Article

Age Restrictions and the Right to Keep and Bear Arms, 1791–1868

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The disproportional misuse of firearms by eighteen-to-twenty-year-olds has long been a problem in America. The concerns are not novel. Nor are legislative responses to this problem a recent development in American law. These limitations are deeply rooted in American legal history.

While minimum age gun laws routinely survived constitutional challenges before the Supreme Court's decision in New York State Rifle & Pistol Ass'n v. Bruen*, the majority of courts applying* Bruen *have struck down firearms restrictions based on age.* Bruen *fundamentally altered the way courts evaluate the constitutionality of firearms regulations, requiring them to judge modern gun laws based on history, text, and tradition. As* Bruen *requires, courts have turned to history to adjudicate these challenges. Unfortunately, many courts have discounted the relevant history and tradition.*

At the time of the Founding, individuals under the age of twenty-one were viewed as lacking sufficient judgment to make responsible decisions. These individuals, categorized as "infants" at the time, were unquestionably not full members of the political community. Their ability to contract was limited, which prevented them from obtaining arms without the assistance of parents or guardians. Although those under the age of twenty-one

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served in the militia, statutes mandating militia service do not demonstrate a right to keep and bear arms outside of militia service. Instead, these statutes demonstrate the government's power over eighteen-to-twenty-year-olds, and represent the obligation of minors to serve, not an independent right to possess firearms.

The nation's tradition of regulating firearms based on age expanded after the Founding. By the time of the adoption of the Fourteenth Amendment, such regulations were commonplace and widely viewed as a core exercise of state and local police power. Bruen*'s directive that modern-day firearms regulation must be guided by history supports limits on minors' access to deadly weapons.*

Anglo-American law has always countenanced restrictions based on age, and recent developments in neuroscience have vindicated historical wisdom on this matter. Brain development of eighteen-to-twenty-year-olds is incomplete, a fact that limits their ability to evaluate risk and heightens their inclination to make reckless decisions. Indeed, while our understanding of the place of women and minorities in society and the political community has rightfully transformed since the time of the Founding, the view of teenagers' limited capacity to make responsible decisions has not changed, but, instead, has been bolstered by scientific development. Applying Bruen*'s analytical framework to these facts leads to the conclusion that modern-day firearm regulations based on age are justified by history, text, and tradition.*

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INTRODUCTION

Age-based firearms restrictions are prevalent across the country.[1] These policies are evidence of a strong consensus among the American people that restrictions on eighteen-to-twenty-year-olds' access to, and public carry of, certain firearms promote safety and the public interest. Federal law makes it unlawful for anyone under the age of eighteen to possess handguns or to transfer a handgun to anyone under the age of eighteen,[2] and prohibits eighteen-to-twenty-year-olds from purchasing handguns from federal firearm licensed dealers (FFLs).[3] Many states prohibit eighteen-to-twenty-year-olds from purchasing or possessing certain firearms, such as handguns or assault weapons, and from carrying firearms in public.[4] These laws are not derived from novel insights about the dangers associated with allowing minors unfettered access to guns. These types of limits are deeply rooted in American legal history.

Age-based firearms laws exist for good reason: statistics show that eighteen-to-twenty-year-olds are at high risk of misusing firearms for both homicide and suicide. Youth suicide has

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1. *See, e.g.*, DEL. CODE ANN. tit. 11, § 1448(a)(5) (2023) (effective June 30, 2025) (banning the sale of firearms to anyone under the age of twenty-one); FLA. STAT. § 790.065(13) (2023) (banning the sale of firearms to eighteen-to-twenty-year-olds); MD. CODE ANN., PUB. SAFETY § 5-133(d)(1) (LexisNexis 2023) (prohibiting possession of a "regulated firearm" to those under the age of twenty-one); MASS. GEN. LAWS ch. 140, § 131(d)(iv) (2023) (prohibiting permits to carry from being issued to those under the age of twenty-one at the time of application); MICH. COMP. LAWS § 28.422 (2024) (prohibiting the sale of pistols to individuals under twenty-one years old); MINN. STAT. § 624.714, subdiv. 2(b)(2) (2023) (requiring applicants for a permit to carry to be "at least [twenty-one] years old"); N.J. STAT. ANN. § 2C:58-6.1(b) (West 2023) (restricting handgun ownership for those under twenty-one); N.Y. PENAL LAW § 400.00(1)(a) (McKinney 2024) (allowing permits to carry for those who are "twenty-one years of age or older," among other conditions); OR. REV. STAT. § 166.291(1)(b) (2023) (allowing sheriffs to issue permits to carry only to those over the age of twenty-one); VT. STAT. ANN. tit. 13, § 4020(a) (2023) (prohibiting sales of firearms to those under twenty-one years of age); WASH. REV. CODE § 9.41.240(1) (2023) (restricting ownership of a pistol or semiautomatic assault rifles to those over the age of twenty-one); *see also Minimum Age to Purchase & Possess*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/minimum-age [https://perma.cc/N5Z9-EEKC] (summarizing federal and state laws regulating firearms on the basis of age).

2. 18 U.S.C. § 922(x)(1).

3. *Id.* § 922(b)(1).

4. *See, e.g.*, statutes cited *supra* note 1 (providing examples of state statutes that regulate the sale of firearms by age).

reached an apex in recent years, and the firearm suicide rate among eighteen-to-twenty-year-olds increased fifty-one percent over the last decade, which is faster than the rates of older adults.[5] One study found that state laws raising the minimum legal age to purchase firearms to twenty-one years were associated with a nine percent decline in rates of firearm suicides among the eighteen-to-twenty-year-old age group.[6] Similar patterns arise in data on homicides. Across the United States, eighteen-to-twenty-year-olds commit homicide at disproportionately higher rates than *any* other age group—at triple the rate of those twenty-one and older.[7]

But neither evidence of the dangers associated with misuse of firearms by eighteen-to-twenty-year-olds, nor the consensus among the majority of states that age-based firearms restrictions are sound public policy, are central considerations under the Supreme Court's test for Second Amendment challenges after *New York State Rifle & Pistol Ass'n v. Bruen*, which fundamentally changed the way courts examine the constitutionality of gun regulations under the Second Amendment.[8] Under *Bruen*, courts examine the Second Amendment's plain text and the historical record to evaluate whether a firearms regulation violates the

5. *The Rise of Firearm Suicide Among Young Americans*, EVERYTOWN FOR GUN SAFETY (June 2, 2022), https://everytownresearch.org/report/the-rise-of-firearm-suicide-among-young-americans [https://perma.cc/UEC2-QL3W] (compiling data from 2011 to 2020 that demonstrates that "the firearm suicide rate among young people has increased faster than among any other age group").

6. Daniel W. Webster et al., *Association Between Youth-Focused Firearm Laws and Youth Suicides*, 292 J. AM. MED. ASS'N 594, 598 (2004).

7. *Eighteen to 20-Year-Olds Commit Gun Homicides at Triple the Rate of People 21 Years and Older*, EVERYTOWN FOR GUN SAFETY (Mar. 1, 2022), https://everytownresearch.org/stat/eighteen-to-20-year-olds-commit-gun-homicides-at-a-rate-triple-the-rate-of-those-21-and-years-older [https://perma.cc/XVS4-FPWQ]; Katherine A. Vittes et al., *Reconsidering the Adequacy of Current Conditions on Legal Firearm Ownership*, *in* REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 65, 70 (Daniel W. Webster & Jon S. Vernick eds., 2013) ("Young people between the ages of 18 and 20 have some of the highest rates of homicide offending, and age-specific homicide offending rates rise sharply in the late teens and peak at age 20."); Michael Dreyfuss et al., *Teens Impulsively React Rather than Retreat from Threat*, 36 DEVELOPMENTAL NEUROSCIENCE 220, 220 (2014) ("Adolescents commit more crimes per capita than children or adults in the USA and in nearly all industrialized cultures. Their proclivity toward . . . risk taking has been suggested to underlie the inflection in criminal activity observed during this time." (footnotes omitted)).

8. 591 U.S. 1, 70 (2022).

Second Amendment right to keep and bear arms.[9] As one court applying *Bruen* to an age limit challenge stated, "*Bruen* makes clear that today's policy considerations play no role in an analytical framework that begins and ends more than two hundred years ago."[10]

Instead, under *Bruen*, courts determine whether the challenged law burdens the right protected by the plain text of the Second Amendment.[11] When it does, the court advances to the second step and evaluates whether "the regulation is consistent with the Nation's historical tradition of firearm regulation."[12] Lower courts have interpreted *Bruen* to direct them to consider "who" has Second Amendment rights as part of the first step of *Bruen*'s test.[13] Specifically, courts look to whether the individual who is regulated by the challenged statute is part of "the people" covered by the Amendment.[14]

Neither *Bruen* nor *District of Columbia v. Heller*,[15] a preceding case invalidating a District of Columbia law banning handgun possession, comprehensively answered the question of "who" is protected by the Second Amendment.[16] When referring to "the people," *Heller* explained that "the term unambiguously refers to all members of the political community, not an unspecified subset."[17] Yet *Heller*'s description of "the people" was hardly

9. *Id.* at 17.

10. Worth v. Harrington, 666 F. Supp. 3d 902, 926 (D. Minn. 2023).

11. *Bruen*, 591 U.S. at 24.

12. *Bruen*, 591 U.S. at 1; *see also* United States v. Sitladeen, 64 F.4th 978, 987 (8th Cir. 2023) (ending the constitutional analysis at step one, after holding that illegal immigrants are not part of "the people" entitled to Second Amendment protection).

13. *See, e.g.*, Range v. Att'y Gen., 69 F.4th 96, 101 (3d Cir. 2023) (en banc) (noting the threshold question of the plain text analysis is whether defendant is "one of 'the people' who have Second Amendment rights"); *Sitladeen*, 64 F.4th at 987 (providing that a court must examine whether the people whose conduct is burdened by a firearm regulation are part of "the people" with Second Amendment rights as part of the step one "plain text" analysis).

14. *See, e.g.*, *Range*, 69 F.4th at 101; *Sitladeen*, 64 F.4th at 987.

15. District of Columbia v. Heller, 554 U.S. 570 (2007).

16. *See Bruen*, 591 U.S. at 72 (Alito, J., concurring) ("Our holding decides nothing about who may lawfully possess a firearm . . . ."); *see also* Jacob D. Charles, *Time and Tradition in Second Amendment Law*, 51 FORDHAM URB. L.J. 259, 271 (2023) ("Based in part on the mixed messages *Heller* sent about who can exercise the right to keep and bear arms, courts have yet to work out an adequate theory of when government can constitutionally disarm someone.").

17. *Heller*, 554 U.S. at 580.

unambiguous. The majority opinion contextualized the Second Amendment right by stating that it applies to "law abiding, responsible citizens," which is not coextensive with the nation's political community.[18] While some parties bringing Second Amendment challenges under *Bruen* claim that this language is dicta and should not be interpreted to narrow the scope of "the people,"[19] *Bruen* itself used the phrase "law-abiding" over a dozen times when describing the scope of the Second Amendment right, including in its opening sentence.[20] Elsewhere in the opinion, *Heller* referred to people who have Second Amendment rights as "all Americans,"[21] "citizens,"[22] and those who are part of the "national community," citing a Fourth Amendment opinion, *United States v. Verdugo-Urquidez*.[23] Justice Scalia has noted that texts must be read reasonably, not literally.[24]

Given the varying terms the Court has used to describe who is entitled to exercise Second Amendment rights, unsurprisingly, the lower courts have reached opposing results when applying *Bruen* to determine "who" has a Second Amendment right. Several federal courts have held that certain groups do not possess Second Amendment rights categorically, including felons and illegal immigrants, but other courts take the approach that the Second Amendment applies to "all Americans," then

18. *Id.* at 635. The Supreme Court carried through the phrase "law-abiding, responsible citizens" in *Bruen*. *See Bruen*, 591 U.S. at 2–3 ("The Second Amendment 'is the very product of an interest balancing by the people,' and it 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense." (quoting *Heller*, 554 U.S. at 635)).

19. *See, e.g.*, Supplemental Brief of Appellant at 7–9, *Sitladeen*, 64 F.4th 978 (No. 22-1010).

20. *Bruen*, 591 U.S. at 8–9; *e.g.*, Brief for the United States at 12, United States v. Rahimi, 143 S. Ct. 2688 (2023) (mem.) (No. 22-915).

21. *Heller*, 554 U.S. at 581.

22. *Id.* at 584.

23. *Id.* at 580 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)).

24. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 23 (Amy Gutmann ed., 1997) ("A text . . . should be construed reasonably, to contain all that it fairly means.").

analyze historical analogues to determine whether the government is permitted to restrict their exercise of the right.[25]

History provides insight into "who" had Second Amendment rights at the Founding; the phrase "the people" excluded a variety of individuals and groups. In addition to constitutional outsiders such as slaves or the members of the "Indian" nations,[26] such exclusions applied to groups who were deemed to be dangerous, such as individuals disarmed for failing to sign loyalty oaths and those judged to be mentally unfit.[27]

Minors, meaning those under the age of twenty-one, or "infants," in the language used at the time of the Founding,[28] occupied a status somewhere between full members of the polity and those categorically excluded from the full benefits of citizenship.[29] Those under the age of twenty-one did not have

25. *Compare* United States v. Sitladeen, 64 F.4th 978, 987 (8th Cir. 2023) (holding that illegal immigrants are not part of "the people" who have any Second Amendment protection), *with* Range v. Att'y Gen., 69 F.4th 96, 111 (3d Cir. 2023) (Ambro, J., concurring) (noting that felons are included in "the people" with Second Amendment rights, despite *Heller*'s identification of felon prohibitors as "presumptively lawful"), *and* Rocky Mountain Gun Owners v. Polis, No. 23-cv-01077-PAB, 2023 WL 5017253, at *11 (D. Colo. Aug. 7, 2023) (assuming that "the people" includes every American).

26. The terms used to describe the tribal populations of North America follows the usage recommended by legal historian Gregory Ablavsky, who uses "the term 'Indian' as a term of art for individuals either historically labeled as 'Indians' by Anglo-Americans or, in the present, legally defined as 'Indian' by the federal government." Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1028 n.1 (2018). By contrast, "the term 'Native' to describe the indigenous peoples of North America and their descendants" is best applied to these peoples in all other contexts. *Id.*

27. *See, e.g.*, United States v. Jackson, 69 F.4th 495, 502–03 (8th Cir. 2023) (summarizing historical firearms prohibitions on Native Americans, and groups deemed to be dangerous, including individuals disarmed for declining to take a loyalty oath and Catholics).

28. For a good discussion of the way Founding-era law treated minors as not fully autonomous legal actors, see 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT: IN SIX BOOKS 212–18 (1795).

29. For a discussion of the concept of constitutional outsiders and Founding-era law, see GERALD LEONARD & SAUL CORNELL, THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780S–1830S, at 60–65 (2019). On the disarmament of Loyalists, see Amanda L. Tyler, Rahimi*, Second Amendment Originalism, and the Disarming of Loyalists During the American Revolution*, LAWFARE (Nov. 30, 2023) https://www.lawfaremedia.org/article/rahimi-second-amendment-originalism-and-the

independent political rights; they did not vote or serve on juries, and the law limited their ability to assert rights in court.[30] Their ability to enter contracts was severely restricted, and contractual obligations undertook by minors were not enforceable against them.[31] Their place in society was subsumed into their role as part of a family unit in which they were subservient to the head of household.[32] Accordingly, minors were not considered independent adults in the legal or political realm, the economy, or in the social or familial structure. These limits existed because the prevailing legal understanding was that those under the age of twenty-one were not able to make mature, reasonable decisions, and thus required an adult to care for them.[33]

Given the common law understanding of minors' capacity and the legal limits placed on minors at the time of the Founding,

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-disarming-of-loyalists-during-the-american-revolution [https://perma.cc/M9M2-KDUC]. Tyler correctly notes that Loyalists were not placed outside of the polity, but they were deprived of some rights. *Id.* On the marginal legal status of minors in the Founding era and its relationship to those judged to be mentally unfit, see *infra* text accompanying notes 68–70.

30. *See generally* HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 230–87 (2005) (discussing the formation of legal rights for children in American history).

31. *Id.* at 239.

32. Saul Cornell, *"Infants" and Arms Bearing in the Era of the Second Amendment: Making Sense of the Historical Record*, YALE L. & POL'Y REV.: INTER ALIA, at pt. II (Oct. 26, 2021) [hereinafter Cornell, *Infants*], https://yalelawandpolicy.org/inter_alia/infants-and-arms-bearing-era-second-amendment-making-sense-historical-record [https://perma.cc/K2RL-7AM9].

33. *See, e.g.*, T.E. James, *The Age of Majority*, 4 AM. J. LEGAL HIST. 22, 22 (1960) ("In the eyes of the common law, all persons were esteemed infants until they attained [twenty-one years of age] . . . ."); Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 66 (2016) (explaining that the "legal age of majority" reflects society's perception that an individual has reached the level of maturity required to function as an adult); Toby L. Ditz, *Ownership and Obligation: Inheritance and Patriarchal Households in Connecticut, 1750–1820*, 47 WM. & MARY Q. 235, 236 (1990) (describing how, in the eighteenth century, "patriarchal household heads [spoke] for their dependents in dealings with the larger world," and that the "civic status of household dependents [was] an indirect or secondary one" where "the community reaches them primarily through the actions and voices of the heads"); BREWER, *supra* note 30, at 132 ("In placing so much weight on reason and holding that children do not have it, the political writers of the eighteenth century developed new categories of those who could exercise the rights and obligations of subjects and citizens, definitions that increasingly rested on age (and higher age) as opposed to property and that began to coalesce around one age in particular by the late eighteenth century: twenty-one.").

the Second Amendment was not understood to apply to those below the age of legal majority.[34] Although it is true that minors served in the militia during the Founding era and after,[35] participation in the militia exchanged one form of patriarchy for another. Minors in the militia were subject to adult supervision and were placed under the full force of military discipline.[36] Moreover, the obligation to serve in the militia is not evidence that minors had a right to keep or bear arms outside of the militia. Treating obligations and rights as synonymous is a serious logical and legal error.[37]

Courts that reviewed challenges to firearm laws limiting eighteen-to-twenty-year-olds' legal access to firearms have had difficulty grappling with the Founding era's understanding of minors' legal status. Pre-*Bruen* cases turned to history from the time of the Founding to evaluate the constitutionality of age-limit laws, but did not expressly answer the question of whether minors are part of "the people" who have Second Amendment rights.[38] In upholding federal regulations prohibiting FFLs from

34. Cornell, *Infants*, *supra* note 32, at pt. II.

35. *See* United States v. Bainbridge, 24 F. Cas. 946 (C.C.D. Mass. 1816) (No. 14,497) (discussing a case of a twenty-year-old serving in the United States Navy during 1815). In his opinion, Justice Joseph Story underscored the indisputable fact that the legislature had plenary authority to define the legal age of majority: "Can there be a doubt, that the state legislature can, by a new statute, declare a minor to be of full age, and capable of acting for himself at fourteen, instead of twenty-one years of age?" *Id.* at 950.

36. *See* 1 FRIEDRICH WILHEIM VON STEUBEN, REGULATIONS FOR THE ORDER AND DISCIPLINE OF THE TROOPS OF THE UNITED STATES 128–54 (1779) (discussing the structure and supervision required of both officers and soldiers serving in the United States military in 1779).

37. *See* Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761, 777 n.59, 773–91 (2012) (addressing the relationship between duties and rights in the context of choice rights, option rights, and protection rights, and citing *Singer v. United States*, 380 U.S. 24, 34–35 (1965), as an example of how "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right").

