

# Of Constitutional Liberty and the Fate of the Republic Gun Control in America

As the violence on the streets of America and the number of guns possessed by its citizens becomes more and more alarming, the debate over gun control assumes a tone of greater urgency. Many believe that the first step in tackling violent crime is disarming the general public. However, the history of gun control in America, the U.S. Constitution itself and the freedoms it guarantees, have made the issue of gun control one which prescribes no easy solution.

by Mark Meier

"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."

For an amendment to the Constitution of the United States of America, this pronouncement is not particularly well-written. Perhaps if it were not sandwiched in between guarantees of freedom of speech and freedom from unreasonable searches and seizures, Americans would not cling to it so tenaciously. But there it is, the Second Amendment, part and parcel of the Bill of Rights—and it must be addressed.

A variety of legal restrictions on the manufacture, sale, and possession of weapons have fallen under the rubric of gun control, from the institution of background checks and waiting periods prior to the purchase of weapons, to the outright ban of firearms. For staunch opponents of gun control—most prominently the National Rifle Association (NRA), and the membership for whom they presumably speak—even the least of these measures are anathema to the absolute liberty to "bear Arms" guaranteed by the Second Amendment. Talk of licensing firearms, a far cry from barring possession of them completely, sparks comparisons to infamous Soviet tyrannies and analogies to Nazi Germany. Where does this passion come from?

The contested nature of the Second Amendment derives, in part, from its role as one manifestation of a broader cultural conflict. From origins in classical and Renaissance political theory, to the liberal reform spirit of the nineteenth century, to the issue at hand today of individual possession of firearms, the struggle owes debts to many of the most important intellectual currents of Western civilization. To understand the issue in depth, we must consider the history of this amendment in its broader cultural terms.

## Machiavelli's Legacy: The Intellectual Foundations of the Second Amendment

Provisions for an armed citizenry, and particularly state militia, were included in nearly all the constitutions of the original thirteen states. The prevalence of this position was partly born of practical



Romanticizing gun culture in the great American gangster movie.  
[G-Men]

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experience: American revolutionaries would have faced a much harder road to independence had the central government—in this case the British monarchy—maintained a monopoly on weapons. However, as historians such as Robert Shalhope and the late Richard Hofstadter have argued, the late sixteenth century emphasis on the citizen's right to bear arms had deeper intellectual roots.

One important source of the political beliefs of America's founders was a classical republican philosophy descended



*Machiavelli: the necessity of an armed citizenry for a virtuous republic.*

from Ancient Rome and Florentine Italy, which was also prevalent in the Anglo-American world of the eighteenth century. Conceived in opposition to monarchy, and founded on the notion of a virtuous citizenry on guard against the corruption of the republic, this political philosophy—particularly as expressed by Niccolò Machiavelli (1469-1527), focused attention on the issue of arming citizens. Standing armies were anathema to a virtuous republic, as they posed the threat of a powerful warrior class divorced

from the citizenry and the interests of the state. To political theorists, citizen militia were the favored alternative. Only such militia could combine the force of arms with the citizens' interests in the health and virtue of the republic.

Shalhope explains that republican theorists, beginning with Machiavelli, believed that "a dynamic relationship" existed between arms, individuals, and the well-being of the society. Machiavelli argued that the health of a republic was best guaranteed by the economic independence of its citizens, and by their ability and willingness to take up arms. Shalhope wrote that "arms were essential to liberty—in order for the individual citizen to protect himself, to hunt, to defend his state against foreign invasion, to keep his rulers honest, and to maintain his republican character."

Many Anglo-American political theorists in the seventeenth and eighteenth centuries upheld Machiavelli's beliefs, and none more so than America's Revolutionary generation. Joel Barlow, a Connecticut-born poet and political philosopher, wrote in the late eighteenth century, that one of the strengths of the American republic lay in "making every citizen a soldier, and every soldier a citizen; not only permitting every man to arm, but obliging him to arm." Barlow's claim, like the ideas of many of his peers, rested on his faith in the unique virtue of the American people. Because of their singular circumstances, background, and attitudes, Americans, these men believed, were capable of threatening a corrupt government—but not their own society. In such a situation, no harm could come from an armed citizenry. To disarm the citizen

while arming the professional soldier would leave the fate of the republic in the hands of those who would, in Barlow's phrase, "forget the duties of a man, to practice those of a soldier."

