

WIGGUM'S WORRY: POLITICAL EXTERNALITIES OF LOCAL GUN CONTROL

While scholars and lawmakers have long recognized one locality's gun control laws affect the availability of guns in other regions,¹ the impact of one locality's gun control laws on the *laws* of another locality receives less consideration. If city A bans guns, does that affect the gun control laws of neighboring state B? This Comment argues that localities' laws do influence one another, a consequence of the unique politics and culture surrounding the gun control debate. In particular, this Comment submits that one locale's "commerce-prohibiting" laws, such as taxes and bans,² can prevent stricter controls in another locality.

Given these unique political externalities, this Comment submits that federally imposed constraints limiting both minimum *and* maximum levels of local gun control levels are functionally necessary. While federal legislation now establishes minimum levels of gun control, the federal government has not heretofore established ceilings on local regulation. The Twelfth Circuit's recent decision in *Wiggum v. Springfield*,³ however, may correct this omission. *Wiggum*'s invalidation of Springfield's handgun ban limits the cost externalizations caused by gun bans without curbing localities' ability to combat gun crime individually. In this light, *Wiggum* may represent the fairest and most socially beneficial interpretation of the Second Amendment's right to bear arms.⁴

Section I reviews the rationale and legislation involved in establishing a national floor for gun control legislation. Section II explains the need for a corresponding ceiling, and Section III considers the ceiling *Wiggum* sets.

I

INTERSTATE ECONOMICS AND GUNS

Even extreme commerce-prohibiting measures like bans do not eliminate guns entirely from a locality; guns continue to enter the region through a secondary market comprised of illegal gun transfers by gun runners, straw purchasers, and other criminal activity.⁵ Evidence demonstrates that the supply of these illegal weapons comes from regions with laxer gun laws.⁶ Locales with lax regulations, then, impart negative externalities onto areas with stricter gun regulations, because the consequential interstate trafficking of firearms incurs social costs resulting from additional gun violence.⁷

Recognizing this compromising effect, federal gun legislation focuses on reducing interstate gun trafficking. The federal Gun Control Act, first passed in 1968, limits the interstate shipment of guns to federally licensed dealers.⁸ Later, the federal Brady Act created national requirements for background checks and waiting periods before all gun sales.⁹ Together, these laws set a national floor for gun control, thereby minimizing the costs that one state's lax laws can impose on its neighbors. Evidence indicates that the national floor has curbed interstate gun trafficking.¹⁰

II

INTERSTATE POLITICS AND GUNS

Federal legislation establishes a beneficial national floor for firearms regulations that facilitates state efforts to curb violence. This Section provides reasons why a national *ceiling* on gun control also can limit negative externalities, albeit substantively different externalities than those hitherto addressed by Congress.

A. Interest Group Externalities

One state's gun reform can affect the interest group makeup in neighboring states. Though City X may institute a citywide gun ban and thereby reduce its own crime,¹¹ X's ban expands its secondary market for illegal guns, which gun dealers in neighboring state Y can supply.¹² Since Y dealers' profits depend on Y's relaxed gun laws, dealers may use part of their new revenue stream to influence the gun control debate in Y. This new political influence cements the status quo or even relaxes laws further. Lax laws, however, increase gun availability and crime in Y, imposing social costs on Y as whole.¹³

While only additional studies can confirm this relationship, three facets of gun control politics support this theory. One, well-organized interest groups dominate gun control debates.¹⁴ Two, money plays an enormous role in the gun debate. The National Rifle Association alone earmarks over \$20 million for lobbying¹⁵ and contributes millions of dollars in campaign contributions.¹⁶ Third, history shows that gun control is extremely sensitive to the political climate, and various factors—be it a change in the dominant political party or a publicized school shooting—affect laws.¹⁷ Changes in financial incentives, therefore, seem likely to affect local gun regulation as well.