38. *See, e.g.*, Nat'l Rifle Ass'n of Am. v. Swearingen, 545 F. Supp. 3d 1247, 1258 (N.D. Fla. 2021) (analyzing laws about the age of militia eligibility, but not considering whether minors were among "the people"). Courts rejected the vast majority of Second Amendment challenges to age-limit laws under *Heller*. *See* Nat'l Rifle Ass'n of Am. v. McCraw, 719 F.3d 338, 350 (5th Cir. 2013) (upholding Texas's statutory scheme that prevented eighteen-to-twenty-year-olds from lawfully carrying handguns in public); Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 188 (5th Cir. 2012)

selling handguns to persons under twenty-one, the Fifth Circuit, in a 2012 opinion, referenced that the "age of minority at common law was 21," and cited scholarship suggesting that the government could prohibit "infants" from possessing firearms, like other groups who were deemed dangerous or non-law-abiding, such as felons and "those of unsound mind."[39] Although the Fifth Circuit noted that "considerable evidence" suggested that "the conduct at issue falls outside of the Second Amendment's protection," the court stopped short of holding so explicitly, "in an abundance of caution."[40]

Similarly, the First Circuit upheld the federal ban on juvenile handgun possession in 2009 and cited an 1878 opinion from the Supreme Court of Tennessee stating,

> [W]e do not deem it necessary to do more than say that we regard the acts to prevent the sale, gift, or loan of a pistol or other like dangerous

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(upholding the constitutionality of 18 U.S.C. § 922(b)(1) and (c)(1), which prohibit FFLs from selling handguns to persons under twenty-one); United States v. Rene E., 583 F.3d 8, 9 (1st Cir. 2009) (upholding the constitutionality of 18 U.S.C. § 922(x), the federal ban on juvenile possession of handguns). *But see* Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives, 5 F.4th 407 (4th Cir. 2021) (striking down 18 U.S.C. § 922(b)(1) and (c)(1)), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021).

39. *Nat'l Rifle Ass'n of Am.*, 700 F.3d at 201 (citing BLACK'S LAW DICTIONARY 847 (9th ed. 2009) ("An infant in the eyes of the law is a person under the age of twenty-one years, and at that period . . . he or she is said to attain majority.")). A noted exception to the pre-*Bruen* cases upholding firearm age limit laws is *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, which relied primarily on militia statutes "requir[ing] those 18 and older to join the militia and bring their own arms" in finding that eighteen-year-olds are entitled to Second Amendment rights. 5 F.4th at 421, *vacated as moot*, 14 F.4th 322 (4th Cir. 2021). For a rejoinder to this conclusion, see Cornell, *Infants*, *supra* note 32, at pt. I, and *infra* Part I.D (demonstrating the flawed logic in courts using the fact that minors were required to serve in the militia as evidence that minors were also entitled to Second Amendment protection for privately purchased arms).

40. *Nat'l Rifle Ass'n of Am.*, 700 F.3d at 203–04 (upholding the law pursuant to the interest-balancing test that courts used to evaluate Second Amendment challenges after *Heller* and prior to *Bruen*). The relevance of virtue as a qualification for arms bearing has been controversial. In part this confusion is a result of conflating the concept of civic virtue with private virtue. The former concept has proven difficult to translate into a modern idiom. For a discussion of the relevance of Founding-era ideas regarding civic virtue, as opposed to private virtue, for interpreting the Second Amendment after *Heller*, see Saul Cornell, *Constitutional Mischiefs and Constitutional Remedies: Making Sense of Limits on the Right to Keep and Bear Arms in the Founding Era*, 51 FORDHAM URB. L.J. 25, 33 (2023) [hereinafter Cornell, *Constitutional Mischiefs*].

> weapon to a minor, not only constitutional as tending to prevent crime but wise and salutary in all its provisions.[41]

The First Circuit further relied on late nineteenth- and early twentieth-century cases addressing criminal and civil claims related to transferring deadly weapons, including handguns, to juveniles and concluded that "from at least the Civil War period . . . regulating juvenile access to handguns was permissible on public safety grounds and did not offend constitutional guarantees of the right to keep and bear arms."[42] Although the First Circuit did not explicitly address whether eighteen-to-twenty-year-olds were part of "the people," it suggested that "the right to keep arms in the founding period did not extend to juveniles."[43]

Despite *Bruen*'s mandate that courts must reconstruct history and tradition to evaluate the scope of the Second Amendment right,[44] courts addressing age-limit firearms regulations post-*Bruen* have largely ignored the societal and legal framework in which Founding era legislatures acted.[45] Courts addressing firearm regulations involving age limits have either simply held that eighteen-to-twenty-year-olds are part of "the people" whose conduct is entitled to Second Amendment protection, or assumed that they are part of "the people," and focused on the

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41. *Rene E.*, 583 F.3d at 13–16 (quoting State v. Callicutt, 69 Tenn. 714, 716–17 (1878)). The *Rene E.* court relied on late nineteenth- and early twentieth-century cases to uphold the federal ban on juvenile handgun possession. *See id.* at 14 (first citing *Callicutt*, 69 Tenn. at 716–17 (suggesting that a regulation criminalizing the sale of a pistol to a juvenile did not violate the Second Amendment and was wise public policy); then citing Coleman v. State, 32 Ala. 581, 582 (1858) (citing an act that "makes it a misdemeanor to sell, or give, or lend, to any male minor, a pistol"); and then citing Tankersly v. Commonwealth, 9 S.W. 702, 702 (Ky. 1888) (referencing criminal indictment for "selling a deadly weapon to a minor")).

42. *Id.* at 15.

43. *Id.* at 16.

44. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 591 U.S. 1, 17 (2022) ("To justify its regulation, the government . . . . must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.").

45. *See, e.g.*, Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 672 F. Supp. 3d 118, 145–47 (E.D. Va. 2023) (finding 18 U.S.C. § 922(a)(5) unconstitutional); Worth v. Harrington, 666 F. Supp. 3d 902, 926–27 (D. Minn. 2023) (finding MINN. STAT. § 624.714, subdiv. 22 unconstitutional); Reese v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 647 F. Supp. 3d 508, 525 (W.D. La. 2022) (upholding the constitutionality of 18 U.S.C. § 922(b)(1)).

second-step historical analysis.[46] Both of these approaches ignore key features of the historical background of the Second Amendment. Minors were not full members of the American political community at the time of the Founding or the adoption of the Fourteenth Amendment.[47]

This Article provides the missing historical context necessary to understand the limited nature of the rights of eighteen-to-twenty-year-olds at the time the Second Amendment was adopted. Under *Bruen*'s test, investing eighteen-to-twenty-year-olds today with rights they did not possess at the Founding is not consistent with originalism. A genuinely originalist analysis not only precludes such an approach, but it also underscores that decisions about minors and guns have always been something that legislatures, not courts, decided. While eighteen-to-twenty-year-olds in modern America do have expanded rights in many realms beyond what they possessed in the Founding era, these developments are properly the function of legislatures to decide, not judges.

Applying *Bruen*'s method correctly requires incorporating the historical limitations on minors' rights at the time of the Founding into courts' analysis of modern-day age-limit laws. This historical context is relevant at both steps of the *Bruen* test. First, courts should understand what this historical context tells us about whether eighteen-to-twenty-year-olds were part of "the people" at the Founding, and how that affects whether they are part of "the people" with Second Amendment rights today. It also affects the second step of the *Bruen* test, which requires courts to look to the historical record to determine the scope of permissible regulation, including the constitutionality of age-limit laws.

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46. *See* Jones v. Bonta, No. 19-CV-1226-L-AHG, 2023 WL 8530834, at *5 (S.D. Cal. Dec. 8, 2023) (finding *Bruen*'s first prong met where government agreed for purposes of a preliminary injunction motion that "18-20-year-olds are part of the 'people' protected by the Second Amendment"); Firearms Pol'y Coal., Inc. v. McCraw, 623 F. Supp. 3d 740, 748 (N.D. Tex. 2022) ("[L]aw-abiding 18-to-20-year-olds are a part of 'the people' referenced in the Second Amendment."); Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317, 1324 (11th Cir. 2023) (acknowledging that "it's not clear whether 18-to-20-year-olds 'are part of "the people" whom the Second Amendment protects,'" but conducting second-step analysis, as defendant did not contest that 18-to-20-year-olds were part of "the people" with Second Amendment rights), *vacated on grant of reh'g en banc*, 72 F.4th 1346 (11th Cir. 2023) (mem.).

47. *See infra* Parts I.A, I.B, I.E.

Part I of this Article describes the relevant legal background for assessing the scope of minors' rights at the Founding, including the right to keep and bear arms. In addition to canvassing regulations, one must understand the role of the common law, societal norms, and the economic realities of gun ownership. Moreover, a survey of firearms regulations in place at state and private colleges in the Founding era, one of the few situations in which minors lived outside of traditional family units, underscores the fact the Founding generation did not support minors' untrammeled access to guns outside of situations in which they were closely supervised by adults. Part II evaluates how Founding era views of the limited autonomy of minors rested on assumptions about those below the legal age of majority that continue to shape the rights of minors. In contrast to other groups who had limited rights at the Founding, but have since gained equal rights in modern America, such as women and Black Americans, minors continue to be viewed as citizens whose autonomy is limited because of the unique nature of their status. Part III addresses step two of the *Bruen* test and shows how extensive regulation of minors' access to firearms is deeply rooted in American law.

Bruen requires courts to determine the scope of today's Second Amendment right by analyzing the scope of the right as it was understood at the Founding and at the time of the Fourteenth Amendment. A rigorous application of *Bruen*'s method compels one conclusion: restrictions on the right to keep and bear arms for those under the age of twenty-one are among the most long-standing restrictions in the Anglo-American legal tradition.

I. THE LIMITED RIGHTS OF EIGHTEEN-TO-TWENTY-YEAR-OLDS AT THE TIME OF THE FOUNDING

Eighteen-to-twenty-year-olds at the Founding operated in a much different societal and legal structure than today, one that meaningfully limited their ability to act autonomously. This Part explores the legal context and the socio-economic forces shaping the law. In addition to common law and statutory limits on the rights of minors, the patriarchal structure of society and market forces profoundly limited the autonomy of eighteen-to-twenty-year-olds, particularly regarding the acquisition and ownership of firearms.

A. COMMON LAW LIMITS ON MINORS' LEGAL AUTONOMY

The first step in evaluating the status of Second Amendment rights for those aged eighteen to twenty and other minors in the Founding era is to consider the common law treatment of the legal capacities and rights of persons under the age of legal majority at that time. American law, particularly the law governing the family, derived from English common law. A central principle inherited from this common law tradition was the legal distinction between adults and "minors," or "infants" as minors were often known; there was no legal category of "young adult" under English common law or the American law of domestic relations.[48] Persons aged eighteen to twenty were considered "minors" under the law in the Founding era.[49]

Although little known today, Thomas Rutherforth was well known to the Founding generation and cited by the Supreme Court in a number of important cases in the decades following the adoption of the Second Amendment.[50] When writing on the age of majority, Rutherforth expressed that the "civil legislator of any community is at liberty to fix that period of life, as the age of discretion, at which experience and observation have shown the judgment of those, who live in the same climate with himself, to be usually ripe."[51] Rutherforth continued by stating that these "principles" led "the civil laws of [England] [to] have long determined twenty-one years to be the age of consent."[52] This legal

48. Cornell, *Infants*, *supra* note 32 (describing that the problem with modern courts using the term "young adult" was that "there was no legal category of young adult in the Founding Era," that "[i]ndividuals below the age of majority were 'infants' in the eyes of the law," and that "[t]he principle inherited from the common law tradition was unambiguous on this point").

49. SWIFT, *supra* note 28, at 213 ("Persons within the age of twenty-one, are, in the language of the law denominated infants . . . .").

50. R.H. Helmholz, *Judicial Review and the Law of Nature*, 39 OHIO N.U. L. REV. 417, 418 n.13 (2013) (first citing Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend XIV; then citing Van Rensselaer v. Kearney, 52 U.S. (11 How.) 297 (1850); then citing Livingston v. Moore, 32 U.S. 469 (7 Pet.) (1833); then citing Comegys v. Vasse, 26 U.S. (1 Pet.) 193 (1828); then citing L'Invincible, 14 U.S. 238 (1 Wheat.) (1816); then citing Ware v. Hylton, 3 U.S. 199 (3 Dall.) (1796); and then citing United States v. Lawrence, 3 U.S. 42 (3 Dall.) (1795)).

51. T. RUTHERFORTH, INSTITUTES OF NATURAL LAW; BEING THE SUBSTANCE OF A COURSE OF LECTURES ON GROTIUS'S DE JURE BELLI ET PACIS, bk. II, ch. VI, § XIV, at 388 (2d Am. ed., William & Joseph Neal 1832) (1754–56).

52. *Id.*

fact did not change until the latter half of the twentieth century.[53]

Under common law, and under later statutory revisions of the common law, minors enjoyed few rights that could be asserted in court; the law subsumed the legal identity of minors almost entirely within their parents, guardians, or masters, with a few well-defined exceptions.[54] Under English common law, individuals under the legal age of majority, twenty-one, were subsumed under the authority of their parents (usually their fathers) or guardians.[55] The power of fathers or guardians under this system of patriarchy exceeded the power of the monarch over his subjects. For example, for minors there was no right of petition or other rights enjoyed by English subjects and later by American citizens.[56] Parents and other legal guardians had the legal authority to correct those in their charge, including through corporal punishment. There was no recourse to legal redress for such minors against their parents or guardians (provided the punishment was deemed necessary and not excessively cruel).[57]

In the 1790s, minors were not part of the political community, nor did they exercise other traditional civic duties.[58] In fact, eighteen-to-twenty-year-olds were expressly excluded from the political community as they had no right to vote: voting was

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53. *See* Hamilton, *supra* note 33, at 63–65 (discussing the historical progression of the age of majority in the United States).

54. SWIFT, *supra* note 28, at 212–18.

55. *Id.* at 212.

56. *See generally* Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 142–53 (1986) (discussing the right of citizens in colonial America to petition the court).

57. *See* John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 449–51 (2008) (discussing the forms of child protection from the colonial period through 1875); ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 69–87 (First Illinois ed. 2004) (1987) (discussing the first criminal prosecution of child abuse in the United States in 1874 and the subsequent social reckoning afterwards).

58. *See* BREWER, *supra* note 30, at 231–87 (discussing the history and scope of children's "legal abilities"); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 8 (rev. ed. 2009) (explaining that the commonly-held view at the time was that "[t]he interests of the propertyless, like . . . children, could be represented effectively by wise, fair-minded, wealthy white men").

restricted to those over the age of twenty-one.[59] Moreover, minors were not able to serve on juries.[60] Across the board, American legal history relevant to Second Amendment analysis, infants' or minors' legal status was significantly constrained under law and would not have included the ability to assert a legal claim in any court of law that would vindicate a Second Amendment right or a similar claim under an analogous state constitutional provision.[61]

Furthermore, minors could not enter into contracts, except for necessaries, such as food, clothes, lodging, and occasionally education.[62] Zephaniah Swift, an esteemed Connecticut jurist in the Founding era and author of one of the first legal treatises published after the adoption of the Second Amendment, captured the central legal fact governing persons below the age of majority at the time of the Founding: "Persons within the age of twenty-one, are, in the language of the law denominated infants, but in common speech, minors."[63] Swift noted, "[b]y the common law, a minor can bind himself by his contract for necessaries, for diet, apparel, education, and lodging," but little else.[64] Furthermore, the law did not recognize a minor's contract if a minor undertook an obligation that the minor did not honor or repay.[65] Similarly, a minor could not collect a debt owed to himself or herself, and had to act through a guardian to collect a debt.[66] Thus, minors were subject to far greater state supervision than

59. *See* BREWER, *supra* note 30, at 43 ("[A]ll states settled on the age of twenty-one as appropriate for voting privileges . . . ."); KEYSSAR, *supra* note 58, at 8 (describing how "[o]nly men with property . . . were deemed to be sufficiently attached to the community and sufficiently affected by its laws to have earned the privilege of voting," and excluding the "propertyless," women, and children from voting).

60. *See* BREWER, *supra* note 30, at 248 n.30 (explaining that "those under twenty-one should not be jurors" for a civil jury trial for land disputes).

61. Brief of Amici Curiae Historian Holly Brewer in Support of Appellant and in Support of Reversal at 16–23, Worth v. Jacobson, No. 23-2248 (8th Cir. July 25, 2023) [hereinafter Brewer Amici Curiae] (providing guidance on the historical conception of infants' legal status).

62. *Id.* at 18 (providing exceptions "for his good teaching and instruction, whereby he may profit himself afterwards").

63. SWIFT, *supra* note 28, at 213.

64. *Id.* at 216.

65. *See id.* at 215–16 (noting that a merchant who contracts with a minor "knowing him to be a minor" is delivering the goods as a gift).

66. *Id.* at 216–17.

any other legal entity involved in the marketplace during the early years of the republic.[67]

The reason for the limits on minors' rights through the Founding era was because minors were deemed mentally immature and unable to self-govern responsibly. Legal author James Kent stated in his influential *Commentaries on American Law*, "The necessity of guardians results from the inability of infants to take care of themselves; and this inability continues, in contemplation of law, until the infant has attained the age of twenty-one years."[68] This view meant that limits on a minor's legal autonomy were distinct from other groups that were excluded from full legal rights because of their status as constitutional outsiders.

John Bouvier, author of the first American law dictionary, shared the views of Swift and Kent, and his 1858 explanation of the legal significance of the age of majority followed their lead: "The rule that a man attains his majority at age of twenty-one years accomplished, is perhaps universal in the United States. At this period, every man is in the full enjoyment of his civil and political rights . . . ."[69] Bouvier's statement captures the widespread view of early American legal commentators that minors were not recognized as independent legal actors who enjoyed the full array of rights under American law.[70]

In this historical context, treating infants as autonomous legal actors capable of having the right to keep, bear, and acquire arms independent of militia service is profoundly anachronistic and ignores the common law context in which the Second Amendment and similar state constitutional provisions were enacted in the eighteenth and early nineteenth centuries.

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67. *See* BREWER, *supra* note 30, at 260–62 (describing the different types of historical supervision children were subjected to).

68. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 232 (3d ed. 1836).

69. 1 JOHN BOUVIER, INSTITUTES OF AMERICAN LAW 148 (1858).

70. Bouvier's dictionary was praised by Joseph Story and Chancellor Kent. *See A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union; with References to the Civil and Other Systems of Foreign Law. To Which Is Added, Kelham's Dictionary of the Norman and Old French Language. By John Bouvier*, 93 N. AM. REV. 71, 74 (1861).

B. PATRIARCHY AND LIMITS ON MINORS' RIGHTS AT THE FOUNDING[71]

An exclusive focus on militia laws by scholars and courts, without due attention to context, has resulted in a type of legal myopia, obscuring, not elucidating, the legal realities of the Founding.[72] The social history of the Founding era, particularly the way economic and social realities shaped family formation in this period, underscores the conclusion that minors had no Second Amendment rights at the Founding. Johns Hopkins historian Toby Ditz summarizes the centrality of the legal concept of patriarchy to family law and governance in the Founding era,

> [H]istorians have begun to use the concept "household patriarchy" to describe community organization in the eighteenth century, especially in New England. Household patriarchy refers to both internal and external aspects of domestic organization. It describes authority relations in which heads, and not others within households, have the formal right to make final decisions about internal matters. Patriarchal household heads speak for their dependents in dealings with the larger world. The civic status of household dependents is an indirect or secondary one; the community reaches them primarily through the actions and voices of the heads.[73]

In many respects, the situation of minors under twenty-one resembled that of married women under coverture. Under the doctrine of coverture, a married woman ceased to exist as a legal entity, and her entire legal persona was subsumed within her husband's authority.[74] Sir William Blackstone described the legal meaning of coverture as follows:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called in our law-french a *feme-covert* . . . .[75]

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71. The absorption of the common law in America and the development of different variants of common law in the colonies and states have generated a rich scholarly literature. For a useful overview, see Lauren Benton & Kathryn Walker, *Law for the Empire:* The Common Law in Colonial America *and the Problem of Legal Diversity*, 89 CHI.-KENT L. REV. 937 (2014).

72. *See supra* notes 45–47 and accompanying text (discussing how post-*Bruen* courts have impermissibly ignored the societal and legal framework in which Founding-era legislatures acted).

73. Ditz, *supra* note 33, at 236.

74. 1 WILLIAM BLACKSTONE, COMMENTARIES *442.

