

HISTORY AND TRADITION IN MODERN CIRCUIT CASES ON THE SECOND AMENDMENT RIGHTS OF YOUNG PEOPLE

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I. INTRODUCTION

This Article surveys nineteenth century laws and cases that restricted arms ownership based on age. We analyze the nineteenth century statutes and cases through the lens of five federal Circuit Court of Appeals cases involving restrictions on the Second Amendment rights of young people.

Part II examines *Rene E.*, a First Circuit case. Because *Rene E.* relied on nineteenth century cases, Part II analyzes those cases.

Part III is the Fifth Circuit's *NRA v. BATF*, which cited nineteenth century statutes, some of which had led to the cases that *Rene E.* cited. So, Part III reviews the statutes.

Parts IV, V, and VI each have shorter discussions of the other leading Circuit cases: *NRA v. McCraw* (5th Cir.) (carry permits); *Horsely v. Trame* (7th Cir.) (parental permission for gun license), and *Ezell v. Chicago* (7th Cir., "Ezell II") (ban on persons under 18 using firing ranges).

Because this Article focuses on post-*Heller* circuit court cases and their use of history, there are certain topics that we do not address. First, we discuss the Supreme Court's Second Amendment decisions only to the extent that they are discussed by the circuit opinions. Second, we do not discuss the history of colonial and Early Republic militia statutes. Those statutes typically set the minimum age for militia service at sixteen, although by the end of the eighteenth century the minimum age federally and in most states had been raised to eighteen. Third, we do not discuss contemporary gun control laws, except to the extent that particular laws are at issue in the circuit cases we analyze. All of the topics that we do not examine in this Article will be reviewed in depth in an Article in the next issue of this Journal.¹

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II. UNITED STATES V. RENE E.

Rene E. was convicted of violating the federal ban on juvenile handgun possession, by possessing a handgun at age seventeen.² The First Circuit upheld the ban based “on the existence of a longstanding tradition of prohibiting juveniles from both receiving and possessing handguns.”³ The court considered (1) “contemporary federal restrictions on firearm and handgun possession by juveniles;” (2) “nineteenth-century state laws imposing similar restrictions;” and (3) “whether the Founders would have regarded prohibiting the juvenile possession of handguns as consistent with the Second Amendment right.”⁴ We will analyze the issues following *Rene E.*’s organization.

A. Congressional regulation of juvenile access to firearms

First, the court inaccurately summarized federal age-based firearms regulations, describing federal law as “prohibiting the sale of firearms to individuals less than twenty-one years old.”⁵ Actually, the 1968 law cited by the court applied only to a federally “licensed importer, licensed manufacturer, or licensed dealer,” and it allowed long gun sales to persons 18-to-20.⁶ There were not, and never have been, federal rules on private long gun possession by juveniles; it is a matter of state law. The same was true for handguns until 1993, when the Youth Handgun Safety Act, restricted, but did not ban, juvenile handgun possession.⁷

The *Rene E.* court emphasized that the allowances for juvenile possession made the statute less burdensome than the handgun ban struck down in *Heller*:

¹ David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. (forthcoming 2019).

² *United States v. Rene E.*, 583 F.3d 8, 9 (1st Cir. 2009). 18 U.S.C. § 922(x)(2) (2018) provides:
It shall be unlawful for any person who is a juvenile to knowingly possess--
(A) a handgun; or
(B) ammunition that is suitable for use only in a handgun.

³ *Rene E.*, 583 F.3d at 12.

⁴ *Id.* at 12–13.

⁵ *Id.* at 13.

⁶ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 922(a)(1), 82 Stat. 197, 235 (1968) (codified at 18 U.S.C. § 922(a)(1); 18 U.S.C. § 922(b)(1) (2018) (prohibiting FFL transfer of “any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age.”).

⁷ Youth Handgun Safety Act, Pub. L. No. 103–159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. § 922(x)).

These exceptions permit juveniles to possess handguns for legitimate purposes, including hunting and national guard duty, as well as “in defense of the juvenile or other persons against an intruder into the residence of the juvenile or a residence in which the juvenile is an invited guest.” Thus, contrary to appellant’s suggestion, the ban on juvenile possession of handguns is not “even more complete” than the D.C. ban at issue in *Heller*, but contains important exceptions.⁸

B. Historic state cases on juvenile access to firearms

1. *Callicutt*: Tennessee’s Misinterpretation of the Right to Arms

Next, *Rene E.* considered state cases. The court pointed first to *State v. Callicutt*, decided by the Supreme Court of Tennessee in 1878.⁹ The law at issue had made it “a misdemeanor to sell, give, or loan a minor a pistol, or other dangerous weapon, except a gun for hunting, or weapon for defense in traveling.”¹⁰ The defendant “insisted that every citizen who is subject to military duty has the right ‘to keep and bear arms,’ and that this right necessarily implies the right to buy or otherwise acquire, and the right in others to give, sell, or loan to him.”¹¹ As quoted in *Rene E.*, the *Callicutt* court retorted: “we regard the acts to prevent the sale, gift, or loan of a pistol or other like dangerous weapon to a minor, not only constitutional as tending to prevent crime but wise and salutary in all its provisions.”¹²

Callicutt is poor precedent because it is based on the Tennessee Supreme Court’s interpretation of the Second Amendment in the 1840 case *Aymette v. State*.¹³ The *Heller* Court expressly denounced *Aymette*: “This odd reading of the right is, to be sure, not the one we adopt. . . .”¹⁴ Indeed, as

⁸ *Rene E.*, 583 F.3d at 13–14 (internal citations omitted).

⁹ *State v. Callicutt*, 69 Tenn. (1 Lea) 714 (1878).

¹⁰ *Id.* at 714.

¹¹ *Id.* at 716.

¹² *Id.* at 716–17; *Rene E.*, 583 F.3d at 14.

¹³ 21 Tenn. (2 Hum.) 154 (1840).

¹⁴ *District of Columbia v. Heller*, 554 U.S. 570, 613 (2008). In full, the U.S. Supreme Court said:

Those who believe that the Second Amendment preserves only a militia-centered right place great reliance on the Tennessee Supreme Court’s 1840 decision in *Aymette v. State*, 21 Tenn. 154. The case does not stand for that broad proposition; in fact, the case does not mention the word “militia” at all, except in its quoting of the Second Amendment. *Aymette* held that the state constitutional guarantee of the right to “bear” arms did not prohibit the banning of concealed weapons. The opinion first recognized that both the state right and the federal right were descendants of the 1689 English right, but (erroneously, and contrary to virtually all other authorities) read that right to refer only to “protect[ion of] the public liberty” and “keep[ing] in awe those who are in power,” *id.*, at 158. The court then adopted a sort of middle position, whereby citizens were permitted to carry arms openly, unconnected with any service in a formal militia, but were given the right to use them only for the military purpose of banding together to

the sentence from *Callicutt* immediately preceding the sentence quoted by the First Circuit explains, the *Callicutt* court was relying on the *Aymette*'s "odd reading of the right." The full paragraph from *Callicutt* states:

The cases of *Aymette v. State*, 2 Hum., 155, opinion by Judge Greene, and of *Page v. State*, 3 Heis., 198, opinion by Chief Justice Nicholson, sufficiently indicate the difference between the right and the wrong construction of the "right to keep and bear arms," etc., and we do not deem it necessary to do more than say that we regard the acts to prevent the sale, gift, or loan of a pistol or other like dangerous weapon to a minor, not only constitutional as tending to prevent crime but wise and salutary in all its provisions.¹⁵

2. *McMillan: Pennsylvania Ban on Handgun Sales to Persons under Sixteen*

After the quote from *Callicutt*, the First Circuit provided a string cite of other nineteenth and early twentieth century cases.¹⁶ First, was Pennsylvania's *McMillen v. Steele*.¹⁷ The case involved an 1880 statute that made it unlawful to "knowingly and willfully sell . . . to any person under the age of sixteen years, any cannon, revolver, pistol or other such deadly weapon."¹⁸ A storeowner was being sued because his store sold a firearm to a person under 16.

McMillen explained why the limit was set at 16: "The act of 1881 merely substitutes, for the proof necessary to show lack of capacity, the hard and fast rule of sixteen years of age. Children under that age have been legislatively declared utterly unfit to handle firearms. The negligent act is solely referable to the unlawful sale to a minor under sixteen."¹⁹ Persons 16 and above were held to a different standard than those below 16. Thus, *McMillen* did not support the ban on the 17-year-old in *Rene E.*

oppose tyranny. This odd reading of the right is, to be sure, not the one we adopt—but it is not petitioners' reading either.

¹⁵ *Callicutt*, 69 Tenn. at 716–17. *Page v. State*, 79 Tenn. (11 Lea) 202 (1883) dealt with bearing arms in public and contributes nothing to the discussion of age limitations.

¹⁶ *Rene E.*, 583 F.3d at 14.

¹⁷ *McMillen v. Steele*, 119 A. 721 (Pa. 1923).

¹⁸ *Id.* at 721; Act of June 10, 1881, § 1 (Pub. L. 111; Pa. St. 1920, § 10595). This statute was involved in another negligence case, *Shaffer v. Mowery*, 108 A. 654 (Pa. 1919), in which a 13-year-old purchased a cartridge from a general merchandise store.

¹⁹ *McMillen*, 119 A. at 722.

3. Cases not Addressing the Right to Arms

Second, *Rene E.* cited *State v. Quail*.²⁰ The *Quail* defendant unsuccessfully argued that a Delaware law prohibiting the concealed carrying of a deadly weapon (other than a pocket knife) did not apply to unloaded revolvers. The same statute made it unlawful to “knowingly sell a deadly weapon to a minor other than an ordinary pocket knife,” although that part of the statute was not at issue.²¹

The next case was *Tankersly v. Commonwealth* from the Court of Appeals of Kentucky—a three sentence opinion, in which the court declared that it did not have jurisdiction to hear an appeal to an indictment for selling a deadly weapon to a minor, because the punishment was not severe enough to qualify for an appeal.²²

The fourth case, *State v. Allen*, was decided by the Supreme Court of Indiana. Allen was accused of unlawfully bartering “to Wesley Powles, who was then and there a minor under the age of twenty-one years, a certain deadly and dangerous weapon, to wit: a pistol, commonly called a revolver, which could be worn or carried concealed about the person.”²³ Since the appeal was argued on procedural grounds, the constitutionality of the statute was not at issue.

The next case, *Coleman v. State*, was an Alabama appeal of an indictment founded on an 1856 statute making it a misdemeanor to “sell, or give, or lend” a pistol to “any male minor.”²⁴ Notably the Alabama statute did not apply to female minors. The constitutionality of the statute was not at issue in *Coleman*.

4. Georgia and Minnesota Tort Liability for Illegal Sale of Handgun to Minor

The sixth case, *Spires v. Goldberg*, involved tort liability for an injury that occurred after the defendants sold a pistol and cartridges to a boy around 14 years old.²⁵ The Georgia appellate court noted that a state statute “forbids the sale of pistols to minors and makes the violation of the statute a misdemeanor.”²⁶ The constitutionality of the law was not litigated; the question was whether the statutory violation constituted negligence.

²⁰ *State v. Quail*, 92 A. 859 (Del. Super. Ct. 1914).

²¹ *Id.*; 16 Del. Laws 716 (1881).

²² *Tankersly v. Commonwealth*, 19 S.W. 702, 703 (Ky. 1888).

²³ *State v. Allen*, 94 Ind. 441, 442 (1884).

²⁴ *Coleman v. State*, 32 Ala. 581, 582 (1858).

