

CONSTITUTIONAL ANTECEDENTS OF A REASONED POLICY ON GUN CONTROL

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In the wake of the Newtown, Connecticut tragedy on Wednesday January 16, 2013, President Obama issued his administration's proposal for augmenting national controls over gun violence. The proposal recommended both executive and congressional action items, the latter of which would:

- Require criminal background checks for all gun sales, including those by private sellers that currently are exempt;
- Reinstate and strengthen the ban on assault weapons that was in place from 1994 to 2004;
- Limit ammunition magazines to 10 rounds;
- Ban the possession of armor-piercing bullets by anyone other than members of the military and law enforcement; and,
- Increase criminal penalties for so-called "straw purchasers" – individuals who pass the required background check to buy a gun on behalf of someone else.

Predictably, the political left responded by stating that the President's proposal was too narrow, and although it did address some mental health issues, it left untouched the question of how violence in our society is portrayed by the entertainment and computer games industry, as well as the media generally. With an equal degree of predictability, the more conservative side of the political spectrum, represented by the National Rifle Association (NRA), announced that it would oppose Obama's proposal in "the fight of the century". With reference to the Newtown tragedy, the NRA stated:

"Attacking firearms and ignoring children is not a solution to the crisis we face as a nation. Only honest, law-abiding gun owners will be affected and our children will remain vulnerable to the inevitability of more tragedy."

Given the *sturm und drang* of current American politics, the congressional debate over the President's recommendations promises to be carried out with prolific references to the 2nd Amendment, government regulation, and free enterprise. And, should Congress choose to expand its discussion to controls over violence generally, then we likewise can expect an equal share of rhetoric devoted to the 1st Amendment, free speech and the entertainment industry's exploitation of violence in films, computer games, and nightly newscasts.

The Free Enterprise Model and Governmental Regulation

At the heart of the coming debate over gun control, and potentially the reporting and portrayal of violence in American culture, is a business model steeped in the tradition of unregulated free enterprise. Citing respectively the 2nd and 1st Amendments, those who have benefitted the most from this model will claim that their right to bear arms, and their right to free speech, are threatened by any increase in governmental regulation of guns, violence and the entertainment value of those artifacts in the free market.

Unfortunately, and this is especially true when viewed in the context of crafting a reasonable policy for the governmental regulation of guns and violence, these questions of constitutional intent frequently escape the conceptual grasp of many U. S. congressional and executive leaders. As a consequence, and we probably have little cause to believe otherwise, current efforts to achieve an equitable governmental policy over the control of guns and violence will ultimately appear on the Supreme Court docket. A paucity of reasoned or appropriate public policy is certain to result from a narrow parsing of the Second Amendment by the ideologues of either the left or right. A just and enduring public policy controlling the sale of guns and the portrayal of violence in 21st century America can be realized only in the light of an objective understanding of the constitutional intent of not only the Bill of Rights, but the innate system of checks and balances which is the foundation of the Constitution itself.

The Origins of Constitutional Intent

It has long been accepted by students of government that the checks and balances incorporated into the U. S. Constitution find their genesis in the fear of James Madison and his peers of unlicensed governmental power. Whether it was a paranoia of the absolute monarch or unchecked mob, this fear is reflected in the Bill of Rights such that what is implicit in the articles of its constitutional parent document become explicated and indeed prioritized in the Bill of Rights and its First, Second and, to a lesser degree, Third Amendments. The First Amendment is *proscriptive* in the sense that it prohibits the government from limiting, among other rights, freedom of speech and assembly as well the citizenry's right to petition the government for the redress of grievances. To ensure that the provisions of the First Amendment are honored, two essentially enabling or *prescriptive* amendments follow. The Second Amendment, recognizing the need for security through a well regulated militia, establishes the right of individual citizens "to keep and bear arms". The Third Amendment further limits excesses of sovereign power by establishing the primacy of private property and citizens' property rights in time of war.

There is some merit to the argument that the roots of the first three amendments lie in the American Revolution, and to a lesser degree in both the English and European post-Reformation quest for religious freedom. But, it would be short-sighted to assume that, for example, the Second Amendment was written to ensure that the local citizenry was sufficiently armed to cope with another George III – of either the home-grown or foreign variety. To the contrary, the constitutional intent of the Second Amendment, and the Bill of Rights more generally, reflects not solely the sovereign exigencies of post-colonial America, but even more so, the social and political consequences of the English Civil War and its impact on Enlightenment political thought and theory.

The U. S. Constitution arguably represents one of the first and few historical instances in which an abstract socio-political theory, i.e., Hobbes' and Locke's concept of the social contract (see below), was successfully transformed into an operationally functional framework that governed an enduring sovereign nation – and a democratic one at that. Although the functionality of that government is now subject to debate, there is little question that the framers of the U. S. Constitution, and especially James Madison, not only had read their Hobbes and Locke well, but that they also had the practical skills to take the social contract in the abstract and engineer it into the real world of the U. S. Constitution and its supporting Bill of Rights.

