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SUMMARY OF *NRA V. BATFE*

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SUMMARY

In *NRA v BATFE* (700 F.3d 185), the Fifth U.S. Circuit Court of Appeals in Texas upheld a federal law that prohibits federally licensed firearm dealers (FFLs) from selling handguns to people under age 21. Plaintiffs challenged the law's constitutionality on grounds that it violated their Second Amendment right to keep and bear arms and Fifth Amendment right to equal protection under the Due Process Clause.

The three-judge panel adopted a flexible two-step inquiry established by other circuits analyzing firearm regulations in the wake of the U. S. Supreme Court holdings in *District of Columbia v. Heller* (554 U.S. 570 (2008)) and *McDonald v. Chicago* (130 S. Ct. 3020 (2010)). The two-step inquiry involves (1) first determining whether a challenged law impinges upon a protected Second Amendment right and (2) next determining the appropriate level of judicial scrutiny to apply to the analysis. The court, after surveying the history and tradition of gun sale regulations, concluded that the federal ban on handgun sales to people under age 21 did not touch on protected Second Amendment activity. It rejected the National Rifle Association's (NRA) request to apply strict scrutiny in considering the ban. Applying the less exacting intermediate scrutiny standard, it held that curbing crime by those under age 21 constitutes an important government objective and the ban adequately served that end.

The court also rejected the NRA's equal protection argument, noting that the government may discriminate on the basis of age without offending the constitutional guarantee of equal protection if such discrimination is rationally related to a legitimate state interest.

BACKGROUND

Federal law prohibits FFLs from selling handguns (pistols and revolvers) to anyone under age 21 and long guns (rifles and shot guns) to anyone under age 18 (18 USC § 922(b)(1), 27 CFR § 478.99 (b)(1)). The law also prohibits people under age 18 from possessing handguns and bars handgun transfers to them, with limited exceptions (18 USC § 922(x)).

The plaintiffs, NRA and others, challenged the ban on FFL sales to people under age 21. They claimed the law was unconstitutional in that it infringed on the right of 18-to-20-year-old adults to keep and bear arms under the Second Amendment and denied them equal protection under the Fifth Amendment's Due Process Clause. The district court granted summary judgment for the government, rejecting the constitutional claims. The plaintiffs appealed, and the Appeals Court decided to review the constitutionality of the federal statutes.

ANALYTICAL FRAMEWORK

The Second Amendment provides: "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" (U.S. Cons. Amend. II). The Fifth Circuit Court noted that the U.S. Supreme Court, in *Heller* made clear that the Second Amendment codified a pre-existing right to keep and bear arms (554 U.S. at 592, 595).

In *McDonald*, the Supreme Court further clarified that "the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty" (130 S. Ct. 3020 (2010)). The Court invalidated statutes banning the possession of usable handguns in the home and requiring residents to keep their firearms either disassembled or trigger locked because they violated the central Second Amendment right—that is, the "right of law-abiding, responsible citizens to use arms in defense of hearth and home" (*Id.* at 635). But the Court also emphasized that the right secured by the Second Amendment is not unlimited (*Id.* at 626). It said that a wide range of gun control laws

remain “presumptively lawful,” including laws that (1) ban the carrying of concealed weapons, (2) ban gun possession by felons or the mentally retarded, (3) ban the carrying of firearms in sensitive places such as schools and government buildings, and (4) impose “conditions and qualifications on the commercial sale of arms” (*Id.* at 626, 627).

The Fifth Circuit court said that neither *Heller* nor *McDonald* established an analytical framework with which to evaluate firearm regulations, but a two-step inquiry had emerged as the prevailing approach in appeal courts. The first step involves determining whether a challenged law regulates conduct that falls within the scope of the Second Amendment; the second step involves determining whether to apply intermediate or strict scrutiny to the law and then determine whether the law survives the proper level of scrutiny (*NRA* at p. 194).

If the challenged law burdens conduct that falls outside the Second Amendment’s scope, it is constitutional. If the law burdens conduct that falls within the Second Amendment’s scope, the court applies the appropriate level of scrutiny (*NRA* at p. 195). The court said it agreed with the prevailing view that the appropriate level of scrutiny “depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right” (*NRA* at p. 195). It rejected the contention that every regulation impinging upon the Second Amendment right must trigger strict scrutiny, although it is a fundamental right (*NRA* at p. 198). It said it believed that a law impinging upon the Second Amendment right must be reviewed under a level of scrutiny appropriate to the severity of the burden that the law imposes on the right.

Traditionally, courts employ strict scrutiny, the most stringent test, when a law infringes on a fundamental constitutional right or involves the use of a suspect classification, such as race or ethnicity. To pass the strict scrutiny test, the law must serve a compelling government interest, be narrowly tailored to achieve that interest, and be the least restrictive means of achieving that interest. To pass intermediate scrutiny, a law must be substantially related to serving an important government interest.

REVIEW AND ANALYSIS

The Fifth Circuit court said that a longstanding, presumptively lawful regulatory measure—whether specified on *Heller’s* illustrative list—would likely be upheld at step one of the two-step framework (*NRA* at p. 196).

A regulation that is ‘longstanding,’ which necessarily means it has been accepted by the public, is not likely to burden a constitutional right; concomitantly the activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment (*NRA* at p. 196, citing *Heller*).

