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Guns Across America: Opinion, Fact, Fiction,

Sabrina Sadler  
PO-400-IB: Senior Thesis

## **Introduction**

A surge of mass shootings in the twenty-first century has compelled divisive political and legal agendas around the Second Amendment. The connection between guns and the country's fight for independence cultivates Americans attachment to guns. The sentiment to guns can be identified as gun culture in the United States. The central argument that will be advanced is that gun culture is composed of opinions that are based off of fact and fiction, by drawing upon history, data, and political perspectives. Ultimately, the reader will understand how gun culture affects the political framing and trajectory surrounding the gun issue. First, a history of firearms will provide an understanding of the evolution of gun manufacturing and how its evolution impacted civilian relations with firearms.

## **History of Guns**

The first gun in history was developed in China during the middle ages.<sup>1</sup> During that time, gunpowder already existed and was being used to create explosives. Blacksmiths in China began to test materials to create a tube that can handle explosions. In the early 14<sup>th</sup> century, craftsmen in China, and then in Europe, made cannon by casting them in bronze.<sup>2</sup> Shortly afterward, blacksmiths began to build cannon by assembling them from strips of wrought iron. Early firearms were known as cannons and mostly loaded at the muzzle, with gunpowder and balls carved from stone. A vent in the barrel of the cannon allowed the gunpowder to be ignited.<sup>3</sup> Before various gunlocks were invented, a smoldering match cord was used to light the gunpowder in a cannon. Gunpowder is used as a propellant to drive the

bullet down the barrel of a gun. A gunlock makes firing a weapon faster and easier because it is a firing mechanism to light the gunpowder.

Cannons were cumbersome and temperamental to handle due to the exposure of the gunpowder in the matchlock firing mechanism. There were different types of cannons made for specific types of warfare. For instance, a type of siege cannon that was common during the 14<sup>th</sup> century was known as a bombard. Siege cannons are heavy artillery designed to bombard fortifications, cities, and fixed targets. The stone balls they hurled were loaded through the muzzle after the gunpowder charge.<sup>4</sup> As with most types of early guns, bombards had a narrow powder chamber and a wider bore. This helped concentrate the force of the exploding gun powder and focus it behind the center of the ball. For example, the Great Turkish Bombard was cast in bronze, and built to defend the Dardanelles.<sup>5</sup> This bombard was made in two parts making it more than 16 ½ ft. long.<sup>6</sup> It was made in two parts so that it can be moved or to place the powder charge in the breech.<sup>7</sup> The size and composition of bombards varied from region to region. For instance, the Chinese Iron Cannon was a small cannon fired from a trestle like stand. Rather than firing a single projectile, it was loaded with a number of small missiles. In contrast, the Mons Meg Bombard, originated in the Flanders, fired stone balls that weighed almost 440 lbs., but was too cumbersome for regular service because it could only be moved 3 miles in a day.<sup>8</sup>

Swivel guns that arose in the late 14<sup>th</sup> century were smaller than cannons but still too big to be fired by hand. Unlike fixed cannon, which could only be fired in one direction, swivel guns provided an arc of fire and were mainly-breech loading.<sup>9</sup>

Swivel guns would have been mounted on a boat or building, and loaded with small balls of iron and lead (a grapeshot).<sup>10</sup> Until the 19<sup>th</sup> century, the barrels of cannon used at sea were similar to those used on land. Naval cannon were either cast in bronze or built by forging together pieces of wrought iron.<sup>11</sup> Most of these early guns were named after birds of prey. For instance, the Bronze Saker was named after the Saker Falcon, and was acquired from an Italian craftsman as part of Henry VIII's campaign to supply English forces with artillery.<sup>12</sup> Simple hand cannons used in the 14<sup>th</sup> and 15<sup>th</sup> centuries eventually evolved into harquebuses (hook guns). Hook guns were muzzle-loaders with a recoil-absorbing hook on the underside to place over a wall or portable support for a steadier aim.<sup>13</sup> There was also a wooden shoulder stock that allowed the user to brace the gun with his or her shoulder.<sup>14</sup> Harquebuses were fired by a handheld match-cord using led balls as ammunition, eventually the harquebuses was modified by attaching a matchlock which gave rise to the first musket in the late 16<sup>th</sup> century.<sup>15</sup>

The matchlock was an early firing mechanism for hand held guns that held the match cord in what was known as the serpentine. Upon pulling the trigger, the serpentine plunged the match cord into a pan carrying priming powder.<sup>16</sup> Ignition of the priming powder produced a flash, which ignited the main charge in the vent on the side of the barrel.<sup>17</sup> Early matchlock guns were loaded at the muzzle, and a wooden rod called a ramrod was used to ram the gunpowder charge and ball into the breech.<sup>18</sup> Before the 1500s, all firearms were fired using a piece of smoldering match cord. The burning match cord on the mechanism made the shooter vulnerable to danger and it can be extinguished in inclement weather. The

invention of the wheel lock in the early 1500s restructured guns in that it was the first mechanism to use an internal system for firing a firearm. The wheel lock revolutionized the use of firearms allowing guns to be carried loaded and ready to fire in an instant. The mechanism consists of a spring loaded steel wheel that sits under a pan. A piece of iron pyrite is held in jaws on a spring-loaded arm called a dog. Before firing, the dog is placed onto the pan cover, and gunpowder is placed in the priming pan.<sup>19</sup> Pulling the trigger causes the wheel to spin as the pan cover opens, bringing the iron pyrite in contact with the wheel.<sup>20</sup> The steel wheel rotates against the iron pyrite to produce sparks.

The invention of the wheel lock not only made guns more convenient in the way they were fired but in their composition as well. Smaller firearms appeared after the wheel lock such as the pistol and carbine. These guns were lighter and easier to handle than muskets or cannons. Carbines were shorter than muskets, but larger than pistols, and they provided significant firepower. Most if not all of these guns had a wheel lock. Sporting guns appeared during the mid 16<sup>th</sup> century and hunting guns were also available. The firing mechanism on hunting guns differed from place to place. For example, the snaphance was preferred in Scotland and the wheel lock in Italy and Germany. The snaphance was a precursor to the more efficient flintlock. Although the wheel lock revolutionized firearms it was still a complex design and expensive to produce. The snaphance was simpler than the wheel lock in that it used an automatic pan cover that kept the priming dry until the exact moment of firing. Upon firing, a piece of flint strikes against a plate of steel held on a pivoting arm, which produced sparks.<sup>21</sup> The flint is held in a clamp at the

end of a bent lever called the cock. Upon pulling the trigger the cock moves forward pushing open the pan cover containing the priming powder. Simultaneously, the flint scrapes against a steel plate held on a pivoting arm, which produces sparks.<sup>22</sup> These sparks fall into a flash pan igniting the priming powder inside the pan. The igniting of the priming powder causes a propellant combustion that pushes the bullets out of the barrel.

The snaphance was simplified to create the flintlock. The flintlock combined the separate pan cover and steel to create a part called the frizzen making it cheaper to manufacture and more reliable. The flintlock was simpler than the wheel lock because it had 16 parts compared to a wheel lock's 40.<sup>23</sup> Thus, the mechanism was easier and cheaper to make. The contraption also contains a touchhole to the side of the pan that connects to the barrel's breech. The matchlock, wheel lock, and flintlock remained in use throughout the 17<sup>th</sup> century. However, by the 18<sup>th</sup> century gun makers were fitting a flintlock to all kinds of firearms. The mechanism made guns affordable for everyday civilians, and continued to be a principal firing mechanism for more than 200 years after its inception.<sup>24</sup> By the 18<sup>th</sup> century, the flintlock musket was the main infantry weapon in Europe and North America.<sup>25</sup> The firearm was produced in masses in the late 17<sup>th</sup> century to equip armies in Europe. By the 18<sup>th</sup> century, large-scale firearms production was made possible. Thus, standardized patterns of flintlock weapons became available to armies. The flintlock musket was prominently used during the American Revolutionary War. Flintlock pistols were used widely for self-defense and dueling in the 18<sup>th</sup> century. The firearm continued

to be refined into the 19th century with the flintlock mechanism remaining constant.

