

Department of Political Science Master's Degree in International Relations Chair of History of the Americas

The Right to Keep and Bear Arms Dilemma. The Second Amendment between Constitution, History and Politics. ABSTRACT

SUPERVISOR Prof. Gregory Alegi ASSISTANT SUPERVISOR Prof. Andrea Ungari CANDIDATE Francesca Greco Student ID 621072

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On December 14, 2012 in Newtown, CT, something happened that shocked the United States of America and the world. An armed 20-year-old boy, after having killed his own mother, entered in Sandy Hook Elementary School and fatally shot twenty children and six adults working at the school. It all happened in a rush. Five minutes of hell. Then, Adam Lanza killed himself. The firearms used in the massacre have been legally purchased by his mother were kept at home, accessible to the young boy with mental problems.

After the Virginia Tech massacre in 2007, where Seung-Hui Cho, 23, killed 32 students before committing suicide, Newtown is the deadliest school shooting in U.S. history and it holds the record for number of young victims. There are three shared features between the two cases: a) the disturbed personality of the perpetrators, b) the extremely easy access they had to firearms, c) the handful of seconds it took to accomplish both the massacres – 11 minutes per 30 people and 5 minutes per 26 – something made possible by the semi-automatic arms used by Adam and Cho.

Unfortunately, those of Blacksburg and Newtown are not isolated episodes of madness resulting in this type of violence. Statistics report that there have been more than 200 school shootings in the United States since 1990 – 74 of which after Sandy Hook. The most interesting figure is that in the 59% of cases, perpetrators were aged between 10 and 19 – which means that in many circumstances they had not the legal age to possess a firearm – while the 69% of victims were aged between 10 and 19.

The Second Amendment to the Constitution of the United States of America, recognizes to American citizens the individual right to keep and bear arms. However, these numbers together with horrific cases of last 15 years culminated in the senseless slaughter of defenseless children in Newtown renewed and gave new strength to a fifty-year long debate on gun control and to the call for restrictions over the Second Amendment right to keep and bear arms. In particular, Americans wonder what kind of arms the Second Amendment gives the right to *keep and bear* and complain

the effectiveness of Federal control on the purchase of arms. The outcome has been a fight between gun enthusiasts and gun control advocates that invested both the political and the legal field, giving the Amendment a new relevance and putting it under the spotlight.

Due to the renewed attention on the right to keep and bear arms in the U.S., the purpose of this thesis is to observe the evolution of the Second Amendment since its adoption, walking through its legal path and its role in the political debate. Subsequently focusing on the effects of the – almost unrestricted – right, the reasoning will try to show that today the Amendment is one of the greatest anachronism in American society. It has been voided of its initial significance and vested of a purely political meaning, ignoring what could be the consequences suffered by innocent people.

The Second Amendment, one of the ten composing the Bill of Rights, states, "A well-regulated militia being necessary to the security of a free state, the right of people to keep and bear arms shall not be infringed." On closer view, it is clear that the amendment is composed by two separate parts, apparently unmatched. The first one protects a collective right (i.e. the right of the states to maintain a well-regulated militia), the other recognizes an individual right to possess and use arms. Two different subjects, two different objectives. What was the real intent of the Framers? Is it an individual or collective right? If so, who can really keep arms and to what kind of arms the amendment refers? The most notably ancestor of the right contained in the Second Amendment is the historical evolution of the militia in the mother country and the statement of the right to keep arms in the English Bill of Rights of 1689. This document read in the second part "That the Subjects, which are Protestants, may provide and keep Arms for their common Defence." Instead of the assertion that Protestants "should provide and keep arms", the Bill states that Protestants "may provide and keep arms". Although superficially identical, this change was substantial. It meant that keeping arms was no longer a positive duty but a right. As Protestants began to sail toward the New World, they brought with them a heritage that would have taken roots overseas.

