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“Infants” and Arms Bearing in the Era of the Second Amendment:
Making Sense of the Historical Record

Saul Cornell

“Constitutional rights,” Justice Scalia wrote, “are enshrined with the scope they were understood to have when the people adopted them.”¹ One of the most contentious issues now being litigated is the status of minors’ Second Amendment rights. In *Hirschfeld v. ATF*,² a recent Fourth Circuit decision that was mooted when the plaintiffs turned twenty-one, the court concluded that those under the age of twenty-one could claim full Second Amendment protections. Although the decision has been vacated,³ the reasoning of the majority is still puzzling. Rather than beginning with the conception of rights and the legal status of minors in the era of the Second Amendment, the *Hirschfeld* court works backward from the conception of the rights of young adults articulated in the Warren Court’s landmark First Amendment decision *Tinker v. Des Moines*.⁴ Indeed, the *Hirschfeld* opinion uses the decidedly anachronistic term “young adult” more than sixty times.⁵ The problem with this term is that there was no legal category of young adult in the Founding Era.⁶ Individuals below the age of majority were “infants” in the eyes of the law. The principle inherited from the common law tradition was unambiguous on this point. Individuals between the ages of eighteen and twenty (and indeed all those under the age of twenty-one) were considered “minors” or “infants” from the time of the nation’s Founding up through the latter half of the twentieth century.⁷ Thus, the proper historical

¹ *Dist. of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008).

² *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407 (4th Cir.), *vacated*, No. 19-2250, 2021 WL 4301564 (4th Cir. 2021).

³ *Id.*

⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

⁵ *Hirschfeld*, 5 F.4th.

⁶ The majority opinion in *Hirschfeld* relied on a flawed analysis offered by gun-rights activists. See David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. UNIV. L.J. 495, 530–33 (2019). The title of this article references the “rights of young adults,” demonstrating that the argument made by Kopel and Greenlee is premised on an anachronistic understanding of the legal status of infants and general lack of familiarity with the social and legal history of the family in Anglo-American law during the colonial periods and after American Independence.

⁷ On the role of common law in shaping American law’s treatment of those below the age of majority, see T. E. James, *The Age of Majority*, 4 AM. J. LEGAL HIST. 22 (1960); and Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55 (2016).

framing of the issue before the Fourth Circuit should have been: did the Second Amendment recognize a right of infants, meaning those under twenty-one, to keep and bear arms? The answer to that question is simple: no. Indeed, when framed in historically correct terms, the very idea of infants bearing arms suggests the constitutional absurdity of the claims advanced by the court in *Hirschfeld*.

The Fourth Circuit's decision also highlights multiple ironies in post-*Heller* jurisprudence. First, the text, history, and tradition approach championed by many gun-rights advocates present an insurmountable obstacle to advancing the cause of gun rights for minors by constitutional litigation.⁸ Champions of gun rights have viewed originalism as their salvation, but more recent research on the history of gun regulation has demonstrated that those who live by the originalist sword may also perish by it: for much of American history, gun regulations were much more onerous and robust than gun-rights advocates have credited.⁹ The Founding generation were advocates of ordered liberty, not the anti-statist libertarianism that defines the agenda of many of today's originalists and gun-rights advocates.¹⁰ The second irony revealed by *Hirschfeld* is the anti-democratic impulse driving today's gun-rights originalists. Justice Scalia, the chief architect of *Heller* and the patron saint of modern originalism, claimed that his theory

⁸ See *infra* Parts I-II.

⁹ Eric M. Ruben & Darrell A.H. Miller, *Preface: The Second Generation of Second Amendment Law & Policy*, 80 LAW & CONTEMP. PROBS. 1, 6 (2017) ("gun laws were 'ubiquitous' in American history"); ROBERT J. SPITZER, GUNS ACROSS AMERICA: RECONCILING GUN RULES AND RIGHTS (2015) (summarizing the wideranging historical scope of gun regulation in American history).

¹⁰ Jonathan Gienapp, *Response: The Foreign Founding: Rights, Fixity, and the Original Constitution*, 97 TEX. L. REV. ONLINE 115 (2019) ("In essence, scholars have not been wrong to emphasize Founding-era Americans' commitment to individual liberty, but early Americans did not think that individual liberty was protected primarily through *limiting* government; rather they assumed that liberty was often best protected by *empowering* government 'in the right kind of way.'"); Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 87 (2017) ("[R]etained natural rights were aspects of natural liberty that could be restricted only with *just cause* and only with *consent of the body politic*.").

of originalism was grounded in democratic values.¹¹ But the “litigate first, legislate second” approach taken by those pushing for an expansion of gun rights for minors is a stark repudiation of this philosophy. Rather than pursue their agenda through the political process, advocates for expanding gun rights have chosen to do an end-run around the political process and litigate their way to victory. Although the rhetoric of gun rights often employs populist language, the turn to courts for solutions is itself deeply counter-majoritarian and hence fundamentally anti-democratic.¹² The gun lobby and gun-rights community are well-funded, well-organized, and highly effective, so it is hard to see why one of the most powerful lobbies in modern America needs the help of the courts to defend its rights.¹³ If expanding access to guns is a high priority for the gun-rights community, then the appropriate path is to change laws, not file briefs.¹⁴

The Fourth Circuit decision in *Hirschfeld* is a perfect storm of historical error and interpretive confusion.¹⁵ The decision purports to engage in originalist analysis, but its application of this methodology is deeply flawed: the evidence and logic of the opinion are not consistent with *Heller*’s history, text, and tradition framework. Although one might justify extending the gun rights of minors under a theory of the living Constitution, such an approach is

¹¹ Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997).

¹² For studies of gun culture in modern America, see generally FIRMIN DEBRABANDER, *DO GUNS MAKE US FREE? DEMOCRACY AND THE ARMED SOCIETY* (2015); Claire Boine et al., *What is Gun Culture? Cultural Variations and Trends Across the United States*, 7 *HUMANS. & SOC. SCIS. COMMS* 21 (2020); D. Yamane, *The Sociology of U.S. Gun Culture*, 11 *SOCIO. COMPASS* 1 (2017). On the counter-majoritarian nature of judicial review, see generally Barry Friedman, *The Birth Of An Academic Obsession: The History Of The Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153 (2002).