These ideas were prevalent in political documents critical to the formation of the American nation. Various bills of rights appended to state constitutions of the 1780s protected the right to bear arms and affirmed the importance of citizen militia. In his draft of the Virginia state Constitution, Thomas Jefferson proposed that "no man ever be debarred the use of arms," to which he later added the qualification, "within his own lands or tenements." Throughout the state conventions responsible for ratifying the national Constitution, the right to bear arms was reaffirmed. Notable Boston revolutionary Samuel Adams, challenging the federal Constitution, offered a possible amendment before the Massachusetts state convention which would prohibit Congress from "[preventing] the people of the United States who are peaceable citizens from keeping their own arms."

The Second Amendment embodies the beliefs and fears of the republican-minded men who considered and ratified it. In the late eighteenth century, the fear of a standing army, the reliance on state militia, the subordination of any military force to civilian control, and the right of individual citizens to bear arms were all closely tied to the preservation of liberty and virtue within the new republic. As this republic matured in the nineteenth century, the role of both the citizen militia and firearms in American life increasingly came under scrutiny.

### **The Rapid Demise of the Citizen Militia and Early Attempts at Gun Control**

Regardless of the theoretical virtue a citizen militia represented to republican idealists in the late eighteenth century, its practical value was quite low. George Washington, as commander of the Continental Army during the Revolutionary War, had numerous opportunities to appraise the performance of militia, and found such units virtually worthless on the battlefield. Advocates of a standing professional army as a guarantor of national security gained influence in the early nineteenth century as the experience of the War of 1812 pressed home the need for an adequate military. Historian Marcus Cunliffe notes that by the 1850s militia service had become "a joke, a bore, a nuisance to a majority of American citizens." Militia companies had become little more than social clubs, often more interested in drinking than drilling.

Yet, even though a citizen militia no longer appeared capable of preserving liberty and virtue in the republic, few recommended disarming the citizenry. Indeed, the gun is one of the enduring symbols of America in the nineteenth century. Certainly, a firearm was an important means of security for a frontier-dweller. Just as certainly, guns played a role (long over-romanticized) in wars against native Americans and in the criminal life of that time period. If Hollywood and popular fiction of the twentieth century have indeed overestimated the role of the gun in nineteenth-century America, the truth still remains that few restrictions on gun ownership existed.

The earliest cases challenging the Second Amendment did not reach the Supreme Court until late in the nineteenth century. In three cases concerning the right of individuals to orga-

nize and bear arms as members of local militia, the court established a precedent for subsequent decisions that disregarded the intent of the authors of the Second Amendment.

In *U.S. v. Cruikshank* (1876), *Presser v. Illinois* (1886), and *Miller v. Texas* (1894), the Court enunciated two critical principles. The first was that the Second Amendment provided no individual right to bear arms, only a communal right to form militia. The second principle established in these cases was that the Second Amendment was not incorporated in the Fourteenth Amendment. (Under the due process and equal protection clauses of the Fourteenth Amendment, other rights guaranteed by the Constitution could be incorporated—that is, extended to protect individuals in non-Federal cases.) These Court decisions, by not incorporating the Second Amendment, established state sovereignty over the formation of militia and the institution of gun control legislation. To this day, the Second Amendment remains one of the few Constitutional guarantees not brought under the umbrella of the Fourteenth Amendment.

Although no observer could have realized it then, a critical moment for the gun control debate occurred in November, 1871, when the state of New York granted a charter authorizing efforts “to promote rifle practice, and for this purpose to provide a suitable range or ranges in the vicinity of New York...” The organization born of this charter, the National Rifle Association (NRA), was backed by a vocal and persistent group of retired and active soldiers (including Ambrose E. Burnside, who served as a general in the Union army in the Civil War, and as the NRA’s first president).

