new assault weapons ban is one of the more controversial provisions in the Firearm Safety Act.[27] The assault weapons ban is a regulation that, possibly more than anything else, captures the essence of Second Amendment debate.[28] The ban itself greatly expands the amount of guns that cannot be purchased in the State of Maryland.[29]

Some argue that the State has the power to outlaw certain types of firearms.[30] Much of this argument comes from the textual debate over the initial clause of the Second Amendment, which states, "A well regulated Militia, being necessary to the security of a free State . . . ."[31] This clause raises the issue of who the Second Amendment was designed to protect.[32] Many deem this prefatory clause as unique in the U.S. Constitution, because nothing like it appears in any other section of the document.[33] Because this is the only instance of its use, there must be some legal significance to its inclusion.[34]

Proponents of gun control measures often argue that this clause demonstrates that the Second Amendment was designed only to apply to

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[24] Pat Warren, *Some Md. Legislators Compare O'Malley's Gun Control Bill to Poll Tax*, CBS BALTIMORE (Jan. 31, 2013), http://baltimore.cbslocal.com/2013/01/31/some-md-legislators-compare-omalleys-gun-control-bill-to-poll-tax/.

[25] Warren, *supra* note 24.

[26] *Id.*

[27] *See* Bach, *supra* note 19.

[28] *Id.*

[29] Dumais, *supra* note 11.

[30] Donna-Marie Korth and Candace R. Gladston, *The Second Amendment Was Not Intended To Justify Arming Every Tom, Dick, and Harriet With an Assault Weapon*, 17 ST. JOHN'S J. LEGAL COMMENT. 515 (2003).

[31] *Id.* at 515; *see also* U.S. CONST. amend. II.

[32] Korth & Gladston, *supra* note 30, at 517-19.

[33] ADAM FREEDMAN, THE NAKED CONSTITUTION: WHAT THE FOUNDERS SAID AND WHY IT STILL MATTERS 202 (2012).

[34] *Id.*

state militias and has no application as an individual right.[35] In that sense, the Second Amendment would protect the State, and not individual citizens.[36] Thus, any restrictions on the sale or possession of guns would be well within the power of the state governments because they are effectively choosing to limit a right that they possess.[37]

Opponents, on the other hand, take the exact opposite approach to this belief.[38] Opponents argue that while the operative clause is unique to the federal Bill of Rights, it is not necessarily unique compared to several state constitutions that existed at the time of ratification.[39] For example, the 1790 Pennsylvania Constitution contained a section declaring that "the free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject being responsible for the abuse of that liberty."[40] If taking a literal approach like gun control advocates, this statement would appear to authorize the Pennsylvania State government to limit free speech as long as it is not "thoughts and opinions."[41] Opponents of gun control do not see limiting free speech as a feasible interpretation.[42]

Along with the "well regulated militia" clause of the Second Amendment, there remains the issue of whether, if it is an individual right, the Firearm Safety Act's ban is an overreach of the State of Maryland's Constitutional authority.[43] Maryland Attorney General Douglas Gansler used the *Heller* decision to make the case that this is a Constitutional use of authority.[44] In a letter advising Governor O'Malley, Attorney General Gansler used a three part test found in the *Heller* decision to show that the assault weapons ban is a Constitutional regulation.[45] The *Heller* decision suggested three factors in determining whether gun regulation is acceptable.[46] These factors include (1) whether the weapon in question is uncommon, (2) whether it is dangerous or unusual, and (3) whether it is related to home self-defense.[47] He argued that the assault weapons in question satisfy the first two factors because the overwhelming majority of gun owners in the State of Maryland choose to

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[35] *Id.* at 201.
[36] Freedman, *supra* note 33, at 201.
[37] *Id.* at 200.
[38] *Id.* at 196.
[39] *Id.* at 202-03
[40] *Id.* at 202.
[41] *Id.*
[42] Freedman, *supra* note 33, at 203.
[43] *See generally* Freedman, *supra* note 33, at 193-94.
[44] Letter from Douglas Gansler, Att'y Gen., State of Md., to Martin O'Malley, Governor, State of Md. (April 30, 2013) (on file with the author).
[45] *Id.* at 3-4.
[46] *Id.*
[47] *Id.*

arm themselves with handguns as opposed to assault weapons.[48] He also argued that it is unusual for individuals to use assault weapons purely in a self-defensive manner to protect their homes.[49]