75. *Id.*

So too the legal existence of minors was subsumed under their parent or guardian's authority.[76]

Although minors were allowed to act independently before the age of twenty-one in some specific circumstances, these examples should also be understood in the context of the way patriarchal society functioned in the eighteenth-century Anglo-American world. For example, the *Worth* and *Hirschfeld* courts noted that minors were permitted to be married at twelve (for women), to choose a guardian at fourteen (for women), or to take an oath at twelve.[77] The courts took these examples to mean that the age of majority was not strictly understood to be twenty-one, and that the Founding society may have understood twenty-year-olds to be minors in some circumstances, and adults in others. Although at first glance these examples may seem to support the view that minors acted autonomously, interpreting these laws historically demonstrates that these exceptions only highlight the influence of patriarchy. As a practical matter, the effect of the minors' seemingly autonomous actions did not facilitate their independence. Instead, it integrated them more fully into patriarchal households: as wives subservient to a husband, as a child subservient to a guardian, or as a peacekeeper or militia member under adult male authority. Thus, these exceptions only confirm Kent's view that minors lacked the ability to care for themselves. Legal authority over their lives rested with other decision-makers.[78]

The social and economic forces supporting patriarchy further eroded the legal autonomy of minors, placing significant

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76. *See* Mark Anthony Frassetto, *Historical Militia Law, Fire Prevention Law, and the Modern Second Amendment*, *in* NEW HISTORIES OF GUN RIGHTS AND REGULATION: ESSAYS ON THE PLACE OF GUNS IN AMERICAN LAW AND SOCIETY 195, 209 (Joseph Blocher et al. eds., 2023) (noting that women and "men who had not yet established their own households," i.e., minors, "would have been considered wards of their fathers"). In contrast to wives, subsequent legal change has not bestowed full rights on minors. *See* discussion *infra* Part II.A (discussing the legal limits imposed upon eighteen-to-twenty-year-olds throughout U.S. history).

77. Worth v. Harrington, 666 F. Supp. 3d 902, 916 (D. Minn. 2023); Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives, 5 F.4th 407, 435 (4th Cir. 2021), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021).

78. *See* KENT, *supra* note 68, at 232 (explaining how infants are under the protection of a guardian because they cannot "take care of themselves; and this inability continues, in contemplation of law, until the infant has attained the age of twenty-one years").

hurdles in the effort to establish their own independent households. The laws governing settlement and residency for Massachusetts are revealing in this regard: they imposed an age requirement of twenty-one, as well as a variety of different wealth requirements, to establish residency in the commonwealth.[79] Moreover, acquiring the necessary economic resources to establish independence was increasingly difficult during the era of the American Revolution and Second Amendment.[80] Indeed, most adult men in Concord, the town virtually synonymous with the Minuteman ideal of a well-regulated militia, were forced by economic necessity to postpone establishing their own independent households until their mid-twenties.[81] This decision was necessitated by the difficulty of acquiring enough land to establish an independent farmstead.[82] Indeed, every aspect of an eighteen-to-twenty-year-old's life during the relevant period would have been shaped by his or her role as legally subservient to a parent, guardian, or the state.

C. PATRIARCHAL GOVERNANCE OF MINORS IN THE FOUNDING ERA: THE CASE OF COLLEGES

Founding era colleges were one of the few places where minors resided outside of a traditional home. The tight regulation of arms in colleges also offer one of the strongest examples of the Founding generation's belief that minors could not be trusted

79. Douglas Lamar Jones, *The Transformation of the Law of Poverty in Eighteenth-Century Massachusetts*, 62 PUBL'NS COLONIAL SOC'Y MASS.: L. COLONIAL MASS. 1630–1800, at 153, 189 (1984). Persons residing outside of a properly governed household, i.e., a home headed by a white male patriarch, could be banished from early New England towns in a process known as "warning out." *Id.* at 176–81.

80. ROBERT A. GROSS, THE MINUTEMEN AND THEIR WORLD 76 (1976) ("A silent struggle between the generations was under way . . . . The slipping authority of the fathers reflected an inescapable dilemma in Concord's agricultural life: there were simply too many sons and not enough productive land for all.").

81. *See id.* at 78 ("Most young men had to wait to marry until their fathers willingly released control of land and enabled them to sustain households of their own.").

82. *See* Mary Babson Fuhrer, *The Revolutionary Worlds of Lexington and Concord Compared*, 85 NEW ENG. Q. 78, 85–91 (2012) (discussing economic trends affecting younger generations' independence).

with guns when not supervised by adults.[83] Minors attending college were governed by a restrictive rule of in loco parentis.[84] The regulations enacted by colleges prohibiting guns on campus illustrate the view that the Founders opposed unfettered access to guns by minors. Harvard's campus rules adopted in the era of the American Revolution prohibiting guns on campus are illustrative:

> XVI No Undergraduate shall keep a Gun, Pistol or any Gunpowder in the College, without Leave of the President—nor shall he go a gunning, fishing, or seating over deep Waters, without Leave from the President, or one of the Tutors or Professors, under the Penalty of one shilling for either of the Offences aforesaid—and if any Scholar shall fire a Gun, or Pistol, within the College Walls, Yard or near the College, he shall be fined not exceeding two shillings & six pence, or be admonished, degraded, or rusticated according to the Aggravation of the Offence.[85]

Although Harvard was a private entity, its role in early Massachusetts society straddled the public and private spheres.[86]

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83. Cornell, *Infants*, *supra* note 32, at pt. II (describing how during the Revolutionary era "[m]inors attending college traded strict parental authority for an equally restrictive rule of *in loco parentis*"). For an extensive collection of historical weapons restrictions by colleges, see Robert J. Spitzer, *Historical Weapons Restrictions on Minors*, 76 RUTGERS U. L. REV.: COMMENTARIES 101, 112–18 (2024).

84. Brian Jackson, *The Lingering Legacy of "*In Loco Parentis*": An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1146 (1991) ("The court [in explaining the doctrine] held that college authorities stand *in loco parentis* when the physical, moral, and mental welfare of the pupils is concerned. Any rule or regulation for the betterment of their pupils in these areas was deemed permissible." (footnotes omitted)). The case described by Jackson, *Gott v. Berea Coll.*, 161 S.W. 204 (Ky. 1913), "often is cited as the clearest expression of [in loco parentis] in this country." Jackson, *supra*, at 1146.

85. *The Laws of Harvard College [1767]*, 31 PUBL'NS COLONIAL SOC'Y MASS.: HARV. COLL. RECS. PART 3, at 347, 358 (1935).

86. Thus, the Massachusetts Constitution of 1780 instructed "legislatures and magistrates . . . to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge." MASS. CONST. ch. V, § 2 (1780), https://www.nhinet.org/ccs/docs/ma-1780.htm [https://perma.cc/VAF3-NVNJ]. Harvard students and faculty were exempted from militia obligations but during the American Revolution Harvard College did create a militia company. Conrad Edick Wright, *Creating a Fellowship of Educated Men: Forming Gentleman at Pre-Revolutionary Harvard*, *in* YARDS AND GATES: GENDER IN HARVARD AND RADCLIFFE HISTORY 17, 29–30 (Laurel Thatcher Ulrich ed., 2004) (highlighting undergraduate clubs at Harvard in the early 1770s and describing the "Martimercurian Company, an undergraduate militia with more than 60 members" that wore uniforms, drilled in public, and carried "muskets supplied by the province").

Other colleges in the Founding era adopted similar restrictions as Harvard. Yale College prohibited students from possessing any guns or gun powder.[87] The nation's first public universities also adopted similar prohibitions. The University of Georgia, one of the nation's oldest public institutions of higher education, also forbade guns on campus.[88] The rule was emphatic: "no student shall be allowed to keep any gun, pistol, Dagger, Dirk sword cane or any other offensive weapon in College or elsewhere, neither shall they or either of them be allowed to be possessed of the same out of the college in any case whatsoever."[89]

A similar law governed students at the University of North Carolina, another public university founded in the same period.[90] The university prohibition was total: "No Student shall keep a dog, or fire arms, or gunpowder. He shall not carry, keep, or own at the College, a sword, dirk, sword-cane . . . ."[91] College regulations from this era further demonstrate the fact that norms governing American society in the era of the Second Amendment's ratification opposed the view that unsupervised minors were to be trusted with free access to firearms.

The University of Virginia's exceedingly strict laws on this point are illustrative of this general societal attitude.[92] The actions of the university are of particular relevance because of the role that Thomas Jefferson and James Madison played in the governance of the university in its earliest days.[93] The laws enacted regarding weapons are worth quoting in detail: "No

87. THE LAWS OF YALE-COLLEGE IN NEW-HAVEN IN CONNECTICUT, ENACTED BY THE PRESIDENT AND FELLOWS ch. VIII, § XIV, at 26 (1795).

88. Univ. of Ga., *The Minutes of the Senate Academicus* 1799 – 1842, DIGIT. LIBR. OF GA. (Nov. 4, 1976), https://dlg.galileo.usg.edu/data/guan/ua0148/pdfs/guan_ua0148_ua0148-002-004-001.pdf [https://perma.cc/Y56Y-NPGA].

89. *Id.*

90. UNIV. OF N.C., ACTS OF THE GENERAL ASSEMBLY AND ORDINANCES OF THE TRUSTEES, FOR THE ORGANIZATION AND GOVERNMENT OF THE UNIVERSITY OF NORTH-CAROLINA 15 (1838).

91. *Id.*

92. *See* Univ. of Va. Bd. of Visitors, *University of Virginia Board of Visitors Minutes (October 4–5, 1824)*, ENCYCLOPEDIA VA. 6–7 (Dec. 7, 2020), https://encyclopediavirginia.org/entries/university-of-virginia-board-of-visitors-minutes-october-4-5-1824 [https://perma.cc/5PHC-4R9C] (prohibiting various behaviors including the keeping or use of firearms within the university).

93. Jefferson and his good friend James Madison, the primary architect of the Second Amendment, attended the meeting in which this policy was adopted. *Id.* at 1.

Student shall, within the precincts of the University, introduce, keep or use any spirituous or vinous liquors, keep or use weapons or arms of any kind, or gunpowder, keep a servant, horse or dog, appear in school with a stick, or any weapon . . . ."[94]

Despite Jefferson's ardent defense of an expansive vision of the right to keep and bear arms as a matter of constitutional law, even he took a dim view of allowing guns at the University of Virginia.[95] Similarly, James Madison, the drafter of the Second Amendment, was also opposed to permissive policies when the issue was minors and guns.[96]

The fact that many American educational institutions banned firearms is also consistent with the patriarchal systems in which minors lived in the 1700s and 1800s.[97] College regulations from the era of the Second Amendment only underscore this understanding, a view that pervaded early American law and society.[98]

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94. *Id.* at 6–7.

95. *See id.* (noting Jefferson's attendance at the meeting where University of Virginia restricted firearms on campus).

96. *See id.* (noting Madison's attendance at the meeting where University of Virginia restricted firearms on campus); *cf.* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 500 (2004) (noting Madison's distinction "between bearing a gun for personal use and bearing arms for the common defense").

97. *See* discussion *supra* Part I.B (illustrating how the patriarchal system of this time period limited the rights of minors as their legal existence was in effect subsumed under their parent or guardian's authority).

98. The district court in *Worth* refused to agree that collegiate regulations from the era of the Second Amendment "demonstrate a relevantly similar historical tradition of restrictions on 18-to-20-year-olds possessing or carrying firearms." Worth v. Harrington, 666 F. Supp. 3d 902, 921 (D. Minn. 2023). It stated, "none of these proposed analogues appears to be the product of a legislative body elected by founding-era voters." *Id.* The restrictions noted above were found in private institutions chartered by the state and public institutions. The *Worth* court's requirement that only actions expressly enacted by legislatures count both misreads *Bruen* and ignores the fact that most regulation in this period occurred by common law means. *See*, *e.g.*, WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 19–50 (1996) (explaining the nineteenth-century vision of the police power in a common law system). Indeed, all statutes were read in the context of the common law as it had been absorbed after the American Revolution. *See* 1 ZEPHANIAH SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 11 (1822) ("The common law is to be regarded in the construction of statutes, and three things are to be considered. The old law, the mischief, and the remedy: that is, how the

These university provisions are relevant historical evidence even though they were not "the product of a legislative body elected by founding-era voters."[99] First, these policies illuminate broadly shared culture and legal values essential to identifying the original meaning of the scope of permissible firearms regulation. Ignoring them fails to apply *Bruen*'s mandate that the scope of the Second Amendment is understood through analyzing "historical tradition," which is not limited solely to codified statutes and ordinances.[100] *Bruen* stated that "examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification" is "a critical tool of constitutional interpretation."[101] Tools that *Bruen* lists as relevant in *Heller*'s analysis evaluating the scope of the right include "founding-era legal scholars [who] interpreted the Second Amendment in published writings"; "19th-century cases that interpreted the Second Amendment"; the "discussion of the Second Amendment in Congress and in public discourse" after the Civil War; and writing from post–

common law stood at the time of the making of the act; what the mischief was for which the common law did not provide: and what remedy the statute had provided to cure the mischief: and the business of the judges is so to construe the act as to suppress the mischief and advance the remedy." (footnote omitted)). Thus, the *Worth* court's approach is itself inconsistent with Founding-era interpretive practices and hence inconsistent with *Bruen*, which provides that the Constitution's "meaning is fixed according to the understandings of those who ratified it" and directs courts to look to the "public understanding" of the right at the time of ratification. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 591 U.S. 1, 28, 37–38 (2022). For a summary of the relationship between common law and statutory construction in the Founding era, see *id.*

99. *Compare Worth*, 666 F. Supp. 3d at 921 (finding that collegiate regulations are not relevant historical evidence in part because they were not "the product of a legislative body elected by founding-era voters"), *with* Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317, 1326–27 (2023) (noting that "[p]ublic universities have long prohibited students from possessing firearms on their campuses," and holding these "traditional firearm regulations" are passed for the same "why" as Florida's law prohibiting eighteen-to-twenty-year-olds from purchasing firearms), *vacated on grant of reh'g en banc*, 72 F.4th 1346 (11th Cir. 2023) (mem.).

100. *See Bruen*, 591 U.S. at 17 ("Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."); District of Columbia v. Heller, 554 U.S. 570, 578, 583, 593–95, 600–05, 615–16, 626 (2008) (citing, by way of example, legal commentators, case law, legislative discussion of proposed constitutional amendments, and state constitutions).

101. *Bruen*, 591 U.S. at 20 (quoting *Heller*, 554 U.S. at 605).

Civil War commentators.[102] Thus, courts have recognized the importance of historical evidence other than historical laws passed by legislative bodies in evaluating the text of the Second Amendment since *Heller*.[103] The court in *Jones v. Bonta* stated expressly that these university policies "demonstrate the general understanding during the historically relevant era that firearm regulation of 18-20-year-olds was well-established on numerous fronts and consistent with municipal and state regulation in the first half of the nineteenth century."[104] Moreover, these university institutions were chartered by the state and were given broad police powers by the state.[105] The universities thus operated as extensions of the state. Had the state not had such power, it would not have been able to delegate this authority to colleges.[106]

Courts have accepted private rules and regulations as relevant historical analogues pursuant to *Bruen*, and it makes sense to do so here, where university regulations represent one of the few times that minors lived outside of their familial unit.[107] Furthermore, they represent the view of the scope of the Second Amendment right held by influential figures in the Founding era, including Thomas Jefferson and James Madison.[108]

The fact that these bans were also adopted by several public universities only underscores their relevance. These restrictions provide historical insight into what state-affiliated entities understood to be lawful firearm regulations of minors in the Founding era. Accordingly, the rules and regulations of American

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102. *Bruen*, 591 U.S. at 21 (quoting *Heller*, 554 U.S. at 605, 610, 614, 616–19).

103. *See Heller*, 554 U.S. at 578, 583, 593–95, 600–05, 615–16, 626 (examining a wide variety of historical sources as evidence in order to interpret the text of the Second Amendment).

104. Jones v. Bonta, No. 19-cv-1226-L-AHG, 2023 WL 8530834, at *10 (S.D. Cal. Dec. 8, 2023).

105. *See* Joshua Hochman, Note, *The Second Amendment on Board: Public and Private Historical Traditions of Firearm Regulation*, 133 YALE L.J. 1676, 1709–11 (2024) (describing gun regulations at quasi-private–quasi-public schools).

106. *See id.* (treating collegiate firearms restrictions as delegated legislative authority).

107. *See, e.g.*, Frey v. Nigrelli, 661 F. Supp. 3d 176, 203–06 (S.D.N.Y. 2023) (relying on restrictions from private rail carriers as historical analogues because there was no government-run rail carrier at the Founding).

108. *See supra* notes 92–96 and accompanying text.

colleges in the era of the Second Amendment further support the conclusion that for individuals below the age of majority, there was no unfettered right to purchase, keep, or bear arms. Rather, access to, and the ability to keep or bear, weapons occurred in supervised situations where minors were under the direction of those who enjoyed legal authority over them: fathers, guardians, constables, justices of the peace, or militia officers.

D. THE ROLE OF MINORS IN THE MILITIA AT THE FOUNDING

Plaintiffs in age-limit challenges primarily rely on Founding-era laws that required eighteen-to-twenty-year-olds to serve in the militia as evidence that minors are entitled to Second Amendment protection for privately purchased arms.[109] The logic of this claim is flawed: militia duties mandated by Founding law are evidence of obligations, not rights. In the Anglo-American legal tradition, rights are the correlatives of duties, they are not synonyms.[110] The characterization of rights "as absolute shields and trumps protecting individuals from society and government," a frame that is often used today to characterize Second Amendment rights, is in conflict with the understanding of rights at the time of the Founding, at which time rights were "secondary to (indeed derived from) the larger social obligations of man."[111] The "dominant early American legal discourse . . . took duties, not rights, seriously,"[112] and it would follow that Founding-era thinkers would have interpreted militia statutes as establishing duties, not investing individuals rights.

An illustrative example that clarifies the distinction between rights and duties is provided by the role of the jury.

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109. *See*, *e.g.*, Worth v. Harrington, 666 F. Supp. 3d 902, 914–15 (D. Minn. 2023) (discussing early militia laws as support for the argument that eighteen-to-twenty-year-olds should enjoy Second Amendment protections); Firearms Pol'y Coal., Inc. v. McCraw, 623 F. Supp. 3d 740, 751 (N.D. Tex. 2022) ("[B]ecause 18-to-20-year-olds were (and are) a part of the militia, the Second Amendment must protect their right to keep and bear arms.").

110. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–33 (1913) (describing rights in terms of the correlative duties they impose on others). There is a vast, erudite, and complex scholarly literature on the nature of legal rights in the modern Anglo-American legal tradition. *See* J. Raz, *Legal Rights*, 4 OXFORD J. LEGAL STUD. 1 (1984); Leif Wenar, *Rights*, STAN. ENCYCLOPEDIA PHIL. (Feb. 24, 2020), https://plato.stanford.edu/entries/rights [https://perma.cc/V32G-ERUT].

111. NOVAK, *supra* note 98, at 34.

112. *Id.*

Individuals have a duty to participate in jury service, but do not have a right to be chosen to serve on a jury. Or, even more relevant here, modern draft laws do not create a right to serve in the United States military. Even in the context of historical militia service, individuals mustered into militia service were not guaranteed to carry a weapon: minors might have been tasked with carrying a flag, fife, or drum.[113] The notion that these minors had a right to carry a gun outside the context of the militia illustrates the flaws of treating obligations as evidence of a right. Imposing a legal obligation on individuals to participate in militia service does not establish a constitutional right to keep, bear, or acquire firearms for those under the age of twenty-one.

Militia laws, considered in the proper historical context, gave governments broad power over minors, underscoring minors' inability to act independently outside of the context of adult supervision. These laws did not erect a barrier against government intrusion into the most private sphere of American life—the home. In fact, militia statutes achieved the opposite goal: they gave government sweeping powers over Americans and their guns.[114] Weapons were subject to government inspection, including home inspection.[115] Indeed, although militia weapons

113. *Fifes and Drums*, COLONIAL WILLIAMSBURG, https://www.colonialwilliamsburg.org/explore/fifes-and-drums [https://perma.cc/2V2G-WW2E] ("During the American Revolution, one fifer and one drummer were deployed as a regular component of a company of 75 officers and men. Two boys, generally aged between 10 and 18, marched along with each company.").

114. *See* Cornell & DeDino, *supra* note 96, at 487, 496, 505, 509 (analyzing several "intrusive" militia regulations).

