

Gun Control in America and Japan: Ideas for a Second Amendment Society from a Katana Culture

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I. Introduction

By the numbers, America has a problem with guns. In 2017 alone, 14,542 people were killed by firearms in homicides.¹⁾ This level of annual American firearm fatalities is unbelievable to people in Japan, where gun deaths are almost unheard of. When one considers that only three gun homicides in all of 2017 occurred in Japan,²⁾ its strict gun control laws present a stark contrast to the enormity of America's annual firearms fatalities.³⁾ It is easy to see that Japan's extremely tight regulation of guns results in extremely low deaths from guns. This does not, however, mean that the United States can or should adopt a simple copy and paste approach to Japan's gun control laws. Even with the disparity in firearms deaths, the corresponding disparities in each nation's history, culture, and law need to be considered.

On the one hand, the depictions of the role of firearms in American culture throughout its history have left a perception that "[t]he right to keep and bear arms is not a 1791 anachronism. It is alive in the hearts and minds of the American people."⁴⁾ On the other hand, perhaps Americans too often picture a romanticized version of the rugged colonial pioneer blazing his way across the New World with pistols at the hip and rifle in hand. The truth may have been less glamorous. Firearms at the time were not only cumbersome, but

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1) Gunpolicy.org, *United States - Gun Facts, Figures and the Law*, <https://www.gunpolicy.org/firearms/region/united-states> (accessed Apr. 2, 2020). Note that this figure would be 39,773 when calculating all firearms deaths for the year, including accidents and suicides.

2) National Police Agency Organized Crime Countermeasures Department, Organized Crime Countermeasures Planning Division, *Heisei 29-nen ni Okeru Soshiki Hanzai no Jōsei (Kakuteichi Ban) [Report of Organized Crime in 2017 (Final Version)]* 73 (Apr. 2018), <https://www.npa.go.jp/sosikihanzai/kikakubunseki/sotaikikaku03/h29.sotaijousei.pdf> (accessed Apr. 2, 2020).

3) For examples of such comparisons, see Harry Low, *How Japan Has Almost Eradicated Gun Crime*, BBC News (Jan. 6, 2017), <https://www.bbc.com/news/magazine-38365729>, and Anna Fifield, *In Japan, Even the Gun Enthusiasts Welcome Restrictions on Firearms*, Wash. Post (June 29, 2015), https://www.washingtonpost.com/world/in-japan-even-the-gun-enthusiasts-are-in-favor-of-gun-control/2015/06/27/283cfaea-19a6-11e5-bed8-1093ee58dad0_story.html (accessed Apr. 2, 2020).

4) David B. Kopel, *The Truth About Gun Control* 28 (Encounter Books 2013).

not terribly accurate or reliable in the field. They may not have been as beloved as Americans now think. Rather than an America born of individual arsenals, it is argued that the “individual right to keep and bear private arms is not rooted in early-American traditions, but is an anachronism imposed on history by modern gun rights activists.”⁵⁾

Regardless of the historical interpretation, firearms play a prominent role in American society by way of the Second Amendment to its constitution: “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.”⁶⁾ Like the interpretation of the importance of guns in American history, the language of the Second Amendment itself has been subject to different interpretations and meanings. This is in no small part due to the fact that the language of the Second Amendment is anything but crystal clear. “With its odd syntax, the Second Amendment gives the whiff of an urgent, impassioned point being made in a long forgotten argument.”⁷⁾ Yet that odd statement has played a pivotal role in the history of the United States of America, and the right of its people to bear arms for self-protection. It also serves as a definitive barrier against incorporating a system of gun control legislation similar to Japan. While Japanese gun control does not fit the American model, it can and should serve as an example of the low fatality results America should strive for, while providing some examples of proactive measures to reduce fatalities in a manner that is constitutionally and culturally compatible.

II. Gun Crime Statistics

A brief look at some statistics concerning the relative prevalence of gun ownership and gun violence in the United States and Japan is helpful to put the different cultural and legal approaches to guns into perspective. It will probably surprise no one that the United States has substantially more gun owners (both by number of guns and on a per capita basis) and firearm related deaths than Japan.

A. Gun Ownership and Death Statistics in the United States

Although it is impossible to get an exact figure, the estimated number of privately-owned firearms in the United States may exceed 393 million in a country with 326 million people.⁸⁾ This gives America a civilian firearm possession rate of over 120 guns per 100 people as of 2017. Estimates indicate that handguns are the most prevalent type of gun

5) Allan J. Lichtman, *Repeal the Second Amendment* 30 (St. Martin's Press 2020).

6) U.S. Const. amend. II.

7) Michael Waldman, *The Second Amendment* 5 (Simon & Schuster Paperbacks 2014).

