The Second Amendment and a Well-Regulated Firearms Environment

On February 14, 2018, a former student fired a semi-automatic AR-15 rifle at Marjory Stoneman Douglas High School in Parkland, Florida, killing 17 and injuring 15 more. The Parkland students turned to social activism, creating the #NeverAgain movement. Since the 2012 Sandy Hook massacre, 239 school shootings have occurred. In political debates, gun rights advocates often invoke the Second Amendment as an obstacle to gun control, but the Supreme Court has left ample space for a well-regulated firearms environment.

A Public Health Crisis

The United States accounts for 48% of all civilian-owned firearms globally, with a gun homicide rate 25 times higher than the average for other high-income countries. More than 33,000 firearm fatalities occur annually, averaging more than 90 deaths each day. Mass shootings garner the most attention, but well more than half of gun deaths are suicides, and a third are homicides. The fatality rate for black men is 53% higher than for non-Hispanic white men, with firearm injuries being the leading cause of death among 15- to 34-year-old black men. The presence of firearms in the home is associated with an increased risk of injury or death. Individuals with a history of domestic violence are 5 times more likely to subsequently murder an intimate partner when a firearm is in the house, and more than half of women murdered with guns in 2011 (at least 53%) were killed by intimate partners or family members.

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.” Breaking with 70 years of jurisprudence, the Supreme Court in District of Columbia v Heller (2008) conferred a personal right to bear arms unrelated to a militia. The right to own a gun, however, is not unlimited. Heller recognized “longstanding prohibitions” against concealed weapons, ownership by felons or mentally ill persons, and carrying firearms in sensitive places (eg, schools). Similarly, government can impose “conditions and qualifications on the commercial sale of arms” and prohibit “dangerous and unusual weapons.” The Court has repeatedly declined to hear challenges to firearm control laws (eTable 1 in the Supplement). It allowed New York’s ban on carrying guns in public; New Jersey’s public-carry licensing law; and San Francisco’s requirement to disable firearms while in storage. Just this year, the Court declined to hear 2 cases challenging California’s 10-day waiting period and $5 fee on gun sales.

Firearm Regulations Are Riddled With Loopholes

The Gun Control Act of 1968 and the Brady Handgun Violence Prevention Law require licensed firearms dealers to run background checks on every purchaser through the Federal Bureau of Investigation’s National Instant Criminal Background Check System (NICS). The law prohibits felons, fugitives, unlawful residents, users of prohibited substances, and persons adjudicated as mentally ill from purchasing a weapon. The 1996 Lautenberg Amendment bans sales to individuals convicted of domestic violence. No law, however, prohibits individuals on terrorist watch lists, and other dangerous individuals, from purchasing firearms.

States under-report to the NICS database. A review of gun purchase transactions found that states failed to properly update the NICS in 630 of 631 instances. Individuals in the NICS database, moreover, can bypass background checks entirely. Only federally licensed dealers must conduct background checks; private and unlicensed sellers are not regulated. Thus, no background check is required for transfers among family or friends, internet purchases through unlicensed dealers, or purchases at gun shows. Thus, persons prohibited by various laws from owning firearms can easily amass dozens of weapons, including assault-style weapons.

Federal law affords special protection to gun manufacturers and sellers by restricting litigation, data-sharing, and research. Victims harmed by a criminal’s unlawful access to dangerous weapons cannot bring negligence actions against the gun’s manufacturer or seller, except in rare cases. The Bureau of Alcohol, Tobacco, Firearms, and Explosives is prohibited from releasing gun-tracing data from crime scenes to investigate illegally trafficked firearms or corrupt dealers. Thus, federal law stifles the use of vital data to prevent and solve crimes.

High-quality research evaluating the effectiveness of an intervention should guide policy. Yet, the Dickey Amendment bans the Centers for Disease Control and Prevention from using injury prevention funds “to advocate or promote gun control.” The Dickey Amendment sends a political signal to public health agencies dissuading firearms research. Between 1996 and 2012, Centers for Disease Control and Prevention research funding for gun violence declined by 96%.