In 1776 The thirteen colonies were summoned to participate to the first Continental Congress and were asked to adopt Constitutions or Bill of Rights. Not all of them did so. The most notable works, useful for this analysis, that became the models on which the framers would rely upon in 1791, were the documents adopted in Virginia, Pennsylvania and Massachusetts. The different points of view and preeminence they gave the militia either the right to have arms influenced the final writing of the amendment. In Virginia, George Mason preferred to preserve the role of Militia, rejecting the proposal of Thomas Jefferson for an individual right to keep arms. This idea was adopted, instead, in Pennsylvania Bill of Rights where people were recognized a right to bear arms "for the defense of themselves and the State". This meant that individuals were entitled to carry arms for personal protection. The term "bear arms" was not limited to bearing arms in a military force. Bearing arms for self-defense is "a right" of "the people", while bearing arms in a military unit was not "a right". In Massachusetts, John Adams, main drafter of the state's Bill of Rights, chose a different manner to cope with the issue of arms and militia by recognizing for the first time a righto "keep" as well as to "bear" arms. It seems that by using both the verbs, Adams wanted to grant at the same time a right of both the people and the militia. Adams' mistake that brought to reject his proposal was to qualify the entire provision by recognizing it only for "common defense", which was a limitation nullifying any individual right.

Once the Constitution had been drafted, the ratification by the thirteen states was the next necessary step. However, the Anti-Federalist components in Virginia and New York – the two major states in America – made it impossible for the new text to enter into force. They accepted only thanks to the promise of a Bill of Rights, to be drafted after the ratification. The first amendment proposed by James Madison in1789 was about the right to keep and bear arms and the militia, indeed. He proposed a solution that put together both provisions, being aware that the militia statement alone would be unacceptable for groups claiming an individual right and that an

amendment proposing the sole individual right to keep and bear arms would have not been accepted by militia supporters. Hence, the Second Amendment was the outcome of an attempt to pleas both Federalists and Anti-Federalists, Radicals and Conservatives, Northerners and Southerners. To consider the two parts as a single piece would not enable us to understand its real intentions. Thinking of them as depending on each other would be an error. In particular, to take the right to arms subsumed within militia recognition would annihilate what was intended as an individual right. The Second Amendment represented a bridge between the declining past of domination and the liber democracy of the future.

However, now that the United States of America has become the liberal democracy par excellence, now that the bridge has been crossed, how do we have to consider the Second Amendment?

Since the adoption of the Second Amendment, in fact, history has gone forward and society and culture developed. The context in which the right to keep and bear arms can be exercised by American citizens has completely changed. Nevertheless, the Second Amendment still stands with its uncertainties and syntactical misunderstandings. Decade after decade, conflicting interpretations came out. Is it a State right? Of the people? And if so, which people? What can they keep and bear? Americans in the twentieth century have wondered what right was actually described in those two lines, detecting the intentions of Founding Fathers and at the same time trying to understand the complex syntax of the amendment. The Supreme Court played a fundamental role during the 19th and 20th century in orienting the understanding of the amendment, even though groping in the darkness of uncertainty for too long. After important cases related to the Second Amendment like *Cruikshank, Presser* and *Miller*, the SC came to a clear and univocal interpretation just in 2008 in the case *District of Columbia v. Heller*. In D.C., a 1976 Firearms Control Regulation Act (FCRA) was approved that banned handguns and semiautomatic weapons and imposed the registration of

all already owned firearms. After 30 years, this Act came under the attention of the Supreme Court thanks to Dick Anthony Heller challenging its constitutionality. Heller, a licensed Police Officer in the Federal District, who could carry a gun in federal buildings for his job, was not permitted to register or obtain a license to keep a handgun at home for self-defense, what was considered a violation of the Second Amendment. In April 2007, the Heller case was brought before the Supreme Court, which declared the FCRA unconstitutional. Senior Associate Justice Antonin Scalia, the longest-serving justice and anchor of the Court's conservative wing made a long and detailed analysis in order to prove that the Second Amendment protects an individual right to keep and bear arms. Highlighting lexical and historical evidences of the individual character of the right, he was able to prove his point in such a way that with a vote of 5 to 4 the SCOTUS for the first time declared that the right enshrined in the Amendment is individual and as such Federal law cannot violate it.