8) Christopher Ingraham, *There Are More Guns Than People in the United States, According to a New Study of Global Firearm Ownership*, Wash. Post (June 19, 2018). <https://www.washingtonpost.com/news/work/wp/2018/06/19/there-are-more-guns-than-people-in-the-united-states-according-to-a-new-study-of-global-firearm-ownership/> (accessed Apr. 2, 2020).

owned, at 111 to 114 million, followed by rifles at 87 to 110 million, and shotguns at 53 to 86 million. The military has an estimated 4.5 million firearms, and the nation's law enforcement an additional one million. The number of gun deaths in 2017 totaled 39,773 people, which corresponds to a death rate of over 12 individuals per 100,000 people. Gun homicides alone in 2017 accounted for 14,542 deaths, for a rate of 4.46 per 100,000 people.⁹⁾

B. Gun Ownership and Death Statistics in Japan

Out of a population of almost 127 million people,¹⁰⁾ Japanese civilians possessed approximately 377,000 firearms in total as of 2017. This results in a civilian firearm possession rate of approximately 0.3 guns per 100 people. The most commonly held type of firearm is the shotgun, with almost 145,000 in private hands, followed by rifles at over 30,000. Handgun possession by civilians is virtually non-existent, with a total of only seventy-seven estimated in the country. The military has a reported 745,514 firearms, with another 252,000 held by law enforcement.¹¹⁾ The number of shooting cases in Japan for the year 2017 totaled just 22 incidents, which corresponds to a rate of approximately 0.02 per 100,000 people.¹²⁾ That, however, includes all cases where guns were fired. Shootings resulting in homicides numbered just three. Not three per hundred thousand, but three people in total for the entire nation. For perspective, the three gun homicides in Japan were dwarfed by just the 486 *unintentional* gun deaths in the United States in 2017.¹³⁾

With so few guns in private hands, Japan has almost no gun crime. But that does not mean its gun control laws are inherently applicable or advisable for the United States to adopt in full. Rather than draw conclusions based solely on the numbers, it is important to also carefully consider the cultural and historical roles of firearms, in addition to the relative legal protections (or lack thereof) of firearms ownership.

III. American Gun Culture and Law

A. The Historical Role of Guns in the United States

Guns undoubtedly played an important role in the colonization of North America, and the birth of the United States. The degree of the importance of the gun for the average citizen at the time, however, is less clear. Firearms are traditionally understood to have been used as critical tools for American life from its colonial days. The American frontier

9) Gunpolicy.org, *supra* n. 1.

10) The World Bank, *Population, Total - Japan*, <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=JP> (accessed Apr. 2, 2020).

11) Gunpolicy.org, *Japan - Gun Facts, Figures and the Law*, <https://www.gunpolicy.org/firearms/region/japan> (accessed Apr. 2, 2020).

12) Report of Organized Crime in 2017, *supra* n. 2.

13) Gunpolicy.org, *supra* n. 1.

presented an entirely new way of life for early settlers emigrating from England. The gun was necessary to put food on the table, as there were no domesticated animals waiting and ready to eat. The American wilderness was considered public bounty, with its wild game open for all, so long as you could successfully hunt it.¹⁴⁾ Guns were used not just for hunting, but also for pest control and self-protection.¹⁵⁾ Further, the land being settled, while new to the colonists, was already occupied. The potential for violent conflict with Native Americans was perpetual. Life on the edge of wilderness kept American settlers constantly armed and ready for trouble.¹⁶⁾ Thus, at the time of the United States' founding, firearms were prevalent. The western frontiers were still fighting Native American tribes, civilians hunted game, many towns and cities had no established police force, and some males had militia duties.¹⁷⁾

While guns were necessary tools for survival, the concept of America as a nation of self-reliant rugged individuals that solely relied on their own firepower to the exclusion of all others may not be entirely historically accurate, with the concept of an inherent “gun culture” as part of the very fabric of America overstated. Colonial legislatures may have tried to require able-bodied men to acquire muskets ready for military use, but this was difficult to enforce. Military weapons were expensive, difficult to maintain, and hard to aim accurately. Colonists preferred the practicalities of firearms more suited for the home front than the battlefield. “Weapons were not cheap, and most Americans allocated their scarce resources to guns that were lighter to carry and more useful for shooting birds or killing vermin.”¹⁸⁾

Rather than relying on the common defense, early American colonists relied on the British military for their protection, and on American forces after becoming an independent nation. “America has not always been subject to a gun culture.”¹⁹⁾ American militiamen were armed, but largely untrained, and far from the idealized “dead-eyed, sharpshooting military force”.²⁰⁾ Rather, the concept of an American gun culture may have been cultivated much later, in the generation that lived through the onset and aftermath of the Civil War.²¹⁾ The Civil War accelerated cultural attitudes towards the necessity of firearms, as were technological developments and government support. After the war, the Union soldiers could take their guns home, and Confederate soldiers were allowed to keep their sidearms. It may be said that only at this later date “[t]he government had finally succeeded in arming

14) David B. Kopel, *The Samurai, the Mountie, and the Cowboy* 309 (Prometheus Books, 1992).

15) Joseph Blocher & Darrell A.H. Miller, *The Positive Second Amendment* 19 (Cambridge University Press 2018).

16) Kopel, *supra* n. 14.

17) Michael Waldman, *The Second Amendment* 32 (Simon & Schuster Paperbacks 2014).

18) *Id.* at 9.