²⁵ *Spires v. Goldberg*, 106 S.E. 585 (Ga. Ct. App. 1921).

²⁶ *Id.* at 586.

The *Spires* court cited two cases “which come nearest to analogy.”²⁷ *Fowell v. Grafton* was a case from Ontario that involved the violation of a statute making it illegal to sell an airgun to a child under 16.²⁸ More relevant to this Article, *Binford v. Johnston* involved the violation of an Indiana statute prohibiting the sale of pistol cartridges to persons under 21.²⁹

The seventh case, *Schmidt v. Capital Candy Co.*, was about a Minnesota ordinance prohibiting the sale of fireworks and explosives to minors. The ordinance also made it “unlawful for any person or dealer . . . to sell, expose or offer for sale, or in any manner furnish or dispose of . . . to any minor person at any time, any blank cartridge, pistol or revolver.”³⁰ The case decided a question of liability, rather than the constitutionality of the ordinance.

5. Georgia: Minors Have No Constitutional Rights and Handguns can be Banned

As the First Circuit recognized, the statutes in all of the above cases were bans only on *sales*, and not on uncompensated transfers (except for the Alabama statute). None of the statutes criminalized possession by minors. So the First Circuit then looked for laws that “criminalized the mere *possession* of handguns by juveniles.”³¹

The first anti-possession case cited by the First Circuit was *Glenn v. State*.³² It challenged a 1910 Georgia statute that prohibited the carrying of firearms without a license and did not make licenses available to persons under 18.³³ The same statute made it illegal to “knowingly sell, or furnish, any minor with ‘any pistol, dirk, bowie knife, or sword cane, except under circumstances justifying their use in defending life, limb, or property.’”³⁴ The *Glenn* court interpreted the statute as a complete prohibition on persons under 18 from possessing pistols.³⁵ The interpretation is plainly incorrect, since the statute allowed possession for self-defense.

The *Glenn* court upheld the statute under the theory that minors have *no* rights that the legislature is bound to respect: “It is entirely within the

²⁷ *Id.* at 588.

²⁸ *Id.*

²⁹ *Binford v. Johnson*, 82 Ind. 426 (1882).

³⁰ *Schmidt v. Capital Candy Co.*, 166 N.W. 502, 503 (Minn. 1918).

³¹ *United States v. Rene E.*, 583 F.3d 8, 14 (1st Cir. 2009).

³² *Id.*

³³ *Glenn v. State*, 72 S.E. 927 (Ga. Ct. App. 1911).

³⁴ *Id.* at 928.

³⁵ *Id.* (“We conclude, therefore, that the act of 1910 not only prohibits minors under the age of 18 years from obtaining license to have a pistol or revolver on their persons, but that the clear intendment of the act is to prevent minors from having about their persons at all this character of weapons, and this construction is in harmony with the general legislation of the State on the subject of minors”)

province of the legislature, in the exercise of the police power of the State, to prohibit, on the part of minors, the exercise of any right, constitutional or otherwise, although in the case of adults it might only have the right to regulate and restrict such rights.”³⁶

The assertion that minors have no constitutional rights is plainly wrong under modern precedent, and it was plainly wrong under the law of the time.³⁷

Glenn also asserted that handguns are not constitutionally protected arms: “So far as the writer of this opinion is concerned, he is decidedly of the opinion that the possession of a pistol or revolver about the person, either by a minor or an adult, concealed or open, is a menace to individual safety and to law and order, and he concurs strongly in the view of those able jurists who construe the constitutional provision above quoted as not applicable to the modern pistol or revolver.”³⁸

The *Glenn* decision is contrary to *Heller*, which holds that the possession of pistols and revolvers (handguns) is a constitutional right. *Glenn* was also contrary to Georgia Supreme Court precedent from 1844, which had held that handguns are protected by the right to keep and bear arms.³⁹

³⁶ *Id.* at 928-29.

³⁷ See *In re Gault*, 387 U.S. 1, 13 (1967) (holding that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone” and that juveniles have right to counsel, right to notice of charges, right to confront and cross-examine witnesses, and right against self-incrimination); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (“Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect...”); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth and Fourteenth Amendments forbid the execution of individuals who committed their crimes when they were under 18); 1 BLACKSTONE, COMMENTARIES *460-466 (chapter “Of Guardian and Ward” describing various legal rights of minors). If *Glenn* were correct that minors have no constitutional rights, then the Georgia Constitution of 1877, which was still in effect in 1911, would have been no barrier to the Georgia legislature enacting laws against some or all minors: to take their property without due process of law, to banish them from the state, to inflict cruel and unusual punishments on them, to require all Georgians under 21 to profess believe in an official state religion, to punish their dissent from said religion as heresy, to forbid them from criticizing government officials of Georgia, to search their houses without warrants, to forbid them to petition government, and to punish them with ex post facto laws and bills of attainder. See GA. CONST. (1877), art. I, § 1, parts 3, 7, 12, 15, 16, 24, § 3, part 2 (enumerating prohibitions on aforesaid types of government action, and not limiting the protections only to adults). The absurdity of the proposition is self-evident.

³⁸ *Glenn*, 72 S.E. at 929.

³⁹ *Nunn v. State*, 1 Ga. 243 (1846).

Glenn silently sidestepped *Nunn* by stating that the right to arms did not apply to “the *modern* pistol or revolver.” (emphasis added). This is implausible. By the time *Nunn* was decided in 1844, modern revolvers, from Colt’s Manufacturing Company, were on the market. They had been preceded by widespread sales of multi-shot “pepperbox” handguns, which function like a revolver. See JACK DUNLAP, AMERICAN BRITISH & CONTINENTAL PEPPERBOX FIREARMS 16 (1964); LEWIS WINANT, PEPPERBOX FIREARMS (1952); WILLIAM B. EDWARDS, THE STORY OF COLT’S REVOLVER (1953).

6. *Illinois Case Not Addressing Minors*

The second anti-possession case cited, *Biffer v. City of Chicago*,⁴⁰ did not involve a statute that “criminalized the mere *possession* of handguns by juveniles.”⁴¹ The case challenged a Chicago ordinance that required arms dealers to have licenses and that restricted advertising. Those provisions were upheld as lawful under Chicago’s police power.⁴² At the time, Illinois had no constitutional right to keep and bear arms, and the U.S. Supreme Court had specifically declined an opportunity to enforce the Second Amendment against Illinois.⁴³

Another portion of the Chicago ordinance, which was not specifically challenged, prohibited the general superintendent of police from issuing to minors the permit required “to purchase any pistol, revolver, derringer, bowie knife, dirk or other weapon of like character which can be concealed on the person.”⁴⁴ This was a sales restriction, not a possession prohibition.

7. *The Kansas Supreme Court Reversal in Parman: Minors Have a Constitutional Right to Long Guns*

The First Circuit also cited *Parman v. Lemmon*.⁴⁵ *Parman* is particularly relevant to this Article. The issue was whether a 20-gauge Winchester pump-action shotgun was a “dangerous weapon” prohibited by the Kansas statute that made it a misdemeanor to “sell, trade, give, loan or otherwise furnish any pistol, revolver or toy pistol, by which cartridges or caps may be exploded, or any dirk, bowie knife, brass knuckles, sling shot, or other dangerous weapons, to any minor, or to any person of notoriously unsound mind.”⁴⁶ As detailed *infra*, many laws prohibiting the sale of pistols and revolvers also prohibited “other deadly weapons.” Long guns were not considered “other deadly weapons”—the closest they came to being so characterized was by the Supreme Court of Kansas in *Parman*.

The *Parman* court initially held that shotguns (and therefore all firearms) were covered by the statute, and consequently that it was illegal to transfer any firearm to a minor. The court based its decision on the rule of *eiusdem generis*:

⁴⁰ *Biffer v. Chicago*, 116 N.E. 182 (Ill. 1917).

⁴¹ *United States v. Rene E.*, 583 F.3d 8, 14 (1st Cir. 2009).

⁴² *Biffer*, 116 N.E. at 184.

⁴³ *See Presser v. Illinois*, 116 U.S. 252 (1886).

⁴⁴ *Biffer*, 116 N.E. at 184.

⁴⁵ *Parman v. Lemmon*, 244 P. 227 (Kan. 1925).

⁴⁶ *Id.* at 228 (citing R. S. 38–701). R. S. 38–702 made it unlawful for minors to possess these dangerous weapons.

Applying this general rule to the question, we have a title specifying minors and deadly weapons. The act enumerates pistol, revolver, toy pistol, dirk, bowie knife, brass knuckles, sling shot, and “other dangerous weapons.” Can it be said that a Winchester rifle or repeating shotgun placed in the hands of an insane or incompetent person is not a weapon that is inherently dangerous to himself and his associates? The answer is obvious.⁴⁷

“The rule, *ejusdem generis* ordinarily limits the meaning of general words to things of the same class as those enumerated under them.”⁴⁸

Justice John Dawson dissented:

The fathers of our republic believed that a well-regulated militia was necessary to the security of a free state and that the right of the people to keep and bear arms should never be infringed. Have we ceased to believe that doctrine? I refer to this not because it is a provision of the federal constitution, and restricts the power of congress over this subject, but because it is a basic principle of statecraft of deep concern to all who are clothed with authority and who feel their responsibility to hand on undiminished to future generations those liberties which are our proud American heritage.

From the landing of the Pilgrims in 1620 until the last Indian menace on the Kansas frontier in 1885, the rifle over the fireplace and the shotgun behind the door were imperatively necessary utensils of every rural American household. And it was just as imperative that the members of such household, old and young, should know how to handle them. And it was almost equally true that unless a man were trained in the use of the rifle and shotgun in his boyhood he seldom learned to use them. The American Civil War was largely fought by boys. Half of the Union armies were made up of lads in their teens. When those armies were disbanded, so many thousand ex-Union soldiers came to Kansas that their political views and outlook on life and government gave form and tone to the genius of our Kansas institutions. They filled our public offices for a full generation. They constituted a majority of the legislature of 1883, when this statute was enacted, and a majority of all the Legislatures of Kansas for a decade prior to and succeeding that time. Does anybody believe that while our western prairies were still sporadically subjected to Indian raids, while our pioneer homes were still shaded in gloom because of the tomahawk and scalping knife of Ogallalas, Cheyennes, Brule Sioux, and other bloodthirsty savages who smeared our frontier with blood and tears as late as 1878 and 1879, a

⁴⁷ *Id.* at 229.

⁴⁸ *Id.* at 229 (citing 2 Words and Phrases, Second Series, 225). “Ejusdem generis” is Latin for “of the same kind or class.” BLACK’S LAW DICT. 631 (10th ed. 2014). It is a canon of construction “that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.” *Id.*

Kansas legislature would enact a law declaring it to be a crime for a father to intrust a rifle to his son of less than twenty-one years, and declaring it to be a crime for every youth less than twenty-one years of age to handle such a weapon? Yet that is exactly what this decision means when plainly spelled out in the Kansas language for everybody to read.

Yes, and it means more than that. It means that every parent in Kansas since the enactment of this statute in 1883 who has permitted his son under twenty-one to take the family shotgun or heirloom rifle and go rabbit hunting committed a crime in so doing and repeated that crime every time he did permit it. And the boy, too, committed a criminal act every time he used the gun or had it in his possession. Until the recent acceleration of urban population our people have been largely country bred and reared, and it is conservative to say that nine out of every ten country-reared boys have been and still are permitted to use rifles and shotguns. Yet this decision in effect says all such doings are crimes!

It is only the indisputable fact that the legislature so intended which should constrain this court, after a lapse of forty-two years, to discover such an interpretation for this statute.

