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IN DEFENSE OF SELF AND HOME: THE PROBLEMS WITH LIMITING SECOND AMENDMENT RIGHTS FOR YOUNG ADULTS BASED ON THEIR AGE

*Andrew White**

I. INTRODUCTION

The Bill of Rights is perhaps one of the most significant legal documents ever written, particularly in American history. It contains some of the most fundamental freedoms guaranteed to American citizens and is seen by many as the centerpiece of our constitutional order.[1] Of course, the scope of the first ten Amendments to the United States Constitution have not gone unchallenged nor without controversy. Several of these Amendments' protections and guarantees have been the subject of vast amounts of national litigation, producing a progeny of case law that has developed a long line of jurisprudence throughout American history. But not all provisions in the Bill of Rights have this same rich history of case law and interpretation. The Third Amendment,[2] for instance, has been the subject of litigation in only one major case.[3]

Surprisingly, another Amendment that had scanty and underdeveloped jurisprudence throughout most of American history was the Second Amendment, which protects the right "of the people to keep and bear Arms."[4] In fact, until the twenty-first century, the scope of the Second Amendment had only been explored in one major Supreme Court case.[5] Not until 2008 did the Supreme Court perform its first extensive interpretation of the Second Amendment in the landmark case *District of Columbia. v. Heller*.[6] In *Heller*, a divided five-four Court interpreted the Second Amendment as a right held by all individuals for self-defense.[7] *Heller* ushered in a sea of change in Second Amendment interpretation from previous federal court jurisprudence, where the right had generally been understood as

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1. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1131 (1991).

2. U.S. CONST. amend. III ("No solider shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law").

3. Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982).

4. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed").

5. *See* United States v. Miller, 307 U.S. 174, 178 (1939) (holding that the Second Amendment does not protect an individual's right to keep and bear a "sawed-off" shotgun).

6. 554 U.S. 570 (2008).

7. *Id.* at 594-95.

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intertwined with only military or militia use.[8] Moreover, the Second Amendment was not even incorporated and enforceable against the States until 2010.[9]

After the Court's decision in *Heller*, litigation over various gun control statutes and regulations exploded.[10] In July 2021, a challenge to federal gun control laws arose in the United States Court of Appeals for the Fourth Circuit in *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*.[11] In *Hirschfeld I*, the Fourth Circuit held that federal gun laws that prohibited licensed firearm dealers from selling handguns to eighteen-, nineteen-, and twenty-year-olds were unconstitutional and violated the Second Amendment.[12] However, the Fourth Circuit vacated the decision on mootness grounds two months later in *Hirschfeld II*.[13] Nevertheless, the Fourth Circuit's original decision created a circuit split with the Fifth Circuit, which had found the same challenged laws and regulations constitutional in 2012.[14] Although the vacatur decision quelled this circuit split for the time being, the Fourth Circuit acknowledged that "the 'legal community as a whole,' … will still retain some benefit from the panel opinion even if vacated, because the exchange of ideas between the panel and dissent will remain available as a persuasive source."[15]

This Note argues that despite being vacated, courts should adopt the majority's analysis in *Hirschfield I*. Courts should therefore reject the Fifth Circuit's contrary holding. Section II of this Note discusses the history of Second Amendment jurisprudence leading up to and including the Supreme Court's landmark decision in *Heller* as well as notable post-*Heller* cases that established the modern framework for analyzing challenges brought under the Second Amendment. Section II concludes by examining the two decisions that initially created the circuit split.

Section III of this Note argues that the Fifth Circuit's decision to uphold the challenged gun control laws, while not indefensible, is

8. *See*, *e.g.*, Parker v. District of Columbia, 311 F. Supp. 2d 103, 105 (D.D.C. 2004) (stating that the "vast majority of circuit courts…reject[ed] an individual right to bear arms separate and apart from Militia use").

9. *See* McDonald v. City of Chicago, Ill., 561 U.S. 742 (2010).

10. A number of post-*Heller* cases are discussed *infra*, Part II.C.

11. 5 F.4th 407 (4th Cir.), *as amended* (July 15, 2021), *vacated*, 14 F.4th 322 (4th Cir. 2021).

12. *Hirschfeld I*, 5 F.4th at 452.

13. Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives, 14 F.4th 322 (4th Cir. 2021) (vacating its prior decision in 5 F.4th 407 (4th Cir. 2021) on mootness grounds because the plaintiffs had turned 21, thus the challenged laws no longer applied to them).

14. *See* Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 211 (5th Cir. 2012).

15. *See Hirschfeld II*, 14 F.4th at 328.

nonetheless irreconcilable with *Heller*. Rather, the Fifth Circuit's reasoning runs contrary to both the original purpose and central concern of the Second Amendment as well as the history of vigorous protections accorded to fundamental liberties found in the Bill of Rights. Section III further contends that the Fourth Circuit's decision in *Hirschfeld I* is more consistent with *Heller's* central holding and demonstrates a greater respect for constitutional rights. Finally, Section III discusses the practical realities and policy concerns that further suggest courts should follow *Hirschfeld I*. Section IV concludes that the issue in *Hirschfeld I* should be revisited and that the vacated opinion be reinstated and adopted as the controlling standard.

II. BACKGROUND

The Bill of Rights was ratified by the requisite three-fourths of the States on December 15, 1791.[16] The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[17] Until 2008,[18] the "vast majority of circuit courts" had "reject[ed] an individual right to bear arms separate" from the context of a militia.[19] After the Supreme Court's decision in *Heller*, an assortment of challenges to even longstanding federal and state gun control laws made their way through the lower courts.[20]

This Section discusses the history and background of Second Amendment jurisprudence leading to the circuit split created by *Hirschfeld I*. First, Part A discusses the history of Second Amendment jurisprudence leading up to *Heller*. Second, Part B analyzes the majority's decision in *Heller*, which was the Court's first extensive look into the scope of the Second Amendment. Part C discusses *Heller*'s progeny and the legal framework created by the lower courts to examine challenges brought under the Second Amendment. Finally, Part D addresses the circuit split created by the Fourth Circuit's original ruling in *Hirschfeld I*.

A. The Second Amendment Pre-Heller

The Second Amendment has rarely surfaced in litigation before the

16. *Bill of Rights: Primary Documents in American History*, LIBRARY OF CONGRESS (Apr. 11, 2022, 10:37 PM), https://guides.loc.gov/bill-of-rights?&loclr=reclnk. [https://perma.cc/EK4T-7ZQA].