¹³ On the politics of gun control, see Matthew J. Lacombe, *The Political Weaponization of Gun Owners: The National Rifle Association’s Cultivation, Dissemination, and Use of a Group Social Identity*, 81 *J. POL.* 1342 (2019).

¹⁴ Not all defenses of originalism rest on theories of democratic legitimacy. For a useful discussion, see Richard A. Primus, *When Should Original Meanings Matter?*, 107 *MICH. L. REV.* 165 (2008); and Jamal Greene, *Selling Originalism*, 97 *GEO. L.J.* 657 (2009).

¹⁵ See discussion *infra* Part I.

precluded by *Heller*.¹⁶ Ironically, *Heller*'s originalism presents an almost insurmountable obstacle to extending gun rights to minors by constitutional text alone.

I. *Hirschfeld v. ATF: The Dubious Argument for Gun Rights for Minors*

The central issue in *Hirschfeld* was the constitutionality of a federal prohibition limiting the ability of those below the age of twenty-one to legally obtain a handgun.¹⁷ In a divided decision, a three-judge panel of the Fourth Circuit concluded that the federal prohibition on commercial handgun sales to eighteen- to twenty-year-olds was unconstitutional. The law in question had been on the books since the tumultuous era of the 1960s and had withstood challenge for decades. To resolve the constitutional question, the two-judge majority applied the two-step analysis that has come to dominate appellate Second Amendment jurisprudence in the years following the Supreme Court's controversial but landmark decision in *Heller*.¹⁸ The first prong of the test focuses on the applicability of the Second Amendment to the conduct regulated by the statute. If a court concludes that the individuals impacted by the law are not among those who can claim a Second Amendment right, or the conduct regulated is outside of the sphere of Second Amendment protection, the challenge fails at step one. A challenge by an ex-felon (one who had committed a violent crime) seeking to purchase a machine gun would not survive this first step of the test because felons are not protected by the Second Amendment, and machine guns are not the types of weapons protected by the Second Amendment under *Heller*'s analysis.¹⁹ If, however, the individual and the conduct are not excluded from the scope of the

¹⁶ Saul Cornell, *The Ironic Second Amendment*, 1 ALB. GOV'T L. REV. 292 (2008).

¹⁷ 18 U.S.C. §§ 922(b)(1), (c)(1) (2018); 27 C.F.R. §§ 478.99(b)(1), 478.124(a), 478.96(b) (2021).

¹⁸ For a comprehensive analysis of appellate jurisprudence in this area of Second Amendment law, see Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433 (2018).

¹⁹ *Dist. of Columbia v. Heller*, 554 U.S. 570626-27 (2008). The case of non-violent felons poses more interesting constitutional questions. See C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695 (2009).

Second Amendment protection, then the analysis turns to the second prong of the framework: a version of intermediate scrutiny.²⁰ In this part of the analysis, the modern tools of constitutional analysis and public policy considerations become central to adjudicating a Second Amendment claim. Weighing the ban on minors' acquisition of handguns, the *Hirschfeld* majority concluded that prohibition failed the balancing test demanded by intermediate scrutiny.²¹

The problem with the *Hirschfeld* decision is that the court should never have reached step two of the analysis because the claim failed at the first step of the two-part test. In asserting that minors had full Second Amendment rights in the Founding Era, the court erred. The evidence to support the court's assertion rested on a combination of unsubstantiated claims and historical errors. The court did not consult any reputable history of the Founding Era to establish the legal standing of minors. Instead, the court worked backward from modern ideas about the rights of young adults in modern law. The presentism of the court's decision is striking: the majority simply assumed that the rights of minors in the era of the Second Amendment were legally indistinguishable from the rights of young adults in contemporary law.²² In short, the court assumed that nothing much had changed in American law in the last two hundred years regarding the legal status of those below the age of legal majority. This claim is both deeply ahistorical and demonstrably false.

To support their contention that minors would have enjoyed full Second Amendment rights in the Founding Era, the majority opinion asserts, without any evidence, that minors would have enjoyed robust First Amendment rights in the Founding Era.²³ If this was true, the court

²⁰ Ruben & Blocher, *supra* note 18. See also *Heller v. District of Columbia* (Heller II), 670 F.3d 1244, 1252 (D.C. Cir. 2011) (“We accordingly adopt, as have other circuits, a two-step approach to determining the constitutionality of the District’s gun laws.”).

²¹ *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407 (4th Cir.), *vacated*, No. 19-2250, 2021 WL 4301564 (4th Cir. 2021).

²² *Id.*

²³ *Id.*

reasoned, it naturally followed that they must have also enjoyed Second Amendment rights.²⁴ Comparisons between the First and Second Amendments are plagued by multiple problems. The structure and language of the two texts share little in common, and guns and words have never been treated the same in American law.²⁵ Moreover, this claim rests on a dubious understanding of the First Amendment rights of minors in the era of the Second Amendment.²⁶ Consider the following hypothetical. Imagine the situation of an eighteen-year-old who would have been required by law to serve in the Massachusetts militia. The young man in question has a religious awakening and decides that he wishes to abandon his family and join one of the pacifist religious sects that flourished in the Founding Era, the Shakers or Sandemanians. Now imagine that his father, master, or other guardian forbids him to take such action. He insists on asserting his right of conscience and free exercise. His father rejects his claim, administers corporal punishment to his child, and orders him to report to muster. Although repellant, odious, and arguably criminal by today's standards, a minor living in the Founding era would have no legal recourse to challenge the decisions made by a father or guardian regarding religious practices. The patriarchal authority of fathers or other legal guardians would have been absolute in this sphere. A minor facing this desperate situation would have been forced to follow the decisions made by his father or legal guardian. Moreover, if the father wished to enforce this decision with the administration of corporal punishment, that would also have been perfectly legal under the

²⁴ *Id.* at 422-23.

²⁵ It is beyond the scope of this Essay to fully explore the significance of the different text and structure of the two Amendments, but a few points are worth noting. In addition to containing a preamble, the Second Amendment's text is framed in terms of the concept of "infringement." In contrast the First Amendment uses the term "abridge." The two words have distinct meanings these point to very different spheres of regulatory authority. The First Amendment prohibits Congress from diminishing the right, but the Second enjoins the destruction of the right.

