

SURVIVAL OF THE SOCIAL INTEREST: REDEFINING THE *BRUEN*
STANDARD TO PROTECT WOMEN FROM VIOLENCE THROUGH
UNITED STATES V. RAHIMI

by
Katelyn M. Sundstrom*

*This Note explores the intersection of gun rights and gender-based violence within the U.S. legal system. It delves into the pervasive issue of domestic violence and explores the 2022 Supreme Court decision in *New York State Rifle & Pistol Association v. Bruen*, which rejected the use of “interest balancing” in evaluating gun regulations in favor of a purely historical and traditional approach. This shift placed significant legal scrutiny on existing firearm restrictions, including 18 U.S.C. § 922(g)(8), which prohibits individuals subject to domestic violence restraining orders from possessing firearms.*

*The analysis centers on the 2023 case *United States v. Rahimi*, where the Court assessed whether the firearm prohibition under § 922(g)(8) infringes on the Second Amendment rights of domestic abusers. This Note argues that while *Bruen* disallows social considerations in gun regulation, *Rahimi* reaffirms the need to disarm dangerous individuals, framing the decision as a potential model for how courts might balance historical precedent with contemporary social interests, such as protecting women from domestic abuse.*

*Through an examination of legislative history, Second Amendment jurisprudence, and the complexities of applying historical tests, this Note concludes that *Rahimi* provides a path forward for integrating historical and traditional social interests—like protecting women from domestic violence—within constitutional frameworks for gun regulation.*

* J.D., Lewis & Clark Law School, 2025; Article Editor, 2024–2025, Lewis & Clark Law Review. A warm thank you to Meg Garvin for her constant mentorship, my parents for their steadfast guidance, and to my family and friends for their ceaseless support and encouragement. In addition, I thank the staff of Lewis & Clark Law Review for their attentive editing in this publication process. Most importantly, I extend my gratitude to the survivors of domestic violence and other violent crimes who continue to use their voice to make bounds in victims’ rights jurisprudence and scholarship—your role is vital to the emergence of an equitable system for victims of violent crime.

Introduction	214
I. The Legislative History Behind § 922(g)(8)–(9) and the VAWA	218
II. Second Amendment Jurisprudence and the <i>Bruen</i> Decision	219
A. <i>Supreme Court Cases pre-Bruen</i>	219
B. <i>The Bruen Standard</i>	220
C. <i>Effect on Lower Courts</i>	223
D. <i>Inconsistent Applications of Bruen by Lower Courts</i>	224
III. Historical Social Considerations	226
A. <i>The 1791 Standard</i>	227
1. <i>The Adoption of the Second Amendment</i>	227
2. <i>State Regulations</i>	227
3. <i>The Application of the 1791 Standard</i>	228
B. <i>The 1868 Standard</i>	229
1. <i>The Adoption of the Fourteenth Amendment</i>	229
2. <i>State Militia and Concealed Carry Laws</i>	230
C. <i>History and Tradition in the Context of § 922(g)(8)</i>	232
IV. <i>United States v. Rahimi</i>	233
A. <i>Background and Relationship to Bruen</i>	233
B. <i>The Argument on How Rahimi Could Reframe Bruen</i>	235
C. <i>The Supreme Court's Decision in United States v. Rahimi</i>	237
1. <i>Majority Opinion</i>	238
i. <i>Clarifying Bruen</i>	238
ii. <i>Disarming "Dangerous Individuals"</i>	239
2. <i>Concurrent Opinions</i>	240
V. Moving Forward: <i>Rahimi's</i> Effect on Second Amendment Jurisprudence and the Workability of <i>Bruen</i>	241

*All too often, the only difference between a battered woman and
a dead woman is the presence of a gun.¹*

INTRODUCTION

Domestic, intimate partner, and gender-based violence are extensive problems facing women in the United States.² Statistics are horrifying—every 15 seconds, a

¹ *United States v. Castleman*, 572 U.S. 157, 160 (2014) (citing 142 Cong. Rec. 22986 (1996) (statement of Sen. Wellstone)).

² Although this Note discusses female victims of gender-based violence, that is not to say women are the only victims. It's important to note that men are also victims of intimate partner and domestic violence. In addition, men who petition the court for protection orders are also protected by 18 U.S.C. § 922(g)(8) and are affected by the decision in *United States v. Rahimi*. Because women are disproportionately victims of domestic and intimate partner violence, as

woman will be abused in the United States of America, and 95% of these abusers are men.³ Between three and four million women in America are abused in their homes each year, and abuse is the leading cause of injury to women, regardless of their demographic.⁴ In fact, “[d]omestic violence is the leading cause of injury to women ages 15–44 in the United States—more than car accidents, muggings, and rapes combined.”⁵ Women are also killed more often than men in these circumstances.⁶ In 2021, 34% of female murder/negligent manslaughter victims were killed by an intimate partner,⁷ compared to 6% of male murder/negligent manslaughter victims killed by an intimate partner in the same year.⁸ This impact extends beyond the abused—family members, friends, children, and those who intervene have a higher chance of being killed. Roughly 70% of the time, the intervenor was killed by the perpetrator using a firearm.⁹ In fact, domestic abuse disputes are some of the most dangerous situations for officers to respond to;¹⁰ “[b]etween 1980 and 2006, a total of 113,236 officer assaults occurred at these calls and 160 officers died as a result.”¹¹ The United States is unique in this posture on the international stage: Women in the United States are 28 times more likely to die by firearm homicide than women in peer nations,¹² and 92% of all women killed with guns in high-income countries were from the United States.¹³ Nearly one million American women alive today have had a gun used against them by an intimate partner.¹⁴ State

explained *infra* notes 3–5, and because the facts of *Rahimi* include a female victim and a male abuser, women affected by this violence are the scope of this Note.

³ *Abused Woman: Fact Sheet*, U.S. DEP’T OF JUST.: OFF. OF JUST. PROGRAMS (1989), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/abused-woman-fact-sheet>.

⁴ *Id.*

⁵ *Domestic Violence*, HOPE ALL., <https://www.hopealliancetxt.org/domestic-violence-information/> (last visited Apr. 7, 2025).

⁶ Erica L. Smith, *Female Murder Victims and Victim-Offender Relationship, 2021*, BUREAU OF JUST. STAT. (Dec. 2022), <https://bjs.ojp.gov/female-murder-victims-and-victim-offender-relationship-2021>.

⁷ *Id.*

⁸ *Id.*

⁹ *Guns and Violence Against Women*, EVERYTOWN FOR GUN SAFETY [hereinafter *Guns and Violence Against Women*], <https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem/> (Oct. 15, 2024).

¹⁰ Richard R. Johnson, *How Dangerous are Domestic Violence Calls to Officer Safety?*, DOLAN CONSULTING GRP. (Oct. 2017), https://www.dolanconsultinggroup.com/wp-content/uploads/2017/10/RB_Domestic-Violence-Calls_Officer-Safety.pdf; Emma Tucker, *Domestic Incidents are Highly Dangerous for Police Officers, Experts Say*, CNN (Jan. 22, 2022), <https://www.cnn.com/2022/01/22/us/domestic-incidents-police-officers-danger/index.html>.

¹¹ Johnson, *supra* note 10.

¹² *Guns and Violence Against Women*, *supra* note 9.

¹³ *Id.*

¹⁴ *Id.*

legislators and Congress have moved to lessen instances of violence against women by introducing legislation regarding the accessibility of protection orders for stalking, harassment, and other forms of violence, introducing full faith and credit clauses for protection orders, and creating “no fees” provisions for those seeking protection orders in court, although arguably too slowly.¹⁵

A specific peril to women facing violence is when their abuser has access to a weapon.¹⁶ An abuser’s access to a firearm greatly increases the chance that they harm or kill their victim.¹⁷ Congress attempted to rectify this issue through two provisions: 18 U.S.C. § 922(g)(8)–(9) (colloquially, § 922(g)(8)) and the Violence Against Women Act (VAWA). The relevant provisions of § 922(g)(8)–(9) state:

(g) It shall be unlawful for any person—

...

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)

(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or

¹⁵ *Full Faith and Credit: A Passport to Safety—A Judge’s Guide*, NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, <https://ncjfcj.org/bench-cards/full-faith-and-credit-a-passport-to-safety-a-judges-guide/> (last visited Apr. 7, 2025).

¹⁶ See *Statistics*, HARBOR HOUSE, <https://www.harborhousedv.org/resources/statistics/> (last visited Apr. 7, 2025).

