

SECOND-CLASS: *HELLER*, AGE, AND THE PRODIGAL AMENDMENT

Christopher M. Johnson*

This Note examines the constitutionality of age-based handgun-purchase restrictions in the wake of the Supreme Court's decision in District of Columbia v. Heller (Heller I). Part I explores Second Amendment jurisprudence since the Founding and provides an overview of current federal and state firearms restrictions. It also reviews current challenges in the courts to federal prohibitions on firearms purchases and possession by classes defined in the Gun Control Act of 1968. Part II examines the recent challenge to age-based restrictions on handgun purchases as defined by the Omnibus Crime Control and Safe Streets Act of 1968. It also distinguishes the Heller I exceptions and examines age-based restrictions on other fundamental rights. Part III outlines a judicial framework for evaluating age-based restrictions on handgun purchases and proposes a method by which Congress could remedy the arguably unconstitutional infringement on the fundamental right to keep and bear arms by the current law.

INTRODUCTION

Recent Supreme Court decisions in *District of Columbia v. Heller* (*Heller I*) and *McDonald v. City of Chicago* recognized an individual right to keep and bear arms for traditionally lawful purposes.¹ In the wake of these decisions, numerous challenges have arisen to federal laws restricting the purchase or possession of firearms by various classes of people.² In 2010, the National Rifle Association (NRA), on behalf of its 18-to-20-year-old members, challenged the constitutionality of federal age-based handgun-purchase restrictions.³ Although a Fifth Circuit panel upheld the constitutionality of these restrictions,⁴ subsequently, in a denial of a

* J.D. Candidate 2018, Columbia Law School

1. See *District of Columbia v. Heller* (*Heller I*), 554 U.S. 570, 624–26 (2008) (recognizing an individual right to keep and bear arms for traditionally lawful purposes, including self-defense); see also *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (incorporating this individual right against the states through the Fourteenth Amendment).

2. See, e.g., *Tyler v. Hillsdale Cty. Sheriff's Dep't* (*Tyler I*), 775 F.3d 308 (6th Cir. 2014), *aff'd* in part *en banc*, 837 F.3d 678 (6th Cir. 2016); *NRA v. Bureau of Alcohol, Tobacco, Firearms & Explosives* (*NRA I*), 700 F.3d 185 (5th Cir. 2012); see also *infra* section I.C (detailing challenges to federal firearms restrictions following *Heller I*).

3. See *NRA I*, 700 F.3d at 188; Brief of Plaintiffs-Appellants at 6, *NRA I*, 700 F.3d 185 (No. 11-10959), 2011 WL 6167172; see also 18 U.S.C. § 922(b)(1), (c)(1) (2012); 27 C.F.R. § 478.99(b)(1) (2017).

4. See *NRA I*, 700 F.3d at 212.

petition for rehearing en banc, Judge Edith Jones—joined by five of her colleagues—issued a compelling dissent in which she argued that such regulations were an unconstitutional infringement on the Second Amendment right.⁵ The dissent noted, “Never in the modern era has the Supreme Court held that a *fundamental constitutional right* could be abridged for a *law-abiding adult class* of citizens.”⁶ Successful challenges to limitations on firearms purchases and possession by various groups—the § 922 “who” provisions—continue to raise doubts as to the constitutionality of the age-based restrictions.⁷

This Note argues that such restrictions are, in fact, unconstitutional and aims to provide a framework through which Congress could remedy this infringement on the fundamental right of an adult class of citizens. Part I explores Second Amendment jurisprudence since the Founding and provides an overview of current federal and state firearms restrictions. It also examines recent challenges to restrictions on purchases and possession of firearms by classes defined in the Gun Control Act of 1968.⁸ Part II examines the recent challenge to federal age-based restrictions on gun purchases from federal firearms licensees (FFLs) as defined by the Omnibus Crime Control and Safe Streets Act of 1968.⁹ Moreover, it distinguishes the *Heller I* exceptions and assesses age-based restrictions on other fundamental rights. Part III outlines a judicial framework for evaluating federal age-based restrictions on handgun purchases from FFLs and proposes a method by which Congress could remedy the provisions, which are arguably unconstitutional as currently written.

I. CONSTITUTIONAL INTERPRETATION OF THE SECOND AMENDMENT

Part I explores Second Amendment jurisprudence since ratification, provides an overview of current federal and state firearms restrictions, and discusses recent challenges to federal laws limiting firearms purchases by certain classes. Section I.A describes Second Amendment

5. See *NRA v. Bureau of Alcohol, Tobacco, Firearms & Explosives (NRA II)*, 714 F.3d 334, 336 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc).

6. *Id.* (emphasis added).

7. See, e.g., *Tyler v. Hillsdale Cty. Sheriff's Dep't (Tyler II)*, 837 F.3d at 699 (casting doubt on the constitutionality, as applied to the plaintiff, of the restriction in 18 U.S.C. § 922(g)(4) on handgun possession by those individuals previously committed to a mental institution, but remanding to the district court for ultimate determination); *Binderup v. Attorney Gen.*, 836 F.3d 336, 356–57 (3d Cir. 2016) (concluding 18 U.S.C. § 922(g)(1), which prohibits the possession of firearms by those previously convicted of a crime punishable by imprisonment for more than one year, failed to pass constitutional muster as applied to the plaintiffs); *Keyes v. Lynch*, 195 F. Supp. 3d 702, 722 (M.D. Pa. 2016) (finding that the § 922(g)(4) restriction on firearms possession by those previously committed to a mental institution was unconstitutional as applied to the plaintiff).

8. See Pub. L. No. 90-618, sec. 102, § 922, 82 Stat. 1213, 1218, 1220–21.

9. See Pub. L. No. 90-351, sec. 902, § 922, 82 Stat. 197, 230–31.

case law up to, and including, the landmark cases of *Heller I* and *McDonald*. Section I.B discusses current federal and state laws regulating the purchase and possession of firearms. Section I.C outlines successful and unsuccessful challenges to § 922 “who” provisions in the years following the Supreme Court’s decision in *Heller I*.

A. *The Evolution of the Right to Keep and Bear Arms as a Fundamental Right*

The Second Amendment to the United States Constitution states, “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.”¹⁰ An examination of evidence from early American history points to the conclusion that many viewed this right as critical to the preservation of a people free from tyranny.¹¹ It is perhaps surprising, then, that the right of the American public to keep and bear arms for traditionally lawful purposes—including self-defense—was not recognized by the Supreme Court until 2008.¹² In fact, until 2008, there was relatively little case law relating to the Second Amendment. Nonetheless, an analysis of nineteenth-century cases concerning this right demonstrates that the Supreme Court typically ruled on Second Amendment issues narrowly and avoided defining the scope of the right until its decision in *Heller I*.

1. *Second Amendment Rights Before Heller I*. — In *Heller I*, the Court noted that “[t]he 19th-century cases that interpreted the Second Amendment universally support an individual right unconnected to militia service.”¹³ Federal court cases from this era suggest that the right was thought to extend outside the context of a militia to self-defense.¹⁴ A similar disposition can be found in state and territorial courts during the antebellum period.¹⁵ These cases support the claim that, in the early to

10. U.S. Const. amend. II.

11. See The Federalist No. 46, at 247 (James Madison) (George W. Carey & James McClellan eds., 2001) (“Besides the advantage of being armed, which . . . Americans possess over the people of almost every other nation, the existence of subordinate governments . . . forms a barrier against the enterprises of ambition Notwithstanding the military establishments in the several kingdoms of Europe . . . governments are afraid to trust the people with arms.”); see also *Heller I*, 554 U.S. 570, 599 (2008) (“But the threat that the new Federal Government would destroy the citizens’ militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution.”).

12. See *Heller I*, 554 U.S. at 636.

13. *Id.* at 610. But see *id.* at 666–70 (Stevens, J., dissenting) (arguing evidence from the pre-Civil War era, including statements made by Justice Story, does not support a reading unconnected with militia service).

14. See, e.g., *Johnson v. Tompkins*, 13 F. Cas. 840, 852 (C.C.E.D. Pa. 1833) (No. 7416) (noting the plaintiff “had a right to carry arms in defence of his property or person, and to use them, if either were assailed with such force, numbers or violence as made it necessary for the protection or safety of either”).

15. See, e.g., *Nunn v. State*, 1 Ga. 243, 251 (1846) (“The right of the whole people . . . 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

mid-nineteenth century, American courts saw the Second Amendment as a protection of the right to keep and bear arms outside the context of a militia.

Post-Civil War case law arguably supports a similar conclusion. Although the Court did not initially incorporate the Second Amendment against the states following the ratification of the Fourteenth Amendment, it also declined to qualify the right as relating only to militia service.¹⁶

The Supreme Court reversed this trend in *United States v. Miller*, perhaps the most consequential of the Court's pre-*Heller I* decisions, by tying the right to keep and bear arms to the conservation of a militia.¹⁷ Following *Miller*, in the years leading up to the decision in *Heller I*, constitutional scholars continued to debate the scope of the Second Amendment right.¹⁸

2. *Modern Interpretation of the Scope of the Right and Subsequent Incorporation.* — In *Heller I*, the Supreme Court held that the Second Amendment protects a fundamental right to keep and bear arms for

smallest degree . . ."); *United States v. Sheldon*, 5 Blume Sup. Ct. Trans. 337, 346 (Mich. 1829) ("The constitution . . . grants to the citizen the right to keep and bear arms."); see also *Heller I*, 554 U.S. at 610–14 (summarizing pre-Civil War state and territorial Second Amendment cases).

16. See *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) ("The second amendment . . . means no more than that it shall not be infringed by Congress."); see also *Presser v. Illinois*, 116 U.S. 252, 264–65 (1886) (holding that a ban on private pseudo-militia groups did not infringe on the Second Amendment, but not otherwise discussing the scope of the right).

17. 307 U.S. 174, 176–78 (1939) ("With obvious purpose to assure the continuation and render possible the effectiveness of such [militia] forces the declaration and guarantee of the Second Amendment were made."). The petitioners in *Miller* had successfully argued in the lower federal courts that § 11 (and accordingly § 5) of the National Firearms Act violated their Second Amendment right to bear arms. See *United States v. Miller*, 26 F. Supp. 1002, 1002–03 (W.D. Ark.), rev'd, 307 U.S. 174 (1939). The Act provided, in relevant part, that anyone possessing a shotgun with a barrel of less than eighteen inches must register the firearm within sixty days of the passage of the Act. Failure to properly register the firearm within the timeline outlined in the Act made it unlawful to ship, carry, or deliver such a firearm in interstate commerce. See National Firearms Act, Pub. L. No. 73-474, § 5, 48 Stat. 1236, 1238 (1934).

18. Compare Laurence H. Tribe, *American Constitutional Law* 299 n.6 (2d ed. 1988) ("[T]he central concern of the second amendment's framers was to prevent such federal interferences with the state militia as would permit the establishment of a standing national army and the consequent destruction of local autonomy."), with Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793, 795 (1998) (arguing the scope of the justification and operative clauses of a constitutional right need not be identical).

lawful purposes.¹⁹ Justice Scalia, a noted textualist²⁰ who authored the majority opinion, argued that the Second Amendment contained two connected but independent clauses: a prefatory clause, which related to militias, and an operative clause, which related to the individual right to bear arms.²¹ In supporting its claim that the Second Amendment protected a right outside the context of a militia, the majority noted that operative clauses often guarantee rights and remedies that go beyond the purpose stated in their corresponding prefatory clauses.²² The Court also turned to English tradition,²³ state constitutions adopted between 1789 and 1820,²⁴ and an assortment of nineteenth-century cases and legislation

19. See 554 U.S. at 635–36. The lawsuit involved a District of Columbia police officer, Dick Heller, who sought approval from the District to keep a handgun at his residence. *Id.* at 575. Upon denial of his application, Heller filed suit in federal district court challenging the District’s restrictive gun provisions and seeking, *inter alia*, “to enjoin the city from enforcing . . . the trigger-lock requirement insofar as it prohibits the use of functional firearms within the home.” *Id.* at 575–76 (internal quotation marks omitted) (quoting Respondent’s Brief at 1, *Heller I*, 554 U.S. 570 (No. 07-290), 2008 WL 336304).

20. See, e.g., Bradford C. Mank, *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 Ky. L.J. 527, 527, 533 (1998) (noting “Justice Antonin Scalia has led a revival of textualist statutory interpretation” and that his “textualist approach continues to have a major influence on the rest of the Court”).

21. See *Heller I*, 554 U.S. at 577–78; see also Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 10.10, at 942 (4th ed. 2011) (summarizing the *Heller I* decision); Volokh, *supra* note 18, at 801–06 (highlighting examples of rights at the state level with related but independent prefatory and operative clauses).

22. See *Heller I*, 554 U.S. at 578 (noting “a prefatory clause does not limit or expand the scope of the operative clause”). The majority argued that “[r]eading the Second Amendment as protecting only the right to ‘keep and bear Arms’ in an organized militia . . . fits poorly with the operative clause’s description of the holder of that right as ‘the people.’” *Id.* at 580–81 (quoting U.S. Const. amend. II). The Court also addressed the argument that the right applied only to firearms in existence at the time of the Founding. This would have had the effect of excluding from the scope of the Second Amendment all firearms with semiautomatic firing mechanisms, including most handguns and rifles, as this mechanism was not in existence at the Founding. The majority rejected this argument, contending that just as the provisions of the First Amendment (which protects “modern forms of communications”) and Fourth Amendment (which protects “modern forms of search”) continue to apply to new types of communication and searches, “the Second Amendment extends . . . to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Id.* at 582.

23. See *id.* at 582–83. Justice Scalia offered several examples to demonstrate that the phrase “keep arms” has historically been understood to refer to an individual right distinct from militia service. For instance, he cited an example from England in which Catholics who refused to attend Anglican church services were deprived of the right to “keep arms” in their homes. See *id.* at 582 (citing 4 William Blackstone, *Commentaries* *55). The deprivation of the right was unconnected with militia membership and was instead motivated by religious animus. See *id.* at 582, 592–93.

