Political Theory on the Rights and Regulations of the Second Amendment

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**Abstract**

*With the recent mass-shooting in Las Vegas, the right to bear arms controversy is being constantly disputed once again. With far-left progressives advocating for increased gun regulations or even the ban of firearms altogether, Second Amendment proponents continue to push back. However, these proponents, rather than deriving their argument from logic and reason, too often support the right to bear arms simply because of their infatuation of firearms. The following discourse suggests an alternative method of advocating for the Second Amendment by citing the previous works of early political theorists, such as John Locke and John Stuart Mill, to support and assist the position for the right to bear arms. This is useful because the Founders were heavily influenced by these same theorists, which ultimately provides an explanation of why the Second Amendment was given in the first place. Once the Second Amendment is upheld by relying on the presumption that the right to bear arms is an indispensable human right, the closing portion of the discourse suggests a remedy to help aid the ills of firearms being faced in present-day America. As a result, it is clear that the controversy surrounding the Second Amendment relies on compromise between both parties, the very same way the Second Amendment was given as a compromise between the Federalists and Anti-Federalists.*

**Introduction**

According to the U.S. Centers for Disease Control and Prevention (CDC), approximately 93 Americans are killed by guns every day. On average, there are 12,000 gun homicides in the United States every year, and for everyone person killed, there are at least two others injured. What is more alarming being that seven children, ages 19 or under, are killed with guns in the U.S. on the average day. Ultimately, America's gun homicide rate is more than 25 times the average of other high-income countries. Based on the data, gun violence is certainly an epidemic in the United States. Countless attempts have been made to regulate gun ownership, or completely ban the use of guns. Current gun control, however, has proven to be more ineffective than legislators had hoped, partially due to the narrow scope of current policies, and partially due to a push-back by gun enthusiasts. But what might be more alarming is that contemporary American society’s case for the right to bear arms is not grounded in reason, but rather in admiration and infatuation for firearms. The following discourse will analyze gun ownership as an unalienable right. It begins by focusing on the works of early political theory to establish the right to bear arms as a fundamental right of human nature. The latter portion of this discourse will analyze the implementation of gun regulation, with a final suggestion to broaden firearms regulations to decrease the likelihood of high-risk individuals owning or possessing a firearm.

**Political Theory and the Right to Bear Arms**

To understand the rationale behind the Second Amendment, it is important to understand how the titans of classical liberalism struggled with the relationship between the sovereign and the individual.13 While early philosophers questioned the concept of liberty, it was not until 1651, when Thomas Hobbes published his book, *Leviathan*, that a concept of liberty began being seriously studied deeply and questioned. In *Leviathan*, Hobbes focuses specifically on why social unity amongst citizens is best achieved through a social contract. Hobbes, in particular, wanted to study why individuals conform to live together in a society. The social contract is a thought experiment that seeks to construct principles that regulate an ideal society. Citizens use these principles to judge their own social institutions, and if those institutions are out of line with the principles of the social contract, then citizens call them unjust and seek to change them.13 Hobbes social contract theory is particularly important, not because his theories are accurate, but rather his theory on liberty. In the beginning of his book, Hobbes elaborates on what he calls the “state of nature.” This represents what the world would look like without a state or community. Essentially, this state of nature would be a state of all at war. Because of a scarcity of goods, this would lead to competition and strife, and prompt some individuals to form groups to protect themselves. With no power to keep people controlled, they would be in a constant state of war with each other. To get out of the state of nature, all people transfer their natural rights, and this is done through a social contract.3