The legal path of the right to keep and bear arms continued after *Heller* with another important case in 2010, *McDonald v. Chicago*. In 1982, Chicago became the only city in the 20th century to follow the example of the District of Columbia by passing a law banning handgun possession. After the landmark decision in *Heller*, the 1982 law came under attention thanks to some Chicago residents. Among these, Otis McDonald, a 76 year-old man, who after having suffered several robberies decided to purchase a handgun for self-defense, what was prohibited by the 1982 law. Similarly to Heller, the case reached the Supreme Court. This time the question was if the guarantee contained in the Constitution was applicable also to state and local government. In a 5 to 4 decision, again the Federal Court ruled in favor of the plaintiff, declaring the Second Amendment incorporated in the Fourteenth Amendment's Due Process Clause. After *McDonald*, all the states had to adapt their constitutions to the decision, recognizing the individual right of the citizens – for

example in Kansas, the only state where the right to keep and bear arms was still recognized only for "common defense".

After having seen the origins of the Amendment and how it was officially recognized as an individual right, is possible to move on a practical field in order to understand what kind of weapons American citizens can own and who can purchase firearms and where they can be brought. The 1934 National Firearms Act (NFA) and the 1968 Gun Control Act (GCA), respectively Title II and Title I of Federal firearms law, define the term "firearms" as machine guns, rifles, shotguns, silencers, destructive devices (DDs) and any other weapon (AOW). The GCA added two further categories of firearms, i.e. short-barreled shotguns (SBSs), short-barreled rifles (SBRs). Today machineguns, silencers, DDs, SBSs, SBRs and AOW, referred to as "NFA weapons" or "Title II" weapons, encounter several restrictions at Federal level as they require registration with the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE), a background check of the applicant and the payment of a \$200 tax for making and transferring. In 1986, the Firearms Owners' Protection Act (FOPA) banned civilians from owning and transferring new machineguns. Nevertheless, according to the FOPA, an unlicensed civilian may acquire a machine gun with the approval of the BATF, paying the required tax. About "who" can possess firearms, the GCA rules that it is unlawful purchase any firearms or ammunition to any person which (a) is under indictment or has been convicted of, a crime punishable with imprisonment; (b) is a fugitive from justice; (c) is an unlawful user of or addicted to marihuana or any depressant or drug; or (d) has been adjudicated as a mental defective or has been committed to any mental institution. In order to verify if a person is eligible for the ownership of a firearm, he or she has to submit to a Federal background check in order to prove that he or she does not belong to any of these categories.

Last thing to explain is where firearms can be brought. Each state has its own regulations about areas in which arms are not allowed. Most of the U.S. colleges prohibit carrying guns in their

premises. Nevertheless, there are some states where students and personnel are permitted to bring firearms in classrooms, campus grounds, dormitories or parking lots. Only in eleven states, the law prohibits to carry guns on campuses.

Another aspect to consider is how to keep and bear arms. In fact, weapons can be carried concealed or openly. Individual states regulate in a different manner the right to carry a concealed weapon, depending on whether a permit/license is required and whether the issuing authorities shall or may grant it. In particular, states can be guarded as "Shall-issue" – meaning that upon completion of specified requirements, a law-abiding person shall be granted a permit to carry concealed firearms – "May-issue" – meaning the authorities have some discretion over the issuance of a carry permit - "No-issue" - where State law completely prohibits carrying firearms for personal protection outside the home or place of business. The majority of states are Shall-issue states (36). Open carry, instead, often requires a permit and it may be restricted only to some specific areas and in several states where carrying a weapon in plain sight is illegal. Opinion over open carry, indeed, is heavily divided. The dispute between concealed and open carry is over which one is more effective in deterring crime. Open-carry supporters stand that a criminal could be more easily discouraged in committing a crime if aware that the potential target is armed. Nowadays, however, concealed carry is the basic right-to-carry-law as long as considered more effective in reducing crime and violence. Nevertheless, concealed or in plain sight, recent events proved that Americans can easily own a gun and either option seems not to discourage criminals and psychopaths from grabbing whatever type of firearm and perpetrate the heinous crimes that in last years have shocked the United States and the world.