115. *See* Act of Oct. 10, 1799, § 4, 1799 Conn. Acts 511, 511–12 (Reg. Sess.) ("That the Fines and Penalties incurred for Non-appearance and deficiencies of Arms, Ammunition and Accoutrements shall in future be as follows, viz. Each non-commissioned Officer, Drummer, Fifer or Trumpeter who shall neglect to appear at the Time and Place appointed for regimental or battalion Exercise or Review, being legally warned thereto shall forfeit and pay a Fine of *Three Dollars* for each Days neglect, and for each Days neglect to appear at the Time and Place appointed for company Exercise or Inspection, being legally warned thereto, shall forfeit and pay a Fine of *One Dollar* and *Fifty Cents*, and each Private belonging to any Company of Militia, shall for Non-appearance on Days of regimental or battalion Exercise or Review, being thereto legally warned, forfeit and pay a Fine of *Two Dollars* for each Day's neglect, and for Non-appearance at Time and Place for company Exercise or Inspection he shall forfeit and pay a Fine of *One Dollar* for each Day's neglect; and for deficiencies of Arms, Ammunition and Accoutrements, required by Law, each non-commissioned

were privately owned, they were among the most heavily regulated forms of private property in early American law.[116] The historical record demonstrates that infants were typically only entrusted with firearms when under the supervision of a parent or a guardian, or when serving in militias or other community-based peace keeping activities such as the "hue and cry."[117]

The acquisition of required arms for militia service also depended on adults. Minors did not arm themselves for militia service; they depended on parents and guardians to outfit them with the necessary arms, and, in some instances, depended on local government or the state to provide arms.[118] Arms were

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Officer and Private shall forfeit and pay for each Day of Review or Exercise that he shall be deficient, the following Fines, viz. For a Gun or pair of Pistols, each *Seventy-five Cents*; for Sword, Bayonet or Cartridge Box, each *Fifty Cents*; and for each of the other Articles required by law, *Twenty-five Cents*.").

116. *See* Cornell & DeDino, *supra* note 96, at 508–10 (describing extensive regulations of New York and Massachusetts militias).

117. Cornell, *Infants*, *supra* note 32, at pt. II; Brewer Amici Curiae, *supra* note 61, at 8 ("The state militia laws demonstrate that 18-to-20-year-olds were not thought to hold political rights such as the right to bear arms afforded to 'the people.' Instead, the presence of these laws and the language therein demonstrates that the underlying assumption was that 18-to-20-year-olds did not possess weapons and were under the supervision and authority of others—thus the need for laws explicitly granting 18-20-year-olds the right to bear arms *in the militia*.").

118. ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA 307–08 (1796) (setting fines if militia member does not show up with weapons, but providing that, for a man under twenty-one years of age, it is the responsibility of the "Parent, Master or Guardian" to supply the weapons and to bear the costs of any fines for his failure to appear or to perform his duty); 2 LAWS OF THE STATE OF DELAWARE, FROM THE FOURTEENTH DAY OF OCTOBER, ONE THOUSAND SEVEN HUNDRED, TO THE EIGHTEENTH DAY OF AUGUST, ONE THOUSAND SEVEN HUNDRED AND NINETY-SEVEN 1135 (1797) (exempting men under twenty-one from having to supply their own weapons); 2 THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, FROM THE ESTABLISHMENT OF ITS CONSTITUTION, IN THE YEAR 1780, TO THE END OF THE YEAR 1800, at 172–94 (1801) (exempting young men from supplying their own "arms and equipment" and providing for parents, masters, or guardians, to provide such weapons, or for the town to step in if the parent could not afford weapons); THE LAWS OF THE STATE OF NEW-HAMPSHIRE, THE CONSTITUTION OF THE STATE OF NEW-HAMPSHIRE, AND THE CONSTITUTION OF THE UNITED STATES, WITH ITS PROPOSED AMENDMENTS 422 (1797) (providing that minors unable to arm themselves will be provided weaponry by the town); PUBLIC LAWS OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 69 (1798) (dictating that the town will pay for the "arming and equipping" of minors unable to equip themselves); *see* Brewer Amici Curiae, *supra* note 61, at 12–13 (explaining how

provided to minors to allow them to comply with their militia obligations mandated by early American militia statutes. The fact that these laws provided mechanisms by which eighteen-to-twenty-year-olds would be supplied weapons to meet a militia obligation reflect that minors did not have the legal capacity or financial resources to purchase or own weapons themselves.[119]

Moreover, early American militia statutes reflected the persistent problem states and the federal government faced in properly arming the militia. Although Americans were better armed than their British ancestors, most households did not have a military quality musket at the time of the Second Amendment.[120] In contrast to modern Americans, most gun-owning households had only a single weapon, and typically that gun was better suited to life on a farm, not the rigors of eighteenth-century ground warfare.[121]

Americans' reluctance to purchase the guns government required them to have for service in the militia meant that all guns were not created equal in the eyes of the law. Government policy was designed to force militia members to acquire the type of weapons the government deemed essential for a well-regulated militia.[122] Failure to acquire the officially proscribed type of weaponry could result in fines.[123] A 1794 Rhode Island statute adopted a few years after the Second Amendment was ratified is illustrative of the punishments that could be meted out:

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eighteen-to-twenty-year-olds historically were not responsible for arming themselves for militia service).

119. *See* Brewer Amici Curiae, *supra* note 61, at 12–13 (arguing that provision of weapons to minors and minors' exemption from certain militia penalties placed them outside the political community); *see also* laws cited *supra* note 118 (providing examples of several statutory mechanisms).

120. Kevin M. Sweeney, *Firearms Ownership and Militias in Seventeenth- and Eighteenth-Century England and America*, *in* A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT 54, 62–63 (Jennifer Tucker et al. eds., 2019).

121. *Id.*

122. *Id.*

123. *E.g.*, Act of Apr. 14, 1778, ch. 22, § 46, 1778 N.J. Laws 42, 53 (imposing a twenty-shilling fine for failure to bring weaponry when called to training or service). For a sampling of other Founding-era militia statutes, see Act of Mar. 13, 1779, ch. 33, 1779 N.Y. Laws 136 (raising a thousand men to defend the state); Act of Feb. 16, 1779, 1779 Vt. Acts & Resolves 57 (forming and regulating the militia, and; encouraging military skill for state defense); Act of 1786, ch. 1, 1786 N.C. Sess. Laws 407 (raising troops to protect the inhabitants of Davidson County).

> That every non-commissioned Officer or Private who shall neglect to appear at the regimental Rendezvous, shall forfeit the Sum of *Six Shillings* and for every Day he shall neglect to appear at the Company Parade, he shall forfeit *Four Shillings and Sixpence*. And if he shall not be armed and equipped according to other said Act of Congress, when so appearing, without sufficient Excuse, he shall, for appearing without a Gun, forfeit *One Shilling and Sixpence*; without a Bayonet and Belt, *Sixpence*; without a Cartouch-Box and Cartridges, *Sixpence* . . . .[124]

Once they had mustered, members of the militia were subject to military discipline and punishment.[125] Militia statutes prescribed penalties and punishments for failing to report to muster properly armed and for misuse of weapons once an individual appeared at muster.[126] Indeed, eighteenth-century military discipline was exceedingly harsh, including corporal punishment such as whipping.[127] Tennessee's enforcement mechanism involved the institution of the court martial:

> [T]he commissioned and staff officers of the infantry are hereby required to meet at the place of holding their battalion musters at eleven o'clock on the day preceding said muster, armed with a rifle, musket, or shot gun and dressed in the uniform prescribed by law, for the purpose of being trained as at regimental drills, and the commanding or senior officer present shall call, or cause the roll to be called, and make a return of all delinquents to the next regimental or battalion court martial.
>
> . . . That Regimental courts martial shall have power to fine delinquents, field or staff officers, and it shall be the duty of the commanding or senior officer present at any regimental, battalion or drill muster, to make a return of all such delinquents to the next regimental or

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124. Act effective May 5th, 1794, § 10, 1794 R.I. Pub. Laws 14, 21–22.

125. *See Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820) (upholding state and federal government jurisdiction over militia punishment); Act of Dec. 20, 1791, 1791 S.C. Acts 16 (amending and putting into force an earlier act calling for the organization and discipline of militia); *see also* Cornell & DeDino, *supra* note 96, at 508–10 (noting the requirement for militiamen to appear at muster with certain equipment).

126. *See, e.g.*, § 10, 1794 R.I. Pub. Laws at 21–22 ("And if he shall not be armed and equipped according to the said Act of Congress, when so appearing, without sufficient Excuse, he shall, for appearing without a Gun, forfeit *One Shilling and Sixpence* . . . ."); Act of Dec. 28, 1792, 1792 N.H. Laws 436, 443 (providing that any private who "shall unnecessarily neglect to appear equipped, [at muster] as the law directs" shall "pay a fine of nine shillings"); Act of Oct. 10, 1799, § 4, 1799 Conn. Pub. Acts 511, 512–13 (providing for fines and penalties for "[n]on-appearance and deficiencies" of equipment).

127. *See* Act of Apr. 10, 1812, ch. 55, § 6, Pub. L. No. 12-55, 2 Stat. 705, 707 (1812) (prohibiting whipping, which was a common form of punishment used by the military in the eighteenth century).

> battalion court martial, and they shall have discretionary power to assess fines or not as they may think proper on delinquents.[128]

The fact that punishment was incorporated into historical militia laws to compel service members to meet their *obligations* is hard to reconcile with the idea that these laws offer evidence of a *right* that might be asserted against government.[129] In short, minors required to serve in the militia had no choice about the types of weapons needed to meet their legal obligations, a fact that further undermines the claim that minors enjoyed a right to bear arms against government interference.

Furthermore, within the context of militia discipline, minors who failed to meet their militia obligations to acquire the correct armaments were not held personally responsible.[130] Parents, guardians, or, at times, the local government were responsible in the event a minor appeared without sufficient weaponry.[131] For example, New Hampshire's 1792 militia law was explicit that parents and guardians were responsible if minors under their care failed to acquire the necessary weapons for militia participation; the parent or guardian suffered the penalties:

> That such of the infantry as are under the care of parents, masters or guardians, shall be furnished by them with such arms and accoutrements. . . . [and] That parents, masters and guardians shall be liable for the neglect . . . of such persons as are under their care . . . .[132]

And even when such obligations were not expressly included by statute, the common law definition of infants meant that any legal proceeding that would attempt to prosecute minors for such a failure would have to proceed against the legally responsible adult in charge of the minor's household.[133] Connecticut's militia law, adopted in October, 1792, described in considerable detail

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128. Act of Nov. 16, 1821, ch. 55, §§ 2–3, 1821 Tenn. Pub. Acts 63, 63.

129. Brewer Amici Curiae, *supra* note 61, at 14 ("[T]he punitive components of the laws further demonstrate that these laws were imposing an obligation—not creating or codifying a preexisting right—for 18-to-20-year-olds to bear arms . . . .").

130. *E.g.*, ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA, *supra* note 118, at 308 (assigning the "Parent, Master or Guardian" of minors to supply the weapons and to bear the costs of any fines for a minor's failure to appear or to perform his duty).

131. *Id.*; 1792 N.H. Laws at 447; Act of Mar. 6, 1810, ch. CVII, § 28, 1810 Mass. Acts 151, 176.

132. 1792 N.H. Laws at 447; *see also* § 28, 1810 Mass. Acts at 176 (subjecting parents, masters, or guardians of a minor to the same penalties as of age militia members for failure to provide the required arms and equipment).

133. SWIFT, *supra* note 28, at 213, 217.

what weapons were required by statute to meet the obligation to participate, and it also listed the penalties and punishments for failing to appear at muster properly armed and accoutered.[134]

Appearing at muster without proper armaments rendered one "delinquent" and a fine was levied against him if he is "upwards of twenty-one Years of Age."[135] For those not legally adults, this responsibility fell on the "Parent, Master or Guardian" to supply the weapons and to bear the costs of any fines for his failure to appear or to perform his duty.[136] The Connecticut militia statute unambiguously stated that the ultimate legal responsibility for acquiring armaments needed by minors serving in the militia rested with parents, guardians, or masters, not the infants under their charge.[137]

Delaware's militia law of 1792 also exempted young men under the age of twenty-one from having to supply their own weapons.[138] These laws further demonstrate that minors were not full participants in the "political community" at the time of the Founding, as they were not full citizens independently held by the law to be legally responsible for failing to arm.[139]

Imposing mandatory militia service was a policy choice made by states and the federal government; it does not represent a fixed constitutional principle in American law. This fact is clear from the drafting history of the Second Amendment. The Second Amendment's original language defined the militia as "composed of the body of the people."[140] As the debates of the First Congress make clear, Congress chose to omit this language so that it would retain plenary authority to decide the composition of the militia and alter it to meet the demands of the nation's

134. ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA, *supra* note 118, at 299, 307 (describing the precise weaponry and equipment each citizen enrolled in the militia must acquire and dictating a fine of "*One Dollar* and *Fifty Cents*, for each Day" he appears without being properly "armed and equipped").

135. *Id.* at 308.

136. *Id.*

137. *Id.*

138. Act of Jun. 18, 1793, ch. XXXVI, § 2, II Del. Laws 1134, 1135 (1793).

139. *See* Brewer Amici Curiae, *supra* note 61, at 6–15 (discussing how, contextually, the Second Amendment's reference to "the people" was not inclusive of eighteen-to-twenty-year-olds).

140. For an account of the Second Amendment's drafting history, see Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 124–32, 158–59 (2000).

defense requirements.[141] There was no constitutional requirement for any subset of the population to serve in the militia.[142] And these statutory requirements were adjusted over time to the changing needs of the individual states and the federal government.[143] The claim that minors have an inherent right to bear arms would essentially rewrite the plain text of the Second Amendment and contravene its original meaning, reinserting language that Congress deliberately excised from the text. Such an approach is antithetical to the originalist methodology required in Second Amendment cases.

It is not surprising that the debate over the composition of the militia was influenced by public concern over the economic burden that participation in the militia placed on American families.[144] This concern was voiced forcefully during the debate over the first militia act in Congress. Thomas Fitzsimons, a Federalist representative from Pennsylvania, expressed his concern that militia service was a burdensome tax on Americans, and that it would prove to be an undue burden for most families.[145] During this debate, Congress seriously considered abandoning the idea of a broadly inclusive militia in favor of a smaller, more select, better trained, and better equipped force, but ultimately this proposal failed.[146] Instead, Congress settled on a compromise:

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141. SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 60–65 (2006) [hereinafter CORNELL, A WELL-REGULATED MILITIA].

142. *See id.* at 65, 67.

143. *Id.* at 67; *see also* Cornell & DeDino, *supra* note 96, at 487, 496, 508–10 (highlighting the variation in state and federal statutes regarding militia service).

144. *See* 2 ANNALS OF CONG. 1804 (1790) ("[House Representative] observed, the clause which enacts that every man in the United States shall 'provide himself' with military accoutrements would be found impracticable, as it must be well known that there are many persons who are so poor that it is impossible they should comply with the law.").

145. *Id.* at 1806 ("[S]ubjecting the whole body of the people to be drawn out four or five times a year [for militia service] was a great and unnecessary tax on the community; that it could not conduce either to the acquisition of military knowledge, or the advancement of morals.").

146. *See id.* at 1805 (recording a suggestion from one representative that "[a] much smaller number would, in his opinion, answer all the purposes of a militia"); *cf.* H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 471–72 (2000) (describing how George Washington was in favor of a small, highly trained, professional militia).

the first federal militia act carried forward a broadly inclusive idea of a militia, but it did not take the necessary action to properly arm and equip the militia.[147]

The imposition of an obligation, enforced by a range of punishments, was necessitated by the economic realities facing American families in the eighteenth century. The labor of sons was vital to the survival and prosperity of families.[148] Rural communities needed this labor on farms.[149] Apprentices were essential to artisan modes of production.[150] Given the strong economic pressures on small farm owners and artisans in a pre-industrial society to maximize this source of labor, market forces could easily have led families to oppose allowing sons to join the militia voluntarily.[151] Thus, at the time of the Second Amendment's enactment, these legal and social facts meant that it was necessary for the states to enact laws requiring able-bodied minors under twenty-one to participate or face penalties. Without such laws, it is likely that few minors would have been enrolled in the militia because of the opposition of those who needed their labor, i.e., parents, guardians, and masters. The individual states and federal government had the power to, and did, coerce individuals to participate in the militia, even if such participation posed an economic hardship to individuals, their families, or legal guardians.[152] And the states flexed that power by threatening punishment: Delaware's 1782 militia law, for example, expressly recognized this problem and included a provision that levied a

147. *See* Uviller & Merkel, *supra* note 146, at 516 ("[T]he Act provided that citizens, for whom militia service was required, furnish their own standard arms and equipment.").

148. GROSS, *supra* note 80, at 78 ("Next to the land itself, a farmer's children were his basic resource. From sunup to sundown, throughout the year, and with only a few weeks off for winter school, his sons were with him on the farm, tilling his crops, building his income, easing his toil.").

149. *Id.*

150. *See id.* at 70 (listing "artisans, laborers, and teen-age apprentices" in the Concord militia); BRUCE LAURIE, ARTISANS INTO WORKERS: LABOR IN NINETEENTH-CENTURY AMERICA 18–21 (1989).

151. *See* GROSS, *supra* note 80, at 78 (describing how the labor of sons was vital to their family's livelihood, and noting that it was "[n]o wonder, then, that farmers were reluctant to let their labor force go").

152. *See* 2 ANNALS OF CONG. 1804–10 (1790) (debating the impact of militia act provisions on citizens).

fine on any "Parent, Guardian, or Master" if their militia eligible minor failed to enroll.[153]

The fact that the composition of the militia was shaped by policy choices, not a constitutional mandate, meant that if a state felt it was necessary to exclude minors because of the economic burden it placed on families it could redefine the population of those eligible as needed. Similarly, if military necessities led legislatures to the conclusion that younger Americans were no longer viewed as effective soldiers, there was nothing to prevent a legislature from implementing changes that excluded them from participation.[154] Thus, New Jersey changed the legal definition of the militia in 1829: "[F]rom and after the passing of this act, all persons under the age of twenty-one years be, and they are hereby, exempt from militia duty in time of peace."[155] Kansas excluded minors by framing its constitutional provision on the militia as follows: "The Militia shall be composed of all able-bodied white male citizens between the ages of twenty-one and forty-five years."[156] Ohio also set the minimum age to serve at twenty-one.[157]

Indeed, the ages of individuals required to serve in the militia fluctuated, depending on the need for soldiers, and whether the country was in a time of war or peace. "In times of war, the age for service in the militia crept down towards sixteen; in times of peace, it crept up towards twenty-one."[158] Moreover, the Federal Militia Act of 1792 set the minimum age for service at eighteen, but allowed states to set their own minimum ages in their own statutes.[159] The varying minimum ages of militia service members demonstrate that there is no direct correlation between militia age and the Second Amendment right vesting at

153. Act of Feb. 5, 1782, § 9, Del. Laws 1, 4 (Jan. Adjourned Sess. 1782).

154. *See* Rakove, *supra* note 140, at 159 (discussing the legislative authority of government to regulate the form of the militia).

155. Act of Nov. 6, 1829, § 1, 1829 N.J. Laws 3, 3. By the 1820s, the militia had fallen into disrepute in many parts of America and became a subject of satire and ridicule. *See* David Tatham, *David Claypoole Johnston's* Militia Muster, AM. ART J., Spring 1987, at 4, 7–8 (discussing the circumstances surrounding the militia's ridicule in the 1820s).

156. KAN. CONST. of 1859, art. VIII, § 1.

157. Act of Mar. 12, 1844, § 2, 1843 Ohio Laws 53, 53.

158. Nat'l Rifle Ass'n of Am. v. Swearingen, 545 F. Supp. 3d 1247, 1258 (N.D. Fla. 2021).

159. Act of May 8, 1792, Pub. L. No. 2-33, §§ 1–2, 1 Stat. 271, 271–72 (1792).

eighteen. Moreover, the federal militia statute would not permit states to override its age minimum if the federal government viewed the age of those who served in the militia to correspond to the time the Second Amendment right vests.

