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You'll Grow Into It: How Federal and State Courts Have Erred in Excluding Persons Under Twenty-One from 'the people' Protected by the Second Amendment

Ryder Gaenz
FIU College of Law, rgaenz@fiu.edu

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YOU’LL GROW INTO IT: HOW FEDERAL AND STATE COURTS HAVE ERRED IN EXCLUDING PERSONS UNDER TWENTY-ONE FROM ‘THE PEOPLE’ PROTECTED BY THE SECOND AMENDMENT

Ryder S. Gaenz*

ABSTRACT

After more than two centuries of jurisprudential stillness, the United States Supreme Court undertook the task of discerning the Second Amendment’s meaning in *District of Columbia v. Heller*, holding that the Second Amendment protects the individual right to self-defense. Since *Heller*, the lower courts have grappled with determining the scope of the Second Amendment. One question of scope—the subject of this piece—is at what age does a person come within the scope of the Second Amendment’s protections? Some federal and state courts have suggested, and in some cases held, that persons under twenty-one do not enjoy Second Amendment rights. However, colonial and founding era history, as well as the Court’s jurisprudence regarding other individual, constitutional rights, suggests otherwise. Research reveals that during the colonial and founding eras, persons as young as sixteen often were required to bear arms not only for militia purposes, but generally and irrespective of military service or purpose. Additionally, the Court’s long-standing First Amendment, Fourth Amendment, and privacy-abortion jurisprudence is clear: Constitutional rights do not vest only when a person attains a particular age. Instead, individual, constitutional rights protect persons of all ages, although the rights of minors under eighteen—while meaningful—are often less robust than their adult counterparts. In light of this history and jurisprudence, courts should begin recognizing that persons eighteen and older enjoy full Second Amendment rights, while minors under eighteen maintain truncated—albeit meaningful—Second Amendment rights.

I.	Introduction.....	198
II.	The Second Amendment and Supreme Court Authority	200
	A. An Individual Right to Keep and Bear Arms	201
	B. Incorporation Against the States.....	203
III.	The Two-Step Analysis Employed by the Circuit Courts	205

* J.D. Candidate 2023, FIU College of Law

IV.	You'll Grow Into it: Federal and State Authority Reserving Second Amendment Protections to Persons Twenty-One and Older	207
A.	The Fifth Circuit Tentatively Concludes that Persons Under Twenty-One Do Not Enjoy Enumerated Second Amendment Rights.....	208
B.	Citing the Fifth Circuit, the Illinois Supreme Court Affirmatively Held That Persons Under Twenty-One Are Not Protected by the Second Amendment.....	209
V.	The Fifth Circuit and the Illinois Supreme Court Err in Confining the Second Amendment's Protections to Persons Under Twenty-One	210
A.	Historical Exercise of the Preexisting Right to Keep and Bear Arms by Age: The Colonial and Founding Periods	211
i.	Colonial Law Regarding the Right to Keep and Bear Arms by Age.....	212
ii.	Founding-Era Law Regarding the Right to Keep and Bear Arms by Age.....	216
B.	The Court's Interpretation of Enumerated, Fundamental Rights Militates Against the Conclusion that Second Amendment Rights Do Not Vest Until Adulthood	219
i.	Fourth Amendment Vesting by Age.....	220
ii.	First Amendment Vesting by Age	224
iii.	Right to Privacy Vesting by Age	228
VI.	Conclusion	231

I. INTRODUCTION

Although the United States is only two years the Second Amendment's elder, the Supreme Court did not explain the Second Amendment's meaning for almost the entirety of the Nation's history. In 2008, the Court decided *District of Columbia v. Heller*, a lengthy opinion in which the Court explained the Second Amendment's history, that the Amendment means what it meant when it was ratified, and that the central component thereof is the individual right to bear arms for self-defense.¹ Two years later, the Court decided *McDonald v. City of Chicago*, in which the Court held that the Second Amendment is incorporated into the Fourteenth Amendment's Due Process Clause protections and is fully applicable against the states.²

Since *Heller* and *McDonald*, the Court has not decided a Second Amendment case. Absent further direction from the Court, the lower courts

¹ See *District of Columbia v. Heller*, 554 U.S. 570, 592, 599 (2008).

² See *McDonald v. City of Chicago*, 561 U.S. 742, 750, 791 (2010).

have attempted to apply the Second Amendment in accord with the Court's general instructions in *Heller* and *McDonald* to more specific legal questions. One such question—the subject of this piece—is at what age does a person's Second Amendment right vest? Phrased to track the language of the Second Amendment, when does a person become an individual member of “the people” protected by the Second Amendment?

Applying the circuit court-created, two-step analytical framework described in further detail below, the Fifth Circuit has concluded that Second Amendment rights likely do not vest until a person is twenty-one,³ while the Illinois State Supreme Court has simply held that persons under twenty-one do not enjoy Second Amendment rights.⁴

However, the limited history regarding who—by age—bore arms during the colonial and founding periods cast doubt on the conclusion that the Second Amendment does not apply to persons under twenty-one. During the colonial and founding eras, boys as young as sixteen regularly exercised the right to bear arms *at least* for limited, militia purposes,⁵ if not for general use.⁶

Furthermore, a review of the Supreme Court's jurisprudence regarding when other individual, constitutional rights vest clarifies the answer. The Court has consistently held that individual, constitutional rights are enjoyed by all Americans and do not vest at a particular age.⁷ However, the Court's

³ Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 700 F.3d 185, 204 (5th Cir. 2012) (concluding that Second Amendment rights likely are not enjoyed by persons under twenty-one); Nat'l Rifle Ass'n of Am. v. McCraw, 719 F.3d 338, 347 (5th Cir. 2013) (considering the constitutionality of a state law banning eighteen-to-twenty-year-olds from carrying handguns under the two-step framework and concluding that “the conduct burdened by the [state] scheme likely ‘falls outside the Second Amendment’s protection’”).

⁴ See *People v. Mosley*, 33 N.E.3d 137, 155 (Ill. 2015) (holding that persons under twenty-one do not have a Second Amendment right to possess a firearm).

⁵ See Clayton E. Cramer, *Colonial Firearms Regulation*, 16 J. ON FIREARMS AND PUB. POL'Y 1, 3–4, 7–10 (2004) (discussing law of the colonies of Connecticut, New York, New Jersey, North Carolina, and Georgia requiring persons aged sixteen to join the militia); *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco, and Explosives*, 5 F.4th 407, 428 (4th Cir. 2021) (“Before ratification, when militias were solely defined by state law, most colonies and states set the age for militia enlistment at [sixteen]”).

⁶ See Cramer, *supra* note 5, at 7 (discussing New Hampshire's law requiring males ages sixteen to sixty to maintain firearms regardless of militia membership).

⁷ See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (explaining that the Second Amendment is an individual right and then stating, “[w]e start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans”); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”); *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (“Viewed together, our cases show that . . . children generally are protected by the same constitutional guarantees against governmental deprivations as are adults.”).

precedents do make clear that the constitutional rights of minors under eighteen are often narrower than the constitutional rights of adults.⁸

In light of history regarding firearm ownership during the colonial and founding eras and current jurisprudence regarding other fundamental, constitutional rights, courts should recognize that Second Amendment protections apply with full-force to adults and meaningfully—albeit with less vitality—to minors under eighteen.

II. THE SECOND AMENDMENT AND SUPREME COURT AUTHORITY

A single sentence, the Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁹

Since the Second Amendment’s ratification in 1791 until mid-2008, the Supreme Court produced precious little Second Amendment jurisprudence.¹⁰ In June of 2008, the Court decided *District of Columbia v. Heller*, the Court’s seminal Second Amendment case in which the Court held that the Second Amendment protects an individual right to keep and bear arms, although not without limitation.¹¹ Shortly thereafter in 2010, the Court decided *McDonald v. City of Chicago*, in which it incorporated the Second Amendment, holding that the Second Amendment “is fully applicable to the States” under the Fourteenth Amendment.¹²

Notwithstanding Justice Thomas’ recent and consistent lamentations regarding the Court’s refusal to further expound the Second Amendment,¹³

⁸ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 339–40 (1985) (explaining that under the Fourth Amendment, the rights of schoolchildren to not be subjected to unreasonable searches and seizures are relaxed); *Ginsberg v. New York*, 390 U.S. 629, 636–38 (1968) (explaining that under the First Amendment, what is obscene for minors—and therefore not protected by the First Amendment—is broader than what is obscene for adults); *Bellotti*, 443 U.S. at 634 (explaining that the rights of minors are subject to greater intrusion than those of adults).

⁹ U.S. CONST. amend. II.

¹⁰ See *Heller*, 554 U.S. at 619–25 (discussing the Court’s pre-*Heller* Second Amendment cases of *U.S. v. Cruikshank*, *Presser v. Illinois*, and *U.S. v. Miller*, further noting that until *Heller*, the Second Amendment’s meaning had not been examined by the Court).

¹¹ *Id.* at 626–27 (holding that Second Amendment protects an individual, but not unlimited, right to keep and bear arms).

¹² *McDonald v. City of Chicago*, 561 U.S. 742, 749 (2010) (holding that the Second Amendment “is fully applicable to the States”).

¹³ See *Jackson v. City and County of San Francisco*, 576 U.S. 1013, 1017–18 (Mem) (2015) (Thomas, J., dissenting) (“Because of the importance of the constitutional right at stake and the questionable nature of the Court of Appeals’ judgment, I would have granted a writ of certiorari.”); *Friedman v. City of Highland Park*, 577 U.S. 1039, 1043 (Mem) (2015) (Thomas, J., dissenting) (“I would grant certiorari to prevent the Seventh Circuit from relegating the Second Amendment to a second-class right.”); *Silvester v. Becerra*, 138 S. Ct. 945, 952 (Mem) (2018) (“Because I still believe that the Second

the *Heller* and *McDonald* decisions offer insight regarding how to determine the scope of the Second Amendment. Specifically, in both decisions the Court approached the Second Amendment with an eye toward the history surrounding the ratification of the Second and Fourteenth Amendments,¹⁴ as well as precedent regarding the interpretation and application of other individual rights.¹⁵

A. An Individual Right to Keep and Bear Arms

In 2008, the Court decided *District of Columbia v. Heller*, the cornerstone of modern Second Amendment jurisprudence. In *Heller*, a dissatisfied Washington D.C. resident brought suit against the District of Columbia, seeking injunctive relief on the ground that the District's then-existing statutory scheme effectively prohibited the ownership of handguns within the home in violation of the Second Amendment.¹⁶ The Court granted certiorari¹⁷ and, recognizing that it had yet to discern and declare the meaning of the Second Amendment, undertook to construe the meaning of the Amendment for the first time since its ratification 217 years prior.¹⁸

While expounding the Second Amendment's meaning, the Court noted the fact that the Second Amendment was comprised of two clauses: one prefatory, and one operative.¹⁹ The Court explained that the prefatory clause consists of the language, "[a] well regulated Militia, being necessary to the

Amendment cannot be 'singled out for special—and specially unfavorable—treatment,' . . . I respectfully dissent from the denial of certiorari.").

¹⁴ See *Heller*, 554 U.S. at 581–619, 625 (engaging in a lengthy examination of the Second Amendment's history to understand its original meaning); *McDonald*, 561 U.S. at 767–78 (recapping *Heller*'s historical analysis and engaging in a thorough historical excavation of the Second Amendment's meaning when the Fourteenth Amendment was ratified for purposes of incorporation analysis thereunder).

¹⁵ See *Heller*, 554 U.S. at 582, 634–35 (rejecting the argument that the Second Amendment protects only the weapons technology that existed in 1791 because other rights, such as those in the First and Fourth Amendments, are not interpreted in such a manner; further explaining that an "interest-balancing" test had never been applied in situations where other enumerated rights were burdened and therefore is not applicable when Second Amendment rights are burdened); *McDonald*, 561 U.S. at 778–79, 780–82, 786–87, 790 (2010) (explicitly and continuously rejecting the notion that the Second Amendment is treated differently than other enumerated rights).

¹⁶ *Heller*, 554 U.S. at 575–76.

¹⁷ *District of Columbia v. Heller*, 552 U.S. 1035 (2007) (granting certiorari).

¹⁸ *Heller*, 554 U.S. at 625–26 (noting that until *Heller*, the Second Amendment's meaning had not been examined or decided by the Court).