The *Heller* decision certainly was far more broad that any regulation in the Firearms Safety Act.[50] *Heller* only dealt with a statute that barred the ability of citizens to possess handguns in their own homes for protection.[51] One could certainly argue in that regard that this is an extreme situation, which would make any comparison to the *Heller* decision itself inoperable.[52]

Opponents of the Act argue that the restrictions are arbitrary and thus would not satisfy any balancing test as it relates to their rights.[53] Opponents argue specifically that the ban on the M-1 Carbine Rifle is an arbitrary restriction.[54] The M-1 Carbine is one of the new items added to the "banned" list with the Firearm Safety Act.[55] However, some argue that this ban is nonsensical because the M-1 Garand, which is a far more powerful weapon, is not on the list.[56]

Opponents also argue against this ban because of the fixation on weapons being semi-automatic.[57] Many of the Firearm Safety Act's newly regulated assault weapons carry the distinction of being "semi-automatic."[58] The term, semi-automatic, indicates that a weapon reloads automatically after it has been fired.[59] However, gun rights activists feel that this is a deceptive factor in regulating assault weapons.[60] This is because even most handguns these days are semi-automatic, but they are not in the same category as other semi-automatic weapons for the purposes of the Act.[61]

Opponents find this regulation troubling considering that semi-automatic handguns are more likely to be involved in assaults.[62] Although there have been several mass murders involving rifles like those included on the banned list, such incidents are less as prevalent than similar occurrences using

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[48] Gansler, *supra* note 45 at 3-4.
[49] *Id.* at 3-4.
[50] *Heller*, 554 U.S. at 636.
[51] *Id.*
[52] *See id.*
[53] Jonathan F. Keiler, *Maryland's Second Amendment Nightmare: Coming Soon to a State Near You?*, AMERICAN THINKER (Apr. 15, 2013), http://www.americanthinker.com/2013/04/marylands_second_amendment_nightmare_coming_soon_to_a_state_near_you.html.
[54] *Id.*
[55] Keiler, *supra* note 54.
[56] *Id.*
[57] Freedman, *supra* note 33, at 214.
[58] H.R. 281, 2013 Leg., 430th Sess. (Md. 2013).
[59] Freedman, *supra* note 33, at 214.
[60] *Id.* at 214.
[61] *Id.* at 214.
[62] Freedman, *supra* note 33, at 214.

handguns.[63] Opponents feel that this is attributable to the fact that using a rifle in an assault is not an easy task because of its much larger size.[64] A handgun by comparison is more compact and easier to conceal.[65]

There have also been arguments that guns on the banned list comply with the *Heller* factors.[66] This concern is no more apparent than with the AR-15 Rifle.[67] The AR-15, more than any other weapon that has been banned by the Firearm Safety Act, has raised strong arguments from the opposition.[68] Many gun rights advocates see the AR-15 as satisfying the *Heller* factors.[69] Gun rights advocates point to the fact that "in 2007 this one popular model accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market."[70] A statistic like that is one that shows that the AR-15 may be a common firearm that satisfies the first factor of the *Heller* test.[71] They also point to the fact that the AR-15 is a popular gun for hunting and target practice, thus strengthening the commonality argument.[72] Finally, they point to the fact that studies have shown that individuals also use the AR-15 for self-defense at the home, thus illustrating that there is a connection to self-defense as recommended by the third *Heller* factor.[73]

B. The Permit Requirement

Another important aspect of the law that has come under fire is the handgun permit requirement.[74] However, this type of regulation differs heavily from the assault weapons ban in one key way.[75] The permit regulation is just that, a regulation.[76] It does not in itself ban the sale of handguns to any Maryland citizen.[77] All it does is create a requirement that a citizen go through the proper channels to gain access to a handgun.[78]

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[63] *See id.* at 214.
[64] *Id.* at 345.
[65] *Id.* at 345.
[66] Dave Kopel, *The AR-15 And The Second Amendment: No Respect*, NRA Publications, http://www.nrapublications.org /index.php/12717/the-ar-15-and-the-second-amendment-no-respect/2/ (Last visited Sept. 11, 2013).
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] Kopel, *supra* note 67.
[71] *Id.*
[72] *Id.*
[73] Id.
[74] *See id.*
[75] *See id.*
[76] *See* Kopel, *supra* note 67.
[77] *See* Kopel, *supra* note 67.
[78] *See id.*

