



Gun rights in America

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Abstract

The aim of the study is to focus on few key areas of the debate. First on the definition of the right to keep and bear arms in historical and theoretical perspective in accordance with the approach of protecting individual liberties. Second, it will emphasize on conservative arguments in favour of gun rights and liberal arguments in favour of gun control. Third, analyse the individual rights approach that is promoted by various advocacy groups. Fourth, an endeavour would be made in the study to identify the reasons that have created a political and social divide. Fifth, an attempt would be made to analyse the reasons that have prompted the Supreme Court to reverse the previous understanding of the Second Amendment. The final objective of the study being to analyse the reasons behind some advocates championing the case of gun rights as against gun control.

Keywords: second amendment, gun control, bill of rights, NRA, individual rights, gun culture, US

Introduction

The right to keep and bear arms is a fundamental right ^[1] in the United States that was included in the Bill of Rights as the Second Amendment. In *District of Columbia v. Heller* (2008) case, which was a landmark in the history of gun rights, Supreme Court of the United States upheld that the Second Amendment to the United States Constitution applies to federal enclaves and protects individuals right to possess a firearm for traditionally lawful purposes, such as self-defense. At the same time, the Court recognized that the government can regulate gun rights.

The outcomes of a case left some issues unanswered, including whether the Second Amendment restricts state regulation of firearms, and the standards for evaluating the constitutionality of other gun laws and regulations that impact the Second Amendment right. Later in *McDonald v. City of Chicago* (2010), the Supreme Court addressed one issue, ruling that Second Amendment rights are applicable to the states through the Fourteenth Amendment. Both of these Supreme Court decisions were divided in the ratio of five to four and dissenting opinions, on the other hand, focused on the differing interpretations of the Second Amendment ^[2]. History of the Second Amendment has taught us is that this amendment has not been clearly defined since its ratification under the Bill of Rights.

In the American political system, it is largely the judiciary that decides what the constitution means. All the court cases during the nineteenth and twentieth century (prior to the *Heller Case*), first enunciates that the Second Amendment could play a part with citizen service in government regulated militia.

Second, the cases do not endorse the individual right of citizens to bear arms, as is enunciated by the Second Amendment.

Third, it affirmed the constitutional right of Congress as well as the states to regulate firearms and no gun law was declared unconstitutional as a violation of the Second Amendment. Fourth, the Second Amendment was not incorporated as the courts have most of the rest of the Bill of Rights, meaning that it pertains only to the federal government, not to states.

America's Bill of rights reflects the Founding Fathers' understanding of the necessary links between personal freedom and representative government, as well as their experience with threats to liberty. The Second Amendment secured liberty against national government tyranny by affirming self-defense of states. Few at that time thought that individual freedom needed national protection against states invasions on the rights of people.

Politics and Society of America hold widely diverse views on the gun rights issue. These differences have at the level of political affiliation, race, gender, geography, economic status and gun ownership. Republican are more supportive than Democrats to gun rights, whites are more likely supportive than racial minorities, men are more supportive than women, and southerners and westerners are more sympathetic than people from other parts of the country.

For the maximum period of the 1990s and the following decades, because of a rise in gun violence, a sizeable majority of Americans were of the belief that controlling gun ownership was more significant than safeguarding the rights of the gun owners. However, in December 2014, there was significant alteration in the balance of opinion for the first time. Majority of the Americans favor safeguarding gun rights to controlling gun ownership in the ratio of 52% to 46%. The question now arose about the reason behind the shift in the public opinion regarding gun rights. Some have championed that Republicans have shown far greater support to the issue

¹ Kyle J. Pozan, "Scrutinizing the Seventh Circuit: How the Court Failed to Address the 'Levels of Scrutiny' Quagmire in *United States v. Skoien*", *Seventh Circuit Review*, Volume 6, Issue 1, Fall 2010.

² "Interpreting the Second Amendment: An Introduction", <http://www.lawsonline.net/LegalTopics/SecondAmendment/interpreting-the-second-amendment.shtml>

of gun rights during the Obama years. To add to it, there is another factor suggesting this shift. That is the changing perception of Americans about crime. Over the period of the last 25 years or so, a divergence has been witnessed between American perception regarding crime and the actual crime rates. The sections of the American society who had previously expressed concern about crime and were in favour of stricter gun control measures, now favored to safeguard laws as they began losing gun control^[3]. In recent years, political polarization has made it seemingly impossible to pass gun-control legislation. For decades, the NRA and other gun-rights groups have convinced their members and legislators that it is unconstitutional to control weapons that the founding fathers could have never imagined. These groups see all gun-control proposals as stealth attempts to eliminate the Second Amendment and seize privately owned guns (Whitney 2012). Also, both the major parties have a diverse view on gun rights reflected in their official position through their platforms. The first reference to gun rights in major party platforms appeared in 1969 when rising crime, political assassination and consideration of major gun control legislation in Congress spurred the parties to address the issue. In general, the Republicans have emphasized gun rights and crime control, whereas the Democrats have emphasized stronger gun laws, crime control and more recently protecting gun rights for hunting and sporting.