¹⁹ *Id.* at 577 ("The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose.").

security of a free State,”²⁰ while the operative clause is comprised of the subsequent phrase, “the right of the people to keep and bear Arms[.]”²¹

Immediately after declaring the bi-phrasal nature of the Second Amendment, the Court took cognizance of the textual fact that the Second Amendment codifies a “right of the people.”²² To properly understand the phrase “right of the people,” the Court looked to its jurisprudence regarding other rights-related²³ portions of the Constitution employing similar language: namely, the First, Fourth, and Ninth Amendments.²⁴ Noting that *all* of those amendments protected certain individual—not collective—rights, the Court approvingly quoted *United States v. Verdugo-Urquidez*, stating:

“[T]he people” seems to have been a term of art employed in select parts of the Constitution [Its uses] sugges[t] that “the people” protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.²⁵

After explaining the legal significance of the phrase “the people,” the Court recognized that the right codified in the Second Amendment is broader than a right conferred only upon the prefatory phrase’s “militia,” which consisted of “those who were male, able bodied, and *within a certain age range*.”²⁶ Specifically, prior to deciding the meaning of the Second Amendment’s right to “keep and bear arms,” the Court explained that it began its analysis “with a strong presumption that the Second Amendment right is exercised individually and belongs to *all* Americans.”²⁷

Subsequently, the Court engaged in a lengthy, nearly forty-page historical excavation to unearth the original meaning of right to “keep and bear arms,” as well as how the prefatory and operative clauses dovetail

²⁰ *Id.* at 595 (“The prefatory clause reads: ‘A well regulated Militia, being necessary to the security of a free State’”).

²¹ *See id.* at 578 & n.4.

²² *Id.* at 579.

²³ *See id.* (taking cognizance of the phrase “the people” within the Preamble, Article 1 § 2, and the Tenth Amendment, but noting that those sections do not refer to rights and therefore do not inform the meaning of the Second Amendment’s phrase “right of the people”).

²⁴ *Id.* at 579–80.

²⁵ *Id.* at 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)).

²⁶ *Id.* at 580–81 (emphasis added).

²⁷ *Id.* at 581 (emphasis added).

“perfectly” together to create a cogent law.²⁸ Ultimately, the Court held that the Second Amendment protects now what it protected when it was ratified: A pre-existing, individual right to possess and carry certain weapons for self-defense, although not without notable exceptions.²⁹ Among those constitutional limitations on the right to keep and bear arms, the Court explained that “[n]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by . . . the mentally ill . . . or laws imposing conditions and qualifications on the commercial sale of arms.”³⁰

Additionally, and importantly, the Court laid to rest any notion that the Second Amendment’s protections are somehow less stout than those found in other enumerated rights, such as those codified in the First and Fourth Amendments, stating that “[t]he Second Amendment is no different.”³¹

Thereafter, the Court held that the District’s scheme that effectively prohibited the ownership of handguns in the home was unconstitutional under the Second Amendment.³²

B. Incorporation Against the States

A year after the Court decided *Heller*, the Court granted certiorari³³ in *McDonald v. City of Chicago*, and decided whether the Second Amendment was incorporated against the States by virtue of the Fourteenth Amendment.³⁴ In 2009, the City of Chicago effectively prohibited handgun ownership via a licensing and regulatory scheme, and a Chicago resident brought suit against the City of Chicago seeking declaratory relief from enforcement of the scheme.³⁵ Specifically, the resident argued that the scheme violated the Second Amendment, which was applicable against the state (and its subsidiaries) by virtue of the Fourteenth Amendment.³⁶

²⁸ See *id.* at 581–619 (engaging in a lengthy examination of the Second Amendment’s history to understand its original meaning).

²⁹ *Id.* at 592, 625–27.

³⁰ *Id.* at 626–27.

³¹ See *id.* at 582, 634–35 (explaining that the Second Amendment is not to be interpreted in a manner inconsistent with how the First and Fourth Amendments are interpreted, and that the infringements upon Second Amendment rights may not be analyzed under an “interest-balancing” test that is not applied to other enumerated constitutional rights).

³² *Id.* at 635 (holding D.C.’s prohibition on handgun ownership in the home unconstitutional under the Second Amendment and enjoining the District to issue Respondent a handgun license).

³³ *McDonald v. City of Chicago*, 557 U.S. 965 (2009) (granting certiorari).

³⁴ *McDonald v. City of Chicago*, 561 U.S. 742, 749–50 (2010).

³⁵ *Id.* at 750–52.

³⁶ See *id.* at 752.

The Court explained that a prerequisite to incorporation of a fundamental right under the Fourteenth Amendment is that the right is “deeply rooted in this Nation’s history and tradition.”³⁷ In determining whether the Second Amendment right to keep and bear arms was a fundamental right, the Court first considered *Heller*.³⁸ Spilling little ink over three short pages, the Court recapped the historical analysis in *Heller* regarding the Second Amendment’s meaning at ratification, concluding: “Our decision in *Heller* points unmistakably to the answer. Self-defense is a basic right, . . . and in *Heller*, we held that individual self-defense is ‘the central component’ of the Second Amendment right.”³⁹

Then, the Court turned the pages of history forward several decades to the 1850–60’s, homing in on the historical understanding of the right to keep and bear arms during the relevant time period for its incorporation analysis under the Fourteenth Amendment.⁴⁰ Although the Court spent a significant ten pages explaining the public perception of the right to keep and bear arms as a fundamental right for purposes of incorporation under the Fourteenth Amendment,⁴¹ most notable for purposes of determining the scope of the right as it regards the age of the right-holder was the Court’s discussion of the history of the Freedman’s Bureau Act of 1866, the Civil Rights Act of 1866, and Congress’s discussions regarding the right to bear arms while debating the Fourteenth Amendment.⁴²

Specifically, the Court took notice of Section 14 of the Freedman’s Bureau Act, which provided, in pertinent part: “[T]he right . . . to have full and equal benefit of all laws . . . including the constitutional right to bear arms, shall be secured to and enjoyed by *all the citizens* . . .”⁴³ The Court then looked to Section 1 of the Civil Rights Act of 1866, which guaranteed “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens[]” to all persons.⁴⁴ Further, the Court explained that per the legislative history undergirding the Civil Rights Act of 1866 that the Act was intended to protect all of the rights enumerated in the Freedman’s Bureau Act, which enumerated the right to keep and bear

³⁷ *Id.* at 767 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

³⁸ *Id.* at 767–70 (discussing *Heller* in Part III-A).

³⁹ *Id.* at 767.

⁴⁰ *See id.* at 770–80 (discussing the history of the right to keep and bear arms during the 1850–60’s, Parts III-B-1–2).

⁴¹ *Id.*

⁴² *See id.* at 773–75 (discussing the Freedman’s Bureau Act of 1866, the Civil Rights Act of 1866, and Congress’s debates while considering the Fourteenth Amendment).

⁴³ *Id.* at 773 (original emphasis removed and other emphasis added).

⁴⁴ *Id.* at 774.

arms.⁴⁵ Before turning to Congress's discussions concerning the right to bear arms while debating the Fourteenth Amendment, the Court noted that the Fourteenth Amendment is commonly understood to provide constitutional protection for all rights protected by the Civil Rights Act of 1866, and therefore appears to protect the right to keep and bear arms.⁴⁶

Turning to the debates surrounding the adoption of the Fourteenth Amendment, the Court considered a statement made by Senator Samuel Pomeroy. Senator Pomeroy stated, in pertinent part, “[e]very man . . . should have the right to bear arms for the defense of himself and family and his homestead.”⁴⁷ After considering additional history surrounding the adoption of the Fourteenth Amendment with regard to the right to keep and bear arms, the Court concluded: “[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”⁴⁸

Finally, concluding that the Second Amendment was no different than other rights enumerated in the Bill of Rights, the Court rejected the City of Chicago's argument that the Second Amendment should be treated differently,⁴⁹ ultimately holding that the Second Amendment was incorporated against the states by virtue of the Fourteenth Amendment.⁵⁰

III. THE TWO-STEP ANALYSIS EMPLOYED BY THE CIRCUIT COURTS

Although the Supreme Court did answer important questions regarding the type of right that the Second Amendment protects⁵¹ and its relationship to the states,⁵² the Court did not provide specific instructions to the lower courts regarding how to analyze Second Amendment claims or defenses. Absent specific instruction from the Court regarding the analytical framework upon which a Second Amendment-based claim or defense is

⁴⁵ *Id.*

⁴⁶ *Id.* at 775.

⁴⁷ *Id.* (emphasis added).

⁴⁸ *Id.* at 778.

⁴⁹ *See id.* at 778–83, 786–87 (continually rejecting the City's argument that the Second Amendment should be treated differently than other enumerated rights).

⁵⁰ *Id.* at 791 (holding that the Second Amendment was incorporated by the Fourteenth Amendment's Due Process Clause).

⁵¹ *See* *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (finding that the Second Amendment codified a pre-existing, individual right to possess and carry certain kinds of weapons).

⁵² *See McDonald*, 561 U.S. at 749, 791 (holding that the Second Amendment is applicable against the states by virtue of the Fourteenth Amendment's Due Process Clause).

analyzed,⁵³ the circuit courts have developed the “two-step” analytical framework, although the various circuits refer to the framework by differing dubs.⁵⁴ Indeed, the Eighth Circuit is the sole circuit to have not adopted the two-step framework, although it has not expressly rejected the framework.⁵⁵

The two-step framework consists of two inquiries: First, is the allegedly protected conduct within the scope of, and therefore protected by, the Second Amendment?⁵⁶ Second, if the conduct is protected by the Second Amendment, the court must discern which level of heightened means-end scrutiny applies and then analyze the challenged law thereunder.⁵⁷ However, if the allegedly-protected conduct is not protected by the Second Amendment, the court need not entertain the second inquiry on the ground that because the conduct is not protected under the Second Amendment that no heightened level of scrutiny applies thereunder.⁵⁸

The instant piece concerns the first of these two inquiries, regarding the scope of the Second Amendment and its application to persons of various

⁵³ See *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) (noting the Supreme Court's failure to prescribe a Second Amendment analytical framework and the Circuits' role in filling the void).

⁵⁴ See, e.g., *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (creating the “two-step” framework); *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018) (explicitly adopting the two-step approach); *New York State Rifle and Pistol Ass'n v. Cuomo*, 804 F.3d 242, 253 (2d Cir. 2015) (same); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (adopting the “two-part” analytical approach); *Nat'l Rifle Ass'n of Am.*, 700 F.3d at 194 (adopting the two-step framework); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (adopting the “two-pronged” framework); *Ezell v. City of Chicago*, 651 F.3d 684, 701–04 (7th Cir. 2011) (explaining and subsequently applying, without dubbing, the two-step framework); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013) (adopting the two-step framework); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010) (adopting the two-step framework); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012) (same); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2012) (same).

⁵⁵ See *United States v. Adams*, 914 F.3d 602, 605 (8th Cir. 2019) (ruling that to succeed on a Second Amendment-based, as-applied challenge, the Defendant must prove (1) that his conduct was protected by the Second Amendment and (2) that his protected conduct was unjustly infringed upon); *United States v. Lehman*, 8 F.4th 754, 757 (8th Cir. 2021) (affirming the rule); *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco and Explosives*, 5 F.4th 407, 458 n.7 (4th Cir. 2021) (Wynn, J., dissenting) (noting that the Eighth Circuit is the sole Circuit yet to have adopted the two-step framework), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021).

⁵⁶ See, e.g., *Marzarella*, 614 F.3d at 89 (“First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.”); *Chester*, 628 F.3d at 680 (same).

⁵⁷ See, e.g., *Marzarella*, 614 F.3d at 89 (ruling that if the first inquiry is answered in the affirmative, then “we evaluate the law under some form of means-end scrutiny”); *Chester*, 628 F.3d at 680 (providing the same, but noting that in accordance with *Heller*, the means-end scrutiny may not be rational-basis review).