²⁶ For illuminating scholarly discussions of the problematic analogy drawn between the First and Second Amendment, see Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49 (2012); Darrell A.H. Miller, *Analogies and Institutions in the First and Second Amendments: A Response to Professor Magarian*, 91 TEX. L. REV. 37 (2013); Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229 (2020).

common law rules governing domestic relations.²⁷ In short, whatever limited claims of religious liberty the minor in question enjoyed as a matter of law, it is beyond dispute that these claims would not have trumped the authority of their parents or guardians to control the religious decisions of a minor living under their authority. Until the minor reached the age of majority, he would have been a legal cipher, with few legal rights.²⁸ Given the status of minors in American law at the time of the Second Amendment's enactment, there is no credible legal argument that an infant might have made regarding a Second Amendment right to purchase or use a gun without the permission of a legal guardian. Thus, the claim asserted in *Hirschfeld* fails the first part of the two-part test.

II. Reading History Backwards

The problem with *Hirschfeld* stems from its failure to understand the status of minors under American law at the time of the Second Amendment. Any discussion of minors and rights in the Founding Era must reckon with the common law's treatment of those below the age of legal majority. Simply put, minors in the Founding Era had no legal standing to assert a claim in court to vindicate their rights, including Second Amendment-type claims. Thus, the Fourth Circuit erred when it asserted, without reference to any Founding Era sources, that the modern status of young adults as rights-bearing individuals extended backward in time to the Founding Era. In fact, the term "young adult" is itself profoundly anachronistic; there was no legal

²⁷ On the scope of patriarchal authority of parents or guardians in the Founding era, see generally JEFFREY SHULMAN, *THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND ENFRANCHISEMENT OF THE CHILD* (2014); and Toby L. Ditz, *Ownership and Obligation: Inheritance and Patriarchal Households in Connecticut, 1750-1820*, 47 WM. & MARY Q. 235, 236 (1990).

²⁸ For a useful guide to the radical religious sectarian groups of this era, particularly in New England, see STEPHEN A. MARINI, *RADICAL SECTS OF REVOLUTIONARY NEW ENGLAND* (1982). Of course, none of the original amendments to the Constitution, including the First Amendment, applied to the states during the Founding Era. Thus, Massachusetts did not embrace the idea of the separation of church and state until the early decades of the nineteenth century. The scope of religious liberty in the era of the Second Amendment was exceedingly narrow by modern standards. The literature on early American religious freedom is enormous. For a useful starting place, see MARK MCGARVIE, *LAW AND RELIGION IN AMERICAN HISTORY: PUBLIC VALUES AND PRIVATE CONSCIENCE* (2016).

category of “young adult” in the Founding Era.²⁹ Leading legal commentaries on the law of domestic relations published in the years between the adoption of the Second Amendment and the Civil War all agreed on this incontrovertible point of Founding-Era law. Nor did such a category emerge in the next century following the adoption of the Second Amendment. In fact, the idea of a “young adult” is a very recent development in American society and law.³⁰ Indeed, the majority opinion in *Hirschfeld* cites the landmark Warren-era case *Tinker v. Des Moines*.³¹ Although *Tinker* is a natural starting point for questions about the rights of minors today, it has no probative value as a guide to Founding Era views on this question.³² *Tinker*’s analysis of the rights of minors was not grounded in any originalist claims or evidence. Indeed, it would be impossible to make such an argument given the prevailing views of “infants” in American law at the time the Second Amendment was enacted. Justice Thomas’ originalist critique of *Tinker* in his dissent in *Morse v. Frederick* makes this point forcefully: “As originally understood, the Constitution does not afford students a right to free speech in public schools.”³³

Rather than read backward the expansive civil libertarian theory articulated in *Tinker*, a genuine originalist account must begin with English common law and its evolution in the early Republic. Founding-Era family law was grounded in English common law. Under English common law, individuals under the legal age of majority, twenty-one, were entirely subsumed under the authority of their parents (usually their fathers) or guardians. The power of fathers or

²⁹ On the emergence of the category of young adult in contemporary legal theory, see generally Elizabeth S. Scott, Richard J. Bonnie & Laurence Steinberg, *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 *FORDHAM L. REV.* 641 (2016).

³⁰ See *infra* footnotes 41-43.

³¹ *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407 (4th Cir.), *vacated*, No. 19-2250, 2021 WL 4301564 (4th Cir. 2021).

³² *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 511 (1969) (“Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.”).

³³ *Morse v. Frederick*, 551 U.S. 393, 418–19 (2007) (Thomas, J., dissenting).

guardians under this system of patriarchy exceeded the power of the monarch over his subjects. For example, minors could not claim the right of petition or other rights enjoyed by English subjects and later by American citizens. Indeed, many constitutional outsiders and disempowered groups, including felons, women, tribal communities, and slaves, used the right of petition, but this avenue was foreclosed on minors.³⁴ Parents and other legal guardians had the legal authority to discipline those in their charge, including through corporal punishment, as long as the punishments were not excessive.³⁵ In many respects, the situation of minors under twenty-one resembled that of married women under coverture. Under the doctrine of coverture, a married woman ceased to exist as a legal entity, and her entire legal persona was subsumed within her husband's authority.³⁶ Sir William Blackstone described the legal meaning of coverture as follows:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-French a *feme-covert*³⁷

An influential eighteenth-century English treatise on the law of domestic relations noted that the comparison between a *feme covert* and a minor was frequently made by writers on the law: “Feme Covert in our Books is often compared to an Infant, both being persons being disabled in the Law.”³⁸ Given the irrefutable fact that minors were legally “disabled” in the eyes of the law,

³⁴ Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 153 (1986). A search of the terms minor and petition in the Corpus of Founding Era English at BYU law school revealed a number of petitions on behalf of minors, but no petitions by minors.

³⁵ ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT (1987); John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 451 (2008) (discussing the historical development of child protection law).

³⁶ JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 522-23 (5th ed. 2019); Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 YALE J.L. & FEMINISM 165, 167 (2014).

³⁷ 1 WILLIAM BLACKSTONE, COMMENTARIES *442.

³⁸ BARON AND FEME: A TREATISE OF LAW AND EQUITY CONCERNING HUSBANDS AND WIVES 8 (T. Waller ed., 1738).

the claim that they might assert a Second Amendment right against government interference is just false.