Therefore, in theory, anyone who wants to access a handgun can do so as long as they receive a permit first.[79] This comparatively minor hindrance is counterbalanced by the much more substantial benefits that permit laws can have on public safety.[80] Professor Daniel Webster of the Johns Hopkins Center for Gun Policy and Research outlined these benefits.[81] Webster analyzed data from the State of Missouri after the Missouri State Government repealed its permit laws in 2007.[82] Since the repeal of Missouri's permit laws, his research showed that "the share of guns recovered by Missouri police agencies that had an unusually short time interval from retail sale to crime indicative of trafficking more than doubled."[83]

Public safety advocates argue that handgun regulations such as this are well within the definition of "laws that impose 'conditions and qualifications on the commercial sale of arms'" that were deemed to be acceptable regulations as part of the *Heller* decision.[84] They feel that this is a simple change in the conditions of gun purchasing and thus survives Second Amendment scrutiny.[85]

To help bolster that claim, Dan Friedman, the Counsel for the Maryland General Assembly provided his own analysis to the Senate as the bill was being debated.[86] He looked to D.C. Circuit decisions applying Heller, which made requirements that handgun permit laws must be "basic and longstanding."[87] Friedman argued that the handgun permit portion of the Firearm Safety Act is "basic and longstanding" in that they act as "merely an administrative means to improve compliance with existing Maryland laws regarding the qualifications of firearms purchasers.[88] Thus it can be considered an extension of longstanding Maryland law.[89]

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[79] *See* Warren, *supra* note 24.
[80] *See* Dumais, *supra* note 11.
[81] *Proposals to Reduce Gun Violence: Protecting Our Communities While Respecting the Second Amendment: Hearing Before the S. Subcomm. on the Constitution, Civil Rights, and Human Rights*, 113th Cong. (2013) (statement of Daniel Webster, Professor and Director, Johns Hopkins Center for Gun Policy and Research).
[82] *Id.* at 3-4.
[83] *Id.* at 4.
[84] Geoffrey R. Stone, *Statement of Professors of Constitutional Law: The Second Amendment and the Constitutionality of the Proposed Gun Violence Prevention Legislation*, THE HUFFINGTON POST (Jan. 30, 2013, 10:35 AM), http://www.huffintonpost.com/geoffrey-r-stone/the-second-amendment_b_2581625.html.
[85] *Id.*
[86] Letter from Dan Friedman, Counsel to the Gen. Assembly, State of Md., to Brian Frosh, Senator, State of Md. (Jan. 29, 2013) (on file with author).
[87] *Id.* at 4.
[88] Friedman, *supra* note 87, at 4.
[89] *Id.*

Opponents have a different opinion when faced with the "conditions and qualifications" argument.[90] The quote in question from the *Heller* decision is that in finding the Second Amendment to be an individual right, the Court did not "cast doubt on longstanding . . . laws imposing conditions and qualifications on the commercial sale of arms."[91] The word "longstanding" is used by opponents to illustrate that the *Heller* decision was written with original intent playing a major role.[92] Thus, one would have to look back to nineteenth century beliefs on gun ownership, which opponents often consider to support their side.[93] They argue that the right to defend oneself is a right guaranteed to the individual through natural, English, and state law.[94] They do not believe that the Second Amendment allows the government to create legal hoops for which one has to jump through in order to exercise such an important right.[95]

To counter the fact that this is a weaker regulation, opponents have developed another Constitutional argument to create a possible legal challenge.[96] Many Maryland legislators have argued that the new permit legislation is tantamount to a poll tax.[97] While the Act does not ban the sale of handguns, it instead requires payment for a license.[98] As stated earlier, each new handgun license would cost prospective buyers one-hundred dollars.[99] Gun rights activists believe this is an unconstitutional infringement on individual rights as it essentially requires citizens to pay a fee to exercise their Second Amendment right to bear arms.[100] Theoretically, if one does not have one-hundred dollars to spend on a license, then they would not be able to exercise their rights and thus the regulation would effectively be a ban on the sale of handguns.[101]

This argument is a particularly intriguing one considering the history of federal court rulings on poll taxes in general. One of the landmark cases on the issue of the poll tax was the case of *Harper v. Va. State Bd. of Elections*.[102] In this case, the Supreme Court held for the first time that the Equal Protection Clause of the Fourteenth Amendment prohibited the use of

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[90] *See* Freedman, *supra* note 33, at 212.
[91] *Id.* (citing *Heller*, 554 U.S. at 570-71).
[92] Freedman, *supra* note 33, at 212 ("the point being that traditional restrictions on gun ownership – like those going back to the nineteenth century – can help to illustrate the original meaning of the Second Amendment.").
[93] Freedman, *supra* note 33, at 198.
[94] *Id.*
[95] *Id.*
[96] *See* Warren, *supra* note 24.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *See id.*
[101] *See* Warren, *supra* note 24.
[102] Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

a poll tax in state run elections.[103] In particular, the Court held that" the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate."[104] One could certainly argue that the new handgun permit regulation would discriminate in a way similar to that of a poll tax and should thus be held unconstitutional.