Indeed, the massacres occurred in last 15 years, renewed the debate over the right to keep and bear arms, especially at national level. The right represents, indeed, one of the main topic of modern political debate between the Republican Party and the Democratic Party. The two major U.S.

parties showed different position on the matter since the 1968, year of the adoption of the Gun Control Act and, thus, the year in which the right of the Second Amendment began to be a recurrent protagonist of the parties' platforms. The Democratic Party has always been on the side of the gun control advocates, fighting especially for restriction on assault weapons and for the registration of firearms. Two elements the conservative party opposed, especially the latter. Barack Obama two presidential elections came in particular moments in the timeline of gun massacres in the U.S.A. Few months after the Virginia Tech massacre the first, few after Aurora Movie Theater bloodbath the second. Gun control has always been a main objective of the 44th President of the U.S.A. His commitment improved even more after the Sandy Hook massacre in December 2012. With the program "Now Is The Time", Obama showed several problem raised by the increasing in numbers of school shooting in the U.S. and put important objectives in gun control that were traduced in 23 executive actions that should have been transformed in legislative ones.

Indeed, the first attempt was made in March 2013 with the introduction in the Congress of a proposal for the renewal of the ban on assault weapon – expired and not repeated in 2004. However, it was actually a harsh defeat for the Presidency and the Democratic Party, since the ban failed to pass in the Senate in April. President Obama blamed the National Rifle Association for the defeat, accusing the pro-gun organization to have lied about the proposed ban, convincing conservative Senators to vote against it. The NRA is the greatest and most powerful interest group in the United States of America. Founded in 1871, the NRA's goal was to improve the marksmanship of its members. Then, after the WWII the power of the organization incredibly increased and after the approval of the 1968 GCA it began to assume also a political role. In 1975, it created the Institute for Legislative Action (ILA), the lobbying group of the NRA, which set forth the entrance in politics of the organization. With the election of George W. Bush, the most pro-gun President, it reached the peak of its political power. It works especially to block any type of gun control measure.

To this aim, for six years it successfully blocked the passage of the Brady Act (Handgun Violence Prevention Act), which was finally approved by Clinton in 1993, representing a big defeat for the conservative organization. On the other hand, the latest success has been the failure of the ban on assault weapon in 2013.

The NRA is biggest star in the constellation of national organizations focusing on the right to keep and bear arms. Some are pro-gun, other fight for control measures. An example is the organization Mayors Against Illegal Guns that created by the former mayor of New York, Bloomberg that gathers mayors all around the United States. Those who decide to adhere, have to pursue a program aiming at reducing crime through the adoption of measures like the extension of background check requirements to online sales and gun shows and support local state and federal legislation that targets illegal guns.

The large number of organizations gathering groups pro or against gun rights, help understand the importance of the right to keep and bear arms for American society. But what is the price of this fight compromising possibilities of legislative actions?