The American Revolution set in motion a process of change that republicanized the rights of minors by giving society, acting through courts and legislatures, greater authority to intervene to protect and promote the well-being of those under the age of majority.³⁹ This change did not endow minors with full legal rights under the law, but it did diminish the near-absolute power that fathers (or parents more generally) and guardians had over minors living under their authority under American law.⁴⁰

Early American legal treatises and law dictionaries all support the notion that infants were not endowed with the full panoply of rights enjoyed by adults. Zephaniah Swift, an esteemed Connecticut jurist and author of one of the first legal treatises published after the adoption of the Second Amendment, summarized the law governing minors at the time of the Founding: “Persons within the age of twenty-one, are, in the language of the law denominated infants, but in common speech—minors.” Swift noted: “by common law an infant can bind himself by his contract for necessaries, for diet, apparel, education and lodging,” but little else.⁴¹ In short, minors had few legal rights. During the decades after the American Revolution, courts became more involved, adopting a more aggressive role in protecting their interests even if it meant voiding contracts.⁴² This new supervisory role narrowed the range of contractual freedom of minors acting without the consent of their parents and guardians. Thus, minors were subject to far greater state supervision than any other legal entity involved in the marketplace during the

³⁹ See generally JEFFREY SHULMAN, *THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND ENFRANCHISEMENT OF THE CHILD* (2014).

⁴⁰ *Id.*

⁴¹ ZEPHANIAH SWIFT, *1 A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* 213 (Windham & John Byrne eds., 1795).

⁴² HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* 271 (2012).

early years of the Republic. Although the rights of contract were among the most important protected by the Constitution, even this venerable right could be overridden when the contracting party was a minor.⁴³

The influential early nineteenth-century legal author and jurist James Kent discussed the legal status of minors in 1836 in his *Commentaries on American Law*: “The necessity of guardians results from the inability of infants to take care of themselves; and this inability continues, in contemplation of law, until the infant has attained the age of twenty-one years.”⁴⁴ When radical Jacksonian Democrats suggested that the age of majority for voting ought to be lowered for those who had served in the militia, leading Federalists in the New York state constitutional convention mocked them. Federalist Elisha Williams, a delegate from Columbia County, wondered if his Democratic opponents wished to enfranchise “brave infants” by giving them the right to vote.⁴⁵ Extending full constitutional rights to minors was literally treated as a joke by Federalists sitting in the constitutional convention.

John Bouvier, the author of the first American law dictionary, shared the views of Swift and Kent, and his 1858 explanation of the legal significance of the age of majority followed their lead: “The rule that a man attains his majority at age twenty-one years accomplished, is perhaps universal in the United States. At this period, every man is in the full enjoyment of his civil and political rights.”⁴⁶ Bouvier’s statement captured an indisputable fact about American law in the period between the Founding Era and the Civil War: minors were not recognized as independent legal actors who enjoyed the full range of rights under American law.⁴⁷

⁴³ *Id.*

⁴⁴ JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 191 (O. Halsted ed., 1827).

⁴⁵ CORINNE T. FIELD, THE STRUGGLE FOR EQUAL ADULTHOOD: GENDER, RACE, AGE, AND THE FIGHT FOR CITIZENSHIP IN ANTEBELLUM AMERICA 58 (2014).

⁴⁶ JOHN BOUVIER, 1 INSTITUTES OF AMERICAN LAW 148 (Robert E. Peterson ed., 1851).

⁴⁷ *Id.*

To buttress their claims about the rights of minors, the majority in *Hirschfeld* cite John Adams's summary of the common law's requirements that individuals below the age of majority assist in preserving the peace through participation in the hue and cry and *posse comitatus*. The Adams passage merits closer scrutiny: "It is the duty of all persons (except women, decrepit persons, and infants under fifteen) to aid and assist the peace officers in suppressing riots [] when called upon to do it. They may take with them such weapons as are necessary to enable them effectually to do it."⁴⁸ The justification, it is worth noting, did not mention firearms but only such weapons as were necessary. Constables and other peace officers did not typically carry firearms in this period, so it seems highly unlikely that minors would have done so in the Founding Era in the context Adams mentioned.⁴⁹ Moreover, these actions were not undertaken by isolated individuals but were always done in a situation in which adults supervised minors. As Princeton historian Laura Edward has noted, the enforcement of the peace was embedded in the patriarchal structure of local communities.⁵⁰ Minors acting in such a setting were supervised by adults (as were minors serving in the militia). Thus, the example cited by the court does not support an unfettered and freestanding right of minors to keep and bear arms. Instead, the point made by Adams underscores that minors were expected to "aid and assist peace officers." Minors assisted and aided peace officers; they were not independent actors.

A popular South Carolinian Justice of the Peace manual published in 1788, the year the Constitution was adopted, echoed the view that minors were not fully capable of acting

⁴⁸ *No. 64 Rex v. Wemms*, in JOHN ADAMS, 3 LEGAL PAPERS OF JOHN ADAMS 285 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

⁴⁹ For a concise overview of the early history of American police forces, see generally Wilbur Miller, *The Good, The Bad & The Ugly: Policing America*, 50 HIST. TODAY 29 (2000). On the history of police use of firearms, see Scott W. Phillips, *A Historical Examination of Police Firearms* 94 THE POLICE J: THEORY, PRAC. AND PRINCIPLES 122, 123-4 (2021).

⁵⁰ Laura F. Edwards, *The Peace: The Meaning and Production of Law in the Post-Revolutionary United States*, 1 U.C. IRVINE L. REV. 565, 570 (2011).

independently when it came to law enforcement. The author of this popular legal guide, John Fauchereaud Grimké, was among the state's most influential jurists; he described the categories of person "who shall not be a constable" as including "infants," "madmen," and "idiots."⁵¹ Grouping infants together with "madmen" and "idiots" only underscores the fact that the law did not treat them as legally autonomous actors. To understand Founding Era conceptions of rights, one must understand the way in which common-law notions about the age of majority shaped ideas about rights.⁵²

Johns Hopkins historian Toby Ditz summarizes the centrality of the legal concept of patriarchy to family law and governance in the Founding Era:

Historians have begun to use the concept "household patriarchy" to describe community organization in the eighteenth century, especially in New England. Household patriarchy refers to both internal and external aspects of domestic organization. It describes authority relations in which heads, and not others within households, have the formal right to make final decisions about internal matters. Patriarchal household heads speak for their dependents in dealings with the larger world. The civic status of household dependents is an indirect or secondary one; the community reaches them primarily through the actions and voices of the heads.⁵³

Any assertion that infants below the age of majority could claim the right to bear arms outside of supervised contexts, such as the militia or related peacekeeping activities, rests on an anachronistic interpretation of early American militia statutes, an ignorance of Founding-Era domestic law, and unfamiliarity with the most basic historical facts about the social realities of domestic life in the Founding Era.