When humans form a society, they socially agree to follow community laws to ensure survival. No individual has nearly as many rights as they would if they were still living in the state of nature (since in the state of nature everyone owns everything and can do whatever they want).13 Every individual gives up some of their rights to others, agreeing to only retain those rights over others that they are content for everyone else to retain over them.3 Hobbes believed that for the people to acquire that security and to be free men, the people would need to contract with the Leviathan (state). In theory, the Leviathan would be able to concentrate all the wills of the people and the nation to better the lives of all and lead everyone to a prosperous end. If the people consented to being governed by the Leviathan, then their freedoms would remain intact if they did not act in rebellion against him.3 Hobbes argues that for a government to be effective, it must absolute authority. Even after insisting this, Hobbes reserves to subject the liberty of disobeying some of their government’s commands, giving them the right to disobey or resist when their lives are in danger.3 But his ascription of apparently inalienable rights – what he calls the “true liberties of subjects” – seems incompatible with his defense of absolute sovereignty.13 Moreover, if the sovereign's failure to provide adequate protection to subjects extinguishes their obligation to obey, and if it is left to each subject to judge for themselves the adequacy of that protection, it seems that people have never really exited the fearsome state of nature. Because of his discussion of the limits of political obligation, it is not clear, but certainly arguable, that Hobbes operated off the assumption that the state of government was incapable of possessing ill will against those they governed. If he does hold this assumption, and if mankind is interested in self-preservation, how do the people respond to tyranny if the Leviathan turns out wicked?

The answer to this question comes from John Locke’s *Two Treatises of Government*, where he outlines ideas for a more civilized society based on natural rights, and the social contract theory Hobbes had developed earlier. Locke saw the state of nature very differently than Hobbes, where instead of a state of war, the law of nature wills the “peace and preservation of all mankind,” so it forbids invasion of another’s rights. Instead, he distinguishes between the state of nature and the state of war, which are identical for Hobbes. Locke also disagreed with Hobbes definition of liberty, stating that:

*“In the state of nature, liberty consists of being free from any superior power on Earth. People are not under the will or lawmaking authority of others but have only the law of nature for their rule. In political society, liberty consists of being under no other lawmaking power except that established by consent in the commonwealth. People are free from the dominion of any will or legal restraint apart from that enacted by their own constituted lawmaking power according to the trust put in it. Thus, freedom is not as Sir Robert Filmer defines it: 'A liberty for everyone to do what he likes, to live as he pleases, and not to be tied by any laws.' Freedom is constrained by laws in both the state of nature and political society. Freedom of nature is to be under no other restraint but the law of nature. Freedom of people under government is to be under no restraint apart from standing rules to live by that are common to everyone in the society and made by the lawmaking power established in it. Persons have a right or liberty to (1) follow their own will in all things that the law has not prohibited and (2) not be subject to the inconstant, uncertain, unknown, and arbitrary wills of others.” 6*

Locke suggest that individuals get three important things from government: (1) law, to bind people and resolve disputes, (2) fair adjudication, because people cannot be judges in their own cases, and (3) reliable enforcement of the law.6 Like Hobbes, the people delegate away their natural rights when they form a society. However, unlike Hobbes, Locke would still say that those individuals are free even though the "state of perfect freedom" is given up, since freedom under the state of nature is fundamentally different from freedom under a government.

By his definition here, one might initially assume that Locke does not advocate the right to bear arms. This is not only because he sees man as more reasonable than Hobbes, but because it is assumed that by his definition, denying the right to bear arms would not prevent individuals from following their own will. Constraints on people under the government by laws is not considered a deprivation of liberty. By Locke’s definition of liberty, one must assume that if humans are subjected to a common judge in a civil society, firearms would not be needed because it would be the responsibility of the government to provide a remedy to prevent war, not the individual. But just because one has left the state of nature and relinquished their rights to a common judge does not necessarily mean they must relinquish their guns because there are many situations where there is not an option to seek remedy from a common judge. In Chapter III, Sec. 17 of the *Two Treatises of Government*, Locke states:

