Accessed 5/25/2021 at https://www.newyorker.com/magazine/2021/05/31/from-guns-to-gay-marriage-how-did-rights-take-over-politics.

A Critic at Large
May 31, 2021 Issue

From Guns to Gay Marriage, How Did Rights Take Over Politics?

The N.R.A., the Supreme Court, and the forces driving the country's most intractable legal debates.

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May 24, 2021

"You came through for me, and I am going to come through for you," Donald Trump said. It was 2017, and he was in Atlanta, speaking at a meeting of the National Rifle Association—the first time in more than thirty years that a sitting President had addressed the group. Unlike his recent predecessors, Trump did not claim to enjoy shooting skeet (Barack Obama), or doves (George W. Bush), or ducks (Bill Clinton), or quail (George H.W. Bush). His connection to the group was purely political. "We want to assure you of the sacred right of self-defense for all of our citizens," he told the members. "As your President, I will never, ever infringe on the right of the people to keep and bear arms—never, ever."

The N.R.A. had spent decades teaching politicians to talk like this. The organization was founded, in 1871, as a kind of non-governmental training agency, but it transformed first into a hobbyist club and then into a political-advocacy group until, by the early twenty-first century, it was more or less indistinguishable from the conservative movement and the Republican Party. In a partisan country, "the sacred right of self-defense" became yet another partisan issue, and political scientists have spent years trying to figure out whether the power of the N.R.A. has been more a cause or an effect of this evolution. Four years after Trump's address, both the organization and the former President are much diminished, at least for the moment. While Trump regroups in Florida, the New York attorney general is suing to dissolve the N.R.A. for a series of financial scandals that seem to involve kickbacks, phantom jobs, and the misuse of private airplanes, and that together create the impression of an organization scrambling to deal with a problem that its founders surely did not foresee: having more money than it could responsibly spend.

The N.R.A. thrived, until recently, by harnessing the power of political abstraction. For decades, the group found ways to portray its project as a defense of liberty, shifting its focus from guns to gun rights, and from gun rights to rights more generally. Gallup polls suggest that the number of Americans living in gun-owning households has trended down slightly, from fifty per cent in 1968 to forty-two per cent last year. But, for an organization that seeks mainly to energize one of the two major political parties, minority status is not necessarily a problem. In a new book, "Firepower" (Princeton), the political scientist Matthew Lacombe shows how the N.R.A. succeeded by embracing its subcultural identity, teaching its people to think of themselves as a "persecuted minority under attack." In 1989, the group sent members a dire warning, saying that anyone who owned a semi-automatic firearm—"30

million law-abiding Americans," the N.R.A. estimated—had reason to fear proposed legislation. "You must act now," the organization declared, "before you become a criminal."

Lacombe's book is primarily descriptive, not prescriptive, although he does not conceal his disapproval of the N.R.A. agenda. He notes that the organization has blocked countless gun regulations that score well in opinion polls, and he worries that this kind of activity "subverts the will of the majority." Most people agree, however, that the "will of the majority" sometimes deserves to be subverted, even if we disagree about when. In 1994, the law professor Lani Guinier published "The Tyranny of the Majority," a sharp collection of essays arguing that certain minorities, especially racial minorities, had the right not just to vote but to meaningfully share in political power, rather than submit to "majority rule." (The book was published after Guinier lost a high-profile political battle: President Clinton nominated her as the Assistant Attorney General for Civil Rights, and then withdrew the nomination in the face of controversy; critics said that Guinier espoused reforms that amounted to a "racial spoils system" for Black politicians.) Guinier and the leaders of the N.R.A. had little in common, but they shared a belief in the importance of minority rights. Especially since the sixties, advocates of all sorts have learned to present their causes as demands for the recognition of their civil rights. "As long as *your* rights to freedom are denied, *ours* are not secure," Rupert Richardson, the president of the N.A.A.C.P., said in 1993, when she addressed a landmark rally for gay rights. Using similar language, a Christian activist group told the *Times* that the rally was a threat to "the silent majority of Americans whose individual rights are at stake."

