

Gun Rights in United States: Changing Interpretations from Collective Rights to Individual Rights

Deva Ram

Research Scholar at CCUSLAS, SIS, JNU, New Delhi, Delhi, India

Abstract

The debate on the interpretation of Second Amendment primarily emphasizes on the question that does the Second Amendment protect an individual right to keep and bear arms or endorses the collective right of states to regulate militia independent of the federal interference? The ambiguity of the Second Amendment texts provides the scope for a different meaning of the rights for the opposite camps. Conservative groups like the National Rifle Association insist on the later part of text 'right to keep and bear arms' for promoting individual right approach among American society and political parties, whereas Liberals insist on the collective right approach focusing on the militia clause of the text.

Keywords: collective rights, NRA, individual rights, militia, firearms

Introduction

Meaning of Second Amendment

The debate on the interpretation of Second Amendment primarily emphasizes on the question that does the Second Amendment protect an individual right to keep and bear arms or endorses the collective right of states to regulate militia independent of the federal interference? At least since 1939, Supreme Court decision in *United States v. Miller* case, the federal court have tended to read the Second Amendment in accordance with the collective rights approach. In recent years, however, the individual right view- which claim that Amendment guarantees individuals the right to possess firearms for personal self-defence-gained considerable support among academics and courts alike (Winkler 2006).

A critical difficulty in understanding the essence of the Second Amendment was to conclude on the sources that must be used for analysis. To a great extent, such a choice is dependent on the background and the training of the scholars. Judges and lawyers prefer to view the amendment in two ways, the original meaning or the original intent. The original intent focuses on word placement, word choice at times draft of the amendment. Popular sources constitute popular opinion of the Framers from sources such as the Federalist Papers and personal correspondence from prime figures like James Madison ^[1].

To add to the above mentioned sources, the approach adopted by the historians as well as lawyers differ to some extent. Whereas historians focus on the grey areas, lawyers emphasize on the exact interpretation of the Second Amendment ^[2].

Ratified more than 200 years ago, the essence of the Second Amendment to the Bill of Rights remains unclear to numerous Americans today. Considering the crisis of gun violence that the American society confronts today, discussion on the most effective tactic to its prevention is a roaring issue of debate. An accurate understanding of the real meaning and objective behind the Amendment is critical. Prior to the *Heller case* (2008), Federal courts have

unanimously championed the argument that the Amendment guarantees: "the right to keep and bear arms" to members of the "well-regulated militia." However, textbooks have often failed identify the link between a well-organized state militia and the right to be armed. Such a misconception has had a deep impact on the contemporary debate on guns and violence. To this end legal experts have sought to articulate the real meaning of the Second Amendment. Former Chief Justice of US Supreme Warren Burger had put forth that " the language of the Second Amendment shows the framers intended to secure the right to bear arms essentially for military purposes, and not to guarantee every citizen an unfettered right to any kind of weapon he or she desires." Former Dean of Harvard Law School Erwin Griswold stated "that the Second Amendment poses no barrier to strong gun laws is perhaps the most well-settled proposition in American constitutional law." In order to understand the Second Amendment, the test of right played the crucial role because its language is ambiguous and has the scope of various interpretations. The Second Amendment 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." The language of the text is ambiguous and subject to various interpretations.

Individual Rights Approach versus Collective Rights Approach

The ambiguity of the Second Amendment texts provides the scope for a different meaning of the rights for the opposite camps. Conservative groups like the National Rifle Association insist on ^[3] the later part of text 'right to keep and bear arms' for promoting individual right approach among American society and political parties, whereas Liberals insist on the collective right approach focusing on the militia clause of the text. Both in recent cases which ruled that the Second Amendment protects the individual's right to keep and bear arms, Supreme Court decisions were split five to four and dissenting opinions highlighted the difference in interpretations of the Second Amendment that persist.

¹ Jack N.Rakove, "Words, Deeds and Guns: "Arming America" and the Second Amendment", *The William and Mary Quarterly*, Volume 59, No. 1, January 2002, pp. 205-210.