19) Michael A. Bellesiles, *Arming America* 13 (Alfred A. Knopf 2000).

20) Blocher & Miller, *supra* n. 15 at 22.

21) Bellesiles, *supra* n. 19.

America²²⁾ rather than being something that had always been part of the national identity.

Whether or not creating an armed civilian population was the intent of the Founding Fathers is still debatable. When the U.S. Constitution was ratified, they realized the mistake of not including a Bill of Rights. This was rectified in 1791 with the adoption of the first ten amendments to the Constitution. Sandwiched between the right to free speech²³⁾ and the freedom from soldiers being quartered in the home²⁴⁾ was another right codified in text that is, to put it kindly, less than clear and concise in its prose. The Second Amendment has a beginning, and end, and a lot of commas, but is not really a complete sentence: “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.”²⁵⁾ For over two hundred years, this somewhat ambiguous language was understood to simultaneously permit Americans to possess firearms, but also to allow the federal government to control the ownership and use of such firearms. While the decisive *Heller*²⁶⁾ case discussed below clarified the balance between these two competing interests to a large degree, it is important to first look back to some of the major federal laws regulating the ownership and sale of firearms, as a reflection of the American legislative approach to the Second Amendment.

B. Statutory Regulation of Guns in the United States

The era of modern firearms legislation began in 1934 in response to the rising incidence of crime in U.S. cities. The federal government attempted to cut down on the proliferation of what were considered to be especially lethal weapons, which were the preferred arms of many gangsters. The National Firearms Act of 1934 approached gun control through registration and taxation requirements.²⁷⁾ The goal was for the regulations to reduce the proliferation of the types of firearms most used by criminals, such as short barreled shotguns and rifles, fully automatic guns, silencers, and unorthodox weapons like guns designed as canes. Furthermore, controls mandated a federal license for those who produced, imported, or dealt in the sale of such weapons. All aspects of the manufacture and distribution of such weapons were subject to tax. Notably, a transfer tax was imposed on each sale of machine guns, with the buyer subject to mandatory fingerprinting with the IRS.

Congress attempted to further strengthen gun registration with the Federal Firearms Act of 1938.²⁸⁾ Licensing and record keeping procedures were established for those who engaged in interstate commerce with the sale or manufacture of firearms. Despite some support for a federal registration system, no further major federal gun control law was enacted as war was

22) *Id.* at 429.

23) U.S. Const. amend. I.

24) U.S. Const. amend. III.

25) U.S. Const. amend. II.

26) *District of Columbia v. Heller*, 554 U.S. 570 (2008).

27) 26 U.S.C.A. §§ 5801 – 5872.

28) 15 U.S.C.A. §§ 901 – 910, *repealed by* Pub.L. 90-351, Title IV, § 906, June 19, 1968, 82 Stat. 234.

waged around the globe. As in the First World War a generation earlier, Americans saw U.S. arms as necessary for protecting democracy around the world.

The relative domestic peace of the immediate postwar years was not to last forever. In the wake of the violence that plagued America in the 1960's, and perhaps more specifically the assassinations of President John F. Kennedy, Malcolm X, Dr. Martin Luther King, Jr., and Senator Robert F. Kennedy, the Gun Control Act of 1968 (the "GCA")²⁹⁾ was enacted to replace the Federal Firearms Act of 1938. It was the most comprehensive federal law regulating the ownership of firearms in the United States to date. The GCA prohibited mail order purchases of all firearms, as well as the interstate sale of handguns. Furthermore, the GCA required gun dealers to be federally licensed, established stricter standards for licensing than the Federal Firearms Act, and made dealer records subject to inspection. The GCA also banned the import of small, cheap pistols referred to as "Saturday Night Specials", in the hope that limiting the number allowed into the country would help reduce the amount of crimes committed with them. The GCA further outlawed the import of firearms not designed for sporting purposes. Newly manufactured guns made and imported into the country were required to have serial numbers, and the private use of "destructive devices" such as bombs, grenades, mines and missiles were prohibited. Additionally, gun and ammunition purchases were no longer permitted for a number of specified groups, including felons, the mentally ill, illegal aliens, and minors.

The next major change to federal gun control law was the adoption of the McClure-Volkmer Amendments to the GCA in 1986, also known as the Firearms Owners' Protection Act ("FOPA").³⁰⁾ As one might surmise from the name of the legislation, the rights of gun owners were greatly expanded. The interstate sale of firearms was no longer prohibited, and gun dealers were no longer required to keep records of ammunition sales. Furthermore, the ability of federal agents to enforce the laws were also limited. While the Bureau of Alcohol, Tobacco, Firearms and Explosives could still inspect firearms dealerships, it was required to provide prior notice before inspections took place. Convicted felons could now own firearms, so long as their crimes were limited to the regulation of business practices.³¹⁾ FOPA also prohibited the manufacture of fully automatic weapons for civilian use in the country. Ownership of machine guns already in existence at the time of enactment were permitted under a grandfather clause, but the transfer of ownership of such weapons was regulated.