17. U.S. CONST. amend. II.

18. *See* District of Columbia v. Heller, 554 U.S. 570 (2008).

19. Parker v. District of Columbia, 311 F. Supp. 2d 103, 105 (D.D.C. 2004).

20. *See infra* Part C.

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Supreme Court. In fact, the Court had only meaningfully addressed the Second Amendment's meaning three times before *Heller*.[21] In each of these cases, however, the Court did not elaborate on the scope of the Second Amendment right.[22] The first of these Supreme Court cases arose from an indictment for conspiracy under the Enforcement Act of 1870.[23] In *United States v. Cruikshank*, several white defendants were indicted on a number of counts for conspiring to "injure, oppress, threaten, and intimidate" two black citizens.[24] The second count of the indictment accused the defendants of intending to "hinder and prevent the exercise by the same persons of the 'right to keep and bear arms for a lawful purpose.'"[25] The Court briefly addressed the meaning and nature of the Second Amendment, stating only that the second count was defective because the right of "bearing arms for a lawful purpose" was not granted by the Constitution.[26] The Court explained that the Second Amendment's protection of the right to bear and keep arms "has no other effect than to restrict the powers of the national government."[27]

The Second Amendment made its way back to the Supreme Court a few years later in *Presser v. State of Illinois*.[28] In *Presser*, the plaintiff was convicted for violating a section of the Military Code of Illinois that made it unlawful for any "body of men… other than the regular organized volunteer militia of this state, and the troops of the United States, to associate themselves… as a military company or organization, or to drill or parade with arms in any city or town of this state, without the license of the governor thereof."[29] The plaintiff argued that his conviction violated the Second Amendment.[30] The Court held that the law did not violate the Second Amendment because it did not prevent people from joining either the United States military or official state militias.[31] Further, the Court reiterated its holding in *Cruikshank*, declaring that the Second Amendment "is a limitation only upon the power of congress and the national government, and not

21. Sarah Perkins, *District of Columbia v. Heller: The Second Amendment Shoots One Down*, 70 LA. L. REV. 1061, 1062 (2010).

22. *Id.*

23. *See* United States v. Cruikshank, 92 U.S. 542, 544 (1875).

24. *Id.*

25. *Id.* at 545 (internal citation omitted).

26. *Id.* at 553.

27. *Id.*

28. 116 U.S. 252 (1886).

29. *Id.* at 253.

30. *Id.* at 260.

31. *Id.* at 265.

upon that of the state."[32]

The Supreme Court's last analysis of the Second Amendment prior to *Heller* was *United States v. Miller*.[33] In *Miller*, the defendants were convicted of violating the National Firearms Act for transporting a shotgun with a barrel less than eighteen inches in length across state lines.[34] The Court held that the Second Amendment did not guarantee the right to keep and bear the type of shotgun at issue.[35] In coming to its decision, the Court reasoned that because the weapon the law prohibited was not ordinarily used by the military and lacked a "reasonable relationship" to the establishment of a well-regulated militia, the Second Amendment did not protect the right to possess such a weapon.[36] Once again, the Court declined to interpret the Second Amendment as providing an individual right to keep and bear firearms and instead relegated its guarantees to the sole context of military and militia use.[37]

After *Miller*, a challenge under the Second Amendment did not reach the Supreme Court for nearly seventy years. During the twentieth century, federal gun control taxes and regulations increased dramatically.[38] Challenges were rare, however, because of the holdings in these earlier cases. The individual right of American citizens to keep and bear firearms under federal law was simply not recognized before the 2008 decision in *Heller*.

B. District of Columbia v. Heller

On June 26, 2008, the Supreme Court issued its landmark opinion in *Heller*.[39] The central issue in *Heller* concerned the constitutionality of a series of District of Columbia gun control laws that prohibited the possession of usable handguns in the home.[40] The first statute at issue both prohibited carrying an unregistered firearm and placed a blanket ban on the registration of handguns.[41] The second statute required persons to receive a license to carry a handgun from the D.C. chief of

32. *Id.*

33. 307 U.S. 174 (1939).

34. *Id.* at 175.

35. *Id.* at 178.

36. *Id.*

37. *Id.* at 178-82.

38. *See* United States v. Lopez, 2 F.3d 1342, 1348-60 (5th Cir. 1993) for a comprehensive review of congressional action on gun control regulation during the twentieth century.

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

40. *Id.* at 573.

41. *Id.* at 574-75; D.C. CODE ANN. §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4) (West) (2001).

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police for a one-year period.[42] The third statute required residents to keep their lawfully owned firearms "unloaded and dissembled or bound by a trigger lock or similar device" unless those firearms were located in a place of business or were being used for other lawful recreational activities.[43]

Heller was a D.C. special police officer authorized to carry a handgun on duty at the Judiciary Building in Washington, D.C.[44] He applied to register a handgun in his home, but his application was denied.[45] Following his denied application, Heller filed a lawsuit in the Federal District Court for the District of Columbia seeking to enjoin the city from enforcing the statutes, claiming these restrictions prohibited the use of functional firearms in the home and violated the Second Amendment.[46] The district court dismissed the case, rejecting the notion that an individual right to keep and bear arms existed separate and apart from service in a Militia.[47] On appeal, the Court of Appeals for the District of Columbia reversed, holding that the Second Amendment protects an individual's right to possess firearms, and therefore the city's ban on handguns and requirement that firearms in the home be kept dissembled, and effectively unfunctional, were unconstitutional.[48]

Writing for the five-four Supreme Court majority, Justice Scalia's opinion held that "on the basis of both text and history… the Second Amendment conferred an individual right to keep and bear arms."[49] Looking at the text of the Second Amendment, Justice Scalia identified two separate clauses: the operative clause and the prefatory clause.[50] The majority interpreted the text of the operative clause—"the right of the people to keep and bear arms"—to guarantee the individual right to carry firearms for the purpose of self-defense.[51] The majority also identified practices in the American colonies and Britain to highlight the historical significance of the right to carry arms as a "pre-existing right" codified in the Constitution.[52] As for the prefatory clause—"A well regulated Militia, being necessary to the security of a free

42. *Id.* at 575; D.C. CODE ANN. §§ 22-4504(a), 22-4506 (West) (2001).

43. *Id.* at 575; D.C. CODE ANN. § 72507.02 (West) (2001).

44. *Heller*, 554 U.S. at 575.

45. *Id.*

46. *Id.* at 575-76.