Initially concerned with a perceived lack of proficiency with firearms on the part of the American citizenry, the NRA has in the 120 years since its inception played a central role in promoting firearm safety and education, sponsoring competitive shooting, and has concerned itself with blocking what it has viewed as reactionary efforts to restrict the manufacture, sale, and possession of firearms. In this last role, however, the NRA did not emerge as the organized and powerful lobby it is today until later in the twentieth century. During much of the early history of gun control legislation, the NRA was relatively quiet.

Court decisions such as *Cruikshank* and *Presser* paved

the way for subsequent gun control measures, but did not by themselves create any momentum for such legislation. This dynamic emerged during the socio-cultural transformations in late nineteenth- and early twentieth-century America, as the pressures caused by immigration, urbanization, and industrialization prompted a wide variety of reform movements.

## Of Cops, Robbers, and Reform at the Turn of the Century

For most of the nineteenth century, widespread possession of firearms did not incur public rancor as much as simple disorder did. Many distressed travelers from the East Coast wrote of the lawlessness rampant in western settlements. The first step in “civilizing” these settlements and turning them into proper towns often consisted of the establishment of vigilante committees, who, perversely, were to end disorder by eliminating its sources. “Civilizing” the cities of the East and Midwest posed a slightly different problem, and part of the solution seemed to lie in professionalizing law enforcement and restricting firearms.

Maintaining law and order in the early nineteenth century posed peculiar problems. Organized, uniformed police forces in the American republic were subject to the same suspicions directed at a standing, professional army. Largely because of these suspicions, most urban police were not permitted to carry weapons other than clubs. In the late nineteenth century, however, as cities swelled with the influx of immigrants, and as violent clashes between immigrant and native-born,

and between labor and management intensified, calls for increased efforts to restore order were commonplace.

In a sense, reform intended to achieve “stricter law enforcement” provided a method of addressing the symptoms of late nineteenth-century America’s problems—violence, crime—without tackling their social and economic causes. As part of this reform impulse, law enforcement underwent significant changes. Police forces were reorganized under professional and meritocratic principles, and crime and disorder were tackled head-on as the products of an older, “savage” world, undesirable in modern civilization.



[Kirk Anderson]

# MORE FUN... with YOUR GUNS



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*Defending the constitutional right to have fun? Over a quarter century has passed since this NRA portrayal of guns in America.*

## “Civilizing” New York

In the first decade of the twentieth century, many influential “opinion leaders” in New York City—journalists, politicians, businessmen—took aim at one particular manifestation of “savagery” in their city: handgun violence. Leaders desired some form of gun control to lessen the crime and domestic violence that New Yorkers felt had reached alarming proportions. The Sullivan Law, passed by the New York State Legislature in 1911, was the broadest attempt at gun control in the United States to that date, and was to exert enormous influence over future efforts toward gun control.

The Sullivan Law mandated that individuals had to receive a permit, or license, from local authorities to purchase or own a handgun; carrying an unlicensed handgun was made a felony. The granting of such permits was left to the discretion of the local authorities, who might refuse or revoke a permit if the individual in question engaged in any criminal activity or demonstrated “suspect character.” It was hoped that this piece of legislation would control crime.

Yet, hopes based on legislation are rarely fully realized, and this case was no exception. Handgun violence in New York City continued to rise in the years after the Sullivan Law was enacted, and the ensuing debate now sounds familiar to anyone paying attention to current gun control discussions. Critics of the Sullivan Law argued that it served only to disarm the honest citizenry of New York, while advocates claimed that tougher, wider enforcement was necessary—perhaps even legislation at the federal level. It would be unfair to label the Sullivan Act a success or failure, although gun control scholar Lee Nisbet has assessed its symbolic impact:

[The] Sullivan Law, along with its advocates and critics, marked the emergence of the firearm as a symbol of a much larger ongoing political, social, and cultural struggle—*kulturkampf*—to define the kind of nation America should be. Specifically, the gun control debate can be viewed as part of a larger social struggle between an urban, well-educated, politically liberal class and one with more traditional political and social views.

## Here from There: Gun Control After the Sullivan Law

The First World War temporarily shifted attention away from the issue of gun control. Ironically, however, the Great War also sounded the death-knell for the ideal of a citizen militia, as the National Defense Act of 1916 recognized the National Guard as the militia, putting an end to the few state and local units that remained.