¹⁷ *Guns and Violence Against Women*, *supra* note 9.

ammunition which has been shipped or transported in interstate or foreign commerce.¹⁸

Despite general agreement that protecting people from gun violence is laudable, there are questions of § 922(g)(8)'s legitimacy based on the Second Amendment of the U.S. Constitution. The Second Amendment states: "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."¹⁹ Recently in the realm of constitutional law, Second Amendment cases have swamped federal courts based on *New York Rifle & Pistol Ass'n v. Bruen*.²⁰ In that 2022 case, the Court overturned a standard test used for years by appellate courts for determining the legality of gun laws.²¹ Before *Bruen*, courts were allowed to consider social implications of a gun regulation alongside history and tradition, using a method called "interest balancing."²² The Court in *Bruen* overturned interest balancing for an approach that considers only history and tradition.²³ Notably, however, the Court failed to discuss whether a government's interest in a gun law based on social implications could still be relevant when determining its legality.²⁴

The most recent Supreme Court decision on gun rights involved the Constitution's intersections with laws aimed at mitigating gender-based violence. *United States v. Rahimi*, heard in 2023, discusses the illegality of abusers owning weapons under § 922(g)(8) when considering the abuser's constitutional interest—specifically, whether their Second Amendment rights are violated.²⁵ The burning question and the social effects of *Rahimi* boils down to this: Does a person's Second Amendment right to bear arms outweigh a survivor of intimate partner violence's right to be free from abuse and even death?²⁶ This Note analyzes *Bruen*, the gaps it leaves behind, and how § 922(g)(8) managed to survive in a post-*Bruen* landscape. Part I explores the legislative history of § 922(g)(8) and the VAWA. Part II discusses Second Amendment jurisprudence and the *Bruen* standard. Part III addresses historical considerations, including those in the context of § 922(g)(8)–(9). Part IV explains the Supreme Court's decision in *United States v. Rahimi*. Finally, in Part V, this Note concludes by considering how the Court's holding in *Rahimi* may mean that

¹⁸ 18 U.S.C. § 922(g)(8)–(9).

¹⁹ U.S. CONST. amend. II.

²⁰ Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 68–69 (2023) [hereinafter Charles, *The Dead Hand of a Silent Past*]. See generally *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

²¹ Charles, *The Dead Hand of a Silent Past*, *supra* note 20, at 71–72.

²² See *Bruen*, 142 S. Ct. at 2126 n.3, 2131, 2133.

²³ *Id.* at 2126.

²⁴ Charles, *The Dead Hand of a Silent Past*, *supra* note 20, at 138–39.

²⁵ *United States v. Rahimi*, 144 S. Ct. 1889, 1894 (2024).

²⁶ *Id.* at 1894–96.

social implications can survive in a post-*Bruen* world to protect victims of domestic violence. Ultimately, while *United States v. Rahimi* did not alter the test created by *Bruen*, it does show that government and social interests carry weight if they can display how founding-era regulations addressed similar problems. This clarification is vital because it demonstrates that social implications, such as the protection of women from domestic abuse, are factors for the courts to consider in constitutional jurisprudence.

I. THE LEGISLATIVE HISTORY BEHIND § 922(g)(8)–(9) AND THE VAWA

Title 18, Section 922 of the U.S. Code was created based on the Gun Control Act of 1968, and subsection (g) of § 922 was added as a response to the recognition of the significant risk posed by domestic violence perpetrators who have access to firearms.²⁷ Section 922(g)(8) is rooted in the social interest of protecting women from great harm, even death, at the hands of their armed abusers.²⁸ For example, during debates regarding the passage of this Act, Senator Thomas J. Dodd (D–Conn.) discussed family violence specifically. He stated:

In 82 percent of the [gun murder] cases, the murder resulted from a fight, a domestic quarrel, or a family argument. The argument has always been used by those who oppose sensible gun legislation, that these people were just engaging in a family quarrel, or a quarrel with a friend, and that they were not really criminals. The facts are, as I have stated, that 71 percent of them had prior criminal records. Such people should not be allowed to get their hands on a gun, despite the fact, of course, that they knew each other. But they had guns, so that, when they got into a quarrel with a friend or acquaintance, they used a gun and committed murder. In every case the ready availability of firearms was a major factor for the simple reason that it is easier to kill with a gun than with any other weapon.²⁹

Another piece of data shared by Senator Dodd showed that in 1968 in Chicago, “78 per cent of the killings resulted from quarrels growing out of domestic problems.”³⁰ The creation of 18 U.S.C. § 922 is a direct result of the passage of the Gun Control Act of 1968 and Congress’s interest in protecting people from domestic abuse.

²⁷ See 114 Cong. Rec. 26,715–16 (Sept. 12, 1968) (statement of Sen. Thomas Dodd) (noting that most murderers had an arrest or multiple arrests on their record before their domestic conflicts resulting in murder); U.S. Dep’t of Justice Archives, Criminal Resource Manual § 1117 (2013).

²⁸ See 114 Cong. Rec. 26,715 (Sept. 12, 1968).

²⁹ *Id.* at 26,716 (statement of Sen. Thomas Dodd).

³⁰ *Id.* at 26,724.

Second, a bill that shows the importance of protecting women from domestic gun violence is the VAWA of 1994.³¹ VAWA (enshrined in the Violent Crime Control and Law Enforcement Act of 1994)³² amended firearm protections for victims of intimate partner violence and amended provisions of 18 U.S.C. § 922.³³ Specifically, VAWA created a prohibition “against disposal of firearms to, or receipt of firearms by, persons who have committed domestic abuse.”³⁴ One significant amendment made by VAWA to § 922 included adding individuals who have been convicted of misdemeanor domestic violence offenses to the definition of prohibited persons under 18 U.S.C. § 922(g). This means that individuals who have been convicted of domestic violence misdemeanors are prohibited from possessing firearms or ammunition.³⁵ Democratic Representative Myron “Mike” Kriedler from Washington state described the importance of VAWA stating that “4 million women suffer from domestic violence, which Secretary of HHS [Health and Human Services] Donna Shalala rightly calls ‘terrorism in the home.’ I am especially pleased this crime bill includes the Violence Against Women Act.”³⁶

II. SECOND AMENDMENT JURISPRUDENCE AND THE *BRUEN* DECISION

A. *Supreme Court Cases pre-Bruen*

The legitimacy of the protections created by § 922(g)(8)–(9) were questioned after the passage of *Bruen*.³⁷ *Bruen* was predictable based on two important cases—*District of Columbia v. Heller* in 2008 and *McDonald v. City of Chicago* in 2010.³⁸ *Heller*, using a history and tradition test, found that the Second Amendment is not an unlimited right, and rejected a rational-basis test, which would allow any gun law to pass constitutional muster if it were rationally related to a legitimate government interest.³⁹ Ultimately, the Court held that if the Second Amendment’s text plainly covers an individual’s conduct, that conduct is presumptively protected by the Constitution, and the government must show its alignment with history and

³¹ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110401, 108 Stat. 1796, 2014–15 (1996).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ 140 Cong. Rec. 6067, 6067 (Mar. 23, 1994) (Statement of Rep. Myron Kriedler).

³⁷ See, e.g., *United States v. Rahimi*, 61 F.4th 443, 448 (5th Cir. 2023).

³⁸ See *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. Chicago*, 561 U.S. 742 (2010).

³⁹ *Heller*, 554 U.S. at 626, 634.

tradition if it wanted to regulate that conduct.⁴⁰ Building from this, the Supreme Court determined in *McDonald* that the Fourteenth Amendment applies to the Second Amendment based on *Heller*, meaning that the Second Amendment is now incorporated and applicable to the states rather than just federal regulations.⁴¹ *McDonald* and *Heller* were used by lower courts to establish what is now an invalid test.⁴² The old test—focused on “interest balancing” the Second Amendment, and the individual right protected therein, with a “comparably justified” burden created by the government⁴³—was altered to focus only on history and tradition.

B. *The Bruen Standard*

Based on *Heller* and *McDonald*, the *Bruen* standard only looks at the year the Second Amendment was ratified; a gun law will only be permissible today if it would pass Constitutional muster in that time period.⁴⁴ The case came as a result of New York state licensing laws that, at their most basic level, required those seeking to legally own a firearm appear in front of a licensing officer and prove their good moral character.⁴⁵ If an applicant could not make that showing, then they could only brandish⁴⁶ a firearm in very limited circumstances—hunting, target shooting, or as a requirement of employment.⁴⁷ New York, along with other states at the time of *Bruen*, had a “proper cause” standard for showing why an individual would need a full license to brandish a firearm.⁴⁸ This standard entailed limited judicial review of the issuance or lack of issuance of licenses and was found impermissible by the Justices who decided *Bruen*.⁴⁹ In *Bruen*, two citizens of New York applied for licenses on the basis of the need for self-defense, but the lower courts could not find a proper cause for this need.⁵⁰

⁴⁰ *Id.*

⁴¹ *McDonald*, 561 U.S. at 791.

⁴² *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2131–33 (2022) (citing *Heller*, 554 U.S. at 599; *McDonald*, 561 U.S. at 767).

⁴³ *Id.*

⁴⁴ *Bruen*, 142 S. Ct. at 2118–19.

⁴⁵ *Id.* at 2122–23 (citing N.Y. PENAL LAW § 400.00(1)(a)–(n) (McKinney 2022)).

⁴⁶ To brandish, in this sense, means to use the gun as a threat. In New York, citizens felt that brandishing the gun, and even utilizing it, was important in case of attack to avoid serious harm or death. *See id.* at 2158 (Alito, J., concurring).