Evidence-Based Laws Work, Complying With the Second Amendment

The United States should adopt an evidence-based public health strategy, compliant with the Constitution (eTable 2 in the Supplement). A lawful, public health strategy would have the following 6 elements.
1. Prohibit Dangerous Individuals From Purchasing Firearms

Individuals prone to violence should not have access to firearms, subject to due process. Laws specifying “prohibited” persons should encompass all potentially dangerous individuals, including those on “no-fly” registers. The law should also set a minimum age of 21 years for firearm purchases, recognizing that youth lack full cognitive capacity, often prone to impulsive judgments, especially in risk situations. Although the National Rifle Association is challenging Florida’s recent 21-year-old age limit, the courts will likely uphold this age limit given alcohol and tobacco precedents and appellate court decisions upholding similar age restrictions.

2. Enforce Prohibited Purchase Laws

Federal law disqualifies prohibited persons from buying firearms, but there is scant enforcement. Effective implementation requires accurate, comprehensive NICS data; minimum waiting periods; and universal background checks. Federal rules should incentivize reporting, with rigorous accuracy audits, thus supporting rapid identification of prohibited persons. Most importantly, Congress should mandate universal background checks.

3. Safe Storage, Smart Guns, and Child Protection

To prevent suicides and accidental discharge, firearms should be safely stored—for example, unloaded, with trigger locks, in secure cabinets. The Supreme Court struck down a District of Columbia trigger lock mandate as applied to home self-defense. States, therefore, should tailor trigger lock mandates to high-risk environments, such as loaded firearms accessible by children. Technology can also make firearms safer, such as “smart” guns, which can be fired only by authorized users.

4. Ban Hazardous Weapons

The Supreme Court expressly stated that government could ban especially hazardous weapons: assault or military-style firearms, rapid-fire capacity (eg, bump stocks), high-capacity magazines, and armor-piercing or exploding bullets. Hazardous weapons are often used in mass shootings, and physicians have graphically described the catastrophic anatomic damage caused by these weapons.

5. Concealed Carry

Municipalities have restricted openly carrying firearms from the colonial period to the present. The Supreme Court identified these laws as constitutionally permissible. Research suggests that permissive right-to-carry laws significantly increase violent crime, including homicides.

6. Crime Detection

Effective law enforcement is vital to prevent, detect, and prosecute crimes. This requires sharing data, including trafficking in weapons (eg, high-volume firearm purchases) and tracing firearms or bullets used in criminal activity. As with all data collection, privacy should be respected. Yet, the state has a compelling interest in identifying and prosecuting criminal activity.

Removing research barriers would improve the empirical base for firearms legislation. Importantly, a suite of measures operating in concert is most effective. Gun prevalence and violence are highly correlated: states with high levels of gun ownership have the highest gun-related death rates and vice versa. In short, a well-regulated firearms environment is consistent with the Second Amendment and has substantially reduced firearm deaths in peer countries.

A Pathway Forward

Given the high burden of firearm deaths, the President should declare a public health emergency, convening an expert, nonpartisan blue-ribbon panel. Declaring an emergency—similar to the opioid declaration—would shine a spotlight on gun violence, triggering research funding and law reform. The panel should propose a comprehensive evidence-based and constitutionally permissible legislative agenda. With endemic levels of gun violence, a Marjory Stoneman student expressed justified outrage: “No kid should be afraid to go to school, no kid should be afraid to walk outside, and no kid should have to worry about being shot.”

ARTICLE INFORMATION

Published Online: March 23, 2018. doi:10.1001/jama.2018.4044

Conflict of Interest Disclosures: Both authors have completed and submitted the ICMJE Form for Disclosure of Potential Conflicts of Interest and none were reported.

Additional Contributions: We thank Eric A. Friedman, JD, Han-Hsi Liu, LLM, Jingyi Xu, LLB, and Sibel Ozcelik, ML, MS, for providing research support. They were compensated for their research assistance by the O’Neill Institute for National and Global Health Law, Georgetown University.

REFERENCES


