



ESSAY

**Defending an Under-21 Firearm Ban Under
the Second Amendment Two Step**

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Introduction

In the wake of the mass shooting in Parkland, Florida, more lawmakers may be willing to concede that 18-to-20-year-olds are ill suited to keep and bear firearms. Under current federal law, an 18-to-20-year-old may purchase a long gun from a federally licensed or unlicensed dealer, may purchase a handgun from an unlicensed dealer, and may possess a handgun or a long gun.¹ Some states have ventured beyond the federal floor, barring 18-to-20-year-olds from purchasing or possessing any firearm, short or long.² In large measure, though, a 19-year-old in the United States—such as the perpetrator of the Parkland tragedy—may lawfully purchase and possess an AR-15 rifle.

Any proposed legislation to implement an absolute, under-21 ban on firearm purchasing and possession will be met with vehement resistance. The Second Amendment guarantee, the National Rifle Association (NRA) will say, vests at 18, and prohibiting 18-to-20-year-olds from purchasing or possessing firearms impermissibly impinges on—indeed, snuffs out—their individual rights.

Yet the constitutional basis to counter the NRA's inevitable Second Amendment challenge is readily available. It can be gleaned from a trilogy of settled circuit precedents: *Rene E.*³ from the First Circuit; *BATFE*⁴ from the Fifth; and *Horsley*⁵ from the Seventh. Although no absolute, under-21 firearm ban was at issue in those decisions, an advocate for such a ban should avail herself of the premises underlying their holdings. The decisions present

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1. See 18 U.S.C. § 922(b)(1), (c)(1), (x)(1), (x)(5) (2016).
2. See *Minimum Age to Purchase & Possess*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://perma.cc/V93P-AWLZ> (archived Apr. 21, 2018) (summarizing state legislation).
3. *United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009).
4. *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives (BATFE)*, 700 F.3d 185 (5th Cir. 2012).
5. *Horsley v. Trame*, 808 F.3d 1126 (7th Cir. 2015).

historical evidence that, according to the Framers, only those with adequate “civic virtue” are worthy of wielding lethal weapons, and one’s capacity for virtue grows with age. The decisions also translate the Framers’ intuition into modern terms of criminology and neuropsychology, presenting evidence that 18-to-20-year-olds are disproportionately responsible for violent gun crimes, and that their minds house immature impulse-control structures. All those premises, old and new, can bear a heavier load than they did in *Rene E.*, *BATFE*, and *Horsley*. So, a lawyer defending an under-21 ban should impress upon the court the importance of taking those premises seriously. Taken to their logical conclusion, they militate for the ban’s constitutionality.

I. Three Circuit Precedents

Almost a decade ago, in *Rene E.*, a First Circuit panel upheld the federal ban on juvenile (under-18) handgun possession, noting that “the founding generation would have regarded [it] as consistent with the right to keep and bear arms.”⁶ In the panel’s view, the ban was “part of a longstanding practice of prohibiting certain classes of individuals from possessing firearms—those whose possession poses a particular danger to the public.”⁷ Three years later, a Fifth Circuit panel extended that reasoning to uphold federal laws prohibiting 18-to-20-year-olds from purchasing handguns from federally licensed dealers.⁸ That decision, *BATFE*, applied the now-familiar two-step framework for evaluating the constitutionality of firearm regulations.⁹ Under step one—whether the regulation burdens conduct protected by the Second Amendment—the panel found “considerable [historical] evidence” that the federal laws at issue were “consistent with a longstanding, historical tradition, which suggests that the conduct at issue falls outside the Second Amendment’s protection.”¹⁰ Although the panel was “inclined to uphold the challenged federal laws at step one,” “in an abundance of caution,” the court “proceed[ed] to step two”—whether the laws triggered intermediate or strict scrutiny.¹¹ The panel determined that intermediate scrutiny was appropriate, as the laws did not squarely strike the Second Amendment’s core as defined by the Supreme Court in *Heller*: “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”¹² Finally, the panel held that the laws survived intermediate scrutiny because they were reasonably adapted to resolving an important state interest: “curbing violent crime” that sprang from the ease with

6. *Rene E.*, 583 F.3d at 16 (upholding 18 U.S.C. § 922(x)(2)(A)).

