

Determining The Scope of The Second Amendment's Application

Introduction

In the wake of several tragic school shootings, gun control remains one of the most controversial issues in American law and politics.¹ Federal courts have reached varying conclusions regarding whether the Second Amendment's protection extends to individuals or only to states.² One such example is the recent Twelfth Circuit opinion, *Wiggum v. City of Springfield*,³ which upholds an individual right to bear arms.⁴ While this conclusion is fairly uncontroversial given the precedent of *United States v. Emerson*,⁵ *Wiggum* breaks new ground in extending Second Amendment protections to overturn a city code.⁶ Indeed, some commentators have assumed that the Second Amendment applies only to federal regulations because the Supreme Court has denied certiorari in cases that might have incorporated the Amendment against the states.⁷

This comment will demonstrate that, contrary to this assumption, the *Wiggum* court's application of the Amendment to a city is permissible; however, the court's error lies in presuming this expansive application without considering important policy implications. Part I illustrates the openness of the Second Amendment's language regarding its application. Part II shows how a court's view of the nature of the right to bear arms dictates whether it will apply the Amendment against cities. Part III will address policy implications that warrant consideration by courts applying the Second Amendment to cities.

I. The Inconclusive Language of the Second Amendment

The Second Amendment states: "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."⁸ The passive construction of "shall not be infringed" leaves open which specific governmental entity the Amendment prohibits from infringing. The most expansive reading would apply this prohibition to any governmental body, including the federal government, states and cities. The *Wiggum* court applies such a reading.⁹

However, three key contextual considerations suggest that the Founders intended to distinguish between the federal government and the states. First, the Tenth Amendment delegates different powers to

“the United States” versus “the states respectively.”¹⁰ Second, the militias at the time of enactment were specifically within the purview of individual States.¹¹ Third, the Amendment’s protection of state militias was intended as a compromise¹² to offset the Anti-Federalists’ concern of an over-reaching federal government.¹³

In spite of this balance between federal and state power, the plain text does not explicitly preclude the Amendment’s application to cities. Considering the federal government is no longer feared as it was two centuries ago,¹⁴ it may be appropriate to update the scope of the Amendment’s application.¹⁵ However, the *Wiggum* court did not separate analytically the issue of whether to apply Second Amendment scrutiny to a city, as arguably it should have.

II. The Nature of the Right Dictates the Scope of Its Application

The relevant jurisprudence demonstrates that a court’s definition of the scope of the Amendment’s application is inextricably tied to its interpretation of the right the Amendment bestows. In interpreting this right, courts have often referred to the collective-individual distinction. Under the “collective right” approach, the Amendment protects the right of “state governments to preserve and arm their militias.”¹⁶ Under the “individual right” approach, the Amendment protects the right of “individuals to possess arms for private use.”¹⁷ An intermediate approach, identified as the “sophisticated collective right,” grants an individual right only to militia members “actively participating in the organized militia’s activities.”¹⁸

The collective-individual distinction is salient because a court’s adoption of a collective / sophisticated collective right leads the court to conceive the Second Amendment’s scope narrowly,¹⁹ whereas the individual right produces the opposite result. In *Love v. Pepersack*, the defendant claimed that, by denying her handgun application on grounds not specified by Maryland code, the police had violated her individual constitutional right.²⁰ Relying on the Supreme Court precedent of *United States v. Miller*,²¹ the court concluded based on a sophisticated collective approach that the defendant failed to show how her possession would preserve an effective militia.²² Under this approach, it seems absurd that

the Amendment would protect the states' right to a "well-regulated militia"²³ while also prohibiting the states from regulating this right. Thus, it is fitting that, prior to finding a collective right, the *Love* court declared that "[t]he Second Amendment does not apply to the states."²⁴

By contrast, the *Wiggum* court overturned the Springfield Code on the basis of an individual right to possess guns²⁵ without even addressing the appropriateness of applying Second Amendment scrutiny to a city. Yet, the court's failure to analyze the scope of the Second Amendment is not surprising. Under the individual rights model the court espouses, the personal right of self-preservation would be held paramount.²⁶ The logical conclusion of this model is that the individual right to bear arms must be protected irrespective of whether the federal, state or city government is the infringing party. Skipping an analytical step, the court thus assumes the Amendment applies to cities.

The problem with *Wiggum's* methodology is that the question of scope is roughly equivalent to a jurisdictional question that should ideally be addressed *before* determining the nature of the right bestowed. That is, courts should fully consider *whether* the Amendment applies before deciding *how* it applies. Whether or not the *Love* court reached the proper conclusion, it addressed (albeit succinctly) the former prior to deciding the latter. Conversely, while the *Wiggum* court's expansive application may be permissible, its shrunken analysis is not.