⁴⁷ *Id.* at 2123 (majority opinion) (citing *In re O’Brien*, 663 N.E. 2d 316, 438 (N.Y. 1996); *Babernitz v. Police Dept. of New York*, 65 App. Div. 2d 320, 321–22 (N.Y. 1978); *In re O’Connor*, 154 Misc. 2d 694, 696–98 (N.Y. 1992)).

⁴⁸ *Id.* at 2122–23.

⁴⁹ *See generally id.*

⁵⁰ *Id.* at 2125.

On appeal, the appellate court affirmed the lower court's finding that there was no proper cause.⁵¹ Both courts relied on the federal case *Kachalsky v. Cnty. of Westchester*, which sustained New York's proper cause standard and held that the standard was "substantially related to the achievement of an important government interest."⁵² The plaintiffs sought further review and argued that the Second and Fourteenth Amendments applied here based on *Heller*, and the New York law violated the standard that ordinary, law-abiding citizens have the right to carry a gun outside their home for self-defense.⁵³ The Supreme Court granted certiorari and found that the two-part test that the court of appeals created was "one step too many."⁵⁴ Instead, the Court held that the government must affirmatively show that the regulation in question is supported by a historical tradition that "delimits the outer bounds of the right to keep and bear arms."⁵⁵ The Court declined to recognize "means-end" scrutiny—a method also declined in *Heller* that determines whether the government has a solid justification for its action.⁵⁶ The Court also declined to adopt an intermediate scrutiny test that the government urged it to.⁵⁷ The Court continued to explain that it is their duty to protect individual rights; if the government passes a law infringing on those rights, then it is the government's burden to prove the constitutionality of that law.⁵⁸ Further, the Court elaborated that while some laws that ask for historical tests include deference to the legislature,⁵⁹ the Second Amendment cannot be one of them because the amendment *itself* is the product of a balancing test.⁶⁰ "It is this balance—struck by the traditions of the American people—that demands our unqualified deference."⁶¹

Finally, the Court took perhaps its staunchest stance in this opinion by implying that social impacts should not be considered in future cases. While a quick glance at the language of the opinion makes it seem like the courts will consider social implications, the result is drastically different; social considerations seem of little

⁵¹ *Id.*

⁵² *Id.* (quoting *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012)).

⁵³ *Id.* at 2125.

⁵⁴ *Id.* at 2126–27.

⁵⁵ *Id.* at 2127.

⁵⁶ *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008). *See generally* Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449 (1988) (discussing means-end scrutiny).

⁵⁷ *Bruen*, 142 S. Ct. at 2126–27, 2131.

⁵⁸ *Id.* at 2130–31 (citing *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 818 (2000)); *see also* *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986).

⁵⁹ *Bruen*, 142 S. Ct. at 2130.

⁶⁰ *Id.*

⁶¹ *Id.*

importance to the decision.⁶² The Court may say that the Second Amendment can be interpreted to fit societal growth, but it means that the protections afforded by the Second Amendment will apply no matter the circumstance.⁶³ In fact, the Court states:

[O]ther cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868. Fortunately, the Founders created a Constitution—and a Second Amendment—“intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.⁶⁴

The Court continued that line of reasoning by describing one way in which they will not use history—to define the meaning of “arms.” The reasoning is that history needs to have some metric of measurement, and precedent points to the fact that the metric to be used in these cases should be based on “*how and why* the regulations burden a law-abiding citizen’s right to armed self-defense.”⁶⁵ Therefore, this should be a central consideration when determining whether current regulations are in line with historic traditions. The meaning of arms does not pose a burden on the right, so it can evolve as civilization does.⁶⁶ Further, they describe another instance in which history supports gun regulations. Settled and sensitive places can still restrict gun use—like courts, schools, and other government property—and as new sensitive places emerge, there is no reason that these laws cannot apply there too if it is historically permissible.⁶⁷

⁶² *Id.* at 2129–33 (rejecting means-end scrutiny in Second Amendment cases, instead requiring the government to justify regulations solely through historical tradition rather than balancing public safety concerns or social policy implications).

⁶³ *Id.* at 2132.

⁶⁴ *Id.* (internal citations omitted) (quoting from *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819)).

⁶⁵ *Id.* at 2132–33 (emphasis added).

⁶⁶ *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (“Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” (internal citations omitted)).

⁶⁷ *Bruen*, 142 S. Ct. at 2133.

Consequently, the *Bruen* decision issued by the Supreme Court in June of 2022 overturned over a dozen federal gun laws by July of 2023.⁶⁸ The introduction of the *Bruen* standard, and the gaps it leaves for lower courts to fill, had the power to dismantle years of protections for battered women.⁶⁹

C. *Effect on Lower Courts*

Ultimately, *Bruen* requires “courts to assess whether modern firearms regulations are consistent with the Second Amendment’s text and historical understanding.”⁷⁰ Reasonably so, the lower courts have had a very difficult time approaching gun laws because of the lack of guidance given by the Supreme Court on how they should apply the *Bruen* test.⁷¹ There are a lot of things to consider: what history is permissible to view; how Courts should be expected to acknowledge historical times when American jurisdictions allowed gun laws to prevail over potential Constitutional interferences; and how the courts should be expected to issue timely decisions while properly combing through all the history they can. In response to these concerns, the Court gave this statement: “We see no reason why judges frequently tasked with answering these kinds of historical, analogical questions cannot do the same for Second Amendment claims.”⁷²

Historical and traditional laws are difficult for courts to analyze, especially when there is little guidance on how to tackle their complexities.⁷³ In *Bruen*, the Court stated: “Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*.”⁷⁴ This makes it seem like if a gun regulation were permissible traditionally and historically, it would always be permissible. However, the Court contradicts this notion later. While the Court acknowledges that in the *Heller* opinion they did analyze “a variety of legal and other sources to determine the public understanding of [the Second Amendment] after its . . . ratification,” the *Bruen* opinion is clear that just because society once accepted a certain gun regulation after ratification despite its inconsistency with the Constitution, that alone does not give historical bearing to affirm that regulation.⁷⁵

⁶⁸ Charles, *The Dead Hand of a Silent Past*, *supra* note 20, at 78–79.

⁶⁹ *Id.* at 112–13, 151.

⁷⁰ *Bruen*, 142 S. Ct. at 2118.

⁷¹ Charles, *The Dead Hand of a Silent Past*, *supra* note 20, at 128–30.

⁷² *Bruen*, 142 S. Ct. at 2134.

⁷³ See generally Charles, *The Dead Hand of a Silent Past*, *supra* note 20, at 94–110.

⁷⁴ *Bruen*, 142 S. Ct. at 2119 (emphasis added) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008)).

⁷⁵ *Id.* at 2127–30 (alteration in original) (emphasis omitted) (quoting *Heller*, 554 U.S. at 605).

In addition, when determining whether historical evolvments control over text, the Court says simply that the text controls if an issue arises.⁷⁶ Accordingly, there is debate on whether the proper “tradition” depends on the time of ratification of the Second Amendment, or the time of ratification of the Fourteenth Amendment because of its use to define the scope of an individual right regarding state law.⁷⁷ The Court also declined to discuss that issue because “public carry” differed in no relevant respects in 1791 or 1868.⁷⁸ The lack of discussion means that lower courts do not know what year is applicable for any circumstances warranted by the new test, other than issues arising that implicate “public carry” laws.⁷⁹ Ultimately, this leaves a lot of debate on the proper procedure for analyzing gun laws. A few questions that lower courts must decide, among others, include: Which, if any, past regulations are relevant; what year of the Second Amendment’s ratification is proper; and what other historical and traditional factors are appropriate for assessing gun laws in all facets of constitutional analysis.

D. Inconsistent Applications of Bruen by Lower Courts

The gun rights discussion is not new, but now it may be more prevalent than ever. In a panel entitled *The Past and Future of the Right to Keep and Bear Arms*, the executive director for the Duke Center for Firearms Law said that “*Bruen* revolutionized constitutional doctrine. It upended a lot of what was previously considered to be a relatively settled consensus about the constitutionality of various types of gun regulation.”⁸⁰ As a result, lower courts have had a hard time grappling with *Bruen* and how to apply it. On one hand, the Gifford Law Center says that lower courts have been able to grasp *Bruen* well and apply it to gun regulations across a variety of jurisdictions, and some have found the regulation permissible under the new test. However, the Law Center cites a few instances where *Bruen* has been “weaponized” to fight gun laws and asks the Supreme Court to step in and correct these “outlier decisions.”⁸¹ In the dissenting opinion of *Bruen*, Justice Breyer urges

⁷⁶ *Id.* at 2137 (citing *Gamble v. United States*, 139 S. Ct. 1960, 1985 (2019) (Thomas, J., concurring)); see also Letter from James Madison to Nicholas P. Trist (Dec. 1831), in 9 WRITINGS OF JAMES MADISON 471, 476 (G. Hunt ed., 1910).

⁷⁷ *Bruen*, 142 S. Ct. at 2136–38.

⁷⁸ *Id.*

⁷⁹ Charles, *The Dead Hand of a Silent Past*, *supra* note 20, at 99–100.

⁸⁰ *Far-Reaching Court Decisions Impact Gun Rights and Regulations*, AM. BAR. ASS’N (Feb. 3, 2024), <https://www.americanbar.org/news/abanews/aba-news-archives/2024/02/court-decisions-impact-gun-rights/>.