Despite the advantages the flintlock had to the other firing mechanisms it still had its drawbacks. For instance, the flint needed to be kept in precisely the right shape and place, and the touchhole needed to be kept clear of residue. The contraption exposed priming made it vulnerable to bad weather. Although reliable, the flintlock suffered from the occasional “flash in the pan” when the priming powder would ignite but the gun would fail to fire.<sup>26</sup> Gun maker’s solutions to these problems came in the form of gunlocks using chemicals called fulminates as primers as opposed to gunpowder. Matchlocks, wheel lock’s, and flintlocks used a small amount of gunpowder to prime the gunpowder charge.<sup>27</sup> Frustrated with the flintlocks setbacks, Alexander Forsyth patented a way of igniting the propellant by using a chemical primer that ignites when struck. Joshua Shaw later patented the percussion cap as the simplest way of making Forsyth’s invention work.

The percussion cap consisted of a tiny copper cup with fulminate in it and varnish holding the chemical in place.<sup>28</sup> Shaw placed this cuplike cap on a hollow plug, or nipple, screwed into the breech of a gun, ready to be struck by the hammer.<sup>29</sup> Striking the cap ignited the fulminate, producing a flash that was relayed to the propellant via a vent in the barrel.<sup>30</sup> Loose fulminate was dangerous to use, so further devices were invented to contain just enough for priming a gun once. Flintlock weapons were gradually upgraded by converting them to employ percussion caps. By 1830 percussion caps began replacing the flintlock in most of Europe.<sup>31</sup>



By the middle of the 19<sup>th</sup> century guns that were capable of giving off sustained fire began to appear, also known as machine guns. The machine gun involved feeding the cartridge into the chamber of the barrel, firing it, and then extracting the empty case by a manually powered mechanical process in a continuous cycle.<sup>32</sup> At the time machine guns were referred to as “battery guns.” They became known as machine guns because the process of loading and firing had been mechanized turning them into shooting machines. The machine gun was reliable but had its disadvantages. The force that drives the ammunition forward causes the gun to recoil. Thus, the gun required human energy to operate it and stamina to maintain the continuous fire. Hiram Maxim saw the force of the recoil as an advantage rather than a disadvantage. In 1833, Maxim patented the concept for the machine gun.<sup>33</sup> He created what was known as the Maxim gun, which modernized firearms. In the Maxim gun, the energy from the recoil was used to eject each spent cartridge and insert the next one and fire it. Thus, the Maxim was less labor intensive because it didn’t require manual cranking. Maxims gun breakthrough spurred the refinement of automatic weapons.

The invention of the assault rifle in World War II revolutionized the machine gun in that it perfected portable automatic firepower. The rifle is interchangeable to automatic and semi-automatic modes. Automatic mode is when the rifle will load and fire continually while the trigger is kept pulled. Semiautomatic does not provide continuous fire. However, it allows the weapon to go through one cycle of firing and self-loading on each pull of the trigger. The first mass-produced assault rifle was the German Sturmgewehr 44.<sup>34</sup> It was extensively used during World War II on both

Eastern and Western fronts. Mikhail Kalashnikov designed the original AK47, a modern assault rifle.<sup>35</sup> The AK-47 had a short barrel, high capacity magazine, and full-and semiautomatic fire controls.<sup>36</sup> Characteristics that are found in most modern day assault rifles. The popularity of the AK47 moved at a slow pace. In 1956, firearms designers Eugene Stoner and James Sullivan developed a small caliber rifle for the Armalite Company of the Netherlands.<sup>37</sup> The rifle became known as the M16, the U.S. army's standard assault rifle. Today the AK47 is known as the civilian version of the M16. The US army used the M16 during the Vietnam War. Its ability to focus a large volume of fire on a target made it highly effective providing the US with a formidable response to the North Vietnamese Communists. The M16 was lighter, more accurate, and fired more quickly than the AK47. However, the AK47 was still reliable in war conditions and continued to fire despite exposure to the elements of nature. The rifle is easily maintained and simple in design making it's working easy to grasp. Thus, the rifle became a weapon that changed the rules of modern warfare because it demystified the rifles usage for ordinary people. It also brought about a new trend in warfare where irregular combatants and terrorists could now hold out against well-trained armies.<sup>38</sup>

### **Gun Culture**

The heritage that gun culture reflects affects the trajectory framing and trajectory of gun policy. Gun culture is inflaming public sentiment because it is disrupting American lives and the societal concept of ordered liberty.<sup>39</sup> The American attachment to guns stem from the connection between personal ownership of guns and the country's early struggle for survival and independence.

The cultural mythology about guns in both frontier and modern life also plays a role in shaping the gun culture. Such mythology is reflected in books, movies, folklore, and other forms of popular expression. Not all Americans embrace this ideology about guns and some acknowledge the destructive consequences of weapons. However, those who have a strong sentimental attachment to guns counterbalance these beliefs. Thus, the gun culture is generally recognized as a key component of the American mythic tradition. Regardless of its origins, the American gun culture as it exists today contains at least two elements that have survived since the country's early history: the hunting/sporting ethos and the militia/frontier ethos.<sup>40</sup>

Individual ownership of guns became more common after the Civil War. A increase in gun ownership during this was time was partly due to gun manufacturers romanticizing the attachment to guns as well as, technological improvements that made guns cheaper, more reliable, easier to use, and durable.<sup>41</sup> Despite the primitive composition of guns in America's early history, guns were an everyday necessity for some Americans. The hunting tenor sprang from a time when the US was an agrarian, subsistence nation existing in a hostile environment.<sup>42</sup> For example, hunting game was one source of food for American settlers, just as it was a method of protection from animal predators. In addition, guns were used to fight off Native Americans and other hostiles. During this time, the acquisition of shooting skills and survival was considered a rite of passage for boys entering manhood. This is a tenor that still lingers today although as settlements grew, the practice of carrying arms declined along the nations eastern coast.<sup>43</sup> Even during the colonial period the urban areas were relatively free of the consistent use of

firearms.<sup>44</sup> Despite this the hunting tradition survived as well as the element of competitive/sport shooting. Competitive shooting was a form of recreation and occurred in part to improve shooting skill and aim. However, the reputation of the American sharpshooter that arose during this time exceeded actual American shooting skills. Most militiamen during the American Revolution were ill equipped for combat due to lack of knowledge in operating war artillery, and the composition of the artillery.

The militia/frontier tradition stems from militia laws in the country's early history. During the American Revolution, the country had neither the manpower nor the budget to maintain a full time army. Thus, anyone capable of carrying and using a weapon (excluding blacks and women) participated in local defense. Furthermore, the government did not have the resources to arm citizens in the militia so they were required to provide their own arms and ammunition. Despite this, the citizen-soldiers serving in the militia fought and won American independence against what was considered the most powerful standing army in the world. However, the knell of the citizen militia was its abysmal performance in the War of 1812, after which it ceased to play an active role in national defense.<sup>45</sup> Despite this fact, the idea of the militia tradition has survived.