24. See *id.* at 602–03 (noting seven state constitutions adopted between 1789 and 1820 contained provisions that protected the right to bear arms and outlawed infringement of such rights, focusing not only on defense of the State but also on the *individual*).

from before and after the Civil War²⁵ to buttress this view. Turning to twentieth-century precedent, Justice Scalia distinguished *Miller*²⁶ and found that stare decisis did not prevent the Court from adopting the original understanding of the Amendment simply because its interpretation had remained effectively unresolved for over 200 years.²⁷

The majority opinion did make clear that the enumerated right was not absolute, highlighting four longstanding exceptions to the right and noting that this list was not exhaustive.²⁸ Ultimately, although the majority acknowledged concerns related to handgun violence and the potential ramifications of its holding, it nonetheless concluded, “[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table . . . includ[ing] the absolute prohibition of handguns held and used for self-defense in the home.”²⁹

Two years later, in *McDonald v. City of Chicago*, the Supreme Court incorporated the Second Amendment right against the states through the Fourteenth Amendment.³⁰ As one commentator noted, “The most important implication of the case is the obvious one: now state and local gun control laws . . . can be challenged on Second Amendment grounds.”³¹

The Court’s decisions in *Heller I* and *McDonald* left unanswered many questions related to the scope of the Second Amendment right. In the years since *McDonald*, the Supreme Court has not reviewed a Second

25. See *id.* at 610–19 (collecting pre- and post-Civil War cases and legislation defining the scope of the Second Amendment right); see also Chemerinsky, *supra* note 21, § 10.10, at 942 (summarizing the use of historical evidence by the majority in *Heller I*).

26. See *Heller I*, 554 U.S. at 621–25. Justice Scalia contended that the *Miller* court merely discussed the scope of the Second Amendment as it relates to the *type* of firearm—a short-barreled shotgun—and not the overall scope of the right itself. See *id.* at 625.

27. See *id.* at 625. The majority was not surprised that the scope of the Second Amendment right had remained essentially unresolved for over two hundred years and noted that, in the First Amendment context, the Court did not invalidate a law on free speech grounds until the 1930s—nearly 150 years after the ratification of the Bill of Rights. See *id.* at 625–26.

28. See *id.* at 626–27 & n.26. These exceptions include prohibitions on gun possession by felons and the mentally ill, as well as “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.” *Id.* at 626–27. The Court did not elaborate further on the scope of the exceptions. See *id.* at 635 (noting there would be “time enough to expound upon the historical justifications for the exceptions . . . if and when those exceptions come before us”).

29. *Id.* at 636.

30. 561 U.S. 742, 750 (2010). A plurality of four Justices did so using the Due Process Clause, while Justice Thomas wrote a concurrence in which he argued that the Second Amendment was best incorporated through the Privileges or Immunities Clause. See *id.* at 791, 805–06. *McDonald* involved a challenge to Chicago’s handgun ban, which was one of the most restrictive in the country. Petitioners sought to have the ban declared unconstitutional so that they could possess handguns within their respective homes for purposes of self-defense. See *id.* at 751–52.

31. Chemerinsky, *supra* note 21, § 10.10, at 945.

Amendment challenge involving firearms and instead appears content to let the lower federal courts define the scope of the right.³² Some academics have argued that this has led lower federal courts to quietly resist the Supreme Court's decision in *Heller I*.³³ This Note examines federal restrictions on handgun purchases by 18-to-20-year-old adults within this context.

B. *Federal Restrictions on Firearms Purchases and Possession*

During the mid-twentieth century, concerns related to firearms proliferation and rising crime rates led Congress to enact two major gun control laws.³⁴ The recent decisions in *Heller I* and *McDonald* have led to challenges in the lower federal courts concerning the constitutionality of various provisions in those laws.³⁵ The purpose and effect of, as well as the policy rationale behind, the laws are discussed below.

1. *The Omnibus Crime Control and Safe Streets Act of 1968 and Age-Based Restrictions on Handgun Purchases.* — Modern federal laws prohibiting 18-to-20-year-old adults from purchasing handguns are derived from the Omnibus Crime Control and Safe Streets Act of 1968³⁶ and are codified at 18 U.S.C. § 922(b)(1) and 922(c)(1).³⁷ The provisions make it

32. See, e.g., *Peruta v. California*, 137 S. Ct. 1995, 1996–2000 (2017) (Thomas, J., dissenting from denial of certiorari) (“The Court’s decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right.”); *Friedman v. City of Highland Park*, 136 S. Ct. 447, 448–50 (2015) (Thomas, J., dissenting from denial of certiorari) (arguing the Seventh Circuit’s decision was at odds with the Court’s holdings in *Heller I* and *McDonald* and noting that the Second Amendment is not “a second-class right”); *Jackson v. City and County of San Francisco*, 135 S. Ct. 2799, 2799–802 (2015) (Thomas, J., dissenting from denial of certiorari) (warning that “[a] constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all” (internal quotation marks omitted) (quoting *Heller I*, 554 U.S. at 634)).

33. See, e.g., *Alice Marie Beard, Resistance by Inferior Courts to Supreme Court’s Second Amendment Decisions*, 81 *Tenn. L. Rev.* 673, 673–74, 680 (2014) (arguing, *inter alia*, that lower federal courts have misapplied a balancing test, disguised as intermediate scrutiny, that was specifically rejected by the majority in *Heller I*).

34. See *Gun Control Act of 1968*, Pub. L. No. 90-618, § 101, 82 Stat. 1213, 1213–14 (“[T]he purpose of this title is to provide support to . . . law enforcement officials in their fight against crime and violence”); *Omnibus Crime Control and Safe Streets Act of 1968*, Pub. L. No. 90-351, 82 Stat. 197, 197–98 (highlighting rising crime rates as an important reason for enacting the legislation).

35. See, e.g., *NRA I*, 700 F.3d 185, 212 (5th Cir. 2012) (affirming federal restrictions on handgun possession by 18-to-20-year-old persons); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (upholding the ban on firearms possession by felons); see also *infra* section I.C (discussing recent federal court challenges to federal firearms restrictions).

36. See sec. 902, § 922, 82 Stat. at 230.

37. See 18 U.S.C. § 922(b)(1), (c)(1) (2012); see also 27 C.F.R. § 478.99(b)(1) (2017).

unlawful for a federal firearms licensee (FFL) to sell or deliver a handgun to an individual under the age of twenty-one.³⁸

Although not an outright ban on the *possession* of handguns by 18-to-20-year-old persons, the law prevents this class of adults from *purchasing* handguns—including pistols, revolvers, and derringers—from FFLs. Additionally, federal law prohibits the sale of firearms, including handguns, in violation of “any State law or any published ordinance applicable at the place of sale, delivery or other disposition.”³⁹ An 18-to-20-year-old adult is not, however, “restricted from owning or learning the proper usage of [a] firearm which his parent or guardian desired him to [obtain].”⁴⁰ Thus, while individuals in this class may be given a handgun by a parent or guardian, or purchase one in a private sale,⁴¹ they may not obtain one from an FFL.

The legislative history of the Act outlines Congress’s rationale for prohibiting handgun purchases from FFLs by this class of persons. It discusses how minors (under twenty-one) and juveniles (under eighteen) had previously used the anonymity offered by the mail-order system to obtain handguns.⁴² This system, the legislative history notes, undermined state and local laws aimed at preventing minors and juveniles from acquiring such weapons.⁴³ The law itself identifies the ability of individuals under twenty-one to acquire a handgun as a “significant

38. See 18 U.S.C. § 922(b)(1). The relevant portion of the Code provides: “It shall be unlawful for any licensed . . . dealer . . . to sell or deliver . . . any firearm . . . other than a shotgun or rifle . . . to any individual . . . less than twenty-one years of age . . .” *Id.*

39. *Id.* § 922(b)(2). The federal law thus acts as a “floor” for handgun purchases by this class, but states are free to use their police powers to enact laws further regulating this practice. See *infra* note 55 (detailing state regulations on handgun purchases and possession by 18-to-20-year-old individuals).

40. S. Rep. No. 90-1097, at 79 (1968), as reprinted in 1968 U.S.C.C.A.N. 2112, 2167.

41. See 18 U.S.C. § 921(a)(21)(C) (defining the scope of the term “engaged in the business” of firearms dealing). Although able to obtain a handgun from a parent, guardian, or other adult in the form of a gift, an 18-to-20-year-old may not use a “straw man” purchaser. See *id.* § 922(a)(6).

42. See S. Rep. No. 90-1097, at 77.

43. See *id.* at 76–77 (“Because of interstate, nonresident purchases of firearms for criminal purposes, the laws of our States and their political subdivisions are circumvented, contravened, and rendered ineffective.”). President Lyndon B. Johnson echoed these sentiments when signing the Act: “The measure also ends three decades of inaction on the problem of gun controls. Interstate traffic in handguns and their sales to minors will now be prohibited by law. The majority of all the murders by firearms . . . are committed by these small but deadly weapons.” President Lyndon B. Johnson, Statement by the President upon Signing the Omnibus Crime Control and Safe Streets Act of 1968, Am. Presidency Project (June 19, 1968), <http://www.presidency.ucsb.edu/ws/?pid=28939> [<http://perma.cc/A4Z2-X3LD>]. The legislative history also discusses the fact that minors accounted for a majority of all serious crimes committed in the country at that time, although it does not state the source of this proposition. See S. Rep. No. 90-1097, at 77 (“In contributing to our ever-increasing crime rates, juveniles account for some 49 percent of the arrests for serious crimes in the United States and minors account for 64 percent of the total arrests in this category.”).

factor in the prevalence of lawlessness and violent crime in the United States.”⁴⁴ This statement reflects a concern by some in Congress that the ability of this class to obtain handguns from FFLs directly contributed to rising violent crime rates in the late 1960s.

2. *The Gun Control Act of 1968 and Class-Based Restrictions on Firearms Possession.* — Congress followed the Omnibus Crime Control and Safe Streets Act by passing the Gun Control Act of 1968 later that year.⁴⁵ The Act—codified in part at 18 U.S.C. § 922(g)—imposes possession restrictions on various classes of people, including convicted felons,⁴⁶ fugitives,⁴⁷ drug addicts and unlawful users of controlled substances,⁴⁸ illegal and nonimmigrant aliens,⁴⁹ persons dishonorably discharged from the American armed forces,⁵⁰ individuals who have renounced their United States citizenship,⁵¹ persons subject to certain court orders associated with stalking, harassing, and other domestic-related actions,⁵² and those “convicted in any court of a misdemeanor crime of domestic violence.”⁵³ In 1993, the passage of the Brady Handgun Violence Prevention Act enhanced the provisions of the Gun Control Act.⁵⁴ Additionally, all fifty states have laws regulating firearms purchases or possession by individuals under the age of twenty-one.⁵⁵

44. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901(a)(2), 82 Stat. 197, 225. The Act also provides that “there is a causal relationship between the easy availability of [handguns] . . . and . . . juvenile . . . criminal behavior” and that “such firearms have been widely sold by federally licensed . . . dealers to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior.” *Id.* at 225–26. Nonetheless, a subsequent portion of the Act highlights that the law is not meant to be an undue burden on the possession of firearms by law-abiding citizens. *Id.* at 226.

45. Pub. L. No. 90-618, 82 Stat. 1213. Congress passed the Act largely in response to rising crime rates and the assassinations of President John F. Kennedy in 1963, civil rights leader Dr. Martin Luther King Jr. in 1968, and Senator Robert “Bobby” Kennedy later that same year. See Steve Rosenfeld, *The NRA Once Supported Gun Control*, Salon (Jan. 14, 2013), http://www.salon.com/2013/01/14/the_nra_once_supported_gun_control/ [<http://perma.cc/MMV3-2X4Z>]. Ultimately, the Act “reauthorized and deepened the FDR-era gun control laws. It added a minimum age for gun buyers, required guns have serial numbers and expanded people barred from owning guns from felons to include the mentally ill and drug addicts.” *Id.*

46. See 18 U.S.C. § 922(g)(1).

47. See *id.* § 922(g)(2).

48. See *id.* § 922(g)(3).

49. See *id.* § 922(g)(5).

50. See *id.* § 922(g)(6).

51. See *id.* § 922(g)(7).

52. See *id.* § 922(g)(8).

53. *Id.* § 922(g)(9).

54. See Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 102, 107 Stat. 1536, 1536–41 (1993) (creating the National Instant Criminal Background Check System).

55. Twelve states and the District of Columbia have outlawed the *purchase* of a handgun by 18-to-20-year-old persons under any circumstance, including a private sale. See Cal. Penal Code § 27505(a) (West 2012); Conn. Gen. Stat. Ann. § 29-34 (West 2017);

Following the Court's decision in *Heller I*, many of the provisions contained in the 1968 laws have been challenged in the lower federal courts. Until late 2014, the lawsuits were largely unsuccessful with all disputed provisions upheld under intermediate scrutiny (although the level of scrutiny remains subject to debate). However, recent challenges to prohibitions on firearms possession by those previously committed to a mental institution have slowed this trend.