⁸¹ Billy Clark, *Second Amendment Challenges Following the Supreme Court’s Bruen Decision*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE (June 21, 2023), <https://giffords.org/memo/second-amendment-challenges-following-the-supreme-courts-bruen-decision/> (discussing *United States v. Quiroz*, 629 F. Supp. 3d 511 (W.D. Tex. 2022); *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023), *rev’d*, 144 S. Ct. 1889 (2024)).

that judges are lawyers, not historians, and it is unreasonable to expect them to go through a historical analysis under every case they see.⁸² According to the Duke Center for Firearms Law, the lack of court resources to do so has allowed courts to weaponize *Bruen* to support questionable decisions with a lack of reasoning behind them, resulting in historical analyses that do not bode well for the proliferation of gun regulations.⁸³

While a full national scan is beyond the scope of this Note, the following cases show the disparate applications. One example includes *Rigby v. Jennings*, where the District Court of Delaware found that a ghost gun law was unconstitutional because the plaintiffs failed to prove that guns were not in common use.⁸⁴ The Duke Center for Firearms Law argues this was decided incorrectly because of the failed use of the “step one” approach. In an argument for whether something constitutes an “arm,” the proper approach is “whether the weapon is in common use by law-abiding citizens for lawful purposes.”⁸⁵ Delaware instead asked the government to prove that the weapon is not in common use in order for it to not be an arm.⁸⁶ That does not match with the step one approach postured by the Court previously and even reaffirmed in *Bruen* because it incorrectly switches the burden to the defendant.⁸⁷ Another case that contrasts *Bruen* is *Antonyuk v. Bruen*, where a New York court found that all “sensitive place” gun laws are essentially void after *Bruen* with very little reasoning.⁸⁸ In fact, the decision directly contradicts the language of *Bruen* because it states that *Bruen* effectively barred the expansion of sensitive places.⁸⁹ However, after listing several sensitive locations, the Court wrote that lower “courts can use analogies to those historical regulations of ‘sensitive places’ to determine that modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible.”⁹⁰ The emphasis in the original *Bruen* opinion on “new” makes the *Antonyuk* court’s reasoning all the more perplexing.

A final example is the stark contrast between a decision issued by a federal court in Texas and one in California. In Texas, *Firearms Pol’y Coal. v. McCraw* held that people between the ages of 18 and 20 can own a firearm after analyzing the historical

⁸² *Bruen*, 142 S. Ct. at 2177 (“Judges are far less accustomed to resolving difficult historical questions. Courts are, after all, staffed by lawyers, not historians.”).

⁸³ Jacob Charles, *Worrying Trends in the Lower Courts After Bruen*, DUKE CTR. FOR FIREARMS L. (Sept. 30, 2022) [hereinafter Charles, *Worrying Trends in the Lower Courts*], <https://firearmslaw.duke.edu/2022/09/worrying-trends-in-the-lower-courts-after-bruen>.

⁸⁴ *Rigby v. Jennings*, 630 F. Supp. 3d 602, 613–14 (D.C. Del. 2022).

⁸⁵ Charles, *Worrying Trends in the Lower Courts*, *supra* note 83.

⁸⁶ *Id.*; *Rigby*, 630 F. Supp. 3d, at 613–15.

⁸⁷ Charles, *Worrying Trends in the Lower Courts*, *supra* note 83.

⁸⁸ *Antonyuk v. Bruen*, 624 F. Supp. 3d 210, 254 (N.D.N.Y. 2022).

⁸⁹ *Id.*

⁹⁰ Charles, *Worrying Trends in the Lower Courts*, *supra* note 83 (quoting N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2133 (2022)).

traditions of the Second Amendment.⁹¹ On the other hand, in *Nat'l Ass'n for Gun Rts., Inc. v. City of San Jose*, a federal court of California decided that gun owners must procure firearms liability using the exact same history cited in *McCraw*.⁹² These decisions are vastly different despite the identical historical analyses.⁹³ These cases show the cracks in *Bruen*'s promise of consistency in gun regulations and a check on judicial policy preferences. These inconsistent cases are unprecedented and lack clear reasoning, but they seem to remain viable based on the *Bruen* standard.

III. HISTORICAL SOCIAL CONSIDERATIONS

Courts have struggled with applying *Bruen*—specifically, it's unclear what exact “historical tradition” applies. There are two historical standards to look to—1791 and 1868—because the Second Amendment was ratified to the U.S. Constitution in 1791 and the Fourteenth Amendment was ratified in 1868.⁹⁴ When the Fourteenth Amendment was added, it allowed for the Court to start incorporating the Bill of Rights to apply to the states.⁹⁵ The Second Amendment was incorporated to the states from the holding in *McDonald*.⁹⁶ Therefore, based on *Bruen*, the legislators must look to either the 1791 standard or 1868 standard when regulating guns. As previously acknowledged, the Court in *Bruen* declined to decide whether courts should use the 1791 standard or the 1868 standard.⁹⁷ So, courts (at the Supreme Court's directive) use different historical standards for different issues of gun regulations. For example, the Supreme Court urges that because the definition of “public carry” has not changed, either a 1791 or an 1868 standard would be permissible in application to those cases.⁹⁸ The Court declined to discuss any other historical social considerations.⁹⁹ The following subsections analyze social considerations related to gun laws in both 1791 and 1868.

⁹¹ *Firearms Pol'y Coal. v. McCraw*, 623 F.Supp.3d 740, 751 (N.D. Tex. 2023).

⁹² *Nat'l Ass'n for Gun Rts., Inc. v. City of San Jose*, 618 F. Supp. 3d 901, 917 (N.D. Cal. 2022).

⁹³ *Id.*; *Firearms Pol'y Coal.*, 623 F.Supp.3d at 747.

⁹⁴ U.S. CONST. amends. II, XIV.

⁹⁵ *Incorporation Doctrine*, CORNELL L. SCH.: LEGAL INFO. INSTITUTE, <https://www.law.cornell.edu/wex/incorporationDoctrine> (last visited Apr. 7, 2025).

⁹⁶ *McDonald v. Chicago*, 561 U.S. 742, 791 (2010).

⁹⁷ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2138 (2022).

⁹⁸ *Id.*

⁹⁹ *See generally id.*

A. *The 1791 Standard*

1. *The Adoption of the Second Amendment*

Seemingly obvious, the hallmark of gun rights and regulations in the United States is the addition of the Second Amendment to the United States Constitution in 1791. The Second Amendment states: “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.”¹⁰⁰ The Second Amendment was added to the Constitution for a multitude of reasons: protection against a tyrannical government (something of great importance for a country that was founded from a group of colonies trying to detach itself from the British monarchy); defense of a newly-founded nation; and the protection of individual rights and liberty.¹⁰¹

James Madison in the Federalist Papers stated that “the State governments, with the people on their side,” would be more than adequate to counterbalance a federally controlled “regular army,” even one “fully equal” to the resources of the country.¹⁰² Further, he stated “the advantage of being armed,” together with “the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.”¹⁰³ Further, Alexander Hamilton argued that militias are the “most natural defense of a free country.”¹⁰⁴

2. *State Regulations*

Some states had their own way of protecting gun rights even before the ratification of the Second Amendment, usually in state constitutions or declarations of rights. Three examples of this are explored in this section; provisions from Virginia, Pennsylvania, and Massachusetts. Adopted in 1776, the Virginia Declaration of Rights influenced the drafting of state and federal constitutions, including its provisions on the right to bear arms for the state’s defense. In fact, this document was drawn upon by Thomas Jefferson for the opening of the Declaration of Independence.¹⁰⁵ Section 13 of the Virginia Declaration of Rights states:

That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing

¹⁰⁰ U.S. CONST. amend. II.

¹⁰¹ *Amdt2.2 Historical Background of the Second Amendment*, CORNELL L. SCH.: LEGAL INFO. INSTITUTE, <https://www.law.cornell.edu/constitution-conan/amendment-2/historical-background-of-the-second-amendment> (last visited Apr. 7, 2025).

¹⁰² THE FEDERALIST NO. 46, at 243 (James Madison) (Ian Shapiro ed., 2009).