⁵¹ JOHN FAUCHEREAUD GRIMKÉ, *THE SOUTH-CAROLINA JUSTICE OF PEACE* 117 (R. Aitken & Son ed., 1788). Grimké was one of the state's most eminent lawyers and became one of its most influential jurists. For biographical background on his life, see Eli A. Poliakoff, *Grimké, John Faucheraud*, S.C. ENCYCLOPEDIA (May 17, 2016), <https://www.scencyclopedia.org/sce/entries/grimke-john-faucheraud> [<https://perma.cc/5PGL-NKEZ>].

⁵² See generally HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* 271 (2012).

⁵³ Toby L. Ditz, *Ownership and Obligation: Inheritance and Patriarchal Households in Connecticut, 1750-1820*, 47 WM. & MARY Q. 235, 236 (1990).

One final body of evidence raises further doubts about the Fourth Circuit’s dubious claim that Founding-Era Americans believed that young men below the age of majority could be trusted to keep and bear arms outside of supervised contexts: the stringent rules prohibiting firearms ownership and use enacted by colleges in the Revolutionary era. College was one of the very few circumstances where minors lived outside of their parents’ or a guardian’s direct authority. As a matter of law, minors attending college traded strict parental authority for an equally restrictive rule of *in loco parentis*.⁵⁴

Yale College prohibited students from possessing any guns or gun powder.⁵⁵ The University of Georgia, one of the nation’s oldest public institutions of higher education, also forbade guns on campus. The rule was emphatic: “[N]o student shall be allowed to keep any gun, pistol, Dagger, Dirk[,] sword cane[,] or any other offensive weapon in College or elsewhere, neither shall they or either of them be allowed to be possessed of the same out of the college in any case whatsoever.”⁵⁶ A similar law governed students at the University of North Carolina, another public university founded in the Founding period. The university prohibition was total: “No Student shall keep a dog, or firearms, or gunpowder. He shall not carry, keep, or own at the College, a sword, dirk, sword-cane.”⁵⁷ The figure of Thomas Jefferson looms large in modern discussions about the meaning of the Second Amendment.⁵⁸ Although Jefferson was among the Founding Fathers’ most ardent defenders of an expansive vision of the right to keep and bear

⁵⁴ Brian Jackson, *The Lingering Legacy of “In Loco Parentis”*: An Historical Survey and Proposal for Reform, 44 VAND. L. REV. 1135, 1136 (1991).

⁵⁵ THE LAWS OF YALE-COLLEGE, IN NEW-HAVEN, IN CONNECTICUT, ENACTED BY THE PRESIDENT AND FELLOWS, THE SIXTH DAY OF OCTOBER, A.D. 1795, at 26 (Thomas Green & Son ed., 1800).

⁵⁶ *The Minutes of the Senate Academicus 1799–1842*, UNIV. OF GA. LIBRS. (2008), <https://www.libs.uga.edu/hargrett/archives/senatus/senatus%20academicus%201799-1811.pdf> [<https://perma.cc/VVT2-KFDB>].

⁵⁷ ACTS OF THE GENERAL ASSEMBLY AND ORDINANCES OF THE TRUSTEES, FOR THE ORGANIZATION AND GOVERNMENT OF THE UNIVERSITY OF NORTH-CAROLINA 15 (Raleigh, Off. of the Raleigh Reg. 1838).

⁵⁸ See David Thomas Konig, *Thomas Jefferson's Armed Citizenry and the Republican Militia*, 1 ALB. GOV’T L. REV. 250 (2008).

arms, even he took a dim view of allowing guns at the University of Virginia, the institution he helped found. The rules at the University were exceedingly strict on this point: “No Student shall, within the precincts of the University, introduce, keep or use any spirituous or vinous liquors, keep or use weapons or arms of any kind, or gunpowder, keep a servant, horse or dog, appear in school with a stick, or any weapon, nor, while in school.”⁵⁹

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

III. Rights vs. Duties: Clearing up a Conceptual Confusion

The majority opinion in *Hirschfeld* relies largely on the uncontroversial fact that colonial militias and the militias created by the first state constitutions imposed legal obligations on some minors under the age of twenty-one to serve in the militia at the Founding. This indisputable fact does not mean that the imposition of this legal obligation somehow created a *rights*-based claim against government regulation. Simply put, rights and duties are not the same. Modern constitutional theory typically treats them as correlatives, not synonyms.⁶⁰ Accordingly, while the existence of a right may impose a duty on *another* legal actor (such as a duty to refrain from interfering with the right), *duties* do not automatically confer individual *rights* on those who are

⁵⁹ *University of Virginia Board of Visitors Minutes (October 4-5, 1824)*, ENCYCLOPEDIA VA. (Dec. 7, 2020), <https://encyclopediavirginia.org/entries/university-of-virginia-board-of-visitors-minutes-october-4-5-1824> [<https://perma.cc/6JCL-A88D>].