The Brady Handgun Violence Prevention Act of 1993³²⁾ (the "Brady Act") amended the GCA by requiring background checks before individuals could purchase handguns (and later, any firearm) from licensed dealers. The intent was to help prevent guns from falling

29) 18 U.S.C.A. §§ 921 – 931.

30) PL 99-308 (S 49), PL 99-308, May 19, 1986, 100 Stat 449.

31) Osha Gray Davidson, *Under Fire 57* (Expanded Ed., University of Iowa Press 1998).

32) PL 103-159, November 30, 1993, 107 Stat 1536.

into the hands of criminals, while maintaining the ability of law-abiding citizens to purchase them. Sales by licensed firearms sellers can be completed after the prospective purchaser passes an instant criminal background check, or if flagged for an issue, after three business days from the application if no further response is received from the FBI.

As part of sweeping law enforcement reform legislation, the Federal Assault Weapons Ban of 1994 (formally referred to as the Public Safety and Recreational Firearms Use Protection Act)³³⁾ prohibited the manufacture, sale and possession of a list of specific semi-automatic weapons, as well as other semi-automatic weapons that had two or more characteristics of “assault weapons” such as high capacity magazines, folding stocks, pistol grips, and silencer-ready barrels. Magazines holding ten or more rounds were prohibited. The ban included a sunset provision, expiring ten years from its September 13, 1994 date of effect. The law was not renewed upon expiration in 2004. However, the end of the Federal Assault Weapons Ban did not end discussion about the Second Amendment in the United States.

From the founding of the United States until 2008, individuals had no federally enforced private right to bear arms.³⁴⁾ While debate continues about certain aspects of the language of the Second Amendment, many heretofore murky considerations were clarified by the Supreme Court in the 2008 case *District of Columbia v. Heller*.³⁵⁾

C. The Defining Case Law – *District of Columbia v. Heller*

Washington, D.C. law criminalized carrying unregistered firearms, and prohibited handgun registration.³⁶⁾ While carrying handguns was prohibited without a license, separate provisions allowed for one-year licenses to be issued by the police chief.³⁷⁾ Legally-owned firearms were required to be kept unloaded and either disassembled or locked, unless in a place of business or in use for lawful recreation.³⁸⁾ This rendered them effectively useless for self-defense of the home. The law was challenged by Dick Heller, who was a special police officer authorized to carry a handgun on duty. D.C. refused his registration certificate request to keep a handgun at home. He sued to enjoin D.C. from enforcing its prohibition of handgun registration, the prohibition of having a firearm at home without a license, and the trigger-lock requirement that prohibited using “functional firearms within the home.”³⁹⁾ The District Court dismissed his complaint, but the Court of Appeals for the District of Columbia Circuit reversed, holding that D.C.’s handgun ban and requirement for home

33) Title XI, Subtitle A of the Violent Crime Control and Law Enforcement Act of 1994, PL 103-322, September 13, 1994, 108 Stat 1796.

34) Blocher & Miller, *supra* n. 15 at 13.

35) *District of Columbia v. Heller*, 554 U.S. 570 (2008).

36) D.C. Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (2001).

37) D.C. Code §§ 22-4504(a), 22-4506 (2001).

38) D.C. Code § 7-2507.02 (2001).

39) *Heller*, 554 U.S. at 576.

firearms to be non-functional violated the Second Amendment right of an individual to possess firearms.⁴⁰⁾ On appeal, the Supreme Court was tasked with examining the meaning and syntax of the language of the Second Amendment.

Justice Scalia's majority opinion analyzed the Second Amendment in two parts: the operative clauses and the prefatory clause. The Court first looked at the operative clause's meaning of the "right of the people" to keep and bear arms. The majority concluded that these are "individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body." The "militia" is referenced in the prefatory clause of the Second Amendment, but the operative clause invokes rights of "the people". When the Constitution provides for rights to "the people", it is expressly referring to individual rights. The Court thus began its analysis with a strong presumption that the Second Amendment right belongs to all Americans, rather than just the subset of the people in "militias".⁴¹⁾

The Court then addressed the specific meaning of "to keep and bear Arms". It quickly dismissed the notion that only the types of arms in existence at the time the Constitution was enacted are protected. "We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."⁴²⁾ Additionally, keeping and carrying were never construed to be limited to use in an organized militia. As such, "to bear arms" is not limited to military use⁴³⁾ and the Court concluded that in light of the text and historical context, "the Second Amendment conferred an individual right to keep and bear arms."⁴⁴⁾

Turning to the prefatory clause, "A well regulated Militia, being necessary to the security of a free State", the Court determined that "militia" refers to "all able-bodied men", whereas the federally organized militia is made up of a subset of such individuals. Further, a "free State" refers not to the several states of the union, but in context refers to a "free country". It saw no conflict or contradiction between the language of the prefatory clause and the operative clause that followed.⁴⁵⁾

The majority opinion held that precedent did not preclude this interpretation of the Second Amendment. In particular, it looked back to *United States v. Miller*, 307 U.S. 174 (1939), which rejected a Second Amendment challenge on behalf of two men indicted for the interstate transportation of an unregistered short-barreled shotgun in violation of the

40) *Id.*

41) *Id.* at 579-580.