⁵⁸ See, e.g., *Marzarella*, 614 F.3d at 89 (explaining that if the first prong is not satisfied, “our inquiry is complete.”); *Chester*, 628 F.3d at 680 (explaining that if the first prong is not satisfied, “then the challenged law is valid.”).

ages.⁵⁹ What level of means-end scrutiny should be applied to challenged laws regulating various Second-Amendment-protected conduct of persons of various ages is not considered in the forgoing sections.⁶⁰

IV. YOU'LL GROW INTO IT: FEDERAL AND STATE AUTHORITY RESERVING SECOND AMENDMENT PROTECTIONS TO PERSONS TWENTY-ONE AND OLDER

Notwithstanding the Supreme Court's statements that the Second Amendment's verbiage "the right of the people" creates "a strong presumption that the Second Amendment right is exercised individually and belongs to *all Americans*"⁶¹ and that the Fourteenth Amendment incorporated a Second Amendment right that history indicates belongs to "*all the citizens*" and "*every man*,"⁶² the lower federal and state courts appear to have jettisoned the Court's guidance, concluding that the Second Amendment protects only a subset of Americans.⁶³

⁵⁹ See, e.g., *Nat'l Rifle Ass'n of Am.*, 700 F.3d at 199–200 (deciding whether a law regulating the purchase of handguns by persons aged eighteen to twenty was conduct protected by the Second Amendment); *Nat'l Rifle Ass'n of Am. v. McGraw*, 719 F.3d 338, 347 (5th Cir. 2013) (deciding whether carrying handguns in public by persons ages eighteen to twenty was conduct within the scope of the Second Amendment); *Ezell v. City of Chicago*, 846 F.3d 888, 896–97 (7th Cir. 2017) (deciding whether entering a firing range by a person under eighteen was conduct within the scope of the Second Amendment).

⁶⁰ Since this piece was authored, the Supreme Court has rejected the second prong of the two-step analytical framework, directing courts to employ an "historical analog" test rather than a means-end scrutiny analysis. See *N.Y. State Rifle and Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2127 (2022).

⁶¹ See *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (emphasis added).

⁶² See *McDonald v. City of Chicago*, 561 U.S. 742, 773–75 (2010) (explaining that the Fourteenth Amendment effectively codified the Civil Rights Act of 1866, which guaranteed the right to keep and bear arms for "all the citizens" and that while discussing the Fourteenth Amendment in Congress, Senator Pomeroy stated that "every man" has the right to bear arms for defense) (emphasis added).

⁶³ See *People v. Mosley*, 33 N.E.3d 137, 155 (Ill. 2015) (holding that persons under twenty-one do not have a Second Amendment right to possess firearms); cf. *Nat'l Rifle Ass'n of Am.*, 700 F.3d at 204 ("Although we are inclined to uphold the challenged federal laws [regulating the sale of handguns to persons aged eighteen to twenty] at step one of our analytical framework, in an abundance of caution, we proceed to step two."); *McCraw*, 719 F.3d at 347 (considering the constitutionality of a state law banning eighteen-to-twenty-year-olds from carrying handguns under the two-step framework, concluding "the conduct burdened by the [state] scheme likely 'falls outside the Second Amendment's protection,'" but nonetheless proceeding to step two of the framework) (quoting *Nat'l Rifle Ass'n of Am.*, 700 F.3d at 203).

A. *The Fifth Circuit Tentatively Concludes that Persons Under Twenty-One Do Not Enjoy Enumerated Second Amendment Rights*

Although the Fifth Circuit has not outright addressed whether the Second Amendment applies to those under twenty-one, it has indicated that if the outcome of a case turned on the answer to that question, the answer would be in the negative. In *National Rifle Association of America v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, a group of three individuals aged eighteen-to-twenty and the National Rifle Association (challengers) brought suit against the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), arguing that a law prohibiting the sale of handguns to persons under twenty-one violated the Second Amendment.⁶⁴

In disposing of the claim, the Fifth Circuit adopted the two-step approach and subsequently analyzed whether the challenged law was within the scope of the Second Amendment.⁶⁵ Initially, the court noted that since the founding era, the use of arms was regulated to some degree insofar as it was illegal to discharge firearms in certain areas, gunpower storage was regulated, the militia and its use of guns was regulated, and other public safety regulations were on the books.⁶⁶ However, the court homed in on a theory espoused by some scholars who argue that the Second Amendment right to bear arms was reserved only for persons who had “virtue,” while a prerequisite of virtuousness was attaining the age of majority.⁶⁷ Because the common law age of majority was twenty-one during the founding era, and the court explained:

If a representative citizen of the founding era conceived of a “minor” as an individual who was unworthy of the Second Amendment guarantee, and conceived of eighteen-to-twenty-year-olds as “minors,” then it stands to reason that the citizen would have supported restricting an eighteen-to-twenty-year-old’s right to keep and bear arms.⁶⁸

The court then took notice of the fact that by the late nineteenth century, nineteen states and the District of Columbia had prohibited the sale or use of particular firearms by minors—as defined by then-existing state and D.C. law—and that by 1923, twenty-three states and D.C. had enacted such laws.⁶⁹

⁶⁴ *Nat’l Rifle Ass’n of Am.*, 700 F.3d at 188.

⁶⁵ *Id.* at 194, 199.

⁶⁶ *Id.* at 200.

⁶⁷ *Id.* at 201.

⁶⁸ *Id.* at 202.

⁶⁹ *Id.*

Subsequently, the court noted that Thomas Cooley, in his 1868 Treatise on Constitutional Limitations, opined that “the State[s] may prohibit the sale of arms to minors,”⁷⁰ although the court did not mention that the Second Amendment was incorporated and therefore applicable against the states only since 2010 per the Supreme Court’s holding in *McDonald v. City of Chicago*.⁷¹ The court explained that although the historical record—as compiled by the court—indicated that the Second Amendment did not apply to persons under twenty-one, “in an abundance of caution” the court proceeded to step two of the two-step framework.⁷²

In step two of the analysis, the court subjected the challenged law to intermediate scrutiny, subsequently holding that the law did not violate the challengers’ Second Amendment rights.⁷³

B. Citing the Fifth Circuit, the Illinois Supreme Court Affirmatively Held That Persons Under Twenty-One Are Not Protected by the Second Amendment

In 2015, the Illinois Supreme Court followed the Fifth Circuit’s lead. In *People v. Mosely*, a nineteen-year-old was in possession of a firearm when, under then-existing Illinois state law, possession of firearms by persons under twenty-one was prohibited unless possessed for hunting purposes.⁷⁴ Subsequently, the defendant was arrested and charged with illegal possession of a firearm.⁷⁵

The Defendant argued that he was a member of “the people” under Second Amendment and that the Illinois state laws prohibiting persons aged

⁷⁰ *Id.* at 203. Cooley’s position that states could prohibit the sale of firearms to minors may be best understood as a recognition that minors’ Second Amendment rights are subject to certain reasonable infringements that would not be constitutional if applied to adults. This reasoning is in-line with the Supreme Court’s reasoning in *Ginsberg v. New York* and *Bellotti v. Baird*, discussed further *infra*, where the Court recognized that the state may regulate minors’ access to pornography and abortion further than would be constitutional for adults, but that minors could view pornography and obtain abortions with parental consent. This distinction is important because, although the States could prohibit the sale of firearms to minors in 1868, perhaps in 1868 the States could not deprive all minors of the entire right to bear arms protected by the Second Amendment.

⁷¹ See *McDonald v. City of Chicago*, 561 U.S. 742, 749, 791 (2010) (holding that the Second Amendment is incorporated and fully applicable against the states under the Fourteenth Amendment’s Due Process Clause).

⁷² *Nat’l Rifle Ass’n of Am.*, 700 F.3d at 204; see also *Nat’l Rifle Ass’n of Am. v. McCraw*, 719 F.3d 338, 347 (5th Cir. 2013) (considering the constitutionality of a state law banning eighteen-to-twenty-year-olds from carrying handguns under the two-step framework, concluding that “the conduct burdened by the [state] scheme likely ‘falls outside the Second Amendment’s protection,’” but nonetheless proceeding to step two of the framework) (quoting *Nat’l Rifle Ass’n of Am.*, 700 F.3d at 203).

⁷³ *Nat’l Rifle Ass’n of Am.*, 700 F.3d at 204, 211.

⁷⁴ *People v. Mosley*, 33 N.E.3d 137, 142–43 (Ill. 2015).

⁷⁵ *Id.* at 144.

eighteen to twenty from possessing firearms violated the Second Amendment.⁷⁶ The Illinois Supreme Court, after adopting the two-step analytical framework, proceeded to the first step, and decided whether possession of a firearm by persons aged eighteen to twenty was within the scope of the Second Amendment's protections.⁷⁷

In so deciding, the court took notice not only of precedent within its own state, but also that of the Fifth Circuit in *National Rifle Association of America* and its progeny.⁷⁸ Unlike the Fifth Circuit, which concluded that eighteen-to-twenty-year-olds likely did not maintain Second Amendment rights but nonetheless assumed without deciding that they did,⁷⁹ the Illinois Supreme Court held that possession of handguns by persons under the age of twenty-one is simply not conduct within the scope of the Second Amendment and is not protected thereby.⁸⁰

V. THE FIFTH CIRCUIT AND THE ILLINOIS SUPREME COURT ERR IN CONFINING THE SECOND AMENDMENT'S PROTECTIONS TO PERSONS UNDER TWENTY-ONE

Unfortunately, the Fifth Circuit's and Illinois Supreme Court's jurisprudence holding that persons under twenty-one likely do not,⁸¹ or plainly do not,⁸² enjoy Second Amendment rights is incorrect. Instead, a historical analysis of firearm ownership by age during the colonial and founding periods casts a shadow of doubt over those conclusions, affirmatively proving that—generally—males as young as sixteen

⁷⁶ *Id.* at 154.

⁷⁷ *Id.*

⁷⁸ *Id.* at 154–55 (considering precedent, including *National Rifle Association of America v. Bureau of Alcohol, Tobacco, Firearms, and Explosives* and *National Rifle Association of America v. McCraw*).

⁷⁹ See *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 204 (5th Cir. 2012) (“Although we are inclined to uphold the challenged federal laws [regulating the sale of handguns to persons aged eighteen to twenty] at step one of our analytical framework, in an abundance of caution, we proceed to step two.”); *Nat'l Rifle Ass'n of Am. v. McCraw*, 719 F.3d 338, 347 (5th Cir. 2013) (considering the constitutionality of a state law banning eighteen-to-twenty year-olds from carrying handguns under the two-step framework, concluding that “the conduct burdened by the [state] scheme likely ‘falls outside the Second Amendment’s protection,’” but nonetheless proceeding to step two of the framework) (quoting *Nat'l Rifle Ass'n of Am.*, 700 F.3d at 203).

⁸⁰ *Mosley*, 33 N.E.3d at 155.

⁸¹ See *Nat'l Rifle Ass'n of Am.*, 700 F.3d at 204 (explaining that persons under twenty-one likely do not enjoy Second Amendment rights); *McCraw*, 719 F.3d at 347 (considering the constitutionality of a state law banning eighteen-to-twenty-year-olds from carrying handguns under the two-step framework, concluding that “the conduct burdened by the [state] scheme likely ‘falls outside the Second Amendment’s protection[.]’”).

⁸² See *Mosley*, 33 N.E.3d at 155 (holding that under the Second Amendment, persons under twenty-one have to right to possess a firearm).

maintained the right to own and bear arms *at least* for militia purposes,⁸³ and in some cases for general use.⁸⁴

Confirming what is indicated by the history surrounding firearm ownership during the colonial and founding periods, the Supreme Court's jurisprudence regarding when other individual, constitutional rights vest reveals that persons of all ages maintain constitutional rights,⁸⁵ although the rights of minors under eighteen are narrower than those of their adult counterparts.⁸⁶

In light of the history and jurisprudence examined below, courts should begin recognizing what the Court “strong[ly] presume[d]” in *Heller*: “[T]he Second Amendment right is exercised individually and belongs to *all* Americans.”⁸⁷

A. *Historical Exercise of the Preexisting Right to Keep and Bear Arms by Age: The Colonial and Founding Periods*

In *Heller*, the Court made clear that the Second Amendment means what it meant when it was adopted in 1791.⁸⁸ Therefore, a historical assessment of who, by age, exercised the right to bear arms when the Second Amendment was adopted sheds light on who, by age, maintains Second Amendment rights to bear arms today. Further, the colonial history provides additional guidance regarding who—by age—enjoys Second Amendments rights because, as the

⁸³ See Cramer, *supra* note 5, at 3–4, 7–9 (discussing law of the colonies of Connecticut, New York, New Jersey, North Carolina, and Georgia requiring persons aged sixteen to join the militia); Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco, and Explosives, 5 F.4th 407, 428 (4th Cir. 2021) (“Before ratification, when militias were solely defined by state law, most colonies and states set the age for militia enlistment at [sixteen]. Right after ratification, when federal law set the age at [eighteen], every state also set their militia age at [eighteen].”).