The war also marked the waning of the reform impulse that had swept America in the three previous decades. One of the last great acts of that impulse, Prohibition, contributed to the reorganization of law enforcement and, indirectly, to the cause of gun control. The Eighteenth Amendment, ratified in 1919, banned the manufacture and sale of alcohol within the United States. Like many other reform acts of this period, Prohibition was intended to buttress domestic order. It was the culmination of a campaign against the evils of alcohol—evils which supposedly showed the weaknesses and dangers of recent immigrants to America.

In 1933, less than a decade and a half after ratification of the Eighteenth Amendment, Prohibition was repealed. It left

## The Lessons

In the current debate over gun control, Prohibition is often presented as an example of the failure of restrictive legislation. Gun control opponents repeatedly make the argument that Prohibition did not stop drinking, and that instead, by encouraging smuggling, bootlegging and moonshining, it fostered organized crime. This is all true. However, the National Rifle Association (NRA), one of the most vociferous adversaries of gun control, would do well to study history more closely before resting its case on the uselessness of Prohibition laws. Moreover, Prohibition contains lessons about the force of public opinion that the gun lobby ignores at its own peril.

Contrary to the way they are often portrayed, federal Prohibition laws never actually forbade drinking or possession of alcohol. In fact, citizens could even purchase alcohol or make their own wine and hard cider without breaking the law. What Prohibition *did* disallow was the “manufacture, sale, or transportation of intoxicating liquors.” Thus, the point of Prohibition was not to end drinking in the United States—although some legislators clearly hoped this would happen—but rather, to eliminate the alcohol industry. Prohibitionists emphasized that saloons destroyed lives and families, and that brewers and distillers corrupted politics. This type of talk was enough to alarm the general public about the evils of the alcohol industry.

Particularly relevant to the current furor over gun control is the alcohol industry’s reaction to Prohibition. Even in the face of tremendous public outrage, the industry appeared incapable of self-reform. Saloons, competing for business, continued to sell to minors and drunkards. Brewers insisted that beer was a “healthy” beverage; distillers—that whiskey was an “American” one. Distributors smuggled their products into states and counties that had banned alcohol sales. Even after Prohibition was written into the Constitution in 1919 as the

behind, at best, a mixed legacy. Consumption of alcohol had dropped, but the law of the land was regularly flaunted. More importantly, Prohibition had resulted in bootlegging, which created a new class of organized criminal, such as Al Capone, who posed a new threat to law and order. As law enforcement endeavored to meet the challenge of organized crime, new gun control measures were passed to aid the struggle.

The National Firearms Act of 1934 (bolstered in 1938 by additional legislation) was the first attempt by the federal government to establish some control over personal weapons ownership. In part intended to curb the power of organized crime, the Act prohibited private possession of a variety of firearms: machine guns, assault rifles, sawed-off shotguns, and silencers. In addition, the Act required the licensing of all firearms manufacturers and dealers, and prohibited the interstate transportation of unregistered shotguns.

In 1939 the National Firearms Act was tested in the Supreme Court, in *U.S. v. Miller*. The Court unanimously upheld the convictions of two men charged with transporting sawed-off shotguns across state lines. The Court argued that such weapons had no "reasonable relationship" to "a well-regulated militia," and therefore the defendants were not protected

## of Prohibition

Eighteenth Amendment, the industry still refused to take public sentiment to heart. The alcohol industry believed that the Supreme Court would dismiss Prohibition; instead, it was upheld. Except for medicinal and sacramental products, the beverage alcohol industry ceased to exist for the next fourteen years. After Prohibition was repealed in 1933, states such as Pennsylvania, not trusting the industry to monitor itself, retained strict control over alcohol distribution.

The point need not be overstated that people today are just as scared and desperate as during World War I, and are just as willing to turn to drastic measures. The NRA—by loudly opposing even the most moderate gun control measures, by denying the violence perpetrated by gun owners, by supporting products such as armor-piercing bullets that can only be used for killing, and by excusing tragic social destruction in the name of constitutional liberty—looks increasingly like the alcohol industry of 75 years ago. And politicians, just as they did then with the "dreaded liquor interests," are now beginning to turn the gun lobby into a scapegoat. The NRA's inflexibility only makes it that much easier.