¹⁰³ *Id.*

¹⁰⁴ THE FEDERALIST NO. 29, at 183 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁰⁵ *Compare* VIRGINIA DECLARATION OF RIGHTS § 1 (1776), *with* DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.¹⁰⁶

Like the Virginia Declaration of Rights, the 1790 Pennsylvania Constitution included provisions related to the right to bear arms for the state's defense. Article IX, Section 21 states: "The right of the citizens to bear arms in defense of themselves and the State shall not be questioned."¹⁰⁷ In addition, the Massachusetts Declaration of Rights in 1780 adopted the following language in Article XVII:

The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.¹⁰⁸

This provision is still in the Massachusetts Declaration, being one of the oldest written constitutions still in use.¹⁰⁹

3. *The Application of the 1791 Standard*

As demonstrated by the provisions explored above, the plain language indicates that the right to bear arms is absolute and cannot be infringed. Courts have struggled with how to apply this standard in a multitude of cases. A notable case already discussed is *District of Columbia v. Heller*, in which the Court held that the Second Amendment protects an individual's right to possess a firearm for self-defense within the home.¹¹⁰ The majority opinion, written by Justice Antonin Scalia, extensively relied on historical sources and the original meaning of the Second Amendment in its interpretation. Justice Scalia analyzed historical texts from the founding era like dictionaries, legal treatises, colonial statutes, and documents authored by the Founding Fathers.¹¹¹ The Court also employed English common law and the English Bill of Rights of 1689 to provide context for the addition of the Second Amendment to the Constitution, how the colonies and states recognized its application, and commentary from authors such as St. George Tucker and William Blackstone that explored political and legal understanding of the right to bear arms in the 18th century.¹¹² Ultimately, the Court held that the right to bear arms is an

¹⁰⁶ VIRGINIA DECLARATION OF RIGHTS § 13 (1776).

¹⁰⁷ PA. CONST. art. I, § 21.

¹⁰⁸ MASS CONST. pt. 1, art. XVII.

¹⁰⁹ *John Adams & the Massachusetts Constitution*, COMMONWEALTH OF MASS., <https://www.mass.gov/guides/john-adams-the-massachusetts-constitution> (last visited Apr. 7, 2025).

¹¹⁰ *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

¹¹¹ *Id.* at 584, 601, 602, 607.

¹¹² *Id.* at 582, 593–94, 605.

individual's right, and regulations are only permissible if they are compatible with history and tradition.¹¹³

Another case in which the Court employs the 1791 standard is *Caetano v. Massachusetts*.¹¹⁴ Although it does not explicitly state its application of the 1791 standard, the Court uses the historical and traditional context of the Second Amendment to support its decision to rule that the regulation created by Massachusetts is unconstitutional.¹¹⁵ In that case, the Court said that Massachusetts' ban on stun guns was unconstitutional as it unlawfully restricted an individual's right to bear a commonly used weapon, and Massachusetts failed to provide historical and traditional support for the regulation.¹¹⁶ Interestingly, stun guns had not yet been invented in the 18th century.¹¹⁷ The Court still found that there is historical evidence showing that non-lethal weapons and improvised tools were used for personal protection around the addition of the Second Amendment.¹¹⁸ This illustration is an example of a confusing precedent set by the Court: History and tradition must be used to evaluate the validity of gun regulations, even if the weapon at issue did not exist historically or traditionally.

B. The 1868 Standard

1. The Adoption of the Fourteenth Amendment

The Fourteenth Amendment was adopted in 1868 for the purpose of mitigating issues related to formerly enslaved Americans after the Civil War.¹¹⁹ This included a variety of clauses like the Equal Protection Clause, which ensures states govern their citizens impartially, and the Due Process Clause, which prohibits the deprivation of life, liberty, or property. Section 1 of the Fourteenth Amendment encompasses both clauses, reading:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹²⁰

¹¹³ *Id.* at 634–35.

¹¹⁴ *Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016).

¹¹⁵ *Id.* at 411–12.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 416–17.

¹¹⁸ *Id.* at 419.

¹¹⁹ *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/14th-amendment> (Mar. 6, 2024).

¹²⁰ U.S. CONST. amend. XIV, § 1.

Incorporation is derived from the Due Process Clause,¹²¹ and refers to the doctrine through which the Supreme Court selectively applies provisions of the Bill of Rights to state law.¹²² Initially, the Bill of Rights only applied to the federal government.¹²³ However, through incorporation, the Supreme Court held that certain fundamental rights protected by the Bill of Rights must also be respected by the states, thus applying these protections nationwide.¹²⁴ The year 1868, when the Fourteenth Amendment was ratified, marked a new period for history and tradition analyses of the Second Amendment; this is when the Second Amendment had the *potential* to be incorporated to the states (though it was not done so until 2010 after the decision in *McDonald v. City of Chicago*).¹²⁵ Therefore, courts should analyze gun regulations in context of what would be permissible in 1868 based on incorporation.

2. *State Militia and Concealed Carry Laws*

New York, Pennsylvania, Ohio, Texas, and California are examples of states that had different gun regulations in 1868 based on their militia laws. In 1862, New York was allowed to organize and regulate militia members, especially related to their arming and equipment.¹²⁶ In addition, Pennsylvania's Militia Law of 1867 established the organization and operation of the state militia including the possession and use of firearms by militia members for training and mobilization.¹²⁷ Ohio had a similar law to both New York and Pennsylvania in 1867. Ohio's Militia Law of 1867 outlined the state militia's structure and responsibilities of the militia, including firearm and equipment provisions.¹²⁸ Texas's militia law in 1866 and

¹²¹ *Incorporation Doctrine*, *supra* note 95.

¹²² *Id.*

¹²³ *Barron v. City of Baltimore*, 32 U.S. 243, 247 (1833).

¹²⁴ *Info Brief: Incorporation*, NAT'L CONST. CTR.: CONST. 101 RES., <https://constitutioncenter.org/education/classroom-resource-library/classroom/5.6-info-brief-incorporation> (last visited Apr. 7, 2025). Examples of incorporated rights include freedom of speech and religion (First Amendment), the right to bear arms (Second Amendment), protection against unreasonable searches and seizures (Fourth Amendment), the right to counsel in criminal cases (Sixth Amendment), and protection against cruel and unusual punishment (Eighth Amendment). *Id.*

¹²⁵ *McDonald v. Chicago*, 561 U.S. 742, 791 (2010).

¹²⁶ *New York Militia Laws During the Civil War*, N.Y. STATE MIL. MUSEUM & VETERANS RSCH. CTR., <https://museum.dnna.ny.gov/unit-history/conflict/us-civil-war-1861-1865/new-york-militia-laws-during-civil-war> (last visited Apr. 7, 2025).

¹²⁷ *Militia Resource Guide—1815–1870*, COMMONWEALTH OF PENN., <https://www.phmc.pa.gov/Archives/Research-Online/Pages/Militia-Resource-Guide-1815-1870.aspx> (last visited Apr. 7, 2025).

¹²⁸ *The Mobilization of the Ohio Militia in the Civil War*, OH. HIST. CONNECTION, [https://resources.ohiohistory.org/ohj/browse/displaypages.php?display\[\]=0098&display\[\]=147&display\[\]=174](https://resources.ohiohistory.org/ohj/browse/displaypages.php?display[]=0098&display[]=147&display[]=174) (last visited Apr. 7, 2025).

California's militia law in 1863 also addressed these concerns of militia organization, responsibilities, and equipment of firearms to members.¹²⁹

In addition to these militia laws, some states had regulations concerning concealed carry. In fact, California had a gun regulation in 1863 that completely banned the concealed carry of firearms.¹³⁰ The rationale was based on the "lawlessness" of the Gold Rush era, a sentiment created because many mining camps in California had little government oversight.¹³¹ This regulation was meant to mitigate this by combatting gun violence in the era.¹³² However, it was overruled in 1917 with the introduction of concealed carry permits.¹³³ While it did not have explicit laws, Texas had similar expectations for weapons during the frontier era—they should not be concealed.¹³⁴ While Texas wanted to consider public safety, the focus was individualism and liberty during this era of exploration and settlement.¹³⁵ Further, other states in the West followed suit. Take the town of Tombstone, Arizona, for example:

"Tombstone had much more restrictive laws on carrying guns in public in the 1880s than it has today," says Adam Winkler, a professor and specialist in American constitutional law at UCLA School of Law. "Today, you're allowed to carry a gun without a license or permit on Tombstone streets. Back in the 1880s, you weren't." Same goes for most of the New West, to varying degrees, in the once-rowdy frontier towns of Nevada, Kansas, Montana, and South Dakota.¹³⁶

Winkler asserts that these towns, while cautious of the dangers the frontier could bring (wild animals, outlaws, etc.), were focused on preserving peace and harmony for families in city limits.¹³⁷ At the time, this was not only a concern for the frontier. In fact, rising crime in states and cities in the 19th century led to more gun regulations. Richard Spitzker of The Atlantic describes these instances:

In the post-revolutionary 1800s, as rising violent crime led more people to arm themselves, a total of 42 states (plus the District of Columbia) enacted

¹²⁹ TEX. CONST. art. VI (1866); CAL. CONST. art. VII (1849).

¹³⁰ 1863 Cal. Stat. 748.

¹³¹ Martin Ridge, *Disorder, Crime, and Punishment*, MONT.: THE MAG. W. HIST., Autumn 1999, at 12, 14, 27.

¹³² Matt Jancer, *Gun Control is as Old as the Old West*, SMITHSONIAN MAG. (Feb. 5, 2018), <https://www.smithsonianmag.com/history/gun-control-old-west-180968013/>; *The Rise and Fall of California's First Concealed Carry Law*, NAT'L RIFLE ASS'N INST. FOR LEGIS. ACTION (Jan. 1, 2013), <https://www.nraila.org/articles/20130101/the-rise-and-fall-of-californias-first-concealed-carry-law/>.

¹³³ 1863 Cal. Stat. 748; 1917 Cal. Stat. 221.