III. Problems With The Inbuilt Connection

While a court's interpretation of the right to bear arms quite clearly affects how the court defines the scope of the Second Amendment's application,²⁷ the inbuilt connection displayed between the scope and the right is problematic for two main reasons. Namely, in addition to raising federalism concerns, the analytical framework seems to allow courts such as *Wiggum* to sidestep important policy considerations that should not be given short shrift.

The principle of federalism dictates that certain matters should be left to the states and their localities out of respect for the "dual sovereignty system."²⁸ Federalism concerns are strongest when the states have traditionally been responsible for regulating an area of law. Perhaps federalism concerns are

weaker in the realm of gun control because Congress has been active in regulating gun ownership since the 1930s.²⁹ However, extant federal regulations merely restrict certain classes of individuals from owning guns,³⁰ such as felons³¹ or persons convicted of domestic violence.³² Some states and cities have enacted regulations stricter than federal regulations, the most notable examples being the outright bans on handguns in Chicago and Washington D.C.³³ This difference may well owe to the freedom of state and city regulations from Second Amendment scrutiny. Admittedly, the effectiveness of stricter regulations is empirically debatable.³⁴ However, the value of local experimentation with gun control methods--beyond the baseline set by federal regulations but without an effect on the rest of the country--should not be dismissed without consideration. Furthermore, this freedom enables localities to appropriately tailor their laws to the cultural needs of their constituents³⁵ without being second-guessed by the judiciary. At the very least, the freedom of cities and states to regulate more forcefully than the federal government should not be denied without a functional justification for this policy choice.³⁶

Moreover, George Thomas suggests that policy considerations may actually favor greater localism in gun regulation.³⁷ Some have argued, though without direct evidence, that federal laws might be more effective than the state and local laws often undermined by cross-state gun trafficking.³⁸ However, existing federal regulations fail to address the “secondary market” of illegally resold guns that contributes to most gun-related violent crime.³⁹ While the NRA has gained passage of state “preemption laws” limiting local power over gun control,⁴⁰ this does not automatically require that all state regulations mirror federal regulations. Rather, as Thomas argues, given the narrowing of the technological gap and the increased local access to data,⁴¹ gun regulation at the local level bears the advantages over federal regulation of greater market intelligence and process protection.⁴² Local market intelligence is particularly salient in an era where the “diffuse and decentralized”⁴³ secondary market is the main cause of criminal and youth access to weapons.⁴⁴ Process protection ensures democratic legitimacy because local regulations enable citizens to participate in the laws that affect them.⁴⁵

This is not to say that federalism and the advantages of local gun regulation should categorically prevent courts from applying the Amendment to cities. These factors merely demonstrate that such a conclusion warrants fuller discussion of scope than that accorded by the *Wiggum* court.

Conclusion

Ultimately, the problem with courts applying the Second Amendment to cities without pause is that doing so diminishes the legitimacy of this expansive application. The Second Amendment's language leaves open whether it applies to cities. However, policy considerations demand that courts fully analyze the scope of the Amendment's application rather than assuming whatever scope naturally corresponds to the right bestowed. In this sense, the *Wiggum* opinion is troubling not because of its conclusion but because of how it arrives at its conclusion.

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¹ See Emma Schwartz, *In Congress, the Uphill Battle for Gun Control*, U.S. NEWS & WORLD REP., Mar. 17, 2008, <http://www.usnews.com/articles/news/politics/2008/03/06/in-congress-the-uphill-battle-for-gun-control.html>.

² Compare *Silveira v. Lockyear*, 312 F.3d 1052 (9th Cir. 2003) (upholding a state right), and *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999) (upholding a state right), with *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) (upholding an individual right).

³ 555 F.3d 373 (12th Cir. 2007).

⁴ See *id.* at 386.

⁵ See *Emerson*, 270 F.3d at 231.

⁶ Cf. *Wiggum v. City of Springfield*, 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.”)

⁷ See Jessica Reese, *The Lone Second Amendment Interpretation: Has It Reached the Status of “Superprecedent”?*, 32 S. ILL. U. L.J. 211, 224 (2007).

⁸ U.S. CONST. amend. II.

⁹ See generally *Wiggum*, 555 F.3d 373 (applying the Second Amendment to a city code).

¹⁰ *Id.* at 376.

¹¹ See *United States v. Miller*, 307 U.S. 174, 177-78 (1939) (“The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress.”).

¹² See *Silveira v. Lockyear*, 312 F.3d 1052, 1069 (9th Cir. 2003) (discussing the counter-balancing of federal control over national defense with the Second Amendment).