C. Challenges to § 922 “Who” Provisions in the Wake of *Heller I*

1. *Successful Challenges to § 922 “Who” Provisions.* — Recent court decisions at the federal district and circuit court levels indicate that the permanent ban on firearms possession by those previously committed to a mental institution—codified at 18 U.S.C. § 922(g)(4)—may not pass constitutional muster in the wake of *Heller I*.⁵⁶ Applying intermediate

Del. Code Ann. tit. 24, § 903 (2017); D.C. Code § 7-2502.03(a) (2001 & Supp. 2017); Haw. Rev. Stat. Ann. § 134-2(d) (LexisNexis 2016); 430 Ill. Comp. Stat. Ann. 65/3(a), 65/4(2) (West 2017); Iowa Code § 724.22 (2017); Md. Code Ann., Pub. Safety §§ 5-133(d), 5-134 (LexisNexis 2016); Mass. Ann. Laws ch. 140, § 130 (LexisNexis 2016); N.J. Stat. Ann. § 2C:58-6.1 (West 2016); N.Y. Penal Law §§ 400.00(1), 400.00(12) (McKinney 2017); Ohio Rev. Code Ann. § 2923.21 (West 2017); 11 R.I. Gen. Laws §§ 11-47-30, 11-47-35(a) (2002 & Supp. 2016); see also Minimum Age to Purchase & Possess, Law Ctr. to Prevent Gun Violence, http://smartgunlaws.org/gun-laws/policy-areas/consumer-child-safety/minimum-age/#identifier_33_454 [<http://perma.cc/ES68-NRUH>] (last visited July 26, 2017). Eight states and the District of Columbia ban the *possession* of a handgun by 18-to-20-year-old persons, a regulation that goes beyond the scope of the federal law. See Conn. Gen. Stat. Ann. § 29-36f; D.C. Code § 7-2502.03(a); Haw. Rev. Stat. Ann. § 134-2(d); 430 Ill. Comp. Stat. Ann. 65/4(a)(2)(i); 720 Ill. Comp. Stat. 5/24-3.1 (West 2017); Iowa Code § 724.22; Md. Code Ann., Pub. Safety § 5-133(d); Mass. Ann. Laws ch. 140, § 131(d)(iv); N.J. Stat. Ann. § 2C:58-6.1; N.Y. Penal Law § 400.00(1)(a); see also Law Ctr. to Prevent Gun Violence, *supra*. The state of New Mexico outlaws the possession of a handgun by individuals under the age of nineteen. See N.M. Stat. Ann. § 30-7-2.2 (2016); see also Law Ctr. to Prevent Gun Violence, *supra*. Six states—Indiana, Michigan, Minnesota, Montana, Utah, and Washington—have chosen not to regulate *handgun* purchases or possession by young adults, although all six regulate, in some form, the purchase or possession of other *firearms* by juveniles (under eighteen) or minors (eighteen to twenty). See Law Ctr. to Prevent Gun Violence, *supra*. Although some states have chosen to go beyond the federal “floor” outlined in 18 U.S.C. § 922(b)(1) and 922(c)(1), a majority have not. This may reflect a belief that the federal laws are sufficient or that 18-to-20-year-old individuals are not perceived, at least in states without additional age-based restrictions, as significantly more dangerous than other segments of the adult population.

56. See *Tyler II*, 837 F.3d 678, 699 (6th Cir. 2016); *Keyes v. Lynch*, 195 F. Supp. 3d 702, 722 (M.D. Pa. 2016). In *Tyler I*, a Sixth Circuit panel held that the plaintiff’s “complaint [challenging the constitutionality of § 922(g)(4)] validly state[d] a claim for a violation of the Second Amendment.” 775 F.3d 308, 344 (6th Cir. 2014), *aff’d* in part en banc, 837 F.3d 678 (6th Cir. 2016). The court noted that “[t]he government’s interest in keeping firearms out of the hands of the mentally ill is not sufficiently related to depriving the mentally healthy, who had a distant episode of commitment, of their constitutional rights.” *Id.* The Sixth Circuit, sitting en banc, later affirmed this decision in part in *Tyler II*. See *Tyler II*, 837 F.3d at 699 (casting doubt on the constitutionality of the handgun possession restrictions in 18 U.S.C. § 922(g)(4), as applied to the plaintiff, but remanding to the district court for application of intermediate scrutiny). In *Keyes*, a federal district court held that application

scrutiny to determine whether the plaintiff had a viable Second Amendment claim, one court found that while “keep[ing] firearms out of the hands of presumptively risky people,”⁵⁷ protecting the American public, and preventing suicide were important, and likely compelling, government objectives, the mental institution provision was not substantially related to this goal.⁵⁸ The court concluded, based on the available record, that the government failed to satisfy its burden of demonstrating that there was a “reasonable fit between the important goals of reducing crime and suicides and § 922(g)(4)’s permanent disarmament of all persons with a prior commitment.”⁵⁹ These lawsuits represent the first successful challenges to the § 922(g) “who” provisions since the *Heller I* decision.

2. *Unsuccessful Challenges to § 922 “Who” Provisions.* — Challenges to the other § 922 “who” provisions have been largely unsuccessful. Nearly every federal circuit court has held that bans on firearms possession by convicted felons are constitutional,⁶⁰ keeping with the *Heller I* exception that “longstanding prohibitions on the possession of firearms by felons” are “presumptively lawful.”⁶¹

of the provisions of 18 U.S.C. § 922(g)(4) violated the Second Amendment as applied to a plaintiff who was civilly committed as a juvenile. See *Keyes*, 195 F. Supp. 3d at 722. Bizarrely, although federal law allowed the plaintiff to use a firearm in his official capacity as a corrections officer, it barred him from obtaining one in his private capacity because of his stay in a mental-health facility for eight days when he was fifteen. See *id.* at 720. The federal restriction on firearms possession by those previously committed to a mental institution is unique as compared to other § 922(g) provisions in that “its prohibition is permanent; it applies potentially to non-violent individuals; it applies potentially to law-abiding individuals; and it punishes potentially non-volitional conduct.” *Tyler I*, 775 F.3d at 336.

57. *Tyler II*, 837 F.3d at 693 (internal quotation marks omitted) (quoting *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 112 n.6).

58. See *id.* at 693–99; see also *United States v. Salerno*, 481 U.S. 739, 747 (1987) (“[P]reventing danger to the community is a legitimate regulatory goal.”).

59. *Tyler II*, 837 F.3d at 699. The court remanded the case to the district court to determine the constitutionality of § 922(g)(4) as applied to the plaintiff. *Id.*

60. See, e.g., *United States v. Barton*, 633 F.3d 168, 171–72 (3d Cir. 2011); *United States v. Whisnant*, 391 F. App’x 426, 430 (6th Cir. 2010); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010); *United States v. Rozier*, 598 F.3d 768, 770–71 (11th Cir. 2010); *United States v. Vongxay*, 594 F.3d 1111, 1114–15 (9th Cir. 2010); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *United States v. Stuckey*, 317 F. App’x 48, 50 (2d Cir. 2009); *United States v. Brunson*, 292 F. App’x 259, 261 (4th Cir. 2008); *United States v. Irish*, 285 F. App’x 326, 327 (8th Cir. 2008) (per curiam). But see *United States v. Williams*, 616 F.3d 685, 693 (7th Cir. 2010) (“[A]lthough we recognize that § 922(g)(1) may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent, that is not the case for [the defendant].”).

61. See *Heller I*, 554 U.S. 570, 626 (2008). The prohibition in § 922(g)(1) is not defined in terms of a *felony* conviction. Instead, the statute uses the common law definition of felony: “It shall be unlawful for any person . . . convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . [to] possess . . . any firearm or ammunition . . .” 18 U.S.C. § 922(g)(1) (2012). However, another provision of the statute expressly provides that in cases of state misdemeanor convictions, § 922(g)(1)

The federal circuit courts of appeals have also upheld the provisions contained in § 922(g) banning firearms possession by illegal aliens,⁶² domestic violence misdemeanants,⁶³ persons subject to domestic violence restraining orders,⁶⁴ and unlawful-drug users and addicts.⁶⁵ The Fifth Circuit also upheld the constitutionality of federal age-based restrictions in *National Rifle Association v. Bureau of Alcohol, Tobacco, Firearms, and Explosives (NRA I)*.⁶⁶ Furthermore, although some courts have raised doubts as to the constitutionality of the provisions in § 922(g)(4) prohibiting firearms possession by individuals previously committed to a mental institution,⁶⁷ other courts have found these prohibitions, at least in cases involving the mentally ill, to be lawful.⁶⁸ In the end, these challenges, both successful and unsuccessful, are useful for considering how future federal courts may analyze the constitutionality of age-based restrictions on handgun purchases.

applies only if the individual is convicted of a crime punishable by more than two years of imprisonment. See *id.* § 921(a)(20)(B). A majority of judges on the Third Circuit, sitting en banc, recently found that § 922(g)(1) was unconstitutional as applied to two plaintiffs, previously convicted of nonviolent misdemeanors, because their convictions were for crimes that did not historically lead “to exclusion from Second Amendment protections.” See *Binderup v. Attorney Gen.*, 836 F.3d 336, 356–57 (3d Cir. 2016).

62. See, e.g., *United States v. Huitron-Guizar*, 678 F.3d 1164, 1170 (10th Cir. 2012); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam); *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011).

63. See, e.g., *United States v. Chovan*, 735 F.3d 1127, 1139–42 (9th Cir. 2013); *United States v. Staten*, 666 F.3d 154, 167–68 (4th Cir. 2011); *United States v. Booker*, 644 F.3d 12, 25–26 (1st Cir. 2011); *United States v. Skoien (Skoien II)*, 614 F.3d 638, 645 (7th Cir. 2010); *United States v. White*, 593 F.3d 1199, 1205–06 (11th Cir. 2010).

64. See, e.g., *United States v. Chapman*, 666 F.3d 220, 230–31 (4th Cir. 2012); *United States v. Bena*, 664 F.3d 1180, 1184–86 (8th Cir. 2011).

65. See, e.g., *United States v. Carter (Carter II)*, 750 F.3d 462, 469–70 (4th Cir. 2014); *United States v. Dugan*, 657 F.3d 998, 999–1000 (9th Cir. 2011); *United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010); *United States v. Yancey*, 621 F.3d 681, 686–87 (7th Cir. 2010).

66. See *infra* section II.A (discussing the Second Amendment challenge in *NRA I*); see also *United States v. Rene E.*, 583 F.3d 8, 9, 16 (1st Cir. 2009) (upholding 18 U.S.C. § 922(x)(2)(A), which restricts handgun possession by individuals under the age of eighteen).

67. See *Tyler II*, 837 F.3d 678, 699 (6th Cir. 2016) (“[T]he proper resolution of the case is to reverse and remand to the district court for the application of intermediate scrutiny to determine the . . . constitutionality [of § 922(g)(4)] as applied to [the defendant.]”); *Keyes v. Lynch*, 195 F. Supp. 3d 702, 722 (M.D. Pa. 2016) (“[W]e find that the application of 18 U.S.C. § 922(g)(4) to [the plaintiff] violates the Second Amendment to the United States Constitution . . .”).

68. See, e.g., *Petramala v. U.S. Dep’t of Justice*, 481 F. App’x 395, 396 (9th Cir. 2012); *United States v. McRobie*, No. 08-4632, 2009 WL 82715, at *1 (4th Cir. Jan. 14, 2009) (per curiam); see also *Heller I*, 554 U.S. 570, 626–27 & n.26 (2008) (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by . . . the mentally ill.”).

II. THE SECOND AMENDMENT, AGE, THE *HELLER I* EXCEPTIONS, AND OTHER CONSTITUTIONAL ANALOGUES

Part II of this Note explores the recent Fifth Circuit challenge to age-based prohibitions on handgun purchases from FFLs by 18-to-20-year-old individuals and analyzes these restrictions in light of the *Heller I* exceptions and other fundamental constitutional rights. Section II.A describes the NRA's challenge to age-based restrictions in *NRA I*. Section II.B distinguishes the *Heller I* exceptions and demonstrates how age-based restrictions fall within the scope of the Second Amendment right as historically understood. Lastly, section II.C examines age-based restrictions on other fundamental rights.

A. *Challenges to Age-Based Restrictions on Handgun Purchases: National Rifle Association v. Bureau of Alcohol, Tobacco, Firearms, and Explosives (NRA I)*

1. *The Panel Decision.* — Following *Heller I*, questions remained as to which federal laws and regulations might violate Second Amendment protections. One challenge that arose concerned restrictions on handgun purchases from FFLs by 18-to-20-year-old adults.⁶⁹ In *NRA I*, the National Rifle Association brought an action in federal court challenging the constitutionality of 18 U.S.C. § 922(b)(1) and 922(c)(1), and related regulations on behalf of its members.⁷⁰ Looking to Founding-era attitudes to determine whether Second Amendment protections traditionally extended to 18-to-20-year-old individuals,⁷¹ the panel concluded there was “considerable evidence that burdening the conduct at issue—the ability of 18-to-20-year-olds to purchase handguns from FFLs—is consistent with a longstanding, historical tradition, which . . . falls

69. See *NRA I*, 700 F.3d 185 (5th Cir. 2012). A challenge to restrictions on handgun possession by persons *under eighteen* also arose following *Heller I*. See *Rene E.*, 583 F.3d at 9. There the First Circuit upheld the constitutionality of 18 U.S.C. § 922(x)(2)(A), which restricts handgun possession by this class. See *id.*

70. See *NRA I*, 700 F.3d at 188. The plaintiffs alleged that the regulations, arising out of the Omnibus Crime Control and Safe Streets Act of 1968, were “unconstitutional because they infringe on the right of 18-to-20-year-old adults to keep and bear arms under the Second Amendment.” See *id.*; see also 18 U.S.C. § 922(b)(1), (c)(1) (2012); 27 C.F.R. § 478.99(b)(1) (2017).