Closely related to the militia tradition is the frontier tradition, which linked westward movement with weaponry.<sup>46</sup> After the Civil War, the South witnessed violence at rates greater than the rest of the country. However, the role of guns that is shown in Hollywood movies is a romanticized and wildly exaggerated assessment of the importance of guns in the settling of the West. This narrative prevalent in

movies and books strengthens Americans sentiment to guns. When in actuality, the taming of the West was an agricultural and commercial movement, attributable primarily to ranchers and farmers, not gun slinging cowboys.<sup>47</sup> Historian Richard Shenkman says, "Many more people died in Hollywood westerns than ever died on the real frontier. In the real Dodge city, for instance, there were just five killings in 1878, the most homicidal year."<sup>48</sup>

In contemporary society, the gun culture revolves around those who continue to own and use guns for legitimate hunting, sporting, and related purposes.<sup>49</sup> However, there are those who would include urban street gangs, gun-toting criminals, and other anti-social individuals and groups in this category.<sup>50</sup> Those who compose and support the active gun culture are mostly protestant white males who live in rural areas.<sup>51</sup> Thus, those for whom the gun culture carries the least appeal are likely to be females, from larger metropolitan areas, from the northeast, and from more recent immigrant decent.<sup>52</sup> Fewer than 15% of gun owners are female.<sup>53</sup> Those most likely to embrace and carry on the gun tradition, are socialized by other family members into patterns of gun ownership and use.

### **Frequency of colonial guns**

A historical analysis of the frequency of guns, drawn from studies analyzing colonial gun possession, disproves the misconceptions found in the military and sporting tradition that still lingers today. Guns were being circulated amongst the earliest European settlers despite them becoming more common in the mid 19<sup>th</sup> century. To some, gun regulation is recognized as going against the United States legal traditions and squelches individual rights. To a degree, the modern gun debate

is framed and judged around if gun control policies are compatible with the countries perceived values and traditions on guns. However, perceived colonial gun tenor is both fact and myth. The belief that every white male had a gun propped against his door and that handguns were common in early America isn't entirely true.

Reliable historical accounts revealed variation as to the frequency and distribution of gun ownership in colonial and early federal America. For instance, colonial historian Kevin Sweeney reported that the number of firearms equaled the 670 male citizens in 1620 and exceeded the number of male citizens (814) in 1625.<sup>54</sup> Although wealthier men were more likely to own a firearm than those with little or no wealth, the cost of a gun was not beyond the reach of most.<sup>55</sup> However, as the colonies became safer and the frontier and natives were pushed to the west, gun ownership began to decline. By the start of the 18<sup>th</sup> century, efforts of colonies to create an armed populace and an inclusive body of organized and trained militiamen had begun to fall by the wayside.<sup>56</sup> New Jersey had gun ownership rates of 56% in the late 1600s and by 1740 the rate dropped to 31%.<sup>57</sup> Thus, there was a strong correlation between the degree of military necessity and civilian arms possession. For example, Pennsylvania consistently had one of the lowest arms ownership estimated at 34-38 percent.<sup>58</sup> This is due to the large Quaker population and their refusal to organize a militia until the outbreak of the American Revolution. The nonexistent militia meant that men could avoid owning a firearm and military training obligations. However, there were still significant disparities in firearm rates

across the colonies/states. For example, Massachusetts and South Carolina had far higher gun ownership rates and a well-established militia.

Until the inception of the flintlock in the 18th century, most personally owned guns were of low quality, smaller caliber, and shorter range making them unsuitable for battlefield. Militia members were required by law to obtain their own firearms instead of relying on government issued arms. By the time of the 1770s, most colonies found themselves ill equipped in terms of weapons and organization for a large scale armed conflict. They faced a challenge in operating heavier military-grade weapons. Colonial American military leaders have said that most military recruits were unprepared for service, and unskilled in the handling of war artillery leading up to the Revolution. The weapons shortage at the time was exacerbated because 40% of weapons were reported to be broken, too old, or otherwise unserviceable.<sup>59</sup> Artillery was made of iron, which deteriorates rapidly, and the replacement of parts had to be handmade. There was a shortage of weapons consistently throughout the Revolution. The scarcity of weapons continued to be a problem because the pressing need for arms ended with the Revolution, and many weapons were either destroyed during the conflict or confiscated by the British.<sup>60</sup>

Military records and gun censuses continued to report the distribution of firearms well into the 19<sup>th</sup> century. Records undercut the commonly held contemporary notion that civilians routinely carried pistols for self-protection in the colonial or federal periods. According to Sweeney, 2-10 percent of all guns recorded were pistols.<sup>61</sup> The gun was rare because they were less useful in terms of range and accuracy for hunting game or on the battlefield. However, pistol ownership was

found to be higher in cities and places with slave patrolling, like South Carolina.<sup>62</sup> Aside from the periodic conflicts with Native Americans, after the War of 1812, the country experienced a prolonged period of peace.<sup>63</sup> Thus, private gun ownership halted. However, with the onset of the Civil War, millions of men were exposed to firearms. The federal and Confederate government's now supplied their armies with artillery, and the manufacturing of guns greatly improved with the invention of the percussion cap. Consequently, handgun ownership spread in the post-Civil War period. It can be concluded that from the early eighteenth century on, civilian gun ownership fluctuated around or below 50 percent with 90 percent of this number being long guns.<sup>64</sup>

### **History of Gun laws**

Gun regulations are apart of Americas founding and were wildly accepted throughout the countries history. The first gun law that was enacted in the United States was in 1619 when European settlers in North America convened in the Virginia Colony.<sup>65</sup> The settlers otherwise known as the first General Assembly of Virginia met in Jamestown, where it deliberated for five days and enacted a series of measures to govern the new colony.<sup>66</sup> Among its more than thirty enactments was a gun control law, which said:

That no man do sell or give any Indians any piece, shot, or powder, or any other arms offensive or defensive, upon pain of being held a traitor to the colony and of being hanged as soon as the fact is proved, without all redemption.<sup>67</sup>

Other colonies adopted similar regulations but they were not effective because of how difficult it was to monitor trading at the time, and how profitable trading was.

However, the enactment provides an insight to how tense and suspicious the



settlers were of the Native Americans. According to the Constitution, a census of population is required every 10 years. In other words, the government keeps track of the number of US citizens every 10 years. Like a population census, until the inception of the modern Constitution in 1789, the government counted the number of privately and government owned guns in the colonies and later the states. Gun censuses were typically conducted by militia officers or other local officials and occurred throughout the country.<sup>68</sup> Under law, firearms could also be confiscated for public purposes or could be required to be kept in a central location for reasons of safety or ready access. In the 1640s, the Massachusetts colonial law for example, created a position of “surveyor of arms,” whose job was to survey, record, and gather all the country’s arms and ammunition within all the towns that were within his jurisdiction.<sup>69</sup> The surveyor of arms was also required to sue and recover arms from those that refused to relinquish them in the hands of the surveyor of arms.<sup>70</sup> Furthermore, Massachusetts law supported the larger notion that local and national defense needs rested primarily on government-organized militia, where militia members bore the responsibility of providing arms, and were subject to state and federal regulation.