*“And hence it is, that he who attempts to get another man into his absolute power, does thereby put himself into a state of war with him; it being to be understood as a declaration of a design upon his life: for I have reason to conclude, that he who would get me into his power without my consent, would use me as he pleased when he had got me there, and destroy me too when he had a fancy to it; for nobody can desire to have me in his absolute power, unless it be to compel me by force to that which is against the right of my freedom, i.e. make me a slave. To be free from such force is the only security of my preservation; and reason bids me look on him, as an enemy to my preservation, who would take away that freedom which is the fence to it; so that he who makes an attempt to enslave me, thereby puts himself into a state of war with me. He that, in the state of nature, would take away the freedom that belongs to any one in that state, must necessarily be supposed to have a foundation of all the rest; as he that in the state of society, would take away the freedom belonging to those of that society or commonwealth, must be supposed to design to take away from them everything else, and so be looked on as in a state of war.”6*

Locke’s response to Hobbes about the necessity of the Leviathan was that such a sovereign power is only necessary when most the people consent to the social contract between both parties. Without that social contract, then the people and the state would be in a state of war that necessitates the need for self-preservation. Locke goes on to say that, “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-defense is a part of the law of nature, nor can it be denied the community, even against the king himself...”6

Early political theory from Hobbes and Locke heavily influenced the Founders. The Bill of Rights, more specifically, the Second Amendment, were not merely passed to ease Anti-Federalists who worried about an excessively powerful federal military, but because they enforced the founding principle of liberal political theory on the unalienable right to life – or, more precisely, the right to self-preservation. In some important ways, the Hobbesian view of politics and government have been revived by the modern progressive left.7 These individuals promote a never-ending expansion of government control of lives of the citizenry, including disarmament as a tool for keeping the peace.7 As mentioned before, John Locke rejected Hobbes’ essential claim that the preeminent human desire to avoid death and sorrows drives us to leave the state of nature by agreeing to the institution of political rule.7 Instead, Locke lays the theoretical basis that reason dictates natural laws that include a duty to refrain from harming others in their life, health liberty, and possessions. This duty, in turn, implies a right in everyone to enforce the natural law by punishing those who offend it.7 The understanding of correlative rights and duties is implicitly echoed in the structure of the Second Amendment. Locke reasoned that:

*“He, that, in the state of nature, would take away the freedom that belongs to anyone in that state must necessarily be supposed to have a design to take away everything else, that freedom being the foundation of all the rest; as he that, in a state of society, would take away the freedom belonging to those of that society or commonwealth must be supposed to design to take away from them everything else, and so be looked on as in a state of war….*

*Thus a thief, whom I cannot harm but by appeal to the [civil] law for having stolen all that I am worth, I may kill when he sets on me to rob me but of my horse or coat; because the law, which was made for my preservation, where it cannot interpose to secure my life from present force, which, if lost, is capable of no reparation, permits me my own defense and the right of war, a liberty to kill the aggressor, because the aggressor allows not time to appeal to our common judge, nor the decision of the law, for remedy in a case where the mischief may be irreparable.”6*

For Locke, the same reasoning that establishes the right to kill a robber establishes the right to overthrow a predatory ruler. The right to arms is the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain violence of oppression. The same fundamental right of self-preservation authorizes the use of lethal force against both violence from the government and violence from criminals. With this analysis of early political theorist’s work, it is clear that the right to bear arms is an indispensable aid to securing fundamental rights of personal security, personal liberty, and private property.7

**An Individual Issue or a Collective Issue?**

At the core of Locke and Hobbes’ conceptions of the social contract are a clear moral discussion about the relationship between the individual and the society in which the individual is a part of. In Isaiah Berlin’s *Two Concepts of Liberty*, he distinguishes between negative and positive liberty, where the former is the freedom *from* and the latter is the freedom *to*.2 The right to bear arms is essentially a competing argument between the two, for whether citizens should be free *from* the danger posed by the government, or whether citizens should have the freedom *to* own a gun solely for private purposes.2 The Second Amendment of the United States Constitution reads: “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.” What has followed has been a clash of interpretations of this amendment, however. Some take the phrase to guarantee an individual constitutional right for citizens, while others contend the Framers intention was to only prevent the state from taking away a citizen’s right to self-defense, thus protecting it from tyranny. The former implicates the right to bear arms as an individual issue; the latter, a collective issue.