Jamal Greene, a legal scholar at Columbia, thinks that all this talk about rights has gone too far. In a provocative new book, "How Rights Went Wrong: Why Our Obsession with Rights Is Tearing America Apart" (Houghton Mifflin Harcourt), he pushes back against what he calls "rightsism," which in his view makes judges too powerful, and makes it harder for the rest of us to find reasonable solutions to our political problems. When he mocks our tendency to "kiss the hems of the robes of judges," Greene echoes the view of conservatives like the late Justice Antonin Scalia. "It's not up to the courts to invent new minorities that get special protections," Scalia said, in a 2013 speech. The remarks were widely interpreted as a message to his colleagues, who were growing more receptive to the idea that gay people had a constitutional right to marry their partners. But Greene is no conservative; his book is driven by liberal-minded concern about racism and inequality, and is aimed at readers who share this perspective. (Greene happens to be the brother of a prominent social commentator: the rapper Talib Kweli, who once rhymed, "The cops flashing the lights, or passing on bikes/Ask for your rights and they beat you like 'The Passion of Christ.'") To Greene, the story of the N.R.A. is just one more example of how seductive—and how destructive—the language of rights can be.

Like many of our sacred texts, the Bill of Rights, ten amendments added to the Constitution in 1791, is a familiar document that comes to us from a deeply unfamiliar world. Greene writes that the First Amendment—which forbids Congress to prohibit the "free exercise" of religion, or to curtail "the freedom of speech," and which today constrains the regulation of everything from political campaigning to pharmaceutical advertising—was originally meant to shield not individuals but "local political institutions" like churches from federal interference. Arguments about the Second

Amendment, which guarantees “the right of the people to keep and bear Arms,” often center on the significance of its opening phrases, which stipulate the importance of maintaining a “well regulated militia.” One purpose of such a militia, in post-Revolutionary America, was to put down rebellions of enslaved people, who in some states constituted a large portion of the population; in 1998, the legal historian Carl Bogus published an influential essay suggesting that this was the hidden purpose of the Second Amendment. “If there should happen an insurrection of slaves,” Patrick Henry declared, during a debate over ratification, in 1788, the states “ought to have power to call forth the efforts of the militia, when necessary.”

The N.R.A. does not quite date back to the militia era. It was founded just after the Civil War, in New York, and its mission evolved in synch with its complicated relationship to the government. Especially in its early years, the N.R.A. provided marksmanship training, partly to make sure that citizens would be able to help the military defend America. Lacombe refers to the organization’s approach during those decades as “quasi-governmental,” although the government did not always see it that way. Starting in the nineteen-thirties, the N.R.A. turned its attention to fighting proposed laws that would limit the sale or use of guns. Lacombe analyzes the language used in the group’s magazine, *American Rifleman*, which cast gun owners as patriots crucial to the project of defending America. The N.R.A opposed mandatory gun registration, insisting that it could be a first step toward confiscation; in an editorial from 1940, the group suggested that British gun regulations had left that country “disarmed and gun-ignorant,” and therefore vulnerable to both criminals and foreign invaders.

One of Lacombe’s most surprising findings is that N.R.A. messages did not always foreground the constitutional right to bear arms. Using a technique called automated topic modelling to track the group’s evolving messages, he found that the Second Amendment became a major focus of the N.R.A. only in the nineteen-seventies. In the aftermath of the assassination of President John F. Kennedy, debates over gun laws were growing more heated, and the group’s reputation more polarizing. As a consequence, the N.R.A. began to deëmphasize the theme of “military preparedness.” The group spent less time asking what citizens could do for their government and more time asking what their government might try to do *to* them. N.R.A. editorials that cited the Second Amendment, Lacombe found, tended to portray guns as a means with which to resist “tyranny from one’s own government.” The group’s opposition to gun restrictions grew closer to total; the right to bear arms was “America’s first freedom,” the one right that prevents the government from taking away all the others.

Rights exist to protect minorities, and so rights groups typically conceive of themselves as minority-rights groups, defending a besieged few from a threatening many. This explains why, paradoxically, the N.R.A.’s embrace of Second Amendment arguments led the group to become *less* focussed on guns and more focussed on partisan and cultural concerns. In 2016, the group started a video network, NRATV, which sometimes made headlines with provocations wholly unrelated to firearms; one notorious segment mocked a diversity initiative on “Thomas & Friends,” the children’s show about talking locomotives, by depicting the trains wearing Ku Klux Klan hoods. (NRATV was shut down in 2019, amid a growing dispute between the N.R.A. and the advertising agency that helped run the network.)