71. The panel contended that the classical republican idea of virtue was dispositive regarding a citizen's right to bear arms during the colonial and post-revolutionary eras. *NRA I*, 700 F.3d at 201. The court cited a law review article that noted, “[T]he right to arms does not preclude laws disarming the unvirtuous citizens (i.e., criminals) or those who, like children or the mentally imbalanced [sic], are deemed incapable of virtue.” *Id.* (internal quotation marks omitted) (quoting Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 *Hastings L.J.* 1339, 1360 (2009)) (misquotation). The court also highlighted that by the end of the nineteenth century, nineteen states restricted, in some fashion, the ability of 18-to-20-year-old “minors” to purchase or possess certain classes of firearms. See *id.*

outside of the Second Amendment's protection."⁷² Such a prohibition was consistent with longstanding restrictions barring certain classes from exercising their Second Amendment right.⁷³

Although concluding that the Second Amendment did not historically extend to 18-to-20-year-old individuals, the panel nevertheless proceeded to apply means-end scrutiny to the challenged statutory provision⁷⁴—perhaps an implicit acknowledgement that the relationship between the federal prohibition and the historical evidence discussed was tenuous. Applying intermediate scrutiny, the panel concluded that the government's goal of curtailing violent crime by adults under twenty-one represented an important government objective (the "end" portion of the test).⁷⁵ The court also determined that the means selected by Congress were reasonably well adapted to its stated objectives, noting that "Congress restricted the ability of persons under 21 to purchase handguns from FFLs, while allowing (i) 18-to-20-year-old persons to purchase long-guns, (ii) persons under 21 to acquire handguns from parents or guardians, and (iii) persons under 21 to possess handguns and long-guns."⁷⁶ Ultimately, the Fifth Circuit panel found the statutory and regulatory provisions restricting the purchase of handguns by 18-to-20-year-olds to be constitutionally permissible.⁷⁷

2. *Denial of Rehearing En Banc.* — Although the Fifth Circuit denied the plaintiffs' later motion for a rehearing en banc,⁷⁸ Judge Edith Jones, joined by five of her colleagues, issued a dissent in which she criticized the panel's analysis in upholding the federal restrictions on handgun

72. *Id.* at 203.

73. *See id.*

74. *See id.* at 204 ("Although we are inclined to uphold the challenged federal laws . . . in an abundance of caution, we proceed . . . [and] ultimately conclude that the challenged federal laws pass constitutional muster even if they implicate the Second Amendment guarantee.").

75. *See id.* at 207–09. To reach its conclusion, the court reviewed the legislative history of the Omnibus Crime Control and Safe Streets Act. The panel argued that the government's program was both reasonable and "calibrated" in pursuit of furthering the public good. *See id.* It further justified this stance by highlighting crime statistics tending to show that 18-to-20-year-old persons are significant contributors to gun-crime rates. *See id.* at 209–10. For additional information concerning this law, see *supra* section I.B.1 (detailing the history and passage of the Act).

76. *NRA I*, 700 F.3d at 209. The panel also pointed to congressional evidence that "FFLs . . . constituted the central conduit of handgun traffic to young persons under 21." *Id.*

77. *See id.* at 211 (concluding the challenged provisions were aimed at combatting "violent crime associated with the trafficking of handguns from FFLs to young adults" and that the regulatory scheme was reasonably adapted to that end).

78. *NRA II*, 714 F.3d 334, 335 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc). The motion for a rehearing en banc was denied by a single vote, with seven judges in favor and eight opposed. *See id.*

purchases from FFLs by 18-to-20-year-old adults.⁷⁹ Reviewing historical evidence from the late-eighteenth-century, the dissenters concluded, “It is untenable to argue that the core of the Second Amendment right to keep and bear arms did not extend to 18- to 20-year olds at the founding.”⁸⁰ Judge Jones argued that strict scrutiny should apply because the right to purchase a handgun for the purpose of self-defense went to the core of the Second Amendment.⁸¹ Despite this assertion, however, the dissenting opinion also contended that, even under intermediate scrutiny, the challenged provisions were unconstitutional.⁸² Judge Jones concluded by cautioning, “Congress has seriously interfered with this age group’s constitutional rights because of a class-based determination that applies to, at best, a tiny percentage of the lawbreakers among the class.”⁸³ Ultimately, the arguments the dissent outlined in *NRA II* provide a blueprint for future challenges to the federal age-based restrictions on handgun purchases and raise doubts as to the constitutionality of such limitations following *Heller I*.

B. *Distinguishing the Heller I Exceptions from Age-Based Restrictions on the Fundamental Right to Keep and Bear Arms*

In one of the more notable passages in *Heller I*, the Court wrote, “[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places . . . or laws imposing conditions and qualifications on the commercial sale of arms.”⁸⁴ In a related footnote, the Court also noted, “We identify these presumptively lawful regulatory measures only as examples; our list does

79. See *id.* at 335–47. The dissent articulated three areas in which the panel’s decision was flawed. First, the dissenting judges felt that the panel’s historical analysis lacked the tailoring of the *Heller I* approach. See *id.* at 336–44. Moreover, the dissenters believed that strict, as opposed to intermediate, scrutiny should have been applied. See *id.* at 336, 344–46. Additionally, the dissenters argued that even if the challenged provisions were examined under intermediate scrutiny, they would not pass constitutional muster based on the Supreme Court’s ruling in *Heller I*. See *id.* at 346–47.

80. *Id.* at 344. For additional information regarding state and federal militia laws enacted shortly after the drafting of the Constitution and Bill of Rights, see *infra* section II.C.1 (highlighting late-eighteenth-century militia laws and their relationship to the original understanding of the right of 18-to-20-year-old adults to keep and bear arms).

81. See *NRA II*, 714 F.3d at 344–46 (Jones, J., dissenting from denial of rehearing *en banc*).

82. See *id.* at 346–47. In applying intermediate scrutiny, the dissenting opinion noted that while the government’s *end* in seeking to reduce violent crime was undoubtedly important, the selected *means* were insufficiently related to this purpose. See *id.* Judge Jones also argued that the restrictions are vastly overbroad in terms of fit—less than 0.6% of 18-to-20-year-old persons were arrested for *violent* crimes in 2010. See *id.* at 347.

83. *Id.*

84. *Heller I*, 554 U.S. 570, 626–27 (2008).

not purport to be exhaustive.”⁸⁵ These qualifications have become known as the *Heller I* exceptions.⁸⁶

The passage is arguably incompatible with the otherwise originalist majority opinion,⁸⁷ and it was criticized by Justice Breyer in dissent.⁸⁸ Nonetheless, following *Heller I*, lower federal courts have interpreted this passage as requiring the complaining party to demonstrate that the alleged infringement falls within the scope of the right “as historically understood”⁸⁹—and not into one of the *Heller I* exceptions—before heightened scrutiny can be applied.⁹⁰ Thus, to be reviewed under heightened scrutiny, age-based restrictions on handgun purchases from FFLs must be distinguished from each of the exceptions and shown to fall within the historical bounds of the constitutional protection.

1. *The Felon Exception*. — As previously noted in section I.C.2, virtually every federal circuit court has upheld the constitutionality of bans on firearms possession by felons.⁹¹ The age-based restrictions on handgun purchases, however, apply to predominantly nonviolent and *law-abiding* individuals, while punishing nonvolitional conduct. Federal restrictions

85. *Id.* at 627 n.26.

86. See, e.g., Carlton F.W. Larson, Four Exceptions in Search of a Theory: *District of Columbia v. Heller* and Judicial *Ipsa Dixit*, 60 *Hastings L.J.* 1371, 1372 (2009).

87. See *id.* (“The *Heller* exceptions lack the historical grounding that would normally justify an exception to a significant constitutional right.”).

88. See *Heller I*, 554 U.S. at 722 (Breyer, J., dissenting) (“One cannot answer . . . questions by combining inconclusive historical research with judicial *ipse dixit*.”); see also Larson, *supra* note 86, at 1372 & n.6 (“The Court offered no citations to support this statement, and its ad hoc, patchy quality has been readily apparent to commentators, who have speculated that it was compromise language designed to secure Justice Kennedy’s vote.”).

89. See *Tyler I*, 775 F.3d 308, 318 (6th Cir. 2014) (internal quotation marks omitted) (quoting *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012)), *aff’d* in part en banc, 837 F.3d 678 (6th Cir. 2016).

90. See, e.g., *NRA I*, 700 F.3d 185, 196–97, 204 (5th Cir. 2012) (maintaining that “[m]odern restrictions on the ability of persons under 21 to purchase handguns . . . seem . . . to be firmly historically rooted” and thus fall outside the scope of the Second Amendment right as historically understood). The most widely cited articulation of the two-part test comes from a Third Circuit case, *United States v. Marzzarella*. See David B. Kopel & Joseph G.S. Greenlee, The Federal Circuits’ Second Amendment Doctrines, 61 *St. Louis U. L.J.* 193, 204 (2017) (contending *Marzzarella* has become the most influential circuit court opinion since the *Heller I* and *McDonald* decisions). In *United States v. Marzzarella*, the court detailed the two-step approach as follows: First, the court asks “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.” 614 F.3d 85, 89 (3d Cir. 2010). If the law does not, the review is at an end. *Id.* However, if it does, the court proceeds to the second part of the test: The law is evaluated “under some form of means-end scrutiny.” *Id.* If the law survives the court’s review, it is constitutional; however, if it fails, it is unconstitutional. *Id.*

91. See *supra* section I.C.2 (collecting challenges to the 18 U.S.C. § 922(g)(1) prohibition on firearms possession by felons and discussing other unsuccessful challenges to § 922 “who” provisions).

on the right of 18-to-20-year-old adults to purchase handguns from FFLs do not fall within the scope of this exception.

2. *The Mentally Ill Exception.* — Although recent challenges to bans on possession of firearms by those previously committed to a mental institution have been successful,⁹² the lower federal courts have consistently upheld laws banning the possession of firearms by the mentally ill.⁹³ However, much like the ban on firearms possession by convicted felons, this longstanding exception applies only to individuals who are “adjudicated as a mental defective.”⁹⁴ Because age is not a mental illness, this exception does not apply to federal restrictions on the ability of 18-to-20-year-old persons to purchase handguns.

3. *The Sensitive Places Exception.* — The third exception cited in *Heller I* is the ban on the carrying of firearms in “sensitive places such as schools and government buildings.”⁹⁵ The Court did not, however, elaborate further on the characteristics that might constitute a “sensitive place.”⁹⁶ Although the lower federal courts have had a limited opportunity to review laws restricting the right to bear arms in sensitive places, in 2011, the Fourth Circuit upheld the constitutionality of a law regulating the carrying of loaded firearms in a national park under intermediate scrutiny.⁹⁷ It did not, however, attempt to “resolve the ambiguity in the ‘sensitive places’ language.”⁹⁸ Nonetheless, the age-based restrictions clearly fall outside the scope of this exception as these restrictions apply, at all times, to 18-to-20-year-old persons, regardless of where the handgun is possessed.

4. *The Commercial Regulation Exception.* — Because 18 U.S.C. § 922(b)(1) and 922(c)(1) work in conjunction to limit the purchase of handguns by, and sale by FFLs to, 18-to-20-year-old individuals, the *Heller I* exception that may be most relevant in this context is that concerning “laws imposing conditions and qualifications on the commercial sale of

92. See, e.g., *Tyler II*, 837 F.3d at 699; *Keyes v. Lynch*, 195 F. Supp. 3d 702, 722 (M.D. Pa. 2016).

93. See, e.g., *Petramala v. U.S. Dep’t of Justice*, 481 F. App’x 395, 396 (9th Cir. 2012); *United States v. McRobie*, No. 08-4632, 2009 WL 82715, at *1 (4th Cir. Jan. 14, 2009) (per curiam).

94. See *Tyler I*, 775 F.3d at 317 (6th Cir. 2014) (internal quotation marks omitted) (quoting Gun Control Act of 1968, Pub. L. No. 90-618, sec. 102, § 922, 82 Stat. 1213, 1220).

95. 554 U.S. 570, 626 (2008).

96. See *Larson*, supra note 86, at 1383–84 (“The exception for sensitive places includes, according to the Court, government buildings and schools. What characteristics determine a ‘sensitive’ place? The Court does not say. Do hospitals, subways, sport stadiums, train stations, or shopping malls count?” (footnote omitted)).

97. See *United States v. Masciandaro*, 638 F.3d 458, 472–73 (4th Cir. 2011) (finding that the federal restriction was a constitutionally permitted limitation on this right, despite the fact that the plaintiff had a right to possess a handgun for self-defense).

98. *Id.* at 473 (declining to determine whether the national park was “a sensitive place” as the federal regulation “passe[d] constitutional muster under the intermediate scrutiny standard”).

arms.”⁹⁹ In fact, the panel decision in *NRA I*, upholding the age-based restrictions, cited this exception.¹⁰⁰ Surprisingly, the panel did not raise this exception to establish that the challenged regulations fell outside the scope of the Second Amendment right but rather to demonstrate that the laws would survive intermediate scrutiny.¹⁰¹

The Third Circuit decision in *Marzzarella* supports the integration of the commercial regulation exception into the scrutiny analysis. There, the court distinguished the commercial regulation exception from its brethren, noting that “[i]f there were somehow a categorical exception for [the commercial sale of firearms], it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a result would be untenable under *Heller*.”¹⁰² Thus, although the language in *Heller I* appears to place laws regulating “the commercial sale of firearms” outside the scope of the Second Amendment, its relative incompatibility with the historical focus of the opinion has caused lower courts to adopt the *Marzzarella* rationale and apply a means-end test, even when the commercial regulation exception might otherwise apply.¹⁰³ As such, age-based restrictions on handgun purchases are unlikely to be seen as “presumptively lawful” by a lower federal court and should be subject to heightened scrutiny when challenged.

5. *Dangerousness as a Longstanding Prohibition.* — At least one court has indicated that regulations targeting dangerous individuals may qualify as presumptively lawful, even if they do not fall into one of the explicit

99. *Heller I*, 554 U.S. at 626–27; see also 18 U.S.C. § 922(b)(1), (c)(1) (2012).

100. See *NRA I*, 700 F.3d 185, 206 (5th Cir. 2012) (“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.’” (quoting *Heller I*, 554 U.S. at 626–27, 626 n.26)).

101. See *id.* at 204–07. While the panel did hold that the age-based restrictions were outside the scope of the Second Amendment as historically understood, it did not do so because of this *Heller I* exception. Rather, the panel argued that there was significant “historical evidence of age- and safety-based restrictions on the ability to access arms.” *Id.* at 204. The court concluded, “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.” *Id.* Nonetheless, the court continued in its analysis by applying intermediate scrutiny to demonstrate that, even if the purchase of handguns by 18-to-20-year-old adults was protected by the guarantees of the Second Amendment, the current regulations could survive the application of heightened scrutiny. See *id.* at 204–11.

102. *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010). The *Marzzarella* opinion, and its two-step analytical framework for reviewing Second Amendment challenges, is perhaps the most influential post-*Heller I* circuit court decision related to Second Amendment jurisprudence. See *supra* note 90.