7. *Id.* at 15.

8. *BATFE*, 700 F.3d at 211 (upholding 18 U.S.C. § 922(b)(1), (c)(1)).

9. *Id.* at 193-98.

10. *Id.* at 203.

11. *Id.* at 204.

12. *Id.* at 205 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

which handguns were “falling into the hands of 18-to-20-year-olds.”¹³ In so holding, the panel relied on criminological evidence that 18-to-20-year-olds are disproportionately responsible for violent gun crimes, as well as neuropsychological evidence that 18-to-20-year-olds are more impulsive than their elders because their brains’ frontal lobes are immature.¹⁴

In *Horsley*, a 2015 decision, a Seventh Circuit panel relied heavily on *BATFE*’s reasoning to uphold Illinois laws requiring 18-to-20-year-old applicants for an Illinois Firearm Owner’s Identification Card to secure a parent’s signature.¹⁵ The panel declined to decide whether the state laws burdened conduct protected by the Second Amendment because, even if they did, the laws survived “means-ends scrutiny.”¹⁶ Although an 18-to-20-year-old in Illinois may not lawfully purchase or possess a firearm without the card, failing to secure a signature is not the end of the road.¹⁷ “Rather, a person for whom a parent’s signature is not available can appeal to the Director of the Illinois State Police,” who may issue a card “[u]pon a sufficient showing regarding the applicant’s criminal record, lack of dangerousness, and the public interest.”¹⁸ Citing “studies and data regarding persons under 21 and violent and gun crimes,” and “scholarly research on development through early adulthood,” the panel held that the laws were “substantially related to” the important interest in “protecting public safety.”¹⁹

II. Two Observations

Two aspects of the circuit courts’ two-step analyses are noteworthy here. First, the decisions conduct their step-one analyses at multiple levels of generality. At a low level of generality, the decisions analyze historical evidence that the Framers deemed 18-to-20-year-olds unworthy of lethal weapons. For our purposes, if that analysis is sound, founding-era attitudes justify not only the regulations at issue in those decisions, but also an under-21 ban. Meanwhile, at a higher level of generality, the decisions ask whether the regulations at issue accord with the longstanding tradition of disarming classes of people (e.g., felons and Loyalists) to promote public safety. That framing bodes well not only for the regulations at issue in those decisions. It also bodes well for an under-21 ban, which would fit comfortably within that highly abstract tradition.

13. *Id.* at 209-11.

14. *Id.* at 210 & n.20, 211 n.21.

15. *Horsley v. Trame*, 808 F.3d 1126, 1134 (7th Cir. 2015) (upholding 430 ILL. COMP. STAT. 65/4(a)(2)(i)).

16. *Id.* at 1131.

17. *Id.* at 1132.

18. *Id.*

19. *Id.* at 1133-34.

Second, *BATFE* and *Horsley*'s step-two analyses were driven by criminological and neuropsychological data showing that 18-to-20-year-old firearm users tend to be dangerous. According to the data, 18-to-20-year-olds are not poster children for "responsible"²⁰ firearm ownership (to borrow *Heller*'s term). Notably, that same data warrants imposing an even more severe burden on 18-to-20-year-olds' Second Amendment rights than the burdens imposed in *BATFE* (prohibiting them from purchasing handguns) and in *Horsley* (enlisting parents as first checks). Why stop there? Given the data, anything less burdensome than an absolute, under-21 ban might be a half-measure.

One might argue that these implications of the Second Amendment two-step hint at its weaknesses as a methodology. Arguably, step one can do little to constrain a judge from cherry-picking the historical record—separating the confirmatory wheat from the disconfirming chaff.²¹ Step two similarly appears to evade limiting principles.²² Curiously, however, the two-step framework's (arguable) analytical *weaknesses* in the hands of a judge transform into argumentative *strengths* in the hands of a litigator. The *bugs* morph into *features*.

