Second Amendment Rights of Young People

David Kopel

February 26, 2019

Do persons under 21 have any Second Amendment rights? Around the nation, gun control activists have been pushing for laws to prohibit firearms for persons under 21. In a symposium issue of the Southern Illinois University Law Journal, Joseph Greenlee and I examine the issue. History and Tradition in Modern Circuit Cases on the Second Amendment Rights of Young People concentrates on two topics: First, the five leading post-Heller federal circuit cases that have addressed age-based restrictions or bans on exercise of Second Amendment rights. Second, statutes and case law from the nineteenth and early twentieth century on the issue. We pay particular attention to how the modern cases employed legal history.

A separate and much longer article, The Second Amendment Rights of Young Adults, will appear in the next issue of the SIU Law Journal (but you can read a near-final draft via the link). That article examines the colonial and Founding periods, twentieth century laws, and modern policy questions. I will write more about that article when it is published.

Rene E. (1st Cir.)

The first post-Heller case to examine an age limit for the Second Amendment was the First Circuit's United States v. Rene E., which upheld 18 U.S.C. 922(x)(2). The statute prohibits handgun possession by persons under 18, with certain exceptions, including self-defense in the home, hunting, farm and ranch work, and target shooting (if the person at the target range carries a permission note from her parents).

The Rene E. court cited a litany of historical cases, but on closer examination, not all of these cites really supported the federal ban. For example, McMillen v. Steele, 119 A. 721 (Pa. 1923) upheld an 1881 statute that banned handgun sales to persons under 16, but did not ban possession. State v. Quail, 92 A. 859 (Del. Super. Ct. 1914) involved a statute against concealed carry; a separate section of the statute banned deadly weapons sales to minors, but that part of the statute was not at issue in the case. Several other cases in the Rene E. list were decided on procedural or other grounds, and did not address constitutional questions. Tennessee's State v. Calicutt, 69 Tenn. 714 (1878), was on-point, but was expressly based on the Tennessee Court's 1840 Aymette v. State. In Heller, the U.S. Supreme Court expressly stated that Aymette's reading of the Second Amendment was "odd" and incorrect; so Aymette and its progeny are not much use as modern precedent.

The best historical precedent cited by the First Circuit was Georgia's Glenn v. State, 72 S.E. 927 (Ga. Ct. App. 1911). It upheld a 1910 statute against furnishing handguns to minors, except for self-defense. According to Glenn, the state may "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." 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.
(Otherwise, minors could be prosecuted for heresy, executed without due process, etc.)

The most detailed treatment of minors was Parman v. Lemmon, 244 P. 227 (Kan. 1925). It
involved the interpretation of a statute that banned furnishing "any pistol, revolver," toy cap
pistol, "dirk, bowie knife, brass knuckles, sling shot, or other dangerous weapons" to minors. Did
"other dangerous weapons" include long guns? The Kansas Court ruled 3-2 that it did, since long
guns can be dangerous. The Court then granted rehearing, reversed itself, and made the dissents
into the controlling opinion. 244 P. 232 (Kan. 1926). The newly-controlling (former) dissent found it extremely implausible that the 1881 legislature would have sub silento banned common
activities such as teenagers using shotguns on the family farm. In Kansas and American history,
"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." A ban on long guns for minors
"offends against the genius of Kansas and her hitherto free institutions, contemns her heroic
history, and disdains the epics of her pioneers."

The Parman court did seem accepting of handgun bans for minors, making it nearly the best
historical precedent for the federal handgun statute at issue in Rene E.

NRA v. BATFE (5th Cir.)

Another part of the federal Gun Control Act forbids persons under 21 from buying handguns in
retail stores, but does not prohibit them from acquiring handguns from other sources. The Fifth
Circuit addressed the ban in NRA v. BATFE, 700 F.3d 185 (5th Cir. 2012). The court correctly
pointed out that gun controls existed at the time of the Founding, and that the Founders were
concerned about keeping arms away from people who were not "virtuous" citizens. Without a
scintilla of evidence, the Fifth Circuit speculated that the Founders considered persons under 21
to be unvirtuous, and so such persons have no Second Amendment rights. Since the standard
starting age for militia service in the colonial and Founding periods was 16 or 18, the Fifth
Circuit's notion that the Founders distrusted young people with arms is implausible and absurd.