⁸⁴ Cramer, *supra* note 5, at 7 (discussing the colony of New Hampshire's law requiring males ages sixteen to sixty to maintain firearms regardless of militia membership).

⁸⁵ See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (“Viewed together, our cases show that . . . children generally are protected by the same constitutional guarantees against governmental deprivations as are adults”); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–13 (1975) (citation omitted) (“Minors are entitled to a significant measure of First Amendment protection and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”).

⁸⁶ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 339–40 (1985) (explaining that under the Fourth Amendment, the rights of schoolchildren to not be subjected to unreasonable searches and seizures are relaxed); *Ginsberg v. New York*, 390 U.S. 629, 636–38 (1968) (explaining that under the First Amendment, what is obscene for minors—and therefore not protected by the First Amendment—is broader than what is obscene for adults); *Bellotti*, 443 U.S. at 634 (explaining that the rights of minors are subject to greater intrusion than those of adults).

⁸⁷ See *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (emphasis added).

⁸⁸ See *id.* at 581–619 (engaging in a lengthy examination of the Second Amendment's history to understand its original meaning).

Court recognized in *Heller*, the Second Amendment codified a pre-existing, English right to bear arms.⁸⁹

Although the historical record regarding who, by age, maintained the right to bear arms during the colonial and founding periods is not destitute, it is by no means complete. Therefore, the historical record cannot, standing alone, adequately depict who enjoyed the right to keep and bear arms in 1791. Notwithstanding the limited nature of the historical record, what is available does demonstrate that, generally, persons aged sixteen and older maintained the right to bear arms at least for limited purposes.⁹⁰

i. Colonial Law Regarding the Right to Keep and Bear Arms by Age

Clayton E. Cramer's 2004 article *Colonial Firearm Regulation* sheds significant—albeit limited—light on who, by age, maintained the right to bear arms during the colonial era.⁹¹ Specifically, all colonies, with the exception of the pacifist-quaker-dominated Pennsylvania, implicitly or explicitly required their colonists—or subsets thereof—to maintain arms.⁹² Of the colonies requiring arms ownership, several required their colonists—or subsets thereof—to maintain arms generally, while the majority of colonies required a subset of men to maintain arms at least for militia purposes.⁹³

Of the fifteen colonies (including New Haven and Plymouth), six—Massachusetts, New Haven, Plymouth, New Hampshire, Delaware, and

⁸⁹ See *id.* at 592–95 (explaining that the Second Amendment codified a pre-existing, English right to bear arms).

⁹⁰ See Cramer, *supra* note 5 (describing New Hampshire's requirement that all males aged sixteen to sixty maintain firearms irrespective of militia membership; describing Connecticut, New York, New Jersey, North Carolina, and Georgia requirements that males aged sixteen enlist in the militia); Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco, and Explosives, 5 F.4th 407, 428 (4th Cir. 2021) (noting that “[b]efore ratification, when militias were solely defined by state law, most colonies and states set the age for militia enlistment at [sixteen]. Right after ratification, when federal law set the age at [eighteen], every state also set their militia age at [eighteen].”).

⁹¹ See Cramer, *supra* note 5, at 1.

⁹² See Cramer, *supra* note 5, at 3–11 (discussing colonial laws of Connecticut, Virginia, New York, Maryland, Massachusetts, New Haven and Plymouth, New Hampshire, New Jersey, Delaware, Rhode Island, South Carolina, North Carolina, Georgia, and Pennsylvania regarding required arms ownership); see also Alexander Gouzoules, *The Diverging Right(s) to Bear Arms: Private Armament and the Second and Fourteenth Amendments in Historical Context*, 10 ALA. C.R. & C.L. L. REV. 159, 166 (2019) (explaining that in the American colonies, “[o]wnership of weaponry was usually required for all white men of military age in order to provide for colonial security”).

⁹³ See Cramer, *supra* note 5, at 3–10 (explaining that the colonies of Connecticut, Virginia, New York, Maryland, Massachusetts, New Jersey, Delaware, South Carolina, North Carolina, and Georgia maintained militia laws while the colonies of Massachusetts, New Haven, Plymouth, New Hampshire, Delaware, and Rhode Island all required their colonists, or subsets thereof, to maintain arms).

Rhode Island—implicitly or explicitly required their colonists, or subsets of their colonists, to maintain arms unconnected to militia service.⁹⁴ Five of the six colonies—Massachusetts, New Haven, Plymouth, New Hampshire, and Delaware—required not merely the ownership of arms, but of firearms specifically.⁹⁵

Although the laws required arms ownership and maintenance, at what age a person was required to comply with such laws is not entirely clear for every colony. Absent any age requirement, Massachusetts, Delaware, and Maryland required “all inhabitants,” “every Freeholder and taxable Person, and “each person” to maintain firearms, respectively.⁹⁶ While Rhode Island did not require arms ownership explicitly, it did prohibit “men” from traveling further than two miles outside of town without arms and required all “men” to bring their weapons to public meetings.⁹⁷ Explicit were New Haven’s and New Hampshire’s laws, which required males ages sixteen to sixty to own and maintain firearms.⁹⁸

Although the colonial laws requiring general arms ownership were not always clear regarding the ages of the persons who came within their scopes, the colonial militia laws often were specific. Ten colonies—Connecticut, Virginia, New York, Maryland, Massachusetts, New Jersey, Delaware, South Carolina, North Carolina, and Georgia—maintained militia laws.⁹⁹ Of the

⁹⁴ See Cramer, *supra* note 5, at 6–9 (discussing Massachusetts, Plymouth, New Haven, New Hampshire, Delaware, and Rhode Island laws); see also 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 1642–1649, at 119 (Nathaniel B. Shurtleff ed., 1853) [hereinafter RECORDS OF MASSACHUSETTS] (1645 law requiring “all inhabitants” to “have armes in their houses fit for service, w[i]th powder, bullets, [and] match, as oth[e]r souldiers[.]”); RECORDS OF THE COLONY AND PLANTATION OF NEW HAVEN, FROM 1638 TO 1649, at 96–97 (Charles J. Hoadly ed., 1857) [hereinafter RECORDS OF NEW HAVEN] (1643 law requiring “every male, fro[m] [sixteen] yeares olde to sixty” to maintain a “good gun, . . . powder, . . . match, . . . flints, [and] bullets,” or be subject to a fine); THE COMPACT, CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 35, 44–45 (1836) [hereinafter RECORDS OF PLYMOUTH] (1636 law requiring “each person for himself” to maintain a firearm, powder, and ammunition, subject to a fine for failure to comply); ACTS AND LAWS, PASSED BY THE GENERAL COURT OR ASSEMBLY OF HIS MAJESTIES PROVINCE OF NEW HAMPSHIRE IN NEW-ENGLAND 91–92 (1716) [hereinafter RECORDS OF NEW HAMPSHIRE] (requiring all males ages sixteen to sixty to maintain a firearm and participate in military exercises (although not necessarily enlist in the militia) and all householders to maintain a firearm, powder, and ammunition, subject to a fine for failure to comply).

⁹⁵ See Cramer, *supra* note 5, at 6–8.

⁹⁶ See Cramer, *supra* note 5, at 5, 6, 8; RECORDS OF MASSACHUSETTS, *supra* note 94, at 119; RECORDS OF PLYMOUTH, *supra* note 94, at 44–45; see also Gouzoules, *supra* note 92, at 166 (“By 1645, Massachusetts law required all inhabitants to ‘endeavor after such armes as may be most usefull for their owne & ye countryes defence.’”).

⁹⁷ See Cramer, *supra* note 5, at 8–9.

⁹⁸ See Cramer, *supra* note 5, at 7; RECORDS OF NEW HAVEN, *supra* note 94, at 96–97.

⁹⁹ See Cramer, *supra* note 5, at 3–10; see also THE CODE OF 1650, BEING A COMPILATION OF THE EARLIEST LAWS AND ORDERS OF THE GENERAL COURT OF CONNECTICUT 72 (1836) [hereinafter CODE OF CONNECTICUT]; CHARLES Z. LINCOLN ET AL., 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 49–50 (1896) [hereinafter COLONIAL LAWS OF NEW YORK]; ARCHIVES OF MARYLAND 77 (William Hand Browne ed., 1883); JOURNAL OF THE GRAND COUNCIL OF SOUTH

ten, only three—Virginia, South Carolina, and Massachusetts—did not specify at what age(s) their colonists were required to enlist.¹⁰⁰ Virginia required “all free men” to enlist in the militia, while South Carolina required “all, and every person and persons now in this Colony” to maintain arms for militia purposes.¹⁰¹ Although Massachusetts did maintain a militia, it is unclear whether its colonists were required to enlist therein, and if so, at what age.¹⁰²

However, the colonies of Connecticut, New York, New Jersey, Delaware, North Carolina, and Georgia required males of specific ages to enlist in the militia. The colonies of Connecticut, New York, New Jersey, North Carolina, and Georgia required males to enlist in the militia at age sixteen while Delaware required enlistment at eighteen.¹⁰³

Somewhere in the middle was Maryland. Maryland’s Act for Military Discipline of 1638/9 required “every house keeper” within the colony to maintain a firearm, presumably for military use, but that act did not specify at what age a person was subject thereto.¹⁰⁴ In apparent aid of the Act for Military Discipline of 1638/9, in 1641 Maryland made firearms ownership by men ages sixteen to fifty a prerequisite to property ownership to ensure that “house keepers” did maintain firearms as required by the 1638/9 Act.¹⁰⁵ The age requirement in the 1641 Act indicates that Maryland considered males aged sixteen to fifty as being the “house keeper[.]” militia created by the 1638/9 Act for Military Discipline.

Although colonial law does not point to any concrete answer regarding who, by age, enjoyed the right to bear arms during the colonial period, it is clear that persons aged sixteen and older regularly exercised that right *at least*

CAROLINA 10–11 (A. S. Salley ed., 1907); COLLECTION OF ALL THE PUBLIC ACTS OF ASSEMBLY, OF THE PROVINCE OF NORTH-CAROLINA 215–16 (1752) [hereinafter NORTH CAROLINA ACTS]; 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA, pt. 1 291–92 (1911) [hereinafter RECORDS OF GEORGIA].

¹⁰⁰ See Cramer, *supra* note 5, at 4, 6–7, 9.

¹⁰¹ See Cramer, *supra* note 5, at 4, 9; see also JOURNAL OF THE GRAND COUNCIL OF SOUTH CAROLINA, *supra* note 99, at 10–11.

¹⁰² See Cramer, *supra* note 5, at 6–7 (discussing Massachusetts’s general requirement that “all inhabitants” therein maintain arms, and that it also maintained a militia).

¹⁰³ See Cramer, *supra* note 5, at 3–4, 7–10; see also CODE OF CONNECTICUT, *supra* note 99, at 72 (1650 Connecticut colonial law requiring “every male person,” “that are above the age of sixteen yeares” to maintain a firearm for militia purposes); COLONIAL LAWS OF NEW YORK, *supra* note 99, at 49–50 (New York colonial law requiring “Every Male . . . Sixteen to Sixty years of age” to maintain a firearm, powder, and ammunition for militia purposes); NORTH CAROLINA ACTS, *supra* note 99, at 215–16 (North Carolina colonial law requiring all “[f]reemen and [s]ervants . . . between the Age of Sixteen Years, and Sixty” to enlist in the militia and maintain a “gun fit for service,” powder, and ammunition); RECORDS OF GEORGIA, *supra* note 99, at 291–92 (Georgia colonial law requiring “all male Persons . . . from the Age of Sixteen Years to Sixty Years” to be armed and join the militia).

¹⁰⁴ Cramer, *supra* note 5, at 4–5; ARCHIVES OF MARYLAND, *supra* note 99, at 77.