Soon after the *Harper* decision, federal courts began to strike down poll tax laws.[105] Not the least of which was a Mississippi law, which placed a two dollar tax on individuals who wanted to cast a vote.[106] With this sort of ruling, it is clear that courts took the right to vote very seriously.[107] So much so that even the most seemingly minor of monetary inhibitors is a violation of the constitution. Thus there is an argument that since the Due Process clause of the Fourteenth Amendment denies states the right to place monetary restrictions on the ability of citizens to enjoy their right to vote, it stands to reason that a similar restriction on their right to bear arms would also be invalid.[108]

IV. HOW WOULD THE COURTS RULE ON THESE PROVISIONS?

As it relates to the assault weapons ban, it is a very real possibility that a court would overturn the restriction based on Second Amendment grounds. In examining the history of the Second Amendment, it is clear that the Amendment is an individual, as opposed to a collective, right.[109] With that in mind, it is important to determine if a complete ban on certain weapons infringes this individual right.[110] After evaluating the arguments, it appears that any strict ban carried out by the General Assembly is one, which courts may not accept.[111] The ban creates both overly broad issues as well as under broadness issues.[112] The over broadness issue is based on the inclusion of the AR-15 Rifle which many argue satisfies the *Heller* factors for Second Amendment protection.[113] The under broadness issue comes as a result of the ban's emphasis on semi-automatic weaponry without describing how that

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[103] *Id.* at 666.
[104] *Id.*
[105] *Federal Court Voids Mississippi Poll Tax*, MILWAUKEE JOURNAL, Apr. 9, 1966, at 3.
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *See* Freedman, *supra* note 33, at 196-204.
[110] *See* Kopel, *supra* note 67.
[111] *See* Freedman, *supra* note 33, at 216-20.
[112] *See* Freedman, *supra* note 33, at 212-16; Keiler, *supra* note 54; Kopel, *supra* note 67.
[113] *See* Kopel, *supra* note 67.

differs from the non-regulated semi-automatic handgun.[114] Thus, without a major overhaul, it appears that a challenge to the ban based on the Second Amendment would be successful.[115]

As for the handgun permit requirement, it appears answer is clearer. Accepting the argument that the Second Amendment is an individual right for citizens, and that a major purposes of this right is self-defense, then the only logical conclusion is that the permit requirement as it stands now is a violation of the Second Amendment.[116] Delegate Dumais raised the point that handguns already cost five-hundred dollars on their own, and thus the requirement for an one-hundred dollar license seems to be paltry.[117] However, it is still a limitation that could keep people from exercising their rights.[118] Handguns are the most protected style of gun under the Second Amendment, and even though it is not likely that people would not afford the price of a permit, it is still presents a problem for individuals burdened by the regulation.[119]

V. CONCLUSION

The U.S. has seen more than its fair share of tragedy in recent years in which guns played a key role. However, while these events are devastating, it is important to keep in mind that it is a natural right of humanity to protect oneself from potential threats. That is one of the major reasons why the Second Amendment exists. Some argue that the Second Amendment is an antiquated concept, which should be removed from the Constitution altogether.[120] But without the Second Amendment, the country could also deteriorate into a state of fear where no one has that natural right to defend him or herself. It is important to seriously consider Second Amendment issues. If state laws go too far, civil liberties advocates must respond to rectify the regulations and sustain this natural right.

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[114] *See* Freedman, *supra* note 33, at 214; Kopel, *supra* note 67.
[115] *See* Freedman, *supra* note 33, at 214-20; Keiler, *supra* note 54; Kopel, *supra* note 67.
[116] *See* Freedman, *supra* note 33, at 204-10; Keiler, *supra* note 54; Kopel, *supra* note 67; Warren, *supra* note 24.
[117] Dumais, *supra* note 11.
[118] *See* Warren, *supra* note 24.
[119] *See id.*
[120] Korth & Gladston, *supra* note 30, at 522.