42) *Id.* at 582 (internal citations omitted).

43) *Id.* at 589.

44) *Id.* at 589, 595.

45) *Id.* at 595-599.

National Firearms Act. The *Heller* court noted that precedent determined that a particular type of firearm was not within the right of an individual to possess, but that it did not contradict the general right of individuals to possess arms that “have some reasonable relationship to the preservation or efficiency of a well regulated militia”. In sum, the majority determined that “*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.”⁴⁶⁾

This begs the inevitable question: Exactly what types of weapons are permitted under the *Miller* decision? A right to bear arms does not mean that the government is prohibited from any regulation of weapons. The Court determined that since a traditional militia was formed of men bringing their own arms “in common use at the time for lawful purposes like self-defense”, *Miller* should be interpreted to mean “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”⁴⁷⁾ Therefore, *Miller* does not contradict the *Heller* conclusion of a general right to bear lawful arms for self-defense, but established that the prohibition of certain types of arms is constitutional.

The Court acknowledged that the individual right to bear arms was not unlimited, similar to limitations on the First Amendment’s right to free speech. “Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”⁴⁸⁾ It emphasized that “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.”⁴⁹⁾ Further, carrying “dangerous and unusual weapons” may also be limited, as they would not be the kind of weapon “in common use” as discussed above.⁵⁰⁾

The District of Columbia’s law was effectively a ban of home handgun possession, and required other firearms to be inoperable. While not overturning licensing requirements, the ban of handguns was held to be a prohibition of a class of weapons “overwhelmingly chosen by American society” for the lawful purpose of self-defense. As a result, D.C.’s ban on handgun possession in the home was held a violation of the Second Amendment, as was its prohibition against operable firearms in the home for immediate self-defense purposes.⁵¹⁾

In his dissenting opinion, Justice Stevens took exception to the majority’s interpretation of a broad individual right to possess firearms. He believed that the *Miller* decision

46) *Id.* at 622-623.

47) *Id.* at 624-25.

48) *Id.* at 595 (internal citations omitted).

49) *Id.* at 626-27. In footnote 26, the Court clarified that these prohibitions were “presumptively lawful regulatory measures” cited only as examples, rather than an exhaustive list of permissible regulation.

50) *Id.* at 627.

51) *Id.* at 634-636.

determined that the Second Amendment protected the right to bear arms for certain military purposes, but that the most natural reading of the Second Amendment does not prevent the legislature from regulating the nonmilitary use and ownership of weapons.⁵²⁾ He noted that no language in the prefatory language of the Second Amendment even mentions the civilian uses of firearms.⁵³⁾

In a separate dissent, Justice Breyer additionally noted that the majority was not clear about how it decided which arms are protected and which are not, as the majority held that the Second Amendment only protects weapons “typically possessed by law-abiding citizens for lawful purposes.” As such, the right to own a machine gun is excluded from protection, but the right to possess a handgun, which the majority defined as “the most popular weapon chosen by Americans for self-defense in the home” is protected. Justice Breyer did not see how this made sense. After all, if machine guns were one day allowed to be obtained by civilians in an unrestricted manner by Congress and the States, and machine guns then became popular to protect homes, the Second Amendment would now protect the right to own machine guns forever. In the future, newly created but highly dangerous self-defense weapons would have to be immediately banned, or else they could never be prohibited once attaining a modicum of popular use. “In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing that the Framers intended such circular reasoning.”⁵⁴⁾ Nevertheless, this is now the law of the land in the United States, in stark contrast to the gun control laws governing Japan.

IV. Japanese Gun Culture and Law

The American image of Japanese gun control is that it is a nation with no guns. But that is not an entirely accurate perception. The Japanese military and police are certainly armed. In addition, there are, compared to the United States, a rather limited number of members of the civilian population fully licensed to carry firearms, for purposes generally limited to hunting, commerce, public safety, or athletic competition. Japan’s experience with firearms dates back to some of its earliest contact with the Western world in the 1500s.

A. The Introduction of Guns to Japan and Early Regulation

Like the United States, Japan has a history of violence and war, using swords and firearms. Firearms were introduced to Japan with Portuguese trading ships in 1542 or 1543.⁵⁵⁾ By 1560, guns were being used effectively by the military. Like swords before them, guns were not widespread among the populace. “Weapons always were, and remain

52) *Id.* at 637-38 (Stevens, J., dissenting).

53) *Id.* at 643-44.

54) *Id.* at 721 (Breyer, J., dissenting).