47. *See* Parker v. District of Columbia, 311 F.Supp.2d 103, 109 (D.D.C. 2004), *rev'd*, 478 F.3d 370 (D.C. Cir. 2007).

48. Parker v. District of Columbia, 478 F.3d 370, 395, 399-401 (D.C. Cir. 2007).

49. *Heller*, 554 U.S. at 595.

50. *Id.* at 577.

51. *Id.* at 592.

52. *Id.* at 592-95.

State"—the Court interpreted the word "Militia" as referring to "all able-bodied men," a group already in existence prior to governmental organization.[53] The majority went on to interpret the phrase "security of a free State" as referring to the security of the people in general rather than security of the States as an entity.[54]

After explaining that the Court's precedents did not preclude an individual rights interpretation of the Second Amendment,[55] Justice Scalia recognized it limitations. He wrote that the Second Amendment did not extend the "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[56] Moreover, the Court noted that many historical restrictions on firearm possession were appropriate and remained constitutional after *Heller*'s interpretation, including prohibitions on carrying concealed weapons, possession by felons and the mentally ill, and possession in "sensitive places" such as schools and government buildings.[57] The Court also stated that, consistent with its decision in *Miller*,[58] the government could reasonably restrict the use of dangerous and unusual weapons.[59]

Addressing the challenged laws, the Court recognized the handgun ban as a total prohibition on an entire class of "arms" that is overwhelmingly chosen by citizens for the lawful purpose of self-defense—a purpose central to the Second Amendment right.[60] The Court also found that the prohibition's extension to the home, where the need for defense of self, family, and property is most important, was of particular constitutional concern.[61] The Court explained this statute would be unconstitutional under any standard of scrutiny.[62] Further, the Court asserted that it is impermissible to ban individual handgun possession just because individuals may possess other types of firearms.[63] Finally, the Court struck down the statute requiring firearms kept in the home to be dissembled or inoperable because it made it "impossible for citizens to use [firearms] for the core lawful purpose of self-defense."[64]

53. *Id.* at 596.

54. *Id.* at 597.

55. *Heller*, 554 U.S. at 619-25.

56. *Heller*, 554 U.S. at 626.

57. *Id.*

58. *Miller*, 307 U.S. at 179.

59. *Heller*, 554 U.S. at 627.

60. *Id.* at 628.

61. *Id.* at 628-29.

62. *Id.*

63. *Id.* at 629 (citing the importance and popularity of handguns for self-defense as sufficient to invalidate a complete prohibition of their use).

64. *Heller*, 554 U.S. at 630.

While stating that the D.C. regulations at issue would have failed constitutional muster under any level of scrutiny, the Court did not categorically decide what standard of scrutiny should apply to laws that infringed Second Amendment rights.[65] The Court left that question open for lower federal courts to answer when faced with challenges to other laws under the Second Amendment.

C. The Second Amendment Post-Heller: Establishing the Framework

After the Court's decision in *Heller*, the Second Amendment remained unincorporated until 2010.[66] In *McDonald v. City of Chicago*, several residents of Chicago and the surrounding suburb of Oak Park, Illinois, challenged several municipal ordinances that prohibited the possession of handguns.[67] The district court dismissed the lawsuits because the Supreme Court had not incorporated the Second Amendment against the states.[68] After the Seventh Circuit affirmed the district court's dismissal, the Supreme Court granted certiorari.[69]

In a four-one-four decision, the Court reversed, with Justice Alito writing for the plurality that "it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."[70] Justice Alito emphasized the importance of the right to bear arms at the time of the founding,[71] as well as congressional debates over the Fourteenth Amendment discussing the right to bear arms as a "fundamental right deserving of protection."[72] Thus, the Court held that the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment right against the states.[73]

Following the Second Amendment's incorporation in *McDonald*, lower federal courts were left to define the scope the right, particularly how and when the government could constitutionally burden the right through regulation.[74] The circuit courts have since largely utilized a

65. However, the Court did mention in a footnote that permitting rational-basis review to be used on laws that infringed on Second Amendment rights would give the Second Amendment "no effect." *Heller* 554 U.S. at 628 n.27.

66. *See* McDonald v. City of Chicago, 561 U.S. 742 (2010).

67. *Id.* at 750.

68. *Id.* at 752.

69. *Id.* at 752-53.

70. *Id.* at 778.

71. *Id.* at 768.

72. *Id.* at 775.

73. *Id.* at 791.

74. *See, e.g.*, United States v. Masciandaro, 638 F.3d 458, 467 (4th Cir. 2011) ("The upshot of

two-part test to determine whether a law that burdens an individual's exercise of Second Amendment rights is constitutional.[75] First, courts ask whether the challenged law imposes a burden on conduct protected by the Second Amendment.[76] In making this determination, the courts engage in a historical and textual inquiry to determine whether the conduct at issue was understood to be within the scope of the Second Amendment's protection at the time of its ratification.[77] If it was not, the analysis ends, and the challenged law is constitutionally valid.[78]

If the challenged law does burden conduct within the Second Amendment's scope, courts next evaluate the law under some form of means-end scrutiny.[79] If it fails muster under that level of scrutiny, the law is declared unconstitutional.[80] Means-end scrutiny is a judicial reasoning process involving the analysis of purposes, or ends, to be served by the challenged government actions and the methods, or means, chosen to further those purposes.[81] When government actions are challenged as unconstitutional, courts frequently evaluate the justification for that action and determine whether the methods of obtaining the purported government purpose are appropriate.[82] Currently, there are three primary levels of means-end scrutiny commonly applied by courts: rational-basis review, intermediate scrutiny, and strict scrutiny.[83]

Courts must determine which level of scrutiny applies to a challenged government action.[84] Strict scrutiny applies where the classification made by the challenged government action involves a

[*Heller* and *McDonald*] is that there now exists a clearly-defined fundamental right to possess firearms for self-defense within the home. But a considerable degree of uncertainty remains as to the scope of that right beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation."); Ezell v. City of Chicago, 651 F.3d 684, 701 (7th Cir. 2011) ("The Court resolved the Second Amendment challenge in *Heller* without specifying any doctrinal 'test' for resolving future claims.").

75. *See, e.g.*, United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010) (stating that a two-part approach to claims of Second Amendment infringement seems appropriate in light of *Heller*); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010) (same); United States v. Reese, 627 F.3d 792 (10th Cir. 2010) (same).

