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Limited Government and Gun Control

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Abstract

In the following, the author presents a case for federally mandated gun control regulations. Specifically, the author argues—with reference to The Declaration of Independence, the Constitution, and the Bill of Rights—that the principle of limited government often used against federal gun control laws actually provides legitimate justification for them. The aim is to persuade gun advocates to accept such regulations from their own point of view.

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INTRODUCTION

The debate about whether the United States federal government should or should not enact gun control regulations typically does not get very far. The public discussion is usually dominated by two ideologically distinct points of view that are so entrenched in their own set of beliefs that neither side adequately understands the other. Instead of having a constructive debate, each side simply asserts its own reasons either for or against gun control with little regard for why the other holds a different position. The ideological divide is about whether the federal government has the constitutional authority, given the Second Amendment, to place legal constraints on the ownership as well as the sale and distribution of guns. The gun advocate argument is most often based on the principle of limited government. The general idea is that the Constitution and the Bill of Rights codify limits to government power that prohibit the infringement upon the right of all American citizens to own guns. The intent of the Second Amendment would therefore be to keep the federal government from overreaching its constitutional authority. According to this argument, any form of gun control on the federal level would be unconstitutional because it would exceed the enumerated powers of the government. The argument is not against gun control *per se*, but about the constitutional right of the federal government to get involved. Except for extreme cases, the belief is that gun control regulations should be decided by each individual state. On the other side of the ideological divide is the idea of an *energetic* federal government. This view is based on the Implied Powers reading of the ‘Necessary and Proper Clause’ of the Constitution, according to which the federal government is permitted to enact any laws that are requisite

(necessary) in order to fulfill its responsibilities to the people. In this case, the argument in favor of gun control is that the federal government is obligated to place legally binding regulations on the ownership, sale and distribution of guns to protect the American people against the threat of violence. Thus, the enactment of gun control regulations should not be allocated to the states alone for the reason that the federal government has a constitutional obligation to protect the American people.

The unfortunate result of this ideological battle is an ever-widening rift in the United States on the gun question that continues to grow without much hope for effective solutions or political compromise. However, the need to get beyond this impasse is particularly urgent at the present moment due to the many incidents of arbitrary and senseless mass shootings around the country in recent years. Since the Columbine incident in 1999, which raised the gun question for a new generation, there have been a number of equally tragic incidents, some but not all of which include: Virginia Tech University in 2007 (32 killed, 17 wounded); Binghamton, NY in 2009 (13 killed, 4 wounded); twice at Ford Hood Military Base in Texas: the first in 2009 (13 killed, 30 wounded) and the second in 2014 (4 killed, 16 wounded); the Aurora Colorado Movie Theater in 2012 (12 killed, 70 wounded); Sandy Hook Elementary School in 2012 (20 children and 6 staff members killed); Santa Monica College in 2013 (6 killed, 4 wounded); Washington DC Navy Yard in 2013 (12 killed, 3 wounded); the University of California, Santa Barbara in 2014 (7 killed, 13 wounded); Marysville Pilchuck High School in Washington in 2014 (5 killed, 1 wounded); Emanuel African Methodist Episcopal Church in Charleston, South Carolina on June 17, 2015 (9 killed, 1 wounded); as well as others on a growing list. It is in this tragic context that the attempt will here be made to get beyond the impasse on the gun question. This will *not* be

done by simply asserting and thereby imposing a set of beliefs that are ideologically foreign to gun owners or even to the most enthusiastic defenders of the Second Amendment. There will be no attempt, in other words, to develop a rationale for gun control in accordance with the Implied Powers Doctrine. Rather, an argument will be given in defense of federal gun control regulations on the basis of the principle of limited government so often used against the constitutionality of such laws. The aim is persuade those against gun control *from their own point of view*.