In Trump, the N.R.A. found first a candidate and then a President who shared its cultural preoccupations, even if he didn't always share its staunch opposition to new gun restrictions. After seventeen people were killed at a school shooting in Parkland, Florida, in 2018, Trump announced that he would support a law allowing police officers to disarm anyone deemed dangerous, without an initial court order. "Take the guns first, go through due process second," he said, during a televised meeting. His Administration never pursued that proposal, but later that year it unilaterally banned bump stocks—mechanical accessories that enable semi-automatic guns to fire continuously, like machine guns, which are much more heavily regulated. The N.R.A.'s response to the ban was notably mild: a spokesperson told the Associated Press that the group was "disappointed." A much stronger response arrived earlier this year from an appeals-court judge, who ruled, in an ongoing lawsuit over the ban, that the Trump Administration had overstepped its authority, possibly in a way that could threaten "the people's right to liberty."

The N.R.A.'s legal strategy was evidently well chosen. Today, Americans have freer access to firearms than the citizens of any other country in the world, and the Supreme Court recently accepted a case that may clarify precisely where, and how, we are entitled to "bear arms." The historian Carol Anderson thinks that America's singular relationship with guns reflects its singular history of racism. In "The Second: Race and Guns in a Fatally Unequal America" (Bloomsbury), she writes that the Second Amendment was "designed and has consistently been constructed to keep African Americans powerless and vulnerable." Anderson's book is a bracing reminder that the defense of rights is not necessarily a liberatory project. She notes that a 1792 law, meant to encourage the kind of "militia" formation called for by the Second Amendment, required every "free able-bodied white male citizen" to arm himself. In the nineteen-sixties, armed demonstrations by the Black Panthers in California inspired Ronald Reagan, then the governor, to sign the Mulford Act, which made it illegal to carry loaded firearms in public. The N.R.A. supported the law, and, according to a contemporaneous newspaper account quoted by Anderson, an N.R.A. representative was satisfied that the law would "not affect the law-abiding citizen, sportsman, hunter, or target shooters." (The unmistakable implication was that no member of the Black Panthers could be described as a "law-abiding citizen.") And Anderson begins her book with the story of Philando Castile, the Black man who was shot to death by police in 2016, during a traffic stop, after telling them that he was carrying a gun, for which he had a permit. The killing set off a wave of protests, but the N.R.A. conspicuously declined to join in. For Anderson, this is a sign that the organization did not truly support gun rights for everyone—that its agenda was merely an extension of the eighteenth-century white-militia movement.

The Mulford Act, though, was not an expansion of gun rights but a restriction of them, and its passage was proof that such restrictions have sometimes targeted Black citizens. Black people may be particularly burdened, too, by some of the most broadly popular current restrictions, like the laws that bar felons from owning firearms, and laws meant to tamp down urban violence. The sociologist Jennifer Carlson has written about an ongoing "war on guns," which in many ways resembles the war on drugs, and which is likewise "disproportionately fought in urban America against black and brown boys and men." Anderson argues that the Second Amendment is "steeped in anti-Blackness," but it does not follow that every effort to curtail its protections is therefore pro-Black.

Jamal Greene shares Anderson's suspicion of Second Amendment activism, which seems to him a particularly egregious example of the "rightsism" that he deplores. He quotes Wayne LaPierre, the longtime N.R.A. leader, saying that the group's "absolutist" view of gun rights reflects the vision of the Founding Fathers, and he offers a one-word response: "rubbish." Greene notes that, at the time the Constitution was drafted, gun rights, like other rights, were not treated as sacrosanct: a number of states enshrined the right to bear arms in their constitutions while simultaneously enforcing gun restrictions. The Bill of Rights, which was written largely to protect the states from federal interference, gave rise to countless mutually incompatible rights claims, and courts were often asked to decide how to reconcile them. As Greene shows, courts responded not just by enumerating and sometimes creating new rights but by constructing hierarchies of rights, to help decide which should predominate.

One of our most important rights turns out to be one not mentioned in the Constitution: the right to privacy. In 1965, when the Supreme Court struck down a law banning the sale of contraceptive drugs and devices, Justice William O. Douglas wrote that the government was obliged to respect "the notions of privacy surrounding the marriage relationship." (The right to buy contraception was later extended to non-married people.) Douglas described the right to privacy as a "penumbral" right, necessary to shield individuals from the harsh glare of "government intrusion"; in a concurrence, Justice Arthur Goldberg wrote that the right to privacy was "a fundamental personal right," and that the government was therefore forbidden, by the Fifth and Fourteenth Amendments, to deprive anyone of it "without due process of law." Less than a decade later, the Court cited this right to privacy when it struck down anti-abortion laws nationwide, and a wide range of advocates learned a strategic lesson: to prevail in the Supreme Court, it was useful to be able to claim that the right you were seeking to defend was "fundamental."