I think it unnecessary to supplement these general observations with a mere lawyer's argument that the decision is wrong, although it could readily be made. An application of the principle of *ejusdem generis* would make it perfectly clear what the lawmakers of 1883 were concerned with—the vice of permitting children to handle revolvers, toy pistols, using explosives, dirks, sling shots and dangerous weapons of that character, *ejusdem generis*. A shotgun, a rifle, a pitchfork, a hatchet, is a dangerous weapon, of course, but neither is *ejusdem generis* with the sort of weapons denounced by the statute. But I place my dissent principally on the ground that the interpretation of the statute offends against the genius of Kansas and her hitherto free institutions, contemns her heroic history, and disdains the epics of her pioneers.⁴⁹

Justice Henry Mason, also dissenting, argued that *ejusdem generis* required a different result:

Here the dangerous weapons specifically named in the statute have a quality in common, bearing a clear relation to the evil to be remedied. They all (with the exception of the toy pistol, which, as noted in the opinion of the court, was inserted by amendment after the bill had been introduced) are weapons primarily intended and used to inflict injury upon human beings, and generally speaking, serve no worthy purpose but the quite exceptional one of self-defense. The shotgun, on the other hand, is habitually employed for such useful and ordinary purposes as protecting crops and procuring

⁴⁹ *Parman*, 244 P. at 231–32 (Dawson, J., dissenting).

game. Moreover, it is such a common implement that if the lawmakers intended to include it in the prohibited list it is extremely unlikely they would have failed to mention it.⁵⁰

These dissenting opinions apparently persuaded some justices who had originally constituted the majority. Rehearing was granted, and within five months of the original decision, the Kansas Supreme Court reversed itself.

It is argued that if the meaning of a statute is doubtful, that construction should be given which leads to the most reasonable result, and that it is reasonable to conclude that the legislature did not intend to make law violators of sixty per cent of the militia of the state, it being estimated that sixty per cent. of the personnel of that body are minors; that it did not intend to prohibit students under twenty-one years of age in the colleges from taking military training; that it did not intend to prohibit young men under twenty-one years of age from taking out hunters' licenses and hunting; that it did not intend to prohibit young men who have not yet reached the age of twenty-one, who reside on the farms and ranches, from carrying and using shotguns and rifles when necessity requires.

These suggestions and many others have had the consideration of the court. We do not deem it necessary to discuss the question at length, nor to analyze the cases. We are of the opinion that, if the legislature of 1883 had intended to include shotguns in the prohibited list of dangerous weapons it would have specifically mentioned them.

...

By a change of view on the part of some of the justices, the dissenting opinion at the time of the first decision has now become the controlling voice of the court, and further discussion is needless.⁵¹

The vacated *Parman* opinion had cited *Evans v. Waite*.⁵² This Wisconsin case involved a dispute over liability where someone was accidentally shot with a revolver by “a minor of about the age of 18.” “The circuit judge held that, because the defendant was a minor and was armed with a revolver” in violation of state law, “he was liable to the plaintiff for the injury, without regard to the question of negligence.”⁵³ The Supreme Court of Wisconsin affirmed.

⁵⁰ *Id.* at 232 (Mason, J., dissenting).

⁵¹ *Parman v. Lemmon*, 244 P. 232, 233 (Kan. 1926).

⁵² *Evans v. Waite*, 53 N.W. 445 (Wis. 1892).

⁵³ *Id.* at 446

8. Virginia: *Young Adults can Sign Arms-Bearing Contracts*

Also cited by the First Circuit was *United States v. Blakeney*.⁵⁴ The Supreme Court of Appeals of Virginia held that 18-to-20-year-old “minors” were to be treated as adults in the context of bearing arms.⁵⁵ Blakeney was a 19-year-old who volunteered for military duty, and regretting his decision, argued that a minor (at the time, a person under 21) could not enter into a valid contract.⁵⁶ The court held the contract valid, based in part on the fact that as a 19-year-old, Blakeney had the mental and physical capacity to bear arms.⁵⁷

The court explained that “children” were exempted from military service because they are incapable of handling arms:

No person is naturally exempt from taking up arms in defence of the state; the obligation of every member of society being the same. They only are excepted who are incapable of handling arms, or supporting the fatigues of war. This is the reason why old men, children, and women are exempted.⁵⁸

By contrast, “We know, as a matter of fact, that at the age of eighteen, a man is capable intellectually and physically of bearing arms.”⁵⁹ And since 18-year-olds were just as capable as 21-year-olds of both carrying arms and consenting to military service, the court held that 18-to-20-year-olds were bound by military enlistments just as adults over 21 were:

It seems to me obvious that the enlistment of a minor capable of bearing arms, does not fall within the general rule of the municipal law, in regard to the incapacity of infants under the age of twenty-one years, to bind themselves by contract. Nor am I disposed to regard the enlistment as an exception to that rule. The rule, I think, has no application to the subject. The capacity of all citizens or subjects able to bear arms to bind themselves to do so by voluntary enlistment, is in itself a high rule of the public law, to which the artificial and arbitrary rule of the municipal law forms no exception. The rule of the public law is subject to but two conditions, the ability of the party to carry arms, and his consent to do so; and these conditions may exist in as full force at the age of eighteen as at the age of twenty-one. The party is subject to no incapacity by any arbitrary rule in regard to discretion;

⁵⁴ *United State v. Blakeney*, 44 Va. (3 Gratt.) 405 (1847).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 408.

⁵⁹ *Id.* at 418.

and there is but little room for discretion when he is in the line of his allegiance and public duty.⁶⁰

In sum, *Rene E.*'s list of cases is less than meets the eye. Many of the cited cases did not address constitutional issues. Of those that did, several are indefensible in light of *Heller*. *Parman*, in its final outcome, affirms that minors have the right to possess and use long guns, and *Blakeney* is in the same spirit. Most the remaining cases involved handgun sales bans and not possession bans.

C. Evidence of the Founders' Attitudes

Turning to the Founding, the *Rene E.* court could not cite a single source in support of the notion that young people could be disarmed. The absence of such sources can hardly be surprising; as detailed in our forthcoming Article, over 250 colonial and state militia statutes through 1799 mandated that persons 16 and older (or sometimes 18, 15, or 10) be armed.⁶¹

So the First Circuit merely cited some modern law review articles contending that the Founders believed that unvirtuous persons could be disarmed. The paradigmatic examples in these articles were persons who were disloyal to the government during wartime, as well as slaves and hostile Indians.

The only Founding Era source directly cited in *Rene E.* was a never-adopted proposal from Pennsylvania's Anti-Federalists. The proposal would have amended the U.S. Constitution to prevent anyone from being disarmed "unless for crimes committed, or real danger of public injury from individuals." The proposal is addressed in Part III, but it is worth emphasizing here that it made no mention of age whatever. It hardly stands for the proposition that being under 21 years old constitutes "real danger of public injury."

The one other early historical source in *Rene E.* is a 1697 pro-militia pamphlet from England.⁶² The pamphlet refers to ancient "Israelites, Athenians, Corinthians, Achaians, Lacedemonians, Thebans, Samnites, and Romans."⁶³ According to the pamphlet, "Their Arms were

⁶⁰ *Id.* at 409–10.

⁶¹ David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. (forthcoming 2019).

⁶² J. Trenchard & W. Moyle, *An Argument Shewing, That a Standing Army Is Inconsistent with a Free Government, And Absolutely Destructive to the Constitution of the English Monarchy*, U. OF MICH., <https://quod.lib.umich.edu/e/eebo/A63115.0001.001/1:3?rgn=div1;view=fulltext> (last visited October 2, 2018).

⁶³ *Id.* The ancient Hebrew militia obligation began at age 20. Numbers 1:2–4. Under the Hebrew monarchy, training the use of arms began during childhood. 2 Samuel 1:18; CHAIM HERZOG & MORDECHAI GICHON, *BATTLES OF THE BIBLE: A MILITARY HISTORY OF ANCIENT ISRAEL* 110–11 (rev. ed. 2002) (1978).

never lodg'd in the hands of any who had not an Interest in preserving the publick Peace."⁶⁴ That may be true, but there is no evidence that any of these ancient societies considered arms possession by young people to be contrary to preserving the public peace.

In short, *Rene E.* was able to muster little historical evidence in support of a handgun possession ban for persons under 18, although there was some history of sales restrictions.

II. NATIONAL RIFLE ASSOCIATION VERSUS BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES

This Fifth Circuit case directly addressed the Second Amendment rights of young adults.⁶⁵ The National Rifle Association challenged the federal statute that prohibits federally licensed firearms dealers from selling handguns to 18-to-20-year-olds.⁶⁶ The court upheld the law after analyzing the historical understanding of the right to keep and bear arms.⁶⁷

A. No Founding-Era Source Supports Disarming People under 21

The court found that “when the fledgling republic adopted the Second Amendment, an expectation of sensible gun safety regulation was woven into the tapestry of the guarantee.”⁶⁸

Since even before the Revolution, gun use and gun control have been inextricably intertwined. The historical record shows that gun safety

The Athenians, Corinthians, Achaians, Lacedemonians (Spartans), and Thebans, were inhabitants of Greek city-states or regions. In *Politics*, Aristotle had explained that oligarchs attempt to obtain and maintain power by disarming the general public. 1 *The Politics of Aristotle* 48 (B. Jowett trans. & ed., 1885) (“the husbandmen have no arms, and the artisans neither arms nor land, and therefore they become all but slaves of the warrior class.”); *id.* at 80 (“in a constitutional government the fighting-men have the supreme power, and those who possess arms are the citizens.”); *id.* at 131 (oligarchies consolidate power by exempting the poor from the obligation to have arms); *id.* at 171 (“As of oligarchy so of tyranny . . . both mistrust the people, and therefore deprive them of their arms.”); *id.* at 221–22 (Citizens should be warriors at a young age, when their strength is greatest, and should be “councillors, who advise about the expedient and determine matters of law,” later in life. “It remains therefore that both functions of government should be entrusted to the same persons, not, however, at the same time, but in the order prescribed by nature, who has given to young men strength and to older men wisdom.”).

The Samnites were a central Italian tribe that was conquered by, and assimilated to, the growing city-state of Rome. In the Roman Republic, the starting age for militia service was 16 years old. *See* STEPHEN DANDO-COLLINS, *LEGIONS OF ROME: THE DEFINITIVE HISTORY OF EVERY IMPERIAL ROMAN LEGION* 16 (2012).

⁶⁴ Trenchard & Moyle, *supra* note 64.

⁶⁵ *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185 (5th Cir. 2012).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 200.

regulation was commonplace in the colonies, and around the time of the founding, a variety of gun safety regulations were on the books; these included safety laws regulating the storage of gun powder, laws keeping track of who in the community had guns, laws administering gun use in the context of militia service (including laws requiring militia members to attend “musters,” public gatherings where officials would inspect and account for guns), laws prohibiting the use of firearms on certain occasions and in certain places, and laws disarming certain groups and restricting sales to certain groups.⁶⁹

The court provided no specific examples, and the various laws listed can hardly be said to have woven an expectation of restrictions into the tapestry of the guarantee.

The gunpowder of the Founding Era was blackpowder, which is volatile.⁷⁰ To prevent fires and explosions, merchants were often required to store their reserves in a brick building.⁷¹ The “laws prohibiting the use of firearms on certain occasions and in certain places” were typically for fire prevention.⁷² Or laws might prohibit unsafe behavior such firing guns randomly at night—because gunshots were used to raise an alarm, and random fire at night would create a false alarm.⁷³

The colonial and Founding Era arms sales restrictions for “certain groups” were primarily for Indians, and sometimes for slaves (or, very rarely, for free blacks).⁷⁴ There were no restrictions on sales to free citizens.