When individuals below the age of legal majority served in the militia, or participated in community-based efforts to keep the peace, these public safety duties were undertaken in a supervised setting under the authority of parents, guardians, or other adults authorized under the color of law.[160] Further, the circumstances under which an infant could participate in community forms of keeping the peace were defined by the patriarchal structure of local communities and the peacekeeping mechanism instantiated by law.[161] As Princeton historian Laura Edwards notes:

> The social order of the peace was profoundly patriarchal. The concept was based in a long-standing, highly gendered construction of government authority, which subordinated everyone to a sovereign body, just as all individual dependents were subordinated to specific male heads of household.[162]

The involvement of minors in community-based law enforcement also was, as Professor Edwards notes, embedded in the patriarchal structure of local communities.[163] A minor acting on their own accord would not have had the legal authority to engage in peace keeping activities without supervision.[164]

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160. The Statute of Winchester, adopted in 1285 in the Reign of Edward I, required male members of the community between fifteen and sixty to join the "hue and cry" and participate in community law enforcement. 1 STATUTES OF THE REALM 96, 97–98. Until the rise of modern police forces in the middle of the nineteenth century, community-based law enforcement, including the "hue and cry," was the only means to deal with most forms of ordinary crime. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 29 (1993).

161. *See* Laura F. Edwards, *The Peace: The Meaning and Production of Law in the Post-Revolutionary United States*, 1 U.C. IRVINE L. REV. 565, 571 (2011) ("Keeping the peace meant keeping everyone—from the lowest to the highest—in their appropriate places, as defined in specific local contexts. Those contexts, while different in their own ways, were defined by stark, entrenched inequalities. . . . To the extent that individuals figured in the logic of the peace, it was through hierarchical family and community relationships that connected them to the social order and made them part of the peace.").

162. *Id.* at 570.

163. *See id.* at 572 ("[T]he peace folded everyone into its jurisdiction. Even those without rights—wives, children, and slaves, all of whom were legally subordinated to their household heads . . . had direct access to this arena of law.").

164. *Id.*

A popular South Carolina justice of the peace manual published in 1788, the year the Constitution was adopted, captured the dominant view of the era when it described the categories of person "who shall not be a constable" as including "infants," "madmen," and "idiots."[165] The author of this popular legal guide, John Fauchereaud Grimké, was among the state's most distinguished and influential jurists.[166] The fact that he included infants—who were old enough to participate in the militia, but under the age of majority—in the same category as madmen and idiots, whom the law considered to be incapable of asserting their legal will independently,[167] illustrates that the Founding era did not treat those under twenty-one as having a robust, freestanding right to keep, bear, and freely acquire arms. Any assertion that infants below the age of majority could claim the right to bear arms outside of the militia or related peacekeeping activities, without the authority of parents or a guardian, rests on an anachronistic interpretation of early American militia statutes, ignorance of Founding-era domestic law, and disregard of the social realities of domestic life at the Founding.[168]

In sum, militia statutes did not exist in a vacuum, and they must be read and interpreted in the relevant historical contexts in which they were enacted. Such laws are not evidence of rights but instead represent the government's coercive authority to force minors to participate in the militia. These laws embodied policy choices made by legislatures to ensure that the militia was properly staffed and equipped. These laws do not provide evidence that minors had an independent, constitutional right to keep and bear arms outside of the militia context.[169]

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165. JOHN FAUCHEREAUD GRIMKÉ, THE SOUTH CAROLINA JUSTICE OF PEACE 117 (1788).

166. *See* Eli A. Poliakoff, *Grimké, John Faucheraud*, S.C. ENCYCLOPEDIA (May 17, 2016), https://www.scencyclopedia.org/sce/entries/grimke-john-faucheraud [https://perma.cc/4U9Z-GUDU] (detailing Grimké's professional history and involvement with the city of Charleston's legal community).

167. On the disabilities of minors under early American law, see discussion *supra* Parts I.A–B.

168. For a more elaborate argument about the dangers of interpreting the Second Amendment with an ahistorical modern understanding of rights, see Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS., no. 1, 2020, at 31.

169. Several courts that have addressed age limits post-*Bruen* have agreed. *See, e.g.*, Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317, 1331–32 (11th Cir. 2023)

E. SOCIAL CHANGE, LEGAL CHANGE, AND THE DEVELOPMENT OF NEW WEAPONS REGULATIONS OVER THE COURSE OF THE NINETEENTH CENTURY

The proliferation of guns in the decades after the adoption of the Second Amendment and the first state constitutional arms bearing provisions produced an expansion of regulation to address a range of problems that did not exist in 1791.[170] The primary focus of Founding-era firearms policy was to get Americans to purchase the types of guns needed for the militia at a time when most Americans desired guns necessary for life in agrarian society, typically fowling pieces and light hunting muskets.[171]

("Congress imposed upon 18-to-20-year-olds a specific obligation to serve in the militia but did not give them all the rights associated with full citizenship . . . . So we can't infer from the fact that 18-to-20-year-olds had a specific obligation that they had a specific right."), *vacated on grant of reh'g en banc*, 72 F.4th 1346 (11th Cir. 2023) (mem.); Rocky Mountain Gun Owners v. Polis, No. 23-cv-01077-PAB, 2023 WL 5017253, at *17 (D. Colo. Aug. 7, 2023) ("The Court agrees with the Governor that service by 18-to-20-year-olds in militias does not prove that such persons had an unfettered right to possess firearms outside of militias."). Courts that have relied on the militia statutes as evidence of an individual Second Amendment right have not acknowledged that many militia statutes required parents, guardians, or the state to supply the weapons that minors would use in the militia. *See, e.g.*, Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 672 F. Supp. 3d 118, 143 (E.D. Va. 2023) (finding "a broad . . . consensus that 18 was the age of majority for membership in the militia, membership which required its members to supply their own arms"); Worth v. Harrington, 666 F. Supp. 3d 902, 915 (D. Minn. 2023) ("Founding-era militia laws requiring service in the militia by 18–20-year-olds who are responsible for supplying their own weapons is consistent with a contemporary understanding that this age group was not excluded from the class of persons who had the right to keep and bear arms."); Firearms Pol'y Coal., Inc. v. McCraw, 623 F. Supp. 3d 740, 750 (N.D. Tex. 2022) (noting the 1792 Militia Act "required militia members to arm themselves rather than rely on the Government to provide arms" in holding that participation in militia supported an individual Second Amendment right, and citing *United States v. Miller*, 307 U.S. 174, 179 (1934), for the finding that militia presupposed firearm possession). *See generally* notes 130–39 (listing historical laws in which minors were not held personally responsible for failure to bring their own weapons for militia service).

170. For recent historical research demonstrating the Founding generation did not face an urban gun violence problem, see Randolph Roth, *Why Guns Are and Are Not the Problem: The Relationship Between Guns and Homicide in American History*, *in* A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT, *supra* note 120, at 113, 116–17.

171. Sweeney, *supra* note 120, at 62; Roth, *supra* note 170, at 116 (noting that in the colonial and revolutionary period "few households owned pistols, but

Moreover, at the time of the Second Amendment, handguns were owned by a tiny fraction of the population.[172] Given these facts there was little need to enact modern-style gun regulations aimed at restricting access to weapons. There were limited gun homicides in urban areas in 1791, and family and household homicides were largely not perpetrated by firearms.[173] The misuse of firearms was complicated by the necessity to acquire a high level of skill to load and shoot a muzzle loading musket, fowling piece, or pistol.[174] Technological change and economic transformation in the early decades of the nineteenth century changed both the calculus of self-defense, making guns, including handguns, more available, easier to use, and more prone to misuse.[175] These changes forced governments to deal with gun violence as a significant societal problem for the first time in American history.[176] Among the new problems governments

most owned muskets or fowling pieces, used for hunting, warfare, [and] vermin control").

172. Sweeney, *supra* note 120, at 61 tbl.3.5.

173. *See* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 153–54 (2023) ("[D]uring the colonial period, the urban areas were relatively free of the consistent use of firearms." (quoting LEE KENNETT & JAMES LAVERNE ANDERSON, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA 48 (1975)); Roth, *supra* note 170, at 117 (noting that family and household homicides were committed with "weapons close at hand" at the time of the Founding, which meant "whips, sticks, hoes, shovels, axes, knives, feet, or fists" instead of guns, and that while gun homicide occurred in nonrural areas in the colonial period, urban gun violence was uncommon).

174. RANDOLPH ROTH, AMERICAN HOMICIDE 56 (2009) ("Muskets had their limits as murder weapons. They were inaccurate with slugs, impossible to conceal, and difficult to load.").

175. Saul Cornell, *Limits on Armed Travel Under Anglo-American Law: Change and Continuity over the Constitutional* Longue Durée*, 1688–1868*, *in* A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT, *supra* note 120, at 72, 79 ("Economic and technological changes during [the Jacksonian period] were also profound, particularly regarding firearms. The expanding market revolution made variety of new good available to ordinary consumers, everything from wooden clocks to cheap and reliable handguns. The latter development lay at the heart of an even more profound change in the legal meaning of arms in American life.").

176. *See id.* (describing how the new proliferation of concealable and dependable handguns in nineteenth-century America created a new practice of Americans carrying handguns in public and how, "[i]n response to this new practice and widespread perception that it encouraged more violence, the first wave of modern-style American gun-control laws were enacted" for reasons of public

confronted related to these technological and economic changes was the easier access and potential abuse of firearms by minors.

Several states and localities enacted laws limiting minors' access to firearms in the antebellum era. Pre–Civil War laws from Alabama, Tennessee, and Kentucky expressly limited minors' access to firearms. In 1856, twelve years before the ratification of the Fourteenth Amendment, Alabama prohibited selling, giving, or lending, "to any male minor, a bowie knife, or knife or instrument of the like kind or description, by whatever named called, or air gun or pistol."[177] Similarly, in 1858, Tennessee enacted a law prohibiting the selling, loaning, giving, or delivering "to any minor a pistol, bowie-knife, dirk, Arkansas tooth-pick, or hunter's knife," with exceptions for hunting and traveling.[178] An 1859 Kentucky law prohibited selling, giving, or loaning "any pistol, dirk, bowie-knife, brass-knucks, slung-shot, colt, cane-gun, or other deadly weapon . . . to any minor."[179] All of these laws responded to new problems posed by the proliferation of firearms and other deadly weapons that were more easily concealed and carried. No similar problem existed during the Founding era because weapons in that period were more cumbersome to use, less reliable, and harder to conceal.[180] These types of arms posed a new and unprecedented threat to public safety because they could be more easily carried and used by minors for illegal purposes. Nor is it surprising that the South, the region with the highest rates of armed violence, led the way in enacting a variety of new laws to deal with unprecedented problems,[181] including the increased threat to public safety posed by minors and weapons.

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safety). For an overview of recent historical scholarship demonstrating the profound changes in gun culture and regulation resulting from technological and economic developments in the decades after the adoption of the Second Amendment, see Cornell, *Constitutional Mischiefs*, *supra* note 40, at 37–44. On regional gun cultures and the slave South's propensity for violence, see Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J.F. 121 (2015).

177. Act of Feb. 2, 1856, no. 26, § 1, 1856 Ala. Laws 17, 17.

178. Act of Feb. 26, ch. 81, §§ 2–3, 1856 Tenn. Pub. Acts 92, 92.

179. Act of Jan. 12, 1860, ch. 33, § 23, 1859 Ky. Acts 241, 245.

180. ROTH, *supra* note 174, at 56.

181. *See, e.g.*, H.V. REDFIELD, HOMICIDE, NORTH AND SOUTH 68 (Ohio State Univ. Press 2000) (1880) ("[I]n the single State of Texas, with a population of about one-twelfth the aggregate in [Maine, New Hampshire, Vermont,

Local governments also responded in turn to these changes. An 1803 law from New York City also held parents liable for the unlawful discharge of firearms by minors.[182] Columbia, South Carolina, enacted a law in 1817 providing for weapons, including firearms, to be seized from minors within city limits.[183] In 1857, the city of Louisville, Kentucky, passed an ordinance stating that "[n]o person shall retail gunpowder to minors" but included an exception for those who had "authority from his parent or guardian."[184]

These antebellum trends intensified in the years following the Civil War. The number of restrictions on minors' access to firearms increased dramatically during this period. After surveying hundreds of gun laws in the nineteenth century, political scientist Robert Spitzer concluded that "[n]umerous laws restricting gun access by minors—minimum ownership ages ranged from twelve to twenty-one—or others deemed irresponsible arose in the late 1800s."[185] In fact, he concluded that in the period between 1868 and 1899 restrictions on minors' access and use of arms were more common than limits on felons.[186]

While language in *Bruen* suggests that laws enacted during and after the time of the Fourteenth Amendment's ratification

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Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, Michigan, and Minnesota], there are more homicides in a year than in all these States combined."); FREDERICK LAW OLMSTED, A JOURNEY THROUGH TEXAS: OR, A SADDLE-TRIP ON THE SOUTHWESTERN FRONTIER 158 (Univ. of Tex. Press 1978) (1857) (describing the frequency of gun violence in San Antonio).

182. New York, N.Y., To Prevent the Firing of Guns in the City of New-York, § 1 (Apr. 18, 1803), https://firearmslaw.duke.edu/laws/edward-livingston-laws-and-ordinances-ordained-and-established-by-the-mayor-aldermen-and-commonalty-of-the-city-of-new-york-in-common-council-convened-for-the-good-rule-and-government-of-the-inh [https://perma.cc/P33A-Y8C6].

183. Columbia, S.C., For Prohibiting the Firing of Guns in the Town of Columbia (Apr. 23, 1817), https://firearmslaw.duke.edu/laws/ordinances-of-the-town-of-columbia-s-c-passed-since-the-incorporation-of-said-town-to-which-are-prefixed-the-acts-of-the-general-assembly-for-incorporating-the-said-town-and-others-in-relati [https://perma.cc/8996-N68X].

184. Louisville, Ky., An Ordinance as to Retailing Gun Powder (Oct. 17, 1853).

185. Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 LAW & CONTEMP. PROBS., no. 2, 2017, at 55, 76.

186. *See id.* at 60 tbl.1 (comparing the number of gun laws by category).

are less relevant than Founding-era laws,[187] laws from after the Civil War are especially relevant when analyzing state laws.[188] As stated in *Bruen*, states are "bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second."[189] Thus, when courts are analyzing state gun restrictions, it is appropriate to consider laws at the time of the Fourteenth Amendment's passage, as those laws governed the scope of the right as understood when the states ratified it.[190]

The changing circumstances states and localities faced after the Civil War, most importantly changes in gun technology, gun commerce, and gun culture, led to an increase in gun crime and gun injury. As the table below shows, states and localities responded by passing a range of new gun laws. These new laws responded to novel problems, but the legal justifications for them were identical to those employed by antebellum legislatures and courts: the state's ample police powers.[191]

187. N.Y. State Rifle & Pistol Ass'n v. Bruen, 591 U.S. 1, 35 (2022) ("[W]e must also guard against giving postenactment history more weight than it can rightly bear.").

188. *See* Brief of Everytown for Gun Safety as Amicus Curiae in Support of Appellant and Reversal at 13–18, Worth v. Jacobson, No. 23-2248 (8th Cir. July 20, 2023) (citing multiple court decisions; oral argument from Paul Clement, who argued on behalf of Bruen; and multiple originalist, conservative legal scholars who endorse the view that "applying the 1868 understanding of the right to keep and bear arms in a case challenging a state law" is appropriate).

189. *Bruen*, 591 U.S. at 37.

190. *See Bruen*, 591 U.S. at 28–29 (tying the interpretation of the Amendment to the public understanding at the time of ratification); *see also* Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317, 1323 (11th Cir. 2023) (stating that where "the Fourteenth Amendment Ratification Era understanding of the right to keep and bear arms . . . differ[s] from the 1789 understanding[,] . . . the more appropriate barometer is the public understanding of the right when the States ratified the Fourteenth Amendment and made the Second Amendment applicable to the States"), *vacated on grant of reh'g en banc*, 72 F.4th 1346 (11th Cir. 2023) (mem.); Gould v. Morgan, 907 F.3d 659, 669 (1st Cir. 2018) ("Because the challenge here is directed at a state law, the pertinent point in time would be 1868 (when the Fourteenth Amendment was ratified).").

191. On the role of antebellum police power jurisprudence in shaping the contours of early American firearms law, see Cornell, *Constitutional Mischiefs*, *supra* note 40, at 32–35.

Table 1

States with Firearms Laws Limiting Minors Enacted Between 1851–1890

State	Year	Provision
Alabama	1856	Act of Feb. 2, 1856, no. 26, § 1, 1856 Ala. Laws 17, 17 (making it unlawful to sell, give, or lend an air gun or pistol to a male minor).
Tennessee	1856	Act of Feb. 26, 1856, ch. 81, § 2, 1856 Tenn. Pub. Acts 92, 92 (making it unlawful to sell, loan, or give to any minor a pistol).
Kentucky	1860	Act of Jan. 12, 1860, ch. 33, § 23, 1859 Ky. Acts 241, 245 (making it unlawful for anyone other than a parent or guardian to sell, give, or loan any pistol or other deadly weapon which can be conceal carried to a minor).
Indiana	1875	Act of Feb. 27, 1875, ch. 40, § 1, 1875 Ind. Acts 59, 59 (making it unlawful to sell, barter, or give a pistol or other deadly weapon to any person under twenty-one).
Georgia	1876	Act of Feb. 17, 1876, no. 128, § 1, 1876 Ga. Laws 112, 112 (making it unlawful to sell, give, lend, or furnish any pistol or other deadly weapons to a minor).
Mississippi	1878	Act of Feb. 28, 1878, ch. 46, § 2, 1878 Miss. Laws 175, 175 (making it unlawful to sell a pistol or other similarly deadly weapon to a minor).
Delaware	1881	Act of Apr. 8, 1881, ch. 548, § 1, 16 pt. 2 Del. Laws 716, 716 (1881) (making it unlawful to sell a deadly weapon to a minor).
Florida	1881	Act of Feb. 4, 1881, ch. 3285, §§ 1–2, 1881 Fla. Laws 87, 87 (making it unlawful to sell, hire, barter, lend, or give a pistol or other arm or weapon, with certain exceptions, to minors under sixteen).
Illinois	1881	Act of Apr. 16, 1881, § 2, 1881 Ill. Laws 73, 73 (making it unlawful for any person other than a parent, guardian, or employer to sell, give, loan, hire, or

		barter a pistol, revolver, or other deadly weapon to a minor).
Pennsylvania	1881	Act of June 10, 1881, no. 124, § 1, 1881 Pa. Laws 111, 111–12 (making it unlawful to sell a revolver, pistol, or other deadly weapon, to a person under sixteen).
Maryland	1882	Act of May 3, 1882, ch. 424, § 2, 1882 Md. Laws 656, 656 (making it unlawful to sell, barter, or give away any firearm or other deadly weapons, with some exceptions, to a minor under the age of twenty-one).
West Virginia	1882	Act of Mar. 24, 1882, ch. 135, § 7, 1882 W. Va. Acts 421, 421–22 (making it unlawful to furnish a revolver, pistol, or other dangerous and deadly weapon, to a person under twenty-one).
Kansas	1883	Act of Mar. 1, 1883, ch. 105, §§ 1–2, 1883 Kan. Sess. Laws 159, 159 (making it unlawful to furnish a pistol, revolver, toy pistol, or other dangerous weapon to a minor, and making it unlawful for any minor to possess such weapons).
Missouri	1883	Act of Mar. 5, 1883, § 1, 1883 Mo. Laws 76, 76 (making it unlawful to sell, deliver, loan, or barter a firearm or other deadly weapon to a minor without their parent's or guardian's consent).
Wisconsin	1883	Act of Apr. 3, 1883, ch. 329, §§ 1–2, 1883 Wis. Sess. Laws 290, 290 (making it unlawful for any person to sell, loan, or give a pistol or revolver to a minor, and making it unlawful for any minor to go armed with any pistol or revolver).
Iowa	1884	Act of Mar. 29, 1884, ch. 78, § 1, 1884 Iowa Acts 86, 86 (making it unlawful to sell, present, or give any pistol, revolver, or toy pistol to a minor).
Nevada	1885	Act of Mar. 2, 1885, ch. 51, § 1, 1885 Nev. Stat. 51, 51 (making it unlawful for any person under twenty-one to wear or carry any concealed pistol or other dangerous or deadly weapon).

