

A Constitutional Perspective on Modern Gun Control

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I. Abstract

Using a variety of techniques for interpreting the Constitution including modernism and the use of data and statistics, textualism, historic context, and original intent, this paper analyzes the constitutionality of modern gun control. Many of the monumental gun control cases that have moved through the Supreme Court and become precedent are used in conjunction with data collected surrounding gun control laws to come to the conclusion that US citizens do have a fundamental right to use firearms for self defense, but that they do not have unrestricted access to said firearms. The balance between federal and state powers is used to determine when and where firearm legislation is allowed to be passed and what specific individuals have the right to own firearms.

II. Introduction

Gun control and firearm ownership rights are some of the most controversial topics in the US currently, especially in relation to a person's Constitutional rights. Over the past couple decades there have been a number of Supreme Court cases that have proved to be monumental when it comes to interpretation of the Second Amendment and the balance in power between the federal government and the states. Since its ratification in 1791, times have drastically changed and technology has changed along with it. The United States doesn't (for the most part) rely on farmers and commonfolk to defend the nation, we instead have a large and powerful military that is readily capable of defending the country from foreign threats. In relation to the Second Amendment, some interesting questions are raised as to what constitutes a "well regulated militia" and whether or not the Second Amendment guarantees the right to own weapons and if so, what weapons this entails. On the other hand, there has been a dramatic rise in violent crime in recent times within the United State's borders which raises some questions regarding the constitutionality of self defense. The US court system has been put in an interesting position where it needs to evaluate the balance between rights and powers and whether putting restrictions on and/or banning certain weapons is in the best interest of the people of the United States. With the rise of technology and data collection abilities, we now have more data

surrounding gun usage than any other time in history. This data is currently being used to evaluate which areas of the legislature might benefit the most from gun control, however there are some opponents to this that express concerns over statistics being taken too far and violating certain areas of the Constitution. This paper aims to use a combination of textualism and modernism coupled with current data to answer the question: to what extent does the Second Amendment protect an individual's right to bear arms over public safety, and how should it be interpreted in the context of the modern age with advancements in technology and an improved understanding of mental health?

III. The Second Amendment and its Historical Context

Before examining any argument considering gun control, a firm understanding of the Second Amendment is of the utmost importance. The Second Amendment is short and to the point stating

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 (U.S. Const. amend. II).

This text does not reference what guns a person has the right to own or how a person is allowed to obtain one, it simply states that citizens have the right to own and bear arms in order to maintain a well regulated Militia. Using the Revolutionary War as a frame of reference, one can come to the conclusion that the purpose of including this clause in the Bill of Rights was to maintain a military presence to deter foreign threats. The majority of the Revolutionary Army consisted of civilian forces who rallied under one cause: fighting tyranny. The Framers decided that in order to maintain their freedom from tyranny, every citizen had the right to own guns.

Interestingly enough, the Second Amendment was based on the English Bill of Rights ("Amdt 2.2, Historical...") which found its way into several state constitutions that expressly allowed their citizens to bear arms under the pretext of self defense and defense of the state. It is quite interesting to observe that the authors of the Bill of Rights decided to exclude any commentary on the role of firearms in self defense, ultimately leaving this issue up to the interpretation of the Supreme Court.

IV. Interpretations of the Second Amendment

Due to the brevity of the Second Amendment, the interpretation of gun rights lies almost solely in the hands of the Supreme Court. Following the Civil War and the ratification of the 14th Amendment, there have been several landmark cases surrounding gun control and the Second Amendment that have shaped what gun rights look like today.