55) Kopel, *supra* n. 14 at 27.

today, the mark of the rulers, not the ruled”⁵⁶⁾ and thus not seen as tools for the average citizen. To the contrary, Japan’s ruler, Hideyoshi Toyotomi, issued an order in 1588 that prohibited commoners from possessing swords, bows, spears, muskets, or any other type of weapons.⁵⁷⁾ The “Sword Hunt” followed, in an effective effort to remove swords and firearms from all but the nobility. Hideyoshi decreed that widespread arms ownership inhibited tax collection and promoted uprisings, but he also presented the confiscation as a religious sacrifice, as the weapons would be melted down and used as rivets in a statue of the Great Buddha.⁵⁸⁾ All gun and powder production in Japan was centralized, with firearms business permitted only with government permission.⁵⁹⁾

In subsequent years, the Tokugawa Shogunate refined gun control laws by issuing such orders as: permitting guns for pest control upon submitting a written promise to use the gun properly (1629); a prohibition of guns in Tokyo by anyone other than a gun official (1645); prohibiting gun possession by anyone other than a hunter (1662); and allowing villages without hunters to rent guns (1687).⁶⁰⁾ The Shogun Ienobu published an edict in 1711 prohibiting firearms from being discharged at random, and mandating reporting of any such firing.⁶¹⁾ The eighth Shogun, Yoshimune, reigning from 1716 to 1745, expanded punishment for firearms violations as the twenty-first edict of the 1742 “Edict in 100 Articles”. The punishment’s severity increased the closer the violation occurred in proximity to Tokyo. Anyone caught “in secret possession of a gun” within ten *ri* (a unit of measurement equal to approximately thirty-nine kilometers) of the capital would be banished to a distant island for life, with the confiscation of the violator’s lands, houses and personal property. The severity of punishment decreased the further a violator was found from the capital, with travel restrictions imposed, rather than island exile, and lesser confiscations of property. Collective punishment was also imposed, as the villages where such offenses occurred were subject to heavy fines. A carrot was also offered with this stick, with the government offering rewards to those reporting violators.⁶²⁾

When the “black ships” of Commodore Perry arrived in 1853, Japan was largely a nation without firearms. The American fleet, and the guns of its ships and soldiers, were a wakeup call to the Japanese government. A social and political upheaval for the nation was on the horizon, but an armed civilian population was not to be among the changes. With the Meiji Restoration in 1868, the new government established the Gun Control Regulation in

56) *Id.*

57) Mary Elizabeth Berry, *Hideyoshi* 102-103 (Harvard Univ. Asia Ctr., 1989).

58) *Id.* at 104.

59) Kopel, *supra* n. 14 at 30-31.

60) Sayuri Umeda, *Japan Firearms-Control Legislation and Policy*, in *Firearms-Control Legislation and Policy* 118 (The Law Library of Congress, Feb. 2013), <https://www.loc.gov/law/help/firearms-control/japan.php#f1> (accessed Apr. 2, 2020).

61) John Carey Hall, *Japanese Feudal Law* 320-321 (University Publications of America, Inc., 1979).

62) *Id.* at 707-708; 793-797.

1872, which allowed only licensed merchants to sell firearms. Former soldiers who still retained their military weapons were required to report them, and gun use was limited to hunters. Further firearms regulation culminated in the 1910 Firearms and Explosives Control Law revisions that most significantly authorized the possession of firearms and swords only with police approval.⁶³⁾

The 1920s and 1930s saw increasing military control of civilian life in Japan, with war and expansionism pushing its power through the early 1940s.⁶⁴⁾ Militarism ended when the defeated Japanese military was disarmed by American occupation forces after World War II. Private citizens were prohibited from possessing firearms, other than licensed hunting guns. A 1950 Order Concerning Firearms and Swords allowed firearms not just for hunting, but also to kill harmful animals or other enumerated public safety purposes.⁶⁵⁾ This Order was replaced eight years later by the first version of today's gun control law in Japan, the 1958 Firearm and Sword Possession Control Law (the "1958 Law").⁶⁶⁾ Various amendments to the original law have been made over the years, each slightly tightening the already strict regulation of firearms ownership. The general prohibition of civilian firearms ownership continued.

B. Current Gun Control Law in Japan

The 1958 Law does not prohibit all guns in Japan. The stark difference from the Second Amendment in the United States, however, is that the 1958 Law starts with the premise that all firearms possession is prohibited, subject to strictly limited exemptions granted by the government. Article 3 of the 1958 Law explicitly states that "[e]xcept under one of the following conditions, no person shall possess any firearm or sword" and proceeds to list the specific exceptions thereto. In this way, firearms may be utilized in the nation, but their possession is limited to categories of people, such as the police (while on duty), the military, and people who are granted permits upon application to the government for the use of firearms for a specific reason. Permitted reasons include firearms testing and research, shooting instruction, firing range operation for instructional purposes, manufacturing, athletic training for national and international shooting competitions, hunting, destruction of harmful animals, target practice, foreign nationals competing in international competitions in Japan, animal butchery, commercial fishing (to use, for example, whaling or harpoon guns), rescue signal or rescue line guns, or construction (e.g., nail guns).⁶⁷⁾

When a firearm is licensed, it is licensed only for the individual permittee's use.⁶⁸⁾

63) Umeda, *supra* n. 60.

64) Kopel, *supra* n. 14 at 33-34.

65) Umeda, *supra* n. 60 at 119.

66) Mark Alleman, Translation, *Firearm and Sword Possession Control Law*, 9 Pac. Rim L & Pol'y J. 176 (2000). All quotations and article references to the Firearm and Sword Possession Control Law, Law No. 6 of 1958 (Mar. 10, 1958) refer to this translation.