¹³ See *id.* at 1068.

¹⁴ See Akhil Reed Amar, *Enduring and Empowering: The Bill of Rights in the Third Millennium: Second Thoughts*, 65 LAW & CONTEMP. PROBS. 103, 107 (2002) (“To rail against central tyranny today is to be considerably more paranoid than were the Founders . . .”).

¹⁵ See *id.* (“[W]e are free today to read the Second Amendment more broadly if we choose.”).

¹⁶ *Wiggum v. City of Springfield*, 555 F.3d 373, 375 (12th Cir. 2007).

¹⁷ *Id.*

¹⁸ *United States v. Emerson*, 270 F.3d 203, 214 (5th Cir. 2001); *see also* *Silveira v. Lockyear*, 312 F.3d 1052, 1056 (9th Cir. 2003) (describing the intermediate approach as a “limited individual right” requiring only a “reasonable relationship to militia service.”). *But see* *Wiggum*, 555 F.3d at 375 (arguing that the sophisticated collective right is effectively the same as the regular collective right theory).

¹⁹ Note that *Silveira*, 312 F.3d 1052, does not assert that the Second Amendment cannot be applied against a state statute. However, its promotion of a collective right leads it to strike down the challenge against a state statute nonetheless.

²⁰ *Love v. Pepersack*, 47 F.3d 120, 123 (4th Cir. 1995).

²¹ 307 U.S. 174 (1939).

²² *Love*, 47 F.3d at 123. Admittedly, the *Love* court applied *Miller* either incorrectly or expansively because *Miller* required only a nexus between the militia and the weapon itself, *see* *United States v. Miller*, 307 U.S. at 177. However, the *Love* court’s reasoning remains instructive because, by requiring a nexus at all, the court implies that the right to bear arms can be restricted.

²³ U.S. CONST. amend. II.

²⁴ *Love*, 47 F.3d at 123. The court does leave open the possibility that, because the Maryland constitution incorporated the Second Amendment, the Amendment’s protections may apply against Maryland as a matter of a state law. However, as this Comment focuses on the application of the Second Amendment itself, this possibility is irrelevant.

²⁵ *See* *Wiggum v. City of Springfield*, 555 F.3d 373, 386 (12th Cir. 2007).

²⁶ *See* Jerry Bonanno, *Exploring the Implications of Adopting an Individual Rights Interpretation of the Second Amendment to the United States Constitution*, 29 *HAMLIN L. REV.* 463, 467 (2006).

²⁷ *See supra* Part II.

²⁸ George J. Thomas, *Re-emphasizing Localism in Gun Control Legislation*, 30 *UWLA L. REV.* 23, 33 (1999).

²⁹ *See* Reese, *supra* note 7, at 223 (discussing the National Firearms Act of 1934, the Gun Control Act of 1968, the Firearm Owner’s Protection Act of 1986, the Brady Handgun Violence Prevention Act of 1993, and the 1994 Omnibus Crime Control Act).

³⁰ Philip J. Cook & Jens Ludwig, *Principles for Effective Gun Policy*, 73 *FORDHAM L. REV.* 589, 598 (2004) (“[G]un-control policies adopted by the federal and state governments in the United States are not intended to reduce the general rate of gun ownership, but rather to bar acquisition and possession by those who are prohibited by reason of age or criminal record.”); *see also* Thomas, *supra* note 28, at 24-25 (discussing the federal government’s “use-specific approach”).

³¹ *See, e.g.,* *Lewis v. United States*, 445 U.S. 55 (1980).

³² *See, e.g.,* *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999).

³³ *See* Cook & Ludwig, *supra* note 30, at 604.

³⁴ *See* Schwartz, *supra* note 1.

³⁵ *See id.* (“[F]ault lines in the gun debate . . . mark divisions between rural areas, where hunting is deeply embedded in the culture, and urban communities, where guns are linked with drugs and crime.”).

³⁶ *See* Amar, *supra* note 14, at 107 (“[G]iven that a broad reading is a policy choice rather than a clear constitutional command, it must be functionally justified.”).

³⁷ *See generally* Thomas, *supra* note 28.

³⁸ *See* Cook & Ludwig, *supra* note 30, at 605.

³⁹ *See* Thomas, *supra* note 28, at 25-27.

⁴⁰ *See* Schwartz, *supra* note 1.

⁴¹ *See* Thomas, *supra* note 28, at 31-32.

⁴² *See id.* at 29-31.

⁴³ *Id.* at 30.

⁴⁴ *See id.* at 26.

⁴⁵ *See id.* at 30-31 (arguing that process protection requires gun control measures to come from local sources).