Constitutional Antecedents I: Thomas Hobbes, Fear, and the Brave New World of the Leviathan

Thus viewed in the context of social contract theory, it might be analogously if not lightly proposed that the U. S. Constitution was precipitated by the passing of the Spanish Armada along the English coast near Westport on April 5, 1588. For it was there that the wife of the local vicar, Thomas Hobbes, in her fright of the Spanish fleet prematurely gave birth to a son, who was to be named Thomas in honor of his father. It is reputed that the circumstances of his premature birth caused the younger Hobbes to later observe that "my mother gave birth to twins – myself and fear".

Fear was indeed Hobbes' twin, and there was a lasting and close companionship between the two. Fear pointed Hobbes away from the vacuous scholasticism of Aristotelian political thought and toward a then radical intellectual path that ultimately brought him to the brave new world of his leviathan and the social contract. Although there is an academic preference to discount the influence of the English Civil War on Hobbes' thinking, the political chaos of mid-17th Century England certainly must have evoked some measure of fear in his mind as he penned the lines of *The Leviathan*. Although the major portion of that work had been completed prior to the Short Parliament, one cannot help but hear Hobbes' twin whispering to him that Charles I's head had been put to rest on a pikestaff above the Thames – this untoward event occurring while Hobbes was still engaged as the exiled Charles II's tutor in Holland.

In a truly Hobbesian sense the English Civil War was the socio-political reification of one of Hobbes' greatest fears, the state of nature. One suspects that Hobbes' philosophic reaction to that fear ultimately led to Descartes' intellectual rejection of Hobbes. The French rationalist intuited that, indeed, in his heart-

of-hearts Hobbes believed that humans entered into a social contract and formed the leviathan not by reason but by fear.

Regardless of whether humanity was driven from the state of nature by fear or reason, Hobbes saw that state as essentially a jungle full of “continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short”. To avoid the consequences of living in a state of nature, the leviathan, the sovereign state, is formed. Humans enter into a social contract to protect themselves from themselves. But, as Hobbes admonishes us, when we enter into a social contract and form the leviathan, we pay the price. And for the vicar’s son that price was, as was Adam’s bite of the apple, very dear because, for Hobbes, the social contract was irrevocable. There was no turning back; the excesses and abuses of the Hobbesian leviathan must be endured, otherwise we return to a state of nature.

Constitutional Antecedents II: John Locke’s Well Reasoned Alternative to the Leviathan

Born in 1632 nearly two generations after Hobbes, it fell to John Locke to propose that the social contract could indeed be revoked. The son of a country lawyer whose career was broken by service in the Parliamentary forces during the Civil War, Locke rejected Hobbes’ monarchist vision of the leviathan. In contrast Locke’s *Two Treatises of Government* saw the social contract as an instrument whereby the consent of individual citizens legitimized sovereign authority. Likewise, in contrast to Hobbes, Locke argued that the social contract was most certainly revocable. Moreover, he contended that should a sovereign state fail in its contractual responsibility to provide for the common good, then its citizens must *per force* overthrow their no longer legitimate government. This proposition was a century later to make the good Dr. Locke a very popular figure with Jefferson, Adams, Madison and their fellow patriots in the United States as they declared their independence from the then British version of the leviathan.

Interestingly, although his political thoughts contrast significantly to the royalist Hobbes, Locke benefitted from the patronage and intellectual influence of Lord Anthony Ashley Cooper, the 1st Earl of Shaftsbury. Locke became Lord Ashley’s personal physician and is credited with later saving the earl’s life. There is little question that Shaftsbury, as the founder of the post-Restoration Whig party, nourished Locke’s political theories, especially up to the point that Locke fled England for Holland in 1683 after being accused of participating in the Rye House Plot. Locke remained in Holland until shortly after the Glorious Revolution deposed James II, and the newly empowered Parliament placed William of Orange and his wife Mary on the English throne. Of some anecdotal interest is the fact that Locke accompanied Queen Mary on her journey from Holland to England in 1688.

With the parliamentarians in power in the years following the Glorious Revolution, Locke became something of an intellectual flag bearer for the nascent Whig party. And, it is in this context that contemporary historians have come to generally regard Locke as the Revolution’s preeminent apologist. It is important to bear in mind, however, that recent research demonstrates that the Lockean interpretation of the social contract, and especially the right to rebel, were at the very least adumbrated by Locke a decade prior to the radical events of 1688.

Nonetheless, Locke stands with Hobbes at the intellectual headwaters of the social contract. They both believed that society and the sovereign state were preferable to the short, brutish and nasty life of unmitigated self-interest. But from there the similarity of their political thought diverges into two separate streams. Hobbes’ thinking reflected an English political *milieu* in which a millennium of tribal disputes, from the Celts and the Picts to the houses of Lancaster and York, drove the inhabitants of their less than happy little isle to subject themselves to the vicissitudes of an absolute monarch. For Hobbes, tribal fears brought humans out of the jungle that was the state of nature, and it was this fear that cemented the bonds of the Hobbesian social contract. Locke, however, was as Voltaire referred to him, *le sage Locke*, a product of the Age of Reason, a proponent of and believer in the proposition that human beings by reason choose to enter into the social contract, and not from the tribal fears of the jungle postulated by the royalist vicar’s son. Likewise, it was a simple matter of logic for Locke to contend that, if humans entered into the social contract as a consequence of reason, so to could that contract be broken. The ramifications of Locke’s logic did not go un-noticed a century later in the drafting of the American Bill of Rights.