76. *See, e.g.*, *Marzzarella*, 614 F.3d at 89; Heller v. D.C. (Heller II), 670 F.3d 1244, 1252 (D.C. Cir. 2011).

77. *See, e.g.*, *Chester*, 628 F.3d at 680; *Ezell*, 651 F.3d at 701-02.

78. *See, e.g.*, *Chester*, 628 F.3d at 680; *Marzzarella*, 614 F.3d at 89.

79. *See, e.g.*, *Marzzarella*, 614 F.3d at 89; Silvester v. Harris, 843 F.3d 816, 821 (9th Cir. 2016).

80. *Id.*

81. Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449, 449 (1988).

82. *Id.*

83. *Id.* at 451-56.

84. *See, e.g.*, Pedersen v. Off. of Pers. Mgmt., 881 F.Supp.2d 294, 310 (D. Conn. 2012); Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 637 (1994).

suspect classification, such as classifications based on race or ethnicity, or where the government action infringes on a fundamental or important right.[85] Under strict scrutiny, the challenged law is unconstitutional unless the government can show that it is necessary to achieve a compelling government interest and the law itself is narrowly-tailored to achieve that interest.[86]

If the challenged action involves a semi-suspect classification, such as gender, or infringes on an important, although not fundamental, right, intermediate scrutiny applies.[87] The government then must show the law is substantially related to achieving an important or substantial government purpose.[88] On the other hand, if the challenged government action involves neither a suspect or semi-suspect classification nor infringes on an important or fundamental right, rational-basis review applies.[89] Under the highly deferential rational-basis standard, the challenged law is presumed constitutional so long as it employs rational means to achieve a legitimate government purpose.[90]

Heller noted that courts should refrain from using rational-basis review to analyze laws challenged on Second Amendment grounds but otherwise provided no guidance as to which level of scrutiny to apply to such cases.[91] Since *Heller*, circuit courts have determined which level of scrutiny to apply to Second Amendment challenges.[92] The courts borrowed a First Amendment analysis to analyze Second Amendment challenges, where the level of scrutiny "depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right."[93] Most circuit courts agree that a regulation that threatens a core Second Amendment protection—such as the right of a law-abiding, responsible adult to possess a handgun for defense of home and family—triggers strict scrutiny.[94] A less severe regulation that does not infringe on the core protections of the

85. Russell W. Galloway Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 124 (1989).

86. *Id.* at 125.

87. *Id.* at 125-126.

88. *Id.*

89. *Id.* at 124.

90. *Id.* at 126.

91. *See* District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008).

92. *See* United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010) ("Our task … is to select between strict scrutiny and intermediate scrutiny.").

93. *Id.*; *see also* Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 195 (5th Cir. 2012).

94. *See Nat'l Rifle Ass'n*, 700 F.3d at 195; *see also* Heller v. D.C., 670 F.3d 1244, 1257 (D.C. Cir. 2011); *Chester*, 628 F.3d at 682.

Second Amendment warrants intermediate scrutiny.[95]

D. The Temporary Circuit Split Over Age-Based Handgun Regulation

Although different circuits have applied the two-step approach to many different gun regulation challenges, two cases stand out. Both cases concern a series of challenges to federal gun control statutes and their attendant regulations, which taken together, effectively prevented federally licensed firearms dealers from selling handguns and handgun ammunition to anyone under the age of twenty-one.[96] Below, Subpart 1 discusses the Fifth Circuit's decision in *National Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, which found these statutes and regulations constitutional. Subpart 2 then discusses the Fourth Circuit's decision in *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco, & Explosives*, which held the same laws to be unconstitutional.

1. National Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives

In *National Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, the Fifth Circuit upheld the constitutionality of several federal gun control statutes and their accompanying regulations, which prohibited federally licensed firearms dealers from selling handguns to persons under the age of twenty-one.[97] Appellants included several plaintiffs who were between the ages of eighteen and twenty-one when the suit was filed, and the National Rifle Association on behalf of both its eighteen-to-twenty-year-old members who were prevented from purchasing handguns and its members who were federally licensed dealers prohibited from making sales to individuals in that age range.[98] Although the plaintiffs sought injunctive relief and a declaratory judgment that the laws were unconstitutional, the district court decided that the plaintiffs lacked a viable Second Amendment claim and held for the government.[99]

In a three-zero decision, the Fifth Circuit affirmed, holding that the challenged federal gun laws at issue did not violate the Second

95. *Id.*

96. *See Nat'l Rifle Ass'n*, 700 F.3d at 195 (5th Cir. 2012); Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives, 5 F.4th 407 (4th Cir.), *as amended* (July 15, 2021), *vacated*, 14 F.4th 322 (4th Cir. 2021); These two cases involved challenges to 18 U.S.C. § 922(b)(1), (c)(1); 27 C.F.R. §§ 478.99(b)(1) (2012), 478.96(b) (2008), 478.124(a) (2012).

97. 700 F.3d at 188.

98. *Nat'l Rifle Ass'n*, 700 F.3d at 188.

99. *Id.*

Amendment.[100] The court first adopted the familiar two-step framework that had prevailed in sister circuits: determining first whether the challenged law "regulates conduct that falls within the scope of the Second Amendment's guarantee" and then whether to apply intermediate or strict scrutiny to the law.[101] In the first step of its inquiry, the court looked to whether the challenged laws "harmonize[d] with the historical traditions associated with the Second Amendment guarantee."[102] The court performed a historical analysis and noted that the colonies had many gun safety regulations at the time of the Founding.[103]

In its historical review, the court specifically noted that the Founders would have supported limiting or banning certain groups such as "minors, felons, and the mentally impaired" from purchasing firearms.[104] The court then emphasized that the term "minor" historically applied to persons under the age of twenty-one until the 1970s.[105] Then, after noting that other states had historically banned firearm possession by individuals under the age of twenty-one,[106] the court concluded that the burdened conduct at issue—the ability of eighteen-to-twenty-year-olds to purchase handguns from federally licensed dealers—was "consistent with a longstanding, historical tradition."[107] The court explained that Congress's findings, that curbing easy access to handguns to those under age twenty-one would deter violent crime, were in "conformity with founding-era thinking" in making those restrictions.[108] Although the court seemed inclined to uphold the challenged laws in step one of the analysis and find that the burdened conduct did not fall within the Second Amendment's guarantee, it proceeded to step two out of "an abundance of caution."[109]

The court quickly decided that intermediate scrutiny applied to the challenged laws.[110] The Fifth Circuit read *Heller*'s observations,

100. *Id.* at 211.