Reports of murders are in the news every day, everywhere. Crimes committed through any type of weapon, knives, hammers, and baseball bats, objects killers can easily find at home, in the kitchen or in a closet. One or two persons are the victims. Nevertheless, what if the weapon that the murderer can *easily* find *at home*, in a drawer, under the bed or in the wardrobe is a handgun or a carbine rifle and targets are defenseless children and students? In the U.S., the average number of civilian firearms is 270,000,000 out of a population around 305,000,000 (2005). Gun owners are around 85,000,000, which means that 3 in 4 Americans have two or more guns. Repeated studies have shown that the presence of a gun boosts the risk of gun-related violence and incidents in the home. Like the one that occurred in Detroit, MI on January, 2014 when a 4-year-old girl playing in the back bedroom of a home with her equal-in-age cousin found a rifle – loaded and unlocked –

underneath the bed. She took it, pointed at the young boy and pulled the trigger killing him. That of Detroit is just one of the more recent gun-related death news.

In last 15 years there have been three different cases shocking the U.S.A. The first one was that of Columbine High School in 1999, when Eric Harris (18) and Dylan Klebold (17) armed with semi-automatic firearms and explosives entered in the school and killed 13 students before committing suicide. In 2007, Seung-Hui Cho, 23, armed with a Glock 9mm and a .22 caliber handgun, slaughtered 32 students at Virginia Tech in April 2007. Then, in December 2012, there was the last shocking case occurred in Newtown.

These three cases highlight fundamental flaws in the American system that are the ineffectiveness of the background check system and the easy way in which they came in possess with the weapons they used in the massacres. In fact, while Eric and Dylan had not the legal age to purchase firearms – and recurred to a straw purchase – both Cho and Adam were diagnosed with mental problems, thus ineligible to lawfully possess arms. Indeed, the former was also able to pass the background check and legally purchase his two handguns, while Lanza had an indisputable free access to any kind of weapon collected by his mother and stored at home.

Hence, background check system, the type of firearms that civilians can own and the possibility to store them at home can be considered the main problems in the American system leading to so many horrific massacres.

What seems to be very clear from this analysis is how deeply rooted the foundations of the dispute are and how this issue has assumed such characteristics that it seems nearly impossible to overcome, what seems very clear is that the Second Amendment's meaning has radically changed. It is no more the symbol of the freedom and of the fight against the oppressor it used to be in the 18th century. It is rather a shield protecting a form of silent anarchy. The fight for the defense of gun rights, indeed, shows a mistrust towards the Federal Government and makes people reluctant

to give up their right. They prefer to provide for their own defense rather than rely on something far and unknown like a central regime. Another important aspect resulting from this study is the fact that the Amendment has lost his historical value in favor of a complete politicization. In the last fifty years, the right to keep and bear arms became important protagonist of political debate, to such an extent as to become a key feature in the profile of politicians. The powerful forces it is able to move, like the NRA, and the influence this issue can exercises makes the Second Amendment an important piece on the table of political game. At this point, one could wonder what would have happened if in 2008 the Supreme Court would have counted five Democrat Justices and four Republicans, instead of the contrary.

However, the outcome is that now American citizens are legally recognized the right to have arms for their defense. But this is not the only way they can use their *legal* arms. Indeed, the main problem is that all the massacres happened in last years have been committed with arms legally purchased by people that should not have been in possess of firearms. It is true what they say, "guns do not kill people; people with guns do it." But it is also true that American system, with all its gaps and compromises, makes it so much easier.

Actually, an aspect that leaps out from this analysis is the powerlessness of the Federal government to manage the difficult situation related to firearms. Due to the preemptive power of the states, the central government's possibilities to curtail the problem of background check, for example, are very little. The decision to collaborate or not with FBI, in fact, is up to the states. However, even in this case the suspicion against the real intentions of Federal enclaves discourage states to give them important information that could save lives.

The Second Amendment is one of the most dangerous anachronisms in American history. It has been violently uprooted from its original context and decade after decade it has been given new meanings to adapt to different situations, becoming at the end what it is today, an individual right

like those of speech, of religion or to assemble declared by the First Amendment. America has always been a country at the forefront, the republic of freedom, leader of the democratic world, and yet it is stuck in a historical legacy from which it cannot get away.

The dilemma raised by the Second Amendment proves that the United States has one foot forward and one rooted in the past.

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