² "Interpreting the Second Amendment, An Introduction", <http://www.lawsonline.com/LegalTopics/SecondAmendment/interpretin-g-the-second-amendment.shtm>

³ Patrick J. Charles, "The Second Amendment In Historiographical Crisis: Why The Supreme Court Must Re-Evaluate The Embarrassing "Standard Model" Moving Forward", *Fordham Urban Law Journal*, Volume 39, Issue 5, October 2012.

The Second Amendment has broadly been interpreted into two different streams of thought: the individual rights view and the collective rights view. Adherents to the individual rights view contend that the objective behind drawing up the Second Amendment was to establish a fundamental individual right to own firearms for personal protection, hunting and recreation. On the other hand, partisans to the collective rights view, claim that the Founders' intent was to allocate military power into the federal structure [4]. While the first view aids the interest of the advocates of gun rights, the second views yields to the goals of gun control. Historically argument about the "right" to bear arms and an armed citizenry have been a subject of discussion across several eras. Aristotle stated that bearing arms was a necessary element of true citizenship. Machiavelli put forth that armed citizens were an important defence against the rulers who primarily represented their own interest and not that of the people. However, it is also true, that while delving into the works of more ancient scholars one finds the argument of disarming the citizens. A case in point is the Republic, written by Plato, where he stated that the key to maintaining an ordered society was to disarm the citizenry. To a great extent, American law and culture are founded on English history and English Common Law. Here too one may find illustrations of cases which offer support to the American right to bear arms.

By the middle of the eighteenth century, the American colonialists became anxious of the increasing British military presence in their country. The colonials who were suspicious of both the British military as well as the monarchy did have before them the lessons of European and English history. By the end of the century, the newly created nation of United States of America had both a Constitution as well as a Bill of Rights. By the nineteenth century, the Americans became fully armed. The expanding frontiers of the new nation created a thriving market for improved firearms. Further, the American civil war was a stage where technological advancements greatly induced the competence of the American populace to admire and acquire as well as efficiently use the lethal firearms.

A land mark case which advocates the collective rights view is the *United States v. Miller* case. The Supreme Court upheld that the Second Amendment sustained the authority of the states to maintain militias. The Court concluded that "In the absence of any evidence tending to show that possession or use of a [sawed-off] shotgun...has some reasonable relationship to the preservation or efficiency of a well regulate militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."

The 19th century witnessed various cases where the Supreme Court pronounced that the Second Amendment does not restrict state regulation of firearms [5]. A case in point is the *United States v. Cruikshank* (1876) case where the Court ruled that the Second Amendment "has no other effect than to restrict the powers of the national government." A similar stance was reiterated in the *Presser v. Illinois* (1897) case where the Court declared that the Second Amendment "is a limitation only upon the power of the Congress and the National government, and not upon the States."

Champions of the restrictive gun legislation lay stress on

communal responsibilities and collective rights. This position is promoted by Irvin Brant in his work the Bill of Rights. Advocates of this perspective argue that in view of the violence that is associated with armed individuals and the protection of society at large, they prefer to emphasise on the phrase "well-regulated Militia" within the Second Amendment. Brant put forth that the real objective of the amendment was "to forbid Congress to prohibit the maintenance of a state militia." To add to it, he stated that "the amendment cannot be transformed into a personal right to bear arms, enforceable by federal compulsion upon the states." This position has further been reiterated by the President's Commission on Law Enforcement and Administration of Justice (1967) which states that the "US Supreme Court and lower Federal courts have consistently interpreted this Amendment only as a prohibition against Federal interference with State militia and not as a guarantee of an individual's right to keep or carry firearms."

The judicial orthodoxy came under glaring attack with the emergence of the revisionist position in the 1980s. The revisionist scholars claimed that the Amendment "protects an individual right inherent in the concept of ordered liberty." Their work had considerably begun to influence the judiciary in the United States of America. In view of the above, Justice Thomas in the 1997 case *Printz v United States* put forth that the Second Amendment was founded on the case of a "personal right to keep and bear arms". However, such a right may be viewed as a preclusion to an aggressive gun control regulation.