¹³⁴ Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 105–06 (2016).

¹³⁵ Jancer, *supra* note 132.

¹³⁶ *Id.*

¹³⁷ *Id.*

laws against concealed carry. Three more did so in the early 1900s, so that the total included almost every state in the Union. As many states from the 1700s to 1900s also enacted some form of weapons-licensing law.¹³⁸

The 1868 history and tradition standard points towards the fact that states have autonomy to create concealed carry regulations; although the Court has not taken a definitive stance, it seems to agree. For example, in *Heller*, the Court reaffirmed that while an individuals' right to bear arms should be protected, the right secured by the Second Amendment is not unlimited and does not extend to carrying any weapon in any manner, for any purpose.¹³⁹ For example, the Court in *Bruen* clarified that the Second Amendment does not cast doubt on long-standing prohibitions on the possession of firearms in sensitive places such as schools or government buildings.¹⁴⁰ While *Heller* provides clarity, *Bruen*'s scarcity when it comes to addressing these issues has created confusion for the application of the 1868 standard to analyze history and tradition in constitutional jurisprudence today.

C. *History and Tradition in the Context of § 922(g)(8)*

An application of history and tradition standards, in both the context of 1791 and 1868, has hinged on the idea of disarming "dangerous individuals" when considering the constitutionality of 18 U.S.C. § 922(g). *United States v. Emerson*, decided in 2001, is one such case. In *Emerson*, a man—who had a protection order issued against him by his estranged wife—threatened his wife and daughter at gun point, resulting in his indictment by a jury for violating 18 U.S.C. § 922(g)(8).¹⁴¹ The Fifth Circuit held that while the Second Amendment is an important individual right, the United States has a history and tradition of disarming an individual posing a threat to his wife or child; therefore, § 922(g)(8) is constitutional.¹⁴²

United States v. Skoien, decided in 2010, is another case where § 922(g)(8) met constitutional muster. In *Skoien*, the Seventh Circuit found that the defendant had violated § 922(g)(8) after he continued to possess firearms after receiving notice that possessing them was illegal due to the issuance of his protection order.¹⁴³ The court held that despite the fact that modern-day domestic violence misdemeanors were not enacted until 1996, it could assume that historical application of the

¹³⁸ Robert J. Spritzer, *America's Original Gun Control*, THE ATLANTIC (Aug. 12, 2023), <https://www.theatlantic.com/ideas/archive/2023/08/america-history-gun-control-supreme-court/674985/>.

¹³⁹ *District of Columbia v. Heller*, 554 U.S. 570, 595, 626 (2008).

¹⁴⁰ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2133 (2022).

¹⁴¹ *United States v. Emerson*, 270 F.3d 203, 211–12 (5th Cir. 2001).

¹⁴² *Id.* at 214–15, 260.

¹⁴³ *United States v. Skoien*, 614 F.3d 638, 639 (7th Cir. 2010). Note that this case was decided prior to the Fifth Circuit's decision in *Rahimi*.

Second Amendment would apply to persons convicted of domestic violence.¹⁴⁴ It's important to note that *Skoien* utilized a means-end scrutiny standard which, as discussed previously, was overturned by *Bruen*.¹⁴⁵

Both cases found that § 922(g)(8) was historically permissible in light of the Second Amendment because the country has had a history and tradition of disarming dangerous individuals.¹⁴⁶ *United States v. Rahimi* reiterates that § 922(g)(8) is permissible under the Second Amendment.

IV. UNITED STATES *v.* RAHIMI

A. Background and Relationship to Bruen

United States v. Rahimi, heard by the Supreme Court in 2023, involved a Fifth Circuit decision that held § 922(g)(8) unconstitutional in favor of the Second Amendment.¹⁴⁷ The facts of the case directly involve alleged instances of intimate partner violence committed by defendant Zackey Rahimi.¹⁴⁸ In 2019, Rahimi assaulted his intimate partner. His partner sought a protection order as a result, which was granted.¹⁴⁹ Rahimi was given proper notice of the hearing that issued this protection order.¹⁵⁰ After this issuance, Rahimi went on to shoot a firearm into public places, drive recklessly, commit hit-and-runs, and involve himself in other residential shootings—all of which was uncovered after his arrest for threatening another woman with a firearm in 2020.¹⁵¹ Officers discovered the protection order against him, which outlawed him from owning firearms, and he was indicted by a federal grand jury for violating § 922(g)(8).¹⁵² He timely appealed his indictment alleging a violation of his Second Amendment rights, an argument the Fifth Circuit agreed with.¹⁵³

In issuing the decision, Judge Wilson of the Fifth Circuit stated that while Rahimi is “hardly a model citizen,” his gun rights should not be infringed.¹⁵⁴ The Fifth Circuit found no historical relevance for § 922(g)(8) based off of the holding

¹⁴⁴ *Id.* at 640–41, 645.

¹⁴⁵ *Id.*; *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2127 (2022) (citing *Nar’l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977)).

¹⁴⁶ *Emerson*, 270 F.3d at 236, 261–62; *Skoien*, 614 F.3d at 639.

¹⁴⁷ *United States v. Rahimi*, 144 S. Ct. 1889, 1894–96 (2024).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1895.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 1894–95.

¹⁵³ *United States v. Rahimi*, 61 F.4th 443, 461 (5th Cir. 2023).

¹⁵⁴ *Id.* at 453.

in *Bruen*.¹⁵⁵ Specifically, the court found that while *Heller* distinguished law-abiding, responsible citizens, Rahimi did not fall into this group. The court said:

When he was charged, Rahimi was subject to an agreed domestic violence restraining order that was entered in a civil proceeding. That alone does not suffice to remove him from the political community within the amendment's scope. And, while he was suspected of other criminal conduct at the time, Rahimi was not a convicted felon or otherwise subject to another "longstanding prohibition on the possession of firearms" that would have excluded him.¹⁵⁶

In terms of the legality of § 922(g)(8), the court found that the government failed to establish how § 922(g)(8) falls into three given categories: "(1) English and American laws (and sundry unadopted proposals to modify the Second Amendment) providing for disarmament of 'dangerous' people, (2) English and American 'going armed' laws, and (3) colonial and early state surety laws."¹⁵⁷ The analysis under the first category failed in the Fifth Circuit's eyes because the court did not feel the "dangerousness" aspect of those laws fit here—especially because disarmament of "dangerous" people historically meant targeting minority groups who the legislature felt at the time would be "disloyal" to the efforts of the militia.¹⁵⁸ Therefore, the history did not apply there because disarming dangerous people at the time meant disenfranchising groups based on problematic and dubious ideas. The second category of analysis also failed because "going armed" laws, according to the Fifth Circuit, are not indicative of our nation's traditional firearm regulations,¹⁵⁹ and they also are not relevant to the provisions set forth in § 922(g)(8).¹⁶⁰ The third category failed constitutional muster as well, because of the lack of connection between historical surety laws and § 922(g)(8). At common law, someone could have a claim of surety against someone else if they had "just cause to fear" that another person would injure him or his property.¹⁶¹ While very analogous to § 922(g)(8) in effect and purpose, the Fifth Circuit found it failed regardless because § 922(g)(8) imposes more of an actual burden on the rights protected by the Second Amendment than the surety laws.¹⁶² The government petitioned the Supreme Court to hear this case, and the Court issued a writ of certiorari.¹⁶³

¹⁵⁵ *Id.* at 460.

¹⁵⁶ *Id.* at 452 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 595, 626–27 (2008)).

¹⁵⁷ *Id.* at 456.

¹⁵⁸ *Id.* at 457.

¹⁵⁹ *Id.* at 458.

¹⁶⁰ *Id.* at 459.

¹⁶¹ *Id.*

¹⁶² *Id.* at 460.

¹⁶³ *United States v. Rahimi*, 144 S. Ct. 1889, 1896 (2024).

B. *The Argument on How Rahimi Could Reframe Bruen*

United States Solicitor General Elizabeth Prelogar vehemently disagreed with the Fifth Circuit. In the argument before the Supreme Court and in her brief filed in favor of overturning the Fifth Circuit decision, she provided numerous examples of historical relevance for protecting victims of domestic violence as well as disarming “dangerous persons.” In oral argument, she stated:

The Fifth Circuit profoundly erred in reading this Court’s decision in *Bruen* to prohibit that widespread common-sense response to the deadly threat of armed domestic violence. Like *Heller* and *McDonald*, *Bruen* recognized that Congress may disarm those who are not law-abiding, responsible citizens. That principle is firmly grounded in the Second Amendment’s history and tradition. Throughout our nation’s history, legislatures have disarmed those who have committed serious criminal conduct or whose access to guns poses a danger, for example, loyalists, rebels, minors, individuals with mental illness, felons, and drug addicts.¹⁶⁴

After the Court questioned the meaning of “law-abiding and responsible,” Solicitor General Prelogar postured that in this circumstance, the government “think[s] that history and tradition show that it applies to those whose possession of firearms would pose an unusual danger, beyond the ordinary citizen, with respect to harm to themselves or harm to others.”¹⁶⁵

Rahimi adds an interesting layer to the argument focused on this textual hook—what does being a “responsible” gun-owner mean? The idea of responsibility was questioned by the Court during oral arguments. Chief Justice Roberts posed an interesting question: Is someone who forgets to take their recycling to the curb on Thursday irresponsible enough to warrant their Second Amendment right being taken away?¹⁶⁶ The government asserted no. Instead, “[w]ith respect to responsibility in particular, [the government’s] understanding of what history and tradition reflect and how this Court has used the term is that it’s identifying those whose possession of firearms presents an unusual danger beyond the ordinary citizen.”¹⁶⁷ This argument could have pushed the Court to redefine *Bruen* by asserting the fact that responsibility is linked to dangerousness, although it ultimately failed to do so.¹⁶⁸ If it held that responsibility is linked to dangerousness, it may have limited instances of arguments that someone is too irresponsible to own a gun. Instead, the

¹⁶⁴ Transcript of Oral Argument at 4, *Rahimi*, 144 S. Ct. 1889 (No. 22-915).