The only gun laws that were pervasive were the mandates to possess certain types and quantities of arms and accoutrements.⁷⁵ As will be detailed in our Article in the next issue of this Journal, militiamen (typically, ages 16 to 50 or 60) had to possess certain arms. So did men who had aged out of the militia (but who might be needed for local defense). In some colonies, heads of households (regardless of sex or age) also had to possess arms.

⁶⁹ *Id.*

⁷⁰ See David B. Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 38 CHARLESTON L. REV. 283, 291 (2012).

⁷¹ *Id.*

⁷² See *Ezell v. City of Chicago*, 651 F.3d 684, 706 (7th Cir. 2011).

⁷³ See NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE MOCSARY & MICHAEL P. O’SHEA, *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY* 187 (2d ed. 2017) (Virginia: no shooting “any guns at drinking,” except for marriages and funerals; Maryland: no shooting a gun more than three times in an hour, except to raise an alarm; Plymouth: no shooting at night, except at wolves or “for the finding of someone lost”; Pennsylvania, no shooting guns “wantonly” on New Year’s Eve in inhabited areas, or shooting guns near highways). Founding Era limits on firing guns in municipalities were discussed in *Heller* and determined not to be limits on lawful defensive use. *Heller* at 631–34.

⁷⁴ JOHNSON et al., *supra* note 75, at 187–96.

⁷⁵ *Id.* at 175–82 (also noting exception for Pennsylvania, which had no colonial or local militias during most of the colonial period).

Militia musters were the occasion for militiamen to demonstrate that they had the requisite arms by bringing them to the muster.

These laws do show that there were gun laws in the Founding Era, but these laws hardly created a pervasive system of gun control. If an individual possessed the required minimum arms, he or she could purchase and possess additional arms (or choose not to) with zero regulation, including zero restrictions on purchases.

The Fifth Circuit asserted that “laws that confiscated weapons owned by persons who refused to swear an oath of allegiance to the state or to the nation” supported the ban on young adults because the laws “targeted particular groups for public safety reasons.”⁷⁶ These laws were rare and were enacted exclusively during war time to disarm potential enemy combatants.⁷⁷ The disarmament of disloyal persons during wartime is hardly a precedent for targeting other “particular groups” whose loyalty is unquestioned.

The Fifth Circuit specifically cited only two founding-era sources. The first was the document (mentioned above) issued by the Pennsylvania Anti-Federalists who opposed ratifying the Constitution without a declaration of rights. *The Address and reasons of dissent of the minority of the convention, of the state of Pennsylvania, to their constituents* called for the inclusion of the following right to bear arms in the Constitution:

That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game, and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil powers.⁷⁸

Because the dissenting minority’s proposal would have permitted disarmament of people for “real danger of public injury from individuals,” the Fifth Circuit concluded that *all* young adults could be placed outside of the Second Amendment’s protections. This was the strongest founding-era justification that the court produced.

⁷⁶ Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 700 F.3d 185, 200 (5th Cir. 2012).

⁷⁷ JOHNSON et al, *supra* note 75, at 196–98.

⁷⁸ Nathaniel Breeding et al., *The Address and reasons of dissent of the minority of the convention, of the state of Pennsylvania, to their constituents*, LIBR. OF CONGRESS (Dec. 12, 1787), <https://www.loc.gov/resource/bdsdcc.c0401/?sp=1>.

The other founding-era source—included in a footnote—was William Rawle. Rawle was an eminent lawyer, and his constitutional law treatise was the leading work on the subject following its publication in 1825.⁷⁹

According to the court, Rawle “maintained that although the Second Amendment restrained the power of Congress to ‘disarm the people,’ the right to keep and bear arms nonetheless ‘ought not, ... in any government, to be abused to the disturbance of the public peace.’”⁸⁰ Certainly, persons who abuse the right to arms by disturbing the peace may be punished by government. The principle does not justify disarming persons who do *not* abuse the right.

The Fifth Circuit omitted Rawle’s language making it clear that Rawle was writing about people whose conduct demonstrated their danger. After the language quoted by the Fifth Circuit, Rawle elaborated that he was referring to mutinies and to specific individuals who terrorized the public:

An assemblage of persons with arms, for an unlawful purpose, is an indictable offence, and even the carrying of arms abroad by a single individual, attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them, would be sufficient cause to require him to give surety of the peace. If he refused he would be liable to imprisonment.⁸¹

The Supreme Court in *Heller* put the quote from Rawle in proper context.⁸² The Court also quoted Rawle about how the foundation of a militia is an armed populace: “In a people permitted and accustomed to bear arms, we have the rudiments of a militia, which properly consists of armed citizens, divided into military bands, and instructed at least in part, in the use of arms for the purposes of war.”⁸³ Since 18-year-olds were part of the militia—in Rawle’s time and at present—they should be “permitted and accustomed to bear arms.”

⁷⁹ David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1384–88 (1998).

⁸⁰ Nat’l Rifle Ass’n of Am., 700 F.3d at 212 n.12.

⁸¹ WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125–26 (William S. Hein & Co. 2003) (2d ed. 1829). (“Surety of the peace” statutes could be used to require that individuals who had been proven to be acting in a threatening manner could be required to post bond for good behavior if they wanted to continue carrying arms.) See David B. Kopel, *The First Century of Right to Arms Litigation*, 14 GEO. J. L. & PUB. POL’Y 127, 175–77 n.345 (2016).

⁸² *District of Columbia v. Heller*, 554 U.S. 570, 607–08 (2008) (quoting RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA at 123) (“Rawle further said that the Second Amendment right ought not ‘be abused to the disturbance of the public peace,’ such as by assembling with other armed individuals ‘for an unlawful purpose’—statements that make no sense if the right does not extend to *any* individual purpose.”).

⁸³ *Id.*, 554 U.S. at 607 (quoting WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA at 140).

Thus, Rawle's treatise stands for the opposite of the point for which the Fifth Circuit cited the treatise. According to Rawle, law-abiding persons, including whoever would be in the militia, should be "permitted and accustomed to bearing arms." Further, persons of any age who abused the right by disturbing the peace could be punished.

Like the First Circuit in *Rene E.*, the Fifth Circuit in *NRA v. BATF* was unable to cite even one Founding Era source for stripping young adults of civil rights.

Like the Georgia Supreme Court in 1911, the Fifth Circuit resorted to the claim that minors lack constitutional rights. "The age of majority at common law was 21, and it was not until the 1970s that States enacted legislation to lower the age of majority to 18."⁸⁴ Therefore, "If a representative citizen of the founding era conceived of a 'minor' as an individual who was unworthy of the Second Amendment guarantee, and conceived of 18-to-20-year-olds as 'minors,' then it stands to reason that the citizen would have supported restricting an 18-to-20-year-old's right to keep and bear arms."⁸⁵

The Fifth Circuit's speculation is contrary to all the evidence. Persons under 21 were certainly minors under the common law of the Founding Era. Thus, their independent exercise of contract and property rights was limited.

However, there is no evidence "a representative citizen" (or anyone else) in the Founding Era considered all minors "unworthy of the Second Amendment guarantee." To the contrary, state and federal laws of the Founding Era are unanimous that minors aged 18-to-20 *were* considered worthy of the Second Amendment guarantee. As had been the case from the earliest colonial days, they were part of the militia and were required to possess their own arms.

As Blackstone put it, age limits are "different for different purposes."⁸⁶ For example, 14-year-olds were capable of discerning right from wrong and could be "capitally punished for any offense."⁸⁷ The principles of age limits on diverse matters will be discussed further in our forthcoming Article.

We do not need to reason by analogy to know the Founding Era laws for age limits for capital punishment, marriage (universally allowed before age 18), conveying real estate (21), or being elected to the U.S. House of Representatives (25).⁸⁸ Analogies are unnecessary because of the massive and uncontradicted evidence from the Founding Era—which also shows that

⁸⁴ Nat'l Rifle Ass'n of Am., 700 F.3d at 201.

⁸⁵ *Id.* at 202.

⁸⁶ 1 BLACKSTONE, COMMENTARIES 463 (discussing various ages at which male and female wards may consent to marriage, choose their guardian, be an executor of an estate; listing various exceptions to the general rule that minors may not alienate property or enter contracts).

⁸⁷ *Id.* at 463-64; *cf.* *Roper v. Simmons*, 543 U.S. 551 (2005) ("Today, the Supreme Court has forbidden capital punishment for persons under 18.").

⁸⁸ U.S. CONST., art. I, § 2, cl. 2.

18-to-20-year-olds *did* have the right to keep and bear arms, and indeed were required by law to exercise that right.

B. Late Nineteenth-Century State Statutes on Handguns for Minors

The Fifth Circuit found better support from the nineteenth century. It accurately stated that “by the end of the 19th century, nineteen States and the District of Columbia had enacted laws expressly restricting the ability of persons under 21 to purchase or use particular firearms, or restricting the ability of ‘minors’ to purchase or use particular firearms while the state age of majority was set at age 21.”⁸⁹ A string citation in a footnote listed the laws. Most of them date from around the last quarter of the century. These laws did not apply to long guns, but only to handguns, and sometimes to other arms that were considered especially disreputable, such as brass knuckles and bowie knives. Some were limits only on sales; some had exceptions for parental consent, for self-defense, or for hunting.

The laws were:

Alabama. 1856. No one may give a male minor a handgun or bowie knife.⁹⁰

Delaware. 1881. No one may sell to a minor a deadly weapon, other than a pocket knife.⁹¹

District of Columbia. 1892. No one may give a minor a pistol, bowie knife, dagger, or brass knuckles.⁹²

Georgia. 1876. No one may give a minor a “pistol, dirk, bowie knife, or sword cane.” The law does not limit “the furnishing of such weapons under circumstances justifying their use in defending life, limb or property.”⁹³

⁸⁹ Nat’l Rifle Ass’n of Am., 700 F.3d at 202.

⁹⁰ 1856 Ala. Acts §17 (“That anyone who shall sell or give or lend, to any male minor, a bowie knife, or knife or instrument of the like kind or description, by whatever name called, or air gun or pistol, shall, on conviction be fined not less than three hundred, nor more than one thousand dollars.”).

⁹¹ 16 Del. Laws 716, § 1 (1881): “That if any person shall carry concealed a deadly weapon upon or about his person other than an ordinary pocket knife, or shall knowingly sell a deadly weapon to a minor other than an ordinary pocket knife, such person shall, upon conviction thereof, be fined...”

⁹² 27 Stat. 116–17, § 5 (1892) (District of Columbia)
That any person or persons who shall, within the District of Columbia, sell, barter, hire, lend or give to any minor under the age of twenty-one years any such weapon as hereinbefore described [deadly or dangerous weapons, such as daggers, air-guns, pistols, bowie-knives, dirk knives or dirks, blackjacks, razors, razor blades, sword canes, slung shot, brass or other metal knuckles] shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, pay a fine or penalty of not less than twenty dollars nor more than one hundred dollars, or be imprisoned in the jail of the District of Columbia not more than three months.