The argument has two parts, the first of which is perhaps culturally the most important. At the start, a concerted effort will be made to understand the limited government argument *against* gun control. To persuade—and not merely to quarrel—one must first listen to and respect the other. To this end, a case will initially be made against federal gun control regulations from the standpoint of the astute scholar of limited government, Patrick Garry. The second part will then demonstrate, contrary to Garry, how the principle of limited government can be used to justify the constitutional authority of the federal government to enact gun control regulations.

LIMITED GOVERNMENT AGAINST GUN CONTROL

The prevalence of extreme images of gun advocates on the 24 hour news channels may make it difficult for some to see that the limited government argument against gun control is quite reasonable. The viewing public is so frequently shown footage of people like Ted Nugent expressing less than respectful epithets at the President or with images of people carrying assault weapons into a Chipotle restaurant that some may forget that the argument is based on a reputable and thoroughly researched understanding of the Bill of Rights. A good example of this

is Garry's book, *Limited Government and the Bill of Rights*.ⁱ Garry argues against an interpretation of the Bill of Rights that he claims began in the New Deal era, but was instituted into common practice during the time when the Supreme Court was led by Chief Justice Earl Warren from 1953-69. The Warren court, as it is now known, interpreted the Bill of Rights as containing a list of natural rights that, in one way or another, articulates a finite number of liberties that inherently belong to individuals. So understood, the direct intent of the Bill of Rights was to establish "a moral space or liberty in which individuals should be free to live their own lives, free from interference by other persons."ⁱⁱ This gave the Supreme Court a mandate: its primary obligation was to protect the rights of individuals. It did not need to *directly* concern itself with the overreach of political power for the simple reason that the legal protection of the individual would always *indirectly* keep the federal government in check. For instance, a ruling by the Supreme Court that, in some specific way, directly protects an individual's freedom of religion or freedom of speech, establishes a set of legal parameters, i.e. precedents that also, albeit indirectly, restrain the federal government. For those who defend the principle of limited government, the Warren court created a serious problem.

The issue that Garry and others have with the Warren court is not the attempt to protect the rights of individuals—no one would dispute that—but the power that it granted to the Supreme Court. The disagreement is with the so-called 'moral space' that the Warren court sought to establish for the individual. Limited government proponents would

ⁱ Garry, Patrick. *Limited Government and the Bill of Rights* (University of Missouri Press, 2012)

ⁱⁱ *Ibid*, p. 11

claim that this enabled the Supreme Court to circumvent the democratic process.ⁱⁱⁱ Garry believes that the threat to the democratic process can be remedied by returning to the original intent of the Bill of Rights. His argument is based on an astute and profoundly simple insight: the Warren court had reversed the *direct and indirect* intent of the Bill of Rights. According to Garry, the direct and original intent was *not* to create a ‘moral space’ that would insulate individuals from exigent democratic outcomes, but to provide a set of structural limits to government power and authority that would, then, indirectly protect them. The First Amendment does not state that an individual’s freedom of speech ought to be protected, but that “Congress shall make no law ... abridging the freedom of speech.”^{iv} The direct emphasis is on Congress and its limits, not the protection of the individual. To be sure, the individual’s right to free speech is still protected, but only as an indirect outcome of the structural limits placed on the federal government. For limited government proponents, this is a small, but important change that realigns the balance of power. The Supreme Court would no longer find

ⁱⁱⁱ Perhaps the most contentious example is the ruling on abortion in 1973. The *Roe v. Wade* decision established as *de facto* federal law a woman’s right to an abortion in the first trimester of pregnancy. It is argued that this undercut the sovereignty of each state to decide the matter for themselves through long-standing legislative procedures by democratically elected officials. Limited government advocates believe that the abortion issue, which still fosters passionate disagreements in our society up to the present day, was determined by an elite group of unelected judges who hold permanent positions. For them, the abortion ruling is a clear case, but certainly not the only one, in which the Supreme Court acted outside of its constitutional authority. Specifically, the abortion ruling was an instance of “legislating from the bench” that violates the Separation of Powers outlined in the Constitution.