A lawyer defending an under-21 ban, then, would be well advised to wring as much assistance from *United States v. Rene E.*, *BATFE*, and *Horsley* as possible. The lawyer should urge the court to follow the trio's reasoning; that reasoning logically leads to the ban's constitutionality.

III. Advocacy Lesson Number One: In Defending an Under-21 Ban at Step One, the Advocate Should Deploy the Historical Record at Multiple Levels of Generality—Especially High Ones

Rene E. and *BATFE* draw on the scholarship of Saul Cornell, Don B. Kates, and others to illustrate that, during the founding era, it was considered sensible to disarm "certain classes of individuals" "whose possession pose[d] a particular danger to the public."²³ These classes included Loyalists—that is, people "who

20. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) ("[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, *responsible* citizens to use arms in defense of hearth and home." (emphasis added)).

21. See Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485, 537 (2017) ("[T]he selection of the level of generality provides a substantial amount of room for an originalist to profess fidelity to the original meaning while ensuring desired outcomes.").

22. See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1470 (2009) ("If the substantial relationship or reasonable fit claim has to be merely intuitively persuasive to reasonable legislators, that requirement would nearly always be satisfied.").

23. *United States v. Rene E.*, 583 F.3d 8, 15 (1st Cir. 2009) (citing Saul Cornell, "Don't Know Much About History": *The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 679 (2002)); see also *BATFE*, 700 F.3d at 200.

refused to swear an oath of allegiance to the state or to the nation.”²⁴ The scholars opined that, far from a suicide pact, the Second Amendment was flexible enough to accommodate commonsense, categorical restrictions.²⁵ As *BATFE* observes, “when the fledgling republic adopted the Second Amendment, an expectation of sensible gun safety regulation was woven into the tapestry of the guarantee.”²⁶ And as *BATFE* recounts, founding-era “categorical restrictions may have been animated by a classical republican notion that only those with adequate civic ‘virtue’ could claim the right to arms.”²⁷

Scholars have proposed that at the time of the founding, “the right to arms was inextricably and multifariously linked to that of civic virtue (i.e., the virtuous citizenry),” and that “[o]ne implication of this emphasis on the virtuous citizen is that the right to arms does not preclude laws disarming the unvirtuous citizens (i.e., criminals) or those who, like children or the mentally imbalanced, are deemed incapable of virtue.” This theory suggests that the Founders would have supported limiting or banning “the ownership of firearms by minors, felons, and the mentally impaired.”²⁸

BATFE and *Horsley* explain that a “minor” at common law was a person under 21; only recently (the 1970s) did states lower the age of majority to 18.²⁹ And nineteenth-century legislators, courts, and commentators were willing to restrict minors’ access to firearms.³⁰ Perhaps as a sop to *Heller* and to judges and scholars who champion its originalist reasoning, *BATFE* and *Horsley* also find support in the work of Thomas M. Cooley—the judge, professor, and author of the 1868 *Treatise on Constitutional Limitations*, which was “massively popular” at the time and, most importantly, was beloved by *Heller*’s author, the late Justice Scalia.³¹ As *BATFE* infers: “If a representative citizen of the founding era conceived of a ‘minor’ as an individual who was unworthy of the Second Amendment guarantee, and conceived of 18-to-20-year-olds as ‘minors,’ then

24. *BATFE*, 700 F.3d at 200 (citing scholarly sources).

25. *Id.*

26. *Id.*

27. *Id.* at 201.

28. *Id.* (emphasis omitted) (first quoting Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1359-60 (2009); and then quoting Don B. Kates, Jr., *Second Amendment*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1639, 1640 (Leonard W. Levy et al. eds., 1986)).

29. *Horsley v. Trame*, 808 F.3d 1126, 1130 (7th Cir. 2015) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 463 (St. George Tucker ed., William Young Birch & Abraham Small 1803)); *BATFE*, 700 F.3d at 201 (citing JOHN INDERMAUR, PRINCIPLES OF THE COMMON LAW 195 (Edmund H. Bennett ed., Sumner Whitney & Co. 1878) (1876)).