⁹³ 1876 Ga. Laws 112, § 1
That from and after the passage of this Act it shall not be lawful for any person or persons knowingly to sell, give, lend or furnish any minor or minors any pistol, dirk, bowie knife, or sword cane. Any person found guilty of a violation of this Act shall be guilty of a misdemeanor, and punished as

Illinois. 1873. Most people may not give a minor, “any pistol, revolver, derringer, bowie knife, dirk or other deadly weapon of like character, capable of being secreted upon the person.” Such arms may be given to a minor by the minor’s “father, guardian or employer.”⁹⁴

Indiana. 1875. No one may give a minor “any pistol, dirk, or bowie-knife, slung-shot, knucks, or other deadly weapon that can be worn, or carried, concealed upon or about the person.” The same restriction applies to handgun cartridges.⁹⁵

Iowa. 1884. No one may give “any pistol, revolver or toy pistol to any minor.”⁹⁶

Kansas. 1883. No one may give “any pistol, revolver or toy pistol, by which cartridges or caps may be exploded, or any dirk, bowie-knife, brass knuckles, slung shot, or other dangerous weapons to any minor, or to any person of notoriously unsound mind.”⁹⁷ Minors in possession of such items are guilty of a misdemeanor, and may be fined up to ten dollars.⁹⁸ As discussed *supra*, the Kansas Supreme Court held these restrictions did not apply to long guns.⁹⁹

Kentucky. 1873. The court cited 1873 Ky. Acts 359, but the cited material has nothing to do with arms.¹⁰⁰ We did find the following restriction

prescribed in section 4310 of the Code of 1873: *Provided*, that nothing herein contained shall be construed as forbidding the furnishing of such weapons under circumstances justifying their use in defending life, limb or property.

⁹⁴ 1881 Ill. Laws 73, § 2

Whoever, not being the father, guardian or employer of the minor herein named, by himself or agent, shall sell, give, loan, hire or barter, or shall offer to sell, give, loan, hire or barter to any minor within this state, any pistol, revolver, derringer, bowie knife, dirk or other deadly weapon of like character, capable of being secreted upon the person, shall be guilty of a misdemeanor, and shall be fined in any sum not less than twenty-five dollars (\$25) nor more than two hundred dollars (\$200).

⁹⁵ 1875 Ind. Acts 86, § 1

That it shall be unlawful for any person to sell, barter, or give to any other person, under the age of twenty-one years, any pistol, dirk, or bowie-knife, slung-shot, knucks, or other deadly weapon that can be worn, or carried, concealed upon or about the person, or to sell, barter, or give to any person, under the age of twenty-one years, any cartridges manufactured and designed for use in a pistol.

⁹⁶ 1884 Iowa Acts 86, § 1 (“That it shall be unlawful for any person to knowingly sell, present or give any pistol, revolver or toy pistol to any minor.”).

⁹⁷ 1883 Kan. Sess. Laws 159, § 1

Any person who shall sell, trade, give, loan or otherwise furnish any pistol, revolver or toy pistol, by which cartridges or caps may be exploded, or any dirk, bowie-knife, brass knuckles, slung shot, or other dangerous weapons to any minor, or to any person of notoriously unsound mind, shall be deemed guilty of a misdemeanor, and shall, upon conviction before any court of competent jurisdiction, be fined not less than five nor more than one hundred dollars.

⁹⁸ 1883 Kan. Acts 159, § 2 (“Any minor who shall have in his possession any pistol, revolver or toy pistol, by which cartridges may be exploded, or any dirk, bowie-knife, brass knuckles, slung shot or other dangerous weapon, shall be deemed guilty of a misdemeanor, and upon conviction before any court of competent jurisdiction shall be fined not less than one nor more than ten dollars.”).

⁹⁹ See *supra* text accompanying note 45.

¹⁰⁰ 1873 KY Law chapter 359 is an act to incorporate a banking and warehouse company. 1873 Kentucky Law page 359 is part of an 1874 law (beginning on page 327) revising and amending the charter of the city of Newport. Heinonline’s Session Laws Library for Kentucky for 1873 contains

on minors passed in 1860: “If any person, other than the parent or guardian, shall sell, give, or loan, any pistol, dirk, bowie-knife, brass-knucks, slung-shot, colt, cane-gun, or other deadly weapon, which is carried concealed, to any minor, or slave, or free negro, he shall be fined fifty dollars.”¹⁰¹

Louisiana. 1890. No one may give a minor “any pistol, dirk, bowie-knife or any other dangerous weapon, which may be carried concealed.”¹⁰²

Maryland. 1882. No one may give a minor “any firearm whatsoever or other deadly weapons, except shot gun, fowling pieces and rifles.”¹⁰³

Mississippi. 1878. It is unlawful to sell to a minor or an intoxicated person “any bowie knife, pistol, brass knuckles, slung shot or other deadly weapon of like kind or description” or to sell pistol cartridges to such persons. Concealed carry by anyone of such arms is prohibited, except while traveling.¹⁰⁴ A father who knowingly allows “any minor son under the age of sixteen years to carry concealed” the above arms is guilty of a

three books: “1873 (General Assembly, Public, Local, Private Acts, Regular Session pp. 1-570)”; “1873 vol. I (General Assembly, Public, Local, Private Acts, Adjourned Session pp. 1-694)”; and “1873 vol. II (General Assembly, Local, Private Acts, Adjourned Session pp. 1-644).” We could not locate a firearms law enactment about minors in any of them.

¹⁰¹ 1860 Ky. Acts 245.

¹⁰² 1890 La. Acts 39, § 1 (“That, hereafter, it shall be unlawful, for any person to sell, or lease or give through himself or any other person, any pistol, dirk, bowie-knife or any other dangerous weapon, which may be carried concealed to any person under the age of twenty-one years.”).

¹⁰³ 1882 Md. Laws 656, § 2

That it shall be unlawful for any person, be he or she licensed dealer or not, to sell, barter or give away, to any person who is a minor under the age of twenty-one years. Any person or persons violating any of the provisions of this act shall, on conviction thereof, pay a fine of not less than fifty nor more than two hundred dollars, together with the cost of prosecution, and upon failure to pay said fine and cost, be committed to jail and confined therein until such fine and costs are paid, or for the period of sixty days, whichever shall first occur.

¹⁰⁴ “Fowling pieces” would today be considered a type of shotgun especially suitable for bird hunting. 1878 Miss. Laws 175–76, § 1

SEC. 1. That any person, not being threatened with, or having good and sufficient reason to apprehend an attack, or traveling (not being a tramp) or setting out on a journey, or peace officers, or deputies in discharge of their duties, who carries concealed, in whole or in part, any bowie knife, pistol, brass knuckles, slung shot or other deadly weapon of like kind or description, shall be deemed guilty of a misdemeanor, and on conviction, shall be punished for the first offence by a fine of not less than five dollars nor more than one hundred dollars, and in the event the fine and cost are not paid shall be required to work at hard labor under the direction of the board of supervisors or of the court, not exceeding two months, and for the second or any subsequent offence, shall, on conviction, be fined not less than fifty nor more than two hundred dollars, and if the fine and costs are not paid, be condemned to hard labor not exceeding six months under the direction of the board of supervisors, or of the court. That in any proceeding under this section, it shall not be necessary for the State to allege or prove any of the exceptions herein contained, but the burden of proving such exception shall be on the accused.

SEC. 2. *Be it further enacted,* That it shall not be lawful for any person to sell to any minor or person intoxicated, knowing him to be a minor or in a state of intoxication, any weapon of the kind or description in the first section of this Act described, or any pistol cartridge, and on conviction shall be punished by a fine not exceeding two hundred dollars, and if the fine and costs are not paid, be condemned to hard labor under the direction of the board of supervisors or of the court, not exceeding six months.

misdemeanor.¹⁰⁵ Also guilty of a misdemeanor is “any student of any university, college or school, who shall carry concealed” as well as “any teacher, instructor, or professor” who knowingly permits student concealed carry.¹⁰⁶

Missouri. 1879. Delivering arms to minors without parental consent is a misdemeanor.¹⁰⁷

Nevada. 1885. Minors who carry concealed arms are guilty of a misdemeanor.¹⁰⁸

North Carolina. 1893. It is illegal to sell or “dispose of to a minor any pistol or pistol cartridge, brass knucks, bowie-knife, dirk, loaded cane, or sling-shot.”¹⁰⁹ Unlike some other states (e.g., Alabama 1856), North Carolina did not prohibit loaning such arms to minors.

Tennessee. 1856. It is unlawful “for any person to sell, loan, or give, to any minor a pistol, bowie-knife, dirk, or Arkansas tooth-pick, or hunter’s knife.” The law “shall not be construed so as to prevent the sale, loan, or gift, to any minor of a gun for hunting.” Since the act did not apply to all to

¹⁰⁵ *Id.* § 3

That any father, who shall knowingly suffer or permit any minor son under the age of sixteen years to carry concealed, in whole or in part, any weapon of the kind or description in the first section of this Act described, shall be deemed guilty of a misdemeanor, and on conviction, shall be fined not less than twenty dollars, nor more than two hundred dollars, and if the fine and costs are not paid, shall be continued to hard labor under the direction of the board of supervisors or of the court.

¹⁰⁶ 1878 Miss. Acts 175–176

SEC. 4. *Be it further enacted.* That any student of any university, college or school, who shall carry concealed, in whole or in part, any weapon of the kind or description in the first section of this Act described, or any teacher, instructor, or professor who shall, knowingly, suffer or permit any such weapon to be carried by any student or pupil, shall be deemed guilty of a misdemeanor, and, on conviction, be fined not exceeding three hundred dollars, and if the fine and costs are not paid, condemned to hard labor under the direction of the board of supervisors or of the court.

¹⁰⁷ 1883 Mo. Acts 76 § 1274

If any person shall carry concealed, upon or about his person, any deadly or dangerous weapon, or shall go into any church or place where people have assembled for religious worship, or into any school room or place where people are assembled for education, literary or social purposes, or to any election precinct on any election day, or into any court room during the sitting of court, or into any other public assemblage of persons met for any unlawful purpose other than for militia drill or meetings called under the militia law of this state, having upon or about his person any kind of fire arms, bowie knife, dirk, dagger, slung-shot, or other deadly weapon, or shall in the presence of one or more persons exhibit any such weapon in a rude, angry or threatening manner, or shall have or carry any such weapon upon or about his person when intoxicated or under the influence of intoxicating drinks, or shall directly or indirectly sell or deliver, loan or barter to any minor any such weapon, without the consent of the parent or guardian of such minor, he shall, upon conviction, be punished by a fine of not less than twenty-five nor more than two hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

¹⁰⁸ 1885 Nev. Stat. 51, § 1 (approved March 4, 1881)

Every person under the age of twenty-one (21) years who shall wear or carry any dirk, pistol, sword in case, slung shot, or other dangerous or deadly weapon concealed upon his person, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be fined not less than twenty nor more than two hundred (\$200) dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment.

¹⁰⁹ 1893 N.C. Sess. Laws 468–69, § 1.

long guns, the intent of the exemption was to allow minors to hunt with handguns.¹¹⁰

Texas. 1897. In order to sell or give a minor, “any pistol, dirk, dagger, slung shot, sword-cane, spear, or knuckles made of any metal or hard substance,” the vendor or donor must have “the written consent of the parent or guardian of such minor, or of some one standing in lieu thereof.”¹¹¹

West Virginia. 1882. No one may “sell or furnish” to a minor “any revolver or other pistol, dirk, bowie knife, razor, slung shot, billy, metallic or other false knuckles, or any other dangerous or deadly weapon of like kind or character.” However, “nothing herein contained shall be so construed as to prevent any person from keeping or carrying about his dwelling house or premises any such revolver or other pistol,” or taking the handgun to or from a gunsmith for repair.¹¹²

Besides the blanket exception for handguns in the home, there was also an exception for carrying outside the home if the minor could prove “that he

¹¹⁰ 1856 Tenn. Pub. Acts 92, § 2

That, hereafter, it shall be unlawful for any person to sell, loan, or give, to any minor a pistol, bowie-knife, dirk, or Arkansas tooth-pick, or hunter’s knife ; and whoever shall so sell, loan, or give, to any minor any such weapon, on conviction thereof, upon indictment or presentment, shall be fined not less than twenty-five dollars, and be liable to imprisonment, at the discretion of the Court : *Provided*, that this act shall not be construed so as to prevent the sale, loan, or gift, to any minor of a gun for hunting.