¹⁶⁵ *Id.* at 5–6.

¹⁶⁶ *Id.* at 9.

¹⁶⁷ *Id.* at 11.

¹⁶⁸ *Rahimi*, 144 S. Ct. at 1944–45.

question would hinge on whether the person would be dangerous if they had access to one.¹⁶⁹

Further, the government argued that gun regulations can be monitored to make sure they are not disarming people in “wide sweeps” that would violate the purpose of the Second Amendment. Solicitor General Prelogar explained how, in cases of domestic violence, disarming abusers does not result in disarming people in great numbers.¹⁷⁰ First, § 922(g)(8) states that those with protection orders issued against them cannot legally own a firearm.¹⁷¹ Those with protection orders against them must have notice and the opportunity to be heard in that circumstance, which limits who protection orders are issued to.¹⁷² Even further, if the legislature does end up making categorical and potentially prejudicial assessments based on § 922(g)(8), the Court has full authority to overturn these assessments based on historical purposes of the Second Amendment.¹⁷³ Solicitor General Prelogar asserted that in these circumstances:

[T]he factors [she] would point to first would be the breadth of the law, because we know that the Second Amendment was entire—was intended to prevent disarming wide swaths of the American public. So, if it’s sweeping broadly or indiscriminately and capturing people we think of as ordinary citizens, that’s going to be a problem.¹⁷⁴

Another interesting aspect of Solicitor General Prelogar’s argument is that she defined aspects of *Bruen* that fail when being applied by lower courts, fleshing out the problems to the Court directly. She stated that “[t]he first error we see is that Respondent has asserted here and other courts have embraced the idea that the only thing that matters under *Bruen* is regulation.”¹⁷⁵ She further stated that lower courts believe they cannot look at other sources of history that bear on original meaning other than past regulations.¹⁷⁶ Second, she argues that courts are nit-picking historical tests and that’s why *Bruen* looks different in different jurisdictions.¹⁷⁷ Third, she says that “courts are placing dispositive weight on the absence of regulation in a

¹⁶⁹ The Court did not further define this issue here. Instead, it said it rejected the Government’s assertion that someone can be disarmed because they are not “responsible”, because the definition of “responsible” is too vague. *Id.* at 1903. Perhaps in future cases, the Court will be more inclined to define responsibility in terms of gun ownership.

¹⁷⁰ Transcript of Oral Argument at 14, *Rahimi*, 144 S. Ct. 1889 (No. 22-915).

¹⁷¹ 18 U.S.C. § 922(g)(8).

¹⁷² *Id.*

¹⁷³ *See, e.g.,* United States v. Rahimi, 61 F.4th 443, 459 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023), *rev’d*, 144 S. Ct. 1889 (2024).

¹⁷⁴ Transcript of Oral Argument at 14, *Rahimi*, 144 S. Ct. 1889 (No. 22-915).

¹⁷⁵ *Id.* at 39.

¹⁷⁶ *Id.* at 39–40.

¹⁷⁷ *Id.* at 40.

circumstance where there's no reason to think that that was due to constitutional concerns."¹⁷⁸ Specifically, in *Rahimi* there is no past regulation effectively disarming domestic abusers. But on the other hand, there is nothing to suggest that the government could not disarm domestic abusers. Drawing a parallel between *Bruen* and *Rahimi* in terms of lack of regulation, she stated:

It's contrary to the situation the Court confronted in *Bruen*, where there was a lot of historical evidence to say states can't completely prohibit public carry, and against that evidence, you might say that the absence of regulation is significant. But, here, there's nothing on the other side of this interpretive question, and I think that that just shows that you shouldn't hold the absence of a direct regulation against us.¹⁷⁹

The Court had the opportunity to rectify these issues, and the government laid out a wonderful test to do so. The government argued that by editing these faults, the Court could redeem the *Bruen* standard by connecting responsibility to dangerousness and asserting exactly what they're looking for in a historical analysis.¹⁸⁰ As stated by Solicitor General Prelogar, "Once the Court corrects the misinterpretation of *Bruen*, then I think the constitutional principle is clear. You can disarm dangerous persons. And under that principle, Section 922(g)(8) is an easy case."¹⁸¹

Notwithstanding the factual analysis of *Rahimi*, the *Rahimi* decision from the Supreme Court could have fixed the issues *Bruen* left behind. For example, *Rahimi* could overturn the historical precedence test. Even if not that extreme, *Rahimi* could have at least refined the *Bruen* standard as to not put such a strain on the efficiency of lower courts.¹⁸² Ultimately, while the Court did clarify *Bruen* in some sense, it's unclear how helpful the clarification will be.¹⁸³

C. *The Supreme Court's Decision in United States v. Rahimi*

In June 2024, the Court overturned the Fifth Circuit's decision and deemed § 922(g)(8) constitutional in an 8–1 decision.¹⁸⁴ Despite the large majority, the Justices had vastly different ideas of why § 922(g)(8) meets constitutional muster. *United States v. Rahimi* saw a majority opinion, one dissenting opinion, and five concurrences.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 41.

¹⁸⁰ *Id.* at 101–02.

¹⁸¹ *Id.* at 102.

¹⁸² Charles, *The Dead Hand of a Silent Past*, *supra* note 20, at 78, 146, 153; Jimmy Donlon, *United States v. Rahimi*: "We Do Not Resolve Any of Those Questions Because We Cannot", 111 VA. L. REV. 27, 27 (2025).

¹⁸³ See discussion *infra* Part V.

¹⁸⁴ *United States v. Rahimi*, 144 S. Ct. 1889, 1894 (2024).

1. *Majority Opinion*

The majority begins by asserting that the protection order hearing fulfilled notice and opportunity to be heard requirements under § 922(g)(8).¹⁸⁵ Although this was not the issue on appeal, it was important to discuss nonetheless—during oral arguments, Rahimi suggested the notion that perhaps these requirements were not consistent with due process requirements.¹⁸⁶ The Court did not seem interested in evaluating that, especially because it was not an issue raised on appeal.¹⁸⁷ In dicta, however, the Court seemed to acknowledge that his restraining order met the criteria required by § 922(g)(8), including notice and the opportunity to be heard.¹⁸⁸

i. *Clarifying Bruen*

Overall, the majority found that § 922(g)(8) “fits comfortably” within the historical tradition test—“[s]ince the founding, our Nation’s firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms.”¹⁸⁹ The majority opinion, written by Chief Justice Roberts, reiterates that the Second Amendment is not absolute, a notion created by *Heller*.¹⁹⁰ Even though *Heller* was decided prior to the *Bruen* test being created, the Court affirms here that *Heller*’s holding, and the language within it, still apply to Second Amendment jurisprudence.¹⁹¹ This includes that fact that the Second Amendment “was never thought to sweep indiscriminately.”¹⁹²

Although not explicitly, the Supreme Court seems to agree with Solicitor General Prelogar’s hesitations surrounding lower courts finding identical, historical laws, and “nit-pick[ing]”¹⁹³ the ones that apply. It asserts that historical underpinnings and purposes behind laws carry weight in analyzing history and tradition. For example, the Court stated that “Section 922(g)(8) is by no means identical to these founding era regimes, *but it does not need to be*. Its prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly within the tradition the surety and going armed laws represent.”¹⁹⁴

¹⁸⁵ *Id.* at 1896.

¹⁸⁶ Transcript of Oral Argument at 93, *Rahimi*, 144 S. Ct. 1889.

¹⁸⁷ *Rahimi*, 144 S. Ct. at 1903 n.2.

¹⁸⁸ *Id.* at 1896.

¹⁸⁹ *Id.* at 1896–97.

¹⁹⁰ *Id.* at 1902.

¹⁹¹ *Id.* at 1903; *District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding that the inquiry into whether a law violates the Second Amendment begins with the Constitution’s “text and history,” and finding that a law which regulated the possession of handguns in one’s home violates the Second Amendment).

¹⁹² *Id.* at 1897.

¹⁹³ Transcript of Oral Argument at 40, *Rahimi*, 144 S. Ct. 1889.

¹⁹⁴ *Rahimi*, 144 S. Ct. at 1901 (emphasis added).