101. *Id.* at 194.

102. *Id.*

103. *Id.* at 200. Some of these early gun control regulations used at the time of the colonies included laws regulating the storage of gun powder, laws keeping track of who in the community had guns, and laws disarming certain groups and restricting sale to certain groups. For further discussion of colonial gun control laws and regulations, *see* Saul Cornell and Nathan DeDino, *A Well Regulated Right: The Early Origins of Gun Control*, 73 FORDHAM L. REV. 487, 502-513 (2004).

104. *Nat'l Rifle Ass'n*, 700 F.3d at 201.

105. *Id.*

106. *Id.* at 202-03.

107. *Id.* at 203.

108. *Id.*

109. *Id.* at 204.

110. *Id.* at 205.

specifically that longstanding prohibitions on firearm possession by felons and the mentally ill are presumptively valid,[111] as interpreting the Second Amendment to permit categorical regulation of gun possession by entire classes of people.[112] Further, the court found that this categorical ban did not violate the Second Amendment's central concern as articulated in *Heller*—protecting "law-abiding, *responsible*" citizens—because Congress considered that persons under twenty-one tend to be "irresponsible and prone to violent crime, especially when they have easy access to handguns."[113] The court also observed that the laws did not severely burden eighteen-to-twenty-year-olds' Second Amendment rights because they did not prohibit handgun possession and use through other means, such as acquiring one from a responsible parent or guardian.[114] In addition, the laws regulated commercial sales with only a temporary effect: any eighteen-to-twenty-year-old subject to the laws would soon age out of its reach.[115] In light of these mitigating circumstances, the court believed it was appropriate to review the challenged laws under only intermediate scrutiny.[116]

The Fifth Circuit held that the challenged laws passed constitutional muster under intermediate scrutiny.[117] In applying intermediate scrutiny, the court decided whether there was a "reasonable fit between the law and an important government objective."[118] The court then determined that Congress had identified an important government objective: curbing violent crime perpetrated by those under twenty-one, given an extensive record showing those individuals' proclivity towards such crime.[119] Further, the court found that the challenged laws were reasonably related to achieving that objective because the congressional record revealed that access to handguns by persons under twenty-one was contributing to crime more so than other types of guns.[120] Additionally, Congress determined that federally licensed dealers, as opposed to other sources, constituted "the central conduit of handgun traffic" to persons under twenty-one, so the court found that the prohibition on the sale of handguns by these dealers was

111. *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008).
112. *Nat'l Rifle Ass'n*, 700 F.3d at 205.
113. *Id.* at 206 (quoting *Heller*, 554 U.S. at 635 (emphasis added)).
114. *Id.* at 206-07.
115. *Id.* at 207.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 209.
120. *Id.*

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appropriate.[121]

Therefore, the court concluded that because Congress's chosen means—the challenged laws at issue—reasonably fit the identified important objective—curbing violent crime by those under twenty-one—the laws survived intermediate scrutiny. Thus, the laws did not infringe the Second Amendment.[122] This was the uncontested law of the land until two more prospective handgun buyers under age twenty-one brought suit against the Bureau of Alcohol, Tobacco, Firearms, and Explosives under the same challenged laws nearly a decade later.[123]

2. Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco, & Explosives

In *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco, & Explosives*, two plaintiffs, both prospective handgun buyers under the age of twenty-one, sued the government seeking an injunction and declaratory judgment that the same gun regulations at issue in *Nat'l Rifle Ass'n* violated the Second Amendment.[124] In a two-one decision, the Fourth Circuit held that, "despite the weighty interest in reducing crime and violence," the challenged federal laws were unconstitutional under the Second Amendment.[125] Before engaging in its analysis, the court first discussed Congress's findings regarding the link between violent crime and juvenile firearm possession.[126] Following its review of legislative history and prior case law,[127] the court began its analysis by asking whether the challenged laws were "presumptively valid" based on "longstanding prohibitions on the possession of firearms" as listed in *Heller*.[128]

The government argued that the challenged laws fell into two categories of presumptively valid laws: as conditions on commercial sales and as longstanding regulations.[129] The court declared, however, that the laws were not conditions or qualifications on the commercial

121. *Id.*

122. *Id.* at 211.

123. Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives, 5 F.4th 407 (4th Cir.), *as amended* (July 15, 2021), *vacated*, 14 F.4th 322 (4th Cir. 2021).

124. *Id.* at 410-11.

125. *Hirschfeld I*, 5 F.4th at 410.

126. *See id.* at 411-12 for a review on congressional findings that led to the enactment of the challenged laws.

127. *See id.* at 412-13, 414.

128. *Id.* at 415-16 (This list includes "'longstanding prohibitions on the possession of firearms by felons and the mentally ill, [] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, [and] laws imposing conditions and qualifications on the commercial sale of arms.'") (quoting *Heller*, 554 U.S. at 626-27).

129. *Id.* at 416.

sale of firearms because conditions on sale were hurdles an individual must go through in order to *sell* a gun.[130] Here the laws operated as a total ban on *buying* a handgun from a licensed dealer that had already met the required qualifications to sell firearms.[131] The court then turned to the argument that the laws were "longstanding" regulations and noted that the word "longstanding" as used in *Heller* was not meant to be a standalone exception.[132] Rather it was interpreted as a potential limit on commercial conditions, "requiring the law to be both a commercial condition *and* longstanding to be presumptively valid."[133] Refusing to uphold the challenged laws solely based on how long they existed, the court held that the laws were not presumptively valid and moved on to the familiar two-step inquiry.[134]

In the first step of its inquiry, the court conducted a historical analysis to determine whether the conduct at issue was understood to be within the scope of the Second Amendment's protection at the time of its ratification.[135] First, the court identified the Constitution's text and structure and noted that neither the Second Amendment nor most other constitutional rights were limited in application by age.[136] The court also noted that while there are certain things that even those under twenty-one cannot do by law,[137] none of those restrictions implicate rights found in the Constitution, so states can regulate such activities more freely under their general police powers.[138] The court concluded that because individuals under twenty-one possessed other constitutional rights, those persons would also undoubtedly possess rights under the Second Amendment.[139]

The court then looked at Founding-era militia laws. It noted that every state and the federal government required eighteen-year-old men to enroll in the militia and bring their own arms at the time of the Second Amendment's ratification.[140] The court also rejected that the age of full majority at the time of the Founding was twenty-one.[141] It

130. *Id*.