Gun censuses and America’s early governmental concentration on civilian’s gun possession, storage, and regulation were connected to overall public safety, even though it sometimes intruded on civilian’s private gun habits. A representation of the government’s preoccupation of gun regulation was more than 600 laws colonial and state governments enacted pertaining to militia regulation and related militia activities.<sup>71</sup> These laws are listed in Robert Spitzers book *Guns Across*

*America* and encompass the time period from the country's founding to 1934. Some categories of these laws include: carry laws, dangerous weapons laws, firing weapons, and hunting laws. Although many of these laws predate the inclusion of the Second Amendment in the Bill of Rights in 1791, the laws accentuate the curve of regulation throughout American history. A handful of these laws established categorical bans on firearms. All of the categorical bans on firearms were enacted in the post-Civil War era. Six of the seven-state bans were of pistols: one each in Arkansas, Kansas, and Texas as well as, three in Tennessee.<sup>72</sup> The seventh, from Wyoming, banned all firearms (both handguns and long guns) from any city, town or village.<sup>73</sup>

Subsequent categories of gun laws that existed included ban on specific types of weapons such as, automatic weapons and weapon accessories like silencers.<sup>74</sup> A silencer is a canister attached to the gun muzzle to subdue the sound a gun makes when after firing.<sup>75</sup> The first successfully manufactured silencer was in 1902 by Hiram Maxim and was called the "Maxim Silencer."<sup>76</sup> States also enacted brandishing laws, which criminalized the threatening use of weapons. Brandishing laws generally pertained to pistols and knives used for interpersonal violence.<sup>77</sup> Portraying any of these weapons in a rude, angry, or threatening manner fell under the umbrella of prohibited behaviors. Behaviors such as self-defense and using the weapons for military use were exempted from criminalization.

Carry restriction laws multiplied in the 1800s and then exploded during the post- Civil War era. Gun laws in the eighteenth century did not typically discern concealed carry as criminal. Instead, laws restricted general carrying of firearms,

usually if done in crowded places or by groups of armed people. One of the earliest concealed carry restrictions was enacted in 1813 in Kentucky.<sup>78</sup> Concealed carry laws predominantly targeted pistols and various knives and were put in place for the purpose of protecting citizens. For instance, the preamble of Georgia's 1837 concealment carry law stated that: "An act to guard and protect the citizens of this State, against the unwarrantable and too prevalent use of deadly weapons."<sup>79</sup> In the nineteenth century, laws focused on prohibiting concealed carry and eventually in the twentieth century, laws applied to all carrying whether concealed or open. Carry laws were among the most common and accepted gun regulations to be found in our post 1789 history.<sup>80</sup> These laws are a stark contrast to the political agenda during the 1980s to spread the legality of concealed carry. Furthermore, the gun regulations found in early America mostly targeted pistols and offensive knives.

Gun regulations that identified certain weapons as dangerous or unusual started to appear in the early 1900s. During this time most states moved aggressively to outlaw machine guns (fully automatic weapons), sawed off shotguns, pistols, weapons, and mechanisms that allowed firearms to be fired a certain number of times rapidly without reloading, as well as silencers, and air guns. In 1927, the first anti-machine gun law was enacted in West Virginia.<sup>81</sup> Nine states then followed suit and enacted their own anti-machine gun laws in 1927.<sup>82</sup> Overall, at least twenty-eight states enacted anti-machine gun laws during this period. The national political agenda during this period was to regulate machine guns and other gangster-type weapons. Semi-automatic weapons were targeted during this time as well. At least seven and as many as ten state laws specifically restricted semi-

automatic weapons.<sup>83</sup> States in this category typically combined fully automatic and semi-automatic weapons under a single definitional category.<sup>84</sup> A 1927 Rhode Island measure defined the prohibited “machine gun” to include any weapon which shoots more than twelve shots semi-automatically without reloading.”<sup>85</sup> Ohio’s 1933 law banned any gun that shoots automatically, or any firearm, which shoots more than eighteen shots semi-automatically without reloading.<sup>86</sup> Many states had different definitional categorical bans on semi and fully automatic guns. Minnesota’s 1933 categorical ban went so far to say that fully automatic .22 caliber light sporting rifles were also considered machine guns under the law.<sup>87</sup> However, .22 semi-automatic light sporting rifles were exempted from the ban.<sup>88</sup>

The prohibition of dueling was also a widely accepted category of gun laws. Dueling was at its pinnacle at the time of the American Revolution and lasted until the end of the 17<sup>th</sup> century.<sup>89</sup> A duels purpose was to defend a gentlemen’s sense of honor. A duel is a formal combat with weapons fought between two persons in the presence of witnesses.<sup>90</sup> A highly publicized duel during Americas founding was between Alexander Hamilton and New York politician Aaron Burr. The two men dueled in New Jersey in 1804 because in New York it was banned so they traveled to the neighboring state.<sup>91</sup> Hamilton died from his wounds and Burr’s political career never recovered after the duel.<sup>92</sup> Though not barred in every state, the practice declined in the North after the Hamilton-Burr duel, but persisted in the South until the nineteenth century.<sup>93</sup>

Gun laws aimed at barring felons, foreigners, or others deemed dangerous from possessing firearms was emphasized in the country’s early history on Native

Americans, with at least five colonies enacting such laws.<sup>94</sup> As anti-immigrant sentiment spread in the early 1900s, many states enacted laws aimed at keeping guns from non-citizens, the young, and those who were inebriated, felons, and out of state residents.<sup>95</sup> In the 1770s, Pennsylvania enacted laws to bar or strip guns from those who refused to swear loyalty to the new American government.<sup>96</sup> During the Revolution, ten of the thirteen colonies had laws allowing the confiscation of privately held firearms.<sup>97</sup> Concern over the inherent harm and risk associated with firing arms near others became prevalent in laws spanning from the 1600s through the early 1900s.<sup>98</sup> Examples of such laws prohibited the firing of firearms in or near towns, after dark, on Sundays, and near roads. Laws also punished firing that wasted gunpowder or that occurred while under the influence of alcohol. In 1655, Virginia law prohibited drunken firing at weddings and funerals.<sup>99</sup> In 1774, a North Carolina law barred hunting by firelight at night concerned over the accidental killing of horses and cattle.<sup>100</sup>

Early hunting laws reflected contemporary concerns like wildlife management and safe hunting practices. North Carolina's 1774 nighttime hunting law reflects such concerns. The penalty for violating this hunting law was a fine of 5 pounds and forfeiture of the firearm used.<sup>101</sup> North Carolina's law banned what was known as firelight hunting (hunting at night). Early hunting laws were mostly aimed at those who were poaching on private lands and certain type of game. Licenses and bar fishing were required to protect certain type of game with any type of gun. Similar to firelight hunting, waterfowl was prohibition's on hunting certain game from canoes, skiffs, or other watercraft. States also prohibited hunting deer. For

example, Pennsylvania established a deer-hunting season, penalizing out-of-season hunting.<sup>102</sup> Laws also restricted certain weapons used for hunting, such as punt or swivel guns and any gun not fired from the shoulder. Punt or swivel guns are defined as a smooth bored gun that fires a charge of shot mounted on a swivel to bring down waterfowl.<sup>103</sup> In the twentieth century, states barred hunting with silencers, from aircraft, by underage persons, and with automatic weapons as well as swivel or punt guns.<sup>104</sup>

A prominent category of gun laws pertained to the manufacturing, sale, and inspection of weapons. The laws under this category greatly concerned the manufacture, sale, transport, and storage of gunpowder. Early firearms operated with additional loose gunpowder that served as the igniting or explosive force to propel a projection.<sup>105</sup> In 1814, for example, Massachusetts required that all musket and pistol barrels manufactured in the state be first tested to make sure they can withstand the firing process without rupturing.<sup>106</sup> Massachusetts as well as New Hampshire appointed state gunpowder inspectors to examine every storage and manufacturing site. In the nineteenth century, at least eight states regulated, barred, or licensed firearm sales.<sup>107</sup> For example, Florida (1927), Georgia (1902), and North Carolina (1905) gave localities the power to license, regulate, or even bar the commercial sale of firearms.<sup>108</sup> In a 1917 law, New Hampshire required the licensing of gun dealers; requiring them to record the name, address, date of sale, amount paid, and date of the purchasers permit for all who made gun purchases.<sup>109</sup> The records were passed on to the local city or town clerk and they were open to the inspection of the police departments or other public authorities.<sup>110</sup> While New

Jersey prohibited pawnbrokers from selling or transferring firearms in any matter. New York established a system of registration for all handgun sales as well as an additional requirement that gun owners had to obtain a permit for ownership. In a 1925 law, West Virginia bared the public display of any firearms and ammunition for sale or rent.<sup>111</sup> Gun dealers were required to obtain a license and to record the name, address, age, general appearance of the purchaser, and information about the gun.<sup>112</sup> This information was to be passed on to the superintendent of the local department of public safety.