The National Firearms Act

One of the first cases that still has precedence today is the *United States v. Miller* (1939). This case started as a man from Arkansas being convicted of violating the National Firearms Act (NFA) for transporting sawed-off shotguns across state borders. The federal district court found that the NFA was unconstitutional at which point the government appealed and the case was taken to the Supreme Court. The district court's ruling was ultimately overruled on the grounds that a sawed-off shotgun does not have "a reasonable relationship to the effectiveness of a well-regulated militia under the Second Amendment" ("*United States v. Miller*..."). It is again interesting to note that self defense was not cited as a reason for possession of a firearm, only the necessity to maintain a militia. Following the ruling on this case, the decision of the court has been used to extend to firearms other than sawed-off shotguns, primarily weapons defined in the NFA Section § 5845 part A. All of the weapons and weapon modifications listed in this section have been deemed unnecessary to regulate and maintain a militia via the ruling of this case. Guns included in this list are short barrel rifles and shotguns, fully automatic guns (machine guns), and silenced weapons. Full length rifles and shotguns, as well as handguns are not covered by the NFA, and thus are considered relevant in relation to maintaining a well regulated militia.

Modern Supreme Court Cases

The *United States v. Miller* case is one of the only historical firearm specific cases that still has relevance today, but there have been several recent cases that have a large impact on gun control in the United States. These modern cases covered issues including the use of firearms in self defense, the legality of the Second Amendment in reference to the 14th Amendment, the power of the government to strip people of firearms after committing crimes, and deciding on what is considered a firearm in relation to self defense.

District of Columbia v. Heller

Prior to 2010, provisions were added to the District of Columbia Code that made it illegal to carry an unregistered firearm in public and prohibited the registration of handguns. In addition

to the provisions regulating firearms in public, the code also stated that owners of lawfully owned firearms must be kept disassembled or kept with a trigger lock. The code did allow for a person to apply for a one year permit for a handgun which could be approved by the Chief of Police. After being denied a permit for a handgun, Dick Anthony Heller sued the District of Columbia citing that his second Amendment rights had been broken and the case eventually reached the Supreme Court. The question in concern was whether restricting the licensing of firearms and requiring firearms to be kept in a nonfunctional state violated the Second Amendment. Upon deliberation, the court found in a split decision that these provisions in the District of Columbia Code were unconstitutional on the grounds that maintaining a well regulated militia doesn't solely refer to the military, it instead guarantees "an individual right to possess and carry weapons in case of confrontation" ("District of Columbia v. Heller..."). This decision was monumental for gun rights and has been part of public controversy ever since. Prior to this case, any legislation passed regarding self defense, specifically self defense in relation to firearms, was passed and enforced by the states, but following this decision, the states are required to permit some ownership of firearms in the name of self defense.

McDonald v. Chicago

Prior to the ruling on the Heller case, Chicago had enacted several gun laws that many residents were unhappy with but were unable to overturn. Following the ruling on the Heller case where the Supreme Court explicitly stated that the Second Amendment guaranteed a person's right to own a firearm in the name of self defense, these unhappy residents were able to file suit against Chicago and sue to overturn the gun bans. The problem was that there had been no definite ruling on whether or not the Second Amendment was applicable to the States via the 14th Amendment. After arguing that the Second Amendment was in fact covered by the 14th Amendment, the case eventually found its way in front of the Supreme Court where a decision was made in favor of McDonald. The court cited that

"Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in Heller, we held that individual self-defense is "the central component" of the Second Amendment right" ("McDonald v. City of Chicago...").

Alongside the ruling in the Heller case, the ruling in this case defined what rights a person has when it comes to the ownership of a firearm and guaranteed that those rights will not be infringed upon by the states.

V. Modern Gun Control Legislation

Although it has been found that there is a constitutional right for people to own firearms, there is not a constitutional right for a person to own any weapon that they want. When we look at rulings of the Miller and Heller cases, we can come to the conclusion that any weapon that has a reasonable relationship to the right of self defense is protected under the Second Amendment. The Miller case protects the right to firearms in order to maintain a well regulated militia while the Heller case interprets regulating a militia as the right to self defense. One method of defining which firearms belong to the class of providing a 'reasonable right to self defense' is using the NFA. As previously mentioned, the NFA restricts people from owning weapons such as machine guns or sawed-off shotguns. On a federal level, the NFA is the driving legislation defining the legality of firearms, but at a state level there have been countless attempts to impose firearm bans and restrictions, some being allowed and others being declared unconstitutional.