The court reiterated that a “longstanding measure that harmonizes with the history and tradition of arms regulation in this country would not threaten the core of the Second Amendment guarantee” (*NRA* at p. 196). But even if such a measure advanced to step two of the two-step framework, it would trigger intermediate scrutiny (*NRA* at p. 196).

The court examined the legislative record of the laws at issue and said the record made it clear that Congress’s purpose was to curb violent crime. Essentially, then, the federal laws at issue are safety-driven, age-based categorical restrictions on handgun access, according to the court (*NRA* at p. 199).

The court examined historical evidence and tradition and concluded that the laws’ restrictions were “consistent with a longstanding, historical tradition of age and safety-based restrictions on the ability to access arms, thereby suggesting that the conduct at issue falls outside the Second Amendment’s protection” (*NRA* at p. 203). The court said that:

[i]n conformity with founding-era thinking, and in conformity with the views of various 19th century legislators and courts, Congress restricted the ability of minors under 21 to purchase handguns because Congress found that they tend to be relatively immature and that denying them easy access to handguns would deter violent crime (*NRA* at pp. 203, 204).

The court also noted that “modern restrictions on the ability of persons under 21 to purchase handguns—and the ability of persons under 18 to possess handguns—seem, to us, to be firmly historically rooted” (*NRA* at p. 204). The court said that although it was inclined to uphold the challenged federal laws at step one of the analytical framework, “in an abundance of caution,” it proceeded to step two and ultimately concluded “that the challenged federal laws pass constitutional muster even if they implicate the Second Amendment guarantee” (*NRA* at p. 204).

The court first acknowledged that a law burdening a core Second Amendment right would trigger strict scrutiny, while a less severe law would be proportionately easier to justify. But it said strict scrutiny did not apply in this case because:

1. the ban is narrowly tailored and does not disarm an entire community, unlike the ban in *Heller*;
2. like the federal bans targeting felons and the mentally ill, the laws targeting minors under age 21 are an outgrowth of an American tradition to regulate certain groups' access to arms for the sake of public safety; and
3. as with felons and the mentally ill, categorically restricting the presumptive Second Amendment rights of 18-20-year-olds does not violate the central concern of the Second Amendment (*NRA* at pp. 205, 206).

“The Second Amendment, at its core protects ‘law-abiding, *responsible*’ citizens, the court said, and Congress had found that persons under 21 tend to be relatively irresponsible and can be prone to violent crime, especially when they have easy access to handguns” (*NRA* at p. 206).

The court also pointed out that “unlike bans on felons, the mentally ill, and domestic-violence misdemeanants”:

1. the ban at issue does not severely burden the presumptive Second Amendment rights of 18-to-20-year-olds because they impose an age qualification on commercial firearm sales, which *Heller* deemed presumptively lawful;
2. the ban does not strike the core of the Second Amendment because it does not prevent 18-20-year-olds from possessing and using handguns in defense of hearth and home or possessing them for self-defense, hunting, or other lawful purposes; and
3. the laws regulate commercial sales through an age qualification with temporary effect, in that it ends at age 21 (*NRA* at pp. 206, 207).

The court concluded that the regulations did not implicate the Second Amendment and the intermediate scrutiny test was appropriate (*NRA* at p. 207).

The court next examined the legislative record to determine if the law passed the intermediate scrutiny test, which requires a reasonable fit between the law and an important government objective. It said the legislative record illustrates that Congress was concerned (1) not only with juveniles under the age of 18 but also with minors under the age of 21; (2) with FFLs role in the crime problem; and (3) with handguns, which were the predominant weapon used by criminals to commit serious crimes (*NRA* at p. 208). Based on these considerations, “Congress restricted the ability of *young persons under 21* to purchase *handguns from FFLs*” (*NRA* at p. 208).

The court said that curbing violent crime perpetrated by young persons under age 21 by preventing them from acquiring handguns from FFLs constitutes an important government objective (*NRA* at p. 209). It said that Congress had tailored a reasonable solution to the problem by restricting the ability of persons under age 21 to purchase handguns from FFLs, while allowing (1) 18-20-year-olds to purchase long guns, (2) people under age 21 to acquire handguns from parents or guardians, and (3) people under age 21 to possess handguns and long guns. In other words, Congress deliberately adopted a calibrated, compromise approach, the court said (*NRA* at p. 209).

The court declined the NRA’s request to strike down the law, under intermediate scrutiny, on the grounds that it did not completely prevent young adults from accessing handguns and committing violent crimes.

It held that the challenged laws are constitutional under the Second Amendment (*NRA* at p. 211).

FIFTH AMENDMENT CHALLENGE

The court rejected the NRA’s contention that the ban violates the equal protection component of the Fifth Amendment. According to the court, “equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar advantage of a suspect class” (*NRA* at p. 211, citing *Mass. Bd. Of Ret. V. Murgia*, 427 U.S. 307, 312 (1976)).

The court said it had demonstrated that the ban does not impermissibly interfere with Second Amendment rights. And age is not a suspect classification, unlike race- or gender-based classifications. Thus, the government “may discriminate on the basis of age without offending the constitutional guarantee of equal protection if the age classification

in question is rationally related to a legitimate state interest” (*NRA* at p. 212, citing *Kimel v. Fla. Bd. Of Regents*, 528 U.S. 62, 83 (2000)). And “because an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving the facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker” (*NRA* at p. 212, citing *Kimel*).

The court ruled that for the same reasons that the laws are reasonably adapted to an important state interest, they are rationally related to a legitimate state interest (*NRA* at p. 212).

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