⁶⁰ Leif Wenar, *Rights*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2021), <https://plato.stanford.edu/entries/rights> [<https://perma.cc/B7KH-GPTV>].

required by law to participate in the militia. Several militia statutes recognized that minors were not responsible for procuring their own arms, so the statutes required parents or guardians to provide firearms to militia members under the age of twenty-one who were in their care.⁶¹ Moreover, given the law of domestic relations, even when parents were not singled out as the individuals who suffered the legal consequences for failing to comply with the requirement to acquire suitable arms, the law would have had to prosecute the parent or guardian, not the infant, for the violation of the law.⁶²

The majority opinion also commits a serious error by conflating the federal government and early states' specific *policy preferences* regarding whom to include within the militia with a *fixed constitutional principle* hardwired into constitutional text. Among originalist theorists, there is widespread agreement that the original public meaning resides in the enacted constitutional text and not the original expected application of that text at the time of the Founding.⁶³ Moreover, it is not simply originalist theory that militates against treating early American policy preferences as binding on modern American law. It is a well-established principle of constitutional law that the text of the Constitution and the principles it enacts are legally determinative, but the policy choices made by earlier generations of Americans to implement those principles are not binding on future generations. The United States Supreme Court made this point expressly in 1926.

[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application of

⁶¹ See *infra* Table 1.

⁶² See discussion of Swift and Kent *supra* pp. 11-13.

⁶³ Under any credible theory of originalism, the subjective policy choices made by earlier generations are not legally binding. See Jack M. Balkin, *The New Originalism and the Uses of History*, *FORDHAM L. REV.* 641, 646 (2013).

constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.⁶⁴

It is certainly true that many states chose *as a policy matter* to include minors—including those between the ages of eighteen and twenty-one, or those even younger—in the militia for pragmatic reasons. However, the composition of the militia was always dictated by strategic imperatives, not by any constitutional mandate that those under twenty-one had a right to serve or a right to bear arms. States were at liberty to expand or contract the legal definitions of the militia to further their goals of public defense. If a state felt it was necessary to exclude those under twenty-one because of the economic burden that militia service placed on families, or because the labor of minors was needed in some other economic activity equally important to public defense, there was nothing in its constitution's text preventing a legislature from implementing such changes. Nor would states be prohibited from excluding some or all of those between the ages of eighteen and twenty-one from participating in the militia if it determined that such a policy furthered the goal of a well-regulated militia.

IV. Balancing, Public Policy Preferences, and the *Heller/McDonald* Framework

Interestingly, the *Hirschfeld* court struck down the limits on minors' access to handguns after evaluating it under an intermediate scrutiny standard, an approach that involves a type of balancing analysis. The role of balancing in post-*Heller* jurisprudence is one of the most important unresolved issues in contemporary firearms law.⁶⁵ Champions of gun rights have

⁶⁴ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

⁶⁵ *Dist. of Columbia v. Heller*, 554 U.S. 570, 634 (2008). Balancing is one of the central issues that post-*Heller* jurisprudence must resolve. See Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 379 (2009); Joseph S. Hartunian, *Gun Safety in the Age of Kavanaugh*, 117 MICH. L. REV. ONLINE 104 (2019); Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187 (2015).

argued that any interest-balancing exercise is precluded by *Heller*.⁶⁶ Despite this argument, courts continue to apply the two-step model and its intermediate scrutiny framework.⁶⁷

Banishing balancing from Second Amendment jurisprudence is not only out of step with much modern constitutional theory; it deprives courts of the ability to consider prudential concerns in an area of the law where different rights collide. Some scholars have noted that public carry may have a chilling effect on forms of peaceful protest and association.⁶⁸ Moreover, firearms pose particular dangers to public health and safety that require legislatures to evaluate a complex and often contradictory body of research to frame effective policies. The claim that *Heller* precludes any type of balancing analysis ignores a fundamental tension and contradiction in the majority opinion's analysis. The foundation for the claim that *Heller* prohibits balancing is an extended attack on this concept by Justice Scalia. In *Heller*, Justice Scalia attacked Justice Breyer's invocation of modern interest-balancing as the proper judicial framework for analyzing Second Amendment claims. Justice Scalia argued, erroneously, that such an approach was inconsistent with the Founding Era's inclusion of the Second Amendment in the Bill of Rights.⁶⁹

The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.⁷⁰

⁶⁶ Alan Gura, *The Second Amendment as a Normal Right*, 127 HARV. L. REV. 223 (2014).

⁶⁷ Ruben & Blocher, *supra* note 18, at 1452 (“[S]cholars generally agree that some version of the two-part test predominates throughout the lower courts.”).

⁶⁸ See generally, Joseph Blocher and Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Under Heller*, 116 N.W. U. L. REV. 139 (2021).

⁶⁹ The classic account of balancing in modern law is T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987). On Justice Breyer's alternative balancing model, see Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 707 (2012).

⁷⁰ *Heller*, 554 U.S. at 634.

Justice Scalia was undoubtedly correct that the Founding Era did not use the modern legal metaphor of balancing.⁷¹ But, Scalia was unquestionably wrong about the Founding Era's conception of rights being incompatible with balancing-type inquiries. Leading jurists in the Founding Era, including John Marshall, employed a form of prudentialism as a mode of constitutional interpretation, and these arguments were not devoid of concerns about the social costs that might follow from judicial decisions.⁷² Scalia's claim that the Founding Era believed that the inclusion of rights in written constitutions took "enumerated rights out of the hands of government" rests on a decidedly ahistorical and anachronistic understanding of how the Founding Era approached the issue of rights.⁷³ Although modern lawyers and judges typically think of powers as the inverse of rights, this was not how members of the Founding Era

⁷¹ A corpus-linguistic search of the Corpus of Founding Era American English (COFEA), a database hosted by Brigham Young University Law School, shows scant evidence that the terms "balancing" and "rights" occurred together in Founding-Era constitutional writing. *Corpus of Founding Era American English (COFEA)*, BYU LAW: LAW & CORPUS LINGUISTICS, <https://lawcorpus.byu.edu/cofea/concordances> [<https://perma.cc/8DAC-T3H9>].

⁷² On prudentialist modes of legal analysis, see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 61 (1982) ("Prudential argument is constitutional argument which is actuated by the political and economic circumstances surrounding the decision."). On the Founding Era's use of this mode of argumentation, see William Michael Treanor, *Against Textualism*, 103 N. U. L. REV. 983 (2009); and William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005).