¹⁰⁵ Cramer, *supra* note 5, at 5.

for militia purposes¹⁰⁶ and that sometimes sixteen-year-olds were required to keep and bear arms unconnected to militia service.¹⁰⁷ Additionally, the colonies that required persons to bear arms for militia purposes required those persons to keep those arms personally.¹⁰⁸ While it is possible that those arms were to be kept and used *exclusively* for militia purposes, it makes sense that if a colonist personally owned a firearm as a piece of personal property and kept that firearm in his home, he was also permitted to retrieve that firearm from atop the fireplace mantel and employ it in defense of himself and his family. If such was the case, then militia laws requiring persons to maintain personal weapons for militia service also had the double-effect of affirming that those persons—often as young as sixteen—maintained the right to bear arms in self-defense, as the Second Amendment protects.¹⁰⁹

Therefore, while the colonial historical record does not affirmatively prove that minors maintained the right to bear arms for general self-defense purposes during the colonial era, as the Second Amendment protects,¹¹⁰ it does cast doubt on Fifth Circuit's and Illinois Supreme Court's conclusions that persons under twenty-one do not maintain Second Amendment rights because they were historically exempt from the right to bear arms.¹¹¹ Instead, the historical record indicates that during the colonial era, persons under twenty-one—generally males aged sixteen and older—at least maintained the right to bear arms for certain purposes, if not generally. This history is probative regarding who the Second Amendment applied to at the time of the founding due to the pre-existing nature of the right to bear arms that is protected by the Second Amendment,¹¹² but a delve into relevant founding era history is necessary to more fully develop an understanding of who, by

¹⁰⁶ See Cramer, *supra* note 5, at 3–4, 7–10 (discussing law of the colonies of Connecticut, New York, New Jersey, North Carolina, and Georgia requiring persons aged sixteen to join the militia).

¹⁰⁷ See Cramer, *supra* note 5, at 6–8 (discussing New Hampshire's requirement that all males aged sixteen to sixty maintain firearms unconnected to militia service; Massachusetts' requirement that "all inhabitants" maintain firearms unconnected to militia service; Delaware's requirement that "every Freeholder and taxable Person" maintain firearms unconnected to militia service).

¹⁰⁸ See Cramer, *supra* note 5, at 11–12 (explaining that colonists kept their firearms in their homes even if the firearm was one used for militia purposes).

¹⁰⁹ See *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (explaining that the "central component" of the Second Amendment is the right to self-defense) (original emphasis removed).

¹¹⁰ See *id.*

¹¹¹ See *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 204 (5th Cir. 2012) (explaining that persons under twenty-one likely do not enjoy Second Amendment rights); *Nat'l Rifle Ass'n of Am. v. McCraw*, 719 F.3d 338, 347 (5th Cir. 2013) (considering the constitutionality of a state law banning eighteen-to-twenty-year-olds from carrying handguns under the two-step framework, concluding that "the conduct burdened by the [state] scheme likely 'falls outside the Second Amendment's protection.'"); *People v. Mosley*, 33 N.E.3d 137, 155 (Ill. 2015) (holding that under the Second Amendment, persons under twenty-one have no right to possess a firearm).

¹¹² See *Heller*, 554 U.S. at 592–595 (explaining that the Second Amendment codified a pre-existing, English right to bear arms).

age, maintained the right to bear arms when the Second Amendment was ratified.

ii. Founding-Era Law Regarding the Right to Keep and Bear Arms by Age

Not only does the colonial history surrounding the right to bear arms support the conclusion that the Second Amendment protects those under twenty-one, but so too does founding-era history. Examined below is a history-laden opinion written by the Fourth Circuit regarding the rights of persons under twenty-one to bear arms, as well as the duty of males fifteen-years-old and older during the founding era to bear their personal arms when summoned as members of the *posse comitatus*.

In the now-vacated-as-moot case *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco, and Explosives*, the Fourth Circuit conducted a lengthy historical inquiry into the original meaning of the Second Amendment as it applied to persons aged eighteen-to-twenty.¹¹³ Although *Hirschfeld* is no

¹¹³ See *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco, and Explosives*, 5 F.4th 407, 419–438 (4th Cir. 2021) (using history to explain why at the time of the Second Amendment’s ratification persons aged eighteen to twenty maintained the right to bear arms), *vacated as moot*, 14 F.4th 322, 322 (4th Cir. 2021). *Contra* Saul Cornell, “Infants” and Arms Bearing in the Era of the Second Amendment: Making Sense of the Historical Record, *YALE L. & POL’Y REV.* (Oct. 26, 2021, 2:45 PM), https://ylpr.yale.edu/inter_alia/infants-and-arms-bearing-era-second-amendment-making-sense-historical-record (arguing that the Fourth Circuit incorrectly decided *Hirschfeld*). Cornell provides a strong counterargument against the Fourth Circuit’s *Hirschfeld* reasoning. However, it remains unpersuasive for three principal reasons. First, Cornell argues that because minors under twenty-one were subject to patriarchal control and did not independently have rights during the founding era that persons under twenty-one must lack Second Amendment rights today. However, the fact that minors under twenty-one were subject to patriarchal control does not mean that those minors were subject to the same control at the hand of government. Because constitutional, individual rights protect persons from *government*—and not usually their parents—the fact that fathers could deprive their children of otherwise constitutional rights during the founding period does not indicate that government could do the same. Second, Cornell argues that because minors under twenty-one did not have Second Amendment rights during the founding era, they must not have those rights today by virtue of the Second Amendment’s inherent requirements. This argument requires two assumptions: (1) the Second Amendment implicitly excludes minors from its scope and (2) the age of majority is locked in at twenty-one. However, the Second Amendment does not speak of an age of majority, let alone a twenty-one-year age of majority. Instead, it speaks of a constitutional right. The question to be answered is who the right applies to. Assuming *arguendo* that the Second Amendment does implicitly exclude minors from its protections, nothing in the Second Amendment indicates that the age of majority is an unchanging twenty-one simply because the common law age of majority was twenty-one when the Second Amendment was ratified. To assume that the Second Amendment implicitly imported the founding era common law age of majority into its legal substance is not only not grounded in Second Amendment text, but also ignores the evolutionary nature of the common law. For these reasons Cornell’s second argument remains unpersuasive. Third, Cornell argues that just because sixteen-year-olds often had a legal *duty* to bear arms for militia purposes does not establish that those sixteen-year-olds had a legal *right* to bear arms. Cornell is correct that the duty does not establish the right. However, just because a duty does not establish a right does not mean that the existence of the duty should not be taken into consideration when determining whether a right exists.

longer good law as a result of its vacatur, the historical analysis therein is thorough and sheds light on who—by age—enjoyed the right to bear arms codified in the Second Amendment during the founding period.

The Fourth Circuit first noted much of what was explained in the preceding subsection regarding colonial law: American colonies generally required able-bodied males to enlist in the colonial militias at each sixteen.¹¹⁴ Indeed, the right of men sixteen years and older to keep and bear arms in America was so well understood that in 1788, a mere three years prior to the Second Amendment's ratification, the founding father Tench Coxe wrote: "[T]he powers of the sword are in the hands of the yeomanry of America from sixteen to sixty Their swords . . . are the birthright of an American."¹¹⁵

In 1792, a year after the Second Amendment's ratification, Congress passed the Militia Act of 1792, which required able-bodied white men aged eighteen to enlist in the militia.¹¹⁶ However, while formulating the Militia Act, the fact that sixteen-year-olds did maintain the right to bear arms—at least for military purposes—was recognized. Then-Secretary of War Henry Knox argued to Congress that while the "military age has generally commenced at sixteen," the federal militia should be comprised of those aged eighteen and older due to the superior strength of eighteen-year-olds.¹¹⁷ Taking the advice of Secretary Knox, Congress crafted the Militia Act to require enlistment of those eighteen and older.¹¹⁸ Only after the Act took effect in 1792 did states change their respective militia laws to require enlistment at age eighteen instead of age sixteen.¹¹⁹ Importantly, the states only changed their laws to *require* enlistment at eighteen years of age, but did not *exclude* younger men.

Indeed, within the ensuing decades, the states of Pennsylvania and Delaware did exempt active militia service from members under twenty-one during peacetime, but still required enlistment at age eighteen and service from those members if peace dissolved.¹²⁰ And, again, nothing indicates that those states prohibited men younger than eighteen from joining the militia voluntarily.

¹¹⁴ See *Hirschfeld*, 5 F.4th at 428 ("Before ratification, when militias were solely defined by state law, most colonies and states set the age for militia enlistment at [sixteen].").

¹¹⁵ *Id.* at 429.

¹¹⁶ See *id.* at 428.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* ("Right after ratification, when federal law set the age at [eighteen], every state also set their militia age at [eighteen].").

¹²⁰ See *id.* at 430 (2021).

Additionally, as noted by David B. Kopel, males under twenty-one were eligible to serve in *posse comitatus* during the founding era.¹²¹ When called into service by the sheriff, members of a posse were required to be armed—often with firearms from their own homes.¹²² The *posse comitatus* requirement that applied to males as young as fifteen further indicates that during the founding era, males as young as fifteen were not only expected to have access to firearms, but to use those firearms for public purposes from time to time.¹²³

While the history regarding firearm ownership by age immediately surrounding the founding period does not reveal a changing trend of ownership since the colonial period, it does tend to confirm that what was true during the colonial period was also true when the Second Amendment was ratified in 1791: Males aged sixteen were not only permitted to own weapons personally and keep them in their homes, but in many states they were required to do so.¹²⁴ Furthermore, the founding-era *posse comitatus* requirement that males as young as fifteen could be required to bear their personally-owned arms to assist the sheriff provides further evidence that, during the founding era, the right to bears arms was not reserved to those twenty-one and older.¹²⁵ Additionally, the post-ratification history regarding the evolution of militias to require enlistment at eighteen instead of sixteen does not indicate that boys aged sixteen were not *permitted* to voluntarily join the militia and own personal firearms at least for militia purposes. Therefore, history regarding the ownership of firearms by age directly before and after the ratification of the Second Amendment indicates that the general understanding that “the powers of the sword [were] in the hands of the yeomanry of America from sixteen to sixty,” and that “[t]heir swords . . . [were] the birthright of an American” was an unchanging principle during the founding period.¹²⁶

121 David B. Kopel, *The Posse Comitatus and the Office of the Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761, 805 (2014) (explaining that the founding father “James Wilson stated in 1790 that “[n]o man above fifteen and under seventy years of age, ecclesiastical or temporal, is exempted from this service.”); see also Brittany Occhipinti, *We the Militia of the United States of America: A Reanalysis of the Second Amendment*, 53 WILLAMETTE L. REV. 431, 444 (2017) (explaining that, even during the Anglo-Saxon rule in England, males over fifteen were a part of the *posse comitatus*).

122 Kopel, *supra* note 121, at 806–07.

123 See Kopel, *supra* note 121, at 805–07.

124 See *Hirschfeld*, 5 F.4th at 428 (“Before ratification, when militias were solely defined by state law, most colonies and states set the age for militia enlistment at [sixteen]. Right after ratification, when federal law set the age at [eighteen], every state also set their militia age at [eighteen].”) (footnote omitted from quotation).

125 See Kopel, *supra* note 121, at 805–07.

126 *Hirschfeld*, 5 F.4th at 429.

This history again contradicts the conclusions of the Fifth Circuit and the Illinois Supreme Court that persons under twenty-one likely do not,¹²⁷ or plainly do not,¹²⁸ enjoy Second Amendment rights because such persons were not among those who bore arms during the founding period. Instead, the founding-era history proves positively that when the Second Amendment was ratified, males aged sixteen and older enjoyed the right to keep and bear arms, *at least* for militia purposes if not more generally.¹²⁹ Additionally, assuming that weapons owned privately and kept within the home for militia purposes could also be used to defend one's home, the general right of sixteen-year-olds to join the militia had the double effect of affirming the right of such minors to bear arms for personal self-defense—the right codified and protected by the Second Amendment.¹³⁰

B. The Court's Interpretation of Enumerated, Fundamental Rights Militates Against the Conclusion that Second Amendment Rights Do Not Vest Until Adulthood

Although the historical record establishes that persons as young as sixteen maintained the right to bear arms at least for militia purposes during the colonial and founding periods,¹³¹ whether those same persons historically maintained the broader right to bear arms for self-defense as protected by the Second Amendment is less clear. Following the Court's guidance in *Heller* and *McDonald* that the Second Amendment—like the First, Fourth, and Ninth—protects an individual right and carries equally robust protections as its enumerated siblings in the Bill of Rights,¹³² a review of the Court's

¹²⁷ See *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 204 (5th Cir. 2012) (explaining that persons under twenty-one likely do not enjoy Second Amendment rights); *Nat'l Rifle Ass'n of Am. v. McCraw*, 719 F.3d 338, 347 (5th Cir. 2013) (considering the constitutionality of a state law banning eighteen-to-twenty-year-olds from carrying handguns under the two-step framework, concluding that “the conduct burdened by the [state] scheme likely ‘falls outside the Second Amendment’s protection[.]’”).