67) *Id.* at arts. 3, 4, & 6.

68) *Id.* at art. 3(3).

Additional permission must be received by firearms owners “for each firearm or sword to be possessed”.⁶⁹⁾ The firearm cannot be openly carried or transported, except for the uses related to the reason that the firearm permit was given.⁷⁰⁾ Home protection and self-defense are not among the categories of permitted uses for firearms. The 1958 Law specifically provides that licensed civilian gun owners “shall, prior to firing the permitted firearm, check the surroundings and use care so as to ensure that no damage is inflicted upon a person’s life, body, or property.”⁷¹⁾

Ordinary civilians cannot possess handguns, other than by special permission for handgun shooting contests, or as a starting signal for athletic competitions of national or international scope.⁷²⁾ If a civilian wants to otherwise obtain a gun for one of the permitted specific purposes, the type of firearm is generally limited to rifles and shotguns. Hunting applicants must be at least twenty years old and have already been in possession of the firearm or completed approved training.⁷³⁾ Rifles are generally only permitted for those who are professional hunters, need to kill animals to stop damage to a business enterprise, or already held a hunting gun permit continuously for more than ten years. The other exception to the civilian prohibition of rifle ownership is for athletes engaged in target practice for national competition.⁷⁴⁾

A person seeking permission to own a firearm must be at least eighteen years old, except that as mentioned above, the minimum age for a hunting gun is twenty.⁷⁵⁾ In addition to the minimum age requirements, enumerated categories of people are outright disqualified from gun possession, including people who are: mentally ill or incapacitated; addicted to drugs; homeless; former prisoners within the prior five years of permit application; repeat violent offenders; reasonably believed to be threats to public safety; applicants who have a person living with him or her that could reasonably be seen as a threat to public safety; at risk for suicide; under bankruptcy proceedings; stalkers; or have records pertaining to domestic violence.⁷⁶⁾

Assuming that the potential applicant is still qualified, the process to obtain a firearm license is just beginning. Applicants must take a skills test or shooting classes. The instruction must be held at an instructional firing range from a qualified instructor, using a gun provided by the firing range.⁷⁷⁾ Applicants “must submit thirteen attachments, including

69) *Id.* at art. 4.

70) *Id.* at art. 10.

71) *Id.* at art. 10(3).

72) *Id.* at arts. 4(4) and 4(5).

73) *Id.* at arts. 5-2(2)(1) and 5-2(3).

74) *Id.* at art. 5-2(4).

75) *Id.* at arts. 5(1) and 5-2(2)(1).

76) *Id.* at art. 5, and *Diet Tightens Laws on Knives, Guns*, Japan Times (Nov. 29, 2008), <https://www.japantimes.co.jp/news/2008/11/29/national/diet-tightens-laws-on-knives-guns/> (accessed Apr. 2, 2020).

77) Mark Alleman, *The Japanese Firearm and Sword Possession Control Law: Translator’s Introduction*, 9 Pac. Rim L. & Pol’y J. 165, 169 (2000).

photos, a medical certificate, a copy of his or her family register, certificates of completion of classes, etc., to the prefecture's Public Safety Commission. The Public Safety Commission then gives an eligible person a permit certificate to possess a firearm, which is valid for three years and can be renewed every three years."⁷⁸⁾ Once a license is obtained, the gun owner must store the weapon in a gun locker. Local authorities may ask about such storage at any time. Ammunition must be stored in a separate safe, and purchases in excess of three hundred bullets, or fifty for rifle ammunition, require submission of a plan for use before receiving a permit. Hunters cannot store more than eight hundred bullets in total.⁷⁹⁾

Local police have broad authority over licensed gun owners. Police may conduct a home storage inspection with prior notice if deemed necessary. When a gun owner is deemed to be a threat to others due to suspicious behavior or circumstances, police may inspect the firearm, and confiscate it if deemed necessary. Unless the gun was improperly possessed at the time of confiscation, it is returned to the owner within five days of seizure.⁸⁰⁾

Despite the strict regulations in place before one can legally purchase a gun, individuals can and do comply to receive licenses.⁸¹⁾ It is a meticulous process. It is a burdensome process. It is a process that results in almost no gun deaths per year. But it is also a process that would never pass constitutional muster in the United States. Still, there are important lessons that can be learned and perhaps adapted to the American system of firearms regulation.

V. Conclusion

The effectiveness of gun control law in the United States of America can be called into question in its own right, and is particularly abysmal when compared with the success of gun control in Japan. But the government and society of the United States is vastly different from that of Japan. America needs a system which is able to account for both its unique heritage, as well as its unique problem of crimes committed with guns. The application of laws and regulations must be seen within the greater context of the differences between American and Japanese society, making direct comparisons difficult.

Japan has no constitutional guarantee of the right to bear arms. Nothing even close to resembling this American constitutional right is, or has ever been, recognized in Japan. Even if the Japanese Constitution included language mirroring the American Second Amendment,

78) Umeda, *supra* n. 60 at 123-124.

79) *Id.* at 125.