Greene doubts that Supreme Court Justices are in a position to credibly tell us which of our rights are "fundamental." And he worries that their approach has turned us all into fundamentalists, debating our disagreements in terms that suggest our basic freedom is constantly at stake. He alludes to the case of Masterpiece Cakeshop, the Colorado bakery that refused to create a cake for a same-sex wedding and was ordered by the state to change its policy. The Supreme Court eventually ruled that the baker's First Amendment right to the free exercise of religion had been violated. In Greene's view, our obsession with rights encouraged advocates on both sides to view a complicated case as a simple referendum on liberty, pitting gay rights against religious freedom. "A Christian baker who refuses to bake cakes for same-sex weddings is compared, in court, to Jim Crow-era segregationists," he writes. "The couple who want only to be served on equal terms are likened to a Babylonian king persecuting religious dissidents who refuse to prostrate themselves before him." He worries that the endless search for "fundamental" rights inevitably makes disputes like this one more intractable.

Most people know that American gun laws are anomalous. But Greene argues that our broader approach to civil rights is also anomalous. In many other countries, he notes, judges are freer to consider context, and to seek compromise. They can weigh the value of free expression, say, against the cost of possible harms—which is the sort of "balancing" test that American jurisprudence generally prohibits. Greene assumes that our various rights are bound to conflict, and he wants courts to settle

these questions not by determining which rights are fundamental but by asking smaller, more factual questions: “Is the government motivated by bigotry? Is it responding to evidence?” He calls Masterpiece Cakeshop a “hard case,” and says that, in some instances, courts should be more willing to “negotiate,” thinking less about abstract questions of fundamental rights and more about whether the parties involved are behaving reasonably. He believes that it is often reasonable for colleges, private or public, to punish faculty or students who make “racist or sexist” remarks. In his view, institutions of all sorts should be granted more “leeway” to fight historical discrimination by explicitly favoring Black and Latino applicants. And he reminds readers that, in 1952, the Supreme Court upheld the conviction of a man who had distributed an anti-“Negro” pamphlet, in violation of an Illinois law banning the “exhibition” of printed matter that subjected “citizens of any race, color, creed or religion to contempt, derision, or obloquy.” That decision, he notes, would be “inconceivable” in today’s Supreme Court, which consistently holds that the First Amendment protects our right to virtually all political speech, no matter how bigoted. Yet he suspects that, in some cases, our freedom to offend is not worth the price we pay for it.

Rights that are unlimited in scope must be limited in number. Greene argues that courts are reluctant to enumerate new rights, perhaps because any new right, broadly interpreted, could have far-reaching and unpredictable effects, in the way that “the right to privacy” effectively legalized not only contraception but also abortion and, decades later, in Lawrence v. Texas (2003), gay sex. Greene criticizes the Court’s refusal, in 1987, to interfere with a death-penalty sentence on the basis of statistical evidence of racial disparity in such sentences. Justice Lewis Powell wrote that doing so might threaten “the principles that underlie our entire criminal justice system.” Greene thinks that this kind of fear helps explain why American courts, unlike a number of their global counterparts, have mostly declined to recognize positive rights, such as “the right to food or shelter or health care.” He thinks that it also may explain why courts are often unwilling to tackle discrimination that occurs on the basis of physical or mental difference. He worries that the Americans with Disabilities Act, which was passed in 1990, might be “vulnerable,” because the Supreme Court has previously limited Congress’s ability to prohibit discrimination. (The Court has found that, in some circumstances, citizens have a right to discriminate.) Greene imagines a world where lawmakers could act creatively to address all kinds of unfairnesses—for example, the way our society favors people with a capacity for “logical-mathematical and verbal-linguistic intelligence.”

Greene’s approach would oblige both liberals and conservatives to accept compromises that they might find abhorrent. He notes that when the Court found that the right to privacy implied a right to abortion, for instance, it was “denying that a fetus could be a subject of constitutional concern.” As a result, abortion in America is largely unrestricted in theory but not always readily accessible in practice, mainly because of our endless fight over state-level restrictions. He thinks that we could learn something from Germany, where laws consider the interests both of pregnant women and of fetuses. Abortion is decriminalized there, but generally only in the first trimester of pregnancy, and seekers are required to speak with a counsellor; there are special benefits and rights available to new birth parents as well. Because there is no possibility of a court offering total vindication of the right to choice or the right to life, each side is more willing to live with the compromise. This is the sobering underlying

message of Greene's book, aimed at a wide range of advocates: you probably won't win. The United States is a big country, full of obstreperous citizens who claim, or would like to claim, a broad array of rights that can't all be recognized. In his view, the only way for us to live together is to guard our rights a little less jealously, resigning ourselves to a future in which we are entitled to most of what we want, but not all of it.