B. Perception Politics

Braman and Kahan's examination of the culture surrounding gun control identifies another negative consequence of strict regulation.¹⁸ The legitimacy of gun control proposals, they argue, depends upon the political context in which they arise.¹⁹ Specifically, context dictates whether gun enthusiasts view moderate gun control proposals (registration, waiting periods, background checks, etc.) as "a device for stigmatizing" gun possession or a requirement of "civic duty and personal responsibility."²⁰

Context is derived from sources outside the involved parties.²¹ In this vein, if X bans handguns, it may signal to gun enthusiasts in Y that all gun control has the same ultimate goal—to deprive everyone of the right to bear arms.²² Thus, one locality's increase in gun control may close the door on other region's reform efforts, creating reasons for distrust that would otherwise not exist.²³

C. Reassessing Gun Bans

Taking into account political effects of local gun control, one sees that strict measures like bans export political costs to other localities, by both empowering local gun proponents and instilling a sense of distrust for all reform proposals. These relationships suggest that local gun control involves de facto wealth transfer, with commerce-prohibiting laws marginally improving one area's safety at the expense of another's.

Evidence that gun bans have no statistically measurable effect on crime²⁴ raises questions as to whether gun bans are actually socially counterproductive, which would result if X's benefits were less than the costs imposed on Y. If the incremental gains achieved by implementing moderate gun control measures are significantly higher than the incremental benefits of additional commerce-prohibiting measures, local gun bans may lead to a net social loss. Even if the bans are not socially detrimental, however, concepts of fairness require at minimum critical reevaluation of strict commerce-prohibiting regulations.

III

SECOND AMENDMENT JURISPRUDENCE AND POLITICAL EXTERNALITIES

In *Wiggum v. Springfield*, the Twelfth Circuit joined a minority among federal courts of appeals that interprets the Second Amendment to afford individuals the right to bear arms.²⁵ The *Wiggum* court's reconception of the Amendment led to its invalidation of Springfield's blanket

ban on handguns so far as the ban inhibits a firearm in the home for the purposes of self-defense.²⁶ By contrast, other federal appeals courts have concluded the Second Amendment affords no individual a right to a firearm²⁷; under this “collective rights model,” the Amendment poses no bar on local regulation.²⁸

The scope of the individual right envisioned by *Wiggum* is not entirely clear, though both the opinion and other decisions endorsing the “individual rights model” indicate the right will not prohibit all gun regulation.²⁹ *Wiggum* could be only a ban on extreme commerce-prohibiting measures for weapons arguably used for either self-defense in the home or hunting.³⁰ In this case, bans on assault weapons and lesser regulations, such as gun registration and licensing, would be permitted.³¹ *Wiggum* also suggested that federal laws prohibiting felons from possessing firearms are constitutionally valid, as are bans on carrying concealed weapons.³²

If *Wiggum* reaches only this far, the decision appears to set a ceiling on gun regulation that mitigates political externalities without greatly impinging local police power.³³ Recognizing a constitutional right to firearms may dilute interest group control in certain localities by minimizing the economic incentives for lax gun laws. The reduced financial gain of dealers in former supplier states may considerably weaken the opposition to moderate gun measures in supplier states. The individual rights model could also spark moderate gun reform across the nation by eliminating the commerce-prohibiting measures that fuel suspicions of all gun laws. Braman and Kahan argue that recognizing an individual right might induce gun enthusiasts to accept moderate regulations.³⁴

If the incremental gains of these moderate reforms are greater than the incremental gains of the bans prohibited under *Wiggum*, accepting the individual rights model can be seen as a

socially beneficial decision. At minimum, *Wiggum* offers a solution to local cost externalization that the collective rights model does not.

CONCLUSION: NATIONAL CONSTRAINTS UPON LOCAL GUN CONTROL

Those advocating locally led approaches to combating gun crime may criticize *Wiggum* for infringing upon localities' power to regulate gun control.³⁵ While those supporters are right to note the historical successes of localism in combating social evils,³⁶ local approaches must be limited to a range of policies with minimal negative externalities. Since, as this Comment shows, both overly lax *and* overly strict firearms regulation impose external costs on neighbors, both national floors and ceilings for gun regulation appear necessary to mitigate cost exportation by states.