⁷³ See Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J.L. & PUB. POL'Y 569 (2017). Apart from the more ardent Anti-Federalists, judicial review was recognized by a broad range of legal actors in the Founding Era. Still, this power was novel to many in the first generation after the Revolution. Thus, despite its embrace by leading Federalists, it was resisted by some former Anti-Federalists and was typically framed in a departmentalist framework by Republicans. Jefferson's departmentalist view of judicial review acknowledged that each branch of government would exercise a form of constitutional review of statutes in the process of exercising their legitimate governmental functions. The most fervent champions of judicial review among the Federalists, however, pressed the idea that the judiciary had a special authority on questions of legal/constitutional interpretation, pushing the doctrine of judicial review far closer to the modern idea of judicial supremacy, in which each branch of government is expected to abide by the legal/constitutional pronouncements of the Court even when exercising their own independent functions. For a summary of the exceedingly complex history of judicial review in the Founding Era, see GERALD LEONARD & SAUL CORNELL, *THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780S–1830S* (2019).

conceptualized rights.⁷⁴ Without regulation there was no liberty.⁷⁵ Furthermore, the Founders would have been shocked that modern judges would think that the Second Amendment was understood to empower unelected federal judges to act as “Platonic guardians” of the people’s rights, including the right to keep and bear arms.⁷⁶ Scalia’s anti-balancing diatribe in *Heller* has little to do with Founding-Era constitutionalism. In his critique of this concept, Justice Scalia imputes to the Founders a view of rights of fairly recent vintage: an indictment of balancing most closely associated with Justice Black’s critique of Justice Frankfurter’s conception of the First Amendment.⁷⁷ Justice Black famously argued that the Bill of Rights’ purpose “was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to ‘balance’ the Bill of Rights out of existence.”⁷⁸ In *Heller*, Justice Scalia channeled Black’s jurisprudence, vehemently rejecting the application of modern-style “freestanding interest balancing” to Second

⁷⁴ See generally Jonathan Gienapp, *The Foreign Founding: Rights, Fixity, and the Original Constitution*, 97 TEX. L. REV. ONLINE 115 (2019). The irony is doubly compounded by the fact that Justice Scalia’s approach, reflecting the influence of modern incorporation theory, accepts a conception of the scope of federal judicial review of local laws that was rejected by the Founding generation, making his approach not simply inconsistent with Founding-Era constitutionalism but almost the mirror image of it. Nobody in the Founding Era would have ever imagined that the Second Amendment could be used to limit state police-power authority over the regulation of gunpowder and firearms. If such a view had been articulated, the Second Amendment would never have been ratified, a fact that makes Scalia’s originalism paradoxical. Ironically, had Scalia’s vision of the Second Amendment been championed in the Founding Era it would have likely prevented the Second Amendment from being adopted. Thus, Scalia’s Second Amendment originalism produces a paradoxical “back to the future” effect. If anyone embraced his theory in 1791 and advanced it in public it would have made the Second Amendment impossible to ratify.

⁷⁵ Joseph Postell, *Regulation During the American Founding: Achieving Liberalism and Republicanism*, 5 AM. POL. THOUGHT 80, 81 (2016) (“In their view regulation harmonized the exercise of individual rights and the promotion of the common good by establishing a truly free market, ordering the use of property to protect the rights of all, and limiting the use of property to enhance the freedom of every individual.”)

⁷⁶ The reference to Platonic guardians is from LEARNED HAND, *THE BILL OF RIGHTS* 73-77 (1958). There is a strong scholarly consensus that some form of judicial review was widely recognized at the time the Constitution was ratified but that the scope of the power was narrowly defined, for a summary of recent views of judicial review and the Founding era, see Leonard and Cornell, *supra* note 73, at 24-25.

⁷⁷ On Justice Scalia’s unacknowledged debt to Justice Black, see Joseph Blocher, *Rights as Trumps of What?*, 132 HARV. L. REV. F. 120, 123 (2019) (quoting *Konigsberg v. State Bar*, 366 U.S. 36, 61 (1961) (Black, J., dissenting)).

⁷⁸ *Konigsberg*, 366 U.S. at 61 (1961) (Black, J., dissenting).

Amendment questions.⁷⁹ There is nothing inherently problematic with Justice Scalia siding with Justice Black in his battle with Justice Frankfurter over the issue of judicial balancing, but these modern debates have nothing to do with Founding-Era constitutional thought. This type of analysis has little to do with originalism. In fact, anti-balancing is a decidedly modern theory, not one rooted in Founding-Era constitutional thought. Given these facts, it would make sense to recognize that nothing about the Second Amendment’s history precludes balancing by legislatures. Indeed, the pre-Civil War Southern cases on the right to bear arms under state constitutional law, which *Heller* treats as practically oracular, were occasioned by early American legislatures engaging in precisely the types of balancing exercises that Scalia claimed were impermissible.⁸⁰ Scalia never offered a principled justification for why early American legislatures were allowed to engage in balancing exercises, but modern legislatures are precluded from employing these legal tools.

One of the cases that Scalia highlights as probative of the original meaning of the right to bear arms was an antebellum case, *State v. Reid*.⁸¹ The judges in this case framed their analysis in terms of the police power, an analytical tool that became one of the most important jurisprudential developments in antebellum law.⁸² The *Reid* court concluded that a state prohibition on concealed carry was a legitimate exercise of police power authority. “The terms in which this provision is phrased,” the court noted, “leave with the Legislature the authority to adopt such regulations of police, as may be dictated by the safety of the people and the

⁷⁹ *Dist. of Columbia v. Heller*, 554 U.S. 570, 634 (2008). The classic account of the balancing in modern law is Aleinikoff, *supra* note 69. Although *Heller* precludes something Scalia dubs “freestanding interest balancing,” there is less agreement on whether it precludes all forms of balancing. See *Heller*, 554 U.S. at 634-35; Rostron, *supra* note 69, at 707.

⁸⁰ Saul A. Cornell, *The Police Power and the Authority to Regulate Firearms in Early America*, BRENNAN CTR. FOR JUST. (June 2021), https://www.brennancenter.org/sites/default/files/2021-06/Cornell_final.pdf [<https://perma.cc/3D3J-CZE3>].

⁸¹ *State v. Reid*, 1 Ala. 612 (1840).

⁸² *Id.*

advancement of public morals.”⁸³ Although the court used the language of police power jurisprudence, not modern balancing, the analysis was quintessentially an example of prudentialist analysis.