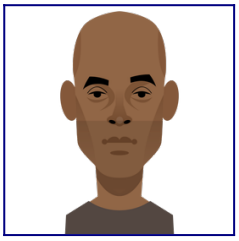
There is another way to think about what Greene calls the "rights explosion." For many decades, the advance of gay rights in America was slow and fitful. In 2004, the year after Lawrence v. Texas, President George W. Bush ran for reëlection while promising to amend the Constitution to ban same-sex marriage; four years later, Barack Obama, during his successful Presidential campaign, affirmed that marriage was reserved for "a man and a woman." But in 2015 the Supreme Court ruled that same-sex couples had the right to marry, and suddenly the issue was settled and political opposition melted away. There has been little effort to overturn this right, even among leaders who spent decades fighting against gay rights. L.G.B.T.Q. people in America still face discrimination and hardship. But the legalization of same-sex marriage was the kind of sweeping and definitive victory that naturally leads advocates to wonder how many more might be attainable.

Greene views the "rights explosion" as an engine of political division, but it is not clear that American politics was significantly less divisive before it or would be less divisive without it. On its own terms, certainly, this explosion has been a grand success. Speech rights, religious rights, gun rights, and privacy rights have all been expanded and defended; it is hard to argue that any previous generation enjoyed broader rights than we enjoy today. Somehow, this state of affairs has left us feeling "fractured," as Greene puts it, and dissatisfied. Why?

One answer is that the American way of adjudicating rights is inherently tantalizing: full vindication—a court decision that would radically limit the right to abortion, or the right to own a gun—is always within sight, though rarely within reach. Even the N.R.A., having almost always prevailed in its argument that gun ownership deserves broad protection, has largely declined to celebrate such victories, concentrating instead on the possibility that some of these hard-won rights could be taken away. Greene would argue that our system is built to generate high-stakes court fights, which keep everyone anxious. In the years after the "privacy" cases, some liberals grew accustomed to thinking of the Supreme Court as an ally, often (though certainly not always) defending unpopular rights against legislators and local officials eager to violate them. But liberals are now less likely to think of themselves as members of a minority than they were when Lani Guinier wrote her defense of minority rights, perhaps because of a sense that demographic change is turning racial minorities into a national majority. At the dawn of the nineteen-nineties, Democrats had lost three straight Presidential elections, and the Supreme Court was perceived as liberal-leaning. Nowadays, Democrats have won the popular vote in seven of the past eight Presidential elections, and the Supreme Court, where Trump and Bush appointees predominate, is conservative-leaning. It is probably no coincidence that there seems to be, on the left, a newfound appreciation for the power of democracy, and a newfound skepticism of judges—"unelected judges," as Greene sometimes calls them, borrowing a term that conservatives once liked to use, when they were fighting what they called "judicial activism."

Observing these reversals, one can see that what Greene calls “rightsism” is less a philosophy than a strategy, by which a minority cause can achieve a fuller political victory than might otherwise be possible. Structural and cultural shifts have convinced many on the left that their causes are broadly and increasingly popular, and that strong rights protections have become a political obstacle. But it is rash, especially in a big and insubordinate country like this one, to imagine that appeals to reasonableness and popularity will always serve as a more reliable guide to justice than the language of the Constitution. Yes, the N.R.A. used the language of rights to defeat laws that many people say they support. And, yes, America has vastly more guns than any other country, and vastly more gun violence as well. But this is how rights often work: they protect things that most people think don’t deserve protection at all. It is possible that, in the decades to come, the long expansion of gun rights in America will begin to be reversed—even Supreme Court Justices, after all, are not wholly insulated from the voters who elect the Presidents who nominate their replacements. One lesson from Carol Anderson’s book is that such a reversal would likely come with its own costs and benefits, unequally shared. But it seems possible, too, that some of the fiercest opponents of gun rights may one day find themselves championing unpopular causes of their own, and hoping not to compromise but to win. ♦

Published in the print edition of the May 31, 2021, issue, with the headline “Guns and Butter.”



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