The state of California has long since been known to pass legislation restricting and prohibiting the ownership of firearms, and has oftentimes found itself in federal court defending the constitutionality of said legislation. California leads the nation in passing what are known as "common sense gun laws" which attempt to use statistics and data to analyze which categories of weapons and what actions need to be regulated. Some examples of legislation passed that is under scrutiny by federal courts is *Nichols v. Newscom* concerning the rights of an individual to carry a loaded weapon in public and *Floyd v. San Jose Police Dept.* which challenges the legality of a California Law restricting carrying loaded firearms in a vehicle ("Defending California's..."). Even though these cases are being appealed in federal court, California is fighting to maintain their strict gun laws.

On a separate note from putting general restrictions on firearms, there are both federal and state laws that put restrictions on gun ownership if an individual has committed a crime. In general, if a person has committed a felony, they forfeit their right to bear arms. Similarly, any person that is convicted of domestic violence is no longer able to own a firearm, and there are different provisions in each state's laws that further restrict gun ownership after committing certain crimes (Pirius). There are a lot of constitutional questions that arise around criminals being allowed ownership of firearms. One school of thought considers that when the Second Amendment references "the people" it is specifically referencing responsible and law abiding

citizens. Under this frame of reference, one might consider that felons and certain criminals have abandoned their civic responsibilities and thus don't qualify as "the people" under the Second Amendment (Charles). This is only one of many views on the issue, and the answer really lies somewhere in the discussion on the balance between rights and powers. In the decision from the Supreme Court case *Caron v. In The United States*, it was affirmed that all felons do not have the right to own or possess firearms which ultimately trumps all arguments on the rights of certain criminals being allowed access to firearms on the federal level ("*Caron v. United States...*").

Being able to determine whether a person is able to buy a firearm, they must first have a background check to determine whether they have been convicted of felony or domestic assault charges. Depending on the amount of effort put into a background check and other circumstances that may arise, getting permission to buy a firearm can take a decent amount of time, and there are some that argue that imposing long waiting periods on the purchase of firearms is unconstitutional. There are currently states that have a mandated waiting period in the purchase of all firearms including California, Rhode Island, Colorado, and a few others (Paul). The reasoning behind many of the legislatures in these states passing the waiting period laws are to prevent both self harm and harm to others, hopefully putting a deterrent on spur of the moment decisions. When it comes to the length of the waiting period, there have been many claims that having any waiting period at all violates the Second Amendment. Just recently, the Rocky Mountain Gun Owners (RMGO) challenged the three day waiting period recently passed by the Colorado legislature but the challenge was denied by a federal judge citing that statistical evidence suggests that the ban would save upwards of 100 people in 2023 and thus suggesting that the Colorado government has a controlling interest towards life that outweighs the constitutional questioning in this case.

Recently, gun control relating to people with a history of mental illness has become more prominent. Whilst there haven't been any cases in the Supreme Court that specifically reference mental illness in respect to gun control, the rulings from the *Heller* and *McDonald* have been interpreted to mean that States do have the right to refuse ownership of firearms to the mentally ill. Precedent exists that allows a person to be involuntarily committed to a hospital if they are mentally unfit to be in public, and this same reasoning applies to a person's ability to purchase a firearm. Mental illness and disability fall under the due process clause of the 14th Amendment

meaning that at a state level, laws passed that bar people of an unfit mental state from possessing, selling, or purchasing a firearm are constitutional.