103. See *Marzzarella*, 614 F.3d at 92 n.8; see also *Teixeira v. County of Alameda*, 822 F.3d 1047, 1057 (9th Cir. 2016) (“Indeed, if all regulations relating to the commercial sale of firearms were exempt from heightened scrutiny, there would have been no need to specify that certain ‘conditions and qualifications on the commercial sale of arms’ were ‘presumptively lawful.’” (quoting *Heller I*, 554 U.S. at 626–27, 626 n.26)); *NRA I*, 700 F.3d at 206.

exceptions outlined in *Heller I*.¹⁰⁴ Concurring in the Third Circuit opinion in *Binderup v. Attorney General*, Judge Thomas Hardiman wrote, “The most cogent principle that can be drawn from traditional limitations on the right to keep and bear arms is that dangerous persons likely to use firearms for illicit purposes were not understood to be protected by the Second Amendment.”¹⁰⁵ Much like the nonviolent misdemeanants in *Binderup*, however, nearly all 18-to-20-year-old adults lack a “demonstrated proclivity for violence.”¹⁰⁶ In fact, the overwhelming majority of individuals in this class are nonviolent and law abiding.¹⁰⁷ As such, restrictions on this group do not fall within the realm of presumptively lawful regulations discussed in *Heller I*.¹⁰⁸

Ultimately, because the age-based restrictions do not fall within an exception articulated in *Heller I*—at least as currently interpreted by the lower federal courts—these limitations will be subject to a historical analysis to determine whether they fall within the scope of the Second Amendment right as historically understood.¹⁰⁹ The following section undertakes a historical analysis of the entitlements of 18-to-20-year-old persons in the context of various constitutional rights, including the Second Amendment.

C. *Age-Based Restrictions in the Context of the Second Amendment and Other Fundamental Constitutional Rights*

Although age is not a protected classification for the purposes of equal protection,¹¹⁰ challenges to age-based restrictions have arisen in the context of self-defense, reproductive autonomy, and voting.¹¹¹

104. See *Binderup v. Attorney Gen.*, 836 F.3d 336, 357 (3d. Cir. 2016) (Hardiman, J., concurring in part and concurring in the judgments); see also *Heller I*, 554 U.S. at 627 n.26 (noting that the presumptively lawful exceptions were “only [] examples” and that the “list [did] not purport to be exhaustive”).

105. 836 F.3d at 357 (Hardiman, J., concurring in part and concurring in the judgments).

106. *Id.*

107. See, e.g., *NRA II*, 714 F.3d 334, 346–47 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc) (“[O]nly 0.58% of 18-to-20-year olds were arrested for violent crimes in 2010.”).

108. See 554 U.S. at 626–27 & n.26 (outlining the four categories of presumptively lawful regulations).

109. *Id.* at 605 (assessing eighteenth- and nineteenth-century interpretations of the Second Amendment).

110. See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976); see also Chemerinsky, *supra* note 21, § 9.7.1, at 802–04 (summarizing Supreme Court rulings concerning equal protection challenges on the basis of age).

111. See Chemerinsky, *supra* note 21, § 10.3.2, at 835–38, § 10.3.3, at 839–66, § 10.8, at 893–931, § 10.10, at 941–45 (discussing the scope and limits of fundamental rights such as the right to purchase and use contraceptives, the right to an abortion, the right to vote, and the right to bear arms).

1. *The Right to Keep and Bear Arms.* — In *NRA II*, the dissenting judges strongly disputed the *NRA I* panel’s assertion that an examination of Founding-era attitudes concerning the right to keep and bear arms excluded 18-to-20-year-old individuals.¹¹² The dissent cited laws from Connecticut,¹¹³ Delaware,¹¹⁴ Georgia,¹¹⁵ Maryland,¹¹⁶ Massachusetts,¹¹⁷ New Hampshire,¹¹⁸ New Jersey,¹¹⁹ New York,¹²⁰ North Carolina,¹²¹ Pennsylvania,¹²² South Carolina,¹²³ and Virginia,¹²⁴ passed in response to the 1792 Militia Act,¹²⁵ all of which established that the minimum age for militia service was eighteen.¹²⁶ These laws, as well as the federal Militia Act, which prompted their passage, make it clear Congress intended not only that 18-to-20-year-old adults serve in the state militias but also that they “provide [themselves] with a good musket or firelock.”¹²⁷ Thus, there is strong historical evidence that the Second Amendment right originally permitted this class of persons to purchase and possess firearms, including handguns, whether or not they served in a militia. It was

112. See 714 F.3d at 339–42 & n.8 (Jones, J., dissenting from denial of rehearing en banc); see also *NRA I*, 700 F.3d 185, 199–204 (5th Cir. 2012).

113. See Act of Oct. 11, 1792, 1792 Conn. Acts & Laws 423, 423 (establishing a military force for the State of Connecticut).

114. See Act of June 18, 1793, ch. XXXVI c., 1793 Del. Laws 1134, 1134 (creating a militia in the State of Delaware).

115. See Act of Dec. 14, 1792, *in* Digest of the Laws of the State of Georgia 458, 460 (Robert & George Watkins eds., 1800) (amending the militia law of Georgia).

116. See Act of Dec. 28, 1793, ch. LIII, 1793 Md. Laws (regulating the Maryland militia).

117. See Act of June 22, 1793, ch. I, 1793 Mass. Acts 289, 290 (governing the militia of the Commonwealth of Massachusetts).

118. See Act of Dec. 28, 1792, 1792 N.H. Laws 441, 441 (forming the New Hampshire militia).

119. See Act of Nov. 30, 1792, ch. CCCCXIII, 1792 N.J. Laws 824, 825 (organizing the New Jersey militia).

120. See Act of Mar. 9, 1793, ch. 45, 1793 N.Y. Laws 440, 440 (arranging the New York militia force).

121. See Act of Dec. 15, 1793, ch. 1, 1793 N.C. Sess. Laws 36, 36 (amending the previous North Carolina militia act). A North Carolina law passed in early 1787 set the minimum age for militia service in the state at eighteen. See Act of Jan. 6, 1787, ch. 22, 1786 N.C. Sess. Laws 18, 18.

122. See Act of Apr. 11, 1793, ch. CLXXVI, 1792 Pa. Laws 394, 394 (regulating the militia of the Commonwealth of Pennsylvania).

123. See Act of May 10, 1794, 1794 S.C. Acts 1, 2 (amending the prior law governing the South Carolina militia).

124. See Act of Dec. 22, 1792, ch. IV, 1792 Va. Acts 6, 8 (governing the militia of the Commonwealth of Virginia).

125. See *NRA II*, 714 F.3d 334, 339 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc) (“Eighteen year olds were required by the 1792 Militia Act to be available for service . . .”).

126. See *supra* notes 113–124 (demonstrating the minimum age for nearly all state militias in the early 1790s was eighteen).

127. Act of May 8, 1792, ch. XXXIII, 1 Stat. 271, 271 (mandating the organization of state militias).

understood that 18-to-20-year-old militia members would obtain the necessary equipment to fulfill this duty; the fact that the common law age of majority was twenty-one did not serve as a bar to such action.¹²⁸

Although the states took different approaches to firearms purchases and possession following the Civil War—nineteen states had restricted firearms possession by persons under twenty-one by the beginning of the twentieth century¹²⁹—as noted in *Heller I*, sources from after the Civil War “do not provide as much insight into [the Second Amendment’s] original meaning as earlier sources.”¹³⁰ Ultimately, a review of eighteenth- and nineteenth-century laws provides compelling evidence that Second Amendment protections were originally understood to extend to 18-to-20-year-old persons. Nonetheless, this understanding became less uniform over time, particularly at the state level in the later decades of the nineteenth century.

2. *The Right to an Abortion.* — Looking to modern sources for a constitutional analogue, laws concerning reproductive autonomy illustrate that constitutional rights often do not depend significantly on age. In *Roe v. Wade*, the Supreme Court balanced the competing interests of a woman’s right to privacy and bodily autonomy against a state’s interests in protecting a pregnant woman’s health and the potentiality of human life.¹³¹ The decision put forth a trimester framework, which limited the ability of a state to regulate abortion practices.¹³² The Court later affirmed this right to an abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹³³ Although it rejected the *Roe* trimester framework, the *Casey* Court outlined a new “undue burden” test for determining whether a state restriction on the abortion right prior to the viability of

128. See *id.*; see also T. E. James, *The Age of Majority*, 4 *Am. J. Legal Hist.* 22, 22 (1960) (highlighting that the common law age of majority was twenty-one). One might argue that the types of firearms available to this class in the late-eighteenth century were far different than the modern handgun. However, the majority in *Heller I* dismissed this argument, noting that eighteenth-century Americans used small arms in the context of militia service as well as “in defense of person and home.” 554 U.S. 570, 624–25 (2008). The Court also contended that “the American people . . . consider[] the handgun to be the quintessential self-defense weapon.” *Id.* at 629.

129. See *NRA I*, 700 F.3d 185, 202 & n.14 (5th Cir. 2012) (collecting relevant state statutes).

130. 554 U.S. at 614.

131. See *Roe v. Wade*, 410 U.S. 113, 162 (1973) (affirming a woman’s right to bodily autonomy but noting that “the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and that it has still *another* important and legitimate interest in protecting the potentiality of human life”).

132. See *id.* at 164–65; see also Chemerinsky, *supra* note 21, § 10.3.3.1, at 841 (discussing the trimester framework outlined in *Roe*).

133. 505 U.S. 833, 846, 876–77 (1992) (affirming the central holding of *Roe* while altering the test used to evaluate the constitutionality of state restrictions on abortion); see also Chemerinsky, *supra* note 21, § 10.3.3.1, at 846–49 (summarizing the *Casey* decision).

the fetus unconstitutionally infringes on the exercise of that right.¹³⁴ The Court noted that while a state could implement regulations to ensure that the decision to have an abortion was informed, it could not do so in a manner that “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”¹³⁵ Much of the litigation in the years following *Roe* and *Casey* has centered on determining which state regulations constitute an undue burden on the right to an abortion.¹³⁶

One such challenged regulation concerned parental-consent and parental-notification requirements in the event of an abortion by a minor under eighteen years of age.¹³⁷ In *Danforth*, the Supreme Court struck down a state law that required an unmarried minor to obtain parental consent for an abortion, except in cases in which a physician provided a certification attesting that her life was in danger.¹³⁸ The Court argued, “Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.”¹³⁹ In a subsequent case, *Bellotti v. Baird*, the Court again weighed the right of a female minor to obtain an abortion against parental discretion in raising a child.¹⁴⁰ The majority concluded that while a state *may* require parental consent to an abortion, it must also provide a bypass mechanism through which the minor can obtain authorization for an abortion from a court.¹⁴¹

134. See 505 U.S. at 876–77 (“Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”).

135. *Id.* at 877.

136. See Chemerinsky, *supra* note 21, § 10.3.3.1, at 849–51 (“The key question after *Casey* . . . is what constitutes an undue burden on the right to abortion.”).

137. For an in-depth analysis of state and federal requirements concerning parental involvement in abortion decisions, see Jon F. Merz, Catherine A. Jackson & Jacob A. Klerman, A Review of Abortion Policy: Legality, Medicaid Funding, and Parental Involvement, 1967–1994, 17 *Women’s Rts. L. Rep.* 1, 9–57 (1995) (discussing the intersection of abortion-related parental-consent laws and state laws regulating the ability of a minor to consent to medical care).

138. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75 (1976) (“The fault with § 3(4) is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor’s termination of her pregnancy and does so without a sufficient justification for the restriction.”).

139. *Id.* at 74. The Court emphasized that the Constitution bestows rights on both adults and minors. *Id.* Nonetheless, the Court conceded that the state does have somewhat broader regulatory power with respect to minors. *Id.* at 74–75.

140. See 443 U.S. 622, 637–38, 642 (1979) (acknowledging both the critical role that parents play in the upbringing of their children and the “constitutional right to seek an abortion”).

141. See *id.* at 643–44 (“A pregnant minor is entitled . . . to show either: (1) that she is mature enough and well enough informed to make her abortion decision . . . independently of her parents’ wishes; or (2) that . . . the desired abortion would be in her best interests.”); see also Chemerinsky, *supra* note 21, § 10.3.3.5, at 864–65 (outlining

Ultimately, restrictions in the abortion context provide an instructive analogue to age-based limitations on the enumerated right to keep and bear arms. Although the law permits states to require parental consent for abortions administered to minors, they cannot do so without also permitting a judicial bypass.¹⁴² A blanket prohibition—based on age—on the exercise of the fundamental right to an abortion is not permitted.¹⁴³

3. *The Right to Purchase and Use Contraceptives.* — Another modern fundamental right—the right to purchase and use contraceptives—was first discussed in *Griswold v. Connecticut*.¹⁴⁴ Although disagreeing on the source of the right, six Justices nonetheless held that the Connecticut law in question, prohibiting dissemination and use of contraceptives, was unconstitutional.¹⁴⁵ The Court later recognized the right to purchase and use contraceptives as a fundamental right in *Eisenstadt v. Baird*.¹⁴⁶

The Supreme Court addressed age-based restrictions on the right to obtain contraceptives in *Carey v. Population Services International*.¹⁴⁷ In *Carey*, the Court reviewed a New York statute that established criminal penalties for the sale of contraceptives to minors under the age of sixteen.¹⁴⁸ The majority held that this law was an unconstitutional infringement on a fundamental right, arguing, “Since the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives

Supreme Court precedent concerning abortion-related parental-notice and parental-consent requirements).

142. See *Danforth*, 428 U.S. at 74 (“[T]he State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy.”).

143. See *Bellotti*, 443 U.S. at 643.

144. 381 U.S. 479 (1965).