30. *BATFE*, 700 F.3d at 202-03; see also *Horsley*, 808 F.3d at 1130.

31. *Horsley*, 808 F.3d at 1130 (quoting *District of Columbia v. Heller* 554 U.S. 570, 616 (2008)) (citing THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 740 n.4 (5th ed. 1883)); *BATFE*, 700 F.3d at 203 (citing COOLEY, *supra*, at 740 n.4).

it stands to reason that the citizen would have supported restricting an 18-to-20-year-old's right to keep and bear arms."³²

In a refreshingly honest stroke, *BATFE* and *Horsley* step back from ultimately concluding that 18-to-20-year-olds, as a class, fall outside the Second Amendment's scope.³³ *BATFE* spells out the truth: Judges face "institutional challenges in conducting a definitive review of the relevant historical record" and in confirming whether the Framers "shared a collective view on such a subtle and fine-grained distinction" as whether an 18-to-20-year-old, as opposed to a 21-year-old, or a 17-year-old, has the right to keep and bear a lethal weapon.³⁴ Put differently, judges have no falsifiable way to check the accuracy of their historical judgments. A time machine does not exist. Why should a court make a shaky judgment at step one when it can uphold a regulation at step two?

Still, for a lawyer defending an absolute, under-21 firearm ban, *United States v. Rene E.*, *BATFE*, and *Horsley* are quite useful. The trio teaches that the lawyer should deploy historical evidence at multiple levels of generality. At a low level of generality, the lawyer should (of course) advance historical evidence that, as the Framers originally understood it, the Second Amendment did not cover 18-to-20-year-olds. The goal should be to marshal enough historical facts to push 18-to-20-year-olds outside the ambit of the Second Amendment's protection. In *BATFE* and *Horsley*, after all, historical facts tempted the panels to hold that the Second Amendment is silent on prohibiting 18-to-20-year-olds from purchasing handguns, and that the Second Amendment has nothing to say about requiring them to first check with their parents before purchasing or possessing firearms. Perhaps more historical facts would have tipped the scales and spawned a step one holding. If the Framers truly deemed minors inherently unworthy of lethal arms, that original attitude's clear and present-day implication is that 18-to 20-year-olds, as a class, may be barred from purchasing or possessing firearms.

But the lawyer should not stop there. She should also defend the under-21 ban at higher levels of generality. As she invokes the historical record at incrementally higher levels—from the Framers' specific views on the propriety of restricting *18-to-20-year-olds'* access to arms (a low level of generality), to the Framers' views on the propriety of restricting *select groups'* access to arms (a high level of generality), to the Framers' general views on implementing any safety-based arms regulations at all (an even higher level of generality)—the lawyer's job becomes incrementally easier. As the lawyer abstracts out, the "historical evidence" becomes "considerable,"³⁵ and the more persuasively the lawyer can illustrate that an under-21 ban comports with founding-era attitudes.

32. 700 F.3d at 202.

33. *Horsley*, 808 F.3d at 1131; *BATFE*, 700 F.3d at 204.

34. 700 F.3d at 204.

35. *Id.*

So, even if there is limited historical evidence at a low level of abstraction—as *BATFE* put it, on whether the Framers’ shared a “collective view on such a subtle and fine-gained distinction” as “whether 18-to-20-year-olds had a stronger claim than 17-year-olds to the Second Amendment guarantee”³⁶—the lawyer should press forward. Abstracting up a level or two, it will be easier to show that an under-21 ban is “consistent with a longstanding tradition of age- and safety-based restrictions on the ability to access arms,” and “consistent with a longstanding tradition of targeting select groups’ ability to access and to use arms for the sake of public safety.”³⁷ And abstracting up from there, an under-21 ban—without a doubt—harmonizes with the Framers’ general tolerance for safety-based arms regulations. The Framers “wove[]” that tolerance “into the tapestry of the [Second Amendment] guarantee.”³⁸ At bottom, the advocacy lesson of *United States v. Rene E.*, *BATFE*, and *Horsley* is that, at high levels of abstraction, the historical record becomes plentiful, ripe for the lawyer’s use at step one.