VI. Gun Statistics and Data

With the rise of the internet and increased ability to track and analyze crime data, there are many that believe that statistics should play a larger role in both passing laws and evaluating the constitutionality of laws previously passed. As previously discussed, there are states and legislatures that have and continue to use statistical data in evaluating whether or not certain legislation should become law. Some specific data that can be collected includes homicide rates in relation to the use of different classes and types of firearms, suicide statistics and how likely a likely someone is to use each firearm to commit the act, and specific numbers about the circulation of firearms in an area and the likelihood that that firearm is used to commit a crime.

Effect of Waiting Period on Homicides

Many proponents of gun control push for there to be a longer waiting period to purchase a firearm in order to deter both suicides and spur of the moment crimes. This idea can be backed via a few studies including one published in the PNAS Journal that found that imposing a waiting period reduces the number of homicides by up to 17% (Luca). The data collected on this study covered the 45 year time span between 1970 and 2015 and took into consideration different states and when/if a gun control law was put into place. This study uses behavioral economics to predict how a person acts following a stressful and anger inducing situation and suggests that if a person has limited access to a firearm in the time before the event happens and the time that it takes them to ‘cool off,’ they are less likely to take action. This idea is only applicable when the person in question doesn’t already own a firearm and is generalized to all firearms, but a 17% reduction in homicide is statistically significant and coupled with the national average for homicides, the study suggests that roughly 750 people could be saved from homicides per year if all 50 states instituted a waiting period.

Effect of Handgun Ban on Homicides and Violent Crime

Examining another form of firearm regulation that consists of regulating and banning certain classes of weapons from being purchased, sold, or transferred some interesting results come up. In the District of Columbia, such a law was enacted in 1975 called the Firearms Control Regulation Act of 1975 (the same act that was overturned in Heller). During this time

period, data was collected surrounding homicide rates which yields some interesting results. Using a month by month measurement metric, researchers were able to find that following the passing of this act there was a 25% decrease in homicides and 23% decrease in suicides (Loftin). Another study that analyzed violent crime rates in major cities with populations over 25,000 found that there were only a select few gun control measures that seemed to have a substantial effect on crime rates. One measure that did seem to have an effect was requiring alcoholics to obtain a license to purchase a firearm where a substantial decrease in robbery and homicide was measured from within that group. Another measure that the study found to be slightly effective was bans on weapons pertaining to the mentally ill and criminals which decreased assault and robbery rates (Kleck).

One interesting statistic to dive into revolves around the likelihood of criminals to become repeat offenders or that they recidivate. In a study conducted by the United States Sentencing Commission, 25,000 federal offenders were tracked, 3,446 of which were federally incarcerated due to firearm related crimes. The study found that firearm offenders were nearly 22% more likely to recidivate than non firearm offenders (68.1% compared to 46.3%) (“Recidivism...”). Since all of the criminals in this study were convicted of a federal crime, there was already a complete ban on purchase and ownership of firearms being imposed meaning that the inmates who recidivated due to another gun crime obtained the weapon illegally.

VII. Conclusion

Taking all the precedence and data discussed above, it is important to make clear how it should all be connected together to create a constitutional decision. There are a large number of different ways that the Constitution can be interpreted including textualism, modernism, historic events and precedence, and using the intent of the founders. I believe that they all have merit and that a combination of all methods should be used to create a definite interpretation of the Constitution, but I believe that some should have a higher weight than others. First and foremost, interpreting the text as literally as possible is of the utmost importance. A great deal of thought and effort was put into the creation of the Constitution and thus the wording and phrasing of the physical text was most likely intended to be that way. Secondly, the Constitution is a living document that was created with the idea that it can be amended and changed to fit modern times

and this modernism is also essential in order to get the full value out of the Constitution and interpret it as it was meant to be interpreted.