Early militia laws represent the power of state governments to impress or take the firearms of citizens if needed. Militia-eligible men were required to obtain and maintain in working order the necessary combat-worthy firearm at their own expense. In some states, laws stipulated when, where, and under what circumstances guns were to be loaded or unloaded. Maryland's 1799 law stated that privates or noncommissioned officers who used their muskets for hunting were fined.<sup>113</sup> In contrast, in the early 1600s in Virginia, men were required to bring their firearms to church for fear of Indian attacks.<sup>114</sup> However, militia laws disappeared with the end of the old militia system in the mid-1800s.<sup>115</sup> Numerous laws restricting gun access to specific individuals arose in the late 1800s, becoming more common in the early 1900s. Barred individuals include: minors (ages ranging from 12 to 21), convicts, those who are inebriated, and of unsound mind. In 1907, Arizona barred "any constable or other peace officer while under the influence of intoxicating liquor of any kind, to carry or have on his person a pistol, gun or other

firearm, or while so intoxicated to strike any person, or to strike any person with a pistol, gun, or other firearm.”<sup>116</sup>

Arms and ammunition trafficking was as much a colonial concern as it is a contemporary concern. Various registration and taxation laws sought to address this concern. In the 1800s, three southern states imposed taxes on personally held firearms. In 1866, Georgia levied a tax of one dollar on every gun or pistol, musket, or rifle over the number of three kept or owned on any plantation.<sup>117</sup> In 1856 and 1858, North Carolina taxed pistols and other weapons “used or worn about the person.”<sup>118</sup> A 1652 New York law outlawed illegal trading of guns, gunpowder, and lead by private individuals.<sup>119</sup> Nebraska granted to city mayors the power to issue licenses to carry concealed weapons, adding mayoral discretion to “revoke any and all such licenses at his pleasure.”<sup>120</sup>

A relevant yet not prominent category of gun laws during the 17<sup>th</sup> – 19<sup>th</sup> century concerned firearms in the presence of a crime. In 1783, Connecticut enacted a law that called for the death penalty for those who committed a burglary or robbery with a gun because it was seen to “clearly indicate their violent intentions.”<sup>121</sup> In contrast, commission of the same crimes without a gun resulted in a whipping and jail time. A 1788 Ohio law increased the penalty and jail time for anyone convicted of breaking and entering with a dangerous weapon, including firearms.<sup>122</sup> In addition, in the 1800s, several states enacted enhanced sentences for crimes committed with firearms. Furthermore, in the 1900s extended sentences were meted out to those who used explosives or guns while committing crimes.



The final category of gun regulation concerns storage regulations. Many early storage restrictions imposed restrictions on gunpowder but sometimes extended to firearms as well. For example, Massachusetts enacted a 1782 law specifying that any loaded firearms found in any dwelling house, out house, stable, barn, store, ware house, shop, or other building was subject to seize by the “firewards” of the town.<sup>123</sup> By the terms of an 1859 Connecticut law, armories and gun houses were subject to regular inspection.<sup>124</sup> In 1919 Massachusetts passed a law to authorize the issuance of warrants for any complaint alleging that someone was keeping “an unreasonable number of rifles, shot guns, pistols, revolvers, or an unnecessary quantity of ammunition, is kept or concealed for any unlawful purpose in a particular house or place.”<sup>125</sup> If a court concluded that the possession of such apparatus was not justified, the ammunition and weapons were seized.

### **Policy Definition**

According to social regulatory policy theory, certain distinctive political patterns and characteristics are associated with social regulatory issues.<sup>126</sup> The primary role of government is to establish and maintain order. During the seventeenth century, the only law that existed was self-preservation when one could only expect a war of every man against every man. Thomas Hobbes, British political theorist noted in his *Leviathan* that life in such a state of nature was solitary, poor, nasty, brutish, and short.<sup>127</sup> To stave off a lawless society people formed governments. A consequence of establishing order in an anarchical society is trading personal freedoms for lawfulness in a civil society. In such a civil state, according to Hobbes, “there is a power set up to constrain those that would

otherwise violate their faith.”<sup>128</sup> Several decades after Hobbes, British political thinker John Locke in his *Of Civil Government* concurred, noting, “God hath certainly appointed government to restrain the partiality and violence of men. I easily grant that civil government is the proper remedy for the inconveniences of the state of nature.”<sup>129</sup> However, order is not the most important consideration government has to make. As a democratic nation, the United States values freedom and the protection of basic rights. Thus, it must continually strive to achieve and maintain a balance between order and freedom. Nevertheless, order is the first purpose of government because without order there can be no freedom in society.<sup>130</sup> As James Madison wrote to Thomas Jefferson in 1788, “it is a melancholy reflection that liberty should be equally exposed to danger whether the Government have too much or too little power.”<sup>131</sup>

Due to social regulatory policy, the gun debate incorporates stridency and immobility. In other words, the political pattern that exemplifies the gun debate is a repetitive cycle of outrage, action, and reaction. The Sandy Hook shooting, for example, prompted President Obama to make new gun laws his top post-election priority, and spurred the formation of new gun safety organizations.<sup>132</sup> In contrast, after the Columbine massacre, national outrage pushed the US Senate to approve the first new federal gun control measure since 1994.<sup>133</sup> However, the bill eventually died in the House of Representatives as well as gun control measures Congress considered passing after the Sandy Hook massacre. Anti-gun control forces, spearheaded by the NRA, have fought all these efforts. Despite the gradual decline in

recreational gun activities, the gun culture persists in areas typically thought of as less than “gun friendly” or dominated by urban-suburban life.<sup>134</sup>

Political patterns are observable among major elements of the political process, including the political behavior of courts, interest groups, the presidency, political parties, congress, public opinion, federal agencies, and intergovernmental relations. For instance, courts define and change the policies on a specific issue. While single-issue groups are prevalent in the politics of the issue, and they behave in an absolutist, polarizing fashion; that is they are singularly strident, they seek and define extreme positions, and they are reluctant to compromise.<sup>135</sup> The NRA is a single-issue group in the realm of the gun control issue. Political parties seek to exploit differences over social regulatory policies.<sup>136</sup> Republicans use issues to mobilize conservatives while Democrats seek to mobilize liberals.<sup>137</sup> While the federal government exercises limited control and jurisdiction on issues. State and local governments continue to act with a higher degree of control on the gun rights issue. Thus, federalism defines the structure and politics of the issue.<sup>138</sup> Lastly, presidential leadership plays a relatively marginal role and operates primarily on a symbolic level.<sup>139</sup>

The maintenance of order in society is dependent on government policy, which is defined as “whatever governments choose to do or not to do.”<sup>140</sup> The word ‘policy’ has the same linguistic root as ‘police.’ This semantic fact highlights the link between order and public policy. The techniques or tools of public policy take many forms however, its two primary forms consist of dispensing of benefits and strict regulation of individual contact. Carrying out public order involves regulating

individual freedoms. Policy that is geared towards shaping individual conduct to achieve public order almost always stirs controversy in a nation with a long tradition of individualism. According to the political analyst Theodore J. Lowi, “when the likelihood of government coercion is immediate the prospect of controversy is high. When the likelihood of government coercion is remote the prospect of controversy is low.”<sup>141</sup>

