NRA v. BATFE: A Misinterpretation of History

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Edited by: JURIST Guest Columnist **Stephen Halbrook** says that the Fifth Circuit's decision in *NRA v. BATFE* misinterprets Second Amendment history and leads to absurd results...

Recently, in **NRA v. BATFE**, the US Court of Appeals for the Fifth Circuit **upheld** the ban on the sale of handguns by federally licensed dealers to persons under the age of 21. The law in question, which was codified in sections of **18 USC § 922** and was passed as part of the **Omnibus Crime Control and Safe Streets Act of 1968** [PDF], raises serious issues under the **Second Amendment**. Persons in the 18 to 20-year-old age group at issue have borne arms in military service since the US was founded and are entitled to vote under the **Twenty-Sixth Amendment**.

Under the law, such persons may possess handguns, non-dealers may transfer handguns to them and a dealer can sell a handgun to a parent to give to such person. The government thus asserted that the plaintiffs were not injured and lacked standing. The court disagreed, finding the inability to purchase a handgun from a dealer to be a concrete, particularized injury.

District of Columbia v. Heller upheld the "right of law-abiding, responsible citizens to use arms in defense of hearth and home," **invalidating** the District of Columbia's handgun ban under the Second Amendment. Two models have emerged since that decision, both of which were epitomized in **Heller II** — the majority there opting for **intermediate scrutiny** (but allowing for **strict scrutiny**), and the dissent of Judge Brett Kavanaugh rejecting balancing tests and embracing text, history and tradition.

While choosing the former approach, the Fifth Circuit in *BATFE* paid homage to history by stating that "longstanding" restrictions are consistent with the Second Amendment. The court, however, found as unpersuasive the only type of founding-era laws applicable to 18 to 20-year-olds — militia laws requiring them to obtain firearms. The federal **Militia Act**, enacted in 1792, required "every free able-bodied white male citizen" aged 18 to 44 to enroll in the militia and to "provide himself with a good musket or firelock" or, for horsemen, "a pair of pistols." Militiamen kept their arms and were not supervised by their officers other than during musters. Such laws are irrelevant, the court opined, because other statutes required persons as young as 16 to obtain firearms.

Instead the court found the correct precedents to be "laws disarming certain groups" deemed untrustworthy, such as Loyalists during the Revolution. However, the patriots not only disarmed Loyalists, but also seized their printing presses, confiscated their real estate, imprisoned some and shot others. This would be prohibited by the guarantees in the **US Constitution** against bills of attainder and for a free press, due process, just compensation and — yes — the right to keep and bear arms.

The court also **cited** [PDF] as precedent for disarming "anyone deemed untrustworthy" the ban on firearms possession by "law-abiding slaves." However, that was because in Chief Justice Roger Taney's infamous words in **Dred Scott v. Sandford**, African-Americans had "no rights which the white man was bound to respect," for if they did, they would have had "the full liberty of speech … and to keep and carry arms wherever they went." As the Court articulated in **McDonald v. City of Chicago**, the **Fourteenth Amendment** was adopted in part to secure Second Amendment rights to former slaves.

The sources used by the Fifth Circuit to support the view that, to the founders, "disarming select groups for the sake of public safety was compatible with the right to arms," were the same cited in Justice Stephen Breyer's dissent in *Heller*. These same authors filed *amici curiae* briefs

in *Heller* supporting the District of Columbia's handgun ban, using some of the same arguments. It may as well be argued that the Crown's violation of the Americans' right to keep and bear arms is precedent for doing so today. To the contrary, the Second Amendment was adopted to prevent such infringement.

From the period of the ratification of the Constitution, the Fifth Circuit referred to an **article** [PDF] by Professor Saul Cornell showing the "Pennsylvania Anti-Federalists' support for a high level of gun regulation." This alleged support consisted of their demand in 1787 for a bill of rights to include:

That the people have a right to bear arms for the defense 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[.]

While insurrections against the federal government are undoubtedly real dangers of public injury, being 18-years-old hardly constitutes a "real danger." Those demanding a bill of rights thought — in the words of Richard Henry Lee in 1788 — that "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them[.]"

That thought was continued in the early republic in **Nunn v. State**, a Georgia case which invalidated a handgun carry ban and stated:

The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree[.]

In *Heller*, the Court found found that this passage from *Nunn* "perfectly captured the way in which the operative clause of the Second Amendment

furthers the purpose announced in the prefatory clause[.]" The Fifth Circuit did not cite *Nunn*.

The court did find that by the end of the nineteenth century, nineteen states had laws restricting purchase of particular firearms by persons under 21. It then concluded that a ban on purchase of handguns from dealers "is consistent with a longstanding, historical tradition," and thus falls outside Second Amendment protection. The adoption of the Twenty-Sixth Amendment extending voting rights to 18-year-olds and state laws setting 18 as the age of majority do not compel "Congress or the States to select eighteen as the minimum age to purchase alcohol, lottery tickets, or handguns." Of course, the Constitution does not protect a right to alcohol or lottery tickets.

The court concedes that a law burdening a core Second Amendment right, such as armed self-defense in the home, "would trigger strict scrutiny, while a less severe law would be proportionately easier to justify." However, the court held that strict scrutiny does not apply here because, "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." Comparing that age group to felons and the mentally ill seems to be a stretch.

The Fifth Circuit proceeded to uphold the age restriction under the less exacting standard of intermediate scrutiny. Since only commercial sales are forbidden, the burden is not severe. Persons who are in the 18 to 20 age group may possess and use handguns for self-defense, hunting and other lawful purposes. They may acquire handguns from non-dealers and may acquire long guns either from dealers or non-dealers. Because it applies to age, the restriction is temporary.

The court sought support in the legislative history of the handgun ban in question and studies on crime. The law originally passed with findings about juveniles obtaining handguns without parental consent and dealer sales of handguns to "juveniles and minors prone to criminal behavior."

The findings are silent on the Second Amendment, which was argued by some at the time not even to protect individual rights.

Justice Breyer relied on the same types of legislative findings and studies in his dissent in *Heller*. The intermediate-scrutiny analysis here differs little from Breyer's interest-balancing approach rejected by the majority in *Heller*.

Now for the irony of this exercise, the law allows a person aged 18 to 20 to buy a handgun from a non-dealer and allows a person aged 21 or over to buy a handgun and give it to a person aged 18 to 20. Thus, since persons aged 18 to 20 are too untrustworthy to have Second Amendment rights, they do not have to go through a background check when obtaining a handgun. However, anyone purchasing a firearm from a dealer is subject to a background check for criminal convictions, mental commitments and other prohibited categories giving rise to a denial to purchase firearms. The court rejected the argument that this undermines the reasonableness of the fit between the restriction and the objective to keep firearms out of the wrong hands.

Stephen Halbrook is author of ***The Founder's Second Amendment: Origins of the Right to Bear Arms****, and related books and articles. He has argued numerous constitutional issues in federal courts nationwide, including the US Supreme Court. In addition to his legal education, Halbrook holds a PhD in Philosophy from Florida State University.*