Given the externalities that lax gun laws impose upon other locales, the public readily accepts national legislation to curb illegal trafficking of guns across state borders.³⁷ Though political externalities of gun control are more abstract, they pose no less a threat to localities. While no federal legislation has ever addressed this issue, *Wiggum's* interpretation of the Second Amendment fills this void. Just as the public accepts the federal floor for gun control, it should also accept the ceiling *Wiggum* offers.

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¹ See, e.g., H.R. REP. NO. 103-344, at 1986 (1993) (noting that professional gun runners serve as a major source of illegal firearms for criminals).

² George J. Thomas, *Re-emphasizing Localism in Gun Control Legislation*, 30 UWLA L. REV. 23, 24 (1999).

³ 555 F.3d 373 (12th Cir. 2007).

⁴ U.S. CONST. amend. II (“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.”).

⁵ Philip J. Cook & Jens Ludwig, *Principles for Effective Gun Policy*, 73 FORDHAM L. REV. 589, 605 (2004).

⁶ Since 2000, for instance, sixty percent of all handguns seized in Newark have been traced back to origins in Pennsylvania, Florida, Ohio, Georgia, North Carolina, and South Carolina. These states all have laxer gun control measures than New Jersey. Kareem Fahim, *In Newark, Proposing a First Step in Regulating Guns*, N.Y. TIMES, Aug. 17, 2007, at B5.

⁷ One study by Cook and Ludwig, for instance, found that the Chicago’s gun ban had no measurable effects on gun availability. The authors attributed their findings in part to “the ease with which these regulations are circumvented by the informal, secondary market.” Cook & Ludwig, *supra* note 5, at 604-05. The authors also suggested that the gun ban’s effect might be modest enough that their analysis could not detect it. *Id.* This paper will assume that the number of replacements guns is less than the number of guns eliminated by the commerce prohibiting act (i.e. an assumption of rational lawmaking).

⁸ 18 U.S.C. § 922(a)(1)(A) (2000). See also Thomas, *supra* note 2, at 25 (noting date of passage).

⁹ Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(s)(1) (2000); H.R. REP. NO. 103-344, at 1987 (1993).

¹⁰ Cook & Ludwig, *supra* note 5, at 603.

¹¹ Some debate exists over whether gun availability, particularly in the second market, influences the level of gun crime in an area. However, some evidence indicates that the availability of guns increases level of gun crime. See Cook & Ludwig, *supra* note 5, at 590 (discussing the “instrumentality effect” of gun prevalence).

¹² Sales onto the secondary market are “reported to be extremely profitable” and can be done rather easily at locations like gun shows. Thomas, *supra* note 2, at 27.

¹³ While evidence that gun laws have any effect on illegal firearms’ prevalence is scarce, some authors argue that commerce-prohibiting laws decrease the prevalence of firearms by making them more costly to obtain and riskier to possess. *Id.*

¹⁴ Interest groups dominate both sides of the debate, pressuring not only elected officials on specific policies but also coordinating national policy campaigns. Emma Schwartz, *In Congress, the Uphill Battle for Gun Control: Why It’s Been Years Since Significant Federal Legislation*, U.S. NEWS & WORLD REPORT, Mar. 17, 2008, at 41, available at <http://www.usnews.com/articles/news/politics/2008/03/06/in-congress-the-uphill-battle-for-gun-control.html>.

¹⁵ *Id.*

¹⁶ Gun control opponents spent over \$1 million in 2006 election cycle alone, and have contributed \$17 million since 1989. Jessica Reese, Note, *The Lone Second Amendment Interpretation: Has It Reached the Status of “Superprecedent”?*, 32 S. ILL. U. L.J. 211, 211, 213 (2007).