When government coercion is immediate it directly affects individual behavior. Whereas when it is remote, the primary purpose of the coercion is to provide benefits. Examples of policies when government coercion is low include public works projects (constriction of roads, harbors, buildings etc.) and subsidies to farmers.<sup>142</sup> Government can influence behavior by providing these benefits, but the primary emphasis is awarding of benefits, not the shaping of conduct.<sup>143</sup> Examples of policy that regulates the conduct of individuals include imposing highway safety regulations, pure food and drug requirements, cable television rates, criminal laws, or laws regulating abortion. Regulatory policies have direct consequences on individuals as apposed to policies that seek to shape the environment of conduct. Thus making regulatory policies more controversial. Policies that seek to shape the environment of conduct include fiscal and monetary policy, progressive income tax, and welfare programs.<sup>144</sup> Although these policies affect individual citizens, they are designed to shape broad classes or groups of people such as, the poor, certain categories of wage earners, and homeowners.<sup>145</sup>

Regulatory policies can be distinguished into two types of regulation: economic and social regulation. Economic regulation dates back to the late eighteen

and early nineteenth century with the inception of the first modern regulatory agency the Interstate Commerce Commission (ICC).<sup>146</sup> The ICC was created in 1887 to regulate railroad rates, prices affecting consumers, require the publication of rail rates, and bar collusive practices.<sup>147</sup> Economic regulation eventually incorporated a wide variety of business, market, and economic sectors. Social regulation primarily concerns itself with issues of public safety, health, or morals. Such issues include prostitution, marriage and polygamy, alcohol consumption, etc. Social regulation dates back many decades however, it greatly expanded at the national level in the 1960s.<sup>148</sup> Governmental and social issues has focused on abortion, women's rights, pornography, school prayer, gay rights, affirmative action, and gun control in recent decades. Social regulation that was prevalent before the 1960s was crime control. Social regulation is especially controversial and provoked more controversy than economic regulation because it is concerned with values. Furthermore, moral issues provoke passionate feelings rather than economic issues.

### **Rise of the National Rifles Association**

On November 17, 1871, two former members of the Union army, Colonel William C. Church and General George Wingate founded the National Rifles Association (NRA).<sup>149</sup> As mentioned before, because of the primitive conditions of guns during the revolution, most war artillery was made by iron which deteriorates rapidly, and were cumbersome and difficult to use. There was no standing militia so citizens were required to fight against the finest army in the world and provide their own weapons. Consequently, most militiamen were ill equipped to operate war artillery and poorly trained. Thus, Church and Wingate founded the NRA to promote

rifle shooting by using the organization to train shooters. The NRA's first goal was developing a rifle practice range on a farm on Long Island, New York.<sup>150</sup> The organization's goal was displayed at its national headquarters, now in Fairfax, Virginia: "Firearms Safety Education, Marksmanship Training, Shooting for recreation" for its first century.<sup>151</sup> The group held shooting matches every summer and in 1903, NRA secretary Albert S. Jones began promoting the establishment of rifle clubs at colleges, universities, and military academies.<sup>152</sup>

For a century, the NRA favored reasonable gun control measures. During the 1920s and 30s, the country was experiencing a high level of crime from the rise of big-city gangsters using weapons such as sawed off shotguns and machine guns.<sup>153</sup> Consequently, and federal gun regulation was not controversial during this time. President Franklin D. Roosevelt made gun control and crime fighting part of his New Deal. The NRA helped write the federal gun control legislation that became the National Firearms Act (NFA) of 1934 and the Federal Firearms Act (FFA) of 1938.<sup>154</sup> The NFA imposed a tax on the making and transfer of firearms and the FFA imposed a federal license requirement on gun manufacturers, importers, and sellers of firearms. The National Revolver Association, NRA branch involved in handgun training, supported a permit requirement to carry a concealed weapon.<sup>155</sup> As well as, adding five years to a sentence if a gun was used in a crime, and preventing noncitizens from owning handguns.<sup>156</sup> Although no new laws were passed, in 1963 the NRA vice president testified before Congress, supporting a ban on mail-order gun sales after the Kennedy assassination.<sup>157</sup> Assassin Lee Harvey Oswald bought his weapon through a mail-order ad in *American Rifleman*, the NRA magazine.<sup>158</sup>

Race riots during the 1960s inflamed fear in white lawmakers over militant civil rights groups having access to guns.<sup>159</sup> In 1967, a group of Black Panther party members entered the California Statehouse carrying rifles to protest a gun control bill.<sup>160</sup> These fears plus the back-to-back assassinations of Martin Luther King Jr. and Robert F. Kennedy inspired passage of the Gun Control Act (GCA) of 1968.<sup>161</sup> The GCA imposed stricter licensing and regulation on the firearms industry, establishes new categories of firearms offenses, and prohibits the sale of firearms and ammunition to felons and certain other prohibited persons.<sup>162</sup> However, the NRA blocked the two strongest proposals in the bill: a national gun registry and mandatory licenses for all gun owners.<sup>163</sup> Up until 1977, NRA leaders were still focused on hunting and marksmanship.<sup>164</sup> However, there were still rebels within the organization that wanted to fight all attempts on gun control. The rebels staged the revolt in Cincinnati at the annual NRA convention on May 21, 1977.<sup>165</sup> The rebellion succeeded and the NRA shifted from a hunting and marksmanship group to an anti-gun control interest group. Rebel John D. Aquilino stated “after Cincinnati, the NRA became a grassroots lobbying organization bent on stopping all gun control legislation, and closely associated itself with the Republican Party.<sup>166</sup> Neal Knox and Harlon Carter spearheaded this change and both believed gun control laws threatened basic US freedoms and would lead to disbarment of the country’s citizens.

Carter founded the group’s Institute for Legislative Action in 1975, and was the executive vice president after the Cincinnati revolt.<sup>167</sup> At this time, Carter replaced the old NRA motto on his Washington, D.C. headquarters with the Second

half of the Second Amendment: “The Right of the People to Keep and Bear Arms Shall Not Be Infringed.”<sup>168</sup> Carter’s promotion marked a shift in the view of the Second Amendment, the organization started to promote the Amendment as an individual instead of a collective right. This view was not supported by most jurists of the time, but the public and political leaders began endorsing this understanding. It started catching on when articles began appearing in *American rifleman* supporting the view that the Second Amendment confers the individual right to bear arms, Utah Senator Orrin Hatch began endorsing this idea.

An early NRA victory was the passage of the 1986 Firearm Owners Protection Act.<sup>169</sup> This legislation made interstate firearm sales easier and prevented the government from creating a gun-owner database. The NRA supported background checks as recently as 1999, but NRA executive vice president Wayne LaPierre now says they do not work.<sup>170</sup> The NRA has a strong hold over state governments, and works tirelessly in every state to decrease or eliminate firearm regulations. It works to prevent lawsuits against the gun industry and against shooting ranges and to eliminate restrictions on guns in public places such as bars and campuses.