As focus shifts to individual liberties as an application to the right to bear arms, the discussion must make some acknowledgement to John Stuart Mill's *On Liberty*. Mill turns the discussion from "what is liberty" to "when should liberty be given?" Although his book mainly focuses on freedom of thought and expression, collision of ideas, and individuality, Mill's “Harm Principle" certainly can be useful when applied to the debate of gun rights. He states that if someone is not harming someone else or impeding on other's freedom, that individual should be able to do what they want.8 It is societies purpose to regulate the harms, and Mill says the "one very simple principle is that mankind can only interfere with the liberty of another as means of self-protection or to prevent harms to others.”8 Mill then goes on to say that the domain or sphere of action that an individual is sovereign are actions that do not affect others. This is because society would only have concern over actions that hurt others, in the interest of other people. Essentially, this domain for Mill is the inward domain of consciousness; therefore, thoughts, feelings, desires, and opinions.8 When we apply Mill's "Harm Principle" to the right to bear arms, there is a clear correlation. Because guns pose harm to others, Mill would likely agree that society has an interest in regulating or controlling guns.

Until 2008, the examination of the issue of collective vs. individual gun rights deferred back to the precedent set by the 1939 court case of *United States v. Miller*. In that case, the Court unanimously held that if a particular type of weapon – in this case, a sawed-off shotgun – does not clearly have “some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument” (). Over the next several decades, gun laws significantly constrained firearm purchases made by non-militia individuals for non-militia purposes.10 However, this precedent radically changed with the 2008 court case of *District of Columbia v. Heller*, where the Supreme Court overruled the holding in *Miller* and held that the Second Amendment guarantees an individual’s right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.10 Two years later, the court ruled in *McDonald v. City of Chicago* that the right to keep and bear arms for self-defense in one’s home as protected under the Second Amendment is incorporated against the states through the Due Process Clause of the Fourteenth Amendment. This incorporated the ruling in *Heller* against state and local governments who attempted to ban the ownership and possession of firearms.10 Nonetheless, difficulties have risen on exactly what level of scrutiny the courts should apply when analyzing a statute that infringes on the Second Amendment.

**Political Theory and Gun Regulation**

Justice Antonin Scalia, when speaking on the right to regulate arms, said “Like most rights, the right secured by the Second Amendment is not unlimited.”9 In fact, most particular rights do not come without restrictions. Americans are given the right of free speech and press, yet cannot slander or libel or create a riot. Americans are given the freedom of religion, yet polygamy is illegal. Americans are given the freedom of assembly, but must sometimes abide by government curfews and apply for government permits. Countless laws regulations on personal liberty, such as driver’s licenses, seatbelt laws, and vaccinations.4 All these regulations underscore a principle of the common good, which can be dated back to early philosophers, such as Plato. This principle itself is enshrined in the first words of the Constitution, which include its intention to “insure domestic tranquility” and “promote the general welfare.” With the right to bear arms must equally come the right to regulate them in order to insure the right to life.

Today, gun control laws focus on one or more of four general objectives. These laws aim to:

1. Define conditions that prohibit a person from possessing firearms;
2. Implement regulations to prevents prohibited persons from possessing firearms;
3. Restrict carrying of concealed firearms outside the home; and
4. Regulate the design of firearms to enhance public and personal safety.12