The stronger part of the Fifth Circuit opinion was a list of 19th century statutes involving arms
restrictions on minors. These start with an 1856 Alabama law against giving handguns or bowie
knives to male minors, and Tennessee law of the same year against giving such arms to minors
or slaves (with an exception for hunting). The rest of the laws date from 1873 or later.

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.

Three other states did not restrict transfers in general, but did restrict sales (Delaware,
Mississippi) or dealer sales (Wisconsin). Five states required parental consent for handgun
transfers to minors (Illinois, Iowa, Kentucky, Missouri, Texas). Nevada simply prohibited concealed carry.

In short, the historical statues strongly indicate that long gun bans for persons under 21 are unconstitutional. There is minority support for handgun restrictions. Support for extra regulation on handgun acquisition is much stronger than support for prohibition.

In an abundance of caution, the Fifth Circuit also upheld the statute under intermediate scrutiny. The court accurately pointed out that 18-to-20-year-olds have higher violent crime rates than do older people. The rationale can used to justify almost any age ban: 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 perpetrate crimes disproportionately. For instance, African Americans commit murders at disproportionately high rates, but that cannot justify bans on all African Americans. Regardless of age or race, males commit far more murders and other gun crimes than females. The fact cannot justify an arms ban for all males.

NRA v. McCraw (5th Cir.)

Another case in the Fifth Circuit, National Rifle Association v. McCraw, challenged the Texas concealed handgun carry licensing statute, which does not allow young adults aged 18-20 to obtain permits. (An statutory exception was later added for young adults with past or present service in the armed forces.) The McCraw court mostly relied on the NRA v. BATFE precedent, and improperly so. The BATFE case involved a restriction on one means of acquiring handguns, and was tested under intermediate scrutiny. The McCraw case, in contrast, involved a near-total prohibition on the exercise of the right to bear arms; accordingly the statute should have been subject to more rigorous review.

The McCraw court applied a special, feeble version of intermediate scrutiny, which has become a specialty for the Fifth Circuit, and some other courts, in Second Amendment cases. In normal intermediate scrutiny, the government carries the burden of proving that there is no "substantially less burdensome alternative." Under the more rigorous rules of strict scrutiny, the government must prove that there is no "less restrictive alternative." In McCraw, the plaintiffs argued that young adults could be issued permits under a stricter system--for example, additional training or background checks could be required. The Fifth Circuit refused to consider the argument, and incorrectly stated that intermediate scrutiny requires no consideration of alternative regulations.

Horsley v. Trame (7th Cir.)

In Illinois, gun owners must have a Firearm Owner's Identification Card (FOID). Persons 18-20 who apply for a FOID card must have a signed authorization for a parent or guardian. If the signature is not obtainable, there is a safety valve provision for the applicant to seek relief from a state official, and an option for judicial review of an administrative denial. In abortion jurisprudence, parental permission laws have been upheld if they have a safety valve for alternative means of obtain permission. By analogy, the Illinois system for gun licenses was upheld in Horsley v. Trame, 808 F.3d 1126 (7th Cir. 2015).
After the City of Chicago's ban on gun ranges open to the public was ruled unconstitutional, the Chicago City Council enacted a new ordinance. That ordinance prohibited any person under 18 from entering a target range. The ban was held unconstitutional in Ezell v. City of Chicago, 846 F.3d 888 (7th Cir. 2017) (Ezell II). The City pointed to some of the historical restrictions on minors discussed above. But 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." Indeed, the Supreme Court in Heller had quoted a 19th century treatise that "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." Benjamin Vaughan Abbott, Judge and Jury: A Popular Explanation of the Leading Topics in the Law of the Land 333 (1880).

In sum, the legal tradition of the nineteenth and early twentieth centuries, as well as post-Heller federal circuit cases provide two approaches to the right to arms of persons under 21. Under the 1911 approach of the Georgia Court of Appeals, and of the modern Fifth Circuit, persons under 21 have no rights that the government is bound to respect. Under the approach of the Seventh Circuit, people under 21 may sometimes be subject to extra regulation, but not to prohibition. A ban on long guns for persons 18-20 is bereft of any support in history and tradition.

*David Kopel, an adjunct scholar at the Cato Institute, is research director at the Independence Institute and adjunct professor of Advanced Constitutional Law at Denver University, Sturm College of Law.*