131. *Id.*

132. *Id.* at 418.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 421. The court further noted that those rights that do have an age-based restriction are typically explicitly in the Constitution's text, such as the right to vote, and these rights all apply at age eighteen, not twenty-one. *Id.* at 421-23.

137. *Id.* at 424. For example, individuals under twenty-one may not purchase alcohol, tobacco, or gamble.

138. *Id.* at 424.

139. *Id.*

140. *Id.* at 428.

141. *Id.* at 435.

explained that the age of majority lacked meaning without reference to a particular right, as different rights vested at different ages and constitutional rights "were not generally tied to an age of majority."[142] Finally, the court looked at the historical development of gun regulations and determined that there were "no laws restricting minors' possession or purchase of firearms" at the time of the Second Amendment's ratification.[143]

Most laws affecting minors were enacted after the Civil War, and the court found that state laws passed decades after ratification restricting gun ownership, at a time when these laws were enacted to primarily disarm African-Americans in the southern states, were weak evidence of the original scope of the Second Amendment.[144] Thus, the court held that persons eighteen and older have traditionally had a Second Amendment right to purchase firearms and moved onto the second step of its inquiry.[145]

The court declined to decide which level of scrutiny applied because it found that the laws could not pass even intermediate scrutiny.[146] The court restated the maxim that intermediate scrutiny required the government to demonstrate a "reasonable fit between the challenged regulation and a substantial government objective,"[147] and it recognized that the government's interest in "preventing crime, enhancing public safety, and reducing gun violence" were "not only substantial, but compelling."[148] The court decided, however, that the regulations at issue were an unreasonable fit to achieve those interests on two grounds.[149]

First, the court declared that a showing of "disproportionate bad conduct by a group" is insufficient to justify a categorical restriction on rights when very few members of that group engage in the unwanted conduct.[150] While the court recognized the congressional findings and admitted that eighteen-to-twenty-year-olds committed a disproportionate amount of crime, it also emphasized that an "exceedingly small percentage, around 0.3% … of the 13 million young adults" in this age group committed crimes.[151] The Fourth Circuit used the Supreme Court's "unduly tenuous" threshold from the

142. *Id.*
143. *Id.* at 439.
144. *Id.* at 439-40.
145. *Id.* at 440.
146. *Id.*
147. *Id.* at 441 (quoting United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010)).
148. *Id.* (quoting Kolbe v. Hogan, 849 F.3d 114, 139 (4th Cir. 2017)).
149. *Id.* at 443.
150. *Id.*
151. *Id.* at 444-45.

landmark case of *Craig v. Boren*[152] and determined that restricting a whole group that is almost entirely law-abiding because a fraction of 1% of the group commits a disproportionate amount of violent crime is the "definition of an unduly tenuous fit."[153] Further, because the congressional findings also showed that young people are disproportionately the victims of crime, the court found that preventing them from purchasing handguns implicated the "self-defense core of the Second Amendment the most."[154]

Second, the court found that eighteen-to-twenty-year-olds' access to guns through licensed dealers was not sufficiently connected to that age group's use of such firearms to commit violence.[155] A review of congressional findings and government amici testimony supported the court's conclusion that the evidence demonstrated only that "'almost all' firearms in the hands of minors—not that 'almost all' guns used by minors *to commit violent crime*—came from a licensed dealer."[156] Further, the court found that the studies relied upon by Congress actually showed that few guns used to commit crime came from licensed dealers, and the few guns from dealers used to commit crime rarely were sold directly from the dealer to the criminal.[157]

Finally, the court was unable to find evidence in the record that the challenged laws had led to any "meaningful or measurable positive effects," which highlighted "the lack of reasonable connection between licensed dealers and gun crimes."[158] Thus, the court held that the challenged laws lacked the reasonable fit required to survive intermediate scrutiny and therefore unconstitutionally burdened the Second Amendment rights of eighteen-to-twenty-year-olds.[159]

III. DISCUSSION

When the Fourth Circuit vacated its decision in *Hirschfeld I* on mootness grounds, it was careful to note that the "constitutional

152. 429 U.S. 190 (1976). In *Craig*, the Supreme Court enjoined an Oklahoma law that prohibited licensed sellers from selling low-alcohol beer to males under twenty-one but permitted sale to females aged eighteen-to-twenty because the state could not show that the sex classification was substantially related to road safety. *Craig*, 429 U.S. at 204. The law at issue was enacted due to congressional findings that 2% of males, as opposed to 0.18% of females, had been arrested for drunk driving. *Id.* at 201. The Court held that if "maleness is to serve as a proxy for drunk driving, a correlation of 2% must be considered an unduly tenuous fit." *Id.* at 201-02.

153. *Hirschfeld I*, 5 F.4th at 446.

154. *Id.*

155. *Id.* at 447.

156. *Id.* at 447-48.

157. *Id.* at 450.

158. *Id.* at 452.

159. *Id.*

interests implicated and the short timeframe in which to challenge the restrictions mean there is a strong public interest" in avoiding vacating its decision.[160] Nevertheless, the court adhered to "customary practice" and vacated the case as moot to promote the "orderly operation of the federal judicial system" and allow for future relitigating of the issues.[161] The Fourth Circuit, however, ended its vacatur opinion by explaining that the public and legal community will still retain some benefit from the vacated opinion because the "exchange of ideas … will remain available as a persuasive source."[162] While the vacatur opinion technically ended the circuit split, it practically left the door open for the issues to be relitigated with the proper parties joined to avoid mootness.

Part A of this Section analyzes the legal reasoning that the Fifth Circuit adopted in *Nat'l Rifle Ass'n* and argues why that reasoning is insufficient to justify the categorical ban on handgun sales to persons between eighteen and twenty years of age. This is particularly so after considering both the central core of the Second Amendment's protections as announced in *Heller* and analogues to other constitutional rights. Part B examines the Fourth Circuit's reasoning in its vacated *Hirschfeld I* decision and concludes that the court employed an approach to Second Amendment jurisprudence that is more consistent with both *Heller*, historical gun regulations, and constitutional rights jurisprudence. Finally, Part C illustrates that while practical policy preferences may, at first glance, support deference to the constitutionality of governmental gun control regulation, the more practical reality supports increased Second Amendment protections that ensure an individual's right to self-defense.