80) *Id.*

81) To follow the details of one couple's journey to shotgun ownership, see Karl Denzer, *Behold the Four-month Process of Buying a Gun in Japan*, Wash. Post (Oct. 6, 2017). https://www.washingtonpost.com/opinions/behold-the-four-month-process-of-buying-a-gun-in-japan/2017/10/05/72283fea-2375-11e7-b503-9d616bd5a305_story.html (accessed Apr. 2, 2020).

it quite likely would be ignored to a significant degree. For example, Article 9 of the Japanese Constitution forbids “land, sea, and air forces, as well other war potential,”⁸²⁾ yet its Self Defense Forces exist in equal harmony with a pacifist constitution. Similarly, the Japanese Constitution clearly “guarantees social equality for women, creates a right to counsel, prohibits prolonged detention, outlaws courtroom use of confessions extracted under duress, and bars convictions based solely on confession. Today, every one of these provisions is routinely violated” as the Japanese Constitution “has been interpreted like a Japanese contract: regardless of what is written, the ‘agreement’ can evolve as the needs of the parties change.”⁸³⁾ Japan has made no pretense of any right of the people to bear arms. Japan’s government and its people are, for the most part, completely content to forego firearms for self-defense. It is a position that fits the historical and accepted legal norms for the country.

America was born from a group of citizens taking up arms to rebel against a government they found oppressive and unrepresentative of the people it ruled. From that point of view, it may be beneficial for the citizens of a nation that their government has a healthy fear of its people. However, in a civilized society, the people should not be afraid of each other. Living in fear of being shot in a random act of violence should never be acceptable so long as reasonable measures exist that can reduce the possibility of such an occurrence. The difficulty lies with balancing the right of the people to be armed for self-defense, while restricting the rights of those who would pose a danger to themselves or others. Neither Japan nor the United States has found that perfect balance.

Given that the United States has, under the *Heller* decision, a confirmed Second Amendment individual right to possess firearms for self-defense, America can still learn a number of lessons from Japan’s comparatively draconian gun control laws. First of all, people in the United States need to see past the illusion that more guns in the hands of more people will somehow reduce violence. In 2017, the United States suffered 14,542 homicides by firearms. “By the gun lobby’s twisted logic, Japan, which has one of the world’s strictest gun control laws, should be drenched in innocent blood. Yet, out of a population of 127 million, shooters in Japan murdered only three persons and injured only five in firearms assaults throughout 2017.”⁸⁴⁾ More can be done to keep guns from killers while keeping the rights of law-abiding citizens secure.

As Justice Scalia pointedly noted in *Heller*, the Second Amendment does not preclude the sensible regulation of firearms or the use thereof. But the scope and potential efficacy of such changes need to be discussed openly, honestly, and rationally. “The Second Amendment does not condemn us to unending gun violence. What does is our obstinate

82) Nihonkoku Kenpō [Kenpō] [Constitution], art. 9 (Japan), unofficial English translation, https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html (accessed Apr. 2, 2020).

83) Kopel, *supra* n. 14 at 36 (citations omitted).

84) Lichtman, *supra* n. 5 at 3.

refusal to engage with each other about constitutional ways to control it.”⁸⁵⁾ Rather than fighting over abolition of the Second Amendment and all firearms in the United States (both unrealistic and ultimately ineffective) versus a rejection of any and all limitations on firearms purchases and use (both irresponsible and ultimately failing to reduce illegal gun violence), America can use Japan’s negligible gun violence as an aspirational goal, while drawing inspiration from some of its licensing requirements.

The United States can try to increase firearms safety by increasing individual respect for the power of the gun. For example, Japan has rigorous training requirements prior to the issuance of a permit for firearms. The United States could similarly consider uniform and rigorous mandatory training for all firearms owners. Professional instruction could be required in how to operate, maintain, and store firearms. A minimum level of marksmanship could also be considered. If one of the purposes of owning a firearm is for self-defense, owners should be able to shoot properly. A good guy with a gun is not a good guy if he takes down innocent bystanders while trying to incapacitate a bad guy with a gun.

Japan also requires firearms applicants to submit psychological evaluation results. This may be overly intrusive, but creating a confidential database of individuals with severe psychiatric illnesses may be a method for consideration to reduce firearms acquisition by those who are at risk to harm themselves or others. Similarly, expanding a more robust national background check that refuses sales or permits to anyone convicted of crimes of violence, or under restraining orders, or are otherwise considered “at risk” pending judicial determination, could go a long way towards reducing gun violence, while not disturbing the Second Amendment rights of ordinary citizens.

It may seem that any new gun control law in the United States is pointless, given the sheer number of firearms already in circulation. But if the problem is viewed in the long-term, changes in the law may gradually make a difference over time. The above suggestions are not meant to be either exhaustive or definitive. Rather, they are points that should be discussed as a part of a measured response to the unacceptable levels of annual deaths by firearms in the United States of America. Japan’s gun control laws in their entirety are not suitable for direct application to the United States. However, Japan’s low rates of deaths from firearms should be a target on which America constantly sets its sights.

85) Craig R. Whitney, *Living with Guns* 250 (Public Affairs 2012).