Although some have suggested that balancing is impermissible after *Heller*, and the only permissible mode of analysis is a history, text, and tradition approach, the sources *Heller* cites do not support this claim.⁸⁴ Neither Founding-Era constitutional thought nor the antebellum firearms jurisprudence that Justice Scalia invokes as probative vindicate such a claim. In fact, both periods support the opposite conclusion: a type of legislative balancing is hardwired into both the Founding Era’s constitutional theory and antebellum police power jurisprudence.

In the case of gun rights for minors, the balancing analysis required by intermediate scrutiny is unnecessary since the claim that minors enjoyed robust Second Amendment rights in the Founding Era is erroneous. In the case of other Second Amendment questions, the role of balancing and intermediate scrutiny is very much an open question. If courts take history seriously, then some type of balancing is not only allowable but also inevitable. *Heller*’s history, text, and tradition model implicitly accepts the legitimacy of balancing decisions made by earlier generations. Recognizing the balancing decisions made by early nineteenth-century legislatures in the slave South as presumptively lawful and rejecting the decisions made by modern legislatures as invalid is neither logical nor constitutionally mandated by the Second Amendment. Indeed, history, text, and tradition weigh heavily in favor of some type of balancing.

V. Conclusion

⁸³ *Id.* at 616.

⁸⁴ *Heller v. District of Columbia* (Heller II), 670 F.3d 1244, 1277-78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (arguing that *Heller* rejected interest balancing tests in favor of a “history, text, tradition” approach).

The issue of gun rights for minors presents originalists with irony. Following *Heller's* originalist methodology, there is no way to argue that “infants” in the Founding Era could assert a Second Amendment rights claim against government regulation. Infants—those below the age of majority—were legally disabled and resembled married women, whose legal identity was totally eclipsed by their husbands’. The fact that many states made a policy choice to force some minors to serve in the militia or other types of peacekeeping activity does not establish the existence of a right. In modern law, rights and duties are correlatives, not synonyms. Nor does modern Supreme Court doctrine recognize any legally binding authority for the policy preferences enacted by earlier generations of Americans. Indeed, the Constitution’s text makes it clear that Congress is free to alter the composition of the militia as it sees fit. Ironically, extending gun rights to minors by an interpretation of constitutional text would only be possible if champions of this goal abandoned originalism and adopted a living-constitution approach. *Heller's* originalist methodology erects an almost unbreachable barrier to those claiming that constitutional text supports the rights of minors to keep and bear arms. The irony is further amplified by the fact that the only interpretive method that would facilitate such a conclusion would require courts to abandon *Heller* and embrace the Warren Court’s approach in the landmark case of *Tinker v. Des Moines*. Thus, to vindicate the gun rights of minors, one must use a living constitutional modality, an anathema to gun-rights activists.

Table One

Examples of Early American State Laws Expressly Requiring Parents to Furnish or Provide Arms to Children in the Militia

State	Year	Source	Statutory Text
New Hampshire	1776	An Act for Forming and Regulating the Militia Within The State of New Hampshire, in New-England, and For Repealing All the Laws Heretofore Made for That Purpose, 1776 ACTS & LAWS OF THE COLONY OF N.H. 36, 39.	And be it further Enacted by the Authority aforesaid, That each and every Officer and private Soldier of said Militia, not under the control of Parents, Masters, or Guardians, and being of sufficient Ability therefore, in the Judgment of the Select-men of the Town wherein he has his usual place of Abode, shall equip himself and be constantly provided with a good Fire Arm
Delaware	1785	An Act for Establishing a Militia, §§ 7-8, 1785 Del. Laws 59.	[E]very apprentice, or other person of the age of eighteen and under twenty-one years, who hath an estate of the value of eighty pounds, or whose parent shall pay six pounds annually towards the public taxes, shall by his parent or guardian respectively be provided with a musket or firelock
New Hampshire	1792	An Act for Forming and Regulating the Militia Within This State, and For Repealing All the Laws Heretofore Made for That Purpose, 1792 N.H. Laws 441, 447.	That such of the infantry as are under the care of parents, masters or guardians, shall be furnished by them with such arms and accoutrements.
Massachusetts	1793	An Act for Regulating and Governing the Militia of The Commonwealth of Massachusetts, ch. 1, § XIX, 1793 Mass. Acts & Laws May Sess. 289, 297.	[A]ll parents, masters and guardians shall furnish those of the said Militia who shall be under their care and command, with the arms and equipments aforementioned
Vermont	1797	An Act, for Regulating and Governing the Militia of This State 1797, ch. LXXXI, No. 1, § 15, 2 THE LAWS OF THE STATE OF VERMONT, DIGESTED & COMPILED	And all parents, masters or guardians, shall furnish those of the said militia who shall be under their care and command, with the arms and equipments above mentioned

		122, 131–32 (Randolph, Sereno Wright 1808).	
North Carolina	1806	2 WILLIAM T. DORTCH, JOHN MANNING & JOHN S. HENDERSON, THE CODE OF NORTH CAROLINA § 3168, 346–47 (New York, Banks & Bros. 1883).	And all parents and masters shall furnish those of the militia, who shall be under their care or command, with the arms and equipments above mentioned . . .
Massachusetts	1810	An Act for Regulating, Governing, and Training the Militia of This Commonwealth, ch. CVII, § 28, 1810 Mass. Laws 151, 176.	[A]ll parents, masters or guardians, shall furnish all minors enrolled in the militia, who shall be under their care respectively with the arms and equipments, required by this act
New Hampshire	1820	An Act for the Forming, Arranging and Regulating the Militia, ch. XXXVI, § 46, 1820 N.H. Laws Nov. Sess. 321.	[A]ll parents, masters, and guardians, shall furnish all minors enrolled in the militia, who shall be under their care respectively, with the arms and equipments required by this act
Maine	1821	An Act To Organize, Govern, and Discipline the Militia of This State, ch. CLXIV, § 34, 1821 Me. Laws 548, 570.	[A]ll parents, masters or guardians, shall furnish all minors enrolled in the militia, who shall be under their care respectively, with the arms, and equipments, required by this Act
Missouri	1825	An Act To Organize, Govern and Discipline the Militia, ch. I, § 24, 1825 Mo. Laws 533, 554.	[A]ll parents, masters and guardians, shall furnish all minors, enrolled in the militia, who shall be under their care, respectively, with the arms and equipments required by this act.