A. The Fifth Circuit's Reasoning Failed to Properly Apply the Central Core of the Second Amendment and Failed to Give the Second Amendment the Same Scope of Protection as Other Similar Constitutional Rights

The Fifth Circuit in *Nat'l Rifle Ass'n* correctly cited the central right that the Second Amendment was intended to protect, as announced in *Heller*, "the 'right of law-abiding, responsible citizens to use arms in defense of hearth and home.'"[163] The court also prudently recognized

160. Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives, 14 F.4th 322, 327 (4th Cir. 2021).

161. *Id.* (quoting U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 27 (1994)).

162. *Id.* at 328.

163. Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 193 (5th Cir. 2012) (quoting D.C. v. Heller, 554 U.S. 570, 635 (2008)).

that since the time of the Founding, an "expectation of sensible gun safety regulation was woven into the tapestry of the [Second Amendment's] guarantee."[164] However, the historical gun regulations that the court relied upon in coming to its decision, particularly those whose purpose was to disarm certain "disfavored" groups such as law-abiding slaves and free African Americans,[165] are too problematically bigoted to rely upon when considered in modern context. Moreover, the Fifth Circuit improperly emphasized that the age of majority at the time of the Founding was thought to be twenty-one in order to justify the categorical age-based ban on handgun sale to those eighteen-to-twenty-years of age,[166] despite the fact that there were no gun regulations that restricted a minors' ability to possess or purchase weapons at the time of the Founding.[167]

The Fifth Circuit also cited various nineteenth-century state laws that restricted gun access to persons under the age of twenty-one to support its conclusion that the regulations at issue were constitutionally permissible.[168] These nineteenth-century laws were, of course, enacted prior to the Supreme Court's recognition in *Heller* that the Second Amendment protected an *individual* right to keep and bear arms, rather than merely in the context of a militia. Therefore, states had more constitutional leeway prior to *Heller*'s new precedent to enact such laws prohibiting individuals from possessing or acquiring firearms. Given these glaring oversights, it is quite peculiar that the court in *Nat'l Rifle Ass'n* was "inclined to uphold the challenged federal laws at step one" of its analytical framework,[169] finding the ability of eighteen-to-twenty-year-olds to purchase handguns from federally licensed dealers to be outside the Second Amendment's protection.[170]

The insufficiencies of the Fifth Circuit's reasoning do not end in step one of its analysis. It may have been appropriate to analyze the challenged laws under only intermediate scrutiny, and curbing violent crime committed by persons under twenty-one is certainly an

164. *Id.* at 200.

165. *Id.* One would be hard pressed to justify the constitutionality of regulations that categorically banned handgun sale to groups such as African Americans or women.

166. *Id.* at 201-02.

167. *See* Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives, 5 F.4th 407, 437 (4th Cir.), *as amended* (July 15, 2021), *vacated*, 14 F.4th 322 (4th Cir. 2021). Interestingly, the same laws the Fifth Circuit relied on to permit the regulations at issue were rejected in *Heller* as justifications for broader regulations. *Compare Nat'l Rifle Ass'n*, 700 F.3d at 200-01 (majority opinion), *with Heller*, 554 U.S. at 683-86 (Breyer, J., dissenting) (using similar laws as the majority in *Nat'l Rifle Ass'n* to justify handgun ban in homes), *and Heller* at 631-34 (majority opinion) (rejecting those laws as not probative).

168. *Nat'l Rifle Ass'n*, 700 F.3d at 202-03.

169. *Id.* at 204.

170. *Id.* at 203.

"important government objective."[171] The challenged laws, however, were not as reasonably tailored to fit such an objective, as the Fifth Circuit seemed to believe. While the Fifth Circuit looked to the congressional record for evidence of increased violent crime committed by persons eighteen-to-twenty years of age,[172] it failed to consider how overbroad the challenged laws were. The laws restricted the ability of law-abiding, responsible individuals aged eighteen-to-twenty to purchase handguns for purposes of self-defense.[173] This over-inclusivity rendered the laws at odds with the core of the Second Amendment's protections: the right of law-abiding, responsible citizens to use firearms for self-defense.[174]

It would be a stretch to imagine Congress could limit the First or Fourth Amendment rights of eighteen-to-twenty-year-olds just because a congressional record demonstrated that persons in that age group were more likely to incite violence with their speech or possess drugs or other dangerous items in their homes. Likewise, the attempt to burden the Second Amendment rights of this same age group based on the actions of a fraction of its members should be met with equal skepticism. And while it may be true that members of the eighteen-to-twenty-year-old age group are prohibited from doing other activities by law, such as purchasing alcohol or gambling at a casino, such activities are not protected by constitutional amendments, where protections of rights are not based on age. The Fifth Circuit in *Nat'l Rifle Ass'n* failed to afford the Second Amendment the same scope of protection as other, similarly situated amendments.

B. The Fourth Circuit's Conclusion Is More Consistent With the Second Amendment's Central Concern

Holding that the laws prohibiting federally licensed dealers from selling handguns to persons eighteen-to-twenty-years-old were unconstitutional, the Fourth Circuit took an approach more consistent with the historical gun rights of eighteen-to-twenty-year-olds. First, the court correctly explained that the challenged regulations at issue

171. The Fourth Circuit in *Hirschfeld I*, finding these same laws unconstitutional, even conceded that the government's interest in curtailing such crimes is "not only substantial, but compelling." 5 F.4th at 441.

172. *Nat'l Rifle Ass'n*, 700 F.3d at 209-10.

173. *See Hirschfeld I*, 5 F.4th at 444 ("… these laws over-inclusively restrict the rights of a large group of law-abiding citizens to target a tiny portion of them."). The Fourth Circuit in *Hirschfeld* read the same congressional record as the Fifth Circuit in *Nat'l Rifle Ass'n*, and found that only an "exceedingly small percentage, around 0.3% and definitely less than 1%, of the 13 million young adults in this group commit [violent] crimes." *Id.* at 445.

174. *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

were more than mere "conditions or qualifications on the commercial sale of arms"[175] that would be found presumptively valid under *Heller*.[176] An outright ban that effectively prohibits an entire age group from purchasing handguns from licensed dealers who have already met the required qualifications to sell handguns is quite different from conditions on being able to *sell* such firearms in the first place.

Second, the court looked at the Constitution's text and structure, observing that neither the text of the Second Amendment nor other analogous constitutional rights imposed an age requirement.[177] While other amendments of our Constitution have certainly been limited by the courts irrespective of the plain text, most of these amendments do not apply only to certain age groups and certainly do not limit protections based on age once an individual reaches eighteen.[178] The court also looked at militia laws at the time of the Founding and noted that all of them required eighteen-year-olds to join the militia and furnish their own arms, with some states even setting the age at sixteen.[179] This alone provides strong evidence that the Framers intended the Second Amendment to protect at least those age eighteen and older, contrary to the Fifth Circuit's reasoning.