Could Prohibition happen again, this time with guns? The gun industry refuses all responsibility for urban violence, fear, and crime; yet, no cheaper, faster, or more effective solutions to these problems than gun control are in sight. Handgun advocates argue that gun control will not work, that it will not affect the more than 200 million firearms already on the streets. That may be. Nevertheless, we should bear in mind that in times of crisis, Americans are capable of re-writing the Constitution to eliminate industries that they consider corrupt, arrogant and murderous. The question is whether or not the gun industry will finally acknowledge that guns kill people—before people, in their frustration, finally kill guns.

- Catherine Gilbert Murdock

by the Second Amendment. As it had been since *Cruikshank* in 1876, the Court emphasized the militia clause of the Amendment, but it went further in clearly spelling out a doctrine for Second Amendment cases. In its decision, the Court found that the "clear purpose" of the Second Amendment was to implement the provision found in Article I, Section 8 of the Constitution, empowering Congress to "[call] forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions." This opinion firmly declared that no individual right was guaranteed in the Second Amendment, only a communal right related to the safety of the republic—a doctrine that has yet to be revised or discarded.

### In the Wake of Miller

Since World War II, the cause of gun control in America has been confronted with difficulties from a variety of directions. In the mid-1950s, the member states of the North Atlantic Treaty Organization (NATO), to further integrate their armed forces, switched to a standard, 7.62 mm

bore in their field weapons. This transition created a surplus of thousands of non-standard weapons from Western European nations that sold for as low as \$10.00 on the American market. It was a welcome situation for gun dealers, collectors, and enthusiasts, but posed a vexing problem for gun control advocates. Attention was drawn to the problem in dramatic fashion by the assassination of President John F. Kennedy, who was killed (apologies to Oliver Stone) with a surplus Italian rifle, purchased at a cut-rate price by Lee Harvey Oswald.

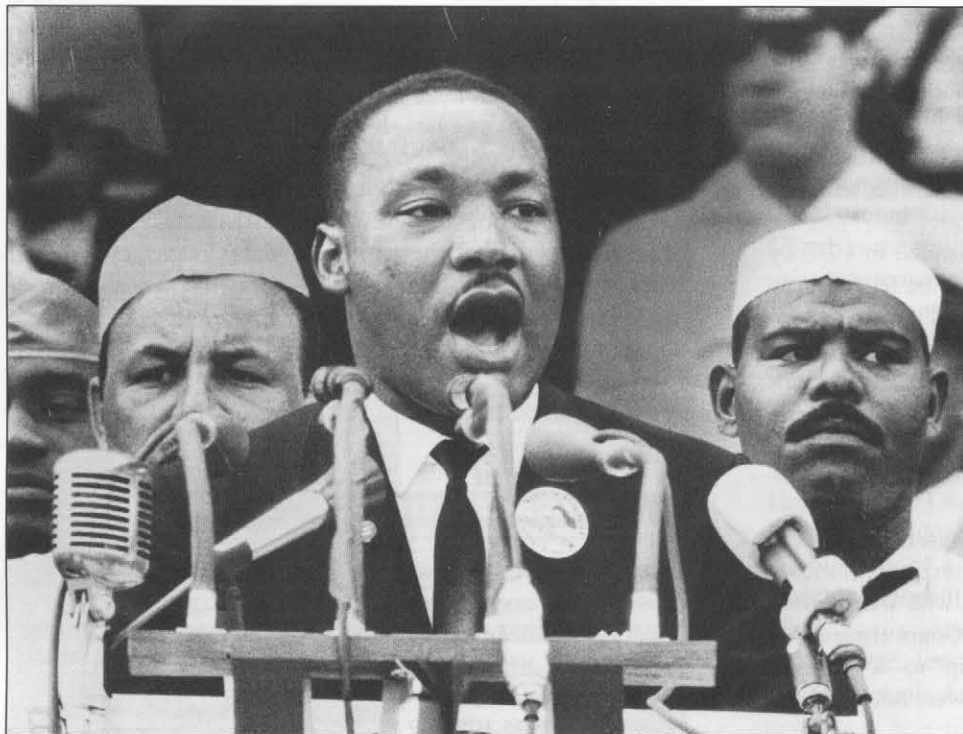
Five years later, Robert Kennedy and Martin Luther King were both shot by assassins. In addition, increasingly violent unrest struck both urban areas and once-idyllic college campuses. In 1967, a year before the Robert Kennedy and King assassinations, the President's Commission on Law Enforcement and Administration of Justice issued a report that reaffirmed the judiciary's decisions regarding the Second Amendment, and particularly the doctrine set forth in *U.S. v. Miller*.