It goes without saying that while gun regulations have perhaps radically reduced the probability of high-risk persons from being able to possess firearms, gun death rates are still at alarming rates in the United States. Instead of completely amending or changing current gun regulations, a proposal to simply broaden criteria would be very successful. For instance, most people believe that criminals should not be able to possess firearms lawfully. Yet, our current laws permit many people who have been convicted of crimes – most violent misdemeanor crimes adjudicated in adult court and felony crimes handled in juvenile court – to possess firearms.12 A prison study of inmates with prior convictions charged with gun crime, only 27 percent of those inmates were prohibited from legally owning a gun. The argument made against this is that there is an assumption that persons convicted of misdemeanor crimes do not pose a significant threat for committing serious violent crimes. But many suspects charged with a felony are convicted of lesser charges as a result of a plea agreement.12 Research has shown that prior convictions and a history of arrests increases the likelihood of committing a gun crime at rates of two to ten times higher than that of gun purchasers with no prior convictions.12 This justifies broadening the prohibitions for persons with a history of criminal behavior to include persons convicted of all misdemeanor crimes of violence and felony crimes as a juvenile. The same principles given with regard to a person with a criminal history should also apply to those with psychiatric histories. There must be a broader responsibility by current gun owners and gun sellers to prevent mentally disturbed individuals from coming in contact with firearms.11

A competing argument made by gun enthusiasts is that more guns make society safer; therefore, there should be less regulations on firearms. However, this is merely enabling; statistics may support this approach, but in fact it perpetuates or exacerbates the problem by making it much easier for high-risk individuals to come in possession of a firearm. In fact, firearm prohibitions for high-risk groups reduces violence and saves lives. A study of legal handgun purchasers in California before and after the law found that denial of firearm purchase applications by violent misdemeanants was associated with lower rates of violence by this high-risk group.12 Right-to-Carry laws also do not make society safer and actually increase aggravated assaults. Arguments for RTC laws are premised on the idea that everyone who is eligible to legally own a firearm is law-abiding, and is at low risk for committing a violent crime. In fact, over a five-year period in North Carolina, more than 2,400 permit holders were convicted of crimes (excluding traffic violations), including more than 200 felonies and 10 murders or manslaughters.12 RTC laws increase the aggravated assaults and estimated one to nine percent.12 The suggestion that more guns equal less crime is very prominent in the gun-rights movement. Some even argue that stricter gun laws are unwarranted because such laws will not stop mass shootings and terrorism. But this logic would be the same as saying there is no way to prevent all people from speeding, therefore society should do away with speed limits. No country will ever be immune to such tragedies, but it is not wrong to think that they can reduce their frequency though reasonable measures.

Some mistakenly believe that the Second Amendment to the U.S. Constitution would prohibit the kinds of legal reforms suggested here. And while *Heller* ruled that the Second Amendment protected an individual right to own guns, the decision also mentioned numerous types of presumptively valid gun laws, including “laws imposing conditions and qualifications on the commercial sale of arms.” Since Heller, lower courts have overwhelmingly upheld the constitutionality of a wide range of gun laws other than handgun bans.12 Current gun laws are weak because they establish low standards for legal gun ownership and significant loopholes in policies designed to keep guns from prohibited persons. The same principles given with regard to a person with a criminal history should also apply to those with psychiatric histories. There must be a broader responsibility by current gun owners and gun sellers to prevent mentally disturbed individuals from coming in contact with firearms.11

**Conclusion**

Too often, conservatives who lobby for gun rights romanticize about firearms or an outdated frontier mentality, when their arguments should pay more attention to the views of early political theorists such as John Locke and John Stuart Mill, grounded on the reality of human nature and on reason. This discourse demonstrated that when the values and beliefs of early political theorists and American Founders are probed and analyzed, there is an unalienable right to bear arms, both to deter a tyrannical government and as self-defense. However, further analysis shows that gun regulation is warranted to also give citizens the right to self-preservation. Much like the Bill of Rights was a compromise between the Federalists and Anti-Federalists, so too should the regulation of firearms be a compromise between the progressive left and conservative right. Abolishing guns altogether from legally-abiding citizens would be a deprivation of a fundamental human right, and relaxing present-day gun regulations would not make society inherently safer. Instead, current regulations should be strengthened by making high-risk individuals less likely to possess firearms. In regard to the Second Amendment, once society can fully answer why and individual may buy a firearm, then society can turn its attention to defining when he may do so and what he may purchase.

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