Unlike the militia tradition, there is also another hunting-sporting tradition which survive to the present. This tradition is account for most gun ownership in the United States especially long guns. It is a tradition entirely unrelated to the rights set out in the Second Amendment. The rights conferred by the Second Amendment in the Bill of Rights is against tyranny of national government and for the protection of individual liberty. In sum, recreational tradition has not directly influence the incorporation of Second Amendment.

Gun culture has been a prevalent aspect of American society for several centuries. It stems from the country's revolutionary roots, colonial history, frontier expansion and most importantly the Second Amendment that declares "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."^[4] It is interesting to note that the United States contains 88.8 guns per 100 people or about 270 million guns in 2007^[5]. 22% Americans possess one or more guns (12% women and 35% men). Further, the country ranks highest in terms of homicide-by-firearm rate amongst the most developed nations of the world.

The Second Amendment enshrined in the US Bill of Rights was an amalgamation of several proposals and a resultant simplification into twenty seven words^[6]. It is this aspect that

has fuelled the discussion on gun rights^[7]. For the last quarter of the twentieth-century, the Amendment has attracted increasing attention from the general public, historians of the colonial as well as early American national history, politicians, legal commentators. In view of the multiplication of incidents of gun violence, there has been a stark polarisation in society amongst those who favour gun control versus those who promote the constitutional right of the individuals to own guns. This has amplified the quest amongst academicians to determine the intentions of the Founders of the Second Amendment^[8].

Analysis of the gun rights debate in the United States depends on a number of factors namely, history and controversy of the constitutional right to bear arms; criminological consequences of gun rights; role of the American governing institutions, political parties, interest groups, public opinion (Spitzer 2014).

Society is largely divided on the meaning of the Second Amendment in particular and issue of gun rights in general. There appears to be no bridge between the two sides. However a number of interpretations exist regarding this clause of the Bill of Rights. Sections of the populace who oppose the issue of gun control espouse the idea of romantic individualism whereby they argued that guns are a part of individual freedom of the citizens to protect themselves. On the other hand, those who advocate gun control emphasize on the aspect of collective good. These are radically different visions (Chemerinsky 2004). But what is interesting and puzzling is why this divide developed? What accounts for the differing visions? One possibility is that it is a reflection of differences in personal experience and thinking.

The historical literature demonstrating the bond between society and arms dates back to the Florentine tradition, which had a profound influence on American republican thought. The tradition was best articulated by Niccolo Machiavelli. In his view, willingness and ability of a citizen to become a warrior as well economic independence formed a bulwark of a republic. This led to the development of the sociology of liberty which was founded on the role of arms in the society. Further, he put forth that economic, political and moral conditions must enable the arming of citizens. It is this premise in Machiavelli's work that has evolved the principle that civil rights and arms are inseparable. However, allowing arms to some men while denying it to others was noticeably a denial of freedom. Machiavelli's conviction was that arms were critical to individual liberty. Such a stand offered a good groundwork for succeeding republican scholars to build upon. Scholars such as Jean Bodin and Sir Walter Raleigh too emphasized on the bond between the type of society, form of government and arms, prevalent in a nation^[9]. Raleigh put forth that under the façade of protecting their weapons, a crafty tyrant would disarm his citizens and pile up their arms

³ Andrew Kohut, "Despite Lower Crime Rates, Support for Gun Rights Increases", *Pew Research Centre*, April 17, 2015, <http://www.pewresearch.org/fact-tank/2015/04/17/despite-lower-crime-rates-support-for-gun-rights-increases/>

⁴ "Should More Gun Control Laws be Enacted?", *ProCon.org*, February 18, 2016.

⁵ *Ibid*.

⁶ "Interpreting the Second Amendment, An Introduction", *Lawsonline.com*, <http://www.lawsonline.net/LegalTopics/SecondAmendment/interpreting-the-second-amendment.shtml>

⁷ *Ibid*.