In *Hirschfeld I*, the Fourth Circuit's reasoning was also more consistent with the Second Amendment's central concern. While the court recognized that the government's interest in preventing crime and gun violence were not only important, but compelling, the majority of the panel took issue with the means the government used to achieve its interests.[180] The Fourth Circuit appropriately identified the overbreadth of the challenged laws, explaining that they sought to restrict an entire group's rights for the crimes of less than 1% of that group, based on evidence from the congressional record.[181] One could imagine the outrage and grave legal concerns that would accompany legislation that sought to prohibit men, for example, from possessing handguns based on findings that they were more likely to commit violent crime than women. The court's recognition of the challenged

175. *See Hirschfeld I*, 5 F.4th at 416.

176. *See Heller*, 554 U.S. at 626-27. That list of presumptively valid gun regulation measures includes "longstanding prohibitions on the possession of firearms by felons and the mentally ill, [] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.*

177. *Hirschfeld I*, 5 F.4th at 421.

178. In fact, the Eight Amendment provides greater protection for those under the age of eighteen. *See* Roper v. Simmons, 543 U.S. 551, 574 (2005) (holding that the Eight Amendment's application to minors prohibited the use of the death penalty for those who were under eighteen at the time they committed the offense).

179. *Hirschfeld I*, 5 F.4th at 428.

180. *Id.* at 441.

181. *Id.* at 444-46.

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laws' overbreadth is more consistent with the central concern of the Second Amendment—the right of law-abiding citizens to use firearms for defense of self and the home.[182]

The Fourth Circuit's reasoning accords the proper respect to constitutional rights and is consistent with the Supreme Court's decision in *Heller*. Once another challenge to these particular laws is brought with the proper parties involved, the federal circuit courts should adopt *Hirschfeld I*'s holding.

C. Practical Realities Further Support That Restricting Firearm Access to Eighteen-Twenty Year Olds Is Unconstitutional

Practical realities, such as policy preferences for enhanced public safety and reduction in gun violence,[183] may naturally lead to laws such as those challenged in *Nat'l Rifle* and *Hirschfeld I* to be upheld as constitutional, extending more deference to Congress to curb violent crime through gun control laws. The practical realities of gun possession and violence in America, however, suggest the need for *increased* Second Amendment protections. As much as persons under twenty-one may be the perpetrators of violent crime, they are just as disproportionately the victims of violent crime.[184] Thus, they are in strong need of the Second Amendment's protections. While critics of this position may argue that the challenged laws at issue before the Fourth and Fifth Circuit still permitted eighteen-to-twenty-year-olds to both acquire handguns through other legal means and purchase other types of long guns other than handguns through federally licensed dealers,[185] these "mitigating factors" are flawed.

First, these factors do not account for the law-abiding eighteen-to-twenty-year-old citizens who may not have a parent or guardian from whom they may acquire a handgun for use of self-defense.[186] This leaves these individuals with an incentive to obtain firearms in less

182. *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

183. *See, e.g.*, New York Rifle and Pistol Association, Inc. v. Bruen, No. 20-843, where the Supreme Court is actively considering a challenge to a New York law that, in citing concerns for public safety, requires citizens to demonstrate "proper cause" to carry a firearm. The author predicts that the Court will declare the New York law unconstitutional and extend *Heller*'s self-defense rationale outside of merely the home.

184. *See* Rachel E. Morgan & Jennifer L. Truman, *Criminal Victimization, 2019*, at 21, 45, U.S. DEP'T. OF JUST., BUREAU OF JUST. STATS. (Sept. 2020), https://www.ojp.gov/library/publications/criminal-victimization-2019. [https://perma.cc/B7NB-664L].

185. *See, e.g.*, Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 189-90 (5th Cir. 2012) ("Parents or guardians may gift handguns to 18-to-20-year-olds.").

186. This can become especially problematic for those persons under twenty-one who live in neighborhoods where the violent crime rate is disproportionately high.

regulated ways, such as buying it privately without a background check or obtaining it illegally.[187] Further, *Heller* itself recognized that handguns are the most popular firearm chosen by Americans for self-defense, and a "complete prohibition of their use is invalid."[188] Depriving those persons aged eighteen-to-twenty of the "quintessential self-defense weapon" certainly strikes at the core of what the Second Amendment was intended to protect.[189] Finally, as the *Hirschfeld I* court notes, many, if not most, guns used to commit crime are obtained illegally.[190] And as young persons are disproportionately the victims of violent crime,[191] it is imperative that they enjoy the same ability to defend themselves and their homes as those twenty-one and older.

These practical realities of gun violence in America demonstrate the need not for increased gun regulation burdening law-abiding individuals eighteen-to-twenty years of age, but rather the need for those persons to have equal protection under the Second Amendment as citizens twenty-one and older.

IV. CONCLUSION

The Fourth Circuit did not reverse its decision in *Hirschfeld I* on the merits. In fact, but for the failure of the plaintiff's attorney to join new parties before the plaintiff reached the age of twenty-one, the court's vacated decision would not have been rendered moot, and this circuit split would still exist for the Supreme Court to resolve. But nevertheless, the Fourth Circuit's decision offers an approach with greater respect for and consistency with the central concern of the Second Amendment as established in *Heller*. *Hirschfeld I* exemplifies precisely why courts should adopt that analysis and reject the Fifth Circuit's holding. It may be tempting to belittle or treat the Second Amendment differently than other constitutional rights due to the admittedly foreseeable dangers that come with allowing citizens to possess firearms. However, its inclusion in the text of the Bill of Rights, the legal precedent set in *Heller*, and practical realities with gun violence in America all signify that the Second Amendment should be given the same deference and respect as its sister amendments, therefore providing to citizens, including those adults

187. *Hirschfeld I*, 5 F.4th at 451.

188. *See Heller*, 554 U.S. at 629.

189. *Id.*

190. *See Hirschfeld I*, 5 F.4th at 449 (finding from the congressional record studies that show only "11.8% of inmates … obtained their guns from their source legally.").

191. *See* Morgan and Truman, *supra* note 184.

aged eighteen-to-twenty, the right to defend, at least, both themselves and their homes.