

## Guns, Young Adults, and the Constitution

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

The tragic school shooting in Parkland, Florida shined a bright spotlight on the fact that 18-, 19- & 20-year olds can buy assault weapons in many states, even though they can't purchase alcohol and exercise other privileges.

Bills to raise the minimum-age for some weapons purchases are being seriously discussed nationally and in many states. Florida adopted such a ban, which was quickly challenged in a lawsuit by the National Rifle Association.

Meanwhile, several national chain-stores announced self-imposed limitations of gun sales to otherwise qualified buyers under 21. Such a move by Dick's Sporting Goods and Walmart prompted an age-discrimination lawsuit by a 20-year-old Oregonian.

As tragic as the recent Parkland massacre is, it nevertheless points to four lessons about how the Constitution does, and does not, contribute to the national gun-control conversation involving young adults.

First, it's always worth emphasizing that as a general matter the Constitution only limits *governmental* actors and officials. The Constitution and its protection against discrimination, age or otherwise, has nothing directly to say about the sales policies of a *privately* owned store.

Rather, the plaintiff in the Oregon age-discrimination lawsuit is suing under an Oregon State anti-discrimination law.

Which brings up the related point that the U.S. Constitution isn't even the *source* of the Oregon law the young-adult would-be gun buyer is suing under. Each *state's* constitution and legal system source their state's legislative power. And it is *state* constitutions that provide the lion's share of limits on enactments by state legislators.

OK, you might be thinking, so the U.S. Constitution doesn't have much to say about *private* actions and isn't the *main* source of limitations on the legislation passed by the States. Still, doesn't the U.S. Constitution prohibit discrimination (including age discrimination) at all levels of government? Couldn't that invalidate special prohibitions on assault-weapons sales to buyers under 21?

This brings up a third lesson about the Constitution's reach. Specifically, although the U.S. Constitution's “equal protection” clauses provide special protection against some kinds of governmental discrimination (such as discrimination based on race, nationality or gender), it provides more tepid protection against discrimination based on age.

The Supreme Court has for several decades applied a low-level “rational basis” test to laws distinguishing based on age. This government-friendly test would apply whether we are talking about a law burdening older persons (such as the federal law requiring airline pilots to retire at age 65) or discriminating against younger persons (such as state drinking-age limitations). To pass the relevant test, government merely needs to have a “conceivably legitimate” reason for drawing age-based distinctions, an interest it is rational to think the law furthers in some way.

The concerns about maturity of judgment that motivate restrictions on under-21 drinking seem legitimately applicable to gun sales. And the age profile of many (but by no means all) recent shooters likely makes it more than rational to think that trying to keep the most lethal guns from shooters in that age group could further public-safety goals. Note that a law isn’t “irrational” as a legal matter because it leaves out others who pose a similar threat or penalizes many who don’t pose the threat.

Finally, the passage of age-based gun restrictions in Florida – and perhaps elsewhere – points to something I’ve highlighted in previous podcasts and which bears repeating here: After declaring in a 2008 decision that the Second Amendment right to bear arms protects individual gun ownership for self-protection, the Supreme Court has repeatedly declined to define the exact contours of the right.

Will the challenges to Florida’s law or to other age-based restrictions imposed by legislative officials be the occasion for more clarity about gun rights? Stay tuned...