145. See *id.* at 484–87, 500–02. Justice Douglas found that the right to privacy included access to and use of contraceptives and was derived from the penumbras of the First, Third, Fourth, and Fifth Amendments. See *id.* at 484–85. Justice Goldberg, joined by two other Justices, concurred, finding the Ninth Amendment to be the source of the right. See *id.* at 486–87 (Goldberg, J., concurring). Justice Harlan also concurred, arguing the right was rooted in the Due Process Clause of the Fourteenth Amendment. See *id.* at 500 (Harlan, J., concurring). In a third concurrence, Justice White, although articulating a different rationale than Justice Harlan, also contended that the right was based in the Due Process Clause of the Fourteenth Amendment. See *id.* at 502 (White, J., concurring).

146. See 405 U.S. 438, 453–54 (1972) (“If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).

147. See 431 U.S. 678, 681–82 (1977); see also Chemerinsky, *supra* note 21, § 10.3.2, at 837–38 (discussing the importance of *Carey*, as well as *Griswold* and *Eisenstadt*, in highlighting the challenges of constitutional interpretation).

148. See *Carey*, 431 U.S. at 691–92 (“[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.” (internal quotation marks omitted) (quoting *In re Gault*, 387 U.S. 1, 13 (1967))).

to minors is . . . foreclosed.”¹⁴⁹ The Court concluded that even restrictions that do not completely bar a person from acquiring contraceptives are subject to review if they *significantly burden* the right.¹⁵⁰

The Court’s position on the fundamental right to use and obtain contraceptives therefore provides a useful analogue concerning the interpretation of the right to keep and bear arms. The Court has not drawn a bright line at the age of majority and instead allows individuals under *eighteen* to obtain contraceptives without unreasonable state interference. The state may regulate this right, but must do so without substantially burdening its exercise.¹⁵¹

4. *The Right to Vote.* — The U.S. Constitution did not initially outline qualifications on the right to vote, instead leaving the task to the states to set their own requirements.¹⁵² In general, at the time the Constitution was ratified, only white males—aged twenty-one and older—were permitted to vote, and even they were often subject to certain income or property qualifications.¹⁵³ Following the Civil War, Congress proposed, and the requisite number of states ratified, the Fifteenth Amendment, which extended voting rights to all males over the age of twenty-one.¹⁵⁴ The Nineteenth Amendment, ratified in 1920, extended the right to women.¹⁵⁵ Following World War II, in which many 18-to-20-year-olds served, calls intensified for suffrage to be extended to this class, and by 1960, three states had set the voting age below twenty-one: Kentucky (setting it at eighteen), Alaska (nineteen), and Hawaii (twenty).¹⁵⁶ In 1970,

149. *Id.* at 694. The Court found that a state’s interest in the protection of the mental and physical health of a minor—insufficient to permit a blanket ban on obtaining an abortion—was therefore insufficient to justify a similar ban on obtaining contraceptives. See *id.*

150. See *id.* at 697 (“As we have held [regarding] limitations upon distribution to adults, less than total restrictions on access to contraceptives that significantly burden the right to decide whether to bear children must also pass constitutional scrutiny.”).

151. See *id.*

152. See U.S. Const. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”).

153. See Thomas H. Neale, Cong. Research Serv., No. 83-103 GOV, *The Eighteen Year Old Vote: The Twenty-Sixth Amendment and Subsequent Voting Rates of Newly Enfranchised Age Groups 2* (1983), http://digital.library.unt.edu/ark:/67531/metacrs8805/m1/1/high_res_d/83-103GOV_1983May20.pdf [<http://perma.cc/XF39-ZC2R>]. Income and property restrictions on the right to vote gradually receded during the antebellum period. See *id.*

154. See U.S. Const. amend. XV (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

155. See U.S. Const. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”); see also Neale, *supra* note 153, at 3.

156. See Neale, *supra* note 153, at 4–6.

Congress amended the 1965 Voting Rights Act and lowered the countrywide voting age to eighteen.¹⁵⁷ Later that year, the Supreme Court upheld the provisions of the law that granted suffrage to 18-to-20-year-old citizens in *federal* elections but declared unconstitutional the portions of the Act enfranchising 18-to-20-year-olds in *state* and *local* elections.¹⁵⁸ In response to the Court's decision, Congress quickly enacted the Twenty-Sixth Amendment, and it was ratified pursuant to the provisions of Article V of the U.S. Constitution on July 1, 1971.¹⁵⁹ The Amendment states: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."¹⁶⁰

Ultimately, the abortion, contraceptive, and voting rights of young adults are useful analogues to draw from as the scope of the Second Amendment right is defined in the coming years. The Supreme Court has clearly stated that blanket prohibitions on the fundamental right to obtain contraceptives or an abortion are unconstitutional infringements on these rights, regardless of age.¹⁶¹ States may regulate in these areas, but their actions are subject to heightened scrutiny if challenged.¹⁶² Furthermore, the evolution of voting rights demonstrates that while the age of suffrage—not explicitly mentioned in the Constitution until the ratification of the Twenty-Sixth Amendment—has evolved over time, the scope of the right has only ever *increased*, and no class of persons has ever been stripped of this fundamental right once conferred.¹⁶³ The Supreme Court's treatment of these rights raises doubts as to the constitutionality of the age-based restrictions on handgun purchases, particularly in light of recent Second Amendment decisions.

157. See *id.* at 11.

158. See *Oregon v. Mitchell*, 400 U.S. 112, 117–18 (1970). Previously, President Nixon had expressed reservations regarding the amendments to the Voting Rights Act, writing in a signing statement that he believed lowering the voting age likely required a constitutional amendment. See Neale, *supra* note 153, at 11.

159. See Neale, *supra* note 153, at 14–15.

160. U.S. Const. amend. XXVI, § 1.

161. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 642–43 (1979) (highlighting the right of persons under eighteen to obtain an abortion); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 (1977) (discussing the right of individuals under sixteen to obtain contraceptives); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (outlining the abortion rights of minors under eighteen).

162. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876–77 (1992) (discussing the undue burden test in the abortion context); *Carey*, 431 U.S. at 697 (noting regulations that significantly burden access to contraceptives must pass constitutional muster).

163. See Neale, *supra* note 153, at 2–15 (detailing the history of the expansion of the right to vote in the United States).

III. THE VIOLATION OF A FUNDAMENTAL RIGHT: REMEDYING THE INFRINGEMENT

Part III outlines a judicial framework for evaluating age-based restrictions on handgun purchases from federal firearms licensees. It also proposes a method by which Congress could remedy the arguably unconstitutional infringement on the enumerated right to keep and bear arms by the current law. Section III.A maintains that when evaluating Second Amendment claims, courts should be careful not to elevate policy preferences above sound constitutional interpretation. Section III.B discusses how future federal courts might evaluate the constitutionality of the federal age-based restrictions on handgun purchases under strict and intermediate scrutiny. Section III.C contends that allowing 18-to-20-year-old individuals to apply to have federal handgun-purchase restrictions removed under the state-based relief-from-disabilities programs could alleviate concerns regarding the constitutionality of the restrictions.

A. *The Abridgement of a Fundamental Right for a Law-Abiding, Adult Class: Distinguishing Policy Preferences, Social Stigmas, and Constitutional Rights*

The § 922 “who” provisions and the Fifth Circuit challenge in *NRA I* highlight competing interests: group rights and public policy decisions as compared to individual rights and constitutional guarantees. In passing the Omnibus Crime Control and Safe Streets Act of 1968 (as well as the Gun Control Act of 1968), Congress—with a *policy* focus on *group* rights—placed an array of restrictions on the purchase and possession of firearms by certain *individuals* it deemed to be dangerous, potentially infringing on their *constitutional* rights.¹⁶⁴ At the time, Congress was arguably acting within the bounds of legal precedent: *Miller*, the seminal Second Amendment case of that era, does not appear to have raised doubts related to the law’s constitutionality with its focus on a well-regulated militia.¹⁶⁵ The Supreme Court’s recognition in *Heller I* of a fundamental constitutional right to bear arms for the purposes of self-defense¹⁶⁶ is, however, cause for reevaluation of the constitutionality of the firearms restrictions contained in both laws. This evaluation is not an analysis as to whether the firearms restrictions—including the age-based handgun-purchase prohibition—are good *policy*.¹⁶⁷ As the majority in *Heller I*

164. See *supra* section I.B (discussing the Omnibus Crime Control and Safe Streets Act of 1968, the Gun Control Act of 1968, and the current regulatory environment at the state level).

165. See *United States v. Miller*, 307 U.S. 174, 178 (1939).

166. See 554 U.S. 570, 636 (2008).

167. See, e.g., Chelsea Parsons & Anne Johnson, Ctr. for Am. Progress, *Young Guns: How Gun Violence Is Devastating the Millennial Generation 10–11* (2014), <http://www.americanprogress.org/wp-content/uploads/2014/02/CAP-Youth-Gun-Violence-report.pdf> [<http://perma.cc/XQ2D-UMHF>] (noting “young people are perpetrators of gun violence in high numbers”).

remarked, “We are aware of the problem of handgun violence in this country, and we take seriously the[se] concerns . . . [b]ut the enshrinement of constitutional rights necessarily takes certain policy choices off the table.”¹⁶⁸

Nonetheless, even following *Heller I*, the constitutionality of many of the firearms restrictions contained in the 1968 acts—including prohibitions on gun possession by felons and the mentally ill—remain relatively uncontroversial. However, as discussed in sections I.C and II.A, doubts regarding the constitutionality of *other* § 922 “who” provisions—including restrictions on firearms possession by nonviolent misdemeanants and those previously committed to a mental institution—have recently been raised in the lower federal courts.¹⁶⁹ Courts examining these particular restrictions found them, as applied, to be an unconstitutional infringement on the fundamental right to keep and bear arms, even under intermediate scrutiny.¹⁷⁰ While these recent federal court decisions may be anomalies—isolated cases of success in an environment that has not otherwise proven fertile for challenges to the § 922 “who” restrictions¹⁷¹—the federal age-based restrictions on handgun purchases remain themselves somewhat anomalous. As noted by Judge Jones of the Fifth Circuit, the prohibition abridges a fundamental right for a “*law-abiding* adult class of citizens.”¹⁷² Furthermore, it differs from other § 922 “who” provisions in that it punishes nonvolitional conduct—age—and applies to nonviolent 18-to-20-year-old persons.¹⁷³

168. See 554 U.S. at 636 (2008); see also *supra* section IA.2 (outlining the Court’s decision in *Heller I*).

169. See *supra* section I.C.1 (discussing successful challenges to federal firearms restrictions following *Heller I*); see also *supra* section II.A.1 (highlighting concerns regarding the constitutionality of the federal age-based restrictions on handgun purchases by 18-to-20-year-old persons).

170. See, e.g., *Tyler II*, 837 F.3d 678, 699 (6th Cir. 2016) (expressing doubt as to the constitutionality of 18 U.S.C. § 922(g)(4) as applied to the plaintiff but remanding the case to the district court for final determination); *Binderup v. Attorney Gen.*, 836 F.3d 336, 356–57 (3d Cir. 2016) (concluding the provisions of 18 U.S.C. § 922(g)(1) were unconstitutional as applied to the plaintiffs); *Keyes v. Lynch*, 195 F. Supp. 3d 702, 722 (M.D. Pa. 2016) (holding firearms restrictions in § 922(g)(4) were unconstitutional as applied to the plaintiff).

171. See, e.g., *United States v. Mahin*, 668 F.3d 119, 123 (4th Cir. 2012) (highlighting “mounting case law declining to overturn on Second Amendment grounds criminal convictions under 18 U.S.C. § 922(g)”).

172. *NRA II*, 714 F.3d 334, 336 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc) (emphasis added).

173. Cf. *Tyler I*, 775 F.3d 308, 336 (6th Cir. 2014) (discussing the similar effect of the restrictions contained in § 922(g)(4) when applied to individuals previously committed to a mental institution), *aff’d* in part en banc, 837 F.3d 678.

Ultimately, the Second Amendment is not, as members of the Supreme Court have observed, “a second-class right,”¹⁷⁴ and the current restrictions on handgun purchases by law-abiding 18-to-20-year-old adults raise serious concerns regarding its infringement. Decisions by the federal courts that seemingly elevate policy preferences over neutral principles of constitutional interpretation have compounded the problem. As noted by Justice Thomas in *Whole Woman’s Health*, “[O]ur Constitution renounces the notion that some constitutional rights are more equal than others Unless the Court abides by one set of rules to adjudicate constitutional rights, it will continue reducing constitutional law to policy-driven value judgments until the last shreds of its legitimacy disappear.”¹⁷⁵ Because FFLs are the main conduit of handguns for people under twenty-one,¹⁷⁶ the inability of 18-to-20-year-olds to purchase handguns—the “quintessential” home-defense weapon¹⁷⁷—from this source represents a substantial burden on their fundamental right to keep and bear arms.¹⁷⁸ The federal prohibition, based on 1960s-era perceptions and less-than-robust statistical evidence, is arguably unconstitutional under either strict or intermediate scrutiny. While Congress’s group-rights-focused *end* may be sufficient to satisfy heightened scrutiny, there is a strong case to demonstrate that its *means* are not.

B. *The Application of Heightened Scrutiny and the Constitutionality of Federal Age-Based Restrictions on Handgun Purchases*

Although *Heller I* did not state the appropriate level of scrutiny to apply to laws and regulations allegedly infringing on the Second Amendment, it specifically rejected the application of rational basis review.¹⁷⁹ The Court also rejected the dissent’s proposed use of a freestanding “‘interest-balancing’ approach,” noting that it could not find any other constitutional right whose core protection had been exposed to such a test, but declined to “establish a level of scrutiny for

174. *Friedman v. City of Highland Park*, 136 S. Ct. 447, 450 (2015) (Thomas, J., dissenting from denial of certiorari); see also *Peruta v. California*, 137 S. Ct. 1995, 1996–2000 (2017) (Thomas, J., dissenting from denial of certiorari) (criticizing “the treatment of the Second Amendment as a disfavored right”).

175. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2329–30 (2016) (Thomas, J., dissenting).

176. *NRA I*, 700 F.3d 185, 209 (5th Cir. 2012) (“FFLs . . . constitute[] the central conduit of handgun traffic to young persons under 21.”).