^{iv} *The United States of America: State Papers.*, ed. by Thomas Adamo (Woodbine Cottage Publication, 2010), p. 20

itself in the position of “legislating from the bench,” but would now correctly assume, as its primary obligation, a review of the federal government and its laws to ensure that it abides by its constitutional limits. Doing so would also ensure that the rights of individuals would not be infringed, which would thereby provide indirect protection.

Limited government proponents view the growing appeal of gun control regulations around the country as a byproduct of the Warren court’s interpretation of the Bill of Rights and its influence on the culture at large. The American people have become so accustomed to the idea that the intent of the Bill of Rights is to create a protective space for individuals that it now makes complete sense to codify gun control regulations into federal law in order to fulfill that purpose. The worry about gun control is that any kind of federal regulation would set a legally binding precedent that the Supreme Court could use to dismantle the Second Amendment. It is also feared that the Supreme Court could potentially exploit such a precedent to strike down other provisions of the Bill of Rights under the pretense of “protecting the individual.” Limited government proponents argue that this need not happen, or even be a threat for that matter, so long as the Second Amendment is properly understood as a structural check on government power. Although this means that the direct intent of the Second Amendment is not to protect the individual’s right to bear arms, it nevertheless places restrictions on the federal government that indirectly ensure that the right of the individual to own, sell and distribute guns “shall not be infringed.”^v For limited government proponents, any federally sponsored form of gun control, strictly speaking, is therefore not constitutionally permissible.

^v Ibid, p. 20

LIMITED GOVERNMENT AND THE DECLARATION
OF INDEPENDENCE

The ‘structural limits’ interpretation of the Bill of Rights must contend with what can be read as counter statements in the Declaration of Independence about the precise role of government with respect to the rights of individuals. Garry is fully aware of this issue. He devotes a good deal of time trying to show that the Declaration is not a document on par with the Constitution and the Bill of Rights as defining the role of the government, but is a revolutionary document with the sole purpose of separating the Colonies from the British Empire:

Any use of the Declaration of Independence to interpret the Constitution is unfounded, since there was a critical difference in function between the two documents. Whereas the Declaration was a document justifying independence from Britain, the Constitution provided a frame of operation for the new United States government.^{vi}

The reason for Garry’s reluctance to include the Declaration as a government-forming document is its famous assertion about the primacy of natural rights. This would lend credence to the idea that the Bill of Rights, as the Warren court had proposed, ought to be interpreted as setting legal parameters to protect the rights of the individual:

The argument that the Bill of Rights serves to protect natural rights stems in part from the statement in the Declaration that all persons ‘are

^{vi} Garry, p. 16

endowed by their creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness'.^{vii}

This gets at the very heart of the debate about the role of the federal government. If, contrary to Garry, the Declaration can be included among the other government-forming documents, then a case can be made that at least part of the role of the federal government is to protect the rights of individuals. This would then reopen the discussion about gun control regulations.

Garry is a meticulous and fair-minded scholar of the founding documents who does not sidestep the contentious passages. He correctly focuses on the second paragraph of the Declaration to argue that the opening assertion about natural rights was originally intended to supply a moral justification for independence and not to establish a scheme of rights:

Because the Declaration of Independence served primarily to provide a moral and political rationale for independence from Britain, it was not intended as a document about individual rights or the parameters of such rights.^{viii}

The next two sentences after the assertion of rights challenge the accuracy of Garry's interpretation of the Declaration as exclusively revolutionary. Although Garry is indeed correct to point out that the assertion of rights is moral in its meaning, there is no revolutionary declaration entailed therein. It simply posits the moral principles that all human beings are equal and that they possess the same

^{vii} Ibid, p. 10

^{viii} Ibid, p. 16

unalienable rights. The next two sentences, however, are quite different:

That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed, –That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter and abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem likely to effect their Safety and Happiness.^{ix}