Another piece of federal gun control legislation arrived on the heels of this report, spurred by strains on the social fabric that violence at home and abroad had created. The Gun Control Act of 1968 prohibited the importation of military surplus weaponry (in this case, closing the barn door well after the horse had gotten in), the importation and sale of cheap, small, "Saturday Night Special"-type handguns, and the interstate retailing of all firearms. This last stipulation was intended mainly to stifle mail-order sales of weapons, transactions which were becoming increasingly difficult to monitor.

To this day, the Court's position has remained unchanged.



Al Capone: the Prohibition-era rise of organized crime.



*Easy access to guns: civil rights leader Martin Luther King, Jr., killed by an assassin's bullet.*  
[U.S. Embassy, Ottawa]

In *Adams v. Williams* (1972), a case not directly related to Second Amendment issues, Justices Thurgood Marshall and William O. Douglas cited *U.S. v. Miller* and reaffirmed the states' right to regulate weapons. In *Lewis v. U.S.* (1980), Justice Harry A. Blackmun remarked in a footnote to the Court's opinion that *U.S. v. Miller* still represented the Court's thinking on the Second Amendment. Finally, the Court refused to hear the case of *Quilici v. Morton Grove* (1982), in which a municipal ordinance of the city of Morton Grove (Illinois) banning handgun ownership except for those used in the line of duty, was challenged. *Quilici* had been heard in the Federal District Court and the Federal Court of Appeals, both of which had upheld the Morton Grove ordinance. The Supreme Court's refusal to hear the case left the decision of the lower courts in effect, and preserved state and local prerogatives to regulate firearms.

Public distress over violent crime has ebbed and flowed throughout the 1970s, 1980s, and 1990s. Particular events, such as the killing of John Lennon and the shooting of President Ronald Reagan, have highlighted the ease with which anyone can obtain handguns. In addition, popular attention to developments such as the violent environment created by illegal drug trafficking and the apparent profusion of firearms among America's youth has served to keep issues of law, order, and gun control at the forefront of the public consciousness.

### The Legislative Battleground

Attention to the issue of gun control is now particularly intense. New Jersey has enacted an assault gun ban, and the recently passed Brady Bill has put in place additional federal legislation restricting gun ownership and availability. As expected, the political debate over these new proscriptive

measures and other local ordinances is quite heated. Successful challenges to gun control through the courts seem unlikely, unless a major turn-around takes place in judicial attitudes regarding *U.S. v. Miller*. In the century since *U.S. v. Cruikshank*, the Court has shown no inclination to stray from its original findings; thus, no intention to block firearms regulation nor guarantee an individual's right to bear arms is evident. The battleground, then, is in the legislature. The chief hurdle for gun control advocates has been passing controlling legislation, and the lobbyists of the National Rifle Association (NRA) have labored mightily to raise that hurdle whenever possible.

It is quite possible that Lee Nisbet is correct in placing gun control at the center of a broader cultural struggle. Opposition to gun control appears strongest in rural America, and in the West and South in particular. In addition, there appears to be at least some correlation between opposition to gun control and conservative stands on other political

and social issues. If a broader struggle does exist, then the lobbyists of the NRA and gun control advocates are in the skirmish lines.

In a democratic society, the state can offer no better arena for playing out such struggles than the legislature: local, state, or federal. Legislatures are imperfect institutions, bound to offer imperfect solutions. But on the issue of firearms, where cultural stakes are high, and social costs much higher, even imperfect solutions must be considered. ●

### Suggestions for Further Reading

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