¹²⁸ See *People v. Mosley*, 33 N.E.3d 137, 155 (Ill. 2015) (holding that under the Second Amendment, persons under twenty-one have the right to possess a firearm).

¹²⁹ See *Hirschfeld*, 5 F.4th at 428–29.

¹³⁰ *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (explaining that the central component of the Second Amendment is the right to self-defense); *McDonald v. City of Chicago*, 561 U.S. 742, 787 (2010) (same).

¹³¹ See *Cramer*, *supra* note 5, 3–4, 7–10 (discussing law of the colonies of Connecticut, New York, New Jersey, North Carolina, and Georgia requiring persons aged sixteen to join the militia and New Hampshire's law requiring males ages sixteen to sixty to maintain firearms regardless of militia membership); *Hirschfeld*, 5 F.4th at 428 (“Before ratification, when militias were solely defined by state law, most colonies and states set the age for militia enlistment at [sixteen]. Right after ratification, when federal law set the age at [eighteen], every state also set their militia age at [eighteen].”).

¹³² See *Heller*, 554 U.S. at 579–80, 592 (noting that the First, Second, Fourth, and Ninth Amendments all use similar language regarding “the people,” denoting an individual right, and that the

jurisprudence regarding when other individual rights vest for minors and adults clarifies the answer.

A review of the Court's jurisprudence regarding when constitutional rights vest in minors and adults reveals three things. First, both minors and adults maintain individual, constitutional rights.¹³³ Second, a person is a minor when they are under eighteen, and an adult when eighteen or older.¹³⁴ Third and lastly, although minors do maintain robust individual, constitutional rights, minors' rights are subject to greater infringement than those of adults.¹³⁵

i. Fourth Amendment Vesting by Age

The Fourth Amendment's Search and Seizure Clause provides for "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]"¹³⁶ As the Court noted in *District of Columbia v. Heller*, the Fourth and Second Amendments both codify pre-existing rights enjoyed by "the people," and that the phrase "the people" carries the same legal import in both amendments.¹³⁷ In accordance with the Court's act of looking to the Fourth Amendment to determine whether the Second Amendment codified an individual right of "the people,"

First, Second, and Fourth Amendments all codify pre-existing individual rights); *McDonald*, 561 U.S. at 778–82, 786–87, 790 (explicitly and continuously rejecting the notion that the Second Amendment is treated as an inferior to other enumerated rights in the incorporation context).

¹³³ See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) ("Viewed together, our cases show that . . . children generally are protected by the same constitutional guarantees against governmental deprivations as are adults . . ."); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–13 (1975) ("Minors are entitled to a significant measure of First Amendment protection . . . and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.").

¹³⁴ See *Ginsberg v. New York*, 390 U.S. 629, 631 (1968) (deciding whether a state law that prohibited the sale of pornographic material to persons under seventeen violated the First Amendment rights of minors when a law applied to adults would unquestionably violate the same); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 72–75 (1976) (deciding whether a law that required unmarried pregnant women under eighteen to receive parental consent for the abortion violated the rights of such minor women); *Bellotti*, 443 U.S. at 625–26, 633–34 (same).

¹³⁵ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 339–40 (1985) (explaining that under the Fourth Amendment, the rights of schoolchildren to not be subjected to unreasonable searches and seizures are relaxed); *Ginsberg*, 390 U.S. at 636–38 (explaining that under the First Amendment, what is obscene for minors—and therefore not protected by the First Amendment—is broader than what is obscene for adults); *Bellotti*, 443 U.S. at 634 (explaining that the rights of minors are subject to greater intrusion than those of adults).

¹³⁶ U.S. CONST. amend. IV.

¹³⁷ See *Heller*, 554 U.S. at 579 (looking to the meaning of the Fourth Amendment's Search and Seizure Clause to understand the meaning of the phrase "the people" in the Second Amendment context); cf. *McDonald*, 561 U.S. at 778–79 (2010) (rejecting the notion that the Second Amendment is treated specially and unfavorably compared to other enumerated rights).

a review of the Court's Fourth Amendment jurisprudence is helpful to understand if a person becomes a member of "the people" at a particular age.

In *New Jersey v. T.L.O.*, a high school student was taken to her assistant vice principal's office, where the assistant vice principal subsequently searched the student's purse.¹³⁸ The assistant vice principal discovered marijuana in the purse, turned the evidence over to the police, and, subsequent to the student's confession, the student was charged.¹³⁹ The student moved to suppress the evidence of marijuana on the grounds that the assistant vice principal illegally searched her in violation of the Fourth Amendment.¹⁴⁰

Initially, the Court had to decide the question of whether students are afforded Fourth Amendment protections against public school officials.¹⁴¹ After rejecting arguments that public school officials operate outside the scope of the Fourth Amendment and that public school officials—regardless of their status as government agents—act *in loco parentis* and therefore are not within the Fourth Amendment's strictures, the Court held that public school children do maintain Fourth Amendment rights to not be unreasonably searched by public school officials.¹⁴²

While deciding whether the search in question violated the student's Fourth Amendment rights, the Court noted that "[a] search of a child's person or of a closed purse or other bag carried on her person, *no less than a similar search carried out on an adult*, is undoubtedly a severe violation of subjective expectations of privacy," thereafter concluding that schoolchildren do maintain a reasonable expectation of privacy regarding their personal effects while at school.¹⁴³ However, the Court further explained that in the school context, children possess only truncated Fourth Amendment protections relative to adults, such that "the level of suspicion of illicit activity needed to justify a search" is lessened for children and that "school officials need not obtain a warrant before searching" schoolchildren.¹⁴⁴

Ultimately, the Court held that, notwithstanding the child-student's Fourth Amendment rights, the challenged search was reasonable and therefore did not violate the student's constitutional rights.¹⁴⁵

¹³⁸ *T.L.O.*, 469 U.S. at 328.

¹³⁹ *Id.* at 328–29.

¹⁴⁰ *Id.* at 329.

¹⁴¹ *Id.* at 333.

¹⁴² *Id.* at 336–37 (rejecting the state's arguments and holding that public school children do maintain Fourth Amendment rights against unreasonable searches from school officials).

¹⁴³ *Id.* at 337–39 (emphasis added).

¹⁴⁴ *Id.* at 339–40.

¹⁴⁵ *Id.* at 347–48.

In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, a school district required any student participating in extracurricular activities to take a drug test, submit to further random drug testing, and agree to submit to drug testing based on reasonable suspicion of drug use.¹⁴⁶ Two students brought suit against the school district, seeking relief from the enforcement of the district's drug-testing policy.¹⁴⁷

In considering the policy's constitutionality, the Court stated that although "schoolchildren do not shed their constitutional rights when they enter the schoolhouse," the Fourth Amendment rights of schoolchildren are relaxed when compared to other contexts and that the Fourth Amendment's "reasonableness inquiry" must take into consideration a school's responsibility for the children under its care.¹⁴⁸ Specifically, the Court explained that "[s]ecuring order in the school environment sometimes requires that [child] students be subjected to greater controls than those appropriate for adults," concluding that the student-challengers maintained only a "limited expectation of privacy."¹⁴⁹

Upon weighing the student-challengers' privacy interests against those of the school district in curbing student drug use, the Court concluded that the "invasion of students' privacy [was] not significant" and that the district's policy was a "reasonably effective means" of curbing student drug use and therefore did not violate the Fourth Amendment.¹⁵⁰

In addition to *T.L.O.* and *Earls*, the Court has made absolutely clear that school children do enjoy Fourth Amendment rights—albeit truncated versions thereof—in both *Vernonia School District 47J v. Acton* and *Safford Unified School District No. 1 v. Redding*. In the former case, the Court held that although a seventh-grader did maintain Fourth Amendment protections at school, those protections were lesser than those afforded to adults, and ultimately held that a school's policy of drug-testing students athletes did not violate the Fourth Amendment.¹⁵¹ Similarly, in the latter case, a thirteen-year-old female student was subjected to a partial strip-search by school officials who believed the student was hiding drugs on her person.¹⁵² Again, the Court recognized that the thirteen-year-old did maintain Fourth Amendment rights against unreasonable searches and seizures at school and held that—even when taking into consideration the student's minority—the school did violate

¹⁴⁶ *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 826 (2002).

¹⁴⁷ *Id.* at 826–27.

¹⁴⁸ *Id.* at 829–30 (some internal quotations omitted).

¹⁴⁹ *Id.* at 831–32.

¹⁵⁰ *Id.* at 834, 837–38.

¹⁵¹ *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648, 651–652, 655–56, 664–65 (1995).

¹⁵² *See Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 368 (2009).

the student's Fourth Amendment rights when it subjected her to a partial strip search.¹⁵³

Although research has not revealed a United States Supreme Court case considering the Fourth Amendment rights of minors outside the school context, the federal circuit courts have considered the issue and consistently hold that minors do enjoy Fourth Amendment rights more generally. In *Brokaw v. Mercer County*, the Seventh Circuit held that a plaintiff pled a prima facie Fourth Amendment claim under 42 U.S.C. § 1983 against various defendants for an alleged unreasonable seizure of himself from his home when he was six years old.¹⁵⁴ The Ninth Circuit, in *Mann v. County of San Diego*, held that the government violated the Fourth Amendment rights of four children under six years old to be free from unreasonable searches and seizures when the government removed the children from their parents and subjected them to medical tests.¹⁵⁵ In *Kovacik v. Cuyahoga County Department of Children and Family Services*, the Sixth Circuit held that the government violated minor-plaintiffs' Fourth Amendment rights when it removed them from their mother's home without a warrant and absent exigent circumstances.¹⁵⁶ Likewise, in *Tenenbaum v. Williams*, the Second Circuit recognized that a five-year-old girl had a Fourth Amendment right to be free from unreasonable searches and seizures and held that the government violated the Fourth Amendment when it conducted medical examinations on the young girl without first obtaining a court order.¹⁵⁷

Therefore, in the Fourth Amendment context, the Supreme and Circuit court jurisprudence is unmistakably clear: minors, even those as young as five-years old, are members of "the people" that are within the scope of the Fourth Amendment's protections.¹⁵⁸ However, minors—at least in the public school context—do enjoy a less robust version of the Fourth Amendment's protections.¹⁵⁹ In accordance with the direction of the *Heller* Court that the

¹⁵³ *See id.* at 370, 377.

¹⁵⁴ *Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1006, 1010–12 (7th Cir. 2000).

¹⁵⁵ *Mann v. Cnty. of San Diego*, 907 F.3d 1154, 1164, 1167 (9th Cir. 2018).

¹⁵⁶ *Kovacik v. Cuyahoga Cnty. Dep't of Child. and Fam. Servs.*, 724 F.3d 687, 695–96 (6th Cir. 2013).

¹⁵⁷ *Tenenbaum v. Williams*, 193 F.3d 581, 605–06 (2d Cir. 1999).

¹⁵⁸ *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325, 337–38 (1985) (holding that a minor student did maintain a meaningful—albeit truncated—Fourth Amendment right to be free from unreasonable searches and seizures at school); *Safford Unified Sch. Dist. No. 1*, 557 U.S. at 370, 377 (holding that a thirteen-year-old student was subjected to an unlawful partial strip search by public school officials in violation of the Fourth Amendment); *Tenenbaum*, 193 F.3d at 605–06 (holding that the government violated a five-year-old girl's Fourth Amendment rights when, after removing her from school, it subjected her to medical testing without first obtaining a court order).

¹⁵⁹ *See, e.g., T.L.O.*, 469 U.S. at 337–38 (holding that a minor student did maintain a meaningful—albeit truncated—Fourth Amendment right to be free from unreasonable searches and seizures at school);

phrase “the people” in both the Second and Fourth Amendments share the same legal meaning,¹⁶⁰ the courts’ Fourth Amendment jurisprudence indicates that courts should construe the Second Amendment to apply fully to adults and—perhaps a somewhat truncated version thereof—to minors, who are members of “the people” for purposes of the Second and Fourth Amendments.¹⁶¹ Lastly, it should be noted that, consonant with the Court’s jurisprudence that schoolchildren enjoy lesser Fourth Amendment rights in the school context due to the states’ need to keep safety and order in school,¹⁶² schoolchildren almost certainly would enjoy little-to-no Second Amendment rights in the school context.¹⁶³

ii. First Amendment Vesting by Age

Upon turning to the Court’s First Amendment jurisprudence, one finds a familiar theme. In *Ginsberg v. State of New York*, a state law prohibited the sale of pornographic magazines to minors under seventeen years of age.¹⁶⁴ A store owner subsequently sold one such magazine to a sixteen-year-old minor in violation of the law, for which he was charged and convicted.¹⁶⁵ The case caused the Court to decide whether the law prohibiting the sale of pornographic material to persons under seventeen was unconstitutional as violative of the First Amendment rights of persons under seventeen in light of the fact that the material was not obscene for adults.¹⁶⁶

First, the Court noted that obscene material is not protected under the First Amendment.¹⁶⁷ Although the challenged law banned sale of pornographic material to minors under seventeen that in the adult context would not be obscene, the Court explained that what qualifies as obscene for

Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 829–30 (2002) (same).