¹¹¹ 1897 Tex. Gen. Laws 221–22, § 1

That if any person in this State shall knowingly sell, give or barter, or cause to be sold, given or bartered to any minor, any pistol, dirk, dagger, slung shot, sword-cane, spear, or knuckles made of any metal or hard-substance, bowie knife or any other knife manufactured or sold for the purpose of offense or defense, without the written consent of the parent or guardian of such minor, or of some one standing in lieu thereof, he shall be punished by fine of not less than twenty-five dollars nor more than two hundred dollars, or by imprisonment in the county jail not less than ten nor more than thirty days, or by both such fine and imprisonment. And during the time of such imprisonment such offender may be put to work upon any public work in the county in which such offense is committed.

¹¹² 1882 W. Va. Acts 421–22, § 7

If a person carry about his person any revolver or other pistol, dirk, bowie knife, razor, slung shot, billy, metallic or other false knuckles, or any other dangerous or deadly weapon of like kind or character, he shall be guilty of a misdemeanor, and fined not less than twenty-five nor more than two hundred dollars, and may, at the discretion of the court, be confined in jail not less than one, nor more than twelve months; and if any person shall sell or furnish any such weapon as is hereinbefore mentioned to a person whom he knows, or has reason, from his appearance or otherwise, to believe to be under the age of twenty-one years, he shall be punished as hereinbefore provided; but nothing herein contained shall be so construed as to prevent any person from keeping or carrying about his dwelling house or premises any such revolver or other pistol, or from carrying the same from the place of purchase to his dwelling house, or from his dwelling house to any place where repairing is done, to have it repaired, and back again. And if upon the trial of an indictment for carrying any such pistol, dirk, razor or bowie knife, the defendant shall prove to the satisfaction of the jury that he is a quiet and peaceable citizen, of good character and standing in the community in which he lives, and at the time he was found with such pistol, dirk, razor or bowie knife, as charged in the indictment he had good cause to believe and did believe that he was in danger of death or great bodily harm at the hands of another person, and that he was, in good faith, carrying such weapon for self defense and for no other purpose, the jury shall find him not guilty.

is a quiet and peaceable citizen, of good character and standing in the community...and had good cause to believe...that he was in danger of death or great bodily harm at the hands of another person.”¹¹³

Wisconsin. 1883. It is “unlawful for any minor...to go armed with any pistol or revolver.”¹¹⁴ It is also “unlawful for any dealer in pistols or revolvers, or any other person, to sell, loan, or give any pistol or revolver to any minor.”¹¹⁵

Wyoming. 1890. It is unlawful “to sell, barter or give to any other person under the age of twenty-one years any pistol, dirk or bowie-knife, slung-shot, knucks or other deadly weapon that can be worn or carried concealed upon or about the person.” It is also unlawful to give “cartridges manufactured and designed for use in a pistol” to a person under 16.¹¹⁶

Besides the state statutes, the Fifth Circuit also cited the cases of *State v. Quail*, *State v. Allen*, *Tankersly v. Commonwealth*, and *Coleman v. State*, all of which were cited by *Rene E.* and discussed *supra*.

As of 1899, there were forty-six states in the Union. Nineteen of them had some sort of law involving handguns and minors and the other twenty-seven had no such laws. No state criminalized handgun possession by minors. Ten states generally prohibited handgun transfers to minors; four of those ten had exceptions for self-defense, hunting, or home possession, and Alabama’s law was only for males. Of these ten statutes, five expressly prohibited loans, while the other five were phrased in terms that could be construed to refer only to permanent dispositions. We do not know of caselaw for how those latter five statutes were applied, but we do note the 2006 Maryland decision that a statute restricting the “transfer” of a regulated weapon did not apply to loans.¹¹⁷

Three other states did not restrict transfers in general, but did restrict sales (Delaware, Mississippi) or dealer sales (Wisconsin). Five states

¹¹³ *Id.*

¹¹⁴ 1883 Wis. Sess. Laws 290

SECTION 1: It shall be unlawful for any minor, within this state, to go armed with any pistol or revolver, and it shall be the duty of all sheriffs, constables, or other public police officers, to take from any minor, any pistol or revolver, found in his possession.

SECTION 2: It shall be unlawful for any dealer in pistols or revolvers, or any other person, to sell, loan, or give any pistol or revolver to any minor in this state.

¹¹⁵ *Id.*

¹¹⁶ 1890 Wyo. Sess. Laws 1253

It shall be unlawful for any person to sell, barter or give to any other person under the age of twenty-one years any pistol, dirk or bowie-knife, slung-shot, knucks or other deadly weapon that can be worn or carried concealed upon or about the person, or to sell, barter or give to any person under the age of sixteen years any cartridges manufactured and designed for use in a pistol; and any person who shall violate any of the provisions of this section shall be fined in any sum not more than fifty dollars.

¹¹⁷ *State v. Chow*, 903 A.2d 388, 406-07 (Md. 2006).

required parental consent for handgun transfers to minors (Illinois, Iowa, Kentucky, Missouri, Texas). Nevada simply prohibited concealed carry.

C. Justice Cooley's Commentary

After the list of statutes, the Fifth Circuit turned to the most influential constitutional commentator of the latter nineteenth century, Michigan Supreme Court Justice Thomas Cooley. The court wrote that Cooley, in his “massively popular 1868 Treatise on Constitutional Limitations” relied on by *Heller*, “agreed that ‘the State may prohibit the sale of arms to minors’ pursuant to the State’s police power.”¹¹⁸

This is overstated in a section that analyzed the police power (and which was not analyzing the right to arms). Cooley cited *State v. Callicutt* in a footnote as holding “That the State may prohibit the sale of arms to minors.”¹¹⁹ Cooley was simply identifying *Callicutt* as a case related to his discussion, which is how he utilized footnotes to cite thousands of cases throughout the treatise.

Callicutt, as explained *supra*, was based on an interpretation of the right to bear arms that was expressly denounced by *Heller* as “odd” and “not the one we adopt.”¹²⁰ *Heller* aside, because Congress does not have a police power, *Callicutt* is no precedent for the permissibility of the congressional statute that was at issue in *NRA v. BATF*.

In the section of *Constitutional Limitations* that *did* discuss the right to arms, Cooley set forth general rules, but expressly avoided discussing restrictions on the right: “how far it may be in the power of the legislature to regulate the right [to keep and bear arms] we shall not undertake to say.”¹²¹ “Happily,” he added, “there neither has been, nor, we may hope, is likely to be, much occasion for an examination of that question by the courts.”¹²²

¹¹⁸ Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 700 F.3d 185, 203 (5th Cir. 2012).

¹¹⁹ THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 740 (6th ed. 1890). The footnote followed a discussion of laws establishing wharf lines and penalizing the removal of stones, gravel, or sand from a beach. Cooley, quoting the Supreme Judicial Court of Massachusetts in upholding the latter law, explained that courts viewed such regulations as “a just restraint of an injurious use of property, which the legislature have authority to impose.” (citing, *Commonwealth v. Tewksbury*, 11 Mass. (11 Tyng) 55 (1846) (a statute which prohibited the having in possession of game birds after a certain time, though killed within the lawful time, was sustained in *Phelps v. Racey*, 60 N.Y. 10 (1875). But, such statute is held in Michigan not to cover a case where the birds were killed out of the State. *People v. O’Neil*, 39 N.W. 1 (Mich. 1888). That the State may prohibit the sale of arms to minors, see *State v. Callicutt*, 69 Tenn. (1 Lea) 714 (1878).). Cooley, *supra*, at 739-40.

¹²⁰ *District of Columbia v. Heller*, 554 U.S. 570, 613 (2008).

¹²¹ Cooley, *supra* note 121, at 427.

¹²² *Id.*

The Fifth Circuit did not discuss Cooley's other major treatise, *The General Principles of Constitutional Law*, which was also quoted by *Heller*. The treatise does have application to arms rights of young adults. While emphasizing that the right to arms is not limited to persons in the militia, Cooley made clear that those in the militia certainly were protected:

It might be supposed from the phraseology of [the Second Amendment] that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. *The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms*; and they need no permission or regulation of law for the purpose. But this enables government to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.¹²³

According to Cooley, although the right is not limited to militiamen, everyone in the militia is protected by the Second Amendment. That includes young adults.

D. The Fifth's Circuit's Flawed Application of Intermediate scrutiny

Determining that “there is considerable historical evidence of age- and safety-based restrictions on the ability to access arms,” the court concluded that “Modern restrictions on the ability of persons under 21 to purchase handguns—and the ability of persons under 18 to possess handguns—seem, to us, to be firmly historically rooted.”¹²⁴ Nevertheless, in an abundance of caution, the court proceeded to apply heightened scrutiny.

The court explained that “A law that burdens the core of the Second Amendment guarantee—for example, ‘the right of law-abiding, responsible

¹²³ *Heller*, 554 U.S. at 617–18 (quoting Thomas M. Cooley, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 271 (1880) (emphasis added)).

¹²⁴ *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 204 (5th Cir. 2012).

citizens to use arms in defense of hearth and home,’ *Heller*, 554 U.S. at 635, 128 S.Ct. 2783—would trigger strict scrutiny, while a less severe law would be proportionately easier to justify.”¹²⁵

Intermediate scrutiny was deemed appropriate because: (1) “this federal scheme is not a salient outlier in the historical landscape of gun control;”¹²⁶ (2) “The Second Amendment, at its core, protects ‘law-abiding, *responsible*’ citizens;”¹²⁷ (3) “Far from a total prohibition on handgun possession and use, these laws resemble ‘laws imposing conditions and qualifications on the commercial sale of arms,’ which *Heller* deemed ‘presumptively lawful;”¹²⁸ (4) “these laws do not strike the core of the Second Amendment because they do not prevent 18-to-20-year-olds from possessing and using handguns ‘in defense of hearth and home;”¹²⁹ (5) “18-to-20-year-olds may possess and use handguns for self-defense, hunting, or any other lawful purpose . . . and they may possess, use, and purchase long-guns;”¹³⁰ and (6) “they regulate commercial sales through an age qualification with temporary effect. Any 18-to-20-year-old subject to the ban will soon grow up and out of its reach.”¹³¹ Each of these reasons, however, was flawed.

1. *The Federal Statute as an Outlier*

As discussed above, by the end of the nineteenth century, thirteen states restricted handgun sales to minors, while four more required parental permission. So the Fifth Circuit was right that an age-based handgun sales restriction for persons under 21, although a minority in historical context, is not a “salient” outlier.

On the other hand, the *federal* scheme was “a salient outlier in the historical landscape of gun control” because no federal law had ever restricted handgun possession so severely. As the First Circuit recognized in *Rene E.*, federal laws receive limited support from cases that upheld regulations under a state’s police power because “Congress does not have the police power. Its jurisdiction to regulate the juvenile possession of handguns must rest on a different basis.”¹³²

¹²⁵ *Id.* at 205.

¹²⁶ *Id.*

¹²⁷ *Id.* at 206 (quoting *Heller*, 554 U.S. at 635).