177. See *Heller I*, 554 U.S. 570, 629 (2008) (“[H]andguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”).

178. See *Tyler II*, 837 F.3d at 709 (Sutton, J., concurring) (“*Heller* tells us that the Second Amendment protects ‘the right of law-abiding, responsible citizens’ . . . to possess a gun.” (quoting *Heller I*, 554 U.S. at 635)).

179. See 554 U.S. at 628 n.27 (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”).

evaluating Second Amendment restrictions.”¹⁸⁰ Following *Heller I*, some judges rejected the application of tiers of scrutiny outside the context of the four presumptively lawful regulations, instead finding that an individual possesses an unencumbered constitutional right to possess a firearm so long as she is not a danger to herself or others.¹⁸¹ Applying this approach to the handgun-purchase restrictions on 18-to-20-year-old adults would cast serious doubt on their constitutionality.¹⁸² However, the majority of courts have chosen to apply tiers of scrutiny to all firearms restrictions.¹⁸³

In the years following the landmark decision, the lower federal courts have developed a framework in which strict scrutiny is applied to laws burdening the “core” of the Second Amendment right, while those laws burdening activities outside the core of this right receive intermediate scrutiny.¹⁸⁴ Both levels of scrutiny are “quintessential balancing inquiries that focus ultimately on whether a particular government interest is sufficiently compelling or important to justify an infringement on the individual right in question.”¹⁸⁵ Because the federal age-based restrictions fall outside the *Heller I* exceptions¹⁸⁶ and within the scope of the right as historically understood,¹⁸⁷ future courts will analyze their constitutionality by applying heightened scrutiny.¹⁸⁸

1. *Strict Scrutiny and the Core of the Second Amendment Right.* — The strict scrutiny test requires courts to determine whether a challenged law is “necessary to achieve a compelling government purpose.”¹⁸⁹ If so, the law will be upheld as constitutional. Although there is an ongoing debate in the lower federal courts as to when strict scrutiny should apply to a

180. See *id.* at 634–35 (“We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.”).

181. See, e.g., *Tyler II*, 837 F.3d at 710–11 (Sutton, J., concurring) (“Whatever utility [tiers of scrutiny] may have elsewhere, they have no role to play here.”).

182. Cf. *id.* at 710–11, 714 (discussing this approach in the context of a challenge to 18 U.S.C. § 922(g)(4), which prohibits firearms possession by persons previously committed to a mental institution).

183. See, e.g., *id.* at 692 (majority opinion) (applying intermediate scrutiny); see also *supra* notes 60–65 and accompanying text (collecting challenges to federal firearms restrictions following *Heller I*).

184. See *United States v. Marzarella*, 614 F.3d 85, 89, 95–98 (3d Cir. 2010); see also *supra* note 90 (discussing this framework).

185. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1281 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

186. See *supra* section II.B.

187. See *supra* section II.C.1 (outlining the traditional scope of the Second Amendment right).

188. Cf. *Heller I*, 554 U.S. 570, 634–35 (2008) (“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”).

189. *Chemerinsky*, *supra* note 21, § 6.5, at 554; see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 219 (1995); *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

challenged federal law restricting an individual's Second Amendment right,¹⁹⁰ the D.C. Circuit recently held, "[A] regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify."¹⁹¹

In determining which level of scrutiny to apply, a federal court entertaining a challenge to the age-based restrictions on handgun purchases would first need to determine whether the law infringes on the "core" of the Second Amendment right. There is considerable evidence supporting the position that the restriction does burden the core of the right. The prohibition bars 18-to-20-year-old adults from purchasing handguns from FFLs—the main supplier of such firearms.¹⁹² Although members of this class are permitted under federal law to possess a handgun,¹⁹³ they are barred from purchasing one from an FFL. Because of this, these individuals must acquire a handgun in a private sale from a person not normally employed in the business of selling firearms, or from a family member as a gift.¹⁹⁴ The regulations substantially limit the ability of persons in this class to purchase a handgun, "the quintessential self-defense weapon."¹⁹⁵ Thus, there is a strong basis for demonstrating that

190. See *Tyler I*, 775 F.3d 308, 324–26 (6th Cir. 2014) (surveying the federal circuit doctrines), *aff'd* in part *en banc*, 837 F.3d 678 (6th Cir. 2016).

191. *Heller II*, 670 F.3d 1244, 1257 (D.C. Cir. 2011).

192. See *NRA I*, 700 F.3d 185, 207–08 (5th Cir. 2012) (noting Congress concluded FFLs served as the "central conduit" through which 18-to-20-year-olds obtained firearms); see also Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary, 89th Cong. 57 (1965) (testimony of Sheldon S. Cohen, Comm'r, Internal Revenue Service) ("The vast majority . . . of these firearms, are put into the hands of juveniles by importers, manufacturers, and dealers who operate under licenses issued by the Federal Government."); Philip J. Cook & Jens Ludwig, Nat'l Inst. of Justice, *Guns in America: National Survey on Private Ownership and Use of Firearms* 2, 6–7 (1997), <http://www.ncjrs.gov/pdffiles/165476.pdf> [<http://perma.cc/Q39N-WDPA>].

193. See 18 U.S.C. § 922(b)(1), (c)(1) (2012); *cf. id.* § 922(x) (prohibiting the possession of handguns by individuals under eighteen).

194. See *id.* § 922(b)(1), (c)(1); see also *NRA I*, 700 F.3d at 209. A recent survey published in the *Annals of Internal Medicine* found that the vast majority of all firearm purchases (nearly eighty percent) are conducted through FFLs, which are required by law to conduct a background check on the purchaser. See Matthew Miller, Lisa Hepburn & Deborah Azrael, *Firearm Acquisition Without Background Checks: Results of a National Survey*, 166 *Annals Internal Med.* 233, 233, 237 (2017).

195. *Heller I*, 554 U.S. 570, 629 (2008). In many respects, this federal prohibition covering 18-to-20-year-old adults is similar to the challenged law in *Heller I*. It substantially burdens the ability of class members to defend their persons and homes. See *id.* at 628–29 ("The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute."). While the age-based restrictions do not ban handgun possession by this class, for 18-to-20-year-old adults no longer living with a parent or guardian, the restrictions may have just that effect. See *NRA II*, 714 F.3d 334, 345 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing *en banc*).

the prohibitions burden the core of the Second Amendment right and should be examined by the federal courts under strict scrutiny.

In applying strict scrutiny, a court should first determine whether the government's *end* is compelling.¹⁹⁶ Age-based restrictions on handgun purchases are aimed at furthering the safety of the broader community and preventing suicide among 18-to-20-year-old adults.¹⁹⁷ Because future plaintiffs are unlikely to argue that public safety and protecting life are not compelling government interests, additional legal challenges will hinge on whether the *means* selected by Congress—a universal ban on the purchase of handguns from FFLs by 18-to-20-year-old persons—are necessary to achieve this purpose.¹⁹⁸

The federal restriction in question abridges a *fundamental* constitutional right for an *entire* class of persons, an overwhelming majority of whom are nonviolent and law abiding.¹⁹⁹ Moreover, it punishes nonvolitional conduct—the fundamental right of 18-to-20-year-olds to bear arms is burdened simply because this group is the youngest class of adult citizens—and draws a bright, age-based line, not present in other fundamental-rights contexts.²⁰⁰ There is compelling evidence that the handgun restriction, in its current form, is not necessary to achieve the government's stated purpose.

In *NRA I*, the panel argued that evidence presented by the government tended to show 18-to-20-year-old persons “are immature and prone to violence.”²⁰¹ Nonetheless, as noted by the dissent in *NRA II*, forty years of evidence has shown that such a restriction—the congressional *means*—has done little, if anything, to further Congress's stated objective of curbing gun violence perpetrated by 18-to-20-year-old adults.²⁰² Furthermore, in spite of congressional statements to the contrary, not all 18-to-20-year-

196. See Chemerinsky, *supra* note 21, § 6.5, at 554 (highlighting that a “court must regard the government's purpose as vital”).

197. See, e.g., *Tyler I*, 775 F.3d 308, 331 (6th Cir. 2014) (highlighting suicide prevention as one of the government's purposes in enacting the § 922(g) restrictions), *aff'd in part en banc*, 837 F.3d 678 (6th Cir. 2016); *NRA I*, 700 F.3d at 209–10 (discussing violent crime and community safety).

198. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (“Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose.” (citing *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980))).

199. See *NRA II*, 714 F.3d at 336 (Jones, J., dissenting from denial of rehearing en banc).

200. See *supra* section II.C.2 (highlighting that courts have not allowed blanket, age-based prohibitions in the context of an abortion); see also *supra* section II.C.3 (noting that the right to obtain and use contraceptives extends to minors).

201. 700 F.3d at 208.

202. See, 714 F.3d at 346 (Jones, J., dissenting from denial of rehearing en banc). In fact, the dissenting judges in *NRA II* used the crime statistics cited by the panel in *NRA I* to justify this conclusion. See *NRA I*, 700 F.3d at 209–11 (outlining congressional findings concerning the threat posed by 18-to-20-year olds with access to handguns).

old individuals are immature, irresponsible, and prone to law-breaking; in fact, the dissent in *NRA II* noted that “only 0.58% of 18- to 20-year olds were arrested for violent crimes in 2010.”²⁰³

An analogous gender discrimination case, *Craig v. Boren*,²⁰⁴ provides a useful analytical framework. In *Craig*, the plaintiffs challenged an Oklahoma law that prohibited the sale of certain alcoholic beverages to men under twenty-one, while allowing such sales to women over eighteen.²⁰⁵ The government argued that its stated *end*, preventing drinking and driving by men, justified its *means*, a categorical ban on the purchase of *certain* alcoholic beverages by men under twenty-one.²⁰⁶ Finding the government’s stated means to be overly broad, the Court noted, “Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an *unduly tenuous ‘fit.’*”²⁰⁷ Substituting “age” for “maleness,” “gun-related crime” for “drinking and driving,” and “0.58%” for “2%” demonstrates the applicability of the *Craig* Court’s analysis to age-based handgun restrictions.

Moreover, the fact that the prohibitions apply to only *handguns* and not all types of firearms is also insufficient to support a finding that the regulations are “necessary.” As stated clearly in *Heller I*, “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.”²⁰⁸ In the end, the government’s selected means unduly burden the exercise of an enumerated right and are not necessary to further the government’s objectives, however compelling they might be. The age-based restrictions arguably fail to pass constitutional muster when subject to strict scrutiny.

2. *The Intermediate Scrutiny Alternative.* — In a future challenge to the age-based restrictions, a federal court could, in the alternative, apply intermediate scrutiny.²⁰⁹ To do so, the court would have to hold that such restrictions are outside the scope of the core of the Second Amendment right.²¹⁰ Nonetheless, the government could argue, and a court may accept, that because the age-based restrictions burden handgun

203. See 714 F.3d at 347 (Jones, J., dissenting from denial of rehearing en banc).

204. See 429 U.S. 190, 202–03 (1976). *Craig* was the first case in which the Supreme Court applied intermediate scrutiny in the context of gender discrimination. See *id.* at 197; see also *Chemerinsky*, *supra* note 21, § 9.4.1, at 774–75.

205. *Craig*, 429 U.S. at 191–92.

206. See *id.* at 199–204.

207. *Id.* at 201–02 (emphasis added). Only two percent of individuals in the regulated class—18-to-20-year-old men—had been arrested for driving under the influence of alcohol. See *id.*

208. 554 U.S. 570, 629 (2008).

209. See, e.g., *NRA I*, 700 F.3d 185, 205–07 (5th Cir. 2012) (arguing the challenged provisions should be evaluated under intermediate scrutiny).

210. See *Heller II*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (discussing when to apply strict and intermediate scrutiny in the Second Amendment context).

purchases by only a subset of adults (18-to-20-year-olds), they do not encroach on the “core” of the right.²¹¹ In cases in which intermediate scrutiny does apply, a law will survive if it is “substantially related to an important government purpose.”²¹²

A court is likely to find that regulations aimed at preventing suicide and violence in the broader community are important.²¹³ Even the dissent in *NRA II* was quick to concede that the government’s stated *end* in passing the Omnibus Crime Control and Safe Streets Act was sufficient to withstand intermediate scrutiny.²¹⁴ The constitutionality of the age-based prohibitions, therefore, turns on whether the handgun-purchase restrictions are substantially related to their stated purpose.

The federal age-based restrictions on handgun purchases are vastly overbroad with no element of narrow tailoring.²¹⁵ They apply to *all* 18-to-20-year-old individuals, based on the argument that *some* 18-to-20-year-olds are prone to violent criminal behavior.²¹⁶ Although it chose not to do so, Congress could have alleviated constitutional concerns related to

211. See *Heller I*, 554 U.S. at 630 (finding the challenged handgun restrictions burdened the core of the Second Amendment right); see also *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) (“Both *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are categorically unconstitutional.” (citing *Heller I*, 554 U.S. at 628–35)). The handgun restrictions in *Heller I* effectively barred all adults from possessing handguns in their homes. See 554 U.S. at 574–76.

212. Chemerinsky, *supra* note 21, § 6.5, at 553 (emphasis omitted); see also *Lehr v. Robertson*, 463 U.S. 248, 265–66 (1983); *Craig*, 429 U.S. at 197. In contexts outside of the Second Amendment, the Supreme Court has given mixed signals as to what “substantially related” entails. For example, in the First Amendment context, the Court has noted that for a government action to survive intermediate scrutiny, there must be some element of “narrow tailoring,” but the means employed need not necessarily be the *least restrictive* means available. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001); see also *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 188 (1999).

213. See *supra* note 197 and accompanying text (noting examples of cases in which courts found these objectives compelling).

214. See 714 F.3d 334, 346 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc) (“There is an important governmental interest in reducing violent crime.”).

215. For a discussion on narrow tailoring, see *supra* note 212 and accompanying text (discussing narrow tailoring in the First Amendment context).