In fact, Chief Justice Roberts noted the lower courts' difficulty in applying the *Bruen* standard and stated that *Bruen*'s requirement of history and tradition did not create "a law trapped in amber. . . . By that same logic, the Second Amendment permits more than just those regulations identical to ones that could be found in 1791."¹⁹⁵ The Court continued to say that the underpinning of these regulations is more important than them being identical to historical regulations. For example, "if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations."¹⁹⁶ Overall, new regulations do not need to be "historical twins" or "dead ringers" to be historically permissive.¹⁹⁷

ii. *Disarming "Dangerous Individuals"*

The Court discussed historical laws in depth, drawing the conclusion that "[f]rom the earliest days of the common law, firearm regulations have included provisions barring people from misusing weapons to harm or menace others."¹⁹⁸ The Court discussed English common laws that stated that individuals could be disarmed if they disrupted the peace of the King's subjects.¹⁹⁹ English common law also permits the disarming of political opponents and members of religious subsets.²⁰⁰ Notably, the Founders did not carry these laws over to America, but they did continue to regulate the weapons of people who "menace" others.²⁰¹ Accordingly, by the 1800s, America had two large groups of laws that regulated firearms—surety laws and going armed laws.²⁰²

Surety laws are forms of preventative justice that require those who pose a future threat to post some sort of bond.²⁰³ In the context of domestic abuse, "entrenched in the common law, the surety laws could be invoked to prevent all forms of violence, including spousal abuse."²⁰⁴ Importantly, surety laws also implicated firearms. For example, "[i]n 1795 . . . Massachusetts enacted a law authorizing justices of the peace to 'arrest' all who 'go armed offensively [and] require of the offender to find sureties for his keeping the peace.'"²⁰⁵ Going armed laws, on the other hand, prohibited "riding or going armed, with dangerous or unusual weapons, [to]

¹⁹⁵ *Id.* at 1897.

¹⁹⁶ *Id.* at 1898.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1899.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 1901.

²⁰³ *Id.* at 1893.

²⁰⁴ *Id.* at 1900.

²⁰⁵ *Id.*

terrify the good people of the land.”²⁰⁶ These were prevalent in American common law as well as state statutory law, like in Massachusetts, Virginia, North Carolina, and New Hampshire.²⁰⁷ Using these laws, the Court held that “[t]aken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed.”²⁰⁸ These laws form the historical and traditional basis that § 922(g)(8) is a permissible gun regulation under the Second Amendment.²⁰⁹

2. *Concurrent Opinions*

Five concurrences accompanied the issuance of *United States v. Rahimi*.²¹⁰ The concurrences do not discuss the legal theories implicated in this Note. While Justice Kavanaugh, Justice Barrett, and Justice Gorsuch discuss textualism in their concurrences, Justice Sotomayor, with whom Justice Kagan joins, concur based on the fact that they both believe *Bruen* was wrongly decided.²¹¹ The concurrences do not go into a thorough discussion on the constitutionality of § 922(g)(8) in a way that is different from the majority.²¹² Therefore, an analysis of those arguments is omitted. One notable quote in Justice Sotomayor’s concurrence is based off of Justice Thomas’s dissenting opinion in this case, in which he argues that § 922(g)(8) is unconstitutional based on a historic and traditional regulation on firearms kept by domestic abusers.²¹³ Justice Sotomayor states: “If the dissent’s interpretation of *Bruen* were the law, then *Bruen* really would be the ‘one-way ratchet’ that I and the other dissenters in that case feared, ‘disqualify[ing] virtually any “representative historical analogue” and mak[ing] it nearly impossible to sustain common-sense regulations necessary to our Nation’s safety and security.’”²¹⁴

This concurrence highlights the importance of disarming domestic abusers. Justice Sotomayor and Justice Kagan argue that social implications should matter in discussion of gun rights, especially considering the way firearms have evolved.²¹⁵ In regard to domestic abuse, they vehemently state that “the Government has a compelling interest in keeping firearms out of the hands of domestic abusers.”²¹⁶ They continued by creating a strong record of statistics supporting this statement: “A woman who lives in a house with a domestic abuser is five times more likely to be

²⁰⁶ *Id.* at 1901.

²⁰⁷ *Id.* at 1900–01.

²⁰⁸ *Id.* at 1904.

²⁰⁹ *Id.* at 1902.

²¹⁰ *Id.* at 1894.

²¹¹ *Id.* at 1903–04 (Sotomayor, J., concurring).

²¹² *See id.* at 1903–30.

²¹³ *Id.* at 1938–40 (Thomas, J., dissenting).

²¹⁴ *Id.* at 1905 (Sotomayor, J., concurring).

²¹⁵ *Id.*

²¹⁶ *Id.* at 1906.

murdered if the abuser has access to a gun.”²¹⁷ Over 70 people a month are shot and killed by an intimate partner.²¹⁸ In roughly a quarter of cases where an abuser kills their intimate partner, the abuser kills someone else such as a child, roommate, or family member.²¹⁹ Further, armed domestic abusers are the most dangerous assailant for a law enforcement officer to confront; they cause more officer deaths than any other type of call.²²⁰ These statistics show the apparent need for government interference—a social implication that *Bruen* fails to recognize.²²¹

While *Rahimi* did not alter *Bruen*’s holding, it did clarify it in a way to show that social implications do carry weight if they are indicative of founding-era regulations to address particular problems.²²² This allowed the Justices, working across ideological lines, to find § 922(g)(8) sound under the Second Amendment. Once again, a regulation does not need to have a “historical twin” or “dead ringer” to be Constitutional—there just needs to be historical regulations that support the notion that the modern regulation addresses a particular problem addressed during the founding era.²²³

V. MOVING FORWARD: *RAHIMI*’S EFFECT ON SECOND AMENDMENT JURISPRUDENCE AND THE WORKABILITY OF *BRUEN*

In her concurrence, Justice Jackson asserts that the Court’s clarifications of *Bruen* do not provide enough discussion surrounding its workability. Her statements on this are poignant—she seems to apply a history and tradition test to the workability of legal standards. Specifically, Justice Jackson states:

In my view, as this Court thinks of, and speaks about, history’s relevance to the interpretation of constitutional provisions, we should be mindful that our common-law tradition of promoting clarity and consistency in the application of our precedent also has a lengthy pedigree. So when courts signal they are having trouble with one of our standards, we should pay attention.²²⁴

Even after *Rahimi*, legislatures are still tasked with creating regulations that fit neatly into history and tradition, and courts are still tasked with combing through mountains of past regulations or historical approaches to problems facing the public.²²⁵ Perhaps with time, the gray areas remaining due to *Bruen* will clear themselves

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 1906.

²²¹ *Id.* at 1906–07.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 1926–27 (Jackson, J., concurring).

²²⁵ Charles, *The Dead Hand of a Silent Past*, *supra* note 20, at 150–53.

up. On the other hand, “it is becoming increasingly obvious that there are miles to go. Meanwhile, the Rule of Law suffers. That ideal—key to our democracy—thrives on legal standards that foster stability, facilitate consistency, and promote predictability. So far, *Bruen*’s history-focused test ticks none of those boxes.”²²⁶

Although *Rahimi* did not alter *Bruen* and the workability of the *Bruen* standard is still debated, the Court’s emphasis that the Second Amendment is not “encased in amber” is vital when discussing the use of social interests in evaluating gun laws.²²⁷ In fact, social interests can affect the viability of firearms regulations in terms of history and tradition.²²⁸ One interesting line from the majority opinion shows this potential: “An individual found by a court to pose a credible threat to the physical safety of another, that individual may be temporarily disarmed consistent with the Second Amendment.”²²⁹ The Court seems to narrow the Second Amendment’s scope—a law that disarms threatening individuals is not a violation of the Second Amendment.²³⁰ Further, if a government or social interest is indicative of founding-era regulations to address particular problems, it’s proper for courts to consider them under *Bruen*.²³¹

The crux of the United States’ victory in *Rahimi* is that even since English common law, the government has always had an interest in disarming “dangerous individuals” who disrupt the social peace.²³² It is imperative that those trailblazing the way for greater protections for survivors of domestic violence in the legal landscape hone in on these arguments, especially when a history and tradition test like the one established in *Bruen* is used. After all, disarming dangerous individuals, like domestic abusers, is historically permissive. This mission should be at the zenith of the government’s interest because American women and children face immense peril at the hands of their abusers every day.²³³ Initially, *Bruen* appeared to shut the door on any sort of firearm regulation. *Rahimi* appears to clarify *Bruen* by implying that the Court meant to leave that door ajar; it’s vital that lawmakers use this opportunity to continue protecting vulnerable populations from domestic violence.

²²⁶ *Rahimi*, 144 S. Ct. at 129 (Jackson, J., concurring).

²²⁷ *Id.* at 1897–98 (majority opinion).

²²⁸ *Id.* at 1905–06 (Sotomayor, J., concurring).

²²⁹ *Id.* at 1903 (majority opinion).

²³⁰ *Id.* at 1893.

²³¹ *Id.* at 1898.

²³² *Id.* at 1926 (Barrett, J., concurring).

²³³ Smith, *supra* note 6.