The individualist interpretation is usually supported by citing selected quotations from colonial or federal documents or debate that emphasize that rights of the individual to carry guns, aside or apart from their service in a militia. The main problem with this analysis is that none of the available evidence explains the purpose of the Second Amendment that supports the individualist view. No coherent intention or understanding of the individual's right to keep and bear arms could accordingly be derived from these evidence, including the debates at the Constitutional Convention and the First Congress [6].

Individualistic view of the right to keep and bear arms often refers to the Locke's Self-defence theory. Locke put forth that all individuals are essentially equal in the sense with a view that they have enshrined certain inalienable natural rights. Such rights can never be taken away as it is god gifted. Among these are right to life, liberty and property as fundamental rights. Locke upheld that self-preservation was the most basic human law of nature [7]. Each individual is the owner of his or her life. To serve that purpose, he reasoned, individuals have both a right and a duty to preserve their own lives (Dunn 1969). Locke put forth, "Must men alone be debarred the common privilege of opposing force with force, which nature allows so freely to all other creatures for their preservation from injury? I answer: self-defence is a part of the law of nature, nor can it be denied the community, even against the king himself..." An increasingly influential body of writing put forth a fresh interpretation of the Second Amendment, unlike the version delivered by the Founders, history and courts of the

⁴ Saul Cornell, "A New Paradigm for the Second Amendment", Law and History Review, Volume 22, No. 1, Spring 2004, pp. 161-167.

⁵ "United States: Gun Ownership and the Supreme Court", Library of Congress, <http://loc.gov/law/help/second-amendment.php>

⁶ Jack N. Rakove, "Words, Deeds and Guns: "Arming America" and the Second Amendment", *The William and Mary Quarterly*, Volume 59, No. 1, January 2002, pp. 205-210.

⁷ "Declaration of Independence and Natural Rights", *Constitutional Rights Foundation*, <http://www.crf-usa.org/foundations-of-our-constitution/natural-rights.html>

constitution. Generally identified as the individualist view, this discourse shares two key traits. First, the new theory of the Second Amendment has proliferated entirely amongst academicians, lawyers and writings such as law journals. Secondly, such a body of writing has progressively exerted greater influence on the interpretation of the Second Amendment interpretation, writings on it in the public press, and to some extent on public policy ^[8].

A landmark case testifying the individualist interpretation of the Second Amendment is the *District of Columbia v. Heller* case of June 26, 2008. The case was the first such decision issued by the U.S Supreme Court since the 1939 interpretation of the Amendment to the United States Constitution. The Supreme Court deliberated that the Second Amendment does bestow the individual right to bear firearms in order to meet traditionally lawful objectives such as self-defence. Further, the Court declared that two District of Columbia provisions that related to the requirement of lawful firearms in homes and banning of handguns were to be disassembled.

Opponents of such restrictive measures declare that “when guns are outlawed only outlaws will have guns”. It must be mentioned that the National Rifle Association (NRA) transmutes such a popular impulse into an active and the most powerful lobby in Washington. *The American Rifleman*, a magazine of the NRA, clearly declares: “The NRA, the foremost guardian of the traditional American right to ‘keep and bear arms,’ believes that every law-abiding citizen is entitled to the ownership and legal use of firearms.” ^[9] A key reason for this debate gaining ground is the likely impact that it may have on public policy. In case the revisionists succeed in changing the doctrine, the courts would in all likelihood confine the scope of the permissible gun control measures.

In view of the libertarian thought that predominated the English Commonwealth men, the colonial Americans considered the essence of a republic depended on the spirit and the character of the citizens. The construct of a republic could only survive through the sustained protection of liberty from the assertive forces of power. Such arguments suggest that discussion about gun rights has formed a recognized constituent of the American republican thought.

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⁸ Robert J. Spitzer, *Gun Control* (USA: Greenwood Press, 2009) Robert J. Spitzer, “Lost and Found: Researching the Second Amendment”, *Chicago Kent Law Review*, Volume 76, Issue 1, October 2000.

⁹ Robert E Shalhope, “The ideological origins of the second amendment”, *The Journal of American History*, Volume 69, No. 3, December 1982, pp. 559