Using this combination approach in the evaluation of gun control, it becomes simple for me to evaluate what I think should be the Constitutional precedence when it comes to gun control and how advancements in technology and data collection should play into the decision. First and foremost, in regards to self defense, a person does have the right to own a firearm, but not any firearm. As was stated in the decision on the Heller case, a well regulated militia references “able-bodied men” who are able to be called to service. Through a historical lens, this phrase does seem to reference common folk that were around during the revolutionary war who were able to fight and thus able bodied people today should be afforded that same right. This ruling and line of thought does not permit able bodied persons from owning any weapon that they want. Again using a historical lens, firearms were all extremely similar to one another which is just not the case today. Using a modern point of view, it seems obvious that not every weapon can be considered the same, and that there must be some sort of line to determine if a weapon is and isn’t needed in a self defense situation. The power to make this law lies in the hands of congress and each individual state which ties directly into the constitutionality of states being able to pass gun control legislation.

Under the Fourteenth Amendment, no state has the ability to outright ban weapons particularly due to the ruling of the Heller case stating that the right to bear arms for use in self defense is a right that all people have. With that being said, states do have the ability to put certain restrictions on buying and selling firearms which is where the constitutionality of gun control gets fuzzy. It is in this space that I think modernism has the largest effect in interpreting the Constitution. Considering the statistics discussed above that bring forth evidence suggesting that firearm bans do have an impact on violent crime and homicide rates, states do have the power to impose regulations and some bans in order to maintain the controlling interest in human life. When collected and analyzed properly, data doesn’t lie so with some concrete proof that imposing a gun ban on a specific area would save lives, the gun law can be justified constitutionally. This reasoning can be extended in the other direction as well. There is statistical evidence suggesting that people convicted of violent gun crimes are more likely to commit said crimes again suggesting that they have the ability to obtain weapons illegally. Any new gun law must not infringe upon a law abiding citizen's right to protect themselves. Once again moving

back to textualism and the original intent of the Constitution, the Second Amendment guarantees a person a reasonable right to protect themselves, and if there are people that can illegally obtain firearms to commit a crime, it is reasonable for a person to legally own some sort of firearm in order to protect themselves.

After considering if different geographical areas are allowed to enact firearm laws and bans, the next logical step is to examine whether it is constitutional for different groups and classifications of people to have laws enacted on them. First and foremost, it is specifically stated in the 14th Amendment states that no person shall be denied equal protection of the Constitution by any law passed. Extending this into the gun control debate, it is extremely clear that no law can be passed banning/restricting the possession of firearms from any specific sex or racial group. What can be constitutional is imposing bans and restrictions on those who have committed crimes and people with a history of mental illness. The Fourteenth Amendment guarantees equal protection and ensures that no person's liberties can be infringed upon "without due process of law". The due process section of this Amendment is where the constitutionality of imposing firearm bans on criminals comes from. Moving back to a modern perspective, if a person has previously committed a crime and they are now more likely to recidivate, the government has a controlling interest in public safety and has the duty to ensure that that person doesn't have the ability to infringe upon law abiding citizens' right to safety. Given the tendency for violent offenders to recidivate, states should have the power to enact a ban on violent offenders from owning firearms. Mental illness falls under the same umbrella. Depending on whether or not a person with a mental illness is statistically more likely to commit a crime with a firearm, the state has the constitutional power to prevent that person from owning a firearm. As previously mentioned, there is legal precedent that allows a state to ban an individual that is of an unfit mental state from purchasing a firearm.

To summarize, citizens of the United States have a fundamental right to self defense which includes ownership of a reasonable firearm. Using a combination of textualism and modernism, one can determine that under the 14th Amendment, a state cannot outright bar a person from ownership of a firearm without first going through the due process of the law. Using data and statistics that have been previously collected surrounding firearms and restrictions that were placed on them, a state can decide if there is a controlling interest in human life and public safety to put some bans on the purchase and ownership of firearms. Depending on a person's

criminal history and their pertinence to violent and gun related crimes, states have the power to impose laws that are backed by statistics and relevant data in order to mitigate crime and protect law abiding citizens.

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