Post–Civil War legal authorities recognized that improvements in gun technology and changes in society posed new challenges to government's efforts to preserve the peace. In particular, the proliferation of small pistols, some expressly marketed to young people, prompted a backlash as legislators responded to increasing levels of gun violence among minors.[192] The rising levels of gun violence, including accidents, in the post–Civil War era drew notice by jurists, journalists, and physicians.[193] Indeed, one prominent medical expert noted that an entire class of firearms injuries were specific to boys whose behavior with guns was reckless and whose access to smaller firearms made injuries more likely.[194] The development of smaller weapons specifically targeted at minors exacerbated a problem that had emerged in the antebellum era, prompting widespread calls for more regulation.[195]

Although the problems society faced were new, the legal tools used by governments to legislate were not. As had been true during the antebellum era, states and localities turned to their ample police powers to justify new laws and regulations. Lewis Hochheimer, one of the leading authorities on domestic law and

192. *See* Saul Cornell, *The Right to Regulate Arms in the Era of the Fourteenth Amendment: The Emergence of Good Cause Permit Schemes in Post-Civil War America*, 55 UC DAVIS L. REV. ONLINE 65, 68–70, 78 (2021) [hereinafter Cornell, *Right to Regulate*] (discussing the rising level of gun violence in the Reconstruction Era and the bevy of new laws, including laws aimed at limiting the access of weapons to minors, passed by legislators in response). For a good illustration of this concern in regard to minors, see J.N. Hall, *Accidents with Firearms*, 23 OUTING, Oct. 1893–Mar. 1894, at 89, 89–90.

193. For an examination of the proliferation of journalistic accounts of gun violence in the post–Civil War era, see Jennifer Carlson & Jessica Cobb, *From Play to Peril: A Historical Examination of Media Coverage of Accidental Shootings Involving Children*, 98 SOC. SCI. Q. 397, 403–04 (2017).

194. J.N. Hall, *Accidental Gun Shot Wounds: A Medico-Legal Study*, MED. REC., Sept. 19, 1896, at 408, 411 ("Perhaps the most prolific cause of accidental shootings is to be found in the habit of pointing a weapon at another in fun, under the impression that it is not loaded. . . . Children learn to shoot toy pistols and are permitted to fire them at one another with impunity. Then, obtaining a revolver in some manner, they use it in similar fashion. . . . Sheer foolhardiness is responsible for an enormous number of accidents.").

195. *See Firearms*, IOWA STATE BD. OF HEALTH, MONTHLY BULLETIN, June 1891, at 75, 75–76 (noting that, in reference to revolvers especially, "[t]he practice of carrying concealed weapons seems on the increase, and is indulged in too often by mere boys and generally without the slightest excuse," and calling for "vigorous enforcement of the law prohibiting the carrying of firearms . . . especially the law prohibiting the sale of firearms to children").

respected commentator on legal matters, addressed these developments in his influential writing on the police power.[196] Fortunately, the problem of guns and minors was easily addressed using the police power framework that antebellum jurists had developed to address these questions.[197] The regulation of firearms was an area of the law in which the police power was at its greatest reach.[198] Interestingly, Hochheimer noted that "infants," those below the age of legal majority,[199] were not entirely beyond the protection of the Bill of Rights,[200] but Hochheimer

196. *See New Books and Editions: Hochheimer on Custody of Infants,* 36 ALB. L.J. 380, 380 (1887) (celebrating Hochheimer's new book, *The Law Relating to the Custody of Infants*).

197. *See* Lewis Hochheimer, *The Police Power*, 44 CENT. L.J. 158, 158, 161 (1897). Hochheimer defined the police power as "the inherent and plenary power of a State or government to prescribe regulations to preserve and promote the public safety, health and morals, and to prohibit all things hurtful to the comfort and welfare of society." *Id.* at 158. He noted that "[t]he constitutionality of statutes as to the care and protection of minors has been universally upheld," and that States may utilize their police power in regard to minors for purposes of care and "moral training." *See id.* at 161.

198. *See* LEWIS HOCHHEIMER, A MANUAL OF CRIMINAL LAW AS ESTABLISHED IN THE STATE OF MARYLAND 146–47 (1889) ("The carrying or wearing of dangerous or deadly weapons concealed upon or about the person and the carrying or wearing of such weapons openly, with the intent or purpose of injuring any person, are statutory offenses. Such statutes have frequently been held not to conflict with the constitutional right of the people of the United States to keep and to bear arms." (footnotes removed)); ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 246–47 (1904) (detailing the permissibility of laws that restrained adults from selling deadly weapons to minors and commenting that "[t]he constitutionality of legislation for the protection of children or minors is rarely questioned; and the legislature is conceded a wide discretion in creating restraints"); Glenn v. State, 10 Ga. App. 128, 72 S.E. 927, 928 (1911) ("The police power of the state makes a special charge of minors. It gathers them under its ample and protective wing 'even as a hen gathereth her brood.' Minors, as to their property rights, are the wards of chancery. Minors, as to their protection from vicious conduct or habits, are the wards of the police power of the state. The truth of the latter part of this statement is proved by the numerous statutes in the Code restricting the exercise by adults of rights in so far as the exercise of these rights relate to minors.").

199. LEWIS HOCHHEIMER, THE LAW RELATING TO THE CUSTODY OF INFANTS 1 (3d ed. 1899).

200. *See id.* at 2 ("The only limitations upon the governmental power are those resulting from the obligation towards the infant himself, not to infringe upon those constitutional guaranties and safeguards which are enacted for the security and protection of the person and property of all citizens. Thus, the constitutional requirement, that no person shall be deprived of life, liberty or

was quick to point out that the need to protect those below the age of majority meant that some types of firearms regulations that were impermissible if applied to adults were perfectly legal when regulating infants.[201] In this instance, the broad power to protect the welfare of minors gave government extraordinary latitude in regulating their conduct.[202] Hochheimer's comments echoed other commentators from the period who saw firearms regulation as the *locus classicus* of state police power authority.[203]

II. THE HISTORICAL CONTEXT OF MINORS' RIGHTS IN TODAY'S SECOND AMENDMENT

The question at issue for courts is how the historical status of eighteen-to-twenty-year-olds as minors affects the modern-day Second Amendment right. *Bruen*'s approach compels courts to recognize and incorporate the historical limitations on minors' autonomy into any analysis of modern age-limit firearm regulations—either at *Bruen*'s first step, as minors were not part of "the people" with Second Amendment rights at the Founding, or at the second step, as evidence that government has historically limited minors' ability to keep and bear arms as part of a long

property without due process of the law operates as a limitation upon the general powers of the courts over the estates of infants as well as a prohibition of any legislation . . . .").

201. *See id.* at 3–4 (describing how governments' exercise of duty and power to protect and care for infants includes "[s]pecific regulations and prohibitions, designed for the protection of their morals and health and the security of their persons, such as those relating to the sale of . . . dangerous weapons," i.e., firearms). A Reconstruction era review of Hochheimer's book on infants praised the work for its exhaustive treatment of the subject, noting that it offered a "convenient and comprehensive summary" of the rights, remedies, and procedures available to infants, parents, guardians, and courts in this area of the law. *New Books and Editions: Hochheimer on Custody of Infants*, *supra* note 196, at 380. A brief review in the *Harvard Law Review* also praised the book for its "careful exposition of a small but important topic in the law." *Reviews*, 13 HARV. L. REV. 416, 420 (1900) (book review) (giving a positive review to Lewis Hochheimer's book, *The Law Relating to the Custody of Infants*).

202. *See* HOCHHEIMER, *supra* note 199, at 2–4 (describing the scope of the government's police power over infants).

203. For an exploration of the broad legal consensus on the scope of police power regulation of arms during the era of the Fourteenth Amendment, see Cornell, *Right to Regulate*, *supra* note 192. For a discussion of the regulation of gun access by infants during this period, see *supra* notes 185–97 and accompanying text.

historical tradition of arms regulation.[204] As *Bruen* and *Heller* tell us, "[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*."[205] The historical tradition and context in which minors operated at the Founding must factor into any analysis of the constitutionality of modern-day age-limit regulations. *Bruen*'s focus solely on history, tradition, and the plain text of the Second Amendment mandate such an analysis.[206] Courts have nonetheless been reluctant to start from the position that minors are not part of the people with Second Amendment rights.[207] The historical tradition of limiting minors' autonomy in multiple areas of the law, including firearms regulation, provides ample evidence that government can limit eighteen-to-twenty-year-olds' access to firearms and their ability to carry firearms legally in public today.

A. LIMITS ON EIGHTEEN-TO-TWENTY-YEAR-OLDS SPAN THE LONG ARC OF AMERICAN HISTORY

Several courts addressing firearm age limits have reasonably expressed concerns about defining "the people" whom the Second Amendment protects today as the political community that existed at the Founding era.[208] Societal norms about

204. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 591 U.S. 1, 24 (2022); *see also, e.g.*, United States v. Sitladeen, 64 F.4th 978, 985 (8th Cir. 2023) (interpreting *Bruen* to require a two-part test).

205. *Bruen*, 591 U.S. at 34 (quoting District of Columbia v. Heller, 554 U.S. 570, 634–35 (2007)).

206. *See, e.g.*, United States v. Collette, 630 F. Supp. 3d 841, 848–51 (W.D. Tex. 2022) (noting the nation's "longstanding" tradition of exercising its right to exclude those who committed crimes and violence from "the people").

207. *See*, *e.g.*, Firearms Pol'y Coal., Inc. v. McCraw, 623 F. Supp. 3d 740, 748 (N.D. Tex. 2022) (concluding that law-abiding eighteen-to-twenty-year-olds are part of the "the people"); Nat'l Rifle Ass'n v. Bondi, 61 F.4th 1317, 1324 (11th Cir. 2023) (proceeding to *Bruen*'s second-step analysis without deciding whether eighteen-to-twenty-year-olds are part of "the people"), *vacated on grant of reh'g en banc*, 72 F.4th 1346 (11th Cir. 2023) (mem.).

208. *E.g.*, Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 672 F. Supp. 3d 118, 132–34 (E.D. Va. 2023); Transcript of Oral Argument at 57, Worth v. Harrington, 666 F. Supp. 3d 902 (D. Minn. 2023) (No. 21-cv-1348) ("If I endorse your idea that 'the people' excluded people who were not full participants in civic life, then whether I say it out loud or not, I am implicitly saying that the Bill of Rights only applies to certain people. And I am saying that 'the people' doesn't include people under 21, and whatever analysis I use to reach that conclusion, it's hard to figure out how I don't also find that it doesn't apply to women, which can't be.").

inclusion and democracy have changed dramatically over the past two centuries.[209] As the *Fraser* court noted, "[i]t is no secret" that the voting population at the time of the Founding was limited to white male property owners.[210] Certainly, limiting voting rights—or other constitutional rights—to the subset of the citizenry that accounted for the voting population at the Founding would not be constitutional today.[211] But the historical understanding of minors and the rights they held at the time of the Founding is nonetheless relevant to evaluating the scope of the modern-day Second Amendment right as it applies to eighteen-

209. *See, e.g.*, Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 909 (2023) ("Only recently have women taken seats on the Supreme Court and begun to play a role in the articulation of our fundamental law. Yet women are asked to accept a Constitution that was written and interpreted for centuries by men *only* as a Constitution that speaks for men and women *both*. What does it mean when the Supreme Court endorses originalist and history-and-traditions methods that amplify this bias, by centering the Constitution's meaning around lawmaking from which women were excluded[?]" (footnote omitted)).

210. *Fraser*, 672 F. Supp. 3d at 133.

211. Courts have relied on historical guideposts that would no longer be acceptable or constitutional today in other areas of Second Amendment jurisprudence, including as historical analogues for *Bruen*'s second step. *See, e.g.*, United States v. Jackson, 69 F.4th 495, 502–03 (8th Cir. 2023) (noting how "[i]n colonial America, legislatures prohibited Native Americans," religious minorities such as Catholics, and people who refused to declare an oath of loyalty, "from owning firearms," and stating that "[w]hile some of these categorical prohibitions of course would be impermissible today under other constitutional provisions, they are relevant here in determining the historical understanding of the right to keep and bear arms"); *see also* Kanter v. Barr, 919 F.3d 437, 458 & n.7 (7th Cir. 2019) (Barrett, J., dissenting) (considering historical laws categorically prohibiting firearms on the basis of race, notwithstanding that "[i]t should go without saying that such race-based exclusions would be unconstitutional today"). *But see* Range v. Att'y Gen., 69 F.4th 96, 105 (3d Cir. 2023) (rejecting Founding-era laws that "disarmed groups [contemporary governments] distrusted like Loyalists, Native Americans, Quakers, Catholics, and Blacks" as not analogous because the defendant in that case is not part of a similar group today). While historical laws that derive from racist or discriminatory motives do not justify modern laws driven by similar animus, ignoring these Founding-era laws entirely distorts the relevant history. As one court has recently noted, a failure to understand those laws in context presents a distorted "picture" that is "incomplete or misleading." Baird v. Bonta, No. 2:19-CV-00617-KJM-AC, 2023 WL 9050959, at *25 (E.D. Cal. Dec. 29, 2023).

to-twenty-year-olds because society continues to recognize the special status of minors under law.[212]

Limits on the rights of minors are grounded in long standing views that their ability to evaluate risk and make responsible decisions is compromised. The law has always countenanced some restrictions based on age for this reason. Age is not a suspect class under the Fourteenth Amendment, unlike gender or race, and the U.S. Supreme Court has expressly held that "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests."[213] Laws that assign different rights or privileges on the basis of age, in contrast to insidious distinctions based on race, gender, or other suspect classifications, are tied to legitimate interests of the state and are now grounded in hard scientific evidence. Age restrictions do not target "discrete and insular minorit[ies]."[214] Nor do they represent the kind of invidious discrimination associated with laws targeting persons based on such suspect categories as race, religion, national origin, and alienage.[215] Also, unlike legislation targeting suspect

212. *Cf.* Joseph Blocher & Caitlan Carberry, *Historical Gun Laws Targeting "Dangerous" Groups and Outsiders*, *in* NEW HISTORIES OF GUN RIGHTS AND REGULATION: ESSAYS ON THE PLACE OF GUNS IN AMERICAN LAW AND SOCIETY, *supra* note 76, (manuscript at 12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3702696 [https://perma.cc/7VCL-V8WS] (arguing that gun regulations "at the Founding (or in the mid 1800s for state and local laws), even those whose specific targets are no longer relevant, desirable or even constitutional" are relevant to evaluating the scope of the government's power to regulate guns under the Second Amendment); Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE 30 (2023) (arguing for an approach that relies on abstracting general principles of historical laws with now-unconstitutional goals, while condemning the reasons for their adoption).

213. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 84 (2000). "States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." *Id.* at 83. The Court then compared the higher scrutiny that applies to discrimination on the basis of gender or race. *Id.*

214. *Id.* at 83 ("Old age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it." (citing Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313–14 (1976))); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (referencing the merit of applying heightened scrutiny when analyzing legislation targeting "discrete and insular minorities").

215. *Cf.* Ortwein v. Schwab, 410 U.S. 656, 660 (1973) (contrasting discrimination against the poor with suspect categories of "race, nationality, [and] alienage").

classifications, all individuals who reach the age of an average life span have experience with being a teenager.[216] In short, age-based restrictions do not pose the same type of equal protection concerns that arise in the context of other features of established Fourteenth Amendment law.[217]

Importantly, while society long ago repudiated discriminatory laws based on race, religion, gender, or status, society's view of teenagers has not shifted in the same way. As the *Fraser* court noted, "[s]ince time immemorial, teenagers have been, well, teenagers."[218] Put another way, the Founding era's concerns about teenagers' ability to make mature decisions has not shifted. Modern laws and policies limiting the rights of those under the age of twenty-one exist now for the same reason that similar restrictions have been in place for centuries: individuals under the age of majority are limited in their capacity to act responsibly in the eyes of the law.[219] Minors today, as was true in the Founding era, do not have capacity to make fully informed mature decisions.[220] Although the Founding era's views of

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216. *Kimel*, 528 U.S. at 83.

217. *See id.* ("[A]ge is not a suspect classification under the Equal Protection Clause.").

218. Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 672 F. Supp. 3d 118, 145 (E.D. Va. 2023).

219. By way of example, the legislative history for the federal law that prohibits those under twenty-one from purchasing handguns noted concerns about handguns that had been sold by FFLs to "emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior." Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901(a)(6), 82 Stat. 197, 225–26 (1968).

220. The underdeveloped capacity of the brains of eighteen-to-twenty-year-olds recently led the Massachusetts Supreme Judicial Court to hold that sentencing eighteen-to-twenty-year-olds to life in prison without the possibility of parole was unconstitutional cruel and unusual punishment. Commonwealth v. Mattis, 224 N.E.3d 410, 415 (Mass. 2024). The trial judge made four core findings of fact following an evidentiary hearing, including that eighteen-to-twenty-year-olds

> (1) have a lack of impulse control similar to sixteen and seventeen year olds in emotionally arousing situations, (2) are more prone to risk taking in pursuit of rewards than those under eighteen years and those over twenty-one years, (3) are more susceptible to peer influence than individuals over twenty-one years, and (4) have a greater capacity for change than older individuals due to the plasticity of their brains.

Id. at 421 (footnote omitted). The court concluded that "[t]he driving forces behind these behavioral differences are the anatomical and physiological

appropriate limits on minors were not based on evidence drawn from modern neuroscience or psychology, the law recognized that such persons were not fully developed as adults until they reached the legal age of majority.[221]

Moreover, today we have a greater understanding than existed in the Founding era of *why* eighteen-to-twenty-year-olds do not have the capacity to make fully mature decisions, due to our greater understanding of the development of brain physiology and chemistry.[222] Modern scientific discovery has identified that the brains of young adults do not finish developing until they are approximately twenty-five years old, or even later.[223] Specifically, the prefrontal cortex, which controls impulse control and judgment, continues to develop into one's mid-twenties.[224] Comparatively, the limbic system, which controls emotions of pleasure, fear, and anger, develops well before the prefrontal cortex,

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differences between the brains of emerging and older adults." *Id.* (citing Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78, 82–84, 85–89 (2008)). If the mental maturity of eighteen-to-twenty-year-olds is different enough that the Constitution prohibits them from being sentenced in the same way as older adults, it should follow that governments can lawfully determine that this age group's access to and carry of firearms poses sufficient risk that limitations are necessary.

221. *See supra* text accompanying notes 68–70.

222. *See generally* Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861 (1999) (analyzing gray and white matter brain development in people between the ages of four and twenty-one), https://www.nature.com/articles/nn1099_861.pdf [https://perma.cc/J65F-WPE2]. In this important pediatric neuroimaging study, Giedd and his team "examined magnetic resonance brain imaging data of typically developing children and adolescents . . . . [and] found steady increases in the overall volume of white matter with increasing age (individuals in the study were 4–21 years old)." Praveen Kambam & Christopher Thompson, *The Development of Decision-Making Capacities in Children and Adolescents: Psychological and Neurological Perspectives and Their Implications for Juvenile Defendants*, 27 BEHAV. SCIS. & L. 173, 179 (2009). Changes in white matter volume, along with a host of other changes and developments in the brain "during adolescence and early adulthood[,] reinforce[] the notion that adolescence is likely a time of significant risk for engaging in potentially problematic, even criminal, behavior and, to some extent, begin[] to provide an etiology/explanation for these behaviors." *Id.* at 187.

223. Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 453 (2013). *See generally* B.J. Casey et al., *The Adolescent Brain*, 1124 ANNALS N.Y. ACAD. SCIS. 111 (2008) (offering a modern understanding of childhood brain development and its effect on adolescent behavior).

224. Arain et al., *supra* note 223, at 453.

which can cause impulsive emotions and desires to overcome rational thinking.[225] The effect is that members of this age group typically have more difficulty exercising self-control and effectively weighing risk, leading to greater impulsivity, including a heightened reaction to perceived threats.[226] The modern scientific understanding of eighteen-to-twenty-year-olds' brain development provides evidence for why states routinely choose to limit this group's access to specific firearms and lawful ability to carry in public. Thus, while an evolved societal understanding of race and gender has discredited the foundation for laws discriminating against women and racial minorities,[227] the evolution of our modern understanding of brain development only reinforces why limits on minors are both necessary and appropriate.