216. See Federal Firearms Act: Hearings on S. 1, Amendment 90 to S. 1, S. 1853, and S. 1854 Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary, 90th Cong. 57 (1967) (statement of Sheldon S. Cohen, Comm’r, Internal Revenue Service) (“The greatest growth of crime today is in the area of young people, juveniles and young adults. The easy availability of weapons makes their tendency toward wild, and sometimes irrational behavior that much more violent, that much more deadly . . .”). While there is little doubt that a small subset of 18-to-20-year-old adults has a tendency toward such behavior, individuals disposed to crime exist in all age brackets. Ultimately, the vast majority of 18-to-20-year-old persons are not inclined toward violent crime. See *NRA II*, 714 F.3d at 346–47 (Jones, J., dissenting from denial of rehearing en banc).

the breadth of the law in a number of ways: It could have barred 18-to-20-year-old persons convicted of a felony, violent crime, or other unlawful act from purchasing a handgun from an FFL; alternatively, it could have provided a path for 18-to-20-year-old adults seeking relief from their “disability” to apply to have the restriction removed—as it has done for some § 922(g) provisions.²¹⁷ Because Congress chose not to tailor the restrictions, a court could have grounds for determining that they are not substantially related to the government’s stated objectives.

Under either level of scrutiny, the age-based restrictions on handgun purchases are arguably unconstitutional. This issue, however, need not be resolved in the courts. In fact, Congress has already put in place a state-based relief-from-disabilities program, which, if expanded to include those persons subject to the federal age-based handgun-purchase restrictions, could alleviate concerns related to the constitutionality of 18 U.S.C. § 922(b)(1) and 922(c)(1).

C. *A Path Forward: Congress and NICS Improvement Amendments Act of 2007*

On April 16, 2007, Seung-Hui Cho perpetrated one of the worst mass shootings in American history.²¹⁸ Armed with two legally obtained firearms,²¹⁹ Cho murdered thirty-two members of the Virginia Tech community while injuring approximately thirty others.²²⁰ Unbeknownst to officials at the university, Cho had a history of mental illness.²²¹ Cho’s ability to obtain a firearm despite his prior institutionalization led to congressional reform of the National Instant Criminal Background

217. See *infra* section III.C (discussing the federal and state relief-from-disabilities programs).

218. Ian Shapira & Tom Jackman, *Gunman Kills 32 at Virginia Tech in Deadliest Shooting in U.S. History*, *Wash. Post* (Apr. 17, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/16/AR2007041600533.html> (on file with the *Columbia Law Review*).

219. Drew Griffin et al., *Campus Killer’s Purchases Apparently Within Gun Laws*, *CNN* (Apr. 19, 2007), <http://www.cnn.com/2007/US/04/19/gun.laws/index.html?s=PM:US> [<http://perma.cc/HF5U-UCQT>].

220. Shapira & Jackman, *supra* note 218.

221. See Brigid Schulte & Tim Craig, *Unknown to Va. Tech, Cho Had a Disorder*, *Wash. Post* (Aug. 27, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/08/26/AR2007082601410_pf.html (on file with the *Columbia Law Review*). Specifically, Cho had a “condition, called selective mutism, [which] is a symptom of a larger social anxiety disorder.” *Id.* In fact, in December 2005, “a district court in Montgomery County, Va., ruled that Cho presented ‘an imminent danger to self or others’” and ordered him detained at a psychiatric hospital so that he “could be evaluated by a state doctor.” Ned Potter & David Schoetz, *Va. Tech Killer Ruled Mentally Ill by Court; Let Go After Hospital Visit*, *ABC News* (Apr. 18, 2007), <http://abcnews.go.com/US/story?id=3052278> [<http://perma.cc/4PV6-JCXY>]. He was subsequently released on an outpatient basis and ordered to seek treatment. See *id.*

Check System (NICS) in 2008.²²² Congress voted to provide federal grants to states “to assist them in determining which individuals are eligible to purchase and possess firearms and to aid them in supplying accurate information to federal databases.”²²³ The relief-from-disabilities portion of the NICS Improvement Amendments Act (NIAA) of 2007 applied only to individuals who were prohibited from obtaining firearms under the provisions of 18 U.S.C. § 922(d)(4) or 922(g)(4).²²⁴ The Act did not apply to age-based restrictions on handgun purchases or other § 922(g) “who” provisions.²²⁵

Unfortunately, in the years following the passage of the NIAA, fewer than twenty-five states decided to implement their own programs, despite

222. See NICS Improvement Amendments Act (NIAA) of 2007, Pub. L. No. 110-180, 121 Stat. 2559 (2008) (reforming the National Instant Criminal Background Check System by, *inter alia*, providing state governments with federal funding to improve their ability to perform background checks and maintain records); see also Fernanda Crescente, Congress and Guns: Key Moments in 26 Years of Death and Debate, USA Today (June 23, 2016), <http://www.usatoday.com/story/news/politics/onpolitics/2016/06/23/congress-and-guns-key-moments-26-years-death-and-debate/86262812/> [<http://perma.cc/5YV8-596H>].

223. *Tyler I*, 775 F.3d 308, 313 (6th Cir. 2014), *aff'd* in part en banc, 837 F.3d 678 (6th Cir. 2016). The reforms were modeled on the now-defunct federal relief-from-disabilities program, which was initially enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968. See Pub. L. No. 90-351, sec. 902, § 922, 82 Stat. 197, 233–34; see also *supra* section I.B.1 (discussing the enactment and provisions of the Omnibus Crime Control and Safe Streets Act of 1968). The Act provided that an individual “convicted of a crime punishable by imprisonment for a term exceeding one year” could apply to the Attorney General for relief from the law prohibiting firearms purchases and possession by such persons. See sec. 902, § 922, 82 Stat. at 233. The program did not extend to those individuals convicted of crimes “involving the use of a firearm or other weapon.” *Id.* The provision was later amended as part of the Firearms Owners’ Protection Act. See Pub. L. No. 99-308, § 105, 100 Stat. 449, 459 (1986). The 1986 Act extended this program to any person who “is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition.” *Id.* In 1992, Congress defunded this program, effectively imposing a permanent ban on firearms purchases and possession by those subject to the “who” provisions. See Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992) (“[N]one of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c).”). Because the Attorney General delegated review of relief-from-disability applications to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the lack of funding has prevented the ATF from reviewing applications since 1992. See 28 C.F.R. § 0.130(a)(1) (2016) (delegating relevant authority of the Attorney General to the Director of the ATF); see also 27 C.F.R. § 478.144 (2016) (detailing the process necessary to obtain relief from a disability). The program has not received any funding during the past twenty-five years and remains effectively dormant. See 106 Stat. at 1732. In 2008, rather than reestablishing funding for the existing federal program, Congress instead chose to use its spending power to encourage states to set up their own relief-from-disabilities programs as part of the NICS Improvement Amendments Act (NIAA) of 2007. See § 105, 121 Stat. at 2569–70 (2008).

224. See § 105, 121 Stat. at 2569–70. 18 U.S.C § 922(d) provides, in part, “It shall be unlawful for any person to sell . . . any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . has been adjudicated as a mental defective or has been committed to any mental institution.” 18 U.S.C. § 922(d) (2012).

225. See § 105, 121 Stat. at 2569–70.

the promise of federal funding.²²⁶ Although the number of states granted funding under this program has varied from year to year, only twenty states received funding in 2015.²²⁷ Due to issues of commandeering, Congress cannot mandate that each state set up its own system.²²⁸ What began as a promising solution for individuals with a history of institutionalization to restore their fundamental right to keep and bear arms turned out to be a dead end in many states. Additionally, because the federal relief-from-disabilities program has been defunded since 1992, countless citizens—including those with misdemeanor convictions punishable by more than two years in prison—remain unable to obtain relief.²²⁹ No such path to relief exists, at the state or federal level, for 18-to-20-year-old persons barred from purchasing handguns from FFLs.

A congressional amendment to the NIAA could help alleviate concerns regarding the constitutionality of age-based restrictions on handgun purchases.²³⁰ Allowing law-abiding adults to apply for relief from the “disability” of their age would provide a measure of “narrow tailoring” to the government restrictions while still creating a presumption *against* handgun purchases from FFLs by 18-to-20-year-old adults. This pathway to relief would subject this class to judicial review for approval before the disability is removed.²³¹ Approval from “a State court, board, commission, or other lawful authority” would not immediately allow 18-to-20-year-old

226. See The NICS Improvement Amendments Act of 2007: State Profiles, Bureau of Justice Statistics, <http://www.bjs.gov/index.cfm?ty=tp&tid=491> [<http://perma.cc/WL86-7UW5>] (last visited July 26, 2017).

227. See *id.*

228. See *New York v. United States*, 505 U.S. 144, 174–77 (1992) (holding Congress may not “commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program”); see also *Printz v. United States*, 521 U.S. 898, 925–34 (1997) (“[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”). The Supreme Court has stated that “Congress has broad power to spend funds to advance the ‘general welfare.’” See *Chemerinsky*, *supra* note 21, § 3.4.3, at 284 (citing *United States v. Butler*, 297 U.S. 1, 65 (1936)). As noted in Justice O’Connor’s dissenting opinion in *South Dakota v. Dole*, “[T]here are four separate types of limitations on the spending power: the expenditure must be for the general welfare, the conditions imposed must be unambiguous, they must be reasonably related to the purpose of the expenditure, and the legislation may not violate any independent constitutional prohibition.” 483 U.S. 203, 213 (1987) (O’Connor, J., dissenting) (citations omitted). So long as Congress does not violate these limitations, it may “place conditions on grants to state and local governments.” *Chemerinsky*, *supra* note 21, § 3.4.3, at 285.

229. See *supra* note 223 (discussing the history of the federal relief-from-disabilities program); see also Paulsen, *supra* note 61 (reviewing the recent Third Circuit decision in *Binderup*, which found the provisions of 18 U.S.C. § 922(g)(1) to be unconstitutional as applied to the plaintiffs).

230. See *supra* section III.B (arguing that federal age-based handgun-purchase restrictions fail to survive strict or intermediate scrutiny).

231. See NICS Improvement Amendments Act (NIAA) of 2007, Pub. L. No. 110-180, § 105, 121 Stat. 2559, 2569–70 (2008) (outlining the state-based relief-from-disabilities process in the context of § 922(d)(4) and 922(g)(4) disabilities).

individuals to purchase a handgun.²³² Instead, they would simply be permitted to begin the process of obtaining a handgun from an FFL in the same manner as all other adults: by submitting to a *federal* background check and undergoing a waiting period.²³³ Thus, allowing this class to apply for relief from its disability would significantly narrow the congressional *means* of accomplishing its goals related to violence among 18-to-20-year-old persons,²³⁴ while retaining a presumption against handgun purchases from FFLs by this class and submitting these purchases to both judicial and executive review.²³⁵ In accordance with congressional goals of increasing public safety, expanding the existing program would dramatically increase the number of background checks conducted on handgun purchases by 18-to-20-year-old adults.²³⁶ Because this class is not banned from *possessing* handguns but may *purchase* handguns only via private sales in which background checks are *not* required, it remains essentially the only group not subject to background checks for handgun purchases.²³⁷

Expansion of the relief-from-disabilities program to alleviate constitutional concerns surrounding the age-based restrictions is unlikely to be successful unless Congress wields its spending power in a manner that encourages the adoption of these programs in all fifty states. A nationwide system of state-run relief-from-disabilities programs would ensure that the *means* selected by Congress to further its *end* of combatting gun crimes among young adults pass constitutional muster following *Heller I*. Additionally, this solution would offer a similar measure of relief from state laws restricting the *possession* of handguns by this class. Ultimately, Congress should revisit the design of federal spending grants in the NIAA with the aim of encouraging full state participation in the relief-

232. See *id.*.

233. See 18 U.S.C. § 922(s)–(t) (2012); see also Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 102, 107 Stat. 1536, 1536–41 (1993) (establishing the National Instant Criminal Background Check System). The establishment of a state relief-from-disabilities program does not remove current procedural hurdles for purchasing a handgun from an FFL. Federal background checks, for example, remain in place. See § 105, 121 Stat. at 2569–70; see also 18 U.S.C. § 922(s)–(t).

234. See *supra* section I.B.1 (discussing the congressional rationale for establishing age-based restrictions on handgun purchases).

235. See *supra* notes 231–233 and accompanying text (outlining requirements for handgun purchases under the state relief-from-disabilities programs).

236. See *NRA II*, 714 F.3d 334, 346 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc) (noting the ban on handgun purchases from FFLs “perversely assures that when such young adults obtain handguns, they do not do so through licensed firearms dealers, where background checks are required, see 18 U.S.C. § 922(t), but they go to the unregulated market”).

237. Surprisingly, it was not until 1994 that persons *under* eighteen were prohibited from possessing handguns. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110201, 108 Stat. 1796, 2010–12 (1994) (banning the possession of handguns by individuals under eighteen as well as the transfer or sale of handguns to this class of persons).

from-disabilities programs. Such action would further congressional goals relating to public safety and serve as a critical vindication of the right of law-abiding citizens to keep and bear arms.

CONCLUSION

Following Supreme Court decisions in *Heller I* and *McDonald*, numerous challenges have arisen to federal restrictions on the right of law-abiding, adult citizens to keep and bear arms. Although the federal ban on handgun purchases from federal firearms licensees by 18-to-20-year-old persons was narrowly upheld in the Fifth Circuit, Second Amendment case law has continued to evolve with successful challenges to other § 922 “who” provisions in recent years. Ultimately, there may be additional challenges to the age-based restrictions in the future, and the overly broad prohibitions may not pass constitutional muster. Rather than waiting for the issue to be settled in the courts, Congress could expand the scope of the state-based relief-from-disabilities programs it authorized as part of the NICS Improvement Amendments Act of 2007. This would permit a law-abiding class—currently subject to the infringement of an enumerated right—to purchase handguns while remaining accountable to stringent government oversight, an element not present in the current system. Such an action would be a powerful vindication, not only of Second Amendment protections but also of fundamental rights in general.