¹⁶⁰ See *District of Columbia v. Heller*, 554 U.S. 570, 579–80 (2008) (looking to the meaning of the Fourth Amendment’s Search and Seizure Clause to understand the meaning of the phrase “the people” in the Second Amendment context).

¹⁶¹ See *T.L.O.*, 469 U.S. at 337–38 (holding that a minor student did maintain a meaningful—albeit truncated—Fourth Amendment right to be free from unreasonable searches and seizures at school); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 (1995) (same); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty.*, 536 U.S. at 829–30 (same); *Safford Unified Sch. Dist. No. 1*, 557 U.S. at 370 (same).

¹⁶² See, e.g., *T.L.O.*, 469 U.S. at 339–40; *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty.*, 536 U.S. at 831–32.

¹⁶³ See *Heller*, 554 U.S. at 626–27 (noting that the Court’s opinion does not cast doubt on the government’s authority to regulate firearm possession in schools and other “sensitive places”).

¹⁶⁴ See *Ginsberg v. New York*, 390 U.S. 629, 631–33 (1968).

¹⁶⁵ *Id.* at 631.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 635.

minors is different than what qualifies as obscene for adults.¹⁶⁸ Two considerations undergirded the bifurcation. First, the Court explained that parents have constitutional authority to rear their children as they deem fit, and that the state may so aid parents, including by prohibiting the sale of certain material to minors.¹⁶⁹ Importantly, however, the Court did note that the law in question left parenting to the parents: If the parents so desired, they could purchase the material for their minor children, who could then view the material unhindered by law.¹⁷⁰ Second, the Court recognized that “[t]he State also has an independent interest in the well-being of its youth,” and that due to that independent interest a minor’s First Amendment rights may be relaxed relative to the First Amendment rights of adults.¹⁷¹

Subsequently, although the Court did recognize that minors do enjoy First Amendment rights, the Court concluded that the material in question was obscene in relation to minors under seventeen, was therefore outside the scope of the First Amendment rights of such minors, and ultimately upheld that state law under rational-basis review.¹⁷²

In *Tinker v. Des Moines Independent Community School District*, a group of students ages thirteen, fifteen, and sixteen, wore black armbands to their public schools in violation of school policy to protest the Vietnam War; thereafter, all three students were suspended.¹⁷³ The students brought suit against the school district, arguing that the policy prohibiting students from wearing armbands in protest violated the First Amendment.¹⁷⁴

The Court recognized that the minor students “are ‘persons’ under our Constitution” and do maintain meaningful First Amendment rights, although those rights were tempered within the public-school setting.¹⁷⁵ Thereafter, the Court concluded that the students’ acts of wearing armbands to school did not disrupt schooling and further held that the policy prohibiting the minor

¹⁶⁸ See *id.* at 636–38 (noting that “we have recognized that even where there is an invasion of protected freedoms ‘the power of the state to control the conduct of children reaches beyond the scope of its authority over adults[.]’”) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

¹⁶⁹ See *id.* at 639.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 640.

¹⁷² *Id.* at 640–43.

¹⁷³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

¹⁷⁴ *Id.* at 504–05.

¹⁷⁵ *Id.* at 506–07, 511 (discussing precedent and re-affirming that minor children do have First Amendment rights at school, further noting that “the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools,” and concluding that “[o]ur problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities”).

students from wearing armbands violated the students' First Amendment right to exercise their freedom of speech.¹⁷⁶

More recently, in 2021, the Court decided *Mahanoy Area School District v. B.L.*¹⁷⁷ In *Mahanoy*, a public high school student used social media to profanely criticize her school and its cheerleading team.¹⁷⁸ The student made her comments outside of school hours and off school property.¹⁷⁹ Subsequently, the school suspended the student from the cheerleading team for one year, causing the student to sue the school, arguing that the school violated her First Amendment freedom of speech.¹⁸⁰

Again, the Court recognized that “[m]inors are entitled to a significant measure of First Amendment protection,” even in the public-school setting, although the rights of minor students are lessened to some degree.¹⁸¹ After noting that if the student were an adult, her speech would have undoubtedly been protected, the Court analyzed the student’s speech in context and ultimately held that the school did violate her “robust” First Amendment rights when it suspended her from the cheerleading team due to her profane criticism of the school and its cheer team.¹⁸²

Although the cases highlighted above illustrate a clear picture that minors are entitled to First Amendment protections, they do not stand alone. Indeed, the Court has enunciated the same idea many times over in cases such as *West Virginia State Board of Education v. Barnette*, *Erznoznik v. City of Jacksonville*, and *Brown v. Entertainment Merchants Association*. In *Barnette*, the Court enjoined a state board of education resolution requiring minor students to salute the flag as violative of the students’ First Amendment rights.¹⁸³ In *Erznoznik*, the Court refused to uphold a city ordinance prohibiting films containing certain kinds of nudity on the basis that the ordinance protected minors.¹⁸⁴ Specifically, the Court explained that although minors maintain a truncated version of First Amendment rights compared to adults, “minors are entitled to a significant measure of First Amendment protection” and “only in relatively narrow and well-defined circumstances may government bar public dissemination of protected

¹⁷⁶ *Id.* at 514.

¹⁷⁷ *See generally* *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

¹⁷⁸ *Id.* at 2042.

¹⁷⁹ *Id.* at 2043.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 2044–45 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

¹⁸² *Id.* at 2046–48.

¹⁸³ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626, 642 (1943) (enjoining enforcement of the state regulation requiring students to salute the flag at school).

¹⁸⁴ *See* *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–14 (1975).

materials to them.”¹⁸⁵ Lastly, in *Brown*, the Court held that a state law prohibiting the sale or rental of certain violent video games to minors “abridges the First Amendment rights of young people,” subsequently enjoining enforcement of the law.¹⁸⁶

Like its Fourth Amendment jurisprudence, the Court’s First Amendment jurisprudence is clear: Minors, including those as young as thirteen, enjoy First Amendment rights, although often a less-robust form thereof.¹⁸⁷ As the Court explained in *Heller*, both the First and Second Amendments codify pre-existing, individual rights.¹⁸⁸ The fact that First Amendment rights apply *fully* to adults and often in a modified manner to minors¹⁸⁹ indicates that Second Amendment rights also apply fully to adults and likely in a less-robust manner to minors. What is more, the Court has never provided that a person ceases being a minor and attains adulthood at the common law age of twenty-one for purposes of enjoying full First Amendment rights,¹⁹⁰ as the Fifth Circuit and the Illinois Supreme Court held in regard to the vestment of Second Amendment rights.¹⁹¹ Therefore, the Court’s First Amendment jurisprudence further suggests that full Second Amendment rights vest for adults at the modern age of majority (eighteen), rather than the common law age of twenty-one.

¹⁸⁵ *Id.* at 212–13.

¹⁸⁶ *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 789, 805 (2011).

¹⁸⁷ *See, e.g., Ginsberg v. New York*, 390 U.S. 629, 634–42 (1968) (discussing a minor’s truncated version of First Amendment rights); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–07, 511 (1969) (stating that minor students are “persons” within the meaning of the Constitution and enjoy modified First Amendment protections while at school); *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2044 (noting that “[m]inors are entitled to a significant measure of First Amendment protection,” even in the public-school setting, although the rights of such students are lessened to some degree).

¹⁸⁸ *See District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (noting that “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right.”) (original emphasis removed).

¹⁸⁹ *See, e.g., Ginsberg*, 390 U.S. at 634–35, 638 (explaining that what is considered “obscene” for adults differs than what is considered “obscene” for minors under seventeen years of age); *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2046–47 (explaining that the minor student did not enjoy the full First Amendment rights that an adult would); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (noting that “[i]t is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults.”).

¹⁹⁰ *See Ginsberg*, 390 U.S. at 634–35, 638 (explaining that what is considered “obscene” for adults differs than what is considered “obscene” for minors under seventeen years of age).

¹⁹¹ *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 204 (5th Cir. 2012) (explaining that persons under twenty-one likely do not enjoy Second Amendment rights); *Nat’l Rifle Ass’n of Am. v. McCraw*, 719 F.3d 338, 347 (5th Cir. 2013) (considering the constitutionality of a state law banning eighteen-to-twenty-year-olds from carrying handguns under the two-step framework, concluding that “the conduct burdened by the [state] scheme likely ‘falls outside the Second Amendment’s protection’”); *People v. Mosley*, 33 N.E.3d 137, 155 (Ill. 2015) (holding that possession of handguns by persons under the age of twenty-one is not conduct within the scope of the Second Amendment and is not protected thereby).

Lastly, two thoughts on specific limitations of minors' Second Amendment rights are particularly noteworthy. First, the Court's note in *Ginsberg* that a state may regulate the sale of certain obscene material to minors that it could not prohibit for adults suggests that perhaps states may be able to prohibit the sale of firearms—or some subset of firearms—to minors.¹⁹² Second, and consonant with its Fourth Amendment jurisprudence, the Court has held that minor children's First Amendment rights are narrower in the school context than otherwise.¹⁹³ This precedent provides further support for the proposition that recognition of minors' Second Amendment rights does not mean that minors have the right to carry weapons to school. On the contrary, states likely may prohibit possession of weapons on school property while simultaneously recognizing the limited Second Amendment rights of minors.¹⁹⁴

iii. Right to Privacy Vesting by Age

Lastly, the Court's abortion jurisprudence as it relates to minors continues along the same path of recognizing that minors—like adults—also enjoy individual, constitutional rights.¹⁹⁵ In *Planned Parenthood of Central Missouri v. Danforth*, a state law proscribed abortion providers from performing abortions on unmarried minor women under eighteen within the first twelve weeks of their pregnancy unless the minor obtained parental consent or the abortion was necessary to save the life of the minor.¹⁹⁶ Three days after the law went into effect, abortion providers brought suit against the state's attorney general, seeking injunctive relief against the enforcement of the law on the grounds that the law violated the Fourteenth and Ninth Amendments.¹⁹⁷ The state defended the challenged law on two grounds: First, the state has a special interest in providing for the welfare of children under

¹⁹² See *Ginsberg*, 390 U.S. at 639 (after explaining that the state may prohibit the sale of certain obscene material to minors as applied to minors because such prohibitions aid parents in parenting their children, the Court noted that “the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children”).

¹⁹³ See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–07 (1969); *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2044–45.

¹⁹⁴ See *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008) (noting that the Court's opinion does not cast doubt on the government's authority to regulate firearm possession in schools and other “sensitive places”).

¹⁹⁵ Since this piece was authored, the Supreme Court held that obtaining an abortion is not a protected liberty interest under the Fourteenth Amendment's Due Process Clause. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022). Notwithstanding this development, the following caselaw indicates that when the Constitution protects an individual right, both minors and adults enjoy such right.

¹⁹⁶ *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 72 (1976).

¹⁹⁷ See *id.* at 56–57, 60.

its authority, and second, that the law will serve to protect family unity and preserve parental authority.¹⁹⁸

The Court began its analysis powerfully, stating: “Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”¹⁹⁹ However, the Court noted that the constitutional rights of minors are subject to greater impingements than those of their adult counterparts.²⁰⁰ Notwithstanding the truncated nature of minors’ individual, constitutional rights, the Court held that the state’s interest in proscribing abortions for unmarried minors who had not obtained parental consent “violate[d] the strictures of *Roe [v. Wade]*” and therefore the Fourteenth and Ninth Amendments.²⁰¹

Three years after *Danforth*, the Court decided *Bellotti v. Baird*. In *Bellotti*, a state law prohibited unmarried minors under eighteen from obtaining abortions unless the minor received parental consent (parents were permitted to withhold consent based exclusively on the minor’s best interests) or a judge consented to the abortion “for good cause shown,” only taking into consideration the minor’s best interests.²⁰² An unmarried, pregnant minor challenged the law as violative of the Fourteenth Amendment.²⁰³

The Court began its analysis by noting that “[a] child, merely on account of [her] minority, is not beyond the protection of the Constitution” and that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”²⁰⁴ However, the Court explained that the constitutional rights of minors do not mirror those of their adult counterparts for three principal reasons: “[T]he peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”²⁰⁵

Regarding vulnerability, the Court explained that the constitutional rights of minors are “virtually coextensive” with those of adults, but that “the State is entitled to adjust its legal system to account for children’s vulnerability[.]”²⁰⁶ Turning to minors’ inability to make important decisions with “potentially serious consequences,” the Court explained that constitutional rights of minors are lessened to some degree because “during

¹⁹⁸ See *id.* at 72–73 (discussing the state’s defense of the challenged law).