The Constitutional Ramifications and Ideological Anachronisms of the Social Contract

In an intellectually historical sense, social contract theory flowed in a stream of political thought from Hobbes and Locke to the framers of the U. S. Constitution, the Bill of Rights, and specifically the First and Second Amendments. For this reason the control of guns cannot be restricted to a narrow legalistic interpretation of phrases such as “the right of the people to keep and bear arms”, or that the control of media violence constitutes “abridging the freedom of speech, or of the press”. These issues of constitutional intent do not end with the Bill of Rights; they begin there and find their genesis in Hobbes, Locke and their respective visions of the social contract.

When viewed from the perspective of the social contract, the current liberal-conservative polemic over gun control, as Marx did to Hegel, becomes “turned on its head”. Hobbes’ view of the social contract required that all instruments of force be surrendered by individual humans when they leave the state of nature and form the leviathan. This is of course precisely the modern liberal’s view of a national gun control policy. Yet, ironically, many of these same conscientious liberals cast Hobbes in the role of the intellectual arch-demon of modern fascism.

Nor by the same token does Locke escape the ideological anachronisms of the current gun control debate. Locke differed most strongly from Hobbes on the individual’s right to rebel from a failed social contract. Indeed, Locke contended that individual citizens are obligated by natural law to destroy the bonds of the social contract if the sovereign state violates its terms. Rebellion, however, is impossible unless the citizenry retains or keeps some measure of force to oppose the leviathan. Thus, we are anachronistically confronted here with Locke, who has been called the “father of Western liberalism”, saying that individual members of society must be able to keep and bear arms as a countervailing force against the potential contractual abuses of the state – a position currently well articulated by the NRA and other conservative opponents of gun control.

Regardless of their contemporary consequences, the disparate views of Hobbes and Locke regarding the disposition and right to use force under the social contract did not escape the thoughts of Madison and his peers as they labored over the Bill of Rights. It is to their credit, and to the United States’ lasting good fortune, that they recognized the theoretical tension between their English philosophical predecessors, and translated that tension into the system of checks and balances inherent not only in the articles of the Constitution proper, but the Bill of Rights and its constituent amendments as well.

It may very well be that some of the more contentious issues regarding gun control and violence may be resolved by conceiving the Bill of Rights systemically in the sense that its various amendments are a reflection of the same framework of checks and balances intentionally prescribed by the Constitution. This is no more evident than in the contractual tension between the First and Second Amendments. The First Amendment speaks to the essence of the Lockean liberal ethic by proclaiming the fundamental rights of the individual in an open society. It recognizes, as did both Hobbes and Locke, that individual citizens form the sovereign state. But, it establish in a purely Lockean sense the primacy of the individual citizen within the constraints of the social contract.

Implicit in the First Amendment is the fiat recognized by both Hobbes and Locke that the cost of individual freedom requires that individual citizens cede the use of force to the sovereign state. It is in the relinquishing of individual force to the state – the theoretical ground where Hobbes and Locke chose far different paths – that the Second Amendment is a critical check and balance. The conservative Hobbes required that all force be vested in the leviathan. But, the liberal Locke said a countervailing control must be secured such that individual citizens retain the right to confront the state over the potential abuse of sovereign power. The Second Amendment thus follows as both the practical consequence and constitutional necessity inherent in liberal Lockean political theory.

There is not only a dynamic contractual tension between the First and Second Amendments, there is likewise within the terms of the Second Amendment itself the presence of countervailing checks and balances. The phrase most tendentiously used when quoting the Second Amendment is “the right of the

people to keep and bear Arms shall not be infringed”, which could have been as easily penned by Locke as it was by Madison. Of a far more Hobbesian tone is the less frequently cited injunction that “a well regulated militia” is “necessary to the security of a free State”. These two phrases must be interpreted as an inherent check and balance written into the provisions of the Second Amendment. In short, the sovereign state must have sufficient force to ensure national security, but that force must be balanced and checked by the right of individual citizens to confront the potential abuse of sovereign power by the leviathan against its constituent members.

Toward A Reasoned National Policy on Gun Control and Violence

In summary, there will be little hope for a reasoned national policy for gun control and violence if our leaders fail to recognize the historical antecedents and constitutional imperatives of the issues they are debating. A well reasoned public policy should not be the fruit of a myopic argument over what constitutes an appropriately regulated business model for the armaments industry, the precise definition of an assault rifle, or the maximum number of rounds permitted for a rifle or handgun.

Arguably, public law may address these specific concerns, but public law follows reasoned public policy, and reasoned public policy can occur only when framed in the light of our constitutional antecedents and imperatives. That remains the sole and equitable path to the common good.