Modern laws reflect a broad scientific and social consensus that eighteen-to-twenty-year-olds lack the maturity to make fully informed decisions in many areas—the same understanding that prevailed at the Founding. For these reasons, both laws and market forces have limited what minors are permitted to do. Individuals between eighteen and twenty years of age are prevented from lawfully using alcohol or tobacco,[228] and they cannot

225. *Id.*

226. Dreyfuss et al., *supra* note 7, at 226 (finding that adolescents—particularly males—were more likely to react impulsively to threat cues than their older and younger peers); *see* Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCH. 1764, 1764 (2008) (finding that adolescents are vulnerable to risk taking because of a combination of higher inclination to seek excitement and immature capacities for self-control).

227. *See*, *e.g.*, Kirchberg v. Feenstra, 450 U.S. 455, 456 (1981) (striking down a statute giving a husband the unilateral right to dispose of joint property without his spouse's consent as unconstitutional gender-based discrimination); Allen v. Milligan, 599 U.S. 1, 24 (2023) (striking down voting maps that diluted voting power based on race as unconstitutional discrimination).

228. 21 U.S.C. § 387f(d)(5) (prohibiting those under twenty-one from purchasing tobacco products); 23 U.S.C. § 158(a)(1)(A) (setting the national legal age to drink alcohol at twenty-one).

rent a car in a majority of states.[229] Several states do not permit eighteen-year-olds to adopt a child.[230]

The most important counter example, the change in the legal age for voting, occurred in 1971, when concerns about the draft during the Vietnam War put political pressure on government to allow those drafted to be able to vote.[231] Prior to this change, the history of voting supports the long-standing view that minors have not been entrusted with the full rights of citizens. "Since the nation's founding, a voting age of twenty-one . . . had been a remarkable constant in state laws governing the franchise" due to a "traditional consensus that twenty-one was the age of political maturity."[232] The voting age has been eighteen for a fraction of American history and is a recent innovation in American law. If Americans wish to expand gun rights by setting aside the long-standing view that easy access to guns by minors poses unacceptable risks to public safety, the proper approach would be do so by statute. Legislatures have instead done the opposite, and consistently restrict eighteen-to-twenty-year-olds' access to firearms.[233] *Bruen*'s directive that courts must turn to history to define the scope of Second Amendment rights prevents courts from overruling these legislative choices, which are ably supported by history from the Founding and Reconstruction eras.[234]

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229. *See* Christopher Elliott, *Car Rental Age Restrictions Can Be Complicated. Here's What to Know.*, WASH. POST (Jan. 18, 2023), https://www.washingtonpost.com/travel/tips/car-rental-age-restrictions [https://perma.cc/SHV3-Q7FT] ("There are no upper age limits in the United States, but car rental companies may restrict rentals to young drivers. For example, Enterprise and its brands (including Alamo and National) don't allow retail rentals to anyone under 21 in the United States and Canada, except in New York and Michigan, where state laws set the minimum at 18. Avis and Budget are the same.").

230. COLO. REV. STAT. § 19-5-202(1) (2024); DEL. CODE ANN. tit. 13, § 903(3) (2023); OKLA. STAT. tit. 10, § 7503-1.1 (2023).

231. U.S. CONST. amend. XXVI, § 1; *see also* Eric S. Fish, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1219 (2012) (discussing the impact the Vietnam War had on the passage of the Twenty-Sixth Amendment).

232. KEYSSAR, *supra* note 58, at 225.

233. *See* statutes cited *supra* note 1 (providing a non-exhaustive list of modern laws restricting minors' access to firearms).

234. *See infra* Part III (detailing *Bruen's* second step historical tradition requirement and discussing some courts' misapplication of history and tradition in age-limit cases).

B. THE CENTRALITY OF THE COMMON LAW TO *BRUEN*'S METHOD

Courts should not discount the common law when interpreting early American statutes and Founding era law more generally. *Bruen* correctly noted that some aspects of the common law were not absorbed into early American law,[235] but it is beyond dispute that the common law and common law modes of legal analysis remained vital in the period in which the Second Amendment was adopted. In contrast to most modern lawyers, the members of the First Congress who wrote the words of the Second Amendment and the American people who enacted the text into law were well schooled in English common law ideas.[236] Not every feature of English common law survived the American Revolution, but there were important continuities between English law and the common law in America.[237] Each of the new states, either by statute or judicial decision, adopted multiple aspects of the common law, focusing primarily on those features of English law that had been in effect in the English colonies for generations.[238]

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235. N.Y. State Rifle & Pistol Ass'n v. Bruen, 591 U.S. 1, 39 (2022). On the absorption of the common law in America, see generally KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM (2011).

236. *See* William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 426 (1968) (noting that courts in post-revolutionary America applied common law in their decisions).

237. *See id.* ("The post-Revolutionary evidence makes it nigh conclusive that Chief Justice Daniel Horsmanden spoke not only for New York but of colonial America when he said in 1765 that the courts applied the common law 'in the main.'"); MD. CONST. of 1776, Declaration of Rights, art. III ("[T]he inhabitants of Maryland are entitled to the common law of England, and the trial by Jury, according that law, and to the benefit of such of the English statutes, as existed at the time of their first emigration, and which, by experience, have been found applicable to their local and other circumstances . . . ."). For a discussion of the relationship between colonial legal origins and the constitution of empires, see generally Benton & Walker, *supra* note 71.

238. 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 29–30 (James T. Mitchell & Henry Flanders eds., 1903) (adopting and adapting some provisions from English common law); FRANCOIS-XAVIER MARTIN, A COLLECTION OF THE STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH-CAROLINA 60–61 (1792) (adopting English common law of firearms regulation); Commonwealth v. Leach, 1 Mass. 59, 60–61 (1804) ("[G]enerally speaking . . . the *English statutes* which were in force at the time of the emigration of our ancestors from that country, are common law *here*. The statutes of *Ed.* III. have been adopted and practised upon *here*, and are, therefore, to be considered as part of our common law.").

Some lower courts have misapplied *Bruen*, failing to distinguish between those aspects of the common law vital to understanding early American law and those aspects of the common law that were rejected by early American courts and legislatures.[239] *Bruen* does not stand for the proposition that common law can never be used to provide insight into the historical understanding of the Constitution at the time of its adoption, it stands for the proposition that one must approach the absorption of the common law with some degree of historical sophistication.[240]

Relying on the common law is, in fact, necessary to understand the interpretive rules and background assumptions of laws governing the interpretation of early American statutes.[241]

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239. *See* Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes:* Bruen*'s Originalist Distortions*, SCOTUSBLOG (June 27, 2022), https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions [https://perma.cc/S2HD-K3JW] (describing the selective interpretation of historical evidence to support gun-rights claims while dismissing or ignoring counterevidence).

240. *See Bruen*, 591 U.S. at 38, 43–44, 46–47, 59 (referencing and relying on the common law and historical statutes codifying the common law and noting that the government can rely on "an American tradition" to justify a modern-day law).

241. *See* Munroe Smith, *State Statute and Common Law*, 2 POL. SCI. Q. 105, 105–06 (1887) ("The law of the American colonies, like the rest of their civilization, was English; and the development of American law, however modified by new conditions and alien grafts, has been and is a growth from English roots. The English law which the colonists brought with them and by which they lived—avowedly, in most cases; actually, where they did not avow it—was case law, *i.e.*, judge-made law. . . . The United States emerged from the war of independence with this body of English judge-made law as the basis of their legal development."). The Supreme Court has extensively relied on the common law for examples of the nation's historical tradition when evaluating the scope of other constitutional rights. S*ee, e.g.*, Tyler v. Hennepin County, 598 U.S. 631, 639–42 (2023) (analyzing common law to interpret a Fifth Amendment takings claim); Washington v. Glucksberg, 521 U.S. 702, 712 (1997) (relying on the Anglo-American common law tradition in deciding that individuals do not have a fundamental liberty interest in receiving assisted suicide under the Due Process Clause of the Fourteenth Amendment); Wilson v. Arkansas, 514 U.S. 927, 931 (1995) (looking to protections against unreasonable searches and seizure permitted by common law in evaluating scope of Fourth Amendment right). In *Dobbs v. Jackson Women's Health Organization*, decided the day after *Bruen*, the Court significantly relied on "eminent common-law authorities" and noted expressly that "American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions." 597 U.S. 215, 217, 242–43 (2022).

Early American judges and legislators were schooled in common law modes of interpretation. The distinguished Connecticut jurist Zephaniah Swift summarized these common law-based rules of construction in an influential early constitutional text.[242] Three of the paramount rules used to make sense of statutes were linked to the common law tradition:

> [I]t is impracticable to make statutes so plain and explicit that no doubt can be entertained respecting their meaning, certain rules of construction have been adopted.
>
> 1. The intention of the makers of the statute is to be pursued in the construction of it, and may be collected from the cause or necessity of making it, as well as from other circumstances.
>
> 2. The common law is to be regarded in the construction of statutes, and three things are to be considered. The old law, the mischief, and the remedy: that is, how the common law stood at the time of the making of the act; what the mischief was for which the common law did not provide: and what remedy the statute had provided to cure the mischief: and the business of the judges is so to construe the act as to suppress the mischief and advance the remedy.
>
> 3. When a statute makes use of a word, the meaning of which is known to the common law, the word shall be understood in the same sense.[243]

Thus, taking text, history, and tradition seriously means reckoning with the common law, including its key concepts and modes of statutory construction. When these laws are applied to early law, the claim that minors were fully included among the people who enjoyed Second Amendment rights is no longer tenable.

III. *BRUEN*'S SECOND STEP: THE HISTORICAL TRADITION OF REGULATING MINORS

The common law, public understanding of minors' place in society from the time of the Founding, and laws enacted prior to the Civil War are vital to analyzing modern age-limit regulations within the *Bruen* framework. Yet it is also necessary to consider laws responding to developments in firearms technology and production in the century between the adoption of the Second Amendment and the Fourteenth, which altered how guns were used and significantly changed gun violence in Reconstruction America.

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242. SWIFT, *supra* note 98, at 11.

243. *Id.* (footnotes omitted).

At the second step of the *Bruen* test, the government must identify regulatory analogues to demonstrate that the modern regulation is consistent with this nation's historical tradition.[244] The court then determines whether the challenged regulation is similar enough to the government's proposed historical analogues to justify the modern law, with particular emphasis on "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified."[245] *Bruen* directs courts to look at "how and why the regulations burden a law-abiding citizen's right to armed self-defense" as meaningful metrics for this analogical reasoning.[246]

The state and municipal laws that regulated minors' access to firearms discussed herein[247] are consistent with society's continued understanding at the Founding that parents, guardians, and other adults were responsible for keeping those under the age of twenty-one safe. Minors' access to firearms was mediated through the patriarchal structure of the family and comparable institutions governed by the principle of in loco parentis.[248] In the context of the militia, minors were also supervised and subject to the harsh rules of military discipline and punishment.[249] As described above, minors did not typically purchase weapons directly themselves because of their limited ability to make contracts.[250]

Some of the courts addressing age limits post-*Bruen* have rejected pre–Civil War era laws governing parents or other

244. *Bruen*, 597 U.S. at 24.

245. *Id.* at 29.

246. *Id.* For analysis of how *Bruen*'s metrics of "how" and "why" are insufficient to resolve Second Amendment challenges, see Blocher & Ruben, *supra* note 173, at 109–13.

247. *See supra* Part I.E.

248. *See supra* Parts I.B–I.C.

249. *See supra* notes 125–34 and accompanying text.

250. *See* Brewer Amici Curiae, *supra* note 61, at 20 ("By the late eighteenth century, it was an established rule that young people under the age of 21 could not make contracts except for necessaries. While the exact scope of those 'necessaries' was slightly flexible and debatable, Amicus has never encountered a situation where a firearm was considered a necessary. Thus, at the time of the founding, people under the age of 21 could only enter into contracts for food, clothes, lodging, and occasionally education . . . ."); *see also* Brewer, *supra* note 30, at 230–87 (providing a comprehensive overview of minors' abilities to form contracts from the sixteenth to the nineteenth century).

adults as sufficiently similar historical analogues for modern age-limit laws, without taking this historical context into account. As one court noted, "[t]hese laws are not properly characterized as 'restrictions on the use of firearms by minors.'"[251] Today's age-limit laws respond to the fact that eighteen-to-twenty-year-olds today access firearms differently than they did at the time of the Founding, including through direct purchases.[252] Direct regulation of minors is more effective and appropriate now than it was at the Founding. Yet both these historical and modern laws have the same "why": concerns about public safety resulting from minors' impulsivity and their improper usage of firearms.[253] As the court in *Jones v. Bonta* explained, "The foregoing are examples of historical regulations which limited the ability of 18-20-year-olds to purchase, acquire and possess certain weapons in common use to ensure public safety due to the immaturity of individuals under the age of 21."[254] Both sets of laws also have the same "how": limiting minors' access to weapons by regulating the main mechanism minors use to obtain weapons.

The lack of direct regulation of minors at the Founding is also explained by firearms technology at the time. At the time of the ratification of the Second Amendment, about ninety percent of the guns owned by Americans were long guns.[255] Flintlocks and muzzle-loading weapons took too long to load and were too

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251. Rocky Mountain Gun Owners v. Polis, No. 23-cv-01077-PAB, 2023 WL 5017253, at *18 (D. Colo. Aug. 7, 2023) (quoting The Governor's Response to Plaintiff's Motion for Preliminary Injunction at 17, *Rocky Mountain Gun Owners*, 2023 WL 5017253 (23-cv-01077)); *see also* Worth v. Harrington, 666 F. Supp. 3d 902, 925 (D. Minn. 2023) ("Several of the Reconstruction-era laws pointed to by the Commissioner prohibited sales of firearms to minors, but did not place restrictions on minors receiving them from parents or even employers. . . . These restrictions do not burden the Second Amendment right in a manner distinctly similar to the age requirement [of] Minnesota's permit-to-carry law." (footnote omitted)).

252. Daniel W. Webster et al., *How Delinquent Youths Acquire Guns: Initial Versus Most Recent Gun Acquisitions*, 79 J. URB. HEALTH 60, 60–68 (2002) (describing a study that demonstrated that youth obtained guns primarily through "purchases, gifts, and by finding them").

253. *See generally supra* note 246 and accompanying text (discussing *Bruen*'s "why" and "how" metrics).

254. Jones v. Bonta, No. 19-cv-1226-L-AHG, 2023 WL 8530834, at *8 (S.D. Cal. Dec. 8, 2023).

255. *See* Sweeney, *supra* note 120, at 61 tbl.3.5 (collecting firearm data on probate inventories of colonial male decedents).

inaccurate to make them effective instruments of anti-social violence or criminal activity.[256] Given these facts, gun violence was not a serious problem that prompted governments to limit minors' access to guns. Government arms policy at the time of the Second Amendment was driven by an alternative problem: too few military guns in the hands of members of the militia.[257] Public policy, both at the state and federal level, aimed to encourage the ownership of military-quality weapons needed for militia service and regulation was designed to further this objective.[258] Given the problems of arming the population, governments correctly directed enforcement mechanisms at those who had the economic resources to acquire weapons: adults, not minors.

Laws from the Reconstruction era, many of which did directly regulate minors, are relevant to showing the historical tradition of restricting minors' access and use of firearms, even though they were not in place at the time the Second Amendment was ratified. There was no systemic youth gun violence problem at the time of the Second Amendment's adoption, so there was no problem with minors and gun violence to regulate.[259] Times change, and the law seeks to respond to those changes. The expansion of laws regulating minors and guns over the courts of the nineteenth century illustrates this reality.

Technological changes and economic efficiencies in the nineteenth century made weapons that were more accurate and more easily concealable widely available.[260] The market revolution of the Jacksonian period (1828–1854) transformed American life, making a host of consumer goods—from wooden clocks to

256. *See* Roth, *supra* note 170, at 117 (discussing the limitations of muzzle-loading firearms).

257. *See* Sweeney, *supra* note 120, at 62 (discussing the difficulties faced by colonial governments who were attempting to properly arm the militia).

258. *See* CORNELL, A WELL-REGULATED MILITIA, *supra* note 141, at 69 ("To achieve the goal of having a well-regulated militia meant that government would encourage citizens to acquire military-style firearms and attain a basic competency with them.").

259. *See* CORNELL, A WELL-REGULATED MILITIA, *supra* note 141, at 138–40 (noting that America's first gun violence problem was during Jacksonian era and that proliferation of handguns and knives in Jacksonian era led to more interpersonal violence).

260. *See id.* at 137–41. For an in-depth discussion of the technological differences between eighteenth- and nineteenth-century firearms, see Roth, *supra* note 170, at 117–27.

firearms—widely available for the first time.[261] The impact of this inter-connected set of changes in production, consumption, and technology transformed gun culture by making a variety of weapons, including pistols, more common and reliable.[262] Cheap handguns became widely available for the first time in American history in the early decades of the nineteenth century.[263] In response to the perception that these guns posed a particular danger, states began passing laws to deal with the negative consequences of these weapons, including new limits on public carry.[264] As discussed above, these regulations also included regulation of minors' access to weapons.[265]

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261. *See generally* CHARLES SELLERS, THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815–1846 (1991) (providing a comprehensive overview of the changes in American life during the Jacksonian era); MERRITT ROE SMITH, HARPERS FERRY ARMORY AND THE NEW TECHNOLOGY: THE CHALLENGE OF CHANGE 17–21, 272–73 (1977) (describing the transformative effect technological advances had on the arms and machine tool industry during the early eighteenth century and, in the context of armorers and the Clock Strike of 1842, describing how "the new technology helped to lighten physical labor, increase output and yield a more uniform product," while also leading to a loss in the "artistry" of many goods); Andrew J.B. Fagal, *American Arms Manufacturing and the Onset of the War of 1812*, 87 NEW ENG. Q. 526, 526–37 (2014) (detailing the rise of United States military industry and manufacturing in the early eighteenth century, which "solved a critical problem that had beset the United States during the Revolutionary War: a ready domestic supply of arms and munitions"); Lindsay Schakenbach Regele, *Industrial Manifest Destiny: American Firearms Manufacturing and Antebellum Expansion*, 92 BUS. HIST. REV. 57, 57–83 (2018) (detailing the transformation of industrial firearms manufacturing during this period and the impact of Manifest Destiny ideology).

262. *See* CORNELL, A WELL-REGULATED MILITIA, *supra* note 141, at 137–41; Roth, *supra* note 170, at 120–22 (describing the transformation of firearms during the Jacksonian era).

263. *See* CORNELL, A WELL-REGULATED MILITIA, *supra* note 141, at 137–41.

264. *See supra* Table 1 and related text. For a good example of an early public carry law, see Act of Jan. 9, 1841, ch. 7, § 4, 1840 Ala. Laws 148, 148–49 ("Everyone who shall hereafter carry concealed about his person, a bowie knife, or knife or instrument of the like kind or description, by whatever name called, dirk or any other deadly weapon, pistol or any species of fire arms, or air gun, unless such person shall be threatened with, or have good cause to apprehend an attack, or be travelling, or setting out on a journey, shall on conviction, be fined not less than fifty nor more than three hundred dollars: It shall devolve on the person setting up the excuse here allowed for carrying concealed weapons, to make it out by proof, to the satisfaction of the jury; but no excuse shall be sufficient to authorize the carrying of an air gun, bowie knife, or knife of the like kind or description.").

265. *See supra* Table 1 and related text.

The municipal and state regulations which governed access to firearms and ammunition by those under the age of twenty-one are examples of how governments respond to the technological development of firearms and the resulting increase in interpersonal gun violence after the enactment of the Second Amendment. As Jennifer Carlson's work demonstrates, post–Civil War America became alarmed at the problem of gun violence and injury.[266] Concerns over the danger guns posed to minors increased dramatically during the era of the Civil War.[267] States responded to this concern with a variety of laws, including statutes enacted in 1856,[268] 1858,[269] and 1859,[270] all of which reflect responses to technological and societal developments post-1791. Municipal laws regulating minors' access to guns also expanded dramatically in this period.[271]

While *Bruen* left open the question of the degree of influence that laws enacted during the Reconstruction era should have for *Bruen*'s second-step historical analysis,[272] courts should not undervalue the expansion of legislative regulation of minors related to firearms during Reconstruction. The technological changes in firearms during the Civil War, the resulting effect on youth gun violence during the Reconstruction era, and government's responsive regulation demonstrate why there was a significant upsurge in laws regulating minors at that time.