¹⁹⁹ *Id.* at 74.

²⁰⁰ *Id.*

²⁰¹ See *id.* at 75.

²⁰² See *Bellotti v. Baird*, 443 U.S. 622, 630 (1979).

²⁰³ See *id.* at 625–26, 633.

²⁰⁴ *Id.* at 633 (second quotation is quoting *In re Gault*, 387 U.S. 1, 13 (1967)).

²⁰⁵ *Id.* at 634.

²⁰⁶ *Id.* at 634–35.

the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.²⁰⁷ Lastly, the Court explained that the rights of parents to exercise parental authority over their children requires the constitutional rights of minors be relaxed to some degree, noting that “[p]roperly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty[.]”²⁰⁸

Notwithstanding the truncated nature of the minor’s right, the Court explained that it was still considering a *constitutional right* to abortion, a right that is afforded robust protection.²⁰⁹ Specifically, the Court reasoned that the ability to exercise the right to obtain an abortion must be particularly safeguarded because an inability to exercise that right will lead to “far-reaching” and “potentially severe detriment.”²¹⁰ Going further, the Court ruled that a state may not simply prohibit a minor from obtaining an abortion absent parental or judicial consent, but that the minor must also have an opportunity to demonstrate her maturity to a judge, and upon a successful demonstration of maturity obtain an abortion notwithstanding her parents’ or the judge’s opinion that an abortion is not in the minor’s best interest.²¹¹

Subsequently, the Court held that the challenged law’s failure to provide for such a proceeding rendered it constitutionally defective, thereafter enjoining its enforcement.²¹²

Once again, the Court’s privacy-right jurisprudence echoes a familiar theme: Although individual rights vest *fully* for adults aged eighteen and older, even minors under eighteen enjoy robust constitutional rights.²¹³ This jurisprudence re-enforces what the Court’s First and Fourth Amendment

²⁰⁷ *Id.* at 635.

²⁰⁸ *Id.* at 637–38 (“But an additional and more important justification for state deference to parental control over children is that ‘[the] child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.’”) (quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925)).

²⁰⁹ *See id.* at 642 (“But we are concerned here with a constitutional right to seek an abortion. The abortion decision differs in important ways from other decisions that may be made during minority.”).

²¹⁰ *See id.* at 642–43.

²¹¹ *See id.* at 643 (“A pregnant minor is entitled in such a proceeding to show . . . that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents’ wishes[.]”).

²¹² *Id.* at 651.

²¹³ *See* *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (explaining that “[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights,” notwithstanding that fact that minors’ rights are subject to greater infringements than those of adults); *Bellotti*, 443 U.S. at 634–35 (noting that the constitutional rights of minors are “virtually coextensive” with those of adults, but that “the State is entitled to adjust its legal system to account for children’s vulnerability”).

jurisprudence already makes clear: persons eighteen years and older maintain *full* Second Amendment rights, while their minor counterparts likely maintain some truncated version thereof. Particularly noteworthy is the Court's explanation that the decision to obtain an abortion is a weighty one and the state may require—with limitation—that the minor obtain a parent's consent or demonstrate to a judge that she is sufficiently mature to make the decision to abort on her own, because if she is not permitted to exercise her right to an abortion that the minor may suffer "severe detriment."²¹⁴ Courts should share similar concerns regarding the curtailment of adults' and minors' Second Amendment rights. If the ability of minors and young adults to exercise their Second Amendment right to self-defense is curtailed,²¹⁵ minors may suffer "severe detriment" in the form of property damage, bodily harm, or death to themselves or others.

Additionally, although purchasing, possessing, and using a firearm is undoubtably an important decision and therefore a minor's ability to do so may be subject to more regulation than an adult,²¹⁶ an appropriate remedy may be that which was prescribed in *Bellotti*: A minor who wishes to exercise his Second Amendment rights to use a firearm in a situation in which risk of harm to himself or others is particularly high (conceal carrying a handgun, for instance) must have an opportunity to demonstrate to a judge that he is sufficiently mature to exercise his Second Amendment right to use that weapon for lawful purposes notwithstanding his minority.²¹⁷

VI. CONCLUSION

The Supreme Court has only recently begun to explain the meaning of the Second Amendment and the contours of the rights it protects.²¹⁸ Absent further elucidation from the Court, lower courts have grappled with the scope of the Second Amendment and who is afforded protections thereunder. Although some courts have held that persons under twenty-one are not individual members of "the people" protected by the Second Amendment—

²¹⁴ See *Bellotti*, 443 U.S. at 642–43.

²¹⁵ *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (explaining that the central component to the Second Amendment is the right to self-defense); *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (same).

²¹⁶ See *Bellotti*, 443 U.S. at 637 ("The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors.").

²¹⁷ See *id.* at 643 (providing that a minor must be afforded an opportunity to seek a judicial declaration that the minor is mature enough to decide whether to obtain an abortion on her own).

²¹⁸ See *Heller*, 554 U.S. 570; *McDonald*, 561 U.S. at 749, 752, 778.

and therefore do not maintain a constitutional right to bear arms²¹⁹—colonial and founding era history, as well as Supreme Court precedent regarding when other individual, constitutional rights vest by age, suggest that *all* Americans maintain Second Amendment rights.

Specifically, the *Heller* Court indicated that the Second Amendment means what it meant when it was ratified, placing a strong emphasis on colonial and founding era history.²²⁰ Taking the Court’s guidance that the Second Amendment means what it meant when it was ratified, a review of colonial and founding era history regarding who, by age, maintained the right to bear arms is probative in determining who maintains that same right—codified in the Second Amendment—today.

Colonial history affirmatively proves that persons as young as sixteen regularly were required to exercise the right to bear arms, *at least* for limited militia purposes,²²¹ but also that sixteen-year-olds often were required to bear arms in general and without relation to militia membership.²²² Additionally, all firearms maintained by such sixteen-year-olds—militia members or otherwise—were privately purchased, owned, and stored in the personal homes of those individuals,²²³ a fact that indicates that such firearms could also be used to exercise the private right of self-defense.

Founding-era history surrounding the Second Amendment’s ratification continues the same story. In 1788, three short years prior to the Second Amendment’s ratification, the founding father Tench Coxe wrote: “[T]he powers of the sword are in the hands of the yeomanry of America from sixteen to sixty Their swords . . . are the birthright of an American.”²²⁴ Further, only *after* the ratification of the Second Amendment did the popular age for required militia enlistment change from sixteen to eighteen, a change

²¹⁹ Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, 700 F.3d 185, 204 (5th Cir. 2012) (concluding that Second Amendment rights likely are not enjoyed by persons under twenty-one); Nat’l Rifle Ass’n of Am. v. McCraw, 719 F.3d 338, 347 (5th Cir. 2013) (considering the constitutionality of a state law banning eighteen to twenty-year-olds from carrying handguns under the two-step framework and concluding that “the conduct burdened by the [state] scheme likely ‘falls outside the Second Amendment’s protection’”); People v. Mosley, 33 N.E.3d 137, 155 (Ill. 2015) (holding that persons under twenty-one do not have a Second Amendment right to possess a firearm).

²²⁰ See *Heller*, 554 U.S. at 581–619, 625 (engaging in a lengthy examination of the Second Amendment’s history to understand its original meaning).

²²¹ See Cramer, *supra* note 5, at 3–4, 7–10 (explaining that the colonies of Connecticut, New York, New Jersey, North Carolina, and Georgia required males to enlist in the militia at age sixteen); Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco, and Explosives, 5 F.4th 407, 428 (2021) (“Before ratification, when militias were solely defined by state law, most colonies and states set the age for militia enlistment at [sixteen].”).

²²² See Cramer, *supra* note 5, at 7 (explaining that New Hampshire colonial law required men ages sixteen to sixty to maintain firearms personally irrespective of militia membership).

²²³ See *id.* at 12 (explaining that militia members privately owned and kept their firearms that were to be used for militia purposes).

²²⁴ *Hirschfeld*, 5 F.4th at 429.

that occurred in response to the federal Militia Act of 1792's requirement that males aged eighteen enlist in the federal militia.²²⁵ However, nothing in the history surrounding the ratification indicates that the general attitude espoused by Coxe, that persons aged sixteen and older had the right to bear arms, had changed.

Instead, *post*-ratification the federal government merely set its age for required militia enlistment at eighteen, while the States followed suit. As the Court explained in *Heller*, because the Second Amendment codified a broader individual right to bear arms than the right to bear arms for militia purposes,²²⁶ the *post*-ratification change in the mandatory militia enlistment age from sixteen to eighteen only proves that eighteen was the desired age for mandatory militia enlistment, not that sixteen-year-olds no longer possessed the right to bear arms if they so choose for either militia or other lawful purposes.

Although colonial and founding era history does demonstrate that persons as young as sixteen exercised the right to bear arms at least for militia purposes, and likely for more general purposes as well, a review of the Supreme Court's jurisprudence regarding when other constitutional rights vest in relation to age suggests that the Court's "strong presumption that the Second Amendment right is exercised individually and belongs to *all* Americans" is correct.²²⁷

The Court's First Amendment,²²⁸ Fourth Amendment,²²⁹ and privacy jurisprudence²³⁰ makes absolutely clear that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-

²²⁵ See *id.* at 428 ("Before ratification, when militias were solely defined by state law, most colonies and states set the age for militia enlistment at [sixteen]. Right after ratification, when federal law set the age at [eighteen], every state also set their militia age at [eighteen].").

²²⁶ See *District of Columbia v. Heller*, 554 U.S. 570, 580–81 (2008) (explaining that the right to bear arms codified in the Second Amendment is broader than the right to bear arms for militia purposes).

²²⁷ See *id.* at 581 (emphasis added).

²²⁸ See, e.g., *Ginsberg v. New York*, 390 U.S. 629, 637–38 (1968) (recognizing First Amendment rights of minors); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–07 (1969) (discussing precedent and re-affirming that minor children do have First Amendment rights at school); *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2044–45 (2021) (recognizing First Amendment rights of minors).

²²⁹ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 336–37 (1985) (rejecting the state's arguments and holding that public school children do maintain Fourth Amendment rights against unreasonable searches from school officials); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 829–30 (2002) (recognizing the schoolchildren are protected by the Fourth Amendment's prohibition of unreasonable searches and seizures).

²³⁰ See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (holding that "[a] child, merely on account of his minority, is not beyond the protection of the Constitution" and that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone") (second quotation is quoting *In re Gault*, 387 U.S. 1, 13 (1967)).

defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”²³¹ Notwithstanding the fact that minors and adults both enjoy constitutional rights, the Court has repeatedly held that the rights of minors under eighteen are subject to greater infringement than their adult counterparts.²³²

Considering colonial and founding era history, as well as extensive jurisprudence from the Court explaining time and again that all persons—regardless of age—are protected by constitutional rights, courts should recognize that Americans of all ages are protected by the Second Amendment, but in accordance with that jurisprudence, the Second Amendment rights of minors under eighteen likely are less robust than those of their adult counterparts.

²³¹ *Planned Parenthood of Cent. Mo.*, 428 U.S. at 74.

²³² *See id.* at 72, 74 (considering whether a state law requiring parental consent for an abortion to be performed on women under eighteen violated such minor women’s constitutional rights, which were subject to greater intrusion than those of adults); *Bellotti*, 443 U.S. at 630, 634 (same); *cf. Ginsberg*, 390 U.S. at 634–35, 638 (considering whether a state law that prohibited the sale of certain kinds of pornography to minors under seventeen violated the First Amendment rights of such minors and explaining that the First Amendment rights of minors do not mirror those of adults).