¹²⁸ *Id.* (quoting *Heller*, 554 U.S. at 626–27 & n.26).

¹²⁹ *Id.* (quoting *Heller*, 554 U.S. at 628–30, 635).

¹³⁰ *Id.* at 207.

¹³¹ *Id.*

¹³² *United States v. Rene E.*, 583 F.3d 8, 19 n.6 (1st Cir. 2009).

2. *Young Adults were Improperly Equated with Felons and the Mentally Ill*

Second, the court inappropriately equated law-abiding young adults with felons and the mentally ill by claiming that they are all too “irresponsible” for Second Amendment protection: “as with felons and the mentally ill, categorically restricting the presumptive Second Amendment rights of 18-to-20-year-olds does not violate the central concern of the Second Amendment. The Second Amendment, at its core, protects ‘law-abiding, *responsible*’ citizens.”¹³³ Such treatment contradicts the standing of young adults in American society, where they can vote, marry, contract, serve on juries, and serve in the military.

It is true that persons 18-to-20 commit gun crimes at a higher rate than do older people. It has long been known that there is a relationship between age and criminal activity. For example, one of the founders of quantitative criminology, Adolphe Quetlet, observed in 1833 that the percentage of the population that perpetrates crime peaks in late adolescence and early adulthood, and then declines as people age. The age-crime relationship can be found in many different historical periods and nations, and for many diverse types of crime.¹³⁴

The age-crime relation persists as persons age. Persons 21-to-25 commit crimes at a higher rate than do people over 25. Persons 60-to-65 commit crimes at a higher rate than do persons over 65. By the Fifth Circuit’s rationale, the minimum age for gun ownership could be set at 100, since persons under 100 commit crimes at a much higher rate than persons over 100.

A similar prohibitory rationale could be applied to many groups that commit crimes disproportionately. For instance, African Americans commit murders at disproportionately high rates, but that cannot justify bans on *all* African Americans.¹³⁵ If nineteenth century statutes are the basis for denial of the right to arms, one can find many more statutes for disarmament of persons of color, including free persons of color, than one can find for limiting handgun acquisition by minors. While the colonial and founding periods had no laws against guns for minors, some of the colonies and early states did restrict guns racially, such as in limits on arms possession by slaves (who were black or Indian). Limits on gun possession by free people of color became common in slave states during the nineteenth century. After the Civil

¹³³ Nat’l Rifle Ass’n of Am., 700 F.3d at 206 (emphasis added by Fifth Circuit).

¹³⁴ ADOLPHE QUETLET, OF THE DEVELOPMENT OF THE PROPENSITY TO CRIME (1833).

¹³⁵ FBI, *Uniform Crime Reports, 2016 Crime in the United States, Expanded Homicide Data Table 2*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/expanded-homicide-data-table-2.xls> (last visited on Oct. 5, 2018) (For 2016, the FBI reported 5,004 “White” murder offenders, 6,095 “Black or African American” murder offenders, 291 “Other” (which “Includes American Indian or Alaska Native, Asian, and Native Hawaiian or Other Pacific Islander”), and 5,574 “Unknown.”).

War and the Fourteenth Amendment, race-based limits continued, albeit in formally neutral gun control statutes that were enforced only against people of color.¹³⁶

Regardless of age or race, males commit far more murders and other gun crimes than females.¹³⁷ That cannot justify an arms ban for all males—even though the 1856 Alabama statute is a precedent for sex discrimination in arms laws.

As the Fifth Circuit acknowledged, law-abiding, responsible citizens are at the core of the Second Amendment right. Their rights should not be forfeited because of irresponsible behavior by other persons of the same age, race, or sex.

3. “Conditions and Qualification on the Commercial Sale of Arms” Do Not Justify Prohibition

The Fifth Circuit’s third rationale was that *Heller* allows “conditions and qualifications on the commercial sale of arms.” Legitimate conditions and qualifications could include, for example, the federal licensing system for persons who are “engaged in the business” of selling arms. They must obtain a federal license and allow federal inspections of their inventory records. To be issued a license, persons must meet certain “qualifications,” such as not having a felony conviction, and having a fixed place of business where sales will be conducted.¹³⁸

The permissibility of “conditions and qualifications on commercial sale” does not authorize prohibition. For example, before *Heller*, a lawful seller of arms in the District of Columbia could not sell a handgun to a person who was not a government employee. The “conditions and qualifications” language from *Heller* is not an exception that swallows the *Heller* rule against banning handgun possession by classes of law-abiding citizens.

4. Long Guns are Not Acceptable Substitutes for Handguns, and Private Sales can be Inferior Substitutes for Store Sales

The court’s fourth and fifth points were that the federal limit on commercial sales of handguns to young adults did not actually prevent young adults from obtaining handguns and from using those handguns for home defense, hunting, or other lawful activities. The young adults simply had to obtain the handguns someplace other than a licensed gun store—such as by

¹³⁶ See David B. Kopel, The First Century of Right to Arms Litigation, 14 GEO. J. L. & PUB. POL’Y 127 (2016); David B. Kopel, Background Checks for Firearms Sales and Loans: Law, History, and Policy, 53 HARV. J. LEGIS. 303, 336–40 (2016).

¹³⁷ FBI, *supra* note 137 (10,310 male murder offenders; 1,295 female offenders; and 5,359 unknown).

¹³⁸ 18 U.S.C. § 923; 27 C.F.R. § 478.41 et seq.

purchase from a private individual, or by gift or loan from friends or family. Moreover, young adults could buy long guns from gun stores.

The long gun argument was directly contrary to *Heller*, which declares that long guns are *not* constitutionally adequate substitutes for handguns: “It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed.”¹³⁹

The point about private sales was true. Young adults in Texas could, and still can, buy a handgun from anyone who is not a federally licensed firearms dealer. However, there is no guarantee that a young adult will be able to find a private seller or somebody to gift them a handgun. This is particularly so for young adults who are living on their own and recently moved to Texas from elsewhere.

Besides, as was pointed out by the briefs, but not addressed by the Fifth Circuit’s opinion, it is hard to find much of a government interest in requiring young adults to buy from private sellers only, and not from stores. Presumably stores would be superior for many buyers, as the stores would typically have greater expertise in helping the buyer choose a reliable handgun with good ergonomics (e.g., grip fit, controllable recoil) for the particular buyer. And stores are more likely to be able to guide buyers towards available safety training courses.

Moreover, the Fifth Circuit’s point about the alternative of private sales, while valid in Texas, is not applicable in some other states, such as those that have adopted Michael Bloomberg’s “universal background check” laws. These laws require all private sales, all private loans of firearms, and all returns of loaned firearms, to take place at a gun store; the store must process the private sale (or the loan or return of a firearm) as if the store were selling a firearm out of its own inventory. Yet federal law prohibits the store from delivering a handgun to a person under 21.

Suppose an uncle wishes to give his 20-year-old niece a handgun. Or he wishes to loan it to her for her week-long camping trip. In “universal background check” states, the handgun transfer may only take place at a gun store. But the gun store may not transfer the handgun, because the recipient is under 21.

Thus, in Colorado, the Bloomberg law, adopted in 2013, has operated to terminate handgun acquisitions by young adults. This was never the intent of the Colorado legislature; the issue of blocking handguns for young adults was never mentioned during legislative debate or public testimony. The

¹³⁹ District of Columbia v. Heller, 554 U.S. 570, 629 (2008).

prohibition was an unintended consequence. Or at least unintended by the legislature.¹⁴⁰

6. *Unlike Illegal Drug Users, Young People have No Escape from Bans*

Finally, the Fifth Circuit pointed out the temporary nature of the ban on gun store handgun sales to young adults. The court compared the age ban to the temporary nature of bans on illegal drug users. As we have previously argued:

First, that a severe burden will be lifted in a few years does not change the present severity of the burden. That a person will be able to protect herself with a handgun three years from now is cold comfort when she cannot protect herself with a handgun from an imminent threat today. Similarly, the fact that a now-pregnant woman would be eligible to get an abortion in three years would not bolster the constitutionality of a law preventing her from getting an abortion today. Second, the court's comparison to unlawful drug users is misguided. As the court explained, the unlawful drug user can end the prohibition by simply ending his drug use—it is completely within the prohibited person's control.¹⁴¹ In contrast, an age limitation is completely beyond the prohibited person's control.¹⁴²

IV. NATIONAL RIFLE ASSOCIATION V. MCCRAW

We have finished with history. The remainder of this Part will address the three other major post-*Heller* federal circuit cases involving young adults.

NRA v. McCraw challenged Texas's statute that prevented most 18-to-20-year-olds from applying for a license to carry handguns for lawful

¹⁴⁰ David B. Kopel, *Background Checks for Firearms Sales and Loans: Law, History, and Policy*, 53 HARV. J. LEGIS. 303 (2016) (the “background check” bills drafted by Mr. Bloomberg’s organizations are laden with prohibitions and consequences that go very far beyond simply requiring background checks on the private sales of guns. The Colorado law still allows transfers among some family members, without need for gun store processing. But many young adults in Colorado cannot take advantage of this. First, the permissible relatives may not live in Colorado. The out-of-state relatives cannot donate a gun, because federal law forbids private arms transfers across state lines. Or the young adult may be living independently from an abusive or otherwise dysfunctional family. Even for functional in-state families, a parent cannot purchase a handgun as an agent for a young adult, because the transaction would be a “straw purchase” under federal law.) See *United States v. Moore*, 109 F.3d 1456 (9th Cir. 1997) (en banc).

¹⁴¹ *United States v. Carter (Carter I)*, 669 F.3d 411, 419 (4th Cir. 2012) (“[I]t is significant that § 922(g)(3) enables a drug user who places a high value on the right to bear arms to regain that right by parting ways with illicit drug use.”); see also *United States v. Yancey*, 621 F.3d 681, 687 (7th Cir. 2010) (“[T]he gun ban extends only so long as Yancey abuses drugs. In that way, Yancey himself controls his right to possess a gun.”).

¹⁴² David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits’ Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 282 (2017).

protection in public places.¹⁴³ Having recently decided *NRA v. BATF*, the Fifth Circuit provided little analysis, explaining that it was bound by *BATF*: “The Texas scheme restricts the same age group’s access to and use of handguns for the same reason [as the handgun sale restriction upheld in *BATF*]. Therefore, under circuit precedent, we conclude that the conduct burdened by the Texas scheme likely ‘falls outside the Second Amendment’s protection.’”¹⁴⁴ In other words, young adults have no Second Amendment rights, or at least no Second Amendment handgun rights.

Like the *BATF* court, the *McCraw* court applied intermediate scrutiny in an abundance of caution and upheld the law for similar reasons.

However, the *McCraw* court made at least two mistakes in its application of intermediate scrutiny. Under the post-*Heller* doctrines adopted by the federal circuits, the level of Second Amendment scrutiny in a given case depends on the severity of the burden on Second Amendment rights. Severe burdens should have more rigorous scrutiny than lesser burdens. In *BATF*, the effect of the federal statute was to restrict where and how young adults could acquire handguns; they could acquire handguns from private persons, but not from stores. The federal law simply forced young adults to use less convenient means of buying handguns. So arguably, intermediate scrutiny was the correct standard of review in *BATF*.

However, in *McCraw*, the effect of the law was to completely disable young adults from bearing handguns for lawful defense. Being a complete prohibition on the exercise of the right to bear handguns, the law at issue in *McCraw* should have been tested under strict scrutiny.¹⁴⁵

The Fifth Circuit also refused to apply all of the intermediate scrutiny tests. In strict scrutiny, the government must prove that there is no “less restrictive alternative.” Under the more relaxed standard of intermediate scrutiny, the government must prove that there is no “substantially less burdensome alternative.”¹⁴⁶ The plaintiffs had argued that instead of banning licensed carry for young adults, Texas could have a more rigorous licensing system for young adults, compared to applicants over 21.