IV. Advocacy Lesson Number Two: In Defending an Under-21 Ban at Step Two, the Advocate Should Take the Empirical Evidence to Its Logical Conclusion

BATFE and *Horsley* held that the regulations at issue—even if they impinged on the Second Amendment rights of 18-to-20-year-olds—were “reasonably adapted,” or “substantially related,” to the important state interest of curbing gun violence, thereby satisfying step two’s scrutiny test.³⁹ And laudably, the panel authors backed their empirical holdings with empirical evidence—rather than with, say, untested assumptions about teenage and 20-year-old behavior.

For one, *BATFE* and *Horsley* revealed a means-ends fit through criminological data. Each cited a 1999 report by the Justice and Treasury Departments, *Gun Crime in the Age Group 18–20*, which found that, “[i]n 1997, 18, 19 and 20 year olds ranked first, second, and third in the number of gun homicides committed,” that, “[o]f all gun homicides where an offender was identified, 24 percent were committed by 18 to 20 year olds,” and that, “[a]mong murderers, 18 to 20 year olds were more likely to use a firearm than adults 21 and over.”⁴⁰ In addition, *BATFE* cited FBI reports from 2009 and 2010, which found that “18-, 19-, and 20-year-olds accounted for the three highest percentages of arrests for any age up to 24 (after which data are reported by age

36. *Id.*

37. *Id.* at 203.

38. *Id.* at 200.

39. *Horsley v. Trame*, 808 F.3d 1126, 1132-33 (7th Cir. 2015); *BATFE*, 700 F.3d at 207-09.

40. *BATFE*, 700 F.3d at 210 (first alteration in original) (quoting U.S. DEP’T OF THE TREASURY & U.S. DEP’T OF JUSTICE, *GUN CRIME IN THE AGE GROUP 18-20*, at 2 (1999)); see also *Horsley*, 808 F.3d at 1133 (citing the same).

group)” and “accounted for a disproportionately high percentage of arrests for violent crimes.”⁴¹

BATFE and *Horsley* also highlighted neuropsychological research to “support[] the commonsense notion that 18-to-20-year-olds tend to be more impulsive than young adults aged 21 and over.”⁴² *BATFE* relied on the American Medical Association’s conclusion that the “brain’s frontal lobes are still structurally immature well into late adolescence, and the prefrontal cortex is ‘one of the last brain regions to mature’”—meaning that “response inhibition, emotional regulation, planning and organization . . . continue to develop between adolescence and young adulthood.”⁴³ *Horsley* credited a different source, a neuropsychologist, but one who surveyed the scientific landscape and emerged with the same takeaway: “The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable.”⁴⁴

A lawyer defending an under-21 ban should lean heavily on this dataset. If these are the empirical facts, then it might not be enough to prohibit 18-to-20-year-olds from purchasing handguns from federally licensed dealers (*BATFE*), or to require 18-to-20-year-olds to check with their parents or otherwise demonstrate their lack of dangerousness before purchasing or possessing firearms (*Horsley*). The empirical facts, the lawyer should argue, should be taken seriously. They warrant a stronger remedy.

41. *BATFE*, 700 F.3d at 210 & n.20 (citing *Crime In the United States 2010*, FED. BUREAU OF INVESTIGATION, <https://perma.cc/QM9L-5ATL> (archived Apr. 21, 2018)).

42. *BATFE*, 700 F.3d at 211 n.21; see also *Horsley*, 808 F.3d at 1133.

43. 700 F.3d at 211 n.21 (alteration in original) (quoting Brief for the American Medical Association and the American Academy of Child and Adolescent Psychiatry as *Amici Curiae* in Support of Neither Party, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646 & 10-9647), 2012 WL 121237, at *19-20) (citations omitted)).

44. *Horsley*, 808 F.3d at 1133 (quoting Declaration of Ruben C. Gur, Ph.D. 15 (2002), <https://perma.cc/V2SN-7MFS>).