## **Second Amendment**

Firearm possession early in the country’s history was necessary for protection and to hunt game as a source of food. Since there was no standing army, citizens had to band together for mutual defense from foreign armies and hostile Native Americans. The reliance on part time militias, instead of on a regular, professional standing army was not only based on lack of resources or man power,



but on the shared mistrust of standing armies. This mistrust stemmed from their knowledge of and experiences with standing armies in European history, in which, with depressing regularity, professional armies had subverted or overthrown civilian governments and deprived people of basic rights.<sup>171</sup> For instance, Great Britain experienced turmoil for thirteen years in the middle of the seventeenth century under the rule of Oliver Cromwell.<sup>172</sup> King James II, a devout catholic, took the thrown and used oppressive tactics to advance Catholicism. Local protestant militias defeated James's Catholic Army, which, eventually led to his overthrow and replacement by William of Orange.<sup>173</sup>

The overthrow was dubbed the Glorious Revolution of 1688 thereafter; in 1689 Parliament enacted the British Bill of Rights in which various grievances against James II were enumerated.<sup>174</sup> The right defined in this document was "that the Subjects which are Protestants may have Arms for their Defense suitable to the Conditions, and as allowed by Law."<sup>175</sup> The British Bill Rights gave citizens the right to own firearms for defense 100 years before the United States incorporated the Bill of Rights in the Constitution. To a degree, The US saw Great Britain as a role model of what not to do. However in contrast to GB, the Second Amendment gave the right to own arms in connection to a government regulated militia.

The mistrust of standing armies was a pervasive sentiment during the revolutionary period and was directly related to the bearing of arms by citizens.<sup>176</sup> In this way, the reliance on the citizen soldier became synonymous with the revolutionary spirit.<sup>177</sup> The Virginia Declaration of Rights, written in 1776, said, "standing armies, in time of peace, should be avoided, as dangerous to liberty."<sup>178</sup>

America's first Constitution, the Articles of Confederation (1777-1789) reflects suspicion of standing armies and a strong national government. The articles placed primary burden of national defense on the states, stipulating that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered." The founding fathers saw this and many other provisions in the Articles as shortcomings. This led to the Federal Convention of 1787 and the adoption of the modern Constitution. The modern Constitution resolved the military issue by establishing federal government power over both militias and a standing army.<sup>179</sup> In Article I, Section 8, Congress was given the power to "raise and support armies, provide and maintain a navy, and finance and regulate both."<sup>180</sup>

The adoption of the Constitution codified the dual militia and standing army military system, but the Constitution gave the federal government vast new power over the militia. Thus, the pressure of the Bill of Rights to limit federal authority became a necessity. On June 8, 1789, Madison introduced in the House of Representatives of the First Congress a proposed list of rights to be added to the Constitution.<sup>181</sup> The Second Amendment as well as others went to the Senate, where the final wording of the Second Amendment emerged "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."<sup>182</sup> The founders wanted to articulate through the amendment that citizens have a constitutionally protected right or duty to serve in state militias when called into service by and in defense of state and country, and that the militias cannot be disarmed so as to render them ineffectual.<sup>183</sup> The aim was to ensure the continued balance existence of state militias as a military and political

counterbalance to the national army and, more broadly, national power.<sup>184</sup> Thus the Second Amendment is founded on federalism, balancing powers between the federal government and the states, and on military necessity, developing a political compromise between politically popular militias, and a necessary national professional army.<sup>185</sup>

### **Supreme Court Rulings**

The contemporary battle over the meaning of the Second Amendment revolves around two competing interpretations: a Constitutional originalism and the living Constitution view. Constitutional originalism says that judges should interpret the Constitution based on the documents original intent or ‘fixed’ meaning, filtering out contemporary values and preferences.<sup>186</sup> The “living Constitution” view does not abandon the Constitutional texts but notes that the Constitution was the product of many hands, that is often vague as to meaning, that it often raises more questions than it answers, that the framers themselves disagreed not only about the meaning of the document but how strictly to adhere to its provisions, and that for the document to survive, it must be adapted into modern society and conditions that could not have been anticipated in the eighteenth century.<sup>187</sup>

Originally the high court viewed the Amendment as a collective instead of an individual right. In other words, a citizen has a right to bear arms only in connection with service in a government-organized and regulated militia. Former Supreme Court Chief Justice Warren Burger noted, the Second Amendment “must read as though it began with the word ‘because,’ meaning that “the need for a state militia was the predicate of the right guaranteed; in short, it was declared ‘necessary’ in

order to have a state military force to protect the security of the state.”<sup>188</sup> The militia based understanding of the Amendment was prominent until Justice Antonin Scalia severed the connection between the right to bear arms and militia service in *D.C v. Heller (2008)*. The Second Amendment has generated relatively little constitutional law. There has only been six instances where the Supreme Court has directly ruled on this Amendment.<sup>189</sup> The first case, *United States v. Cruikshank (1876)*, confirmed the militia-based interpretation of the Amendment. William Cruikshank and two other defendants were charged with thirty-two counts of depriving blacks of their constitutional rights, including two claiming that the defendants had deprived blacks of firearms possession, in violation of the Force Act of 1870.<sup>190</sup> The Federal Enforcement Act made it illegal to band together or conspire to deprive people of their rights under the Constitution.<sup>191</sup> The Act is an expression in statute of principles found in the new 14<sup>th</sup> Amendment.<sup>192</sup>

William Cruikshank was a Ku Klux Klan leader in the South following the Civil War.<sup>193</sup> He led a band of rioters in Louisiana who burned down a courthouse in which a group of armed blacks had taken refuge, all part of a disputed election.<sup>194</sup> In order to convict the defendants, the court had to decide if the rights allegedly deprived were actually rights granted by the Constitution.<sup>195</sup> Speaking for the court, Chief Justice Morrison Remick wrote,

The second and tenth counts are equally defective. The right there specified is that of “bearing arms for a lawful purpose.” this is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed; but this... Means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National Government.<sup>196</sup>

The Supreme Court did not start incorporating the Bill of Rights to the states through the due process clause in the 14<sup>th</sup>, until 1897.<sup>197</sup> However, the Supreme Court shot down numerous opportunities to incorporate the Second Amendment until 2008.<sup>198</sup> Thus, the basic human rights the prosecution claimed were violated were recognized but not created by the Constitution. These rights included free speech, the right to assemble for redress of grievances, and the right to bear arms. Furthermore, the court found that these basic human rights existed prior to when the Constitution was written, and all the Constitution did was guarantee against any federal interference in those extant rights. The Court ruled that the First and Second Amendment does not exist because of the Constitution, but is recognized and guaranteed by the Constitution as a preexisting fundamental human right. Thus, the charges against Cruikshank were defective because the First and Second Amendments limited the power of Congress to restrict those preexisting rights.

Ten years later the Court ruled similarly in *Presser v. Illinois* confirming an Illinois law that barred paramilitary organizations from drilling or parading in cities or towns without a license from the governor as constitutional.<sup>199</sup> Herman Presser was found guilty in violating this law after drilling and parading his armed company of 400 men, called the Lehr and Wehr group, through the streets of Illinois.<sup>200</sup> Presser challenged the Constitutionality of this law by claiming it violated his Second Amendment rights. Speaking for a unanimous Court, Justice William Burnham Woods went on to discuss the relationship between the citizen, militia, and government:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserved militia of the United States as well as of the States; and in view of this prerogative... the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general Government. But, as already stated, we think it clear that the sections under consideration do not have this effect.<sup>201</sup>

The Court found that Presser did not have the right to organize with others as a self-proclaimed armed military organization against state law. Based on the fact that militias exist under the regulation of state or federal government. Thus, the Court established that the right to bear arms is determined by the formation and conduct of the militia, as formed and regulated by the government.