⁸ "In the United States Court of Appeals for the Ninth Circuit", http://cdn.ca9.uscourts.gov/datastore/general/2014/02/28/10-56971_motion_to_intervene.pdf

⁹ "Firearms Owners Against Owners", <https://foac-pac.org/law-reviews/204-shalhope-the-ideological-origins-of-the-second-amendment->

[10]. However, the tyrant would use the service of these individuals when required, and arm them to an extent he deemed fit. Bodin on the other hand, differentiated between monarchy and democratic society with respect to arms. Whereas in a democratic society the populace could be armed, in a monarchic setup on the other hand, the monarchs risked disaster by furnishing his citizens with arms.

In the second half of the seventeenth century scholars like Marchamont Nedham declared that a government that was founded on the principle of regular election of its representatives and magistrates as well as possession of arms, was truly a republican society. Nedham claimed that a free state could remain virtuous and survive only if citizens were acquainted with the usage of armaments. However, the notion that responsible citizens or freemen could bear arms became the standard argument amongst most libertarians.

James Harrington was another pre-eminent scholar who made a critical contribution to English libertarian thought on arms, society and the individual. While acknowledging Machiavelli's theory of ownership of arms as key to a citizen's social power as well as political participation as responsible moral agents of society, Harrington grounded his idea on the ownership of land. Hereafter civic virtue was defined as a freeholder bearing arms not only to defend his state but also his property. Subsequent writers like Andrew Fletcher warned "he that is armed, is always master of the purse of him that is unarmed." From his argument it became clear that citizens in a republican society were confronted by the banes of corrupt authorities and vicious fellow citizens. Therefore to accomplish his protection, a responsible citizen had to be armed.

The fundamental role of arms in the libertarian thought of the country was articulated by Joel Barlow. According to Barlow the greatest strength of the country rests upon the principle of not only granting the right to every man to arm but also obliging him to arm. He maintained that in a democratic society the citizens take on arms for ensuring security, which the art of war had designed for destruction. Further, he put forth that unlike a tyrannical government that disarmed its citizens, a republican society required armed citizens in order to ensure the society remained uncorrupted.

To add to the arguments of the above-mentioned scholars, James Madison discussed about the amendments in the American constitution that founded the basis of the Bill of Rights. The amendments were suggested on the basis of state conventions that had ratified the American Constitution. Such sources reiterated four key themes or issues that were later incorporated in the Second Amendment. These included fear of a professional army, individual right to possess arms, reposing the military under civilian control and reliance on militias that were regulated by the individual states.

Views of ancient thinkers clearly indicate their influence on the American republican thought regarding the relationship between arms and society. During the colonial era, guns were a common element in the American colonies for the purpose of self-defence and hunting; and at a later stage as weapons in the American war of revolution. Gun laws in several colonies

necessitated the heads of households to own guns, required able-bodied men to register in the militia as well as carry personal firearms. A case in point, are the laws in some American colonies, including Connecticut (1643) where it was mandatory for "at least one adult man in every house to carry a gun to church or other public meetings" in order to check theft of arms from unattended households as well as to ensure protection against assaults by Native Americans.

The Second Amendment in the U.S Bill of Rights was ratified on December 15, 1791. The Founders of the American Constitution lived in an era when the threat of the federal government exercising force to overpower dissident states or interstate warfare was a reality. Truly much had changed since the year 1791. The likelihood of an armed confrontation against the government force was well demonstrated during the Shay's Rebellion in Massachusetts. To add to it, an uncontrolled ownership of gun in the contemporary times poses a formidable threat to public safety, an unimaginable fact back in 1791.

The dilemma arose when one had to incorporate the case of changed circumstances into doctrinal form. It must be mentioned at this juncture that the Second Amendment as an authoritative text remains the same as it was in 1791. There is no recognized methodology to contemplate the manner in which the connotation of an unamend constitutional text can alter over time.

Historians put forth that the collective versus the individual rights debate had not struck the Founding Fathers as the two arguments were in a way interdependent^[11]: individual rights were a definite reality in order to meet the collective right of serving the militia^[12].

A federal law passed in the year 1792 necessitated every individual qualified to be a part of the militia service to possess a gun suitable for military service. However, they were required to report for regular inspection of their guns as well as registration of their ownership in public records. Several Americans owned pistols and hunting rifles instead of appropriate military weapons.