The *McCraw* court dismissed that alternative and said that “less restrictive alternative” is not part of intermediate scrutiny. True enough, but “substantially less burdensome alternative” is part of intermediate scrutiny, and the court offered no explanation for refusing to consider it.

¹⁴³ *Nat'l Rifle Ass'n of Am. v. McCraw*, 719 F.3d 338 (5th Cir. 2013).

¹⁴⁴ *Id.* at 347 (quoting *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 203 (5th Cir. 2012)).

¹⁴⁵ *Id.* (held categorically unconstitutional, as were the complete prohibitions on handguns and on home defense with any firearm in *Heller*.)

¹⁴⁶ *Kopel & Greenlee, supra* note 144, at 309–12.

V. HORSLEY V. TRAME

Illinois requires that residents obtain a firearm owner's identification (FOID) card before acquiring or possessing a firearm. In *Horsley v. Trame*, the plaintiff challenged the requirement that FOID card applicants between 18 and 21 obtain the consent of a parent or guardian.¹⁴⁷ The Seventh Circuit determined that the requirement did not violate the Second Amendment because "Illinois does not impose a categorical ban on firearm possession for 18-to-20-year-olds whose parents do not consent. Rather, when an applicant cannot obtain a parent or guardian signature, he or she may appeal to the Director for a FOID card, and the Director will make a determination."¹⁴⁸

Specifically, "The Director may grant relief to a person who lacks a parent or guardian signature if the applicant establishes to the Director's satisfaction that the applicant has not been convicted of a forcible felony within a certain number of years, the applicant will not be likely to act in a manner dangerous to public safety, and granting relief would not be contrary to the public interest or to federal law. A decision from the Director denying an appeal is subject to judicial review under Illinois's Administrative Review Law."¹⁴⁹

The Illinois Attorney General argued "that the Second Amendment was not originally understood to include minors, and that minors during the founding era were understood to be persons under the age of 21. From there she reasons that persons who are presently under the age of 21 do not have a Second Amendment right to possess a firearm."¹⁵⁰

Following this reasoning, the court acknowledged that "[a]ccording to Blackstone . . . 'full age in male or female is twenty-one years,' and 'till that time is an infant, and so stiled in law.'"¹⁵¹ "So most right-to-bear-arms laws were passed while 18-to-20-year-olds were minors."¹⁵² Moreover, "Thomas Cooley's treatise that *Heller* called 'massively popular' [explains] that the

¹⁴⁷ *Horsley v. Trame*, 808 F.3d 1126 (7th Cir. 2015). The law, 430 ILL. COMP. STAT. 65/4(a)(2)(i), requires an applicant to submit evidence that:

He or she is 21 years of age or over, or if he or she is under 21 years of age that he or she has the written consent of his or her parent or legal guardian to possess and acquire firearms and firearm ammunition and that he or she has never been convicted of a misdemeanor other than a traffic offense or adjudged delinquent, provided, however, that such parent or legal guardian is not an individual prohibited from having a Firearm Owner's Identification Card

¹⁴⁸ *Trame*, 808 F.3d at 1127.

¹⁴⁹ *Id.* at 1128.

¹⁵⁰ *Id.* at 1130.

¹⁵¹ *Id.* (quoting 1 COMMENTARIES ON THE LAWS OF ENGLAND 463 (St. George Tucker ed. 1803)).

¹⁵² *Id.* at 1130.

states ‘may prohibit the sale of arms to minors’ pursuant to their police power.”¹⁵³ The problems with these arguments have been discussed above.¹⁵⁴

Horsley argued that even if the age of majority had once been 21, it is now 18. After all, nowadays 18-year-olds “can vote and serve in the military, get married without parental consent, and own land.”¹⁵⁵ Moreover, she pointed out that the federal Uniform Militia Act of 1792 included 18-year-olds. “Because a minor could be a member of the militia and be armed, she reasons that the Second Amendment gives these persons a right to bear arms.”¹⁵⁶

After describing the pro/con arguments, the Seventh Circuit declared: “We need not decide today whether 18-, 19-, and 20-year-olds are within the scope of the Second Amendment.”¹⁵⁷ Because regardless, the law would be constitutional. In deciding so, the court repeatedly emphasized that the law did not constitute a ban of any sort on 18-to-20-year-olds.¹⁵⁸

Since there was no blanket ban on 18-to-20-year-olds who could not get parent or guardian consent, this case was “much different from the blanket ban on firearm possession present in *Heller*.” The Illinois law was also different from the statute *Planned Parenthood v. Danforth*,¹⁵⁹ where the Supreme Court struck down a blanket provision requiring the consent of a

¹⁵³ *Id.* (quoting THOMAS M. COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS 740 n.4 (5th ed. 1883)); *District of Columbia v. Heller*, 554 U.S. 570, 616 (2008).

¹⁵⁴ *See supra* notes 88 and 119.

¹⁵⁵ *Trame*, 808 F.3d at 1131.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*; *see* *People v. Mosley*, 33 N.E.3d 137 (Ill. 2015); *see also* *People v. Jordan G. (In re Jordan G.)*, 33 N.E.3d 162 (Ill. 2015) (The court cited these two cases from the Supreme Court of Illinois upholding restrictions on 18-to-20-year-olds but was apparently not persuaded by either. Nor should it have been, as the Supreme Court of Illinois failed to conduct meaningful historical analysis in either case).

¹⁵⁸ *Trame*, 808 F.3d at 1127 (“We disagree with Horsley that the Illinois statutory scheme violates her rights under the Second Amendment. Illinois does not impose a categorical ban on firearm possession for 18-to-20-year-olds whose parents do not consent.”); *Id.* at 1130 (“The question in our case is whether the Illinois statutory scheme that promulgates a different procedure for 18-to-20-year-olds to possess a firearm, but does not ban them from doing so, violates the Second Amendment.”); *Id.* at 1131–32 (“Significantly, although Horsley’s arguments treat the challenged statute as a categorical ban on firearm possession, the FOID Card Act does not in fact ban persons under 21 from having firearms without parent or guardian consent.”); *Id.* at 1132 (“The absence of a blanket ban makes the Illinois FOID Card Act much different from the blanket ban on firearm possession present in *Heller*.”); *Id.* at 1132 (“So the lack of a parent signature does not bar Horsley from possessing a firearm, despite her arguments to the contrary. Nor does it impose a bar on gun possession on an 18-to-20-year-old whose parents have passed away or are disqualified from owning guns.”); *Id.* at 1132 (“The absence of a parent or guardian signature is not a ‘veto’ on the ability of a person between 18 and 21 to get a FOID card in Illinois. And the Illinois scheme is not a regulatory means that imposes severe burdens because it does not leave open ample alternative channels; rather it is a restriction that imposes only modest burdens because it does leave open ample alternative channels.”)(internal quotations, citations, footnote markers, and brackets omitted).

¹⁵⁹ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

parent or person *in loco parentis* for an abortion in certain circumstances.¹⁶⁰ Pursuant to *Danforth*, states that require parental consent for abortions for minors must have a safety valve, by which a minor can instead seek consent from a court.

So “The question in our case is whether the Illinois statutory scheme that promulgates a different procedure for 18-to-20-year-olds to possess a firearm, but does not ban them from doing so, violates the Second Amendment.”¹⁶¹ Persuaded primarily by the relatively higher crime rate of 18-to-20-year-olds, the court determined that a different—but not prohibitive—procedure for young adults was “substantially related to the state’s important interests.”¹⁶²

VI. EZELL V. CITY OF CHICAGO

Ezell challenged a Chicago ordinance that prohibited anyone under 18 from entering a shooting range.¹⁶³

Chicago argued that persons under 18 have no Second Amendment rights. “To support this sweeping claim, the City points to some nineteenth-century state laws prohibiting firearm possession by minors and prohibiting firearm sales to minors. Laws of this nature might properly inform the question whether minors have a general right, protected by the Second Amendment, to purchase or possess firearms. But, they have little relevance to the issue at hand.”¹⁶⁴ As discussed above, in the nineteenth century, the majority of states imposed no age limits on the right to arms. Towards the end of the century, a minority of states did limit handgun acquisition. No state prohibited long gun acquisition by minors.

The nineteenth century laws did not prohibit minors who were lawfully in possession of arms from practicing with those arms. As the Seventh Circuit observed, “There’s zero historical evidence that firearm training for this age group is categorically unprotected. At least the City hasn’t identified any, and we’ve found none ourselves.”¹⁶⁵

Moreover, the court found nothing from *Heller* that would justify the ban:

To the contrary, *Heller* itself points in precisely the opposite direction. 554 U.S. at 617–18, 128 S.Ct. 2783 (“[T]o bear arms implies something more than the mere keeping; it implies the learning to handle and use them ...; it

¹⁶⁰ *Trame*, 808 F.3d at 1132.

¹⁶¹ *Id.* at 1130.

¹⁶² *Id.* at 1134.

¹⁶³ *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017).

¹⁶⁴ *Id.* at 896.

¹⁶⁵ *Id.*

implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.” (quoting Thomas McIntyre Cooley, *A Treatise on the Constitutional Limitations* 271 (1868)); see also *id.* at 619, 128 S.Ct. 2783 (“No doubt, a citizen who keeps a gun or pistol under judicious precautions, practices in safe places the use of it, and in due time teaches his sons to do the same, exercises his individual right.” (quoting Benjamin Vaughan Abbott, *Judge and Jury: A Popular Explanation of the Leading Topics in the Law of the Land* 333 (1880))).¹⁶⁶

The court, having determined that the Second Amendment applies to minors at firing ranges, applied heightened scrutiny to the law.

The government was “left to rely on generalized assertions about the developmental immaturity of children, the risk of lead poisoning by inhalation or ingestion, and a handful of tort cases involving the negligent supervision of children who were left to their own devices with loaded firearms.”¹⁶⁷ Since the government could address these concerns with “a more closely tailored age restriction—one that does not *completely extinguish* the right of older adolescents and teens in Chicago to learn how to shoot in an appropriately supervised setting at a firing range,” the law violated the Second Amendment.¹⁶⁸

VII. CONCLUSION

This Article has not attempted to fully analyze all the legal issues involving restrictions on firearms for persons under twenty-one-years-old. Examination of all relevant Supreme Court precedents, of the legal history of the colonial period and Early Republic, of all contemporary statutes on arms and young people, and of age limits for other rights or activities will be discussed in our forthcoming article in the *Southern Illinois University Law Journal*.

In this Article, we have confined the analysis to the five major Circuit Court of Appeals cases on age restrictions for arms. We have closely examined how those cases used history and policy arguments. In short, there are no Founding Era sources that support restrictions on arms acquisition by young people. The first age restrictions appear in the South shortly before the Civil War; by the end of the nineteenth century, thirteen of the forty-six states had restricted handgun sales to minors; and five more required parental permission for such sales. Five states went so far as to prohibit handgun loans to minors. No state had restrictions on long gun sales or loans; a Kansas decision applying a vague statutory term to long guns was swiftly overturned.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 898.

¹⁶⁸ *Id.*

Modern policy arguments attempting to justify prohibitions on young adults 18-to-20 are thinly reasoned and rely on the unsupportable theory that law-abiding young adults are legally similar to convicted felons, illegal drug users, or wartime traitors.