In *Miller v. Texas* (1894), Frank Miller, a convicted murderer from Dallas, appealed his death sentence, arguing in part that the Texas law prohibiting carrying of dangerous weapons on oneself was in violation of his Second Amendment rights.<sup>202</sup> He argued that the Second Amendment was enforceable on the states by way of the Fourteenth Amendment. Miller also argued that search and seizure of his firearm without a warrant under Texas law was unconstitutional. The high court rejected Miller's appeal because he had not raised this argument prior to his Supreme Court appeal, and the Second Amendment did not apply to the states.<sup>203</sup> *United States v. Miller* (1939) addressed the meaning of the Second Amendment after the Court began the process of incorporation. This Miller case challenged the National Firearms Act of 1934, which regulated the interstate transport of various weapons.<sup>204</sup> Jack Miller and Frank Layton were indicted under the 1934 Act for transporting an unregistered 12-gauge sawed off shotgun across state lines.<sup>205</sup> They

challenged the act by claiming their Second Amendment rights were violated and that it represented an improper use of commerce power.<sup>206</sup> The Court ruled that federal taxing power could be used to regulate firearms and that firearm registration was constitutional.<sup>207</sup> Beyond this the Court reasoned that there was no evidence of the military usefulness of the weapon at hand. Thus, there was no connection to the individual ownership of the shot gun and the “preservation or efficiency of a well regulated militia.” The ruling on Miller affirmed the right to bear arms in connection with service in a government organized and regulated militia. In addition, it asserted the constitutional right of Congress and the states to regulate firearms.<sup>208</sup> Gun regulations were upheld by the Court again in *Lewis v. United States* (1980). The court ruled to uphold gun regulations as long as there was some “rational basis” for them, after George Lewis appealed his conviction for “possession of a firearm by a convicted felon.” Lewis claimed his conviction was unconstitutional under the Sixth Amendment. He had been found guilty of a Florida breaking-and-entering felony 16 years earlier without being represented by lawyer, before his arrest for gun possession in 1977.<sup>209</sup> The Court ruled that the “fact of conviction must deprive the person of a right to a firearm.”<sup>210</sup>

In more than forty cases from *United States v. Miller* to *Heller*, federal courts of appeal “analyzed the Second Amendment purely in terms of protecting state militias, rather than individual rights.”<sup>211</sup> Of those, the Supreme Court declined to hear appeals in nearly half of these cases, thus letting the lower courts rule stand.<sup>212</sup> The *Heller* and *McDonald* ruling established an individual-rights interpretation of the Second Amendment. Legislation in the District of Columbia made it illegal for

citizens to carry an unregistered firearm and prohibited the registration of handguns,<sup>213</sup> thereby creating a de facto blanket ban on handgun possession. D.C. also put in place a separate law prohibiting the carrying of handguns without a license, and granting sole licensing power to the chief of police.<sup>214</sup> Moreover, D.C. legislation required gun owners who have a lawfully registered firearm to keep them unloaded and disassembled or bound by a trigger lock, unless the firearms were located in a place of business or are being used for lawful recreational activities.<sup>215</sup>

Dick Heller, a special police officer in the District, was licensed to carry a handgun during his shifts at the Federal Judicial Center.<sup>216</sup> However, when Heller applied for a one-year license for a handgun to keep in his home, he was denied the license.<sup>217</sup> Furthermore, Heller sued the District of Columbia in district court arguing that the restriction on gun ownership in D.C violated his Second Amendment right to keep a functional firearm in his home without a license.<sup>218</sup> The district court dismissed Heller's argument on the grounds that the Second Amendment confers no individual right to bear arms outside the militia.<sup>219</sup> The US Court of Appeals for the District of Columbia Circuit reversed and held that the Second Amendment protects the right to keep firearms in the home for purpose of self-defense, and the District of Columbia's requirement that firearms kept in the home be nonfunctional violated that right.

Justice Antonin Scalia delivered the opinion for the 5-4 majority.<sup>220</sup> When delivering the opinion of the court, Justice Scalia addressed two key phrases in the operative clause of the amendment: "right of the people" and "keep and bear arms"



as well as the phrase in the prefatory clause “a well regulated militia, being necessary to the security of a free state.” The Court believed that the prefatory clause referencing a “militia” does not limit the operative clause of the Amendment. Moreover, Justice Scalia concluded that the two clauses fit perfectly in that the protection of a right to bear arms individually was a means of protecting the people's collective ability to form a militia.<sup>221</sup> Furthermore, suggesting that the right to bear arms exists only specifically within the militia is the wrong interpretation of the Amendment.

The Second Amendment's operative clause functions to protect the people's ability and right to form a militia. Justice Scalia drew on similar provisions in Founding-era state constitutions and nineteenth century commentary on the amendment to confirm his reasoning.<sup>222</sup> Furthermore, Scalia reasoned that the individual right to bear arms is limited to the possession of weapons "in common use."<sup>223</sup> Based on this reasoning, Justice Scalia concluded that D.C.'s gun laws violated the Second Amendment. However, notwithstanding this holding, the Court noted that the Second Amendment does not establish an unlimited right:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. <sup>224</sup>

The ruling in *District of Columbia v. Heller* in 2008 influenced the ruling in *United States v. Reese* a year later. In *United States v. Reese*, the Tenth Circuit ruled that a

statute prohibiting an individual subject to a domestic protection order from possessing any type of firearm was constitutional.<sup>225</sup> The Courts ruling in *United States v. Reese* was based on the high courts ruling that the Second Amendment confers an individual right that includes possessing weapons in the home for self-defense.<sup>226</sup> Therefore, the Court declared that the D.C.'s statue banning handgun possession in the home and prohibiting any lawful firearm in the home for the purpose of self-defense violated the Second Amendment.

Finally, the Supreme Court completed its establishment of this new right two years later in the case of *McDonald v. Chicago* (2010). Several suits were filed against Chicago and Oak Park in Illinois challenging their gun bans after the Supreme Court issued its opinion in *District of Columbia v. Heller*.<sup>227</sup> The case ultimately challenge Chicago law that banned handguns and any other gun not already registered with the city. The majority opinion delivered by Justice Samuel Alito said that "rights that are fundamental to the Nation's scheme of ordered liberty" or that are "deeply rooted in this Nation's history and tradition" are appropriately applied to the states through the Fourteenth Amendment.<sup>228</sup> The Court reasoned that because of it's holding in *Heller*, the Second Amendment applied to the states.<sup>229</sup> In *Heller*, the D.C law violated the Second Amendment because it was at the federal level where the Second Amendment applied. *McDonald* simultaneously applied the 2<sup>nd</sup> Amendment to the states while rejecting total incorporation when the court said that: "incorporation does not imperil every law regulating firearms."<sup>230</sup>

## Discussion

The gun debate fueled by both fact and myth that promotes beliefs and values that play a role in affecting the framework and discourse of the gun debate. Although complete regulation of firearms would be rejecting the nations values, forms of gun laws do not strangle the rights the Second Amendment provides. Gun laws are not just compatible with the nations history they are apart of it. The government is perpetually trying to balance two ideas: order and freedom. Unlimited order is tyranny while unlimited freedom is anarchy. In a democratic system, freedom is exalted, yet it is bounded by the power of the state.<sup>231</sup> As a political analyst from an earlier age once noted, “the state has the power of promoting the public welfare by restraining and regulating the use of liberty and property.”<sup>232</sup> It is essential for the government to a certain degree monopolize the use of force. German sociologist and political theorist Max Weber famously argued: “the claim of the modern state to monopolize the use of force is as essential to it as its character of compulsory jurisdiction and of continuous organization.”<sup>233</sup> However, that does not mean one is not prohibited from exerting justifiable violence. Weber also noted that “the use of force is regarded as legitimate only so far as it is either permitted by the state or prescribed by it.”<sup>234</sup> Furthermore, governance protecting social order does not stifle individual freedoms. As James Madison wrote, “if men were angels, no government would be necessary.”<sup>235</sup>

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