¹⁷ See, e.g., Randal C. Archibold, *Arizona Weighs Bill to Allow Guns on Campuses*, N.Y. TIMES, Mar. 5, 2008, at A10 (noting the Arizona legislature’s response to gun violence at Northern Illinois University); Schwartz, *supra*

note 14 (noting recent congressional legislation following the election of a Democratic majority and in the wake of the Virginia Tech killings).

¹⁸ Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569, 577 (2006).

¹⁹ *Id.*

²⁰ *Id.*

²¹ One example of this is the national response to single school shootings. *See supra* note 17.

²² Thus, current gun bans may explain why, as one scholar observes, “[r]equiring registration of guns and even licenses... sends some gun lovers up the wall—the first step toward confiscation, they predict in dire tones.” Akhil Reed Amar, *Enduring and Empowering: The Bill of Rights in the Third Millennium: Second Thoughts*, 65 LAW & CONTEMP. PROBS. 103, 109 (2002).

²³ Unlike interest group externalities, there is a simple solution for redefining the context of local negotiations. State constitutional guarantees of the right to bear arms, such as that recently passed in Wisconsin, may avoid fears about ulterior motives in moderate gun reform proposals. *See State v. Hamdan*, 665 N.W.2d 785, 786–87 (Wis. 2003) (discussing the state’s new constitutional amendment). However, requiring constitutional amendments rather than mere legislative compromises imposes an extra transactional cost and therefore decreases the likelihood of moderate reforms.

²⁴ *See supra* note 7.

²⁵ *Wiggum v. City of Springfield*, 555 F.3d 373, 386 (12th Cir. 2007) (“To summarize, we conclude that the Second Amendment protects an individual right to keep and bear arms.”).

²⁶ *Id.* at 388 (“Once it is determined—as we have done—that handguns are ‘Arms’ referred to in the Second Amendment, it is not open to Springfield to ban them.”).

²⁷ *Silveira v. Lockyer*, 312 F.3d 1052, 1052 (9th Cir. 2003); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 695 (7th Cir. 1999); *Love v. Peppersack*, 47 F.3d 120, 123 (4th Cir. 1995).

²⁸ *Silveira*, 312 F.3d at 1056. A third interpretation of the Second Amendment argues that the Amendment does not apply to local governments like Springfield. *See Wiggum*, 555 F.3d at 389 (Hibbert, J., dissenting) (“[T]he City of Springfield is not a state within the meaning of the Second Amendment and therefore the Second Amendment’s reach does not extend to it.”). Like the collective rights model, this interpretation sets no ceiling on local regulation.

²⁹ *Wiggum*, 555 F.3d at 387 (“That is not to suggest that the government is absolutely barred from regulating the use and ownership of pistols.”); *United States v. Emerson*, 270 F.3d 203, 229 (5th Cir. 2001) (noting the individual rights model “does not mean [the right to bear arms] may never be made subject to any limited, narrowly tailored specific exceptions” by the government).

³⁰ The *Wiggum* plaintiffs limited their challenge to Springfield’s ban to the extent that it prohibited a “functional firearm” that could be accessed in the home for the purposes of self-defense. *Wiggum*, 555 F.3d at 373.

³¹ Some *Wiggum* dicta, like its claim that the Second Amendment would not guarantee a right to a “cannon,” support this claim. *Id.* at 385.

³² *Id.* at 387 (citing *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980)).

³³ Bans are not necessary for many local law enforcement programs targeted at seizing illegal firearms. Washington D.C. police officers, for instance, have noted that the majority of guns seized today would still be illegal without the city’s gun ban. Schwartz, *supra* note 14.

³⁴ Braman & Kahan, *supra* note 18, at 577.

³⁵ *See generally* Thomas, *supra* note 2 (advocating locally led approaches to gun control).

³⁶ *Id.* at 29.

³⁷ At the time of the Brady Law's passage, polls showed over eighty percent of Americans supported waiting periods and registration. H.R. REP. NO. 103-344, at 1986 (1993).