266. On the growing perception of the threat guns posed to minors in the post–Civil War era, see Carlson & Cobb, *supra* note 193, at 399–407.

267. *See id.* at 403–04 (describing how in the years directly following the Civil War most public coverage of child-involved gun violence was framed as "as incidental private troubles, not systematic public concerns," but that by the 1880s "narratives that would frame child-involved shootings as more than mere accidents were taking shape").

268. *See, e.g.*, Act of Feb. 2, 1856, no. 26, § 1, 1856 Ala. Laws 17, 17 (making it unlawful to sell, give, or lend an air gun or pistol to a male minor).

269. *See, e.g.*, Act of Feb. 26, ch. 81, §§ 2–3, 1856 Tenn. Pub. Acts 92, 92 (prohibiting people from selling, loaning, giving, or delivering pistols and like dangerous weapons to minors except under limited circumstances).

270. *See, e.g.*, Act of Jan. 12, 1860, ch. 33, § 23, 1859 Ky. Acts 241, 245 (forbidding individuals from selling, giving, or loaning pistols and other dangerous weapons to minors).

271. *See, e.g.*, Louisville, Ky., An Ordinance as to Retailing Gun Powder (Oct. 17, 1853) (making it unlawful to sell gunpowder to minors); *see also* Spitzer, *supra* note 185, at 59 tbl.1 (demonstrating a dramatic increase in the numbers of gun laws in states, including local and municipal laws, during Reconstruction).

272. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 35 (2022).

Reconstruction era laws regulating minors are part of this nation's history and tradition and should be a part of *Bruen*'s second-step calculus.

Moreover, the laws enacted during Reconstruction to address minors and guns addressed new problems, but they were not a novel application of the police power. Such laws were an extension of legal conceptions grounded in Founding-era constitutionalism. These efforts illustrated a point beyond dispute: the flexibility inherent in police power regulations of guns. American states had regulated arms since the dawn of the republic, and Reconstruction simply renewed America's commitment to the idea of well-regulated liberty.[273]

Bruen also directed that courts may use a "more nuanced approach" in evaluating analogies when addressing "unprecedented societal concerns or dramatic technological changes" that were unforeseeable to the Framers.[274] Many courts that have followed this directive and applied a "nuanced approach" have trended toward looking at analogies at a higher level of generality.[275] Some courts dealing with age limit cases have opted not to apply the nuanced approach, instead citing *Bruen*'s language that a modern law may be unconstitutional if it addresses a "general societal problem that has persisted since the 18th century" but uses "materially different means" to address it.[276] This

273. Cornell, *Right to Regulate*, *supra* note 192, at 89 ("Rather than acting as a high-water mark for gun rights, Reconstruction ushered in a period of expansive regulation. Courts, legislators, and commentators during this period recognized that the robust power to regulate firearms, particularly in public, was not only constitutional, but essential to preserve ordered liberty.").

274. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 27 (2022).

275. *See, e.g.*, Nat'l Ass'n for Gun Rights v. Lamont, No. 3:22-1118 (JBA), 2023 WL 4975979, at *27, *32 (D. Conn. Aug. 3, 2023) (upholding a prohibition on assault weapons and large capacity magazines based on "a longstanding tradition of the government exercising its power to regulate new and dangerous weapon technology" without requiring a more specific analogue); Or. Firearms Fed'n v. Kotek, No. 2:22-cv-01815-IM, 2023 WL 4541027, at *39–46 (D. Or. July 14, 2023) (considering "regulations on the use of trap guns, the storage of gun powder, the possession and carrying of blunt objects like clubs, the possession and carrying of certain fighting knives, the concealed carrying of pistols, the concealed carrying of revolvers, and the use and possession of fully-automatic and semi-automatic firearms" as historical analogues to a modern prohibition on large capacity magazines); *see also* Blocher & Ruben, *supra* note 173, at 162–67 (discussing the "potential virtues" of applying a high level of generality).

276. *See, e.g.*, Worth v. Harrington, 666 F. Supp. 3d 902, 911–12 (D. Minn. 2023) (citing *Bruen*, 597 U.S. at 26).

perspective fails to consider the rapidly changing technological shift in firearms between the Founding and the adoption of the Fourteenth Amendment.

Moreover, although societal concerns about teenagers' ability to make sound decisions have been ever-present since the Founding, our understanding of why teenagers are prone to impulsive behavior, and do not have full capacity for evaluating risk, has improved because of developments in cognitive science.[277] Indeed, our understanding of brain development has increased exponentially since the time the Second and Fourteenth Amendments were ratified.[278] Like developments in technology and unprecedented social concerns, the Founders could not have anticipated these scientific developments or crafted laws based on their insights. This evolved understanding demonstrates why modern society may use "materially different means" to address a problem inherent in human psychology "that has persisted since the 18th Century."[279]

Furthermore, dramatic technological changes in weaponry have made teenagers' capacity to make reckless decisions have greater consequences, consequences that could not have been predicted at the time of the Founding. Developments in large capacity magazines, bump stocks, and other modern firearms technology, have significantly increased the damage that can be, and, at times, is, caused by teenagers' faulty decision-making in connection with firearms.[280] There were no mass shootings at the time of the Founding.[281] The capacity of a lone teen to inflict multiple casualties in a single event would have been unimaginable to the authors of the Second Amendment. Yet, as of June 2022,

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277. *See supra* notes 218–27 and accompanying text (discussing Founding-era concerns over the decision-making ability of minors and illuminating modern-day, scientific understandings regarding the brain development of minors).

278. *See supra* notes 220–27 and accompanying text (discussing our increased understanding of brain development in minors due to advances in science and technology); *see also* Eric Ruben, *Scientific Context, Suicide Prevention, and the Second Amendment After* Bruen, 108 MINN. L. REV. 3121 (2024).

279. *See generally Bruen*, 597 U.S. at 26–27 ("[I]f earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional.").

280. *See, e.g.*, *Kotek*, 2023 WL 4541027, at *13, *39 ("[M]odern LCM allows an individual to fire at least four times more rapidly than the most well-trained soldier of the Founding era.").

281. *See id.* at *13–14 ("Mass Shootings are a recent phenomenon in American history.").

six of the nine deadliest shootings since 2018 were committed by individuals aged twenty-one or younger.[282] Jefferson and Madison did not trust the sons of Virginia's elite to possess firearms at the University of Virginia and would not countenance unrestricted access of those under the age of twenty-one to today's weapons.[283]

The continuity in human psychology stands in marked contrast to the profound changes in firearms technology and the societal ills arising from these changes. Requiring society to limit solutions to modern gun violence by employing regulations developed at a time when there were limited gun violence problems is apiece with claims that the Second Amendment only protects muskets. Indeed, Justice Scalia noted it would be "bordering on the frivolous" to argue that the Second Amendment would not cover modern-day weapons, despite the significant development of firearms since the Founding.[284] Arguments that we cannot address modern gun violence with insights drawn from recent social science and neural science are equally risible. Addressing gun violence with the benefit of today's enhanced scientific understanding and with regulations adapted to the realities of modern weaponry is true to *Heller* and its progeny, which

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282. Glenn Thrush & Matt Richtel, *A Disturbing New Pattern in Mass Shootings: Young Assailants*, N.Y. TIMES (June 2, 2022), https://www.nytimes.com/2022/06/02/us/politics/mass-shootings-young-men-guns.html [https://perma.cc/S67B-RDKG].

283. *See supra* notes 92–96 and accompanying text (describing how Thomas Jefferson and James Madison attended a University of Virginia board meeting where it was decided that students would not be allowed to keep or use guns); *cf. Kotek*, 2023 WL 4541027, at *14 ("During the Newtown, Connecticut mass shooting that occurred at Sandy Hook Elementary school in 2012, nine children were able to flee and two were able to hide when the shooter paused to reload magazines.").

284. District of Columbia v. Heller, 554 U.S. 570, 582 (2007); *Bruen*, 597 U.S. at 28 (carrying through *Heller*'s holding that the Second Amendment applies to "modern instruments that facilitate armed self-defense"); *see also* Blocher & Ruben, *supra* note 173, at 53 (noting that *Heller* and *Bruen*'s conclusion that modern weapons receive Second Amendment protection "must be understood more broadly as an argument against anachronism" and "must account for other forms of change, including those regarding regulation"); Ruben, *supra* note 278, at 3181 ("[A] good-faith comparison of why policymakers passed modern and historical laws requires comparing contexts, and if today's laws are informed by science, it becomes highly relevant to consider the scientific context at the time historical laws were enacted.").

recognize that government regulation is fully consistent with the Second Amendment.

Fortunately, some courts have begun to recognize the radically different nature of today's gun violence problem from the issues that faced early American courts and legislatures. In *Oregon Firearms Federation v. Kotek*, the court found, after a bench trial, that mass shootings represent a unprecedented societal concern that did not exist at the Founding.[285] It noted that "[b]etween 1776 and 1949, or for about 70 percent of American history, there was no example of a mass shooting event that resulted in double digit fatalities."[286] It further found that the "annual incidence of high-fatality mass shootings," defined as shootings where six or more individuals died, "has increased along a linear trend line from 1990 to 2022," and noted testimony regarding "a rise in the fatalities or victims killed in recent years from mass shooting events."[287] Mass shootings have an unprecedented effect on "the capacity of health care systems," where mass shootings exceed a hospital's surge capacity and create situations where hospitals do not have sufficient resources to treat all patients.[288] The trauma associated with these events has touched the lives of millions of Americans.[289]

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285. *See Kotek*, 2023 WL 4541027, at *14, *36 (finding that "based on the evidence presented at trial, Defendants and Intervenor-Defendant have shown that mass shootings using LCMs are an unprecedented societal concern rather than a general societal problem that has persisted since the eighteenth century," and that "[m]ass shootings are a recent phenomenon in American history").

286. *Id.* at *13.

287. *Id.* at *13, *36.

288. *Id.* at *37.

289. *See* Amy O'Kruk et al., *In the Last Decade, an Estimated 40 Million Americans Lived Within 1 Mile of a Mass Shooting*, CNN (last updated Oct. 26, 2023), https://www.cnn.com/interactive/2023/08/us/americans-living-near-mass-shootings-statistics-dg [https://perma.cc/2G62-AZ9B] (sharing the stories of people who lived near recent mass shootings, noting that "[c]ommunity-wide, mass shootings lead to increases in feelings of fear and lack of safety," and reporting research data that found "[a]mong children, witnessing urban violence is a risk factor for adverse outcomes, such as substance abuse, aggression, anxiety, depression and antisocial behavior"); Associated Press & Nat'l Op. Rsch. Ctr., *Americans' Experiences, Concerns, and Views Related to Gun Violence*, UNIV. CHI. HARRIS SCH. OF PUB. POL'Y (Aug. 2022), https://harris.uchicago.edu/files/uchicago_harris_ap_norc_poll_report_final.pdf [https://perma.cc/F3BX-98A5] (detailing that one in five Americans report that either themselves, a

Our evolved understanding of the brain development of eighteen-to-twenty-year-olds also provides empirical evidence why this age demographic is more dangerous than other age groups when they have access to firearms.[290] The historical tradition of disarming those who are dangerous also supports age limit firearms restrictions.[291] As of this writing, the Justices are considering *United States v. Rahimi*, a challenge to the constitutionality of 18 U.S.C. § 922(g)(8), which prohibits gun possession by persons subject to domestic violence restraining orders, as defined by 18 U.S.C. § 922(g)(8).[292] Most observers expect the Court to uphold the restriction, though it could do so in a variety of

family member, or close friend has been a victim of gun violence); Zara Abrams, *Stress of Mass Shootings Causing Cascade of Collective Traumas,* MONITOR ON PSYCH. (July 11, 2022), https://www.apa.org/monitor/2022/09/news-mass-shootings-collective-traumas [https://perma.cc/J2ZQ-UJTA] (summarizing studies that indicate millions of Americans experience behavior-altering trauma as a result of continual mass shootings).

290. *See supra* note 7 and accompanying text (providing empirical evidence demonstrating that eighteen-to-twenty-year-olds have some of the highest homicide rates of any age group and some of the highest rates of general criminal activity).

291. A now oft-cited quotation from her days as a Seventh Circuit Judge, U.S. Supreme Court Justice Amy Coney Barrett wrote, "[h]istory is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns." Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting); *see also* United States v. Jackson, 69 F.4th 495, 504 (8th Cir. 2023) ("Legislatures historically prohibited possession by categories of persons based on a conclusion that the category as a whole presented an unacceptable risk of danger if armed."). Indeed, scholars and practitioners who favor strong gun rights have also concluded that history shows that governments have the ability to disarm those who are dangerous. *See* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 261–65 (2020) (recognizing that there is a historical tradition of legislators authorizing disarmament for persons they determined were potentially dangerous); Brief of Amici Curiae Professors of Second Amendment Law, the Second Amendment Law Center, and the Independence Institute in Support of Respondent and Affirmance at 4, United States v. Rahimi, 143 S. Ct. 2688 (2023) (No. 22-915) ("The original public meaning of the Second Amendment is not infringed by laws to take arms from persons proven to be dangerous to others.").

292. United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023) (No. 22-915).

different ways, each with implications for the arguments and evidence we have laid out here.[293]

The Solicitor General argued in *Rahimi* that there is a historical tradition that supports the constitutionality of restricting access to firearms by people, or categories of people, who have a higher propensity for dangerousness than the general public.[294] Several courts have highlighted historical laws evidencing dangerousness as a basis for disarmament.[295] If that principle becomes the basis for the result in *Rahimi*, then our arguments about the historical tradition of regulating minors based on their inability to make mature, reasonable decisions is further bolstered by *Rahimi*'s conclusion that the Second Amendment permits restrictions on those whose access to firearms poses a high risk of dangerousness to self or others.

Other parts of our argument stand largely independent of *Rahimi*, which has not been fully litigated on the basis of whether Rahimi, an individual subject to a domestic violence restraining order, is among "the people."[296] Domestic violence was viewed by the Founding generation through a lens in which women had no legal identity separate from their husbands, and husbands had the right to "physically chastise" their wives.[297] In

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293. *See* Brannon P. Denning & Glenn H. Reynolds, *Trouble's* Bruen*: The Lower Courts Respond*, 108 MINN. L. REV. 3187 (2024) (highlighting that the Supreme Court seemed willing to adopt a standard that would permit disarmament of those who are dangerous to themselves or others). The advocate who argued on behalf of Rahimi has said as much, stating that he predicts a majority opinion finding a "'tradition' of 'disarming the dangerous.'" J. Matthew Wright (@attorneydad), X (formerly TWITTER) (Jan. 23, 2024), https://twitter.com/attorneydad/status/1750035530476134755 [https://perma.cc/R9VW-T47Z].

294. Brief for the United States at 6–8, 14–15, 28, United States v. Rahimi, 143 S. Ct. 2688 (2023) (No. 22-915).

295. *See* sources cited *supra* note 291.

296. *See* Brief for the United States, *supra* note 294, at 36 ("The Fifth Circuit emphasized that the Second Amendment guarantees the right of 'the people' to keep and bear arms and that Rahimi, 'while hardly a model citizen, is nonetheless among "the people."' Rahimi similarly argues that the Amendment secures 'an unqualified right belonging to all of "the people,"' and that Congress has no power to make 'judgment[s] about who should be trusted with firearms.' That is incorrect." (citations omitted) (quoting briefs)); Reply Brief for the Petitioner at 8–9, United States v. Rahimi, 143 S. Ct. 2688 (2023) (No. 22-915) (arguing that reading "the people" as "all Americans" is a historically erroneous interpretation).

297. Kelly Roskam et al., *The Case for Domestic Violence Protective Order Firearm Prohibitions Under* Bruen, 51 FORDHAM URB. L.J. 221, 245 (2023).

contrast, those between the ages of eighteen and twenty were identified as potentially more dangerous, and less responsible, than the general public, both at the Founding and today.[298] The state and municipal laws that regulated minors' access to firearms discussed herein[299] are consistent with society's continued understanding that parents, guardians, and other adults were responsible for keeping those under the age of twenty-one safe.

In sum, the common law, the public understanding of minors' role in society at and after the time of the Founding, and historical laws addressing minors' access to firearms provide ample historical support that modern age-limit laws are part of this nation's history and tradition. The Supreme Court's incoming decision in *United States v. Rahimi* may further bolster the constitutionality of age limit-based restrictions on firearms.

CONCLUSION

Courts addressing age-limit firearm regulations post-*Bruen* have erred in discounting the historical context of minors' limited legal rights during the Founding. The history catalogued above demonstrates that minors were not treated as independent and autonomous actors capable of engaging in commerce or acting independently of their head of household in most circumstances. For most of the pre–Civil War period in American history, minors only had legal access to arms when under the control and authority of a parent or guardian, when assisting sheriffs, justices of the peace, or constables to preserve the peace, or when performing militia duties supervised by militia officers. The practical realities of acquiring firearms in early America further limited the opportunities of minors to acquire them without parental consent. The laws and historical context demonstrate that those under twenty-one have never had a constitutional right to keep, bear, or acquire firearms.

While it is incontrovertible that governments chose to require males who were under twenty-one to serve in the militia in the 1700s and 1800s, the militia laws from these time periods do not contradict the conclusion that minors had no Second

298. For Founding-era views on the responsibility and dangerousness of eighteen-to-twenty-year-olds, see *supra* notes 28–37, 68–70 and accompanying text. For a modern understanding, see *supra* notes 222–27, 291 and accompanying text.

299. *See supra* Table 1 and related text.

Amendment rights at or after the time of the Founding. Rather, these laws demonstrate that governments have imposed a constitutional duty and obligation upon minors when the nation required more bodies to contribute to public defense. Moreover, the argument that service in the militia established a Second Amendment right for those under twenty-one would have to mean that the right applies equally to those under the age of eighteen, a position that even courts that have struck down age-limit laws have been unwilling to hold.[300]

Minors called to serve were not required to purchase firearms to use in service; firearms for minors were often provided by parents or guardians, or, in some instances, the state or local government. Punishments meted for a minor's failure to provide his own weapons also fell on his parents or guardians. The militia laws relied upon by plaintiffs in age-limit cases do not demonstrate that any right to bear arms existed for minors outside of militia service, they demonstrate that minors were obligated to serve in the militia. Creating a right out of an obligation is contrary to the understanding of rights and duties at the Founding and modern law that treats rights and obligations as correlates.[301] Lower courts that have failed to recognize this fact have simply misconstrued one of the most basic features of our legal tradition.

The Reconstruction era also ushered in a wave of new laws expressly regulating minors and guns.[302] Technological changes in firearms during the Civil War led to a proliferation of cheap and concealable firearms, which youth were able to access more readily than in previous eras.[303] Legislatures responded to these developments, and the resulting increase in gun violence,

300. *See* Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 672 F. Supp. 3d 118, 136 n.18 (E.D. Va. 2023) ("This, of course, does not mean that the Second Amendment applies to individuals under the age of 18 who have not yet attained full admittance into the political community."); Worth v. Harrington, 666 F. Supp. 3d 902, 915 (D. Minn. 2023) ("No court has read the Second Amendment to cover those under the age of 18, and this case does not raise that issue."); *see also* Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives, 5 F.4th 407, 422 & n.13 (4th Cir. 2021) (showing a pre-*Bruen* opinion stating that Second Amendment protections do not "extend in full force to those under 18"), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021).

301. *See supra* notes 109–13 and accompanying text.

302. *See supra* Table 1 and related text; *supra* notes 264–71 and accompanying text.

303. *See supra* notes 256–67 and accompanying text.

including youth gun violence, with new laws. While these Reconstruction-era laws regulating minors were enacted by legislative bodies, they were an extension of the common law principles of the police power that were at the root of limits on minors in the Founding era. Laws regulating minors and firearms in the Reconstruction era, along with the common law, show how limits on minors' access to firearms is consistent with our nation's history and tradition.

Courts which have disregarded the original understanding of minors' status under early American law have effectively rewritten the meaning of the Second Amendment to accord with modern ideas. While such an approach was common during the Warren Court era, this unconscious turn to living constitutionalism for gun rights is not consistent with *Heller* or *Bruen*.[304]

304. On the Warren Court's rights revolution and its connection to the idea of a living Constitution, see generally Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5 (1993).