Between 1700s and the 1800s, first the "slave codes" and in the later years after slavery was brought to an end in 1865, "black codes" prevented the black people from possessing guns^[13]. Ownership of guns was frequently stipulated for the "free white men." A case in point, is the Georgia law passed in 1833 which stated that "it shall not be lawful for any free person of colour in this state, to own, use, or carry fire arms of any description whatsoever...that the free person of colour, so detected in owing, using, or carrying fire arms, shall receive upon his bare back, thirty-nine lashes, and that the firearm so found in the possession of said free person of colour, shall be exposed for public sale."^[14] In 1929, the St. Valentine's Day Massacre in Chicago led to the demise of

¹⁰ "Ol' Buffalo Gun Control page", http://www.three-peaks.net/gun_control.htm

¹¹ "Should More Gun Control Laws Be Enacted?", ProCon.Org, <http://gun-control.procon.org/>

¹² Clayton E. Cramer, *Armed America: The Story of How and Why Guns Became as American as Apple Pie* (USA: Thomas Nelson, 2006).

¹³ "Should More Gun Control Laws Be Enacted?", ProCon.Org, <http://gun-control.procon.org/>

¹⁴ "History of Georgia's Carry Laws", *GeorgiaCarry.Org*, <http://www.georgiacarry.org/cms/georgias-carry-laws-explained/history-of-georgias-carry-laws/>

seven gangsters who were associated with the “Bugs” Moran. This set off a string of debates that led to the ban of machine guns. Later in 1938 the Federal Firearms Act was passed, which necessitated federal firearms licenses as well as made it illegal to sell guns to certain sections of society.

However on October 22, 1968, provoked by the assassination of President John F. Kennedy in 1963, Malcolm X in 1965, Martin Luther King, Junior in 1968, Robert F. Kennedy in 1968 and finally the mass shooting at the University of Texas in 1966, President Lyndon B. Johnson had signed the Gun Control Act of 1968 (GCA) into law ^[15]. The GCA monitors interstate gun trade, preventing interstate commerce unless concluded amongst licensed manufacturers, dealers and importers and confining gun ownership ^[16].

The Democrats did try to enforce several legislations to bring about gun control namely the Brady Law and the Assault Weapons Ban. Brady Handgun Violence Prevention Act, the formal name of the Brady Law was authorised by President Clinton in 1993. It instituted the condition of performing background checks for every firearm purchase within the territory of the United States. The following year, in 1994 he signed the Public Safety and Recreational Firearms Use Protection Act. The act prohibited manufacture of semi-automatic firearms, which were termed as assault weapons under law ^[17]. However the ban terminated in the year 2004 and despite several efforts by the Democrats, the law could not be renewed. However, the efforts touched new grounds in 2013 after the Sandy Hook shooting on 2013. The ban was proposed by President Obama under a broader gun-control bill. Though the Assault Weapons Ban failed on a 60:40 vote yet in 2014 the House unanimously passed an amendment which granted a funding worth \$19.5 million to the background check system. Thus, in view of such a rich history of the association of firearms with the American society, it may be deduced that the issue of gun rights and gun control has been a recurrent subject of deliberation in the country.

Gun rights issue become again a prominent one in 2016 Presidential election. Hillary Clinton cites her roles as mother and grandmother to deliver an impassioned rebuttal to Donald J. Trump’s, who got the support of NRA, contention that her push for stricter gun control would make families less safe, saying the presumptive Republican nominee would put more children “at risk of violence and bigotry.” Donald Trump has accused Hillary Clinton of wanting to let violent criminals out of prison and “disarm” law-abiding citizens in unsafe neighborhoods.

A landmark incident that stirred the debate on gun rights as a national discussion, in the United States in the recent times was first, the mass killings of twenty school children in Newtown, Connecticut in December 2012 and second, an appeal by the Obama administration to curb the availability of military weapons. However, a compromise legislation that would have expanded background checks and banned semiautomatic assault weapons was defeated in the Senate in

2013.

Further following a series of mass assaults in 2015, which involved the killing of fourteen people at a community centre in San Bernardino, California and nine people at a church in Charleston, South Carolina, partisans of gun control rekindled the debate once again. They advocated the necessity of stricter gun laws and cited the example of democracies like Australia and Japan where instances of gun violence are relatively low ^[18]. In view of the raging national debate on the issue of gun rights, President Barack Obama in January 2016 undertook a string of executive actions to curb the rate of gun violence. Some key steps to this end are the expansion of federal background checks to most gun buyers, budgeting worth \$500 million to increase access to mental health care, as well as the requirement for dealers trading firearms online or on gun shows to acquire the federal licence for the same.

A federal prohibition on high-capacity magazines and assault weapons was in place from 1994 to 2004. However, the Congress had granted the expiry of such restrictions. President Obama had once mentioned that he was compelled to focus on the issue of gun rights and gun control during his administration because the Congress had in a way failed to pass “common-sense gun safety reforms.”

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