The first of these two sentences does not make any claim to revolution or independence. Rather, it succinctly defines the purpose and role of government as the securing of the natural rights spelled out in the previous sentence. Prior to any revolutionary proclamations, the Declaration states that the primary role of government is to protect the rights of individuals. In fact, the protection of such rights is characterized as its one *limited* role. Garry devotes so much time trying to separate the Declaration from the Constitution and Bill of Rights precisely because it defines the principle of limited government directly in opposition to his understanding of it. The first revolutionary statement only occurs in the next sentence; and the reason given for revolution is quite telling: it is only when *a government fails to secure and thus to protect the rights of individuals* that the people should ‘abolish’ it and form a new government that would protect them. What is more, this new government should ‘organize its powers’ in a way that would protect the rights of individuals in order to ensure their ‘Safety and Happiness.’ Despite Garry’s insistence that any use of the Declaration to interpret the Constitution

^{ix} *The United States of America: State Papers*, p. 1

and the Bill of Rights is unfounded, there is clear evidence to the contrary. Given that the Declaration unambiguously identifies the primary responsibility of the government as protecting of the rights of the people, it is more likely that the Constitution and Bill of Rights, rather than having no relation to it, were deeply and inextricably informed by it.

LIMITED GOVERNMENT AND GUN CONTROL

The principle of limited government, when the Declaration of Independence is included among the government-forming documents, must be revised to include the protection of the rights of individuals. This does not mean that Garry is wrong, but only that his view is one-sided. He is correct to argue that the Bill of Rights places restrictions on the federal government. However, the Bill of Rights also articulates, at the same time, a list of legal parameters whose purpose is to secure the rights of individuals. To be sure, although the federal government must be restrained from any undue overreach of power, it also has the obligation to protect the people. Failure to do so would be sufficient grounds for structural change to the federal government. Today, this would not mean outright revolution, but electoral change in the ruling body as well as reform to existing laws. So understood, the Bill of Rights has the two-sided intent of restraining the power of the federal government *and* of protecting the rights of individuals. This interpretation of the Bill of Rights can end the ideological impasse over the gun question because it incorporates both sides of the issue. The question as to whether the federal government does or does not have the authority to enact gun control regulations is not about whether the Bill of Rights articulates a set of structural limits or a list of protected rights. *It does both.* In light of this, the federal government does, indeed, have the constitutional authority to enact gun control regulations, but

if and only if the safety and security of the American people are at stake. However, the federal government does not have absolute authority in this regard, but is compelled to abide by and never to exceed its constitutional powers.

The hope in getting beyond this impasse is to begin an open and constructive debate about gun control that would lead to effective political solutions to the problem of mass shootings across the country. The debate would no longer have to come to its usual standstill on the issue of the role of government, but could address the underlying concerns of the conflicting sides. The ideological disagreement on the gun question is really a conflict between two basic, but sometimes competing rights: *liberty* and *life*. It is undeniable that the Second Amendment restricts the government from infringing upon the liberty of American people to bear arms; but the American people also have the right to live in safety and security. The underlying issue in the gun control debate, which should become a subject of public discussion, is how to reconcile these equally important rights. To side with one over the other would be an injustice to the American people and contrary to United States constitutional system of government. A simple either/or solution is not adequate for a complicated and contentious issue like gun control. What is required is a nuanced and fair solution that upholds both rights equally. This is precisely the intent of reasonable federal gun control regulations. It is not to take away the liberty of individuals to own, sell or distribute guns, but to ensure that the federal government does not do so, while, at the same time, protecting the American people from the threat of mass shootings across the country. We should not let the debate-thwarting caricatures of the conflicting sides distract us. It is time to stop portraying gun owners as violent radicals who are indifferent to the tragedies at places like Sandy Hook Elementary School. It is also time to stop

accusing gun control proponents of being unpatriotic cultural warriors who are hell-bent on taking away the liberty of American citizens. Each side ought to be regarded with proper respect for their efforts to defend the values of liberty and life. It is the duty of the federal government to ensure that both values endure. In the case of gun control, the federal government can do precisely this by implementing reasonable policies and laws that uphold the Second Amendment in a way that also protects the American people.